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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Common Pleas
Appeal from Cherokee County
Honorable Daniel Dewitt Hall, Circuit Court Judge
Appellate Case No. 2023-000537

FRANKLIN DOVER,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON CERTIORARI

"Whether the PCR court erred finding defense counsel was not deficient for failure to object to the trial court's instruction that the jury could infer malice from the use of a deadly weapon and in finding petitioner was not prejudiced by this failure where State v. Burdette, was decided two days after petitioner was sentenced to life for murder?" (footnote omitted).

COUNTER-STATEMENT OF ISSUE ON CERTIORARI

Did the PCR judge somehow err by declining to find defense counsel was constitutionally ineffective for failing to be clairvoyant and anticipate a change in the law that only came about *after* Dover's trial?

STATEMENT OF THE CASE

In July of 2014, Petitioner Franklin Dover was arrested following an investigation into a fatal shooting that occurred a few weeks earlier at an apartment complex located in Gaffney, South Carolina. In September of 2014, the Cherokee County Grand Jury indicted both Dover and his accomplice, Rajshun Bernard Foster, for one count each of murder. On July 15, 2019, a joint jury trial was commenced in the Cherokee County Court of General Sessions with the Honorable R. Keith Kelly, circuit court judge, presiding.[1] At the conclusion of the three-day trial, the jury convicted Dover and Foster as indicted. Following the verdict, the trial judge sentenced Dover to life without parole and Foster to a thirty-five-year term of imprisonment. Dover then timely initiated an appeal.[2]

On appeal, Dover's appellate counsel submitted a brief pursuant to Anders v. California, 386 U.S. 738 (1967), along with a petition to be relieved as counsel.[3] After reviewing the matter, the Court of Appeals issued an unpublished decision dismissing the appeal and granting appellate counsel's petition to be relieved. State v. Dover, Op. No. 2022-UP-060 (S.C. Ct. App. filed Feb. 9, 2022). Thereafter, on February 25, 2022, remittitur was issued.

Subsequent to the issuance of the remittitur, Dover timely filed an application for post-conviction relief ("PCR"), and, in response, the State filed a return requesting an evidentiary hearing along with a more definite statement. On August 8, 2022, an evidentiary hearing was

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[1] The July 2019 trial was the second trial conducted in the matter. (App'x p. 303).

[2] Foster also appealed, and the appellate records from his appeal are presently available through the South Carolina Appellate Public Index. Appellate Records for State v. Rajshun Bernard Foster, South Carolina Appellate Court Public Index, https://ctrack.sccourts.org/public/caseView.do?csIID=70814.

[3] The records from Dover's appeal are presently available through the South Carolina Appellate Public Index. Appellate Records for State v. Franklin Pierre Dover, South Carolina Appellate Court Public Index, https://ctrack.sccourts.org/public/caseView.do?csIID=70447.

conducted in the Cherokee County Court of Common Pleas with the Honorable Daniel Dewitt Hall, circuit court judge, presiding. At the conclusion of the hearing, the PCR judge took the matter under advisement. Thereafter, through an order filed on March 15, 2023, the PCR judge denied and dismissed Dover's PCR application with prejudice. Dover then timely filed a notice of appeal.

STANDARD OF REVIEW

In PCR cases, the standard of review to be applied on appeal is directly dependent on the specific issues raised. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing a PCR judge's factual findings on appeal, the appellate court will defer to those findings and uphold them if they are supported by any evidence of probative value appearing in the record. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); see Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) ("Under the proper standard of review, the appellate court's 'view' must be limited to whether there is probative evidence to support the PCR court's factual findings."). Meanwhile, when reviewing a pure question of law, an appellate court will consider such a matter de novo and is not required to give deference to the PCR judge's rulings. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014). Ultimately, if the PCR judge's decision is controlled by an error of law, an appellate court will reverse that decision on appeal. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The PCR judge correctly found defense counsel was not constitutionally ineffective for failing to be clairvoyant and anticipate a change in the law that only came about *after* Dover's trial.

