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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Petition for Writ of Certiorari to Horry County Court of Common Pleas

The Honorable Benjamin H. Culbertson, Trial Judge
The Honorable William H. Seals, Jr., PCR Judge

Appellate Case No. 2018-000396

RICHARD B. NILES, JR... .....Petitioner.

v.

STATE OF SOUTH CAROLINA. .....Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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II. Did the PCR court err in failing to find trial counsel 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?

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II. Did the post-conviction relief court properly determine that Petitioner failed to establish counsel was ineffective for failing to object to the Court's response to the jury question because this issue is not preserved, given that the failure to request a more specific instruction, as laid out before the circuit court, was pertaining to the other jury note, not the one on appeal and, even if this issue was preserved, Counsel acted reasonably in asking more specific response to the question, which the Court declined to use, and because, even if Counsel was found deficient, no prejudice is found flowing therefrom?

STATEMENT OF THE CASE

Richard B. Niles (hereafter "Petitioner") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. During its August 2007 term, the Horry County Grand Jury indicted Petitioner for murder (2007-GS-26-3363). During its October 2008 term, the Horry County Grand Jury indicted Petitioner for possession of a weapon during the commission of a violent crime (2008-GS-26-04116) and armed robbery (2008-GS-26-04117). Petitioner was represented by Ronald Hazzard and Verdell Barr, Esquires (hereafter "Counsel"). Assistant Solicitor Donna Elder and Brad Richardson, Esquires, from the Fifteenth Circuit Solicitor's Office, represented the State. On March 9-13, 2009, the case proceeded to trial before the Honorable Benjamin H. Culbertson, circuit court judge. On March 13, 2009, the jury found Petitioner guilty of the crimes charged. Judge Culbertson sentenced Petitioner to thirty years' imprisonment for both armed robbery and murder and five years' imprisonment for possession of a weapon during the commission of a violent crime.

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

> Whether the court erred in declining to charge voluntary manslaughter where there was evidence Appellant was initially fired upon after which he returned fire?

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, 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 filed a petition for panel rehearing, which was denied by written

order filed November 14, 2012. Also in this order, the Court of Appeals withdrew its initial order and substituted with another order reversing and remanding the conviction. *State v. Niles*, Op. No. 5034 (S.C. Ct. App. filed Nov. 14, 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.

Petitioner timely filed a PCR application on February 24, 2016, alleging:

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.'"

Respondent made its return on February 16, 2017. The evidentiary hearing occurred on November 27, 2017, before the Honorable William H. Seals, Jr., circuit court judge. James K. Falk, Esquire was Petitioner's attorney. Johnny E. James, Jr., Esquire of the South Carolina Attorney General's Office represented Respondent.

The Court issued an order of dismissal, denying Petitioner's PCR application and

remanding him to the custody of South Carolina Department of Corrections on February 5, 2018, finding:

1. Trial Counsel was not ineffective for failure to object to the alleged "golden rule" argument made by the State during closing arguments because the closing argument did not rise to the level of unfairness rendering the trial a denial of due process and any conceivable error was harmless.
2. Trial Counsel was not ineffective for failure to object to the State's alleged bolstering of co-conspirator witness Ervin Moore because the testimony was not objectionable and Counsel, therefore, could not be found deficient and no prejudice could be found flowing therefrom.
3. Trial Counsel was not ineffective for failure to object to and challenge the indictments against him because the indictments provided Petitioner with notice of the charges and elements of the offenses and, accordingly, Counsel was not deficient for failure to challenge them and no prejudice was found flowing therefrom.
4. Trial Counsel was not ineffective for failure to demand the Court provide greater clarification to the jury in response to the questions sent out during deliberations because the record reflects Counsel asked for a more specific answer from the Court and this request was denied.
5. Appellate Counsel was not 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 Petitioner's argument for self-defense because the allegation was without merit as a matter of law and, accordingly, no deficiency was found on the part of Appellate Counsel and no prejudice found flowing therefrom.
6. Appellate Counsel was not ineffective for failure to raise the issue of the Court's response to the jury questions on appeal because Appellate Counsel is not required to raise all non-frivolous issues on appeal and Counsel raised a substantially stronger issue on appeal instead, which fell within their discretion to do so.

