THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM SUMTER COUNTY

Court of Common Pleas

G. Thomas Cooper, Jr., Post-conviction Relief Judge
Clifton B. Newman, Trial Judge

Case No. 2008-CP-43-1858

Reginald Tyrell Clea, #309063, ... Petitioner,

v.

State of South Carolina, ... Respondent.

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the PCR Court err in finding that petitioner was not denied effective assistance of appellate counsel, where counsel failed to appeal the trial court's refusal to charge that the inference of malice from the use of a deadly weapon is rebuttable, because of appellate counsel's mistaken belief that the charge was improper or that the issue was not preserved?

STATEMENT OF THE CASE

Petitioner was indicted and tried at the May 2005 term of Court of General Sessions for Sumter County on two counts of murder and one count of unlawfully carrying a weapon. He was acquitted on one count of murder but convicted on the other, and convicted on the unlawful weapon charge. He was sentenced to thirty years imprisonment on the murder conviction and to five years for on the unlawful weapon charge, to run concurrently. The judgment was affirmed upon appeal to the South Carolina Court of Appeals.

Petitioner's amended application for post-conviction relief dated March 18, 2009 was heard before the Honorable G. Thomas Cooper, Jr., Presiding Judge of the Third Judicial Circuit, on November 4, 2009.

By order dated February 9, 2010, post-conviction relief was denied.

Notice of appeal was timely served and filed on February 22, 2010.

ARGUMENT

Petitioner lacked the effective assistance of appellate counsel when counsel failed to contend that the trial judge's refusal to charge the jury that the inference of malice from the use of a deadly weapon is rebuttable, where appellate counsel mistakenly believed that the charge was improper or that the issue was not preserved.

A. The refusal to charge that the inference of malice from the use of a deadly weapon is rebuttable was error.

The key portion of the trial court's charge to the jury on the question of malice was as follows:

> Express malice is shown when a person speaks words which express hatred or ill will for another or when the person prepared beforehand to act — to do the act which was later accomplished, for example, lying in wait for a person or any other acts of preparation going to show that the deed was within the Defendant's mind would be express malice.
>
> Malice may be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon.

[Appdx. 829/3-12.] The juxtaposition of the last two quoted sentences led the jury to believe that there are two facts from which malice may be inferred: (1) "conduct showing a total disregard for human life"; and (2) the use of a deadly weapon. If a deadly weapon is used, malice may inferred even though the defendant exhibited no "total disregard for human life".

The court failed entirely to give the "deadly weapon" charge prescribed in *State v. Elmore,* 279 S.C. 417, 308 S.E.2d 781 (1983):

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

308 S.E.2d at 785. The Court in *Elmore* "caution[ed] the bench, that hereafter only slight deviations from this charge will be tolerated." *Id.*

Petitioner's counsel drew the court's attention to the error, in the following way:

> THE COURT: Are there any additions or exceptions to the charge?
>
> MR. SALEEBY: None from the State, your Honor.
>
> MR. CLARK: Yes, your Honor. The Defendant objects to the Court's charge on inferred malice and use of a deadly weapon. We believe that's the appropriate charge, your Honor, but we believe also when that charge is given, the Court should charge that inferred malice can be rebutted by competent evidence. And we would ask the Court to recharge the jury, include a charge that inferred malice from the use of a deadly weapon can be rebutted and also if the Court's going to give the jury written jury instructions, that that be added to the written instructions, your Honor.
>
> THE COURT: What says the State?
>
> MR. SALEEBY: I think your charge covered it.
>
> MR. CLARK: Just, if I may, we believe the way the charge is stated impermissibly shifts the burden to the Defendant, unlawfully unconstitutionally shifts the burden.

[Appdx. 837/9 – 838/3.] The court refused to modify the charge by explaining to the jury that the inference of malice was rebuttable.

