

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Appeal from Darlington County

R. Ferrell Cothran, Jr., Circuit Court Judge  
\_\_\_\_\_

RECEIVED

DEC 29 2015

S.C. Supreme Court

CURTIS NEALEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000881  
\_\_\_\_\_

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

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## ISSUES PRESENTED

### I.

The PCR court erred in finding that trial counsel provided effective assistance of counsel where Petitioner's right to a fair trial was adversely affected because trial counsel failed to call a toxicologist at trial to support the defense theory that Perkins' fell off of Petitioner's motorcycle because she was extremely intoxicated while under the influence of prescription anti-depressants and alcohol.

### II.

Defense counsel provided ineffective assistance of counsel by failing to object to the trial court's improper charge on inferred malice, thus preserving it for appellate review, where this Court's decision in *State v. Belcher*<sup>1</sup> prohibiting such instructions in ABIK cases had been filed a month before Petitioner's trial.

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<sup>1</sup> 385 S.C. 597, 685 S.E.2d 802 (2009).

## STATEMENT

On the night of October 14, 2008, Petitioner and his girlfriend, Dorothy Perkins, had drinks at the Darlington County house Perkins shared with her mother, Victoria, and then went to a local bar in nearby Hartsville where they continued to drink. App. 70, ll. 6-13. After about an hour at the bar, the couple returned on Petitioner's motorcycle to Perkins' house.

The State claimed that a violent argument then erupted between Petitioner and Perkins because Perkins' refused to attend an upcoming court hearing with him.<sup>2</sup> App. 96, l. 9 - 101, l. 24. By contrast, Petitioner would testify at trial that Perkins and her mother, Victoria, began to fight over Perkins' continued drug and alcohol abuse, which had caused her to lose custody of her five children to DSS. App. 232, ll. 14-21.

The State countered that when Victoria Perkins attempted to intervene in the fight between Petitioner and Perkins, Petitioner struck her over the head with a porcelain vase. App. 110, ll. 6-13. The defense countered that Perkins threw the vase at her mother. App. 232, ll. 14-21. Petitioner and Perkins then left the residence on Petitioner's motorcycle traveling on Billy Farrow Highway towards Hartsville. App. 234, ll. 3-12.

A highly intoxicated and impaired Perkins fell off of Petitioner's motorcycle while they were traveling down the road. App. 236, ll. 1-14. The State accused Petitioner of forcing Perkins onto his motorcycle at knife point and pushing her off of the back of his motorcycle during a high speed wheelie. App. 112, l. 4 - 113, l. 16.

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<sup>2</sup> Petitioner was facing charges arising out of a fight he had with Perkins' ex-husband. App. 67, ll. 7-13.

## **Indictment**

On June 22, 2009, the Darlington County Grand Jury indicted Petitioner for two counts of assault and battery with intent to kill (ABIK), two counts of possession of a weapon during the commission of a violent crime, one count of criminal domestic violence of a high and aggravated nature (CVDHAN), and one count of kidnapping. App. 477 - 488.

## **Trial**

On November 9-10, 2009, Petitioner proceeded to trial before the Honorable J. Michael Baxley and a jury. Petitioner was represented by Tonya Copeland Little. Assistant Solicitor Patti McKenzie.

### Dorothy Perkins' Testimony

Both Perkins and her mother testified at trial. Perkins testified that on the night of the incident Petitioner arrived at her house around five or six o'clock in the evening. App. 107, ll. 6-23. The two drank beer and watched television with Victoria Perkins. *Id.* Perkins claimed that Petitioner began pressuring her to "to come up with him to talk to the solicitor." *Id.* Perkins recalled that she refused and that Petitioner did not appear upset about her refusal. *Id.*

After dinner, Perkins and Petitioner went a Hartsville bar and continued drinking. App. 108, ll. 11-24. When the two returned to Perkins' house, Perkins claimed that Petitioner again asked her to come to court with him. App. 109, l. 11 - 110, l. 23. Perkins testified that she refused again, but this time Petitioner "grabbed a whatnot off the table" and started beating her. *Id.*

According to Perkins, her mother then attempted to intervene and Petitioner hit her with the "whatnot" knocking her to the ground. *Id.* Perkins averred that Petitioner then forced her at knife point onto the back of the motorcycle. Once they were on the motorcycle Petitioner purportedly threatened to kill them both by crashing it. Perkins claimed that she asked Petitioner to slow down

so that she could readjust her grip. In response, Petitioner “popped a wheelie” and pushed her off the motorcycle. App. 112, l. 4 - 113, l. 16.

