IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2017

No. 17 - _____

Luzenski Allen Cottrell,

Petitioner,

-vs.-

State of South Carolina,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO SOUTH CAROLINA SUPREME COURT

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CAPITAL CASE

More than three years after their appointment, and less than three weeks before petitioner's South Carolina capital trial was set to begin, the trial judge, over objection, dismissed both of his lawyers after learning that they had made disparaging remarks about each other in out-of-court conversations with prosecutors. The court took no evidence and found no facts, but justified dissolving the attorney-client relationship on the ground that the alleged tension between counsel would leave a jury verdict against petitioner intolerably vulnerable on state collateral review. The South Carolina Supreme Court affirmed.

In *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), this Court established that the erroneous removal of a criminal defendant's counsel of choice is structural error. Because the issue was undisputed in that case, however, the Court did not explicitly address the anterior question of the legal standard governing involuntary dissolution of an established attorney-client relationship. Other lower courts have attempted to fill that gap themselves with slightly varying formulations informed by this Court's decisions in *Gonzalez-Lopez* and other cases. While any of the other lower courts' formulations would appear to prohibit what the South Carolina courts did in this case, the Sixth Amendment doctrine concerning the right to counsel of choice would be materially improved by an authoritative formulation from this Court.

The question presented is:

> Whether a court violates the Sixth Amendment right to counsel of choice when, over a defendant's objection, it dissolves an established attorney-client relationship in the absence of specific findings demonstrating legal disqualification or other extreme circumstances not curable through a less drastic remedy?

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Petitioner, Luzenski Allen Cottrell, prays that a writ of certiorari issue to review the judgment of the South Carolina Supreme Court.

OPINIONS BELOW

The opinion of the South Carolina Supreme Court affirming Cottrell's conviction and death sentence is published at 809 S.E.2d 423 (S.C. 2017), and is attached as Appendix A. The section of the record in which the trial court dismissed Cottrell's counsel over objection is attached as Appendix B. Petitioner's *Pro Se* Motion to Maintain Lead Counsel in Death Penalty Case is attached as Appendix C.

JURISDICTION

The South Carolina Supreme Court affirmed the trial court's judgment on December 20, 2017, and denied a timely request for rehearing on February 16, 2018. By order dated April 19, 2018, the Chief Justice extended the time to file this petition to and including June 18, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which provides: "In all criminal prosecutions, the accused shall enjoy the right to ... have the Assistance of Counsel for his defense."

This case also involves the Fourteenth Amendment to the United States Constitution, which applies the Sixth Amendment to the States and provides in pertinent part: "No state may deprive any person of life [or] liberty ... without due process of law ...."

STATEMENT OF THE CASE

I. The trial court's dissolution of Cottrell's defense team based on "absolutely no investigation" of allegations brought forth by prosecutors.

By March of 2012, petitioner Luzenski Allen Cottrell and his two appointed lawyers, Stuart Axelrod and Lisa Armstrong, had spent more than three years together preparing for Cottrell's retrial for the capital offense of killing a South Carolina police officer.[1] ROA 388.[2] Trial was set to begin

[1]Cottrell's first trial on that charge ended in a conviction and death sentence, but that judgment was set aside on appeal because the trial court erroneously prevented the jury from considering the factually colorable defense that the deceased officer's conduct in the moments preceding the shooting constituted legal provocation sufficient to reduce the homicide offense to voluntary manslaughter. *State v. Cottrell*, 657 S.E.2d 451, 453-54 (S.C. 2008) (*Cottrell I*).

[2]"ROA" refers to the Record on Appeal submitted to and on file with the South Carolina Supreme Court, whose judgment is the subject of this petition.

later that month, on March 26. ROA 380. By all outward indications, the attorney-client relationship had been an industrious and productive one; counsel met with and consulted Cottrell, gathered and analyzed the evidence, prepared and argued numerous pretrial motions, and earned and maintained their client's trust. *See*, *e.g.*, ROA 6; 29; 190; 240; 334; 363. The relationship remained observably functional and oriented toward Cottrell's defense through March 5, 2012, when the lawyers appeared and presented arguments together at a pretrial hearing on discovery and other matters. ROA 336-360.

