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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable D. Craig Brown, Circuit Court Judge
Honorable G. Thomas Cooper, Jr., Circuit Court Judge

App. Case No.: 2023-00085

Johnnie Walker Gaskins, Petitioner,

vs.

State of South Carolina, Respondent.

AUSTIN PETITION FOR WRIT OF CERTIORARI

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I. STATEMENT OF THE ISSUES

A. As a result of the record and PCR counsel's admitted failures in her representation on the PCR Application at issue, this Court should vacate the Order of Dismissal and grant a new post-conviction relief hearing.

B. The lower court erred for failing to find ineffective assistance of counsel and resulting prejudice when counsel failed to ensure that the trial court gave the proper malice instruction and failed to properly preserve the matter for appellate review.

II. STANDARD OF REVIEW

In a Post Conviction Relief appeal, great deference is given to the lower court's findings of fact but deference is not given to conclusions of law. *Smalls v. State*, 810 S.E.2d 836 (2018). The existence of "any evidence" of probative value is sufficient to uphold the lower court's ruling on findings of fact. *Webb v. State*, 281 S.C. 237, 314 S.E.2d 839 (1984). Questions of law are reviewed *de novo*, and the appellate court "will reverse the decision of the PCR court when it is controlled by an error of law." *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

III. STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Richland County Clerk of Court. Petitioner was indicted during the July 2008 term of the Richland County Grand Jury for two counts of murder (2008-GS-40-1626; -3948), three counts of assault and battery with intent to kill (ABWIK) (2008-GS-40-1629; -1631; -1632), and use of a firearm during the commission of a violent crime (2008-GS-40-1627).

On October 19-23, 26-27, 2009, Petitioner proceeded to trial in front of the Honorable L. Casey Manning and a jury. Petitioner was represented by Joseph M. McCulloch, Jr., Esquire, and Kathy R. Schillaci, Esquire. Petitioner was found guilty as indicted. The Honorable L. Casey Manning sentenced Petitioner to concurrent terms of life for each count of murder. Petitioner

was sentenced to consecutive terms of twenty years for each count of ABWIK, and a consecutive term of five years for the one count of use of a firearm during the commission of a violent crime.

A timely direct appeal was filed and perfected by Tara Dawn Shurling, Esquire. On July 3, 2013, the South Carolina Court of Appeals affirmed Petitioner's convictions and sentences. *State v. Gaskins*, Op. No. 2013-UP-304 (S.C. Ct. App. filed July 3, 2013). A Petition for Rehearing was filed on January 18, 2013. An Order denying the Petition was issued by the South Carolina Court of Appeals on August 6, 2013.

On January 6, 2013, a Petition for Writ of Certiorari was filed in the South Carolina Supreme Court. An Order denying the Petition was issued on August 6, 2014. The Remittitur was issued on August 15, 2014.

On May 27, 2015, Petitioner filed an Application for Post Conviction Relief with the Richland County Clerk of Court. On September 11, 2015, David K. Allen, Esquire, was appointed to represent Petitioner. On October 1, 2025, Respondent filed a Return. On June 27, 2015, Respondent filed a Return and Motion for More Definite Statement. On January 29, 2016, an *Ex Parte* Order for Funding to obtain a private investigator was issued. An Order of Substitution appointing Aimee J. Zmroczek, Esquire, was entered on July 25, 2016.

On July 18, 2017, an evidentiary hearing was conducted at the Richland County Courthouse in front of the Honorable G. Thomas Cooper, Jr. Petitioner was present and represented by Aimee J. Zmroczek, Esquire. Respondent was represented by Jessica E. Kinard, Esquire. Petitioner, through counsel, made a verbal Amendment of his Application and called Joseph M. McCulloch, Jr., Esquire, and Tara Dawn Shurling, Esquire, to the stand. Petition introduced four exhibits.

At the conclusion of the hearing, the court gave both parties thirty days to submit proposed Orders. On October 6, 2017, an Order of Dismissal was issued, which was filed and mailed to counsel on October 10, 2017. No appeal was filed.

