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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Greenville County

The Honorable Deadra L. Jefferson, Trial Judge
The Honorable Robin B. Stilwell, PCR Judge

Appellate Case No. 2020-000796

WILLIE M. WILLIAMS,

Respondent-Petitioner,

v.

STATE OF SOUTH CAROLINA,

Petitioner-Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Did the PCR court correctly find that Williams failed to prove that his defense lawyers were constitutionally ineffective for not preserving for appellate review the issue of the involuntary manslaughter instruction when a reviewing court would have found that Williams was not entitled to the instruction or that any error with regard to the issue was harmless beyond a reasonable doubt?

Did the PCR court correctly find that Williams failed to prove that his defense lawyers were constitutionally ineffective for not objecting to the jury instruction that the specific intent to kill is not an element of attempted murder when the level of criminal attempt required by the attempted murder statute was not clear at the time of Williams' trial and when there was evidence at trial that Williams actually had the specific intent to kill Wilson?

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STATEMENT OF THE CASE

Willie Marvin Williams is presently confined in the South Carolina Department of Corrections. In April of 2013, the Greenville County Grand Jury indicted him for murder (2013-GS-23-3238), the possession of a weapon during the commission of a violent crime (2013-GS-23-3238), attempted murder (2013-GS-23-3239), and unlawful conduct towards a child (2013-GS-23-3240). W. Townes Jones, IV, Esquire, and Richard H. Warder, Esquire, represented Williams in the case. On May 13-16, 2013, Williams proceeded to trial with the Honorable Deadra L. Jefferson ("trial court") presiding. The jury found Williams guilty as indicted. The trial court sentenced Williams to concurrent terms of imprisonment of life for murder, five years for possession of a weapon during the commission of a violent crime, thirty years for attempted murder, and ten years for unlawful conduct towards a child.

Appellate Defender David Alexander perfected Applicant's appeal. Alexander argued the trial court erred (1) in excluding a statement made by the boyfriend of Williams' deceased wife, and (2) denying Williams' request to instruct the jury on the lesser-included offense of involuntary manslaughter. State v. Williams, Op. No. 2016-UP-215 (S.C. Ct. App. filed May 18, 2016) (per curiam). The Court of Appeals affirmed, finding the trial court did not abuse its discretion in admitting the statement and that the request to instruct the jury on involuntary manslaughter was not preserved for appellate review. The remittitur was issued on June 3, 2016.

A hearing regarding Williams' application for PCR was held before the Honorable Robin B. Stilwell ("PCR court") on December 18, 2019. On March 31, 2020, the PCR court issued an order denying post-conviction relief to Williams on all claims raised, save for one: that Williams' defense attorneys were constitutionally ineffective for failing to object to the trial court's

instruction on mutual combat. The PCR court denied the State's motion to alter or amend the judgment, and this appeal follows.

STATEMENT OF FACTS

In the early morning hours of July 10, 2010, Williams murdered his wife Natasha Kerns with a handgun, shot Anthony B. Wilson moments later, and endangered the lives of Kerns' minor children. Williams was estranged from Kerns, and Wilson—her new boyfriend—was staying at Kerns' home in Greenville that night after having taken Kerns and her children out to dinner. Williams and Kerns had previously lived in the home together. Kerns's car was parked behind her home and Wilson's was parked in front. Kerns was afraid of Williams. There had been two domestic incidents between Williams and Kerns at the home in the past, including one in which the police were called, and Williams moved out of that home and into his own residence in Gray Court. On June 25, 2010, Williams made another appearance at Kerns's home. Right before Kerns's murder, she had petitioned for a restraining order against Williams and for child support, and Williams had just been served with the papers. Williams was due in court in the matter the week following Kerns's murder and he was upset about having to pay child support. At the time of her death, Kerns had barricaded her front door with furniture and her back door was equipped with a security alarm. (App. 67-82, 109, 285-87, 300-01, 307-14, 340, 505, 513, 554-58, 564, 574, 669).

On the night of July 9, 2010, Williams picked up his date Cynthia Booker and Booker's aunt and drove them in his black Chrysler 300 to a club. App. 250, 518. The three were at the club until approximately 3:45 a.m., when Williams left Booker and her aunt suddenly. R. 250, 253, 524. Booker saw Williams peeling his tires on his way out of the club's parking lot, leaving her and her

aunt to find their own ride home. Williams, who had been drinking alcohol, changed clothes at another location and then drove to Kerns's home. App. 569. Upon arrival, he found Wilson's car parked in the driveway. App. 329.

