STATE OF SOUTH CAROLINA	) IN THE COURT OF COMMON PLEAS
	)
COUNTY OF RICHLAND	) FIFTH JUDICIAL CIRCUIT
	)
	) Case No. 2005-CP-40-5071
Eric Lee Rife, 285810,	)
	) BOOK RH PAGE 319
Applicant,	)
	) **ORDER**
v.	)
	)
State of South Carolina,	)
	)
Respondent.	)

This matter is before the Court on the petition of Eric Lee Rife, by and through his attorneys, for Post-Conviction Relief from his conviction of the crime of murder. After considering all testimony and memoranda before it, the Court issues the following findings of fact and legal rulings. For the reasons set forth below, Rife's petition is GRANTED.

PROCEDURAL HISTORY

This matter comes before the Court on Application for Post-Conviction Relief filed October 5, 2005 by Applicant Eric Lee Rife. Respondent filed its Return to the application on February 27, 2006. The Court heard evidence in this matter at a hearing held on April 16, 2007 at the Richland County Courthouse. The Applicant was present at the hearing and was represented by Richard A. Harpootlian, Esquire. The Respondent was represented by Robert L. Brown of the South Carolina Attorney General's Office.

STANDARD OF REVIEW

The burden is on the applicant in a post-conviction proceeding to prove the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985), cert. denied, 474 U.S. 1094, 106 S.Ct. 869, 88 L.Ed.2d 908 (1986). To establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case. Custodio v. State, 373 S.C. 4, 9, 644 S.E.2d 36, 38 (2007); citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

ANALYSIS

I. By failing to object to the burden-shifting comments of the Solicitor and the burden-shifting jury charge of malice, Petitioner's counsel failed to render reasonably effective assistance

Petitioner's counsel failed to render assistance consistent with prevailing professional norms, first, by failing to object to the assistant solicitor's prejudicial misstatements of law as to "malice" during the State's closing argument, and second, by failing to object the Court's unconstitutional burden-shifting jury charge of "implied malice".

"[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. ... The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Strickland v. Washington, supra, at 690, 104 S.Ct. at 2066. "There is a strong presumption that counsel rendered adequate

assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 72 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). "When evaluating the reasonableness of counsel's conduct, 'the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.'" Id.; quoting Strickland v. Washington, 466 U.S. at 690, 104 S.Ct. at 2052.

During the State's closing argument, the assistant solicitor made several misstatements regarding the law of "implied malice". Some examples include:

> So implied, you can imply malice by several factors. And one factor, ladies and gentlemen, is simply arming yourself with a deadly weapon. **That is enough to imply malice**, by possessing a deadly weapon.
>
> ***
>
> **Right there we can imply malice** by him possessing that gun and returning it and aiming it another human being and blowing – shooting the fatal blow.
>
> ***
>
> No reasonable person, no reasonable juror, no reasonable citizen would ever think a couple of friends could get in a little tousle on the couch and that one person would go and elevate the situation between friends by getting a loaded .40 caliber gun and coming back to the situation. He knows that. **He knows no reasonable juror, no reasonable citizen would think that is lawful**.
>
> ***
>
> **[Malice] is doing something knowing it is wrong.**
>
> ***
>
> Eric Rife didn't go to his closet, ladies and gentlemen, and get a gun for protection. He got that gun for punishment. He was mad. He didn't arm himself in fear, he armed himself because he was angry.

R. p. 532, ll. 20-23; R. p. 533, ll. 9-11; R. p. 605, ll. 13-20; p. 609, ll. 23-24; p. 610, ll. 3-7 (emphasis supplied). The proper description of the law of "implied malice" has been thoroughly litigated in our courts. In State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983)(overruled on other grounds), our state Supreme Court enunciated a model text to be used in charging juries on the law of implied malice. That charge is as follows:

> 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.

Elmore at 421, 308 S.E.2d at 784.

The Court continued, "[w]e caution the bench that hereafter only slight deviations from this charge will be tolerated."

The Elmore opinion was issued in the wake of Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979), in which the United States Supreme Court found that charges that instruct the jury to raise a conclusive presumption as to any element of a crime, or that instruct the jury to raise a rebuttable presumption, violate the requirement of the Due Process Clause of the Fourteenth Amendment that the state must prove each element of a criminal offense beyond reasonable doubt. "[A] conclusive presumption ... would 'conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime,' and would 'invade [the] factfinding function' which in a criminal case the law assigns solely to the jury." Id. at 523, 99 S.Ct. at 2459. "A presumption which, although not conclusive, had the effect of shifting the burden of persuasion to the defendant, would have suffered from similar infirmities." Id. at 524, 99 S.Ct. at 2459. The comments of the Deputy Solicitor during the State's closing both go beyond those approved by the South Carolina Supreme Court and threaten to shift the burden of proof of the element of malice from the State to the Defendant. Yet counsel for the Petitioner registered no objections to this facet of the State's argument.

