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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Richland County
Honorable G. Thomas Cooper, Jr., Trial Judge
Honorable D. Craig Brown, Post-Conviction Relief Judge

Appellate Case No. 2023-00085

JOHNNIE WALKER GASKINS, #313590,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI PURSUANT TO AUSTIN V. STATE

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INDEX

PETITIONER'S STATEMENT OF ISSUES ON CERTIORARI

I. 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.

II. 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.

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON CERTIORARI

I. Did the second post-conviction relief court properly grant a belated appellate review of the first post-conviction relief court's order of dismissal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), where Gaskins did not knowingly and intelligently waive his right to appellate review from the first post-conviction relief action?

II. Does Issue I in Gaskins's petition requesting this Court to vacate his first post-conviction relief order of dismissal based on the alleged failures of his first post-conviction relief counsel in an effort to use his Austin petition as a vehicle to assert ineffective assistance of post-conviction relief counsel claims beyond failure to file an appeal exceed the scope of Austin?

III. Did the first post-conviction relief court properly find Gaskins failed to establish any deficiency by trial counsel's perceived failure to request a jury instruction in line with Belcher v. State, 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), where Gaskins failed to present any evidence showing trial counsel's conduct was deficient and where the charge on malice was proper because there was no evidence presented at trial that reduced, mitigated, excused, or justified the two counts of murder and three counts of assault and battery with intent to kill?

RESPONDENT'S STATEMENT OF THE CASE

Petitioner Johnnie W. Gaskins ("Gaskins") is presently confined in the South Carolina Department of Corrections pursuant to the Richland County Clerk of Court orders of commitment. Gaskins was indicted at the July 2008 term of the Court of General Sessions for Richland County for two counts of Murder (2008-GS-40-1626; 2008-GS-40-3948), three counts of Assault and Battery with Intent to Kill (ABWIK) (2008-GS-40-1629; 2008-GS-40-1631; 2008-GS-40-1632), and one count of Use of a Firearm during the Commission of a Violent Crime (2008-GS-40-1627). Gaskins proceeded to a jury trial on October 19 – 27, 2009, before the Honorable L. Casey Manning. Gaskins was represented by Joseph McCulloch, Esquire, and Kathy R. Schillaci, Esquire. Deputy Solicitor John P. Meadors and Assistant Solicitor Joanna A. McDuffie of the Fifth Circuit Solicitor's Office prosecuted the case.

On October 27, 2009, the jury convicted Gaskins as indicted. Judge Manning sentenced Gaskins to imprisonment for life for each count of Murder, twenty years imprisonment for each count of ABWIK, and five years imprisonment for the Use of a Firearm during the Commission of a Violent Crime. The two life sentences were to be served concurrently, with the remaining sentences to be served consecutively.

Gaskins filed a timely Notice of Appeal. Gaskins's direct appeal was perfected by Tara D. Shurling, Esquire. On appeal, Gaskins raised the following instances of trial court error:

I. The trial court did not abuse its discretion in the admission of a series of photographs from the crime scene which showed blood where they had probative value in a case where the photographs were not unduly prejudicial or inflammatory. Further, it appears at the time of the introduction of the "close-up" photographs the Appellant had abandoned the earlier objection

II. Where the trial court instructed the jury to disregard evidence concerning an unexpected assertion in a dying declaration of one of the victims and an interrogative from an unknown caller to

the Appellant's cell phone, the trial court did not abuse his discretion in denying the motion for a mistrial

III. A new trial is not warranted where the trial judge gave a cautionary instruction to the jury after a series of exchanges between counsel for the prosecution and defense concerning the form of questions on re-direct required the Court to intervene to maintain civility between counsel in the courtroom. The Appellant's contention that defense counsel ability to represent the Appellant in the eyes of the jury was undermined in not supported by the record where both the state and defense were admonished to relax.