On April 8, 2022, Petitioner filed an Application for Post Conviction Relief. The State submitted a Return on August 19, 2022. On November 14, 2022, Petitioner, through counsel, filed an Amendment, which stated the following:

> Applicant, through counsel, would move to amend his Application, as addressed below. Pursuant to Rule 15(b), SCRCP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.
>
> In addition to the information provided in response to question eleven on his Application, Applicant would add the following:
>
> (a) Applicant's counsel failed to provide him notice of the entry of the Order of Dismissal, failed to file a Motion under Rule 59, SCRCP, due to the Order omitting the matter of the Court sustaining the State's objection to a late amendment and/or expert witness, and failed to timely file an appeal. PCR Transcript pp. 90-96, 138-145.
>
> (b) Following the evidentiary hearing, Applicant was under the belief that further proceedings were going to take place regarding the matter of the late amendment and/or expert regarding video evidence. PCR Transcript pp. 90-96, 138-144.
>
> In addition to the response provided to question nineteen on his Application, Applicant would add the following: A belated appeal of prior PCR Application or whatever relief the Court deems proper.

An evidentiary hearing was conducted on November 14, 2022 at the Richland County Courthouse in front of the Honorable D. Craig Brown. Petitioner was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by D. Russell Barlow, II, Assistant Attorney General. During the hearing, Petitioner took the stand and called Aimee J. Zmroczek, Esquire. Prior to the testimony, Petitioner introduced two exhibits.

At the conclusion of the evidentiary hearing, the Honorable D. Craig Brown found that Petitioner was entitled to a belated appeal pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991) and discussed the other relevant matters with counsel for both parties. App. pp. 1599-1606. The court instructed Petitioner's counsel to submit an Order, and she obtained permission to obtain the hearing transcript. App. pp. 1606-1607. After the submission of the proposed Order, the Honorable D. Craig Brown issued an Order on Application for Post-Conviction Relief Granting Belated Appeal Pursuant to *Austin v. State* on February 15, 2023, which was filed on February 28, 2023. App. p. 1615. Respondent filed a Motion Pursuant to Rule 59(e) and 60(b), SCRCP, with Exhibits. App. p. 1630. On March 24, 2023, Petitioner, through counsel, filed a Response to Motion Pursuant to Rule 59(e) and 60(b), SCRCP. App. p. 1668. On April 26, 2023, the Honorable D. Craig Brown issued an Order Denying Motion Pursuant to Rule 59(e) and 60(b), SCRCP, which was filed on May 2, 2023. App. p. 1679. A timely Notice of Appeal was filed, from which this Petition follows.

IV. ARGUMENT

A. As a result of the record and PCR counsel's admitted failures in her representation on the PCR Application at issue, this Court should vacate the Order of Dismissal and grant a new post-conviction relief hearing.

1. Summary of the 2022 Hearing

After Respondent provided the procedural history detailed above, Petitioner's counsel was asked to clarify the allegations on which Petitioner was moving forward. Counsel responded that based upon discussions with Respondent she filed an Amendment that morning, which was previously provided to Respondent, to clarify and further support the allegations made in the Application. Therefore, Petitioner was going forward on the Application and the Amendment filed on November 14, 2022. App. p. 1561. Respondent informed the court that the State

objected to the amendment since it was a collateral attack on prior PCR counsel's performance and not appropriate under *Austin*[1]. App. p. 1562. Before calling Petitioner's first witness, counsel moved the orders providing for funding and substitution of counsel in the prior PCR Application in as Petitioner's Exhibit one and two, without objection. App. pp. 1562-1563.

