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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA  
In the Supreme Court

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Appeal from Cherokee County  
The Honorable Brian M. Gibbons, Circuit Court Judge

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Appellate Case No. 2023-000687

Rajshun Bernard Foster ....., Petitioner,

v.

The State of South Carolina ....., Respondent.

**APPENDIX**  
**Volume II**

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**SC Court of Appeals**

STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM CHEROKEE COUNTY  
Court of General Sessions  
The Honorable R. Keith Kelly

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Case No.: 2019-001571

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State of South Carolina,

Respondent,

vs.

Rajshun Bernard Foster,

Appellant.

---

FINAL BRIEF OF APPELLANT

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## **STATEMENT OF ISSUE ON APPEAL**

The circuit court erred, as a matter of law, in instructing the jury it could infer malice from the use of a deadly weapon.

### **STATEMENT OF THE CASE**

Mr. Foster (“Appellant”) was indicted for murder (Indictment 2014-0878, which became case number 2014-GS-11-00878) (ROA. p.14, 483) Appellant and a co-defendant, Franklin Pierre Dover, proceeded to trial before a jury and the Honorable R. Keith Kelly July 15-17, 2019. Appellant was represented by Tracy Racine, Esquire. Both men were found guilty of murder, with Appellant sentenced to 35 years’ imprisonment. (ROA. p. 471; 477, 481) Appellant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Cherokee County Clerk of Court.

Appellant filed a timely Notice of Appeal on July 26, 2019 with the Cherokee County Clerk of Court. She had served opposing trial counsel the day prior (July 25, 2019). Unfortunately, the notice of appeal was not properly filed with this court. Undersigned counsel filed a motion to file belated appeal on September 11, 2019 that was unopposed by the State. The request was granted by this court on September 25, 2019. This initial brief follows.

## STATEMENT OF FACTS

On June 22, 2014, Timothy Blair (“Victim”), also known as “Slick,” was shot and killed in the Connecticut Village Apartments in Gaffney, Cherokee County, South Carolina. The State alleged that four individuals were involved in the crime – Appellant, Rajshun Foster, also known as “Fawlk;” Franklin Dover, also known as “Gwap;” Terence Studyvance, also known as “T;” and Antron Bronner, also known as “Red.” ROA. p.157, line 20 – p.158, line 1; p.178, line 13-p.179, line 16. Allegedly, Appellant, while driving his girlfriend’s car, dropped off Dover and Studyvance at a wooded path that led to the apartment complex. ROA. p.159, line 12 – p.160, line 8; p.323, lines 13-25. There, Dover laid in wait for Victim. ROA. p. 223, lines 2-13. While Dover waited, Appellant went into the complex and began socializing with friends. Several witnesses testified to seeing Appellant and Victim have a verbal altercation, then Victim walked to his ex-girlfriend’s apartment where he was shot once through the lungs. ROA. p.225, line 9- p.226, line 15; p.275, line 23 – p.276, line 6.

The State relied on an accomplice liability or “hand of one, hand of all” theory to charge Appellant with murder. Because, it alleged, Appellant drove Dover to the scene, knew Dover was armed, and picked him up after, he is complicit in this murder. However, there were no eyewitnesses to the shooting, no DNA evidence, no fingerprints, no confessions, and no one who could affirmatively state that any of these men caused Victim’s death.

## STANDARD OF REVIEW

“In criminal cases, the Appellate Court sits to review errors of law only. We are bound by the trial court’s factual findings unless they are clearly erroneous. This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases.” State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) (citations omitted).

Review is limited to determining whether any evidence supports the trial court’s finding. State v. Banda, 371 S.C. 245, 251, 639 S.E.2d 36, 39 (2006). Upon such review, an appellate court may reverse only when the trial court’s decision is clear error. State v. Pichardo, 367 S.C. 84, 95, 623 S.E. 2d 840, 846 (Ct. App. 2005). Under the “clear error” standard, the appellate court will not reverse a trial court’s finding of fact simply because it may have decided the case differently. Id. at 96, 623 S.E.2d at 846. [T]his deference does not bar this Court from conducting its own review of the record to determine whether the trial judge’s decision is supported by the evidence.” State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010).

“Errors, including erroneous jury instructions, are subject to harmless error analysis.” State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). “When considering whether an error with respect to a jury instruction was harmless, we must ‘determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.’” State v. Middleton, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) (quoting State v. Kerr, 330 S.C. 132, 144-45, 498 S.E.2d 212, 218 (Ct. App. 1998)). “In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered.” Id.

## ARGUMENT

**The circuit court erred, as a matter of law, in instructing the jury it could infer malice from the use of a deadly weapon.**

The trial court erred, as a matter of law, in issuing the following jury instruction:

The use of a deadly weapon gives rise to a permissive inference of malice. You twelve may draw an inference of malice from proof of the use of a deadly weapon if you conclude such an inference is proper after considering all the facts and circumstances in evidence. You are free to accept or reject the permissive inferences, depending on your view of the evidence.

ROA, p.460-61.

The question of whether trial judges can instruct juries on the inference of malice when a deadly weapon is used (also known as the permissive inference charge) has a detailed past in South Carolina. This history is detailed in State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) – the first case to establish a bright line rule that there could be any limit to a trial court’s instruction on the matter. The Belcher court concluded, after detailed discussion of the history of the instruction, that they were “unable to harmonize the earlier writings of this Court with our modern jurisprudence.” Id., 385 S.C. at 609, 685 S.E.2d at 808. However, it held, there are scenarios in which it may be appropriate for a jury to infer malice based on the involvement of a deadly weapon. These are “where evidence is presented that would reduce, mitigate, excuse or justify the killing (or the alleged assault and battery with intent to kill).” Id., 385 S.C. at 610, 685 S.E.2d at 809. Regardless, this decision created a new, overarching rule regarding the specific jury instruction.

This past summer, however, the Supreme Court again took up the implied malice jury instruction and, again, created a bright line rule. The analysis began with the consideration that “[they] have held in other settings that it is improper to give examples of conduct the jury may consider when determining whether the State has proven an element of a crime or when

determining whether certain other facts have been proven or disproven.” State v. Burdette, 427 S.C. 490, 502, 832 S.E.2d 575, 582 (2019) This, they reasoned, is a direct comment from the trial court on the facts in evidence, and “even telling the jury that it is to give evidence of the use of a deadly weapon only the weight the jury determines it should be given does not remove the taint of the trial court's injection of its commentary upon that evidence.” Id.

The Court further elaborated that this does not prevent the attorneys from arguing whether the jury should or should not infer malice based on the facts, but commentary from the trial court on the topic was inappropriate. Id. 427 S.C. at 503, 832 S.E.2d at 582-83. It even referred back to its holding in Belcher, stating, “It is axiomatic that some matters appropriate for jury argument are not proper for charging. ‘Do jurors need the court’s permission to infer something? The answer is, of course not.’” Belcher, 385 S.C. at 612 n.9, 685 S.E.2d at 810 n.9 (quoting Bruce A. Antkowiak, *The Art of Malice*, 60 RUTGERS L. REV. 435, 476 (2008)).” Id.

Importantly in the case at bar, though, is the conclusion to Burdette, which holds that the ruling is effective in this case and in those cases which are pending on direct review or are not yet final, so long as the issue is preserved. See Griffith v. Kentucky, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987) (holding “a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on direct review or not yet final”). Id. This opinion was filed July 31, 2019 – approximately two weeks after the trial in this matter ended. However, the initial notice of appeal was filed July 26, 2019, with notice being provided to Respondent the day prior. Though the notice was not properly filed with this court, Respondent and the County were on notice of an intent to appeal within the time required to file. Any doubt as to the same should be resolved in favor of Appellant. Therefore, for purposes of applying the new case law, this matter was pending on direct review when the Burdette opinion was issued.

Specifically, regarding issue preservation, this matter is an example of a “clear break” discussed in Griffith, *supra*. Trial counsel could not have known that the court would rule on this issue mere days after trial. At the time of trial, they were following the jurisprudence laid out in Belcher which allowed implied malice, so long as there was no evidence of mitigating circumstances presented. The jury instruction as issued on that day was appropriate. However, as contemplated in Griffith, “failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication.” Griffith, 479 U.S. at 322, 107 S. Ct. at 713. Specifically, it quoted Justice Harlan, who stated,

"If we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is difficult to see why we should so adjudicate any case at all. . . . In truth, the Court's assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation." Mackey v. United States, 401 U.S., at 679 (opinion concurring in judgment).

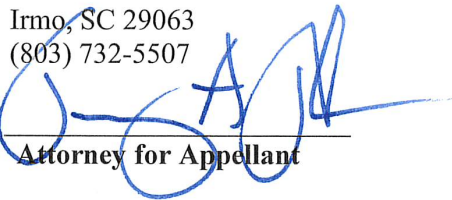
Griffith, 479 U.S. at 323, 107 S. Ct. at 713 (citing Mackey v. United States, 401 U.S. 667, 91 S. Ct. 1160 (1971)). For this reason, because Appellant’s litigation is still pending, the principle issued in Burdette must apply. The issuance of this permissive inference instruction that was constitutional under Belcher is now unconstitutional under Burdette and, therefore, Appellant’s conviction must be overturned.

### CONCLUSION

For the above stated reasons, Appellant respectfully requests that this Court reverse his conviction.

Respectfully submitted,

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July 23, 2020

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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHEROKEE COUNTY  
Court of General Sessions

Case No.: 2019-001571

State of South Carolina, .....Respondent

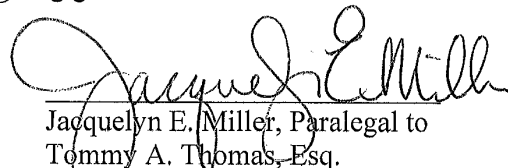
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Rajshun Bernard Foster, .....Appellant.

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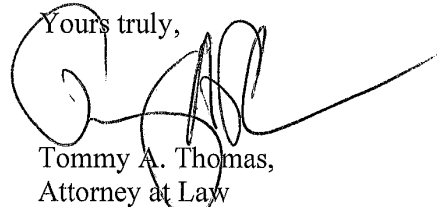
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Appellate Case No.: 2019-001571

Dear Sir or Madam:

Attached please find for filing a Final Brief of Appellant with a Certificate of Service by email.

Please feel free to contact me should you have any questions.

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**SC Court of Appeals**

**STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS**

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**Appeal from Cherokee County  
Honorable R. Keith Kelly, Circuit Court Judge**

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**THE STATE,**

**Respondent,**

**v.**

**RAJSHUN BERNARD FOSTER,**

**Appellant.**

**Appellate Case No. 2019-001571**

---

**FINAL BRIEF OF RESPONDENT**

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### **APPELLANT'S STATEMENT OF THE ISSUE ON APPEAL**

- I. Whether the circuit court erred, as a matter of law, instructing the jury it could infer malice from the use of a deadly weapon.

### **RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL**

- II. Whether Judge Kelly committed reversible error in charging the permissive inference of malice from a deadly weapon where the charge was appropriate under the law and facts at the time the case was tried because there was no evidence reducing or mitigating the offense and the decision in State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), is not applicable to this case because the issue was not preserved below and even if it had been, the instruction was harmless because it could not have reasonably affected the jury's verdict given the other jury instructions and the evidence of malice in this case?

## STATEMENT OF THE CASE

On June 22, 2014, Appellant Rajshun Foster (“Foster”) and a co-defendant, Franklin-Pierre Dover (“Dover”), murdered Timothy Blair in Cherokee County. After a police investigation, Foster and Dover were both arrested for the murder. Foster was subsequently indicted by the Cherokee County Grand Jury for Blair’s murder (Ind. # 2014-GS-11-878) as was Dover. Foster and Dover proceeded to a joint trial before the Honorable R. Keith Kelly, Circuit Court Judge, and a jury on July 15-17, 2019. Foster was represented by Tracy Racine, Esquire. Dover was represented by Michael Morin, Esquire. At the conclusion of the trial, both men were found guilty of Blair’s murder. Judge Kelly sentenced Foster to thirty-five (35) years in prison. Dover was sentenced to life. (R. 1, 14, 471, 477). Foster directly appeals his conviction and sentence raising one (1) issue. (IBOA, p. 2).<sup>1</sup> This is the Brief of Respondent.

---

<sup>1</sup> Currently pending before this Court is another appeal raising a very similar issue to that raised by Foster. State v. DeShannndon Markelle Franks, Appellate Case No. 2016-002244. At the time of the filing of this brief, Appellant Foster’s co-defendant Dover had not filed an Initial Brief of Appellant.

## RESPONDENT'S STATEMENT OF FACTS

Timothy Blair ("Victim"), known by the nickname "Slick," was murdered on June 22, 2014 in the Connecticut Village Apartments in Gaffney, S.C. Four (4) men were involved in Victim's murder: Appellant Rajshun Foster (hereinafter "Foster") who was also known as "Shawn Fawlk"; Franklin Dover (hereinafter "Dover"), also known as "Gwap"; Terrance Studyvance (hereinafter "Studyvance"), also known as "T"; and Antron Bonner (hereinafter "Bonner"), also known as "Red." The two (2) main perpetrators in the murder were Appellant Foster and his co-defendant at trial Dover. Neither man lived in Connecticut Village Apartments. At Foster and Dover's joint trial, Bonner testified for the State. Numerous other eyewitnesses also testified for the State. Neither Foster nor Dover testified, or offered any witnesses at trial. They did not argue self-defense, accident, defense of others, stand your ground, or any other defense such as insanity. They did not argue or present any evidence the crime was voluntary manslaughter or involuntary manslaughter. The only issue at trial was whether Foster and Dover committed the murder of Victim, i.e. whether either or both of them were perpetrators of the murder. (R. pp. 1-14; 41-74; 76-77; 93-142; (Pg. 143 - Supp. ROA pg. 1); 144-166; 176-194; 197-267; 269-292; (Pg. 293 - Supp. ROA pg. 2); 294-296; 305-471; 473-477).

The testimony at trial proved that Appellant Foster and co-defendant Dover had been looking for Victim for several days prior to Victim's death. Foster and Dover believed Victim had stolen something that belonged to them. It is unclear whether it was drugs or money. Several witnesses testified Foster and Dover were actively looking for Victim in the days leading up to Victim's murder and had threatened Victim. Foster and Dover had told the witnesses to tell Victim they were looking for him. (R. pp. 93-113; 116-124; 128-133; 308-313).

Then on the afternoon of June 22, 2014, Foster and Dover both drove to Connecticut Village Apartments in separate vehicles. Once they arrived there, they confronted Victim. Eyewitnesses testified Foster was the instigator of the confrontation “getting up in” Victim’s chest or face. Victim refused to fight Foster and kept backing away from him. Then two (2) different eyewitnesses heard Dover state out loud to Victim that: “he would get him [Victim] one way or the other.” Victim walked away from the confrontation with the two (2) men with his head down. One (1) eyewitness saw Dover armed with a rifle, standing in the doorway of his vehicle, when he made the verbal threat that he would get Victim one way or the other. (R. pp. 177-193; 146-166; 198-207; 207-218; 263-267; 277-292 (Page 293 – Supp. ROA pg. 2); 308-313).

Foster and Dover both then left the apartment complex in their two (2) respective vehicles. They drove to a nearby mobile home park where Dover lived with his girlfriend. The two (2) men then had a discussion with Studyvance (aka “T”) in front of one of the mobile homes. Terrance Bonner (aka “Red”) walked up and saw the three (3) men conversing. Bonner asked if anyone knew where they could get some marijuana, and Foster said yes, to come with them to Connecticut Village Apartments. The four (4) men; Foster, Bonner, Studyvance, and Dover got in Foster’s girlfriend’s car headed for Connecticut Village Apartments. Before getting in the car, Dover got his rifle and at least one (1) surgical type glove out of his own car, and got in the back of Foster’s girlfriend’s car where Bonner was seated in the back seat. Studyvance was also armed with a pistol, seated in the front passenger seat, as the four (4) men traveled to Connecticut Village Apartments with Foster driving. (R. pp. 308-400; 93-103; 58-74; 146-166; 277-292 (Page 293 – Supp. ROA pg. 2); 308-313; 314-363).

The four (4) men arrived at Connecticut Village Apartments shortly before 5:00 p.m., on June 22<sup>nd</sup>, while it was broad daylight. First, the men drove into Connecticut Village Apartments briefly and then turned around and left the apartment complex parking lot. Foster, still driving his girlfriend's car, then drove up a nearby paved road and dropped Dover and Studyvance (aka "T") off at a wooded path that led down to the back of Connecticut Village Apartments and directly to the back door of Victim's girlfriend's apartment. When he got out of the car, Dover was carrying his loaded rifle and had with him a mask and surgical gloves. Studyvance was still armed with his pistol. Dover then snuck on foot to a location near the Victim's girlfriend's apartment. Studyvance followed Dover. Once at the back of the apartment complex near Victim's girlfriend's apartment, Dover laid in wait for Victim. (R. pp. 93-125; 58-74; 128-142; (page 143 – Supp. ROA page 1); 144-145; 146-166; 177-193; 207-218; 218-244; 245-263; 263-67; 277-292 (Page 293 – Supp. ROA page 2); 314-363; 363-383).

While Dover waited, Foster and Bonner drove back into the Connecticut Village Apartments immediately after dropping off Dover and Studyvance at the head of the wooded trail. Foster was still driving his girlfriend's car and Bonner was now seated in the front passenger seat. Once they drove back into the apartment complex, Foster parked his girlfriend's car near a garbage dumpster. Foster got out of the car and confronted Victim again, who was walking through the apartment complex on foot. Several witnesses testified to seeing Foster and Victim have another verbal altercation there. Again, Foster was the instigator of the verbal altercation. However, there was no physical contact between Foster and Victim. Victim again walked away. Foster got back in his girlfriend's car and Foster and Bonner were still parked in Foster's girlfriend's car next to a garbage dumpster and seated in the front seat where they could see Victim. They did not leave. Victim then began walking to his girlfriend's apartment. (R.

pp. 58-74; 128-142; (Page 143 – Supp. ROA page 1); 144; 145; 146-166; 177-193; 198-207; 207-218; 219-244; 263-267; 277-292; (Page 293 – Supp. ROA page 2); 308-313; 314-363; 385-400).

While walking to his girlfriend's apartment, Victim stopped at another female friend's apartment and told her he was afraid for his life. He told her he had been in an argument with Foster and Dover and was scared. She told Victim to go to his girlfriend's apartment, get his clothes and personal things, return to her apartment, and she would help him get safely out of the apartment complex. Victim left her apartment to get his things as she suggested. (R. pp. 128-142 (Page 143 – Supp. ROA page 1); 144-145; 207-218; 219-244; 245-263; 263-267; 277-293; 314-363).

Phone records introduced at trial proved between the time Foster and Bonner pulled into the apartment complex parking lot and parked next to the dumpster and when Victim was killed, there were three (3) phone calls between Foster and Dover on their cell phones, i.e. Foster and Dover were communicating as Foster and Bonner sat in the car watching Victim as Dover laid in wait for Victim somewhere near the back of the apartment complex. (R. pp. 58-74; 146-166; 219-244; 245-263; 263-267; 277-292 (Page 293 – Supp. ROA page 2); 314-363; 385-400).

While walking to his girlfriend's apartment to get his things, Victim rounded a building's corner. When he did, Dover shot Victim once through the lungs with the rifle killing Victim. Victim was unarmed. Dover was wearing a mask and gloves when he shot victim in the chest with the rifle he was carrying. An eyewitness saw Dover, wearing a mask and surgical type gloves carrying a rifle just moments before the fatal shot was fired, lurking around the side of one of the apartment buildings. Police later found a fired 7.62 shell casing near victim's body at the crime scene. After killing the victim, Dover and Studyvance then fled back up the path

through the woods where they had been dropped off earlier by Foster. An eyewitness saw two (2) men flee from the area of the shooting up the wooded path immediately after the fatal shot was fired. (R. 93-125; 128-142; (Page 143 – Supp. ROA page 1); 144; 145; 146-66; 177-193; 198-207; 207-218; 219-244; 245-263; 263-267; 270-76; 277-292; (Page 293 – Supp. ROA page 2); 308-313; 314-363; 363-383).

According to co-defendant Bonner, after Victim was shot, Foster received a telephone call from Dover. Foster and Bonner then left the apartment complex in Foster's girlfriend's car with Foster still driving. Foster drove back to the same location he had dropped Dover and Studyvance out at earlier and picked up Dover and Studyvance. Both Dover and Studyvance hurriedly jumped in the same back door of the car. As soon as he got in the car, Dover stated to Foster, "get me out of here fast, get me out of here fast." Foster asked Dover where he shot Victim, and Dover stated: "in the chest area." Foster then drove the four (4) men to the residence of Dover's girlfriend where Dover and Studyvance got out of Foster's girlfriend's car and entered Dover's girlfriend's residence. (R. pp. 58-74; 93-125; 128-142; (Page 143 – Supp. ROA page 1); 144; 145; 219-244; 245-263; 270-276; 277-293; 308-313; 314-363; 363-383; 385-400).

A witness, Dover's former girlfriend, testified Dover then changed clothes in her house and put the clothes he removed in a shoe box. He had never done this before. Dover later instructed her to call a friend of his to come and pick up the box with the clothes in it, which she did. The friend came and picked up the shoe box full of clothing. Then the former girlfriend and Dover left her residence in Dover's car and drove immediately to Westgate Mall in Spartanburg arriving right at closing time, but soon enough for both to enter and be seen inside the mall, i.e. Dover was trying to set up an alibi for himself for Victim's murder. (R. pp. 363-383).

The State also proved at trial that Dover's cell phone pinged in the area of Connecticut Village Apartments at the time of the murder. (R. 58-74; 385-400). Cell tower information also showed Dover's phone pinged in the area of his girlfriend's mobile home before the four (4) men left for Connecticut Village Apartments to commit the crime, and the phone pinged along the path away from the crime scene and back to his girlfriend's home shortly after the crime, when Dover removed the clothes he had been wearing during the murder. (R. 58-74; 385-400; 363-383). Cell tower information also showed Dover's phone pinged along I-85 after leaving his girlfriend's mobile home and arriving at Westgate Mall in Spartanburg shortly before 6:00 p.m. (R. pp. 58-74; 385-400; 363-383).

The State relied on accomplice liability [i.e. "the hand of one is the hand of all"] to prove Foster's guilt because he drove Dover to the scene, knew what Dover was going to do, was complicit and aided and abetted in the murder, and then picked up Dover after the murder, and effected the group's getaway or escape. (R. pp. 58-73; 93-142 (Page 143 – Supp. ROA page. 1); 144-166; 176-194; 197-267; 269-292; 308-400; 410-428; 451-469). The only issue at trial was whether either Foster or Dover or both committed Victim's murder. (R. pp. 58-73, 93-142 (Page 143 – Supp. ROA page 1); 144-166, 176-194; 197-267; 269-292; 308-400; 451-469). There was no evidence reducing the crime to voluntary manslaughter or involuntary manslaughter. (R. pp. 58-73; 93-142; (Page 143 – Supp. ROA page 1); 144-166; 176-194; 197-267; 269-292; 308-400; 404-410; 451-469). There was no jury instruction on voluntary or involuntary manslaughter. (R. pp. 451-469). Neither Foster nor Dover offered a defense such as accident, self-defense, defense of others, stand your ground, or insanity. (R. pp. 404-410). There was no jury instruction on any such defense (R. pp. 451-469), because none was offered and there was no evidence supporting such a charge. (R. pp. 58-72; 93-142; (Page 143 – Supp. ROA page 1); 144-166; 176-

194; 197-267; 269-292; 308-400). There was no objection by either Foster or Dover to Judge Kelly not charging voluntary or involuntary manslaughter or not charging any recognized defense because there was no evidence supporting such an instruction. (R. pp. 400-477; 58-73; 93-142; (Page 143 – Supp. ROA page 1); 144-166; 176-194; 197-267; 269-292; 308-400).

### **Appellate Issue**

Did Judge Kelly commit reversible error in instructing the jury it could infer malice from the use of a deadly weapon and is the holding in State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), applicable to Foster’s case and if so was the instruction harmless beyond a reasonable doubt?

### *What occurred below*

At the charge conference, the State requested Judge Kelly instruct the jury on the permissive inference of malice from the use of a deadly weapon given the evidence in the case.<sup>2</sup> In this case, there was no evidence mitigating or reducing the crime from murder to any lesser included offense such as voluntary manslaughter or involuntary manslaughter and there was no evidence of or a defense offered such as accident, self-defense, or insanity. (See BOA, p. 10, ll. 1-5). In the present case, Appellant Foster and his co-defendant either committed the murder or they were innocent. This case was tried before the South Carolina Supreme Court issued its Opinion in State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019). Because the charge was appropriate at the time of trial pursuant to the Supreme Court’s previous opinions in State v. Belcher, 385 S.C. 597, 685 S.E.2d 892 (2009) and State v. Stanko, 402 S.C. 252, 741 S.E.2d 708 (2013), there was no objection from Appellant Foster or his co-defendant Dover to the instruction on the permissive inference of malice from a deadly weapon. (R. pp. 400-477)(See

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<sup>2</sup> On information and belief, the charge conference was conducted in chambers. It is not contained in the trial transcript.

also IBOA, p. 10, lines 1-5).<sup>3</sup> Thereafter, Judge Kelly gave the following jury instruction on the permissive inference of malice from the use of a deadly weapon:

The use of a deadly weapon gives rise to a permissive inference of malice. You twelve may draw an inference of malice from proof of the use of a deadly weapon if you conclude that such an inference is proper after considering all the facts and circumstances in evidence. You are free to accept or reject the permissive inferences, depending on your view of the evidence. The law says if one kills another with a deadly weapon, the implication of malice may arise. If the facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, the inference would be simply an evidentiary fact to be taken into consideration by you, along with all other evidence, and give it such weight as you determine it should receive.

