THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LAURENS COUNTY
General Sessions Court

Thomas A. Russo, Jr., Circuit Court Judge

C.A. No. 2012-212940

Domonique Brown. . . . . .Petitioner,

vs.

State of South Carolina. . . . . Respondent.

PETITIONER DOMONIQUE BROWN'S BRIEF

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STATEMENT OF THE CASE

This is an appeal from the Circuit Court's denial of Petitioner Domonique Brown's (hereinafter "Petitioner" or "Mr. Brown") Post-Conviction Relief. Petitioner was indicted at the February 2007 term of the Laurens County Grand Jury for Murder (2007-GS-30-220), Armed Robbery (2007-GS-30-221), and Possession of a Firearm or Knife during the Commission of a Violent Crime (2007-GS-30-222). App. p.71. On May 18, 2009, Petitioner pled guilty as indicted to the aforementioned charges. App. p.72. The Honorable D. Garrison Hill sentenced Petitioner to a negotiated sentence of thirty (30) years for Murder, thirty (30) years for Armed Robbery, and five (5) years for the weapon charge, sentences running concurrently. App. p.72.

Petitioner filed for Post-Conviction Relief on July 6, 2010. The State made its Return on January 21, 2011. App. p.71. An evidentiary hearing into the matter was convened on June 4, 2012, at the Newberry County Courthouse. App. p.71. On June 28, 2012 Judge Thomas A. Russo signed an Order dismissing, with prejudice, the Application for Post-Conviction Relief because Applicant failed to establish any constitutional violations or deprivations that would require the court to grant the Application. Subsequent to Judge Russo's denial of Petitioner's Application for Post-Conviction Relief a Notice of Appeal was timely filed on Petitioner's behalf.

Accordingly, this matter is before the Court pursuant to a Post-Conviction Relief proceeding initiated by Mr. Brown alleging ineffective assistance of counsel and a violation of his Sixth Amendment rights.

STATEMENT OF FACTS

Trial counsel, William S. Mcguire (hereinafter referred to as "trial counsel" or "Mr. Mcguire"), filed a number of pre-trial motions in this case. App. p.39, l.22-23. The particular motion at issue was filed to suppress a statement from Mr. Brown about where the murder weapon was located and to suppress certain physical evidence, including but not limited to the murder weapon itself. App. p.39, l.22-23. Mr. Mcguire admitted this was "not an insignificant motion." App. p.40, l.14-15. Subsequent to its filing the motion was held under advisement by the trial judge. App. p.40, l.17. While the motion was under advisement, Mr. Mcguire used what he felt was "a pretty good motion based on a pretty good investigation to have the prosecutor withdraw the death notice." App. p.41, l.4-6. Mr. Mcguire then informed Mr. Brown that he had withdrawn the motion in question, to which Mr. Brown clearly and vociferously objected. App. p.40, l.11-12. In objecting to Mr. Mcguire's decision to act in what he felt was Mr. Brown's best interest, Mr. Brown informed Mr. Mcguire that he "wanted to have the judge decide the motion before making any other decisions with regard to a trial or plea." App. p.40, l.17-19. Despite Mr. Brown's clearly and unequivocally stated demand to proceed toward trial with the rendering of a decision on the motion in question, Mr. Mcguire came to the Laurens County Detention Center, where Mr. Brown was being housed, and informed Mr. Brown that the decision was already made to withdraw the motion, and that the motion had in fact been withdrawn. App. p.55, l. 22-24. Mr. Brown, being incarcerated, then took the only action available to him and vehemently commanded Mr. Mcguire to return to the solicitor and put the motion back

on the table to proceed towards trial. App. p.55, l.24. Again despite Mr. Brown's fervent wishes, Mr. Mcguire informed Mr. Brown in a heated discussion there was no way he was going back to put the motion on the table. App. p.55, l.24; App. p.56, l.1. Having had the critical motion withdrawn against his express wishes and commands to proceed towards trial, Mr. Brown, now faced with a trial into which evidence upon which he would surely be convicted was to be admitted, proceeded with the only course of action left open to him by his attorney and entered into the plea agreement negotiated by his counsel. App. p.54, l.23-25; p.55, l.1-3.

