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**S.C. SUPREME COURT**

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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On Petition for Writ of Certiorari to Edgefield County  
Court of Common Pleas  
Honorable Debra R. McCaslin, Circuit Court Judge

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Appellate Case No. 2021-0001426

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K.C. LANGFORD,

Petitioner,

vs.

THE STATE,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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**Where Langford was knowingly represented in his initial post-conviction relief appeal by the same appellate defender that represented his co-defendant on direct appeal several years prior, the post-conviction relief judge correctly refused to allow Langford to invoke the South Carolina Rules of Professional Conduct—of which this Court has held have no bearing on the constitutionality of a criminal conviction—as a procedural weapon aimed at the Division of Appellate Defense in an effort to secure a second bite at the apple and correctly determined that no actual conflict of interest existed under the constitutional standards set forth by this Court and the United States Supreme Court where Langford failed to identify any instance in which the appellate defender’s previous representation of his co-defendant on direct appeal adversely affected her subsequent representation of Langford on post-conviction relief appeal such that he is somehow entitled to proceed with a second appeal of the denial of his initial post-conviction relief action on claims of ineffective assistance of trial counsel that are wholly unrelated to the co-defendant or appellate counsel .....20**

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**PETITIONER’S STATEMENT OF ISSUE ON CERTIORARI**

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?

**RESPONDENT’S COUNTERSTATEMENT OF ISSUES ON CERTIORARI**

Where Langford was knowingly represented in his initial post-conviction relief appeal by the same appellate defender that represented his co-defendant on direct appeal several years prior, did the post-conviction relief judge correctly refuse to allow Langford to invoke the South Carolina Rules of Professional Conduct—of which this Court has held have no bearing on the constitutionality of a criminal conviction—as a procedural weapon aimed at the Division of Appellate Defense in an effort to secure a second bite at the apple and correctly determine that no actual conflict of interest existed under the constitutional standards set forth by this Court and the United States Supreme Court where Langford failed to identify any instance in which the appellate defender’s previous representation of his co-defendant on direct appeal adversely affected her subsequent representation of Langford on post-conviction relief appeal such that he is somehow entitled to proceed with a second appeal of the denial of his initial post-conviction relief action on claims of ineffective assistance of trial counsel that are wholly unrelated to the co-defendant or appellate counsel?

## STATEMENT OF THE CASE

On August 14, 2008, K.C. Langford took \$3,000 in cash from the victims' home while his co-defendants, Bryan Phillips (Bryan) and Alvin Phillips (Alvin), held the victims at gunpoint in their front yard. During its December 2008 term, the Edgefield County Grand Jury indicted Langford for criminal conspiracy (2008-GS-19-0673). (App'x 581–82). Langford was subsequently indicted for first-degree burglary (2010-GS-19-0272); armed robbery (2010-GS-19-0273); and kidnapping (2010-GS-19-0278) in May 2010. (App'x 583–88). Mark R. Calhoun, Sr, represented Langford on these charges. Assistant Solicitor Ervin J. Maye of the Eleventh Circuit Solicitor's Office prosecuted the case.

### **A. Trial**

On September 7, 2010,<sup>1</sup> Langford and Bryan proceeded to a joint jury trial before Judge Keesley. (App'x 1–567). At the conclusion of trial, the jury convicted Langford as indicted on all charges. (App'x 573–76). Judge Keesley sentenced him to concurrent terms of twenty years' imprisonment for kidnapping, twenty years for first-degree burglary, twenty years for armed robbery, and five years for criminal conspiracy. (App'x 577–80).

### **B. Direct Appeal**

Langford filed a timely notice of appeal. (App'x 592). Appellate Defender Elizabeth A. Franklin-Best of the South Carolina Commission on Indigent Defense, Division of Appellate Defense (OAD) perfected his appeal by filing a brief with the Court of Appeals on the following issues:

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

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<sup>1</sup> The cover page of the trial transcript, (App'x 17), erroneously indicates the trial was held on January 23, 2011.

continuance of that trial so it could further pressure a formerly cooperating co-defendant, who elected to assert his right to remain silent under the 5<sup>th</sup> Amendment of the federal Constitutional, into testifying for the state at the subsequent trial?

(App’x 630–45).

Following initial briefing, the case was certified to this Court pursuant to Rule 204(b), SCACR, and Langford’s case was consolidated with that of his co-defendant, Bryan Phillips. Following final briefing and oral argument, this Court issued a published opinion affirming Langford’s convictions and sentences on November 21, 2012. *State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012). (App’x 708–24). On December 20, 2012, this Court denied cross-petitions for rehearing and issued the remittitur. (App’x 730–31; 732).

On March 18, 2013, Langford filed a petition for a writ of certiorari in the Supreme Court of the United States. By written order dated October 7, 2013, the Court denied Langford’s petition.