(R. 460-61). There was no objection to this charge after Judge Kelly gave his jury instructions either. (R. pp. 466-469). There was no post-verdict motion for a new trial or to set aside the verdict based on Judge Kelly's instruction on the permissive inference of malice from a deadly weapon. (R. pp. 470-477).

### ARGUMENT

**Judge Kelly did not commit reversible error in charging the permissive inference of malice from a deadly weapon where the charge was appropriate under the law and facts at the time the case was tried because there was no evidence reducing or mitigating the offense and the decision in State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), is not applicable to Foster's case because the issue was not preserved below; and, even if it had been, the instruction was harmless because it could not have reasonably affected the jury's verdict given the other jury instructions on malice and the evidence in this case.**

In State v. Burdette, 427 S.C. 490, 502-03, 832 S.E.2d 575, 582-83 (2019), a case decided after this case was tried, and after the challenged instruction was given, the South Carolina Supreme Court held that it was now error to instruct the jury on the permissive inference of malice from a deadly weapon, even where there is no evidence mitigating or

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<sup>3</sup> Foster concedes in his brief that there was no objection below to the charge of the permissive inference of malice from a deadly weapon because it was appropriate at the time of trial based on the evidence in this case and the law at the time. (IBOA, p. 10, ll. 1-5).

reducing the crime from murder to manslaughter and where there is no defense to the crime. The Court held its' change in the law would be applicable to any case pending on direct review **where the issue was preserved for appeal.** Burdette, 427 S.C. at 504-505, 832 S.E.2d at 585, *overruling in part* Belcher, *supra* & Stanko, *supra*.

### ***Lack of Preservation***

Foster concedes, as he must, that this issue is not preserved for appeal. (IBOA, p. 10, ll. 1-5). It was not preserved for appeal with an objection below. (IBOA, p. 10, ll. 1-5). And, there was no objection to Judge Kelly instructing the jury on the permissive inference of malice because at the time the instruction was given, the instruction was entirely appropriate. (R. pp. 400-477)(See also IBOA, p. 10, ll. 1-5)(“Trial counsel could not have known that the court [the South Carolina Supreme Court] would rule on this issue mere days after trial. At the time of trial, they were following the jurisprudence laid out in Belcher which allowed implied malice, so long as there was no evidence of mitigating circumstances presented. The jury instruction as issued on that day was appropriate.”). As a result, this appeal must be dismissed as the Burdette Court held its' holding in Burdette would only be applicable to those cases pending on direct review, “if the issue was preserved” by an objection below. Id. at **504-505**, 832 S.E.2d at **583**. Here, there was no objection to the jury instruction, so the issue is not preserved and must be denied and dismissed with prejudice. (R. 400-477). Burdette at **504-505**, 832 S.E.2d at **583**; State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)(rejecting plain error and requiring issue preservation in future appeals).

Instead, Foster argues that pursuant to the United States Supreme Court's holding in Griffith v. Kentucky, 479 U.S. 314 (1987), he should receive the benefit of the holding in Burdette, even though the issue was not preserved below. He argues, Griffith held anytime there

is a new rule of criminal law that represents a clear break with the past, it is to be applied retroactively to all cases pending on direct review, whether preserved or not. Foster is wrong.

There is an explicit limitation of Griffith's holding. It only applies to new **federal constitutional** rules. Trice v. Secretary, Florida Department of Corrections, 766 Fed. Appx. 840 (11<sup>th</sup> Cir. 2019). It does not extend to state Supreme Court decisions on state substantive criminal law, even if they represent a clear break with that state's past decisions. Trice v. Secretary, Florida Department of Corrections, 766 Fed. Appx. at 846-849 (Petitioner was not entitled to retroactive application of Florida Supreme Court's change in its substantive criminal law as Griffith only applied to changes in federal constitutional law). Where there is a change in a state's substantive criminal law by that state's Supreme Court, the state's Supreme Court's decision controls whether it is retroactive or not and to which cases it is retroactively applied. Id. at 848-849. Because the South Carolina Supreme Court changed its' state substantive criminal law in Burdette, not federal constitutional law, its' Opinion controls to which cases its' holding applies retroactively, and it specifically held it applied to any cases pending on direct review where the issue was preserved below by an objection. Burdette, *See also* Trice, 766 Fed. Appx. at 848-849 (Because Florida's Supreme Court only changed its state's substantive criminal law in Weiland v. State, 732 So.2d 1044 (Fla 1999), and not federal constitutional law, the Florida Supreme Court's decision that Weiland would only be applicable to cases pending on direct appeal where the issue was preserved below with an objection was controlling, not Griffith v. Kentucky). As a result, there is no merit to Foster's argument in his brief that Griffith requires Burdette be applied to his case.

Further, Griffith involved whether the United States Supreme Court would apply its' holding in Batson v. Kentucky<sup>4</sup> retroactively to cases pending on direct review. Griffith itself dealt with two (2) cases pending on direct review, one (1) from state court and one (1) from federal court, where the issue was preserved below by an objection by trial counsel in each case. Griffith, 479 U.S. 314. In both cases, the state and the federal case, trial counsel had raised challenges immediately after jury selection to the prosecutor's use of peremptory challenges against African-American jurors and argued the exercise of those strikes violated each respective defendant's federal constitutional rights, i.e. the issue was preserved for appellate review. *See* Griffith, 479 U.S. 314. The United States Supreme Court decided to apply its holding in Batson retroactively to cases pending on direct review, but it did not decide to apply Batson to cases on direct review where the issue was not even raised at trial. To have applied Batson as Foster argues, would have produced an absurd result. This would have resulted in numerous lower appellate court's having to comb the record for any case pending on direct review at the time of Batson, to attempt to determine if a prosecutor improperly used peremptory challenges even where there was no challenge to the use of peremptory challenges at trial. That cannot be what the Supreme Court intended. Thomas v. Moore, 866 F.2d 803, 805 (5<sup>th</sup> Cir. 1989) (Griffith v. Kentucky applies to cases on direct review where there was an objection at trial to the prosecutor's use of peremptory challenges, not to cases like this defendant's where there was no objection at trial and the issue was not preserved for appellate review) State v. Luttrell, 764 P.2d 554 (Ore. 1988)(recognizing in Griffith the defendant preserved the issue by raising an objection at trial, however, Luttrell did not; therefore, Griffith did not apply).

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<sup>4</sup> 476 U.S. 79 (1986).

Here, in the present case, there was no objection below to the trial court's instruction on the permissive inference of malice. This is conceded in Foster's brief. (IBOA, p. 10, ll. 1-5). Our appellate courts have rejected plain error as far back as State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). As a result, this appellate ground has no merit and must be denied.

***The was no error at the time and the instruction was harmless***

It goes without saying, Judge Kelly did not err at the time, in instructing the jury on the permissive inference of malice from a deadly weapon, because at the time of trial this was an appropriate charge on the law. Belcher, 385 S.C. 597, 685 S.E.2d 892, *overruled by* Burdette; Stanko, 402 S.C. 252, 741 S.E.2d 708, *overruled by* Burdette. Foster concedes this in his brief, as he must. (IBOA, p. 10, ln. 5)(“The jury instruction as issued on that day was appropriate.”). However, *post-hac* the instruction is now considered error if the case was pending on direct review at the time Burdette was decided and the issue is preserved below. Burdette, 504-505, 832 S.E.2d at 583; State v. Brooks, 428 S.C. 613, 627-33, 837 S.E.2d 236, 241-44 (Ct. App. 2019)(recognizing the instruction is now error where the case was pending on direct review at time Burdette was decided and the issue is preserved below). Even if Foster could show this issue was preserved, which he cannot, Burdette's application to those cases pending on direct review and preserved would provide him no relief.

Consistent with earlier precedent, the Court in Burdette stated that the giving of this instruction is subject to harmless error analysis. Id. at 578-79. *See also* State v. Stanko, 402 S.C. 252, 265, 741 S.E.2d 708, 714–15 (2013) (finding instruction that malice could be inferred from use of deadly weapon was improper but concluding error was harmless), *overruled on other grounds*, Burdette, *supra*; Belcher, 385 S.C. at 611, 685 S.E.2d at 809, *overruled on other grounds*, Burdette, *supra*. The Court in Burdette explained that:

An erroneous instruction alone is insufficient to warrant this Court's reversal. "Errors, including erroneous jury instructions, are subject to harmless error analysis." Belcher, 385 S.C. at 611, 685 S.E.2d at 809. "When considering whether an error with respect to a jury instruction was harmless, we must 'determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.'" State v. Middleton, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) (quoting State v. Kerr, 330 S.C. 132, 144-45, 498 S.E.2d 212, 218 (Ct. App. 1998)). "In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered." Id. (quoting Kerr, 330 S.C. at 145, 498 S.E.2d at 218).

Burdette, at 578-79.

Applying the above harmless error standard to the charge given in this case, any error must be viewed as harmless beyond any reasonable doubt. First, Belcher abandoned strict adherence to the common law inference of malice from use of a deadly weapon based on the Court's conclusion that this inference was "confusing and prejudicial where evidence is presented that would reduce, mitigate, excuse or justify the homicide." Belcher, 385 S.C. at 611, 685 S.E.2d at 809. It was the presence of such evidence that led the Court to hold the jury instructions in Belcher and Burdette were not harmless beyond a reasonable doubt. *See* Burdette, 832 S.E.2d at 579-82; Belcher, 385 S.C. at 604, 609-12, 685 S.E.2d at 806, 808-10.

Foster's case, however, does not present a concern of possible jury confusion because there was no evidence that the killing was in self-defense or that Foster could be guilty of any lesser-included offense of murder. There was no jury instruction on voluntary manslaughter, involuntary manslaughter, or any recognized defense such as self-defense, accident, defense of others, or insanity. Accordingly, any error in giving the instruction was harmless beyond a reasonable doubt.

A second reason the instruction was harmless beyond any reasonable doubt is that the trial judge gave two (2) alternative definitions of “malice” that support a conclusion that the killing was malicious. Specifically, he instructed jurors that:

Now, each of these defendants is charged with murder. And in order to prove this crime, the State must prove each defendant killed another person with malice afore-thought, either expressed or implied.

Malice has been defined as hatred, ill will, hostility to another. It is the intentional doing of a wrongful act without justification or excuse and with an intent to kill that the law will infer an evil intent.

Malice aforethought does not require that malice exists for any particular time before the act is committed, but malice must exist in the mind of the defendant before and at the time the act was committed. Therefore, there must be a combination of previous evil intent and the act itself.

Malice aforethought may be expressed or inferred. These terms expressed and inferred do not mean different kinds of malice, but merely the means and manner in which malice may be shown to exist. It is either by direct evidence or by inference from the facts and circumstances.

Express malice is shown when a person speaks words which express hatred or ill will for another, or when the person prepared beforehand to do the act which was later accomplished. For example, lying in wait for a person.

Malice is wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong. It is the doing of a wrongful act intentionally without just cause or excuse.

Intent means intending the result which actually occurred and not accidentally or involuntarily.

Intent may be shown by acts and conduct of each defendant and other circumstances from which you may naturally and reasonably infer intent.

Evidence of the character of the act, the character of the instrument used, the manner in which it was used, the purpose to be accomplished and resulting wounds or injuries, may be considered in determining intent.

(R. p. 459, ln. 13 – p. 460, ln. 23). Each of these definitions is supported by South Carolina case law. *See, e.g., Margolis v. Telech*, 239 S.C. 232, 238, 122 S.E.2d 417, 419-20 (1961) (“Malice is

the deliberate, intentional doing of a wrongful act without just cause or excuse”); Id. at 238, 122 S.E.2d at 420 (“Malice ‘is implied where it shows a disregard of the consequences of the injurious act, without reference to any special injury which he may inflict on another’, and ‘in doing some illegal act for one’s own gratification or purposes, without regard to the rights of others or the injury he may inflict on another’”); State v. Murphy, 86 S.C. 268, 68 S.E. 570, 570 (1910) (“‘Malice is a term of art, implying wickedness, and excluding a just cause or excuse. It is implied from an unlawful act, willfully done, until the contrary be proved.’ It has also been defined to be the willful or intentional doing of a wrongful act, without just cause or excuse”); McBride v. Sch. Dist. of Greenville Cty., 389 S.C. 546, 565, 698 S.E.2d 845, 855 (Ct. App. 2010) (“malice is ‘the deliberate intentional doing of a wrongful act without just cause or excuse’”) (quoting Eaves v. Broad River Elec. Coop., Inc., 277 S.C. 475, 479, 289 S.E.2d 414, 416 (1982) (internal quotation omitted)); Law v. S.C. Dep’t of Corr., 368 S.C. 424, 437, 629 S.E.2d 642, 649 (2006) (malice may be implied where the evidence reveals a disregard of the consequences of an injurious act, without reference to any special injury that may be inflicted on another person”); State v. Young, 238 S.C. 115, 124-25, 119 S.E.2d 504, 509 (1961), *overruled on other grds*, State v. Torrence, 305 S.C. 45, 60-69, 406 S.E.2d 315, 323-28 (1991) (Toal, J., (concurring in result) (abolishing in favorem vitae review). *See also, e.g.*, State v. Cottrell, 421 S.C. 622, 644, 809 S.E.2d 423, 435 (2017) (finding trial judge properly instructed jurors that malice could be inferred from conduct showing a total disregard for human life); State v. Oates, 421 S.C. 1, 20, 803 S.E.2d 911, 921 (Ct. App. 2017)(“Malice can be inferred from conduct [that] is so reckless and wanton as to indicate a depravity of mind and general disregard for human life”) (emphasis in original); State v. Mouzon, 231 S.C. 655, 662, 99 S.E.2d 672, 675 (1957); In re Tracy B., 391 S.C. 51, 69, 704 S.E.2d 71, 80 (Ct. App. 2010). Each definition

instructed to the jury above likewise fits the facts of this case. There was both express malice and inferred malice in this case. There were threats made to the victim and there was “lying in wait” for the victim. There was a clear intent to kill or injure the victim.

Finally, the charge was harmless under the facts of this case. Unlike Burdette, *supra*, there was no evidence in the present case reducing the crime from murder to voluntary manslaughter or involuntary manslaughter. In Burdette, the South Carolina Supreme Court found, and the State conceded, there was evidence reducing the crime from murder to voluntary or involuntary manslaughter. The permissive inference charge should not have been given by the trial judge. In fact, in Burdette, the trial court instructed the jury on both voluntary and involuntary manslaughter. Id. The Supreme Court found in Burdette that the instruction there was not harmless because the trial court failed to instruct the jury that voluntary manslaughter was an intentional killing **without malice**, so it was impossible to tell if the jury relied on the permissive inference or not when it convicted the defendant of the lesser offense of voluntary manslaughter. Id.

Here, that did not occur. There was no instruction on any lesser included offense (R. 451-469). Foster concedes in his brief that there was nothing mitigating or reducing the offense. (IBOA, p. 10, ll. 1-5). In the present case, Foster and his co-defendant Dover either committed murder or they were innocent.

And, the evidence of malice was overwhelming. Therefore, the permissive inference of malice from a deadly weapon instruction was harmless. Stanko, 402 S.C. 252, 264-65, 741 S.E.2d 708, 714-15 (erroneous instruction of permissive inference of malice arising from the use of a deadly weapon was harmless where there was overwhelming evidence of malice and given the entire jury instruction including definition of malice); State v. Brooks, 428 S.C. 613, 627-33,

837 S.E.2d 236, 241-44 (Ct. App. 2019)(permissive inference of malice instruction was harmless beyond a reasonable doubt after considering jury instruction as a whole and other evidence of malice independent of the use of a deadly weapon)(citing Stanko, *supra*).

*The overwhelming evidence of malice*

Foster and Dover searched for Victim for several days before finding him. They believed the victim had stolen something from them. They had told more than one (1) witness to tell Victim they were looking for him. Witnesses described this communication as “not a friendly visit.” (R. pp. 93-113; 116-124; 128-133; 308-313).

Then on the day of Victim’s murder, Foster and Dover drove in separate vehicles to Connecticut Village Apartments where victim lived with his girlfriend. Once there, both men got out of their respective vehicles and confronted Victim in the parking lot of the apartment complex. Witnesses testified Foster was the instigator of the confrontation “getting up” in Victim’s face or chest yelling at him. Victim backed away and refused to fight Foster. Dover was seen standing in the doorway of his car holding a rifle. Two (2) witnesses heard Dover yell at the victim that he would “get him one way or the other.” Victim walked away from both defendants. Foster and Dover then got back in their respective vehicles and left the apartment complex. (R. pp. 177-193; 146-166; 198-207; 207-218; 263-267; 277-292; (Page 293 – Supp. ROA page 2); 308-313).

Foster and Dover drove to Dover’s girlfriend’s residence where they met up with and began talking to Studyvance. Bonner then walked up. The men agreed to go to Connecticut Village Apartments together in Foster’s girlfriend’s car. Foster drove; Studyvance was in the front passenger seat carrying a handgun; Bonner got in the back seat; and, Dover got in the back

of seat after retrieving his rifle from his own car and carried it with him. (R. pp. 308-400; 93-103; 58-74; 146-166; 277-292; (Page 293 – Supp. ROA – page 2); 308-313; 314-363).

Foster drove the group of men to Connecticut Village Apartments, where victim lived, again looking for the victim. Upon arriving at Connecticut Village Apartments, Foster first circled through the apartment complex and then left the complex. Foster drove up a paved road outside the apartment complex and dropped Dover and Studyvance off at a wooded trail that led down the back of the apartment complex. When Dover got out of Foster's car he was armed with his loaded rifle. Studyvance was still carrying his pistol. The wooded trail led directly to the back door of Victim's girlfriend's residence in the apartment complex. According to an eyewitness, Dover was also wearing a mask and gloves. (R. pp. 93-125; 58-74; 128-142; (Page 143 – Supp. ROA page 1); 144; 145; 146-166; 177-193; 207-218; 218-244; 245-263; 263-67; 277-292; (Page 293 – Supp. ROA page 2); 314-363; 363-383).

After dropping off Dover and Studyvance, Foster then drove to back to Connecticut Village Apartments with Bonner still in the car with him. Bonner was now in the front passenger seat. Once there, Foster pulled in next to a garbage dumpster and got out of his car and confronted Victim again. The victim walked away from the confrontation. Foster got back in the driver's side of the car and according to eyewitnesses, Foster and Bonner sat in the car watching Victim walk away. During this time period, at least two (2) phone calls were made between Foster and Dover on their cell phones. (R. pp. 58-74; 128-142; (Page 143 – Supp. ROA page 1); 144; 145; 146-166; 177-193; 198-207; 207-218; 219-244; 245-263; 263-267; 277-292; (Page 293 – Supp. ROA page 2); 308-313; 314-363; 385-400).

Meanwhile, after being dropped off, Dover and Studyvance had walked down the wooded trail and snuck through the wooded area to a location near the victim's girlfriend's

apartment. As Victim walked away from Foster and Bonner, Victim rounded the corner of an apartment building, where Dover confronted him wearing a mask and gloves. Dover pointed his loaded rifle at Victim and shot him in the chest with 7.62 large caliber ammunition, killing him. Dover then fled the scene with the rifle and still wearing the mask and gloves. Studyvance also fled with Dover. An eyewitness in the apartment complex saw two (2) men fleeing up the wooded trail immediately after the shooting. Dover then called Foster using his cell phone. Foster received a phone call on his cell phone, and was also told by an acquaintance in the apartment complex who walked up to his car, that Victim had been shot and killed. Foster and Bonner then drove out of the apartment complex, with Foster driving, and picked up Dover and Studyvance at the same location Foster had dropped them off before the murder. Dover, still carrying the rifle, stated “get me out of here, get me out of here.” Foster asked Dover where he shot Victim and Dover stated “in the chest area.” Foster then drove all of the men back to another residence, Dover’s girlfriend’s residence, where they decided to split up and did. (R. 58-74; 93-125; 128-142; (Page 143 – Supp. ROA page 1); 144; 145; 146-66; 177-193; 198-207; 207-218; 219-244; 245-263; 263-267; 270-76; 277-292; (Page 293 – Supp. ROA page 2); 308-313; 314-363; 363-383; 385-400).

Dover and Studyvance got out of the car, and Dover changed out of the clothes he was wearing during the murder rolling them up and putting them in a shoe box. Dover also told his girlfriend to call a friend of Dover’s to come pick up the clothes and get rid of them. She did as Dover directed. Dover’s friend came and picked up the clothes and got rid of them. Dover and his girlfriend then attempted to create a false alibi for Dover for the murder by driving to Spartanburg and being seen at Westgate Mall. Dover also called a friend at Connecticut Village

Apartments and told her to tell another individual there not to mention his name to police; “Keep my name out of his mouth.” (R. pp. 314-363; 363-383; 242-244).

There was overwhelming evidence of malice. There was evidence of a premeditated plot to kill or wound the victim. There were threats communicated to the victim heard by witnesses. Foster dropped the shooter off before and picked up the shooter after the murder. The shooter laid in wait for the victim wearing a mask and gloves. (R. 58-74; 93-125; 128-142; (Page 143 - Supp. ROA page 1); 144; 145; 146-66; 177-193; 198-207; 207-218; 219-244; 245-263; 263-267; 270-76; 277-292; (Page 293 – Supp. ROA page 2); 308-313; 314-363; 363-383; 385-400). There was no evidence reducing or mitigating the offense, and no defense was offered such as self-defense, accident, or insanity. (R. pp. 58-73; 93-142; (Page 143 – Supp. ROA page 1); 144-166; 176-194; 197-267; 269-292; 308-400; 404-410; 451-469). The challenged instruction could not have impacted the jury’s verdict. Stanko, 402 S.C. at 264-65, 741 S.E.2d at 714-15; Brooks, 428 S.C. 613, 627-33, 837 S.E.2d 236, 241-44.

### CONCLUSION

For the above stated reasons, Foster’s conviction and sentence for the murder of Timothy Blair must be affirmed.

Respectfully submitted,

ALAN WILSON  
Attorney General

DONALD J. ZELENKA  
Deputy Attorney General

MELODY J. BROWN  
Senior Assistant Deputy Attorney General

J. ANTHONY MABRY  
Senior Assistant Attorney General

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By: s/ J. Anthony Mabry  
J. ANTHONY MABRY

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ATTORNEYS FOR RESPONDENT

July 23, 2020

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**Jul 23 2020**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

Appeal from Cherokee County  
The Honorable R. Keith Kelly, Circuit Court Judge

---

THE STATE,

Respondent,

v.

RAJSHUN BERNARD FOSTER,

Appellant.

Appellate Case No. 2019-001571

---

**CERTIFICATE OF COMPLIANCE**

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The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This 23<sup>rd</sup> day of July, 2020.

s/ J. Anthony Mabry  
J. ANTHONY MABRY  
Senior Assistant Attorney General

ATTORNEY FOR RESPONDENT

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**Jul 23 2020**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
In the Court of Appeals

Appeal from Cherokee County  
The Honorable R. Keith Kelly, Circuit Court Judge

THE STATE,

Respondent,

v.

RAJSHUN BERNARD FOSTER,

Appellant.

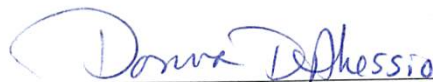
Appellate Case No. 2019-001571

**CERTIFICATE OF SERVICE**

I, Donna D'Alessio, am an employee of the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Final Brief of Respondent, Certificate of Compliance, and Certificate of Service has been forwarded to Appellant's counsel, Tommy A. Thomas, Esq., via email today, July 23, 2020 to [thomaslaw@me.com](mailto:thomaslaw@me.com), and by depositing one copy of the same in the United States mail, postage prepaid, and addressed to his attorney of record: Tommy A. Thomas, Esq., P.O. Box 88, Irmo, South Carolina 29063.

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

This 23<sup>rd</sup> day of July, 2020.



Donna D'Alessio,  
Legal Assistant to J. Anthony Mabry  
Senior Assistant Attorney General

**RECEIVED**

**Mar 17 2021**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM CHEROKEE COUNTY  
Court of General Sessions  
The Honorable R. Keith Kelly

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Case No.: 2019-001571

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State of South Carolina,

Respondent,

vs.

Rajshun Bernard Foster,

Appellant.

---

FINAL REPLY BRIEF

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TOMMY A. THOMAS  
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ATTORNEY FOR APPELLANT

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### **RESPONDENT'S ARGUMENT**

No reversible error was committed by the trial court's jury charge because State v. Burdette, 427 S.C. 490, 832 S.E.2d 585 (2019) is not applicable as the issue was preserved below, a fact that was considered in the opinion. Even if it had been, the instruction was harmless because it could not have reasonably affected the jury's verdict given the other jury instructions on malice and the evidence in this case.

### **APPELLANT'S RESPONSE**

The issues regarding implied malice that Burdette overruled could not have been preserved at trial because they represented a diametrical change from the case law at the time. Further, though there may be evidence of malice on the part of the other players in the crime, there was no evidence of malice on the part of Appellant.

## ARGUMENT

The issues regarding implied malice that Burdette overruled could not have been preserved at trial because they represented a diametrical change from the case law at the time. Further, though there may be evidence of malice on the part of the other players in the crime, there was no evidence of malice on the part of Appellant.

Respondent argues that, in order for Appellant to prevail in this appeal, he must have objected to the jury instruction at trial. However, had he done so, his argument would have been improper and against precedent, with absolutely no basis for it to be made. It is well-settled law, generally mentioned during post-conviction relief actions, that lawyers cannot anticipate every possible event, outcome, or change in the law. See Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993), Chalk v. State, 313 S.C. 25, 437 S.E.2d 19 (1993), overruled on other grounds by Brightman v. State, 336 S.C. 348 520 S.E.2d 614 (1999).

