

No. \_\_\_\_\_

\_\_\_\_\_  
IN THE  
SUPREME COURT OF THE UNITED STATES  
\_\_\_\_\_

Antonio V. Moultrie - PETITIONER

vs.

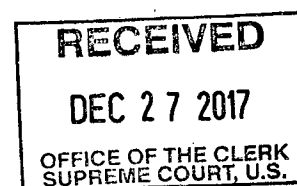
Warden Randall Williams - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

\_\_\_\_\_  
**PETITION FOR WRIT OF CERTIORARI**  
\_\_\_\_\_

Antonio V. Moultrie  
#332073  
Lieber Correctional Institution  
Post Office Box 205  
Ridgeville, South Carolina 29472

**PETITIONER, *Pro se***



## QUESTIONS PRESENTED

This case presents a recurring national and South Carolina State issues regarding the application of the Sixth, and Fourteenth Amendments. These issues present where a criminal defendant is denied the effective assistance of counsel to investigate evidence and require the State to prove each and every element of the crime charge. A viable self-defense claim was denied because the Attorney never investigated all issues of shoes, knife, footprints evidence. This resulted in a Murder charge where the defendant was never charge with a weapon but the Judge gave the jury a unconstitutional burden shifting charge, malice instruction containing inference of malice from the use of a deadly weapon, Defendant is entitled to effective assistance of counsel are concerned. This question is of national importance to the number of South Carolina state convictions where trial counsel is only concerned with guilty pleas instead of representing a criminal defendant's position.

1. **The Fourth Circuit erred in affirming the District Court decision failing to issue a certificate of Appealability as to the merits of whether the trial court improperly admitted evidence in contravention of *Crawford v. Washington* and *Davis v. Washington***
2. **The Fourth Circuit erred in affirming the District Court Decision failing to issue a Certificate of Appealability where trial counsel rendered ineffective assistance of counsel by failing to fully investigate shoe print evidence and requiring the State to produce the decedent's (Jones') shoes prior to trial to establish that a footprint in close proximity to a knife recovered at the scene was the footprint of decedent, support Appellant's claim that the decedent was in possession of the recovered knife and Appellant, with second knife, stabbed the decedent in self-defense.**

3. **The Fourth Circuit erred in affirming The District Court Decision failing to issue a certificate of Appealability where trial counsel provided deficient performance when [they] failed to object to the burden-shifting malice instruction containing inference of malice from the use of a deadly weapon and PCR counsel provided deficient performance in failing to properly amend the issue, present the issue and ensure a factual finding by the PCR Court**
  
4. **The Fourth Circuit erred in affirming The District Court Decision not issuing a Certificate of Appealability where in light of *Montgomery v. Louisiana*, \_\_\_\_ U.S. \_\_\_\_, 136 S.Ct. 718 (2016), the state post-conviction court was required to give retroactive effect to the substantive rule announced in *State v. Belcher* 685 S.E. 2d 802 (S.C. 2009) that applied clearly established law on the constitutionality of a mandatory inference in a malice instruction.**

## LIST OF PARTIES

☐ All parties appear in the caption of the case on the cover page.

☒ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Alan Wilson, Attorney General of South Carolina;

The State of South Carolina and  
Alphonso Simon Jr. Assistant Attorney General

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## **STATE CASES**

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*Carter v. State* 392 S.E.2d 184, 185, (S.C. 1990)

*Gibson v. State* 586 S.E.2d 119 (S.C. 2003)

*Jacques Gibson v. State of South Carolina* 786 S.E.2d 121 (Filed May 11, 2016)

## **STATUTES AND RULES**

28 USC §2254(b)(1)(B)(i)

## **OTHER**

*South Carolina Association of Criminal Defense Lawyers*

IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix D to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ is unpublished.

The opinion of the South Carolina Appeals court appears at Appendix G to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ is unpublished.

## JURISDICTION

☐ For cases from **Federal Courts:**

The date on which the United States Court of Appeals decided my case  
Was September 26, 2016.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the Order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_A\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

☐ For cases from **state courts:**

The date on which the highest state court decided my case was January 15, 2015.  
A copy of that decision appears at Appendix D.

☐ A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_A\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a).

## **STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED**

The Fifth Amendment of the United States Constitution provides in part:

“No person shall be held to answer for a capital, or otherwise infamous crime, ... nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law...”

U.S. CONST. Amend. V

The Sixth Amendment of the United States Constitution provides in part:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial ... to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.”

U.S. CONST. Amend. VI

The Fourteenth Amendment of the United States Constitution provides in part:

“[n]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

U.S. CONST. Amend. XIV

## STATEMENT OF THE CASE

Petitioner was indicted by the Charleston County Grand Jury at the May 2008 term for the offense of Murder (2008-GS-10-4135).

Petitioner proceeded to trial on December 4, 2008 before the Honorable G. Edward Welmaker and a jury. Petitioner was represented at trial by Martha Kent Runey, Esquire and Beattie Butler, Esquire, of the Charleston County Public Defenders Office. Petitioner was found guilty as indicted and Judge Welmaker sentenced him to a term of forty-five (45) years confinement.

A Notice of Appeal was timely filed. An appeal was perfected in the South Carolina Court of Appeals<sup>1</sup> by Robert Dudek, Esquire, of the South Carolina Office of Appellate Defense. The Court of Appeals affirmed Petitioner's conviction and sentence on December 5, 2011, *State v. Moultrie* Op. No. 2011-UP-543. <sup>2</sup> The Remittitur was issued on December 22, 2011.

Petitioner filed an Application for Post-Conviction Relief ("PCR") in the Charleston County Court of Common Pleas on December 21, 2011 (2011-CP-10-9422).<sup>3</sup> Petitioner was represented at PCR by Lesley Sasser, Esquire.<sup>4</sup> An evidentiary hearing was convened on January 22, 2013, before the Honorable R. Markley Dennis. Judge Dennis issued a written Order of Dismissal denying Petitioner relief dated March 11,

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<sup>1</sup> Raising Ground One of the instant §2254 petition.

<sup>2</sup> Pursuant to Rule 220(b)(1), SCACR and citing *Crawford v. Washington*, 541 U.S. 36 (2004), *Davis v. Washington*, 547 U.S. 813 (2006) and Rule 803, South Carolina Rules of Evidence.

<sup>3</sup> Raising Grounds Two and Three of the instant §2254 Petition.

<sup>4</sup> An Amended PCR Application was filed by PCR Counsel on January 30, 2013.

2013. Petitioner asked Ms. Sasser, and sent a letter Certified Mail to do a 59(e) about the issues not presented.

Petitioner filed a timely Notice of Appeal for Petition for Writ of Certiorari on March 26, 2013. Petitioner was represented by Katherine H. Hudgins, Esquire, of the South Carolina Office of Appellate Defense.<sup>5</sup> On October 8, 2014, the South Carolina Supreme Court denied the Petition for Writ of Certiorari. The Remittitur issued on October 24, 2014.

