

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPELLATE CASE No. 2014-000653

PETITIONER'S MEMORANDUM OF LAW IN

SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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FEB 09 2015

S.C. SUPREME COURT

XAVIER L. DERRY

Petitioner

h.c.i. - Richland - C#123

990 Wisacky Hwy.

Bishopville, S.C. 29010

STATE OF South Carolina

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S.C. SUPREME COURT

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CERTIFICATE OF SERVICE

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Xavier H. PERRY,

Petitioner,

v.

State of South Carolina

Respondent.

Appellate Case No. 2014-000653

PETITIONER'S MEMORANDUM OF LAW

IN SUPPORT OF PETITION FOR

WRIT OF CERTIORARI

COMES NOW the above-named Petitioner, Xavier H. PERRY, who moving pro se, submits this memorandum of law in support of Petition for Writ of Certiorari.

The PCR court displayed a great fallacy in its decision in this case and openly degraded the integrity of the United States Constitution and the rights that it is meant to afford each and every citizen of this country. Thus, the Petitioner has entreated this Honorable Court by way of a Petition for Writ of Certiorari to rectify the erroneous decision of the lower court.

Petitioner requested for appellate counsel to raise claim of the Confrontation Clause of the Sixth amendment being violated where plea counsel simultaneously represented Petitioner and co-defendant

who had adverse interests. Petitioner also requested that appellate counsel amend the issue presented in which appellate counsel also refused to do. (see Correspondence from Appellate Counsel dated January 20th, 2015; Attachment One).

Petitioner is aware that appellate counsel does not have a constitutional duty to raise every non-frivolous issue requested by defendant. However, Petitioner has meritorious issues that must be reviewed by this court. Petitioner is also aware that before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in the state court; in other words, the state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in habeas petition. (see O'Sullivan v. Boerckel, 119 S.Ct. 1728).

PROCEDURAL HISTORY

The Petitioner adopts the procedural history stated within the Petition for Writ of Certiorari.

ISSUE BEING PRESENTED

In the Petition for Writ of Certiorari submitted to this court by Petitioner's original Appellate Counsel, Carmen Granjehsani, the issue presented was:

"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?"

Appellate Counsel presented the issue of the conflict of interest as the conflict only "existed when plea counsel represented both Petitioner and his co-defendant during guilty pleas..." However, the Petitioner's argument of Ineffective Assistance of Counsel / Conflict of Interest was argued in Petitioner's Application for PCR and at the PCR Evidentiary Hearing as the conflict existing where counsel simultaneously represented Petitioner and his co-defendant during pretrial phases and guilty plea; and not solely during guilty plea as the issue is presented by Appellate Counsel in Petition for Writ of Certiorari.

Thus, Petitioner amends the issue presented in the Petition for Writ of Certiorari and also raises the claim of a violation of the Confrontation Clause; presenting it to this Honorable Court as follows:

(1.) 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 pretrial stages and guilty pleas that arose out of related offenses.

(2.) Whether or not there was a violation of the Confrontation Clause of the Sixth Amendment where counsel represented both Petitioner and his co-defendant who was a witness in Petitioner's case.

ARGUMENT ONE

In the PCR Court's order of Dismissal the PCR Court relied on the case of Langford v State, 310 S.C. 257; 426 S.E.2d 793 (1993) which held that there mere possibility of a conflict of interest is insufficient to challenge a criminal conviction. However, the facts of the Petitioner's case demonstrate an actual conflict and not the mere possibility of a conflict.

In the case of Langford, Langford and his co-defendant had the same alibi defense which was interdependent of one another and thus eliminating the conflict. While in Petitioner's case, Petitioner's co-defendant (MR. Anderson) actually gave implicating statements in regards to their related charges and actively cooperated with law enforcement in their investigation. MR. Anderson also gave implicating statements about Petitioner allegedly committing an armed robbery in which he himself had no involvement with. (see Attachment Two; Investigative Report). Therefore, the position of the Petitioner and MR. Anderson were obviously not interdependent; distinguishing Petitioner's case from that of Langford.

ARGUMENT TWO

The PCR court held that (1.) the Petitioner had failed to meet his burden of proof as to the allegation that counsel operated under a conflict of interest and (2.) that NO evidence or testimony was presented to support the claim of a conflict of interest or that would indicate that counsel's performance was adversely affected by a conflict of interest. However, the facts of RECORD and the testimony of Petitioner and plea counsel (MR. Cheek) at PCR hearing are contrary to the PCR court's findings.