Incredibly, Perkins claimed that Petitioner was holding the alleged knife the entire time she was on the motorcycle and that he was able to singlehandedly balance the bike on one wheel while pushing her one hundred eighty five pound frame off with his free hand. App. 74, ll. 3-24; App. 436, ll. 3-9. After she rolled off of the road, Perkins stated that she ran towards an upcoming semi-truck and tried to get into the cab. The driver refused to let her in and called the police. *Id.* Perkins claimed that Petitioner attempted to pull her off of the truck’s running board before he left on his motorcycle. *Id.*

At the State’s prompting, Perkins admitted that she stayed in the same hospital room as her mother during her recuperation. App. 117, l. 7-17. The State then brought up Perkins’s custody battle with DSS and Perkins’ abuse of drugs and alcohol. App. 118, l. 17 - 120, l. 23. Perkins testified that she had now overcome her drinking problem and “straightened up my life to get my kids back.” *Id.*

Crucially, Perkins adamantly denied being drunk on the night of the incident, “***I can tell you I wasn’t drunk and I remember everything that happened, and I was in complete control of my body and everything. I can tell you that.***” App. 119, l. 18 - 120, l. 1 (*emphasis added*). Perkins stated that she had “a couple of beers and couple of shots.” *Id.* In contrast to her alleged moderation, Perkins accused Petitioner of regularly abusing painkillers, smoking marijuana, and using cocaine. App. 120, l. 15-23.

On cross-examination, Perkins continued to minimize her alcohol and drug use on the night of the incident. App. 122, l. 2 - 123, l. 9. ***When asked if she had taken any pills that night, Perkins***

*said no*. She then gingerly conceded that her mother would, on occasion, give her a “Xatarel” to help her sleep, but that she had not taken any pills that night. *Id*.

The police never found the alleged knife that Perkins and her mother claimed Petitioner used. During cross-examination, Perkins claimed that her mother had seen Petitioner’s knife. App. 125, ll. 17-25. This seemed unlikely as Perkins had earlier testified that her mother had crawled into her bedroom at the back of the house after being struck by the “whatnot.” Perkins then clarified that her mother must have looked through a window, but when pressed further, she suddenly did not know or could not remember how she knew her mother had seen the knife.

Perkins then retraced her earlier testimony, stressing that Petitioner “had a knife at my throat threatening to kill me and go in there and kill my mother.” App. 126, ll. 1-20. Perkins also had trouble explaining why she did not jump off the motorcycle and run to her brother’s house next door once Petitioner disengaged the kickstand and had to balance the motorcycle. *Id*.

Perkins was also cross-examined on how she lost custody of her children. She claimed that she and one of her children’s father had a fight and the police were called. App. 128, ll. 5-15. As with the current incident, she denied being drunk, but later conceded that her drinking was a factor in her losing custody. *Id.*; App. 118, l. 17 - 120, l. 11.

#### Victoria Perkins’ Testimony

Dorothy’s mother, Victoria, claimed that Petitioner struck her in the head with a vase (“the whatnot”) after she threatened to contact her son, who was next door, and have him intervene in Petitioner and Perkins’ fight. App. 135, ll. 5-25. Victoria recalled that her daughter did not appear intoxicated on the night of the incident, “I don’t think she was drinking.” App. 143, ll. 14-25. Victoria stressed that, since the incident, Perkins has been sober and regained custody of her children. App. 143, l. 25 - 145, l. 10.

*Victoria conceded that she had given Perkins what she believed were prescription sleeping pills on occasion, but denied giving her any on the night of the incident. Id.* Curiously, despite having poor vision due to diabetes and having suffered a blow to the head, Victoria alleged that she saw Petitioner holding a knife to Perkins' throat and forcing her on his motorcycle. App. 150, ll. 13-19.

Victoria claimed that she was able to observe this through the window on her front door. App. 148, ll. 5-25. Victoria waived, claiming that she only overheard Perkins asking Petitioner to put a knife down. Victoria then reiterated that she had seen Petitioner and Perkins leave on the motorcycle "in a hurry" and that Petitioner had a knife in his hand. App. 147, l. 7 - 149, l. 7.