On November 24, 2014, Petitioner filed a *Pro se* Petition for Writ of Habeas Corpus in the Original Jurisdiction of the Supreme Court of South Carolina ("State Habeas").<sup>6</sup> The South Carolina Supreme Court denied the petition in an Order dated January 15, 2015 and dismissed the matter in a separate Order dated February 5, 2015.<sup>7</sup> The State Habeas was filed within the one (1) year statute of limitations set forth in amended 28 USC §2254(b) and is thus timely exhausted.

This Petition for federal habeas corpus pursuant to 28 USC §2254 seasonably follows.

Petitioner stabbed Daniel Jones ("Jones") following an altercation in the front yard of Gerald Blake ("Blake"). Petitioner testified that while leaning on his car, Jones

*"[s]tarted walking towards me, I stood straight up instead of leaning on my car. He came out of his pocket with a box cutter in his left hand and a knife in his right hand. He came up and started swinging at me. He swung two times. I pushed him. He came back again. He swung two more times. I pushed him again. By that time, I went in my pocket, opened my knife and stabbed him."*

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<sup>5</sup> Raising Ground Two of the instant §2254 Petition.

<sup>6</sup> Timely Raising Ground Three of the instant §2254 petition for exhaustion; raising the issue of the PCR being an inadequate corrective process to exhaust federal claims; and encompassing Issues(s) A (App. 397-404) and B(App. 405-407) which were ruled upon by the PCR Court (App. 496-497).

<sup>7</sup> Petitioner moved this federal habeas court on January 20, 2016 to order Respondents to Supplement the record before this court with the State Habeas Petition and Orders.

App. 263 (Emphasis supplied).

Petitioner also testified in response to the question from Blake, "Why did you stab him?" was "because he tried to stab me," App. 262-268. He further testified he was afraid for his life because "the first two times he swung at me, it was up towards my throat," App. 267-268.

When police arrived, they found a bloody knife on the tire of a truck as well as shoeprints, App. 93-100. The blood on the knife matched Jones' blood type, App. 220. Petitioner testified that he dropped the knife while fleeing over a fence, App. 263-266. He also argued the knife and shoeprint belonged to Jones, App. 318-319.

Jones and Blake drove to the home of a friend located a few doors from Petitioner's home. Petitioner walked up to the group while they were talking and drinking. Petitioner and Jones engaged in a verbal altercation, App. 259-260, at which Petitioner became upset at Jones' remark about his mother, *Id.* Jones and Blake drove away, App. 107.

Petitioner went to his car after Jones and Blake left, App. 261. Petitioner testified he planned to go the store, purchase some beer, and fuel his taxi for the night, *Id.* Instead, he went to Blake's home to apologize to Jones, Which he did. Petitioner testified Jones asked Blake if he was "ready to get him?" indicating Petitioner, App. 262. Blake walked behind his home to relieve himself, App. 263. At that time, Jones walked directly towards the Petitioner. He came out of his pocket with a box cutter in his left hand and a knife in his right hand, *Id.* At that point, Blake returned from the rear of the house.

The State introduced the 911 recording of Jones being questioned about past events by the 911 dispatcher, App. 46 - 65. The trial court admitted the 911 tape into

evidence, App. 65. Trial counsel timely objected to the hearsay statement of Daniel Jones via the 911 recording as “asking about past events” and was thus testimonial in nature and the Sixth Amendment’s Confrontation Clause attached to the statement. The trial court unreasonably applied the clearly established law of *Crawford v. Washington*,<sup>8</sup> and more specifically, *Davis v. Washington*<sup>9</sup> to the facts (testimonial statement) of the case, opting to admit the statement under a state evidentiary rule,<sup>10</sup> (which was subservient to federal law), thus over-riding the clearly established precedent.

Trial counsel Martha Kent Runey (“Runey”) testified at PCR that she attended the preliminary hearing and Detective Watson testified that the footprint found at the scene did not match Petitioner, App. 459, and that she did not further investigate the shoe print evidence, *Id.* Runey further testified that prior to trial the State told her that they would not be introducing shoeprint evidence at trial, App. 461. However, during trial, the State introduced photos of the shoeprint impressions, attempted to introduce expert testimony in regards to the shoeprint evidence, and in closing, argued that the shoe print belonged to Petitioner. The State admitted at trial that they informed Petitioner prior to trial that they did not intend to use the shoe print evidence at trial, but later changed their mind and did not inform counsel, App. 188. This was also acknowledged in the PCR Order, App. 493.

Opposite of it’s finding in the Order, the PCR Court rationalized during the evidentiary hearing that, “Oh, its prejudice. Big time. Big time. I think it’s obvious prejudice,” App. 486. This rationale was in relation to the State sandbagging trial counsel on the shoeprint evidence and trial counsel failing to make a motion to produce the shoes at trial.

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<sup>8</sup> 541 U.S. 36 (2004)

<sup>9</sup> 547 U.S. 813 (2006)

<sup>10</sup> Rule 803, South Carolina Rules of Evidence (“SCRE”)

In addition, on this issue at PCR, Petitioner moved for a continuance in order to retain the services of an expert in shoeprint impressions, App. 429-430. The State objected and the PCR Judge denied the motion for continuance, App. 430.

The trial court issued a constitutionally infirm jury charge on malice and the inference thereof from the use of a deadly weapon, App. 343-344. Trial counsel did not enter a timely objection based on clearly established law where second-chair, Beattie Butler ("Butler") testified it did not occur to him to preserve the issue for appeal, as he did in a previous case, "So I did not object to the charge," App. 444.

When Petitioner was sworn as a witness and attempted to build a sufficient record upon which the PCR Court could issue an objectively reasonable finding, or may be reviewed by the appellate court; the PCR Court refused to allow Petitioner to make a federal constitutional argument against state precedent, App. 481. The PCR Court forestalled Petitioner's federal presentation by interrupting testimony and holding "he doesn't need to go into that. That's a matter of law. He's raised the issue. We don't need to publish what the ---for him to read out what the --- the law is," *Id.* This holding rendered the PCR evidentiary proceeding an inadequate corrective process.

To further limit Petitioner, PCR Counsel Lesley A. Sasser, asked Petitioner immediately there after if he believed "That your lawyer's inability to properly represent you hurt your case?" To which he responded, "Yes, I do," App. 481. Counsel then stated she had no further questions.

PCR Counsel's entire testimony elicited from Petitioner consisted of three (3) questions, which rendered the PCR evidentiary hearing an inadequate corrective process since it was Petitioner who bore the burden of proof.

Similarly, the Assistance Attorney General's cross-examination followed suit, App. 482, lines 2-17, with only five (5) questions.

Petitioner entered a pre-trial Memorandum In Support of Application for Post-Conviction Relief, filed December 21, 2011, App. 394-420, in which Petitioner fully addressed the ineffective assistance of counsel for failing to object to the trial court's malice instruction that was unconstitutionally burden-shifting, *Id.* at 397-404; and where the court failed to instruct the jury that they may accept or reject the inference of malice from the use of a deadly weapon, *Id.* at 405-407. These issues were presented face up and squarely on clearly established law existing at the time of trial.

Respondent's Return answered based upon the Application for PCR that was filed on January 11, 2013.

