

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

On Petition for Writ of Certiorari to Georgetown County
Honorable Larry B. Hyman, Circuit Court Judge
Honorable William H. Seals, PCR Judge

TAMAR YARON BRYANT

PETITIONER

v.

STATE OF SOUTH CAROLINA

RESPONDENT

APPELLATE CASE NO. 2020-000590

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Petitioner's Statement of the Issue

Whether the lower court erred in failing to grant a new trial due to ineffective assistance of counsel for failure to enter an objection or exception to the jury instruction on malice for lacking the general permissive inference instruction.

Respondent's Statement of the Issue

Whether the PCR court properly found that Petitioner received effective assistance of counsel where trial counsel did not object to a jury instruction that did not specify any facts permitting an inference of malice, properly informed the jury of its duty to weigh all the evidence, and where the verdict was supported by significant evidence that Petitioner killed the victim with malice aforethought.

STATEMENT OF THE CASE

Tamar Yaron Bryant (“Petitioner”) is presently confined in the South Carolina Department of Corrections. Petitioner was indicted for murder by the Georgetown County Grand Jury at its May, 2011 term. Applicant was represented by Ronald Hazzard, Esq., and Assistant Solicitor Erin Bailey, of the Fifteenth Circuit Solicitor’s Office, prosecuted the case. Petitioner proceeded to a jury trial before the Honorable Larry B. Hyman, Jr., on March 18, 2013. The jury convicted Petitioner of murder, as indicted, on March 20, 2013. Judge Hyman subsequently sentenced Petitioner to 35 years’ imprisonment.

Petitioner filed a notice of appeal and the appeal was perfected by David Alexander, Esq., of the South Carolina Commission on Indigent Defense. Petitioner raised the following issue on direct appeal:

1. Whether the trial court’s refusal to order a mental competency examination was erroneous because it was an improper consideration, a mistake of fact, and the State consented to the evaluation.

Petitioner’s conviction was affirmed by the South Carolina Court of Appeals. *State v. Bryant*, Op. No. 2014-UP-440 (S.C. Ct. App. filed December 3, 2014). The remittitur was sent on December 19, 2014.

Petitioner filed an application for post-conviction relief on December 9, 2015. In his application for post-conviction relief, Petitioner alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel
 - a. Failure to properly prepare Applicant prior to trial
 - b. Failure to call witnesses and utilize evidence
2. Ineffective assistance of appellate counsel
 - a. Failure to raise all meritorious issues on appeal.

Respondent made its return on February 5, 2016, and requested an evidentiary hearing to resolve Petitioner's claims. Petitioner filed an amended application on August 27, 2018, further alleging that he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel for failure to properly advise Applicant regarding and utilize Applicant as a witness at the *Jackson v. Denno* hearing.
2. Ineffective assistance of trial counsel for the handling of the witness, Shaquetta Holmes.
3. Ineffective assistance of counsel for failure to enter an objection or exception to the jury instruction on malice for lacking the general permissive inference instruction. *Gibson v. State*, 416 S.C. 260, 786 S.E.2d 121 (2016). (317)
4. Ineffective assistance of counsel for failure to enter an objection or exception to the Court's comments, specifically, but not limited to comments regarding searching for the truth to the jury.

An evidentiary hearing was convened at the Georgetown County Courthouse on March 25, 2019, before the Honorable William Seals. Petitioner was represented by Tricia A. Blanchette, Esq., and Assistant Attorney General Johnny E. James, Jr., represented Respondent. Judge Seals dismissed the application on December 5, 2019, via written order. Petitioner filed a motion for reconsideration, pursuant to Rule 59(a) and (e), SCRPC, on January 23, 2020. This motion was denied on March 6, 2020. This appeal follows.

