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JUN 23 2014

**S.C. Supreme Court**

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County

Edward W. Miller, Circuit Court Judge

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WILLIAM JERMAINE HENRY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002762

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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LANELLE CANTEY DURANT  
Appellate Defender

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Division of Appellate Defense  
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ATTORNEY FOR PETITIONER

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## ISSUE PRESENTED

Did the PCR court err in failing to find trial counsel ineffective for not objecting to the jury charge that inferred malice may arise when the deed is done with a deadly weapon when State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) provided that this jury charge was no longer good law in South Carolina if mitigating evidence was presented, and that the Belcher ruling applied to cases pending on direct appeal where the issue was preserved?

## STATEMENT

In November 2006, the Greenville County Grand Jury indicted William Jermaine Henry on the charges of murder, kidnapping, assault and battery with intent to kill (ABWIK), and armed robbery (AR). On February 2-4, 2009, Henry proceeded to trial before the Honorable G. Edward Welmaker and a jury. Henry was represented by Tom Creech, and the state was represented by Jeff Weston. App. 1. The jury found Henry guilty of murder, but returned verdicts of not guilty of kidnapping, ABWIK, and AR. App. 441, ll. 2 – 25. Judge Welmaker sentenced Henry to fifty years imprisonment. App. 449, ll. 7 – 13. Henry filed an appeal which was perfected by the Office of Appellate Defense. The Court of Appeals affirmed Henry's conviction and sentence on June 27, 2011. State v. Henry, Op. No. 2011-UP-333 (Ct. App. filed June 27, 2011).

On June 29, 2012, Henry filed an application for post-conviction relief (PCR). The state filed a return on November 30, 2012. An evidentiary hearing was held on October 22, 2013 before the Edward W. Miller. Henry was represented by Caroline M. Horlbeck, and the state was represented by Karen C. Ratigan. App. 500. On November 26, 2013, Judge Miller filed an order denying Henry's PCR application and dismissing it with prejudice. App. 521 – 528. Henry's attorney filed a notice of appeal. This petition follows.

## ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for not objecting to the jury charge that inferred malice may arise when the deed is done with a deadly weapon when State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) provided that this jury charge was no longer good law in South Carolina if mitigating evidence was presented, and that the Belcher ruling applied to cases pending on direct appeal where the issue was preserved.

On March 21, 2006, William Henry called three friends---Freddie Irby, Mark Cureton, and Michael Garrett--to go with him to the apartment of Francisco Perez. The testimony was that Henry wanted to rob and “rough up” Perez because Perez had robbed Henry two weeks earlier. The testimony at trial was that Henry and Perez were drug dealers. App. 35, ll. 1 – 19; App. 79, ll. 14 – 25; App. 82, ll. 3 – App. 83, ll. 5; App. 273, ll. 1 – 23; App. 321, ll. 1 – App. 324, ll. 9.

Henry did not have a weapon. The only person with a weapon was Mark Cureton, and the gun was not loaded. App. 323, ll. 21 – App. 324, ll. 9; App. 279, ll. 20 – App. 280, ll. 12.

The four of them entered the apartment and found Perez and Andre Brooks, a friend of Perez’s there. The four started fighting when suddenly a shot rang out. The three friends all testified they saw Henry standing over Perez with a gun and saw him shoot Perez two more times. App. 278, ll. 1 – Ap. 279, ll. 2; App. 300, ll. 1 – 23; App. 328, ll. 1 – App. 329, ll. 17. The four were later arrested and charged with the murder of Perez and the kidnapping, ABWIK, and AR of Brooks. The three co-defendants pled guilty to voluntary manslaughter. App. 511, ll. 21 – App. 512, ll. 23.

In his charge to the jury on murder, the trial judge instructed the jury that the state had to prove beyond a reasonable doubt that Henry killed another person with malice aforethought. The judge then stated:

Inferred malice may also arise when the deed is done with a deadly weapon.

App. 428, ll. 22 – App. 429, ll. 25.

Trial counsel did not object. App. 430, ll. 1 – 25. When the judge discussed jury charges with the two attorneys, trial counsel made no reference to the malice charge. App. 357, ll. 1 – 371, ll. 7.

At his PCR hearing, Henry testified that his trial counsel was ineffective because he did not object to the judge's improper jury charge on malice which Henry said shifted the burden of proof to him. Because his attorney did not object, that issue was not preserved for appellate review. App. 510, ll. 21 – App. 511, ll. 20.

