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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable Jocelyn J. Newman, Circuit Court Judge

JAMAAL HINSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2020-001316

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the lack of a general permissive inference instruction that is required when a judge charges the jury on implied malice, and where Petitioner was prejudiced because there is a reasonable probability the outcome of his trial would have been different if this instruction had been properly charged to the jury, particularly when there was no evidence of express malice?

STATEMENT OF THE CASE

The state alleged Petitioner shot and killed Anthony Salley with malice aforethought. App. 80, ll. 18-19. Petitioner maintained he armed himself in self-defense and later accidently discharged the firearm after a struggle with Salley striking Salley once in the abdomen. App. 648, l. 1 – 659, l. 18. The trial judge charged the jury on self-defense and accident. App. 950, l. 18 – 955, l. 16. However, over Petitioner's objection, the judge refused to charge the lesser included offense of involuntary manslaughter. App. 814, l. 8 – 818, l. 13. The jury convicted Petitioner of murder. App. 961, ll. 6-15.

On January 15, 2010, Petitioner spent the night at his girlfriend Lauren Banks's house in Vineyard Crossing, a neighborhood in Blythewood. App. 644, ll. 2-8. The following morning, Petitioner borrowed Banks's car so he could deliver marijuana. App. 644, ll. 14-21. As Petitioner was leaving the neighborhood, he saw Richard Thomas and Anthony Salley outside near Banks's house. App. 645, ll. 11-14. Petitioner and Thomas did not "like each other at all" and had engaged in multiple verbal and physical altercations over the course of the previous year. App. 639, l. 24 – 640, l. 17; App. 685, ll. 8-10. Petitioner did not personally know Salley, but he knew Salley was friends with Thomas. App. 640, l. 24 – 641, l. 6. When they saw each other on the street that morning, both Thomas and Salley exchanged threats with Petitioner. App. 645, ll. 11-19. Thomas was known to carry a gun. App. 640, ll. 18-21; App. 646, ll. 14-16; App. 669, ll. 5-7.

While Petitioner was out that morning, the brakes on Banks's vehicle failed. App. 644, ll. 21-23. Petitioner stopped at a gas station to investigate what was wrong with the car. App. 644, ll. 23-24. There, he ran into Devan Bailey. Bailey asked Petitioner for some marijuana.

Petitioner did not want to make a transaction in public, so he asked Bailey to meet him at Banks's house in Vineyard Crossing. App. 644, l. 24 – 645, l. 3.

Bailey arrived in a pickup truck driven by Quinton Emerson. Derrick Diamond was also a passenger. App. 473, l. 24 – 474, l. 4; App. 645, l. 20 – 646, l. 2. At Petitioner's request, Emerson drove Petitioner to his house to get his pistol. App. 646, ll. 1-9. Because of his encounter with Richard Thomas and Anthony Salley in Banks's neighborhood earlier that morning, Petitioner was afraid Thomas may try to harm him. Petitioner wanted to be in a position to defend himself due to Thomas likely being armed. App. 646, ll. 5-16; App. 669, ll. 5-7; App. 694, ll. 10-14; App. 695, ll. 21-23.

After he got his pistol, Petitioner rode with the three men back to Banks's house, where he went inside. App. 646, ll. 17-23. After dropping Petitioner off, Emerson, Bailey, and Diamond left. However, Bailey quickly realized he had forgotten to ask Petitioner for a cigar to use to smoke the marijuana. App. 215, ll. 5-10; App. 477, ll. 15-16; App. 646, l. 25 – 647, l. 5. Bailey called Petitioner who told Bailey to return to the neighborhood and he would give him a cigar. App. 646, l. 25 – 647, l. 5. When they returned, Bailey told Emerson where to stop on the street, which ended up being a couple houses down from where Banks lived. Bailey thought Petitioner was sitting in a black car in the driveway of this house. App. 478, l. 7 – 479, l. 17; App. 647, ll. 6-13. However, the black male in the vehicle turned out to be Anthony Salley. App. 141, ll. 7-22.

