February 23, 2018

Daniel Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RECEIVED
FEB 28 2018
S.C. SUPREME COURT

RE: Filings Case # 2015-000881

Dear Honorable Sir Clerk:

Enclosed you will find documents that have been forwarded to the Attorney General's Office. I need for the enclosed documentations to be Clocked Date Stamped True Copy and forward all the enclosed documentation stamped to me at the Return address located on the forwarding envelope.

Every single document enclosed is in need of a True Copy Stamp indicating that it has been received by this Honorable Court.

Sincerely,

Curtis R. Nealey

CRN/prtiii
cc: file

Curtis R Nealy

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM DARLINGTON COUNTY

Ralph Ferrell Cothran, Jr., Circuit Court Judge

CURTIS NEALEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENTS.

2015-000881 Case No.

PETITIONER'S PETITION FOR REHEARING

The Petitioner hereby request for this Honorable Court to conduct a Rehearing into the Petition for Writ of Certiorari from this Court order denying the Petitioner's Petition for Writ of Certiorari. This request is made based on inadvertent granting of the appeal from a Post-Conviction Relief denial.

This request for Rehearing to be conducted is based on this Court adoption of the Respondent's Brief, conforming their versions of events.

On February 1, 2018, this Court issued is Order Dismissing Certiorari as Improvidently Granted, that

this Court shouldn't have accepted this case, that the Original Order should have reflected Per Curiam decision. Did not Check order.

The Respondent filed its Brief the very Same day that the South Carolina Commission on Indigent Defense reassigned the Petitioner's case to another Appellate Defender from the Division of Appellate Defense on October 16, 2017. On October 20, 2017, Petitioner receives notification that his case has been reassigned another Appellate Counsel. Then, Petitioner requested that Appellate Counsel file a Reply brief correcting the misstatement of facts alleged by the Respondent on October 23, 2017, of which was filed with this Honorable Court on October 26, 2017, of which a Reply was waived.

This Honorable Court granted the Petition for Writ of Certiorari on April 13, 2017 as to Question 2 on the Petition for Writ of Certiorari. This Honorable Court has abandoned its original decision reached Previously, as the thereforth nature of the current decision is without the Acting Chief Justice participating Per Curiam, of which requires an Unanimous

agreement, collectively.

The Petitioner believes that the decision was rendered without the correct application of facts and should therefore adjust or abandon thereof.

WHEREFORE, the Petitioner request that this Honorable Court grants the Petition for Rehearing and rehear the Petitioner's case.

Respectfully Submitted,

Curtis R. Nealey

Curtis R. Nealey
Petitioner

S.C.D.C. No. 00337988
Lee Correctional Institution
F-5 Unit, C-Pod, Cell 118
990 Wisacky Highway
Bishopville, South Carolina 29010

PETITIONER, *PRO SE*

February 23, 2018.
Bishopville, South Carolina.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Curtis Ray Nealey, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2015-000881

ON WRIT OF CERTIORARI

Appeal from Darlington County
R. Ferrell Cothran Jr., Circuit Court Judge

Memorandum Opinion No. 2018-MO-004
Submitted January 16, 2018 – Filed February 7, 2018

CERTIORARI DISMISSED AS IMPROVIDENTLY GRANTED

Appellate Defender Robert M. Pachak, of Columbia, for Petitioner.

Attorney General Alan M. Wilson and Assistant Attorney General Jessica E. Kinard, both of Columbia, for Respondent.

PER CURIAM: We granted Curtis Nealey's petition for a writ of certiorari to review the post-conviction relief (PCR) court's decision to deny relief. We now dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

KITTREDGE, Acting Chief Justice, HEARN, FEW and JAMES, JJ., concur. BEATTY, C.J., not participating.

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29210

FS

INTER-AGENCY MAIL
C/O
SC DEPT. OF CORRECTIONS
4444 BROAD RIVER ROAD
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Mr. Curtis Ray Neale
Lee Correctional Insti
990 Wisacky Hwy
Bishopville, SC 2901

SCCID
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Division of Appellate Defense
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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

October 16, 2017

Mr. Curtis Ray Nealey #337988
Lee Correctional Institution
990 Wisacky Hwy
Bishopville, SC 29010

Re: Your Case

Dear Mr. Nealey:

John Strom left our office to accept a legal position in Washington, D.C. Your case has been reassigned to me. Your appeal will proceed in normal fashion but I did want you to know that I am your new attorney.

