

STATE OF SOUTH CAROLINA  
In The Supreme Court

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**S.C. Supreme Court**

CERTIORARI TO SPARTANBURG COUNTY  
Court of Common Pleas

The Honorable J. Derham Cole, Circuit Court Judge

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Appellate Case No. 2014-000653

Xavier La-Lord Perry,..... Petitioner,

v.

State of South Carolina,..... Respondent.

**RETURN TO PETITION FOR  
WRIT OF CERTIORARI**

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**TABLE OF CONTENTS**

QUESTION PRESENTED .....1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW .....3

ARGUMENT

    Petitioner failed to meet his burden of proof of establishing that an  
    actual conflict of interest existed when Counsel represented both  
    Petitioner and his co-defendant at a joint plea .....3

CONCLUSION .....9

## **QUESTION PRESENTED**

Did Petitioner fail to meet his burden of proof of establishing that an actual conflict of interest existed when Counsel represented both Petitioner and his co-defendant at a joint plea?

## STATEMENT OF THE CASE

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. The Petitioner was indicted at the June 2011 term of the Spartanburg County Grand Jury for eight (8) counts of armed robbery (11-GS-42-2353, -2354, -3044, -3069, -3070, -3072, -3075, and -3076). He was represented by James A. Cheek, Esquire. On July 15, 2011, the Petitioner pled guilty to the charges as indicted. He was sentenced by the Honorable Roger L. Couch to confinement for concurrent terms of thirty (30) years for seven (7) counts of armed robbery, and a consecutive term of ten (10) years for the remaining armed robbery charge (11-2354). The Petitioner did not appeal his guilty plea or sentence.

This matter comes before the Court by way of an Application for Post-Conviction Relief filed May 18, 2012, and amended applications filed November 19, 2012, and June 4, 2013. The Respondent made its Return on or about March 26, 2013. An evidentiary hearing into the matter was convened on October 1, 2013, at the Spartanburg County Courthouse. The Petitioner was present at the hearing and was represented by W. Reid Wildman, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Petitioner testified on his own behalf. Petitioner's co-defendant Chadwick Anderson testified on Petitioner's behalf as well. James A. Cheek, Esquire, testified on behalf of the State. Following the hearing, the Honorable J. Derham Cole denied the PCR application by written Order dated February 20, 2014.

A timely Notice of Appeal was filed on Petitioner's behalf and a Petition for Writ of Certiorari was submitted. This Return to the Petition for Writ of Certiorari follows.

## STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

## ARGUMENT

- I. Petitioner failed to meet his burden of proof of establishing that an actual conflict of interest existed when Counsel represented both Petitioner and his co-defendant at a joint plea.**

On July 15, 2011, Petitioner pled guilty to committing eight armed robberies of various convenience stores during a period of several months from August 2010 through January 2011, along with his co-defendant, Chadwick Anderson. At the PCR hearing, Petitioner argued Counsel had an actual conflict of interest because he represented both Petitioner and his co-defendant jointly at their guilty pleas.

Where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner must prove that “Counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that Counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable

professional judgment. Strickland, 80 L.Ed.2d 674. The Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of Counsel. First, the Petitioner must prove that Counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland). Second, Counsel's deficient performance must have prejudiced the Petitioner such that "there is a reasonable probability that, but for Counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id.

Petitioner testified that he was represented by Counsel at his guilty plea, but Petitioner was also appointed Robert Hall from the Spartanburg County Public Defender's office. (App. p. 119). However, Petitioner testified that he only met with Counsel and never with Mr. Hall. (App. p. 120). Petitioner testified that Counsel informed him of a plea offer for an open plea to all charges between 10-30 years at their first meeting in March 2011. (App. p. 120). Petitioner testified that at the time, he informed Counsel that he would consider pleading guilty if a more favorable offer could be procured. (App. p. 121). Petitioner testified that at the second meeting with Counsel, Counsel informed him that the Solicitor did not wish to negotiate any further. (App. p. 121). Petitioner testified that he informed Counsel of his desire to obtain private counsel at that time because of Counsel's failure to obtain a more favorable offer. (App. p. 121). However, Petitioner then testified that he meet with Counsel on the day of the plea with his co-defendant and was advised that if he pled guilty, he would receive no more than ten years, but if he did not plead guilty on that day, that his trial would proceed the following Wednesday. (App.

