

STATE OF SOUTH CAROLINA)	SOUTH CAROLINA SUPREME COURT
County of Greenwood)	Case No.: 96-GS-24-0295
Reginald M. Gilliam)	
PETITIONER,)	
V)	PETITIONER'S 243(C) EXPLANATION
)	
State of South Carolina)	
RESPONDENT)	

Petitioner in the above captioned case will show this Honorable Court that he was convicted by a jury for murder in the Greenwood County General Sessions Court. Since the time of his conviction and sentencing, Petitioner has filed a direct appeal, a Federal habeas corpus and four (4) applications for post-conviction relief (PCR) challenging his conviction and sentence. On June 21, 2010, the Honorable Judge Eugene C. Griffith, Jr. issued an Order Restricting Future Filings pursuant to Docket No.: 2009-CP-24-1345. See affidavit attached as required by Order Restricting Future Filings.

Petitioner will show this Honorable Court why the lower court's determination was improper. Petitioner filed a PCR application on May 15, 2018 in the Greenwood County Court of Common Pleas because his attorney, Tricia Blanchette filed a motion pursuant to Rule 29(b), SCRCrimp in the General Sessions Court which was not the proper venue to attack a conviction for ineffective assistance of counsel on the basis of an alleged undisclosed conflict of interest.

Petitioner can demonstrate and prove (cause) for default and actual prejudice as a result of his attorney's deficient performance at a critical stage in the proceeding. Petitioner was denied an opportunity to litigate his claims in the wrong motion that his attorney filed. Petitioner was denied an opportunity to show the court that his conflict of interest claim would probably change the result if a new trial were to be granted based on trial counsel having a possible conflict of interest.

The facts would have shown that trial counsel (J. Stephen Welch) placed himself in a "situation inherently conducive to divided loyalties" by representing an individual by the name of Detric Lee McGowan on unrelated, Federal drug charges during the same time period of the trial. Mr. McGowan was connected with a prior incident involving the Petitioner in this case and was subsequently interviewed by investigators in connection with the homicide of Demond Jenkins. However, Mr. McGowan was not a codefendant, victim or witness directly involved in the trial of Defendant for the murder of Demond Jenkins.

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Petitioner can show cause by his attorney's deficient performance in filing the wrong pleading. The General Sessions found that his conflict of interest claim must be brought in the S.C. Court of Common Pleas by an application for post-conviction relief (PCR) pursuant to S.C. Code Section 17-27-10 et al. The General Session's decision was that a motion for a new trial on the basis of after-discovered evidence in Rule 29(b), SCRCrimp is not the appropriate avenue for Petitioner to collaterally attack his conviction and sentence on the basis of IAC.

There is sufficient indication that counsel's assistance in filing the wrong pleading in the wrong court was defective enough to undermine confidence in a proceeding's result because counsel's representation fell below an objective standard of reasonableness, 466 U.S. at 688, 104 S.ct. 2052; and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id at 694, 104 S.ct. 2052; Strickland v Washington, 466 U.S. 668

Does the Petitioner have a created liberty interest in PCR counsel? Petitioner asserts that his Federal Constitutional rights were violated by counsel of his choice during a critical stage of the proceeding. The choices made by counsel in the instant matter fail the objectively reasonable requirement. The Federal Court imposes one general requirement: that counsel make objectively reasonable choices; Bobby v Hook, ~~558~~ U.S. 4, 130 S.ct. 13 (2009), citing Roe v Flores-Ortega, 528 U.S. 470, 479 (2000).

In Lee v Kemna, 534 U.S. 362, 394 (2002), the court held that there are exceptional cases in which exorbitant application of a generally sound [state procedural] Rule renders the state ground inadequate to stop consideration of a federal question. In this case, counsel Tricia Blanchette failed to comply with the procedural rules and hinders the unwary Petitioner from presenting a viable federal constitutional claim.

