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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable George M. McFaddin, Jr., Circuit Court Judge

BILLY J. GEISENDORFF,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-000232

BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
ISSUE PRESENTED	1
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS	6
STANDARD OF REVIEW	14
ARGUMENT	
The PCR court erred in finding that trial counsel provided constitutionally effective representation where counsel failed to object to the “lying in wait” example used in the actual malice jury charge as an impermissible comment on the facts of the case.	15
Deficient performance	16
Prejudice	20
CONCLUSION.....	23

TABLE OF AUTHORITIES

United States Cases

<u>Anders v. California</u> , 386 U.S. 738 (1967).....	2
<u>Reed v. Ross</u> , 468 U.S. 1 (1984).....	17
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984).....	15
<u>Teague v. Lane</u> , 489 U.S. 288 (1989).....	17

South Carolina Cases

<u>Brown v. State</u> , 340 S.C. 590, 533 S.E.2d 308 (2000)	15
<u>Buckson v. State</u> , 423 S.C. 313, 815 S.E.2d 436 (2018).	14
<u>Cherry v. State</u> , 300 S.C. 115, 386 S.E.2d 624 (1989).	15
<u>Dawson v. State</u> , 352 S.C. 15, 572 S.E.2d 445 (2002).	15, 17
<u>Gilchrist v. State</u> , 350 S.C. 221, 565 S.E.2d 281 (2002)	14
<u>Gilmore v. State</u> , 314 S.C. 453, 445 S.E.2d 454 (1994).....	17
<u>High v. State</u> , 300 S.C. 88, 386 S.E.2d 463 (1989)	20, 21
<u>Narciso v. State</u> , 397 S.C. 24, 723 S.E.2d 369 (2012).....	14
<u>Pantovich v. State</u> , 427 S.C. 555, 832 S.E.2d 596 (2019)	16
<u>Sellner v. State</u> , 416 S.C. 606, 787 S.E.2d 525 (2016)	14
<u>Smalls v. State</u> , 422 S.C. 174, 810 S.E.2d 836 (2018)	14
<u>State v. Belcher</u> , 385 S.C. 597, 685 S.E.2d 802 (2009).....	16, 17
<u>State v. Burdette</u> , 427 S.C. 490, 832 S.E.2d 575 (2019).....	17, 21
<u>State v. Cartwright</u> , 425 S.C. 81, 819 S.E.2d 756 (2018).....	16
<u>State v. Cheeks</u> , 401 S.C. 322, 737 S.E.2d 480 (2013).....	3, 16, 21
<u>State v. Dill</u> , 48 S.C. 249, 26 S.E. 567 (S.C. 1897)	16

<u>State v. Hughey</u> , 339 S.C. 439, 529 S.E.2d 721 (2000).....	18, 19
<u>State v. Smith</u> , 304 S.C. 129, 403 S.E.2d 162 (Ct. App. 1991).....	2, 19
<u>State v. Stukes</u> , 416 S.C. 493, 787 S.E.2d 480 (2016).....	16
<u>Stone v. State</u> , 419 S.C. 370, 798 S.E.2d 561 (2017).	18
Constitutional Provisions	
S.C. Const. art. V, § 21	16
Other Authorities	
Bruce A. Antkowiak, <i>The Art of Malice</i> , 60 RUTGERS L. REV. 435 (2008).....	16

ISSUE PRESENTED

Whether the PCR court erred in finding that trial counsel provided constitutionally effective representation where counsel failed to object to the “lying in wait” example used in the express malice jury charge as an impermissible comment on the facts of the case and where the state specifically argued that Petitioner formed the requisite malice while “lying in wait” in the woods?

STATEMENT OF THE CASE

Petitioner was indicted during the June 2014 term of the Lexington County grand jury for one count of murder and one count of possession of a weapon during the commission of a violent crime. On September 6-8, 2016, the state, represented by Suzanne Mayes and Robert E. McNair, III, called the case to trial before the Honorable D. Garrison “Gary” Hill¹ and a jury. Petitioner was represented by Benjamin A. Stitely and Robert T. Williams. App. 1.

Petitioner was found guilty as indicted. App. 554, l. 16 – 555, l. 1. Judge Hill sentenced Petitioner to life in prison for murder and five years of imprisonment for the weapons charge. App. 568, ll. 4-7. Petitioner timely appealed his convictions and sentences. Former appellate defender John H. Strom filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). This Court dismissed the appeal, pursuant to Anders, in an unpublished opinion. State v. Geisendorff. Op. No. 2019-UP-071 (Ct. App. Filed on February 13, 2019). The remittitur was issued on March 1, 2019.