During that same March 5 hearing, the State gave the trial judge two one-page memoranda – one dated January 6, 2012, and one dated February 21, 2012 – purporting to summarize disparaging remarks each defense lawyer had made about the other in conversations with the individual prosecutors. ROA 358-362. When the pretrial hearing resumed on March 8 as previously planned, the trial judge announced that a "matter more pressing" had emerged in the form of allegations by the Solicitor's office that "a serious rift or problem [was] developing in the defense team," and that it had prompted "concern about the defendant's ability to be effectively represented by this defense team." ROA 365.[3]

After noting that he had "reviewed both of the memorandum [sic] in detail" and spoken privately with each defense lawyer, the judge declared for the record: "I have made, let me make this clear, absolutely no investigation to determine whether or not there was any truth to the allegations. My only concern was whether the allegations had been made." ROA 366. He then added: "My inclination is, and I quite frankly feel that I have no alternative but to continue this case

[3]Although the first of the two memos given to the trial judge concerned a conversation that occurred two months earlier, the record suggests no explanation for the prosecutors' delay in approaching the trial court about their concerns for the effectiveness of Cottrell's defense.

and relieve one or both counsel in this matter and hire a substitute." ROA 367.

The trial judge then invited the parties to speak. The prosecution went first, claiming concern for Cottrell's right to be "adequately" and "effectively represented," and worrying that "a post-conviction relief [sic] would be granted if we went forward with the trial ...." ROA 368. Defense counsel Armstrong – who was the subject of the second, more recent, prosecutor memo – was conciliatory and optimistic: "I would like to reiterate, that as far as I'm concerned I can set aside my personal misgivings about dealing with co-counsel and one thing I have never questioned is his commitment to Mr. Cottrell, notwithstanding some impressions that I've gotten and may have been wrong about." ROA 369. Defense counsel Axelrod agreed that Cottrell's defense was "most important" and that the Solicitor's "memo solidifies probably a PCR," but suggested Cottrell himself should be consulted. ROA 370.

When asked for "any comments" he might have, ROA 371, Cottrell said that the allegations of dysfunction portrayed in the prosecution's memos were news to him, but made clear that he trusted and valued Axelrod and needed a chance to speak to his lawyers:

> Your Honor, I know from my knowledge from speaking with both my attorneys that I know Mr. Axelrod's strategy. I know that he's been preparing diligently for my trial. We've spoken on numerous occasions about how he would like to proceed and I feel confident in his ability to represent me as the attorney for this trial.
>
> I just became aware of this rift between the two attorneys. I had no idea that it was there. It does cause me concern as well but if I could I would like to speak with both of them, you know. I haven't had a chance to do that since I found out ....

ROA 371-372. The court then declared a recess to permit the meeting Cottrell had requested.

When the proceedings resumed a short time later, Cottrell reported to the court that his

lawyers "would be able to work together." ROA 372. He went on to "reiterate that I do feel confident in the representation," and emphasized that his confidence in Axelrod was especially strong: "I know that the work that Mr. Axelrod has done in the first part of the trial of this case, I don't think it can be matched by anybody else." ROA 373.

Unpersuaded by the assurances that counsel could work together despite their personal differences, or by the strength of Cottrell's relationship with Axelrod, and without taking any additional evidence or making any findings of fact, the trial judge followed his initial "inclination" and summarily removed both lawyers:

> As I've said I have been very careful not to go into the specifics other than general allegations, but there have been allegations involving dishonesty, unethical conduct, personal problems that should be addressed, all sorts of things that I believe on review would be matters that would be of grave concern to a PCR judge .... I'm telling you that if it reaches that point that could certainly be a problem.
>
> I don't think that ... I have any alternative than to relieve counsel in this matter, both attorneys. I am going to appoint someone, I'm going to give them adequate opportunity to pick up your defense and they will, I'm sure, proceed in the same fashion or very much the same fashion.

ROA 374-375.[4] In reaching these conclusions, the trial judge neither articulated nor purported to apply any recognized legal standard applicable to the dissolution of an existing attorney-client relationship. He likewise offered no explanation for removing both lawyers instead of just one.