Petitioner believes he is entitled to a full and fair hearing in order to develop his federal claims. The Petitioner contends that this Honorable Court would commit a manifest abuse of discretion that would amount to an error of law if the Petitioner is denied an evidentiary hearing.

Petitioner contends that his conviction and sentence was in violation of the Constitution of the United States and the South Carolina Constitution and laws of this state. The Petitioner is asserting a 6th and 14th amendment violation which sets forth the prima facie violation of my constitutional rights.

Petitioner hired attorney Tricia Blanchette to represent him with a legitimate claim of filing of a Rule 29(b) motion in the General Sessions Court as

discussed above.

Grounds are constitutional demensions. The fundamental defect alleged are standards that require establishment of a complete miscarriage of justice and an omission inconsistent with the rudimentary demand of fair proceeding.

Petitioner can meet the five (5) criteria of after-discovered evidence. Counsel should be appointed and a hearing held because the Petitioner can show that the evidence upon which it is based:

- (1) is such as would probably change the results if a new trial was had
- (2) had been discovered since the trial
- (3) could not by the exercise of due diligence have been discovered before the trial
- (4) is material to the issue of guilt or innocence and
- (5) is not merely cumulative or impeaching

Petitioner has attempted to present the reason why his conflict of interest Claim was not heard in his PCR case that he filed on Allegations in Petitioner's PCR application for post-conviction relief must be deemed true until those allegations are controverted by the state. Until allegations contained in verified application for post-conviction relief are controverted by the state, they are deemed to be true for purpose of determining whether an evidentiary hearing should be held. Genuine issues of material fact exists which would warrant a hearing.

The Petitioner has shown that a duty of care was owed to him. Rayfield v S.C. Dept. of Corrections, 297 S.C. 95, 105-06, 374 se2d 910, 916 (Ct. App. 1988), cert. denied 298 S.C. 204, 379 se2d 133 (1989). An affirmative legal duty may be created by a [statute], contract relationship, status, property interest, or some other special circumstances, as in the case at bar. Arthurs v Aiken County, 338 S.C. 253, 525 se2d 542, 547 (S.C. App. 1999).

The affirmative legal duty here was created by the South Carolina Constitution, Article I, section 3; S.C. Code Ann. 17-27-60 (2003); and Rule 71.1(d) of S.C. Rules of Civil Procedure, but the court summarily dismissed his PCR application without appointing counsel.

Remand of post-conviction relief case at bar require for the appointment of counsel and an evidentiary hearing regarding indigent Petitioner's claim and equitably tolled on the ground that his attorney, Tricia Blanchette simply filed his Rule 29(b) in the wrong venue. Code 1976, section 17-27-45(a); Rules Civ. Procedure, Rule 71.1(d). See also Gary v State, 557 se2d 662 citing Whitehead v State, 310 S.C. 532, 426 se2d 315(1992). Petitioner was not appointed counsel to

represent him and there is no waiver of his right to counsel on the record. In the interest of fairness, counsel should have been appointed under Rule 71.1(d) when the state moved for dismissal and the Petitioner raised an issue of material fact regarding counsel's blatant mistake of filing in the wrong venue.

Without the constitutional duty of effective assistance, the PCR procedure itself is ineffective and runs-a-fowl of the United States Supreme Court's Fourteenth Amendment directive that the states employ adequate post conviction remedies to present federal constitutional claims. *Case v Nebraska*, 381 U.S. 336 (1965).

Petitioner's ability to present claims of constitutional violations in both South Carolina and Federal Courts, should not be abridged merely because he has unwittingly fallen into a procedural trap created by intricacies by counsel. Petitioner was not allowed a full and fair hearing with the appointment of counsel to present his federal constitutional claims. Petitioner asserts he has a liberty created interest in statutory appointed PCR counsel.

