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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas
Debra R. McCaslin, Circuit Court Judge

Appellate Case No. 2021-001426

K.C. Langford Petitioner,

v.

State of South Carolina, Respondent.

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

Did the PCR court err when it concluded that K.C. Langford's appellate counsel during the appeal of the denial of his first PCR action did not have a conflict of interest because of the attorney's representation of his co-defendant, Bryan Phillips, during the direct appeal of the underlying conviction?

INTRODUCTION TO PETITION

In South Carolina, an applicant for post-conviction relief ("PCR") has a right to counsel. Rule 71.1, SCRPC; *Odom v. State*, 337 S.C. 256, 262, 523 S.E.2d 753, 756 (1999) ("Odom never received a complete "bite at the apple" because both of his PCR applications were summarily dismissed before he was appointed legal counsel."). "An applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR." *Odom*, 337 S.C. at 262, 523 S.E.2d at 756 (citing *Austin v. State*, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991) and Rule 71.1(g), SCRPC). To ensure quality representation for everyone, our General Assembly created the statewide indigent defense system, S.C. Code Ann. § 17-3-5, *et. seq.*, which includes the Division of Appellate Defense, S.C. Code Ann. § 17-3-360.

This Court recognizes "the Sixth Amendment guarantee of effective assistance of counsel is a bedrock principle in our justice system." *Mangal v. State*, 421 S.C. 85, 99, 805 S.E.2d 568, 575 (2017) (internal quotations omitted). In order to balance the right to effective representation with the practical realities of the indigent defense system, this Court created Rule 402, SCACR, Rule 1.10(e), RPC to address representation of co-defendants by programs serving indigent clients. The Division of Appellate Defense never adopted procedures to implement Rule 1.10(e), which resulted in the same Appellate Defender representing K.C. Langford and his co-defendant, Bryan Phillips, in different stages of the same matter. This Court's intervention is needed to correct the injustice that

resulted to Mr. Langford and to provide guidance to the indigent defense community regarding their ethical obligation to co-defendants.

STATEMENT OF CASE

The State of South Carolina charged K.C. Langford with criminal conspiracy, first-degree burglary, armed robbery, and kidnapping for an incident occurring on August 14, 2008, involving the owners of a Chinese restaurant in Johnston, South Carolina. A. 581-88. On May 17, 2020, the Honorable William P. Keesley, Presiding Judge for the Court of General Sessions for Edgefield County, convened a pre-trial hearing. A. 1-16. From September 7-9, 2020, the State tried Mr. Langford and co-defendant Bryan Phillips before Judge Keesley and a jury. A. 17-567.¹ Ervin J. Maye of the Eleventh Circuit Solicitor's Office represented the State. Mark R. Calhoun represented Mr. Langford. Randall D. Williams represented Mr. Phillips. On September 9, 2010, the jurors found Mr. Langford and Mr. Phillips guilty as charged. A. 573-76. For both defendants, Judge Keesley imposed concurrent sentences of five years for criminal conspiracy, twenty years for first-degree burglary, twenty years for armed robbery, and twenty years for kidnapping. A. 565, 577-80.

Mr. Langford appealed the convictions and sentences to the Court of Appeals of South Carolina. A. 592. Elizabeth A. Franklin-Best of the Appellate Division of the South Carolina Commission on Indigent Defense represented Mr. Langford. A. 630-45. David Spencer represented the State. A. 596-646. After Mr. Langford filed his initial brief of

¹ The cover page of the trial transcript (A. 17) reflects the trial occurred on January 23, 2011; however, this date is an error.

appellant, the South Carolina Public Defender Association petitioned for leave to file an *amicus curie* brief, which then Chief Judge John Cannon Few granted.

Pursuant to Rule 204(b), SCACR, Mr. Langford petitioned the Supreme Court of South Carolina to certify his case from the Court of Appeals. Bryan Phillips, who was represented by LaNelle Cantey DuRant, of the of the Appellate Division of the South Carolina Commission on Indigent Defense, petitioned the Supreme Court of South Carolina to certify his appeal form the Court of Appeals, moved for his appeal to be consolidated with Mr. Langford's appeal, and requested the *amicus* brief of the Public Defender Association be incorporated into his appeal. On November 3, 2011, the Supreme Court of South Carolina granted these motions. On February 6, 2012, the Supreme Court of South Carolina expedited Mr. Langford's appeal, set a briefing schedule, and scheduled oral arguments for April 18, 2012.