When Aimee Zmroczek, Esquire, took the stand, she recalled taking over Petitioner's PCR per the substitution order and that funding had been obtained for Mr. Watkins via the order issued prior to her representation. App. pp. 1564-1565. Referencing the prior evidentiary hearing transcript, counsel was asked if she could explain what was going on with the amendments the morning of the hearing. App. pp. 1565-1566. She explained that she had discussed the matter with Respondent prior to that morning, and she was led to believe the timing of the amendments were "no big deal." App. p. 1566, lns. 7-13, p. 1578. She recalled it turning into a big deal when Respondent "started to object to all of the things that, that we had previously talked about." App. p. 1566, lns. 7-17. On cross-examination, she recalled multiple discussions about a continuance even if her requesting a continuance was not reflected in the record. App. p. 1578.

Regarding her questioning of Mr. McCulloch about the video, she explained that she was attempting to lay the foundation to call the expert, Mr. Watkins, about his work in the case. App. p. 1567. When asked about when she brought up the matter of Mr. Watkins and leaving the record open if needed, she explained again that she was caught off guard by Respondent claiming lack of notice and need for time to obtain an expert, so she proposed leaving the record open since testimony had already been taken. App. pp. 1567-1568. She agreed that at that point the matter of Mr. Watkins' testimony was left to be further discussed and/or proffered after Ms.

[1] *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991).

Shurling's testimony. App. pp. 1568-1569. She acknowledged that she questioned Ms. Shurling about the video evidence. App. p. 1569.

Turning to what occurred after Ms. Shurling's testimony, counsel explained that she more aggressively tried to make her argument that she needed to at least proffer Mr. Watkins' testimony because she was confused by the court's ruling that differed from his initial ruling. App. p. 1569. She also explained "obviously it's not reflected in the transcript because it doesn't pick up movements and things like that I'm, I'm trying to make this argument to tell him that I need to proffer and he's shaking his head no." App. p. 1569, lns. 19-23. When asked about the court comments that the matter fell outside the purview of PCR, she responded that she did not agree, but she was trying to find a way to preserve the issue once she could tell he was not going to let it in. App. p. 1570. She explained that she was prepared to proffer and was very confused when the court issued his final ruling before the proffer was conducted. App. pp. 1571-1572. She acknowledged that she tried to figure out a way to preserve the issue and mentioned filing under Rule 29, but she later determined that it did not fall under Rule 29, SCCrimP. App. pp. 1572-1573, 1579. She concluded that she was boxed in and trying to find a way out, but she found the issue to be proper for PCR and attempted to raise it via her handwritten amendment. App. p. 1572, lns. 13-24, pp. 1573-1574.

On cross-examination when asked about her withdrawal of the issue, she explained that she was confused then and confused when reviewing the transcript now, but she did not intend to withdraw it. App. pp. 1579-1580. On redirect, she explained that her comments about not being able to PCR a PCR attorney demonstrated her attempts to preserve the matter for appellate review. App. pp. 1582-1583. She also agreed that the video issue was a primary issue in the PCR case. App. p. 1584, lns. 8-10.

When asked about the court's instruction to submit a proposed order, she responded that she had checked her notes and did not have a record of submitting a proposed order. App. p. 1574, lns. 6-10. She explained that she was trying a bunch of cases at the time and likely missed a deadline. App. p. 1574, lns. 12-14. She also explained that her busy trial docket was the reason that "neither the 59 nor the eventual appeal was filed." App. p. 1574, lns. 14-17.

Regarding the Order of Dismissal, she stated that she did not have independent knowledge of receiving it, and she should have checked the public index. App. pp. 1575, 1580. She concluded: "So, either way it's on me." App. p. 1575, ln. 11. When asked about being contacted by Petitioner or his family, she said it was "certainly possible" that she led them to believe it was still pending and likely discovered her error when she checked the public index following such contact. App. p. 1575, lns. 12-21.

As to the content of the Order of Dismissal, she agreed that the matter involving the video and Mr. Watkins was not addressed in the order and that she should have filed a Rule 59, SCRCP, motion to ensure the completeness of the order. App. p. 1576. She also agreed that under *Marlar*[2] and its progeny, it was her duty as PCR counsel to file a Rule 59 Motion to ensure that all issues were addressed in the order and preserved correctly. App. p. 1576. She agreed that it was her duty to timely file an appeal, which was a duty she did not fulfill. App. p. 1576. She also testified that Petitioner wanted an appeal and never instructed her not file one on his behalf. App. p. 1577.

