

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Berkeley County  
Deadra L. Jefferson, Circuit Court Judge

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S.C. Supreme Court

Appellate Case No.: 2014-001743

JERMAINE T. MCKELVEY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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### PETITIONER'S QUESTION PRESENTED

Did the PCR court err in failing to find trial counsel ineffective for not objecting to the trial judge's jury charge on assault and battery with the intent to kill (ABWIK) when he instructed the jury that "inferred malice may also arise when the deed is done with a deadly weapon" which was error pursuant to State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), because evidence was presented which would reduce the ABWIK to assault and battery of a high and aggravated nature (ABHAN) as evidenced by the judge instructing the jury on ABHAN as a lesser-included offense?

## STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Berkeley County Clerk of Court. Petitioner was indicted at the February 2009 term of the Berkeley County Grand Jury for Assault and Battery with Intent to Kill (ABWIK) (2009-GS-08-0304) and Possession of a Firearm During the Commission of a Violent Crime (2009-GS-08-0305). Petitioner was subsequently indicted at the April 2009 term of the Berkeley County Grand Jury for Armed Robbery (2009-GS-08-0504). Petitioner was represented by Chad D. Shelton, Esquire and David Schwacke, Esquire.

On April 14, 2010, Petitioner proceeded to a jury trial before the Honorable R. Markley Dennis, Jr., and was found guilty on all charges. Petitioner was sentenced to confinement for a period of twenty-seven (27) years for Armed Robbery, five (5) years for Possession of a Firearm During the Commission of a Violent Crime, and twenty (20) years for ABWIK. The sentences for Armed Robbery and Possession of a Firearm During the Commission of a Violent Crime are to be served consecutively to each other and concurrent with the remaining sentences.

A timely Notice of Appeal was filed on Petitioner's behalf. Katherine H. Hudgins, Esquire, of the South Carolina Office of Appellate Defense perfected the appeal in the form of an Anders brief. See Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967). The South Carolina Court of Appeals affirmed Petitioner's convictions and sentences. The Remittitur was issued on February 26, 2013.

On April 23, 2012, Petitioner filed an application for post-conviction relief. Petitioner filed amendments on May 28, 2013, and May 9, 2014. Respondent made its Return on June 28, 2013, requesting that an evidentiary hearing be held. An evidentiary hearing was convened on May 19, 2014 in Charleston County before the Honorable Deadra L. Jefferson. Dennis J. Rhoad

and Sally Rhoad, Esquires, represented Petitioner at the hearing. Ashleigh R. Wilson, Esquire, of the South Carolina Office of the Attorney General represented Respondent. By an Order of Dismissal signed July 17, 2014 and filed July 22, 2014, the PCR Court denied and dismissed Petitioner's application with prejudice.

## STANDARD OF REVIEW

The proper standard of review of a post-conviction relief 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, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

## ARGUMENT

**There is evidence of probative value to support the post-conviction relief court's ruling that trial counsel was not ineffective for failing to object to the trial judge's jury charge on assault and battery with intent to kill where no evidence was presented at trial that would reduce, mitigate, excuse or justify Petitioner shooting the victim.**

Petitioner asserts that the PCR Court erred in failing to find his trial counsel (hereinafter "Counsel") ineffective when Counsel did not object to the ABWIK jury charge, where the trial court instructed the jury that malice may be inferred by the use of a deadly weapon, in violation of State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). This argument is without merit.

In a PCR action, the Petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Petitioner 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, 2064 (1984); Butler, *supra*.

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

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, Petitioner must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. Second, counsel's deficient performance must have prejudiced Petitioner

such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id.

Petitioner alleges that Counsel was ineffective for not objecting to the inferred malice jury instruction given to the jury during the ABWIK charge. During this charge, the trial court instructed, "Inferred malice may also arise when the deed is done with a deadly weapon." (App. 397 ll. 18-19). Petitioner believes that Counsel should have objected to this charge pursuant to the law set out in Belcher, where the South Carolina Supreme Court held that "where evidence is presented that would reduce, mitigate, excuse or justify...assault and battery with intent to kill caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon." State v. Belcher, 385 S.C. at 612, 685 S.E.2d at 810. Counsel testified at the PCR hearing that he was familiar with Belcher and admitted that he did not object to the instruction. (App. 519, ll. 15-17; App. 520, ll. 2-4)

Counsel testified at the PCR hearing that his main defense theory regarding Petitioner's ABWIK charge was to argue actual innocence in that Petitioner never shot the victim (App. 498, l. 22), and attack the medical reports and the victim's credibility because the victim was the only person who actually said that Petitioner shot him. (App. 542, ll. 14-20). The PCR Court found Counsel's testimony to be credible and found Petitioner's testimony was not credible. (App. p. 712). Where matters of credibility are involved, the Court gives great deference to a judge's findings, because the Court lacks the opportunity to directly observe the witnesses. See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is given to the PCR judge's findings on the credibility of witnesses); see also Menne v. Keowee Key Prop. Owners' Ass'n, Inc., 368 S.C. 557, 567, 629 S.E.2d 690, 696 (Ct. App. 2006) ("Because the appellate

court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved.").