Thus, the request for relief was denied. Petitioner appeals from the denial of relief based upon the allegation that:

1. The PCR court erred 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.
2. The PCR court erred in failing to find trial counsel 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.

The notice of appeal was filed on March 7, 2018, and perfect by James K. Falk, Esquire, who filed a brief pursuant to *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988), raising the

following issue:

> 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 [who] testified in exchange to a plea to a lesser charge?

On October 26, 2021, the South Carolina Court of Appeals issued an order denying the motion to be relieved as counsel and directing the parties to address the following questions and "any other questions of arguable merit:

1. 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?

2. Did the PCR court err in failing to find trial counsel 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?

Petitioner, through Counsel Falk, filed the petition for writ of certiorari, raising the above issues on February 8, 2022. This return follows.

STATEMENT OF FACTS

On April 9, 2007, Petitioner and his co-defendant Mokeia Hammond acted as a modern-day Bonnie and Clyde, with Hammond as the getaway driver and Petitioner as the robber. (App. 137-38, 153). At trial, the State offered co-conspirator Ervin Moore's testimony, who stated Petitioner, shortly before the robbery, announced to the trio, "we're going to do a lick" which Moore understood to mean, "we're going to commit a robbery." (App. 380-81). Moore testified he was supposed to make sure the marijuana was in the car, and that Petitioner would get out of the car and demand money from the victim, James Salter. (App. 397-989). Hammond would serve as the getaway driver. (App. 397-99).

Moore testified that upon Salter's entering the parking lot and pulling beside Petitioner's vehicle, he got out of the car to inspect the marijuana. (App. 398-99). Moore explained that after identifying the marijuana and passing Petitioner on his return to the car, he watched as Petitioner stood alongside Salter's car. (App. 399). Moore then described Petitioner leaning into Salter's window and hearing two shots. (App. 399-400). Thereafter, Petitioner, with the marijuana and a .357 in hand, dove into the backseat. (App. 399-400, 402, 403, 406). Moore testified that Salter returned fire, and Petitioner fired back and ultimately shot Salter. (App. 400-03). Moore stated that the trio fled the Best Buy parking lot in Petitioner's car, retreating to a nearby trailer park. (App. 400-01). There, Petitioner called his mother and asked her to report the car stolen. (App. 401). Petitioner hid the stolen marijuana and gun before getting a cab to a motel. (App. 405). Hammond accompanied Petitioner, leaving Moore behind. (App. 405).

The next day, officers located a vehicle possibly involved in the incident that had bullet holes and defects in it. (App. 354). The search of Petitioner's car the next day revealed shell casings and bullets, a red plastic cup, cigarette filters, glass fragments, and blood samples. (App.

356-65). On April 13, 2007, Investigator Willie Brown of the Williamsburg County Sherriff's office along with investigators from the Myrtle Beach Police Department executed a search warrant at the home of Martha Niles, Petitioner's mother. (App. 474-75). The results of the search yielded additional shell casings, a room key, a digital scale, baggies with marijuana seeds, a rental car receipt for a black Ford Fusion, and seven-hundred dollars in cash. (App. 476-79).

The State also presented eyewitness testimony from Angie Hooper and Harold Watts. Watts, a passerby, stated he heard gunfire and saw a heavy-set black male matching Petitioner's description run from a white car and jump into the rear driver's side door of a dark car that sped out of the parking lot. (App. 227-29). Watts testified that a female drove the car. (App. 229). Hooper, whose minivan was hit by a stray bullet, echoed Watt's testimony but instead described the female driver simply as a "dark figure." (App. 205-06). Petitioner's fingerprints were found on top of Salter's car and DNA evidence taken from the driver's seat of Petitioner's car was consistent with that of Hammond to a probability of one in one quadrillion. (App. 328, 526-27).

