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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Appellate Case No. 2020-000896

JULIAN YOUNG, #352043, Respondent/Petitioner,

vs.

STATE OF SOUTH CAROLINA, Petitioner/Respondent.

PETITION FOR WRIT OF CERTIORARI IN CROSS-APPEAL OF RESPONDENT/PETITIONER

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QUESTION PRESENTED

Did the PCR Court err in failing to grant Respondent/Petitioner relief on his Allegation No. 9, in which he alleged that Trial Counsel was ineffective for neglecting to advise the Applicant thoroughly concerning the law as it relates to the lesser included offense of voluntary manslaughter? Allegation 9

STATEMENT OF THE CASE

Young, Julian Young (Hereafter Young), was indicted for Murder during the April, 2014, term of the Orangeburg County Grand Jury. See, Indictment No. 2011-GS-38-1833. Young proceeded to trial before the Honorable Edgar W. Dickson on August 14, 2012. At the conclusion of his jury trial, Young 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 On June 18, 2014, the South Carolina Court of Appeals issued an unpublished opinion affirming the ruling and conviction.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.

Young 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 Young 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 Young, that the State was withdrawing its Rule 59(e) motion. The following day, June 19,

2020**,** 2020, Petitioner/Respondent served Young 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. Young 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.

Young has filed his Return to the State's Petition for Writ of Certiorari appealing the Order of judge Brown granting Respondent/Petitioner a new trial. While Respondent /Petitioner submits that the PCR Court correctly found that he was entitled to the grant of a new trial on the multiple issues addressed in the Order issued by Judge Brown, he respectfully asserts that relief should also have been granted on the allegations addressed herein.

STATEMENT OF FACTS

Respondent Petitioner submits that the Statement of Facts set forth in his Return to the State's Petition for Writ of Certiorari is accurate and relevant to the issue addressed herein. Those facts are set forth below.

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. App. p. 82, line 3 - p. 83, line. 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. App. p. 83, lines. 6-25.

Williams arrived at the scene at 11:20 p.m. App. p. 83, lines. 6-12. When Williams arrived, she observed that a green car had struck the front of the building at 2195 Russell Street. App. p. 84, lines. 13-22. Williams observed "a lot of car pieces and a lot of bricks everywhere." App. p. 84, lines. 19-20. There were already a number of public safety officers and an ambulance at the scene. App. p. 84, lines 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. App. p. 87, lines 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. App. p. 88, lines 3-13. Williams observed that Bailey "was frantic, he was scared, terribly scared." App. p. 88, lines 14-17. Bailey was rolling back and forth on a stretcher and complaining of the pain he was in. App. p. 88, lines 14-21. According to Williams, he kept saying, "'get me to the hospital, I'm going to die.'" App. p. 89, lines 2-4.

Williams asked Bailey his name and if he was a student at SC State, but Bailey would not answer. App. p. 88, line. 22 - p. 89, line. 2. Bailey gave few audible responses. App. p. 93, lines. 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.

App. p. 89, lines 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. App. p. 89, lines 19-25. Bailey died later that night from his injuries. App. p. 90, lines 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. App. p. 91, lines 13 - p. 92, lines 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. App. p. 92, lines 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. App. p. 100, lines 4-10. By the time Officer Johnson arrived, the crime scene had already been secured. App. p.100, lines 11-16. Officer Johnson then started to look around, investigate, and do the initial processing of the crime scene. App. p. 100, lines 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. App. p. 100, lines 24 – p. 101, lines 8. Officer Johnson also photographed an area that had—what he perceived to be—fresh, tire skid marks. App. p. 101, lines 8 - 12. Officer Johnson did not find any bullets or shell casings in the area. App. p. 107, lines 11-17.

Officer Johnson then went to process the second crime scene, which was a short distance away on Russell Street. App. p. 107, lines 23 - p. 108, lines 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. App. p. 109, lines 2 - p. 110, lines 24. He found a bullet projectile about eighteen inches from the side of the car, right under the driver side door. App. p. 111, lines 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. App. p. 114, lines 8 - p. 115, lines 20. Johnson then secured the vehicle with evidence tape and had it towed to a secure location. App. p. 115, lines 21 - p. 116, lines 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. App. p. 292, lines 22 - p. 294, lines 23. The latent print from the window was identified as belonging to Ray Anthony Alston. App. p. 315, lines 13 - p. 316; p. 325, lines 15-19. The other print could not be identified at first, but eventually it was identified as belonging to Young. App. p. 317, lines 9 - p. 318, lines 14; p. 325, lines 20-24.