Six days after the trial judge ruled from the bench, on March 14, 2012, Cottrell filed a *pro*

[4] In a written order entered five days later, the trial judge discounted counsel's assurances that they could set aside their differences, ROA 381 ("This is a capital case two weeks from trial. I see no way to repair the relationship of co-counsel and the damage done to the defense."), and insisted that his "duty at this point is to protect this defendant by taking the course most likely to assure that he will be effectively represented and his constitutional rights will be preserved," *id.*

se motion in the South Carolina Supreme Court seeking to reinstate Axelrod as lead counsel and to eliminate the source of any possible team dysfunction by removing Armstrong from the case. ROA 383-386. That motion was summarily "dismissed" by the South Carolina Supreme Court on the ground that "no extraordinary reason exists to entertain [it] ...." ROA 391. Cottrell's request to reinstate Axelrod was later renewed by replacement counsel, who pointed out that if the issue "was one of dysfunction between the two [dismissed lawyers], it would seem that if Mr. Axelrod stayed alone or paired up with new counsel, the problem would have been resolved." ROA 559. Counsel also contended that Axelrod's removal violated Cottrell's Sixth Amendment right to counsel, because once a relationship between the defendant and appointed counsel is established, "it is entitled to constitutional protection and respect." *Id.* In response, the judge offered no further explanation for the decision to permanently remove both Armstrong and Axelrod. Instead, he maintained only that he knew what was best for Cottrell and his defense. ROA 560 ("Let me assure you that everything I did in that regard was to protect you. Let me assure you of that.").

The case proceeded to trial, where Cottrell was convicted and sentenced to death.

II. Cottrell's direct appeal to the South Carolina Supreme Court.

Cottrell appealed directly to the South Carolina Supreme Court, asserting that the trial court's dissolution of his longstanding relationship with both of his attorneys violated his Sixth Amendment right to counsel, and that, pursuant to *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), the error required automatic reversal. In support of his claim, Cottrell acknowledged that, as an indigent defendant, he did not enjoy the same right to select a lawyer with whom to form a relationship as would a defendant with greater financial means. But he maintained that where, as in this case, an attorney-client relationship has already formed and become established, that relationship merits the

same protection regardless of whether counsel arrived at it by way of appointment or retainer. Cottrell further contended that the decision to remove both lawyers in this case not only lacked factual support in the record developed by the trial court, but also ran afoul of the standards for the removal of counsel over a defendant's objection that have been embraced and applied by every other state court to have addressed the question. Finally, Cottrell argued that even if the intra-defense-team dysfunction alleged by the prosecution did require some intervention, removal of both counsel rather than just one was too extreme. *See generally*, Final Brief of Appellant at 10-23.

III. The South Carolina Supreme Court's decision on direct review.

The South Carolina Supreme Court agreed that a criminal defendant's "relationship with appointed attorneys, once established, should be afforded the same level of deference as that which is afforded to clients with retained counsel[.]" *State v. Cottrell*, 809 S.E.2d 423, 430 (S.C. 2017). The court also agreed that, "'as a procedural safeguard, an evidentiary hearing is appropriate to determine whether there is evidence to support counsel's removal,'" and that the absence of evidence or findings concerning "the allegations" underlying the trial judge's action in this case was "somewhat problematic." *Id.* at 431 (quoting *State v. Sanders*, 534 S.E.2d 696, 698 (S.C. 2000)).

This concern notwithstanding, the South Carolina Supreme Court accepted that "the allegations" – which were neither specified in the record, *Cottrell*, 809 S.E.2d at 431, nor investigated by the trial court, ROA 374 – posed a sufficient risk of generating a meritorious claim for state collateral relief to justify – perhaps even mandate – removal of Cottrell's lawyers:

> [O]nce one of Cottrell's attorneys admitted on the record that he believed Cottrell would likely prevail on PCR based on these allegations, we find the trial judge had little choice but to remove the attorneys to preserve the integrity of the trial in accordance with *Gonzales-Lopez* and *Sanders*. The right to counsel is not so absolute

> that it requires a trial judge to preside over a trial, exhausting the time of attorneys, jurors, and judicial staff despite an admission by a defendant's attorney that the integrity of the verdict is in doubt due to conduct falling below the accepted standards of the legal profession.

