

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Honorable William H. Seals, Circuit Court Judge

RECEIVED
OCT 24 2018
S.C. SUPREME COURT

RICHARD B. NILES, JR.

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2018-000396

MOTION FOR APPOINTMENT
OF OUTSIDE COUNSEL

Undersigned counsel respectfully moves this Court for the appointment of outside counsel for petitioner, Ricard B. Niles, Jr., based on a conflict of interest or the appearance of a conflict of interest should this Court in its sound discretion find that relief proper under the circumstances. In support of this motion, the undersigned would show this Court:

(1) Petitioner was indicted by an Horry County Grand Jury on August 23, 2007, for the offense of Murder (2007-GS-26-3363). Petitioner was also indicted by an Horry County Grand Jury on October 30, 2008, for the offenses of Armed Robbery (2008-GS-26-4117), and Possession of a Weapon During the Commission of a Violent Crime (2008-GS-26-4116).

(2) Petitioner's case was tried from March 9 – 13, 2009, before the Honorable Benjamin H. Culbertson, and a jury. Verdell Barr represented petitioner. At the conclusion of the trial petitioner was convicted as indicted and Judge Culbertson sentenced petitioner to imprisonment for thirty years for Murder, thirty years for Armed Robbery, and five years for Possession of a Weapon During the Commission of a Violent Crime.

(3) Petitioner was represented on direct appeal by Chief Appellate Defender Robert M. Dudek and Reid T. Sherard of Nelson Mullins Riley & Scarborough, LLP. The South Carolina Court of Appeals reversed petitioner's convictions. After rehearing, the Court of Appeals withdrew its prior opinion and issued a substituted opinion reversing and remanding petitioner's murder conviction in *State v. Richard Bill Niles, Jr.*, 400 S.C. 527, 735 S.E.2d 240 (2012). This Court granted the state's petition for writ of certiorari and reversed the South Carolina Court of Appeals. After rehearing, this Court withdrew its prior opinion and issued a substituted opinion reversing the Court of Appeals in *State v. Richard Bill Niles, Jr.*, 412 S.C. 515, 772 S.E.2d 877 (2015).

(4) Petitioner filed an application for post-conviction relief in the Horry County Court of Common Pleas on February 24, 2016. Petitioner raised various grounds of ineffective assistance of trial counsel, and he did raise two grounds of ineffective assistance of appellate counsel. Chief Appellate Defender Robert M. Dudek **did** testify during the post-conviction relief hearing before the Honorable William H. Seals, Jr., on November 27, 2017. James K. Falk represented petitioner at that PCR hearing. The PCR judge did address the two grounds of ineffective assistance of appellate counsel, and found Mr. Dudek was not ineffective. Order of dismissal at 12-13. *See* Exhibit A.

(5) Undersigned counsel works at the Office of Appellate Defense and is supervised by Chief Appellate Defender Robert M. Dudek. It is the practice of undersigned counsel to discuss cases with Mr. Dudek before they are filed. Undersigned counsel was preparing to talk with Mr.

Dudek today, October 24, 2018, about this case as usual, and given that Mr. Dudek was a target of PCR allegations it was suggested that undersigned counsel make this motion due to a potential appearance of a conflict of interest issue.

(6) Allegations of ineffective assistance of appellate counsel were preserved for appellate review. In this case, appellate counsel is Mr. Dudek, undersigned counsel's supervisor. In light of the allegation of ineffective assistance being against Mr. Dudek, the person who reviews and approves undersigned counsel's work, counsel is concerned about the appearance of a conflict of interest. Undersigned counsel's concern is derived from Rule 1.7(a)(2), RPC, Rule 407, SCACR and from Comment 8 to Rule 1.7.

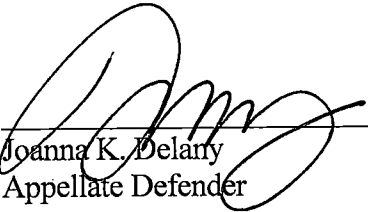
(7) The appendix in this case has been completed, reviewed, and undersigned counsel is aware of the possible issues that could be raised on certiorari to this Court.

(8) The petition for writ of certiorari is due to be filed on October 29, 2018, and under any ordinary circumstances should have been filed that day. **This motion is not made for purposes of delay.** The undersigned counsel can file this petition for writ of certiorari in a timely manner. However, out of an abundance of caution, because the representation of Chief Appellate Defender Robert M. Dudek was addressed in the Order of Dismissal, and Mr. Dudek testified at the PCR hearing and was found not to be ineffective, undersigned counsel makes the present motion, and leaves the matter to the sound discretion of this Court.