That night, after dinner, Kerns and Wilson talked with the two children before going to bed. App. 288. Kerns and Williams slept in Kerns's bedroom, the young girl in a crib in Kerns's bedroom, and the young boy ("J") in his own bedroom. App. 86, 88-89. J knew something was wrong when he heard the first gunshot. App. 90. J woke up, flipped on the lights, flipped them off again, and looked out the window to see Williams' Chrysler 300 parked outside. App. 90-91. J recognized the car as Williams' because he knew it as the belonging to Williams, the father of the young girl, J's sister. App. 91. Wilson had been awakened by the barking of dogs and "some ruckus going on around the outside of the house." App. 288-90. Wilson woke Kerns, who retrieved her gun from under the bed and went towards the front of the home. App. 290-91. Wilson took the little girl to J's bedroom and put her in the bunkbed there. App. 290-91. Kerns called 911 on her cell phone, telling the operator that someone was outside, her dogs were barking, she was armed with a pistol, she and Williams were going through a divorce, and Williams was on her front porch. The 911 recording caught Kerns telling Williams to leave her home. Wilson heard Kerns near the front door before the shot was first saying something like "get away from my property, get away from my house. Wilson heard "banging on the outside" of the house and Kerns shouting. The recording showed there was then a gunshot, and that Kerns dropped her phone and collapsed on the floor in front of a picture window in her living room, where police found her body later. App. 67-82, 540. Williams had shot Williams between the eyes through the window. App. 108-09, 120-23, 262-63. After that, according to Wilson, "it went like straight silent." App. 292-93.

Williams knocked in the lower front pane of a window in a garage that had been converted into a den. The pane did not break and was later found propped against the inside wall of the den. Williams entered the home armed with his handgun. Wilson testified the intruder entered J's room where Wilson and the children were, and fired three shots, one of which rendered Wilson unconscious. The bullet had grazed his head and caused powder burns on his face and clothing. Wilson regained consciousness when J shook him. Wilson went down the hallway to find Kerns lying on her back in the front living room. He checked her for a pulse. Responding law enforcement entered the house before Wilson could get out. App. 118, 126, 174-75, 187-88, 295, 297-98, 492.

J testified he heard the first shot, saw Williams' car outside, and crawled to find his mother on the living room floor. App. 92. J testified he saw Williams standing over Kerns and shooting her either four or nine times, leaving when his ammunition was spent. App. 92-93, 101. J believed Williams was out of ammunition because Williams pointed his gun at J, with it making a sound when he tried to fire. App. 104. J saw Williams leave through the window in the den. Williams left in his Chrysler and drove to his home in Laurens County. He parked the car in his garage, pushed a lawn mower between the car and the garage door, and then closed the garage door. App. 561, 576-77.

When police arrived, they found the two children crying hysterically, and J spontaneously said, "Willie Marvin killed my mom." App. 117-18 Wilson was in the living room with a bloody towel wrapped around his head. App. 118. Kerns was lying on her back in the living room with a gunshot wound to the head. Her cell phone was near her body. There was a bullet hole in the front window between where the curtains opened. Kerns was lying below the curtains with her feet toward the window. App. 108-09, 120-22. The window in the garage had been forced out of the

frame by someone standing outside the home. App. 109-10, 120. The empty pane was wide enough for one person to crawl through. App. 109-10, 120. There was one bullet hole in J's bunkbed and two in his ceiling. App. 95, 392-401. A fired bullet was taken from a wall. There was a bloodstain on the carpet where Wilson had collapsed in J's room. Police did not find any spent casings in or outside of the home, indicating Williams had either picked up the casings or used a revolver. They never located the murder weapon, but did determine that it had been a .38 or 9mm caliber handgun and that Kerns's handgun was not the murder weapon. App. 341, 360-64, 404-17. Police entering the back sliding glass door of the home set off a burglar alarm that had not been triggered earlier when Williams entered the home through the forced out window. App. 182-83. The Greenville County Sheriff's Office requested assistance from the Laurens County Sheriff's Office in locating Williams after identifying Williams as the suspect. App. 118, 154, 315-17, 323-25, 331-33, 360-64.

