

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
—————

SUPPLEMENTAL APPENDIX
—————

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

MICHAEL D. DAVIDSON
Assistant Attorney General
1000 Assembly Street
Columbia, SC 29201
(803) 734-1680

ATTORNEYS FOR RESPONDENT

RECEIVED

Jun 02 2021

S.C. SUPREME COURT

INDEX

INDEX i

MOTION TO RECONSIDER
PURSUANT TO RULE 59(A) AND (E), SCRCrimP 1

PROPOSED ORDER GRANTING APPLICATION FOR
POST CONVICTION RELIEF (ATTACHMENT) 6

ORDER DENYING MOTION TO RECONSIDER
PURSUANT TO RULE 59(A) AND (E), SCRCrimP 26

STATE OF SOUTH CAROLINA)
 COUNTY OF RICHLAND)

 Jamaal Hinson, 325190,)
 Applicant,)
 v.)
 State of South Carolina,)
 Respondent,)
 _____)

IN THE COURT OF COMMON PLEAS
 DOCKET NO.: 2015-CP-40-03946

MOTION PURSUANT TO RULE
 59(a) & (e), SCRCP

2017 JUN 26 PM 12:09
 FILED
 CLERK OF COURT
 RICHLAND COUNTY

Pursuant to Rule 59(a) and (e) of the South Carolina Rules of Civil Procedure, Applicant would move before this Court for relief as follows.

This matter comes before the Court pursuant to an Application for Post Conviction Relief filed on June 29, 2015. The State filed a Return on January 15, 2016. Applicant, through counsel, filed an Amendment on July 26, 2017, which made the following specific allegations of ineffective assistance of counsel:

1. Ineffective assistance of trial counsel for failing to properly represent Applicant in the handling of the State’s witnesses. Specifically, but not limited to the following:
 - a. Devan Bailey: Failing to conduct cross-examination.
 - b. Derrick Diamond: Failing to object to leading and reading of statement on re-direct examination. Transcript p. 202.
 - c. Matthew Ellis: Failing to object to opinion testimony regarding murder being the appropriate charge and eliciting testimony regarding the intentional nature of the shooting. Transcript pp. 524-5, 538. Ineffective assistance for opening the door to prejudicial testimony regarding Applicant. Transcript p. 540.

2. Ineffective assistance of trial counsel for failing to be attentive and object to line of questioning that resulted in Applicant being questioned about a prior bad act (shooting). Transcript pp. 671-684.

3. Ineffective assistance of trial counsel for failing to properly present the defense of self-defense, which was demonstrated by the following:
 - a. Failing to properly address prior difficulties.

- b. Failing to properly address Applicant's knowledge that victim had a gun and for being "thrown for a loop" by the Court's ruling(s) on character. Trial Transcript pp. 165-168, 370-391, 580-81, 641.
 - c. Giving the State a complete preview of the defense and arguments, thus allowing the State to argue successfully against it throughout trial and allowing the Court to conclude that the defense conceded self-defense. Trial Transcript pp. 153-155, 579-581, 816, lns. 13-14.
4. Ineffective assistance of trial and appellate counsel for failing to argue applicable and favorable cases regarding involuntary manslaughter. Ineffective assistance of trial counsel for "anticipating" and not obtaining a charge on involuntary manslaughter. Transcript pp. 778-790, 792-4, 813-824.

Applicant, through counsel, filed an additional Amendment on January 9, 2018, which added the following specific allegation of ineffective assistance of trial counsel:

1. Ineffective assistance of trial counsel for failing to object and/or enter an exception to the inferred malice instruction. Trial Transcript p. 811-2, 949. See State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009); See 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"), overruled on other grounds by Belcher; 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).

On January 24, 2018, an evidentiary hearing was conducted at the Richland County Courthouse in front of the Honorable Jocelyn Newman. Applicant was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by Jessica E. Kinard, Assistant Attorney General. Prior to the offering of testimony at the evidentiary hearing, Applicant, through counsel, submitted a Memorandum, which counsel explained was provided to address an allegation from the January 2018 Amendment in relation to the trial record and applicable cases. The Memorandum was filed with the Clerk of Court.

During the course of the evidentiary hearing, Applicant took the stand, along with Eleanor Duffy Cleary, Esquire. At the conclusion of the hearing, the Court requested proposed Orders from both parties, which were submitted, and Applicant, through counsel, provided the Court with a copy of the evidentiary hearing transcript. Thereafter, the Court issued an Order of Dismissal on May 28, 2020, which was filed on the same date.¹ On June 9, 2020, Applicant's counsel received a copy of the signed and filed Order in the mail from the Richland County Clerk of Court, from which this Motion timely follows.

