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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas
Debra R. McCaslin, Circuit Court Judge

Lower Court Case No. 2020-CP-19-00091

K.C. Langford Petitioner,

v.

State of South Carolina, ...Respondent.

NOTICE OF APPEAL

K.C. Langford appeals the order of the Honorable Debra R. McCaslin, dated August 27, 2021, and filed September 7, 2021, dismissing his application for post-conviction relief. This appeal is taken from the amended order of Judge McCaslin, dated November 8, 2021, and filed November 8, 2021, following Mr. Langford's Rule 59(e), SCRCF motion. Counsel for Mr. Langford received notice of entry of this order on November 10, 2021 by mail from the Clerk of Court and by email from the Attorney General's Office.

Respectfully Submitted,

By s/E. Charles Grose, Jr

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Rec 11/10/2021

EDGEFIELD COUNTY
CLERK OF COURT
STATE OF SOUTH CAROLINA CHARLES L. REED IN THE COURT OF COMMON PLEAS
COUNTY OF EDGEFIELD 2021 NOV -8 AM 11:59 FOR THE ELEVENTH JUDICIAL CIRCUIT

K.C. Langford, SCDC #294500,

Case No. 2020-CP-19-0091

Applicant,

AMENDED

v.

ORDER OF DISMISSAL

State of South Carolina,

Respondent.

This matter comes before the Court by way of a post-conviction relief (PCR) action commenced by K.C. Langford (Applicant) on April 14, 2020, and amended on April 30, 2020. On April 27, 2021, this Court convened an evidentiary hearing via Cisco WebEx Meetings in accordance with the Chief Justice's administrative memorandum, *Court Operations*, dated September 14, 2020.¹ A second evidentiary hearing was convened via WebEx on July 22, 2021. Applicant was present at the hearings and represented by E. Charles Grose, Jr., Esquire. Assistant Attorney General Lillian L. Meadows represented the State. Applicant and Counsel DuRant both testified at both hearings.

The sole issue before this Court is whether Appellate Defender LaNelle DuRant labored under an actual conflict of interest during her representation of Applicant. In addition to the

¹ See S.C. Sup. Ct. Memorandum dated September 14, 2020 ("Judges . . . have discretion to determine whether it is appropriate to conduct a hearing using remote communication technology. Consent of the parties or counsel is not required. Please use WebEx, the conferencing platform supported by the Judicial Branch.").

pleadings in this action, this Court has before it a copy of the Edgefield County Clerk of Court records regarding the subject convictions; Applicant's records from the South Carolina Department of Corrections; a full and complete record of Applicant's direct appeal, including the trial transcript; Applicant's prior post-conviction relief records challenging these convictions and the appeal therefrom; and the records of the current PCR action. Additionally, this Court has before it a full and complete record of Bryan Phillips' direct appeal and post-conviction relief records.

This Court took the matter under advisement and requested both parties prepare proposed orders. By order filed September 7, 2021, this Court issued an order denying post-conviction relief and dismissing the action with prejudice. Applicant subsequently filed a motion to alter or amend pursuant to Rule 59(e), SCRCP, on September 20, 2021.

After hearing the testimony and evidence presented at the PCR hearing, along with the record in its entirety and review of Applicant's Rule 59(e) motion, this Court finds no conflict of interest existed based on Counsel DuRant's prior representation of Applicant's co-defendant, Bryan Phillips, such that Applicant was denied his one full "bite at the apple." For the reasons discussed below, this Court amends its prior order to consider the Applicant's issues and once again denies relief and dismisses this action with prejudice.

I. FACTS & PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant orders of commitment of the Edgefield County Clerk of Court. During its December 2008 term, the Edgefield County Grand Jury indicted Applicant for criminal conspiracy (2008-GS-19-0673). Applicant was subsequently indicted for first-degree burglary (2010-GS-19-0272); armed robbery (2010-GS-19-0273); and kidnapping (2010-GS-19-0278) in May 2010.

On September 7, 2010, Applicant proceeded to a jury trial before the Honorable William P. Keesley. Mark R. Calhoun, Sr., Esquire (Counsel Calhoun), represented Applicant and Assistant Solicitor Ervin J. Maye of the Eleventh Circuit Solicitor's Office prosecuted the case.

A. Summary of Evidence Adduced at Trial

The victims in this case were the husband, wife, and son, who ran a Chinese Restaurant, along with the son's wife. (PCR App'x 203, 216, 232). While they toiled away in their restaurant, Bryan Phillips (Phillips) and Alvin Phillips watched and plotted robbing the victims of their hard-earned cash for their own easy profit. (PCR App'x 242–46). Applicant jumped at the opportunity to join this venture. (PCR App'x 248). They robbed the victims outside the restaurant and grabbed a bag of cash from the victims' house. (PCR App'x 205–07, 210, 213, 218–19, 224, 233, 250–53). The three Chinese-speaking victims likely seemed perfect prey because they knew virtually no English. (PCR App'x 214, 219, 222, 321).