#### Dr. James C. Balvich's Testimony

Dr. Balvich treated Perkins in the emergency room on the night of the incident. Dr. Balvich testified that Perkins was visibly intoxicated. App. 173, l. 20 - 175, l. 22. However, Perkins had lied to Dr. Balvich and denied having taken any medications. *Id.*

Dr. Balvich testified that Perkins' injuries were consistent with having fallen off of a motorcycle, but he was unable to recall that Perkins had told him she had been thrown from a bicycle. *Id.* Balvich stated that Perkins never mentioned being held at knife point and she did not have any injuries consistent with having been stabbed or cut. *Id.*

#### Cedric R. Gibson's Testimony

Gibson stated that, on the night of the incident, he was driving his semi-truck on Billy Farrow Highway towards Hartsville. App. 178, l. 24 - 180, l. 21. A few miles before he reached his house, Gibson came across Perkins and Petitioner in the roadway and initially believed there had been an accident, until Petitioner started running towards him screaming hysterically for help. App.

181, l. 2 - 183, l. 21. He believed that Petitioner tried to stop Perkins from screaming by forcibly kissing her. *Id.* Gibson never saw Petitioner with a knife.

Gibson stated that Perkins broke free of Petitioner's embrace and attempted to enter his cab by jumping onto the truck's running board. *Id.* Fearing that Perkins would rob him if she gained access to the cab, Gibson locked her out and shouted out of his open window that he had called the police. Gibson alleged that Petitioner then restarted his motorcycle and drove away after trying briefly to pull Perkins off of the running board. *Id.*

#### Petitioner's Testimony

Petitioner testified that after they returned from the bar, Perkins and her mother began to fight over to Perkins' continued abuse of alcohol and drugs. App. 231, l. 14 - 233, l. 17. Perkins had consumed a significant amount of alcohol and taken a number of painkillers that night. Petitioner tried to break up the fight, but Perkins struck her mother in the head with a vase before he could separate them. *Id.*

Petitioner demonstrated the steps required to start his motorcycle, revealing how difficult it would have been to release the kick stand, start the engine, engage the clutch, and begin steering with only one free hand and a non-compliant passenger. App. 234, l. 9 - 235, l. 18. Petitioner also demonstrated how difficult it would have been to push Perkins off of the back of his motorcycle while executing a "wheelie" and steering the motorcycle with one hand. *Id.*

Petitioner recalled that as the couple drove down Billy Farrow Highway, an intoxicated Perkins simply let go of Petitioner and fell off the motorcycle. App. 236, l. 1 - 237, l. 24. Perkins was hysterical and in shock from her injuries. Petitioner testified that he fled because he was afraid the truck driver had a weapon after the driver gestured at him. *Id.* Petitioner adamantly denied carrying a knife on the day of the incident.

After the close of the State's case, Petitioner moved for a directed verdict on all charges. The trial court granted a directed verdict of acquittal on Petitioner's indictment for possession of a weapon during the commission of a violent crime arising out of the alleged assault on Victoria Perkins. App. 218, l. 19 - 219, l. 22. The court denied the motion for the remaining charges. *Id.*

### **Jury Instruction and Verdict**

The court instructed the jury that "you have one [objective] and that is to search for and find the truth regardless of which witness, or from which side of the case it may come. App. 282, ll. 14-17. The court further instructed jurors that "a reasonable doubt is a doubt that makes an honest, sincere, conscientious juror, in search of the truth, hesitate to act. App. 286, ll. 7-9.

With respect to ABIK, the court expounded that "malice must exist in the mind of the defendant." App. 294, ll. 4-9. The court explained that "malice may be inferred however from conduct that shows a total disregard for human life. *Inferred malice may also arise when the deed is done with a deadly weapon.*" App. 294, l. 22 - 295, l. 3 (*emphasis added*).

