No. 17-9449

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2017

LUZENSKI ALLEN COTTRELL,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF IN OPPOSITION

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General
*Counsel of Record

Office of the Attorney General
State of South Carolina
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

CAPITAL CASE

PETITIONER'S QUESTION PRESENTED

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?

(Petition, i).

RESPONDENT'S RESTATEMENT OF QUESTION PRESENTED

Whether the Supreme Court of South Carolina erred in affirming the trial judge's decision to remove appointed counsel for an indigent capital defendant when counsel confirmed each made, and stood by, allegations of serious ethical misconduct against the other to the extent that the trial judge had a duty to report to disciplinary counsel, and also admitted strained interaction negatively affecting preparation of the defense?

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OPINION BELOW

The opinion challenged is a published opinion by the Supreme Court of South Carolina after direct appeal review of a capital case, *State v. Cottrell*, 421 S.C. 622, 809 S.E.2d 423 (2017). Petitioner has included a copy as "Appendix A" to the petition.[1]

JURISDICTION

The Supreme Court of South Carolina decided the direct appeal on December 20, 2017. Petitioner filed a timely petition for rehearing that was denied on February 16, 2018. A petition to this Court had to be filed on or before May 17,

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[1] On February 16, 2018, after conclusion of the direct appeal, the Supreme Court of South Carolina issued the remittitur along with a notice of execution. A stay of execution was entered by the Supreme Court of South Carolina on March 7, 2018 for Petitioner to pursue this action.

2018. On April 17, 2018, Petitioner sought and received one extension from the Chief Justice allowing a petition to be filed on or before June 18, 2018. The Court's docket reflects the petition was filed on June 15, 2018. Thus, the petition is timely filed according to the Court's records, and this Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner submits the Sixth and Fourteenth Amendments of the United States Constitution are involved to the extent they secure the right to counsel in state criminal proceedings. (Petition, p. 2).

STATEMENT OF THE CASE

I. General Procedural History.

The Supreme Court of South Carolina succinctly stated the basis for the convictions and sentence at issue: "Appellant Luzenski Allen Cottrell was convicted and sentenced to death by an Horry County jury for the 2002 murder of Myrtle Beach police officer Joe McGarry." *Cottrell,* 809 S.E.2d at 427. The Court also noted Petitioner was previously tried for Officer's McGarry's murder in 2005, but that it had reversed the murder conviction on direct appeal "finding the trial court erred in refusing to give the jury an instruction on voluntary manslaughter in addition to murder. *State v. Cottrell,* 376 S.C. 260, 265, 657 S.E.2d 451, 454 (2008) (hereinafter referred to as *Cottrell I*)." *Id.* Petitioner's convictions for assault with intent to kill, resisting arrest, and grand larceny from the 2005 trial were left undisturbed, and were not a part of the retrial. *Cottrell,* 809 S.E.2d at 428. Upon review of

Petitioner's five (5) issues presented in his appeal from the retrial – "all of which involve[d] rulings largely addressed to the trial judge's discretion," *id.* at 427 – the Supreme Court of South Carolina concluded Petitioner failed to show an abuse of discretion, and affirmed the conviction and sentence.

II. General Facts of the Crime.

> Shortly after midnight on December 29, 2002, McGarry and fellow police officer Mike Guthinger entered a Dunkin Donuts in the city of Myrtle Beach. Both officers were in uniform and on duty, completing a traffic stop a short time earlier before deciding to get coffee. Upon entering Dunkin Donuts, McGarry immediately recognized Cottrell, who was ordering coffee at the register with two companions, Diane Lawson and Fred Halcomb. McGarry was familiar with Cottrell, having had several previous encounters with him, including arresting Cottrell for possession with intent to distribute marijuana earlier that year. More significantly, Lt. Amy Prock of the Myrtle Beach Police Department had recently notified McGarry that Cottrell had been identified as a possible suspect [FN1], in the shooting death of Rick Hartman, whose body had been found in a rural part of Horry County roughly a month earlier.
>
> Upon recognizing Cottrell, McGarry informed Guthinger that Cottrell was identified as a suspect in a shooting and that he was possibly carrying a gun. Rather than proceed in line to get coffee, McGarry and Guthinger exited the Dunkin Donuts and approached Cottrell on the sidewalk as he stepped out the door. McGarry asked Cottrell whether he remembered him, and then inquired as to whether he had taken care of the previous charges for which McGarry had arrested him. Cottrell indicated they were all taken care of. At that point, McGarry asked Cottrell for his identification and informed him he was going to run an NCIC check to see if Cottrell had any outstanding warrants.
>
> While waiting for a response from the dispatcher after calling in Cottrell's information, McGarry indicated to

