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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for a Writ of Certiorari to Richland County
DeAndrea G. Benjamin, Trial Judge
Jocelyn J. Newman, Post-Conviction Relief Judge

Appellate Case No. 2020-001316

JAMAAL HINSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

YASMEEN E. KLEIN
Assistant Attorney General
SC Bar No. 104681

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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ISSUE ON PETITION FOR WRIT OF CERTIORARI

Petitioner's Issue on Petition for Writ of Certiorari

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

Respondent's Counterstatement of Issue on Petition for Writ of Certiorari

The post-conviction relief court properly found Petitioner failed to meet his requisite burden of establishing constitutionally ineffective assistance of counsel because the trial court correctly charged the jury that malice may be inferred from the facts and circumstances of the case, where an *Elmore* charge was not required and the language of the instruction was only a slight deviation of *Elmore*, and because Petitioner cannot establish he suffered prejudice or the likelihood of a different outcome due to the substantial evidence of express malice presented at trial

STATEMENT OF THE CASE

Jamaal Hinson ("Petitioner") is presently confined within the South Carolina Department of Corrections. During the April 2010 term, the Richland County Grand Jury indicted Petitioner for Murder (2010-GS-40-0829). Eleanor Cleary, Esquire, ("Trial Counsel") was retained to represent Petitioner. Petitioner proceeded to a jury trial November 14-18, 2011, before the Honorable DeAndrea G. Benjamin. On November 18, 2011, following deliberations, the jury convicted Petitioner as indicted. Judge Benjamin sentenced Petitioner to forty years' imprisonment. Petitioner filed a timely notice of appeal and Reid T. Sherard, Esquire, perfected the appeal on Petitioner's behalf. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. *State v. Hinson*, 2014-UP-113 (S.C. Ct. App. filed March 19, 2014). Thereafter Petitioner filed a petition for rehearing, which was denied by the Court May 20, 2014. Petitioner filed a petition for writ of certiorari, and the South Carolina Supreme Court denied the petition by Order dated November 20, 2014. The Remittitur issued June 2, 2015.

Petitioner sought post-conviction relief alleging ineffective assistance of trial and appellate counsel. Petitioner, through counsel, Tricia A. Blanchette, Esquire, filed two amendments and a memorandum explaining the amended arguments. On January 24, 2018, the Court convened an evidentiary hearing before the Honorable Jocelyn Newman. At the evidentiary hearing, Petitioner proceeded on the allegations as amended. Petitioner testified on his own behalf and presented testimony from Trial Counsel. Judge Newman denied and dismissed the application by order filed June 1, 2020. On June 26, 2020, Petitioner timely filed a motion to reconsider pursuant to Rule 59(a) and (e), SCRCP. Judge Newman denied the motion by Form 4 order filed September 2, 2020.

STATEMENT OF FACTS

Petitioner's charges stem from an incident occurring on the morning of January 16, 2010, when Petitioner left his girlfriend Lauren Banks' ("Banks") house in the Vineyard Crossing subdivision of Blythewood, South Carolina to complete a series of marijuana transactions. (App. 644). While leaving Vineyard Crossing, Petitioner saw Richard Thomas ("Thomas") and Anthony Salley ("Victim") outside of the victim's own home, two houses down from Banks' house. (App. 506-07, 645). Petitioner and Thomas had a contentious history and "[didn't] like each other at all" after Petitioner beat Thomas with a pistol in the fall of 2009 during an altercation at a gas station. (App. 640, 641-42, 689). Petitioner acknowledged tension with the Victim, but Petitioner claimed he did not know him well and the two never fought. (App. 641, 689). However, Banks' statement to police indicated Petitioner referred to the Victim as a "pussy," stated he did not like the Victim, and Petitioner beat up the Victim before. (App. 689). Upon seeing each other on January 16, 2010, Petitioner and Thomas exchanged threats. (App. 640). Afterwards, Petitioner left Vineyard Crossing to complete his marijuana sales. (App. 644-45).

Later that day, Petitioner encountered his friend Devan Bailey ("Bailey") at a gas station. Bailey was with Derrick Diamond ("Diamond"), and Quinton Emerson ("Emerson"), who drove the trio around in a silver/gray pickup truck. (App. 474). Bailey asked if Petitioner could provide him with any marijuana. (App. 644-45). Petitioner indicated he could, but first required a ride to his house. (App. 646, 692). Petitioner wanted to stop at his house first to retrieve his pistol. (App. 646, 695). After Petitioner retrieved his gun from his house, Bailey, Emerson, and Diamond took Petitioner back to Banks' house in Vineyard Crossing. (App. 694-95).

