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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Heath P. Taylor, Circuit Court Judge

DARIUS T. CATHCART,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2025-000936

RETURN TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF ISSUES ON CERTIORARI

I. Does any evidence support the post-conviction relief court's finding that trial counsel had an actual conflict of interest where he represented another individual during the time he represented Mr. Cathcart and where that individual interests were clearly adverse to Mr. Cathcart's interests?

II. Does any evidence support the post-conviction relief court's finding that trial counsel was ineffective for failure to investigate the exculpatory statement of a witness indicating Mr. Cathcart was not the shooter and identifying another individual as the shooter?

STATEMENT OF THE CASE

Procedural History

On May 6, 2010, a Spartanburg County grand jury indicted Darius Cathcart for assault with intent to kill (AWIK), assault and battery with intent to kill (ABWIK), and murder. App. 1203-1208. On May 9, 2011, Mr. Cathcart, along with his co-defendant, Rashawn Reeder, proceeded to trial before the Honorable Roger L. Couch, and a jury. App. 115-599. Roger Poole represented Mr. Cathcart. App. 115. Abel Gray and Prina Tailor prosecuted for the state. App. 115.

The jury found Mr. Cathcart guilty of all charges. App. 579, 1. 20—580, 1. 7. Judge Couch sentenced Mr. Cathcart to an aggregate term of forty-five years' imprisonment. App. 596, 11. 13-14.

Appellate counsel filed a brief pursuant to *Anders*.¹ App. 1211-1220. After review, the South Carolina Court of Appeals dismissed his appeal. *State v. Cathcart*, Op. No. 2013-UP-52 (S.C. Ct. App. Filed Jan. 30, 2013). App. 1222-1223.

Mr. Cathcart filed an application for post-conviction relief (PCR). App. 1255-1259. The state filed a return and motion to dismiss. App. 1386-1394. A hearing was held before the Honorable William McKinnon on September 14, 2021. Judge McKinnon denied the state's motion to dismiss by written order on October 20, 2021. App. 1405-1408.

Subsequently an evidentiary hearing was held May 20, 2024, before the Honorable Heath P. Taylor. App. 1484-1588. Susannah Ross represented Mr. Cathcart. App. 1484. Shayla Flores was present for the state. App. 1484. Judge Taylor signed an order granting PCR on January 2, 2025. App. 1419-1430.

¹ *Anders v. California*, 386 U.S. 738 (1967).

Introductory Facts

The charges against Mr. Cathcart and his co-defendant, Rashawn Reeder, were the result of a shoot-out between two cars. Darius Cathcart, Rashawn Reeder, and Antwan Mack were in one car. Dwight Geter, Duncan Geter, Bryant Miller, and Marty Jackson were in the other car. Earlier in the evening the men were all at the same nightclub in Spartanburg County. App. 199, ll. 13-23. An altercation occurred between some of the individuals in the two parties. Bryant and Dwight testified Mr. Cathcart was involved in the altercation. App. 200, ll. 6-13; 292, ll. 1-15. However, on cross-examination Bryant admitted he did not witness the altercation and was only told of Cathcart's involvement. App. 215, ll. 1-11.

At some point later the two parties came back in contact and shots were fired between the cars. App. 205, ll. 2-23. Dwight Geter died from a gunshot wound. App. 206, l. 19—207, l. 10. Bryant Miller was injured. App. 206, ll. 1-6. In Mr. Cathcart's car he and Rashawn Reeder were both shot. App. 259, ll. 1-3. Marty Jackson was not injured, and it was unclear from testimony at trial whether he was in the car at the time of the shooting. App. 227, l. 4—228, l. 4; 293, l. 17—294, l. 18; 309, ll. 20-23. Antwan Mack was not charged in this incident.

