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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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On Writ of Certiorari to the Court of Appeals
Appeal from Beaufort County
Honorable Thomas W. Cooper, Jr., Circuit Court Judge
Appellate Case No. 2009-147286

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THE STATE,

Respondent,

vs.

DEMETRIUS UNDREUS PRICE,

Petitioner.

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# RETURN TO PETITION FOR WRIT OF CERTIORARI

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ALAN WILSON
Attorney General

MARK R. FARTHING
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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Any issue with the giving of an inference of malice jury charge was not preserved for appellate review because Price did not object to the charge when it was first presented to the jury in the initial jury charge, specifically indicated he had no objection to the charge, and only later objected to the charge after the same instruction was repeated to the jury after it began its deliberations. Regardless, the Court of Appeals properly found the trial judge did not commit reversible error in instructing the jury on inferring malice from the use of a deadly weapon because there was no evidence presented during trial that could have reduced, mitigated, justified, or excused Price's actions, and any error was harmless in light of the overwhelming evidence of malice.

## STATEMENT OF THE CASE

### Procedural History

In August of 2008, Petitioner Demetrius Undreus Price was arrested following an investigation into a home invasion and shooting. In December of 2008, the Beaufort County grand jury indicted Price for one count of assault and battery with intent to kill, one count of possession of a weapon during the commission of a violent crime, and one count of first-degree burglary. In June of 2009, the Beaufort County grand jury indicted Price for an additional count of possession of a handgun by a prohibited person. On November 16, 2009, a jury trial was commenced in the Beaufort County court of general sessions with the Honorable Thomas W. Cooper, Jr., circuit court judge, presiding. At the conclusion of trial, the jury convicted Price as indicted. Following the verdict, the trial judge sentenced Price to life imprisonment without the possibility of parole pursuant to S.C. Code Ann. § 17-25-45 for the burglary and assault and battery with intent to kill convictions and to concurrent terms of imprisonment of five years for the firearm convictions. Price then timely filed and perfected an appeal.

On appeal, the Court of Appeals issued a published opinion affirming Price's ABWIK conviction.[1] State v. Price, 400 S.C. 110, 732 S.E.2d 652 (Ct. App. 2012). Subsequently, both the State and Price petitioned the Court of Appeals for a rehearing, and the petitions were denied. Price then filed a petition for a writ of certiorari in the Supreme Court.

### Factual History

Around 1:30 p.m. on the afternoon of July 28, 2008, Lieutenant Jeff Meyer of the Bluffton Township Fire District was alerted of multiple shootings at the Plantation Point

[1] Price only appealed his ABWIK conviction. (App'x p. 1).

apartment complex and responded to the scene. (R. pp. 160-162). When he arrived, he found eighteen-year-old Deon Cannick ("Deon") lying on the ground next to a car. (R. p. 166; p. 173; p. 225). Deon was conscious and breathing, but he was suffering from a gunshot wound to the neck. (R. pp. 166-167). Lieutenant Meyers began treating Deon's injuries and discovered an exit wound in the mid-center of Deon's back that was so severe he was able to see Deon's spinal cord. (R. p. 167).

After tending to Deon and securing him to a backboard, Lieutenant Meyers was called to assist with another victim at the scene, Deverol Cannick ("Deverol"), Deon's older brother.[2] (R. p. 168; p. 177; p. 225). When he arrived at the ambulance, he found Deverol already inside. (R. p. 169). Deverol was breathing, conscious, and alert, but he had a gunshot wound to his abdomen and was exhibiting symptoms of lung damage. (R. p. 169). Based on Deverol's condition, Lieutenant Myers quickly transported him to the hospital. (R. p. 169). On the way, Deverol advised Lieutenant Meyers he had been shot by his brother's girlfriend's uncle. (R. p. 171; pp. 172-173).

Shortly thereafter, Deon and Deverol were admitted at Memorial University Medical Center in Savannah, Georgia. (R. p. 435; pp. 438-439; p. 457). Dr. Gage Ochsner, the chief of trauma services and surgical critical care, treated Deon. (R. p. 435; pp. 437-438). He determined Deon suffered a devastating, potentially-fatal injury as the result of a gunshot and was instantly paralyzed. (R. pp. 446-447; p. 451). Based on the extent of Deon's injuries, which included a collapsed lung, Dr. Ochsner was forced to surgically stabilize Deon's vertebrae and spinal cord. (R. p. 449). Additionally, Dr. James Bromberg, an expert in trauma surgery, treated Deverol. (R. pp. 456-457). Deverol was suffering from injuries to his stomach, liver, and diaphragm as a result of

[2] Deverol also went by "Devin." (R. p. 477).

gunshot wounds. (R. pp. 465-466). Having never seen a patient with similar injuries who was not extremely ill or dying, Dr. Ochsner concluded Deverol's injury could have been fatal. (R. p. 467).

Meanwhile, officers from the Beaufort County Sheriff's Office began an investigation into the shooting. (R. p. 180; p. 340; p. 536; p. 547). Officers searched inside and outside of the apartment where the shooting occurred and discovered three shell casings outside of the apartment and one lead projectile inside of the apartment's front door. (R. pp. 541-542; p. 565). Officers located money, drugs, and four firearms inside of the apartment, recovering two guns from a guest bedroom and two guns from a closet in the master bedroom.[3] (R. p. 389; p. 548; pp. 552-553). However, no guns or drugs were located in the stairwell where the shooting occurred. (R. p. 433). Furthermore, officers viewed surveillance footage from the gate to the apartment complex, identified the license tag on the suspects' vehicle as a Georgia tag, and discovered the vehicle was registered to Petitioner Demetrius Undreus Price. (R. p. 344; pp. 347-348; p. 540). Price's vehicle was recorded arriving at the apartment complex at 1:27 p.m. and leaving shortly thereafter at 1:35 p.m. (R. p. 347).