Appellant argues that this was the precise reason that the court in State v. Burdette, 427 S.C. 490, 505, 832 S.E.2d 585, 583 (2019) cited to Griffith v. Kentucky, 479 U.S. 314, 328, 107 S. Ct. 708 and pulled the quote “holding ‘a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on direct review or not yet final.’” To counter this argument, Respondent cites an unpublished federal case from the 11<sup>th</sup> circuit: Trice v. Secretary, Florida Department of Corrections, 766 Fed. Appx. 840 (11<sup>th</sup> Cir. 2019). It is clear in the Burdette opinion that Griffith was cited for this one holding, not the convoluted explanation provided by Respondent that includes how law would be applied in this case if it were a Batson challenge. IBOR, p.12; 4-11.

Respondent argues that Appellant could not be found guilty of any lesser-included offense of murder. In this matter, he was found guilty of murder based on accomplice liability or hand of one is the hand of all. However, there is no evidence that Appellant had a gun, knew a crime was about to occur, or had any involvement with the planning of the crime. Respondent recites the

definitions of malice given at trial, as well as other approved definitions of malice given in South Carolina courts. It argues that any error is harmless.

Appellant, though being tried under an accomplice liability theory, did not have to meet the same fate as his co-defendant who was found guilty of murder. It is true that there were no mitigating factors provided, nor was there an instruction on any lesser included offense. However, Respondent's assertion that "Foster and his co-defendant Dover either committed murder or they were innocent" is incorrect insofar that it assumes both must meet the same fate.

The factual evidence against Dover is much higher than that against Appellant. The jury could have found Dover guilty of murder but found that Appellant was not sufficiently related to or informed of the crime to be bound by accomplice liability. While evidence may have been overwhelming against Dover, it was not against Appellant. No evidence was presented at trial to show that Appellant knew Dover was intending to commit a crime or knew Dover was armed. The reading of a Belcher<sup>1</sup> instruction could have caused the jury to carry over the idea that, because Dover was armed while in Appellant's car, Appellant had malicious intent. Simply because the idea of malice was tied up with the presence of a deadly weapon in the jury's instructions, Appellant may have suffered because of it. This cannot be deemed harmless error.

Similarly, Respondent's argument that there was a premeditated plot to kill or wound the victim is preposterous. Even in Respondent's account of the facts, Appellant is only involved in verbal altercations with the victim. All acts of violence were conducted by Dover. Any implications made against Dover carried over to Appellant, including the shooting and suspicious activity afterward. Though Appellant was tried under hand of one hand of all, he is still a separate individual and was not found guilty of murder solely because Dover was. Instead, the malice that

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<sup>1</sup> State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

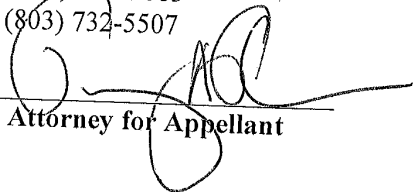
was introduced and implied against Dover was foisted onto Appellant. Allowing the Belcher instruction exacerbated this harm to a level that cannot be deemed harmless error.

### CONCLUSION

For the above stated reasons, Appellant respectfully requests that this Court reverse his conviction.

Respectfully submitted,

TOMMY A. THOMAS  
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By: 

Attorney for Appellant

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March 16, 2021

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHEROKEE COUNTY  
Court of General Sessions

Case No.: 2019-001571

State of South Carolina, .....Respondent

vs.

Rajshun Bernard Foster, .....Appellant

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**Mar 17 2021**

**SC Court of Appeals**

CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, Paralegal to Tommy A. Thomas, Attorney for the Appellant  
hereby certify that emailed, a copy of a Final Reply Brief of Appellant to:

MELODY J. BROWN  
Senior Assistant Deputy Attorney General  
P.O. Box 11549  
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March 17, 2021

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**Mar 17 2021**

**Jackie Miller**

**SC Court of Appeals**

**From:** Jackie Miller  
**Sent:** Wednesday, March 17, 2021 2:17 PM  
**To:** mbrown@scag.gov  
**Subject:** Rajshun B. Foster  
**Attachments:** Foster.replybrief.pdf

**Jackie Miller**

Paralegal to Tommy Thomas, Esq.



**THOMAS LAW**

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# THOMAS LAW

March 17, 2021  
VIA EMAIL

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**SC Court of Appeals**

V. Clare Allen, Deputy Clerk  
S.C. Court of Appeals  
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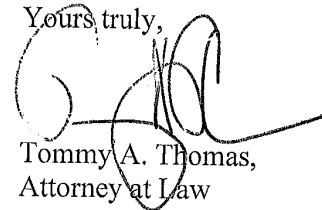
RE: State v. Rajshun B. Foster  
Appellate Case No.: 2019-001571

Dear Sir or Madam:

Attached please find for filing a Final Reply Brief of Appellant with a Certificate of Service by email. A bound copy will be hand delivered tomorrow.

Please feel free to contact me should you have any questions.

Yours truly,



Tommy A. Thomas,  
Attorney at Law

TAT/jem  
cc: Melody Jane Brown, Esq. via email

**TOMMY A. THOMAS, P.C.**

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE  
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING  
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

The State, Respondent,

v.

Rajshun Bernard Foster, Appellant.

Appellate Case No. 2019-001571

---

Appeal From Cherokee County  
R. Keith Kelly, Circuit Court Judge

---

Unpublished Opinion No. 2022-UP-057  
Submitted January 1, 2022 – Filed February 9, 2022

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**AFFIRMED**

---

Tommy Arthur Thomas, of Irmo, for Appellant.

Attorney General Alan McCrory Wilson, Deputy  
Attorney General Donald J. Zelenka, Senior Assistant  
Deputy Attorney General Melody Jane Brown, and  
Senior Assistant Attorney General J. Anthony Mabry, all  
of Columbia; and Solicitor Barry Joe Barnette, of  
Spartanburg, all for Respondent.

---

**PER CURIAM:** Rajshun Bernard Foster appeals his murder conviction for which the trial court sentenced him to thirty-five years' imprisonment. On appeal, Foster

argues the trial court erred in charging the jury that it could infer malice from the use of a deadly weapon because our supreme court issued *State v. Burdette*<sup>1</sup> during the pendency of his appeal. Because Foster failed to object to the jury charge at trial, we affirm pursuant to Rule 220(b), SCACR, and the following authorities: *Burdette*, 427 S.C. at 505, 832 S.E.2d at 583 ("Our ruling today is effective in this case and in those cases which are pending on direct review or are not yet final, *so long as the issue is preserved*." (emphasis added)); *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("Issues not raised and ruled upon in the trial court will not be considered on appeal.").

**AFFIRMED.**<sup>2</sup>

**THOMAS, GEATHERS, and VINSON, JJ., concur.**

---

<sup>1</sup> 427 S.C. 490, 832 S.E.2d 575 (2019).

<sup>2</sup> We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA

COUNTY OF CHEROKEE

RAJSHUN BERNARD FOSTER #320680

Plaintiff(s)

vs.

STATE OF SOUTH CAROLINA

Defendant(s)

Submitted By: TOMMY A. THOMAS, ESQ.

Address: P.O. BOX 88

IRMO, SC 29063

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

-CP-

**22CP-11026**

BRADY W. HARRIS

2022 APR 14 PM 1:21

FILED IN OFFICE OF  
CLERK OF COURT  
CHEROKEE COUNTY, S.C.

SC Bar #: 5536

Telephone #: 803-732-5507

Fax #: 803-781-4226

Other:

E-mail: JACKIE@PAROLEME.COM

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing cases that are NOT E-Filed. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint. This form is NOT required to be filed in E-Filed Cases.

**DOCKETING INFORMATION (Check all that apply)**

*\*If Action is Judgment/Settlement do not complete*

- ☐ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.  
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.  
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.  
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

**NATURE OF ACTION (Check One Box Below)**

- Contracts**  
☐ Constructions (100)  
☐ Debt Collection (110)  
☐ General (130)  
☐ Breach of Contract (140)  
☐ Fraud/Bad Faith (150)  
☐ Failure to Deliver/  
Warranty (160)  
☐ Employment Discrim (170)  
☐ Employment (180)  
☐ Other (199) \_\_\_\_\_

- Torts - Professional Malpractice**  
☐ Dental Malpractice (200)  
☐ Legal Malpractice (210)  
☐ Medical Malpractice (220)  
Previous Notice of Intent Case #  
20\_\_\_\_-NI-\_\_\_\_\_  
☐ Notice/ File Med Mal (230)  
☐ Other (299) \_\_\_\_\_

- Torts - Personal Injury**  
☐ Conversion (310)  
☐ Motor Vehicle Accident (320)  
☐ Premises Liability (330)  
☐ Products Liability (340)  
☐ Personal Injury (350)  
☐ Wrongful Death (360)  
☐ Assault/Battery (370)  
☐ Slander/Libel (380)  
☐ Other (399) \_\_\_\_\_

- Real Property**  
☐ Claim & Delivery (400)  
☐ Condemnation (410)  
☐ Foreclosure (420)  
☐ Mechanic's Lien (430)  
☐ Partition (440)  
☐ Possession (450)  
☐ Building Code Violation (460)  
☐ Other (499) \_\_\_\_\_

- Inmate Petitions**  
☒ PCR (500)  
☐ Mandamus (520)  
☐ Habeas Corpus (530)  
☐ Other (599) \_\_\_\_\_

- Administrative Law/Relief**  
☐ Reinstate Drv. License (800)  
☐ Judicial Review (810)  
☐ Relief (820)  
☐ Permanent Injunction (830)  
☐ Forfeiture-Petition (840)  
☐ Forfeiture-Consent Order (850)  
☐ Other (899) \_\_\_\_\_

- Judgments/Settlements**  
☐ Death Settlement (700)  
☐ Foreign Judgment (710)  
☐ Magistrate's Judgment (720)  
☐ Minor Settlement (730)  
☐ Transcript Judgment (740)  
☐ Lis Pendens (750)  
☐ Transfer of Structured  
Settlement Payment Rights  
Application (760)  
☐ Confession of Judgment (770)  
☐ Petition for Workers  
Compensation Settlement  
Approval (780)  
☐ Incapacitated Adult Settlement  
(790)  
☐ Other (799) \_\_\_\_\_

- Appeals**  
☐ Arbitration (900)  
☐ Magistrate-Civil (910)  
☐ Magistrate-Criminal (920)  
☐ Municipal (930)  
☐ Probate Court (940)  
☐ SCDOT (950)  
☐ Worker's Comp (960)  
☐ Zoning Board (970)  
☐ Public Service Comm. (990)  
☐ Employment Security Comm (991)

- Special/Complex /Other**  
☐ Environmental (600)  
☐ Automobile Arb. (610)  
☐ Medical (620)  
☐ Other (699) \_\_\_\_\_  
☐ Sexual Predator (510)  
☐ Permanent Restraining Order (680)  
☐ Interpleader (690)  
☐ Pharmaceuticals (630)  
☐ Unfair Trade Practices (640)  
☐ Out-of State Depositions (650)  
☐ Motion to Quash Subpoena in  
an Out-of-County Action (660)  
☐ Pre-Suit Discovery (670)

Submitting Party Signature: \_\_\_\_\_

Date: April 12, 2022

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10 et. seq.

SCCA / 234 (02/2018)

Page 1 of 2

FORM 5

STATE OF SOUTH CAROLINA

COUNTY OF CHEROKEE

Rajshun Bernard Foster #320680  
Full name and prison number (if any) of Applicant.

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

**22CP-110261**

APPLICATION FOR

POST-CONVICTION RELIEF

**INSTRUCTIONS - READ CAREFULLY**

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899
2. Name and location of Court which imposed sentence Cherokee County Court of General Sessions, 125 E. Floyd Baker Blvd. Gaffney, SC 29342
3. Name(s) of co-defendant(s) (if any) Frank Dover, Terence Studyvance, Antron Bonner
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
  - (a) 2014GS1100878 - Murder
  - (b) \_\_\_\_\_
  - (c) \_\_\_\_\_
5. The date upon which sentence was imposed and the terms of the sentence:

FILED IN OFFICE OF  
CLERK OF COURT  
CHEROKEE COUNTY, S.C.  
2022 APR 14 PM 1:21  
BRANDY W. MCBEE

Revised 3/2003

- (a) July 18, 2019 - 35 Years  
(b) \_\_\_\_\_  
(c) \_\_\_\_\_
6. Check whether a finding of guilty was made:  
(a) after a plea of guilty \_\_\_\_\_  
(b) after a plea of not guilty x  
(c) after a plea of nolo contendere \_\_\_\_\_
7. Did you appeal from the judgment of conviction or the imposition of sentence?  
Yes
8. If you answered "yes" to (7), list:  
(a) the name of each Court to which you appealed:  
i. Court of Appeals  
ii. \_\_\_\_\_  
iii. \_\_\_\_\_  
(b) the result in each such Court to which you appealed:  
i. Denied  
ii. \_\_\_\_\_  
iii. \_\_\_\_\_  
(c) the date of each such result:  
i. February 9, 2022  
ii. \_\_\_\_\_  
iii. \_\_\_\_\_  
(d) if known, citations of any written opinion or orders entered pursuant to such results:  
i. 2022-UP-057  
ii. \_\_\_\_\_  
iii. \_\_\_\_\_
9. If you answered "no" to (7), state your reasons for not so appealing:  
(a) \_\_\_\_\_  
(b) \_\_\_\_\_  
(c) \_\_\_\_\_

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective Assistance of Counsel
  - (b) And as to be Amended
  - (c) \_\_\_\_\_
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Trial Counsel did not object when trial court charged the jury that it could infer malice from the use of a deadly weapon.
  - (b) \_\_\_\_\_
  - (c) \_\_\_\_\_
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? No
  - (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
  - (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
  - (d) any other petitions, motions or applications in this or any other Court? No
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
    - i. \_\_\_\_\_
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
    - iv. \_\_\_\_\_
  - (b) the name and location of the Court in which each was filed:
    - i. \_\_\_\_\_
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
    - iv. \_\_\_\_\_
  - (c) the disposition thereof:
    - i. \_\_\_\_\_

- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- iv. \_\_\_\_\_
- (d) the date of each such disposition:
  - i. \_\_\_\_\_
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
  - i. \_\_\_\_\_
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_
- 14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?  
no
- 15. If you answered "yes" to (14) identify:
  - (a) which grounds have been presented:
    - i. \_\_\_\_\_
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
  - (b) the proceedings in which each ground was raised:
    - i. \_\_\_\_\_
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
- 16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
  - (a) \_\_\_\_\_
  - (b) \_\_\_\_\_
  - (c) \_\_\_\_\_

Revised 3/2003

17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? \_\_\_\_\_
  - (b) your trial, if any? yes
  - (c) your sentencing? yes
  - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
  - (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? \_\_\_\_\_

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
  - i. Tracy Racine, Esq., Racine Law Firm, 2764 Pleasant Road #11215, Fort Mil, SC 29708
  - ii. Tommy A. Thomas, Esq., P.O. Box 88, Irmo, SC 29063
  - iii. \_\_\_\_\_
- (b) the proceedings at which each such attorney represented you:
  - i. Trial and Sentencing
  - ii. Direct Appeal
  - iii. \_\_\_\_\_

19. State clearly the relief you seek in filing this application:

New Trial

20. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA

County of McCormick

VERIFICATION

I, Rajshun Foster, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Rajshun Foster

SWORN to and subscribed before me this 1st  
day of April, 2022

Lakiasa D. Gray (L.S.)  
Notary Public

My Commission Expires: 01/13/30



BRANDY W. MCBEE

2022 APR 14 PM 1:21

FILED IN OFFICE OF  
CLERK OF COURT  
CHEROKEE COUNTY, S.C.

**APPLICATION TO PROCEED WITHOUT PAYMENT  
OF COSTS AND AFFIDAVIT  
IN SUPPORT THEREOF**

I, Rajshun Foster, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Rajshun Foster

Applicant

SWORN or affirmed to and subscribed before me this

1<sup>st</sup> day of April, 2022

Lakisha D. Gray

Notary Public

My Commission Expires: 01/13/30



FILED IN OFFICE OF  
CLERK OF COURT  
CHEROKEE COUNTY, S.C.  
2022 APR 14 PM 1:22  
BRANDY W. MCBEE



April 12, 2022

Cherokee County Clerk of Court  
Court of Common Pleas  
125 E. Floyd Baker Blvd., Ste. 1  
Gaffney, SC 29340

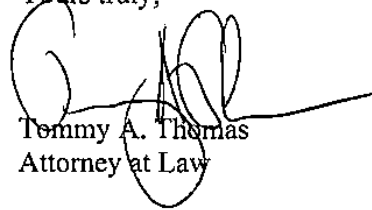
RE: Rajshun Bernard Foster #320680 v. State

Dear Sir or Madam:

Enclosed please find for filing an Original and a copy of Mr. Rajshun Foster's PCR Application with the coversheet.

Kindly return a clocked copy to me in the enclosed envelope. Thank you.

Yours truly,



Tommy A. Thomas  
Attorney at Law

TAT/jem

FILED IN OFFICE OF  
CLERK OF COURT  
CHEROKEE COUNTY, S.C.  
2022 APR 14 AM 11:32  
BRANDY W. MCBEE

TOMMY A. THOMAS, P.C.  
803 732 5507 | FAX 803 781 4226 | INMATE LINE 803 732 6542  
HARRINGTON BUILDING, 7588 WOODROW STREET, IRMO, SC 29063  
MAIL: P.O. BOX 88, IRMO, SC 29063

STATE OF SOUTH CAROLINA  
COUNTY OF CHEROKEE

Rajshun Foster, #320680

Applicant,

v.

State of South Carolina

Respondent,

) IN THE COURT OF COMMON PLEAS  
) FOR THE SEVENTH JUDICIAL  
) CIRCUIT

) Case No.: 2022-CP-11-0261

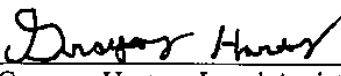
) Certificate of Service by Mail

FILED IN THE OFFICE  
CLERK OF COURT  
2022 JUN - 6 P 12:55  
GRANDY W. MOORE  
CHEROKEE COUNTY, SC

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Tommy A. Thomas, Esquire  
PO Box 88  
Irmo, SC 29063

DATED this 2<sup>nd</sup> day of June 2022.

  
\_\_\_\_\_  
Grayson Horton, Legal Assistant  
For Respondent



ALAN WILSON  
ATTORNEY GENERAL

June 2, 2022

The Honorable Brandy W. McBee  
Cherokee County Clerk of Court  
P. O. Box 2289  
Gaffney, SC 29342-2289

FILED IN THE OFFICE  
CLERK OF COURT  
2022 JUN -6 P 12:50  
BRANDY W. McBEE  
CHEROKEE COUNTY, SC

**Re: Rajshun Foster, #320680 v. State of South Carolina**  
**2022-CP-11-0261**

Dear Ms. McBee:

Enclosed for filing please find Respondent's original Return to the Application for Post-Conviction Relief of the above-captioned case. Please let me know if anything additional is needed at this time.

Sincerely,

  
for Chelsey F. Marto  
CFM Assistant Attorney General

CFM/geh  
Enclosure

cc: Tommy Thomas, Esquire

STATE OF SOUTH CAROLINA  
COUNTY OF CHEROKEE

Rajshun Foster, #320680,  
Applicant,

v.

State of South Carolina,  
Respondent.

IN THE COURT OF COMMON PLEAS  
FOR THE SEVENTH JUDICIAL CIRCUIT

Case No. 2022-CP-11-0261

**RETURN**

FILED IN THE OFFICE  
CLERK OF COURT  
2022 JUN - 6 P 12:50  
BRANDY W. MOORE  
CHEROKEE COUNTY, SC

NOW COMES Respondent, making its return to the post-conviction relief (hereafter  
“PCR”) application filed on April 14, 2022, by Rajshun Foster (hereafter “Applicant”).

Respondent respectfully offers the following in support of its return:

**I. Procedural History**

Applicant is presently

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Cherokee County Clerk of Court. During its September 2014 term, the Cherokee County Grand Jury indicted Applicant for murder (2014-GS-11-00878). Applicant was represented by Tracy Racine, Esquire. Deputy Solicitor Kim Leskanic of the Seventh Circuit Solicitor’s Office prosecuted the case. On July 15-17, 2019, Applicant proceeded to trial before the Honorable R. Keith Kelly, circuit court judge, and a jury, where he was found guilty as indicted. Judge Kelly sentenced Applicant to thirty-five years’ imprisonment.

Applicant filed a timely notice of appeal on September 16, 2019, that was perfected by Tommy A. Thomas, Esquire, through filing a brief, raising the following issue:

The circuit court erred, as a matter of law, in instructing the jury it could infer malice from the use of a deadly weapon.

The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished

opinion, finding that this issue was not preserved on appeal. *State v. Foster*, 2022-UP-057 (S.C. Ct. App. filed Feb. 9, 2022). The remittitur was issued on February 25, 2022.

## **II. Statement of Facts**

Timothy Blair (“Victim”), known by the nickname “Slick,” was murdered on June 22, 2014 in the Connecticut Village Apartments in Gaffney. The two main perpetrators were Applicant and Dover, neither of whom lived in Connecticut Village Apartments Complex. The testimony at trial proved that Applicant and Dover had been looking for Victim for several days prior to Victim’s death because they believed Victim had stolen something, likely either drugs or money, that belonged to them. Several witnesses testified Applicant and Dover were actively looking for Victim in the days leading up to Victim’s murder and had threatened Victim. Foster and Dover had told the witnesses to tell Victim they were looking for him. (R. 93-113; 116-24; 128-33; 308-13).

On June 22, 2014, Applicant and Dover both drove to the complex in separate vehicles and confronted Victim. Eyewitnesses testified Applicant was the instigator of the confrontation and that Victim refused to fight Applicant and kept backing away from him. Then two different eyewitnesses heard Dover state out loud to Victim that: “he would get him [Victim] one way or the other.” Victim walked away from the confrontation with the two men with his head down. One eyewitness saw Dover armed with a rifle, standing in the doorway of his vehicle, when he made the verbal threat that he would get Victim one way or the other. (R. 177-93; 146-66; 198-207; 207-18; 263-67; 277-92 (Page 293 – Supp. ROA pg. 2); 308-13).

Applicant and Dover both left the complex in their respective vehicles and drove to a nearby mobile home park where Dover lived with his girlfriend. The two men talked to Studyvance (aka “T”) in front of one of the homes. Terrance Bonner (aka “Red”) walked up and

saw the three men conversing. Bonner asked if anyone knew where they could get some marijuana, and Foster said yes, to come with them to the complex. Applicant, Bonner, Studyvance, and Dover got in Applicant's girlfriend's car headed for the complex. Before getting in the car, Dover got his rifle and at least one surgical-type glove out of his own car and got in the back of Applicant's girlfriend's car where Bonner was seated in the back seat. Studyvance was also armed with a pistol, seated in the front passenger seat, as the four men traveled to the Apartments with Applicant driving. (R. pp. 308-400; 93-103; 58-74; 146-66; 277-92 (Page 293 – Supp. ROA pg. 2); 308-13; 314-63).

The four men arrived shortly before 5:00 p.m., on June 22<sup>nd</sup>, in broad daylight. First, the men drove into the complex briefly and then turned around and left the parking lot. Applicant drove up a nearby paved road and dropped Dover and Studyvance off at a wooded path that led down to the back of the complex and directly to the back door of Victim's girlfriend's apartment. When he got out of the car, Dover was carrying his loaded rifle and had with him a mask and surgical gloves. Studyvance was still armed with his pistol. Dover then snuck on foot to a location near the Victim's girlfriend's apartment. Studyvance followed Dover. Once at the back of the complex near Victim's girlfriend's apartment, Dover laid in wait for Victim. (R. 93-125; 58-74; 128-42; (page 143 – Supp. ROA page 1); 144-45; 146-66; 177-93; 207-18; 218-44; 245-63; 263-67; 277-92 (Page 293 – Supp. ROA page 2); 314-63; 363-83).

While Dover waited, Applicant and Bonner drove back into the complex immediately after dropping off Dover and Studyvance. Once they drove back into the complex, Applicant parked the car near a dumpster. Applicant got out of the car and confronted Victim again, who was walking through the complex on foot. Several witnesses testified to seeing Applicant and Victim have another argument there, Applicant being the instigator, Victim walked away.

Applicant got back in his girlfriend's car and he and Bonner sat in the front seat where they could see Victim. They did not leave. Victim then began walking to his girlfriend's apartment. (R. 58-74; 128-42; (Page 143 – Supp. ROA page 1); 144-66; 177-93; 198-207; 207-18; 219-44; 263-67; 277-92; (Page 293 – Supp. ROA page 2); 308-13; 314-63; 385-400).

While walking, Victim stopped at another female friend's apartment and told her he was afraid for his life. She told Victim to go to his girlfriend's apartment, get his clothes and personal things, return to her apartment, and she would help him get safely out of the complex. Victim left her apartment to get his things. (R. 128-42 (Page 143 – Supp. ROA page 1); 144-45; 207-18; 219-44; 245-63; 263-67; 277-93; 314-63).

Phone records introduced at trial proved between the time Applicant and Bonner pulled into the apartment complex parking lot and parked next to the dumpster and when Victim was killed, there were three phone calls between Applicant and Dover on their cell phones. (R. pp. 58-74; 146-166; 219-244; 245-263; 263-267; 277-292 (Page 293 – Supp. ROA page 2); 314-363; 385-400).

