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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.

APPENDIX

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VOLUME II OF II

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FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

MITCHELL MONROE WEATHERALL)
(371932)

Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2024 CP 26 4551

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Perry Correctional Institution
2. Name and location of Court which imposed sentence Horry County General Sessions
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2014-GS-26-01415 Murder 30 years
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) 032317 Life sentence

- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty X
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirmed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. 081920
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. SC Ct Appeals Opinion 5763 State v. Mitchell Monroe Weatherall
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Ineffective assistance of Trial Counsel
- (b) Failure of the State to comply with Rule 5, Brady, and other requirements of discovery and the production of information by the prosecution.

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Failure to properly prepare and investigate the case. (Including the failure to investigate and obtain evidence, surveillance video, cell phone records, cell phone video recordings, etc., that would establish a defense in the case. Failure to obtain transcripts from court proceedings wherein potential witnesses had given previous testimony. Failure to follow instructions or requests of the applicant. Failure to properly present an adequate defense based on the facts and circumstances of the case. Failure to properly conduct discovery in the case. Failure to properly interview, subpoena and call witnesses and present evidence in the case. Failure to raise proper objections during the trial to present and preserve evidentiary issues. Making improper stipulations or giving consent on issues during the trial which were adverse to the defense of the case. Failure to move for appropriate suppression hearings and properly object to the testimony of witnesses and evidence in a timely manner. Failure to properly and effectively cross-examine the State's witnesses. Failure to raise and properly argue and preserve record and issues for appeal. Failure to make a proffer of evidence when warranted by the circumstances of the case and properly present and preserve issues for appeal. Failure to make and preserve the record in cases of conferences at the bench and in chambers. Failure of counsel to communicate all plea offers to the Applicant and to adequately discuss same. Failure to properly discuss the case and advise the Applicant on the applicable law and procedure and facts known or believed to exist. (Including the failure to meet with the applicant adequately and the failure to, in a timely manner, fully review and discuss the discovery material, evidence, law, and procedure so that the applicant would fully understand the charges, consequences and choices, including plea options). Failure to fully and timely explain the advantages of a guilty plea and any plea offers.

(b) Failure of the State to produce discoverable material that would have aided in the defense of the case.

(c) _____

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? No
 - (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
 - (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
 - (d) any other petitions, motions or applications in this or any other Court? No
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
 - (b) the name and location of the Court in which each was filed:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
 - (c) the disposition thereof:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
 - (d) the date of each such disposition:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
 - (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
 - i. _____

- ii. _____
 - iii. _____
 - iv. _____
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
No
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
 - i. _____
 - ii. _____
 - iii. _____
 - (b) the proceedings in which each ground was raised:
 - i. _____
 - ii. _____
 - iii. _____
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) PCR is the appropriate remedy for the grounds alleged herein.
 - (b) _____
 - (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? Yes
 - (b) your trial, if any? Yes
 - (c) your sentencing? Yes
 - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
 - (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:

- i. Johnny Gardner, Johnny Gardner Law, P.A., 212 Main Street, Conway, SC 29526
Thomas Jarrett Bouchette, The Floyd Law Firm PC, 15 US 17 Bypass, Surfside Beach,

SC 29575

- ii. J. Falkner Wilkes, 114 Whitsett Street, Greenville, SC 29601

- iii. _____

(b) the proceedings at which each such attorney represented you:

- i. Trial

- ii. Appeal, and Post Conviction Relief

- iii. _____

19. State clearly the relief you seek in filing this application:

Reversal and new trial.

20. Are you now under sentence from any other court that you have not challenged?

No

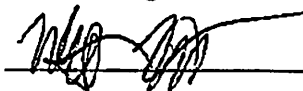
STATE OF SOUTH CAROLINA

County of Horry

)
)
)

VERIFICATION

I, Mitchell Monroe Weatherall, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.



SWORN to and subscribed before me this 2nd
day of July, 2021

Tamara Conwell (L.S.)
Notary Public

My Commission Expires: Sept-25-2023

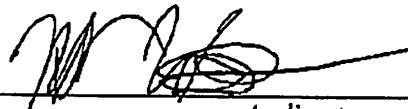
FILED
HORRY COUNTY
2021 JUL 12 A 8:09
RENEE N. ELYS
CLERK OF COURT
HORRY COUNTY, SC

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

2021 CP 26 4551

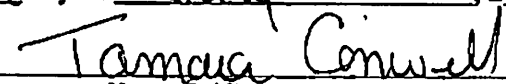
I, Mitchell Monroe Weatherall, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.



Applicant

SWORN or affirmed to and subscribed before me this
2nd day of *July*, 2021.



Notary Public

My Commission Expires: *Sept - 25 - 2023*

FILED
HORRY COUNTY
2021 JUL 12 A 8:00
RENEE N. ELVIS
CLERK OF COURT
HORRY COUNTY, SC

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Mitchell M. Weatherall, SCDC No. 371932

Applicant,

v.

State of South Carolina

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case No. 2021-CP-26-4551

RETURN

FILED
HORRY COUNTY
2021 OCT 19 P 3 11
RENEE N. ELYS
CLERK OF COURT
HORRY COUNTY, SC

NOW COMES Respondent, the State of South Carolina, making its return to Applicant Mitchell M. Weatherall's July 12, 2021 application for post-conviction relief. Respondent would respectfully show this Court:

I. 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, prosecuted the case. On March 20 Applicant proceeded to a jury trial before the Honorable Benjamin H. Culbertson. On March 23, 2017, the jury convicted Applicant of murder. Judge Culbertson then sentenced him to a term of life imprisonment.

Applicant appealed and the appeal was perfected by Attorney J. Falkner Wilkes.¹ Applicant raised the following issues on appeal:

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 the 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?

¹ Attorney Wilkes continues to represent Applicant in this application for post-conviction relief.

4. Does any of the court's errors, or a combination thereof, require a reversal of the Appellant's conviction and sentence?

The Court of Appeals affirmed the conviction and sentence without oral argument on June 1, 2020. *State v. Weatherall*, Op. No. 5763 (Ct. App. filed August 19, 2020). The remittitur was sent on September 11, 2020.

II. FACTUAL HISTORY

The Court of Appeals summarized the facts giving rise to Applicant's conviction as follows:

At trial, Norma Davis, the owner of the Atlantic View Motel, testified Applicant and Helbert Woodbury (Victim) checked into one of its rooms for a week. Melissa Baines, a member of the motel's housekeeping staff, testified the guests broke the door to the room and she could not open it. She testified she found a broken bottle in the room and blood was soaked into the carpet and the bed.

Kelly Matteson, of the Myrtle Beach Police Department's crime scene unit, testified she processed the motel room and found blood on the bed, headboard, dresser, and wall. She testified the location of bloodstains in the room indicated the blood was cast off from a weapon used in the assault. Jennifer Bartman, an expert in DNA comparisons, testified the blood from the bed, carpet, and dresser matched Victim's DNA. Victim suffered multiple lacerations on the back of his head, an underlying blunt force injury that fractured his skull, and defensive wounds on his arms and hands. Victim died from a skull fracture and brain injury.

Investigators found Victim's body concealed off of a dirt access trail. The State published a surveillance video to the jury. Angie Gunter, the manager at the Atlantic View Motel, explained the video showed someone carrying a body out of a room and putting it in a car. Applicant admitted in his opening statement that the video showed him and a man named Joey Garsow carrying the Victim's body to the car.

Tonya Wedlock, Applicant's friend, testified Applicant and Garsow were lovers. Wedlock stated Applicant met Victim through Craigslist, and Victim took a bus to Myrtle Beach to receive sexual favors from Applicant. She recalled that once Victim was in Myrtle Beach, Applicant called a dealer in order to buy drugs. Wedlock testified that later that week, Applicant asked to use her car to take Victim back to the bus station. Wedlock explained she, Applicant, and Garsow drove to the motel, where Applicant asked her to wait outside. She testified she walked to the corner to drink and was unable to see who came in or out of the room. Wedlock identified herself, Garsow, and Applicant in the surveillance video.

Marcus Bell, an inmate at the South Carolina Department of Corrections, testified he was Applicant's roommate for two weeks in jail. He explained Applicant told him Victim and Applicant had argued about money to purchase drugs. Bell stated Applicant said he got angry with Victim and hit Victim across the head with a bottle. Bell testified he did not expect anything from the State in exchange for his testimony against Applicant.

State v. Weatherall, Op. No. 5763 (Ct. App. filed August 19, 2020)

III. CURRENT APPLICATION

In his current application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
 - a. Failure to properly prepare and investigate the case. (Including the failure to investigate and obtain evidence, surveillance video, cell phone records, cell phone video recordings, etc., that would establish a defense in the case. Failure to obtain transcripts from court proceedings wherein potential witnesses had given previous testimony. Failure to follow instructions or requests of the applicant. Failure to properly present an adequate defense based on the facts and circumstances of the case. Failure to properly conduct discovery in the case. Failure to properly interview, subpoena, and call witnesses and present evidence in the case. Failure to raise proper objections during the trial to present and preserve evidentiary issues. Making improper stipulations or giving consent on issues during the trial which were adverse to the defense of the case. Failure to move for appropriate suppression hearings and properly object to the testimony of witnesses and evidence in a timely manner. Failure to properly and effectively cross-examine the State's witnesses. Failure to raise and properly argue and preserve record and issues for appeal. Failure to make a proffer of evidence when warranted by the circumstances of the case and properly present and preserve issues for appeal. Failure to make and preserve the record in cases of conferences at the bench and in chambers. Failure of counsel to communicate all plea offers to the Applicant and to adequately discuss same. Failure to properly discuss the case and advise the Applicant on the applicable law and procedure and facts known or believed to exist. (Including the failure to meet with the applicant adequately and the failure to, in a timely manner, fully review and discuss the discovery material, evidence, law, and procedure so that the applicant would fully understand the charges, consequences, and choices, including plea options). Failure to fully and timely explain the advantages of a guilty plea and any plea offers.

2. Prosecutorial misconduct
 - a. Failure of the State to produce discoverable material that would have aided in the defense of the case.

Attached and incorporated herein are Applicant's records from the South Carolina Department of Corrections, the Clerk of Court's Office, the current application for post-conviction relief, the record on appeal, the records from his direct appeal, and the current application for post-conviction relief. Respondent reserves the right to alter or amend this return upon receipt of any relevant materials.

IV. RESPONSE TO ALLEGATION OF INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant alleges numerous instances of ineffective assistance of counsel. Namely, Applicant asserts that his counsel (1) failed to properly prepare and investigate, (2) failed to obtain transcripts from proceedings where potential witnesses had given previous testimony, (3) failed to follow instructions or requests of the applicant, (4) failed to properly present an adequate defense, (5) failed to properly conduct discovery, (6) failed to properly interview, subpoena, and call witnesses and present evidence, (7) raise proper objections and preserve evidentiary issues, (8) made improper stipulations or gave consent on adverse issues during the trial, (9) move for appropriate suppression hearings and properly and timely object to witness testimony and evidence, (10) failed to properly and effectively cross-examine the State's witnesses, (11) failed to raise and properly argue and preserve record and issues for appeal, (12) failed to make a proffer of evidence when warranted, (13) failed to make and preserve the record in conferences at the bench and in chambers, (14) failed to communicate and discuss all plea offers, (15) failed to properly discuss and advise Applicant on the law, procedure, facts known or believed to exist, (16) and failed to fully and timely explain the advantages of a guilty plea and any plea offers. Respondent submits that these allegations are without merit.

Applicant's allegations of ineffective assistance of counsel are without merit. 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 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 (4th Cir. 2015) (quoting *Elmore v. Ozmint*, 661 F.3d 783, 858 (4th Cir. 2011)).

Applicant’s assertions range broadly from failure to investigate, failure to present an appropriate defense, failure to properly conduct discovery, failure to object, failure to make appropriate pretrial motions, failure to properly present witness testimony, failure to communicate plea offers, and failure to properly advise Applicant on the law. Applicant has not provided any sufficient factual basis for any of these allegations to enable the State to make an adequate response. For example, Applicant states that counsel failed to object but does not state the basis of the objection, where it should have been made, and why it prejudiced him at trial. Without more, the State cannot properly respond to the allegations. Therefore, the State moves later herein for a

more definite statement, before an evidentiary hearing is held on this ground for relief. *See Sharper v. State*, 279 S.C. 264, 305 S.E.2d 247 (1983).

V. RESPONSE TO ALLEGATION OF PROSECUTORIAL MISCONDUCT

Respondent interprets Applicant's claim that the State failed to properly disclose evidence as a claim of prosecutorial misconduct, specifically, a *Brady* and Rule 5, SCRCrimP, violation.

Post-conviction relief is not a substitute for an appeal. *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. *Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Because Applicant could have raised this issue on appeal, the failure to do so has waived this allegation as grounds for relief. Regardless, it is Applicant's burden to prove actual prosecutorial misconduct. *Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201 (1989). Respondent submits the Applicant cannot carry her burden of proving actual prosecutorial misconduct, therefore, this allegation should be summarily dismissed.

Applicant alleges *Brady*² and Rule 5, SCRCrP, violations. *Brady* requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment. *Clark v. State*, 315 S.C.385, 388, 434 S.E.2d 266, 268 (1993). A *Brady* claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. *Gibson v. State*, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the

² *Brady v. Maryland*, 373 U.S. 83 (1963).

defense, the result of the proceeding would have been different. *Clark*, 315 S.C. at 388, 434 S.E.2d at 268 (citing *U.S. v. Bagley*, 473 U.S. 667 (1985)).

The requirements of Rule 5, as opposed to the constitutional dictates of *Brady*, are judicially created discovery mechanisms for use in criminal proceedings. *State v. Gullede*, 326 S.C. 220, 487 S.E.2d 590 (1997). Rule 5(a)(1)(C) requires:

Upon request of the defendant the prosecution shall permit the defendant to inspect and copy books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant.

