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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

The Honorable B. Alex Hyman, Post-Conviction Relief Judge
The Honorable Michael G. Nettles, Circuit Court Judge

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Appellate Case No. 2025-000184

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TRISTIAN XAVIER-MARIAN CUMMINGS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

# RETURN TO PETITION FOR WRIT OF CERTIORARI

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## PETITIONER'S STATEMENT OF ISSUE 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 judgement?
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?

## RESPONDENT'S RESTATEMENT OF ISSUE PRESENTED

The PCR judge properly denied Petitioner's application for post-conviction relief on the basis of ineffective assistance of counsel because Petitioner's counsel acted within the professional standards of reasonableness and exercised sound trial strategy to best represent Petitioner during trial, and even if Petitioner's counsel acted unreasonably, Petitioner failed to present any evidence of a fair probability that the outcome of trial would have been different but for the actions of Petitioner's counsel.

## STATEMENT OF THE CASE

Petitioner, Tristian Xavier-Marian Cummings, is currently incarcerated in Broad River Correctional Institution on sentences imposed for attempted armed robbery (2016-GS-23-8780), first-degree burglary (2016-GS-23-8782), criminal conspiracy (2016-GS-23-8773), murder (2016-GS-23-8778), and possession of a weapon during a violent crime (2016-GS-23-8779). The State extended Petitioner a plea offer on November 2, 2016, for a plea to murder with the State recommending thirty-five (35) years. Petitioner denied this offer. A Greenville County grand jury indicted Petitioner in June 2017 for attempted armed robbery, first-degree burglary, criminal conspiracy, second-degree domestic violence, murder, and possession of a weapon during a violent crime. The charge of second-degree domestic violence was in association with a separate incident and was dismissed prior to trial. On June 16, 2018, the State extended an additional offer of voluntary manslaughter and first-degree burglary with no recommendation from the State, and the remaining charges dismissed. Petitioner rejected this offer. Rodney Wade Richey, Esq. ("trial counsel") represented Petitioner on the charges at trial. Assistant Solicitors William McMaster and Andrew Culbreath prosecuted the case.

On April 8, 2019, the State called the above charges for trial and a jury was selected and impaneled. The Honorable Michael G. Nettles presided. At trial, Mr. Richey requested that the State reinstate the previous offer. The State notified the Court that they would be seeking a life sentence upon conviction, and that information was told to Petitioner and his counsel. The state extended the plea offer of voluntary manslaughter, first-degree burglary, and attempted armed robbery with no recommendation from the state. Again, Petitioner rejected this offer.

Petitioner's co-defendant, Simeon Williams who was represented by Joseph Watson, Esq., pled guilty prior to Petitioner's trial to first-degree burglary and voluntary manslaughter. His initial

charges include attempted armed robbery, first-degree burglary, criminal conspiracy, first-degree domestic violence, murder, and possession of a weapon during a violent crime. Mr. Williams received seventeen (17) years for attempted armed robbery and seventeen (17) years for voluntary manslaughter. Mr. Williams testified against the Petitioner at his trial.

On April 10, 2019, the jury returned guilty verdicts on all counts as charged. Judge Nettles sentenced Petitioner to twenty (20) years for attempted armed robbery, thirty-five (35) years for first-degree burglary, five (5) years for criminal conspiracy, thirty-five (35) years for murder, and five (5) years for possession of a weapon during a violent crime. The sentences were to run concurrently, and Petitioner was given credit for time-served for one-thousand and thirty (1,030) days. Petitioner timely appealed.

Appellate Defender Katherine Haggard Hudgins of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, represented Petitioner on appeal. The South Carolina Court of Appeals dismissed Petitioner's appeal upon consideration of Petitioner's *pro se* brief and review pursuant to *Anders v. California,* 386 U.S. 738 (1967) by unpublished *per curium* opinion issued on July 14, 2021. Petitioner did not seek further review from the Supreme Court of South Carolina and the Court of Appeals issued the remittitur on August 5, 2021.

On April 26, 2022, Petitioner initiated the captioned action by filing an application for post-conviction relief (PCR). On May 16, 2024, an evidentiary hearing was held before Judge B. Alex Hyman. In a written ordered filed January 13, 2025, Judge Hyman denied Petitioner's request for relief on all allegations and dismissed the PCR action with prejudice. Petitioner filed a timely notice of appeal, and a petition for writ of certiorari was filed April 24, 2025. This return to the petition for writ of certiorari follows.

## STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts defer to the post-conviction relief court's finding of fact and will uphold them if there is any evidence in the record to support them. *Id.* at 180, 810 S.E.2d at 839. (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 [2016]; *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 [2013]). However, pure questions of law will be reviewed *de novo* without deference to the lower court. *Id.* at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

## ARGUMENT

**The PCR judge properly denied Petitioner's application for post-conviction relief on the basis of ineffective assistance of counsel because Petitioner's counsel acted within the professional standards of reasonableness and exercised sound trial strategy to best represent Petitioner during trial, and even if Petitioner's counsel acted unreasonably, Petitioner failed to present any evidence of a fair probability that the outcome of his trial would have been different but for the actions of Petitioner's defense counsel.**

Petitioner alleges trial counsel was ineffective because he: (1) failed to timely notify the Court that grounds existed for him to move to be relieved as counsel of record; (2) failed to adequately advise client sufficiently to make an informed decision relating to the decision whether the Petitioner should proceed to trial, enter a plea, or accept plea offers; (3) failed to properly make, raise and preserve issues relating to severance and joint trial with co-defendant; (4) failed to adequately investigate, prepare, and present a defense, including failure to subpoena witnesses and present a 911 call; and (5) failed to raise and preserve issues for direct appeal. At the evidentiary hearing, Petitioner repeatedly contended that trial counsel didn't properly investigate the evidence being presented against Petitioner; testifying he felt that trial counsel didn't do anything for him during trial (Appendix ["App."] p. 35, lines 18-20).

The PCR court disagreed. (App. p. 1). Judge Hyman found that Petitioner was aware of his right to relieve trial counsel as his attorney and was aware of his opportunity to do so as he had previously relieved counsel within these proceedings. (App. p. 5). On March 28, 2019, following a request for a hearing to remove trial counsel, Judge Verdin told Petitioner he could keep trial counsel as his attorney, he could represent himself, or hire a new attorney, however, that attorney must be ready to proceed to trial in early April. (App. p. 5). Again, before selecting a jury for the April trial, Judge Nettles asked Petitioner if he would like trial counsel to proceed as his representation or if he wanted to represent himself. (App. p. 5). Petitioner stated that he would

prefer trial counsel to remain as his counsel. (App. p. 5). Petitioner was unable to provide the court with any evidence of resulting prejudice arising from trial counsel's actions. (App. p. 6).

Judge Hyman found that trial counsel adequately advised Petitioner of the risks he faced at trial and explained that he would not be able to entertain certain arguments on behalf of Petitioner if he went to trial. (App. p. 8). Despite this advice, Petitioner's chose to proceed to trial, rejecting four pleas from the State in the process. (App. p. 8). The court found that Petitioner failed to present any evidence that trial counsel erroneously advised Petitioner or failed to advise him. (App. p. 8). Judge Hyman found that trial counsel raised the issue, at Petitioner's request, of trying both Petitioner and his co-defendant jointly and therefore did not act deficiently. (App. pp. 8-9).

Finally, Judge Hyman found that Petitioner was unable to meet the standards outlined in *Strickland* to establish ineffective assistance of counsel, (App. p. 11), finding that the State's evidence against Petitioner was "overwhelming" (App. p. 12) and Petitioner failed to produce anything beyond mere speculation to support his allegations (App. p. 13). Petitioner's application for post-conviction relief was denied and dismissed with prejudice. (App p. 13).

**Standard for Ineffective Assistance of Counsel Claims**

To establish that Sixth Amendment counsel was ineffective, a PCR applicant must show that counsel's representation fell below an objective standard of reasonableness, and but for counsel's error, there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington,* 466 U.S. 668, 694 (1984); *Simpson v. Moore,* 367 S.C. 587, 595–96, 627 S.E.2d 701, 706 (2006).

### 1. Petitioner's counsel acted within the professional standards of reasonable and sound trial strategy to best represent Petitioner during trial.

Petitioner alleges that trial counsel had a fundamental misunderstanding of the law in allowing the Petitioner to "determine strategy and make tactical decisions, including which witnesses to call and evidence to introduce," despite the decisions being contrary to trial counsel's professional judgement. (Petitioner ["Pet."] pp. 5-6). Petitioner further alleges that trial counsel failed to fulfill his role as an advocate and officer to the court by allowing Petitioner to make such decisions regarding his case. (Pet. p. 7). However, Petitioner mischaracterizes trial counsel's statements from the evidentiary hearing and does not address that he failed to present any evidence that trial counsel's strategy falls outside the professional guidelines requiring reasonable action by counsel or that he was prejudiced as a result of such reasonable action. To be clear, Petitioner is not claiming that trial counsel failed to investigate or failed to present critical evidence.[1]

