

STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIORARI TO JASPER COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2017-000246

BRETT HOWARD,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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The PCR judge properly denied relief where Trial Counsel had no reason to object to a jury instruction that malice may be inferred from the use of a deadly weapon where there was no mitigating evidence relating to Petitioner shooting the unarmed and non-hostile victim in the face at close range without provocation, thus distinguishing the case from State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), and Petitioner would not have been prejudiced regardless where there was ample evidence of express malice13

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RESPONDENT'S ISSUE PRESENTED

Did the PCR judge properly find Petitioner has failed to meet his burden of establishing ineffective assistance of counsel where Trial Counsel had no reason to object to a jury instruction that malice may be inferred from the use of a deadly weapon where there was no mitigating evidence relating to Petitioner shooting the unarmed and non-hostile victim in the face at close range without provocation, thus distinguishing the case from State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009)?

STATEMENT OF THE CASE

Procedural History

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Jasper County Clerk of Court. The January 2010 term of the Jasper County Grand Jury indicted Petitioner for murder (2010-GS-27-0014) and possession of a weapon during the commission of a violent crime (2010-GS-27-0015). Robert Hughes (“Trial Counsel”), Esquire, and Stephen Plexico, Esquire, represented Petitioner at trial. On May 14, 2012, Petitioner proceeded to a jury trial before the Honorable Perry M. Buckner, III. He was found guilty as indicted. On May 16, 2012, Judge Buckner (“the trial judge”) sentenced Petitioner to imprisonment for forty years for murder and five years for the weapon charge, to be served concurrently.

Petitioner filed a timely notice of appeal. An appeal was perfected by Appellate Defender Kathrine H. Hudgins, Esquire, pursuant to Anders v. California, 386 U.S. 378 (1967). Petitioner argued on appeal that the trial judge erred in charging the jury that inferred malice may arise when a deed is done with a deadly weapon. The South Carolina Court of Appeals dismissed Petitioner’s appeal and granted counsel’s motion to be relieved on June 11, 2014. State v. Howard, Op. No. 2014-UP-216 (Ct. App. 2014). The remittitur was issued on June 27, 2014.

Petitioner filed an application for post-conviction relief (“PCR”) on July 25, 2014. Respondent made its return on August 14, 2015. An evidentiary hearing into the matter was convened on October 19, 2016, before the Honorable Michael G. Nettles. Petitioner was present at the hearing and represented by James K. Falk, Esquire. Assistant Attorney General Ruston Neely, Esquire, represented Respondent. Following the hearing, Judge Nettles denied and

dismissed the application with prejudice by written order, dated December 20, 2016. Petitioner subsequently filed a petition for writ of certiorari, dated September 20, 2017. This return follows.

STATEMENT OF THE FACTS

Facts Adduced at Trial

Petitioner's charges resulted from an incident on the night of December 9, 2011, in which Petitioner fatally shot Woodrow Brantley ("Victim") in the head at point-blank range. (App. p. 241, ll. 1-9; p. 253, ll. 8-16). That night, Victim and two friends were laughing with each other in the pool room of "Missy's Lounge" in Jasper County. (App. p. 150, ll. 1-15). Victim was joking with a friend that he cut his hair for "the white man" for a job interview, as Victim and his friends routinely exchanged friendly banter. (App. p. 222, ll. 4-6; p. 238, ll. 9-24). The conversation between Victim and his friends did not involve Petitioner, nor was Petitioner in any way the subject of the conversation. (App. p. 240, ll. 9-11). No one involved had bothered Petitioner that night. (App. p. 255, ll. 10-21). Nevertheless, Petitioner inserted himself into the situation, called Victim a racist, and drew his revolver. (App. p. 252, ll. 14-22). Petitioner proceeded to point the revolver at Victim and walk toward Victim while repeatedly pulling the trigger. (App. p. 240, ll. 12-17). Eventually, once Petitioner was standing right next to Victim, he pulled the trigger and shot Victim in the head. (App. p. 241, ll. 1-4). Petitioner then calmly walked out of the building. (App. p. 162, ll. 13-25 – p. 163, ll. 1-4).