Subsequently, Investigator Todd Calhoun and Sergeant Dejuan Holmes went to the hospital to interview the victims and the witnesses who were present during the shooting. (R. pp. 342-343; p. 578). Based on the information they obtained during their investigation, they prepared a photographic line-up and showed it to Deverol, Malik

[3] Ken Whitler, a firearm tool marks examiner with S.L.E.D. and an expert in firearms identification, examined the guns recovered from the apartment and compared them with the shell casings and the projectile collected at the scene. (R. p. 598; pp. 601-602; p. 607). He determined neither the shell casings nor the projectile were fired by any of the recovered guns. (R. p. 607).

Campbell, Marcus Campbell, and Sharita Willingham.[4] (R. p. 342; pp. 348-349). The witnesses identified suspects from the photo line-up, with Deverol identifying Price as the person who shot Deon. (R. pp. 293-294; p. 348; pp. 515-516; p. 657).

On August 1, 2008, Sergeant Holmes met with Price at the Savannah Metro Police Department, advised him of his rights, and took a statement from him. (R. pp. 579-580). During the meeting, Price claimed he went to his girlfriend's house on the day of the shooting in order to obtain help finding a job. (R. pp. 581-582). Price then claimed he went to a car wash, left his car there, and accompanied a friend to lunch before picking his car back up and going home.[5] (R. pp. 582-583). Price denied going to Bluffton that day or ever before and claimed he had never had a reason to go there. (R. p. 583). In response, Sergeant Holmes showed Price a photograph of his vehicle at the apartment complex in Bluffton where the shooting occurred. (R. pp. 583-584). Initially, Price denied it was his vehicle. (R. pp. 583-584). However, when confronted with a photograph of his license plate, Price claimed someone from the car wash must have taken his car there, but he acknowledged they would not have had enough time to do so before he allegedly picked his car back up. (R. pp. 583-584).

Meanwhile, Investigator Calhoun contacted Price's co-defendant, Lucius Simuel, Jr., and advised him he needed to speak with him. (R. pp. 350-351). Simuel surrendered to officers in Savannah, and Investigator Calhoun and Sergeant Holmes met with Simuel on the same day Sergeant Holmes met with Price. (R. pp. 351-352). During the meeting, Simuel waived his rights and informed the officers he went to Deon and Deverol's

[4] Marcus and Malik Campbell were Deon and Deverol's brothers. (R. p. 225). Sharita Willingham was Deverol's girlfriend. (R. p. 288).

[5] During the interview, Price refused sign a waiver of rights form and refused to provide the officer with his girlfriend's name, the name of the car wash, or the name of the friend he escorted to lunch. (R. p. 580; p. 582).

apartment, was not expecting anyone to get shot, was being greedy, wanted money, had arranged the whole thing, and would have to face the consequences. (R. p. 356). Simuel claimed Deon had asked him to get him pills in the past when he had been at the apartment. (R. pp. 356-357). Simuel asserted he went to the apartment on the day of the shooting and found Deon standing outside with "a white kid and a Mexican[.]" (R. p. 357). Simuel stated Deon was behaving strangely and then went inside for his brother. (R. p. 357). Simuel asserted Deon's brother came outside, Deon came back outside a few minutes later with a gun, "the Mexican" pulled a gun, shots were fired, he saw Deon drop, and then he heard three more gunshots. (R. pp. 356-357). Simuel claimed he then returned to Savannah and called his niece to let her know "her boyfriend tried to set him up." (R. p. 358).

Following the interview, Simuel was transported to the Beaufort County Detention Center. (R. p. 359). Investigator Calhoun then later met with Simuel on two more occasions, and Simuel acknowledged lying during his original statement. (R. pp. 360-361; p. 366). During those meetings, Simuel admitted he was involved in the incident, but he denied entering the apartment, possessing a gun, or shooting anyone. (R. pp. 360-361; p. 366; p. 368). Subsequently, Price and Simuel were indicted for numerous offenses based on their involvement in the shootings, and they jointly proceeded to trial. (R. pp. 38-41; pp. 899-906).

During trial, several witnesses testified about the details of the shooting at the Plantation Point apartment complex. On the day of the shooting, Deon testified he was playing video games with his brothers when his friend, Martin, called about buying some marijuana. (R. pp. 225-226; p. 271). Shortly thereafter, Deon went downstairs, met with Martin and another of his friends, Jesse, and sold them a small bag of marijuana. (R. p.

226). Deon testified Martin then informed him there were some guys looking for him. (R. p. 227). Martin and Jesse left, and Simuel, the uncle of Deon's ex-girlfriend, and another man approached Deon and asked him if he wanted to buy drugs. (R. pp. 227-228). Deon declined the men's offer, and they asked him to go inside and get his brother. (R. p. 228).

Deon testified he then went inside, closed and locked the apartment door, told Deverol about the men downstairs, and resumed playing video games while Deverol went to speak with them. (R. pp. 229-230). Deon continued playing video games until his dog was released from the bedroom and ran downstairs. (R. pp. 229-230). Deon testified he then ran downstairs after the dog, grabbed the dog's harness, looked up, and saw Simuel inside of the apartment armed with a gun and Price pointing a gun at him. (R. pp. 230-231; p. 259; p. 261). Deon put his hands in the air, asked the men not to shoot, and told them they could have anything they wanted. (R. p. 235). The men then waived Deon over to them, and Deon began walking down the steps towards them. (R. p. 235). Deon testified Price then moved the gun to the left side of his neck and shot him. (R. p. 235; p. 261). After he was shot, Deon collapsed on the stairs, rolled to the bottom, and heard the men repeatedly ask "where's the iron at?" (R. p. 238; p. 263). Deon testified the men ran outside after a few seconds, Deverol followed after them to get the license plate number of the men's vehicle, and then he heard three more gunshots. (R. pp. 239-240; p. 266).