PCR hearing

At Mr. Cathcart's evidentiary hearing PCR counsel told the court that the public index reflected Cathcart's trial counsel, Roger Poole, also represented Antwan Mack.² Mack was known to Cathcart as Black. Cathcart alleged from the beginning Mr. Mack was in the car with him the night of the shooting. He stated Mack threatened him and was the shooter. PCR counsel argued that while Mack was not formally charged in this case there was a conflict of interest in

² Mr. Cathcart knew Antwan Mack as "Black", but he will be referred to throughout the Return as Mr. Mack. App. 1495, ll. 23-24.

the public defender's office representing both Mr. Mack and Mr. Cathcart. App. 1492, l. 14—
1493, l. 4.

ARGUMENTS

I. Evidence supports the post-conviction relief court's finding that trial counsel had an actual conflict of interest where he represented Mr. Mack while representing Mr. Cathcart and where Mack's interests were clearly adverse to Mr. Cathcart's interests.

Relevant facts

Mr. Cathcart testified at his evidentiary hearing. App. 1494-1555. He explained that on the night of the shooting he gave "a dude from [his] neighborhood" Rashawn Reeder, and Reeder's friend, Antwan Mack, a ride home from the club. App. 1495, ll. 4-14. During the ride Mack was moving about in the backseat and Cathcart asked him if he was okay. App. 1495, l. 24—1496, l. 2. Mack indicated he was not okay and commanded Cathcart to pull the car up beside another car. Cathcart heard a gun being cocked and did as Mack instructed. He testified that when they pulled up beside the other car Reeder and Mack began shooting at the other car and persons in the other car fired back. Cathcart was shot in the arm. App. 1496, ll. 3-16.

Mr. Cathcart drove away, and he realized Reeder was also shot. App. 1497, ll. 5-14. Cathcart drove them to the hospital. He was directed by Mack to pull across the street into a Church's Chicken and then he and Reeder ran to the hospital. App. 1498, ll. 18-24. He testified that was the last time he ever saw his car. App. 1499, ll. 2-4. Cathcart admitted he did not immediately tell law enforcement what happened when asked at the hospital. App. 1499, ll. 12-25.

Cathcart was later interviewed by lead investigator Lorin Williams and he gave a statement regarding the shooting and picked Mr. Mack out of a photo lineup. App. 1501, ll. 5—1502, l. 25. The photo lineup was admitted as Applicant's exhibit 1. App. 1432; 1502, l. 25.

Mr. Cathcart testified that he initially hired David Turnipseed to represent him. Later Mr.

Turnipseed was relieved as counsel and Cathcart was appointed public defender Roger Poole. App. 1509, l. 17—1510, l. 6. During a meeting with Mr. Poole close to trial Mr. Poole indicated he was going to visit Antwan Mack and Cathcart was taken aback. App. 1510, ll. 10-22. He told Mr. Poole that Mack was involved in the shooting for which he was charged. App. 1519, ll. 8-16.

During Mr. Cathcart's testimony a printout from the public index showing Antwan Mack had been represented by Mr. Poole was admitted. Applicant's exhibit 4; App. 1436; 1508, l. 12—1509, l. 16. Additionally, "defendant's list of potential witnesses," which included Antwan Mack, was admitted. Applicant's exhibit 5; App. 1441; 1511, ll. 15-23. None of the witnesses on that list were called on behalf of Mr. Cathcart. App. 1511, l. 24—1513, l. 25.

Roger Poole testified regarding his representation. App. 1555-1570. Mr. Poole testified he was "relatively new" in the public defender's office when he took on Mr. Cathcart's case a few months before it went to trial. App. 1556, ll. 1-8.

Regarding his simultaneous representation of Mr. Mack and Mr. Cathcart he stated, "It came to my attention after my representation was basically over that he kept referring to an individual known as Black B-L-A-C-K . . . he told me he did not know his name . . . just knew him as Black." App. 1557, ll. 7-14.

Mr. Poole testified that he, along with attorney Robert Hall, represented Mr. Mack from September 2010 until March 2011. App. 1557, l. 15-20. Mr. Poole claimed he did not remember Mack and did not remember "any conversations with Mr. Mack." App. 1557, ll. 21-25. Additionally, he did not remember Mr. Cathcart explaining how Mr. Mack was related to his case. Mr. Poole did not recall anything about Mr. Mack's case and stated, "I can't recall and don't think my name is ascribed to any proceeding involving [Mack]." App. 1558, ll. 2-23.