Wherefore, undersigned counsel requests that this Court appoint outside counsel for petitioner if, in the discretion of this Court, it finds outside counsel is warranted given the above information. Undersigned counsel also requests that this Court hold the timelines for filing the petition for writ of certiorari, and the appendix, in abeyance pending a ruling on this motion. If this

motion is denied, undersigned counsel respectfully requests an additional fifteen days to file the petition for writ of certiorari and the appendix.

Respectfully submitted,



Joanna K. Delany
Appellate Defender

Attorney for Petitioner

This 24th day of October, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Honorable William H. Seals, Circuit Court Judge

RICHARD B. NILES, JR.

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Motion for Appointment of Outside Counsel in the above referenced case has been served upon opposing counsel, Johnny Ellis James, Jr., Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Richard Bill Niles, Jr., #333708, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 24th day of October, 2018.



Joanna K. Delany
Appellate Defender

Attorney for Petitioner

SUBSCRIBED AND SWORN TO before me
this 24th day of October, 2018.

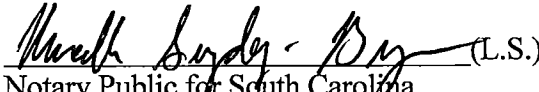
 (L.S.)
Notary Public for South Carolina
My Commission Expires: July 26, 2028.

Exhibit A

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTEENTH JUDICIAL CIRCUIT
)

Richard B. Niles, Jr.,
S.C.D.C. No. 333708,

) Case No.: 2016-CP-26-01258
)

Applicant,

) **ORDER OF DISMISSAL**
)

v.

State of South Carolina,

Respondent.

HORRY COUNTY
2018 FEB 13 PM 12:47
RENEE H. ELLIS
CLERK OF COURT
HORRY COUNTY, SC

This matter comes before the Court by way of an application for post-conviction relief filed by Richard B. Niles, Jr. ("Applicant") on February 24, 2016. Respondent made its return on or about February 16, 2017. The Court convened an evidentiary hearing into the matter on Monday, November 27, 2017, at the Horry County Courthouse in Conway, South Carolina. Applicant was present at the hearing and represented by James K. Falk, Esquire. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's appellate counsel, Robert M. Dudek, Esquire ("Counsel") also testified by telephone with the consent of the parties and this Court.¹ The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the August 2007

¹ Applicant's trial counsel, Verdell Barr, Esquire, was deceased at the time of the evidentiary hearing.

term of the Horry County Grand Jury for murder (2007-GS-26-03363). Applicant was further indicted at the October 2008 term for possession of a weapon during the commission of a violent crime (2008-GS-26-4116), and armed robbery (2008-GS-26-4117). Verdell Bar, Esquire represented Applicant. Donna Elder and Bradley C. Richardson, each of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On March 9, 2009, Applicant proceeded to trial before the Honorable Benjamin H. Culbertson and a jury. The jury found Applicant guilty as indicted on March 13, 2009. Judge Culbertson sentenced Applicant to imprisonment for concurrent terms of 30 years for murder, 30 years for armed robbery, and 5 years for possession of a weapon during the commission of a violent crime.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Robert M. Dudek, Esquire, who raised the following issue:

Whether the court erred by refusing to charge voluntary manslaughter based on evidence appellant was shot at and returned fire where the court incorrectly reasoned that Appellant was either acting in self-defense or shot the decedent during the commission of an armed robbery since voluntary manslaughter and self-defense are not mutually exclusive?

The parties proceeded to oral arguments on February 14, 2012. Mr. Dudek and Reid T. Sherard, Esquire, represented Applicant. Brendan J. McDonald, of the South Carolina Attorney General's Office, appeared for the State. By opinion decided September 12, 2012, and substituted November 14, 2012, the South Carolina Court of Appeals reversed Applicant's convictions, finding the circuit court erred in refusing to charge the jury on voluntary manslaughter. State v. Niles, 400 S.C. 527, 735 S.E.2d 240 (Ct. App. 2012). The State petitioned the Supreme Court of South Carolina for a writ of certiorari, which was granted by order dated February 6, 2014. The parties proceeded to oral arguments in the Supreme Court on June 25, 2014, with the same attorneys appearing. By opinion decided March 25, 2015, and substituted June 10, 2015, the

Supreme Court reversed the Court of Appeals, finding the evidence did not warrant a voluntary manslaughter charge. State v. Niles, 412 S.C. 515, 772 S.E.2d 877 (2015). The Remittitur was issued on June 10, 2015.

