STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

R. Knox McMahon, Circuit Court Judge

JOSHUA FORREST,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001045

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. Did trial counsel provide ineffective assistance in derogation of Petitioner's state and federal constitutional rights by failing to object to a police officer's testimony that Petitioner was incarcerated shortly before the incident for which he stood trial where the testimony (1) impermissibly placed Petitioner's character at issue, (2) was irrelevant and the danger of unfair prejudice substantially outweighed any probative value, and (3) could have been redacted in a way that would not reveal the redaction to the jury?

II. Did trial counsel provide ineffective assistance in derogation of Petitioner's state and federal constitutional rights by 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?

III. Did trial counsel provide ineffective assistance in derogation of Petitioner's state and federal constitutional rights by failing to object to a jury charge that malice may be implied from conduct showing total disregard for human life, which unconstitutionally shifted the burden of proof, in violation of Petitioner's constitutional right to due process of law?

STATEMENT

In April 2006, an Aiken County grand jury indicted Petitioner for possession of a firearm during the commission of a violent crime and murder (2006-GS-02-694 & -695). App. 552-553; App. 555-556. Prosecutor DeGrant Gibbons, called the case for trial before the Honorable Doyet A. Early, III, and a jury on December 4-6, 2006. Supp. App. 1. Sherri Stoney Hicks represented Petitioner. Supp. App. 1. When the jury was unable to reach a verdict, the judge declared a mistrial. Supp. App. 287, l. 4 – Supp. App. 288, l. 6. The state, represented by Stephen Kodman and David Miller, called the case for retrial before the Honorable Michael G. Nettles and a jury on June 22-24, 2009. App. 1. Hicks represented Petitioner again. App. 1. The jury found Petitioner guilty as charged. App. 253, l. 15 – App. 254, l. 2. Judge Nettles sentenced Petitioner to life imprisonment for the murder and five years' imprisonment for the weapon. App. 262, l. 22 – App. 263, l. 9; App. 554; App. 557. Petitioner filed a notice of appeal, which was perfected by Joseph Savitz, III, who filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). App. 267-276. The South Carolina Court of Appeals affirmed. App. 277; State v. Forrest, 2011-UP-254 (S.C. Ct. App. filed June 1, 2011).

Petitioner filed an application for post-conviction relief (PCR) on August 23, 2011. App. 279-288. Petitioner amended his application on July 3, 2013, and January 6, 2014. App. 296-307; App. 308-320. On July 31, 2014, the Honorable R. Knox McMahon presided over an evidentiary hearing. App. 321. David Spencer represented the state, and Martin Puetz represented Petitioner. App. 321. By an order filed on October 9, 2014, Judge McMahon denied Petitioner relief from his convictions and sentences. App. 530-543. On October 23, 2014, Petitioner filed a motion to alter or amend. App. 544-548. By an order filed on April 13, 2015, Judge McMahon denied the motion. App. 549-551. Petitioner filed a timely notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

I. Trial counsel provided ineffective assistance in derogation of Petitioner's state and federal constitutional rights by failing to object to a police officer's testimony that Petitioner was incarcerated shortly before the incident for which he stood trial where the testimony (1) impermissibly placed Petitioner's character at issue, (2) was irrelevant and the danger of unfair prejudice substantially outweighed any probative value, and (3) could have been redacted in a way that would not reveal the redaction to the jury.

Relevant facts

Evidence at trial

Prior to trial, the judge convened a hearing pursuant to Jackson v. Denno, 378 U.S. 368 (1964), to determine the admissibility of Petitioner's statement to police. During the hearing, an officer testified that Petitioner provided the following information during custodial interrogation:

> [Petitioner] reported of Chantelle Epps driving him to the Elk's Club and arriving and entering between 01:30 and 02:00 hours on 12-4-05 and consumed a large quantity of alcohol that intoxicated him.
>
> [Petitioner] reported while inside [Tameka Campbell] Bussey,[1] his ex-girlfriend who had formed a relationship with [Mario] Reddish during his, being [Petitioner], *recent incarceration*, began a verbal argument over his flirtations with Monique.
>
> [Petitioner] continued to report Bussey took his ball cap and relocated within a group of 12 males toward the rear of the Elk's Club. [Petitioner] reported he approached her to retrieve his cap whereas Bussey threw a drink on him and slapped his face several times.
>
> [Petitioner] reported he ignored Bussey's assault and after obtaining his cap the 12 males began to shove him and he left the interior of the Elk's Club, relocating to the rear driver door of the white-in-color Lincoln operated by James Forrest.
>
> [Petitioner] reported he opened the door to enter, was unable - - was unable to due to the driver's seat being fully declined (sic) and upon relocating to the front of the vehicle observed Bussey and the same group of males approaching him.
>
> [Petitioner] reported Bussey hit his face several times and he grabbed her throat and pushed her away. [Petitioner] reported Reddish then approached him and punched

[1] Throughout the trial and PCR transcripts, various witnesses and the lawyers refer to this witness as Tameka Campbell and/or Tameka Bussey. For consistency and ease of reference, Petitioner refers to this witness as Bussey throughout his petition.

him in the face and a physical fight erupted whereas Reddish again struck him in the jaw as the fight relocated to the front region of the Lincoln.