After receiving another call from Bailey, Petitioner came outside and saw Emerson's pickup truck parked on the street two houses down. App. 647, ll. 6-13. Bailey was standing in the driveway of this house talking to Salley and Salley's girlfriend, Andina Lee. App. 648, ll. 1-3. Petitioner began walking from Banks's house to the driveway where Bailey was standing so

he could give Bailey the cigar. As soon as Salley saw Petitioner, Salley removed his jacket and rushed at Petitioner in a threatening manner. App. 648, ll. 4-6. Petitioner was at the bottom of a hill and Salley ran toward him from the top. App. 186, ll. 22-25. Salley was much larger than Petitioner. App. 727, ll. 14-17. Afraid, Petitioner pulled out his pistol and pointed it at Salley to scare him. However, Salley was unfazed and continued to advance closer to Petitioner demanding that Petitioner shoot him. App. 648, l. 7 – 649, l. 1.

Petitioner stood frozen. Salley knocked the gun from Petitioner's hand and then struck Petitioner twice in the face. App. 124, ll. 17-19; App. 649, ll. 2-7. The two men began fist fighting. App. 649, ll. 7-10. While they were fighting, the pistol was lying on the ground where it had fallen after being knocked out of Petitioner's hand. App. 125, ll. 4-9. Consequently, neither man was armed. App. 125, ll. 10-12. Bailey was standing beside the fight. App. 182, ll. 9-17. The fight moved toward Bailey and he threw an elbow to push the men away from him. App. 482, ll. 2-15.

Petitioner made no effort to retrieve the pistol during the fight. Salley's girlfriend, Andina Lee, went over to where the gun had fallen and picked it up. App. 125, ll. 21-24; App. 145, ll. 21-23. She pointed the gun at Bailey. App. 127, l. 18 – 128, l. 1; App. 182, ll. 6-8. Her intent in grabbing the gun was "to scare" Petitioner. App. 127, ll. 10-16. Lee pointed the gun at Bailey and yelled "get the fuck back" three times. App. 147, ll. 2-25; App. 482, l. 17 – 483, l. 9. Scared, Bailey fled down the street. App. 183, l. 14 – 184, l. 1; App. 483, l. 21 – 484, l. 8.

Salley eventually stopped fighting back and Petitioner, knowing he had won the fight, voluntarily stopped as well. App. 649, ll. 15-25. As Petitioner was getting up from the ground, he saw Lee with the pistol, but she quickly threw it back on the ground. App. 650, l. 6 – 651, l. 3. Salley also got up off the ground. Petitioner picked up the pistol and intended to return to

Banks's house. He retrieved the gun before leaving because he was afraid of being shot in the back as he retreated. App. 651, ll. 3-23.

As Petitioner turned around to leave, he saw Salley walking toward him, mere steps away. In being so positioned, Salley startled Petitioner. Petitioner was holding the pistol by the trigger and was in the process of moving the gun from his hand to his waistband. App. 710, l. 22 – 711, l. 25. When Salley startled Petitioner, Petitioner "flinched" and "accidentally pulled the trigger." App. 651, l. 24 – 652, l. 14; App. 710, l. 12 – 711, l. 25. The gun fired once striking Salley in the abdomen. App. 427, ll. 1-15. Petitioner did not continue shooting because "it was an accident that [he] shot him the first time." App. 659, ll. 10-14. Petitioner did not intentionally shoot Salley. He "didn't want to kill him." App. 659, ll. 15-20.

A Richland County Grand Jury indicted Petitioner on April 14, 2010 for the offense of murder. App. 1379-1380. His case was called to trial on November 14, 2011 before the Honorable Deandrea G. Benjamin, and a jury. App. 1. Assistant Solicitors K. Luck Campbell and Nicole Simpson represented the state. App. 1. Eleanor D. Cleary represented Petitioner. App. 1.

After the defense rested, a lengthy charge conference was held. A majority of the discussion centered on whether self-defense, accident, and involuntary manslaughter would be charged. See App. 745, l. 15 – 825, l. 12. Ultimately, the judge ruled she would instruct the jury on self-defense and accident since the state had no objection to the charges. However, the judge refused to charge the jury on the lesser included offense of involuntary manslaughter finding there was no evidence to support the charge. App. 814, l. 8 – 818, l. 13.

The parties further agreed that the instruction involving implied malice from the use of a deadly weapon was properly omitted from the jury charge pursuant to State v. Belcher, 385 S.C.