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).

The fact that Petitioner's co-defendant (MR. ANDERSON) implicated Petitioner in his statements and active cooperation with investigation made their positions inherently adversarial. Petitioner asserted to investigating law enforcement that, "it was not him.", when quest-

ioned in reference to the armed robberies in which Petitioner was later charged with. Subsequently, Mr. Anderson told investigators that he had driven Petitioner to scene of crime, which is what caused Petitioner and Mr. Anderson to be arrested.

The Petitioner told law enforcement that he had not committed the robberies in which he was being questioned about, but then Mr. Anderson implicated Petitioner. At this point the Petitioner's interests became adverse to the interests of Mr. Anderson. (see Attachment Two; Investigative Report). Thus, an actual conflict is demonstrated in Petitioner's case. Therefore, Mr. Cheek actively pursued conflicting interests when he simultaneously represented Petitioner and Mr. Anderson during pretrial stages and plea hearing. (see Sawyer v. Drough, 358 F.2d 70.

"However, it is well settled that the Sixth Amendment right to assistance of counsel is breached where one lawyer is required to represent two defendants despite the defendants' conflicting interests." (Glasser v. United States, 315 U.S. 60, 70; 62 S.Ct. 457, 465.).

The performance of Petitioner's counsel was rendered inadequate and thus constitutionally ineffective because of the adverse effect that the conflict of interest had on Mr. Cheek's performance. Mr. Cheek was hindered in what actions he could or could not take on behalf of Petitioner because of his loyalties being divided be-

tween two co-defendants with adverse interests. "As observed by the Supreme Court in Holloway, a conflict of interest has constitutionally detrimental effects before trial, just as during trial, "because of what it tends to prevent attorney from doing." ~~435~~ U.S. at 489-90, 98 S.Ct. at 1181.

Essentially, all Petitioner's counsel could do is advise Petitioner and Mr. Anderson to plead guilty in a futile effort to avoid a conflict that was already present. Mr. Cheek had not even released discovery material and case files to the Petitioner during pretrial stages. Petitioner, had to write to the Office of Disciplinary Counsel after he was convicted to have them compel Mr. Cheek to release case files and discovery material to him. (see Attachment Three; Petitioner's Compliant to Office of Disciplinary Counsel).

Mr. Cheek's testimony at the PCR hearing gives evidence that the conflict of interest hindered him from even advising Petitioner as to whether or not to accept the plea offer, let alone begin to prepare a trial defense. (see PCR Evidentiary Hearing Transcript at pg. 30; lines 22 - pg. 31; lines 1-3).

It is obvious that an attorney that could not even render advice to the Petitioner as to whether or not to accept the state's plea offer could certainly not take any other actions on behalf of Petitioner, because the conflict of interest obstructed his performance by limiting what he could or could not do.

MR. Cheek's testimony at the PCR Hearing made it apparent that he was aware of the statements that MR. ANDERSON had given to law enforcement; creating the conflict. (see PCR Hearing transcript at pg. 31; lines 9-12). However, when asked at the PCR hearing if he had talked to the Petitioner and MR. ANDERSON about him representing them both or having them sign a waiver to waive any conflict, he avoided the question with an evasive response. (see PCR Hearing Transcript at pg. 35; lines 6-13):

MR. Wildman : AND did you talk to them about -- about the fact that you were representing both of them or have them sign anything to that effect OR --

MR. Cheek : I told them if you don't want to accept the plea offer I'll ~~refer~~^{XP} refer your cases back to your trial attorneys, 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.

It was evident from the testimony of the Petitioner and MR. Cheek that the Petitioner had not been aware of the fact that MR. Cheek had been representing he and MR. ANDERSON during pre-trial stages. Petitioner had not been made aware of this until the day of his pleading guilty. (see PCR Hearing Transcript at pg. 12; lines 2-10.). Therefore, he could not have waived any conflict in MR. Cheek's simultaneous representation because he was not aware of it. "A defendant cannot knowingly and in-

intelligently naive what he does not know." Hoffman v. Keeke, 903 F.2d 280, 289 (4th Cir. 1990).