Laurens County Sheriff's Deputy Joshua Garrison saw Williams driving a champagne-colored Chevrolet Tahoe on the afternoon of July 10. App. 155. Deputy Garrison activated his lights to initiate a stop, but Williams "sped off at a high rate of speed." App. 156. After a twenty-six-mile chase that reached speeds in excess of 110 mph, Deputy Garrison disabled Williams' vehicle by ramming into it with the patrol car. App. 156-57. Williams was found inside the vehicle with a knife stuck in his chest and had to be airlifted for medical attention; he had tried to kill himself. App. 158.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When

reviewing factual findings, the appellate courts defer to the PCR court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, at 180-81, 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)). However, pure questions of law will be reviewed de novo without deference to the lower court. Smalls, at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The PCR court correctly found that Williams failed to prove that his lawyers were constitutionally ineffective for not requesting an instruction on the theory of transferred self-defense because the theory has not been recognized in South Carolina and because Williams has not proven that the jury would have acquitted him if the instruction had been given.

The PCR court found that Williams failed to prove that his lawyers were ineffective for not requesting a jury instruction on transferred self-defense because the theory has not been recognized by our appellate courts and because to find them ineffective for not requesting an instruction whose viability has not been passed upon in South Carolina would be to hold the lawyers to the standard of a clairvoyant. App. 919-20. The PCR court's finding was correct because it does not matter for the deficiency determination whether the facts of this case are distinct from those in State v. Porter, 269 S.C. 618, 239 S.E.2d 641 (1977). The PCR court cited Porter for the point that the theory of transferred self-defense has not been recognize in South Carolina, which is undeniably true. Jamison v. State, 410 S.C. 456, 471, 765 S.E.2d 123, 131 (2014). This Court "has never required an attorney to anticipate or discovery changes in the law, or facts which did not exist, at the time of the trial." Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765-66 (1993). If an issue

that is unsettled becomes settled, the state of the law has changed. To require as a constitutional matter that defense attorneys wade into the waters of every unsettled issue, and then to require that they have done so correctly and effectively, lest their performances be found to be deficient, is to require lawyers to be trailblazers with a perfect success rate. The law does not require perfection of defense attorneys, it requires "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989).

Williams' argument that he suffered prejudice from the lack of an instruction on self-defense is without merit. Although Williams contends that, if the jury had believed that Williams acted in self-defense with Wilson, then it could not have found that Kerns' death was accomplished with malice, he fails to take into consideration the fact that the jury obviously did not believe Williams' testimony about self-defense. If the jury had believed Williams' testimony on acting in self-defense with Wilson, the jury would have acquitted him of the attempted murder of Wilson. Even if this Court accepts that the lack of the transferred self-defense instruction deprived the jury of an opportunity to consider whether the theory negated the malice element of the charged offense of Kerns' murder, it would be of no consequence because the jury's decision not to believe Williams' testimony over the other evidence proves that there would have been any difference had the jury been instructed on the theory.

The PCR court correctly found that Williams failed to prove that his defense lawyers were constitutionally ineffective for not preserving for appellate review the issue of the involuntary manslaughter instruction because a reviewing court would have found that Williams was not entitled to the instruction or that any error with regard to the issue was harmless beyond a reasonable doubt.

The Court of Appeals determined on direct appeal that the issue of whether the trial court erred in not instructing the jury on involuntary manslaughter was not preserved for appellate review because Williams' lawyers did not object when the trial court charged the jury without

instructing on the lesser-included offense. The PCR court correctly determined that, if the issue had been preserved, the appellate courts would have found that Williams was not entitled to the instruction. App. 908-09. When an issue was unpreserved for appellate review, a PCR court must examine whether the applicant suffered prejudice by analyzing the merits of the issue and considering whether the applicant has established that the outcome would have been different had the issue been preserved. See Milledge v. State, 422 S.C. 366, 380, 811 S.E.2d 796, 804 (2018) (instructing that the PCR court is to evaluate prejudice when considering an applicant's claim that counsel failed to preserve an issue for appellate review by viewing "the trial court's ruling through the same lens that would be applied on appeal . . . "). Involuntary manslaughter is "the unintentional killing of another without malice while engaged in (1) an unlawful activity not naturally tending to cause death or great bodily harm or (2) a lawful activity with reckless disregard for the safety of others." Sullivan v. State, 407 S.C. 241, 244, 754 S.E.2d 885, 887 (S.C. Ct. App. 2014) (citation omitted). "Involuntary manslaughter requires a showing of criminal negligence, which 'is defined as the reckless disregard of the safety of others.'" State v. Scott, 414 S.C. 482, 487, 779 S.E.2d 529, 531 (2015) (citing S.C. Code Ann. § 16-3-60 (2003)).