When Petitioner took the stand, he acknowledged his familiarity with the instant Application and subsequent Amendment. App. p. 1585. He also agreed that he had reviewed the same with counsel and understood the relief he was requesting. App. p. 1586.

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[2] *Marlar v. State*, 375 S.C. 407, 653 S.E.2d 266 (2007).

Regarding his prior PCR Application, he recalled meeting with and talking on the phone with Mr. Watkins after Ms. Zmroczek took over his case. App. pp. 1588-1589. He further recalled Mr. Watkins informing him about the issue he was working on regarding the video evidence and the possibility of the video being edited. It was his understanding that the matter was going to be addressed at his PCR hearing as a primary issue. App. pp. 1589, 1591.

Turning to the day of his PCR hearing, he remembered seeing the handwritten amendment for the first time that morning and being unaware of any concern over Mr. Watkins testifying. App. p. 1590. As it began being discussed, Petitioner recalled thinking the hearing was going to be continued to give the State time to prepare. App. p. 1591, lns. 16-19. When asked about the later discussion of the issue, he explained that he understood that the court was giving the State more time and a final ruling would not be made until that was done. App. p. 1592, lns. 3-9, p. 1594. He agreed that upon recently reviewing the evidentiary hearing transcript he now understood that he was not correct about the court's ruling. App. p. 1595. On cross-examination, he responded that he did not understand at the hearing that Ms. Zmroczek withdrew the issue. App. p. 1598.

He testified that he did not receive a copy of the Order of Dismissal from Ms. Zmroczek, and he was delayed in reaching out to her due to the passing of his father. App. pp. 1592-1593. He recalled it being difficult to reach her and when he did it was his understanding his case was still pending, which he took to mean they were still waiting on the State to address the video issue. App. p. 1593. He explained that he found out that his PCR was denied by accessing the public index. Thereafter, he asked his mother to reach out to current counsel. App. pp. 1593-1594.

Regarding the filing of a Rule 29, SCRCrimP, he recalled that counsel mentioned it in the courtroom, but it was never discussed further. App. p. 1593. He testified that he never heard from Ms. Zmroczek about filing an appeal on his behalf and he never informed her that he did not want an appeal filed. App. pp. 1595-1597. He also testified that he would have wanted Ms. Zmroczek to ensure that all issues were properly addressed in the Order of Dismissal. App. p. 1596. When asked what relief he was seeking, he said: "To, to let me get my appeal back and preserve this issue." App. p. 1596, lns. 12-15, p. 1597.

2. Argument

As a result of the record and PCR counsel's admitted failures in her representation on the PCR Application at issue, this Court should vacate the Order of Dismissal and grant a new post-conviction relief hearing. Following the 2022 hearing, the Honorable D. Craig Brown held:

> This Court also agrees with counsel that Applicant's case is not simply a matter of whether Applicant is entitled to an *Austin* appeal. Hearing p. 45, lns, 22-24, pp. 45-51. Here, Ms. Zmroczek readily admitted that she did not have an independent recollection of receiving or reviewing the Order of Dismissal. She also stated that she would have filed a Rule 59, SCRCP, motion if she had reviewed the Order for the purposes of preserving the issue regarding the video evidence and expert and ensuring the completeness of the Order. She acknowledged that it was her duty to file such a motion, but she did not in this case. Additionally, this Court finds credible Applicant's testimony that he was under the belief that further action was going to be taken regarding the issue with the video evidence and expert and that he was led to believe that his PCR Action was still pending until he independently discovered otherwise.
>
> This Court is constrained by the existing precedent to grant relief on counsel's failure regarding the first PCR Action beyond her failure to file an appeal, but this Court is highly concerned about these failures. Admittedly, counsel provided a handwritten Amendment on the day of the hearing, attempted to call an expert on Applicant's primary issue without providing adequate notice to the State, failed to request a continuance as noted by the PCR court, failed to submit a proposed order and failed to ensure that the issue regarding the video evidence was properly ruled upon and preserved for appellate review.[3] Therefore, this Court wants to make it abundantly clear that the Applicant has raised these issues via

[3] Counsel also had confusion on whether she withdrew the issue and failed to file a timely Rule 29(b), SCRCrimP, motion as she indicated to the court she would do.