Following briefing, the South Carolina Court of Appeals affirmed Gaskins's convictions and sentences in an unpublished opinion. State v. Gaskins, No. 2013-UP-304 (Ct. App filed July 3, 2013). Gaskins filed a Petition for Rehearing on July 18, 2013. By Order dated August 6, 2013, the Court of Appeals denied the Petition. Gaskins then filed a Petition for *Writ* of *Certiorari* on January 6, 2014. The Supreme Court of South Carolina denied the Petition for *Writ* of *Certiorari* on August 6, 2014. The Remittitur was returned on August 15, 2014.

Thereafter, Gaskins filed his first post-conviction relief action on May 27, 2015, alleging ineffective assistance of counsel. In response, the State made its Return on October 1, 2015. On June 27, 2015, Respondent made its Return and Motion for a More Definite Statement. An evidentiary hearing into the matter was convened on July 18, 2017, before the Honorable G. Thomas Cooper, Jr. Gaskins was present at the hearing and represented by Aimee J. Zmroczek, Esquire ("Zmroczek"). Jessica E. Kinard, Esquire, of the South Carolina Attorney General's Office, represented Respondent. Gaskins's attorneys, Joseph M. McCulloch, Esquire ("Trial Counsel") and Tara Dawn Shurling, Esquire ("Appellate Counsel"), were present and testified.

The morning of the hearing, Zmroczek emailed the State and the court a handwritten document listing amended allegations. The State objected to the submission of the amendments pursuant to Rule 15(a), SCRCP, and moved for a continuance to prepare to defend the allegations.

The motion was denied. Following the hearing, Judge Cooper requested proposed orders from both parties within thirty days. Judge Cooper issued the Order of Dismissal on October 6, 2017 and filed on October 10, 2017. Gaskins did not file an appeal challenging the denial of relief.

On April 8, 2022, Gaskins filed his second application for post-conviction relief. On August 19, 2022, Respondent filed its Return. On November 14, 2022, Gaskins, through Tricia A. Blanchette, Esquire ("PCR Counsel"), filed amendments to the application. On November 14, 2022, an evidentiary hearing convened at the Richland County Courthouse before the Honorable D. Craig Brown. PCR Counsel represented Gaskins, and Assistant Attorney General D. Russell Barlow, II, represented Respondent. Gaskins testified on his behalf and presented testimony of Zmroczek.

At the conclusion of the evidentiary hearing, Judge Brown found Gaskins was entitled to a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Judge Brown issued the Order on Application for Post-Conviction Relief Granting Belated Appeal Pursuant to Austin v. State on February 15, 2023, and filed on February 28, 2023. Respondent filed its Motion Pursuant to Rule 59(e) and 60(b), SCRCP, with exhibits on March 15, 2023. On March 23, 2023, Gaskins filed its Response to Motion Pursuant to Rule 59(e) and 60(b), SCRCP. On May 2, 2023, Judge Brown denied Respondent's motion by filed order.

This Petition follows.

RESPONDENT'S STATEMENT OF THE FACTS

On February 5, 2007, Gaskins was removed from the Super Bowl party at Club 360 for unruly behavior. (App. p. 257, l. 20-24; p. 259, l. 12-19; p. 352, l. 21-p. 353, l. 6). According to bar manager Erin Hellman ("Hellman"), Gaskins had demanded service: "Give me a f—ing Hennessy (cognac)." When she offered him a menu, he retorted again, "Give me a f—ing Hennessy bitch," and threw money at her. Gaskins then approached aggressively toward her behind the bar. (App. p. 254; p. 257). At that point security for the club took Gaskins out the front door of the club. (App. p. 257; p. 281). Hellman described Gaskins as very sweaty and unsteady on his feet, with difficulty keeping his head up. (App. p. 258). Hellman identified Gaskins in court (and in a photographic line-up) as the unruly person. Around twenty (20) minutes later, she heard shots being fired. (App. pp. 259-260).

Prior to the shooting, Shannavia Williams ("Williams") arrived at Club 360 around midnight. After staying for a while, she decided to leave to go to another club with her friends. Before leaving, she sits her drink down but spills it. (App. pp. 580-581). Williams leaves her friend, Deirdre Houston, and gets something to clean the spilled drink. Two other friends, Shanna Williams and Shanelle Whack, are at the back of the bar.

