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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

On Petition for Writ of Certiorari to Lexington County
Court of Common Please (PCR)
J. Derham Cole, Circuit Court Judge

Appellate Case No. 2020-001419

KEVIN J. MERCER, ... PETITIONER

v.

STATE OF SOUTH CAROLINA, ...RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTIONS PRESENTED

I. 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?

II. 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?

RESPONDENT'S COUNTER STATEMENT OF QUESTIONS PRESENTED

I. Should this Court grant certiorari review when the record reflects ample probative evidence that supports the PCR judge's determination that Petitioner showed no conflict of interest in counsel's representation of Petitioner during two separate prosecutions – for both his capital and non-capital charges – when counsel explained that Petitioner's "interest remained paramount" in each and counsel expressed that continuity was beneficial to Petitioner?

II. Should this Court grant certiorari review when the record reflects ample probative evidence that supports the PCR judge's determination that Petitioner failed to show ineffective assistance where counsel sufficiently investigated, obtained, and presented evidence of self-defense/defense of others, even though such evidence was not allowed at trial?

STATEMENT OF CASE

Petitioner, Kevin J. Mercer, is incarcerated with the South Carolina Department of Corrections pursuant to orders of commitment from the Lexington County Clerk of Court. Mercer has two sets of convictions. Though separate factually, this brief summary will show how the two intertwine.

Mercer murdered Sergeant First Class Tracy Davis on night of March 16, 2002, and was arrested that same night. *State v. Mercer*, 381 S.C. 149, 153-55, 672 S.E.2d 556, 558-59 (2009). He was indicted by the Lexington County Grand Jury in February 2003 for murder, armed robbery, possession of a firearm while in the commission of a violent crime, and one count of criminal conspiracy (2003-GS-32-409). While awaiting trial in the Lexington County Detention Center, Mercer was charged with assaulting another inmate. This appeal stems from his post-conviction relief (PCR) challenge to the charges from the assault.

Murder Conviction and Sentence of Death

Mercer presently still has a murder conviction. On April 19, 2006, a jury convicted Mercer of murder, armed robbery and possession of a firearm while in commission of a violent crime. The conspiracy charge was *nolle prossed* prior to trial. The Honorable John Few, then a circuit court judge assigned the capital matter, sentenced Mercer to death in compliance with the jury verdict; and additionally sentenced Mercer to thirty years for armed robbery and five years, consecutive, on the weapon conviction. However, after subsequent PCR proceedings, Mercer was granted partial relief. By Order filed June 29, 2011, the Honorable James R. Barber, granted resentencing on the murder conviction finding trial counsel has provided deficient representation in the investigation and presentation of a mental retardation claim. Both the State and Mercer filed

petitions for certiorari review.[1] On September 6, 2013, this court denied both petitions. The murder conviction stands but upon information and belief, Mercer has not yet been resentenced.

Assault and Battery with Intent to Kill and
Carrying or Concealing a Weapon by an Inmate Convictions

Mercer was indicted by the Lexington County Grand Jury during August 2004 for Lynching, Second Degree (2004-GS-32-3097), and Carrying or Concealing Weapon by Inmate (2004-GS-32-3096). He was subsequently indicted in March 2006 for Assault and Battery with Intent to Kill (2006-GS-32-0553). Melissa J. Kimbrough, Esq., who also represented Mercer in the capital case, represented him on these charges, as well. A jury trial on all three charges began on March 13, 2006, before the Honorable Larry R. Patterson. Judge Patterson granted a motion for a directed verdict on the lynching charge after the State rested its case. (App. p. 251). The jury found Mercer guilty of the other two charges. (App. p. 231). Judge Patterson sentenced Mercer to twelve (12) years confinement on the ABWIK conviction and five (5) years confinement on the Carrying/Concealing Weapon by Inmate conviction.[2] (App. p. 311).