597, 685 S.E.2d 802 (2009). App. 750, ll. 3-19. At the conclusion of the charge conference, the judge provided the parties with a complete copy of her intended jury charge to review. The next morning before closing arguments, the assistant solicitor made the following request:

> Judge, the only other thing I did notice last night late, because we took out all the language about the inference of malice from the use of a gun, and then so your inference, you talk about express malice in a whole paragraph and then you don't really - - in your charge you don't really talk about inferred malice. If you can just say malice can be inferred from the facts and circumstances surrounding the case. I think that would cover it.

App. 811, ll. 12-21.

The judge later specified:

> THE COURT: And what is the additional language?
>
> MS. CAMPBELL: Just malice may be inferred from the facts and circumstances surrounding the case.
>
> THE COURT: Ms. Cleary [trial counsel], any response regarding adding that, malice may be inferred from the facts and circumstances surrounding the case?
>
> MS. CLEARY: No, I don't have any objection to that.

App. 812, ll. 5-14.

The judge later instructed the jury:

> The defendant is charged with murder. The state must prove beyond a reasonable doubt that the defendant killed another person with malice aforethought.
>
> Malice is a legal term implying wickedness and excluding a just cause or excuse. The term malice indicated a formed purpose and design to do a wrongful act under the circumstances that exclude any legal right to do it. It is something which springs from wickedness, from depravity, from a heart devoid of social duty and fatally bent on mischief. Malice may be expressed or implied.
>
> Malice is hatred, ill-will, or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or under circumstances that the law would infer an evil intent.

> Malice aforethought does not require that malice exist for any particular time before the act is committed, but malice must exist in the mind of the defendant just before and at the time of the act at the time the act is committed. Malice may be conceived at the very moment the fatal blow is given. Therefore, there must be a combination of the previous evil intent and the act.
>
> Malice aforethought may be express or inferred. There terms, "express" and "inferred," do not mean different kinds of malice, but merely the manner in which malice may be shown to exist. That is either by direct evidence or by inference from the facts and circumstances which are proved. Express malice is shown when a person speaks words which express hatred or ill-will for another or when the person prepared beforehand to do the act which is later accomplished. For example, lying in wait for a person or any other act of preparation going to show that the deed was within the defendant's mind would be express malice.
>
> **Malice may be inferred from conduct showing a total disregard for human life. Malice be may inferred from the facts and circumstances surrounding the case.**
>
> Malice does not necessarily impart ill-will towards the individual injured, but signifies rather a general malignant recklessness of the lives and safety of others, or a condition of mind which shows a heart regardless of social duty and fatally bent on mischief.

App. 947, l. 12 – 949, l. 15 (emphasis added).

Trial counsel did not object to the charge nor request any additional language. On November 14, 2010, the jury found Petitioner guilty of murder as indicted. App. 961, ll. 6-15. He was sentenced to forty years imprisonment. App. 975, ll. 21-23.

A timely notice of intent to appeal was filed. The appeal was perfected by Reid T. Sherard. The Court of Appeals affirmed Petitioner's conviction and sentence in an unpublished opinion. State v. Jamaal Hinson, Op. No. 2014-UP-113 (S.C. Ct. App. filed March 29, 2014); App. 1071-1077. This Court ultimately denied Petitioner's petition for writ of certiorari by order dated November 20, 2014. App. 1233.

On June 29, 2015, Petitioner filed an application for post-conviction relief (PCR). App. 1235-1241. The state filed a return to this application dated January 11, 2016. App. 1242-1248.

With the assistance of counsel, Petitioner filed an amended application on July 26, 2017, and a second amended application on January 8, 2018, raising the claim argued in this petition. App. 1249-1253. An evidentiary hearing was held on January 24, 2018 before the Honorable Jocelyn Newman. App. 1254. Assistant Attorney General Jessica Kinard represented the state. App. 1254. Tricia Blanchette represented Petitioner. App. 1254.

In his second amended application, Petitioner alleged trial counsel was deficient for failing to object to the implied malice instruction given by the trial judge which lacked a general permissive inference instruction. App. 1252. In support of this allegation, Petitioner cited to State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009); State v. Mattison, 276 S.C. 235, 238, 277 S.E.2d 598, 600 (1981) ("[W]e strongly suggest to the Trial Bench that a more appropriate instruction on implied malice would deal with the evidentiary nature of the presumption and that the implication does not require the jury to infer malice but only permits it."); and Gibson v. State, 416 S.C. 260, 786 S.E.2d 121 (2016) (A trial attorney's failure to object to the lack of a general permissive inference instruction when it is warranted constitutes deficient conduct). App. 1252.