Club security, Quinton Harris ("Harris") and Lamont Davis ("Davis") had taken Gaskins outside and handcuffed him. Gaskins states that the security thinks they are gangsta and says, "I'll show them gangsta." (App. pp. 553-554). A friend of Gaskins, Sydney Williams, approached Harris and Davis and convinced them not to call the police on Gaskins. (App. p. 354, ll. 13-24; p. 503, ll. 15-25). Security removed the handcuffs from Gaskins, and he returned to his car.

Gaskins walks back towards a Chevy Impala, which was the vehicle he used to go to the club. Another security guard, Epsil Palmer ("Palmer"), remained concerned about Gaskins

because he was still acting rowdy by his car. Palmer went and talked to Gaskins and told him to leave. (App. pp. 555-556; pp. 566-567). Subsequently, Gaskins is seen getting in the car by himself. (App. p. 508, ll. 5-10). Harris and Davis go back inside the club to remove another patron, Christopher Lyles ("Lyles"). (App. p. 355, ll. 18-23; 408, l. 18-p. 409, l.7; p. 492, l. 16-p. 493, l. 8). At that time, Gaskins has gotten in his Impala, drives to the front of Club 360, and opens fire. (App. p. 588). Harris testified that while he tussled with Lyles, he looked up and saw Gaskins, whom he had removed from the club, firing gunshots from the Impala. (App. pp. 409-416).

Independent witnesses identified Gaskins as either being the shooter or the person who went to the Impala where the shooting came from. (App. p. 356; p. 359) (victim Lamont Davis identified Gaskins as the individual he saw shooting from the car); (App. p. 431) (victim Quinton Harris identifies Gaskins as the person he saw in the car with the gun); (App. p. 506; p. 531) (Sydney Williams identified Gaskins as getting in the car which stopped in front of the club when the shooting started); (App. p. 571) (Palmer identified Gaskins as person who entered vehicle and that he saw flashes coming from vehicle although it was too far at the time to see the actual shooter).

Security guard John Adams is hit and subsequently dies. (App. pp. 606-607; p. 790). Inside the bar, Houston was shot while she was standing waiting for Williams to return to clean up the spill. (App. pp. 581-583). While Williams was returning to clean up the spill, she was shot in the head, resulting in her death. (App. p. 796). Davis was also shot. (App. pp. 356-358). Harris was shot in his knuckle but avoided other bullets in his direction. (App. pp. 438-439). The Chevy Impala with tinted windows left the scene. Calls were made to 911. The acquaintance of Gaskins, Sydney Williams, was handcuffed by security because they believed he knew something about the shooter. (App. p. 514). The owner of the club, Lindburgh Porterfield, recovered a cell phone in

the parking lot and ultimately turned it over to the Sheriff's Department. (App. p. 458; pp. 464-465).

The Chevy Impala was ultimately found. (App. pp. 749-752). Inside the vehicle, the police located documents with Gaskins's name, gunshot residue, and trace evidence linking Gaskins's DNA to the vehicle. (App. pp. 808-811; pp. 889-895). Additionally, a shell casing was found inside the vehicle. Forensic testing of the shell casing in the Impala was linked to the .40 caliber shell casings found in the club's parking lot as being fired from the same weapon. (App. pp. 847-848; p. 852).

STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. However, pure questions of law will be reviewed *de novo* without deference to the post-conviction relief court. Id. Appellate courts will reverse the decision of the post-conviction relief 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).

ARGUMENT

I. The second post-conviction relief court properly granted belated appellate review of the first post-conviction relief court's order of dismissal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), where Gaskins did not knowingly and intelligently waive his right to appellate review from the first post-conviction relief action.

