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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO HORRY COUNTY
Court of Common Pleas
J. Mark Hayes, II, Post-Conviction Relief Court Judge

Case No. 2021-CP-26-4551

Mitchell M. Weatherall, # 371932, Respondent,
v.
State of South Carolina, Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals Honorable J. Mark Hayes' Order Granting Post-Conviction Relief, filed on May 2, 2025. On May 6, 2025, Petitioner timely served a motion to reconsider, alter, or amend pursuant to Rule 59(e), SCRCR. On May 9, 2025, Petitioner's Rule 59(e) motion was timely filed. On June 10, 2025, Judge Hayes issued a Form 4 Order denying Petitioner's Rule 59(e) motion to reconsider. On June 10, 2025, Petitioner received notice of the entry of the Order. Petitioner has attached with the Form 4 Order a June 4, 2025, email from Judge Hayes indicating that no further Order will be issued by the court. Therefore, pursuant to Rule 203, SCACR, Petitioner files this notice of appeal after receipt of the Form 4 Order. A copy of the Order Granting Post-Conviction Relief; a copy of the Rule 59(e) motion with its attachment; and a copy of the Form 4 Order denying Petitioner's 59(e) motion with its attachment are attached hereto.

[Space left blank intentionally, conclusion and signature follow on next page.]

WHEREFORE, the State of South Carolina respectfully appeals.

Respectfully submitted,

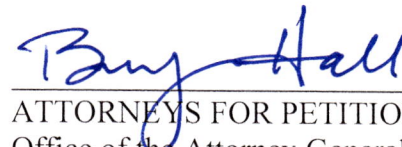
ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

D. RUSSELL BARLOW, II
Senior Assistant Deputy Attorney General

BRYAN T. HALL
Assistant Attorney General

By:



ATTORNEYS FOR PETITIONER
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

July 9, 2025,

Other Counsel of Record:

J. Falkner Wilkes, Esquire
248 Deerwood Park Drive
Oakland, MS 38948
Attorney for Respondent

cc: Honorable Renee Elvis, Horry County Clerk of Court
Honorable J. Mark Hayes, II, Post-Conviction Relief Judge

Mitchell M. Weatherall

State of South Carolina

2025 JUN 10 11

APPLICANT(S)

RESPONDENT(S)

Submitted by:

Attorney for : Plaintiff Defendant
 or
 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
- 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:

See additional information.

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : See page 2 for additional information. Formal Order to follow.

INFORMATION FOR THE JUDGMENT INDEX

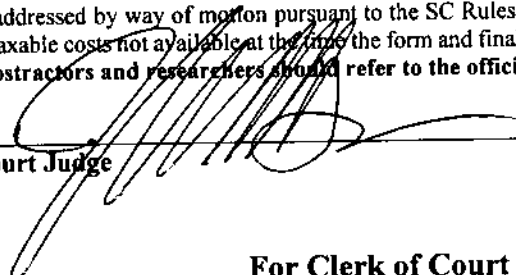
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
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.

Circuit Court Judge



2132
Judge Code

6/5/25
Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

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

This is a post-conviction relief matter that is before this Court on the Respondent's SCRCR Rule 59(e) Motion to Reconsider, Alter, and Amend this Court prior order granting the applicant's PCR application.

In its motion the State raises two issues:

- (1) that applicant failed to prove he was prejudiced by Counsel's failure to object to the jury charge on malice inferred from the use of a deadly weapon because (1) the charge did not contribute to the verdict since there was other evidence of malice presented at trial from Applicant's conduct and other evidence of malice presented at trial from Applicant's conduct and efforts to cover up the murder, and (2) the charge was proper under Belcher, the law available at the time of Applicant's trial, since there was no evidence presented to reduce, excuse, mitigate, or justify the murder; and

- (II) (II) Applicant failed to prove Counsel was ineffective for failing to call Tommy Lee Benton as a witness because (1) Bouchette articulated reasonable strategic decisions for not calling Benton, believing him to be a “risky” witness, believing it would have undermined the defense’s argument to the jury, and wanting to reserve the defense’s right to last argument; and (2) Applicant failed to prove there’s a reasonable probability that the result of trial would have been different with Benton’s testimony since Marcus Bell’s testimony that Applicant confessed the murder and cover up to him was corroborated by the testimony of other witnesses and physical evidence.

In response to the State’s motion, applicant’s PCR counsel advised that he was willing to file a response to the State post-trial motion, if requested, but that his response would largely be a reiteration of the facts and law stated in the Order.

After reviewing the State’s motion and the prior Order, this Court, in accordance with SCRCF Rule 59(f), exercises its discretion to decide the motion without oral arguments. Based on the review, the court denies the present motion and declines to alter or amend the prior order. In its motion, the State asks that one of the witness’s, Bouchette, testimony be found as credible. This Court declines to make such a finding. Attorney Gardner was the applicant primary attorney at trial. Also see Order Granting Post-Conviction Relief pp 10 to 12.

While the State argues the existence of “overwhelming evidence of Applicant’s guilt”, this court, as examined in the Order, disagrees, especially as to the issue of malice. Order p. 9. Even if the State’s jailhouse witness was credible—which Gardner expressed the witness was not— his testimony was the only direct evidence in the record to establish that applicant hit the deceased with a beer bottle. His testimony—if believed--- established that he struck the deceased but did very little, if any, to support a premeditation of an intent to kill. Order pp 4 to 6.

Again, after having reviewed the present motion, this Court finds not reason to alter or amend its prior Order.

J. MARK HAYES, II, JUDGE
Circuit Court Judge, At-Large, Seat 5
180 MAGNOLIA STREET, 2ND FLOOR
SPARTANBURG, SOUTH CAROLINA 29306

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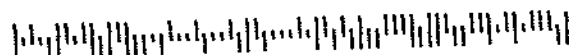
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The Hon. Renee Elvis
Horry County Clerk of Court
PO Box 677
Conway, SC 29528-0677

38 DRDUNMP 29528



From: Hayes, J. Mark <mhayesj@sccourts.org>

Sent: Wednesday, June 4, 2025 11:32 AM

To: Bryan Hall <Bryanhall@scag.gov>; jfalknerwilkes@gmail.com

Cc: Hayes, J. Mark Law Clerk (Allen Chaplin Hughes, Jr.) <mhayeslc@sccourts.org>; Hayes, J. Mark Secretary (Sharyn M. Walker) <mhayessc@sccourts.org>

Subject: Weatherall v. State 2021-CP-26-04551

All

This is a post-conviction relief matter that is before this Court on the Respondent's SCRPC Rule 59(e) Motion to Reconsider, Alter, and Amend this Court prior order granting the applicant's PCR application.

In its motion the State raises two issues:

- (I) that applicant failed to prove he was prejudiced by Counsel's failure to object to the jury charge on malice inferred from the use of a deadly weapon because (1) the charge did not contribute to the verdict since there was other evidence of malice presented at trial from Applicant's conduct and other evidence of malice presented at trial from Applicant's conduct and efforts to cover up the murder, and (2) the charge was proper under Belcher, the law available at the time of Applicant's trial, since there was no evidence presented to reduce, excuse, mitigate, or justify the murder; and
- (II) (II) Applicant failed to prove Counsel was ineffective for failing to call Tommy Lee Benton as a witness because (1) Bouchette articulated reasonable strategic decisions for not calling Benton, believing him to be a "risky" witness, believing it would have undermined the defense's argument to the jury, and wanting to reserve the defense's right to last argument; and (2) Applicant failed to prove there's a reasonable probability that the result of trial would have been different with Benton's testimony since Marcus Bell's testimony that Applicant confessed the murder and cover up to him was corroborated by the testimony of other witnesses and physical evidence.

In response to the State's motion, applicant's PCR counsel advised that he was willing to file a response to the State post-trial motion, if requested, but that his response would largely be a reiteration of the facts and law stated in the Order.

After reviewing the State's motion and the prior Order, this Court, in accordance with SCRPC Rule 59(f), exercises its discretion to decide the motion without oral arguments. Based on the review, the court denies the present motion and declines to alter or amend the prior order. In its motion, the State asks that one of the witness's, Bouchette, testimony be found as credible. This Court declines to make such a finding. Attorney Gardner was the applicant primary attorney at trial. Also see Order Granting Post-Conviction Relief pp 10 to 12.

While the State argues the existence of "overwhelming evidence of Applicant's guilt", this court, as examined in the Order, disagrees, especially as to the issue of malice. Order p. 9. Even if the State's jailhouse witness was credible—which Gardner expressed the witness was not—his testimony was the only direct evidence in the record to establish that applicant hit the deceased with a beer bottle. His testimony—if believed--- established that he struck the deceased but did very little, if any, to support a premeditation of an intent to kill. Order pp 4 to 6.

Again, after having reviewed the present motion, this Court finds not reason to alter or amend its prior Order.

A copy of the above will be incorporated into a Form 4 for filing with the Horry County Clerk of Court's Office. Since no alterations or amendments were made to the prior Order, no further Order will be issued by the Court.