ARGUMENT

In Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007), the South Carolina Supreme Court made it clear that a post-conviction relief judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented. See also S.C. Code Ann. § 17-27-80. Therefore, Applicant would respectfully request that the Court ensure that specific findings of fact and conclusions of law are entered on each issue raised and that the record before the Court and testimony of each witness is properly addressed in the standing Order of Dismissal ("Order").

Specifically, Applicant would ask the Court to address and/or reconsider the following:

- a. Applicant would ask the Court to reconsider the attached and previously submitted proposed Order Granting Application for Post Conviction Relief as argument for reconsideration of the standing Order of Dismissal and/or grounds for granting relief. Applicant does not hereby

¹ It appears the Order of Dismissal contains the incorrect Civil Action No. 2015-CP-40-03926, which should be 2015-CP-40-03946.

concede any issues denied in the proposed Order since the proposed Order was drafted in line with the issues of interest to the Court.

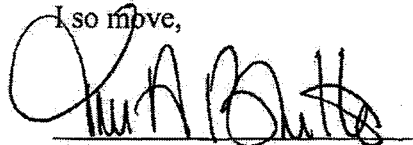
- b. Applicant would ask the Court to re-examine the record provided to the Court, to include but not limited to the trial transcript, evidentiary hearing transcript and Applicant's Memorandum, to ensure that all issues are properly considered for relief and addressed for appellate review. Specifically, Applicant would ask the Court to review the admissions made by trial counsel regarding her conclusion that an attorney should not attempt to handle a murder trial without assistance and her understanding of Applicant's case. See proposed Order pp. 8-9, PCR Transcript pp. 12-13, 15, 56-58.
- c. Applicant would ask the Court to reconsider the Memorandum and proposed Order, in conjunction with the record, as such relate to the Court's finding that the inferred malice instruction was not in error, counsel was not ineffective for failing to object to it, and there was evidence of express malice rendering prejudice non-existent. Order pp. 15-16. Specifically, Applicant submits the Order fails to address counsel's admission that the inferred malice instruction was not a proper charge and explanation of why she should have objected to it. PCR Transcript pp. 42-46, 49-51. Additionally, Applicant would ask the Court to consider State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (Ct. App. 2019), which was decided after the submission of the proposed

Order and addresses the continuing validity of the inferred malice instruction in South Carolina.²

CONCLUSION

In conclusion, Applicant would request that the Court review the full record, including the evidentiary hearing transcript, reconsider the standing Order of Dismissal, reconsider Applicant's proposed Order Granting Post Conviction Relief, and/or rehear Applicant's case pursuant to Rule 59(a) and (e), SCRPC.

I so move,



Tricia A. Blanchette
Attorney for Applicant
PO Box 2147
Leesville, SC 29070

June 17, 2020

² Applicant acknowledges that Burdette addresses the "deadly weapon" inferred malice instruction, but Applicant submits that the reasoning and ruling of the South Carolina Court of Appeals is instructive and worthy of consideration in the instant case.

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)	FIFTH JUDICIAL CIRCUIT
)	
Jamaal Hinson, 325190,)	2015-CP-40-03946
Applicant,)	
v.)	
)	ORDER GRANTING APPLICATION FOR
State of South Carolina,)	POST CONVICTION RELIEF
<u>Respondent.</u>)	

This matter comes before the Court pursuant to an Application for Post Conviction Relief filed on June 29, 2015. Applicant, through counsel filed an Amendment on July 26, 2017, which made the following specific allegations of ineffective assistance of counsel:

1. Ineffective assistance of trial counsel for failing to properly represent Applicant in the handling of the State's witnesses. Specifically, but not limited to the following:
 - a. Devan Bailey: Failing to conduct cross-examination.
 - b. Derrick Diamond: Failing to object to leading and reading of statement on re-direct examination. Transcript p. 202.
 - c. Matthew Ellis: Failing to object to opinion testimony regarding murder being the appropriate charge and eliciting testimony regarding the intentional nature of the shooting. Transcript pp. 524-5, 538. Ineffective assistance for opening the door to prejudicial testimony regarding Applicant. Transcript p. 540.
2. Ineffective assistance of trial counsel for failing to be attentive and object to line of questioning that resulted in Applicant being questioned about a prior bad act (shooting). Transcript pp. 671-684.
3. Ineffective assistance of trial counsel for failing to properly present the defense of self-defense, which was demonstrated by the following:
 - a. Failing to properly address prior difficulties.
 - b. Failing to properly address Applicant's knowledge that victim had a gun and for being "thrown for a loop" by the Court's ruling(s) on character. Trial Transcript pp. 165-168, 370-391, 580-81, 641.
 - c. Giving the State a complete preview of the defense and arguments, thus allowing the State to argue successfully against it throughout trial and allowing the Court to conclude that the defense conceded self-defense. Trial Transcript pp. 153-155, 579-581, 816, Ins. 13-14.

