ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable Jean H. Toal, Circuit Court Judge

MARIE ASSA'AD-FALTAS,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO 2018-001290

RETURN TO PETITION FOR WRIT OF CERTIORARI

JESSICA M. SAXON
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR RESPONDENT

INDEX

PETITIONER'S QUESTION PRESENTED

Did the PCR court err in finding trial counsel ineffective for failing to raise at trial the issue of whether the local City of Columbia rubbish ordinance was preempted by state law and Department of Health and Environmental Control regulations where the City had the power to enact its ordinance, where the ordinance is consistent with the Constitution and the general law of the state, and where there is nothing to indicate the intention of the legislature to preempt the ability of local municipalities to regulate property maintenance?

RESPONDENT'S COUNTER QUESTION PRESENTED

Was there any evidence to support the PCR court's ruling that counsel was ineffective for failing to raise the issue of whether the local City of Columbia definition of rubbish and definition of sanitary conditions was preempted by state law and the Department of Health and Environmental Control (DHEC) regulations definitions?

STATEMENT OF THE CASE

Respondent, Dr. Marie Assa'ad-Faltas, co-owns a vacant lot with her mother located at 324 Byron Road in the City of Columbia. App. 263-264; App. 388, ll. 9-10. On October 5, 2011, city code inspector Myron Sims went to the Byron Road property to perform an inspection after receiving some complaints. App. 264, ll. 15-19. While at the property he observed some buckets that were neatly stacked upside down on the back of the lot along with two trash cans with lids. App. 264, ll.22-25 – App. 265, ll. 2-3. Sims was unsure if those items constituted a code violation, so no action was taken that day. App. 264, ll. 25 – App. 265, ll. 1-4.

The investigation continued on October 7, 2011, after Sims received additional complaints, and upon inspecting the property noted materials there to include buckets that had been turned temporarily upright, metal, cardboard, and what he determined to be "rubbish" under the International Property Maintenance Code (IPMC). App. 265-266. On October 7, 2011, Sims placed a written notice of violation for having "unauthorized items/debris stored outside" in the mailed to Respondent. App. 614. The notice of violation cited City of Columbia Ordinances 8-32 and 8-41[1], and section 307.1 of the International Property Maintenance Code and gave Respondent ten days to correct the alleged violations. Id.

Sims returned to the property on October 10, 2011, to give Respondent another copy of the notice of violation and to provide her with a copy of the city ordinances. App. 268. While there he asked her the purpose of the material on the property and was informed that the material would be used in building a solar home. Id. Sims later found no active building permit for the

[1] The City of Columbia amended the ordinances in 2016. Then-section 8-32 was rewritten in its entirety and renamed "other nuisances." Then-section 8-41 was moved from the Nuisances Article to the General Article and renumbered as section 8-3.

lot. Id. On October 20, 2011, within ten days of the delivery of the notice of violation, Respondent was charged with Unlawful Acts, First Offense. App. 615.

At a pre-trial status conference on March 12, 2013, Respondent's appointed counsel, Ted Lupton, stated that he intended to move to quash the ticket and the court ruled it would handle this matter on the day of the trial. App. 47, ll. 1-3. Two days before trial Orin Briggs was substituted as counsel for Respondent. App. 135. At a pretrial hearing on April 10, 2013, Counsel Briggs indicated he had a speedy trial motion, a motion to dismiss the jury pool, a motion for continuance and "a few other matters" that would be proper to argue at trial. App. 125, ll.17-25 – App. 126, ll. 1-3; App. 127, ll.8-11.

At trial, Sims testified that Respondent had three different violations on her property. App. 265 ll. 18-19. Sims cited section 8.32, which dealt with sanitation, because some of the buckets were turned upright when he returned to the property and could hold water. App. 265, ll. 19-23. Sims then cited section 8.41 because there was "scrap metal"[2] on the property which is specifically banned under the ordinance. App. 265, ll. 23-25 – App. 266 ll. 1. Finally, Sims cited section 307.1 of the IPMC that based on his opinion there were items that constituted rubbish. App. 266, ll. 1-4.

At the close of the state's case, Counsel Briggs made a motion challenging the constitutionality of the ordinances, renewed the motion to suppress and made a directed verdict motion, all of which were denied. App. 311-316. Briggs then proceeded to present Respondent's case.

---

2 Scrap metal was not defined anywhere in the City's ordinances. Sims testified he relied on a definition taken from Wikipedia which he classified as an encyclopedia. App. 299 ll. 7-11. Wikipedia is a website that can be edited by anyone, anytime, and is not considered a reliable source of information.

