

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas
The Honorable R. Keith Kelly, PCR Judge

S.C. SUPREME COURT

Appellate Case No. 2019-001575

KERWIN S. PARKER

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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PETITIONER'S STATEMENT OF ISSUE ON CERTIORARI

Did the PCR judge err in refusing to find trial counsel ineffective for failing to object to the judge's instruction to the jury that malice could be inferred from the use of a deadly weapon when there was evidence that would have reduced the charge from assault and battery with intent to kill to assault and battery of a high and aggravated nature and counsel was aware of the challenge to the implied malice charge decided in State v. Belcher, a case that was decided before Petitioner was sentenced but was pending at the time the judge instructed the jury?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON CERTIORARI

The PCR court correctly found trial counsel's failure to object to the trial court's instruction that malice may be inferred from the use of a deadly weapon did not constitute deficient performance where *Belcher* was decided after Petitioner's conviction and because an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law.

STATEMENT OF THE CASE

On November 20, 2006, Petitioner Kerwin S. Parker (Petitioner) and his brother and co-defendant, Curtis T. Johnson (Johnson) were arrested following an investigation into an incident where several people were injured and one person was fatally shot.

In April 2007, the Lexington County grand jury indicted Petitioner for murder, assault and battery with intent to kill (ABWIK), and possession of a weapon during the commission of a violent crime.¹ (App. 917–20). On September 14, 2009, Petitioner and Johnson proceeded to a joint jury trial before the Honorable Robin B. Stilwell. Jack Duncan, Esquire (Counsel), represented Petitioner. Eleventh Circuit Solicitor Donald V. Myers and Assistant Solicitor Colleen E. Dixon prosecuted the case.

A. Summary of Evidence Adduced at Trial

At approximately 1:30 a.m. in the early morning hours of November 20, 2006, Jose Hernandez, a resident of the Church Hill Apartments in Lexington County, South Carolina, heard a loud noise coming from an area across from his apartment followed by several gunshots. (App. 324, 328–29). Hernandez went outside to see what was going on and, when he did so, observed a vehicle stuck between a tree and the apartment building across from him. (App. 329). He then saw two individuals, one with long hair and one with short hair, standing on a patio behind the apartment near where the vehicle was located. (App. 329–32). Hernandez continued to watch as

¹ Johnson was indicted for one count of murder (2009-GS-32-1473); two counts of ABWIK (2009-GS-32-1474, -1476); and one count of possession of a firearm during the commission of a violent crime (2007-GS-32-1475) for his role in the incident. At the conclusion of trial, the jury convicted Johnson of one count of the lesser-included offense of voluntary manslaughter, two counts of the lesser-included offense of assault and battery of a high and aggravated nature (ABHAN), and one count of possession of a weapon during the commission of a violent crime. (App. 877). Judge Stilwell sentenced Johnson to concurrent terms of thirty years' imprisonment for voluntary manslaughter, ten years for each of the ABHAN convictions, and a consecutive term of five years' imprisonment for possession of a weapon during the commission of a violent crime.

the long-haired man walked back to the vehicle, and the short-haired man remained on the patio while pointing a gun in a downward direction. (App. 329–32). Hernandez then heard someone ask not to be shot before he saw the short-haired man fire two gunshots. (App. 330, 333–34). Following the gunshots, a woman came out of the apartment and asked the men what they had done, and the men then walked down the street together. (App. 330–31). Thereafter, Hernandez watched as the short-haired man left the area, and the long-haired man returned to the apartment. (App. 330–31). The long-haired man then kicked a man lying on the ground several times, returned to the crashed vehicle, attempted to leave in it, and then walked away. (App. 331).

Shortly thereafter, law enforcement officers were notified of the shooting and responded to the scene. (App. 357–58; 374; 392–93; 412). After they arrived, Deputy Teddy Xanthakus and Deputy Danny Lewis of the Lexington County Sheriff’s Office observed a vehicle resting in the bushes next to the apartment building and saw a long-haired man, later identified as Curtis T. Johnson, walking in the road “in a daze.” (App. 357–61; 374–75; 427). The officers then arrested Johnson and found a set of brass knuckles in his pocket. (App. 360–61; 376–77). Thereafter, Deputy Xanthakus moved to secure the apartment, found a severely injured man on the apartment patio, observed a blood trail leading away from the apartment, and discovered the body of a deceased person sprawled out on the floor of the kitchen inside of the apartment. (App. 361; 363–66). Emergency medical personnel then arrived on the scene and began treating the injured victims, and officers secured the apartment. (App. 370). Officers subsequently recovered numerous pieces of evidence from the scene, including a shotgun, a metal pipe, eight shell casings, a box of shotgun shells, numerous bullet fragments, and multiple fired bullets. (App. 365; 463–65; 468–69; 473; 479; 489; 503–04; 508; 510; 512–13).

