STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

James R. Barber, III, Circuit Court Judge

Appellate Case No. 2014-000967
Lower Court Case No. 2013-CP-40-2107

ADAMS GIBSON, #322094,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether the lower court properly concluded that defense counsel was ineffective for failing to object to the trial court's failure to include a permissive inference of malice charge?

II.

Whether the lower court properly concluded that defense counsel was ineffective for failing to object to the trial court's malice charge inasmuch as the trial court's failure to include permissive language rendered the malice charge a presumptive charge?

STATEMENT OF THE CASE

The Respondent, Adams Gibson, was indicted in Richland County for one count of murder. The Respondent's co-defendant Jacques Gibson was also indicted for murder and was additionally indicted for unlawful possession of a firearm by an individual under the age of 21. On May 21-24, 2007, the Respondent and Jacques proceeded to a joint trial by jury. The Respondent was represented at this proceeding by Nathaniel Roberson, Esquire. At the conclusion of the trial, the jury found both defendants guilty as charged. The Honorable Steven H. John, presiding circuit judge, sentenced the Petitioner to thirty years' imprisonment.

The Respondent timely appealed his convictions and sentence to the South Carolina Court of Appeals. Robert M. Dudek, Appellate Defender with the South Carolina Office of Appellate Defense, represented the Respondent on appeal. In a published opinion September 29, 2010, the Court of Appeals affirmed the Respondent's conviction and sentence. State v. Gibson, 390 S.C. 347, 701 S.E.2d 766 (Ct. App. 2010). Although this Court initially granted certiorari to review the Court of Appeals' opinion, this Court ultimately dismissed certiorari as improvidently granted. State v. Gibson, 401 S.C. 569, 737 S.E.2d 2013 (2013).

On April 8, 2013, the Respondent filed an Application for Post-Conviction Relief with the Richland County Clerk of Court. This Application was later amended on September 27, 2013. The State made its Return on July 31, 2013. An evidentiary hearing into the matter was convened on October 1, 2013, before the Honorable James R. Barber, III, presiding circuit judge. On March 20, 2014, the PCR court filed an Order Granting Application for Post-Conviction Relief which granted relief to the Respondent on two claims pertaining to defense counsel's performance with regard to the malice charge, and denied relief with regard to the Respondent's remaining allegations for relief. On April 2, 2014, the Petitioner served a Rule 59(e), SCRCP, motion to alter

or amend the judgment. The Respondent served its Return to this motion on April 23, 2014. On April 23, 2014, the PCR court filed a Form 4 order denying the Petitioner's Rule 59(e) motion.

The Petitioner served its certiorari petition on the Respondent on January 2, 2015. This Return follows.

STATEMENT OF FACTS

On September 4, 2005, two groups of individuals encountered each other at Chance's Sports Bar in Columbia. One group was from Winnsboro, and consisted of Torri Boyd, Ravaris Henry, Antwan Martin, Antonio Smith, and the decedent Dennis Irby. The other group was from Ridgeway, and consisted of Marcus Tucker, Lakisha Davis, Demetric Davis, Tramele Davis, and the Respondent.

During the evening, members of the two groups peaceably intermingled, but eventually hostilities developed, primarily between Demetric Davis and Boyd. The Respondent, anticipating that the hostilities would worsen, called his brother, Jacques Gibson, to come pick him up. See App. p. 739, line 15-p. 740, line 5. Jacques then arrived on the scene with two other individuals, Stephon Willingham and Vernon Davis, Jr.

The two groups exited Chance's and a large brawl broke out. Boyd and Demetric Davis, Henry and Tramele Davis, and Tucker and Martin each paired off in individual fights. See App. pp. 256-258; pp. 306-308; p. 370, lines 12-19. Shots were then fired, one of which struck the decedent. In a statement to police, Jacques admitted to firing shots from his vehicle, and stated that he fired three or four shots into the air, but that the gun may have dropped down as he was firing and that he may have unintentionally shot the decedent. See App. p. 883, line 13-p. 885, line 7.

