

RECEIVED

May 18 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

CERTIORARI TO HAMPTON COUNTY
Court of Common Pleas
The Honorable R. Lawton McIntosh, Post-Conviction Relief Judge
The Honorable Perry M. Buckner, Trial Judge

Appellate Case No. 2019-000192

JAMES A. GARDNER,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOSHUA A. EDWARDS
S.C. Bar No. 101188
Assistant Attorney General

Post Office Box 11549 Columbia,
South Carolina 29211 (803) 734-
3737

ATTORNEYS FOR RESPONDENT

INDEX

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON CERTIORARI 1

STATEMENT OF THE CASE.....2

STATEMENT OF THE FACTS.....6

STANDARD OF REVIEW 7

ARGUMENT8

 I. The post-conviction relief judge did not abuse his broad discretion by reasonably limiting the evidence and testimony introduced during the evidentiary hearing solely to matters relevant to the grounds specifically identified by Gardner's counsel as having arguable merit because he had the authority pursuant to the Uniform Post-Conviction Procedure Act along with other provisions of South Carolina law to require the claims being raised to be specifically identified by Gardner and his counsel and to prevent the introduction of matter that was not relevant to the identified claims.....8

 II. The post-conviction relief judge properly determined that Gardner failed to establish his ineffective assistance of counsel claim because trial counsel's "all or nothing" plan for not requesting jury instructions on lesser-included offenses was valid trial strategy based on Gardner's acceptable outcomes and a charge on a lesser-included offense would not have changed the outcome12

CONCLUSION.....17

TABLE OF AUTHORITIES

Cases

<i>Abney v. State</i> , 408 S.C. 41, 757 S.E.2d 544 (Ct. App. 2014).....	12, 13
<i>Butler v. State</i> , 286 S.C. 441,334 S.E.2d 813 (1985)	8
<i>Cherry v. State</i> , 300 S.C. 115, 118,386 S.E.2d 624,625 (1989)	9
<i>Coardes v. State</i> , 262 S.C. 493, 497, 206 S.E.2d 264, 265 (1974).....	9
<i>Harbin v. State</i> , 14 So.3d 898 (Ala.Crim.App.2008)	13
<i>Havard v. State</i> , 928 So.2d 771 (Miss.2006)	13
<i>Ingle v. State</i> , 348 S.C. 467, 560 S.E.2d 401 (2002)	13
<i>Jones v. Barnes</i> , 463 U.S. 745 (1983)	11
<i>Mathre v. State</i> , 619 N.W.2d 627 (N.D.2000)	13
<i>Odom v. State</i> , 337 S.C. 256, 523 S.E.2d 753 (1999).....	9
<i>Sellner v. State</i> , 416 S.C. 606, 787 S.E.2d 525 (2016).....	7
<i>Simeon v. State</i> , 90 P.3d 181 (Alaska Ct.App.2004)	13
<i>Smalls v. State</i> , 422 S.C. 174, 810 S.E.2d 836 (2018).....	7
<i>State v. Grier</i> , 171 Wash.2d 17, 246 P.3d 1260 (2011).....	13
<i>State v. King</i> , 422 S.C. 47, 810 S.E.2d 18 (2017).....	15
<i>State v. Stalk</i> , 383 S.C. 559, 681 S.E.2d 592 (2009)	9
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	8, 13
<i>Sweet v. State</i> , 255 S.C. 293,296, 178 S.E.2d 657,658 (1971)	12
<i>United States v. Estrada-Fernandez</i> , 150 F.3d 491 (5th Cir.1998).....	13
<i>Whitehead v. State</i> , 308 S.C. 119,122,417 S.E.2d 529,531 (1992)	14

Statutes and rules

S.C. Code Ann. § 16-3-29 (2010)	15, 17
S.C. Code Ann.§ 17-27-50	9
S.C. Code Ann. § 17-27-70(a)	10
Rule 3.1, RPC, Rule 407, SCACR.....	11
Rule 12(e); SCRCF	10
Rule 71.l(d), SCRCF	10, 11
Rule 71.l(e), SCRCF	8
Rule 402, SCRE.....	12

STATEMENT OF ISSUES ON APPEAL

- I. The post-conviction relief judge did not abuse his broad discretion by reasonably limiting the evidence and testimony introduced during the evidentiary hearing solely to matters relevant to the grounds specifically identified by Gardner's counsel as having arguable merit because he had the authority pursuant to the Uniform Post-Conviction Procedure Act along with other provisions of South Carolina law to require the claims being raised to be specifically identified by Gardner and his counsel and to prevent the introduction of matter that was not relevant to the identified claims.

