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**Dec 22 2025**

**S.C. SUPREME COURT**

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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

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Appellate Case No. 2025-001371  
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MITCHELL M. WEATHERALL, ..... RESPONDENT,

v.

STATE OF SOUTH CAROLINA, ..... PETITIONER.

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RETURN  
—————

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December 21, 2025.

## RETURN

### *Standard of Review*

In PCR cases, the standard of review to be applied on appeal is directly dependent on the specific issues raised. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing a PCR judge’s factual findings on appeal, the appellate court will defer to those findings and uphold them if they are supported by any evidence of probative value appearing in the record. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); *see* Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) (“Under the proper standard of review, the appellate court’s ‘view’ must be limited to whether there is probative evidence to support the PCR court’s factual findings.”). Meanwhile, when reviewing a pure question of law, an appellate court will consider such a matter de novo and is not required to give deference to the PCR judge’s rulings. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014); *see also* Strickland v. Washington, 466 U.S. 668, 698 (1984) (recognizing the question of whether defense counsel was constitutionally ineffective “is a mixed question of law and fact”). Ultimately, if the PCR judge’s decision is controlled by an error of law, an appellate court will reverse that decision on appeal. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

#### **1. COUNSEL’S FAILURE TO OBJECT TO THE IMPLIED MALICE CHARGE ON DUE PROCESS GROUNDS.**

State and federal case law existing at the time of the Respondent’s trial was sufficient to inform Counsel of the need to object to the implied malice charge on due process grounds. In Gibson v. State, Justice Pleicones discussed an improper malice charge as a due process violation:

I concur in the majority's decision to affirm the PCR orders denying Donnie and David post-conviction relief. Unlike the majority, I would not reach the retroactivity issue. Were I to find it necessary to reach the claim, I would employ a different analytical approach. In my opinion, whether to apply a new decision retroactively under Teague v. Lane is determined by applying the Teague v. Lane exceptions to that new decision. Therefore, I would analyze the Sandstrom decision to determine whether it met a Teague v. Lane exception. Only if I found that Sandstrom met one of these exceptions would I engage in a review of the facts of the case in which the unconstitutional malice charge was given to determine, on a case-by-case basis, whether the defendant in that pre-Sandstrom case had been so prejudiced by the charge that he was entitled to a new trial.

Gibson v. State, 355 S.C. 429, 437, 586 S.E.2d 119 (S.C. 2003) (*overruled on other grounds*).

In Gibson, Justice Pleicones went on to say:

I recognize the validity of Donnie's contention that Sandstrom v. Montana is merely a logical extension of In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) and Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). *See, e.g.* Francis v. Franklin, 471 U.S. 307, 326, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985) ("Sandstrom v. Montana made clear that the Due Process Clause of the 14th Amendment prohibits the State from making use of jury instructions that have the effect of relieving the State of the burden of proof enunciated in In re Winship on the critical question of intent in a criminal prosecution. Today we reaffirm the rule of Sandstrom and the wellspring due process principle from which it was drawn"). Had Donnie framed his claim as a violation of his due process rights, rather than as a violation of his sixth amendment right to counsel, I would reach the issue of retroactivity under Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Were I to reach this issue, I would not necessarily find that Sandstrom did not apply retroactively. *See, e.g.*, Hall v. Kelso 892 F.2d 1541 (11th Cir.1990).

Gibson v. State, 355 S.C. 429, 586 S.E.2d 119 (S.C. 2003), FN 4, (*overruled on other 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. Gibson v State, 586 S.E.2d 119, 355 S.C. 429 (2003) (*reversed on other grounds*). Gibson and Hall were sufficient to inform Respondent'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 Respondent's due process rights because it relieved the state of its burden of proving, beyond a reasonable doubt, that Respondent intentionally committed the homicide with malice. Counsel's failure to raise an objection on due process grounds constitutes error under the first prong of the *Strickland* analysis. Given the lack of evidence to establish malice or that the homicide was intentional, the record fails to show beyond a reasonable doubt that the improper malice charge did not contribute to the verdict. As to the due process issue the Respondent has satisfied the second prong of Strickland. The decision of the PCR court should therefore be affirmed.

