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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 the Court of Common Pleas  
Appeal from Spartanburg County  
Honorable Heath P. Taylor, Post-Conviction Relief Judge  
Honorable Roger L. Couch, Trial Judge

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Appellate Case No. 2025-000338

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DARIUS T. CATHCART, #303063,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

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**PETITION FOR A WRIT OF CERTIORARI**

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ALAN WILSON  
Attorney General

DONALD J. ZELENKA  
Deputy Attorney General

D. RUSSELL BARLOW, II  
Senior Assistant Deputy Attorney General  
S.C. Bar No. 105228

P.O. Box 11549  
Columbia, SC 29211  
803-734-3737

ATTORNEYS FOR RESPONDENT

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## **STATEMENT OF THE ISSUES ON PETITION FOR CERTIORARI**

- I. Whether the post-conviction relief court erred in granting relief on the premise that Counsel Poole had an actual conflict of interest where the evidence presented contradicts the post-conviction relief court's conclusion of presumed prejudice because Counsel Poole was, unbeknownst to him, temporarily appointed to represent an alleged third-party actor in an unrelated case, yet he did not engage in any substantive actions during this temporary appointment and this lack of involvement underscores the absence of an actual conflict of interest, and where Cathcart failed to demonstrate how any supposed conflict adversely impacted Counsel Poole's representation, thus highlighting the post-conviction relief court's fundamentally flawed order and warrants reversal?
  
- II. Whether the post-conviction relief court erred in granting relief on the premise that Counsel Poole had a duty to investigate third-party guilt where the State's theory of the case was that Cathcart was guilty under the theory of accomplice liability and any investigation into third-party guilt would not have changed the results of Cathcart's trial where it did not hinge on who the shooter was but rather that Cathcart was present and involved which was readily admitted by Cathcart in his statements to law enforcement?

## STATEMENT OF THE CASE

Respondent Darius T. Cathcart (Cathcart) was indicted at the May 2010 term of the Spartanburg County Grand Jury for assault with intent to kill (2010-GS-42-02874), murder (2010-GS-42-02875), and assault and battery with intent to kill (2010-GS-42-02876). Roger Poole, Esq., represented Cathcart, and Abel O. Gray, Esq., of the Seventh Circuit Solicitor's Office, prosecuted the case.

Prior to trial, Cathcart appeared before the Honorable Roger L. Couch on or about March 28, 2011,<sup>1</sup> for a hearing pursuant to Jackson v. Denno, 378 U.S. 368 (1964). On May 9, 2011, Cathcart proceeded to trial before the Honorable Roger L. Couch and a jury. The jury found Cathcart guilty as indicted on May 12, 2011. Judge Couch sentenced Cathcart to imprisonment for concurrent terms of 10 years for AWIK, 40 years for murder, and 20 years for ABWIK.

Cathcart filed a timely notice of appeal, and a direct appeal was perfected by Kathrine H. Hudgins, Esq., who filed a motion to be relieved as counsel and a brief pursuant to Anders v. California, 386 U.S. 738 (1967), in which she offered the following issue:

Did the trial judge err in charging the jury that malice may be inferred from the use of a deadly weapon when the judge charged the jury on the law of self-defense?

The South Carolina Court of Appeals dismissed Cathcart's appeal by unpublished opinion. State v. Cathcart, Op. No. 2013-UP-052 (S.C. Ct. App. filed Jan. 30, 2013). The Remittitur was issued on February 21, 2013.

Cathcart filed his first application for post-conviction relief on August 31, 2015 (2015-CP-42-03695). He alleged the following grounds for relief in his application:

1. Conflict of interest, in that:
  - a. "After the Defendant was sentenced and through investigation conducted by the undersigned and by his private investigator, it has been learned that

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<sup>1</sup> The transcript indicates it was on March 28 and March 29 at different points.

the Defendant's trial attorney, Roger Poole, previously and possibly during the time of representation of the Defendant, had represented Black. Mr. Poole never advised the Defendant that he represented Black and the Defendant was never aware that his attorney represented, or had represented, the very witness who could have provided exculpatory evidence for the Defendant and/or upon whom the Defendant was basing his defense."

