

**RECEIVED**

**Nov 07 2025**

**S.C. SUPREME COURT**

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

CERTIORARI TO Horry COUNTY  
Honorable J. Mark Hayes II, Circuit Court Judge

---

Appellate Case No. 2025-001371

---

MITCHELL M. WEATHERALL,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

---

**PETITION FOR WRIT OF CERTIORARI**

---

ALAN WILSON  
Attorney General

BRYAN T. HALL  
Assistant Attorney General  
S.C. Bar No. 106039  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3737

ATTORNEYS FOR PETITIONER

**TABLE OF CONTENTS**

TABLE OF CONTENTS ..... i

QUESTIONS PRESENTED ..... 1

STATEMENT OF THE CASE ..... 2

STATEMENT OF THE FACTS ..... 4

STANDARD OF REVIEW ..... 6

ARGUMENT ..... 7

    I.    The PCR court committed an error of law by retroactively applying *State v. Burdette* to find Counsel ineffective for failing to object to the trial court’s jury charge on malice inferred from use of a deadly weapon where *Burdette* was not the law at the time of trial, and the Supreme Court expressly stated that the *Burdette* ruling, which prohibited the charge, would not apply retroactively to convictions challenged on PCR. .... 7

    II.   The PCR court erred in finding Counsel ineffective for failing to object to the trial court charging the jury that it could infer malice from use of a deadly weapon where the charge was proper under *State v. Belcher*, the law at the time of trial, since there was no evidence presented to reduce, excuse, mitigate, or justify the murder, and Respondent was not prejudiced since there was evidence of malice presented at trial from Respondent’s conduct in attacking the victim and covering up the murder. .... 10

    III.  The PCR court erred in finding trial counsel ineffective for failing to call Tommy Lee Benton as a witness to testify that another person confessed the murder to Benton in jail where trial counsel articulated a reasonable strategy for not calling Benton, believing him to be a “risky witness” that would undermine the defense’s argument to the jury about the unreliability of the State’s jailhouse witness, and Respondent was not prejudiced where the result of trial would not have been different if Benton testified since his testimony was inconsistent with several witnesses and the physical evidence presented at trial. .... 17

CONCLUSION ..... 25

## STATEMENT OF QUESTIONS PRESENTED

- I. Whether the PCR court committed an error of law by retroactively applying *State v. Burdette* to find Counsel ineffective for failing to object to the trial court's jury charge on malice inferred from use of a deadly weapon where *Burdette* was not the law at the time of trial, and the Supreme Court expressly stated that the *Burdette* ruling, which prohibited the charge, would not apply retroactively to convictions challenged on PCR?
  
- II. Whether the PCR court erred in finding Counsel ineffective for failing to object to the trial court charging the jury that it could infer malice from use of a deadly weapon where the charge was proper under *State v. Belcher*, the law at the time of trial, since there was no evidence presented to reduce, excuse, mitigate, or justify the murder, and Respondent was not prejudiced since there was evidence of malice presented at trial from Respondent's conduct in attacking the victim and covering up the murder?
  
- III. Whether the PCR court erred in finding trial counsel ineffective for failing to call Tommy Lee Benton as a witness to testify that another person confessed the murder to Benton in jail where trial counsel articulated a reasonable strategy for not calling Benton, believing him to be a "risky witness" that would undermine the defense's argument to the jury about the unreliability of the State's jailhouse witness, and Respondent was not prejudiced where the result of trial would not have been different if Benton testified since his testimony was inconsistent with several witnesses and physical evidence presented at trial?

## STATEMENT OF THE CASE

In April 2014, the Horry County Grand Jury indicted Mitchell Weatherall (“Respondent”) for murder (2014-GS-26-01415). Between March 20-23, 2017, Respondent proceeded to a jury trial before the Honorable Benjamin Culbertson. Deputy Solicitor Nancy Livesay prosecuted the case. Respondent was represented by Johnny Gardner, Esq., (“Counsel”) and Jared Bouchette, Esq. (referred to collectively as “trial counsel”). The jury convicted Respondent, and Judge Culbertson sentenced him to life imprisonment.

On November 28, 2017, a notice of appeal was filed. On appeal, Respondent was represented by J. Falkner Wilkes, Esq., who filed a brief raising the following issues:

1. Did the trial court err in denying the Appellant’s Batson motion where state struck the only African American juror called?
2. Did the trial court err in denying the Appellant’s Batson motion where state struck gay juror?
3. Did the trial court err in denying the Appellant’s requested jury charge to show potential bias on the part of the state’s key witness?
4. Does any of the court’s errors, or a combination thereof, require a reversal of the Appellant’s conviction and sentence?