While walking to his girlfriend's apartment, Victim rounded a corner. When he did, Dover shot Victim once through the lungs with the rifle killing him while unarmed. Dover was wearing a mask and gloves when he shot victim. An eyewitness saw Dover, wearing a mask and surgical type gloves carrying a rifle just moments before the fatal shot was fired, lurking around the side of one of the apartment buildings. Police later found a fired 7.62 shell casing near victim's body at the crime scene. After killing the victim, Dover and Studyvance then fled back up the path through the woods where they had been dropped off earlier by Foster. An eyewitness saw two men flee from the area of the shooting up the wooded path immediately after the fatal shot was fired. (R. 93-125; 128-42; (Page 143 – Supp. ROA page 1); 144-66; 177-93; 198-267;

270-292; (Page 293 – Supp. ROA page 2); 308-83).

According to co-defendant Bonner, after Victim was shot, Applicant received a telephone call from Dover. Applicant and Bonner then left the complex in Applicant's girlfriend's car with Applicant still driving. Applicant drove back to the same location he had dropped Dover and Studyvance out at earlier and picked up Dover and Studyvance, who hurriedly jumped in the back door of the car. As soon as he got in the car, Dover stated to Applicant, "get me out of here fast, get me out of here fast." Applicant asked Dover where he shot Victim, and Dover stated: "in the chest area." Foster drove the men to the Dover's girlfriend's residence. (R. 58-74; 93-125; 128-142; (Page 143 – Supp. ROA page 1); 144-45; 219-63; 270-93; 308-83; 385-400).

Dover's former girlfriend testified Dover then changed clothes in her house and put the clothes he removed in a shoe box. Dover instructed her to call a friend of his to come and pick up the box. The friend complied. The former girlfriend and Dover drove to Westgate Mall and went inside so Dover could set up an alibi for himself. (R. 363-383).

The State proved that Dover's cell phone pinged around the complex at the time of the murder, in the area of his girlfriend's mobile home before the four men left for the complex to commit the crime, and along the path away from the crime scene and back to his girlfriend's home shortly after the crime. (R. 58-74; 363-383; 385-400). Cell tower information also showed Dover's phone pinged along I-85 after leaving his girlfriend's mobile home and arriving at Westgate Mall shortly before 6:00 p.m. (R. 58-74; 363-383; 385-400).

The State relied on accomplice liability [i.e. "the hand of one is the hand of all"] to prove Applicant's guilt because he drove Dover to the scene, knew what Dover was going to do, was complicit and aided and abetted in the murder, and then picked up Dover after the murder. (R. 58-73; 93-142 (Page 143 – Supp. ROA page. 1); 144-166; 176-94; 197-267; 269-92; 308-400;

410-28; 451-69).

### III. Current Action before the Court

In his PCR application, Applicant, through Counsel, alleges he is detained unlawfully for the following reasons (excerpts verbatim):

1. Ineffective Assistance of Counsel
  - a. Trial Counsel did not object when trial court charged the jury that it could infer malice from the use of a deadly weapon.

Attached to and incorporated herein are Applicant's Cherokee County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the direct appeal records, the trial transcript, and the current PCR application. Respondent reserves the right to amend this Return upon receipt of additional relevant information.

### IV. Argument

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Effective assistance of counsel does not mean perfect or mistake-free representation. *See Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017) (“[A] defendant has a right to effective representation, not a right to an attorney who performs his duties ‘mistake-free.’” (citation omitted)); *Burt v. Titlow*, 571 U.S. 12, 24 (2013) (“[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]”); *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (“The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.”). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. *Strickland*, 466 U.S. at 687-688.

When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show “counsel’s conduct so undermined the proper functioning of the adversarial

process that [it] cannot be relied upon as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel’s performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel’s actions fell outside of the zone of “reasonableness under prevailing professional norms.” *Strickland*, 466 U.S. at 688. *See also* Rule 71.1(e), SCRPC (“The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence.”). Reasonableness is determined by the “variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant,” and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690); *see Dunn v. Reeves*, 141 S. Ct. 2405, 2410 (2021) (noting counsel’s strategic decisions are to be afforded “‘strong presumption’ of reasonableness that the defendant must overcome); *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation). Judicial scrutiny of counsel’s performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually “countless” ways. *Strickland*, 466 U.S. at

688-89.

Second, counsel's deficient performance must have prejudiced the applicant so that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Whether failure to object constitutes deficient performance generally hinges on whether or not a valid trial strategy was utilized. *See Thompson v. State*, 423 S.C. 235, 241, 814 S.E.2d 487, 490 (2018) (finding Counsel was deficient because the failure to object was not related to an otherwise valid trial strategy); *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (where "counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel").

Respondent contends that Applicant likely cannot meet his burden of proof in showing Counsel was ineffective for failing to object when trial court charged the jury that it could infer malice from the use of a deadly weapon. Still, the ineffective assistance of counsel allegations

probably raise questions of fact that the record does not conclusively refute. Accordingly, Respondent respectfully requests an evidentiary hearing to fully resolve this issue. *See Sharper v. State*, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (“Where an application for post-conviction relief alleges specific instances of ineffective assistance of counsel which are not conclusively refuted by the record before the lower court, a question of fact is raised which can only be resolved by an evidentiary hearing.”).

#### **V. Other Allegations Denied**

Each and every other allegation in Applicant’s PCR application not explicitly admitted, qualified, or explained in this return is hereby denied by Respondent.

#### **VI. Assertion of Rights to Notice of Amendments, Experts**

Applicant should raise any claims he intends to raise at the PCR evidentiary hearing well in advance of the hearing. Here, Applicant’s retained attorney is the only individual authorized to file amendments to this application, given his representative capacity, Rule 11(a), SCRCP and *pro se* filings will not be considered at the PCR hearing. *State v. Devore*, 416 S.C. 115, 123, 784 S.E.2d 690, 694 (Ct. App. 2016) (*Pro se* filing is a nullity where person was represented by counsel); *Miller v. State*, 388 S.C. 347, 697 S.E.2d 527 (2010) (“Since there is no right to ‘hybrid representation’ that is partially *pro se* and partially by counsel, substantive documents, with the exception of motions to relief counsel, filed *pro se* by a person represented by counsel are not to be accepted unless submitted by counsel.”).

Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent or, in the alternative, continue the matter to permit adequate time to investigate and address the claims. *See Mangal v. State*, 421 S.C. 85, 805 S.E.2d 568 (2017) (“In most PCR cases . . . we have refused to excuse the pleading

and issue-preservation requirements that apply in all civil cases.”); *Love v. State*, 428 S.C. 231, 242, 834 S.E.2d 196, 201 (2019) (“When analyzing the substance of a proposed amendment and any prejudice the State might suffer, a PCR court should consider all relevant circumstances, including, but not limited to, the timing of the motion, the complexity of the new issue, the degree of surprise to the State, the need for and availability of necessary witnesses to defend against the claim, and whether the substance of the proposed amendment is readily apparent from the underlying plea or trial record.”); *see also* Rules 15(a)-(b), SCRCP (explaining how to amend a pleading). Pursuant to Section 17-27-150 of the South Carolina Code of Laws, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless the Court grants leave upon good cause shown. Furthermore, Respondent requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to Respondent well in advance of the evidentiary hearing. Respondent reserves the right to request a continuance and oppose witness testimony and exhibits withheld until the last minute resulting in undue prejudice to Respondent.

**VII. Conclusion**

WHEREFORE, Respondent requests that the Court hold an evidentiary hearing regarding Applicant's allegation.

Respectfully submitted,

ALAN WILSON  
Attorney General

W. JEFFREY YOUNG  
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON  
Senior Assistant Deputy Attorney General

CHELSEY F. MARTO  
Assistant Attorney General

By:   
ATTORNEYS FOR RESPONDENT CFM

Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
Telephone: (803) 734-0386

 June 2nd, 2022

FILED IN THE OFFICE  
CLERK OF COURT  
2022 JUN -6 P 12:50  
BRANDY W. MCBEE  
CHEROKEE COUNTY, SC

|                              |   |                           |
|------------------------------|---|---------------------------|
| STATE OF SOUTH CAROLINA      | ) |                           |
|                              | ) | COURT OF GENERAL SESSIONS |
| COUNTY OF CHEROKEE           | ) | 2022-CP-11-261            |
|                              | ) |                           |
|                              | ) |                           |
|                              | ) |                           |
|                              | ) |                           |
| RAJSHUN FOSTER,              | ) |                           |
|                              | ) |                           |
|                              | ) |                           |
| vs.                          | ) | TRANSCRIPT OF RECORD      |
|                              | ) |                           |
| THE STATE OF SOUTH CAROLINA, | ) |                           |
| DEFENDANT.                   | ) |                           |
|                              | ) |                           |

---

October 18, 2022  
Spartanburg, South Carolina

B E F O R E:

THE HONORABLE BRIAN M. GIBBONS, JUDGE.

A P P E A R A N C E S:

CHELSEY MARTO, ESQ.  
Assistant Attorney General

TOMMY A. THOMAS, ESQ.  
Attorney for the Applicant

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Circuit Court Reporter

**I N D E X**

(SW) - Denotes State's Witness  
 (AW) - Denotes Applicant's Witness

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INDEXEXHIBITS

There were no exhibits entered during this hearing.

**P R O C E E D I N G S**

(Whereupon, the hearing began at  
2:16 p.m.)

THE BAILIFF: All rise, please. Court come to  
order, please.

THE COURT: All right. Thank you. You can be  
seated. All right. Madam A.G.?

MS. MARTO: Yes, Your Honor. May it please the  
Court.

THE COURT: Yep.

MS. MARTO: We are here today in the case of  
"Rajshun Foster vs. the State of South Carolina,"  
2022-CP-11-261. He's presently confined in the  
South Carolina Department of Corrections. September  
2014, he was indicted for murder. He was  
represented by Ms. Tracy Racine and prosecuted by  
Kim Leskanic. July 15th through the 17th, 2019, he  
proceeded to trial before Judge Kelly, where he was  
found guilty as indicted and was sentenced to 35  
years imprisonment.

Applicant filed a timely notice of appeal,  
September 16th, 2019. This was perfected by Mr.  
Tommy Thomas, who was representing him in the PCR  
application, as well. He filed a brief raising the  
following issue that the Circuit Court erred as a

1 (inaudible) in instructing the jury it could infer  
2 malice from use of a deadly weapon. This was  
3 dismissed by unpublished opinion finding that the  
4 issue was not preserved on appeal, and the  
5 remittitur issued February 25th, 2022. This  
6 application was filed April 14th, 2022. And the  
7 State's return made June 2nd, 2022. And with that,  
8 I'll turn it over to Mr. Thomas.

9 THE COURT: All right.

10 MR. THOMAS: Good afternoon, Your Honor.

11 THE COURT: Good afternoon.

12 MR. THOMAS: Your Honor, if it'll please the Court,  
13 just for part of the record, this -- there was an  
14 appeal in this case. One of the issues regards not  
15 preserving an issue for appeal. I've spoken to the  
16 Attorney General about it. I'd just like to submit  
17 this to the Court, which are all of the briefs, as  
18 well as the court's order.

19 THE COURT: Do you have any objection,  
20 Madam --

21 MS. MARTO: No objection --

22 THE COURT: -- A.G.?

23 MS. MARTO: -- Your Honor. I think, most if not  
24 all, that's in your packet too, so . . .

25 THE COURT: All right. Thank you.

1 MR. THOMAS: And rather than argue all these issues,  
2 Your Honor, in regards to the appeal, I will do the  
3 basics for that and leave the Court to -- to have  
4 those documents for  
5 your --

6 THE COURT: Perfect. That'll be --

7 MR. THOMAS: Yes.

8 THE COURT: -- great. Thank you, Mr. Thomas.

9 MR. THOMAS: Yes, sir. Your Honor, if it please the  
10 Court --

11 THE COURT: Yes.

12 MR. THOMAS: -- we will call Mr. Foster to the  
13 stand.

14 THE COURT: All right. Mr. Foster, come on up here,  
15 sir. You can go ahead and have a seat.

16 (WHEREUPON, the applicant was sworn.)

17 THE COURT: Just make sure you speak loudly and  
18 answer your lawyer's questions.

19 MR. THOMAS: Your Honor, if it please the Court.

20 THE COURT: Yes, sir.

21 **DIRECT EXAMINATION OF RAJSHUN FOSTER**

22 BY MR. THOMAS:

23 Q Mr. Foster, you are obviously incarcerated?

24 A Yes, sir.

25 Q And you were arrested roughly when? Do you remember?

1 A It was 2014. I'd say around June.

2 Q Okay. All right. And when you were arrested, you were  
3 charged with what?

4 A Murder.

5 Q Murder?

6 A Yes, sir.

7 Q Just one charge?

8 A Just one charge.

9 Q All right, sir. And you and I've talked about this. You  
10 have filed a post-conviction relief application?

11 A Yes, sir.

12 Q And you're requesting that your conviction be set aside?

13 A Yes, sir.

14 Q In this case, you had a trial?

15 A Yes, sir.

16 Q All right. So you understand that if you're successful  
17 with your post-conviction today, that this case would be  
18 set aside -- your conviction would be set aside, and you  
19 kind of fictitiously go back into the position that you  
20 were prior to your trial?

21 A Yes, sir. I understand.

22 Q You understand that there's a certain risk with that?

23 And we've talked about that. That, in other words, you  
24 could go back to trial, be retried, and could get  
25 something larger than what you already had sentence-wise.

1 A Yes, sir. I understand.

2 Q And you have what kind of sentence?

3 A Thirty-five.

4 Q Thirty-five years. And that's day-for-day?

5 A Mandatory.

6 Q All right. And given that, you wish to go forward today?

7 A Yes, sir.

8 Q Okay. All right. Now, Mr. Foster, you were -- was --

9 were taken to the county detention center?

10 A Yes, sir.

11 Q And how long were you in detention?

12 A I'll say about five months. Say, five/six -- five or six  
13 months.

14 Q Okay. And you made -- you made bond?

15 A Yes, sir.

16 Q Okay. And how long were you out on bond?

17 A Like four and a half years. Five -- almost five.

18 Q All right. And during that time, you weren't rearrested  
19 for anything?

20 A No, sir.

21 Q Okay. Now, when you were in the detention center, did  
22 you retain an attorney, or was one appointed for you, or  
23 what happened?

24 A One was appointed to me.

25 Q And who was appointed for you?

1 A Tracy Racine.

2 Q And was she a public defender or . . .

3 A Public defender.

4 Q Public defender, okay. And you had co-defendants?

5 A Yes, sir.

6 Q And how many co-defendants did you have?

7 A Three others.

8 Q There were three of you?

9 A And all of --

10 Q What --

11 A And all is four, counting you, but it's three others.

12 Q Three others other than you?

13 A Yes, sir.

14 Q And what happened to those other co-defendants?

15 A Two went home and two went to prison.

16 Q And one of the two was you?

17 A One of the two was me.

18 Q And who was the other co-defendant that went to prison?

19 A Mr. Dover.

20 Q Mr. Dover? And were you tried with him? Y'all were  
21 tried jointly?

22 A All of us were tried together.

23 Q Okay. All right. And just for, kind of, housekeeping,  
24 you actually had one trial -- you had two trials; is that  
25 correct?

1 A Yes, sir.

2 Q And what happened in the first one?

3 A The first one I had two hung juries.

4 Q Had a hung jury -- two hung jurors?

5 A Two hung.

6 Q Okay.

7 A Yes, sir.

8 Q Okay. And so a mistrial was granted?

9 A Yes, sir.

10 Q All right. And how long after that were you retried?

11 A A month and a half later, I went back to trial.

12 Q Back to trial?

13 A Yes, sir.

14 Q Okay. The reason I asked you about the detention center  
15 and about bond, during that period of time, were you able  
16 to speak with your lawyer?

17 A I spoke with her like once in the county.

18 Q All right. You spoke with her once in the county?

19 A Yes, sir.

20 Q And when did you speak with her after that?

21 A Like two weeks before court.

22 Q So you only met with her two or three times?

23 A No more than that.

24 Q Okay. And were you concerned about that?

25 A Yes, sir. The times I met with her -- when I met with

1 Ms. -- Ms. Racine, I had to meet with her with the  
2 solicitor. I ain't get --

3 Q All right. And what do you mean that you met with her  
4 with the solicitor?

5 A We didn't get to meet by ourselves. Like, she wanted me  
6 to meet -- she wanted me to talk to the solicitors about  
7 wanting me to really get on the stand and basically . . .

8 Q Was this in regards to some sort of cooperation with  
9 the --

10 A Yes, sir.

11 Q -- solicitor's office? Okay. Well, let's -- let's talk  
12 about that. When you were meeting with her, you got a  
13 period there where you're preparing for either for trial  
14 or you're preparing for a guilty plea. And so, when you  
15 met with your attorney, what did y'all talk about?

16 A To be honest, we talked about really not my case. We  
17 talked about cooperating with the State. To  
18 get --

19 Q Okay.

20 A To get me not go to prison, but I couldn't do that,  
21 because I ain't -- I really didn't know what was going  
22 on, so I couldn't get on stand and tell a lie on somebody  
23 else.

24 Q Right. Because your case is fairly complicated. I mean,  
25 there are a lot of moving parts to this --

1 A Yes, sir.

2 Q -- is that correct?

3 A Yes, sir.

4 Q And you were never alleged to be the actual shooter or  
5 "gun person" in this case; is that right?

6 A Right.

7 Q They never alleged that you had a weapon, did they?

8 A Right. Never had one.

9 Q Mr. Dover is the one who had the -- the weapon?

10 A That's what they acknowledged. That was --

11 Q That's what they alleged?

12 A Yes, sir.

13 Q That's what they said?

14 A Yes, sir.

15 Q Okay.

16 A It never was -- it never was me.

17 Q All right. And given this, when you talk to your  
18 attorney, how did -- what I call a "theory of defense" --  
19 how did -- how was she gonna defend you? What was your  
20 defense gonna be?

21 A I didn't have a defense.

22 Q And the allegations against you were basically "hand of  
23 one, hand of all"?

24 A The "hand in one, hand of all (as spoken)," yes, sir.

25 Q Do you know -- do you -- and that's a legal term, but you

1 know what that means?

2 A They use it as a theory, but they charged me with "hand  
3 in one, hand of all."

4 Q "Hand of one, hand of all."

5 A But only two went to prison and two went home.

6 Q Right. And so when you prepared for this trial, you met  
7 with your attorney? I mean, you had to do something to -  
8 - to get ready for -- for your defense, for your -- well,  
9 I guess, you had to consider about testifying and those  
10 kind of things.

11 A The -- the deal was -- the last time I met with Ms.  
12 Racine; I was at work. I had to get off work. I had to  
13 meet with her at Cherokee County Detention Center. And  
14 it was with her and Kim Leskanic. They wanted me to get  
15 on the stand and point the fingers on Mr. Dover just to  
16 save me. That's what Mr. Bonner did to my case. Mr.  
17 Bonner took that deal, and he never went to jail. So Mr.  
18 Bonner got on stand and did what they wanted him to do,  
19 and he never did any time in jail. I didn't do it  
20 because I didn't know -- I didn't know what to say, how  
21 to say it, because it was a lie. I couldn't just get on  
22 stand and tell a lie. I really don't know what -- I  
23 really don't know what -- what really went on. So I  
24 couldn't get on stand and tell a lie on  
25 some -- on a innocent man. He could be innocent, or he

1       could be guilty, but I don't know. But I couldn't get on  
2       the stand and just say, Yeah. He did it, and knowing not  
3       he didn't (as spoken.)

4   Q    There never was any allegation or proof that you were  
5       there when the shooting took place; is that correct?

6   A    Right. It just he say, she say. She said this. He said  
7       that.

8   Q    I mean -- and -- and correct me if I'm wrong. I've read  
9       the transcript a number of times. No one ever says that  
10      you were there when the shot was fired?

11   A    Right.

12   Q    Okay. And so, in essence, your two co-defendants -- your  
13      other two co-defendants, not Mr. Dover, but the other  
14      two, you said they went home. Did they go home because  
15      they cooperated with the State?

16   A    I know -- I know one cooperated. The one that testified,  
17      he cooperated, and he went home. And they found the  
18      other one not guilty. In the first trial, he got found  
19      not guilty.

20   Q    Ah, okay.

21   A    And I don't understand how.

22   Q    So there was one verdict in the first trial?

23   A    Yes, sir.

24   Q    And that was for one of your co-defendants?

25   A    Yes, sir.

1 Q Okay. But they couldn't reach a verdict on you and Mr.  
2 Dover?

3 A Yes, sir.

4 Q All right. Okay. Now, how about as far as the -- the  
5 discovery? Because there had to be a lot of discovery in  
6 this case. Do you know what I mean by the word  
7 "discovery"?

8 A No. Would you --

9 Q Okay.

10 A -- explain it?

11 Q The evidence that the State had against you. Which --  
12 they -- your attorney would file a discovery motion, and  
13 she would be provided with -- with the evidence the State  
14 had. You're entitled to see that. The evidence that  
15 they had that they were gonna present against you.

16 A Wasn't any.

17 Q Okay. Did you sit down and go through any of that?  
18 witness statements? anything?

19 A The statements on what witness was saying?

20 Q Yes, sir.

21 A Yes, sir. I -- that's about it. Just what people were  
22 saying. What she was showing me what people were saying  
23 about me, and what they saying that -- what they heard I  
24 did. Other than that, there was no evidence pointing to  
25 me.

1 Q Okay.

2 A It just he say, she say.

3 Q All right. When you were arrested -- and it may not have  
4 been appropriate at that time -- did they do a gunshot  
5 residue test, or was it too late?

6 A No, sir. I turned myself in the same day -- the same day  
7 it happened.

8 Q Oh, you did?

9 A Yes, sir. The same -- all -- they didn't do no gun  
10 residue. They didn't take no clothes from me. They  
11 didn't take nothing.

12 Q All right. Now, in this trial, there was cell phone data  
13 that was presented into evidence.

14 A Yes, sir.

15 Q And they had somebody there that interpreted this data.  
16 Do you understand all of that?

17 A Yes, sir.

18 Q Okay. Did you go over any of that information with your  
19 attorney?

20 A In -- in court. They -- they read it all that in court,  
21 but I didn't -- I don't know nothing about no cell phone  
22 data. They did the towers in court, but I ain't never go  
23 in it with my attorney.

24 Q You didn't see any of that prior?

25 A (Shakes head from side to side.)

1 Q Okay.

2 THE COURT REPORTER: I'm sorry. (To Mr. Thomas)

3 Can he answer out loud?

4 THE APPLICANT: No, sir.

5 THE COURT REPORTER: Thank you.

6 Q Any video -- any video from the complex or security cam  
7 video or anything of the -- of the --

8 A No, sir. No video.

9 Q Okay. And was a private investigator hired?

10 A To my -- my first -- the first trial?

11 Q Or either one.

12 A No, sir.

13 Q Okay. All right. Okay. You're now coming up for your  
14 trial. How about pleas? Did you ever discuss with your  
15 attorney about any kind of pleas from the State?

16 A She came to me with two -- with two pleas, but I ain't  
17 never -- didn't get to sign either one of them. After  
18 she came to me, I think my co-defendant wanted a trial, I  
19 think he -- that's the reason why I went to trial. After  
20 he wanted to go to trial, she basically put me in his  
21 trial. I wanted my own trial. And she was saying,  
22 basically, Kim wanted me to be trialed (as spoken) with  
23 the rest of the people at once. I couldn't get --

24 Q And whose -- who is "Kim"?

25 A Kim Leskanic. That's the solicitor.

1 Q Solicitor, okay.

2 A At the time, I couldn't get my own trial. I wanted my  
3 own trial, but I couldn't get my own trial. They had us  
4 all in a joint trial, so the plea went off the table.

5 Q All right. Let me ask you this: That -- you said there  
6 were two plea offers. What was the first offer?

7 A Thirty to life.

8 Q Okay. Just, basically, a straight-up plea to murder?

9 A Yes, sir.

10 Q Okay. And what was the second plea offer?

11 A Fifteen.

12 Q Fifteen?

13 A Yes, sir.

14 Q And were there conditions on that 15, or was that just  
15 15?

16 A The condition was on -- was me getting on stand and  
17 testifying. In order for me to get them -- get them  
18 pleas, I had to get on the stand and testify.

19 Q About Mr. Dover?

20 A About Mr. Dover. But -- when -- last time we  
21 met -- when I didn't wanna testify, that took everything  
22 off the table.

23 Q Okay. Did you want to accept the 15-year plea offer?

24 A Yes, sir. I did.

25 Q And did you talk to your attorney about accepting that

1 offer?

2 A Once -- once they knew I wasn't gonna testify, they  
3 didn't -- there was no more negotiating about it.

4 Q Okay.

5 A Once they couldn't use me -- once they couldn't use me no  
6 more, it was no more pleas. It was trial.

7 Q Right.

8 A That's all it was, trial.

9 Q And you said that you wanted your separate own trial?

10 A Yes, sir. I wanted to go to trial for my -- for my  
11 charge by myself, but they put us in joint trial. They  
12 tried all three of us together.

13 Q Okay. And did you talk to your attorney about that?

14 A Actually, I did. And, once again, she said Kim wanted us  
15 to be in trial. And after the judge had asked her in --  
16 in court, why was we being tried together and not  
17 separately, but they still tried us all together, three  
18 peoples.

19 Q Okay.

20 A It was four in all, but they took one of my  
21 co-defendant (as spoken) and made him a witness. So they  
22 automatically exited him off the -- off the picture. So  
23 he a witness, so he don't got the charges no more. So he  
24 testified on -- on us three. And when he testified on us  
25 three, they found one not guilty and found me and my

1       other co-defendant guilty, and that -- that was it. But  
2       if I would've probably did what Mr. Dover -- Mr. Bonner  
3       did, would got on stand and testified, I wouldn't be in  
4       prison today, but --

5   Q     Yeah.

6   A     -- it --

7   Q     And that was gonna be my next question about Mr. Bonner.  
8       I mean, he was -- so he was a  
9       co-defendant, and then he decided that he was going to  
10      testify for the State.