Mercer timely filed a motion for a new trial on March 17, 2006, and argued he was entitled to a new trial due. He argued the trial judge erred in denying his request for a self-defense charge,

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[1] The State appealed the finding of ineffective assistance and Mercer appealed Judge Barber's ruling that his free standing claim of a mental retardation exemption pursuant to *Atkins v. Virginia*, 536 U.S. 306 (2002), and *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003), was barred from review as that claim could have been raised at trial. As asserted above, the petitions were denied. Thus, the matter was returned to circuit court for general sessions proceedings. The appeal and relevant filings are a part of this Court's records and may be found in Appellate Case No. 2011-196608.

[2] Mercer completed his twelve year sentence on December 3, 2016, during the pendency of the PCR action. (App. pp. 415-17). While initially hesitant to go forward with the instant action given that he had already served the sentence, PCR counsel asserted he explained to Mercer that the convictions may affect the capital resentencing, and Mercer agreed to continue. (App. pp. 425-26).

and defense of others charge, along with other charges relevant to his right to act on appearances and to possess a weapon for the purposes of self-defense. Judge Patterson denied the motion by order filed on March 30, 2006, finding the evidence did not warrant a self-defense or defense of others charge. He noted that the testimony revealed that Mercer had chased the victim and assaulted him with a weapon known as a shank. (See App. p. 2; see also C/A 2006-GS-32-00553, Lexington County Clerk of Court).

Mercer timely appealed. Robert M. Dudek, Deputy Chief Attorney for Capital Appeals with the South Carolina Commission on Indigent Defense, Division of Appellate Defense, represented Mercer on appeal. In his Final Brief of Appellant filed May 12, 2008, Mercer asserted that defense counsel correctly argued there was evidence Mercer intervened in a prison fight to prevent another inmate from being injured, and that evidence entitled him to a jury instruction on the defense of others. (App. p. 322 and pp. 324-28). The State filed its final brief in opposition to the appeal issue on May 12, 2008, (App. pp. 332-44), and Mercer filed his reply brief on May 12, 2008, (App. pp. 348-54).

The South Carolina Court of Appeals issued an opinion affirming the convictions on February 23, 2009. (App. pp. 357-58). Mercer's petition for rehearing was denied on May 5, 2009. (See App. p. 361). Mercer sought further review by filing a petition for writ of certiorari in this Court, but his petition was denied on January 22, 2010. (See App. p. 394). The Court of Appeals issued the remittitur on March 24, 2010. (See App. p. 394).

On April 21, 2010, Mercer filed an application for post-conviction relief. (App. pp. 385-91). The state made its return on August 6, 2010. (App. pp. 392-99). Mercer, represented by counsel S. Boyd Young, Esq., of the SCCID Capital Trial Division, amended his application on Jun 29, 2017. (App. pp. 400-403). The state made its return to the amended application on July

31, 2017. (App. pp. 404-19).

After a series of delays, the matter was eventually heard on February 22, 2018 by the Honorable J. Derham Cole.[3] (App. p. 420). Mr. Young, Esq. represented Applicant. Mercer was present for a portion of the hearing.[4] Assistant Attorney General Al Simon represented the State. Mercer proceeded on the grounds of "Ineffective Assistance of Counsel" in that (1) "[c]ounsel was conflicted" (*Williams v. Moody*, 287 Ga. 665 (2010)); (2) "counsel failed to thoroughly investigate... and present evidence that the applicant was acting to protect others from harm at the time of the incident" ; and, (3) "counsel was not afforded ample time for investigation and preparation" for the trial. (See App. pp. 401-402).

At the conclusion of the hearing, Judge Cole took the matter under advisement. On August 13, 2019, Judge Cole issued a short form order advising the parties that he determined relief should be denied, and directed counsel for respondent to submit a proposed order. (See App. p. 489). Judge Cole issued his Order on May 14, 2020, which was filed June 3, 2020. (App. pp. 487- 506).

Mercer filed a motion to reconsider that Judge Cole denied, without a hearing, on October 7, 2020. This appeal followed.

