

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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Appellate Case No. 2023-000687

Rajshun Bernard Foster,

Petitioner,

vs.

The State of South Carolina,

Respondent.

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**REPLY**

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**Sep 21 2023**

S.C. SUPREME COURT

## ARGUMENTS

### **I. The PCR court erred in concluding that trial counsel was not ineffective for failing to object to the jury instructions regarding implied malice from the use of a deadly weapon.**

The State argues that the ruling of the PCR Court that trial counsel was not ineffective for failing to object to the jury instructions regarding implied malice from the use of a deadly weapon was correct because counsel is not responsible for anticipating changes in the law before they occur. Respondent's Return p. 7.

Petitioner agrees that counsel is not responsible for anticipating changes in the law before they occur. However, the State's return fails to address Petitioner's full argument. This Court's opinion in *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019), did not announce a new rule of law which was wholly unfounded in previous South Carolina jurisprudence. In deciding *Burdette*, this Court cited its previous cases of *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), and *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983). South Carolina jurisprudence clearly already disfavored this type of jury instruction as evidenced in previous decisions of *Elmore* and *Belcher*.

Additionally, the Court of Appeals' dismissal of Petitioner's appeal indicated that the court may have been inclined to grant relief on the issue had it been preserved for appeal. *See* App. 540-541. Furthermore, this Court emphasized in the *Burdette* opinion that all cases decided before *Burdette*, but still on review, would have benefited from the decision in *Burdette* so long as that issue was preserved for appeal. This indicates trial counsel would not have needed to be clairvoyant to anticipate this case decision and could have seen this coming from this Court based on its previous decisions.

To make matters worse, when trial counsel was questioned at PCR as to why she did not object, she could not say for certain whether she was even familiar with the *Belcher* case at the time of Petitioner's trial. This was the governing case law at the time of Petitioner's trial on a central issue in his case. Her failure to be familiar with this case at the time of trial is inexcusable. Furthermore, the decision in *Burdette* was announced so soon after Petitioner's trial that trial counsel should have filed a motion for reconsideration. At the very least, trial counsel should have seen the Advance Sheet that was issued a few days after the notice of appeal was filed. At the time of the Advance Sheet's release, trial counsel was within the ten-day window to file a motion for reconsideration or other post-trial motion seeking relief. PCR counsel addressed this in his post-trial memorandum, but it was not addressed in the Order of Dismissal by the PCR Court. *See App. 620-633.*

Finally, the State argues that even if Petitioner's counsel was ineffective, Petitioner was not prejudiced because there was substantial evidence of malice. Respondent's Return p. 11. As discussed in Petitioner's brief, the State's argument hinged on implied malice and the State did not present evidence of express malice with regard to Petitioner. Any express malice presented, pointed to Dover, not Petitioner.

Respondent's argument fails to address the points above, which were originally argued in Petitioner's brief.

Based on the arguments in Petitioner's brief and this reply, trial counsel provided ineffective assistance of counsel in violation of Petitioner's Sixth Amendment right to counsel.

**II. The PCR court erred in concluding that trial counsel was not ineffective for inadequate trial preparation.**

The State argues the ruling of the PCR Court finding that trial counsel was not ineffective was accurate because she sufficiently prepared for trial. Respondent's Return p. 12-13.

The State's argument fails to address that trial counsel admitted she was not familiar with an essential case during Petitioner's trial, *State v. Belcher*. She also testified that she went out and attempted to speak to witnesses but was unsuccessful. She did not testify why she did not try again or have a private investigator go out and attempt to speak to witnesses. She merely testifies that she tried once but no one would talk to her.

The State points to the fact that trial counsel met with Petitioner seven times prior to the trial as definitive proof that her representation of Petitioner was not ineffective. However, those seven meetings were over four years of her representation of Petitioner with many meetings occurring in the presence of the solicitor assigned to the case and the meetings were to encourage Petitioner to testify on behalf of the State, not to prepare Petitioner's defense against the State's charges. These meetings were not focused on reviewing evidence, discussing trial strategies, or preparing to present a defense, they were arranged to encourage Petitioner's to cooperate against Dover as a State's witness.

Petitioner's counsel had significantly more opportunity to prepare an effective defense of Petitioner than the average public defender considering she represented him on these charges for four years prior to trial. Even though she had significant amount of time to prepare, she still did the bare minimum and her preparation was a deficient performance. That deficient performance prejudiced Petitioner. Petitioner's Sixth Amendment right to counsel was violated by the ineffective assistance of his trial counsel.

## CONCLUSION

Respectfully, Mr. Foster asks this Court to grant his petition for a writ of certiorari.

Respectfully submitted,  
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