

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Sumter County  
Honorable William Jeffrey Young, Circuit Court Judge

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Opinion No. 2018-UP-025 (S.C. Ct. App. Filed 1/17/18)  
2008-GS-43-00646

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RECEIVED

APR 18 2018

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

FAVIAN A. HAYES,

PETITIONER

APPELLATE CASE NO 2009-129706

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PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS

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WANDA H CARTER  
Deputy Chief Appellate Defender

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Appellate Defender

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**INDEX**

INDEX ..... i

CERTIFICATE OF COUNSEL .....1

QUESTION PRESENTED .....2

STATEMENT OF THE CASE.....3

ARGUMENT

The Court of Appeals erred in failing to address petitioner’s Sixth Amendment issue raised on appeal, which was properly preserved for appellate review, concerning the denial of his right to conflict free legal representation during his plea proceeding because counsel simultaneously represented petitioner **and** a potential state’s witness in the case who would have testified at petitioner’s trial had he opted to be tried by jury, and how this impacted the voluntariness of his guilty pleas. ....5

CONCLUSION.....16

**CERTIFICATE OF COUNSEL**

Counsel for petitioner certifies that the Petition for Rehearing was filed in the case on January 31, 2018, and denied by the Court of Appeals on March 21, 2018.

### **QUESTION PRESENTED**

The Court of Appeals erred in failing to address petitioner's Sixth Amendment issue raised on appeal, which was properly preserved for appellate review, concerning the denial of his right to conflict free legal representation during his plea proceeding because counsel simultaneously represented petitioner **and** a potential state's witness in the case who would have testified at petitioner's trial had he opted to be tried by jury, and how this impacted the voluntariness of his guilty pleas.

## STATEMENT OF THE CASE

In October of 2007, the Sumter County Grand Jury indicted petitioner for possession with intent to distribute (“PWID”) cocaine base and PWID cocaine base within one half mile of a school. In May of 2009, the Sumter County Grand Jury indicted petitioner, in an amended indictment, for armed robbery and criminal conspiracy. R. 72 - 73.

On June 1, 2009, petitioner appeared before the Honorable Howard P. King and pled guilty to one count of armed robbery, conspiracy, and the lesser included offense of possession of cocaine base, 2nd offense. David Sullivan (“defense counsel”) represented petitioner at the guilty plea. Assistant Solicitor Catherine Fant represented the State.

After denying petitioner’s motion to relieve defense counsel due to a conflict of interest, Judge King sentenced petitioner to a total sentence of thirty-five years of imprisonment. R. 56, ll. 22 – R. 57, ll. 14. Defense counsel filed a timely Notice of Appeal, however, defense counsel failed to submit an explanation pursuant to Rule 203(d)(1)(B)(iv) showing that there was an issue to be raised on direct appeal of the guilty plea.

On September 22, 2009, petitioner filed an application for post-conviction relief. The state filed a return on February 22, 2010. On March 23, 2012, an evidentiary hearing was held before the Honorable W. Jeffrey Young.

Patrick Killen represented petitioner at the PCR hearing. In a written order signed May 16, 2012, Judge Young denied relief and dismissed the application. A timely notice of intent to appeal was served on May 29, 2012.

Petitioner filed a petition for writ of certiorari seeking review of the order of dismissal and was represented on appeal by Appellate Defender Katherine Hudgins. The state filed a return and was represented by Assistant Deputy Attorney General David Spencer.

The Supreme Court transferred the appeal to the South Carolina Court of Appeals. On July 3, 2014, the Court of Appeals denied certiorari. The Remittitur was issued on June 23, 2014.

On September 23, 2014, petitioner filed a petition for writ of *habeas corpus* with the United States District Court, District of South Carolina. The State filed a Return to the Rule to Show Cause issued by the Honorable Thomas E. Rogers, III, United States Magistrate Judge, in response to petitioner's petition. The State then filed a motion for summary judgment on January 28, 2015. On May 28, 2015, Magistrate Judge Rogers issued his Report and Recommendation that the State's motion for summary judgment be denied unless the State promptly allowed petitioner leave to appeal out of time and provided petitioner with the assistance of counsel and recommended the remainder of the claims be dismissed.