Petitioner relies on *United States v. Chapman* to support the notion that trial counsel should have overriden Petitioner's demands because trial counsel did not agree with Petitioner. While *Chapman* clearly grants attorneys the ability to make certain decisions on behalf of their clients without first consulting them or obtaining consent, the Court places no *per se* requirement on attorneys to do so. Further, *Chapman* states that if the decision(s) are tactical in nature, they must be left to the judgement of counsel. *United States v. Chapman*, 593 F.3d 365, 369 (4th Cir. 2010). "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

[1] Trial counsel was aware of the witnesss and discussed her with Petitioner. (App. p. 74). During the PCR hearing, the witness testified she was a bad angle to see anything and it was possible she did not see someone with a red shirt. (App. pp 64, 66).

of counsel." *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing *Goodson v. United States*, 564 F.2d 1071 [4th Cir. 1977]).

In this case, trial counsel followed a strategy. Trial counsel talked extensively with Petitioner prior to trial about what potential evidence both the witness and the 911 call could present. (App. pp. 72-73). Trial counsel discussed with Petitioner problem areas of the case (App. p. 73, lines 4-8) and was able to craft a strategy for trial (App. p. 73, lines 24-25, App. p. 74, lines 1-2). During the evidentiary hearing, trial counsel stated, "...we talked about this...witness. And we also talked about these other phantom people. And in the end, that (sic) was a decision not to do that." (App. p. 74, lines 15-24). Trial counsel also testified that "...we talked about what was going to be presented," as part of his reasoning for not presenting the 911 call. (App. p. 78, lines 18-25). Trial counsel also explained the effects of not producing such evidence – having a last argument – indicating that this was not only a decision made by Petitioner but also a tactical decision on the part of trial counsel. (App. p. 87, lines 4-10). Trial counsel explained, "I was trying to muddy up the water on this thing about – I was trying to muddy up the water by saying that, I guess, they had the house surrounded, it was a weak link." (App. p. 76, lines 19-23).

While Petitioner also urged for these actions to be taken, trial counsel had his own independent tactical reasons for not presenting certain evidence. Further, Petitioner's claim that last argument was "merely a consequence of [P]etitioner's decision rather than any strategy on the part of [trial] counsel," is not supported by the record. During a colloquy with Judge Hyman, trial counsel explained that "we wanted the last [argument]," and explained that this was a common decision in his practice. (App. p. 87, lines 4-10). In essence, trial counsel exercised professional judgement along with allowing client to make some decisions in the case.

Petitioner attempts to draw similarities between Petitioner's case and the facts set out in

*Poindexter v. Booker* to further his claim, citing trial counsel's response of "I don't know," to highlight trial counsel's ineffectiveness. In *Poindexter*, defense counsel failed to call, or even interview, several alibi witnesses even after the witnesses expressed a willingness and desire to testify on behalf of the defendant. *Poindexter v. Booker*, 301 Fed.Appx. 522 (6th Cir. 2010). When asked why he did not interview or investigate these witnesses, defense counsel simply said "I can't give you an answer to that." *Poindexter* at 529. The court found that the failure to interview and investigate key witnesses was objectively unreasonable and trial was ineffective. *Id.*

"Putting to one side the exception cases in which counsel is ineffective, the client must accept the consequences of the lawyer's decision to forgo cross-examination, to decide not to put certain witnesses on the stand, or to decide not to disclose the identity of certain witnesses in advance of trial." *Taylor v. Illinois*, 484 U.S. 400, 108 S.Ct. 646 (1988). Trial counsel reasonably acted within the professional guidelines of sound trial strategy, in agreement with Petitioner's wishes, which were not unreasonable. Petitioner fails to meets the first prong of the *Strickland* test; therefore, this court should affirm Judge Hyman's ruling.

**2. Even if Petitioner's counsel acted unreasonably, Petitioner failed to present any evidence of a fair probability that the outcome of the trial would have been different but for the actions of Petitioner's counsel.**

Petitioner additionally alleges that the court erred in finding that Petitioner failed to meet his burden of proof under *Strickland v. Washington*. The State does not assert that trial counsel acted unreasonably. However, should the court believe that trial counsel did act unreasonably, the Petitioner failed to satisfy the second prong of *Strickland v. Washington*.

To show prejudice, a defendant is required to show a "reasonable probability" that the proceeding would have raised a "reasonable doubt respecting guilt." *Strickland* at 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the

trial. *Strickland* at 694. Relief will not be granted on a showing of mere error—prejudice must also be shown. *Id.* To conduct a fair review of counsel's performance, a reviewing court must "eliminate the distorting effects of hindsight" and attempt "to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland* at 689.

