

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI FROM GREENWOOD COUNTY
Court of Common Pleas
The Honorable J. Mark Hayes, II, Post-Conviction Relief Judge

Appellate Case No. 2020-000574

MAUNWELL ERVIN,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

BRIEF OF PETITIONER

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PETITIONER'S STATEMENT OF ISSUES ON CERTIORARI

I.

The PCR court erred in failing to find the PCR application was procedurally barred because it was untimely filed and the discovery of preexisting law does not constitute new facts under S.C. Code Ann. § 17-27-45 (C). Ervin was aware that he filed a PCR application alleging counsel was ineffective at trial, so the alleged conflict that was not an actual conflict of interest also fails to constitute new facts under section 17-27-45.

II.

Counsel reasonably ascertained that no double jeopardy violation occurred and the PCR court's finding that counsel was ineffective for failing to raise a double jeopardy violation is controlled by an error of law. Further, no conflict of interest arose from Respondent filing a PCR application against the State alleging counsel was ineffective at the prior trial because counsel still owed a duty of loyalty solely to Applicant for the remaining charges to which the jury was unable to reach a verdict.

STATEMENT OF THE CASE

On December 9, 2010, officers from the Greenwood Drug Enforcement Unit and the Greenwood Special Weapons and Tactics (SWAT) team executed a search warrant on a Lawson Street residence in Greenwood. App. p. 419. The SWAT team entered through the front door and upon entering the residence, officers located an individual, in the living room, ultimately identified as a Mr. Bush. App. p. 419. Ervin was found in the hallway of the residence. Both Ervin and Mr. Bush were detained and placed in handcuffs. App. p. 419. During the search, officers found marijuana, pills, cocaine, and a firearm throughout the residence. App. p. 419.

During the March 2011 term, the Greenwood County Grand Jury indicted Ervin for trafficking in cocaine base, 100 to 200 grams (2011-GS-24-785), trafficking in cocaine base within proximity of a school or park (2011-GS-24-786), possession of marijuana with intent to distribute (2011-GS-24-783), possession with intent to distribute marijuana within proximity of a school or park (2011-GS-24-784), possession of a controlled substance (2013-GS-24-293), and possession of a weapon during the commission of a violent crime (2011-GS-24-0708). Lauren Taylor, Esquire (Plea Counsel), represented Ervin. Deputy Solicitor Yates Brown of the Eighth Circuit Solicitor's Office prosecuted the case.

In January 2013, Ervin first went to trial on these charges. At the conclusion of this first trial, Ervin was acquitted on the possession of a firearm charge, and the jury was unable to reach a verdict on the remaining charges.

On July 23-24, 2013, Ervin proceeded to a jury trial on the remaining charges: trafficking in cocaine base (2011-GS-24-785), trafficking in cocaine base within proximity of a school or park (2011-GS-24-786), possession of marijuana with intent to distribute (2011-GS-24-783), possession of marijuana with the intent to distribute within proximity of a school or park (2011-

GS-24-784), and possession of a controlled substance (2013-GS-24-293)¹. The jury convicted Ervin of possession of a controlled substance, possession of marijuana with intent to distribute, and the possession of marijuana with intent to distribute within proximity of a school or park. The jury was unable to reach a verdict as to the trafficking in cocaine base and trafficking in cocaine within proximity of a school or park charges.

Ervin appealed and represented by Appellate Defender Robert Pachak, who filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Ervin's appeal. State v. Ervin, 2014-UP-427 (filed November 26, 2014). The Remittitur was issued December 12, 2014.

On April 11, 2016, Ervin appeared before the Honorable Eugene C. Griffith, Jr., and pled guilty to the lesser included offense of trafficking in cocaine (28-100 grams, 2nd offense). Pursuant to the prosecution's recommendation, Judge Griffith sentenced Ervin to the mandatory minimum seven years imprisonment. The trafficking proximity charge (2011-GS-24-786) was dismissed. Ervin did not file a notice of appeal.

On June 27, 2017, Ervin filed a PCR application, alleging:

1. "Trial Counsel was ineffective for failing to raise a double jeopardy argument."
2. "Trial Counsel was ineffective in that she continued to represent me after I had filed a request that she be terminated as my attorney and after I had filed a Post-Conviction Relief action alleging she was ineffective in representing me at my trial."