On June 17, 2015, the Honorable Richard Gergel, United States District Judge, entered a conditional order granting writ of *habeas corpus* and directing that the State restore petitioner's direct appeal rights. R. 58 - 59. On September 3, 2015, the South Carolina Supreme Court issued an order that the Court of Appeals recall the remittitur in petitioner's direct appeal and reinstate the appeal. R. 60 - 61.

On September 23, 2015, the Court of Appeals recalled the remittitur. R. 62. On December 2, 2015, Petitioner submitted an "Explanation of Appeal Pursuant to Rule 203(d)(1)(B)(iv), SCACR". R. 63 - 70. On June 16, 2016, the Court of Appeals informed petitioner and the state, via a signed letter from Deputy Clerk V. Claire Allen, that Petitioner's appeal was to proceed. R. 71. A Final Brief of Appellant was filed on May 31, 2017, by former Assistant Appellate Defender John Strom. Petitioner's convictions and sentences were affirmed on appeal on January 17, 2018, by the South Carolina Court of Appeals. See State v. Hayes, Unpublished Op. No. 2018-UP-025 (January 17, 2018). App. 1 - 3. A Petition for Rehearing

was filed by Assistant Appellate Defender Lara Caudy on January 31, 2018. App. 4-16. On March 21, 2018, the Court of Appeals issued an Order denying the Petition for Rehearing filed in the case. App. 17. This Petition for Writ of Certiorari requesting review of the Court of Appeals' decision issued in this case follows.

### **ARGUMENT**

The Court of Appeals erred in failing to address petitioner's Sixth Amendment issue raised on appeal, which was properly preserved for appellate review, concerning the denial of his right to conflict free legal representation during his plea proceeding because counsel simultaneously represented petitioner and a potential state's witness in the case who would have testified at petitioner's trial had he opted to be tried by jury, and how this impacted the voluntariness of his guilty pleas.

### **FACTUAL BACKGROUND**

During the plea colloquy, the court questioned the parties on whether petitioner understood that by pleading guilty to only one of the two armed robberies, he was exposing himself to a life sentence should the state decide to try him on the second robbery. R. 11, l. 1 - 13, l. 25. Plea counsel alleged that he had explained this possible outcome to petitioner. R. 14, ll. 15-23. The state averred that petitioner was pleading guilty to this specific armed robbery because the case had been called for trial that morning. R. 13, ll. 9-17. The State then added that it fully intended to try petitioner on the second armed robbery indictment in the coming months. *Id.*; R. 14, ll. 10-14.

Continuing with the plea hearing, the court asked petitioner if he was "pleading guilty of your own free will and accord?" R. 18, ll. 19-20. Petitioner responded that he was not and that he

was pleading guilty because he believed his attorney's conflicted and ineffectual representation rendered a guilty verdict at trial a foregone conclusion. R. 18, l. 21 - 19, l. 3.

Without receiving an affirmative answer, the trial court continued with the plea colloquy asking petitioner if he was satisfied with his lawyer's representation. R. 19, ll. 4-9. Petitioner stated that he was not satisfied and moved to relieve counsel. R. 19, l. 10 - 22, l. 1. Petitioner said that plea counsel had a conflict of interest arising from his simultaneous representation of an individual named Stacy Rhodes. *Id.*

Petitioner explained that Rhodes had been among of group of people he had been with after the two armed robberies he was accused of committing and that Rhodes was preparing to testify against him at trial. R. 23, ll. 2-10; R. 26, ll. 13-21. The state confirmed that following Petitioner's arrest, Rhodes was arrested for interfering with police arising from his conduct during the investigation into the robberies. R. 28, ll. 3-6. Petitioner's attorney was appointed to represent Rhodes. The State also admitted that Rhodes had offered to testify in petitioner's case and the state was seriously considering having him testify should there be a trial. *Id.* at ll. 6-22. She also admitted that Rhodes was "a possible witness in this case" and that she was "bringing him back [from the Department of Corrections where he was currently incarcerated] to testify" if Petitioner proceeded to trial. R. 27, ll. 6-21.