STATEMENT OF THE FACTS

Petitioner's conviction stems from an altercation at a Plantersville night club on the evening of March 15, 2011. Terrell Myers testified at trial that he was working the door at the Ghost Den club on that evening when the victim, Deon Myers (Terrell's brother), arrived and entered the club with two women. (App. 90, 3-20). Lavern Holmes arrived shortly thereafter, brandishing a shotgun. (App. 90, 21-22). Terrell stated that everyone in the club knew Lavern Holmes, and they tried to tell him to stop when he walked in the door carrying the shotgun. (App. 104, 17 – App. 105, 21). Deon Myers, seeing what was taking place, made his way to the bathroom to avoid a confrontation with Lavern. (App. 91, 21 – App. 92, 5). Holmes's niece, Shaquettia Holmes, was present in the club and ran to Lavern to stop him as he was following Deon into the bathroom. (App. 108, 8 – App. 109, 21). She was able to get Lavern to exit through the front door when another man, short and with a red bandana covering his face, entered the club. (App. 92, 10-11; App. 112, 20 – App. 113, 12). Deon exited the bathroom and made it halfway to the door when the man in the red bandana shot him with a small, black handgun. (App. 92, 13-22). Terrell then called 911, attempted to tend to his brother's injuries, and held him until the police arrived. (App. 93, 7 – App. 94, 4). The man who fired the shot fled out the front door. (App. 101, 16-17).

Shaquettia Holmes testified that she was at the bar in the club when Lavern Holmes entered carrying a "big gun." (App. 123, 6-8). She confronted him, fearing that he may do something "stupid," told him he needed to leave Deon alone, and caused him to leave the club. (App. 123, 9-13). When she approached Lavern she heard him accusing Deon of threatening his family, but noted that Deon did not know what he was talking about. (App. 130, 18-24). Petitioner, who she knew because he was acquainted with her brother, then entered the bathroom and told her to let Deon leave. (App. 125, 1-23). Petitioner told her that "he's good," which she interpreted as

meaning that it was okay for Deon to leave, despite her concerns that both Petitioner and Lavern were armed. (App. 126, 3-8). Shaquettia remained in the bathroom as Petitioner followed Deon out, and then she heard the gunshot. (App. 126, 13-22). She testified that she did not actually see who fired the shot, but noted that she had seen Petitioner brandishing a “little black gun” while in the bathroom. (App. 140, 3-14).

Cameron Green testified that he was with Kawaun Myers on the night of March 15, 2017, and Kawaun told him about an altercation that took place earlier that day between himself, Lavern Holmes, and Deon Myers, where Deon allegedly pulled a gun on Lavern. (App. 148, 16-23). Cameron later went to Lavern’s house, and Lavern told him that he was uncomfortable staying in Plantersville, so the two traveled to Georgetown. (App. 149, 9-16). They met up with Petitioner and Brandon Cheeks along the way, told them about the confrontation, and at some point someone presented a .22 caliber revolver with a missing grip. (App. 149, 24 – App. 150, 17). They decided to go to a party in Cameron’s neighborhood, and stopped at the home of one of Petitioner’s family members along the way. (App. 150, 19 – App. 151, 1). Petitioner went inside and returned with a shotgun, and the group continued to the Ghost Den club in Plantersville. (App. 151, 11-24).

Cameron Green further testified that he and Lavern entered the club without paying the cover charge, while Kawaun Myers remained in the car. (App. 152, 5-17). He did not know where Brandon Cheeks or Petitioner went when he entered the club. (App. 152, 11-13). Cameron stated that he quickly left because the club was going to stop charging an entrance fee in about fifteen minutes, so he stood outside and spoke with a neighbor. (App. 152, 25 – App. 153, 1). He then heard a commotion, saw people running out of the club, and suspected that an altercation had taken place between Petitioner and Lavern Holmes. (App. 153, 8-13). Cameron looked around briefly for Lavern before returning to the vehicle, and found Kawaun still in the car. (App. 153, 15-19).

Then Petitioner, Brandon Cheeks, and Lavern arrived, and Lavern “let off a shot with the shotgun.” (App. 153, 19-23). When they were leaving the scene Lavern kept asking Petitioner “why he shot him” and Petitioner apologized but “couldn’t explain exactly why he did it.” (App. 154, 2-7).