Discussion

The PCR court properly found there was an actual conflict of interest where Mr. Poole represented Mr. Mack and Mr. Cathcart at the same time. It is true Mr. Mack was not charged with this crime. However, if Mr. Poole had even minimal knowledge of the facts and circumstances of this case he would have known Mr. Mack was a third party whose interests were in direct opposition to Mr. Cathcart's because Cathcart said from the beginning that Mack was the shooter and there was an additional witness that identified Mack as the shooter.

A criminal defendant's Sixth Amendment right to effective assistance of counsel includes a right to counsel "unhindered by a conflict of interest." *Cuyler v. Sullivan*, 446 U.S. 335, 345–50, 355 (1980) (quoting *Holloway v. Arkansas*, 435 U.S. 475, 483 n. 5 (1978)). When counsel is burdened by an actual conflict of interest, he "breaches the duty of loyalty, perhaps the most basic of counsel's duties." *Strickland v. Washington*, 466 U.S. 668, 692 (1984).

Due to the seriousness of the breach and the difficulty in "measure[ing] the precise effect on the defense of representation corrupted by conflicting interests," the *Strickland* ineffective assistance of counsel standard is modified in actual conflict of interest cases in that the defendant is not required to show prejudice. *Strickland*, 466 U.S. at 692; *see also Duncan v. State*, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984) (quoting *Cuyler*, 446 U.S. at 348). In other words, a defendant is not required to show prejudice in the traditional *Strickland* sense, i.e., that there is a reasonable probability the result of the proceeding would have been different. *Strickland*, 466 U.S. at 692–94 (citing *Cuyler*, 446 U.S. at 345–50). Rather, "prejudice is presumed" if the defendant demonstrates that counsel "'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Strickland*, 466 U.S. at 692 (quoting *Cuyler*, 446 U.S. at 350); *see also Duncan*, 281 S.C. at 438, 315 S.E.2d at 811

(quoting *Cuyler*, 446 U.S. at 348); *Lomax v. State*, 379 S.C. 93, 102, 665 S.E.2d 164, 168 (2008).

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.

Jordan v. State, 406 S.C. 443, 449, 752 S.E.2d 538, 541 (2013) (quoting *Duncan*, 281 S.C. at 438, 315 S.E.2d at 811 (quoting *Zuck v. Alabama*, 588 F.2d 436, 439 (5th Cir. 1979))). In a PCR proceeding, the applicant bears the burden of proving her attorney had a conflict of interest necessitating relief. *Jordan*, 406 S.C. at 449, 752 S.E.2d at 541.

In *Gonzales v. State*, the South Carolina Supreme Court held defense counsel's simultaneous representation of a juvenile defendant and defendant's mother's boyfriend for other drug-related charges created an actual conflict of interest prior to defendant's trial. 419 S.C. 2, 4, 795 S.E.2d 835, 835 (2017). The Court held specifically that "regardless whether an attorney recognizes an actual conflict of interest, if the conflict adversely affected the attorney's performance the applicant has established his entitlement to relief." *Id.* at 12, 795 S.E.2d at 840.

The PCR court found Mr. Cathcart's testimony was credible. App. 1429. Although the court did not make a specific finding it stands to reason that the court found trial counsel's testimony, that he either did not know he represented Mack or could not recall whether he took any substantive action on Mack's behalf, was not credible. The PCR court found, according to *Gonzales*, whether or not trial counsel was aware of the conflict, if the conflict adversely affected counsel's performance Mr. Cathcart was entitled to relief. App. 1429. Mr. Cathcart provided proof including the public index and the witness list to support his credible testimony that trial

counsel knew, or should have known, Mr. Mack's involvement would make his representation of them both a conflict of interest.

