

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Lancaster County

Honorable Patrick Cleburne Fant, III, Circuit Court Judge

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DEMARCUS OBRIEN FOSTER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-001688

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PETITION FOR WRIT OF CERTIORARI

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**Dec 15 2025**

S.C. SUPREME COURT

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**ISSUE PRESENTED**

Did the PCR court err in excusing trial counsel's ineffective assistance in failing to object to the lower court's improper implied malice charge by finding the matter harmless beyond a reasonable doubt?

Did the PCR court err in denying trial counsel was ineffective when he failed to object on the record to the admission of petitioner's prior record without the required judicial scrutiny under Rule 609, SCRE?

## STATEMENT

A Lancaster County grand jury indicted petitioner DeMarcus Foster for murder, possession of a weapon during the commission of a violent crime, and possession of a weapon by a convicted felon. App. 681. On March 18, 2019, petitioner was tried before the Honorable Roger E. Henderson and a jury. App. 1. By agreement of the parties, the possession of a weapon by a convicted felon charge was tried by the court. App. 23, ll. 3 – 9. Mark Grier represented petitioner. App. 1. Jarrod Fussnecker and Heather Weiss, from the Attorney General’s Office, represented the State. App. 1. The jury convicted petitioner of murder and the weapons charge. App. 667, ll. 19 – 22. Judge Henderson convicted petitioner on the felon in possession charge. App. 671, l. 17 – 672, l. 3. Pursuant to South Carolina’s recidivist statute, Judge Henderson sentenced petitioner to life imprisonment without the possibility of parole for murder, and concurrent sentences of five years’ imprisonment on the two weapons charges. App. 677, l. 17 – 678, l. 13.

On direct appeal, appellate counsel filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), asserting trial court error in admitting an alleged excited utterance as a hearsay exception. The Court of Appeals denied error in an unpublished opinion. *See State v. Foster*, No. 2019-000543 (S.C. Ct. App. Oct. 6, 2021).

Petitioner sought post-conviction relief by written application dated June 15, 2022. App. 690. An evidentiary hearing was held before the Honorable Patrick Fant on February 20, 2024. App. 715. Rodney Richey represented petitioner and D. Russell Barlow appeared on behalf of the state. App. 715.

During trial, the jury was presented with only two options: either petitioner shot McLemore without provocation and without motive or someone else fired the fatal shot and

petitioner was merely present at the scene and was being made a scapegoat. That petitioner was at the scene when McLemore was fatally shot was not disputed. McLemore was killed by a single gunshot wound to the head and the witnesses on scene reported only hearing a single shot. Most of the witnesses who were present at the shooting failed to identify the shooter. Two witnesses, Kristarius “Bree” Stevens and Ladario “Dario” Jones both identified petitioner as the shooter. Stevens indicated that petitioner spoke to folks on the porch and was drinking a beer, but then said “you’all ain’t seen nothing”, raised a revolver. and shot McLemore in the head. App. 171, ll. 1 – 14.<sup>1</sup> Jones relayed a similar story. App. 321, l. 2 – 322, l. 23.

In contrast, petitioner testified that he did not shoot McLemore, and other people were present at the scene. App. 513, l. 1 – 4. He went to the party to see his niece, but when the drinking started, he told her mother to take the child home. App. 485, l. 18 – 22. Petitioner did not know McLemore. App. 493, l. 7 – 8. Someone on the porch asked appellant for a beer. App. 490, l. 16 – 24. As petitioner reached for a beer, he heard a gunshot. App. 490, l. 16 – 491, l. 6. Petitioner then ran to his girlfriend’s car and told her “Let’s go” and they drove away from the scene. App. 491, l. 1 – 492, l. 16.

Petitioner argued trial counsel was ineffective in allowing an inferred malice charge without objection. App. 698-99. Due to the role credibility undoubtedly played in the jury’s determination, petitioner also argued trial counsel was ineffective in dealing with his prior record and in failing to secure a ruling on the admissibility of his prior convictions under Rule 609, SCRE. App. 700.

Based upon error by the PCR court on both issues, this Petition for certiorari follows.

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<sup>1</sup> Stevens contradicted himself on whether he actually saw the shooting. App. 177, l. 22 – 178, l. 8.