Cottrell that he was going to perform a pat-down for weapons. Cottrell told McGarry "no" before turning and walking away toward another vehicle driven by Donnie Morgan, who was part of Cottrell's group but unknown to the officers at the time. Cottrell's right hand was somewhere near the front of his waistband as he turned and walked away. [FN2] McGarry then immediately began yelling for Cottrell to stop and show his hands. When Cottrell did not comply, McGarry unholstered his weapon and again commanded Cottrell to show his hands. With Cottrell's back still turned to him, McGarry reholstered his weapon and rushed towards Cottrell from behind, struggling to grab Cottrell's right hand which was near the front of his waistband, while McGarry's left hand was somewhere on Cottrell's upper back or shoulder, attempting to gain control of him.

The pair stumbled and separated as they slid toward the rear of the Morgan vehicle. As they regained their balance and squared up, Cottrell raised a .45 caliber handgun and fired a shot, striking McGarry in the face from eight to twelve inches away. The shot incapacitated McGarry, who fell backwards and struck his head on the pavement. [FN3]

Immediately upon seeing Cottrell shoot McGarry, Guthinger drew his weapon and fired several shots at Cottrell, striking him in the leg as Cottrell sought cover behind Morgan's car. [FN4] Guthinger and Cottrell continued to exchange gunfire, and numerous vehicles and nearby buildings were struck by bullets. At some point during the shootout, Cottrell told Guthinger he was surrendering, prompting Guthinger to leave his protected position to place him under arrest. However, as he approached, Cottrell reloaded his firearm and resumed shooting at Guthinger, who retreated to cover and called for backup.

Cottrell fled the scene and responding officers engaged in a high speed chase through Myrtle Beach until his getaway vehicle was brought to a halt using stop sticks to disable the tires, and he was placed under arrest. Police recovered the .45 caliber weapon that was forensically matched to the bullet which killed McGarry, along with

another loaded .357 revolver in the backseat. Officers attempted to perform CPR on McGarry, but he passed away in the Dunkin Donuts parking lot.

[FN1] Halcomb was also identified as a suspect in Hartman's death, but he was not immediately recognizable to the officers.

[FN2] Cottrell was wearing an oversized, baggy jersey, which Guthinger testified made it impossible for him to see whether he had a concealed handgun underneath, though he also stated that such oversized clothing was often worn for the purposes of concealing illegal weapons. Though there was no eye witness testimony to confirm it, the State's theory was that at some point while waiting for the NCIC to come back, McGarry caught a glimpse or saw the imprint of a concealed handgun on Cottrell's person, thereby causing McGarry's rapid change in demeanor and his instructions to Cottrell to keep his hands visible.

[FN3] Guthinger testified he witnessed Cottrell raise his gun and shoot McGarry, and that the sound of the first shot was simultaneous with the muzzle blast he saw from the gun's muzzle. Guthinger then heard a second shot but did not see a muzzle flash. Experts confirmed that McGarry's weapon fired a shot, and Lawson, who witnessed the events from the passenger seat in Halcomb's vehicle, testified that McGarry's weapon discharged while he was falling backwards after being shot by Cottrell.

[FN4] There was some dispute as to when Cottrell was shot. The defense produced an expert who testified that Cottrell was shot from the front, attempting to convince the jury that McGarry fired the first shot and struck Cottrell. Guthinger testified that he shot Cottrell, and that Cottrell was moving without any signs of injury immediately after shooting McGarry, and only after Guthinger fired at him did Cottrell begin hopping or limping on one leg. In a statement to police following the shooting, Cottrell stated he believed it was Guthinger who

> shot him, not McGarry. Lawson also confirmed that it was Cottrell who fired the first shot, while McGarry then fired as he was falling to the ground.