### **C. Initial Post-Conviction Relief Action**

Following an unsuccessful appeal, Langford timely filed his first post-conviction relief application, raising the following grounds for relief (excerpted verbatim):

1. “The Applicant was denied effective assistance of trial counsel by counsel’s failure to object to the composition of the jury.”
2. “The Applicant was denied effective assistance of trial counsel by counsel failing to ask for a continuance to obtain a certified interpreter.”
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.”
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.”
5. “Trial counsel was ineffective for helping assist the State in laying the foundation for their case.”

6. “The Applicant was denied effective assistance of trial counsel by counsel’s failure to object to Officer Roosevelt Young testifying to hearsay testimony.”
7. “The Applicant was denied effective assistance of trial counsel by counsel asking codefendant Alvin Phillips about the mandatory minimum of his charges.”
8. “The Applicant was denied effective assistance of trial counsel by counsel by failing to object to the kidnapping indictment.”
9. “The Applicant was denied effective assistance of trial counsel by counsel arguing charges I wasn’t on trial for.”
10. “The Applicant was denied effective assistance of trial counsel by counsel commenting on Applicant’s silence.”
11. “The Applicant was denied effective assistance of trial counsel by failing to object to the solicitor commenting on Applicant’s silence.”
12. “The Applicant was denied effective assistance of trial counsel by failing to object to police officer Roosevelt Young vouching for Joseph Stevens.”
13. “The Applicant was denied effective assistance of trial counsel by counsel quoting Bible scriptures during closing argument.”
14. “Prosecutorial misconduct: by the solicitor denying that a deal exist[*sic*] between the Applicant’s codefendant (Alvin Phillips).”
15. “Prosecutorial misconduct: for using inflammatory and irrelevant testimony in closing argument.”
16. “Trial counsel was ineffective for failing to object to the Solicitors’ vouching and bolstering for the credibility of numerous of its witnesses in closing argument.”
17. “The Applicant was denied effective assistance of trial counsel by trial counsel failing to object to premature deliberations by the jury.”
18. “The Applicant was denied effective assistance of appellate counsel for failing to file a reply brief concerning inadmissible testimony presented at Applicant’s trial.”
19. “The Applicant was denied the right to effective assistance of trial counsel due to counsel’s cumulative errors.”

(Supp. App’x 1–33). The State made its return on April 28, 2015. (App’x 744–50). On January 26, 2017, Langford, through PCR counsel Charles T. Brooks, III, Esquire, filed an amended application to include the allegation of ineffective assistance of trial counsel for failing to investigate two potential alibi witnesses, Veronica and Vanessa Phillips. (App’x 740–43).

On February 1, 2017, the PCR court convened an evidentiary hearing before the Honorable Eugene C. Griffith, Jr. (App'x 751–887). Langford was present at the hearing and represented by Mr. Brooks. Senior Assistant Deputy Attorney General Johanna C. Valenzuela appeared on behalf of the State. Langford, Veronica Phillips, Vanessa Phillips, Mark Calhoun, and Assistant Solicitor Maye all testified at the hearing.<sup>2</sup> On June 15, 2017, Judge Griffith issued an order denying the application on all grounds and dismissing the action with prejudice. (App'x 888–900).

#### **D. Initial Post-Conviction Relief Appeal**

Langford filed a timely notice of appeal. (App'x 902). Appellate Defender LaNelle Cantey DuRant of OAD perfected Langford's appeal by filing a petition for writ of certiorari in this Court on the following issue:

The PCR court erred 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.

(App'x 919–31). The State made its return to the petition on July 9, 2018. (App'x 933–51). Shortly thereafter, this Court issued an order dated July 24, 2018, transferring the case to the Court of Appeals pursuant to Rule 243(1), SCACR. (App'x 953). On October 8, 2019, the Court of Appeals issued an order denying certiorari. (App'x 954). The case was remitted back to the circuit court on October 23, 2019. (App'x 955).

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<sup>2</sup> Notably, Ms. Franklin-Best did not testify despite Langford raising a claim of ineffective assistance of appellate counsel.

### **E. Second Post-Conviction Relief Action**

Langford filed a second application for post-conviction relief on April 14, 2020, raising two allegations of ineffective assistance of trial counsel and an allegation regarding a conflict of interest in his previous post-conviction relief appeal. (App’x 956–1023). He subsequently filed an amended application on April 23, 2020. (App’x 1024–31).

The State made its return on July 16, 2020, requesting the application be summarily dismissed as procedurally barred because it was filed after the statute of limitations expired; it is successive to Langford’s prior PCR action; it is barred by the doctrine of *res judicata*; and for failing to state a cognizable claim under the Uniform Post-Conviction Procedure Act<sup>3</sup> (the Act). (App’x 1033–54).