11  A     Yes, sir.

12  Q     And he said a couple of very damaging things against you?

13  A     Yes, sir.

14  Q     Because you had a car?

15  A     Yes, sir.

16  Q     And what did he say about you?

17  A     Say it again?

18  Q     What did he say about you that -- that hurt you?

19  A     Mr. Bonner?

20  Q     Yeah.

21  A     Mr. Bonner, he waited till like to -- well, till court,  
22       and basically told them that I said -- I asked him where  
23       -- where did he -- where did he get shot at? Where did  
24       he shoot him at? Like -- and that what got me my time.  
25       But the whole time I was out, wasn't none of that brought

1 up until he started meeting with the solicitors. Once he  
2 started meeting with the solicitors, doing what they want  
3 him to do, then that came about that what he said about  
4 me.

5 Q Which implicated you in -- in possibly knowing that Mr.  
6 Dover was gonna shoot this man?

7 A No. I didn't have no knowledge of him knowing. I didn't  
8 have no knowledge of him what he wanted to do. No  
9 knowledge.

10 Q Right. Now, did you think about testifying at trial?

11 A I wanted to testify but not on nobody. I wanted to speak  
12 on my behalf.

13 Q Right.

14 A But she wouldn't let me. She -- she told me no. It  
15 ain't best of me to get on stand to talk, because it can  
16 backfire on me. Like -- like, they can question me --  
17 cross-examine me the wrong way or something, but all I  
18 know is she didn't want me to get on stand and say  
19 nothing. I was gonna talk for myself, but she didn't  
20 allow me.

21 Q Okay. And did you have a prior record?

22 A I got a prior record, but it's not a -- like, a bad  
23 record. Like, it's not a violent record.

24 Q Right.

25 A Yes, sir.

1 Q And, I mean, you understand that you had the right not to  
2 testify?

3 A Yes, sir.

4 Q To remain silent?

5 A Yes, sir.

6 Q So you made some sort of decision with her as far as to  
7 not testify?

8 A Yeah. I just -- just -- I -- I didn't -- I didn't get up  
9 there and say anything.

10 Q Okay. And in talking with her, did she give you any --  
11 any indication about your defenses about, like, your  
12 presence? Did y'all talk about that?

13 A No, sir.

14 Q Like you just being there?

15 A No, sir.

16 Q Okay. How about any -- any lesser included charges? Any  
17 manslaughter or anything less than murder?

18 A No, sir. My charge is murder. It never went down.  
19 Never got dropped to anything less than murder. Just  
20 murder.

21 Q Murder. Okay. And you weren't charged with possession  
22 of a weapon, because you didn't have a weapon.

23 A Right.

24 Q You filed an appeal?

25 A Yes, sir.

1 Q Okay. And this is -- I'll ask you. I don't know if you  
2 know the answer to this or not. You know that the -- the  
3 Court said that your issue on appeal was not preserved.  
4 Do you -- do you understand that?

5 A Like it wasn't put in?

6 Q Your -- your appeal was -- was denied.

7 A Yes, sir.

8 Q Okay.

9 A Yes, sir.

10 Q And do you know why your appeal was denied?

11 A No, sir.

12 Q Okay. All right. Mr. Foster, we talked about this, you  
13 know, that this -- you've been waiting a long time --

14 A Yes, sir.

15 Q -- to be here today.

16 A Yes, sir.

17 Q And is there anything else that I may have forgotten or  
18 that I failed to bring to the Court's attention or that  
19 you feel that's important that the judge should know  
20 about?

21 A Just -- I just want, like -- I just want a fair trial,  
22 and I really wanna know what the juror -- why the juror  
23 had wrote the notes to the judge saying she couldn't vote  
24 in my first trial.

25 Q Okay.

1 A And the juror wrote the notes saying she couldn't vote.  
2 I wanna know why she couldn't vote. I wanna know what  
3 they do to her for her not to vote.

4 Q In the first trial?

5 A In the first trial. I wonder what --

6 Q So I looked for that and I couldn't find it, but I found  
7 it.

8 A I wonder what happened.

9 Q Yeah. Because it's not in the second trial.

10 A It's not in the second trial. It's in my first trial.  
11 The juror wrote three notes to the judge saying she  
12 couldn't vote, and I wanna know why. Like, what  
13 happened? What did they do? What -- did they explain  
14 something to them wrong, or they wasn't presenting  
15 something to them? But it wasn't nothing -- did nothing  
16 get presented. She said she couldn't vote.

17 Q Right.

18 A And that made me have a -- a mistrial.

19 Q Right.

20 A I went back on my second trial the one they found me  
21 guilty.

22 Q All right. So is there anything else that you'd -- other  
23 than that, is there anything else you'd like to bring to  
24 -- to the attention of the Court?

25 A I think that's -- I think that should be it.

1 Q Okay. I'm not suggesting that I forgot something, but  
2 I --

3 A No.

4 Q -- just wanted you to double-check.

5 A Yes, sir.

6 Q Okay. All right.

7 MR. THOMAS: I have no further questions, Your  
8 Honor.

9 THE COURT: All right.

10 **CROSS-EXAMINATION OF RAJSHUN FOSTER**

11 BY MS. MARTO:

12 Q Good afternoon, sir. So is your testimony on direct that  
13 the only real offer you got was contingent upon you  
14 testifying for the State, right?

15 A Right.

16 Q Okay. And you didn't wanna testify for the State?

17 A No, sir. I mean, no, ma'am. I'm sorry.

18 Q And so the 15-year offer wasn't going to be available to  
19 you absent your cooperation?

20 A I had to cooperate in order to get that.

21 Q Okay. And you -- did you ever ask your -- you've asked  
22 Counsel why she didn't move to sever the trials, right?

23 A Yes. I asked, but she always say Kim wanted us to be  
24 tried together. I mean, I never understood that.

25 Q And she basically just told you the State wanted

1           everybody tried together, right?

2   A       Basically.

3   Q       And was the theory at trial effectively that you were  
4           like the driver?

5   A       Ma'am?

6   Q       Were you the driver? Is that the State's theory at  
7           trial?

8   A       Yes, ma'am.

9   Q       Okay. Were you there that night?

10   A       Was I there? I was there, but not where they say I was.  
11           Every -- like it's an apartment complex. Everybody be  
12           there.

13   Q       But the -- you're just saying that you didn't help aid in  
14           the murder, right?

15   A       No. I did not.

16   Q       So is that why multiple eyewitnesses identified you?

17   A       Yes. Because I'm known for being in the -- in the area.

18   Q       And, again, you said you never discussed with Ms. Racine  
19           about a mere presence defense?

20   A       No, ma'am.

21   Q       So what was your defense at trial?

22   A       To be honest, there wasn't no defense. There wasn't no  
23           objection; there wasn't nothing. It, basically, going  
24           off -- whatever the State was saying, that's basically  
25           what was going on. I think she didn't reject to

1           anything. It was just whatever they -- they was doing,  
2           that's what happened.

3   Q       You said you reviewed all the witness statements with Ms.  
4           -- Counsel, right?

5   A       I did what?

6   Q       You reviewed all the witness statements with Counsel  
7           prior?

8   A       Yes. I -- I seen the witness statements.

9   Q       So why did you elect not to cooperate with the State?

10   A       I can't tell them something I don't know. She wanted me  
11           to -- to do --

12   Q       What --

13   A       She wanted -- the solicitors -- the State wanted me to  
14           say things -- they wanted me to say to convict the next  
15           person --

16   Q       But --

17   A       -- just --

18   Q       -- you were there, right? So you just -- did you not see  
19           what happened?

20   A       No. I did not.

21   Q       Okay. And you recall Mr. Bonner's testimony, correct?

22   A       Ma'am?

23   Q       You recall Mr. Bonner's testimony?

24   A       Yes, ma'am.

25   Q       Do you recall him saying once Mr. Dover got back in the

1 car, you asking him where you -- he shot the victim? Do  
2 you recall?

3 A That what he said, but I never said that.

4 Q Okay. And were you driving the car that night?

5 A Yes. I drove.

6 Q Did you know Mr. Dover had shot someone when he reentered  
7 the car?

8 A No, ma'am.

9 Q When did you find that out?

10 A When I got -- started getting phone calls from everybody  
11 saying something. They saying I had killed somebody.  
12 But it wasn't me. And . . .

13 Q When did you start getting those phone calls?

14 A Like -- like I was -- like, say an hour or so. Later --  
15 like later that day, I started getting calls. When I  
16 started getting phone calls, I turned myself in. I went  
17 straight to the police station, and they didn't have --  
18 they didn't have nothing on me. Just people saying, "Oh,  
19 yeah. He shot such and such. He shot such and such."  
20 That's it. I didn't get a warrant till a month later.

21 Q Why did think that you were going to the apartment  
22 complex at that time?

23 A Why? That's where I hang out at. That's where I always  
24 hang out at. Everybody hang out in the apartment complex  
25 there, at the time.

1 Q Did you hang out that night?

2 A That night?

3 Q Yes, sir.

4 A No. I wasn't there. I wasn't there that night.

5 Q You weren't at the complex that night?

6 A It was daytime.

7 Q Okay. Did you hang out that day with people at the  
8 complex?

9 A Was I out there hanging out with peoples?

10 Q Yeah.

11 A Yes. I was hanging out with peoples --

12 Q Okay.

13 A -- there at the complex.

14 Q And did you arrive at the complex with Mr. Dover?

15 A Did I arrive there with him?

16 Q Yeah.

17 A Yes. I arrived there with him.

18 Q Okay.

19 MS. MARTO: Nothing further, Your Honor.

20 THE COURT: Any redirect, Mr. Thomas?

21 MR. THOMAS: Yes, Your Honor. Please the Court.

22 **REDIRECT EXAMINATION OF RAJSHUN FOSTER**

23 BY MR. THOMAS:

24 Q When Counsel asked you about multiple witnesses  
25 identified you at the apartment complex, that would be

1 true, wouldn't it? I mean --

2 A That --

3 Q -- you were there?

4 A Yeah. I was in the apartment complex. I'm always in the  
5 apartment complex.

6 Q Right. A matter of fact, and I think his nickname is  
7 "Slick," that was the victim in this case?

8 A Yes, sir.

9 Q You and Slick were friends?

10 A Yes, sir.

11 Q Okay. And you had no reason to harm him?

12 A No, sir. Not at all.

13 Q Okay. Do you know what the beef was between he and Mr.  
14 Dover?

15 A If they had any beef, they kept it away from me. They --  
16 neither -- neither or told me anything about any beef  
17 (verbatim.) So it was kind of hard for me to believe  
18 what's really going on. I don't -- I don't understand  
19 this at all, because I don't think they had no beef. Not  
20 to my knowledge they ain't have no beef.

21 Q Right. And, matter of fact, you did speak with Slick  
22 that day?

23 A Yes, sir. I did.

24 Q Okay. And why was that?

25 A Just normal conversations.

1 Q Okay.

2 A We always talk when we see each other.

3 Q All right.

4 A That's -- that's normal.

5 Q And -- and, again, I know I -- I'll ask -- ask you this  
6 question once again. No one ever placed you at the  
7 murder?

8 A No. No one can ever place me at the murder.

9 Q Or with a gun?

10 A Or with a gun.

11 Q Okay. And when Mr. Bonner said that -  
12 allegedly -- well, he said that you said, when Mr. Dover  
13 got back in the car, "Where did you shoot him at?" Was  
14 that true?

15 A That's false. I never said that.

16 Q Okay. And Mr. Bonner had a reason to be -- to say that,  
17 right?

18 A He had -- but he cooperated with the State.

19 Q He cooperated with the State.

20 A That's why he said that.

21 Q And what happened with Mr. Bonner?

22 A Nothing. He's at home now. He never did no time in  
23 jail. He went to jail. He had a -- they PR-ed him out.

24 Q All right. Why were you running around with Mr. Dover?

25 A I grew up with him. I know him. We grew up together. I

1 know him.

2 Q Okay. All right. And, again, in preparing for this case  
3 with your attorney, did -- did you talk to her or tell  
4 her all of this so she had this information?

5 A Did I tell her like this?

6 Q Like what we've been talking about, yeah.

7 A She -- she think -- she -- like, explain like what you  
8 mean.

9 Q Okay. I'm sorry. When you talked to your attorney and  
10 you were getting ready for -- of course, you didn't know  
11 what Mr. Bonner was gonna say, so you couldn't prepare --  
12 you couldn't prepare for that.

13 A Right.

14 Q But in regards to your relationship with Slick, why you  
15 were there, what you were doing there, and those kind of  
16 things, did you talk to her about that?

17 A Yeah. We talked about it, but it just went out the  
18 window. If I wasn't doing nothing -- if I wasn't working  
19 with the State or talking with Kim, wasn't nothing going  
20 on.

21 Q So that was your option?

22 A That was my option. Either I can testify or either I can  
23 sit and do 35 years what I'm doing now.

24 Q Was that your defense?

25 A It's -- pretty much, because that's all -- when we --

1 every time we met, it's always, I got to meet with Kim.

2 "Meet with Kim. Kim wanna talk with you." Why would Kim  
3 wanna talk with me? She's a prosecutor.

4 Q Right.

5 MR. THOMAS: No further questions, Your Honor.

6 MS. MARTO: Nothing further, Your Honor.

7 THE COURT: All right. Thank you, sir. You can  
8 step down. Mr. Thomas, you can call your next  
9 witness.

10 (WHEREUPON, the applicant was excused.)

11 MR. THOMAS: Your Honor, if it please the Court. We  
12 call Tracy Racine to the stand.

13 THE COURT: All right. Ms. Racine?

14 (WHEREUPON, the witness was sworn.)

15 THE COURT: (To Mr. Thomas) All right.

16 MR. THOMAS: Please the Court.

17 THE COURT: Yes, sir.

18 **DIRECT EXAMINATION OF TRACY RACINE, ESQ.**

19 BY MR. THOMAS:

20 Q Ms. Racine, you had an opportunity to represent Rajshun  
21 Foster?

22 A Yes.

23 Q Okay. And this was a murder charge?

24 A Yes.

25 Q What did -- what did you do to prepare this case, I

1       guess, for trial or plea?

2   A     I met with him several times. Starting in August of  
3       2014, we met seven times. At one point, I didn't have a  
4       working number for him, had no way of getting in touch  
5       with him. That was in April of 2018. I went out. I  
6       talked to the investigators. I talked to -- I tried to go  
7       out to the scene and talk to witnesses. I didn't have  
8       any luck with that. They weren't willing to talk to me.  
9       But I did go and talk to people and try to do what I  
10      could.

11             And, also, I talked to the solicitor, Kim Leskanic,  
12      and she was willing to have him testify against Mr.  
13      Dover, who she believed was the shooter. And had he been  
14      willing to do that, then she was going to make him some  
15      sort of offer. It was not a specific offer at that  
16      point. It was just a, "We'll work something out." As a  
17      general rule, she never made offers until she knew  
18      exactly what information she would get.

19   Q     All right. So if -- if you're unable to work something  
20      out with the solicitor, what was your theory of defense  
21      going to be?

22   A     Basically, we approached it with two different ways. One  
23      was that he was unaware that there  
24      was -- the -- the weapon. And then the second was that  
25      he was there, but he was there with Mr. Bonner to buy

1 marijuana. That he dropped Mr. Studyvance and Mr. Dover  
2 off at the trail. And then he and Mr. Bonner went  
3 further into the apartments and met with a man named  
4 "Mook" (phonetic.) And they bought marijuana from Mook  
5 and sat there in the parking lot and were not anywhere  
6 near Slick when he was murdered. So --

7 Q All right.

8 A -- that was -- that was what we went with. We also tried  
9 to -- the witnesses who testified, we tried to make sure  
10 that -- even though they tried to put him there, you  
11 know, I tried to go with, "Did you hear him threaten  
12 Slick? Did you see anything like that?" We tried to --  
13 to go with the -- the position that he had absolutely no  
14 reason to harm Slick, wish Slick harm, anything like  
15 that, and that he was in a totally different part of the  
16 complex when all this happened.

17 Q As a matter of fact, I mean, they never were able to  
18 present any evidence that he had a reason to harm Slick?

19 A No. No. We -- they -- I think we did a good job keeping  
20 them from -- from --

21 Q All right.

22 A -- bringing that out.

23 Q And they never were able to say that he had a weapon or  
24 he fired a weapon or that he shot and killed Slick?

25 A No. They just -- they said he was the driver of the car.

1 Q All right. So was he not, maybe, an accessory after the  
2 fact or something?

3 A I -- I think that's a possibility. And that was actually  
4 the offer that I did make to the solicitor between  
5 trials, and she rejected that offer, said, "No."

6 Q Okay. What happened to the first trial?

7 A It was a mistrial. We had 11 to one. One juror just  
8 refused to -- to convict. She -- she would not vote to  
9 convict.

10 Q But they found one of the co-defendants not guilty.

11 A Yes.

12 Q Okay. And in that first trial, was it four  
13 co-defendants, or did they try three?

14 A Three.

15 Q Okay. Which Mr. Bonner was one of them?

16 A No. It was Studyvance, Dover, and Mr. Foster.

17 Q All right. Because Studyvance allegedly had a - had a  
18 weapon?

19 A Yes. I believe so.

20 Q Okay. Now, would it be correct to say that they -- the  
21 person that they really wanted was Mr. Dover and that Mr.  
22 Foster kind of was along for the ride?

23 A Based on the fact that Ms. Leskanic wanted Mr. Foster to  
24 testify against Mr. Dover, yes. I would say that that  
25 was her primary goal -- primary target.

1 Q Okay. And what about severing the cases? Were -- did  
2 you think about that, or were you able to make a motion  
3 to sever?

4 A I don't remember, honestly. I -- we -- that was  
5 something we would've been talking about in Judge Kelly's  
6 chambers most likely. But I don't remember a specific  
7 conversation with the judge, so I don't wanna say yes or  
8 no on that.

9 Q Would it have been more beneficial for Mr. Foster to go  
10 to trial by himself?

11 A I don't believe that it would've been, no.

12 Q Okay. In reading the transcript, there was some sort of  
13 problem in -- where both you and counsel for Mr. Dover  
14 were concerned about opening a door for testimony. I  
15 didn't really follow that. I couldn't really understand  
16 exactly what -- it looked like it was leaning maybe  
17 towards a mistrial motion, but it never happened. Do you  
18 remember that?

19 A I do not remember that, no.

20 Q Okay. And the judge basically said, "Well, we're not  
21 gonna say anything else about it."

22 A Okay.

23 Q Okay.

24 A Okay.

25 Q You said --

1 A Yeah. I -- I don't remember. I truly don't remember --

2 Q Don't remember --

3 A -- that.

4 Q -- okay. All right. So the only plea offer he got was  
5 straight up or 15 or somewhere, I mean, if he was to  
6 cooperate and testify against Mr. Dover?

7 A There would've been no offer if he didn't cooperate.  
8 There would've been an offer if he had, but she did not  
9 make a specific offer. Like I  
10 say --

11 Q Right.

12 A -- that's not her policy.

13 Q Right. Now, are you aware of the appeal?

14 A Yes. I -- I know he hired you for an appeal.

15 Q Okay. And --

16 MR. THOMAS: Your Honor, may I approach?

17 THE COURT: Yes, sir.

18 MR. THOMAS: Your Honor, what I've got is a copy of  
19 the -- the Court's order of Court of Appeals.

20 THE COURT: I've got it here. I've already read it.

21 MR. THOMAS: Yes, sir.

22 Q Ms. Racine, I'm gonna let you look at that if you  
23 would --

24 A Okay.

25 Q -- please.

1 A (Reviews document.)

2 Q And if you don't mind, in the "Court's Opinion or  
3 Decision," do you see where, about a third of the way  
4 down, it says, "Because Foster failed to object to the  
5 jury charge at trial, we affirmed pursuant to Rule  
6 220(b)"?

7 A Yes.

8 Q Okay. And then it goes on to say that, "Our ruling today  
9 is effective in this case and those cases which are  
10 pending on direct review are not yet final so long as the  
11 issue is preserved."

12 A Yes.

13 Q And they were talking about an objection to the Court's  
14 charge on implied malice?

15 A Yes.

16 Q Okay. And then it goes and says, "Finally, issues not  
17 raised and ruled upon in the trial court will not be  
18 considered on appeal."

19 A Yes.

20 Q All right. So I know that we're looking kind of  
21 hindsight which is 20/20. But this is the Court's  
22 decision. Would it have been prudent for you to have  
23 objected to the Court's charge?

24 A Well, I -- I don't think so, at that point, because Mr.  
25 Foster's conviction was on July 17th. The "Burnette"

1 opinion wasn't issued until July 31st, so it didn't come  
2 out till two weeks after the trial.

3 Q But doesn't it imply -- because there's argument in  
4 the --

5 MR. THOMAS: And the court has the -- this Court has  
6 all the -- the briefs, Your Honor.

7 THE COURT: Yes, sir.

8 Q Doesn't it imply that our -- our ruling is talking about  
9 "Burdette (as spoken)." And it says, "Our ruling today  
10 is effective in this case and in those cases which are  
11 pending on direct review and are not yet final." Do you  
12 know whether or not this court -- this case was pending  
13 on appeal during that time?

14 A No. Without doing research, I can't say --

15 Q Okay. All right.

16 A -- yes or no.

17 Q All right.

18 MR. THOMAS: Your Honor, if I approach, may I get  
19 that?

20 THE WITNESS: Sure.

21 THE COURT: Yes, sir.

22 Q So you didn't -- you didn't object, because you didn't  
23 know, or what was the reason for not objecting?

24 A (No response.)

25 Q Did you think about it, I mean, as far as implied malice

1 from the use of a deadly weapon?

2 A No. I did not. That was just, at that point, the  
3 standard jury charge, and that's what we went with.

4 Q Okay. But you were . . .

5 MR. THOMAS: Your Honor, if I can beg the Court's  
6 indulgence.

7 THE COURT: All right.

8 Q But you were aware of "Belcher," right? "Belcher" being  
9 the first case. It -- one of the first cases that came  
10 along about implied malice from the use of a deadly  
11 weapon.

12 A I can't say for sure if I did or did not know at that  
13 point. I -- I don't want to make up something and say --

14 Q Okay. All right.

15 A -- something that may not be true.

16 Q All right. So -- so you're not sure that if you did or -  
17 - or didn't know about "Belcher." I'm just wondering if  
18 you -- well, I guess, I know the answer to that question.  
19 Then if you didn't know about "Belcher," it didn't set  
20 off any alarm bells for you in regards to some potential  
21 problem with that charge?

22 A No. Because they never alleged he actually used the gun.  
23 They alleged he was the driver but not that he actually  
24 fired a weapon.

25 Q But he was charged with murder?

1 A He was charged with murder.

2 Q And part of the conviction of murder is with malice  
3 aforethought?

4 A Yes.

5 Q All right. Now --

6 MR. THOMAS: Your Honor, and just for the Court's  
7 information, the -- in the transcript on Page 460  
8 and 461, is basically the Court's charge and  
9 comments in regards to the malice.

10 THE COURT: All right.

11 Q So, Ms. Racine, I think I've asked you about severing the  
12 trials, the plea. How about any kind of -- were there  
13 any lesser includeds (as spoken) that you could've asked  
14 the Court to charge? Would that -- was that possible?

15 A That would've been possible based on my conversation with  
16 Mr. Foster, though, we decided to go all or none.

17 Q Roll the dice?

18 A Yes, sir.

19 Q Okay. And I think the Court did charge a mere presence.  
20 Do you remember?

21 A I don't specifically remember, but I would say that that  
22 would be a charge that -- that Judge Kelly would've  
23 charged based on the fact that we did present the fact  
24 that he was there buying marijuana but not necessarily  
25 there with a weapon participating.

1 Q Yes, ma'am.

2 MR. THOMAS: Your Honor, may I beg the Court's  
3 indulgence?

4 THE COURT: Yes, sir.

5 Q Let me ask you this, Ms. Racine: Was Mr. Foster on house  
6 arrest?

7 A I believe he was on home detention, yes.

8 Q He was on home detention?

9 A Yes.

10 Q Did he get credit for that in regards to his sentence?

11 A Yes, sir. He got 1,325 days credit.

12 Q All right. I was just curious about the statement that  
13 you made about there was a period of time in which you  
14 couldn't get in touch with him. But if he was on house  
15 arrest, wouldn't you know where he was?

16 A I just didn't have any working numbers for him.

17 Q Didn't have any have phone numbers, okay.

18 A Yeah. I called every number I had. I couldn't get in  
19 touch with him, but --

20 Q Okay. All right.

21 MR. THOMAS: Thank you, Your Honor. I have no  
22 further questions.

23 THE COURT: All right.

24 **CROSS-EXAMINATION OF TRACY RACINE, ESQ.**

25 BY MS. MARTO:

1 Q Good afternoon.

2 A Hi.

3 Q And so, again, you didn't object during the jury charge  
4 because that wasn't law at the time, correct?

5 A Correct.

6 Q And you have no reason to object based upon any potential  
7 path the law might take after the trial; is that correct?

8 You --

9 A Yes.

10 Q Okay. And, again, any plea offers in this case would've  
11 been based upon Mr. Foster's cooperation with the State,  
12 correct?

13 A Yes.

14 Q And you reviewed the evidence in this case, correct?

15 A I did.

16 Q You reviewed it with Mr. Foster?

17 A Yes.

18 Q And what evidence existed in the case that would've  
19 helped establish the State's case at trial against Mr.  
20 Foster in particular?

