

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**ORIGINAL**

Appeal from Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

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**FEB 24 2020**

Opinion No. 2019-UP-394 (S.C. Ct. App. Filed December 18, 2019)

**S.C. SUPREME COURT**

13-CP-23-1325

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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  
TO THE COURT OF APPEALS

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**CERTIFICATE OF COUNSEL**

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on January 24, 2020.

## **QUESTIONS PRESENTED**

1. Did the Court of Appeals err in finding that the PCR judge did not err 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?
2. Did the Court of Appeals err in finding that the allegation that trial counsel was 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 was not preserved for appellate review?

## STATEMENT OF THE CASE

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 [PCR]. The State filed a return on October 23, 2013. On June 18, 2015, an evidentiary hearing was held before the Honorable Perry H. Gravely. Caroline Horlbeck represented Petitioner at the PCR hearing. Karen Ratigan represented the State. 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. The petition for writ of certiorari was filed on April 6, 2016. The return was filed on August 22, 2016. On October 30, 2017, the South Carolina Supreme Court transferred the case to the South Carolina Court of Appeals pursuant to Rule 243(j), SCACR. On June 22, 2018, the South Carolina Court of Appeals granted the petition for writ of certiorari. The brief of petitioner was filed on July 19, 2018. The brief of respondent was filed on November 19, 2018. On December 18, 2019, the Court of Appeals affirmed the denial of relief by the PCR judge. A timely petition for rehearing was filed on December 27, 2019. The petition for rehearing was denied on January 24, 2020. This petition for writ of certiorari follows.

## **STANDARD OF REVIEW**

Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). We review questions of law de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)). Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018).

## 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 Court of Appeals erred in finding that the PCR judge did not err 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.**

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). Importantly, Kayte Allison 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, 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). Importantly, 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 Allsion 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>1</sup>. (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

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<sup>1</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).

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 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 Allison 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 over 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 inculpatory 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 Allisons 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 Allisons to testify at trial.

The South Carolina Court of Appeals 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 Allisons as witnesses at trial. The Court of Appeals and the PCR court misapprehended the nature and value of the Allison testimony. The testimony from the Allisons 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, as the Allisons testified at the PCR hearing.

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). 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 inculpatory conversations with Petitioner they testified to at trial.

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

Additionally, they [the Allisons] 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 Allisons' testimony would not have refuted Wood's and Murray's testimony about alleged conversations they had with Clark after the shooting. Furthermore, the Allisons could have been impeached regarding their differing testimony about whether Murray remained in his truck or came to the Allisons' front porch. Because the Allisons' testimony would have been cumulative and impeachable, we find trial counsel's decision not to call the Allisons 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 that Petitioner did not go outside and speak with Wood and Murray 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<sup>2</sup>, 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 Allisons was critical to establish that neither Wood nor Murray could have heard Petitioner make the statements they claim he made.

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<sup>2</sup> 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).

2. **The Court of Appeals erred in finding that the allegation that trial counsel was 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 was not preserved for appellate review**

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), 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, the Court of Appeals 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).

The Court of Appeals erred. The issue was properly raised at the PCR hearing and ruled upon, incorrectly, by the PCR judge. The PCR judge found that the inferred malice charge was proper because there was no evidence presented at trial that would mitigate, reduce, excuse, or justify the murder for which a jury found Petitioner guilty. As discussed above, this ruling is not supported by the record. While PCR counsel did not specifically discuss the evidence that mitigated, reduced, excused or justified the act, by raising the allegation that counsel was ineffective in failing to object to the charge 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 was presented. 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 presented. Instead, the State argued, incorrectly, that the inferred malice

charge was proper because there was additional evidence of malice. (App. p. 444, lines 8-25). The State argued:

And as far as the Belcher, the inference of malice issue, when you read Belcher, the issue with that charge, about the inference of malice arising with the use of a deadly weapon, it's only if the only evidence of malice is, in fact, a gun was used. In this case we argue there's clearly other evidence of malice. He brought a gun to a party where there were going to be multiple people. He fired at least nine times into the air, based on his own stipulation at trial. And then later disposed of the weapon, after the party but before he went to his cousin's house. So, because there's other evidence of malice, we would argue that the failure to object to the inference of malice charge would not have been an error, Your Honor.

(App. p. 444, lines 8-25). While purported evidence of other malice could be considered in the prejudice prong of Strickland, it does not render the inferred malice charge proper. The inference of malice charge was error because, as discussed above, there was evidence presented at trial that would mitigate, reduce, excuse, or justify the murder for which a jury found Petitioner guilty. Trial counsel was ineffective in failing to object to the inferred malice charge. The error was not harmless. The PCR judge ruled on the issue and the issue is preserved for appellate review.

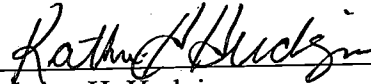
In footnote five of the opinion the Court of Appeals wrote, "Even if we addressed this issue, the supreme court's recent decision in *Burdette*, 427 S.C. at 504-05, 832 S.E.2d at 583, stated, 'today's ruling will not apply to convictions challenged on post-conviction relief.' *Id.* Therefore, trial counsel's 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). In Burdette this Court held that "regardless of the evidence presented at trial, a trial court shall not instruct the jury that it may infer the existence of malice when the deed was done with a deadly weapon." 427 S.C. at 503, 832 S.E.2d at 582. While the holding in Burdette does not apply in the present case, the holding in Belcher does apply.

The Court of Appeals overlooked the fact that Belcher was decided one month prior to Petitioner's trial. The Belcher ruling, now overruled by Burdette, was the law at the time of Petitioner's trial. Trial counsel was deficient in not knowing the law. 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.

**CONCLUSION**

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

Respectfully Submitted,



Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

This 24<sup>th</sup> day of February, 2020.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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

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Opinion No. 2019-UP-394 (S.C. Ct. App. filed 1/24/2020)  
13-CP-23-1325

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BRANDON HEATH CLARK

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

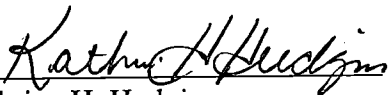
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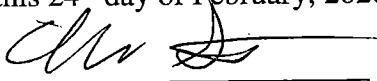
CERTIFICATE OF SERVICE

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I certify that a copy of the Petition for Writ of Certiorari and a copy of the Second Supplemental Appendix in this case has been served on 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; and the Court of Appeals, at 1220 Senate Street, Columbia, SC 29201, this 24<sup>th</sup> day of February, 2020.

  
Kathrine H. Hudgins  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE  
ME this 24<sup>th</sup> day of February, 2020.

  
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(L.S)  
Notary Public for South Carolina  
My Commission Expires: September 30, 2029