The PCR Court's March 11, 2013 Order of Dismissal failed to address, identify or properly extend the clearly-established law as set forth in the Memorandum in Support. PCR Counsel Sasser failed to file a Rule 59(e) motion to have issues, as raised in the application, addressed in the Order;<sup>11</sup> thus rendering the PCR here an inadequate corrective process.

Where Petitioner recognized the inadequate process and the probable procedural bar, still within the one (1) year statute of limitations created by the AEDPA, he submitted the issue of the unconstitutional, burden-shifting malice instructions in a Petition for Writ of Habeas Corpus in the Original Jurisdiction of the South Carolina Supreme Court.<sup>12</sup>

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<sup>11</sup> See *Bostick v. Stevenson*, 589 F.3d 160 (4<sup>th</sup> Cir. 2009) (requiring PCR counsel to file a Rule 59(e) motion in PCR cases after 2007 where the Order omits addressing issues)

<sup>12</sup> November 24, 2014 (pending Supplement of the Record before this Court).

Presentation face up and squarely to the state PCR Court and subsequent presentation of the malice instruction claim to the South Carolina Supreme Court on Petition for Writ of Habeas Corpus, within the statute of limitations,<sup>13</sup> satisfied the exhaustion of this issue.

## ARGUMENT

**I. The Fourth Circuit erred in affirming The District Court Decision failing to issue a Certificate of Appealability as to the merits of whether the trial court improperly admitted evidence in contravention of *Crawford v. Washington* and *Davis v. Washington*.**

The clearly established law at issue here is *Crawford v. Washington*<sup>14</sup> and *Davis v. Washington*,<sup>15</sup> applying the Confrontation Clause of the Sixth Amendment to the United States Constitution.

Respondent asserts this claim “clearly hinges on the interpretation of state evidentiary rules, not federal law,” Resp.S.J. 29. Respondent also asserts the Appellant has “fail[ed] to assert that any federal law is at issue here. Nor does he claim that any constitutional right was violated,” *Id.*

Appellant contends that Respondent’s next paragraph acknowledges Appellant’s claim is “the admission of the 911 tape constituted a violation of the *Confrontation Clause* under *Crawford v. Washington* and *Davis v. Washington*, *Id.* Appellant also submits that the South Carolina Court of Appeals cited *Crawford* and *Davis* in its December 5, 2011 unpublished opinion.<sup>16</sup>

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<sup>13</sup> 28 USC §2254(b).

<sup>14</sup> 541 U.S. 36 (2004)

<sup>15</sup> 547 U.S. 813 (2006)

<sup>16</sup> *The State v. Antonio Moultrie*, Op. No. 2011-UP-543 (S.C. Ct. App. Dec 5, 2011)

The 911 call from Jones became the most important single piece of evidence in this case. It was undisputed that Appellant stabbed Jones but that his defense was self-defense. Highlighting the importance of the tape was that it was played three (3) times - first, during the State's case in chief, App. 335; second, during the solicitor's closing argument, App. 256; and third, the jury requested to hear the tape again during deliberations, App. 358.

Judge Welmaker made a pre-trial ruling that he had reviewed *Crawford* and *Davis*, and that he found the entire 911 tape was admissible under Rule 803, SCRE, and App. 61-65. The 911 tape and the transcript were before the Court of Appeals upon its review.

On the 911 tape, Jones told the 911 Operator that he had been stabbed and *he told some other person with him* at his friend's house *at the time of the call*: "I ain't even got no knife." He informed the 911 Operator he was at a friend's house and that he had been stabbed in the chest, App. 286.

Towards the end of the 911 tape, after EMS had been notified and had the address, the EMS person asked Jones to "tell me exactly what happened?"<sup>17</sup> Jones responded, "Fella just came out... I left him. We had an argument. He came to my friend's house and stabbed me with a box cutter," *Id.*

Trial counsel argued pursuant to *Davis* and *Crawford* that the trial court was required to differentiate between those parts of the 911 tape which were admissible under *Davis* as non- testimonial, because their primary purpose was to enable police assistance

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<sup>17</sup> This question was beyond the parameters of providing emergency medical assistance and in the realm of an interrogation or of eliciting investigative statements.

in an on-going emergency; and those portions of the tape which indicate that the primary purpose of the statement is meant to reconstruct past events, App. 47- 65.

Trial counsel argued the portion of the statement stating Jones was bleeding and needed medical assistance became testimonial because they involved “a question about past events, which is testimonial,” App. 59 - 61. Trial counsel conceded that Jones telling the 911 Operator that he was bleeding and when he started bleeding was admissible. However, trial counsel noted this case involved “sort of a mixed question of past and future.” Counsel argued an application of the facts of the instant case to the clearly established law and facts of *Davis v. Washington* in comparison with *Hammond v. Indiana*,<sup>18</sup> demonstrating the facts as an interrogation that rendered Jones’ statement testimonial under the Confrontation Clause, App. 61- 62.

Trial counsel emphasized there was no dispute in this case that Jones was stabbed by Appellant. Counsel emphasized the 911 tape was a very critical piece of evidence because the defense was self-defense. Counsel argued: “[W]hen a defense is self-defense and the issue isn’t what happened, but why it happened, the statements wouldn’t be competent for that purpose,” App. 63.

Trial counsel asserted that it was impractical to expect a victim calling 911 to say “by the way, I started the fight. Or, I swung at him. Or, I had a knife too,” App. 63. Counsel stated that the portion of the 911 tape here, when it was viewed within the context of this case, the objectionable portion of the tape was being offered “to negate self-defense.” Counsel also asserted that they had evidence Jones was armed with a knife, but that his claim on the 911 tape was nonetheless inadmissible hearsay, App. 64 - 65.

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<sup>18</sup> 547 U.S. \_\_\_\_ (2006) (joint opinion to *Davis v. Washington*)

The trial court ruled that after he had reviewed *Crawford v. Washington* and *Davis v. Washington*, that the 911 tape was admissible under Rule 803, SCRE. The tape was later admitted subject to Appellant's objection, App. 156, and played for the jury three times, App. 335, 356, and 358.

Clearly and starkly trial counsel objected to the portion of the tape that tended to negate self-defense. Jones' claim, when asked "exactly what happened," was that he got into an argument and that the person who stabbed him came to his friend's house with a box cutter. This completely neutered Appellant's self-defense claim. This became apparent where the jury's request to hear the 911 tape during deliberations demonstrated its critical attention was focused on the contents of the 911 tape.

The Solicitor played the 911 tape during his closing argument. The Solicitor told the jury: "Fortunately Daniel Jones got to give his side of the story. And I know you've already heard it, but I think it's worth listening to again. Danny Jones' 911 call," App. 334-335. The Solicitor stressed the only two "*eyewitnesses*" to the stabbing were Appellant and Jones and that is what made the 911 tape so important, *Id.*

In *Crawford v. Washington*, the Supreme Court held that the Confrontation Clause bars the admission of testimonial statements of a witness who does not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity to cross-examine him. Statements by an *eyewitness* during police interrogation would generally fall within this prohibition where the eyewitness is not available to testify at trial, and the defendant did not have a prior opportunity to cross-examine the witness. Thus, in the classic setting, a witness's statement to the police during interrogation, which implicates the defendant in the crime, is not admissible.