Petitioner, testifying in his own defense, rejected Moore's version of the incident explaining there was no agreement to do "a lick." (App. 559-61). Instead, Petitioner stated that he was simply trying to connect Moore, whom he claimed was looking to buy marijuana, with Salter, who was looking to sell marijuana. (App. 558-59).

Petitioner stated that upon Salter's arrival at the scene, Moore emerged from Petitioner's car and got into Salter's white Mustang, presumably to purchase the marijuana. (App. 568, 587). Meanwhile, Hammond, who was seated next to Petitioner, allegedly informed Petitioner that Moore and Salter were fighting. (App. 568). Petitioner testified to hearing Salter yell, "[y]ou ain't getting out this car with my weed without no money" after which Salter allegedly reached for his gun and fired at the car. (App. 568-69). Continuing, Petitioner explained that he reached

in his bag, which he often kept open with his gun exposed, and fired two shots at Salter, because "he was trying to get him to stop shooting." (App. 569). After the incident, Petitioner admitted to leaving the car in a nearby trailer park.[1] (App. 571-72).

[1] On cross-examination, Petitioner admitted, that to his knowledge, Moore did not have a gun. (App. 594).

STANDARD OF REVIEW

The standard of review for PCR matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Overall, reviewing courts "give[] great deference to the PCR court's findings of fact and conclusions of law", *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005), with the applicant shouldering the burden of proof. Rule 71.1(e), SCRCP; *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Further, a PCR court's findings will be upheld if there is "any evidence of probative value sufficient to support them." *Id.* Reversal of the lower court's findings occurs when there is no probative evidence to support the initial finding. *Pierce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000). Courts must conduct a *de novo* review when evaluating questions of law and are required to reverse the initial holding when the decision is controlled by an error of law. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40; *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

In a PCR action, the petitioner bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Effective assistance of counsel does not mean perfect or mistake-free representation. *See Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017) ("[A] defendant has a right to effective representation, not a right to an attorney who performs his duties 'mistake-free.'" (citation omitted)); *Burt v. Titlow*, 571 U.S. 12, 24 (2013) ("[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]"); *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. *Strickland*, 466 U.S. at 687-688.

When a petitioner asserts ineffective assistance of counsel as a ground for relief, the petitioner must show "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the petitioner must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the petitioner must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. S*ee also* Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence.").

Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690); *see Dunn v. Reeves*, 141 S. Ct. 2405, 2410 (2021) (noting counsel's strategic decisions are to be afforded "'strong presumption' of reasonableness that the defendant must overcome); *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

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*, 466 U.S.

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. *Id.* at 696-97.

Whether failure to object constitutes deficient performance generally hinges on whether or not a valid trial strategy was utilized. *See Thompson v. State*, 423 S.C. 235, 241, 814 S.E.2d 487, 490 (2018) (finding Counsel was deficient because the failure to object was not related to an otherwise valid trial strategy); *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (where "counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel").

I. The post-conviction relief court properly determined that Petitioner failed to establish counsel was ineffective for failing to object to the alleged improper bolstering of Ervin Moore because the State did not engage in improper bolstering, Counsel was not deficient because there was no basis for an objection to this line of questioning, and any conceivable error on the part of Counsel concerning this issue was harmless and non-prejudicial.

On appeal, Petitioner argues the PCR court erred in denying him relief because Counsel was ineffective for failing to object to the prosecutor improperly bolstering co-conspirator Ervin Moore's testimony. However, the PCR court properly rejected this argument, finding that this line of questioning did not constitute improper bolstering and was not objectionable. Therefore, the PCR Court found, Counsel was not deficient for failing to object to an unobjectionable line of questioning and because Counsel was not deficient, no prejudice was found. These findings are not controlled by an error of law and are supported by probative evidence in the record. Consequently, this Court should deny certiorari.