The briefing in your case was done by John Strom but I will take care of any administrative matters that arise involving your appeal until it is decided by the Appellate Court. You are welcome to write me if you have any questions regarding this letter of reassignment.

Sincerely,

RMP

Robert M. Pachak
Appellate Defender

RMP/ls

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Division of Appellate Defense
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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

October 24, 2017

Mr. Curtis Nealey #337988
Lee Correctional Institution
990 Wisacky Hwy
Bishopville SC 29010

Re: Your Case

Dear Mr. Nealey:

Enclosed is a copy of the Brief of Respondent that was filed in your case with the South Carolina Supreme Court.

Please contact me if you have any questions.

Sincerely,

RMP

Robert M. Pachak
Appellate Defender

RMP/lms

Encl.

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29210

FS -118

INTER-AGENCY MAIL
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SC DEPT. OF CORRECTIONS
4444 BROAD RIVER ROAD
COLUMBIA, SC 29210

Mr. Curtis Nealey #337988
Lee Correctional Institution
990 Wisacky Hwy
Bishopville SC 29010

RECEIVED
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STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI FROM DARLINGTON COUNTY
Court of Common Pleas

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

Appellate Case No. 2015-000881

Curtis Nealey, ... Petitioner,

v.

State of South Carolina, ... Respondent.

BRIEF OF RESPONDENT

ALAN M. WILSON
Attorney General

JESSICA E. KINARD
Assistant Attorney General
S.C. Bar No. 77889

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ISSUE PRESENTED

Defense counsel did not provide ineffective assistance of counsel when she did not object to the trial court's issuance of an implied malice jury instruction because the decision in State v. Belcher[1], which had been decided approximately one month before trial, does not apply to the facts of this case.

[1] 385 S.C. 597, 685 S.E.2d 802 (2009).

STATEMENT OF THE CASE

Petitioner was indicted at the June 2009 term of the Darlington County Grand Jury for two counts of assault and battery with intent to kill (ABWIK) (2009-GS-16-0869, -0874), two counts of possession of a weapon during commission of a violent crime (2009-GS-16-0870, -0871), criminal domestic violence of a high and aggravated nature (CDVHAN) (2009-GS-16-0872), and kidnapping (2009-GS-16-0873). Tonya Copeland-Little, Esquire, represented him.

The State brought the case to trial before the Honorable J. Michael Baxley on November 9 and 10, 2009. Judge Baxley granted trial counsel's motion for a directed verdict on one of the counts of possession of a weapon during commission of a violent crime (2009-GS-16-0871). The jury found Petitioner guilty of the remaining charges. On November 10, 2009, Judge Baxley imposed concurrent sentences of twenty years on each count of ABWIK, ten years for CDVHAN, and thirty years for kidnapping. Judge Baxley imposed a consecutive five year sentence for possession of a weapon during commission of a violent crime (2009-GS- 16-0870).

A notice of appeal was filed on the Petitioner's behalf at the South Carolina Court of Appeals. Joseph L. Savitz, III, Esquire of the South Carolina Commission on Indigent Defense - Office of Appellate Defense perfected the appeal in the form of an Anders[2] brief. The Court of Appeals dismissed the appeal. State v. Nealey, Op. No. 2011-UP-574 (S.C. Ct. App., filed Dec. 20, 2011).

Petitioner filed an application for post-conviction relief on January 17, 2012. App. p. 319-364. The State filed a return on or about May 8, 2012. App. p. 365-371. The Honorable R. Ferrell Cothran, Jr. convened an evidentiary hearing on the application at the Darlington County Courthouse on July 15, 2013. App. p. 372. Petitioner was present and represented by Tristan M.

[2] Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967).

Shaffer, Esquire, and Karen C. Ratigan, Esquire was present on behalf of the South Carolina Attorney General's Office. App. p. 372. The PCR court denied relief in an order signed August 20, 2013 and filed September 9, 2013, with the PCR court noting there was no prejudice to Petitioner as there was overwhelming evidence of guilt. App. p. 457-467. Petitioner filed a motion to reconsider on September 26, 2013, and the State filed a return to this motion on October 1, 2013. Judge Cothran denied the motion without oral argument in an order dated March 19, 2015, and filed March 23, 2015. Petitioner filed a notice of appeal on April 20, 2015. The appeal was perfected by the filing of a petition for writ of certiorari by appellate defender John H. Strom, Esquire on December 29, 2015, and the State filed a return to petition for writ of certiorari on May 18, 2016. This Court granted a petition for a writ of certiorari as to one of Petitioner's issues in an order dated April 13, 2017. Petitioner filed its brief on June 16, 2017. The State's brief in response follows.

