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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Appeal from Richland County

Honorable Brian M. Gibbons, Circuit Court Judge

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Opinion No. 2025-UP-017

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HOLLY JO THOMPSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-000654

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RETURN TO PETITION FOR REHEARING

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On August 20, 2025, this Court issued a memorandum opinion that 1) reversed the Court of Appeals' holding regarding deficiency, 2) reversed the PCR court's determination of deficiency, 3) found that trial counsel was deficient in failing to pursue an immunity hearing, and 4) remanded the matter back to the circuit court for a determination of prejudice on the existing record. Respondent filed for rehearing pursuant to Rule 221(a), SCACR, on September 2, 2025, arguing that the record supported the PCR court's initial determination that counsel was not deficient or, in the alternative, that if this Court upheld its decision that the record did not support the PCR court's initial deficiency determination, that the matter should be remanded to allow the

PCR court to again rule on the issue of deficiency. Respectfully, this Court’s well-reasoned, unanimous opinion did not overlook or misapprehend any points when it determined that the PCR court’s determination “that trial counsel was not deficient based on an articulated trial strategy is not supported by the evidence.” Thompson v. State, 2025-MO-039 (S.C. Sup. Ct. filed August 20, 2025) at 2. As this Court found “[t]rial counsel did not assert he had a valid strategic reason for failing to seek immunity under the Act. Instead, trial counsel articulated no strategy at all on this issue.”

The PCR court found that trial counsel was not ineffective in failing to pursue an immunity hearing because counsel considered the relevant factors of the Act and decided to instead focus on asserting self-defense at trial. There was no testimony or evidence in the record to support that finding. What counsel testified to was that he did not recall having discussions with *Petitioner or his co-counsel* about an immunity hearing, that he had *no notes* (such as a pro/con list) regarding discussions about an immunity hearing, and that his first concern *if he would have considered a hearing* probably would have been whether the Decedent’s home was a place Petitioner had the right to be. App. 816, ll. 4-19. Further, neither Counsel Bailey nor Petitioner had any recollection of discussing pursuing immunity from prosecution under the Act.

The PCR court further found Counsel Bank’s failure to file for immunity pursuant to the Act was not deficient performance by ruling that he had articulated a valid strategy of focusing on self-defense. However, again, there was no evidence or testimony in the record to support that finding. Notably, Counsel Bank testified that a hearing under the Act was “something that *could* have been explored.” He confirmed that he understood he could have pursued immunity from prosecution under the Act and *still asserted self-defense at trial*. App. 816, ll. 20-22. At no point did he, or anyone else, testify that there was an affirmative decision to forgo a hearing

under the Act to focus on self-defense at trial. Even if there had been some affirmative decision to forgo a hearing and focus on self-defense, Counsel Bank was still required to articulate a valid reason for *not* pursuing immunity under the Act. See Stone v. State, 419 S.C. 370, 384, 798 S.E.2d 561, 569 (2017).

The probative evidence in the record supports this Court's determination that Counsel Bank did not consider pursuing an immunity hearing at any point during the representation of Petitioner. Not only did Counsel Bank, co-counsel, or Petitioner testify they did not have independent recollection of any discussions regarding immunity, but there were no written notes in counsel's file indicating that immunity had been considered, not even a pro/con analysis. The PCR court misconstrued what Counsel Bank could, would, and should have done as what he did do instead. The testimony from Counsel Bank, co-counsel, and Petitioner show that immunity was not considered and Counsel Bank could not offer a valid, sound reason, as required by law, for that supposed strategic decision. This Court properly determined Counsel Bank was deficient.

Respondent points to Wood v. Allen, 558 U.S. 290 (2010), to support the argument that counsel's "strategic or tactical decision does not have to be articulated by counsel on the record before a PCR court may acknowledge it, nor does counsel have to personally identify his or her thinking. It is enough that the record reflects strategic design, such that a PCR court may fairly infer from the record what the strategy was, even if trial counsel cannot or will not subsequently articulate it." PFR, 4. However, Petitioner's case is inapposite to Wood.

In Wood v. Allen, 558 U.S. 290, 294, (2010), the United States Supreme Court granted certiorari to address the relationship between §§ 2254(d)(2) and (e)(1) of the Antiterrorism and Effective Death Penalty Act. Wood had been convicted of the capital murder of his ex-girlfriend and was sentenced to death. Id. at 294. Wood filed for state PCR arguing that his mental

retardation made him ineligible for the death penalty and that his trial lawyers were ineffective for failing to investigate and present evidence of his mental deficiencies during the penalty phase of trial. Id. During the state PCR proceedings, the evidence presented revealed that Wood had been represented by three appointed lawyers, two with significant trial experience, Dozier and Ralph, and one, Trotter, who had been admitted to practice for five months at the time of appointment. Id. Trotter had been put in charge of the penalty phase presentation.

The record revealed that Trotter had requested a Dr. Karl Kirkland to conduct a mental evaluation of Wood. Dr. Kirkland's final report included details about Wood's nineteen prior arrests and his previous attempted-murder of another ex-girlfriend. Dr. Kirkland's report also found that notwithstanding Wood's mental deficiencies, Wood had a high level of adaptive functioning. Trotter hired an investigator to seek out mitigation evidence from Wood's family members, and also himself met with family members and sought guidance from capital defense organizations. Id. at 298. Trotter had testified that that he had seen the references to Wood's intellectual functioning in the Kirkland report but did not recall considering whether to pursue that issue. Trotter further testified that he had unsuccessfully attempted to subpoena Wood's school records and that he did not recall speaking to any of Wood's teachers. Shortly before the penalty phase began, Trotter told the judge that he would request further psychological evaluation before the judge's sentencing hearing, even though the evaluation would come too late to be considered by the jury. Id. at 296.