- II. The post-conviction relief judge properly determined that Gardner failed to establish his ineffective assistance of trial counsel claim because trial counsel's "all or nothing" plan for not requesting jury instructions on lesser-included offenses was valid trial strategy and a charge on lesser-included offenses would not have changed the result of trial.

STATEMENT OF THE CASE

Petitioner James Gardner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Hampton County Clerk of Court. In August 2013, the Hampton County Grand Jury indicted Gardner for three counts of attempted murder (2013-GS-25-0073, - 0075, -0079), four counts of pointing and presenting firearms at a person (2013-GS-25-0074, -0076, -0077, -0078), and possession of a weapon during a violent crime (2013-GS-25-0080). Gardner was subsequently indicted in October 2014, for pointing and presenting firearms at a person (2014-GS-25-0374). All five of the pointing and presenting firearms at a person charges were subsequently dropped. Cory Fleming, Esquire, represented Gardner. Assistant Solicitor Tameaka Legette, Esquire, prosecuted the case. On February 2-4, 2015, Gardner proceeded to trial before the Honorable Perry M. Buckner. The jury found Gardner guilty as indicted. Judge Buckner sentenced Gardner to imprisonment for concurrent terms of twenty-five years for each of the three attempted murder charges and five years for possession of a weapon during a violent crime.

Gardner filed a timely notice of appeal. Katherine Hudgins, Esquire, of the Office of Indigent Defense perfected the appeal pursuant to *Anders v. California*, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed the appeal on July 20, 2016. *State v. Gardner*, Op. No. 2016-UP-369 (S.C. Ct. App. filed July 20, 2016). The remittitur was returned to the circuit court on August 5, 2016.

Gardner filed an application for Post-Conviction Relief ("PCR") on January 9, 2017, including two subsequent amendments filed on January 13, 2017 and May 1, 2017, respectively.

1.. "Ineffective Assistance of Trial Counsel"

- a. "Trial counsel was ineffective and denied Applicant due process of law and denied him his right to a fair trial. There was also a breach in communication from the very beginning of this case."
- b. "Trial counsel violated Applicant's constitutional rights in one or all of the following ways, which prejudiced the case:"
 - i. "Failure to object to the jury composition because Juror Alice Scott is biologically related to the alleged victim."
 - ii. "Failure to investigate case or interview witnesses and failed to file motions to additional funding to hire an investigator and also investigate the medical records of alleged victims to properly assess the extent of their claimed injuries. The radiologist wasn't subpoenaed to testify to the extent of the alleged bullet wound, Applicant was denied his substantial right to confrontation and also compulsory."
 - iii. "Counsel failed to object and file timely motions to object to the indictment being multiplicitous, because the indictment has several counts for one fire arm."
 - iv. Counsel was ineffective for stipulating to the involuntary statement made by Applicant to investigators. Counsel should have motioned for a Jackson Denno hearing because the stipulation was used when the judge instructed the jury." -
 - v. "Trial counsel was ineffective for failing to object to the use of Applicant's prior convictions because they were beyond ten years old and was remote and he didn't investigate the validity of the prior convictions."
 - vi. "Due to the breakdown of communication [Applicant] ended up going to trial, he was willing to enter a plea to a lesser included offense for a sentence under nine years, but trial counsel would not hire and investigator to investigate the case to show there's evidence of a lesser included offense. As a result of such poor legal strategies, Applicant ended up going to trail which subjected him to a greater sentence."