## ARGUMENT

I. The PCR court erred in excusing trial counsel's ineffective assistance in failing to object to the lower court's improper implied malice charge by finding the matter harmless beyond a reasonable doubt?

A. How the matter was addressed at PCR.

Trial counsel admitted he made no objection to the trial court's instruction on implied malice.

Malice may be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon.

A deadly weapon is an article, 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 in each case.

App. 662, ll. 9 – 16.

Petitioner asserted trial counsel erred in allowing an inferred malice charge. App. 698; 718.

B. How the PCR court ruled.

The PCR court found trial counsel ineffective in handling the inferred malice jury instruction.

Turning to Applicant's allegation Trial Counsel should have objected based on Gibson<sup>2</sup>, this Court finds that Trial Counsel was deficient for failing to object on this basis. The trial court's charge completely omitted the required permissive language from

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<sup>2</sup> Gibson v. State, 416 S.C. 260, 786 S.E.2d 121 (2016).

Elmore,<sup>3</sup> similar to Gibson. Trial Counsel should have objected to the malice charge, as it constituted burden shifting, and therefore, he was deficient.

App. 766.

Despite this admitted deficiency, the PCR court found “Trial Counsel's failure to object to the omission of the permissive language [from Gibson] was harmless error, as there was overwhelming evidence of malice.” App. 767.

Crucially, the improper implied malice charge used against petitioner omitted any balancing with the general burden of proof required to convict, so as was required at the time of his trial by this Court’s decision in State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983)

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 taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

Id. at 421, 308 S.E.2d at 784.

### C. How the PCR court erred.

The PCR court’s view that the implied malice charge had no impact on the jury’s verdict because there was overwhelming evidence that petitioner shot and killed McLemore with malice aforethought ignores the evidence that the fatal shot may have been fired in connection with other tragic events that involved several people who were on the porch when McLemore was shot and killed.

Numerous witnesses testified that petitioner missed his deceased brother (nicknamed “Bullet” who had been killed in a shooting incident earlier in the year) and was drinking a beer

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<sup>3</sup> State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983). Elmore was overruled regarding instructing the jury on implied malice by this Court in State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019).

avored by his brother (Yuengling) on the night McLemore was killed. App. 169, ll. 12 – 19; 197, ll. 8 – 13; 215, ll. 12 – 21; 243, ll. 7 – 25; 272, l. 23 -273, 1. Quaterious “Damu” Peay testified that he was wearing a shirt in honor of “Merk” who was killed along side petitioner’s brother. App. 215, ll. 12 – 23. Moreover, the jury heard testimony that Lashan “Deuce” White made statements just before McLemore was shot that the jury could have inferred either as a signal or as an assertion that McLemore had nothing to do with the earlier murders. According to Jones, White made cryptic comments just prior to McLemore being shot:

Q When you-all were standing there together, were Lashawn and Joel speaking?

A Yes.

Q What was said?

A Lashawn said, "This is my friend. He is my home boy. I love you boy."

"I love you back."

Q Was he referring to Joel?

A Yeah.

Q What happened next?

A D got off the porch and he shot him in the head.

App. 320, l. 18 – 321, l. 3.

The jury was given detailed testimony about an earlier shooting in which petitioner’s brother and another companion had been shot and killed. They were told by several witnesses that there was no connection between petitioner and McLemore and no violence preceded the fatal shooting. From this evidence, the jury could have logically concluded that McLemore was shot and killed not out of malice aforethought but anger and passion surrounding the earlier

shooting. In fact, the only incident leading up to McLemore's fatal shooting was this interplay with White. The solicitor, in closing argument, asserted much the same theory to the jury:

Demarcus Foster is the only one who knows why he shot Joel McLemore. Maybe it was a message to Lashawn White. Maybe it was a message to drug dealers on 16th Street. Maybe it was a message to Joel's family. Maybe there was something going on with them. Maybe there was something going with Lashawn and Demarcus.

App. 646, l. 25 – 647, l. 5.