On March 21, 2012, Mr. Langford filed the Final Brief of Appellant, asserting a single issue:

Did the trial court judge err when he did not dismiss Langford's case in May 2010 when Langford motioned for dismissal for violating his right to a speedy trial, and when the state sought a continuance of that trial so it could further pressure a formally cooperating co-defendant, who elected to assert his right to remain silent under the Fifth Amendment of the United States Constitution, into testifying for the state at the subsequent trial.²

² This Court stated the issues on appeal as follows:

- (i) Is section 1-7-330 constitutional?
- (ii) Did Langford suffer any prejudice as a result of the solicitor controlling when his case would be called for trial?

State v. Langford, 400 S.C. 421, 432, 735 S.E.2d 471, 477 (2012); *see also* Slip Opinion, A. 712.

A. 630-45. On March 22, 2012, the State filed the Final Brief of Respondent. A. 596-629. Also on March 22, 2012, the Public Defender Association filed its *amicus curiae* brief. A. 646-84. On April 17, 2012, the South Carolina Solicitor's Association filed its *amicus curiae* brief. A. 685-707.

On April 18, 2012, this Court convened oral arguments in the consolidated appeals. On November 21, 2012, this Court declared unconstitutional S.C. Code § 1-7-330, which vested Solicitors with control of the General Sessions Court dockets, but held Mr. Langford did not suffer prejudice. *State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012); *see also* Slip Opinion, A. 708-29. At the same time, the Supreme Court of South Carolina affirmed Mr. Phillips' convictions and sentences in an unpublished opinion. *State v. Phillips*, No. 2010-173307, 2012 WL 10907975 (S.C. Nov. 21, 2012). On December 20, 2012, this Court denied cross-petitions for rehearing (A. 730-31) and issued the remittitur (A. 732).

On March 18, 2013, Mr. Langford filed a petition for a writ of certiorari in the Supreme Court of the United States, raising the following issue:

Did the South Carolina Supreme Court err when it held that Langford, an indigent defendant who spent nearly 2 years in pre-trial detention, failed to establish he was prejudiced for purposes of analyzing his federal speedy trial right, even though Langford filed two pro se motions invoking his right to a speedy trial, and when the Solicitor, who controlled the docket system, simply did not call the case for trial because it was not prepared to go forward?

Ms. Franklin-Best represented Mr. Langford. On April 8, 2013, the Public Defender Association filed an *amicus curiae* brief. On May 31, 2013, the State filed its brief in opposition to the petition for a writ of certiorari. Salley W. Elliott represented the State. On October 7, 2013, the Supreme Court of the United States denied the petition for a writ of certiorari. *Langford v. South Carolina*, 571 U.S. 831 (2013).

On January 3, 2014, Mr. Langford filed an application for post-conviction relief (“PCR”) in the Court of Common Pleas for Edgefield County (A. 733-42) and supplemented it on January 13, 2017 (A. 743), raising the following grounds for relief:

10(a)(1)&11(a)(1) The Applicant was denied effective assistance of trial counsel by counsel’s failure to object to the composition of the jury.

10(a)(2)&11(a)(2) The Applicant was denied effective assistance of trial counsel by counsel failing to ask for a continuance to obtain a certified interpreter.

10(a)(3)&11(a)(3) The applicant was denied effective assistance of trial counsel by counsel allowing the State to do a proffer, with the state’s key witness (Alvin Phillips) on the witness stand, listening to the argument pertaining to the proffer.

10(a)(4)&11(a)(4) The Applicant was denied effective assistance of trial counsel by not securing the defense key witness (Joseph Patrick Stevens). Applicant was denied the right to confront his accuser.

10(a)(5)&11(a)(5) Trial counsel was ineffective for helping assist the state in laying the foundation for their case.