Earlier that night, Petitioner had been walking around the premises showing his gun to people, even joking he was security. (App. p. 209, ll. 23-25 – p. 210, ll. 1-5). Petitioner told others there the weapon was loaded and he wanted to show them. (App. p. 209, ll. 6-9). Petitioner continued to flash his gun to others later that night inside the club. (App. p. 226, ll. 10-

12). Petitioner remarked, “Ain’t nobody better say a [expletive] thing to me tonight; they get their brains blown out.” (App. p. 274, ll. 10-17).

Jury Charge at Issue

The trial judge instructed the jury the State had the burden of proving Petitioner guilty beyond a reasonable doubt, and a defendant is never required to prove himself innocent. (App. p. 378, ll. 22-25 – p. 379, ll. 1-10). The trial judge also instructed the jury on the presumption of innocence enjoyed by Petitioner at trial, as well as an in-depth explanation of “reasonable doubt.” (App. p. 379, ll. 11-25 – p. 380, ll. 1-20). The State’s burden of proof and Petitioner’s presumption of innocence were reemphasized throughout the jury charge. (App. p. 386, ll. 11-15).

The trial judge also charged the jury on criminal intent and that it must be proven by the State beyond a reasonable doubt, which is to be determined by the jury from the circumstances surrounding the situation based on evidence introduced during the trial. (App. p. 387, ll. 18-25 – p. 388, ll. 1-5). Regarding murder, the trial judge charged the State must prove, beyond a reasonable doubt, that Petitioner killed another person with malice aforethought. (App. p. 390, ll. 3-6). The trial judge defined malice aforethought for the jury. (App. p. 390, ll. 7- 17). The trial judge then proceeded to explain how malice aforethought may be express or inferred, with the distinction not being different kinds of malice aforethought, but rather how malice is shown to exist. (App. p. 390, ll. 18-23). Regarding the distinction between express malice and inferred malice, the trial judge specifically charged:

“Express malice, ladies and gentlemen of the jury, is shown when a person actually speaks words which express hatred or ill will or hostility to another, or when a person prepared beforehand to do the act, which was later accomplished. For example, lying in wait for a person, or any other act or preparation going to show that the deed was within the defendant’s mind would be examples of express malice.”

“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.”

When the trial judge asked whether there were any objections to the charge after the jury and alternate jurors had been excused, Trial Counsel informed the trial judge, “I had thought I knew the use of a weapon to indicate malice had been removed.” (App. p. 400, ll. 22-24). The trial judge replied, “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. p. 400, l. 25 – p. 401, ll. 1-2). The trial judge repeated the above-quoted selection from the jury charge for Trial Counsel, and both Trial Counsel and the trial judge agreed the charge was correct. (App. p. 401, ll. 6-13). Trial Counsel explained he had thought he heard something he did not hear. (App. p. 401, ll. 15-17).

Relevant Testimony from the PCR Hearing

At the July 2014 PCR hearing, Petitioner argued the jury charge was incorrect based on State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). (App. p. 456, ll. 16-21). The PCR judge noted that, quite often, when charges are given for voluntary or involuntary manslaughter regarding incidents that took place in a bar and facts are favorable, there is a good chance the defendant will be convicted. (App. p. 461, ll. 10-17). So, the PCR judge asked, “do you think that the defendant has the ability to say all or nothing?” (App. p. 461, ll. 17-18). Petitioner admitted he appreciates that is a hurdle, whether “all or nothing” was a trial strategy. (App. p. 461, ll. 19-21). Petitioner did tell the PCR judge he thinks there are fact patterns where such a strategy would be justified. (App. p. 461, ll. 24-25). The PCR judge later asked Respondent whether a defendant has the right to go “all or nothing” with murder, rather than seek a manslaughter charge. (App. p. 467, ll. 18-23). Respondent asserted he believed so, and it could

definitely be a part of trial strategy. (App. p. 469, ll. 1-8). Petitioner, on the other hand, suggested the issue of manslaughter should have been sent to the jury. (App. p. 470, ll. 1-17).

In Respondent's argument, Respondent posited Trial Counsel was "playing against a very heavily stacked deck," and it is hard to see a better example of overwhelming evidence. (App. p. 462, ll. 22-25). Respondent noted Petitioner was showing off a gun to numerous people at the club the night of the incident, walked toward Victim while pulling the trigger, and shot Victim in the face from less than three feet away. (App. p. 463, ll. 12-23). There was no testimony indicating a struggle or justified reason for the shooting. Moreover, Respondent recalled Petitioner having said, "Ain't nobody better say a [expletive] thing to me tonight; they get their brains blown out." (App. p. 464, ll. 7-15). Respondent stated there was no evidence to justify an involuntary charge. (App. p. 464, ll. 16-21). Therefore, Respondent reasoned, Petitioner's only real argument at trial was he either did not know the bullets were real or did not know the gun was loaded. (App. p. 464, ll. 21-25).