Deon acknowledged he and Deverol were drug dealers and indicated Deverol was a member of the Gangsta Disciple gang. (R. pp. 237-238; pp. 246-247; pp. 266-267). Deon further acknowledged they had guns inside of the apartment, but he testified Deverol was unarmed at the time he went downstairs to speak with the men. (R. pp. 255-256; pp. 272-273). Deon further indicated he had not contacted Simuel or invited him to

the house, had not given the men permission to come inside the apartment, and was not expecting to see them that day. (R. p. 229; p. 236; p. 238).

Similarly, Deverol testified he was playing video games on the day of the shooting when he heard a knock at the door. (R. pp. 477-478). Deon then came upstairs and advised Deverol that Simuel was at the door. (R. p. 478). Deverol testified he went downstairs to see what Simuel wanted, went outside, closed the door behind him, and saw two men. (R. p. 478). Deverol testified one of the men, Price, then offered to sell him pills and marijuana, but he declined the offer. (R. pp. 479-480). Deverol stated the men suddenly pulled out guns, pushed him back inside of the apartment, and demanded to know where the guns were located. (R. p. 480). Deverol testified Deon then ran downstairs and was holding the dog when Price moved towards Deon and shot him. (R. pp. 481-482). Deon collapsed down the stairs, and the men fled. (R. p. 483). Deverol stated he then ran around the apartment for a moment before running outside to see what vehicle the men were driving. (R. p. 483). When he exited the apartment, the men were still outside, and Simuel was asking Price why he shot "little dude." (R. p. 483; p. 511). Deverol stated he then dropped to the ground when he saw the men and was shot several times. (R. pp. 484-486). Deverol acknowledged he had guns and drugs inside of the apartment, but he testified he did not arm himself after Deon was shot. (R. pp. 492-493). Deverol identified Price in-court as the person who shot Deon. (R. pp. 490-491).

Additionally, Sharita Willingham, Deverol's girlfriend, testified about the shooting. (R. pp. 287-288). Willingham testified she heard a knock on the door, and Deon and Deverol went downstairs. (R. p. 288). She testified she looked downstairs and saw Deverol trying to close the door while Deon remained on the staircase. (R. pp. 289-290). Willingham stated Simuel, who was armed with a gun, and another man then

forced their way into the apartment, she ran to call the police, and she heard gunshots followed by more gunshots. (R. pp. 290-291; p. 311).

At the conclusion of the State's case, counsel for Simuel and Price made motions for directed verdicts. (R. pp. 614-615; pp. 623-625). As part of his directed verdict motion, counsel for Simuel argued there was no evidence of malice aforethought. (R. p. 624). After considering the arguments, the trial judge denied the motions. (R. pp. 626-629). Additionally, the trial judge stated:

> Insofar as the absence of malice is concerned, the inference of malice can be drawn. I'm aware of State v. [B]elcher. I have it right here in front of me, and I'm aware of the fact that it applies to ABWIK cases. And it might well be that the evidence at the end of the day entitled the defendants to a charge that does not include the inference of malice. And this – gentlemen, based on what I've heard, I'm going to allow it to infer malice from what has been introduced thus far because there has been no issue raised sufficient to eliminate that evidence from consideration that I can make and in looking at the status of the evidence right now.

(R. p. 628).

Subsequently, several more witnesses were called to testify about the shooting at the Plantation Point apartment complex. Malik Campbell ("Malik") testified Deon answered a knock at the door, came back upstairs, and spoke with Deverol. (R. pp. 644-647). Malik stated Deverol went downstairs, Deon followed him at some point, and then gunshots were fired. (R. pp. 647-649). Malik further clarified he did not see his brothers fighting with anyone during the incident, and he stated any of his statements to law enforcement interpreted in a way to suggest the contrary might have been mixed up or misunderstood.[6] (R. p. 657). Likewise, Martin Guzman testified he went to Deon's apartment with his friend, Jesse, to purchase marijuana and was waiting for Deon to get it

[6] In the statement Investigator Calhoun took from Malik at the hospital, the officer recorded that: "Malik then went to the top of the stairs to see what was wrong and saw two subjects at the bottom of the stairs fighting with his brothers." (R. p. 700).

for him when two men approached. (R. p. 663). Guzman testified they got the marijuana from Deon, and the two men who approached were speaking with Deverol at the door when he and Jesse left. (R. p. 664). Guzman stated no one was fighting at the time, and he did not see any gun. (R. p. 664). As they walked away, Guzman testified he heard gunshots and saw the two men run to a tan car and drive off. (R. p. 670).

Additionally, Simuel's niece and nephew testified for the defense. (R. p. 280; p. 689). Tiah Frazier, Simuel's niece, testified Deon called to speak with Simuel on the day of the shooting, and she provided him with Simuel's phone number. (R. pp. 680-681; p. 684). Frazier stated Simuel called her later that day and stated Deon tried to rob him. (R. pp. 686-687). Similarly, Chris Battle, Simuel's nephew, testified he was present when Deon called Frazier for Simuel's phone number. (R. pp. 689-690). He stated he later received a phone call from Simuel, who stated the deal went bad and Deon and Deverol were shot. (R. p. 692). However, Frazier and Battle each confirmed all the information they knew about the shooting was provided by Simuel. (R. p. 687; p. 693).

Subsequently, at the close of the evidentiary phase of trial, the trial judge conducted a charge conference to go over his proposed jury instructions with counsel and to entertain any requests for specific charges. (R. pp. 727-728). Regarding the assault and battery charge, the trial judge stated:

> I will charge assault and battery with intent to kill. [Defense counsel], I'm also inclined to charge assault and battery of a high and aggravated nature. There is some evidence in the record from which some of the testimony has indicated, indirectly though it might be, that this was something perhaps other than just a knocking down the door and going in there and shooting up everybody. And so there may be something there that is sufficient to indicate the absence of malice in this particular case. I will not charge assault and battery of a high and aggravated nature if both of you all object to that charge.