STATEMENT OF FACTS

On October 14, 2008, Petitioner went to visit his on-and-off girlfriend, Dorothy Perkins. App. p.98. This was during a period in their relationship where they were broken up, in part because Perkins was the victim in a pending criminal domestic violence charge against Petitioner. App. p. 107;18-20. During the evening, as they spent time together, Petitioner repeatedly asked Perkins to drop the charges against him, and she repeatedly refused. Id.; p.107;1 – 10. The pair had gone on a drive on Petitioner's motorcycle, but returned to the house and were watching television when their conversation got heated. App. p. 99. Petitioner took a ceramic object (referred to at trial as a "whatnot" and by Petitioner as a vase) from a table began to strike Perkins in the head with it, and breaking her wrist in the process. Id.; p.112;12 – p.113;1. As this progressed, Perkins's mother, Victoria Perkins, came in to see what the commotion was, and Petitioner also beat her with this object until she could flee and hide. Id. However, the altercation between Petitioner and Perkins continued, as he pulled a knife on her and forced her to get onto his motorcycle, stating that he would kill her mother if she did not obey. Id.

Petitioner took off on his motorcycle with Perkins onboard, leaving Perkins's mother hiding at her home. App. p. 100. He began speeding down a country road and popping wheelies, all the while threatening to kill Dorothy. Id. Petitioner threw her from the motorcycle and into a ditch. Id. As she continued struggling with Petitioner, who was chasing her, a truck driver pulled up to assist. Id. Perkins crawled, injured and bleeding, toward the cab of the truck and begged the driver to call 911. Id. Petitioner took off on the motorcycle as assistance came to care for Perkins. Id. Back at the house, Perkins's mother made it to a neighbor's house, where they contacted emergency assistance. Id.

At trial, Petitioner insisted that he got in the middle of a fight that erupted between

Perkins and her mother after he and Perkins had been drinking and using drugs. App. p.102. He further contended that Perkins fell off the motorcycle because she was so intoxicated, and she was on the motorcycle willingly because the two were heading to Darlington to Petitioner's house. App. p. 103. Petitioner insisted that Perkins's story was a concoction to minimize the damage to her character that the truth may do, as she was attempting to regain custody of her children after completing rehabilitation treatment for alcohol dependency. App. 118 – 120.

STANDARD OF REVIEW

In a post-conviction relief action, the applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). 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." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). This Court should reverse the PCR court only where there is no probative evidence to support the decision or the decision was controlled by an error of law. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010). Furthermore, this Court "gives great deference to the [PCR] court's findings of fact and conclusions of law." Id. (quoting Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005)).

The Court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Cherry, 300 S.C. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's

performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. 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." Id., at 117-18, 386 S.E.2d at 625.

When reviewing questions of fact, this Court will affirm the post-conviction relief court's grant of relief "if there is any probative evidence to support those findings." Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry, 300 S.C. 115, 386 S.E.2d 624). Conversely, the Court will not uphold a finding that is not supported by probative evidence. Jackson v. State, 329 S.C. 345, 348, 495 S.E.2d 768, 769 (1998) (citing Satterwhite v. State, 325 S.C. 254, 481 S.E.2d 709 (1997); Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996). When reviewing questions of law, the Court conducts a *de novo* review, and can reverse the post-conviction relief court when a decision is controlled by an error of law. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014) (quoting Jordan v. State, 406 S.C. 443, 752 S.E.2d 538 (2013).

ARGUMENT

Defense counsel did not provide ineffective assistance of counsel when she did not object to the trial court's issuance of an implied malice jury instruction because the decision in State v. Belcher, which had been decided approximately one month before trial, does not apply to the facts of this case.

