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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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On Petition of Writ of Certiorari to Orangeburg County
Court of Common Pleas
The Honorable Craig D. Brown, Post-Conviction Relief Judge
The Honorable Edgar W. Dickson, Trial Judge

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Appellate Case No. 2020-000896

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JULIAN YOUNG, #352043, Respondent,

vs.

STATE OF SOUTH CAROLINA, Petitioner.

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# RETURN TO RESPONDENT'S PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

**I.**

Did the PCR correctly find trial counsel ineffective for advising the jury during his opening argument for the defense that although he anticipated the State's evidence would not prove that Young had a gun, that they might be able to infer Young had a gun?

**II.**

Did the PCR Court err in finding trial counsel ineffective for failing to adequately advise Young concerning the potential advantages and disadvantages of testifying in his own defense?

a. The PCR court correctly found trial counsel ineffective for failing to advise Young that the trial court would not charge the jury on any lesser-included offenses without evidence to support such charges, which could only be provided through Young's testimony.

i. Self-Defense
ii. Accident
iii. Involuntary Manslaughter

**III.**

Did the PCR Court correctly find trial counsel was deficient for neglecting to discuss with Young the decision of the Supreme Court of South Carolina in *State v. Belcher* and the potential impact of that decision on the prosecution's ability to receive a jury instruction in which the jury would be advised that they could infer malice from the use of a deadly weapon?

**IV.**

Did the PCR Court correctly find trial counsel ineffective for failing to object to testimony from SLED Agent Johnson where Young clearly met his burden of proof met regarding the deficiency of trial counsel in failing to object to this testimony and established the prejudice resulting from trial counsel failing to object to testimony from SLED agent Richard Johnson?

**V.**

Did the PCR Court correctly find Young met his burden of showing prejudice resulted from trial counsel continuing to question Ricky Gipson?

**VI.**

Did the PCR court err in undertaking a cumulative error analysis, and granting relief based on cumulative error?

## STATEMENT OF THE CASE

Respondent/Petitioner, Julian Young, was indicted for Murder during the April, 2014, term of the Orangeburg County Grand Jury. See, Indictment No. 2011-GS-38-1833. Respondent/Petitioner proceeded to trial before the Honorable Edgar W. Dickson on August 14, 2012. At the conclusion of his jury trial, Respondent/Petitioner was found guilty and was sentenced by Judge Dickson to be incarcerated in the custody of the South Carolina Department of Corrections for a term of thirty-five years.

Young filed a timely notice of appeal. On June 18, 2014, the South Carolina Court of Appeals issued an unpublished opinion affirming the ruling and conviction. Following the denial of his Petition for Rehearing, Young sought certiorari to this Honorable Court, which was denied on December 18, 2014. App. 948.

Respondent/Petitioner filed the Application for Post-Conviction Relief, on March 5, 2015. In that Application, as well as two subsequent Amended Applications, he asserted forty-four allegations in support of his prayer for a new trial. The State filed its Return on September 9, 2015. Thereafter, an evidentiary hearing was held in Dorchester County before the Honorable D. Craig Brown on October 4-5, 2018. Judge Brown's Order, granting Respondent/Petitioner a new trial was filed on May 20, 2020. Petitioner/Respondent subsequently filed a Motion to Alter of Amend pursuant to Rule 59(e), SCRCP on June 15, 2020. On June 18, 2020, Petitioner/Respondent noticed Counsel for Respondent/Petitioner, that the State was withdrawing its Rule 59(e) motion. The following day, June 19, 2020**,** 2020, Petitioner/Respondent served Respondent/Petitioner with his Motion to Withdraw Motion to Reconsider, Alter or Amend Pursuant to Rule 59(e), SCRCP. App.pp. 1498 – 1499. That same date, June 19, 2020, Petitioner/ Respondent served and filed his Notice of Appeal from the Order granting relief in

this Post-Conviction Relief matter. The Notice of Appeal is not contained in the Appendix filed in this matter. Respondent/Petitioner filed a Notice of Appeal from said order on behalf of the State on June 19, 2020, the same date the State's Motion to Withdraw their Rule 59(e) Motion was filed. Petitioner/Respondent's Motion to Withdraw their 59(e) motion, SCRCP, was granted by Order of Judge Brown substantially after the Notice of Appeal was filed. That Order is not contained in the Appendix filed in this matter by Petitioner/Respondent.

Respondent/Petitioner now files his Return to Petitioner/Respondent's Petitioner for Writ of Certiorari and respectfully submits that the Writ should be denied.

**STATEMENT OF FACTS**

Kendra Williams, a sergeant with the South Carolina State University (SC State) Police Department, was dispatched to 2195 Russell Street on the night of April 15, 2011. (Trial Tr. p. 82, ln. 3 - p. 83, ln. 5). Williams was called to the property around 11:14 p.m. because a vehicle had hit the building at 2195 Russell Street, which held offices for SC State. (Trial Tr. p. 83, ln. 6-25).

Williams arrived at the scene at 11:20 p.m. (Trial Tr. p. 83, ln. 6-12). When Williams arrived, she observed that a green car had struck the front of the building at 2195 Russell Street. (Trial Tr. p. 84, ln. 13-22). Williams observed "a lot of car pieces and a lot of bricks everywhere." (Trial Tr. p. 84, ln. 19-20). There were already a number of public safety officers and an ambulance at the scene. (Trial Tr. p. 84, ln. 13-21).

Williams found the former occupant of the wrecked vehicle, a man named Jonathan Bailey, who is the Bailey in this case, in the ambulance. (Trial Tr. p. 87, ln. 11-22). Williams got in the back of the ambulance with Bailey and observed that he had a gunshot wound to the right chest area and another wound to the left chest area. (Trial Tr. p. 88, ln. 3-13). Williams

observed that Bailey "was frantic, he was scared, terribly scared." (Trial Tr. p. 88, ln. 14-17). Bailey was rolling back and forth on a stretcher and complaining of the pain he was in. (Trial Tr. p. 88, ln. 14-21). According to Williams, he kept saying, "'get me to the hospital, I'm going to die.'" (Trial Tr. p. 89, ln. 2-4).

Williams asked Bailey his name and if he was a student at SC State, but Bailey would not answer. (Trial Tr. p. 88, ln. 22 - p. 89, ln. 2). Bailey gave few audible responses. (Trial Tr. p. 93, ln. 22-23). Williams testified that she:

> asked him if he was Queen's Village, he said he—well, he shook his head, yes. I asked him if he had been robbed, he shook his head, yes. I asked him if, how many, and he stuck his hand up and showed me four fingers. I asked him if he saw the weapon, he shook his head, yes. I asked him if it was a revolver, he shook his head, yes. When I asked him if he saw the color of the weapon, he just shook his head, no. He just kept saying he was in pain, get me to the hospital. It wasn't real easy to get anything out of him.

Trial Tr. p. 89, ln. 6-14.

The ambulance ultimately took Bailey to the helipad at The Regional Medical Center of Orangeburg where he was then transported to another hospital. (Trial Tr. p. 89, ln. 19-25). Bailey died later that night from his injuries. (Trial Tr. p. 90, ln. 1-3).

After getting information from Bailey, Williams contacted her supervisors and then a number of officers from the SC State Police Department responded to 2195 Russell Street and Queen's Village. (Trial Tr. p. 91, ln. 13 - p. 92, ln. 14). At this point, the two crime scenes consisted of the Queen's Village area, where Sergeant Williams believed the shooting had occurred based on the information she obtained from Bailey, and the Russell Street location where the ambulance had responded to treat Bailey due to the traffic accident report. Law enforcement secured both locations and began looking for evidence. (Trial Tr. p. 92, ln. 1-14).

Dustin Johnson, an officer with the SC State Police Department (hereinafter "Officer Johnson"), responded to Queen's Village the night of April 15, 2011, in response to a call that there had been a shooting in Queen's Village, which was part of the South Carolina State campus, and was debriefed by Sergeant Williams and the responding police Commander upon his arrival. (Trial Tr. p. 100, ln. 4-10). By the time Officer Johnson arrived, the crime scene had already been secured. (Trial Tr. p.100, ln. 11-16). Officer Johnson then started to look around, investigate, and do the initial processing of the crime scene. (Trial Tr. p. 100, ln. 20-24). As he was performing his crime scene investigation at the Queen's Village area, Officer Johnson found and collected what he believed to be evidence, two bags of a green leafy substance that appeared to be marijuana and a fifty dollar bill. (Trial Tr. p. 100, ln. 24 – p. 101, ln. 8). Officer Johnson also photographed an area that had—what he perceived to be—fresh, tire skid marks. (Trial Tr. p. 101, ln. 8 - 12). Officer Johnson did not find any bullets or shell casings in the area. (Trial Tr. p. 107, ln. 11-17).

Officer Johnson then went to process the second crime scene, which was a short distance away on Russell Street. (Trial Tr. p. 107, ln. 23 - p. 108, ln. 14). While observing the wrecked car at the crime scene, Officer Johnson noticed a marking on the arm rest of the driver side door that appeared to be blood spatter, so he began looking for a bullet projectile. (Trial Tr. p. 109, ln. 2 - p. 110, ln. 24). He found a bullet projectile about eighteen inches from the side of the car, right under the driver side door. (Trial Tr. p. 111, ln. 4-11). In the passenger side of the car, he found another fifty dollar bill, along with five, twenty dollar bills and another bag of a green leafy substance that appeared to be marijuana. (Trial Tr. p. 114, ln. 8 - p. 115, ln. 20). Johnson then secured the vehicle with evidence tape and had it towed to a secure location. (Trial Tr. p. 115, ln. 21 - p. 116, ln. 7).