During the evidentiary hearing, Eleanor Cleary, Petitioner's trial counsel, testified that she did not anticipate the state asking for an inferred malice instruction the morning following the charge conference. App. 1296, l. 5 – 1297, l. 3. Cleary admitted there was no reason why she did not ask for a more complete implied malice instruction, specifically the permissive inference language, or object to the lack of such an instruction once the trial judge agreed to charge the jury on implied malice. App. 1297, ll. 8-12; App. 1298, ll. 7-10. She testified that she was aware of the case law requiring a permissive inference instruction when implied malice is charged. However, at the time, she was "overwhelmed" and "just worn down mentally and

missed it." App. 1298, ll. 7-14. Cleary also asserted, "[T]here's really nothing I can say to excuse not asking for the proper charge." App. 1313, ll. 5-20.

Cleary testified that she thought the lack of a permissive inference charge regarding implied malice was prejudicial to Petitioner because his defense was that he acted without malice and accidentally discharged his weapon upon being startled by the decedent. Cleary asserted that there was no evidence of express malice so the instruction on implied malice was "crucial . . . to the jury's decision." App. 1298, l. 21 – 1299, l. 18. She believed the implied malice instruction "encouraged" the jury to find Petitioner acted with malice and convict him of murder. App. 1299, ll. 14-18.

By order filed June 1, 2020, the PCR judge denied Petitioner relief. App. 1361-1376. The judge found that while Petitioner relied on correct law, including State v. Mattison, 276 S.C. 235, 277 S.E.2d 598 (1981), State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), and Gibson v. State, 416 S.C. 260, 786 S.E.2d 121 (2016), "his application to the facts of this case is misguided." App. 1374. The judge determined the permissive inference language was included in the charge given to the jury. App. 1374. She maintained, "The trial court charged that malice may be expressed or inferred, that malice may be inferred from the facts and circumstances, that malice may be inferred from conduct showing a total disregard for human life—most of the language suggest by Elmore and no more than a slight deviation therefrom." App. 1374. Consequently, the PCR judge concluded trial counsel was not deficient for failing to object. App. 1374-1375.

Moreover, the judge found Petitioner failed to prove prejudice "as a result of this slight deviation from Elmore." App. 1375. She determined that "unlike the facts in Gibson, there was substantial other evidence of [Petitioner's] malice presented at trial." App. 1375. The judge cited

to evidence that Petitioner disliked the decedent, had previously called the decedent names, immediately before the fistfight allegedly said, "this is exactly what I want," and allegedly instructed Bailey to shoot the decedent during the fight. App. 1375. Consequently, the judge concluded "there was overwhelming evidence of malice such that, even if trial counsel erred in failing to object, there is no evidence that her error 'contributed to the verdict based on all the evidence presented to the jury.'" App. 1375 (quoting Gibson, 416 S.C. at 265, 786 S.E.2d at 124).

On June 26, 2020, Petitioner filed a Motion to Reconsider Pursuant to Rule 59(e), SCRCP, which was denied by order filed September 2, 2020. Supp. App. 1.

Because Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the lack of a general permissive inference instruction, and since Petitioner was prejudiced because there was no evidence of express malice, this petition for writ of certiorari follows.

ARGUMENT

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the lack of a general permissive inference instruction that is required when a judge charges the jury on implied malice, and when Petitioner was prejudiced because there is a reasonable probability the outcome of his trial would have been different if this instruction had been properly charged to the jury, particularly since there was no evidence of express malice.

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the lack of a general permissive inference instruction that is required pursuant to State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983) when a judge charges the jury on implied malice. A trial attorney's failure to object to the omission of a general permissive inference instruction when it is warranted constitutes deficient conduct. See Gibson v. State, 416 S.C. 260, 786 S.E.2d 121 (2016). The general permissive inference instruction should have been given during Petitioner's trial when the judge charged the jury that "malice may be inferred from conduct that shows a total disregard for human life." See App. 949, ll. 1-2.

Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability the outcome of his trial would have been different if this instruction had been properly charged to the jury, particularly since there was no evidence of express malice. A complete review of the record demonstrates that the erroneous implied malice instruction contributed to the jury's verdict in light of all the evidence presented.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that

the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

In State v. Mattison, 276 S.C. 235, 237, 277 S.E.2d 598, 599 (1981), Mattison argued that the charge on implied malice given by the trial judge created an irrebuttable presumption and thereby unconstitutionally shifted the burden of proof. The trial judge instructed the jury in part:

> [T]he law says that if one intentionally kills another with a deadly weapon, the implication of malice arises. In other words, the law implies malice from the use of a deadly weapon. Now, if facts are proved, sufficient to raise a presumption of malice to your satisfaction, such a presumption would be rebuttable and it is always for the jury to determine from all the evidence in the case whether or not malice has been proved beyond a reasonable doubt.

Id. at 236, 277 S.E.2d at 599-600.

This Court held that when the above charge is considered as a whole, the instructions on the law of implied malice made it clear that any presumption or inference of malice was rebuttable and whether malice had been proved was an issue of fact for the jury to determine under all of the evidence. Id. at 238, 277 S.E.2d at 600. Despite finding no reversible error, the Court "strongly suggest[ed] to the Trial Bench that a more appropriate instruction on implied malice would deal

with the evidentiary nature of the presumption and that the implication does not require the jury to infer malice but only permits it." Id. Stated differently, the Court asserted, "[T]he presumption or inference of malice from the use of a deadly weapon is simply an evidentiary fact to be taken into consideration by the jury, along with other evidence in the case, and to be given such weight as the jury determines it should receive." Id.

Two years later in State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), the Supreme Court suggested the following charge on the presumption of malice from the use of a deadly weapon:

> The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. **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.**

Id. at 421, 308 S.E.2d at 784 (emphasis added). The Court emphasized that "only slight deviations from this charge will be tolerated." Id.

Decades later, in Gibson v. State, 416 S.C. 260, 786 S.E.2d 121 (2016), this Court held Gibson's trial counsel was ineffective for failing to object to the complete omission of the permissive inference language required by Elmore when implied malice is charged. The evidence presented at trial showed that a fight occurred between two groups at a bar. Id. at 262, 786 S.E.2d at 122. Following the confrontation, Gibson's brother, Adams, called Gibson to request a ride home. Id. Shortly after Gibson arrived to pick up Adams, the dispute that began inside the bar spilled out into the parking lot. Id. During the commotion, several gunshots were heard, and the decedent was killed by a single nine millimeter shot to the back of his shoulder. Id. There was evidence, including a statement from Gibson, that Gibson retrieved his gun from his car, pointed his gun at another person he suspected was going to hit Adams, and subsequently fired his gun into the air three to four times as he drove away. Id. When asked whether he

believed he may have shot the decedent, Gibson admitted he thought he had, but stated "I didn't just look at him and shoot him . . . the gun could have dropped down because I was driving. I promise I don't remember seeing him and aiming." Id.

A witness testified Adams walked over to Gibson's car and pulled out a small caliber handgun from under the driver's seat. Id. The witness maintained that Adams was the only person she saw with a gun. Id. She identified Adams as wearing jeans and a black shirt. Id. However, other witnesses and evidence showed Gibson was wearing a black shirt and Adams wore a white shirt. Id. The evidence did not provide a clear picture of who fired a weapon or how many shorts were fired. Id.

The trial judge charged the jury in part:

> Now, malice aforethought can either be express or inferred. Express means that malice is shown when a person speaks words with express hatred or ill will for another or the person prepared beforehand to do the act which was later accomplished. Malice can be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon . . .

Id. at 263, 786 S.E.2d at 123.

Gibson's counsel objected to the charge as a comment on the facts but did not object to the trial judge's failure to use the permissive inference language approved in State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983). Id.

This Court held the charge given by the trial judge clearly deviated from the suggested Elmore charge as it did not contain the permissive inference language. Id. at 264, 786 S.E.2d at 123. The Court emphasized that Elmore made clear "only slight deviations" from the suggested charge would be "tolerated." Id. at 264, 786 S.E.2d at 123-124. It concluded that the "complete omission of the permissive inference language is not a 'slight deviation' that would be permissive under Elmore." Id. at 264-265, 786 S.E.2d at 124. Because the charge was

erroneous, the Court held the PCR judge erred by finding Gibson's trial counsel was not deficient for failing to object to the malice charge. Id. at 265, 786 S.E.2d at 124.