Present Application

In his post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons:

1. Ineffective Assistance of Trial Counsel, in that:
 - a. "Trial counsel ineffective for failing to object to the solicitor's improper closing."
 - b. "Trial counsel ineffective for failing to object to the prosecution's improper bolstering that resulted in impermissible vouching for a State's witness."
 - c. "Trial counsel ineffective for failing to object to the prosecution introducing void indictments to the trial court."
 - d. "Trial counsel ineffective for not objecting to the trial court's inadequate response to the jury's question."
2. Ineffective Assistance of Appellate Counsel, in that:
 - a. "Appellate counsel ineffective for failing to argue that 'trial court erred in charging the jury that it may infer malice from the use of a deadly weapon.'"
 - b. "Appellate counsel was ineffective failing to raise the issue that 'trial court erred in not properly answering the jury's questions.'"

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Trial Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she 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.” Butler at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

“[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Butler at 442, 334 S.E.2d 441 (quoting Strickland at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). “Judicial scrutiny of counsel’s performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel’s assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” Strickland, 466 U.S. at 689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). “[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel’s performance was deficient. Under this

prong, attorney performance is measured by its "reasonableness under professional norms." Cherry at 117, 386 S.E.2d at 625 (citing Strickland at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry at 117-18, 386 S.E.2d at 625 (citing Strickland at 694).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 696-97.

1. Failure to Object to Golden Rule Argument

Applicant argues Counsel was ineffective for failing to object to alleged "golden rule" arguments made by the State in its closing argument. On review, the solicitor's argument must be reviewed in the context of the entire record. State v. Reese, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006) (citing State v. Copeland, 378 S.C. 572, 300 S.E.2d 63 (1982)). "A solicitor's argument must be carefully tailored not to appeal to the personal biases of the jury." Id. (citing Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2004)). "The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." Id.; see also State v. White, 246 S.C. 502, 144 S.E.2d 481 (1965) (granting a new trial where the solicitor explicitly called upon jurors to imagine their wives or daughters as the victim); State v. McDaniel, 320 S.C. 33, 462 S.E.2d 882 (Ct. App. 1995) (reversing where the solicitor used 'you' some 45 times in

addressing the jury, placing them in the position of the victim). Improper comments in closing, including a “golden rule” argument, do not automatically require reversal if they are not prejudicial to the defendant, and Applicant has the burden of proving he did not receive a fair trial because of the alleged improper comment. Brown v. State, 383 S.C. 506, 516, 680 S.E.2d 909, 915 (2009) (citing Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002)). “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.

At trial, Applicant argued that he fired at the victim, James Salter, in self-defense after a drug deal turned sour between the victim and Ervin Moore, a co-conspirator who testified against Applicant at trial, and the victim opened fire. Tr. 636-43. During the State’s closing argument at trial, the solicitor on occasion utilized a degree of second-person tense while retelling the story of the crime:

What do they see? They see a heavysset black male running, jumping from that Mustang over to the Ford Fusion, not a tiny little fellow like Ervin Moore. You saw him. He’s a tiny thing but a heavysset black male. Mr. Niles is a good bit bigger than Mr. Moore. What else does Mr. Watts see? He sees a black female driving. That’s Mokeia Hammond. Once again by everybody’s testimony she’s driving. When that car hops the curb, curb over in Logan’s Roadhouse Mr. Watts is close. What does he get a view of? He sees two individuals in that car. Like Ervin Moore told you he’s down in the floorboard covering that eye saying, “What did you do?” He sees a heavysset black male in the back. It’s happening fast. All you can tell is it’s a heavysset black male. Once again, not a tiny guy like Ervine Moore but a big old fellow with black female driver.

Tr. 674-75. The State later argued to the jury the supposed reasoning of the deceased victim:

. . . folks, I submit to you when *you* get shot, uh, it takes a second to recover even with adrenaline. *You* pull your weapon and *you* see the Defendant Niles jumping in that backseat. Where are *you* going to shoot first? Back towards *your* attacker, the man who’s killed you, given *you* the mortal wound; and so, James reaches back, bam, first shot strikes the upper doorpost and fragments, bam, he blows out the window, glass is going everywhere, cuts Ervin Moore, cuts Richard Niles,

cuts Mokeia Hammond, they start to take off. Those two shell casings are down. Bam, bam, bam, he's shooting the car as it's pulling out. He's trying to get some manner of defense. He's working on adrenaline. He's trying to fight back. Folks, we know that's about how it happened because where the shell casings are. The last shot I believe he even shoots off his rearview mirror. He's going into shock already and he drives out.

Tr. 678-79 (emphasis added).

