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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas
Honorable Edward W. Miller, Circuit Judge
Appellate Case No. 2024-000232

BILLY GEISENDORFF, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

Petitioner's Issue in Petition

Whether the PCR court erred in finding that trial counsel provided constitutionally effective representation where counsel failed to object to the "lying in wait" example used in the express malice jury charge as an impermissible comment on the facts of the case?

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is **any** evidence in the record to support them. Id. at 179, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). "[W]e [also] afford great deference to a PCR court's credibility findings." Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433, 435 (2018). Foster v. State, No. 2020-000143, 2024 WL 1092329, at *1 (S.C. Ct. App. Mar. 13, 2024). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

"To establish a claim of ineffective assistance of counsel, the [PCR applicant] has the burden of proving '(1) counsel failed to render reasonably effective assistance under prevailing professional norms[ ] and (2) counsel's deficient performance prejudiced the applicant's case.' " Frierson, 423 S.C. at 262, 815 S.E.2d at 436 (quoting McKnight v. State, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008)).

"Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." Strickland v. Washington, 466 U.S. 668, 700 (1984). Thus, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Id. at 697.

STATEMENT OF THE CASE

This matter comes before this Court by a certiorari proceeding from the denial of post-conviction relief on January 19, 2024. The application for post-conviction relief filed by Petitioner Billy John Geisendorff (Applicant) on May 22, 2019. The Applicant, though appointed counsel Ola Johnson filed an initial amended application on June 7, 2021. An initial PCR hearing was held before the Honorable George M. McFaddin on October 13, 2022. During that hearing, the Applicant testified about matters not included in the original or amended application requiring witnesses from the 11th Circuit Solicitor's Office. On December 22, 2022, the Applicant, through counsel Johnson filed a Second Amended application. The Respondent filed an Amended Return on June 22, 2023.

In his original post-conviction relief application dated May 17, 2019, he made the following pro se allegation:

1.
    A. Applicant was denied the right to effective assistance of counsel - guaranteed by the Sixth and Fourteenth Amendments to the United State Constitution and by "Article I, sects, 3 and 14 of the South Carolina Constitution – during the guilt – or – innocence phase of his capital trial.

2.
    A. Supporting facts: trial counsel's performance during the guilt – or- innocence phase was both unreasonable and prejudicial. See Strickland v. Washington, 466 U.S. 668 (1984). Counsel's acts or omissions included, but not limited to the following:

        1. Counsel was ineffective for filing to request a voluntary manslaughter jury instruction.
        2. Counsel was ineffective for advising applicant to agree to not request a voluntary manslaughter jury instruction.

In the first amended application, through counsel Ola Johnson, dated June 7, 2021, he made the following additional allegations:

I. Ineffective Assistance of Counsel:

1. Applicant retained Robert T. Williams Jr., to represent him but Mr. Williams did not participate in the applicant's trial to assist in his defense. (3)

2. Applicant's trial counsel, Benjamin A. Stitely, failed to make a pretrial motion to suppress the testimony of Donna Blanchett or John Michael Williams regarding statements allegedly made to them by the applicant as hearsay or opinion testimony. (4)

3. Applicant's trial counsel, Benjamin A. Stitely, failed to make a pretrial motion to suppress the weapon seized from the residence or photographs or testimony regarding this. (5)

4. Applicant's trial counsel, Benjamin A. Stitely, failed to object to testimony by John Michael Williams regarding statements allegedly made by applicant over the phone (p.189, Line 1-7), and testimony that he (John Michael Williams) "could tell he had been drinking" an "he wanted to fight", also stating "he wanted to fight" (p.192, Line 12). Counsel also failed to object to leading questions by the solicitor and hearsay or opinion testimony (P.193, Line 1-9) that applicant was intoxicated and angry and hearsay statements (p.193, Line 20). Counsel also failed to object to a leading question by the solicitor about perceiving statements he heard the applicant saying as "an invitation to come up to his yard and fight" and hearsay (p.194, Line 4) and again regarding another phone call made by applicant (p.196, Line 23 to p.197, Line 6). (6)