[Petitioner] displayed apparent visible injury to his inner lip region. [Petitioner] reported and demonstrated during the fight, Reddish secured him in a frontal bear hug, gripping both of his, Reddish's, arms around his, [Petitioner]'s, arms and torso.

[Petitioner] reported upon trying to break free he heard apparent gunshots and began to back away from Reddish, who ripped his, [Petitioner], shirt off while falling forward to the ground.

[Petitioner] reported of running to and entering the Lincoln with Little James, James Forrest, and Jay, Joseph Gartrell, while hearing Bussey state, shoot that nigger.

[Petitioner] reported while departing the incident location to - - while departing the incident location an unknown black male ran beside the Lincoln firing a pistol.

[Petitioner] reported of soon arriving to the Waffle House located at Highway 19 and I-20, Aiken, South Carolina, where he accepted a ride from Myron to his, [Petitioner], girlfriend, Marcy Coleman's residence located in Apple Valley Subdivision, Augusta, Georgia, arriving between 05:00 and 06:00 hours on 12-4-05.

Finally, [Petitioner] reported of overhearing Coleman's mother state at 08:30 hours that he was wanted by the police and of speaking with his mother later that day who coordinated his surrender to law enforcement.

App. 13, l. 24 – App. 16, l. 2 (emphasis added).[2]

Despite the judge inviting argument on the matter, trial counsel responded, "Your Honor, I don't have anything to say." App. 21, ll. 16-17. Importantly, trial counsel made no argument for exclusion of the statement or even redaction of the part mentioning Petitioner's prior and recent incarceration. Unsurprisingly, the judge ruled Petitioner's statement was admissible in toto. App. 21, l. 18 – App. 22, l. 22.

[2] During Petitioner's first trial, Cain testified to the same statement purportedly made by Petitioner. Supp. App. 14, l. 5 – Supp. App. 16, l. 8. Included in that testimony was the statement allegedly made by Petitioner concerning his "recent incarceration." Supp. App. 14, l. 12. Trial counsel presented no argument on the issue during the first trial. Supp. App. 21, ll. 18-20. Thus, trial counsel was well aware the state intended to introduce evidence of Petitioner's prior incarceration, and by implication, a prior conviction and/or prior bad act.

When the prosecutor called the officer to testify before the jury, he testified almost verbatim to his testimony during the pre-trial hearing. App. 127, l. 7 – App. 128, l. 12. His testimony included Petitioner's reference to his "recent incarceration." App. 127, l. 13. During the testimony, it was revealed that while the police attempted to audio and video record the interrogation, the equipment malfunctioned. App. 12, l. 7 – App. 13, l. 10; App. 18, l. 23 – App. 20, l. 10; App. 126, ll. 12-16. Thus, no audio or video was available. The *only* evidence was the officer's notes, which were not admitted as exhibits. App. 13, ll. 12-17; App. 126, l. 24 – App. 127, l. 2. Thus, the jury received only the officer's oral recitation of what Petitioner said during the interrogation. The jury did not receive any written or otherwise recorded documentation of Petitioner's statements during the interrogation.

Evidence at the PCR hearing

Trial counsel acknowledged she failed to object to law enforcement referencing Petitioner's recent prior incarceration. App. 340, l. 23 – App. 341, l. 2. She did not object to the officer testifying about Petitioner's incarceration because (1) the fact that Bussey left him while he was incarcerated "kind of gives … a bit of the *res gestae* of that situation," (2) trial counsel did not want the jury focusing on it, and (3) she did not want "removing part of [Petitioner]'s statement" to be construed as the defense "trying to hide something." App. 387, ll. 7-18. Further, trial counsel noted the officer's testimony did not reveal the charge for which Petitioner was incarcerated or the length of the incarceration. App. 387, l. 19 – App. 388, l. 4.

Petitioner believed the officer's testimony impermissibly placed his character at issue. App. 431, ll. 8-20; App. 431, l. 25 – App. 432, l. 8. Petitioner noted his surprise that trial counsel would permit his character to become an issue in the case when trial counsel had advised him not to testify

so that his character – including his guilty plea to charges two weeks prior to the shooting – would not be an issue in the trial. App. 432, ll. 4-18.