The PCR court was correct in ruling trial counsel was not ineffective when she failed to object to the trial court's issuance of a jury instruction regarding implied malice, because the facts of this case do not fall under the purview of the recently decided Belcher case. Petitioner argues that Belcher should apply in the case at bar because he was convicted of assault and battery with intent to kill (ABWIK) and several instruments were used that could be viewed as deadly weapons. Therefore, he alleges, the trial court erred in instructing the jury regarding implied malice, as it was in contravention of the Belcher ruling that this Court published approximately one month before trial. This is not an appropriate case for Belcher analysis because, even though it involves a charge of assault and battery with intent to kill, there was no evidence presented "that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon" and, therefore the prohibition against the implied malice charge does not come into play. Belcher, 385 S.C. at 612, 685 S.E.2d at 810.[3] Furthermore, as found by the PCR court, there was overwhelming evidence of Petitioner's guilt, such that no prejudice could befall Petitioner *even if* trial counsel were deficient. There should be no finding of ineffective assistance of appellate counsel, and this Court should affirm the finding of the PCR court.

[3] In its return to petition for writ of certiorari, the State stipulated that the inferred malice charge was improper. Upon further research, it has realized that this was in error. Instead, the State now argues that the implied malice charge was harmless error because the holding in Belcher does not apply to the facts of this case.

In order for Belcher to apply, there must be evidence presented that reduces, mitigates, excuses, or justifies homicide or ABWIK. A classic example of this, as considered in the opinion itself, is that of self-defense. Id. at 385 S.C. at 612, 685 S.E.2d at 810. When raising self-defense, a defendant alleges that his actions were in response to those of another in order to protect his life or safety. In the instant case, there is no such allegation. The only defenses raised were that of third-party guilt, in that it was actually Victoria Perkins who assaulted her mother, and accident, in that chance or victim's own carelessness caused her other injuries. Neither of these defenses put the Petitioner's actions into one of the four categories contemplated by Belcher.

Petitioner's argument that "error could not have been harmless because of the evidence of an accident and third party guilt [ ] put forward by Petitioner, 'thereby highlighting the prejudice resulting from the charge' (citation omitted)" is inaccurate. BOP p. 19. As considered above, theories of accident and third-party guilt do not involve any action on the part of a defendant similar to the actions taken in self-defense. In fact, they imply inaction on the part of a defendant by suggesting that the misfortune befalling the victim came at the hands of another or due to bad luck. Therefore, an implied malice jury instruction is proper and non-prejudicial if the jury is to believe Petitioner's theory of the case, as he engaged in no actions that need to be reduced, mitigated, excused, or justified.

Furthermore, even if one assumes that the Perkinses' versions of events are true and that Petitioner beat them with a vase, made Victoria mount the motorcycle at knifepoint, and pushed her from the motorcycle, it is quite a stretch to say that a vase and motorcycle are deadly weapons in the context of this case. It is clearly apparent from Petitioner's convictions that the jury found the State's witnesses and presentation propounding these theories credible, so we must consider the actuality of these items being considered deadly weapons as described in the

instruction provided to the jury. The jury instruction regarding implied malice from the use of a deadly weapon was as follows:

> Malice may be inferred however from conduct that shows a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon. A deadly weapon is any article, or instrument, or substance which is likely to cause death or great bodily harm. Whether an instrument has been used as a deadly weapon depends on the facts and the circumstances of each case. Now the following are some examples of deadly weapons. A pistol, a shotgun, a knife, a rifle, or a razor. A gun may be a deadly weapon, even if it's not operating. I tell you that a deadly weapon may by any article or instrument that is likely to produce death or great bodily harm. If facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be considered by you along with the other evidence in the case, and you should give it the weight that you believe it is entitled to receive.

App. p.294;22 - 295;14. Certainly, Petitioner used a vase to beat the Perkinses, but that vase was not likely to produce death or great bodily harm. A motorcycle may be deadly if used to run over a person, but it is less likely to be deadly if one is pushed off it. By classifying all three objects as deadly weapons, Petitioner is attempting to bring all of his actions under a supposed protection of Belcher that would, if his argument prevails, mean the implied malice jury instruction was reversible error, entitling him to a new trial.