5. Applicant's trial counsel, Benjamin A. Stitely also failed to object to a leading question by the solicitor asking if Mr. Williams saw the applicant "run at the defendant" or "lunge at the defendant" (p.201, Line 2-6). (7)

6. Applicant's trial counsel, Benjamin A. Stitely, failed to object to leading questions and to hearsay and opinion testimony by John Michael Williams regarding statements allegedly made by applicant over the phone (p.203, Line 6-14), and testimony that he (John Michael Williams) could tell applicant was angry, drunk and wanted to fight. (8)

7. Applicant's trial counsel, Benjamin A. Stitely also failed to object to a leading question by the solicitor asking if John Michael Williams heard the applicant "yell for help, or stay back, or somebody call 911" (p.204, Line 6-8). (9)

8. Applicant's trial counsel, Benjamin A. Stitely also failed to object to a leading question by the solicitor asking if John Michael Williams heard the applicant call him "a punk ass bitch" and "puss ass bitch" and failed to object based on the basis of hearsay and relevance (p.208, Line 22 to p.209, Line 9). (10)

9. Applicant’s trial counsel, Benjamin A. Stitely, failed to object to hearsay testimony from Donna Blanchett (p..241, Line 21-23) where she testified that the applicant stated to her that he “had a bead” on the victim and John Michael Williams and “could take them out at any time”. (11)

10. Applicant’s trial counsel, Benjamin A. Stitely, failed to object to the chain of custody regarding SLED testing of ballistics evidence (p.257, Line 10). (12)

11. Applicant’s trial counsel, Benjamin A. Stitely, failed to object to hearsay testimony from Theresa Sabbagha regarding statements made by the victim (p.292, Line 6-8, p.293, Line 13-17). (13)

12. Applicant’s trial counsel, Benjamin A. Stitely, failed to request a lesser included charge of voluntary manslaughter (p.464, Line 12). (14)

13. **Applicant’s trial counsel, Benjamin A. Stitely, failed to object to the improper jury charge by the court regarding malice (p.543, Line 10 to p.544, Line 17). The charge included an example or expressed malice by stating “for example, lying in wait for a person or any other acts of preparation showing the deed was within the defendant’s mind would be expressed malice” (p.544, Line 7-10). The example was so similar to facts placed into evidence by the testimony of the witness Donna Blanchett (P.241, Line 21-23) that this charge elevated these facts and emphasized them to the jury. <u>State v. Cheeks</u>, 401 S.C. 322, 737 S.E.2d 480 (S.C. 2013). (15)**

14. Applicant’s trial counsel, Benjamin A. Stitely, failed to retain a private investigator to interview witnesses or experts regarding crime scene analysis to assist in the defense. (16)

15. Applicant’s trial counsel, Benjamin A. Stitely, filed to properly review the evidence with applicant to prepare for trial. (17)

In his second amended application through counsel Johnson dated December 22, 2022, he makes the following additional allegations of ineffective counsel:

1. Benjamin A. Stitely failed to object when the solicitor pointed a pistol at the jury and pulled the trigger several times. (18)

2. Benjamin A. Stitely failed to object to solicitor coloring the picture of victim red and trying to hand it to the jury until applicant pointed this out to his attorney. (19)

3. Benjamin A. Stitely failed to object to pictures of streetlights used by the state at trial appeared to have more lights then the pictures provided in evidence to the defense. (20)

4. Benjamin A. Stitely failed to investigate or question states witnesses regarding the blood alcohol level of victim not matching the testimony of the victim and witness and their drinking on the day of the incident. (21)

5. Benjamin A. Stitely failed to object to or question or investigate testimony of John Michael Williams at the pre-trial or trial regarding witnessing a muzzle flash through woods or why Donna Blanchett did not see this. (22)

6. Benjamin A. Stitely failed to object to the solicitor's poster representing the crime scene. (23)

7. Benjamin A. Stitely failed to advise applicant to testify. (24)

An evidentiary hearing was convened before the Honorable Edward W. Miller on June 22, 2023. The Applicant was present and represented by appointed counsel Ola Johnson. The Respondent was represented by Deputy Attorney General Donald J. Zelenka. Testimony was received from Benjamin Stitely (Applicant's trial counsel), the Applicant and Robert McNair (trial prosecutor). At the conclusion of the hearing, this Court indicated its intent to dismiss the Application. A written order denying relief was issues on January b19, 2024. App.p. 688-725.