Cottrell, 809 S.E.2d at 431. While the court did not cite *Strickland v. Washington*, 466 U.S. 668 (1984), its references to "prevail[ing] on PCR" and "conduct falling below the accepted standards of the legal profession" make plain that it was responding to a perceived risk that maintaining Axelrod and/or Armstrong as defense counsel would have somehow given rise to a meritorious Sixth Amendment ineffective assistance of counsel claim.[5] Like the trial court below, however, the South Carolina Supreme Court did not elaborate on how the lawyers' disparaging statements pointed to an imminent violation of the right to effective assistance of counsel or how a lawyer's conclusory "admission" of such an imminent violation might qualify as a substitute for a factual record. Nor did either court acknowledge the alternative and less extreme remedy – specifically requested in Cottrell's *pro se* filing and reiterated later by replacement counsel – of eliminating the source of any remaining dysfunction by removing Armstrong but retaining Axelrod.[6]

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[5] While the court's reference to "the accepted standards of the legal profession" might also call to mind the rules of professional responsibility, it is axiomatic that a mere breach of those rules, without more, does not give rise to a colorable claim for post-conviction relief in a criminal case. *See*, *e.g.*, *Nix v. Whiteside*, 475 U.S. 157, 165 (1986) ("[B]reach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel."); *Langford v. State*, 426 S.E.2d 793, 795 (S.C. 1993) (quoting Rule 407, SCACR) ("In our view, the Rules of Professional Conduct have no bearing on the constitutionality of a criminal conviction. Their purpose is to regulate and guide the legal profession by defining proper ethical conduct, and 'nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.'").

[6] The justification for affirmance offered by the separate concurring opinion was no more illuminating than that of the majority. After expressing sharp disagreement with the majority's conception of the breadth of discretion afforded to a trial judge, and lamenting the inadequacy of the record made below, the concurring justice simply declared the circumstances "unique" and unworthy of a new trial. *See Cottrell*, 809 S.E.2d at 438-440 (Few, J., concurring).

REASONS THE WRIT SHOULD BE GRANTED

The South Carolina Supreme Court's endorsement of the abrupt dissolution, over objection, of a capital defendant's long-established relationship with his counsel, on a barren record and for a stated purpose recognized by no other court, violated Cottrell's Sixth Amendment right to counsel of choice and threatens enforcement of that right in all future cases, whether counsel is appointed or retained. This Court's intervention is necessary not only to correct the South Carolina courts' error in this case, but also to ensure more broadly that the Sixth Amendment's "command[]" "that the accused be defended by the counsel he believes to be best," *Gonzalez-Lopez*, 548 U.S. at 146, is followed in the absence of a genuine "need," *id*. at 147 n.3, to override it.

I. The state courts' rule in this case implicates the right to counsel of choice in any case involving an existing attorney-client relationship.

As a practical matter, the Sixth Amendment "right to counsel of choice," *Gonzalez-Lopez*, 548 U.S. at 146, is made up of two related but separable components: *first*, the right to choose the lawyer with whom an attorney-client relationship is to be started; and *second*, the right to maintain and benefit from an established, functional attorney-client relationship free of unwarranted external interference. *See Wheat v. United States*, 486 U.S. 153, 159 (1988) (observing that Sixth Amendment "comprehend[s]" "the right to select *and* be represented by one's preferred attorney") (emphasis added).

As an indigent defendant, Cottrell had no say in the initial selection of the lawyers assigned to represent him. *Gonzalez-Lopez*, 548 U.S. at 151 ("the right to counsel of choice does not extend to defendants who require counsel to be appointed for them"). But once the assignment was made – and certainly by the time the trial court intervened more than three years later, virtually on the eve

of trial – Cottrell's interest in maintaining the relationship he had built with his counsel was constitutionally indistinguishable from that of a defendant paying counsel from his own pocket. *See Cuyler v. Sullivan*, 446 U.S. 335, 344-45 (1980) ("[W]e see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers."); *Morris v. Slappy*, 461 U.S. 1, 23 n.5 (1983) (Brennan, J., concurring in the result) ("[T]he considerations that may preclude recognition of an indigent defendant's right to choose his own [court-appointed] counsel, such as the State's interest in economy and efficiency, ... should not preclude recognition of an indigent defendant's interest in continued representation by an appointed attorney with whom he has developed a relationship of trust and confidence.").[7]