Respondent testified that the items on her property were not waste, rubbish or scrap but items she was repurposing for various uses. The cardboard cylinders[3] and plastic spools that originally demarcated her property lines were replaced with inverted buckets and metal angle irons. App. 347; App. 352-353. The "scrap metal" was not scrap but was being used in building shelves she had designed. App. 353 ll. 8-11. Respondent frequently transported things to and from the property and such items were stored there for less than a day. She went to the property multiple times a week to fix any overturned buckets, straighten the angle irons, and fix other things on the property. App. 356-357; App. 361 ll. 2-4.

Respondent was convicted of Unlawful Acts, First Offense, sentenced to thirty days imprisonment and released on an appeal bond. App. 591, ll. 15; App. 607, ll. 6-7. Prior to sentencing Respondent made a *pro se* motion for a new trial. App. 581. The issue of preemption was raised for the first time by Respondent, not by trial counsel, in the new trial motion. App. 584-585. At no point did trial counsel raise the issue of preemption or challenge the definitions used by the City.

At the PCR hearing Counsel Lupton testified that he thought there were several problems with the City's case of a legal nature, regarding "notice and a number of other things related to that". App. 1021-1023. He further testified that after he was relieved as counsel, he offered Briggs everything he had, indicating that this included the legal motions he intended to make, but that Briggs did not want the material. App. 1024, ll. 1-6.

In the oral ruling granting relief, the PCR court cited Judge Lee's order affirming Respondent's conviction which stated that the matter of preemption was not raised prior to or

---

[3] Respondent testified that the only arguable violation on her property at the time of notice was the cardboard cylinders which were removed prior to the summons being issued. App. 375 ll. 22-24; App. 376 ll. 10-12.

during trial and was not preserved for appellate review. App. 1050, ll. 18-23. The PCR court ruled that it was deficient performance by both Lupton and Briggs to not raise the specific question of preemption, particularly when it was clear that the original strategy of Lupton was to attack the technical sufficiency of the city's ordinance. App. 1050 ll. 24-25 – App. 1051, ll. 1-3. The PCR court explained that the question of preemption was a powerful and valid argument that should have been raised. App. 1051, ll. 9-12.

ARGUMENT

There was evidence to support the PCR court's ruling that counsel was ineffective for failing to raise the issue of whether the local City of Columbia definition of rubbish and definition of sanitary conditions was preempted by state law and the Department of Health and Environmental Control (DHEC) regulations definitions.

I. PCR Was Properly Granted

In its petition for writ of certiorari the state focuses on whether the definition of "rubbish" is preempted by DHEC regulations. That, however, is not the main issue before the Court. The question is whether there was evidence to support the PCR judge's finding of ineffective assistance of counsel for failing to raise the argument of preemption and there was such evidence. In reviewing the grant of PCR, the court must uphold the ruling if there is "any evidence of probative value" to support the lower court's findings. Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984). A review of the record below offers ample evidence to support the PCR court's ruling.

At trial the central matters focused on whether the items on Respondent's property fell under the ordinance definitions of "rubbish", "unsanitary conditions" and "prohibited items." App. 52, ll. 21-25 – App. 53, ll. 1-5. One of the main arguments put forth by Respondent was that the materials on her property were all being used and repurposed into various items, such as shelves that she had designed, and did not fall under the definitions in the ordinances. The City argued everything on the property was rubbish, scrap, garbage, or debris and used those terms interchangeably throughout the trial.

A review of the record shows that while trial counsel did object to the use of certain terms, such as "debris," and that there was some argument over the definition of "trash" and

"rubbish," trial counsel never put forth the DHEC definition of rubbish and unsanitary conditions. What constituted "rubbish" and unsanitary conditions was at the heart of the case and it was paramount that trial counsel challenge the definitions the City relied upon through all legal means available.

DHEC regulations define "rubbish" as "solid wastes from **residences and dwellings, commercial establishments and institutions.**" S.C. Code of Regulations R. 61-62.1 § I, 79. (emphasis added). The overbroad definition relied on by the City includes "combustible and noncombustible waste materials" and goes on to lists a myriad of random items to include "crockery and dust." Int'l Prop. Bldg. Code § 202 (2009). The definition promulgated by DHEC is significantly narrower and focused on the solid waste typically found in households or commercial establishments. Under the DHEC regulations none of the items on Respondent's property at the time of the case would have been defined as "rubbish" and Respondent would not have been subject to prosecution.