Prior Procedural History

Applicant is presently incarcerated pursuant to orders of commitment of the Lexington County Clerk of Court. During its June of 2014 term, the Lexington County Grand Jury indicted Applicant for possession of a weapon during the commission of a violent crime (2014-GS-32-01426) and murder (2014-GS-32-01423). Applicant was represented by Robert T. "Theo" Williams, Sr., Esquire, and Benjamin A. Stitely, Esquire. Assistant Solicitors Laura Suzanne Mayes and Robert E. McNair, III, both of the Eleventh Circuit Solicitor's Office, prosecuted the case. On September 6, 2016, through September 8, 2016, Applicant proceeded to a jury trial with

the Honorable Eugene C. Griffith, Jr., and the Honorable D. Garrison Hill, presiding. The record reflects that on September 6, 2016, Judge Griffith held an immunity hearing pursuant to the Protection of Persons and Property Act, S.C. Code Ann. 16-11-410. Judge Griffith denied Applicant immunity after the hearing. Tr.p. 110.

Applicant proceeded to the jury trial on September 7, 2016 before Judge Hill. After the conclusion of trial, the jury found Applicant guilty as indicted, and Judge Hill sentenced Applicant to imprisonment for life for murder and for five years for possession of a weapon during the commission of a violent crime.

Applicant's defense attorneys timely filed a notice of appeal. Appellate Defender John H. Strom of the South Carolina Commission on Indigent Defense filed a brief on Applicant's behalf pursuant to Anders v. California, 386 U.S. 738 (1967), arguing Applicant was entitled to immunity from prosecution under the Protection of Persons and Property Act, and moved to be relieved as counsel. The South Carolina Court of Appeals granted Strom's motion to be relieved and affirmed in an unpublished opinion. State v. Geisendorff, Op. No. 2019-UP-071 (S.C. Ct. App. filed on February 13, 2019) (per curiam). The Remittitur was issued on March 1, 2019.

HOW THE PCR COURT RULED ON THIS ISSUE

In denying relief on this ground, the PCR judge denied relief in the following manner:

> **FAILED TO OBJECT TO MALICE INSTRUCTION – LYING IN WAIT AS EXPRESS MALICE**
>
> In his thirteenth allegation, the Applicant asserts that counsel should have objected to the instruction on malice. (p.543, Line 10 to p.544, Line 17). In particular, he states that the charge included an example of expressed malice by stating "for example, lying in wait for a person or any other acts of preparation showing the deed was within the defendant's mind would be expressed malice" (p.544, Line 7-10). He claims that since this example was so similar to facts placed into evidence by the testimony of the witness Donna Blanchett (Tr.p. 241, Line 21-23) that this charge elevated these facts and emphasized them to the jury.

State v. Cheeks, 401 S.C. 322, 737 S.E.2d 480 (S.C. 2013). There was no objection to the charge by the defense. Tr.p. 551-552.

During the trial, the following instruction was given on malice:

> Malice of forethought may be expressed or inferred. These terms expressed and inferred do not mean different kinds of malice but different ways in which they may be shown to exist. That is either by direct evidence or by inference from the facts and circumstances that are proven. Expressed 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 or any other acts of preparation showing the deed was within the defendant's mind would be expressed malice.**
>
> Malice may be inferred from conduct showing a total disregard for human life. If facts are proven beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, this inference would simply be an evidentiary fact you could take into consideration along with all the other evidence in the case and give it whatever weight, if any, you decide it should receive.

Tr.p. 543, l. 24- p. 544, l. 17.

During the PCR hearing, counsel Stitely took issue with the concern about the lying in wait instruction. He noted that it was in the standard charge book concerning malice. More importantly, however, counsel indicated that this was not a “lying in wait’ situation. As he credibly stated the death did not occur when the Applicant was in the woods and allegedly had a bead on Williams and the victim. Instead, it occurred much later after a series of verbal confrontations.