Thank you all for your cooperation and patience while this matter was reviewed.

Mark Hayes

~~~ CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.



ALAN WILSON  
ATTORNEY GENERAL

May 6, 2025

The Honorable Renee Elvis  
Horry County Clerk of Court  
Post Office Box 677  
Conway, SC 29528-0677

**Re: Mitchell M. Weatherall, # 371932 v. State of South Carolina**  
**2021-CP-26-04551**

Dear Ms. Elvis,

Enclosed please find the original Motion to Reconsider, Alter, and Amend Judgement Granting PCR Pursuant to Rule 59(E) of the Respondent, with its accompanying attachments, in the above-captioned case, for filing in your office.

If you have any questions regarding this matter, please let me know.

Sincerely,

Bryan F. Hall  
Assistant Attorney General

BTH/l  
Enclosure

cc: The Honorable J. Mark Hayes, II  
J. Falkner Wilkes, Esquire

FILED  
HORRY COUNTY  
RENEE M. ELVIS  
CLERK OF COURT  
HORRY COUNTY, SC  
2025 MAY -9 P 1:49

STATE OF SOUTH CAROLINA  
COUNTY OF HORRY

Mitchell M. Weatherall, #371932,

Applicant,

v.

State of South Carolina,

Respondent.

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

) Case No.: 2021-CP-26-04551  
)

) **MOTION TO RECONSIDER, ALTER, OR**  
) **AMEND JUDGMENT GRANTING PCR**  
) **PURSUANT TO RULE 59(E)**

) (Counsel Retained)  
)  
)  
)

FILED  
HORRY COUNTY  
MAY - 9 P 1:49  
JAMES E. EVIS  
CLERK OF COURT  
HORRY COUNTY, SC

Pursuant to Rule 59(e), SCRPC, the State of South Carolina (“Respondent” or “the State”) moves for this Court to reconsider, alter, or amend its judgment granting post-conviction relief (“PCR”) for Mitchell M. Weatherall (“Applicant”). An evidentiary hearing was convened before the Honorable J. Mark Hayes, II, on October 29, 2024. At the hearing, the State provided the court a memorandum of law on the trial court’s implied malice from use of a deadly weapon jury charge (Attachment 1). On May 2, 2025, Judge Hayes granted Applicant’s PCR application, finding Counsel was ineffective for failing to object to the trial court’s jury charge on implied malice from use of a deadly weapon and for failing to call Tommy Lee Benton as a witness to testify that Marvin McElveen confessed to the murder. (Order referenced as “PCR Order”).

The State would respectfully show this Court that Applicant is not entitled to relief because of the following:

- I. Applicant failed to prove he was prejudiced by Counsel’s failure to object to the jury charge on malice inferred from use of a deadly weapon because (1) the charge did not contribute to the verdict since there was other evidence of malice presented at trial from Applicant’s conduct and efforts to cover up the murder, and (2) the charge was proper under *Belcher*, the law available at the time of Applicant’s trial, since there was no evidence presented to reduce, excuse, mitigate, or justify the murder.
- II. Applicant failed to prove Counsel was ineffective for failing to call Tommy Lee Benton as a witness because (1) Bouchette articulated reasonable

strategic decisions for not calling Benton, believing him to be a “risky” witness, believing it would have undermined the defense’s argument to the jury, and wanting to reserve the defense’s right to last argument; and (2) Applicant failed to prove there’s a reasonable probability that the result of trial would have been different with Benton’s testimony since Marcus Bell’s testimony that Applicant confessed the murder and cover up to him was corroborated by the testimonies of other witnesses and physical evidence.

### STATEMENT OF FACTS

Applicant proceeded to a jury trial before the Honorable Benjamin Culbertson on March 20-23, 2017. Applicant was represented by Johnny Gardner (“Counsel”) and Jared Bouchette (“Bouchette”). At trial, Marcus Bell, Applicant’s cellmate at the detention center, testified that Applicant told Bell that he and Victim got into a misunderstanding about drugs, and Applicant grabbed a bottle and hit Victim across the head. (R. 272). Bell testified that Applicant said he did not notice Victim was dead until a few days later, and when he noticed, Applicant tried to clean the hotel room up. (R. 273). Bell’s testimony was corroborated by the testimony of Missy Baines, an employee at the hotel who testified that the room was cleaned but there was a red substance and broken glass on the floor. (R. 78-80). Bell testified that Applicant told him that Applicant and another person put Victim’s body in a car that Applicant had borrowed from a female friend, and Applicant planned to dispose of the body in a metal scrap yard. (R. 273). Victim’s body was found off the side of a dirt road. (R. 153; 155). Bell testified that he never saw Applicant’s paperwork about his case, and the only person he talked to about the case was Applicant. (R. 280).

Tonya Wedlock, Applicant’s friend, testified that Applicant borrowed her car. (R. 218; 220). Wedlock identified Applicant in video surveillance from the hotel, which showed Applicant and his co-defendant carrying Victim’s body and putting it in Wedlock’s car. (R. 225-27; St.’s Ex. 77). Wedlock’s testimony corroborated Bell’s testimony that Applicant told him he borrowed a

car from his female friend and disposed of the body. (R. 273; 218-20). The jury convicted Applicant of murder, and Judge Culbertson sentenced him to life.

### ARGUMENT

In a PCR, Applicant bears the burden of proving the allegations in his application by a preponderance of the evidence. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). In evaluating allegations of ineffective assistance of counsel, Applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, measured under "prevailing professional norms" (i.e. deficient performance), and (2) the applicant sustained prejudice as a result of counsel's performance. *Strickland v. Washington*, 466 U.S. 668 (1984); *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Counsel is *strongly presumed* to have rendered adequate assistance and made all significant decisions in exercise of reasonable judgment, and the Applicant must overcome this presumption to receive relief. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (citing *Strickland*, 466 U.S. at 690) (emphasis added); *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. To prove prejudice from Counsel's performance, the applicant must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, *the result of the proceeding would have been different.*" *Id.* at 117-18, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 688) (emphasis added). The focus of the prejudice inquiry is whether the result of the proceeding would have been different. *Id.*

**I. Applicant failed to prove Counsel was ineffective for failing to object to the trial court's jury charge that malice may be inferred from use of a deadly weapon.**

The State asks this Court to reconsider and alter its decision and find that Applicant failed to prove prejudice from the jury charge on malice inferred from use of a deadly weapon. This Court need not address whether Counsel was deficient for failing to object to the jury charge where Applicant failed to prove he was prejudiced. *Strickland*, 466 U.S. at 670 (stating "[a] court need

not first determine whether counsel's performance was deficient before examining prejudice resulting from the alleged deficiencies... [i]f it is easier to dispose of the ineffectiveness claim on the ground of lack of prejudice, that course should be followed"). In evaluating whether a PCR applicant has suffered prejudice as a result of a jury charge, the charge must be viewed in its entirety and not in isolation. *Gibbs v. State*, 403 S.C. 484, 495-96, 744 S.E.2d 170, 176 (2013). A jury charge that is substantially correct and covers the law does not require reversal. *State v. Adkins*, 353 S.C. 312, 318-19, 577 S.E.2d 460, 464 (Ct. App. 2003).

In Applicant's trial, the trial judge charged the jury as follows:

Malice is hatred, ill will, or hostility towards another person.

...

Malice aforethought may be expressed or inferred.

...

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

...

Malice may be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the dead is done with a deadly weapon. A deadly weapon is any article, instrument or substance, which is likely to cause death or great bodily harm.

(R. 397-98).

In *State v. Burdette*, the Supreme Court held that regardless of the evidence presented at trial, a trial court should not instruct the jury that it may infer malice from the use of a deadly weapon. *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019). However, *Burdette* does not apply to Applicant's case because it was decided in 2019, two (2) years *after* Applicant's 2017 trial. Additionally, the Court expressly stated that the ruling in *Burdette* would only apply to cases pending on direct appeal at the time if the issue was preserved and would *not* apply to convictions challenged on PCR. *Id.* at 505, 832 S.E.2d at 583 ("Our ruling is effective in this case and those

cases which are pending on direct review or are not yet final, so long as the issue is preserved.... However, today's ruling will not apply to convictions challenged on post-conviction relief").

This Court ruled that Applicant is entitled to retroactive application of *Burdette* and entitled to PCR relief therefrom. (PCR Order 9: "As a result, the Applicant is entitled to a retroactive application of the holding in *Burdette* and therefore granted a new trial."). This Court's ruling stands in contrast to the Court's express language in *Burdette* that its ruling will not be applied in PCR. The State asks this Court to reconsider its decision.

This Court also ruled that Counsel was ineffective for failing to object to the charge on due process grounds for burden shifting. (PCR Order 7-8). However, the *Burdette* ruling states the charge is improper because it requires the trial judge to comment on the facts, not because of burden shifting. *Burdette*, 427 S.C. at 503, 832 S.C. at 582 ("A jury instruction that malice may be inferred from the use of a deadly weapon is an improper court-sponsored emphasis of a fact in evidence—that the deed was done with a deadly weapon—and it should no longer be permitted."). Respectfully, the State asks this Court to reconsider its ruling because the conclusion that the jury charge constitutes burden shifting is inconsistent with both the *Burdette* ruling and the dicta that allows the solicitor to argue to the jury the existence of malice based on the use of a weapon. *Burdette*, 427 S.C. at 582-83 (stating if the deed is done with a deadly weapon, the state is free to argue to the jury that it could infer the existence of malice based on that fact).

