STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2014-001428

Jonathan Millard Campbell,.....Petitioner,

v.

State of South Carolina,.....Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

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ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

1. Did trial counsel's deficient performance – failing to object to the trial judge's instruction to the jury that malice may be inferred from the use of a deadly weapon in order to convict him of murder – prejudice Petitioner?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the January 2006 term of General Sessions for murder (2006-GS-23-0328) and possession of a weapon during the commission of a violent crime (2006-GS-23-0329). (App.pp.618-19; pp.621-22). John P. Abdalla, Esquire represented Petitioner.

After the State called the case to trial, Petitioner was found guilty. On January 14, 2010, the Honorable Edward W. Miller sentenced Petitioner to concurrent terms of forty-five years for murder and five years for possession of a weapon during the commission of a violent crime. (App.p.480; p.620; p.623).

A notice of appeal was filed at the South Carolina Court of Appeals. Joseph L. Savitz, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense represented Petitioner on appeal. (App.pp.484-93). The Court of Appeals affirmed Petitioner's convictions and sentences. State v. Campbell, Op. No. 2012-UP-236 (S.C. Ct. App. filed April 18, 2012). (App.pp.522-23). The Remittitur was sent on May 4, 2012. (App.p.524).

Petitioner filed an application for post-conviction relief (PCR) on December 5, 2012 (2012-CP-23-7608). (App.pp.525-32). A hearing was held at the Greenville County Courthouse on April 22, 2014. (App.pp.539-606). Petitioner was present and represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable D. Garrison Hill denied relief in an order filed June 5, 2014. (App.pp.608-17).

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

The PCR judge did not err in finding Petitioner failed to meet his burden of proving he was prejudiced by the lack of objection to the trial judge's jury charge.

Certiorari is not warranted in this case. Petitioner argues "[t]rial counsel's failure to object to the jury instruction regarding inferred malice from the use of a deadly weapon resulted in ineffective assistance of counsel based on State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009)." (Cert. Pet., p.9). Petitioner argues the jury charge "was not harmless beyond a reasonable doubt" and that the evidence against him "was not overwhelming." (Cert. Pet., p.12). This argument is without merit.

A.

On June 19, 2005, Petitioner and his co-defendant (Carl Southerland) twice approached Jermaine Proctor (the victim) and his girlfriend in the parking lot of an apartment complex to ask if the victim wanted to buy some speakers. (App.pp.65-70; p.216). The second time they were approached, Petitioner also asked the victim if he had any drugs on him and the victim said he did not. (App.pp.70-71; pp.216-17). The victim,

Petitioner, and Southerland then had a conversation the victim's girlfriend did not hear.[1] (App.p.71). The victim and his girlfriend then gave Petitioner and Southerland a ride and – when he dropped them off – the victim said he would see them later. (App.pp.72-75; p.219). The victim's girlfriend saw the victim around midnight but did not know his plans for the rest of the evening. (App.pp.77-78).

The victim met Petitioner and Southerland after midnight in the same apartment complex as earlier. (App.p.221). The three men drove around in the victim's vehicle and looked for places to rob. (App.pp.221-23). After Petitioner and Southerland finished smoking the crack cocaine provided by the victim, they told him they would not break into a specific store because there was too much security. (App.pp.223-24). The victim became upset and put his vehicle into park in the middle of the road. (App.p.225).

Southerland (sitting behind the victim) thought Petitioner was going to hit the victim, so he grabbed his shoulders. (App.p.225). Petitioner then repeatedly stabbed the victim and Southerland described him as "going crazy." (App.pp.226-27). The victim did not fight back and received eighteen stab wounds in total.[2] (App.p.159; p.226). Petitioner and Southerland moved the victim's body to the back seat of his own vehicle and Petitioner drove them from the scene. (App.pp.230-31).

Several hours later, Petitioner called his mother and said he had killed someone. (App.pp.96-99; p.234). Petitioner then drove them out of town. Petitioner and Southerland made several stops (in Atlanta and later Alabama) to steal and pawn items

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[1] Southerland testified the victim talked about meeting them later that evening and that he would give them drugs if they would commit some burglaries. (App.pp.219-21).

[2] Petitioner's version of events was that the victim struck him in the head with a hammer and then Southerland stabbed him. (App.pp.319-22; pp.326-29).

and purchase crack cocaine. (App.pp.235-40). On June 21, 2005, the pair were arrested in Alabama after the victim's vehicle overturned during a high-speed police chase. (App.pp.126-31; p.169). The victim's body and a bloody knife were recovered from the vehicle. (App.p.132; p.147; p.169).

In addition to several other charges, the trial judge charged the jury on: accomplice liability, voluntary manslaughter, and murder. (App.pp.457-61). The trial judge also issued the following malice charge at issue in this appeal:

> Inferred malice may also arise when the deed is done with a deadly weapon. And a deadly weapon is any article, instrument or substance which is likely to cause death or great bodily harm. And whether an instrument has been used as a deadly weapon depends on the facts and circumstances of each case.

(App.p.460, lines 14-19).

B.