Following deliberations, the jury found Petitioner guilty on all remaining indictments. The trial court then sentenced Petitioner to concurrent terms of twenty years imprisonment for both ABIK indictments, ten years imprisonment for CDVHAN, and thirty years imprisonment for kidnapping. App. 315, l. 22 - 316, l. 19. Petitioner was also sentenced to a consecutive five year sentence of imprisonment for the possession of a weapon during the commission of a violent crime with respect to Perkins. *Id.* Petitioner was sentenced to a total of thirty-five years. *Id.*

## **Direct Appeal**

On his direct appeal, Petitioner was represented by Senior Appellate Defender Joseph L. Savitz. On February 7, 2011, Savitz submitted an *Anders*<sup>3</sup> brief alleging that the trial court committed reversible error by instructing jurors that they could infer malice from the use of a deadly weapon. On December 20, 2011, the South Carolina Court of Appeals denied Petitioner's appeal in an unpublished opinion holding that trial counsel had failed to preserve this argument for review. *State v. Nealey*, Unpublished Opinion No. 2011-UP-574 (Filed December 20, 2011).

## **PCR Application**

On January 17, 2012, Petitioner filed an application for post-conviction relief (PCR) with multiple allegations of trial counsel's ineffectiveness, including trial counsel's failure to present an expert toxicologist and counsel's failure to object to the trial court's improper inferred malice charge. App. 319 - 364; App. 456. On May 8, 2012, the State filed a return. App. 365 - 371.

## **Evidentiary Hearing**

On July 15, 2013, an evidentiary hearing was held before the Honorable R. Ferrell Cothran, Jr. App. 372 - 455. Tristan M. Shaffer represented Petitioner and Assistant Attorney General Karen C. Ratigan represented the State. SLED Assistant Lab Director Wendy Bell, Petitioner, and trial counsel all testified at the hearing.

## Wendy Bell's Testimony

Bell was qualified as an expert in the field of forensic toxicology. App. 380, ll. 15-20. She examined Perkins' medical records from the night of the incident. App. 381, l. 1 - 387, l. 20. The

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<sup>3</sup> 386 U.S. 738 (1967).

hospital records indicated that Perkins had a serum blood alcohol level of .175 and tested positive for high levels of tricyclic anti-depressants.<sup>4</sup> App. 381, ll. 14-23.

Bell concluded that Perkins' must have taken the anti-depressants on the day of the incident. App. 382, l. 2 - 383, l. 17. She also noted that SLED's testing thresholds for anti-depressants are lower than the hospitals. *Id.* Bell explained that because of the difference between serum blood alcohol and whole blood alcohol content, Perkins' .175 serum blood alcohol level was equivalent to .15 whole blood alcohol reading. App. 384, l. 1 - 385, l. 24. This is almost twice the legal limit to operate a vehicle.

Based on her expertise, Bell concluded that the combination of alcohol and anti-depressants would have caused "significant impairment" including: "muscular incoordination," slurred speech, and a staggered gate. She postulated that Perkins would have behaved like a person with a .2 whole blood alcohol content. *Id.*

Looking at the records, Bell stated that the serum blood alcohol test was conducted at 12:45 a.m. on October 15, 2008 and the urinalysis was conducted at 3:00 a.m. App. 386, ll. 3-19. These tests were done approximately two hours and five hours after the incident. On cross-examination, Bell testified that people who regularly use anti-depressants can develop a tolerance and adjust to the effects of the medication. App. 388, l. 17 - 389, l. 17.

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<sup>4</sup> Bell explained that tricyclic anti-depressants are an older and less prescribed class of anti-depressant. App. 388, ll. 14-22. "You would expect slowed reaction time because of the slow -- this is a central nervous system depressant; it slows the brain's processes. So you would expect impairment, impaired judgment, impaired -- it could affect memory recollection." App. 385, ll. 3-8. Tricyclic anti-depressants have become disfavored due to the frequency of adverse side-effects, such as blurred vision or disorientation, and the development of the more targeted selective serotonin reuptake inhibitor medications (SSRIs). Jeffery E. Kelsey, Charles D. Nemeroff, and D. Jeffery Lewport, *Principles of Psychopharmacology for Mental Health Professionals* 116 - 120 (John Wiley & Sons, Inc. 2006).

### Trial Counsel's Testimony

Trial counsel testified that she was a public defender when she represented Petitioner. App. 390, ll. 18-24. Counsel recalled that her trial strategy was based on discrediting Perkins and her mother by emphasizing that they had a motive to lie because Perkins' was trying to regain custody of her children from DSS. App. 398, ll. 4-14. She believed the trial was largely a credibility battle.