Petitioner filed a *pro se* application for post-conviction relief on May 22, 2019. App. 576-584. The state filed a return on January 10, 2020, requesting an evidentiary hearing. App. 585-591. Petitioner, through PCR counsel Ola Johnson, filed an amended PCR application on June 7, 2021, alleging that counsel Stitely was ineffective for failing to object to the “lying in wait” example used in the express malice jury charge as an impermissible comment on the facts of the case. App. 592-595. The parties originally convened for an evidentiary hearing before the Honorable George M. McFaddin, Jr., on October 13, 2022. The state was represented by Taylor Zane Smith. Petitioner was represented by counsel Johnson. App. 596.

¹ Judge Eugene C. Griffith, Jr., conducted the jury qualifications, *voir dire*, and selection in this matter. Judge Hill heard all the substantive trial motions, testimony, and objections.

As Petitioner began his testimony, he made allegations of prosecutorial misconduct that had not previously been raised. App. 603, l. 14 – 604, l. 4. The state moved to continue the matter, as assistant solicitor Mayes had not been subpoenaed for the hearing, and her testimony or the testimony of assistant solicitor McNair would be required to rebut the claims Petitioner had suddenly made. The parties agreed to a continuance. App. 604, l. 6 – 606, l. 1. To ensure the case did not languish, counsel Johnson was to file a second amended PCR application within sixty days, and there could be no further amendments made after that. The state also requested that the hearing convene during the April 2023 PCR term in Lexington County. App. 606, l. 2 – 607, l. 8.

Counsel Johnson filed a second amended PCR application on December 22, 2022. App. 609-612. The state filed an amended return dated June 22, 2023. App. 613-620. The parties reconvened for the full evidentiary hearing on June 22, 2023, before the Honorable Edward W. Miller. Petitioner was represented by counsel Johnson, and the state was represented by Deputy Attorney General Donald J. Zelenka. App. 621. Counsel Stitely, Petitioner, and assistant solicitor McNair testified at the evidentiary hearing. Regarding the failure to object to the jury charge, the following exchange occurred:

Question: No. 13, this one involves a jury charge. Starting on page 543, lines 10 to page 544, line 17, charge included an example of expressed malice by stating, for example -- quote, "For example, lying in wait for a person or any other acts of preparation showing the deed was within the defendant's mind would be expressed malice," listing page 544, line 7 through 10. This example was so similar to facts placed in evidence by testimony of the witness, Donna Blanchette, back on 241, lines 21 to 23, and the point here being, "Couldn't you have objected?" I listed this Cheeks (ph) case as an example of how that would have prejudiced the jury by creating an example of a judge stressing an example that was so similar to the testimony that you should have objected to.

Answer: *That's the charge out of Judge Anderson's book. I did not object to it. Nobody argued lying in wait in this case specifically.* In fact, like I said, it was a showdown on the road. The testimony that you're talking about "I had a bead on him" or whatever it was, I think I even illustrated that wasn't the case because he doesn't do anything about it. It's not until the guy comes down the road at him. *Maybe I could have objected to it. I don't know.*

Question: But that was actually the similar -- very similar language to Ms. Blanchette when she said that his statement was that.

Answer: Fair enough. But, no, to my knowledge, that's the standard example the judge gives of the legal definition.

App. 640, l. 3 – 641, l. 5 (emphasis added). On cross-examination, counsel Stitely confirmed that he believed the expressed malice jury charge was the one from the charge book and that it reflected his current understanding of the law at the time. App. 653, l. 23 – 654, l. 7.

After brief argument by the parties, the PCR court denied Petitioner's application at the close of the hearing. App. 683, l. 19 – 684, l. 20. A written order of dismissal was issued on January 19, 2024. App. 688-725. The PCR court found that counsel Stitely was not deficient because 1) the instruction was the general instruction given at the time in South Carolina courts; 2) there had been no previous challenge to the "lying in wait" instruction; and 3) that the death did not occur based upon Petitioner "lying in wait" but based on the verbal altercations near and in the road. App. 717-718. The PCR court continued that "[the verbal altercations were] the focus of the defense and the focus of the prosecution, not lying in wait and shooting the victim from the woods." App. 718. The PCR court further found that Petitioner could not show prejudice "because there was other evidence of malice shown in the State's case and the factual circumstance of the woods incident was separated in time with the actual use of weapon." App. 718.

Petitioner timely appealed the denial of his PCR application. A petition for writ of certiorari was filed in the South Carolina Supreme Court on October 11, 2024. The state filed a return to the petition on January 28, 2025. A reply to the return was filed on February 5, 2025. By order dated February 13, 2025, the Supreme Court transferred the case to this Court. On July 15, 2026, this Court granted certiorari. This brief of petitioner follows.

