THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2020-CP-23-02941

Marqual Griffin #358328.....Petitioner,

v.

State of South Carolina.....Respondent,

NOTICE OF APPEAL

Petitioner appeals the Honorable Grace Gilchrist Knie's Order of Dismissal dismissing petitioner's application for post-conviction relief. On December 27th, 2023, the court signed an order dismissing Petitioner's application for post-conviction relief with prejudice. Appellant, through counsel, received written notice of entry of this order on January 8th, 2024. A copy of the Order of Dismissal is attached.

January 11th, 2024

Sarah M. Henry
406 Pettigru Street
Greenville, South Carolina 29601
(864) 478-8324
Attorney for Petitioner

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE	)	
Marqual Griffin, #358328,	)	Case No.: 2020-CP-23-02941
Applicant,	)	
v.	)	
	)	**ORDER OF DISMISSAL**
State of South Carolina,	)	
Respondent.	)	ENTERED COMPUTER

'24 JAN 8 PM3:45
Brice Garrett CDC GVL SC

This matter is before the Court by way of a post-conviction relief (PCR) application filed on June 12, 2020, and amended on September 18, 2023.[1] Applicant's case was heard on September 20, 2023, in the Greenville County Courthouse. Applicant was present and represented by counsel, Sarah M. Henry, Esq., Senior Assistant Deputy Attorney General Melody J. Brown represented the State. At the conclusion of the hearing, this Court allowed the parties to submit memoranda addressing each of the claims. After consideration of the testimony given at the hearing, and after reviewing and considering the record, arguments and memoranda presented by counsel, along with the controlling case law, this Court finds that Applicant has failed to carry his burden of proof. Consequently, this Court DENIES relief for the specific reasons set out in this order.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections in the Broad River Correctional Institution pursuant to orders of commitment from the Greenville County Clerk of Court. During its March of 2016 term, the Greenville County Grand Jury indicted

[1] This Court finds that the amendment superseded the prior claims and will address only those claims as presented by Applicant's PCR counsel. This is consistent with the presentation and the arguments presented by counsel.

Applicant for murder (2016-GS-23-002335), attempted armed robbery (2016-GS-23-002330), two counts of kidnapping (2016-GS-23-002332-002333), possession of a weapon during the commission of a violent crime (2016-GS-23-002335), and first degree assault and battery (2016-GS-23-002331). During its June of 2017 term, the Grand Jury indicted Applicant for first-degree burglary (2016-GS-23-002334). Applicant was represented by Randall Lee Chambers, Esq., and Edward Hood Dawson, III, Esq. Assistant Solicitors Andrew Scott Culbreath and Elizabeth Morrow Gary, both of the Thirteenth Circuit Solicitor's Office, prosecuted the case.

A jury trial was held September 11-13, 2017, before the Honorable Perry H. Gravely. The jury found Applicant guilty as indicted. (Trial Tr., at 458-460). Judge Gravely sentenced Applicant to imprisonment as follows, with all sentences running concurrently: 45 years for murder; 10 for attempted armed robbery; 10 for first-degree assault and battery; 15 for first-degree burglary; 10 on each kidnapping conviction; and 5 for possession of a weapon. (Trial Tr., at 469). Applicant timely appealed.

Direct Appeal

Assistant Appellate Defender Susan B. Hackett of the South Carolina Commission on Indigent Defense represented Applicant on appeal. Counsel filed a no-merit brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and argued that the trial judge erred by instructing the jury that malice could be inferred from the use of a deadly weapon. Counsel also moved to be relieved from appointment. The South Carolina Court of Appeals granted appellate counsel's motion and dismissed the appeal. *State v. Griffin*, Op. No. 2019-UP-226 (S.C. Ct. App. filed June 26, 2019) (per curiam). The Court of Appeals issued the remittitur on July 12, 2019.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In addition to carefully considering the record and the arguments presented by counsel, this Court has also had the opportunity to consider the testimony presented at the PCR evidentiary hearing and has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. §17-27-80 (2003).

