APPEAL NUMBER: CR-2023-0511

IN THE ALABAMA COURT
OF CRIMINAL APPEALS

JASON DEWANE GREEN,

***Appellant*,**

v.

STATE OF ALABAMA,

***Appellee*,**

On Appeal from the Circuit Court
Of Franklin County, Alabama
CC11-295.61

ORAL NOT ARGUMENT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

The appellant does not believe oral argument is necessary to a clear understanding of the issues raised in this appeal.

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STATEMENT OF THE CASE AND FACTS

The Franklin County Grand Jury returned a 3 Count indictment against the appellant. The appellant was charged with intentional murder in count 1, alleging the appellant shot the victim through the mouth in violation of Ala. Code §13A-6-2. CR 157

The appellant was charged with possession of marijuana 2nd degree in count 2. Count 3 charged the appellant with possession of drug paraphernalia. CR 157

The jury returned a verdict of guilty to the lesser included offense of manslaughter on January 29, 2019. The appellant was also convicted of possession of marijuana in the 2nd degree and possession of drug paraphernalia. CR 157

The Trial Court sentenced the appellant to 20 years for the manslaughter conviction and 1 year for the marijuana and drug paraphernalia charges to run concurrently with the manslaughter sentence. CR 158

According to the Alabama Department of Forensic Science's report, the

blood of the alleged victim tested positive for ethanol, THC, hydrocodone, methamphetamine, amphetamine, and phentermine. The alleged victim's mental health records indicated she had a history of several suicidal attempts or gestures. CR 158

The alleged victim died of a single gunshot wound to the mouth. CR 158 The gun was found next to her body. The tips of her fingers of her left hand were on the gun and the gun barrel was near her eye. A partially burned cigarette was found in between the index and middle finger of her right hand. CR 158

In the 911 call, the appellant, Jason Green, admitted to the dispatcher he and the alleged victim had been in an argument and he handed the gun to the alleged victim and dared her to do it. He handed her the gun after she said fuck this, fuck you, fuck it all. CR 158

The appellant filed his Petition for Rule 32 Relief From Conviction or Sentence and supporting Brief with the Franklin County Circuit Court on or about May 20, 2021. Amendments to the appellants brief were also filed. CR 158

Franklin County Circuit Court Judge Brian Hamilton held an

evidentiary hearing on the appellant's petition on December 20, 2022. CR 158

The trial court issued an order on or about June 16, 2023, holding that the claims of ineffective assistance of counsel raised by the appellant were without merit and denied the appellant's petition. CR 216-223

This appeal follows.

STATEMENT OF THE STANDARD OF REVIEW

Initially, *"[w]hen reviewing a circuit court's denial of a Rule 32 petition, this Court applies an abuse-of-discretion standard.*" Clemons v. State, 123 So.3d 1(Ala. Crim. App. 2012) quoting *Shouldis v. State, 38 So. 3d 753, 761 (Ala. Crim. App. 2008).*

However, "*when the facts are undisputed and an appellate court is presented with pure questions of law, that court's review in a Rule 32 proceeding is de novo."* Clemons v. State, 123 So.3d 1 (Ala. Crim. App. 2012) quoting *Ex parte White, 792 So. 2d 1097, 1098 (Ala. 2001).*

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. **The trial court erred in its' holding that the appellant's claim of ineffective assistance of trial counsel failing to properly object to improper jury instructions regarding manslaughter, voluntary intoxication were without merit.**

II. **The trial court erred in its' holding that the appellant's claim of ineffective assistance of trial counsel failing to request an instruction pursuant to *§13A-2-4(c) and trial counsel's failure* properly object to improper jury instructions regarding causation were without merit.**

III. **The trial court erred in its' holding that the appellant's claim of ineffective assistance of trial counsel failing to request a severance of the marijuana and drug possession charges were without merit.**

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW-(CONTINUED)

IV. The trial court erred in its' denial of the appellant's claim of ineffective assistance of trial counsel by failing to timely amend the motion for a new trial to include the perjury of the state's forensic expert, Jan Johnson.

SUMMARY OF THE ARGUMENT

The trial court abused its discretion by denying and dismissing the appellant's *Rule 32* petition.

ARGUMENT

I.

The trial court erred in its' holding that the appellant's claim of ineffective assistance of trial counsel by failing to properly object to improper jury instructions regarding manslaughter, voluntary intoxication and causation were without merit.

The Appellant's claims of ineffective assistance of counsel are governed by the 2-part *Strickland* Test. "To prevail on a claim of ineffective assistance of counsel, the defendant must show (1) that his counsel's performance was deficient and (2) that he was prejudiced as a result of the deficient performance." *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "Counsel's conduct must be considered within the context of the facts of the particular case and as of the time of the alleged misconduct"'. *Morrison v. State*, 551 So.2d 435, 446 (Ala.Crim.App.1989) citing *Ex parte Baldwin*, 456 So.2d 129, 134 (Ala.1984). "To establish ineffective assistance of counsel, the appellant must show his counsel's performance fell below an objective standard of reasonableness and a reasonable probability exists that, but for

counsel's mistakes, the result of the trial would have been different. "*Wilson v. State*, 644 So.2d 1326, 1328 (Ala.Crim.App.1994); citing *Strickland v. Washington*, 466 U.S. 668, 687-688 (1984).

