

STATE OF SOUTH CAROLINA  
In The Supreme Court

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CERTIORARI TO WILLIAMSBURG COUNTY  
Court of Common Pleas

JAN 17 2017

R. Ferrell Cothran, Jr., Circuit Court Judge

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S.C. SUPREME COURT

Appellate Case No.: 2014-002471

EDMOND GOODMAN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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**PETITIONER'S ISSUE PRESENTED**

- I. Trial counsel erred in failing to object to the trial jury's instruction that allowed them to infer malice from the use of a deadly weapon in violation of State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

## STATEMENT OF THE CASE

Petitioner (Edmond Goodman) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Williamsburg County Clerk of Court. Petitioner was indicted at the December 2008 term of the Williamsburg County Grand Jury for Murder and Possession of a Weapon during a Violent Crime (2008-GS-45-253). William LeGrand Carraway, Esquire, represented Petitioner. Applicant proceeded to a jury trial and was convicted of both charges. On March 18, 2009, Petitioner was sentenced by the Honorable Michael G. Nettles to imprisonment of thirty years for Murder and five years for Possession of a Weapon during a Violent Crime, to be served concurrently.

Petitioner filed a timely notice of appeal. An appeal was perfected by Elizabeth A. Franklin-Best, Esquire. The South Carolina Court of Appeals affirmed Petitioner's conviction. State v. Goodman, Op. No. 2011-UP-541 (Ct. App. filed December 5, 2011). The Remittitur was returned on May 7, 2012.

Petitioner filed an application for post-conviction relief on June 8, 2012, and an amended application on July 8, 2013. An evidentiary hearing was held on December 16, 2013, at the Sumter County Courthouse before the Honorable R. Ferrell Cothran, Jr. Petitioner was present at the hearing and was represented by David P. Caraker, Esq. By Order filed January 21, 2014, Judge Cothran denied and dismissed Petitioner's post-conviction relief action. Petitioner did not appeal the denial of his application for post-conviction relief.

Petitioner filed a second application for post-conviction relief on April 21, 2014, alleging ineffective assistance of PCR counsel for failing to file an appeal. On September 25, 2014, Respondent filed its Return and Motion to Dismiss all claims beyond review pursuant to Austin

v. State, 305 S.C. 453 (1991). An evidentiary hearing was held on October 2, 2014, at the Sumter County Courthouse before the Honorable Clifton B. Newman. Petitioner was present and represented by Charles T. Brooks, III, Esquire. At the hearing, Respondent consented to Petitioner's request for a belated PCR appeal. By Order issued November 10, 2014, Judge Newman granted Petitioner's request for a belated appeal of his first PCR application pursuant to Austin v. State.

On November 6, 2015, Petitioner filed a Johnson Petition for Writ of Certiorari to this Court. On December 29, 2015, Respondent submitted to the Court a letter in lieu of a formal brief stating that it took no position on the Johnson petition. On January 11, 2015, Petitioner submitted a *pro se* response to the Johnson petition. On September 13, 2016, this Court was advised that the Johnson petition was filed by mistake, and it was meant to be a full petition on the merits of the issue presented. Respondent was asked to submit a return. This Return to the Johnson Petition for Writ of Certiorari follows.

## STANDARD OF REVIEW

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

## ARGUMENT

### **I. Probative evidence supports the PCR Court's finding that Trial Counsel was not ineffective when counsel did not object to a jury instruction allowing for inference of malice.**

Petitioner's argument that the PCR Court erred in finding that trial counsel was not ineffective for not objecting to a jury instruction allowing for malice to be inferred from the use of a deadly weapon is without merit.

In a PCR action, the petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler, supra.

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

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland, 80 L.E.2d 674). Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

First, it should be recognized that the PCR Court found Trial Counsel's testimony to be very credible, as opposed to Petitioner's testimony which was found to be less credible. (App. p. 464, 465). The PCR judge was in the best position to determine credibility and, as such, his findings must be given great deference. See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993).