(R. p. 731). Price's counsel then requested a charge on assault and battery of a high and aggravated nature ("ABHAN"). (R. p. 731). Subsequently, the solicitor stated he had no objection to an ABHAN charge, indicating "the jury may find that there was an absence of malice." (R. p. 732).

Following the charge conference and counsel's closing statements, the trial judge charged the jury on the applicable law in the case. (R. p. 812). During the charge, the trial judge instructed the jury on the law of assault and battery with intent to kill ("ABWIK") and ABHAN. (R. pp. 826-831). As part of the instructions on the assault and battery offenses, the trial judge defined malice and instructed:

> Now, malice may be inferred from the conduct of a person if that conduct shows a total disregard for human life. Inferred malice may arise when the deed is done with a deadly weapon. A deadly weapon is any article or instrument which is likely to cause death or bodily harm when the conduct in connection with that bodily – with that deadly weapon shows a heart fatally bent on mischief and totally disregarding any social consequence.
>
> And so if facts are proven beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, that inference would simply be an evidentiary fact. And you would take it into account with all the other evidence in the case and give it the weight that you decide it should receive.

(R. pp. 828-829). At the conclusion of the jury charge, the trial judge inquired if any of the parties had any objections to the charge or requests for additional charges aside from the objections and requests previously noted. (R. p. 846). Price's counsel responded: "No, Your Honor." (R. p. 846).

Subsequently, during its deliberations, the jury requested a written summary of the conditions of ABWIK. (R. p. 847). In response, the trial judge re-instructed the jury on the law of ABWIK and ABHAN, including again on the definition of malice and the

fact an inference of malice could be drawn from the use of a deadly weapon. (R. p. 847; pp. 850-854).

Following the jury re-charge, the trial judge asked if there were any objections or requests to the repeated instructions. (R. p. 856). Price's counsel responded: "Yes, Your Honor. I just wanted to ensure that you[r] instruction on the ABWIK didn't include the language that was excluded by State v. Belcher." (R. p. 857). In response, the trial judge noted his charge included the language from Belcher, but he indicated the facts of Price's case were different in that self-defense was not charged as it was in Belcher. (R. pp. 857-859). The trial judge further noted his instruction contained language indicating there had to be the intentional doing of a wrongful act without just cause or excuse, which was part of the definition of malice, in order for the jury to convict Price of ABWIK. (R. pp. 859-860). The trial judge then noted Price's objection. (R. p. 860).

Subsequently, at the conclusion of trial, the jury convicted Price of first-degree burglary, ABWIK, possession of a weapon during the commission of a violent crime, and possession of a handgun by a prohibited person. (R. pp. 862-863). Price's co-defendant, Simuel, was also convicted of all of the indicted offenses. (R. p. 948). Pursuant to S.C. Code Ann. § 17-25-45 and based on Price's prior convictions for armed robbery, aggravated assault, and first-degree burglary, the trial judge sentenced Price to a term of imprisonment of life without the possibility of parole for the first-degree burglary and ABWIK convictions. (R. pp. 872-873; pp. 898). Additionally, Price received concurrent five-year sentences for his other convictions. (R. pp. 897-898).

Following the trial, Price appealed his ABWIK conviction, and the Court of Appeals affirmed in a divided opinion. (App'x p. 5). In reaching that decision, a majority of the Court of Appeals initially determined "there [was] a substantial question"

as to whether Price preserved any issue regarding the inference of malice jury instruction but chose to address the merits of the issue regardless of any issue preservation concerns. (App'x p. 4). The Court of Appeals then determined the trial judge did not err in instructing the jury on inferring malice from the use of a deadly weapon because no evidence was presented during Price's trial which could have excused, justified, reduced, or mitigated Price's actions. (App'x pp. 4-5). In finding there was no evidence to reduce or mitigate Price's actions, the Court of Appeals instructed:

> On appeal, Price points to the testimony indicating that Deon and Deverol were drug-dealing gang members and that Deon's shooting may have been part of a drug deal gone wrong. We disagree that these facts would reduce, mitigate, excuse, or justify the crime. It is undisputed that someone shot Deon in the neck, causing him serious injury. The shooter raised the gun, pointed it at Deon, approached him, and shot him at close range as he stood with his hands up. There was no evidence to the contrary. There may have been conflicting evidence as to who did these things, but it is not possible to interpret the evidence to support any conclusion other than that the person who shot Deon committed ABWIK. Therefore, if the jury believed Price is the person who shot Deon, Price is necessarily guilty of ABWIK.

(App'x p. 5). For that reason, the Court of Appeals concluded the trial judge committed no error in instructing the jury. (App'x p. 5).

## ARGUMENT

**Any issue with the giving of an inference of malice jury charge was not preserved for appellate review because Price did not object to the charge when it was first presented to the jury in the initial jury charge, specifically indicated he had no objection to the charge, and only later objected to the charge after the same instruction was repeated to the jury after it began its deliberations. Regardless, the Court of Appeals properly found the trial judge did not commit reversible error in instructing the jury on inferring malice from the use of a deadly weapon because there was no evidence presented during trial that could have reduced, mitigated, justified, or excused Price's actions, and any error was harmless in light of the overwhelming evidence of malice.**

Price contends the Court of Appeals erred in affirming his conviction. In support of that contention, Price maintains the trial judge erred in instructing the jury that malice could be inferred from the use of a deadly weapon because the evidence presented during his trial allegedly could have reduced his actions from an ABWIK to an ABHAN. Initially, any issue with the trial judge's instructions to the jury was not preserved for appellate review because Price did not object to the inference of malice charge after it was initially given, Price specifically indicated he had no objection to the trial judge's jury instructions, and Price only objected after the inference of malice charge was presented to the jury for a second time after the jury already began deliberating. However, regardless of any issue preservation concerns, the Court of Appeals properly determined the trial judge did not commit reversible error in instructing the jury on inferring malice from the use of a deadly weapon because no evidence was presented during trial reducing, mitigating, justifying, or excusing Price's actions. Furthermore, any error was harmless in light of the overwhelming evidence of malice presented during trial. Price's petition for a writ of certiorari should be denied.