Order of dismissal

After recalling that trial counsel "testified that she did not object to [the officer]'s testimony because she did not want it to appear that she was hiding anything from the jury," the PCR court held the "oblique reference to incarceration was not prejudicial." App. 537. The PCR judge held the testimony "provide[d] context beneficial to the defense." App. 537. The judge explained that Bussey was "clearly the instigator and clearly was unreasonable." App. 537. These points were "underscored by the fact that she broke up with [Petitioner] while he was involuntarily elsewhere and was now jealous that he was flirting with another women [*sic*], even though she started dating Reddish while he was incarcerated." App. 537. Bussey's conduct was "clearly the catalyst for these unfortunate events." App. 537. The court held the testimony was not prejudicial and its omission would not have changed the outcome of the trial. App. 537. In fact, the court stated the testimony about Petitioner's prior recent incarceration was "generally beneficial to the defense and probative in providing context." App. 537-538.

Discussion

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. To prove ineffective assistance of counsel, Petitioner must establish that counsel's performance was unreasonable under prevailing professional norms, and that counsel's deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668 (1984); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). Prejudice occurs where there is a reasonable probability that, but for counsel's errors, the result at

trial would have been different. A reasonable probability is a probability sufficient to under confidence in the outcome of trial. Strickland, supra; Johnson, supra.

Impermissible Character Evidence

Whether this Court analyzes the evidence under the rubrics of prior bad acts or prior convictions, trial counsel's error in failing to object is clear. Had trial counsel objected to the portion of the statement referencing Petitioner's recent prior incarceration either as character evidence or prior conviction, the trial judge would have been obliged to sustain the objection and order the alleged statement to police redacted in that regard. The prejudice resulting from the jury learning of Petitioner's recent prior incarceration cannot be overstated. The jury was asked to determine whether Petitioner acted with malice or reacted with the sudden heat of passion to sufficient legal provocation. Knowing Petitioner had a prior criminal record placed Petitioner in the realm of "bad actors" or criminals. Thus, it was not a far jump for the jurors to conclude that a criminal would act with malice rather than in the sudden heat of passion.

Prior Bad Acts

The South Carolina Rules of Evidence and case law preclude the introduction of evidence of a defendant's other crimes, wrongs, or acts to prove the defendant's guilt for the charged crime except to establish (1) motive, (2) identity, (3) a common scheme or plan, (4) the absence of mistake or accident, or (5) intent. Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). As explained by this Court in State v. Wesley Smith, 391 S.C. 353, 361, 705 S.E.2d 491, 495 (2011), the prosecutor must prove by clear and convincing evidence that the defendant committed the prior bad act, if the defendant was not convicted of the act. Id. (citing State v. Fletcher, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008)). Next, the prosecutor must articulate the logical connection between the other act and one of the five exceptions listed in Rule 404(b),

SCRE. Id. (citing State v. Pagan, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006)). If the trial judge determines the prosecutor has satisfied both requirements, then the judge must determine whether the probative value outweighs the prejudicial effect pursuant to Rule 403, SCRE. Id. (citing State v. Stokes, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009)).[3]

The prosecution simply could not prove that Petitioner's recent prior incarceration fell within one of the delineated exceptions. Certainly, the state could show no logical connection between the incarceration or conduct resulting in the incarceration and the shooting death of Reddish. Evidence of Petitioner's prior incarceration served merely to show he was a bad actor. Thus, trial counsel should have objected and requested redaction of the statement. Counsel's failure to do so was prejudicial as it permitted the state to place Petitioner's character in issue and allowed the jury to consider his prior criminal conduct when deciding whether Petitioner acted with malice aforethought.

Prior Conviction

Admissibility of evidence of a defendant's conviction of a crime is limited by Rule 609(a)(1), SCRE. The evidentiary rules prohibit the introduction of a defendant's prior record unless the evidence is being used to attack the credibility of a testifying defendant. Rule 609(a)(1), SCRE. In light of the fact that Petitioner was not testifying, the prosecutor's introduction of his prior incarceration was improper. Trial counsel's failure to object was deficient performance resulting in prejudice.