Ineffective Assistance Claims

For claims that trial counsel provided ineffective assistance, this Court is guided by the familiar *Strickland* test: To show a violation of the Sixth Amendment, an applicant must show that counsel's representation fell below an objective standard of reasonableness, and but for counsel's error, there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington,* 466 U.S. 668, 694 (1984); *Simpson v. Moore,* 367 S.C. 587, 595–96, 627 S.E.2d 701, 706 (2006). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. *Strickland,* at 694. It is presumed that counsel made all decisions in exercise of reasonable judgment. *Strickland,* at 689. It is the applicant's burden to prove, by a preponderance of the evidence, that he is entitled to relief. Rule 71.1 (e), SCRCP. *See also Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008) ("the burden of proof is on the applicant to prove the allegations in his application").

This Court finds considering the record and testimony and exhibits from the PCR evidentiary hearing, that Applicant has failed to carry his burden of proof for the below reasons.

> *Allegation 1: Trial counsel failed to object to and request a mistrial regarding the judge's instructions to the jury on malice, specifically the trial court's instructions improperly expressing an opinion on the facts.*

Applicant alleges the trial court should not have explained express malice by using the example of a person "lying in wait," as he contends that was a comment on the facts of his case.

He further alleges that trial counsel should have objected to the charge and to the written charge with the same example going into the jury room. This Court has reviewed the jury instructions at issue:

> Malice aforethought may be either express or inferred. These terms, "express" and "inferred" do not mean different kinds of malice, but merely *the manner* in which malice may be shown to exist. That is, either by direct evidence or by inference from the facts and circumstances *which are proved.* Express malice is shown when a person speaks words which express hatred or ill will for another, or when the person prepared beforehand to do the act which was later accomplished; *for example*, lying in wait for a person *or any other acts of preparation* going to show that the deed was within the defendant's mind would be express malice.

(Trial Tr., at 435; *see also* 475) (emphasis added). And also:

> If one intentionally kills another during the commission of a felony, the inference of malice may arise. If facts are proven beyond a reasonable doubt, sufficient to raise an inference of a malice to your satisfaction, this inference will be simply an evidentiary fact to be taken into consideration by you the jury, along with other evidence in the case, and you may give it such weight as you decide it should receive.

(Trial Tr., at 435-36).

Further, in this same charge, the trial judge instructed the jury, several times, that the State had the burden of proving the elements of the charges beyond a reasonable doubt, (Trial Tr., at 415, 417-18, 422, 427); that the jury was the "sole and exclusive judges of the facts in a case," (Trial Tr., at 419-20); that proof may be received by either direct or circumstantial evidence, (Trial Tr., at 421); that the State must prove "criminal intent" which "must be determined by the jury from the circumstances surrounding the situation," (Trial Tr., at 427); and, that "criminal intent may be inferred from the circumstances shown to have existed," (Trial Tr., at 427).

The trial judge additionally charged, after reviewing the sufficiency of the instructions given at that point with the parties:

> ... In discussing the elements of murder, as I said, one of the requirements of murder is that the State must prove beyond a reasonable doubt that the act is committed with malice - - with malice aforethought. It may be either express or inferred. These terms - - do not mean different kinds of malice, but merely the manner.
>
> I want to discuss with you that the law says - - and this is in the inference of malice - - the law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you along with all the other evidence. You may give it such weight as you determine it should receive. A deadly weapon - - again, as I previously defined to you what a deadly weapon. That has been - - that is to be used in consideration of whether malice was inferred.

(Trial Tr., at 449). Trial counsel requested that the judge read the entirety of the charge again, instead of supplementing the charge, which the trial judge declined to do, but trial counsel did not object to the charge as given. (*See* Trial Tr., at 446-449 and 451).

Further, the jury, during deliberations, requested the court "write out" the law as to each charge. (Trial Tr., at 454 and 471). The trial judge "printed only the portions of [the] charge that talks about the different indictments, the charges" and sent that back to the jury room. (Trial Tr., at 454 and 472-77). Counsel did not object to this response. (Trial Tr., at 456).

Analysis

Comments on the facts violate the separate roles of the judge and jury and are prohibited. *See* S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."). "A jury instruction is a comment on the facts when it expresses the court's opinion of a case, thereby imposing the court's belief on the jury in a way likely to influence it." *State v. Brown*, 438 S.C. 146, 151–52, 881 S.E.2d 771, 774 (Ct. App. 2022). In essence, a "[j]udge violates" the prohibition "when he expresses ... his own opinion upon the force and effect of the

testimony, or any part of it, or intimates his views of the sufficiency or insufficiency of the evidence in whole or in part." *State v. Thorne*, 237 S.C. 248, 251, 116 S.E.2d 854, 855 (1960). However, that is not the case here. It simply is not a comment on the facts when the trial court explains a principle of law. *See generally State v. Philips*, 73 S.C. 236, 53 S.E. 370, 371 (1906) ("In properly defining a reasonable doubt, it cannot be successfully contended that the presiding judge charged upon the facts.").

