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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Greenville County
Honorable Perry H. Gravely, Circuit Court Judge

Opinion No. 2021-UP-283 (S.C. Ct. App. Filed July 21, 2021)
Lower Court Case No. 2015-GS-23-03343

THE STATE,

RESPONDENT,

V.

JANE KATHERINE HUGHES,

PETITIONER

APPELLATE CASE NO. 2018-000659

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on September 1, 2021.

QUESTIONS PRESENTED

1. In this murder trial, did the Court of Appeals err in finding that the trial judge correctly refused to instruct the jury on the law of assault and battery of a high and aggravated nature when there was evidence from which the jury could decide that Petitioner only committed an assault and battery that did not result in death?

2. Did the Court of Appeals err in finding that the trial judge correctly refused to direct a verdict of acquittal for conspiracy when the State failed to prove that an agreement existed between Petitioner and anyone else to commit murder?

3. Did the Court of Appeals err in finding that the trial judge correctly refused to grant trial counsel's motion to be relieved as counsel?

STATEMENT OF THE CASE

In June of 2015, the Greenville County Grand Jury indicted Petitioner, Jane Katherine Hughes, for murder and possession of a weapon during the commission of a violent crime. In June of 2017, the Greenville County Grand Jury indicted Petitioner for conspiracy. On April 4, 2018, Petitioner, with her brother and co-defendant, Jacob Cody Hughes, proceeded to jury trial before the Honorable Perry H. Gravely on just the murder and conspiracy charges as the State elected not to go forward on the weapon charge. (R. p. 26, lines 7-10). Lauren M. Taylor represented Petitioner at trial. Brian P. Johnson represented the co-defendant. L. Mark Moyer prosecuted the case. The jury found Petitioner guilty of both charges. The jury found the co-defendant not guilty of murder but guilty of conspiracy. Judge Gravely sentenced Petitioner to thirty (30) years for murder and five (5) years concurrent for conspiracy. Judge Gravely sentenced the co-defendant to four (4) years for conspiracy. A timely notice of intent to appeal was served on April 10, 2018, and the direct appeal perfected. On December 7, 2020, a three-judge panel of the South Carolina Court of Appeals heard oral arguments in the case. On July 21, 2021, in an unpublished per curiam opinion, the Court of Appeals affirmed the convictions. (App. pp. 1-8). A timely petition for rehearing was filed on August 5, 2021. The Court of Appeals requested a return and on August 23, 2021, the State filed a return. On September 1, 2021, the Court of Appeals denied the petition for rehearing. This petition for writ of certiorari follows.

REASONS WHY CERTIOARI SHOULD BE GRANTED

This Court should grant the petition for writ of certiorari to clarify that assault and battery of a high and aggravated nature can be considered a lesser included offense of murder. Additionally, this Court should grant the petition for writ of certiorari to clarify the elements of conspiracy. Finally, this Court should grant the petition for writ of certiorari to clarify when a trial judge should relieve appointed counsel.

ARGUMENTS

1. **In this murder trial, the Court of Appeals erred in finding that the trial judge correctly refused to instruct the jury on the law of assault and battery of a high and aggravated nature when there was evidence from which the jury could decide that Petitioner only committed an assault and battery that did not result in death.**

There is evidence in the record from which the jury could have determined that Petitioner, in striking her estranged husband with a hammer, was guilty only of assault and battery of a high and aggravated nature [ABHAN]. The trial judge, however, refused to instruct the jury on the law of assault and battery of a high and aggravated nature. During the trial the judge asked for proposed jury instructions and trial counsel stated, "I don't have mine typed up because I thought we were doing that after lunch. I just have one additional. I was going to request an ABHAN." (R. p. 393, lines 17-19). The judge indicated that he would review the proposed instructions during the lunch break. (R. p. 393, lines 20-21). Later, the judge denied the requested jury instruction on ABHAN stating, "As to the jury charge, I know that Defendant Jane Hughes has – had requested a charge for ABHAN, assault and battery of a high and aggravated nature. And I think that is a totally separate issue and would not be – that would be a separate charge. It would not be a lesser included offense of the charges here. So I'm going to decline to charge that. But, at this time, I'll be glad to have anybody put anything on the record they need to." (R. p. 507, lines 6-15).

Trial counsel responded, "Certainly, Your Honor. May it please the Court. As I stated in chambers and just to put it on the record, I do believe that there's been sufficient evidence that the State has introduced, at this point, that establishes that the Defendant – or the victim died from a gunshot wound. I believe gunshot wound number four, the pathologist testified to – that that was the mortal would and cause of death. And so that is the basis for me asking for the

instruction." (R. p. 507, lines 18-25). The trial judge responded, "And I understand your argument. Again, I find that, under the law, that would not be appropriate to charge." (R. p. 508, lines 1-3). The trial judge erred.