In *State v. Belcher,* 385 S.C. 597, 685 S.E.2d 802 (2009), the Court abolished the charge that the use of a deadly weapon permits an inference of malice where there is evidence of self-defense, for example, as here. This was only the final act in a long succession of cases in which the Court expressed its concern with this charge and insisted

that when it is given, it must be given in a balanced way which brings home to the jury the fact that the inference "is simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case ...." *Elmore*. In other words, the inference is ***rebuttable***. This jury was not told that. This jury was told, with no limitation or elaboration, that the use of a deadly weapon is the malicious equivalent of a total disregard for human life. In *State v. Norris,* 285 S.C. 86, 328 S.E.2d 339 (1985), the Court found that "[t]he charge could not reasonably have been understood by the jury as shifting the burden of proof to [the defendant] to disprove malice or the implication of malice." Here, the opposite is true.

For more than a century pre-*Belcher,* trial judges in this State routinely cautioned juries that the inference of malice from the use of a deadly weapon is rebuttable. *See, e.g., State v. Levelle,* 34 S.C. 120, 127, 13 S.E. 319, 320 (1891), where the Supreme Court noted the truism that the inference "may be rebutted by testimony . . . ." In *State v. Byrd,* 72 S.C. 104, 110, 51 S.E. 542, 544 (1905), in reviewing the jury charge the Supreme Court affirmed that "[t]he use of a deadly weapon presumes malice, *but the presumption may be rebutted.*" [Emphasis added by the Court in quoting this passage in *State v. Belcher,* 385 S.C. 597, 685 S.E.2d 802, 804 (2009).] The trial judge instructed the jury in *State v. Koon,* 278 S.C. 528, 535, 298 S.E.2d 769 (1982), that "such presumption [of malice] is [a] rebuttable presumption . . . ." The Supreme Court observed that this instruction — explicitly characterizing the presumption as rebuttable

— "measures favorably with the [charge] we suggested" in *State v. Mattison,* 276 S.C. 235, 277 S.E.2d 598 (1981). The Court in *Mattison* felt that the charge in that case "made it clear that any presumption or inference of malice was rebuttable . . . ." 276 S.C. at 238,

277 S.E.2d at 600 (1981). As recently as 2003, a jury instruction appeared in *Gibson v. State,* 355 S.C. 429, 586 S.E.2d 119, 120 (2003), that "[t]his presumption [of malice] is also a rebuttable one." Although the word "rebuttable" is not found in the standard charge promulgated by the Court in *State v. Elmore,* 279 S.C. 417, 308 S.E.2d 781 (1983), that is the substance of the mandated language.

It was error to refuse the requested charge, as appellate counsel should have known.

B. Appellate counsel was ineffective when counsel failed to appeal the error in the charge.

1. Appellate counsel is held to the same standard as trial counsel.

A defendant is entitled to effective assistance of appellate counsel. *Southerland v. State,* 337 S.C. 610, 615, 524 S.E2d 833, 836 (1999); *Bennett v. State,* 383 S.C. 303, 309, 680 S.E.2d 273 (2009); *Evitts v. Lucey,* 469 U.S. 387, 398, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985).

> Generally, in analyzing a claim of ineffective assistance of appellate counsel, this Court applies the *Strickland* test just as it would when analyzing a claim of ineffective assistance of trial counsel. *See Southerland v. State,* 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, in this case, we ask 1) whether appellate counsel's performance was deficient, and 2) whether Respondent was prejudiced by appellate counsel's deficient performance.

Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273 (2009). *Accord: Frederick v. Warden,* 308 F.3d 192 (2d Cir. 2002); *Brinson v. Walker,* 407 F.Supp.2d 456 (W.D.N.Y. 2005); *Reed v. State,* 825 N.E.2d 911 (Ind. Ct. App. 2005). Ineffectiveness based on the failure to argue an issue on appeal is governed by the *Strickland* test. *Beamon v. United States,* 189 F.Supp.2d 350 (E.D.Va. 2002).

