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**Jan 05 2026**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Jasper County

Honorable Roger M. Young, Circuit Court Judge

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SAMUEL OLALDE GONZALEZ,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-000135

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BRIEF OF PETITIONER

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## **ISSUE PRESENTED**

**Whether the PCR court erred in finding trial counsel was effective when he failed to object to the state introducing evidence of petitioner's inadmissible "Nazi" tattoo when trial counsel's entire strategy required the jury to reject the malice element of murder to return a verdict on a lesser included offense?**

## STATEMENT

Petitioner admitted to killing his girlfriend and cooperated with investigators during the investigation of her death. App. 130, l. 1 – 134, l. 5. The only question before the jury during trial was whether the killing involved murder or voluntary manslaughter.<sup>1</sup> App. 231, l. 1 – 7; 245, l. 11 – 246, l. 23. At trial, petitioner was represented by Robert Hughes while Hunter Swanson and Brian Hollen represented the state. App. 1 – 2.

Trial counsel’s strategy depended on the jury rejecting the malice element of murder. App. 231, ll. 1 - 7. Trial counsel elicited testimony regarding petitioner’s demeanor and work habits. App. 100, ll. 7 – 14. Trial counsel focused on petitioner’s cooperation with law enforcement, including petitioner leading them to the scene of the location of the killing. App. 150, ll. 2 – 16. Trial counsel called petitioner to the stand to testify about the heated and lengthy argument, and his girlfriend’s reactions leading up to the killing. App. 187, l. 1 – 194, l. 25. The only question before the jury was whether the killing involved murder or voluntary manslaughter. App. 231, l. 1 – 7; 245, l. 11 – 246, l. 23.

Unfortunately for petitioner, despite basing the entire trial strategy around the jury rejecting malice, trial counsel failed to object to the introduction of a “Nazi” tattoo on petitioner’s hand when the state solicited testimony from two witnesses regarding the tattoo. App. 102, ll. 2 – 7; 161, ll. 1 – 11. Trial counsel also failed to object when the solicitor tied the “symbol of hate” tattooed onto petitioner’s flesh to the malice element of murder during closing argument. App. 237, ll. 11 – 19 (emphasis added).

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<sup>1</sup> Petitioner was charged with murder and tried before the Honorable Brooks Goldsmith and a Jasper County jury from April 23 – 25, 2018.

Following a guilty verdict on the murder charge, Judge Goldsmith sentenced petitioner to thirty-seven years in prison. App. 262, ll. 3 – 6; 346. Petitioner appealed and Chief Appellate Defender Robert M. Dudek filed an Anders<sup>2</sup> brief asserting an error in the admission of petitioner’s statements made without the benefit of a qualified interpreter. The South Carolina Court of Appeals dismissed the appeal in an unpublished opinion. *See State v. Gonzalez*, No. 2018-000807 (S.C. Ct. App. Mar. 25, 2020).

Petitioner timely filed an application for post-conviction relief. App. 264. The application was amended before the evidentiary hearing to include allegations surrounding counsel’s failure to object to testimony surrounding the “Nazi” tattoo and ineffective assistance of counsel in rejecting the pre-trial plea offer. App. 288. An evidentiary hearing was held before the Honorable Roger Young on November 27, 2023. App. 291. Chelsey Marto appeared on behalf of petitioner and Chase Seymour represented the state. App. 291. Petitioner and trial counsel, Robert Hughes, presented testimony. By order dated January 16, 2024, Judge Young denied the application for relief. App. 328 – 343.

On petition for *certiorari*, this Court granted review on the issue surrounding trial counsel’s ineffective assistance in failing to object to the introduction of the “Nazi” tattoo. Petitioner’s Brief on this issue follows.

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<sup>2</sup> Anders v. California, 386 U.S. 738 (1967)

## STANDARD OF REVIEW

The standard for appellate review in PCR cases “depends on the specific issue” raised to the Court. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). The reviewing court will “defer to a PCR court’s findings of fact and will uphold them if there is evidence in the record to support them.” Id. However, “[q]uestions of law are reviewed *de novo*, and [this Court] will reverse the PCR court's decision when it is controlled by an error of law.” Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016).

Criminal defendants are entitled to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments to the United States Constitution. “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984). “An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense.” Wiggins v. Smith, 539 U.S. 510, 521(2003). “When a convicted defendant complains of the ineffectiveness of counsel’s assistance, the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” Id. at 687-688. “[T]he performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances.” Strickland, 466 U.S. at 688. Concerning prejudice, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. at 694.

