

STATE OF SOUTH CAROLINA
In the Court of Appeals

ORIGINAL

CERTIORARI TO GREENVILLE COUNTY
Court of Common Pleas

The Honorable Perry H. Gravely, Post-Conviction Relief Court Judge
The Honorable Edward W. Miller, Trial Judge

Appellate Case No. 2015-001898

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SC Court of Appeals

BRANDON HEATH CLARK,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT

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INDEX

TABLE OF AUTHORITIES ii

ISSUES PRESENTED ON APPEAL.....1

STATEMENT OF THE CASE.....2

STATEMENT OF FACTS6

STANDARD OF REVIEW.....14

ARGUMENTS.....15

 I. The post-conviction relief court properly denied Petitioner’s assertion that trial counsel was constitutionally ineffective for failing to present Petitioner’s family members, Kayte and Dustin Allison, as defense witnesses to impeach the testimony of State’s witnesses Joshua Wood and David Murray regarding conversations with Petitioner following the shooting, where the testimony of Kayte and Dustin Allison would not have had any impact on the outcome of the trial and counsel made a strategic decision to challenge the State’s circumstantial case through cross-examination rather than presenting a defense.....16

 II. The post-conviction relief court properly denied Petitioner’s assertion that trial counsel was constitutionally ineffective for not objecting to the trial court’s jury instruction that malice could be inferred from the use of a deadly weapon, where Petitioner never requested an involuntary manslaughter jury instruction nor ever alleged until now on appeal that he was entitled to one, and no evidence was presented that would reduce, mitigate, excuse, or justify the homicide, and accordingly, the jury instruction was proper.....21

CONCLUSION.....28

TABLE OF AUTHORITIES

Cases

<u>Bozeman v. State</u> , 307 S.C. 172, 414 S.E.2d 144 (1992)	24
<u>Buckson v. State</u> , 423 S.C. 313, 815 S.E.2d 436 (2018)	14, 17, 19, 20
<u>Butler v. State</u> , 286 S.C. 441, 334 S.E.2d 813 (1985)	16
<u>Cherry v. State</u> , 300 S.C. 115, 386 S.E.2d 624 (1989)	15, 16
<u>Douglas v. State</u> , 332 S.C. 67, 504 S.E.2d 307 (1998)	24
<u>Edwards v. State</u> , 392 S.C. 449, 710 S.E.2d 60 (2011)	19
<u>Gaddy v. Douglass</u> , 359 S.C. 329, 597 S.E.2d 12 (Ct. App. 2004)	22
<u>Goins v. State</u> , 397 S.C. 568, 726 S.E.2d 1 (2012)	14
<u>I’On, L.L.C. v. Town of Mt. Pleasant</u> , 338 S.C. 406, 526 S.E.2d 716 (2000)	22
<u>Jackson v. State</u> , 329 S.C. 345, 495 S.E.2d 768 (1998)	19
<u>Jordan v. State</u> , 406 S.C. 443, 752 S.E.2d 538 (2013)	14
<u>Lomax v. State</u> , 379 S.C. 93, 665 S.E.2d 164 (2008)	15
<u>Mangal v. State</u> , 421 S.C. 85, 805 S.E.2d 568 (2017)	22, 23
<u>Sellner v. State</u> , 416 S.C. 606, 787 S.E.2d 525 (2016)	14
<u>Smalls v. State</u> , 422 S.C. 174, 810 S.E.2d 836 (2018)	14
<u>State v. Belcher</u> , 385 S.C. 597, 685 S.E.2d 802 (2009)	4, 6, 21, 26, 27
<u>State v. Cooney</u> , 320 S.C. 107, 463 S.E.2d 597 (1995)	24
<u>State v. Gibson</u> , 390 S.C. 347, 701 S.E.2d 766 (Ct. App. 2010)	24
<u>State v. Morris</u> , 307 S.C. 480, 415 S.E.2d 819 (Ct.App.1991)	25
<u>State v. Pickens</u> , 320 S.C. 528, 466 S.E.2d 364 (1996)	24
<u>State v. Rogers</u> , 361 S.C. 178, 603 S.E.2d 910 (Ct. App. 2004)	22
<u>State v. Smith</u> , 391 S.C. 408, 706 S.E.2d 12 (2011)	24
<u>Stokes v. State</u> , 308 S.C. 546, 419 S.E.2d 778 (1992)	20
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984)	15, 16, 20
<u>Sullivan v. State</u> , 407 S.C. 241, 754 S.E.2d 885 (Ct. App. 2014)	24
<u>Wood v. Allen</u> , 558 U.S. 290 (2010)	20

Constitutional Provisions/Statutes/Rules

U.S. Const. amend. VI	15
Rule 243, SCACR	3, 5
Rule 404(b), SCRE	11, 12

Other Authority

JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002)	22
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ISSUES PRESENTED ON APPEAL

- I. Did the post-conviction relief court properly deny Petitioner's assertion that trial counsel was constitutionally ineffective for failing to present Petitioner's family members, Kayte and Dustin Allison, as defense witnesses to impeach the testimony of State's witnesses Joshua Wood and David Murray regarding conversations with Petitioner following the shooting, where the testimony of Kayte and Dustin Allison would not have had any impact on the outcome of the trial and counsel made a strategic decision to challenge the State's circumstantial case through cross-examination rather than presenting a defense?

- II. Did the post-conviction relief court properly deny Petitioner's assertion that trial counsel was constitutionally ineffective for not objecting to the trial court's jury instruction that malice could be inferred from the use of a deadly weapon, where Petitioner never requested an involuntary manslaughter jury instruction nor ever alleged until now on appeal that he was entitled to one, and no evidence was presented that would reduce, mitigate, excuse, or justify the homicide, and accordingly, the jury instruction was proper?