> The standard for a claim of ineffective assistance on direct appeal is the same as that for ineffective assistance at trial. *Matire v. Wainwright,* 811 F.2d 1430, 1435 (11th Cir.1987). That is, as required by *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the petitioner must establish that 1) his counsel's representation fell below an objective standard of reasonableness, and 2) but for the deficiency in representation, there is a reasonable probability that the result of the proceeding would have been different.

Abraham v. United States, 477 F.Supp.2d 1232, 1245 (S.D.Fla. 2007).

> A defendant is constitutionally entitled to the effective assistance of appellate counsel. *Evitts v. Lucey,* 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) (to be effective appellate counsel must give assistance of such quality as to make appellate proceedings fair); *Thrift v. State,* 302 S.C. 535, 397 S.E.2d 523 (1990) (appellate counsel must provide effective assistance but need not raise every nonfrivolous issue presented by the record). In deciding a claim of ineffective assistance of counsel, the focus is on "the fundamental fairness of the proceeding whose result is being challenged." *Strickland v. Washington,* 466 U.S. 668, 685, 696, 104 S.Ct. 2052, 2063, 2069, 80 L.Ed.2d 674, 692, 699 (1984). First, the burden of proof is upon petitioner to show that counsel's performance was deficient as measured by the standard of reasonableness under prevailing professional norms. Second, the petitioner must prove that he or she was prejudiced by such deficiency to the extent of there being a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington, supra. Accord: Smith v. State,* 309 S.C. 413, 424 S.E.2d 480 (1992).

Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999).[1]

2. *Appellate counsel's decision not to argue a preserved issue must be objectively reasonable.*

Obviously appellate counsel need not and should not argue frivolous issues, or even every non-frivolous issue:

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[1] The Oregon court has concluded that the search for a single succinctly-stated standard for appellate effectiveness applicable to every case is "a fool's errand". *Krummacher v. Gierloff,* 290 Or. 867, 627 P.2d 458 (1981).

> Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is not required to raise every nonfrivolous issue that is presented by the record." *Thrift v. State,* 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) citing *Jones v. Barnes,* 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) (emphasis supplied). "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,* 463 U.S. at 754, 103 S.Ct. 3308, *see People v. Miller,* 85 Cal.App.3d 194, 149 Cal.Rptr. 204 (1978), or issues which in counsel's judgment are meritless unless his appraisal of the merits is patently wrong, *People v. Bennett,* 36 Ill.App.3d 902 344 N.E.2d 740 (1976).

Tisdale v. State, 357 S.C. 474, 594 S.E.2d 166, 167 (2004).

In *Southerland v. State,* 337 S.C. 610, 524 S.E.2d 833 (1999), the Court cited with approval the case of *People v. Griffin,* 178 Ill.2d 65, 227 Ill.Dec. 338, 687 N.E.2d 820 (1997), for the proposition that a defendant who contends appellate counsel rendered ineffective assistance by failing to argue an issue must show that failure to raise the issue was *objectively unreasonable*. [Emphasis added.] It is not enough for counsel to say that he considered the issue but decided for tactical reasons not to argue it. The standard is an objective one. *See: Griffin v. Warden,* 277 S.C. 288, 286 S.E.2d 145, 148 (1982) ("the decision to exclude certain exceptions was deliberate, strategic tactics.").

The issue which appellate counsel failed to argue here was neither frivolous nor "patently wrong". On the contrary, it was meritorious. Appellate counsel's decision not to present the issue was not a "deliberate, strategic tactic[]," *Griffin v. Warden, supra,* but was based upon the mistaken belief that the requested charge was improper or that the issue was not preserved.

3. *Appellate counsel's decision not to argue that the failure to charge was reversible error was not a tactical decision based upon counsel's judgment in selecting the strongest issues. It was based upon appellate counsel's mistaken belief that the requested charge was*

improper or that the issue was not preserved.