## ARGUMENT

The PCR court erred in finding trial counsel was effective when he failed to object to the state introducing evidence of petitioner's inadmissible "Nazi" tattoo when trial counsel's entire strategy required the jury to reject the malice element of murder to return a verdict on a lesser included offense.

### **A. How the matter was raised at PCR.**

Petitioner asserted trial counsel was ineffective in failing to object to the introduction of evidence related to a "Nazi" tattoo on his hand. Petitioner testified at the PCR hearing that:

Q. Now, do you recall questioning concerning the Nazi tattoos on your arm?

A. Yes, I remember.

Q. Okay, and just for the record I will highlight that. It's on pages 102 and 161. Now, did you wish counsel objected to those questions?

A. I wish that he had intervened, or at the very least had asked me how I got it, why I got it, how long ago I got it, because to be completely honest I was in primary school. I was ten years old when I got it, and the neighborhood I lived in was in the hood in Mexico, and so everyone there did it, so I just wanted to do it to see how it felt to have a tattoo, and didn't even know what it meant; but when I found out what it meant, then I covered it.

App. 303, l. 17 – 304, l. 6. Petitioner asserted trial counsel was ineffective for failing to object to the introduction of the "Nazi" tattoo during his trial or at least allowing him to explain the tattoo for the jury. App. 288; 303, l. 17 – 304, l. 6.

In explaining why he did not object to the introduction of the nature of the tattoo, trial counsel claimed there was no basis for objecting and that the change showed "growth" in petitioner:

Q. Okay. Now, do you recall any questionings about his Nazi tattoos?

A. The Nazi tattoos were covered. The only way they would have ever been acknowledged or even known about would have been from him, and that was a statement by party opponent, and I couldn't object, because it wasn't hearsay.

Q. Okay. Do you think you could have objected based upon relevance?

A. A tattoo that has been covered up is more beneficial, it's no longer an acknowledgement. It's not like some that have swastikas, it is a I had this, it's gone. That's better than I have it here and look at it.

App. 314, 12 – 25.

**B. How the PCR court ruled.**

The PCR court found trial counsel articulated a valid and credible reason for not objecting: it was “favorable testimony that Applicant's tattoo was now covered up by another tattoo” and “it was better that the tattoo was covered up so that others could not see the Nazi symbol” and that “covering up the Nazi tattoo with another tattoo showed that [petitioner] had changed.” App. 339. The PCR court also found there was no prejudicial impact to the introduction of the Nazi tattoo “without more.” App. 339 – 340.

**C. How the PCR court erred.**

The reference to “Nazi” tattoos was not in passing, as implied by the PCR court's reference, in a footnote, to a single mention of it in the trial. App. 339 (“At trial, Officer Crosby testified that Applicant told him his “(black widow] tattoo was to cover up a Swastika or the Nazi symbol that he had in the web of his hand.”). To the contrary, the state inquired about the tattoo in questioning petitioner's former employer:

Q. Have you seen the black widow that's on his hand?

A. I never paid attention to that on his hands.

Q. Did you know that was to cover up a Nazi symbol?

A. No, I didn't know.

App. 102, ll. 4 – 7.

As referenced by the PCR court, the state also solicited testimony from investigator Crosby on the tattoo:

A. On his right hand, right here by his waist, there's a tattoo of a black widow spider.

Q. Did you ask him about that tattoo?

A. Yes, I did. It should have been on the video, but I think that portion was redacted because of the statement that he wrote. He advised me that that tattoo was to cover up a Swastika or the Nazi symbol that he had in the web of his hand right there.

App. 161, ll. 4 – 11.

The state also entered a picture of the tattoo into evidence. App. 161, ll. 1 – 11. Finally, the state returned to the tattoo during closing in arguing against a finding of voluntary manslaughter: “I challenge you to find that Samuel Gonzalez is this great guy who made a mistake, *this great guy who had a symbol of hatred tattooed on his body.*” App. 237, ll. 11 – 13 (emphasis added).

This testimony regarding a “Nazi” tattoo was introduced without objection from petitioner’s counsel. Without detailed analysis, the PCR court found trial counsel articulated a valid trial strategy for not objecting to the introduction of this evidence. Notably, evidence of this nature is generally not admissible unless it established some fact in controversy, such as identity.

