

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**S.C. Supreme Court**

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Certiorari to Spartanburg County  
Roger L. Couch, Circuit Court Judge  
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KENNETH D. SMITH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000696

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JOHNSON PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether trial counsel was ineffective for failing to object to a jury charge that malice could be inferred from the use of a deadly weapon where, if the issue had been preserved, petitioner would have received the benefit of State v. Belcher, 388 S.C. 597, 685 S.E.2d 802 (2009) on direct appeal?

## STATEMENT

On October 24, 2008, petitioner was indicted by a Spartanburg County grand jury for murder. App. 506. On July 17, 2009, petitioner was indicted for Breach of Peace of a High and Aggravated Nature ("BPHAN"). App. 510. On September 8, 2009, petitioner was tried before the Honorable J. Derham Cole and a jury. App. 1. Derrick B. Bulsa and Danny Fulmer represented the State. App. 1. Richard Whelchel represented petitioner. App. 1. The jury convicted petitioner on both charges. App. 417, l. 21 – 418, l. 9. Judge Cole sentenced petitioner to life imprisonment for murder and ten years' imprisonment for BPHAN. App. 421, l. 21 – 422, l. 10. On March 14, 2012, the Court of Appeals dismissed petitioner's appeal. App. 498. State v. Smith, Op. No. 2012-UP-178 (S.C. Ct. App. Mar. 14, 2012).

On January 30, 2013, petitioner filed a PCR application. App. 423. On September 18, 2014, a hearing was held before the Honorable Roger L. Couch. App. 446. Christopher D. Brough represented petitioner. App. 446. Suzanne H. White represented the State. App. 446. On March 27, 2015, Judge Couch denied petitioner's application. App. 497. This petition follows.

## ARGUMENT

Trial counsel was ineffective for failing to object to a jury charge that malice could be inferred from the use of a deadly weapon where, if the issue had been preserved, petitioner would have received the benefit of State v. Belcher, 388 S.C. 597, 685 S.E.2d 802 (2009) on direct appeal.

Petitioner testified in his own defense. On a Thursday night, Jay Sainvil ("Sainvil") picked up petitioner. App. 277, ll. 1 – 20. Following Sainvil's directions, Petitioner drove them to the home of Santos Ruiz ("Ruiz"). App. 279, ll. 12 – 23. Petitioner loaned Sainvil \$150 to buy a pistol from Ruiz. App. 279, l. 24 – 281, l. 4. Once back in the car, Sainvil checked the pistol to make sure it worked, but it did not. App. 281, ll. 5 – 15. Sainvil became angry. App. 281, ll. 5 – 15.

Sainvil went back to the door and talked to Ruiz. App. 281, ll. 16 – 20. Ruiz said he could not give the money back until the next day and Sainvil left, keeping the pistol. App. 282, ll. 2 – 18. Petitioner and Sainvil left and Petitioner got out of the car in Cowpens where he intended to spend the night with his girlfriend. App. 281, l. 24 -282, l. 15. They planned to go to the Georgia Aquarium the next day. App. 283, ll. 5 – 10.

On Friday afternoon, Sainvil told petitioner he had a meeting with Ruiz to return the pistol and get his money. App. 283, l. 15 – 285, l. 6. They were going to meet in the Biggerstaff grocery store's parking lot. App. 285, l. 3 – 285, l. 1. Sainvil received a call telling them to go the Li'l Cricket convenience store. App. 286, ll. 2 – 6. When they got to the Li'l Cricket, Ruiz was already in the parking lot. App. 287, ll. 12 – 15.

Sainvil waved Ruiz over to their car. App. 288, ll. 15 - 25. Ruiz gave Sainvil the money and asked for the pistol, but Sainvil told him he did not have the pistol. App. 289, ll. 1 – 9. Sainvil gave Ruiz the money back and Ruiz began speaking to the people in his car in Spanish. App. 289, ll. 1 – 9. Ruiz's truck then moved to block in petitioner and Sainvil. App. 289, ll. 1 – 11.

A "little guy" jumped out of Ruiz's car, screamed "give me my f'ing pistol," and used a racial slur. App. 289, l. 12 – 290, l. 4. Ruiz threw the money in the car and also demanded the pistol. App. 290, ll. 1 – 7. Another person exited the truck and stood by the car on petitioner's side. App. 290, ll. 1 – 7. Ruiz opened the door and kicked Sainvil in the face. App. 290, l. 22 – 291, l. 23. The "little guy" tried to get in their car to help Ruiz assault Sainvil. App. 292, ll. 7 – 16. The men took a necklace and a pair of boots from Sainvil. App. 293, ll. 6 – 7.

