

THE STATE OF SOUTH CAROLINA

 ORIGINAL

IN THE COURT OF APPEALS

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THE STATE,

RESPONDENT,

V.

KERWIN PARKER,

APPELLANT

APPELLATE CASE NO. 2009-147266

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Appeal from Lexington County

Robin B. Stilwell, Circuit Court Judge

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Opinion No. 2013-UP-403

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PETITION FOR REHEARING

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**SC Court of Appeals**

Pursuant to Rules 221 and 224, SCACR, appellate counsel requests a rehearing in this appeal because when deciding the case, this Court might have overlooked the fact that appellant's trial was a bifurcated proceeding (including a guilt phase and a sentencing phase); and therefore, the Belcher,<sup>1</sup> issue that would apply to cases "pending on direct review or not yet final where the issue [was ] preserved," was indeed preserved for review in this appeal as the Belcher issue was raised at sentencing, which was when the case "was not yet final," and "the issue [was] preserved" prior to the finality of sentencing. Appellate counsel would present the following points in support of this position.

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<sup>1</sup> State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

1.) Appellant was convicted of possession of a firearm during the commission of a violent crime and assault and battery with intent to kill A. J. Wilson during a shoot-out between appellant, co-defendant Johnson, A.J. Wilson, Walter Gadsen, and Isaac Wilson (deceased) on the night of November 20, 2006. Co-defendant Johnson was convicted of voluntary manslaughter in relation to Isaac Wilson's death, and aggravated assault against Walter Gadsen and AJ Wilson. The action began when appellant and co-defendant Johnson arrived at Isaac Wilson's residence. During the commotion that followed, appellant acted in self defense and in defense of others when A.J. Wilson, Isaac Wilson, and Walter Gadsen, all of whom held guns, and shouted "let's shoot [appellant and codefendant]." R. 691, l. 5 - p. 692, l. 13. Also, appellant acted in self-defense at one point during the melee when A. J. Wilson fought and held him down while Isaac Wilson pointed a gun at him. R. 732, lines 3-10. In addition, it appeared that all of the men were engaged in mutual combat during the fighting.

2.) The trial judge charged the jury on the law of self defense, defense of others, mutual combat, and murder and voluntary manslaughter. R. 853, l. 13 – p. 854, l. 21; R. 858, l. 21 – p. 865, l. 2. In addition, the trial judge gave the following instructions on "malice" and "the use of a deadly weapon" to the jury:

In order to prove assault and battery with intent to kill, the State must prove, beyond a reasonable doubt, that the defendant committed an unlawful act of a violent nature to the person of another with malice aforethought. The difference between assault and battery with intent to kill and assault and battery of a high and aggravated nature is the presence or absence of malice. Malice, as I have previously defined to you, is ill will or hostility towards another person and the intentional doing of a wrongful act without just cause or excuse with the intent to inflict an injury or under circumstances that the law will infer an evil intent.

R. 719, l. 21-p. 721, l. 15:

Malice is hatred, ill will, or hostility towards another person. [Malice] is the intentional doing of a wrongful act without just cause or excuse and with the intent to inflict an injury or under certain circumstances that the law will implicate an evil intent. Malice

aforethought may be expressed or inferred. Express malice is shown when a person speaks words which express hate or ill will. Malice may be indicated from conduct showing a disregard for human life. An implication of malice may also arise when the deed is done with a deadly weapon. That implication is merely an evidentiary fact which may be taken into consideration along with any other evidence in this case.

R. 715, l. 2 – p. 716, l. 5.

3.) The Belcher issue was raised at appellant's sentencing proceeding and on direct appeal. The Court of Appeals affirmed appellant's appeal on the Belcher issue as follows:

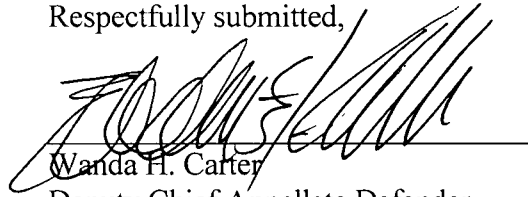
We affirm pursuant to Rule 220(b), SCACR and the following authorities: State v. Belcher, 385 S.C. 597, 685 S.E. 2d 802 (2009) (providing the Belcher Court's "ruling is effective in all cases which are pending on direct review or not yet final where the issue is preserved."

4.) The imposition of the sentence is the final judgment in a case from which an appeal can be taken. State v. Miller, 289 S.C. 426, 346 S.E.2d 705 (1986). Petitioner's guilt phase concluded on September 18, 2009. Belcher was decided on October 12, 2009. Petitioner was sentenced on October 21, 2009. Undoubtedly, appellant's case was "not yet final" when the Belcher issue was raised at sentencing because this happened before appellant's sentences were pronounced and thus before the case was final; and furthermore, the Belcher issue "[was] preserved" at sentencing before appellant's sentences were pronounced, and again before the case was final. Hence, per appellant's bifurcated proceeding, the Belcher issue was properly raised at sentencing before the case was "not yet final" and "preserved" at sentencing before the sentences were pronounced and the case finality achieved.

WHEREFORE, inasmuch as this Court might have overlooked the fact that appellant's trial was a bifurcated proceeding that included a guilt phase and a sentencing phase, then the Belcher issue, which was raised and preserved at the sentencing phase

before the case was finalized, was clearly and properly preserved for appellate review before this Court. As a result, counsel for appellant respectfully requests a rehearing into the preservation of and merits of the Belcher error in this case on appeal.

Respectfully submitted,



Wanda H. Carter  
Deputy Chief Appellate Defender

This 14th day of November, 2013.

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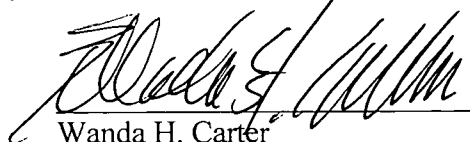
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CERTIFICATE OF SERVICE  
\_\_\_\_\_

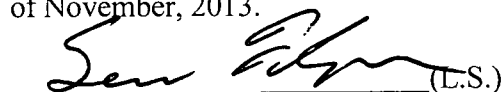
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and upon Mr. Kerwin Parker, #337544 at Broad River Correctional Institution, 460 Broad River Road, Columbia, SC 29210, this 14th day of November, 2013.



Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 14th day  
of November, 2013.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.