Petitioner was indicted for murder and conspiracy involving the shooting death of John Ferrell, her estranged husband and the father of her two young children. Petitioner and Ferrell were involved in a highly contested custody dispute that originated in California where the couple once lived. At the time of the shooting, Petitioner, her boyfriend, Andrew Martin, and her two children were living in South Carolina with her parents, John and Margaret Hughes. (R. p. 306, lines 15-17). Petitioner's father, John Hughes, and brother and co-defendant at trial, Jacob Hughes, as well as the boyfriend, Martin, were all charged in connection with the shooting of Ferrell. At sentencing the prosecutor told the judge, "Other than regarding Jane Hughes, Your Honor sentenced her father, who was the shooter, to 40 years. It is our contention that she is just as guilty, if not more so, than her father. And that this was all because of her. And we would ask the Court for a similar sentence as you gave her father." (R. p. 585, line 21 – p. 586, line 1). Petitioner received a thirty (30) year sentence for murder and a concurrent five (5) year sentence for conspiracy. Petitioner's co-defendant brother was acquitted of murder and received a four (4) year sentence for conspiracy. Neither Petitioner nor her brother co-defendant had any prior criminal record. (R. p. 586, lines 6-7).

Martin testified at trial that on the day of the shooting John Hughes, Petitioner's father, told him that he was trying to arrange a meeting with Ferrell at the house to work out the custody issue. (R. p. 312, lines 9-25). According to Martin, he was asked to stay out of sight so as not to be a detriment to the custody case. (R. p. 313, lines 13-15). At the time of trial the charges against Martin were still pending. (R. p. 332, lines 7-15).

The State introduced evidence that earlier in the evening of the shooting Jacob Hughes, Petitioner's brother, and the estranged husband, Ferrell, went to the Station Bar for two to three hours and then went to the Waffle House. (R. pp. 450-457). The time stamp of video surveillance showed the two leaving the Waffle House at approximately 11:20 PM. (R. p. 456, lines 1-12). The State also introduced evidence of text messages and phone calls between Petitioner's father and brother prior to the shooting. (R. pp. 461-464). There was no evidence of any text messages or phone calls between Petitioner and her father or brother or Ferrell on the night of the shooting.

Martin testified at trial that on the night of the shooting he was in the backyard when he heard a loud crash inside the house. (R. p. 315, lines 4-11). Martin testified that he went inside to investigate and, "[w]hen I entered the sliding glass door, I saw framed in the kitchen entry way, Jane with a hammer, John Michael Hughes with a gun, John Ferrell on his knees bleeding, and Jacob Hughes behind him." (R. p. 315, lines 21-25). The kitchen table was overturned. (R. p. 316, lines 1-6). Martin testified that he pulled Petitioner back and took the hammer out of her hand so she could call the police. (R. p. 318, line 19 – p. 319, lines 1-12). The State entered a CD of Petitioner's call to 911, State's exhibit #94, in evidence without objection.[1] (R. p. 55, lines 11-19). The 911 call was later player for the jury. (R. p. 448, lines 6-7). The 911 call was made at 11:54 PM. (R. p. 55, lines 5-9). During the 911 call Petitioner told the operator that her husband broke into the home and was trying to kill her and her children.

According to Martin, Ferrell tried to escape through a kitchen window but Petitioner's mother, Margaret Renee Hughes, and co-defendant brother, Jacob Hughes, tried to prevent him

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[1] When the call is later played for the jury trial counsel stated, "Subject to my previous objection." (R. p. 448, line 4). No objection was made, however, when the exhibit was entered in evidence.

from going out the window. (R. p. 320, lines 6-22). When asked if Ferrell made it out of the window, Martin answered that he believed Ferrell made it out of the window because he did not use the door and his body was found outside. (R. p. 321, lines 1-9). Martin testified that he saw John Hughes go outside and then Martin heard several gunshots. (R. p. 321, line 14 – p. 322, lines 1-11). Martin stayed seated on a bench in the foyer with Petitioner until they were asked to leave the house when the police arrived. (R. p. 323, line 24 – p. 324, lines 1-3). Ferrell died as a result of multiple gun shot wounds. (R. p. 371, lines 2-3). The pathologist also testified that Ferrell had non-lethal injuries consistent with being struck by a hammer. (R. p. 381, lines 1-11).

Martin was in the back yard and could not testify about what happened before he walked into the house. When asked if Petitioner told him why she did what she did with the hammer Martin answered, "She said she did it because her dad hesitated. And that she did what she had to do to protect her family." (R. p. 324, lines 18-19).