Petitioner states that he learned of the existence of his attorney Tricia Blanchette's error of filing his conflict of interest claim in the wrong venue (court) on July 13, 2015. See attached order. Petitioner was also advised by attorney Tricia Blanchette to pursue his claim in the PCR court. Petitioner then filed his claims on May 15, 2018, in the Greenwood County clerk of court's office in good faith because of his attorney's error. Therefore, Petitioner argues that he is not procedurally barred from raising the present claim.

Shortly after making this discovery and formal consultation with his attorney Tricia Blanchette, he now files his Fifth PCR action pursuant to the "Discovery Rule" in accordance to S.C. Code Ann. 17-27-45(c); *McCoy v State*, 401 S.C. 363, 737 se2d 623 (S.C. 2013); see also *Coates v State*, 575 se2d 557 (S.C. 2003). Therefore, the conflict of interest claim raised above is timely filed and an evidentiary hearing should be held with the appointment of counsel to assist the Petitioner in this matter because genuine issue of material fact exists, which would warrant a hearing. See PCR application.

Petitioner avers that he has demonstrated sufficient reason why his claims, through no fault of his own was filed in the wrong court, by copy of the Rule 29(b) attached. Based on this factual dispute, a hearing is necessary to resolve this critical issue with the appointment of counsel.

The Petitioner has presented clear and convincing evidence to remand this case back to the Greenwood Common Pleas Court to grant a PCR hearing. Petitioner has rebutted the findings of fact and conclusions of law. Our South

Carolina Supreme Court has made it abundantly clear that a PCR proceeding is still a constitutionally protected and statutorily provided mechanism to address a denial of fundamental fairness shocking to the universal sense of justice.

The PCR judge's decision in the Order was an unreasonable determination of the facts in light of the evidence submitted. Because Petitioner has filed merely five (5) PCR actions, his filings are neither repetitive, numerous, nor frivolous. This is clearly a situation distinguishable from that in the Maxton Rule. See also Williams v State, 583 se2d 52 (2003); see affidavit attached.

In a judge's error case, where the attorney's inability to provide effective representation is apparent from the record, the court has notice of the attorney's inability, and the court's protecting duty is triggered. If the court fails to discharge its protecting duty, the constitutional error is a scribble to the court. The record itself yields a presumption of prejudice. Stano v Digger, 921 F2d 1165 (7).

Petitioner will show this Honorable Court through his argument of facts that the PCR court's decision was an unreasonable determination of the facts in light of the evidence submitted. There is a reasonable probability that the outcome of the proceeding would have been different if it not were for attorney Tricia Blanchette's blatant acts and omissions.

ARGUMENT

On December 14, 1995, Defendant was shot at his mother's house. In his report to police, a copy of which is attached, Defendant implicated Detric Lee McGowan (McGowan). As a result, Lt. Evans interviewed Angie Brooks (Brooks) and McGowan on December 16, 1995 regarding McGowan's whereabouts at the time Defendant was shot. Exhibit 1. Per Lt. Evans notes, a copy of which is attached, McGowan stated that he did not have anything to do with the shooting and Brooks provided an alibi for the time when Defendant got shot. Exhibit 1.

On January 7, 1996, Demond Jenkins (Jenkins) was murdered and Defendant was arrested for his murder. Defendant retained J. Stephen Welch (Welch), Esquire, on or about January 12, 1996, and he was represented by Welch through the filing of the Notice of Intent to Appeal on March 27, 1997.¹

Defendant was indicted for the murder of Jenkins on February 19, 1996. At the trial that began on March 17, 1997, the State moved to introduce evidence of the prior shooting of Defendant to establish motive for the murder of Jenkins. The State explained and the trial court summarized

¹ The appeal was perfected by Joseph S. Savitz, III, of the South Carolina Office of Appellate Defense.

that Defendant had been shot in the hand, made a report, no arrest was made and Defendant allegedly informed law enforcement "I'll take care of this myself." Transcript pp. 365-66. Exhibit 2.