Georgetown County Sheriff’s Investigator James Clinton Busbee testified that he arrived on the scene of the shooting as Deon Myers was being placed into an ambulance, and later attended the autopsy. (App. 187, 17 – App. 189, 20). The autopsy revealed that Deon had been killed by the bullet found lodged in his brain. (App. 189, 25 – App. 190, 4; App. 236, 20-25; App. 241, 10-20). Investigator Busbee arrested Petitioner after he was seen in town, verbally read him his *Miranda* rights, and transported him to the Sheriff’s office. (App. 192, 16 – App. 194, 2). Petitioner initially admitted to being “with those guys” but denied shooting Deon. (App. 195, 2-10).

However, Petitioner changed his story while talking to Investigator Busbee, confessing that he shot Deon in retaliation for a prior confrontation with him in 2007. (App. 201, 8-13). Petitioner claimed that Deon had previously shot at him at a club in Hemingway, but Investigator Busbee testified that he could not find any information corroborating this claim. (App. 201, 12-20). Petitioner confessed that once he realized who Deon Myers was he thought to himself, “I got this fucker,” and “followed him real slow” out of the bathroom. (App. 286, 1-19). Petitioner stated that he pulled out his gun, with the hammer already cocked, and shot Deon when he stopped on his way out of the club to pick something up off the floor. (App. 286, 19-22).

Michael Thacker, a Georgetown County Sheriff’s forensic specialist, testified that he processed the crime scene on the night of the shooting. (App. 215, 6-19). He also later processed a red Mercury Sable automobile, noting that a work ID card belonging to Cameron Green and a red bandana were inside. (App. 223, 1-15). Georgetown City Patrol Officer John Ohler testified

that he arrested Brandon Cheek in March, 2011 for trespassing and resisting arrest and discovered a black revolver pistol in his waistband. (App. 181, 10 – App. 183, 1).

Petitioner did not present any witnesses to testify in his defense. Petitioner’s trial counsel objected to the charging instructions regarding the culpability of a defendant with prior knowledge of a co-defendant’s criminal intentions. (App. 273, 1 – App. 276, 22). Neither Petitioner nor the State raised any further objections. (App. 276, 18-24).

The judge read the charging instructions from a prepared transcript that was also provided to the jury during deliberations. (App. 308, 1-3). He instructed the jury to “consider the charge as a whole document and look at it as a whole because every part is important and many of these parts and interconnected.” (App. 308, 11-14). Regarding the murder charge, the judge instructed the jury as follows:

Now, the Defendant is charged with murder. The State must prove beyond a reasonable doubt that the Defendant killed another person with malice aforethought. Malice is hatred, ill-will or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or under circumstances that the law will infer an evil intent.

Malice aforethought does not require that malice exist for any particular time before the act is committed, but malice must exist in the mind of the Defendant just before and at the time the act is committed. Therefore, there must be a combination of the previous ill intent and the act. Malice aforethought may be express or inferred. These terms, express and inferred do not mean different kinds of malice but merely the manner in which malice may be shown to exist, that is either by direct evidence or by inference from the facts and circumstances which are proved. Express malice is shown when a person speaks words which express hatred or ill will for another or when the person prepared beforehand to do the act which was later accomplished; for example, lying in wait for a person or any other act of preparation going to show that the deed was in the Defendant’s mind would be express malice. Malice may be inferred from conduct showing a total disregard for human life.

(App. 316, 7 – App. 317, 5). Petitioner was convicted by a unanimous jury. (App. 325, 14-17). He was then sentenced to 35 years’ imprisonment in the South Carolina Department of Corrections.