2. "Ineffective Assistance of Appellate Counsel"

- a. "Counsel was ineffective for failing to request jury instructions on lesser included offenses of attempted murder because the court denied motion for directed verdict (which was definitely preserved for appellate review and should have been raised by appellate counsel to avoid procedural default when raised on a post-conviction. The appellate brief was inadequate by not raising this claim on appeal. As a result of this error, this prejudiced the outcome of Applicant's case and confuse and mislead the jury. The jury instructions was constitutionally invalid, had the jury been instructed on 1st, 2nd, or 3'rd degree assault, Applicant may have been convicted of a lesser offense."

3. "Actually Factually Legal Innocence"

- a. "Applicant is actually, factually, and legally innocent of attempted murder because the laws of the State of South Carolina require the State to prove their case 'beyond a reasonable doubt.' It is well established law in the State of South Carolina, the 'due process clause' requires that the prosecution in any case must prove beyond a reasonable doubt every essential element of the crime charged."
- b. "Reasonable doubt instructions will confirm such."

An evidentiary hearing into the matter was convened on January 29, 2018, at the Beaufort County Courthouse in Beaufort, South Carolina. Gardner was present and represented by James K. Falk, Esquire. Respondent was represented by DeShawn H. Mitchell, Esquire, of the South Carolina Attorney General's Office. At the hearing, Gardner testified on his own behalf. Gardner's trial counsel, Cory Fleming, Esquire, also testified. After the State rested Judge McIntosh addressed the PCR allegations raised by Gardner:

In this case, you've alleged three what I consider recognizable, potentially meritorious claims. One, that trial counsel had a conflict of interest in that he had a friendship, pre-existing friendship, with the son or son-in-law of the victim. Also, that a juror is related to the victim, and didn't announce that. And trial counsel should have sought a lesser-included offense. You have presented zero credible evidence about the relationship between trial counsel, who I find to be credible, that they went and play high school ball together. Trial counsel didn't even go to the same school. He said he didn't know him. So you haven't presented anything to contradict that or to prove otherwise. You just said you saw some picture, allegedly... and somebody in the detention center made a hearsay statement. That's not sufficient. So you failed to meet your burden of proof.

Also, as to the relationship of the juror, again, there's no proof of that. Your allegation is she didn't stand up. The record is clear on that on Page 58. There's been no showing that she was not being candid to the Court and should have stood up because she -was in fact related to 'the victim in the matter. So you've failed to meet your burden there.

I find that the explanation given by trial counsel as to failure to request a lesser-included charge is valid trial strategy, given that it was engaged with you after your refusal to accept nine years [plea offer], and under the circumstances, it would have subjected you to up to 20 years, which you did not want, you know, certainly and understandably didn't want to do. But that

being said, it makes - his explanation constitutes valid trial strategy. And to the extent your testimony is otherwise, I just don't find it to be convincing or credible. _ Also, there's just overwhelming evidence of your guilt in this case. So your application is denied.

(App'x p. 478-480).

Judge McIntosh, in an order filed April 24, 2018, denied relief and dismissed the application with prejudice finding Gardner had not satisfied his burden under *Strickland's* two-part test. Gardner filed a notice of appeal from the denial of his claim for relief, and, through counsel, filed a petition for writ of certiorari on October 28, 2019. The State filed a return on March 13, 2020. The case was transferred from the supreme court to this Court on April 2, 2020. The petition was granted on September 20, 2022. Gardner filed a Brief of Petitioner on January 18, 2023. This Brief of Respondent follows.

STATEMENT OF FACTS

Gardner was convicted at trial of the attempted murder of his girlfriend, M. M., her sister, M. W., and B. A., of the Varnville Police Department. At the time of the attempted murders, Gardner lived together with his girlfriend and her sister in a house in Varnville, South Carolina. M. M. testified at trial that Gardner came into the home, accused her of being unfaithful and threatened to kill her. Gardner allegedly then went to his truck, got a rifle, came back into the house and shot at M. M., but missed. M. M. testified she left the house and walked to a friend's home where she met her sister, during which time Gardner followed her in his truck. M. M. then returned home, with Gardner again following, at which point she ran to a nearby church for help. (App'x p. 157-166). M. W. testified that after she and her sister left their friend's house and returned home, Gardner came into the house with two rifles and threatened to kill her. M. W. testified she dropped to her knees, heard the gun click, but it did not fire. When she opened her eyes, Gardner stated he was going to kill himself and then ran out of the house. M. W. then called 911 and ran from the home to look for her sister. According to M. W., as she ran out of the house, Gardner shot her. (App'x p. 198-200).