Once police learned that Bailey had died from his injuries, the South Carolina Law Enforcement Division (SLED) was called in to take over the case. Karl Kenley, a crime scene special agent with SLED, responded to the crime scene and lifted two latent prints from outside of the passenger door of Bailey's vehicle, one from the top of the window and one from the door, near the key entry. (Trial Tr. p. 292, ln. 22 - p. 294, ln. 23). The latent print from the window was identified as belonging to Ray Anthony Alston. (Trial Tr. p. 315, ln. 13 - p. 316; p. 325, ln. 15-19). The other print could not be identified at first, but eventually it was identified as belonging to Applicant. (Trial Tr. p. 317, ln. 9 - p. 318, ln. 14; p. 325, ln. 20-24).

SLED Agent Richard Johnson (hereinafter "Agent Johnson") came to Orangeburg on April 16, 2011, to begin his investigation. (Trial Tr. p. 336, ln. 14-24). As part of SLED's investigation, Agent Johnson obtained Bailey's phone records. (Trial Tr. p. 338, ln. 8-17). From those records, Agent Johnson identified Ricky Gipson as someone who had been in "constant contact" with Bailey before his death and who had sent two text messages to Bailey shortly after the 911 call was made regarding Bailey's accident. (Trial Tr. p. 338, ln. 17- 25). Agent Johnson contacted Gipson and took his statement about what happened the night of April 15th. (Trial Tr. p. 340, ln. 3-8). Agent Johnson showed Gipson a photograph of Alston, and Gipson identified Alston as someone who was present the night Bailey was shot. (Trial Tr. p. 340, ln. 9-17).

Thereafter, Alston was arrested for murder and Alston identified the other individuals that were present the night Bailey was shot. (Trial Tr. p. 340, ln. 18 - p. 341, ln. 22). Alston also identified Applicant, who goes by the nickname Gouda, as one of the individuals present the night Bailey was killed. (Trial Tr. p. 341, ln. 8-24).

At trial, Alston testified that, on the night of April 15, 2011, he was hanging out with Applicant and others at a friend's house. (Trial Tr. p. 198, ln. 8 - p. 199, ln. 4). Alston decided

he wanted to get some marijuana. (Trial Tr. p. 202, ln. 3-8). Alston testified that he talked to Applicant about making arrangement for Alston to buy marijuana. (Trial Tr. p. 202, ln. 17 - 19). Alston testified that Applicant then made some phone calls and set something up. (Trial Tr. p. 202, ln. 20 - p. 203 ln. 3). Thereafter, Alston, Applicant, Hilliard Pinckney, and Maurice Thompson drove to the SC State campus in a silver Buick. (Trial Tr. p. 199, ln. 1-4; p. 199, ln. 9-13; p. 200, ln. 1-23). Thompson drove, and Pinckney sat in the passenger seat. (Trial Tr. p. 204, ln. 21 - p. 205, ln. 4). Alston and Applicant sat in the back seat. (Trial Tr. p. 205, ln. 5-24).

Once on the SC State campus, the group picked up Gipson, who had been contacted by Applicant earlier in the day about purchasing marijuana. (Trial Tr. p. 130, ln. 16 - p. 135, ln. 4). Because Gipson did not have as much marijuana as Alston wanted to buy, Gipson arranged for Bailey to sell to Alston. (Trial Tr. p. 131, ln. 16 - p. 132, ln. 20). Gipson sat between Alston and Applicant in the back of the car, but Applicant was the only one there who knew Gipson. (Trial Tr. p. 132, ln. 18 - p. 136, ln. 16; p. 205, ln. 25 – p. 206, ln. 4).

Gipson testified that he had arranged to meet with Bailey at the marriage housing area. (Trial Tr. p. 134, ln. 18 - p. 135, ln. 4). Gipson and the group arrived before Bailey, so they reversed and parked in a parking space and waited for Bailey to arrive. (Trial Tr. p. 138, ln. 8-21; p. 176, ln. 4-24). When Bailey arrived, Bailey pulled into a parking spot such that his passenger side was closest to the passenger side of the Buick. (Trial Tr. p. 138, ln. 21 - p. 139, ln. 11; p. 207, ln. 25 - p. 208, ln. 21). Gipson, Alston, and Applicant went to Bailey's car, and Gipson got in the passenger seat to facilitate the transaction. (Trial Tr. p. 140, ln. 1-13). Alston and Applicant began complaining to Bailey because they were not happy with the quality of the marijuana that Bailey had to sell to them. (Trial Tr. p. 140, ln. 4-13; p. 209, ln. 13 - p. 210, ln. 7). Gipson then got out of Bailey's car, as Alston and Applicant were communicating with

Bailey, because at that point "it didn't have anything to do with [him]." (Trial Tr. p. 141, ln. 21 - p. 142, ln. 7). After Gipson had gotten out of Bailey's car and walked away, another silver car pulled up to the general area and Gipson spent about fifteen seconds observing this silver car because he did not know who the car belonged to. (Trial Tr. p. 142, ln. 8-15). When Gipson turned back around towards Bailey's car, he saw Applicant and Bailey "tussling in the car. . . ." (Trial Tr. p. 142, ln. 12-14). Gipson could not tell what Applicant and Bailey were fighting over. (Trial Tr. p. 143, ln. 22-24). Gipson observed that the passenger side door of Bailey's car was open and Applicant was leaning in the car while this tussling was occurring, and while all this was occurring, Bailey's car was simultaneously going into reverse. (Trial Tr. p. 142, ln. 10-16). Gipson testified that the tires of Bailey's car began to "spur out" as it was going to reverse and that he heard a "pop" after he heard the tires 'spurring out.' (Trial Tr. p. 142, ln. 16-18). Gipson ran away after hearing the "pop." (Trial Tr. p. 142, ln. 18-21). Gipson testified that he never saw anyone with a gun. (Trial Tr. p. 143, ln. 25 - p. 144, ln. 2). Gipson also observed that Alston was standing away from the car at the point that Bailey's car had begun to go into reverse. (Trial Tr. p. 144, ln. 11-19). After Gipson began to run away from the scene, he looked back and saw that Bailey's car had left the parking spot so Gipson continued to run away. (Trial Tr. p. 142, ln. 21-25).

Alston also testified at Applicant's trial. He testified that: he walked away from Bailey's car and Applicant went up to the passenger side window of Bailey's car (Trial Tr. p. 210, ln. 22-25); it looked like Applicant and Bailey were just talking at first, and then Bailey's car went into reverse with Applicant "inside the car" (Trial Tr. p. 210, ln. 25 – p. 211, ln. 2); when the car started to go into the reverse with Applicant leaning into the car, Applicant was "getting dragged by it, somewhat getting dragged by it" when Alston heard a "pow" sound (Trial Tr. p. 212, ln. 5-

11); and, he heard this "pow" sound, which Alston believed to be a gun shot, and then Applicant got back into the silver Buick the group arrived in. (Trial Tr. p. 211, ln. 2-3; p. 212, ln. 12-14). Alston asked Applicant "if he was alright, and then [Alston] asked if he shot the guy, but [Applicant] never answered." (Trial Tr. p. 211, ln. 3-6; p. 214, ln. 1-7).

In addition to the above, Respondent/Petitioner asserts that the following must be considered. A full and fair analysis of the allegations before the PCR Court required that the following be taken into account in considering Trial Counsel's theory of the case. Trial Counsel testified throughout the PCR hearing that: he wanted to establish that Applicant did not take the gun to the car and therefore could not have been the one that did the shooting (PCR Hr'g Tr. p. 23, ln. 18-21); his theory was that Applicant had nothing to do with the gun (PCR Hr'g Tr. p. 35, ln. 10-11); "[s]omebody could have take [sic] the gun, somebody could have moved the gun, but I can tell you who I know didn't touch the gun. Julian Young didn't touch the gun. That was my theory" (PCR Hr'g Tr. p. 35, ln. 14-17); his theory was to show that the gun came from Bailey (PCR Hr'g Tr. p. 101, ln. 7-8) & (PCR Hr'g Tr. p. 112, ln. 10-11); and his position was Bailey got mad because of the failed drug deal, and that Bailey drew the gun that belonged to him out of anger because no one else saw Applicant with a gun. (See PCR Hr'g Tr. p. 114, ln. 11-13).

Co-Counsel confirmed this theory at the PCR hearing when he testified that no witness could show that Applicant had a gun and that it was possibly a third party that shot the Bailey. (PCR Hr'g Tr. p. 197-198, ln. 14-25 & ln. 1). When Co-Counsel was asked if there was any kind of "insinuation or implication that he [Bailey] was maybe shot somewhere else, in another location, by another person," Co-Counsel responded saying, "I don't think we ever put that in, . . . ." (PCR Hr'g Tr. p. 198, ln. 17-20). Co-Counsel's only implication "was that there were not just

one scene, . . . , but possibly two because of where they located – and I think the fragment -- . . . , was found outside of the car, . . . ." (PCR Hr'g Tr. p. 199, ln. 4-8).

Trial Counsel's theory of the case was based upon him asking Respondent/Petitioner if the gun used in this incident would ever be found and his client telling him that it would not. Trial Counsel further stated that if they could never find the gun, then there was no way to connect Applicant with the shooting at all. (PCR Hr'g Tr. p. 33, ln. 16-23). Trial Counsel also testified that the only thing his client told him was that the gun would not be found and that was what he (Trial Counsel) used in forming his defense. (PCR Hr'g Tr. p. 48, ln. 17-23). Based upon Respondent/Petitioner telling Trial Counsel that the gun would not be found, Trial Counsel inferred that his client had the gun and, therefore, that he wanted to "keep [him] out of harm [sic] way" due to Trial Counsel's fear of what would happen "if [his client] took the stand." (PCR Hr'g Tr. p. 34, ln. 7-10). Trial Counsel also testified, based solely upon Respondent/Petitioner telling him that the gun would not be found, that he had no question in his mind that the gun did not come from Bailey, but rather from Applicant. (PCR Hr'g Tr. p. 46, ln. 17-20). Trial Counsel never asked Applicant if he *brought the gun* to Bailey's car. (PCR Hr'g Tr. p. 216, ln. 21-22). Trial Counsel stated that all he asked Applicant was, "*Do you think this gun will ever be found*." (PCR Hr'g Tr. p. 47, ln. 10-11).