In fact, the state's recitation of the facts supporting the guilty plea made clear that Rhodes was going to be called as a witness. R. 35, l. 6 - 40, l. 19. The State averred that Petitioner' co-defendant, Brandon McFadden, lived near one of the robbed convenience stores and that police first came into contact with McFadden and petitioner on the day of the second robbery. *Id.* Detective Curtis Hodge of the Sumter Police Department spoke with the two as they were leaving McFadden's house only minutes after the robbery. *Id.*

Hodge was suspicious of McFadden and petitioner because they were sweating and in the area of the robbery, but did not detain them. After police reviewed the video surveillance footage, a detective who had arrested McFadden as juvenile identified McFadden as possibly being one of the two robbers. R. 36, ll. 16-25.

On August 2, 2007, two days after the second robbery, petitioner was riding in a friend's car that was pulled over. R. 37, ll. 1 - 22. Police searched petitioner and found an Advil bottle containing a small amount of cocaine base. *Id.* Police also found three hundred eighty-five dollars in cash and a key to a motel room at the Mount Vernon Inn in Sumter. *Id.*

Law enforcement then raided the Mount Vernon Inn room. When police forced open the door, four men attempted to flee the room, including Stacy Rhodes. R. 37, l. 21 - 40, l. 19. All four were arrested. Rhodes told police that petitioner and McFadden had let the others know about the room. Rhodes also informed police that petitioner and McFadden had recently come into "an excessive amount of money." *Id.* Police recovered a gun matching the description of the revolver used in the July 31st robbery in the motel room.

The motel room was rented by petitioner. *Id.* A disposable camera was also seized during the search of the motel room. Petitioner was not in any of the pictures, but the four men arrested at the motel room - including Rhodes - all told police that he had been with them. *Id.* When interrogated by police, McFadden admitted to committing the robbery with petitioner. Petitioner denied any involvement in the robbery, but stated that he was with McFadden on the night of the robbery. *Id.*

To complicate matters, during a meeting between plea counsel and Rhodes, Rhodes saw incriminating photographs of himself and petitioner. R. 19, l. 10 - 22, l. 22. Apparently, plea

counsel had inadvertently brought recently received discovery documents from petitioner's case to his meeting with Rhodes. *Id.*

Rhodes became upset, took the photographs from plea counsel and refused to return them. *Id.* Petitioner stated to the court that when Rhodes returned to pre-trial detention he still possessed some of the documents and was showing them to other inmates. *Id.* Plea counsel disputed this and claimed that he believed all of petitioner's discovery documents were recovered prior to Rhodes being returned to detention. *Id.*

Plea counsel posited that there was no conflict of interest. *Id.* Petitioner continued to argue that there was a conflict of interest and noted that he had unsuccessfully contacted the Chief Circuit Public Defender, the Chief County Public Defender, and the "Lawyer Conduct Board" in an effort to have his concerns with plea counsel addressed. R. 28, l. 16 - 39, l. 20.

The court rejected petitioner's efforts to have plea counsel relieved:

Well, this is not the time. The time to tell me right now is whether you're willing to advise me that you're satisfied with his representation of these, charges for armed robbery and this charges, and we're talking about the [first robbery] at this time and the charge of the drugs and if you're not, I can tell you this as far as his representation is concerned. ***He's representing you on these charges and he's also representing you on the [second robbery].*** You do not get your choice of public defenders. . . .

So, if you wish to withdraw your plea because you're not happy with Mr. Sullivan on this, don't think that's going to get you a new lawyer, because it's not. You don't have your choice of lawyers when it comes time to try the case. ***I will let you withdraw your plea if you want to go to trial, but Mr. Sullivan's going to be your lawyer.*** Is that, that's your call if you don't want to plead guilty, fine. I'm sure the State is ready to go forward. ***They got the other charges that they are going to call I think shortly and you can go to trial on this charge, this armed robbery, that is the [first] armed robbery, or you can go to trial and go to trial on the drug charges, you can go to trial on both of those and I have not accepted your plea yet and if you are not comfortable pleading guilty to these charges with Mr. Sullivan as your lawyer, now is the time to tell me and he'll stand you aside and***

***Ms. Fant can call the case to trial and it can go before a jury. It's your call, which way you want to go?***

R. 30, l. 16 - 32, l. 14 (*emphasis added*). Petitioner responded that, faced with those options, he would “go with the plea.” *Id.* The court reiterated that if petitioner wished to withdraw his plea, plea counsel would remain his lawyer and the trial would begin immediately. R. 32, l. 24 - 33, l. 3.