Williams argues that his lawyers should have preserved the issue for appellate review because his testimony at trial that he and Wilson struggled over the weapon that shot and killed Kerns entitled him to an instruction on involuntary manslaughter. Williams cites multiple authorities, all of which are distinguishable. In Casey v. State, Casey sat in his car in his sister's yard. 305 S.C. 445, 446, 409 S.E.2d 391, 391-92 (1991). The victim threatened to cut Casey and approached the car, at which point Casey got out of the car with a shotgun. Id. A passenger in the car scuffled with Casey over the shotgun, and Casey's sister, the only eyewitness available to

testify at trial, turned and began walking away from the struggle. Id. The sister heard a shotgun blast and turned back to see that the victim had been shot. Id. In that case, this Court extended the principle that evidence of a struggle between a defendant and a victim was sufficient evidence for that defendant to be entitled to a jury instruction in involuntary manslaughter to situations in which "the defendant, in struggling with a third person over a gun, shoots the victim." State v. Battle, 408 S.C. 109, 119, 757 S.E.2d 737, 742 (S.C. Ct. App. 2014). In State v. Burris, the victim and his accomplice attacked Burris, throwing him to the ground and trying to empty his pockets. 334 S.C. 256, 258, 513 S.E.2d 104, 106 (1999). Burris drew a gun and shot twice, which caused the two attacked to back away. Id. at 258-59, 513 S.E.2d at 106. The accomplice starting moving towards Burris again while Burris tried to get off the ground, so Burris picked up his gun and it went off, killing the victim. Id. at 259, 513 S.E.2d at 106. This Court found that Burris was entitled to an involuntary manslaughter instruction because there was evidence that he was lawfully armed in self-defense and was negligent in handling his loaded gun. Id. at 265, 513 S.E.2d at 109. In Tisdale v. State, Tisdale, a co-defendant, and the victim were in a car together when the victim was killed from two gunshots to the head. 378 S.C. 122, 662 S.E.2d 410 (2008). Tisdale testified that the victim pulled out a gun and shot at him when the two got into an argument. Battle, at 119, 757 S.E.2d at 742. Tisdale testified that "he struggled with the victim for control of the weapon" and that the gun accidentally discharged while in the victim's hand, killing the victim. Id. The co-defendant testified that he did not know who had the gun whenever the shots were fired, but that he saw the gun in Tisdale's hand afterwards. Tisdale, at 124, 662 S.E.2d at 411. Tisdale further testified that the gun "was never in [Tisdale's] hand until [the victim] was just motionless." Id. at 124, 622 S.E.2d at 412. This Court determined that Tisdale's testimony was sufficient to support

the charging the jury on involuntary manslaughter. Battle, at 119, 757 S.E.2d at 742. In State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008), Light testified that he discovered his girlfriend screaming and pointing a rifle at him whenever he stepped out of his bathroom. Battle, at 118, 757 S.E.2d at 741. He testified that he stumbled after snatching the rifle away from his girlfriend and that the rifle then accidentally discharged, killing her. Id. This Court found that there was evidence to support an involuntary manslaughter instruction because Light's testimony that he took the loaded rifle from his girlfriend and that it fired immediately thereafter was evidence that "Light recklessly handed the gun . . . ." Id. at 118, 757 S.E.2d at 741-42. In State v. Battle, Battle attended a party and got into an altercation with the victim when Battle tried to end an argument between two other people. 408 S.C. at 113, 757 S.E.2d at 739. During the altercation, victim was shot and died, but none of the witnesses saw the weapon that was fired. Id. Battle testified at trial that the victim pulled out a gun when Battle told him to keep his hands off of Battle, that he grabbed the victim's right hand because it was the victim's gun hand, that he twisted the victim's left hand, that he was trying to grab the gun because he wanted to get it away from him, that he twisted and the gun went off after he tried to grab it, and that he did not intend for the gun to go off. Id. at 113-14, 757 S.E.2d at 739. Battle testified that he "never actually grabbed the gun" but also indicated that his hand may have touched the trigger as he struggled for control of the gun. Id. at 114-21, 757 S.E.2d at 739-43. The Court of Appeals found that Battle's testimony was sufficient to support an instruction on involuntary manslaughter because he testified that he and the victim struggled for control of the victim's gun and that the victim was shot and killed by the victim's own gun, and that Battle's testimony that his finger may have touched the trigger during the struggle was evidence that he recklessly handled the gun. Id. at 120-21, 757 S.E.2d at 743.