In Green v. State, 338 S.C. 428, 527 S.E.2d 98 (2000), this Court found trial counsel ineffective for failing to argue the prejudicial effect of the defendant's prior convictions outweighed

[3] An analysis pursuant to Rule 403, SCRE, will be discussed in a later section of the petition, but is equally applicable here and is incorporated by reference.

their probative value. At Green's trial for distribution of crack cocaine and distribution of crack cocaine within proximity of a school, the prosecutor impeached Green with two prior convictions of possession of crack cocaine and possession of cocaine. Id. at 431, 527 S.E.2d at 100. Although this Court declined to hold that all similar prior convictions are inadmissible, this Court held that trial courts must weigh the probative value of the prior convictions against their prejudicial effect to the accused and determine in their discretion whether to admit the evidence. Id. at 433-434, 527 S.E.2d at 101. This Court held the trial counsel's failure prejudiced Green where his credibility was critical because the jury was forced to choose between his version of events and those expressed by SLED agents. Id. at 434, 527 S.E.2d at 101. Rejecting the state's argument that any error was cured by the trial court's limiting instruction, this Court found persuasive authority in a Fourth Circuit Court of Appeals case:

> Admission of evidence of a similar offense often does little to impeach the credibility of a testifying defendant while undoubtedly prejudicing him. The jury, despite limiting instructions, can hardly avoid drawing the inference that the past conviction suggests some probability that the defendant committed the similar offense for which he is currently charged.

Id. at 434, 527 S.E.2d at 101 (quoting United States v. Beahm, 664 F.2d 414, 418-419 (4th Cir. 1981)).

A decision from the Washington Court of Appeals finding trial counsel ineffective for eliciting on direct examination the defendant's prior conviction for possession of methamphetamine is instructive for the prejudice resulting from such evidence. State v. Saunders, 958 P.2d 364 (Wash. Ct. App. 1998). At trial, the prosecution maintained that methamphetamine found in a wallet in a car in which the defendant was driving belonged to the defendant. Id. at 366. However, the defense argued that the possession was unwitting as the defendant was a mechanic who had just finished working on the vehicle and was test driving it when he was stopped by police. Id. at 366.

During the defendant's direct examination, his counsel asked if he had any prior convictions for similar offenses. The defendant answered that he had been convicted of possession of methamphetamine previously. Id. The court ruled evidence of the prior conviction would have been ruled inadmissible if challenged, in light of the state's evidentiary rules, which are similar to South Carolina's. Id. On this point, the court noted "[e]vidence of a prior conviction is inherently prejudicial when the defendant is the witness because it shifts the jury's focus from the merits of the charge to the defendant's general propensity for criminality." Further, "greater prejudice may result from the nature of the conviction; the more similar the prior crime to the one presently charged, the greater the prejudice." Id. at 367. Turning to the prejudice prong, the court found that the evidence against the defendant was not overwhelming and the defense was plausible. Thus, the court found a reasonable probability that the outcome would have been different but for the introduction of the defendant's prior conviction existed. Id.

Similarly, trial counsel's failure to object to the officer's testimony that Petitioner had been incarcerated shortly before the shooting permitted the state to inject his character into the case and permitted the jury to judge Petitioner as a bad actor. Petitioner had not testified so the evidence of his incarceration could not be used to impeach his credibility. Additionally, the nature of the prior offense was unknown; therefore, its bearing on a credibility determination was purely speculative. The evidence could only be used to judge Petitioner a bad character and find him guilty of the greater offense of murder, rather than voluntary manslaughter.

Irrelevant Evidence and Rule 403, SCRE

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Generally, "[a]ll relevant evidence is admissible." Rule

402, SCRE. "Evidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986)(citing Toole v. Salter, 249 S.C. 354, 361, 154 S.E.2d 434, 437 (1967)).

However, even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE; see also State v. Orozco, 392 S.C. 212, 218, 708 S.E.2d 227, 230 (Ct. App. 2011). Thus, the first step requires a determination of the probative value of the evidence. The second step requires an evaluation of the danger of unfair prejudice resulting from the introduction of the evidence. The third step requires balancing of the probative value and unfair prejudice. "When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case." State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008). Unfair prejudice means an undue tendency to suggestion a decision on an improper basis, commonly, but not necessarily, an emotional one. Orozco, 392 S.C. at 218, 708 S.E.2d at 230 (citing State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001)); see also State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)(providing that "[e]vidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one").