4. Ineffective assistance of trial and appellate counsel for failing to argue applicable and favorable cases regarding involuntary manslaughter. Ineffective assistance of trial counsel for “anticipating” and not obtaining a charge on involuntary manslaughter. Transcript pp. 778-790, 792-4, 813-824.

On January 9, 2018, Applicant, through counsel, filed an additional Amendment, which added the following specific allegation of ineffective assistance of trial counsel:

1. Ineffective assistance of trial counsel for failing to object and/or enter an exception to the inferred malice instruction. Trial Transcript p. 811-2, 949. See State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009); See 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”), overruled on other grounds by Belcher; 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).

On January 24, 2018, an evidentiary hearing was conducted at the Richland County Courthouse in front of the Honorable Jocelyn Newman. Applicant was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by Jessica E. Kinard, Assistant Attorney General. Prior to the offering of testimony at the evidentiary hearing, Applicant, through counsel, submitted a Memorandum, which counsel explained was provided to address an allegation from the Amendment in relation to the trial record and applicable cases. The Memorandum was filed with the Clerk of Court.

During the course of the evidentiary hearing, Applicant took the stand, along with Eleanor Duffy Cleary, Esquire. At the conclusion of the hearing, this Court requested proposed Orders from both parties, from which this Order follows.

GENERAL SESSIONS PROCEDURAL HISTORY

Applicant was indicted for murder by the Richland County Grand Jury on April 14, 2010. On November 14, 2011, Applicant proceeded to trial at the Richland County Courthouse in front of the Honorable Deandra G. Benjamin. Applicant was represented by Eleanor Duffy Cleary, Esquire. The State was represented by K. Luck Campbell, Senior Assistant Solicitor, and Nicole Simpson, Assistant Solicitor. The State called twenty-one witnesses. Applicant was the only witness for the defense.

On November 18, 2011, Applicant was found guilty as indicted. Judge Benjamin sentenced Applicant to a term of forty years.

A timely Notice of Appeal was filed, and the appeal was perfected by Robert M. Dudek, Chief Appellate Defender for the Division of Appellate Defense, and Reid T. Sherard, Esquire. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence on March 19, 2014. State v. Jamaal Hinson, Op. No. 2014-UP-113 (S.C. Ct. App. filed March 19, 2014). A Petition for Writ of Certiorari was sought in the South Carolina Supreme Court, which was denied by written Order on November 20, 2014.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). Where an application for post conviction relief 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 the trial cannot be relied upon as having produced a just result." Id. 466 U.S. at 686; see Butler v. State, 286 S.C. 441 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence

required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 691. The applicant must overcome this presumption in order to receive relief. Bell v. State, 321 S.C. 238 (1996); see also Cherry v. State, 300 S.C. 238 (1989); Rule 71.1(e), SCRPC.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117 (citing Strickland, 466 U.S. at 688). 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.

In analyzing a claim of ineffective assistance of appellate counsel, the South Carolina Supreme Court has held that the lower court must apply the two prong Strickland test just as it would be to a claim of ineffective assistance of trial counsel. See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). In Bennett v. State, 383 S.C. 303,309, 680 S.E.2d 273, 277 (2009), the South Carolina Supreme Court explained that the lower court should “ask 1) whether appellate counsel’s performance was deficient, and 2) whether Petitioner was prejudiced by appellate counsel’s deficient performance.”

SUMMARY OF THE TRIAL

While opening at trial, the State argued that Applicant acted as a “cold blooded murderer” when he started a fight with victim, pointed a gun at him that was knocked away by the victim while defending himself, retrieved the gun and shot the victim. Trial Transcript pp. 81-2. In her opening argument, defense counsel explained that Applicant was acting in self-defense and

accidentally fired the gun killing the victim. Trial Transcript p. 96. When the State called the victim's girlfriend, she provided a version of the facts in line with the State's opening argument. Trial Transcript pp. 121-133.