The State made its return and motion to dismiss on November 16, 2016, arguing the application was untimely. On November 22, 2016, the Honorable J. Mark Hayes, II issued a Conditional Order of Dismissal. Cathcart did not respond to the Conditional Order. On April 3, 2017, the Honorable J. Derham Cole issued a Final Order dismissing the matter with prejudice. Cathcart did not appeal.

Cathcart filed his second application for post-conviction relief on June 29, 2018, alleging the following grounds for relief in his application:

1. Conflict of Interest

The State filed its Return and Motion to Dismiss on May 28, 2019, requesting Cathcart's application be summarily dismissed as untimely, as barred by the statute of limitations pursuant to S.C. Code Ann. § 17-27-45, and as successive pursuant to S.C. Code Ann. § 17-27-90. A conditional order of dismissal was entered, provisionally dismissing the application as time-barred but allowing Cathcart twenty days to provide a sufficient reason why the dismissal should not become final. In response, Cathcart filed a memorandum asserting that the post-conviction relief counsel he retained to assist him in his initial post-conviction relief action failed to timely file his first action, despite being retained before the statute of limitations ran, and failed to respond to the State's motion to dismiss or the Court's conditional order of dismissal. Thereafter, the State moved for a hearing on its motion to dismiss pursuant to Mose v. State, 420 S.C. 500, 511-12, 803 S.E.2d 718, 723 (2017).

On September 14, 2021, a Mose hearing was held before the Honorable William A. McKinnon at the Spartanburg County Courthouse. Assistant Attorney General William Ray represented the State. Cathcart was present and represented by Susannah C. Ross, Esquire. At the commencement of the hearing, the State argued that the present application was filed outside of the one-year statute of limitations and was successive, as a prior post-conviction relief application had been summarily dismissed. Cathcart argued that equitable tolling is appropriate and justified in this matter due to Cathcart's belief that Attorney James P. Craig had filed a timely post-conviction relief application on his behalf. Cathcart argued that this post-conviction relief action should not be considered successive because the prior application was dismissed without a hearing or effective legal representation, so Cathcart reasonably believed Mr. Craig had properly filed that action. Judge McKinnon denied the State's motion by written order, filed on November 2, 2021.

On May 7, 2024, Cathcart amended his application for post-conviction relief with the following additional allegations:

1. Ineffective Assistance of Counsel – Turnipseed
  - a. Setting up interviews with the solicitor and investigator Lorin Williams that provided information on Antwan Lamar Mack as third party shooter;
  - b. Submitting Applicant to State administered polygraph without first securing an independent polygraph; and
  - c. Moving to be relieved after the Applicant balked at continued interviews without assurances that his cooperation would not be used against him.
2. Ineffective Assistance of Counsel – Mr. Poole
  - a. Proceeding with representation despite a conflict of interest because Mr. Poole and the Seventh Circuit Public Defender's Office represented Antwan Lamar Mack who Applicant said was the third-party uncharged shooter in his case and responsible for the arson of his car;
  - b. Failure to conduct independent investigation or review trial strategy with Applicant;
  - c. Failure to move for a severance or challenge motion to exclude third party guilt;
  - d. Failure to interview and subpoena witnesses including lead investigator Lorrin Williams, Antwan Mack AKA "Black", Monique Brown, Edward Robinson, Dangelo Williams, Brandon Glenn, and Bralen Morris;

- e. Failure to present Edward Robinson's and Applicant's statements and photo affidavit as evidence that the shooter was Antwaun Mack AKA "Black";
  - f. Failure to request duress instruction or take exception to the jury instructions regarding "hand of one" and inferred malice from the use of a handgun. Record on Appeal p. 556, l. 7; p. 563, l. 11; p. 571, l. 9.
  - g. Failure to object to the Solicitor's burden shifting argument and reference to Applicant's burned car as evidence of a cover up Record on Appeal p. 538, l. 7; 539, l. 17; p. 540, l. 22.
3. Due process violation due to State promising the Applicant consideration for his extensive cooperation, moving to exclude exculpatory evidence of third party guilt, making burden shifting comments in closing and arguing that the Applicant tried to destroy evidence by burning his car when the State knew the Applicant was not involved in burning. Record on Appeal p. 438, l. 7.