Appellate counsel in the case at bar did not testify that his failure to appeal the refusal to charge rebuttability was because of the need to winnow a variety of issues into a manageable few. On the contrary, there were only two possible issues: the refusal to charge manslaughter and the refusal to charge rebuttability. This is not a case where appellate counsel strategically chose to focus upon a few issues rather than to bury the good issues in a sea of probable losers. The focus and strength of the appeal would have lost nothing if both issues had been briefed. It is often said that ineffectiveness is shown where counsel omitted obvious and strong issues while pursuing significantly weaker issues. *See, e.g., Moultrie v. United States,* 147 F.Supp.2d 405 (D.S.C. 2001) (per Blatt, J.). But this is not a case where counsel had to search for the strongest issues and jettison the ones deemed weaker to avoid watering-down the better issues. There were only two possible issues, and no good reason to leave one of them out. The decision not to appeal the refusal to charge rebuttability was not "a reasonable tactical move," *McClure v. Kemp,* 285 Ga. 801, 684 S.E.2d 255 (2009). It was not a tactical move at all. It was purely the result of counsel's mistaken belief either that the requested charge was improper or that the issue was not preserved. [Appnx. 48/11 – 51/4; 51/14 – 55/15; 56/9–23; 57/1 – 58/17; 64/18 – 65/4; 70/17 – 71/3.] Counsel was wrong on both counts.

Certainly, appellate counsel is not ineffective when counsel declines to raise on appeal an issue that was not preserved for review. *Legge v. State,* 349 S.C. 222, 562 S.E.2d 618 (2002). The test of whether an issue regarding the trial court's failure to charge has been properly preserved for appellate review was set forth in *Gilchrist v. State,* 365 S.C. 173, 612 S.E.2d 702 (2005). "[T]rial counsel's submission of [a]request to charge, without any further explanation of his point, [is] insufficient to preserve for review the trial

court's failure to charge the specific language [requested]." On the other hand:

> In *State v. Johnson,* 333 S.C. 62, 66, 508 S.E.2d 29, 31 (1998), we set out this preservation rule: "[W]here a party requests a jury charge and, after opportunity for discussion, the trial judge declines the charge, it is unnecessary to preserve the point on appeal, to renew the request at conclusion of the court's instructions." When given the opportunity, counsel must articulate a reason for the requested charge. Counsel need not object to the charge when given if the basis of the requested charge is clear from the record. It is not for the trial judge to study the requested charge and make an informed decision with no further input from counsel, especially in a situation such as this where there is only a subtle difference in the language of the judge's proposed charge and the language of the request.

612 S.E.2d at 705. Under the test announced in *Johnson* and reaffirmed in *Gilchrist,* the issue was properly preserved, and appellate counsel was mistaken in concluding that it was not. Unlike the case in *Patrick v. State,* 349 S.C. 203, 562 S.E.2d 609 (2002), where the PCR court found that the issue "had been properly raised and preserved by trial counsel", *id.* at 611, here the PCR court erroneously found that the issue was not preserved. Appellate counsel confused the basic malice charge as given with the "rebuttability" charge as requested and refused. Appellate counsel rightly concluded that there was no basis to appeal the charge, as given, that an inference of malice may arise from the use of a deadly weapon because trial counsel conceded that such a charge was "appropriate". In other words, a *Belcher*-type attack on the whole charge of malice from the use of a deadly weapon was not possible. But appellate counsel overlooked the fact that the refusal to charge that the inference of malice is rebuttable was duly preserved. Unlike the facts of *Tisdale v. State,* 357 S.C. 474, 594 S.E.2d 166, 167 (2004), where "Appellate Counsel testified during the PCR Hearing that she made a tactical decision to raise only two preserved issues on appeal . . .," the only reason offered by appellate

counsel in the case at bar for his failure to raise the issue in question was belief that it was not preserved. This is not a case where appellate counsel "select[ed] among [the nonfrivolous issues] in order to maximize the likelihood of a favorable outcome. *Smith v. Robbins,* 528 U.S. 259, 288, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000)." *Bennett v. State,* 383 S.C. 303, 309, 680 S.E.2d 273 (2009). Counsel mistakenly thought that the issue was not preserved, and mistakenly thought that the requested charge was improper. Appellate counsel's representation was therefore deficient.