Despite Williams' attempt to compare his case to these others, his case is distinguishable from them. Williams testified at trial that he was at a club with a date in the early morning hours on the date of Kerns's death, and that he left the club (and his date) at some point after 3:00 a.m. and, after making a stop at another club, left for Kerns's home at approximately 4:15 a.m. to 4:30 a.m. because Kerns was not answering his phone calls and because it was more convenient for him to go to Kerns's then than to go back to his home. App. 524-26, 574. Williams testified that he intended to stay over at Kerns's whenever she answered her door and also admitted that he knew that Kerns was afraid of him. App. 554, 575. Williams testified that he knocked on Kerns's front door for "three to five minutes" and then, after peeping through a window near the front porch, heard a noise in the grass and turned to see a man approaching him quickly. App. 529-30, 535. Williams testified that the man pointed the weapon at him, which Williams thought was a handgun. App. 530, 535-36. Williams testified, "I took self-defense, so I react. And by control movement of self-defense, you're going to grab here, which you're going to grab in here, and put pressure to keep from doing a squeeze. And then you're going to come here in a control movement like that, and then like that." App. 536-37. Then, as Williams testified, "[T]he gun went off, pow." App. 536-37. On cross-examination, Williams testified that he and Wilson "wrestled down the hallway. And during the scuffle, the gun went off." App. 576. When asked if he had ever had control of the gun, Williams answered, "No, ma'am. I had control of his arms and wrists to keep him from – a self-defense hold." App. 576.[1] Williams testified that Wilson's gun discharged in Wilson's hand

[1] Williams explained at trial that a certain self-defense maneuver is impossible "when you're wrestling with a person and you've got a weapon". App. 537-38. It is not clear whether Williams meant that he actually had a gun or if he meant that his self-defense strategy was affected by the presence of the gun in the fight, but that does not affect the involuntary manslaughter analysis because Kerns had already been shot by this point in Williams' narrative.

and killed Kerns while Williams was performing a self-defense move. Williams did not testify that he had his hands on the gun, that he was trying to get control of the gun, or that his finger touched the trigger. Williams' testimony was that he grabbed different parts of Wilson's body in a movement meant to gain control of Wilson's movements.

The PCR court was correct that, like the defendant in State v. Scott, 414 S.C. 482, 779 S.E.2d 529 (2015), Williams was not entitled to the involuntary manslaughter instruction. App. 907. In Scott, the defendant resented the victim, who was the mother of his child's mother. 414 S.C. at 484-85, 779 S.E.2d at 530. The victim confronted Scott in the apartment of Scott's sister and told him that she was tired of his domestic abuse of her daughter. Id. at 485, 779 S.E.2d at 530. Scott and the victim got into a physical altercation, and the victim was stabbed in the neck with a knife that Scott had been holding when the victim entered the apartment. Id. Scott did not present any evidence at trial, but he had told a law enforcement officer that the victim took a shiny, silver object from her pocket during the struggle, that he performed a martial arts move that pushed the victim's elbow up and caused her to stab herself in the throat. Id. This Court found that Scott was not entitled to an involuntary manslaughter instruction because he did not "present[] any evidence that he acted with reckless disregard for the safety of others." Id. at 488-89, 779 S.E.2d at 532. In this case, Williams' testimony supports only the understanding performed a self-defense maneuver that brought him into contact with Wilson's body and that the contact caused Wilson to fire the shot that killed Kerns. Like Scott, Williams has not presented evidence that entitles him to the involuntary instruction.

Even if our appellate courts would have found that the trial court's refusal to instruct the jury on involuntary manslaughter was error, Williams has failed to prove that there is a reasonable

likelihood that the appellate courts would have reversed on appeal. A trial court's error in refusing to instruct the jury on involuntary manslaughter is subject to harmless error analysis. Battle, at 121, 757 S.E.2d at 743 (citation omitted). When considering whether this alleged error was harmless, the appellate court "must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict." Id. (quotation omitted). The court should ask whether the erroneous instruction contributed to the jury's verdict, not what the verdict would have been if the jury had been instructed properly. Id. The PCR court pointed to evidence, which led only to the conclusion that Williams murdered Kerns: Kerns had served Williams with court papers a few days before her death seeking a restraining order against Williams; Kerns barricaded her front door with furniture because she feared Williams; Williams abandoned his date at a club that night, spinning his tires on his way out after Kerns had not answered his calls; Kerns told the 911 dispatcher that she thought Williams was the man trying to enter her home; Wilson identified Williams as the man who shot at him; and Kerns' young son, who was Williams' own step-son, identified Williams as the murderer. App. 908. Additionally, the 911 recording captured Kerns telling Williams to leave her home. App. 67-82. Williams does not present this Court with any analysis or argument as to the likelihood that an appellate court would have found that, if the issue had been preserved for appellate review, the issue was not harmless beyond a reasonable doubt. The PCR court's findings on this issue should stand.

