STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Lexington County

Honorable J. Derham Cole, Circuit Court Judge

KEVIN J MERCER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-001419

PETITION FOR WRIT OF CERTIORARI

KATHRINE H. HUDGINS
Appellate Defender

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

ATTORNEY FOR PETITIONER

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ISSUES PRESENTED

1. Did the PCR judge err in refusing to find trial counsel ineffective for asking to represent Petitioner for his charges of ABWIK, lynching second degree and carrying a weapon by an inmate and proceeding to trial six days later under the mistaken belief that in exchange for her going forward with the trial, the judge would limit the evidence the State could present in regard to those convictions during the subsequent capital murder trial, creating a conflict in counsel's representation in the first trial?

2. Did the PCR judge err in refusing to find trial counsel ineffective for attempting to present a self-defense/defense of others claim when there was no evidence to support the defense, rendering the purported trial strategy unreasonable?

STATEMENT

In August of 2004, the Lexington County Grand Jury indicted Petitioner, Kevin J. Mercer, for carrying a weapon by an inmate and lynching second degree, indictments #04-GS-32-3097, 3097. (App. p.92, lines 6-8; pp. 313-314). On March 13, 2006, the day the trial started, the Lexington County Grand Jury indicted Petitioner for assault and battery with intent to kill [ABWIK], indictment #2006-GS-32-0553. (App. pp. 315-316). On March 13, 2006, Petitioner proceeded to jury trial before the Honorable Larry R. Patterson. Melissa J. Kimbrough represented Petitioner at trial. Samuel R. Hubbard, III, and David Shawn Graham prosecuted the case. Judge Patterson directed a verdict of acquittal for the lynching charge. (App. p. 251, lines 1-13). The jury returned verdicts of guilty for the ABWIK and weapon charges. Judge Patterson sentenced Petitioner to twelve (12) years for ABWIK and five (5) years concurrent for the weapon charge. A timely notice of intent to appeal was filed and the direct appeal perfected. On February 23, 2009, the South Carolina Court of Appeals affirmed the convictions. State v. Mercer Op. No. 2009-UP-093 (S.C. Ct.App. filed February 23, 2009). (App. pp. 357-358). A petition for rehearing was filed and then denied on May 5, 2009. A petition for writ of certiorari was filed and then denied on August 4, 2009.

On April 21, 2010, Petitioner filed an application for post-conviction relief [PCR]. (App. pp. 385-391). The State filed a return on August 6, 2010. (App. pp. 392-399). Petitioner filed an amended PCR application on June 29, 2017. (App. pp. 400-403). The State filed a return to the amended PCR application on July 31, 2017. (App. pp. 404-419). On February 22, 2018, an evidentiary hearing was held before the Honorable J. Derham Cole. S. Boyd Young represented Petitioner at the PCR hearing. Assistant Attorney General Al Simon represented the State. In a written order signed May 14, 2020, Judge Cole denied relief and dismissed the application. A

timely notice of intent to appeal was served on October 14, 2020. This petition for writ of certiorari follows.

ARGUMENTS

1. The PCR judge erred in refusing to find trial counsel ineffective for asking to represent Petitioner for his charges of ABWIK, lynching second degree and carrying a weapon by an inmate and proceeding to trial six days later under the mistaken belief that in exchange for her going forward with the trial, the judge would limit the evidence the State could present in regard to those convictions during the subsequent capital murder trial, creating a conflict in counsel's representation in the first trial.

