No. 24-5727 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Jose Angel Herrera ..... Petitioner,

VS.

State of South Carolina ..... Respondent

South Carolina Supreme Court Habeas Corpus
In Original Jurisdiction / Denied

PETITION FOR WRIT OF CERTIORARI

Jose Angel Herrera, #333836
Allendale C.I. F-4-B-#60
1057 Revolutionary Trail
Fairfax, S.C. 29827

QUESTIONS PRESENTED FOR REVIEW

1.) Did the S.C. Supreme Court Error By failing to Grant Petition for Writ of Habeas Corpus in Light of Consideration; in Light of Francis vs. Franklin, Yates vs. Aiken to invalidate his Conviction due to improper Burden-Shifting Instruction, Rule of Federal Constitutional Law on the Ground that it had authority to Grant Relief due to Petitioner was on Direct Review at the time of State vs. Belcher which merely an Application of governing Principle of Sandstrom vs. Montana that Due Process Clause of Fourteenth Amendment Prohibits Jury Instructions that have the effect of relieving the State of its Burden of Proof on the critical question of intent/Malice can Be inferred from use of deadly weapon in a Criminal Prosecution?

1. of 1.

LIST OF PARTIES

☑ All parties appear in the caption of the Case on the cover page

Related Cases

See: Writ of Certiorari Brief & Appendix-A hereto Attached

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TABLE OF AUTHORITIES CITED

CASES

STATUTES AND RULES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[X] For cases from **state courts**:

The date on which the highest state court decided my case was May 21, 2024
A copy of that decision appears at Appendix A - pg. 1

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved are set forth in Appendix A- And Writ of Certiorari Pages 3-14

"ON PETITION FOR A WRIT OF CERTIORARI"

PETITION FOR WRIT OF HABEAS CORPUS IN S.C. SUPREME COURT / JURISDICTION SHOULD'VE BEEN GRANTED

And the Reasons Why the

This matter is before this Honorable Court for Original Jurisdiction files pursuant to Rule 245, SCACR; S.C. Code Ann. §14-3-310; and art. I §3; which was denied on May 21, 2024; Now Petitioner Seeks Writ of Certiorari

STATEMENT OF THE CASE

Jose Angel Herrera (hereinafter "petitioner") was indicted during the October, 2007 term of the Beaufort County Grand Jury for murder (2007-GS-07-1921) and a related weapons charge (2007-GS-07-1922). On March 16, 2009, Petitioner was tried before the Honorable G. Thomas Cooper, Jr., and a jury. Petitioner was represented by Lauren Carroway, Esquire and Gene Hood, Esquire. Petitioner was subsequently found guilty and Judge Cooper imposed a sentence of life without parole and five years concurrent for possession of a weapon during the commission of a violent crime.

A timely Notice of Appeal was perfected in the South Carolina Court of Appeals. Petitioner was represented by Robert M. Dudek, Esquire, South Carolina Office of Appellate Defense. The Court of Appeals affirmed Petitioner's convictions and sentences in an unpublished opinion, State v. Herrera, Op. No. 2011-op-354 (Ct. App. June 20, 2011).

A timely Notice of Appeal was perfected in the South Carolina Court of Appeals. Petitioner was represented my Robert M. Dudek, of the South Carolina Office of Appellate Defense. The Court of Appeals affirmed Petitioner's convictions and sentences in an unpublished opinion, State v. Herrera, Op. No. 2011-op-354 (Ct. App. June 20, 2011).

Petitioner filed an application for post-conviction relief ("PCR") dated December 14, 2011 (2011-cp-07-5302) raising the following allegations:

(1) Ineffective Assistance of Counsel:

(a) counsel failed to argue Applicant's first and second version of events as a basis for requesting involuntary manslaughter and preserving the issue for appeal.

(b) counsel failed to object to certain portions of the solicitor's closing argument.

(c) counsel failed to move for a change of venue.

(d) "Doyle violation

(2) The Stated failed to produce all necessary ingredients for the conviction of murder defined in Section 16-3-10.

(3) Court erred in admitting photographs.

(4) Court erred in denying request for jury instructions.

On April 2, 2013 an evidentiary hearing was held before the Honorable Perry M. Buckner. Ashleigh Wilson represented the State. Dudley b. Ruffalo represented the Petitioner. On May 2, 2013 Judge Buckner dismissed Petitioner's PCR application.