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[3] The case was called on August 8, 2017, but continued as a dental procedure affected Mercer's ability to testify. (See Order of Continuance filed August 10, 2017). The case was then set for December 2018; however, the PCR judge for that term determined that he had a possible conflict and the case was continued again. The case was again set for February 21, 2018, at which time the Court was informed Mercer had declined transportation to the hearing. The case was continued within the same term to the next day, February 22, 2018, to allow counsel for Mercer the opportunity to discuss and advise him on the possible effect(s) of the failure to participate in the hearing. (App. pp. 425-26). Mercer was not initially present at the time the case was called on the 22nd, not due to a refusal to attend, but due to a mere delay in transportation. (App. p. 426). Mercer eventually arrived at the courthouse and gave testimony in the case. (See App. pp. 459 and 467).

[4] As noted, Mercer was delayed in arriving at the courthouse; however, his counsel agreed to begin the hearing without Mercer being present. (App. p. 426).

RESPONDENT'S STATEMENT OF FACTS

The following summary of facts is based on the trial testimony. This presentation follows a portion of the fact section in the Final Brief of Respondent as filed in the direct appeal on May 12, 2008, (see App. pp. 337-39), with changes to the appropriate PCR appendix cites:

Terry Brown ("Brown") testified he was incarcerated in the Lexington County Detention Center in January 2004, and shared a cell with Mercer and Darrell Williams ("Williams"). On January 13, 2004, he was playing cards in the cell with Mercer and Williams when Mercer accused him of cheating and threatened to physically harm him. They argued, but there was no physical altercation at that time. (App. pp. 118-19; 125-27.

On January 14, 2004, the inmates in Brown's cell block went into the outside recreation area, but Brown stayed inside for approximately thirty minutes. When he walked outside, another inmate, Marcus Robinson ("Robinson"), confronted him and asked what Brown had been saying about him. Brown told Robinson he had not said anything about him and started to turn around. Robinson then said he would "kick [Brown's] behind anyway," and Brown turned back around to "square off with [Robinson]." (App. pp. 128-31).

As Brown was facing off with Robinson, Mercer jumped on Brown from a nearby wall and started hitting him in the face with two shanks (jail made knives). Robinson started hitting Brown with his fists. Mercer cut Brown's face multiple times before someone got between them to break it up. Mercer then said he was going to kill Brown, and Brown ran back inside the building. (App. pp. 131-41).[5] Brown went to the cell block bathroom to check his face, and Mercer followed him. They started fighting again, which continued until the guards arrived, broke up the fight and took

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[5] It appears the copy of the trial transcript in the appendix is missing trial transcript pages 55 and 56.

Brown to the infirmary. He was ultimately transported to the hospital for treatment. (App. pp. 141-45).

Robinson testified that on the day of the fight, Mercer approached him and said Brown and Williams were planning to "jump" Robinson, but he would not "let it get too far out of hand." (App. pp. 157-63). Robinson confronted Williams and asked why he wanted to jump him, and then confronted Brown when he came out of the building. When Brown "threw up his guards," Mercer jumped on him, and Robinson admitted he then hit Brown as well. Robinson testified that after Mercer jumped on Brown, Williams ran into the building and he chased Williams to fight with him inside. (App. pp. 163-68).

Robinson stated that prior to the incident on January 14, Brown never did or said anything to him in a threatening manner, and they got along well for the most part. He said neither Brown nor Williams jumped on him when he confronted them about what Mercer said, and Mercer threw the first punch that day. (App. pp. 169-75).

Richard Adams ("Adams") testified he was in the same cell block with Mercer, Robinson, Brown and Williams in January 2004, and he was in the recreation area when the incident occurred on January 14. He stated he saw Mercer and Robinson hitting Brown, and Brown never had a chance to react. He testified Mercer had two shanks in his hands when he was hitting Brown, and after Mercer went into the bathroom after Brown, he saw Mercer flush the shanks down the toilet. (App. pp. 189-204 and 215-17).