Counsel stated that Petitioner's never changed: Perkins "was drunk, she fell off the motorcycle." App. 400, ll. 5-22. Counsel conceded that she did not call an expert toxicologist to testify despite knowing that Perkins tested positive for anti-depressants and had a high blood alcohol level. App. 402, l. 4 - 403, l. 4.

Counsel claimed that she had a medical doctor available to testify, but that she did not call him at trial because the Dr. Balvich testified for the prosecution that Perkins was visibly intoxicated. Counsel also noted that the court had ruled that Perkins' medical records could only be used to impeach her testimony. Counsel could not explain why she did not impeach Perkins when she and her mother denied Perkins took any anti-depressants on the night of the incident. App. 404, l. 6 - 405, l. 9. Counsel admitted that Perkins' intoxication was central to the defense's theory of the case. *Id.*

With respect to the inferred malice charge, counsel acknowledged that she was unaware of *State v. Belcher* at the time of Petitioner's trial. App. 410, ll. 9-21. "I wasn't aware of the *Belcher* case at the time . . . obviously I probably should have been." *Id.* Counsel then posited that the trial court was also unaware of it and noted that ***Belcher* was published about four weeks prior to Petitioner's trial.** *Id.*

### Petitioner's Testimony

Petitioner testified that presenting an expert toxicologist at trial would have supported his version of events. App. 426, l. 4 - 427, l. 15. Petitioner stated that without supporting expert testimony on Perkins' intoxication, the case came down to his word versus Perkins and her mother.

*Id.* On cross-examination, Petitioner reiterated that Perkins, her mother Victoria, and the prosecution misleadingly minimized Perkins' drinking on the night of the incident and that Perkins had clearly lied about taking an prescription drugs. App. 443, l. 9 - 445, l. 5.

Petitioner also observed that Dr. Balvich, trial counsel's purported substitute for a defense expert, only testified that Perkins appeared intoxicated, there was no mention of her level of intoxication or of the anti-depressants. *Id.* On re-direct examination, Petitioner said that his testimony would have been more credible had trial counsel secured an expert witness to support his claims regarding Perkins' drug use and high level of intoxication. App. 452, ll. 9-25.

### **Order of Dismissal**

On August 20, 2013, the PCR court filed an order of dismissal denying Petitioner's application. App. 457 - 467. The PCR court ruled trial counsel was not ineffective for failing to retain an expert toxicologist or for failing to introduce Perkins' medical records into evidence. App. 462 - 463. The court summarily resolved that the admission of Perkins' medical records would not have changed the outcome of the case. App. 463.

Curiously, given the certainty of Bell's conclusions, the PCR court decided that her testimony was merely speculative as to the effect that the combination of high alcohol consumption and use of prescription anti-depressants would have had on Perkins' balance. Also inexplicable was the PCR court's determination that, "Bell admitted, however, that she did not know the prescribed dosage of the antidepressants." App. 463. **Perkins was not prescribed any anti-depressants.**

The PCR court further ruled that counsel was not ineffective for failing to challenge the trial court's improper charge on inferred malice. App. 466. The court simply found that Petitioner was not prejudiced by the improper charge because there was overwhelming evidence of his guilt. *Id.*

**Motion to Reconsider**

On September 26, 2013, Petitioner filed a motion to reconsider, specifically citing the PCR court's ruling on trial counsel's failure to secure an expert toxicologist and the PCR court's possible failure to make a ruling on whether counsel was deficient for failing to object to the improper inferred malice charge. App. 468 - 471.

On October 1, 2013, the State filed a Return. App. 473 - 475. On March 19, 2015, the PCR court denied Petitioner's motion to reconsider. App. 476.

## ARGUMENT

### I.

**The PCR court erred in finding that trial counsel provided effective assistance of counsel where Petitioner's right to a fair trial was adversely affected because trial counsel failed to call a toxicologist at trial to support the defense theory that Perkins' fell off of Petitioner's motorcycle because she was extremely intoxicated while under the influence of prescription anti-depressants and alcohol.**

Trial counsel's failure to hire a toxicologist to testify as to Perkins' high blood alcohol content and the substantial amount of prescription tricyclic anti-depressants - for which she did not have a prescription - she had consumed on the day of the incident, was constitutionally deficient. App. 461 - 464; *see Lounds v. State*, 380 S.C. 454, 462, 670 S.C. 646, 650 (2008) (not objectively reasonable given the defense theory of the case for counsel not to call witnesses that were critical to his client's defense.); *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007) (counsel ineffective in handling of critical gun-shot residence evidence where counsel's defense expert was not an independent expert as he had previously reviewed evidence in defendant's case as a supervisor of State's expert witness).

