STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Abbeville County

Frank R. Addy, Circuit Court Judge

ROBERT ORLANDO HILL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2013-002106

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Whether the PCR court erred in finding that appellate counsel provided effective assistance of counsel where appellate counsel failed to raise on appeal the preserved issue that the Trial Court's jury charge that inferred malice may arise when the deed is done with a dangerous instrumentality was erroneous because Petitioner presented evidence reducing, mitigating, excusing or justifying the homicide, including evidence of self-defense?

STATEMENT

Indictment

On November 15, 1999, Petitioner Robert Orlando Hill was indicted by the Abbeville County Grand Jury for (1) murder; and (2) possession of a firearm during the commission of a violent crime. App. 904-905.

Trial and Guilty Verdict

On July 11, 2005, Petitioner was tried before the Honorable Wyatt T. Saunders and a jury. App. 1. This was Petitioner's second trial as the South Carolina Court of Appeals had previously reversed and remanded Petitioner's convictions for murder and possession of a firearm during the commission of a violent crime. State v. Hill, 360 S.C. 13, 598 S.E.2d 732 (Ct. App. 2004).

In his second trial, Petitioner was represented by E. Charles Grose, Jr. and W. Alexander Buergey. App. 1. The State was represented by Assistant Solicitor John C. Anthony. Id.

The jury found Petitioner guilty of voluntary manslaughter and possession of a firearm during the commission of a violent crime. App. 663, l. 24 – 664, l. 9. Judge Saunders sentenced Petitioner to thirty years for voluntary manslaughter and five years consecutive for possession of a firearm during the commission of a violent crime. App. 668, l. 18 – 669, l. 2; 906-907.

Direct Appeal

Petitioner appealed his convictions and sentences to the South Carolina Court of Appeals. Appellate Defender Eleanor Duffy Cleary of the Office of Indigent Defense filed an appellant's brief on behalf of Petitioner arguing two issues: (1) that the Trial Court erred

in refusing to allow a witness to testify about prior threats from the decedent; and (2) that the Trial Court erred in failing to permit Petitioner to testify that another person told him about threats the decedent had made. App. 671-689. The State filed a respondent's brief, and Petitioner filed a reply. App. 690-713. The Court of Appeals affirmed Petitioner's convictions and sentences in an unpublished opinion on February 6, 2008. App. 714-718.

Chief Appellate Defender Joseph L. Savitz, III petitioned the Court of Appeals for a rehearing on Petitioner's behalf which was denied. App. 719-724. Savitz then filed a Petition for Writ of Certiorari to this Court on Petitioner's behalf which was denied on February 19, 2009. App. 725-747. The Remittitur was issued on February 24, 2009.

Application for Post-Conviction Relief and Evidentiary Hearing

On August 10, 2009, Petitioner filed his application for post-conviction relief ("PCR"), asserting claims of ineffective assistance of trial counsel and appellate counsel. App. 749-796. The State filed its Return on or about March 11, 2010. App. 797-802.

An evidentiary hearing was held before the Honorable Frank R. Addy, Jr. on March 13, 2012. App. 803-883. Tommy Lee Stanford represented Petitioner, and the State was represented by Assistant Attorney General J. Rutledge Johnson. App. 803. Petitioner, Mr. Grose, Mr. Savitz, and Ms. Cleary each testified at the hearing. App. 808-873.

The primary arguments raised at the evidentiary hearing were trial counsel's failure to call certain witnesses at trial, trial counsel's failure to call an expert for the defense at trial, appellate counsel's failure to correctly set forth the facts as to self-defense, and appellate counsel's failure to brief the preserved issue of whether the Trial Court erred by charging the jury that "inferred malice may arise when the deed is done with a dangerous

instrumentality, which is any article, instrument, or substance which is likely to cause death or great bodily harm." App. 631, ll. 1-5; 808-883.

