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APR 20 2018

ORIGINAL SUPREME COURT

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Abbeville County

Honorable G. Thomas Cooper, Circuit Court Judge

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DWAYNE EDDIE STARKS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001731

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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Kathrine H. Hudgins  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Did the PCR judge err in refusing to find trial counsel ineffective in failing to advise Petitioner that he could move, before the judge, to relieve counsel based on the potential conflict arising from trial counsel's prior prosecution of Petitioner?

## STATEMENT

In July of 2012, the Abbeville County Grand Jury indicted Petitioner, Dwayne Eddie Starks, for armed robbery and possession of a firearm during the commission of a violent crime, indictments #2012-GS-01-391, 392. On April 1, 2013, Petitioner proceeded to jury trial before the Honorable Thomas L. Hughston, Jr. Patricia Bolen and Janna Nelson represented Petitioner at trial. Solicitor David Stumbo and Yates Brown prosecuted the case. The jury returned verdicts of guilty. Judge Hughston sentenced Petitioner to twenty-five years (25) years for armed robbery and five (5) years concurrent for the weapon charge. A timely notice of intent to appeal was filed and the direct appeal perfected. The South Carolina Court of Appeals affirmed the convictions and sentence. State v. Dwayne Eddie Starks, Op. No. 2014-UP-490 (S.C.Ct.App. filed October 29, 2014).

On June 10, 2015, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on July 21, 2016. On June 5, 2017, an evidentiary hearing was held before the Honorable G. Thomas Cooper. Laura Saunders represented Petitioner at the PCR hearing. Justin Hunter represented the State. In a written order signed June 16, 2017, Judge Cooper denied relief and dismissed the application. A timely notice of intent to appeal was served on August 28, 2017. This petition for writ of certiorari follows.

## ARGUMENT

**The PCR judge erred in refusing to find trial counsel ineffective in failing to advise Petitioner that he could move, before the judge, to relieve counsel based on the potential conflict arising from trial counsel's prior prosecution of Petitioner.**

The jury found Petitioner guilty of the armed robbery of a convenience store. During the PCR hearing Petitioner alleged that his court appointed public defender who represented him at trial did not adequately explain the conflict of interest issue arising from the fact that she previously worked as a prosecutor and prosecuted Petitioner. (App. p. 382, line 9 – p. 383, lines 1-21). Petitioner acknowledged that his public defender advised him that she had prosecuted him previously but stated that she never asked him to waive the conflict or explained that he could have moved for substitute counsel as a result of the conflict.

When asked at the PCR hearing about advising Petitioner about her former role as prosecutor, the public defender testified:

I can't remember exactly what our conversation was but I remember bringing it up and I remember him saying it wasn't a big deal. I do have notes, we have a computerized system, it is actually a State-wide defense system and I know that from my notes and from my conversations with him that, you know, Mr. Goranson had been his previous attorney. Mr. Goranson was still in the office, he was in, covering Greenwood. And I know that I said, if you are uncomfortable with me representing you I can talk to my boss about Mr. Goranson keeping your case.

(App. p. 395, lines 3-12). Counsel also testified that, pursuant to the rules, there was not an actual conflict. (App. p. 395, lines 13-20).

In the order of dismissal the PCR judge wrote:

Applicant alleged that Counsel had a conflict of interest because she prosecuted a case against Applicant four years prior to the trial when she was employed at the Eighth Circuit Solicitor's Office. This Court finds that Counsel provided credible testimony that she disclosed her prior dealing with Applicant and he did not object. This Court finds that Counsel was not ineffective as there was no conflict

of interest in her representation of Applicant. This Court also finds that Applicant has failed to show that Counsel represented interests adverse to Applicant's or that she had any divided loyalties based on her work in the Solicitor's Office years before representing Applicant. Furthermore, this Court finds that Counsel did not violate Rules 1.7 and 1.8 of the Rules of Professional Conduct that govern conflicts of interest. Accordingly, this allegation must be dismissed.

(App. pp. 414 – 415). The PCR judge erred.

Trial counsel failed to adequately explain options available to Petitioner as a result of trial counsel's prior prosecution of Petitioner. Although trial counsel testified that she advised Petitioner that she could talk to her boss about allowing another public defender to represent Petitioner, she never made the trial judge aware of the prior dealing and never gave Petitioner an opportunity to move, before the judge, to relieve counsel.