Pursuant to this request, the Honorable Walton J. McLeod, IV, acting in his capacity as Chief Administrative Judge, issued a conditional order of dismissal signed July 28, 2020, and filed September 4, 2020, provisionally denying and dismissing the application while giving Langford twenty days to show why the dismissal should not become final. (App’x 1056–75). On September 18, 2020, Langford timely filed objections to the conditional order and requested a hearing on the State’s motion to dismiss. (App’x 1077–86; 1087–95). The State filed a response to Langford’s objections on October 2, 2020. (App’x 1096–07). By 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.” (App’x 1118).

A hearing on the State’s motion to dismiss convened on November 13, 2020, before Judge McCaslin via Cisco WebEx Meetings in accordance with the Chief Justice’s administrative

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<sup>3</sup> S.C. Code Ann. § 17-27-10 to -160.

memorandum, *Court Operations*, dated September 14, 2020. (Supp. App'x 34–75). E. Charles Grose, Jr., represented Langford and Assistant Attorney General Lillian L. Meadows represented the State. At the conclusion of the hearing, Judge McCaslin took the matter under advisement and allowed both parties to submit post-hearing briefs. (App'x 1108–17; Supp. App'x 76–77).

On December 11, 2020, Judge McCaslin issued an order granting an evidentiary hearing solely on the conflict of interest issue. (App'x 1119–26). The remaining issues were dismissed for the reasons set forth in the conditional order of dismissal.

On January 11, 2021, the State filed a timely motion to alter or amend pursuant to Rule 59(e), SCRCF, to which Langford filed a response. (App'x 1127–30; Supp. App'x 78–81). Judge McCaslin denied the State's Rule 59(e) motion by order dated January 29, 2021. (App'x 1132).

An evidentiary hearing then convened on April 27, 2021, before Judge McCaslin via WebEx. (App'x 1133–1211). Langford was present and again represented by Mr. Grose. Assistant Attorney General Meadows again represented the State. Both Langford and his previous post-conviction relief appellate counsel, LaNelle DuRant, testified at the hearing. The record was left open at the State's request, and the evidentiary hearing reconvened via WebEx on July 22, 2021. (App'x 1200–11). Langford and Ms. DuRant both presented additional testimony.

On August 27, 2021, Judge McCaslin issued an order denying Langford's post-conviction relief application and dismissing the action with prejudice. (App'x 1212–43). Langford subsequently filed a timely motion to alter or amend pursuant to Rule 59(e), SCRCF, on September 20, 2021. (App'x 1245–61). The State made its return to Langford's 59(e) motion on October 1, 2021. (App'x 1309–28). On November 8, 2021, Judge McCaslin issued an amended order of dismissal. (App'x 1329–62). Langford then timely filed a notice of appeal.

## STATEMENT OF FACTS

On August 14, 2008, Ji Quing Chen, along with his son, Li Guan Xin, and wife, Li Ai Ming, left the Chinese restaurant they own in Johnston, South Carolina, shortly after 10:00 p.m. and headed home. (App'x 203, 216, 232; 709). With them was a black bag containing the day's earnings. (App'x 217; 709). When they arrived home, Ji Quing stayed outside to water some plants while his wife and son went inside. (App'x 217; 709). As he was tending to his garden, three men wearing masks came out from the bushes, forced him to the ground, hit him, and took his wallet. (App'x 205–07, 210, 213, 218–19, 224, 233, 250–53; 709).

Concerned that his father had not yet come inside, Li Guan stepped out onto the porch to check on him. (App'x 218; 709). Once he was outside, the men forced Li Guan to the ground and asked where the restaurant's money was. (App'x 218; 709). He told them it was in the house, and one of the men went inside to find it. (App'x 218–19; 709) That man returned shortly with the black bag, and all three of them ran off. (App'x 216–19; 709). The three Chinese-speaking victims knew virtually no English. (App'x 214, 219, 222, 321). Because the men wore masks, the victims were unable to provide a useful description to law enforcement. (App'x 709).

Investigators eventually met with Alvin Phillips (Alvin), who in a statement dated September 28, 2008, confessed that he was one of the men who robbed the family. (App'x 709). He further identified his cousin, Bryan Phillips (Bryan), and K.C. Langford as the two remaining suspects. (App'x 709). Langford was arrested shortly thereafter on October 3, 2008.

## **STANDARD OF REVIEW**

The standard of review for post-conviction relief depends on the specific issue before the appellate court. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's factual findings and will uphold them if any probative evidence in the record supports them. *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); *Smalls*, 422 S.C. at 180–81, 810 S.E.2d at 839–40. However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

## SUMMARY OF POST-CONVICTION RELIEF PROCEEDINGS

Following an unsuccessful post-conviction relief action and appeal, Langford filed a second application for post-conviction relief on April 14, 2020, raising two issues of ineffective assistance of trial counsel that were fully litigated and finally adjudicated in the initial action. He additionally raised a claim of ineffective assistance of appellate counsel, alleging that “appellate counsel during the appeal of Mr. Langford’s prior post-conviction relief case had a conflict of interest because of her representation of codefendant Bryan Phillips during the direct appeal of his convictions and sentences;” that 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; and that “appellate counsel during the appeal of his prior post-conviction relief case abandoned issues that ultimately resulted in relief for co-defendant Bryan Phillips.” (App’x 960).