STATEMENT OF THE CASE

Petitioner Brandon Heath Clark is presently confined in the South Carolina Department of Corrections serving a forty-year sentence following convictions in Greenville County. During its March 2007 term, the Greenville County Grand Jury indicted Petitioner for two counts of murder and two counts of possession of a weapon during the commission of a violent crime following the fatal shooting of Christopher Garland and Cameron Wade¹ on July 29, 2006. (2007-GS-23-0002442, -002443). He was represented on these charges by Scott D. Robinson, Esquire. Assistant Solicitor Bryna Seay of the Thirteenth Circuit Solicitor's Office prosecuted the case on behalf of the State.

On November 2, 2009, Petitioner proceeded to a jury trial in the Greenville County Court of General Sessions before the Honorable Edward W. Miller, circuit court judge. Following a three-day trial, the jury convicted Petitioner as indicted. Judge Miller sentenced Petitioner to forty years' imprisonment for each count of murder and five years' imprisonment for each count of possession of a weapon during the commission of a violent crime, with the sentences to be served concurrently.

Petitioner filed a timely notice of appeal and an appeal was perfected on his behalf by Appellate Defender Elizabeth Franklin-Best of the South Carolina Commission on Indigent Defense. On appeal, Petitioner argued the trial court erred in denying his motion for a directed verdict because the State failed to establish the bullets from Petitioner's gun killed the victims. Respondent, represented by Assistant Attorney General Alphonso Simon, Jr. of the South Carolina Attorney General's Office, argued the State presented both direct evidence and

¹ Wade's name is spelled "Kamron" on the indictment (2007-GS-23-002443), but appears elsewhere in the Appendix spelled "Cameron." Respondent uses the most common spelling found in the Appendix, Cameron, through this brief.

substantial circumstantial evidence that Petitioner fired the shots that killed both victims. Following oral argument, the South Carolina Court of Appeals affirmed Petitioner's convictions and sentences by unpublished opinion, finding the record included sufficient evidence which tended to prove Petitioner's guilt. State v. Brandon Heath Clark, 2012-UP-549 (Ct. App. filed October 10, 2012). The Remittitur was returned to the circuit court on October 26, 2012.²

On March 7, 2013, Petitioner filed a *pro se* application for post-conviction relief (2013-GS-23-01325), alleging the following grounds for relief:

1. Ineffective assistance of counsel.
 - a. "Trial [counsel] should have objected to Indictment of Possession of a weapon during commission of a violent crime."
 - b. "Trial [counsel] should have objected to State Attorney vouching for the truthfulness and validity of a states witness."
 - c. "Trial [counsel] should have objected to the charge of inferred malice because deed was done with a deadly weapon."

On October 23, 2013, Respondent filed its return to the application and requested an evidentiary hearing on the application. Thereafter, Petitioner, through counsel Caroline M. Horlbeck, served an amended application on December 16, 2014, adding an allegation "that evidence of material facts exist which have not been previously presented and heard by the Court. This material evidence requires vacation of the conviction and sentence."

An evidentiary hearing into the application and amendment was convened June 18, 2015, in the Greenville County Court of Common Pleas before the Honorable Perry H. Gravely, circuit court judge. Petitioner was present alongside counsel Horlbeck. Respondent was represented by

² The records from Petitioner's direct appeal were not included in the Appendix. As these were before the lower court, these records should have been included in the Appendix pursuant to Rule 243(f)(1), SCACR. See App. 328 (noting the appellate records were included as attachments to Respondent's return) and App. 445 (Judge Gravely indicates he has and wishes to review the appellate briefs before ruling). Respondent has conferred with counsel for Petitioner and based on this conversation, anticipates that Petitioner will be supplementing the Appendix with these materials.

Assistant Attorney General Karen C. Ratigan of the South Carolina Attorney General's Office. At the hearing, Petitioner testified on his own behalf and presented testimony from trial counsel Robinson and a variety of fact witnesses, including: Howard Stewart, who had engaged in several Facebook conversations with Petitioner's family members about the case but was not present at the scene and admitted he had no personal knowledge related to the shooting; Petitioner's cousin Kayte Allison and her former husband Dustin Allison, who were both with Petitioner before and after the party where the shooting occurred but were not present at the scene; Petitioner's mother Christy Clark, who had engaged in Facebook conversations with Stewart but was also not present at the scene. At the conclusion of the evidentiary hearing, Judge Gravely took the matter under advisement to review all the materials and evidence presented.

By letter dated July 1, 2015, Judge Gravely denied relief, specifically finding, "Pursuant to the hearing on June 18, 2015, in the above-referenced case, I have decided the matter as follows: Plaintiff's application for post-conviction relief is denied. State v. Belcher, 385 S.C. 597 (2009), is inapplicable in this case as there was no evidence presented that would mitigate, reduce, excuse or justify the murder for which a jury found Mr. Clark guilty. Further, Plaintiff did not meet his burden as to the remaining claims asserted in his petition." Judge Gravely instructed Respondent to prepare a proposed order denying relief. By order filed August 6, 2015, Judge Gravely denied post-conviction relief. Specifically, Judge Gravely found counsel was not ineffective for failing to present the testimony of Kayte and Dustin Allison, as it would not have changed the outcome of the trial, counsel was not ineffective for not objecting to the State's closing argument because the argument was proper, and counsel was not ineffective for not objecting the jury instruction on inferring malice from the use of a deadly weapon because the

charge was proper where no evidence was presented that would reduce, mitigate justify, or excuse the murder.