C. The failure to charge was prejudicial.

> In order to prove that he was prejudiced by his counsel's deficiency, an applicant must show that " there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry v. State,* 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." *Johnson v. State,* 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

Bennett v. State, 383 S.C. 303, 308 n.4, 680 S.E.2d 273 (2009).

The failure to instruct the jury in so many words that the inference is rebuttable cannot be considered harmless error. Petitioner's defense was self-defense. He was acquitted on one murder charge but convicted on the other, where the shootings occurred in quick succession. As in *Belcher,* "[i]t is entirely conceivable that the only evidence of malice was [petitioner's] use of a handgun." 685 S.E.2d at 806. In *State v. Norris,* 285 S.C. 86, 328 S.E.2d 339 (1985), the Court found that "[t]he charge could not reasonably have been understood by the jury as shifting the burden of proof to [the defendant] to disprove malice or the implication of malice." Here, the opposite is true. It is entirely likely that the jury understood that the use of a deadly weapon compelled the inference of malice.

Much of what the Court held in *Southerland v. State,* 337 S.C. 610, 524 S.E.2d 833 (1999), is closely in point here and bears quoting at length:

> Here, the first element of *Strickland* is clearly met as the case law of this state is to the effect that an *Atkins* plain meaning charge is mandatory, if requested, and that the failure to give such a charge is reversible error. Accordingly, counsel was deficient in failing to raise this issue. The PCR court held, however, that Southerland failed to demonstrate prejudice. We disagree.
>
> The standard established by *Strickland* is that the defendant must establish by a reasonable probability that the result of the proceeding would have been different. *Strickland, supra; Evitts v. Lucey, supra; Smith v. State,* 309 S.C. 413, 424 S.E.2d 480, 481 (1992) (petitioner must prove there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). *See also People v. Griffin,* 178 Ill.2d 65, 227 Ill. Dec. 338, 687 N.E.2d 820 (defendant who contends appellate counsel rendered ineffective assistance, *e.g.,* by failing to argue issue, must show that failure to raise issue was objectively unreasonable and that, but for this failure, defendant's conviction or sentence would have reversed).

The petitioner need not prove that he would have won his appeal, had counsel been effective. He only need show that an omitted issue had a reasonable probability of success on appeal.

> The standard established by *Strickland* is that the defendant must establish by a reasonable probability that the result of the proceeding would have been different. *Strickland, supra; Evitts v. Lucey, supra; Smith v. State,* 309 S.C. 413, 424 S.E.2d 480, 481 (1992) (petitioner must prove there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). *Accord: Lader v. Warden,* 120 P.3d 1164 (Nev. 2005); *State v. Moore,* 93 Ohio St.3d 537, 751 N.E.2d 1040 (2001).

CONCLUSION

Even before the implied malice charge at issue here was abolished by this Court in the *Belcher* case, the Court had blunted the charge by requiring that the rebuttability of the inference of malice be made clear. When it promulgated a balanced version of this charge, the Court emphasized that "only slight deviations from this charge will be tolerated". *Elmore.* Here, the necessary explanation of how the inference may be dissipated was entirely omitted. The petitioner's objection was duly preserved. Appellate counsel's failure to present the issue because he thought it wrong or unpreserved was objectively unreasonable and was prejudicial.

For these reasons, petitioner asks the court to grant the writ.

Respectfully submitted,

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March 7, 2011.

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IN THE SUPREME COURT

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S.C. Supreme Court

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CERTIFICATE OF SERVICE

I certify that I served one copy of the petition for a writ of certiorari and one copy of the accompanying appendix by first class mail, postage prepaid, addressed to respondent's attorney at her address of record, namely:

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