The murder indictment alleges, "That JANE KATHERINE HUGHES did in Greenville County, on or about the 24th day of January, 2015, unlawfully and with malice aforethought kill JOHN MICHAEL FERRELL by means of shooting him multiple times with a handgun and assaulting him with a hammer, and that JOHN MICHAEL FERRELL died as a proximate result thereof. This in violation of the South Carolina Code of Laws (1976) as amended." (R. p. 596). The State sought to prosecute both Petitioner and her brother by accomplice liability, hand of one is the hand of all, as the evidence showed that the father, John Hughes, was the shooter. The prosecutor argued accomplice liability, hand of one is the hand of all, in closing argument. (R. p. 537, lines 10-18). The judge instructed the jury with the law on accomplice liability, hand of one is the hand of all. (R. p. 571, line 8 – p. 572, lines 1-17). The jury had two specific questions about the hand of one is the hand of all charge. (R. p. 579, lines 7-10; p. 580, lines 6-8). There

is evidence in the record from which the jury could have determined that Petitioner, in striking her estranged husband, Ferrell, with the hammer, was guilty only of assault and battery of a high and aggravated nature and not guilty of murder by accomplice liability, hand of one is the hand of all. The jury, however, was not given this option.

Generally, the trial court is required to charge only the current and correct law of South Carolina. Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). A charge to the jury is correct if it contains the correct definition of the law when read as a whole. Id. at 665, 594 S.E.2d at 472-73. "The law to be charged to the jury is determined by the evidence presented at trial." State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). "The trial court is required to charge a jury on a lesser-included offense if there is evidence from which it could be inferred that the defendant committed the lesser, rather than the greater, offense." State v. Sams, 410 S.C. 303, 308, 764 S.E.2d 511, 513 (2014); see also State v. Drafts, 288 S.C. 30, 340 S.E.2d 784 (1986); State v. Gourdine, 322 S.C. 396, 472 S.E.2d 241 (1996). "An appellate court will not reverse the trial [court]'s decision absent an abuse of discretion." State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id. at 570, 647 S.E.2d at 166–67. "The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law." Id. at 570, 647 S.E.2d at 167. "In determining whether the evidence requires a charge on a lesser-included offense, the [appellate court] must view the facts in the light most favorable to the defendant." Sams, 410 S.C. at 308, 764 S.E.2d at 513 (citing State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000)). "The charge request is properly rejected when there is no evidence tending to show the defendant was guilty of the lesser offense." Id. (citing State v.

Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996); State v. Cooney, 320 S.C. 107, 463 S.E.2d 597 (1995); State v. Gadsden, 314 S.C. 229, 442 S.E.2d 594 (1994)).

In State v. Fields, 314 S.C. 144, 145, 442 S.E.2d 181, 182 (1994), this Court wrote, "Whether AB and ABHAN are lesser included offenses of murder is a novel question in this State. We now hold where there is no dispute the victim died as a result of the battery alleged in the indictment, AB and ABHAN are not lesser included offenses of murder. See Martin v. State, 342 So.2d 501 (Fla.1977) [superceded by rule as stated in Daugherty v. State, 211 So.3d 29 (Fla. 2017); Commonwealth v. Myers, 356 Mass. 343, 252 N.E.2d 350 (1969)." Fields was charged with murder for his alleged participation in the victim's beating. The jury found Fields guilty of voluntary manslaughter. The case provides the facts as follows, "At trial, the State presented evidence that Petitioner participated in beating the victim by kicking him while he was on the ground. Petitioner testified he only pushed the victim from behind and the others then beat him. Petitioner claimed he acted in self-defense because he thought the victim had a gun and was about to shoot someone. He denied any participation in the beating." Fields, 314 S.C. at 145, 442 S.E.2d at 182. The indictment in Fields alleged, "that Glen Fields did in Spartanburg County on or about the 16th day of November 1988 feloniously, wilfully and with malice aforethought beat and/or aid and abet others in beating Steven Allen Greer with fists and/or various other weapons and that Steven Allen Greer died as a proximate result thereof." 314 S.C. at 145, 442 S.E.2d at 182. The Court found that Fields was not entitled to the lesser included offense of ABHAN, or assault and battery, because, "There is no dispute that the victim died as a result of the battery alleged in the indictment, i.e. the beating. We conclude AB and ABHAN are not lesser included offenses of murder **in this case**." Fields, 314 S.C. at 146, 442 S.E.2d at 182 (emphasis added).