Gaskins asserts his first post-conviction relief counsel failed to file an appeal of the denial of his first post-conviction relief action. Respondent concedes probative evidence exists in the record to support the second post-conviction relief court's finding Gaskins did not knowingly and voluntarily waive his right to appeal the dismissal of his first post-conviction relief action, and the second post-conviction relief court properly granted Gaskins's request to petition this Court for belated appellate review of the denial his first post-conviction relief action pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

II. Issue I in Gaskins's petition requests that this Court vacate his first post-conviction relief order of dismissal based on the alleged failures of his first post-conviction relief counsel in an effort to use his Austin petition as a vehicle to assert ineffective assistance of post-conviction relief counsel claims beyond failure to file an appeal thereby exceeding the scope of Austin.

On appeal, Gaskins requests that this Court vacate his first post-conviction relief order of dismissal based on the alleged failures of his first post-conviction relief counsel. Relying on the second post-conviction relief court's order, Gaskins argues that his first post-conviction relief counsel's representation was ineffective. Notably, Gaskins's claim of ineffective assistance of his first post-conviction relief counsel is improperly submitted to the Court within his Austin Petition for *Writ* of *Certiorari*. However, in response to Gaskins's argument, Respondent asserts that Gaskins improperly attempts to use his petition pursuant to Austin as a vehicle to assert ineffective assistance of his first post-conviction relief counsel claims beyond whether counsel failed to file

an appeal which exceeds the scope of Austin review. Accordingly, this Court should grant Gaskins a belated appeal pursuant to Austin and deny all claims exceeding the scope of the belated appellate review pursuant to Austin.

Importantly, the Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, (1991); see e.g., Aice v. State, 305 S.C. 448, 452 n.2 409 S.E.2d 392, 295 n.2 (1991); see also Wainwright v. Torna, 455 U.S. 586 (1982) (holding that where there is no constitutional right to counsel there can be no deprivation of effective assistance); cf. Kelly v. State, 754 S.E.2d 377, 377 (S.C. 2013) (holding Martinez v. Ryan, 566 U.S. 1 (2012), is "not applicable to state post-conviction relief actions") (reaffirmed by Robertson v. State, 795 S.E.2d 29, 31 (S.C. 2016)).

In Martinez, the United States Supreme Court held that "a procedural default will not bar a federal *habeas* court from hearing a substantial claim of ineffective assistance at trial if, in the initial review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." 566 U.S. at 17. This Court later held in Robertson that "because the PCR Act is a legislatively created scheme, any post-Martinez change to PCR proceedings must be instituted by the Legislature." 418 S.C. at 516, 795 S.E.2d at 34. While the United States Supreme Court's ruling in Martinez held that attorney error amounting to ineffective assistance of counsel during an initial review collateral proceeding may be sufficient "cause" to excuse a prisoner's procedural default in a federal *habeas corpus* proceeding, it has no bearing on a petitioner's ability to raise ineffective assistance of collateral counsel claims in a subsequent, successive state post-conviction relief application. Indeed, in Kelly v. State, this Court explicitly held that the holding in Martinez is limited to federal *habeas corpus* review and is not applicable to state post-conviction relief actions. 404 S.C. 365, 745 S.E.2d 377 (2013). Further, in Robertson, this Court expressly declined

to "create a state remedy that is the equivalent of the federal remedy established by Martinez." 418 S.C. at 521, 795 S.E.2d at 37.

Therefore, this Court's holding in Aice v. State is still applicable to a claim raised in a subsequent state post-conviction relief action alleging ineffective assistance of prior collateral counsel. See Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991) ("The contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' allowing for a successive PCR application under 17-27-90."). Aice went on to note that such a holding was in accord with the United States Supreme Court's opinion in Pennsylvania v. Finley, 481 U.S. 551 (1987) (finding there is no constitutional right to counsel for collateral review of a conviction). Moreover, this Court in Aice held the PCR rules "contemplate an adjudication on the merits of the original petition, one bite at the apple as it were." 305 S.C. at 452, 409 S.E.2d at 395 (citing Gamble v. State, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989)).

The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in Austin v. State, *supra*. Austin provides for a belated appellate review of an initial post-conviction relief action where prior collateral counsel fails to timely appeal the denial of the application. Id. at 454, 409 S.E.2d at 396; see S.C. Code Ann. § 17-27-100 (right to appeal the final judgment by post-conviction relief court). But Austin "is limited to its particular factual situation." Aice, 305 S.C. at 452, 409 S.E.2d at 395.

