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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Honorable Jessica A Salvini, Circuit Court Judge

HEIRBERONE H. FOSTER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2026-001297

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR judge err in refusing to find trial counsel ineffective for failing to elicit testimony that the decedent, Petitioner's son, had been put on trespass notice for Petitioner's house where the fatal shooting took place?

STATEMENT

In December of 2016, the Lexington County Grand Jury indicted Petitioner, Heirberone Heava Foster, for murder and possession of a weapon during the commission of a violent crime, indictments #2016-GS-32-03022, 03040. (App. pp. 787-790). On May 20, 2019, Petitioner proceeded to jury trial before the Honorable William P. Keesley. Aimee J. Zmroczek and Ryan Schwartz represented Petitioner. Rhonda Patterson and Luke Pincelli prosecuted the case. The jury returned verdicts of guilty on both charges. Judge Keesley sentenced Petitioner to thirty (30) years for murder and five (5) years concurrent for the weapon charge. (App. pp. 791-792). A timely notice of intent to appeal was filed and the direct appeal perfected with the filing of a brief pursuant to Anders v. California, 386 U.S. 738 (1967). On December 8, 2021, the South Carolina Court of Appeals dismissed the appeal. State v. Foster, Op. No. 2021-UP-433 (S.C. Ct.App.filed Dec. 8, 2021).

On May 12, 2022, Petitioner filed an application for post-conviction relief [PCR]. (App. pp. 793 – 799). On July 8, 2024, the State filed a return and motion for more definite statement. (App. pp. 800-808). Two amendments to the PCR application were filed on September 10th and 11th 2025. (App. pp. 809-813). On September 6, 2025, an evidentiary hearing was held before the Honorable Jessica Ann Salvini. Tommy Thomas represented Petitioner. Sydney Willingham represented the State. In a written order signed February 18, 2026, Judge Salvini denied relief and dismissed the PCR application. (App. pp.906-953). On March 9, 2026, Petitioner filed a motion to alter or amend. (App. pp. 954-961). Judge Salvin filed an initial order regarding motion to reconsider on March 31, 2026. (App. p. 970). The State filed a return on May 8, 2026. (App. pp. 962-969). On May 13, 2026, Judge Salvini denied the motion to reconsider.

(App. p. 971). A timely notice of intent to appeal was served on May 27, 2026. This appeal follows.

ARGUMENT

The PCR judge erred in refusing to find trial counsel ineffective for failing to elicit testimony that the decedent, Petitioner's son, had been put on trespass notice for Petitioner's house where the fatal shooting took place.

The jury found Petitioner guilty of the fatal shooting of his adult son, Heirbrane Will Foster, during an altercation at Petitioner's home. During the "Stand Your Ground" hearing prior to trial Petitioner testified that he had put a trespass notice on his son Will prior to the fatal encounter. (App. p. 90, lines 6-10). Petitioner testified that his son Will was troubled and had threatened Petitioner and other family members before. (App. p. 75, line 14- p. 76, lines 1-25). Petitioner had called the police about Will over twenty times. (App. p. 75, lines 1-5). On the day of the shooting Will first threatened Petitioner with a heavy aluminum level and then came into Petitioner's carport swinging a two by four at Petitioner. (App. pp. 103 – 109). Petitioner testified that his wife Cathy tried to take the two by four from Will but he knocked her down. (App. p. 110, lines 3-5). Petitioner testified he went into the house, got the shotgun, came outside and the shotgun went off striking Will. (App. p. 110, lines 7-9). The judge denied immunity and the case proceeded to jury trial. The failure to grant immunity was addressed on direct appeal in the Anders brief.

Petitioner did not testify at trial and trial counsel did not ask any witnesses about the trespass notice Petitioner testified about at the Stand Your Ground/Immunity hearing. The judge instructed the jury on the law of self-defense, voluntary manslaughter, and involuntary manslaughter. (App. pp. 756-766). The jury found Petitioner guilty of murder.

In a second amended PCR application Petitioner alleged that trial counsel was ineffective for "[f]ailure to introduce or present evidence of Notice of Trespass of real property regarding the victim Heirberone Will Foster." (App. p. 812). During the PCR hearing Petitioner testified

about the events leading up to the shooting. (App. pp. 877-885). Petitioner testified that he did not intentionally shoot his son but grabbed the shotgun in self-defense and it went off. (App. p. 882, lines 1-13; p. 884, lines 1-24).

During the PCR hearing trial counsel was asked about the trespass notice. (App. p. 861, lines 9-11). Trial counsel testified:

> Well, candidly, I don't believe that once we got past the stand your ground, that I did anything with it, [the trespass notice] because, again, it was a strategy of, I think that it would open the door to some other bad character evidence that I really just was trying to get in.
>
> I know that Judge Keesley had ruled in the stand your ground hearing that he had a right to be there, but I still think the State would have fought me had we brought that up again in front of the jury. And so that was a strategy at that point, I think, to just let it go.
>
> And the problem was, is. I believe, like you said, that they had let him in earlier that day and then agreed to let him have the grill, I fear that it was a slippery slope that could have opened a lot of doors that would have, again, hurt the case.

(App. p. 861, line 14 – p. 862, lines 1-3).