On September 1, 2015, Petitioner filed a notice of appeal. On April 6, 2016, Appellate Defender Kathrine H. Hudgins of the South Carolina Commission-on Indigent Defense filed the petition for a writ of certiorari and appendix on Petitioner's behalf. On August 22, 2016, Respondent, through Assistant Attorney General Ratigan, filed its return to the petition. Thereafter, on October 30, 2017, the South Carolina Supreme Court transferred this case to this Court pursuant to Rule 243(l), SCACR. On June 22, 2018, this Court granted certiorari and instructed parties to file briefs as provide by Rule 243(j), SCRCR.

STATEMENT OF FACTS

On July 29, 2006, Petitioner shot Christopher Garland and Cameron Jack Wade while they were inside a car outside of Steve Watson's house in Greenville County. Garland suffered a single gunshot wound; the bullet travelled through his back into his right chest, then his right lung, then his heart, and through his sternum, eventually lodging in the tissue just beneath the skin of his chest.³ (App. 170). Wade suffered a through and through gunshot wound to the head. (App. 172-73). The bullet entered in the area around his right temple, and exited through the back of his head.⁴ Id.

The Party Where the Shooting Occurred

On the late evening of July 29, 2006, a gathering was held at Steve Watson's home in celebration of Cameron Wade's ("Wade") birthday.⁵ (App. 51). Several witnesses testified that a physical altercation between Wade and Joshua Wood ("Wood") was also planned for that evening. (App. 52, 77, 104, 111). Wood and Wade had been involved in a physical confrontation within the two weeks prior to the July 29th gathering, where Wade had gotten the better of Wood, who suffered a black eye and bruised ego from the fight; Wood's pregnant fiancée had also been pushed to the ground during the altercation. (App. 58-59, 65-66, 76-77, 87-88, 111). While a third individual was involved in the first altercation, Wade and Wood were the only ones set to be involved in the second fight. (App. 51-52, 76-78, 104, 111-12).

³ The pathologist noted the wound indicated the bullet passed through something prior to hitting Garland. (App. 171-71).

⁴ The pathologist testified that it appeared Wade was sitting with his head turned distinctly to his right as if he was looking back over his right shoulder. (App. 173).

⁵ Watson testified that he was initially unaware a gathering was going to be at his house, but he learned of it on MySpace. (App. 52).

Witnesses gave different accounts regarding how many were at the gathering. Prior to the victims' arrival, Watson indicated no more than fifty people showed up for the party. (App. 53). Partygoer Tyler Stone indicated there were at least fifty people present, (App. 66), and another attendee Tiffany Saltz stated there were around a hundred people at scene. (App. 108). Altogether, law enforcement was told there were between twenty and two-hundred people at the gathering. (App. 239). Nearly everyone who testified established that it was a dark and chaotic scene.

Wood arrived at the party with his friend David Murray. Most of the witnesses indicated Wood was acting crazy that evening, running round shirtless and commenting that he was going to beat Wade. (App. 66, 78, 112; see App. 53). In fact, Wood even admitted that he was "acting ignorant," and that he was drinking, and acting wild and out of control. (App. 78). However, none of those witnesses testified they saw Wood with a gun. (App. 79, 112).

Saltz testified she saw Petitioner with a gun that evening. (App. 104, 105). She noted it was in his pants, and he had his shirt fashioned in a manner that allowed the gun to be visible. (App. 105). Saltz also testified it appeared Petitioner was aggravated and he was in an ill mood. (App. 105, 107). She admitted that in prior statements, she informed law enforcement that she told Petitioner not to shoot her. (App. 107). Saltz did not see anyone else with a gun. (App. 107). She also did not see the shooting. (App. 107). She also acknowledged she did not check everyone for guns. (App. 108).

David Murray testified he went to the gathering with Wood. (App. 111). It was his understanding that there would be a rematch of the prior fight between Wade and Wood. (App. 111). Murray was not present for the first fight. (App. 111). Murray noted when the other group arrived, "a bunch of people started running down there and they started running up there

and it just got pretty crazy.” (App. 112 l 20-22). Murray watched Wood hit one guy, and then the two heard gunshots. (App. 113). Murray could not recall where they were when he heard the shots. (App. 113).

Woods testified that he recalled when Wade and Garland arrived. (App. 79). Multiple cars pulled up alongside the road. He recalled there were five to six cars there. (App. 79). Woods saw one guy that he did not recognize get out of one of the cars. (App. 79-80). When Wood determined he did not know the guy, Wood hit the guy in the face with a stick. (App. 80). Shortly thereafter, Wood started hearing gunshots. (App. 80).

The Shooting and Immediate Aftermath

Christopher Allison, one of Petitioner’s friends, went to the gathering with Petitioner and Jordan Mardis. Christopher was standing by Petitioner when they saw Wade and Garland arrive. (App. 139, 141). Christopher indicated Wade and Garland were part of a four-car entourage. (App. 139-41, 147-48). Christopher heard a gunshot and saw a shot being fired over the roof of the last car of the entourage, a dark colored Honda. (App. 141, 148). In response, Petitioner fired his .40-caliber Smith and Wesson handgun approximately nine times, according to some witnesses, in the air. (App. 141, 148). After Petitioner fired the shots, the two ran to Christopher’s car. They drove away soon after with Mardis. (App. 141-42). Petitioner drove the group to the home of Dustin Allison, Christopher’s brother. (App. 142).

