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SC SUPREME COURT

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County  
Perry H. Gravely, Circuit Court Judge

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BRANDON HEATH CLARK

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001898

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PETITION FOR WRIT OF CERTIORARI

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## ISSUES PRESENTED

1. Did the PCR judge err in refusing to find trial counsel ineffective for failing to call Katie and Dustin Allison as witnesses to impeach the testimony of Josh Wood and David Murray about alleged conversations they had with Petitioner after the shooting?
2. Did the PCR judge err in refusing to find counsel ineffective for failing to object to the Judge's instruction to the jury that inferred malice may also arise when the deed is done with a deadly weapon when there was evidence in the record that would reduce the murder to involuntary manslaughter?

## STATEMENT

In March of 2007, the Greenville County Grand Jury indicted Petitioner Clark for two counts of murder and two counts of possession of a weapon during the commission of a violent crime, indictments #2007-GS-23-2442, 2443. On November 2, 2009, Petitioner proceeded to jury trial before the Honorable Edward W. Miller. Scott Robinson represented Petitioner at trial. Bryna Seay prosecuted the case on behalf of the State. The jury found Petitioner guilty as charged. Judge Miller sentenced Petitioner to forty (40) years concurrent for each count of murder and five (5) years concurrent for each weapons charge. A timely notice of intent to appeal was filed and the direct appeal perfected. The South Carolina Court of Appeals affirmed the convictions and sentences. State v. Clark, Op. No. 2012-UP-549 (S.C.Ct.App. filed Oct. 10, 2012).

On March 7, 2013, Petitioner filed an application for post conviction relief. The State filed a return on October 23, 2013. On June 18, 2015, an evidentiary hearing was held before the Honorable Perry H. Gravely. In a written order signed July 30, 2015, Judge Gravely denied relief and dismissed the application. A timely notice of intent to appeal was served on September 5, 2015. This petition for writ of certiorari follows.

## STATEMENT OF FACTS

On July 29, 2006, a crowd gathered to watch a fight between Cameron Wade and Joshua Wood. (App. p. 53, lines 4-17; p. 77, line 21 – p. 78, lines 1-8). Wood was angry with Wade because two weeks earlier the two were involved in a fight where Wood was hurt “pretty bad” and his pregnant girlfriend was knocked down. (App. p. 76, line 19 – p. 77, p. 78, lines 1-8). At trial Wood admitted that on the night of the scheduled second fight he was drinking and acting wild and out of control. (App. p. 78, lines 5-12). When asked what he meant, Wood testified, “I mean, I broke sticks, and acted – I was yelling, screaming, dancing around, and acting completely uncivilized, I guess.” (App. p. 78, lines 13-16).

Wood arrived at the scene with David Murray. (App. p. 82, lines 1-6). Wood testified that Wade arrived at the scene a bit later with Christopher Garland and four to five other cars. One guy got out of one of these other cars and Wood admitted to hitting that person with a stick. (App. p. 79, line 24 – p. 80, lines 1-12). Wood claimed that he heard gunshots after hitting the guy with the stick. (App. p. 80, lines 10-12). When asked where the shots appeared to be coming from Woods testified, “I heard a few shots behind me and then down on the road.” (App. p. 80, line 25 – p. 81, line 1). Wood testified that Petitioner was behind him and he saw Petitioner shoot into the air twice. (App. p. 81, lines 9-15). Wade and Garland were fatally shot while sitting in their car. Inside the car police found a nine millimeter handgun belonging to the deceased Garland. (App. p. 180, lines 6-24; p. 232, lines 4-20). Three casings fired from the nine millimeter handgun belonging to Garland were collected at the scene. (App. p. 247, lines 17-18)

Petitioner arrived at the scene with Christopher Allison and Jordan Mardis. At trial Allison testified as follows:

Q: Okay. What happened next?

A: Like I said, we got down -- we started heading down there and we heard the boy in the white hoodie say it was going to be a fair fight between Cameron and Josh.

Q: Right.

A: And then we saw the fire -- or gun -- muzzle fire, come above the hood of the car, the last car, the dark-colored Honda.

Q: One of the cars that was parked down there, one of the cars that came with Cameron Wade?

A: Yes.

Q: Okay.

A: We seen the muzzle fire and that's when Brandon shot his gun and we got in my car.

Q: What did -- did you see Brandon fire his gun?

A: Yeah, I see him fire it upwards.

Q: How many times did he shoot upwards?

A: About nine times.

Q: So it's your testimony he fired the gun in the air?

A: Yes, sir.

(App. p. 148, lines 4-23). Allison testified Petitioner's gun was a Smith and Wesson .40 caliber.

(App. p. 141, lines 16-17).