The State moved to dismiss the action as untimely, successive, barred by the doctrine of *res judicata*; and for failing to state a cognizable claim. (App’x 1033–54). In response to Judge McLeod’s conditional order of dismissal, Langford asserted the following exception applied to the statute of limitations and the rule prohibiting successive PCR applications:

The grounds set forth in paragraphs 10(a) and 11(a) were included in Mr. Langford’s prior application for post-conviction relief and addressed in the order of dismissal. Appellate counsel for Mr. Langford abandoned these two issues on appeal. This Court can consider these issues because of the conflict of interest of appellate counsel during the appeal of the prior post-conviction relief case.

(App’x 1093). In its reply, the State asserted that Langford was not permitted to re-litigate the two aforementioned claims of ineffective assistance of trial counsel in a successive PCR action

based on an alleged conflict of interest pertaining to appellate counsel that was unrelated to the claims against trial counsel. (App'x 1101–02).

Following a hearing on the State's motion to dismiss, which took place on November 13, 2020, both parties submitted briefs. (App'x 1108–17; Supp. App'x 76–77). Judge McCaslin ultimately issued an order granting an evidentiary hearing on the sole issue of whether Appellate Defender LaNelle DuRant labored under an actual conflict of interest during her representation of Langford. (App'x 1119–26). The remaining claims against trial counsel were dismissed untimely, successive, and barred by *res judicata*, as set forth in the conditional order of dismissal. (App'x 1124–25).

The State subsequently filed a timely motion to alter or amend pursuant to Rule 59(e), SCRCF, reasserting its position that the claim against Ms. DuRant is a non-cognizable allegation of ineffective assistance of PCR appellate counsel. (App'x 1128–31). Langford filed a response. (Supp. App'x 78–81). Judge McCaslin issued an order denying the State's motion on January 29, 2021. (App'x 1131).

At the evidentiary hearing on April 27, 2021, Langford first called Ms. DuRant to testify. She stated she began working at OAD in 2006 until she retired from practicing law in 2019. (App'x 1139–40). She retired from the OAD in 2019. (App'x 1140). Ms. DuRant was first asked on direct examination about OAD's filing system. (App'x 1143). She testified that, during her time at OAD, there was a large file room where all files were stored until the cases were closed. (App'x 1142–43). Once she began working on a case, Ms. DuRant kept the case files in her office. (App'x 1143). She testified that most attorneys did the same or returned their files to the file room after submitting their brief. (App'x 1143). However, each attorney's files were not kept separate from one another within the file room. (App'x 1143).

She further testified that the attorneys did not usually lock their offices. (App'x 1143). Chief Appellate Defender Robert Dudek had an open door policy. (App'x 1143). She explained that the attorneys could close their doors if they were working on an argument, but that everyone's doors were usually open. (App'x 1143–44). Regarding the computer system, Ms. DuRant testified that each individual had access to his or her own profile but that there was a general database where research and case files were located. (App'x 1144–45). Ms. DuRant was then asked whether there was any effort to screen one attorney's access to another attorney's cases in the computer system. (App'x 1145). She stated that she could not remember exactly, but that she believed they had to get special permission to access other attorneys' files. (App'x 1145).

Ms. DuRant testified that Mr. Dudek reviewed all cases when they first came in before assigning them out.<sup>4</sup> (App'x 1147–48). Mr. Dudek never shared with anyone how he assigned cases. (App'x 1148). Regarding co-defendants, Ms. DuRant testified OAD routinely represented co-defendants. (App'x 1146). Ms. DuRant was then asked what procedures were in place to screen the attorneys from confidential information. (App'x 1148). She testified she did not remember anything in particular other than the attorney's honor. (App'x 1148). When co-defendants' cases were pending on appeal at the same time, the appellate defenders who represented them routinely discussed their cases with one another because they all had the same transcript. (App'x 1146, 1148). However, an attorney's notes were considered work product, which they did not share. (App'x 1149). Additionally, any letters between the attorney and client were privileged. (App'x 1149).

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<sup>4</sup> Ms. DuRant testified that Mr. Dudek's procedure differed from the previous chief appellate defender, Joey Savitz, who did not review cases before they were assigned. (App'x 1147). At that time, cases were immediately assigned to an appellate defender on a rotating basis. (App'x 1147–48).