> Amendment and at the evidentiary hearing and it is being addressed herein to ensure that the additional admitted failures of counsel in representing Applicant on his first PCR Application are properly preserved for review by the appellate court and/or in a federal action in whatever way maybe proper.

App. pp. 1628-1629.

Sadly, via Rule 59, SCRCP, Motion, Respondent asked the court to strike this portion of the Order and not address the failures of counsel that were testified to under oath at the evidentiary hearing. Fortunately, the lower court denied Respondent's motion that was rift with unverified information and exhibits that were not properly presented at the evidentiary hearing nor were addressed in cross-examination of prior PCR counsel. Respondent's position, the performance of counsel, and the inadequate Order of Dismissal are all demonstrative of why this Court must repeatedly address the failure of the attorneys and the courts for drafting, issuing and not amending inadequate and incomplete orders. See *Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992) (Remanding and explaining the Court's concern with PCR orders that fail to address the issues raised at a PCR hearing, which result in depriving parties of rulings on the issues, make review by the appellate court and the workload of the appellate court more difficult, and require remand for new hearings and/or orders.); *Reese v. State*, 425 S.C. 108, 820 S.E.2d 376 (2018) (Granting the request for remand by both parties as result of the "patent inadequacies" of the PCR court's order.); *Fishburne v. State*, 427 S.C. 505, 832 S.E.2d 584 (2019) (Remanding for the PCR court to make adequate findings of fact and conclusions of law regarding an unaddressed PCR claim despite a Rule 59, SCRCP, motion not being filed.), *Marlar v. State*, 375 S.C. 407, 653 S.E.2d 266 (2007) (Holding a post conviction relief judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented).

As addressed above, counsel candidly admitted that she filed a handwritten Amendment the day of the hearing and was precluded from calling an expert witness to address Petitioner's

primary issue regarding the video evidence, yet any mention of the video and expert are absent from the Order of Dismissal. Additionally, counsel admitted that she should have moved for a continuance and/or ensured that the matter regarding the expert and video evidence was preserved and properly addressed. Here, the record of the 2017 evidentiary hearing, resulting Order of Dismissal and counsel's testimony at the 2022 evidentiary hearing establish that Petitioner has not received one full bite of the apple. *See Poston v. State*, 339 S.C. 37, 528 S.E.2d 422 (2000), *Wilson v. State*, 348 S.C. 215, 218, 559 S.E.2d 581, 582-83 (2002).

As the record of the 2017 hearing reflects, the State objected to and requested a continuance due to the Amendment submitted via email at 7:00 a.m. the morning of Petitioner's evidentiary hearing. App. pp. 1364-1365. After deeming the amendments general in nature, the PCR court determined that the State should be able to proceed and a continuance was not needed. App. p. 1365. After the court cautioned PCR counsel about filing late amendments, PCR counsel responded:

> I appreciate the latitude, Your Honor. And I do apologize. I was in trial, and it was completely my fault. So I have been speaking with the trial attorney though, so I think he should probably be aware of some of the issues that we were discussing.

App. pp. 1364, lns. 17-25. Immediately thereafter, PCR counsel called trial counsel to the stand. App. p. 1366. While trial counsel was on stand, he acknowledged that an investigator for Petitioner was in his office reviewing the file yesterday or the day before. App. p. 1374. He responded to counsel's questions regarding the video evidence and later responded to counsel's request for him to talk about the video. App. pp. 1388-1389, 1401-1403. When asked what he did to challenge the video, he responded that he did not retain an expert and did not have a basis to believe or suspect it was altered. App. p. 1403, lns. 11-18.