This Court cited *Gibson v. State*, 355 S.C. 429, 586 S.E.2d 119 (2003), *overruled by Burdette, supra*. However, the *Gibson* Court held that a "presumption" of malice implied from use of a deadly weapon was unconstitutional as burden shifting, not the jury's "inference" from the facts and conduct of the defendant. *Compare Id.* at 433, 586 S.E.2d at 121-22 (holding the trial court's charge that the jury can "presume" malice is unconstitutional as burden shifting) *with*

*Burdette, supra*. The *presumption* under the law is improper as burden shifting because it *mandates* that the judge or jury make a conclusion. However, nothing prevents the jury from making an *inference* malice from the facts and conduct.<sup>1</sup> The latter being a permissive deduction that the jury is free to make or not.

Further, *Burdette* was decided *after* Applicant's trial. This Court is to evaluate Counsel's actions by the law available at the time of trial and "every effort be made to eliminate the distorting effects of hindsight." *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (quoting *Strickland*, 466 U.S. at 689). Counsel is not required to be clairvoyant and anticipate changes in the law that did not exist at the time of trial or the conviction. *Harden v. State*, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004).

The law available at the time of Applicant's trial was *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), *overruled by Burdette, supra*. In *Belcher*, the Court held that the trial court could not charge jury that malice could be inferred from use of a deadly weapon where there was evidence presented at trial that would reduce, mitigate, excuse, or justify the homicide. *Id.*

**A. Applicant failed to prove prejudice because the trial court's jury charge on implied malice from use of a deadly weapon did not contribute to the verdict since there was evidence of malice presented at trial, apart from Applicant's use of a weapon, from Applicant's conduct in attacking Victim and efforts to cover up the murder.**

This Court determined the implied malice from use of a deadly weapon charge contributed to the guilty verdict and prejudiced Applicant because "there was no evidence that Applicant had any intent to harm the victim *prior* to the argument and assault." (PCR Order 5-6 (emphasis added)). The State asks this Court to reconsider because there was evidence of malice presented at trial from Applicant's conduct in attacking Victim and covering up the murder.

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<sup>1</sup> This Court also cites *Hall v. Kelso*, 892 F.2d 1541 (11th Cir. 1990). The State submits this case is non-binding on this Court and the jury charge in *Hall* was invalidated as burden shifting because of the "presumption" imposed by law.

In determining whether an applicant was prejudiced by counsel's failure to object to an erroneous malice charge, the court must determine whether the erroneous malice instruction contributed to the verdict based on all the evidence presented to the jury. *Gibson v. State*, 416 S.C. 260, 265, 786 S.E.2d 121, 124 (2016), *overruled on other grounds by Burdette, supra*. The Court "must weigh the significance of the presumption to the jury *against the other evidence of malice considered by the jury* without the erroneous malice charge." *Id.* at 265-66, 786 S.E.2d at 124 (citation omitted and emphasis added). In *Gibson*, the Supreme Court held a defendant was entitled to PCR relief when Counsel failed to object to the trial judge's jury charge on inferred malice from use of a deadly weapon and *there was no evidence of malice presented at trial other than the defendant's use of a deadly weapon*. *Id.* (emphasis added) (reasoning that the erroneous instruction contributed to the verdict since there was no evidence of malice presented at trial except the defendant's firing of the gun).

In *Brooks*, the Court of Appeals held that the defendant was not prejudiced by the trial court's jury charge on malice inferred from use of a deadly weapon where *the defendant's other conduct* satisfied the definition of malice. *State v. Brooks*, 428 S.C. 618, 837 S.E.2d 236 (Ct. App. 2019) (emphasis added). The defendant and others exchanged words, and the defendant displayed his gun. *Id.* at 623-24, 837 S.E.2d at 239. The defendant opened fired and, after he stopped shooting, fled the scene. *Id.* The victim died, and the defendant was indicted for murder. *Id.* In *Brooks*, the court reasoned the jury could find the defendant's conduct showed a total disregard for human life based on the defendant's conduct *preceding and immediately after* the murder. *Id.* at 630, 837 S.E.2d at 242 (emphasis added). The court held that "the jury could have found [the defendant's] conduct showed a total disregard for human life, allowing the jury to infer malice

from this conduct after having been correctly instructed by the circuit court that they could do so.”  
*Id.*

This State asks this Court to reconsider its determination that there was no “overwhelming evidence” of malice apart from Applicant’s use of a deadly weapon. (PCR Order 7). At trial, Marcus Bell testified that Applicant told him that Applicant hit Victim over the head with a bottle after an argument about drugs. (R. 272). Applicant told Bell that he did not notice that Victim was dead until days later. (R. 273). When Applicant noticed Victim was dead, he tried to clean up the hotel room and disposed of the body. (R. 272; 273; 153; 155). Applicant was seen on video surveillance from the hotel putting Victim’s body in a car. (St.’s Ex. 77; R. 225-27).

Although Applicant and Victim were partying together prior to the murder, Applicant’s conduct immediately preceding and immediately after the murder is evidence of malice because the attack itself, Applicant’s choice to use a bottle, and the cover up showed a total disregard for human life. *Brooks, supra* (“[the defendant’s] conduct preceding, and immediately after, his choice to use a gun showed a ‘total disregard for human life’”). When *Belcher* prohibited malice from use of a deadly weapon, it was prohibiting malice implied by operation of law, not the jury’s ability to infer malice based on Applicant’s conduct. *Cf. State v. Taylor*, 434 S.C. 365, 370, 862 S.E.2d 924, 927 (Ct. App. 2021) (“When our supreme court spoke of implied malice in *King*, it was speaking of malice implied by operation of law, not of the jury’s ability to infer malice based on its view of certain facts” (citation omitted)).

The trial court charged the jury that it could infer malice from conduct showing a total disregard for human life (R. 398:8-9), and the fact that Applicant’s attacked Victim by swinging a bottle at his head supports an inference of malice (ill-will towards Victim). After attacking Victim, Applicant left him dead in a hotel room for *days*. The jury was permitted to reasonably infer malice

from Applicant's conduct showing a total disregard for Victim's life. *See id.* at 371, 862 S.E.2d at 927 (malice means hatred or ill will and can be inferred from conduct that shows a total disregard for human life or can be shown by acts and conduct from which someone would naturally and reasonably infer intent).

Further, Applicant's efforts in covering up the murder afterwards *is* evidence of malice. *Brooks*, 428 S.C. at 631, 837 S.E.2d at 243 (“[the defendant’s] efforts to cover up his guilt indicate his malice”); *State v. Ballington*, 346 S.C. 262, 273, 551 S.E.2d 280, 286 (Ct. App. 2001) (“evidence [the defendant] attempted to cover up how his wife died suggests he killed her with a wicked or depraved spirit”), *overruled on other grounds by Belcher, supra*; *see also Taylor*, 434 S.C. at 372, 862 S.E.2d at 928 (holding the solicitor’s argument to jury that it could infer malice from the defendant’s efforts to cover up the crime was not improper).

The trial court’s jury charge did not contribute to the verdict since there was evidence of malice presented at trial such that the jury found malice in Applicant’s conduct before, at the time of, and after the murder, regardless of the court’s charge on Applicant’s use of a weapon. *Brooks*, 428 S.C. at 633, 837 S.E.2d at 244 (“beyond a reasonable doubt, the challenged inferred malice instruction did not contribute to the verdict and, thus, did not constitute reversible error”). Thus, Applicant failed to prove he was prejudiced by Counsel’s failure to object to the jury charge.

**B. Applicant failed to prove prejudice because the jury charge on malice inferred from use of a deadly weapon was proper under *Belcher* since there was no evidence presented at trial that would reduce, mitigate, excuse, or justify the murder at the time the killing was committed.**

This Court has ruled that the trial court’s charge was improper under *Belcher* because there was a lack of malice, which would tend to mitigate or lessen the homicide (PCR Order 7). However, the State respectfully asks this Court to reconsider since there was no evidence presented

at trial that would reduce, mitigate, excuse or justify the murder at the time of the killing. As a result, Applicant failed to prove prejudice.

In *Brooks*, the defendant argued the trial court erred in giving the jury charge on malice inferred from use of a deadly weapon because he believed there was evidence presented at trial that the shooting resulted from sudden heat of passion, which reduces the offense from murder to voluntary manslaughter. *Brooks*, 428 S.C. at 626-27, 837 S.E.2d at 240-41. Evaluating the facts, the court noted there was no evidence that the victim interacted with the defendant. *Id.* However, the court rejected the defendant's argument and found there was no evidence of sufficient legal provocation that would have reduced the offense from murder to manslaughter since there was no evidence the victim provoked the defendant or posed a threat to him. *Id.* (citing *State v. Wharton*, 381 S.C. 209, 214, 672 S.E. 786, 788 (2009) (finding there was no evidence of sufficient legal provocation when there was no evidence showing the victim provoked the defendant although there was evidence the defendant and a third party exchanged words; there was no evidence the third party posed a threat to the defendant either by possessing a weapon or hostile acts)).