Aside from the Respondent and his brother Jacques, all of the surviving individuals from the two groups testified at trial. Almost all of these witnesses testified that the Respondent was either involved in hand-to-hand fighting or was not involved in the fight at all, and no one testified that he had a firearm:

- Boyd: Does not know what the Respondent was doing. App. p. 256, line 22-p. 257, line 1.
- Henry: Did not have a gun; not involved in the fight. App. p. 333, lines 3-13.
- Martin: Did not have a gun. App. p. 375, lines 13-16.
- Lakisha Davis: Not involved in the fight. App. p. 431, lines 8-13.
- Demetric Davis: Did not have a gun; not involved in the fight. App. p. 457, line 21-p. 458, line 1.
- Tramele Davis: Did not have a gun. App. p. 488, line 21-p. 489, line 4.
- Smith: Fighting with Boyd. App. p. 506, lines 1-11.
- Willingham: Did not have a gun; not involved in the fight. App. p. 529, line 9-p. 530, line 8; p. 541, lines 3-9.
- Tucker: Did not have a gun; not involved in the fight. App. p. 552, lines 7-17; p. 560, lines 8-11.
- Vernon Davis: Fighting; did not have a gun. App. p. 809, lines 3-18; p. 830, line 11-p. 831, line 2.

The only witness to implicate the Respondent as a shooter was a bystander named Shunta Wilson, who testified that he was the individual who shot the decedent. App. p. 566, line 25-568, line 2. Wilson, however, identified the Respondent's clothing a black shirt and blue jeans, see App. p. 583, lines 3-11, which is the attire that Jacques wore that evening. She testified that Jacques was involved in the fighting. App. p. 580, lines 2-4.

ARGUMENT

Standard of Review

The Sixth and Fourteenth Amendments to the United States Constitution guarantee every criminal defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In order to prove a claim of ineffective assistance of trial counsel, the moving party must show that defense counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. Id. In other words, the Petitioner must show that but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. Id.

On appeal, a PCR court's findings will be upheld if there is any evidence of probative value supporting them. Cherry v. State, 300 S.C. 155, 386 S.E.2d 624 (1989). "The appellate court will reverse the PCR court only where there is either no probative evidence to support the decision or the decision was controlled by an error of law." Edwards v. State, 392 S.C. 449, 455, 710 S.E.2d 60, 64 (2011).

I. **The PCR court properly concluded that defense counsel was ineffective for failing to object to the trial court's failure to include a permissive inference instruction in its implied malice charge to the jury.**

II. **The PCR court properly concluded that defense counsel was ineffective for failing to object to a burden-shifting charge on malice.**

A. How the Issues Arose Below

At trial, the trial court gave the jury the following instruction on expressed and inferred malice:

> Now, malice aforethought can either be express or inferred. Express means that malice is shown when a person speaks words with express hatred or ill will for another or the person prepared beforehand to do the act which was later accomplished. Malice can be inferred from conduct showing a total disregard for human life. *Inferred malice may also arise when the deed is done with a deadly weapon.* A deadly weapon is any article, instrument, or substance which is likely to cause death or great bodily harm. Whether an instrument has been used as a deadly weapon depends upon the facts and circumstances of each case.

App. p. 1019, line 23-p. 1020, line 8 (emphasis added). Neither defense counsel nor counsel for Jacques objected to this instruction.

At the PCR hearing, the Respondent alleged that defense counsel was ineffective for failing to object to the implied malice instruction on two grounds:

> [N]ormally, the implied malice instruction says that you can infer malice from the use of a deadly weapon but you must—this is only an evidentiary fact for the jury to accept or reject and to give it whatever weight they see fit. None of that is included. Basically, the implied malice instruction that's charged, Your Honor, says you may infer use—you may infer malice from the use of a deadly weapon. We contend that charge was burden shifting and is a presumptive charge and that it should've been objected on common law grounds.

App. p. 1124, line 14-p. 1125, line 1; see also App. p. 1116 (amended PCR). Defense counsel testified that he believed the jury charge adequately conveyed the law to the jury and was not burden-shifting. See App. p. 1156, lines 3-17.