The PCR hearing was convened on March 25, 2019, before the Honorable William Seals. (App. 436). The hearing saw testimony from Petitioner, his trial counsel Ronald Hazzard, and his appellate counsel David Alexander. (App. 437). His trial counsel testified that he was a 15th Circuit public defender, had been practicing criminal law since 1988, and was appointed to represent Petitioner on April 13, 2012. (App. 440, 15 – App. 441, 10). When questioned about his failure to object to the Court’s inferred malice instruction, trial counsel stated that he could not think of why he did not ask the judge for a further general permissive inference instruction. (App. 455, 1-10). He testified that he was aware of case law requiring such an instruction to be given when a Court gives a jury instruction regarding “the total disregard for human life or the inferred malice instruction from the use of a weapon.” (App. 455, 11-22). He went on to state that the State’s characterization of the evidence in closing arguments that Petitioner had already cocked the hammer on the revolver before he pulled it out and fired it at Deon Myers would support a finding of express malice. (App. 455, 23 – App. 456, 13). Trial counsel explained that Petitioner’s and his co-defendants’ actions prior to the shooting, such as “going around finding a gun, who had the gun, whether it was Brandon Cheeks, whether it was Mr. Bryant, why they went to the club” would support a finding of express malice akin to the Court’s given example of lying in wait. (App. 467, 18 – App. 468, 17).

Petitioner testified that he understood the PCR process and its inherent risks and potential benefits. (App. 469, 16 – App. 471, 22). He stated that his confession to Investigator Busbee was not true, and that he fabricated the whole thing because “[Busbee] was going to find out who did it regardless.” (App. 476, 21 – App. 478, 2). He claimed that he was not present at the scene and “wasn’t even in the area” on the night of the shooting. (App. 482, 13-14). Regarding the malice

instruction, Petitioner stated that he would have wanted his trial counsel to object in order to ensure that a more complete instruction was given to the jury. (App. 484, 13-18).

Appellate counsel testified that he was very concerned with Petitioner's confession but did not believe it could be successfully reviewed on appeal. (App. 490, 7-23). He stated that he raised the issue of competency as a way to "do an end run" around the issue and hopefully secure a reversal of Petitioner's conviction. (App. 490, 21-23). He further testified that had trial counsel objected to the malice instructions that he would have "looked at it thoroughly to determine whether or not [he] could have raised it" but did not remember such an objection being made. (App. 492, 2 – App. 493, 4).

The court dismissed Petitioner's application via written order on December 5, 2019. (App. 504 – App. 530). In doing so, the court found that the general permissive inference instruction "is only necessary and required as part of a complete instruction on the inference of malice from the use of a deadly weapon, and there had never been any requirement to charge the language in a stand-alone fashion." (App. 524). The purpose of the instruction, the court explained, is to prevent unlawful burden-shifting presumptions arising from malice instructions based upon the use of a deadly weapon. *Id.* Standing alone, the general permissive inference instruction is "of little instructional value" and would only serve to confuse the jury. *Id.* Even if the Supreme Court were to hold that the instruction were required, trial counsel's performance could not be deficient for failing to object to the subject instructions because no such precedent existed at the time of the subject representation. (App. 524 – App. 525).

Furthermore, the court stated that it could not conceive of how Petitioner suffered prejudice from trial counsel's performance because, when viewed in the absence of an instruction on the implication of malice from the use of a deadly weapon, the instruction "says little more than what

is already instructed to the jury: that they may use evidence and give it such weight as they determine it should receive.” (App. 525).

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Overall, reviewing courts give “great deference to the post-conviction relief court’s findings of fact and conclusions of law,” with the applicant shouldering the burden of proof. *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005); *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985); Rule 71.1(e), SCRPC. Further, a PCR court’s findings will be upheld if there is “any evidence of probative value sufficient to support them.” *Id.* Reversal of the lower court’s findings occurs when there is no probative value to support the initial finding. *Pierce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000). Courts must conduct a de novo review when evaluating questions of law and are required to reverse the initial holding when the decision is controlled by an error of law. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d 839-40; *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The PCR Court properly found that Petitioner received effective assistance of counsel where trial counsel did not object to a jury instruction that did not specify any facts permitting an inference of malice, properly informed the jury of its duty to weigh all the evidence, and where the verdict was supported by significant evidence that Petitioner killed the victim with malice aforethought.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Petitioner, like all other defendants, the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984); *Taylor v. State*, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive effective assistance of counsel guaranteed by the Sixth Amendment. *See generally* S.C. Code Ann. §17-27-20(A) (enumerating allegations cognizable in PCR actions). The allegation of denial of such representation sets forth a prima facie violation of this constitutional right, and raises a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRPC; *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in *Strickland* to determine whether counsel’s conduct “was so ineffective as to require reversal” of the applicant’s conviction or sentence. 466 U.S. at 687. First, the applicant must show that counsel’s performance was deficient; and second, that the deficient performance prejudiced the applicant. *Id.* at 668; *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

