

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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MAY 14 2014

Appeal from Beaufort County
The Honorable Perry M. Buckner, Circuit Court Judge **S.C. Supreme Court**

Appellate Case No. 2013-

001119

JOSE HERRERA,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Attorney General

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ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

I. Whether there is probative evidence to support the lower court's ruling that counsel was not ineffective for failing to object to the malice jury instruction given at trial when the Petitioner's trial took place prior to this Court's ruling in Belcher and trial counsel is not required to be clairvoyant or to anticipate changes in the law that did not exist at the time of trial?

II. Whether counsel was ineffective for failing to request an involuntary manslaughter jury instruction based on the Petitioner's first and second version of facts when this issue is not preserved for appellate review, the Petitioner has failed to carry his burden of proving an involuntary manslaughter instruction was warranted based on the Petitioner's first and second version of facts, and no prejudice resulted from counsel's performance?

STATEMENT OF THE CASE

For purposes of this Return, the Respondent adopts the Petitioner's Statement.

ARGUMENT

The Petitioner asserts the post-conviction relief court erred by finding the Petitioner failed to carry his burden of proving trial counsel provided ineffective assistance. The Respondent submits probative evidence exists to support the post-conviction relief court's findings. The petition should be denied and the appeal dismissed.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their 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 the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. 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. The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test.

On appeal, this Court must affirm the circuit court's denial of post-conviction relief when there is probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 369 (1997); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

I. There is probative evidence to support the lower court's ruling that the Petitioner failed to carry his burden of proving counsel was ineffective for failing to object to the malice instruction given at trial when the Petitioner's trial took place prior to this Court's ruling in Belcher and trial counsel is not required to be clairvoyant or to anticipate changes in the law that did not exist at the time of trial.

The Petitioner asserts trial counsel was ineffective for failing to object to the malice jury instruction given during the Petitioner's trial. The Petitioner asserts the malice instruction given was improper pursuant to this Court's ruling in State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). The Respondent submits the Petitioner's jury trial was pre-Belcher and the malice instruction given during the Petitioner's trial was proper at the time of trial.

The Petitioner was convicted of shooting his wife in the bathroom of their home after a verbal disagreement. Counsel for the Petitioner argued at trial the lack of malice. (App. 425:14-16). The jury was instructed on malice as follows:

"The law says that if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts are proven 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 the jury along with the other evidence in the case and you may give it such weight as you determine it should receive." (App. 373:21-374:3).

In State v. Belcher, this Court held that a "jury charge instruction 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 would reduce, mitigate, excuse or justify homicide." 385 S.C. 597, 600, 685 S.E.2d 802, 803-04 (2009). This Court held further "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 (2009). The malice instruction given in Belcher was the same instruction given in the present case.

While the malice instruction given in the Petitioner’s case was later held to be improper by this Court in Belcher based on the facts presented, the Respondent submits at the time of the Petitioner’s trial the instruction was not improper or objectionable. The Petitioner proceeded to trial on March 16-19, 2009. Belcher was decided by this Court on October 12, 2009. Counsel testified at the evidentiary hearing that the malice instruction given during the Petitioner’s trial was the standard instruction. (App. 427:22-25). She testified further she did not think the instruction was objectionable at the time. (App. 428:1-3). The Respondent submits counsel’s performance was proper because at the time of trial - seven months prior to Belcher- the malice instructive given to the jury was proper and there was no basis to challenge the instruction.

A finding by this Court that counsel was ineffective for failing to object to a malice instruction that was subsequently declared improper by Belcher would be this Court requiring trial counsel to act and make objections based on anticipated changes in the law. This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial. Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993).

In support of his argument that counsel should have objected to the malice instruction, the Petitioner asserts if counsel had objected to the instruction he would have had the benefit of Belcher being applied retroactively while his case was pending on direct appeal. The Petitioner asserts further that this case falls within a narrow window of cases where this Court’s ruling in Belcher should be applied retroactively on post-conviction relief. The Respondent submits this

Court clearly outlined which cases would have the benefit of retroactivity and this case does not meet the requirements necessary for Belcher to be applied retroactively.

In Belcher, this Court held that its decision in the case was a clear break from modern precedent and would be effective in “all cases which are pending on direct review or not yet final where the issue is preserved.” Id. at 612, 685 S.E.2d at 810. This Court went on to hold that its ruling in Belcher “will not apply to convictions challenged on post-conviction relief.” Id. at 612-13, 685 S.E.2d at 810. Belcher does not apply retroactively to this case because trial counsel did not object to the instruction to preserve the issue for appellate review. At the time of trial, the malice instruction had not been found improper by this Court. In State v. Tapp, this Court held our preservation rules require that objections to the admissibility of evidence be specific, but they most certainly do not require clairvoyance. 398 S.C. 376, 385-86, 728 S.E.2d 468, 473 (2012).