10(a)(6)&11(a)(6) The Applicant was denied effective assistance of trial counsel by counsel’s failure to object to Officer Roosevelt Young testifying to hearsay testimony.

10(a)(7)&11(a)(7) The Applicant was denied effective assistance of trial counsel by counsel asking co-defendant Alvin Phillips about the mandatory minimum of his charge.

10(a)(8)&11(a)(8) The Applicant was denied effective assistance of trial counsel by counsel failing to object to the kidnapping indictment.

10(a)(9)&11(a)(9) The Applicant was denied effective assistance of trial counsel by counsel arguing charges [Mr. Langford] was not on trial for.

10(a)(10)&11(a)(10) The Applicant was denied effective assistance of trial counsel by counsel commenting on applicant’s silence.

10(a)(11)&11(a)(11) The Applicant was denied effective Assistance of trial counsel by failing to object to the Solicitor commenting on Applicant’s silence.

10(a)(12)&11(a)(12) The Applicant was denied effect[ive] assistance of trial counsel by [counsel] failing to object to Police Officer Roosevelt Young vouching for Joseph Stevens.

10(a)(13)&11(a)(13) The Applicant was denied effective assistance of trial counsel by counsel quoting *Bible* scripture during closing argument.

10(a)(14)&11(a)(14) Trial counsel was ineffective for failing to object to the Solicitor's vouching and bolstering for the credibility of numerous of its witnesses in closing argument.

10(a)(15)&11(a)(15) The Applicant was denied effective assistance of trial counsel by trial counsel failing to object to premature deliberations by the jury.

10(a)(16)&11(a)(16) The Applicant was denied effective assistance of appellate counsel for counsel failing to file a reply brief concerning inadmissible testimony presented at Applicant's trial.

10(a)(17)&11(a)(17) The Applicant was denied the right to effective assistance of trial counsel due to counsel's cumulative errors.

10(b)(1)&11(b)(1) Prosecution Misconduct: By the Solicitor denying that a deal exist[ed] between the [State and] Applicant's co-defendant (Alvin Phillips).

10(b)(2)&11(b)(2) Prosecution Misconduct: By using inflammatory and irrelevant testimony in closing argument.

Supplemental Ground: Applicant alleges that trial counsel failed to investigate two potential alibi witnesses, Veronica and Vanessa Phillips.

Langford v. State, Case No. 2014-CP-19-00002. On February 1, 2017, the Honorable Eugene C. Griffith, Jr., convened and evidentiary hearing. A. 751-885. Charles T. Brooks, III represented Mr. Langford. Johanna Valenzuela, of the South Carolina Attorney General's Office, represented the State. On June 15, 2017, Judge Griffith dismissed Mr. Langford's PCR application. A. 888-901.

Mr. Langford appealed the Supreme Court of South Carolina. A. 902. LaNelle Cantey DuRant of the Appellate Division of the South Carolina Commission on Indigent

Defense represented Mr. Langford. A. 919-32. Kelley Oppenheimer, of the South Carolina Attorney General's Office, represented the State. A. 933-52. On February 22, 2019, Ms. Durant filed Mr. Langford's petition for a writ of certiorari, raising a single issue:

Did the PCR court err by not finding trial counsel ineffective for failing to conduct a sufficient investigation into Petitioner Langford's case by not interviewing the two alibi witnesses, Veronica and Vanessa Phillips, who testified at the PCR hearing that Petitioner Langford was with them during the incident on August 14, 2008?

A. 921.

On July 9, 2018, the State filed a return. A. 933-52. On July 24, 2019, this Court transferred the appeal to the Court of Appeals of South Carolina, pursuant to Rule 243(1), SCACR. A. 953. On October 8, 2019, the Court of Appeals of South Carolina denied the petition. A. 954. The remittitur issued on October 23, 2019. A. 955.