At the PCR hearing, Petitioner stated trial counsel did not object to the malice jury charge and argued he believed "the inference of malice when used with a deadly weapon prejudiced me and – because it overruled – precluded manslaughter and – I mean possession of a weapon. And the Judge – they couldn't have found me guilty of nothing but murder." (App.pp.582-83). Counsel for Petitioner cited Belcher and argued the malice jury charge must have impacted the jury. (App.pp.599-600).

In denying Petitioner's application for post-conviction relief, the PCR judge found trial counsel was deficient for failing to object to the inferred malice charge. The PCR judge further found, however, that Petitioner could not "prove resulting prejudice because of the overwhelming evidence of [his] guilt." The PCR judge also found the inferred

malice jury charge did not contribute to the jury's verdict.[3] (App.p.615).

C.

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show **both**: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, **and** (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The PCR judge did not err in finding Petitioner failed to prove he was prejudiced by the lack of objection to the malice charge. Any error in conveying this jury charge was harmless. In Belcher, this Court held "the 'use of a deadly weapon' implied malice instruction had no place in a murder . . . prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing." State v. Belcher, 385 S.C. at 610, 685 S.E.2d at 809. The Court held further "the permissive inference charge concerning the use of a deadly weapon remains a correct statement under the law where the only

[3] The PCR judge noted "the jury asked about the jury charges of reasonable doubt and accomplice liability, which indicates they were focusing upon [Petitioner]'s responsibility as a principal and not whether malice existed." (App.pp.615-16).

issue presented to the jury is whether the defendant has committed murder." Id. at 612, 685 S.E.2d at 810. Belcher, however, is factually distinguishable from Petitioner's case. In Belcher, conflicting versions of the killing (including from eyewitnesses) were introduced at trial, with the jury ultimately being given a self-defense jury charge. In Petitioner's case, however, the State presented strong evidence that Petitioner stabbed the victim eighteen times without provocation and the jury clearly did not find credible Petitioner's testimony that the victim hit him with a hammer and Southerland stabbed him to death. See Craven v. Cunningham, 292 S.C. 441, 443, 357 S.E.2d 23, 25 (1987) ("The credibility of witnesses is for the triers of fact."); see also Bruno v. State, 347 S.C. 446, 556 S.E.2d 393 (2001) (noting that, by its verdict, the jury clearly rejected the defendant's account of what transpired). Unlike in Belcher, a self-defense charge was not even requested in Petitioner's case.

This Court's holding in State v. Stanko, 402 S.C. 252, 741 S.E.2d 708 (2013) is more instructive. In Stanko, the defendant killed the elderly victim, took the victim's car, drove across the state (and later to Georgia), and engaged in various social activities during his flight. The defendant presented an insanity defense (which included evidence of a brain abnormality). This Court found the implied malice charge was error – but that it was harmless because the State produced evidence of malice other than the use of a deadly weapon. Similarly in Petitioner's case, the State produced other evidence of malice: (1) Petitioner killed the victim (who did not fight back) and put his body in the backseat of his own vehicle, (2) Petitioner and Southerland drove away in the victim's vehicle, (3) Petitioner and Southerland made several stops in order to steal property and

then pawn it to buy crack cocaine, (4) Petitioner and Southerland kept the victim's decomposing body in the vehicle for two days, (5) Petitioner and Southerland were apprehended two states away after a high-speed chase in which they attempted to elude police, (6) the victim's body and the murder weapon were in the victim's overturned vehicle when Petitioner and Southerland were apprehended, and (7) Southerland testified Petitioner's plan was to drive the pair to Mexico.[4] Similar to the finding in Stanko that a jury could have found evidence of malice because of that defendant's theft of the victim's vehicle and the drinking and socializing activities in two states in the days after the murder,[5] the jury in this case could clearly find – even without considering the use of a deadly weapon – that Petitioner's conduct showed a total disregard for human life.[6] As in Stanko, any error in trial counsel's failure to object to the inferred malice charge must be considered harmless.

Further, as described supra, the State presented substantial and overwhelming evidence of Petitioner's guilt. As such, Petitioner cannot demonstrate prejudice. See Rosemond v. Catoe, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009) (holding no prejudice occurs, even if trial counsel was deficient, where there is otherwise overwhelming evidence of the defendant's guilt); Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994) (holding respondent failed to prove prejudice from trial counsel's failure to request an alibi charge where there was overwhelming evidence of guilt).

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[4] App.p.245.
[5] State v. Stanko, 402 S.C. at 264, 741 S.E.2d at 714.
[6] The trial judge charged "[m]alice may be inferred from conduct showing a total disregard for human life." (App.p.460).

D.

As Petitioner failed to meet his burden of proving both parts of the Strickland analysis of ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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Attorney General

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By: _____
ATTORNEYS FOR RESPONDENT

April 6, 2015

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The Honorable D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2014-001428

Jonathan Millard Campbell, ... Petitioner,

v.

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CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served. This 6th day of April, 2015.

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April 6, 2015

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

RE: **Jonathan Millard Campbell v. State of South Carolina**
Lower Court Case No.: 2012-CP-23-7608
Appellate Case No.: 2014-001428

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Karen C. Ratigan
Senior Assistant Deputy Attorney General
SC Bar No. 68331

KCR/cc
Enclosures

cc: Susan B. Hackett, Appellate Defender (2 copies)
Ms. Trisha Allen, Victim Services