In contrast, in the present case, Ferrell died as a result of the shooting alleged in the indictment but **not** the battery with the hammer alleged in the indictment. Importantly in the present case, unlike in Fields, there was an intervening event, the 911 call, between the non-lethal strikes with the hammer by Petitioner and the fatal shooting by Petitioner's father. There is evidence in the record from which the jury could have determined that Petitioner, in striking her estranged husband, Ferrell, with the hammer, was guilty only of assault and battery of a high and aggravated nature and not guilty of murder by accomplice liability, hand of one is the hand of all.[2] The trial judge erred in refusing to instruct the jury on the law of ABHAN as a lesser included offense of murder.

The issue in State v. Tyler, 348 S.C. 526, 531-32, 560 S.E.2d 888, 890 (2002), involved an erroneous but harmless jury charge equating ABHAN with manslaughter. Tyler was accused of fatally setting her husband on fire. The State charged her with murder. Tyler presented evidence that her husband's death was the result of medical malpractice rather than Tyler's act of setting him on fire. The trial judge in Tyler properly instructed the jury that, in the event it found Tyler's actions did not proximately cause her husband's death, then it could consider the offenses of assault and battery with intent to kill (ABIK) and assault and battery of a high and aggravated nature (ABHAN). Addressing the harmless error in Tyler, this Court wrote:

> Under the above authorities, it is clear the trial court's charge equating ABHAN and manslaughter was erroneous. However, we find the error harmless under the facts of this case. Immediately prior to charging the jury on ABHAN and ABIK, the trial court instructed the jury that "**if the causal link between the defendant's act and the victim's death is broken so that she may not be convicted of murder or voluntary manslaughter,**" the defendant may still be convicted of ABIK or ABHAN. (Emphasis supplied). Accordingly, ABHAN and/or ABIK were possible verdicts if, and only if, the jury concluded that Tyler's actions had

[2] The directed verdict motion made on Petitioner's behalf was limited to the conspiracy charge. (R. p. 499, lines 6-9).

> not proximately caused her husband's death. The jury did not find such a break in the causal chain and, instead, convicted Tyler of murder.

State v. Tyler, 348 S.C. 526, 531, 560 S.E.2d 888, 890 (2002) (n. #3 omitted)(emphasis in original).

While the present case does not involve an intervening act of medical malpractice, the present case does involve an intervening act of Petitioner calling 911. The causal link between Petitioner striking her husband with a hammer and the husband dying as a result of being shot by the father was broken by the 911 call. Petitioner's act of striking her estranged husband with a hammer was not the proximate cause of his death.

Without conceding the argument presented below that the State failed to present sufficient evidence of a conspiracy involving Petitioner to survive the directed verdict motion, even if the jury believed there was a conspiracy, Petitioner's act of calling 911 is evidence of her withdrawal from any alleged conspiracy and evidence that Petitioner was not acting as an accomplice. As a result, there is evidence from which the jury could conclude that Petitioner is only guilty of ABHAN and the judge erred in refusing to instruct the jury with the law of ABHAN. In State v. Vang, 353 S.C. 78, 86, 577 S.E.2d 225, 228–29 (Ct. App. 2003), this Court wrote, "The law of withdrawal is set forth in State v. Woods, 189 S.C. 281, 288, 1 S.E.2d 190, 193–94 (1939), which states that one who has entered a common design to commit a crime escapes responsibility for the acts of his associates '... if, before the [crime] is committed, he withdraws entirely from the undertaking, and the fact of his withdrawal is communicated to his associates, under such circumstances as would permit them to take the same action.'" Once Petitioner called 911 both her father and brother could have stopped and waited on the police to

arrive. Instead, Petitioner's father went outside and fatally shot Ferrell. The trial judge erred in refusing to charge ABHAN.

In affirming the conviction the Court of Appeals wrote:

> As discussed above, there was evidence that Hughes joined with her family to murder Victim and that she participated in Victim's murder. Because it is not disputed that Victim died as a result of one of the batteries alleged in the indictment—i.e., the gunshots—ABHAN is not a lesser-included offense under the facts of this case. See Fields, 314 S.C. at 145, 442 S.E.2d at 182 ("[When] there is no dispute the victim died as a result of the battery alleged in the indictment, ... ABHAN [is] not [a] lesser included offense[ ] of murder."). Accordingly, the trial court did not err in declining to charge the jury with ABHAN, and we affirm the trial court on this issue.

State v. Hughes, No. 2018-000659, 2021 WL 3076693, at *4 (S.C. Ct. App. July 21, 2021). The Court of Appeals erred. This case is distinguished from Fields by the facts that Ferrell did not die as a result of the hammer strikes alleged in the indictment and Petitioner's act of calling 911 broke the causal link between the non-fatal hammer blows by Petitioner and the fatal shooting by her father. Under the facts of this case ABHAN is a lesser-included offense of murder. The trial judge erred in refusing to instruct the jury on the law of the lesser included offense of ABHAN. The error requires reversal.