Reckless Manslaughter Instruction

The appellant's trial counsel objected during trial to the court instructing the jury on reckless manslaughter on grounds other than other than reckless manslaughter was not a lesser included offense under the facts of the case. Unfortunately, trial counsel did raise the variance and improper amendment to the indictment in his motion for judgment of acquittal, which was well after the return of the verdict in this case. Consequently, the issue was not preserved. *"…[A] lesser included offense charge on reckless manslaughter should be given* ***only if*** *the facts of the particular case……..would warrant the giving of such a charge*." *Hill v. State*, 507 So.2d 554, 556 (Ala.Crim.App 1986) (Emphasis Added)

In its' order issued on the appellant's Rule 32 petition, the trial court[1]

[1] The trial court judge hearing the appellant's Rule 32 petition was Hon. Brian P. Hamilton and not Hon. Terry Dempsey the trial court judge that presiding over the underlying trial at issue as he passed away prior to the Rule 32 hearing.

referenced trial counsel's deficient performance stating "[w]hile petitioner is correct that trial counsel did not raise this issue at trial and it was not properly preserved for appeal, the Alabama Court of Criminal Appeals nevertheless addressed the issue in its decision and ruled that this argument is without merit as reckless manslaughter is a lesser included offense of intentional murder. CR. 217. The appellant does agree that reckless manslaughter can be a lesser included offense of intentional murder in some cases but rather, it is not a one size fits all scenario and under the facts of the appellant's case reckless murder was not a lesser included offense of the intentional murder charge returned in the indictment. Further, the appellant's asserts that because of the errors of both his trial counsel and the trial regarding the instructing of the jury as to reckless manslaughter deprived him of the right to a fair trial and denied his rights to due process based upon the 5th, 6th, 8th and 14th amendments to the U.S. Constitution and the Ala. Constitution Article I §6 and §11 (1901).

The unwavering position of the prosecution in this matter is that the appellant intentionally killed the victim, Ms. Ledlow and thereafter

altered the scene so that it appeared as though Ms. Ledlow shot herself. The prosecution maintained their position that the appellant intentionally killed Shaw throughout the duration of the trial and even through the evidentiary hearing held on the appellant's Rule 32 petition. The prosecution stated at the hearing that the appellant "*was indicted for intentional murder, we argued that, you know, down to the very end of the case. It was argued that this was an intentional murder by the actions of Jason Green. That he shot her, and then staged it to look like a suicide. And that was [the] theory that the state went with the entire case, we presented evidence of that, and we presented everything from the officers that were there at the scene that said that the scene appeared staged, we had forensic pathologist ruled out that in her opinion the case was a homicide and not a suicide based on the nature of the trajectory of the bullet, things of that nature*." TR 17-18.

The second pathologist to testify on behalf of the state as one of their many expert witnesses was Dr. Roger Morrison. He was "*presented for that direct purpose of showing that Mr. Green was the one that killed her*

and not that she killed herself". TR 18. "***We were 100 percent intentional he did it,*** *<u>but</u> our argument was that he presented evidence based on case law that he recklessly caused the death*." TR. 18. (Emphasis added) The case law referenced here would be the cases the prosecutor attached to his requested jury instructions in documents numbered 312 and titled "Case Authority In Support of Charging The Jury With The Lesser Included Offense of Manslaughter". The authority relied by the prosecutor and subsequently by the trial court as a basis to charge the jury on reckless manslaughter are *Lewis v. State*, 474 So.2d 766 (Ala. Ct. App. 1985); *Shirah v. State*, 555 So.2d 807 (Ala. Crim. App. 1989); *Witherspoon V. State*, 33 So.3d 625 (Ala. Crim.App. 2009). The facts of this case are quite distinguishable as the appellant did not teach a juvenile to play Russian roulette, nor did he randomly shoot at cars on the highway or walk into a bar with a pistol in his hand and accidentally shoot someone.

The prosecutor has had years with which to amend the original indictment returned in the underlying case well in advance of trial, but

that didn't occur. The fact that the appellant handed Ms. Ledlow at her request, a gun located directly across from her in the coffee table coupled with the appellant daring Shaw to shoot herself. Likewise, the fact that the witnesses called from the defense and state repeated the aforementioned facts did not provide the court a sufficient basis for the instruction. This trial, as the state so clearly stated was "*100 percent intentional he did it*." TR. 18. The state's clear position is further evidenced by the specificity of the intentional murder charge contained in the indictment:

> "*The Grand Jury of Franklin County charges,*
>
> *before the finding of this indictment, Jason Dewane Green, whose name is otherwise unknown to the grand jury than as stated, did intentionally cause the death of another person, to wit: Shay Nicole Ledlow, by shooting the same victim through the mouth, in violation of 13A-6-2 of the Code of Alabama against the peace and dignity of the State of Alabama*." CR. 253

Obviously, the jury did not buy into the state's theory of the case that

the Appellant intentionally murdered Ms. Ledlow. The prosecution's request for the reckless manslaughter instruction was clearly not a reflection of their theory of the case but rather an ambush tactic sounding from a win at all cost strategy. The court erred in granting the prosecution's request to charge the jury on reckless manslaughter as a lesser included of the intentional murder charge under the facts of the case when the state at all times maintained their position that they were"*100 percent intentional he did it*." TR. 18. The reckless murder was contrary to the prosecution's theory of the case. "It is a basic tenet of Alabama law that "a party is entitled to have his theory of the case, made by the pleadings and issues, presented to the jury by proper instruction, . . . and the [trial] court's failure to give those instructions is reversible error." *Alabama Farm Bureau Mut. Ins. Service, Inc. v. Jericho Plantation*, Inc., 481 So.2d 343, 344 (Ala. 1985).'" *Ex parte McGriff*, 908 So.2d 1024 (Ala. 2004).

" If a defendant is only charged with "intentional murder" but the trial judge also charges the jury on "reckless murder", there is a distinct

possibility that the jury could find the defendant guilty of "reckless murder" rather than "intentional murder." There is a serious risk that a defendant, in this situation, could be convicted of an offense for which he was not charged and of which he had no opportunity to defend himself." *Marsh v. State,* 461 So.2d 51 (Ala. Crim. App. 1984).