At the PCR hearing, Mr. Cheek testified that his only function in his representation of Petitioner and Mr. Anderson was to convey to them the plea offer from the state. Mr. Cheek asserted that this was all he was doing and that that being his only function, any conflict was eliminated. However, if this was his only duty in representing the Petitioner then the Petitioner did not receive the reasonable and effective assistance of counsel that the Sixth Amendment affords him the right to.

The conflict of interest in Mr. Cheek's joint representation of Petitioner and Mr. Anderson is what made Mr. Cheek limit his representation to one function. He could not negotiate a plea favorable to one defendant without his efforts being detrimental to the other. He also could not begin to prepare a defense for one defendant without it being detrimental to the other because the Petitioner's interests were adversarial to that of Mr. Anderson who had implicated Petitioner in related offenses; presented himself as an unknowing accessory after the fact; alleged he had knowledge of a robbery that Petitioner had committed that he was uninvolved with; and would have testified against Petitioner at a trial as state's number one witness; in which counsel would not have been able to cross-examine because of his joint representation.

Thus, the conflict of interest adversely affected Mr. Cheek's performance and rendered his assistance ineffective. "Stated another way, the Sixth Amendment right to counsel includes the right to effective assistance free of conflicts of interest, and in the case of a single attorney representing multiple defendants, free from conflicting interests among each of the defendants." Hoffman v. Leeke, 903 F.2d 280, 285. This principal applies to retained counsel as well as to appointed counsel. Cuyler v. Sullivan, 446 U.S. 335, 344.

Mr. Cheek's testimony at the PCR Hearing was that he would have referred the Petitioner and Mr. Anderson back to trial attorneys had they decided to go to trial. Although, facts within the record are contrary to that assertion. Mr. Cheek could not refer Petitioner's case back to any attorney because no other attorney had spoken to Petitioner. Mr. Cheek is the only attorney who had contact with Petitioner. (see PCR Hearing Transcript at pg. 5, lines 14 - pg. 6; lines 1-6). In fact, Mr. Cheek's testimony at pg. 31; lines 1-8 of the PCR Hearing Transcript reflect that he would not have referred Petitioner to another attorney had he chosen to go to trial, but would have begun preparing for it himself.

Mr. Cheek asserted that his function was only to convey a guilty plea to Petitioner and Mr. Anderson. However, his testimony at plea hearing contradicts that assertion. (see Guilty Plea

Transcript at pg. 24 ; lines 7-9).

Thus, as stated in the foregoing the facts on their face and testimony of Petitioner and Mr. Cheek himself satisfied the burden of showing that there was an actual conflict. Whenever a defendant is able to demonstrate that his lawyer "actively pursued conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance", constitutional error has occurred, as prejudice is inherent in the conflict. Strickland v. Washington, 466 U.S. 668, 692.

ARGUMENT THREE

The Petitioner argues that his counsel's joint representation of he and his co-defendant (Mr. Anderson) was in violation of the Confrontation Clause of the Sixth Amendment. Mr. Anderson gave implicating statements to law enforcement and actively assisted them in their investigation in regards to Petitioner's and Mr. Anderson's related offenses. Thus, he was a witness in Petitioner's case. The Confrontation Clause provides that a defendant in a criminal case has the right to be able to confront any of the accusers and/or witnesses in their case.

Petitioner was not able to confront Mr. Anderson and would not have been able to confront him through cross-examination at trial because of Mr. Cheek's joint representation of Petitioner and Mr. Anderson.

CONCLUSION

As set forth herein, the Petitioner has demonstrated that his Sixth Amendment right to effective assistance of counsel and the Confrontation Clause of the Sixth Amendment were violated due to a conflict of interest that arose out of his counsel's representation of both Petitioner and his co-defendant. An affirmation of the PCR Court's decision would be merely a supplement to the PCR Court's failure to discern a Constitutional violation in Petitioner's case.