Co-Counsel also testified to this issue and affirmatively stated that he did not recall asking Respondent/Petitioner whether or not he brought the gun or where it came from. (PCR Hr'g Tr. p. 191, ln. 3-4). However, he believed that Applicant had possession of the gun at some point and disposed of it. (PCR Hr'g Tr. p. 191, ln. 4-7). Co-Counsel acknowledged the fact that Respondent/Petitioner may have had possession of the gun at some point did not establish that it was Applicant's gun, that he was the one that had the gun prior to this altercation, or that he took

the gun to Bailey's car. (PCR Hr'g Tr. p. 200, ln. 23 – p. 201, ln. 1). Furthermore, Co-Counsel stated that he did not remember ever knowing who brought the gun nor did he remember Respondent/Petitioner telling them who brought the gun. (PCR Hr'g Tr. p. 203, ln. 15-17).

Petitioner asserts that Trial Counsel's theory of the case was deficient from the outset. In measuring Trial Counsel's conduct under prevailing professional norms, Respondent/Petitioner submits that Trial Counsel's representation fell below the range of competence required in a criminal case. As will be discussed below, Petitioner argues that Trial Counsel's strategy and/or theory was unreasonable under an objective standard of reasonableness in that he failed to make the adversarial testing process work in this case. Because Trial Counsel's strategy and/or theory was not objectively reasonable based upon that which will be discussed below, Respondent was prejudiced in that "***but for***" Trial Counsel's deficient performance there is a substantial likelihood that the result of the trial would have been different.

## STANDARD OF REVIEW

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Butler, 286 S.C. at 442, 334 S.E.2d at 814 (quoting Strickland, 466 U.S. at 669).

Strickland does not guarantee perfect representation, only a "'reasonably competent attorney.'" 466 U.S. at 687 (quoting McMann v. Richardson, 397 U.S. 759, 770 (1970)). Representation is constitutionally ineffective only if it "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair trial. Strickland, 466 U.S. at 686. A fair assessment of attorney performance requires that 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 perspective at the time. Id. at 689.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). First, an applicant must prove that counsel's performance was deficient. Cherry, 300 S.C. at 117, 386 S.E.2d at 625. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (quoting Strickland, 466 U.S. at 668). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (quoting Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Where trial counsel articulates a valid reason for employing certain trial strategy, counsel will not be deemed ineffective. McKnight v. State, 378 S.C. 33, 43, 661 S.E.2d 354, 359 (2008) (citing Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995)). Counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness based thereon. Where counsel articulates a strategy, it is measured, on a claim of ineffective assistance, under an objective standard of reasonableness. Ingle v. State, 348 S.C.

467, 560 S.E.2d 401 (2002). When evaluating the reasonableness of counsel's conduct, for purposes of claim of ineffectiveness assistance, the "court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in a particular case." Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007) (quoting Strickland, 466 U.S. at 690).

Second, counsel's deficient performance must have 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. "It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Harrington v. Richter, 562 U.S. 86, 104 (2011) (quoting Strickland, 466 U.S. at 687).

In assessing prejudice under Strickland, the question is whether it is "**reasonably likely** the result would have been different absent the errors." Strickland, 466 U.S at 696 (emphasis added). The likelihood of a different result must be substantial, not just conceivable. Harrington, 562 U.S. at 112 (citing Strickland, 644 U.S. at 693).

Courts may not indulge "post hoc rationalization" for counsel's decision making that contradicts the available evidence of counsel's actions. See Wiggins v. Smith, 539 U.S. 510, 526–528 (2003). However, there is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U. S. 1, 8 (2003) (per curiam). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have

been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Harrington, 562 U.S. at 109. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. Id. at 110 (citing Strickland, 466 U.S. at 688).

Petitioner Respondent has corrected stated that on appellate review, the standard of review in Post-Conviction Relief matters depends on the nature of the individual issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, our appellate courts give great deference to a Post-Conviction Relief court's findings of fact and will uphold them if there is *any* evidence in the record to support them. Smalls, 422 S.C. at 179, 810 S.E.2d at 839-40 (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016*); Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); *Caprood v. State,* 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). Challenges based on questions of law will be reviewed *de novo* without deference to the lower court. *Id*. Such challenges will be reviewed without deference to the lower court's decision. Our appellate courts will reverse a decision based solely on an error of law. *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

## ARGUMENT

### I.

**Did the PCR correctly find trial counsel ineffective for advising the jury during his opening argument for the defense that although he anticipated the State's evidence would not prove that Young had a gun, that they might be able to infer Young had a gun? Allegation I.**

An opening statement serves to inform the jury of the general nature of the action and defenses involved in the case so they will be better prepared to understand the evidence presented. State v. Brown, 277 S.C. 203, 284 S.E.2d 777 (1981). The solicitor's comments in opening and closing statements must be confined to the facts presented and the reasonable

inferences therefrom. State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) (citing State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981)). The scope of the opening statement is within the discretion of the trial judge, whose decision will stand absent a showing of an abuse of discretion and prejudice to the complaining party. State v. Harris, 275 S.C. 463, 466, 272 S.E.2d 636, 638 (1980). Any error in the solicitor's opening statement defining a point of law can be cured by the trial judge's charge defining it properly. State v. Jones, 298 S.C. 118, 122, 378 S.E.2d 594, 596 (1989) (internal citation omitted).

Solicitor Bell, in his opening statement at trial, told the jury that: "Implied malice means you have to look at the circumstances. The use of a deadly weapon you can imply, or the fact that during the commission of a crime, another crime - - - ." (Trial Tr. p. 72, ln. 6-9). Trial counsel immediately informed the Trial Court that he had a motion to make outside the presence of the jury. (Trial Tr. p. 72, ln. 10-14). After the jury exited the courtroom, Trial Counsel moved for a mistrial stating:

> Mr. Bell just said that it can be implied from a deadly weapon. That is not the case law. The jury just has been told they can be implied that there was a deadly weapon involved that you can find him guilty of murder and that creates malice. It does not create malice, and if there's any other, if – the law is if there's any other evidence at all you cannot imply or infer malice from a deadly weapon, and they just have been told that you can infer malice from a deadly weapon, and I don't think you can cure that.

Trial Tr. p. 73, ln. 2-10.

Solicitor Bell argued in response that the Trial Court "cannot charge that implied malice, or malice can't be implied from the use of deadly weapon." (Trial Tr. p. 73, ln. 16-20). The Solicitor Bell went on to state that "there's nothing that prevents the State from arguing the use of a deadly weapon can imply malice. Id. Trial Counsel responded, citing to State v. Belcher (385 S.C. 597, 685 S.E.2d 802 (2009)), stating that "[t]he implication of malice is there is not any

testimony that would reflect any other lesser charge is the law, not the fact that you can infer malice." (Trial Tr. p. 73-74, ln. 24-25, 1-3). Trial Counsel went on to state that it was his understanding that "whether you charge self-defense or not, whether it's accident or not, it cannot be inferred if there is any other evidence, not just self-defense." (Trial Tr. p. 74, ln. 8-12). Trial Counsel also argued that if you "tell the jury that now, the jury in the whole deliberation, if they hear about a gun they're going to be saying, well, we can infer, it's planted now that they can infer from a gun, and that's just not the law." (Trial Tr. p. 74, ln. 20-23). The Court denied Trial Counsel's Motion for a Mistrial but told Trial Counsel "you have the absolute right in your opening argument to tell them that, you know, it cannot be inferred if there is any evidence which would reduce, mitigate, excuse or justify the homicide." (Trial Tr. p. 74, ln. 24 – pg. 75, ln. 2).

After Trial Counsel's Motion for a Mistrial was denied and the trial resumed, the State told the jury that ***"inferred malice is not a different type of malice, it can be inferred from the circumstances surrounding the crime, such as use of a deadly weapon, or involvement in another crime."*** (Trial Tr. p. 75, ln. 24 - p. 76, ln. 3)(Emphasis added). Respondent/Petitioner urges this Honorable Court to note that in Trial Counsel's opening statement, he drew attention to the very same information he had challenged just moments earlier. In his opening statement, Trial Counsel stated that ***"[t]here is no testimony and we believe from the evidence we have seen there is no testimony that you, Julian, had a gun there. You may be able to infer it, but no testimony."*** (Trial Tr. p. 79, ln. 20-24)(Emphasis added). Thus, Applicant's own advocate virtually invited his jury to infer a key element of the crime of murder.

Applicant asserts that it would have been best for Trial Counsel not to "parrot" the State's language in his opening. (PCR Hr'g Tr. p. 17, ln. 13-15). Trial Counsel asserted at the PCR

hearing that: he was trying to make sure that the jury knew that Applicant did not have a gun since he believed that the gun was the focal point in the case (PCR Hr'g Tr. p. 16, ln. 2-9); he wanted the jury to start with the fact that Applicant did not have a gun (PCR Hr'g Tr. p. 16, ln. 2-9); he was afraid of the weapon being anywhere near Julian (PCR Hr'g Tr. p. 16, ln. 23); and, he was "trying to make sure I start out front with Julian not having anything to do with that weapon." (PCR Hr'g Tr. p. 17, ln. 3-5).

PCR Counsel asked Trial Counsel on direct examination that "[i]f you felt strongly enough about that and the danger of the jury potentially inferring malice --- from the testimony about a weapon, wouldn't it have been best for you not to parrot that language in your own opening?" (PCR Hr'g Tr. p. 17, ln. 9-15). Trial Counsel acknowledged that in hindsight, PCR counsel may be right. (PCR Hr'g Tr. p. 17, ln. 16-17). However, Trial Counsel said that he was "trying to prepare for anything that might come down the road." (PCR Hr'g Tr. p. 17, ln. 23-24).

