STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO HORRY COUNTY
WILLIAM H. SEALS, Jr, CIRCUIT COURT JUDGE

RICHARD B. NILES , Jr.

PETITIONER ,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT,

APPELLATE CASE NO. 2018-000396

PETITION FOR WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

ISSUES PRESENTED

I.

Did the PCR court err in failing to find trial counsel ineffective for not objecting when the State bolstered the testimony of a co-defendant of Petitioner testified in exchange to a plea to a lesser charge?

II.

Did the PCR court err in failing to find trial counsel was ineffective in failing to object to the trial court's response to an inquiry from the jury about whether Petitioner could be convicted of armed robbery if doubt existed regarding his actual knowledge of the robbery prior to its occurrence?

STATEMENT OF THE CASE

Petitioner was indicted at the August 2007 term of the Horry County Grand Jury for murder (2007-GS-26-03363). (R. p. 1020). Petitioner was further indicted at the October 2008 term for possession of a weapon during the commission of a violent crime (2008-GS-26-41 16), and armed robbery (2008-GS-26-41 17). (R. pp. 1016- 1019). On March 9, 2009, Petitioner and his co-defendant Mokeia Hammond proceeded to trial before the Honorable Benjamin II. Culbertson and a jury. Verdell Bar, Esquire appeared on behalf of Petitioner and Ron Hazzard, Esquire appeared on behalf of codefendant Hammond. The State of South Carolina was represented by Donna Elder, Esquire and Bradley C Richardson, Esquire each of the Fifteenth Circuit Solicitor's Office. (R. p. 1). The jury found Petitioner guilty as indicted on March 13, 2009. (R. p. 741). Judge Culbertson sentenced Petitioner 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. (R. pp. 1022- 1024).

Direct Appeal

Petitioner 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 Petitioner. 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 Petitioner'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.

Post-Conviction Relief hearing

Petitioner filed a timely notice for post-conviction relief (PCR) in the Horry County Court of Common Pleas. Petitioner alleged ineffective assistance of both trial counsel and appellate counsel. Specifically Petitioner alleged that trial counsel provided ineffective assistance of counsel by: failing to object to the solicitor's improper closing (R. pp. 948- 950); failing to object to the State's improper bolstering of its witnesses (R. pp. 951- 952); failing to object the prosecution introducing void indictments to the trial court (R. pp. 958 – 959); failing to object to the trial court's inadequate response to the jury's question (R. pp. 956- 957). Petitioner alleged that appellate counsel provided ineffective assistance by failing to raise on appeal whether the trial court erred in charging the jury that it could infer malice from the use of a deadly weapon (R. pp. 953-956); and, failing to raise on appeal whether the trial court erred in not properly answering the jury's question (R. pp. 956 – 957) .

An evidentiary hearing on Petitioner's PCR application was held before the Honorable

William H. Seals, Jr on November 27, 2017 in the Horry County Courthouse. James Falk, Esquire appeared on behalf of Petitioner and Johnny Ellis James, Jr, Esquire of the South Carolina Attorney General's office appeared on behalf of the State. Robert Dudek of the South Carolina Commission for Indigent Defense testified at the hearing via telephone. (R. p. 976 1ine 9). Petitioner's trial counsel, Verdell Barr, was deceased and the State did not call a witness to testify in his stead. (R. p. 973 line 22 -974 line 8). The parties agreed that the State would not try and assert that any of trial counsel's decisions were supported by a viable trial strategy. (R. p. 974 1ines 9– 12).

At the evidentiary hearing PCR counsel raised the following issues: 1.) Trial counsel was ineffective for failing to object to the State's use of the golden rule argument in its closing. (R. p. 971 line 23 – 972 1ine 3); 2.) Trial counsel was ineffective for failing to object to the State's bolstering of its own witnesses. (R. p. 972 1ines 4-9); 3.) Trial counsel was ineffective for failing to object to the Court's inferred malice instruction. (R. p. 992 lines 5-8); and, 4.). Trial counsel failed to properly handle some of the Court's responses to the jury's questions (R. p. 973 lines 11-14). Appellate counsel was ineffective for failing to raise on appeal whether the trial court erred in charging the inferred malice instruction. (R. p. 972 line 22 -973 1ine 3).

Order denying relief

On February 5, 2018, Judge Seals signed an Order of Dismissal therein denying Petitioner's claims of ineffective assistance of trial counsel and ineffective assistance of appellate counsel in the case.

Petitioner appealed, This Petition follows.

ARGUMENT

I. The PCR court err in failing to find trial counsel ineffective for not objecting when the State bolstered the testimony of a co-defendant of Petitioner testified in exchange to a plea to a lesser charge.