In considering the effect of the deputy solicitor's comments on the soundness of the Petitioner's conviction, it must be conceded that if "the assistant solicitor's minor deviations constituted error, such error would have been rendered harmless in this case when the trial judge correctly charged the jury on those matters." State v. Patrick, 289 S.C. 301, 345 S.E.2d 481 (1986) (overruled on other grounds). In this case, however, the trial court compounded the solicitor's error by misstating the law of implied malice during its jury charge. The trial court charged the law as follows:

> Now, **malice is implied** where one intentionally and deliberately does an unlawful act which he or she then knows to be wrong and in violation of their duty to another and where no excuse or legal provocation appears.

R. p. 623, ll. 5-8 (emphasis supplied).

Petitioner argues that the phrase "malice is implied" instructed the jury to raise a conclusive presumption against him upon a finding of predicate facts in violation of Sandstrom and Elmore. The United States Supreme Court has considered the charge at issue here, and explicitly ruled it to be unconstitutional. Yates v. Evatt, 500 U.S. 391, 111 S.Ct. 1884 (1991). The Yates Court wrote:

> We think a reasonable juror would have understood the unlawful act presumption to mean that upon introduction of evidence tending to rebut malice, the jury should consider all evidence bearing on the issue of malice, together with the presumption, which would still retain some probative significance.

Yates at 401-2, 111 S.Ct. at 1892.

While the Respondent concedes that the "malice is implied" charge was unconstitutional, it argues that any error was corrected because the judge's charge also contained constitutional summations of the law. Both in the initial charge, and again

when the jury asked to be recharged on the issue of malice, the trial judge did in fact use a proper Elmore charge. R. p. 624, ll. 7-11; p. 650, ll. 11-15. However, the inclusion of a constitutional charge alongside an unconstitutional one is not sufficient to correct the error. An identical set of circumstances were presented in the case of State v. Peterson. There, our state Supreme Court addressed the issue thusly:

> In the present case, the trial judge followed the erroneous instructions with the Elmore charge. Instead of replacing the unconstitutional malice charge, the *Elmore* charge was simply added to the end of the charge. Merely superimposing correct instructions over erroneous ones serves only to foster prejudice and confusion.

State v. Peterson, 287 S.C. 244, 335 S.E.2d 800 (1985) (overruled on other grounds).

Here, as in Peterson, the trial court's inclusion of correct charges alongside the incorrect charges likely lead to prejudice and confusion, and did not sufficiently cure any constitutional infirmities of the charge as a whole.

Petitioner's defense counsel do not dispute that they never raised an objection to the Court's erroneous charge of "implied malice". Eric Bland Dep. p. 8, l. 1 – p. 9, l. 22; Gregory Harris Dep. p. 15, l. 23 – p. 16, l. 20. At the same time, Defense counsel now agree that the Court's charge was erroneous under the law applicable at the time of trial. Eric Bland Dep. p. 9, l 14 – 22; Gregory Harris Dep. p. 12, l. 23 – p. 13., l. 12. However, "[b]ecause 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; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland v. Washington, supra, at 690, 104 S.Ct. at 2055.

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Defense counsel have confirmed, however, that their failure to object to the trial court's erroneous jury charge was not the result of a strategic decision. Eric Bland Dep. p. 10, l. 23 – p. 11, l. 5. Furthermore, our courts have consistently held that the failure of trial counsel to object to an unconstitutional jury charge constitutes denial of effective assistance of counsel. See Tate v. State, 351 S.C. 418, 425-26, 570 S.E.2d 522, 526; ("Because the presumption of malice charges were erroneous charges to which counsel did not object on the ground that they constituted unconstitutional burden shifting instructions, counsel's performance was deficient."); Taylor v. State, 312 S.C. 179, 439 S.E.2d 820 (1993) (Holding that counsel was deficient in failing to object to a jury charge which shifted the burden of proof to the defendant).

The failure of Petitioner's defense counsel to object both to the State's misstatements of the law as to implied malice and to the Court's burden-shifting charge on the same issue constitutes a lack of effective assistance of counsel. The law governing these issues at the time of trial was clear that any statement of the law shifting the burden of proof of malice from the State to the Defendant was constitutionally violative. Furthermore, Petitioner's defense counsel have articulated no strategic purpose for failing to object to these constitutional violations. As such, the Court finds that the failure of counsel to object to the State's and the Court's misstatement of the law fell below prevailing professional norms and constituted a denial of reasonably effective assistance of counsel.