**2. RETROACTIVE APPLICATION OF STATE v. BURDETTE, 427 S.C. 490, (S.C. 2019).**

Burdette announced a new rule making an implied malice charge based on the use of a deadly weapon improper in any case. "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." State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (S.C. 2019), 502 "[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Id.* at 301 , 109 S.Ct. at 1070 , 103 L.Ed.2d at 349 (*internal citations omitted*) (*emphasis in original*)." Talley v. State, 640 S.E.2d 878, 371 S.C. 535 (S.C. 2007), 541. (*quoting Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)). The ruling in Burdette therefore constitutes a new rule under Teague.

Whether Burdette should be given retroactive application in the Respondent's case is a

federal question. The U.S. Supreme Court set forth two exceptions to the general principle that landmark criminal procedure decisions should not have a retroactive effect in Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). The first exception is that a decision may be retroactively applied "if it places `certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" Teague, 489 U.S. at 311, 109 S.Ct. at 1075 (*quoting* Justice Harlan's opinion in Mackey v. United States, 401 U.S. 667, 692, 91 S.Ct. 1160, 1180, 28 L.Ed.2d 404 (1971)). This first exception is not applicable to this case. The second exception applies to "those new procedures without which the likelihood of an accurate conviction is seriously diminished." *Id.* Gibson v. State, 355 S.C. 429, 586 S.E.2d 119 (S.C. 2003). The same test for retroactivity was applied by the Fourth Circuit Court of Appeals in Adams v. Aiken, 965 F.2d 1306, 1312 (4th Cir.1992).

This Court has previously applied a Teague analysis in an improper malice charge case on collateral review. *See* Gibson v. State, 355 S.C. 429, 586 S.E.2d 119 (S.C. 2003) (*overruled on other grounds*). In applying a Teague analysis the Court in Gibson looked to the facts of the case to determine whether Gibson's murder conviction was seriously diminished by the improper malice charge. Based on the facts the Court found the accuracy of Gibson's conviction was not diminished because "the jury heard plenty of testimony that established the malice evidence.

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 Court in Gibson found the that the improper implied malice charge did not diminish the accuracy

of the convictions in the Gibsons' case.

Unlike Gibson, the record in the Respondent's case shows no evidence of prior altercations between the Respondent and the deceased; no evidence that the Respondent harbored any ill will towards the deceased prior to the incident; no evidence that the Respondent 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 Respondent had no prior criminal record. Overall, the record lacks the evidence of malice or an intent to kill on the part of the Respondent as seen in Gibson. The implied malice charge in Respondent's case therefore seriously diminished the likelihood of an accurate conviction. The PCR court therefore properly applied Burdette in the Respondent's case.

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

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*).

"Murder" is the killing of any person with malice aforethought, either express or implied. S.C. Code § 16-3-10. The record from Respondent's trial shows no evidence of prior altercations between the Respondent and the deceased; no evidence that the Respondent harbored any ill will towards the deceased prior to the incident; no evidence that the Respondent 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. The Respondent had no prior criminal record. The evidence showed that the Respondent, 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 Respondent had any intent to harm the victim prior to the argument and assault that led to the victim's death. According to Bell's testimony the day the deceased was hit with the bottle the Respondent, the deceased, and others were just sitting down, getting high, just enjoying themselves in the hotel room. The evidence relied on by the PCR court shows a lack of malice aforethought which tends to mitigate the homicide. 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 most often involve overwhelming evidence of malice apart from the use of a deadly weapon, the record in the Respondent's case reveals no such evidence. Here the record overall shows a lack of malice towards the deceased on the part of the

Respondent 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 implied malice charge contributed to the jury's verdict. The decision of the PCR court should therefore be affirmed.