Meanwhile, Bryan Phillips was challenging his convictions and sentences. *Phillips v. State*, Case No. 2013-CP-19-00386. On July 19, 2014, Mr. Phillips filed a PCR application in the Court of Common Pleas for Edgefield County, which he amended several times. On May 4, 2015, the State filed a return. On December 13, 2017, the Honorable J. Cordell Maddox, Jr. convened an evidentiary hearing. On May 25, 2018, Judge Maddox granted Mr. Phillips post-conviction relief on two issues. A. 1015-23. First, Judge Maddox held Mr. Phillips' trial counsel deficient for not adequately objecting to the trial judge improperly qualifying the State's Chinese interpreter and failing "to hire a defense Chinese interpreter [] when he knew that the government's interpreter would be uncertified and that the testimony of the Chinese nationals was critical to the case." A. 1019-20. Judge Maddox also found prejudice because a proper objection to the qualifications of the interpreter would have properly preserved that issue for appeal and "the government's Chinese

interpreter engaged in conversations in Chinese with the testifying Chinese nationals that were not restricted to the questions and answers,” reasoning “[a] defense Chinese interpreter would have ensured that the trial judge and all parties to the knew what the government’s Chinese interpreter said to the testifying Chinese nationals in these comments.” A. 1021. Second, Judge Maddox held Mr. Phillips’ trial counsel deficient for his questioning of Johnston Police Department Investigator Roosevelt Young about statements made to him by a non-testifying informant, Joseph Patrick Stevens, because the questioning of Investigator Young “succeeded only in providing an additional connection between Phillips and the alleged crime” when “[t]he government could not have used [Investigator] Young’s testimony about the statement of the informant.” A. 1020. Judge Maddox also found prejudice because Investigator Young testified the informant “was acting as a good citizen” and this testimony about the informant’s statement “figured prominently in the government closing argument.” A. 1022. On June 19, 2018, the State filed a Rule 59(e), SCRCR motion. On November 18, 2019, Judge Maddox denied the State’s motion. On April 3, 2020, the State appealed to this Court. *Phillips v. State*, Appellate Case No. 2020-000568. On October 20, 2020, the State’s petition filed a writ of certiorari. On March 5, 2021, Mr. Phillips filed a return. On March 12, 2021, the State replied. On March 29, 2021, this Court transferred the appeal to the Court of Appeals. At the time of this petition, the State’s appeal is still pending.

On April 6, 2020, Mr. Langford filed a petition for writ of habeas corpus in the United States District Court for the District of South Carolina. *Langford v. Stonebreaker*, C/A No. 9:20-cv-01298-DCC-MHC (ECF No. 1). On April 7, 2020, Mr. Langford moved to stay these proceedings pending exhaustion of state remedies because he planned to file

a successor PCR application. *Id.* at ECF No. 2. On December 15, 2020, the District Court granted this motion. *Id.* at ECF No. 35.

On April 14, 2020, Mr. Langford filed this successor PCR application in the Court of Common Pleas for Edgefield County. A. 956-1023. On April 22, 2020, he amended his PCR application. A. 1024-33. The amended action raised the following issues:

10(a) Mr. Langford was denied his right to the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984); *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018).

11(a) Trial counsel's performance was deficient and prejudicial for the following reasons:

(i) Trial counsel rendered deficient and prejudicial assistance of counsel by failing to obtain a certified Chinese interpreter.

(ii) Trial counsel rendered deficient and prejudicial assistance of counsel by failing to object to the testimony of Investigator Roosevelt Young, including testimony that constituted hearsay and violated the Confrontation Clause.

10(b) Mr. Langford was denied the right to effective assistance of appellate counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985); *Smith v. Robbins*, 528 U.S. 259 (2000); *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999); *Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609 (2002).

11(b) Appellate counsel's performance was deficient and prejudicial for the following reasons:

(i) Appellate counsel during the appeal of Mr. Langford's prior post-conviction relief case had a conflict of interest because of her representation of co-defendant Bryan Phillips during the direct appeal of his convictions and sentences. *State v. Phillips*, No. 2010-173307, 2012 WL 10907975 (S.C. Nov. 21, 2012). Counsel also had a conflict of interest because Mr. Langford's application for post-conviction relief alleged ineffective assistance of appellate counsel during the direct appeal of his convictions and sentences, when direct appeal counsel and post-conviction appellate counsel both worked for the South Carolina

Commission on Indigent Defense, Appellate Division, during their respective representations of Mr. Langford. *See The Spangenburg Group, South Carolina Commission on Indigent Defense: Appellate Division Review, Final Report*, February 14, 2008, pp. 35-36, 47 (Ex. 3).