Id. The definition of "material" for purposes of Rule 5 is the same as the definition used in the *Brady* context. See *Fradella v. Town of Mount Pleasant*, 325 S.C. 469, 482 S.E.2d 53 (Ct. App. 1997) (per curiam). In order for Applicant to prevail on a Rule 5 claim, she must show not only an actual violation, but also that he suffered prejudice as a result. *State v. Wilkins*, 310 S.C. 81, 425 S.E.2d 68 (Ct. App. 1992); *State v. Trotter*, 322 S.C. 537, 473 S.E.2d 452 (1996).

Applicant has failed to provide a factual basis for the allegation of prosecutorial misconduct, and without more the State cannot adequately respond. Specifically, there is no clear indication of what the evidence in question is, or how it would have supported Applicant's defense. Therefore, Respondent moves for a more definite statement later herein and requests an evidentiary hearing on this ground for relief. See *Sharper v. State*, 279 S.C. 264, 305 S.E.2d 247 (1983).

VI. MOTION FOR A MORE DEFINITE STATEMENT

Respondent hereby moves for a more definite statement. The Uniform Post-Conviction Procedure Act requires the Applicant to "specifically set forth the grounds upon which the application is based." S.C. Code Ann. § 17-27-50. It is incumbent upon Applicant, *through counsel*, to amend his application where necessary to set forth *specific facts* upon which his/her

allegations are based. *See* Rule 71.1(d), SCRCP ("Counsel shall insure that all available grounds for relief are included in the application and shall amend the application if necessary."); *see also Coardes v. State*, 262 S.C. 493, 497, 206 S.E.2d 264, 265 (1974) ("[M]ere allegations of incompetency or ineffectiveness of counsel will not ordinarily suffice as grounds for a new trial under the Post-Conviction Procedure Act. The bare assertion by the appellant that he was deprived of adequate and effective assistance of counsel is insufficient."). Where an applicant fails to adequately set forth the grounds upon which he seeks relief, the court may at any time prior to entry of judgment "issue orders for amendment of the application or any pleading or motion[.]" S.C. Code Ann. § 17-27-70(a); *see also* Rule 12(e), SCRCP (permitting a circuit court judge to require a more definite statement when vague or ambiguous pleadings are filed).

Applicant has failed to set forth any/sufficient facts to "support each ground" or to explain with any/sufficient specificity the facts upon which his claims are based. Therefore, Respondent requests that Applicant be required to amend his application to set forth specifically the grounds on which his claims are based before an evidentiary hearing is held.

VII. GENERAL DENIAL

Respondent denies each allegation not expressly admitted, qualified, or explained elsewhere herein.

VIII. CONCLUSION

WHEREFORE, Respondent respectfully requests that this Court grant its motion for a more definite statement as set forth above and thereafter convene an evidentiary hearing on the allegations of ineffective assistance of counsel and prosecutorial misconduct.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

WILLIAM H. RAY
Assistant Attorney General

By:



ATTORNEYS FOR RESPONDENT
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

10/18, 2021

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-26-4551

Certificate of Service by Mail

FILED
 HORRY COUNTY
 OCT 19 P 1:31
 RENEE N. ELVIS
 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 Return in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

J. Falkner Wilkes, Esquire
 114 Whitsett St.
 Greenville, SC 29601

DATED this 18th day of October, 2021.



Grayson Horton, Legal Assistant
 For Respondent

1 State of South Carolina) **TRANSCRIPT OF RECORD**
2 COUNTY OF HORRY) CASE NO. : 2021-CP-26-04551

3 -----

4 October 29, 2024

5 **BEFORE:** The Honorable J. Mark Hayes II

6 -----

7 Mitchell M. Weatherall,)

8 Applicant,)

9 vs.)

10 State of South Carolina,)

11 -----

12 **APPEARANCES:**

13 Bryan T. Hall, Esquire
14 Assistant Attorney General for the Respondent.

15 J. Falkner Wilkes, Esquire
16 Attorney for the Applicant.

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18 Julie A. Kevish
19 Official Court Reporter

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1 **Applicant's Exhibits**

2			MARKED	ADMITTED
3	Exhibit No. 1	Driving Record	9	9
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1 October 29, 2024

3 THE COURT: Okay, we'll go on the record on the
4 matter of Weatherall versus the State of South Carolina. I've
5 got 2021-CP-26-04551. At this time, I will turn the matter
6 over to the Attorney General for the introduction.

1 State's key witness; and does any of the Court's errors or
2 combination thereof require a reversal of Mr. Weatherall's
3 conviction and sentence. The Court of Appeals affirmed the
4 conviction in a published Opinion at State v. Weatherall 431
5 S.C. 485, that's the 2020 Court of Appeals decision. The
6 Remitter was sent on September 11th of 2020 and this PCR was
7 timely filed on July 12th of 2021. Mr. Weatherall is raising
8 allegations of ineffective assistance of counsel for failure to
9 investigate and call witnesses to testify to Marvin McElveen's
10 alleged confession of the murder; failure to call Tommy Lee
11 Benton as a witness; failure to call Danny Johnson as a
12 witness, failure to call Salvador Ware as a witness and failure
13 to call Gregory McCourt, as well as allegations of failure to
14 advise Mr. Weatherall on the case law and plea offers to
15 efficiently for him to make an informed decision; failure to
16 advise Mr. Weatherall that hand of one hand of all could be
17 charged to the jury even though it was not in the indictment,
18 and Mr. Weatherall alleges that if he had known that he would
19 have decided to plead guilty instead of proceeding the trial;
20 as well as failure to object to the Trial Court's implied
21 malice jury charge; failure to raise and preserve issues for
22 appeal, failure to object to and argue for the Batson issue
23 regarding the Solicitor misidentifying the minority juror and
24 attributing a criminal record to her, which was the basis of
25 the State's strike. Mr. Weatherall is present and represented

1 by Jeff Wilkes and the State is ready to proceed. I'll let Mr.
2 Wilkes state on the record anything that I may have misspoken
3 about.

4 MR. WILKES: That was all very well done, Your Honor,
5 that's complete. We're ready to proceed.

6 THE COURT: Okay, are you ready to call your first
7 witness?

8 MR. WILKES: I am, Your Honor. We'll call Melissa
9 Bridges to the stand.

10 THE COURT: Just come right up here, ma'am.

11 **MELISSA BRIDGES WAS DULY SWORN AT THIS TIME AND**
12 **TESTIFIED AS FOLLOWS:**

13 THE CLERK: Have a seat, ma'am, state your name for
14 the Court, spell it, and speak clearly in the mic.

15 THE WITNESS: Yes, ma'am.

16 THE CLERK: Thank you, ma'am.

17 THE WITNESS: My name is Melissa Bridges, spelled
18 M-e-l-i-s-s-a, B-r-i-d-g-e-s.

19 THE COURT: Yes, sir?

20 **DIRECT EXAMINATION**

21 BY MR. WILKES:

22 Q. Ms. Bridges, what do you do for a living?

23 A. I am a process server and crime investigator for Myrtle
24 Beach, South Carolina.

25 Q. And were you engaged in this PCR case to locate

1 witnesses?

2 A. Yes, I was.

3 Q. Can you tell me the witnesses you attempted to locate
4 and all of the efforts you made to locate each witness?

5 A. Yes, and if it pleases the Court, I have just some notes
6 from my Affidavit of Service so I can have the exact dates and
7 time. The first witness that I attempted to locate was Marvin
8 McElveen. The address that I was given for Mr. McElveen was
9 511 Maple Street in Myrtle Beach, South Carolina. When I
10 arrived at that location, the small apartments were boarded up
11 and completely vacant. I spoke to a neighbor right beside the
12 apartment complex who stated the buildings had been condemned
13 for several months now. It was our belief, possibly, that Mr.
14 McElveen may be homeless, so I drove to New Directions Homeless
15 Shelter located at 1005 Osceola Street in Myrtle Beach. I
16 spoke with Jonathan Myers who's in charge of Men's services and
17 Outreach Director, and showed him a picture of Mr. McElveen.
18 He stated that he had never seen him before and did not believe
19 he was currently staying at the shelter. I also showed this
20 picture to several of the gentlemen that were hanging outside
21 of the shelter, and they could not tell me if they'd ever seen
22 him there before. I drove to the Helping Hands of Myrtle
23 Beach, which was closed and the doors were locked, but there
24 were several gentlemen, unidentified gentlemen, hanging out in
25 front of the building. I spoke with each of them. One of the

1 gentlemen stated to me that, yes, he'd seen this gentleman
2 before and that he was homeless and on the streets and likes to
3 hang out on 3rd Avenue South, which is a Circle K gas station.
4 I drove to the Circle K gas station located at 1411 Joe White
5 on 3rd Avenue South, excuse me, not Joe White. I'm sorry.
6 Please forgive me. I'm so sorry about that, 1009 3rd Avenue
7 South in Myrtle Beach. There was nobody hanging out front of
8 the gas station, and I spoke with one of the employees who
9 stated she'd never seen the gentleman there herself either. I
10 also went to the DMV and requested a 10-year driving record in
11 attempts to get a current address for Mr. McElveen. The
12 address that was on that driving record was an address in
13 Florence. It's [REDACTED], that is spelled A-l-i-n-e,
14 Street in Florence, South Carolina. I also came up to the
15 courthouse here and asked for a copy of any arrest records for
16 Marvin McElveen. I was able to get a copy of one of his arrest
17 records and it stated the same address, as well. I drove to
18 that address and spoke with a gentleman who was standing in the
19 yard. He stated he lived at the residence and Marvin did not
20 live there anymore and that he had been on the streets for
21 several months, and he told me that he had no idea how to
22 locate him or where I could begin to find him.

23 MR. WILKES: May I approach, Your Honor?

24 BY MR. WILKES

25 Q. I'll show you a document that appears to be a certified

1 copy of Mr. McElveen's driving record --

2 A. Yes, sir.

3 Q. -- and a warrant that shows the same address. Is that
4 the address you were aware of?

5 A. Yes, this is the same address.

6 Q. And that is a suspended driver's license for quite a
7 while.

8 A. That's correct. Yeah. It states that the driver's
9 license was surrendered in 2000. It looks like it was
10 surrendered in 2021.

11 Q. Very good.

12 MR. WILKES: We'd marked this as our exhibit, Your
13 Honor, and if the Attorney General doesn't object, we'd
14 introduce it as our number one.

15 THE WITNESS: Would you like me to continue with my
16 next witness?

17 MR. WILKES: Yes.

18 THE COURT: Any objection from the Attorney General
19 to the admission of driver --

20 MR. HALL: No objection, Your Honor.

21 THE COURT: It would be number one,

22 **(Applicant's Exhibit No. 1 was admitted into evidence.)**

23 THE COURT: Yes, sir?

24 MR. WILKES: Thank you, Your Honor.

25

1 BY MR. WILKES:

2 Q. Continue, please. Who was next?

3 A. Yes, sir. Next, I also have Salvador Ware. I drove to
4 his apartment at 3555 Highway 544, Apartment 18D in Conway. I
5 made two attempts to serve him. I knocked on the door. It did
6 appear there were dogs inside barking, but even after knocking
7 on the door and waiting in the area for approximately two hours
8 on one exited the apartment building, I then proceeded and
9 attempted to serve Gregory McCourt. His background showed a
10 different address than what I ran, that I pulled up, I did
11 locate get a location for him in Goose Creek, 209 Farm Road in
12 Goose Creek at his current address. I drove there. The
13 residence had an abandoned vehicle in the driveway. It had no
14 vehicle tag on it. It looked like it was not in service. No
15 one appeared to be at the residence. I stayed in the area for
16 several hours and made several attempts at getting someone to
17 come to the door, and no one appeared to be there. I went to
18 serve Mr. William Beam who was a private investigator. I first
19 contacted his department and reached out to him via email and
20 telephone and left several messages. When I was not able to
21 get a response from him I drove to his most current address,
22 which is 406 Pelican Village Loop, Apartment A in Little River.
23 I knocked on the door multiple times. He did not arrive or
24 show up. He had a previous address that was showing that he
25 lived at, as well, which was 4084 Pine Drive in Little River.

1 I drove there and spoke with Jennifer Beam, who is his wife.
2 She stated that her husband was out of state in the hospital
3 recovering and that she was unsure when he would be back in the
4 state of South Carolina.

5 Q. That would be the Mayo Clinic?

6 A. Yes, yes, sir, Mayo Clinic.

7 Q. Okay. And who --

8 A. Jennifer Beam was there.

9 Q. Jennifer Beam?

10 A. She stated she was his wife.

11 Q. Did you attempt to locate anyone else?

12 A. I did. Well, I actually did locate Ms. Hudson, Christie
13 Hudson, but I did locate her and was able to serve her
14 properly.

15 Q. Very good. Anyone else?

16 A. That was it.

17 MR. WILKES: We have no further questions, Your
18 Honor.

19 THE COURT: You said, Salvador?

20 THE WITNESS: Salvador Ware.

21 THE COURT: S-a-

22 THE WITNESS: I'll spell that for you, sir. Hold on,
23 let me make sure I spell it correctly: S-a-l-v-a-d-o-r-e, and
24 the last name is spelled, W-a-r-e.

25 THE COURT: Thank you.

1 THE WITNESS: Yes, sir.

2 THE COURT: Any Cross?

3 MR. HALL: Briefly, Your Honor.

4 **CROSS EXAMINATION**

5 BY MR. HALL:

6 Q. How you doing, Ms. Bridges?

7 A. I'm doing very well. How are you, sir?

8 Q. I'm doing well. You said you spoke to whose wife?

9 Which witness was that?

10 A. William Beam.

11 Q. William Beam?

12 A. Beam.

13 Q. Beam?

14 A. William Beam, B-e-a-m.

15 Q. Okay. And could you repeat your testimony regarding
16 what his wife told you?

17 A. Yes, sir. When I arrived she was actually exiting the
18 home to get in her vehicle. I approached and informed her I
19 was looking for Mr. William Beam, and she stated that she was
20 his wife, Jennifer Beam, and that he was out of state in the
21 hospital recovering and I asked her if she knew when he would
22 be back in the area or would be returning, and she stated that
23 it would be several weeks, but she was even unsure at the exact
24 time of when he would be back in South Carolina.