The issue in *Davis v. Washington* also concerned a 911 recording. The Court there noted that “non-testimonial statements” are those made during the dispatcher or law enforcement during questioning where the circumstances objectively indicate that the primary purpose of the question is to enable police assistance to meet an ongoing emergency. Conversely, recorded statements made where the primary purpose of the interrogation is to establish or prove *past facts* that may become relevant to a later criminal prosecution are testimonial.

The Court in *Davis* made clear that a conversation can begin as an interrogation to determine the need for emergency assistance and then “evolve into testimonial statements,” once that purpose has been achieved.<sup>19</sup>

In the instant case, the testimonial portion of Jones’ 911 call went to the heart of the case. Trial counsel correctly argued that the purpose of the portion of Jones’ statement on Appellant coming to Jones, and then stabbing him with a box cutter after an argument, was meant to negate Appellant’s self-defense case.

It must be clearly noted that here, Jones was talking with another person at the scene during the 911 call. Jones told the other person “I ain’t even got no Knife...” App. 286. Thus, this case does not present the same frantic 911-call situation as existed in *Davis v. Washington* where Davis was attacking the victim during part of the call. Here, Jones noted that his friend “went in the house to get it [a green cloth] to hold against the wound.” The Operator told him not to apply ice to the wound, but to have his friend apply direct pressure to it, App. 287.

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<sup>19</sup> *Davis v. Washington*, 547 U.S. at 829.

Judge Welmaker erred by ruling the entire 911 tape was admissible under Rule 803, SCRE, and rejecting trial counsel's arguments that part of the tape which referred to past events and which tended to negate self-defense were not admissible as violating Appellant's right to confrontation. As stated, 911 calls such as the one in the instant case may include testimonial answers regardless of the fact the initial inquiries obviously involved an ongoing emergency.<sup>20</sup> The *Davis* Court explained,"... [e]ven when interrogation exists, it is the final analysis of the declarant's statements, not the interrogator's questions that the Confrontation Clause requires to evaluate."<sup>21</sup>

The Court of Appeals affirmed the trial court's ruling with none other than an unpublished memorandum opinion that made no application of the clearly established law to the merits upon which deference pursuant to 28 USC §2254(e) may be relied upon with any certainty.

Appellant submits that the Court of Appeals identified the correct legal principles of *Crawford v. Washington* and *Davis v. Washington*, but misapplied the facts of this case to the facts and legal holdings of those precedents in an objectively unreasonable manner, in contravention of §2254(d)(2), where reasonable jurists would disagree with the application by the Court of Appeals. The application of *Crawford* and *Davis* was more than "an incorrect or erroneous application of federal law."<sup>22</sup> The application here was clearly "unreasonable," the Respondent is not entitled to summary judgment as a matter

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<sup>20</sup> *Davis* at 547 U.S. at 832.

<sup>21</sup> *Id.* at 823 n.1

<sup>22</sup> *Williams v. Taylor*, 529 U.S. at 413.

of law, and Appellant has not only rebutted the State's showing by clear and convincing evidence, but has demonstrated he is entitled to federal habeas relief.

Appellant submits that the test for issuance of a COA is more than sufficiently met here where Appellant has made a *prima facie* showing that "the petition should have been resolved in a different manner or that the issues presented 'were adequate to deserve encouragement to proceed further,'" *Miller-El v. Cockrell*, 537 U.S. at 326, citing *Barefoot v. Estelle*, 463 U.S. at 880. Appellant has clearly demonstrate a "substantial showing of the denial of a constitutional right," [Sixth Amendment Confrontation Clause]. An Appellant satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further, *Id.*, 537 U.S. at 327, citing *Slack v. McDaniel*, 529 U.S., 473, 484 (2000).

Appellant submits that he has shown where members of this Panel could disagree with the district court's resolution of this constitutional claim and the issue is adequate to deserve encouragement to proceed further.

**II. The Fourth Circuit erred in affirming The District Court Decision failing to issue a Certificate of Appealability where trial counsel rendered ineffective assistance of counsel by failing to fully investigate shoe print evidence and requiring the State to produce the decedent's [Jones'] shoes prior to trial to establish that a footprint in close proximity to a knife recovered at the scene was the footprint of decedent, supporting Appellant's claim that the decedent was in possession of the recovered**

knife and Appellant, with a second knife, stabbed the decedent in self-defense.

There is no dispute that the clearly established federal law here is *Strickland v. Washington*.<sup>23</sup> In order to overcome the strong presumption that counsel has acted competently, *id* at 690, a defendant must show that counsel failed to act “reasonabl[y] considering all circumstances,” *id.*, at 688, and must prove the “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different,” *id.*, at 694. Thus, “[t]he bench mark for judging any claim of ineffectiveness must be whether counsel’s conduct *so undermined* the proper function of the adversarial process that the trial cannot be relied upon as having produced a just result,” *Id.*, at 686 (emphasis added). “A reasonable probability is a probability sufficient to undermine confidence in the outcome,” *id.*, at 694. That requires a “substantial,” not just “conceivable,” likelihood of a different result, *Harrington v. Richter*, 562 U.S. \_\_\_, \_\_\_, 131 S Ct. 770, 791 (2011).

At trial Appellant testified he stabbed Jones in self-defense after Jones came at him with a box cutter in his left hand and a knife in his right hand, App. 262 – 263. Appellant fled the scene in his cab, parked the cab behind a neighbor’s house and fled on foot dropping the knife as he jumped over a fence, App. 263 – 266. When the police arrived at the scene, they found a bloody knife on the tire of a truck as well as shoe prints, App. 93 – 100. The blood on the knife was tested and matched Jones, App. 220. The box cutter was not recovered.

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<sup>23</sup> 466 U.S. 668 (1984)

In closing the State argued that the knife and a shoeprint found at the scene both belonged to the Appellant, App. 331 –332. In contrast, Appellant argued in closing that the recovered knife and shoeprint belonged to Jones, App. 318 –319. At trial, the State was precluded from introducing expert testimony concerning the shoeprint.

At the start of the PCR hearing, Appellant moved for a continuance in order to retain the services of an expert in shoeprint impressions, App. 429 – 430. The State objected and the PCR Judge <sup>24</sup> denied the continuance motion, App. 430.

Trial counsel Martha Kent Runey testified that she attended the preliminary hearing held in Appellant's case and Detective Watson testified that the footprint found at the scene did not match Appellant, App. 459. Counsel admitted that she did not further investigate the shoe print evidence, App. 459. *Counsel testified that the shoeprint evidence should have been investigated, with the help of an expert, to establish that the knife and shoeprint found at the scene belonged to Jones rather than Appellant*, App. 459 – 460. Counsel testified that prior to trial that *the State told her* that they would *not be introducing* the shoeprint evidence at trial, App. 461. During trial, however, the State introduced photos of the shoeprint impressions, attempted to introduced expert testimony in regard to the shoe print evidence, and in closing argued that the shoeprint belonged to Appellant, all without objection. The State admitted at trial that they informed counsel that they did not intend to use the shoe print evidence at trial but later changed their mind and did not inform counsel, App. 188. As noted above, the trial judge precluded the State from introducing expert testimony concerning the shoeprint evidence.