Sainvil ran. App. 294, ll. 21 – 23. The men got back into Ruiz's truck and moved into traffic. App. 296, ll. 13 – 19. Petitioner exited the car and stood at the back wheel. App. 296, ll. 13 – 21. Shots were fired from behind petitioner. App. 298, ll. 19 – 20. Petitioner testified that Sainvil must have fired the shots because he "was the only person in the area." App. 299, ll. 5 – 15. The truck drove away, Sainvil got into the car, and he and petitioner left. App. 299, ll. 18 – 24. Sainvil told petitioner that he "better not say nothing to nobody about it." App. 301, ll. 22 – 24.

In Sainvil's version, petitioner was the one who wanted to buy the gun from Ruiz. App. 192, ll. 20 – 22. When the gun did not work, petitioner became angry and tried to return the gun and get his money, but Ruiz refused to open the door. App. 195, l. 22 – 196, l. 16. Sainvil set up a meeting for the next day. App. 198, ll. 5 – 16.

Sainvil agreed that Ruiz came up to their car and the truck blocked them in, but claimed that petitioner told them they were "going to have to fight us or run." App. 204, ll. 7 – 24. One of the other men "had some black stuff in his hand." App. 206, ll. 5 – 10. He hit them through the sunroof. App. 206, ll. 11 – 13. Ruiz hit Sainvil in the eye. App. 207, ll. 2 – 5. Ruiz's brother came out of the truck with a gun. App. 207, ll. 2 – 12. Ruiz tried to drag Sainvil out of the car and pulled his boots off of his feet. App. 210, ll. 5 – 10. When Sainvil's boots came off, Ruiz and the men ran.

App. 210, ll. 7 – 10. Sainvil ran “because I knew that guy had a gun.” App. 210, ll. 8 – 25. Sainvil claimed that during the assault, petitioner fired a gun at the men. App. 211, ll. 15 – 24.

Ruiz agreed that he went to the store to “get a gun back . . . [f]rom him and the other guy.” App. 114, l. 19 – 115, l. 1. Under questioning by the trial judge, Ruiz identified petitioner as “the guy who killed my brother.” App. 115, l. 4 – 116, l. 4. Ruiz agreed there was a fight. App. 123, ll. 16 – 18. Ruiz claimed they were leaving when petitioner “started shooting.” App. 124, ll. 4 – 24.

At the charge conference, Judge Cole asked the parties for their requested instructions. App. 366, ll. 8 – 9. The solicitor—not trial counsel—asked Judge Cole whether he intended to charge any lesser included offenses. App. 366, ll. 10 – 11. The solicitor told Judge Cole he “was anticipating the defense asking for voluntary manslaughter.” App. 366, ll. 12 – 15. Upon prompting from the trial judge, trial counsel stated he “would have no objection to Your Honor charging voluntary whatsoever.” App. 366, ll. 19 – 20. Judge Cole asked, “Well, are you requesting an instruction on voluntary manslaughter?” App. 366, ll. 21 – 22. Trial counsel answered affirmatively. App. 366, l. 23. Trial counsel did not request any other instructions. App. 366, ll. 24 – 25. The solicitor conceded that the charge for voluntary manslaughter should be given. App. 367, ll. 2 – 4.

During his charge, the trial judge told the jury they could infer malice from the use of a deadly weapon. App. 401, ll. 6 – 10. The trial judge charged the jury on voluntary manslaughter. App. 403, l. 11 – 405, l. 3. Trial counsel did not make any objections to the court’s charge. App. 413, ll. 3 – 4. At the PCR hearing, petitioner alleged trial counsel was ineffective for failing to object to the inference of malice charge based on State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

The PCR court committed an error of law in ruling that trial counsel was not ineffective for failing to object to the inference of malice from a deadly weapon charge. App. 502-03. The PCR court used petitioner's claim that trial counsel was ineffective for failing to request a self-defense charge as the basis for rejecting petitioner's Belcher claim. App. 502-03. The PCR court wrote, "Seeing as the Applicant raised the self-defense defense solely at the post-conviction relief hearing and not at trial, this Court finds that the jury charge was not improper." App. 503.

The PCR court failed to apprehend that Belcher not only applies to cases where self-defense is charged, but also where voluntary manslaughter is charged. Belcher held that instructing the jury that malice may be inferred from use of a deadly weapon is error "where evidence is presented that would reduce, mitigate, excuse or justify the homicide." Id. at 600, 685 S.E.2d at 803-04. Evidence that reduces murder to voluntary manslaughter is evidence of mitigation of a homicide as contemplated by Belcher.

