

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

**S.C. Supreme Court**

The Honorable Benjamin H. Culbertson, Circuit Court Judge

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Appellate Case No. 2014-001808

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Thomas A. Smart, .....Petitioner,

v.

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

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**RETURN TO PETITION FOR  
WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

I. Did the post-conviction relief judge properly find Petitioner failed to meet his burden to show counsel acted under an actual conflict of interest that adversely affected the quality of his representation, where South Carolina has never recognized that a Sixth Amendment conflict automatically arises out a defense attorney's marital relationship with a solicitor who works in the office prosecuting his client, and Petitioner presented no evidence of a resulting adverse impact?

## STATEMENT OF THE CASE

In January 2010, the Horry County Grand Jury indicted Petitioner for murder, attempted armed robbery, and first degree burglary. (App. pp. 379-84). On July 19, 2010, Petitioner proceeded to trial before the Honorable William H. Seals, Jr. (“the trial judge”) and a jury. (App. p. 1). William B. Von Hermann, Esquire (“trial counsel”), represented Petitioner. (App. p. 2). Robert B. Bryan, Esquire (“the solicitor”) represented the State. (App. p. 2). The jury ultimately found Petitioner guilty on all charges as indicted. (App. p. 243, l. 12 – 244, l. 19). Judge Seals sentenced Petitioner to consecutive terms of ten (10) years for throwing bodily fluids, three (3) years imprisonment for failure to stop for a blue light, three (3) years for threatening the life of an officer, and six (6) months for resisting arrest. (App. p. 256, l. 10 – 257, l. 3).

Petitioner filed a timely notice of appeal, and Tristan M. Shaffer, Esquire (“appellate counsel”) perfected the appeal. The South Carolina Court of Appeals affirmed the convictions on April 28, 2010. State v. Smart, Op. No. 2012-UP-371, 2012 WL 10844371 (S.C. Ct. App. filed June 20, 2012). Petitioner petitioned the South Carolina Supreme Court for review of the Court of Appeals’ decision, but later voluntarily withdrew his appeal. By order dated February 22, 2013, the Supreme Court dismissed the appeal. The Supreme Court returned the Remittitur to the Circuit Court on February 26, 2013.

Petitioner filed an application for post-conviction relief on April 4, 2013. (App. pp. 285-88). Tristan M. Shaffer, Esquire, represented Petitioner. (App. p. 294). The Honorable Benjamin H. Culbertson (“the post-conviction relief judge”) convened a hearing on the application at the Horry County Courthouse on June 18, 2014. (App. pp. 294-364). The post-conviction relief judge denied relief in an order filed August 1, 2014. (App. pp. 365-78).

### **STANDARD OF REVIEW**

In a post-conviction relief action, the applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (*citing* Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). On appeal, this Court must affirm the circuit court's denial of post-conviction relief when there is probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (*citing* McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry, 300 S.C. at 115, 386 S.E.2d at 624)).

## ARGUMENT

- I. The post-conviction relief judge properly found Petitioner failed to meet his burden to show counsel acted under an actual conflict of interest that adversely affected the quality of his representation, where South Carolina has never recognized that a Sixth Amendment conflict automatically arises out a defense attorney's marital relationship with a solicitor who works in the office prosecuting his client, and Petitioner presented no evidence of a resulting adverse impact**

Petitioner argues the PCR Court erred in finding counsel was effective, alleging that counsel labored under an actual conflict of interest which adversely affected the adequacy of his representation. Respondent submits this argument is without merit, and that there is ample probative evidence in support of the PCR Court's findings. Specifically, there was no actual conflict in violation of the Sixth Amendment, and Petitioner has presented no evidence that the relationship in question adversely affected counsel's performance.

The Sixth Amendment right to counsel "ensur[es] that all persons accused of crimes have access to effective assistance of counsel for their defense." State v. Quattlebaum, 338 S.C. 441, 446, 527 S.E.2d 105, 107 (2000) (citing U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense").

As a general rule, where a criminal defendant seeks to have his conviction overturned on the ground that his right to the effective assistance of counsel was violated, he or she must show that counsel's performance was deficient, as measured by its "reasonableness under prevailing professional norms," and that there was resulting prejudice to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989) (quoting Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

One narrow exception to the general requirements of Strickland allows a defendant to prove ineffective assistance of counsel by showing an *actual* conflict of interest affected the

adequacy of his representation – whether or not prejudice is proven. Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984) (*quoting Cuyler v. Sullivan*, 446 U.S. 335, 348-50, 100 S.Ct. 1708, 1718-19 (1980)<sup>1</sup>.