A motion to relieve counsel is addressed to the discretion of the trial judge and will not be disturbed absent an abuse of discretion. State v. Gregory, 364 S.C. 150, 152, 612 S.E.2d 449, 450 (2005); State v. Graddick, 345 S.C. 383, 385, 548 S.E.2d 210, 211 (2001). The movant bears the burden to show satisfactory cause for removal. Gregory, 364 S.C. at 152, 612 S.E.2d at 450; Graddick, 345 S.C. at 386, 548 S.E.2d at 211. In State v. Childers, 373 S.C. 367, 645 S.E.2d 233, (2007), a direct appeal case, the defendant asked the trial judge to relieve defense counsel based, in part, on defense counsel's prior prosecution of him. Defense counsel told the trial judge he had no independent recollection of prosecuting Childers. The trial judge denied the motion to relieve counsel. The South Carolina Supreme Court affirmed writing:

Childers failed to show his counsel had any divided loyalties or an actual conflict of interest. See Gregory, 364 S.C. at 152, 612 S.E.2d at 450 (“An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's.”); see also People v. Abar, 290 A.D.2d 592, 736 N.Y.S.2d 155 (N.Y.App.Div.2002) (finding there was no conflict of interest where defendant's public defender had previously prosecuted him on unrelated charges when she was employed as an assistant district attorney); State v. Cobbs, 221 Wis.2d 101, 584 N.W.2d 709 (1998) (concluding there was no actual or serious potential conflict where defendant's

counsel had previously prosecuted defendant while working in the district attorney's office).

Childers, 373 S.C. at 372, 645 S.E.2d at 235.

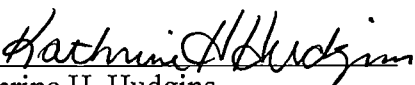
Although the motion to relieve counsel was denied in Childers, in the present case it would have been within the trial judge's sound discretion to either grant or deny the motion. Petitioner, however, was never given the opportunity to move to relieve counsel. Trial counsel was ineffective in failing to explain that Petitioner could move, before the judge, to relieve counsel based on the potential conflict.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2052; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). First, the applicant must show counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687, 104 S.Ct. at 2052. Next, the applicant must show he was prejudiced by counsel's performance such that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Id. at 693, 104 S.Ct. at 2052.

Trial counsel was ineffective in failing to advise Petitioner that he could move, before the judge, to relieve counsel based on the potential conflict arising from trial counsel's prior prosecution of Petitioner. There is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.

**CONCLUSION**

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

  
\_\_\_\_\_  
Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of April, 2018.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Abbeville County

Honorable G. Thomas Cooper, Circuit Court Judge

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DWAYNE EDDIE STARKS,

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RESPONDENT

---

PETITION TO BE RELIEVED AS COUNSEL

---

Counsel for Dwayne Eddie Starks states:


1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.

2. She has reviewed the record of petitioner's trial before Judge G. Thomas Cooper, which was held on June 5, 2017, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Dwayne Eddie Starks.

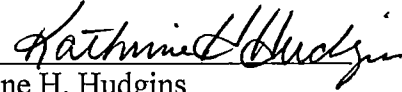
Respectfully Submitted,

  
Kathrine H. Hudgins  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 20th day of April, 2018.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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South Carolina Commission on Indigent  
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This 20th day of April, 2018.

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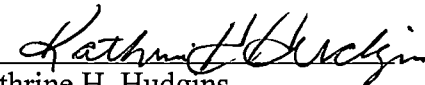
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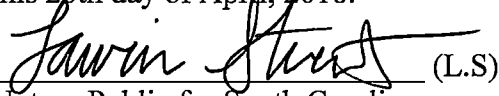
RESPONDENT

\_\_\_\_\_  
CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Justin J. Hunter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Dwayne Eddie Starks, #253926, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 20th day of April, 2018.

  
\_\_\_\_\_  
Kathrine H. Hudgins  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 20th day of April, 2018.

  
\_\_\_\_\_  
Notary Public for South Carolina  
My Commission Expires: July 5, 2027.