Ms. DuRant testified the situation was different if an appellate defender represented an individual on direct appeal and another appellate defender was assigned to represent that individual on PCR appeal. (App'x 1149). If the former attorney was still working at OAD, she explained, the policy was to speak with Mr. Dudek and see if there was a conflict of interest. (App'x 1150). She stated that she personally sent a couple of cases to the South Carolina Supreme Court to determine if there was a conflict because the other prior attorney was still at OAD. She testified the Court developed a very liberal policy in these matters. (App'x 1150). Ms. DuRant recalled one case where the Court held that, even if the attorney was still in the office, there was no conflict. (App'x 1150).

Ms. DuRant confirmed that the conflict of interest criteria utilized by OAD was more vigilant than the South Carolina Supreme Court required. (App'x 1151). Ms. DuRant provided a general overview of the process to determine if there was a conflict. (App'x 1151). If the former attorney no longer worked at OAD, she clarified there was no conflict of interest. (App'x 1151). However, if the former attorney was still working at OAD, Mr. Dudek had to conduct a thorough conflict check. (App'x 1151). Ms. DuRant explained that the basic criteria required Mr. Dudek to determine if he thought the OAD's representation of the client would be harmful or cause prejudice to the client. (App'x 1151–52). However, she emphasized that the specific criteria for determining whether a conflict of interest existed was entirely based upon Mr. Dudek's discretion. (App'x 1151). Once Mr. Dudek determined that there was not a conflict, Ms. DuRant testified that the attorneys at the OAD knew not to discuss the case with the former attorney. (App'x 1152). She further testified that, when a conflict involved Mr. Dudek, OAD drafted and filed a memorandum with the South Carolina Supreme Court requesting they determine if a conflict of interest prevented their office from representing a client. (App'x 1153–54). Finally,

Ms. DuRant testified that screening between appellate defenders was simply based on the honor system. (App'x 1154).

Ms. DuRant testified that Bryan and Langford were tried jointly. She represented Bryan on direct appeal and Betsy Franklin-Best represented Langford on direct appeal. (App'x 1154). She explained that the South Carolina Supreme Court held oral arguments in both cases, which were heard back-to-back on the same day. (App'x 1155). Langford's oral argument went first, and the appeal concluded with a published opinion on the speedy trial and docket control issues. (App'x 1155).

In Bryan's case, Ms. DuRant raised three issues, including the issue raised in Langford's case. (App'x 1155). She noted that she raised two issues not raised in Langford's direct appeal. (App'x 1156). She further explained that Bryan's case concluded with an unpublished opinion based partially on the holding in Langford's opinion. (App'x 1155). Ultimately, Ms. DuRant noted, the Supreme Court affirmed the convictions and sentences for both Langford and Bryan. (App'x 1156).

Ms. DuRant confirmed that Langford applied for post-conviction relief, which was denied by Judge Griffith. (App'x 1156). Langford appealed the denial of his PCR application and the case was assigned to Ms. DuRant at OAD. (App'x 1156). Ms. DuRant explained that, while she had represented Bryan on direct appeal and Counsel Franklin-Best represented Langford, she did not believe there was a conflict because (1) Bryan's case was closed and (2) Franklin-Best no longer worked at OAD. (App'x 1156–57). She therefore did not seek further guidance from Mr. Dudek. (App'x 1157). In fact, she believed her previous representation of Bryan would benefit Langford since she was already so familiar with the case. (App'x 1158). When asked whether she disclosed her representation of Bryan to Langford, DuRant testified that Langford was aware

she represented Bryan on direct appeal and that her procedure would have been to ask Langford if he had any concerns about her representing him in the PCR appeal. (App'x 1158). Although she was sure she discussed this with Langford, she explained that she did not send him a formal letter or writing of some sort. (App'x 1159). When asked if she had any notes in her file regarding this conversation, she explained that she did not have access to her entire file. (App'x 1159).

Ms. DuRant further acknowledged that there were no formal policies in place at OAD to implement Rule 1.10(e) of the South Carolina Rules of Professional Conduct, which requires a public defender appointed to represent a client in the same or a substantially related matter as another client represented by the public defender's office be screened in a timely manner from access to confidential information relating to and from any participation in the representation of the other client. (App'x 1159–60). However, she explained that this was not an issue because the appellate defenders did not share confidential information about co-defendants with one another. (App'x 1160). While she noted that there were no policies to prevent OAD attorneys from accessing each other's files in the file room, she explained that the honor system and nature of an appellate defender's caseload prevented the need for any formal policy in accordance with Rule 1.10(e). (App'x 1162–63).

In regard to the caseload, Ms. DuRant testified that she often had to work on weekends to be able to meet filing deadlines. (App'x 1163). Despite the Supreme Court order discouraging deadline extensions, she explained that the overwhelming caseloads often led to OAD attorneys filing for extensions. (App'x 1163). She further testified that there were no OAD policies limiting the number of cases an attorney could have at any given time. (App'x 1163–64). Ms.