On cross-examination at the PCR hearing, Trial Counsel stated that he did not tell the jury that they could infer malice. (PCR Hr'g Tr. p. 94, ln. 23-25). Trial Counsel further elaborated saying that "the jury got a right to infer what they want, but I wanted them to know – by the time the case is over, they will see that Julian had nothing to do with this. I couldn't stop them from inferring what they want, but if they will listen and let's get through the case. (PCR Hr'g Tr. p. 94, ln. 1-6). On redirect, Trial Counsel indicated that he was telling the jury that they could infer everything, but there were no facts to say that Applicant had a gun. (PCR Hr'g Tr. p. 107, ln. 9-11).

This PCR Court clearly recognized the danger of the State to arguing "implied malice" in its opening statement where at that point in the trial no evidence had been presented. The PCR

Court found that it was improper for the State to argue "implied malice" before any evidence had been presented.

In any event, this Court also finds that Trial Counsel erred in his attempt to rebut the State's argument of this permissive inference pursuant to State v. Belcher. It is of necessity to note that the Belcher decision held that a jury cannot be instructed by the Court that they may infer malice when a defendant uses a deadly weapon during a homicide if there is evidence of mitigation, excuse or justification for the homicide. Belcher, 385 S.C. at 611, 685 S.E.2d at 809 (overruled by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), which held that a jury charge on the inference of malice may not be given by the Court but that this ruling does not apply to convictions challenged on post-conviction relief). However, the Belcher decision stated in a footnote that:

> The standard implied malice charge remains valid, as does the general permissive inference instruction: "If facts, are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive." In addition, **we neither restrict the State from arguing to the jury for a finding of malice from the use of a deadly weapon, nor restrict a defendant from arguing the absence of malice or the presence of reasonable doubt in this regard**. **It is axiomatic that some matters appropriate for jury argument are not proper for charging**.

Id. at 612, 685 S.E.2d at 810 (emphasis added).

The Belcher decision points out the difference between the prosecution stating to the jury an inference they may make, defense counsel arguing the absence of malice or the presence of reasonable doubt, and the Court charging the jury about an inference it can make at the close of trial. In the same way that Belcher allowed a prosecutor to argue to the jury that they may infer malice from the use of a deadly weapon, defense counsel may argue the absence of malice or the presence of reasonable doubt.

It is apparent from the outset of this trial that Trial Counsel did not know or understand the implications of Belcher. Trial Counsel did not know that the State could argue that malice may be inferred from the use of a deadly weapon nor did he know, understand, or appropriately argue to the jury the absence of malice or presence of reasonable doubt. Trial Counsel failed to argue to the jury that malice could not be inferred if there was any evidence which would reduce, mitigate, excuse, or justify the homicide after being instructed by the Court that he could do so. (Trial Tr. p. 74 & 75, ln. 24-25, 1-2). Trial Counsel did not follow the court's direction when he failed to argue the absence of malice or the presence of reasonable doubt which would have contradicted the prosecution's opening argument.

The State's argument that malice could be inferred from the use of a deadly weapon before any evidence was presented and Trial Counsel telling the jury they could infer that Applicant had a gun would result in the only logical conclusion for the jury to reach, and that is, that the element of malice was satisfied. This argument conveyed to the jury from the outset how they could supply a vital element to the charge of murder by merely inferring it from the use of a deadly weapon. The argument further allowed the jury to listen to the State's case with an eye towards inferring malice from the beginning of the trial until its conclusion. Since the jury could logically reach this conclusion as to malice, the only remaining element the State would have to prove would be the "killing of any person" which was not, nor could it have been, contested. The PCR Court was correct in finding that Trial Counsel's error at this stage of the trial, before and evidence was heard, was "particularly prejudicial to [Respondent/Petitioner] since the jury was told they could infer malice and infer that [Respondent/Petitioner] had a gun from the very beginning." Order, p.26, para. 2. The PCR Court correctly found that Trial Counsel's articulated reason for this argument was unreasonable under an objective standard of

reasonableness where his articulated theory of the case was that no one could connect the gun to Respondent/Petitioner, while at the same time he virtually invited the jury to infer his client had a gun. It is clear that Trial Counsel was deficient in his efforts to protect his client from the very danger that he perceived and failed to protect his rights by choosing to argue to the jury in a manner contrary to that suggested by the trial judge. Rather, Trial Counsel's deficient conduct at this early stage of the trial increased the prejudice to Applicant by reinforcing the State's argument which he had, just moments before, made a motion for a mistrial before any evidence was presented in the case. Trial Counsel's error at this stage of the trial was particularly prejudicial to Applicant since the jury was told they could infer malice and infer that Applicant had a gun from the very beginning.

The PCR Court correctly found that Trial Counsel's argument was prejudicial to Applicant's case because he planted in the mind of the jury that they could infer Applicant had a gun after the State told them they could infer malice from the use of a deadly weapon. This argument, in essence, invited the jury to infer a crucial element of the murder charge.

Therefore, Applicant has established that Trial Counsel was deficient as to this allegation and has established that this deficiency resulted in a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). The well reasoned decision in this matter articulates a proper finding of deficiency and a sound basis for a finding of prejudice. The State's Petition for Writ of Certiorari should be denied.

**II.**

**Did the PCR Court err in finding trial counsel ineffective for failing to adequately advise Respondent/Petitioner concerning the potential advantages and disadvantages of testifying in his own defense (Allegation 7) and for failing to Advise Applicant as to possible impact**

**him not testifying would have on his access to jury charges on defenses and lesser-included offenses. (Allegations 8-10).**

**Allegation 7**

Some decisions are reserved for the client, rather than for the lawyer, notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forego an appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983). A defendant's decision to testify or not must be made with knowledge of the consequences of either choice. Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000) (citing State v. Orr, 304 S.C. 185, 403 S.E.2d 623 (1991)). Waiver of Fifth Amendment right must be knowing and voluntary. Id. (citing State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)).

Rule 1.2 of the Rules of Professional Conduct states, in part, the following:

> Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation, and as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. **In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.**[1]
>
> (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.[2]
>
> S.C. Rules of Professional Conduct 1.2 (d) (2016).

Rule of Professional Conduct 1.4(a)(2) & (b) states:

(a) A lawyer shall:

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[1] "Consult" of consultation denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question. S.C. Rule of Professional Conduct 1.0(c) (2016).

[2] "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances. S.C. Rule of Professional Conduct Rule 1.0(h) (2016).

> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished.[3]
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. Rule of Professional Conduct 1.4(b)(2) & (b) (2016).

Rule of Professional Conduct 3.3 (a)(3) states:

(a) A lawyer shall not knowingly:

> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, **other than the testimony of a defendant in a criminal matter**, that the lawyer reasonably believes to be false.[4]

During the trial, prior to the State resting its case, and before SLED Agent Richard Johnson testified, Young was advised of his Constitutional Rights, including his right to testify. (Trial Tr. p. 330, ln. 3 through p. 332, ln. 3). The Trial Court inquired as to whether Applicant had previously discussed this issue with his attorney and he acknowledged that he had. (Trial Tr. p. 330, ln. 4-6). The Trial Court then inquired as to whether Applicant had discussed this issue with his family or friends and Applicant indicated that he had not. (Trial Tr. p. 330, ln. 13-15). Finally, Applicant indicated to the Trial Court that he wanted an opportunity to discuss this issue with his family. (Trial Tr. p. 330, ln. 16-17). After Agent Johnson testified and before the State rested its case, Applicant was given the opportunity to meet with his attorneys and family to

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[3] "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer. S.C. Rule of Professional Conduct Rule 1.0(k) (2016). "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and the circumstances are such that the belief is reasonable. S.C. Rule of Professional Conduct Rule 1.0(l) (2016).

[4] Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. S.C. Rule of Professional Conduct, Comment 9 (2016).

discuss whether or not he would testify. After meeting with his attorneys and family, Applicant indicated to the Trial Court that he did not wish to testify. (Trial Tr. p. 378, ln. 9-21).

Trial Counsel testified at the PCR hearing as to this allegation as follows: Applicant did not want to testify (PCR Hr'g Tr. p. 33, ln. 24); Applicant had the opportunity whether he wanted to take the stand or not (PCR Hr'g Tr. p. 34, ln. 10-11); Applicant was real nervous (PCR Hr'g Tr. p. 34, ln. 12); Applicant's aunt, the minister, was present when we they discussed the issue of him testifying (PCR Hr'g Tr. p. 34, ln. 11-15); Applicant said, "Look, I don't want to take the stand. I'm nervous" (PCR Hr'g Tr. p. 34, ln. 15-16); Applicant's decision not to testify was not from not knowing or from not explaining (PCR Hr'g Tr. p. 34, ln. 24-25); we talked about all the issues and the fact that Applicant could testify but Applicant said he was nervous and that he did not want to take the stand (PCR Hr'g Tr. p. 40, ln. 8-16); there was not a "t" that was not crossed nor an "i" not dotted (PCR Hr'g Tr. p. 77, ln. 17-18); and that if Applicant did not want to take the stand, then he could not put him up to give the evidence (PCR Hr'g Tr. p. 108, ln. 2-3). PCR counsel also asked Trial Counsel whether or not he had any recollection of telling Applicant that if he did not take the stand there would not be a chance of getting a charge on the lesser included offenses. Trial counsel responded saying: "The way you ask that question I gonna – I'm gonna say no, I don't remember that." (PCR Hr'g Tr. p. 215, ln. 2-7). Trial Counsel went on to say, however, that Applicant fully understood what would happen if he didn't take the stand. (PCR Hr'g Tr. p. 215, ln. 8-10).