Trial counsel Butler testified that *he and co-counsel should have looked at the shoeprint evidence more carefully and should have required the State to produced*

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<sup>24</sup> The Honorable R. Markley Dennis

*Jones' shoes for comparison*, App 441. Butler testified that after trial they attempted to obtain Jones' shoes but were unsuccessful, App. 443.

The order of dismissal by the PCR judge held "This Court finds counsel was not ineffective for failing to investigate the possibility that the victim's shoes matched the footprint impression taken at the scene." Holding further that failure to conduct an independent investigation does not constitute ineffective assistance of counsel, App. 449.

This is the finding entitled deference on this federal review. However, the PCR judge erred. Counsel was ineffective in failing to investigate the shoeprint evidence prior to trial and require the State to produced Jones' shoes for comparison. Appellant was prejudiced by counsel's error because he was *unable to challenge the State's argument that the shoeprint belonged to Appellant*. While counsel should have investigated the shoeprint evidence regardless of any representation by the State that they did not intend to introduce the evidence, the State clearly benefited from the failure to disclose the evidence as the State did not have to produce Jones' shoes for comparison and the shoes are no longer available for comparison. The identity of the shoeprint was critical to establish Appellant's self-defense claim and the combination of trial counsel error and the State's failure to disclose entitle Appellant to federal habeas relief.

Rebutting this finding by clear and convincing evidence and entitled to equal deference as the remainder of the State record before this Court,<sup>25</sup> the PCR Court admonished the Assistant Attorney General that the defense was prejudiced by the State's timing and "changing their minds" without informing the defense:

**MS. WILSON:** Well, Your Honor, it's not our ---- It's not our problem  
because ---

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<sup>25</sup> *Cullen v. Pinholster*, 562 U.S. 170, 131 S.Ct. 1388, 1398 (2011)

**THE COURT:** Doesn't that fall below the standard?

**MS. WILSON:** They haven't proved they're prejudiced. They haven't produced a shoe that showed that ----

**THE COURT:** *Oh, it's prejudice. Big time. Big time. I think its obvious prejudice. I don't think there's any — I don't think you can really — I don't think you can legitimately argue that with a straight face that it's not prejudice.*

*Because if it comes back to his shoe, then it shows the blood — everything — confirms everything that there's been a fight and he's been involved. He's holding the knife, because that's the only way the blood could have gotten on the knife. And bingo, now we have a knife in the hands of the victim — — at the fight.*

App. 486 –487. (Emphasis added)

Quite simply, counsel was ineffective in failing to fully investigate the shoeprint evidence and requiring the State to produced Jones' shoes prior to trial to establish that the footprint found in close proximity to the knife matched Jones' shoes supporting the Appellant's claim that Jones pulled the recovered knife on Appellant first, stabbed Jones in self-defense. Appellant was precluded from testing Jones' shoes based on a

combination of trial counsel error and the State's failure to disclose information in regard to the shoeprint evidence. Under the narrow facts of this case, where the state's case was not submitted to true adversarial testing, prejudice should be presumed, *United States v. Cronin*, 466 U.S. 648 (1984). There is no doubt that under the clearly establish law at issue here, *Strickland v. Washington*, and its progeny regarding the duty to perform reasonable investigations,<sup>26</sup> trial counsel, by both their testimony, provided deficient representation below professional norms that did prejudice the defense that more than likely would have caused the jury to reach a different result where the shoeprint and knife belonged to Jones, not Appellant.

Appellant submits that Respondent is not entitled to summary judgment as a matter of law where genuine issues of material fact exist not only in trial counsel's own testimony regarding the failure to investigate or require the State to produce the shoes; but in the PCR Court's evidentiary hearing analysis of the prejudice of counsel's performance and the State's trial tactics. Appellant submits these same facts rebut the assertions of the State and the deference to those portions of the record asserted in a clear and convincing manner, *see, e.g., Cagle v. Branker*, 520 F.3d 320 (4<sup>th</sup> Cir. 2008).

Appellant submits that the PCR Court identified the correct legal principles of *Strickland v. Washington* and *Wiggins v. Smith*, but applied the "contrary to" clause in ways that were "substantially different" from the rules reflected in *Strickland* and *Wiggins*, and by arriving at a result that is different from the result the Supreme Court reached in those cases in which the facts were "materially indistinguishable." The South Carolina Supreme Court denied the petition for writ of certiorari following the order of dismissal from the PCR Court.

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<sup>26</sup> *Wiggins v. Smith*, 539 U.S. 510 (2003)

The PCR Court failed the test established by the “unreasonable application” clause by unreasonably applying the identified legal rules, or by “unreasonably failing to extend a rule to a context in which it should apply,” *Williams v. Taylor*, 529 U.S. at 407 – 408. The “unreasonable application” clause is not concerned with unreasonable judges but rather with “objectively unreasonable “state court decision,” *Id.* at 409 – 410.

Appellant submits that the test for issuance of a COA is more than sufficiently met here where Appellant has made a *prima facie* showing that “the petition should have been resolved in a different manner or that the issues presented ‘were adequate to deserve encouragement to proceed further,’” *Miller-El v. Cockrell*, 537 U.S. at 326, citing *Barefoot v. Estelle*, 463 U.S. at 880. Appellant has clearly demonstrated a “substantial showing of the denial of a constitutional right,” [Sixth Amendment guarantee to the effective assistance of counsel - counsel was required to investigate shoe print evidence that counsel admitted they failed to do based upon the State’s comments regarding the evidence and where the State used the evidence to convince the jury of their theory regarding Appellant’s shoe prints]. An Appellant satisfies this standard by demonstrating that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further, *Id.*, 537 U.S. at 327, citing *Slack v. McDaniel*, 529 U.S., 473, 484 (2000).

Appellant submits that he has shown where members of this Panel could disagree with the district court’s resolution of this constitutional claim and the issue is adequate to deserve encouragement to proceed further.

**III. The Fourth Circuit erred in affirming The District Court Decision failing to issue a Certificate of Appealability where trial counsel provided deficient performance when [they] failed to object to the burden- shifting malice instruction containing inference of malice from the use of a deadly weapon and PCR counsel provided deficient performance in failing to properly amend the issue, present the issue and ensure a factual finding by the PCR Court.**

Appellant's sole defense at trial was that of self-defense. During closing summation the Solicitor argued a definition of malice aforethought, App. 316; that malice may be express or implied, App. 327; and that "[f]or example, use of a deadly weapon, use of a knife, allows you to infer malice aforethought," App. 328.

Immediately thereafter the trial court's instruction regarding malice contained the mandatory presumption that, "Inferred malice may also arise when the deed is done with a deadly weapon." App. 344 The trial court failed to instruct the jury that the use of a deadly weapon is a permissive inference and the jury could either "accept or reject" the inference and give it such weight as the jury deemed proper under the circumstances and facts of the case. Any jurist of reason would have accepted the Court's instruction as being mandatory if the State proved Appellant used a deadly weapon under any set of circumstances.