While responding to the court's questions regarding the remoteness of the prior shooting, the State explained that defense counsel had been provided a copy of the handwritten notes from the investigation involving the prior shooting in which Defendant named several suspects. Transcript p. 372. Exhibit 2. Specifically, in those notes, a copy of which is attached and referenced above, it reflects that Defendant reported that "McGowan knew something about the shooting, if he didn't do it." Exhibit 1. The notes further reflect that Lt. Evans spoke with McGowan, who denied involvement and provided Angie Brooks as an alibi. Exhibit 1. The notes also reflect that law enforcement spoke with Angie Brooks regarding McGowan's alibi. Exhibit 1. Welch did not mention Defendant's report regarding McGowan or the subsequent interviews during the motion hearing. Exhibit 2.

The court allowed testimony regarding the prior shooting, but Defendant's alleged statement was suppressed. Transcript p. 375. Exhibit 2. Later in trial, the State called Officer Eddie Smith to testify about the prior shooting of Defendant. Transcript p. 582. Exhibit 3. During the course of his cross-examination, Welch did not ask Officer Eddie Smith about the report regarding McGowan, the interview of McGowan or the interview of Angie Brooks. Exhibit 3.

During the trial, the State called Angela M. Brooks (Angie Brooks) to testify. She identified Defendant and testified that she saw him with "a bunch of boys" after 11:00 a.m. on January 7, 1996 "walking up the street." Transcript p. 277, lns. 1-13. Exhibit 4. She testified that Defendant was dressed in a black coat with a hood and ski mask on his face. Transcript p. 279, lns. 23-5. Exhibit 4. Through her testimony the State placed Defendant at or around the scene of the shooting

and in the clothing attributed to the shooter. Despite a rigorous cross-examination regarding inconsistencies with her recorded statement, Welch never informed the court or asked the witness about possible bias due to her involvement with McGowan and providing an alibi for him regarding the prior shooting of Defendant. Transcript pp. 290-95, 297-98. Exhibit 4.

Upon receiving information from Rodney Reno Reynolds (McGowan's co-defendant) while incarcerated that Welch had also represented McGowan, Defendant began writing the court's trying to substantiate the information he received. Defendant also retained a private investigator to assist him in obtaining court documentation to substantiate the information he received from Reynolds. Pursuant to his written request and the work of his private investigator, Defendant received documentation from the Greenwood County Clerk of Court and United States District Court for the District of South Carolina.² Upon review of the below information in conjunction with his case documents, Defendant discovered that J. Stephen Welch, Esquire, had an actual conflict of interest due to the concurrent representation of McGowan while representing Defendant.

1. Arrest Warrant No. F-217310, 217311 for Detric Lee McGowan for the offense of Trafficking in Crack Cocaine and Trafficking in Crack Cocaine in Proximity of a Park with an offense date of July 23, 1996. Exhibit 6.
2. A bond form for the above listed arrest warrants signed by Detric McGowan on October 14, 1996 indicating that he is represented by Steve Welch. Exhibit 7.
3. A three count Greenwood County Indictment (1996-GS-24-1564) for Charles Rodriguez Patterson and Detric Lee McGowan true billed by the Greenwood County Grand Jury on November 11, 1996 charging: Conspiracy, Trafficking in Crack Cocaine and Trafficking in Crack Cocaine within Proximity of a Park on July 23, 1996. The indictment states that it was dismissed due to charges being adopted federally. Exhibit 8.
4. The fourteen count indictment (Case No.: 8:97-170-1) from the United States District Court for the District of South Carolina, Greenwood Division, charging Detric

² A copy of the letter dated August 28, 2013 is enclosed by which Defendant received court documents from Sidney Graham, Private Investigator. Exhibit 5.

McGowan with the offense of distribute and possess with intent to distribute cocaine on July 23, 1996 (count two) and conspiracy naming Rodney Reno Reynolds as a co-conspirator (count one). Exhibit 9.