Similar to the defendant in *Brooks*, there was no evidence presented in Applicant's trial that would reduce the offense from murder to manslaughter because there was no evidence presented that Victim provoked Applicant or posed a threat to him by either possessing a weapon or engaging in a hostile act towards him. (sufficient legal provocation). Although Applicant and Victim got into an argument and exchanged words before Applicant hit and killed him with the bottle, words do not constitute sufficient legal provocation in this case. *State v. Byrd*, 323 S.C. 319, 322, 474 S.E.2d 430, 432 ("where death is caused by the use of a deadly weapon, words alone, are not sufficient to constitute legal provocation").

The mere fact that Applicant and Victim were partying shortly before the murder does not reduce the offense from murder or mitigate, excuse, or justify the offense otherwise. This Court determined there was no evidence that Applicant had any intent to harm Victim prior to the homicide because they were partying together, and there was no evidence Victim had been induced to the hotel for an ill purpose. (PCR Order 5). However, regardless of Applicant and Victim's prior interactions, no evidence was presented to establish that Applicant had legal provocation *at the time of the killing* to reduce, mitigate, excuse, or justify the murder. *See Byrd*, 428 S.C. at 627, 837 S.E.2d at 240 ("sufficient legal provocation must be present at the time of the killing").

The conclusion that there was no evidence to reduce the murder offense is also supported by the fact that the trial court did not charge the jury on voluntary manslaughter. (R. 387-99). *See State v. Childers*, 373 S.C. 367, 373, 645 S.E.2d 233, 236 (2007) ("the law to be charged must be determined from the evidence presented at trial"). Since there was no evidence to reduce, mitigate, excuse, or justify the murder, the trial court's jury charge was proper under *Belcher*, the law at the time of trial. Thus, as a matter of law, Counsel cannot be deemed deficient for failing to object to a proper jury charge, and Applicant cannot be prejudiced by a proper jury charge. The State respectfully asks this Court to reconsider, alter, or amend its judgment granting PCR.

**II. Applicant failed to prove Counsel and Bouchette were ineffective for failing to call Tommy Lee Benton as a witness at trial to testify to McElveen's alleged confession of the murder to Benton.**

The State asks this Court to reconsider and alter its judgment and find that Applicant failed to prove Counsel and Bouchette were ineffective for failing to call Tommy Lee Benton as a witness: "A court must indulge a *strong presumption* that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 690 (emphasis added). Judicial scrutiny of counsel's performance "must be highly deferential." *Id.* at 689. Counsel's

decision whether to call a particular witness should be evaluated for reasonableness under all the circumstances, viewed at the time of counsel's conduct, with *heavy deference to counsel's judgment*. See *Bagwell v. State*, 410 S.C. 259, 265, 763 S.E.2d 630, 633 (Ct. App. 2014) (emphasis added).

In Applicant's case, Benton testified at the PCR hearing that he was at the courthouse and prepared to testify that Marvin McElveen (Applicant's co-defendant; AKA "chicken") told Benton in the jail that he committed the murder. Benton and his mother, Christie Hudson, testified that Benton was told by Bouchette that Applicant was taking a plea, and Benton's testimony was not needed. However, Bouchette testified that that was probably a misunderstanding because Applicant was "obviously" in the middle of trial and was not taking a plea.

Bouchette testified that they (Counsel and Bouchette) decided not to call Benton as a witness because Benton was a "risky witness" due to Benton having pending "gruesome felony charges,"<sup>2</sup> which could have been brought up by the State subject to the court's discretion. Bouchette also testified that he and Counsel believed they had planned to argue in closing arguments that the State was relying on "unreliable" jailhouse informants, and Counsel and Bouchette believed they would lose some leverage making that argument in if the defense called its own jailhouse informant as a witness. Bouchette also testified that he believed the State would call McElveen to testify that McElveen had nothing to do with the altercation, which would put Applicant's credibility at issue if Applicant took the stand. Bouchette also testified that the defense wanted to maintain a final closing argument to the jury. The State asks this Court to find Bouchette's testimony *credible*.

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<sup>2</sup> Following a trial in 2017, Tommy Lee Benton was convicted of murder and first-degree arson. *State v. Benton*, 435 S.C. 250, 865 S.E.2d 919 (Ct. App. 2021). Benton's convictions were affirmed on appeal.

- A. Bouchette articulated reasonable strategic decisions in not calling Benton as a witness because he believed Benton was a “risky witness,” believed calling Benton would have undermined their argument to the jury regarding the State’s use of jailhouse informants, and wanted to reserve the defense’s right to last argument.**

The State asks this Court to reconsider its decision and find that Counsel was not ineffective for failing to call Tommy Lee Benton as a witness because Counsel articulated reasonable strategic decisions for not calling Benton. The State asks this Court to give great deference to the reasonable strategic judgments of Counsel and Bouchette at the time of trial.

In *Edwards*, the Supreme Court determined a lawyer was not ineffective for failing to call a witness to testify at trial that (1) a shooting was not the applicant’s fault, (2) the witness alone was the shooter, and (3) the applicant had no involvement in the murder. *Edwards*, 392 S.C. at 454, 710 S.E.2d at 63. The lawyer testified at the PCR hearing that his decision not to call the witness was strategic because he disagreed with the witness’ version of the facts and expressed serious concerns about the witness’ ability to withstand cross examination by the solicitor. *Id.* at 455, 710 S.E.2d at 63-64. The lawyer testified that in hindsight, he would want to reconsider calling the witness. *Id.* Viewing the lawyer’s decision under the circumstances at the time the lawyer made the decision, the Court held that the lawyer’s decision not to call the witness was not deficient because the lawyer articulated a strategic reason for not doing so. *Id.* at 458, 392 S.C. at 65.

Bouchette articulated a reasonable strategic decision in not calling Benton as a witness at trial, believing that Benton was a “risky witness” due to Benton’s pending “gruesome felony charges.” Counsel cannot be deemed deficient where a witness’ credibility is crucial to his trial strategy, and a potential witness poses serious credibility questions. *Edwards*, 392 S.C. at 458, 710 S.E.2d at 65 (“A witness’ credibility and demeanor is crucial to an attorney’s trial strategy, and an attorney cannot be said to be deficient if there is evidence to support his decision to not call a

witness with serious credibility questions...” (citation omitted)). This Court determined that Bouchette’s belief that the State could use pending charges to impeach Benton’s testimony was erroneous. (PCR Order 11). However, Counsel testified at the PCR hearing that the State’s ability to impeach Benton would be subject to the trial court’s [discretion]. This testimony supports an inference and a finding that the court’s Rule 609 determination was also considered by Counsel and Bouchette when deciding whether to call Benton as a witness.

Bouchette also articulated reasonable strategic decisions in not calling Benton as a witness, believing the State would call McElveen to testify which would contradict and put Applicant’s credibility at issue if Applicant took the stand. *See Edwards*, 392 S.C. at 458, 710 S.E.2d at 65 (stating chief among the lawyer’s reasons for not calling the witness was his concern about the witness’ ability to withstand cross-examination or witness’ credibility). Bouchette testified that the State did not call McElveen and relied on Bell’s testimony regarding Applicant’s confession to him instead.

Bouchette also articulated a reasonable strategic decision in not calling Benton, believing they would lose some leverage in making a closing argument that the State was relying on unreliable jailhouse informants if the defense called its own [unreliable] jailhouse informant as a witness. Bouchette also testified that they wanted to maintain a final closing argument to argue the reliability of the State’s witnesses to the jury.

To find Counsel deficient for failing to call Benton as a witness, this Court must find that Counsel’s decision was one that *no competent lawyer* in Counsel’s position would have taken. *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.” (emphasis added and citation,

internal quotations, and brackets in original omitted)). In light of the reasonable strategic decisions articulated by Bouchette and the riskiness of Benton as a witness, Applicant failed to prove that Counsel's decision not to call Benton was a decision that *no competent lawyer* would have made. The State asks this Court to find that Counsel and Bouchette exercised reasonable professional judgment in deciding not to call Benton as a witness and give heavy deference to the strategic decisions of Counsel and Bouchette at the time they were made.