While Petitioner was housed in the Lexington County Detention Center for a capital murder charge, he was accused of assaulting a cellmate, Terry Brown. Petitioner was indicted for lynching second degree and the carrying of a weapon by an inmate. On January 13, 2006, during a pre-trial hearing for the capital case before the Honorable John C. Few, Melissa J. Kimbrough was appointed as second chair for the capital case. (App. pp. 2-4). Attorney Cameron B. Littlejohn served as lead counsel for the capital case. During this hearing the prosecution announced their plan to call the lynching case prior to the capital case. (App. p. 11, lines 16-24). Both newly appointed counsel Kimbrough and lead counsel Littlejohn objected. (App. p. 12, lines 5-11; p. 13, line 1 – p. 14, lines 1-19). Newly appointed counsel Kimbrough told the judge that she believed they would be responsible for representing Petitioner on the new charges but said, "However, we would obviously object to trying this case that soon. We're going to be trying to prepare for a capital case, and wedging in a lynching trial in the midst of a less than hundred day time span I think is a little unrealistic." (App. p. 12, lines 5-11). Lead counsel Littlejohn told the judge, "Your Honor. The Public Defender was also representing Mr. Mercer when I was appointed. It's been my understanding all along that they have been representing him on the lynching charge and another charge that he has pending. I've done very little to prepare for that because I haven't been appointed." (App. p. 14, lines 8-13).

Lead counsel Littlejohn also objected on the grounds of judicial economy and the judge replied, "If you try it and get a guilty verdict, then all that has to be presented in the death penalty case is the fact of the conviction and the - - -and the basic facts surrounding it which will be a very short presentation. I'm assuming that's what he's going to say in terms of judicial economy." (App. p. 17, lines 9-14). The judge later asked the prosecutor, "If you were to try that case and if you got a conviction . . . would it not be true that your presentation of evidence concerning that crime would be as I suggested? . . . limited to the fact of conviction and the basic facts surrounding it?" (App. p. 20, lines 2-10). The prosecutor answered, "That's correct, Your Honor." (App. p. 20, line 11). The judge then asked, "And it would take a relatively short period of time?" (App. p. 20, lines 12-13). The prosecutor answered, "Yes, sir, Your Honor." (App. p. 20, line 14).

The judge asked that the Public Defender office be appointed to represent Petitioner for the lynching charge stating:

> And so I'm going to say that I am not going to require you two to represent him, and I'm going to ask Judge Keesley to appoint the Public Defender to represent Mr. Mercer in the lynching case so that you al are not saddled with that additional time constraint. Now, that doesn't - - if either of you wants to be involved in it, you certainly are free to. Then if they - - if there is a time in which they want to call the case for trial, we'll take it up at that time. At that time I'll address with whoever the administrative - - with Judge Keesley who is the administrative judge and with whoever is the trial judge the concerns that I just mentioned to make sure that the calling of that case for trial does not interfere with what you all are doing to prepare to defend Mr. Mercer in this case.

(App. p. 23, lines 10-24).

On February 23, 2006, during another pre-trial hearing on the capital case the judge addressed a potential conflict with the Public Defender office representing Petitioner on the lynching charge. (App. p. 36, lines 1-9). Lisa McPherson with the Public Defender office represented Petitioner on the lynching charge. Beth Fullwood, a supervisor with the Public

Defender office, represented a witness against Petitioner, Darrell Williams. (App. pp. 65-69). The judge relieved the Public Defender office from representing Darrell Williams and appointed outside counsel. (App. pp. 76-77). The judge found that once outside counsel was appointed to represent Williams, the Public Defender Office did not have a conflict in representing Petitioner for the lynching charge. (App. pp. 80-84).

On March 7, 2006, a hearing was held before the Honorable Larry R. Patterson to again address Petitioner's representation for the lynching charge. In an order signed March 8, 2006, Judge Patterson appointed Melissa Kimbrough and relieved Lisa McPherson from representing Petitioner for the lynching charge. (App. pp. 485-486). The order noted that the State intended to call the lynching case for trial six days later on March 13, 2006. (App. p. 485). The capital case was scheduled for trial beginning April 10, 2006. (App. p. 485). On the day the trial started before Judge Patterson, March 13, 2006, the Lexington County Grand Jury indicted Petitioner for ABWIK. (App. p. 315). There was no objection when the State called the case for trial on March 13, 2006. (App. p. 101, lines 2-11). At the close of the State's case Judge Patterson directed a verdict of acquittal for the lynching charge. (App. p. 251, lines 1-11). The defense was not successful in admitting evidence and testimony, as discussed in issue two below, and did not present a case. The judge instructed the jury on the lesser included offense of assault and battery of a high and aggravated nature [ABHAN]. (App. p. 303, line 11 – p. 304, lines 1-10). The jury found Petitioner guilty of ABWIK.

