

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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S.C. Supreme Court

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Certiorari to Anderson County  
R. Lawton McIntosh, Circuit Court Judge  
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SHAWN WILLIAMS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2013-001697  
\_\_\_\_\_

PETITION FOR WRIT OF CERTIORARI  
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**ISSUE PRESENTED**

Whether the PCR court erred in finding that trial counsel provided effective assistance of counsel because trial counsel failed to preserve for appellate review an objection to the Trial Court's jury charge that "inferred malice may also arise when the deed is done with a deadly weapon" where Petitioner presented evidence reducing, mitigating, excusing or justifying the homicide, including the defense of accident?

## STATEMENT

### **Indictments**

On April 24, 2007, Petitioner Shawn A. Williams was indicted by the Anderson County Grand Jury for (1) murder; and (2) possession of a knife during the commission of a violent crime. App. 406-407. Petitioner was subsequently indicted on October 21, 2008 for death to a child in utero due to the commission of a violent crime. App. 410-411.

### **Trial and Guilty Verdict**

Petitioner's case was called to trial on January 5, 2009 before the Honorable J.C. Nicholson, Jr. and a jury. App. 1. Robert A. Gamble represented Petitioner, and Assistant Solicitor Scott McElhannon represented the State. Id.

The jury found Petitioner guilty on all three counts. App. 300, ll. 9-20. Judge Nicholson sentenced Petitioner to life imprisonment for murder, a concurrent term of life imprisonment for the death of a child in utero, and five years imprisonment for possession of a knife during a violent crime. App. 308, ll. 15-24; 408-409; 412.

### **Direct Appeal**

Petitioner appealed his convictions to the South Carolina Court of Appeals. Robert M. Dudek, Chief Appellate Defender of the Division of Appellate Defense, filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), arguing the Trial Court erred by refusing to direct a verdict of acquittal on the charge of murder and death of a child in utero during the commission of a violent crime since there was no evidence Petitioner acted with malice aforethought and the only evidence was that the decedent was stabbed accidentally. App. 311-323. The Court of Appeals dismissed the appeal on June 30, 2011. App. 324. The remittitur was issued on January 20, 2012. App. 336.

### **PCR Application, Evidentiary Hearing, and Order of Dismissal**

Petitioner filed an application for post-conviction relief (“PCR”) on September 21, 2012. App. 325-334. The State filed its Return on March 26, 2013. App. 335-341.

An evidentiary hearing was held on May 8, 2013 before the Honorable R. Lawton McIntosh. App. 342-392. Petitioner was represented by Todd W. Pruette, and the State was represented by Assistant Attorney General John Walter Whitmire. App. 342. Petitioner and his trial counsel, Robert A. Gamble, both testified at the hearing. App. 347-388.

At the conclusion of the hearing, Judge McIntosh orally denied Petitioner’s PCR application. App. 389, l. 7 – 391, l. 21. The written Order of Dismissal denying and dismissing Petitioner’s PCR application with prejudice was filed on August 1, 2013. App. 394-405.

This petition for writ of certiorari follows.

## STATEMENT OF FACTS

### **Relevant facts from trial**

Patricia Grate was Petitioner's aunt, and she lived in Anderson County. Petitioner lived right across the street from Grate. App. 86, l. 11 – 87, l. 8. Grate said she did not know Petitioner's girlfriend, Josephine Estrich. App. 87, ll. 9-10.

Grate remembered that on January 22, 2007, her neighbors, Lee and Tina Estrich, knocked on her door a little after nine at night. They informed her "that apparently a lady had been hit by a car and they needed a blanket to cover her. So I took a comforter out and we covered her up to the neck." App. 87, l. 20 – 88, l. 4.

Herman Lamar Fowler was Petitioner's cousin. He said Petitioner was like "a brother to him." App. 92, l. 18 – 93, l. 11. Fowler said he really did not know the decedent, Josephine Estrich, but he had seen her and Petitioner riding in her Jeep from time to time. App. 93, ll. 10-21.

Fowler remembered that on January 22, 2007, Petitioner seemed to be acting "a little hyper." This was at about nine o'clock in the morning. App. 94, ll. 1-19. Fowler admitted in his statement that he told the police Petitioner was acting "sort of strange" that morning. App. 95, l. 22 – 96, l. 1.

Fowler testified that Petitioner told him he had "to save" his relationship with the decedent that day. Fowler said he told Petitioner "not to do nothing crazy." App. 96, ll. 1-16.

Denise Perrin was the decedent's hairdresser and her friend. Perrin recalled that the decedent came by her house at about noon that day. Perrin learned the decedent was about six weeks pregnant. Perrin said Petitioner called up irate several times, and he

demanded that Perrin get the decedent to the telephone to talk to him. App. 102, l. 17 – 109, l. 15.