In this case, the trial court's charge on the inference of malice was functionally equivalent to the charge given in Belcher. The trial judge charged the jury on presumptions of malice and that malice may be inferred from the use of a deadly weapon. Just as in Belcher, evidence was presented that mitigated the homicide. The defendant in Belcher received a self-defense instruction. Petitioner received an instruction on voluntary manslaughter. The Belcher Court concluded the error was not harmless beyond a reasonable doubt because the prejudice from the charge went to the heart of the case: whether the killing was in self-defense or done with malice. Id. at 611-12, 685 S.E.2d at 809-10. See also State v. Stanko, 402 S.C. 252, 263-64, 741 S.E.2d 708, 713-14 (2013) (holding that where defendant presented evidence of abnormal brain function the giving of an inferred malice charge was error).

This Court held in Belcher that its ruling would be effective “for all cases which are pending on direct review or not yet final where the issue is preserved.” Belcher at 612, 685 S.E.2d at 810. This court also stated that the Belcher ruling would “not apply to convictions challenged on post-conviction relief.” Id. at 613, 685 S.E.2d at 810. While certainly this case is a PCR case, the timing of this case means that Belcher’s proscription against application of its ruling in PCR cases does not apply to petitioner. The Belcher opinion was issued on October 12, 2009—barely a month after petitioner was convicted and approximately three years before his convictions were affirmed on appeal.

Petitioner’s case therefore falls into a narrow window where the Belcher ruling should apply on PCR. Had trial counsel preserved the objection, petitioner would have received the benefit of Belcher on direct review. Under the facts of this case, with malice as its central question, there is little doubt that Belcher would have required the reversal of petitioner’s convictions and a new trial.

Petitioner’s case is unlike other PCR cases where the issue cannot be raised. Belcher was not intended to apply to post-conviction cases where the applicant would not have received its benefit on direct review. For example, had the Court of Appeals affirmed petitioner’s conviction before this Court issued the Belcher decision, it is without question that petitioner could not raise a Belcher ineffective assistance claim. His conviction would have been final on direct review.

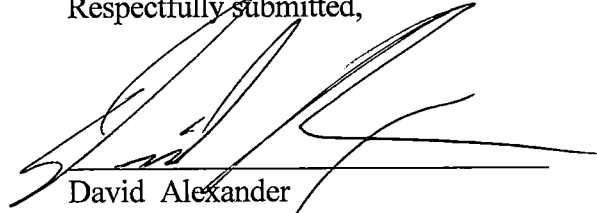
Analytically, petitioner’s case should be treated no differently than any other ineffective assistance of counsel claim regarding Belcher. At any point after 2009, if a trial judge gave an erroneous inference of malice charge and defense counsel failed to object, such failure would unquestionably constitute ineffective assistance of counsel. Petitioner’s case is the same. Drawing the line against post-conviction relief where a defendant would have received the benefit of Belcher but for his attorney’s failure to object was not the Court’s intention. Furthermore, any decision in

petitioner's favor would not open a "floodgate" of PCR claims because any defendant whose conviction was final on direct review before the Belcher decision would still be barred from relief. Therefore, this Court should hold trial counsel ineffective, find prejudice in this case where malice was the sole issue, and grant petitioner a new trial. See Strickland v. Washington, 466 U.S. 668 (1984).

CONCLUSION

For the foregoing reasons, this Court should grant certiorari, reverse petitioner's convictions, and remand for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander  
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of September, 2015.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO SPARTANBURG COUNTY  
ROGER L. COUCH, CIRCUIT COURT JUDGE

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KENNETH D. SMITH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000696

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PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Kenneth D. Smith states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on September 18, 2014. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Kenneth D. Smith.

Respectfully submitted,

  
David Alexander  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 30th day of September, 2015

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Spartanburg County  
Roger L. Couch, Circuit Court Judge

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KENNETH D. SMITH,

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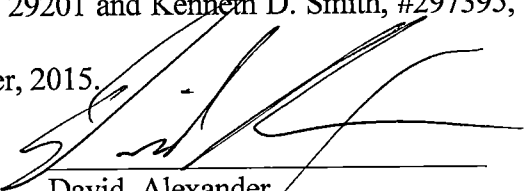
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CERTIFICATE OF SERVICE

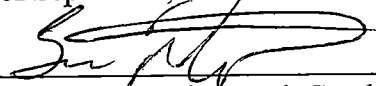
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I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Alicia Olive, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Kenneth D. Smith, #297395, at Perry Correctional Institution, this 30th day of September, 2015.

  
\_\_\_\_\_  
David Alexander  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 30th day  
of September, 2015.

  
\_\_\_\_\_  
(L.S.)  
Notary Public for South Carolina

My Commission Expires: October 30, 2022.