II. There is a reasonable probability that, but for the errors of Petitioner's counsel, the result of the trial would have been different

Having found Petitioner's counsel ineffective regarding their failures to object, the Court must now analyze whether counsel's ineffectiveness prejudiced the Petitioner.

"The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, supra, at 694, 104 S.Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); citing Strickland v. Washington, supra.

Our courts have been very reluctant to find burden-shifting instructions harmless. "[A]n unconstitutional burden shifting instruction is not reversible error if the error was harmless beyond a reasonable doubt." Tate v. State, 351 S.C. 418, 426, 570 S.E.2d 522, 526 (2002); citing Rose v. Clark, 478 U.S. 570, 106 S.Ct. 3101 (1986); Plyler v. State, 309 S.C. 408, 424 S.E.2d 477 (1992). "This Court must determine whether there is a reasonable likelihood that the jury applied the instruction in a way that violates the Constitution." Tate, supra; citing Boyde v. California, 494 U.S. 370, 110 S.Ct. 1190 (1990); State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000), cert. denied, 532 U.S. 1027, 121 S.Ct. 1974, 149 L.Ed.2d 766 (2001). "An erroneous malice instruction is harmless if, based on all of the evidence presented to the jury, it did not contribute to the verdict." Tate, supra; citing Plyler v. State, supra. "In making this determination, the Court must review the evidence the jury considered in reaching its verdict and weigh the probative force of the evidence against the probative force of the presumption standing alone." Tate, supra; citing Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992), cert. denied, 507 U.S. 927, 113 S.Ct. 1302, 122 L.Ed.2d 691 (1993).

While there is evidence in this case from which a reasonable jury could have found that Rife acted with the requisite malice to be found guilty of murder, the

"probative force" of that evidence is not overwhelming. The undisputed evidence produced at trial established that Ian Williams, while high on crack cocaine and Xanax, physically assaulted Eric Rife in Rife's own apartment. R. p. 220, ll. 5-8; p. 223, ll. 20-21; p. 227, ll. 9-11; p. 155, ll. 8-14; p. 339, l. 21-p. 340, l. 7. Rife broke free of Williams' grasp and immediately retrieved a gun from his bedroom and returned to the living room. R. p. 223, ll. 24-25; R. p. 236, ll. 18-19; R. p. 314, ll. 5-8. Rife then told Williams to get out of the apartment. R. p. 236, l. 19. Williams then said to Rife, "Well, you know, what are you going to do? Are you going to shoot me?" R. p. 236, ll. 21-23. Then, according to Rife's testimony, Williams lunged at him and Rife fired his pistol. R. p. 440, ll. 13-23.

The issue of whether Rife acted with malice was therefore very much in question. Given the evidence presented at trial, there is a reasonable likelihood that the probative force of the presumption that "malice is implied from the doing of an unlawful act...." caused the jury to apply the instruction in a way that violates the Constitution. The State continually argued in its closing statements that the jury should imply malice from Rife's "doing of an unlawful act without just cause or excuse" – i.e., merely arming himself with a pistol. R. p. 532, ll. 20-23; R. p. 533, ll. 9-11; R. p. 605, ll. 13-20; p. 609, ll. 23-24; p. 610, ll. 3-7. This misstatement of the law was only compounded by the Court's unconstitutional burden-shifting charge—a combination of errors that leaves the present Court with insufficient confidence in the outcome of the trial.

Given the lack of overwhelming evidence that Rife acted with malice aforethought, the heavy reliance by the State on the argument that the jury should imply that Rife acted with malice merely because he armed himself, and the improper jury

charge, there is a reasonable likelihood that the charge contributed to the verdict. Therefore it cannot be said that Petitioner's failure to object to the State's misstatements and the Court's charge were harmless errors beyond a reasonable doubt in this case. As such, under the second prong of the Strickland v. Washington analysis, there is a reasonable probability that, but for the errors of Petitioner's counsel in failing to register the proper objections, the result of Petitioner's trial would have been different.

CONCLUSION

For the foregoing reasons, this Court finds that Petitioner was denied his Sixth Amendment right to effective assistance of counsel as the result of: first, Petitioner's defense counsel failing to object both to misstatements of the law by the State and an unconstitutional burden-shifting jury charge; and second, the result of these errors likely contributing to Petitioner's guilty verdict of murder. Therefore, Petitioner Rife's application for post-conviction relief is hereby GRANTED.

AND IT IS SO ORDERED this 16 day of July, 2007.

L. Casey Manning
Presiding Judge
Fifth Judicial Circuit

_____, South Carolina.