Murray did not see who was firing the shots. (App. 113). Murray and Wood then started to leave. They got into Murray’s truck and pulled out of the driveway. (App. 113, 116). However, they turned around to see if some of their friends were still at Watson’s house. (App. 113, 116). Wood then got out of the truck, picked up a tire iron from the bed of the truck, and threw the tire iron at the victims’ vehicle. (App. 113-14, 116, 117, 119, 120). Wood kicked the

back window of the car, shattering the window and cutting his leg, before getting back into Murray's truck and leaving. (App. 83, 96, 99). After they left, the three headed to Dustin Allison's house. (App. 114). At Dustin Allison's home, Murray, Wood, and Mardis met up with Christopher and Dustin Allison, Katye Crawford Allison, and Petitioner. (App. 114). Murray recalled Petitioner said Chris was supposed to throw his gun in the river. (App. 115). Murray did not see Petitioner with a gun, and Murray thought Petitioner had only fired shots into the air.⁶ (App. 115). Wood was not allowed inside the Allison home because he had blood on his leg and Kayte did not want him to bleed on the ground where her small child played. (App. 151).

Wood testified that he saw Petitioner at the time of the shooting. (App. 81). Petitioner was behind Wood. (App. 81). Wood saw Petitioner fire his gun twice into the air, but he did not see what happened after that. As soon as Wood saw the gunshots, he ran. (App. 81-82).

Wood testified that he spoke with Petitioner at the house. Wood stated, "[w]ell, when we got back he [Ppetitioner] 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 into the air." (App. 84 ll 12-16). Wood noted the gun Petitioner had that evening was one Petitioner carried in his pockets. (App. 84). Wood also testified Petitioner indicated he was going to throw the gun in the Saluda River. (App. 85).

The Police Investigation

Dar Shaw of the Greenville County Forensics Division processed the victims' vehicle. Shaw testified he saw a couple of possible projectile holes in the windshield. (App. 125). Shaw also noted a side vent wing window was broken, and there was a hole in the top of the roof from where photographs indicated a tire iron was removed. (App. 125). Investigator Fields also

⁶ Murray had surmised that the shots he heard were fired in the air. (App. 113).

testified that there were two large holes in the back windshield, and a small window behind the back window of the passenger side without glass in it. (App. 231). She also noted there appeared to be bullet holes in the door post between the driver's seat and the back passenger seat on the passenger side of the car. (App. 231).

A nine-millimeter handgun and a magazine that belonged to Garland were found beneath Wade in the passenger seat. (App. 180, 232). Three casings that were fired from the handgun were also collected at the scene. (App. 179, 245-47). Garland had a valid concealed weapon permit on his person. (App. 232).

Law enforcement was able to determine that a copper jacket from a projectile found behind the rear seat inside the victims' car was fired by a gun consistent with a firearm marketed by Smith and Wesson handgun. (App. 179, 245; 248-49). The jacket was inconsistent with being fired from Garland's handgun. (App. 248). The projectile that was recovered from Garland's body was determined to be a .40-caliber projectile that was consistent with being fired by a firearm marketed by Smith and Wesson. (App. 250-51). The two projectiles were consistent with one another, but analysis as to whether they were fired by the same firearm was inconclusive. (App. 251, 255). Nine .40-caliber shell casings were found at the scene. (App. 189-90, 197, 201, 202). They were found ten to twelve yards from the victims' vehicle. (App. 207, 208). Those were all fired by the same caliber of .40-caliber Smith and Wesson. (App. 251, 252, 255). The firearms and toolmarks analyst testified he could not make any conclusions as to whether the casings that were retrieved from the scene were fired by the same firearm as the projectiles because he did not have the firearm for comparison. (App. 255-56).

The Trial

At the start of the trial, the State made a motion to introduce Rule 404(b), SCRE, evidence of an incident that occurred two months prior to the homicide, wherein Petitioner shot his father in the leg and subsequently pled guilty to assault and battery of a high and aggravated nature. (App. 6-9). The State argued to the trial court the shell casings from that incident and the current homicides matched and would be necessary to prove identity as they anticipated Petitioner would put up a third party guilt defense. In response, Petitioner, through trial counsel, argued he was not disputing that he was present at the scene, had shot his gun nine times, and the shell casings were from his nine shots, but that he did not fire the shots that killed the victims. (App. 10-11). Petitioner stated that he had offered to stipulate to the aforementioned facts rather than have the evidence of the prior shooting introduced. (App. 10-11). The trial court reserved ruling until hearing the testimony unfold. (App. 12-14).

Petitioner then moved to present evidence of third party guilt, specifically that Wood and Murray were the shooters. In support of this motion, trial counsel noted Petitioner did not have a motive to kill the victims while Wood did. The State responded that it was not its burden to prove motive and Petitioner did not present sufficient evidence to formally proceed forward with a third party guilt defense. The trial court again decided to reserve its ruling until more evidence was presented. (App. 15-17).

Petitioner, through trial counsel, agreed to stipulate to chain of custody, noting that he had independently tested everything. (App. 41).

On the second day of trial, following an initial day of testimony from Watson, Stone, Wood, Saltz, Murray, Christopher Allison, and Sargent Dar Shaw, the parties entered into the following stipulation, which was read to the jury by the trial court:

The defendant hereby stipulates or agrees that he was present at the scene at [redacted address of the party] on July 29, 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 result of his firing his pistol nine times. And that items D-02 through D-010, State's Exhibit 5, are admissible into evidence.

(App 165-166).