At trial the State and Petitioner entered into the following stipulation:

The defendant hereby stipulates or agrees that he was present at the scene at [address redacted] on July 29<sup>th</sup>, 2006. And that he fired his pistol nine times. He further stipulates or agrees that the nine .40 Caliber shell casings located at the scene are the results of his firing his pistol nine times.

(App. p. 166, lines 5-10). The .40 caliber shell casings were found at least 10 yards away from the car where Wade and Garland were shot. (App. p. 207, lines 7-11).

Allison testified that he, Petitioner and Mardis left after Petitioner fired the nine shots in the air. Importantly, Allison testified that Wade and Garland were alive when they left the scene. (App. p. 149, lines 10-25). "I remember looking through his car because the car in front of him had brake lights on. And I could see the two boys [Wade and Garland] look up when Josh Wade [Wood] run up the back of his car with an ax handle, I think it was, in his hand." (App. p. 149, lines 17-20).

Wood admitted that after shots were fired he threw a tire iron at the car and kicked in a rear window but he claimed that he thought the car belonged to the guy who he hit with a stick. (App. p. 82, line 13 – p. 83, lines 1-12). Wood admitted that he cut his leg when he kicked in the window of the car. (App. p. 95, lines 19-25). Wood claimed that he did not see Wade and Garland in the car. (App. p. 83, lines 1-7). Allison testified that he, Petitioner and Mardis left before Woods threw the tire iron and kicked in the window. (App. p. 150, lines 1-15). Murray confirmed that Petitioner, Allison and Mardis left before Wood threw the tire iron and kicked in the window of the car belonging to the deceased. (App. pp. 118-120).

The ballistic evidence showed that both a projectile retrieved from Garland's body and a projectile found in the car were consistent with being fired from a Smith and Wesson .40 caliber handgun. (App. pp. 245-251). While the two projectiles were consistent with one another, analysis as to whether they were fired by the same gun was inconclusive. (App. p. 251, lines 1-13). The firearm examiner was also unable to make any conclusions as to whether the gun that fired the nine casings found ten yards from the car was the same gun that fired the two recovered projectiles. (App. p. 256, lines 11-14).

After leaving the scene Christopher Allison, Petitioner and Mardis went to Dustin Allison's house, Christopher's brother. Dustin's wife Kayte was also at the house. (App. p. 150, lines 16-22; p. 143, lines 12-15). Wood, Murray and Timmy Brooks arrived at the Allison house about thirty minutes later. (App. p. 151, lines 6-15). Allison testified that Kayte would not allow Wood in the house because his leg was bleeding. (App. p. 151, lines 19-24). Wood admitted that his leg was bleeding when he arrived at the Allison house. (App. p. 98, line 21 v- p. 99, lines 1-13). Allison testified that he never saw Murray come in the house and talk with Petitioner. (App. p. 152, lines 1-8).

Murray claimed that while they were at the Allison house he overheard Petitioner say that Chris was supposed to throw Petitioner's gun in the river. (App. p. 115, lines 4-7). Wood claimed to have had a conversation with Petitioner at the Allison house. (App. p. 84, lines 10-16). Wood testified, "Well, when we got back he looked really scared and he had the gun in his hand and said, I think I shot them, I think I shot them. And I said, no, you didn't, you didn't shoot them, you shot in the air." (App. p. 84, lines 12-15). According to Wood Petitioner also said something about throwing the gun in the Saluda River. (App. p. 85, lines 1-4). The gun was never recovered. Petitioner did not present a defense.

## ARGUMENTS

1. The PCR judge erred in refusing to find trial counsel ineffective for failing to call Katye and Dustin Allison as witnesses to impeach the testimony of Josh Wood and David Murray about alleged conversations they had with Petitioner after the shooting.

During the PCR hearing Kayte Allison, Petitioner's cousin, testified that on the night of the shooting Petitioner, Christopher Allison, Kayte Allison's brother in law, and Jordan Martis<sup>1</sup> left the Allison house to attend a party. (App. p. 392, lines 4-7). Josh Wood told the three about the party earlier that afternoon. (App. p. 391, lines 17-22). Kayte testified that Petitioner, Christopher Allison, and Jordan Martis later returned to the Allison house. (App. p. 392, lines 8-23). Approximately forty five minutes later Wood knocked on the door of the Allison but Kayte testified that she would not allow Wood to come inside because he had blood running down his legs. (App. p. 393, line 3 – p. 394, lines 1-25). She testified that David Murray stayed in his truck and never came inside the house. (App. p. 393, line 10 – p. 394, lines 1-18). Kayte Allison also testified that Petitioner did not go outside to speak with either Wood or Murray. This is in contrast to the testimony of Wood and Murray at trial. At trial Wood testified, "Well, when we got back he [Petitioner] looked really scared and he had the gun in his hand and said, I think I shot them, I think I shot them. And I said, no, you didn't, you didn't shoot them, you shot in the air." (App. p. 84, lines 12-15). According to Wood Petitioner also said something about throwing the gun in the Saluda River. (App. p. 85, lines 1-4). At trial Murray claimed he overheard Petitioner say that Chris was supposed to throw Petitioner's gun in the river. (App. p. 115, lines 4-7).