Co-counsel testified at the PCR hearing as well. He testified to the following: Applicant was afraid to testify (PCR Hr'g Tr. p. 187, ln. 3-8); that they met with Applicant's family (PCR Hr'g Tr. p. 192, ln. 10-12); and that multiple people were involved in the decision. (PCR Hr'g Tr. p. 92, ln. 13-14). PCR Counsel also asked Co-Counsel at the PCR hearing whether Applicant

was advised that if he did not testify and tell his side of the story there was not going to be enough evidence in the record for the judge "to give voluntary manslaughter, involuntary, certainly not accident or self-defense?" (PCR Hr'g Tr. p. 187, ln. 12-15). Co-counsel, similar to Trial Counsel's response, acknowledged that he could not recall if they discussed this issue in those terms with Applicant. (PCR Hr'g Tr. p. 188, ln. 2-13).

Applicant testified at the PCR hearing that: he was told a little bit about the good and bad of testifying (PCR Hr'g Tr. p. 242-43, ln. 24 through 3); he was scared (PCR Hr'g Tr. p. 259, ln. 24-25); Applicant was told that if he testified, they (the State) would cross-examine him, mix him up, mix up his words, and it would be like 500 degrees (PCR Hr'g Tr. p. 260, ln. 5-10); Trial Counsel did not think he should testify because they would cross-examine him (PCR Hr'g Tr. p. 264, ln. 11-13); he was nervous and scared (PCR Hr'g Tr. p. 264, ln. 13-14); the conversation that took place with his family about him testifying occurred during an approximate thirty minute break during the trial (PCR Hr'g Tr. p. 265, ln. 5-7); and they never had a discussion about whether or not he should testify before trial. (PCR Hr'g Tr. p. 265, ln. 8-10). Applicant was also asked at the PCR hearing whether his attorneys ever explained to him that if he did not testify and tell his side of the story, then there was not going to be a factual basis for "jury instructions on any of those things," to which Applicant responded that he could not really remember. (PCR Hr'g Tr. p. 242, ln. 10-20). When Applicant was further asked "[b]ut did they tell you that if you didn't testify there wasn't gonna be a way to get those charges," Applicant responded, "No. They didn't told (sic) me that." (PCR Hr'g Tr. p. 243, ln. 12-14).

While Trial Counsel and Co-Counsel testified to the above, Trial Counsel also testified at the PCR Hearing that he did not want to put Applicant on the stand because he was trying to "protect the record and not do any fraud on the Court." (PCR Hr'g Tr. p. 34, ln. 17-22). Trial

Counsel also said that there was reasoning behind why Applicant did not take the stand. (PCR Hr'g Tr. p. 34, ln. 23-24). He also stated that he "couldn't put Julian up." (PCR Hr'g Tr. p. 35, ln. 1). Trial Counsel further stated that he thought, but was not positive, he asked Applicant if he had struggled with Bailey for the gun and that this had a lot to do with not wanting to put him on the stand. (PCR Hr'g Tr. p. 42, ln. 11-21). Co-Counsel reaffirmed Trial Counsel's position when he testified that if Applicant testified, it would have forced them into a position of committing a fraud upon the Court. (PCR Hr'g Tr. p. 190, ln. 12-25).

Applicant testified that: the only in depth discussion that he had with Trial Counsel about the facts of the case was whether or not the gun would be found (PCR Hr'g Tr. p. 238, ln. 23-25 – p. 239, ln. 1); he did tell Trial Counsel what actually happened on the night of the incident[5] (PCR Hr'g Tr. p. 239, ln. 10-24); Trial Counsel was basically telling him not to testify and he felt as though Trial Counsel forced him not to testify (PCR Hr'g Tr. p. 259, ln. 21-22) & (PCR Hr'g Tr. p. 269, ln. 15-17); and his decision not to testify was based on what he knew at that time and on the advice of Trial Counsel. (PCR Hr'g Tr. p. 281, ln. 20-25). In addition, Applicant testified that: Trial Counsel did not tell him why he did not want him to tell his side of the story (PCR Hr'g Tr. p. 259, ln. 4-6); he would have testified to get the lesser included charges regardless of being scared (PCR Hr'g Tr. p. 261, ln. 1-7); and he would overcome his fear of testifying and insisted on telling his side of the story (PCR Hr'g Tr. p. 261, ln. 8-20).

It is clear, based upon the above, that Applicant waived his right to testify at trial. Trial Counsel, Co-Counsel and Applicant acknowledge that Applicant was scared and nervous. This

[5] This is somewhat confirmed by Trial Counsel acknowledging at the PCR hearing that he had asked Applicant if he had struggled with the gentleman in the car and Trial Counsel stating that that had a lot to do with not wanting to put Applicant on the stand. (PCR Hr'g Tr. p. 42, ln. 11-16).

is not something that should surprise anyone in light of the severity of the charge against Applicant, the fact that he was only seventeen at the time of his trial, and he did not have a prior criminal record. (PCR Hr'g Tr. p. 39, ln. 23-24). However, Respondent/ Petitioner asserted that he did not voluntarily waive this right with the knowledge of its consequences. It is apparent from above that Applicant did not make his decision not to testify after "consultation" with his attorney(s) as required under Rule 1.2, Rules of Professional Conduct, since "consultation" requires that an attorney communicate information to his client that is reasonably sufficient so the client can appreciate the significance of the matter. Trial Counsel and Co-Counsel failed to reasonably consult with Applicant in a manner that reasonably prudent and competent lawyers should do. The significance of the matter in this case was that if Applicant did not testify, then there would be no chance of receiving lesser included charges of involuntary or voluntary manslaughter or the defense of accident or self-defense since there was not sufficient evidence in the record after the State rested its case to warrant such charges.[6]

Applicant's waiver of his right to testify both knowingly and voluntarily is further hi-lighted by the requirement of Rule 1.4 of the Rules of Professional Conduct which require a lawyer to explain matters reasonably necessary to permit the client to make an informed decision regarding such representation. Trial Counsel and Co-Counsel acknowledged that they did not convey to Applicant that if he did not testify, then there would be no chance of receiving lesser included charges of involuntary or voluntary manslaughter or the defense of accident or self-defense. By not explaining this to Applicant, he was not in a position to make an informed decision as to whether or not to testify. Had Trial Counsel and Co-Counsel adequately explained the advantages and disadvantages of testifying to Applicant, Applicant testified, and the PCR

[6] The legitimacy and applicability of these will be further discussed below.

Court believed, that he would have overcome his nervousness and fear and testified. Order, page 32 – 33.

Having determined that Applicant's waiver of his right to testify at his trial was not knowing and voluntary, it was imperative that the PCR Court address another issue relevant to Allegation 7. Trial Counsel's theory, as discussed above, based solely on his client telling him that the gun used in the incident would never be found, led him to not want to put Applicant on the stand during his trial because of his concern that Applicant would perpetrate a fraud upon the Court. This concern of Trial Counsel is completely misplaced. Rule 3.3 of the Rules of Professional Conduct not only prohibits an attorney from knowingly offering evidence that the lawyer knows to be false, it allows an attorney in a criminal trial to refuse to offer testimony or other evidence "the lawyer reasonably believes is false." Comment 9 to Rule 3. The PCR Court found that it was not reasonable for Trial Counsel to infer that Applicant brought the gun to the incident based solely upon Applicant saying that the gun would not be found. Order, pg. 33. While trail counsel may have believed this to be true, his own PCR testimony, and that of his co-counsel, demonstrates that they never questioned Applicant concerning how the gun got in Bailey's car. Clearly his only relevant knowledge came from Applicant's answer to his question as to whether the gun was likely to be found. Trial Counsel belief that this information meant that his client brought the gun to the scene was not reasonable on the facts of this case. Trial Counsel did not **know** that Applicant's testimony would be false. In other words, he did not have actual knowledge of this fact. Because Trial Counsel did not **know** the testimony would be false he would be required to honor the client's decision to testify if the client so desired. Therefore, it was error on Trial Counsel's part not to want to put Applicant on the stand out of

fear that Applicant would perpetrate a fraud on the Court when he did not **know** if Applicant brought the gun to the scene of this incident.

Because Applicant's waiver of his right to testify was not knowing and voluntary and because Trial Counsel's belief that he could not put Applicant on the stand at his trial because he feared Applicant would perpetrate a fraud on the court is misplaced, Applicant has clearly established that Trial Counsel was deficient and that he was prejudiced to the extent that if he had been properly advised of the advantages and disadvantages of testifying, there is a reasonable probability that the outcome would have been different which will be further discussed below in addressing Allegations 8-13. The PCR Court properly found that Trial Counsel's fear that he would have run the risk of perpetrating a fraud on the Trial Court was misplaced and was not reasonable. Order, pg, 33-34.

**Failure to Advise Applicant as to Possible Defenses and Lesser-Included Offenses**

Applicant has numerous Allegations that fall within the scope of Counsel's alleged failure to advise Applicant thoroughly on the law concerning possible defenses and lesser included offenses and the impact of such failure. Specifically, the Allegations are that:

> Counsel neglected to advise Applicant concerning the law as it relates to the defense of self-defense (Allegation number 8);
>
> Counsel neglected to advise Applicant thoroughly concerning the law as it relates to the lesser-included offense of voluntary manslaughter (Allegation number 9);
>
> Counsel neglected to advise Applicant concerning the law as it relates to the defense of accident (Allegation number 10);
>
> Counsel failed to adequately explain to Applicant the fact that jury charges on the law as it relates to self-defense, voluntary manslaughter, and accident would not be given unless there was some evidence before the Court which tended to support those jury instructions (Allegation number 12); and,

> Counsel failed to adequately explain that, absent testimony from him, there would be no evidence on the record to support a request for jury charges concerning voluntary manslaughter, self-defense or accident inasmuch as testimony presented during the State's case in chief did not provide evidence supporting these theories (Allegation number 13).