Relevant Facts

On the afternoon of June 22, 2014, a man wearing a mask and gloves shot the victim, Timothy Blair, with a rifle just after Blair reached the back door of his on-again, off-again girlfriend's apartment. (App'x p. 99; p. 121; p. 226; p. 250; pp. 252-253; p. 264; pp. 285-286). The rifle bullet entered the left side of Blair's chest, travelled through both of his lungs, exited his body near his right armpit, and continued on through his right arm. (App'x pp. 272-273; pp. 285-286). Blair bled to death at the apartment's back door as his killer scurried away. (App'x pp. 226-227; pp. 270-273; p. 275).

Following an investigation into the matter, Dover and his associate, Foster, were arrested in connection to the shooting and indicted for Blair's murder. (App'x p. 14). The two elected to proceed forward to trial, and their cases were jointly tried. (App'x p. 13).

During the course of that joint trial, evidence and testimony was presented establishing the following events transpired:

- A few days before the shooting, Foster, who had previously been friends with Blair, came to the apartment of Terrica Bonner ("Terrica")—Blair's aforementioned on-again, off-again girlfriend—with Dover searching for Blair. (App'x pp. 98-99; pp. 118-119). Blair was not there at the time, and, in a threatening manner, Foster and Dover advised Terrica they had "something for him." (App'x pp. 98-99; p. 115).

- Around that period of time, Foster approached Bernice Dowdle, who lived at same apartment complex as Terrica, in an effort to track down Blair. (App'x p. 127; pp. 129-130). Dowdle responded to Foster's search attempt by indicating she thought he and Blair were "cool." (App'x pp. 129-130). Foster responded: "I thought we were[,] too." (App'x p. 131).

- On the date of the incident, Foster returned to the apartment complex along with Dover. (App'x pp. 177-179). That time, they located Blair there. (App'x pp. 177-179). Upon spotting him, Foster aggressively approached Blair and yelled at him. (App'x p. 180; p. 187; pp. 197-198; p. 307). Blair, who appeared to be intimidated, responded by backing away. (App'x p. 180; p. 308). Eventually, the argument—which seemed to about money—ended, and both Foster and Blair parted ways for the time being. (App'x p. 201; p. 203; pp. 308-311). However, as Blair left the scene, Dover, who had remained nearby during the dispute, warned him he would "get [him] one way or the other." (App'x p. 179; p. 201).

- Following the argument, Blair headed to the apartment of Kiara Douglas, who also lived at the apartment complex. (App'x pp. 206-207). Once there, Blair, who seemed afraid, told Douglas he was nervous about an argument he had just had with Foster and Dover. (App'x p. 208; p. 210). Due to that argument, Blair wanted to get away from the apartment complex. (App'x p. 209). Douglas told Blair to go pick up his clothing from a nearby apartment and then return to her residence to wait there until he could obtain a ride out of the area. (App'x pp. 209-210; p. 212). After roughly fifteen minutes, Blair left to go get his clothing as planned. (App'x p. 210; p. 212).

- Meanwhile, Foster and Dover drove over to a nearby trailer park in separate vehicles. (App'x p. 203; p. 315; p. 318). At that location, the two met up with an individual named "T" and began speaking with him. (App'x pp. 316-317). As they all conversed, Antron Bonner approached the group and asked Foster about getting some marijuana. (App'x p. 318). Foster said he could get some from the apartment complex, and they all got into Foster's girlfriend's vehicle to head over there. (App'x pp. 318). However, before they headed out, Foster retrieved a rifle and some gloves, and "T" armed himself with a pistol. (App'x pp. 318-319).

- When the group arrived at the apartment complex, Foster dropped Dover and "T" off near a wooded area, and the two left with their guns. (App'x p. 322). Foster then parked at the apartment complex. (App'x p. 323).