5. The Judgment in a Criminal Case (Case No.: 8:97-170-1) in the United States District Court for the District of South Carolina reflecting a guilty plea on August 27, 1997 in the case against Detrick McGowan, which lists James Stephen Welch as Defendant's Attorney. Exhibit 10.

It is well established that the Sixth Amendment right to counsel attaches upon initiation of adversarial judicial proceedings and at all critical stages of a criminal trial. Michigan v. Jackson, 475 U.S. 625, 629, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986). In order to prove a per se Sixth Amendment violation, the defendant must show that counsel acted under an actual conflict of interest. See State v. Gregory, 364 S.C. 150, 612 S.E.2d 449 (2005) (finding a per se Sixth Amendment violation where attorney acted under an actual conflict of interest at trial); Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001) (finding a per se Sixth Amendment violation where attorney acted under an actual conflict of interest at the plea hearing); United States v. Tatum, 943 F.2d 370, 380 (4th Cir. 1991) (presuming prejudice where actual conflict adversely affected pretrial strategies as well as the defense at trial); Hoffman v. Leeke, 903 F.2d 280, 290 (4th Cir. 1990) (holding defendant suffered a Sixth Amendment violation where counsel acted under a conflict of interest from the pre-indictment stage until the conclusion of defendant's trial).

In Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708 (1980), the Supreme Court of the United States held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see, e.g., Fed. Rule Crim. Proc. 44(c), it is reasonable for the criminal justice

system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335 at 350, 348.

Recently, in Jordan v. State, 406 S.C. 443, 450-51, 752 S.E.2d 538, 541-42 (2013) the South Carolina Supreme Court found that a situation involving concurrent representation of two clients amounted to an actual conflict of interest, which resulted in presumed prejudice and required remand for a new trial. The South Carolina Supreme Court noted that an actual conflict of interest occurs:

When a defense attorney places himself in a situation inherently conducive to divided loyalties. If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.

Duncan, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (internal marks omitted) (quoting Zuck v. Alabama, 588 F.2d 436, 439 (5th Cir. 1979)); see also Thomas, 346 S.C. 140, 143-44, 551 S.E.2d at 256 ("An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's.") (citing Jackson, 329 S.C. 345, 354, 495 S.E.2d 768, 773 (1998))). Jordan, 406 S.C. 443 at 449-50.

In Jordan, counsel (DePew) was retained by Jordan pursuant to the advice of his girlfriend (Summers) who was represented by DePew on an unrelated Lexington County charge. In the case against Jordan, Summers was the original focus of the law enforcement investigation and a traffic stop on Summers was the catalyst for the search warrant that culminated in Jordan's arrest. At trial, the court invited DePew to present a third party guilt claim against Summers but he chose not pursue that defense on Jordan's behalf. The Court found that counsel's concurrent representation

of Jordan and Summers “constituted an actual conflict of interest.” Jordan, 406 S.C. 443 at 450. The Court further found: “The effect of this actual conflict of interest is best illustrated by DePew’s refusal to present a third-party guilt defense, especially after being invited by the judge to do so.” Id.

Here, the newly discovered records show that Welch was concurrently representing Defendant and McGowan. By his own admission at the PCR evidentiary hearing held on February 7, 2002, Welch surmised that Defendant’s best option was to pursue a self-defense claim regarding the prior shooting and that he wanted the State to introduce evidence of that prior shooting. App. pp. 795-798, 810. Exhibit 12. Interestingly, if the self-defense claim would have been presented or the evidence regarding the prior shooting fully addressed, it is very likely that McGowan would have implicated or at a minimum placed counsel in a “situation inherently conducive to divided loyalties” or in a position to “take some action that was detrimental to his other client.” Jordan, 406 S.C. 443 at 449.