Prior to sentencing, Respondent made a *pro se* motion for a new trial where she specifically brought up the issue of state law preemption. App. 584-585. She argued, in part, that what is sanitary or not is determined by DHEC and that determination preempts any other determination. App. 585. During trial, Sims even admitted that the information on stagnant water leading to mosquitos possibly breeding was taken from DHEC. App. 304, ll. 1-4.

On direct appeal to the circuit court, where she represented herself *pro se* in the hearing after moving to have appointed counsel relieved, Respondent raised the specific issue of the DHEC definition of "rubbish" preempting the City definition. App. 727. Circuit Court Judge Lee ruled in her written order that the issue of preemption had not been raised properly below and was not proper for review at the appellate level. App. 758.

Counsel can be held ineffective for failing to make a valid legal argument. In Pantovich v. State, Op. No. 27915 (S.C. Ct. App. filed August 7, 2019) (Davis Adv. Sh. No 32 at 43-58), this Court held that appellate counsel was ineffective for failing to raise a meritorious issue on a direct appeal. Specifically, Pantovich argued that appellate counsel was ineffective for filing an Anders[4] brief that did not raise the issue of whether the trial judge erred in refusing his request to give the "good character alone" charge. Id. at 46. The PCR court dismissed the action ruling that in order to show prejudice the petitioner must show irregularity in the Court of Appeals' Anders procedure. Id.

This Court reversed the dismissal stating that the appropriate inquiry is "but for appellate counsel's errors, the result of the appeal would have been different." Pantovich, at 46. On remand, the PCR court found appellate counsel ineffective reasoning that based on controlling precedent, the trial court was required to give the "good character alone" charge. Id. The PCR court held that petitioner was prejudiced because there was a reasonable probability the charge would have impacted the jury's consideration. Id.

The same principle applies to trial counsel. Failure of counsel to make a meritorious legal argument is a valid ground on which to grant PCR. See, Sikes v State, 323 S.C. 28, 488 S.E.2d. 560 (1994) (finding trial counsel ineffective for failing to raise a meritorious Fourth Amendment claim). Importantly, it has never been asserted that the failure of counsel to make this argument was strategic in nature. Even were trial counsel or the state to argue that the decision was strategic, the notion that failure to raise a meritorious claim is a strategic decision has been dismissed by this Court. Id. at 32.

---

[4] Anders v. California, 386 U.S. 738 (1967)

Respondent was similarly situated to the petitioners in Pantovich and Sikes in that there was a valid legal motion that counsel failed to make. Based on the testimony and record the PCR Judge in the present action found that the question of preemption was a meritorious legal argument that could have changed the outcome of the case and thus failure to make the argument prejudiced Respondent. App. 1060. It is important to note that the PCR judge did not make a legal determination on the question of preemption. In ruling the PCR court stated,

> "It is clear that the strategy of her original counsel, Mr. Lupton, was to pursue an attack on the technical sufficiency of the city's ordinances, and he focused on the definition of the crime for which she was charged. Although it is not clear in the material I have whether his focus was directly on what Judge Lee talked about, what I am talking about, and what you, Ms. Moody, clarified in the material you filed, which is the preemption argument, and that is I don't know how the court would – how the – a higher court look at that (the preemption issue). But it is a very valid argument and might have been and I think was (A) the most powerful argument to be made but (B) the only really valid one to be made."

App. 1050-1051. This constituted a factual determination that it was ineffective assistance of counsel for failing to raise preemption and preserve it for direct appeal.

At the PCR hearing Lupton testified that prior to his substitution he had intended to make motions about the sufficiency of the charging documents, notice and other matters of a technical legal nature. App. 1021-1023. The trial court had ruled that Lupton could make these motions on the day of trial. When Lupton was substituted out as counsel, he offered Briggs the legal motions he had researched but Briggs declined. App. 1024.

At no point did Briggs make any motion regarding the technical sufficiency of the ordinances. Briggs failed to make several motions and regularly deferred to Respondent to raise matters to the court. App. 985-986. Not only did Briggs not discuss the arguments raised in the PCR application with Respondent prior to trial, he had no articulable reason for failing to do so. App. 986, ll. 17.

This Court has held that failure of counsel to properly investigate and research the law is grounds for ineffective assistance of counsel. In Berry v. State, 381 S.C. 630, 675 S.E.2d 425 (2009), counsel was held ineffective for failing to investigate and inform defendant that his prior drug paraphernalia conviction did not qualify for enhancement purposes. In Stevens v. State, 365 S.C. 309, 617 S.E.2d 366 (2005), counsel was held ineffective for failing to investigate and research the issue of whether the receipt of multiple items in a single transaction constitutes one offense or multiple offenses under the receiving stolen goods statute.