The Applicant relies upon State v. Cheeks, 401 S.C. 322, 737 S.E.2d 480 (S.C. 2013). In Cheeks, the defendant objected in a drug possession case, to an “actual knowledge/strong evidence” charge, arguing that it was a comment on the facts and the weight of those facts, and that it nullifies or at least conflicts with the mere presence charge. The particular charge read:

> mere presence at a scene where drugs are found is not enough to prove possession. **Actual knowledge of the presence of the crack cocaine is strong evidence of a defendant's intent to control its disposition or use.** The defendant's knowledge and possession can be inferred when a substance is found on property under the defendant's control. However, this inference is simply an evidentiary fact to be taken into consideration by you along with other evidence in this case and to be given the amount of weight you think it should have. Two or more persons may have joint possession of a drug.

State v. Cheeks, 401 S.C. 322, 327, 737 S.E.2d 480, 483 (2013) The Court found error in the instruction, but found no prejudice in its use in the case because there was no evidence he was merely present. The Court found that this charge both improperly weighed the evidence, and that it largely negated the mere presence charge. The Court found this charge converts all persons merely present who have actual knowledge of the drugs on the premises into possessors of that drug. It agreed that this charge largely negates the mere presence charge, and erroneously conveys that a mere permissible evidentiary inference is, instead, a proposition of law.

First, this case is distinguishable from Cheeks which did not address the "lying in wait instruction on express malice. As counsel noted, this instruction was the general instruction on malice given in South Carolina during that time frame which asserts that lying in weight is evidence of express malice. There has been no decision by the South Carolina Supreme Court that addresses error in the "lying in wait" instruction. In fact, the same "lying in wait" language was given in the murder instruction in State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), but was not raised as an issue of error. See State v. Wilson, 115 S.C. 248, 105 S.E. 341, 342 (1920), overruled on other grounds by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) ('Express malice' is where one kills another, where the malice is evidenced and proved by previous threats, old grudges, lying in wait, or by words showing an evil intent to do the act."

For an ineffective assistance claim, the PCR court must "determine whether counsel was ineffective at the time of the alleged error." Pantovich v. State, 427 S.C. 555, 562–63, 832 S.E.2d 596, 600 (2019), reh'g denied, (September 27, 2019). Thus, the court must consider the law as it existed at the time of trial and "not as it has evolved today ...." Id. at 564, 832 S.E.2d at 601. Accordingly, trial counsel will not be found deficient for failing "to be clairvoyant or anticipate changes in the law ...." Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999); Chappell v. State, 429 S.C. 68, 75, 837 S.E.2d 496, 500 (Ct. App. 2019).

Further, this death did not occur based upon the Applicant "lying in wait." As noted by counsel, the shooting occurred after a series of subsequent verbal confrontations on the road after the Applicant had come out of the woods. This was the focus of the defense and the focus of the prosecution, not lying in wait and shooting the victim from the woods.

For the above reasons, this Court must conclude that counsel was not deficient in failing to object to the "lying in wait" instruction. Further this Court concludes that Sixth Amendment prejudice was not shown because there was other evidence of malice shown in the State's case and the factual circumstance of the woods incident was separated in time with the actual use of the weapon.

App.p. 715-718.

REASONS WHY CERTIORARI SHOULD BE DENIED

In the petition before this Court the Petitioner contends that the PCR court erred in finding that defense counsel in 2016 was not ineffective in failing to object to an instruction on expressed malice. In particular, he contends that the trial judge's reference to "lying in wait" as a form of express malice was a charge on the facts and should have been objected where there was evidence of expressed malice in the evidence before the Court. However, in the Petition, the Petitioner admits that an objection would be a "novel issue" that he should have raised. The PCR Court relying upon the testimony of defense counsel Ben Stitely, found that counsel was of the opinion that the instruction was consistent with charge book law in South Carolina and that the actual murder occurred in a different setting after a series of verbal confrontations. Since there is no caselaw concluding the charge was a violation of the State Constitution, Article V, §21, counsel would have been making, as Petitioner conceding a novel argument, counsel cannot be found deficient. In addition, there was a plethora of additional evidence other than an earlier lying in wait which indicated the Petitioner's expressed malice that any alleged deficiency related to that "phrase" did not meet the prejudice prong of *Strickland*. The PCR Court findings are supported by probative evidence in the record.

