



ALAN WILSON
ATTORNEY GENERAL

December 1, 2023

E. Charles Grose, Jr., Esquire
Grose Law Firm
305 Main Street
Greenwood, South Carolina 29646

Re: LaParis Flowers, #375098 v. State of South Carolina
Case No.: 2020-CP-03-00257

Dear Mr. Grose:

Enclosed is a copy of the Order of Dismissal in the above-captioned case, signed by The Honorable Robert J. Bonds and filed with the Allendale County Clerk of Court.

Sincerely,

Danielle Dixon
Assistant Attorney General

DD/vh
Enclosure(s)

STATE OF SOUTH CAROLINA)
 COUNTY OF ALLENDALE)
)
 LaParis Flowers, SCDC #375098,)
)
 Applicant,)
)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE FOURTEENTH JUDICIAL CIRCUIT

Case No. 2020-CP-03-00257

ORDER OF DISMISSAL

DATE FILED
 2023 APR 11 AM 11:22
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This matter is before the Court by way of an application for post-conviction relief (PCR) filed by LaParis Flowers (Applicant) on October 19, 2020. On March 14, 2023, an evidentiary hearing convened before the Honorable Robert J. Bonds. Applicant was present and represented by E. Charles Grose, Jr., Esquire. Assistant Attorney General Danielle Dixon represented Respondent. Following a thorough review of the records before this Court and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant did not meet his burden of proof. Thus, this Court denies relief and dismisses this application with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections serving an aggregate fifty-year sentence. In July 2015, the Allendale County Grand Jury indicted Applicant for murder (2014-GS-03-00229); three counts of attempted murder (2014-GS-03-231, -232, -233); and possession of a weapon during the commission of a violent crime (2014-GS-03-234). On January 8, 2018, Applicant proceeded to a jury trial before the Honorable Perry M. Buckner, IV. Joshua Koger, Jr. represented Applicant. Assistant Solicitors Tameaka Legette and Brian Hollen prosecuted the case. The jury convicted Applicant as indicted, and Judge Buckner sentenced Applicant to concurrent terms of forty-five years for murder and thirty years for each

charge of attempted murder, and a consecutive term of five years for the weapons charge.

Applicant filed a timely notice of appeal. Appellate Defender Taylor D. Gilliam perfected Applicant's appeal by filing an Anders¹ brief. The Court of Appeals dismissed the appeal pursuant to Anders. Applicant filed a petition for rehearing *en banc*, which was denied. Thereafter, he filed a petition for writ of certiorari in the South Carolina Supreme Court, which was dismissed pursuant to State v. Lyles.² The remittitur was sent September 25, 2020.

SUMMARY OF TRIAL TESTIMONY

At trial, Deputy Jim Evans testified he responded to a shots-fired call at a bar called the Lobster House around 3:00 a.m. on December 6, 2014. He spoke with security, who relayed they had no reports of gunfire. Deputy Evans stated about fifteen or twenty minutes later he responded to another shots-fired call, this time on Barton Road. When he arrived, he noticed a green vehicle against a tree with a crowd of people gathered around. Deputy Evans stated two men were inside the vehicle—the driver and another person in the rear driver's side; both were slumped over and unresponsive. (Tr. 181-83, 189).

According to medical personnel, victim Russell Smart passed away before making it to the hospital. (Tr. 211). Another victim, Tyquin Charton, was shot in the jaw and suffered life-threatening injuries. (Tr. 204-05, 211-12). A third victim, Brandon Lewis, was treated for a gunshot wound to his arm. (Tr. 214).

Tracy Roberts testified she was at the Lobster House that night but did not see Applicant. (Tr. 219). She stated her boyfriend Aldeandre Gray (nickname Dee) got mad at Jaquavian Williams (nickname Toot; hereinafter "Jaquavian") as they were leaving. (Tr. 219-20). Roberts

¹ Anders v. California, 386 U.S. 738 (1967).

² 381 S.C. 442, 673 S.E.2d 811 (2009) (holding the Court will not entertain petitions for writs of certiorari where the Court of Appeals has dismissed an appeal after an Anders review).

left the club without Gray. (Tr. 220). She testified Jaquavian later called and asked if she knew where Gray was; she told him he had gone to Pinewood Apartments. (Tr. 221). She stated Jaquavian was still mad at Gray. Roberts testified Jaquavian later texted her and said, "I hope Russell okay." (Tr. 222). Roberts testified Jaquavian and Applicant were cousins. (Tr. 224).

Elizabeth Rollins testified she was working at the door of the Lobster House that evening; she recalled seeing Jaquavian and Smart arguing. (Tr. 237). Rollins stated she asked Jaquavian's mother, Kimberly Flowers,³ to take him outside. (Tr. 237). She stated the club closed around 2:30 a.m. (Tr. 237). Rollins recalled seeing Applicant that night; she said he became angry and went outside. Rollins stated Smart went outside around the same time. (Tr. 238-41).