Petitioner's argument that trial counsel was ineffective relies on Belcher, in which the Supreme Court of South Carolina prohibited jury charges instructing that malice can be inferred from the use of a deadly weapon in cases where evidence is presented that would reduce, mitigate, excuse, or justify the homicide. State v. Belcher, 385 S.C. 597, 600, 685 S.E.2d 802, 804 (2009). Petitioner alleges that trial counsel was ineffective for not objecting to such a jury instruction. However, Belcher had not yet been decided at the time of Petitioner's trial. Petitioner was convicted on March 18, 2009. (App. p. 400). Belcher was decided on October 12, 2009. Trial counsel could not have been expected to find it necessary to object to a practice that was not prohibited at the time of the trial. As observed by the PCR Court, "Counsel cannot be 'clairvoyant or anticipate changes in the law which were not existent at the time of trial.'" (App. p. 466, citing Gilmore v. State, 314 S.C. 453, 445 S.E.2d 454 (1994)). Therefore, Petitioner's allegation fails the test set forth in Strickland requiring that counsel's behavior be deficiently unreasonable under professional norms.

Moreover, Strickland requires that trial counsel be given leeway to make reasonable strategic decisions. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Strickland v. Washington, 466 U.S. 668, 691 (1984). Therefore, a high degree of deference is granted to the trial counsel. Furthermore, where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective

assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). As the PCR Court observed, trial counsel testified that he did not feel there was any reason to object to the jury charge. (App. p. 466). This stands to reason, as this was before Belcher. Therefore, the lack of objection was a reasonable decision well within trial counsel's discretion. As mentioned above, the PCR Court found trial counsel's testimony to be very credible. (App. p. 468).

Notwithstanding the fact that trial counsel was not inefficient, the holding from Belcher is irrelevant to both Petitioner's conviction and his application for post-conviction relief. As the PCR Court observed, this Court's opinion in Belcher **specifically** noted that the holding did not apply to convictions challenged on post-conviction relief. "Because our decision represents a clear break from our modern precedent, today's ruling is effective in this case and for all cases which are *pending on direct review* or not yet final where the issue is preserved." State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009) (emphasis added). "Our ruling, however, *will not apply to convictions challenged on post-conviction relief.*" Id. (emphasis added). Belcher cited generally to Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060 (1989), which had held that, largely in the interest of finality, that new rules for habeas corpus proceedings could not be retroactively applied to convictions already final.

The PCR Court's finding that Trial Counsel's actions were reasonable in the circumstances and not prejudicial was well-supported by the factual record as well as by the testimony of the parties and the case law. Therefore, because the PCR Court's findings were supported by probative evidence, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's denial of post-conviction relief.

**CONCLUSION**

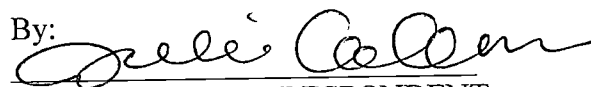
For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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*January 17, 2017*

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to Williamsburg County

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

EDMOND GOODMAN, #271444

Petitioner,

STATE OF SOUTH CAROLINA

Respondent.

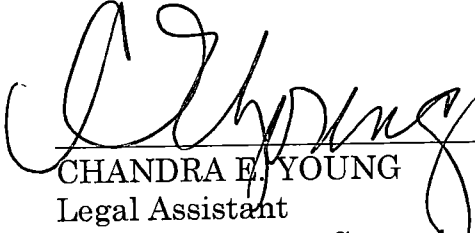
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**PROOF OF SERVICE**  
\_\_\_\_\_

I, CHANDRA E. YOUNG, certify that I have served the Return to Petition for Writ of Certiorari on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire  
Post Office Box 11589  
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.

This 17<sup>th</sup> day of January 2017.

  
\_\_\_\_\_  
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