Initially, though, the Court finds based on trial counsel's credible testimony at the PCR evidentiary that lead counsel, Mr. Chambers, was well-experienced in criminal law and had well-prepared for the trial. Part of that preparation was knowing the facts of the case. The evidence at trial established that Applicant pushed into the victim's home by subterfuge, not that he engaged in a classic example of "lying in wait" for her to return to the home. As such, counsel could reasonably deem the charge not a specific comment on the facts of this case and not expressly detrimental. In fact, counsel urged the jury to treat the State's argument inferring "lying in wait" as an overreach, inconsistent with the evidence. (Trial Tr., at 400-401). Moreover, the instruction also noted the jury could consider "any other acts of preparation," and did not urge the jury to give weight to a particular fact.[2] *See State v. Jackson*, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989) ("a trial judge should refrain from all comment which tends to indicate to the jury his opinion on the credibility of the witnesses, the weight of the evidence, or the guilt of the accused."). In his post-hearing memorandum, Applicant relies in large measure on *State v. Hughey*, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000), *overruled on other grounds by Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009). His reliance on that case is misplaced.

---

[2] Further still, the instructions continually left the fact finding in the province of the jury and repeatedly underscored the State's burden of proof. *See, supra* at p. 4.

In *Hughey*, the defendant requested particular and multiple examples that went directly to the facts of his own case:

> Hughey requested that specific examples of legal provocation be provided to the jury. Specifically, Hughey requested the following examples of legal provocation: pulling a knife on a defendant, pointing a gun at a defendant, spitting in a defendant's face, assault of a family member, sudden mutual combat where one of the participants is killed by the other without a previously informed intention to do so, finding one's spouse in the act of adultery, or the deceased having molested a defendant's minor child. The requested examples constitute a direct charge on the facts because Hughey alleges that a knife was pulled on him, Jackson spit in his face, and there was sudden mutual combat. The requested jury charge elevates the specific facts of the case, such as spitting in a person's face, to an acceptable act of legal provocation.

Id., at 452, 529 S.E.2d at 728.

First, Hughey's specific requests rested not on standard charging language, but a series of handpicked circumstances unique to Hughey's case. In comparison, the charge given here mirrors that used in other cases. *See, e.g., State v. Burdette*, 427 S.C. 490, 498-499, 832 S.E.2d 575, 580 (2019) (referencing same charge given); *State v. Kelsey*, 331 S.C. 50, 78, 502 S.E.2d 63, 77 (1998) (noting favorable jury instruction including: "Proof of malice may be express or direct, such as, where there is evidence of previous threats or evidence of lying in wait."). There was no further definition of "lying in wait" or particular act that would constitute "lying in wait." Hughey is not comparable. Second, because no error occurred, the Hughey court did not consider prejudice, or the possibility of harmless error on the facts of the case. *See Gibson v. State*, 416 S.C. 260, 265, 786 S.E.2d 121, 124 (2016), *overruled by State v. Burdette, supra*[3] (to determine *Strickland* prejudice where counsel does not object to a faulty charge, a court will consider whether the

[3] The case was overruled specifically as to application of a harmless error analysis to a charge on the inference of malice from use of a deadly weapon. *See Burdette*, 427 S.C. at 504, 832 S.E.2d at 583.

"instruction contributed to the verdict"). Even improper comments by the trial judge must carry prejudice to warrant relief. *See Litchfield Co. of S.C. v. Sur-Tech, Inc.*, 289 S.C. 247, 253, 345 S.E.2d 765, 768 (Ct. App. 1986) (should an instruction offend the constitutional provision prohibiting comments on the facts, it is still required, even on direct appeal, to show prejudice to warrant reversal). Again, Applicant's reliance on *Hughey* in these circumstances is misplaced.