The Court finds no deficiency or prejudice from Counsel's lack of objection. At first blush, the second excerpt of the State's closing would appear to fall into the same error as that addressed in McDaniel, insofar as the State repeatedly referred to the jury in the second-person. However, read in the scope of the closing argument as a whole, it appears to this Court that the State's argument was not intended to place the jury into the position of the defendant, but rather to explain the reasoning of the deceased that would be consistent with the ballistics evidence introduced at trial. Furthermore, to the extent that Counsel could have or should have objected, this Court finds that the State's fleeting, arguably inarticulate use of "you" in five instances, italicized above, does not come close to the 45 instances in McDaniel and does not otherwise rise to the level of unfairness so as to make the trial a denial of due process.

Finally, any conceivable error would have been harmless. To quote the Supreme Court's consideration of the case:

We note further that it was undisputed that Niles, Hammond, and Moore met the victim in the parking lot to rob the victim during the drug transaction. Niles further admitted that Moore and Hammond were unarmed, and that he fired the fatal shots, killing the victim. Thus, the scheme to rob the victim, coupled with Niles's [sic] decision to arrive at the scene armed with a deadly weapon, discounts any claim that Niles in any way act in a sudden heat of passion. Rather, Niles clearly planned for the possibility that he might have to discharge his weapon to accomplish the robbery, and did in fact kill the victim. These salient facts cannot be ignored.

Niles, 412 S.C. at 523, 772 S.E.2d at 881. This Court agrees. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

2. – Failure to Object to Improper Bolstering

Applicant argues Counsel was ineffective for failing to object to the State's alleged bolstering of co-conspirator witness Ervin Moore. "A prosecutor cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness." State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001) (citing Elmer v. Maryland, 353 Md. 1, 724 A.2d 625 (1999)). "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." Id. (citing State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001)). "Vouching occurs when a prosecutor implies he has facts that are not before the jury for their consideration." Id. (citing Missouri v. Wolfe, 13 S.W.3d 248 (Mo. 2000)). "A witness' testimony concerning a plea agreement with the prosecution does not necessarily constitute improper vouching." Id.

At trial, on redirect, the State questioned Moore on his written agreement to testify:

Q: Okay, you just know we came out there to talk to you Sunday?

A: Yes, ma'am, and I was happy.

Q: Okay, and the statements that we went over before and your testimony ---

A: Yes, ma'am.

Q: --- you signed a written agreement with us about your deal here today; right?

A: Yes, ma'am.

Q: Part of that written agreement it deals with what happens if you get on the stand and lie; doesn't it?

A: Yes, ma'am.

Q: And if you get up on the stand and you lie what happens to that agreement?

A: It ain't no good.

Q: It goes out the window?

A: Yes, ma'am.

Q: And what you facing?

A: Thirty.

Q: Facing murder, aren't you?

A: Yes ma'am.

Tr. 450-51.

Shuler is dispositive as to this allegation—the above quoted testimony is simply not objectionable. The State was well within its rights to question Moore regarding the terms of his plea agreement, including its provision regarding the need for truthfulness, so long as the solicitor did not personally state or otherwise imply her personal opinion or outside knowledge to the jury. Since she did not, Counsel was not deficient in failing to object, and Applicant's request for relief by way of this allegation is **DENIED**.

3. – Failure to Object to Void Indictments

Applicant argues Counsel was ineffective for failing to object to and challenge the indictments against him. "The indictment is a notice document." State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005). "A challenge to the indictment on the ground of insufficiency must be made before the jury is sworn[.]" Id. Where a timely objection is made, the court must judge an indictment by determining whether "(1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to

know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is to be charged." Id.; see also S.C. Code Ann. § 17-29-20, -30.

No testimony was taken on this allegation. Applicant clearly had notice of the charges, determined how to plead, and was apprised of the elements of the offenses contained therein. The Court finds no deficiency on the part of counsel, nor can it conceive of any possible prejudice that would amount therefrom. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

4. – Failure to Object to Court's Response to Jury Questions

Applicant argues Counsel was ineffective for failing to demand the Court provide greater clarification to the jury in response to the questions sent out during deliberations.

At trial, the jury sent out, among others, a note inquiring: "Can the Defendant be found guilty of murder and not guilty of armed robbery?" Tr. 717, ll. 8-9. Discussing how to answer the question, Counsel argued that Applicant could not be found guilty of murder if he was found not guilty of armed robbery. Tr. 718-19. Judge Culbertson determined the appropriate response was to refer the jury to the written copy of his jury instructions—specifically those sections regarding murder and the jury's verdict. Tr. 719, ll. 18-21. Counsel again voiced that though there was certainly no issue of law to suggest both murder and armed robbery had to be proven together, the particular facts of the case required such a finding. Tr. 720-21. Judge Culbertson declined to respond in detail but conservatively directed the jury's attention to sections of the written copy of jury instructions regarding murder and the jury verdict. Tr. 721, ll. 14-17. Counsel preserved his objection. Tr. 721-222.