Both Counsel Briggs and Counsel Lupton failed to adequately investigate and research the law regarding preemption of the definitions used in the ordinances. While Lupton testified that he had technical legal challenges he intended to make, he never stated he was going to raise the issue of preemption. App. 1023-1024. Briggs not only passively fail to conduct his own research, be actively refused help that was offered. While he attempted to justify his performance by relying on the fact that he was substituted only twenty-four hours prior to trial the record shows he accepted representation knowing the date of trial had been set. App. 980 ll. 7-9; App. 981 ll. 5-10. Further, he had seen the property, knew what the city was charging and had knowledge of the case. App. 981, ll. 16-20. Briggs was not effective when he accepted the representation, ignored the offer of help from prior counsel but claimed to have knowledge of the matters being tried.

Respondent was prejudiced by the failings of counsel. Had the argument of preemption been researched, investigated, raised and ruled upon it would have resulted in either a dismissal of the charges or a meritorious issue to be argued on appeal. Either way respondent was deprived of effective assistance of counsel under the standards set out in Strickland v. Washington, 466 U.S. 668 (1984). There was an abundance of evidence to support the ruling of the

PCR judge that trial counsel provided ineffective assistance of counsel in this case. The state's petition for writ of certiorari should be denied and the ruling of the PCR court should be affirmed under the "any evidence" standard. See, Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

II. Additional Sustaining Grounds

Respondent submits the following additional grounds as bases to deny the petition for certiorari. I'on, L.L.C. v. Town of Mt. Pleasant, 388 S.C. 406, 526 S.E.2d 716 (2000) (holding that the prevailing party in the lower court may raise on appeal any additional reasons the court should affirm the lower court rulings regardless of whether those reasons were presented to or ruled on by the lower court).

Failure to challenge the applicability of the ordinances to the property

The City tried Respondent for three alleged violations under three different code sections. With a minimal amount of effort, trial counsel could have seen that the code sections cited do not apply to vacant lots. Failure to make the argument that, as a threshold matter, the ordinances did not apply to Respondent's property was ineffective assistance of counsel. Had counsel effectively made the arguments the case would have been dismissed. Counsel was deficient for failing to investigate and research the law as it applied to Respondents property.

Section 307.1 of the IMPC

Counsel was ineffective for not arguing that the IPMC as a whole did not apply to the vacant lot owned by Respondent. The City, at the time of this case, had adopted the IPMC only in Chapter 5 of the Code, which dealt specifically with buildings and building regulations. There was no adoption of the IMPC in Chapter Eight, which is where the alleged violations arose from.

In its certiorari petition the state cites City of Columbia Code Section 8-32(b) to support the application of the IMPC to Respondent's property but section 8-32(b) is the *current law* and was not in effect at the time of this case.

At the time this matter was charged and went to trial the only mention of IPMC in Chapter Eight of the City Code is that multiple violations of the IPMC will be declared a public nuisance. Nothing in then Chapter Eight purports to adopt the definitions of the IPMC either explicitly or by reference. The adoption of IPMC is restricted to Chapter Five of the Code. This is supported by fact that Chapter Nineteen of the City Code has a wholly different definition of "rubbish" that is used solely within that section.

Further, the state relies on S.C. Code § 6-9-60 to argue the IMPC was properly adopted and applied to Respondent's property. However, S.C. Code § 6-9-60 specifically states that

> "Municipalities and counties may adopt by reference only the latest editions of the following nationally recognized codes and the standards referenced in those codes ***for regulation of construction*** within their respective jurisdictions: property maintenance, performance codes for buildings and facilities, existing building, and swimming pool codes as promulgated, published, or made available by the International Code Council, Inc."

Thus, in accord with state law municipalities cannot adopt the IPMC to regulate vacant lots. The IPMC may only be used for the regulation of construction. It was well established at trial that no construction was occurring on this lot.