The State later renewed its motion to introduce the evidence of Petitioner shooting his father pursuant to Rule 404(b), SCRE, as Petitioner's intent to shoot the victims and absence of mistake or accident. The State argued the prior incident established Petitioner knew how to control his weapon, which was crucial to proving intent in the present case. (App. 192-93). In response, Petitioner, through counsel, noted the stipulation already covered any of the State's concerns or needs to introduce evidence of the prior shooting and argued it would be extremely prejudicial. The trial court agreed and refused to allow the State to present evidence of Petitioner's prior shooting. (App. 194-95).

Following the close of the State's case, the court advised Petitioner of his right to testify and gave Petitioner the lunch break to discuss the issue with trial counsel. (App. 257-58). Following the lunch break, Petitioner advised the trial court he did not wish to testify. (App. 259-60).

The court then held a charge conference. Petitioner asked for a jury instruction on third party guilt. The trial court declined to give a third party guilt instruction, noting the defense had been that Petitioner did not fire the shots that killed the victims. (App. 260-61). The State then requested a jury instruction on flight as evidence of guilt and Petitioner objected. (App. 262-63). The trial court ultimately did not give a jury instruction on evidence of flight, noting it was an impermissible instruction to give the jury. (App. 295). No jury instructions were requested or given on involuntary manslaughter, voluntary manslaughter, self-defense, accident, or anything

else what would reduce, mitigate, excuse, or justify the homicide. The jury was charged with solely with the crimes as indicted—murder and possession of a weapon during the commission of a violent crime.

Following deliberations, the jury return with guilty verdicts to all four charges.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

On appeal, Petitioner argues the post-conviction relief court erred in denying him relief as to two of his allegations: first, that trial counsel was ineffective for failing to present family members Kayte and Dustin Allison as defense witnesses to impeach the testimony of Woods and Murray; and second, that trial counsel was ineffective for failing to object to the trial court's jury instruction that malice could be inferred from the use of a deadly weapon because he was entitled to a jury instruction on involuntary manslaughter based on his conduct. Petitioner argues both of these errors or omissions by trial counsel rise to the level of constitutional ineffectiveness and warrant the reversal of his murder convictions and a remand for retrial. The post-conviction relief court properly found Petitioner did not meet his requisite burden of proof as to either allegation.

Petitioner, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Petitioner has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Petitioner must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at

625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). Petitioner must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced Petitioner such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Petitioner failed to meet this high burden of proof required of him as to either allegation, and accordingly, the post-conviction relief court properly denied relief. This Court should affirm the post-conviction relief court’s findings.

- I. **The post-conviction relief court properly deny Petitioner’s assertion that trial counsel was constitutionally ineffective for failing to present Petitioner’s family members, Kayte and Dustin Allison, as defense witnesses to impeach the testimony of State’s witnesses Joshua Wood and David Murray regarding conversations with Petitioner following the shooting, where counsel made a strategic decision to challenge the State’s circumstantial case through cross-examination rather than presenting a defense case and the testimony of Kayte and Dustin Allison would not have had any impact on the outcome of the trial.**

On appeal, Petitioner argues trial counsel should have presented his cousin, Kayte Allison and her former husband, Dustin Allison, as defense witnesses. Petitioner acknowledges that neither were present at the scene of the shooting, and therefore, presumably also acknowledges that neither had any firsthand knowledge of what actually happened at the scene when Petitioner elected to fire his weapon nine times at a crowded and tension-filled event. However, Petitioner argues Kayte and Dustin should have been presented as defense witnesses to testify as to whether

Petitioner had conversations with Wood and Murray following the shooting at the Allison home. Specifically, Petitioner asserts Kayte and Dustin should have been called to impeach Wood's testimony that Petitioner told Wood that he feared he shot the victims and Murray's testimony that he overheard Petitioner say Christopher was supposed to throw Petitioner's gun in the river. The basis for this impeachment is Kayte and Dustin's recollection nine years later at the post-conviction relief hearing that Wood never came inside their home due to bleeding on his leg and inconsistent testimony as to whether Murray ever exited his truck and came to their porch. Both Kayte and Dustin testified they spoke with counsel prior to trial and both were subpoenaed as potential defense witnesses for trial. Petitioner argues trial counsel was constitutionally ineffective for failing to present Kayte and Dustin for impeachment purposes as to what happened at their house after the shooting and the result of his trial would have been different had they been presented.

The post-conviction relief court rejected this argument, finding Kayte and Dustin's testimony would not have had any impact on the result of the trial, and therefore, Petitioner failed to meet his burden of proof. Petitioner argues the post-conviction relief court's factual findings are not supported, as "[t]he record does not support the PCR judge's finding that Petitioner suffered no prejudice from trial counsel's failure to call the Allisons to testify at trial." However, these factual determinations by the post-conviction relief court are supported by the any evidence standard and therefore, must be afforded a deferential standard of review by this Court. See Buckson, 423 S.C. at 320, 815 S.E.2d at 440 ("Under the proper standard of review, the appellate court's 'view' must be limited to whether there is probative evidence to support the PCR court's factual findings.").

A. The testimony of Kayte and Dustin Allison would not have had any impact on Petitioner's trial, and therefore, the post-conviction relief court properly found Petitioner failed to establish the requisite prejudice needed for relief.