The danger of unfair prejudice resulting from the admission of testimony concerning Petitioner's recent prior incarceration was extremely high. The evidence permitted the jury to view Petitioner as a criminal who failed to learn from prior mistakes. Little, if any, probative value could be found in the evidence. Petitioner's recent prior incarceration had nothing to do with the instant shooting. Despite the state's attempt at PCR to show the evidence was probative of a dispute between Bussey and Petitioner, the nature of the dispute could have been shown without the danger of unfair prejudice. Although the state and the PCR judge attempted to cast this evidence as some

type of *res gestae* evidence, neither the record nor a review of the case law supports such a proposition. See State v. Owens, 346 S.C. 637, 652, 552 S.E.2d 745, 753 (2001) (stating "the *res gestae* theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred"); State v. Gilmore, 396 S.C. 72, 83, 719 S.E.2d 688, 694 (Ct. App. 2011)(explaining "the State may prove the actions of the defendant when those actions are part of the crime, not separate"); State v. Adams, 354 S.C. 361, 379-380, 580 S.E.2d 785, 794-795 (Ct. App. 2003)(permitting evidence of other crimes when the evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the '*res gestae*' "or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other ...' [and is thus] part of the *res gestae* of the crime charged").

Rather than demonstrating that Bussey was unreasonable in her decision to leave Petitioner while he was incarcerated, the evidence served to show Bussey's decision was rational. Few would be surprised that a relationship terminates while one party is in prison or jail. Additionally, the fact that Petitioner was incarcerated at the time of the break-up was unnecessary to demonstrate the history between Petitioner and Bussey or the relationship that Reddish had with the two. That relationship could have been demonstrated without reference to the incarceration, which was the evidence that created the danger of unfair prejudice.

Effect of Redacting In this Case

Despite trial counsel's testimony at the PCR hearing that she feared redacting the statement would lead the jury to believe the defense was hiding something, redacting information concerning Petitioner's recent prior incarceration would have been simple and would not have invited the jury to speculate that evidence was being hidden. There was no written, audio, or video statement; thus, the redaction would not have been clear to the jury. The jury only heard about Petitioner's oral statement to police through the officer's testimony. Had trial counsel objected to the testimony, then it would have been a simple matter for the judge to instruct the witness to simply refrain from mentioning his recent prior incarceration. The officer's testimony would have been limited to the fact that Bussey had been Petitioner's girlfriend, the two had split, and recently, Bussey began seeing the deceased. The jury would have been completely unaware of the redaction because there would have been no literal redaction – it would have been a simple matter of instructing the witness on the parameters of his testimony. Therefore, trial counsel's alleged strategic reason for failing to object was nonsensical in that the jury would have had no idea that any portion of Petitioner's alleged statement to police was redacted. See Ingle v. State, 348 S.C. 467, 560 S.E.2d 401 (2002), Gilchrist v. State, 350 S.C. 221, 228 n.2, 565 S.E.2d 281, 285 n.2 (2002); Sanchez v. State, 351 S.C. 270, 276, 569 S.E.2d 363, 366 (2002); Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992).

Trial counsel rendered deficient performance by failing to object to portion of Petitioner's statement mentioning his recent prior incarceration and could provide no reasonable strategic decision for her failure. This error was prejudicial to Petitioner in light of the evidence against him and the impact upon the jury of learning of his recent prior incarceration.

II. Trial counsel provided ineffective assistance in derogation of Petitioner's state and federal constitutional rights by 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.

Relevant facts

Evidence at trial

Petitioner was attending a party at the Elk's Club in Aiken on December 3-4, 2005. App. 69, ll. 13-16; App. 80, ll. 16-18; App. 81, ll. 22-24; App. 127, ll. 3-10. His ex-girlfriend, Tameka Bussey was there too. App. 71, ll. 15-20; App. 80, ll. 13-15; App. 127, ll. 10-14. Bussey was dating Mario Reddish, another patron at the club. App. 127, ll. 10-12. Everyone agreed that Petitioner and Bussey engaged in a verbal argument inside the club. App. 70, ll. 14-21; App. 75, ll. 11-13; App. 82, ll. 13-19; App. 94, l. 23 – App. 95, l. 6; App. 95, l. 23 – App. 96, l. 2; App. 127, ll. 10-14. Several witnesses indicated the argument turned physical. App. 70, ll. 19-21; App. 71, ll. 3-5; App. 75, ll. 11-13; App. 127, ll. 15-19. According to Petitioner, Bussey threw a drink on him and slapped his face several times. App. 127, ll. 17-19. Jonathan Thomas and Reddish intervened in the disagreement between Petitioner and Appellant. App. 71, ll. 3-14; App. 75, ll. 11-13; App. 82, l. 23 – App. 83, l. 2; App. 86, ll. 23-25; App. 95, ll. 15-17; App. 96, ll. 3-4; App. 102, l. 24 – App. 103, l. 3. According to Petitioner, Thomas and Reddish were part of a group of approximately twelve men who shoved him in the club. App. 127, ll. 20-21.

