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**Apr 25 2025**

**S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY  
COURT OF COMMON PLEAS  
B. Alex Hyman, Circuit Court Judge

Appellate Case No. 2025-000184

Tristian Cummings, #344693 , ..... Petitioner,  
v.  
State of South Carolina, ..... Respondent.

PETITION FOR WRIT OF CERTIORARI

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April 24, 2025.

## PETITION

### *Questions Presented*

1. Did the court err in finding the petitioner failed to meet his burden of proof under Strickland v. Washington?
2. Did counsel allow the petitioner to determine strategy and make tactical decisions, including which witnesses to call and evidence to introduce, even though contrary to counsel's professional judgment?
3. Did trial counsel fail to fulfill his role as an advocate and officer of the court based on a fundamental misunderstanding of the law?

### *Procedural History*

Petitioner Tristian Cummings was indicted by the Greenville County Grand Jury on murder, burglary first degree, attempted armed robbery, possession of a weapon during a violent crime, and criminal conspiracy. The applicant was tried by jury on April 8, 2019, the Hon. Michael G. Nettles presiding. The petitioner was represented at trial by counsel Rodney Richey. The State was represented by William McMaster. Petitioner was found guilty on all charges and sentenced to 35 years on the murder, thirty-five years concurrent on the burglary, twenty years concurrent on the attempted armed robbery, five years concurrent on the weapons charge and five years concurrent on the conspiracy charge. The petitioner filed a direct appeal which was dismissed by the court of appeals pursuant to Anders v. California in an unpublished opinion (No. 2021-UP-266, July 14, 2021). On April 25, 2022 the petitioner filed his application for post-conviction relief. A hearing was held on May 16, 2024, the Hon. Alex Hyman presiding. An Order of Dismissal was entered on January 13, 2025, from which the petitioner on February 3, 2025. This petition follows.

### ***Standard of Review***

"Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (*citing* Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). We review questions of law *de novo*, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (*citing* Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014))." Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839-40 (2018).

#### **I. THE COURT ERRED IN FINDING THAT PETITIONER FAILED TO CARRY HIS BURDEN OF PROOF UNDER STRICKLAND V. WASHINGTON.**

Petitioner was appointed counsel during his pretrial detention. 47. Counsel represented petitioner for approximately 10 months prior to the trial. 47. Counsel came to see the petitioner four to five times prior to trial. 70. During pre-trial discussions the petitioner told counsel about a third person at the scene of the shooting, Trevon Rogers, who the petitioner knew as "Little Twenty". 29-30. During pre-trial discussions the petitioner explained to counsel that Shaquan, Simeon, Little Twenty, and petitioner wanted to buy some marijuana before they went to a club. 29-30. Shaquan, who had a car, drove them to Shaquan's house. 29-30. The victim, who apparently sold marijuana, lived nearby. 30. Shaquan stayed at his house while the other three walked to the victim's house. 30. When the three got the victim's house the petitioner stayed outside while Little Twenty and Simeon went inside. 30. Petitioner heard an argument followed by a gunshot. 31. When he heard the shot he took off running and ran to the front of the house where he was seen, chased, and subsequently arrested by deputies. 31; 59.

Just prior to the shooting the victim's neighbor called 911 to report a disturbance by three people outside of the victim's house. 32, 17-19; 29-40; Ex. 2. The 911 call was disclosed in discovery. 40. Although counsel was aware that a recording of the 911 conversation was available during the trial he failed to request that it be played for the jury. 31-33; 29. Petitioner's discovery material also contained a police report that showed Kaitlin Nichols, an intern with the Sheriff's Office, was riding along with one of the first officers on the scene. 33; 61. The report indicated that after Nichols heard a gunshot she saw a person wearing red jacket run from front of the house towards Poinsett Highway. 188-190. Counsel was aware of the report. 74-80. The intern did not testify at petitioner's trial.

Kaitlin Williams (formerly Nichols) was a college senior and intern at the Greenville County Sheriff's Office riding along with Deputy Robinson on the night of the shooting. 60. Robinson was taking Williams back to the law enforcement center when dispatch called for units to respond to a home invasion in progress. 64. Being close Deputy Robinson made a quick u-turn which put them at the scene almost immediately. 64. Robinson proceeded to the side door of the victim's residence. 64. Williams remained in the patrol car but could see the residence from where she was. 64. Williams heard a gunshot followed by a black male wearing a red shirt run out of the front door towards Poinsett Highway. 64. Deputy Sandefur testified that he saw the petitioner, who was dressed in all black clothing, come out of the front door and run towards Perry Avenue into the woods. 208-211. Although Williams received a call about a subpoena for trial she testified that she never received one. 62. Williams testified that had she been subpoenaed she would have appeared and testified consistent with the facts related in the incident report. 62.