25 Q. Okay. And did you understand anything regarding the

1 nature of their relationship at that time?

2 A. I did not. Again, when I went to -- the address on his
3 background showed he lived, it was about a mile down the road,
4 but then this address showed that he still had resided there
5 currently in 2024, but it wasn't listed as his current address
6 on my investigative background. So I just drove there since I
7 wasn't able to locate him at the first one just to see if, you
8 know, he was either living there or if he had a family member
9 living there, and that's when I met the wife.

10 Q. I want to ask you about Marvin McElveen.

11 A. Yes, sir.

12 Q. When you went to the Florence address --

13 A. Yes, sir.

14 Q. -- and spoke to someone at the Florence address --

15 A. Yes, sir.

16 Q. -- you testified that they said that he didn't live
17 there anymore?

18 A. They said he did not live there anymore and they had not
19 seen him for a while and that he was on the streets, that's all
20 the information he would give me.

21 Q. Okay. Did you ask that person about potential places
22 that you could find them?

23 A. I did. I asked him, do you know what area on the
24 streets or where he was possibly last seen, or even seen
25 period, and he said, I have no idea, he's on the streets.

1 Q. Did you ask them where Mr. McElveen typically hangs out?

2 A. I did. I asked him if there was -- well, first off, I
3 asked him if there was any other family members in the area, I
4 asked him if there was anywhere would hang out, and he said,
5 no, he was not aware, and that was all the information he was
6 willing to provide for me.

7 Q. Okay. And again, regarding McElveen, when you went to
8 the Helping Hands Shelter and spoke to the witness there, they
9 told you that Mr. McElveen typically hangs out around the
10 Circle K Gas Station?

11 A. Yes. I had a picture that I printed out of Mr.
12 McElveen, and that was what I was using to show them, and he
13 said, yes, I know that guy and he is on the streets, and I
14 asked him where have you seen him? Like, what area have you
15 seen him in so I could attempt to go see if I could locate him,
16 and he stated to me that he hung out at the Circle K on 3rd
17 Avenue South, which is where I drove to. The employee that was
18 there said she works there, and she's never seen him there. I
19 showed her the picture, as well, and I did look around the
20 area, but I did not see anybody else that was matching Mr.
21 McElveen's description.

22 Q. At any point during your search did you attempt to work
23 with local law enforcement to locate Mr. McElveen?

24 A. I did not work with local law enforcement, however, I
25 did -- like I said, I did everything that I knew possible,

1 going to the DMV, getting any addresses I could, coming up to
2 the courts to see if they had any documentation, any arrests,
3 any -- anything at all that could help lead me to Mr. McElveen,
4 and they -- the only thing I was provided here was for the --
5 the driving record at the DMV and then the arrest warrant for
6 him, and that arrest warrant is the paperwork that I just --
7 it's just been placed.

8 Q. Okay. And in attempting to locate Mr. Salvador where
9 did you ever work with local law enforcement to attempt to
10 locate him?

11 A. I did not.

12 Q. And Gregory McCourt, did you ever work with law
13 enforcement?

14 A. I did not.

15 Q. Okay. And William Beam, did you ever contact or work
16 with local law enforcement to try to locate him?

17 A. I did not, however, I did contact, and please forgive
18 me, I did not bring that note with me, the office that he works
19 through as a private investigator, I contacted them and they --
20 I told him I was looking for him and she stated, basically,
21 that he was just a PI that they used, and I also did go on to
22 the Internet and located a website for him, to which had a
23 contact form. I reached out through that, as well as the phone
24 number and email address that was provided to me by Mr. Wilkes
25 Falkner, I'm not sure how you said that, Mr. Falkner, I called

1 and emailed that address, as well. I called the phone number
2 twice, left voice mails, basically stating that I really needed
3 to get in touch with him about some official documents, to
4 please call me, and I received no phone call or emails.

5 MR. WILKES: No further questions, Your Honor.

6 THE COURT: Any Redirect on what he went into?

7 MR. WILKES: Yes, Your Honor.

8 **REDIRECT EXAMINATION**

9 BY MR. WILKES:

10 Q. I actually asked you to find a friend in law enforcement
11 and see if they could run his Rap sheet, and you said, what?

12 A. Well, I did ask. I do have a friend. I did ask around,
13 but they weren't able to help me with anything because --

14 Q. Because they're not allowed to, correct?

15 A. Right, they're not allowed to.

16 Q. Okay.

17 A. Basically, he said, yeah, he said, there's nothing I can
18 do. He actually pretty much told me that all I could do is
19 just try to go find him and that if he was homeless, it was
20 going to be extremely difficult to locate him.

21 Q. Okay, how long did you look for Mr. McElveen?

22 A. I mean, I looked for him on four different days for
23 several hours each day, trying to actually locate him.

24 Q. Okay. And do you believe there's anything else you
25 could have done to locate him?

1 A. I mean, I don't believe there's anything else I could
2 have done, other than just, you know, every day, but I did
3 everything I could. I went to all the areas where the
4 gentleman would hang out, and like I said, I spoke with the
5 director of men's services at the New Directions Shelter, and
6 he basically looked at the pictures and he'd never seen him
7 before.

8 MR. WILKES: Thank you very much. No further
9 questions, Your Honor.

10 MR. HALL: Nothing from the State, Your Honor.

11 THE COURT: Thank you, ma'am. You may step down.

12 THE WITNESS: Thank you, sir.

13 MR. WILKES: May she be excused, Your Honor?

14 MR. HALL: No objection.

15 THE COURT: Without objection, you may be excused.
16 Thank you, ma'am.

17 THE WITNESS: Thank you, sir.

18 THE COURT: Are you ready to call your next witness?

19 MR. WILKES: I am, Your Honor. We'll call Christie
20 Hudson.

21 THE COURT: Ma'am, just come right up here and let
22 the Clerk of Court swear you in.

23 **CHRISTIE HUDSON WAS DULY SWORN AT THIS TIME AND**
24 **TESTIFIED AS FOLLOWS:**

25 THE CLERK: Have a seat, state your name for the

1 Court, spell your name and speak clearly in the mic. Thank
2 you.

3 THE WITNESS: My name is Christie Hudson,
4 C-h-r-i-s-t-i-e, and my last name is Hudson, H-u-d-s-o-n.

5 MR. WILKES: If I can have just a second, Judge.

6 **DIRECT EXAMINATION**

7 BY MR. WILKES:

8 Q. Ms. Hudson, for the Attorney General's purpose, could
9 you give me your date of birth, please?

10 A. Yes, [REDACTED].

11 Q. Thank you. And they're going to ask, I'm sure, have you
12 been convicted of any felonies?

13 A. No, sir.

14 Q. Okay. Ms. Hudson, are you Tommy Benton's mother?

15 A. Yes, sir.

16 Q. Is that right? Were you with Tommy on the day of Mr.
17 Weatherall's trial?

18 A. Yes, sir.

19 Q. And tell me about that day.

20 A. My son was on home detention here in South Carolina. We
21 live in North Carolina, me and my husband and my daughter. We
22 were notified by home detention that there was a subpoena for
23 my son to come testify. I think that was the day before, and
24 so the next morning we rushed to take my daughter to my
25 grandparents, rushed to get to Loris to pick my son up to bring

1 him to the courthouse, and when we arrived we told the bailiff
2 what we were here for and he came in, and forgive me if I say
3 this name wrong, Mr. Bouchette, the gentleman right there,
4 (indicating,) he went out and he told us that Mr. Weatherall
5 was taking a guilty plea, and I said something to the effect
6 that I wish I'd known that because I rushed from North Carolina
7 to be here, and he said, it's a beautiful day outside, go enjoy
8 the beach, and we left.

9 Q. And you left?

10 A. Yes.

11 Q. So you were not there for the trial itself?

12 A. No, sir.

13 Q. Okay. Very good.

14 MR. WILKES: No further questions, Your Honor.

15 THE COURT: Yes, sir?

16 MR. HALL: Beg the Court's indulgence. No questions
17 for this witness, Your Honor.

18 THE COURT: Thank you, ma'am. You may step down.

19 THE WITNESS: Thank you.

20 MR. WILKES: May she be excused when she chooses to
21 leave?

22 MR. HALL: No objection from the State.

23 THE COURT: Ma'am, you may be excused, or you can
24 stay with us, whatever you'd like.

25 MR. WILKES: Thank you, Your Honor. We'll call Tommy

1 Benton, who is an SCDC resident.

2 THE COURT: Sir, just come right over here. Take the
3 witness stand. Yes, go ahead.

4 MR. WILKES: If I can have just a second, Judge.

5 **TOMMY BENTON WAS DULY SWORN AT THIS TIME AND**

6 **TESTIFIED AS FOLLOWS:**

7 THE WITNESS: Tommy Benton, Last name, B-e-n-t-o-n.

8 THE COURT: Yes, sir?

9 MR. WILKES: Thank you, Your Honor.

10 **DIRECT EXAMINATION**

11 BY MR. WILKES

12 Q. Mr. Benton, your mother is Christie Hudson?

13 A. Yes, sir.

14 Q. Did you go to court the day of Mr. Mitchell Weatherall's
15 trial with your mother?

16 A. Yes, sir.

17 Q. And when you got to court, tell me what happened.

18 A. Mr. Weatherall's representative, or his attorney, he
19 told me in the hallway that I was no longer needed, and he told
20 me I could go home.

21 Q. And did you go home?

22 A. Yes.

23 Q. You did not stay for the trial?

24 A. I didn't even enter the courtroom.

25 Q. And had you received a subpoena to appear?

1 A. I believe so, I just can't recall 100 percent.

2 Q. Okay. And what was the purpose of your testimony, do
3 you know?

4 A. I overheard some things from some roommates that I've
5 had pertaining to Ms. Weatherall's --

6 Q. That would be Mr. McElveen, or "Chicken," as they call
7 him?

8 A. Yes, sir.

9 Q. And what did Chicken tell you that you were going to go
10 to court and testify to?

11 MR. HALL: Objection. Hearsay.

12 THE COURT: Okay, I'm going to talk allow it. Go
13 ahead.

14 MR. WILKES: Thank you, Your Honor.

15 BY MR. WILKES

16 Q. What would your testimony have been that day?

17 A. Okay. From what I overheard from the individual was
18 that it was not the fault of Mr. Weatherall.

19 Q. Okay.

20 A. And that's pretty much the extent to that.

21 Q. And was that coming from someone that sounded like he
22 was there?

23 A. Yes.

24 Q. Very good. And you said you did not testify that day?

25 A. No, sir.

1 MR. WILKES: No further Questions, Your Honor.

2 MR. HALL: Beg the Court's indulgence?

3 THE COURT: Uh-huh.

4 **CROSS EXAMINATION**

5 BY MR. HALL

6 Q. Mr. Benton, isn't it true that you were convicted of
7 murder in 2016?

8 A. Yes.

9 Q. Okay. And isn't it true that you were convicted of
10 first degree arson in 2016?

11 A. Yes.

12 Q. Okay. And you were also convicted of two counts of
13 burglary first in 2016?

14 A. Yes.

15 Q. And Mr. Weatherall's trial was in March of 2017, right?

16 A. Okay. I'm gonna say this. I'm not exactly sure what
17 the years or days were there, but I was on house arrest during
18 the time that Mr. Weatherall was in court, and I came to this
19 courthouse in person.

20 Q. So you were on house arrest around that time, right?

21 A. I was out on bond, yes.

22 Q. Okay. And you said that you overheard Chicken tell you
23 that it wasn't Mr. Weatherall's fault, right?

24 A. Yes. It was my roommate at the time.

25 Q. Your roommate where?

1 A. At J. Reuben. This is before I bonded out.

2 Q. When did you bond out?

3 A. I believe that was December 16, 2016.

4 Q. So when did this conversation take place?

5 A. Inside the jail cell. We were roommates at the time.

6 It was during the time I was incarcerated within J. Reuben,

7 Long before I bonded out.

8 Q. Do you have a month or a year for when that conversation
9 would have occurred?

10 A. It had been in 2016, but I cannot give you an accurate
11 month.

12 Q. Okay. So you don't recall when exactly this was, right?

13 A. I cannot give you a precise date.

14 Q. Okay. And were you in the same -- you said you were
15 roommates with Mr. McElveen?

16 A. Yes.

17 Q. He's also known as Chicken, right?

18 A. Yes.

19 Q. Okay. Do you know why Mr. McElveen decided to tell you
20 that it was not Mr. Weatherall's fault?

21 A. Well, it was not exactly -- let's just say he just
22 talked about everything and anything there was to discuss about
23 his personal life. He was a very sociable person within the
24 room.

25 Q. So he just decided to just tell you some information

1 about his case?

2 A. It wasn't just me, it was everybody in the room. There
3 was four people to a cell. He talked about that, plus his drug
4 habits, and other things of that nature.

5 Q. Okay. And again, Mr. Weatherall's case was back in
6 2017. The year is 2024, isn't it, right?

7 A. Yes.

8 Q. Okay. So it's seven years later. Why are you coming
9 forward now if you have this information?

10 A. Okay. As Ms. Weatherall's counsel stated, I did come to
11 this courthouse with my mother, which is seated out there.
12 When I got here, Mr. Weatherall's counsel at the time met me in
13 the hallway outside the courtroom, told me that I was no longer
14 needed, it was not necessary, and that I could go back home. I
15 was also on home detention so I only had business to be in this
16 courtroom. When he told me I was no longer needed, I returned
17 to my residence.