Order of Dismissal

On April 25, 2012, Judge Addy denied Petitioner's PCR application finding that trial counsel was not ineffective for failing to call certain witnesses at trial, including an expert witness, where trial counsel articulated a valid strategy for not calling these witnesses and where these witnesses did not testify at the PCR evidentiary hearing. App. 886-894. Judge Addy also ruled that appellate counsel was not ineffective where appellate counsel used her professional judgment to brief issues according to their potential merit. Judge Addy also noted that when appellate counsel briefed the case, the current law at the time was that the malice instruction objected to was still proper and that State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), which held that such a charge was improper where mitigating circumstances were shown to justify the homicide, had not yet been issued. Judge Addy further concluded that appellate counsel was not required to anticipate changes in the law that were not in existence at the time of his or her representation. App. 890-893.

A motion for reconsideration was filed by Petitioner on July 18, 2012, which was denied by an order filed September 18, 2013. App. 895-902.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in finding that appellate counsel provided effective assistance of counsel where appellate counsel failed to raise on appeal the preserved issue that the Trial Court's jury charge that inferred malice may arise when the deed is done with a dangerous instrumentality was erroneous because Petitioner presented evidence reducing, mitigating, excusing or justifying the homicide, including evidence of self-defense.

Relevant facts of trial

Sergeant Terrence Harvard with the Calhoun Falls police department testified that he received a call at 7:18 p.m. on August 6, 1999 about a shooting at the Eastgate Apartments. App. 139-140. He met a group of people there who pointed him towards a small blue car. App. 141, ll. 12-21. There he saw Artell Hill (Artie) slumped forward, having been shot, in the front passenger seat of the car. App. 142. Sergeant Harvard saw a stick in Artie's left hand, which was the size of a little league baseball bat. App. 175, ll. 2-6. He confirmed that Artie had a grip on that stick. App. 174, ll. 21-25.

Frank Tut took Sergeant Harvard to Lake Russell and threw a rock in the water to show where he had thrown a weapon in the water. App. 154-155. The police retrieved the pistol, which had one round remaining in the magazine. App. 156, ll. 14-22. The SLED expert opined that the casings found at the scene could have been fired from the pistol but he could not rule out other pistols as their source of propulsion. App. 374-375.

The police found four shell casings at the scene, which they sent to SLED, and one more later, which was not sent to SLED. App. 151, ll. 21-23; 159, ll. 10-12.

Jeffrey Crooks, a SLED agent, testified that based on the fact that they could not find one of the bullets in the car from a left shoulder gunshot wound to Artie, it was "definitely a possibility" that Artie was not shot in the position he was later found in by police. App. 310, ll. 4-14. He also agreed there was a possibility that the shooter and Artie could have

been squared up face to face when Artie was shot. App. 311, ll. 8-19. He further acknowledged that blood being found on the outside of the car could have indicated that the car door was open when the blood got there and he could not rule out that possibility. App. 317, l. 23- 319, l. 4; 329, l. 19 – 330, l. 9.

SLED Agent Crooks also conceded that if blood was found outside of the vehicle, then it was more probable than not that Artie was outside of the car when he was shot:

> Q: So, what you're saying is, if that's blood it didn't get there from while he was sitting in the car?
>
> A: Right. I can't, I cannot come up with a scenario how that blood could have gotten there if he was sitting in the vehicle, as a result of the actual wound itself.
>
> Q: All right. So, it would mean that if that is his blood, then more probably than not it got there with him outside the vehicle. Would you agree with that?
>
> A: Yes, it would have had to.
>
> Q: And you agree that there is blood on that vertical part of the door?
>
> A: Yes, sir, that's correct.
>
> Q: All right. And that's very consistent with the door being open, right?
>
> A: That's one possibility, yes, sir.

App. 343, ll. 3-20.

Another SLED analyst testified that when he arrived Artie was dead in the passenger seat and the car doors were closed and the window open. App. 283, ll. 11-13. He opined that the blood on Artie's body was consistent with him being in the sitting position when he was shot. App. 285, ll. 1-4. He, however, could not rule out that the car door may have been open when Artie was shot because there was blood on the vertical part of the door where the door would normally be closed. App. 318, l. 11 - 319, l. 4. He also testified that

the wound in Artie's shoulder was consistent with someone being shot standing face to face with someone, meaning Artie would have been outside the vehicle when he was shot. App. 337-338.