As such, any charge to the jury that allowed it to skip the hard work of deciding on whether or not the state met its burden of proof to establish malice aforethought would not have been harmless. “Because there was little evidence of malice aside from the use of a gun, the PCR judge erred in finding petitioner was not prejudiced by trial counsel's failure to object to the charge on the inference of malice from the use of a deadly weapon.” Gibson v. State, 416 S.C. 260, 266, 786 S.E.2d 121, 124 (2016).<sup>4</sup>

In both Burdette and Gibson, this Court found the erroneous jury charge that improperly eliminated a key element of the state's burden of proof by allowing guilt based upon implied malice from the use of a weapon required ordering a new trial in the post-conviction relief setting. In light of trial counsel's clear failure to object to the improper charge, the PCR court erred in finding that there was not a reasonable probability that petitioner's trial would have been different had trial counsel been effective.

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<sup>4</sup> *Overruled by State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019) regarding the propriety of any jury instruction on implied malice from the use of weapon. Burdette further supports the PCR court's holding that trial counsel was ineffective in failing to object to the implied malice charge. “We further overrule our precedent to the extent it permits a jury instruction that malice may be inferred from the defendant's use of a deadly weapon.” Id., 427 S.C. at 504, 832 S.E.2d at 583.

II. The PCR court erred in denying trial counsel was ineffective when he failed to object on the record to the admission of petitioner's prior record without the required judicial scrutiny under Rule 609, SCRE.

A. How the matter was raised at PCR.

At the evidentiary hearing, petitioner asserted trial counsel was ineffective in handling the admission of his prior record as impeachment evidence during trial. App. 723, l. 21 – 724, l. 3. Petitioner argued that the admission of his prior record adversely impacted his trial testimony since the jury would base its determination on who to believe based in part on his past criminal history. App. 700; 724, ll. 4 – 16.

Trial counsel admitted bringing out the criminal history during his direct exam to avoid “hiding” information from the jury. App. 743, l. 21 – 744, l. 8. Trial counsel asserted he would have prepared petitioner for questions regarding his criminal history and was able to limit references to “felonies and misdemeanors” to limit the impact. App. 737, l. 10 – 738, l. 1.

What is missing from the entire trial transcript is any evidence trial counsel made an effort under Rule 609, SCRE, to prevent the introduction of petitioner's prior criminal record. The explanation for that absence was provided by trial counsel: those rulings were made off the record during breaks in trial. App. 737, ll. 17 – 22. In fact, at no point in the record was there any discussion about petitioner's prior record in the colloquy with the trial court about petitioner's right to testify in his own defense. App. 465 – 66.

B. How the PCR court ruled.

The PCR court ruled that Rule 609(a), SCRE, “would not have been applicable because (1) Trial Counsel objected to the use of Applicant’s prior convictions to impeach Applicant and (2) the Judge did not allow any evidence of the nature of those convictions, merely that those convictions were felonies and misdemeanors.” App. 769. Additionally, the PCR court found that “Trial Counsel **credibly** testified that he had an in-camera meeting with the Judge to discuss how Applicant’s prior conviction would be treated and that Trial Counsel objected to the use of prior convictions. However, the trial court conducted a balancing test and determined that the fact that those convictions were misdemeanors and felonies would be admissible, but not the details of those convictions. Moreover, Applicant testified and was not impeached with his prior convictions.” (emphasis in original). App. 770.

C. How the PCR court erred.

The PCR court erred as a matter of law in finding an off the record discussion of the use of a defendant’s criminal record for impeachment purposes satisfies the requirement for effective assistance of counsel. Under Rule 609(a), SCRE, “evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused.”

To be admissible to impeach an accused under Rule 609(a), SCRE, prior convictions must be balanced against prejudicial impact under the factors outlined in State v. Colf, 337 S.C. 627, 525 S.E.2d 246 (2000). *See* State v. Robinson, 426 S.C. 579, 828 S.E.2d 203 (2019). Those factors require that the trial court evaluate:

1. The impeachment value of the prior crime;
2. The point in time of the conviction and the witness's subsequent history;
3. The similarity between the past crime and the charged crime;
4. The importance of the defendant's testimony; and
5. The centrality of the credibility issue.

Colf, 337 S.C. at 627, 525 S.E.2d at 248.