18 Q. And since then you just had this information and just --
19 that's -- you haven't said anything about it since then?

20 A. What am I gonna say?

21 MR. HALL: Beg the Court's indulgence?

22 BY MR. HALL

23 Q. And so --

24 MR. HALL: I'll withdraw. No further questions, Your
25 Honor.

1 THE COURT: Any Redirect, limited to what he went
2 into?

3 MR. WILKES: No, Your Honor.

4 THE COURT: Thank you, sir. You may step down.

5 MR. WILKES: May Mr. Benton be excused, Your Honor?

6 THE COURT: Any objection?

7 MR. HALL: No objection from the State.

8 THE COURT: Mr. Benton, you may be excused, as well.
9 Thank you, sir. Yes, sir?

10 MR. WILKES: We call Mitchell Weatherall.

11 THE COURT: Mr. Weatherall, come right up here.

12 **MITCHELL M. WEATHERALL WAS DULY SWORN AT THIS TIME**
13 **AND TESTIFIED AS FOLLOWS:**

14 THE CLERK: Have a seat, state your name for the
15 Court, spell it, and speak clearly into the mic, please. Thank
16 you.

17 THE WITNESS: Mitchell Weatherall, M-i-t-c-h-e-l-l,
18 Weatherall, W-e-a-t-h-e-r-a-l-l.

19 THE COURT: Yes, sir?

20 **DIRECT EXAMINATION**

21 BY MR. WILKES:

22 Q. Mr. Weatherall, were you aware that Mr. Benton had been
23 subpoenaed for your trial, your criminal trial?

24 A. Yes.

25 Q. And what do you believe he was going to testify to?

1 A. It was my understanding that Chicken, Marvin McElveen,
2 that he confessed to killing the victim in my case.

3 Q. In other words, hitting him on the head with the bottle?

4 A. Correct.

5 Q. Okay. Now, to your knowledge, he was subpoenaed to be
6 there. Had you discussed his testimony with your defense
7 counsel?

8 A. From what I remember, I believe we did discuss it. Yes,
9 we did discuss it.

10 Q. If he had been subpoenaed by the defense?

11 A. Yes.

12 Q. Okay. And to your knowledge, how many people heard
13 Chicken, or Mr. McElveen, confess to being the person that hit
14 the deceased on the head with the bottle?

15 A. Four people.

16 Q. And would those four people be -- well, name those four
17 people for me.

18 A. Tommy Benton, Greg McCourt, Salvador Ware and Danny
19 Johnson.

20 Q. And you became aware of that, did you -- did you become
21 aware of that first?

22 A. Yes.

23 Q. And did you relay that to your defense counsel?

24 A. Yes.

25 Q. And how many of those people did they issue a subpoena

1 for?

2 A. That, I'm unsure of. I know -- I know, Tommy, and I'm
3 not sure about the others. I'm pretty sure Greg McCourt and
4 Salvador Ware, but Danny Johnson, I'm not -- I'm not certain
5 about.

6 Q. And did you -- are you aware of Mr. Beam's role in your
7 defense?

8 A. Yes, sir.

9 Q. What did he do?

10 A. I know that he interviewed each of the witnesses and
11 took statements from them.

12 Q. Was it your understanding that he had obtained a
13 statement from Ware saying that Chicken, or Mr. McElveen, had
14 hit the deceased on the head with the bottle?

15 A. Yes.

16 Q. And your defense attorney would have, of course, known
17 that, because they were working with the private investigator,
18 correct?

19 A. Correct.

20 Q. Okay. Did Mr. Benton or any of those other people
21 testify at your trial?

22 A. No.

23 Q. Were you expecting some of them to testify at your
24 trial?

25 A. Yes.

1 Q. When did you learn that Mr. Benton had appeared but gone
2 home?

3 A. Honestly, I don't recall, but it wasn't -- it wasn't
4 until after my trial was over.

5 Q. Do you think it may have had a difference in the outcome
6 of your case?

7 MR. HALL: Objection. Leading. I'll withdraw the
8 objection.

9 THE COURT: Thank you.

10 BY MR. WILKES

11 Q. Do you believe it would have had -- a potential outcome
12 would have been different had the jury heard the testimony of
13 those four people?

14 A. Yeah. Yes, I think it would have made a -- it would
15 have made a big difference.

16 Q. Okay. Tell me, were there plea negotiations in your
17 case?

18 A. Yes, there was.

19 Q. And were you made aware of a plea offer in your case?

20 A. Yes.

21 Q. And do you recall what that plea offer was?

22 A. The plea was 15 years with -- 15 years for voluntary
23 manslaughter with the time served for the three and a half that
24 I had already sat in J. Reuben Long.

25 MR. WILKES: May I approach, Your Honor?

1 THE COURT: Yes, sir.

2 MR. WILKES: Thank you.

3 BY MR. WILKES

4 Q. I'll show you a document, two documents, actually. One,
5 a letter dated February 27, 2015, from the Solicitor to Mr.
6 Gardner, and then another one, March 18, 2014, it looks like
7 from the Solicitor to Mr. Diggs. Does that sound familiar?

8 A. Yes.

9 Q. Mr. Diggs was a early lawyer, not your trial lawyer?

10 A. Correct.

11 Q. Okay. Take a look at those. Have you seen those
12 before?

13 A. This one I -- this one I did see.

14 Q. From Mr. Gardner?

15 A. No. I didn't see it from Mr. Gardner. To be honest
16 with you, that one, I believe I got after. Once I had Bill
17 Diggs, they sent me a copy of what the offer was, which at that
18 time was 20 years for voluntary manslaughter, and I remember
19 speaking to Mr. Diggs and telling him that I will reject it,
20 but I never saw that specific letter.

21 Q. Okay. And Mr. Gardner apparently received the 20-year
22 offer February 27, 2015. Are you aware of that?

23 A. No.

24 Q. Okay.

25 MR. WILKES: Your Honor, we would offer these as our

1 second exhibit.

2 MR. HALL: No objection from the State, Your Honor.

3 THE COURT: And that's Applicant's 2?

4 MR. WILKES: Yes, sir.

5 THE COURT: Are you going to have them together as
6 one?

7 MR. WILKES: Yes, sir, they're stapled together.

8 THE COURT: All right. Yes, sir?

9 **(Applicant's Exhibit No. 2 was admitted into evidence.)**

10 BY MR. WILKES

11 Q. Mr. Weatherall. Now, in regards to the plea, you were
12 charged with murder, correct?

13 A. Correct.

14 Q. And the deceased in the case, apparently, from the
15 transcript of the trial, died as a result of being hit on the
16 head with the bottle, is that correct?

17 A. That's correct.

18 Q. And your defense throughout the case has been, you
19 didn't do it --

20 A. That's correct.

21 Q. -- that Mr. McElveen did it?

22 A. Yes, sir.

23 Q. Okay. So you had been given a plea offer and you
24 rejected the 20-year plea offer, correct?

25 A. That's correct.

1 Q. And you had, I think you just said that you were later
2 offered 15 through Mr. Gardner's representation?

3 A. Yes, sir.

4 Q. Okay. You did not accept those offers. Why?

5 A. Well, because I -- I didn't, I didn't commit the crime,
6 I didn't -- I didn't kill the victim. Someone else -- someone
7 else killed the man, so.

8 Q. Okay. Now, when you were considering the plea offer,
9 had anybody told you, had your defense attorneys told you that
10 the jury would be charged hand of one hand of all, so that it
11 wouldn't matter whether or not you were the person that hit him
12 on the head with the bottle? Did you know that?

13 A. No.

14 Q. Had you ever heard of hand on the hand of all?

15 A. No.

16 Q. So knowing now, I presume, that hand of one hand of all
17 is accomplice liability and you could be convicted even though
18 you didn't hit the person on the head with the bottle, if you
19 had known that in plea negotiations would that have changed
20 your decision on entering a plea?

21 A. Certainly. If I would have known that I could be found
22 guilty even if I didn't commit the crime, I would certainly --
23 I would have definitely taken the plea. Had my attorneys
24 advised me about that, I would have taken the plea.

25 Q. During the -- I think right at the beginning of the

1 trial the judge made an inquiry about a plea and the discussion
2 of a plea came up, do you remember that?

3 A. I can't say that I do.

4 Q. If the judge asked your defense attorney at the
5 beginning of the case: Would your client still take the
6 plea -- do you remember that?

7 A. I can't say that I do.

8 Q. Do you remember having a discussion with your attorney
9 at the beginning of the trial as to whether or not you still
10 would take a plea?

11 A. I think at some point -- at some point through the
12 proceedings there was talk that the plea might still be
13 available, it might still be on the table. I do kind of
14 remember having that conversation, but the exact words that
15 were exchanged, that, I don't know.

16 Q. Okay. And would that be at the beginning of the trial?

17 A. I don't know, honestly.

18 Q. Would that be before hand of one hand of all was charged
19 to the jury?

20 A. Certainly. Well, honestly, I don't -- I don't really
21 remember. I don't remember.

22 Q. Do you remember the jury being charged hand of one hand
23 of all? Do you remember that?

24 A. So it's still fuzzy in my mind. At that point in time
25 it was like at the end of the trial. We hadn't called any

1 witnesses, nothing seemed to be going the way that I thought
2 that it would go. I can't say that I really -- I can't say
3 with any certainty that I remember that.

4 Q. Can you say with certainty whether or not you knew about
5 hand of one hand of all at the time you were offered a plea?

6 A. No, I never -- I never knew anything about hand of one
7 hand of all until after this whole thing was, after I got into
8 prison.

9 MR. WILKES: If I can have just a second, Your Honor?

10 THE COURT: Yes, sir.

11 MR. WILKES: Thank you.

12 BY MR. WILKES

13 Q. Mr. Weatherall, are there any other things that you're
14 aware of that counsel didn't do that counsel should have done,
15 or that counsel did do that counsel should not have done that
16 affected the outcome of your trial to your prejudice?

17 A. There are a few things, I would say about three things.
18 One, I was in the County Jail for about three-and-a-half years
19 waiting for trial, but my attorneys didn't begin to investigate
20 or get a PI on my case until really just a few months before
21 trial. Two, at trial, my attorney, Johnny Gardner, referred to
22 "Chicken," the man that I contended the whole time was actually
23 the killer, he referred to him as "George," to three different
24 witnesses, and asked the three different witnesses if they
25 know -- if they know who George is. Of course, none of the

1 witnesses knew who George was because there's no George
2 anywhere in my case. After he interviewed the witnesses, I
3 asked him about it, and he says he keeps mixing up Chicken with
4 the movie character, Chicken George. By this time the damage
5 was done. He asked witnesses Melissa Ann Baines, Norma Davis
6 and Kelly Lynn Matteson before finally correcting himself while
7 cross-examining Michelle McFadden (ph). Lastly, number three,
8 I feel like -- I feel that the Trial Court violated my due
9 process rights by instructing the jury on accomplice liability
10 because the State presented no evidence that I acted in concert
11 with another. My co-defendant --

12 MR. HALL: Judge, I'm going to object to that. This
13 is not an allegation that was raised, and just for the record,
14 I'm just objecting.

15 THE COURT: Okay, thank you. Yes sir, go ahead.

16 A. Okay. My co-defendant and supposed accomplice was never
17 put on the witness stand, no evidence or testimony was
18 presented to support that he and I joined together in a common
19 plan or scheme to commit murder, and in fact -- in fact, at
20 trial, the Solicitor says on page 35 and 36 of the trial
21 transcript: Quote, there's been no evidence in this record to
22 show anybody was even in the room other than this defendant and
23 the victim. We can ask every witness that comes in here about
24 Chicken, but it doesn't produce any evidence that Chicken was
25 ever in the room, more or less that he was in the room when the

1 incident happened, there's no evidence that anybody else was in
2 the room, unquote.

3 The State cannot be allowed to have it both ways. On
4 the one hand, arguing there's no evidence that Chicken was ever
5 in the room, and then on the other hand to say it's a hand of
6 one hand of all case. This third point is one that my lawyers
7 failed to articulate.

8 Q. Mr. Weatherall, were you under the impression going into
9 the trial that you were charged with murder and the State had
10 no evidence of anyone being in the room?

11 A. No.

12 Q. What going into the trial did you believe the case was?
13 From your attorneys, what did you believe?

14 A. It was either I killed -- or I killed the victim or
15 Chicken killed the victim.

16 Q. Very good.

17 MR. WILKES: No further Questions, Your Honor.

18 MR. HALL: Beg the Court's indulgence?

19 **CROSS EXAMINATION**

20 BY MR. HALL

21 Q. How are you doing, Mr. Weatherall?

22 A. I'm doing okay.

23 Q. Mr. Weatherall, isn't it true that at your trial there
24 was testimony that you arranged for the victim to come down and
25 spend the week with you at a hotel, right?

1 A. There was testimony of that, yes.

2 Q. Okay. And isn't it true that there was testimony in
3 your trial that during that week that you spent with the
4 victim, you and the victim and Joey Garsow and a few others
5 were in the hotel room doing drugs, essentially?

6 A. Yes, sir.

7 Q. Okay. And isn't it true that there was testimony that
8 you and Joey Garsow, who was also your co-defendant, worked
9 together to get the victim to the hotel room?

10 A. That, no.

11 Q. No? Okay. Isn't it true that Tonya Wedlock, who was
12 your friend at the time, testified in your trial, right?

13 A. I wouldn't call her friend, but yes, she did testify.

14 Q. Okay. And she testified that she was with you in
15 November of 2013, which is when this incident would have
16 occurred, right?