Shortly after the disagreement, the club closed and the patrons exited. App. 71, l. 21 – App. 72, l. 1; App. 83, ll. 3-15; App. 95, ll. 20-22; App. 96, ll. 13-14; App. 127, ll. 20-23. Petitioner and Reddish got into a second altercation in the poorly lit parking lot. App. 83, ll. 19-25; App. 128, ll. 6-11. According to Reddish, Bussey hit him in the face several times as well. App. 128, ll. 5-6. One witness recalled Reddish walking up to Petitioner and punching him in the face. App. 73, ll. 3-8. Petitioner also stated that Reddish struck him in the jaw during their fight, which caused a visible

injury to his lip. App. 128, ll. 12-13. The two then "locked up, like in a bear hug." App. 73, ll. 8-9; App. 85, ll. 3-9; App. 98, ll. 2-23; App. 128, ll. 14-17. Shots were fired, and Reddish was hit by two bullets. App. 73, ll. 13-16; App. 85, ll. 7-10; App. 98, ll. 15-23; App. 128, ll. 18-21. Subsequently, Reddish died as a result of a gunshot wound. App. 189, ll. 2-3; App. 190, ll. 6-13.

No one disputed that Reddish was killed while in a physical altercation with Petitioner. Further, no one disputed that Reddish's death was the result of a gunshot wound. Thus, the jury was tasked with deciding whether Petitioner committed murder or manslaughter, or was not the shooter at all. Based on the facts presented, the judge instructed the jury on murder and voluntary manslaughter. App. 233, l. 15 – App. 236, l. 23.

When defining murder, the judge instructed the jury that in order to convict Petitioner of murder, the jury would have to find that the state proved "malice aforethought." App. 233, ll. 15-17. The judge defined malice as "hatred, ill will or hostility towards another person." App. 233, ll. 17-18. Further, the judge told the jury that malice is "the intentional doing of a wrongful act without just cause or excuse with an intent to inflict injury or under circumstances that the law will infer an evil intent." App. 233, ll. 18-21. Thereafter, the judge instructed the jury concerning "express malice" and "inferred malice." Specifically, on the issue of inferred malice, the judge told the jury:

> 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 a[n] instrument has been used as a deadly weapon depends on the facts and circumstances of the case.

App. 234, ll. 16-22. The judge further instructed the jury that a deadly weapon includes a pistol. App. 234, ll. 23-24.[4] There was no objection to this instruction.

[4] During the first trial, the judge instructed the jury concerning implied malice from the use of a deadly weapon. Supp. App. 269, ll. 10-15.

Evidence at PCR hearing

Trial counsel admitted she did not object to the trial court's instruction that malice could be inferred from the use of a deadly weapon. She thought "that was the law at the time." App. 349, ll. 15-18. Generally speaking, she did not believe the jury instructions were erroneous or that "any of the charges were burden shifting." App. 382, ll. 7-10; App. 382, ll. 14-16.. Rather, she thought the "malice charge" was consistent with what was generally being charged at trial." App. 382, ll. 11-13.

Order of dismissal

The PCR judge found trial counsel was not ineffective for failing to object to the judge charging the jury regarding implied malice. App. 539. The PCR court relied upon the statements in Belcher, supra indicating the decision would not apply retroactively. App. 539. According to the PCR court, counsel was not required to be clairvoyant and anticipate a change in the law. App. 539.

Discussion

Trial 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). Had counsel objected to the jury instruction, then Petitioner would have been granted a new trial upon review by the Court of Appeals. In Belcher, 385 S.C. at 600, 685 S.E.2d at 803-804, this Court overruled prior law and held "that a jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide."

Belcher was convicted of murder and possession of a firearm during the commission of a violent crime following the shooting of his cousin. Id. at 600, 685 S.E.2d at 803. The jury was

charged with the offenses of murder and voluntary manslaughter, as well as self-defense. Id. This Court noted that of special importance was the jury instruction that permits an inference of malice from the use of a deadly weapon. Id. Belcher argued on direct appeal that because the evidence presented a jury question on self-defense, the trial judge committed error by charging the jury that it may infer malice from the use of a deadly weapon. Id. at 601, 685 S.E.2d at 804. Belcher asserted that the permissive inference charge violated South Carolina common law and the state's constitutional prohibition against charging juries on the facts. Id. at 602, 685 S.E.2d at 804.

After an extensive review of the South Carolina's jurisprudence in this area, this Court discovered that when the permissive inference charge first developed in the late nineteenth century it was subject to "some qualification," specifically "the recognition that some facts will not permit the inference of malice from the use of a deadly weapon." Id. at 604, 685 S.E.2d at 806. This Court stated, "We are persuaded . . . that this qualification relates to homicide prosecutions where the evidence shows the death may have been something less than murder—that is, mitigated, excused or justified." Id. at 605, 685 S.E.2d at 806. This Court recognized that it later "began a slow, and at first almost imperceptible, retreat" from above established law and that "by the 1970s, juries were routinely charged in any murder prosecution involving a deadly weapon that 'malice is presumed from the use of a deadly weapon.'" Id. at 605-608, 685 S.E.2d at 806-807.