The PCR court concluded that defense counsel was ineffective for failing to object to the implied malice instruction on two grounds. First, the PCR court found that the trial court's failure to charge the jury on the permissive inferences that can be drawn from the use of a deadly weapon violated South Carolina's common law, and that defense counsel was ineffective for failing to object to the charge on that basis. See App. pp. 1250-1259. Second, the PCR court found that the trial court's charge was burden-shifting, and that defense counsel was ineffective for failing to object to the charge on that basis. See App. pp. 1259-1262. The Petitioner arguably challenges these findings on appeal.[1] The Respondent respectfully submits that the PCR court properly found defense counsel ineffective, and that this Court should deny certiorari.

B. Discussion

As with any claim of ineffective assistance of counsel, a reviewing court must determine whether or not counsel was deficient and whether or not that deficient conduct prejudiced his client. See Strickland, *supra*. The Respondent submits that the PCR court's findings on both prongs of Strickland with regard to both claims for relief are amply supported by the record.

In State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), this Court announced a standard jury charge for trial courts to use when instructing the jury on how to draw a permissive inference of malice when a deadly weapon was used in a homicide:

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[1] As will be addressed in greater detail below, the Respondent contends that the Petitioner has abandoned its argument on appeal with regard to the burden-shifting allegation, given its brief, conclusory, and unsupported arguments on the issue. Additionally, aside from a brief citation to the order as a whole in the statement of the case, the Petitioner does not cite to a specific portion of the PCR court's order again in its certiorari petition. Cf. Rule 243(e)(3), SCACR ("The argument on each question shall include citation of authority and specific reference to pertinent portions of the lower court record.")

> The law says that if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts, are proved 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 other evidence in the case, and you may give it such weight as you determine it should receive.

279 S.C. at 421, 308 S.E.2d at 784. The very next sentence in Elmore states that "[w]e caution the bench, that hereafter only slight deviations from this charge will be tolerated." Id. In State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), this Court referred to the first sentence of Elmore's proposed charge as "[t]he standard implied malice charge" and the second sentence as "the general permissive inference instruction." 385 S.C. at 612, 685 S.E.2d at 811 (footnote 9).

The trial court gave Elmore's implied malice instruction but failed to give the general permissive inference instruction. The PCR court concluded that defense counsel was ineffective for failing to object to the lack of a permissive inference instruction. The PCR court also concluded that the failure to give the general permissive inference instruction rendered the implied malice instruction mandatory and burden-shifting, and that defense counsel was ineffective for failing to object to the charge on that basis. These decisions were correct.[2] Accordingly, the Respondent respectfully requests that this Court deny the Petitioner's certiorari petition.

1. Defense Counsel Was Ineffective for Failing to Object to the Trial Court's Failure to Charge the Jury on Elmore's Permissive Inference Instruction

The Petitioner raises two arguments in support of its claim that the PCR court erred in finding that defense counsel was deficient in failing to object to the lack of a permissive inference

[2] The Petitioner criticizes the PCR court's order for using the term "implied malice." Petition at 17 (footnote 3). This criticism is misplaced. This Court has, on several recent occasions, used the term "implied malice" to describe this charge. See generally State v. Belcher, *supra*, (using the term "implied malice" eight times); Tate v. State, 351 S.C. 418, 570 S.E.2d 522 (2002) (using the term "implied malice" twice); State v. Stanko, 402 S.C. 252, 262, 741 S.E.2d 708, 713 (2013) ("The trial court in this case issued a jury instruction regarding both express and implied malice.") It is clear that the terms "implied malice charge" and "inferred malice charge" are interchangeable. The PCR court's usage of the term "implied malice" to describe the charge at issue is in accord with this Court's jurisprudence, and no error should be ascribed to it.

instruction. First, the Petitioner argues that "the charge as a whole constitutes a proper charge on the law," so defense counsel could not be deficient for failing to object. Certiorari Petition at 16. Second, the Petitioner argues that the charge given by the trial court "was a customary one at the time," so defense counsel could not be ineffective for failing to be "clairvoyant" that such a permissive inference charge was required. Certiorari Petition at 17. Both of these contentions lack merit.