**B. Applicant failed to prove there's a reasonable probability that the result of trial would have been different based on Benton's testimony.**

Applicant failed to prove prejudice because he failed to prove a reasonable probability the result of trial would have been different based on Benton's testimony. To prevail on a claim that counsel failed to interview or call witnesses, an applicant must prove counsel's inaction resulted in prejudice by producing witnesses at the PCR hearing to show a reasonable probability the result of the trial would have been different based on the witness's testimony. *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995).

In *Edwards*, the Court reasoned that while the witness that the lawyer failed to call may have served to corroborate the applicant's testimony concerning his involvement in the crime, "this benefit must be evaluated against the legitimate concerns regarding [the witness'] credibility and the strong evidence of [the applicant's] guilt." *Edwards*, 392 S.C. at 460, 710 S.C. at 66. "Those concerns run directly counter to the possibility that the jury would have reached a different result if [the witness] had testified." *Id.*

Similar to *Edwards*, in Applicant's trial, Benton's credibility and the overwhelming evidence of Applicant's guilt stand in contrast to any benefit Benton's testimony would have served. If Benton had testified, the jury would have weighed Benton's testimony against the testimony of Marcus Bell that Applicant confessed the murder. The case would have come down

to the credibility of witnesses. However, Bell would have likely appeared as the more credible witness since Bell's testimony was corroborated by the testimonies of several witnesses and physical evidence.

Bell testified Applicant told him that after hitting the victim and noticing the body, Applicant cleaned up the hotel room. (R. 272-73) Testimony from the hotel worker, Missy Baines, corroborated the fact that the hotel was cleaned up but had a residual "red substance" and broken glass. (R. 78-80). Bell testified that Applicant told him that Applicant borrow a car from a female friend to dispose of the body. (R. 273-74). Tonya Wedlock, Applicant's female friend, testified that Applicant borrow her car, and Wedlock identified Applicant on video surveillance of Applicant placing Victim's body in her car. (R. 225-27). Bell testified that Applicant told him that Applicant planned to dispose of the body in a scrap metal yard. (273-74). Officer Michell McSpadden testified that Victim's body was found on a dirt road. (R. 153).

Even if Benton had testified at trial that McElveen told him that McElveen committed the murder; the jury could reasonably find Bell more credible since Bell's testimony was corroborated by the testimonies of several witnesses and physical evidence. As a result, Applicant failed to prove a reasonable probability that the result of trial would have been different but for Counsel's failure to call Benton. The State asks this Court to reconsider and alter its decision.

CONCLUSION

WHEREFORE, the State respectfully requests that this Court grant its motion and reconsider, alter, or amend its judgment to deny Applicant's PCR application.

Respectfully submitted,


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Attorney General

DON ZELENKA  
Deputy Attorney General

D. RUSSELL BARLOW, II  
Senior Assistant Deputy Attorney General

BRYAN T. HALL  
Assistant Attorney General

By:

  
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May 6, 2025

ATTACHMENT 1

|                                  |   |                                     |
|----------------------------------|---|-------------------------------------|
| STATE OF SOUTH CAROLINA          | ) | IN THE COURT OF COMMON PLEAS        |
| COUNTY OF HORRY                  | ) | FOR THE FIFTEENTH JUDICIAL CIRCUIT  |
|                                  | ) |                                     |
| Mitchell M. Weatherall, #371932, | ) | Case No.: 2021-CP-26-04551          |
|                                  | ) |                                     |
| Applicant,                       | ) | <b>RESPONDENT'S MEMORANDUM</b>      |
|                                  | ) | <b>IN RESPONSE TO APPLICANT'S</b>   |
| v.                               | ) | <b>MEMORANDUM ON IMPLIED MALICE</b> |
|                                  | ) | <b>JURY CHARGE</b>                  |
| State of South Carolina,         | ) |                                     |
|                                  | ) | (Counsel Appointed)                 |
| Respondent.                      | ) |                                     |
|                                  | ) |                                     |

Mitchell M. Weatherall ("Applicant") filed a post-conviction relief ("PCR") action on July 12, 2021. The State of South Carolina ("Respondent" or "the State") hereby makes a memorandum in response to Applicant's Memorandum on Issue of Malice Charge to Jury. Respondent would respectfully show this Court that Applicant is not entitled to relief because Applicant was not prejudiced by the trial court's jury charge that malice may be inferred from use of a deadly weapon as there was evidence of malice other than Applicant's use of a weapon.

**I. STATEMENT OF FACTS**

Applicant proceeded to a jury trial before the Honorable Benjamin Culbertson on March 20-23, 2017. At trial, Marcus Bell, Applicant's cellmate at the detention center, testified that Applicant told him that he and Victim got into a misunderstanding about drugs, and Applicant grabbed a bottle and hit Victim across the head. (R. 272). Bell testified that Applicant told Bell that he did not notice Victim was dead until a few days later, and when he noticed, Applicant tried to clean the hotel room up. (R. 273). Bell testified that Applicant told him that Applicant and another person put Victim's body in a car that Applicant had borrowed from a female friend and planned to dispose of the body in a metal scrap yard. (R. 273). Victim's body was found off the side of the road. (R. 153; 155).

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 HORRY COUNTY, S.C.

Tonya Wedlock, Applicant's friend, testified that Applicant borrowed her car. (R. 218; 220). Wedlock identified Applicant in video surveillance from the hotel, which showed Applicant and his co-defendant carrying Victim's body and putting it in Wedlock's car. (R. 225-27; St.'s Ex. 77).

The trial judge charged the jury as follows:

Malice is hatred, ill will, or hostility towards another person.

...

Malice aforethought may be expressed or inferred.

...

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

...

Malice may be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the dead is done with a deadly weapon. A deadly weapon is any article, instrument or substance, which is likely to cause death or great bodily harm.

(R. 397-98). The jury found Applicant guilty of Murder.

## II. ARGUMENT

**Applicant cannot prove Counsel was ineffective for failing to object to the trial court's jury charge that malice may be inferred from the use of a deadly weapon because Applicant was not prejudiced by the charge since there was other evidence of malice presented at trial such as Applicant's conduct in attempting to cover-up the murder by cleaning the hotel room, placing Victim's body in a car, and discarding the body.**

Applicant alleges Counsel was ineffective for failing to object the trial court's jury charge that malice may be inferred from use of a deadly weapon. However, this Court need not address whether Counsel was deficient for failing to object because Applicant failed to prove he was prejudiced by the jury charge since the court charged the jury that it could infer malice from conduct showing a total disregard for human life, and Applicant's conduct in attacking Victim and attempting to cover up the murder manifests a total disregard for human life. There was sufficient evidence of malice presented at trial from Applicant's conduct during and after the murder such

that malice existed regardless of Applicant's use of a deadly weapon. As a result, this Court need not address whether the jury charge on malice inferred from use of a deadly weapon itself was erroneous because the charge did not contribute to the guilty verdict. To the extent that Applicant alleges the jury charge constitutes a due process violation, the State submits the charge is a harmless error beyond a reasonable doubt since there was overwhelming evidence presented at trial of Applicant's guilt and malice from Applicant's conduct showing a total disregard for human life.

In *State v. Burdette*, the Supreme Court held that regardless of the evidence presented at trial, a trial court should not instruct the jury that it may infer malice from the use of a deadly weapon. *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019). *Burdette* was decided in 2019, two (2) years after Applicant's trial in 2017. Additionally, the Court stated that its ruling in *Burdette* would not apply retroactively to convictions challenged on PCR. *Id.* at 505, 832 S.E.2d at 583 ("today's ruling will not apply to convictions challenged on post-conviction relief").

A court is to evaluate Counsel's performance based on the law available at the time of trial. *See Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (quoting *Strickland*, 466 U.S. at 689); *see also Winkler v. State*, 418 S.C. 643, 654, 795 S.E.2d 686, 692 (2016). The law available at the time of Applicant's 2017 trial was *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), *overruled by Burdette*, 427 S.C. at 503-04, 832 S.E.2d at 582-83, (holding the trial court could not charge jury that malice could be inferred from use of a deadly weapon where there was evidence presented at trial that would reduce, mitigate, excuse, or justify the homicide).

This Court need not address whether there was evidence presented at Applicant's trial that would reduce the homicide or whether Counsel was deficient for failing to object to the trial court's jury charge because Applicant failed to prove he was prejudiced by the charge since there was

evidence of malice presented at trial of Applicant's cover-up after the murder such that the jury could have found malice regardless of the use of the deadly weapon. "A court need not first determine whether counsel's performance was deficient before examining prejudice resulting from the alleged deficiencies... [i]f it is easier to dispose of the ineffectiveness claim on the ground of lack of prejudice, that course should be followed." *Strickland v. Washington*, 466 U.S. 668, 670 (1984).