Petitioner timely filed a petition for writ of certiorari from the denial of his application for PCR. Petitioner was represented by David Alexander, of the South Carolina Office of Appellate Defense. Petitioner raised the following issues:

(1) Trial counsel was ineffective for failing to object to a jury charge that malice could be inferred from the use of a deadly weapon where, if the issue had been preserved, Petitioner would have received the benefit of State v. Belcher, 3885, C. 597, 685 S.E. 2d 802 (2009) on direct appeal.

(2) Trial counsel was ineffective for failing to obtain a jury instruction for voluntary manslaughter and preserve the request for a charge for appellate review.

(3) Trial court erred in admitting photographs of holes in the walls not relevant to the shooting and calculated to be an impermissible inference Petitioner had a violent character.

On May 30, 2016, the Honorable Margarent B. Seymour, United States District Court Judge granted the State's motion for summary judgment and dismissed the petition

for writ of habeas corpus with prejudice and denied a certificate of appealability. On October 16, 2016 Petitioner filed an appeal with the Court of Appeals for the Fourth Circuit. On October 20, 2016, the Fourth Circuit denied certificate of appealability.

A petition for writ of certiorari was filed in the United States Supreme Court. On June 5, 2017, the petition was denied.

Petitioner filed a petition for writ of habeas corpus in the Court of Common Pleas of Beaufort County on June 25, 2021, raising the following issues:

(1) Trial counsel was ineffective for failing to preserve the Belcher issue.

(2) Appellate counsel was ineffective for failing to incorporate the issue while his case remained pending on direct review.

(3) The PCR court erred in not making specific findings of fact and conclusions of law on the record, consistent with the PCR Act.

The Honorable Carmen T. Mullen, Chief Administrative Judge-Common Pleas for the Fourteenth Judicial Circuit dismissed the petition September 14, 2023.

Petitioner has made a prima facie showing that all available remedies have been exhausted relating to this allegation. No other remedy remains available in state court except for petition for writ of habeas corpus in the original jurisdiction of this court, upon which this court may remand, S.C. Supreme Court denied Writ on May 21, 2024; Petitioner seeks review now on U.S. Supreme Court Writ of Cert.

REASONS WHY THIS WRIT SHOULD BE GRANTED IN THE UNITED STATES SUPREME COURT ON WRIT OF CERTIORARI

Applicability of Belcher and the relation to Petitioner in the Post-Conviction Relief Stage.

Foremost, S.C. Code Ann section 17-27-60(6)(b) specifies that the Act "[C]omprehends and take place of all other common law3, statutory or other remedies heretofore available for challenging the validity of the conviction and sentence. It [Act] shall be used exclusively in place of them.

In Belcher this Court held "Because our decision represents a clear break from our modern precedent today's ruling is effective in this case and for all cases which are pending on direct review or not yet final where the issue is preserved. Furthermore, this Court created an impassable hurdle for Petitioner to address this burden-shifting jury charge in the statutory remedy (S.C. Code Ann. § 17-27-10 et seq.) created by South Carolina Legislature by holding "Our ruling, however, will not apply to conviction challenged on post-conviction relief." In its analysis, this Court relied on Teague v. Lane, 489 U.S. 288 (1989) as an applicable guideline in which Petitioner's claim should be preserved for collateral review as to retroactivity. As the date of the Belcher decision (October 12, 2009), if the matter was not properly preserved; or conviction had reached its finality, then the issue of retroactivity was mute.

Petitioner was tried March 16-20, 209. A timely notice of appeal was filed. Petitioner's direct appeal was pending when the Belcher opinion came down and his convictions were affirmed in State v. Herrera, Op. No. 2011-Up-354 (Ct. App. June 30, 2011).

Although counsel is not required to be clairvoyant concerning charges in the law, it was common knowledge amongst South Carolina trial attorneys that the permissive inference of malice from the use of a gun charge was pending before the South Carolina Supreme Court. Actually, the permissive inference of malice from the use of a deadly weapon goes back to Sandstorm v. Montana, 442 U.S. 510 (1979), Yates v. Evatt, 500 U.S. 391 (1991) and Francis v. Franklin, 471 U.S. 307 (1985).

Given the chronological sequence Petitioner's case with the Belcher proceedings, where trial counsel did not raise the proper objection, direct appeal is not a proper remedy in which to challenge the effectiveness of trial counsel's performance duri8ng the trial stage but such a claim is reserved exclusively fopr post-conviction reiief proceedings, see, State v. Kornahrens, 290 S.C. 281, 350 S.E. 2d 180 (1980)(ineffective assistance of counsel at the trial level is an issue which may be asserted only in proceedings under

Post-Conviction Procedures Act, and the issue is inappropriate for review on direct appeal.) Petitioner's direct appeal was not decided until June 30, 2011.