### **DIRECT APPEAL ISSUE**

On direct appeal, petitioner raised defense counsel’s conflict of interest with the plea court prior to court accepting petitioner’s guilty plea. However, the court flatly refused to appoint petitioner a new, conflict free attorney or to delay petitioner’s trial. “You don’t have your choice of lawyers when it comes time to try the case. I will let you withdraw your plea if you want to go to trial, but Mr. Sullivan’s going to be your lawyer.” R. 30, l. 16 - 32, l. 14. Once petitioner objected to being represented by defense counsel and established that defense counsel had an active conflict of interest due to his representation of Rhodes, the trial court should have allowed him to withdraw his guilty plea and ordered the appointment of conflict free counsel. The court’s failure to do so constitutes reversible error. Here, petitioner’s defense counsel had an active conflict of interest. Stacey Rhodes, who defense counsel also represented, was going to testify for the state against petitioner. R. 37, l. 21 - 40, l. 19. Rhodes’ interests were directly adverse to petitioner’s interests. The state anticipated that Rhodes was going to testify that Petitioner and McFadden had arranged for the motel room where Rhodes was arrested and that both men had “an excessive amount of money” in the days after the robbery. *Id.* While defense counsel stated that his representation of Rhodes had concluded with Rhodes’ guilty plea, the conflict of interest remained. The state made clear that it believed Rhodes may lie on the witness stand. *Id.* Thus, during petitioner’s trial, defense counsel might have had to advise Rhodes on his Fifth Amendment right to remain silent and on the

consequences of perjury in his capacity as Rhodes' attorney; while then having to cross-examine Rhodes when acting as petitioner's attorney.

### **COURT OF APPEALS' RULING**

On January 17, 2018, this Court affirmed petitioner's convictions for armed robbery, conspiracy, and possession of cocaine base. State v. Petitioner, Op. No. 2018-UP-025 (S.C. Ct. App. filed January 17, 2018). This Court held petitioner's argument that he did not freely, voluntarily, and intelligently plead guilty because the plea judge improperly denied his motion to relieve counsel **based on a conflict of interest was unpreserved** because petitioner made a different argument on appeal than he made during the plea hearing.

### **PROCEDURAL ISSUE: ERROR PRESERVATION**

Respectfully, this Court erred by holding petitioner's argument that he did not freely, voluntarily, and intelligently plead guilty because the plea judge improperly denied his motion to relieve counsel based on a conflict of interest is unpreserved. When the plea judge asked Petitioner whether he was "satisfied with the manner in which your lawyer has advised and represented you," Petitioner immediately asserted counsel had a conflict of interest and explained how he had only recently learned from Stacey Rhodes, an important witness for the state if Petitioner proceeded to trial, that *plea counsel also represented Rhodes*. R. 20, l. 8 – 21, l. 13. Petitioner complained about Rhodes obtaining a portion of his discovery materials from counsel, which only occurred because counsel simultaneously represented both petitioner and Rhodes. R. 20, l. 8 – 22, l. 1. *On at least three other occasions*, petitioner asserted plea counsel had a conflict of interest. R. 24, ll. 23-25; R. 25, ll. 4-6; R. 28, l. 7 – 29, l. 12. He also told the judge he wrote to the circuit public defender, the chief county public defender, and the "Lawyers Conduct Board" to complain about counsel's conflict of interest in an effort to have counsel relieved. R. 24, l. 25 – 25,

l. 17; R. 31, ll. 3-5. Petitioner also asked counsel before the plea hearing to move to be relieved as counsel, but counsel failed to do so. R. 25, ll. 11-12.