21 A There were several witnesses who testified that they saw  
22 him there, that it looked like he was in some sort of  
23 altercation with the victim, took his shirt off, came at  
24 him. They couldn't hear the words, but they were  
25 obviously heated arguments. There was the testimony that

1       -- that he was there. He -- he knew of the gun, that  
2       was, I believe, Mr. Bonner testified to something like  
3       that, but there were several witnesses who could put him  
4       there at the scene. And I just -- I felt like,  
5       cumulatively, there was enough evidence with just those  
6       statements.

7   Q   Did you think it was a strong case for the State?

8   A   I did. And that's why I did my best to convince him to  
9       cooperate with Ms. Leskanic. I wanted him to not get the  
10      time that he got.

11   Q   And, essentially, the argument at trial was that he was  
12      the getaway driver, right?

13   A   Yes. That he did not know what was happening. He was in  
14      there buying marijuana. He got a call, he picked them  
15      up, and drove off with them.

16   Q   And, again, you stated that you didn't think severed  
17      trials would've been beneficial in this case, correct?

18   A   Correct.

19               MS. MARTO: Nothing further, Your Honor.

20               THE COURT: (To Mr. Thomas) Any redirect?

21               MR. THOMAS: Nothing further, Your Honor.

22               THE COURT: All right. Thank you, ma'am. You can  
23      step down.

24               (To Mr. Thomas) Call your next witness.

25               THE WITNESS: Thank you, Your Honor.

1 (WHEREUPON, the witness was excused.)

2 MR. THOMAS: Your Honor, we have no further witness.

3 THE COURT: All right. Thank you.

4 Anything --

5 MS. MARTO: No witnesses --

6 THE COURT: -- from the State?

7 MS. MARTO: -- Your Honor.

8 THE COURT: All right. Brief argument. Of course,  
9 I have all the stuff, and I'm gonna take it under  
10 advisement. But --

11 MR. THOMAS: Yes, Your Honor.

12 THE COURT: -- anything you wish to add?

13 **CLOSING ARGUMENTS**

14 MR. THOMAS: If -- if I may? It'd be very, very  
15 brief.

16 Your Honor, in the -- and the Court has all of  
17 the briefs, so I'm not gonna belabor all that.  
18 You've got the State's brief, as well. There's a  
19 comment that we make in the reply brief, which I  
20 think -- and looking back over everything really  
21 kind of hits home with this. I'm not sure what the  
22 defense was. I think, if you take my client's  
23 position, it was mere presence. There wasn't any  
24 really evidence other than this one gentleman that  
25 comes forward to turn State's evidence. But in the

1           -- in the malice situation, I mean, the trial  
2           attorney didn't know, and I think with all of the  
3           past history of the implied malice and all of that,  
4           she should have acted. I mean, it should have -- it  
5           would've me. And sometimes I don't understand all  
6           of that, but -- but it would have rang a bell that  
7           this is a potential problem and something that  
8           should've been objected to.

9           THE COURT: When was the trial -- the second trial  
10          made?

11          MR. THOMAS: The second trial, Your Honor, was -- I  
12          apologize. It is July 15th, 2019.

13          THE COURT: Okay. Just --

14          MR. THOMAS: Yes, sir.

15          THE COURT: -- three years ago.

16          MR. THOMAS: Yes, sir. And what's interesting is  
17          that, in reading the -- the Court of Appeals order  
18          or opinion, it leads you to believe that -- that  
19          they wouldn't have reached a decision. They would  
20          have made a decision --

21          THE COURT: Yeah. Sir, I read that into it, as  
22          well, and I wanna hear the State's response. I -- I  
23          mean, you know, when I first grabbed your packet, I  
24          looked at the -- the opinion from the Court of  
25          Appeals, and it says, you know, "We're not raising

1 the issue because it wasn't objected to," which is  
2 kind of a, you know, an indirect message. You know,  
3 "If it had been objected to and preserved for  
4 appeal, well, yeah. We would've reviewed it and  
5 reversed the conviction and set it for" -- I see  
6 exactly ---

7 MR. THOMAS: Yes.

8 THE COURT: -- what you're going after.

9 MR. THOMAS: Yes. And in conclusion, then, the --  
10 and my implying was that -- is that malice that was  
11 introduced and implied against Dover was fostered  
12 onto the appellate allowing "Belcher" instructions  
13 to exacerbate this harm to a level that cannot be  
14 deemed harmless error.

15 THE COURT: Got it. When did "Belcher" -- when was  
16 "Belcher" decided?

17 MR. THOMAS: "Belcher" was earlier, Your Honor. Let  
18 me see. I apologize. I don't know these dates  
19 right off, but I can find them.

20 THE COURT: I just meant -- what's that?

21 LAW CLERK: That was set in 2019, Your Honor.

22 THE COURT: And that?

23 LAW CLERK: Yeah.

24 THE COURT: (To the court clerk) And that was when?  
25 (To Mr. Thomas) My law clerk is talking. (To court

1 clerk) Go ahead?

2 LAW CLERK: Right at July 30th of 2019.

3 THE COURT: July -- the end of July of 2019. Right  
4 after this date is when "Burdette" (as spoken) was  
5 decided.

6 MR. THOMAS: Yes, sir. Yes, sir.

7 THE COURT: And then "Belcher" came down 2015,  
8 maybe? I -- I can't --

9 MR. THOMAS: Let me see. I've got --

10 MS. MARTO: I was thinking --

11 THE COURT: I just remember -- I just -- I had  
12 several murder trials where this issue came up, and  
13 I just changed my murder charge. I don't even --  
14 the only thing I do inferred malice for is conduct  
15 showing a total disregard for human life. That's  
16 it. I --

17 MR. THOMAS: Two-thousand --

18 THE COURT: I --

19 MR. THOMAS: 2009, Your Honor

20 THE COURT: 2009? Yeah. I knew it's been a while.

21 MR. THOMAS: Yeah. It's been a long time.

22 THE COURT: So I don't even -- I don't even charge  
23 that, so --

24 MR. THOMAS: Yes, sir.

25 THE COURT: Well, let -- let me cut to the chase. I

1           wanna hear the State --

2           MR. THOMAS:   Okay.

3           THE COURT:   -- while it's fresh in my --

4           MR. THOMAS:   Yes, sir.

5           THE COURT:   -- mind.   What -- what's the State's  
6           position?   Did -- do you see the Court of Appeals  
7           read it the same way I may be reading it?   Of  
8           course, I'm -- I'm reading through everything, but  
9           just at first blush I'm certainly seeing that they  
10          were saying, "Look.   Had this issue been reserved  
11          for appeal" -- you know, "Hey, considering this was  
12          a 'hand of one, hand of all' type case, you know,  
13          that that's pretty important."

14                               **CLOSING ARGUMENTS**

15          MS. MARTO:   Your Honor, my read of it, in the more,  
16          I guess, generous view towards Mr. Thomas and the  
17          applicant in this case is that if it was objected  
18          to, they might be able to entertain it on the direct  
19          appeal, but I think they are two very different  
20          situations between a direct appeal and a PCR.

21          THE COURT:   Sure.

22          MS. MARTO:   And so, here, what you're basically  
23          looking at, was Counsel reasonable in not objecting  
24          to a law that was unfounded at the time.   We'd argue  
25          that, you know, she was reasonable in not objecting,

1           because she didn't really have a solid basis to  
2           object.

3           THE COURT:  So, essentially, they're seeking  
4           retroactive to the application of the "Burdette"  
5           decision for something that really wasn't settled  
6           yet?

7           MS. MARTO:  Yes, Your Honor.  But it would be the  
8           State's position that Counsel isn't clairvoyant nor  
9           is Counsel required to be clairvoyant in these types  
10          of situations, and it was effectively new law that  
11          "Burdette" --

12          THE COURT:  Sure.

13          MS. MARTO:  -- decided.  And Counsel shouldn't have  
14          been able to see into the future and determine what  
15          way the Court would've gone, the scope with which  
16          "Burdette" would've been reached, and thus was  
17          reasonable because she didn't have a basis to object  
18          to it at that point.

19          THE COURT:  Okay.

20          MS. MARTO:  And then, also, we would argue they had  
21          -- also haven't established that the objection  
22          would've been sustained given the fact that the law  
23          wasn't in place at the time or that prejudice exists  
24          in this case.

25          THE COURT:  But the issue is preservation?

1 MS. MARTO: Yes.

2 THE COURT: Or ability to reach it because it wasn't  
3 preserved. I mean -- you know, objections get  
4 overruled all the time, but they're in the record,  
5 and that preserves an issue for appellate counsel to  
6 seek review. I mean, if you don't object, you're --  
7 you know?

8 MS. MARTO: Yes, Your Honor. But then that goes  
9 back to whether or not Counsel was deficient. And  
10 we would argue, Counsel was not deficient for  
11 launching a objection that she didn't have a basis  
12 for at the time.

13 THE COURT: Under the Strickland two-prong test?

14 MS. MARTO: Yes, Your Honor.

15 THE COURT: I got it. Anything further, Mr. Thomas?

16 **FURTHER CLOSING ARGUMENTS**

17 MR. THOMAS: Yeah. Other than just what the Court  
18 has said, Your Honor. I think this case is unique a  
19 little bit in that when we're talking about  
20 prejudice, I think we almost have a window into  
21 prejudice. The Court of Appeals I think is saying,  
22 "We would've reviewed it. We would've rendered  
23 opinion, but we can't."

24 THE COURT: I had a case just like this, and I don't  
25 know what happened to it. Your superior -- your

1 supervisor, Ms. Marto, tried it in Greenwood County  
2 several years ago. And I cannot -- it's a PCR, and  
3 it was this -- almost the same -- the exact same  
4 issue except it dealt with -- dealt with the  
5 defense not objecting to an improper violation of  
6 the golden rule by the State. And in that case, the  
7 State referred to the defendant -- basically,  
8 compared him to -- to Charles Manson, and you can't  
9 unring that bell.

10 MR. THOMAS: Yeah.

11 THE COURT: And there was no objection. Of course,  
12 it was during closing argument, but the Court of  
13 Appeals made the Supreme Court issue a decision  
14 saying, "Well, we can't really pass judgment on that  
15 because it was preserved." And -- and, in that  
16 case, I did grant post-conviction relief and ordered  
17 a new trial, and I don't know what happened to it  
18 after that. I think it resolved itself, but I don't  
19 know. I mean, you maybe wanna mention it to your  
20 office. They know which case I'm talking about  
21 because it was in Greenwood County three years ago.  
22 It was a pre-COVID. I just remember being there and  
23 hearing that. And it came out in -- as I -- as I  
24 had the matter under advisement. So all that being  
25 said, I am taking the matter under advisement, okay?

1           If you wanna talk to -- to your people, of course,  
2           you can reply, as well --

3           MR. THOMAS: Yeah.

4           THE COURT: -- and submit any further memorandum.  
5           You don't have to. If you want to, that's fine. I  
6           -- I usually -- when I take matters under advisement  
7           in these types of hearings, I wait for a couple of  
8           weeks, and -- and I deliberate on them. Of course,  
9           me and my law clerk, we need to read through  
10          everything and -- and talk about it, deliberate on  
11          it. If y'all want to shoot me another memo  
12          addressing that very issue, you certainly can. You  
13          don't have to, but I think I have enough, okay?

14          MR. THOMAS: Okay. Thank you, Your Honor.

15          THE COURT: All right.

16          MS. MARTO: Thank you, Your Honor.

17          THE COURT: Thank you.

18          MR. THOMAS: Yes, sir.

19          THE COURT: Thank you, sir.

20          MR. THOMAS: Definitely. My pleasure.

21          THE COURT: (To the applicant) Your lawyer will let  
22          you know what I do, okay?

23          THE APPLICANT: Okay.

24          THE COURT: Good luck to you, sir.

25          THE APPLICANT: All right. Thank you.

1                   (Whereupon, the within hearing was  
2                   concluded at 3:13 p.m.)  
3           (\*This transcript may contain quoted material.  
4           Such material is reproduced as read or quoted by the  
5           speaker.)

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF SPARTANBURG )

CERTIFICATE

I, Amber Payne, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings had and the evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina on October 18th, 2022.

I do further certify that I am neither of kin, counsel,  
nor interest to any party herein.

Amlen Payne

Amber J. Payne, CVR

Date: July 13, 2023

Notary public for South Carolina

My commission expires August 12, 2029

STATE OF SOUTH CAROLINA  
COUNTY OF CHEROKEE

Rajshun Foster, #320680,  
Applicant,

v.

State of South Carolina,  
Respondent.

IN THE COURT OF COMMON PLEAS  
FOR THE SEVENTH JUDICIAL CIRCUIT

Case No. 2022-CP-11-0261

**RESPONDENT'S POST-TRIAL  
MEMORANDUM OF LAW**

FILED IN OFFICE OF  
CLERK OF COURT  
CHEROKEE COUNTY, S.C.  
2022 NOV - 7 AM 11:54  
BRADY W. MCREE

NOW COMES Respondent, offering its post-trial memorandum of law following the evidentiary hearing held on October 18, 2022, concerning Mr. Rajshun Foster's post-conviction relief application, filed on April 14, 2022.

**I. Procedural History**

Investment

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Cherokee County Clerk of Court. During its September 2014 term, the Cherokee County Grand Jury indicted Applicant for murder (2014-GS-11-00878). Applicant was represented by Tracy Racine, Esquire. Deputy Solicitor Kim Leskanic of the Seventh Circuit Solicitor's Office prosecuted the case. On July 15-17, 2019, Applicant proceeded to trial before the Honorable R. Keith Kelly, circuit court judge, and a jury, where he was found guilty as indicted. Judge Kelly sentenced Applicant to thirty-five years' imprisonment.

Applicant filed a timely notice of appeal on September 16, 2019, that was perfected by Tommy A. Thomas, Esquire, through filing a brief, raising the following issue:

The circuit court erred, as a matter of law, in instructing the jury it could infer malice from the use of a deadly weapon.

The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished

opinion, finding that this issue was not preserved on appeal. *State v. Foster*, 2022-UP-057 (S.C. Ct. App. filed Feb. 9, 2022). The remittitur was issued on February 25, 2022.

## **II. Statement of Facts**

Timothy Blair (“Victim”), known by the nickname “Slick,” was murdered on June 22, 2014, in the Connecticut Village Apartments in Gaffney. The two main perpetrators were Applicant and Franklin Dover (“Dover”), neither of whom lived in Connecticut Village Apartments Complex. The testimony at trial proved that Applicant and Dover had been looking for Victim for several days prior to Victim’s death because they believed Victim had stolen something, likely either drugs or money, that belonged to them. Several witnesses testified Applicant and Dover were actively looking for Victim in the days leading up to Victim’s murder and had threatened Victim. Foster and Dover had told the witnesses to tell Victim they were looking for him. (R. 93-113; 116-24; 128-33; 308-13).

On June 22, 2014, Applicant and Dover both drove to the complex in separate vehicles and confronted Victim. Eyewitnesses testified Applicant was the instigator of the confrontation and that Victim refused to fight Applicant and kept backing away from him. Then two different eyewitnesses heard Dover state out loud to Victim that: “he would get him-[Victim] one way or the other.” Victim walked away from the confrontation with the two men with his head down. One eyewitness saw Dover armed with a rifle, standing in the doorway of his vehicle, when he made the verbal threat that he would get Victim one way or the other. (R. 177-93; 146-66; 198-207; 207-18; 263-67; 277-92 (Page 293 – Supp. ROA pg. 2); 308-13).

Applicant and Dover both left the complex in their respective vehicles and drove to a nearby mobile home park where Dover lived with his girlfriend. The two men talked to Studyvance (aka “T”) in front of one of the homes. Terrance Bonner (aka “Red”) walked up and

saw the three men conversing. Bonner asked if anyone knew where they could get some marijuana, and Applicant said yes, to come with them to the complex. Applicant, Bonner, Studyvance, and Dover got in Applicant's girlfriend's car and headed to the complex. Before getting in the car, Dover got his rifle and at least one surgical-type glove out of his own car and got in the back of Applicant's girlfriend's car where Bonner was seated. Studyvance was also armed with a pistol, seated in the front passenger seat, as the four men traveled to the Apartments with Applicant driving. (R. pp. 308-400; 93-103; 58-74; 146-66; 277-92 (Page 293 – Supp. ROA pg. 2); 308-13; 314-63).

The four men arrived shortly before 5:00 p.m., on June 22<sup>nd</sup>, in broad daylight. First, the men drove into the complex briefly and then turned around and left the parking lot. Applicant drove up a nearby paved road and dropped Dover and Studyvance off at a wooded path that led down to the back of the complex and directly to the back door of Victim's girlfriend's apartment. When he got out of the car, Dover was carrying his loaded rifle, a mask, and surgical gloves. Studyvance was still armed with his pistol. Dover left on foot to a location near the Victim's girlfriend's apartment. Studyvance followed Dover. Once at the back of the complex near Victim's girlfriend's apartment, Dover laid in wait for Victim. (R. 93-125; 58-74; 128-42; (page 143 – Supp. ROA page 1); 144-45; 146-66; 177-93; 207-18; 218-44; 245-63; 263-67; 277-92 (Page 293 – Supp. ROA page 2); 314-63; 363-83).

Applicant and Bonner drove back into the complex immediately after dropping off Dover and Studyvance and parked the car near a dumpster. Applicant got out of the car and confronted Victim again, who was walking through the complex on foot. Several witnesses testified to seeing Applicant and Victim have another argument there, Applicant being the instigator, Victim walked away. Applicant got back in his girlfriend's car and he and Bonner sat in the front seat

where they could see Victim. They did not leave. Victim then began walking to his girlfriend's apartment. (R. 58-74; 128-42; (Page 143 – Supp. ROA page 1); 144-66; 177-93; 198-207; 207-18; 219-44; 263-67; 277-92; (Page 293 – Supp. ROA page 2); 308-13; 314-63; 385-400).

While walking, Victim stopped at another female friend's apartment and told her he was afraid for his life. She told Victim to go to his girlfriend's apartment, get his clothes and personal things, return to her apartment, and she would help him get safely out of the complex. Victim left her apartment to get his things. (R. 128-42 (Page 143 – Supp. ROA page 1); 144-45; 207-18; 219-44; 245-63; 263-67; 277-93; 314-63).

Phone records introduced at trial proved between the time Applicant and Bonner pulled into the complex parking lot and parked next to the dumpster and when Victim was killed, there were three phone calls between Applicant and Dover on their cell phones. (R. pp. 58-74; 146-166; 219-244; 245-263; 263-267; 277-292 (Page 293 – Supp. ROA page 2); 314-363; 385-400).

While walking to his girlfriend's apartment, Victim rounded a corner. When he did, Dover shot Victim once through the lungs with the rifle killing him while unarmed. Dover was wearing a mask and gloves when he shot victim. An eyewitness saw Dover, wearing a mask and surgical type gloves carrying a rifle just moments before the fatal shot was fired, lurking around the side of one of the apartment buildings. Police later found a fired 7.62 shell casing near Victim's body at the crime scene. After killing Victim, Dover and Studyvance then fled back up the path through the woods where they had been dropped off earlier by Applicant. An eyewitness saw two men flee from the area of the shooting up the wooded path immediately after the fatal shot was fired. (R. 93-125; 128-42; (Page 143 – Supp. ROA page 1); 144-66; 177-93; 198-267; 270-292; (Page 293 – Supp. ROA page 2); 308-83).

According to Bonner, after Victim was shot, Applicant received a telephone call from

Dover. Applicant and Bonner then left the complex in Applicant's girlfriend's car with Applicant still driving. Applicant drove back to the same location he had dropped Dover and Studyvance out at earlier and picked up Dover and Studyvance, who hurriedly jumped in the back door of the car. As soon as he got in the car, Dover stated to Applicant, "get me out of here fast, get me out of here fast." Applicant asked Dover where he shot Victim, and Dover stated: "in the chest area." Applicant drove the men to Dover's girlfriend's residence. (R. 58-74; 93-125; 128-142; (Page 143 – Supp. ROA page 1); 144-45; 219-63; 270-93; 308-83; 385-400).

Dover's former girlfriend testified Dover then changed clothes in her house and put the clothes he removed in a shoe box. Dover instructed her to call a friend of his to come and pick up the box. The friend complied. The former girlfriend and Dover drove to Westgate Mall and went inside so Dover could set up an alibi for himself. (R. 363-383).

The State proved that Dover's cell phone pinged around the complex at the time of the murder, around his girlfriend's mobile home before the four men left for the complex to commit the crime, and along the path away from the crime scene and back to his girlfriend's home shortly after the crime. (R. 58-74; 363-383; 385-400). Cell tower information also showed Dover's phone pinged along I-85 after leaving his girlfriend's mobile home and arriving at Westgate Mall shortly before 6:00 p.m. (R. 58-74; 363-383; 385-400).

The State relied on accomplice liability [i.e. "the hand of one is the hand of all"] to prove Applicant's guilt because he drove Dover to the scene, knew what Dover was going to do, was complicit and aided and abetted in the murder, and then picked up Dover after the murder. (R. 58-73; 93-142 (Page 143 – Supp. ROA page. 1); 144-166; 176-94; 197-267; 269-92; 308-400; 410-28; 451-69).

### **III. Current Action before the Court**

In his PCR application, Applicant, through Counsel, alleges he is detained unlawfully for the following reasons (excerpts verbatim):

1. Ineffective Assistance of Counsel
  - a. Trial Counsel did not object when trial court charged the jury that it could infer malice from the use of a deadly weapon.

This memorandum is in response to the above issue, as raised at the PCR hearing.

#### IV. Argument

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Effective assistance of counsel does not mean perfect or mistake-free representation. See *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017) (“[A] defendant has a right to effective representation, not a right to an attorney who performs his duties ‘mistake-free.’” (citation omitted)); *Burt v. Titlow*, 571 U.S. 12, 24 (2013) (“[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]”); *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (“The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.”). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show “counsel’s conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense

counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. See also Rule 71.1(e), SCRPC ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690); see *Dunn v. Reeves*, 141 S. Ct. 2405, 2410 (2021) (noting counsel's strategic decisions are to be afforded a 'strong presumption' of reasonableness that the defendant must overcome); *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

The court makes this determination based upon the totality of the evidence. *Id.* at 695.

Importantly, “[t]he likelihood of a different result must be *substantial*, not just conceivable.”

*Harrington v. Richter*, 562 U.S. 86, 112 (2011).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Whether failure to object constitutes deficient performance generally hinges on whether a valid trial strategy was utilized. *See Thompson v. State*, 423 S.C. 235, 241, 814 S.E.2d 487, 490 (2018) (finding Counsel was deficient because the failure to object was not related to an otherwise valid trial strategy); *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (where “counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel”).

Counsel has never been required “to be clairvoyant or anticipate changes in the law which were not existent at the time of trial.” *Gilmore v. State*, 314 S.C. 453, 456, 445 S.E.2d 454, 457 (1994), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999). *See generally e.g. Thornes v. State*, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765-66 (1993) (citations omitted); *Robinson v. State*, 308 S.C. 74, 417 S.E.2d 88 (1992); *Arnette v. State*, 306 S.C. 556, 413 S.E.2d 803 (1992); *Kirkpatrick v. State*, 306 S.C. 359, 412 S.E.2d 389 (1991).

In determining whether a defendant was prejudiced by improper jury instructions, the

court must find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the improper instruction in a way that violates the Constitution. *Battle v. State*, 382 S.C. 197, 203, 675 S.E.2d 736, 740 (2009). The law to be charged must be determined from the evidence presented at trial. *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001).

Here, Counsel was not deficient because *State v. Burdette*<sup>1</sup> was not decided until after this trial was held. Accordingly, the controlling law was *State v. Belcher*,<sup>2</sup> which permitted an implied malice instruction so long as there was no evidence of mitigating circumstances presented. The charge given at Applicant's trial was appropriate at the time and this fact was recognized on direct appeal by Applicant himself. (R. 400-477) (See also FBOA, p. 10, ll. 2-5) ("Trial counsel could not have known that the court [the South Carolina Supreme Court] would rule on this issue mere days after trial. At the time of trial, they were following the jurisprudence laid out in *Belcher* which allowed implied malice, so long as there was no evidence of mitigating circumstances presented. The jury instruction as issued on that day was appropriate."). Counsel is not deficient for failing to object to the jury instruction that were both appropriate at the time and where Counsel never could have anticipated the change in law. *See e.g. Thornes*, 310 S.C. at 309-10, 426 S.E.2d at 765-66 ("[t]his court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of trial."). Counsel acted reasonably in refraining from objecting to good and current law at the time and, accordingly, should not be found deficient.

Furtherance, no prejudice has been established because any alleged error in the

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<sup>1</sup> 427 S.C. 490, 502-03, 832 S.E.2d 575, 582-83 (2019).

<sup>2</sup> 385 S.C. 597, 685 S.E.2d 892 (2009).

instructions was harmless. Respondent submits this is the case for three primary reasons. First, Applicant's case does not present a concern of possible jury confusion because there is no evidence that Applicant was entitled to a lesser-included offense instruction or that a relevant defense, such as self-defense or defense of others, was applicable.

This runs counter to *Burdette*, where there was evidence reducing the crime from murder to voluntary or involuntary manslaughter and instructions on both lesser-included offenses were given. The Supreme Court found in *Burdette* that the instruction there was not harmless because the trial court failed to instruct the jury that voluntary manslaughter was an intentional killing without malice, so it was impossible to tell if the jury relied on the permissive inference or not when it convicted the defendant of voluntary manslaughter. *Id.*

Here, that did not occur. There was no instruction on any lesser-included offense. (R. 451-69). Applicant and his co-defendant Dover either committed murder or they were innocent and no lesser-included offense or defense instructions were requested or given.