SLED Agent Richard Johnson (hereinafter "Agent Johnson") came to Orangeburg on April 16, 2011, to begin his investigation. App. p. 336, lines 14-24. As part of SLED's investigation, Agent Johnson obtained Bailey's phone records. App. p. 338, lines 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. App. p. 338, lines 17- 25. Agent Johnson contacted Gipson and took his statement about what happened the night of April 15th. App. p. 340, lines 3-8. Agent Johnson showed Gipson a photograph of Alston, and Gipson identified Alston as someone who was present the night Bailey was shot. App. p. 340, lines 9-17.

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

At trial, Alston testified that, on the night of April 15, 2011, he was hanging out with Young and others at a friend's house. App. p. 198, lines 8 - p. 199, lines 4. Alston decided he wanted to get some marijuana. App. p. 202, lines 3-8. Alston testified that he talked to Young about making arrangement for Alston to buy marijuana. App. p. 202, lines 17 - 19. Alston testified that Young then made some phone calls and set something up. App. p. 202, lines 20 - p. 203 lines 3. Thereafter, Alston, Young, Hilliard Pinckney, and Maurice Thompson drove to the SC State campus in a silver Buick. App. p. 199, lines 1-4; p. 199, lines 9-13; p. 200, lines 1-23. Thompson drove, and Pinckney sat in the passenger seat. App. p. 204, lines 21 - p. 205, lines 4. Alston and Young sat in the back seat. App. p. 205, lines 5-24.

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

Gipson testified that he had arranged to meet with Bailey at the marriage housing area. App. p. 134, lines 18 - p. 135, lines 4. Gipson and the group arrived before Bailey, so they reversed and parked in a parking space and waited for Bailey to arrive. App. p. 138, lines 8-21; p. 176, lines 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. App. p. 138, lines 21 - p. 139, lines 11; p. 207, lines 25 - p. 208, lines 21. Gipson, Alston, and Young went to Bailey's car, and Gipson got in the passenger seat to facilitate the transaction. App. p. 140, lines 1-13. Alston and Young began complaining to Bailey because they were not happy with the quality of the marijuana that Bailey had to sell to them. App. p. 140, lines 4-13; p. 209, lines 13 - p. 210, lines 7. Gipson then got out of Bailey's car, as Alston and Young were communicating with Bailey, because at that point "it didn't have anything to do with [him]." App. p. 141, lines 21 - p. 142, lines 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. App. p. 142, lines 8-15. When Gipson turned back around towards Bailey's car, he saw Young and Bailey "tussling in the car. . . ." App. p. 142, lines 12-14. Gipson could not tell what Young and Bailey were fighting over. App. p. 143, lines 22-24. Gipson observed that the passenger side door of Bailey's car was open and Young was leaning in the car while this tussling was occurring, and while all this was occurring, Bailey's car was simultaneously going into reverse. App. p. 142, lines 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.' App. p. 142, lines 16-18. Gipson ran away after hearing the "pop." App. p. 142, lines 18-21. Gipson testified that he never saw anyone with a gun. App. p. 143, lines 25 - p. 144, lines 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. App. p. 144, lines 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. App. p. 142, lines 21-25.

Alston also testified at Young's trial. He testified that: he walked away from Bailey's car and Young went up to the passenger side window of Bailey's car. App. p. 210, lines 22-25 He additional testified that it looked like Young and Bailey were just talking at first, and then Bailey's car went into reverse with Young "inside the car" App. p. 210, lines 25 – p. 211, lines 2, that when the car started to go into the reverse with Young leaning into the car, that Young was "getting dragged by it, somewhat getting dragged by it" when Alston heard a "pow" sound App. p. 212, lines 5-11; and, he heard this "pow" sound, which Alston believed to be a gun shot, and then Young got back into the silver Buick the group arrived in. App. p. 211, lines 2-3; p. 212, lines 12-14. Alston asked Young "if he was alright, and then [Alston] asked if he shot the guy, but [Young] never answered." App. p. 211, lines 3-6; p. 214, lines 1-7.

