

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Spartanburg County

Honorable Robin B. Stilwell, Circuit Court Judge

\_\_\_\_\_  
JAMES BROWN, JR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001340

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JOHNSON PETITION FOR WRIT OF CERTIORARI  
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ATTORNEY FOR PETITIONER

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S.C. SUPREME COURT

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**ISSUE PRESENTED**

Whether the PCR court erred when it found counsel provided effective representation where it was undisputed that a critical witness against petitioner had been represented by petitioner's counsel, since petitioner was coerced to plead guilty because he understandably believed his counsel had a conflict of interest and was not willing to cross-examine the witness?

## STATEMENT

On December 14, 2015, a Spartanburg County Grand Jury indicted petitioner for shoplifting an amplifier from a pawn shop. App. 89 – 90. On February 10, 2016, petitioner appeared before the Honorable J. Derham Cole. App. 1. Petitioner was represented by Joshua Schultz and Matthew Shealy. App. 1. The state was represented by Grady Anthony. App. 1. The shoplifting penalty was enhanced due to petitioner’s prior convictions. App. 3, l. 3.

The court asked petitioner if he wanted to plead guilty and petitioner responded, “I guess so.” App. 3, ll. 7-9. The court told petitioner, “Well, you can have a jury trial. I’ve got a jury waiting on us down here.” App. 3, ll. 10-11. As the PCR court would later recognize, petitioner demonstrated “reluctance” to give up his trial rights. App. 85. The transcript of petitioner’s guilty plea spanned forty-two pages and “appear[ed] to have been a half hour hearing” due to this reluctance. App. 85.

According to the solicitor, had the case proceeded to trial, the state planned to call Brady Rhodes as a witness to testify that petitioner stole the amplifier. App. 22, ll. 2-10. “Mr. Rhodes was going to testify that he sees [petitioner] take the amplifier out from underneath his coat.” App. 23, ll. 4-6. “Mr. Rhodes then did pawn the item at a store down the street for which he was charged and convicted . . .” App. 23, ll. 8-10. Prior to petitioner’s guilty plea, Rhodes pleaded guilty to obtaining money by false pretenses for this conduct. App. 23, ll. 15-19.

At the plea hearing, petitioner repeatedly denied taking the amplifier, and answered “I guess” multiple times when asked if he wanted to enter a plea of guilty. App. 16, ll. 5-6; App. 21, ll. 4-8; App. 28, ll. 4-18. However, after being told by the court he could have a trial and conferring with his counsel, petitioner eventually said he was “sure” he wanted to plead guilty. App. 35, ll. 3-13.

The court sentenced petitioner to eight years imprisonment. App. 42, ll. 6-9. No direct appeal was taken. On September 27, 2016, petitioner filed an application for post-conviction relief (PCR). App. 44 – 58. The state made its return on February 6, 2017. App. 59 – 63. A hearing was held before the Honorable Robin B. Stilwell on June 28, 2017. App. 64. Petitioner was represented by Susannah Ross and the state was represented by Valerie Giovanoli. App. 64.

Petitioner alleged that his counsel had a “conflict of interest.” App. 70, ll. 17-19. Petitioner offered that counsel knew that “Mr. Rhodes” was not “a credible witness,” but that counsel would not “challenge” the “credibility” of Brady Rhodes because counsel had also represented Mr. Rhodes. App. 71, ll. 19-22; App. 72, ll. 2-7.

According to petitioner, counsel “previously represented the state’s witness against [him].” App. 75, ll. 7-10. Petitioner said that counsel “was wondering, he kept saying his name or something. He said, yeah, I know Mr. Rhodes.” App. 75, ll. 13-15. Petitioner explained that counsel told him he had previously represented Rhodes. App. 72, ll. 5-7.

Petitioner said he hoped counsel was prepared to cross-examine Rhodes, but “at the last minute, he gets me up here, he wanted me to plead.” App. 75, ll. 18-22. Petitioner explained that he pleaded guilty because of counsel’s apparent unwillingness to advocate for him at trial. App. 73, ll. 6-8.