DuRant noted that at the time she was handling Mr. Langford's PCR appeal, her caseload was heavy, but she was not overwhelmed. (App'x 1164)

Ms. DuRant recalled that Langford's appeal piqued her interest for two reasons: (1) she was familiar with the case from her work on Bryan's case and (2) Langford had two fact witnesses to testify. (App'x 1164). She testified it was uncommon to have witnesses other than the applicant, trial counsel, and solicitor testify in PCR cases. (App'x 1164). She recalled previous PCR cases where fact witnesses testified and the court granted relief. (App'x 1165). Ms. DuRant explained that, in her experience, if she believed an issue was particularly significant, the best strategy is to focus on strengthening that single issue rather than bringing the Court's attention to additional, weaker issues. (App'x 1165–66). She testified that while Langford had raised claims of ineffective assistance of appellate counsel, case law allows her to pick the most significant issue rather than raise every single issue that might be meritorious. (App'x 1166).

On cross-examination, Ms. DuRant reiterated that she was appointed to represent Langford well after Bryan's appeal had concluded. (App'x 1167). However, when selecting the issues to proceed on in Bryan's case, she explained that she believed the most significant issue was the solicitor's comment on Bryan's decision not to testify. (App'x 1167–68). Ms. DuRant testified that the speedy trial issue was insignificant because it had not been extensively discussed at trial according to the transcript. (App'x 1168). She also noted that she believed the Supreme Court would find the interpreter issue more significant than it did. (App'x 1168).

Ms. DuRant proceeded by providing a brief overview of the procedural history of Langford's and Bryan's direct appeals. (App'x 1170–74). She explained that while Langford and Bryan were co-defendants and their oral arguments were scheduled on the same day back-to-back, they were separate cases with their own records on appeal. (App'x 1170). In his application

for post-conviction relief, Langford raised several issues. (App'x 1171). However, Ms. DuRant could not recall much about his allegation of ineffective assistance of appellate counsel against Counsel Franklin-Best. (App'x 1171–72). Ms. DuRant further testified that she did not believe there was a conflict of interest on the basis that Franklin-Best previously worked at OAD or that OAD was involved in both Bryan's and Langford's cases. (App'x 1172). She explained that the office policy designated that there was no conflict of interest as long as the prior attorney no longer worked in the office. (App'x 1172). Since Franklin-Best left OAD in 2012, there was no conflict of interest. (App'x 1172). She further explained that she did not believe Bryan and Langford had opposing interests that would amount to a conflict of interest on her part. (App'x 1172). She reiterated that she believed her representation of Bryan would be beneficial to Langford because she knew the case so well. (App'x 1172–73).

Ms. DuRant testified that there was never any overlap between her representation of Bryan on direct appeal and Langford on PCR appeal. (App'x 1173). Her appellate strategy was focused solely on the strongest issue in Langford's case—which she believed was the alibi issue. (App'x 1173). Throughout her representation of Langford, Ms. DuRant never felt that her duty to Bryan as her former client interfered with her ability to represent Langford. (App'x 1173–74). In fact, she noted that even if she did gain any confidential information from working on Bryan's case, it was irrelevant because she was bound by what was in the appellate record. (App'x 1174).

On re-direct examination, Ms. DuRant testified that she raised three issues in Bryan's direct appeal. (App'x 1174). She further acknowledged that she had raised more than one issue in previous PCR appeals. (App'x 1174). While she was not very familiar with federal habeas, she understood and explained to her clients that federal habeas was the next step. (App'x 1173–75).

Ms. DuRant reiterated that she believed all three issues that she raised in Bryan’s direct appeal to be meritorious. (App’x 1177).

Langford also testified, and confirmed that Ms. DuRant represented him in his prior PCR appeal. (App’x 1181). Throughout her representation, Langford testified that he was never informed that Ms. DuRant previously represented Bryan. (App’x 1181). In fact, he did not receive any verbal or written notice of her previous representation of Bryan. (App’x 1181). Additionally, Langford explained that he was never asked to sign a document waiving any potential conflict. (App’x 1182). Langford testified that he did not learn of Ms. DuRant’s previous representation of Bryan until his current attorney informed him of the conflict. (App’x 1182). In light of this information, Langford would have sought a new “independent” lawyer. (App’x 1182).

At the conclusion of the hearing, Judge McCaslin granted the State’s request to keep the record open to allow Ms. DuRant to fully review her file from OAD.<sup>5</sup> The hearing reconvened on July 22, 2021. (App’x 1200–11). At that time, DuRant testified she discovered a note dated February 5, 2018, in her file regarding a phone call she received from Langford.<sup>6</sup> (App’x 1199; 1204–05). “K.C. Langford” and the date are written at the top of the note. It states, in relevant part:

“He said he knew that I represented Bryan on his direct appeal but he had no problem with that.”