As the investigation into the shooting progressed, officers learned Johnson's older brother, Petitioner, was involved in the incident, and they went to his residence to apprehend him. (App. 85; 393–94; 653). Upon arriving, officers found a man standing in the yard of the residence, and he advised them that Petitioner was inside. (App. 399–400; 404). The officers then entered the residence, located Petitioner and his mother, and detained Petitioner.² (App. 400; 405). Following his arrest, Petitioner's mother provided the officers with Petitioner's shoes and informed them Petitioner's gun was in a vehicle located in the yard of the residence. (App. 400–01; 407–08). Officers then discovered a forty-caliber handgun in the glove box of the vehicle, and it was later confirmed to belong to Petitioner. (App. 415; 419; 591–92).

After Johnson and Petitioner were arrested, officers collected the sweatshirts they were wearing at the time and performed gunshot residue tests on their hands and clothing.³ (App. 427–28; 432–33; 460; 471). Upon analysis, gunshot residue was discovered on both of Johnson's hands and on the right and left sleeves of both sweatshirts that were submitted for testing. (App. 563–64; 567–68). Blood was also located on Petitioner's shoes and Johnson's socks and shoes. (App. 596–600). Jasper Humbert, a forensic D.N.A. analyst with SLED, determined the blood on Petitioner's shoes belonged to one of the victims, Isaac Wilson ("Isaac"), and the blood on Johnson's socks and shoes belonged to Isaac and another of the victims, A.J. Wilson ("A.J."). (App. 603–04; 606–08). Furthermore, Petitioner's gun and the fired cartridges, bullets, and bullet fragments recovered during the investigation into the shooting were analyzed by SLED Agent David Black, an expert

² At the time of his arrest, Petitioner had short hair, was not wearing any shoes, and did not appear to have any injuries. (App. 396; 400; 402; 405; 536; 760–61). Likewise, at the time of his arrest, Johnson had no visible injuries. (App. 748). Furthermore, Johnson was wearing a black sweatshirt and Parker was wearing a gray sweatshirt when they were arrested. (App. 319; 428).

³ The gunshot residue test was not conducted on Petitioner until approximately 6:30 a.m., which was roughly five hours after the shooting. (App. 471; 565–66).

in firearms examinations. (App. 576–78). Based on his analysis, Black concluded all seven of the recovered bullet cartridges were fired from Petitioner’s gun, and three of the four recovered bullets were fired from the weapon.⁴ (App. 578).

Meanwhile, the victims were taken to the hospital and treated for their injuries. (App. 609; 613–14). The man who left the blood trail at the scene, Walter Gadson, suffered a femur fracture during the incident. (App. 610–11). Likewise, the man found on the patio, A.J., suffered numerous injuries, including injuries to his vertebrae, face, mouth, extremities, shoulder, flank, wrist, and thumb. (App. 255; 612; 617–18). A.J.’s injuries were so severe that a person who saw him after the shooting stated “it looked like... some of his mouth was gone.” (App. 199). Furthermore, the lower portion of A.J.’s body was paralyzed as a result of the shooting. (App. 256; 617–18).

Dr. Janice Ross, an expert in forensic pathology, performed an autopsy on Isaac, who was killed in the shooting. (App. 620–21). During the autopsy, Dr. Ross located two gunshot wounds to Isaac’s chest and gunshot powder burns on Isaac’s clothing. (App. 621–22). One bullet entered the right side of Isaac’s chest, travelled through his lungs and heart, and left an exit wound that suggested Isaac was lying on concrete at the time he was shot. (App. 623–24). The other bullet entered the left side of Isaac’s chest and travelled through his left lung and stomach. (App. 624–25). Based on her findings, Dr. Ross concluded Isaac bled to death as a result of the shooting. (App. 625). She further concluded Isaac was shot from a close distance, and the gun was only four to twelve inches away from his body when the shots were fired. (App. 622–23; 626).

Gadson recounted he and Isaac got into a physical altercation with Johnson earlier in the evening prior to the shooting, and Johnson threatened them as he was leaving the area. (App. 150–

⁴ Black was unable to determine which gun fired the final bullet because it was too damaged for proper analysis. (App. 578).