### A. Issue Preservation

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004); see also JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005).

Regarding the requirement that a timely objection be raised, a defendant must make a **contemporaneous** objection to a perceived error during trial in order to preserve the issue for further review. State v. Blalock, 357 S.C. 74, 79, 591 S.E.2d 632, 635 (Ct. App. 2003); see State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) ("A contemporaneous objection is required to properly preserve an error for appellate review."). Thus, when a perceived error arises, the defendant must object at the first opportunity to do so or the issue is waived. State v. Sullivan, 310 S.C. 311, 314, 426 S.E.2d 766, 768 (1993); see State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) ("A defendant must object at his first opportunity to preserve an issue for appellate review."); see also State v. King, 349 S.C. 142, 157, n.1, 561 S.E.2d 640, 647 (Ct. App. 2002) ("[N]o objection was made contemporaneously with this testimony so as to preserve the issue for review. King's belated objection to subsequent testimony came too late.").

In addition to the general requirements of our issue preservation rules, the South Carolina Rules of Criminal Procedure also provide specific guidance in regards to raising

and preserving an objection to a jury charge. See Rule 20, SCRCrimP (outlining the requirements for requesting jury instructions and objecting to a jury charge). Pursuant to our criminal procedure rules, a defendant must object to the jury charge as given or request an additional charge when afforded the opportunity to do so in order to properly preserve an objection to a charge. State v. Stone, 285 S.C. 386, 387, 330 S.E.2d 286, 287 (1985); see Rule 20(a), SCRCrimP ("All requests for legal instructions to the jury shall be submitted at the close of the evidence, or at such earlier time as the trial judge shall reasonably direct."); Rule 20(b), SCRCrimP ("Notwithstanding any request for legal instructions, the parties shall be given the opportunity to object to the giving or failure to give an instruction before the jury retires, but out of the hearing of the jury. Any objection shall state distinctly the matter objected to and the grounds for objection."). "The rule in this State is firmly established that failure to object to a charge, or failure to request an additional charge when the opportunity is afforded, constitutes a waiver of any right to complain on appeal of an alleged error in the charge." State v. Williams, 266 S.C. 325, 335, 223 S.E.2d 38, 43 (1976); see Rule 20(b), SCRCrimP ("Failure to object in accordance with this rule shall constitute a waiver of objection."). "[T]he right to have the law declared may be waived by the parties and, ordinarily, silence in the face of an omission from, or error in the charge amounts to waiver." Williams, 266 S.C. at 335, 223 S.E.2d at 43.

In the case sub judice, Price failed to preserve any issue with the inference of malice jury charge by not timely and contemporaneously objecting to the jury charge before or after it was given and by affirmatively stating he had no objection to the charge. During the charge conference on the potential jury instructions to be given, Price did not raise any issue in regards to the inclusion of or impropriety of a charge on the jury's

ability to potentially draw an inference of malice from the use of a deadly weapon at the time the trial judge discussed the ABWIK charge he intended to give. Subsequently, after the inference of malice charge had been presented to the jury, the trial judge inquired if Price had any objection to the jury instructions, and Price indicated he did not. See State v. Armstrong, 263 S.C. 594, 600, 211 S.E.2d 889, 892 (1975) ("At the conclusion of the charge, an opportunity was afforded to counsel to make any objections thereto. No objection was made that the instructions given were inadequate nor were any additional requests made to the court. The failure to timely request a specific charge or charges constituted a waiver of any right to complain on appeal of asserted errors in the charge."); see also State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007) (finding any issue with the admission of a challenged piece of evidence was waived where Dicapua's counsel specifically stated he had no objection when the evidence was introduced during trial). By failing to object to the inference of malice instruction before or after the charge had been given and by allowing the jury to retire and begin deliberations without objection, Price waived any issue with the inference of malice instruction. See Rule 20(b), SCRCrimP ("Failure to object in accordance with this rule shall constitute a waiver of objection.").

Subsequently, after the jury was instructed and began its deliberations, the jury submitted a request necessitating further instruction on the ABWIK charge. Before bringing the jury back out, the trial judge indicated he intended to re-instruct the jury exactly as he did before and offered Price an opportunity to raise any exceptions to the proposed re-instructions. Once again, Price did not object or raise any issue in regards to the inference of malice charge that had already been presented to the jury. Thereafter, the trial judge re-instructed the jury on ABWIK **exactly as he had done during the initial**

**jury charge** and again instructed the jury on inferring malice. Only after the trial judge had instructed the jury on inferring malice for the second time did Price raise an objection to the charge. Thus, at the point in trial Price finally objected to the inference of malice charge, the proper time to raise a timely objection to that instruction had long since passed from both a procedural and practical standpoint, particularly in light of the fact the jury had begun deliberations and twice heard the allegedly improper instruction prior to Price's first and only objection.[7] See, e.g., State v. Williams, 319 S.C. 54, 56, 459 S.E.2d 519, 520 (Ct. App. 1995) ("The trial court had no obligation in this case to give the instruction that Williams requested because the time for Williams to properly request a particular instruction had passed."). Therefore, Price's untimely objection was insufficient to preserve the issue for appellate review. Cf. State v. Wallace, 392 S.C. 47, 56, 707 S.E.2d 451, 455 (Ct. App. 2011) ("This issue is not preserved because the evidence had already been presented to the jury before Wallace made any objection to it.")