Cottrell, 809 S.E.2d at 427–28.

III. Relevant Procedural History for the Question Presented.

The Supreme Court of South Carolina opinion also set out these particular facts in regard to Petitioner's claim the trial judge erred in removing his first appointed attorneys:

> Weeks prior to the scheduled start of Cottrell's second trial in March 2012, the solicitors representing the State had separate conversations with Cottrell's appointed attorneys, at which time each accused co-counsel of misconduct and questioned their ability to adequately represent Cottrell in light of their difficulty working together. The solicitors made the trial judge aware of these allegations, and he conducted discussions in chambers with the appointed attorneys, who both confirmed they had indeed made the allegations brought to light by the State. Both attorneys also indicated they felt their inability to work together jeopardized Cottrell's defense.
>
> In a pre-trial hearing, the trial judge expressed his concerns over the allegations made by Cottrell's attorneys, questioning whether it was possible for them to effectively represent Cottrell. Cottrell's attorneys stated they could put their differences aside and work together so the case could proceed, but acknowledged they would defer to the trial judge's decision. One of the attorneys admitted that the allegations were probably sufficient to solidify post-conviction relief if the case went forward. The trial judge then gave Cottrell an opportunity to discuss the matter with his attorneys. After their discussion, Cottrell reiterated he felt confident in his attorneys' ability to represent him, but that he would defer to the trial judge's decision. Ultimately, due to his concerns for Cottrell's representation and the ability of the attorneys to overcome their problems just two weeks before trial,

> the trial judge decided to relieve both attorneys. After appointing new defense counsel, [FN5] the trial judge afforded Cottrell more than two years before rescheduling the trial so that his new attorneys would have adequate time to prepare.
>
> ———————
>
> [FN5] There is no dispute over replacement counsel's qualifications to represent Cottrell.

Cottrell, 809 S.E.2d at 428–29.

REASONS WHY CERTIORARI SHOULD BE DENIED

Petitioner requests "error" correction and an advisory opinion in the form of "an authoritative statement by this Court" to guide state courts in application of a formula to individual factual situations where appointed counsel may need to be relieved and new counsel appointed. His problem is two-fold. First, if the Court should wish to grant a fact-intensive review of the rare situation evident in the record, there is no error to correct. The trial judge, faced with admitted accusations by both defense attorneys of unethical conduct sufficient to prompt a duty to report to disciplinary counsel, see Petition Appendix B, p. 12, and admission by both defense attorneys that the tension among the attorneys had actually been to "the detriment of [the] defense," see Petition Appendix B, p. 7, removed counsel and appointed new qualified counsel to represent Petitioner. The judge was well within his discretion. The action was reasonable and warranted under the facts of this case. Second, Petitioner has failed to suggest any formula for such a fact-specific inquiry, and none is readily apparent. Further, the fact pattern in this case does not lend itself to exploring any subtleties in application of some yet undefined

formula. The direct appeal opinion reflects no dissent from the five-member state supreme court reviewing the trial judge's action, and even the concurring opinion that challenged the disposition method, did not challenge the correctness of the disposition under the rare fact pattern presented:

> In a written order, the trial court stated first chair "made serious allegations of dishonesty and unethical conduct against her co-counsel," and second chair "challenged [first chair's] competence, work ethic, and personal life." The court stated, "Each acknowledged having made the statements against co-counsel and that they believed the statements to be true."
>
> In conclusion, the trial court should have made specific findings on the record, and given that it did not do so, this Court should remand with a requirement that those findings be made now. However, I acknowledge the trial court was in a very difficult position. In ten years as a trial judge in which I presided over hundreds of criminal trials and numerous capital cases, I never faced an "extreme situation" like this. I am not sure how I would have handled it if I had. Reading this record convinces me that a dilemma of this magnitude will almost never arise. While I steadfastly disagree with the majority's characterization of the trial court's power to resolve this problem as one of "wide latitude" or "considerable discretion," I do believe that on these unique facts the failure of the trial court to make specific findings that would form the basis for a legal disqualification does not warrant a new trial.