Craig Estrich testified he was living with the decedent, his sister, at the time. Craig remembered that Petitioner had dated his sister for about six months. App. 118, l. 17 – 119, l.24.

Craig testified that Petitioner telephoned the house about ten to fifteen times that day. He remembered the decedent “was just happy. I don’t know why.” Craig recalled that the decedent told him that Petitioner was in Anderson, that he wanted a ride, and she asked him if she should go get Petitioner. Craig contended he told the decedent: “You make that decision. She went to pick him up.” App. 121, l. 13 – 122, l. 3.

Craig recalled that he got a call from his cousin inquiring if the decedent had ever come home. Craig said he knew at that point that something was wrong. App. 122, ll. 9-18.

Billy Lee Ethridge was Grate’s neighbor. He remembered when he returned to his house on the evening of January 22, 2007 that there was a body lying on the side of the road. Ethridge recalled: “Everyone thought she had been hit by a car.” App. 133, l. 13 – 139, l. 4.

Pendleton EMS worker, Jack Dorfner, testified that he noticed injuries to the decedent that were inconsistent with “being struck by a vehicle.” Dorfner said he determined this case involved a homicide. App. 139, l. 18 – 142, l. 11.

Petitioner was located in Mobile, Alabama after a call was apparently placed by Petitioner’s ex-girlfriend from Mobile to the authorities in Anderson. Garland Major of the Anderson County Sheriff’s Department remembered he received a telephone call

from Anderson Detective Eddie Stancil who drove to Mobile after the tip. Stancil told Major Petitioner had admitted to throwing his clothing in the woods after the decedent was stabbed. There was no hearsay objection to this testimony. App. 153, ll. 9-20.

The decedent's Jeep was found at the MLK apartment complex in Mobile, Alabama. Both the decedent's and Petitioner's blood and DNA were found inside the Jeep. The decedent's purse was found hidden underneath the sink in the home of his former girlfriend. App. 166, l. 6 – 172, l. 14; 178, l. 1-25; 224, l. 1 – 231, l. 25.

Petitioner gave the Anderson detectives a statement while he was in Mobile. Petitioner told Detective Stancil that he had dated the decedent for eight or nine months and “we got along real good and never fought about nothing.” App. 197, ll. 15-21.

Petitioner remembered he went with the decedent in the early evening around 7:00 p.m. to O'Reilley Auto Parts on Clemson Boulevard buy a fuel pump relay. App. 198, ll. 3-6. The receipt for that fuel pump relay and the fuel pump relay were found inside the Jeep. App. 188, l. 18 – 189, l. 19.

They left O'Reilley Auto Parts and started to head back to Petitioner's house. The two began talking about where their relationship was going. They stopped at a Quick Stop to get some coffee. The decedent stayed in the car while Petitioner got out to get some coffee. When he came back to get in the Jeep, he opened the door and asked the decedent if she was going to talk to him about the relationship. She said “Get in the car.” Petitioner said no and again asked if they could talk about the relationship. The next thing Petitioner knew, the decedent drove off and left him standing there. App. 198, ll. 7-23.

After the two talked on the telephone, the decedent came back to pick him up and they started to head back to Petitioner's house again. App. 198, l. 24 – 199, l. 4.

Petitioner said that during the drive, he tried to explain the difference to the decedent “between physical pain and the pain of the heart.” App. 199, ll. 5-10. Petitioner said he cut himself on purpose with the knife and the decedent grabbed the knife from him. Petitioner said, “Stupidly, I tried to grab the knife back from her. When I did, she slammed on the brakes. After she slammed on the brakes, the knife went into her chest.” App. 199, ll. 5 – 21.

Petitioner said he was freaking out and at that point everything was “kind of blurry.” App. 199, ll. 22-25. Petitioner said before the decedent died they prayed together, he then threw his clothes into the woods, drove to Alabama and abandoned the Jeep at an apartment complex. He went to his former girlfriend's house in Mobile, “and I only told her that I did something bad.” App. 200, l. 19 – 203, l. 4.

Dr. Michael Ward, the pathologist, testified the decedent was stabbed in the chest and that she had two to three other stab wounds. Dr. Ward opined the decedent was deliberately stabbed and that she had defensive wounds. App. 242, l. 3 – 248, l. 21.

Defense counsel moved for a directed verdict at the close of the evidence. App. 253, ll. 11-15. The only evidence regarding how the decedent came to be stabbed was Petitioner's statement that the decedent had the knife and that she was stabbed when she slammed on the brakes.

