

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

**RECEIVED**

**Jun 28 2022**

S.C. SUPREME COURT

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Certiorari to Richland County

Honorable L. Casey Manning, Circuit Court Judge

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GARY A. WHITE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-001270

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JOHNSON PETITION FOR WRIT OF CERTIORARI  
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Appellate Defender

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ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Whether the PCR court erred where it summarily dismissed Petitioner's after-discovered evidence claim that there was a conflict of interest in his legal representation, since Petitioner should have been permitted a hearing to develop the facts?

## STATEMENT

On July 21, 2004, a Richland County Grand Jury indicted Petitioner for two counts of armed robbery and one count of kidnapping. App. 1030 – 1035. The State served notice of intent to seek life without parole due to Petitioner's prior convictions. App. 12, ll. 14-18. Petitioner was tried before the Honorable James R. Barber, and a jury, from June 14 – 16, 2005. Stacy Owings and LaNelle DuRant represented Petitioner. Dolly Garfield and Vanessa Cooper prosecuted the case. App. 1.

The State alleged that on April 19, 2004, Petitioner participated in the armed robbery of the Circle K convenience store on the corner of Garner's Ferry Road and Old Woodlands Road in Columbia at approximately 1:30 a.m. According to the store's manager, Gwen Anthony (Complainant), two robbers came into the store with their faces obscured. One man had a gun and held it to her neck. Complainant claimed the gunman had on a mask, white shirt, dark jeans, and held a black and silver .45 caliber pistol. App. 63, ll. 5-25; App. 65, ll. 22-23; App. 79, l. 7 – 82, l. 3; App. 90, ll. 11-14.

Complainant alleged the men took cash from the register, lottery tickets and beer, as well as Complainant's wallet and cell phone. Complainant claimed that at one point, the robber with the gun appeared to pass out; his head fell on her shoulder. Complainant further alleged that after the robber with the gun woke up, he tried to push her out of the store and make her leave with him, but Complainant successfully resisted. App. 82, l. 4 – 94, l. 17.

The two robbers ran off towards Old Woodlands Road. App. 92, l. 23 – 94, l. 11. Coincidentally, Officer Rouppasong with the Columbia Police Department happened to arrive at the store, and Complainant flagged Rouppasong down. App. 94, l. 16 – 95, l. 13. According to Rouppasong, he saw one man running away and he gave chase, although he briefly lost sight of

the man. However, Rouppasong saw the man get into a nearby Honda and then get back out. The driver of the Honda, Roy Wiggins, was in the car. Petitioner's driver's license was on the car's passenger seat. The stolen items from the convenience store were near the Honda. Rouppasong stayed with Wiggins and the Honda and called for backup. App. 152, l. 13 – 162, l. 11; App. 176, l. 5 – 179, l. 3; App. 325, ll. 2-15.

Other officers arrived and set up a perimeter. App. 268, l. 22 – 271, l. 18. A K-9 officer and his police dog arrived approximately thirty minutes later. The police dog tracked through the neighborhood behind the Circle K until it came upon Petitioner asleep under some bushes with a .45 caliber pistol, dressed in a white shirt and dark jeans. App. 224, l. 5 – 236, l. 21; App. 164, l. 3 – 175, l. 13. Three men were charged with the robbery (two counts of armed robbery and one count of kidnapping)—Petitioner, Anthony Morris, and Roy Wiggins. App. 1030 – 1035; App. 306, l. 7-18; App. 369, l. 18 – 370, l. 9; App. 989 – 994.

No fingerprints were found on the recovered items. App. 295, l. 2 – 298, l. 24. Despite being caught in the Honda near the stolen items, Roy Wiggins gave self-serving testimony at Petitioner's trial and claimed that he was merely present in the car with Petitioner and Anthony Morris when they stopped near the Circle K. Wiggins claimed Petitioner got out of the car with a pistol and headed to the convenience store with Morris. Wiggins alleged Petitioner wore a ski mask. Wiggins claimed that he refused to participate in the robbery or drive the car away as a getaway car. App. 317, l. 6 – 327, l. 6; App. 338, l. 17 – 341, l. 17. However, Wiggins admitted he was testifying in hopes of obtaining a favorable disposition of his charges. App. 361, ll. 19-21.

Anthony Morris also testified and claimed that he robbed the store with Petitioner. Morris alleged Petitioner was the gunman while he, Morris, stole the items. App. 382, l. 15 – 394, l. 14. Morris admitted he had already pleaded guilty to the charges and was awaiting sentencing. Morris

claimed that there was no plea deal in place but he admitted that he hoped his testimony against Petitioner would help him obtain a favorable sentence. App. 369, l. 18 – 370, l. 23; App. 403, ll. 11-13.