Petitioner's trial was a credibility battle and both Perkins and her mother, Victoria, denied that Perkins was intoxicated and denied that Perkins had taken any of Victoria's prescription drugs. App. 407, ll. 1-14. Thus, the PCR court erred in holding that trial counsel provided effective assistance of counsel. App. 462 - 463; *See Strickland v. Washington*, 466 U.S. 668 (1984) (provides that a petitioner must show that counsel was deficient and that the deficiency prejudiced the outcome of petitioner's proceedings); *see also Gallman v. State*, 307 S.C. 273, 414 S.E.2d 780 (1992).

In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a

preponderance of the evidence.” *Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRPC). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant 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*, 466 U.S. at 692; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Bulter*, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the applicant must prove that counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” *Id.* at 117, 386 S.E.2d at 625 (citing *Strickland*, 466 U.S. 668). Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 117-118, 386 S.E.2d at 625. Specifically, “[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*, 466 U.S. at 694); *see also Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

### **Deficient Performance**

In this case, trial counsel’s failure to call an expert toxicologist to impeach Perkins’ and her mother’s testimony was deficient, as it fell well below an objective standard of reasonableness given the facts of the case. *See Strickland*, 466 U.S. at 687-88; *see also McKnight*

v. *State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008) (counsel was ineffective in a homicide by child abuse case for: (1) calling an expert witness that undermined the defense; (2) failing to call an expert witness that supported the defense theory; and (3) in failing to challenge the State's evidence.).

At the PCR evidentiary hearing, appointed trial counsel admitted that she had retained an expert witness to testify on Perkins' level of intoxication. Trial counsel claimed that her strategy at trial was to discredit Perkins and her mother by demonstrating that they were lying to cover up Perkins' continued alcohol and drug abuse so that Perkins' could regain custody of her children from DSS. App. 398, ll. 4-18. Counsel claimed that she did not call an expert witness because the treating emergency room doctor testified that Perkins appeared intoxicated. App. 402, ll. 10-21. His testimony, carefully put forward by the State to minimize its impact, was not a substitute for adversarial expert testimony detailing her alcohol and drug consumption on the day of the incident and the impact it would have had on her balance and coordination. *See Stacy v. Solem*, 801 F.2d 1048, 1051 (8th Cir. 1986) (labeling counsel's actions as "trial strategy" does not automatically immunize an attorney's performance from sixth amendment challenges); *Strickland*, 466 U.S. at 690 ("counsel's function ... is to make the adversarial testing process work in the particular case").

At trial, Perkins testified that she had had "a couple of beers and a couple of shots." She strenuously denied being drunk or taking any prescription pills that night. App. 119, l. 15 - 123, l. 6. Trial counsel was in possession of Perkins' medical records which proved that, several hours after the incident, Perkins had a blood alcohol level of .15 and had tested positive for high levels of tricyclic anti-depressants. App. 381, l. 14 - 385, l. 16;

At a minimum, trial counsel should have called an expert toxicologist to explain to the

jury the impact that the combination of drugs and alcohol in Perkins' system would have on her balance. *See also Lounds*, 380 S.C. at 460, 670 S.C. at 64. Such expert testimony would have significantly undermined the credibility of Perkins and her mother - the State's two key witnesses. It would have also strengthened the defense's theory of the case by corroborating Petitioner's testimony and supporting the defense's contention that Perkins was lying to regain custody of her children despite continuing to abuse drugs and alcohol. *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010); *State v. Council*, 335 S.C. 1, 21, 515 S.E.2d 508, 518 (1999).

Therefore, the PCR court erred in holding that trial counsel provided effective assistance of counsel because trial counsel's performance was constitutionally deficient, as it fell well below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 694; *see also Bulter*, 286 S.C. 441, 334 S.E.2d 813.