The forensic pathologist testified that Artie was shot six times and two wounds were to the body and four were to the head. App. 386. One of the bullets went into Artie's right upper arm and into his pectoral muscle. App. 387, ll. 19-25. Another bullet went into his left shoulder from the front and came out his back. App. 388, ll. 1-5. Two wounds were to the front part of his head going from the right side to the left side. Another shot went into his skull above his right ear and lodged in his brain. Another grazed the bones in his head. App. 388.

From the location of the gunshots, the pathologist believed that Artie was turning towards the open window facing his shooter and that his upper arm was raised when he was shot. App. 390, ll. 1-5; 392, ll. 8-21; 418. The left shoulder gunshot most likely occurred first according to the pathologist. App. 397. He testified it was "certainly" possible Artie was standing and out of the car when he was shot in the shoulder, as that shot was level and consistent with someone squared up and facing Artie shooting at Artie's shoulder. App. 425-426. In addition, the projectile from that shot was not in the body or the car. App. 435, ll. 15-19.

The pathologist also believed the end of the gun barrel was a foot or more away from Artie when the gun was fired. App. 391, ll. 8-10; 425, ll. 5-8. The pathologist also testified that Artie could not have been in the seated position in which he was found by police when he was shot because no window glass was broken and so Artie's body would have been in a different position when he was shot in the left shoulder. The pathologist

agreed that Artie would have had to been squared up with the shooter. App. 416, l. 1 – 417, l. 1. He further agreed the wound could have occurred with someone standing up, squared up with the shooter, facing him. App. 417, l. 18 – 418, l. 7.

Despite the testimony of SLED Agent Crooks and the pathologist which showed it was very probable that the car door was open and Artie was even outside of the car "squared up" and face to face with the shooter, several witnesses testified that they did not see Artie open the car door or get out of the car when he was shot.

Jeffrey Tatum testified that Odell Tillman, a lifelong friend Artie, and he were riding in Odell Tillman's car on August 6, 1999 when they stopped at the Eastgate Apartments. Artie was in the front passenger seat. App. 216 – 217; 227, l. 25 –228, l. 2. Jeffrey was in the backseat and when Odell parked, Jeffrey got out of the car and stood beside Artie's position in the passenger seat. App. 219, ll. 17-21. Petitioner rode up on his bicycle. Jeffrey knew him from his brother Reggie and stated "we were good friends and all." He testified that he had no dispute or bad feelings with Petitioner. App. 218, ll. 9-13. He had seen Petitioner fifteen minutes earlier at Seneca Circle. App. 218, ll. 16-21.

Jeffrey and Artie kept talking when Petitioner rode up on his bike. Jeffrey said "What's up, Lan?" and Petitioner said "what's up Bodine?" App. 219, ll. 18-20. Then, according to Jeffrey, Petitioner said "What's up, I heard you was looking for me." App. 219, ll. 14-15. Artie sat up in his car seat and said "I heard you was looking for me." App. 220, ll. 9-10. Petitioner got off his bike and said "all right, stay right there." Jeffrey claimed Petitioner then pulled out his gun and started shooting after taking two or three steps toward the car. App. 220, ll. 17-24. Jeffrey testified that Petitioner shot Artie from half a parking space away; however, he originally told police it was "point blank." App. 225-226. Jeffrey

said he heard four shots. App. 221, l. 2. Incredibly, he never moved when Petitioner was shooting and continued to lean against the car standing right next to Artie. App. 221, ll. 5-10. Artie had both hands on his stick. App. 221, l. 17. Petitioner did not stick the gun in the car according to Jeffrey. App. 226, ll. 24-25. Jeffrey also agreed that Artie had the stick in his hand the entire time and still had the stick in his hand when he got shot. App. 228, ll. 3-12.

