

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Spartanburg County

J. Derham Cole, Circuit Court Judge

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S.C. Supreme Court

XAVIER LALORD PERRY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2014-000653

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PETITION FOR WRIT OF CERTIORARI

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**INDEX**

INDEX ..... 1

ISSUE PRESENTED ..... 2

STATEMENT ..... 3

ARGUMENT

The PCR court erred in failing to find that a conflict of interest existed when  
plea counsel represented both Petitioner and his co-defendant during guilty  
pleas which arose out of related offenses. .... 7

CONCLUSION ..... 11

**ISSUE PRESENTED**

Whether the PCR court erred in failing to find that a conflict of interest existed when plea counsel represented both Petitioner and his co-defendant during guilty pleas which arose out of related offenses?

## STATEMENT

### **Indictments**

At the May and June 2011 terms of court, Petitioner Xavier Lalord Perry was indicted by the Spartanburg County Grand Jury for eight counts of armed robbery. App.173-195.

### **Guilty Plea**

On July 15, 2011, Petitioner pled guilty to the eight counts of armed robbery before the Honorable Roger L. Couch. App. 1-51. His co-defendant, Chadwick Anderson, pled guilty to six armed robberies and two counts of accessory after the fact of a felony. App. 11, l. 18- 12, l. 7. Both Petitioner and Anderson were represented by James A. Cheek. App. 1; 11, ll. 13-17. The State was represented by Assistant Solicitor Michael D. Morin. App. 1.

The incidents arose out of a series of armed robberies at convenience stores between August 31, 2010 and January 30, 2011. App. 26, l. 25 – 29, l. 24. Part of the State's case included allegations that Anderson made statements that in at least two incidents, Anderson did not know Petitioner was planning a robbery. App. 28, ll. 18-21.

Judge Couch sentenced Petitioner to thirty years for seven of the armed robberies, with those sentences to run concurrently, and ten years on the remaining count of armed robbery to run consecutively to the other sentences for a total of forty years. App. 50, l. 23 – 51, l. 3; 175; 178; 181; 184; 187; 190; 193; 196. Anderson was sentenced to thirty years for five of the armed robberies with those sentences to run concurrently and ten years on the remaining count of armed robbery to run consecutively to the other sentences. Anderson was also sentenced to fifteen years on the two accessory charges which would run

concurrently to the other sentences. Anderson received a total sentence of forty years. App. 51, ll. 4-9.

Petitioner did not file a direct appeal.

### **Application for Post-Conviction Relief and Evidentiary Hearing**

On May 18, 2012, Petitioner filed his application for post-conviction relief (“PCR”) alleging, among other things, that his plea counsel’s representation of both Petitioner and his co-defendant at the guilty plea hearing constituted a conflict of interest. App. 53-67. The State filed its Return on or about March 26, 2013. App. 93-101.

An evidentiary hearing was held before the Honorable J. Derham Cole on October 1, 2013. App. 115-154. Petitioner was represented by W. Reid Wildman, and the State was represented by Assistant Attorney General Suzanne H. White. App. 115. Petitioner, his co-defendant Chadwick Anderson, and plea counsel testified at the hearing. App. 119-153.

Petitioner testified that he met with plea counsel three separate times. The third time he met with plea counsel was on July 15, 2011, the day of the guilty plea hearing. Plea counsel met with both Petitioner and co-defendant Anderson. Plea counsel advised Petitioner that if he did not plead guilty that day, he would proceed to trial on the following Wednesday and was looking at spending the rest of his life in prison. App. 120, l. 5 – 122, l. 17; 139, l. 14 – 140, l. 1.

Petitioner further asserted at the evidentiary hearing that his plea counsel had an actual conflict of interest when he simultaneously represented both Petitioner and his co-defendant Anderson at the guilty plea hearing where both Petitioner and Anderson pled guilty to charges arising out of the armed robberies. App. 123, ll. 5-22; 153, ll. 2-18. Plea counsel never discussed the conflict of interest that existed with Petitioner and never

obtained any waiver of the conflict of interest presented by plea counsel's representation of both Petitioner and Anderson. Petitioner did not actually realize that his plea counsel was representing both him and Anderson until the day of the plea hearing. App. 126, ll. 2-20; 135, ll. 11-13.