Alvin Phillips testified he lived with his sister, Veronica Phillips, and her children about a minute away from the restaurant. He was finishing eleventh grade at Strom Thurmond High School. Alvin and his cousin, co-defendant Bryan Phillips, both noticed that the "Chinese people"² never seemed to go to the bank when they closed the restaurant, but rather always brought a black bag with them to their nearby home instead. So, Alvin and Bryan deduced that the Chinese people were bringing their cash home from the restaurant. They made plans to rob the Chinese people. Bryan called Alvin one night, August 14, 2008. Alvin got his gun and ski mask. Bryan brought his own ski mask and met Alvin. Veronica is mother to Applicant's child. Applicant arrived at the house and Alvin and Bryan told him what they were planning. Applicant wanted to join in, so

² This is the term Alvin used to describe the victims.

Applicant went into the house to grab a blue shirt to tie around his head as a mask. (PCR App'x 239–48).

They went to the Chinese restaurant as the family closed their restaurant. Alvin pointed a gun at the husband outside the restaurant. The robbers kept demanding money, but could not understand the husband. They demanded money from the son when he came out of the house, but the robbers could not understand him either. Bryan hit one of the victims over the head with his fist. Applicant ran into the house and came back out with a bag of money. They fled and later divided the money amongst themselves, and Alvin got about \$800. Then, Alvin and Applicant got in the car with Veronica, who was leaving to pick up Alvin's mother, Vanessa Phillips, and take her to work. They were stopped by an officer who asked to see Veronica's and Applicant's identification. The officer let them go afterwards. Applicant stayed at Alvin's house that night. (PCR App'x 251–58).

Alvin testified he was telling the truth and denied he was telling the story the solicitor wanted. (PCR App'x. 292). Of course, the truth was not what Applicant wanted. He brought two statements claiming Applicant and Bryan were not involved and wanted Alvin to sign them so Applicant and Bryan would not get in trouble. Applicant told Alvin if he signed those statements, nobody would get in trouble. Alvin admitted this did not turn out to be good advice. But, Alvin admitted Applicant and Bryan were his friends. He never wanted them to get in trouble. It was not easy for Alvin to testify against them. He admitted he wished the whole thing would go away for all of them. The statements he signed for Applicant were false. In contrast, he testified the truth was Applicant and Bryan were with him for the robbery and further, that the prosecution and law enforcement never asked Alvin to say anything but the truth. (PCR App'x 296–99). On re-cross

examination, Alvin agreed he did not want to sign the statements and was forced to sign them. (PCR App'x 301).

Deputy Zach Strom stopped Veronica's vehicle, and he corroborated Alvin's account of the traffic stop. He was responding to a bulletin about a larceny at the restaurant which described the suspects as three black males with no other details. The stop was about fifteen minutes after the bulletin and was near where the robbery occurred. (PCR App'x 308–13).

Bryan called Investigator Roosevelt Young as a defense witness. Investigator Young received the tip that broke the case. Joseph Patrick Stevens, an acquaintance of Investigator Young's, provided the tip. Investigator Young knew Stevens' family and had known Stevens for a long time. On direct examination, Investigator Young described Stevens as a good citizen. Stevens had a bench warrant served on him and called Investigator Young for information. During the conversation, he indicated Alvin, Bryan, and Applicant committed the robbery. Young thought Stevens was related to one or more of the co-defendants. (PCR App'x 368–92, 397, 400–01). Young testified he had no influence over the disposition of Stevens' warrant. (PCR App'x 396). Furthermore, the record does not indicate Stevens was seeking assistance with his bench warrant or charge in exchange for the information he gave. Young also testified he had Alvin moved from the Edgefield detention center to the Saluda detention center because he was concerned Alvin was being intimidated and influenced into not testifying against his co-defendants. (PCR App'x 403).

Law enforcement first brought Veronica to the station because her name was one of the names Stevens provided Young. (PCR App'x 397). Then, Alvin came to the station. (PCR App'x 398–99). Because Alvin knew Young, he was more comfortable with Young. Alvin confessed to Young, implicated himself completely in the robbery, and admitted he was the gunman. He also implicated Bryan and Applicant. He did not attempt to minimize his involvement. (PCR App'x

399–401). The information Alvin gave was exactly the same information Stevens previously told Young. (PCR App’x 400).