In his own defense, Applicant took the stand and explained his knowledge of Richard Thomas ("Richard") dating back to 2004 and his prior difficulties with Richard over the last year. Trial Transcript pp. 639-644. He indicated that he did not know the victim in the same capacity, but he knew the victim was a best friend of Richard. Trial Transcript p. 641.

Applicant further testified that on the night prior to January 16, 2010, he had stayed at his girlfriend's house. Trial Transcript p. 644. He was unaware that Richard and victim stayed in a house in close vicinity until that morning, when they had "words." Trial Transcript p. 644, 646. After borrowing his girlfriend's truck, he had trouble with it, pulled into a gas station and ran into Devan Bailey. Trial Transcript p. 644. Devan wanted some "weed," and Applicant told him to meet him back at his girlfriend's house. Trial Transcript pp. 644-5. He walked up the street and met up with Devan, who was in Quinton's truck. Trial Transcript pp. 645-6.

While out with them, he went by the gas station to get some cigars, and he went to his house where he got his pistol, for self-defense, due to his concerns over his last physical altercation with Richard. Trial Transcript p. 646. He returned to his girlfriend's house, and Devan called wanting a cigar. Trial Transcript pp. 646-7. He told Devan to call when he arrived since he had them pick him up earlier on the road. Trial Transcript pp. 647-8. When Devan called, he discovered that they were parked in the wrong driveway, and Devan was speaking to the victim. Trial Transcript pp. 647-8.

Applicant walked over, and the victim took his jacket off and ran towards him "talking about do I have a problem." Trial Transcript p. 648, lns. 4-6. Applicant explained that victim was

“bigger” than him, so he recalled: “I pulled the pistol to scare him, but he wasn’t scared. He walked up on the pistol closer and he told me to shoot him.” Trial Transcript p. 648, lns. 7-11. He explained that he did not shoot the victim because he did not even “dislike” him. Trial Transcript p. 648, lns. 15-20. Then, victim approached him, called his “bluff,” punched him in the face, and the pistol dropped to the ground. Trial Transcript p. 649.

A fist fight ensued, Applicant got the better of the victim, and noticed victim’s girlfriend had his gun. Trial Transcript pp. 649-50. After she dropped it to the ground, Applicant retrieved the pistol since he was in fear of his life and not wanting to get shot in his back with his own gun while leaving the scene. Trial Transcript pp. 651-2. He then detailed the fatal events as follows:

When I picked up the pistol and I turned around and Anthony was walking towards me, and I left him on the ground, I thought he was still on the ground, so when I turned around and seen him walking towards me, it kind of scared me and I flinched. And I accidentally pulled the trigger. And then he was hit. I got scared and I ran.

Trial Transcript p. 651, ln. 25 – 652, ln. 7.

After the defense rested, a lengthy charge conference was placed on the record. Trial Transcript pp. 746-826. A majority of the discussion and rulings were centered on whether self-defense, accident and involuntary manslaughter would be charged. Ultimately, the court found that she would give self-defense and accident charges since the State agreed to the charges. Trial Transcript pp. 814-15. The court denied Applicant’s request to charge involuntary manslaughter, which defense counsel conceded eviscerated Applicant’s defense. Trial Transcript pp. 793-94, 815, 18, 950-55.

During the charge conference, both parties agreed that the instruction involving inferred malice derived from the use of a deadly weapon was properly omitted from the jury instruction pursuant to State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). Trial Transcript p. 750. At the

conclusion of the first day of the charge conference, the court provided both parties a complete copy of her intended jury charge to review. Trial Transcript pp. 770, 790. At the beginning of the second day of the charge conference, the State 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.

Trial Transcript p. 811, lns. 13-21. After hearing the State's request, the following took place:

COURT: And what is the additional language?

STATE: Just malice may be inferred from the facts and circumstances surrounding the case.

COURT: Ms. Cleary, any response regarding adding that, malice may be inferred from the facts and circumstances surrounding the case?

DEFENSE: No, I don't have any objection to that.

Trial Transcript p. 812, lns. 5-14.

Thereafter, the trial court gave the following instruction on murder:

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 indicates 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 express 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. These terms, "express" and "inferred," do not mean different kinds of malice, but merely the manner in which malice may be shown to exist. That is either by direct evidence or by inference from the facts and circumstances which are proved. Express malice is shown when a person speaks words which express hatred or ill-will for another or when the person prepared beforehand to do the act which was later accomplished. For example, lying in wait for a person or any other act of preparation going to show that the deed was within the Defendant's mind would be express malice.