2. **The Court of Appeals erred in finding that the trial judge correctly refused to direct a verdict of acquittal for conspiracy when the State failed to prove that an agreement existed between Petitioner and anyone else to commit murder.**

At the close of the State's case Petitioner moved for a directed verdict of acquittal for the conspiracy charge arguing, "Your Honor, at this point, I would make a motion to have the Court rule on the conspiracy charge. I don't believe the State has met the burden, even in the light most favorable to them, at this point." (R. p. 499, lines 6-9). The judge denied the motion stating, "All right. I think there is enough for this matter to go to the jury on the conspiracy charge. So I'm going to deny your motion." (R. p. 499, lines 10-12). The trial judge erred.

On the recording of Petitioner's 911 call to report that Ferrell had broken into the home and was trying to kill her and her children, State's exhibit #94, Petitioner can be heard saying, "[Y]ou gotta get to him" and "[Y]ou gotta get him." Prior to the shooting the Bishop of the church the Hughes attended asked another church member, Christine Boisher, if she and her husband could talk with the Hughes family about the custody situation because Boisher had served as a guardian-ad-litem and had experience with the family court. (R. p. 415, line 17 – p. 416, lines 1-10). Boisher and her husband met with John and Margaret Hughes, Jane Hughes and Andrew Martin. (R. p. 417, lines 23-25). Boisher and her husband also met with the Hughes the night before the shooting. Boisher testified that Appellant was angry about a court hearing in a few days to address custody issues. (R. p. 439, line 15 – 25). Boisher also testified, "And she [Appellant] said, I wish he [Ferrell] was just gone. Things would be so much easier if he [Ferrell] was just gone. And everybody chuckled." (R. p. 440, lines 12-14). Appellant and Ferrell lived in California until Appellant moved back to South Carolina with the children. (R. p. 234, lines 9-21). According to Martin, Petitioner told him that she struck Ferrell with the hammer "because her dad hesitated" and "she did what she had to do to protect her family." (R.

p. 324, lines 18-19). This evidence presented by the State fails to establish that Petitioner conspired to murder Ferrell.

In State v. Pearson, 415 S.C. 463, 469–70, 783 S.E.2d 802, 805–06 (2016), this Court wrote:

> "[W]hen the State fails to produce substantial circumstantial evidence that the defendant committed a particular crime, the defendant is entitled to a directed verdict." State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011); see Hepburn, 406 S.C. at 429, 753 S.E.2d at 408 ("In cases where the State has failed to present evidence of the offense charged, a criminal defendant is entitled to a directed verdict."). Further, when the State relies exclusively on circumstantial evidence and a motion for a directed verdict is made, the trial judge is concerned with the existence or non-existence of evidence, not with its weight. Cherry, 361 S.C. at 594, 606 S.E.2d at 478. The trial judge "should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty." *Id.* " 'Suspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." Id. "However, a trial judge is not required to find that the evidence infers guilt to the exclusion of *any other reasonable hypothesis.*" State v. Ballenger, 322 S.C. 196, 199, 470 S.E.2d 851, 853 (1996) (emphasis added).
>
> "On appeal from the denial of a directed verdict, this Court views the evidence and all reasonable inferences in the light most favorable to the State." State v. Butler, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014).

"If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." State v. Cherry, 361 S.C. 588, 593–94, 606 S.E.2d 475, 478 (2004). "A case should be submitted to the jury when the evidence is circumstantial 'if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced.'" State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011) (quoting State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)). "Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt." Id. The State failed to produce substantial circumstantial evidence that Petitioner was part of a

conspiracy to murder her estranged husband. The State's evidence, at best, merely raises a suspicion about Petitioner's involvement in a conspiracy with her family. The trial judge erred in refusing to direct a verdict of acquittal on the conspiracy charge.

The conspiracy indictment alleges, "That JANE KATHERINE HUGHES did in Greenville County, on or about the 24th day of January, 2015, willfully and unlawfully combined with Margaret Hughes and/or Jacob Hughes and/or John Hughes for the purpose of accomplishing an unlawful object or a lawful object by unlawful means, to wit: Murder. This is in violation of §16-17-0410 of the South Carolina Code of Laws (1976) as amended." (R. p. 598).

