

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

DEC 27 2019

SC Court of Appeals
PETITIONER,

BRANDON HEATH CLARK

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2015-001898

Appeal from Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

Opinion No. 2019-UP-394

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Brandon Heath Clark petitions the Court for rehearing and respectfully submits that this Court misapprehended the testimony from Kayte and Dustin Allison, the two witnesses trial counsel failed to call at trial, as cumulative and impeachable. The testimony from the Allisons was not cumulative and was critical to demonstrate that two other witnesses, Joshua Wood and David Murray, could not have heard Petitioner make the alleged inculpatory statements, as they testified at trial, because Petitioner was inside the Allison home,

neither witness ever went inside the home and Petitioner never went outside to talk with Wood or Murray. Another witness, Christopher Allison, testified at trial that neither Murray or Wood came inside the Allison home. (App. p. 151, line 16 – p. 152, lines 1-8). Christopher Allison testified that he saw Wood on the front porch. No witness, however, at trial testified that Petitioner remained inside the Allison home. At the PCR hearing Kayte Allison testified that to her knowledge Petitioner never went outside to speak with Wood and Murray. (App. p. 394, lines 19-23). Dustin Allison testified at the PCR hearing that to his knowledge Petitioner never went outside to speak with Wood and Murray. (App. p. 403, line 23 – p. 404, lines 1-11). The testimony from the Allisons that Petitioner did not go outside and speak with Wood and Murray is not cumulative.

The Allison testimony was inconsistent as to whether Murray stayed in his truck or came on the porch. Kayte Allison testified that Murray stayed in his truck (App. p. 393, lines 8-22). Dustin Allison testified that Murray was on the front porch. (App. p. 404, line 15 – p. 405, lines 1-19). Whether in the truck or on the porch, Murray was outside the home and Petitioner was inside the home. The testimony from the Allisons was critical to establish that neither Wood nor Murray could have heard Petitioner make the statements they claim he made. Trial counsel was ineffective in failing to call the Allisons as witnesses at trial. Petitioner was prejudiced by the deficient performance.

Additionally, counsel respectfully submits that in finding the issue with regard to the failure to object to the inferred malice charge was not preserved for review, this Court overlooked the fact that the PCR judge ruled counsel was not ineffective for failing to object to the charge because there was no evidence presented at trial that would mitigate, reduce, excuse, or justify the murder for which a jury found Petitioner guilty. While PCR counsel did not specifically discuss the evidence that mitigated, reduced, excused or justified the act, by raising the allegation pursuant to State v.

Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) (overruled by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019)), it is implied that mitigating evidence exists. The PCR judge did not ask about the mitigating evidence and the State, at the PCR hearing, did not argue that the charge was proper under the law at the time because there was no mitigating evidence. Instead, the State argued that there was additional evidence of malice. (App. p. 444, lines 8-25). The issue is preserved for appellate review.

Finally, counsel respectfully submits that this Court, in footnote five stating that, “today’s ruling will not apply to convictions challenged on post-conviction relief.” overlooked the fact that Belcher was decided one month prior to Petitioner’s trial. The Belcher ruling, although now overruled by Burdette, applies to Petitioner’s PCR case. Trial counsel testified that he did not believe that he was aware of the Belcher 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). Trial counsel was ineffective in failing to object to the judge’s inferred malice instruction. Petitioner was prejudiced by the deficient performance.

1. The PCR judge erred in refusing to find trial counsel ineffective for failing to call Kayte 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.

At trial 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).

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 Mardis 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 Mardis 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 home 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, to her knowledge, Petitioner did not go outside to speak with either Wood or Murray.

Dustin Allison, Kayte’s former husband and Christopher Allison’s brother, 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 Petitioner and Mardis 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 Allison¹. (App. p. 355, line 15 – p. 356, lines 1-15). Trial counsel testified that he decided not to call witnesses and present a defense because “I believed that the State had not proved their case beyond a reasonable doubt to the jury.” (App. p. 368, lines 6-8). Trial counsel went on to testify, “And they couldn’t really put –they didn’t have nothing that would indicate that the grooves or the exact bullets were the same bullets, even the same caliber or the gun that was fired.” (App. p. 368, lines 18-23). Earlier in the PCR hearing trial counsel testified that Petitioner’s gun did not match the bullets that killed the two men. “I think in the last part of the transcript, at some point, Mr. Armstrong stated that the shell casings did not match – that shot these two folks, whatever, did not match Brandon’s gun.” (App. p. 341, line 24 – p. 342, lines 1-3). Trial counsel also testified, “But we had a bullet that the casing didn’t match, the caliber and so forth.” (App. p. 342, lines 20-22). Trial counsel continued to testify that the bullets did not match Petitioner’s gun stating, “But the defense, as I said before, was that the bullets that killed these guys didn’t come from Brandon’s gun.” (App. p. 343, lines 3-6). Finally, trial counsel testified, “And if they could pinpoint – if Brandon had shot these guys, we would have had nothing – this case wouldn’t have gone to trial, but the bullets did not match.” (App. p. 343, lines 22-25).