Initially, the post-conviction relief court properly determined Petitioner failed to establish that the result of his trial would have been different, i.e., prejudice, from counsel's decision not to present Kayte and Dustin as defense witnesses. Their testimony could not rule out whether Petitioner ever spoke to Wood or Murray at their residence and was internally inconsistent between the two. Petitioner's assertion that Kayte testified Petitioner did not go outside to speak with Wood or Murray is not supported by the record. Crucially, Kayte testified that to her knowledge, Petitioner did not speak to Wood or Murray, not that she was physically with Petitioner all night and never saw them speak, which is an important distinction. (App. 392-94). The record established that there were several people coming and going from the Allison home that evening and Kayte did not purport to account for Petitioner's movements around the home and property the entire evening. Kayte also testified that Murray never exited his truck, which was directly contradicted by her former husband Dustin Allison, who testified Murray sat on the porch alongside Wood after Wood was denied entry to the home due to his bloody leg. (App. 392-94; 403). Dustin also testified similar to Kayte that he did not see Petitioner speak with Wood or Murray, but later acknowledged he did not know how long the men remained on his porch or when they left. (App. 404-05). Ultimately, the testimony presented by Kayte and Dustin did little to impeach the testimony of Wood and Murray and would not have affected the outcome of the trial.

Additionally, the testimony of Kayte and Dustin has no impact on the physical evidence presented, such as the firearms analysis establishing the bullet removed from one of the victims was a .40-caliber, the same as caliber as Petitioner's gun, and had similar markings to the shells

Petitioner admitted came from his weapon. Additionally, it does not lessen the acknowledgment from Petitioner that he fired a weapon in a crowded location nine times. The physical evidence and Petitioner's own admission were powerful evidence that resulted in Petitioner's conviction. Petitioner's attempts to hang the jury's verdict on the post-shooting statements he made to Wood and Murray, which he characterizes as "critical for the State's case", fall flat when compared to this other evidence. The post-conviction relief court properly reviewed the record and made proper factual determinations that the result of Petitioner's trial would not have been different had his family members testified. These factual findings are supported by probative evidence, and accordingly, must be affirmed.

B. Trial counsel had a reasonable trial strategy behind not presenting any witnesses, and therefore, the post-conviction relief court properly denied relief.

In addition to a complete lack of prejudice, the post-conviction relief court also properly denied relief because trial counsel's decision not to present Kayte or Dustin was not due to sheer neglect as he purports, but rather, was based on a valid trial strategy not to present defense witnesses. Both Kayte and Dustin had previously met with counsel and provided him with the basis for their testimony. Trial counsel subpoenaed both to be present for trial, but after hearing the State's case, counsel made a strategic decision not to present any defense witnesses.

"In most PCR cases in which the applicant seeks relief for trial counsel's failure to call witnesses, the PCR court's analysis—and the analysis by the appellate court—is focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular witness against the identifiable risks." Buckson, 423 S.C. at 320–21, 815 S.E.2d at 440 (citing Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 64-65 (2011) (deferring to trial counsel's strategic considerations); Jackson v. State, 329 S.C. 345, 350, 495 S.E.2d 768, 770-71 (1998)

(same); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (same)). “A PCR court’s analysis of counsel’s strategic decisions must be ‘highly deferential’ to counsel’s judgment, and ‘a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight.’ ” Buckson, 423 S.C. at 321, 815 S.E.2d at 440 (quoting Strickland, 466 U.S. at 689)). “[A] court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” Id.

Trial counsel testified the defense made a decision against Petitioner testifying because “[he] didn’t believe the State put up enough evidence in this matter for the jury to convict him of this crime.” (App.362). Trial counsel testified he believed “the State had not proved their case beyond a reasonable doubt to the jury” and that “conflicting testimony” came out at trial. (App. 368). Petitioner stated trial counsel discussed the “pros and cons of presenting a defense and not presenting.” (App. 418). Petitioner stated trial counsel did not want to call witnesses or present a defense but Petitioner could not recall why. (App. 421-22; 429-30). Based upon this testimony and a review of the record as required, it is apparent that trial counsel’s decision not to call Katie or Dustin Allison as defense witnesses was part of his trial strategy to refrain from presenting a defense case in order to have the final closing argument. A strategic or tactical decision does not have to be articulated by counsel on the record; counsel does not have to personally identify his or her thinking. It is enough that the record show a basis for strategy, not that counsel announce that strategy on the record. Wood v. Allen, 558 U.S. 290 (2010). Trial counsel testified he had pointed out inconsistencies in witnesses’ testimony and did not believe the State had met its burden of proof. As such, trial counsel decided not to present a defense case. It is clear from this testimony and the record as a whole that this a strategic decision to retain the final closing argument to the jury. Petitioner cannot rebut the presumption that trial

counsel rendered adequate assistance and trial counsel cannot be deemed ineffective for choosing not to call Katy or Dustin as defense witnesses based on a valid strategy.

In conclusion, the post-conviction relief court properly denied relief, as Petitioner failed to establish any constitutional ineffectiveness of counsel for electing not to present Kayte or Dustin Allison as defense witnesses.

II. The post-conviction relief court properly denied Petitioner's assertion that trial counsel was constitutionally ineffective for not objecting to the trial court's jury instruction that malice could be inferred from the use of a deadly weapon, where Petitioner never requested an involuntary manslaughter jury instruction nor ever alleged until now on appeal that he was entitled to one, and no evidence was presented that would reduce, mitigate, excuse, or justify the homicide, and accordingly, the jury instruction was proper.