Following briefing and oral argument, the Court of Appeals affirmed Respondent’s convictions, determining (1) the prosecutor’s proffered race-neutral reason for striking the juror was not pretextual; (2) the defendant failed to establish that the prospective gay juror was a part of a protected group; (3) the trial court did not abuse its discretion by denying the defendant’s request to charge the jury that a statute provides that, upon the State’s motion, the court can reduce the sentence of a defendant who provides substantial assistance to an investigation or prosecution. *State v. Weatherall*, 431 S.C. 485, 848 S.E.2d 338 (Ct. App. 2020). The Remittitur was sent on September 11, 2020.

On July 12, 2021, Respondent filed an application for post-conviction relief (“PCR”)

alleging ineffective assistance of counsel. On October 19, 2021, the State (“Petitioner” or “the State”) filed its Return. On October 29, 2024, an evidentiary hearing convened before the Honorable J. Mark Hayes, II. Assistant Attorney General Bryan T. Hall represented the State. Respondent was represented by J. Falkner Wilkes.

On May 2, 2025, Judge Hayes granted Respondent’s PCR. On May 9, 2025, the State filed a Rule 59(e) motion to reconsider, alter, or amend judgment. On June 10, 2025, Judge Hayes denied the State’s motion. This Petition follows.

## STATEMENT OF THE FACTS

Helbert Woodbury (“Victim”) traveled to Myrtle Beach to visit Respondent after the two met on Craigslist. (App. 216). On November 1, 2013, Respondent and Victim checked into a motel in Myrtle Beach and reserved the room for a week. (App. 86-87). Respondent checked out of the room on November 8, 2013. (App. 88).

Missy Baines, a motel employee, testified that she cleaned the room after Respondent checked out. (App. 78-80). Baines testified that the lock on door to the room was broken, and she could not open or unlock the door. (App. 80). Once a maintenance person opened the door, Baines testified that the room was “fairly clean” but she observed broken glass, which appeared to be from a beer or liquor bottle; a white powder on the floor; and noticed a red substance on the carpet when she shampooed it. (App. 79-80). Motel staff contacted police, who processed the room and found blood spots on the mattress, bed, wall, and in the bathroom that were consistent with a homicide. (App. 100; 112).

Tonya Wedlock, Respondent’s friend, testified that Respondent asked to use her car to take Victim back to the bus station. (App. 218). Wedlock testified that she hung out in the motel room with Joey Garsow (“Garsow”), Respondent’s lover and co-defendant, while Respondent used her car. (App. 220). The group consisting of Wedlock, Garsow, and “Pocket” were in and out of the motel room for days, doing drugs, drinking, and hanging out. (App. 223-24). Wedlock testified that during that time, she did not ever see a guy named “Chicken” (Marvin McElveen AKA “Chicken”) or Victim. (App. 224). Wedlock testified that she noticed a stain on the wall of the motel room that looked like “ketchup.” (App. 221). Wedlock identified herself, Respondent, and Garsow in video surveillance from the motel that showed Respondent and Garsow placing

Victim's body in Wedlock's car. (App. 198; 227-29). Wedlock testified that she saw Respondent give Garsow a card, belonging to Victim, to buy various items. (App. 234-35; 314).

Marcus Bell, Respondent's cellmate in jail, testified that while detained together, Respondent confessed the murder to Bell as follows. (App. 270). Respondent and Victim were in the motel room doing drugs, getting high, and enjoying themselves. (App. 272). At some point, Respondent and Victim got into an argument due to a misunderstanding about money to buy more drugs. (App. 272). Respondent got angry during the argument and hit Victim across the head with a bottle. (App. 273). Respondent did not notice that Victim was dead until days later. (App. 273). Upon realizing that Victim was dead, Respondent attempted to clean up the motel room. (App. 273). Respondent admitted to borrowing a car from a female friend of his [Tonya Wedlock], and Respondent and "someone else" [Joey Garsow] planned to take Victim's body to a scrap metal yard off Carolina Forest. (App. 273).

Bell testified that Respondent initially said the murder was "Chicken's" fault, but when Respondent became more comfortable with Bell, Respondent later admitted that Chicken (Marvin McElveen) did not commit the murder. (App. 274-75). Respondent admitted to Bell that he hit Victim with the bottle, resulting in his death. (App. 275). Bell testified that he never saw any paperwork about Respondent's case and only talked about the case with Respondent. (App. 280).

A week after the murder, Police found Victim's body on a dirt trail off Carolina Forest. (App. 153). An autopsy revealed the cause of Victim's death was blunt force trauma to the skull and revealed defensive wounds on Victim's arms and hands. (App. 248). Custodian records showed Victim's card was used several times between November 1-5, 2014. (App. 314-25).

## STANDARD OF REVIEW

Appellate courts give great deference to the PCR court's factual findings and will uphold them if there is any evidence of probative value in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts will review the PCR court's conclusions of law *de novo* and will reverse if the PCR court's decisions are controlled by an error of law. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms (i.e. deficient performance), and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). To establish prejudice, the applicant must prove "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 (quoting *Strickland*, 466 U.S. at 694).

Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. When evaluating a claim for ineffective assistance of counsel, the court is to examine counsel's conduct 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).

## ARGUMENT

- I. **The PCR court committed an error of law by retroactively applying *State v. Burdette* to find Counsel ineffective for failing to object to the trial court's jury charge on malice inferred from use of a deadly weapon because *Burdette* was not the law at the time of trial, and the Supreme Court expressly stated that the *Burdette* ruling, which prohibited the charge, would not apply retroactively to convictions challenged on PCR.**

The PCR court committed an error of law by retroactively applying *State v. Burdette*, despite the Supreme Court's express language that the opinion would not be applied retroactively to convictions challenged on PCR. This Court should grant certiorari to reverse the PCR court's decision. The appellate courts do not defer to the PCR court's conclusions on questions of law. *Mangal v. State*, 421 S.C. 85, 91, 805 S.E.2d 568, 571 (2017). Instead, questions of law are reviewed de novo, and the courts will reverse the PCR court's decision when it is controlled by an error of law. *Id.* (citations omitted).

In Respondent's 2017 trial, the judge charged the jury as follows:

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.

(App. 397-98).

Two (2) years after Respondent's trial, the Supreme Court in *Burdette* invalidated the jury charge and 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). The Court further stated, expressly, that the ruling in *Burdette* would *not* apply to convictions challenged on PCR and would only apply to cases pending on direct appeal at the time of the opinion if the issue was preserved. *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" (citations omitted)).

Despite *Burdette* not being the law at the time of Respondent's trial, the PCR court ruled that Respondent "is entitled to retroactive application of the holding in *Burdette* and therefore granted a new trial." (App. 603). The PCR court's ruling stands in *stark contrast* to the Supreme Court's express language in *Burdette* that its ruling will not apply retroactively to convictions challenged on PCR. The PCR court's ruling is an error of law.

Although Respondent's case was pending on appeal at the time *Burdette* was decided, this specific issue was not preserved and thus, *Burdette* is inapplicable to both Respondent's direct appeal and PCR. Additionally, where the issue was not preserved in Respondent's direct appeal, Counsel cannot be deemed ineffective for failing to preserve it at trial because Counsel is not required to be clairvoyant or anticipate the changes in the law which did not exist at the time of trial. "[R]easonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law." *Teamer v. State*, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) (holding the PCR court erred in finding trial counsel ineffective for failing to object to a jury charge and preserve the issue for appeal where the case overruling the charge had not yet been decided at the time of trial); *see also Harden v. State*, 360 S.C. 405, 408, 360 S.E.2d 48, 49 (2004) ("An attorney is not required to anticipate potential changes in the law which are not in existence at the time of the conviction."). Similar to *Teamer*, Counsel was not ineffective for failing to object to the jury charge and preserve the issue for appeal where *Burdette* had not yet been decided.

The PCR court also found Counsel ineffective for failing to object to the inferred malice charge on due process grounds for burden shifting. (App. 601-02). To support its reasoning that Counsel *should have known* to object to the jury charge for burden shifting, the PCR court cited

*Hall v. Kelso*, 892 F.2d 1541 (11th Cir. 1990). (App. 601). However, the *Kelso* case is non-binding to this Court, or any South Carolina court, and is not directly on point to the issue. *See id.* (holding a jury instruction of a “presumption” imposed by law regarding a defendant’s mental state for committing a crime was unconstitutional as burden shifting). The *Kelso* court invalidated the *presumption* imposed by law as burden shifting because it *mandated* that the judge or jury make a conclusion regarding the defendant’s mental state. *See id.*

The PCR court also cited *Gibson v. State*, 355 S.C. 429, 586 S.E.2d 119 (2003), *overruled by Burdette*, to support its reasoning that Counsel should have challenged the jury charge as burden shifting. However, the *Gibson* case is also distinguished. In *Gibson*, the Court held that a “presumption” of malice from use of a deadly weapon was unconstitutional as burden shifting, not an “inference” of malice as was the jury charge in Respondent’s trial. *Id.* at 433, 586 S.E.2d at 121-22 (holding the trial court’s jury charge that the jury can “presume” malice is unconstitutional as burden shifting). Similar to *Kelso*, the *Gibson* court invalidated the *presumption* imposed by law as burden shifting because it *mandated* that the judge or jury make a conclusion regarding a defendant’s mental state. The *Gibson* court did not invalidate the *inference*.

A *presumption* imposed by law is different from an *inference* permitted by law. Although case law at the time prohibited the *presumption* of malice, Counsel could not have known that in the future, the Court would also issue a ruling to invalidate an *inference* of malice from the use of a deadly weapon outright. Under *Strickland*, Counsel is not required to anticipate that change. Additionally, the *Burdette* Court stated that the jury charge is improper because it requires the judge to comment on the facts, not because of burden shifting. *Burdette*, 427 S.C. at 503, 832 S.E.2d. 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.”).