An evidentiary hearing was convened at the Spartanburg County Courthouse on May 20, 2024, before the Honorable Heath P. Taylor. Cathcart was present and represented by Susannah C. Ross, Esquire (PCR Counsel). Assistant Attorney General Shayla Joan Flores represented the State. Cathcart testified on his own behalf and presented the testimony of Michael Crossley, Princess Cathcart, Monique Brown, and Tanisha Cathcart. The State presented the testimony of J. Roger Poole, Esquire (Counsel Poole), and Abel Orlando Gray, Esquire (Solicitor).

The post-conviction relief court granted relief by filed order on January 14, 2025.<sup>2</sup> Respondent made its Motion to Reconsider, Alter, or Amend, pursuant to Rule 59(e), SCRPC<sup>3</sup>, by

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<sup>2</sup> The State received notice of the filing of the Order Granting Post-Conviction Relief on January 16, 2025.

<sup>3</sup> As noted in the State's Rule 59(e), SCRPC, motion, the post-conviction relief court's order granting post-conviction relief did not address the following allegations that were duly raised at the evidentiary hearing: 1) Counsel Turnipseed failed to set up interviews with the Solicitor and Lorin Williams that provided information on Antwan Lamar Mack as the third party shooter; 2) Counsel Turnipseed failed to secure an independent polygraph examination; 3) Counsel Turnipseed moved to be relieved after Cathcart balked at the lack of assurances that his cooperation would not be used against him; 4) Counsel Poole failed to conduct independent investigation or review trial strategy with Cathcart; 5) Counsel Poole failed to move for a severance or challenge the motion to exclude third party guilt; 6) Counsel Poole failed to interview and subpoena witnesses including lead investigator Lorin Williams, Antwan Mack AKA "Black", Monique Brown, Edward Robinson, Dangelo Williams, Brandon Glenn, and Bralen Morris; 7) Counsel Poole failed to request duress instruction or take exception to the jury instructions regarding "hand of one" and inferred malice from the use of a handgun; 8) Counsel Poole failed to object to the

serving the post-conviction relief court and post-conviction relief counsel by email and USPS mail on January 27, 2025.<sup>4</sup> On March 31, 2025, the State received correspondence from the post-conviction relief court containing a signed order denying the State's Rule 59(e), SCRCP, motion. The post-conviction relief court concluded that the motion was untimely because it was not filed within the ten-day period following receipt of the order. On the same day, the State contacted the post-conviction relief court to seek guidance and/or a hearing, indicating that it would not take any further action until guidance was provided. On April 23, 2025, the State was informed that the post-conviction relief court had issued a signed Amended Order Denying Motion to Reconsider, which stated that the State had not filed the Rule 59(e), SCRCP, motion within the ten-day time period required by the Rule, thereby rendering it untimely. The State received notification of the filing of the Amended Order Denying Motion to Reconsider on Friday, May 9, 2025.

In light of the atypical circumstances and the improper application of the provisions outlined in the post-conviction relief court's order denying the first Rule 59(e), SCRCP, the State filed a second Rule 59(e), SCRCP, motion on May 19, 2025.<sup>5</sup> On May 30, 2025, the post-conviction relief court filed its Second Amended Order Denying Motion to Reconsider, in which the court concluded that the State *had* filed its initial Rule 59(e) motion in a timely manner, as

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Solicitor's burden shifting argument and reference to Cathcart's burned car as evidence of a cover-up; and 9) Due Process violation due to the State promising Cathcart consideration for his extensive cooperation, moving to exclude exculpatory evidence of a third party guilt, making burden-shifting comments in closing, and arguing that the Cathcart tried to destroy evidence by burning his car when the State knew Cathcart was not involved in the burning.

<sup>4</sup> The State received notice of the filing of the order on January 16, 2025, establishing that a Rule 59(e), SCRCP, motion would be due for service on or by January 26, 2025. Given that January 26, 2025, fell on a Sunday, the State effected service on January 27, 2025, which was that Monday.