ARGUMENT

I. Pursuant to United States Supreme Court Sixth Amendment jurisprudence Petitioner Domonique Brown received ineffective assistance from his trial counsel in derogation of his Sixth Amendment rights where, during the pre-trial phase of Petition's case, trial counsel, against Petitioner's expressly stated demands and goals, withdrew a pivotal motion, leaving Petitioner with no choice but to accept the plea negotiated by his trial counsel.

At its most basic, the issue presented to this honorable Court by this appeal is one concerning the fundamental nature of the rights created by the Sixth Amendment to the United States Constitution. In essence the question is whether the Sixth Amendment simply dictates the provision of organs of the State to create a façade of fairness and due process of law or whether the Amendment guarantees to each defendant the tools of defense by which the accused can exercise his right to defend himself personally. Turning to the language of the Amendment itself it, the Founding Fathers tacitly answered this question in favor of the individual, providing that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury..., and to be informed of the nature

> and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. VI (emphasis added). As recognized by the United States Supreme Court, the "personal character" of the Sixth Amendment "does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." Faretta v. California, 422 U.S. 806, 819 (1975) ("The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.") (emphasis added); see also United States v. Cronic, 466 U.S. 648, 654 (1984) ("The [Sixth] Amendment requires not merely the provision of counsel to the accused, but 'Assistance,' which is to be 'for his defence.'").

Of these tools of personal defense that are guaranteed to the accused by the Sixth Amendment, "the right to be represented by counsel is by far the most pervasive for it affects [the accused's] ability to assert any other rights he may have." Cronic, 466 U.S. at 654. Though representation by counsel is the "means through which the other rights of the person on trial are secured," it is essential that counsel not lose its character as an assistant for the accused's personal defense, least it become "an organ of the State interposed between an unwilling defendant and his right to defend himself personally." Faretta, 422 U.S. at 820-21 ("An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction."); Cronic, 466 U.S. at 654-55 ("The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment."). As such, the right to counsel must not only mean the right to "the effective assistance of counsel," but, as a "necessary corollary,...the right to

representation that is free from conflicts of interest." Fullwood v. Lee, 290 F.3d 663, 688-89 (4th Cir. 2002); Strickland v. Washington, 466 U.S. 668, 688 (1984) ("Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest."); see also Nance v. Ozmint, 367 S.C. 547, 626 S.E.2d 878, 880 (2006) ("[T]he Sixth Amendment requires that a criminal defendant receive effective assistance of counsel."). The constitutional requirement imposed by the Sixth Amendment that counsel be "effective" and "loyal" in assisting an accused with his personal defense is built upon the reality that "it is [the accused] who suffers the consequences if [his] defense fails," not his attorney. Faretta, 422 U.S. at 820; Cooke v. Delaware, 977 A.2d 803, 842 (Del. 2009) (holding that "[a]lthough these fundamental decisions are indeed strategic choices that counsel might be better able to make, because the consequences of them are the defendant's alone, they are too important to be made by anyone else"); see also ABA Model Code Prof. Responsibility, EC 7-8 (directing that "[i]n the final analysis...the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself"); South Carolina Rules of Professional Conduct, Rule 1.2, RPC, Rule 407, SCACR ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation and...shall consult with the client as to the means by which they are to be pursued...In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.").

Consequently both the United States Supreme Court and various state courts throughout the United States have time and again held that "certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate." Florida v. Nixon, 543 U.S. 175, 187 (2004); Jones v. Barnes, 463 U.S. 745, 751 (1983) ("It is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal."); Abney v. State, Op. No. 5207 (S.C. Ct. App. filed March 19, 2014) (Shearouse Adv. Sh. No. 11 at 64) (Pieper, J., concurring) ("Certain decisions are considered fundamental and personal to a criminal defendant, and thus, are waivable only by the defendant."); Taylor v. Delaware, 28 A.3d 399, 406 (Del. 2011) (holding that "certain fundamental decisions regarding [a criminal] case...implicate inherently personal rights which would call into question the fundamental fairness of [a] trial if made by anyone other than the defendant") (internal quotation marks omitted); see also Edwards v. Florida, 88 So. 3d 368, 374 (Fla. Dist. Ct. App. 2012) (holding that trial counsel violated defendant's Sixth Amendment rights where trial counsel asserted the affirmative defense of insanity over defendant's objection because such a defense was akin to a plea and, accordingly, violated counsel's "responsibility to abide by his client's decisions concerning the objectives of the representation"); Montana v. Jones, 923 P.2d 560, 566 (Mont. 1996) (holding that a criminal defendant's Sixth Amendment rights were violated where attorney's conduct ran "directly afoul of Rule 1.2(a), MRPC" where attorney "put his personal interest in not wanting to take [defendant's] case to trial ahead of [defendant's]