In a PCR proceeding, the applicant who claims his or her attorney had a conflict of interest bears the burden of demonstrating he or she is entitled to relief. Jordan v. State, 406 S.C. 443, 449, 752 S.E. 2d 538, 541 (2014). Petitioner has failed to meet his burden.

#### Actual Conflict

First, Petitioner has not shown that counsel *actively represented* conflicting interests. See Langford v. State, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993) (“Until [an applicant] shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for a claim of ineffective assistance of counsel arising from multiple representation.” ). There mere possibility of “a conflict of interest is insufficient to impugn a criminal conviction.” Lomax v. State, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008).

Respondent is unable to find a single *South Carolina* case holding that a marital relationship between a defense attorney and a prosecutor automatically gives rise to an actual conflict of interest – nor has Petitioner presented any controlling authority on point.<sup>2</sup> In fact, the South Carolina Court of Appeals has acknowledge most cases in this state that involve Sixth Amendment conflict-of-interest claims involve the joint representation of codefendants. See Gonzales v. State, 412 S.C. 478, 772 S.E.2d 557, 569-70 (Ct. App. 2015) (*citing Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008)(plea counsel *simultaneously represented* both the petitioner and her husband during guilty pleas that arose out of related offenses); Thomas v. State, 346 S.C.

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<sup>1</sup> The Supreme Court has since cautioned against an overly broad application of Cuyler. See Mickens v. Taylor, 535 U.S. 162, 174, 122 S.Ct. 1237, 1245, 152 L.Ed.2d 291 (2002); *INFRA*, Actual Conflict.

<sup>2</sup> Petitioner cites to one case from Georgia’s intermediate appellate court, Abney v. State, 240 Ga. App. 280, 523 S.E.2d 362 (1999); and another case out of Arkansas, Norris v. State, 205, 427 S.W.3d 626 (2013). Neither is controlling here, and Petitioner’s argument fails under more general areas of South Carolina law.

140, 551 S.E.2d 254 (2001) (actual conflict existed where counsel *jointly represented* petitioner and her husband); Staggs v. State, 372 S.C. 549, 643 S.E.2d 690 (2007) (actual conflict where trial counsel represented defendant on murder charge and his father, mother, and brother on related accessory after the fact of murder charges)). Other Sixth Amendment conflicts cases in South Carolina still deal with issues arising out of multiple representation of *clients*. See, e.g., Jordan v. State, 406 S.C. 443, 752 S.E.2d 538 (2013).

Moreover, the United States Supreme Court has cautioned against a broad application of Cuyler. See Mickens v. Taylor, 535 U.S. 162, 174, 122 S.Ct. 1237, 1245, 152 L.Ed.2d 291 (2002). Noting that the law requires a defendant to show that his counsel *actively represented* conflicting interests as a predicate for claiming ineffective assistance on conflict grounds, the Court in Taylor pointed out that the language of Cuyler does not clearly establish, or even support, its application to “a romantic entanglement with the prosecutor” (among other things). Taylor, 535 U.S. 162, 174-75, 122 S.Ct. 1237, 1245.<sup>3</sup>

Such a limitation makes sense from a practical perspective. The Supreme Court further emphasizes this point, noting that the purpose of the Cuyler exception to the ordinary requirements of Strickland “is not to enforce the Canon of Legal Ethics, but to apply needed prophylaxis in situations where Strickland itself is evidently inadequate to assure vindication of the defendant’s Sixth Amendment right to Counsel.” Mickens, 535 U.S. 162, 176, 122 S.Ct. 1237, 1246 (2002).