<sup>5</sup> Out of an abundance of caution, the State filed a contemporaneous Notice of Appeal pursuant to Hudson v. Hudson, 290 S.C. 215, 349 S.E. 2d 341 (1986).

required by the SCRCF, and denied the State's motion on the merits. On June 9, 2025, the State timely filed an Amended Notice of Appeal.

This Petition for Writ of Certiorari follows.

## STATEMENT OF FACTS

Sometime after midnight on March 14, 2009, Bryant Miller and his friends, Dwight Geter, "D.G." (the victim), and Marty, visited a nightclub called "Club Dreams" in Spartanburg. (App'x pp. 198–199). There, Geter, Marty, and D.G. got into a fight with an individual they knew as Cathcart. (App'x p. 200). Miller and his friends were thrown out of the club as a result of the fight, and from there, the group rode together in a red Ford Crown Victoria to Waffle House, where they sat in the parking lot for 30 to 45 minutes. (App'x pp. 200–201). After leaving Waffle House, they stopped by Miller's house and then went to take D.G. home. (App'x pp. 202–204).

Miller testified that on the way there, they pulled up at a four-way stop, and a dark green Nissan with tinted windows and rims pulled up behind them and started shooting. (App'x p. 204). Dwight was driving, Marty was in the passenger seat, Miller was in the rear on the driver's side, and D.G. was in the rear passenger seat. (App'x pp. 235–236). Miller testified that once he heard gunshots, he shot back at the dark green Nissan using a .40 caliber pistol. (App'x p. 205). Miller testified that all of the windows in the Crown Victoria were rolled up and, after they shattered from the initial gunshots, Miller knocked out the remainder of the window to shoot back. (App'x pp. 211–212). Miller was shot in the neck, and the bullet travelled straight through his neck and entered D.G.'s neck, ultimately killing him. (App'x pp. 206–210, Attachment 1, PCR App. at 93-97, 235).

Similarly, Dwight Geter testified that a car "just pulled up beside us and started shooting." (App'x p. 293). Geter testified that the car had its headlights off, pulled up on the left side of his car, and started shooting. (App'x pp. 294, 297). Geter said Miller did start shooting back, but only after the other car shot first. (App'x p. 299). Geter identified Cathcart as the individual involved in the altercation at the club. (App'x pp. 302–303, 309). The victim's car had ten impact marks

from bullets, all on the driver's side of the vehicle, including marks to the driver's side of the windshield, driver's door, and back door on the driver's side. (App'x p. 353).

After the shooting, Dwight drove to his mother's house to tell her what happened and to let Marty out of the car. (App'x pp. 230–234, 238). Hysterical, Ms. Geter told them to take D.G. to Mary Black Hospital. (App'x pp. 251–252). There, D.G. was pronounced dead. (App'x p. 253).

Around the same time, Cathcart and Reeder<sup>6</sup> went to Spartanburg Regional Hospital with gunshot wounds. (App'x pp. 258–259). In his statement to police, Cathcart said he drove himself and Reeder to the hospital that night. (App'x p. 267). Cathcart had a grazing injury to his right side. (App'x pp. 265, 503). Investigators who located Cathcart and Reeder at Spartanburg Regional noted Reeder had a gunshot wound to his left wrist area. (App'x p. 503). Cathcart's statements to police indicated he drove a gray Nissan with Reeder and a guy named "Black," when a car drove up beside them near I-85 Business and shot at them. (App'x pp. 267, 272–273). Later, Cathcart's car was found in flames. (App'x pp. 273, 281, 284).

Investigators performed a gunshot residue ("GSR") kit on Cathcart and Reeder at the hospital. (App'x p. 440). The kit showed residue on the palms of Cathcart's hands. (App'x p. 440).

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<sup>6</sup> Rashawn Reeder is Cathcart's co-defendant and was tried with Cathcart.

## STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180–81, 810 S.E.2d at 839–40. However, pure questions of law will be reviewed *de novo* without deference to the post-conviction relief court. Id. 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

- I. **The post-conviction relief court erred in granting relief on the premise that Counsel Poole had an actual conflict of interest where the evidence presented contradicts the post-conviction relief court's conclusion of presumed prejudice because Counsel Poole was, unbeknownst to him, temporarily appointed to represent an alleged third-party actor in an unrelated case, yet he did not engage in any substantive actions during this temporary appointment and this lack of involvement underscores the absence of an actual conflict of interest, and where Cathcart failed to demonstrate how any supposed conflict adversely impacted Counsel Poole's representation, thus highlighting the post-conviction relief court's fundamentally flawed order and warrants reversal.**

The post-conviction relief court erred in granting relief on the premise that Counsel Poole had an actual conflict of interest where the evidence presented contradicts the post-conviction relief court's conclusion of presumed prejudice for the following reasons: 1) Counsel Poole was, unbeknownst to him, temporarily appointed to represent an alleged third-party actor in an unrelated case, yet he did not engage in any substantive actions during this temporary appointment and this lack of involvement underscores the absence of an actual conflict of interest; and 2) where Cathcart failed to demonstrate how any supposed conflict adversely impacted Counsel Poole's representation. Thus highlighting the post-conviction relief court's fundamentally flawed order and warrants reversal. Accordingly, this Court should grant this petition for certiorari and reverse the post-conviction relief court's order granting relief.

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of

counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690.

"To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representations, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance." Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d 768, 773 (1998) (citing Cuyler v. Sullivan, 446 U.S. 335 (1980); Duncan v. State, 281 S.C. 435, 315 S.E.2d 809 (1984)). "An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's." Id. (citing Duncan v. State, *supra*). "The mere possibility of a conflict of interest is insufficient to impugn a criminal conviction." Jackson, 329 S.C. at 354–355, 495 S.E.2d at 773 (citing Cuyler v. Sullivan, *supra*).

"When a petitioner premises his ineffective assistance claim on the existence of a conflict of interest, the claim is subjected to the specific standard spelled out in Cuyler v. Sullivan, 446 U.S. 335 (1980), instead of that articulated in Strickland." United States v. Nicholson, 475 F.3d 241 (4th Cir. 2007) (citing Strickland, 466 U.S. at 692). To establish that a conflict of interest resulted in ineffective assistance, "[m]ore than a mere possibility of a conflict ... must be shown." United States v. Tatum, 943 F.2d 370, 375 (4th Cir. 1991). The [applicant] must show (1) that his lawyer was under "an actual conflict of interest" and (2) that this conflict "adversely affected his lawyer's performance." Cuyler, 446 U.S. at 348. Once an actual conflict of interest is shown to have "affected the adequacy of [counsel's] representation", applicant does not have to "demonstrate

prejudice to obtain relief." Jordan, 406 S.C. at 449, 752 S.E.2d at 541 (quoting Staggs v. State, 372 S.C. 549, 551–52, 643 S.E.2d 690, 692 (2007)).

An actual conflict of interest arises where:

[A] defense attorney places himself in a situation inherently conducive to divided loyalties. If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.

Id. (quoting Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809, 811; Zuck v. Alabama, 588 F.2d 436, 439 (5th Cir. 1979)).

Here, the post-conviction relief court found that an actual conflict of interest existed based merely on the fact that while Counsel Poole represented Cathcart, he was temporarily appointed to represent Mack<sup>7</sup> in an unrelated matter. The post-conviction relief court further found that "minimal familiarity with the case would have identified Antwan Mack as a third-party whose interests were adverse to [Cathcart]." (App'x p. 1428). However, the mere fact that Counsel Poole represented Cathcart and Mack for a brief period—in *unrelated cases*—is not sufficient to show an actual conflict of interest. See United States v. Taft, 221 F. App'x 277, 279 (4th Cir. 2007) (holding that defendant's right to effective counsel was not violated when former trial counsel also represented a government witness for a short overlapping period). Furthermore, the evidence presented to the post-conviction relief court does not support its findings where the evidence presented indicates that Cathcart himself did not know Mack's real name until August of 2009, and Counsel Poole testified that towards the conclusion of his representation of Cathcart, Cathcart made references to an individual known to him as "Black." (App'x pp. 1431–1432; 1557). This

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<sup>7</sup> Antwan (or Antuan) Mack AKA Black.

does not align with the post-conviction relief court's finding that "minimal familiarity" would have revealed that "Black" was Mack.<sup>8</sup> Based on the circumstances and the evidence presented to the post-conviction relief court, the post-conviction relief court erred in finding an actual conflict existed. See Taft, supra.