- After parking, Foster again spotted Blair, who was outside chatting with some people that lived at the apartment complex. (App'x pp. 222-223; p. 323). Foster approached Blair and briefly spoke with him. (App'x pp. 223-224; p. 323). During the conversation, Blair

told Foster to "stay out of it." (App'x pp. 224-225). After that, Foster returned to his vehicle and Blair walked off in the direction of Terrica's apartment building. (App'x pp. 225-226).

- Moments after that, Blair went around a corner and headed to Terrica's apartment's back door. (App'x p. 226). When he got to the door, a masked-and-gloved gunman waiting nearby shot Blair with a rifle. (App'x p. 226; p. 250; pp. 252-253; pp. 285-286). The shooter then fled through the nearby wooded area with an accomplice as Blair lay dying nearby. (App'x pp. 226-227; p. 271; p. 275).

- Shortly after that, Foster and Bonner began to head away from the apartment complex in Foster's girlfriend's vehicle. (App'x pp. 325-326). However, before they left the area, Foster stopped where he had dropped off Dover and "T" earlier and picked the two back up. (App'x p. 326). Once Dover was back in the vehicle, he urged Foster to rapidly get him away from the scene. (App'x p. 327). Foster complied, and, as they were driving away, he asked Dover where he shot "him" at. (App'x p. 327). Dover responded: "Up in the chest area." (App'x p. 327).

- Foster proceeded to drop Dover and "T" off at the home of one of Dover's girlfriends before returning Bonner to the trailer park. (App'x pp. 363-35). After being dropped off, Dover changed clothes, arranged for a friend to pick up the clothing he had been wearing, and then quickly left the county with his girlfriend. (App'x p. 365; p. 367; pp. 371-375).

- In the days that followed, Dover warned Bonner not to talk about what had happened on the date of the incident. (App'x p. 329). Likewise, he encouraged his girlfriend to falsely claim he had been in Spartanburg on the date of the incident before and around the time it occurred. (App'x pp. 375-376).

- Investigating officers subsequently obtained Dover's phone records. (App'x pp. 59-60; p. 383; p. 387). Upon analysis, those records refuted the false alibi Dover had attempted to convince his girlfriend to advance and supported a conclusion he was in the vicinity of the crime scene around the time of the killing. (App'x pp. 375-376; p. 387; p. 392).

After all the testimony and evidence was presented, the parties presented their closing arguments to the jury, and the trial judge instructed the jury on the applicable law. (App'x pp.

408-465). As part of those jury instructions, the trial judge thoroughly instructed the jury on malice and its meaning. (App'x pp. 457-459). And, in doing so, the trial judge—in part—advised the jury malice could be inferred from the use of a deadly weapon. (App'x pp. 458-459).

Notably, at that time, the decision in State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), constituted the controlling law on the propriety of such an instruction. In that case, this Court recognized such instructions had long been sanctioned in South Carolina but nevertheless ruled one could no longer properly be given "where evidence is presented that would reduce, mitigate, excuse or justify the homicide." Id. at 600, 685 S.E.2d at 803-804.

During Dover and Foster's trial, no jury instructions were presented on any lesser-included offenses or on anything that could excuse, justify, or mitigate the charged murder. (App'x pp. 449-465). Accordingly, consistent with Belcher and its progeny, no objections were raised to that particular instruction—or any of the trial judge's other jury instructions—by either Dover's or Foster's defense counsel. (App'x pp. 465-466).

Following that, the case was submitted to the jury. (App'x p. 467). After roughly three hours of deliberations, the jury unanimously convicted both Dover and Foster of Blair's murder. (App'x pp. 467-469).