Although trial counsel testified at the PCR hearing that the bullets did not match Petitioner’s gun, 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

¹ 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).

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). Petitioner had a Smith and Wesson .40 caliber gun. (App. p. 141, lines 16-17). In a stipulation Petitioner admitted that nine .40 caliber shell casings located about ten yards from the car were the result of him firing his gun. (App. p. 166, lines 5-10; p. 207, lines 7-11). Although the ballistics evidence was inconclusive, the projectiles in question were at least consistent with being fired from a Smith and Wesson .40 caliber gun, the same type of gun Petitioner admitted to firing. In claiming that he did not present a defense because the State had not proved its case, trial counsel failed to recognize that the ballistic evidence did not exclude the possibility that the bullets in question came from Petitioner's gun. The testimony from the Allisons was critical because the ballistic evidence could not exclude Petitioner

At trial, during a pre-trial hearing, trial counsel told the judge, "James Armstrong does not know the type of bullet that killed the individual. He did recover the bullet from the other individual in this case but they do not have, as this other case talks about, any idea what type of bullet killed these individuals." (App. p. 10, lines 5-10). The State corrected the misstatement stating, "James Armstrong, it's my understanding from his report and from speaking with him, will testify that that was a .40 caliber bullet. So he does know the type of bullet that it is." (App. p. 11, line 24 – p. 12, lines 1-2). If trial counsel had not underestimated the strength of the State's ballistics evidence, although inconclusive, it would have been clear that the Allison testimony was necessary. As argued by PCR counsel:

Judge, this is a case that's no direct evidence that connected the killing to Mr. Brandon [Petitioner Brandon Clark]. There are also no witnesses that saw Mr. Clark pointing a gun at the victims and shoot them. There's certainly evidence that Mr.

Clark shot into the air, and I think that's from his own admission. But this was certainly not a slam dunk for the State, Judge.

And it seems like this case was right down the middle and probably needed every ounce of testimony and evidence to push it over to the not guilty realm that – it needed as much evidence as it could get to help it get overt there, Judge, which is why I believe that the Allison's testimony was so important.

(App. p. 435, lines 3-19).

The testimony from the Allisons that neither Murray nor Wood came into the house or came in contact with Petitioner after leaving the party was critical to refute the testimony from Murray and Wood that Petitioner allegedly stated that Chris Allison was supposed to have thrown the gun in the river and Wood's testimony that Petitioner allegedly stated that he thought he shot them. Refuting the testimony of Wood and Murray was especially important in light of the defense theory that Wood and/or Murray were the shooters. (App. p. 348, line 3 – p. 349, 350, lines 1-9).

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 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 Kayte 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, apart from the inconclusive ballistics evidence, 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.

This Court found that there was probative evidence to support the PCR court's finding that trial counsel did not act ineffectively when he made the decision not to call the Allison's as witnesses at trial. Counsel respectfully submits that both this Court and the PCR court misapprehended the nature and value of the Allison testimony. Trial counsel was ineffective in failing to call Kayte 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.

In finding Petitioner failed to show prejudice from counsel's failure to call the Allison's as witnesses at trial, this Court found the testimony cumulative and impeachable writing:

Additionally, they [the Allison's] testified Wood and Murray never came into their home, and to their knowledge, Clark never went outside their home or spoke to Wood or Murray. Therefore, the Allison's' testimony would not have refuted Wood's and Murray's testimony about alleged conversations they had with Clark after the shooting. Furthermore, the Allison's could have been impeached regarding their differing testimony about whether Murray remained in his truck or came to the Allison's' front porch. Because the Allison's' testimony would have been cumulative and impeachable, we find trial counsel's decision not to call the Allison's as witnesses did not prejudice Clark.