Even though the self-defense claim was not pursued, evidence of the prior shooting came in through motive. Counsel explained at the PCR proceedings that he wanted this evidence to come in at trial. App. pp. 796-7. Exhibit 12. Interestingly, it was never brought out by defense counsel that Defendant not only named the victim as a suspect but named several others, including McGowan.³ This matter was only addressed by the State in arguing that Defendant’s alleged oral statement to law enforcement was admissible. App. p. 372. Exhibit 2. Now having discovered counsel’s representation of McGowan, Defendant submits that counsel’s handling of this matter was most likely tainted by concurrent representation of McGowan.

³ The Assistant Solicitor informed the Court that defense counsel was provided the reports via discovery where Defendant identified three or four suspects in the shooting. App. p. 372, lns. 9-18. Exhibit 2.

Clearly, the concurrent representation of Defendant and McGowan amounted to an actual conflict of interest. Here, counsel placed "himself in a situation inherently conducive to divided loyalties." Counsel owed a duty to two parties whose interests were adverse, and most importantly he represented a client whose interests were "adverse to those of the defendant." Obviously the full exploration of the prior shooting would have caused counsel to "to take some action that could be detrimental to his other client."

Interestingly, Welch never mentioned at trial or during the PCR proceedings that he represented McGowan. Via his affidavit, Defendant submits that he was never advised by Welch that he represented McGowan nor did he ever sign a written waiver of the conflict the concurrent representation presented. See Rule 1.7(b)(4), RPC, Rule 407, SCACR. Defendant submits that there is simply no evidence that Welch informed him or the trial court of his dual representation of Defendant and McGowan, or that Defendant knowingly, voluntarily, and intelligently waived any potential conflict of interest. See Thomas, 346 S.C. 140, 144, 551 S.E.2d at 256 ("To be valid, a waiver of a conflict of interest must not only be voluntary, it must be done knowingly and intelligently.") (citing United States v. Swartz, 975 F.2d 1042, 1048-49 (4th Cir. 1992); Hoffman v. Leeke, 903 F.2d 280, 289 (4th Cir. 1990)); See Swartz, 975 F.2d at 1049-50 (holding that a waiver is not knowing, intelligent, and voluntary unless the defendant knows the precise form of the conflict of interest that eventually results); Hoffman, 903 F.2d at 289 ("A defendant cannot knowingly and intelligently waive what he does not know.").

In conclusion, Defendant submits that he has discovered the evidence regarding Welch's concurrent representation of McGowan within the last year and due to counsel's failure to disclose such it could not have been discovered prior to trial. Defendant further submits that upon receiving information that Welch may have represented McGowan, he exercised all

possible due diligence by hiring a private investigator and writing the appropriate clerk of court offices to obtain the court documents regarding Welch's representation. Finally, Defendant submits, as detailed above, the evidence of concurrent representation and an actual conflict of interest would probably change the result if a new trial were granted and is not merely cumulative or impeaching. Therefore, Defendant would urge this Court to grant a new trial on the basis of newly discovered evidence of an actual conflict of interest.

CONCLUSION

For the above stated reasons, Defendant would respectfully request that this Court allow this Motion to proceed to a hearing and that a new trial be granted.


Reginald L. Hill
Petitioner

STATE OF SOUTH CAROLINA)	SOUTH CAROLINA SUPREME COURT
County of Greenwood)	Case No.: 96-GS-24-0295
Reginald M. Gilliam)	
PETITIONER,)	
V)	CERTIFICATE OF SERVICE
State of South Carolina)	
RESPONDENT)	

I, Reginald M. Gilliam, #240636, certify and verify that I have served the Respondents with a copy of my 243(c) Explanation, by placing a copy in the hands of mailroom personnel for mailing, postage prepaid, addressed as follows:

Alan Wilson
Attorney General
P.O. Box 11549
Columbia, S.C. 29211

I, Reginald M. Gilliam, #240636, certify and verify under the penalty of perjury that the foregoing is true and correct.

S/  7-25-18
Reginald M. Gilliam

PETITIONER

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