The PCR court erred in determining Counsel was ineffective for failing to object to the charge as burden shifting where no case law rendered the *inference* of malice improper as burden shifting at the time of trial. *See Teamer*, 416 S.C. at 183, 786 S.E.2d at 115 (“We...hold that the PCR court erred in finding trial counsel ineffective for failing to object to the jury instruction ‘when no case law existed rendering the instruction improper...’”); *Winkler v. State*, 418 S.C. 643, 654, 795 S.E.2d 686, 692 (2016) (“One of the key circumstances a court must consider in its examination of counsel’s decision not to make a particular objection is whether there was any law to support the objection.”). Therefore, the PCR court erred in finding Counsel ineffective for failing to object to the jury charge.

**II. The PCR court erred in finding Counsel ineffective for failing to object to the trial court charging the jury that it could infer malice from use of a deadly weapon where the charge was proper under *State v. Belcher*, the law at the time of trial, since there was no evidence presented to reduce, excuse, mitigate, or justify the murder, and Respondent was not prejudiced since there was evidence of malice presented at trial from Respondent’s conduct in attacking the victim and covering up the murder.**

The PCR court erred in finding Counsel ineffective for failing to object to the jury charge on malice inferred from a deadly weapon because the charge was proper under *Belcher*, the law at the time. Additionally, the PCR court erred in finding Respondent was prejudiced where the charge did not contribute to the guilty verdict since there was other evidence of malice presented at trial apart from Respondent’s use of a weapon. Under *Strickland*, the court is to evaluate Counsel’s conduct under the law available at the time of trial. *Thornes v. State*, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993) (“This Court has never required an attorney to anticipate or discover changes in the law...which did not exist at the time of trial.”).

The law at the time of Respondent's trial was *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), *overruled by Burdette*, 427 S.C. 490, 832 S.E.2d 575. In *Belcher*, the Court held the trial court could not charge the jury that malice may be inferred from use of a deadly weapon if there was evidence presented at trial that would reduce, mitigate, excuse, or justify the homicide. *Id.* 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 Respondent's trial, the court charged the jury on malice 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.

(App. 397-98).

**A. Counsel was not deficient for not objecting because the trial court's jury charge was proper under *Belcher* since there was no evidence presented in Respondent's trial that reduced, mitigated, excused, or justified the murder at the time of the killing.**

The PCR court erred in ruling that the trial court's jury charge was improper under *Belcher* because of its finding that there was no "overwhelming evidence of malice" in Respondent's case apart from his use of a deadly weapon. (App. 601). The PCR court based its assessment on the mere fact that Respondent and Victim were partying together shortly before the murder, determining the interaction shows a "lack of malice" on the part of Respondent and "tended

mitigate or reduce the homicide.” (App. 600). However, this Court is not bound by the PCR court’s erroneous finding of no malice based on its assessment of the prior interactions between Respondent and Victim where the evidence presented at trial demonstrates Respondent did not have sufficient legal provocation at the *at the time of the killing* to reduce the killing from murder to manslaughter. *State v. Byrd*, 323 S.C. 319, 322, 474 S.E.2d 430, 432 (1996) (“sufficient legal provocation must be present at the time of the killing”). Regardless of Respondent’s and Victim’s prior interactions, there was no evidence presented at trial to reduce, mitigate, excuse, or justify the killing. As a result, Counsel was not deficient for failing to object since the trial court’s jury charge was proper under *Belcher*.

The Court of Appeals previously rejected similar reasoning employed by the PCR court that there was a lack of malice simply because of prior non-hostile interactions between Respondent and Victim. In *Brooks*, a defendant argued that under *Belcher*, the trial court erred in charging the jury on malice inferred from use of a deadly weapon because he did not have prior interactions with the victim and believed there was evidence presented that the shooting resulting in victim’s death arose from sudden heat of passion. *State v. Brooks*, 428 S.C. 618, 625-27, 837 S.E.2d 236, 240-41 (Ct. App. 2019). The court rejected the argument and found the trial court did not err because there was no evidence presented of sufficient legal provocation that would have reduced the offense from murder to manslaughter. *Id.* at 627, 837 S.E.2d at 240-41. The court noted that while there were no prior interactions between the victim and the defendant, the lack of prior interactions and the defendant’s altercation with a third-party did not reduce the offense. *Id.* at 627, 837 S.E.2d at 240-41. The court held there was no sufficient legal provocation at the time of the killing since there was no evidence presented that the victim provoked the defendant or posed a threat to him. *Id.* at 627, 837 S.E.2d at 241 (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*, regardless of Respondent's and Victim's prior interactions, there was no evidence of sufficient legal provocation presented in Respondent's trial because there was no evidence that Victim provoked Respondent or posed a threat to him by either possessing a weapon or engaging in a hostile act towards him. Although Respondent and Victim got into an argument about drug money in the moment immediately preceding the killing, words alone do not constitute sufficient legal provocation in this case. *Byrd*, 323 S.C. at 322, 474 S.E.2d at 432 ("where death is caused by the use of a deadly weapon, words alone, however opprobrious, are not sufficient to constitute legal provocation"). There was no evidence presented at trial that Respondent was acting in self-defense when he killed Victim. Instead, the evidence presented supports a finding that Respondent was the aggressor: Respondent admitted to hitting Victim over the head with a bottle, and an autopsy revealed defensive wounds on Victim's arms and hands which supports a finding that Victim was defending himself from Respondent's attack.