The South Carolina Supreme Court accepted this principle when it observed that "Cottrell's ... relationship with [his] appointed attorneys, once established, should be afforded the same level of deference as that which is afforded to clients with retained counsel[.]" *Cottrell*, 809 S.E.2d at 430. Accordingly, when it went on to endorse as a valid exercise of the trial court's "broad

[7]*See also*, *e.g.*, *Lane v. State*, 80 So.3d 280, 295 (Ala. Crim. App. 2010) ("With respect to continued representation, however, there is no distinction between indigent defendants and nonindigent defendants."); *Smith v. Super. Ct. of L.A. Cnty.*, 440 P.2d 65, 74 (Cal. 1968) ("To hold otherwise would be to subject that relationship to an unwarranted and invidious discrimination arising merely from the poverty of the accused."); *Weaver v. State*, 894 So.2d 178, 189 (Fla. 2004) ("To allow trial courts to remove an indigent defendant's court-appointed counsel with greater ease than a non-indigent defendant's retained counsel would stratify attorney-client relationships based on defendants' economic backgrounds."); *People v. Davis*, 449 N.E.2d 237, 241 (Ill. App. 1983) ("[F]or purposes of removal by the trial court, a court-appointed attorney may not be treated differently than privately retained counsel."); *State v. Huskey*, 82 S.W.3d 297, 305 (Tenn. Crim. App. 2002) ("[A]ny meaningful distinction between indigent and non-indigent defendants' right to representation by counsel ends once a valid appointment of counsel has been made."); *Stearns v. Clinton*, 780 S.W.2d 216, 223 (Tex. Crim. App. 1989) ("[T]he power of the trial court to appoint counsel to represent indigent defendants does not carry with it the concomitant power to remove counsel at his discretionary whim [because] to hold otherwise would be to discriminate between retained and appointed counsel without a semblance of rationality.").

discretionary authority" the removal of Cottrell's lawyers in the absence of an evidentiary record or specific factual findings, and on the basis of a speculative theory about "PCR" implications, the South Carolina Supreme Court set a precedent applicable to *all* attorney-client relationships, appointed or retained. *Id.* The question, therefore, is whether the approach taken by the state courts here is consistent with the limitations on the right to counsel of choice recognized by this Court and the interpretations and applications of those limits reflected in the decisions of other state courts. As discussed below, it is not.

II. The South Carolina Supreme Court exceeded the boundaries set by this Court's cases and would have been prohibited under the varying formulations used by other lower courts.

This Court has recognized some limits on the right to maintain a relationship with counsel of choice, but the state courts' action in this case does not align with any of them. For example, *Wheat* cited the federal courts' "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them" as reasons for upholding a trial court's refusal to permit a single lawyer to simultaneously represent three criminal defendants despite their attempts to waive the obvious potential conflict. *Wheat*, 486 U.S. at 160. And in *Slappy*, this Court reversed a grant of habeas relief where the record made clear that although the prisoner's substitute counsel had been appointed to replace a physically incapacitated lawyer only six days before trial, the replacement lawyer still had adequate time to prepare, and the prisoner's request for a continuance to facilitate the return of his original lawyer was not made until the third day of trial. *Slappy*, 461 U.S. at 12-13.

Although their formulations vary and would benefit from an authoritative statement by this Court, lower courts outside South Carolina generally treat a trial judge's discretion to sever an

established attorney-client relationship – retained or appointed – over the defendant's objection as "severely limited." *Huskey*, 82 S.W.3d at 308; *People v. Courts*, 693 P.2d 778, 781 (Cal. 1985). "Gross incompetence or physical incapacity, or contumacious conduct that cannot be cured by a citation for contempt may justify the court's removal of an attorney[] over the defendant's objection." *Harling v. United States*, 387 A.2d 1101, 1105 (D.C. 1978) (quoted in *Huskey*, 82 S.W.3d at 308); *accord Lane*, 80 So.2d at 299; *Smith*, 440 P.2d at 72-74; *Weaver*, 894 So.2d at 189; *Burnett v. Terrell*, 905 N.E.2d 816, 824-25 (Ill. 2009); *People v. Johnson*, 547 N.W.2d 65, 69 (Mich. 1996). "However, mere disagreement as to the conduct of the defense certainly is not sufficient to permit the removal of any attorney." *Huskey*, 82 S.W.3d at 309 (quoting *Harling*, 387 A.2d at 1105); *accord McKinnon v. State*, 526 P.2d 18, 22 (Alaska 1974); *Clements v. State*, 817 S.W.2d 194, 200 (Ark. 1991); *Davis*, 449 N.E.2d at 242; *Stearns*, 780 S.W.2d at 223.