Following trial counsel's testimony, PCR counsel informed the court she intended to call Christopher Watkins as her next witness. App. p. 1447. She explained that Mr. Watkins was retained by prior PCR counsel and he had done work on the "video aspect of it." App. p. 1447, lns. 12-15. She further explained that she had provided information regarding his work to the State over the break and understood if the record may need to be left open to allow the State time to respond. App. pp. 1447-1448. After the court questioned counsel about Mr. Watkins' work in the case and the purpose of calling him, the State objected and referenced the late notice of the amendments and this "new testimony." App. pp. 1448-1449, p. 1448, lns. 24-25.

When the court asked for further clarification of the purpose of calling Mr. Watkins, counsel responded that he was being called to show that the video was altered and not presented to the defense in the way it was received. She also explained that she had questioned trial counsel about it and he did not seem to realize the video had been altered. App. p. 1449, ln. 18- p. 1450, ln. 25. After continued discussion with the court, counsel admitted that she had just received Mr. Watkins' report the night before. App. pp. 1450-1453. The court sustained the State's objection, but he indicated that he would review the video *in camera* to see if he could understand what counsel was trying to say about it and further address it. App. p. 1453, ln. 15 – p. 1454, ln. 1.

After appellate counsel took the stand, PCR counsel also asked her about the video evidence in the following manner:

> Question: And I know that you sat here for Mr. McCulloch's testimony. And I asked him several times, because the search warrant relied on the video; there were several witnesses testified to the video, and the jury asked to see the video again during deliberations.
>
> And as you sit here today, is that something you just can't remember whether or not you had seen or examined the video or if you realized that it wasn't the complete video?
>
> Answer: I believe I testified earlier that I have no present recollection of whether or not I saw it. I know that there were no specific objections or motions

> made with reference to it. If there had been, I could tell you with certainty that I would have seen it.
>
> Looking back, it is something I very well might have done, but I don't independently recall. Remember.

App. p. 1480, ln. 9 – p. 1481, ln. 2.

Following appellate counsel's testimony, counsel revisited the matter of calling Mr. Watkins. App. p. 1496. PCR counsel stated: "And if the Court is not inclined to accept it – I think that I have to proffer because of the new case out there how about now you can't PCR a PCR attorney." App. p. 1496, lns. 11-14. After the court indicated he was thinking about a proffer himself, further discussion was had regarding calling Mr. Watkins and the issue of the video evidence. App. pp. 1496-1500. Thereafter, the State restated their objection due to the late notice and discussion was had about calling Mr. Watkins for limited testimony. App. pp. 1500-1501. PCR counsel again admitted that the late notice was her fault due to being in a trial, and the court noted that she could have moved for a continuance. App. p. 1501. From there, a discussion ensued about after-discovered evidence and filing a motion under Rule 29(b), SCRCrimP, which resulted in counsel withdrawing her request to call Mr. Watkins. App. pp. 1502-1503. As the record reflects, the matter of the video evidence and/or Mr. Watkins is a absent from the Order of Dismissal and counsel did not file any subsequent motions on Petitioner's behalf.

Here, the record of the 2017 and 2022 hearing establish that PCR counsel failed Petitioner prior to, during and after the 2017 evidentiary hearing. As a result of counsel's admitted failures, Petitioner was deprived the proper execution of the Uniform Post-Conviction Relief Act and his one full bite of the apple. *See Poston v. State*, 339 S.C. 37, 528 S.E.2d 422 (2000), *Wilson v. State*, 348 S.C. 215, 218, 559 S.E.2d 581, 582-83 (2002).