However, if this Court concludes Belcher applies to the facts of this case, there is still probative evidence to support the PCR court's finding that counsel was not ineffective. Assuming, *arguendo*, that Belcher applies and trial counsel was deficient[4] for not objecting to the related jury instruction, her performance was not prejudicial to Petitioner based on the

[4] The PCR court specifically found that "[Petitioner] failed to present specific and compelling evidence that trial counsel committed either errors or omissions in her representation of the Applicant," thus failing to satisfy the first prong of the Strickland test. App p. 466. Petitioner argues the opposite on page 16 of its brief, stating that "the PCR court ruled that counsel's performance was deficient for failing to object to the trial court's improper inferred malice instruction. App. 466." BOP p.16. That is simply incorrect.

overwhelming evidence of Petitioner's guilt. Several opinions arising from post-conviction relief challenges address the idea that, if evidence is overwhelming, the result of a trial may not have been different if trial counsel's performance had not been deficient. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d. 718, 722 n. 3 (2001); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991).

Respondent takes note of this Court's recent decision in Gibson v. State, 416 S.C. 260, 786 S.E.2d 121 (2016), as it specifically undertakes to weigh deficiency and prejudice in terms of failure to object to an improper implied malice charge. In Gibson, this Court found that "the PCR judge erred in finding there was evidence of malice other than the use of a deadly weapon," thus making the implied malice charge prejudicial, and a failure to object reversible error. Id., 416 S.C. 265, 786 S.E.2d at 124. In the case at hand, though, the PCR court made no such particular finding regarding malice, instead repeatedly making the general finding that the State presented overwhelming evidence of guilt while describing incidents that can be deemed malicious. App. p. 464, 465, 466. This Court stated in Gibson that "there was very little evidence of malice aside from the use of a gun," which led the petitioner in that case to be prejudiced by trial counsel's failure to object to an implied malice charge. 416 S.C. at 265, 786 S.E.2d at 124. However, as discussed elsewhere, there is abundant evidence of malice exhibited by Petitioner, both with and without the use of a deadly weapon.

Further, the record presents ample evidence of malice on the part of Petitioner. There is no doubt that Petitioner spoke angrily with Perkins about withdrawing the domestic violence charge pending against him. Perkins testified Petitioner beat her with a household object when she refused, beat her mother with this same object, ordered Perkins onto his motorcycle, threatened to kill her mother if she did not go with him, held her at knifepoint until she complied,

drove unsafely with her on the back of the motorcycle, and pushed her from the motorcycle. Perkins's mother's testimony aligns with this. While Petitioner argues differently, he was convicted[5] of these charges and, the State argues, "based upon all the evidence presented tending to prove or disprove malice, no rational juror could have failed to find malice." Arnold v. State, 309 S.C. 157, 171, 420 S.E.2d, 834, 842 (1992).

Petitioner argues that Carter v. State, 301 S.C. 398, 392 S.E.2d 184 (1990) applies for the proposition that "trial counsel's failure to object to an improper jury instruction is evaluated in the same manner as an allegation on direct appeal that the trial court gave an improper jury instruction." BOP p. 17. However, this argument is inaccurate, as the opinion does not explicitly state this, though it does apply a harmless error analysis in certain circumstances.[6] The State argues that a harmless error analysis is appropriate, as required by Belcher. Carter cites to Rose v. Clark, 478 U.S. 750 (1986), and that standard was espoused by this Court specifically regarding "whether 'beyond a reasonable doubt the error complained of did not contribute to the verdict contained'" in Arnold. This Court held a reviewing court must determine that an error did not contribute to a verdict by finding the "error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record. Thus, to say an instruction to apply an unconstitutional presumption did not contribute to the verdict is to make a judgment about the

[5] He was granted a directed verdict regarding the charge of possession of a weapon during the commission of a violent crime regarding Victoria Perkins, as no evidence was presented that supported the allegation Petitioner had a knife (as stated in the warrant) while committing assault and battery with intent to kill. App. p. 216;23 – 219;5.

[6] "A mandatory presumption of malice charge, rather than one creating a permissive inference, constitutes reversible error. ... While such a charge is subject to a harmless error analysis, the analysis is inappropriate where, as here, there is evidence from which the jury could find the defendant guilty of the lesser offense of voluntary manslaughter." Id., 301 S.C. at 398, 392 S.E.2d at 185 (citations omitted).

significance of the presumption to reasonable jurors, when measured against the other evidence considered by those jurors independently of the presumption." Id. 309 S.C. at 166, 420 S.E.2d at 839. Further, the court "must ask what evidence the jury actually considered in reaching its verdict," and also "must weigh the probative force of the evidence as against the probative force of the presumption standing alone." Id.