The PCR judge questioned Respondent about the statement giving rise to the allegation that victim was racist. Respondent replied both men in the conversation were African-American, and the statement was a friendly joke about one of the men getting a haircut "for the white man." Petitioner interjected himself into the friendly joking. (App. p. 465, ll. 9-20). Respondent further explained even if the statement would have been directed toward Petitioner, which it was not, there would still be no evidence to justify a manslaughter charge. (App. p. 465, ll. 22-25).

Petitioner read the portion of the jury charge from the trial transcript regarding malice being inferable from the use of a deadly weapon. (App. p. 471, ll. 17-25). Petitioner reasserted the lack of objection resulted in an unpreserved error, as the instruction was improper under Belcher. (App. p. 473, ll. 7-9). Respondent responded Belcher only applies when there exists

evidence of self-defense, with the justification being the court did not want malice to be inferred from a weapon used in self-defense. (App. p. 473, ll. 11-25). In this case, Respondent asserted, there were no allegations of self-defense. (App. p. 473, l. 25 – p. 474, ll. 1-5). Petitioner responded he felt there was mitigating evidence in this case, which Petitioner alleged was the argument Petitioner was just joking by repeatedly pulling the trigger. (App. p. 475, ll. 4-14). Respondent reasserted the only joking that took place was between the victim and his friend. (App. p. 476, ll. 7-15).

Trial Counsel testified he met with Petitioner a number of times and they discussed everything that happened. (App. p. 477, ll. 24-25). Trial Counsel testified he communicated with Petitioner at least once a month, and believed there were offers made that Petitioner rejected. (App. p. 478, ll. 2-4). Trial Counsel testified his trial strategy was to show the incident was an unfortunate event rather than a murder. (App. p. 478, ll. 11-15). There were a number of witnesses who identified Petitioner and no alibis, as Trial Counsel recalled, but he was not conceding anything at trial. (App. p. 478, ll. 21-25). Trial Counsel elaborated his strategy was to show Petitioner did not think the gun was loaded and “was surprised as everybody else when it went off.” (App. p. 479, ll. 14-16).

When questioned about asking for a charge on a lesser-included offense, Trial Counsel testified most of the discussion with Judge Buckner took place in chambers, so he did not remember if he did not ask for a lesser-included offense because he was going for an “all or nothing” defense or if Judge Buckner had already told him there was not enough evidence for manslaughter. (App. p. 479, ll. 21-25 – p. 480, l. 1). Trial Counsel concluded, based on his closing argument, he must have been going for an “all or nothing” defense. (App. p. 480, ll. 1-4). Regarding the inferred malice instruction, Trial Counsel testified he argued against it, or would

have and should have argued against it. However, Trial Counsel testified the problem is the jury would have already heard it, and further, “bringing a jury back in to correct a mistake like that, especially when I’ve already done my best to convince them this was not a murder, would highlight things I did not want highlighted.” (App. p. 481, ll. 1-9). Moreover, Trial Counsel testified he felt he had already convinced the jury this was not murder. (App. p. 481, ll. 21-25). Trial Counsel did testify he was surprised by the inferred malice charge. (App. p. 483, ll. 6-7).

On cross-examination of Trial Counsel, Respondent questioned Trial Counsel about mitigating evidence, and Trial Counsel again testified that his strategy was just to show the shooting was an accident. (App. p. 485, ll. 4-10). Respondent asked, “And because of that, it seems to make sense that you would not be pushing for a voluntary manslaughter in the slightest, because that would go against what you’re arguing.” Trial Counsel confirmed that was correct. (App. p. 485, ll. 11-15). Respondent posited to Trial Counsel if the trial judge refused to give a manslaughter charge because he thought there was no evidence of that type presented, then there would have been no mitigating Belcher evidence. (App. p. 486, ll. 22-25 – p. 487, ll. 1-3). Trial Counsel testified he knows a lot more about Belcher now, and would have argued the issue until he was “blue in the face.” (App. p. 487, ll. 4-9). Again, Trial Counsel testified he did bring up the Belcher charge after closing arguments, but felt he had already convinced the jury and did not want to highlight the matter. (App. p. 487, ll. 10-22).