This is what occurred with the appellant in the trial of this case except the jury found the appellant guilty of reckless murder and not "intentional murder". The appellant's defense prepared and presented their defense in direct response to the intentional murder which charged that the appellant did *intentionally cause the death of another person, to wit: Shay Nicole Ledlow, by shooting the same victim through the mouth, in violation of 13A-6-2.* CR 253. The indictment does not mention reckless conduct based upon the appellant providing the gun to Shaw and daring her to shoot herself. The indictment charges an intentional murder not a psychological murder. The trial court correctly defined an indictment to the jury as follows:

"Now, the indictment that I just read to you is simply a piece of

paper. It's the formal method that's used under Alabama Law or any state in the United States to inform a person that they have been charged. It gives them and their attorney or attorneys an opportunity to prepare for the case." CR 254.

In Gayden v. State, 38 Ala.App, 80 So.2d 495, Presiding Judge Carr, speaking for the Court said"

> 'The constitutional right of an accused to demand the nature and cause of his accusation is not a technical right, but is fundamental and essential to the guaranty that no person shall be deprived of his liberty except by due process of law, nor be twice put in jeopardy for the same offense.
>
> 'An indictment should be sufficiently specific in its averments in four prime aspects to afford this guaranty: (1) To identify the accusation or charge lest the accused should be tried for an offense different from that intended by the grand jury. (2) To enable the defendant to prepare for his defense. (3) That the judgment may inure to his subsequent

protection and foreclose the possibility of being twice put in jeopardy for the same offense. (4) To enable the court, after conviction to pronounce judgment on the record.

'This protection which the law furnishes to one charged with crime has not been relaxed or relented by our courts throughout its history.

'The law does not contemplate that a person charged with crime should be brought to trial and stand before the courts of our land unaware or in doubt of the nature and character of the accusation against him.'

'Indictments must always conform to the mandates of our organic law. The emphasis in our cases 'that in all criminal prosecutions, the accused has the right * * * to demand the nature and cause of the accusation' now § 6 of the Constitution of 1901--is not meaningless tautology, but one of the cornerstones of our Bill of Rights.

'We are further restrained in this case by the requirements

of the Fourteenth Amendment to the Constitution of the United States. The following utterances [50 Ala.App. 288] by our Federal courts are pertinent: 'No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.' Cole v. State of Arkansas, 333 U.S. 196, 201, 68 S.Ct. 514, 517, 92 L.Ed. 644. 'The petitioner charged that he had been denied any real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process * * *.' Smith v. O'Grady, Warden, 312 U.S. 329, 334, 61 S.Ct. 572, 574, 85 L.Ed. 859. 'An intelligent and full understanding by the accused of the charge against him is a first requirement of due process.' Bergen v. United States, 8 Cir., 145 F.2d 181, 187.

'Regardless of some ill-considered, loose expressions in some

of the cases, the law is and always has been that it is not enough to charge against a defendant a mere legal conclusion as justly inferential from facts not set out in the indictment. *United States v. Almeida*, 24 Fed.Cas. pages 775, 776, No. 14,433.

"In order to properly inform the accused of the 'nature and cause of the accusation', within the meaning of the constitution and of the rules of the common law, a little thought will make it plain, not only to the legal, but to all other educated, minds, that not only must all the elements of the offense be stated in the indictment, but that also they must be stated with clearness and certainty, and with a sufficient degree of particularity to identify the transaction to which the indictment relates as to place, persons, things, and other details. The accused must receive sufficient information to enable him to reasonably understand, not only the nature of the offense, But the particular act or acts touching which he must be prepared with his proof; and

when his liberty, and perhaps his life, are at stake, he is not to be left so scantily informed as to cause him to rest his defense upon the hypothesis that he is charged with a certain act or series of acts, with the hazard of being surprised by proofs on the part of the prosecution of an entirely different act or series of acts, at least so far as such surprise can be avoided by reasonable particularity and fullness of description of the alleged offense.' (Italics supplied.) United States v. Potter, 1 Cir., 56 F. 83, 89.

'* * * As example, if the indictment had charged that the defendant 'did commit murder,' he would be informed of the crime charged against him, but no student of the law with the slightest conception of constitutional liberty would suggest that he could be put to trial on such an indictment against his will. * * *'

The indictment in this case charges that appellant 'did commit murder', nothing more, nothing less. To this extent appellant is apprised of the charge against him but he could

not know the contentions of the state as to How he committed murder.

There is a line of cases holding that where an indictment fails to state any offense such defect must be noticed despite the absence of any attack on it in the court below. Brown v. State, 32 Ala.App. 246, 24 So.2d 450; Raisler v. State, 55 Ala. 64; Emmonds v. State, 87 Ala. 12, 6 So. 54; Gaines v. State, 146 Ala. 16, 41 So. 865; Mehaffey v. State, 16 Ala.App. 99, 75 So. 647; Jetton v. State, 29 Ala.App. 134, 195 So. 283.

At first blush it would seem that the law on this subject is in a sad state of flux. Be that as it may, these are rules of state practice and procedure. Otherwise stated, these are judge-made decisions. **When rules of state practice and procedure conflict with the due process clause of the Fourteenth Amendment, they must yield to the commandments of that Amendment**. In the words of the Supreme Court of the United States,

> **'Conviction upon a charge not made would be sheer denial of due process**.' DeJonge v. State of Oregon, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278. (Emphasis added)
>
> In Cole v. State of Arkansas, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644, the Supreme Court said: 'No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. * * *' "

Nelson v. State, 278 So.2d 734 (Ala.Crim.App. 1973). (Emphasis added)

"The policy behind the variance rule is that the accused should have sufficient notice to enable him to defend himself at trial on the crime for which he has been indicted and proof of a different crime or the same crime under a different set of facts deprives him of that notice to which he is constitutionally entitled." *Ex parte Hightower*, 443 So.2d 1272 (Ala. 1983)