(ii) Appellate counsel during the appeal of his prior post-conviction relief case abandoned issues that ultimately resulted in relief for co-defendant Bryan Phillips. *Bryan Phillips v. State*, Case No. 2013-CP-19-00386 (Ex. 1).

On July 23, 2020, the State filed a return and motion to dismiss. A. 1034-55. On September 4, 2020, the Honorable Walton H. McLeod, IV issued a conditional order of dismissal. A. 1056-77. On September 18, 2020, Mr. Langford objected to the conditional order of dismissal. A. 1078-95. On October 13, 2020, the State responded to Mr. Langford's objections. A. 1096-1107. By written order dated December 8, 2020, Judge McLeod assigned the Honorable Debra R. McCaslin jurisdiction "to hear and rule upon all pending motions and preside over future hearings until a final order is recorded in this case." A. 1118. On November 13, 2020, via WebEx, the PCR court convened a hearing on the Mr. Langford's objections to the conditional order of dismissal. By written order dated December 23, 2020, the PCR court vacated the conditional order of dismissal, denied the State's motion to dismiss, and allowed an evidentiary hearing on whether PCR appellate counsel had a conflict of interest. A. 1119-27. By written order dated January 29, 2021, the court denied the State's Rule 59(e), SCRCP motion. A. 1128-32.

On April 27, 2021, via WebEx, the PCR court convened an evidentiary hearing. A. 1133-98. Charles Grose represented Mr. Langford, who was present. Lillian L. Meadows, of the South Carolina Attorney General's Office, represented the State. Ms. DuRant and Mr. Langford testified. On July 22, 2021, via WebEx, the PCR court re-convened the

evidentiary hearing and received additional testimony from Ms. DuRant and Mr. Langford. A. 1200-11.

On August 27, 2022, the PCR court issued an order of dismissal. A. 1212-43. On September 20, 2021, Mr. Langford served his Rule 59(e), SCRCR motion and proffered the parties' proposed orders. A. 1244-1309. On October 1, 2021, the State filed a return to the Rule 59(e) motions. A. 1310-28. On November 8, 2021, the PCR court issued an amended order of dismissal. A.1329-62. This petition for a writ of certiorari follows.

STATEMENT OF FACTS

During most of the twelve and one-half years Ms. DuRant worked at the Division of Appellate Defense, the Chief Appellate Attorney assigned cases.³ The Chief Appellate Defender “never shared with anyone . . . how he assigned cases.” The agency “routinely represent[ed] co-defendants.” The Chief Appellate Defender assigned co-defendants to different attorneys. The agency did not have a policy of obtaining “written informed consent to represent co-defendants.” Appellate Defenders representing co-defendants on direct appeal discussed “cases and issues with each other.” The agency did not have a “formal procedure” to screen one attorney from another attorney’s work product of privileged communications. All attorneys shared the same file room, attorneys did not lock their individual offices, and attorneys were forbidden from shutting their office doors unless preparing for an oral argument. A. 1140-49, 1159.

When a former direct appeal client had a PCR appeal, the case would be assigned to a different attorney. If the prior attorney no longer worked for the agency, then the office

³ When Joseph L. Savitz, III was Chief Appellate Defender, cases were assigned based on a rotation. When Robert M. Dudek became Chief Appellate Defender, he assigned the cases. A. 1146-47.

policy was “there is no conflict.” If the former attorney still worked for the agency, then the attorney assigned to the PCR appeal would consult the Chief Attorney “to determine if there was a conflict.” When the Chief Attorney referred conflicts to the South Carolina Supreme Court, this Court was “very liberal” in appointing conflict counsel. If the Chief Attorney decided to keep the case inside the office, then PCR attorney could not discuss the case with direct appeal attorney. However, the agency did not have “any formal screening policies in place” other than the “honor system.” A. 1149-54.