In the amended PCR application Petitioner alleged that, "Counsel was conflicted. Counsel was preoccupied with applicant's capital case and failed to provide the best possible representation for applicant's assault and battery with intent to kill case." (App. p. 401). Additionally, Petitioner alleged in the amended application that, "Counsel was not afforded

ample time for investigation and preparation." (App. p. 402). Petitioner cited United States v. Cronic, 466 U.S. 648 (1984). (App. p. 402). Counsel was appointed as second chair in the capital case on January 13, 2006. Less than two months later on March 7, 2006, counsel asked to be appointed to represent Petitioner for the lynching charge. (App. p. 485). Six days later on March 13, 2006, the State called the lynching case for trial. On the same day the State called the case for trial, March 13, 2006, the State presented an additional indictment for ABWIK to the Lexington County Grand Jury and the indictment was true billed. (App. pp. 315-316). At trial the prosecutor told the judge that trial counsel was put on notice of a possible ABWIK indictment on February 21, 2006. Trial counsel, however, was not appointed on the lynching/ABWIK case until March 7, 2006. The jury convicted Petitioner of ABWIK and the weapon charge. The capital trial started a little over a month later on April 17, 2006.

During the PCR hearing trial counsel, (Melissa Armstrong, formerly Kimbrough), admitted that during the January 13, 2006, pre-trial hearing she told the judge that she would not be able to try the lynching case before the capital case. (App. p. 435, line 5 – p. 436, 437, lines 1-23). PCR counsel then asked trial counsel about comments the judge made about the lynching charge. (App. p. 437, line 24 – p. 438, lines 1-2). Trial counsel answered:

> Uhm, he, well, I mean, the transcript[1] speaks for itself, but what he says, I mean fundamentally what he says is, listen, if you try it and you get whatever verdict, it may be to your benefit because then at the penalty phase of the capital trial when you get there, instead of the jury essentially having to hear all this stuff, they're just gonna hear that he was convicted of something and therefore you kind of, you get to bypass the gory details essentially.

(App. p. 438, lines 3-10).

Referencing the comments made by the judge, PCR counsel asked, "Yep. He said if you try it and get a guilty verdict, then all that has to be presented in the death penalty case is the fact

[1] App. p. 17, lines 1-14.

of the conviction and the basic facts surrounding it which would be a very short presentation." (App. p. 438, lines 13-16). Trial counsel answered, "Correct. In other words, we get to kind of water it down." (App. p. 438, lines 17-18). PCR counsel then reaffirmed trial counsel's understanding and asked "If you'll agree to try it in the short amount of time, it's gonna be to your benefit because I'm gonna limit what they can put in in the penalty phase of the capital case?" (App. p. 438, lines 19-22). Trial counsel answered, "That was my understanding." (App. p. 438, line 23).

PCR counsel then asked if the State agreed with the judge's comments. (App. p. 438, line 24 – p. 439, lines 1-16). PCR counsel asked, "On line 5[2] the court says, would it not be true that your presentation of the evidence concerning that crime would be as I suggested and Mr. Hubbard said yes, sir?" (App. p. 439, lines 5-7). Trial counsel answered, "Yes, sir. I'm sorry. I was reading too far down. That's right." (App. p. 439, lines 8-9). PCR counsel asked, "Limited to the fact of the conviction and the basic facts?" (App. p. 439, lines 10-11). Trial counsel answered, "Correct." (App. p. 439, line 12). Trial counsel again stated that the prosecutor agreed with the judge. (App. p. 439, lines 13-16).