Trial counsel testified that he reviewed all of the evidence with Henry. The state offered Henry a plea deal for thirty years if he pled guilty to voluntary manslaughter, but Henry refused to accept the offer. App. 515, ll. 15 – App. 518, ll. 25.

The PCR judge found the testimony of trial counsel to be credible and found Henry's testimony to not be credible. The judge wrote that trial counsel's competence was reflected by the jury's decision finding Henry not guilty of the other charges and guilty only of the murder. App. 525.

The judge ruled that trial counsel was not ineffective by not objecting to the malice jury charge because State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) did not apply to Henry's case. Belcher held that malice jury charge in a murder case did not apply if there was evidence that would reduce or mitigate or justify the killing. The judge ruled that the Supreme Court held that Belcher would apply to case pending on appeal where the issue was preserved. App. 526. The issue in Henry's case was not preserved for appeal. Therefore, Belcher could not be applied retroactively to Henry, and could not be applied in a PCR. App. 527. The judge denied Henry's PCR. App. 528.

Where ineffective assistance of counsel is alleged 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, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel’s performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

In State v. Belcher, *supra*, the Supreme Court held that the jury charge that malice may be inferred from the use of a deadly weapon was no longer good law in South Carolina where evidence was presented that would reduce, mitigate, excuse or justify the homicide. The Supreme Court also held that this ruling would be effective for all cases pending on direct review where the issue was preserved.

The Supreme Court has ruled that issues not raised and ruled on in the trial court will not be considered on appeal. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-694 (2003).

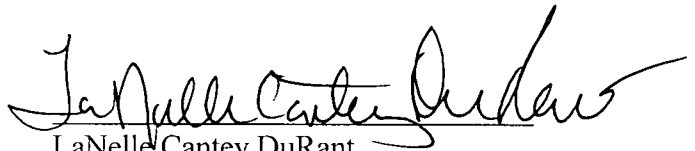
Trial counsel was ineffective for not objecting to the trial court’s jury charge that malice could be inferred from the use of a deadly weapon. Although Henry’s trial was decided in February 2009 before Belcher was decided in October 2009, Henry’s case was pending on direct appeal. If his

attorney had objected to the charge, this issue could have been reviewed by the appellate court. The fact that Henry did not have a weapon when he entered the apartment indicated that the malice requirement for murder did not exist. The only weapon was in Co-defendant Cureton's possession and was not loaded. This should be sufficient to show mitigation. Henry was prejudiced by his trial attorney not objecting because the issue could not be considered under Belcher.

CONCLUSION

Based on the above, certiorari should be granted, and the conviction and sentence reversed, and the case remanded for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "LaNelle Cantey DuRant", written over a horizontal line.

LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

This 23<sup>rd</sup> day of June, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO GREENVILLE COUNTY  
EDWARD W. MILLER, CIRCUIT COURT JUDGE

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WILLIAM JERMAINE HENRY,

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PETITION TO BE RELIEVED AS COUNSEL

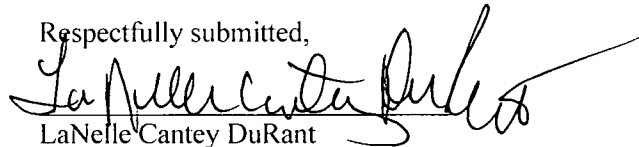
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Counsel for William Jermaine Henry states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on October 22, 2013. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for William Jermaine Henry.

Respectfully submitted,



LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR PETITIONER

This 23<sup>rd</sup> day of June, 2014

STATE OF SOUTH CAROLINA  
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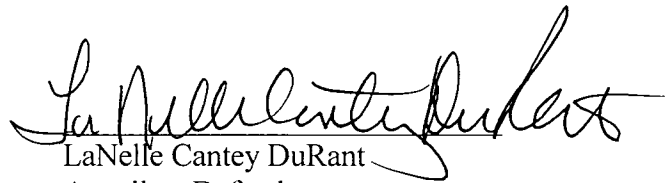
RESPONDENT

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CERTIFICATE OF SERVICE

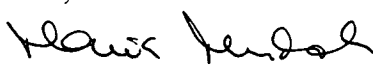
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I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. William Jermaine Henry, #276767, McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 23<sup>rd</sup> day of June, 2014.

  
LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 23<sup>rd</sup> day  
of June, 2014.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 3, 2023.