"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, 630-31, 545

S.E.2d 805, 818-19 (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.* "'By calling a witness who testifies pursuant to an agreement requiring him to testify truthfully, the Government does not insinuate possession of information not heard by the jury and the prosecutor cannot be taken as having expressed his opinion on a witness' veracity.'" *Id.* (quoting *United States v. Creamer*, 555 F.2d 612, 617-18 (7th Cir. 1977).

In *Shuler*, this Court found that improper bolstering did not occur because the prosecutor made no overt statement of his personal belief as to the truth of the witness's testimony, made no insinuation that he knew better than the jury what the truth was, and because questioning on re-direct where the prosecutor asked the witness if he was telling the truth did nothing more than reference what the witness had agreed to through the proffer agreement. *Id.* Further, the Court found that "it was not error for the Solicitor to introduce the plea agreement on direct examination because the Solicitor was entitled to anticipate the inevitable cross-examination of a federal inmate and to dispel any notion he was hiding something from the jury." *Id.* at 628-29, 545 S.E.2d at 817. *Shuler* also drew a sharp distinction between the instant case and the Court's finding in S*tate v. Kelly,* 343 S.C. 350, 540 S.E.2d 851 (2001), because the prosecutor did not comment in *Shuler* that he had personal knowledge that the witness was telling the truth like

implied in *Kelly*. Specifically, in *Shuler*, the court found that the bolstering in *Kelly* was impermissible because he improperly phrased his questions in the first person, which could have led the jury to perceiving that the prosecutor held the opinion that the witness was telling the truth, causing the witness' testimony to carry "with it the imprimatur of the government." *Shuler*, 344 S.C. at 630, 545 S.E.2d at 818. This was not the case in *Shuler*, where the witness testified concerning the agreement with the State without the prosecutor implying they had independent knowledge of the truth.

"In an ineffective assistance case, 'trial counsel's failure to object to [improper bolstering] testimony does not remove a [] [PCR] applicant's burden to prove prejudice." *Chappell*, 429 S.C. at 80, 837 S.E.2d at 502 (quoting *Thompson*, 423 S.C. at 246, 814 S.E.2d at 492). "The determination of whether a bolstering error is harmless depends on whether the case turns on the credibility of the [witness]." *State v. Chavis*, 412 S.C. 101, 110, 771 S.E.2d 336, 341 (2015). "The outcome of a trial turns on the credibility of the [witness] when the State presents no physical evidence or 'relie[s] solely upon the [witness's] testimony to establish the details of the crime . . . .'" *Chappell*, 429 S.C. at 80, 837 S.E.2d at 502 (quoting *Thompson*, 423 S.C. at 248, 814 S.E.2d at 494).

The alleged bolstering of co-conspirator Ervin Moore at trial reads as follows:

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.

(App. 465-66).

This line of questioning is much more akin that found in *Shuler*, than the questioning in *Kelly.* Accordingly, Respondent contends that this line of questioning does not constitute improper bolstering. The prosecutor did not speak in the first person like the prosecutor in *Kelly* did, nor did they vouch for his credibility, indicate that he had an opinion concerning the witness's truthfulness or credibility, or imply he had information not presented to the jury. Instead, the prosecutor merely elicited testimony concerning the plea agreement, including the fact that the agreement was contingent on the witness's truthfulness at Petitioner's trial. Accordingly, as per *Shuler*, this line of questioning is acceptable, and Counsel cannot be found deficient for failing to object to an unobjectionable line of questioning.

Even if this Court were to find Counsel deficient, Petitioner was not prejudiced by the deficiency. Officers found shell casings and bullets, glass fragments, and blood the following day when they searched Petitioner's car. (App. 356-65). Additionally, on April 13, 2007, a search warrant was executed at the home of Martha Niles, Petitioner's mother, revealing additional shell casings, a room key, a digital scale, baggies with marijuana seeds, a rental car receipt for a black Ford Fusion, and seven-hundred dollars in cash. (App. 476-79).