B. A. of the Varnville Police Department was one of the officers who arrived at the scene, and testified he exchanged gunfire with Gardner. (App'x. p. 284-285). After Gardner was subdued, he was arrested and read his Miranda rights, and transported to the Varnville Police Department, where he provided a taped statement confessing to the crimes, including his intent to kill. (App'x p. 256-258, 260, 337, 340).

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. *Sellner v. State*, 416 S.C. 606,610, 787 S.E.2d 525,527 (2016). Questions of law are reviewed *de novo*. *Id.*; *Smalls v. State*, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

ARGUMENT

- I. **The post-conviction relief judge did not abuse his broad discretion by instructing counsel to limit the evidence and testimony introduced during the evidentiary hearing solely to matters relevant to the grounds specifically identified by counsel as having arguable merit because the judge had the authority pursuant to the Uniform Post-Conviction Procedure Act along with other provisions of South Carolina law to require the claims being raised to be specifically identified by Gardner and his counsel and to prevent the introduction of matter that was not relevant to the identified claims.**

Gardner contends the PCR judge erred by limiting the testimony presented during the evidentiary hearing solely to matters related to the grounds identified by PCR counsel as having arguable merit. In support of that contention, Gardner maintains the PCR judge committed an error of law by relying on Rule 11, SCRPC, to place limitations on the claims permitted to be addressed during the hearing. To the contrary, the PCR judge properly exercised his authority pursuant to the provisions of the Uniform Post-Conviction Procedure Act, our civil procedure rules, and our evidentiary rules to require Gardner and his PCR counsel to specifically identify the grounds upon which there was a legitimate basis to proceed forward and to limit the evidence and testimony subsequently introduced solely to matters relevant to the specified grounds. As a result, the PCR judge did not abuse his discretion or commit an error of law. This Court should affirm.

In a post-conviction relief action, an applicant has the burden of proving the allegations in his application. Rule 71.1(e), SCRPC; *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, they must present evidence to satisfy the two-prong test enumerated in *Strickland v. Washington*, 466 U.S. 668 (1984), to determine whether counsel's assistance was so incompetent as to violate a defendant's right to counsel. First, the applicant must show

counsel's performance fell outside of objective standards of reasonableness; second, the applicant must show they were prejudiced by that deficiency. *State v. Stalk*, 383 S.C. 559, 560–61, 681 S.E.2d 592, 594 (2009). The second prong of *Strickland* requires the applicant to prove that counsel's deficient performance prejudiced applicant to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Cherry v. State*, 300 S.C.115, 117–18, 386 S.E.2d 624, 625 (citing *Strickland*, 466 U.S. at 694). These 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.

When seeking relief, every PCR applicant is entitled to a full and fair opportunity to present claims in a single application. *Odom v. State*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999). Importantly though, pursuant to the requirements of the Uniform Post-Conviction Procedure Act, the applicant must set forth any claims being raised with *specificity*. See S.C. Code Ann. § 17-27- 50 ("The application shall identify the proceedings in which the applicant was convicted, give the date of the entry of the judgment and sentence complained of, *specifically set forth the grounds upon which the application is based*, and clearly state the relief desired." (emphasis added); see also *Coardes v. State*, 262 S.C. 493, 497, 206 S.E.2d 264, 265 (1974) ("[M]ere allegations of incompetency or ineffectiveness of counsel will not ordinarily suffice as grounds for a new trial under the Post-Conviction Procedure Act. The bare assertion by the appellant that he was deprived of adequate and effective assistance of counsel is insufficient."). If the applicant's claims are not set forth with sufficient specificity and clarity, it is incumbent on counsel to ensure the application complies with the necessary requirements. See Rule