Because Price did not object to the inference of malice jury charge when it was initially given, Price waived any issue he might have had with that charge. See State v. Smith, 279 S.C. 440, 442, 308 S.E.2d 794, 794-795 (1983) ("Error is claimed by reason of the trial judge's charge to the jury concerning the implication of malice from the use of

[7] At the time Price first raised an objection to the inference of malice charge, the trial judge would have been unable to correct any error with the charge assuming one had occurred because he could not have simply told the jury that they could not infer malice from the use of a deadly weapon since that would **not** have been a correct statement of the law. See State v. Belcher, 385 S.C. 587, 612, n. 9, 685 S.E.2d 802, 810 (2009) (instructing that the solicitor is not prohibited from arguing to the jury that malice should be inferred from the use of a deadly weapon). Thus, the untimely nature of Price's objection left the trial judge with no way to cure the error even assuming that one had occurred. That fact is one of the precise reasons our issue preservation rules require a timely and contemporaneous objection in order to preserve an issue for appellate review. See Hoffman, 312 S.C. at 393, 440 S.E.2d at 873 ("A contemporaneous objection is required to properly preserve an error for appellate review."); see also Wallace, 392 S.C. at 56, 707 S.E.2d at 455 ("Corporal Crompton had already testified without objection that Wallace made the statement identifying the bag as his. As the trial judge observed during the hearing, 'I can't do anything about something that's already happened.' ").

a deadly weapon. No objection to the jury instruction was raised at trial. The question therefore is not available for our review."). Significantly, in addition to not objecting to the initial jury instructions, Price specifically assured the judge he had no objection to the charge as given, which included an instruction on the jury's ability to potentially draw an inference of malice from the use of a deadly weapon. See State v. Rios, 388 S.C. 335, 342, 696 S.E.2d 608, 612 (Ct. App. 2010) ("Even after the trial court specifically asked if there were any objections to the charges given, Rios responded, 'None.' By failing to contemporaneously object to the jury charges, Rios has waived his right to allege error on appeal."). As Price did not contemporaneously raise a timely objection to the initial jury charge, Price cannot raise an objection to the charge for the first time on appeal. See State v. Sampson, 317 S.C. 423, 427, 454 S.E.2d 721, 723 (Ct. App. 1995) (finding unchallenged rulings are the law of the case); see also Bennett v. Wilbro, Inc., 310 S.C. 371, 374, n. 1, 426 S.E.2d 812, 813 (Ct. App. 1992) ("Bennett did not object to the charge on contributory negligence; therefore, it becomes the law of the case.").

Furthermore, because Price failed to raise a contemporaneous objection to the jury charge at his first opportunity to do so, Price could not later object to the jury re-charge and use that objection to preserve his issue with an instruction already presented to the jury without objection. See Hoffman, 312 S.C. at 393, 440 S.E.2d at 873 ("A contemporaneous objection is required to properly preserve an error for appellate review. Here, the record shows no such preservation occurred. Defense counsel's lone objection was well after the initial admission of the choking incident." (citations omitted)); State v. Norris, 253 S.C. 31, 40, 168 S.E.2d 564, 568 (1969) ("[T]he objection of the appellant upon the stated ground came too late because it was made after the objectionable evidence had been admitted."). A ruling to the contrary would mean Price was permitted

to remain silent following the presentation of an allegedly objectionable charge and then withhold his objection until after the jury began deliberations and the trial judge had no way to correct the perceived error with the charge other than by granting a mistrial. Cf. State v. Lynn, 277 S.C. 222, 226, 284 S.E.2d 786, 789 (1981) ("Failure to contemporaneously object to the question now advanced as prejudicial cannot be later bootstrapped by a motion for a mistrial. Any objection to the testimony was waived."). However, such a result is simply not permitted. See Rule 20(b), SCRCrimP (identifying the appropriate time to object to an allegedly-improper jury instruction and instructing that the failure to object in accordance with the rule constitutes a waiver of the asserted objection to the jury instruction); see, e.g., State v. Penland, 275 S.C. 537, 538, 273 S.E.2d 765, 766 (1981) ("One may not preserve a vice until he learns what the result will be and then, take advantage of the error on appeal."). Therefore, Price's lone objection to the repetition of the inference of malice instruction in the jury re-charge did not properly preserve the issue for review because the objection was not timely and not raised at Price's first opportunity to object to the perceived error with the instruction.[8] Cf. Kosko v. Kohler, 176 Conn. 383, 390, 407 A.2d 1009, 1012 (Conn. 1978) ("The plaintiff claims error in the use of the term 'agents,' on the ground that no evidence of an agency relationship had been presented, yet the plaintiff did not object when the charge was given initially. The objection surfaced only after the recharge on the next day; **the exception was therefore not timely**." (emphasis added)).

[8] Furthermore, even if the issue with the jury re-charge was properly preserved despite the fact Price raised no objection to the inference of malice charge at his first opportunity to do so, Price could have suffered no prejudice from this alleged error because the allegedly improper charge had already previously been presented to the jury without objection in the initial charge, which precluded Price from challenging the earlier unobjected-to identical instruction. Cf. State v. McHoney, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2001) (holding an issue with allegedly bolstering testimony was not preserved because a contemporaneous objection was not raised to the testimony during redirect examination and further finding the challenged testimony was merely cumulative to other identical testimony from the same witness).

In this case, Price waived any objection to the trial judge's jury instructions on inferring malice from the use of a deadly weapon because: (1) Price did not contemporaneously object to the charge at his first opportunity to do so; (2) Price specifically indicated he had no objection to the trial judge's jury instructions that included the subsequently-challenged charge; and (3) Price did not object to the charge before the jury retired and began its deliberations. Because Price failed to properly preserve his objection to the jury charge, Price was not entitled to any relief on appeal even if the trial judge erred in instructing the jury, and the issue should not have been addressed on appeal. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("An issue that was not preserved for review should not be addressed by the Court of Appeals[.]"). Accordingly, the decision of the Court of Appeals affirming Price's conviction was correct. Price's petition for a writ of certiorari should be denied.