Turning to whether the alleged conflict adversely affected Counsel Poole's representation of Cathcart, the post-conviction relief court found that because Counsel Poole did not "investigate and pursue third party guilt against another client [Counsel Poole] was appointed to represent was ineffective and evidences an adverse effect on the attorney's performance." (App'x p. 1429). Again, this presumption wholly ignores the evidence presented to the post-conviction relief court regarding Counsel Poole's testimony that he was unaware of an existing conflict at the time, did not represent Mack for the entirety of the time he represented Cathcart, did not do any substantive work or filings on Mack's case, and did not represent Mack during Cathcart's trial.<sup>9</sup> See Tatum,

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<sup>8</sup> Interestingly, the post-conviction relief court seemingly confers a duty of perception and knowledge to Counsel Poole, such that when a client provides him with a street name—and with at least a minimal familiarity with all his cases—Counsel Poole is required to discern whether the street name belongs to one of his other appointed clients, even if that appointment is brief and he had no involvement in that case. By this logic, Counsel Poole had a duty to discern that when Cathcart referred to Black, he was actually referring to another client, Mack, in an unrelated case. The logic of the post-conviction relief court's order is mind-bending and a test of mental vigor, especially given the precedent it is establishing regarding public defenders temporarily assigned to cases.

<sup>9</sup> Notably, during the evidentiary hearing, Cathcart testified that he knew Mack by the nickname "Black." (App'x p. 21). Counsel Poole testified that he did not recall having any conversations with Mack, nor did he believe his name was affixed to any judicial proceeding involving Mack. (App'x pp. 1557–1558). Counsel Poole testified that he did not recall having any knowledge of Mack's case. (App'x p. 1558). Counsel Poole testified that, while he had no recollection of representing Mack, he had been provided information by Michael Morin, Chief Public Defender of the Seventh Circuit Public Defender's Office, in preparation for the evidentiary hearing that his name along with another attorney's name were ascribed to unrelated cases of Mack from September of 2010 until they were transferred to another attorney in March of 2011. (App'x pp. 1556–1559). Cathcart's trial took place from May 9–11, 2011. (App'x p. 115). Counsel Poole testified to his belief that his appointment to an unrelated case of Mack did not constitute a conflict of interest and did not hinder his representation of Cathcart in any way. (App'x pp. 1558–1559).

943 F.2d at 375 (holding the critical determination is whether the attorney "is actively engaged in legal representation which requires him to account to two masters."). No evidence presented at the evidentiary hearing substantiates that Counsel Poole actively engaged in legal representation of Mack. Still, the post-conviction relief court found Counsel Poole did not investigate third-party guilt because it would have been adverse to Cathcart. While the post-conviction relief court has woven a remarkable web of reasoning to reach its conclusion, that conclusion is neither supported by the evidence nor by the law. Furthermore, the post-conviction relief court's assertion that Counsel Poole had a duty to investigate third-party guilt where the State's theory of the case was accomplice liability, which will be discussed further *infra* at Argument II, is not objectively reasonable or logical.

**II. The post-conviction relief court erred in granting relief on the premise that Counsel Poole had a duty to investigate third-party guilt where the State's theory of the case was that Cathcart was guilty under the theory of accomplice liability and any investigation into third-party guilt would not have changed the results of Cathcart's trial where it did not hinge on who the shooter was but rather that Cathcart was present and involved which was readily admitted by Cathcart in his statements to law enforcement.**

The post-conviction relief court erred in granting relief on the flawed assumption that Counsel Poole's representation was constitutionally ineffective. Counsel Poole had a duty to investigate third-party guilt only where such a defense was viable, yet the State's theory of the case rested firmly on the premise of accomplice liability for Cathcart's guilt. Additionally, the post-conviction relief court overlooked Counsel Poole's compelling testimony regarding his strategic reasoning for deeming third-party guilt an implausible defense in light of the State's theory of the case. What is more, the post-conviction relief court wholly ignored the record in this case, where Cathcart admitted to being present during the shooting to law enforcement. Accordingly, this Court should reverse the grant and deny relief.

