

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

—————  
Certiorari to Lexington County

Honorable George M. McFaddin, Circuit Court Judge  
—————

BILLY GEISENDORFF,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-000232  
—————

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI  
—————

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## ARGUMENT IN REPLY

During both opening and closing arguments, the State repeatedly argued that the jury could find the requisite malice to convict Petitioner of murder because of his conduct in the woods. The State even used the words “lying in wait” during closing argument stating,

*Evidence of malice, implied malice, and again you take it from the circumstances, it's little pieces of evidence along the way that when pieced together form something that can't be disputed. Form something that's abundantly clear and in this case it's that he intended malice towards Bobby Christofoli lying in wait in the woods. Lying in wait. What else was he doing in the woods? He didn't go into the woods because he was afraid. He would have stayed in his house and locked the doors. He had a weapon. He wasn't afraid of anyone or anything. He left his house seeking out trouble. Seeking out what his actions lead to.*

App. 518, l. 24-App. 519, l. 22 (emphasis added). Respondent wholly fails to acknowledge these facts in its Return. Instead Respondent argues that “Petitioner attempts to give an impression that the shooting by Petitioner of Bobby Chirstofoli occurred while the Petitioner was lying in wait.” Return, 13, and that “Petitioner conflates ‘lying in wait’ with the Petitioner’s verbal statements of express malice when they are separate items.” Return, pg. 15. Respondent misapprehends Petitioner’s position in this matter. At trial *the State* argued that proof of malice was established by Petitioner’s conduct of lying in wait in the woods prior to the shooting death of Christofoli. The trial court then charged the jury that

*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. 543, l. 24-App. 544, l. 10 (emphasis added). The jury charge became an impermissible charge on the fact based on *the State’s own argument at trial* that malice was proven by Petitioner

“lying in wait.” Trial counsel’s failure to object to the illustration as a comment on the facts was not reasonable under professional norms and was deficient performance. Much like State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000) the illustrative example given by the judge related to the “specific facts of the case” and therefore constituted an improper charge on the facts. Hughey at 452, 529 S.E.2d at 728.

Citing to Harden v. State, 360 S.C. 405, 409, 602 S.E.2d 48, 50 (2004) which in turn cites to Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994), Respondent’s other argument is that trial counsel could not be clairvoyant and anticipate or discover changes in the law which were not in existence at the time of trial. Respectfully, while this particular charge may have not previously been found to be a charge on the facts in other cases thereby making it a “novel” issue, the prohibition against a judge commenting on the facts has existed since the drafting of our State Constitution. See Article V, Section 21 of the South Carolina Constitution and State v. Dill, 15 S.E. 567 (S.C. 1897). The legal basis of Petitioner’s challenge is one that this Court has considered numerous times and merely required trial counsel to apply settled law by objecting to the charge as a comment on the facts in the case, not anticipate changes or discover new law.

As noted in State v. Burdette, 427 S.C. 490, 502, 832 S.E.2d 575, 582 (2019), this Court has “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.” See, e.g., State v. Grant, 275 S.C. 404, 407-08, 272 S.E.2d 169, 171 (1980) (holding it was improper for the trial judge to charge the jury that the defendant’s flight may be considered as evidence of guilt); State v. Hughey, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000) (holding, in a voluntary manslaughter case, the trial court correctly refused the defendant’s request to charge the jury specific examples of conduct that might

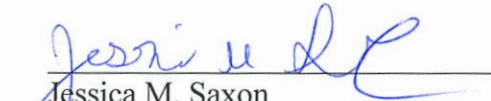
be considered as evidence of legal provocation, as the giving of such examples would be an impermissible charge on the facts), overruled on other grounds by Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009); State v. Cheeks, 401 S.C. 322, 328-29, 737 S.E.2d 480, 484 (2013) (holding, in a drug trafficking case, that the trial court must not charge the jury that actual knowledge of the presence of a drug is strong evidence of a defendant's intent to control its disposition or use). Critically, in Cheeks, *supra*, which PCR counsel relied upon to support Petitioner's allegation, this Court wrote,

Simply because certain facts may be considered by the jury as evidence of guilt in a given case where the circumstances warrant, *it does not follow that [the jury] should be charged that these facts are probative of guilt.* It is always for the jury to determine the facts, and the inferences that are to be drawn from these facts.

Cheeks at 328, 737 S.E.2d at 484 (emphasis added). Here, when the trial court told the jury it could use evidence of lying in wait “to establish the existence of malice, a critical element of the charge of murder, the trial court has directly commented upon the facts in evidence, elevated those facts, and emphasized them to the jury”. Burdette, at 502, 832 S.E.2d at 582. This was error under the case law as it existed at the time of Petitioner's trial. Trial counsel should have objected to the charge as a direct comment on the facts and his failure to do so was ineffective assistance of counsel.

**CONCLUSION**

Based on the foregoing argument, as well as the argument set forth in the Petition for Writ of Certiorari, Petitioner respectfully requests that this Court grant the petition to allow full briefing of this issue.

  
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ATTORNEY FOR PETITIONER

This 5th day of February, 2025.