52). He testified he and Isaac then returned home before observing Petitioner's vehicle near their apartment. (App. 153–54). In response, Gadson stated he, Isaac, and A.J. exited the apartment after Isaac retrieved a shotgun. (App. 157–58). Once outside, Gadson stated Johnson got out of the vehicle and blew its horn, and then Petitioner came around from the side of the apartment. (App. 158–59). He testified he then spoke with Petitioner; Petitioner pulled his pants leg up and reached for something; A.J. yelled that Petitioner had a gun; A.J. and Isaac ran towards the patio; and Isaac tossed him the shotgun. (App. 159–70). After that, Gadson indicated Johnson drove the vehicle towards him while he unsuccessfully tried to fire the shotgun to stop the vehicle, and he was struck and injured. (App. 170–73). Thereafter, he stated he saw Johnson exit the vehicle armed with a pistol and then heard multiple gunshots as he crawled away from the scene. (App. 173–176).

Similarly, A.J. testified he was at his apartment late on the night of November 19, 2006, when Isaac and Gadson arrived and stated they had been in a fight with Johnson. (App. 241–42; 263–64). Later that night, A.J. stated Johnson arrived at the apartment complex so they all went outside with Isaac armed with a shotgun. (App. 244–45). Once outside, A.J. stated a man approached them and asked why they did something to his brother. (App. 246–48). After that, A.J. testified the man reached for something, and he responded by yelling that the man had a gun before running towards the apartment patio. (App. 249–50). Thereafter, A.J. stated he heard gunshots, went inside the apartment, and then went back outside when he did not see Isaac. (App. 250). When he went outside, A.J. indicated he saw a long-haired man on top of Isaac, and he tried to get the man off of Isaac. (App. 251–52). When he did so, he testified the man who confronted them earlier pulled out a gun and shot him in the mouth, side, hand, and back. (App. 252–56). A.J. further testified he selected the photograph of the shooter from a photographic line-up, and he

identified Petitioner in-court as the shooter and indicated he was certain of the identification.^{5 6} (App. 254–60).

Johnson testified in his own defense and offered a substantially different account of the incident from the testimony of A.J. and Gadson. (App. 653). Prior to the shooting, Johnson stated he was attacked by Gadson and Isaac while stopped at a red light, and Gadson kicked him in the head while he was still seated in his own vehicle. (App. 670–71). Johnson claimed he was then pulled from the vehicle during the altercation but was eventually able to escape.⁷ (App. 672–74). Thereafter, Johnson testified he returned home and told Petitioner about the incident, and Petitioner responded by saying he was going to go speak with the attackers. (App. 677–78). Johnson indicated they then drove to Isaac’s apartment, parked in the rear, and intended to resolve the dispute by talking to Isaac and Gadson. (App. 681–685). Johnson testified Petitioner then exited the vehicle and walked out of view before Isaac, Gadson, and A.J. approached his vehicle while carrying three different shotguns. (App. 687–90). He claimed he then heard Isaac say he was going to shoot him, he honked the horn, and they stopped walking towards him. (App. 690–91). When he honked the horn, Johnson testified Petitioner ran back to the vehicle, stopped when he saw the shotguns, and asked the men to put the guns down. (App. 691–92; 943–44). Johnson claimed Petitioner then tried to convince Isaac to let them leave, but Gadson charged at Petitioner with a shotgun. (App. 944–96). Johnson stated he then drove towards Gadson and struck a wall. (App. 946–49; 951). After

⁵ Detective Steve Collins of the Lexington County Sheriff’s Office showed A.J. a photographic line-up while A.J. was still hospitalized from his injuries. (App. 296; 298–301). A.J. selected Petitioner from the line-up and indicated he was certain of his identification. (App. 300–01; 307–09).

⁶ Consistent with A.J.’s testimony, Amy Fleming, who lived with Isaac and A.J. at the time of the shooting, stated she saw Petitioner armed with a gun on the apartment patio after A.J. was shot, and she testified she heard Petitioner state he should kill all of them. (App. 86; 93–94).

⁷ As a result of the attack, Johnson stated he suffered “a little nick” under his lip, dirt in his eye, and emotional pain. (App. 675–76).

hitting the wall, Johnson indicated he looked over at the patio and saw Isaac pointing a gun at Petitioner while A.J. held onto Petitioner. (App. 952). Johnson claimed he then grabbed a gun from his vehicle's glove box and fired a warning shot out of the window before running over and shooting A.J. five times and Isaac two times.⁸ (App. 954–955). After the shooting, Johnson testified Petitioner left to go get help while he went into the apartment and then walked in the roadway. (App. 955–57).