At trial, two eyewitnesses testified, corroborating Moore's testimony. Specifically, Watts, a passerby in an adjacent parking lot, stated he heard gunfire and saw a heavy-set black male matching Petitioner's description run from a white car and jump into the rear driver's side door of a dark car, which was operated by a female and sped out of the parking lot. (App. 227-29).

Hooper, whose minivan was hit by a stray bullet, echoed Watt's testimony but instead described the female driver simply as a "dark figure." (App. 197-98, 206). The State further corroborated Moore, Hooper and Watts' testimony through forensic evidence taken from the cars of Salter and Petitioner. Specifically, Petitioner's fingerprints were found on top of Salter's car and DNA evidence taken from the driver's seat of Petitioner's car was consistent with that of Hammond to a probability of one in one quadrillion. (App. 332, 526-27). Accordingly, even if Counsel was found deficient, no prejudice can be found flowing therefrom because any error on the part of Counsel did not have an impact on the outcome at trial, given that there was sufficient evidence to convict beyond the co-conspirator's statement. Accordingly, relief should be denied as a result.

II. The post-conviction relief court properly determined that Petitioner failed to establish counsel was ineffective for failing to object to the Court's response to the jury question because this issue is not preserved, given that the failure to request a more specific instruction, as laid out before the circuit court, was pertaining to the other jury note, not the one on appeal and, even if this issue was preserved, Counsel acted reasonably in asking more specific response to the question, which the Court declined to use, and because, even if Counsel was found deficient, no prejudice is found flowing therefrom.

On appeal, Petitioner argues the PCR court erred in denying him relief because counsel was ineffective for failure to object to the Court's response to a jury inquiry about whether Petitioner could be convicted of armed robbery if doubt existed regarding his actual knowledge of the robbery prior to the occurrence. This issue was not preserved for appeal. However, even if it was properly preserved, Counsel was not ineffective because Counsel asked for a more specific response to the question, the Court declined to use Counsel's requested response, and Counsel's objection was preserved on the record. These findings are not controlled by an error of law and are supported by probative evidence in the record. Consequently, this Court should deny certiorari.

During circuit court proceedings, Petitioner alleged Counsel was ineffective for failing to demand the Court provide clarification to the jury concerning the question of "can the Defendant be found guilty of murder and not guilty of armed robbery?" (App. 729). Here, the question in issue is "can the defendant be guilty of armed robbery if doubt exists as to his actual knowledge of it prior to the act of robbery?" (App. 729-30). Because the claim now raised was never raised in the post-conviction relief court, it is not preserved for this Court's review.

In South Carolina, issue preservation requirements are a fundamental component of appellate procedure. *Gaddy v. Douglass*, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004). Significantly, the application of issue preservation requirements ensures the trial court has an opportunity "to rule properly after it considered all relevant facts, law, and arguments." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). For an issue to properly be preserved for appellate review, it must be: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. *State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004); *see* JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). Although our courts have recognized the somewhat relaxed procedures in PCR cases and will excuse procedural defaults in extraordinary cases, "[i]n most PCR cases, however, [appellate courts] have refused to excuse the pleading and issue-preservation requirements that apply in all civil cases." *Mangal v. State*, 421 S.C. 85, 97, 805 S.E.2d 568, 574 (2017). In *Mangal*, the South Carolina Supreme Court noted:

> [T]here are situations where the interests of justice require PCR courts to be flexible with procedural requirements before PCR applicants suffer procedural default on substantial claims. Such flexibility is consistent with the purpose and spirit of our Rules of Civil Procedure. These considerations should guide PCR

> courts when struggling to balance procedural requirements against the importance of the issues at stake in PCR proceedings. We encourage trial courts in PCR cases to use the discretion we grant them on procedural matters to find reasonable ways—within the flexibility of our Rules—to reach the merits of substantial issues.