The State subsequently filed a Return and Motion to Dismiss, asserting Ervin's application was barred by the statute of limitations. A hearing was held on March 2, 2018, before the

¹ Ervin also filed a post-conviction relief action challenging his trial convictions and, following a hearing before Judge Hayes, was also granted post-conviction relief for these convictions. The State appealed, this Court granted certiorari, and this action is pending before this Court. (Ervin v. State, Appellate Case No. 2020-000530).

Honorable J. Mark Hayes, II. Ervin was represented by C. Rauch Wise, Esquire. The State was represented by Assistant Attorney General Justin J. Hunter. By Order dated August 27, 2018, and filed September 13, 2018, Judge Hayes found Ervin's PCR application was not barred by the statute of limitations, and found that Ervin was entitled to a new trial on the basis that Plea Counsel failed to file a motion to dismiss Ervin's remaining charges based on double jeopardy².

The State filed a timely Motion to Reconsider Pursuant to Rule 59(e), SCRCP. A hearing on the State's motion was held on October 1, 2019. Counsel C. Rauch Wise, Esquire, again represented Ervin. Assistant Attorney General Janelle Gregory argued on behalf of the State. By Order dated February 14, 2020, Judge Hayes denied the State's motion to reconsider. The State subsequently filed a Notice of Appeal.

STANDARD OF REVIEW

When reviewing post-conviction relief decisions, the standard of review depends on the specific issue involved. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). Appellate courts will uphold a PCR court's findings of fact if there is any probative evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

² Additionally, although the PCR court's order solely discusses the alleged conflict of interest in its statute of limitations section, it is arguable whether the PCR court granted relief on the merits of the alleged conflict.

ARGUMENT

- I. The PCR court erred in failing to find the PCR application was procedurally barred because it was untimely filed and the discovery of preexisting law does not constitute new facts under S.C. Code Ann. § 17-27-45 (C). Ervin was aware that he filed a PCR application alleging counsel was ineffective at trial, so the alleged conflict that was not an actual conflict of interest also fails to constitute new facts under section 17-27-45.**

The PCR court incorrectly found that Ervin's PCR application was not barred by the statute of limitations because of Counsel's alleged conflict arising out of Ervin's pending PCR action challenging his conviction in his previous trial, and because that alleged conflict purportedly prevented Ervin from discovering a double jeopardy defense pursuant to Yeager v. United States, 557 U.S. 110 (2009). Simply put, there is no nexus between the PCR application Ervin filed and Counsel's professional determination that Yeager does not apply. More specifically, the PCR court found, pursuant to S.C. Code §17-27-45(C), Ervin's PCR application was not untimely because Plea Counsel's alleged conflict and Yeager defense constituted newly discovered evidence. However, the PCR court's finding was incorrect as Ervin's application was filed beyond the standard one year statute of limitations, and neither the alleged conflict nor the alleged Yeager defense constitute newly discovered facts relieving Ervin from the application of the general one-year statute of limitations. Accordingly, this Court should find the PCR court erred by finding Ervin's PCR application was timely and find Ervin's PCR application is barred by the statute of limitations.

Generally, an application for relief filed must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later. S.C. Code Ann. § 17-27-45(A). Pursuant to S.C. Code Ann. § 17-27-45(B), if an applicant's conviction is affected by a change in a legal standard or constitutional right that applies retroactively, an application may

be filed not later than one year from the date on which the standard or right was determined to exist. This section is not applicable. Pursuant to S.C. Code Ann. § 17-27-45(C), if the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed within one year after the date of the actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. Additionally, the statute of limitations may be equitably tolled in certain instances, none applicable in the instant case, such as, when an applicant untimely files his application due to mental incompetency³, if the applicant asserts an applicant was denied his right to a direct appeal⁴, and if the applicant is alleging he is entitled to a belated PCR appeal⁵.

Ervin pled guilty to a lesser-included trafficking in cocaine offense on April 11, 2016, and therefore, his application must have been filed on or before April 12, 2017, in order to comply with the standard one-year statute of limitations pursuant to S.C. Code §17-27-45(A). However, Ervin filed his PCR application on June 27, 2017, beyond the standard one-year statute of limitations. Ervin did not allege, nor did the PCR court find, that Ervin was entitled to equitable tolling pursuant to Ferguson, Austin, Wilson, or under any other grounds. Additionally, Ervin did not allege, nor did the PCR court find, that Ervin's PCR action was timely pursuant to S.C. Code Ann. § 17-27-45(B).