The first prong—constitutional deficiency—is “necessarily linked to the practice and expectations of the legal community.” *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). In order to prove deficient performance, the applicant must show counsel’s representation fell below an

objective standard of “reasonableness under prevailing professional norms.” *Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

The second, or “prejudice” prong of *Strickland* is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. *Id.* at 691-92. In order to prove prejudice, an applicant must demonstrate counsel’s deficient performance prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability “sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. Thus, it is not enough “to show the errors had some conceivable effect” on the outcome of the proceeding—counsel’s errors must be “so serious as to deprive the defendant of a fair trial.” *Id.* at 687 (emphasis added).

Strickland “does not guarantee perfect representation . . . only a ‘reasonably competent attorney.’” *Harrington v. Richter*, 562 U.S. 86, 110 (2011) (quoting *Strickland*, 466 U.S. 687). Representation is constitutionally ineffective only if counsel’s conduct so undermined the proper functioning of the adversarial process” that the defendant was denied a fair proceeding. *Strickland*, 466 U.S. at 686. Just as there is “no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities.” *Harrington*, 562 U.S. at 110.

Accordingly “[j]udicial scrutiny of counsel’s performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel’s assistance after conviction or an

adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689; see also *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Id.* (quoting *Strickland*, 466 U.S. at 690).

Thus, a fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspectives at the time. *Id.* Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Butler*, 286 S.C. at 445, 334 S.E.2d at 816. The applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

Reviewing courts "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed at the time of counsel's conduct." *Strickland*, 466 U.S. at 690. An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id.* The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.*

The *Strickland* standard must be applied with scrupulous care, lest “intrusive post-trial inquiry” threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689-90; see also *Harrington*, 562 U.S. at 105 (cautioning that an ineffective assistance of counsel claim could potentially function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial). Even under *de novo* review, the standard for judging counsel’s representation is a most deferential one.

The performance and prejudice standards, however, “do not establish mechanical rules; [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.” *Id.* at 696. Moreover, “there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.” *Id.* at 697. The court “need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *Id.* If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. *Id.*

Petitioner argues his trial counsel was ineffective by failing to object or enter an exception to the jury instruction on inferred malice for lacking the general permissive inference instruction. Petitioner asserts that a charge on inferred malice must detail the circumstances from which malice may be inferred, as well as an instruction that the inference of malice is to be treated as an evidentiary fact to be considered and weighed by the jury alongside the other evidence. Petitioner argues that the trial judge did not properly instruct the jury, his trial counsel’s performance was deficient when he failed to object, and he was prejudiced by this failure because the evidence supporting a finding of inferred malice was not proven beyond a reasonable doubt by the State’s

evidence. The PCR Court then failed in finding that the instruction was unnecessary, as it is only required when a jury is instructed to infer malice from the use of a deadly weapon, and giving it in this case would have only confused the jury. The PCR Court also failed in finding that Petitioner was not prejudiced, as there was no reasonable probability that the outcome of trial would have been different had the instruction been given. Respondent submits that this argument is without merit and this Court should deny certiorari.

A. Petitioner cannot show that trial counsel's performance was deficient because the jury instructions were proper, as they did not suggest any specific facts of the case permitted a permissive inference of malice.

The PCR court's findings should be upheld because Petitioner has failed to meet the burden imposed upon him to prove that his counsel's performance was deficient because the jury instructions were proper, thereby absolving trial counsel of the need to object. Petitioner argues that an attorney is always deficient for failing to object to an inferred malice instruction that lacks the general permissive inference instruction. However, an objection to such a charge is only warranted when the instruction's language risks shifting the burden of proof from the State to the defendant. Such was not the case here, and therefore no objection from Petitioner's trial counsel was necessary. Because trial counsel did not need to object, his failure to do so cannot possibly be considered deficient performance under *Strickland*.