constitutional right to an attorney devoted solely to [defendant's] interest in exercising his right to a trial by jury"). In defense of the personal nature of the Sixth Amendment and to ensure counsel remains an "assistant" to the accused and not a "master," the United States Supreme Court has promulgated two related lines of cases that acknowledge "first magnitude" violations of a criminal defendant's Sixth Amendment rights where the actions and/or conflicts of interest of counsel wrest control of the ends of an accused's defense from the defendant and thereby "strip[]" the accused's defense "of the personal character upon which the [Sixth] Amendment insists." Faretta, 422 U.S. at 820.

The first of the two lines of cases to be discussed herein in which the United States Supreme Court found one of these "first magnitude" violations is Cuyler v. Sullivan, 446 U.S. 335, 350 (1980), in which the Court held that a "defendant who show[ed] that a conflict of interest actually affected the adequacy of his representation" had suffered a per se "denial of the right to have effective assistance of counsel," and "need not demonstrate prejudice in order to obtain relief." State v. Gregory, 364 S.C. 150, 612 S.E.2d 449, 450 (2005) (holding that to establish a violation of Sixth Amendment rights "a defendant need not demonstrate prejudice if there is an actual conflict of interest"). Augmenting the Cuyler prohibition against real and substantial conflicts of interest, the United States Supreme Court in Cronic, 466 U.S. at 658, expanded the prohibition of Cuyler to situations in which counsel's actions or inactions have constructively denied an accused the affective assistance of counsel by failing to "function in any meaningful sense as the Government's adversary." Nance 367 S.C. at ___, 626 S.E.2d at 880-81. As with Cuyler, where counsel's actions result in a

constructive denial of the right to the effective assistance of counsel, a "constitutional error of the first magnitude" has occurred "and no amount of showing of want of prejudice would cure it," and, accordingly, none is required to obtain relief. Cronic, 466 U.S. at 659. Pursuant to the tests laid out by both Cuyler and Cronic, the actions of counsel in the case at bar were clearly antithetical to the loyal and effective assistance of counsel contemplated and guaranteed by the Sixth Amendment.

A. The Conflict Between Trial Counsel's Personal Sympathies and Petitioner's Right to the Assistance of Counsel Devoted Solely to Petitioner's Interest in Exercising his Right to Trial Constituted a Real and Substantial Conflict of Interest that Adversely Affected Petitioner's Defense.

Implicit in the personal and individual nature of the Sixth Amendment, and necessary to ensure that defense counsel is not simply an organ of the State, the right to effective assistance of counsel must "[a]t a minimum...encompass the attorney's duty of loyalty to the client and, concomitantly, the duty to avoid conflicts of interest." United States v. Magini, 973 F.2d 261, 263 (4th Cir. 1992); Fullwood v. Lee, 290 F.3d 663, 688-89 (4th Cir. 2002) (holding that a "necessary corollary to [defendant's] Sixth Amendment right to effective assistance of counsel is the right to representation that is free from conflicts of interest") (citation and internal quotation marks omitted); see Cuyler, 446 U.S. at 349-50 (holding that an attorney's conflict of interest "itself demonstrated a denial of the right to have the effective assistance of counsel...Thus, a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief") (internal quotation marks and citation omitted). Accordingly, where the assistance rendered by

defense counsel's is impeded by an actual conflict of interest, "counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties," Strickland, 466 U.S. at 692, and what results is that the "defense presented is not the defense guaranteed [the defendant] by the Constitution for, in a very real sense, it is not his defense." Faretta, 422 U.S. at 821; but see Gregory, 364 S.C. at ___, 612 S.E.2d at 450 (noting while an actual conflict of interest will violate the Sixth Amendment, the "mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction"). Thus, in South Carolina the determinative question with regard to the Cuyler analysis is when does an actual conflict of interest occur.