Later in the hearing PCR counsel questioned trial counsel about why she changed her mind and on March 7, 2016, asked to represent Petitioner for the lynching charge that was set to be tried six days later on March 14, 2016[3]. (App. p. 443, lines 7-16). Trial counsel answered, "It was 12 years ago but essentially what it boiled down to is we were gonna have to deal with these facts and they were gonna push this case to get it tried before our capital trial and wisely or unwisely I figured I would be in as good or better a position as anybody else to try this case so I said I would do it." (App. p. 443, lines 17-22). PCR counsel then asked, "Was there anything

[2] App. p. 20, lines 5-14).

[3] The trial actually started on March 13, 2016. (App. p. 87).

else? I mean, did you think that Judge Few had made you an offer that would be of value to you in the capital case?" (App. p. 443, lines 23-25). Trial counsel answered, "Well, sure. I mean, we had him on the record saying that." (App. p. 444, lines 1-2). Trial counsel was mistaken and during the capital trial that started a little less than a month after the ABWIK trial, the judge **did not** limit the State in regard to what evidence they presented regarding the ABWIK conviction. (App. p. 459, lines 15-23).

Trial counsel testified that her hope was that the jury would convict on the lesser included offense of ABHAN. (App. p. 444, line 4 – p. 445, lines 1-24). Later, however, trial counsel agreed that her theory of defense was self-defense or defense of others. (App. p. 448, lines 3-11). Trial counsel admitted that she did not argue that Petitioner was only guilty of the lesser included offense of ABHAN. (App. p. 448, lines 12-24). The record reflects that trial counsel failed to present any admissible evidence on self-defense or the defense of others.

In summation PCR counsel argued:

> We all know that a person is entitled to effective representation on each offense they have representation on and we know that from a lot of cases where the State has talked to people who were represented by counsel saying, well, we were talking about a different issue and the Supreme Court ruled, well, the Sixth Amendment is offense specific so you can have counsel on one case and still be questioned in another case without violating right to counsel.
>
> The same thing applies here where Mr. Mercer has two different sets of charges and he has attorneys appointed to each on those sets of charges. He has Ms. Kimbrough and Mr. Littlejohn on his capital murder charges and he has Ms. McPherson all the way up until the week before trial on his lynching and possession of a weapon charge which became an ABWIK possession of a weapon charge.

(App. p. 477, line 17 – p. 478, lines 1-8). PCR counsel then discussed trial counsel's mistaken belief about a limitation on the State. (App. p. 478, lines 8-17). PCR counsel argued that the judge created the conflict when in fact trial counsel created the conflict. (App. p. 478, lines 23-

24). PCR counsel argued that the case must be reversed based on the conflict resulting in ineffective assistance of counsel without the need to show prejudice. (App. p. 478, lines 17-23).

In the order of dismissal the PCR judge wrote, "Applicant failed to show trial counsel had divided loyalties. The very allegation undermines his legal position as the competing interest he relies upon actually shows strategic considerations for the separate proceedings that followed the separate crimes *he* committed, not conflicts between duties or personal interests. Applicant's interest remained paramount in the representation, as indicated in Ms. Armstrong's testimony that she was in a 'better' position to protect his interest that [sic] someone not involved in the capital case. (PCR Tr. p. 260)." (App. p. 499). The PCR judge erred.