The PCR court found Ervin's PCR application was not untimely because Counsel's alleged conflict and the Yeager claim constituted newly discovered evidence pursuant to S.C. Code §17-27-45(C). The PCR court erred in its finding, as neither the alleged conflict nor the Yeager claim

³ Ferguson v. State, 382 S.C. 615, 677 S.E.2d 600 (2009).

⁴ Wilson v. State, 348 S.C. 215, 559 S.E.2d 581 (2002).

⁵ Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

constitute newly discovered evidence allowing Ervin to avoid the generally applicable statute of limitations that runs from the date of the conviction and sentence.

First, the record clearly establishes Ervin knew he filed a PCR application alleging counsel was ineffective; therefore, the alleged conflict was known and not a basis to find Ervin's PCR application was timely. Counsel testified at the PCR hearing she filed a motion to be relieved because the solicitor indicated that he was planning on trying the case for a third time. App. pp. 479-481. Ervin also filed a motion to relieve Counsel. App. p. 481. Counsel testified Ervin did not inquire as to the status of his motion to be relieved, and instead asked Counsel questions about his case. App. p. 481. Additionally, Plea Counsel testified Ervin did not indicate he was concerned about her continuing to represent him on the day of his plea. App. p. 481. Ervin was aware of the purported conflict at the time of his plea, so his allegation is untimely pursuant to section 17-27-45 and not based on the discovery of new facts under section 17-27-45(C).

Moreover, Ervin's plea colloquy serves as an implicit waiver of the conflict, and therefore, the PCR court erred in using this alleged conflict as a basis for its finding that Ervin's application was timely filed. Ervin informed the plea court he was pleading freely and voluntarily.⁶ App. p. 423, lines 21-23. Ervin testified at his guilty plea hearing that he was satisfied with Counsel's services, and he had enough time to speak with Counsel regarding his case. App. p. 423, lines 15-20.

"[R]epresentations of the defendant, his lawyer, and the prosecutor at . . . a [guilty plea] hearing, as well as any findings made by the judge accepting the plea, constitutes a formidable

⁶ Ervin also confirmed at his plea hearing that he had not consumed drugs or alcohol within twenty-four hours prior to his guilty plea hearing and he did not suffer from any mental, physical, or emotional disabilities that would have prevented him from understanding what was occurring at his guilty plea hearing, thereby negating any possibility that he did not comprehend the questions he was being asked by the plea court. App. p. 418.

barrier in any subsequent collateral proceedings.” Blackledge v. Allison, 431 U.S. 63, 73-74 (1977). Such “[s]olemn declarations in open court carry a strong presumption of verity” and “subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible.” Id. at 74.

Ervin pled guilty fully aware he filed a PCR application, yet he nevertheless pled guilty after affirming his satisfaction with counsel. Accordingly, Ervin implicitly waived any complaints concerning counsel’s continued representation, and therefore, the PCR court erred in using this alleged conflict as a basis to determine Ervin’s PCR application was timely filed.

Furthermore, for the reasons discussed below in Part II of this petition, the alleged double jeopardy defense is not a meritorious claim, and therefore, it fails to provide a basis for Ervin to overcome the statute of limitations. Accordingly, the PCR court erred in finding that Ervin’s PCR application was not barred by the statute of limitations, and therefore, this Court should grant this Petition and reverse the PCR court’s erroneous findings as it relates to the statute of limitations.

II. Counsel reasonably ascertained that no double jeopardy violation occurred and the PCR court’s finding that counsel was ineffective for failing to raise a double jeopardy violation is controlled by an error of law. Further, no conflict of interest arose from Respondent filing a PCR application against the State alleging counsel was ineffective at the prior trial because counsel still owed a duty of loyalty solely to Applicant for the remaining charges to which the jury was unable to reach a verdict.

In its Order granting relief, the PCR court found counsel was ineffective for allowing Ervin to plead guilty to trafficking instead of challenging the Solicitor’s ability to prosecute for the trafficking charge on the theory jeopardy attached pursuant to Yeager v. United States, 557 U.S. 110 (2009).

“A defendant who pleads guilty on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing 1) that counsel’s representation fell below an objective

standard of reasonableness and 2) that there is a reasonable probability that but for counsel's errors, the defendant would not have pleaded guilty but would have insisted on going to trial." Wolfe v. State, 326 S.C.158, 485 S.E.2d 367 (1997); accord Hill v. Lockhart, 474 U.S. 52 (1985).