Malice may be inferred from conduct showing a total disregard for human life. Malice may be 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.

Trial Transcript p. 947, ln. 12 – p. 949, ln. 10 (emphasis added). No exception was entered by defense counsel to the inferred malice instruction.

The jury was sent out to deliberate and returned after three hours with a guilty verdict. Trial Transcript pp. 959-960. The Honorable Deandra G. Benjamin sentenced Applicant to a term of forty years. Trial Transcript p. 976.

FINDINGS

As a threshold matter, this Court finds Eleanor Duffy Cleary offered highly credible testimony. This Court also finds that the testimony offered by Applicant was credible.

Regarding the testimony of Eleanor Duffy Cleary, this Court must note that she was very candid regarding her representation at the evidentiary hearing. She readily admitted that Applicant's trial was the first General Sessions trial she had handled after going into private practice and that she was completely overwhelmed and overmatched by the Solicitor's Office. She stated that she learned that "no one should ever try a murder case by themselves." PCR

Transcript p. 15, lns. 22-24. She explained her understanding of the case was that it was not a “classic murder case” and thought it would result in plea. She acknowledged her mistake in believing it would be a plea case since the Solicitor’s Office would not engage with her in plea negotiations.¹ PCR Transcript pp. 12-13. Trial counsel also explained that she felt her integrity was impugned throughout the trial. PCR p. 15, lns. 1-3. She recalled that she had an oral argument in the Court of Appeals scheduled in the middle of trial, and the Court of Appeals denied her request for a continuance. PCR p. 15. As a result, the trial had to be suspended on the day of her oral argument, and the State made it appear she had wasted everyone’s time and complained whenever she asked for time to “regroup.” PCR p. 15, lns. 11-21.

1. Ineffective assistance of trial counsel for failing to properly represent Applicant in the handling of the State’s witnesses.

By way of his Amendment and at the evidentiary hearing, Applicant specifically alleged that trial counsel rendered ineffective assistance of counsel by: 1) failing to conduct cross examination of Devan Bailey; 2) failing to object to leading during the testimony of Derrick Diamond; 3) failing to object to opinion testimony offered by Matthew Ellis regarding murder being the appropriate charge and eliciting testimony regarding the intentional nature of the shooting; and 4) opening the door to prejudicial testimony regarding Applicant from Matthew Ellis.

First, this Court finds that Applicant has failed to establish that trial counsel’s performance was deficient when she chose to not cross examine Devan Bailey. At the evidentiary hearing, Applicant detailed the information he thought counsel should have questioned Mr. Bailey about at trial. PCR Transcript pp. 68, 89. While on the stand, trial counsel

¹ Specifically, counsel stated: “I met Luck Campbell and realized that there wasn’t going to be a lot of concern with seeking justice. Okay. There was gonna be – she was gonna win.” PCR Transcript p. 13, lns. 23-25. In response to trial counsel’s testimony, the State did not call the attorneys that prosecuted the case.

explained that she made a strategic decision to not cross-examine Mr. Bailey since his direct testimony had been favorable and she did not want to provide the Solicitor “another shot at him.” PCR Transcript p. 23, lns. 14-24. This Court finds counsel’s testimony establishes that she made a reasonable strategic decision to not cross-examine Mr. Bailey. As a result, this Court finds that Applicant has failed to establish ineffective assistance of counsel.

Next, this Court finds that Applicant has failed to establish that trial counsel’s performance was ineffective when she failed to object to leading during the testimony of Derrick Diamond. When asked, trial counsel said she had reviewed the testimony, and she did not have a reason that she did not object to leading during the testimony of Derrick Diamond. This Court appreciates counsel’s candor, but this Court has reviewed the record and does not find that counsel was deficient as the State could have merely rephrased the questions if an objection was successfully made. Furthermore, Applicant has failed to show how he was prejudiced due to counsel’s failure to object. Therefore, this Court finds that Applicant has failed to establish ineffective assistance or resulting prejudice.

Finally, this Court finds that Applicant has failed to establish that counsel was ineffective during the testimony of Matthew Ellis. Referencing the trial transcript, Applicant alleged that trial counsel failed to object to opinion testimony regarding murder being the appropriate charge and for eliciting testimony regarding the intentional nature of the shooting during the testimony of Matthew Ellis. Trial Transcript pp. 524-525, 538.

While on the stand, counsel noted that she found the testimony that murder was the appropriate charge objectionable, and she did not have a specific reason for not making an objection. PCR Transcript pp. 25-26. Again, this Court appreciates counsel’s candor and characterization that the testimony may have encroached upon the province of the jury, but this

Court does not agree. This Court finds that Applicant has failed to establish that the testimony was inadmissible opinion testimony.