Trial counsel's loyalties were divided between representation on the capital case and representation on the lynching/ABWIK case. Trial counsel asked to represent Petitioner in the lynching/ABWIK trial because she hoped to gain an advantage in the capital trial. During the PCR hearing trial counsel did not remember the circumstances surrounding her appointment on the lynching case, mistakenly believing that the Public Defender Office had been conflicted out of the lynching case at the time she was appointed. (App. p. 444, line 22 – p. 445, lines 1-24). There was no conflict with the Public Defender office at the time trial counsel asked to be appointed. As reflected in Judge Patterson's order, trial counsel asked to be appointed on the lynching case, replacing Ms. McPherson with the Public Defender Office, but not based on a conflict. (App. pp. 485-486). During a previous hearing on February 23, 2006, Judge Few found there was no conflict in the Public Defender Office representing Petition for the lynching charge. (App. pp. 80-84). The Public Defender Office was appointed to represent Petitioner for the lynching, at the latest, right after the January 13, 2006, hearing when the judge specifically stated that he would ask that the Public Defender Officer be appointed. (App. p. 23, lines 10-24). Lead

counsel in the capital case believed that the Public Defender Office was already representing Petitioner on the lynching charge at the time of the January 13, 2006, hearing. (App. p. 14, lines 8-13). A conflict did not exist with the Public Defender Office when trial counsel, six days before trial, asked to be appointed to represent Petitioner.

Trial counsel asked to be appointed not because she was in a better position but because she mistakenly believed that if she agreed to represent Petitioner during the March trial for lynching/ABWIK, the judge presiding over Petitioner's capital trial scheduled for April would limit the evidence the State could present with regard to those convictions. (App. p. 438, lines 3-23). The State was entitled to present evidence of the ABWIK conviction as evidence of future dangerousness. Trial counsel's mistaken belief that the judge could limit the States's evidence was unreasonable, and not supported by the law. Trial counsel created a conflict by asking to be appointed on the lynching charge, six days before trial, and sacrifice adequate preparation for that trial in exchange for what counsel mistakenly believed would be a limitation on what evidence the State could present during the capital trial. The fact that the Judge did not and could not limit the State in the presentation of evidence about the ABWIK conviction during the capital trial further demonstrates the deficiency in trial counsel's performance.

Trial counsel could not have had sufficient time to prepare for the lynching/ABWIK trial when she asked to be appointed six days before trial in the middle of preparing for the capital case. The PCR judge addressed the lack of sufficient time pursuant to Cronic in the order of dismissal writing:

> To the extent counsel also argues that Ms. Armstrong expressed that she did not have sufficient time, (PCR Tr. p. 63), thus Cronic rather than Strickland should apply, this Court credits Ms. Armstrong's explanation that the prior assertions before appointment during the January 2006 hearing were made without contemplation of the specifics of this case and more with an eye to preserving her time and efforts for the capital case. (PCR Tr. pp. 41-43). Further, Ms.

> Armstrong testified she was prepared for trial when the trial began, and because of her representation in the capital case, perhaps was in a "better" position than most to represent Applicant in this action. (PCR Tr. pp. 14, 26, and 43-45). The fact that she even requested appointment after initial hesitancy is also supported by the appointment order. (PCR Tr. p.45). All this credible and supported testimony shows Ms. Armstrong eventually requested appointment to further Applicant's interest, not that she was pushed into representation, or lacked time, resources or failed to conduct an adequate investigation to prepare a defense. Applicant's claim fails factually.

(App. p. 504).

The PCR judge erred. Trial counsel requested appointment to further Petitioner's interest in the capital case at the expense of adequate preparation for the lynching/ABWIK trial, creating the conflict discussed above. The PCR judge additionally wrote in the order of dismissal, "Additionally, the transcript of the trial reflects that counsel did a very reasonable job of defending Applicant at trial. Trial counsel was able to obtain a direct verdict upon one of the charges, (on the lynching charge), and vigorously defended throughout the trial. The mere fact that trial counsel's strategy was unsuccessful on the remaining counts does not render counsel's assistance unconstitutionally ineffective. Bell v. Evatt, supra." (App. p. 505).