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<sup>5</sup> Because she is retired, Ms. DuRant was initially only able to review the transcripts and records provided by the Attorney General’s Office rather than her original OAD file.

<sup>6</sup> Ms. DuRant testified that she contacted Mr. Dudek at the conclusion of the April hearing. Mr. Dudek first searched through Langford’s OAD file and found the note. (App’x 1204). Ms. DuRant’s former assistant then mailed her a flash drive which included a copy of Langford’s entire OAD file. (App’x 1204). Ms. DuRant then reviewed the file in its entirety. (App’x 1204–05, 1206).

(App'x 1199). The bottom of the note includes Ms. DuRant's initials in her handwriting. (App'x 1199). She testified to its authenticity. (App'x 1205–07). The note was admitted as Court's Exhibit #1 without objection. (App'x 1205).

With the note refreshing her memory, Ms. DuRant recalled Langford calling her to notify her that he had been transferred from Evans Correctional Institution to Allendale Correctional Institution. (App'x 1208). He also told her about a training program he was working on. (App'x 1208). She brought up the possible conflict to Langford at that time. (App'x 1208). Specifically, she told Langford that she previously represented Bryan on direct appeal, and asked him if he had any concerns. (App'x 1208). Langford indicated to her that he was aware of her prior representation of Bryan, but that he did not have any concerns. (App'x 1208).

Ms. DuRant testified she reviewed the OAD file in its entirety and did not discover anything else in the file regarding her representation of Bryan or the alleged conflict of interest. (App'x 1206).

At the July hearing, Langford testified he did not recall the February 5, 2018, phone conversation reflected in Ms. DuRant's note. (App'x 1208).

On August 27, 2021, Judge McCaslin issued an order denying Langford's post-conviction relief application and dismissing the action with prejudice. (App'x 1212–43). Langford subsequently filed a timely motion to alter or amend pursuant to Rule 59(e), SCRCR, on September 20, 2021. (App'x 1245–61). The State made its return to Langford's 59(e) motion on October 1, 2021. (App'x 1309–28). On November 8, 2021, Judge McCaslin issued an amended order of dismissal. (App'x 1329–62).

## ARGUMENT

**Where Langford was knowingly represented in his initial post-conviction relief appeal by the same appellate defender that represented his co-defendant on direct appeal several years prior, the post-conviction relief judge correctly refused to allow Langford to invoke the South Carolina Rules of Professional Conduct—of which this Court has held have no bearing on the constitutionality of a criminal conviction—as a procedural weapon aimed at the Division of Appellate Defense in an effort to secure a second bite at the apple and correctly determined that no actual conflict of interest existed under the constitutional standards set forth by this Court and the United States Supreme Court where Langford failed to identify any instance in which the appellate defender’s previous representation of his co-defendant on direct appeal adversely affected her subsequent representation of Langford on post-conviction relief appeal such that he is somehow entitled to proceed with a second appeal of the denial of his initial post-conviction relief action on claims of ineffective assistance of trial counsel that are wholly unrelated to the co-defendant or appellate counsel.**

In the instant appeal, Langford contends the post-conviction relief judge erred in refusing to grant him relief in the form of a second appeal of his first post-conviction relief action based on multiple purported conflicts of interest within the Division of Appellate Defense (OAD) as a result of the agency allegedly violating multiple provisions of the South Carolina Rules of Professional Conduct. Specifically, Langford claims the entire agency—which is comprised of individual attorneys exercising individual judgment in representing their clients—should have been conflicted out of representing him in his initial post-conviction relief appeal because he and Bryan were both previously represented by an appellate defender. He specifically contends that Ms. DuRant had a conflict of interest based on her representation of Bryan on direct appeal and based on the agency’s prior representation of Langford.

To the contrary, the post-conviction relief judge properly applied the constitutional standards set forth by this Court and the United States Supreme Court in concluding Langford

failed to demonstrate an actual conflict of interest existed under the Sixth Amendment as a result of Ms. DuRant’s previous representation of Bryan on direct appeal that adversely affected her performance in Langford’s post-conviction relief appeal. Specifically, the post-conviction relief judge noted that (1) the only continuing duty Ms. DuRant owed to Bryan at the time she represented Langford was to protect any confidential information; and (2) Ms. DuRant’s role as appellate counsel significantly undermined any conflict of interest claim because her argument was limited to the information contained in the record on appeal. Further, the post-conviction relief judge found Ms. DuRant’s note from February 2018 regarding her conversation with Langford demonstrates he was aware she represented Bryan on direct appeal and specifically told her he had no concerns. Because these findings are supported by probative evidence and do not constitute an error of law—and because Langford is not entitled to any more bites at what is left of the apple—this Court should deny certiorari.