Simply, the charge at issue here explained the difference between express or inferred malice, terms that are included in the basic definition of murder. *See* S.C. Code § 16-3-10. And the language was used was language commonly used in such instructions. *See Burdette, supra, Kelsey, supra.* There is no indication of deficient performance. Applicant simply has not shown that counsel representation was contrary to "prevailing professional norms." *Strickland,* at 688.

Applicant also relies upon the *Belcher* and *Burdette* line of cases to show deficient performance. However, these cases do not aid Applicant in meeting his burden of proof either.

In addition to addressing a different instruction (those cases addressed an instruction that pointed to one fact that could well-be the only fact supporting malice, *i.e.*, intentional use of a gun),[4] those cases were not premised on the constitutional prohibition regarding comments on the facts. Rather, our Court recognized confusion in the charge and ultimately directed, under the authority of the Supreme Court pursuant to the common law, that lower courts may not instruct that "malice may be inferred from the use of a deadly weapon." *State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009) ("jury charge is not place for purposeful ambiguity"); *State v. Burdette*, 427 S.C. at 502-03, 832 S.E.2d at 582 ("jury instruction that malice may be inferred from

[4] Of course, the extension of *Belcher* and Burdette that would have to occur to make the argument relevant in context of a different instruction would be new precedent and not relevant to a *Strickland* analysis.

the use of a deadly weapon is an improper court-sponsored emphasis of a fact in evidence—that the deed was done with a deadly weapon—and it should no longer be permitted" but "decid[ing] this issue solely under the common law; pursuant to our policy-making role under the common law"). Further, the charge at issue here does not suffer from the ills associated with instructions the courts have generally held to be improper. The instruction was not misleading. *Belcher*, at 610, 685 S.E.2d at 809 (charge that "if one intentionally kills another with a deadly weapon" only a "half-truth" because "malice includes the absence of justification, excuse and mitigation"). Further still, there is no qualifier in the charge to indicate weight of the evidence, like the "strong evidence of intent" instruction found to be "either a comment on the facts or an improper expression of the trial judge's view of the weight of the evidence...." *State v. Cheeks*, 401 S.C. 322, 329, 737 S.E.2d 480, 484 (2013). Nor is there any language erroneously indicating an inference is "presumed" from a fact. *See Tate v. State*, 351 S.C. 418, 425–26, 570 S.E.2d 522, 526 (2002).

And, again, trial counsel was aware of the facts of this case – Applicant pushed his way into April Green's home brandishing a gun, demanding to know what they had, terrorizing the occupants, hitting Green with his gun, fighting with her brother, Shane Barron, and eventually shooting and killing her friend, Nathan Crouch. (*See* Trial Tr., at 98-103; 120; 170-79;193-94; *see also* State's Exhibit 8). Ms. Green was selling drugs from the home. A customer named Kevin came by twice that day. One transaction happened without incident. In the second, she opened the door for him to complete another drug buy when Applicant pushed in, holding a gun to Kevin's head. (State's Exhibit 9; *see also* Trial Tr., at 171-72; 189). Barron testified that he held the opinion that Kevin was an accomplice as Kevin was allowed to slip away. (Trial Tr., at 191).

Kevin Hoffman testified that he had knocked on the door and made the transaction and then "somebody" came up, said "get down," but Kevin was unsure if the gun was to the back of his head, or the person's hands were on him, but he ran and hid until he could make a break for the front door and leave. (Trial Tr., at 209-13). He denied being involved. (Trial Tr., at 214). He denied seeing anyone "suspicious" around the home as he approached. (Trial Tr., at 215).

Terry Harris, a friend who knew Applicant from "smok[ing] and chill[ing] together, testified that Applicant told him that he intended to "get some money or something," a "lick," which he understood to mean robbery. (Trial Tr., at 362). Harris further testified that, though he declined to aid in the robbery, he and his partner gave Harris a ride. He knew Applicant had a gun. Harris was charged with attempted armed robbery for his part and pled guilty. (Trial Tr., at 363-69). He also testified that Kevin Hoffman was speaking with Applicant before the crimes. (Trial Tr., at 374).

Applicant maintained at trial that he entered the home with a gun to get money back from a drug deal. (*See* Trial Tr., at 409).