The Instruction on Expressed Malice.

This issue surrounds the jury instruction on expressed malice. In the instruction, without objection, Judge Gary Hill stated as follows:

> Malice of forethought may be expressed or inferred. These terms expressed and inferred do not mean different kinds of malice but different ways in which they may be shown to exist. That is either by direct evidence or by inference from the facts and

> circumstances that are proven**. Expressed 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 or any other acts of preparation showing the deed was within the defendant's mind would be expressed malice.**

App..p. 543, ll. 24- p. 544, l.10. (emphasis added).

This instruction on expressed malice, including the use of "lying in wait" is consistent with instructions arising from the common law in South Carolina. *See, State v. Bodie,* 33 S.C. 117, 11 S.E. 624, 625 (1890)*; State v. Ariel*, 38 S.C. 221, 16 S.E. 779 (1893); *State v. Way*, 38 S.C. 333, 17 S.E. 39, 41 (1893); *State v. Symmes*, 40 S.C. 383, 19 S.E. 16 (1894), *overruled by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009)(on other grounds as related to implied malice instruction through use of a deadly weapon); *State v. Cleland*, 148 S.C. 86, 145 S.E. 628, 629 (1928), overruled by *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009))(on other grounds as related to implied malice instruction through use of a deadly weapon); *State v. Hardin*, 114 S.C. 280, 103 S.E. 557, 558 (1920), overruled by *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009))(on other grounds as related to implied malice instruction through use of a deadly weapon); *State v. Kelsey*, 331 S.C. 50, 78, 502 S.E.2d 63, 77 (1998) (instruction that stated "Proof of malice may be express or direct, such as, where there is evidence of previous threats or evidence of lying in wait. In other words, circumstances which show directly that an intent to kill existed").

Defense counsel's testimony

Defense counsel Ben Stitely testified at the PCR hearing that he saw no reason to object to these instructions in 2016. PCR counsel Johnson gave an expansive question to counsel Stitely

and referenced *State v. Cheeks*, 401 S.C. 322, 737 S.E.2d 480(2013) as supportive of Petitioner position. App.p. 640, l. 3-16. Counsel stately responded as follows:

A. That's the charge out of Judge Anderson's book. I did not object to it. Nobody argued lying in wait in this case specifically. In fact, like I said, it was a showdown on the road. The testimony that you're talking about "I had a bead on him" or whatever it was, I think I even illustrated that wasn't the case because he doesn't do anything about it. It's not until the guy comes down the road at him. Maybe I could have objected to it. I don't know.

Q. But that was actually the similar -- very similar language to Ms. Blanchette when she said that his statement was that.

A. Fair enough. But, no, to my knowledge, that's the standard example the judge gives of the legal definition.

App.p. 640, l. 17-p. 641, l. 5. On cross-examination, related to the expressed malice instruction, counsel Stitely testified similarly:

Q. And as far as the malice instruction that was given at the time of this trial, you understood it was similar to the instruction in Judge Ralph King Anderson's criminal charge book?

A. Yeah. To my knowledge, that's the exact same – I hear that exact charge in almost every case, so I did not object to it.

Q. Okay. And that was based upon your understanding of the law at that particular time; is that right?

A. Correct.

App.p. 653-654.

The Relevant Testimony related to Expressed Malice.

The Petitioner focuses on the trial testimony of Donna Blanchett related to "lying in wait." However, Petitioner attempts to give an impression that the shooting by Petitioner of Bobby Christofoli occurred while the Petitioner was lying in wait. A reasonable reading of the record supports the defense counsel's testimony that the shooting occurred after Petitioner had exited the woods.