"The defendant is called upon to answer only the specific charge contained in the indictment. Underwood v. State, 33 Ala.App. 314, 33 So.2d 379 (1948). "No proposition of law is more fundamental than the one requiring that the proof at trial must correspond with the material allegations of the indictment." Gray v. State, 346 So.2d 974, 978 (Ala.Cr.App.1976), cert. quashed, 346 So.2d 978 (Ala.1977); Owens v. State, supra, 46 Ala.App. at 592, 246 So.2d at 478. The Court of Criminal Appeals erred in holding that there was no fatal variance between the solicitor's complaint and the proof." *Ex Parte Hightower*

Trial counsel's performance was deficient as he failed to timely and properly object to the prosecution's request of the jury charged on reckless manslaughter as a lesser included charge of intentional murder and the subsequent charging of the trial court on reckless manslaughter. Trial counsel did not object to the reckless manslaughter instruction on the basis of a fatal variance, improper amendment, unsupported by the requesting party, the prosecutor, theory and position on the case, due process violations, complete undermining of

the appellant's constitutional right to a fair trial and other issues set forth above and how under the under the facts of this case. This was greatly prejudicial to the appellant. It was error for the trial court to find that this issue set out in the appellant's Rule 32 petition was without merit. TR. 217. Had trial counsel properly and timely objected to the prosecution's requested jury instruction on reckless manslaughter as a lesser included offense and properly preserved that issue for appeal, there is a substantial likelihood and more than a reasonable probability, that the outcome would have been different. The error of trial counsel on this issue was significant enough to have undermined the outcome of the appellant's trial. "To meet the second prong of the [Strickland] test, the petitioner' must show that there is 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. It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. The likelihood of a different result must be substantial, not just conceivable. Capote v.

State, CR-20-0537 (Ala. Crim. App. Aug 18, 2023) citing *Strickland v. Washington*, 466 U.S. 668, 687-688 (1984); and *Harrington v. Richter*, 562 U.S. 86, 112, 131 S.Ct. 770, 178 L.Ed. 2D 624 (2011).

We have said that it is not reversible error for the court to refuse an abstract charge, nor will the giving of an abstract charge which asserts a correct legal proposition operate a reversal **unless it appears that on account of the circumstances of the case and the character of the charge given it was calculated to prejudice**." *McPhearson v. State*, 271 Ala. 533, 540, 125 So.2d 709 (1961). (emphasis added) , "[W]e are not prepared to say in the case at bar that this charge was not prejudicial to the defendant. The judgment of the circuit court is reversed and the cause remanded." *McPhearson v. State*

Both prongs of the Strickland test have been met by the appellant on this issue of ineffective assistance of counsel. The prejudice endured by the appellant is significant and like entitled to relief from this Honorable Court.

Voluntary Intoxication

The trial court erred in finding that trial counsel's failure to object to the trial court's confusing and misleading voluntary intoxication instructions to the jury was without merit.

The trial court gave the following instructions on voluntary intoxication:

"Now, a person who creates a risk, but is unaware that he has created that risk solely because of voluntary intoxication acts recklessly with regard to that risk". CR. 260 The trial court's inclusion of the word "solely" was misleading and confusing to the jury. Trial counsel was ineffective by failing to timely object to this instruction and to raise it on appeal. The court's instruction was a departure from the pattern jury instruction of intoxication Ala. Code §13A-3-2(a)-(b), which states:

"*Intoxication of the defendant, whether voluntary or involuntary, may be considered by the jury whenever it is relevant to negate an element of the offense charged, such as "intent".*

However, being unaware of a risk because of voluntary intoxication

is not relevant in considering whether the defendant acted recklessly where recklessness is an element of the crime charged."

"The appellate courts of this state endorse the use of the Alabama Pattern Jury Instructions in criminal cases. *Ex parte Martin*, 548 So.2d 496, 499 (Ala.1989); *Stewart v. State*, 730 So.2d 1203, 1211 (Ala.Crim.App. 1996)..." *Ex parte McGriff*, 908 So.2d 1024 (Ala. 2004).

The record does indicate that after the court's erroneous instruction, they deliberated over the issue of intoxication in accordance to how they were instructed by the trial court. Specifically, the foreperson submitted a question to the trial court which read "[w]as there a toxicology report on Jason Green? CR. 289 When the jury returned for day two of deliberations, they requested to be reinstructed on intentional murder, reckless manslaughter and criminally negligent homicide. CR. 292-293 Trial counsel requested the trial court to read the intoxication instruction to the jury once again and trial counsel's request was denied. CR. 294-295. In its' order on the appellant's Rule 32 petition, the courted stated "[w]hen considering a trial court's jury instructions, the court must review the instructions as a whole and not in isolation."

Quoting *Holloway v. State*, 971 So.2d 729,732 (Ala.Crim. App. 2006). If we look at the trial court's re-instructing of the homicide offenses, the court charged on murder, intentional conduct, manslaughter, reckless conduct, criminally negligent homicide and criminal negligence, but not on intoxication. CR. 295-302 "The trial court's instruction essentially requires the jury to find the [appellant] guilty of being reckless if the jury finds the [appellant] was voluntarily intoxicated at the time of the offense." CR 34

The appellant was prejudiced by his trial counsel's failure to object to the trial court's instruction on voluntary intoxication and his failure to preserve that issue for appeal. Further, if we take the totality approach when reviewing the trial court's jury instructions as mentioned in the court's order on the appellant's Rule 32 petition, we see confusion of the issues, applicable law and the mental states at issue which resulted in a compromised verdict against the appellant. CR. 252-302

Both prongs of the Strickland test have been met by the appellant on this issue of ineffective assistance of counsel. The prejudice endured

by the appellant is significant and like entitled to relief from this Honorable Court.