Petitioner further testified that by simultaneously representing both him and his co-defendant at the guilty plea hearing, plea counsel could not negotiate a favorable sentence for Petitioner without hurting Anderson's case and vice versa. App. 126, l. 21 – 127, l. 8. Petitioner also stated that Anderson had given statements against Petitioner, and by representing interests which were inherently adverse, plea counsel could not fully and adequately represent both Petitioner and Anderson. For example, plea counsel could not prepare any defense for Petitioner which would refute Anderson's statements because such an action by plea counsel would then be detrimental to Anderson's case. App. 127, l. 9 - 128, l. 11; 130, ll. 8-21; 135, ll. 14-21.

At the evidentiary hearing, plea counsel confirmed that he met with both Petitioner and Anderson together. App. 140, ll. 21-22. Plea counsel testified that prior to the plea hearing, he advised both Petitioner and Anderson not to "turn [on] each other at this point . . . ." App. 143, ll. 2-7.

When asked if he discussed with Petitioner and his co-defendant his simultaneous representation of them, Plea counsel dodged the question and testified that he believed there was no conflict of interest in representing both Petitioner and Anderson at the guilty plea hearing because he did not plan to represent either of them if they proceeded to trial. Plea counsel testified: "I told them if you don't want to accept the plea offer I'll refer your cases back to your trial attorney, they will come and talk to you and prepare you for trial. There is

no conflict at the end of a plea, especially in it together. No conflict.” App. 148, l. 17 – 149, l. 13.

Following the hearing, Petitioner submitted a memorandum in his support of his PCR application. He argued he was entitled to relief because of the actual conflict of interest that arose out of his plea counsel’s joint representation of both Petitioner and his co-defendant at the guilty plea hearing. App. 157-162.

### **Order of Dismissal**

Judge Cole filed his order dismissing Petitioner’s PCR application on February 20, 2014. App. 163-172. Judge Cole concluded that Petitioner “failed to meet his burden of proof as to the allegation that [plea counsel] operated under a conflict of interest.” Judge Cole also ruled that the “mere possibility of a conflict of interest is insufficient to challenge a criminal conviction.” Furthermore, Judge Cole found that to establish a violation of the Sixth Amendment, Petitioner had to demonstrate an actual conflict of interest adversely affected his lawyer’s performance and that Petitioner had to show that his attorney actually owed duties to a party whose interests were adverse to his. Judge Cole denied and dismissed Petitioner’s claim of a conflict of interest, finding “[n]o evidence or testimony was presented to support this claim or that would indicate that [plea counsel’s] performance was adversely affected by a conflict of interest.” App. 167-168.

This petition for a writ of certiorari follows.

## ARGUMENT

**The PCR court erred in failing to find that a conflict of interest existed when plea counsel represented both Petitioner and his co-defendant during guilty pleas which arose out of related offenses.**

In denying Petitioner post-conviction relief, the PCR court ruled that Petitioner failed to establish that his plea counsel operated under any conflict of interest and also failed to present any evidence that his plea counsel owed duties to a party whose interests were adverse to Petitioner. App. 167-168. The PCR court's ruling is unsupported by the law of this Court and the evidence presented at the evidentiary hearing.

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). "In the context of a challenge to a guilty plea, a PCR applicant must establish both that his plea counsel's representation was deficient and that there is a reasonable probability that but for counsel's deficient representation, the applicant would not have pled guilty." James v. State, 377 S.C. 81, 83-84, 659 S.E.2d 148, 149 (2008). "In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). The appellate court will reverse if there is no probative evidence to support the PCR court's findings or the decision is controlled by an error of law. Miller v. State, 379 S.C. 108, 115, 665 S.E.2d 596, 599 (2008).

"The Sixth Amendment right to counsel attaches upon initiation of adversarial judicial proceedings and at all critical stages of a criminal trial." State v. Sterling, 377 S.C.

475, 479, 661 S.E.2d 99, 101 (2008). “To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance.” Thomas v. State, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001). “An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's.” Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007). This Court has further stated that an actual conflict of interest occurs:

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.

Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984) (quoting Zuck v. State of Alabama, 588 F.2d 436, 439 (5th Cir.1979)).

Where a defendant has shown an actual conflict of interest or that his counsel actively represented conflicting interests, a defendant need not demonstrate prejudice to be entitled to relief for ineffective assistance of counsel. Lomax v. State, 379 S.C. 93, 102, 665 S.E.2d 164, 168 (2008).