71.(d), SCRCP ("Counsel shall insure that all available grounds for relief are included in the application and *shall amend the application if necessary.*" (emphasis added)). Beyond that, the PCR judge is also vested with authority to require the applicant or appointed counsel to amend the application to conform to the requirements of the Uniform Post-Conviction Procedure Act when necessary. *See* S.C. Code Ann. § 17-27-70(a) ("At any time prior to entry of judgment the court may, when appropriate, *issue orders for amendment of the application or any pleading or motion*, for pleading over, for filing further pleadings or motions, or for extending the time of the filing of any pleading" (emphasis added)); *see also* Rule 12(e); SCRCP (permitting a circuit court judge to require a more definite statement when vague or ambiguous pleadings are filed).

Here, Gardner's allegation that the PCR court threatened sanctions under Rule 11, SCRCP, is misleading, as the record is void of such testimony.¹ In this case, PCR counsel was requested by the court to enumerate with specificity the meritorious allegations Gardner planned to proceed on. The PCR court sensibly asked PCR counsel to specifically identify the supportable claims that were going to be pursued during the hearing, and his decision to do so was wholly permissible, reasonable, and proper under the circumstances. *See* S.C. Code Ann. § 17-27-70(a) (authorizing the PCR judge to require a PCR application to be amended when necessary). At that point, PCR counsel specifically identified the claims that could legitimately be raised as he was required to do by both our civil

¹ Since the PCR judge's discretionary decision to impose reasonable limitations was authorized by various provisions of South Carolina law, the fact the PCR judge—who did not impose any sanctions on Gardner or PCR counsel—innocuously referenced Rule 11 of the South Carolina Rules of Civil Procedure was irrelevant to the propriety of his ruling even assuming that rule had not been applicable under the circumstances.

procedure rules and his ethical responsibilities, and the hearing proceeded forward solely on those claims, as was proper. *See* Rule 3.1, RPC, Rule 407, SCACR ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."); *see also Jones v. Barnes*, 463 U.S. 745, 751 (1983) (explaining no authority suggests an "indigent defendant has a constitutional right to compel appointed counsel to press non-frivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points"). Thereafter, during the course of the hearing, Gardner was permitted to present all the evidence and testimony he wished in support of the claims that PCR counsel identified to the judge, and the PCR judge solely placed limitations on the questioning and testimony as needed to ensure relevant evidence, which was the only type of evidence that could properly be introduced, alone was admitted. *See* Rule 402, SCRE ("Evidence which is not relevant is not admissible.").

The record before this Court is void as to any threat of sanctions as claimed by Gardner. Because the limits placed on the testimony presented and questioning conducted were entirely proper and supported by a multitude of provisions of South Carolina law, the PCR judge neither abused his discretion nor committed an error of law by instructing counsel to identify and proceed on issues of arguable merit. *Cf. Sweet v. State*, 255 S.C. 293,296, 178 S.E.2d 657,658 (1971) (finding no abuse of discretion occurred by the circuit court judge's discretionary decision to decide a post-conviction relief issue without hearing testimony from a witness who was not present when nothing was presented to establish the witness's testimony would have been relevant or material to the issue raised).

II. The post-conviction relief judge properly determined that Gardner failed to establish his ineffective assistance of trial counsel claim because trial counsel's "all or nothing" plan for not requesting jury instructions on lesser-included offenses was valid trial strategy and an instruction on lesser-included offenses would not have changed the outcome of trial.

Gardner further contends the PCR court erred by finding trial counsel was not ineffective based on his decision not to seek a jury instruction on assault and battery of a high and aggravated nature (ABHAN), a lesser-included offense of attempted murder. The PCR court properly denied relief because trial counsel articulated a valid trial strategy, informed by the desires of his client, to seek full acquittal rather than run the risk of being convicted of a still-serious lesser-included offense. Gardner claims he would have been convicted of ABHAN instead of attempted murder if the jury received the instruction. However, Gardner sought complete acquittal rather than conviction of a lesser-included offense and refused to consider reasonable plea offers for that reason. Furthermore, Gardner failed to show prejudice because he would have been convicted of attempted murder regardless of a jury charge on lesser-included offenses. This Court should affirm.