Based on its review of the evidence presented at trial, the trial court did not charge the jury on voluntary manslaughter since, impliedly, the court determined there was no evidence presented to reduce, mitigate, excuse, or justify the murder. (App. 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"); *see Adkins*, 353 S.C. at 317-18, 577 S.E.2d at 463 (stating the appellate courts must consider jury charges "in light of the evidence and issues presented at trial" (citation omitted)). The mere fact that Respondent and Victim were partying together shortly

before the killing neither reduces the offense from murder to manslaughter nor justifies, mitigates, or excuses it. Where there was no evidence to reduce, mitigate, excuse, or justify the murder, the trial court was permitted under *Belcher* to charge the jury that malice can be inferred from use of a deadly weapon. Accordingly, Counsel was not deficient for failing to object to the jury charge. Therefore, the PCR Court erred in finding Counsel ineffective.

**B. Respondent failed to prove prejudice from the trial court's jury charge on malice inferred from use of a deadly weapon because the charge did not contribute to the guilty verdict since there was other evidence of malice presented from Respondent's conduct in attacking Victim, leaving him for dead, and subsequently covering up the murder.**

Further, the PCR erred in finding Counsel ineffective because Respondent was not prejudiced since the charge did not contribute to the jury's guilty verdict based on other evidence of malice presented at trial. In determining whether an applicant was prejudiced by counsel's failure to object to an erroneous jury charge on malice inferred from use of a deadly weapon, 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. 490, 832 S.E.2d 575. 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).

The PCR court erred in finding the inferred malice from use of a deadly weapon charge was improper and contributed to the guilty verdict because "there was no evidence that [Respondent] had any intent to harm the victim prior to the argument and assault." (App. 599). However, there was evidence of malice presented from Respondent's conduct both *preceding* and

*subsequent to* the murder, such that the jury did not have to rely on an inference of malice from his use of a deadly weapon.

The State asks this Court to compare Respondent's case with *Gibson* and *Brooks*. In *Gibson*, the Supreme Court held a defendant was prejudiced by the trial court's jury charge on malice inferred from use of a deadly weapon where there was *little evidence* of malice presented at trial aside from the defendant's use of a weapon. *Id.* at 265-66, 786 S.E.2d at 124 (emphasis added).

By contrast, 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. *Brooks*, 428 S.C. at 630, 837 S.E.2d at 242 ("aside from any inference of malice the jury may have drawn from Appellant's use of a deadly weapon, the evidence of Appellant's other conduct satisfied the definition of malice"). The *Brooks* defendant and others exchanged words; the defendant displayed his gun and opened fire which resulted in the victim's death. *Id.* at 623-24, 837 S.E.2d at 239. After the shooting, the defendant fled the scene. *Id.* The court determined that the jury could find malice from the defendant's conduct *preceding and immediately after* the murder, which showed a total disregard for human life, and the defendant's efforts to cover up his guilt indicated his malice. *Id.* at 630-31, 837 S.E.2d at 242-43 (emphasis added). The court held that 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.*

At trial, the trial court charged the jury that it could infer malice from "conduct showing a total disregard for human life." (App. 398:8-9). Respondent hit Victim over the head with a bottle following an argument. Victim's body lay in the motel room for days, unnoticed by Respondent.

Once he realized Victim was dead, Respondent cleaned the motel room attempting to cover-up the murder. The lock on the motel room door was broken, and it is reasonable to infer that it was done to prevent anyone from entering. Respondent and Garsow placed Victim's body in Wedlock's car and disposed of it on the side of the road.

Respondent's efforts to cover-up the murder after the fact *is* evidence of malice: cleaning the motel room, breaking the lock on the door, and disposing of Victim's body. *Brooks*, 428 S.C. at 243, 837 S.E.2d at 631 ("Additionally, Appellant's efforts to cover up his guilt indicate his malice" (citation omitted)); *State v. Ballington*, 346 S.C. 262, 273, 551 S.E.2d 280, 286 (Ct. App. 2001) (stating evidence Ballington's attempt cover up how his wife died suggests he killed her with malice), *overruled on other grounds by Belcher*. Additionally, Respondent's conduct in both attacking Victim and leaving him dead for days *is* evidence of malice because it shows a total disregard for human life, irrespective of the fact that Respondent used a weapon. *Brooks*, 428 S.C. at 242, 837 S.E.2d at 630 ("Appellant's conduct preceding, and immediately after, his choice to use a gun showed a 'total disregard for human life'").