After dropping Petitioner off at Banks' house, Bailey called Petitioner asking for a cigar. (App. 647). Though either Emerson or Diamond could legally purchase a cigar, (App. 170, 204-

05, 912), Petitioner told Bailey to return to Banks' house for a cigar, because he was uncomfortable allowing Bailey to obtain one illegally. (App. 647). When the trio returned, Bailey instructed the driver, Emerson, to stop in front of the Victim's house two doors down from where they dropped Petitioner off previously. (App. 479). At the time, the Victim was sitting with Andina Lee ("Lee") in his car in the driveway. (App. 121). Lee testified the truck blocked the driveway when it was parked behind them. (App. 121). Bailey got out of the truck and called Petitioner to tell him he was outside. (App. 182, 215-17, 647, 698). The Victim left his car and spoke to Bailey. (App. 215-17). Petitioner then emerged from Banks' house and saw the Victim and Bailey talking. (App. 699). The Victim did not make any gestures or raise up his fists, and Petitioner could not hear what he was saying. (App. 701). Petitioner advanced towards the Victim and Bailey, armed with his pistol. (App. 648, 700). Petitioner then "racked" his gun to show it was loaded and pointed it at the Victim's head. (App. 217, 219). As Petitioner was approaching the area, Petitioner claimed the Victim saw Petitioner and "went toward him." (App. 648, 702). Petitioner did not know the Victim to carry a gun, and saw nothing that day to indicate otherwise. (App. 641, 702).

Lee testified as Petitioner approached the scene, he said, "Yes, you bitch ass n****r. This is exactly what I want." (App. 123-24). Lee testified she saw Petitioner walk toward the Victim, pull the gun out, and point it directly at the victim. (App. 124). Emerson testified when Petitioner was face to face with the Victim, he "racked the gun" to demonstrate that it was loaded and ready to fire and pointed it at the Victim's head. (App. 217, 219). Eventually, the Victim hit Petitioner, knocking the gun from his hand. (App. 124, 704-07). Petitioner and the Victim then fought. (App. 124, 219, 707). Lee grabbed the gun but later threw it down. After forcing the victim to the ground, Petitioner punched the Victim in the head, face, and chest until the Victim no longer fought back.

(App. 707-08). Diamond testified after the fight, Petitioner told Bailey to "Bust him!" in reference to the Victim. (App. 184).

After Petitioner won the fight, Petitioner claimed he stood up and he saw Lee toss the gun to the ground. (App. 650, 708). Petitioner claimed he picked up the gun, turned, and fired the gun, hitting the Victim. (App. 651-52). Lee testified she was helping the Victim get up from the ground in order to retreat into the house when Petitioner pointed the gun and shot the Victim. (App. 129-133). The Victim died that afternoon from a single gunshot wound to his abdomen. (App. 427-38).

Petitioner left, running through backyards where he threw the gun away before getting a ride to a friend's house. (App. 653-54, 712-14). Later that day, Petitioner met with Bailey to "get their story straight." (App. 490, 718). Petitioner eventually fled to Atlanta, where he was later apprehended and brought back to South Carolina for trial. (App. 716-17, 722).

During Petitioner's post-conviction relief hearing, Petitioner's trial counsel Eleanor Cleary testified she did not object to the State's request that inferred malice be charged to the jury, and she was not anticipating this request, but she did argue to the court the accident charge covered the fact Petitioner acted lawfully. (App. 1297). She further testified she had no reason for failing to request a more complete malice instruction, which would include permissive inference language, but she was likely aware of case law which mandated a permissive instruction if an inferred malice instruction was given, as she read every case in preparation for trial. (App. 1297). She elaborated she was aware of the permissive inferences discussed in *Belcher*[1], but she did not have a reason for objecting to the State when the state asked for the instruction, or when it was given to the jury. (App. 1298). She testified at that point during the trial, she was overwhelmed, still focused on accident, and missed the objection. (App. 1298). She also testified she believed she should have

[1] *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009).

entered an exception to the court's charge because the theory of the case was that the death of the victim was the result of a mistake. (App. 1298-99). Therefore, Counsel believed any instruction on malice would have been crucial to the jury's decision. (App. 1299). She further testified an inferred malice instruction would have allowed the jury to infer malice from the facts and circumstances surrounding Petitioner's case. (App. 1299). Counsel acknowledged the record reflects she repeatedly reargued certain points of her defense, including the elements of self-defense and lack of malice. (App. 1304). Counsel also testified she did not recall discussing inferred and express malice with Petitioner prior to trial. (App. 1300).