Here, there was no hearing on the record to demonstrate trial counsel's claim that the trial judge made the required determination based upon these factors. The solicitor at trial took full advantage on petitioner's criminal history.

Q. Your attorney said that you had been in some trouble before?

A Yes, ma'am.

Q I think he said all of your arrests were before you were 20. One of them, actually, was when you were 20; right?

I believe you said you pled and took responsibility for those?

A Yes, ma'am.

Q You had never been to trial before?

A No, ma'am.

Q One of those charges that you said you took responsibility for, it took you over eight years to plead to it?

A Yes, ma'am. That is when they came to me with the plea, like. They waited until after I served my time to get me in court for the charge.

Q They offered you time served for that?

A Yes, ma'am.

Q So that is when you pled?

A Yes, ma'am.

Q But you didn't serve any time on that?

A The eight, I did, then it was time served. I had to do time before that.

App. 588, ll. 4 – 589, l. 2.

In closing, the solicitor reminded the jury about petitioner's time in prison and implied that "history" made witnesses fearful of him to explain actions and reluctance to cooperate:

The child was six years old. *Demarcus Foster told you it was 2014 when he got out of prison. She knew Demarcus Foster. She knew his background. She was Bullet's girlfriend. She had a child with Bullet. She knew Demarcus. She knew Angela Foster. Demarcus Foster would bring her child money, twos, two bills of something every time. She holds no ill-will towards Demarcus Foster, but she didn't think that Joel deserved to be shot and killed.*

*She didn't want to think that Demarcus Foster shot and killed anybody. Would she not send him text messages? Is he not still the uncle to her child?*

*She knew Demarcus Foster's history. She didn't know what was going to come out of this case. She just told some people that she had heard Demarcus Foster shot him, and that information got to law enforcement.*

App. 645, ll. 5 – 20 (emphasis added).

D. Prejudice.

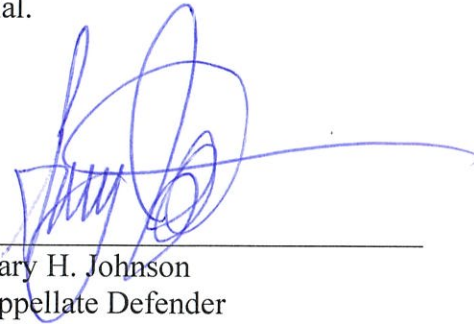
As noted, the solicitor was able to both go into testimony and argue the impact of petitioner's prior record to the jury without a ruling, on the record, that the prior convictions would have been admissible under 609(a), SCRE. This prior record included a conviction for voluntary manslaughter. App. 56, l. 22 – 57, l. 2. In this setting, the burden would have been on the state to overcome the prejudicial impact and establish the Coif factors. See State v. Robinson, 426 S.C. 579, 595, 828 S.E.2d 203, 211 (2019) (holding that the burden is on the state to establish admissibility of the prior convictions as the proponent of the evidence).

Thus, the state would have had to establish that voluntary manslaughter had impeachment value and that such value was not overcome by the similarity between the past crime and the charged crime. Both factors weigh against admissibility. In addition, the importance of the defendant's testimony and the centrality of credibility each weigh against admission. As noted,

this trial presented the jury with only two options: either petitioner shot McLemore without provocation and without motive or someone else fired the fatal shot and petitioner was merely present at the scene and was being made a scapegoat. Petitioner testified at trial and during PCR that he did not shoot McLemore and did not have a weapon on his person when the fatal shot was fired. Credibility was central to the jury's determination of guilt. Trial counsel was ineffective in failing to secure a ruling on the admissibility of petitioner's criminal record without the appropriate evaluation of the Coif factors and a determination that the state had met its burden to overcome the prejudicial impact on the jury as outlined by this Court in Robinson.

**CONCLUSION**

Here, petitioner has established that “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.” Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (*quoting Strickland v. Washington*, 466 U.S. 668, 692 (1984)). Based upon the foregoing arguments, this Court should grant the petition for certiorari and allow full briefing on whether the PCR court erred on the questions presented and grant petitioner a new trial.



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SC Bar #8898

ATTORNEY FOR PETITIONER

This 15th day of December 2025.