These courts have likewise emphasized the seriousness and care with which the prospect of removing a defendant's lawyer must be approached, and have made clear that unwarranted separation of client and attorney amounts to a violation of the right to counsel. *McKinnon*, 526 P.2d at 22-23 ("Once counsel has been appointed, and the defendant has reposed his trust and confidence in the attorney assigned to represent him, the trial judge may not, consistent with the United States ... [C]onstitution[], rend that relationship by dismissing the originally appointed attorney and then thrusting unfamiliar and unwelcome counsel upon the defendant."*); Clements*, 817 S.W.2d at 200 ("[W]here, as here, a trial court terminates the representation of an attorney, either private or appointed, over the defendant's objection and under circumstances which do not justify the lawyer's removal and which are not necessary for the efficient administration of justice, a violation of the

accused's right to particular counsel occurs.").[8]

In this case, "[n]one of the[] limitations on the right to choose one's counsel" recognized by this Court or others "is relevant[.]" *Gonzalez-Lopez*, 548 U.S. at 152. The record before the trial court gave no hint of the clear and present danger of a conflict of interest that justified dissolving the attorney-client relationship in *Wheat*; unlike in *Slappy*, there was no concern over counsel's physical availability to appear and try the case as scheduled; nor was there even an allegation, let alone hard facts, suggesting either gross incompetence or contumaciousness not curable by other means.

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[8] *Accord People v. Harlan*, 54 P.3d 871, 878 (Colo. 2002) (quoting *Williams v. District Court*, 700 P.2d 549, 555 (Colo. 1985)) (an indigent defendant is entitled to "continued and effective representation by court-appointed counsel in the absence of a demonstrable basis in fact and law to terminate that appointment"); *Harling*, 387 A.2d at 1106 ("The court's discharge of appellant's [appointed] attorney [without cause] was not only an encroachment on appellant's right to counsel, but also a threat to the independence of the bar which represents indigent defendants."); *Grant v. State*, 607 S.E.2d 586, 587 (Ga. 2005) (interest in appointing local counsel was not sufficient "to overcome the strong interest of the defendant and of the court system in sustaining an existing, close relationship between a death penalty defendant and his counsel"); *English v. State*, 259 A.2d 822, 826 (Md. 1969) ("[O]nce counsel has been chosen, whether by the court or the accused, the accused is entitled to the assistance of that counsel at trial.") (emphasis in original); *Johnson*, 547 N.W.2d at 69 ("[O]nce an attorney is serving under a valid appointment by the court and an attorney-client relationship has been established, the trial court may not arbitrarily remove the attorney over the objection of both the defendant and counsel."); *State v. Nelson*, 333 S.E.2d 499, 501 (N.C. App. 1985), *aff'd*, 341 S.E.2d 561 (N.C. 1986) ("[W]hen an indigent defendant has confidence in and is satisfied with the appointed lawyer that has handled his case to the eve of trial, ... he should not be deprived of that counsel's services during the trial except for justifiable cause."); *People v. Griffin*, 987 N.E.2d 282, 284 (N.Y. 2013) ("courts cannot arbitrarily interfere with the attorney-client relationship, and interference with that relationship for purpose of case management is not without limits, and is subject to scrutiny"); *Commonwealth v. Cassidy*, 568 A.2d 693, 698 (Pa. Super. 1989) ("[A] *presumption* must first be recognized in favor of the defendant's counsel of choice; to overcome that presumption, there must be a demonstration of an *actual conflict or a showing of a serious potential for conflict*.") (emphasis by the court); *Huskey*, 82 S.W.3d at 311 (removal of appointed counsel in response to counsel's motion practice was unwarranted because it failed to accord sufficient weight to court's "obligation to protect the defendant's right to the effective assistance of his counsel of choice"); *Stearns* ,780 S.W. 2d at 225 ("Once a valid appointment has been made, the trial court cannot arbitrarily remove him as attorney of record over the objections of the defendant and counsel."); *State v. Fields*, 696 S.E.2d 269, 274 (W. Va. 2010) ("upon conducting a hearing, a circuit court can remove a court-appointed attorney for good cause").