The general permissive inference instruction's intent is to prevent the burden shifting effects of inferred malice instructions by clarifying to the jury that it may determine the weight of such an inference. *Gibson v. State*, 416 S.C. 260, 264, 786 S.E.2d 121, 123 (2016); *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983) (overruled on other grounds). The classic example of the general permissive inference instruction curing the risk of burden shifting is the case where a jury is charged with inferring malice solely from evidence that a defendant used a deadly weapon to

commit a homicide. *See State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009) (finding that the general permissive inference instruction must be given when the jury is instructed to infer malice from the intentional use of a deadly weapon.); *But see also State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019) (finding that a deadly weapon malice instruction is improper, even with the general permissive inference instruction). This Court has explicitly found that a “trial judge’s instruction on the presumption of malice from the use of a deadly weapon constituted a mandatory presumption rather than a permissive inference” and therefore necessitates the general permissive inference instruction. *Elmore*, 279 S.C. at 421, 308 S.E.2d at 784. Regardless of whether the court instructs the jury on the use of a deadly weapon, an “appropriate instruction on implied malice would deal with the evidentiary nature of the presumption and that the implication does not require the jury to infer malice but only permits it.” *State v. Mattison*, 276 S.C. 235, 238, 277 S.E.2d 598, 600 (1981).

At the time of Petitioner’s trial, a jury instruction on implied malice derived from the use of a deadly weapon was prohibited when the defense presented evidence that would reduce, mitigate, excuse, or justify the killing. *Belcher*, 385 S.C. at 610, 685 S.E.2d 809. A Maryland Court has referred to this as a “half-truth” because malice includes the absence of justification, excuse, and mitigation. *Glenn v. State*, 68 Md.App. 379, 511 A.2d 1110 (1986). Since Petitioner’s trial, such an instruction has been explicitly disallowed by this Court. *Burdette*, 427 S.C. at 504, 832 S.E.2d at 583. It was said to be particularly harmful because it amounts to a direct commentary and emphasis on certain facts of the case by the trial court. *Id.* 427 S.C. at 503, 832 S.E.2d at 582.

Specifically, there is no error despite the lack of a general permissive inference instruction where the “instructions on the law of implied malice made it clear that any presumption or inference of malice was rebuttable and whether malice had been proved was an issue of fact for

the jury to determine under all of the evidence.” *Mattison*, 276 S.C. at 238, 277 S.E.2d at 600. It is clear that the general permissive inference instruction is not itself a mandatory instruction that must be given every time a jury is instructed on implied malice. Instead, it is necessary to ensure that the presumption of malice, when inferred through evidence other than the defendant’s express actions, may nevertheless be rebutted by other evidence presented by the defense.

In the trial court’s prescience, no instruction on inferred malice from the use of a deadly weapon was given, despite the fact that Petitioner presented no evidence reducing, mitigating, excusing, or justifying his killing of Deon Myers. Rather than emphasizing or commenting upon certain facts by instructing the jury on the use of a deadly weapon, the trial judge stated that “a trial judge cannot intimate, state, comment on or make any statement to a trial jury about the facts in a case.” (App. 309, 11-13). The judge went on to explain that “[a]s jurors it is your duty to determine the effect, value, weight and truth of the evidence presented during this trial.” (App. 309, 20-22). He continued by stating that the jurors “should weigh all of the evidence in the case” and then, “after weighing all the evidence if you are not convinced of the guilt of the Defendant beyond a reasonable doubt, you must find the Defendant not guilty.” (App. 312, 14-17). Finally, the judge stated that “[m]alice may be inferred from conduct showing a total disregard for human life” but stopped short of alluding to any evidence in the case that may support said inference.