The PCR court correctly found that Williams failed to prove that his defense lawyers were constitutionally ineffective for not objecting to the jury instruction that the specific intent to kill is not an element of attempted murder because the level of criminal attempt required by the attempted murder statute was not clear at the time of Williams' trial and because there was evidence at trial that Williams actually had the specific intent to kill Wilson.

Section 16-3-29 of the South Carolina Code "was enacted in 2010 as part of the Omnibus Crime Reduction and Sentencing Reform Act." King, at 408, 772 S.E.2d at 192 (citation omitted).

The statute provides, in part, that "[a] person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." S.C. Code Ann. § 16-3-29. Applicant was tried for and convicted of the attempted murder of Wilson, the crime codified by this statute. App. 9, 660. When instructing the jury on the elements of attempted murder, the trial court charged the jury "that a specific intent to kill is not an element of attempted murder. But there must be a general intent to commit serious bodily injury. Intent means intending the result which, actually, occurs, not accidentally or involuntarily." App. 642. Williams' lawyers had no objection. App. 651. Neither lawyer could remember at the PCR hearing what his understanding of the intent required had been at the time of trial. App. 914. The PCR court found that Williams' lawyers were not acting outside the reasonable bounds of prevailing professional norms whenever they did not object to the instruction because the attempted murder statute was ambiguous and because to find that they were constitutionally ineffective for not objecting to the instruction at the time of Williams' trial would be to hold the lawyers to the standard of a clairvoyant. App. 914.

Under the first prong of the test outlined in Strickland v. Washington, 466 U.S. 668 (1984), Applicant must prove that counsel's performance was deficient. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. 668). Under this prong, a court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, at 117, 386 S.E.2d at 625. The "preeminent authority for all" courts when they are considering an ineffectiveness claim mandates great deference to a defense lawyer's performance because:

> [I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was

> unreasonable . . . . 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. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Butler v. State, 286 S.C. 441, 444-45, 334 S.E.2d 813, 815-16 (1985) (quoting Strickland). Applicant must overcome this presumption to receive relief. Cherry, at 118, 386 S.E.2d at 625.

In its 2017 opinion in King, this Court considered the implications of the phrase "malice aforethought, either express or implied," which is found in the attempted murder statute, and modified the Court of Appeals' opinion. 422 S.C. at 56-64, 810 S.E.2d at 22-27. In King, the this Court approvingly cited another court's reasoning that implied malice is incompatible with the specific intent to kill, and with that court's summary that:

> Attempted murder . . . is the performance of an act or acts which tend, but fail, to kill a human being, when such acts are done with express malice, namely with the deliberate intention unlawfully to kill.

422 S.C. at 58, 810 S.E.2d at 24 (quoting Keys v. State, 104 Nev. 736 (1988)). This Court agreed that the Court of Appeals partly based its conclusion in King on dicta from another of this Court's opinions, acknowledged that South Carolina has been afflicted with "conflicting case law regarding levels of criminal intent," and noted the "ambiguity" created by the language in the attempted murder statute. King, at 55-62, 810 S.E.2d at 22-26. In his concurring opinion in King, Justice Kittredge further emphasized the ambiguity of the attempted murder statute, writing that the question of whether attempted murder is a specific-intent crime "is easily stated . . . but not easily answered." Id. at 71, 810 S.E.2d at 31 (Kittredge, J., concurring). The majority acknowledged Justice Kittredge's point and agreed with it. Id. at 62, 810 S.E.2d at 25-26. This

Court believed the ambiguity of the attempted murder statute to be so great that it requested that the General Assembly "re-evaluate the language" of the statute. Id. at 64, 810 S.E.2d at 27, n.5.

The PCR court found that Williams' lawyers would not have been acting unreasonably in believing at the time of Williams' trial that the attempted murder statute codified a general-intent crime, as the trial took place years before either of our appellate courts issued an opinion in King. App. 914. This Court "has never required an attorney to anticipate or discovery changes in the law, or facts which did not exist, at the time of the trial." Thornes, at 309-10, 426 S.E.2d at 765-66. The level intent required by the attempted murder statute was sufficiently ambiguous at the time of Williams' trial that, to find his lawyers constitutionally ineffective for not objecting to the intent instruction given at trial, this Court would be holding the lawyers to the standard of a clairvoyant.