17 A. Yes.

18 Q. Okay. And she was there and she was present at the
19 hotel with you and Joey Garsow and the others, right?

20 A. Yes.

21 Q. And Tonya Wedlock testified that you borrowed her car
22 that week?

23 A. Yes.

24 Q. And isn't it true that the State played video
25 surveillance from the hotel that week that show you and Joey

1 Garsow, your co-defendant, carrying the victim's body out of
2 the hotel and putting it in Tonya Wedlock's car?

3 A. This is true.

4 Q. Okay. And isn't it true that at your trial Tonya
5 Wedlock identified you and Joey Garsow in that video?

6 A. Yes.

7 Q. And then isn't it true that Tonya Wedlock also testified
8 that you gave her the victim's card to use, right?

9 A. I don't believe she testified to that, no.

10 Q. She didn't?

11 MR. HALL: Beg the Court's indulgence? For the
12 record, I'm referring to page 234 of the trial transcript.

13 THE COURT: 234?

14 MR. HALL: Yes, sir, beginning at line 14.

15 BY MR. HALL:

16 Q. So Mr. Weatherall, Tonya testified: Quote, okay -- or
17 Solicitor was asking this question: And was Mitch working?
18 And Tonya testified: He was pulling cards off that -- I mean,
19 Craig's List. And the Solicitor asked: And I know it's been a
20 long time, do you remember when y'all were out whether or not
21 anybody used any kind of credit or debit card? Yes. Okay.
22 And tell me who was all around when the cards were being used.
23 Me and Joey. And where were y'all going with the card?
24 Different places. And how did you get the card? Mitch gave it
25 to Joey. And you saw Mitch give it to Joey? Yes. We was in

1 the room and he got it out of a backpack.

2 So isn't it true at the Tonya Wedlock testified that she
3 gave him the victim's credit card?

4 A. She must have, yes.

5 Q. And she testified that you and Joey Garsow, after the
6 victim had died, was killed, were using the credit card at
7 various places, right?

8 A. You're asking me is that what happened, or is that what
9 she testified to?

10 Q. That's what she testified, right?

11 A. That's what she testified to.

12 Q. Okay. And so you and Joey Garsow were hanging out with
13 the victim together, right?

14 A. Not with the victim, no.

15 Q. So y'all weren't all in the hotel room doing drugs
16 together?

17 A. I was in the hotel room with Joey and Tonya. This is
18 after -- after the victim died, after the victim was killed.
19 They were -- they were not in the room, or they weren't even
20 around when the incident actually happened.

21 Q. Okay. After the victim died, you and Joey Garsow worked
22 together to dispose of the body, right?

23 A. Yes.

24 Q. Okay, and you and Joey Garsow worked together to spend
25 the victim's money on his credit card, right?

1 A. No.

2 Q. That's what Tonya Wedlock testified to, right?

3 A. That's what she said.

4 Q. Okay. And isn't it true that at your trial, Marcus
5 Bell, who was your cellmate at the detention center testified
6 that you told him that you and the victim got into an
7 altercation, right?

8 A. That was a lie.

9 Q. Did he testify to that at your trial?

10 A. Yes.

11 Q. Okay. And isn't it true that Bell testified that you
12 told him that you hit the victim over the head with the bottle?

13 A. That was a lie, but he -- he testified to that, yes.

14 Q. Okay. And isn't it true that Marcus Bell testified at
15 your trial that you told him that you cleaned up the hotel
16 room, right?

17 A. Again, lie --

18 Q. Yes or no question.

19 A. He testified to that.

20 Q. Yes or no question, Mr. Weatherall.

21 A. Testified to that, yes.

22 Q. Yes. Okay. And isn't it true that Marcus Bell's
23 testimony was consistent with the hotel worker's testimony,
24 that the hotel room had been cleaned up?

25 A. I don't remember the hotel room worker's testimony.

1 Q. Would you dispute the fact that the hotel room -- the
2 hotel staff testified at your trial that the room had been
3 cleaned up?

4 A. No, I wouldn't dispute that.

5 Q. Okay. And isn't it true that Marcus Bell testified that
6 you told him that you put the body in the car that you had
7 borrowed from a female friend, right? You told -- isn't it
8 true that he testified to that?

9 A. He testified to that.

10 Q. Okay. And isn't it true that that testimony is
11 consistent with Tonya Wedlock's testimony that you borrowed the
12 car?

13 A. It would -- it would seem so.

14 Q. Okay. And isn't it true that that Marcus Bell's
15 testimony is also consistent with the fact that there's video
16 surveillance from the hotel showing you putting the victim's
17 body in the car?

18 A. Yes.

19 Q. Okay. And isn't it true that Marcus Bell also testified
20 that you told him initially that Chicken did the crime, but
21 after you became more comfortable with Bell, you told Bell that
22 you were the one that hit the victim?

23 A. He testified to that.

24 Q. Okay. And isn't it true that Bell testified that he had
25 no access to your case, right?

1 A. He testified to that, yes.

2 Q. Okay. And isn't it true that Mr. Bell knew other
3 details about your life, such as the fact that you were from
4 Wisconsin, right?

5 A. It wouldn't have been hard to find that out.

6 Q. Okay. But he also knew the name of your attorney,
7 right?

8 A. Yes.

9 Q. Okay. And he knew the name of your co-defendant's
10 attorney, right?

11 A. I'm not sure, but probably.

12 Q. He testifies at trial that he did, right?

13 A. Yes, sir.

14 Q. Okay. And Mr. Bell knew all those facts because he
15 testified that you told him, right?

16 A. That was his testimony.

17 Q. Okay. Now, I want to ask you about plea offers in this
18 case. You were given two offers in this case and you rejected
19 both, didn't you?

20 A. That's correct.

21 Q. Okay. And you testified that you rejected the offers
22 because you didn't commit the crime, right?

23 A. That's correct.

24 Q. But you also testified that if you had known about hand
25 of one hand of all, you would have pled guilty, right?

1 A. Correct.

2 Q. So you rejected the plea offers because you didn't
3 commit the crime, but you would have taken the plea deal if you
4 had known about hand of one hand of all; is that right?

5 A. That's right.

6 Q. Okay. Doesn't that seem inconsistent?

7 A. Certainly not.

8 Q. Okay. And you also testified on direct that at some
9 point -- I'm going to withdraw that question. Do you recall a
10 discussion about plea offers at the beginning of your trial?

11 A. At the beginning of my trial?

12 Q. Yes.

13 A. I don't remember.

14 Q. You don't remember?

15 MR. HALL: Beg the Court's indulgence.

16 BY MR. HALL

17 Q. If I told you, and this is for the record, page 48 of
18 the transcript beginning at line 15.

19 THE COURT: Thank you.

20 Q. The judge asked your attorney, would your client accept
21 a plea offer at arraignment if he had what he had now, and your
22 attorney's response was, beginning at line 18: I can't
23 conclusively tell you for certain that he would or he wouldn't,
24 but the point is we don't know whether we would or we wouldn't
25 if we are not provided all of the information. My question is,

1 so at the beginning of trial your attorney couldn't say for
2 certain whether you would have taken the plea offer, right?

3 A. That's what it says in there.

4 Q. Okay. And then you testified on direct that at some
5 point during trial, trial wasn't going the way you expected,
6 right?

7 A. Yes.

8 Q. Okay. So doesn't it seem like you decided to rethink
9 your decision to plead guilty when trial was going the way you
10 expected?

11 A. Here's the thing, if the witnesses that --

12 Q. Answer my question.

13 A. I'm not sure.

14 MR. HALL: No further questions, Your Honor.

15 THE COURT: Any Redirect?

16 MR. WILKES: No, Your Honor.

17 THE COURT: Thank you, sir. You may step down and
18 watch your step. Let me ask you a point of question of
19 clarification. The witness in his direct testimony referenced
20 two pages of the transcript, and the two pages that I looked at
21 do not correspond with what he was testifying to. Ask him
22 again what those two pages were.

23 MR. WILKES: Your Honor, his notes appeared to say
24 335 and 336 of the trial transcript, and he's actually got a
25 quote there that starts: There's been no evidence in the

1 record to show anybody was even in the room other than this
2 defendant, the victim.

3 THE COURT: That's clear. I just wrote down 35 and
4 36. I missed three. So it was 335 and 336?

5 MR. WILKES: 335 to 336 is what his notes said.

6 THE COURT: Thank you for that. Yes, sir?

7 MR. WILKES: Your Honor, we'll call Johnny Gardner to
8 the stand, please.

9 THE COURT: Sir, just come right up here.

10 **JOHNNY GARDNER WAS DULY SWORN AT THIS TIME AND**
11 **TESTIFIED AS FOLLOWS:**

12 THE CLERK: Have a seat, state your name and spell
13 your name and state it clearly. Thank you.

14 THE WITNESS: Johnny Gardner, J-o-h-n-n-y,
15 G-a-r-d-n-e-r.

16 **DIRECT EXAMINATION**

17 BY MR. WILKES:

18 Q. Mr. Gardner, you were one of two trial attorneys for Mr.
19 Weatherall?

20 A. Correct.

21 Q. And you've heard Mr. Weatherall's testimony today.
22 Going back to the time leading up to the trial, and even during
23 the trial, what was the state's theory of the case, do you
24 recall?

25 A. The best that I can recall, the State's theory of the

1 case was that these guys were in a hotel room and they're
2 alleging that Mr. Weatherall hit the deceased with some kind of
3 beer bottle or something and that they had left and that they
4 came back and stayed in the room for a day or two afterwards
5 and that Mr. Weatherall was somebody else, carried the
6 decedent's body and disposed of it.

7 Q. And the testimony at trial from Marcus Bell was
8 something to the effect that they didn't even realize he was --
9 the guy was dead for days, correct?

10 A. Now that you say that, that reminds me. Yeah, that
11 was -- I think what -- I think what the case was about was two
12 or three people in a hotel room with the decedent, and I don't
13 know what they were doing there, the allegations were drinking
14 and drugging, and that somebody hit the decedent over the head
15 with a beer bottle, and then people left or dispersed, or came
16 and went, and I don't know how it was, but they didn't find out
17 he was dead until a day or so later.

18 Q. And the state's case was, and I think, I think that
19 might have just been read from the record. The state's case
20 was essentially -- well, the State's case was Mr. Weatherall
21 did it --

22 A. Yes, sir.

23 Q. -- based on the testimony of his cellmate, Marcus Bell?

24 A. Yes, sir.

25 Q. Okay. And there was no indication that the State was

1 presenting any kind of hand of one hand of all case, was there?

2 A. No, sir. Their theory from the beginning to the end was
3 that Mr. Weatherall did it.

4 Q. Okay. So did that come as a surprise that hand of one,
5 hand of all was charged to the jury?

6 A. Yeah, hand of one and hand of all, it's a slippery slope
7 to begin with, but when the state puts all their eggs into one
8 basket then they shouldn't be charging hand of one hand of all,
9 from my understanding.

10 Q. But it is always a possibility since hand of one does
11 not have to be put in the indictment?

12 A. Yeah, they can -- the judge is going to -- a good judge
13 is going to charge the law on what was presented at the case
14 during the trial. So, yeah, it can always -- it can always be
15 brought up, yes, sir.

16 Q. And you may not recall, but did hand of one -- do you
17 remember how hand of one hand of all came up in the trial?

18 A. I do not recall how it came up.

19 Q. Would you be surprised if it was Mr. Bouchette that
20 actually may have been the first person to mention it?

21 A. That would be shocking.

22 Q. Okay. Did you advise Mr. Weatherall of the possibility
23 that hand of one could come up in a murder case and he could be
24 convicted based -- even though he didn't hit the person on the
25 head with the bottle?

1 A. I don't think we did. I've been trying to figure out --
2 that was a question brought to me by the Attorney General and
3 by you, and Jarrett and I have been talking this morning about
4 that, I cannot swear that we talked -- that Mr. Weatherall and
5 I talked about that, but based on the presentation today, I've
6 been in the courtroom the whole time listening to it, it makes
7 more sense that we would not have talked about it because we
8 only want to talk about the things that we think are relevant
9 that are coming up for a murder trial. We may have talked
10 about it, but I could not swear that we did.

11 Q. Now, during the trial I believe that implied malice was
12 also charged to the jury, do you recall that?

13 A. I don't. I know you are attorney -- somebody had
14 mentioned that to me this morning, but I don't recall that
15 issue.

16 Q. Okay. And if implied malice had been charged, if
17 there's no evidence to support that, you would normally make an
18 objection, right?

19 A. Yes, sir.

20 Q. Okay. Or at least an arguable lack of evidence to
21 support it, you would make an objection?

22 A. Yes, sir.

23 Q. Okay. And do you recall -- would you agree if I told
24 you that there was no objection to implied malice?

25 A. I would not have a reason to disagree with you.

1 Q. But you don't recall?

2 A. I don't recall, no, sir.

3 Q. Do you recall the Batson objection?

4 A. I recall one vividly because it had to do with, I don't
5 know what the proper technology is or terminology is, but we
6 thought the solicitor struck somebody because of his sexual
7 preferences.

8 Q. The sexual orientation?

9 A. Yes, sexual orientation.

10 Q. The juror -- I believe there was a Batson objection,
11 also, on juror 191, a black female?

12 A. They struck a black -- I overheard this -- I think,
13 yeah, I don't think, I know that they struck a person based on
14 their race, and we objected that, rightly so.

15 Q. And during the discussion on the Batson issue, do you
16 recall -- do you recall anything about that?

17 A. I don't have a recollection of the trial hearing about
18 it, I heard reference to it today, and maybe the solicitor
19 quoted the wrong statistical data about that particular juror
20 to avoid the Batson argument.

21 Q. And --

22 MR. HALL: Objection. Speculation.

23 THE COURT: Okay. Noted.

24 MR. WILKES: I have to ponder that for just a second.

25 Oh, he does? Okay. That is something he does not recall.

1 That is a question. He's recalling that from a question either
2 the Attorney General or I have asked him, so I'll withdraw that
3 question.