Cottrell, 809 S.E.2d at 439–40 (Few, J., concurring).

Indeed, Petitioner did not even challenge the disposition of this matter on appeal in his petition for rehearing.[2] He made no argument challenging application

[2] Petitioner raised two issues in his petition for rehearing: one challenging the disposition of a *voir dire* issue; and one challenging disposition of an issue contesting the exclusion of a witness. (Jan. 4, 2018 Petition for Rehearing, pp. 1-4).

of the law, or a misunderstanding regarding the facts in regard to the state supreme court opinion. *See generally* Rule 221 (a), *South Carolina Appellate Court Rules* ("A petition … shall state with particularity the points supposed to have been overlooked or misapprehend by the court.").

The record supports the trial judge committed no error in these unique circumstances, and the Supreme Court of South Carolina reasonably and logically affirmed without offense to this Court's precedent. Petitioner fails to present a compelling case for review.

I.

> The Supreme Court of South Carolina did not err in affirming the trial court's ruling, under the unique circumstances in this case, to appoint new, qualified counsel to ensure a fair trial for both the indigent capital defendant and the state.

Petitioner's claim of unwarranted interference with the attorney-client relationship lacks merit factually and legally. Rather than supporting the state supreme court "exceeded the boundaries set by this Court's cases" on removal, (see Petition, p. 11), the state court's opinion reflects it considered and was guided by this Court's precedent. In particular, the state court addressed, and rejected, Petitioner's argument on direct appeal that "the trial judge's removal of his counsel [was] arbitrary and unsupported by any basis in the record," relying on *United States v. Gonzalez–Lopez,* 548 U.S. 140, 150 (2006). *Cottrell,* 809 S.E.2d at 430. The largest point of distinction was readily apparent – this Court in *Gonzalez-Lopez* was not considering whether a discretionary ruling was erroneous, thus there was no reasoning on application of discretion which would apply. *Id.* (citing *Gonzalez-*

Lopez, 548 U.S. at 152). However, the Supreme Court of South Carolina also noted this Court "reiterated the wide latitude that must be afforded to trial courts in balancing the right to counsel choice with the needs of fairness, and its '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.'" *Id.* (quoting *Gonzalez-Lopez*, 548 U.S. at 152).

Petitioner's claim fails to account for the trial court's, and the appellate court's, consideration of the fairness in the proceedings *for all parties*. The judicial system effects balance in the rights of all parties – it is not solely a source of defense rights which a defendant may opt to waive or impose at his discretion. *See Stein v. New York,* 346 U.S. 156, 197 (1953), *overruled on other grounds in Jackson v. Denno,* 378 U.S. 368 (1964) ("The people of the State are also entitled to due process of law."). *See also Payne v. Tennessee,* 501 U.S. 808, 827 (1991) ("'[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.'") (quoting *Snyder v. Mass.,* 291 U.S. 97, 122 (1934)). While true there is not complete balance or wholly reciprocal rights in all Constitutional measures, it should be without question that the goal remains the same – a fair trial. The trial judge in the instant case struck a balance in favor of protecting the integrity of the proceedings, which, in turn fully protected Petitioner's right to counsel and his right to a fair trial. Petitioner's argument fails to take into account the ethical assertions – confirmed separately to the trial judge – which leads to a much greater concern than ordinary

reversal for a bad choice during representation. This was very much a part of the South Carolina Supreme Court's ruling:

> Given the trial judge's discretionary authority and *his duty to ensure the integrity of the judicial process* ***and*** *safeguard Cottrell's right to effective counsel*, we find the trial judge did not abuse his discretion in removing Cottrell's attorneys and appointing new counsel.

Cottrell, 809 S.E.2d at 430 (emphasis added).