Tyquin Charlton testified he was at the Lobster House that evening; he recalled seeing Smart, Gray, Jarrell Murray, Lewis, and Applicant. (Tr. 246-47). Charlton testified he initially left with his brother but later got in Smart's green Crown Victoria. (Tr. 247-48). He testified Smart was driving, Murray was in the front passenger seat, and Lewis was in the back with Charlton. (Tr. 248-49). Charlton stated Gray was initially in Smart's car, but Gray got out as Charlton got in. (Tr. 249). He stated they drove to Pinewood Apartments. (Tr. 250). While they were at Pinewood, Charlton testified Applicant drove up in a white Alero, pulled up "driver's door to driver's door," and said, "Y'all trying to flex on my little cousin." (Tr. 254-55). Charlton testified Applicant pulled out a gun and began shooting. (Tr. 256). He stated he next remembered waking up in the hospital; law enforcement spoke to him but he was medicated at the time. (Tr. 258). Charlton stated he told law enforcement that Applicant shot him. He explained he had known and Applicant for a couple of years and knew him "pretty good." (Tr. 260-61). He recalled picking Applicant from a photo-lineup. (Tr. 264).

³ At the PCR hearing, Jaquavian's mother stated her name was Kimberly Williams. She will be referred to hereinafter as "Kimberly."

Murray recalled leaving the Lobster House that morning with Smart, Charlton, and Lewis. He testified a white car pulled up while they were at Pinewoods Apartments and the driver began shooting. Murray clarified Applicant—whom he had known “quit a while”—was the shooter. (Tr. 279-86). Murray also identified Applicant from a photo lineup. (Tr. 290).

Lewis likewise recalled leaving the Lobster House that morning with Smart, Charlton, and Murray. He stated Gray was initially in the car with them but got out after he and Smart “had some words.” (Tr. 298-302). Lewis stated that while they were at Pinewood, somebody pulled up and began shooting at them. (Tr. 302). He claimed he did not know the shooter. (Tr. 307-08).

Captain Quatique Manor testified he obtained surveillance videos from the Lobster House and identified Applicant entering a white Oldsmobile, “maybe an Alero.”⁴ (Tr. 308-13). He stated he spoke to Lewis shortly after the shooting, and Lewis identified Applicant as the shooter and selected Applicant from a lineup. (Tr. 314-18). Likewise, Lieutenant Matt Brown stated he spoke to Lewis, and Lewis identified Applicant as the shooter. (Tr. 412-14, 417). Lieutenant Brown stated he also spoke to Murray and Charlton; they both identified Applicant as the shooter and selected him from lineups. (Tr. 420-36).

Agent Haley Nelson testified she processed a white Alero and discovered paperwork with Applicant and his mother’s name. (Tr. 371-74). Agent Nelson swabbed the Alero for gunshot residue, and Tyler Sturkie, an expert in trace evidence, determined the Alero contained gunshot residue. (Tr. 375, 477-80).

⁴ The video was entered into evidence.

ALLEGATIONS RAISED AND RELIEF SOUGHT

Applicant timely commenced this PCR action on October 19, 2020, alleging he is being held in custody unlawfully for the following reasons:

- 1) Ineffective Assistance of Trial Counsel
 - a. "Trial counsel was ineffective in failing to obtain and introduce at trial recorded evidence that would reveal more clearly the improper manner and highly suggestive identification procedure used to identify the Applicant";
 - b. "Trial counsel failed to interview known alibi witness in light Applicant claim of being elsewhere during the initial altercation".
 - c. "Trial counsel fail to request for additional jury instruction as it concern the court limited and inadequate identification testimony charge to the jury that, as a whole, represented the prosecution case in chief";
 - d. "Trial counsel failed to object and preserve for appellate review the trial court use of the questionable and now prohibited inferred malice charge based on the charge giving as not being sufficient to compensate for its prejudicial effect".
- 2) Ineffective Assistance of Appellate Counsel
 - a. "Appellate counsel was ineffective in failing to raise the issue as to whether the new Supreme Court rule prohibiting the use of the malice charge applied to his case that was on appeal at the time."

Respondent filed a return requesting an evidentiary hearing. On November 10, 2022, Applicant amended his application to allege:

- a. Ineffective assistance of trial counsel:
 - i. Failed to obtain and introduce at trial evidence that would reveal more clearly the improper and highly suggestive identification procedures used to identify Flowers;
 - ii. Failed to interview and present testimony of an alibi;
 - iii. Failed to request additional jury instructions concerning the trial court's limited and inadequate identification testimony charge to the jury that, when taken as a whole, represented the prosecution case in chief;
 - iv. Failed to object to the charge that malice may arise from the use

of a deadly weapon;

v. Failed to introduce into evidence audio recordings of the interviews of complaining witnesses;

vi. Failed to object to improper comments during closing argument;

vii. Failed to object to the unsealing of Flowers' juvenile records without an order from a Family Court Judge;

viii. Failed to object to improper truth-seeking language;

b. Ineffective assistance of appellate counsel:

i. Failed to raise the issue of whether the new Supreme Court rule prohibiting the use of the malice charge applied to his case that was on appeal at the time.