After petitioner testified, the court denied him relief. App. 17, ll. 14-17. No testimony was given by petitioner’s counsel. The court filed an order of dismissal October 4, 2017. App. 82 – 88. The order of dismissal stated that although petitioner “demonstrated some reluctance to waive his rights during the guilty plea, [ ] his ultimate decision was to accept the plea.” App. 85. The order continued, “The record is dispositive on the issue that [c]ounsel did not coerce

[petitioner] to plead guilty. Any allegation or testimony from [petitioner] otherwise is not credible.” App. 86.

This petition for writ of certiorari follows.

## ARGUMENT

The PCR court erred when it found counsel provided effective representation where it was undisputed that a critical witness against petitioner had been represented by petitioner's counsel, since petitioner was coerced to plead guilty because he understandably believed his counsel had a conflict of interest and was not willing to cross-examine the witness.

Impeaching the credibility of Brady Rhodes was critical, since the state intended to use his testimony as evidence that petitioner stole the amplifier. Petitioner was coerced to plead guilty, as he believed counsel had a conflict of interest and was unwilling to impeach Rhodes.

This Court can take judicial notice that petitioner's counsel, Joshua Schultz, had, in fact, previously represented Brady Rhodes. According to the Spartanburg County Clerk of Court's records as shown on the public index, counsel represented Brady Rhodes in 2012 on charges of resisting arrest (2012GS4204766); driving under the influence (37880EY), driving under suspension (37881EY), use of another's or altered license identification card (37883EY); failure to stop for a blue light (37884EY); public disorderly conduct (37868EY); and another traffic-related offense (37882EY).

"Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial." *Cuyler v. Sullivan*, 446 U.S. 335, 346 (1980). Here, petitioner explained that counsel said he previously represented Brady Rhodes. App. 72, ll. 5-7. When counsel realized he had represented Rhodes, he was ethically obligated to promptly advise the court so that the proceedings could be stopped to allow petitioner to obtain new counsel. Counsel's conflicting loyalty resulted in petitioner's understandable belief that counsel was not willing to zealously cross-examine Rhodes, a critical state's witness.

“An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant’s.” *Thomas v. State*, 346 S.C. 140, 143-44, 551 S.E.2d 254, 256 (2001). “[A] defendant may not be represented by counsel who might be tempted to dampen the ardor of his defense in order to placate his other client. This possibility is sufficient to constitute an actual conflict as a matter of law.” *State v. Gregory*, 364 S.C. 150, 153, 612 S.E.2d 449, 450-51 (2005) (internal alterations omitted) (quoting *Zuck v. Alabama*, 588 F.2d 436, 440 (5th Cir.1979)). However, “the mere possibility of a conflict of interest is insufficient to impugn a criminal conviction.” *Fuller v. State*, 347 S.C. 630, 634, 557 S.E.2d 664, 665 (2001).

The test to determine when an actual conflict of interest occurs is

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. An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant’s.

*Gregory*, 364 S.C. at 153, 612 S.E.2d at 450 (quoting *Duncan v. State*, 281 S.C. at 438, 315 S.E.2d at 811 (1984)). Although counsel’s representation of Rhodes had ended, counsel still had an actual conflict of interest.<sup>1</sup> Counsel was undoubtedly privy to confidential information during his representation of Rhodes that may have been useful fodder for cross-examination during petitioner’s trial. Further, cross-examination by its nature is adverse and often hostile.

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<sup>1</sup> *But see Cuyler v. Sullivan*, 446 U.S. at 350 (“until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance); *Strickland v. Washington*, 466 U.S. 668, 692 (1984) (“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”) (quotations omitted, quoting *Cuyler v. Sullivan*, 446 U.S. at 350).