The malice instruction containing the mandatory inference from the use of a deadly weapon was specifically critical here where Appellant's sole defense was that of

self-defense; where Appellant defended himself from Jones, who had a knife, and Appellant stabbed Jones in self-defense. The mandatory inference instructing the jury that the use of a knife automatically indicated malice – thus, was murder, instead of manslaughter, or not guilty by reason of self-defense. Appellant received both manslaughter and self-defense jury instructions, which were negated by the mandatory inference from the use of a deadly weapon.

Respondent asserts that Appellant's claim is "based solely upon the South Carolina Supreme Court's decision in *State v. Belcher*," <sup>27</sup> Resp.S.J. 45.

Appellant contends that assertion is a starkly incorrect representation of the pleadings litigated in the state courts as demonstrated by the record in this matter, see App. 397 – 404 and 405 – 407. <sup>28</sup>

PCR Counsel Lesley Sasser failed to ensure the PCR Court ruled on the two (2) issues raising the unconstitutional malice instruction presented in the PCR and Supporting Memorandum by filing a Rule 59(e) Motion to have the PCR Court address the issues properly presented in a written order. <sup>29</sup>

Appellant next raised the issue before the South Carolina Supreme Court in a Petition for Writ of Habeas Corpus in the Original Jurisdiction. See submitted Pending Supplemental Record to the District Court.

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<sup>27</sup> 685 S.E.2d 802 (2009)

<sup>28</sup> See also Pending Supplemental Record (filed January 20, 2016 containing state Habeas Corpus)

<sup>29</sup> See *Bostick v. Stevenson*, *supra*

Appellant submits that *State v. Belcher* is not *new law*, but acknowledgement by the Supreme Court of South Carolina that South Carolina Courts have failed to follow the United States Supreme Court holdings in *Sandstrom v. Montana* and *Yates v. Evatt*.<sup>30</sup>

It is without doubt that the clearly established law here is *Sandstrom v. Montana*, 442 U.S. 510 (1979) and *Yates v. Evatt*, 500 U.S. 391 (1991).

In a long line of cases culminating in *Yates v. Evatt*, the United States Supreme Court has recognized that the prosecution “must prove each and every element” of the crime charged beyond a reasonable doubt, *In re Winship*, 397 U.S. 158 (1970). The burden of proof of any element cannot be shifted to a defendant, because in doing so decreases the state’s burden of proving the crime beyond a reasonable doubt.

As early as 1975, the Supreme Court considered a Maine rule that required the defendant charged with murder to prove that he acted in the heat of passion in order to reduce the homicide to manslaughter. The Court determined that a state could not shift the burden of proof on [any element] of the crime to the defendant, see *Mullaney v. Wilbur*, 421 U.S. 684, 701 (1975). The Court found the risk to be intolerable and reversed Wilbur’s conviction.

The Supreme Court overturned another conviction in *Sandstrom v. Montana*, 442 U.S. 510 (1979). Montana law provided that a person could be charged with deliberate homicide when that person knowingly caused the death of another and at Sandstrom’s trial, the judge instructed the jury that “the law presumes that a person intends the ordinary consequences of his voluntary acts,” *Sandstrom*, 442 U.S. at 512.

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<sup>30</sup> The United States Supreme Court remanded *Yates* back to the South Carolina Supreme Court three (3) times.

After considering Sandstrom's argument the Court agreed that the effect of that was to shift the burden of proof to Sandstrom on a critical element of the offense, "that he purposely or knowingly killed another person". The Court noted again that the State must prove every element of the crime charged beyond a reasonable doubt and that the defendant cannot be required to prove any element of his defense or disprove any element of his crime. A reasonable juror might have interpreted the instruction either as a conclusive presumption or as a burden shifting presumption, but either interpretation; the Court rendered the instruction unconstitutional.

The Supreme Court was confronted with another burden-shifting jury instruction in *Francis v. Franklin*, 471 U.S. 307 (1985). The Court found that the use of a rebuttable presumption was also unconstitutional for the same reasons set forth in *Sandstrom*. The defendant there was charged with malice murder, and his sole defense was that he lacked the requisite intent to kill. The Court focused on and held unconstitutional two (2) sentences of the trial court's jury instruction: "the acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted," *Francis v. Franklin*, 471 U.S. at 311.

The *Franklin* Court evaluated both conclusive and rebuttable mandatory presumptions and concluded that both place the burden of persuasion on the presumed element by instructing the jury that it must find the presumed element unless the defendant persuades the jury not to make the finding, *Id.* at 355; "[s]uch shifting of the burden of persuasion with respect to a fact the state deems so important that it must either

be proved or presumed is impermissible under the Due Process Clause,” *see, also, Patterson v. New York*, 432 U.S. 197, 215 (1977). As part of its decision, the Court refused to find that a presumptive jury instruction is cured if the jury is told that the presumption may be rebutted by the defendant. The Court noted that such an instruction does not cure the violation of the Due Process Clause because telling the jury the defendant may rebut the presumption only serves to shift the burden of proof more firmly to the defense.

In deciding *Francis v. Franklin*, the Court relied on its decision in *Mullaney v. Wilbur*, just as the Court did in *Sandstrom*. But more importantly, all three cases relied on the bedrock constitutional principles set forth in *In re Winship*: “that a state must prove every fact of every element of the crime charged beyond a reasonable doubt, and mandatory burden shifting jury instructions relieves the state of the burden of proof in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Shortly after *Franklin*, Dale Robert Yates was convicted of murder and sentenced to death in South Carolina. His direct appeal was denied at every appellate stage.<sup>31</sup>

Yates filed a petition for writ of habeas corpus to the South Carolina Supreme Court in which Yates claimed the trial court erred in charging the jury “that malice is implied or presumed from the use of a deadly weapon” because that presumption relieves the State of its burden of proof of an essential element of the crime. That petition was summarily denied. Yates then filed an appeal to the U.S. Supreme Court in 1985. That Court remanded his case to the South Carolina Supreme Court for reconsideration in light

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<sup>31</sup> *State v. Yates*, 310 S.E.2d 805 (S.C. 1982), cert. denied, *Yates v. South Carolina*, 462 U.S. 1124 (1983).

of the decision in *Francis v. Franklin*.<sup>32</sup> On remand, the Supreme Court of South Carolina noted that the jury instructions at Yates' trial suffered from the same infirmities present in *State v. Elmore* 308 S.E.2d 781 (S.C. 1983) and addressed in *Francis v. Franklin*.<sup>33</sup>

Yates again appealed to the U.S. Supreme Court. In a second decision issued early in 1998, the Court briefly recounted the procedural history of *Yates* against the background of the decision in *Sandstrom*, *Elmore*, *Franklin* and *In re Winship*. The Court noted the South Carolina opinion apparently concluded that *Franklin* was not to be applied retroactively because it had announced a new rule of law. The Court *disagreed* saying *Franklin* was merely *an extension and reaffirmation of its prior decisions*. The *Yates* opinion concluded, since it [South Carolina Supreme Court] has considered the merits of the federal claim, it therefore has the duty to grant the relief that federal law requires.<sup>34</sup> Again, the South Carolina Supreme Court refused to vacate Yates conviction, finding the jury charge was harmless error.<sup>35</sup> Once again, Yates appealed this denial to the United States Supreme Court. In its third review of his conviction, the Court set aside Yates' conviction without a third remand to the South Carolina Supreme Court.<sup>36</sup>

Based upon the analysis above, there is no doubt the malice instruction given here was unconstitutional, mandatory and burden shifting – and was additionally confusing because the trial court told the jury malice could be inferred from the deliberate intentional doing of a wrongful act [or] from the use of a deadly weapon. The trial court instructed the jury regarding murder, manslaughter, and self-defense; as well as “the

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<sup>32</sup> *Yates v. Aiken*, 474 U.S. 896 (1985).