Geneva B. Clinkscales testified that she was standing outside her house on the sidewalk when she saw Odell Tillman drive up and get out of his car. He came to the sidewalk where she was located. Artie Hill and Jeffrey Tatum were also in the car. Artie was in the front seat. App. 195, ll. 8-11. Geneva B. Clinkscales claimed Artie did not leave the car but that Jeffrey did and Jeffrey "was kneeling down on the sidewalk at the front end [passenger side] of the car talking to" Artie. App. 186, l. 13- 187, l. 4; 198, l. 18. Petitioner came up on his bicycle and got off his bike. She then claimed that Petitioner walked up to Odell's car "and put his hand and pulled out the gun and like that shot him." App. 188, ll. 9-12. She heard two shots, a pause, and then four or five more shots. App. 188, ll. 23-25. She alleged that she never saw the door of the car open. App. 189, l. 7. She said Petitioner got back on his bicycle and left. App. 189, ll. 13-15. She heard no conversation between anyone in the car and Petitioner. App. 189, ll. 16-21. She said she saw Petitioner put the gun a couple of inches from Artie's head. App. 196, l.18 –197, l. 2. Her claim that Petitioner put the gun a couple of inches from Artie's head was directly contradicted by the forensic pathologist who testified that the gunshot could not have come from such a close distance and opined that the end of the gun was at least a foot away. App. 415, ll. 2-12; 425, ll. 5-8.

Her granddaughter, Geneva Michelle Clinkscales (Michelle), testified that she was with her grandmother. She saw Odell drive up and said Artie was in the front seat and Jeffrey was in the back. App. 201, ll. 16-21. Artie was her half-brother's first cousin with whom she grew up. App. 202, ll. 1-2. Jeffrey got out of the car and talked to Artie. App. 202, ll. 18-19. Odell got out of the car and went to talk to Michelle's friend. App., ll. 5-7. Petitioner came up on a bicycle and walked over to Odell's car. App. 203, l. 22-23. Michelle then heard two gunshots, a pause, and then a "couple more shots." App. 204, ll. 4-8. Petitioner got back on his bike and left. App. 202, ll. 17-19. She claimed she never saw Artie get out of the car or the car door open. App. 205, ll. 1-7. She heard no conversations. App. 205, ll. 10-13. She called 9-1-1. App. 207, ll. 24.

Shannon Hill testified that her brother grew up with Petitioner. App. 231. She saw Petitioner on August 6, 1999, and he was riding his bicycle. App. 231, ll. 16-18. He spoke to her and asked about some friend's daughter, said he had to go the grocery store and get his uncle something to eat at Gurley's. App. 231, l. 24 - 232, l. 9. He went inside her apartment and spoke to her brother and his girlfriend and then left on his bicycle, heading towards Gurley's. App. 232, ll. 14-25. Then Odell and Artie pulled up in Odell's car. App. 233, ll. 9-11. A few minutes later, Petitioner returned on his bicycle. App. 234, ll. 1-6. She heard Jeffrey say "what's up, man" and Artie said "Heard you were looking for me." App. 235, ll. 10-17. Petitioner dropped the bike and said "Stay right there." Artie said "I'm not worried about you shooting me." App. 236, ll. 21-24. Shannon claimed Petitioner lifted his shirt, pulled something out and pointed it toward Artie as he was walking toward the car. App. 236, ll. 1-7. She saw something glaring in the sun. App. 236, ll. 10-11. Shannon then claimed that Petitioner pointed it toward Artie's head and started shooting. App. 236, ll. 14-

18. She also claimed she never saw Artie get out of the car. App. 237, ll. 8-17. She also testified that Petitioner put the gun to Artie's temple, even though the forensic pathologist confirmed that never could have happened. App. 254, ll. 1-7; 415, ll. 10-12; 425, ll. 5-8.

Ira Green testified he was visiting his cousin, Otis Green, who lived at the Eastgate Apartments. App. 256, ll. 20-25. His cousin was not home so he talked to Shannon and was talking to her when Petitioner came up to talk to them. Petitioner said he was going to the grocery store to get something to cook dinner for his uncle. App. 258, ll. 6-23. Petitioner left on his bicycle toward Gurley's. App. 259, l. 1. Fifteen minutes later, Ira saw Petitioner again when he returned and approached the car in which Artie was sitting. App. 259-260. His testimony about the shooting incident essentially mirrored Shannon's, except that Ira testified the gun jammed after Petitioner fired it four or five times and Petitioner cocked it back and fired again. App. 262 – 263. He testified the gun was "close to his head" and inside the car when Artie was shot. App. 271, ll. 3-17. Ira also testified that he saw a stick between Artie's legs and that Artie was holding the stick tightly with both hands. App. 265, ll. 19-20. He testified he had never seen Artie do anything with the stick prior to that night. App. 265, l. 21 –266, l. 1. Ira Green was a good friend of Artie's. App. 272, ll. 15-17.