Petitioner also testified at his PCR hearing. On direct examination, Petitioner testified Trial Counsel came to him with a plea offer for involuntary manslaughter and explained to Petitioner he did not think Petitioner would be successful at a trial. (App. p. 490, ll. 10-17). On cross-examination, Petitioner testified there was no reason to “take a charge” because he was

innocent. (App. p. 496, ll. 6-11). Petitioner then testified he did not pull the trigger. (App. p. 496, ll. 20-21).

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review in a post-conviction relief action is whether “**any** evidence of probative value” exists to sustain the post-conviction relief court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added). The reviewing court will affirm if there is any evidence to support the post-conviction relief court's ruling. Moore v. State, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012). The appellate court will reverse the post-conviction relief court's decision when it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007) (citing Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove “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, 686 (1984); Butler, at 441, 334 S.E.2d at 814.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, at 689. An applicant must overcome this presumption in order to receive relief. Cherry, at 118, 386 S.E.2d at 625.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel, and both prongs must be established by an applicant to receive relief. Strickland, at 687. First, an applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (citing Strickland, at 688). 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

ARGUMENT

The PCR judge properly denied relief where Trial Counsel had no reason to object to a jury instruction that malice may be inferred from the use of a deadly weapon where there was no mitigating evidence relating to Petitioner shooting the unarmed and non-hostile victim in the face at close range without provocation, thus distinguishing the case from State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), and Petitioner would not have been prejudiced regardless where there was ample evidence of express malice.

Petitioner argues the PCR judge erred in denying relief because the jury instruction was improper under Belcher and the outcome of the trial would have been different had he objected to the jury instruction. This argument is without merit, and Petitioner has failed to satisfy either prong of the Strickland standard for a claim of ineffective assistance of counsel.

Notwithstanding the PCR judge's proper finding that Trial Counsel had no reason to object to the jury charge under Belcher, Petitioner has also failed to establish prejudice from the alleged omission. As the PCR judge correctly observed, there was evidence of express malice in this case notwithstanding the inferred malice. (App. p. 505). Petitioner's argument for prejudice is dependent upon the notion the jury would not have otherwise found malice without the deadly weapon charge. This would require the jury to disregard Petitioner's own disturbing statements before the shooting to the effect of "Nobody better say a [expletive] thing to me tonight; they'll get their brains blown out." (App. p. 275, ll. 3-8; p. 464, ll. 7-15). At the PCR hearing, the PCR judge identified Petitioner's remarks as express malice. (App. p. 466, ll. 18-21). Even without the charge on inferred malice, the fact Petitioner held a revolver to the face of the victim and repeatedly pulled the trigger would certainly, in and of itself, be evidence of malice. (App. p. 240, ll. 13-24). Furthermore, witnesses testified Petitioner called the victim names such as a "racist [expletive]" before shooting him in the face. (App. p. 251, ll. 18-21). Witness Claude Morris testified Petitioner showed him his revolver outside the establishment earlier that night,

told onlookers it was loaded, and breached the revolver to show it was indeed loaded. (App. p. 210, ll. 2-9). Witness Mark Childs also testified Petitioner flashed the gun at him near the bathroom. (App. p. 226, ll. 4-12). Clearly, there was ample evidence presented for the jury to conclude express malice was present even without the jury charge now challenged by Petitioner.

Had Trial Counsel presented mitigating evidence in this case to bring this case under the purview of Belcher, it would have been logically inconsistent with the “all or nothing” trial strategy. The PCR judge noted this was part of the defense strategy, and a verdict of “not guilty” was the only verdict sought. (App. p. 505). If Trial Counsel would have presented mitigating evidence such as provocation to justify a manslaughter charge, the “all or nothing” argument that Petitioner did not intentionally shoot the victim would have been even less credible. Petitioner therefore fails to satisfy the second prong of Strickland, as there is no reasonable probability of prejudice arising from Trial Counsel’s alleged deficiency.