STANDARD OF REVIEW

The standard of review for PCR matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, 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). Only pure questions of law will be reviewed *de novo* without deference to the lower court. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the PCR court when controlled by an error of law. *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief court properly determined Petitioner did not meet his burden of establishing counsel was constitutionally ineffective for failing to object to the jury charge because the jury charge was correct. The charge included a sufficient general permissive inference instruction, and substantial evidence of Petitioner's express malice was presented at trial. The Court properly instructed the jury it could find malice based on the facts and circumstances of the case. Accordingly, this Court should deny certiorari.

A. Applicable Law

The Sixth and Fourteenth Amendments to the United States Constitution guarantees the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984); *Taylor v. State*, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Petitioner bears the burden of proving the allegations in his PCR action, and when alleging counsel was constitutionally ineffective, he must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result." *Strickland*, 466 U.S. at 686. In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*, 466 U.S. 668.

First, Petitioner must prove counsel's performance was deficient. *Id*.; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* (citing *Strickland*, 466 U.S. at 690). Petitioner must

overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Strickland*, 466 U.S. 668.

Moreover, *Strickland* does not require a finding of ineffectiveness merely for deviation from a rigid rule of representation. Rather, *Strickland* requires the Petitioner to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 697. The function of the PCR court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance" required of a criminal defense attorney." *Id.* at 690. With respect to prejudice, a Petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. *Harrington*, 562 U.S. 86.

"Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). An ineffective assistance of counsel claim can function as a way to escape rules

of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversarial process the right to counsel is meant to serve. *Strickland*, 466 U.S. at 689–690. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S at 690.

In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. *See Wong v. Belmontes*, 558 U.S. 15, 20 (2009) (stating in evaluating the question of whether the jury would have returned a different verdict s it is necessary to consider *all* the relevant evidence the jury would have had before it); *Strickland*, 466 U.S. at 693. Instead, *Strickland* asks whether it is "reasonably likely" the result would have been different. *Id.* at 696. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." *Id.* at 693, 697. The likelihood of a different result must be substantial, not just conceivable. *Id.* at 693; *Harrington*, 562 U.S. 86. "In determining whether the Petitioner has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial." *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) (citing *Strickland*, 466 U.S. at 695-96 (explaining the court must analyze how individual errors of counsel affect the important factual findings in a particular case)); *see also Belmontes*, 558 U.S. at 26 ("[T]he reviewing court must consider all the evidence – the good and the bad – when evaluating prejudice. . . .").

B. Analysis

The post-conviction relief court properly found Petitioner failed to meet his requisite burden of establishing constitutionally ineffective assistance of counsel because the trial court correctly charged the jury that malice may be inferred from the facts and circumstances of the case, where an *Elmore* charge was not required and the language of the instruction was only a slight deviation of *Elmore,* and because Petitioner cannot establish he suffered prejudice or the likelihood of a different outcome due to the substantial evidence of express malice presented at trial

i. Permissive Inference Instruction

Petitioner alleges his Sixth and Fourteenth Amendment rights to effective counsel were violated when trial counsel failed to object to the lack of a permissive inference instruction required by *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983). As an initial matter, Petitioner's argument of the necessity in producing a verbatim *Elmore* charge, and the alleged ineffectiveness of counsel for failing to do so, misapprehends the function and scope of the *Elmore* charge.

As discussed in *State v. Mattison*, 276 S.C. 235, 237, 277 S.E.2d 598, 599 (1981), *overruled by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), the Court's historical concern of an implied malice instruction was that it created an irrefutable presumption which shifted the burden of proof to the defendant. The Court in *Mattison* thus suggested a more appropriate instruction on implied malice be developed to "deal with the evidentiary nature of the presumption and that the implication does not require the jury to infer malice but only permits it." *Id.* at 238, 277 S.E.2d at 600. In that case, the suggested instruction specifically addressed the presumption or inference of malice stemming from the use of a deadly weapon. *Id.* As such, the inference of malice that arises from "use of a deadly weapon" was the relevant catalyst to create a more detailed permissive inference instruction. Thus, in circumstances absent the instruction "a jury may infer malice from use of a deadly weapon," there is no additional need for an evidentiary instruction about weighing

or determining whether the presumption or inference is present as one fact to be considered by the jury.