Respondent was not prejudiced by the jury charge on inferred malice from use of a deadly weapon because the charge did not contribute to the guilty verdict based on all the evidence of malice presented to the jury. *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"). Where the trial court charged the jury that it could infer malice from Respondent's conduct, the jury did not rely on an inference of malice from Respondent's use of a weapon. Instead, there was sufficient evidence for the jury to find malice from Respondent's conduct in attacking Victim and subsequently covering up the murder. *State v. Taylor*, 434 S.C. 365, 862 S.E.2d 924 (Ct. App. 2021) (holding malice 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). Therefore, the PCR court erred in finding Respondent was prejudiced by the jury charge.

**III. The PCR court erred in finding trial counsel ineffective for failing to call Tommy Lee Benton as a witness to testify that another person confessed the murder to Benton in jail where trial counsel articulated a reasonable strategy for not calling Benton, believing him to be a “risky witness” that would undermine the defense’s argument to the jury about the unreliability of the State’s jailhouse witness, and Respondent was not prejudiced where the result of trial would not have been different if Benton testified since his testimony was inconsistent with several witnesses and physical evidence presented at trial.**

The PCR court erred in finding trial counsel ineffective for failing to call Tommy Lee Benton as a witness at trial to testify that Marvin McElveen confessed the murder to Benton in jail where trial counsel articulated a valid strategy, believing Benton to be a risky witness that could jeopardize the defense’s argument to the jury. The PCR court erred in refusing to give the “heavy deference” required by *Strickland* to trial counsel’s reasonable judgment and valid strategy for not calling Benton. Additionally, the PCR court erred in finding Respondent was prejudiced because even if Benton had testified, there is not a reasonable probability that the result of trial would have been different since it is very unlikely the jury would have found Benton’s testimony credible over Marcus Bell’s testimony of Respondent’s confession. Unlike Benton, Bell’s testimony was consistent with and corroborated by the testimony and physical evidence presented at trial.

Under *Strickland*, the courts “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).

At the PCR hearing, Benton testified that that he was subpoenaed by trial counsel and appeared at the courthouse on the day of Respondent's trial. (App. 534-35). According to Benton, he was prepared to testify at trial that Respondent's co-defendant, Marvin McElveen (AKA "Chicken") told Benton in jail that McElveen committed the murder. (App. 535-36). At the PCR hearing, Benton's mother, Christie Hudson, testified that on the day of trial, Benton was sent away and told by trial counsel (Bouchette) that Respondent was taking a plea. (App. 533). Bouchette testified that the information Benton and Hudson received was probably a misunderstanding because Respondent was "obviously in the middle of trial" and was not taking a plea. (App. 582:1-4).

Bouchette testified that trial counsel (collectively Counsel and Bouchette) decided not to call Benton as a witness because he was a "risky witness." (App. 582:7-13). Bouchette testified that Benton had "gruesome felony charges" pending.<sup>1</sup> Counsel testified at the PCR hearing that the State's ability to impeach Benton for the charges would have been subject to the trial court's [discretion]. (App. 571:14-25). Regarding their trial strategy, Bouchette testified that trial counsel had planned to argue in closing that the State was relying on an "unreliable" jailhouse witness (Marcus Bell), and trial counsel believed they would lose leverage in making that argument if the defense called its own jailhouse witness. (App. 581).

Bouchette testified that if Benton testified, the State simply would have called McElveen to testify in reply that he was not present in the motel room and had nothing to do with the

---

<sup>1</sup> At the time of Respondent's trial, Tommy Lee Benton was charged with murder and first-degree arson. Benton was subsequently convicted in 2017, and the convictions were affirmed on appeal. *State v. Benton*, 435 S.C. 250, 865 S.E.2d 919 (Ct. App. 2021).

altercation. (App. 580:17-25). Bouchette testified that McElveen, as a reply witness, could have also put Respondent's credibility at issue if Respondent chose to testify in his own defense. (App. 581:1-13). Bouchette testified that the defense decided not to call witnesses because they wanted to maintain a final closing argument to the jury that the State did not prove its case and relied on "unreliable witnesses." (App. 581:11-21). Consistent with Bouchette's PCR testimony, the record reflects the defense gave the final argument in Respondent's trial and argued to the jury against the believability of Marcus Bell, the State's jailhouse witness. (App. 383-84).

