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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE 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

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS 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?

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.

The PCR judge erred in refusing to recognize the conflict created by trial counsel's mistaken belief that that in exchange for her agreement to represent Petitioner six days before trial on the ABWIK, lynching and weapon charges the trial judge in the subsequent capital murder trial would limit the evidence the State could present in regard to any convictions obtained at the ABWIK, lynching and weapon trial [ABWIK trial]. 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 had divided loyalties between the ABWIK trial and the capital trial. Trial counsel's interest in the capital trial remained paramount to the detriment of the ABWIK trial. The record fails to support that trial counsel was in a 'better' position to protect Petitioner's interests than the public defender who had been appointed to represent Petitioner for the ABWIK, lynching and weapon charges since at least January 13, 2006, when trial counsel was

appointed on the capital case and objected to being appointed on the additional charges. Petitioner's interest would have remained paramount to the public defender without a rush to move forward to gain an advantage in the capital case.

Respondent argues that Petitioner failed to show a conflict without addressing trial counsel's mistaken belief that in exchange for her agreement to represent Petitioner six days before trial she would gain an advantage in the later capital murder trial. Respondent writes, "In sum, the record shows a careful presentation and consideration of the evidence surrounding the allegation of 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." (Return to Petitioner for Writ of Certiorari, p. 13). Trial counsel created a conflict by asking to be appointed six days before the ABWIK trial in the hopes that the judge presiding over the subsequent capital trial would limit the States presentation of evidence in regard to any convictions obtained at the ABWIK trial. Trial counsel was ineffective in creating the conflict.

As discussed in the brief of Petitioner, prejudice should be presumed as a result of the conflict. See United States v. Cronic, 466 U.S. 648 (1984); Nance v. Ozmint, 367 S.C. 547, 626 S.E.2d 878, 880 (2006). ("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.'"). Alternatively, Petitioner demonstrated prejudice from the conflict causing a lack of preparation. As discussed in issue two below, in 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 to pursue a defense

of others claim. The trial judge properly refused to instruct the jury on the law of defense of others. 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.

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 creating a conflict between the ABWIK trial and the capital trial. Prejudice should be presumed. Alternatively, Petitioner can show prejudice. There is a reasonable probability that but for trial counsel's deficient performance, the result of the proceedings would have been different, as discussed in issue two below.

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.**

Trial counsel was ineffective in attempting to present a defense of others claim when there was no evidence to support the defense. 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. The record reflects that trial counsel failed to present any admissible evidence on self-defense or the defense of others. The trial judge properly refused to instruct the jury on the law of defense of others. (App. p. 267, line 15 – p. 268, lines 1-8). On direct appeal the State argued that, "The circuit court properly refused to give a defense of others jury charge because the evidence established Appellant instigated the entire incident, the person he was allegedly defending initiated the confrontation with the victim, and both Appellant and the person he was allegedly defending could have avoided the danger." (App. p. 335). 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. (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. Trial counsel's attempt to present a defense of others/self-defense claim when there was no evidence to support the defense was not simply an unsuccessful strategy, it was an unreasonable strategy. The unsuccessful and unreasonable strategy was likely the result of trial counsel asking to be appointed six days prior to trial while also attempting to prepare for a capital trial one month later.

Trial counsel's decision to ask to be appointed six days before trial and then pursue a defense of others claim when there was no evidence to support the claim was objectively unreasonable, especially in light of the fact that there was evidence to support the lesser-included offense of ABHAN. 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 testified that an ABHAN conviction would be less damaging in the subsequent capital trial. (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). There was evidence to support that Petitioner was guilty of ABHAN rather than ABWIK and the judge instructed the jury on the lesser included offense. (App. pp. 303-304).

In Stokes v. Stirling, No. 18-6, 2021 WL 3669570, at *9 (4th Cir. Aug. 19, 2021), the Fourth Circuit Court of Appeals, deciding a claim pursuant to Martinez v. Ryan, 566 U.S. 1, 132

S.Ct. 1309, 182 L.Ed.2d 272 (2012), found that PCR counsel's abandonment of the mitigation claim was objectively unreasonable and wrote:

> Considering the dramatic lack of mitigation evidence presented at trial despite Stokes's background, PCR counsel's failure to consider adding the mitigation claim back into the petition is further evidence of unreasonableness, not strategy. See McKee v. United States, 167 F.3d 103, 106 (2d Cir. 1999) ("A petitioner may rebut the suggestion that the challenged conduct reflected merely a [tactical] choice ... by showing that counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker.").

Trial counsel in the present case omitted argument that Petitioner was only guilty of ABHAN while pursuing a defense of others claim that was clearly and significantly weaker, rebutting any suggestion that this decision was merely a tactical choice.

"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.

Respondent writes, "Consequently, even if Mercer could show an "unreasonable strategy," which Respondent denies, he still cannot show any specific prejudice from the purported deficiency." (Return to Petitioner for Writ of Certiorari, p. 16). Petitioner was prejudiced because while attempting a defense of others claim with no evidence, counsel omitted the stronger issue that Petitioner was guilty of the lesser included offense of ABHAN. There is a

reasonable probability that if counsel had argued that Petitioner was only guilty of the lesser included offense of ABHAN rather than pursing a defense of others claim that was unsupported by the evidence, the jury would have found Petitioner guilty of ABHAN rather than ABWIK.

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 26th day of August, 2021.

STATE OF SOUTH CAROLINA

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Appeal from Lexington County

Honorable J. Derham Cole, Circuit Court Judge

KEVIN J MERCER,

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V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-001419

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Reply to Return to Petition for Writ of Certiorari in the above-referenced case has been served upon Melody J. Brown, Esquire at the primary e-mail address listed in the Attorney Information System (AIS); and Kevin J. Mercer, #360547, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 26th day of August, 2021.

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