Regardless, Trial Counsel had no reason to object under Belcher. In Belcher, this Court held that a jury charge instructing that malice may be inferred from the use of a deadly weapon is not good law in South Carolina where evidence is presented that would reduce, mitigate, excuse, or justify the homicide. 385 S.C. at 600. As the PCR judge correctly found, there was no evidence presented in this case to “reduce, mitigate, excuse, or justify” the killing, and therefore Belcher does not apply. (App. p. 505). In Belcher, the defendant actually presented evidence of self-defense. There was evidence at trial that the victim, without provocation, confronted Belcher with a gun before Belcher retrieved a gun of his own and the killing occurred. Id. at 601. However, in this case, no such evidence existed. None of the evidence or testimony regarding Petitioner’s deadly encounter would tend to mitigate the homicide. Witnesses Wallace Mike and Jerrieme Washington both testified the victim was simply joking around with his friend about

“getting his hair cut for the white man” when Petitioner interrupted and eventually shot the victim in the face. (App. p. 237, ll. 14-24; p. 251, ll. 3-17). Petitioner was not part of the conversation, nor was any comment directed at Petitioner. (App. p. 252, ll. 19-22).

Trial Counsel’s testimony at the PCR hearing reflects the lack of mitigating evidence for Petitioner. Trial Counsel testified there was no argument between the parties, nothing to indicate a fight, and nothing to anger Petitioner to the point of killing someone. (App. p. 479, ll. 2-9). It must be noted the PCR judge found Trial Counsel’s testimony credible. (App. p. 504). 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). In fact, as the PCR judge properly observed, the testimony of both Trial Counsel and Applicant was that a verdict of not guilty was the only verdict sought. (App. p. 505). Where counsel articulates valid reasons for employing a certain strategy, counsel’s choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). Trial Counsel testified he was going for an “all-or-nothing” approach or had been told by the trial judge in his chambers there was not enough mitigating evidence to bring about a charge for a lesser included offense. (App. p. 479, ll. 21-25 – p. 480, l. 1-4). If there was indeed no evidence to justify a charge on a lesser included offense, it logically follows there was no such evidence to mitigate this homicide and bring Petitioner’s case under the purview of Belcher. Therefore, Petitioner has failed to satisfy the first prong of Strickland, as Trial Counsel was not deficient for not objecting to a jury charge to which there was no reason to object.

Furthermore, Trial Counsel’s decision not to object to the jury instruction was also a matter of trial strategy. As Trial Counsel testified at the PCR hearing, bringing the jury back in would have “highlighted things [he] did not want highlighted.” (App. p. 481, ll. 1-8). It was a

reasonable decision not to draw more and more attention to Petitioner's use of a revolver to shoot the victim in the face, especially when there was no absence of express malice to being with.

For these reasons, there is ample probative evidence to support the PCR judge's finding that Petitioner has not met his burden of proving ineffective assistance of counsel as Trial Counsel rendered effective representation employing a valid trial strategy in a difficult case, and Petitioner has failed to establish any reasonable basis on which to find prejudice.

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 fully brief the issue discussed above.

Respectfully submitted,

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By: 
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February 2, 2018

STATE OF SOUTH CAROLINA
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Michael G. Nettles, Circuit Court Judge

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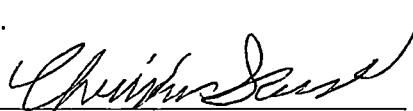
PROOF OF SERVICE

I, Christian Saville, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Appellate Defender Laura M. Caudy
South Carolina Commission on Indigent Defense—Division of Appellate Defense
P.O. Box 11589
Columbia, South Carolina 29211-1589

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

This 7 day of February, 2018.



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S.C. SUPREME COURT

The Honorable Michael G. Nettles, Circuit Court Judge

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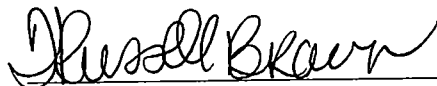
STATE OF SOUTH CAROLINA,.....Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Lara M. Caudy, Esquire
S.C. Commission on Indigent Defense
Appellate Defense
PO Box 11589
Columbia, SC 29211

This 2nd day of February, 2018



TAMIEKA RUSSELL-BROWN
Legal Assistant for Respondent



RECEIVED

FEB 02 2018

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

February 2, 2018

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Brett Howard, #350845 v. State of South Carolina
Appellate Case No. 2017-000246
Lower Court Case No: 2014-CP-27-0323

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Christian Saville
Assistant Attorney General
SC Bar No. 103272

CS/trb
Enclosures

cc: Lara M. Caudy, Esquire