Believing that the earlier cases more closely reflect the "proper application of the charge," this Court concluded "that instructing a jury that 'malice may be inferred by the use of a deadly weapon' [was] confusing and prejudicial where evidence [was] presented that would reduce, mitigate, excuse or justify the homicide. A jury charge [was] no place for purposeful

ambiguity." Id. at 611, 685 S.E.2d at 809. In light of the evidence of self-defense presented at Belcher's trial and it was "conceivable that the only evidence of malice was Belcher's use of a handgun," this Court held the permissive inference charge was not harmless error and Belcher was entitled to a new trial. Id. at 612, 685 S.E.2d at 810.

In effect, the Belcher ruling "return[ed] to the rationale" of prior South Carolina jurisprudence on the matter dating back to the late nineteenth century, and overturned existing case law to the contrary that occurred in the intervening century. Id. Because the rule in Belcher marked a "clear break from our modern precedent," this Court applied its effect to "all cases which [were] pending on direct review or not yet final where the issue [was] preserved." Id. (citing Griffith v. Kentucky, 479 U.S. 314, 328, 107 S.Ct. 708 (1987)("hold[ing] that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on direct review or not yet final")).

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI. To establish ineffective assistance of counsel, the Petitioner must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984). "First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted). "The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The defendant is required to overcome the presumption that counsel was effective in order to receive relief." Id. at 118, 386 S.E.2d at 625 (internal citations omitted). Therefore, where ineffective

assistance of counsel is alleged as a ground for PCR 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.

Had trial counsel objected to the inference of malice charge, Petitioner's conviction would have been reversed on direct appeal. 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, 385 S.C. 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 case was argued on May 14, 2009, over a month prior to Petitioner's trial starting on June 22, 2009. The Belcher opinion was issued on October 12, 2009 – less than four months after Petitioner was convicted and approximately two years before his conviction was affirmed on appeal.

Contrary to the PCR judge's assertion that clairvoyance was required on trial counsel's part to anticipate the Belcher ruling, the case had been argued prior to Petitioner's trial. While the opinion had not yet been generated, the nature of the objection was well known and understood by criminal defense lawyers that in order to preserve the issue on appeal should Belcher be decided the way the defense bar anticipated, then an objection to the instruction was necessary. Thus, no clairvoyance was necessary; rather, conduct complying with the professional norms of lawyers in the area dictated an objection.

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 conviction and a new trial.

As in Belcher, the erroneous instruction that malice may be inferred from the use of a deadly weapon cannot be considered harmless here. The erroneous inference of malice from the use of a deadly weapon jury instruction was reversible error because it was not harmless beyond a reasonable doubt. See Rose v. Clark 478 U.S. 570 (1986). The evidence in the record supported the jury instruction for voluntary manslaughter, which mitigated the offense. When the jury was instructed that it could infer malice from the use of a deadly weapon, its consideration of voluntary manslaughter was precluded because the use of a deadly weapon – a gun – was undisputed. The evidence against Petitioner concerning malice was not overwhelming. The jury heard testimony from several one live witness – a witness for the prosecution – and through Petitioner's statement to law enforcement that Reddish punched him in the face prior to the shooting. Numerous witnesses indicated the two were fighting, "locked up," "wrapped up," or in some type of bear hug at the time of the shooting. In fact, the evidence presented by the prosecution was that Petitioner had a prior difficulty with Reddish inside the club, that Petitioner exited the club to avoid the difficulty, that Reddish also exited the club and continued his assault on Petitioner. The assault only ended when Petitioner fired his gun. Thus, the charge permitting the jurors to infer malice was not harmless beyond a reasonable doubt.

III. Trial counsel provided ineffective assistance in derogation of Petitioner's state and federal constitutional rights by failing to object to a jury charge that malice may be implied from conduct showing total disregard for human life, which unconstitutionally shifted the burden of proof, in violation of Petitioner's constitutional right to due process of law.

Relevant Facts

Evidence at trial

There was no question that Reddish was killed as a result of a gunshot wound during an altercation with Petitioner. The question before the jury was whether Petitioner committed murder or voluntary manslaughter, or was not the shooter. In fact, the judge instructed the jury on murder and voluntary manslaughter. App. 233, l. 15 – App. 236, l. 23.