Petitioner turned himself in on August 6, 1999. App. 460. Petitioner testified that on a prior occasion, Artie asked whether he knew that Artie's girlfriend was cheating on him. Petitioner said he knew nothing about the matter and Artie said he could "beat all you all." App. 473. On a later occasion when Petitioner was in a cast, Artie told him that if he was not in a cast that he "would do what he have to do." App. 474. Artie ran back in and got a baseball bat, as did his friend. App. 475, ll. 1-5. Artie hit the car with the bat and

dented it. App. 475, ll. 15-17. One of Petitioner's friends was able to chase them away. App. 475, ll. 11-14. Threats from Artie and his friend, Sammy, were conveyed to Petitioner so he stopped visiting places where they would be, in an effort to avoid trouble. App. 476, ll. 13-25.

Petitioner testified that he attempted to avoid Artie on the day of the shooting. He was at the Eastgate Apartments to get food for his uncle. App. 480. He saw Artie, who raised his stick. Petitioner left and waited 45 minutes to return, thinking Artie would be gone. App. 480, ll. 14-25. He needed to tell his girlfriend to get her child. App., ll. 6-7. He had a pistol on him because he said the police would not arrest Artie after the incident with the baseball bat. App. 482, ll. 16--24. He got the gun from Frank Tut. App. 483, ll. 10-11.

Petitioner was riding his bike and he did not see Artie. Jeffrey said something to him and then he saw Artie rise up, showing his stick, and saying "I heard you been looking for me." App. 484, ll. 13-21. He ignored him and started to get off his bike to go up to the door of his friend's house. Artie reached over and started to open the car door, so Petitioner started shooting. App. 485, ll. 1-6. He testified he feared for his life based on what had happened with Artie in the past. App. 485, l. 21 –486, l. 4. He had no intention of using his gun that day. App. 483, l. 24 – 484, l. 1. His defense was that he acted in self-defense. App. 551-600.

At trial, the Trial Court charged the jury:

> Inferred malice may arise when the deed is done with a dangerous instrumentality, which is any article, instrument or substance which is likely to cause death or great bodily harm.

App. 631, ll. 1-5.

The Trial Court also charged the jury on self-defense. 633, l. 15 – 638, l. 2.

Following the Trial Court's charge to the jury, Petitioner's trial counsel made the following objection:

> And I know you adjusted the charge from what we do sometimes but when you were talking about malice and inferred malice you talked about a dangerous instrumentality and you talked about also a deadly weapon at some point near the end of that, and we had had a discussion in chambers and I think under State versus Huey which is a case out of Abbeville County, if the defense can't get examples of what provocation is for manslaughter, you just have a general instruction of malice and not single something out with a deadly weapon or dangerous instrumentality, because a dangerous instrumentality can be used intentionally in manslaughter and intentionally in self defense, and when you say, you know, you can infer from the intentional use of a dangerous instrumentality, that seems to say that that applies here but doesn't apply there but, you know, it would be intentional in self defense, so I would make that objection.

App. 648, l. 11 – 649, l. 5.

The Trial Court overruled the objection. App. 649, l. 6.

After the jury requested a copy of the differences in writing of the murder charge and the voluntary charge, Petitioner's trial counsel again objected to the malice charge and the inference of malice when a deadly weapon is used and observed it was a charge on the facts. App. 659, l. 10 – 662, l. 19.