Michael Moulder ("Moulder") testified he was incarcerated in the Lexington County Detention Center on January 14, 2004, and was sitting in the recreation area when he saw Mercer and Robinson hitting Brown. He grabbed Robinson and threw him off of Brown. He then saw shanks in Mercer's hands, and he pushed Mercer away. Brown ran behind him into the building

and Mercer followed Brown inside. (App. pp. 221-27). Officer Russell Jackson of the Lexington County Detention Center testified he was working on January 14, 2004, when Williams come in from the recreation yard and told him there was a fight in the yard. Officer Jackson went to investigate and saw Brown run in from the yard toward the bathroom with Mercer running after him. He saw a white object in Mercer's right hand. (App. pp. 231-39).

STANDARD OF REVIEW

This Court will "defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). However, this Court will "review questions of law de novo, with no deference to trial courts." *Id.*, at 180-181, 819 S.E.2d at 839.

ARGUMENT

I.

Certiorari review is not warranted because the record reflects ample probative evidence that supports the PCR judge's determination that Petitioner Mercer showed no conflict of interest in counsel's representation of Mercer during two separate prosecutions – for both his capital and non-capital charges – when counsel explained that Mercer's "interest remained paramount" in each and counsel expressed that continuity in representation was beneficial to Mercer given the intertwined nature of the separate prosecutions.

"To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an *actual* conflict of interest adversely affected his attorney's performance." *Jordan v. State*, 406 S.C. 443, 449–50, 752 S.E.2d 538, 541 (2013) (quoting *Thomas v. State,* 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001) (emphasis added)). "An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendants." *State v. Gregory*, 364 S.C. 150, 152, 612 S.E.2d 449, 450 (2005) (citing *Fuller v. State,* 347 S.C. 630, 557 S.E.2d 664 (2001)). Specifically, "an actual conflict of interest occurs" where " 'a defense attorney places

himself in a situation inherently conducive to divided loyalties....' " *Duncan v. State*, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984) (*quoting Zuck v. State of Alabama,* 588 F.2d 436, 439 (5th Cir. 1970)). A PCR applicant "does not have to demonstrate prejudice if there is an actual conflict of interest." *Thomas v. State*, 346 S.C. 140, 145 n. 2, 551 S.E.2d 254, 257 n. 2 (2001).

In rejecting Mercer's conflict claim, the PCR judge resolved:

> 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 of loyalty 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 someone not involved in the capital case. (PCR Tr. p. 26). There was no evidence presented of a divided loyalty. Applicant failed in his burden of proof to establish a conflict that would relieve him of demonstrating prejudice.

(App. p. 499) (emphasis in original).

In this appeal, Mercer submits that Judge Cole erred in rejecting his argument that counsel suffered from divided loyalty *between Mercer's cases.* Specifically, Mercer argues that counsel was ineffective in asking to represent him in his non-capital case. (See Petition at pp. 8-9 and 12). In the same argument, though, Mercer admits that before the PCR judge, "PCR counsel argued that the judge created the conflict" even though now on appeal, he asserts that, "in fact[,] trial counsel created the conflict." (Petition at p. 9). He also admits that "[t]rial counsel asked to represent Petitioner in the lynching/ABWIK trial *because she hoped to gain an advantage in the capital trial.*" (Petition at p. 10; see also p. 11) (emphasis added). Mercer also asserts "[t]rial 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." (Petition, at p. 11). He argues that, in his estimation, "[t]rial 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." (Petition, at p. 13). Mercer simply fails to show any factual error in the PCR court's order. While he may disagree with the result, there simply was no evidence presented of actual, divided loyalties.

