STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Jasper County

Honorable Michael G. Nettles, Circuit Court Judge

BRETT HOWARD,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-000246

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the jury instruction that malice may be inferred from the use of a deadly weapon pursuant to State v. Belcher, 385 S.C. 597, 610, 685 S.E.2d 802, 809 (2009) when, in closing argument, Petitioner extensively argued the shooting was an accident, and where Petitioner was prejudiced because if counsel had properly objected, the outcome of his trial would have been different where there was no evidence Petitioner shot the decedent with malice?

STATEMENT OF THE CASE

The state alleged at trial that Petitioner fatally shot Woodrow "Woody" Brantley inside Missy's Lounge in Ridgeland, South Carolina. Petitioner's defense at trial was accident. Evidence in the record showed that, after jokingly calling Brantley, the decedent, a racist, Petitioner pulled the gun and walked toward Brantley repeatedly pulling the trigger, but the gun did not fire. App. 240, l. 5 – 241, l. 9; App. 252, l. 16 – 253, l. 16. The gun did not fire until Petitioner was very close to Brantley. App. 241, ll. 1-9. During his closing argument, trial counsel argued that the only inference to be drawn from the evidence was that Petitioner was joking around with what he thought was an unloaded gun and, by accident and unknown to Petitioner, a bullet remained in the gun. App. 374, l. 6 – 377, l. 6.

Specifically, counsel argued:

> And then we get to the pool room. They're joking around in the pool room. Mr. Brantley is joking with Mr. Mike when he says, ah, you cut your hair working for the man. That's a joke. Mr. Brantley wasn't a racist. All that was is Mr. Brantley and Mr. Mike joking. Everybody was joking.
>
> Brett Howard [Petitioner] shows them the gun again. Points it at him [Mr. Brantley]. Mr. Brantley [says] I'm not afraid of a gun. Brett pulls the trigger. Mr. Brantley's not afraid of a gun because everybody's joking.
>
> There are three people standing here, here, and here. Are they reacting? No, they're not. **Brett pulls the trigger and pulls the trigger and pulls the trigger, because he doesn't think the gun is loaded,** or he doesn't think the bullets are real.
>
> Now, if someone is coming at someone, pulling the trigger, and they think that it means them harm, they're going to do something besides stand there. They're going - - like the doctor said, they're going to put up their hands. It's not going to stop, but you don't think up here, you think here if you think you're in danger. You're going to put your hands up. I mean, if a train is coming at you, you're going to put your hands up. It's not going to stop it, but you can't help yourself. There is no sign that Woodrow Brantley thought he was in any danger, because nobody thought there was any danger.
>
> . . .

> **There is a big difference between murder and killing. We do not have a murder; we have a killing. It is a death not brought about by malice, not brought about by evil intent. It is brought about by accident.**

App. 374, l. 6 – 377, l. 6 (emphasis added).

Despite Petitioner's defense that the shooting was an accident, trial counsel failed to object to the jury instruction that malice may be inferred from the use of a deadly weapon pursuant to State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). The trial judge instructed the jury: "Malice may be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon. A deadly weapon is any – the article, instrument or substance which is likely to cause death or great bodily harm." App. 391, ll. 7-12.

When asked if there were any exceptions to the charge, trial counsel stated, "The other thing, about your charging, though, I – forgive me if I am wrong, I had thought I knew that the use of a weapon to indicate malice had been removed." App. 400, ll. 22-24. The judge responded, "I don't think I said it indicated use. I said it was an example of inferred from conduct showing a total disregard for human life." App. 400, l. 25 – 401, l. 2. Counsel responded, "Okay. I might have misheard that, your Honor. If I did, I apologize. That was my only thing as far as the charge, your Honor." App. 401, ll. 3-5.

The judge then elaborated and said, "What I said was, malice may be inferred from conduct showing a total disregard for human life. 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. I think that's the correct charge." App. 401, ll. 6-12. Trial counsel agreed. App. 401, ll. 13-20.