Petitioner was convicted of voluntary manslaughter and possession of a weapon during the commission of a violent crime. App. 664, ll. 2-9. Following the trial, Petitioner's trial counsel sent an e-mail to appellate counsel Savitz informing him that he objected to the charge on the inference of malice from the use of a deadly weapon and he wanted appellate counsel to take a look at the issue for appeal. App. 885. Petitioner's trial counsel also attached a brief prepared by C. Rauch Wise on the issue and an e-mail from Wise which stated: "I believe that if we start objecting to the inference of malice charge, we can get the court [to] change that rule." Id. C. Rauch Wise would later prevail on this issue

in State v. Belcher, 385 S.C. 597, 685 S.E.2 802 (2009) where this Court held that a jury charge instructing that malice may be inferred from the use of a deadly weapon is improper where evidence is presented that would reduce, mitigate, excuse or justify the homicide.

Relevant facts of the PCR evidentiary hearing

Petitioner testified that his appellate counsel did not brief the issue concerning the inference of malice from the use of a deadly weapon charge. App. 825, ll. 5 – 826, l. 3. He believed his appellate counsel were ineffective for failing to brief this issue. App. 826, ll. 1-24.

Charles Grose, Petitioner's trial counsel, testified that after Petitioner's trial, he sent Savitz, Petitioner's appellate counsel and the chief appellate defender at the time, an e-mail that he should raise on appeal the malice charge that he had objected to at trial, the very charge that this Court has now prohibited in its Belcher decision. App. 848, ll. 6-23; 885. He suggested to Savitz that this would be an important issue to take up on appeal. App. 849, l. 23 – 850, l. 3. The e-mail sent from Grose to Savitz was entered as an exhibit at the evidentiary hearing. App. 856, ll. 3-4; 885.

Savitz testified at the hearing and confirmed he received the e-mail from Grose suggesting that the malice issue be appealed. He, however, "lost track of the case, and the next thing [he] heard about it was [Grose] calling [him] up or e-mailing [him] or something and that he was upset about the brief . . . ." App. 858, l. 22 – 859, l. 4. Grose was upset that the issue of the inference of malice from the use of a deadly weapon had not been raised at all. App. 860, ll. 10-19. Savitz had not realized that the brief had been filed as it had been assigned to Cleary. App. 860, ll. 5-9. Savitz testified:

> I'll take the blame. I mean I was, I was the chief attorney. We - - [Grose] made the right objection, and he got us the information, and this was an issue

> that I knew about and that a lot of other people knew about and that we should of raised in the appeal, and, again, you know, I'm willing to accept the blame for that.
>
> . . .
>
> It was Appellate Defense failure.

App. 862, ll. 4-11.

Savitz agreed that made him ineffective and that appellate defense should have raised the issue. App. 862, ll. 12-17. He reiterated that he was aware of the malice instruction issue and it was a failure of appellate defense not to raise it. App. 862, l. 22-863, l. 1.

Cleary, who actually prepared the appellate brief on behalf of Petitioner, testified that she did not have a specific recollection of receiving the e-mail from Grose to Savitz asking that the malice instruction issue be briefed. App. 866, l. 23 – 867, l. 3. Cleary also testified that she was unaware of any growing movement to change the precedent that malice could be inferred from the use of a deadly weapon so she did not brief the issue on appeal. App. 870, ll. 9-21.

The PCR court determined that Petitioner's appellate counsel had not been ineffective and were not required to be clairvoyant of changes in the law. The PCR court further determined that appellate counsel Cleary had not been made aware of the communications between Grose and Savitz regarding the briefing of the malice instruction issue. Furthermore, the PCR court found that Cleary, in her professional judgment, decided to brief the issues according to their potential merit. App. 890-892.

Discussion

To establish ineffective assistance of counsel, Petitioner must satisfy the two-

prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984). "First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (internal citations omitted). "The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The defendant is required to overcome the presumption that counsel was effective in order to receive relief." Id. at 117-18, 386 S.E.2d at 625 (internal citations omitted).

Furthermore, a criminal defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 398 (1985). Generally, in analyzing a claim of ineffective assistance of appellate counsel, this Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009); Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). The question is therefore (1) whether appellate counsel's performance was deficient, and (2) whether Petitioner was prejudiced by appellate counsel's deficient performance.