Petitioner filed an application for post-conviction relief on December 11, 2014. In Petitioner's laymen-terms, he raised trial counsel was ineffective for failure to object to a bad malice instruction. Judge Buckner's May 13, 2013 order of dismissal found that the jury charge given in Petitioner's trial was the standards malice charge given in South Carolina and was not objectable. Post-conviction counsel did not amend the PCR nor file a Rule 59(e) motion or any other post-trial motion in this matter. Petitioner was not able to preserve the issue for federal review.

I. The failure to apply the unconstitutional jury instruction on the permissive inference of malice from the use of a gun holding in State v. Belcher, or in the alternative, apply Sandstorm v. Montana; Yates v. Evatt; Francis v. Franklin; and State v. Elmore to Petitioner's case results in a fundamental miscarriage of justice and offends the principal bedrock of the Due Process Clause of the Fourteenth Amendment.

During closing argument, to the Solicitor asked the jury, "Malice. What is malice?" App. 353 1.1.7-11. He then told the jury, " The determination you have before you is whether or not when Jose Herrera shot and killed his wife there was malice." App. 353, 1.1.12-14. Immediately following telling the jury their task, the solicitor told them they could infer malice from the use of a deadly weapon:

Now there's a number of ways in South Carolina that you can determine that. Number one, use of a deadly weapon. Did Jose Herrera use a pistol when he shot and killed Katherine Herrera in the back of her head? You may use that determine his malice. App. 353, 1.1.15-19.

Petitioner admitted shooting in closing argument, but argued that it was not done with malice. He never intended to pull the trigger of the gun that killed his wife. App. 362, 1.1.4-8. App. 362, 1.1.16-23; App. 363, 1.1.1-3. App. 364, 1.1.4-5.

Petitioner called 911 to report that his wife had been shot in the head. App. 305, 1.1.16-21. Petitioner's wife was fund in their bathroom. App. 306, 1.1.9-19. Petitioner gave several versions of the evening's events and he repeatedly and adamantly denied intentionally firing the gun and professed that he loved his wife. App. 307, 1.1.4-9, App. 389, 1.1.7-16, App. 312, 1.1.9-10.App. 313. 1.1.7-20, App. 319, 1.1.19-25, App. 320, 1.1.4-321, 1-15, App. 324, 1.1.21-326, 1.5. App. 328, 1.1.2-25. App. 328, 1.19-329, 1.1.9-15, App. 331, 1.25-332, 1.3. App. 1.21-332, 1-10. The trial court charged the jury: " The law says that if one intentionally kills another with a deadly weapon, the implication of malice may arise." App. 373, 1.1.21-22. The trial court further charged: "If you find evidence supports a presumption of malice, that presumption would be rebuttable and is always fir the jury to determine from all the evidence whether or not malice has been proved beyond a reasonable doubt." App. 374, 1.1.4-7. Trial counsel did not object to these instructions after the court completed its charge.

In Sandstorm v. Montana, 442 U.S. 510 (1979), the united States Supreme Court pronounced that the Due Process Clause of the Fourteenth Amendment to the United States Constitution is violated when a jury charge creates a mandatory presumption and impermissibly shifts the burden of proof to the defendant, id. at 524 also holding that "burden-shifting presumption[s]" or "conclusive presumption[s]" deprive a defendant of the "due process of law" and are therefore unconstitutional; see also Mullaney v. Wilbur 421 U.S. 684, 703-04 (1975) (holding that the "Due Process Clause" forbids a State from placing the burden on the accused to prove his actions reduced the crime from "murder to manslaughter"). Taking the Supreme Court's lead in Sandstorm, it is evident that the Due Process Clause, by virtue of the Fourteenth Amendment of the United States Constitution, Protects a criminal defendant's right to be proven guilty, not to have to prove his innocence.