Beginning with the Petitioner's first argument, the Respondent would note that this argument appears to be more appropriately raised as a prejudice argument as opposed to a deficiency argument. See generally McKnight v. State, 378 S.C. 33, 50-51, 661 S.E.2d 354, 362-363 (2008) ("Even if this Court were to find McKnight entitled to such a charge upon request, counsel's failure to request the charge must still be evaluated for prejudicial effect. ... When read as a whole, the instructions adequately conveyed the State's burden of proof beyond a reasonable doubt and the corresponding absence of any such burden for McKnight.") Even if the Petitioner's first argument is properly raised as a deficiency argument, the only basis for the Petitioner's contention is its argument that the implied malice charge, in conjunction with the standard reasonable doubt charge, "made it clear that whether malice had been proved was an issue of fact for the jury to determine under all of the evidence." Certiorari Petition at 16. In other words, the Petitioner asserts that the implied malice charge and the reasonable doubt charge adequately convey Elmore's permissive inference charge. This assertion cannot be correct, as this Court has consistently held that the trial judge "*should make it clear to the jury* that it is free to accept or reject ... permissive inferences depending on its view of the evidence." State v. Peterson, 287 S.C. 244, 247, 335 S.E.2d 889, 902 (1985); see also Elmore, *supra*, 279 S.C. at 421, 308 S.E.2d at 784 ("[O]nly slight deviations from this charge will be tolerated"); State v. Lewellyn, 281 S.C. 199,

201, 314 S.E.2d 326, 327 (1984) ("The trial bench is reminded that the proper charge on implied malice is that suggested in Elmore.") The permissive inference charge is a necessary requirement for any implied malice charge, and a general instruction on reasonable doubt does not sufficiently convey the permissive inference's substance. Accordingly, the Respondent submits that the Petitioner's challenge to the PCR court's ruling on this basis should fail.

Turning to the Petitioner's second argument, the Respondent contends that this is not a case where defense counsel was required to be clairvoyant to know that the trial court needed to include the permissive inference instruction in his charge to the jury. Elmore was decided in 1983, and there has been constant litigation over jury instructions about malice for the last several decades. Furthermore, the existence of malice was one of the primary issues at trial. Given the significance of malice to any murder case, and the greater significance it had in this case, defense counsel should have been prepared to ensure that the proper implied malice instruction was charged to the jury, and that a significant deviation from Elmore's proposed charge was not given. Instead, he raised no objection. The failure to raise any objection constituted deficient conduct. Accordingly, the PCR court appropriately concluded that defense counsel's performance was deficient.

With regard to prejudice, the Petitioner's primary contention is that the trial court's failure to give the permissive inference instruction was harmless because "the use of the weapon alone under the circumstances constituted overwhelming evidence of malice" and that to conclude otherwise would "produce[] an absurd result." Certiorari Petition at 18. The Respondent submits that the PCR court's conclusion that the Respondent was prejudiced by the charge is correct and that its conclusion is amply supported by this Court's and the United States Supreme Court's jurisprudence.

There are two bases by which the jury could have found the Respondent guilty of murder. First, the jury could have concluded that Shunta Wilson's testimony that the Respondent was the shooter was accurate, despite all of the evidence to the contrary. Second, the jury could have concluded that the Respondent was Jacques' accomplice, and that Jacques acted with malice when he fired the shot that struck the decedent. Under either theory, defense counsel's failure to object to the trial court's failure to include the permissive inference charge prejudiced the Respondent.

Starting with the unlikely proposition that the Respondent was the fatal shooter, the Respondent was prejudiced by the lack of the permissive inference charge. As described above in the Statement of Facts, almost every other witness at the trial testified that the Respondent was either involved in the fracas or was not involved whatsoever. Had the jury been instructed to consider all of the other evidence in the case when determining whether or not to infer malice simply from the use of a deadly weapon, there is certainly a reasonable probability that they would have concluded that the Respondent did not act with malice that night.[3]