II.

The trial court erred in its' holding that the appellant's claim of ineffective assistance of trial counsel failing to request an instruction pursuant to *§13A-2-4(c) and trial counsel's failure* properly object to improper jury instructions regarding causation were without merit.

Mental State Instruction -§13A-2-4(c) / Causation Instructions

The trial court erred in finding that trial counsel's failure to request an instruction on criminal negligence pursuant to ***§13A-2-4(c)*** and trial counsel's failure to object to the causation instructions were without merit.

Under the facts of this case coupled with the trial court's instruction of reckless manslaughter and the defense requested

instruction of criminally negligent homicide and instruction pursuant to *§13A-2-4(c)* was imperative for the jury to hear and receive to fully understand the law and mental state's at issue with regard to each homicide instruction given by the trial court. *§13A-2-4(c) state as follows:*

> *(c) If a statute provides that criminal negligence suffices to establish an element of an offense, that element also is established if a person acts recklessly, knowingly or intentionally. If recklessness suffices to establish an element, that element also is established if a person acts knowingly and intentionally. If acting knowingly suffices to establish an element, that element also is established if a person acts intentionally.* Ala. Code 13A-2-4 Construction of statutes with respect to culpability requirements (Code Of Alabama (2023 Edition)).

This specific statute addresses mental states and causation. Instructions on these matters were given in a confusing order and some of them were just plainly wrong and arguably invaded the province of the jury. After instructing the jury on murder, reckless manslaughter

and intoxication the trial court instructed the jury on concurrent cause, supervening cause and foreseeability before instructing on the lesser included charge of criminally negligent homicide. It was at this juncture that the court instructed the jury that "[i]f the defendant knowingly advanced and participated in reckless behavior **even if you do not know the identity of the person who fired the fatal shot** and the reckless behavior resulted in the death of another, then the defendant is criminally liable for the result" (emphasis added) CR. 262-263. Being that this was a prosecution for intentional murder with the State's theory being that the appellant intentionally killed Shaw and staged the scene to look like she committed suicide, the aforementioned instructions are beyond confusing and certainly misleading as it fails to completely instruct the jury on causation. "A determination as to whether the conduct of a person caused the suicide of another must necessarily include an examination of the victim's free will, which may be supervening, intervening cause sufficient to break the chain of causation." *Lewis v. State*, 474 So.2d 766 (Ala.Crim.App.1985); see also, notes to decisions and analysis of §13A-2-5, Causation. *"…[*T]he causal

link between the defendant's conduct and the victim's death was severed when the victim exercised his own free will." *Lewis.*

"On the one hand, McGriff's requests for jury instructions and objections to jury instructions were imprecise. Further, McGriff at times acquiesced in the trial judge's erroneous statements to counsel to the effect that the trial judge had instructed the jury correctly. On the other hand, McGriff's requests and objections **alerted the trial court to the importance of, and McGriff's desire for, proper and complete instructions**." *Ex parte McGriff*, 908 So.2d 1024 (Ala. 2004). (emphasis added). Trial counsel was ineffective in his failure to request an instruction pursuant to ***§13A-2-4(c)*** and also for failing to object to the trial court's misleading and erroneous instructions regarding causation. As mentioned above, it is more likely than not that the jury believed that reckless behavior required a manslaughter conviction. The appellant was prejudiced by the errors of his trial counsel and the erroneous ruling of the trial court.

"[I]t has been uniformly held that it is the mandatory duty of a trial

judge to instruct the jury orally on the different and distinguishing elements of the offense charged and that in the absence of such instructions from the court, the jury could not intelligently comply with their duty as jurors." *Miller v. State*, 405 So.2d 41, 48 (Ala.Crim..App.1981), quoting *Ex parte McGriff*, 908 So.2d 1024 (Ala. 2004).

Both prongs of the Strickland test have been met by the appellant on this issue of ineffective assistance of counsel. The prejudice endured by the appellant is significant and like entitled to relief from this Honorable Court.

III.

The trial court erred in its' holding that the appellant's claim of ineffective assistance of trial counsel failing to request a severance of the marijuana and drug possession charges were without merit.

The appellant was charged in count two (2) of the indictment with possession of marijuana in the second degree and also charged with

possession of drug paraphernalia in count three (3). The substances found at the scene were those substances that served as the basis of counts two (2) and three (3) of the indictment returned against the appellant. The appellant's trial counsel failed to request a severance of the counts two counts two (2) and three (3) from the intentional murder count of the indictment. It is undisputed that the underlying trial was regarding the intentional murder of Ms. Shaw and to this regard the prosecutor state the following at the Rule 32 hearing:

" I know you were not the presiding judge in the case so I would like to just bring up a little about the case itself. I know you have probably gone back and read everything that was provided, as well as even potentially parts of the trial transcript, but the state's theory in this case was always, as Mr. Austin eloquently put it , it never wavered. He was indicted for intentional murder, we argued that, you know, down to the very end of the case. It was argued that this was an intentional murder by the actions of Jason Green. That he shot her, and then staged it to look like a suicide. " TR 17-18

"Joinder of offenses is governed by Rule 13.3(a), Ala.R.Crim.P., which

provides, in relevant part:

> Two or more offenses may be joined in an indictment, information, or complaint, if they:
>
> " '(1) Are of the same or similar character; or
>
> " '(2) Are based on the same conduct or are otherwise connected in their commission; or
>
> " '(3) Are alleged to have been part of a common scheme or plan.'

See also, *Scott v. State*, 262 So.3d 1239 (Ala. Crim. App. 2010).