As seen, petitioner raised plea counsel's conflict of interest *repeatedly* with the plea judge prior to the judge accepting petitioner's guilty plea. However, the judge flatly refused to appoint petitioner a new, conflict free attorney or to delay petitioner's trial, which was scheduled to begin that day. R. 30, l. 16 – 32, l. 14. The judge asserted, "You don't have your choice of lawyers when it comes time to try the case. I will let you withdraw your plea if you want to go to trial, but Mr. Sullivan's going to be your lawyer." R. 31, l. 24 – 32, l. 2.

After taking a short break to consider petitioner's motion to relieve counsel and his argument that counsel had an actual conflict of interest, the plea judge found:

**I find that the Defendant's [Petitioner's] decision to plead guilty after going very carefully with him on the record in this matter is freely and voluntarily given.** That he has had the advice of counsel, with while has indicated some complaints about he readily admits to his guilt of this crime and does advise that Mr. Sullivan [plea counsel] has represented him and has been in touch with him about this matter. Specifically, I want to make the finding that there was no prejudice to the Defendant as a result of the situation where the photographs got into the hands of another individual. If I had thought that there was any prejudice resulted to this Defendant, as a result to that instance, my willingness to take this plea might have been different, but I can perceive of no way that that resulted in any prejudice to him and his counsel does not see any way that that resulted in any [prejudice] to him. **I also find that there was no conflict of interest. Mr. Rhodes, as far as this matter was concerned, was nothing more than a witness whom Mr. Sullivan [plea counsel] would have had the right to talk to, to learn what he knew about this matter and the fact that Mr. Sullivan represented him on a completely unrelated matter is no conflict of interest whatsoever and I could find that in my view that there was no conflict of interest. . .**

**There's no question in my mind that the Defendant's [Petitioner's] decision to enter this plea as we have set forth is freely and voluntarily given.** Another factor that convinces me of the fact - - of that fact, is the fact that he did not admit to the armed robbery at the Kangaroo store and I have not accepted that plea and have handed that back to the solicitor and that matter will go forward. **So there's no question in my mind** that after having been fully advised of his rights by me and his lawyer and being well represented by his appointed counsel **that the plea in this case is freely and voluntarily given and the Court is going to accept**

**the plea with the stipulations that I have put on the record with regard to or the matter that I have put on the record with regard to . . . any prejudice arising out of the matter that he had discussed or any conflict of interest is simply not there.**

R. 54, l. 5 – 56, l. 17 (emphasis added).

It is apparent from this ruling and from the colloquy that preceded it, that the plea judge understood the nature of petitioner's objection and his argument as to why counsel had a conflict of interest.

“Error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review.” State v. Brannon, 388 S.C. 498, 502, 697 S.E.2d 593, 595 (2010) (citing State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003)). “Instead, *a litigant is only required to fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue.*” Brannon, 388 S.C. at 502, 697 S.E.2d at 595-596 (citing Hubbard v. Rowe, 192 S.C. 12, 19, 5 S.E.2d 187, 189 (1939)) (emphasis added).

Petitioner unequivocally argued plea counsel had a conflict of interest and explained why and how counsel had a conflict. Petitioner clearly explained to the judge that counsel simultaneously represented both petitioner and an important witness for the state, who the solicitor confirmed was expected to testify against petitioner at trial. Consequently, petitioner fairly raised the issue to the plea judge, thereby giving the judge ample opportunity to rule on the issue as required. This is further evidenced by the plea judge's detailed finding that plea counsel did not have a conflict of interest and that petitioner's guilty plea was freely and voluntarily given. See R. 54, l. 5 – 56, l. 17

Therefore, this Court erred by holding petitioner's argument that he did not freely, voluntarily, and intelligently plead guilty because the plea judge improperly denied his motion to relieve counsel based on an actual conflict of interest was unpreserved.

## **SUBSTANTIVE ISSUES: CONFLICT OF INTEREST & INVOLUNTARY PLEAS**

Once petitioner objected to being represented by plea counsel and established that plea counsel had an active of conflict interest due to his representation of Rhodes, the plea judge should have allowed him to withdraw his guilty plea and ordered the appointment of conflict free counsel. The judge's failure to do so constitutes reversible error.