Since the IMPC does not properly apply to Respondent's lot the definition of "rubbish" used by the City was invalid. In the absence of a definition it would be logical to default to the state regulatory agency on such matters and adopt the DHEC definition. Here again trial counsel's failure to research and investigate the case resulted in deficient performance. *Section 8.41*

Counsel was also ineffective for failing to argue that section 8.41, titled "outdoor placement of certain items prohibited" does not apply to vacant lots. The code section at the time of this case read:

> (a) it shall be unlawful for the occupant or owner of any property within the city to allow any of the following items to **remain on the property outside a dwelling or other enclosed structure** for longer than 48 hours, in any location visible from the streets or sidewalks adjacent to the property: Appliances, bedding, bottles, glass, cans, cardboard, upholstered furniture manufactured for indoor use only, household appliances, jars, lumber and building supply materials not related to an active permit and not neatly stacked, machine parts, motor vehicle parts, pallets, paper, plumbing fixtures, scrap metal.
>
> (b) For purposes of this section, the phrase "**outside a dwelling or other enclosed structure**" shall mean any location that is not within the interior of a dwelling or other enclosed structure. Porches, balconies, decks, carports or other similar structures, unless completely enclosed, shall be deemed to be outside a dwelling or other enclosed structure. (emphasis added).

The plain language of the ordinance makes it clear that for section 8.41 to apply there must be a dwelling or enclosed structure on the property. The record reflects that Respondent's property was a vacant lot. App. 263, ll. 12-14. There was also no construction occurring on the property and no permit to build anything at the time of the citation. App. 268, ll. 15-22. While it may very well be a violation of an ordinance to have various materials on a vacant lot, it is not a violation of the cited ordinance as alleged at trial.

Section 8.32

Trial counsel made an unspecific and incomplete argument about the constitutionality of the ordinances Respondent was charged under. App. 311-312. The focus of the argument should have been on the vagueness and overbreadth of section 8.32 specifically. Section 8.32, at the time of the case, read:

> All premises shall be kept at all times in a sanitary condition and all garbage, leaves, trash, damp or low places, cans, vessels, broken bottles, or pieces of china or glass that may hold water shall be deemed unsanitary.

In determining whether a statute is unconstitutionally vague, this Court has held:

> The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication. The primary issues involved are whether the provisions of a penal statute are sufficiently definite to give reasonable notice of the prohibited conduct to those who wish to avoid its penalties and to apprise Judge and jury of standards for the determination of guilt. If the statute is so obscure that men of common intelligence must necessarily guess at its meaning and differ as to its applicability, it is unconstitutional.

State v. Albert, 257 S.C. 131, 134, 184 S.E.2d 605, 606 (1971).

The broad and vague nature of this ordinance makes it impossible for a person to have reasonable notice of the prohibited conduct. Respondent was charged with having a "vessel" that could hold water on her property, specifically buckets. However, a "vessel" is not defined in the ordinance and could be anything from a bird bath or child's pool, to a bucket or trash can. The City is essentially banning any object that could hold water from ever being on a piece of property.

There is also no notice as to what qualifies as "unsanitary." At trial the City alleges that the "unsanitary" condition on Respondent's property is the possibility of mosquito's breeding in stagnant water that sits for five or more days. App. 274, ll. 6-20. The City relies on information from DHEC that the water must be standing for five days at a minimum. App. 304. However, there was never any mosquito activity observed at Respondent's property nor any evidence presented of stagnant water existing for a period of time exceeding five days. App. 303.

A plain reading of the ordinance shows that it is overbroad and vague. A review of the current City of Columbia Code shows *that this section has been abandoned in its entirety.* The Code section where 8.32 originally appeared has been rewritten with specificity and the notion of

items holding water being banned as "unsanitary" has been removed. The ordinance at the time of the trial criminalized future possible outcomes. Again, trial counsel failed to fully and thoroughly argue that this ordinance did not apply to Respondent's property.

As stated above this Court has held that failure of counsel to properly investigate and research the law is grounds for ineffective assistance of counsel. See, Berry v. State, 381 S.C. 630, 675 S.E.2d 425 (2009); Stevens v. State, 365 S.C. 309, 617 S.E.2d 366 (2005). Counsel was derelict in failing to research the ordinances Respondent was charged under and challenge them as the applied to Respondent's property. This case turned on the definitions of "rubbish," "scrap metal," and "unsanitary conditions." It would have taken minimal effort on the part of trial counsel to research these issues and failure to do so cannot be deemed effective assistance of counsel.

Failure to challenge the sufficiency of the jury pool

Counsel was also ineffective for failing to challenge the sufficiency of the jury pool at the time of selection. Prior to the start of jury selection, the court announced that there were *twenty-four* prospective jurors present. App. 222, ll. 21-23. Trial counsel failed to make any objection despite Respondent's insistence that the statute required forty jurors to be present for selection. App. 255, ll. 5-6. Trial counsel refused to make any argument and instead proceeded forward with jury selection with only twenty-four prospective jurors. App. 225, ll. 7-10.