Under the second prong of Strickland, the alleged deficiency in Williams' lawyers' not objecting to the general-intent jury instruction must have prejudiced Williams such that "there is a reasonable probability that, but for [counsels'] unprofessional errors, the result of the proceeding would have been different." Cherry, at 117-18, 386 S.E.2d at 625. The PCR court found that Williams failed to prove that there is a reasonable likelihood that the jury would have acquitted Williams of the attempted murder had his lawyers objected to the instruction because there was evidence that Williams had the specific intent to kill. Williams has not given this Court a reason to disturb that finding.

The PCR court correctly found that Williams failed to prove that his lawyers were constitutionally ineffective for not objecting to the assistant solicitor's reference to the people of Greenville County during her closing argument because the reference was not improper and because Williams has failed to prove that the referenced was so prejudicial that it deprived him of a fair trial.

During her closing argument, the assistant solicitor referred to the State's burden as being "heavy", referred to the presumption of innocence that Williams enjoyed as a "robe of

righteousness", referred positively to the presumption of innocence as a feature of the American justice system, and then said the following:

> But when y'all go back there and start examining that evidence, each piece of evidence is just like a little razor. It's cutting away the threads of that robe of righteousness. And after careful deliberation and without hesitation, you will remove that robe from him. And you'll come back in here and tell him that he's guilty. On behalf of the people of Greenville County, please, find him guilty.

App. 629-30. Applicant's lawyers did not object to the assistant solicitor's reference to the people of Greenville County and testified at the PCR hearing that they did not find the comment objectionable.

The due process clauses prohibit the deprivation of a person's liberty "without due process of law." Fortune v. State, 428 S.C. 545, 549, 837 S.E.2d 37, 39 (2019) (citations omitted). In order to determine whether a solicitor's comments during closing argument violated a defendant's due process rights, a reviewing court must first "determine whether the comments were improper . . . ." Id. (citations omitted). "A Solicitor's closing argument must be carefully tailored so it does not appeal to the personal biases of the jurors. Further, the argument may not be calculated to arouse the jurors' passions or prejudices and its content should stay within the record and its reasonable inferences." State v. Hamilton, 344 S.C. 344, 361-62, 543 S.E.2d 586, 595-96 (S.C. Ct. App. 2001) (citations omitted), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). The PCR court found that the assistant solicitor's reference to the people of Greenville County was not improper. App. 916-17. During closing arguments in Hamilton, the solicitor said that he received good legal training at the start of his career because he was a law clerk for a Circuit Court judge; that Hamilton wasted everyone's time by testifying during a multi-day trial that he did not deny the charges, instead of pleading guilty on the morning of the first day of trial; and that the jury "put [the solicitor there] as a representative of [its] system of justice, a representative of

[its] community, and [that he] wouldn't bring in to [the jury] a borderline case." 344 S.C. at 359-60, 543 S.E.2d at 594. In contrast to the "highly inappropriate and constitutionally impermissible" comments made by the solicitor in Hamilton, the assistant solicitor in this case did not make derogatory references to Williams' right to a jury trial, did not make herself out to be virtuous due to her position as a prosecutor, did not vouch personally for the strength of the evidence of Williams' guilt, and, by reinforcing the point that Williams enjoyed the presumption of innocence that the State was required to overcome beyond a reasonable doubt, did not inject arbitrary factors into the jury's deliberations. 344 S.C. at 362, 543 S.E.2d at 596. In its application of the rule and the Court of Appeals' analysis in Hamilton to this case, the PCR court's finding that the assistant solicitor's comment during closing was not improper was correct.

Williams cites State v. Liberte, in which the Court of Appeals found that the solicitor's improper argument so infected a trial with unfairness that that defendant's due process rights were violated; however that case is easily distinguishable from Williams' because the solicitor in Liberte made comments calculated to "play[] on the jury's fear of the impact of drugs on our society" and that "insinuated that the reasonable doubt standard is itself a threat to 'law and order.'" 336 S.C. 648, 652-58, 521 S.E.2d 744, 746-49 (S.C. Ct. App. 1999). In that case, during closing argument, the solicitor said:

> Ladies and gentlemen, I want to ask you right now to listen to the judge's instructions about reasonable doubt, and ask yourselves is it being used as a sword to attack law and order, to attack law enforcement, to attack people who are trying to keep drugs off our streets?