Turning to the question of whether Jacques acted with malice, which was the State's theory of the case at trial, the use of the weapon, standing alone, is not sufficient evidence to constitute overwhelming evidence of malice. Initially, the Respondent would note that the cases that the Petitioner cites for this proposition do not hold that "[o]ur case law has made clear that unprovoked, unmitigated firing into a crowd constitutes murder – the killing of another with malice." Certiorari Petition at 18. In State v. Slater, 373 S.C. 66, 644 S.E.2d 50 (2007), this Court was only concerned with whether or not an individual who brought a firearm to an ongoing altercation was entitled to a self-defense charge. Notably, this Court did not address malice at all

[3] The Respondent would note that the PCR court concluded that the Respondent would have been prejudiced under this view of the facts. See App. pp. 1256-1257. This conclusion appears to have gone unchallenged on appeal by the Petitioner, as the Petitioner only addresses the argument that Jacques was the fatal shooter in its certiorari petition.

as the word malice does not appear in the opinion. Consequently, Slater should not be cited for the proposition that evidence of malice is overwhelming from the simple use of a firearm to shoot into a crowd. The Petitioner also cites State v. Ross, 75 S.C. 533, 55 S.E. 977 (1906) for the legal proposition that "[i]f you would take the pistol and deliberately fire it into that crowd, with no intention of killing any particular man, but recklessly shot into that crowd and killed someone, that would be murder." 55 S.E. at 978. While this certainly looks like a conclusive statement at first glance, the cited portion of Ross actually comes from the trial court's instruction to the jury. This Court does not adopt this portion of the trial court's instruction; instead, the issue on appeal to this Court in Ross dealt with the jury instructions pertaining to self-defense. See 55 S.E. at 981. Moreover, the instruction is apparently a superfluous one, as the criminal defendant was charged for the murder of the victim, and was convicted of voluntary manslaughter, after he killed the victim with a rake during a physical altercation. See 55 S.E. at 980-981. The Respondent respectfully submits that an extraneous charge given by a trial court in 1905[4] should not be used now as conclusive evidence that Jacques acted with malice in firing a firearm.

The Respondent would submit that the reason that the Petitioner has cited to Slater and Ross in support of its argument is because the prior decisions of this Court and, particularly, of the United States Supreme Court do not support its argument. Elmore reversed a murder conviction so heinous that the jury was instructed on the use of physical torture. See 279 S.C. at 422-423, 308 S.E.d at 785. In Belcher, this Court found that where the only evidence of malice that was presented was the use of a firearm, "[w]e need go no further than saying we cannot conclude the error was harmless beyond a reasonable doubt." 385 S.C. at 612, 685 S.E.2d at 810. In Yates v. Evatt, 500 U.S. 391 (1991), a case arising out of South Carolina, the United States Supreme Court

[4] The trial occurred in 1905; this Court's decision was issued in 1906. See 55 S.E. at 980 ("He was tried at the special term of court of general sessions of Greenville, 1905.")

overturned a murder conviction based on an improper malice charge, and concluded that the defendant was prejudiced because there was evidence "rebutting malice, including petitioner's testimony that neither he nor Davis intended to kill anyone." 500 U.S. at 408; see also 500 U.S. at 411 ("[The victim] could have been killed inadvertently by Davis, and we cannot rule out that possibility beyond a reasonable doubt.") In Francis v. Franklin, 471 U.S. 307 (1985), the United States Supreme Court overturned another murder conviction where the criminal defendant's sole defense was the lack of malice. In Francis, the defendant was a prisoner who escaped during a dental visit, stole a pistol from a police officer, took a dental assistant hostage, went to a nearby house, demanded the resident's vehicle, and then fatally shot the resident when the resident slammed the door in his face. 471 U.S. at 309-310. Even on these facts—an escaped prisoner with a stolen gun and a hostage who shoots someone who refused to give him his car—the United States Supreme Court reversed the conviction because the defendant's argument at trial was that that he did not intend to kill the victim and did not act with malice.