4 THE COURT: Okay. Withdraw the question.

5 MR. WILKES: I'll withdraw that question.

6 BY MR. WILKES

7 Q. If during a Batson discussion a solicitor were to give
8 an explanation that did not seem complete, would you normally
9 ask or challenge that information? Would you press further if
10 you believe that the solicitor was not giving a valid reason?

11 A. I would think so, yes, sir.

12 Q. Would there be any reason not to?

13 A. There would be no reason not to.

14 MR. WILKES: Okay. No further questions, Your
15 Honor.

16 **CROSS-EXAMINATION**

17 BY MR. HALL:

18 Q. How are you doing, Mr. Gardner?

19 A. Good morning, sir.

20 Q. Good morning. Mr. Garner, how long have you been
21 practicing law?

22 A. About 30 years.

23 Q. How much of that time has been spent in criminal
24 practice?

25 A. Most of all of it. I mean, all of it, percentage-wise,

1 about some years 50 percent, some years 100 percent.

2 Q. Okay. And can you tell the Court how you got involved
3 in Mr. Weatherall's case?

4 A. Court-appointed.

5 Q. Court-appointed. Was that a conflict appointment?

6 A. Usually it is. I don't ever question them. I get
7 something in the mail that says, judge says you got to
8 represent so and so, and I do it.

9 Q. And during the course of your representation about how
10 many times did you meet with Mr. Weatherall?

11 A. I don't have -- I tried -- you and I talked earlier and
12 I tried to figure it out, and I don't know how many times, but
13 I can assure you and Mr. Weatherall that I saw him enough times
14 to be ready for trial. Every time I've been PCR'd, that
15 question comes up, so we always know what the answer is. The
16 answer is not as many times as the defendant would like, but
17 more than the lawyer wanted, if that makes sense. I don't mean
18 to be flipped by that, but we go out there -- some cases
19 require more time, and as the trial gets closer and closer the
20 visitations are more and more frequent, but at the end of the
21 day we have seen the client no matter what the charge is, drug
22 charge, murder charge, whatever it is, we've seen the client
23 enough to be prepared for the trial.

24 Q. And do you believe that you met with Mr. Weatherall
25 enough to be prepared?

1 A. Yes, sir.

2 Q. And, Mr. Garner, did you request and receive discovery
3 in this case?

4 A. Yes, sir.

5 Q. Can you tell the Court what evidence they had against
6 Mr. Weatherall?

7 A. Well, in short, they had a bunch of witnesses testifying
8 about -- they spent most of their time, I think, talking about
9 after the fact. Okay? This was an after the fact kind of
10 case. They did have some witnesses, as Mr. Bell, I think, and
11 George, I was mentioning earlier about him, testified that Mr.
12 Weatherall hit the decedent with the beer bottle, but they
13 focused all their attention on after the case. I've looked at
14 the transcripts. I can't recall, or I can't find it, but my
15 recollection was I objected to the number of witnesses they put
16 up to say the same thing. I might be mistaken about that, but
17 that was one of my recollections about this case. It focused
18 on credit card spending, hiding something somewhere and going
19 somewhere, somewhere. This whole case was, we believe that the
20 evidence showed that "Chicken," and we can call him whatever
21 you want to call him, I know that Mr. Weatherall testified
22 about that earlier, but that's his name. Okay?

23 Q. And to clarify, you mean, Chicken -- Chicken's name is
24 George?

25 A. Yes.

1 Q. Okay.

2 A. Yes. So that was the issue. That was the whole issue
3 of the case, that George, or McElveen, or somebody else in
4 there, hit the decedent over the head, or did Mr. Weatherall
5 hit the decedent over the head? Regardless of who hit him over
6 the head, I don't think anybody realized he was -- based on the
7 testimony and the discovery, that the decedent was dead until a
8 day or so later. I think they were still continuing to party
9 and do things in there, I don't know, but clearly there was
10 evidence that Mr. Weatherall participated in an accessory after
11 fact type of event, but he maintained his innocence up to and
12 during and after the trial about murder.

13 Q. And since we're here on this, what was mentioned by Mr.
14 Weatherall on direct, did you ever -- do you ever recall
15 telling him that you were mixing up Chicken with the movie
16 character?

17 A. No. I don't know anything about a movie character, but
18 I know a Chicken Little, I mean everybody knows about that, and
19 I may have made something kind of -- tried to make some levity
20 out of something, but we wouldn't -- I mean, I don't know what
21 that would have to do with the case.

22 Q. And do you recall there being a surveillance video from
23 the hotel showing Mr. Weatherall and Joey Garsow as
24 co-defendant carrying the victim's body out of the hotel?

25 A. That's what I alluded to earlier when I testified that

1 this is clearly an accessory after the fact case.

2 Q. Okay. And did you review this evidence with Mr.
3 Weatherall in preparation for trial?

4 A. Yes, sir.

5 Q. And I want to ask you, what was your defense strategy
6 for Mr. Weatherall's trial?

7 A. Well, I don't know if we had a strategy. I mean, the
8 defense was he didn't do it, mere presence for whatever
9 happened, and that you can't dispute the after the fact stuff,
10 but I don't think they indicted him on after the fact, I think
11 they just indicted him on murder.

12 Q. And during the course of your representation, did you
13 ever discuss with Mr. Weatherall his right to testify or not
14 testify?

15 A. Yes.

16 Q. And did you advise him that he could take the stand and
17 tell his side of the story if he wished to do so?

18 A. The catchphrase that I use, and I've never heard anybody
19 else use this before, or maybe they have, but I always say, if
20 you want to testify they can't stop you, and if you don't want
21 to they can't make you. I thought Mr. Weatherall was a great
22 candidate to testify. He's well spoken. I thought it would be
23 great -- a lot of times we represent people that have a
24 criminal record and they just can't take a stand because of
25 that, or we have people that can't keep a thought coherent and

1 they can't, like, maybe I'm one of those, but they can't
2 testify because of that, it's too confusing. But Mr.
3 Weatherall was coherent, well spoken, and to the best of my
4 memory, had zero criminal record, so he was a good candidate to
5 testify, and I asked him to testify, but he invoked his right
6 not to testify.

7 Q. Okay. And do you recall any plea negotiations in this
8 case?

9 A. Yes, I do, and I was in the courtroom today, so I heard
10 the testimony about it. So, yes, I'm sorry, the answer is,
11 yes.

12 Q. And was Mr. Weatherall, during the course of your
13 representation -- excuse me --

14 A. I'm sorry, what was the question?

15 Q. That's okay. During the course of your representation
16 was Mr. Weatherall ever interested in taking a plea?

17 A. Never.

18 Q. Never?

19 A. He was innocent, or he maintained his innocence from day
20 one throughout my entire trial prep and during the trial.

21 Q. And so during the course of your representation you've
22 always understood this case to be a trial case; is that right?

23 A. Yes, sir. I mean, we always want to try if we can get
24 some kind of settlement on the case, any kind of case, because
25 that if it goes sideways, you know, the stakes are so high, so

1 we don't rule anything out. I had a case -- I learned that a
2 long time ago. I had a case where I represented a guy that was
3 absolutely innocent and he was charged with murder, and the
4 solicitor offered him some kind of deal, and my lawyer friend
5 that was helping me, I said, no, no way. We're not going to
6 plead an innocent guy to a criminal charge, and the guy that
7 was kind of like a mentor to me, he said, we'll get back to
8 you, to the solicitor, meaning, we need to talk about this,
9 because sometimes the stakes are so high that you plead guilty
10 when you're not guilty, and there's ways around it where you
11 can do it honestly, ethically, morally, and I think it's called
12 an Alford plea. So, yes, but he was -- Mr. Weatherall
13 maintained his innocence, so we were hoping to work something
14 out, because like I said, it was clearly an accessory after the
15 fact case, I mean, it's on video, I can't dispute that.

16 Q. And did Mr. Weatherall in preparation for trial ask you
17 to investigate anything in this case?

18 A. I don't know if he asked me to investigate anything. He
19 probably told me to check out the confession by the jailhouse,
20 jailhouse snitch, but we talked about the things we were doing.
21 I mentioned -- I heard mention of Bill Beam. I don't remember
22 hiring him, but we've hired Bill Beam in the past to do
23 investigation stuff, so that would not surprise me that he
24 investigated this case.

25 Q. Okay. Did Mr. Weatherall ever ask you to interview the

1 witness that -- witnesses that he mentioned on direct? Tommy
2 and --

3 A. I don't know -- the answer -- I don't know if he asked
4 me to do these things, but we talked about these people, and I
5 think that Mr. -- the way we try to do these things, we get an
6 investigator to do the interviews, because if in the event the
7 thing goes sideways, the lawyer can't testify. So we want
8 somebody independent to say this is what the interview was, but
9 I thought that the testimony was that we had Bill Beam do all
10 that.

11 Q. Okay. Do you recall what Mr. Benton would have
12 testified to at trial?

13 A. I have no independent recollection, but I did -- didn't
14 he testify a while ago?

15 Q. Yes.

16 A. Yeah, I heard that part so I have no reason to believe
17 that he would not have testified that he was a cellmate with
18 the guy that confessed to doing the killing.

19 Q. Mr. Gardner, let me ask you this, in your experience as
20 a criminal defense attorney, if a witness -- if you had a
21 witness who was willing to testify that someone else had
22 committed the crime, would you have put that person on the
23 stand?

24 A. That's a great question. I've been sitting here
25 pondering that because I heard the testimony, I don't know why

1 we told him to go home. I can't remember why we would tell
2 him, I can't, I don't understand that.

3 Q. Let me ask you this: Would that have -- although you
4 may not recall, is that something that you would have done at
5 that time?

6 A. I've done some things in the past that keep consistency
7 with theory, and sometimes if we have a client that's not going
8 to testify or present evidence, then we don't -- we haven't
9 presented other evidence, we want it to be, you know, clear. I
10 think very -- I think it was very obvious to, except for the
11 jury, I guess, but some of those witnesses that the state put
12 up there were not even marginal. I mean, they were, their
13 testimony was not credible at all.

14 Q. And were you aware at that time that Mr. Benton had been
15 convicted of murder?

16 A. I think Jarrett -- I don't want to misspeak, I think
17 Jarrett had mentioned that to me, so that may have played
18 something into it.

19 Q. And if Mr. Benton had testified, couldn't the state have
20 impeached him using the prior conviction, subject to the
21 Court's --

22 A. Oh, yeah, absolutely, but I've never tried -- I don't
23 think -- never say never, but I don't think I've ever tried a
24 murder case where somebody didn't put up a felon for something,
25 some testimony.

1 Q. Do you recall Mr. Weatherall mentioning a Danny Johnson?

2 A. No, sir.

3 Q. Do you recall Mr. Weatherall mentioning a Salvador Ware?

4 A. I remember that name, yes, sir.

5 Q. Did you make any attempts to interview Mr. Ware?

6 A. I think that we got Bill Beam to do that, I'm not --
7 again, I'm not going to swear to that, but I do know that we've
8 used Bill Beam, or had in the past, for many times on many
9 cases, and I heard his name mentioned in this case, and it
10 would make sense that if we had witnesses that we would use
11 Bill Beam to do so.

12 Q. Do you recall what information came from the
13 investigation of Mr. Ware?

14 A. I think it was consistent with the testimony today.

15 Q. You think, but --

16 A. I don't know. I can't -- I don't have an independent
17 recollection.

18 Q. Okay. And do you recall Mr. Weatherall mentioning a
19 Gregory McGirt(ph)?

20 A. McElveen?

21 Q. Gregory McCourt?

22 A. McCourt? I think that name sounds familiar, but I don't
23 have -- I don't remember anymore about it.

24 Q. I want to ask you about the Batson issue. So at trial,
25 the state struck juror number 191 who was a black woman.

1 A. Yes.

2 Q. And you raised the Batson issue. The state's
3 explanation was that there was an inconsistency regarding her
4 ID; is that right?

5 A. I don't recall. It was something about they had some
6 stats on her or --

7 Q. If I told you that's in the transcript, would you refute
8 that?

9 A. Oh, no. Anything you say I'm not going to challenge you
10 on it.

11 Q. And you didn't give a response to the state's
12 explanation. Is there a reason why you didn't respond to the
13 state's explanation?

14 A. I can't recall what happened there, but I can tell you
15 what I was probably thinking, and if it happened right now,
16 what I would be thinking, they have access to NCI, whatever
17 it's called, the records, the national computer for
18 investigative, whatever it is, you know --

19 Q. NCIC.

20 A. -- and we don't -- okay -- and they don't share that
21 with us. So if they told us that the person was, a potential
22 juror was, you know, Charles Manson, I got no way to dispute
23 that, because I don't have access to the NCIC.

24 Q. And in your experience in criminal practice, where
25 you've made Batson challenges, if the state gives an

1 explanation do you believe that your motion would have been
2 successful?

3 A. I do. I believe it's a very low bar, and I had one
4 grounded against me one time, but I don't think I've ever won
5 one before.

6 Q. And regarding Juror 397 who was gay, and you raised the
7 Batson issue for that juror, as well, isn't it true the state's
8 response to striking that juror was that they didn't know that
9 he was gay?

10 A. If they said that and if they believe that, I'm trying
11 to figure out a nice way to answer that question, other than
12 what I said, was everybody in the room knows, so if the state
13 could say that with a straight face, then that's on them.

14 Q. Let me ask you this, Mr. Gardner. Isn't it true that
15 the Court of Appeals affirmed the trial judge's rulings on both
16 of those Batson motions?

17 A. I didn't read that, but you and I had that conversation.

18 MR. HALL: Beg the Court's indulgence. No further
19 questions.

20 THE COURT: Redirect?

21 MR. WILKES: Yes, Honor.

22 **REDIRECT EXAMINATION**

23 BY MR. WILKES:

24 Q. Mr. Gardner, Mr. Beam provided you with a statement from
25 Mr. Ware stating that Ware heard McElveen confess to hitting

1 the deceased on the head with the bottle. Is that --

2 A. I do remember but I have no -- he did our investigating,
3 and I remember that's what the allegations were. Okay, because
4 it went back to the state's issue which one of them did it.