“The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment.” Faretta v. California, 422 U.S. 806, 807 (1975); See Gideon v. Wainwright, 372 U.S. 335, 339-340 (1963). “Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.” United States v. Cronin, 466 U.S. 648, 654 (1984) (internal citation omitted).

Inherent in the right to counsel is the right to conflict free counsel. While an indigent defendant is not entitled to counsel of his choice, the state and federal constitutions guarantees of equal protection of the laws means that an indigent defendant is entitled to conflict free representation. U.S. Const. Amend. XIV; S.C. Const. Art. I, § 3 and § 19.

Our Supreme Court has held that an actual conflict of interest occurs when an attorney owes a duty to a party whose interests are adverse to those of the defendant. Duncan v. State, 281 S.C: 435, 438, 315 S.E.2d 809, 811 (1984) (citing Zuck v. Alabama, 588 F.2d 436, 43 (5th Cir. 1979)). The interests of another client and the defendant are sufficiently adverse if it is shown the attorney owes a duty to the defendant to take some action that could be detrimental to his other client. Id.; See Edgemon v. State, 318 S.C. 3, 455 S.E.2d 500 (1995) (finding an actual conflict of interest where counsel convinced the solicitor that Edgemon's codefendants were less culpable).

Since trial judges typically will not proceed with a guilty plea when the defendant makes an objection, almost all of South Carolina's case law addressing when plea counsel's conflict of interest requires reversal arise out post-conviction relief actions. However, the logic sustaining these decisions applies with equal force to direct appeals when a timely objection has been lodged.

For example, in Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001), the Supreme Court held that an actual conflict of interest arose when the solicitor offered to dismiss the charges against one spouse if the other spouse pled guilty to possessing the entire amount of cocaine. Thomas v. State, supra. When the offer was extended, Thomas and her husband were represented by the same attorney. Id. at 142-143, 551 S.E.2d at 255. Unlike Petitioner, the spouses had previously waived any conflict of interest arising from their joint representation. Id. at 142, 551 S.E.2d at 255. However, the Court held, "At the moment the solicitor made the plea offer, [Thomas'] and [her husband's] interests became adverse to one another and counsel should have advised them accordingly." Id. at 144, 551 S.E.2d at 265. Unlike in Thomas, far from waiving the conflict of interest, Petitioner objected to the conflict and sought relief from the plea judge. R. 18, l. 19 – 32, l. 14. A non-indigent defendant could avoid the problem Petitioner faced by simply exercising his right to counsel of his choice. Cf: State v. Sanders, 341 S.C. 386, 390, 534 S.E.2d 696, 697-698 (2000) (defendant's right to counsel of his choosing is protected by the Sixth Amendment and courts "must balance the defendant's right to his own freely chosen counsel against the need to maintain the highest ethical standards of professional responsibility.").

Here, petitioner's plea counsel had an active conflict of interest. Stacey Rhodes, who was also represented by counsel, was going to testify against Petitioner at trial. R. 27, ll. 17-21. Rhodes' interests were directly adverse to Petitioner's interests. The assistant solicitor expected Rhodes to testify that Petitioner and McFadden had arranged for the motel room where Rhodes was

arrested, that both men had “an excessive amount of money” in the days after the robbery, and that the brown revolver found in the motel room, which matched the description of the weapon used in the robbery, belonged to Petitioner. R. 37, l. 16 – 38, l. 8.

While plea counsel said his representation of Rhodes concluded with Rhodes’ guilty plea, the conflict of interest remained. The assistant solicitor admitted she believed Rhodes may lie on the witness stand when called to testify against Petitioner. R. 27, ll. 17-21. Consequently, during Petitioner’s trial, plea counsel likely would have had to advise Rhodes of his Fifth Amendment right to remain silent and of the consequences of perjury in his capacity as Rhodes’ attorney, while then having to cross examine Rhodes while acting as Petitioner’s attorney.

Instead, by virtue of his indigence, petitioner was faced with a Hobson’s choice between immediately proceeding to trial represented by an attorney with an active conflict of interest or pleading guilty while represented by an attorney with an active conflict of interest. Petitioner’s situation represents a total breakdown of the adversarial system bordering on the absurd. See State v. Boykin, 324 S.C. 552, 478 S.E.2d 689 (Ct. App. 1996); see also Cronin, 466 U.S. at 654 (“Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.”).