In State v. Woods, 282 S.C. 18, 316 S.E. 2d 673 (1984). Woods argued that the instruction given to the jury constituted a mandatory presumption rather than a

permissive inference. This court agreed with Woods and held the instruction constituted irreversible error, relying upon State v. Elmore, 279 S.C. 417, 308 S.E. 2d 781 (1983). Woods' trial was held prior to the Elmore opinion in which the Court suggested an instruction on implied malice was published. However, our Supreme Court applied the Elmore decision retroactively in State v. Jennings, 280 S.C. 62, 309 S.E. 2d 759 (1983); and State v. Llewellyn, 281 S.C. 199, 314 S.E. 2d 326 (1984).

When analyzing the question as to retroactivity, this Court in Talley V. State, 371 S.C. 535, 640 S.E. 2d 878 (2007), examined the effect of Alabama v. Shelton, 535 U.S. 654 (2002) upon the issue relating to the right to counsel being deprived a criminal defendant. Talley filed a post-conviction application within the one-year time period prescribed by S.C. Code Ann. §17-27-45(b). Respondents argued the Court should apply both Teague v. Lane, 489 U.S. 288 (1989) and State v. Jones, 312 S.C. 100, 439 S.E, 2d 282 (1994) to determine whether Shelton should be applied retroactively on collateral review, This Court had already struck the cord as to the applicablility of the Belcher claim, as relates to this case in the PCR proceedings.

In Talley, this Court found that when reaching a decision pertaining to a federal constitutional right, such as the right to counsel, that being deprived of a criminal defendant, it was required to follow the United State's Supreme Court's decision on retroactivity, see Am. Trucking Assn's Inc. v. Smith, 496 U.S. 167, 178 (1990) ("In order to ensure the uniform application of decisions construing constitutional requirements and to prevent states from denying or curtailing federally protected rights we have consistently required that State court adhere to our retroactivity decisions.); see also State v. Moons 367 S.C. 374, 626 S.E. 2d 348 (2006) (applying Jones in determining whether State v. Gentry, 363 S.C. 93, 610 S.E. 2d 494 (2005) should be applied retroactively; State v. Hill, 361 S.C. 297, 604 S.E. 2d 696 (2004) (applying Jones in determining whether State v. Sutton, 340 S.C. 393, 532 S.E. 2d 283 (2000) (should be applied retroactively); and Gibson v. State, 355 S.C. 429, 586 S.E. 2d 119 (2003) (applying

Teague to determine whether Sandstorm v. Montana, 442 U.S. 510 (1979) should be applied retroactively on collateral review)."

In general, the question of whether a decision announces a new rule should be addressed at the time of the decision, Teague, 489 U.S. at 300. A case announces a new rule when it breaks new ground or imposes new obligations on the State of Federal Government. To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final, Id. At 301. A conviction became final once the judgment is rendered; the defendant exhausts all direct appeals, and the time for filing a petition for certiorari on direct appeal lapses, Id. At 295 (citing Allen v. Hardy, 478 U.S. 255, 258 n.1 (1986).

As a general rule, new procedural rules should not be applied retroactively to cases on collateral review, unless the new rule falls within one or two exceptions to that general rule, Teague, 489 U.S. at 305. The first exception is when the rule "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, "Id. At 311. The second exception is reversed for watershed rules of criminal procedure" which implicated the fundamental fairness and accuracy of the possibility that someone convicted with the invalidated procedure might have been acquitted otherwise. Schiro v. Summerlin, 542 U.S. 348, 352 (2004). To qualify under this exception, the procedural rule must "not only improve accuracy, but also 'alter our understanding of the bedrock procedural elements' essential to the fairness of a proceeding," Sawyer v. Smith, 497 U.S. 227, 242 (1990) (quoting Teague, 489 U.S. at 311).

The position taken by this petitioner as to the applicability of the "new rule" created by Belcher is that the second exception applies to [his} case. The watershed rule of criminal procedure is applicable to this case due to the right to a jury charge or instruction which does not create a mandatory presumption of malice from the use of a deadly weapon. Such a charge undeniably implicates fundamental fairness and accuracy

of the proceeding, see e.g., Gilbert v. Moore, 134 F 3d 642, 647 (4th Cir. 1998) (instruction that malice is presumed from "willful, deliberate and intentional doing of an unlawful act without just cause or excuse" and from use of a deadly weapon unconstitutionally shifted the burden of pervasion on elements of intent).

As demonstrated by the record, the direct appeal in which the Petitioner was pursuing had been filed prior to this Court's decision in Belcher. Petitioner's direct appeal was not decided until June 30, 2011, when the Court of Appeals issued its unpublished opinion.