**Allegations 8-10**

Trial Counsel testified that he recalled reviewing the possible defenses and the lesser included offenses with Applicant. (PCR Hr'g Tr. p. 41, ln. 15-18). Trial Counsel testified that he discussed self-defense with Applicant. (PCR Hr'g Tr. p. 33, ln. 11-13). Applicant confirmed that Trial Counsel discussed self-defense with him but could not recall what he was told about self-defense. (PCR Hr'g Tr. p. 240, ln. 16-20). Trial Counsel testified he could not recall discussing the defense of accident with Applicant.[7] (PCR Hr'g Tr. p. 41, ln. 13-18). At the PCR hearing, when PCR Counsel asked Applicant whether Trial Counsel went over "different ideas in the law and different concepts like self-defense or accident," Applicant responded saying that Trial Counsel "said something about the – like, I think the accident. Basically, I was just using the term of me understanding was, like, self-defense." (PCR Hr'g Tr. p. 240, ln. 3-10). However, when Applicant was further questioned about this issue, Applicant testified that Trial Counsel did discuss the defense of accident with him. (PCR Hr'g Tr. p. 241, ln. 1-2). Trial Counsel testified that he did discuss voluntary manslaughter with Applicant. (PCR Hr'g Tr. p. 41, ln. 13-18). Applicant testified to the contrary, stating that he was not told anything about voluntary or involuntary manslaughter. (PCR Hr'g Tr. p. 241, ln. 1 - p. 242, ln. 2).

The conclusion from the above is that Trial Counsel and Applicant agree that self-defense was discussed. Trial Counsel asserts that he did not discuss the defense of accident with

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[7] At the PCR hearing, Trial Counsel stated that he did not explain accident "because I didn't see how accident applied because my thought from the process he (Applicant) brought the gun, and one of the elements of self-defense is not to be the one who instituted the problem." (PCR Hr'g Tr. p. 215, ln. 11-15).

Applicant while Applicant asserts that it was. However, based upon Applicant's answers to PCR Counsel's questions concerning this defense, Applicant was likely confused as to his understanding of the difference between accident and self-defense. Therefore, the defense of accident probably was not discussed in detail with Applicant. Trial Counsel asserts that voluntary manslaughter was discussed with Applicant. However, it is not clear if involuntary manslaughter was discussed with Applicant because it does not appear in the record that Trial Counsel was specifically asked this question. What is clear from the record though is that Trial Counsel asserts that he submitted a brief to the trial court concerning these lesser included charges and in fact the trial court judge states on the record, after an in-chambers conference, that he would not be charging these lesser-included offenses (voluntary and involuntary manslaughter).[8] (PCR Hr'g Tr. p. 91, ln. 11-19) & (See Trial Tr. p. 382, ln. 3-7). Therefore, this Court believes, in all likelihood, that these two lesser-included offenses were discussed with Applicant in some fashion. To what extent though, it is unclear.

Overall, the testimony at the PCR hearing and the trial record indicates that Trial Counsel likely discussed some lesser-included offenses and defenses and failed to discuss others. Whether Trial counsel adequately explained the law concerning these lesser included offenses and defenses is important and could be evidence of deficiency of Trial Counsel. However, the PCR Court believed that a failure to adequately explain that these jury charges would not be given absent evidence or testimony from Applicant are more critical in assessing deficiency and prejudice of Trial Counsel's conduct and will therefore be discussed more fully below.

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[8] When a conference takes place off the record, it is trial counsel's duty to put the substance of the discussion and the trial court's ruling on the record. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) (citing Foye v. State, 335 S.C. 586, 590, 518 S.E.2d 265, 267 (1999), finding trial counsel was deficient for failing to place his argument about the jury seeing his client in chains on the record, and thus failing to adequately preserve the issue for appeal).

**Allegations 12 & 13**

The law to be charged to the jury is determined by the evidence presented at trial. State v. Lee, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989). If there is any evidence to warrant a jury instruction, a trial court must, upon request, give the instruction. State v. Shuler, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001). A trial court commits reversible error when it fails to give a requested charge on an issue raised by the evidence presented. Lee, 298 S.C. at 364, 380 S.E.2d at 835.

During the PCR hearing, PCR Counsel asked whether Trial Counsel had explained to Applicant that, at the conclusion of the State's case-in-chief, *"[n]one of these other people have testified to anything that's gonna give me a basis for asking for voluntary manslaughter, asking for accident, asking for self-defense. So if I'm going to be able to ask for a charge on either one of those defenses with a lesser included, you've gotta tell your side of the story."* (PCR Hr'g Tr. p. 50, ln. 10-16). Trial Counsel responded: "As to the accident, again, no. As to the others, yes. (PCR Hr'g Tr. p. 50, ln. 8-23). PCR counsel also asked Trial Counsel whether or not he had any recollection of telling Applicant that if he did not take the stand there would not be a chance of getting a charge on the lesser included offenses. Trial counsel responded saying: *"The way you ask that question I gonna – I'm gonna say no, I don't remember that."* (PCR Hr'g Tr. p. 215, ln. 2-7). Co-Counsel was also asked about this issue. More specifically, he was asked by PCR Counsel if Applicant was told that if he didn't testify and tell his side of the story, then there was not going to be evidence in the record for the trial judge to give voluntary manslaughter, involuntary, accident or self-defense. Co-Counsel's response was that he could not recall if it was put in those terms. (PCR Hr'g Tr. p. 187, ln. 9-18; p. 88, ln. 2-3).

Applicant initially testified that he could not remember whether he was advised that if he did not testify this would result in the trial Court not giving the jury charges at issue, and then testified that Trial Counsel ***did not*** explain this to him. (PCR Hr'g Tr. p. 242, ln. 10 – p. 243, ln. 21). Applicant testified that Trial Counsel explained to him that testifying and telling his side of the story could result in the trial court giving beneficial jury charges, but he was not told by Trial Counsel that testifying would be the only way that the trial court would give helpful jury instructions. (PCR Hr'g Tr. p. 243, ln. 12-13).

Applicant's Allegations 12 and 13 come down to Applicant's assertion that he would have testified at trial had he been informed by Trial Counsel of the necessity of evidence being in the record to receive these beneficial instructions, especially in light of the fact that at the conclusion of the State's case, there was insufficient evidence supporting a charge on these lesser included offenses and/or defenses. (PCR Hr'g Tr. p. 243, ln. 12-13). This Court has already concluded in its analysis of Allegation 7 above that Trial Counsel and Co-Counsel were deficient in failing to advise Applicant of the advantages and disadvantages of testifying thus preventing him from making an informed decision about whether or not to testify. Whether Applicant would have received these beneficial instructions had he taken the stand is, therefore, analyzed more fully below. The PCR Court found that Trial counsel was deficient for failing to advise Applicant of the advantages and disadvantages of testifying and therefore that Applicant was deprived of the opportunity p. 34, para. 1.

**Voluntary manslaughter**

The PCR Court found that a Voluntary Manslaughter charge "would not have been likely as a matter of law had Applicant given the same testimony at trial as he gave at his PCR hearing." Order p. 40, para. 2. Respondent/Petitioner will address this issue in his cross-appeal.

**Self-Defense**

The elements of self-defense are as follows:

> (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger; (3)(a) if the defense is based on the belief of imminent danger, then a reasonably prudent man of ordinary firmness and courage would have entertained the same belief, or (3)(b) if the defendant was actually in imminent danger, the circumstances were such that would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life; and, (4) the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984).

The South Carolina Court of Appeals noted in State v. Owens, 427 S.C. 325, 831 S.E.2d 126 (2019), that our Supreme Court held that a defendant who brought a concealed pistol to a drug deal brought on the difficulty and is therefore not entitled to a self-defense charge. Owens, 427 at 332-33, 831 S.E.2d at 129 (citing to State v. Williams, Op. No. 27895, 427 S.C. 246, 830 S.E.2d 904, 2019 WL 2518797 (S.C. Sup. Ct. filed June 19, 2019)). If there is any evidence in the record from which it could reasonably be inferred that Defendant acted in self-defense, it should be charged. State v. Burkhart, 350 S.C. 252, 260, 565 S.E.2d 298, 302 (2002) (internal citation omitted). The State must disprove self-defense beyond a reasonable doubt. State v. Wiggins, 330 S.C. 538, 544, 500 S.E.2d 489, 492-493 (1998). The defense of self-defense is not established if any one of the elements is disproven. See State v. Bixby, 388 S.C. 528, 554, 698 S.E.2d 572, 586 (2010).

Gipson testified at trial, on cross examination by Trial Counsel, that in neither one of his statements did he say that Applicant had a gun. (Trial Tr. p. 155, ln. 11-13). Pinckney testified that he didn't see Applicant get out of the car or get back in the car after the incident with a gun.

(Trial Tr. p. 186, ln. 6-11). Alston testified that he did not see Applicant with a gun. (Trial Tr. p. 225, ln. 1-20). Thompson testified that he never saw Applicant with a gun. (Trial Tr. p. 262, ln. 17-20). Finally, Applicant testified at the PCR hearing that it was Bailey that pulled a gun from beside his console. (PCR Hr'g Tr. p. 253, ln. 10-19). Based upon the testimony of each of these, individuals, there is no evidence that Applicant brought the gun to the incident or was at fault in bringing on the difficulty.

As to element 2 and 3, Gipson testified at trial that Applicant was leaning in Bailey's car and that Applicant and Bailey were tussling over something that Gipson could not see. (Trial Tr. p. 143, ln. 19-24). Gipson also testified that Bailey backed up and at that point he heard a "pop." (Trial Tr. p. 144, ln. 17-21). Gipson further stated that when he heard the "pop", he believed Applicant was still hanging in the car tussling with Bailey. (Trial Tr. p. 144-45, ln. 25 & 1-4). Alston testified that when Bailey began to back his car up, Applicant was inside Bailey's car, "getting dragged by it, somewhat getting dragged by it" and that is when he heard a "pow." (Trial Tr. p. 212, ln. 6-11). Thompson testified that after Alston decided not to purchase the marijuana from Bailey and after Alston had returned to the car that they came in, he felt the car jerk and Applicant was hanging out the passenger side of the car and then he heard a loud bang. (Trial Tr. p. 251, ln. 21-24). Applicant testified that he was leaning in Bailey's car talking to him when he reached by his console, that Bailey put the car in reverse, that the car was hitting him with the door and that it was knocking him out of the way. Applicant also testified that Bailey hit their car and that he was "jammed in it." (PCR Hr'g Tr. p. 252, ln. 11-25). Finally, Applicant testified that while he was trying to take the gun away from Bailey, he heard a "pop." (PCR Hr'g Tr. p. 254, ln. 19-22).