Here, Gaskins is requesting that this Court extend the scope of Austin by vacating the first post-conviction relief order of dismissal based on his first post-conviction relief counsel's alleged deficiencies and the alleged deficiencies within the first post-conviction relief order of dismissal. This Court's jurisprudence in Aice and Austin permits successive applications in limited circumstances to allege ineffective assistance of post-conviction relief counsel limited to the

failure to seek appellate review. See Ferguson v. State, 382 S.C. 615, 619, 677 S.E.2d 600, 602 (2009) (noting Austin appeals are "belated appeals intended to correct unjust procedural defects"). Furthermore, Gaskins fails to cite any relevant cases that support his position. While Gaskins does cite two cases to support his position, he does so without supporting parentheticals. Nevertheless, those cases do not support his proposition. The law in South Carolina is clear: beyond the failure to file an appeal, South Carolina does not recognize ineffective assistance of post-conviction relief counsel claims. See Aice, *supra*; Austin, *supra*; Kelly, *supra*; Robertson, *supra*.

Accordingly, this Court should deny Gaskins's request for this Court to extend the scope of Austin and vacate the first post-conviction relief court's order of dismissal based on ineffective assistance of his first post-conviction relief counsel.

III. The post-conviction relief court properly found Gaskins failed to establish any deficiency by trial counsel's perceived failure to request a jury instruction in line with Belcher v. State, 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), where Gaskins failed to present any evidence showing trial counsel's conduct was deficient and where the charge on malice was proper because there was no evidence presented at trial that reduced, mitigated, excused, or justified the two counts of murder and three counts of assault and battery with intent to kill.

On appeal, Gaskins asserts that the first post-conviction relief court erred in finding that trial counsel was not deficient and that there was no resulting prejudice when trial counsel failed to ensure that the trial court gave the proper malice instruction and failed to properly preserve the matter for appellate review. Specifically, Gaskins contends that trial counsel failed to ensure the trial court gave a jury instruction in line with Belcher[1] and trial counsel failed to preserve the issue

[1] Belcher v. State, 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 the jury instruction on inferred malice from the use of a deadly weapon charge in cases where there is evidence presented that would reduce, mitigate, excuse, or justify a homicide or assault and battery with intent to kill was no longer proper.)

for appellate review. Gaskins's arguments are unpersuasive, as the record reveals the trial court properly instructed the jury on malice based on the evidence presented during trial and controlling case law. Accordingly, the post-conviction relief court properly denied relief in Gaskins's first post-conviction relief action, and this Court should deny *certiorari*.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, the applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have

prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

"[T]he trial [court] is required to charge only the current and correct law . . . and the law to be charged to the jury is determined by the evidence at trial." Taylor, 356 S.C. at 231, 589 S.E.2d at 3 (internal citations omitted). "[A] trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence." State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). "In reviewing jury charges for error, [appellate courts] must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." State v. Mattison, 388 S.C. 469, 697 S.E.2d 578, 583 (2010)

Gaskins alleges that trial counsel was ineffective for not objecting to the inferred malice charge given to the jury. During the jury charge at trial, the trial court instructed the jurors on express and inferred malice. (App. pp. 1089-1091). The trial court also instructed the jurors that "malice may be implied or inferred from the use of a deadly weapon. And it is for you, the jury, to decide the weight, if any, should be given to this fact. And of course, a gun is a deadly weapon." (App. p. 1091). Prior to this jury charge, trial counsel requested paragraph on "page 243 from Ervin, 31-7" be removed from the jury instructions based on Belcher. (App. pp. 1022-1023). From the record, it is deduced that the specific language trial counsel directed the trial court to in § 31-7 is as follows:

> Furthermore, even where there is an absence of a specific, fixed and deliberate intent to take the life of a particular person or that of any person, the law says that if it is proved beyond a reasonable doubt that one intentionally killed another with a deadly weapon or with a dangerous instrumentality [such as a gun], an implication of malice may arise. The use of a deadly weapon permits you to infer malice but it does not require you to infer malice. State v. Mattison, 276

S.C. 235, 277 S.E.2d 598 (1981); State v. Friend, 276 S.C. 552, 281 S.E.2d 106 (1981).