The three victims testified at trial through an interpreter. The father, Ji, testified that he, his wife, and their son left the restaurant at about 10:30 p.m. The others went ahead of him. He was then confronted by three black men, one pointing a gun at him. He was hit in the head and was “pressed” down on the ground. His son, Li Guan, came out of the house. He was also “pressed” down. The robbers took Ji’s wallet containing his license, credit card, and \$300 cash. One of the robbers went into the house and took a bag of money. The robbers ran away. (PCR App’x 202–10).

Li Guan, the son, testified through the interpreter that the bag had \$3,000 in it. At gun point, he was made to kneel on the ground and forced to tell the robbers the bag of money was in the house. (PCR App’x 216–19). One of the robbers then went into the house to get the bag. After the robbers took the bag, the men ran away and Li Guan called 911. (PCR App’x 219–20).

Li Ai, Ji’s wife and Li Guan’s mother, testified through the interpreter a black guy with his face covered ran into the house and took the money bag. Li Guan then called 911. (PCR App’x 230–37).

B. Verdict & Direct Appeal

On June 9, 2008, the jury convicted Applicant as indicted. Judge Keesley sentenced Applicant to concurrent terms of twenty years’ imprisonment for kidnapping, twenty years for first-degree burglary, twenty years for armed robbery, and five years for criminal conspiracy.

Applicant filed a timely notice of appeal, which was perfected on his behalf by Appellate Defender Elizabeth A. Franklin-Best (Counsel Franklin-Best) of the South Carolina Commission

on Indigent Defense, Division of Appellate Defense (OAD). Both parties submitted briefs on the following issue:

Did the trial court judge err when he did not dismiss [Applicant's] case in May 2010 when [Applicant] motioned for dismissal for violating his right to a speedy trial, and when the state sought a continuance of that trial so it could further pressure a formerly cooperating co-defendant, who elected to assert his right to remain silent under the 5th Amendment of the federal Constitutional, into testifying for the state at the subsequent trial?

Following initial briefing, the case was certified to the Supreme Court pursuant to Rule 204(b), SCACR, and Applicant's case was consolidated with that of his co-defendant, Bryan Phillips. Following final briefing and oral argument, the Supreme Court issued a published opinion affirming Applicant's convictions and sentences on November 21, 2012. *State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012). Applicant's subsequent petition for rehearing was denied. The remittitur was issued on December 20, 2012.

Applicant then petitioned to the United States Supreme Court for a writ of certiorari. By written order dated October 7, 2013, the United States Supreme Court denied the petition.

C. Initial Post-Conviction Relief Action and Subsequent Appeal: 2012-CP-37-0076

On January 3, 2014, Applicant filed his initial PCR application, raising the following grounds for relief:

1. Ineffective assistance of trial counsel
 - a. For failing to investigate two potential alibi witnesses: Veronica and Vanessa Phillips;
 - b. For failing to challenge the composition of the jury pool;
 - c. For failing to request a continuance to hire a certified interpreter;
 - d. For failing to object to the non-certified interpreter;
 - e. For allowing the State to proffer the State's key witness;
 - f. For failing to call John Patrick Stevens as a witness;

- g. For failing to object to the alleged hearsay testimony of Investigator Roosevelt Young;
 - h. For failing to pursue Alvin Phillips' claim that he had no plea deal with the prosecutor;
 - i. For asking Alvin Phillips' during his testimony about the mandatory minimum sentence for armed robbery;
 - j. For failing to object or move to dismiss the kidnapping indictment before trial;
 - k. For referencing a pending assault and battery with intent to kill (ABWIK) charge during his closing argument;
 - l. For focusing too much on the victims in his closing argument;
 - m. For failing to object to the solicitor commenting on Applicant's silence;
 - n. For failing to object to Investigator Young vouching for Joseph Stevens;
 - o. For failing to object to solicitors vouching and bolstering for the credibility of numerous witnesses;
 - p. For failing to object to co-defendant's counsel quoting Bible verses in his closing argument;
 - q. For failing to present a case to include Applicant's testimony;
 - r. For failing to object to premature deliberations by the jury;
 - s. Due to trial counsel's cumulative errors
2. Ineffective assistance of appellate counsel
- a. For failing to file a reply brief concerning inadmissible testimony presented on appeal

The State made its return on March 19, 2015. On February 1, 2017, the PCR court convened an evidentiary hearing before the Honorable Eugene C. Griffith, Jr. Applicant was present at the hearing and represented by Charles T. Brooks, III, Esquire. Senior Assistant Deputy Attorney General Johanna C. Valenzuela appeared on behalf of the State. Applicant, Veronica Phillips, Vanessa Phillips, Counsel Calhoun, and Assistant Solicitor Maye all testified at the hearing.³ On

³ Notably, Counsel Franklin-Best did not testify despite Applicant raising a claim of ineffective assistance of appellate counsel.

June 15, 2017, Judge Griffith issued an order denying the application on all grounds and dismissing the action with prejudice.