Thereafter, in *State v. Elmore*, 279 S.C. 417, 421, 308 S.E.2d 781, 784 (1983), *overruled by State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019), the Court again addressed the issue of a jury instruction of the presumption of malice from use of a deadly weapon. The Court agreed the instruction of implied malice constituted a mandatory presumption rather than merely a permissive inference. *Id.* at 421, 308 S.E.2d at 784. To cure the presumption, the Court suggested the following charge:

> The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts, are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

Id.

The Court thereafter cautioned that "only slight deviations from this charge will be tolerated." *Id*. The "*Elmore*" instruction is comprised of a two-part, coupled instruction, created specifically to reinforce the fact that finding malice from use of a deadly weapon was merely a permissive inference allowed to the jury. The emphasis of the secondary permissive inference instruction serves the purpose of combatting the potential danger of mandatory presumptions and burden shifting when the first portion of the instruction is given in isolation. In that vein, the second component of the instruction (the permissive inference) is necessary and must be present verbatim only when the first component of the instruction (the implied malice from use of a deadly weapon) is charged.

The *Elmore* instruction is inapplicable to this case because no implied malice instruction related to the use of a deadly weapon was provided to the jury; therefore, the verbatim secondary

permissive inference instruction in *Elmore* was not necessary. As such, the post-conviction relief court properly found trial counsel was not ineffective for failing to request a more general permissive inference instruction, because the circumstances did not require greater detail of the nature of a permissive inference in the charge. Any additional language would be superfluous in the absence of a charge allowing implied malice from use of a weapon.

In 2009, the Court held in *Belcher* that the "use of a deadly weapon" implied malice instruction was no longer good law in South Carolina. 385 S.C. at 600, 685 S.E.2d at 804. There, the Court determined instructing a jury "malice may be inferred by the use of a deadly weapon" was confusing and prejudicial where evidence was presented that would reduce, mitigate, excuse or justify the homicide. *Id.* at 611, 685 S.E.2d at 810. The Court ultimately found the instruction was erroneous and prejudiced Belcher because sufficient evidence of self-defense was presented to the jury such that "it [was] entirely conceivable the only evidence of malice was Belcher's use of a handgun." *Id.* at 612, 685 S.E.2d at 810. The Court further determined both the standard implied malice charge, and general permissive inference instruction remain valid, but did not mandate any particular instruction. Instead, the Court held "the permissive inference charge *concerning the use of a deadly weapon* remains a correct statement of the law where the only issue presented to the jury is whether the defendant has committed murder. . . . " *Id.* at 612, 685 S.E.2d at 810. (Emphasis added).

Petitioner cites to *Gibson v. State*, 416 S.C. 260, 786 S.E.2d 121 (2016), in support of his argument that trial counsel's failure to object to the lack of the *Elmore* permissive inference instruction constituted deficient conduct. However, *Gibson* is distinguishable from Petitioner's case because the jury charge provided in *Gibson* explicitly included the implied malice from the use of a deadly weapon instruction. *Id.* at 263 ("Inferred malice may also arise when the deed is

done with a deadly weapon."). There, the Court held the instruction to be insufficient pursuant to *Elmore* because the charge omitted *Elmore's* suggested permissive inference language following the implied "from use of a deadly weapon" malice instruction. Moreover, the Court held that the language "depends upon the facts and circumstance of each case" read in the jury charge did not cure the error of the omission in *Gibson*, because that language was in reference to whether an instrument had been used as a deadly weapon, not in the charge on the inference of malice.