At the PCR hearing, counsel Applicant indicated he was no longer going forward on allegations related to (1) trial counsel's failure to introduce evidence that would reveal more clearly the highly-suggestive identification procedure and (2) the unsealing of the juvenile record.⁵ This Court finds Applicant has waived issues (a)(i) and (a)(vii), as set forth above, and dismisses those claims with prejudice. Applicant proceeded on the remaining claims raised in his amended application.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the plea transcript in its entirety and has heard the testimony at the PCR hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony.⁶ After a careful review based on the Strickland standard set forth below, this Court finds Applicant has failed to carry his burden of proof. Below are this Court's findings of facts and conclusions

⁵ Counsel for Applicant agreed with Respondent that they had obtained the Family Court order unsealing the juvenile records.

⁶ This Court will reference PCR testimony where relevant below.

of law as required by section 17-27-80 of the South Carolina Code (2017).

Ineffective Assistance of Trial Counsel

In a PCR action, an applicant bears the burden of proving the allegations. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). An applicant alleging ineffective assistance of counsel must prove “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813. “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). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. at 441, 334 S.E.2d at 813. An applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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, 466 U.S. at 687–88; Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625. “A PCR applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel’s errors, the applicant would not have pled guilty and would have insisted on going to trial.” Dalton v. State, 376 S.C. 130, 136, 654 S.E.2d 870, 873 (Ct. App. 2007). To prove prejudice following a guilty plea, the applicant “must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” Hill v. Lockhart, 474 U.S. 52, 59 (1985).

Alibi

Applicant first contends counsel was ineffective for failing to obtain and introduce evidence of a known alibi. This Court finds Applicant has not shown counsel was ineffective in this regard.

At the PCR hearing, Applicant testified he was not at Pinewood Apartments at the time of the shooting. He acknowledged being at the Lobster House earlier that evening with Jaquavian Williams, Kendall Nix, and Kimberly. Applicant stated Nix was the mother of his child, and while they were at the Lobster House, they received a call indicating their child was cranky. Applicant testified he left the Lobster House with Antron Williams between 2:00 and 2:42 a.m., and there were no altercations or fights while he was at the Lobster House. Applicant stated he left at the same time as Nix and left right behind her, although they were in separate cars. He explained,

Antron Williams he was undecided at where he wanted to go at the time, so he was dating Kendall Nix cousin at the time, so he decided to go to her house. Like I said I was—I was right behind Kendall Nix, as well as her cousin. We just was in separate cars, I was right behind them, and we ended up at—at Ashley's house. And I ended up giving the keys to my brother, and I got in the car with Kendall Nix.

Applicant stated he had been driving his mother's car—a white Alero. After he gave his brother the car, he rode with Nix to their home in North Augusta.

Applicant testified the following day Nix received phone calls from people “stating that they might have said there was a—a white car involved, and might have said I had something to do with it, due to the fact that Jaquavian Williams got into a dispute, when I later learned—learned that they got into some type—type of dispute, and so I volunteered to go to the Police Department.” He testified he spoke with police and provided an alibi, and they did not arrest him at that time. During his testimony, Applicant entered his statement as well as statements from Nix, Kimberly,

and Jaquavian. He stated he did not testify at his trial and none of those witnesses testified. Applicant stated he wanted to present an alibi defense and spoke with his lawyer about it, but his lawyer never contacted the witnesses. According to Applicant, counsel “just constantly stated that . . . the State has to prove beyond a reasonable doubt.” Applicant stated Jaquavian, Nix, and Kimberly were at his trial, but counsel never “did his due diligence.”

On cross-examination, Applicant acknowledged police found gunshot residue in the car he was driving that night. When asked whether he ever asked anyone to clean the car, he replied, “My brother, he stated that I left a towel for him to clean the car, but I never left a towel for him to clean the car. There was just stuff in the car.” Although Applicant initially stated he did not recall discussing with counsel whether his brother could have been the shooter, when asked whether he mentioned anything to counsel about his brother being the shooter, he replied, “[T]hat is one of the things that we talked about.” Applicant recalled the State had subpoenaed his brother to his trial. Applicant agreed he knew Charleton, Murray, and Lewis from living in the area. He acknowledged all of them identified him as the shooter, although he claimed it was due to improperly suggestive police procedures.

Nix testified she was at the Lobster House that evening, and she learned her son was acting cranky. She stated she left the Lobster House with “Ashley” and “Neesy” and drove to Ashley’s house. Nix testified Applicant left behind her with “Tron.” When asked what happened when she arrived at Ashley’s house, Nix testified, “Tron went inside, got my phone charger. . . . I left my clothes there, came back to the car, [Applicant’s brother] came, asked [Applicant] can he hold the car, can he get some money from her, and that was it.” She stated she and Applicant then drove to North Augusta. Nix testified she never went to Pinewood Apartments that evening. Although she initially testified she never spoke with trial counsel or interacted with him, she later

acknowledged meeting him at a fast-food restaurant to provide payment. Nix admitted she did not tell trial counsel she could provide an alibi for Applicant.

Nix initially testified she left the Lobster House around 2:00 a.m. After reviewing her statement to police, she testified she told law enforcement she left round 2:42 a.m. She stated Applicant left the Lobster House at the same time she did, “was right behind [her] at Ashley’s house,” and they left together to go to North Augusta.⁷

Jaquavian, Applicant’s cousin, recalled seeing Applicant and Nix at the Lobster House that night. He stated Applicant and Nix left while Jacquavian was still at the club. Jacquavian recalled Gray getting mad at him, but he stated Applicant had already left at that time. Jacquavian stated he left the Lobster House with his mother, his uncle, and his cousin Ulysses Grant and went to his grandmother’s house. He did not see Applicant that night after Applicant left the club.