**B. Propriety of the Jury Charge on the Inference of Malice**

The law to be charged is determined by the evidence presented at trial. State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009). The trial judge is required to charge only the current and correct law of South Carolina. State v. Buckner, 341 S.C. 241, 246, 534 S.E.2d 15, 18 (Ct. App. 2000). "No instruction should be given by the trial judge, at the request of the appellant, which tenders an issue which is not presented or supported by the evidence." State v. Weaver, 265 S.C. 130, 137, 217 S.E.2d 31, 34 (1975).

The offense of ABWIK is defined as "an unlawful act of a violent nature to the person of another with malice aforethought, either express or implied." State v. Kinard, 373 S.C. 500, 503, 646 S.E.2d 168, 169 (Ct. App. 2007); see State v. Sutton, 340 S.C. 393, 396, 532 S.E.2d 283, 285 (2000) ("ABIK is an unlawful act of violent nature to the

person of another with malice aforethought, either express or implied. The often cited language to describe ABIK is: if the victim had died from the injury, the defendant would have been guilty of murder. Furthermore, a specific intent is not required to commit ABIK." (citations omitted)). "Malice is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong." State v. Zeigler, 364 S.C. 94, 103, 610 S.E.2d 859, 864 (Ct. App. 2005). The four possible mental states encompassed by malice aforethought are: (1) an intent to kill; (2) an intent to inflict grievous bodily harm; (3) extremely reckless indifference to the value of human life; and (4) an intent to commit a felony. Kinard, 373 S.C. at 503-504, 646 S.E.2d at 169.

In order to establish the offense of ABWIK, there must be evidence demonstrating a general intent to kill. See State v. Foust, 325 S.C. 12, 15, 479 S.E.2d 50, 51 (1996) ("Although the cases indicate that **some** intent must be demonstrated before an accused may be convicted of ABIK, we do not believed they stand for the proposition that a **specific** intent to kill must be shown. We hold that it is sufficient if there is shown some general intent, such as that heretofore applied in cases of murder in this State." (emphasis in original)); State v. Coleman, 342 S.C. 172, 176, 536 S.E.2d 387, 389 (Ct. App. 2000) ("ABIK also requires the intent to kill. However, this intent need only be a general intent, demonstrated by acts and conduct from which a jury may naturally and reasonably infer intent." (citations omitted)). Intent may be proven by evidence of the character of the means or instrument used, the manner in which the instrument was used, the purpose to be accomplished, and the resulting injuries to the victim. Coleman, 342 S.C. at 176, 536 S.E.2d at 389.

Similarly, ABHAN is defined as an unlawful act of violent injury accompanied by circumstances of aggravation. State v. Geiger, 370 S.C. 600, 605, 635 S.E.2d 669, 672

(Ct. App. 2006). "As an element of ABHAN, circumstances of aggravation include, inter alia, the use of a deadly weapon, intent to commit a felony, infliction of serious bodily injury, great disparity in the ages or physical conditions of the parties, differences in gender, taking indecent liberties or familiarities with a female, purposeful infliction of shame and disgrace, and resistance to lawful authority." Id. at 605-606, 635 S.E.2d at 672. "An ABHAN charge is appropriate when the evidence demonstrates the defendant **lacked the requisite intent to kill**." Coleman, 342 S.C. at 176, 536 S.E.2d at 389 (emphasis added).

Shortly before Price's trial, this Court revisited the issue of whether a trial judge should instruct the jury on inferring malice from the use of a deadly weapon in State v. Belcher, 385 S.C. 597, 600, 685 S.E.2d 802, 803 (2009). In Belcher, conflicting evidence was presented during Belcher's trial regarding the circumstances under which Belcher shot and killed the victim. Id. at 601, 685 S.E.2d at 804. One view of the evidence suggested Belcher shot the victim without justification or excuse while another view of the evidence suggested Belcher shot the victim only after the victim confronted him with a gun without provocation. Id. The trial judge instructed the jury on inferring malice from the use of a deadly weapon over Belcher's objection, and Belcher was convicted of murder. Id. On appeal, Belcher contended the trial judge erred in instructing the jury on the inference of malice in light of the fact the jury was also instructed on the law of self-defense. Id. This Court ultimately agreed, instructing:

> [W]here evidence is 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, juries shall not be charged that malice may be inferred from the use of a deadly weapon. The permissive inference charge concerning the use of a deadly weapon remains a correct statement of the law where the only issue presented to the jury is whether the

> defendant has committed murder (or assault and battery with intent to kill).

Id. at 612, 685 S.E.2d at 810. Additionally, this Court noted any error in the giving of the inference of malice charge could be harmless where overwhelming evidence of malice was presented apart from the use of a deadly weapon. Id. at 611, 685 S.E.2d at 809.

In the case at bar, the Court of Appeals correctly concluded the trial judge committed no reversible error in charging the jury on inferring malice from the use of a deadly weapon because there was no evidence presented during trial that would have reduced, mitigated, excused, or justified the assault and battery committed by Price. Furthermore, notwithstanding any alleged error in the jury instructions, the evidence of malice was so overwhelming that any error was harmless. Assuming the jury concluded from the evidence that Price was involved in the incident, the only conclusion that could be drawn from the facts presented was that Price acted with malice during the shooting. Therefore, the trial judge did not commit reversible error in instructing the jury on inferring malice from the use of a deadly weapon.

Viewing the evidence presented during trial, the relevant facts surrounding the shooting indisputably established Deon was shot in the neck from close range. The gunshot to Deon's neck instantly paralyzed him, Deon's injuries were so severe his spinal cord was exposed, and the doctor who treated him confirmed the injuries were potentially fatal had Deon not received prompt medical treatment. Based on the extent of Deon's injuries and the fact he was shot from close range, the evidence regarding Deon's injuries only supported a conclusion that the shooter intended to maliciously kill Deon or to wrongfully inflict grievous injuries upon him through the shooting. See, e.g., State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998) (holding that malice is "the wrongful

intent to injure another and indicates a wicked or depraved spirit intent on wrongdoing"); Foust, 325 S.C. at 16, n. 4, 479 S.E.2d at 52 ("[E]vidence of the character of the means or instrument used, **manner in which it was used**, purpose to be accomplished, **resulting wounds or injuries**, etc., are admissible to show intent with which the assault was committed." (emphasis added)).