The jury convicted him of attempted armed robbery; assault and battery, first degree; two counts of kidnapping; first degree burglary; possession of a weapon during the commission or attempt to commit a violent crime; and murder. (Trial Tr., at 458-59). Notably, at sentencing, Applicant repeatedly accepted responsibility and apologized: "... *I'm sorry. I never meant for none of this to happen ... I'm sorry. I never meant for nobody to be taken from their family. ... If I could change everything that happened, I wish I could. I wish I could go back and make better decisions... I can't speak bad on nobody because pretty much, it's my fault... I'm sorry from the bottom of my heart. I never meant to make your family hurt. ...* (Trial Tr., at 464-65) (emphasis added). He also stated "I never meant for that to happen to nobody... never meant for the situation

to go that far," (Trial Tr., at 465 and 466), and "if I could just change it, If I could do it all over again, it would be way different," but at the time he was in need of money, "It was just so much pressure on me about being homeless and not being able to do for my daughter," (Trial Tr., at 466). He stated that it was not planned to "rob these people," but "was just heat of the moment. It just happened." (Trial Tr., at 467). As to the trial, he stated "it just prove that I did something wrong. I'm sorry for that. I mean, I can't take it back." (Trial Tr., at 468).

Considering the facts at trial, and the jury instructions as a whole, Applicant has not shown that counsel's representation was deficient. Notably, there is no controlling, on point case law that counsel overlooked, nor a professional norm that was ignored. *See Strickland,* at 688 ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."). Applicant cannot carry his burden of proof.

That counsel is not deficient ends the *Strickland* inquiry. *Strickland*, 466 U.S. at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim."). However, this Court also finds that there is no *Strickland* prejudice.

In addition to the fact that counsel contested that the facts supported a classic "lying in wait" scenario, there is significant, other evidence of malice in the record. It is undisputed that Applicant went in with a gun to take by force items in the victim's home. Malice is supported by the use of the weapon, the burglary and the armed robbery.[5] There is no likelihood that the

---

[5] Our Supreme Court has expressly instructed that courts may consider that malice may be inferred from the use of a deadly weapon in non-jury context. *Burdette*, at 503, 832 S.E.2d at 583. Further, the permissible inference of malice from the commission of a felony instruction was recently upheld. *State v. Brown,* 438 S.C. 146, 152, 881 S.E.2d 771, 774 (Ct. App. 2022).

definitional instruction at issue was so harmful in the case as to allow Applicant to show a reasonable probability of a different result had counsel objected. *See Gibson, supra*; *State v. Stanko*, 402 S.C. 252, 264, 741 S.E.2d 708, 714 (2013), *overruled by State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019) (finding *Belcher* error harmless where "evidence of malice ... not limited to" the "use of a deadly weapon"). Further, Applicant cannot escape his repeated admissions of going to a drug-related transaction and his admissions at sentencing.

First, having admittedly taken a gun into a hostile situation (even if for a purpose other than murder) makes a claim of self-defense, accident, or a lesser offense highly unlikely. *See State v. Williams*, 427 S.C. 246, 255, 830 S.E.2d 904, 909 (2019) ("as a matter of law—Williams' act of taking the pistol to the drug deal was a violation of law that produced the violent occasion") (citing *State v. Smith*, 391 S.C. 408, 415, 706 S.E.2d 12, 16 (2011) (as to accident) and *State v. Burriss*, 334 S.C. 256, 265, 513 S.E.2d 104, 109 (1999) (as to requirement that possession of weapon be "merely incidental" in "arming himself in self-defense)). Second, even when error would normally be prejudicial, the fact of admission of guilt in open court weighs heavily in finding no basis to reverse. *See State v. Wiley,* 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010). *See also State v. Sroka*, 267 S.C. 664, 665, 230 S.E.2d 816, 817 (1976) ("We affirm because the guilt of the appellant is conclusively shown by the record and any alleged error could not have been prejudicial. Any doubt about the correctness of this conclusion is eliminated by the admission of appellant in open court, after conviction ..."). The cited admissions confirm both the applicability of the legal bars noted and the existence of other specific evidence of malice upon which the lack of prejudice rests.

Again, Applicant failed to carry his burden of proof and is not entitled to any relief.

Allegation 2: Trial counsel failed to object to and request a mistrial regarding the judge's instructions to the jury that malice could be inferred from "possession of a weapon."