S.C. Code §16-17-410 provides, "The common law crime known as 'conspiracy' is defined as a combination between two or more persons for the purpose of accomplishing an unlawful object or lawful object by unlawful means." In State v. Buckmon, 347 S.C. 316, 323, 555 S.E.2d 402, 405 (2001), this Court wrote:

> A conspiracy is a combination or agreement between two or more persons for the purpose of accomplishing a criminal or unlawful object, or achieving by criminal or unlawful means an object that is neither criminal nor unlawful. State v. Wilson, 315 S.C. 289, 433 S.E.2d 864 (1993). The essence of a conspiracy is the agreement. Id. It may be proven by the specific overt acts done in furtherance of the conspiracy but the crime is the agreement. Id. To establish the existence of a conspiracy, proof of an express agreement is not necessary, and direct evidence is not essential, but the conspiracy may be sufficiently shown by circumstantial evidence and the conduct of the parties. State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998).

The State failed to prove an agreement or combination between Petitioner and anyone else to commit murder. The circumstantial evidence presented by the State failed to establish a conspiracy involving Petitioner. In denying the directed verdict motion made by the brother co-defendant, the judge stated, "And I kind of kept a tally just because I knew it would be an important issue at this point. And I believe that based on the – all of the evidence when we look

at the phone calls, the evidence of the testimony, evidence of Martin – again, I'm not to determine whether its credible or not – and all the evidence there, I believe that this is enough for this matter to go to the jury." (R. p. 500, lines 4-11).

The text messages and telephone calls between the co-defendant brother, Jacob Hughes, and the shooter father, John Hughes, did not include Petitioner. The State failed to prove that Petitioner knew about the text messages and telephone calls between Father and Brother. The State failed to establish that Petitioner knew that her co-defendant brother was meeting with Ferrell on the evening of the shooting or that the father was trying to arrange a meeting with Ferrell at the house to work out the custody issue, as testified to by the boyfriend, Andrew Martin. (R. p. 312, lines 9-25). Wishing Ferrell was "just gone" and anger about custody issues is not evidence of an agreement. (R. p. 440, lines 12-14). Petitioner's purported comment that she hit Ferrell with the hammer because her father hesitated is not evidence of an agreement. (R. p. 324, lines 18-19). The father's discussion about the "Castle Doctrine" and self-defense, as testified to by Martin, (R. p. 329, lines 5-14), is not evidence of an agreement. The evidence presented by the State does not establish that Petitioner unlawfully combined with Margaret Hughes and/or Jacob Hughes and/or John Hughes for the purpose of accomplishing an unlawful object or a lawful object by unlawful means, to wit: Murder, as alleged in the indictment.

Viewing the evidence in the light most favorable to the State, the State failed to present any direct evidence or any substantial circumstantial evidence reasonably tending to prove guilt of the accused. The trial judge erred in refusing to direct a verdict of acquittal on the conspiracy charge. This Court should reverse the conspiracy conviction.

In affirming the convictions the Court of Appeals wrote:

> We find the trial court did not err in denying the motion for a directed verdict on the conspiracy charge. When viewed in the light most favorable to the State, the

> text messages between Father and Brother and Father's threatening statements regarding the need to conceal the events occurring inside Hughes's home from the police could lead the jury to "fairly and logically deduce[ ]" there was a conspiracy to murder Victim. See Butler, 407 S.C. at 381, 755 S.E.2d at 460 (stating all evidence is viewed in the light most favorable to the State on appeal from the denial of a directed verdict); see Phillips, 416 S.C. at 192–93, 785 S.E.2d at 452 ("[T]he trial court must submit the case to the jury if there is 'any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.' " (quoting Mitchell, 341 S.C. at 409, 535 S.E.2d at 127)). The State also presented evidence indicating Hughes was a part of the conspiracy. Before Father shot Victim outside the house, Hughes's 911 call recorded Hughes telling others "you gotta get to him" and "you gotta get him." The State also showed that Hughes was worried about losing custody of her children to Victim, that she struck Victim multiple times in the head with a carpentry hammer, and that she did so "to protect her family" and "because [Father] hesitated." A jury could find this evidence shows Hughes acted to further the conspiracy by attacking Victim and then directing others to prevent Victim from escaping and to complete the murder. See Buckmon, 347 S.C. at 323, 555 S.E.2d at 405 (stating a conspiracy can be proven by acts done in furtherance of the conspiracy).

State v. Hughes, No. 2018-000659, 2021 WL 3076693, at *3 (S.C. Ct. App. July 21, 2021).

The Court of Appeals erred. In viewing the evidence in the light most favorable to the State, the text messages between the Father and Brother and Father's threatening statements regarding the need to conceal the events occurring inside the Hughes's home from the police could only allow the jury to fairly and logically deduce there was a conspiracy between Father and Brother, **not** Petitioner. Again, the State failed to present evidence of an agreement. Petitioner's statements on the 911 call that "you gotta get to him" and "you gotta get him" and her purported statements that she struck her husband with a hammer "to protect her family" and "because [Father hesitated]" are not acts in furtherance of a conspiracy. The statements are consistent with Petitioner's statement to the 911 operator that her husband broke into the home and was trying to kill her and her children. These statements and Petitioner's concern about the custody dispute do not add up to substantial circumstantial evidence reasonably tending to prove

that Petitioner conspired with her family to commit murder. The State failed to present evidence that Petitioner was part of any conspiracy.