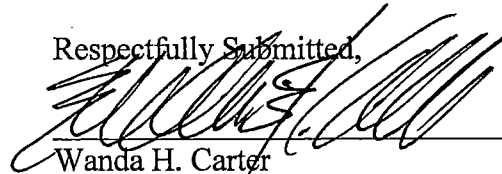
Even after pleading guilty, petitioner still faced charges arising out of a second armed robbery. R. 3, ll. 3-13; R. 12, l. 14 – 16, l. 3. The state intended to seek a sentence of life without parole for the second armed robbery if petitioner pled guilty or was convicted of the armed robbery relevant to this appeal. R. 12, l. 14 – 16, l. 3. Presumably, had the state tried Petitioner for the second robbery, petitioner would have faced the possibility of life imprisonment represented by a defense attorney, who owed a duty to petitioner to take some action that could be detrimental to state witness, Stacey Rhodes. See Duncan, 281 S.C. 435, 315 S.E.2d 809.

Under these circumstances, petitioner's guilty plea could not have been freely, voluntarily, and intelligently made. Accordingly, the plea judge committed an abuse of discretion in refusing to allow petitioner to withdraw from the guilty plea and appoint new, conflict free counsel to represent him. Petitioner's situation represents a total breakdown of the adversarial system bordering on the absurd. *State v. Boykin*, 324 S.C. 552, 478 S.E.2d 689 (Ct. App. 1996); *see also United States v. Cronin*, 466 U.S. 648, 654, 104 S.Ct. 2039, 2044 (1984) (“[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.”).

### **CONCLUSION**

Based on the foregoing argument, counsel for petitioner requests that this Court grant the petition and allow full briefing on the above-raised Sixth Amendment violation.

Respectfully Submitted,



Wanda H. Carter  
Deputy Chief Appellate Defender

Lara M. Caudy  
Appellate Defender

ATTORNEYS FOR PETITIONER

This 18th day of April, 2018.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to Sumter County  
Honorable William Jeffrey Young, Circuit Court Judge

\_\_\_\_\_  
Opinion No. 2018-UP-025 (S.C. Ct. App. filed 1/17/2018)  
2008-GS-43-00646  
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THE STATE,

RESPONDENT,

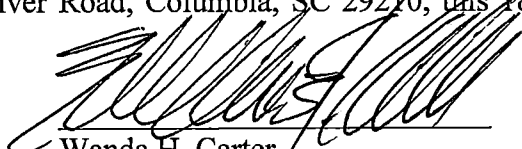
V.

FAVIAN A. HAYES,

PETITIONER

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

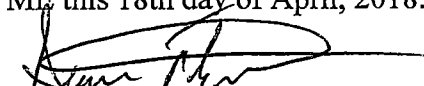
I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Favian A. Hayes, #293544, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 18th day of April, 2018.

  
\_\_\_\_\_  
Wanda H. Carter,  
Deputy Chief Appellate Defender

Lara M. Caudy  
Appellate Defender

ATTORNEYS FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE  
ME this 18th day of April, 2018.

  
\_\_\_\_\_  
(L.S)  
Notary Public for South Carolina  
My Commission Expires: 10/30/2022.



SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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**Robert M. Dudek, Chief Appellate Defender**  
**Wanda H. Carter, Deputy Chief Appellate Defender**

April 18, 2018

David Spencer, Esquire  
Senior Assistant Attorney General  
Rembert Dennis Building  
1000 Assembly Street, Room 519  
Columbia, SC 29201

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APR 18 2018

SC Court of Appeals

Re: The State v. Favian A. Hayes

Dear Mr. Spencer:

Enclosed are two copies of the Petition for Writ of Certiorari and the Appendix in the above case that I have filed with the South Carolina Supreme Court today.

If you have any questions concerning this matter, please contact me.

Sincerely,

Wanda H. Carter  
Deputy Chief Appellate Defender

LMC/sf

Lara M. Caudy  
Appellate Defender

Enclosures

~~cc: Court of Appeals~~