STATEMENT OF THE FACTS

John Michael Williams and Bobby Christofoli worked together at the Wateree Station in Eastover, S.C. The two men worked together and had been friends for at least ten years. Christofoli usually gave Williams a ride to and from work when they were working the same shift. App. 183, l. 4 – 184, l. 2. On April 2, 2014, the two men headed to Williams's home at 5:30 p.m., after working a ten-hour shift. On the way there, they stopped at a gas station to purchase a case of beer. While at the gas station, the men ran into Christofoli's wife Theresa. App. 185, ll. 11 – 187, l. 20.

After buying beer and speaking with Theresa, the two men continued to Williams's home. Williams lived in a trailer on Cheryse Drive with his girlfriend, Lynn Raley. The trailer and land were owned by Raley's mother, Donna Blanchett. Blanchett and Petitioner were in a quasi-romantic relationship that had spanned approximately a year and a half. Blanchett and Petitioner lived in a trailer on the same property as Williams and Raley. App. 180, l. 18 – 182, l. 24; App. 232, ll. 13-18. The trailers were separated by a line of thick woods and were approximately one hundred yards apart. App. 193, l. 24 – 194, l. 24.

The day before the incident, Williams and Petitioner got into an argument over some comments Williams had made about Blanchett being a bad mother to Raley. After some back and forth, including Williams throwing a beer can at Petitioner, the two men settled down and changed a tire on Raley's car. Williams believed that everything was fine between them after the argument. App. 184, l. 8 – 185, l. 10

The following day at approximately 5:30 p.m., as Williams and Christofoli were getting off work, Petitioner called Williams. Williams did not answer, but he returned Petitioner's call. According to Williams, Petitioner told him that he "needed to come up to the house and f***ing

see him” when Williams got home. App. 188, l. 4 – 189, l. 2. Williams declined to go up to the house because he could tell Petitioner had been drinking² and wanted to fight. App. 189, ll. 4-13. Petitioner called Williams numerous times leading up to the incident. According to Williams, the general tenor of the calls was Petitioner aggressively demanding to know where Williams was and why he would not come to the house. App. 191, l. 13 – 193, l. 9.

Williams and Christofoli arrived at Williams’s trailer around 7 p.m. As they were driving past Blanchett’s trailer, Petitioner was in the yard “with his hands up...and he started hollering and started cussing” as they drove by, but Williams ignored him. When Williams exited Christofoli’s truck, Petitioner continued to holler and cuss at him. App. 192, l. 15 – 193, l. 23. Williams stated Petitioner was hollering for about fifteen-to-twenty minutes. App. 194, ll. 1-14.

When Williams went inside to grab two beers, Christofoli walked down the road and confronted Petitioner. Christofoli stayed in the road, and Petitioner was on Blanchett’s property as the two men were arguing and cussing back and forth. Christofoli was telling Petitioner to shut up, as they had just gotten off work and he wanted to unwind. According to Williams, Christofoli said “if you won’t hush up, just come out in the road...and we’ll fight like a man.” However, in Williams’s statement to law enforcement, he stated that Christofoli walked toward Petitioner and said “come out in the road so I can beat your a** like a man.” App. 195, ll. 3-25; App. 217, ll. 1-23; App. 240, ll. 3-6.

Williams eventually managed to get Christofoli to come back to his house. When he returned, Christofoli told Williams that Petitioner had shown him a gun. Petitioner called Williams after the confrontation with Christofoli and asked why he sent “his b***h” up to the

² Blanchett testified that Petitioner “would always start [drinking] early in the morning and drink just about all day.” The day of the shooting, Blanchett asserted that Petitioner had started drinking Corona beers in the morning and then switched to vodka. App. 234, l. 16 – 235, l. 14.

house” instead of coming himself. Williams informed Petitioner that Christofoli had come up there on his own accord. App. 196, l. 1 – 197, l. 3.

After the initial confrontation between Christofoli and Petitioner, Christofoli called his wife Theresa at 8:21 p.m. Christofoli was urgent that she come and pick him up from Williams’s home. Theresa recalled that Christofoli was very stressed, advised her not to bring their special needs child, told her not to ask any questions, and to “[j]ust hurry. Come quick.” App. 291, ll. 7 – 292, l. 10.