Kimberly, Jacquavian’s mother, stated she was also at the Lobster House that night. She stated she saw Applicant and Nix, but they left after learning their son was acting cranky. Kimberly did not see them once they exited the club and did not know if they left together or separately. Kimberly stated she did not see Applicant again that night after he left the club.

Joshua Koger (trial counsel) testified the State’s evidence included three witnesses who were familiar with Applicant that identified him as the shooter, and gunshot residue recovered from Applicant’s car. He stated the identifications were his primary concern, and he sought to impeach the identifications through cross-examination. Counsel did not have any concerns about

⁷ In her supplemental statement to police, which was signed at 7:12 pm on December 7, 2014, Nix stated,

After leaving the club around 2:42 am, I went and drop my cousin and her stepsister off. Stayed there and 10 mins later LaParis pull up and drop Tron off, he then gave Chavis the keys and we went back to North Augusta. He then said he tired of everybody lien [sic] and if something happen take care of his child. This is the correction to my first statement.

This was entered into evidence at the PCR hearing as part of Exhibit 2.

the lineup itself being unduly suggestive.

Counsel testified the timeframe for the shooting was somewhat compressed but Allendale is not a big city, “so you could probably get to any point of Allendale within five to ten minutes.” He did not recall Applicant mentioning an alibi defense during his representation, and he testified Applicant never indicated that he wanted to testify. Although counsel acknowledged an alibi could be presented without a defendant testifying, he stated it weakened an alibi defense if the defendant did not take the stand.

Trial counsel believed he met Nix on more than one occasion and stated she never mentioned that she was with Applicant that night. He recalled seeing Jaquavian and Kimberly’s statements in discovery but stated Applicant never asked him to speak to them. Counsel recalled Applicant’s mother being at trial but stated Applicant did not point out any other individuals at trial. He further stated he would not have known Kimberly or Jaquavian if Applicant had not pointed them out. Counsel agreed he did not interview Nix, Kimberly, or Jaquavian. He stated he did not consider Kimberly or Jaquavian to be alibi witnesses.

This Court finds credible counsel’s foregoing testimony that Applicant never raised to him a defense of alibi, Applicant never indicated he wanted to testify, Applicant never asked him to speak to witnesses, Nix did not mention being with Applicant that night, and Applicant did not point out anyone at trial to counsel. This Court finds not credible Applicant’s testimony that he told counsel he had an alibi. Based on the foregoing, this Court finds counsel’s defense strategy was reasonable within prevailing professional norms, and counsel was not deficient for not pursuing an alibi defense. Although counsel had witness statements from Nix, Kimberly, and Jaquavian, those statements in and of themselves were insufficient to put counsel on notice of a potential alibi defense. This Court notes Nix signed a supplemental statement the same night she

signed her original statement clarifying Applicant arrived at Ashley's house ten minutes after she did. Based on counsel's credible testimony that Allendale is not a large city and "you could probably get to any point of Allendale within five to ten minutes," Nix's statement that there was a ten-minute gap before Applicant met her after leaving the club, and the fact Applicant never mentioned an alibi defense to counsel, this Court finds counsel was not deficient for not further pursuing an alibi defense. In other words, had Applicant truly had an alibi defense, this Court finds he would have brought that to counsel's attention. Counsel thus was not deficient for not pursuing an alibi when Applicant never informed him of his alibi.

Likewise, this Court finds the testimony of Kimberly and Jaquavian did not create an alibi defense. Kimberly and Jaquavian both stated they did not see Applicant after he left the Lobster House that morning—making their testimony insufficient to establish an alibi. Thus, Applicant did not prove prejudice from counsel's failure to call them as witnesses at trial

Further, this Court had the opportunity to view Applicant and Nix's testimony at the PCR hearing and finds their testimony concerning an alibi to be self-serving and not credible. Although Nix testified Applicant followed her when she left the club, in a supplemental statement signed the same night as her original statement, she indicated she "drop[ed her] cousin and her stepsister off, stayed there and 10 minutes later [Applicant] pull[ed] up and drop[ped] Tron off." This statement contradicted her PCR testimony that Applicant was "right behind me at Ashley's house," and this Court finds her PCR testimony in this regard not credible. This Court further finds that based on the evidence presented at trial—including three witness identifications and evidence of gunshot residue in the car Applicant admitted he was driving—it is not reasonably likely the outcome would have been different had Applicant presented the alibi defense he presented at the PCR hearing. Thus, Applicant did not prove prejudice, and this claim is denied.

Jury Charge – Biggers factors

Applicant next contends counsel was ineffective for failing to request additional jury instructions concerning the trial court's limited and inadequate identification testimony charge to the jury that, when taken as a whole, represented the prosecution case in chief. Specifically, he contends counsel should have asked for the jury to be instructed on the factors from Neil v. Biggers. This Court finds Applicant has not shown counsel was ineffective in this regard.

“In Neil v. Biggers, the United States Supreme Court set forth a two-pronged inquiry to determine whether due process requires suppression of an eyewitness identification.” State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012). “Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed.” Id. (citing Neil v. Biggers, 409 U.S. at 198.