5 MR. WILKES: If we can have just a second, Your
6 Honor? Your Honor, on the subject of the juror strike, I would
7 offer to have marked two exhibits next in order and introduced
8 as evidence.

9 THE COURT: They'll be three and four?

10 MR. WILKES: Yes, Your Honor.

11 THE COURT: Any objection?

12 MR. HALL: Your Honor, no objection to number three,
13 and the state will object to number four for authentication, as
14 well as hearsay.

15 THE COURT: Okay.

16 MR. WILKES: Well, from the standpoint of
17 authentication, the Attorney General gave me this.

18 MR. HALL: It was during the course of discovery,
19 Your Honor.

20 MR. WILKES: From the solicitor's file, so all it is
21 is the redacted rap sheet that for that juror, which has
22 absolutely no information on it.

23 MR. HALL: And there's some emails in there, too.

24 MR. WILKES: I'll take the email out. I can take
25 that out if you want. It's absolutely unhelpful as far as

1 information. This just helps complete the record as far as
2 what they did.

3 MR. HALL: Oh, I see. Beg the Court's indulgence,
4 Your Honor? Upon review, Your Honor, we'll withdraw our
5 objection.

6 THE COURT: All right. They'll be admitted as three,
7 and four. Thank you very much.

8 **(Applicant's Exhibits Nos. 3 & 4 were admitted into evidence.)**

9 MR. WILKES: Thank you, Your Honor. For
10 identification of those exhibits, Exhibit 3 is just the email
11 which contains the solicitor's explanation of what happened,
12 and this was an email from 2019, so it was their working to
13 figure it out after we filed the PCR, and then the Exhibit 4 is
14 the redacted rap sheet that they're referring to, I assume,
15 unclear, but they're referring to it, but it's redacted and has
16 no information on it.

17 THE COURT: Redacted rap sheet as to Juror 191?

18 MR. WILKES: As to Juror --

19 THE COURT: 191.

20 MR. WILKES: Yes, sir.

21 BY MR. WILKES:

22 Q. Mr. Gardner, if you would have known at the time or
23 would have -- if you would have known at the time that the
24 juror was struck in error, would you have pressed that issue
25 and argued that that juror should not be struck or that the

1 panel should be reconstituted, or whatever remedy for Batson
2 there would be?

3 A. Yes, sir.

4 Q. Okay. At the time, do you recall the solicitor
5 indicating at the time that they did not have a rap sheet, that
6 they made a mistake?

7 A. I don't recall that.

8 Q. Okay. The record will show that.

9 A. Okay.

10 MR. WILKES: No further questions of Mr. Gardner.

11 THE COURT: Thank you, sir, you may step down.

12 THE WITNESS: Thank you, Your Honor.

13 THE WILKES: May Mr. Gardner be excused if he wishes?

14 THE COURT: Any objection to Mr. Gardner being
15 excused?

16 MR. HALL: No objection.

17 THE COURT: No objection. Thank you, Mr. Gardner.

18 THE WITNESS: Thank you, Judge.

19 THE COURT: Your next witness is also counsel?

20 MR. WILKES: It is.

21 THE COURT: Do you all want to take a break?

22 MR. WILKES: No, sir.

23 THE COURT: Okay.

24 MR. WILKES: It will be very short. We'll call Mr.
25 Bouchette.

1 **THOMAS JARRETT BOUCHETTE WAS DULY SWORN AT THIS TIME**
2 **AND TESTIFIED AS FOLLOWS:**

3 THE CLERK: Have a seat, state your name and spell
4 your name. Thank you.

5 THE WITNESS: Thomas Jarrett Bouchette,
6 B-o-u-c-h-e-t-t-e.

7 **DIRECT EXAMINATION**

8 BY MR. WILKES:

9 Q. Mr. Bouchette, you represented Mr. Weatherall along with
10 Mr. Gardner?

11 A. Yes, sir.

12 Q. And at the trial there was, if I read the record
13 correctly, there's no objection to the implied malice charge,
14 do you recall that?

15 A. Well, I don't recall. I've heard the testimony today,
16 and I have no reason to disbelieve it. I don't recall one way
17 or another implied malice.

18 Q. If there was an arguable issue to the jury charge for
19 implied malice, would you have had any reason not to make that
20 objection?

21 A. None that I recall.

22 MR. WILKES: No further questions for Mr. Bouchette.
23 Thank you, sir.

24 MR. HALL: Briefly, Your Honor?

25 THE COURT: Yes, sir.

CROSS-EXAMINATION

1

2 BY MR. HALL:

3 Q. How you doing, Mr. Bouchette?

4 A. I'm doing good, sir.

5 Q. Mr. Bouchette, how long have you been practicing law?

6 A. Now, or at the time of the trial?

7 Q. Well, both.

8 A. Okay. Now, I guess it's about 11 years, so when the
9 trial commenced, that would have been, I don't know, about four
10 or five years, I guess.

11 Q. Okay. And can you tell the Court how you got involved
12 in Mr. Weatherall's case?

13 A. At the time I had been working as an associate at Mr.
14 Gardner's law office for maybe a year, year and some change.

15 Q. And you assisted Mr. Gardner with this trial as second
16 chair?

17 A. Yes, sir.

18 Q. Okay. Do you recall Mr. Weatherall mentioning Tommy Lee
19 Benton as a potential witness?

20 A. I do. By the time I began really getting involved was
21 when it looked like it was pretty clear it was going to go to
22 trial, so my recollection was I started spending more time on
23 it in substance, maybe six months out from when the case was
24 ultimately tried, Tommy Benton had -- we had information that
25 he would testify, as he indicated today, and I believe he was

1 either out on bond or he had not had his trial yet, but he was
2 currently indicted with pretty serious felony charges.

3 Q. And what were those felony charges?

4 A. I recall, like, an arson and a murder. I think earlier
5 he testified it might have been some burglary in there, as
6 well, but I think whatever he testified to was correct.

7 Q. Okay. And at some point the decision was made not to
8 call Mr. Benton to testify. Do you recall the reason for
9 making that decision?

10 A. Yeah. As I recall, because I believe the trial was in
11 this courtroom, that at the close of the state's case they had
12 not called the person we keep referring to as "Chicken," and in
13 preparation for the case, the only -- in other words, the
14 posture of the case was that two people had been in the room at
15 some point, and Chicken had testified or had given a statement
16 earlier that he left while the decedent was still alive, and
17 therefore, our client must have actually committed murder. Our
18 client's testimony was that, no, Chicken had, in fact,
19 committed the strike, and so we were anticipating that what
20 would likely happen would be the state would call Chicken,
21 Chicken would attest to the fact that he left the room, had
22 nothing to do with an altercation or fight, and then that would
23 put his credibility directly at issue. The state elected not
24 to call him and instead relied on one sole witness which was
25 the jailhouse informant, and so when the state closed, we, I

1 remember us having a conversation here in the lockup, and the
2 rest of the conversation was to determine if Mitchell wanted to
3 take the stand to testify in light of Mr. Benton or even some
4 of the other folks that were mentioned as possible witnesses,
5 just like Mr. Gardner testified, we thought that Mitchell would
6 have been best witness out of all of them, in the sense that he
7 was well spoken, I don't think he had any criminal record, as I
8 can recall, that his primary decision whether or not he was
9 going to testify, and he made pretty clear that he did not want
10 to testify, didn't think he wanted to go forward, and so I
11 remember some level of discussion, I can't recall the specifics
12 of it, that if we were not going to call him and allow him and
13 his credibility to come through, then if our sole defense was
14 to put up some of these other folks that were essentially
15 jailhouse informants, that that would sort of eliminate some of
16 our leverage in the sense of our closing argument was largely
17 that the state had no witnesses other than this jailhouse
18 informant. And so I recall some level of discussion that we
19 would just maintain final close and argue that the state didn't
20 prove its case and that they relied on unreliable witnesses,
21 and that kind of thing.

22 Q. Okay. And do you believe that, or at least at the time
23 that you decided, you and Mr. Garner decided not to call Mr.
24 Benton, did you believe that Mr. Benton would have been a good
25 witness in this case?

1 A. I don't really recall. There was some testimony earlier
2 that I informed his parents that my client was taking a plea.
3 I think that was probably misunderstood. We were obviously in
4 the middle of trial, so I don't think we were taking a plea. I
5 think it was that we decided not to put up a case, and so
6 that's why, obviously, we wouldn't call him. You know, I don't
7 really recall one way or another. I remember the substance to
8 what he was going to testify to that at the end of the day he
9 was facing or had pending some fairly gruesome felony charges
10 that he was later convicted of that, perhaps, could have been,
11 depending on the circumstances and different things, could have
12 been brought up by the state. So there were, I wouldn't say he
13 was good or bad, I would say he was a risky witness.

14 Q. Do you recall any of the other witnesses that were
15 mentioned here, Danny Johnson?

16 A. The only name that sounds familiar to me was a Salvatore
17 Ware, and I can't recall what was done or not done, but that's
18 the only name that sounds familiar to me.

19 Q. Okay, so Danny Johnson and Gregory McCourt don't sound
20 familiar?

21 A. I don't recall.

22 Q. Do you recall Mr. Weatherall ever mentioning them?

23 A. I'm not saying he didn't. I don't independently recall
24 them. Just the two, Mr. Ware and Mr. Benton stand out.

25 Q. Okay. And I want to ask you about plea offers in this

1 case. The state made plea offers to Mr. Weatherall, and Mr.
2 Weatherall rejected those offers. Was Mr. Weatherall during
3 the course of your representation ever interested in taking a
4 plea in this case?

5 A. None that I recall. I think there was some testimony
6 about a 15-year offer. I think that was done at an arraignment
7 that Mr. Gardner attended and I was surprised when that was
8 rejected because, essentially, our defense to the case was that
9 he was guilty of accessory after the fact, but not of murder,
10 but I think particularly after that offer was rejected it was
11 pretty clear it was going to be a case for trial.

12 MR. HALL: That's all the questions I have. No
13 further questions, Your Honor.

14 THE COURT: Any Redirect?

15 MR. WILKES: Yes, Your Honor.

16 **REDIRECT EXAMINATION**

17 BY MR. WILKES:

18 Q. The Court's clarification, is "Chicken" Marvin McElveen?

19 A. I remember the last name was McElveen or McElveen. I
20 don't even recall what his first name was.

21 Q. Marvin McElveen is mentioned in the transcript, Chicken
22 would be that person?

23 A. That's correct.

24 Q. Okay. Do you recall subpoenaing Mr. Benton for trial?

25 A. I don't recall it. Probably what we would have done

1 would have been probably would have signed one and had the
2 process server serving, but I don't doubt that he was
3 subpoenaed in the case and we decided to call him.

4 Q. And would there be any reason to release Mr. Benton
5 before the end of the state's case?

6 A. No.

7 Q. The solicitors strike, did you argue that one? You
8 raised the Batson issue?

9 A. Short answer is, without the transcript in front of me,
10 I don't recall.

11 Q. Okay. If you did, there's no reason you wouldn't fully
12 argue the Batson challenge if there was an obvious reason to do
13 so?

14 A. That's correct.

15 Q. Okay.

16 MR. WILKES: Nothing further, Your Honor.

17 MR. HALL: Nothing from the state, Your Honor.

18 THE COURT: Thank you, sir. You may step down. Can
19 the witness be excused?

20 MR. WILKES: Yes, Your Honor.

21 MR. HALL: No objection.

22 THE COURT: Thank you, sir. You may be excused as
23 well.

24 MR. WILKES: Applicant's case, Your Honor.

25 THE COURT: Does the State intend to call any other

1 witnesses?

2 MR. HALL: No, Your Honor. At this time the State
3 rests, as well, and we would just ask for a brief moment to get
4 a closing argument.

5 THE COURT: Okay. All right. We'll step down for
6 about five minutes and come right back. Do you want five?

7 MR. WILKES: Sir?

8 THE COURT: He wants a brief moment to prepare his
9 closing argument.

10 MR. HALL: Oh, no, Judge, I was asking for a moment
11 to give oral argument. I'm prepared now.

12 THE COURT: Oh, you're ready? Okay. I thought you
13 were saying you wanted. Okay. All right. I thought y'all
14 were gonna do written briefs?

15 MR. HALL: On one of the issues.

16 THE COURT: One of the issues?

17 MR. HALL: Yes.

18 THE COURT: He's ready on all of them.

19 MR. HALL: He's got 50 pages for you. Mine is not
20 that long.

21 MR. WILKES: I have more than 50. Don't sell me
22 short.

23 MR. HALL: I'll let Mr. Wilkes go first, since it's
24 his burden.

25 MR. WILKES: Thank you. Your Honor, there's two

1 issues that are essentially made on the record, or largely on
2 the record. One is the malice charge issue. On the malice
3 charge, Your Honor, and I'm not going to argue it in a whole
4 bunch of detail because I've got a memorandum on it, if that
5 would be okay.