### **Prejudice**

Petitioner was prejudiced by trial counsel's failure to call an expert witness as there was not overwhelming evidence of his guilt. App. 464. This case turned on whether the jurors believed Petitioner or whether they believed Perkins and her mother. Testimony from the truck driver supported the State's case. In contrast, trial counsel's failure to call an expert witness resulted in Petitioner's testimony being uncorroborated. *Thomas v. State*, 308 S.C. 123, 124, 417 S.E.2d 531, 532 (1992) (counsel ineffective where victim was the sole witness and her identification of defendant as her attacker was crucial to the State's case, counsel failed to call emergency medical personnel who would have testified victim stated immediately after attack that she did not know her assailant).

SLED Assistant Lab Director Wendy Bell testified that Perkins had consumed a significant

amount of anti-depressants on the day of the incident and that she would have experienced “muscular incoordination,” slurred speech, and a staggered gate. App. 384, l. 1 - 385, l. 24; *see Bannister v. State*, 509 S.E.2d 807, 809 (S.C. 1998) (“PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony . . . in order to establish prejudice from the witness' failure to testify”). There is nothing speculative about her testimony.

Perkins' was substantially impaired on the night of the incident with a blood alcohol content of around twice the legal limit to operate a vehicle, a level of impairment amplified by the anti-depressants. App. 384, l. 1 - 385, l. 24. PCR court's dismissal of Bell's testimony on the grounds that she did not know the prescribed dosage of anti-depressants was erroneous because Perkins was not prescribed any anti-depressants, her mother was. App. 119, l. 15 - 123, l. 6. It is entirely plausible that Perkins fell off of the motorcycle due to “muscular incoordination” rather than because Petitioner pushed her off while executing an Evel Knievel-esque one handed “wheelie.” App. 435, l. 8 - 437, l. 20.

Prejudice is further illustrated by the State's emphasis at trial that Perkins had reformed her behavior. Not only did she deny taking any prescription medications on the night of the incident, but she claimed that, since the incident, she had astonishingly given up drinking and drugs. App. 118, l. 17 - 120, l. 10. This is a person who unsuccessfully attempted alcohol rehabilitation on multiple occasions and was now claiming that she had successfully stopped drinking on her own accord. *Id.* Coincidentally, she and her mother had since regained custody of her children and they were now even attending church: “we have been doing just great.” *Id.*; App. 131, l. 2-19; App. 128, l. 5 - 129, l. 12.

Accordingly, trial counsel's performance prejudiced Petitioner's right to a fair trial since it “undermine[d] confidence in the outcome of [his] trial.” *See Strickland*, 466 U.S. at 694.

Without any expert testimony supporting the defense's theory of the case or contradicting Perkins' claims of relative sobriety, Petitioner's right to a fair trial was adversely affected by trial counsel's deficient performance. *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

## II.

**Defense counsel provided ineffective assistance of counsel by failing to object to the trial court's improper charge on inferred malice, thus preserving it for appellate review, where this Court's decision in *State v. Belcher*<sup>5</sup> prohibiting such instructions in ABIK cases had been filed a month before Petitioner's trial.**

On direct appeal, Senior Appellate Defender Joseph Savitz argued that the trial court erred by instructing jurors that malice could be inferred by the use of a deadly weapon. This jury charge violated this Court's ruling in *State v. Belcher*. However, because trial counsel failed to object to the charge, the Court of Appeals held the issue was not preserved for appellate review. Had this issue been preserved for review, there is a reasonable probability that Petitioner's conviction would have been reversed and remanded for a new trial.

### **Deficient Performance**

At the evidentiary hearing, trial counsel admitted that *Belcher* was applicable, but that she was unaware of the case at the time of the trial. App. 410, ll. 9-21. Counsel conceded that she and the trial court should have been aware of *Belcher*. *Id.* Likewise, the PCR court ruled that counsel's performance was deficient for failing to object to the trial court's improper inferred malice instruction. *Id.*

### **Prejudice**

Nevertheless, the PCR court also ruled that Petitioner was not prejudiced due to overwhelming evidence of his guilt. App. 466. This ruling was in error as the PCR court misapprehended Petitioner's argument and the applicability of this Court's decision in *Belcher*. As an initial matter, *Belcher* holds that:

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<sup>5</sup> 385 S.C. 597, 685 S.E.2d 802 (2009).

the ‘use of a deadly weapon’ implied malice instruction has no place in a murder (or [ABIK]) prosecution *where evidence is presented that would reduce, mitigate, excuse or justify* the killing (or the alleged [ABIK]); *the trial court’s error in charging jury that malice could be inferred by the use of a deadly weapon could not be considered harmless error.*

385 S.C. at 612, 685 S.E.2d at 810 (*emphasis added*). Erroneous jury instructions are subject to harmless error analysis. *Lowry v. State*, 376 S.C. 499, 509, 657 S.E.2d 760, 765 (2008).