#### **4. FAILURE OF COUNSEL TO CALL WITNESS TOMMY BENTON**

The PCR court's ruling on the issue of Counsel's failure to call witness Tommy Benton is based on determinations of credibility and resulting findings of fact. Because there is evidence in record to support the PCR court's findings of fact, the PCR court's grant of relief on this issue must be affirmed. When reviewing a PCR judge's factual findings on appeal, the appellate court will defer to those findings and uphold them if they are supported by any evidence of probative value appearing in the record. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); *see* Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) ("Under the proper standard of review, the appellate court's 'view' must be limited to whether there is probative evidence to support the PCR court's factual findings.").

The theory of defense in Respondent's case was that the deceased was struck and killed by Marvin McElveen (*aka* "Chicken"), who was also in the hotel room "partying" with the Respondent. App. 72-73. McElveen was present in the hotel room when the deceased was struck and died. McElveen had confessed to four people that he had struck and killed the deceased. 569-575. Tommy Benton was one of the four. 570. The Respondent discussed the witnesses to

McElveen's confession, including Benton, with Counsel. 540; 569-570. McElveen, also charged with murder in the case, was apparently in court and available during the Respondent's criminal trial as he was identified as a potential witness during jury *voir dire*. The State, however, did not call McElveen as a witness at the criminal trial. Instead, the only evidence the State offered to identify the Respondent as the person that had struck the victim with a bottle was the testimony of Marcus Bell. Bell was the Respondent's cellmate prior to the criminal trial. Bell was not a witness to any of the events involving the death of the deceased and was being held on unrelated charges. Bell testified only to what he claimed the Respondent told him while incarcerated with the Respondent:

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. I don't — I don't know, when I say they, I don't  
9 know exactly how many people were left at that moment, but I'm

App. 272, l. 14-273, l. 9.

In Bell's testimony above he implied that the Respondent had admitted to striking the deceased. Later Bell testified that the Respondent had not admitted to striking the deceased:

Q: And as he become more comfortable, he says no, I did it?

A: He didn't he didn't -- I'm not gone lie. He didn't exactly say no, I did it; but he -- he threw it out there to the point to where Chicken didn't do it.

App. 274, l. 20-23.

Respondent attempted to subpoena McElveen in the PCR case. Process server Melissa Bridges testified to exhaustive attempts to locate and serve McElveen with a subpoena for the PCR hearing. Bridges also attempted to locate and subpoena other witnesses to McElveen's confession. She was unable to locate those witnesses. App. 520-531. Based on Bridges' testimony the PCR court found that McElveen, as the declarant of an out of court statement, to be absent from the hearing and that the Respondent had been unable to procure McElveen's attendance or testimony by process or other reasonable means. App 604-605.

At the PCR, Respondent presented the testimony of Tommy Benton. Benton had no connection to the events involving the victim's death but testified that while they had been cellmates McElveen told him that the death of the deceased was not the Respondent's fault. App. 535. After his release from jail on pending charges Benton received a subpoena to appear for the defense at the Respondent's criminal trial. App. 534-535. Unlike Bell, who admitted that he had contacted the solicitor and offered to testify against Respondent in hopes of receiving help from State on his pending charges. Benton on the other hand had nothing to gain from his testimony at the PCR. Had he been called at the Respondent's criminal trial Benton would have testified to McElveen's discussions about the events at the hotel and that Respondent was not responsible for the death of the decedent. App. 534.

Out of jail on bond at the time, Benton was under a defense subpoena for the Respondent's trial. Benton's mother Christie Hudson brought Benton to court. When they arrived at court prior

to the trial they were met by attorney Counsel in the hallway. 534. Both Benton and Hudson testified that Counsel told them that the Respondent's testimony would not be needed and that Benton could leave. 533; 538. Once Counsel released Benton from his subpoena he and his mother left the courthouse and returned home. 533. Benton had therefore left the courthouse before the trial and before Counsel had an opportunity to evaluate the strength of the State's case or weigh the potential risk and benefits of Benton's testimony in light of the State's case. The PCR found Benton and Hudson to be credible. App. 604.