p. 122). Petitioner testified that he pled because he did not think that he would have time to obtain another attorney and prepare for trial in five days. (App. p. 122).

Petitioner testified that he was unaware that Counsel was representing both he and his co-defendant until they were both brought to the joint meeting on the day of the guilty plea, July 15, 2011. (App. p. 126). Petitioner speculates that perhaps the reason that Counsel could not obtain a more favorable plea offer for Petitioner was because Counsel also represented his co-defendant. (App. p. 127; 135). However, Petitioner acknowledged that he committed the armed robberies and did not deny the crimes even at the time of his arrest or his post-conviction relief hearing. (App. p. 133-4). Petitioner never offered any defense or additional mitigating evidence that Counsel failed to present to the plea court. Petitioner testified that he would not have pled guilty, but for Counsel advising him that he faced a life sentence. (App. p. 122-3).

Counsel testified as to the Spartanburg County Public Defender's office process for handling pleas through Counsel. Counsel testified that he does not try any cases, but simply takes plea offers made by the State to inmates in the Spartanburg County Detention Center. (App. p. 144). Counsel testified that his obligation is to convey the offer to a defendant, but allow the defendant to make their own decision as to whether or not they want to plead. (App. p. 145). Counsel testified that he met with Petitioner separately and with his co-defendant. (App. 140). Counsel testified that he informed the Petitioner that if he did not want to accept the plea offer on that day, then Counsel would notify his trial attorney to prepare for trial; however, Counsel testified that he did not inform Petitioner that the trial would take place the next week. (App. p. 148). Counsel testified that he informed Petitioner that the offer would remain open a little while longer, perhaps a week, and then Petitioner would have to begin preparing for trial.

(App. p. 149). Further, Counsel testified that Petitioner never mentioned hiring a private attorney to him. (App. p. 150).

Counsel also testified that there was no conflict and at the time of his representation of both Petitioner and Petitioner's co-defendant, neither one denied involvement or pointed the finger at the other party. (App. p. 143). In fact, Counsel testified that his impression all along was that Petitioner wanted to plead guilty, but just wanted to get the best offer he could get. (App. p. 147). Counsel testified that he cautioned both of the defendants that if they received a sentence of twenty years or less, they would be doing well. (App. p. 147). Counsel testified that he was never provided with any defenses, denials of involvement, or protestations of innocence from either defendant, but instead, was asked to seek the best offer he could obtain for each. (App. p. 145).

The mere possibility of a conflict of interest is insufficient to challenge a criminal conviction. Langford v. State, 310 S.C. 357, 426 S.E.2d 793 (1993). "To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representations, 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) (citing Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Duncan v. State, 281 S.C. 435, 315 S.E.2d 809 (1984)). Respondent submits that Petitioner failed to present any evidence or testimony at the hearing to support his claims that the alleged conflict of interest affected Counsel's performance in representing Petitioner at his plea to eight counts of armed robbery.

The Fourth Circuit has addressed many issues related to conflict of interest and these cases are persuasive in this case. Although an attorney's overlapping representation of two

clients can affect representation when an actual conflict of interest is created, the mere fact that overlapping representation exists is insufficient to create a Sixth Amendment violation. United States v. Taft, 221 F. App'x 277, 279 (4th Cir. 2007) (holding that defendant's right to effective counsel was not violated when former trial counsel also represented a government witness for a short overlapping period).