In State v. Buckmon, 347 S.C. 316, 555 S.E.2d 402 (2001), the South Carolina Supreme Court found that there was sufficient evidence to present the conspiracy charge to the jury. The State presented evidence that Petitioner and his co-defendants discussed committing an unlawful act, getting some cheese or money and getting a lick, a burglary or robbery, prior to the victim's death. There is no evidence in the present case that Petitioner discussed committing an unlawful act with anyone. Wishing that the estranged husband was gone and back in California, leaving Petitioner and her children in South Carolina is not a discussion about committing an unlawful act. Even if wishing the estranged husband was just gone could be construed as a wish that he was dead, simply wishing someone dead is a far stretch from the proof required to prove a conspiracy to commit murder.

The State failed to present any direct or substantial circumstantial evidence that Petitioner entered an agreement with anyone to murder her estranged husband. The trial judge erred in refusing to direct a verdict of acquittal for the conspiracy charge. The error requires reversal.

3. The Court of Appeals erred in finding that the trial judge correctly refused to grant trial counsel's motion to be relieved as counsel.

In January of 2015, prior to the April trial date, the Honorable Letitia H. Verdin heard a motion for a continuance and motion to be relieved as counsel, both filed by counsel for Petitioner, Lauren M. Taylor. (R. pp. 1-17). Judge Verdin granted the continuance motion to allow trial counsel to obtain a transcript from a previous trial, presumably the father's trial. (R. p. 4, line 13 – p. 5, lines 1-7). Judge Verdin, however, denied the motion to be relieved as counsel. The judge erred.

During the hearing on the motion to be relieved counsel claimed that Petitioner or a member of her family encouraged other detainees who were clients of counsel to file grievances against counsel with the Office of Disciplinary Counsel. (R. p. 5, line 22 – p. 6, p. 7, p. 8, lines 1-6). Trial counsel told the judge, "This is very concerning to me, as far as the conflict of the relationship that this has created. I think any amount of trust that existed between us that has, you know, occurred over the last two years is simply evaporated by this. It shows me that this is an intentional act, on either, you know, her family's part or hers, to publicly defame me and, you know, intentionally hurt my career." (R. p. 7, lines 11-20). Petitioner denied the allegation but asked the judge to relieve counsel. (R. p. 8, lines 7-20).

In denying the motion to be relieved, the judge stated:

> Here's what I'm going to do, it puts Ms. Taylor in a horrible position – and Ms. Taylor, I understand the position that you are in – but Ms. Hughes, I am not going to relieve Ms. Taylor. She's an outstanding attorney. I'm not going to relieve her as your attorney because I want you to have the benefit of her experience. I want you to have the benefit of her know-how on your case and knowledge of your case. What I do want you to do, Ms. Hughes, is I want you to figure out ways to work with Ms. Taylor, to work out this problem that you've got with Ms. Taylor and discuss it with her.

(R. p. 13, lines 6-19). The judge also stated, "But here's what I'm going to say, to the extent that you did anything to harm Ms. Taylor – if you did, I – then my apologies to Ms. Taylor in asking her to continue as your attorney. This is probably the worse [sic] situation I've put an attorney in about this, but my understanding from our brief talk about this case is it is nearly three years old." (R. p. 14, lines 12-20). The age of the case is not justification to refuse to relieve an attorney who has accused her client or her client's family of defaming her and intentionally hurting her career. The judge abused her discretion in refusing to relieve counsel.

This Court reviews the trial judge's refusal to grant trial counsel's motion to be relieved for an abuse of discretion. State v. Gregory, 364 S.C. 150, 152–53, 612 S.E.2d 449, 450 (2005). "[A] motion to relieve counsel is addressed to the discretion of the trial judge and will not be disturbed absent an abuse of discretion." State v. Graddick, 345 S.C. 383, 385, 548 S.E.2d 210, 211 (2001) (citation omitted). An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's interests. Fuller v. State, 347 S.C. 630, 557 S.E.2d 664 (2001). The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction. See Langford v. State, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993) citing Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). However, a defendant need not demonstrate prejudice if there is an actual conflict of interest. Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001); Duncan v. State, 281 S.C. 435, 315 S.E.2d 809 (1984) citing Cuyler v. Sullivan, 446 U.S. 335, 348-350, 100 S.Ct. 1708, 1718-19, 64 L.Ed.2d 333 (1980).