In all fairness, the Fourth Circuit has since held that the application of Cuyler to conflicts beyond multiple representations may be appropriate, but it has only done so in extreme

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<sup>3</sup> The court left open the question of whether Cuyler applies to cases of successive representation; it did not say how such a ruling would apply to cases that do not even involve *multiple* representation. Mickens at 176, 122 S.Ct. at 1246.

circumstances involving an attorney's own pecuniary interest and interest in avoiding criminal prosecution. See, e.g., Rubin v. Gee, 292 F.3d 396, 402 n. 2 (4th Cir. 2002) (lawyers' pecuniary interests and interests in avoiding criminal prosecution created actual conflict that adversely affected the adequacy of representation); U.S. v. Stitt, 552 F.3d 345, 350-51 (4th Cir. 2008) (accepting the reasoning from U.S. v. Stitt, 441 F.3d 297 (4th Cir. 2006) *withdrawn for lack of jurisdiction*, U.S. v. Stitt, 459 F.3d 483 (4th Cir. 2006), where the Court held an actual conflict adversely affected representation where defense attorney failed to request court appointed expert in order to avoid scrutiny into possibly illegal fee arrangement with client)). These extreme circumstances, however, are not present in *this* case.

Because Petitioner has failed to show the existence of an actual conflict of interest, or a valid reason for extending this State's application of Cuyler to this specific type of conflict, this petition should be denied.

*Adverse Impact on Representation*

Even if the Court concludes that a Sixth Amendment conflict of interest arose out of the relationship between counsel and his wife, Petitioner has also failed to show any adverse impact as a result of that alleged conflict. This deficiency is highlighted in the PCR judge's order dismissing Petitioner's application, finding that

“[t]rial counsel testified he discussed the novel issues in this case with several other attorneys as well. Certainly such discussions were calculated to assist trial counsel in carrying out his representation of Applicant. Applicant has not presented, and the record does not contain, any evidence suggesting trial counsel's behavior was directly adverse to Applicant's interests.”

App. p. 376-77.

The PCR judge's findings are well supported by the record, and Petitioner presents no reason to overturn those findings. First, Petitioner has presented no evidence to support his

allegation that counsel's performance was adversely affected by the alleged conflict. There is no credible evidence in the record that Counsel divulged confidential information; nor is there even any *allegation* he acted or otherwise failed to act as a result of *any* duty he owed to his wife. The *only* credible evidence in the record<sup>4</sup> indicates that the sole impact from the alleged conflict was beneficial to Petitioner. Id.

Further, the Fourth Circuit has adopted a three factor test in determining whether an actual conflict resulted in an adverse impact:

First, the petitioner must identify a plausible alternative defense strategy or tactic that his defense counsel might have pursued. Second, the petitioner must show that the alternative strategy or tactic was objectively reasonable under the facts of the case known to the attorney at the time of the attorney's tactical decision. To demonstrate objective reasonableness, the petitioner must show that the alternative strategy or tactic was clearly suggested by the circumstances. Finally, the petitioner must establish that the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict.

Gonzales, 412 S.C. at 495, 772 S.E.2d at 566 (*quoting* Mickens v. Taylor, 240 F.3d 348, 361 (4th Cir. 2001), *aff'd* 532 U.S. 162, 122 S.Ct. 1237, 152 L.E.2d 291 (2002) (citation and internal quotation marks omitted). Further,

[a] defendant has established an adverse effect if he proves that his attorney took action on behalf of one client or failed to take action on behalf of one because it would adversely affect another. Thus, both taking action and failing to take actions that are clearly suggested by the circumstances can indicate an adverse effect.

Id.

Petitioner has failed to prove *or even identify*, as is his burden, any alternative, objectively reasonable strategy counsel might have pursued but for the alleged conflict. In light of this failure, as well as the substantial probative evidence in support of the PCR court's ruling, Respondent respectfully request this petition for writ of certiorari be denied.

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<sup>4</sup> The PCR Court found Petitioner's testimony on this issue was not credible. App. p. 376.

**CONCLUSION**

For the foregoing reasons, Respondent respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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By:   
ATTORNEYS FOR RESPONDENT

August 4, 2015

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Horry County

The Honorable Benjamin H. Culbertson, Circuit Court Judge

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THOMAS A. SMART,

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v.

STATE OF SOUTH CAROLINA,

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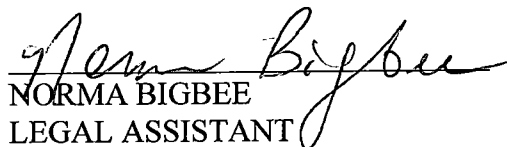
**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of the **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:

Benjamin J. Tripp, Esquire  
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
P.O. Box 11589  
Columbia, SC 29211

This 4<sup>th</sup> day of August, 2015

  
NORMA BIGBEE  
LEGAL ASSISTANT