The State argues that this phrasing applies exactly in this matter – if a jury instruction does not apply to the facts of the case, it cannot have harmed the outcome of the case. On review, this Court must consider whether the trial court's jury instructions correctly conveyed the relevant and applicable law to the jurors and provided the jurors with the appropriate legal standard for deciding Petitioner's case. If so, the trial court committed no error in instructing the jury on the law as he did and, therefore, trial counsel could not have been ineffective for failing to object, even considering the recent Belcher decision. See State v. Rye, 375 S.C. 119, 123, 651 S.E.2d, 321 323 (2007) ("A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied.") In this instance, the implied malice jury instruction was proper because Belcher does not apply and because there is adequate evidence of malice on the part of Petitioner. These facts cannot be viewed as constituting reversible error. See State v. Rabon, 275 S.C. 459, 462, 272 S.E.2d 634, 636 (1980) (holding the failure to give a jury instruction on a proper statement of law did not constitute reversible error in light of the fact the jury instructions as given adequately and sufficiently covered the applicable law)

When considering the weight of the evidence against Petitioner, especially his many displays of malice, it is likely that Petitioner would have been convicted of these charges without the implied malice charge. When applying this to the criteria as stated by Arnold, one can easily

conclude evidence regarding the use of deadly weapons by Petitioner was probably not given much weight by the jury due to the weight and "probative force" of other evidence against him. Arnold, 309 S.C. at 166, 420 S.E.2d at 839. For these reasons, this Court should find that the PCR court's finding that trial counsel was not ineffective is correct, supported by probative evidence, and affirm the denial of relief in this matter.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court affirm the post-conviction relief court's findings.

Respectfully submitted,

ALAN M. WILSON
Attorney General

JESSICA E. KINARD
Assistant Attorney General
S.C. Bar No. 77889

By: _____
ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

October 16, 2017

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO DARLINGTON COUNTY
Court of Common Pleas

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

Appellate Case No. 2015-000881

Curtis Nealey, ... Petitioner,

v.

State of South Carolina, ... Respondent.

CERTIFICATE OF SERVICE

I, Jessica E. Kinard, certify that I have today served the within Brief of Respondent upon Petitioner by depositing a copy of the same in inter-agency mail and addressed to:

Robert M. Pachak, Esquire
SC Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia SC 29211-1589

I further certify that all parties required by Rule to be served have been served. This 16th day of October, 2017.

JESSICA E. KINARD
S.C. Bar # 77889
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
ATTORNEY FOR RESPONDENT

Daniel Shearouse
Clerk of Court

RECEIVED
OCT 26 2017
S.C. SUPREME COURT

Appellate Case No: 2015-000881

Please file with the Court and Forward a Copy to:
(Clockstamped, Dated.)

Robert M. Pachek
Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia S.C. 29211

And:

Curtis Nealey 337988
LCI F-5-C-148
990 Wisacky Hwy
Bishopville SC 29010

Postage inclosed.

Thanks Curtis Nealey

October 23, 2017

Robert M. Pachek
Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

Re.: **Curtis Ray Nealey v. State of South Carolina**
Appellate Case No. 3 2015-000881

Dear Mr. Pachek:

Will you **PLEASE BE ADVISED** and **TAKE NOTICE** that I am writing you in regards to the above referenced matter.

I have reviewed the Brief of the Respondent for the Writ of Certiorari and have concluded that several issues **NEEDS** to be corrected by way of a **Reply** Brief of Petitioner.

The corrections is as follows:

* In the **Statement of Facts:** 'Perkins Statement, App. Page 107-108, Line 20 - motive made up. He was asking me was I going to come up with him to talk to the Solicitor about the Criminal Domestic Violence charges and I told him "no". My attorney clarified the reason.

* Tonya Little Trial Statement, App. Page 67-69, Line 25. She is talking about the charges were related to a incident with Ms. Perkins' Ex-Husband or Boyfriend. She did not have the power to drop the charges because she was not the alleged victim in that case.

* Conclusion, the State let Perkins imply that the Defendant had pending Criminal Domestic Violence charges the next day to make up a motive as to why I supposedly done the present crimes. The Record clearly reflect those incorrect statements.