In the order of dismissal the PCR judge wrote:

> This Court finds Trial Counsel's decision to leave the Notice of Trespass of real property regarding the victim out of evidence to be part of a trial strategy that falls within the scope of reasonable representation. Trial Counsel *credibly* testified that it was a strategy to leave the Notice of Trespass out of evidence to prevent opening the door to character evidence of Applicant that would potentially hurt his defense. This, Applicant failed in his burden of proving deficiency or prejudice. See Glover, *supra.*
>
> It is essential to highlight that, prior to the shooting incident, the Applicant faced charges of Domestic Violence – 1st Degree against his wife. At that time, he was released on bond, which explicitly prohibited him from returning to their residence. Consequently, the Applicant was in clear violation of a court order when he shot his son, being on property he was legally barred from entering. Moreover, addressing any trespass notice regarding the victim would have inevitably allowed this critical evidence to be introduced, significantly undermining his defense. Trial Counsel's strategy was sound and within the scope of reasonable representation.

(App. p. 933).

The PCR judge erred. Any purported trial strategy must still be reasonable. It is unclear how reference to the trespass notice against the deceased would open the door to the pending domestic violence charge against Petitioner. Counsel could have sought a ruling from the judge about whether reference to the trespass notice could somehow open the door to the pending domestic violence. The decision not to explore the trespass notice at trial was not a valid strategic choice. Counsel was deficient in failing to explore the trespass notice and Petitioner was prejudiced from the deficient performance.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

In Stone v. State, 419 S.C. 370, 384, 798 S.E.2d 561, 569 (2017), the South Carolina Supreme Court wrote:

> As we have often stated, counsel's strategic decisions will not be found to be deficient performance if he articulates a valid reason for employing the strategy. *E.g.,* Smith v. State, 386 S.C. 562, 567-68, 689 S.E.2d 629, 632-33 (2010); Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). The necessary converse of this principle is that counsel's decision to employ a certain strategy will be deemed unreasonable under the Sixth Amendment if the reasons given for the strategy are not sound. See Dawkins v. State, 346 S.C. 151, 157, 551 S.E.2d 260, 263 (2001) (finding counsel's performance was deficient in making a decision not to object to the admission of testimony when the underlying strategy was not sound).

In United States v. McCoy, 410 F.3d 124, 135 (3d Cir. 2005), the Third Circuit Court of Appeals wrote:

> We agree with the Government that courts have been highly deferential to counsel's strategic decisions, *see, e.g.,* Strickland, 466 U.S. at 690, 104 S.Ct. 2052 (stating that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable"); United States v. Otero, 848 F.2d 835, 838 (7th Cir.1988), but merely labeling a decision as "strategic" will not remove it from an inquiry of reasonableness. *See generally* Davidson v. United States, 951 F.Supp. 555, 558 (W.D.Pa.1996); *see also* Gov't of the V.I. v. Weatherwax, 77 F.3d 1425, 1431–32 (3d Cir.1996).

In Kellogg v. Scurr, 741 F.2d 1099, 1102 (8th Cir. 1984), the Eighth Circuit Court of Appeals wrote, "We agree that the label 'trial strategy' does not automatically immunize an attorney's performance from sixth amendment challenges." See also Quartararo v. Fogg, 679 F Supp 212, 247 (ED NY, 1988) (noting that "not all strategic choices are sacrosanct" and that "[m]erely labeling [counsel's] errors 'strategy' does not shield his trial performance from Sixth Amendment scrutiny"). "Tactical decisions do not render assistance ineffective merely because in retrospect it is apparent that counsel chose the wrong course. Baldwin v. Blackburn, 653 F.2d 942 (5th Cir.1981). However, certain defense strategies or decisions may be "so ill chosen" as to render counsel's overall representation constitutionally defective. Adams v. Balkcom, 688 F.2d at

738; Washington v. Watkins, 655 F.2d 1346, 1366 (5th Cir.1981), *cert. denied,* 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982)." Willis v. Newsome, 771 F.2d 1445, 1447 (11th Cir. 1985).

In Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974), the Sixth Circuit Court of Appeals wrote:

> Defense strategy and tactics which lawyers of ordinary training and skill in the criminal law would not consider competent deny a criminal defendant the effective assistance of counsel, if some other action would have better protected a defendant and was reasonably foreseeable as such before trial. United States v. Katz, 425 F.2d 928, 930 (2d Cir. 1970). If, however, action that appears erroneous from hindsight was taken for reasons that would appear sound to a competent criminal attorney, the assistance of counsel has not been constitutionally defective. McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970).

Trial counsel's "strategy"" to not explore the trespass notice is not a valid strategy when it is unclear how reference to the trespass notice against the deceased would open the door to the pending domestic violence charge against Petitioner. Trial counsel could have asked for a ruling from the judge. Trial counsel was deficient in failing to explore the trespass notice. Petitioner was prejudiced by the deficient performance. In this case where the jury had to decide issues about self-defense, accident, voluntary, and involuntary manslaughter, the trespass notice could have been critical. There is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.



Kathrine H. Hudgins
Senior Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of November, 2026.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Heirberone Heava Foster states:

1. She is Senior Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge Jessica A Salvini, which was held on , and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Heirberone Heava Foster.

Respectfully Submitted,

Kathrine H. Hudgins
Senior Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of November, 2026.

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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