Plea counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Burt v. Titlow, 571 U.S. 12, 22 (2013) (citing Strickland v. Washington, 466 U.S. 668, 690 (1984)). The burden to show counsel's performance was deficient lies "squarely" on the applicant. Id. at 22-23.

To show prejudice, the applicant is required to show that the deficiency would have affected counsel's advice to accept the plea bargain or cause applicant to decline accepting the bargain. See Stalk v. State, 383 S.C. 559, 681 S.E.2d 592 (2009) (quoting Hill, supra and discussing the prejudice prong). This requires more than the bare assertion that "but for" the deficiency, applicant would not have pled guilty and gone to trial. Id., 383 S.C. at 563, 681 S.E.2d at 594-595.

The Fourth Circuit has recognized that determining prejudice is an objective inquiry depending "on the likely outcome of a trial had the defendant not pleaded guilty." Meyer v. Banker, 506 F.3d 358, 369 (4th Cir. 2007); see Hooper v. Garraghty, 845 F.2d 471, 475 (4th Cir. 1988) (noting despite focus on a subjective inquiry in Lockhart's prejudice standard, the answer to the prejudice inquiry "must be reached through an objective analysis.").

Ervin was acquitted of possession of a weapon during a violent crime and a mistrial was granted for the remaining charges because the jury could not reach a verdict. After the second trial, in which Ervin was convicted of the marijuana charges, but a mistrial was granted on the trafficking charges again due to a hung jury, Counsel received an e-mail from Charles Grose, Esquire, asserting she should move to dismiss the hung trafficking charge under Yeager v. United

States, 557 U.S. 110 (2009). Counsel testified she discussed the issue and the application of Yeager with other attorneys, and she reached the conclusion Yeager was not applicable to the instant case. App. p. 461, lines 16-25; p. 481, line 20 - p. 482, line 5.

In Yeager, the defendant, an Enron executive, was indicted for over a hundred charges related to fraud and insider trading. The defendant was acquitted of what the Supreme Court categorized as the fraud charges, but the jury was hung on the remaining counts, referred to in the opinion as the insider trading counts. The government obtained a new indictment recharging the defendant with some of the insider trading counts, which alleged the defendant failed to disclose the information that was the subject of the fraud charges to the public before selling his company stock. Yeager at 115. Because the defendant was acquitted of the fraud that was necessary to finding the defendant had insider information when he sold his company stock, the Supreme Court found the double jeopardy clause precluded prosecution for the insider trading counts. Id. at 116.

Acquittal of possession of a weapon during the commission of a violent crime⁷ did not mean Yeager prohibited prosecution for trafficking. “To decipher what a jury has necessarily decided [for double jeopardy purposes], we held that courts should ‘examine the record of a prior proceeding, take into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.’” Yeager at 120.

In the instant case, examining the evidence at trial, law enforcement executed a search warrant of a home being leased by Ervin, but Ervin and another individual occupied the home at the time of the search. Various quantities of contraband were found in different areas of the

⁷ The PCR court’s order erroneously refers to the charge as “possession of a firearm while engaged in a drug trafficking offense.”

residence such as the kitchen and a bedroom. The jury may have concluded the firearm did not belong to Ervin but various drugs did. This is supported by the very fact that while enough cocaine in total was found in the home to convict Ervin of trafficking 100 to 200g outright, the jury was unable to reach a verdict for trafficking, evidencing potential doubts about which items belonged to which individual. Therefore, the jury likely held reasonable doubt with the State's evidence that Ervin constructively possessed the weapon.

Or, even if the jury was convinced Ervin constructively possessed the weapon, the jury may have felt the prosecution failed to prove a nexus between possession of the weapon and the narcotics Ervin possessed. State v. Whitesides, 397 S.C. 313, 317, 725 S.E.2d 487, 489 (2012) (finding the statute only penalizes possession of a firearm if "possession furthers or is intended to further a violent crime."). "The General Assembly's purpose would not be furthered by penalizing possession of a firearm that is entirely unrelated to the violent offense." Id. at 318, 319, 725 S.E.2d at 489, 490 (concluding in that case that the trial court "found a sufficient nexus from evidence that appellant ordinarily carried a pistol for the purpose of letting others know that he was armed while dealing drugs.").