See Tom J. Ervin, Ervin's SOUTH CAROLINA REQUESTS TO CHARGE – CRIMINAL § 31-7 (1994).

At the first post-conviction relief evidentiary hearing, trial counsel testified that he had read the advance sheets and requested an omission from the jury charge based on the recent ruling in Belcher. (App. p. 1430).

Appellate counsel testified that she noted "that trial counsel did not renew his objection to the Belcher issue when given the opportunity." (App. p. 1461). Appellate Counsel testified that she was "intimately familiar with Belcher" when she reviewed Gaskins's case. (App. p. 1463).

In 2009, the Court held in Belcher that the "use of a deadly weapon" implied malice instruction was no longer good law in South Carolina. 385 S.C. at 600, 685 S.E.2d at 803. There, the Court determined instructing a jury that "malice may be inferred by the use of a deadly weapon" was confusing and prejudicial *where evidence was presented that would reduce, mitigate, excuse, or justify the homicide*." Id. at 611, 685 S.E.2d at 804 (emphasis added). The Court ultimately found the instruction was erroneous and prejudiced Belcher because sufficient evidence of self-defense was presented to the jury such that "it [was] entirely conceivable the only evidence of malice was Belcher's use of a handgun." Id. at 612, 685 S.E.2d at 810. The Court further determined both the standard implied malice charge, and general permissive inference instruction remain valid, but did not mandate any particular instruction. Instead, the Court held "the permissive inference charge *concerning the use of a deadly weapon* remains a correct statement of the law where the only issue presented to the jury is whether the defendant has committed murder. . . . " Id. at 612, 685 S.E.2d at 810. (Emphasis added).

Gaskins's argument assumes that an objection was required because the instruction contained language prohibited by Belcher. Gaskins's argument misses the mark because Belcher is readily distinguishable from Gaskins's case, where Gaskins did not claim self-defense or present any evidence at trial that would have reduced, mitigated, excused, or justified the two murders and three assault and battery with intent to kill charges. Accordingly, the jury instruction was proper at that time, and trial counsel was not deficient in failing to object. It was not incumbent upon trial counsel to object to the malice instruction in Gaskins's case because the prohibition of the charge, as explained in Belcher, was not applicable. Prior to Burdette, and at the time of this trial, the inferred malice charge was still properly charged "where the only issue presented to the jury is whether the defendant has committed murder [or assault and battery with intent to kill]." Id. That is precisely the case here and trial counsel cannot be deficient for failing to object to a proper jury charge that was not in violation of Belcher and charged prior to Burdette.

Notwithstanding the fact the record refutes Gaskins's allegation of an improper jury instruction, Gaskins is unable to prove he was prejudiced by the trial court's instruction. To prove prejudice, Gaskins must prove "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 694). A reasonable probability is a probability "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. As discussed *supra*, the evidence presented at trial showed Gaskins pulled up to the front of the club and indiscriminately opened fire into a crowd of people. Thus, the malice, in this case, was not proven solely from the use of a deadly weapon – rather, malice was explicitly shown from Gaskins's pulling up to the entrance of the club and indiscriminately shooting into a crowd of people, as this conduct clearly demonstrates a "wanton or reckless

disregard for human life." See State v. Wilds, 355 S.C. 269, 276-77, 584 S.E.2d 138 (Ct. App. 2003) ("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 common experience there was a plain and strong likelihood that death would follow the contemplated act.'").

Therefore, even if the deadly weapon instruction was objectionable, there is no reasonable probability that the instruction affected the result of the proceeding. The first post-conviction relief court correctly denied relief as to this issue, and this Court should deny *certiorari*.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for belated appellate review pursuant to Austin and deny all other claims.

Respectfully Submitted,

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