Counsel admitted that there was a dispute as to whether the petitioner was in the house or had a gun. 81-82. Counsel was aware that Little Twenty went in the house with Simeon. 30. He was aware that Williams saw a person wearing a red shirt ran out of the house towards the highway immediately after the gunshot. 74. While counsel cross-examined the chief investigator about Williams' statement in the police report he failed to actually call her as a witness. 74-75. When asked, counsel testified that he didn't know why he didn't call her as a witness. 74. Counsel was also aware that the tape recording of the 911 call from the victim's neighbor about three people outside the victim's house but made no effort to have it played for the jury. 78. When asked, counsel said he could not say exactly why he didn't ask to have the 911 call published for the jury. 78. Counsel then went on to explain that he didn't call Williams as a witness or have the tape played for the jury because the petitioner was making decisions as to trial strategy:

Question: So you're saying that his strategy was put up no witnesses?

Answer: Yes, that was his strategy, not mine. Because at some point, I was talking to him about testifying.

85, l. 2–86 l. 24.

The record shows that counsel failed to exercise his professional judgement in the case because he believed that he was prohibited from doing anything contrary to the petitioner's wishes:

Question: Let's talk about Ms. Nichols, the intern. Can you tell us why you didn't call her as a witness?

Answer: I don't know why I didn't call her as a witness. I remember talking to him. **And like I said, in this case, he made the decisions on the witnesses.** But we talked about this intern, this witness. And we also talked about these other phantom people. And in the end, that was a decision not to do that. But I had no problem calling any

witness at all that he wanted to call. Absolutely none.

74, l. 13-21.

Question: So that's the 911 tape. And that was -- you had it, it was there the day in court but you didn't play that during -- you didn't ask for that to be played during the trial?

Answer: No, I didn't.

Question: Okay. Why didn't you ask for it to be played?"

Answer: I don't know exactly. I didn't ask for it to be played, really, because, you know, the client, we talked about what was going to be presented. And we – I presented what he wanted me to. **I didn't agree with it but I presented what he wanted me to present."**

78, l. 13-23.

Question: And so if you brought, we say the intern, Mrs. Williams now, to court and she was confident at the time she told Deputy Fortner what she saw, somebody in red coming out the door, is a whole lot closer to the orange than the black, would you say?"

Answer: Well, I agree with your premise but you have to understand, you have a client to represent and **that's his decision whether he wants to call a witness or not. The lawyer can't just say, I'm going to do this. The client has to agree that this is how the case is pursued.** See, we had conversations about these witnesses, but unfortunately, I had a client that wanted to do the litigation absolutely his way. **And so if a client says to me, no, I'm going with what I got right here, then that's – I mean, that's all I can do.** And I agree in a more academic stance right now, that that would be the case. **But if your client is telling you, no, this is what I want to do. I can't say, hey, I don't agree with this."**

83, l. 10-84, l. 24.

Counsel's belief that his professional judgment had to yield to the client's demands was clearly the result of a fundamental misunderstanding of the law and his role as an advocate and officer of the court:

“It is by now well-established that in a criminal trial, defense counsel has the authority to manage most aspects of the defense without first obtaining the consent of the defendant. *See Florida v. Nixon*, 543 U.S. 175, 187, 125 S.Ct. 551, 160L.Ed.2d 565 (2004). "Decisions that may be made without the defendant's consent primarily involve trial strategy and tactics, such as what evidence should be introduced, what stipulations should be made, what objections should be raised, and what pre-trial motions should be filed." *Sexton v. French*, 163 F.3d 874, 885 (4th Cir.1998) (*internal quotation marks omitted*). However, "certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate." *Nixon*, 543 U.S. at 187, 125 S.Ct. 551.

United States v. Chapman, 593 F.3d 365 (4th Cir. 2010).

Counsel failed to understand that he was not only responsible, but required, to exercise his professional judgment in the presentation of the case. “Indeed, an attorney has the authority to manage most aspects of the defense without first obtaining the consent of the defendant." United States v. Chapman, 593 F.3d 365, 367-68 (4th Cir. 2010). The only decisions that have been identified by the Supreme Court as belonging exclusively to the defendant are "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).” “If the decision is a tactical one left to the sound judgment of counsel, the decision must be just that— left to the judgment of counsel. Counsel need not consult with the client about the matter or obtain the client's consent. *See id.* (The "duty to consult with the client regarding important decisions ... does not require counsel to obtain the defendant's consent to every tactical decision." (*internal quotation marks omitted*)).” United States v. Chapman, 593 F.3d 365 (4th Cir. 2010).