Donna Blanchett testified after a series of confrontations with the Petitioner she went inside her house, hid the gun. App.p. 240. She then had another confrontation with him and told him where the gun was which he found. Thinking he was still in the house, she settled in to watch TV when Petitioner started calling her on the phone. Inquiring where he was:

> He finally said he was out in the woods and that he had the gun and I knew he had the vodka bottle with him, but he also had his daddy's blanket. He told me he was out in the woods and he was getting all scratched up. Then he got off the phone and then he called me several more times and I know one time he called me I wouldn't even pick the phone up and then the last time he called was when he told me he had, he could see them and they were talking about him and that he had a bead on them and could take them out at any time.

App.p. 241, l. 2-23. She noted that Petitioner was referring to John Williams and Christofoli. The call was made around 8:39 PM and lasted about 6 minutes. App.p. 254. Blanchett stated Petitioner refused to come back into the house. App.p. 244. She described the tone of Petitioner's voice as hateful. However, she did not know what he was angry about. She left the house and went down to where Michael and Boby were standing and talking, who advised her that they were talking about work. App.p. 244.

Blanchette stated that she turned and walked up the road and the Petitioner came out of the woods and asked her what they were talking about, which she told him about work. App.p. 244. "And he started cussing again and saying all kind of things. Well, Bobby walked back up the road and he got right beside me and my mind was in such a state. I heard Billy say gun and I turned around and ran as fast as I could back to where Michael was." App.p. 244, ll. 19-24. She described the Petitioner at that time as mad and yelling that they were lying. App.p. 245. She next heard the Petitioner say "gun" and she ran off to the truck. About 10 seconds latter she heard the gunshots and Bobby in the road. App.p. 247. She said that she did not see Billy again. App.p. 248.

As defense counsel stated, the incident resulting in death was not a lying in wait scenario. He sought to present a defense of self-defense at the time of the shooting. The Petitioner had given a statement on the night of the incident:

> Bobby threatened to beat my a** if I turned around. I told him I would shoot him if he turned around and [he] began telling me to go ahead and shoot him. He began to say go ahead and shoot him. Shoot me in the back. I'm unarmed. If you turn and walk away, I'm gonna beat you're a**. I fired two warning shots in the air and then unloaded the gun into him. It was either him or me.

App. 455, II. 18-App. 456, l. 10.

Petitioner conflates "lying in wait" with the Petitioner's verbal statements of express malice when they are separate items. The point that defense counsel was making at the PCR was the killing did not result from the fact that Petitioner was lying in wait 12 minutes before the shooting. The added expressed malice was that Petitioner declared his intent to shoot them – this was independently expressed malice. In addition it was his hateful language included in the phone call. These were independent items of evidence of expressed malice. It was further supported by the fact that he came out of the woods with the gun and confronted the victim.

TRIAL COUNSEL IN 2016 NOT REQUIRED TO BE CLAIRVOYANT AND USE A CHANGE IN THE LAW

In the petition before this Court, the Petitioner urges that counsel was ineffective and deficient , not contending that counsel should have foreseen a future change in the law, but contends that based upon the facts in this case and the alleged modern trend of case law regarding trial courts commenting on the facts, that counsel should have raised a novel issue by objecting to the expressed malice charge as an impermissible charge on the facts. Petition, p. 15.

However, the law is clear in collateral 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. E*.g., 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...." (citing *Thornes v. State*, 310 S.C. 306, 309–10, 426 S.E.2d 764, 765 (1993))), overruled on other grounds by *Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999); *Thornes*, 310 S.C. at 309–10, 426 S.E.2d at 765 ("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."). As trial counsel's performance was not deficient, we reverse the PCR court's grant of relief on this ground.

Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016).

It is a long-standing rule that an attorney is not required to be clairvoyant and anticipate or discover changes in the law which were not in existence at the time of trial. *Harden v. State*, 360 S.C. 405, 409, 602 S.E.2d 48, 50 (2004) (*citing Gilmore v. State*, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994)). Typically the rule arises in PCR matters where an applicant alleges defense counsel was ineffective for failing to present at all an argument or law not recognized or in effect until after trial. *See, e.g. Robinson v. State*, 308 S.C. 74, 417 S.E.2d 88 (1992) (counsel not deficient in failing to argue battered spouse syndrome six years before its recognition in *State v. Hill, 387 S.C. 398, 339 S.E.2d 121 (1986))*; *Teamer v. State*, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) (counsel not deficient in failing to object to "reach the truth" jury instruction five years before its prohibition in *State v. Daniels*, 40l S.C. 251. 737 S.E.2d 473 (2012)); *Winkler v. State*, 418 S.C. 643, 653-54, 795 S.E.2d 686, 692 (2016) (counsel not deficient in failing to object to trial court's refusal to answer jury question about what would happen if they failed to reach a unanimous sentencing verdict, where no precedent existed at the time of trial to support such an objection). Clearly, if counsel is not deficient for possessing clairvoyance when a