When considering a PCR claim, the court "should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690. When reviewing an ineffective assistance of counsel claim, "strategic choices made after thorough investigation of law and facts relevant to plausible options are *virtually unchallengeable*" *Strickland*, 466 U.S. at 691 (emphasis added). When counsel articulates a strategy, it is measured under an objective standard of reasonableness. *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002).

In *Abney v. State*, 408 S.C. 41, 757 S.E.2d 544 (Ct. App. 2014), this Court held the decision not to request instructions on lesser included offenses is a matter of strategy and

tactic for trial counsel and will be upheld if counsel articulates a valid reason for doing so.² There, the court upheld the PCR court's finding that trial counsel was not ineffective for failing to request a jury instruction on strong arm robbery, a lesser-included offense of armed robbery, because trial counsel articulated a valid strategic reason for doing so, as he did not believe it was in his client's best interest to ask for a jury instruction on strong armed robbery.

Here, as in *Abney*, trial counsel articulated a valid reason for employing his strategy not to request a jury instruction on ABHAN and only proceed with jury instructions on attempted murder. Even assuming Gardner was entitled to a charge on ABHAN, trial counsel's decision not to request such a charge was reasonable trial strategy, based on the wishes of his client, the purpose of which was to ask the jury to acquit Gardner entirely as

² South Carolina courts had not addressed this issue prior to *Abney*, and the Court of Appeals looked to numerous other jurisdictions in deciding that claim, most specifically Alabama, Utah, and Georgia. See *Harbin v. State*, 14 So.3d 898, 909 (Ala.Crim.App.2008); *Havard v. State*, 928 So.2d 771, 791 (Miss.2006) (explaining "[t]rial counsel's decision not to submit lesser offense instructions, while it turned out to be unsuccessful, was appropriate trial strategy, and thus beyond the realm of serious consideration on a claim of ineffective assistance of counsel"). Judge Pieper, in his concurring opinion, referenced the following cases in support of the Court's ruling: *United States v. Estrada-Fernandez*, 150 F.3d 491, 496 (5th Cir.1998) ("In deciding whether to request a lesser-included-offense instruction, defense counsel must make a strategic choice: giving the instruction may decrease the chance that the jury will convict for the greater offense, but it also may decrease the chance of an outright acquittal."); *Simeon v. State*, 90 P.3d 181, 184 (Alaska Ct.App.2004) (relying in part on the change in the ABA commentary to hold the decision to request a lesser offense instruction rests with trial counsel); *Mathre v. State*, 619 N.W.2d 627, 630 (N.D.2000) (holding that as a matter of trial strategy, trial counsel has the authority to decline requesting an instruction "on lesser included offenses and thereby take an all or nothing risk that the jury will not convict of the greater offense"); *State v. Grier*, 171 Wash.2d 17, 32, 246 P.3d 1260, 1268 (2011) (indicating that "the decision to exclude or include lesser included offense instructions is a decision that requires input from both the defendant and [defense] counsel but ultimately rests with defense counsel").

opposed to finding him guilty of the lesser offense.

Trial counsel testified he was able to negotiate a nine-year plea offer, however Gardner, a "difficult" client, refused to consider it. (App'x p.465–66). "I went and told him. [Gardner] said, 'I ain't pleading to nine years.' I said, 'well, I just don't think it's going to get any better than that; this is a fairly serious case; and you've got a significant prior record.'" (App'x p. 466, 11. 10-13). Trial counsel explained his strategy after Gardner's refusal to consider a nine-year offer:

[A]bout the only way that he was going to get a sentence less than the nine that was on the table was an all-or-nothing strategy, wherein you either-you either win it or you lose it, because James—at James' age, *almost any sentence was going to be significant, like he's facing now, essentially a life sentence*. And I was trying to tell him that at least at nine, there's certainly hope that you won't die in prison. And so, he wanted to significantly lower the nine. I don't recall him ever telling me anything less than nine. *I didn't want to give the jury the opportunity to split the baby and give him a charge that was going to get him 20 years, anyway*. I didn't think that that would give us or give him the result that he was looking for.