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91. "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Id. at 691. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Id.

"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Id. "Counsel's actions are usually based, quite

properly, on informed strategic choices made by the defendant and on information supplied by the defendant." Id. "In particular, what investigation decisions are reasonable depends critically on such information." Id.

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

Here, the post-conviction relief court wholly ignores that it would not have been objectively reasonable for Counsel Poole to pursue a trial strategy of third-party guilt against Mack, where the State was proceeding under the accomplice liability theory of the "hand of one hand of all,"<sup>10</sup> and where Cathcart had previously given a statement to investigating officers that

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<sup>10</sup> See State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999) (holding that under the "hand of one is the hand of all" theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose); State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000) (citations omitted) "It is well-settled that a defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense."; State v. Langley, 334 S.C. 643, 648-49, 515 S.E.2d 98, 101 (quoting State v. Austin, 299 S.C. 456, 459, 385 S.E.2d 830, 832 (1989)) (Under an accomplice liability theory, "a person must personally commit the crime or be

he was in the car with Black<sup>11</sup> during the shooting.<sup>12</sup>

The admissibility of evidence of third-party guilt is governed by State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941). In Gregory, the South Carolina Supreme Court held that evidence of third-party guilt that only tends to raise a conjectural inference that the third party, rather than the defendant, committed the crime should be excluded. Id. at 105, 16 S.E.2d at 534. Furthermore, to be admissible, evidence of third-party guilt must be "limited to such facts as are inconsistent with [the defendant's] own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence." State v. Cope, 405 S.C. 317, 341, 748 S.E.2d 194, 206 (2013) cert. denied, 135 S. Ct. 400, 190 L. Ed. 2d 289 (U.S.S.C. 2014) (citing Gregory at 104, 16 S.E.2d at 534 (internal quotations omitted)).

Pursuant to Gregory and the State's theory of accomplice liability, the evidence of Mack in the vehicle with Cathcart and Mack possibly being one of the shooters are not facts raising an inference or presumption of innocence because they are not facts or circumstances that tend to clearly point to Mack as the guilty party. Additionally, evidence of Mack's guilt is not inconsistent with Cathcart's guilt, nor does it raise a " 'reasonable inference'—and certainly not a presumption"—of Cathcart's innocence. See Id. Further compounding the post-conviction relief court's order granting relief is that Cathcart's guilt or innocence did not hinge on his not being the shooter; instead, he was just as culpable as the primary under accomplice liability. Therefore,

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present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act.").

<sup>11</sup> AKA Mack.

<sup>12</sup> On the night of the shooting, while he and his co-defendant were in the hospital, Applicant gave a statement to Officer Leslie Harrell in which he informed them that, once he and his co-defendant were dropped off at Spartanburg Regional, Mack, whom he only knew by the name "Black" at the time, took the car. The information regarding Mack was recorded in Officer Harrell's incident report.

Counsel Poole cannot be deficient where third-party guilt was not a viable defense, and where Counsel Poole reasonably articulated a valid strategy as to why he did not argue or pursue third-party guilt. (App'x p. 1562–1563) (See Strickland, 466 U.S. at 689) (holding that the review of counsel's actions is hallmarked by deference, as "it is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.").

Accordingly, this Court should grant the Petition for Writ of Certiorari and reverse the post-conviction relief court's order granting relief.

**CONCLUSION**

For the reasons stated above, this Court should grant the Petition for Writ of Certiorari and reverse the post-conviction relief court's grant of relief. Should this Court grant certiorari, Petitioner requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON  
Attorney General

DONALD J. ZELENKA  
Deputy Attorney General

D. RUSSELL BARLOW, II  
Senior Assistant Deputy Attorney General  
S.C. Bar No. 105228

BY:

  
ATTORNEYS FOR RESPONDENT

Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734–3737

December 8, 2025