Instead, the thin record before the state courts showed nothing more than unexplored, unresolved "allegations" amongst the lawyers from which the trial judge presumed (erroneously, as discussed *infra*) a *Strickland* violation in the making.

Also absent from the proceedings below is any sign of concern by either state court for the Sixth Amendment's "particular guarantee ... that the accused be defended by the counsel he believes to be best." *Gonzalez-Lopez*, 548 U.S. at 146. Cottrell made clear both at the March 8 hearing and again in his *pro se* written submission on March 14 that he had sincere, specific confidence in Axelrod's ability, and did not "think it can be matched by anybody else." ROA 373. The response from the trial court could hardly have been less solicitous of Cottrell's expressed wishes or the Sixth Amendment interests they reflected. Without a word on either point, and without any apparent consideration for the obviously less drastic option of removing Armstrong but retaining Axelrod, the judge simply declared that he had no "alternative," and left Cottrell with the hollow consolation that he would "appoint someone," and that someone "will, I'm sure, proceed in the same fashion or very much the same fashion." ROA 374-375. And while the South Carolina Supreme Court purported to afford "deference" to the attorney-client relationship Cottrell had sought to preserve, the content of its discussion demonstrates that its real energies were devoted, not to safeguarding Cottrell's right to keep a trusted, competent, non-conflicted lawyer, but instead to justifying the trial court's removal of both lawyers from the case. *Cottrell*, 809 S.E.2d at 430-431. That effort was misplaced, both because it represented an inversion of the constitutional priorities that should have guided the court's review, and because the "PCR" concern cited by the trial court was obviously and irredeemably meritless.

III. The perceived risk that Cottrell might "prevail on PCR" had no basis in fact or law and should not be permitted to stand as precedent justifying dissolution of an established attorney-client relationship.

The South Carolina Supreme Court identified one reason justifying the trial court's dissolution of Cottrell's three-year relationship with his two lawyers: that "one of Cottrell's attorneys" – Axelrod – "admitted on the record that he believed Cottrell would likely prevail on PCR based on the[] allegations ...." *Cottrell*, 809 S.E.2d at 431; *see also id.* (declaring that counsel's conclusory opinion on this point left the trial court with "little choice but to remove the attorneys"); ROA 374-375 (trial court observing that "allegations" "would be of grave concern to a PCR judge," and that, "I don't think that ... I have any alternative than to relieve counsel in this matter, both attorneys"). Because it is well known that mere breaches (or alleged breaches) of the rules of professional responsibility do not entitle a prisoner to post-conviction relief, *see Nix* and *Langford*, *supra* at n. 5, the statements of the courts below could only have been grounded in concern that the "allegations" were enough to make out a winning claim of ineffective assistance of counsel under the *Strickland* standard. That concern was plainly unfounded.

Under *Strickland*, "[t]he question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoting *Strickland*, 466 U.S. at 690). At the pre-trial stage – where Cottrell's representation was interrupted – counsel's competence in light of professional norms could only have been assessed by whether they had discharged their "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary," and by whether they had rendered themselves fit to "to make the adversarial testing process work" at the upcoming trial by preparing to challenge the State's case

using the mechanisms available to them.[9] *Strickland*, 466 US at 690-691; *see also*, *e.g.*, *Porter v McCollum*, 558 U.S. 30, 39-40 (2009) (per curiam); *Rompilla v Beard*, 545 U.S. 374, 389 (2005).