Applying this analytical framework to the facts of Petitioner's case, the PCR court erred in failing to find that an actual conflict of interest existed thus rendering plea counsel's representation ineffective.

There is no dispute that plea counsel represented both Petitioner and his co-defendant during their guilty pleas which arose out of related offenses. App. 11, ll. 13-17. There was no evidence at the PCR hearing that plea counsel discussed with Petitioner the

implications of plea counsel simultaneously representing his co-defendant at the guilty plea hearing. Petitioner testified that he did not learn that plea counsel was also representing his co-defendant until the day of the plea hearing. App. 126, ll. 14-20; 135, ll. 11-13. Petitioner further testified that plea counsel never once spoke with him about the conflict of interest issue or obtained any waiver from Petitioner consenting to plea counsel's representation of both Petitioner and his co-defendant. App. 126, ll. 2-13; 135, ll. 11-13.

Plea counsel testified that he believed there was no conflict of interest in representing both Petitioner and his co-defendant at the guilty plea hearing. Plea counsel's testimony indicates that he never discussed with Petitioner or his co-defendant the ramifications of representing both of them at the guilty plea hearing and never sought a waiver from either of them. App. 148, l. 17 – 149, l. 13.

Plea counsel's representation of both Petitioner and his co-defendant at the guilty plea hearing is a textbook example of a "situation inherently conducive to divided loyalties." Duncan, 281 S.C. at 438, 315 S.E.2d at 811. Both Petitioner and his co-defendant were facing charges stemming out of the same set of incidents. Petitioner testified that the interests of his co-defendant were adverse to him because his co-defendant had given unfavorable statements against him. App. 127, ll. 9-16. At the guilty plea hearing, the solicitor indicated that Petitioner's co-defendant was potentially less culpable because he did not realize Petitioner was planning the offenses. App. 28, ll. 18-21.

By representing both Petitioner and his co-defendant, plea counsel owed a duty to both of his clients which he could not fully comply with by actively representing both defendants. For example, plea counsel could not have actively pursued a lesser sentence for one by suggesting that he was less culpable without harming the other defendant's case.

Plea counsel's representation of both Petitioner and his co-defendant during guilty pleas that arose out of related offenses created an actual conflict of interest which adversely affected plea counsel's performance. See Lomax, 379 S.C. at 102-03, 665 S.E.2d at 168-69 (holding plea counsel's simultaneous representation of both defendant and her husband during guilty pleas which arose out of related offenses constituted a conflict of interest); see also Jordan v. State, 406 S.C. 443, 752 S.E.2d 538 (2013) (holding defense counsel's simultaneous representation of defendant and his girlfriend constituted an actual conflict of interest where defense counsel could not pursue on behalf of the defendant the defense of the girlfriend's third-party guilt).

The PCR court's ruling that Petitioner failed to establish that his plea counsel operated under a conflict of interest is not supported by the law or the evidence. Clearly, where plea counsel also represented Petitioner's co-defendant, plea counsel owed a duty to that co-defendant. The co-defendant's interests were adverse to Petitioner as the co-defendant had given statements that implicated Petitioner and portrayed the co-defendant as the less culpable defendant. App. 28, ll. 18-21; 126, l. 23 – 128, l. 11; 130, ll. 8-21.

Because Petitioner has established that an actual conflict of interest existed, he need not demonstrate prejudice in order to be entitled to post-conviction relief. Lomax, 379 S.C. at 103, 665 S.E.2d at 169. The decision of the PCR court should accordingly be reversed.

**CONCLUSION**

For the reasons set forth herein, Petitioner Xavier Lalord Perry respectfully requests that this Court grant his Petition for a Writ of Certiorari with the ultimate relief of a new trial.

Respectfully submitted,



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Carmen V. Ganjehsani  
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of November, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Spartanburg County  
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XAVIER LALORD PERRY,

PETITIONER,

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RESPONDENT.


APPELLATE CASE NO. 2014-000653

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CERTIFICATE OF SERVICE

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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Suzanne H. White, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Xavier Perry #346891 at Lee Correctional Institution this 10th day of November, 2014.

  
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Carmen V. Ganjehsani  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 10th day  
of November, 2014.

  
\_\_\_\_\_(L.S.)  
Notary Public for South Carolina

My Commission Expires: October 24, 2021.