* On Page 4 of the Brief of Respondent, the State implied that a statement Perkins made was facts not supported by any medical records. The Record clearly reflects that Perkins sustained no injuries to her wrist. However, the Respondent applied Perkins statement, App. Page 12-19, Line 10, "He broke my wrist at the house". Witness James C. Balvich stated on App. Page 176-178, Line 20, that Perkins sustained no injuries from a so called broken wrist or assault. That all injuries were consistent with falling from a motorcycle. The Respondent is relying on this false testimony, of which the Record clearly reflects such. Please correct that as the Respondent is clearly bolstering their case with these false testimony.

* In the Jury Instructions on Page 294, line 23 to Page 295, line 10, reads in pertinent part, 'a deadly weapon is any article or instrument or substance which is likely to cause death or great bodily harm. Whether an instrument has been used as a deadly weapon, depends on the facts and circumstances of each case. I tell you that a deadly weapon may be any article or instrument that is likely to produce death or great bodily harm. If facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, this inference would be considered.'

* On Page 10 of the Brief of Respondent, the Respondent misquoted the Instructions given to the jury in the Petitioner's case. The Respondent even excluded the knife but stated that a vase and motorcycle could be considered deadly weapons, to say. See Page 9 of Brief of Respondent. The Respondent put its own version of the instructions and what the Trial Court instructed to the jury. The Trial Court instructed the jury that anything they deem a weapon can be considered as inferred malice.

* The Respondent can't be sure how the jury determined the instruction given by the Trial Court and implied that Petitioner's case does not fit the **Belcher** guidelines. **Belcher** states that any case related to Assault and Battery with the Intent to Kill that evidence is put forth to reduce the impact, the instruction should not be included in the jury charge. However, the charge to the jury in the Petitioner's case implied that the Petitioner was guilty if the Petitioner was found guilty of possession of weapon.

* Tonya Little Post-Conviction Relief testimony on App. Page 410, lines 12-21, admitted to not knowing about the **Belcher** case at the time of Petitioner's trial. However, a month after the Petitioner's trial, requested the instruction be excluded in the case. Admission of not knowing about pending case laws renders counsel to be ineffective. Find a case supporting that and correct this in reply.

* On Page 12 of the Brief of Petitioner, shows that the Order of Dismissal the PCR Court ruled that counsel was not ineffective for failing to challenge the Trial Courts improper charge on the inferred malice instruction on App. Page 466. The PCR Court simply found that the Petitioner was not prejudiced by the improper charge because overwhelming evidence of his guilt was present, besides the **Belcher** analysis. Was there malice besides the part of Possession of a Weapon. The PCR Court was wrong in its Order of Dismissal.

* In the Brief of Respondent, on Page 10, there is a footnote that applied that the Order of Dismissal found that Trial Counsel was ineffective, but no prejudice resulted and that the Petitioner is arguing the opposite in the Brief of Petitioner, of which is not true and is trying to confuse the Court in to believing their theories. See Page 14 of Brief of Petitioner. However, the Respondent states the following in its Brief of Respondent: 'The PCR Court specifically found that "[Petitioner] failed to present specific and compelling evidence that trial counsel committed either errors or omissions in her representation of the Applicant", thus failing to satisfy the first prong of **Strickland** test. App. P. 466. Petitioner argues the opposite on Page 16 of its brief stating that the PCR Court ruled that counsel's performance was deficient for failing to object to the Trial Court's improper inferred malice instruction. App. 466. BOP p.16. That is simply incorrect." There is nothing on page 16 of the Brief of Petitioner that indicates this alleged theory given by the Respondent, nor is page 16 a despiction of this misstatement of facts. The Respondent's attempt to sway the opinion of the Court, is clearly unethical and unprofessional in its entirety.

As you can see from the above, there consist of several clear and convincing errors and misstatement of facts that needs to be corrected. Please understand that my life is swaying in the balance of these mistakes and needs to be clarified with a Reply Brief, so that the Court gets the correct applications of facts in this case to determine whether or not the **Belcher** analysis apply in this particular case.

If you believe that a Reply is not needed, please notify me in writing as soon as possible, before the deadline to file such Reply.

I would like to thank you in advance for your attention and assistance in this matter. I do, however, look forward to hearing from you or your Office in these regards.

With the Kindest Regards. I so Remain,

Sincerely,

Curtis Ray Nealey

Curtis Ray Nealey

CRN/htiii
CC: Daniel E. Shearouse
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