The record reflects that Counsel asked for a more specific answer from the Court and the Court declined the request. As such, Applicant's allegation that he failed to do so is factually without merit. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

B. Ineffective Assistance of Appellate Counsel

A defendant is also constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). "However, 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 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (quoting Jones v. Barnes, 463 U.S. 745, 754 (1983) ("For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would dissuade the very goal of vigorous and effective advocacy . . .")).

Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Smith v. Robbins, 528 U.S. 259, 288 (2000) (citing Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

1. Failure to Argue Against Instruction on Inference from Use of Deadly Weapon

Applicant argues Appellate Counsel was ineffective for failing to argue that the Court erred by instructing the jury that it could infer malice from the use of a deadly weapon, despite Applicant's argument for self-defense. Under today's law, where evidence is presented that would reduce, mitigate, excuse, or justify a homicide or attempted homicide 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. State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). However, the Court recognized the case was a "clear break from our modern precedent," and held the new holding was effective only prospectively and in pending appeals where the issue was preserved. Id., 385 S.C. at 612, 685 S.E.2d at 810. Prior to the October 2009 ruling, the charge that malice may be inferred from the use of a deadly weapon was proper even where evidence was presented that would reduce, mitigate, excuse or justify the killing. Id., 385 S.C. at 608, 685 S.E.2d at 807.

At the March 2009 trial, as already noted, Applicant proceeded with a strategy of arguing self-defense. During the charge conference, counsel for co-defendant Hammond, in a moment of notable foresight, initially argued that the instruction regarding inferring malice from the use of a deadly weapon amounted to impermissible burden shifting under Sandstrom v. Montana, 442 U.S. 510 (1979). Tr. 624-25; see also Belcher, 385 S.C. at 608, 685 S.E.2d at 807-08 (touching on Sandstrom in its review of jurisprudential history on the matter). Counsel did not join in the co-defendant's motion. After an overnight break, counsel for the co-defendant withdrew his objection, finding that he was thinking of Lowry v. State, 376 S.C. 499, 657 S.E.2d 760 (2008), which cited to Sandstrom and only prohibited a presumption, whereas the instruction merely permitted the jury to draw an inference. Tr. 632, ll. 2-17. Judge Culbertson charged the jury that

"[i]nferred malice may also arise when the deed is done with a deadly weapon." Tr. 694, ll. 7-8. Appellate Counsel did not raise the issue on appeal.

Appellate Counsel testified the case was pending when Belcher came down, noted that Counsel did not take exception at trial, and that he would have argued Belcher had the issue been preserved for appeal.

Applicant argues Appellate Counsel should have argued against the instruction permitting an inference of malice from the use of a deadly weapon, if only because co-defendant's counsel initially made something similar to that argument at the charging conference. This allegation is without merit as a matter of law—Belcher is explicitly prospective, not retrospective, and the issue was not preserved for appeal. Nor could counsel be said to have been ineffective for failing to object and preserve the issue, as doing so would have been contrary to long-standing law and demanded substantial clairvoyance on his part. The Court finds no deficiency on the part of Appellate Counsel, nor prejudice therefrom, and accordingly Applicant's request for relief by way of this allegation is **DENIED**.

2. Failure to Argue Error in the Court's Responses to Jury Questions

Applicant alleges in his application that Appellate Counsel should have raised the issue of the Court's response to the jury questions (addressed in II.A.4, above) on appeal. Applicant did not argue this allegation at the hearing. In any event, appellate counsel is not required to raise every non-frivolous issue. Based upon its own review of the record, as well as evidenced by the initial vacation of the conviction by the Court of Appeals, this Court finds Appellate Counsel raised a substantially stronger issue on appeal—the Court was well within its discretion to simply direct the jury's attention back to portions of its written instructions. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

III. CONCLUSION


Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 5 day of Feb., 2018.


WILLIAM H. SEALS, JR.
Presiding Judge
Fifteenth Judicial Circuit


_____, South Carolina



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

October 24, 2018

RECEIVED

OCT 24 2018

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
PO Box 11330
Columbia, SC 29211

Re: Richard B. Niles, Jr. v. State of South Carolina

Dear Mr. Shearouse:

Enclosed are an original and six copies of the Motion for Appointment of Outside Counsel in the above-captioned case. Thank you for your assistance in this matter.

Sincerely,

Joanna K. Delany
Appellate Defender

JKD/cs

Enclosure

cc: Johnny James, Esquire
Mr. Richard B. Niles