A Jasper County Grand Jury indicted Petitioner on January 26, 2010 for murder and possession of a weapon during the commission of a violent crime. App. 507-510. His case was called to trial on May 14, 2012 before the Honorable Perry M. Buckner, and a jury. App. 1. Assistant Solicitors Sean Thornton and Tameaka Legette represented the state, and Robert Hughes and Stephen Plexico represented Petitioner. App. 1.

On May 16, 2012, the jury found Petitioner guilty as indicted. App, 406, ll. 2-20. Judge Buckner sentenced Petitioner to forty years for murder and five years consecutive for the weapons offense. App. 423, ll. 7-25.

The Court of Appeals affirmed Petitioner's convictions and sentence pursuant to Anders v. California, 386 U.S. 738 (1967). App. 436-437. On appeal, Petitioner argued the trial court erred by charging the jury that malice could be inferred from the use of a deadly weapon when Petitioner argued in closing that the shooting was an accident. App. 428. However, Petitioner conceded the issue was not preserved for appellate review because trial counsel failed to object to the inferred malice instruction. App. 431.

On July 25, 2014, Petitioner filed an application for post-conviction relief (PCR). App. 438-444. The state filed a return to this application dated May 6, 2016. App. 445-450. The matter proceeded to an evidentiary hearing on October 19, 2016 before the Honorable Michael G. Nettles. App. 451. Assistant Attorney General Ruston Neely represented the state, and James Falk represented Petitioner. App. 452.

At the beginning of the evidentiary hearing, Petitioner orally amended his application to allege the claim argued in the Anders Brief of Appellant. He asserted that trial counsel was ineffective for failing to object to the jury instruction that malice may be inferred from the use of a deadly weapon pursuant to State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) because there was

evidence to mitigate or excuse the killing, namely there was evidence that the shooting was an accident. App. 456, ll. 16-21; App. 471, l. 4 – 473, l. 9.

Robert Hughes, Petitioner's trial counsel, testified that the evidence showed Petitioner "didn't think the gun was loaded" and "was basically just showing off and was as surprised as everybody else when it [the gun] went off." App. 479, ll. 10-16. He asserted that Petitioner's defense at trial was accident. App. 480, ll. 5-8; App. 489, ll. 1-7. As far as the inferred malice instruction, Hughes testified that he thought he had argued against the instruction, but if he did not, he should have because there was evidence to mitigate or excuse the killing. App. 480, l. 20 – 481, l. 8. However, he acknowledged that he did not object to the instruction on the record. App. 482, ll. 3-5. Hughes later admitted, "I know Belcher a lot better [now] than I did then. I would be arguing until I was blue in the face that that charge should never have been told to a jury. That is based on my knowledge now." App. 487, ll. 4-9. He asserted the implied malice instruction should not have been charged because "there was no intent, there was no malice . . . this was a complete and total accident; and that's what I argued to the jury." App. 489, ll. 1-7.

The PCR court found trial counsel was not ineffective for failing to object to the implied malice instruction. App. 505. The court found the charge was proper because "[t]he facts of the case did not give rise to the lesser included charges of voluntary manslaughter, involuntary manslaughter, or the defense of accident." App. 505. Therefore, the court concluded there was no evidence "presented that would reduce, mitigate, excuse, or justify the killing." App. 505 (quoting State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009)) (internal quotation marks omitted). Because there was no evidence in the court's opinion to reduce, mitigate, excuse, or justify the killing, the court found Belcher did not apply. App. 505. This was error.

Because Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the jury instruction that malice could be inferred from the use of a deadly weapon since there was evidence the shooting was an accident, and Petitioner was prejudiced because if counsel had properly objected, the outcome of his trial would have been different where there was no evidence Petitioner shot the decedent with malice, this petition for writ of certiorari follows.

ARGUMENT

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the jury instruction that malice may be inferred from the use of a deadly weapon pursuant to *State v. Belcher*, 385 S.C. 597, 610, 685 S.E.2d 802, 809 (2009) when, in closing argument, Petitioner extensively argued the shooting was an accident, and where Petitioner was prejudiced because if counsel had properly objected, the outcome of his trial would have been different where there was no evidence Petitioner shot the decedent with malice.