Furthermore, the testimony presented during trial did not support a finding that Deon or Deverol did anything to provoke Price and his co-defendant into shooting them. Instead, the evidence established Price shot Deon in the stairwell of Deon and Deverol's apartment after Price forced his way into their home **during the commission of a first-degree burglary**.[9] Accordingly, based on the nature of the shooting, the manner in which the shooting was committed, and the fact the shooting occurred during the commission of a burglary, the evidence presented only rationally and reasonably supported an inference that Price possessed malice aforethought at the time he shot Deon in the form of either an intent to kill Deon, an intent to grievously injure Deon, or an intent to commit a felony. For that reason, there was no evidence from which the jury could conclude Price acted without malice when he committed the assault and battery during the course of the burglary. Cf. Coleman, 342 S.C. at 177, 536 S.E.2d at 389-390 (holding Coleman was not entitled to a charge on ABHAN after finding Coleman's manner of shooting the victim during the course of an armed robbery, which involved deliberately pointing the gun at the victim's head, coupled with the severity of the victim's wounds, which were nearly fatal, only supported an inference Coleman's actions were reasonably calculated to kill or cause great bodily harm).

[9] Price has not challenged his burglary conviction on appeal. See Sampson, 317 S.C. at 427, 454 S.E.2d at 723 (finding unchallenged and unappealed rulings are the law of the case). Therefore, Price's burglary conviction and sentence of life without the possibility of parole for that conviction are the law of the case.

Accordingly, even though the trial judge decided to charge the jury on ABHAN, Price was not actually entitled to the charge since there was no evidence presented from which the jury could find Price guilty of the lesser rather than the greater offense. See State v. Tyndall, 336 S.C. 8, 21, 518 S.E.2d 278, 285 (Ct. App. 1999) ("A lesser included offense instruction is required only when the evidence warrants such an instruction, and it is not error to refuse to charge a lesser included offense where **there is no evidence that the defendant committed the lesser rather than the greater offense**." (emphasis added)). As a result, since Price was not entitled to an ABHAN charge and there was no evidence presented to reduce, mitigate, excuse, or justify the assault and battery, the trial judge did not err by instructing the jury on the inference of malice, and, even if he did err, any error was entirely harmless. See Belcher, 385 S.C. at 611, 685 S.E.2d at 809 ("Errors, including erroneous jury instructions, are subject to harmless error analysis. In many murder prosecutions, as Belcher concedes, there will be overwhelming evidence of malice apart from the use of a deadly weapon." (citations omitted)).

In support of his contention the Court of Appeals erred in affirming his conviction, Price contends there was evidence presented to reduce his actions from an ABWIK to an ABHAN, maintaining the evidence presented during trial established the victims were drug-dealing gang members and had narcotics in their apartment. Price further asserts Simuel's statements to law enforcement and his family members claiming Deon and Deverol tried to set him up and rob him coupled with Malik's alleged statement to law enforcement that he observed his brothers fighting with someone in the stairwell constituted evidence of a drug deal gone wrong. Based on that evidence, Price contends without explanation that the jury could have convicted him of ABHAN instead of the greater offense of ABWIK. However, the fact the victims were drug dealers and gang

members was irrelevant to an analysis regarding whether Price possessed malice at the time of the shooting. Furthermore, the evidence presented during trial regarding the actual circumstances of the shooting wholly contradicted Simuel's conclusory, self-serving statements about a drug deal gone wrong, and these statements were unspecific and entirely uncorroborated. Accordingly, that evidence was not sufficient to establish Price was guilty of the lesser offense of ABHAN instead of ABWIK.

Price was not entitled to a charge on ABHAN because there was no evidence presented during trial to reduce, excuse, mitigate, or justify his actions in shooting Deon. Therefore, even though he received an instruction on ABHAN that he was not actually entitled to, the trial judge committed no error in instructing the jury on inferring malice from the use of a deadly weapon. Furthermore, notwithstanding any alleged errors in the jury instructions, any error was harmless in light of the fact the evidence of malice was absolutely overwhelming. See State v. Hamilton, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) ("Error is harmless when it " 'could not reasonably have affected the result of the trial.' " (quoting State v. Key, 256 S.C. 90, 93, 180 S.E.2d 888, 890 (1971)); see also State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result."). Accordingly, notwithstanding the fact Price failed to properly preserve the issue for appellate review, the Court of Appeals correctly determined that the trial judge did not commit reversible error in instructing the jury on inferring malice from the use of a deadly weapon. Price's petition for a writ of certiorari should be denied.

## CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

BY: 
Mark R. Farthing

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

January 16, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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On Writ of Certiorari to the Court of Appeals
Appeal from Beaufort County
Honorable Thomas W. Cooper, Jr., Circuit Court Judge
Appellate Case No. 2009-147286

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THE STATE,

Respondent,

vs.

DEMETRIUS UNDREUS PRICE,

Petitioner.

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**PROOF OF SERVICE**

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I, Ellen R. DuBois, 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:

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served. This 16th day of January, 2013.

Ellen R. DuBois

ELLEN R. DuBOIS
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ALAN WILSON
ATTORNEY GENERAL



January 16, 2013

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

State v. Demetrius Undreus Price – Appellate Case No. 2009-147286

Dear Ms. Hudgins:

I am enclosing two (2) copies of the Return to Petition for Writ of Certiorari, along with proof of service, in the above-referenced case.

Sincerely,

Mark R. Farthing
Assistant Attorney General
Bar Number 76901

MRF/erd
Enclosures

cc: ~~Honorable Daniel E. Shearouse (original and six enclosed)~~
Victim Services