Right to effective assistance of counsel

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. U.S. Const. amend. VI. To prove ineffective assistance of counsel, Petitioner must establish that counsel's representation fell below an objective standard of reasonableness, and that counsel's deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U. S. at 686. To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-688. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. at 688. Concerning prejudice, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

Improper Witness Bolstering

PCR counsel argued that during the examination of Ervin Moore the State improperly bolstered the Mr. Moore's credibility. Initially Ervin Moore was a co-defendant of Mokeia Hammond and Petitioner. (R. p. 391 1ines 23- 24). On the Monday of the week of Petitioner's trial, Moore plead guilty to "manslaughter and robbery and gun possession." (R. p. 391 lines 17 – 22). In exchange for the State's offer to allow Moore to plead to a lesser offense, Moore agreed to testify against petitioner. (R. p. 392 1ines 11- 15). During its direct examination the State asked Moore: Part of the agreement did that include you being here today to testify to the truth? (R. p. 392 lines 19 -20). Then during the State's redirect examination the following colloquy to place.

> 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 are you facing? A: Thirty
>
> Q: Facing murder, aren't you?
>
> A. Yes Ma'am. (R. p. 465 line 20 - 466 line. 9).

A similar colloquy took place in the capital murder case State v Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001), reversed and remanded on other grounds, Kelly v. South Carolina, 534 U.S. 246, 122 S.Ct. 726 (2002). At Kelly's trial the assistant solicitor asked a jailhouse informant: "what

did I tell you that I absolutely required regarding your testimony to this jury today? ...Did I tell you to tell the truth to the jury? Id 343 S.C. at 368. Defense counsel objected stating that the assistant solicitor was bolstering the witness's testimony and was making himself a witness. Id. The court overruled the objection and Kelly raised this issue on appeal. In addressing this issue the Court in Kelly looked to the Third Circuit's opinion in United State v Walker, 155 F.3d 180 (3d Cir 1998). The Third Circuit in Walker stated:

> Vouching constitutes an assurance by the prosecuting attorney of the credibility of a Government witness through personal knowledge or by other information outside of the testimony before the jury .... A prosecutor's vouching for the credibility of a government witness raises two concerns: (1) such comments can convey the impression that evidence not presented to the jury but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury ;and (2) the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence. Id. 343 S.C. at 368.

The South Carolina Supreme Court in Kelly held that the solicitor's questioning improperly bolstered the jailhouse informant's credibility. The Kelly Court noted that although the solicitor's questioning may not have been technically vouching, the solicitor's questioning raises the second concern outlined by the Walker Court: the jury could have perceived that the assistant solicitor held the opinion that [the jailhouse informant] was, in fact, telling the truth. Id at 369.

The testimony of Earvin Moore was highly prejudicial to Petitioner because he placed Petitioner at the scene for the purpose of robbing decedent and saw Petitioner fire shots at the decedent. Moore testified that he went with Petitioner and co-defendant Moekia Hammond to the beach, and we they got to the beach Petitioner made drug sales at a couple motels (R p. 394 lines 22-23); and Petitioner told him that they were going to the Best Buy

parking lot because he was going to do a lick (R. p. 395 lines 19- 25); he saw Petitioner walk toward the decedent's car (R. p. 398 lines 20 – 23); he heard two shots fired and then saw Petitioner jump back into the car. (R. p. 399 lines 2-5); and after hearing the initial two shots he saw Petitioner fire shots at the decedent's car (R. p. 385 lines 4- 18).

The assistant solicitor's questioning of Mr. Moore regarding the potential consequences Moore would face if the State believed he was not being truthful was an impermissible attempt to bolster the credibility of Moore's testimony. Trial counsel provided ineffective assistance of counsel by failing to object to the State's line of questioning.

II. The PCR court erred in failing to find trial counsel was ineffective in failing to object to the trial court's response to an inquiry from the jury about whether Petitioner could be convicted of armed robbery if doubt existed regarding his actual knowledge of the robbery prior to its occurrence

Court's Response to Jury question

Petitioner took the stand in his defense and his testimony contradicted Earvin Moore's prior testimony regarding Petitioner's plans when he got to Myrtle Beach and who was responsible for the altercation with decedent. After hearing Petitioner's testimony the jury could have inferred that Moore and not Petitioner intended to rob decedent. Petitioner testified that while in route to Myrtle Beach, Petitioner handed his phone to Moore so that Moore could make arrangements with decedent to purchase marijuana. (R. p. 559 lines 7-23). Petitioner denied ever discussing that he planned to commit a "lick" (i.e. robbery) when he got to Myrtle Beach. (R. p. 561 lines 13-25).Petitioner denied that he told Moore to get into decedent's car to check on the marijuana. (R. p. 562 lines 1-8) Petitioner then testified when Moore got into decedent's car he saw them fighting. (R. 553 lines 12-21). Finally Petitioner testified that when Moore exited decedent's car he heard decedent yell; "You ain't getting out this car with my weed without no money" (R. p. 553 lines 23-24)

During their deliberations the jury notified that court that it had the following question: *Can the defendant be guilty of armed robbery if doubt exists as to his actual knowledge of it prior to the act of robbery?* (R. p. 729 lines 21-23). A discussion ensued between counsel and the Court, outside the presence of the jury regarding the Court's

response to the question. Ultimately the Court stated: *All right, then I can just say please refer to the Court's instructions as to reasonable doubt*[1] *and as to armed robbery*[2]. (R. p. 731 lines 22-24). The State argued that the Court should answer the question in this manner and Petitioner's counsel advised that there would be no objection to it. . (R. p. 732 line 3-4). The Court then responded to the jury's question with its written reply to the question. (R. p. 735 lines 3- 9).