Belcher also does not apply retroactively to this case because this appeal stems from the Petitioner’s challenge of his conviction on post-conviction relief. It is true that had counsel objected to the malice instruction given during the Petitioner’s trial, Belcher would likely have applied retroactively to this case on direct appeal. However, this argument by Petitioner cannot be used to circumvent this Court’s clear mandate that its ruling in Belcher “**will not apply to convictions challenged on post-conviction relief.**” Id. (emphasis added). The Respondent submits there is probative evidence to support the lower court’s ruling that the Petitioner failed to carry his burden of proving counsel was ineffective for failing to object to the malice jury instruction given at trial.

II. The issue of whether counsel was ineffective for failing to request an involuntary jury instruction based on the Petitioner's first and second version of facts is not preserved for appellate review and if this Court is inclined to review this issue the Petitioner has failed to carry his burden of proving an involuntary manslaughter instruction was warranted based on the Petitioner's first and second version of facts and no prejudice resulted from counsel's performance.

The Petitioner also asserts counsel was ineffective for failing to request an involuntary manslaughter jury instruction based on the Petitioner's first and second version of facts and failing to preserve the issue for appellate review. The Respondent submits this issue is not properly preserved for appellate review. It is well settled that an issue that has not been presented to or passed upon by trial judge will not be considered on appeal. State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974). If an issue is raised but not ruled upon, it is not preserved for appeal. State v. Watts, 321 S.C. 158, 467 S.E.2d 272 (1996). Only a matter that has been ruled on below can be reviewed, otherwise, the appellate court would be exercising original jurisdiction. Gee, 262 S.C. 373, 204 S.E.2d 727.

The issue of whether or not counsel was ineffective for failing to argue Petitioner's first and second version of facts in support of Petitioner's request for a voluntary manslaughter charge was raised in the Petitioner's application for post-conviction relief, but was not ruled on by the post-conviction relief court in its Order of Dismissal. (App. 404). In the Order of Dismissal, the lower court held "the Applicant failed to meet his burden of proving trial counsel should have requested an involuntary manslaughter jury instruction." The lower court held further "the record reflects counsel requested an involuntary manslaughter instruction." (App. 444). The Respondent submits further the Petitioner failed to file a motion to alter or amend the judgment in order to preserve the issue for appellate review. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (holding if the losing party has raised an issue in the lower

court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review).

The arguments presented by the Petitioner on appeal were not presented to the post-conviction relief court for review. Issue preservation rules are meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2012). The record reflects no argument was made or testimony elicited at the evidentiary hearing by the Petitioner to support a ruling by the lower court that counsel was ineffective for arguing the Petitioner's first and second version of facts in support of his request for an involuntary manslaughter charge. The Respondent submits this issue is not preserved for appellate review by this Court because it was raised, but not ruled on by the lower court.

If this Court is inclined to address the merits of this allegation, the Respondent submits the Petitioner has failed to show that an involuntary manslaughter instruction was warranted based on the Petitioner's first and second version of events. At trial, the Petitioner presented three different versions of facts to explain the shooting to police. In the first version of facts, the Petitioner told police he left home to go buy a beer, returned home shortly after leaving, and found his wife laying by the toilet with a gunshot wound. (App. 299:22-24, 303:1-14, 307:4-9, 309:7-16, 312:1-4, 18-25, 313:1-20). In the second version of events, the Petitioner told police he came home, he told the victim he wanted to leave, V got upset and went to the restroom, V grabbed his pistol and pointed it at her head, he went to reach for the pistol, the V dropped the pistol, and when he grabbed the pistol the gun accidentally fired. (App. 316:13-23, 319:4-25, 320:4-18). In the third version of events, Petitioner told police he and the victim were arguing, he

grabbed his gun, and he tripped over something in the bathroom and accidentally shot the victim. (App. 324:21-25, 328:19-329:18).

During the charge conference at trial, counsel for the Petitioner requested an instruction on involuntary manslaughter and argued the Petitioner had no intent to point the firearm at the victim when he tripped and fell causing the gun to go off. (App. 343:8-9). Trial counsel argued State v. Light in support of her request for involuntary manslaughter. The trial court denied the Petitioner's request for an involuntary manslaughter charge and charged the jury on voluntary manslaughter. (App. 349:5-21).

The Respondent submits the Petitioner has failed to show the Petitioner's first and second version of facts warranted an instruction on involuntary manslaughter. Involuntary manslaughter is "the killing of another without malice and unintentionally, but while one is engaged in the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or bodily harm" or the "killing of another without malice and unintentionally but while engaged in the doing of a lawful act with a reckless disregard of the safety of others".

The Petitioner's first version of facts clearly did not warrant an involuntary manslaughter instruction. In the first version of facts, the Petitioner claims he walked in the bathroom and found the victim dead. In this version of facts, the Petitioner does not admit to any unintentional killing as required for involuntary manslaughter.