The Sixth Amendment right to effective assistance of counsel encompasses the right to representation by an attorney who does not owe conflicting duties to other defendants. Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). Where counsel is guaranteed,

the client has the right to conflict-free representation. Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Violation of this principle is grounds for reversal. Id. A defendant need not demonstrate prejudice if there is an actual conflict of interest. State v. Gregory, 364 S.C. 150, 153, 612 S.E.2d 449, 450 (2005). The trial judge's refusal to relieve counsel violated Petitioner's Sixth Amendment right to conflict-free representation and the violation requires reversal. The conflict in the present case did not involve dual representation. Instead, the conflict existed directly between Petitioner and counsel based on counsel's belief that Petitioner and or family had encouraged other clients to file grievances.

The present case is distinguished from Richardson v. State, 377 S.C. 103, 659 S.E.2d 493 (2008), where this Court found that the PCR judge properly denied the motion to be relieved as counsel. In Richardson this Court noted that a mere disagreement about strategy is not sufficient to relieve counsel. Additionally, with regard to complaints filed with the Office of Disciplinary Counsel, this Court wrote, "We caution the bench that the filing of a disciplinary complaint should not result in automatic removal of appointed counsel. If this were not the case, applicants could obtain substitute counsel by the simple expedient of filing an ethical complaint even if that complaint is without any factual or legal basis. Instead, the basis for the complaint should be explored and the PCR judge should exercise discretion in determining whether the basis for the complaint constitutes sufficient cause to relieve counsel." Richardson, 377 S.C. at 107, 659 S.E.2d at 495. The present case involves more than a mere disagreement in regard to strategy and involves more than Petitioner filing a grievance. In the present case the attorney accused the client or her family of defamation and intentionally hurting her career. Both the attorney and the client asked the judge to relieve counsel. The judge had already granted a

continuance which would have provided newly appointed counsel time to prepare. The judge erred in refusing to relieve counsel. The error is not harmless and requires reversal.

In affirming the convictions the Court of Appeals wrote:

> The alleged conflict of interest was Counsel's belief that Hughes or her family pressured several of Counsel's other clients to file grievances against Counsel. Our supreme court has held "the filing of a disciplinary complaint should not result in automatic removal of appointed counsel." Richardson v. State, 377 S.C. 103, 107, 659 S.E.2d 493, 495 (2008) (per curiam). The trial court asked Hughes if she coerced Counsel's other clients to file the grievances, and she denied doing so. The trial court noted Counsel's reputation as an excellent criminal attorney and considered Counsel's representation following the grievances. Specifically, the court commended Counsel for requesting both the transcript from a previous trial and the funds for the transcript, stating that many attorneys would not have done the same. The trial court, noting Counsel was in a difficult position if her assertion was true, expressed concern that relieving Counsel "midstream" would be detrimental to Hughes. We find the trial court properly exercised its discretion in denying Counsel's motion.

State v. Hughes, No. 2018-000659, 2021 WL 3076693, at *4 (S.C. Ct. App. July 21, 2021). The Court of Appeals erred. Counsel's motion to be relieved as counsel was not based simply on the filing of one disciplinary complaint and the motion was made two months prior to trial, providing sufficient time for newly appointed counsel to prepare for trial.

As discussed above, the present case is distinguished from Richardson v. State, 377 S.C. 103, 659 S.E.2d 493 (2008) because the present case involves more than a mere disagreement in regard to strategy and involves more than Petitioner filing a grievance. Additionally, the Court in Richardson was addressing a specific problem writing:

> However, we take this opportunity to address the recurring problem of PCR applicants seeking repeatedly, and without sufficient cause, to have their appointed counsel relieved. In the case at hand, although the exact number of these motions is unclear, at least nine motions to relieve PCR counsel or to be relieved as PCR counsel were made, and many of those motions were granted. Such tactics constitute an abuse of the judicial process, resulting in significant delays, and should not be tolerated, much less acquiesced in, by judges presiding over PCR matters.

377 S.C. at 105, 659 S.E.2d at 494 (n #2, #3 omitted). The motion to be relieved in the present was the first one made and made for good cause, an actual conflict, not an attempt to manipulate the PCR process, as discussed in Richardson.

The Court of Appeals also found that Petitioner failed to show prejudice from the judge's refusal to relieve counsel writing, "Furthermore, Hughes has failed to show the trial court's denial prejudiced her as the record shows Counsel's representation was not affected by the grievances. State v. Hughes., No. 2018-000659, 2021 WL 3076693, at *4 (S.C. Ct. App. July 21, 2021). The Court of Appeals erred. Petitioner is not required to show prejudice because an actual conflict existed. The error requires reversal.

CONCLUSION

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

Respectfully Submitted,

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Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of October, 2021.