Under the totality of the circumstances, the factors to be considered in assessing the reliability of an otherwise unduly suggestive identification procedure are: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation.

Id. (citing Biggers, 409 U.S. at 199-200).

Initially, Biggers concerns the *admissibility* of an identification—which is part of the court's gatekeeping role. Applicant has not pointed to any case that requires a judge to charge these factors to a jury, and this Court is not aware of any. Thus, counsel's failure to request the court charge the Biggers factors does not fall below prevailing professional norms, and Applicant

did not prove deficiency.

Likewise, this Court finds that here, where the eyewitnesses all testified they knew Applicant prior to the shooting, it is not reasonably likely the outcome would have been different had the court charged the Biggers factors. Notably, this Court finds that applying the Biggers factors to these identifications would not make it more likely the identifications would have been excluded. For that same reason, it is not reasonably likely the jury would have reached a different conclusion had the court charged the Biggers factors here when all the victims knew Applicant. Cf. Liverman, 398 S.C. at 142, 727 S.E.2d at 428 (finding the court's failure to conduct a Biggers hearing was harmless when the witness "knew Petitioner before the shooting and [his] identification was sufficiently reliable because he identified Petitioner by his nickname to Investigator Gray prior to the suggestive police orchestrated show-up," and "a review of [the witness's] trial testimony indicates that his in-court identification of Petitioner as the shooter originated not from any taint associated with the suggestive show-up but from [his] prior association with Petitioner and his observation of Petitioner at the time of the shooting"). Thus, Applicant did not prove prejudice, and this claim is denied.

Jury Charge – Malice Inference

Applicant asserts counsel was ineffective for failing to object to the charge that malice can be inferred from the use of a deadly weapon, which he contends improperly shifted the burden of proof because the court stated the inference could be rebutted. Applicant contends the trial judge and parties agreed "the inference of malice is a wrongful presumption," but rather than deleting the inference instruction, the trial court instructed the jury it is not a conclusive presumption. This Court finds Applicant has not shown counsel was ineffective in this regard.

Prior to charging the jury, the court stated, "I have been over the addition to the charge,

which involves the fact that the inference of malice is a wrongful presumption. They both agree that should be added. I met with them this morning concerning that addition in chambers.” (Tr. 546). Later, the court stated,

I have been over with counsel the addition to the charge that I told you about this morning, and the reason for it being that the burden shifting presumption argument, or conclusive presumption argument, allegedly depriving the Defendant of his due process of law. And, therefore, I intend to explain to the jury that it is not a conclusive presumption in part of my charge on murder, when I get to the point that malice can be inferred from the use of a deadly weapon. Both lawyers have indicated to me that they agree with that addition to the charge in our conference this morning.

(Tr. 588-89). As part of the murder charge, the court charged the jury:

Malice may be inferred from conduct showing the total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon.

A deadly weapon is any article, instrument, or substance which is likely to cause death or great bodily harm. Whether an instrument has been used in the death depends on the facts and circumstances of each case based on evidence introduced during the trial of the case.

The law says that if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts are proven beyond a reasonable doubt by the State sufficient to raise an inference for malice to your satisfaction this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in this case.

And you may give it such weight as you determine it should receive, and it can be rebutted, now the evidence in this case based on your view of the evidence.

(Tr. 606-07).

Under the law that existed at the time of Applicant’s trial, the trial court’s charge was proper. Although an instruction that malice can be inferred from the use of a deadly weapon is no longer good law in South Carolina, the case prohibiting this charge came out *after* Applicant’s

trial. See State v. Burdette, 427 S.C. 490, 503, 832 S.E.2d 575, 582 (2019) (“A jury instruction that malice may be inferred from the use of a deadly weapon is an improper court-sponsored emphasis of a fact in evidence—that the deed was done with a deadly weapon—and it should no longer be permitted.”).⁸ At the time of Applicant’s trial, this charge was permissible when no evidence was presented that would reduce, mitigate, excuse, or justify the homicide. See State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009) (“[W]here 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.”, overruled by Burdette, 427 S.C. at 490, 832 S.E.2d at 575). Here, no evidence was presented that would reduce, mitigate, excuse, or justify this homicide, making this charge proper at the time of Applicant’s trial. Because this charge was proper at the time of trial, counsel was not deficient for failing to object. See Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) (“[T]he 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. This Court has previously held that reasonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law.”).

Further, at the time of Applicant’s trial, courts charging that malice may be inferred from the use of a deadly weapon were also required to charge the “permissive inference” charge from State v. Elmore,⁹ which provided:

We suggest the following charge:

The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts are proved beyond a

⁸ The Burdette court acknowledged it was overruling precedent and found its ruling “will not apply to convictions challenged on post-conviction relief.” 427 S.C. at 505, 832 S.E.2d at 583.

⁹ 279 S.C. 417, 421, 308 S.E.2d 781, 784 (1983), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), and overruled by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019).

reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

We caution the bench, that hereafter only slight deviations from this charge will be tolerated.

The Court here charged the permissive inference charge using substantially the same language as Elmore. (Tr. 606-07). This was a proper charge under the law that existed at the time of trial, and counsel was not deficient for not objecting.¹⁰ Thus, Applicant has not shown counsel was ineffective in this regard, and this claim is denied.