> *(a) RELIEF FROM PREJUDICIAL JOINDER. If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants, or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance, the court may order the district attorney to deliver to the court for inspection, in camera, any statements or confessions made by the defendants that the state*

intends to introduce in evidence at the trial. However, without a finding of prejudice, the court may, with the agreement of all the parties, order a severance of defendants or an election of separate trials of counts or charges. Ala. R. Crim. P. 13.4 Severance (Alabama Rules of Criminal Procedure (2023 Edition))

"*Rule 13.4(a), Ala.R.Crim.P., provides that if the defendant is prejudiced by the joinder of offenses the court may grant a severance. 'It is only the most compelling prejudice that will be sufficient to show the court abused its discretion in not granting a severance*. United States v. Perez, 489 F.2d 51, 65 (5th Cir.1973), cert. denied, 417 U.S. 945, 94 S.Ct. 3067, 41 L.Ed.2d 664 (1974). A mere showing of some prejudice is not enough.' Ex parte Hinton, 548 So.2d 562, 566 (Ala.1989); See also, Scott v. State, 262 So.3d 1239 (Ala. Crim. App. 2010).

Trial counsel was ineffective by failing to request severance of the two (2) misdemeanor drug related charges from the intentional murder charge. It is the assertion of the appellant that the spill-over effect of the drug charges had upon the jury was of the nature that would lead a

juror to conclude that if the appellant was guilty of the drug charges he must have been guilty of reckless manslaughter. The jury returned a guilty verdict on counts two and three, received a year sentence as to each count, run concurrently with the twenty (20) year sentence for the manslaughter conviction. The court erred in finding that this claim raised in the Rule 32 petition was without merit. Both prongs of the Strickland test have been met by the appellant on this issue of ineffective assistance of counsel. The prejudice endured by the appellant is significant and like entitled to relief from this Honorable Court.

IV.

The trial court erred in its' denial of the appellant's claim of ineffective assistance of trial counsel by failing to timely amend the motion for a new trial to include the perjury of the state's forensic expert, Jan Johnson.

While the jury was still convened and deliberating the district attorney, Joey Rushing learned that his forensic expert witness, Jan Johnson had committed perjury and provided false testimony. Instead of

immediately contacting the trial court and defense counsel Rushing waited until after the verdict was returned, sentencing hearing conducted and sentence imposed and the appellant had started his direct appeal before notifying the court and defense as to Jan Johnson's perjury. Trial counsel had 5 days to amend the motion for new trial, motion of judgment of acquittal and the motion to arrest judgment after the State of Alabama filed their notice under Rule 3.3 of the Rules of Professional Conduct. CR 103-105 Unfortunately, the appellant's trial counsel did not timely amend the motion for new trial, motion of judgment of acquittal and the motion to arrest judgment and the amended motions were denied by the trial court. CR 137-138

A chronology of dates of dates at issue in this argument are as follows:

1. January 15, 2019, First day of jury selection.
2. January 18, 2019, Rushing called expert forensic witness to testify at trial. CR 103
3. January 28, 2019, Rushing received an email from Jan Johnson that requested payment of $8,341.69, for her services were pro

bono and/or provided at zero cost to the state. CR 103 -107

4. January 29, 2019, the jury reached its' verdict and found the appellant guilty of Manslaughter, Possession of Marijuana, 2nd and Possession of Drug Paraphernalia.

5. February 12, 2019, Rushing responded to Jan Johnson's email dated January 28, 2019 and attached to the email copies of transcript excerpts from opening arguments and Jan Johnson's testimony which detailed the pro bono or services provided at zero that was discussed or testified about in front of the jury. CR 108-121

6. February 21, 2019, Rushing received another email from Jan Johnson's company, Forensic Pieces with a second or replacement invoice that totaled $2,538.42. CR 103-104, CR 121-123

7. February 25, 2019, the appellant was sentenced to serve 20 years on the manslaughter conviction to be run concurrently with the one (1) year sentences on the misdemeanor drug charges;

8. March 5, 2019, Rushing contacts Mr. Tripp Vickers with the Ethics Division of the Alabama State Bar. CR 104

9. April 3, 2019, Rushing again contacts Mr. Tripp Vickers with the Ethics Division of the Alabama State Bar. CR 104

10. March 20, 2019, the appellant filed a motion for new trial, a motion of judgment of acquittal, and a motion to arrest judgment.

11. March 21, 2019, the appellant filed his written notice of direct appeal in this case.

12. May 6, 2019, Rushing received an e-mai1 from Mr. Vickers requesting a return call. CR 104

13. May 7, 2019, Rushing returned Mr. Vickers phone call and "*Mr. Vickers pointed me to Ethics Opinion RO-2009-01 which discusses in detail the ethical obligations involved when HIS CLIENT has committed or intends to commit perjury. He also stated for me to review Rule 3.3(3) of the Alabama Rules of Professional Conduct which covers "Candor Toward the Tribunal" and the obligations a lawyer has in that regard. I requested that he submit his opinion to me in writing so that I could be better guided in how to handle this situation.*" CR 104

14. May 9, 2019, Rushing received the written ethics opinion of Mr.

Vickers. CR 124, 104

15. May 14, 2019, the State filed a notice under Rule 3.3 of the Rules of Professional Conduct informing this Honorable Court about the actions of the State's expert witness, Jan Johnson, that appeared to be in conflict to her testimony regarding her testifying pro-bono in this case. CR 103-105
16. May 19, 2019, appellant's motion for new trial, a motion of judgment of acquittal, and a motion to arrest judgment were denied by operation of law.
17. May 27, 2019, the appellant filed an amended motion for new trial, motion of judgment of acquittal and motion to arrest judgment in response to the state's notice filed under Rule 3.3 of the Rules of Professional Conduct regarding Jan Johnson's testimony.
18. August 16, 2019, the state filed its' motion to dismiss the appellant's amended motions filed on May 27, 2019 due to the trial court's lack of jurisdiction;
19. August 20, 2019, the trial court issued an order dismissing the

appellant's amended motions filed on May 27, 2019.