Fourteen days later, this Court issued its decision in State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019). Through that decision, this Court overruled Belcher and a considerable number of cases that had followed it "to the extent [that precedent] permit[ted] a jury instruction that malice may be inferred from the defendant's use of a deadly weapon." Id. at 504, 832 S.E.2d at 583. Thus, pursuant to Burdette, a jury instruction on inferring malice from the use of a deadly weapon was no longer proper in South Carolina "[r]egardless of the evidence presented at trial[.]" Id. at 504-505, 832 S.E.2d at 583. Furthermore, this Court declared its newly-

articulated rule was effective in Burdette's case and all other cases "which are pending on direct review or are not yet final, *so long as the issue is preserved*." Id. at 505, 832 S.E.2d at 583 (emphasis added).

Subsequently, Dover—following an unsuccessful appeal—filed a PCR application seeking relief in the form of a new trial. (App'x pp. 483-536). In response, an evidentiary hearing was convened on the matter. (App'x p. 555). Amongst the claims raised during that hearing, Dover alleged defense counsel purportedly should have objected to the inference of malice jury instruction because the decision in Burdette—which he conceded was decided after his trial had concluded—"made th[at] charge improper." (App'x pp. 557-558). Following Dover's testimony, defense counsel took the stand and agreed the inference of malice charge given during trial was now improper. (App'x p. 570). However, he explained he was aware it was *not* invalid at the time of trial, it only became so based on the *subsequent* decision in Burdette, and the then-controlling law supported the charge at the time it was given. (App'x p. 570).

Ultimately, upon considering the matter, the PCR judge ruled Dover was not entitled to a grant of relief. (App'x p. 577; p. 579; p. 598). In so ruling, the PCR judge recognized defense counsel was not required to be clairvoyant or anticipate changes in the law in order to provide effective representation. (App'x p. 590). Therefore, the PCR judge found Dover's defense counsel was not deficient for failing to object to the inference of malice jury instruction because it was permitted at the time of trial by Belcher, which was only later overruled by the Burdette decision. (App'x p. 591). Furthermore, the PCR judge concluded Dover likewise failed to establish he was prejudiced by the alleged deficiency because: (1) the inference of malice jury instruction could not have been confusing under the specific circumstances of Dover's case; (2)

the trial judge thoroughly instructed the jury on how malice could be established in ways other than by inferring it from the use of a deadly weapon; and (3) the evidence of malice presented was overwhelming. (App'x pp. 592-595).

Applicable Law

In every criminal case tried in South Carolina, the defendant has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001); see State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627 (2000) ("The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors."). Pursuant to that right, the defendant is entitled to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970); see Strickland v. Washington, 466 U.S. 668, 685 (1984) ("An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair."). Significantly, effective assistance of counsel does *not* mean perfect representation. See 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. Meanwhile, counsel's assistance is considered to be constitutionally ineffective when "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686.

When faced with a claim of ineffective assistance of counsel, a reviewing court must conduct a two-pronged analysis. Franklin v. Catoe, 346 S.C. 563, 570, 552 S.E.2d 718, 722

(2001). Pursuant to that two-pronged analysis, an applicant raising an ineffective assistance of counsel claim must establish: (1) counsel's representation fell below an objective standard of reasonableness; *and* (2) there is a reasonable probability the outcome of the proceeding would have been different but for counsel's deficient performance. Williams v. State, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005). Thus, the applicant has the heavy burden of establishing both deficiency and prejudice in order to be entitled to relief. Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); see Stone v. State, 419 S.C. 370, 380, 798 S.E.2d 561, 566 (2017) (instructing "the law requires [a reviewing court to] presume counsel rendered adequate assistance and exercised reasonable professional judgment" and only find to the contrary when the applicant has overcome that presumption by establishing both deficiency and prejudice).