Ms. Armstrong testified "it made sense" for her to be appointed on these charges "because those facts were gonna come into play if we got to the sentencing phase in the capital murder and it was my strong suspicion that we were headed to a penalty phase." (App. p. 430; see also p. 443). She testified that she was familiar with the facts of the charges as she had received notice of them, and investigated those facts, as part of the capital matter. (App. pp. 430, 435, and 462-63). Having responsibility for the capital case, Ms. Armstrong testified "I felt like I was in as good a position or better to try to at least get it reduced to an ABHAN because ABHAN at the time was a misdemeanor and I think we could have argued that we should still get that mitigating circumstance that he didn't have a prior history of violent crime." (App. p. 445). There is no conflict in that.

Additionally, Ms. Armstrong testified that she was prepared and was not taken by surprise as to any detail of the event. (App. pp. 462-65). Ms. Armstrong testified that she did ask to be appointed even after that initial hesitancy – a fact, as the PCR judge noted, that found support in the contemporaneously issued order. (See App. pp. 464-65 and 485).

As shown, the record solidly supports that there was no conflict and no deficiency due to mere timing. However, and presumably in an attempt to avoid deference to the factual basis supported by the record, Mercer argues that his "conflict question is a question of law." (Petition, at p. 13). Respondent cannot wholly agree and notes that Mercer does not rest his assertion on specific legal support. Respondent submits that the question is most appropriately considered a mixed question of law and fact:

> Both ineffective assistance of counsel and conflict of interest claims present mixed questions of law and fact. *United States v. Camacho,* 40 F.3d 349,

> 353 (11th Cir.1994), *cert. denied,* 514 U.S. 1090, 115 S.Ct. 1810, 131 L.Ed.2d 735 (1995); *Oliver v. Wainwright,* 782 F.2d 1521, 1524 (11th Cir.), *cert. denied,* 479 U.S. 914, 107 S.Ct. 313, 93 L.Ed.2d 287 (1986). In reviewing these claims, we defer to the district court's findings of fact unless we determine that the findings are clearly erroneous. We apply our own judgment, however, as to whether the conduct in question constitutes ineffective assistance of counsel or an actual conflict of interest warranting relief. *Camacho,* 40 F.3d at 353; *Oliver,* 782 F.2d at 1524.

Buenoano v. Singletary, 74 F.3d 1078, 1083 (11th Cir. 1996). Therefore, there is a factual component to the evaluation, and fact-finding that is entitled to deference. The existence of conflict is not presumed upon its allegation; rather, "until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." *Duncan v. State*, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984) (*quoting Cuyler v. Sulllivan*, 446 U.S. 335, 350 (1980)). Here, the PCR judge reasonably and logically found, based on the record and testimony, that Mercer failed to show a divide loyalty at all.

Mercer is also incorrect in his prejudice analysis. He argues prejudice should be presumed and relies on *United States v. Cronic*, 466 U.S. 648 (1984), and *Nance v. Ozmint*, 367 S.C. 547, 626 S.E.2d 878 (2006). (See Petition, at pp. 11-14). The *Cronic* analysis is reserved for extreme denials, not ordinary performance complaints. As the Supreme Court has acknowledged, "the *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims...." *Williams v. Taylor,* 529 U.S. 362, 391 (2000). This Court has similarly described the "narrow circumstances" of *Cronic*'s applicability. *Nance v. Ozmint,* 367 S.C. at 552, 626 S.E.2d at 880 ("Absent the[] narrow circumstances of presumed prejudice under *Cronic*, defendants must show actual prejudice under *Strickland.*"); *see also Lorenzen v. State*, 376 S.C. 521, 529, 657 S.E.2d 771, 776 (2008) (noting "limited circumstances" for presumption of prejudice). The record supports the PCR court's application of *Strickland* in the absence of a denial

of counsel; a complete failure of "adversarial testing," or circumstances in which counsel could not provide effective assistance – the only limited circumstances identified in the case law. *Id.*

In sum, the record shows a careful presentation and consideration of the evidence surrounding the allegation of conflict. Mercer simply failed to show a conflict. Based on the foregoing, the factual basis for the PCR judge's resolution is well-supported by evidence. Having failed to show a conflict, the discussion on prejudice is merely academic. Mercer has failed to present an issue that warrants certiorari review, and his petition should be denied.