Failed to introduce recorded interviews

Applicant contends counsel was ineffective for not introducing into evidence recordings of interviews of the complaining witnesses. This Court finds Applicant has not shown counsel was ineffective in this regard.

Counsel testified extensively about his cross-examination of the witnesses and his attempt to impeach them. He further testified that had he introduced the videos, he would have lost the last-closing argument—which he discussed with Applicant. This Court finds the transcript itself shows counsel effectively cross-examined Carleton and Murray, and his performance in this regard was reasonable within prevailing professional norms.¹¹ (Tr. 266-73, 276, 291-97). This Court

¹⁰ Applicant's argument that the parties recognized this as a wrongful presumption is misplaced. Although the Court initially referenced a "wrongful presumption," it later referred to the presumption as "not a *conclusive* presumption." This is consistent with the Court's Elmore charge, and in context, this may have been what the parties were referencing. Alternately, this Court notes State v. King had recently been decided, wherein the Court found attempted murder is a specific intent crime and questioned whether malice could be inferred in attempted murder. State v. King, 422 S.C. 47, 64 n.5, 810 S.E.2d 18, 27 n.5 (2017). Applicant faced three charges for attempted murder, so the court may have been referencing this when it stated "wrongful presumption." Notably, in charging attempted murder, the trial court charged it was a specific intent crime that required "expressed malice." The Court did not charge malice could be inferred for attempted murder. (Tr. 607-08). Ultimately, the charge was proper under the law that existed at the time of trial, and counsel thus was not deficient for not objecting.

¹¹ Lewis never identified Applicant as the shooter at trial. (Tr. 298-308).

further finds credible trial counsel's testimony at the PCR hearing that he decided not to attempt to enter the recordings because he had effectively impeached the witnesses through cross-examination, he wanted to preserve his right to close last, and he discussed this strategy with Applicant. This Court finds counsel's decision to impeach the witnesses through cross-examination rather than attempting to enter the recordings was reasonable within prevailing professional norms. Thus, Applicant did not prove deficiency.

Likewise, Applicant did not prove prejudice. Specifically, Applicant did not point to what portion of the recordings could have been used to further impeach the witnesses and thus did not show a reasonable likelihood that they would have been admitted had counsel sought to admit them. See Rule 613(b), SCRE ("Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible. However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2)."). Finally, based upon counsel's effective cross-examination of the witnesses, this Court finds it is not reasonably likely the recording itself would have changed the outcome. Thus, Applicant did not prove prejudice, and this claim is denied.

Failed to object to improper comments

Applicant argues counsel was ineffective for not objecting to the solicitor's improper comments during closing argument. Specifically, Applicant avers counsel should have objected when the solicitor argued, "It is not my intent to prosecute an innocent man. Not so. We do not

prosecute the innocent, only the guilty.” (Tr. 550). Likewise, Applicant contends counsel was ineffective for not objecting when the solicitor improperly vouched for Lewis, an inmate in federal custody, including but not limited to argument about the snitching code. (Tr. 555-57). This Court finds Applicant has not shown counsel was ineffective in this regard.

“A solicitor's closing argument must not appeal to the personal biases of the jurors. In addition, the argument may not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it.” State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). “A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony.” Vasquez v. State, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010). “On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt.” Id. “Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument.” Id. “The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Id.

Initially, the solicitor’s comment about the snitching code did not constitute improper vouching and thus was not objectionable. See State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001) (“Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony.”); State v. Busse, 439 S.C. 104, 111, 886 S.E.2d 208, 212 (2023) (“[A]

prosecutor is expected to comment on the credibility of the witnesses when making a closing argument. Far from improper, . . . doing so is one of the fundamental responsibilities of a lawyer.”). Thus, this Court finds counsel was not deficient for not objecting, and Applicant likewise cannot show any resulting prejudice.

Further, although the solicitor’s statement “We do not prosecute the innocent, only the guilty” may have been improper, this Court finds it did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. This statement was a passing statement at the beginning of a closing argument that spanned twenty-three pages. On balance, this statement did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. See Darden v. Wainwright, 477 U.S. 168 (1986) (finding solicitor’s references to capital defendant as “an animal” whose head he wished had been blown off with a rifle were improper but did not so infect the trial with unfairness as to violate due process). Thus, Applicant did not prove prejudice, and this claim is denied.

Failed to object to truth-seeking language

Applicant contends counsel was ineffective for failing to object to improper truth-seeking language during the court’s opening comments, the State’s opening statement, and the State’s closing argument. Applicant further contends counsel was ineffective for making improper comments during his opening statement and closing argument. This Court finds Applicant has not shown counsel was ineffective in this regard.

Prior to trial, the Court made the following comment to the jury:

An actual trial is a fundamental part of our democracy. It is a search for the truth in an effort to make sure that justice is done between parties before the court.

Searching for the truth and trying to make sure that justice is done is often slow. It is often very deliberate. It is often repetitive. It is

the exact opposite of what you may have seen on television or seen in a movie or read a book.

(Tr. 141). During opening, the solicitor argued:

Our job is to find the truth in this case. That's what we are going to give you. We are not hiding anything. We are going to tell you what happened, and you are going to know what happened. At the end of this case, the truth is going to come out.