Second, the trial judge gave two alternative definitions of "malice" that support a conclusion that the killing was malicious:

Now, each of these defendants is charged with murder. And in order to prove this crime, the State must prove each defendant killed another person with malice aforethought, either expressed or implied.

Malice has been defined as hatred, ill will, hostility to another. It is the intentional doing of a wrongful act without justification or excuse and with an intent to kill that the law will infer an evil intent.

Malice aforethought does not require that malice exists for any particular time before the act is committed, but malice must exist in the mind of the defendant before and at the time the act was committed. Therefore, there must be a combination of previous evil intent and the act itself.

Malice aforethought may be expressed or inferred. These terms expressed and inferred do not mean different kinds of malice, but merely the means and manner

in which malice may be shown to exist. It is either by direct evidence or by inference from the facts and circumstances.

Express malice is shown when a person speaks words which express hatred or ill will for another, or when the person prepared beforehand to do the act which was later accomplished. For example, lying in wait for a person.

Malice is wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong. It is the doing of a wrongful act intentionally without just cause or excuse.

Intent means intending the result which actually occurred and not accidentally or involuntarily.

Intent may be shown by acts and conduct of each defendant and other circumstances from which you may naturally and reasonably infer intent.

Evidence of the character of the act, the character of the instrument used, the manner in which it was used, the purpose to be accomplished and resulting wounds or injuries, may be considered in determining intent.

(R. 459-60).

The above definitions are supported by South Carolina case law. *See, e.g., Margolis v. Telech*, 239 S.C. 232, 238, 122 S.E.2d 417, 419-20 (1961) ("Malice is the deliberate, intentional doing of a wrongful act without just cause or excuse"); *Id.* at 238, 122 S.E.2d at 420 ("Malice 'is implied where it shows a disregard of the consequences of the injurious act, without reference to any special injury which he may inflict on another', and 'in doing some illegal act for one's own gratification or purposes, without regard to the rights of others or the injury he may inflict on another'"); *State v. Murphy*, 86 S.C. 268, 68 S.E. 570, 570 (1910) ("Malice is a term of art, implying wickedness, and excluding a just cause or excuse. It is implied from an unlawful act, willfully done, until the contrary be proved." It has also been defined to be the willful or intentional doing of a wrongful act, without just cause or excuse"); *McBride v. Sch. Dist. of Greenville Cty.*, 389 S.C. 546, 565, 698 S.E.2d 845, 855 (Ct. App. 2010) ("malice is 'the deliberate intentional doing of a wrongful act without just cause or excuse'" (quoting *Eaves v.*

*Broad River Elec. Coop., Inc.*, 277 S.C. 475, 479, 289 S.E.2d 414, 416 (1982) (internal quotation omitted)); *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 437, 629 S.E.2d 642, 649 (2006) (“malice may be implied where the evidence reveals a disregard of the consequences of an injurious act, without reference to any special injury that may be inflicted on another person”); *State v. Young*, 238 S.C. 115, 124-25, 119 S.E.2d 504, 509 (1961), *overruled on other grds*, *State v. Torrence*, 305 S.C. 45, 60-69, 406 S.E.2d 315, 323-28 (1991) (Toal, J., (concurring in result) (abolishing in *favorem vitae* review). *See also, e.g., State v. Cottrell*, 421 S.C. 622, 644, 809 S.E.2d 423, 435 (2017) (finding trial judge properly instructed jurors that malice could be inferred from conduct showing a total disregard for human life); *State v. Oates*, 421 S.C. 1, 20, 803 S.E.2d 911, 921 (Ct. App. 2017)(“Malice can be inferred from conduct [that] is *so reckless and wanton as to indicate a depravity of mind and general disregard for human life*”) (emphasis in original); *State v. Mouzon*, 231 S.C. 655, 662, 99 S.E.2d 672, 675 (1957); *In re Tracy B.*, 391 S.C. 51, 69, 704 S.E.2d 71, 80 (Ct. App. 2010). Each definition above fits the facts of this case because there was both express malice and inferred malice in this case. There were threats made to Victim and there was “lying in wait” for Victim and there was a clear intent to kill or injure Victim. Thus, the instructions given were appropriate and fit the facts of the case.

Third, the charge was harmless because of the facts of this case because the evidence of malice was overwhelming. Therefore, the permissive inference of malice from a deadly weapon instruction was harmless. *See Stanko*, 402 S.C. 252, 264-65, 741 S.E.2d 708, 714-15 (erroneous instruction of permissive inference of malice arising from the use of a deadly weapon was harmless where there was overwhelming evidence of malice and given the entire jury instruction including definition of malice); *State v. Brooks*, 428 S.C. 613, 627-33, 837 S.E.2d 236, 241-44 (Ct. App. 2019)(permissive inference of malice instruction was harmless beyond a reasonable

doubt after considering jury instruction as a whole and other evidence of malice independent of the use of a deadly weapon)(citing *Stanko, supra*).

In short, there was overwhelming evidence of malice and of a premeditated plot to kill or wound Victim. Applicant and co-defendant Dover searched for Victim for several days before finding him under the belief that Victim stole something from them. They had told more than one witness to tell Victim they were looking for him. (R. pp. 93-113; 116-124; 128-133; 308-313). There were threats communicated to Victim heard by witnesses. Applicant dropped the shooter off before and picked up the shooter after the murder. The shooter laid in wait for Victim wearing a mask and gloves. (R. 58-74; 93-125; 128-142; (Page 143 - Supp. ROA page 1); 144; 145; 146-66; 177-193; 198-207; 207-218; 219-244; 245-263; 263-267; 270-76; 277-292; (Page 293 - Supp. ROA page 2); 308-313; 314-363; 363-383; 385-400). The challenged instruction could not have impacted the jury's verdict. *Stanko*, 402 S.C. at 264-65, 741 S.E.2d at 714-15; *Brooks*, 428 S.C. 613, 627-33, 837 S.E.2d 236, 241-44. Because there was overwhelming evidence, the result at trial and on direct appeal was not impacted by the instructions given, even if the Court finds them erroneous. Applicant still would have been found guilty at trial had different instructions been given. The Court had no duty to provide different instructions because they were legally correct at the time. Additionally, Applicant would not have met his burden of proof on direct appeal because of the overwhelming evidence, rendering the same result as was reached, even if the issue was preserved. Accordingly, no prejudice has been established and relief should be denied on this ground.

V. Conclusion

WHEREFORE, Respondent requests that the Court deny relief in Mr. Fosters PCR matter.

Respectfully submitted,

ALAN WILSON  
Attorney General

W. JEFFREY YOUNG  
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON  
Senior Assistant Deputy Attorney General

CHELSEY F. MARTO  
Assistant Attorney General

By: /s Chelsey F. Marto  
ATTORNEYS FOR RESPONDENT

Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
Telephone: (803) 734-0386

November 4, 2022

**Macie Cashion**

---

**From:** Macie Cashion  
**Sent:** Tuesday, November 08, 2022 2:19 PM  
**To:** 'ChelseyMarto@scag.gov'  
**Cc:** 'Jordan Hickman'  
**Subject:** Foster Order  
**Attachments:** 22.261.pdf

Good afternoon,

I have attached a clocked Order for Rajshun Foster for your records. thank you!

**Macie Cashion**

Cherokee County Clerk of Court Office  
Civil Clerk/Jury Coordinator  
864-487-2571  
P.O. Box 2289  
Gaffney, SC 29340



ALAN WILSON  
ATTORNEY GENERAL

November 4, 2022

The Honorable Brandy W. McBee  
Clerk of Court - Cherokee County  
PO Drawer 2289  
Gaffney, SC 29342-2289

**Re: Rajshun Foster, #320680 v. State of South Carolina**  
**2022-CP-11-0261**

Dear Ms. McBee:

Enclosed please find an original of the Respondents Post- Trial Memorandum of Law in the above-captioned case for filing in your office.

Sincerely,

Chelsey F. Marto  
Assistant Attorney General

CFM/jbh  
Enclosure

cc: Tommy A Thomas, Esquire  
The Honorable Brian M. Gibbons

FILED IN OFFICE OF  
CLERK OF COURT  
CHEROKEE COUNTY, S.C.  
2022 NOV - 7 AM 11:54  
BRANDY W. MCBEE

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHEROKEE )

IN THE COURT OF COMMON PLEAS  
FOR THE SEVENTH JUDICIAL CIRCUIT

Rajshun Foster, #320680, )  
Applicant, )  
 )  
vs. )  
 )  
State of South Carolina, )  
Respondent. )

Case No. 2022-CP-11-0261

Applicant's Post-Trial  
Memorandum of Law

FILED IN OFFICE OF  
CLERK OF COURT  
CHEROKEE COUNTY, S.C.  
2022 NOV 14 PM 1:21  
BRANDY W. MCBEE

Comes now Applicant submitting his post-trial memorandum of law following the evidentiary hearing held October 18, 2022 regarding Rajshun Foster's post-conviction relief application filed April 14, 2022.

#### Statement of the Case

Foster ("Applicant") was indicted for murder (Indictment 2014-0878, which became case number 2014-GS-11-00878). Applicant and a co-defendant, Franklin Pierre Dover, proceeded to trial before a jury and the Honorable R. Keith Kelly July 15-17, 2019. Applicant was represented by Tracy Racine, Esquire. Both men were found guilty of murder, with Applicant sentenced to 35 years' imprisonment. Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Cherokee County Clerk of Court.

Applicant filed a timely Notice of Appeal on July 26, 2019 with the Cherokee County Clerk of Court. Ms. Racine had served opposing trial counsel the day prior (July 25, 2019). Unfortunately, the notice of appeal was not properly filed with this court. Undersigned counsel filed a motion to file belated appeal on September 11, 2019 that was unopposed by the State. The request was granted by this court on September 25, 2019.

A brief was filed by the undersigned attorney on September 16, 2019, with the following issue: "The circuit court erred, as a matter of law, in instructing the jury it could infer malice from

the use of a deadly weapon.” After briefing, the Court of Appeals dismissed Applicant’s appeal via an unpublished opinion that held the issue was not preserved on appeal. *State v. Foster*, 2022-UP-057 (S.C. Ct. App., filed Feb. 9, 2022). Remittitur issued February 25, 2022.

### **Statement of Facts**

On June 22, 2014, Timothy Blair (“Victim”), also known as “Slick,” was shot and killed in the Connecticut Village Apartments in Gaffney, Cherokee County, South Carolina. The State alleged that four individuals were involved in the crime – Applicant, Rajshun Foster, also known as “Fawlk;” Franklin Dover, also known as “Gwap;” Terence Studyvance, also known as “T;” and Antron Bronner, also known as “Red.” Allegedly, Applicant, while driving his girlfriend’s car, dropped off Dover and Studyvance at a wooded path that led to the apartment complex. There, Dover laid in wait for Victim. While Dover waited, Applicant went into the complex and began socializing with friends. Several witnesses testified to seeing Applicant and Victim have a verbal altercation, then Victim walked to his ex-girlfriend’s apartment where he was shot once through the lungs.

The State relied on an accomplice liability or “hand of one, hand of all” theory to charge Applicant with murder. Because, it alleged, Applicant drove Dover to the scene, knew Dover was armed, and picked him up after, he is complicit in this murder. However, there were no eyewitnesses to the shooting, no DNA evidence, no fingerprints, no confessions, and no one who could affirmatively state that any of these men caused Victim’s death.

### **Current PCR Application**

Applicant alleges that he is entitled to a new trial because he received ineffective assistance of counsel due to trial counsel’s failure to object when the court charged the jury that it could infer

malice from the use of a deadly weapon. This memorandum provides further insight and argument into this allegation.

### Argument

By and large, Applicant does not disagree with Respondent's description of the case law regarding effective representation and the standards associated therewith. However, Applicant avers that the majority of this is an attempt to screen this court from the ultimate issue – that evidence adduced at the PCR hearing, notably defense counsel's own testimony, showed a clear lack of knowledge on the standard of law at the time and a failure to notice and react to changes in the law.

The basic issue is whether defense counsel, by failing to object to a jury charges regarding implied malice with use of a deadly weapon, provided ineffective assistance of counsel. As a corollary, did this ineffective assistance continue when she did not learn about this change in law and make steps to remedy it. As Respondent notes, during Applicant's trial, *State v. Belcher*<sup>1</sup> was the controlling case regarding implied malice when a deadly weapon is used. A part of this consideration was whether there were mitigating circumstances presented.

As a career defense attorney, Ms. Racine should have been very familiar with *Belcher*, its requirements, and its workarounds, as this case tended to work against many defendants. Instead, her testimony at the hearing in this action was that she was simply unaware of *Belcher* and, therefore, did not object. Respondent goes into theories about why a failure to object is harmless, the first being that there is no evidence Applicant was entitled to a lesser-included offense instruction or that another relevant defense was applicable. Had Ms. Racine even *known* about *Belcher*, she may have worked harder to find these defenses. For example, if Applicant was only

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<sup>1</sup> 385, S.C. 597, 685, S.E.2d 892 (2009).

the driver, perhaps a mere presence defense should have been explored. Having a viable defense combined with the knowledge that the existence of a gun did not mandate malice should have been explored.<sup>2</sup> Similarly, an appropriate lesser-included charge could have been explored due to Applicant's lack of hands-on involvement in the crime.

In the same vein, Respondent argues that evidence of malice was found in other ways and bolstered by other case law. Again, this does not directly point to Applicant. There was malice in the underlying crime, of which Applicant was convicted via accomplice liability. There is no evidence that Applicant had a gun, pulled the trigger, or was anything more than merely present during the crime. Again, had Ms. Racine been aware of the importance of malice and the many ways for it to be determined, she would have been more cognizant of the ramifications of a jury charge in line with *Belcher*.

As the State notes, a failure to object can constitute deficient performance if a valid strategy was not utilized. *See Thompson v. State*, 423 S.C. 235, 241, 814 S.E.2d 487, 490 (2018) (finding counsel was deficient because the failure to object was not related to an otherwise valid trial strategy); *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (where "counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel"). Here, there was no strategy. Ms. Racine let a case that is well-known for being troublesome to defendants go right past her throughout the trial and at the time of jury instruction instead of working in any way to help her client's exposure. This is clearly prejudicial and most certainly would have changed the outcome of Applicant's trial.

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<sup>2</sup> Applicant is aware that the failure to raise viable defenses is not formally alleged in his application; however, this was used for purposes of an example to refute Respondent's points.

Certainly, Applicant does not submit that Ms. Racine should have known about *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019), or the imminent release of that opinion. However, she should have seen the Advance Sheet that issued mere days after the notice of appeal was filed. At that point in time, Ms. Racine was within the ten day window to file a motion for reconsideration or other post-trial motion seeking relief based on the clear break in law. Though it would not have been a contemporaneous objection, it would have at least shown an effort on her part to knowledgeably and zealously represent her client.

Lastly, though the Court of Appeals dismissed this case without argument, its order implies that they may have been inclined to grant relief on the issue had it been preserved. Again, any objection about the propriety or validity of a *Belcher* charge could have protected Applicant. The Court emphasized that all cases decided before *Burdette* but still on review would be affected by the change, “so long as the issue was preserved.” It was Ms. Racine’s failure to know about the issue and apply the knowledge to the facts at hand that caused her to ineffectively represent Applicant. As such, Applicant’s conviction must be vacated and returned for further proceedings.

Respectfully submitted,

TOMMY A. THOMAS

Bar No.: 005536

Post Office Box 88

Irmo, SC 29063

(803) 732-5507

jackie@paroleme.com

By:

Attorney for Applicant

November 10, 2022  
7588 Woodrow Street  
Irmo, South Carolina 29063

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHEROKEE )  
  
Rajshun Foster, #320680, )  
Applicant, )  
 )  
vs. )  
 )  
State of South Carolina, )  
Respondent. )

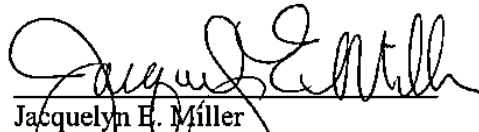
IN THE COURT OF COMMON PLEAS  
FOR THE SEVENTH JUDICIAL CIRCUIT

Case No. 2022-CP-11-0261

**Certificate of Service**

FILED IN OFFICE OF  
CLERK OF COURT  
CHEROKEE COUNTY, S.C.  
2022 NOV 14 PM 1:21  
BRANDY W. MCBEE

I, Jacquelyn E. Miller, paralegal to Tommy A. Thomas, Attorney for the Appellant hereby certify that pursuant to an Order of the Supreme Court dated March 20, 2020 regarding Operation of the Appellate Courts During the Coronavirus Emergency, I email a copy of Applicant's Post-Trial Memorandum of Law to Chelsey Marto, Esq., at the Office of the Attorney General, to [ChelseyMarto@scag.gov](mailto:ChelseyMarto@scag.gov) and to The Honorable Brian Gibbons at [bgibbons@sccourts.org](mailto:bgibbons@sccourts.org) and [bgibbonslc@sccourts.org](mailto:bgibbonslc@sccourts.org)

  
Jacquelyn E. Miller  
TOMMY A. THOMAS, Esq.  
Bar No.: 005536  
Post Office Box 88  
Irmo, SC 29063  
(803) 732-5507

November 9, 2022



November 9, 2022

Cherokee County Clerk of Court  
Court of Common Pleas  
125 E. Floyd Baker Blvd., Ste. 1  
Gaffney, SC 29340

RE: Rajshun Bernard Foster #320680 v. State  
Case No.: 2022-CP-11-0261

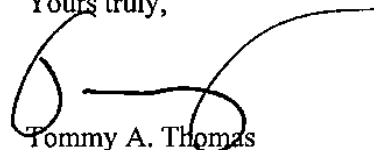
FILED IN OFFICE OF  
CLERK OF COURT  
CHEROKEE COUNTY, S.C.  
2022 NOV 14 PM 1:21  
BRANDY W. MCBEE

Dear Sir or Madam:

Enclosed please find for filing an original and a copy of Applicant's Post-Trial Memorandum of Law along with a Certificate of Service.

Kindly return the clocked copies to me in the enclosed envelope. Thank you.

Yours truly,



Tommy A. Thomas  
Attorney at Law

TAT/jem

cc: The Honorable Brian M. Gibbons - Email  
Chelsey F. Marto, Esq. - Email

TOMMY A. THOMAS, P.C.  
803 732 5507 | FAX 803 781 4226 | INMATE LINE 803 732 6542  
HARRINGTON BUILDING, 7588 WOODROW STREET, IRMO, SC 29063  
MAIL: P.O. BOX 88, IRMO, SC 29063

**FORM 4**

**STATE OF SOUTH CAROLINA  
COUNTY OF CHEROKEE  
IN THE COURT OF COMMON PLEAS**

**JUDGMENT IN A CIVIL CASE  
CASE NUMBER 2022CP1100261**

|                               |  |                                |  |
|-------------------------------|--|--------------------------------|--|
| <b>Rajshun Bernard Foster</b> |  | <b>State Of South Carolina</b> |  |
|-------------------------------|--|--------------------------------|--|

|                      |                                                                                                                                                  |
|----------------------|--------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>PLAINTIFF(S)</b>  | <b>DEFENDANT(S)</b>                                                                                                                              |
| <b>Submitted by:</b> | <b>Attorney for:</b> <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant<br><input type="checkbox"/> Self-Represented Litigant |

**DISPOSITION TYPE (CHECK ONE)**

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);  
☐ Rule 43(k), SCRPC (Settled); ☐ Other: \_\_\_\_\_
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;  
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: \_\_\_\_\_
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:** ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court

**ORDER INFORMATION**

**This order** ☒ ends ☐ does not end the case.

Additional Information for the Clerk: \_\_\_\_\_

**INFORMATION FOR THE JUDGMENT INDEX**

**Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.**

| <b>Judgment in Favor of<br/>(List name(s) below)</b> | <b>Judgment Against<br/>(List name(s) below)</b> | <b>Judgment Amount To be Enrolled<br/>(List amount(s) below)</b> |
|------------------------------------------------------|--------------------------------------------------|------------------------------------------------------------------|
| N/A                                                  |                                                  |                                                                  |
|                                                      |                                                  |                                                                  |
|                                                      |                                                  |                                                                  |

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

**Note: Title abstractors and researchers should refer to the official court order for judgment details.**

**E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.**

S/Brian M. Gibbons

2168

3/31/2023

**Circuit Court Judge**

**Judge Code**

**Date**

**For Clerk of Court Office Use Only**

This judgment was entered on 03/31/2023, and a copy mailed first class or placed in the appropriate attorney's box on 03/31/2023, to attorneys of record or to parties (when appearing pro se) as follows:

CPFORM4Cm

SCCA SCRPC Form 4C (Revised 2/17)

Rajshun Bernard Foster  
Tommy Arthur Thomas PO Box 88 Irmo, SC 29063

State Of South Carolina

---

ATTORNEY(S) FOR THE PLAINTIFF(S)

---

ATTORNEY(S) FOR THE DEFENDANT(S)

*Brandy W. McBee*

Court Reporter

Brandy W. McBee - Clerk of Court

---

**Court Reporter:**

**E-Filing Note:** In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA )  
COUNTY OF CHEROKEE )  
)  
)

Rajshun Foster, #320680, )  
Applicant, )  
)  
)

v. )  
)  
)  
)

State of South Carolina, )  
Respondent. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
FOR THE SEVENTH JUDICIAL CIRCUIT

Case No. 2022-CP-11-0261

**ORDER OF DISMISSAL**

FILED IN OFFICE OF  
CLERK OF COURT  
CHEROKEE COUNTY, S.C.  
2023 MAR 31 A 10:42  
BRANDY W. MCBE

This matter comes before this Court by way of Applicant's post-conviction relief application filed April 14, 2022. Respondent made its return on June 2, 2022, requesting an evidentiary hearing be convened. An evidentiary hearing was held on October 18, 2022, at the Spartanburg County Courthouse. Tommy A. Thomas, Esquire, represented Applicant. Assistant Attorney General Chelsey F. Marto represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Counsel Tracy Racine, Esquire, also testified. After reviewing all records and evidence before this Court, this Court finds Applicant cannot meet his requisite burden of proof of establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice. Findings of fact and conclusions of law are set forth below.

#### Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Cherokee County Clerk of Court. During its September 2014 term, the Cherokee County Grand Jury indicted Applicant for murder (2014-GS-11-00878).

Applicant was represented by Tracy Racine, Esquire. Deputy Solicitor Kim Leskanic of the Seventh Circuit Solicitor's Office prosecuted the case. On July 15-17, 2019, Applicant proceeded to trial before the Honorable R. Keith Kelly, circuit court judge, and a jury, where he

FILED  
2023 MAR 29 9:25  
CLERK OF COURT  
CHEROKEE COUNTY  
VOID CLOKED IN ERROR





One eyewitness saw Dover armed with a rifle, standing in the doorway of his vehicle, when he made the verbal threat that he would get Victim one way or the other. (R. 177-93; 146-66; 198-207; 207-18; 263-67; 277-92 (Page 293 – Supp. ROA pg. 2); 308-13).

Applicant and Dover both left the complex in their respective vehicles and drove to a nearby mobile home park where Dover lived with his girlfriend. The two men talked to Studyvance (aka "T") in front of one of the homes. Terrance Bonner (aka "Red") walked up and saw the three men conversing. Bonner asked if anyone knew where they could get some marijuana, and Applicant said yes, to come with them to the complex. Applicant, Bonner, Studyvance, and Dover got in Applicant's girlfriend's car and headed to the complex. Before getting in the car, Dover got his rifle and at least one surgical-type glove out of his own car and got in the back of Applicant's girlfriend's car where Bonner was seated. Studyvance was also armed with a pistol, seated in the front passenger seat, as the four men traveled to the Apartments with Applicant driving. (R. pp. 308-400; 93-103; 58-74; 146-66; 277-92 (Page 293 – Supp. ROA pg. 2); 308-13; 314-63).

The four men arrived shortly before 5:00 p.m., on June 22<sup>nd</sup>, in broad daylight. First, the men drove into the complex briefly and then turned around and left the parking lot. Applicant drove up a nearby paved road and dropped Dover and Studyvance off at a wooded path that led down to the back of the complex and directly to the back door of Victim's girlfriend's apartment. When he got out of the car, Dover was carrying his loaded rifle, a mask, and surgical gloves.

Studyvance was still armed with his pistol. Dover left on foot to a location near the Victim's girlfriend's apartment. Studyvance followed Dover. Once at the back of the complex near Victim's girlfriend's apartment, Dover laid in wait for Victim. (R. 93-125; 58-74; 128-42; (page 143 Supp. ROA page 1); 144-45; 146-66; 177-93; 207-18; 218-44; 245-63; 263-67; 277-92



FILED  
MAR 29 AM 9:25  
CLERK OF COURT  
ALABAMA  
JOHN W. BOYD  
VOID CLOCKED IN ERROR

(Page 293 – Supp. ROA page 2); 314-63; 363-83).

Applicant and Bonner drove back into the complex immediately after dropping off Dover and Studyvance and parked the car near a dumpster. Applicant got out of the car and confronted Victim again, who was walking through the complex on foot. Several witnesses testified to seeing Applicant and Victim have another argument there, Applicant being the instigator, Victim walked away. Applicant got back in his girlfriend's car and he and Bonner sat in the front seat where they could see Victim. They did not leave. Victim then began walking to his girlfriend's apartment. (R. 58-74; 128-42; (Page 143 – Supp. ROA page 1); 144-66; 177-93; 198-207; 207-18; 219-44; 263-67; 277-92; (Page 293 – Supp. ROA page 2); 308-13; 314-63; 385-400).