As was recently reiterated by this Court in Gregory, the determination of whether an actual conflict of interest is violative of a defendant's Sixth Amendment rights turns on whether "a defense attorney [has] place[d] himself in a situation inherently conducive to divided loyalties...." 364 S.C. at ___, 612 S.E.2d at 450. In further expounding on the line where an attorney's conflict would render a trial fundamentally unfair, this Court cited Zuck v. Alabama, 588 F.3d 436 (5th Cir. 1979), and Colorado v. Castro, 657 P.2d 932 (Colo. 1983), for the proposition that the Sixth Amendment dictates that where an actual conflict of interest exists that might tempt counsel to "dampen the ardor of his defense" there exists a violation of the Sixth Amendment. Gregory, 364 S.C. at ___, 612 S.E.2d at 450-51 ("[A] defendant may not be represented by counsel who might be tempted to dampen the ardor of his defense...This possibility is sufficient to constitute an actual conflict as a matter of law.") (emphasis in original) citing Zuck, 588 F.3d at 440. Moreover, "[a] conflict may not always be 'as apparent as when [an attorney] formally

represents two parties who have hostile interests...[a]n attorney 'may harbor substantial personal interests which conflict with the clear objective of his representation of the client:..." Brown v. United States, No. 4:05-cr-770-TLW (D.S.C. 2011) (quoting United States v. Tatum, 943 F.2d 370, 376 (4th Cir. 1991)) (emphasis added). Consistent with the realization that counsel's personal interest can constitute an actual conflict of interest, the Fourth Circuit has further acknowledged that "the duty of loyalty is violated not merely when counsel represents clients who have conflicting interests, but also when counsel acts more for the benefit of, and with apparent sympathy toward, the prosecution than the client he is defending." Fullwood, 290 F.3d at 689 (citation and internal quotation marks omitted).

Thus it is within this framework that counsel's interests and actions in this case must be viewed to determine whether counsel's assistance comported with that guaranteed to Petitioner by the Sixth Amendment. Looking to this framework provided by the courts, one consideration is starkly missing, that is the question of good faith on behalf of counsel. However, this absence is appropriate and easily understood in light of the discussion hereinabove concerning the very personal and individual nature of the rights afforded by the Sixth Amendment. See Faretta 422 U.S. at 819-21 (discussing the "personal character" of the Sixth Amendment). To inquire into the good faith of counsel's actions would start down the impermissible and slippery slope towards transforming counsel's role from that of "assistant" to a willing defendant to "master" and "organ of the State" interposed upon an unwilling defendant. Id. Consequently, whether counsel in this case believed that he was acting in best interest of Mr. Brown is

inconsequential, rather the question that is dispositive of whether Mr. Brown's Sixth Amendment rights were violated by counsel is whether counsel "put his personal interest in not wanting to take [Mr. Brown's] case to trial ahead of [Mr. Brown's] constitutional right to an attorney devoted solely to [Mr. Brown's] interest in exercising his right to trial by jury." Jones, 923 P.2d at 566 (holding defendant's Sixth Amendment rights to effective and loyal counsel were violated where counsel sought to be relieved because counsel found defendant's rejection of a favorably negotiated plea deal "repugnant," because the "conflict between [counsel's] sympathies and [defendant's] rights and interests [was] unmistakeable and egregious and, under such circumstances, [counsel] can be said to have represented [defendant] only through a tenuous and unacceptable legal fiction") (internal quotation marks and citation omitted). As to this question, the Appendix is abundantly clear, while Mr. Brown's stated goal was to proceed with the rendering of a decision on the pivotal pre-trail motion and then on towards a not guilty trial verdict, counsel's stated goal was to use the "bargaining leverage that we had with a pretty good motion...to have the prosecutor withdraw the death notice." App. p.41, l.4-6.