Mangal, 421 S.C. at 99–100, 805 S.E.2d at 575–76.

Here, Petitioner never raised or otherwise presented the claim that Counsel was ineffective for failing to object to the Court's response to the jury 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?" This issue was not before or addressed by the circuit court and, accordingly, this issue is not properly before the Court and is not an extraordinary case where preservation deficiencies should be overlooked in the interest of justice.

Even if this issue was properly before this Court, Counsel was not ineffective on this ground. In determining whether a petitioner was prejudiced by improper jury instructions, the court must find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the improper instruction in a way that violates the Constitution. *Battle v. State*, 382 S.C. 197, 203, 675 S.E.2d 736, 740 (2009). The law to be charged must be determined from the evidence presented at trial. *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001).

During deliberations, the jury sent out a note with the following question: "Can the Defendant be found guilty of armed robbery if doubt exists as to his actual knowledge of it prior to the act of robbery?" (App. 732). In response, Counsel requested the Court "respond appropriately to their question and then refer them because they do have your charge in the jury room with them and then refer them to those specific sections." (App. 731). The State stated that they had "no problem" with Counsel's recommendation in whole, but requested the Court not

give a specific "yes or no because that's a determination that they're going to have to make based on the charge." (App. 731). The Court stated that his response to the question would be "please refer to the Court's instructions as to reasonable doubt and as to armed robbery." (App. 731). Neither side objected to this instruction. (Tr. 731-32).

Counsel was not deficient on this ground. Counsel requested specific responses concerning that question, most of which were adopted. In fact, seemingly the only instruction not given to the jury, as requested by Counsel, was the request for a specific yes or no answer to the question, which the State took issue with, on the grounds that a more specific answer was ultimately a determination for the jury to make. The Court seemingly acknowledged this in adopting the State's modification to Counsel's recommended response. (App. 732). Accordingly, any objection or request made by Counsel at this point would have been fruitless, given that a more specific request was made and subsequently rejected. (App. 732). Accordingly, Counsel acted reasonably in declining to press the issue further and cannot be found deficient.

Even if Counsel was deficient, no prejudice is found. There has been no showing that the response provided led the jury to apply the instruction, if improper, in a way that violates the Constitution. Instead, he merely directed the jury back to instructions already given, which remain uncontested. Thus, even if Counsel was deficient, prejudice cannot be found, and relief must be denied as a result.

CONCLUSION

For the reasons stated above, this court should deny certiorari and affirm the PCR Court's findings that Petitioner had effective assistance of counsel. However, if this Court decides to grant the petition of writ of certiorari, Respondent respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

CHELSEY F. MARTO
Assistant Attorney General

BY: /s Chelsey F. Marto
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ATTORNEYS FOR RESPONDENT

May 9, 2022

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May 09 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Petition for Writ of Certiorari to Horry County
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Trial Judge
The Honorable William H. Seals, Jr., PCR Judge

Appellate Case No. 2018-000396

Richard B. Niles, Jr.,

Petitioner.

v.

State of South Carolina,

Respondent.

PROOF OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Return to the Petition for Writ of Certiorari has been served upon opposing counsel by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

James K. Falk, Esquire
jfalklaw@gmail.com

This 9th day of May, 2022.

/s Chelsey F. Marto
Chelsey F. Marto
Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
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chelseymarto@scag.gov

RECEIVED
May 09 2022
SC Court of Appeals

ALAN WILSON
ATTORNEY GENERAL

May 9, 2022

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211
(By Electronic Filing Only)

RE: Richard B. Niles, Jr. v. State of South Carolina
Appellate Case No.: 2018-000396

Dear Ms. Kitchings:

Enclosed please find the original Respondent's Return to Petition for Writ of Certiorari in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

/s Chelsey F. Marto
Chelsey F. Marto
Assistant Attorney General
S.C. Bar # 104191

CFM/em
Enclosures

cc: James K. Falk, Esquire (by email only)
Victim Advocacy Division