law does in fact change, he is certainly not deficient for failing to challenge something that has to this date still not changed in favor of Petitioner's position.

INSTRUCTION NOT A COMMENT ON THE FACTS BUT PROPER DEFINITION OF EXPRESSED MALICE

Geisendorff did not and could not establish defense counsel was constitutionally ineffective for failing to object to the illustrative example employed by the trial judge during her jury instructions. Critically, that is true because there was, in fact, nothing improper about the trial judge's use of that example, under present law.

Demonstrating that fact, while it is unquestionably true a trial judge cannot properly make a comment on the facts when instructing the jury on the law in South Carolina, the usage of illustrative examples as part of a jury charge has *for more than a century* been recognized as proper in our state and not violative of the constitutional prohibition on comments on the facts. See S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."); *State v. Young*, 238 S.C. 115, 135, 119 S.E.2d 504, 514-515 (1961) ("[A] judge does not violate this provision of the Constitution [prohibiting a jury charge on the facts] by the use of hypothetical or supposed facts for the purpose of illustrating some principle of law."), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); *Norris v. Clinkscales*, 47 S.C. 486, __, 25 S.E. 797, 806-808 (1896) (explaining an impermissible comment on the facts occurs when a trial judge "expresses in his charge his own opinion upon the force and effect of the testimony, or of any part of it, or intimates his views of the sufficiency or insufficiency of the evidence in whole or in part" and instructing "statements used in illustration of some principle of law" do not violate the constitutional prohibition on a trial judge commenting on the facts); *see also State v. Quick*, 141 S.C. 442, __, 140 S.E. 97, 99 (1927) ("Oftentimes juries can be made to understand the law of the case easier if they are given helpful

illustrations."). Indeed, that principle has even been recognized as being so settled citation to authority is no longer needed to support it. *See State v. Duncan*, 86 S.C. 370, __, 68 S.E. 684, 686 (1910) ("It has been decided too often to require citation of cases that a hypothetical statement of the facts with a statement of the legal result following thereupon, is *not a charge upon the facts*." (emphasis added)). Therefore, the trial judge did not violate the prohibition on comments on the facts by using an illustrative example that—by Petitioner's own admission—was distinct from the factual scenario involved in his case. *Compare State v. Steadman*, 257 S.C. 528, 541, 186 S.E.2d 712, 716 (1972) ("Neither is the charge subject to a valid criticism, as claimed, that it constituted a comment on the facts. The trial judge prefaced a comment with the statement that it was by way of illustration. The comment related to the breaking and entry on an apartment used for both business and dwelling purposes. While it was designated by the trial judge as an illustration, it was nothing more than a general statement of law and did not constitute a comment on the facts."); *Harrelson v. Reaves*, 219 S.C. 394, 402, 65 S.E.2d 478, 482 (1951) ("The Court merely used said hypothetical statements in an effort to clarify the applicable law without expressing or intimating any opinion as to the weight of the evidence. This is permissible."); *and State v. Aughtry*, 49 S.C. 285, __, 26 S.E. 619, 622 (1897) (instructing a trial judge's use of a hypothetical to help explain the law concerning alibi to the jury was neither erroneous nor an impermissible comment on the facts); *with State v. Hughey*, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000) (concluding the trial judge did not err by refusing to give Hughey's requested jury instruction concerning "specific examples of legal provocation" not because all jury instructions involving illustrative examples are categorically improper but, instead, because the specific examples Hughey requested related to the "specific facts of the case" and, thus,

would have constituted an improper charge on the facts), overruled on other grounds by *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009).