Petitioner’s argument assumes that an objection was required because the instruction did not contain the general permissive inference instruction. This argument misses the mark because the general permissive inference instruction is itself curative. It clarifies to the jury that any inference of malice derived from the evidence is a presumption that may be rebutted by other evidence. No “general permissive inference” instruction is necessary without an instruction that specific facts of the case can give rise to a permissible inference of malice.

Here, Petitioner’s argument puts the cart before the horse by presupposing burden shifting language in the trial court’s charge to the jury. Petitioner cites no specific language in the instructions where the court supposedly shifted the burden of proving or disproving malice. Instead, Petitioner simply asserts that the general permissive inference instruction was needed because the court stated that malice could be inferred from conduct that shows a total disregard for human life. This argument clearly fails because a conclusion that one acted with total disregard for human life is a conclusion reached upon consideration of the facts and evidence, rather than a fact itself. Therefore, the trial court’s instructions were proper.

Because the court’s instructions were proper, Petitioner’s trial counsel was not obligated to object. Without more, Petitioner has failed to meet his burden of showing that trial counsel’s performance was deficient. This Court should deny certiorari and uphold the PCR court’s findings.

B. Petitioner cannot show prejudice from trial counsel’s failure to object to the implied malice instruction because any error with its precise wording was rendered harmless in light of the entirety of the jury instructions.

The PCR court’s findings should be upheld because Petitioner has failed to meet the burden imposed upon him to prove that he was prejudiced by his counsel’s allegedly deficient performance. Petitioner attempts to minimize the evidence against him to frame his conviction as the direct product of the jury instructions and nothing else.

An erroneous instruction alone is insufficient to warrant reversal. *State v. Burdette*, 427 S.C. 490, 496, 832 S.E.2d 575, 578 (2019). “Errors, including erroneous jury instructions, are subject to harmless error analysis.” *Belcher*, 385 S.C. at 611, 685 S.E.2d at 809. An erroneous jury instruction constitutes grounds for reversal only if the appellant can show prejudice from the erroneous instruction. *Sulton v. HealthSouth Corp.*, 400 S.C. 412, 416, 734 S.E.2d 641, 643 (2012) (citing *Ellison v. Simmons*, 238 S.C. 364, 372, 120 S.E.2d 209, 213 (1961)). “When considering

whether an error with respect to a jury instruction was harmless, we must ‘determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.’” *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) (quoting *State v. Kerr*, 330 S.C. 132, 144-45, 498 S.E.2d 212, 218 (Ct. App. 1998)). This is to be done by reviewing the trial court’s charge in its entirety. *Burdette*, 427 S.C. at 498, 832 S.E.2d at 580. “In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered.” *Id.* (quoting *Kerr*, 330 S.C. at 145, 498 S.E.2d at 218).

As discussed above, the trial court’s jury instructions did not comment on or emphasize any facts of the case. Nowhere did the court state that the jury could permissibly infer malice from any specific piece of evidence. When read in its entirety, the court’s charge to the jury clearly instructed it to weigh the evidence as it deemed appropriate. Any error in the precise wording of the implied malice charge must therefore be considered harmless. This Court should deny certiorari.

C. Even assuming the instruction was improper, Petitioner cannot show that he was prejudiced by the jury instructions because of the significant evidence that he killed Deon Myers with malice aforethought.

Even assuming that the instruction was improper, this Court should nevertheless deny certiorari as Petitioner cannot show he was prejudiced by trial counsel’s failure to object to the jury instructions, in light of the other significant evidence of guilt presented in this case. Petitioner relies upon the State’s decision to only use three of the twenty potential witnesses at the scene, all of whom provided slightly different testimony and had prior relationships with other parties in

some way, in an attempt to minimize the weight of the evidence against him.¹ Petitioner admits that Lavern Holmes expressly demonstrated malice towards Deon Myers when he confronted him in the club with a shotgun after an alleged confrontation at some earlier time. Petitioner asserts, however, that Holmes's malice cannot be transferred to Petitioner under the doctrine of accomplice liability. This argument misses the mark and the Court need not consider whether accomplice liability can reach so far, because the same facts indicating that Lavern Holmes acted with malice apply to Petitioner. Holmes stated that he had a prior dispute with Deon Myers. So did Petitioner. Holmes confronted him in the club with a gun. So did Petitioner. Holmes even fired his gun as they were leaving the club. *So did Petitioner*. The only difference is that Holmes fired his gun into the air, hitting no one, whereas Petitioner fired his gun directly into Deon Myers's skull. If a finding could be made that Holmes's expressly demonstrated malice, as Petitioner suggests, the same must hold true for Petitioner.