Although the jury deliberated for about three hours, Petitioner was convicted as indicted. Petitioner was sentenced to concurrent terms of life in prison without the possibility of parole for each charge. App. 509, l. 21; App. 513, l. 22 – 519, l. 10; App. 526, l. 2-18; App. 1036 – 1038. Petitioner timely served notice of appeal and his direct appeal was perfected. Petitioner was represented by Aileen Clare and LaNelle DuRant. The State was represented by Harold Coombs, Jr. 530 – 624. On April 27, 2009, this Court affirmed Petitioner’s conviction and sentence. App. 625 – 630.

On August 5, 2009, Petitioner filed an application for post-conviction relief (PCR) and he later filed an amended application. App. 631 – 638; App. 644 – 651. The State made its return on May 10, 2010. App. 639-643. A hearing was held on the matter before the Honorable L. Casey Manning on October 18, 2010. Mark Schnee represented Petitioner and Brian Petrano represented the State. App. 652. On August 31, 2011, the PCR court issued an order of dismissal. App. 701 – 718. Petitioner timely served notice of appeal. David Alexander represented Petitioner on appeal and he submitted a *Johnson*<sup>1</sup> petition for writ of certiorari. App. 719 – 731. On February 28, 2014, Petitioner submitted a pro se brief pursuant to *Johnson v. State, supra*. App 733 – 741. This Court issued an order denying the petition on May 7, 2014. App. 732; App. 742 – 743.

Petitioner sought a writ of habeas corpus in the United States District Court. App 744 – 794. The district court ultimately dismissed the petition. App. 887 – 888.

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<sup>1</sup> *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988).

On June 24, 2018, Petitioner initiated this case when he filed an application for PCR, and then an amended PCR application. App. 889 – 912. Petitioner alleged, *inter alia*, that he had discovered a conflict of interest in his case: that both he and Anthony Morris, the codefendant who testified against him at trial, were represented by lawyers in the same public defender’s office. App. 901 – 903. The State made its return and motion for summary dismissal on June 25, 2020. App. 913 – 922. On June 26, 2020, the PCR court issued a conditional order of dismissal. App. 923 – 932. The PCR court found all grounds other than the newly-discovered evidence of the conflict were barred as successive pursuant to S.C. Code Ann. § 17-27-90 and outside the statute of limitations pursuant to S.C. Code Ann. § 17-27-45(A). App. 927 – 930. As to the newly-discovered evidence claim, the PCR court found Petitioner failed to make a prima facie showing he was entitled to relief since Petitioner’s codefendant was represented by outside counsel Hans Pauling. App. 930 – 931.

On August 14, 2020, Petitioner filed a motion in opposition to the conditional order of dismissal. App. 933 – 954. Petitioner explained that he first learned of the conflict on November 19, 2019. App. 939. Petitioner argued there had been no “factual basis” established to show Hans Pauling represented Morris. App. 945. Petitioner attached, as an exhibit, a document titled “Conflict Memorandum” which was dated June 25, 2004 (conflict memo). App. 950. The conflict memo was addressed to the Deputy Richland County Public Defender and referenced Petitioner and his codefendant, Anthony Morris. The conflict memo stated that Anthony Morris was represented by April Sampson and Petitioner was represented by Jason Chehoski.<sup>2</sup>

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<sup>2</sup> Petitioner filed an additional amendment to his PCR application on September 17, 2020. App. 955 – 981.

On July 20, 2021, the PCR court issued a final order of dismissal, which included the indictments and sentence sheets for Petitioner’s codefendant Anthony Morris. App. 982 – 994. In its final order of dismissal, the PCR court found that there was no conflict of interest because Hans Pauling represented Morris on the charges, as “evidenced by the sentencing sheets,” and because Petitioner was represented at trial by Stacy Owings and LaNelle DuRant, not by Jason Chehoski. “The record reflects no party listed in the memorandum ultimately represented Applicant or his co-defendant.” App. 984. The court also found the conflict claim was not newly-discovered evidence because the evidence was not material to guilt or innocence, and Petitioner had failed to show he was entitled to an evidentiary hearing. App. 983 – 985.

Petitioner filed a motion to alter or amend the judgment. App. 995 – 1010. The State filed a return. App. 1011 – 1018. Petitioner made a response to the return. App. 1019 – 1024. On September 29, 2021, the court issued an order denying Petitioner’s motion pursuant to Rule 59(e), SCRCP. App. 1025 – 1029.

This petition for writ of certiorari follows.

## ARGUMENT

The PCR court erred where it summarily dismissed Petitioner's after-discovered evidence claim that there was a conflict of interest in his legal representation, since Petitioner should have been permitted a hearing to develop the facts.

