

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County

Honorable George M. McFaddin, Jr., Circuit Court Judge

RANDALL GADSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-001463

JOHNSON PETITION FOR WRIT OF CERTIORARI

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Jun 09 2023

S.C. SUPREME COURT

INDEX

INDEX i

ISSUE PRESENTED1

STATEMENT2

ARGUMENT

The PCR court erred in finding counsel provided effective representation where it was undisputed Petitioner’s codefendant had previously been represented by counsel, since Petitioner did not knowingly, voluntarily, and intelligently waive the conflict of interest.....5

CONCLUSION8

PETITION TO BE RELIEVED AS COUNSEL9

ISSUE PRESENTED

Whether the PCR court erred in finding counsel provided effective representation where it was undisputed Petitioner's codefendant had previously been represented by counsel, since Petitioner did not knowingly, voluntarily, and intelligently waive the conflict of interest?

STATEMENT

On February 17, 2016, a Richland County Grand Jury indicted Randall Gadson, Petitioner, for murder. On March 14, 2018, Petitioner appeared before the Honorable Deandra Benjamin and pleaded guilty to the lesser offense of voluntary manslaughter, for a negotiated sentence of seventeen years. Petitioner was represented by Stephen Krzyston. Kathryn Cavanaugh prosecuted the case.¹

The State alleged that shortly after 7:00 pm on September 18, 2015, Petitioner shot and killed Paul Coleman, Decedent, outside the buildings at Hunter's Way Apartments in Columbia. When Petitioner was initially interrogated by law enforcement, he claimed he was in Charleston at the time of the shooting. However, Petitioner subsequently admitted he shot Decedent while defending himself.²

Petitioner explained Decedent first asked to buy marijuana from him, then Decedent taunted Petitioner and said he was not going to pay for the marijuana. Decedent's friend then came around the corner and shot at Petitioner. Petitioner stated he shot Decedent because Decedent's friend, Devon Owens, shot at him first. Owens claimed he had remained in the car and had not shot at Petitioner. Owens alleged Decedent was simply at the apartment complex to meet a girl. A polygraph examination of Owens indicated deception.³

The court accepted the plea and imposed the negotiated seventeen-year sentence. No direct appeal was taken. On June 7, 2018, Petitioner filed an application for post-conviction relief (PCR). On August 22, 2018, the State made its return. On October 29, 2018, Petitioner

¹ App. 195 – 196; App. 1; App. 3, ll. 18-23.

² App. 5, l. 17 – 9, l. 3.

³ App. 8, l. 13 – 10, l. 8; App. 18, ll. 11-25.

amended his application. On May 23, 2022, a hearing was held on the matter before the Honorable George McFaddin, Jr. Petitioner was represented by Nancy Fennell. Russell Barlow represented the State.⁴

One Steven Carswell was also charged with murder and criminal conspiracy in this case. Evidence against Petitioner included messages between Decedent and Carswell. It was undisputed that Petitioner's counsel previously represented Carswell on an armed robbery charge, although counsel's representation of Carswell had concluded by the time he represented Petitioner. Counsel claimed he met with his supervisors to discuss the conflict of interest, and he stated they decided counsel could continue to represent Petitioner as long as his co-counsel, Lucas Hawks, handled any cross-examination of Carswell at trial. Counsel claimed he obtained Petitioner's verbal consent to waive the conflict, but his case file did not contain a written waiver.⁵

In contrast, Petitioner said he never discussed waiving the conflict with counsel. Petitioner testified he wrote to counsel and expressed his concern regarding the conflict of interest. The letter was admitted as an exhibit at the hearing and is located at page 155 of the Appendix.⁶

On September 26, 2022, the PCR court issued an order of dismissal. The order of dismissal stated, "Applicant is not entitled to relief based upon a conflict of interest. Plea counsel credibly testified that he informed Applicant of the potential conflict and Applicant never asked

⁴ App. 14, l. 20 – 15, l. 1; App. 22 – 27; App. 28 – 32; App. 33; App. 34; App. 39, l. 4.

⁵ App. 114, l. 24 – 118, l. 8; App. 133, l. 25 – 134, l. 24; App. 48, l. 21 – 49, l. 15.

⁶ App. 50, ll. 1-24.

for a new attorney. Applicant, knowing that his attorney once represented a potential witness in his case, seemingly waived this potential conflict in entering the plea.”⁷

The order continued, “Even if this conflict was not waived, Applicant has failed to show any prejudicial effect of the potential conflict. There has been no showing that the potential conflict impacted Plea Counsel’s performance or Applicant’s decision to plead.” “Applicant has merely acknowledged a possibility of a conflict existing, which does not warrant relief. Furthermore, this Court finds that there was no *actual* conflict because Applicant chose to plea and did not go to trial. Applicant has failed to meet the burden of showing how he was prejudiced.”⁸

This petition for writ of certiorari follows.

⁷ App. 190.

⁸ App. 190 (emphasis in original).

ARGUMENT

The PCR court erred in finding counsel provided effective representation where it was undisputed Petitioner's codefendant had previously been represented by counsel, since Petitioner did not knowingly, voluntarily, and intelligently waive the conflict of interest.

“Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial.” *Cuyler v. Sullivan*, 446 U.S. 335, 346 (1980).

“[A] defendant may not be represented by counsel who might be tempted to dampen the ardor of his defense in order to placate his other client. This possibility is sufficient to constitute an actual conflict as a matter of law.” *State v. Gregory*, 364 S.C. 150, 153, 612 S.E.2d 449, 450-51 (2005) (internal alterations omitted) (quoting *Zuck v. Alabama*, 588 F.2d 436, 440 (5th Cir. 1979). However, “the mere possibility of a conflict of interest is insufficient to impugn a criminal conviction.” *Fuller v. State*, 347 S.C. 630, 634, 557 S.E.2d 664, 665 (2001).