The actual conflict of interest between Mr. Brown's goals and those of counsel are further evidenced by Mr. Brown's unequivocal demands for counsel to obtain a final ruling on the pivotal and, in essence, dispositive pre-trial motion, and counsel's response that there was no way he would refile the motion in question. App. p.55, l.24; App. p.56, l.1. Allowing the substitution of counsel's opinion as to what is "best," in this case that Mr. Brown avoid the death penalty, is utterly antithetical to the duty of loyalty required by the personal nature of the Sixth Amendment. Moreover, by acting to obtain his own

goal, avoidance of the death penalty for Mr. Brown, through withdrawal of a "not an insignificant motion," App. p.40, l.14-15, counsel acted "more for the benefit of, and with more apparent sympathy toward, the prosecution than the client he [was] defending." Fullwood, 290 F.3d at 689. Having adopted and acted on a belief that Mr. Brown should be convicted, counsel failed to function in any meaningful sense as the State's adversary. Id.; see also App. p. 49, l. 1-7. Consequently, the facts at bar evidence not simply a case where counsel's conflicting personal interest might have tempted counsel to dampen the ardor of his defense, but rather an egregious and actual violation of Cuyler in which counsel's loyalties were so conflicted that he ceased to function as an advocate for Mr. Brown's stated goals, as opposed to a friend of the court. Jones v. Barnes, 463 U.S. 745, 758 (1983) (Brennan, J., dissenting) ("To satisfy the Constitution, counsel must function as an advocate for the defendant, as opposed to a friend of the court"); see also Taylor, 28 A.3d at 408 (holding that trial judge properly protected defendant from an "irreconcilable conflict" where defendant's desired result, a not guilty verdict, was in conflict with counsel's proposed strategy of guilty but mentally ill by prohibiting defendant's counsel from "overriding" defendant's "plain intent to seek a not guilty verdict"). Based on the existence of an actual conflict of interest on behalf of Mr. Brown's counsel, which did in fact affect his representation of Mr. Brown, Mr. Brown's Sixth Amendment right to the effective assistance of counsel in the presentation of his chosen defense, Mr. Brown's Sixth Amendment rights were violated and he is entitled to a new trial.

B. Trial Counsel's Usurpation of Petitioner's Ultimate Authority to Make Certain Fundamental Decisions with Regard to his Defense Constructively Denied Petitioner the Assistance of Counsel in Pursuing Petitioner's Chosen Trial Objective and Further Failed to Expose the State's Case to the Crucible of Meaningful Adversarial Testing.

As a companion case to the United States Supreme Court's decision in Strickland, the Court, after establishing the general rule in Strickland that to prevail on an ineffective assistance of counsel claim a defendant must also establish prejudice, acknowledged "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." Cronic, 466 U.S. at 658. Of the three circumstances which the Court acknowledged as "per-se" prejudicial, the one that is applicable to this case is the second situation noted by the Court is where there has been "a constructive denial of counsel," which happens when counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing," rendering "the adversary process itself presumptively unreliable." Id. at 659; see also Nance, 367 S.C. at ____, 626 S.E.2d at 880.

To determine what constitutes a constructive denial of counsel within the meaning of this case, it is again necessary to harken back to the personal and individual nature of the rights guaranteed by the Sixth Amendment. See Faretta, 422 U.S. at 820-21. It is the personal nature of the defense guaranteed by the Sixth Amendment from which "derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." Strickland, 466 U.S. at 688. Though counsel "undoubtedly has a duty to consult with the client regarding important

decisions, including questions of overarching defense strategy...[t]hat obligation, however does not require counsel to obtain the defendant's consent to every tactical decision."[1] Nixon, 543 U.S. at 187 (internal quotation marks and citation omitted). Nonetheless, some decisions "regarding the exercise or waiver of basic trial and appellate rights are so personal to the defendant 'that they cannot be made for the defendant by a surrogate," for such choices "implicate inherently personal rights which would call into question the fundamental fairness of the trial if made by anyone other than the defendant." Cooke, 977 A.2d at 841 (quoting Nixon, 543 U.S. at 187 and Arko v. Colorado, 183 P.3d 555, 558 (Colo. 2008)). Accordingly, the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." Barnes, 463 U.S. at 751. With regard to these decisions concerning the objectives of the representation, "an attorney must both consult with the defendant and obtain consent to the recommended course of action." Nixon, 543 U.S. at 187.