Additionally, Counsel must rely on the information provided to him by his clients. "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." Barnes v. Thompson, 58 F.3d 971, 979 (4th Cir. 1995) (citing Strickland, 466 U.S. at 690-91, 104 S.Ct. at 2066). In Barnes, the court found that Counsel might rely on the truthfulness of his client and others he interviews when making strategic trial and defense decisions. Id. at 979-80. The United States Court of Appeals, Fourth Circuit, found no deficient performance in Clanton v. Bair, when the client told his attorney about his good childhood, which led the attorney to not seek a psychiatric evaluation, but the client later changed his story. Clanton v. Bair, 826 F.2d 1354 (1987) (finding no deficiency when the attorney had no reason to doubt his client's truthfulness). Counsel relied on both Petitioner and his co-defendant's statements to Counsel regarding their desire to both plead guilty and accept responsibility for their crimes.

"[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S. Ct. 1708, 1719, 64 L. Ed. 2d 333 (1980). The PCR court found that Petitioner's testimony was completely not credible. (App. p. 167; 170). Further, the court found that the Petitioner had failed to meet his burden of proof of establishing that Counsel operated under a conflict of interest at Petitioner's guilty plea. (App. p. 167). The Order noted

that there had been no testimony or evidence to support the argument that Counsel's performance was adversely affected by a conflict of interest. (App. p. 168).

Petitioner was pleading guilty to eight armed robberies, while his co-defendant was present to plead to six armed robberies and two charges of accessory after the fact of a felony. (App. p. 11). The plea colloquy reflects that Petitioner stated that Counsel reviewed the charges and potential sentences with him. (App. p. 13-16). Petitioner acknowledged that he was represented by Counsel and was satisfied with Counsel's representation. (App. p. 19-20). Further, Petitioner informed the court that there was nothing additional that he needed to discuss with Counsel and nothing he felt Counsel needed to do for him at the time. (App. p. 20). Co-defendant Anderson made the same attestations. (App. p. 20). Petitioner also informed the court that Counsel had reviewed information with him and that Petitioner was satisfied with the advice he had received from Counsel. (App. p. 24). Finally, Petitioner agreed with the facts as they were presented to the court by the State. (App. p. 31).

Petitioner offered no evidence or testimony to show that Counsel had an actual conflict of interest or that the "actual conflict of interest adversely affected [his] performance." Thomas v. State, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001).

**CONCLUSION**

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON  
Attorney General

SUZANNE H. WHITE  
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SC Bar #78225

By:   
ATTORNEYS FOR THE RESPONDENT

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January 29, 2015

STATE OF SOUTH CAROLINA  
In The Supreme Court

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Certiorari to Spartanburg County  
Court of Common Pleas

The Honorable J. Derham Cole, Circuit Court Judge

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XAVIER L. PERRY,

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v.

THE STATE OF SOUTH CAROLINA,

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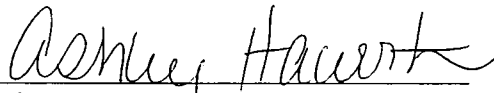
**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of Return to Petition for Writ of Certiorari, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Carmen V. Ganjehsani, Esquire  
SC Commission of Indigent Defense - Appellate Defense  
Post Office Box 11589  
Columbia, SC 29211

This 29<sup>th</sup> day of January, 2015

  
ASHLEY HAWORTH  
LEGAL ASSISTANT



ALAN WILSON  
ATTORNEY GENERAL

**RECEIVED**

JAN 29 2015

January 29, 2015

**S.C. Supreme Court**

The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

**RE: Xavier L. Perry v. State of South Carolina**  
**Lower Court Case No: 2012-CP-42-2121**  
**Appellate Case No. 2014-000653**

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Suzanne H. White  
Assistant Deputy Attorney General  
SC Bar No. 78225

SHW/ah  
Enclosures

cc: Carmen V. Ganjehsani, Esquire (2 copies)  
Trisha Allen, Victim Services (1 copy)