Ultimately, in determining whether Gibson was prejudiced by trial counsel's deficient performance, the Court weighed the significance of the presumption to the jury against the other evidence of malice considered by the jury without the erroneous malice charge. *Id.* at 265, 786 S.E.2d 144 (citing *Lowry v. State*, 376 S.C. 499, 657 S.E.2d 760 (2008)). The Court held that because little other evidence of malice was presented at trial aside from the use of a firearm, Gibson was prejudiced by the jury charge. *Id.*

It is important to note that in contrast to *Gibson*, in Petitioner's case, the jury did not receive the instruction that malice may be inferred from use of a deadly weapon. At trial, the parties agreed to omit the instruction involving implied malice from the use of a deadly weapon pursuant to *Belcher*. (App. 750). At the conclusion of the charge conference, the judge provided the parties with a complete copy of her intended jury charge to review. The next morning before closing arguments, the assistant solicitor made the following request:

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

(App. 811)

The language was later specified:

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

(App. 812)

The judge later instructed the jury:

> The defendant is charged with murder. The state must prove beyond a reasonable doubt that the defendant killed another person with malice aforethought.
>
> Malice is a legal term implying wickedness and excluding a just cause or excuse. The term malice indicated a formed purpose and design to do a wrongful act under the circumstances that exclude any legal right to do it. It is something which springs from wickedness, from depravity, from a heart devoid of social duty and fatally bent on mischief. Malice may be expressed or implied.
>
> Malice is hatred, ill-will, or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or under circumstances that the law would infer an evil intent.
>
> Malice aforethought does not require that malice exist for any particular time before the act is committed, but malice must exist in the mind of the defendant just before and at the time of the act at the time the act is committed. Malice may be conceived at the very moment the fatal blow is given. Therefore, there must be a combination of the previous evil intent and the act.
>
> Malice aforethought may be express or inferred. There terms, "express" and "inferred," do not mean different kinds of malice, but merely the manner in which malice may be shown to exist. That is either by direct evidence or by inference from the facts and circumstances which are proved. Express malice is shown when a person speaks words which express hatred or ill-will for another or when the person prepared beforehand to do the act which is later accomplished. For example, lying in wait for a person or any other act of preparation going to show that the deed was within the defendant's mind would be express malice.
>
> **Malice may be inferred from conduct showing a total disregard for human life. Malice be may inferred from the facts and circumstances surrounding the case.**
>
> Malice does not necessarily impart ill-will towards the individual injured, but signifies rather a general malignant recklessness of the lives and safety of others,

> or a condition of mind which shows a heart regardless of social duty and fatally bent on mischief.

(App. 947– 49) (Emphasis added).

As the instruction on implying malice from use of a deadly weapon was not provided, a verbatim *Elmore* charge was not required. The purpose of the permissive inference instruction is to combat the risk of prejudice from the erroneous implied malice charge, which carries the risk that the jury will misinterpret the "inferred malice" instruction as a presumption. Here, that risk did not exist.

Moreover, an erroneous instruction alone is insufficient to warrant reversal. "Errors, including erroneous jury instructions, are subject to harmless error analysis." *Id.* at 611, 685 S.E.2d at 809. In making a harmless error analysis, the inquiry is not what the verdict would have been had the jury been given the correct charge, but, "whether the erroneous charge contributed to the verdict rendered." *State v. Middleton,* 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) (quoting *State v. Kerr*, 330 S.C. 132, 145, 498 S.E.2d 212, 218 (Ct. App. 1998)).

In this case, the use of the phrase "may be inferred from the facts and circumstances surrounding the case" sufficiently indicates that a finding of implied malice is merely a permissive inference for the jury. The language "may" coupled with an indication to consider the facts and circumstances surrounding the case as directly related to the instruction of malice cures any risk of an irrefutable presumption in this case and is consistent with the essence of the language recommended in *Elmore*. While the Court in *Belcher* determined that the standard implied malice and general permissive inference instructions remained valid, it did not mandate use of the general permissive instruction language in all matters. As such, the PCR court properly found trial counsel was not ineffective for failing to request the general permissive inference language, which is only necessary to qualify the "arise" language contained in the "deadly weapon" part of the charge. This

instruction was inapplicable to the facts of the case, and the language provided to the jury was only a slight deviation of the *Elmore* charge and maintained the substance of the permissive nature of an implied malice finding. The charge was in essence no different than a circumstantial evidence charge. "The substance of the law is what must be charged to the jury, not any particular verbiage." *See State v. Adkins*, 353 S.C. 312, 318-19, 577 S.E.2d 460, 464 (Ct. App. 2003). The PCR court properly denied relief on these grounds, and this Court should likewise deny certiorari.

ii. Evidence of Express Malice

Furthermore, the PCR Court properly found Petitioner failed to demonstrate he suffered prejudice from the phrasing of this instruction because substantial evidence of Petitioner's malice was presented at trial. Malice is defined as hatred, ill-will, or hostility toward another person; a wrongful intent to injure another person indicating a wicked or depraved spirit intent on doing wrong; a formed purpose and design to do a wrongful act without legal justification or excuse. *State v. Fennell*, 340 S.C. 266, 531 S.E.2d 512 (2000); *State v. Harvey*, 220 S.C. 506, 68 S.E.2d 409 (1951) *overruled on other grounds by State v. Torrence*, *supra* (as used in the description of murder, malice does not necessarily import ill-will toward the individual injured, but signifies a general malignant recklessness toward the lives and safety of others, or a condition of the mind that "shows a heart regardless of social duty and fatally bent on mischief.").