Though the State will undoubtedly argue that pre-trial motions are classic tactical decisions that are within the purview of the attorney, and that as such, counsel's withdrawal and refusal to refile the motion in question was a tactical question that cannot form the grounds for a claim of ineffective assistance of counsel, the motion in question went directly to the heart of those decisions that are the defendant's alone, namely the

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[1] With regard to fundamental decisions concerning a defendant's Sixth Amendment rights the Court has used "the term 'consult' to convey a specific meaning advising the defendant about the advantages and disadvantages of [a particular course of action], and making a reasonable effort to discover the defendant's wishes." Roe v. Flores-Ortega, 528 U.S. 470, ___ (2000).

objectives of the representation. The motion in question and the decision to be rendered thereon was in essence a proxy for Mr. Brown's decision on whether to plead guilty or proceed to trail. See App. p.40, l.17-19. (Mr. Brown informed Mr. Mcguire that he "wanted to have the judge decide the motion before making any other decisions with regard to a trial or plea."); see also Cooke, 977 A.2d at 851 (holding that "[t]he decision to pursue a verdict of not guilty and assert his factual innocence belongs to the defendant"); Barnes, 463 U.S. at 751. Though placing the fundamental decision to pursue a not guilty verdict through obtaining a ruling on the motion in question certainly exposed Mr. Brown to a situation where he could have been vastly worse off than if counsel was permitted to have final say on this matter, as the Delaware Supreme Court explicitly acknowledged in Cooke, 977 A.2d at 842, and reaffirmed in Taylor, 28 A.3d at 406, "[a]lthough these fundamental decisions are indeed strategic choices that counsel might be better able to make, because the consequences of them are the defendant's alone, they are too important to be made by anyone else."

Moreover, given that decisions concerning the objectives of Mr. Brown's case were solely for Mr. Brown to make, counsel is prohibited from effectively depriving Mr. Brown of his chosen defense by acting contrary to the Mr. Brown's expressly stated goals and thereby overriding Mr. Brown's ultimate authority regarding the objectives of the representation. Taylor, 28 A.3d at 406 ("As an important corollary, 'counsel cannot undermine the defendant's right to make these personal and fundamental decisions by ignoring the defendant's choice and arguing affirmatively against the defendant's chosen objective.') (quoting Cooke, 977 A.2d at 842); see also Kimberly Helene Zelnick, In

Gideon's Shadow: The Loss of Defendant Autonomy and the Growing Scope of Attorney Discretion, 30 AM. J.CRIM. L. 363, 397-98 (2003) ("Because [the rights enumerated in Barnes] are retained for the defendant, counsel should be bound by his client's decisions regarding how he wishes to exercise these rights, and further, counsel should be bound to act in a fashion that is consistent with those decisions."); 1 Geoffrey C. Hazard Jr. & C. William Hodes, The Law of Lawyering, § 5.6, illus. 5-3 (3d ed. 2009) (explaining that a criminal defense lawyer who interferes with a client's autonomous choice in the area of critical turning-point decisions is not providing the effective assistance of counsel required by the Sixth Amendment).

In this case, as in Cooke, Mr. Brown exercised his ultimate authority to make fundamental decisions concerning the goals of the representation, namely to obtain a verdict of not guilty, however, contrary to that goal, Mr. Brown's counsel insisted on his own objective, to save Mr. Brown's life by obtaining a withdrawal of the death notice. See App. p.41, l.9-11 (Mr. Mcguire stated that Mr. Brown "wanted the judge to decide it and I, over his objection, withdrew it to have the death notice withdrawn"). The conflict between the goals of Mr. Brown and his counsel are further evidenced by Mr. Brown's testimony that he wished to have a final ruling on the motion in question, that he directed Mr. Mcguire to return to the solicitor and put the motion back on the table, and that counsel refused to comply in a heated discussion. App. p.55, l.24;App. p.56, l.1. By counsel having withdrawn and refusing to refile the pivotal and, in essence, dispositive motion, Mr. Mcguire overrode and negated Mr. Brown's "decisions regarding his

constitutional rights, and created a structural defect in the proceedings as a whole." Cook, 977 A.2d at 849.