The truth is that on the morning of December 6th, Laparis Flowers killed Russell Smart. He shot Tyquan Charlton, he shot Brandon Lewis, and he almost shot Jarell Murray.

(Tr. 169). In response, trial counsel argued,

As stated from the bench, and from the Solicitor's office, this is a search for the truth. And the search for the truth starts right here. And it starts in this chair right here. In this witness chair right here.

I often call it the great equalizer, because in this chair everyone is the same. Presidents are the same. Senators are the same. And hard working laborers are the same. When they sit in this chair, they are all the same, because it is a search for the truth in this particular chair right here.

And it doesn't matter how many witnesses one side have over the other. . . . That does not matter, because in this courtroom, as in any other courtroom in this state and in this country, it is the search for the truth.

(Tr. 171). Trial counsel concluded, "And when you find those not guilty on those charge, you would have rendered a true and just verdict." (Tr. 173).

In closing, the solicitor argued:

So what have we proven? Let's talk about the case we put before you. I want you to remember the number 13. Thirteen, some say 13 is an unlucky number. I don't believe 13 is an unlucky number. Thirteen is the beginning of something else.

You get to 12 and you finish, 13 is the beginning of something else. The beginning of a new day. A day when you get the truth.

So what 13 things do I want to discuss today? Let's look at 13 things.

(Tr. 551). The solicitor concluded:

Laparis Flowers, ladies and gentlemen, is a wicked and evil man. He is a killer. It's time to speak the truth.

December 6th, 2014 was a time to kill for Laparis Flowers. He went to Pinewood Apartments to kill, murder, and destroy. He did that. And now it's time to speak the truth. A verdict of guilty will speak the truth. I have insulted you today, and for that I do apologize. But I want you to leave out of this courtroom without any doubt, beyond any reasonable doubt.

Laparis Flowers, the robe of righteousness is in the garbage. Incinerated. On fire. It is over.

Speak the truth this day. Find Laparis Flowers guilty of murder, of attempted murder of Tyquan Charlton, of attempted murder of Brandon Lewis, of attempted murder of Jarrell Murray, and the weapon, because he had to use a firearm to kill. He is a killer.

(Tr. 571). In response, trial counsel argued:

This is the search for the truth, and that was what the Honorable Judge Buckner indicated to you at the beginning. This is a search for the truth, and this journey has taken several days this week.

I need for you to go back in that jury room, as I know you will, and look at everything. Recall every piece of testimony. Not just portions of it, not just portions that are advantageous to the State, and not just portions that are advantageous to the Defendant, but everything. And I'm confident at the end of this journey, that you will find that Laparis Flowers is not a killer, Laparis Flowers is not the shooter, Laparis Flowers is not guilty of the murder of Russell Smart. Laparis Flowers is not guilty of the attempted murder on Tyquan Charlton. Laparis Flowers is not guilty of the attempted murder of Brandon Lewis. Laparis Flowers is not guilty of the attempted murder of Jarrell Murray. And Laparis Flowers is not guilty of possession of a firearm on that particular night during the commission of a violent crime. And I am confident you will come back and you will end this search for justice, and your verdict will be fair, it will be true. And it will be just, and it'll be not guilty on all counts for Laparis Flowers.

(Tr. 585-86). At the PCR hearing, trial counsel testified solicitors often used that language at trial.

Initially, Applicant has not provided any law at the time of Applicant's trial that prohibited

attorneys from arguing truth-seeking language. Although Beaty,¹² Aleksey, and Daniel found such language improper by courts, they did not prohibit attorneys from making such arguments. See State v. Beaty, 423 S.C. 26, 34, 813 S.E.2d 502, 506 (2018) (“[A] trial judge should refrain from informing the jury, whether through comments or through a charge on the law, that its role is to search for the truth, or to find the true facts, or to render a just verdict. These phrases could be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict the jury believes best serves its perception of justice. We instruct trial judges to avoid these terms and any others that may divert the jury from its obligation in a criminal case to determine whether the State has proven the defendant's guilt beyond a reasonable doubt.”); State v. Aleksey, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000) (“[W]e have urged trial courts to avoid using any ‘seek language when charging jurors on either reasonable doubt or circumstantial evidence (emphasis added)); State v. Daniels, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012) (“[W]e instruct the trial judge to remove any suggestion from his general sessions charges that a criminal jury's duty is to return a verdict that is “just” or “fair” to all parties.” (emphasis added)); cf. Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) (“[T]he 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. This Court has previously held that reasonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law.”).

Ultimately, Applicant bears the burden of proving his allegations. Here, he has not proven deficiency from counsel’s failure to object to the solicitor’s use of this language. Likewise, because counsel’s statements were responsive to the solicitor’s statements, this Court finds

¹² Although Beaty was published after Applicant’s trial, the Supreme Court had issued a similar opinion in Beaty prior to Applicant’s trial. See State v. Beaty, Op. No. 27693 (S.C. Sup. Ct. filed Dec. 29, 2016).

Applicant did not show counsel's use of truth-seeking language fell below prevailing professional norms here. Thus, Applicant did not prove deficiency.