With these precedents in mind, the Respondent was certainly prejudiced by the trial court's incomplete malice instruction. "Malice is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong." State v. Zeigler, 364 S.C. 94, 103, 610 S.E.2d 859, 864 (Ct. App. 2005). Jacques told police investigators that while he fired into the air intentionally, he certainly did not intend to kill, or even hurt, anyone. There is no evidence—only bare speculation—that Jacques came to the scene to harm anyone. He did not come into the club shooting, he did not begin firing when everyone went outside, and he did not begin firing when even when the fighting began. Instead, he fired only after a melee had broken out, which is consistent with his statement that he only fired to stop the fight and did not want to shoot anyone. If Jacques had come to that scene intending to kill someone, then he would have fired long before

he actually did. While Jacques' actions were certainly not appropriate, they were not definitively malicious either. In sum, the only credible evidence that Jacques acted with malice was the use of his firearm. The jury needed to understand that they should consider all of this evidence in determining whether or not to conclude that Jacques' use of a firearm demonstrated that he acted with malice. There is certainly a reasonable likelihood that had they been instructed to consider all of the evidence and circumstances surrounding the use of the firearm, and not just the bare use of the firearm, before concluding that Jacques acted with malice, then the jury would have acquitted Jacques and the Respondent. Consequently, the trial court's failure to include the permissive inference instruction prejudiced the Respondent, and the PCR court properly concluded that the appropriate remedy for this error was a new trial. Accordingly, the Respondent submits that the Petitioner has failed to meet its burden of proof with regard to this issue, and that certiorari should be denied.

2. Defense Counsel Was Ineffective for Failing to Object to the Trial Court's Charge as Burden-Shifting

In granting relief on the burden-shifting allegation, the PCR court engaged in extensive findings regarding the mandatory nature of the implied malice charge, defense counsel's performance, and the prejudice stemming from both defense counsel's deficient performance and the implied malice charge. See App. pp. 1259-1262; see also pp. 1255-1259. This was a completely separate allegation for relief, and the grant of relief on this issue stands independently of the PCR court's findings regarding the violation of the common law. In challenging these findings, the Petitioner simply contends, in a one-paragraph argument, that the jury charge "clearly conveys to the jury a permissive inference instead of a presumption," and that defense counsel could not have been deficient because "the court's charge does not amount to unconstitutional burden-shifting." Petition at 15-16. The Petitioner does not cite to any decisions of this Court, or

of any other court, in support of its argument, nor does the Petitioner cite to any portion of the PCR court's ruling it seeks to challenge. Instead, the Petitioner makes only a conclusory argument that the PCR court erred. The Respondent respectfully submits that this Court should deny certiorari on this issue on the basis that the Petitioner abandoned this issue on appeal. See Rule 243(e)(3), SCACR ("The argument on each question *shall* include citation of authority and specific reference to pertinent portions of the lower court record") (emphasis added); see also State v. Jones, 344 S.C. 48, 58, 543 S.E.2d 541, 546 (2001) ("We find Jones' argument is so conclusory that it has been abandoned"); Glassock, Inc. v. U.S. Fidelity and Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.")[5]

To the extent that this issue is appropriately presented for this Court's review, the Respondent respectfully submits that the PCR court's decision is well supported by the record and the law, and that certiorari should be denied. The Respondent will begin by reviewing the mandatory nature of the charge before turning to counsel's performance and the prejudice stemming therefrom. The implied malice charge, standing alone, instructs the jury that the inference of malice arises when a deadly weapon is used. There is no qualification to this language, nor is there any instruction mitigating the inference of malice. In fact, the only qualification language that is present in the instruction arises later when the jury is told that they must determine whether or not an instrument been used as a deadly weapon. See App. p. 1020, lines 6-8. Read logically, the jury heard the following instruction: malice arises when a deadly weapon is used;

[5] In the event the Petitioner attempts to shore up its argument on this issue through the filing of a reply to this return, the Respondent would note that raising the issue more substantively in a reply cannot save a determination that the Petitioner abandoned the issue on appeal. See McClurg v. Deaton, 395 S.C. 85, 87, 716 S.E.2d 887, 888 (2011) (footnote 2) ("It is axiomatic that an issue cannot be raised for the first time in a reply brief.")

you must determine whether or not the instrument used qualifies as a deadly weapon. The failure to sufficiently convey the principle that the jury also needed to determine whether or not malice arose as well rendered the instruction mandatory in nature. Consequently, the PCR court correctly determined that the implied malice charge, when it is not coupled with the permissive inference instruction, constitutes a mandatory and presumptive jury charge.