The Court of Appeals examined Yeager in State v. Henley, 428 S.C. 649, 837 S.E.2d 639 (Ct. App. 2019). In that case, Henley claimed his acquittal for larceny precluded retrial for first degree burglary, in which the jury could not reach a unanimous verdict. The Court of Appeals, analyzing Yeager, concluded, "[A]n acquittal for larceny did not foreclose any element necessary for a first degree burglary conviction." Id. at 659-60.

Like Henley, in the present case, acquittal for the weapons charge did not foreclose any element necessary for trafficking. Possession of a firearm during the commission of a violent crime requires proof of the possession of a firearm **while** committing a violent crime. S.C. Code

Ann. § 16-23-490 (A); Whitesides. Trafficking crack cocaine **does not require proof of the possession of a firearm**. The statute for trafficking crack cocaine reads as follows:

A person who knowingly sells, manufactures, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of ten grams or more of methamphetamine or cocaine base, as defined and otherwise limited in Section 44-53-110, 44-53-210(d)(1), or 44-53-210(d)(2), is guilty of a felony which is known as “trafficking in methamphetamine or cocaine base.”

S.C. Code Ann. § 44-53-375(C).

Whether or not Ervin was in constructive possession of a firearm was not dispositive in any way in regard to the elements of the trafficking, and an acquittal for a firearm offense does not foreclose any required element of drug trafficking. The State could still meet all elements of trafficking crack cocaine without proof of a firearm. Therefore, Yeager is inapplicable and counsel’s professional judgment was reasonable.

Of course, “Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” State v. Brandt, 393 S.C. 526, 713 S.E.2d 591 (2011) (citing Blockburger v. United States, 284 U.S. 299 (1932)). Possession of a firearm during the commission of a violent crime requires proof of the possession of a firearm during **any** violent crime, not just trafficking cocaine. Trafficking crack cocaine **does not require proof of the possession of a firearm**.

Nowhere in the statute is possession of a firearm mentioned, and it is **not an element** of this crime. Because the PCR court erred as a matter of law by finding jeopardy attached and by misinterpreting and misapplying Yeager to the present case, the PCR court’s determination Plea Counsel was constitutionally ineffective for failing to file a Yeager-based motion to dismiss was

was an error of law and must be reversed. See Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

Plea Counsel was correct in her conclusion and her decision to decline asserting double jeopardy falls within the wide range of competent assistance. Counsel's performance will be deemed deficient if it falls "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690. Strickland requires extreme deference to counsel's strategic judgments: "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. . . ." Id. at 690-91. In the instant case her judgement was sound and the PCR court's ruling is not supported by probative evidence. See also United States v. Boce, 488 U.S. 563, 573 (1989) (rejecting claim that defendants did not relinquish right to challenge convictions on double jeopardy grounds, despite plea counsel's affidavit that averred he did not advise the defendants about the possibility of raising double jeopardy: "Our decisions have not suggested that conscious waiver is necessary with respect to each potential defense relinquished by a plea of guilty.>").

No actual conflict arose and counsel was not ineffective due to a conflict of interest.

The PCR court may have an additional ground for relief from the alleged conflict of interest.⁸ To the extent the PCR court's grant of relief is premised on the alleged conflict, the PCR court erred because no actual conflict of interest arose from Ervin filing a PCR application alleging counsel was ineffective for the trial convictions. Despite the PCR application, counsel's duty of loyalty remained only with Ervin – this case does not present an incident of divided loyalties. Note

⁸As mentioned above, although the PCR court solely discusses the alleged conflict of interest in the statute of limitations section of its Order, it is arguable whether the PCR court decided on the merits that Ervin was entitled to PCR relief based on Plea Counsel's alleged conflict, and therefore, in an abundance of caution, Petitioner will address this issue on the merits.

Ervin did not raise any complaints about counsel's representation during the plea proceeding. The PCR court's findings and grant of relief are premised on errors of law.

“A defendant has the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution.” Strickland, 466 U.S. at 684. “Until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.” Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008) (quoting Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984)), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). A defendant who did not object at trial must show an *actual* conflict of interest adversely affected his attorney's performance. Thomas v. State, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001). “A defendant who shows that a conflict of interest **actually** affected the adequacy of his representation need not demonstrate prejudice to obtain relief.” Staggs v. State, 372 S.C. 549, 551–52, 643 S.E.2d 690, 692 (2007) (emphasis added). “Rules of Professional Conduct have no bearing on the constitutionality of a criminal conviction.” Langford v. State, 310 S.C. 357, 426 S.E.2d 793 (1993).