The record amply supports Judge Hyman's findings that Petitioner has failed to show that there is a reasonable probability that, but for trial counsel's unprofessional errors, Petitioner would not have been found guilty by a jury (App. p. 8); thus, Petitioner has failed to carry his burden of proof on any of the allegations in his application for PCR (App. p. 13). The record shows in support of guilt the following facts: On March 6, 2016, at about 1:15 a.m., two men approached the front door of Mr. Jeryl White. (App. p. 144, lines 11-12). Mr. White tells the two individuals to go away and that he is going to call the cops. (App. p. 144, lines 22-24). The two individuals return down the front steps which they came, discover a side door to Mr. White's duplex, and attempt to enter the duplex. (App. p. 144, lines 24-25, p. 145, lines 1-6). The two individuals, identified as Simeon Williams and the Petitioner, intended to rob Mr. White in hopes of finding money. (App. p. 145, lines 9-10). Mr. White was a known drug dealer in the neighborhood (App. p. 171, lines 2-9), and Petitioner and Mr. Williams anticipated he would be in possession of money (App. p. 246, lines 1-25). Applicant, armed with a pistol, kicked in the door to the duplex, and both Mr. Williams and Petitioner ran inside and began searching the home for drugs and money. (App. p. 145, lines 6-16). Mr. White barricaded himself in the bathroom (App. p. 145, lines 19-20) and was shot through the door two times by the Petitioner (App. p. 146, lines 5-15). Mr. White's girlfriend, April Green, who was seven months pregnant, was also living in the home at the time of the incident. (App. p. 145, lines 24-25, p. 146, line 1). After Mr. Williams and the Petitioner approached the home

initially, Mr. White told Ms. Green to lock the doors and call 911. (App. p. 158, lines 12-25). Ms. Green hid behind the bed in the bedroom which had a shared wall with the bathroom where Mr. White was shot. (App. p. 159, lines 3-12). Mr. White was shot once in the front portion of his right thigh, going through the muscle, entering the front, and exiting out the back. (App. p. 361, lines 22-25, p. 362, lines 1-5). Mr. White suffered an additional gunshot wound entering the top left of his shoulder, passing through his cervical vertebra. (App. p. 362, lines 10-13). Mr. White died at the scene due to the gunshot wound in the shoulder. (App. p. 363, lines 2-6).

Deputy Harold Robinson responded to the disturbance call due to his close proximity to the address. (App. p. 146, lines 16-23). Deputy Kenneth Sandefur quickly arrived for backup. (App. p. 183, lines 11-13). Deputy Robinson and Deputy Sandefur approached the bottom door of the duplex where the Petitioner and Mr. Williams entered (App. p. 183, lines 14-25) and were able to see Mr. Williams going through cabinet drawers (App. p. 186, lines 10-11). Both Deputies announced their presence and told Mr. Williams, "let me see your hands, get on the ground," to which Mr. Williams complied. (App. p. 187, lines 12-14). Mr. Williams mumbles to the Petitioner, "let's go, or we got to get out of here, or something along that line," (App. p. 188, lines 11-13) after which the Petitioner runs behind Mr. Williams with a silver metallic firearm in his hands, slams it on the counter, and runs out the front door (App. p. 188, lines 14-19). Deputy Robinson held Mr. Williams at gunpoint for approximately eight minutes until backup arrived. (App. p. 189, lines 6-7). Deputy Sandefur pursues Petitioner and meets him around at the front door to which he identifies Petitioner's clothing and the lack of a pistol in his possession. (App. p. 209, lines 8-12). Petitioner runs from Deputy Sandefur into a thick briar patch where Deputy Sandefur and the Petitioner struggle with each other. (App. p. 147, lines 8-17). Eventually, backup arrives, and

Deputy Ivan Rodriguez is able to subdue the Petitioner, and hold him until additional backup arrives to handcuff and place him in the police vehicle. (App. p. 215, lines 14-17).

Even if trial counsel acted unreasonably, there was no reasonable probability of a different result because of the overwhelming evidence of guilt; therefore, Petitioner has failed to meet the second prong of the *Strickland* test, and this court should affirm Judge Hyman's ruling. *See* Rivers v. State, Op. No. 28285 (S.C.Sup.Ct. filed May 28, 2025) (Howard Adv.Sh. No. 20 at 7).

## CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR court's finding counsel was not constitutionally ineffective.

Respectfully submitted,

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