This conclusion is buttressed by this Court's jurisprudence beginning with Elmore and concluding, most recently, with Belcher. In Elmore, this Court concluded that only "slight deviations" from the standard charge would be tolerated. 279 S.C. at 421, 308 S.E.2d at 784. This position was reiterated in Lewellyn and in Peterson. Finally, in Belcher, this Court reaffirmed Elmore's full charge when it noted that the "standard implied malice charge remains valid, as does the general permissive inference instruction." 385 S.C. at 612, 685 S.E.2d at 810 (footnote 9). If the implied malice charge completely and correctly instructed the jury regarding how malice can be inferred from the use of a deadly weapon, as the Petitioner posits, then there would be no need for the permissive inference instruction. As has been shown, however, the permissive inference instruction must be given with the implied malice instruction, which leads to the logical conclusion that the implied malice instruction is improper and mandatory when it is not coupled with the permissive inference instruction.

Defense counsel did not object to the charge because he believed there was nothing objectionable about the charge. See App. p. 1156, lines 3-17. The failure to object to a burden-shifting charge constitutes deficient conduct under Strickland. See Lowry v. State, 376 S.C. 499, 657 S.E.2d 760 (2008). Inasmuch as the charge was burden-shifting and defense counsel did not object to it, the PCR court properly determined that defense counsel's performance was deficient.

Turning to Strickland's prejudice prong, the Respondent contends that he was prejudiced by defense counsel's deficient conduct for many of the same reasons offered above with regard to the Elmore claim. There was certainly evidence presented at trial that neither Jacques nor the Respondent acted with malice. The jury, however, was instructed that the issue of malice was decided by the simple use of a firearm. If an individual who escapes from custody, steals a gun, takes a hostage, and shoots someone unintentionally while trying to steal their car, see Francis, *supra*, is entitled to a new trial based on a presumptive malice charge, then certainly the Respondent should receive a new trial due to the same legal error. Accordingly, the Respondent asserts that the PCR court properly granted the Respondent a new trial on this basis, and that the Petitioner's certiorari petition should be denied.

CONCLUSION

For the reasons stated, the Respondent asks this Court to deny the Petitioner's certiorari petition.

Respectfully submitted,

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ATTORNEY FOR RESPONDENT.

This 3rd day of April, 2015.

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
James R. Barber, III, Circuit Court Judge

Appellate Case No. 2014-000967
Lower Court Case No. 2013-CP-40-2107

ADAMS GIBSON, #322094,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

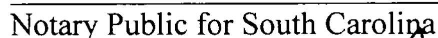
PETITIONER.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the Respondent's Return to Petition for Writ of Certiorari in the above-entitled case have been served upon opposing counsel, Mary Williams Leddon, Assistant Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, by depositing in the U.S. mail with proper postage, this 3rd day of April, 2015.

JEREMY A. THOMPSON
ATTORNEY FOR THE PETITIONER

SWORN TO BEFORE me this 3 day
of April, 2015.


(L.S.)
Notary Public for South Carolina
My Commission Expires: August 21, 2023

LAW OFFICE OF
JEREMY A. THOMPSON
LLC

April 3, 2015

RECEIVED
APR 6 2015
S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211-1330

RE: Adams Gibson, #322094 v. State of South Carolina; 2014-000967

Dear Mr. Shearouse:

Enclosed please find the original and seven copies of the Return to Petition for Writ of Certiorari. I would appreciate your filing the original and six copies of the certiorari petition, clocking the extra copy, and returning the clocked copy to me in the enclosed self-addressed, stamped envelope. With my thanks for the Court's assistance in this matter, and my best regards, I am,

Yours sincerely,

Jeremy A. Thompson
Attorney and Counselor at Law

JAT/
Enclosures
cc: Mary Leddon, Assistant Attorney General (w/ enclosure)
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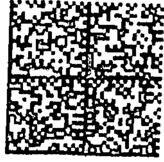

The Honorable Daniel E. Shearouse
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