Clark v. State, Op. No. 2019-UP-394 (S.C. Ct.App. filed December 18, 2019).

The Allison testimony was not cumulative because they were the only witnesses to testify that Petitioner never went outside to speak with Wood and Murray. While the Allison testimony was inconsistent as to whether Murray stayed in his truck or came on the porch, the variance makes no difference because, whether in the truck or on the porch, Murray was outside the home and Petitioner was inside the home. The testimony from the Allison's was critical to establish that neither Wood nor Murray could have heard Petitioner make the statements they claim he made.

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 alleged 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) (overruled by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019)), 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. Scott, 414 S.C. 482, 487, 779 S.E.2d 529, 531 (2015) the South Carolina Supreme Court, providing two definitions for involuntary manslaughter, wrote:

Involuntary manslaughter is a lesser-included offense of murder, and “is defined as the unintentional killing of another without malice while engaged in either (1) the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm, or (2) the doing of a lawful act with a reckless disregard for the safety of others.” *Id.* at 309, 764 S.E.2d at 514 (citation omitted). Involuntary manslaughter requires a showing of criminal negligence, which “is defined as the reckless disregard of the safety of others.” S.C.Code Ann. § 16–3–60 (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. Brayboy, 387 S.C. 174, 180, 691 S.E.2d 482, 485 (Ct.App.2010) (quoting Pittman, 373 S.C. at 571, 647 S.E.2d at 167).

In Scott the Court found that a charge on involuntary manslaughter was not necessary because there was no evidence that Scott was criminally negligent in executing a martial arts move that resulted in death. In contrast, in the present case Petitioner was criminally negligent in shooting the gun in the air.

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:

“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 evidence in the present case supports a charge on involuntary manslaughter. In Casey v. State, 305 S.C. 445, 447, 409 S.E.2d 391, 392 (1991) the South Carolina Supreme Court wrote:

It has long been the law in this State that “to warrant the court in eliminating the offense of manslaughter it should very clearly appear that there is *no evidence whatever* tending to reduce the crime from murder to manslaughter.” State v. Norris, 253 S.C. 31, 35, 168 S.E.2d 564, 565 (1969) [citing State v. Gardner, 219 S.C. 97, 64 S.E.2d 130 (1951)] (Emphasis supplied). Moreover, our cases consistently hold that a request to charge a lesser included offense is properly refused only when there is no evidence that the defendant committed the lesser rather than the greater offense. See State v. Goldenbaum, 294 S.C. 455, 365 S.E.2d 731(1988).

If a charge on involuntary manslaughter had been requested, the trial judge would have erred in refusing to give the charge.

The evidence supports a jury instruction on involuntary manslaughter under either definition. Under the first definition of involuntary manslaughter as the unintentional killing of another without malice while engaged in the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily injury, Petitioner was engaged in the unlawful carrying of a pistol, a misdemeanor, when he fired the pistol in the air nine times. South Carolina courts have held that a defendant who shoots into a crowd or in the direction of an individual or group is not entitled to a charge on involuntary manslaughter. See Sullivan v. State, 407 S.C. 241, 754 S.E.2d 885(S.C. Ct. App. 2014); Douglas v. State, 332 S.C. 67, 504 S.E.2d 307 (1998); State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996). The act of firing the pistol in the air, however, is distinguished from firing a pistol into a crowd or firing shots in the direction of an individual or group of people. In Harris v. State, 354 S.C. 382, 389, 581 S.E.2d 154, 157 (2003) the South Carolina Supreme Court wrote:

This Court has stated, “[t]here is no error in the refusal to charge the law of involuntary manslaughter when the defendant admitted intentionally firing the gun, but claimed only he meant to shoot over the victim's head.” State v. Cooney, 320 S.C. 107, 112, 463 S.E.2d 597, 600 (1995); Bozeman v. State, 307 S.C. 172, 414 S.E.2d 144 (1992). Since Clifton admitted that he intentionally fired warning shots in the direction of Harold, he was not entitled to the involuntary manslaughter charge, and thus could not have been prejudiced by the Court's failure to charge it.

Although Petitioner intentionally fired his pistol in the air, he did not fire the shots into a crowd or in the direction of anybody. Unlawfully carrying a pistol and shooting it in the air is not an unlawful activity naturally tending to cause death or great bodily injury in the way that shooting into a crowd or in the direction of people would naturally tend to cause death or great bodily injury. Petitioner was entitled to an instruction on involuntary manslaughter under the first definition.