The test to determine when an actual conflict of interest occurs is

when a defense attorney places himself in a situation inherently conducive to divided loyalties . . . If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client. An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's.

Gregory, 364 S.C. at 153, 612 S.E.2d at 450 (quoting *Duncan v. State*, 281 S.C. 435, 315 S.E.2d 809, 811 (1984)); see also *Thomas v. State*, 346 S.C. 140, 143-44, 551 S.E.2d 254, 256 (2001).

Although counsel's representation of Carswell had ended, counsel still had a conflict of interest

in violation of the Sixth Amendment.⁹ Counsel admitted he and his supervisors recognized the conflict existed. Counsel was undoubtedly privy to confidential information during his representation of Carswell that may have been useful fodder for cross-examination (which is, by its nature, adverse and often hostile) during Petitioner's trial, yet counsel owed both Carswell and Petitioner a duty of loyalty. These duties would not disappear simply by having co-counsel cross-examine Carswell.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 686 (1984). A defendant's Sixth Amendment right to effective assistance of counsel includes a right to counsel "unhindered by a conflict of interest." *Cuyler v. Sullivan*, 446 U.S. at 349-50. A defendant is entitled to the effective assistance of competent counsel before deciding whether to plead guilty. *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010). "In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) counsel's deficient performance prejudiced the applicant's case." *McKnight v. State*, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008) (citing *Strickland*, 466 U.S. at 687).

"[T]he two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). Ordinarily, to

⁹ *Contra Goins v. State*, 281 S.C. 427, 429, 315 S.E.2d 121, 122 (1984) (multiple representation alone is not violative of the Sixth Amendment; a defendant who raised no objection at trial must demonstrate an actual conflict of interest adversely affected his lawyer's performance) (citing *Vance v. State*, 275 S.C. 162, 163, 268 S.E.2d 275, 276 (1980); *Cuyler v. Sullivan*, 446 U.S. at 350; *Holloway v. Arkansas*, 435 U.S. 475 (1978)). See *Jordan v. State*, 406 S.C. 443, 752 S.E.2d 538 (2013) (defendant who shows conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice to obtain relief). See also *Mickens v. Taylor*, 535 U.S. 162, 176 (2002) (leaving open the question of whether the *Sullivan* presumption applies to claims of ineffective assistance of counsel based on conflicts arising from successive representation).

establish prejudice when challenging a guilty plea, a PCR applicant must prove “there is a reasonable probability that, but for, counsel’s errors, the defendant would not have pled guilty, but would have gone to trial.” *Harden v. State*, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004). However, “a defendant need not demonstrate prejudice if there is an actual conflict of interest.” *State v. Gregory*, 364 S.C. at 153, 612 S.E.2d at 450.

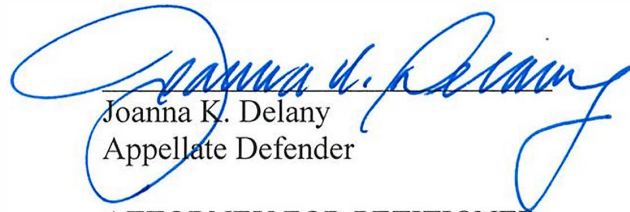
When counsel is burdened by an actual conflict of interest, he breaches the duty of loyalty, perhaps the most basic of counsel’s duties. Due to the seriousness of the breach and the difficulty in measuring the precise effect on the defense of representation corrupted by conflicting interests, **the *Strickland* ineffective assistance of counsel standard is modified in actual conflict of interest cases in that the defendant is not required to show prejudice.**

Gonzales v. State, 419 S.C. 2, 9–10, 795 S.E.2d 835, 839 (2017), *overruled in part on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018) (emphasis added) (cleaned up) (quoting *Strickland v. Washington*, 466 U.S. at 692). *See Strickland*, 466 U.S. at 692 (prejudice is presumed only if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer’s performance) (citing *Cuyler v. Sullivan*, 446 U.S. at 350).

A waiver of a conflict of interest must be made knowingly, voluntarily, and intelligently. *Jordan v. State*, 406 S.C. at 450-51, 752 S.E.2d at 542 (citing *Thomas v. State*, 346 S.C. at 143, 551 S.E.2d at 256). Counsel claimed Petitioner waived the conflict of interest, but he did not obtain and retain a signed waiver. Petitioner explained he was alarmed by the conflict and wrote to counsel about it. Because there was an actual conflict of interest and Petitioner did not knowingly, voluntarily, and intelligently waive the conflict, prejudice should be presumed. *Cuyler v. Sullivan*, 446 U.S. at 350.

CONCLUSION

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



Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of June, 2023.

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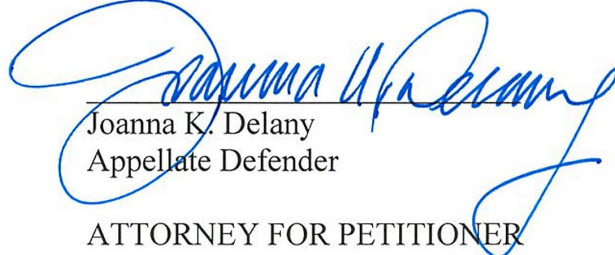
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Randall Gadson 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 hearing before Judge George M. McFaddin, Jr., which was held on May 23, 2022, 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 Randall Gadson.

Respectfully Submitted,



Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

This 9th day of June, 2023.

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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

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."



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This 9th day of June, 2023.