Regarding the deficiency prong of the analysis, the proper measure of performance is whether counsel provided representation within the objectively reasonable range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); see Harrington v. Richter, 562 U.S. 86, 110 (2011) (instructing the proper analysis "calls for an inquiry into the *objective* reasonableness of counsel's performance, not counsel's subjective state of mind" (emphasis added)). When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for overcoming that presumption. Butler, 286 S.C. at 442, 334 S.E.2d at 814; see 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). Furthermore, the reviewing court will scrutinize counsel's performance in a highly deferential manner, will make every effort "to eliminate *the distorting effects of hindsight*," and will "evaluate the conduct from counsel's perspective at the time" in

light of the then-existing circumstances. Strickland, 466 U.S. at 689 (emphasis added). To establish counsel's performance was deficient, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. Thus, counsel's performance will be considered to be deficient only when it objectively amounted to incompetence under prevailing professional norms and *not* when it simply "deviated from best practices or most common custom." Richter, 562 U.S. at 105; see Dunn v. Reeves, 594 U.S. 731, 739 (2021) ("[E]ven if there is reason to think that counsel's conduct was far from exemplary, a court still may not grant relief if the record does not reveal that counsel took an approach that no competent lawyer would have chosen." (citation, internal quotations, and brackets in original omitted)).

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. In order to for that burden to be met, counsel's deficient performance must have prejudiced the applicant to such an extent there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989); see Strickland, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome."). Importantly, "[t]he likelihood of a different result must be substantial, not just conceivable." Richter, 562 U.S. at 112.

Analysis

Through his petition for a writ of certiorari, Dover contends on appeal the PCR judge erred by declining to grant relief in his case. As support for that contention, Dover maintains

defense counsel was deficient for failing to object to the trial judge's jury instruction on inferring malice from the use of a deadly weapon because that particular instruction was declared to be improper in South Carolina through this Court's decision in Burdette, which was issued *after* the trial.[4] And, despite the fact the decision in Burdette *did not yet exist* at the time of his trial and while citing no supporting authority of any kind, Dover alleges the situation involved in his case somehow "did not require [defense] counsel to anticipate a change in the law"—even though one did, in fact, indisputably occur—because certiorari was granted in Burdette roughly a year before his trial and an oral argument had already been held prior to that point. (Pet. for Cert. p. 9). Thus, in effect, Dover avers defense counsel should have realized (or, when phrased slightly differently, *anticipated*) this Court was planning to overrule Belcher through Burdette and was constitutionally ineffective for failing to preemptively act in anticipation of that future change in the law. Beyond that, Dover asserts the inference of malice instruction was somehow prejudicial to him in his case in light of the fact testimony was presented establishing he was seen in possession of a gun on the date of the incident coupled with the circumstantial nature of the State's case.

To the contrary and just as the PCR judge found, defense counsel was not deficient for failing to object to the inference of malice jury instruction because that instruction constituted a

[4] Through his petition for a writ of certiorari, Dover contends the decision in Burdette was issued "two days" after his trial ended. (Pet. for Cert. p. 1; p. 4). Notwithstanding the fact Dover's trial ended on July 17, 2019, and the Burdette decision was issued on July 31, 2019, the specific length of time—whether two years, two weeks, or even two days—between the trial and the subsequent change in the law that was brought about by Burdette was not what mattered in Dover's case; what mattered was the fact Burdette and its accompanying change in the law came *after* Dover's trial and, thus, was not yet available to provide guidance to defense counsel. Cf. Randolph v. Delo, 952 F.2d 243, 247 (8th Cir. 1991) (concluding Randolph's defense counsel did not perform deficiently by failing to raise an objection to the jury selection process because jury selection occurred in the case two days *before* the decision in Batson v. Kentucky, 476 U.S. 79 (1986), was issued).