Further, to the extent counsel was deficient for not objecting to the court's preliminary remarks, this Court finds it is not reasonably likely an objection would have changed the outcome. Importantly, although the court made truth-seeking statements in its opening comments, Applicant has not shown that the court used similar language during its charge. Thus, it is not reasonably likely these comments shifted the burden of proof and made the jury believe Applicant had to disprove the State's case. See Aleksey, 343 S.C. at 20, 538 S.E.2d at 248 (finding that although truth-seek language by the court was not appropriate, it did not shift the burden of proof when it was not given in conjunction with the charge on the State's burden of proof); id. at 28-29, 538 S.E.2d at 252-53 ("There is not a reasonable likelihood the jury applied the challenged instruction in a manner inconsistent with the burden of proof beyond a reasonable doubt. The trial court's instructions concerning seeking the truth were given in the context of the jury's role in determining the credibility of witnesses. The remarks were prefaced by a full instruction on reasonable doubt and followed by an additional exhortation to bear in mind the State's heavy burden of proof." (footnote omitted)).

To prevail on an ineffective assistance of counsel claim, Applicant must show *both* deficiency and prejudice. Under Aleksey, it is not reasonably likely the outcome of this trial would have been different had counsel objected to this language. Cf. Beatty, 423 S.C. 26, 32-34, 813 S.E.2d 502, 505-06 (2018) (finding defendant not prejudiced by court's pretrial comments that a trial is a search for the truth and the jury's role is to render true and just verdict and determine true facts when these comments "were a mere statement to the jury and not a charge on the law" and "the remarks were not linked to either the reasonable doubt or the circumstantial evidence

charges”). Likewise, for the same reason, this Court finds it is not reasonably likely the solicitor’s comment or counsel’s comments shifted the burden of proof and affected the outcome. Thus, Applicant did not prove prejudice.

Ineffective Assistance of Appellate Counsel

A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance of counsel, “appellate counsel is not required to raise every non-frivolous issue that is presented by the record.” Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990). “For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of vigorous and effective advocacy. . .” Jones v. Barnes, 463 U.S. 745, 754 (1983).

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. Southerland, 337 S.C. at 616, 524 S.E.2d at 836. Courts thus must consider (1) whether appellate counsel’s performance was deficient, and (2) whether the applicant was prejudiced by appellate counsel’s deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, the applicant must show that, but for counsel’s errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

Applicant asserts appellate counsel was ineffective for not raising the issue of whether the new Supreme Court rule prohibiting the use of the malice charge applied to his case, which was on appeal at the time. Specifically, Applicant contends the trial court instructed the jurors that an inference of malice may arise from the use of a deadly weapon. (Tr. 606-07). He contends the

Supreme Court decided State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019) while his appeal was pending. Applicant contends the charge was improper and shifted the burden of proof. He further contends the trial court and counsel agreed “the inference of malice is a wrongful instruction,” but rather than deleting the inference instruction, the court “decided to explain to the jury that it is not a conclusive presumption.” This Court finds Applicant did not prove appellate counsel was ineffective in this regard.

This argument was not preserved; thus, appellate counsel was not deficient for not raising it.¹³ Because this argument was not preserved, appellate counsel was not deficient for not raising it, and it is likewise not reasonably likely the outcome would have been different had appellate counsel raised this issue. See Burdette, 427 S.C. at 505, 832 S.E.2d at 583 (“Our ruling today is effective in this case and in those cases which are pending on direct review or are not yet final, *so long as the issue is preserved.*” (emphasis added)). Thus, Applicant did not prove appellate counsel was ineffective, and this claim is denied.

CONCLUSION

Based on the foregoing, this Court concludes Applicant has not established any constitutional violations that would require this Court to grant relief. Thus, this application is denied and dismissed with prejudice.

Should Applicant wish to secure appellate review, he must file and serve a notice of appeal within thirty days of receipt by counsel of written notice of entry of judgment. See Rule 203, SCACR. Applicant has the right to an appellate counsel’s assistance in seeking review of the denial of PCR. Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). If Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on applicant’s behalf. Rule


¹³ Further, as set forth above, this charge was proper under the law that existed at the time of Applicant’s trial—making trial counsel’s failure to object not deficient.

71.1(g), SCRPC. Attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for PCR is denied and dismissed with prejudice; and
2. Applicant shall be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED THIS 29 day of Sept, 2023.



ROBERT L. BONDS
Presiding Judge
Fourteenth Judicial Circuit

Waltham, South Carolina

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

LaParis Flowers, #375098

Applicant,

v.

State Of South Carolina,

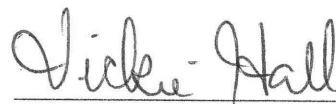
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Order of Dismissal has been served upon the applicant by mailing one copy in the United States mail, postage prepaid, addressed to:

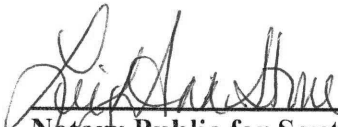
**E. Charles Grose, Jr., Esquire
Grose Law Firm
305 Main Street
Greenwood, South Carolina 29646**

This 1st day of December, 2023.



Vickie Hall, Legal Assistant
for Respondent

SWORN to before me this 1st day of December, 2023.



Notary Public for South Carolina.

My Commission Expires: *May 16, 2029*