Petitioner's statement to the police was largely corroborated by the other evidence. There was a receipt for the fuel pump relay he purchased with the decedent, and the fuel pump relay was found in the Jeep. App. 188, l. 18 – 189, l. 19. Petitioner's

clothes were found in the woods where he told the police he abandoned them. App. 154, l. 3 – 156, l. 10. Petitioner admitted to the police that he went to Mobile, Alabama and left the Jeep in the apartment complex parking lot. The Jeep was found in that apartment complex. App. 178, ll. 15-24.

The Trial Court rejected the argument that there “no showing of malice aforethought,” and denied them motion. App. 253, ll. 12-18.

Along with murder, the Trial Court charged involuntary manslaughter in this case. App. 292, l – 293, l. 2. In addition, the Trial Court also charged the jury that “[i]nferred malice may also arise when the deed is done with a deadly weapon.” App. 291, ll. 3-4. There was no objection to this jury instruction.

The jury ultimately found Petitioner guilty of murder, death of a child who was in utero at the time a violent crime was committed, and possession of a knife during the commission of a violent crime. App. 300, ll. 9-20.

### **Relevant facts of PCR evidentiary hearing**

At the hearing, Petitioner testified that the State never disclosed, or his trial counsel never tried to obtain, photographs of his wounds taken by the officers in Alabama which he explained depicted wounds consistent with his statement of how he received these wounds by trying to retrieve the knife from the decedent. App. 349, l. 2 – 350, l. 10.

Petitioner also stated the State never disclosed, or his trial counsel never obtained, video surveillance of him leaving the O'Reilly Auto Parts store because the video would have shown that he did not get back into decedent's Jeep at the auto parts store but instead walked from that store to another store where decedent then came over to pick

him up. App. 350, l. 11 – 351, l. 3. Petitioner believed this videotape would have shown that there were no arguments occurring between him and the decedent and that decedent did not just drive off and leave Petitioner after a heated exchange. App. 351, ll. 5-18.

Petitioner also believed his trial counsel should have obtained the telephone records of the various witnesses who testified at trial that Petitioner had called them looking for decedent to see if these phone calls were ever made. App. 352, ll. 4 – 18.

Unfortunately, neither the photographs, the videotape, nor the telephone records were presented or entered into evidence at the evidentiary hearing.

Petitioner also testified that his trial counsel did not object to Judge Nicholson's jury charge that malice could be inferred by the use of a deadly weapon, and he asserted his trial counsel should have objected to this charge to preserve the issue for appeal. App. 355, l. 18 – 356, l. 11. In State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), this Court has held "a jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide."

At the evidentiary hearing, Petitioner's trial counsel testified that the trial strategy was to show that the decedent's death was an accident. App. 377, ll. 13-14. He confirmed that he never tried to obtain photographs of Petitioner's wounds to his hands or any telephone records. App. 377, ll. 16-17; 381, ll. 8-13. Trial counsel also testified that while Petitioner told him about the videotape from O'Reilley Auto Parts, he never considered obtaining the tape. App. 384, ll. 16-21.

Trial counsel admitted “one of the big hurdles for the State was proving malice” since the only evidence of how the stabbing occurred was Petitioner’s statement in which he stated that the death was an accident. App. 379, ll. 13-22.

Trial counsel also agreed the jury instruction that malice can be inferred from the use of a deadly weapon made the State’s burden of trying to prove malice much easier. App. 386, l. 21 – 387, l. 1. Trial counsel, however, saw no need to object to the charge at the time because he “was just a plain old criminal lawyer” who could not predict how the South Carolina Supreme Court would rule on the issue. App. 386, ll. 4-20.

At the conclusion of the testimony, Petitioner’s PCR attorney argued:

Your Honor, our position is still that if [trial counsel] would have made the objection, in the [State v. Belcher] case, that attorney had some ground to make an objection and also if the objection had been made here, this case would have been, pending appeal, it would have been overturned on that.

App. 391, ll. 12-18.

### **Order of Dismissal**

Judge McIntosh found that Petitioner’s trial counsel was not ineffective for failing to the photographs, videotape, and telephone records where Petitioner failed to produce those items at the evidentiary hearing. App. 399-400; 404.

The PCR court further ruled that Petitioner’s allegation that his trial counsel should have objected to the Trial Court’s jury instruction that malice may be inferred from the use of a deadly weapon was without merit where State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) was decided by the South Carolina Supreme Court a half a year after Petitioner’s trial. App. 403.