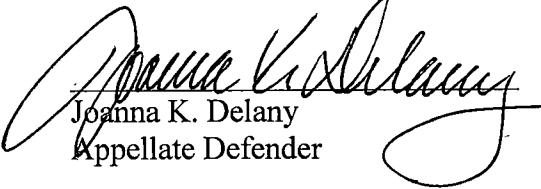
Particularly here, where counsel's prior representation of Brady Rhodes included a charge of dishonesty—using another's or altered driver's license—would the duty of confidentiality counsel owed to Rhodes be adverse to petitioner since zealous representation of petitioner would include thorough cross-examination and impeachment of Rhodes.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. at 686. “In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) counsel's deficient performance prejudiced the applicant's case.” *McKnight v. State*, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008) (citing *Strickland*, 466 U.S. at 687). “[T]he two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel.” *Hill*, 474 U.S. at 58.

However, “a defendant need not demonstrate prejudice if there is an actual conflict of interest.” *State v. Gregory*, 364 S.C. 150, 153, 612 S.E.2d 449, 450 (2005). A defendant's Sixth Amendment right to effective assistance of counsel includes a right to counsel “unhindered by a conflict of interest.” *Cuyler v. Sullivan*, 446 U.S. at 349-50. A waiver of a conflict of interest must be made knowingly, voluntarily, and intelligently. *Jordan v. State*, 406 S.C. 443, 450-51, 752 S.E.2d 538, 542 (2013) (citing *Thomas v. State*, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001)). Because there was an actual conflict of interest and the record is devoid of a knowing, voluntary, and intelligent waiver of the conflict by petitioner, the prejudice should be presumed.

**CONCLUSION**

Based on the foregoing argument, petitioner requests that a writ of certiorari be granted to allow full briefing on this issue.

  
Joanna K. Delany  
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of March, 2019.

STATE OF SOUTH CAROLINA

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JAMES BROWN, JR.

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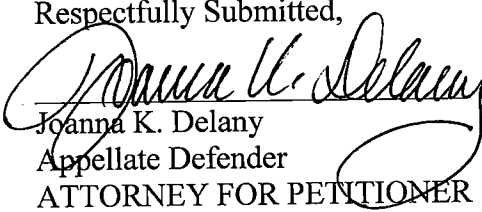
PETITION TO BE RELIEVED AS COUNSEL

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Counsel for James Brown 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 post-conviction relief hearing before Judge Robin B. Stilwell, which was held on June 28, 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 James Brown.

Respectfully Submitted,



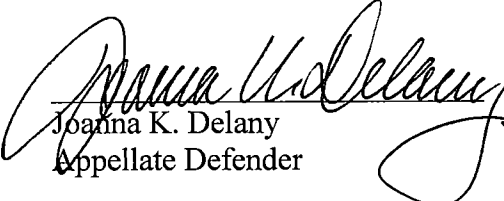
Joanna K. Delany

Appellate Defender  
ATTORNEY FOR PETITIONER

This 6th day of March, 2019.

**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."

  
Joanna K. Delany  
Appellate Defender

South Carolina Commission on Indigent  
Defense  
Division of Appellate Defense  
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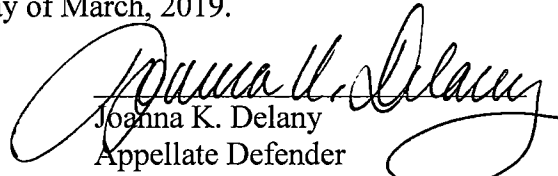
RESPONDENT

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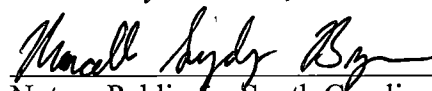
CERTIFICATE OF SERVICE

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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 Johnny Ellis James, Jr., 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 James Brown, #274845, at Livesay Pre-Release Center, Post Office Box 580, Una, SC 29378, this 6th day of March, 2019.

  
Joanna K. Delany  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 6th day of March, 2019.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: July 26, 2028