Based on the evidence from the hearing, the state court denied PCR finding that "while the evidence suggested that [Wood] probably does exhibit significantly subaverage general intellectual functioning, he had failed to show that he has significant or substantial deficits in his adaptive functioning." Id. at 294–95. The PCR court made a factual finding that Wood's counsel

had made a strategic decision not to pursue evidence of his alleged mental retardation. The court observed that counsel had requested that a Dr. Karl Kirkland conduct a mental evaluation, had thoroughly reviewed Dr. Kirkland's report, and had determined that nothing in that report merited further investigation. The court additionally found that counsel appeared to have made a strategic decision not to present to the jury the limited evidence of Wood's mental deficiencies in their possession, because calling Dr. Kirkland to testify was not in Wood's best interest. Id. at 295.

A federal district court reversed the Alabama PCR court and granted Wood habeas relief. Looking mainly at the testimony of Trotter the district court held the state court's finding that a strategic decision was made not to investigate or introduce to the sentencing jury evidence of mental retardation [was] an unreasonable determination of the facts in light of the clear and convincing evidence presented in the record. Id. at 296. A divided Eleventh Circuit Court of Appeals reversed the grant of habeas finding that the state court's determination that counsel was not deficient was not based on an unreasonable determination of the facts because the evidence presented in the state PCR hearings supported the state court's findings that counsel made a strategic decision not to present mental health evidence during the penalty phase. The court also agreed with the state court's legal conclusion that counsel's strategic decision was reasonable. According to the court, the silent record created a presumption that counsel exercised sound professional judgment, supported by ample reasons, not to present the information they had obtained. Id. at 297. The Supreme Court affirmed the denial of habeas finding that under §2254(d) the state court's finding that Wood's counsel made a strategic decision not to pursue or present evidence of Wood's mental deficiencies was not an unreasonable determination of the facts in light of the evidence presented in the state-court proceedings. Id. at 301.

In upholding the Court of Appeals the Supreme Court wrote,

In this case, the evidence in the state-court record demonstrated that all of Wood's counsel read the Kirkland report. Trotter testified that Dozier told him that nothing in the report merited further investigation, a recollection that is supported by contemporaneous letters Trotter wrote to Dozier and Ralph noting that no independent psychological evaluations had been conducted because Dozier had said they would not be needed. Trotter also told the sentencing judge that counsel did not intend to introduce the Kirkland report to the jury. This evidence in the state-court record can fairly be read to support the [PCR] court's factual determination that counsel's failure to pursue or present evidence of Wood's mental deficiencies was not mere oversight or neglect but was instead the result of a deliberate decision to focus on other defenses.

...

Reviewing all of the evidence, we agree with the State that even if it is debatable, it is not unreasonable to conclude that, after reviewing the Kirkland report, counsel made a strategic decision not to inquire further into the information contained in the report about Wood's mental deficiencies and not to present to the jury such information as counsel already possessed about these deficiencies.

Id. at 301-303.

In Wood there was other evidence in the record, outside of the testimony of counsel from which the PCR court could determine that Wood's counsel investigated his mental deficiencies, reviewed the fruits of that investigation, and subsequently determined that further use of that information was more harmful than helpful to Wood. That decision was supported by the fact that information in the mental evaluation report was harmful to Wood because although it revealed mental deficits, it showed he had a high level of adaptive functioning, and it detailed his past crimes. Thus, based on all the circumstances before the PCR court it was not "unreasonable to conclude that, after reviewing the Kirkland report, counsel made a strategic decision not to inquire further into the information contained in the report about Wood's mental deficiencies and not to present to the jury such information as counsel already possessed about these deficiencies." Wood at 302-303.

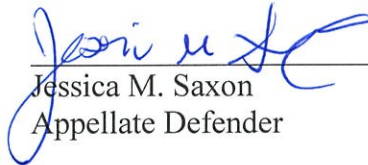
In this matter there is no information in the record from which this Court, or any court, could reasonably infer that Counsel Bank made a strategic decision to not pursue immunity. The testimony from all witnesses with knowledge of the matter was that they did not discuss pursuing immunity from prosecution at any point prior to trial. There was nothing in counsel's case file - no notes, no research, no statutory provisions - to show that he endeavored to investigate the applicability of immunity to Petitioner's case. There was no testimony that pursuing immunity would somehow detract from or conflict with pursuing self-defense. There was nothing in the record other than Counsel Bank's testimony that he had no recollection of why he did not consider immunity and what he would have done *if he had considered immunity prior to trial*. App. 816, ll. 4-22; App. 823, ll. 11-23.

The PCR court ruled on the issue of deficiency in the original order of dismissal. This Court was well within its authority to review the deficiency determination of the courts before it and determine those courts were incorrect. As no court has reviewed prejudice in this matter, it is in fairness to the PCR court that it be given the opportunity to rule on prejudice in the first instance. Respondent has offered no reason to allow the lower court a second bite at the proverbial deficiency apple. This Court correctly found Counsel Bank was deficient and properly remanded the matter to the lower court solely for a prejudice determination.

## CONCLUSION

Based on the foregoing argument, as well as those arguments presented in the petition for writ of certiorari and the reply to return to the petition, Petitioner respectfully requests that this Court deny Respondent's petition for rehearing.

Respectfully Submitted,

  
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Jessica M. Saxon  
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of September, 2025