Moreover, contrary to Petitioner's suggestion, there was not a complete absence of fact finding or investigation as to the basis for the disqualification. The Supreme Court of South Carolina acknowledged its precedent that prefers fuller factual development on claims removal is necessary,[3] but resolved in this case:

> …these concerns are mitigated because in addition to the *in camera* discussions, the trial judge did in fact hold a hearing to allow Cottrell and his attorneys to be heard on the matter. We acknowledge it is somewhat problematic that the record does not indicate with specificity what the allegations of misconduct and disagreement actually entail, but the attorneys' confirmation that the accusations were made and the absence of any rebuttal weighs in favor of affirming the trial judge's decision. Moreover, once 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

[3] The Supreme Court of South Carolina made referenced to its prior case of *State v. Sanders*, and the direction: "As a procedural safeguard, an evidentiary hearing is appropriate to determine whether there is evidence to support counsel's removal." *State v. Sanders,* 341 S.C. 386, 390–91, 534 S.E.2d 696, 698 (2000).

> integrity of the verdict is in doubt due to conduct falling below the accepted standards of the legal profession.
>
> Based on the above analysis, we find the trial judge acted within the limits of his discretionary powers and did not violate Cottrel's Sixth Amendment right to counsel by removing his appointed attorneys and replacing them with new counsel. Had the attorneys denied the allegations or objected to the trial judge's remedy of removal, more complete findings of fact may have been appropriate, but the limited findings in the record are bolstered by the attorneys' acquiescence to the trial judge's ruling. Though deference is afforded to a defendant's attorney-client relationship once established, that relationship is limited by a trial judge's obligation to safeguard the integrity of the judicial process, as the trial judge did here. Thus, we find no error in the trial judge's removal and replacement of Cottrell's appointed attorneys.

Cottrell, 809 S.E.2d at 431.

The facts of record well-support these critical findings.

> a. The fact pattern in this case shows allegations of unethical behavior so extreme as to have obligated the trial judge to seek disciplinary counsel review of former appointed counsel's actions, and supported removal to ensure integrity in the proceedings and a fair trial.

Approximately three (3) weeks before the scheduled capital case re-trial was to occur, the trial judge, Judge Hyman, was informed Petitioner's court-appointed trial counsel, Lisa Kimbrough, Esq., (1st chair) and Stuart Axelrod, Esq., (2nd chair), had made serious accusations of unethical and unprofessional conduct against each other. Solicitor Greg Hembree and then Deputy Solicitor Jimmy Richardson both provided memoranda regarding the allegations. The memorandum from the deputy solicitor Richardson reflected:

> Talked with Stuart [Axelrod] for a few minutes before our status conference. He repeated his dissatisfaction with his co-counsel Lisa Armstrong. He repeated that Lisa was lazy, not easily motivated and drank too much. Stuart said that he had to take the lead on getting started for this trial because Lisa would never request discovery, look into getting experts, and investigate the details of the shooting or possibilities of misconduct by the MBPD.
>
> Stuart also said that he decided to storm ahead and take this case on himself. He realized he was second chair but that he was going to do the work because Armstrong was either incapable or too lazy to start.
>
> I do not remember the first date that Stuart mentioned his problems with Armstrong to me but I know he has expressed concerns over her abilities more than a few times.

(Petition Appendix B, Court Exhibit 1. R. p. 378).[4]

The memorandum of the solicitor reflected similar concerns:

> … Lisa offered how sorry she was that my office had to work with her co-counsel, Stuart Axelrod, on a regular basis. I agreed with her that he was very difficult to work with and that his clients frequently received stiffer prison sentences due to his advice and approach.
>
> Lisa then went into a rather lengthy discussion that in her career practicing law she had never worked with any lawyer more dishonest or unethical than Mr. Axelrod. She went on to say that they were not working together at all and that she could not wait to get this case concluded just to get away from him. From her demeanor it was clear that she strongly disliked her co-counsel.
>
> Ms. Armstrong also stated that Mr. Axelrod was fixated on the wrong strategy for this type of case and that he wouldn't listen to her advice regarding guilt phase

[4] This "storm ahead and take the case" assertion appears supported by the later *pro se* motion to keep Mr. Axelrod on the case, as Petitioner repeatedly refers to him as lead counsel. (See Appendix C).