In addition to the above, Young 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 Young did not take the gun to the car and therefore could not have been the one that did the shooting. App. p. p. 23, lines 18-21; his theory was that Young had nothing to do with the gun App. p. p. 35, lines 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" App. p. p. 35, lines 14-17; his theory was to show that the gun came from Bailey App.p. 101, lines 7-8 & App. p. 112, lines 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 Young with a gun. See, App. p. p. 114, lines 11-13.

Co-Counsel confirmed this theory at the PCR hearing when he testified that no witness could show that Young had a gun and that it was possibly a third party that shot the Bailey. App. p. 197-198, lines 14-25 & line 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, ..." App.p. 198, lines 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, ..."App. p. p. 199, lines 4-8.

Trial Counsel's theory of the case was based upon him asking Young 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 Young with the shooting at all. App. p. p. 33, lines 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. App. p. p. 48, lines 17-23. Based upon Young 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." App.p. p. 34, lines 7-10. Trial Counsel also testified, based solely upon Young 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 Young. App. p. p. 46, lines 17-20. Trial Counsel never asked Young if he *brought the gun* to Bailey's car. App. p. p. 216, lines

21-22. Trial Counsel stated that all he asked Young was, "*Do you think this gun will ever be found*." App. p. p. 47, lines 10-11.

Co-Counsel also testified to this issue and affirmatively stated that he did not recall asking Young whether or not he brought the gun or where it came from. App. p. 191, lines 3-4. However, he believed that Young had possession of the gun at some point and disposed of it. App.p.191, lines 4-7. Co-Counsel acknowledged the fact that Young may have had possession of the gun at some point did not establish that it was Young'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. App. p. 200, lines 23 – p. 201, lines 1. Furthermore, Co-Counsel stated that he did not remember ever knowing who brought the gun nor did he remember Young telling them who brought the gun. App. p. p. 203, lines 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, Young 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, Young 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 Young 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, Young 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 Young 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 Young 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
Allegation 9

Did the PCR Court err in failing to grant Respondent/Petitioner relief on his Allegation No. 9, in which he alleged that Trial Counsel was ineffective for neglecting to advise the Applicant thoroughly concerning the law as it relates to the lesser included offense of voluntary manslaughter? Allegation 9

While the PCR granted Respondent/Petitioner a new trial on multiple grounds, it declined to find that he was additionally entitled to relief on his Allegation number 9. Respondent/Petitioner now most respectfully asserts that the lower court erred in failing to grant him a new trial on this ground as well as those upon which relief was granted.

The witnesses for the prosecution testified to hearing men's voices at the scene, but their testimony indicated they could not hear what was said between Bailey and Applicant in the moments immediately preceding this shooting. While witnesses described the two as ***"tussling***" in the car driven by Bailey, they could not see what they were tussling over. They did not see Bailey retrieving a pistol concealed in his car beside the console. These witnesses were not able to testify to any of these facts described by Applicant in his PCR testimony which would have provided a foundation for a request to charge on both self defense and the lesser included offense of murder; Voluntary Manslaughter. However, under one reasonable view of Applicant's version of the facts, his testimony might have provided a basis for instructions on the defense of accident and/or the charge of involuntary manslaughter. It is clear from Applicant's testimony that he was not adequately advised of the requirements for the defense of self defense, or, the defense of accident. Neither does the record below indicate that Applicant was thoroughly advised of the necessary elements for the lesser-included offenses of voluntary manslaughter or involuntary manslaughter. Applicant submits that he would have testified at his trial if he had

been given better, more thorough advice concerning the requirements for the defenses of self defense and accident, as well as the lesser-included offenses of voluntary manslaughter and involuntary manslaughter. This Court finds Applicant's testimony concerning Counsel's deficiencies in this regard credible and finds nothing in Defense Counsel's PCR testimony which clearly refutes Young's claims. Accordingly, this Court finds that Applicant is entitled to relief on this allegation as well as others addressed herein. There was clearly some testimony to support an inference that Young and the deceased where arguing at the time of this incident and that the altercation move his vehicle with Young trapped in the door way in a manner that was likely to cause grave bodily injury. If the jury believed Bailey pulled a gun on Young, tussled with him for control over the weapon and then initiated a retreat from the scene with Young trapped in the vehicle doorway in such a way as to potentially kill him, leave him paralyzed, or otherwise gravely injured, that would clearly provide evidence of sudden heat of passion upon sufficient legal provocation. If the jury believed that Applicant was not entitled to a claim of self-defense or accident because he was engaged in a drug transaction, they could easily have found that he did not act with malice based upon the role Bailey played in this incident and the complex circumstances of this case.