For the first time on appeal, Petitioner argues the post-conviction relief court erred in finding trial counsel did not perform ineffectively in failing to object to the trial court's jury instruction that malice could be inferred from the use of a deadly weapon because there was evidence in the record to reduce the murder to involuntary manslaughter. Specifically, Petitioner asserts that his action of shooting a weapon into the air nine times at a densely crowded party entitled him to a jury instruction on involuntary manslaughter because either the unlawful act was not a felony and would not naturally tend to cause death or great bodily injury, or in the alternative, he lawfully armed himself in self-defense while acting recklessly in shooting the weapon into the air nine times. While Petitioner argued to the post-conviction relief court that trial counsel was ineffective for failing to object to the inferred malice jury instruction, he never argued it was because he was entitled to an involuntary manslaughter jury charge.

Regardless of preservation concerns, the post-conviction relief court properly found this argument to be without merit and concluded trial counsel was not ineffective in failing to object to the jury instruction as it was proper and did not run afoul of State v. Belcher, 385 S.C. 597,

685 S.E.2d 802 (2009), where there was nothing to reduce, mitigate, excuse, or justify the homicide. This Court should affirm the post-conviction relief court.

A. Petitioner's appellate argument that he was entitled to a jury instruction on involuntary manslaughter is being presented on appeal for the first time, and therefore, is not preserved for this Court's review.

Petitioner's assertion the inferred malice jury instruction was improper because he was entitled to a jury instruction on involuntary manslaughter was never raised to the post-conviction relief court and is only being raised not for the first time on appeal. Accordingly, it is not preserved for this Court's review.

In South Carolina, issue preservation requirements are a fundamental component of appellate procedure. Gaddy v. Douglass, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004). Significantly, the application of issue preservation requirements ensures the trial court has an opportunity "to rule properly after it considered all relevant facts, law, and arguments." On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). In order for an issue to properly be preserved for appellate review, the issue must be: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004); see JEAN HOFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). Although our courts have recognized the somewhat relaxed procedures in post-conviction relief cases and will excuse procedural defaults in extraordinary cases, "[i]n most PCR cases, however, [appellate courts] have refused to excuse the pleading and issue-preservation requirements that apply in all civil cases." Mangal v. State,

421 S.C. 85, 97, 805 S.E.2d 568, 574 (2017). In Mangal, the South Carolina Supreme Court noted,

[T]here are situations where the interests of justice require PCR courts to be flexible with procedural requirements before PCR applicants suffer procedural default on substantial claims. Such flexibility is consistent with the purpose and spirit of our Rules of Civil Procedure.⁹ These considerations should guide PCR courts when struggling to balance procedural requirements against the importance of the issues at stake in PCR proceedings. We encourage trial courts in PCR cases to use the discretion we grant them on procedural matters to find reasonable ways—within the flexibility of our Rules—to reach the merits of substantial issues.

Mangal, 421 S.C. at 99–100, 805 S.E.2d at 575–76.

In the present case, Petitioner never raised or otherwise presented his claim that he should have received a jury instruction on the lesser-included offense of involuntary manslaughter until this appeal. In fact, the term “involuntary manslaughter” is not referenced once throughout the entire appendix. Despite never raising this claim before, it appears as though Petitioner is trying to bypass preservation requirements by weaving this argument into his assertion that trial counsel was ineffective for failing to object to the inferred malice charge on this ground. This issue is not properly before the Court and is not an extraordinary case where preservation deficiencies should be overlooked in the interest of justice.

B. Regardless of any preservation concerns, Petitioner was not entitled to a jury instruction on involuntary manslaughter.

On appeal, Petitioner argues, “[i]f a charge on involuntary manslaughter had been requested, the trial judge would have erred in refusing to give the charge.” Petitioner asserts the evidence established he merely discharged his weapon into the air, and accordingly, he was either engaged in a misdemeanor not naturally tending to cause death or great bodily harm, or in the alternative, had lawfully fired his weapon in self-defense with reckless disregard for the

safety of others. This argument is without merit, as Petitioner's conduct—shooting a firearm nine times in a populated area—did not entitle him to a jury instruction on involuntary manslaughter.

“Involuntary manslaughter is defined as the unintentional killing of another without malice while engaged in (1) an unlawful activity not naturally tending to cause death or great bodily harm or (2) a lawful activity with reckless disregard for the safety of others.” Sullivan v. State, 407 S.C. 241, 244–45, 754 S.E.2d 885, 887 (Ct. App. 2014) (citing State v. Smith, 391 S.C. 408, 414, 706 S.E.2d 12, 15 (2011)).

Our case law is clear that a jury instruction on involuntary manslaughter is inappropriate when the defendant **intentionally** fired his weapon, regardless of whether he was lawfully armed in self-defense. See id. “When the victim was killed by a gunshot, and no evidence is presented showing the defendant fired the gun unintentionally, the defendant is not entitled to a charge of involuntary manslaughter.”); Douglas v. State, 332 S.C. 67, 74–75, 504 S.E.2d 307, 310–11 (1998) (holding involuntary manslaughter charge not warranted when defendant admitted he intentionally fired his gun in self-defense); State v. Pickens, 320 S.C. 528, 531–32, 466 S.E.2d 364, 366–67 (1996) (holding defendant who admitted intentionally shooting the gun was not entitled to involuntary manslaughter charge); State v. Cooney, 320 S.C. 107, 112, 463 S.E.2d 597, 600 (1995) (holding defendant not entitled to involuntary manslaughter charge when he intentionally shot towards the ground at the victim's feet); Bozeman v. State, 307 S.C. 172, 177, 414 S.E.2d 144, 147 (1992) (explaining involuntary manslaughter charge inappropriate when defendant “only meant to shoot over the victim's head” because he intended to shoot the gun); State v. Gibson, 390 S.C. 347, 357–58, 701 S.E.2d 766, 771–72 (Ct. App. 2010) (holding defendant not entitled to involuntary manslaughter charge where defendant intentionally fired the

gun); State v. Morris, 307 S.C. 480, 484, 415 S.E.2d 819, 821–22 (Ct.App.1991) (holding defendant who intentionally fired the gun not entitled to an involuntary manslaughter charge).