Dustin Allison also testified at the PCR hearing. Dustin Allison testified that Wood and Murray arrived at the Allison house forty five minutes after his brother, Christopher Allison, the

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<sup>1</sup> Referred to as Jordan Mardis in the trial transcript.

Petitioner and Martis returned from the party. (App. p. 402, line 9 – p. 403, lines 1-12). Dustin Allison testified that he did not see Petitioner with a gun. (App. p. 402, line 20 – p. 403, lines 1-5). Dustin Allison testified that Murray stayed on the front porch and never came inside the house. (App. p. 403, lines 21-22). Dustin Allison also testified that they would not allow Wood to come inside the house because he was bleeding. (App. p. 403, lines 13-21). Dustin Allison testified that Petitioner was upstairs putting a child back to sleep when Wood and Murray came to the house. (App. p. 404, lines 1-14).

Kayte Allison testified that she spoke with trial counsel and was subpoenaed to testify at trial but was never called as a witness. (App. p. 396, line 3 – p. 397, lines 1-4). Dustin Allison also testified that he spoke with trial counsel and was subpoenaed to testify at trial but was never called as a witness. (App. p. 408, line 19 – p. 409, 410, line 1).

Trial counsel did not recall issuing subpoenas for Kayte and Dustin Allison<sup>2</sup>. (App. p. 355, line 15 – p. 356, lines 1-15). At the close of the evidentiary hearing PCR counsel argued:

If Mr. Robinson had called the Allison's to the stand, there would have been abundant evidence that those conversations between my client and Mr. Murray and Mr. Wood never could have taken place because those two never came into the house.

I believe that would have been very important, Judge, especially given the general questionable preparedness that counsel may have had in this trial. And I say that because within the first ten pages, one of counsel's arguments to the judge was that the State was not able to determine the caliber of the bullet. And within five lines, the State popped up and said "yes, we are."

Then, as we go further into this hearing, Judge, there's a general lack of preparedness as far as recollection about what witnesses were interviewed, what witnesses were subpoenaed. It seems from the Allison's testimony that both of them met with Mr. Robinson on a number of occasions at his office. And both were subpoenaed to come and testify in court. And they both showed up. I find it very hard to believe that they would not have come to court without a subpoena. No one

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<sup>2</sup> It appears that on an earlier date a Judge ordered trial counsel to review the trial transcript and be prepared to testify. (App. pp. 344-345).

really wants to sit here for several days if they don't have to. So I think it's abundantly clear that they were subpoenaed and they just were never put on the stand.

(App. p. 436, line 11 – p. 437, lines 1-17).

In the order of dismissal the PCR judge wrote:

This Court finds the Applicant failed to meet his burden of proving trial counsel should have called witnesses to testify at trial. This Court finds the testimony of Katye and Dustin Allison would not have changed the outcome of the Applicant's trial. While these witnesses testified the Applicant did not have a gun when he arrived at their house after the party, this is irrelevant because the Applicant stipulated at trial that he had a gun at the party and fired nine times into the air. (Trial transcript, p. 11). While the Allisons could have testified about seeing Wood's bloody leg after the party, Wood and Chris Allison testified at trial about Wood's bloody leg. (Trial transcript, p. 99; p. 151). Further, Katye Allison testified only Wood exited the vehicle when it came to her house after the party, while Dustin Allison testified both Wood and Murray got out. This Court finds there is no reasonable probability that Katye and Dustin Allison's testimony would have changed the outcome of the trial. See Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625.

(App. p. 460)(footnote #3 omitted). The PCR judge erred. Trial counsel was ineffective in failing to call Katye and Dustin Allison as witnesses at trial to impeach Wood and Murray and show that they could not have had or overheard the alleged inculcating conversations with Petitioner they testified to at trial. There is a reasonable probability that if the Allisons had been called to testify at trial, the outcome of the trial would have been different.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687-88, 104 S.Ct. 2052. "Under

this prong, “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

Trial counsel was deficient in failing to call the Allison's to testify at trial. Petitioner was prejudiced by the deficient performance. Wood's testimony that Petitioner allegedly said, “I think I shot them, I think I shot them” was critical for the State's case because it is the only evidence indicating that Petitioner shot Wade and Garland instead of simply shooting into the air. The alleged statements about disposing of the gun in the river were particularly prejudicial given the fact that the firearms examiner was unable to make any conclusions as to whether Petitioner's .40 caliber gun that fired the nine casings found ten yards away from the car was the same gun that fired the two recovered projectiles resulting in the fatal shooting of Wade and Garland because the gun was never recovered. (App. p. 256, lines 2-14). The record does not support the PCR judge's finding that Petitioner suffered no prejudice from trial counsel's failure to call the Allison's to testify at trial.