The alleged conflict did not constitute an actual conflict and Ervin was not prejudiced by any alleged conflict. Unlike other cases where this Court has found an actual conflict, Ervin's case does not involve “divided loyalties.” Jordan v. State, 406 S.C. 443, 752 S.E.2d 538 (2013) (citing Duncan v. State, 281 S.C. 435, 315 S.E.2d 809 (1984) (“This Court has noted that an actual conflict of interest occurs: when a defense attorney places himself in a situation inherently conducive to divided loyalties.”)). In the instant case, Counsel did not owe a duty of loyalty to another client in conflict with her representation of Ervin. Counsel merely represented Ervin during a guilty plea hearing five months after Ervin filed a PCR application against Plea Counsel in the previous trial.

Ervin's PCR application filed against the State does not negate Counsel's requirements to effectively represent her client under the Professional Rules of Conduct.

The basis of the purported "conflict" is Ervin filed a PCR application alleging Counsel was ineffective at trial. Counsel was appointed to represent Ervin on all the charges for the trial. Some charges were disposed of by verdicts, but the trafficking charge is one charge that remained, and Counsel remained counsel of record. Ervin necessarily needed to file his application within one year from issuance of the remittitur of his direct appeal to avoid dismissal of the PCR application based on statute of limitations and protect his rights to determine if he received effective assistance of counsel at trial. However, Counsel remained under the same undivided duty of loyalty to Ervin in her representation for the trafficking charge.

In Richardson v. State, 377 S.C. 103, 659 S.E.2d 493 (2008), this Court found the lower court did not err in relieving PCR counsel and bemoaned the fact that the applicant moved nine times to relieve counsel and the motion was granted several times. This Court rightly remonstrated, "Such tactics constitute an abuse of the judicial process, resulting in significant delays, and should not be tolerated, much less acquiesced in, by judges presiding over PCR matters." Id. at 105, 659 S.E.2d at 494. This Court also cautioned, "Another common tactic in PCR matters is for the applicant to file a complaint against appointed counsel with the Office of Disciplinary Counsel. The complaint is then asserted as a basis for a motion to relieve counsel or a motion to be relieved as counsel. We caution the bench that filing of a disciplinary complaint should not result in automatic removal of appointed counsel." Id. at 107, 659 S.E.2d at 495; see generally State v. Graddick, 345 S.C. 383, 548 S.E.2d 210 (2001) (finding the trial court did not err in denying defendant's motion to relieve counsel even though defendant alleged counsel was not representing his interests, was not fully prepared for the case, and the defendant claimed he

was not comfortable going to court with counsel as his lawyer); United State v. Leggett, 162 F.3d 237, 247 (3d Cir. 1998) (“[T]here is not constitutional right to be represented by a lawyer who agrees with the defendant’s trial strategy. Mere disagreement between defendant and counsel with regard to strategic decisions does not create a situation sever enough to compel a district court to investigate whether the defendant’s rights are being impinged”).

Certainly, Ervin cannot be faulted for protecting his rights to pursue an ineffectiveness claim against Counsel by filing a PCR application before the statute of limitations expired to challenge his trial convictions. The facts do not establish he was abusing the process like the petitioner in Richardson. Nonetheless, the filing of a PCR application does not create a conflict where none existed before, as this Court found in Richardson. Indeed, unlike Richardson, in which Richardson’s counsel would be the respondent in a disciplinary complaint, the State is the defendant and counsel is not a party to the action.

Ervin never alleged or testified as to how Plea Counsel’s representation hindered his guilty plea as a result of the PCR action he filed five months earlier. At no point did he suggest that Plea Counsel represented adverse interests. To the contrary, at the PCR hearing Plea Counsel testified she was aware of the pending PCR action filed against her, but the pending PCR action had no effect on her representation or opinion of Ervin “at all.” App. p. 482, lines 15-18. Plea Counsel also testified she liked Ervin “a lot” and she worked very hard on his cases. App. p. 482, lines 20 – p. 38, line 1. Accordingly, Plea Counsel’s alleged conflict did not constitute an actual conflict that would warrant PCR relief, and any alleged conflict did not affect the adequacy of plea Counsel’s representation. Therefore, this Court should reverse the PCR court’s grant of post-conviction relief and reinstate his plea convictions.

CONCLUSION

Based on the foregoing arguments, this Court should reverse the PCR court's grant of post-conviction relief and reinstate Ervin's convictions.

Respectfully submitted,

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S.C. SUPREME COURT