During Petitioner's PCR Counsel's closing argument, the PCR Court interrupted to clarify that Belcher is "limited to self-defense or where there is some defense that mitigates, reduces, or limits the liability of the defendant" (App. 629, ll. 11-13), and further stated, "I haven't heard any testimony that there was any evidence that it would have reduced, mitigated, excused or justified." (App. 629, ll. 19-21). The PCR Court further stated during its ruling, that there was "no testimony that [Petitioner] ever acted in self-defense or in defense of others." (App. 634, ll. 5-7). The PCR Court further found that the "testimony in this record is that [Petitioner] always maintained his innocence so in order for him to have been able to get an instruction like that, he would have had to admitted that he shot [the victim] or injured [the victim] in some way in self-defense." (App. 634, ll. 8-12).

The PCR Court's ruling was finalized in the Order of Dismissal, where the PCR Court found there to be no error in the trial court's instruction because unlike the defendant in Belcher, Petitioner did not claim self-defense or present any evidence that would reduce, mitigate, or justify the shooting. (App. 718). Further, the PCR Court held that the instruction was correct under the law because Petitioner maintained his innocence and the only issue before the jury was whether Petitioner was the actual assailant who committed the ABWIK. (App. 718). See State v. Price, 400 S.C. 110, 114-15, 732 S.E.2d 652, 654 (Ct. App. 2012) (malice inference instruction proper in ABWIK case where only uncontradicted evidence presented was that an assailant shot a victim at close range as the victim stood with his hands up, causing the victim serious injury and the only issue to determine was the identity of the assailant and thus whether the defendant committed the crime). The PCR Court properly found that no evidence was presented at trial that

would reduce, mitigate, excuse or justify the shooting. (App. 718). In his petition to this Court, Petitioner has still not pointed to any evidence that would reduce, mitigate, excuse or justify his shooting. Petitioner goes into much detail regarding the lack medical evidence and whether the wound was actually a gunshot wound, however he has still not presented any evidence to show that Counsel had any basis to object to the jury instruction.

Respondent contends that Petitioner was not prejudiced by trial counsel's failure to object to the court's jury instruction that it may infer malice from Petitioner's use of a deadly weapon. Petitioner failed to support this allegation with any evidence that he did not possess the requisite intent. Petitioner constantly maintained that he was innocent, that he did not use a deadly weapon, and that he was not the shooter. Even at his PCR hearing, Petitioner testified that his discussions with Counsel included "[t]hat I didn't want to go to trial, that I'm innocent, my victim never was shot nor did I rob him." (App. 605, ll. 15-16). Therefore, it would have been inconsistent to argue that Petitioner never used a weapon while also arguing that Petitioner had a justifiable reason for using the weapon. When asked by Respondent during the PCR hearing about whether better communication would have affected the outcome of the trial, Petitioner replies, "It wouldn't have been different because I'm still innocent." (App. 607, ll. 4-5). Respondent argues that the same rationale applies to Counsel's decision not to object to the implied malice charge. Petitioner is not prejudiced by this charge because his entire theory was that he was not the shooter, not that he did shoot the victim but had evidence of mitigation, excuse, or justification.

There is certainly evidence of probative value to support the PCR Court's ruling, especially when, throughout this entire case, Counsel and Petitioner both steadfastly held that Petitioner was not the shooter. Only now in hindsight, and without presenting any evidence to

support his theory, does Petitioner contend that Counsel should have simultaneously argued that he actually was the shooter but evidence was presented to reduce, mitigate, excuse or justify his shooting of the victim.

Further, Respondent contends that the PCR Court properly found that the presence of overwhelming evidence of Petitioner's guilt presented at trial negates any claim that Counsel's performance could have affected the outcome of Petitioner's trial. See App. 434, ll. 4-8, (where the trial court comments: "But they have returned a verdict of guilty, and I think the evidence overwhelmingly supports their decision, both direct and circumstantial evidence as to all charges.") See also Smith v. State, 386 S.C. 562, 566, 689 S.E.2d 629, 631 (2010) ("Moreover, no prejudice occurs, despite trial counsel's deficient performance, where there is otherwise overwhelming evidence of the defendant's guilt.")

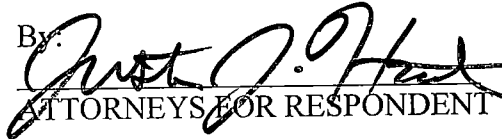
**CONCLUSION**

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issue discussed above fully.

Respectfully submitted,

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By:   
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July 1, 2015

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JERMAINE T. McKELVEY,

PETITIONER,

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THE STATE OF SOUTH CAROLINA,

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**LaNelle Cantey DuRant, Esq.**  
**SC Commission on Indigent Defense**  
**Post Office Box 11589**  
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This 1<sup>st</sup> day of July, 2015

  
ELIZABETH MCLELLAN  
LEGAL ASSISTANT