<sup>33</sup> *Yates v. South Carolina*, 474 U.S. 896 (1985)

<sup>34</sup> *Yates v. Aiken*, 484 U.S. 211 (1988)

<sup>35</sup> *Yates v. Aiken*, 391 S.E.2d 530 (S.C. 1989)

<sup>36</sup> *Yates v. Evatt*, 500 U.S. 391

exercise of a legal right, no matter how offensive it is to another is never sufficient legal provocation for voluntary manslaughter,” App. 345. Thus, the jury could not possibly consider self-defense or voluntary manslaughter. The only reasonable conclusion the jury could have reached based on the trial court’s charge that “malice could be inferred from the use of a deadly weapon” was that it was no doubt murder. This was more damaging since the trial court failed to instruct that the inference could either be accepted or rejected and given such weight as the jury deemed proper.

Such an unconstitutional malice instruction not objected to by trial counsel has been found to be ineffective assistance, *Carter v. State*, 392 SE 2d 184,185 (S.C. 1990).

While Appellant did raise an issue under *Belcher*, *Belcher* itself, as well as Appellant, in his PCR application and supporting Memorandum, and his subsequent State Habeas Petition before the South Carolina Supreme Court, relied on the clearly established law of *Sandstrom v. Montana* and *Yates v. Evatt*, **neither of which, as the Court noted in *Franklin*, was new law.**

Respondent asserted that “[t]his claim clearly hinges on the interpretation of state criminal law, not federal law,” Resp.S.J. 46. Appellant submits he has made an adequate *prima facie* showing otherwise, *ante*.

In so much as the claim was not properly presented to the South Carolina Supreme Court on certiorari from PCR, Appellant has asserted the record fully supports the claim(s) raised and argued. The PCR Order of Dismissal failed to address the claims raised. The PCR Court *refused* to allow Appellant to make the argument on the record,

App. 481. Upon receipt of the Order, PCR counsel failed to file a Rule 59(e) motion on an insufficient final order.<sup>37</sup>

The failure of the PCR Court to address the properly raised issue(s) and of PCR counsel not filing the Rule 59(e) motion rendered the PCR here an inadequate corrective process.

The record here clearly demonstrates that the lower state court failed to identify and apply the clearly established law of *Sandstrom v. Montana* and *Yates v. Evatt* to the law and facts of this issue in contravention of 28 USC §2254(d)(1). There is no record, and thus deference owed, which Appellant must rebut by clear and convincing evidence where the PCR Court refused to allow a record to be built for appellate or federal review. Therefore, Appellant submits that he is entitled to federal habeas relief where Respondent has failed to carry the burden in the initial showing for summary judgment or address the merits of the claim.

In as much as Appellant has alleged ineffective assistance of PCR Counsel, Appellant relies upon *Martinez v. Ryan*<sup>38</sup> regarding PCR counsel failing to argue the issues raised or file a Rule 59(e) motion.

*Martinez v. Ryan* may be applied where PCR Counsel's actions have amounted to ineffective assistance of counsel, as in the instant §2254 petition. The record here succinctly and clearly demonstrates that trial counsel failed to enter the appropriate objections to the unconstitutional malice instruction; and PCR counsel failed to ensure that the issue as contained in the PCR application and Memorandum in Support was addressed in the PCR Order of Dismissal and preserved for appellate review of the claim.

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<sup>37</sup> See *Bostick v. Stevenson*, *supra*

<sup>38</sup> 566 U.S. 1, 132 S.Ct. 1309 (2012)

Where trial counsel has failed to enter a timely objection to a trial issue, it becomes a matter of ineffective assistance of counsel and is thus the duty of post-conviction counsel to properly amend the application<sup>39</sup> to encompass all claims of merit.

The use of *Martinez v. Ryan* as cause and prejudice to overcome procedural default is an application of the two-prong *Strickland v. Washington*<sup>40</sup> analysis to the performance of PCR Counsel. To apply *Strickland* here, the Appellant has sufficiently demonstrated: 1) PCR counsel's failure to raise the issues contained in the PCR application in order to encompass all claims of merit, or file a Rule 59(e) Motion to address the claim(s) in the Order, fell below an objective standard of reasonableness as to professional norms. And, 2) based on those facts, Appellant is entitled to proceed on the error of trial counsel, where PCR counsel failed to amend the issue of trial counsel's failure to object to the jury instruction that even she had to discuss with co-counsel as to its efficacy.

Appellant submits that the test for issuance of a COA is more than sufficiently met here where Appellant has made a *prima facie* showing that "the petition should have been resolved in a different manner or that the issues presented 'were adequate to deserve encouragement to proceed further,'" *Miller-El v. Cockrell*, 537 U.S. at 326, citing *Barefoot v. Estelle*, 463 U.S. at 880. Appellant has clearly demonstrated a "substantial showing of the denial of a constitutional right." An Appellant satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate

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<sup>39</sup> Rule 71.1, SCRCF

<sup>40</sup> 466 U.S. 668 (1984)

to deserve encouragement to proceed further, *Id.*, 537 U.S. at 327, citing *Slack v. McDaniel*, 529 U.S., 473, 484 (2000).

Appellant submits that he has shown where members of this Panel could disagree with the district court's resolution of this constitutional claim and the issue is adequate to deserve encouragement to proceed further.

**IV. The Fourth Circuit erred in affirming The District Court Decision not issuing a Certificate of Appealability where, in light of *Montgomery v. Louisiana*, \_\_\_ U.S. \_\_\_, 136 S.Ct. 718 (2016), the state post-conviction court was required to give retroactive effect to the substantive rule announced in *State v. Belcher*, 685 S.E. 2d 802 (S.C. 2009) that applied clearly-established law on the constitutionality of a mandatory inference in a malice instruction.**

The South Carolina Court in *State v. Belcher* 685 S.E.2d 802, (S.C. 2009) held the “new rule” announced in that ruling “would not apply to convictions challenge on post-conviction relief,” *Id.* at 810-811.