Trial counsel's decision to ask to represent Petitioner six days before trial was not simply an unsuccessful strategy, it was an unreasonable strategy based on a mistaken belief wholly unsupported by the law. While counsel may have been familiar with the facts and witnesses involved with the lynching charge as a result of her preparation for the penalty phase of the capital case, this preparation would be different from the kind of preparation required for a trial on the lynching/ABWIK charge. Also, the capital trial was still a month away while the lynching/ABWIK trial was in six days and the State had not even obtained the ABWIK indictment at the time of appointment. While trial counsel testified that her hope was that the jury would find Petitioner guilty of the lesser included offense of ABHAN, she offered no

argument that Petitioner was guilty of ABHAN instead of ABWIK. (App. p. 444, line 4 – p. 445, lines 1-24; p. 448, lines 12-24). While trial counsel testified that this was a defense of others case, she presented no admissible evidence to support a defense of others claim, as discussed below. (App. p. 448, lines 3-11). Trial counsel's hasty and unreasonable attempt to gain an advantage in the capital case created a conflict in the lynching/ABWIK case that resulted in ineffective assistance of counsel.

The conflict question is a question of law. In Smalls v. State, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839–40 (2018)(n. 2 omitted), the South Carolina Supreme Court wrote, "Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). We review questions of law de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)).

In Nance v. Ozmint, 367 S.C. 547, 551, 626 S.E.2d 878, 880 (2006), the South Carolina Supreme Court wrote:

> The Sixth Amendment guarantees that every criminal defendant shall receive "Assistance of Counsel" in establishing his defense. U.S. Const. amend. VI. On May 14, 1984, the United States Supreme Court handed down two opinions holding that the Sixth Amendment requires that a criminal defendant receive *effective* assistance of counsel. United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Normally, 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.

Noting that in some cases, however, prejudice is presumed, the South Carolina Supreme Court wrote:

> The Supreme Court also recognized in both Strickland and Cronic that in certain circumstances "prejudice is presumed" because prejudice "is so likely that case-by-case inquiry ... is not worth the cost." Strickland, 466 U.S. at 692, 104 S.Ct. 2052 (citing Cronic, 466 U.S. at 658, 104 S.Ct. 2039). In Cronic, the Court identified three distinct situations in which a presumption of prejudice is appropriate. First, prejudice is presumed when the defendant is completely denied counsel "at a critical stage of his trial." Cronic, 466 U.S. at 659, 104 S.Ct. 2039. Second, per-se prejudice occurs if there has been a constructive denial of counsel. This happens when a lawyer "entirely fails to subject the prosecution's case to meaningful adversarial testing," thus making "the adversary process itself presumptively unreliable." Id. Third, the Court identified certain instances "when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." Id. (citing Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932)). A finding of per-se prejudice under any of these three prongs is "an extremely high showing for a criminal defendant to make." Brown v. French, 147 F.3d 307, 313 (4th Cir.1998).

Nance v. Ozmint, 367 S.C. 547, 551–52, 626 S.E.2d 878, 880 (2006)

Trial counsel's actions in the present case meet the high standard for presumed prejudice. Trial counsel was ineffective for asking to represent Petitioner for his charges of ABWIK, lynching second degree and carrying a weapon by an inmate and proceeding to trial six

days later under the mistaken belief that in exchange for her going forward with the trial the judge would limit the evidence the State could present in regard to those convictions during the subsequent capital murder trial, creating a conflict. Under the third situation discussed in Cronic, prejudice should be presumed. Given the conflict presented in this case and lack of sufficient time to prepare, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. Trial counsel was appointed as second chair in the capital case in January 2006, with a trial date set for April 2006, leaving trial counsel three months to prepare for the capital case. On March 7, 2006, in the middle of capital trial preparation, counsel asked to be appointed on the lynching/ABWIK charges and proceeded to trial six days later. Counsel admitted that she believed she would gain an advantage in the capital trial by agreeing to represent Petitioner in the lynching/ABWIK trial. Prejudice should be presumed.