In this Court rests the power to continue to right the wrongs that are being committed in the application and execution of the Uniform Post-Conviction Procedure Act, specifically S.C. Code Ann. § 17-27-80 (1976). As a result of the inadequacy of prior PCR counsel and the court's order, counsel's need of a continuance and Petitioner's issue involving the video evidence was not properly litigated nor is it in the record for proper appellate review. Petitioner submits that the record of both of his evidentiary hearings and the orders issued thereafter establish that this Court should vacate the Order of Dismissal filed on October 10, 2017 and remand for a new post-conviction relief hearing whereby all of Petitioner's meritorious issues can be properly addressed.

B. The lower court erred for failing to find ineffective assistance of counsel and resulting prejudice when counsel failed to ensure that the trial court gave the proper malice instruction and failed to properly preserve the matter for appellate review.

As reflected in the Order of Dismissal and transcript, PCR counsel emailed Respondent and the PCR court a handwritten document listing amended allegations on the morning of the evidentiary hearing. App. p. 1364-1365, 1519. In relevant part, the document listed the following:

> Trial Attorney
> Fail to properly prepare /call witnesses/ utilize evidence
> Fail to preserve obvious issues for appeal
> 7) Did not argue jury charges / Belcher – fail to request charges

App. p. 1506.

At the evidentiary hearing, trial counsel was asked about the decision in *Belcher*[4] that had come out shortly before trial. App. p. 1430. He responded that he applauded himself for "having

[4] *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), overruled by *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019) (Holding that regardless of the evidence presented at trial, the court should not instruct a jury that malice may be inferred from the use of a deadly weapon.).

read the advances," and raising the matter to the trial court. App. p. 1431, lns. 2-14. He agreed, as was reflected in the transcript, that the trial court asked what he wanted taken out of the charge, and the court would be happy to give it to him. App. pp. 1022-1024, 1431. Trial counsel could not recall providing the court with proposed written jury instruction, but he explained that it was generally his practice to submit requested instructions. App. pp. 1431-1432.

When appellate counsel was on the stand at the evidentiary hearing, she explained that it was her habit to dissect jury instructions very carefully when considering issues to raise on direct appeal. App. p. 1461, lns. 7-11. She further explained that improper jury instructions amount to "an interesting and almost disproportionate number of reversals on direct appeal." App. p. 1461, lns. 12-16. Regarding the jury instructions, she testified that she noted that trial counsel did not "renew his objection to the *Belcher* issue when given the opportunity." App. p. 1461, lns. 23-25.

In discussing the jury charges at trial, counsel raised *State v. Belcher*,[5] and the court responded: "I'm a simple person. Tell me what you want and I will be glad to give it to you." App. p. 1022, lns. 7-23. Thereafter, counsel began to address the *Belcher* case and the court cut him off and stated:" No, tell me what you want taken out of this particular charge is what I am saying." App. p. 1022, ln. 24 – p. 1023, ln. 2. Counsel asked the court to omit "that paragraph," and the discussion from there is somewhat confusing, but it appears that the State did not oppose the request and the court agreed to give the charge as requested by counsel. App. pp. 1023-1024.

During the jury charge, the trial court gave a convoluted instruction on express and inferred malice. App. pp.1039-1042. During the malice charge, the court charged the jury that malice could be implied or inferred from the use of a deadly weapon. App. pp. 1040-1041. In

[5] *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), overruled by *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019).

concluding his charge on malice, the court stated: "And of course, a gun is a deadly weapon. Just throw that in there." App. p. 1091, 12-14.

In *Belcher*, this Court reasoned that the inference of malice from the use of a deadly weapon is a "half-truth" because "[o]ther facts and evidence (or the absence of other facts and evidence) are required for the fulfillment of [malice's] component parts" which "include the absence of justification, excuse and mitigation." *Belcher*, 385 S.C. at 609-10, 685 S.E.2d at 808. This Court held: "A jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that that would reduce, mitigate, excuse or justify the homicide." *Belcher,* 385 S.C. at 600, 685 S.E.2d at 803-804.