Under the second definition of involuntary manslaughter as the unintentional killing of another without malice while engaged in the doing of a lawful activity with a reckless disregard for the safety of others, Petitioner was entitled to lawfully arm himself in self-defense because shots were being fired in his direction. In State v. Crosby, 355 S.C. 47, 52, 584 S.E.2d 110, 112 (2003) the South Carolina Supreme Court wrote, “In State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999), this Court held that 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.” Petitioner was engaged in a lawful activity because he was entitled to arm himself in self-defense, even though he was in unlawful possession of a weapon. By shooting into the air nine times, Petitioner was criminally negligent, acting with a reckless disregard for the safety of others. Petitioner was entitled to a charge on involuntary manslaughter.

The PCR judge found that there was no evidence presented at trial that would mitigate, reduce, excuse, or justify the murder. As discussed above, 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.

In affirming the finding of the PCR court this Court wrote:

The PCR court found Clark "failed to meet his burden of proving trial counsel should have objected to the jury charge regarding an inference of malice." In particular, the PCR court found *Belcher* inapplicable to Clark's case because "there was no evidence presented at trial that would mitigate, reduce, excuse, or justify the murder for which a jury found [Clark] guilty." The PCR court found trial counsel was not deficient for failing to object to the jury charge, and trial counsel's representation did not prejudice Clark.

This issue is not preserved for our review because Clark never argued to the PCR court that he was entitled to a jury instruction on the lesser-included offense of involuntary manslaughter.

Clark v. State, Op. No. 2019-UP-394 (S.C. Ct.App. filed December 18, 2019).


Counsel respectfully submits that in finding the issue with regard to the failure to object to the inferred malice charge was not preserved for review, this Court overlooked the fact that the PCR judge ruled counsel was not ineffective for failing to object to the charge because there was no evidence presented at trial that would mitigate, reduce, excuse, or justify the murder for which a jury found Petitioner guilty. While PCR counsel did not specifically discuss the evidence that mitigated, reduced, excused or justified the act, by raising the allegation pursuant to State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) (overruled by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019)), it is implied that mitigating evidence exists. The PCR judge did not ask about the mitigating evidence and the State, at the PCR hearing, did not argue that the charge was proper under the law at the time because there was no mitigating evidence. Instead, the State argued that there was additional evidence of malice. (App. p. 444, lines 8-25). The issue is preserved for appellate review. As discussed above, the evidence supports a jury instruction on involuntary manslaughter. Trial counsel was ineffective in failing to object to the inferred malice charge.

In footnote five of the opinion this Court wrote, “Even if we addressed this issue, the supreme court's recent decision in *Burdette*, 427 S.C. at 504-05, 832 S.E.2d at 583, stated, “today's ruling will not apply to convictions challenged on post-conviction relief.” *Id.* Therefore, trial counsel's decision not to object to the inferred malice jury instruction did not constitute deficient performance in this case.” Clark v. State, Op. No. 2019-UP-394 (S.C. Ct.App. filed December 18, 2019).

Counsel respectfully submits that this Court overlooked the fact that Belcher was decided one month prior to Petitioner's trial. The Belcher ruling, although now overruled by Burdette, applies to Petitioner's PCR case. Trial counsel testified that he did not believe that he was aware of the Belcher 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). Trial counsel was ineffective in failing to object to the judge's implied malice instruction. The deficient performance resulted in prejudice.

Counsel respectfully seeks rehearing and a finding by this Court that trial counsel was ineffective in failing to call the Allison's as witnesses at trial and failing to object to the inferred malice charge. Petitioner was prejudiced by the deficient performance. Petitioner seeks a rehearing and remand for a new trial.

Respectfully Submitted,


KATHRINE H. HUDGINS
Appellate Defender

This 27th day of December, 2019.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

RECEIVED
DEC 27 2019
SC Court of Appeals

BRANDON HEATH CLARK

PETITIONER,

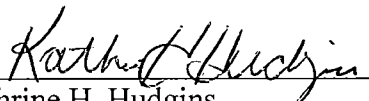
v.

STATE OF SOUTH CAROLINA,

RESPONDENT

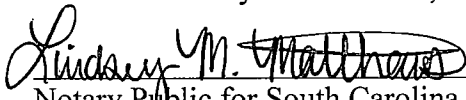
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Brandon Heath Clark, #336351, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 27th day of December, 2019.



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 27th day of December, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: October 22, 2024.