Blanchett, meanwhile, had gone inside the house to try to relax after the first confrontation between Christofoli and Petitioner. Petitioner had taken her cell phone and gun. Petitioner called Blanchett on the house telephone line a few times. The last time he called was at approximately 8:39 p.m. In a conversation that lasted six minutes and 28 seconds, Petitioner admitted that he was in the woods with the gun. Blanchett knew he also had the bottle of vodka and a blanket with him. She alleged that Petitioner told her “he could see them and they were talking about him and that he had a bead on them and could take them out at any time.” App. 241, ll. 2-23; App. 254, ll. 11-23. The statements and the “hateful” tone of Petitioner’s voice prompted Blanchett to get dressed and walk to Williams’s trailer. She asked the men what they were talking about, and they replied work. In an attempt to defuse the situation, Blanchett asked Christofoli to leave and go home. Christofoli responded that he did not have to go, he was visiting, and Blanchett could not tell him to leave. App. 255, ll. 4-15; App. 262, ll. 5-16; App. 264, l. 8 – 265, l. 5; App. 267, ll. 15-19.

As Blanchett returned from Williams’s trailer to hers, Petitioner exited the woods asking her what the two men were talking about. Petitioner starting “cussing again and saying all kind of things” about how the men were lying which was when Christofoli walked back up to

Petitioner, despite Williams telling Christofoli to leave it alone and not go back up there. App. 219, ll. 10-21; App. 243, ll. 12-17. Blanchett heard the word “gun,” turned, and ran toward Williams’s trailer. App. 244, ll. 12-24. According to Williams, he heard Christofoli say “old big boy, if you’re gonna pull it out, you better use it.” App. 119, ll. 24-25. Both Williams and Blanchett heard at least four gunshots. App. 204, ll. 19-23; App. 247, ll. 1-9.

Williams called 911 at 8:58 p.m. App. 170, ll. 5-11. When officers arrived on the scene at 9:05 p.m., they detected no signs of life in Christofoli. App. 283, l. 19 – 284, l. 19. At 10:10 p.m., CSI was on the scene but not cleared to work because Petitioner had not been located. K-9 units were called to the scene to conduct a search for Petitioner. As the dogs and handlers approached Blanchett’s trailer, Petitioner came out from a crawl space underneath the trailer and was apprehended. Officers found a revolver with shell casings in the cylinder, a survival flashlight, a Milwaukee knife, an unopened blue pack of Pall Malls, a single Pall Mall, a box of Corona beer, and a Samsung flip-style phone in the crawlspace. App. 319, l. 18 – 321, l. 24; App. 323, l. 6 – 324, l. 21.

Forensic pathologist Dr. Janice Ross recovered four bullets from Christofoli during the autopsy. App. 476, ll. 13 – 477, l. 8. Bullet one³ entered the back left side of Christofoli’s neck and traveled straight across to the right side. Bullet two went in the chest just, left of the midline, and traveled front-to-back from the left to the right. Bullet three first went through the left arm and then re-entered the chest on the left side under the armpit. Bullet three had gone through both lobes of the left lung. Bullet four was found in the buttock and traveled back to front. App. 478, l. 8 – 479, l. 11. Christofoli cause of death was determined to be exsanguination due to

³ Dr. Ross explained that the numbering of the bullet wounds was not indicative of the order in which the wounds occurred but was merely a way for her to organize the exam, top to bottom. App. 478, ll. 4-7

lacerations of the heart and lungs by gunshot wounds. App. 476, ll. 8-12. No soot or gun powder was located on Christofoli during the autopsy, indicating that the parties were at least two feet apart when Petitioner fired the shots. App. 482, ll. 6-25.

SLED forensic firearms examiner James Green confirmed that the bullets recovered from the autopsy had been fired by the .22 caliber revolver found in the crawlspace where Petitioner had been hiding. App. 412, l. 8 – 413, l. 5; App. 420, ll. 6-9. He also explained that two of the shell casings had “multiple strikes” on them which indicated that the revolver cylinder had continued to rotate due to the trigger being pulled after all of the live ammunition was spent. App. 418, l. 10 – 419, l. 13.

Petitioner asserted that he was acting in self-defense when he fired the gun. The night of the incident he told police:

Bobby threatened to beat my a** if I turned around. I told him I would shoot him if he turned around and [he] began telling me to go ahead and shoot him. He began to say go ahead and shoot him. Shoot me in the back. I’m unarmed. If you turn and walk away, I’m gonna beat you’re a**. I fired two warning shots in the air and then unloaded the gun into him. It was either him or me.

App. 455, ll. 18 – 456, l. 10. Williams described Christofoli as “a pretty big boy” that was taller than Petitioner and about forty-to-fifty pounds heavier. He admitted that Christofoli was not a weak man and was physically imposing. App. 214, ll. 2-21.