When deciding the issue of Belcher, this Court examined two cases which gave evidence in line with that decision. Those two cases are relevant to this Court's to this Court's holding: "Because our decision represents a clear break from our modern precedent today's ruling is effective in this case and for all cases pending in direct review or not yet final where the issue is preserved, "see Griffith v. Kentucky, 479 U.S. 314, 328 (1987) ("holding that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases.... Pending on direct review or not yet final"); and Harris v. State, 543 S.E. 2d 716, 717-18 (Ga. 2001) (reversing a murder conviction and overruling precedent that approved inference of intent to kill from use of a deadly weapon and applying new rule "to all cases in the pipeline"- e.g., cases which are pending on direct review or not yet final"). Petitioner's case was in the "pipeline" at the time of the belcher decision.

Petitioner submits that State v. Belcher is not new law, but acknowledgement by the Supreme Court of South Carolina that South Carolina's Courts have failed to follow the United States Supreme Court holdings in Sandstorm v. Montana; Francis v Franklin; Mukllaney v. Wilbur; and Yates v. Evatt.

In a long line of cases culminating in Yates v. Evatt, the United States Supreme Court has recognized that the prosecution "must prove each and every element" of the crime charged beyond a reasonable doubt, In re Winship, 397 U.S. 158 (1970). The burden of proof of any element cannot be shifted to a defendant, because in doing so

decreases the State's burden of proving the crime beyond a reasonable doubt.

In 1975, the United States Supreme Court considered a Maine rule that required the defendant charged with murder to prove that he acted in the heat of passion in order to reduce the homicide to manslaughter. The Court determined that a state could not shift the burden of proof on [any element] of the crime to defendant, see Mullaney v. Wilbur, 421 U.S. 684, 701 (1985). The Court found the risk to be intolerable and reversed Wilbur's conviction.

The Supreme Court overturned another conviction in Sandstorm v. Montana, 442 U.S. 510 (1979). Montana law provided that a person charged with deliberate homicide when that person knowingly caused the death of another and at Sandstorm's trial, the judge instructed the jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts," Sandstorm, 442 U.S. at 512.

After considering Sandstorm's argument the court agreed that the effect of that was to shift the burden of proof to Sandstorm on a critical element of the offense, "that he purposely or knowingly killed another person." The Court noted again that the State must Prove every element of the crime charged beyond a reasonable doubt and that the defendant cannot be required to prove any element of his defense or disprove any element of his crime. A reasonable juror might have interpreted the instruction either as a conclusive presumption or as a burden-shifting presumption, but either interpretation, the Court rendered the instruction unconstitutional.

The Supreme Court was confronted with another burden-shifting jury instruction in Francis v. Franklin, 471 U.S. 307 (1985). The Court found that the used of a rebuttable presumption was also unconstitutional for the same reasons set forth in Sandstorm. The defendant was charged with malice murder, and his sole defense was that he lacked the requisite intent to kill. The Court focused on and held unconstitutional two sentences in the trial court's jury instruction: "the acts of a person of sound mind and discretion is presumed to be the product of the person's will, but the presumption may be rebutted. A

person of sound mind and discretion is presumed to intend the natural and probable consequences of is acts, but the presumption may be rebutted, "Francis v. Franklin, 471 U.S. at 311.

The Franklin Court evaluated both conclusive and rebuttable mandatory presumptions and concluded that both place the burden of persuasion on the presumed element by instructing the jury that it must find the presumed element unless the defendant persuades the jury not to make the finding, Id. At 355, "[s]uch shifting of the burden of persuasion with respect to a fact the state deems so important that it must either be proved or presumed is impermissible under the Due Process Clause, "see, also, Patterson v. New York , 432 U.S. 197, 215 (1977). As part of its decision, the court refused to find that a presumptive jury instruction is cured if the jury is told that the presumption may be rebutted by the defendant. The Court noted that such an instruction does not cure the violation of the Due Process Clause because telling the jury the defendant may rebut the presumption only serves to shift the burden of proof more firmly to the defense.