Further, the Petitioner's reliance on *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009) is misplaced. *Belcher* was not decided based upon the Article V, Sec. 21 charge on the facts provision.

The Petitioner's reliance on *State v. Cheeks*, 401 S.C. 322, 737 S.E.2d 480 (S.C. 2013) is misplaced. In *Cheeks*, the defendant objected in a drug possession case, to an "actual knowledge/strong evidence" charge, arguing that it was a comment on the facts and the weight of those facts, and that it nullifies or at least conflicts with the mere presence charge. The particular charge read:

> mere presence at a scene where drugs are found is not enough to prove possession. **Actual knowledge of the presence of the crack cocaine is strong evidence of a defendant's intent to control its disposition or use.** The defendant's knowledge and possession can be inferred when a substance is found on property under the defendant's control. However, this inference is simply an evidentiary fact to be taken into consideration by you along with other evidence in this case and to be given the amount of weight you think it should have. Two or more persons may have joint possession of a drug.

State v. Cheeks, 401 S.C. 322, 327, 737 S.E.2d 480, 483 (2013) The Court found error in the instruction, but found no prejudice in its use in the case because there was no evidence he was merely present. The Court found that this charge both improperly weighed the evidence, and that it largely negated the mere presence charge. The Court found this charge converts all persons merely present who have actual knowledge of the drugs on the premises into possessors of that drug. It agreed that this charge largely negates the mere presence charge, and erroneously conveys that a mere permissible evidentiary inference is, instead, a proposition of law.

First, this case is distinguishable from Cheeks which did not address the "lying in wait instruction on the malice element of express malice. As defense counsel noted, this instruction was the general instruction on malice given in South Carolina during that time frame which asserts that lying in weight is evidence of express malice. There has been no decision by the South Carolina Supreme Court that addresses error in the "lying in wait" instruction. In fact, the same "lying in wait" language was given in the murder instruction in State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), but was not raised as an issue of error. See State v. Wilson, 115 S.C. 248, 105 S.E. 341, 342 (1920), overruled on other grounds by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) ('Express malice' is where one kills another, where the malice is evidenced and proved by previous threats, old grudges, lying in wait, or by words showing an evil intent to do the act."

It remains difficult to see how counsel could be deficient in failing to object to instructions that reasonable counsel have not objected.

Relatedly, since the trial judge's use of the illustrative example was neither improper nor a prohibited comment on the facts, defense counsel could not have performed in a deficient manner by failing to raise a meritless objection to an appropriate jury instruction. *See State v. Glenn*, 88 S.C. 162, __, 70 S.E. 453, 453 (1911) (explaining a trial judge's use of a hypothetical statement of facts during a jury charge "is not a charge on the facts"); *cf. Winkler v. State*, 418 S.C. 643, 653, 795 S.E.2d 686, 692 (2016) ("One of the key circumstances a court must consider in its examination of counsel's decision not to make a particular objection is whether there was any law to support the objection."); *Mayo v. State*, 347 S.C. 422, 426, 556 S.E.2d 380, 382 (2001) (holding a PCR judge's grant of relief based on defense counsel's failure to raise an

objection to be without factual support where "there was no sustainable objection" defense counsel could have made).

Moreover, Petitioner similarly could not have been prejudiced under Strickland by defense counsel's performance in regard to that example because there was no reasonable likelihood of a different outcome even if an objection had been raised since: (1) the trial judge's illustrative example was not improper or objectionable; (2) the jury was otherwise properly instructed on the law concerning malice. *See Williams v. State*, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005) (an applicant—in order to prove an ineffective assistance of counsel claim—must establish: (1) trial 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 trial counsel's deficient performance). Under such circumstances, Rivers was not and is not entitled to any relief because he cannot possibly meet his burden of establishing his ineffective assistance of counsel claim. See Strickland, 466 U.S. at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim."). However, as previously noted, that is a finding for the PCR judge to make as opposed to this Court due to the nature of appellate review. See Simmons, 416 S.C. at 593, 788 S.E.2d at 225 ("We sit today in an appellate capacity and making findings of fact de novo would be contrary to this appellate setting.").

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari. Should this Court grant the petition, Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

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