While defining "malice aforethought," an element of murder, the judge told the jury that malice could be "inferred from conduct showing total disregard for human life." App. 234, ll. 16-17.[5] Quickly following this instruction was the permissive inference of malice from the use of a deadly weapon. App. 234, ll. 17-22. There was no objection to this instruction.

Evidence at PCR hearing

During the PCR hearing, trial counsel admitted she failed to object to the trial court's instruction that lessened the prosecution's burden based on defining malice in a way likening it to permit an inference from conduct akin to extreme indifference, recklessness, or negligence or arising from the use of a weapon. She claimed she failed to object because she thought "that was the law at the time." App. 349, ll. 15-18. She testified that in general, she did not think the jury instructions were erroneous. App. 382, ll. 7-10. She believed the "malice charge" was consistent with what was generally being charged at trial." App. 382, ll. 11-13. She also did not think "any of the charges were burden shifting." App. 382, ll. 14-16.

[5] During the first trial, the judge instructed the jury that malice could be inferred from "conduct showing a total disregard for human life." Supp. App. 269, ll. 8-9.

Order of dismissal

After recognizing Petitioner's claim that the portion of the jury instruction permitting the jury to infer malice from conduct showing total disregard for human life was unconstitutional burden shifting, the PCR court held "counsel's judgment" that the instruction was not burden shifting did not fall below professional norms. App. 539. Further, the PCR court found the instruction did "not tend to shift the burden of proof and [was] an accurate statement of law." App. 539. As a result, the court found counsel was not ineffective. App. 539.

Discussion

To prove ineffective assistance of counsel, Petitioner must establish that counsel's performance was unreasonable under prevailing professional norms, and that counsel's deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668 (1984); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). Prejudice occurs where there is a reasonable probability that, but for counsel's errors, the result at trial would have been different. A reasonable probability is a probability sufficient to under confidence in the outcome of trial. Strickland, supra; Johnson, supra.

By instructing the jury that malice may be inferred from conduct showing total disregard for human life, the judge diluted the state's burden of proof and impermissibly shifted the burden of proof to Petitioner in violation of Petitioner's right to due process of law pursuant to the Fifth and Fourteenth Amendments to the United States Constitution. The state must prove each element of an offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970). As a result, evidentiary presumptions in a jury charge that have the effect of relieving the state of its burden of proof beyond a reasonable doubt as to every essential element of the crime are prohibited. Sandstrom v. Montana, 442 U.S. 510, 522 (1979). The inquiry is whether there is a reasonable

likelihood that the jury applied the instruction that malice may be inferred from conduct showing total disregard for human life in a way that violated the Constitution. Estelle v. McGuire, 502 U.S. 62, 72 (1991). Of course, the challenged instruction must not be examined in isolation; rather, the instruction must be examined in the context of the entire charge to the jury. Francis v. Franklin, 471 U.S. 307, 315 (1985).

Petitioner incorporates by reference the discussion of impermissible burden shifting from the jury instruction permitting an inference of malice from the use of a weapon. The judge's instruction to permit the jury to infer malice from showing a total disregard for human life is indistinguishable from the inference of malice from a weapon. Although this Court appears to consider the two separate and distinct, this Court offered no analytical framework of how to view the two separately. See State v. Stanko, 402 S.C. 252, 265, 741 S.E.2d 708, 715 (2013). The judge's instruction placed the inferences together, encourage the jury to analyze the two together. Thus, this Court's reasoning in Belcher, supra, is equally application to the instruction permitting an inference of malice from conduct showing a total disregard of human life.

Additionally, the instruction lessened the state's burden by equating malice with extreme indifference, recklessness, or even negligence. See e.g., State v. Jarrell, 350 S.C. 90, 564 S.E.2d 362 (S.C. Ct. App. 2003)(defining extreme indifference to human life); State v. Rowell, 326 S.C. 313, 487 S.E.2d 185 (1997)(defining reckless disregard for the safety of others); S.C. Code Ann. § 16-3-60 (defining criminal negligence for involuntary manslaughter). The instruction left the jury with no guidance in this area. The jury could only speculate what "conduct" showed "a total disregard for human life." With no guidance, the jury would have considered lesser mental states, such as extreme indifference, recklessness, or negligence.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari on the issues presented and permit full briefing. In the event this Court dispenses with further briefing, Petitioner respectfully requests this Court find trial counsel provided ineffective assistance and order a new trial on the charges.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of March, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

R. Knox McMahon, Circuit Court Judge

JOSHUA FORREST,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix and supplemental appendix in this case have been served on Daniel Gourley, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Joshua Forrest #274525, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 22nd day of March, 2016.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 22nd day of March, 2016.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.