Witnesses testified that Deon Myers was shot in the head after a confrontation at a nightclub between him and Petitioner. Petitioner confessed that he shot Myers because of a prior confrontation years earlier. Petitioner rode to the scene of the crime with Lavern Holmes and

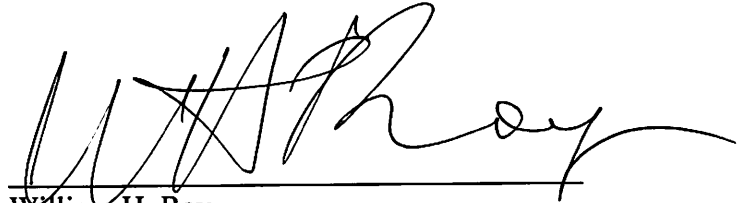
¹ Petitioner's suggestion that the witnesses' relationships with each other and the victims undermines the credibility of their testimony is without merit. This incident took place in a small town and every witness testified that they knew numerous people at the scene. Terrell Myers was the victim's brother, knew Petitioner from his childhood, and testified that everyone in the club knew Lavern Holmes. Lavern Holmes' niece and several of his other relatives were in the club at the time. Cameron Green ran into his cousin in the parking lot, spoke with a neighbor outside the door of the club, and believed himself to be related to Lavern Holmes. No implication can be derived from the State's choice of witnesses and their relationships with other parties in this proceeding, as it is likely that every potential witness had some prior relationship with others at the scene. In any event, it is the function of the jury, not the appellate courts, to decide what parts of witness testimony should be believed. *Small v. Pioneer Machinery, Inc.* 329 S.C. 448, 465, 494 S.E.2d 835, 843-44 (Ct. App. 1997). This Court is unable to observe these witnesses, and therefore owes great deference to the finder of fact. *Drayton v. Evatt*, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993)

stopped to get weapons along the way. He did so after being told that Holmes had been involved in a dispute with Myers that was so serious it made Holmes uncomfortable to even be in Plantersville. There was testimony that Petitioner covered his face with a bandana to conceal his identity and deceptively told Myers that he “was good” in an apparent effort to lure him out of the bathroom and away from Shaquettia Holmes, who was trying to keep the peace, before shooting him. The forensic evidence and eyewitness testimony corroborated the type and caliber of weapon used to commit the crime with the weapon seen in Petitioner’s hand at the scene.

Evidence of malice could fairly be inferred from these facts, and could be given the proper weight it was owed under the jury instructions provided by the court. Even assuming the court and trial counsel both erred in allowing the jury to be instructed on an inference of malice arising from conduct showing a disregard from human life, there was significant evidence elsewhere in the record showing the Petitioner shot Deon Myers with malice aforethought. Therefore, the PCR court properly found that a jury could find the requisite malice supporting a murder conviction. Or, put another way, it is beyond a reasonable doubt that a general permissive inference instruction would not have changed the jury’s verdict in this case. No prejudice resulted from trial counsel’s failure to object to the instructions, and this Court should affirm the PCR’s court’s findings and deny certiorari.

CONCLUSION

For the reasons stated above, this Court should deny certiorari and affirm the PCR court's findings that Petitioner received effective assistance of counsel. However, Respondent respectfully requests permission to more fully brief the issues herein should this Court decide to grant the petition for writ of certiorari.

A handwritten signature in black ink, appearing to read "W. H. Ray", written over a horizontal line.

William H. Ray
Assistant Attorney General

ATTORNEY FOR RESPONDENT

March 31, 2021