The PCR court erred when it summarily dismissed Petitioner's after-discovered evidence claim. A hearing was needed to develop the facts surrounding the conflict of interest that occurred when both Petitioner and his codefendant, Anthony Morris, were represented by lawyers in the same public defender's office.

“Summary dismissal of a PCR application without a hearing is appropriate only when (1) it is apparent on the face of the application that there is no need for a hearing to develop any facts and (2) the applicant is not entitled to relief.” *Mose v. State*, 420 S.C. 500, 505, 803 S.E.2d 718, 720 (citing *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005)); *see also* S.C. Code Ann. § 17-27-70(c) (PCR court may grant summary disposition where there is “no genuine issue of material fact”). “When considering the State’s motion for summary dismissal of an application, where no evidentiary hearing has been held, the PCR judge must assume facts presented by the applicant are true and view those facts in the light most favorable to the applicant.” *Mose*, 420 S.C. at 505-06, 803 S.E.2d at 720. “When reviewing the propriety of a dismissal, an appellate court must view the facts in the same fashion.” *Id.*

As seen, the PCR court was required to assume the facts alleged by Petitioner were true and view those facts in the light most favorable to him. In the light most favorable to Petitioner, an actual conflict of interest had occurred in his case, since at one point both his lawyer and his codefendant’s lawyer were employed by the same firm. *See* Rule 1.7(a), RPC, Rule 407, SCACR;

Rule 1.10(a), RPC, Rule 407, SCACR. As the comments to Rule 1.10 note, “a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client . . .”

Although the court cited to Anthony Morris’s sentencing sheets for the proposition that Morris was represented by private counsel, in the light most favorable to Petitioner, he was entitled to a hearing to determine whether that was true, since Petitioner had made a showing that April Sampson of the public defender’s office had instead represented Morris. App. 950. Also, although Petitioner was ultimately represented by Stacy Owings and LaNelle DuRant, not Jason Chehoski, it is unclear what damage the conflict caused before representation was changed.

Moreover, the PCR erred when it found the conflict was not material to guilt or innocence. Regarding after-discovered evidence, S.C. Code Ann. § 17-27-45(C) provides that,

If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

To obtain a new trial based on after-discovered evidence, the party must show that the evidence: “(1) would probably change the result if a new trial is had; (2) has been discovered since the trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching.” *Clark v. State*, 315 S.C. 385, 387-88, 434 S.E.2d 266, 267 (1993); *see also State v. Spann*, 334 S.C. 618, 513 S.E.2d 98 (1999).

As to factors (2) and (3), Petitioner asserted he first discovered the conflict on November 19, 2019. Petitioner amended his pleadings to include this claim on August 14, 2020, within one year of discovery, so he was compliant with § 17-27-45(C). *See* App. 939; App. 933 – 954. As to factors (1) and (4), the conflict of interest here would probably change the result of a trial and was material to guilt or innocence since the damaging effects of an actual conflict of interest are so

great as to be incalculable. *See generally Strickland v. Washington*, 466 U.S. 668, 692 (1984) (prejudice is presumed if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance). "Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client . . ." Comment to Rule 1.7, RPC, Rule 407, SCACR. When counsel is burdened by an actual conflict of interest, "counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties." *Strickland*, 466 U.S. at 692 (citing *Cuyler v. Sullivan*, 446 U.S. 335, 345-46 (1980)). Finally, as to (5), the conflict was not merely cumulative or impeaching.

A review the facts in the light most favorable to Petitioner, as is required here, reveals the PCR court's dismissal of Petitioner's claim was error. Petitioner was entitled to a hearing to develop the facts underlying his claim of after-discovered evidence of a conflict of interest. *Mose*, 420 S.C. at 505-06, 803 S.E.2d at 720; *Clark*, 315 S.C. at 387-88, 434 S.E.2d at 267.

**CONCLUSION**

Based on the foregoing argument, Petition respectfully requests that a writ of certiorari be granted to allow full briefing on this issue.

*s/ Joanna K. Delany*

Joanna K. Delany  
Appellate Defender  
S.C. Bar No. 76081

This 28th day of June, 2022.

ATTORNEY FOR PETITIONER

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Counsel for Gary A. White states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's post-conviction relief proceedings before Judge L. Casey Manning, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Gary A. White.

Respectfully Submitted,

*sl Joanna K. Delany*

Joanna K. Delany  
Appellate Defender  
S.C. Bar No. 76081

ATTORNEY FOR PETITIONER

This 28th day of June, 2022.

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled “Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.”

s/ Joanna K. Delany

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