This Court believes that this would have been sufficient evidence to create a question for the jury as to whether Applicant actually believed or actually was in imminent danger of losing his life or sustaining serious bodily injury. This Court further believes that this testimony would have created a question for the jury as to whether or not a "reasonably prudent man of ordinary firmness and courage would have entertained the same belief" of being in imminent danger or whether "the circumstances were such that would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life."

As to the final element of self-defense, and referring to the facts previously referenced, Gipson testified that Applicant was hanging out of the car and tussling with Bailey when he heard the "pop." Alston testified Applicant was getting dragged by the car when he heard the "pow." Thompson testified Applicant was hanging out the passenger side of the car when he heard a loud bang. Finally, Applicant testified that Bailey hit their car and that he was "jammed in it." (PCR Hr'g Tr. p. 252, ln. 11-25). These facts would have certainly been evidence for the jury to decide as to whether Applicant had "no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance."

Respondent/Petitioner submits that the well reasoned decision on his allegation correctly found that the testimony adduced at trial would, with the added testimony of Applicant consistent with his PCR testimony, "would have been sufficient evidence to create a question for the jury as to weather Applicant actually believed or actually was in imminent danger of losing his life or sustaining serious bodily injury." The PCR Court found that Applicant's testimony would have "created a question for the jury as to whether or not a 'reasonably prudent man of

ordinary firmness and courage would have entertained the same belief' of being in imminent danger or whether 'the circumstances were such that would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life.'" Respondent/Petitioner submits that the PCR Court correctly found that Applicant's testimony at trial, along with the other evidence introduced, would have supported a jury instructions on self defense and that on the facts of this case, there exists "a reasonable probability that the result of the trial would have been different.

**Accident**

A homicide will be excusable on the ground of accident when: (1) the killing was unintentional, (2) the defendant was acting lawfully, and (3) due care was exercised in the handling of the weapon. State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996). The defense of accident protects a defendant who, while acting lawfully and with due care, unintentionally causes harm to another. See State v. Commander, 396 S.C. 254, 271, 721 S.E.2d 413, 422 (2011). If the circumstances of a case show a defendant was entitled to arm himself in self-defense when the gun went off, he would be entitled to a charge of accident supposing evidence satisfies the other elements of the doctrine. State v. Burris, 334 SAC 256, 513 S.E.2d 104 (1999). The defense of accident fails if the State proves beyond a reasonable doubt that Defendant's unlawful activity proximately caused the harm. State v. Goodson, 312 S.C. 278, 280 n. 1, 440 S.E.2d 370, 372 n. 1 (1994). Where there is evidence that the Bailey was the aggressor along with evidence that the gun discharged accidently then a jury charge on accident would be applicable. See Tisdale v. State, 378 S.C. 122, 126, 662 S.E.2d 410, 413 (2008).

As discussed above, Applicant engaged Bailey after Alston refused to purchase marijuana from Bailey and after Alston had walked away from Bailey's car. (PCR Hr'g Tr. p. 250, ln. 15-

16). Applicant further testified that : it was Bailey who reached by his console and grabbed a weapon before they started tussling (PCR Hr'g Tr. p. 253, ln. 1-3 & 16-19); while Applicant and Bailey were tussling over the gun, the gun went off (PCR Hr'g Tr. p. 254, ln. 8-13); Applicant did not know that Bailey had been shot (PCR Hr'g Tr. p. 255, ln. 1-2); and Applicant was trying to get control of the gun so that Bailey would not shoot him. (PCR Hr'g Tr. p. 255, ln. 11-14). Had Applicant testified to these facts at trial, this Court believes that he would have been entitled to charge on the defense of accident.

The above is evidence that Bailey was the aggressor and that he was killed unintentionally. What may questionable is whether Applicant was acting lawfully. The purchase or attempt to purchase marijuana is an unlawful act. The State would have had to prove beyond a reasonable doubt that the unlawful activity proximately caused Bailey's death. However, this Court believes that death cannot be said to be the natural or necessary result of buying or attempting to purchase marijuana, especially when there is no evidence that Applicant possessed a gun prior to the incident that resulted in Bailey's death or that there was any preexisting plan to rob Bailey. It is also questionable as to whether Applicant exercised due care in the handling of the weapon. Regardless of what is questionable here, this Court finds that Applicant testifying at trial, to the same effect that he testified at the PCR hearing, would have resulted in a jury charge on the defense of accident. It would have clearly created a question for the jury.

Applicant submits that the PCR Court correctly found that Applicant had established that Trial Counsel was deficient for not adequately explaining to Applicant that a jury charge of accident would not be given unless there was some evidence before the Court from the State, or more importantly from Applicant, to support such a charge. Furthermore, Applicant has

established that he was prejudiced by this error, as discussed above, in that the Trial Court would have been required to charge accident based upon the above-referenced facts creating a reasonable probability that the result of the trial would have been different. Order, p. 45, para. 2 and fn. 14.

**Involuntary manslaughter**

Involuntary manslaughter is: (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others. State v. Smith, 391 S.C. 408, 706 S.E.2d 12 (2011). Involuntary manslaughter is a lesser included offense of murder only if there is evidence the killing was unintentional. State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996). Evidence of a struggle between the defendant and the Bailey over a weapon supports submission of an involuntary manslaughter charge. Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991). The South Carolina Supreme Court also recognized in State v. Bray boy that evidence of a struggle between a defendant and Bailey supports submission of an involuntary manslaughter charge. State v. Bray boy, 387 S.C. 174, 180, 691 S.E.2d 482, 485 (2010) (citing to State v. Light, 378 S.C. 641, 648-49, 664 S.E.2d 465, 468-69 (2008), holding a jury charge on involuntary manslaughter was proper when petitioner testified that he took a loaded gun from the Bailey who was threatening him with the gun, that the gun fired almost immediately after he took possession of it, and that there was a struggle between he and the Bailey over the gun).

During the trial, Gipson testified that he saw Applicant and Bailey tussling in the car. (Trial Tr. p. 142, ln. 13-14). Alston also testified that he saw Applicant and Bailey "tugging" over something but did not know what it was about. (Trial Tr. p. 224, ln. 14-18). Applicant

added to this testimony at the PCR hearing when he testified that Bailey was reaching by his console when Bailey grabbed a gun. After Bailey grabbed the gun, Applicant and Bailey began "tussling" over the pistol. (PCR Hr'g Tr. p. 253, ln. 13-19). Applicant further testified that while they were tussling for the gun that both his and Bailey's hands were on the gun when he heard a "pop." (PCR Hr'g Tr. p. 254, ln. 17-22). Trial Counsel even acknowledged at the PCR hearing that he asked Applicant if he had struggled with Bailey over the gun and said this had a lot to do with not wanting to put Applicant on the stand. (PCR Hr'g Tr. p. 42, ln. 11-16).

Gipson also testified at trial that he brought Bailey in on the deal because the guy wanted more than the amount of marijuana he had available. Gipson said he thought it was going to be "something small like a Ten or a Twenty." (Trial Tr. p. 131, ln. 22 – p. 132, ln. 2). Alston testified that he was the one who wanted to buy marijuana that night and said he planned to buy, "probably like an ounce or something." (Trial Tr. p. 203, ln. 8). Therefore, the testimony seems to indicate that the drug deal that was planned involved an ounce of marijuana which would constitute a misdemeanor pursuant to S.C. Code Ann. § 44-53-370 (c) (4) (1976 & Supp. 2011).

This PCR Court found that if Applicant testified at trial, consistent with his testimony at the PCR hearing, coupled with the testimony of Gipson and Alston, then he would have received a jury charge on involuntary manslaughter since there would have sufficient evidence establishing a jury question as to whether the killing was unintentional without malice while engaged in an unlawful activity not amounting to a felony and not naturally tending to cause death or great bodily injury. Furthermore, this Court believes that Applicant would have been entitled to an involuntary manslaughter charge even in light of Dr. Kelly Rose testifying at trial that the bullet that struck Bailey "traveled from right to left, slightly down, and slightly forward, . . ." (Trial Tr. p. 269, ln. 17-19). In other words, a charge on involuntary manslaughter would

have been warranted even if they State argued that Bailey's wound was inconsistent with Applicant's testimony because the PCR Court did not believe that there is overwhelming evidence that Applicant intentionally killed Bailey. See Tisdale v. State, 378 S.C. 122, 126, 662 S.E.2d 410, 412 (2008).

Therefore, Applicant has established that: Trial Counsel was deficient for not adequately explaining to Applicant that a jury charge of involuntary manslaughter would not be given unless there was some evidence before the Court from the State, or more importantly from Applicant, to support such a charge; and, Applicant was prejudiced in the sense that he has established, as discussed above, that the Trial Court would have been required to charge voluntary manslaughter based upon the above-referenced facts creating a reasonable probability that the result of the trial would have been different. Order, p. 47 and p. 47, fn 15.

**Conclusion as to the lesser included charges and defenses**

Based upon the above discussion of the lesser included offenses and defenses, Applicant respectfully asserts that the PCR Court correctly ruled that he would have been entitled to a jury charge on self-defense, accident, and involuntary manslaughter had his testimony at trial been consistent with his testimony at the PCR hearing. Because Trial Counsel and Co-Counsel were deficient in failing to adequately explain the necessity of his testimony to receive such charges, Applicant has demonstrated prejudice by showing that he would have received these charges had he testified and established that there is a reasonable probability the result of the proceeding would have been different.