The defect injected into Mr. Brown's case created a twofold breakdown in the adversarial system. First, given that the decision counsel's actions negated was of the fundamental nature that is left solely to the defendant, counsel in effect constructively denied Mr. Brown counsel, for just as in Cooke, Mr. Mcguire "did not 'assist' [Mr. Brown] with his trail objective of obtaining a not guilty verdict." Id. at 850 (emphasis added). Secondly, counsel further constructively denied Mr. Brown the assistance of counsel by pursuing counsel's inconsistent objective of saving Mr. Brown's life, which led counsel to adopt and act on a belief that his client should be convicted and to fail to "require the prosecution's case to survive the crucible of meaningful adversarial testing. Cronic, 466 U.S. at 656; Fullwood, 290 F.3d at 689 ("[A]n attorney who adopts and acts on a belief that his client should be convicted 'fail[s] to function in any meaningful sense as the Government's adversary.'") (quoting Osborn v. Shillinger, 861 F.2d 612 (10th Cir. 1988)); see also Cooke, 977 A.2d at 850 ("[I]n pursuing their own inconsistent objective of proving that Cooke was guilty but mentally ill, defense counsel not only failed to subject the prosecution's case to meaningful adversarial testing, but also undermined the due process requirement that the State prove Cooke's guilt—and his eligibility for the death penalty—beyond a reasonable doubt.").

In conclusion, Mr. Mcguire disregarded the very foundation of this Sixth Amendment's guarantee of a personal defense, the objectives of which must be directed by the accused, when he refused to assist Mr. Brown with his chosen trial objective. App. p.41, l.9-11. By disregarding Mr. Brown's chosen trial objective, Mr. Mcguire, in

essence, disregarded the very foundation of the Sixth Amendment and became an organ of the State interposed upon an unwilling defendant. See Faretta, 422 U.S. at 821 ("An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense."). Mr. Mcguire did not let the client exercise the "ultimate authority" about the objectives of the representation to which Mr. Brown was entitled, instead choosing to take the action Mr. Mcguire believed in his own opinion to be best for Mr. Brown. Consequently, Mr. Mcguire's inconsistent and irreconcilable goals dominated the representation and undermined Mr. Brown's decisions as to the goals of the representation, effectively depriving Mr. Brown of his constitutional right to personally decide to plead guilty to the prosecution's case and, ultimately, forcing Mr. Brown to accept a substantive outcome that he did not desire. Although Mr. Mcguire's actions were taken in good faith, by undermining the adversarial process through constructively denying Mr. Brown the assistance of counsel, counsel's actions rendered the adversarial process itself presumptively unreliable. Given the patent violation of Mr. Brown's Sixth Amendment rights as laid out by Cronic, Mr. Brown is entitled to a new trial.

C. Assuming Arguendo that Trial Counsel's Actions Were Not Violative of the Prohibitions Laid Down by Cuyler and Cronic such that Prejudice Must Be Shown to Obtain Relief Pursuant to Strickland, Trial Counsel's Actions Were Clearly Prejudicial.

Assuming arguendo that neither counsel's direct conflict of interest with Mr. Brown's stated goals for his personal defense nor counsel's constructive denial of counsel through the usurpation of Mr. Brown's authority to decide his desired goals constitute a circumstance in which per-se prejudice occurs, Mr. Brown is nonetheless entitled to a new trial pursuant to the two part test enunciated in Strickland. First, under Strickland v. Washington, 466 U.S. at 687, a PCR applicant must show that his counsel's performance was deficient such that it falls below an objective standard of reasonableness. The court measures an attorney's performance by its "reasonableness under professional norms." Cherry v. State, 300 S.C. 115,117, 386 S.E.2d 624,625 (1989), (citing Stickland, 466 U.S. 668 (1984)).

Though the United States Supreme Court does not provide a checklist of conduct that comports with the standard of effective assistance of counsel required by the Sixth Amendment, "[i]t relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions." Strickland, 466 U.S. at 688. In this case, reasonable professional conduct should be dictated by Rule 1.2 of the Rules of Professional Conduct requiring a lawyer to abide by a client's decisions concerning the objectives of representation and consult with the client as to the means by which they are to be pursued. See also ABA Model Code Prof. Responsibility, EC 7-8 (directing that

"[i]n the final analysis...the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself"). Mr. Mcguire clearly disregarded Mr. Brown's objective in this case which was to a pursue a verdict of not guilty in part through obtaining a ruling on the pivotal pre-trial motion. This was obviously an important motion that would have had a direct impact on the resolution of Mr. Brown's case. This shows a clear disregard for Rule 1.2 which renders Mr. Mcguire's performance below an objective standard of reasonableness. While Mr. Mcguire's desire to have the death notice withdrawn is admirable, pursuant to Rule 1.2 the choice was not Mr. Mcguire's to make. It was Mr. Brown's life that hung in the balance, and accordingly, the decision to obtain a decision regarding his evidentiary motion, even if that meant that the death penalty would remain on the table, was for Mr. Brown and Mr. Brown alone to make.