> strategy. I agreed with her that what I perceived his strategy was [was] not the strategy I would use if I were defending the case. She never specifically revealed any strategy and I made my judgment based on what Mr. Axelrod has revealed to others along with what I anticipate his strategy to be based on the discovery he has requested.
>
> After that conversation and knowing what Mr. Axelrod said to Deputy Solicitor Richardson about Ms. Armstrong, I became very concerned about the defendant's ability to be effectively represented by this defense team.

(Petition Appendix B, Court Exhibit 2, R. p. 379).

Further, as the Supreme Court of South Carolina noted, Judge Hyman met with counsel to explore the allegations. *Cottrell,* 809 S.E.2d at 431. On March 5, 2012, Judge Hyman held a status hearing. He met with each trial counsel separately in chambers to discuss the matter. Judge Hyman convened another hearing on March 8, 2012. Judge Hyman confirmed he had met in chambers separately with both capital defense counsel after the March 5th hearing. (Petition Appendix B, R. pp. 365-66). Judge Hyman also noted that he was satisfied from his discussions with counsel that the memoranda provided to him by Solicitor Hembree and Deputy Solicitor Richardson were correct – defense counsel were each alleging serious misconduct against each other. Both counsel confirmed privately to Judge Hyman they had made the allegations against each other, and both counsel believed the allegations were true. (Petition Appendix B, R. p. 366). Both counsel told him in chambers on March 5th that in their opinion Petitioner's defense was being jeopardized. (Petition Appendix B, R. p. 366). Mr. Axelrod stated, based on the allegations made, the case if it went forward would probably be reversed on post-

conviction relief (PCR). (Petition Appendix B, R. p. 370). Petitioner stated he was not aware of the allegations being made by defense counsel against each other. After meeting with defense counsel privately, Petitioner stated he wanted Mr. Axelrod to stay on the case. (Petition Appendix B, R. pp. 372-73).

At the conclusion of the hearing, Judge Hyman ruled reluctantly that he had no choice but to relieve both counsel, continue the case indefinitely, and appoint new qualified counsel. Judge Hyman noted he was doing so in order to protect Petitioner's right to the effective assistance of counsel. (Petition Appendix B, R. pp. 373-75). He issued a written Order on March 13, 2012 confirming his ruling. He noted the "serious allegations of dishonesty and unethical conduct" and "concerns about counsel's inability to coordinate trial strategy," and concluded:

> I have carefully explained my concerns to the defendant. He stated that he thought his attorneys could resolve their problems and continue with his defense. However, my duty at this point is to protect this defendant by taking the course most likely to assure he will be effectively represented and his constitutional rights will be preserved. I am not unaware of the delay and expense to be caused by my decision. Nevertheless, I must take the extreme measure of relieving counsel and appoint new counsel.

(Petition Appendix B, R. p. 380).

As the Supreme Court of South Carolina resolved, the trial judge was faced with a rare set of facts and exercised his discretion to balance Petitioner's right to counsel within the actions necessary to preserve the integrity of the capital trial. There was no abuse of discretion in these discrete circumstances. *See United States v. Howard,* 115 F.3d 1151, 1155 (4th Cir. 1997) ("a trial court 'must have sufficiently

broad discretion to rule without fear that it is setting itself up for reversal on appeal' if it disqualifies a defendant's chosen lawyer.") (quoting *United States v. Williams,* 81 F.3d 1321, 1324 (4th Cir.1996)).

b. Petitioner's argument critically omits consideration of the necessity of a fair trial for all parties and the trial court's duty to protect the integrity of the proceedings.

"[W]hile the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat v. United States,* 486 U.S. 153, 159 (1988). *See also Morris v. Slappy,* 461 U.S. 1, 14 (1983) (the Sixth Amendment secures the right to counsel, but does not guarantee a criminal defendant a "meaningful attorney-client relationship" with counsel) (quotation marks in original). "[T]he purpose of providing assistance of counsel 'is simply to ensure that criminal defendants receive a fair trial ....'" *Wheat v. United States,* 486 U.S. 153, 159 (1988) (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)).