Ms. DuRant represented Mr. Phillips during his direct appeal and had attorney-client communications with him. When Mr. Langford’s PCR appeal was assigned to her, Ms. DuRant recognized Mr. Langford as Ms. Phillips’ co-defendant. She did not consult the Chief Appellate Defender about the conflict. Ms. DuRant testified she discussed her prior representation of Mr. Phillips with Mr. Langford.⁴ She did not obtain written informed consent from Mr. Langford. A. 1154-59, 1180-81.

K.C. Langford testified that, if he had known about the conflict of interest, then he would have wanted an attorney who was independent and had not represented his co-defendant. A. 1182-83.

⁴ When the PCR Court reconvened the evidentiary hearing on July 22, 2021, Ms. DuRant identified a handwritten note from her file documenting a February 5, 2018 telephone call with Mr. Langford stating, in pertinent part, “He said he knew that I represented Bryan on his direct appeal, but he had no problem with that.” Ms. DuRant had no other independent recollection of that portion of the conversation. A. 1199, 1204-08. At the same hearing, Mr. Langford testified he has no recollection of that conversation. A. 1209. The record reflects Mr. Langford appealed the order dismissing his first PCR on June 20, 2017, and Ms. Durant filed the petition for writ of certiorari on February 22, 2018. A. 902, 931-33. Thus, 230 days transpired between the notice of appeal and the February 5th conversation, and only 17 days passed between the February 5th conversation and filing the petition for writ of certiorari.

STANDARD OF REVIEW

This Court’s “standard of review in PCR cases depends on the specific issue before” it. *Mangal v. State*, 421 S.C. 85, 91-92, 805 S.E.2d 568, 571 (2017). This Court will “defer to a PCR court’s findings of fact and will uphold them if there is any evidence in the record to support them.” *Id.* This Court will “not defer to a PCR court’s rulings on questions of law.” *Id.* “Questions of law are reviewed de novo, and [this Court] will reverse the PCR court’s decision when it is controlled by an error of law.” *Id.* “On review of a PCR court’s resolution of procedural questions arising under the Post-Conviction Procedure Act or the South Carolina Rules of Civil Procedure, [this Court] appl[ies] an abuse of discretion standard.” *Id.*

ARGUMENT

Did the PCR court err when it concluded that K.C. Langford’s appellate counsel during the appeal of the denial of his first PCR action did not have a conflict of interest because of the attorney’s representation of his co-defendant, Bryan Phillips, during the direct appeal of the underlying conviction?

The sole issue before this Court is whether Mr. DuRant had a conflict of interest when she represented Mr. Langford in the appeal of the order dismissing his PCR application. The following essential facts are beyond dispute:

1. Ms. Franklin-Best, of the Appellate Division of the South Carolina Commission of Indigent Defense, represented Mr. Langford during his direct appeal of his convictions and sentences (A. 1154);
2. Ms. DuRant, of the Appellate Division of the South Carolina Commission of Indigent Defense, represented Mr. Phillips during his direct appeal of his convictions and sentences (A. 1154);
3. Ms. DuRant represented Mr. Langford during the appeal of the order dismissing his PCR application (A. 1156, 1181);
4. Ms. DuRant did not brief all of the claims raised by Mr. Langford in his PCR application (*compare* A. 888-900 *with* 919-31); and

5. The Court of Common Pleas granted Mr. Phillips post-conviction relief on two issues that are identical to two of the claims raised in Mr. Langford's PCR application, neither of which were briefed by Ms. DuRant (*compare* A. 888-900 *with* A.1015-23); and
6. Ms. DuRant did not obtain informed consent, confirmed in writing, from Mr. Langford regarding her prior representation of Mr. Phillips and obtain his informed consent (A. 1154-59, 1181-82, 1206-08).

At first glance, this matter appears to be an issue of first impression, but this Court addressed an indistinguishable issue in *Carter v. State*, 293 S.C. 528, 362 S.E.2d 20 (1987). In 1982, a jury convicted Carter of murder, and the trial court sentenced him to life imprisonment. In 1984, Carter filed a PCR application. At the PCR hearing, Carter was represented by the same attorney who represented him at his jury trial. The PCR court denied relief. In 1986, Carter filed a second PCR application, which was dismissed as successive. Although noting "successive applications for post-conviction relief are viewed with disfavor," this Court held:

Absent a showing that the applicant was specifically advised of the hazards of being represented by trial counsel at the post-conviction hearing and that the applicant consented to such an arrangement, a successive post-conviction application, alleging ineffective assistance of trial counsel, should not be barred.