Evidence concerning a defendant's tattoo or nickname is not prejudicial when used to prove something at issue in a trial, such as the identification of the defendant. *See generally Stevenson v. Texas*, 963 S.W.2d 801 (Tex.App.1998) (holding defendant's ‘bitch killa’ tattoo was admissible evidence of gang membership). In the instant case, the State did not use Day's tattoo or nickname for any

purpose other than to attack his character. The solicitor repeatedly referred to Day as an outlaw in her closing argument in order to paint a picture of Day as someone who was proud of his status as an outlaw, who felt he was above the law, and who was able to deceive law enforcement by hiding evidence and concocting a story about self-defense.

State v. Day, 341 S.C. 410, 422–23, 535 S.E.2d 431, 437–38 (2000).

As in Day, there was no question regarding petitioner’s identity that would have justified the introduction of evidence regarding a tattoo that was originally a Nazi symbol that had been altered to the image of spider. Absent some justification for the introduction of the evidence, the state’s sole purpose was demonstrated in its closing argument: “I challenge you to find that Samuel Gonzalez is this great guy who made a mistake, this great guy who had a symbol of hatred tattooed on his body.” App. 237, ll. 11 – 13. Trial counsel was ineffective in failing to object to this evidence, either as irrelevant or improper character evidence under Rule 404(a), SCRE.

At the PCR hearing, when questioned about not objecting to the admission of evidence surrounding the tattoo, trial counsel asserted there was no basis to object to the evidence regarding the nature of the original tattoo and its altered form since the information came from petitioner and was not hearsay. App. 314, ll. 12 – 18. When challenged on whether the evidence was even relevant, trial counsel asserted his strategy that the alteration of the tattoo was beneficial to petitioner. Trial counsel attempted to explain his lack of objection by claiming “[a] tattoo that has been covered up is more beneficial, it’s no longer an acknowledgement. It’s not like some that have swastikas, it is a I had this, it’s gone. That’s better than I have it here and look at it.” App.

314, 21 – 25. The PCR court found this explanation credible in an apparent finding that counsel had a valid strategic reason for not objecting.<sup>3</sup> App. 339.

The record does not support trial counsel’s alleged valid trial strategy claim and the PCR erred in accepting this claim as credible on face value. When the evidence was initially introduced, trial counsel did not question petitioner’s employer regarding the alteration of the tattoo. App. 102, ll. 2 – 14. Trial counsel asked no questions about the altered tattoo when investigator Crosby testified. App. 162, ll. 1 – 4. Trial counsel asked petitioner no questions about the tattoo on direct or re-direct. App. 179, l. 22 – 212, l. 25. Trial counsel failed to mention this “beneficial” take on the Nazi tattoo (the alteration showed growth) during closing argument. App. 225, l. 5 – 232, l. 5. Thus, to be a valid trial strategy, the benefit from covering up a Nazi tattoo must have been so open and obvious that no explanation of that benefit was required from either witnesses or during closing argument to the jury.

As our Supreme Court noted in Briggs v. State, 421 S.C. 316, 806 S.E.2d 713 (2017), trial counsel’s decision to not object to improper evidence as a valid trial strategy must be supported by the actions taken during trial. The Supreme Court in Briggs noted that the defense strategy to show “nobody believed the victim, and thus the abuse did not happen, could not have been advanced by allowing [forensic interviewer] to testify she believed [victim].” Briggs, 421 S.C. at 329, 806 S.E.2d at 720.

As with Briggs, there was no valid strategic decision that would support allowing evidence of a Nazi tattoo on petitioner’s hand be admitted into evidence unchallenged and allowing the state to reference this “symbol of hate” in support of a finding of malice. “[C]ounsel cannot assert trial

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<sup>3</sup> The PCR court order does not reference a valid trial strategy directly, but the language used in the Order of Dismissal shows deference to trial counsel’s reasoning that an “altered” tattoo showed character growth of petitioner.

strategy as a defense for failure to object to comments which constitute an error of law and are inherently prejudicial.” Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002). In Matthews, trial counsel failed to object during the solicitor’s closing argument out of concern over the trial judge’s earlier admonitions and to avoid extending the prosecution’s time to make closing argument. Our Supreme Court noted that the solicitor’s comments were clearly vouching and objectionable, and that counsel’s stated concerns were not a valid strategic reason to allow improper and prejudicial vouching.