In *Wheat*, this Court found a limited right to choice of counsel, which "is circumscribed in several important respects." *Id.* For example, a criminal defendant does not have the right to insist upon representation by an attorney who has an actual conflict of interest. *Id.* at 160. Further, this Court found while "a presumption in favor of petitioner's counsel of choice" may exist, "that presumption may be overcome…." *Id.* at 164. Upon information of an issue with counsel's

representation, the trial court should make "evaluation of the facts and circumstances of each case" and the determination of whether removal is warranted "must be left primarily to the informed judgment of the trial court." *Id.*

In *Gonzalez-Lopez,* this Court had the opportunity to again affirm what has long been determined; that an indigent defendant does not share a right to choice of counsel with those defendants who are not indigent. The Court also "recognized a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness and against the demands of its calendar." 548 U.S. at 152 (citing *Wheat,* 486 U.S. at 163-164 and *Morris v. Slappy,* 461 U.S. at 11-12). "Ethical considerations and rules of court prevent counsel from making dilatory motions, adducing inadmissible or perjured evidence, or advancing frivolous or improper arguments" though vigorous representation at trial is always required. *McCoy v. Court of Appeals of Wisconsin, Dist. 1,* 486 U.S. 429, 435, 108 S. Ct. 1895 (1988). Waiver of a potential conflict cannot always cure the danger in keeping counsel on the case. *See, for example, United States v. Orgad,* 132 F. Supp. 2d 107, 120–21 (E.D.N.Y. 2001) ("desire to waive his right to conflict-free counsel is immaterial, as the number and depth of the conflicts in this case lead me to conclude that the representation of Orgad by Richards at trial would pose too great a threat to the Court's institutional interest in the integrity of the trial itself.") (citing *Wheat,* 486 U.S. at 162–63).

"Where this Sixth Amendment right is invoked, the court must balance the defendant's right to his own freely chosen counsel against the need to maintain the

highest ethical standards of professional responsibility." *State v. Sanders,* 341 S.C. 386, 390, 534 S.E.2d 696, 697–98 (2000) (citing *United States v. Cunningham,* 672 F.2d 1064 (2nd Cir. 1982)). "Violation of accepted rules of professional conduct which result in the 'erosion of public confidence in the integrity of the bar and of the legal system' also may justify disqualification of defendant's chosen counsel." *United States v. Collins,* 920 F.2d 619, 627 (10th Cir. 1990).

South Carolina precedent has long recognized "where an accused's representation is patently inadequate and incompetent, the trial judge is under a duty to intervene to the extent of insuring that the rights of the accused are afforded adequate protection." *State v. Lewis,* 255 S.C. 466, 472, 179 S.E.2d 616, 619 (1971). But South Carolina is readily cognizant of the restraint of that duty: "such obligation imposes upon the court no duty to intervene merely because it feels that counsel is not experienced or skillful" lest there be unwarranted interference with the exercise of a defendant's rights. *Id.*

Judge Hyman did not abuse his discretion in addressing this issue from the perspective of fairness and integrity of the trial and the protection of the defendant's rights. The facts presented a dilemma. Both appointed attorneys had accused each other of unethical or unprofessional conduct in the representation. Both separately informed Judge Hyman in chambers that they had in fact made the allegations and believed them to be true. Both informed Judge Hyman, at that time, they believed the actions of their co-counsel and the problems they had with each other had prejudiced Petitioner's defense. Judge Hyman did not want to

remove counsel or grant a continuance; however, he felt he had no alternative given that approximately three (3) weeks before the capital trial Petitioner's two (2) trial attorneys were accusing each other of unethical or unprofessional conduct; their relationship had jeopardized the defense; and, Judge Hyman was obligated to report the allegations against each attorney to the appropriate professional governing or investigating body. His ruling allowed for the protection of the right to counsel and integrity of the proceedings. Again, there is no error to correct.

CONCLUSION

For all the foregoing reasons, the petition should be denied.

Respectfully submitted,

MELODY J. BROWN
Senior Assistant Deputy Attorney General
Office of the Attorney General
State of South Carolina
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

July 19, 2018.
Columbia, South Carolina.

ATTORNEY FOR RESPONDENT