As provided in the jury instructions: "[e]xpress malice is shown when a person speaks words which express hatred or ill-will for another or when the person prepared beforehand to do the act which is later accomplished." (App. 949). The facts presented at trial present several examples of Petitioner's expressed malice sufficient to support the jury's verdict. As the PCR Court properly noted, evidence was presented that Petitioner did not like the Victim, referred to the Victim as a "pussy," and claimed he'd beaten the Victim up before. (App. 689; 1376). The

Court noted when Petitioner approached the scene of his friends having a conversation with the Victim, he said, "Yes, you bitch ass n****r. This is exactly what I want." (App. 123-24; 1379). *See Sheppard v. State*, 357 S.C. 646, 663, 594 S.E.2d 462, 471 (2004) (approving a jury charge that "malice can be expressed where there is manifested a deliberate intention to violently and unlawfully take the life of another human being. **For instance with words."**) (emphasis added). The record additionally contains testimony that when Petitioner walked toward the Victim and spewed these expletives, he pulled his gun out and pointed it directly at the Victim. (App. 124).

Emerson testified when Petitioner was face to face with the Victim, he "racked the gun" to demonstrate it was loaded and ready to fire and Petitioner pointed it at the Victim's head. (App. 217, 219). The PCR Court noted it was uncontroverted that Petitioner and Victim physically fought immediately prior to the shooting, with Petitioner "winning" the fight. Evidence presented at trial showed Petitioner punched the Victim in the head, face, and chest until the Victim no longer fought back. (App. 707-08). Evidence was additionally presented that Petitioner told Bailey to shoot the Victim. (App. 184; 1276) ("Bust him!"). Although, Petitioner claimed he picked up the gun (which was discarded on the ground), turned, and fired the gun, accidentally hitting the Victim. (App. 651-52). Other testimony established others helped the Victim off the ground when Petitioner pointed the gun and shot the Victim. (App. 129-133).

Petitioner's contention that absolutely no express evidence of malice existed in this case is incorrect. Petitioner exhibited hostile and aggressive behavior towards the Victim prior to his death, including using offensive language, and pointing a loaded gun at Victim's face for doing nothing other than speaking to Petitioner's friends. Petitioner then proceeded to fight the Victim, gained the upper hand, and rather than leaving the scene, fatally shot the Victim while the Victim was attempting to get off the ground and retreat. In determining whether Petitioner was prejudiced

by the instruction, the Court must determine whether the instruction contributed to the verdict based on all the evidence presented to the jury. *Gibson*, 416 S.C. at 265, 786 S.E.2d at 124 (citing *Rose v. Clark*, 478 U.S. 570 (1986); *Plyler v. State*, 309 S.C. 498, 424 S.E.2d 477 (1992)). To accomplish this, the Court weighs the significant of the presumption to the jury against the other evidence of malice considered by the jury. *Id.* (citing *Lowry*, 376 S.C. 499, 657 S.E.2d 760 (2008)).

As discussed above, the erroneous malice instruction related to use of a deadly weapon was not presented to the jury in Petitioner's case. Petitioner could not have been prejudiced by an instruction which was not provided. Further, the evidence and testimony presented at trial are more than sufficient to support a finding of malice. Ultimately, Petitioner failed in his burden to establish that trial counsel was ineffective, and that trial counsel's alleged failure to request a more specific inference instruction contributed to the verdict such that it overwhelmed the clear evidence of malice presented to the jury. The PCR court properly denied relief on these grounds, and this Court should likewise deny certiorari.

CONCLUSION

As the PCR court correctly found Petitioner failed to meet his burden of establishing ineffective assistance of counsel, this Court should deny certiorari. Should this Court grant certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

YASMEEN E. KLEIN
Assistant Attorney General
S.C. Bar No. 104681

By: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

October 18, 2021