The unusual conflict that developed in the present case was not one of divided loyalties between clients based on joint representation but rather divided loyalties between cases that resulted in insufficient time to prepare for trial in one case in exchange for a mistaken perception of gain in another case. Under the very narrow facts of this case, trial counsel operated under an actual conflict of interest that adversely affected her performance during the lynching/ABWIK trial. In Strickland v. Washington, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674 (1984), the Court wrote:

> In Cuyler v. Sullivan, 446 U.S., at 345–350, 100 S.Ct., at 1716–1719, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see, e.g., Fed.Rule Crim.Proc. 44(c), it is reasonable for the criminal justice system to

> maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the per se rule of prejudice that exists for the Sixth Amendment claims mentioned above. Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, supra, 446 U.S., at 350, 348, 100 S.Ct., at 1719, 1718 (footnote omitted).

Trial counsel in the present case represented conflicting interests in the same way an attorney representing multiple defendants, as in Cuyler v. Sullivan, may represent conflicting interests. The conflicting interests in the present case were between cases rather than defendants. Petitioner was entitled to effective assistance of counsel on both sets of charges. Trial counsel's decision to ask to represent Petitioner six days before trial in the mistaken hope to gain an advantage in the capital trial created an actual conflict that resulted in ineffective assistance of counsel. Prejudice should be presumed.

Alternatively, Petitioner can demonstrate prejudice from Petitioner's deficient performance. As a result of trial counsel's rush to request appointment thinking she was gaining an advantage in the capital trial, trial counsel failed to determine that there was not sufficient evidence for defense of others, as discussed below in issue two. The judge properly refused to instruct the jury on the law of defense of others. Additionally, although there was sufficient evidence for ABHAN and the judge instructed the jury on the law of ABHAN, trial counsel failed to argue that Petitioner's actions constituted ABHAN rather than ABWIK. There is a reasonable probability that, but for counsel's deficient performance in asking to be appointed six days before trial without sufficient time to prepare, the results of the proceedings would have been different.

2. The PCR judge erred in refusing to find trial counsel ineffective for attempting to present a self-defense/defense of others claim when there was no evidence to support the defense, rendering the purported trial strategy unreasonable.

Petitioner alleged that trial counsel's purported trial strategy of attempting to present a self-defense/defense of others claim was unreasonable. (App. p. 479, line 7 – p. 480, lines 1-8). During the PCR hearing trial counsel agreed that her theory of defense was self-defense or defense of others. (App. p. 448, lines 3-11). In opening statement, however, trial counsel never mentioned self-defense or the defense of others. Instead, counsel admitted there was a fight but argued that Petitioner felt threatened and lacked criminal intent. (App. pp. 111– 115).

After the State rested, the defense attempted to introduce evidence and testimony that purportedly supported a defense of others claim but counsel was unsuccessful in having the evidence admitted. Counsel sought to admit in evidence a report made by Petitioner asking to be moved from his cell because of threats by his cellmate, Terry Brown. (App. p. 252, lines 1-9). The judge ruled it was inadmissible hearsay. (App. p. 252, lines 16-25). Counsel then proffered the testimony of Petitioner's mother about a phone conversation she had with Petitioner about the threats. (App. p. 257, line 17 – p. 258, 259, 260, lines 1-3). The State objected to the admission of the testimony and the judge sustained the objection. (App. p. 260, lines 6-9). Petitioner did not testify. Counsel for Petitioner offered no evidence of self-defense or defense of others.

The judge refused to instruct the jury on the law of the defense of others. (App. p. 267, line 15 – p. 268, lines 1-8). The trial judge stated:

> Well, you've got to be without fault in bringing on the difficulty. The law of self-defense has to apply to the defense of another. And one who goes to the assistance of another stands in the same position with regard to the right of defense as the person assisted.