At the conclusion of the evidentiary phase of trial, the trial judge conducted a charge conference and stated he intended to instruct the jury on voluntary manslaughter and self-defense. (App. 770). Thereafter, counsel for both Petitioner and Johnson requested a jury instruction on the lesser-included offense of assault and battery of a high and aggravated nature (“ABHAN”), and the trial judge agreed to give the charge. (App. 773–75). Subsequently, the trial judge instructed the jury on the applicable law, including on murder, voluntary manslaughter, ABWIK, ABHAN, self-defense, and defense of others, and explained malice in the context of murder and ABWIK as follows:

[M]alice may be indicated from conduct showing a disregard for human life. An implication of malice may also arise when the deed is done with a deadly weapon. That implication is merely an evidentiary fact which may be taken into consideration along with any other evidence in this case. The deadly weapon is an article, instrument, or substance which is likely to cause death or great bodily harm. Whether an instrument has been used as a deadly weapon depends on the facts and circumstances of each case.

(App. 850–65).

C. Verdict & Subsequent Proceedings

On September 18, 2009, the jury acquitted Petitioner of murder but convicted Petitioner of ABWIK and possession of a weapon during the commission of a violent crime. (App. 877). Judge

⁸ Notably, Johnson also claimed that he shot Petitioner during the incident. (App. 737).

Stilwell ordered a presentence investigation and deferred sentencing proceedings to a later date. (App. 878–79). On October 21, 2009, the court convened for a sentencing hearing. (App. 882–916). Judge Stilwell sentenced Petitioner to concurrent terms of twenty years’ imprisonment for ABWIK and five years for possession of a weapon during the commission of a violent crime. (App. 913–14, 921–22). Petitioner appealed.

Deputy Chief Appellate Defender Wanda H. Carter represented Petitioner on appeal. During the pendency of the appeal, however, Petitioner’s case was remanded to the trial court for the purpose of reconstructing a portion of the record. A reconstruction hearing convened before Judge Stilwell on October 3, 2011. (App. 923–1011).

Deputy Chief Appellate Defender Carter and Assistant Attorney General Mark R. Farthing subsequently submitted briefs on the following issue:

Whether the trial court erred in instructing the jury with regard to the ABWIK charge that an implication of malice may arise from the use of a deadly weapon.

(Supp. App. 1–44). Following oral argument, the Court of Appeals affirmed Petitioner’s convictions and sentences in an unpublished opinion on October 30, 2013. *State v. Parker*, 2013-UP-403 (S.C. Ct. App. filed Oct. 30, 2013). (Supp. App. 45–46). Petitioner’s subsequent petitions for rehearing and for writ of certiorari to this Court were denied. (Supp. App. 51, 88). The case was remitted back to the circuit court on August 2, 2014. (Supp. App. 89).

Petitioner timely commenced the underlying PCR action on September 2, 2014. (App. 1012–23). The State submitted its return requesting an evidentiary hearing on September 23, 2015. (App. 1024–33). An evidentiary hearing convened on November 10, 2016, before the Honorable R. Keith Kelly. (App. 1034–1125). Petitioner was present and represented by Aimee J. Zmroczek, Esquire. Senior Assistant Deputy Attorney General Johanna C. Valenzuela represented the State.

On July 15, 2019, the PCR court issued an order denying relief and dismissing the action with prejudice. (App. 1126–46). Petitioner thereafter filed a motion to reconsider pursuant to Rule 59(e), SCRCP. (App. 1147–49). The PCR court denied the Rule 59(e) motion by Form 4 dated August 15, 2019. (App. 1150–51). This appeal follows.

STANDARD OF REVIEW

In PCR matters, the standard of review depends on the specific issue involved. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). Appellate courts will uphold a PCR court's findings of fact if there is any probative evidence in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

To establish ineffective assistance of counsel, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989); *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that “[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable” (citation and internal quotation marks omitted)). “The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases.” *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). To prove prejudice, 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.” *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 694). A reasonable probability is a probability “sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694.

ARGUMENT

The PCR court correctly found trial counsel’s failure to object to the trial court’s instruction that malice may be inferred from the use of a deadly weapon did not constitute deficient performance because *Belcher* was decided after Petitioner’s conviction and an attorney’s assistance is not rendered ineffective because he failed to anticipate a new rule of law.