"Both the Alabama and United States Constitutions protect a citizen of this state from being deprived of life or liberty without "due process of law." Const. of Ala. of 1901, Art. I, § 6; U.S. Const., Amend XIV. The phrase "due process of law," although incapable of a precise definition, in its most basic sense encompasses the observation of that degree of fundamental fairness that is essential to our concept of justice. *Ex parte Frazier*, 562 So.2d 560 (Ala. 1989).

From the very outset of this trial the prosecution bolstered the credibility of Jan Johnson through opening arguments and through direct testimony:

Excerpt From Rushing's Opening Argument

"Then you will hear the testimony of a Jan Johnson. Now, Jan Johnson is another expert that is -- owns Forensic Pieces in Pensacola, Florida. Now, her involvement in this case is highly unusual and why I say that is, is because experts, private experts like this don't usually become involved in this case **pro bono.** CR

191 (emphasis added)

But her testimony will be that she found out about this case, I believe, from Mr. Knight at one of the conferences where he was discussing the fact and she wanted to see it. So then she agreed to do -- this is a couple of years later, but she agreed to do work on this case because she was interested in it **and wanted to make sure that justice was done in this case**. **So she has done her entire work so far in this case for free.** CR 191-192 (emphasis added)

Now, obviously in order to come here to come here, the expenses of staying, expenses of testifying, she will be paid for that, but she has not billed this office for anything up to now**, but she will be paid for testifying. I'm not, not saying she's not, but all the work she did over the last few years, she's done free of charge**. And you will see the amount of work she did as far as analyzing evidence, looking at the crime scene, doing her best to try to come up with a picture of what happened in this case and

you will get to hear from her, as well. CR 192 (emphasis added)

Excerpt From Jan Johnson's Direct Examination

Q. All right. Let me ask you this: After you found out what had been done at that time in the case, did you volunteer your services to do additional evidence analysis?

A. Yes, I did.

Q. Okay. And did you agree to take a look at the entire case after the evidence analysis took place?

A. Yes, I did.

Q. Now, at this time let me just ask you, did you ever come up with a fee as far as how much you were going to charge the DA's office and the law enforcement to take a look at this case and do the evidence analysis in this case?

A. Yes, I did.

Q . All right. What was that fee?

A. Zero. I said I would do the case pro bono.

Q. Okay.

A Which means l did not get paid.

Q. And have you ever been paid a penny on this case as of today?

A. No, sir. I think the only thing your office paid were maybe for some chemicals which was less than a hundred dollars.

Q. Okay. And, obviously, you had to have a place to stay last night since you're from out of state; correct?

A. Yes, and you did pay for that.

Q. Okay. But other than that, have you charged the office or stated anything for this as far as working on this case?

A. No, I have not.

Q. Okay. Now have you done extensive work on this case since you became aware of it?

A. Yes, I have. CR 193- 195

It is clear that the testimony given by Jan Johnson was to gain an advantage, to establish that she was more credible than the appellant's paid witnesses, the testimony also would serve to establish sympathy and empathy for Jan Johnson. The jury was lead to believe that Jan Johnson was so convinced of the appellant's guilt that she voluntarily took this case without charge and traveled all the way from Florida to

testified. That she hired a model to recreate the scene and at her own expense performed expensive forensic testing, that at her own expense she engaged in this case because she was doing it for the victim and to seek justice for the victim. That the jury should believe her because she was doing this for free. She was in effect telling the jury that I am so sure he is guilty I am working for free at great expenses that you should agree with me and convict the appellant's that the appellant's witnesses or not reliable as they are not doing it for justice or for the victim but were simply up there for money and did not care about justice for the victim. It is clear that Jan Johnson's testimony and the effect it could have on a jury was not harmless and had a significant chance to affect the jury's verdict. CR 303-558

"In keeping with our goal of adopting a standard that is clear, concise, and fundamentally fair, and with an eye toward striking the proper balance between our interest in the efficient administration of criminal justice and our interest in safeguarding the rights of the accused, we adopt the following standard, which is to be used in those cases in

which a sentence of death has not been imposed: In order to grant a motion for new trial alleging perjured testimony, the trial court must be reasonably well satisfied 1) that testimony given by a witness at trial was false; 2) that there is a significant chance that had the jury heard the truth, it would have reached a different result; 3) that the evidence tending to prove the witness's perjury has been discovered since the trial; and 4) that that evidence could not have been discovered before or during trial by the exercise of due diligence." *Ex Parte Frazier*, 562 So.2d 560, 569-570 (Ala.1989).

The testimony given by Jan Johnson was false and that the appellant could not have discovered the perjury before or during the trial. Moreover, it is abundantly clear that the prosecutor became aware of the falsity of Johnson's testimony while the trial was still going and withheld that information until a win at any cost was obtained. Trial counsel failure to timely bring this to the trial court's attention was not harmless and was prejudicial to the appellant.

"It is the jury's duty to determine the credibility of a witness and they

are instructed to that fact by the trial court. They are told they can disregard the testimony of an expert based on credibility. The determination of credibility and the evidence that affects that credibility is not harmless and is very significant. In the defendant's case the credibility of the witnesses was crucial as the entire trial was based on the credibility of the witnesses." *Ex Parte Frazier*

The crime of perjury in the first degree is defined in Ala .Code 1975, § 13A-10-101:

"(a) A person commits the crime of perjury in the first degree when in any official proceeding he swears falsely and his false statement is material to the proceeding in which it is made."

Section 13A-10-101 "limit[s] perjury to materially false statements, which is in keeping with Alabama law." Commentary to Ala.Code 1975, §§ 13A-10-101 through 13A-10-103 at 402, and cases cited therein. "To constitute perjury, the matter falsely sworn to must be material to the issue in controversy. *McDaniel v. State*, 13 Ala.App. 318, 69 So. 351[, cert. denied, 193 Ala. 678, 69 So. 1018 (1915)]. And the material matter

sworn to must be false or it is not the subject of legal perjury. *Ikner v. State,* 600 So.2d 435 (Ala. Crim. App. 1992).