Turning to counsel's elicitation of testimony from Matthew Ellis regarding the intentional nature of the shooting, this Court finds counsel provided a valid strategic reason for eliciting the testimony. Counsel explained that her line of questioning was an attempt to show that Applicant informed Ellis that the shooting was an accident or that he had some information that the shooting was not intentional. PCR Transcript pp. 27-28. Therefore, this Court finds that Applicant has failed to establish that counsel rendered ineffective assistance during the testimony of Matthew Ellis.

2. Ineffective assistance of trial counsel for failing to be attentive and object to the line of questioning that resulted in Applicant being questioned about a prior bad act.

By way of his Amendment and at the evidentiary hearing, Applicant alleged that trial counsel was ineffective for failing to be attentive and object to the line of questioning that resulted in Applicant being questioned about a prior bad act. During trial, Applicant was cross examined about going back to his house to get a gun. Specifically, he was asked about a statement made on direct that he "had never shot anybody before – or shot at anybody before." Trial Transcript p. 671, ln. 17-25. After Applicant responded that it was true, the State informed the court there was matter of law, and the jury was sent out. Trial Transcript p. 671, ln. 24 – p. 672, ln. 1. Thereafter, argument took place regarding whether Applicant's testimony opened the door to the admissibility of a 2009 incident where Applicant allegedly shot at C. Fulton. Trial Transcript pp. 672-680.

In response, the trial court indicated that she agreed with the State that counsel should have objected when the question was asked on cross-examination. Trial Transcript p. 681, lns. 12-23. The trial court explained that because counsel did not object the "answer is out there."

Trial Transcript p. 682, Ins. 8-22. Thereafter, the trial court ruled that she would allow Applicant to be questioned about the truth of the 2009 incident and then move on. Trial Transcript pp. 683-684. When the jury returned, Applicant denied being involved in a shooting in 2009. Trial Transcript p. 684, Ins. 15-24.

While on the stand at the evidentiary hearing, Applicant acknowledged that counsel did not prepare him to testify about the 2009 incident, so he was not prepared to handle the State's questions at trial. He explained that the State's questions really threw him off, and it was apparent that it hurt his defense. PCR Transcript pp. 66-67.

At the evidentiary hearing, trial counsel recalled having a copy of the arrest warrant from the 2009 incident in her file, but she could not remember if she discussed it with Applicant. PCR Transcript p. 19. She recalled being careful to not open the door on direct, but she admitted she must have missed it when the Solicitor used the phrase "never shot at anybody before." PCR Transcript p. 20, Ins. 12-18. She conceded that the way it was asked opened the door and allowed the admission of the prior bad act. PCR Transcript p. 20, Ins. 19-22. She explained it was "extremely damaging to his case and something that she (Solicitor) wanted to do for a long time." PCR Transcript p. 20, Ins. 22-25. Counsel further explained the importance of keeping the prior bad act out and the way it impacted Applicant's defense. PCR pp. 21-22.

As a result of counsel's admitted failure to object that was noted by the trial court, the Solicitor was able to elicit testimony from Applicant, which the trial court found opened the door to further questioning about the 2009 incident. This admitted failure amounts to deficient performance. The trial court identified counsel's failure in her reasoning that the State should be allowed to ask Applicant about the prior bad act, and counsel explained that she missed it despite knowing the Solicitor wanted to get it in. Counsel offered no excuse for her failure, and this

Court finds the failure cannot be excused or deemed non-deficient. Therefore, Applicant has established the first prong of the Strickland analysis.

Turning to the second prong of the Strickland analysis, this Court finds that counsel's failure prejudiced 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. At trial, the Solicitor was questioning Applicant about his alleged fear that caused him to go to his home and arm himself, but it is obvious to this Court from the record that the questions regarding the prior bad act were not only elicited to disprove Applicant's fear but to defeat his defenses to the charge of murder. Counsel explained at trial and at the evidentiary hearing that she was pursuing the defenses of accident and self-defense to ultimately persuade the court to instruct on involuntary manslaughter. The State's assertion to the court and questions to Applicant regarding the prior bad act of shooting at someone directly impacted the viability of the defense of accident or self-defense and a charge on involuntary manslaughter. This impact was recognized by counsel at the evidentiary hearing, is evident from the record before this Court, and requires that a new trial be granted. Therefore, this Court finds that Applicant has satisfied both prongs of the Strickland analysis.