(App'x p. 466–67) (emphasis added).

Even in the middle of trial, the plea offer was still on the table, but Gardner refused to accept it. Gardner admitted at the evidentiary hearing: "He said a nine year is still on the table, nine years. I said, 'No, I'm not going to take anything less than nine years; I'll plead guilty right now for anything less than nine years.' He said, "No, can't do it.'" (App'x p. 456).

Accordingly, trial counsel's decision not to request a jury instruction on ABHAN was a strategic response informed by the desires of his client. It is not susceptible to collateral attack merely because it was not ultimately successful. *See Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) ("Courts must be

wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel").

If trial counsel had requested a charge on ABHAN, it would have been easier for the jury to convict Gardner because, unlike attempted murder, ABHAN does not require that the State prove specific intent to kill. *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017) (holding that the General Assembly created the offense of attempted murder by purposefully adding the language "with intent to kill" to "malice aforethought, either express or implied" to require a higher level of *mens rea* for attempted murder than that of murder). Specific intent to kill is the "highest possible mental state for criminal attempt." *Id.* It would have been much easier for the jury to convict Gardner of ABAHN than attempted murder, thus exposing him to multiple, potentially consecutive, 20-year sentences.

Based on Gardner's outright refusal to accept the generous plea offer available to him, trial counsel's strategy not to request a charge on the lesser-included offense of ABHAN was reasonable given the facts of the case. During his closing argument, trial counsel reminded the jury that the sole issue before them was that in order for Gardner to be found guilty, he had to specifically intend to kill. He argued Gardner was only three feet away from M. M. when he fired at her, and "you cannot miss that shot. You just can't, which means he did not intend to kill [her]. [H]e didn't intend to kill her because if he wanted to, he could have. She didn't have a weapon. He had all the opportunity if he intended to kill her." (App'x p. 350). Furthermore, trial counsel explained that the

evidence clearly supported the fact that Gardner intended for a police officer to kill him. (App'x p. 351). Trial counsel concluded by asking the jury to find Gardner not guilty, stating, "[Gardner] didn't intend to kill anybody. He intended to be killed." (App'x p. 354, 11.21-23). While unsuccessful, these arguments gave Gardner a fighting chance at acquittal. Thus, counsel employed the only strategy with any chance of achieving Gardner's desired outcome.

Finally, Gardner cannot show prejudice because evidence of his guilt for the attempted murder of M.M. and M.W. was overwhelming. In addition to the evidence showing he intentionally shot at the victims, he admitted to police he intended to kill them. (App'x p. 340, 346). Because Gardner admitted he had the specific intent to kill, he was clearly guilty of attempted murder and a lesser-included charge on ABHAN would not have changed the result of trial.

It is clear from the record that trial counsel, after conferring with Gardner and taking into account his acceptable outcomes and refusal to consider any reasonable plea offers, employed an "all or nothing" strategy in hopes of obtaining an acquittal. As such, the PCR Court properly found trial counsel decision to not request an instruction on the lesser-included offense of ABHAN was valid trial strategy. Gardner failed to establish constitutional ineffectiveness of counsel. Gardner further failed to show prejudice because the evidence overwhelmingly showed he had the specific intent to kill, and a jury charge on a lesser-included offense would not have changed the outcome. The PCR court properly denied relief. This Court should affirm.


CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the lower court.

Respectfully submitted,

ALAN WILSON
Attorney General

JOSHUA A. EDWARDS
S.C. Bar No. 101188
Assistant Attorney General

By: 

Joshua A. Edwards
Bar # 101188

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 743-3727

ATTORNEYS FOR RESPONDENT

May 18, 2023

RECEIVED

May 18 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

CERTIORARI TO HAMPTON COUNTY
Court of Common Pleas
The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2019-000192

JAMES A. GARDNER

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

I, Anne Mueller, certify that I have served a copy of the within Brief Of Respondent on Robert M. Dudek, counsel of record for the Petitioner, by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.
This 18th day of May 2023.



Anne A. Mueller
Legal Assistant

Office of the Attorney General
P.O. 11549
Columbia, SC 29211
(803) 734-3727