**A. Trial counsel was not deficient for not calling Benton where trial counsel articulated a reasonable and valid strategy for not calling Benton, believing him to be a "risky witness" that would undermine the defense's last argument to the jury that the State's jailhouse witness is unreliable.**

Bouchette articulated a reasonable and valid strategy for not calling Benton as a witness, and the PCR court erred in finding trial counsel deficient under the circumstances where *Strickland* requires that the court be highly differential to trial counsel's reasonable strategic decisions. "Generally, trial counsel will not be deemed ineffective when he or she has expressed a valid reason for using a particular trial strategy." *Washington v. State*, 440 S.C. 550, 573, 891 S.E.2d 668, 681 (Ct. App. 2023) (citing *McKnight v. State*, 378 S.C. 33, 43, 661 S.E.2d 354, 359 (2008)). "Because advocacy is an art and not a science," courts are required to give "deference to counsel's informed decisions [;]" counsel's "strategic choices must be respected in these circumstances if they are based on professional judgment." *Strickland*, 466 U.S. at 681. Courts "must be wary of second-guessing trial counsel's tactics." *Edwards*, 392 S.C. at 457, 710 S.E.2d at 64.

In *Edwards*, the Supreme Court determined a lawyer was not ineffective for failing to call a witness to testify at trial that the applicant had no involvement in a murder where lawyer testified at the PCR hearing that his decision not to call the witness to testify was strategic. *Id.* at 455, 710 S.E.2d at 63-64. The lawyer testified that 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.* The court rejected the lawyer's hindsight assertion that he would now reconsider his decision not to call the witness. *Id.* Instead, the court viewed the lawyer's decision under the circumstances at the time the decision was made. *Id.* The Court held that the lawyer was not deficient because the lawyer articulated a valid strategic reason for not calling the witness. *Id.* at 458, 392 S.C. at 65.

Similar to the lawyer in *Edwards*, Bouchette articulated a reasonable and valid strategy for trial counsel's decision not to call Benton as a witness at trial: believing Benton was a "risky witness" that would undermine the defense strategy of making a last argument to the jury regarding the State's use of "unreliable" jailhouse witnesses. Bouchette further reasoned that the defense would lose leverage in making a closing argument to the jury that the State was relying on unreliable jailhouse informants if the defense called its own jailhouse witness. Bouchette's testimony is consistent with the record, which reflects the defense made the last argument at trial and argued to the jury against the believability of the State's jailhouse witness.

At the time of the decision, trial counsel knew that Benton's testimony was inconsistent with the evidence presented at trial from Respondent's statements, witness testimony, and physical evidence which would have seriously jeopardized Benton's credibility (full analysis below). *See id.* at 458, 710 S.E.2d at 65 (stating chief among the lawyer's reasons for not calling a witness was his concern about the witness' ability to withstand cross-examination due to the witness' vacillation, and the lawyer knew that "entirely consistent evidence" would be presented to contrast the witness' version of the facts). Trial counsel cannot be deemed deficient where a witness' credibility is crucial to his trial strategy, and the proposed witness poses serious credibility concerns. *Id.* 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)).

The PCR based its ruling of deficiency primarily on a finding that Counsel "misunderstood" the law on whether Benton's felony charges could be used as impeachment under Rule 609, SCRE. (App. 605). However, the Rule 609 consideration was only *one* of the many considered by trial counsel. As evidenced by Bouchette's testimony, chief among the reasons for the decision not to call Benton was the risk he posed as a witness due to his credibility and the defense's strategic argument to the jury regarding witness credibility.

Further, Bouchette reasoned that if Benton were called as a witness, the State would simply call McElveen in reply to testify that he was not in the room when the murder occurred and had nothing to do with it, which would contradict Benton's testimony. The record reflects that trial counsel exercised reasonable judgment and adequately considered the consequences of calling Benton to testify including Benton's credibility in light of the evidence presented; the defense's trial strategy and argument to the jury; and the State's potential response to Benton's testimony. Thus, trial counsel's strategic decision not to call Benton was reasonable and valid under the circumstances.

Accordingly, since the record does not reflect that trial counsel took an approach that no competent lawyers in their position would have taken under the circumstances, the PCR court's finding that trial counsel was deficient is erroneous. *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)). Therefore, the PCR court erred in finding trial counsel deficient.

**B. Respondent was not prejudiced by trial counsel's decision not to call Benton to testify because the result of trial would not have been different if Benton testified since his testimony was inconsistent with and uncorroborated by testimony from several witnesses and the physical evidence presented at trial.**

The PCR court erred in finding Respondent was prejudiced because the result of trial would not have been different even if Benton testified that McElveen confessed the murder to Benton. 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) (emphasis added).

In *Edwards*, the Supreme Court determined an applicant was not prejudiced by his lawyer not calling a witness to testify that a shooting resulting in a murder was the witness' fault and the applicant was not involved. *Edwards*, 392 S.C. at 458-59, 710 S.E.2d 65-66. The Court reasoned that while the witness may have served to corroborate the applicant's testimony concerning his involvement in the crime, the benefit of calling the witness "must be evaluated against the legitimate concerns regarding [the witness'] credibility and the strong evidence of [the applicant's] guilt." *Id.* 392 S.C. at 460, 710 S.C. at 66. Weighing the witness' testimony against the evidence presented, the Court determined the witness' credibility concerns and the strong evidence of the applicant's guilt "run directly counter to the possibility that the jury would have reached a different result if [the witness] had testified." *Id.* As a result, the Court determined that the applicant was not prejudiced from his lawyer not calling the witness to testify at trial. *Id.* at 458-60, 710 S.E.2d at 65-67.