However, whether an improper “use of a deadly weapon” implied malice instruction is harmless error turns on *whether there is overwhelming evidence of malice apart from the use of a deadly weapon*. *Belcher*, 385 S.C. at 611 - 612, 685 S.E.2d at 809-811. The PCR court’s prejudice analysis erroneously focused on whether there was overwhelming evidence of Petitioner’s guilt, not whether there was overwhelming evidence of Petitioner’s malice. App. 466.

Petitioner testified at trial that Perkins was injured when she accidentally fell from his motorcycle and that Victoria Perkins was injured when she was struck by her daughter. His testimony is evidence that would have reduced, mitigated, excused or justified the kidnapping and ABIK charges. Moreover, Petitioner’s argument at PCR alleges that trial counsel was ineffective for not putting forth expert witness testimony which would have substantially undermined the State’s case and would have constituted additional evidence reducing, mitigating, excusing or justifying the alleged ABIK against both Perkins and her mother.

Under the *Belcher* analysis, the trial court not only erred by improperly charging the jury that it could infer malice from the use of a deadly weapon, but the error could not have been harmless because evidence of an accident and third party guilt was put forward by Petitioner, “thereby highlighting the prejudice resulting from the charge.” 385 S.C at 612, 685 S.E.2d at

810. As in *Belcher*, the only evidence of malice in Petitioner's case was the alleged use of deadly weapons to accomplish the purported ABIK: a motorcycle, a knife, and a vase. *Id.*

Importantly no knife was ever recovered by police and no independent witnesses, such as the truck driver or the emergency room doctor saw or even recalled Perkins' claiming that Petitioner threatened her with a knife. App. 174, l. 13 - 175, l. 4; App. 189, ll. 14-19. Similarly, a directed verdict of acquittal was granted on the charge of possession of a deadly weapon during the commission of a violent crime with respect to the ABIK of Victoria Perkin. App. 218, l. 19 - 219, l. 22.

Moreover, Perkins' story of what occurred on Petitioner's motorcycle - that Petitioner managed to maintain control of his motorcycle with one hand (a hand that was holding a knife) while simultaneously executing a high speed wheelie and turning around to push Perkins off her seat with his free hand - would be laughable if the allegations in this case were not so serious. App. 112, l. 4 - 113, l. 16. It seems far more plausible that a severely intoxicated Perkins simply fell off of Petitioner's motorcycle after losing her balance due a combination of beer, vodka, and powerful, prescription strength tricyclic anti-depressants. App. 236, ll. 1-14; App. 383, l. 18 - 388, l. 4.

Accordingly, there is a reasonable probability that but for defense counsel's failure to object to the improper implied malice jury instruction, thus preserving it for appeal; Petitioner would have been entitled to a new trial. *See Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. In short, counsel's deficient performance prejudiced Petitioner such that it "undermin[ed] confidence in the outcome of [his] trial." *See Strickland*, 466 U.S. at 694; *see also Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

**CONCLUSION**

Based on the foregoing reasons, Petitioner Curtis Nealey's petition for writ of certiorari should be granted in order to allow full briefing on the issue.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John H. Strom", written over a horizontal line.

John H. Strom  
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of December, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Darlington County

R. Ferrell Cothran, Jr., Circuit Court Judge

**RECEIVED**

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**S.C. Supreme Court**

CURTIS NEALEY,

PETITIONER,

V.

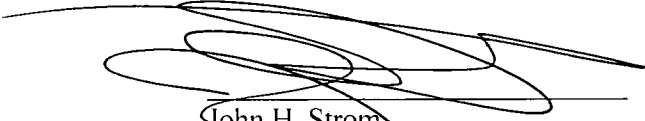
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000881

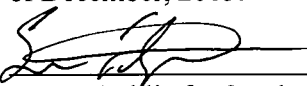
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Jessica Kinard, Esquire this 29<sup>th</sup> day of December 2015.

  
John H. Strom  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 29th day  
of December, 2015.

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

My Commission Expires: October 30, 2022.