Blanchett claimed during trial that Christofoli was trying to deescalate the situation with Petitioner. App. 265, ll. 6-9. However, her written statement from the evening of the incident stated that Christofoli had walked down the road edge “egging” Petitioner on. App. 262, ll. 17-25. She also stated that Christofoli started “running his mouth again” and came towards Petitioner’s home. App. 263, ll. 11-15. Blanchett also apparently made a 911 call at 7:22 p.m.

from her house phone, but she had no recollection of making the call and could not articulate why she made the call. App. 266, l. 9 – 267, l. 3.

The state's opening statement began:

About 12 minutes before the defendant unloaded his revolver on Bobby Christofoli, he called his girlfriend Donna Blanchett and told her that he had a bead on them and that he could take them out now. 12 minutes later Bobby Christofoli lay dead in the middle of the road with four shots, one in the back. This fatal encounter was just the culmination of what the defendant had been trying to provoke all day long.

App. 153, l. 23 – 154, l. 5. Shortly thereafter, the state again referenced Petitioner “hiding in the woods with a gun spying” on Williams and Christofoli. App. 156, ll. 5-14. Then, in defining malice to the jury, the state said “[i]t’s provable by comments like I’ve got a bead on them. I can take them out now.” App. 157, ll. 16-23. Just before sitting down the state concluded “[Petitioner] *made up his mind at least 12 minutes prior* [to the shooting] that he was willing to pull that trigger and when he got the opportunity to do so, he pulled it all nine times.” App. 159, ll. 19-25 (emphasis added).

During closing argument, the state continued to highlight the act of Petitioner hiding in the woods with a gun as an example of malice. Shortly after beginning closing argument the State said:

And Mike told you about he heard a pop in the woods. Didn't know what it was. It was him. He calls Donna Blanchett from the woods and says I got a bead on them. I can take them out right now. Any of you on that jury that hunt you know what that means. That's a term used by deer hunters. *He's in the woods hunting them like prey and they don't even know he's there. That's what we call malice under the law, ladies and gentlemen. That is malice. There is no greater manifestation of malice than that. It's what we call expressed malice under the law.*

App. 510, l. 19 – 511, l. 4 (emphasis added).

Soon thereafter the state continued:

And then you have got that call at 8:39. That's the call that Donna described being the last call. That call at 8:39 was for six minutes and 28 seconds. *The call at 8:39 is when he told her I got a bead on them. I can take them both out.* And she knew I can't sit here. That call is what prompted her to put her clothes on and go out. She's looking for him trying to get him back in the house before he does what she is afraid he's capable of doing. That call at 8:39 for six minutes and 28 seconds, you add the duration of that call to when it was made it's gonna be over around 8:45 and 48 seconds. *Less than 13 minutes later, just over 12 minutes later, the call to 911. That's not a coincidence and that's not happenstance. What he told her he was gonna do in the woods he did.*

App. 515, l. 19 – 516, l.8 (emphasis added). The state argued “[l]ittle do they know he had been in the woods stalking them.” App. 516, ll. 14-15. Near the end of the closing argument the state said:

When we talk about malice, the Judge is gonna charge you on exactly what it means. I said earlier malice includes a callous heart, a malicious heart, a malignant heart, hostility, hatred or ill will.

Remember Donna's description of his tone when he was in the woods that final time, *that final time when he said I got a bead on them and I can take them both out? Hateful.* She knew him better than anybody. Hateful. That's her description of his malice.

Evidence of implied malice is also to be considered by you in determining was there malice of forethought in the killing of Bobby Christofoli. Evidence of malice, implied malice, and again you take it from the circumstances, it's little pieces of evidence along the way that when pieced together form something that can't be disputed. Form something that's abundantly clear and *in this case it's that he intended malice towards Bobby Christofoli lying in wait in the woods. Lying in wait. What else was he doing in the woods? He didn't go into the woods because he was afraid. He would have stayed in his house and locked the doors. He had a weapon. He wasn't afraid of anyone or anything. He left his house seeking out trouble. Seeking out what his actions lead to.*

App. 518, l. 24 – 519, l. 22 (emphasis added).

The last time the state brought up Petitioner being in the woods was in discussing self-defense. The state argued “[h]e spent all day bringing on the difficulty, looking for a fight and then loads his weapon []leaves the home, *stalks them in the woods*, and the comes out of that woodline to confront Donna Blanchett...” App. 522, ll. 17-20 (emphasis added).

The trial court charged the jury:

Malice of forethought may be expressed or inferred. These terms expressed and inferred do not mean different kinds of malice but different ways in which they may be shown to exist. That is either by direct evidence or by inference from the facts and circumstances that are proven. Expressed malice is shown when a person speaks words which express hatred or ill will for another or when the person prepared beforehand to do the act which was later accomplished. *For example, lying in wait for a person or any other acts of preparation showing the deed was within the defendant's mind would be expressed malice.*

App. 543, l. 24 – 544, l. 10 (emphasis added). Defense counsel did not object to any portion of the charge on the law. App. 551, ll. 24-25.