3. Ineffective assistance of trial counsel for failing to properly present the defense of self-defense.

By way of his Amendment and at the evidentiary hearing, Applicant alleged that counsel failed to present the defense of self-defense. Specifically, he alleged that counsel failed to properly address prior difficulties. At the evidentiary hearing, Applicant explained that he had a history with the victim's friend Richard, but he had "nothing" with the victim. PCR Transcript p. 84. This Court finds that Applicant has failed to establish any evidence of prior difficulties that counsel failed to address; therefore, this claim must fail.

Applicant also alleged that trial counsel failed to properly address Applicant's knowledge that victim had a gun and was detrimentally "thrown for a loop" by the Court's ruling(s) on character. During trial, counsel argued at length regarding the admissibility of character evidence of the victim, specifically whether he was known to carry a gun. Trial Transcript pp. 165-168, 370-391. Ultimately, the court ruled that if the defense went into the victim's character the door would be opened for the State to attack Applicant's character. Trial Transcript pp. 378, 383. After the court's ruling, counsel noted that she had been "thrown for a loop" by the court's ruling on character and unsuccessfully requested the evening to prepare before call defense witnesses. Trial Transcript pp. 581-582. Thereafter, Applicant was the sole witness for the defense, and he testified, in accordance with the court's ruling, that he did not know if the victim carried a gun. Trial Transcript p. 641.

At the evidentiary hearing, Applicant and trial counsel testified regarding the court's ruling and Applicant's actual knowledge that the victim carried a gun. PCR Transcript pp. 31-33, 71-72. This Court is not convinced that counsel's handling of the victim's character evidence amounted to ineffective assistance. Counsel argued at length to the trial court and the court simply ruled against counsel's position. The trial court's ruling could have been raised on appeal, but it does not amount to a showing of ineffective assistance of counsel. Therefore, this claim must fail.

Finally, Applicant alleged that counsel was ineffective for giving the State a complete preview of the defense and arguments; thus, allowing the State to argue successfully against the defenses throughout trial and the Court to conclude that the defense conceded self-defense. The record supports a finding that trial counsel thoroughly and repeatedly argued the defenses of accident and self-defense, along with the charge of involuntary manslaughter. This Court does

not agree with Applicant's allegation that counsel's arguments amounted to ineffective assistance since the State was given a preview of the defense and was equipped to argue against it. This Court also does not agree that counsel conceded self-defense in a manner that impacted the outcome of Applicant's trial. Again, counsel argued thoroughly on Applicant's behalf, and the trial court gave an accident and self-defense instruction. The trial court decided that an involuntary manslaughter instruction was not warranted and this decision was upheld on appeal. Therefore, this claim must fail.

4. Ineffective assistance of trial counsel and appellate counsel for failing to argue applicable and favorable cases regarding involuntary manslaughter. Ineffective assistance of trial counsel for "anticipating" and not obtaining a charge on involuntary manslaughter.

By way of his Amendment and at the evidentiary hearing, Applicant alleged that trial and appellate counsel were ineffective for failing to argue applicable and favorable cases regarding involuntary manslaughter. Applicant also alleged that trial counsel was ineffective for "anticipating" and not obtaining a charge on involuntary manslaughter. This Court is not convinced that either trial or appellate counsel were ineffective in this regard. The trial transcript reflects counsel's continuous and detailed arguments to the court in her efforts to obtain an involuntary manslaughter instruction. Applicant has failed to establish any further argument or case law that counsel should have presented that would have resulted in a more favorable outcome. Additionally, the issue was fully addressed on appeal, including via Petition to the South Carolina Supreme Court. The record before this Court is void of any evidence of ineffective assistance of trial or appellate counsel in regards to the issue of the involuntary manslaughter charge. Therefore, this claim must fail.

5. Ineffective assistance of trial counsel for failing to object and/or enter an exception to the inferred malice instruction.

By way of the Amendment and at the evidentiary hearing, Applicant alleged that trial counsel was ineffective for failing to object and/or enter an exception to the inferred malice instruction. As detailed above, the record establishes that the trial court's charge lacks the general permissive inference instruction that is required when a judge charges the jury on inferred malice: "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." State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009) (footnote 9). While Belcher deals specifically with a charge that permits the inference of malice from the use of a deadly weapon, the Supreme Court has stated that all inferences should be accompanied by the general permissive inference instruction. See 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"), overruled on other grounds by Belcher.