Applicant's jury trial was held September 11-13, 2017. There was no objection to the charge regarding possible inference of malice from the intentional killing with a deadly weapon. (Trial Tr., at 450). Applicant alleges the instruction violates *Belcher* and *Burdette*, thus counsel should have objected. Further, Applicant alleges prejudice is shown because involuntary manslaughter was charged. However, under a *Strickland* analysis, this Court must be careful to view the alleged error in context of the time of the trial. *Strickland,* at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."). This Court recognizes that *Burdette* removed the limitation in *Belcher* that the instruction could still be given in where there was no excuse or lesser offense at issue. Yet Applicant's reliance on *Burdette* for his *Strickland* claim is misplaced because *Burdette* was issued in July 2019, well after the 2017 trial. Consequently, counsel cannot be deficient in declining to object under *Burdette*.

At the time of the trial, that charge could not be given in a certain circumstance – when there was evidence presented that would tend to reduce the crime. However, the charge "remain[ed] a correct statement of the law where the only issue presented to the jury is whether the defendant has committed murder...." *Belcher*, at 612, 685 S.E.2d at 810. Respondent submits that trial counsel was not deficient by declining to object primarily because there was no evidence supporting a lesser included offense. This Court agrees with Respondent.

First, though the judge instructed on involuntary manslaughter, the facts did not support it. Without question, Applicant was armed going into the home, uninvited, with the intent to take

something from the occupants – a fact counsel acknowledged at trial and Applicant admitted at sentencing, and again admitted at the PCR hearing. As a matter of law the charge was defeated: Involuntary manslaughter "the unintentional killing of another without malice while engaged in either (1) the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm, or (2) the doing of a lawful act with a reckless disregard for the safety of others." *State v. Scott,* 414 S.C. 482, 487, 779 S.E.2d 529, 531 (2015). Failure to qualify under the definition will defeat the necessity of the charge. *State v. Brewton*, 437 S.C. 44, 55–56, 876 S.E.2d 141, 147 (Ct. App. 2022); *see also State v. Wharton*, 381 S.C. 209, 216, 672 S.E.2d 786, 789 (2009) (even if gun was not "intentionally fire[d]" where defendant "committed an unlawful act that would naturally tend to cause death or great bodily harm" the charge is not warranted). Burglary and attempted armed robbery make it impossible to meet either prong. Thus, under *Belcher*, there could be no error. *Belcher,* at 610-612, 685 S.E.2d at 809 (recognizing error could be harmless though finding error not harmless in that case where self-defense at issue and "it is entirely conceivable that the only evidence of malice was Belcher's use of a handgun"). Consequently, Applicant has failed to show either objection or moving for a mistrial was warranted.

Second, as set out above, there was overwhelming evidence of malice separate and apart from simple use of the weapon, most importantly, the felonies committed – acts for which he admitted guilt in open court at sentencing. Had it been error under the *Belcher* theory, it could only have been considered harmless error pre-*Burdette*. *See generally Stanko*, 402 S.C. at 264, 741 S.E.2d at 714 (finding harmless in error where the evidence of malice was not limited to use of a deadly weapon). Even so, Applicant has not shown deficient performance, and he is not entitled to any relief.

Allegation 3: The trial attorney failed to object to the trial court sending a partial written jury charge back with the jury that did not include the entire jury instructions, specifically omitting the burden of proof or the presumption of innocence.

Applicant alleges that sending only a limited portion of the original charge back to the jury was error, potentially shifting the burden or placing undue emphasis on the portion sent back. However, the trial judge did not merely send limited instructions back *sua sponte*; rather, he responded to the specific request from the jury – for law on the indicted offenses. (*See* Trial Tr., at 453-456). There is no error where "the recharge was properly limited to answering the jury's question." *State v. Anderson*, 322 S.C. 89, 94, 470 S.E.2d 103, 106 (1996). Consequently, there was simply no basis for counsel to lodge an objection. Applicant has failed to show deficient performance under *Strickland*. He is not entitled to any relief.

CONCLUSION

For the above reasons, this Court finds that Applicant has failed to carry his *Strickland* burden of proof.

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief is denied and dismissed with prejudice; and,

2. Applicant is remanded to the custody of Respondent for completion of his sentence.

AND IT IS SO ORDERED this 27th day of December, 2023.

GRACE GILCHRIST KNIE
Presiding Judge

Copy mailed to
Attorney General and Sarah Henry
on 1/9/2024