STANDARD OF REVIEW

The standard of review in PCR cases depends on the specific issue before the appellate court. This Court defers to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Smalls v. State, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839–40 (2018) *citing* Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo* with no deference to the trial court. Id.

South Carolina appellate courts apply an “any evidence” standard of review to factual findings made by PCR courts. See Narciso v. State, 397 S.C. 24, 723 S.E.2d 369 (2012). “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.” Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018). When there is no probative evidence in the record to support the PCR court’s conclusion, this Court must hold that the PCR court’s ruling was in error. See Gilchrist v. State, 350 S.C. 221, 227, 565 S.E.2d 281, 284 (2002) (the Court will not uphold the findings of a PCR court if no probative evidence supports those findings.)

ARGUMENT

The PCR court erred in finding that trial counsel provided constitutionally effective representation where counsel failed to object to the “lying in wait” example used in the actual malice jury charge as an impermissible comment on the facts of the case.

The state’s argument at trial was that Petitioner formed the necessary expressed malice as he laid in wait in the woods, taking aim at Williams and Christofoli, which culminated in the death of Christofoli. The state, while likening Petitioner’s being in the woods to a hunter stalking prey, went so far as to say that it was clear Petitioner had malice for Christofoli because he was “lying in wait in the woods. Lying in wait.” App. 519, ll. 16-17. The contention in the order of dismissal that this was not a “lying in wait case” was directly refuted by the record. The factual findings of the PCR court are not supported by the record. Counsel Stitely’s failure to object to the example of expressed malice in the jury charge that the state argued as the theory of malice in the case was ineffective assistance of counsel that was not excused by any strategy. This Court should reverse the order of the PCR court and grant Petitioner a new trial.

To prove ineffective assistance of counsel, a PCR applicant must establish that (1) counsel failed to render reasonably effective assistance under prevailing professional norms and (2) he was prejudiced by counsel's deficient performance. Strickland v. Washington, 466 U.S. 668 (1984); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). To establish prejudice, the applicant must show, but for counsel's errors, there is a reasonable probability the result of the trial would have been different. Brown v. State, 340 S.C. 590, 533 S.E.2d 308 (2000). A reasonable probability is one sufficient to undermine confidence in the outcome of trial. Dawson v. State, 352 S.C. 15, 20, 572 S.E.2d 445, 447 (2002).

Deficient Performance

Article V, § 21 of the South Carolina Constitution prohibits a trial judge from instructing a jury regarding the facts of a case. This constitutional proscription has been in place for well over one hundred years. See State v. Dill, 48 S.C. 249, 26 S.E. 567 (S.C. 1897). As noted in Pantovich v. State, 427 S.C. 555, 832 S.E.2d 596 (2019), “[t]he modern trend ... has cast doubt upon the validity of charges instructing juries on how to interpret and use evidence.” “It is axiomatic that some matters appropriate for jury argument are not proper for charging. ‘Do jurors need the court's permission to infer something? The answer is, of course not.’” State v. Belcher, 385 S.C. at 612 n.9, 685 S.E.2d at 810 n.9 (*quoting* Bruce A. Antkowiak, *The Art of Malice*, 60 RUTGERS L. REV. 435, 476 (2008)).

In recent years, the appellate courts of this state have struck down various jury charges as impermissible comments on the facts in violation of the South Carolina Constitution. See State v. Belcher, 385 S.C. 597, 600, 685 S.E.2d 802, 803 (2009) (placing significant restrictions on “the [longstanding] practice for trial courts in South Carolina ... to charge juries in any murder prosecution that the jury may infer malice from the use of a deadly weapon”); State v. Cheeks, 401 S.C. 322, 328-29, 737 S.E.2d 480, 484 (2013) (finding error in charging the jury that “actual knowledge of the presence of drugs is strong evidence of intent to control its disposition or use” because doing so “is improper as an expression of the judge's view of the weight of certain evidence”); State v. Stukes, 416 S.C. 493, 499-500, 787 S.E.2d 480, 483 (2016) (eliminating charging the jury that a sexual assault victim's testimony need not be corroborated); State v. Cartwright, 425 S.C. 81, 819 S.E.2d 756 (2018) (holding “the trial court shall not provide a limiting instruction or otherwise comment to the jury” on how it should interpret and use evidence of a defendant's suicide attempt); State v. Burdette, 427 S.C. 490, 832 S.E.2d 575

(2019) (extending Belcher to eliminate from all trials any charge that the jury may infer malice from the use of a deadly weapon). Additionally, South Carolina courts have found that counsel can be deficient for failing to object to a jury charge even when that charge is generally considered good law. See Dawson v. State, 352 S.C. 15, 572 S.E.2d 445 (2002).