A trial attorney's failure to object to the lack of a general permissive inference instruction when it is warranted constitutes deficient conduct. Gibson v. State, 416 S.C. 260, 786 S.E.2d 121 (2016). This Court finds that the general permissive inference instruction should have been given when the trial court instructed the jury that "malice may also be inferred from conduct that shows a total disregard for human life." Trial Transcript p. 949, lns. 1-2. At the evidentiary hearing, counsel readily admitted her knowledge of the Elmore decision, which was argued in the charging conference, and that she should have objected. PCR Transcript pp. 43-44. The record before this

Court makes it clear that counsel was deficient when she did not object to the State's request to charge an incomplete inferred malice instruction or enter an exception when the trial court failed to give the proper instruction.

Turning to the question of prejudice, this Court "must decide whether the erroneous malice instruction contributed to the jury's verdict based on all the evidence presented to the jury." *Id.* at 265, 786 S.E.2d at 265. "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.* Clearly, the State was concerned with the lack of evidence of express malice, which was directly expressed by the State's request to include the erroneous inferred malice instruction.

If found credible by the jury, Applicant's trial testimony was void of expressed malice towards the victim. As instructed by the trial court, "Express malice is shown when a person speaks words which express hatred or ill-will for another or when the person prepared beforehand to do the act which was later accomplished." Trial Transcript p. 948, lns. 19-22. At trial, Applicant explained that he did even "dislike" the victim nor did he plan or intend to shoot him, which was the a basis of Applicant's request for the accident and involuntary manslaughter charges. Trial Transcript p. 648, lns. 15-20. Furthermore, the testimony of the State's witnesses that were with Applicant, Derrick Diamond and Devan Bailey, failed to establish express malice on the part of Applicant. Trial Transcript pp. 169, 468.

As previously addressed, Applicant requested and the court instructed the jury on the defenses of accident and self-defense. As noted in Belcher, 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.

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 as a “half-truth” as the deadly weapon charge that was omitted from the jury charge because killing another in self-defense is unmistakably an activity that shows 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 defense 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. Upon a complete review of the record, this Court finds that the erroneous inferred malice instruction contributed to the jury’s verdict in light of the evidence presented. Therefore, a new trial must be granted.

IT IS THEREFORE ORDERED:

1. That Applicant has met his burden of proof as to his specific allegation of ineffective assistance of trial counsel as detailed above, but has failed to meet his burden of proof as to all other allegations of ineffective assistance of trial counsel as detailed above;
2. That Applicant has failed to meet his burden of proof as to the allegation of ineffective assistance of appellate counsel;
3. That the Application for Post Conviction Relief be granted and the Applicant's convictions be vacated and he be granted a new trial;
4. That Applicant be transferred from the custody of South Carolina Department of Corrections to the custody of Richland County pending the disposition of his criminal case, with normal bond proceedings.

AND IT IS SO ORDRED this ___ day of _____, 201__

Honorable Jocelyn Newman
Circuit Court Judge

_____, South Carolina

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 Jamaal Hinson, 325190,)
 Applicant,)
 v.)
)
 State of South Carolina,)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 FIFTH JUDICIAL CIRCUIT

2015-CP-40-03946

CERTIFICATE OF SERVICE

2020 JUN 26 PM 12:09
 FILED
 TRICIA A. BLANCHETTE
 N. H. GORRIDGE
 S.C. P. & G.S.
 RICHLAND COUNTY

I, Tricia A. Blanchette, Attorney for Applicant, hereby certify that I place in the United States mail this 17th day of June 2020 a Rule 59, SCRPC, Motion to Samuel Key of the Attorney General's Office, at:

Office of the Attorney General
 Att: Samuel Key, Ast. AG
 P.O. Box 11549
 Columbia, SC 29211-1549



Tricia A. Blanchette
 Attorney for Applicant
 PO Box 2147
 Leesville, SC 29070
 (803) 908-3266

June 17, 2020

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2015CP4003946

JAMAAL HINSON (SCDC #325190)

STATE OF SOUTH CAROLINA

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: NEWMAN, J.	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other Rule 41(b), SCRPC
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

Applicant's "Motion Pursuant to Rule 59(a) & (e), SCRPC" (filed on June 26, 2020) is DENIED.

RICHLAND COUNTY
FILED
2020 SEP -2 AM 11:17
COURT CLERK'S OFFICE
C.C.R., G.S., & E.C.

ORDER INFORMATION

This order ends does not end the case.
Additional Information for the Clerk :

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Jocelyn Newman
Circuit Court Judge

2757
Judge Code

August 25, 2020
Date