Accordingly, Petitioner's guilty pleas should be vacated and Petitioner granted a new trial.

s. / Xavier Z. Perry
Xavier H. PERRY
H.C.I. / Richland - C#123
990 Wisacky Hwy.
Bishopville, S.C. 29010

February 4th, 2015
Bishopville, South Carolina

Attachment One



Division of Appellate Defense
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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

January 20, 2015

Mr. Xavier L. Perry, #346891
Lee Correctional Institution
990 Wisacky Hwy.
Bishopville, SC 29010

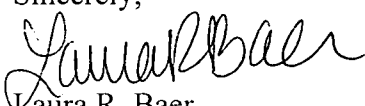
Re: Your case

Dear Mr. Perry:

Thank you for your letters received by this office on December 16, 2014, January 12, 2015, and January 20, 2015 requesting amendments to the Petition for Certiorari and review of an additional case. To clarify as to the posture of your case, Ms. Ganjehsani filed the Petition for Certiorari on November 10, 2014. The State has not yet filed its Return, and obtained a first extension to January 29, 2015. They may file additional extensions. Once the Return is filed, the Supreme Court will either deny certiorari (ending your case) or grant certiorari.

If certiorari is granted, I will file a full brief with the Court on the issue raised in the petition and research the issue fully, including a review of the case law cited in your letters. However, I find no need to amend the Petition filed. See Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983) (holding appellate counsel does not have a constitutional duty to raise every non-frivolous issue requested by defendant).

If you have any other questions, please do not hesitate to contact our office.

Sincerely,

Laura R. Baer
Appellate Defender

LRB

Attachment Two

(195)

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was transported to city hall for interview. While talking to Mr. Perry Mr. Anderson arrived at city hall also.

I spoke with Mr. Perry after he was Mirandize about these robberies. He stated that is was not him. SGT Hillers was interviewing Mr. Anderson at the same time. Mr. Anderson confessed to driving Mr. Perry to the 2053 Southport Rd. store when Mr. Perry robbed it. Both men were arrested for armed robbery after interview and take to the county jail. Mr. Anderson expressed interest in further cooperation with us in reference to this investigation.

On 3-22-11, Mr. Anderson agreed to show SGT Hillers and I the locations he and Mr. Perry Robbed. Mr. Anderson took us to the following locations:

LI'L Cricket at 2053 Southport Rd.
LI'L Cricket at 1997 Nazareth Rd

Mr., Anderson also stated that Mr. Perry robbed the LI'L Cricket on Bryant Rd. as well. Mr. Anderson then spoke with DET. Matt Davis from the Spartanburg County Sheriffs Office in reference to the county locations. Based off Mr. Anderson statements we were able to locate video and other corroborating evidence to charge Mr. Perry and Mr. Anderson with Armed Robbery three times, all being at the 2053 Southport Rd. store.
I singed warrants for armed robbery for the above cases.

(195)

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I singed warrants for armed robbery for the above cases.

Xavier Perry, #346891
Perry C.I./ Q4B-221
Pelzer, SC 29669

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March 9, 2012

MAR 14 2012

Lesley M. Coggiola
The Supreme Court Of South Carolina
Office Of Disciplinary Counsel
Post Office Box 12119
Coloumbia, S.C. 29211

OFFICE OF
DISCIPLINARY COUNSEL

Ms. Coggiola,

I'm currently trying to file an application for Post Conviction Relief and I'm needing the information necessary for doing so. Mr. James A. Cheek of the Spartanburg County Public Defenders Office handled my case. I have written Mr. Cheek requesting my Case Files and pretrial motions pertaining to my case and Mr. Cheek has neither sent this material or responded to my request. I have to file my PCR application in the given time, which in my case, is coming to a close. To have the information I've requested from Mr. Cheek is the paramount factor in meeting this deadline.

I thank you in advance for your assistance in this matter.

Sincerely,

Xavier L. Perry

cc: file

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MAR 14 2012

COMMISSION ON
LAWYER CONDUCT

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that the undersigned caused a copy of the foregoing 'PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI' to be served upon the Supreme Court of South Carolina, this 4th day of February, 2015, via U.S. Postal Service, addressed as follows:

The Supreme Court of South Carolina
Daniel E. Shearouse, Clerk of Court
P.O. Box 11330
Columbia, South Carolina 29211

cc: South Carolina Attorney General's Office
c/o Suzanne White
P.O. Box 11549
Columbia, S.C. 29211

South Carolina Commission on Indigent Defense
Division of Appellate Defense / c/o Laura Daer
1330 Lady St., Suite 401
Columbia, S.C. 29201

s. / Xavier L. Perry
XAVIER L. PERRY

February 4th, 2015
Bishopville, South Carolina

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