II.

Certiorari review is not warranted because the record reflects ample probative evidence that supports the PCR judge's determination that Petitioner Mercer failed to show ineffective assistance where counsel sufficiently investigated, obtained, and presented evidence of self-defense/defense of others, even if such evidence was ultimately not allowed at trial.

To be entitled to relief on an ineffective assistance claim, Mercer had the burden to show that (1) trial counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that but for counsel's error, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). *See also* Rule 71.1 (e), South Carolina Rules of Civil Procedure ("the applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence"). In this appeal, Mercer submits that Judge Cole erred in rejected his argument that counsel was ineffective in pursuing "a self-defense/defense of others claim" arguing that no evidence supported the defense. (Petition, p. 17). This position is contrary to his position at trial; contrary to his position in the direct appeal; contrary to his position in PCR; and lacks support in the record.

At trial, counsel presented evidence and argued for a charge. In the direct appeal, without a procedural bar to the issue, Mercer's counsel on appeal, Mr. Dudek, argued:

> ...Marcus Robinson testified appellant warned him he was in danger because Darrell Williams and Terry Brown planned to jump him on the prison yard. R. 51, 11. 4 - 24. Appellant's awareness of the likely confrontation between Brown and Robinson was relevant to his claim of the defense of others. See State v. Mekler, 368 S.C. 1, 626 S.E.2d 890 (Ct. App.2005). Although this is not a murder case, our Supreme Court has held that in order for the trial judge to give a defense of others instruction, there must be some evidence adduced at trial that the defendant was defending someone else. See State v. Starnes, 340 S.C. 312, 531 S.E.2d 907 (2000).
>
> In Starnes, a death penalty case, our Supreme Court held Starnes was not entitled to a defense of others instruction because his testimony showed he was only defending himself. The court noted that a defendant is entitled to a defense of others instruction if the person whom he is seeking to protect would likewise have the right to act in self-defense. State v. Long, 325 S.C. 359, 480 S.E.2d 62 (1997). As long as there is some evidence introduced at trial that the defendant was lawfully defending someone else, he is entitled to a charge on the defense of others. Douglas v. State, 332 S.C. 67, 73, 504 S.E.2d 307, 310 (1998); McAninch and Fairey, The Criminal Law of South Carolina (3rd Ed. 1996).
>
> It is elementary that the law to be charged is determined from the evidence presented at trial. State v. Gourdine, 322 S.C. 396, 472 S.E.2d 241 (1996). If there is any evidence supporting the requested jury instruction the trial judge is obligated to charge it.
>
> Here, defense counsel correctly argued there was evidence appellant intervened to protect Robinson from the harm he had warned him about previously. The judge consequently erred by refusing to give the requested instruction on the defense of others.

(App. pp. 327-28). (See also App. p. 351-53 (reply brief); pp. 368-69 (petition for writ of certiorari)).

Though Mercer now broadly argues that "[l]awyers of ordinary training and skill would not consider competent a strategy of attempting to present a defense unsupported by the evidence," (Petition, p. 21), it is difficult to argue that trial counsel's strategy in this case was unreasonable when appellate counsel also considered the issue to be meritorious *based on his view of the facts of record and the relevant case law. See Strickland*, 466 U.S. at 688 ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.").

Further, Mercer argued at the PCR hearing that trial counsels' strategy was unreasonable *because there was evidence to present* – Mercer made reference to his own available testimony and the possibility of presentation of a prisons expert to explain weapons in prison. (See App. p.479-80). Mercer has apparently abandoned that position, but the arguments and testimony as presented below do not cease to exist.

Trial counsel, Ms. Armstrong, testified at the PCR hearing that Mercer had maintained that he had "felt threatened" and that "it was essentially a self defense or defense of others case." (App. p. 432). She explained:

> His version of events was very clear to me. He felt threatened. This was - it wasn't successful but his version was that it was essentially a self defense or defense of others case. I didn't feel like he had some other version that he wasn't sharing with me. I felt like he was forthcoming.