Petitioner contends trial counsel was constitutionally ineffective for failing to object to the trial court’s instruction that malice may be inferred from the use of a deadly weapon—despite Petitioner’s trial pre-dating *Belcher*—based on Counsel’s general awareness of discussions among the defense bar about the implied malice issue as a basis for a potentially meritorious objection. The PCR court correctly rejected this strained interpretation of *Strickland*, finding Counsel’s performance is not rendered constitutionally ineffective for failing to object to—what was at the time of trial—a long-standing and well-settled rule of South Carolina criminal law. The PCR court properly refused to require Counsel to be clairvoyant or anticipate changes in the law which were not in existence at time of trial. As these findings are supported by probative evidence and do not constitute an error of law, certiorari should be denied.

Petitioner’s case went to trial in September 2009—approximately one month prior to this Court’s decision in *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009) (published Oct. 12, 2009), *overruled by State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019). In *Belcher*, this Court held “that where evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon.” 385 S.C. at 612, 685 S.E.2d at 810. Although the defendant in *Belcher* presented evidence of self-defense—i.e., evidence tending to justify the use of a handgun—the jury was instructed on the permissive inference charge concerning the use of a deadly weapon. This Court explained that “[t]he absence of justification,

excuse or mitigation cannot be inferred from the use of a deadly weapon standing alone”— “[o]ther facts and evidence (or the absence of other facts and evidence) are required for the fulfillment of these component parts.” *Id.* at 610, 685 S.E.2d at 808–09. Because the *Belcher* opinion announced a wholly new rule of law concerning jury instructions on implied malice and murder and ABWIK prosecutions, this Court instructed retroactive application to “all cases which were pending on direct review or not yet final where the issue was preserved” at trial.⁹ *Id.* at 612, 685 S.E.2d at 810.

At Petitioner’s sentencing hearing—held only nine days after the issuance of *Belcher*—Counsel moved for a new trial, arguing the implied malice instruction was no longer an appropriate charge in light of the *Belcher* opinion. (App. 886–87). Counsel asserted Petitioner was entitled to the benefit of the decision in *Belcher* because his case was not considered final until he was sentenced.¹⁰ (App. 887). Counsel further asserted principles of judicial economy warranted the grant of a new trial because he maintained that relief would be granted through an ineffective assistance of counsel claim if not granted immediately. (App. 888–89). Solicitor Myers argued in response that no objection to the inferred malice charge was made during trial, and *Belcher* only applies to cases where the issue was preserved. (App. 887–88).

The trial court denied Petitioner’s motion, finding Petitioner suffered no prejudice as a result of the charge in light of the jury’s verdict and the evidence presented during trial. (App. 889–90). Specifically, the trial judge noted he was not given an opportunity to grant a curative

⁹ This Court in *Belcher* further stated the ruling “will not apply to convictions challenged on post-conviction relief.” *Id.* (citing *Teague v. Lane*, 489 U.S. 288 (1989)).

¹⁰ Appellate Counsel testified that she raised the *Belcher* issue in Petitioner’s direct appeal because trial counsel argued its applicability at the sentencing hearing—and that she felt that Counsel’s argument preserved the *Belcher* issue because the case was “alive pending direct appeal or direct review.” (App. 1114, 1121). In affirming Petitioner’s convictions and sentences, the Court of Appeals found that the *Belcher* objection was not made until after the jury retired from deliberations and was thus not preserved for review. (Supp. App. 45–46).

instruction or revise the jury charge because Petitioner did not object to the charge during trial. (App. 889–90). The trial court additionally acknowledged that any objection “would have been specious because [the pre-*Belcher* implied malice instruction] was well-settled South Carolina law” at the time of Petitioner’s jury deliberations. (App. 888–89). *See Harden v. State*, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004) (“An attorney is not required to anticipate potential changes in the law which are not in existence at the time of the *conviction*.” (emphasis added)).

At the PCR hearing, Petitioner questioned Counsel about a CLE presentation he attended in 2008 where one of the topics discussed was the implied malice instruction. (App. 1050–52). Counsel admitted he attended the presentation, and he was aware of discussions among the defense bar regarding the implied malice charge, although he did not specifically recall the name “*Belcher*.” (App. 1052). However, Counsel also recognized that he could not have, at that time, anticipated the change in the law. (App. 1071).