> The Order of the PCR Court correctly states the appropriate law involving the elements of Voluntary Manslaughter. As noted in the Order of Judge Brown, "Voluntary manslaughter is defined as the intentional and unlawful killing of a human being in sudden heat of passion and upon sufficient legal provocation. State v. Niles, 412 S.C. 515, 522 772 S.E.2d 877, 880 (2015). Sudden heat of passion, upon sufficient legal provocation, must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence. Id., citing State v. Walker, 324 S.C. 257, 260, 478 S.E.2d 280, 281 (1996). In determining whether the act which caused death was impelled by heat of passion or by malice, all the surrounding circumstances and conditions are to be taken into consideration, including previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing. For a defendant to be entitled to a

> voluntary manslaughter charge, there must be evidence of both sufficient legal provocation and heat of passion at the time of the killing. State v. Smith, 391 S.C. 408, 412-413, 706 S.E.2d 12, 14-15 (2011). "

Respondent Petitioner respectfully submits however, that the PCR Court's reliance upon ***State v. Niles, 412 S.C.515, 772 S.E.2d 877 (2015)*** was misplaced. Applicant's case and the facts in Niles are actually dissimilar in several key respects. As the PCR Court noted in it's Order denying relief on this allegation,

> In Niles, the South Carolina Supreme Court held that a jury charge on voluntary manslaughter was not proper in the factual scenario when an arranged drug deal, gone awry, led to the defendant shooting and killing the drug dealer. 412 S.C. 515, 772 S.E.2d 877. In Niles, the defendant (buyer) was leaning into the passenger door window of the victim's (drug dealer) car. Id. at 519, 772 S.E.2d at 879. He was then seen fleeing the victim's vehicle and jumping into the vehicle that the defendant had arrived in, which was parked near the victim's. Id. at 518-519, 772 S.E.2d at 878-879. The witness testifying to this was in the back seat of the victim's car, and this witness testified that the defendant had robbed the victim before fleeing back to the car that the defendant arrived in. Id. at 519, 772 S.E.2d at 878. After the defendant jumped back into the car opposite of the victim's, the victim began firing shots at the defendant. Id. at 520, 772 S.E.2d at 879. The defendant fired shots in response, which killed the victim. Id. at 519-520, 772 S.E.2d at 879. The defendant testified at trial that he 'grabbed [his pistol] and that's when I shot two times…I went pow pow…I was just trying to get [the victim] to stop shooting.' Id. at 520, 772 S.E.2d at 879. The Niles Court held that the defendant, by his own testimony, lacked the intent to harm the victim, and thus a voluntary manslaughter charge was not appropriate. Id. at 523, 722 S.E.2d at 881.

True, Niles was seen leaning in the passenger window of the drug dealer's car, but he was also seen fleeing that vehicle under his own steam. Young was observed trapped inside the door of the drug dealer's case as it speed off with Young trapped in the vehicle and being drug by the movement of Bailey's car. Once Bailey's car changed directions and Young was able to extricate himself from the door was on the vehicle, witnesses testified to him being hunched over gasping and that he had to briefly recover before getting back into the vehicle with the young men he arrived with. Most importantly, as the section of the PCR Court's order reproduced

above notes, the victim in the Niles case began shooting at Niles After he had gotten back in the care he arrived in, at which point Niles testified that he then, "he 'grabbed [his pistol] and that's when I shot two times…I went pow pow…I was just trying to get [the victim] to stop shooting.' Id. at 520, 772 S.E.2d at 879. Another important factor in Niles was that an eye witness testified to see Niles rob the victim before he fled back to the car. There was no witness in Young's case who testified to even seeing him with a gun, much less to observing him rob Bailey.

CONCLUSION

Respondent/Petitioner respectfully asserts that the PCR Court erred in denying him relief on his Allegation number 9. He asks that the writ be granted in order that he might have the opportunit to more fully brief the issue summarized herein.

Respectfully submitted,

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This 28st day of May, 2021