This Court has unequivocally held that the South Carolina Rules of Professional Conduct (the Rules), whose purpose is to regulate and guide the legal profession in ethical conduct, “*have no bearing on the constitutionality of a criminal conviction.*” *Langford v. State*, 310 S.C. 357, 360, 426 S.E.2d 793, 795 (1993) (emphasis added); *see Nix v. Whiteside*, 475 U.S. 157, 165 (1986) (finding the breach of ethical standard not tantamount to denial of defendant’s Sixth Amendment rights); *see also Moss v. United States*, 323 F.3d 445, 449 (6th Cir. 2003) (noting that the Sixth Amendment constitutional analysis is independent of attorney rules of professional conduct); *Lambert v. Blodgett*, 393 F.3d 943, 986 (9th Cir. 2004) (“[T]he Supreme Court has never applied the ethical imputed disqualification rule in Sixth Amendment analysis.”). In fact, “[n]othing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such duty.” *Langford*, 310 S.C. at 360, 426

S.E.2d at 795 (citing Rule 407, SCACR). Further, an introductory provision of the Rules specifically provides that “the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons.” Scope, RPC, Rule 407, SCACR; *cf. In re Appeal of Infotechnology, Inc.*, 582 A.2d 215, 220 (Del. 1990 (“[T]he Rules [of Professional Conduct] are to be enforced by a disciplinary agency, and are not to be subverted as procedural weapons.”)).

Langford’s petition is nonetheless based almost entirely on a conflict of interest as defined by the Rules and whether OAD’s practices and procedures comport with Rule 1.10(e). However, neither this Court nor the Court of Appeals have ever required public defenders to follow a specific screening procedure, particularly where the alleged conflict is with a former client rather than a current client. In *State v. Wright*, the Court of Appeals expressly rejected the defendant’s claim that the “trial court erred by not relieving the public defender’s office from representing him because . . . his attorney’s supervisor represented a witness against him in his trial, and no screening mechanism protected him as required by Rule 1.10(e) of the Rules of Professional Conduct.” 424 S.C. 335, 339, 818 S.E.2d 236, 238 (Ct. App. 2018). The Court explained:

While we agree with Wright that an explicit screening mechanism or addition of outside counsel would be the best remedy for this situation, we do not agree that the absence of an explicit screening mechanism creates an incurable conflict of interest such that the public defender’s office should have been removed from handling his case.

We read Rule 1.10(e) as providing a way to ensure the public defender’s office is not conflicted out, *but we do not read it as requiring any specific procedures to ensure the absence of a conflict.*”

*Id.* at 340, 818 S.E.2d at 238 (emphasis added).

Langford nonetheless complains about OAD’s lack of a formal, specific procedure under Rule 1.10(e) based on Ms. DuRant’s testimony that Chief Appellate Defender Bob Dudek screens all cases for a conflict before assigning them out to the appellate defenders. However, Langford chose not to call Mr. Dudek—who was present at the July hearing—as a witness or question him about the conflict procedure he follows. *See Pauling v. State*, 331 S.C. 606, 609, 503 S.E.2d 468, 470 (1998) (“In a post-conviction proceeding, the burden is on the applicant to prove the allegations in his application.”). Langford’s remaining complaints pertaining to, for example, appellate defenders sharing a file room and not physically locking their files away from one another do not amount to any conceivable ethics concerns. All attorneys in South Carolina take the same oath of civility. *See* Rule 402(3), SCACR.

Finally, this Court’s opinion in *Carter v. State*, 293 S.C. 528, 362 S.E.2d 20 (1987), is not applicable here. In *Carter*, the applicant unknowingly waived all claims of ineffective assistance of trial counsel in his initial post-conviction relief action because he was represented by the same attorney in both proceedings. *Id.* at 529–30, 362 S.E.2d at 21. Following summary dismissal of his successive post-conviction relief action, Carter appealed. This Court remanded for a hearing on the merits of the allegations of ineffective assistance of trial counsel because the applicant was not made aware of the “hazards of proceeding on his first post-conviction application while represented by his trial attorney.” *Id.* at 530; 362 S.E.2d at 22–22.

*Carter* therefore dealt with the rare situation where trial counsel also serves as PCR counsel because “attorneys cannot argue their own ineffectiveness.” *Gray v. Pearson*, 526 App’x 331, 334 (4th Cir. 2013). *Carter*’s waiver requirement applies solely to PCR applicants appearing at hearings who are represented by their trial counsel. 293 S.C. at 530, 362 S.E.2d at 22. It does not apply where, as is the case here, there is no conflict. Nor does it support Langford’s position

that the proper remedy in this case is a second post-conviction relief appeal—a remedy this Court has never recognized outside the narrow context of *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991) (recognizing a general exception to the rule barring claims of ineffective assistance of post-conviction relief counsel where prior post-conviction relief counsel fails to appeal the denial of the application).

**CONCLUSION**

Based on the foregoing argument, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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