A trial judge concerned about counsel's compliance with the *Strickland* standard would have made some inquiry along these dimensions. Such a judge might have asked, for example, whether counsel had performed an adequate investigation of the facts; whether they had formulated a theory of the case plausibly grounded in the evidence and the law; and whether they were prepared to advance that theory at trial through argument, cross-examination of the prosecution's witnesses, and perhaps presentation of a defense case-in-chief. A judge specifically concerned that interpersonal conflict among counsel might impair their performance of these duties might also have asked whether, regardless of any personal animosities, the lawyers remained capable of directing their efforts toward the professionally competent advancement of their client's interest in a fair trial.[10] The trial judge in this case asked none of these questions, and therefore lacked even the beginnings of a factual basis from which to conclude that *Strickland*-related "PCR" trouble was ahead.

What the record *did* show was that, regardless of the lawyers' purported dislike for one

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[9] There may be extreme cases – such as newly pending criminal charges or sudden grave illness – in which counsel has performed well in the pre-trial phase but there is reason to doubt his or her ability to perform adequately at trial. Such circumstances are not present in this case.

[10] The availability – and likely efficacy – of an inquiry along these lines distinguishes cases involving concerns about possible *Strickland* ineffectiveness from those in which a trial court must address the possibility of a developing conflict of interest. As this Court explained in *Wheat*, a careful trial judge must have "broad latitude" to make a less than fully informed decision in a potential conflict case because "[t]he likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials." *Wheat*, 486 U.S. at 162-163; *see also id.* at 163 ("A few bits of unforeseen testimony or a single previously unknown or unnoticed document may significantly shift the relationship between multiple defendants."). As illustrated in the text above, assessing a lawyer's pre-trial compliance with the requirements of *Strickland* is different – and not nearly so speculative.

another, Axelrod (and perhaps Armstrong) had not neglected the duty to investigate, and was not approaching trial without a plausible theory of defense in which the client believed. Cottrell himself advised the judge that Axelrod had "been preparing diligently" and had made his client "confident in his ability to represent me as the attorney for this trial." ROA 371; *see also* ROA 373 (Cottrell: "I know that the work that Mr. Axelrod has done in the first part of the trial of this case, I don't think it can be matched by anybody else."). That assessment was consistent with what the trial judge himself had witnessed just three days earlier when both lawyers appeared before him, delivered detailed and coherent arguments on discovery issues, and gave every appearance of being fully engaged in the final stages of trial preparation.[11] *See* ROA 336-359.

Given what was known to the trial court and what that court did not bother to ask, there simply was no basis for the South Carolina Supreme Court's conclusion that Axelrod's conclusory "belie[f]" that "Cottrell would likely prevail on PCR" left the trial judge with "little choice but to remove the attorneys ...." *Cottrell*, 809 S.E.2d at 431. Whatever Axelrod might have been thinking when he made that remark, no court with even a passing knowledge of the *Strickland* standard – or of the more general requirements for successfully challenging a criminal conviction – could have taken it as conclusive (or even likely) proof of a looming constitutional violation. And in the absence of a concern rising to that level, the decision below amounts to a serious infringement of the Sixth Amendment right to maintain an established relationship with one's counsel of choice, and a stark departure from the consensus among courts outside South Carolina that a trial judge's power to interfere with that right should be "severely limited." *Huskey*, 82 S.W.3d at 308.

[11]Moreover, counsel's joint appearance and cooperation at the March 5 hearing also supported Armstrong's March 8 representation to the trial judge that counsel could set aside their personal hostilities and work together for the good of their client. *See* ROA 369.

Finally, even if the trial court here had been justified in taking *some* action to address the alleged defense team dysfunction, the remedy it chose was far broader than necessary. As the trial court framed it, the pivotal question was "whether or not ... the issues that have developed between" Axelrod and Armstrong were "jeopardiz[ing]" Cottrell's defense. ROA 366. Assuming they were – as the trial judge appeared to do – that problem could have been solved simply by removing *one* member of the team. Cottrell himself requested exactly that in the "*Pro Se* Motion to Maintain Lead Counsel in Death Penalty Case" he submitted to the South Carolina Supreme Court, ROA 391, and replacement counsel later reiterated it to the trial court, ROA559. Had either court granted that entirely reasonable – and effective – request, the counsel of choice violation in this case could have been mitigated or avoided, and Cottrell could have proceeded to his capital trial confident that he was being "defended by the counsel he believes to be best." *Gonzalez-Lopez*, 548 U.S. at 146.

CONCLUSION

WHEREFORE, for the foregoing reasons, this Court should grant certiorari.

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