In the order of dismissal, the PCR court cited to Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994), for the proposition that defense counsel will not be found deficient for failing “to be clairvoyant or anticipate changes in the law....” However, the prohibition on a judge commenting on the facts of a case is well established in a century’s worth of South Carolina jurisprudence. Further, as the United States Supreme Court has stated, there is a difference in changing the law and a court ruling discussing the law in a novel context. See generally Reed v. Ross, 468 U.S. 1 (1984); Teague v. Lane, 489 U.S. 288 (1989). Petitioner is not contending that trial counsel should have foreseen a future change in the law. Any trial lawyer should know of the prohibition on judicial comments on the facts and should be aware of the trends in caselaw regarding such improper judicial comments when they arise from jury instructions. Trial counsel should have objected to the expressed malice example charged to the jury as an impermissible charge on the facts because the state specifically argued that this was a lying in wait case.

The failure to object was wholly unreasonable and fell well below standard professional norms. From the beginning of the trial, the state argued that Petitioner had waited on Williams and Christofoli in the woods with “a bead on them,” and that a short time later, Petitioner killed Christofoli with malice. The state repeatedly used the time between the phone call to Blanchett and the 911 call, an approximately 12-minute period, to argue that Petitioner formed the requisite malice for murder while lying in wait in the woods. The state repeatedly referred to that time

period describing Petitioner as “stalking,” “hunting,” “spying,” and “lying in wait” for Williams and Christofoli, in both the opening statement and closing argument. It was apparent that the state was arguing that Petitioner’s actions in the wood proved actual malice. The state’s witnesses and the state’s own arguments highlighted that this was a “lying in wait” case. Trial counsel’s failure to recognize the state’s argument over a three-day trial was not reasonable. Trial counsel’s failure to request the trial court not charge the illustrative example of “lying it wait” commonly used in the jury charge on malice was deficient performance.

Critically, counsel Stitely failed to offer any reason for not objecting to the charge as a comment on the facts. “[C]ounsel’s strategic decisions will not be found to be deficient performance if he articulates a valid reason for employing the strategy.” Stone v. State, 419 S.C. 370, 384, 798 S.E.2d 561, 569 (2017). “The necessary converse of this principle is that counsel’s decision to employ a certain strategy will be deemed unreasonable under the Sixth Amendment if the reasons given for the strategy are not sound.” Id. at 384, 798 S.E.2d at 569. At the PCR hearing, he testified that he did not object because the charge represented the proper law, and “nobody argued lying in wait in this case specifically.” This assertion is refuted by the record, wherein the state repeatedly argued at trial that proof of malice was established by Petitioner’s conduct of lying in wait in the woods prior to the shooting. Counsel’s failure to hear and appreciate the state’s argument and then to object is not excused by any strategic decision.

In State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000), our Supreme Court considered, among other issues, whether the trial court erred in failing to give specific factual examples of legal provocation when instructing the jury on voluntary manslaughter. Hughey had been charged with two counts of murder in the deaths of his former girlfriend and her friend. Hughey admitted he shot the women, but he alleged that a knife was pulled on him, that one decedent spit

in his face, and that there was sudden mutual combat leading up to the deaths entitling him to a voluntary manslaughter charge. Hughey requested that the trial court charge specific examples of “sufficient legal provocation,” such as pulling a knife on or pointing a gun at a defendant, spitting in a defendant’s face, assault of a family member, sudden mutual combat, finding one’s spouse in the act of adultery, or the deceased having molested the defendant’s minor child. Our Supreme Court held that trial court correctly refused to charge these examples because they would have been a direct comment on the facts of the case, based on Hughey’s testimony that one decedent pulled a knife, spit in his face, and sudden mutual combat occurred. Our Supreme Court found that the “requested jury charge elevates the specific facts of the case, such as spitting in a person’s face, to an acceptable act of legal provocation” which constituted an improper comment on the facts of the case.

The inverse happened in Petitioner’s case, but the analysis of Hughey is instructive. Here, the standard charge contained specific examples of malice, one of which was lying in wait. The state repeatedly argued that Petitioner formed the requisite malice while he was “lying in wait in the woods” until the fatal confrontation. Much like in Hughey, the trial court’s charge in Petitioner’s case elevated the specific fact of Petitioner being in the woods prior to the shooting to acceptable evidence of express malice. As this Court stated in State v. Smith, 304 S.C. 129, 132, 403 S.E.2d 162, 164 (Ct. App. 1991), “[i]t is not always sufficient for a judge to simply open a charge book and read a generic statement of the law to a jury, no matter how correct that statement may be in the abstract.” This is because a judge must consider the facts of the case when preparing the jury charge to ensure, among other things, that the judge does not comment upon the facts of the case.