(App. p. 432, lines 18-23). Ms. Armstrong testified that she offered two matters in the defense case that were ultimately rejected: 1) a complaint made on behalf of Mercer against Mr. Brown from the detention center records; and 2) a call Mercer made to his mother claiming self-defense, which she offered under excited utterance, but each was rejected. (App. pp. 451 and 455). She also recalled that the trial judge rejected her request for self-defense and defense of others based on the fact that Mercer had chased Brown into the bathroom. (App. pp. 457-58).

Mercer testified at the PCR hearing that Brown threated him and Robinson and a "[t]he whole rec field broke out in a fight." (App. p. 469, lines 13-19). Mercer further testified that when Brown broke away and went to the bathroom area, Mercer believed he was going for a weapon. (App. p. 470, line 16 – p. 471, line 17).

Having the record before him, and the testimony from trial counsel and Mercer, the PCR judge resolved that counsel did, in fact, investigate and offer evidence in support of self-defense/defense of others. (App. pp. 501-502). The judge found the strategy reasonable and

observed that Mercer's counsel in the direct appeal "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." (App. p. 501).[6] The PCR judge correctly noted that "[a]n unsuccessful strategy should not be confused with an unreasonable strategy." (App. p. 501). Mercer, in this appeal though, argues the PCR judge erred because the strategy to pursue self-defense/defense of others was unreasonable. (See Petition, pp. 19-22). Based on the foregoing, Respondent submits the record supports the PCR judge's determination to the contrary.

Further, Mercer merely summarily asserts that he "was prejudiced by the deficient performance" and there is a "reasonable probability" of a different result. (Petition, p. 22). He is unclear as to the basis for finding *Strickland* prejudice. He does not offer, for example, that another defense was available, or that some improper evidence was admitted, or an improper argument was allowed. *Strickland* requires prejudice to be shown to support relief. Mercer has failed to do so. Consequently, even if Mercer could show an "unreasonable strategy," which Respondent denies, he still cannot show any specific prejudice from the purported deficiency. *See Strickland*, 466 U.S. at 691 ("An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."). According to Mercer, there was no evidence of self-defense or defense of others, and counsel did not argue self-defense or defense of others. But counsel clearly argued a lack of criminal intent

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[6] Mercer includes a footnote, n. 4, within the inset quote that is not in the original text of the order, and asserts "[t]he appellate courts consistently rejected that argument." (Petition, p. 18). Actually, the Court of Appeals rejected the argument, but this Court denied the petition and did not review the issue. But, at any rate, Mercer's additional comment does not distract from the fact that appellate counsel found the argument to be meritorious in his estimation. This underscores the well-established point that different lawyers may assess a case or strategy in different ways. *See, e.g, Strickland,* 466 U.S. at 689 ("There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way."). It does not, however, show unreasonable representation under the prevailing norms.

and underscored that Terry Brown testified at trial and admitted threatening Mercer, a fact supported by the record that counsel could argue. (See App. pp. 280-93; see also p. 46).[7] Mercer suggests that counsel should have argued for a lesser charge, but the lesser charge of was part of the instructions given and was before the jury for its consideration. (See App. pp. 303-304). In light of the record, there is no discernible prejudice. At any rate, there is sound, probative evidence supporting the PCR judge's ruling that Mercer failed to show deficiency. Mercer has failed to present an issue that warrants certiorari review, and his petition should be denied.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny Mercer's petition for writ of certiorari.

Respectfully submitted,

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[7] Further, Brown testified that he was "squaring off" with Robinson when Mercer "jumped off the wall" and began to fight. (App. p. 131). Mercer has not complained that counsel had no basis to argue the protection aspect as suggested by the evidence. The record supports counsel attempted to place the defense of others concept before the jury by reference to the testimony.