In State v. Johnson, 396 S.C. 424, 721 S.E.2d 786 (Ct. App. 2012), the petitioner argued that his case should have been continued because only thirty-three jurors were present at selection and the statute mandated that a minimum of forty jurors be present. The state argued that the statute only required a minimum of forty jurors be drawn for qualification and that the only requirement was that there be enough jurors present at selection for each side to be able to

exercise all their peremptory challenges. Id. at 427. After a review of the relevant statutes the court ruled that the statute did not require a minimum number of forty jurors to be present at jury selection. Id. at 432. However, the court held that the statute did *mandate there be enough jurors present for each side to effectively exercise all their peremptory challenges and still seat a jury of six members with four alternates*. Id. at 432-433 (emphasis added). Given that each party was entitled to six peremptory challenges to primary jurors and four peremptory challenges to alternative jurors for a combined twenty challenges, and the statute required a ten-member jury panel be sat, the court held that *thirty jurors was the minimum number required meet the statutory demands*. Id. at 433.

Comparing Johnson to the case at bar it is obvious the *statutory mandated* minimum number of jurors was not present at the time of jury selection. With only twenty-four prospective jurors present it would have proven impossible for both sides to exercise all their peremptory challenges and still seat a full jury. Further the record shows that the municipal judge only sat one alternative instead of the four alternative jurors required by S.C. Code Ann. § 22-2-100. App. 243, ll. 20-21.

A criminal defendant has a constitutional right to a trial by a jury that is randomly selected and representative of the community in which the defendant resides. To ensure that this right is fulfilled in municipal and magistrate courts, the legislature enacted S.C. Code Ann. § 22-2-20 through 22-2-150. The purpose of these statutes is to ensure that the jury pool provided during selection is representative of the community and sufficient in numbers to guarantee that each side would receive its maximum strikes while still being able to seat a full panel. A pool of twenty-four individuals does not meet the statutory mandated minimum required for a full and fair jury. More importantly, such a low number is too small a sample to be a representative cross

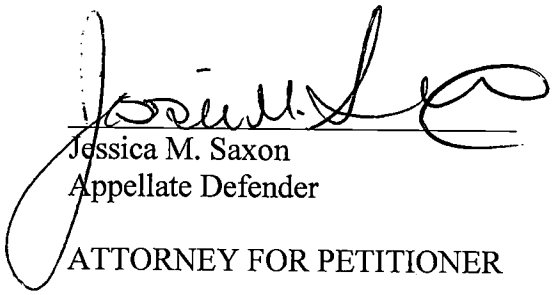
section of the community. Taylor v. Louisiana, 419 U.S. 522, 526–27, 95 S. Ct. 692, 696, 42 L. Ed. 2d 690 (1975) (the Court has unambiguously declared that the American concept of the jury trial contemplates a jury drawn from a fair cross section of the community).

Trial counsel was deficient for failing to challenge the sufficiency of the jury pool prior to selection. Had the challenge been made the case would have been continued and many of the other deficiencies with counsel's performance could have been cured, as he would have had more time to prepare. Even if the case had not been continued the challenge would have been reviewed on direct appeal and would have resulted on a reversal based on Johnson. Also, a challenge would have ensured that Respondent's right to be tried by a representative cross section of the community was protected. That a jury was sat is not relevant. The prejudice was in denying Respondent her right to a random and representative jury pool in which all strikes from each side could be exercised as guaranteed by the Constitution.

But for trial counsel's deficient performance, the case would have reached a different result. Failing to raise a valid legal argument, failing to properly argue the applicability of the ordinances, and failing to challenge the sufficiency of the jury pool were ineffective assistance of trial counsel. Based on the arguments presented above, Respondent respectfully request that the state's petition for writ of certiorari be denied. There is a wealth of evidence of ineffective assistance of counsel and the PCR court's ruling should be affirmed under the "any evidence" standard. See, Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

CONCLUSION

By reason of the foregoing arguments, the petition for writ of certiorari should be denied.



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of September, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County

Honorable Jean H. Toal, Circuit Court Judge

MARIE ASSA'AD-FALTAS,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Johnny Ellis James, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Marie Assa'ad-Faltas, at P.O. Box 9115, Columbia, SC 29290, this 13th day of September, 2019.

Jessica M. Saxon
Appellate Defender

ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me
this 13th day of September, 2019.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: 10/30/2022.