In determining whether an applicant was prejudiced by counsel's failure to object to an erroneous malice charge, the court must determine whether the erroneous malice instruction contributed to the verdict based on all the evidence presented to the jury. *Gibson v. State*, 416 S.C. 260, 265, 786 S.E.2d 121, 124 (2016), *overruled on other grounds by Burdette*, 427 S.C. at 503-04, 832 S.E.2d at 582-83. The Court "must weigh the significance of the presumption to the jury *against the other evidence of malice considered by the jury* without the erroneous malice charge." *Gibson*, 416 S.C. at 265-66, 786 S.E.2d at 124 (emphasis added). In *Gibson*, the Supreme Court held a defendant was entitled to PCR relief when Counsel failed to object to the trial judge's jury charge on inferred malice from use of a deadly weapon and *there was no evidence of malice presented at trial other than the defendant's use of a deadly weapon. Id.* (emphasis added) (reasoning that the erroneous instruction contributed to the verdict since there was no evidence of malice presented at trial except the defendant's firing of the gun).

There was evidence of malice presented in Applicant's trial other than Applicant's use of a weapon since there was evidence that Applicant covered up the crime and disposed of Victim's body. Malice is hatred, ill-will, or hostility toward another person. *State v. Fennell*, 340 S.C. 266, 531 S.E.2d 512 (2000). In *Brooks*, the Court of Appeals determined that aside from any inference of malice the jury may have draw from the defendant's use of a deadly weapon, the defendant's

other conduct preceding and immediately after satisfied the definition of malice since the conduct showed a “total disregard for human life.” *State v. Brooks*, 428 S.C. 618, 837 S.E.2d 236 (Ct. App. 2019). The Court of Appeals further stated that the defendant’s efforts to cover up his guilt indicated his malice. *Id.* at 631, 837 S.E.2d at 243 (citing *State v. Ballington*, 346, S.C. 262, 273, 551 S.E.2d 280, 286 (Ct. App. 2001), *overruled on other grounds by Belcher*, 385 S.C. at 612, 685 S.E.2d at 810), (stating the defendant’s attempt to cover up his wife’s death suggested he killed her with a wicked or depraved spirit)).

In Applicant’s trial, Marcus Bell testified that Applicant told him that Applicant cleaned up the hotel room after Applicant noticed the Victim was dead a few days after Applicant hit Victim with a bottle. (R. 273). Bell testified that Applicant told him that Applicant and another person put Victim’s body in a car that Applicant borrowed from a female friend, and Applicant attempted to dispose of the body at a metal scrap yard. (R. 273). Bell’s testimony is corroborated by Tonya Wedlock’s testimony that Applicant borrowed her car, and Wedlock identified Applicant in video surveillance from the hotel which shows Applicant and his co-defendant putting Victim’s body in Wedlock’s car. (R. 225-27; St.’s Ex. 77).

The trial judge charged the jury that it could infer malice from “conduct showing a total disregard for human life.” (R. 398:8-9). The jury in Applicant’s trial could infer malice from Applicant’s actions after the killing since the Applicant’s attempts to cover up the crime manifests a total disregard for human life regardless of Applicant’s use of a bottle (i.e. a deadly weapon). *Brooks*, 428 S.C. at 630, 837 S.E.2d at 242 (stating the trial court charged the jury that it could infer malice from conduct showing a total disregard for human life, and the jury could have found the defendant’s conduct showed a total disregard for human life). Thus, Applicant was not prejudiced by Counsel’s failure to object to the trial court’s jury charge because the charge did not

contribute to the guilty verdict since there was evidence of malice presented other than Applicant's use of a deadly weapon.

**III. CONCLUSION**

WHEREFORE, the State respectfully requests this Court deny Applicant's PCR application.


Respectfully submitted,

ALAN WILSON  
Attorney General

DON ZELENKA  
Deputy Attorney General

BRYAN T. HALL  
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By:

  
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October 25, 2024

STATE OF SOUTH CAROLINA )  
COUNTY OF HORRY )

MITCHELL M. WEATHERALL, #371932 )

Applicant, )

v. )

STATE OF SOUTH CAROLINA )

Respondent. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTEENTH JUDICIAL CIRCUIT

2021-CP-26-04551

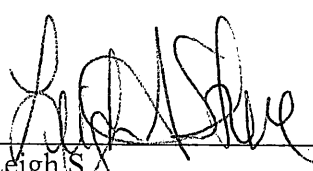
**CERTIFICATE OF SERVICE BY MAIL**

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HORRY COUNTY  
2025 MAY - 9 P 1:49  
RENEE M. ELMIS  
CLERK OF COURT  
HORRY 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 Motion to Reconsider, Alter, and Amend Judgement Granting PCR Pursuant to Rule 59(E) in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

**J. Falkner Wilkes, Esquire  
248 Deerwood Park Drive  
Oakland, MS 38948**

DATED this 6<sup>th</sup> of May, 2025

  
\_\_\_\_\_  
Leigh S.  
Legal Assistant for Respondent

STATE OF SOUTH CAROLINA  
COUNTY OF HORRY

FILED  
HORRY COUNTY ) IN THE COURT OF COMMON PLEAS

2025 MAY } 2 A 10 18  
2021 OP-26-4551

MITCHELL MONROE WEATHERALL  
(371932), APPLICANT

RENEE N. ELVIS  
CLERK OF COURT  
HORRY COUNTY ) ORDER GRANTING  
POST-CONVICTION RELIEF

v.

STATE OF SOUTH CAROLINA,  
RESPONDENT )

The parties appeared before the Court at the Horry County Courthouse on October 29, 2024, for an evidentiary hearing on an application for post-conviction relief. As a result of that hearing the Court hereby grants the Applicant a new trial.

PROCEDURAL HISTORY

Applicant is currently incarcerated in the department of corrections. Applicant was indicted for murder by the Horry County Grand Jury at its April 2014 term. Applicant was represented by Attorney Johnny Gardner, and Assistant Solicitor Nancy Livesay, of the Fifteenth Circuit Solicitor's Office, represented the state. On March 20, 2017, Applicant proceeded to a jury trial before the Honorable Benjamin H. Culbertson. On March 23, 2017, the jury convicted Applicant of murder. Judge Culbertson sentenced Applicant to a term of life imprisonment. Applicant appealed and the Court of Appeals affirmed. *State v. Weatherall, Op. No. 5763* (Ct. App. filed August 19, 2020). The remittitur was issued on September 11, 2020.

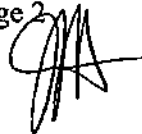
On July 12, 2021, Applicant timely filed the present action for post-conviction relief. A hearing was held at the Horry County Courthouse on October 29, 2024. Applicant was represented by J. Falkner Wilkes, of Oakland, Mississippi. Bryan T. Hall, Asst. Atty. Gen, represented the State. After hearing the testimony and reviewing all of the evidence and matter of



record properly before the Court the Court makes the following findings of facts and conclusions of law.


At the hearing the Applicant proceeded on four allegations of ineffective assistance of counsel: the failure to object to the trial court's implied malice jury charge; the failure to call witnesses to testify to Marvin McElveen's alleged confession of the murder; the failure to request further inquiry during the *Batson* hearing into the state's basis for striking a black juror; the failure to advise Applicant on the law of accomplice liability prior to his rejection of plea offers.

In a PCR action, Applicant bears the burden of proving the allegations in his/her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "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. In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Applicant must prove that counsel's performance was deficient. Strickland, 466 U.S. at 686; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Applicant must so prove his factual allegations by a preponderance of the evidence. Rule 71.1(e), SCRPC. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (*quoting Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the

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exercise of reasonable professional judgment." *Id.* (citing Strickland, 466 U.S. at 690). "When 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 v. Gentry, 540 U.S. 1, 5 (2003) (citing Strickland, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. Cullen v. Pinholster, 563 U.S. 170, 196 (2011); Harrington v. Richter, 562 U.S. 86, 109-10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough, 540 U.S. at 6; *see also* Murphy v. Davis, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable."). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

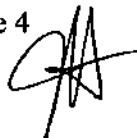
Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland's* prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" Harrington, 562 U.S. at 111-12 (quoting Strickland, 466 U.S. at 697). "The likelihood of a different result must be substantial, not just conceivable." *Id.* at 112. "The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury." United States v. Basham, 789 F.3d 358, 371-72 (4<sup>th</sup> Cir. 2015) (quoting Elmore v. Ozmint, 661 F.3d 783, 858 (4th Cir. 2011)).

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1. COUNSEL'S FAILURE TO OBJECT TO JURY CHARGE ON IMPLIED MALICE BASED ON THE USE OF A DEADLY WEAPON UNDER STATE V. BELCHER.

In 2014, the Applicant and Helbert Woodbury (victim) checked into the Atlantic View Motel in Myrtle Beach. Others joined them for a week of partying, drug use and socializing. At some point during that week the victim was hit on the head with a bottle and died as a result. Apparently, nobody in the room noticed for days that the victim had died and the partying continued. Days later when someone noticed that the victim had died, the Applicant and others removed the victim's body from the room and hid it along a dirt road. The body was later discovered and the Applicant and Marvin McElveen ("Chicken") were arrested. Marcus Bell was Applicant's roommate for two weeks during the Applicant's pretrial detention in jail. Bell had no other connection to the events at the hotel. Bell testified that while cellmates the Applicant had confessed to hitting the victim on the head with a bottle. Bell's testimony was the only direct evidence that it had been the Applicant that had hit the victim with the bottle:

16 Basically, he told me was I don't want to  
17 say an altercation, but a misunderstanding about the victim  
18 having some money to purchase more drugs, this, that, and the  
19 third because they were all in the room, Mr. Weatherall and a  
20 couple of other people were having, you know, just sitting  
21 down, getting high, just enjoying themselves, and the drugs  
22 were running out, the money was getting low, and the victim  
23 supposedly claimed he had more money to get more drugs. Come  
24 to find out, that wasn't the case. Mr. Weatherall said, hey,  
25 you know, kind of got angry and something ensued to the point  
1 to where a bottle was grabbed and hit the victim across the  
2 head, and come to find out, like they didn't even notice that  
3 the victim was, was deceased until some days later and which  
4 was ironic to me because I was like, well, dang, how did you  
5 not know that the person was dead, you know, in the room with  
6 you. But to make a long story short, when they did realize it  
7 that the victim was dead, you know, they tried to clean it up,



8 I guess.  
T. 272-273.

Based on largely on Bell's testimony the trial court charged the jury on implied malice based on the use of a deadly weapon:

8 Malice may be inferred from conduct showing a total  
9 disregard for human life. Inferred malice may also arise when  
10 the deed is done with a deadly weapon. A deadly weapon is any  
11 article, instrument, or substance, which is likely to cause  
12 death or great bodily harm. Whether an instrument has been  
13 used as a deadly weapon depends on the facts and circumstances  
14 of each case. Ordinary objects may become deadly weapons when  
15 the facts show that they have been used to inflict serious  
16 bodily harm or death. If facts are proved beyond a reasonable  
17 doubt, sufficient to raise an inference of malice to your  
18 satisfaction, this inference would be simply an evidentiary  
19 fact to be considered by you along with the other evidence in  
20 the case and you may give it the weight you decide it should  
21 receive.

T. 398.

There was no objection from either defense counsel to the court's implied malice charge. At the PCR hearing Applicant's trial counsel failed to articulate any basis for their failure to object. The record from Applicant's trial shows no evidence of prior altercations between the Applicant and the deceased; was no evidence that the Applicant harbored any ill will towards the deceased prior to the incident; no evidence that the Applicant had armed himself with the bottle prior to the incident in preparation of harming the deceased; no evidence that the victim had been induced to come to the hotel for any ill purpose. The Applicant had no prior criminal record. The evidence showed that the Applicant, the victim, and others had all gone to the hotel just to engage in prolonged drinking, drug use, and socializing. There was no evidence that the Applicant had any intent to harm the victim prior to the argument and assault that led to the



victim's death. The day the deceased was hit with the bottle the Applicant, the deceased, and others were just sitting down, getting high, just enjoying themselves in the hotel room. As Bell testified, nobody in the room even noticed that the victim had died for several days. Had the striking of the deceased occurred in such a way as to demonstrate an intent to kill the victim someone in the room would have likely paid attention to the condition of the victim following the incident. Yet no one noticed the extent of the victim's injury for days. The evidence presented at trial therefore tended to mitigate or reduce the homicide.

In State v. Belcher the court held: "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." State v. Belcher, 385 S.C. 597, 610, 685 S.E.2d 802, 809 (2009)(*reversed on other grounds*). Belcher was the law at the time of the Applicant's trial. Counsel's failure to raise an objection to the trial court's implied malice charge was therefore error under the first prong of the *Strickland* analysis.

Errors, including erroneous jury instructions, are subject to harmless error analysis.

Lowry v. State, 376 S.C. 499, 510-11, 657 S.E.2d 760, 766 (2008):

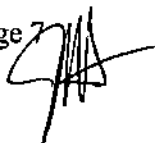
When considering whether an error with respect to a jury instruction was harmless, we must "determine beyond a reasonable doubt that the error complained of did not contribute to the verdict." State v. Kerr, 330 S.C. 132, 144-45, 498 S.E.2d 212, 218 (Ct.App.1998) (*citation omitted*). "In making a harmless 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.* Thus, whether or not the error was harmless is a fact-intensive inquiry. State v. Jefferies, 316 S.C. 13, 22, 446 S.E.2d 427, 432 (1994) ("We must review the facts the jury heard and weigh those facts against the erroneous jury charge to determine what effect, if any, it had on the verdict.") (*citation omitted*).

State v. Middleton, 407 S.C. 312, 755 S.E.2d 432 (2014).

While many murder prosecutions involve overwhelming evidence of malice apart from the use of a deadly weapon, the record in the Applicant's case reveals no such evidence. Here the record overall shows a lack of malice on the part of the Applicant and tends instead to mitigate or lessen the homicide. Through its jury charge on implied malice the trial court gave an example of conduct that the jury could consider when determining whether the State had proven the charge of murder. In doing so the trial court directly commented upon facts in evidence, elevated those facts, and emphasized them to the jury. Given the lack of other evidence in record to establish malice, or the intent to kill the deceased, the court's implied malice charge was likely the basis for the jury's verdict. Because the Court can not conclude beyond a reasonable doubt that the error complained of did not contribute to the verdict the Court finds that the Applicant has satisfied the second prong of the *Strickland* analysis. I therefore find that the Applicant is entitled to a new trial.

2. COUNSEL'S FAILURE TO OBJECT TO THE IMPLIED MALICE CHARGE ON DUE PROCESS GROUNDS.

In addition to the foregoing, state and federal case law existing at the time of the Applicant's trial supported an objection to the implied malice charge on due process grounds. In Hall v. Kelso, 892 F.2d 1541 (11th Cir. 1990) the Eleventh Circuit Court of Appeals, reversed the Georgia court where a jury charge burden-shifted on the issue of intent. Hall found the burden shifting charge violated due process. An improper malice charge was also discussed as being a due process violation in Gibson v State, 586 S.E.2d 119, 355 S.C. 429 (2003) (*reversed on other grounds*). Gibson and Hall were sufficient to inform Applicant's trial counsel of the need for an objection to the implied malice charge on due process grounds. Here the burden-shifting implied



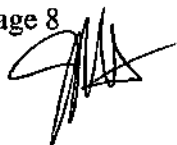
malice charge violated the due process clause of the constitution because it relieved the state of its burden of proving, beyond a reasonable doubt, that Applicant intentionally committed the homicide. Counsel's failure to raise an objection on due process grounds constitutes error under the first prong of the *Strickland* analysis. In considering the record as a whole, the court can not say beyond a reasonable doubt that the error did not contribute to the verdict. As to the due process issue the Applicant has satisfied the second prong of Strickland. I therefore find that the Applicant is entitled to a new trial.

3. RELIEF BASED ON THE HOLDING IN STATE v. BURDETTE, 427 S.C. 490, (S.C. 2019).

In addition to the foregoing, given the record as a whole I further find that the accuracy of the Applicant's conviction was seriously diminished by the court's charge allowing the jury to infer malice from the use of a deadly weapon. While Weatherall's case was still pending on direct appeal our supreme court held that regardless of the evidence offered at trial, trial courts shall not instruct a jury that the element of malice may be inferred when the deed is done with a deadly weapon. State v. Burdette, 427 S.C. 490, at 503 (S.C. 2019). Due to counsel's failure to object to the implied malice charge the issue was not preserved for direct appeal. Although the court in Burdette indicated that its holding would not apply convictions challenged on post-conviction relief, it cited Belcher and Teague v. Lane<sup>1</sup> in its analysis of retroactive application. In Gibson the court discussed Teague and the exceptions to the general bar on retroactive application of new procedural rules in criminal cases. In Gibson, the court considered whether the holding in Belcher should be applied retroactively to an improper implied malice charge in a

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<sup>1</sup> Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

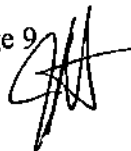


post-conviction relief case. In its *Teague* analysis the court looked to whether the conviction was seriously diminished by the improper charge. Finding that the “jury heard plenty of testimony that established the malice element” the court in Gibson found that the facts failed to meet the Teague standard.

In Gibson the defendants admitted to killing the deceased with their own weapons. The defendants had a history of altercations with the deceased and had armed themselves prior to encountering the deceased. One of the defendants testified that he shot the victim while the victim was crouched down beside a car. Based on the overwhelming evidence of malice in the record the court in Gibson found that the improper implied malice charge did not diminish the accuracy of the convictions. In the Applicant’s case the record shows no evidence of prior altercations between the Applicant and the deceased; no evidence that the Applicant harbored any ill will towards the deceased prior to the incident; no evidence that the Applicant had armed himself prior to the incident in preparation of harming the deceased; no evidence that the victim had been induced to come to the hotel for any ill purpose; and the Applicant had no prior criminal record. Overall, the record lacks evidence of malice or an intent to kill on the part of the Applicant. Applying the same Teague analysis as the court applied in Gibson, I find that the accuracy of the Applicant’s murder conviction was seriously diminished by the court’s charge that allowed the jury to infer malice from the use of a deadly weapon (the bottle). As a result, the Applicant is entitled to a retroactive application of the holding in *Burdette* and therefore granted a new trial.