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the jury instruction that malice may be inferred from the use of a deadly weapon pursuant to State v. Belcher, 385 S.C. 597, 610, 685 S.E.2d 802, 809 (2009) since there was evidence presented that would reduce, mitigate, excuse, or justify the killing. The evidence showed Petitioner was joking around with what he thought was an unloaded gun when he shot the decedent. Trial counsel extensively argued to the jury that the shooting was an accident. Petitioner was prejudiced by counsel's deficient performance because if counsel had properly objected, the outcome of his trial would have been different where there was no evidence Petitioner shot the decedent with malice.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

"This Court has previously held that an issue that was raised on direct appeal but found to be unpreserved may be raised in the context of a PCR claim alleging ineffective assistance of counsel." McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013) (citing McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003) and Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999)). In McHam, this Court found McHam's counsel's failure to renew his Fourth Amendment objection constituted deficient performance that satisfied the first prong of the Strickland analysis. Id. at 474, 746 S.E.2d at 46.

In State v. Belcher, 385 S.C. 597, 610, 685 S.E.2d 802, 809 (2009), the Supreme Court wrote, "Under our policy-making role in the common law, we hold that the 'use of a deadly weapon' implied malice instruction has no place in a murder (or assault and battery with intent to kill) prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing (or the alleged assault and battery with intent to kill)."

Trial counsel was ineffective for failing to object to the inferred malice instruction based on this Court's holding in Belcher because there was evidence presented to mitigate or excuse the killing. Counsel admitted at the evidentiary hearing that Petitioner's defense at trial was accident and that he argued accident to the jury during his closing argument. App. 480, ll. 5-8; App. 489, ll.

1-7. Counsel further asserted that there was no evidence of malice and that the shooting "was a complete and total accident." App. 489, ll. 1-7. He acknowledged he should have objected to the erroneous instruction and admitted he likely failed to object because he was less familiar with this Court's holding in Belcher at the time of Petitioner's trial.[1] App. 487, ll. 4-9.

The PCR court erred by finding there was no mitigation evidence presented at trial. App. 505. As stated, Petitioner's defense at trial was accident. Evidence in the record showed that, after jokingly calling Brantley, the decedent, a racist, Petitioner pulled the gun and walked toward Brantley pulling the trigger, but the gun did not fire. App. 240, l. 5 – 241, l. 9; App. 252, l. 16 – 253, l. 16. The gun did not fire until Petitioner was very close to Brantley. App. 241, ll. 1-9. In closing, trial counsel argued that the only inference to be drawn from the evidence was that Petitioner was joking around with what he thought was an unloaded gun and, by accident and unknown to Petitioner, a bullet remained in the gun. App. 374, l. 6 – 377, l. 6. Based on the facts of this case, there was clearly evidence "presented that would reduce, mitigate, excuse, or justify the killing." Belcher, 385 S.C. at 610, 685 S.E.2d at 809. Consequently, counsel was ineffective for failing to object to the erroneous and prejudicial charge.

Petitioner was prejudiced by counsel's deficient performance because the outcome of his trial would have been different if counsel had properly objected to the erroneous implied malice instruction. As counsel asserted during the evidentiary hearing, there was no evidence of malice. The only evidence was that the shooting "was a complete and total accident." App. 489, ll. 1-7.

Respectfully, this Court should reverse the order of the PCR court and grant Petitioner a new trial.

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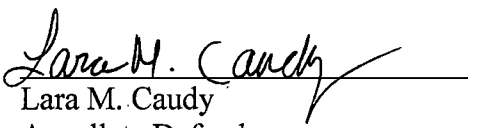
[1] Petitioner's trial was held on May 2012, which was nearly three years after State v. Belcher was decided by this Court in October 2009.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of September, 2017.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case have been served upon Ruston Neely, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served upon Brett Howard, #350845, at Lieber Correctional Institution, P.O. Box 205, Ridgeville, SC 29472, this 20th day of September, 2017.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 20th day of September, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.