The Petitioner's second version of facts also does not warrant an involuntary manslaughter instruction. In his second version of facts, the Petitioner claims the gun accidentally went off as he grabbed it from the victim to prevent her from committing suicide by shooting herself. The Petitioner relies on State v. Light in support of his claim that the second version of facts would have warranted an instruction on involuntary manslaughter. 378 S.C. 641,

664 S.E.2d 465 (2008). In Light, the defendant was convicted of shooting his girlfriend with a rifle after an altercation. This Court held the defendant was entitled to a charge on involuntary manslaughter because there was evidence of self-defense and a struggle over the weapon between the defendant and the victim. Id. at 648-649, 664 S.E.2d at 468-469.

The Respondent submits the facts in Light can be distinguished from the facts in this case. In Light, the Court held the Petitioner was armed in self-defense at the time of the shooting because the defendant took the rifle from the victim after she threatened him with it. Id. In this case, the Petitioner's second version of facts does not indicate the Petitioner was armed in self-defense which may have warranted his possession of a firearm. In this version of facts, the Petitioner never indicated the victim pointed the weapon at him, but instead the victim was pointing the weapon at her head threatening to harm herself.

In Light, the Court also held there was evidence the defendant and the victim struggled over the weapon which supported an involuntary manslaughter charge to the jury. Id. In this case, unlike in Light, there was no evidence of a struggle between the Petitioner and the victim over the weapon in this version of facts. The Petitioner stated he went to grab the gun, the victim dropped the gun, and when he grabbed the gun it accidentally fired. This Court should not consider its ruling in Light dispositive in this case. The Respondent submits it is unlikely the trial court would have granted counsel's request for an involuntary manslaughter jury instruction based on the Petitioner's first and second version of the facts. The Respondent submits it is also unlikely that a denial by the lower court for an instruction based on the Petitioner's first and second version of events would have been reversed on appeal.

The Respondent also submits the Petitioner has failed to show prejudice resulted from counsel's failure to request an involuntary manslaughter charge based on Petitioner's first and

second version of facts. The Respondent submits had counsel requested an instruction for an involuntary manslaughter charge and the request been granted it is unlikely the jury would have found the Petitioner guilty of involuntary manslaughter in light of the evidence presented by the State at trial.

In addition to the Petitioner's multiple conflicting statements to police, the State presented the testimony of Jose Guerrero who testified the defendant came to his home shortly before the murder and was very upset and agitated at the victim. (App. 328-329). Guerrero testified the Petitioner made statements such as: "This bitch is pissing me off," and "He's sick of this bitch." (App. 329:19-21). The State also presented evidence of domestic violence in the home and testimony that the autopsy findings were consistent with the victim being shot while she was on the toilet and the assailant standing in the doorway of the bathroom or the victim's front slightly above her. (App. 176:24-177:11, 206:1-22). The Respondent submits in light of the evidence against the Applicant and the Petitioner's multiple incriminating statements, it is unlikely counsel's performance affected the outcome of the Petitioner's trial. The Respondent submits the Petitioner has failed to carry his burden of proving counsel was ineffective for failing to argue the Petitioner's first and second version of facts in support of Petitioner's request for an involuntary manslaughter jury instruction.

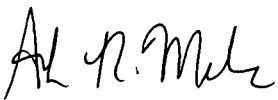
CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General

BY: 

Ashleigh R. Wilson

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ATTORNEYS FOR RESPONDENT

May 14, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Beaufort County
The Honorable Perry M. Buckner, Circuit Court Judge

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MAY 14 2014

S.C. Supreme Court

JOSE HERRERA

Petitioner,

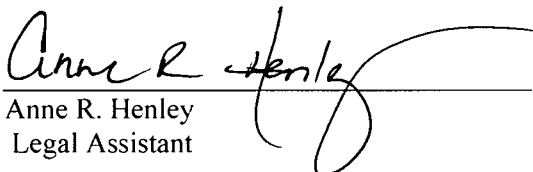
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STATE OF SOUTH CAROLINA,

Respondent.

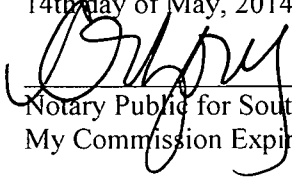
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Respondent's Return to Petition for Writ of Certiorari to The SC Supreme Court has been served upon opposing counsel, Wanda H. Carter, this 14thth day of May 2014.



Anne R. Henley
Legal Assistant

SWORN to before me this
14th day of May, 2014.

 (L.S.)
Notary Public for South Carolina.
My Commission Expires 10/28/2014



ALAN WILSON
ATTORNEY GENERAL

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MAY 14 2014

May 14, 2014

S.C. Supreme Court

Honorable Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: Jose A. Herrera v. State of South Carolina
Appellate Case No. 2013-001119

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari to the South Carolina Supreme Court in the above matter for filing in your office. By copy of this letter we are serving opposing counsel with this Return to Petition for Writ of Certiorari.

With highest regards,

Ashleigh R. Wilson
Assistant Attorney General

ARW/arh
Enclosures

cc: Wanda H. Carter, Esquire