As noted in Matthews and Briggs, a claim of a “valid trial strategy” requires some basis in the record supporting the alleged strategy. Here, the trial record is void of any reference to the personal growth petitioner showed in altering the tattoo or the beneficial aspect of that alteration since it was never articulated to the jury nor was any witness ever questioned to develop this alleged trial strategy. This alleged trial strategy appears only during the PCR evidentiary hearing. App. 314, 12 – 25. A trial strategy that is not used during trial is not, in fact, a trial strategy. It forms no basis for failing to object to the state’s use of an old “Nazi” tattoo as character evidence to convince the jury petitioner was guilty of murder rather than voluntary manslaughter. This alleged trial strategy falls squarely within the realm rejected by our Supreme Court in Mathews and Briggs. The PCR court erred in finding trial counsel’s explanation of his decision not to object as credible and as part of a valid trial strategy insulating the failure from post-conviction relief.

#### **D. Prejudice.**

Petitioner required a Spanish language translator through his interactions with trial counsel, trial, and during his PCR hearing. App. 6, ll. 1 -8; 294, ll. 6 – 12; 309, ll. 21 310, l. 4. Petitioner admitted to killing his girlfriend and cooperated with investigators during the investigation. App. 130, l. 1 – 134, l. 5. Trial counsel’s entire case depended on the jury rejecting the malice element

of murder. App. 231, ll. 1 - 7. Trial counsel elicited testimony regarding petitioner's demeanor and work habits. App. 100, ll. 7 - 14. Trial counsel focused on petitioner's cooperation with law enforcement to guide them to the location of the killing. App. 150, ll. 2 - 16. Trial counsel called petitioner to the stand to testify about the argument and his girlfriend's reactions leading up to the killing. App. 187, ll. 1 - 194, l. 25. The only question before the jury was whether the killing involved murder or voluntary manslaughter. App. 231, l. 1 - 7; 245, l. 11 - 246, l. 23.

To convince the jury that petitioner was guilty of murder, the solicitor, during closing argument, made full use of the prejudicial impact of the Nazi tattoo:

I challenge you to find that Samuel Gonzalez is this great guy who made a mistake, *this great guy who had a symbol of hatred tattooed on his body*. The great guy that threatened to take a newborn from its mother. The great guy, who choked the life out of his girlfriend for three to five minutes. The great guy that looked at the victim's family over here and said with a straight face, he has always been peaceful, respectful and *never liked evil*. Really?

App. 237, ll. 11 - 19 (emphasis added).

Even if, as trial counsel claimed, the later alteration of the tattoo by petitioner showed character growth and not, as characterized by the solicitor during closing "hatred" and "evil", the jury was deprived hearing that theory since trial counsel made no mention of this growth during closing argument.

The prejudicial impact here mirrors that examined by our Supreme Court in Vasquez v. State, 388 S.C. 447, 698 S.E.2d 561 (2010). In Vasquez, the solicitor called the defendant a "domestic terrorist" in the days after the attacks of September 11, 2001. Our Supreme Court noted that "is indisputable that the term 'terrorist,' even in the general sense, can only conjure negative connotations. Thus, the solicitor's use of the term was clearly improper because there was no evidentiary basis to support this characterization." Id., 388 S.C. at 459, 698 S.E.2d at 567.

Here, there was no reason or connection between an alleged “Nazi” tattoo on petitioner’s hand and the crime charged. It was irrelevant to the issues before the jury. As in Vasquez, however, the solicitor improperly emphasized a clearly loaded term to paint petitioner in both a false light and to tip the scales in favor of a murder conviction over a finding of voluntary manslaughter. The introduction of the “symbol of hatred” tattooed on petitioner’s hand, without objection or attempted explanation by trial counsel, was prejudicial. See State v. Ellis, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001) (holding the error in allowing witness to testify to matters beyond the scope of his expertise was “compounded by the solicitor’s closing argument”). Petitioner would argue that the term “Nazi” contains the same prejudicial impact as “terrorist” and was improperly admitted before the jury and undermines “confidence in the outcome” as the jury was asked solely to weigh whether petitioner killed with or without malice aforethought. Strickland v. Washington, 466 U.S. 668, 694 (1984).

**CONCLUSION**

The PCR court erred in finding trial counsel was effective in articulating a valid strategic reason for not objecting to the use of a “Nazi” tattoo without objection was ineffective assistance of counsel and prejudicial, warranting a new trial.



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This 5th day of January, 2026.