Here, the court's jury charge did not omit the language prohibited in *Belcher* nor did counsel object despite addressing *Belcher* with the court and seemingly getting the court to agree to give the proper instruction. In addressing this issue, the PCR court noted that counsel did raise *Belcher*, even though the case had been recently decided.[6] App. p. 1528. The PCR court's order did not address the actual instruction given by the trial court and addressed several other matters regarding the jury instructions with extreme brevity before concluding: "There was no evidence presented showing that any of trial counsel's conduct was deficient or prejudicial, and therefore the standards of *Strickland, supra*, cannot be satisfied." App. p. 1529.

Petitioner submits that the PCR court must be reversed based upon the record and controlling case law. Trial counsel's awareness of then recently decided Opinion in *Belcher* was

[6] On October 12, 2009, this Court issued the Opinion in *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), overruled by *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019), and Petitioner's trial took place on October 19-27, 2009. The Order of Dismissal errantly states Petitioner's trial commenced on April 13, 2015, which would have been three years after Petitioner's direct appeal was commenced.

touted at the evidentiary hearing and via the Order of Dismissal, yet counsel failed to ensure a proper malice instruction was given and failed to preserve the matter for appellate review.

In the year prior to Petitioner's evidentiary hearing, this Court held that a trial attorney's failure to object to the lack of a general permissive inference instruction when it is warranted constitutes deficient conduct. *Gibson v. State*, 416 S.C. 260, 786 S.E.2d 121 (2016) (Addressing trial counsel's failure to ensure a proper inferred malice instruction was given pursuant to *State v. Elmore*, 279 S.C. 417, 308 S.E.2d. 781 (1983) overruled on other grounds by *State v. Torrence*, 305 S.C. 45, 69 n. 5, 406 S.E.2d 315, 328 n. 5 (1991)). Turning to the question of prejudice in the matter of an improper inferred malice instruction, this Court held that a court "must decide whether the erroneous malice instruction contributed to the jury's verdict based on all the evidence presented to the jury." *Gibson* at 265, 786 S.E.2d at 265. "The Court must weigh the significance of the presumption to the jury against the other evidence of malice considered by the jury without the erroneous malice charge." *Id.*

The following portion of the State's closing argument demonstrates exactly how the erroneous malice instruction contributed to the jury verdict:

> Implied malice is when circumstances demonstrate a wanton or reckless disregard for human life or a reasonably prudent man would have known that according to a common experience there was a plain and strong likelihood that grievous bodily injury would follow the contemplated act.
>
> Ladies and gentlemen, I submit to you that when that --- when Johnny Gaskins got into his car with a loaded 40 caliber weapon and opened fire, that was malice.

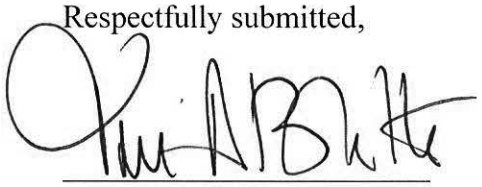
App. p. 1029, lns. 12-21. The standing Order of Dismissal fails to even analyze the matter of prejudice in summarily denying Petitioner's claim as set forth in his handwritten Amendment and addressed at the evidentiary hearing. Even though the record before this Court is not ideally crafted on this issue, it does support the granting of relief for counsel's clear deficiency in raising

Belcher but failing to ensure the malice instruction clearly stated in *Belcher* was given by the trial court. Additionally, the record further supports a finding of prejudice as it is clear that the State's argument on malice hinged on the matter of inferred malice stemming from the "40 caliber weapon." App. p. 1029, lns. 12-21. As a result, Petitioner urges this Court to reverse the lower court's denial on this issue and grant relief.

V. Conclusion

Based upon the foregoing and the record before this Court, Petitioner would ask this Court to vacate the Order of Dismissal filed on October 10, 2017 and grant a new post-conviction relief hearing. Alternatively, Petitioner would ask this Court to grant relief on the issue addressed herein and/or grant certiorari and allow further briefing and/or argument.

Respectfully submitted,



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