Calling witnesses and presenting evidence were tactical decisions that should have been made by counsel based on his professional judgement, even if contrary to the

petitioner's wishes:

“And if consultation and consent by the client are not required with regard to these tactical decisions, the client's expressed disagreement with counsel's decision cannot somehow convert the matter into one that must be decided by the client. For example, which witnesses to call is a classic tactical decision left to counsel, *see Boyle v. McKune*, 544 F.3d 1132, 1139 (10th Cir.2008) (“[T]he decision of which witnesses to call is quintessentially a matter of strategy for the trial attorney.”), and it remains a decision for counsel even when the client disagrees, *see Blanco v. Singletary*, 943 F.2d 1477, 1495 (11th Cir.1991) (“[T]he trial court overreached its authority and infringed upon the relationship between Blanco and his attorneys by requiring defense counsel to call two additional witnesses [as requested by the defendant]. Generally, trial tactics are for defense counsel to formulate. The decision as to which witnesses to call is an aspect of trial tactics that is normally entrusted to counsel.” *(footnotes omitted)*).

United States v. Chapman, 593 F.3d 365 (4th Cir. 2010).

The adversarial process required counsel to exercise his professional judgment rather than follow the demands of the petitioner with which counsel clearly disagreed.

"Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has—and must have—full authority to manage the conduct of the trial. The adversary process could not function effectively if every tactical decision required client approval." *(footnote omitted)*." Taylor v. Illinois, 484 U.S. 400, 417-18, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988); United States v. Chapman, 593 F.3d 365 (4th Cir. 2010).

In allowing the petitioner to “do the litigation absolutely his way” counsel failed to exercise his professional judgment and fulfill his duties as an advocate for his client, allowing instead for the petitioner to become his own attorney:

Defense counsel in a criminal trial is more than an adviser to a client with the client's having the final say at each point. He is an officer of the court and a professional advocate pursuing a result—almost always, acquittal—within the

confines of the law; his chief reason for being present is to exercise his professional judgment to decide tactics..... When the defendant is given the last word about how his case will be tried, the defendant becomes his own trial lawyer. If we add to the list of circumstances in which a defendant can trump his counsel's decision, the adversarial system becomes less effective as the opinions of lay persons are substituted for the judgment of legally trained counsel. The sound functioning of the adversarial system is critical to the American system of criminal justice. We intend to defend it. Burke, 257 F.3d at 1323.

United States v. Chapman, 593 F.3d 365 (4th Cir. 2010).

Being based his fundamental misunderstanding of the law and his role as a professional advocate in the litigation, counsel's failure to offer available evidence and testimony on the petitioner's only defense constitutes ineffective assistance of counsel: "An attorney's misunderstanding of the law, resulting in the omission of his client's only defense, is not a strategic decision and amounts to ineffective assistance of counsel.

United States v. Span, 75 F.3d 1383, 1389-90 (9th Cir. 1996).

The PCR court's finding that *counsel* made the decision not to call Williams as a witness so that he could have last argument is unsupported by the record. Counsel clearly testified that it was the petitioner's decision not to call Williams and that he did not agree with it. 84. Last argument was therefore merely a consequence of the petitioner's decision rather than any strategy on the part of counsel. There is overwhelming evidence that counsel allowed the petitioner to determine strategy and make tactical decisions. Counsel testified: "But, at that point, he was, for lack of better phrase, trying to be his own lawyer. And so he wanted to control the litigation, which was fair. I mean, it's his case. He has a right to pursue it whatever way he wants to. I didn't agree with a lot of it. But in terms of witnesses, preparing, he had 100 percent control of that. 70, l. 20-71, l. 5. Petitioner was

trying to be his own lawyer, which counsel facilitated by allowing the petitioner to control every aspect of the trial, even when it was contrary to counsel's professional judgment. .

In Poindexter v. Booker, 301 Fed.Appx. 522 (6th Cir.2008) defense counsel failed to call witnesses to support the defense theory of the case. The evidence in that case showed that two alibi witnesses accompanied Poindexter to meetings with his counsel, one of whom later approached Poindexter's counsel about the possibility of testifying on Poindexter's behalf. But Poindexter's counsel never interviewed either witness. When asked why he failed to make use of these potential witnesses, Poindexter's counsel responded: "I can't honestly give you an answer to that." *Id.* The court concluded that the "[f]ailure to investigate two alibi witnesses, particularly when the witnesses both personally offered to provide testimony beneficial to Poindexter, is therefore objectively unreasonable" and "not the product of sound trial strategy." *Id.* In the present case, when counsel was asked why he did not call Williams as a witness he responded: "I don't know why I didn't call her as a witness." 75, l. 15. When asked why he failed to ask to have the 911 call be played for the jury counsel responded: "I don't know exactly." 78, l.19. As in Poindexter counsel had evidence relating to petitioner's only possible defense, yet failed to investigate and use that evidence. Counsel's actions were therefore objectively unreasonable and not the product of sound trial strategy. The PCR court therefore erred in finding petitioner failed to meet his burden of proof under Strickland v. Washington.

### ***Conclusion***

Based on the foregoing the decision of the trial court should be reversed and the petitioner granted a new trial.

Respectfully submitted,

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April 24, 2025.