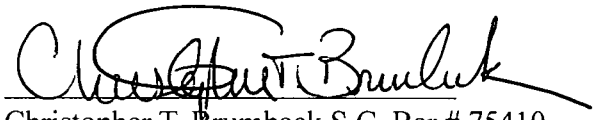
Turning to the second prong of the Strickland test, an applicant then must show there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 687; Alexander v. State, 303 S.C, 539, 541-42, 402 S.E.2d 484, 485 (1991). Where there has been a guilty plea, the applicant must prove prejudice by showing that, but for counsel's errors, there is a reasonable probability he would not have pleaded guilty and instead would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985); Jordan v. State, 297 S.C. 52, 54, 374 S.E.2d 683, 684 (1988). There is no doubt the result of this proceeding would have been different but for Mr. Mcguire's unprofessional errors. Regardless of whether the trial court granted or denied Mr. Brown's motion, Mr. Brown, as he testified at the

PCR hearing, would have proceeded to a trial of his case. See App. p.54, l.21-24 (indicating that Mr. Brown would have "insisted" on going to trial "if Mr. Mcguire [had] received a pretrial decision [on the motion]"). Had the judge denied Mr. Brown's motion, the plea Mr. Brown took would have been off the table while the death penalty would have remained, requiring Mr. Brown to proceed to trial in hopes to avoid a death sentence. Conversely, had the judge granted Mr. Brown's motion and suppressed the evidence, Mr. Brown would almost certainly have taken his case to trial due to the serious evidentiary holes that would have been poked in the State's case. Accordingly, but for Mr. Mcguire's inappropriate withdrawal of the evidentiary motion in question, Mr. Brown would have "insisted" on proceeding to trial. Instead, with all the overwhelming evidence stacked against Mr. Brown because of the withdrawn motion, Mr. Brown was backed into a corner by his own counsel who believed that he knew better than his client with respect to the goals of his client's case. Hemmed in by actions diametrically opposed to his unequivocally expressed wishes, Mr. Brown had no choice but to walk the path dictated to him by his counsel. When it comes to decisions of the nature of a guilty plea, when the decision has been forced upon the deciding individual, voluntariness is nothing but a farce perpetrated upon the individual, the legal system, and society at large. As our criminal justice system is based on the faith of the public and the full presence of propriety and forthrightness, the court must be particularly sensitive to situations such as Mr. Brown's, for no matter how reasonable or astute counsel's trial strategies are, they cannot take control of those fundamental decisions reserved for the defendant alone.

CONCLUSION

Petitioner Domonique Brown respectfully requests that this Court REVERSE the July 5, 2012 Order of Dismissal of the lower court, GRANT Petitioner's application for Post Conviction Relief and REMAND this matter for new trial.

BRUMBACK & LANGLEY, LLC



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Date: November 12, 2014
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LAURENS COUNTY
General Sessions Court

Thomas A. Russo, Jr., Circuit Court Judge

C.A. No. 2012-212940

Domonique Brown. . . . . .Petitioner,

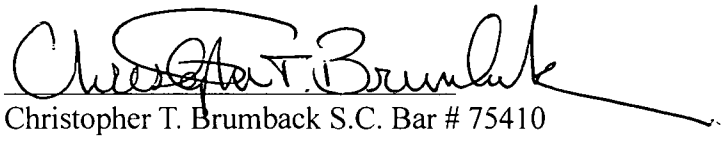
vs.

State of South Carolina. . . . . Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that on this 12th day of November 2014, counsel of record for Respondent was served with a copy of Petitioner's Brief-In-Chief and the Appendix through United States Postal Service First Class Mail in accordance with the South Carolina Rules of Civil Procedure and the South Carolina Rules of Appellate Procedure.

BRUMBACK & LANGLEY, LLC



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