Trial counsel was ineffective for simultaneously representing Mr. Mack and Mr. Cathcart where Mr. Cathcart was being charged in a shooting that Mr. Mack was also implicated in. It matters not whether trial knew at the time or remembers now, the conflict still existed. The interests of the men were adverse where Mr. Cathcart told law enforcement and trial counsel that Mack threatened him and was the shooter. The PCR court correctly granted relief where there was an actual conflict of interest, and the conflict affected counsel's performance as Mr. Cathcart's trial counsel.

II. Evidence supports the post-conviction relief court's finding that defense counsel was ineffective for failure to investigate the exculpatory statement of Edward Robinson indicating Mr. Cathcart was not the shooter and identifying another individual as the shooter.

Relevant facts

Mr. Cathcart testified a man named Edward Robinson gave a written statement to police on November 11, 2009, implicating Mr. Mack in this crime. App. 1504, l. 14—1505, l. 18. Robinson's written statement was admitted. Applicant's exhibit 3; App. 1434-1435; 1505, ll. 16-25. In the statement Mr. Robinson wrote that Mack told him he was involved in the shooting and that he destroyed Mr. Cathcart's car by burning it after the incident to get rid of evidence. Applicant's exhibit 3; App. 1435. Edward Robinson was included on exhibit 5, "defendant's list of potential witnesses." Applicant's exhibit 5; App. 1441; 1511, ll. 15-23.

Mr. Poole testified that he adequately investigated Mr. Cathcart's case but admitted that he did not remember if he interviewed or subpoenaed any witnesses in his case. App. 1561, ll. 8-11; 1563, ll. 13-15. Mr. Poole insisted he obtained all available discovery in Mr. Cathcart's case.

However, he did not remember any of the discussions he and Cathcart had. He did not recall reviewing Edward Robinson's written statement or "anything about that." App. 1559, l. 11—1560, l. 10.

Discussion

The PCR court properly found trial counsel was ineffective for failure to investigate or utilize the exculpatory statement of Edward Robinson, exhibit 3, because the statement named Mr. Mack as the shooter and vastly lessened Mr. Cathcart's culpability.

In a PCR action, the applicant bears the burden of proving their allegations by a preponderance of the evidence. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). An appellate court applies the two-part test set forth in *Strickland* to determine whether trial counsel's conduct was so serious as to require reversal. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland*, at 688. First, the applicant must show that counsel's performance was deficient. *Id.* at 669. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment. *Id.* Second, the defendant must show that the deficient performance prejudiced the defense. *Id.* This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Id.*

"A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence

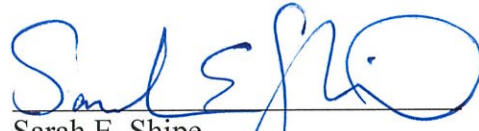
tending to rebut any aggravating evidence introduced by the State.” *Mcknight v. State*, 378 S.C. 33, 45, 661 S.E.2d 354, 360 (2008).

Trial counsel’s failure to investigate this exculpatory statement and his failure to use this testimony along with other witnesses at trial in Mr. Cathcart’s defense was not reasonable and thus deficient. It appears trial counsel conducted almost no investigation at all where he seemingly had access to police reports and statements but failed to come up with any viable defense at trial or call any of these witnesses that he listed as potentials. He could not remember whether he interviewed any of the witnesses he was asked about. Trial counsel testified he did not remember anything about Mr. Robinson or his written statement which tended to point to Mr. Cathcart’s lack of culpability in the shooting. However, trial counsel’s testimony is contradicted by his own potential witness list, exhibit 5.

Mr. Cathcart was prejudiced by trial counsel’s deficient performance. Trial counsel’s failure to further investigate the exculpatory statement and or use it in anyway in the defense of Mr. Cathcart cannot be understated. The jury heard only from individuals that were in the other car and heard no testimony regarding what happened inside Mr. Cathcart’s car. Mr. Cathcart’s entire defense is centered on what happened inside his car during the shooting and trial counsel failed to follow up on a witness who could speak to that. Had this exculpatory evidence been used the result of Mr. Cathcart’s trial would have been different.

CONCLUSION

Based on the foregoing arguments, Mr. Cathcart respectfully requests this Court deny certiorari.



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR RESPONDENT

This 25th day of March, 2026.