## ARGUMENT

**The PCR court erred in finding that trial counsel provided effective assistance of counsel because trial counsel failed to preserve for appellate review an objection to the Trial Court's jury charge that "inferred malice may also arise when the deed is done with a deadly weapon" where Petitioner presented evidence reducing, mitigating, excusing or justifying the homicide, including the defense of accident.**

Petitioner's trial counsel erred in failing to object to the Trial Court's jury charge that "[i]nferred malice may also arise when the deed is done with a deadly weapon." App. 291, ll. 3-4. By failing to object this erroneous charge, trial counsel failed to preserve this meritorious issue for appellate review.

To establish ineffective assistance of counsel, Petitioner must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984). "First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (internal citations omitted). "The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The defendant is required to overcome the presumption that counsel was effective in order to receive relief." Id. at 117-18, 386 S.E.2d at 625 (internal citations omitted).

### **Deficient Performance and Prejudice**

There was strong evidence at trial that decedent accidentally stabbed herself. In fact, the State had no evidence of how the decedent was stabbed other than Petitioner's statement that the decedent had grabbed the knife from him and was holding it when she

slammed on the brakes and accidentally stabbed herself when she did so.

Petitioner's statement to the police that the decedent accidentally stabbed herself was largely corroborated by the other evidence. There was a receipt for the fuel pump relay he said purchased with the decedent, and the fuel pump relay was found in the Jeep. App. 188, l. 18 – 189, l. 19. Petitioner's clothes were found in the woods where he told the police he abandoned them. App. 154, l. 3 – 156, l. 10. Petitioner admitted to the police that he went to Mobile, Alabama and left the Jeep in the apartment complex parking lot. The Jeep was found in that apartment complex. App. 178, ll. 15-24. Given that the police were able to corroborate much of Petitioner's statement with other evidence, his statement that decedent stabbed herself while holding the knife and slamming on the brakes was plausible.

The Trial Court also believed the evidence warranted the lesser included offense of involuntary manslaughter which does not require a showing a malice, and the Trial Court charged involuntary manslaughter to the jury. App. 292, l. 1 – 293, l. 2.

Whether Petitioner acted with malice was a highly contested issue at trial, and Petitioner could have been found guilty of the lesser included offense of involuntary manslaughter for decedent's death by stabbing with a knife or even acquitted if the jury had believed that the decedent had accidentally stabbed herself. Trial counsel should have known to object to the jury charge that malice could be inferred by the use of a deadly weapon to support a guilty verdict for murder where the use of the deadly weapon in this case – the knife – could have either been done so unintentionally and without malice or could have been done so accidentally by the decedent herself.

This Court's opinion in State v. Belcher, 385 S.C. 597, 600, 685 S.E.2d 802, 803-04 (2009), holding that "a jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide," was heard on May 14, 2009 and decided on October 12, 2009, admittedly after Petitioner's trial. The propriety of a jury instruction that permits an inference of malice from the use of a deadly weapon under certain circumstances had, however, no doubt been percolating prior to Petitioner's trial. In fact, long before Belcher, this Court had held that the "use of a deadly weapon" implied malice instruction was error in a case where the defendant had pled accident. State v. Hopkins, 15 S.C. 153 (1881). Petitioner's trial counsel certainly had reason to know to have objected to the inferred malice jury charge.

In Belcher, this Court also ruled that "today's ruling [in Belcher] is effective in this case and for all cases which are pending on direct review or not yet final where the issue is preserved." Id. at 612-13, 685 S.E.2d at 810.

Had trial counsel properly objected to the Trial Court's erroneous inferred malice charge, this error would have been preserved for appellate review and the ruling in Belcher would have controlled since this Court directed Belcher to apply to all cases which were pending on direct review where the issue was preserved. When Belcher was issued, Petitioner's case was pending on direct review. Petitioner would have been entitled to a new trial under Belcher where the Trial Court erroneously charged the jury that malice could be inferred from the use of a deadly weapon where evidence was presented at Petitioner's trial that reduced, mitigated, excused or justified the homicide. Therefore,

where Petitioner's counsel was deficient in preserving this error for appeal, Petitioner is entitled to a new trial.

**CONCLUSION**

For the reasons set forth herein, Petitioner Shawn A. Williams respectfully requests this Court to grant the Petition for Writ of Certiorari with the ultimate relief of a new trial.

Respectfully submitted,



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Carmen V. Ganjehsani  
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of April, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Anderson County  
R. Lawton McIntosh, Circuit Court Judge

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SHAWN WILLIAMS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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CERTIFICATE OF SERVICE

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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on John Walt Whitmire, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Shawn Williams, #332550, McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 21st day of April, 2014.

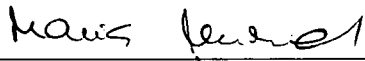


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Carmen V. Ganjehsani  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 21st day  
of April, 2014.

 (L.S.)

Notary Public for South Carolina  
My Commission Expires: July 3, 2023.