While walking, Victim stopped at another female friend's apartment and told her he was afraid for his life. She told Victim to go to his girlfriend's apartment, get his clothes and personal things, return to her apartment, and she would help him get safely out of the complex. Victim left her apartment to get his things. (R. 128-42 (Page 143 – Supp. ROA page 1); 144-45; 207-18; 219-44; 245-63; 263-67; 277-93; 314-63).

Phone records introduced at trial proved between the time Applicant and Bonner pulled into the complex parking lot and parked next to the dumpster and when Victim was killed, there were three phone calls between Applicant and Dover on their cell phones. (R. pp. 58-74; 146-166; 219-244; 245-263; 263-267; 277-292 (Page 293 – Supp. ROA page 2); 314-363; 385-400).

While walking to his girlfriend's apartment, Victim rounded a corner. When he did, Dover shot Victim once through the lungs with the rifle killing him while unarmed. Dover was wearing a mask and gloves when he shot victim. An eyewitness saw Dover, wearing a mask and surgical type gloves carrying a rifle just moments before the fatal shot was fired, lurking around the side of one of the apartment buildings. Police later found a fired 7.62 shell casing near



Victim's body at the crime scene. After killing Victim, Dover and Studyvance then fled back up the path through the woods where they had been dropped off earlier by Applicant. An eyewitness saw two men flee from the area of the shooting up the wooded path immediately after the fatal shot was fired. (R. 93-125; 128-42; (Page 143 – Supp. ROA page 1); 1446-66; 177-93; 198-267; 270-292; (Page 293 – Supp. ROA page 2); 308-83).

According to Bonner, after Victim was shot, Applicant received a telephone call from Dover. Applicant and Bonner then left the complex in Applicant's girlfriend's car with Applicant still driving. Applicant drove back to the same location he had dropped Dover and Studyvance out at earlier and picked up Dover and Studyvance, who hurriedly jumped in the back door of the car. As soon as he got in the car, Dover stated to Applicant, "get me out of here fast, get me out of here fast." Applicant asked Dover where he shot Victim, and Dover stated: "in the chest area." Applicant drove the men to Dover's girlfriend's residence. (R. 58-74; 93-125; 128-142; (Page 143 – Supp. ROA page 1); 144-45; 219-63; 270-93; 308-83; 385-400).

Dover's former girlfriend testified Dover then changed clothes in her house and put the clothes he removed in a shoe box. Dover instructed her to call a friend of his to come and pick up the box. The friend complied. The former girlfriend and Dover drove to Westgate Mall and went inside so Dover could set up an alibi for himself. (R. 363-383).

The State proved that Dover's cell phone pinged around the complex at the time of the murder, around his girlfriend's mobile home before the four men left for the complex to commit the crime, and along the path away from the crime scene and back to his girlfriend's home shortly after the crime. (R. 58-74; 363-383; 385-400). Cell tower information also showed

Dover's phone pinged along I-85 after leaving his girlfriend's mobile home and arriving at Westgate Mall shortly before 6:00 p.m. (R. 58-74; 363-383; 385-400).



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The State relied on accomplice liability [i.e. “the hand of one is the hand of all”] to prove Applicant’s guilt because he drove Dover to the scene, knew what Dover was going to do, was complicit and aided and abetted in the murder, and then picked up Dover after the murder. (R. 58-73; 93-142 (Page 143 – Supp. ROA page. 1); 144-166; 176-94; 197-267; 269-92; 308-400; 410-28; 451-69).

### Current Action Before this Court

In his current PCR application, Applicant alleges he is being held in custody unlawfully because of ineffective assistance of counsel in that:

1. Ineffective Assistance of Counsel
  - a. Trial Counsel did not object when trial court charged the jury that it could infer malice from the use of a deadly weapon.

At the PCR hearing, Applicant proceeded forward on the following allegations:

1. Ineffective Assistance of Counsel
  - a. Brevity of time in consultation.
  - b. Failure to secure a plea offer that did not involve cooperating with the State.
  - c. Failure to create a defense at trial.
  - d. Failure to review all discovery with Applicant.
  - e. Failure to hire a private investigator.
  - f. Failure to sequester trial.
  - g. For telling Applicant not to testify.
  - h. Failure to discuss mere presence and hand of one hand of all.
  - i. Failure to discuss lesser-included offenses and failure to request a jury instruction on these offenses.
  - j. Failure to object to jury instructions regarding inferring malice from use of a deadly weapon.

All other allegations raised in his initial application and amendments are deemed waived and abandoned and, accordingly, will not be addressed in this order.

### Summary of the Testimony

#### *Applicant Testimony*

Applicant testified that he was incarcerated for murder. He stated he filed a PCR application. He stated he knew the relief available. He stated he was represented by Counsel. He



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stated he is serving a thirty-five-year sentence, day for day. He stated he was incarcerated for five to six months before making bond. He stated he was out on bond for about five years without being re-arrested.

He stated he had three co-defendants. He stated that two co-defendants went home, and he and Dover were sent to prison. He stated his first trial resulted in a hung jury. He stated that the retrial was about a month and a half after the first trial. He stated he wanted to know why there was a mistrial.

He stated that he met with Counsel two to three times. He stated he only met with Counsel when he also was meeting with the prosecutor regarding potential cooperations with the State. He stated he did not cooperate because he did not know what happened. He stated he was told to point the finger at Dover like Bonner did. He stated that to do this, he would have to lie. He stated he did not have a weapon. He stated he did not have a trial defense. He stated that he was found guilty based upon hand of one hand of all, even though two co-defendants went home. He stated that one co-defendant went home because he cooperated and the other was found not guilty at the first trial.

He stated that he only saw witness statements in his discovery; not the gunshot residue results. He stated there was not a private investigator working on this case. He stated he wanted his trial sequestered.

He stated he was offered two plea offers but he declined them. He stated the first offer was straight up to murder and the second was fifteen years' imprisonment in exchange for his cooperation with the State. He stated that Counsel told him not to testify because cross-examination would be damning. He stated that his prior record is not bad, but it exists. He stated he understood he had a right not to testify.

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He stated that he did not discuss the defense of mere presence with Counsel. He stated he only went to the complex to hang out with friends. He stated that multiple witnesses identified him, but he had no reason to hurt the victim. He stated he did not know about the issues between Dover and victim. He stated that they did not discuss lesser-included offenses. He denied driving the car and asking Dover where he shot Victim.

He stated that he filed an appeal and the Court found that the issue raised on appeal was not preserved. He stated he did not know why the appeal was denied.

#### ***Counsel Testimony***

Counsel testified that she represented Applicant on his murder charge. She stated she met with Applicant seven times, starting in August 2014. She stated Applicant did not have a working phone number for a while. She stated she went to the scene to talk to people. She stated that the State generally does not make offers before hearing the testimony. She stated that the defense was that Applicant did not know about the weapon and he was only there to buy weed. She stated the mistrial occurred because one juror refused to convict. She stated that Dover was the primary target. She stated that she did not think sequestered trials would be beneficial. She stated she did not recall discussing sequestered trials. She stated that Applicant was offered a deal involving cooperating with the State, but nothing specific regarding sentencing was mentioned. She stated she knew PCR Counsel was hired to handle the appeal. She stated that she did not object to the jury instruction which served as the issue on appeal because what was stated was proper law at the time.

#### **Findings of Fact and Conclusions of Law**

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. Before this Court are Applicant's



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Cherokee County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the direct appeal records, the trial transcript, and the current PCR application. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by South Carolina Code Annotated Section 17-27-80 (2003).

### *Ineffective Assistance of Counsel*

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. *See also* Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence.").

Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the

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scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel’s performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually “countless” ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel’s deficient performance must have prejudiced the applicant so that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Cherry*, 300 S.C. at 117-18. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters “only in the rarest case” because “[t]he likelihood of a different result must be substantial, not just conceivable.” *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

#### *Brevity of Time*

Applicant alleges that Counsel was ineffective for failure to communicate with Applicant

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enough. “[B]revity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation.” *Smith v. State*, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (2012). Applicant must show evidence indicating “how additional preparation or communication would have resulted in a different outcome.” *Id.* See *Jackson v. State*, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) (where application failed to show ineffective assistance of counsel based on lack of preparation by neglecting to show evidence of what counsel failed to discover or what defenses counsel could have pursued had he more fully prepared for the case); *Skeen v. State*, 325 S.C. 210, 214-15, 481 S.E.2d 129, 132 (1997) (where applicant failed to show ineffective assistance of counsel when he did not present evidence showing how additional preparation would have impacted the trial).

Applicant has failed to establish how additional communication would have resulted in a different outcome at trial. Applicant has failed to meet his burden of proof and relief is denied accordingly.

#### ***Failure to Secure Plea Offer***

Applicant claims Counsel was ineffective for failure to procure a plea offer that did not require he cooperate with the State. “Prosecutors have broad powers in the plea bargain process[.]” *Reed v. Becka*, 333 S.C. 676, 684, 511 S.E.2d 396, 400 (Ct. App. 1999). See *Collins v. State*, 422 S.C. 250, 261, 810 S.E.2d 871, 877 (2018) (“[T]he decision whether to revive the expired plea offer rested exclusively with the solicitor.”); *State v. Langford*, 400 S.C. 421, 436 n.6, 735 S.E.2d 471, 479 n.6 (2012) (stating “[u]ndoubtedly, the solicitor has discretion in choosing how to proceed with a case, including whether to prosecute in the first place and whether he brings it to trial or offers a plea bargain”); see also *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977) (finding “there is no constitutional right to plea bargain; the prosecutor need not



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“Prosecutors may pursue a case to trial, or they may plea bargain it down to a lesser offense, or they can simply decide not to prosecute the offense in its entirety.” *Reed*, 333 S.C. at 684, 511 S.E.2d at 400-01. “The Judicial Branch is not empowered to infringe on the exercise of this prosecutorial discretion; however, on occasion, it is necessary to review and interpret the results of the prosecutor’s actions.” *Id.* Yet, plea offers must be analyzed within the bounds of judicial restraint. *Id.*

Applicant is not entitled to a plea offer of his choosing and the State is not required to produce one. Accordingly, relief is denied on this ground.

**Trial Defense**

Applicant claims Counsel was ineffective for failure to prepare a trial defense. Whether failure to assert a defense constitutes deficient performance ultimately hinges on whether failure



to explore the decision was a strategic decision. *Strickland*, 466 U.S. at 680. If there is only one line of defense, counsel must conduct a “reasonably substantial investigation” into that line of defense. *Id.* (quoting *Washington v. Strickland*, 693 F.2d at 1252). However, if there are several lines of defense, counsel may still be effective even if every single line is not explored. *Id.* “[W]hen counsel's assumptions are reasonable given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions, counsel need not investigate lines of defense that he has chosen not to employ at trial.” *Id.* at 681 *Id.* (quoting *Washington v. Strickland*, 693 F.2d at 1255). Further, “[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect.” *Yarborough*, 540 U.S. at 5 (citing *Strickland*, 466 U.S. at 690).

Regarding failure to alert the Applicant of a defense specifically, Counsel will not be found ineffective if there was inadequate evidence to support the defense, if the defense did not exist at the time of trial, or another avenue of defense existed. *See McCray v. State*, 317 S.C. 557, 455 S.E.2d 686 (1995) (stating that failure to state an entrapment defense was not ineffective when the applicant denied any wrongdoing); *Arnette v. State*, 306 S.C. 556, 413 S.E.2d 803 (1992) (stating that failing to inform of a defense was not ineffective when there was no evidence at trial that supported the defense); *Robinson v. State*, 308 S.C. 361, 417 S.E.2d 361, 417 S.E.2d 88 (1992) (stating that Counsel was not ineffective when failing to state a defense that was not recognized by the Court until six years later and was just recently acknowledged by the scientific community).

This Court finds Counsel's approach at trial was reasonable. Applicant failed to present an alternate defense that would have changed the result at trial. Accordingly, relief is denied.

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Applicant claims Counsel was ineffective for failing to review discovery. This Court finds this not credible. Further, Applicant has failed to meet his burden of proving prejudice on this ground because he has not pointed to any discovery specifically that would have changed the outcome at trial. Accordingly, relief is denied.

Applicant claims Counsel was ineffective for failure to hire a private investigator. Applicant has failed to show what evidence, if any, the investigator would have uncovered or how it would have impacted the results at trial. Accordingly, Applicant has not met his burden of proof and relief is denied accordingly.

Applicant claims Counsel was ineffective for failure to move to sequester the trial. Counsel credibly testified that she did not think a sequestered trial would have made a different concerning the results of the proceedings. Accordingly, relief is denied on this ground.

Applicant alleges Counsel was ineffective for discouraging Applicant from testifying.

“The decision to testify or not is a perilous one. If a defendant does not testify, he foregoes the opportunity to tell the jury his version of events. However, if a defendant chooses to testify, he subjects himself to cross-examination, including possible impeachment with prior convictions.” *Brown v. State*, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000). “If a defendant chooses not to take the stand in his own defense, the trial judge must, if requested, instruct the jury that the defendant’s failure to testify cannot be held against him or considered by the jury in any manner during its deliberations.” *Id.* “A defendant’s decision to testify or not must be made with

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*Battle v. State*, 382 S.C. 197, 203, 675 S.E.2d 736, 740 (2009). The law to be charged must be determined from the evidence presented at trial. *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001).

This Court interprets this allegation to mean Applicant wanted communication about and a jury instruction on voluntary manslaughter. “Voluntary manslaughter is the unlawful killing of a human being in the sudden heat of passion upon sufficient legal provocation.” *State v. Cooley*, 342 S.C. 63, 67, 536 S.E.2d 666, 668 (2000). “Both heat of passion and sufficient legal provocation must be present at the time of the killing.” *Id.* “The provocation must be such as to render the mind of an ordinary person incapable of cool reflection and produce an uncontrollable impulse to do violence.” *Id.* “[B]oth heat of passion and sufficient legal provocation must be present at the time of the killing.” *State v. Starnes*, 388 S.C. 590, 596, 698 S.E.2d 604, 608 (2010).

Counsel was not ineffective for failing to inform Applicant and request jury instructions on lesser-included offenses, voluntary manslaughter included. There is no evidence in the record to support the idea that the murder was carried out in a heat of passion upon sufficient legal provocation. Instead, the facts reflect a drawn-out, pre-meditated plot to kill the victim. Counsel is not deficient for failing to educate Applicant or request instructions on an inapplicable ground. Additionally, Applicant suffered no prejudice for not being told of the lesser-included offenses. Applicant also suffered no prejudice for Counsel’s failure request inapplicable jury instructions, as they would not have been given if requested. Accordingly, relief is denied.

#### ***Failure to Object to Jury Instructions***

Applicant claims Counsel was ineffective for failure to object to the jury instructions stating that the jury could infer malice from use of a deadly weapon. Whether failure to object

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constitutes deficient performance generally hinges on whether a valid trial strategy was utilized. See *Thompson v. State*, 423 S.C. 235, 241, 814 S.E.2d 487, 490 (2018) (finding Counsel was deficient because the failure to object was not related to an otherwise valid trial strategy); *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (where “counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel”).

Counsel has never been required “to be clairvoyant or anticipate changes in the law which were not existent at the time of trial.” *Gilmore v. State*, 314 S.C. 453, 456, 445 S.E.2d 454, 457 (1994), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999). See generally e.g. *Thornes v. State*, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765-66 (1993) (citations omitted); *Robinson v. State*, 308 S.C. 74, 417 S.E.2d 88 (1992); *Arnette v. State*, 306 S.C. 556, 413 S.E.2d 803 (1992); *Kirkpatrick v. State*, 306 S.C. 359, 412 S.E.2d 389 (1991).

In determining whether a defendant was prejudiced by improper jury instructions, the court must find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the improper instruction in a way that violates the Constitution. *Battle v. State*, 382 S.C. 197, 203, 675 S.E.2d 736, 740 (2009). The law to be charged must be determined from the evidence presented at trial. *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001).

Here, Counsel was not deficient because *State v. Burdette*<sup>1</sup> was not decided until after this trial was held. Accordingly, the controlling law was *State v. Belcher*,<sup>2</sup> which permitted an

<sup>1</sup> 427 S.C. 490, 502-03, 832 S.E.2d 575, 582-83 (2019).  
<sup>2</sup> 385 S.C. 597, 685 S.E.2d 892 (2009).



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implied malice instruction so long as there was no evidence of mitigating circumstances presented. The charge given at Applicant's trial was appropriate at the time and this fact was recognized on direct appeal by Applicant himself. (R. 400-477) (See also FBOA, p. 10, ll. 2-5) ("Trial counsel could not have known that the court [the South Carolina Supreme Court] would rule on this issue mere days after trial. At the time of trial, they were following the jurisprudence laid out in *Belcher* which allowed implied malice, so long as there was no evidence of mitigating circumstances presented. The jury instruction as issued on that day was appropriate."). Counsel is not deficient for failing to object to the jury instruction that were both appropriate at the time and where Counsel never could have anticipated the change in law. See e.g. *Thornes*, 310 S.C. at 309-10, 426 S.E.2d at 765-66 ("[t]his court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of trial."). Counsel acted reasonably in refraining from objecting to good and current law at the time and, accordingly, should not be found deficient.

Furtherance, no prejudice has been established because any alleged error in the instructions was harmless. This is the case for three primary reasons. First, Applicant's case does not present a concern of possible jury confusion because there is no evidence that Applicant was entitled to a lesser-included offense instruction or that a relevant defense, such as self-defense or defense of others, was applicable.

This runs counter to *Burdette*, where there was evidence reducing the crime from murder to voluntary or involuntary manslaughter and instructions on both lesser-included offenses were given. The Supreme Court found in *Burdette* that the instruction there was not harmless because

the trial court failed to instruct the jury that voluntary manslaughter was an intentional killing

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without malice, so it was impossible to tell if the jury relied on the permissive inference or not when it convicted the defendant of voluntary manslaughter. *Id.*

Here, that did not occur. There was no instruction on any lesser-included offense. (R. 451-69). Foster and Dover either committed murder or they were innocent, and no lesser-included offense or defense instructions were requested or given.

Second, the trial judge gave two alternative definitions of “malice” that support a conclusion that the killing was malicious:

Now, each of these defendants is charged with murder. And in order to prove this crime, the State must prove each defendant killed another person with malice afore-thought, either expressed or implied.

Malice has been defined as hatred, ill will, hostility to another. It is the intentional doing of a wrongful act without justification or excuse and with an intent to kill that the law will infer an evil intent.

Malice aforethought does not require that malice exists for any particular time before the act is committed, but malice must exist in the mind of the defendant before and at the time the act was committed. Therefore, there must be a combination of previous evil intent and the act itself.

Malice aforethought may be expressed or inferred. These terms expressed and inferred do not mean different kinds of malice, but merely the means and manner in which malice may be shown to exist. It is either by direct evidence or by inference from the facts and circumstances.

Express malice is shown when a person speaks words which express hatred or ill will for another, or when the person prepared beforehand to do the act which was later accomplished. For example, lying in wait for a person.

Malice is wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong. It is the doing of a wrongful act intentionally without just cause or excuse.

Intent means intending the result which actually occurred and not accidentally or involuntarily.

Intent may be shown by acts and conduct of each defendant and other circumstances from which you may naturally and reasonably infer intent.

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Evidence of the character of the act, the character of the instrument used, the manner in which was used, the purpose to be accomplished and resulting wounds or injuries, may be considered in determining intent.

(R. 459-60).

The above definitions are supported by South Carolina case law. *See, e.g., Margolis v. Telech*, 239 S.C. 232, 238, 122 S.E.2d 417, 419-20 (1961) (“Malice is the deliberate, intentional doing of a wrongful act without just cause or excuse”); *Id.* at 238, 122 S.E.2d at 420 (“Malice ‘is implied where it shows a disregard of the consequences of the injurious act, without reference to any special injury which he may inflict on another’, and ‘in doing some illegal act for one's own gratification or purposes, without regard to the rights of others or the injury he may inflict on another’”); *State v. Murphy*, 86 S.C. 268, 68 S.E. 570, 570 (1910) (“‘Malice is a term of art, implying wickedness, and excluding a just cause or excuse. It is implied from an unlawful act, willfully done, until the contrary be proved.’ It has also been defined to be the willful or intentional doing of a wrongful act, without just cause or excuse”); *McBride v. Sch. Dist. of Greenville Cty.*, 389 S.C. 546, 565, 698 S.E.2d 845, 855 (Ct. App. 2010) (“malice is ‘the deliberate intentional doing of a wrongful act without just cause or excuse’”) (quoting *Eaves v. Broad River Elec. Coop., Inc.*, 277 S.C. 475, 479, 289 S.E.2d 414, 416 (1982) (internal quotation omitted)); *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 437, 629 S.E.2d 642, 649 (2006) (“malice may be implied where the evidence reveals a disregard of the consequences of an injurious act, without reference to any special injury that may be inflicted on another person”); *State v. Young*, 238 S.C. 115, 124-25, 119 S.E.2d 504, 509 (1961), *overruled on other grds*, *State v. Torrence*, 305 S.C. 45, 60-69, 406 S.E.2d 315, 323-28 (1991) (Toal, J., (concurring in result) (abolishing in *favor*em vitae review). *See also, e.g., State v. Cottrell*, 421 S.C. 622, 644, 809 S.E.2d 423, 435 (2017) (finding trial judge properly instructed jurors that malice could be inferred from conduct

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showing a total disregard for human life); *State v. Oates*, 421 S.C. 1, 20, 803 S.E.2d 911, 921 (Ct. App. 2017)(“Malice can be inferred from conduct [that] is *so reckless and wanton as to indicate a depravity of mind and general disregard for human life*”) (emphasis in original); *State v. Mouzon*, 231 S.C. 655, 662, 99 S.E.2d 672, 675 (1957); *In re Tracy B.*, 391 S.C. 51, 69, 704 S.E.2d 71, 80 (Ct. App. 2010). Each definition above fits the facts of this case because there was both express malice and inferred malice in this case. There were threats made to Victim and there was “lying in wait” for Victim and there was a clear intent to kill or injure Victim. Thus, the instructions given were appropriate and fit the facts of the case.

Third, the charge was harmless because of the facts of this case because the evidence of malice was overwhelming. Therefore, the permissive inference of malice from a deadly weapon instruction was harmless. *See Stanko*, 402 S.C. 252, 264-65, 741 S.E.2d 708, 714-15 (erroneous instruction of permissive inference of malice arising from the use of a deadly weapon was harmless where there was overwhelming evidence of malice and given the entire jury instruction including definition of malice); *State v. Brooks*, 428 S.C. 613, 627-33, 837 S.E.2d 236, 241-44 (Ct. App. 2019)(permissive inference of malice instruction was harmless beyond a reasonable doubt after considering jury instruction as a whole and other evidence of malice independent of the use of a deadly weapon)(citing *Stanko*, *supra*).

In short, there was overwhelming evidence of malice and of a premeditated plot to kill or wound Victim. Foster and Dover searched for Victim for several days before finding him under the belief that Victim stole something from them. They had told more than one witness to tell Victim they were looking for him. (R. pp. 93-113; 116-124; 128-133; 308-313). There were

threats communicated to Victim heard by witnesses. Foster dropped the shooter off before and picked up the shooter after the murder. The shooter laid in wait for Victim wearing a mask and

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gloves. (R. 58-74; 93-125; 128-142; (Page 143 - Supp. ROA page 1); 144; 145; 146-66; 177-193; 198-207; 207-218; 219-244; 245-263; 263-267; 270-76; 277-292; (Page 293 – Supp. ROA page 2); 308-313; 314-363; 363-383; 385-400). The challenged instruction could not have impacted the jury's verdict. *Stanko*, 402 S.C. at 264-65, 741 S.E.2d at 714-15; *Brooks*, 428 S.C. 613, 627-33, 837 S.E.2d 236, 241-44. Because there was overwhelming evidence, the result at trial and on direct appeal was not impacted by the instructions given, even if the Court finds them erroneous. Applicant still would have been found guilty at trial had different instructions been given. The Court had no duty to provide different instructions because they were legally correct at the time. Additionally, Applicant would not have met his burden of proof on direct appeal because of the overwhelming evidence, rendering the same result as was reached, even if the issue was preserved. Accordingly, no prejudice has been established and relief is denied on this ground.

### Conclusion

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty days of receipt by counsel of the judgment entry's written notice to secure appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has the right to appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

FILED  
2023 MAR 29 AM 9:26  
CLERK OF COURT  
SOUTH CAROLINA  
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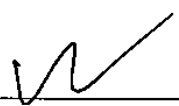


**IT IS THEREFORE ORDERED:**

1. The PCR application be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 2023.

  
BRIAN M. GIBBONS  
Presiding Judge  
Seventh Judicial Circuit

, South Carolina.

FILED  
2023 MAR 29 AM 9:26  
CLERK OF COURT  
SANTANBURG COUNTY  
AMY W. COX

IN THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM CHEROKEE COUNTY  
Court of Common Pleas

The Honorable Brian M. Gibbons, Circuit Court Judge

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2022-CP-11-00261

Rajshun Bernard Foster,

Petitioner,

vs.

The State of South Carolina,

Respondent.

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**NOTICE OF APPEAL**

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Rajshun Bernard Foster appeals the judgment in this matter denying post-conviction relief, filed on March 31, 2023 and signed by the Honorable Brian M. Gibbons. Undersigned counsel has been retained in this matter.

Respectfully submitted,

/s/ Elizabeth Franklin-Best  
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April 27, 2023

## **CERTIFICATE OF SERVICE**

Counsel hereby certifies she has served a copy of this Notice of Appeal on Megan Jameson by sending via email at [MJameson@scag.gov](mailto:MJameson@scag.gov) on this date, April 27, 2023.

/s/ Elizabeth Franklin-Best