In the event this is construed as a “new rule,” Appellant submits this Honorable Court apply *Teague v. Lane*, 489 U.S. 288 (1989) to determine if this claim was actually cognizable on collateral review. The South Carolina Supreme Court addressed this matter in *Gibson v. State*, 586 S.E. 2d 119 (S.C. 2003) in applying *Teague* to determine whether *Sandstrom v. Montana* should be applied retroactively on collateral review. The question of whether a decision announces a new rule when it breaks new ground or imposes new obligations on the state or federal governments.

Both the South Carolina Supreme Court <sup>41</sup> and the Magistrate, <sup>42</sup> in reliance upon that court's holding, used the language “[B]ecause our decision represents a clear break

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<sup>41</sup> *Belcher*, 685 S.E.2d at 610

from our modern precedent... “which indicate that a “new [substantive] rule” was created.<sup>43</sup>

Appellant submits that he is entitled to the consideration of *State v. Belcher, Supra*, raised in the state post-conviction and presented to the South Carolina Supreme Court on a petition for writ of certiorari,<sup>44</sup> in light of the January 25, 2016 holding by the United States Supreme Court in *Montgomery v. Louisiana*, \_\_\_ U.S. \_\_\_, 136 S.Ct. 718 (Op. No. 14-280, filed January 25, 2016).

“The Court now holds that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule. Teague’s conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises. That constitutional command is, like all federal law, binding on state courts.”

\_\_\_ U.S. \_\_\_, 136 S.Ct. 718 (slip.Op. 14-280, pg. 6) (filed 1/25/16).

The Court further held that “[p]recedents addressing the nature of substantive rules... ..establish that the Constitution requires substantive rules to have retroactive effect regardless of when a conviction became final.” *Id.* The Court, relying on earlier precedent,<sup>45</sup> held that, “[I]f a state collateral proceeding is open to a claim controlled by federal law, the state court “has a duty to grant the relief that federal law requires,” Slip. Op. 8.

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<sup>42</sup> R&R 12

<sup>43</sup> Despite *Sandstrom v. Montana, Supra* and *Yates v. Evatt, supra*, being clearly-established law at the time of Appellant’s trial. Or, considered an “old rule” that was settled at the time of trial, *Yates v. Aiken*, 484 U.S. 211, 217 (1988). The Court in *Yates v. Aiken* also held that when a State has not “placed any limit on the issues that it will entertain in collateral proceedings... it has a duty to grant the relief that federal law requires.”

<sup>44</sup> *State v. Moultrie* Op. No. 2011-UP-543 (filed December 5, 2011).

<sup>45</sup> *Yates v. Aiken*, 484 U.S. at 218

Appellant suggest that the inferred malice instruction, found unconstitutional in *Sandstrom*, *Yates*, and later in *Belcher*, and conceded to by Respondents and the Magistrate Judge, was unconstitutional in the present case.

There was a reasonable probability that but for counsel's deficient performance; the result of the proceeding would have been different <sup>46</sup> where the PCR court would have applied the clearly established law and granted Appellant relief on the PCR application.

Thus, to utilize *Martinez v. Ryan* as a procedural default, Appellant must successfully demonstrate the *Strickland v. Washington* analysis to PCR counsel's performance. Appellant submits he has satisfied that analysis, above.

In light of the United States Supreme Court decision in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016) and the South Carolina Supreme Court decision in *Jacques Gibson v. State of South Carolina*, 786 S.E.2d. 121 (filed May 11, 2016) finding trial counsel ineffective for failing to object to a burden-shifting malice instruction, where the law was misapplied at the time of Appellant's trial and post-conviction hearing, supports "a substantial showing of the denial of a constitutional [Sixth Amendment right to counsel] right,"

Appellant submits that the test for issuance of a COA is more than sufficiently met here where Appellant has made a *prima facie* showing that "the petition should have been resolved in a different manner or that the issues presented 'were adequate to deserve encouragement to proceed further,'" *Miller-El v. Cockrell*, 537 U.S. at 326, citing *Barefoot v. Estelle*, 463 U.S. at 880. Appellant has clearly demonstrated a "substantial

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<sup>46</sup> Appellant, as a result, was denied the right to issue preservation of meritorious constitutional claims for appellate and/or federal review.

showing of the denial of a constitutional right.” An Appellant satisfies this standard by demonstrating that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further, *Id.*, 537 U.S. at 327, citing *Slack v. McDaniel*, 529 U.S., 473, 484 (2000).

Appellant has demonstrated that, in light of *Montgomery v. Louisiana*, the lower court’s resolution of the present case was “debatable.”

## REASONS FOR GRANTING THE PETITION

Petitioner requests The United States Supreme Court grant this petition. South Carolina judicial system has denied my Federal Constitutional right, by denying my 6<sup>th</sup> and 14<sup>th</sup> Amendment to due process and not receiving a fair trial.

During my trial my counsel never objected to the unconstitutional burden shifting Jury instruction for malice can be inferred by the use of a deadly weapon, (knife), I was convicted of Murder and sentenced to 45 years, and was never charge with a weapon.

Hon Markley Dennis denied the Petitioner the “ Why did you feel counsel was not effective?” “Petitioner answered counsel was ineffective for failing to object to the trials court’s malice instruction; inferred malice may also arise when the deed is done with a deadly weapon.” The Hon. Markley Dennis stated that he doesn’t need to go into that. That’s a matter of Law I don’t need him to tell me the Law, he raised the issue. We don’t need to publish what the--- for him to read out what the--- Law is. Thank You App. pg. 481 L. 13 with me being a layman in the Law, this was how Petitioner learned and remembered the issue for PCR. Hon. Markely Dennis erred by denying me the opportunity to present my case, and to have Appellate review of my issues. PCR counsel was ineffective for not objecting to the Judges response, this made this an inadequate corrective process. This denied all of my PCR issues on the initial PCR application, Also, not filing a Rule 59(e) as requested by Petitioner.

The failure to apply the unconstitutional jury instruction on the permissive inference of malice from the use of a deadly weapon holding in Belcher to Petitioner’s case results in a fundamental miscarriage of justice and offends the principal bedrock of the Due Process Clause of the Fourteenth Amendment, retroactivity also applies in this case. All these issues were in my initial PCR. This clearly shows my Lawyer was ineffective and denies Petitioner Due Process and inadequate corrective process.

- a. “Was counsel ineffective for failing to object to the trial court’s malice instructions that were unconstitutionally burden shifting in violation of Due Process”.
- b. “Was counsel ineffective for failing to object to the trial court’s malice instruction that resulted in a mandatory burden shifting instruction

when the trial court failed to instruct the jury that they may accept or reject the inference of malice from the use of a deadly weapon”.

- c. “Was counsel ineffective for failing to request the trial judge to instruct the jury on the King charge”.
- d. Was counsel ineffective for failing to object to the burden shifting jury instructions given by the court when the court instructed the jury on self-defense and in doing so the instructed the jury that Petitioner had the burden of establishing self-defense”.
- e. “Was counsel ineffective for failing to object when the trial court impermissibly commented on the facts of the case: and as a result the trial court prematurely directed a verdict for the state”.

I pray that This Honorable Court grants this petition, and grants a new trial.  
Thanks and God Bless!

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted, *Antonio Moultrie* December 18, 2017

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