Id. at 652, 521 S.E.2d at 746. Despite being admonished by the trial court not to inject personal opinion into closing arguments, the solicitor continued to argue that attacks on police conduct are "beneath contempt" because officers worked to bring Liberte's case to trial and "put it on the line";

this argument constituted an improper appeal to the jury's emotions meant to cause the jury to identify with the officers. Id. at 653, 521 S.E.2d at 747, n.2. Compared to the conduct of the prosecutors in Hamilton and Liberte, the assistant solicitor's reference to the people of Greenville County was innocuous.

Even if the reference to the people of Greenville County was improper, Williams has failed to prove that it "so unfairly prejudiced [him] as to deprive him of a fair trial." Fortune v. State, 428 S.C. 545, 837 S.E.2d 37 (2019). The PCR court found that Williams failed to prove that he suffered prejudice from his attorneys' decision not to object to the assistant solicitor's comment. App. 918. The PCR court was correct to point out that the jury was well aware that the assistant solicitor represented the government and that Williams' lawyers worked for Williams, that Williams was being tried for crimes that he committed while in the jurisdiction of Greenville County, and that the jury itself was assembled from citizens of Greenville County. App. 917. Williams has offered no real argument in support of his contention that he suffered prejudice from the comment.

The PCR court correctly found that Williams failed to prove that his lawyers were constitutionally ineffective for not objecting to the jury instruction that the provocation needed for voluntary manslaughter must come from some act of or related to the victim because the question of whether transferred intent applies in the context of voluntary manslaughter was unsettled at the time of Williams' trial and because Williams' testimony about the events on the night of his wife's murder was not believable in light of the other evidence of his guilt.

One of Williams' lawyers requested that the trial court instruct the jury on voluntary manslaughter. App. 581. The trial court instructed the jury that "[t]he provocation needed for voluntary manslaughter must come from some act of or related to the victim." App. 657. Williams' lawyers had no objection. App. 651. During its deliberations, the jury asked for more explanation about the distinction between murder and voluntary manslaughter. App. 655. The trial court repeated its earlier instruction, to which the lawyers did not object. App. 657-58.

The PCR court correctly found that, in reliance upon State v. Wharton, 381 S.C. 209, 672 S.E.2d 786 (2009), the applicability of the doctrine of transferred intent was an issue that remained unsettled and that authority at the time of trial provided that provocation must come from the victim. App. 909-10. More than a year after the trial, this Court wrote that "the applicability of the doctrine of transferred intent to voluntary manslaughter cases remains an unsettled question in South Carolina." Jamison v. State, 410 S.C. 456, 471, 765 S.E.2d 123, 131 (2014). Williams argues that the mere fact that this Court declares an issue to be unsettled is enough to mandate as a constitutional matter that the issue "need[s] to be litigated" by defense attorneys, but provides no authority in support of that argument. The PCR court acknowledged the uncertainty surrounding the issue. App. 910 (citing State v. Starnes, 388 S.C. 590, 597-98, 598 S.E.2d 604, 608 (2010) (affirming the trial court's decision not to instruct the jury on voluntary manslaughter and admitting that "[t]rial courts often struggle with the difficult interplay between murder and the lesser-included offense of voluntary manslaughter . . . ."). And the PCR court identified authorities that supported the instruction given at trial. App. 909-10 (citing Harris v. State, 354 S.C. 382, 387, 581 S.E.2d 154, 156 ("Sufficient provocation necessary to justify a voluntary manslaughter charge must come from the victim and not be transferred from a third-party to the victim.") (emphasis in original) (citations omitted)). The PCR court rightly found that Williams' lawyers should not be held to the standard of a clairvoyant, being called to answer the question on transferred intent that remains unsettled today. App 910. This Court's description of the question as one that is unsettled may be seen as an invitation to some, but it certainly is not a Sixth Amendment command to all defense lawyers. Williams has failed to prove that, by not objecting to the instruction that provocation must have come from the victim, the performance of his lawyers was unreasonable

"under prevailing professional norms." Cherry, at 117, 386 S.E.2d at 625.

The PCR court found that Williams failed to prove that there is a reasonable likelihood that he would have been acquitted of murder had his lawyers objected to the provocation instruction because Williams' testimony that Wilson was approaching him with a weapon in a threatening manner outside of Kerns' home was not credible in light of the other evidence of Williams' guilt. App. 911.

CONCLUSION

For all the foregoing reasons, this Court should deny Williams' petition.

Respectfully submitted,

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