correct statement of law *at the time of Dover's trial*, which was and is the pertinent time period for purposes of a proper analysis of the effectiveness of defense counsel's representation. See Strickland, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective *at the time*." (emphasis added)). Significantly, at the time of Dover's trial, this Court's decision in Belcher remained good law and had not yet been overruled. Burdette, 427 S.C. at 504, 832 S.E.2d at 583. Pursuant to that decision along with a "considerable amount of South Carolina case law" that followed it, the long-sanctioned jury instruction on inferring malice from the use of a deadly weapon was not improper *unless* evidence was presented that would reduce, mitigate, excuse, or justify the homicide, and, critically, no such evidence was presented during Dover's trial. Id. at 504 n. 3, 832 S.E.2d at 583 n. 3; see Belcher, 385 S.C. at 600, 685 S.E.2d at 803-804 ("It has long been the practice for trial courts in South Carolina, as sanctioned by this Court, to charge juries in any murder prosecution that the jury may infer malice from the use of a deadly weapon. . . . Having carefully scrutinized the historical antecedents to this permissive inference, we hold today that a jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide."). Under such circumstances, defense counsel was not—and, when applying the correct non-hindsight-based analysis, could not have been—deficient for failing to anticipate the change brought about by the *subsequent* decision in Burdette, and, by abiding by then-existing state law that supported the inference of malice jury instruction at the time of trial, defense counsel certainly did not pursue a course of action no competent attorney would have chosen as would have been necessary for a finding of deficiency.

Reeves, 594 U.S. at 739; see Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) ("We have never required an attorney to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial."), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999); cf. Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) ("The PCR court found trial counsel was ineffective for failing to object to the trial court's instruction, even though Daniels had not yet been decided, because if trial counsel had made an objection, the issue would have been preserved for appellate review. . . . We disagree and hold that the PCR court erred in finding trial counsel ineffective for failing to object to the jury instruction when no case law existed rendering the instruction improper per se. This Court has previously held that reasonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law. As trial counsel's performance was not deficient, we reverse the PCR court's grant of relief on this ground."). And, that remained true regardless of whether this Court had already granted certiorari, held an oral argument, and taken the matter under advisement in Burdette by the time of Dover's trial. Cf. Kornahrens v. Evatt, 66 F.3d 1350, 1360 (4th Cir. 1995) ("[T]he case law is clear that an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law. Based on this clear precedent, we cannot say that, under the facts of this case, [defense counsel]'s trial performance was constitutionally deficient because he followed a long-standing and well-settled rule of South Carolina criminal law—*even when that rule was under attack in the United States Supreme Court at the time of trial*." (emphasis added and citations omitted)).

Accordingly, since defense counsel's failure to predict the change in the law that occurred only after Dover's trial had concluded did not constitute deficient performance, the PCR judge correctly concluded Dover failed to meet his burden of establishing defense counsel

was constitutionally ineffective, and his ruling was both eminently logical and fully consistent with the proper guiding standard for evaluating ineffective-assistance-of-counsel claims.[5] See Strickland, 466 U.S. at 689 (rejecting hindsight-based evaluation of defense counsel's performance at trial); Thornes v. State, 310 S.C. 306, 309-310, 426 S.E.2d 764, 765 (1993) ("This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial."); Gilmore, 314 S.C. at 457, 445 S.E.2d at 456 ("Trial counsel . . . could not be ineffective for failing to request a jury instruction which would not be applicable to the offenses charged for at least another year."). Dover's petition for a writ of certiorari should be denied.

[5] Because defense counsel's performance was not and could not have been deficient under the circumstances involved, it was unnecessary for the PCR judge to make a prejudice determination before denying relief. See Strickland, 466 U.S. at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim."); cf. Walker v. Jones, 10 F.3d 1569, 1573 (11th Cir. 1994) ("Because Alabama courts had rejected similar claims and the Supreme Court had not yet decided Cage, trial counsel had no basis for objecting to the trial court's instruction on reasonable doubt. Trial counsel's failure to object to the instruction was, therefore, reasonable. Because trial counsel acted reasonably, his representation in this regard was not deficient, and *we need not address whether the alleged failure caused Walker prejudice*." (emphasis added)). However, for the reasons identified by the PCR judge in his order denying relief and because whoever killed the victim by shooting him in the side of his chest with a rifle clearly did so with malice, Dover likewise could not establish he was prejudiced by defense counsel's failure to anticipate Burdette and object to the inference of malice jury instruction given. (App'x pp. 592-595).

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 5, 2024