2. The PCR judge erred in refusing to find counsel ineffective for failing to object to the Judge's instruction to the jury that inferred malice may also arise when the deed is done with a deadly weapon when there was evidence in the record that would reduce the murder to involuntary manslaughter.

During the instructions to the jury the trial judge stated, "Inferred malice may also arise when the deed is done with a deadly weapon." (App. p. 293, lines 22-23). Trial counsel did not object to the inferred malice charge. (App. p. 295, lines 15-17). In the application for post conviction relief Petitioner alleges that trial counsel was ineffective in failing to object to the inferred malice charge. (App. p. 323). During the PCR hearing trial counsel was asked about State v. Belcher, 385 S.C. 597, 601, 685 S.E.2d 802, 804 (2009), decided one month prior to the trial in this case. (App. pp. 357-359). Trial counsel testified that he did not believe that he was aware of the case at the time of trial and could not recall the case at the time of the PCR hearing. (App. p. 358, lines 13-24).

In the order of dismissal the PCR judge wrote, "This Court finds Belcher is inapplicable in this case as there was no evidence presented at trial that would mitigate, reduce, excuse, or justify the murder for which a jury found the Applicant guilty. As such, trial counsel was not deficient in failing to object to this portion of the charge." (App. p. 462). The PCR judge erred.

In State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009), the South Carolina Supreme Court wrote:

Today we return to the rationale underlying Hopkins, Levelle and Jackson and hold that where 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).

(footnote #9 omitted). With the exception of the alleged statement "I think I shot them, I think I shot them" attributed to Petitioner by Wood and discussed above in issue one, the State's other evidence indicates that Petitioner shot nine times up in the air, not at anybody. There is also evidence that gunfire first came from the direction of where Wade and Garland's car was parked. (App. p. 148, lines 4-23). This evidence of shooting up in the air would reduce the homicide to involuntary manslaughter.

In State v. Brayboy, 387 S.C. 174, 180, 691 S.E.2d 482, 485 (Ct. App. 2010) the South Carolina Court of Appeals wrote:

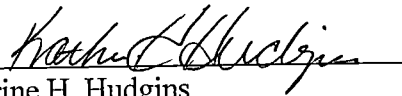
Involuntary manslaughter is (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others. State v. Wharton, 381 S.C. 209, 216, 672 S.E.2d 786, 789 (2009). "To constitute involuntary manslaughter, there must be a finding of criminal negligence, statutorily defined as a reckless disregard of the safety of others." State v. Crosby, 355 S.C. 47, 52, 584 S.E.2d 110, 112 (2003). "Recklessness is a state of mind in which the actor is aware of his or her conduct, yet consciously disregards a risk which his or her conduct is creating." State v. Pittman, 373 S.C. 527, 571, 647 S.E.2d 144, 167 (2007). "A person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting." Crosby, 355 S.C. at 52, 584 S.E.2d at 112. "The negligent handling of a loaded gun will support a charge of involuntary manslaughter." State v. Mekler, 379 S.C. 12, 15, 664 S.E.2d 477, 478 (2008)

The PCR judge found that there was no evidence presented at trial that would mitigate, reduce, excuse, or justify the murder. The finding is not supported by the record. The shooting in the air, under the facts of this case, would reduce the murder to involuntary manslaughter. Trial counsel was deficient for failing to object to the inferred malice charge. Petitioner was prejudiced by the deficient performance. The State did not present evidence of malice apart from the use of the deadly weapon and the error in charging inferred malice is not harmless.

**CONCLUSION**

Based on the above two arguments, this Court should grant the petition for writ of certiorari to allow further briefing on the issues.

Respectfully submitted,

  
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Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of April, 2016.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County  
Perry H. Gravely, Circuit Court Judge

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BRANDON HEATH CLARK

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

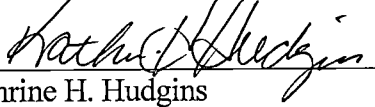
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CERTIFICATE OF SERVICE

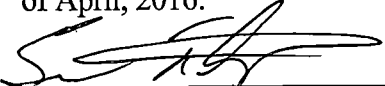
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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 6th day of April, 2016.

  
Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 6th day  
of April, 2016.

  
(L.S.)

Notary Public for South Carolina  
My Commission Expires: October 30, 2022.