Despite the PCR court rejecting this claim based on the deficiency prong of *Strickland*—without addressing prejudice¹¹—Petitioner ignores deficiency and skips straight to the prejudice prong. Specifically, Petitioner asserts that if Counsel had objected to the instruction he would have had the benefit of *Belcher* retroactively while his case was pending on direct appeal. This Court explicitly rejected a similar argument in *Teamer v. State*, holding that “reasonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law.” 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016). The applicant in *Teamer* asserted trial counsel was ineffective for failing to object to an allegedly burden-shifting portion of the trial court’s instruction. Even though this Court’s opinion criticizing that particular jury charge was decided

¹¹ *Strickland* states a reviewing court need not “address both components of the inquiry if the defendant makes an insufficient showing on one.” 466 U.S. at 697.

five years after Petitioner’s trial, the PCR court found trial counsel ineffective “because if trial counsel had made an objection, the issue would have been preserved for appellate review.” *Id.* This Court reversed, “hold[in] that the PCR court erred in finding trial counsel ineffective for failing to object to the jury instruction when no case law existed rendering the instruction improper *per se.*” *Id.* Petitioner’s contention Counsel ineffectively failed to preserve for appellate review the implied malice issue is similarly without merit.

A reviewing court “must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed *at the time of counsel’s conduct.*” *Strickland v. Washington*, 466 U.S. at 690; *cf. Harrington v. Richter*, 562 U.S. 86, 107 (2011) (finding error where the reviewing court failed to “reconstruct the circumstances of counsel’s challenged conduct” and “evaluate the conduct from counsel’s perspective at the time.”). To avoid the distorting effects of hindsight, claims under *Strickland’s* deficiency prong are “evaluated in light of the available authority at the time of counsel’s allegedly deficient performance.” *United States v. Carthorne*, 878 F.3d 458, 466 (4th Cir. 2017). The law is unequivocal on this point—South Carolina courts “have never required an attorney to anticipate potential changes in the law which are not in existence at the time of the conviction.” *Harden*, 360 S.C. at 408, 602 S.E.2d at 49; *Thornes v. State*, 310 S.C. 306, 310, 426 S.E.2d 764, 765 (1993) (collecting cases).

Opinions from the Fourth Circuit and elsewhere similarly foreclose Petitioner’s argument—“the case law is clear that an attorney’s assistance is not rendered ineffective because he failed to anticipate a new rule of law.” *Kornahrens v. Evatt*, 66 F.3d 1350, 1360 (4th Cir. 1995); *e.g., Honeycutt v. Mahoney*, 698 F.2d 213, 216–17 (4th Cir.1983) (finding trial counsel was not deficient for failing to object to malice charge that was correct under state law at the time it was given, despite persuasive authority from other jurisdictions calling the validity of the charge into

question); *Randolph v. Delo*, 952 F.2d 243, 246 (8th Cir.1991) (finding trial counsel did not perform deficiently by failing to raise *Batson* challenge during voir dire because jury selection occurred two days before *Batson* was decided); *Kornahrens v. Evatt*, 66 F.3d 1350, 1359–60 (4th Cir. 1995) (holding trial counsel’s penalty phase performance in not offering evidence of future adaptability to prison life was not constitutionally deficient where he followed long-standing and well-settled rule of state criminal law, even though that rule was under attack in the United States Supreme Court at the time of trial); *Walker v. Jones*, 10 F.3d 1569, 1572–73 (11th Cir. 1994) (holding that trial counsel’s performance in a similar situation was reasonable “[b]ecause Alabama courts had rejected similar claims and the Supreme Court had not yet decided *Cage*,¹² trial counsel had no basis for objecting to the trial court’s instruction on reasonable doubt”).

Particularly in light of this Court’s clear instruction regarding the retroactive application of *Belcher* coupled with Counsel bringing the *Belcher* holding to the trial court’s attention at the first relevant point in time, the PCR court correctly concluded that trial counsel’s failure to object to the implied malice charge did not “so undermine the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland*, 466 U.S. at 686. As the PCR court explained, trial counsel’s presence at a CLE where another criminal defense attorney presented the *Belcher* issue as a basis for a potentially meritorious objection does not bind trial counsel to act in that manner at trial, nor did it render his performance deficient when the theory was not established as law in our State at the time of Petitioner’s jury trial. (App. 1143–44). Because the PCR court correctly determined Counsel was not deficient, this Court should deny certiorari.

¹² *Cage v. Louisiana*, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), *disapproved of* by *Estelle v. McGuire*, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

CONCLUSION

Based on the foregoing argument, this Court should deny certiorari and affirm the PCR court's denial of post-conviction relief. Should this Court grant the petition, the State seeks permission to more fully brief the issues discussed above.

Respectfully submitted,

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