> He went out, it's undisputed, and made a statement. He admits that himself to the other fellow and brought on the difficulty.
>
> And the defense of another is justifiable or excusable when committed by one who has reasonable cause or reasonable grounds to believe in good faith that the person in whose behalf he acts is in imminent danger of death or serious bodily injury. There was no evidence of imminent danger or serious bodily injury.
>
> I don't think defense of another can be charged under these facts. I would deny the motion to charge that.

(App. p. 267, line 15 – p. 268, lines 1-8). The appellate court affirmed the trial judge's decision not to instruct the jury on the law of the defense of others. (App. p. 357). There was no evidence of self-defense or defense of others.

In the order of dismissal the PCR judge wrote:

> In contrast however, counsel's PCR testimony supports that she, along with investigative support, did develop evidence of this position [defense of others] and had a cogent strategy. She not only attempted to develop evidence of self-defense through cross-examination, but also offered evidence (though it was ultimately rejected). It was, nonetheless, developed and offered. It was not missed. Strickland, 466 U.S. 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."). Of note, appellate counsel consistently argued to both the South Carolina Court of Appeals and the Supreme Court of South Carolina that there was enough evidence to warrant a charge on the defense of others.[4] (See Return attachments, Appellate briefs, Petition , and Petition Appendix). An unsuccessful strategy should not be confused with an unreasonable strategy. See Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995) ("Standing alone, unsuccessful trial tactics neither constitute prejudice not definitively prove ineffective assistance of counsel."). This Court will not fault counsel on well-investigated strategic decisions. Strickland, 466 U.S. at 81 ("If counsel conducts such substantial investigations, the strategic choices made as a result 'will seldom if ever, be found wanting.'") (quotations in original).

The PCR judge erred. Any purported trial strategy must still be reasonable. It is not reasonable to present a defense when there is no evidence of that defense.

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[4] The appellate courts consistently rejected that argument.

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.

Trial counsel was ineffective in attempting to present a defense of others claim when there was no evidence to support the defense. 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).

Counsel's reasons for attempting a defense of others claim when there was no evidence to support the claim are unclear. First, trial counsel testified that her hope was that the jury would convict on the lesser included offense of ABHAN. (App. p. 444, line 4 – p. 445, lines 1-24). Trial counsel admitted, however, that she did not argue that Petitioner was only guilty of the lesser included offense of ABHAN. (App. p. 448, lines 12-24). Later, trial counsel agreed that her theory of defense was self-defense or defense of others. (App. p. 448, lines 3-11). The record reflects that there was no admissible evidence to support a claim of self-defense or the defense of others. As discussed issue in one, trial counsel believed that if she agreed to represent Petitioner during the March trial for lynching/ABWIK, the judge presiding over Petitioner's subsequent capital trial would limit the evidence the State could present with regard to those convictions. (App. p. 438, lines 3-23). Trial counsel did not present a sound reason for attempting to present a defense of others claim when there was no evidence of the claim.

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 the present case trial counsel's decision to attempt a defense of others claim when there was no admissible evidence to support the claim was "so ill chosen" as to render counsel's overall representation constitutionally defective.

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).

Lawyers of ordinary training and skill would not consider competent a strategy of attempting to present a defense unsupported by the evidence. Trial counsel initially testified that her hope was that the jury would convict on the lesser included offense of ABHAN and admitted that an ABHAN conviction would have better protected Petitioner at the subsequent capital trial. (App. p. 444, line 4 – p. 445, lines 1-24). There was evidence to support that the Petitioner was guilty of ABHAN rather than ABWIK and the judge instructed the jury on the lesser included offense. The strategy of seeking a conviction for the lesser included charge was foreseeable.

Trial counsel, however, did not argue that Petitioner was guilty of the lesser included offense. Instead, trial counsel attempted to present a defense unsupported by the evidecne. Trial counsel was ineffective for attempting to present a self-defense/defense of others claim when there was no evidence to support the defense, rendering the purported trial strategy unreasonable. Petitioner was prejudiced by the deficient performance. There is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different.

CONCLUSION

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

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of April, 2021.