Similar to *Edwards*, there were legitimate concerns about Benton's credibility, and the strong evidence of Respondent's guilt stands in stark contrast to any benefit Benton's testimony would have served. Benton's credibility and the evidence "run directly counter to the possibility

that the jury would have reached a different result[.]” If Benton had testified, the jury would have weighed his testimony that McElveen confessed the murder against Marcus Bell’s testimony that Respondent confessed the murder. The case would have come down to the credibility of the witnesses in light of the evidence presented. The jury would have likely found Bell’s testimony credible over Benton’s because Bell’s testimony of the facts, as confessed to him by Respondent, was consistent with and corroborated by the testimonies of several witnesses and the physical evidence presented at trial.

Bell testified Respondent told him that after hitting Victim over the head with a bottle and noticing Victim’s dead body, Respondent attempted to clean up the motel room. (App. 272-73). This fact is corroborated by Missy Baines, the motel employee, who testified that the room was cleaned up but she noticed broken glass that appeared to be from a bottle and a “red substance” on the carpet. (App. 78-80). Bell testified that Respondent confessed to borrowing a car from a “female friend” to dispose of Victim’s body. (App. 273-74). This fact is corroborated by Tonya Wedlock, Respondent’s friend, who testified that Respondent borrowed her car and placed Victim’s body in the car as shown on video surveillance from the motel. (App. 225-27). Bell testified Respondent admitted that he planned to dispose of Victim’s body in a scrap metal yard off Carolina Forrest. (App. 273-74). This fact is corroborated by Officer Michell McSpadden who testified that Victim’s body was found on a dirt road off Carolina Forrest. (App. 153).

Contrast Bell’s testimony with Benton’s testimony. Benton’s testimony of McElveen’s confession was inconsistent with the witnesses and evidence presented at trial. Tonya Wedlock, who was partying with Respondent in the motel room the week of the murder, testified that she did not see someone by the name of “Chicken” at the motel. (App. 224). William Stair, a police officer who collected evidence from the motel room, testified that he was unaware of “Chicken”

until recently before trial. (App. 179). Stair sent fingerprints that were found in the motel room to a lab for analysis and comparison to fingerprints from McElveen, which the police already had in the National Fingerprint Database. (App. 179). Stair testified that he did not get a match to McElveen from the fingerprints found in the motel room. (App. 179). Kelly Matteson, an officer that collected evidence from the motel room, testified that she was unfamiliar with someone named “Chicken” or George McElveen (Marvin McElveen). (App. 120-21). Additionally, motel employees Missy Baines, Angie Gunter, and Norma Davis testified that they did not know of someone named “Chicken” or George McElveen. (App. 83; 93; 210).

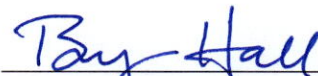
Even if trial counsel called Benton to testify at trial that McElveen confessed the murder to him in jail, it would not have changed the outcome of trial since the jury would not have found Benton credible in light of the evidence presented at trial. Although the PCR court found Benton’s testimony credible, this Court is not bound by the PCR court’s erroneous conclusion of law based on that credibility finding where the record demonstrates Respondent was not prejudiced by trial counsel’s decision not to call Benton as a witness. *Jamison*, 410 S.C. at 465, 765 S.E.2d at 127 (stating the courts “will reverse the decision of the PCR court when it is controlled by an error of law” (citation and internal quotations omitted)).

Here, the PCR court erred in concluding that Respondent was prejudiced since evidence readily apparent from the record demonstrates that Benton’s testimony would not have changed the outcome of trial. *Contra Edwards*, 392 S.C. at 460, 710 S.E.2d 66-67 (stating that with concerns regarding the witness’ testimony and the strong evidence of the applicant’s guilt in mind, “it is readily apparent from the record that there is evidence to support the PCR court’s conclusion that Petitioner failed to establish...prejudice...”). Therefore, the PCR court erred in determining that trial counsel was ineffective.

**CONCLUSION**

Based on the foregoing argument, the PCR court erroneously granted relief for Respondent. Accordingly, the State respectfully requests that this Court grant its petition for writ of certiorari and reverse the PCR court's decision.

Respectfully submitted,



---

BRYAN T. HALL  
Assistant Attorney General

S.C. Bar No. 106039  
Post Office Box 11549  
Columbia, S.C 29211  
(803) 734-3737

ATTORNEY FOR PETITIONER

November 7, 2025