The PCR court also found that the defense theory of the case was that it was not the Respondent but McElveen (Chicken) that had killed the victim by hitting him on the head with the bottle. App. 604. Counsel stated this theory clearly in his opening statements to the jury. App. 72-75. There was so much focus on McElveen by the defense that the solicitor commented on the defense's repeated questions about McElveen in her closing argument. App. 370. (The solicitor also pointed out the defense's failure to put up any evidence to prove that McElveen was in the room or had struck the deceased. App. 370.) At the PCR Counsel testified that instead of calling Benton as a witness to prove his theory, he was counting on the State to call a witness (Joey Garsow) that would testify that McElveen had confessed to having been the one that had struck and killed the deceased. App. 250; 382. In questioning before the jury Counsel stated that the jury would hear from Joey Gaslow. App. 250. Given the fact that such testimony would tend to prove the Respondent not guilty, Counsel's plan to base the entire defense on the State calling Joey Garsow was clearly unreasonable. Competent counsel would have known that the State was not going to put up a witness that would prove that the Respondent was not guilty. Benton's testimony was therefore the only evidence Counsel could reasonable expect to offer testimony to

prove the Respondent was not responsible for the death of the deceased. When the State chose not to call Garsow, and prove the Respondent's innocence, the defense could have called Benton had he not been released prior to the close of the case.

Like Bell, Benton and Garsow were not witness to the events at the hotel. Both were witnesses to McElveen's statements proving that Respondent was not responsible for the death of the deceased. Counsel (Gardner) testified that he was aware of Mr. Benton and "had no reason to believe that he would not have testified that he was a cellmate with the guy that confessed to doing the killing." App. 570, l. 11-18. Counsel (Gardner) could not explain why the defense released Benton from a subpoena before the end of the trial:

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

A. That's a great question. I've been sitting here pondering that because I heard the testimony, I don't know why we told him to go home. I can't remember why we would tell him, I can't, I don't understand that.

App. 570, l. 19-571, l. 2.

It was therefore unreasonable for Counsel to release Benton from the subpoena and send him home before the end of the case. Given the circumstances, Counsel could not possibly have competently evaluated the potential value of Benton's testimony before knowing whether the State would call Garsow, or the strength of the State's case at the close of its case.

Counsel was clearly aware of the importance of Benton's testimony as he had subpoenaed Benton for the trial. At the PCR Counsel (Bouchette) testified that he released Benton because Benton's pending charges made him a risky witness. App. 582, l. 12. Counsel explained that Benton was a risky witness because he "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.” App. 582, 1. 9-13. Benton had not been convicted of those charges and was on bond at the time of Respondent’s trial. App. 536-537. Counsel clearly believed that the State could use pending charges to impeach Benton’s testimony. Counsel’s analysis of Benton’s testimony was therefore 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 Counsel believed.

(a) General Rule. For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

Rule 609 (a)(1), SCRE.

Rule 609, SCRE, pertaining to impeachment is fundamental to the practice of criminal law. Counsel’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 and his untimely release from the subpoena. Because counsel’s decision not to call Benton as a witness was influenced by his misunderstanding of Rule 609, it cannot be considered a valid strategy. 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).

Under Stickland the Respondent 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 (4<sup>th</sup> Cir. 2017). Counsels' untimely 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. Respondent has therefore met the first prong of Stickland.

Benton's testimony was the only evidence the defense had to support the defense theory of the case and it was not presented because Counsel did not understand fundamental law essential in criminal practice. 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). The release

of Benton prior to the Counsel's ability to competently evaluate the strength of the State's case was therefore constitutional error that prejudiced the Respondent. Both prongs of the Strickland are therefore satisfied. The PCR court's decision should be affirmed.

### CONCLUSION

Based on the foregoing the Court should deny the Petition and affirm the decision of the PCR court.

Respectfully submitted,

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