In deciding Francis v. Franklin, the Court relied on its decision in Mullaney v. Wilbur, just as the Court did in Sandstorm. But more importantly, all three cases relied on the bedrock constitutional principals set forth in In re Winship: "that a state must prove every fact of every element of the crime charged beyond a reasonable doubt, and mandatory burden-shifting jury instructions relieves the State of the burden of proof in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Shortly after Franklin, Dale Robert Yates was convicted of murder and sentenced to death in South Carolina. His direct appeal was denied at every appellate stage. State v. Yates, 310 S.E. 2d 805 (S.C. 1982), cert. denied, Yates v. South Carolina, 462 U.S. 1124 (1983)

Yates filed a petition for writ of habeas corpus in this Court in which he claimed

the trial court erred in charging the jury "that malice is implied or presumed from the use of a deadly weapon" because that presumption relieves the State of its burden of proof of an essential element of the crime. That petition was summarily denied. Yates then filed an appeal to the United States Supreme Court in 1985. The Court remanded his case back to this Court for reconsideration in light of the decision in Francis v. Franklin, see Yates v. Aiken, 474 U.S. 896 (1985). On remand, the Supreme Court of South Carolina noted that the jury instructions from the same infirmities present in State v. Elmore, 308 S.E. 2d 781 (1983) and addressed in Francis v. Franklin.

Yates again appealed to the United States Supreme Court. In a second opinion issued in early 1998, the Court briefly recounted the procedural history of Yates against the background of the decision in Sandstorm, Elmore, Franklin, and In re Winship. The Court noted the South Carolina opinion apparently concluded that Franklin was not to be applied retroactively because it had announced a new rule of law. The Court disagreed saying Franklin was merely an extension and reaffirmation of its prior decisions. The Yates opinion concluded, since [South Carolina Supreme Court] has considered the merits of the federal claim, it therefore has the duty to grant the relief that federal law requires, see Yates v. Aiken, 484 U.S, 211, (1988). Again, this Court refused to vacate Yates conviction, finding the jury charge was harmless error. See Yates v. 391 S.E. 2d 530 (1989). Once again, Yates appealed this denial to the United States Supreme Court. In its third review of his conviction, the Court set aside Yates conviction without a third (underlining for added emphasis) third remand to this Court. See Yates v. Evatt, 500 U.S. 391 (1991).

FUNDAMENTAL FAIRNESS REQUIRES APPLICATION OF BELCHER IN THIS MATTER

Petitioner argued that trial counsel was ineffective for failing to object to the bad malice instruction at the PCR evidentiary hearing. The PCR judge denied the claim on

the basis "that the malice instruction given was standard malice charge given in South Carolina and was not objectionable. The PCR judge never applied Sandstorm v. Montana; Francis v. Franklin; Yates v. Evatt; and Mullaney v. Wilbur in his analysis of the unconstitutional burden-shifting jury instruction. Appellate counsel raised Belcher in petition for writ of certiorari on the denial of PCR, in that trail counsel was ineffective for failing to object to the jury charge and presume for appellate review.

The trial court's malice charge "The law says that if one intentionally kills another with a deadly weapon, the kills another with a deadly weapon, the implication of malice may arise", and if you find evidence supports a presumption of malice, that presumption would be rebuttable and is always for the jury to determine from all of the evidence whether or not malice has been proved beyond a reasonable doubt." The testimony of the victim's thirteen year old daughter was evidence that would reduce, mitigate, the homicide. Belcher, Id. At 600, 385 S.E. 2d at 804. The petitioner's statement plus two other statements that counsel failed to argue would have reduced or mitigated the charge. The jury charge further negated the voluntary manslaughter instruction. Thus, the jury could not possibly consider voluntary manslaughter charge. The only reasonable conclusion the jury could have reached based on the trial court's charge that "malice could be inferred from the use of a deadly weapon" was that it was no doubt murder.

Based on the analysis above, there is no doubt the malice instruction given here was unconstitutional, mandatory and burden-shifting.

Such an unconstitutional malice instruction not objected to by trial counsel has been found to ineffective assistance. Carter v. State, 301 S.C. 396, 392 S.E. 2d 184 (1990) citing State v. Elmore, 279 S.C. 417, 308 S.E. 2d 781 (1983).

For the foregoing reasons set forth above, Petitioner respectfully prays this Honorable Court find that the Belcher decision will apply to Petitioner's case, as well as the United States Supreme Court precedence, to grant the writ of Certiorari and remand this matter to the lower court for determination of the merits or any other appropriate relief as

this Court deems just and equitable.

CONCLUSION

Petitioner prays this Honorable Court grant the writ of Certiorari and remand to the lower court for determination of the merits or a new trial.

Submitted this 16th day August, 2024

Respectfully Submitted,

José Angel Herrera, #333836
Allendale Correctional Inst.
Bamberg B-60
1057 Revolutionary Trail
Fairfax, S.C. 29827