4. FAILURE OF COUNSEL TO CALL WITNESS TOMMY BENTON

At the PCR hearing the Applicant presented the testimony of Tommy Benton. Prior to



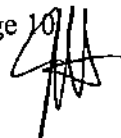
Applicant's trial Benton had been the cell mate of Marvin McElveen (aka "Chicken"), one of the individuals "partying" in the hotel room with the Applicant and others when the victim was struck with a bottle.<sup>2</sup> Benton had no other connection to the events involving the victim's death and apparently had been released from jail prior to the Applicant's trial. At the PCR hearing Benton testified that while he and McElveen were cellmates in jail McElveen had confessed to being the one that had hit the victim on the head with the bottle.<sup>3</sup> Benton was subpoenaed by the defense and appeared at the Applicant's trial. When Benton and his mother Christie Hudson arrived at court they were met by attorney Bouchette in the hallway. Both Benton and Hudson testified that Bouchette told them that the Applicant was taking a plea and that Benton's testimony would not be needed. Once released from his subpoena Benton and his mother left the courthouse and returned home. Benton would have testified to the details of the McElveen's confession had he been called as a witness at the Applicant's trial. Benton and Hudson were both credible witnesses.

The defense theory of the case was that McElveen had hit the victim on the head with the bottle. Despite Benton's testimony being essential to the defense he was released from his subpoena and told that he could leave before the need for his testimony could have even been fully evaluated. Attorney Gardner could not give a reason why Benton was released by Bouchette prior to the close of the case, nor could he give a reason why the defense did not attempt to call

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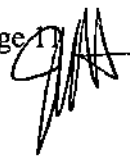
<sup>2</sup> McElveen, also charged with murder in the case, was apparently in court and available during the Applicant's trial as he was identified as a potential witness during jury *voir dire*.

<sup>3</sup> Process server Melissa Bridges testified credibly to exhaustive attempts to locate and serve McElveen with a subpoena for the PCR hearing. I find that McElveen, as the declarant of an out of court statement, to be absent from the hearing and that the Applicant has been unable to procure McElveen's attendance or testimony by process or other reasonable means.



Benton as a witness. While attorney Bouchette testified that the decision was made not to put up any evidence and have last argument, that decision was clearly influenced by an erroneous belief that the State could use pending charges to impeach Benton's testimony. Bouchette testified that Benton "was facing or had pending some fairly gruesome felony charges that he was later convicted of that, perhaps, could have been, depending on the circumstances and different things, could have been brought up by the state." According to Bouchette, this made Benton "a risky witness." Bouchette's analysis of Benton's testimony was based on a misunderstanding of the law. Clearly, under Rule 609, SCRE, Benton's pending charges could not have been used to impeach his testimony, or otherwise "bought up by the state" as Bouchette believed. Rule 609, pertaining to impeachment, is fundamental to the practice of criminal law. Bouchette's apparent misunderstanding of Rule 609 resulted in his failure to properly assess the State's ability to impeach Benton's testimony, which in turn prevented a proper evaluation of the value of Benton's potential testimony. Because counsel's decision not to call Benton as a witness was influenced by his misunderstanding of Rule 609, SCRE, it cannot be considered a valid strategy.

Under Stickland the Applicant is required to demonstrate that counsel's performance was deficient with respect to prevailing professional norms or duties. Strickland, 466 U.S. at 688, 104 S.Ct. 2052. These duties include the duty to investigate and to research a client's case in a manner sufficient to support informed legal judgments. Winston, 683 F.3d at 504. Counsel's "ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonably performance." Hinton v. Alabama, 571 U.S. 263, 134 S.Ct. 1081, 1089, 188 L.Ed.2d 1 (2014) (*per curiam*); *see also* Williams v. Taylor, 529 U.S. 362, 395, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (holding that

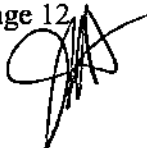
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counsel provided ineffective assistance at sentencing because they failed to investigate records due to their mistaken understanding of state law on accessing such records). Counsel must demonstrate a basic level of competence regarding the proper legal analysis governing each stage of a case. See Hinton, 134 S.Ct. at 1089 (holding that counsel rendered ineffective assistance by failing apparently to understand relevant law relating to expert testimony at trial). United States v. Carthorne, 878 F.3d 458 (4<sup>th</sup> Cir. 2017). Counsel's premature release and decision not to call Benton as a witness was clearly influenced by a fundamental misunderstanding of the law that prevented a proper evaluation of the value of Benton's testimony. Applicant has met the first prong of Strickland.

Where the only evidence as to who struck the victim with the bottle was based on the statement of Applicant's former cell mate, who was not present in the hotel room, the testimony of Benton as to McElveen's confession would have likely altered the outcome of the case. An attorney's misunderstanding of the law, resulting in the omission of his client's only defense, is not a strategic decision and amounts to ineffective assistance of counsel. United States v. Span, 75 F.3d 1383, 1389-90 (9<sup>th</sup> Cir. 1996). Counsel's error was prejudicial to the Applicant under the second prong of Strickland. The Court therefore finds that the Applicant is entitled to a new trial.

5. FAILURE OF COUNSEL TO MAKE ADDITIONAL INQUIRIES DURING *BATSON* MOTION.

During jury selection the state struck a black juror. The Applicant moved for a *Batson* hearing. During the *Batson* hearing the solicitor explained that she struck the juror based on a belief that the juror may have had a disqualifying conviction. While the juror had apparently disputed having any disqualifying convictions during jury selection, the facts stated by the

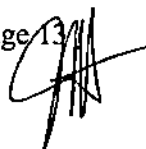


solicitor during the *Batson* hearing were sufficient to prove that the Solicitor nevertheless had a legitimate concern over the juror's potential criminal history. Regardless of whether the juror actually had a disqualifying prior conviction, the solicitor's strike was made in good faith and was race neutral. The record fails to show how further inquiry would have altered the outcome of the *Batson* hearing. The Court therefore finds no error in counsels' lack of further inquiry during the *Batson* hearing.

6. FAILURE OF COUNSEL TO ADVISE ON ACCOMPLICE LIABILITY

Applicant alleged that counsel's failure to inform him of the potential for a conviction based on accomplice liability prevented him from making an intelligent and informed decision as to plea offers. Applicant testified that had he been timely advised that he could be convicted under the theory of accomplice liability he would have accepted one of the state's plea offers. While the record supports Applicant's claim that he was never advised as to the law of accomplice liability, the Court finds no error on the part of counsel.

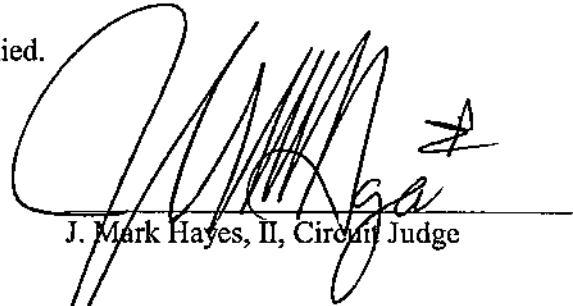
Trial counsel testified there was never any indication from the state that it would rely on a theory of accomplice liability in the Applicant's case. At trial the state made no effort to prove its case on the basis of accomplice liability. While the state did request a *hand of one* charge, it did so only in response to the defense's attempt to show third party guilt. Even though charged, the state did not argue accomplice liability to the jury. Counsel's decision not to go over the law of accomplice liability prior to the Applicant's decision to reject the plea offers was based on an accurate assessment of the facts, as well as the State's theory of the case. Counsel's decision falls within reasonable and valid strategy given everything known and reasonably predictable at that time. The court therefore finds no deficiency under the first prong of the *Strickland* analysis.



The court further finds that even had counsel prior to the plea offers advised the Applicant on the theory of accomplice liability it would not have altered the Applicant's decision to go to trial. Applicant testified: "If I would have known that I could be found guilty even if I didn't commit the crime." Had counsel explained accomplice liability prior to the plea offers they not only would have had to advise the Applicant of the state's lack of intent to rely on accomplice liability, but the lack of evidence to support it as well. Given that the applicant has been consistent in his claim of innocence and desire for a trial, I find that his simply having knowledge of the law on accomplice liability would not have altered his decision to go to trial. The court therefore finds no prejudice under the second prong of Strickland.

Wherefore, based on the foregoing, it is Ordered that the Applicant's conviction is hereby reversed and a new trial granted. As to any and all other grounds not raised, or those raised and not specifically ruled on, those grounds are denied.

SO ORDERED.



J. Mark Hayes, II, Circuit Judge

This 25<sup>th</sup> day of April, 2025

Spartanburg, South Carolina.