Id., 293 S.C. at 530, 362 S.E.2d at 21. A conflict of interest can arise from representing two clients in the same matter, absent informed consent confirmed in writing.⁵ Rule 402, SCACR, Rule 1.7, RPC; *see also Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008) (counsel's simultaneous representation of both defendant and her husband during guilty

⁵ Mr. Langford and Mr. Phillips had separate and independent counsel at their jury trial because of the conflict of interest for one lawyer representing both.

pleas which arose out of related offenses constituted a conflict of interest) *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018).

The Division of Appellant Defense had multiple conflicts of interest when it undertook representation of K.C. Langford during the appeal of his PCR case because of the agency's prior representation of him and Mr. Phillips. Ms. DuRant had a conflict of interest for based on her prior representation of Mr. Phillips and based on the agency's prior representation of Mr. Langford. The note documenting the February 5, 2018 telephone conversation does not constitute informed consent, confirmed in writing. Nothing contained in the note details what Mr. DuRant informed Mr. Langford regarding the hazards of representing a co-defendant in the same matter. This note, however, is evidence that Ms. DuRant was aware of the conflict of interest.

Rule 402, SCACR, Rule 1.10(e), RPC contemplated this situation, but the Division of Appellate Defense did not comply with the rule. Rule 1.10(e) provides:

A lawyer representing a client of a public defender office, legal services association, or similar program serving indigent clients shall not be disqualified under this Rule because of the program's representation of another client in the same or a substantially related matter if:

- (1) the lawyer is screened in a timely manner from access to confidential information relating to and from any participation in the representation of the other client; and
- (2) the lawyer retains authority over the objectives of the representation pursuant to Rule 5.4(c).

South Carolina Bar Ethics Advisory Opinion 09-02⁶ explains, "If the requirements of Rule 1.10(e), which are exceptions to Rule 1.10(a), are satisfied, the attorneys need not refer to Rule 1.7." And, "Provided that the appropriate screening and autonomy

⁶ Fond at <https://www.scbar.org/lawyers/legal-resources-info/ethics-advisory-opinions/eao/ethics-advisory-opinion-09-02/> (last viewed June 12, 2022).

requirements are met, the attorneys do not need the consent confirmed in writing required by Rule 1.7.” This Court finds and concludes the Appellate Division does not have procedures satisfying Rule 1.10(e)(1). Comment 9 to Rule 1.10 refers to Rule 1.0(n) for the screening procedures required by Rule 1.10(e)(1). Rule 1.0(n) states:

“Screened” denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

Ms. DuRant testified all the Appellate Defenders share the same file room, have access to the electronic files of the other attorneys, offices of individual appellate attorneys are not locked to prevent access by other appellate attorneys, and office policy prohibits the appellate attorneys closing their doors. She additionally testified attorneys share support staff. According to Ms. DuRant, only the honor system prevents Appellate Defenders from accessing confidential information of another Appellate Defender representing a co-defendant. Although the honor system is admirable, it does not satisfy the requirements of Rules 1.0(n) and 1.10(e)(1).

Finally, this Court must determine the remedy. Once again, *Carter* provides guidance. This Court notes that the conflict of interest in *Carter* occurred at the circuit court level, and the remedy fashioned by our supreme court was a successive PCR application. Here the conflict occurred at the appellate court level. This Court, accordingly, finds and concludes that a new PCR appeal is the appropriate remedy. Although arising in the context of a PCR attorney not filing an appeal, this Court already recognizes a successive PCR application as the vehicle for obtaining belated appellate review in *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991).

Therefore, K.C. Langford asks this Court to order a new appeal, with conflict free counsel, of the order dismissing his PCR application in case number 2014-CP-19-00002.

CONCLUSION

For the foregoing reasons, this Court should grant the petition and consider the issues.

Respectfully Submitted,

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