**III.**

**Trial Counsel neglecting to discuss with Applicant the decision of the Supreme Court of South Carolina in *State v. Belcher* and the potential impact of that decision**

**on the State's ability to receive a jury instruction through which the jury would be advised that they could infer malice from the use of a deadly weapon in the homicide for which Applicant was charged**. (Allegation 11)

The Belcher decision, as noted during the discussion of Allegation 1, held that a jury cannot be told that they may infer malice when a defendant uses a deadly weapon during a homicide if there is evidence of mitigation, excuse or justification for the homicide. Belcher, 385 S.C. at 611, 685 S.E.2d at 809. Applicant asserts that Trial Counsel failed to discuss or explain the implications of Belcher and what was necessary to prevent the trial court from telling they jury that they could infer malice from the use of a deadly weapon in his case.

Trial Counsel was asked at the PCR hearing if he explained to Applicant that if he did not testify and provide some basis for the assertion of a lesser included or some affirmative defense, then there was not going to be a basis to object to the Court charging that malice could be inferred from the use of deadly weapon. (PCR Hr'g Tr. p. 49, ln. 18-23). Trial Counsel indicated that he thought he had explained it and that he thought he did a brief on it as well. (PCR Hr'g Tr. p. 49-50, ln. 24-25 & 1-2). PCR counsel further inquired of Trial Counsel asking him whether after the State rested and their witnesses had not testified to anything that would give the Court "a basis for asking for "voluntary manslaughter, asking for accident, asking for self-defense," if he told Applicant he had to tell his side of the story so that he could ask for these charges and receive the benefit of Belcher. Trial Counsel responded stating, as to accident, no, but as to the others, yes. (PCR Hr'g Tr. p. 50, ln. 23). Upon further questioning of Trial Counsel, PCR Counsel asked Trial Counsel why he persisted that the rule in Belcher applied to this case when he knew the Trial Court was not going to charge voluntary, involuntary, accident or self-defense. (PCR Hr'g Tr. p. 214, ln. 11-14). Trial Counsel responded saying that he was trying to protect the record. (PCR Hr'g Tr. p. 214, ln. 15-23).

Co-Counsel was also asked about this issue and he testified he understood Belcher to mean that if there was no evidence of a lesser included offense(s) and or defense(s), then Applicant would not receive the benefit of Belcher. (PCR Hr'g Tr. p. 182, ln. 7-22). Co-Counsel acknowledged that when the Trial Court Judge told them that he was not going to give "voluntary manslaughter or involuntary manslaughter" because there was no evidence of mitigation, then that was based upon the record in front of him (the Trial Court Judge) and what "y'all did do, not what you didn't do." (PCR Hr'g Tr. p. 182-183, ln. 23-25 & 1-5). Co-Counsel was further asked, but could not recall, if they told Applicant that if he did not testify there was not going to be enough evidence for the trial judge to give voluntary manslaughter, involuntary, accident or self-defense. (PCR Hr'g Tr. p. 187, ln. 12-16). PCR Counsel went on to state that she would assume that Co-Counsel "did not discuss with him that if you (Applicant) didn't get jury charges on something in that group, you were not gonna be able to stop the judge from giving the inference of malice from the use of a deadly weapon charge. (PCR Hr'g Tr. p. 188, ln. 5-9). Co-Counsel stated that he could not recall "saying it in those terms." (PCR Hr'g Tr. p. 188, ln. 10-13). PCR Counsel pointed out that even though there was no evidence that would warrant a lesser included charge(s) and/or defense(s), Trial Counsel still objected to the Court charging the jury that they could infer malice from the use of a deadly weapon. (PCR Hr'g Tr. p. 189, ln. 8-18). After pointing this out, PCR Counsel asked Co-Counsel if they understood that the rule in Belcher only came into play if those lesser charges or defenses were before the Court and Co-Counsel indicated that he could not remember but thought that he knew that they had to get some evidence of mitigation on the record to receive the benefit of Belcher. (PCR Hr'g Tr. p. 189, ln. 18-24).

This issue was briefly discussed by PCR Counsel and Applicant at the PCR hearing. Applicant was asked if he was told that if he did not testify, there was not going to be a legal reason for the judge not to charge the inference of malice from the use of a deadly weapon. Applicant initially responded that they had but when asked again, responded that they had not. (PCR Hr'g Tr. p. 243, ln. 15-21).

It appears there was some discussion with Applicant concerning the possible implications of Belcher and avoiding a jury charge that they could infer malice from the use of a deadly weapon. Applicant submits that the PCR Court properly found that there was finds insufficient evidence that Applicant was adequately advised of the need to testify to establish evidence in mitigation of the charge of murder and receive the benefits of Belcher. As noted previously in discussing Allegations 7-13, Counsel and Co-Counsel were asked at the PCR hearing whether they discussed the issue that without the defense putting forth evidence that would mitigate, excuse or justify the homicide, the inference of malice jury charge would be proper. Trial Counsel testified he did not recall specifically informing Applicant about the implications of the Belcher decision in those terms. (See PCR Hr'g Tr. p. 215, ln. 2-7). Co-Counsel confirmed such as well. (See PCR Hr'g Tr. p. 188, ln. 4-9, ln 4-13).

This PCR Court found that it was incumbent upon Trial Counsel and Co-Counsel to thoroughly advise Applicant of what was needed to receive the benefits of Belcher so that he could make an informed decision of whether or not to testify. Furthermore, the PCR Court correctly found that had Trial Counsel done so, and had Applicant insisted on testifying at trial, Trial Counsel would have been required to honor Applicant's decision pursuant to the Rules of Professional Conduct which have previously been referenced above and discussed. The PCR's Court's ruling on this issue is sound, when it held that Trial Counsel's failure to adequately

advise him concerning the implications of the Belcher decision, and how it impacted the need for him to testify, could not be harmless error on the facts of this case. The PCR Court properly ruled that Applicant was unable to make a knowing and voluntary decision about whether he wished to testify with adequate advice concerning what was needed in order to receive the benefits of this important decision. Order, p. 51.

**IV.**

**Did the PCR Court correctly find trial counsel ineffective for failing to object to testimony from SLED Agent Johnson where Young clearly met his burden of proof met regarding the deficiency of trial counsel in failing to object to this testimony and established the prejudice resulting from trial counsel failing to object to testimony from SLED agent Richard Johnson?**

As the PCR Court held in this matter, there was no more crucial question at Applicant's trial than who brought the gun to the scene of this drug deal. Order, p. 53, para. 3. The PCR Court correctly found that the testimony in dispute was plain and simply hearsay which was not the subject of any recognized exception to the prohibition against the use of such hearsay statements offered for the truth of the matter asserted. Rule 801, SCRE. Order, p. 53- p. 54. Likewise the finding of the PCR Court that the admission of this improper testimony without objection was prejudicial is irrefutable. There was a large amount of evidence at this trail that no one saw Applicant with a gun before or after this shooting. Order, p. 54, para. 2. Neither was this hearsay testimony merely cumulative to any other evidence offered at this trial. Certiorari should not be granted on the PCR Court's ruling on this important issue.

**V.**

**Allegations 23 & 24**

**Did the PCR Court correctly find Respondent/Petitioner met his burden of showing prejudice resulted from trial counsel continuing to question Ricky Gipson?**

The testimony and arguments presented by Applicant at his PCR hearing, as outlined in detail in the portion of the Order granting relief on this issue, clearly support the PCR Court's ruling that, "Applicant has established that Trial Counsel was deficient for continuing to ask Gipson if he saw Applicant with a gun after beneficial testimony was already in the record concerning such. Trial Counsel knew, or should have known, from an adequate review of the discovery, that pursuing this line of questioning further would have a prejudicial impact upon

Applicant. Furthermore, Trial Counsel's conduct was prejudicial to Applicant in that Trial Counsel opened the door for the State to further clarify to the jury that the only people at Bailey's car when the shooting occurred was Bailey and Applicant. Applicant was further prejudiced in that Gipson's response to Trial Counsel's continuous line of questioning once again undermined Trial Counsel's theory of the case that the gun came from Bailey. Because Applicant has proven that Trial Counsel was deficient at to this allegation and that Applicant was prejudiced, Applicant is entitled to relief as to this Allegation." The factual findings of the PCR Court on this issue are clear and are fully supported by the portions of the record below cited in the Order finding that trial counsel was deficient in the manner in which he cross-examined Ricky Gibson. Likewise, the PCR Court's analysis of the prejudice arising from this error by trial counsel is accurate and reasonable and his discretion in granting relief on this issue should be affirmed. Applicant respectfully asserts that Certiorari should be denied on this issue.

**VI.**

**Did the PCR court err in undertaking a cumulative error analysis, and granting relief based on cumulative error?**

The Petitioner/Respondent asserts that the PCR Court erred in engaging in a cumulative error analysis in this case essentially because the question of whether prejudice may be established through a cumulative error analysis remains an open issue in S.C. pursuant to Green v. State, 351 S.C. 184, 569 S.E.2d 318 (2002) and Lorenzen v. State, 376 S.C. 521, 657 S.E.771 (2008). Petitioner/Respondent also relies on federal law in support of the State's position. The fact remains, this is, just as the Petitioner/Respondent has acknowledged, an open question in South Carolina. Applicant submits that the PCR Court was correct in concluding that this case is an ideal choice for advancing the proposition that prejudice and can and in some cases should be demonstrated through analysis of the cumulative prejudice arising from the many errors and

omissions of trial counsel. While Applicant maintains that each of the issues on which the PCR Court chose to grant relief would sustain the remedy granted on their own merits, he maintains that the cumulative impact of the many errors and omissions of trial counsel in this case cry out for recognition of the cumulative impact of these actions on Applicant's ability to receive a fair trial. Applicant urges this Honorable Court to recognize the cumulative prejudice found in this case as an addition basis for sustaining the Order of the PCR Court in this matter.

Respectfully submitted,

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This 21st day of May, 2021.