Prejudice

The instruction at issue in this case concerned the intent necessary for the jury to find Petitioner guilty of murder. Petitioner never denied shooting Christofoli, but he maintained that he shot in self-defense. Thus, the only issue in contention at trial was why he shot him – essentially, the jury was tasked with determining whether he had the requisite malice to be guilty of murder. The judge, by using the state’s argument as an example of expressed malice, effectively told the jury that the state had proven the malice element and defeated Petitioner’s defense before the jury even began deliberating. Our Supreme Court’s analysis in High v. State, 300 S.C. 88, 386 S.E.2d 463 (1989), is instructive.

In High, our Supreme Court considered whether trial counsel was ineffective for failing to object to the trial court’s jury charge that the law presumes the intent from the doing of an unlawful act. High had been charged with voluntary manslaughter in the accidental shooting death of a bystander. Id. The testimony at trial indicated that High pulled a gun from his pocket, but it was unclear as to why: either to show it to a third party to sell the gun or because he was angry at the third party. Id. at 89, 386 S.E.2d at 463. When High removed the gun from his pocket, it fired a bullet which struck and killed a bystander. Id. The trial court charged the jury on voluntary manslaughter and involuntary manslaughter, stating the later was “the unintentional cause of death of another through mere criminal negligence.” The trial court further charged the jury that intent meant “to act knowingly” before charging the jury that the law presumes the intent from the doing of an unlawful act. Id. Counsel was found deficient because the mandatory presumption of intent was a burden-shifting instruction on an element of the crime which had been prohibited since 1979. Id. at 89, 386 S.E.2d at 464. Our Supreme Court held High was prejudiced because the critical dispute at trial was whether High had the requisite

intent to kill someone when he pulled the gun from his pocket, and the improper charge went directly to that issue. Id.

The jury charge in this case, when viewed in the light of the entire record, was a rubber stamp of the state's argument that it had proven malice. When the trial court told the jury it could use evidence of lying in wait "to establish the existence of malice, a critical element of the charge of murder, the trial court has directly commented upon the facts in evidence, elevated those facts, and emphasized them to the jury". Burdette, at 502, 832 S.E.2d at 582. This was error under the case law as it existed at the time of Petitioner's trial. Trial counsel should have objected to the charge as a direct comment on the facts, due to the state's argument that this was a lying in wait case. Counsel's failure to do so was deficient performance that prejudiced Petitioner.

The instruction, while proper in another case, was not proper here. It was an improper comment on the facts of the case as it equated an element of the crime charged with a contested fact in the case – whether Petitioner was acting in malice or in self-defense. As our Supreme Court noted in Cheeks, *supra*, "[s]imply because certain facts may be considered by the jury as evidence of guilt in a given case where the circumstances warrant, *it does not follow that [the jury] should be charged that these facts are probative of guilt.* It is always for the jury to determine the facts, and the inferences that are to be drawn from these facts." (emphasis added).

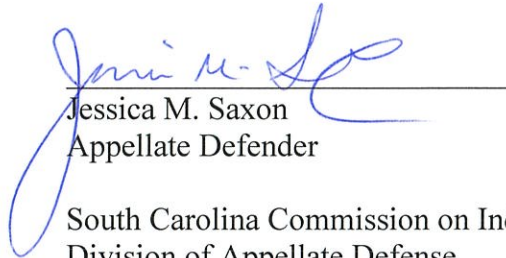
Here, the trial court's charge eviscerated Petitioner's defense of self-defense and greatly prejudiced him because it decided the only issue before the jury – Petitioner's intent. Had Counsel Stitley objected to the improper example, the jury would have been given the opportunity to consider the case without influence – even inadvertent influence – from the bench. It is likely that the results of the proceeding would have been different, as Petitioner's claim of

self-defense would not have been cut down by the trial court, and the jury could have found in his favor based on all of the evidence in the record.

Petitioner has shown both deficient performance and prejudice. The PCR court erred when it denied Petitioner's application on this ground. The record before this Court does not contain probative evidence that supports the PCR court's determination, no strategy was offered to excuse counsel's failures, and Petitioner suffered prejudice. Petitioner received constitutionally ineffective assistance of counsel. This Court should reverse and remand the case for a new trial.

CONCLUSION

For the foregoing reasons, this Court should reverse the order of the circuit court, grant post-conviction relief, and remand Petitioner's case to the Lexington County Court of General Sessions for a new trial.



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This 7th day of August, 2026.

ATTORNEY FOR PETITIONER

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