Despite the clear law establishing a defendant is not entitled to a jury instruction on involuntary manslaughter when he or she intentionally fires his or her weapon, which is the only evidence here, Petitioner nonetheless argues he would have been entitled to an involuntary manslaughter charge because “[t]he act of firing the pistol into the air, however, is distinguished from firing a pistol into a crowd of firing shorts in the direction of an individual or group of people.” BOP 16. However, Petitioner cites to no authority to support this assertion, but rather, attempts to draw a distinction his actions and caselaw assigning no error in refusing to charge involuntary manslaughter when a defendant intentionally fired over the victim’s head.

In conclusion, Petitioner was not entitled to a jury instruction on involuntary manslaughter where the uncontroverted evidence was he intentionally shot his weapon nine times. There was no evidence presented that would reduce his murder convictions to involuntary manslaughter.

C. Because there was no evidence to reduce, mitigate, excuse, or justify Petitioner’s actions, trial counsel acted properly in not objecting to the trial court’s jury instruction that malice could be inferred from the use of a deadly weapon.

The trial court gave the following instruction to the jury:

Therefore, there must be a combination of the previous evil intent and the act. Malice aforethought may be expressed or inferred. These terms, expressed and inferred do not mean different kinds of malice but merely the manner in which malice may be shown to exist. That is either by direct evidence or by inference from the facts and circumstances which are proved. Expressed malice is shown when a person speaks words which express hatred or ill-will toward another or when the person is prepared beforehand to do the act which was later accomplished. Malice may be inferred from conduct showing a total disregard from human life. Inferred malice may also arise when the deed is done with a deadly weapon. A deadly weapon is any article, instrument or substance which is likely to cause death or great bodily harm. And whether an instrument has been

used as a deadly weapon depends on the facts and circumstances of each case.

(App.p.293).

Petitioner argues this charge was improper in light of Belcher, and trial counsel was ineffective for failing to object. In Belcher, the South Carolina Supreme Court held “the ‘use of a deadly weapon’ implied malice instruction had no place in a murder . . . prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing.” Belcher, 385 S.C. at 610, 685 S.E.2d at 809. The Supreme Court held further “the permissive inference charge concerning the use of a deadly weapon remains a correct statement under the law where the only issue presented to the jury is whether the defendant has committed murder.” Id. at 612, 685 S.E.2d at 810.

In denying Petitioner’s application for post-conviction relief, the post-conviction relief found Petitioner “failed to meet his burden of proving trial counsel should have objected to the jury charge regarding an inference of malice.” The court found “[State v.] Belcher⁷ 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 [Petitioner] guilty. As such, trial counsel was not deficient in failing to object to this portion of the jury charge.” (App. 461-62).

The PCR judge did not err in finding Petitioner failed to meet his burden of proving both that trial counsel was deficient in not objecting to the malice instruction in this case and that he was prejudiced as a result. As discussed in full above, Petitioner was not entitled to a jury instruction on involuntary manslaughter and presented nothing that would “mitigate, reduce, excuse, or justify the murder.” Accordingly, the jury instruction was proper and trial counsel was not deficient for failing to object. It was not incumbent upon trial counsel to have objected to the

⁷ 385 S.C. 597, 685 S.E.2d 802 (2009).

malice instruction in Petitioner's case because the prohibition of the charge as explained in Belcher was not applicable. The inferred malice charge is still properly charged "where the only issue presented to the jury is whether the defendant has committed murder." Id. That is precisely the case here. Christopher Allison, who was with Petitioner on the night in question, testified he saw a shot fired and Petitioner fired in the air several times in response. (App. 141; 148). Petitioner stipulated to firing his handgun nine times—leaving behind the nine .40 caliber casings recovered at the scene that had all been fired from the same weapon. (App. 166; 251-52; 255). The trial judge did not charge the jury with involuntary manslaughter, voluntary manslaughter, the defense of accident, or self-defense. Rather, the jury solely considered whether or not Petitioner was guilty or not guilty of murder. As such, the inferred malice charge in Petitioner's case was proper.

In conclusion, the post-conviction relief court properly found trial counsel was not constitutionally ineffective for not objecting to the inferred malice instruction as the instruction was properly given. This finding is supported by the record and is not an error of law. This Court should affirm these findings.

CONCLUSION

Because Petitioner failed to meet his requisite burden of establishing constitutional ineffectiveness as to either of the allegations challenged on appeal, this Court should affirm the post-conviction relief court.

Respectfully submitted,

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Nov. 19th, 2018

STATE OF SOUTH CAROLINA
In the Court of Appeals

CERTIORARI TO GREENVILLE COUNTY
Court of Common Pleas

The Honorable Perry H. Gravely, Post-Conviction Relief Court Judge
The Honorable Edward W. Miller, Trial Judge

Appellate Case No. 2015-001898

BRANDON HEATH CLARK,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PROOF OF SERVICE

I, Megan Harrigan Jameson, certify that I have served the within **Brief of Respondent** on Petitioner by depositing two copies of the same in the interagency mail to be delivered to Petitioner at the address below:

Appellate Defender Kathrine Hudgins
South Carolina Commission on Indigent Defense—Division of Appellate Defense
P.O. Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 19th day of November, 2018.


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