The Supreme Court further held the PCR judge erred in finding there was evidence of malice other than the use of a deadly weapon. Id. The Court concluded that "the only evidence of [Gibson] shooting the gun indicated he shot his weapon in the air after other shots were fired." Id. at 266, 786 S.E.2d at 124. While Gibson admitted in one of his statements that it was possible his gun "may have dropped down" toward the decedent while he was driving away and shooting in the air, the Court asserted this was not overwhelming evidence of malice. Id. "Because there was little evidence of malice aside from the use of a gun," the Court held the PCR judge erred in finding Gibson was not prejudiced by his counsel's failure to object to the charge on the inference of malice from the use of a deadly weapon. Id.

In this case, trial counsel was deficient for failing to object to the implied malice instruction since it wholly omitted the permissive inference language required by this Court in Elmore. Unlike the PCR judge found, the charge to the jury did not include "most of the language suggested by Elmore and no more than a slight deviation therefrom." See App. 1374. As this Court held in Gibson, "The complete omission of the permissive inference language is not a 'slight deviation' that would be permissible under Elmore." Gibson, 416 S.C. at 264-265, 786 S.E.2d at 124; See Elmore, 279 S.C. at 421, 308 S.E.2d at 784. Because the charge was erroneous, the PCR judge erred in finding Petitioner's trial counsel was not deficient for failing to object to the malice charge.

Moreover, Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability the outcome of his trial would have been different if the proper instruction had been charged to the jury. "In determining whether petitioner was prejudiced by

trial counsel's deficient performance, this Court must decide whether the erroneous malice instruction contributed to the verdict based on all the evidence presented to the jury." Gibson, 416 S.C. at 265, 786 S.E.2d at 124 (citing Rose v. Clark, 478 U.S. 570 (1986) and Plyler v. State, 309 S.C. 498, 424 S.E.2d 477 (1992)). "The Court must weigh the significance of the presumption to the jury against the other evidence of malice considered by the jury without the erroneous malice charge." Id. (citing Lowry v. State, 376 S.C. 499, 657 S.E.2d 760 (2008)).

If found credible by the jury, Petitioner's trial testimony was void of any evidence of express malice. Furthermore, the testimony of the state's witnesses who were with Petitioner, including Derrick Diamond and Devan Bailey, failed to establish express malice on the part of Petitioner.

As previously mentioned, Petitioner requested and the trial judge instructed the jury (without objection from the state) on the defenses of accident and self-defense. As this Court emphasized in State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2010), *overruled by* State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019) (extending the holding in Belcher to prohibit trial courts from ever instructing juries that malice may be inferred from the use of a deadly weapon regardless of the evidence presented at trial), which concerned the instruction that malice may be inferred from the use of a deadly weapon, additional context for an inference charge is required because an inferred malice instruction can lead a jury to disregard defenses raised by a criminal defendant:

> Say, for example, a homicide occurs by the use of a deadly weapon under circumstances warranting a self-defense instruction. The killing would be intentional, yet under our currently sanctioned charge, the jury would be permitted to find malice merely because if one intentionally kills another with a deadly weapon, the implication of malice may arise . . . That highlights the "half-truth" of the charge.

Belcher, 386 S.C. at 610, 685 S.E.2d at 809 (internal quotation marks omitted).

Similarly, the jury was instructed in this case that they could infer malice from conduct showing a total disregard for human life. That charge is just as much a "half-truth" as the deadly weapon charge because killing another in self-defense is unmistakably an activity that shows a total disregard for human life. The jury needs context in which to evaluate an inferred malice charge and the general permissive inference instruction provides that context. Since the jury did not receive that context due to trial counsel's deficient performance, it is highly likely that the jury followed the trial judge's instructions and inferred malice, which amounts to a showing of prejudice.

Moreover, this Court recently held that an implied malice charge should never be given if there has been evidence presented that the defendant acted in self-defense because it is confusing and prejudicial. See State v. Smith, 430 S.C. 226, 233-234, 845 S.E.2d 495, 498-499 (2020). The implied malice charge given in this case, which lacked a general permissive inference instruction, was just that: confusing and prejudicial to Petitioner, particularly given that he argued he armed himself in self-defense and accidently shot the decedent after a struggle.

Respectfully, this Court should hold the PCR judge erred by finding trial counsel was not deficient and that Petitioner was not prejudiced by any deficiency, reverse Petitioner's conviction and sentence, and remand for a new trial.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order further briefing on the issue presented. He ultimately requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of June, 2021.