The PCR court determined that Petitioner's appellate counsel could not have been aware of the change in law that this Court would make on the inferred malice instruction in the Belcher decision as that decision was not issued until October 12, 2009. To the contrary, Savitz was aware of the issue through Grose's e-mail to Savitz that the inferred malice issue, which was objected to at trial, needed to be raised on appeal. Grose even

attached a draft brief prepared by C. Rauch Wise, the attorney who would eventually win the Belcher case. App. 885.

That Savitz might not have communicated the e-mail to Cleary or informed Cleary that she needed to brief the inferred malice instruction issue does not does not negate the ineffectiveness of Petitioner's appellate counsel. At the evidentiary hearing, Savitz recognized that there was a breakdown at appellate defense. He knew that the issue about the inference of malice from the use of a deadly weapon had been percolating, he was aware that there was a proper objection to the charge by trial counsel, and he knew the issue should have been raised on appeal. If Savitz did not properly communicate this issue to Cleary, that in itself was ineffective assistance of appellate counsel when he did not ensure that the attorney drafting the brief on behalf of Petitioner would include this meritorious issue. App. 862, l. 4 – 863, l. 1.

Even if Cleary was unaware of the e-mail from Grose to Savitz, there was reason for her to have briefed the preserved issue of whether malice could be inferred from the use of a deadly weapon. In fact, long before Belcher, this Court had held that the "use of a deadly weapon" implied malice instruction was error in a case where the defendant had pled accident. State v. Hopkins, 15 S.C. 153 (1881). Cleary certainly had reason to have known to brief the issue of the inferred malice charge, especially where Grose had strenuously objected to such charge at trial.

In addition, while Belcher was not decided until after Petitioner's direct appeal had concluded, had Petitioner's appellate counsel properly raised whether malice could be inferred from use of a deadly weapon where evidence was presented to reduce, mitigate, excuse, or justify the homicide, then this Court would have likely reached its

holding in Belcher even earlier in Petitioner's direct appeal. Only this Court did not have a chance to do so because appellate counsel failed to raise the issue.

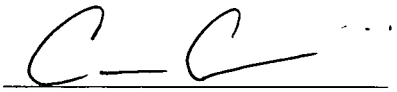
Petitioner's defense in his case was self-defense, and the forensic evidence and testimony, which suggested that the decedent had been outside of the car gripping a stick while having a confrontation with Petitioner, supported Petitioner's justification in shooting the decedent. The Trial Court's charge that "inferred malice may arise when the deed is done with a dangerous instrumentality" was confusing and prejudicial where Petitioner presented evidence that would reduce, mitigate, excuse, or justify the homicide. Without such a charge, the jury may not have compromised and issued a verdict finding Petitioner guilty of voluntary manslaughter instead of not guilty by way of self-defense.

For the reasons set forth above, Petitioner was prejudiced by appellate counsel's failure to raise this preserved issue for appeal. The PCR court's finding that appellate counsel's performance was not deficient is not supported by the evidence. Where Petitioner would have been entitled to a new trial had appellate counsel briefed this issue, Petitioner is now entitled to the grant of post-conviction relief and a new trial. See Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991) (holding appellate counsel ineffective in failing to raise issue, preserved below, which would have entitled defendant to reversal on appeal); see also Patrick v. State, 349 S.C. 203, 562 S.E.2d 609 (2002) (holding appellate counsel was deficient in failing to adequately raise or brief issue of prosecutorial retaliation where Court of Appeals would have reversed if counsel had properly argued the issue).

CONCLUSION

For the reasons set forth herein, Petitioner respectfully requests this Court to grant his Petition for Writ of Certiorari with the ultimate relief of a new trial.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of August, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Abbeville County
Frank R. Addy, Circuit Court Judge

ROBERT ORLANDO HILL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2013-002106

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari in this case has been served through U.S. Postal Service on J. Rutledge Johnson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Robert Orlando Hill, #265223, at Trenton Correctional Institution this 28th day of August, 2014 and a copy of the appendix has been hand delivered to J. Rutledge Johnson at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201.

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 28th day
of August, 2014.

Bailey Reed (L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.