6 In short, the malice charge should have been objected
7 to, there's clear reasons for that that I've outlined.
8 Initially, and the biggest one, the law existing at the time
9 made the malice charge, inferred malice charge inappropriate if
10 there's any evidence that would reduce or mitigate, excuse or
11 justify a homicide, and in this case, the whole case,
12 basically, as far as who hit the deceased on the head with a
13 beer bottle in a hotel room, boiled down to the testimony of
14 Mr. Weatherall's cellmate who said, oh, he told me, and the
15 whole testimony is a paragraph. And so I've got that listed
16 for the Court, and you can see it very simply, but I think when
17 you read it it says, essentially, they were all having a good
18 time, and there was some argument over money for drugs, and Mr.
19 Bell said that my client hit the deceased on the head with the
20 beer bottle. The other evidence in the case, and Mr. Bell's
21 testimony is, no one even knew he was dead for days. That's
22 not evidence that supports malice aforethought. That's
23 actually evidence that would indicate clearly an accident had
24 occurred as far as the death, and because the evidence does not
25 show that malice aforethought and it actually is enough to

1 raise the question of, if somebody got hit on the head with a
2 bottle while they're all doing drugs and nobody notices for
3 days, there was no intent to kill, that sounds like an
4 accident, and if that's enough evidence to indicate that that
5 could have been an accident then at the time of the trial the
6 implied malice was improper and should have been objected to.
7 I've got a lot of other case law as far as applying backwards,
8 let's see, the case that came out during State vs. Burdette.
9 Burdette came out after the trial, and it was actually during
10 Mr. Weatherall's direct appeal, but the issue had not been
11 preserved as far as an objection to the implied malice charge.
12 If that objection had been made and he was still pending on
13 appeal, then the retroactivity under Teague and Sandstrom, even
14 Burdette specifically said, this will apply retroactively to
15 cases on direct appeal. It would have applied, and he would
16 have had a new trial. So I have put in a legal argument as to
17 why Burdette should be applied retroactively. The Burdette
18 case said it's not going to apply to cases on PCR, but the
19 problem with that is Burdette was not raised on due process,
20 and so from a due process standpoint, Justice Pleicones had
21 said in Gibson, he would apply due process retroactively. So
22 we made the due process claim. He should have Burdette applied
23 retroactively, also, which Burdette, of course, just said, no
24 more implied malice, period.

25 So he, Mr. Weatherall, should be granted the new

1 trial on both grounds, and I have got a memo for the Court I'll
2 pass up, along with the wonderful Stanford Law Review article,
3 it makes wonderful reading, and I've also highlighted just
4 relevant portions of, and this is just from the transcript from
5 the trial so the Court will not have to hunt for the things
6 that I have said are important. If I may pass that up to the
7 Court, I think that will outline the malice charge. Did you
8 take my -- no, that's my copy. Hang on just a second, Judge.

9 I've also included a brief of petitioner from the
10 Burdette case just to show the Court that the issue of due
11 process was not raised, or it wasn't raised as due process in
12 that case, and I think with that, Your Honor, that's all I need
13 to say and I appreciate it. Thank you.

14 MR. HALL: Briefly, Your Honor? I'll briefly address
15 the implied malice charge. The state has also prepared a
16 memorandum of law on that issue. Essentially, Your Honor, this
17 Court need not address whether or not counsel should have
18 objected to the implied malice charge. The Court doesn't even
19 need to address whether or not there was evidence that would
20 tend to excuse or justify the homicide in this case, because
21 there was an evidence presented in Mr. Weatherall's trial of
22 malice outside of the use of -- outside of the fact that he
23 used a weapon. Your Honor, Mr. Weatherall's efforts to cover
24 up the murder, the fact that he left the victim's body in the
25 hotel room for days and then cleaned up the hotel room and then

1 disposed the body in the woods, Your Honor, our case law states
2 that efforts to cover up a crime is -- or cover up a murder, is
3 evidence of malice, and the cases that we will cite to that,
4 the first one being, Your Honor, State v. Brooks. I'll try to
5 find the site for you, but I have a printed copy for you if
6 you'd like, but essentially, Your Honor, in the State v. Brooks
7 case, the Court of Appeals stated that when the jury is charged
8 that malice can be implied from conduct showing a total
9 disregard for human life that the jury can infer from the
10 defendant's conduct, malice, and in this case the trial judge
11 gave that charge to the jury. So regardless of the fact that
12 Mr. Weatherall used the bottle, the jury could infer malice
13 from his efforts to cover up the crime, as well as the fact
14 that he left the victim's body dead for a number of days before
15 deciding to dispose of the body, that conduct shows a total
16 disregard -- or shows a -- I'm trying to get the correct
17 language here for the Court -- a total disregard for human life
18 is the correct term. Also stated in Taylor 434 SC 365, that's
19 a 2021 Court of Appeals case, and the Taylor case the Court
20 stated that the jury can use inferences to find specific intent
21 and to find implied malice from conduct, and so we'll just hand
22 up our memo on that issue.

23 Regarding the other issues in this case, Your Honor,
24 Mr. Weatherall alleges that if he had been advised by counsel
25 on the state's theory of hand of one hand of all that he would

1 have pled guilty instead of going to trial. There was
2 testimony from trial counsel that Mr. Weatherall was not
3 interested in the trial, and Your Honor, the U.S. Supreme Court
4 case, *Lafler v. Cooper*, that's 566 U.S. 156, it's a 2012
5 Supreme Court case, and essentially puts the burden on the
6 defendant and states that the defendant must show that but for
7 counsel's advice they actually would have taken the plea and
8 not gone to trial. Where trial counsel has testified that Mr.
9 Weatherall wasn't interested in a plea, he can't say that he
10 would have pled guilty if he had known about the hand of one
11 hand of all.

12 Mr. Weatherall also makes an allegation that the
13 state's theory of hand of one hand of all, while also stating
14 that Mr. Weatherall was the principal, violates due process,
15 and Your Honor, the state argues that that's not the case. We
16 would cite to *Bradshaw v. Stumpf*. *Stumpf* is spelled
17 S-T-U-M-P-F. That's four -- I'm sorry, excuse me, that's 545
18 U.S. 175. That's a 2005 Supreme Court case. Essentially, in
19 that case, Your Honor, the Supreme Court held that the
20 prosecution's use of different theories for two different
21 defendants, arguing that one defendant was the principal and
22 getting another under accomplished liability did not violate
23 due process. Essentially, for a due process violation, the
24 prosecution would have had to misrepresent the facts or make
25 some sort of misrepresentation regarding the evidence. That's

1 not the case here in this case, Your Honor, the facts have
2 always been the facts in this case, and the hand of one hand of
3 all is supported by the evidence. The fact that Mr. Weatherall
4 and his co-defendant were partying with the victim, the victim
5 was killed, and then they used the victim's credit cards, and
6 they acted together in using the credit cards, they acted
7 together in disposing of the body, and so, Your Honor, we would
8 ask you to look at those cases, as well.

9 The other issue, Your Honor, regarding the alleged
10 confession by McElveen, who is Chicken. Your Honor, you heard
11 testimony from Tommy Lee Benton who has been convicted of
12 murder. You heard defense counsel stating that they don't know
13 whether he would have been a good witness. Your Honor, Mr.
14 Benton is testifying to hearsay testimony. No one has been
15 able to locate any of the other witnesses or Chicken, and so we
16 would ask Your Honor to assess the credibility of the witnesses
17 and determine whether hearsay testimony is enough to warrant
18 reversal of Mr. Weatherall's conviction based on hearsay
19 testimony from seven years ago. We would ask this Court to
20 deny Mr. Weatherall's application.

21 And the final issue, the Batson issue, Your Honor,
22 the Court of Appeals has already ruled on this issue and
23 affirmed the trial Court's ruling regarding the Batson issue,
24 and so we just ask that you deny the application at this time,
25 and I'll hand up our memo, as well as the cases I've cited.

1 MR. WILKES: May I also hand up the Court of Appeals
2 Opinion so the Court can see what the Court said on the Batson
3 issue?

4 THE COURT: The Court of Appeals decision in this
5 case?

6 MR. WILKES: Yes, sir.

7 THE COURT: You can. I've got a copy of it, but you
8 can give me your copy, I see it's highlighted in yellow.

9 MR. WILKES: I tried to make it quick.

10 THE COURT: Anything else from the state?

11 MR. HALL: Nothing from the state, Your Honor.

12 THE COURT: Any reply to his argument other than you
13 giving me this case?

14 MR. WILKES: No, sir, other than just clarifying, I
15 think when I said implied malice, I hope I was clear that it's
16 the use of the deadly weapon, implied malice, which I think I
17 was clear, but if I'm not, that's what I'm talking about.
18 Nothing further, Your Honor.

19 THE COURT: All right, thank you very much. Thank
20 you very much for the memos, as well. Be sure, because you've
21 given them to me, be sure you get one into the system, the
22 clerk's office, as well, at some point, because I'll take these
23 and I'll be marking on these and using these for my own
24 purposes, so at some point forward them to the clerk's office,
25 as well. Okay? Thank you all very much.

1 MR. HALL: Thank you, Judge.

2 MR. WILKES: And we can do that by mail?

3 THE COURT: However you can do that, you may do that,
4 yes.

5 MR. WILKES: Because I can't do that today.

6 THE COURT: Oh, yeah, you can mail it to them or
7 however you want to do that, if they'll accept it. My pausing
8 is I'm not sure that you can do it electronically like you can
9 do in all civil cases, but if you can, definitely do that as
10 well.

11 MR. WILKES: Thank you, Your Honor.

12 THE COURT: Thank y'all very much. Sir, good luck to
13 you. Just stay in touch with your lawyer. okay?

14 THE APPLICANT: Okay. Thank you.

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21 CERTIFICATE

22 STATE OF SOUTH CAROLINA

23 COUNTY OF HORRY

24 I, Julie A. Kevish, Official Court Reporter

25 for the State of South Carolina, do hereby certify that the

1 foregoing is a true, accurate and complete Transcript of Record
2 of the proceedings had and evidence introduced in the Court of
3 General Sessions for Horry County, South Carolina, on the 29th
4 of October, 2024.

5 I do further certify that I am neither of kin,
6 counsel, nor interest to any party hereto.

7

8

October 29, 2024

9

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Julie Kevish

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JULIE A. KEVISH
OFFICIAL COURT REPORTER

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STATE OF SOUTH CAROLINA
COUNTY OF HORRY
MITCHELL MONROE WEATHERALL
(371932), APPLICANT
v.
STATE OF SOUTH CAROLINA,
RESPONDENT

FILED
HORRY COUNTY
2025 MAY -2 A 10:18
2021 CP-26-4551
RENEE N. ELVIS
CLERK OF COURT
HORRY COUNTY
ORDER GRANTING
POST-CONVICTION RELIEF

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.

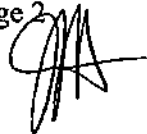
On July 12, 2021, Applicant timely filed the present action for post-conviction relief. A hearing was held at the Horry County Courthouse on October 29, 2024. Applicant was represented by J. Falkner Wilkes, of Oakland, Mississippi. Bryan T. Hall, Asst. Atty. Gen, represented the State. After hearing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



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.

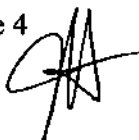
Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "This does not require a showing that 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 (4th Cir. 2015) (quoting Elmore v. Ozmint, 661 F.3d 783, 858 (4th Cir. 2011)).



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. Lane¹ 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

¹ 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.² 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.³ 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

² 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*.

³ 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.

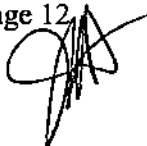
Under Stickland the Applicant is required to demonstrate that counsel's performance was deficient with respect to prevailing professional norms or duties. Strickland, 466 U.S. at 688, 104 S.Ct. 2052. These duties include the duty to investigate and to research a client's case in a manner sufficient to 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 unreasonable 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

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 (4th Cir. 2017). Counsels' 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 (9th 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

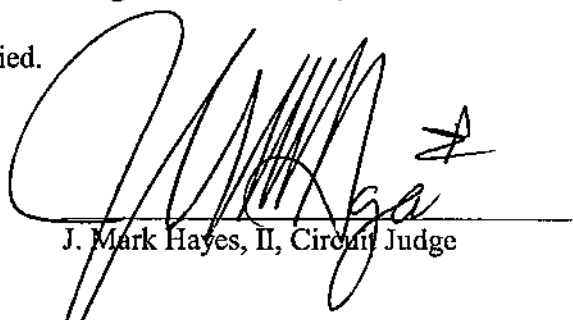
Applicant alleged that counsel's failure to inform him of the potential for a conviction based on accomplice liability prevented him from making an intelligent and informed decision as to plea offers. Applicant testified that had he been timely advised that he could be convicted under the theory of accomplice 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 25th day of April, 2025

Spartanburg, South Carolina.

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
CLERK OF COURT
HORRY COUNTY, SC
MAY - 9 P 1:49

Pursuant to Rule 59(e), SCRCP, 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.¹ 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.

¹ 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,"² 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*.

² 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,

ALAN WILSON
Attorney General

DON ZELENKA
Deputy Attorney General

D. RUSSELL BARLOW, II
Senior Assistant Deputy Attorney General

BRYAN T. HALL
Assistant Attorney General

By:



ATTORNEYS FOR THE STATE
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29212

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,	)	RESPONDENT'S MEMORANDUM
	)	IN RESPONSE TO APPLICANT'S
v.	)	MEMORANDUM ON IMPLIED MALICE
	)	JURY CHARGE
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).

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
Assistant Attorney General

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

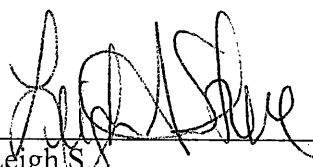
CERTIFICATE OF SERVICE BY MAIL

FILED
HORRY COUNTY
2025 MAY - 9 P 1:49
RENEE H. ELYS
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 6th of May, 2025



Leigh S.
Legal Assistant for Respondent

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP2604551

633

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), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ 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.

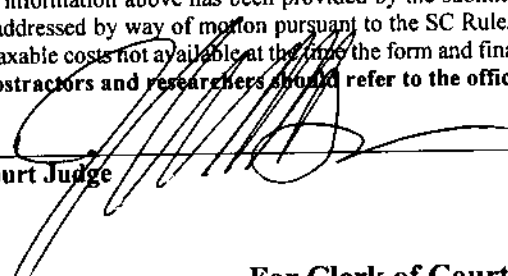
INFORMATION FOR THE JUDGMENT INDEX

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:

- (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 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.