Based upon this question and the conflict in testimony between Moore and Petitioner, it is reasonable to conclude that some jurors believed Petitioner did not plan or participate in the robbery; and that Petitioner was not responsible for starting the altercation between Petitioner, Mr Moore and the Decedent. When presented with a well-framed question from the jury, the Court at times, *must tailor mold and even sculpt the law in fashioning an answer* ***to fit the question***. State v. Huckabee, 388 S.C. 232, 244, 694 S.E.2d 781, 787 (Ct. App. 2010), *citing with emphasis*, State v. Smith, 304 S.C. 129, 132, 403 S.E.2d 162, 164 (Ct. App. 1991), *see also* State v. Fuller, 297 S.C. 440, 443, 377 S.E.2d 328, 330 (1989) ("In charging self-defense, we instruct the trial court to consider the facts and circumstances of the case at bar in order to fashion an appropriate charge."). The Court in Smith stated that when framing a response to a question form the jury, *the judge must be an artist, not a mere technician*. State v. Smith, 304 S.C. at 132. Additionally the Smith Court noted: *It is not always sufficient for a judge to simply open a charge book and read a generic statement of the law to a jury, no matter how correct that statement may be in the abstract. This is*

[1] The Court charge on Reasonable Doubt is at Transcript p. 702 line 23 through p. 703 line 10.
[2] The Court's charge on Armed Robbery is at Transcript p. 709 line 22 through p. 710 line 20.

particularly true where, as here, the judge is called upon to answer a well-framed question following the initial charge. Id.

"When the jury requests more instructions upon a particular phase of the case, the trial court is under a duty to instruct them in a plain, clear manner so as to enlighten rather than confuse them." State v. Davis, 220 W. Va. 590, 595, 648 S.E.2d 354, 359 (2007) quoting Smith v. State, 265 Ga. App. 756, 596 S.E.2d 13, 15 (Ga. Ct. App. 2004). The Court should frame its response with both specificity and accuracy. People v. Sanders, 368 Ill. App. 3d 533, 857 N.E.2d 948, 952, 306 Ill. Dec. 549 (Ill. App). However by merely directing the jury to review their copy of the Court's charge, the trial Court failed to answer the juror's question. The jury asked for clarification regarding their obligation in the event there was doubt as to Petitioner's involvement with the armed robbery. When presented with the jury's question, the Court advised counsel that its initial response would be to charge: " *if there is doubt as to whether or not the Defendant knew there was a robbery that was going to take place then you can't have armed robbery*." (R. p. 729 line 23 - 730 line 2). This response would have enlighten the jury with a clear and concise statement of the applicable law that was tailored to the specifics of this case. However, the State argued that all that was necessary was to recharge the jury on reasonable doubt and armed robbery. (R p. 730 lines 12-15). Even though the Court indicated that merely recharging the jury on these two issues was not responsive to the jury's question (R. p. 16-17), the Court ultimately responded by simply directing the jury to reread the same statements of the law the Court previously provided in its original charge.

The facts which supported the charges on armed robbery and the firearm charge were

part of the same transaction which led to the murder charge. All the charges are inextricably entwined. Thus it is reasonable to conclude the Court's response to the jury's question regarding the armed robbery charge must have influenced their deliberations regarding all three convictions. Trial counsel was deficient by failing to object when the Court declined to fashion an answer to fit the jury's specific question regarding the armed robbery charge. Therefore Appellant is entitled to a new trial on all three convictions.

CONCLUSION

Based upon the above, certiorari should be granted. Petitioner's convictions and sentences should be revered, and the case remanded for new trial.

Respectfully Submitted

s/ James K Falk
Falk Law Firm

ATTORNEY FOR PETITIONER

This February 7, 2022

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM HORRY COUNTY

Court of Common Pleas

Honorable William H. Seals, Jr, Circuit Judge

Case No.: Case No. 2018-000396

Richard B. Niles, Jr. 333708..……..……PETITIONER

V.

State of South Carolina……...…….……RESPONDENT

CERTIFICATE OF SERVICE

I, James Falk certify that I have today served the within PETITION FOR WRIT OF CERTIORARI on Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, William Harold Ray, Esquire Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549. I further certify that all the parties required by Rule to be served have been served this February 6, 2022.

Respectfully Submitted,

S/ James Falk
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