"A statement is 'material,' regardless of the admissibility of the statement under the rules of evidence, if it could have affected the course or outcome of the official proceeding. It is no defense that the declarant mistakenly believed the falsification to be immaterial. Whether a falsification is material in a given factual situation is a question of law." *Ikner v. State*, 600 So.2d 435 (Ala. Crim. App. 1992),

Ala .Code 1975, § 13A-10-100(2). "Regardless of the scope of the proceeding in which testimony is given, ... the test of materiality is essentially whether a truthful answer would have aided the inquiry." *Ikner v. State*, 600 So.2d 435 (Ala. Crim. App. 1992).

"'A false statement is not material unless it is ' 'capable of influencing the tribunal on the issue before it." *Ikner v. State*, 600 So.2d 435 (Ala. Crim. App. 1992).

"[T]he knowing use of material false evidence by the state in a criminal

prosecution does violate due process. Giglio v. United States, 405 U.S. 150, 153, 92 S.Ct. 763, 766, 31 L.Ed.2d 104, 108 (1972) ; Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173 1177, 3 L.Ed.2d 1217, 1221 (1959) ; Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 341–42, 79 L.Ed. 791, 794 (1935) ; Skipper v. Wainwright, 598 F.2d 425, 427 (5th Cir.) (per curiam), cert. denied, 444 U.S. 974, 100 S.Ct. 469, 62 L.Ed.2d 389 (1979). This rule applies equally when the state, although not soliciting perjured testimony, allows it to go uncorrected after learning of its falsity. Giglio, 405 U.S. at 153, 92 S.Ct. at 766, 31 L.Ed.2d at 108 ; Napu[e], 360 U.S. at 269, 79 S.Ct. at 1177, 3 L.Ed.2d at 1221. In addition, '[i]t is of no consequence that the falsehood [bears] upon the witness' credibility rather than directly upon [the] defendant's guilt.' Napue, 360 U.S. at 269, 79 S.Ct. at 1177, 3 L.Ed.2d at 1221 (quoting People v. Savvides, 1 N.Y.2d 554, 557, 136 N.E.2d 853, 854, 154 N.Y.S.2d 885, 887 (1956)); see Giglio, 405 U.S. at 154, 92 S.Ct. at 766, 31 L.Ed.2d at 108." Williams v. Griswald, 743 F.2d 1533, 1541 (11th Cir. 1984).

"To prove a Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), violation [or a Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), violation], the petitioner must show that: (1) the State used the testimony; (2) the testimony was false; (3) the State knew the testimony was false; and (4) the testimony was material to the guilt or innocence of the accused. Williams v. Griswald, 743 F.2d [1533] at 1542 [(11th Cir. 1984)].

Additionally, the prosecutor emphasized all the competing and conflicting experts were charging fees. During cross-examination the prosecutor elicited testimony indicating defense expert witness Chris Robinson was going to make somewhere between $5,500.00 and $6,000.00 for his services. When defense expert witness Dr. John Goff testified during cross-examination the prosecutor elicited testimony indicating he $4,000.00 for his services. During defense expert witness Paul Kish'ss testimony the prosecutor elicited on cross-examination that he would be paid $15,000 for his services. CR 186-187

" '[A] conviction obtained through use of false evidence, known to be

such by representatives of the State, must fall under the Fourteenth Amendment....' *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

"Justice Black stated in *In re Michael*, 326 U.S. 224, 227, 66 S.Ct. 78, 79, 90 l.Ed. 30 (1945), that "[a]ll perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth. Therefore, it cannot be denied that it tends to defeat the sole ultimate objective of a trial." Irrespective of this fundamental concept, the Court of Criminal Appeals concluded that *Frazier* was not entitled to a new trial." *Ex parte Frazier*, 562 So.2d 560 (Ala. 1989).

"Lest the point be missed here, we reiterate that certain rules of evidence were formulated (and will continue to be formulated in the future), and other procedures and safeguards were built into our judicial framework (and will continue to be built into it), to ensure that those individuals who, because of their alleged criminal acts, stand to lose their lives or liberty will receive a fair trial." *Ex parte Frazier*, 562 So.2d 560 (Ala. 1989).

"... The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Scott v. State*, 262 So.3d 1239 (Ala. Crim. App. 2010)

Both prongs of the Strickland test have been met by the appellant on this issue of ineffective assistance of counsel. The prejudice endured by the appellant is significant and like entitled to relief from this Honorable Court.

CONCLUSION

For the reasons set out in the foregoing brief the judgment of the trial court must be reversed.

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CERTIFICATE OF SERVICE

I hereby certify that I have filed the foregoing with the Clerk of the Court using the Alabama Judicial System electronic filing system which will send notification of such filing to those parties of record who are registered for electronic filing, and further certify that those parties of record who are not registered for electronic filing have been served by mail by depositing a copy of same in the United States mail, first class postage prepaid and property addressed to the following addresses on this the 4th day of October, 2023.

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/s/ Nickolas Heatherly

Nickolas R. Heatherly

CERTIFICATE OF COMPLIANCE

I certify that this Brief complies with requirements set forth in Ala. R. App. P. 28(j)(1). According to the word-count function of Microsoft Word, this Brief contains 9,908 words in its entirety. I further certify that this Brief complies with the font requirements set forth in Ala. R. App. P. 32(a)(7). The Notice of Appearance was prepared in the Century Schoolbook font using 14-point type. See Ala.R.App.P.32(d).

/s/ Nickolas Heatherly

Nickolas R. Heatherly