Applicant filed a timely notice of appeal. Appellate Defender LaNelle Cantey DuRant (Counsel DuRant) of OAD perfected Applicant's appeal by filing a petition for writ of certiorari, raising the following issue:

The PCR court erred by not finding trial counsel ineffective for failing to conduct a sufficient investigation into [Applicant] Langford's case by not interviewing the two alibi witnesses, Veronica and Vanessa Phillips, who testified at the PCR hearing that

[Applicant] Langford was with them during the incident on August 14, 2008.

The State made its return to the petition on July 9, 2018. Thereafter, the case was transferred to the Court of Appeals pursuant to Rule 243(l), SCACR. On October 8, 2019, the Court of Appeals issued an order denying certiorari. The case was returned to the circuit court on October 23, 2019.

D. Federal Habeas Corpus Action: 9:20-cv-1298-DCC-BM

On April 6, 2020, Applicant filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court, District of South Carolina. In his petition, Applicant raises the following grounds for relief:

- I. Trial court erred when it did not dismiss defendant's case for violating his right to speedy trial.
- II. Petitioner was prejudiced by the Solicitor docket control which violated due process.
- III. PCR court erred in finding that trial counsel was not ineffective for not interviewing the two alibi witnesses.
- IV. Counsel failed to secure a certified Chinese interpreter.
- V. Trial counsel was deficient by failing to object to the testimony

of Investigator Roosevelt Young that included hearsay.

- VI. Petitioner had a conflict of interest in the appeal of his PCR because his attorney represented his co-defendant in his initial appeal.
- VII. Appellate counsel during appeal of his prior PCR abandoned issues that ultimately resulted into relief for his co-defendant.

On April 7, 2020, Mr. Langford moved to stay these proceedings pending exhaustion of state remedies because he planned to file a successor PCR application. Respondent filed a return and motion for summary judgment on June 29, 2020. On December 15, 2020, the District Court granted this motion. This matter is currently stayed pending the resolution of the instant post-conviction relief action.

II. ISSUES BEFORE THIS COURT

On April 14, 2020, Mr. Langford filed this successor PCR application for post-conviction relief. Applicant alleges he is being held in custody unlawfully based on the following reasons:

1. Mr. Langford was denied his right to the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984); *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018).
 - a. Trial counsel rendered deficient and prejudicial assistance of counsel by failing to obtain a certified Chinese interpreter.
 - b. Trial counsel rendered deficient and prejudicial assistance of counsel by failing to object to the testimony of Investigator Roosevelt Young, including testimony that constituted hearsay and violated the Confrontation Clause.
2. Mr. Langford was denied the right to effective assistance of appellate counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985); *Smith v. Robbins*, 528 U.S. 259 (2000); *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833

(1999); *Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609 (2002).

- a. Appellate counsel during the appeal of Mr. Langford's prior post-conviction relief case had a conflict of interest because of her representation of codefendant Bryan Phillips during the direct appeal of his convictions and sentences. *State v. Phillips*, No. 2010-173307, 2012 WL 10907975 (S.C. Nov. 21, 2012). Counsel also had a conflict of interest because Mr. Langford's application for post-conviction relief alleged ineffective assistance of appellate counsel during the direct appeal of his convictions and sentences, when direct appeal counsel and post-conviction appellate counsel both worked for the South Carolina Commission on Indigent Defense, Appellate Division, during their respective representations of Mr. Langford. See The Spangenburg Group, South Carolina Commission on Indigent Defense: Appellate Division Review, *Final Report*, February 14, 2008.
- b. Appellate counsel during the appeal of his prior post-conviction relief case abandoned issues that ultimately resulted in relief for co-defendant Bryan Phillips. *Bryan Phillips v. State*, Case No. 2013-CP-19-00386. See also Order of the Honorable J. Cordell Maddox dated May 25, 2018.

Applicant requests relief as follows:

"This Court should order a new trial. In the alternative, this Court should allow Mr. Langford to appeal the issues abandoned by appellate counsel during the appeal of his prior post-conviction relief case."

The State made its return on July 16, 2020, requesting the application be summarily dismissed because it was filed after the statute of limitations had expired; it is successive to Applicant's prior PCR action; it is barred by the doctrine of *res judicata*; and for failing to state a cognizable claim under the Uniform Post-Conviction Procedure Act⁴ (the Act).

⁴ S.C. Code Ann. § 17-27-10 to -160.

Pursuant to this request, the Honorable Walton J. McLeod, IV, acting in his capacity as Chief Administrative Judge, issued a conditional order of dismissal signed July 28, 2020, and filed September 4, 2020, provisionally denying and dismissing the application while giving Applicant twenty days to show why the dismissal should not become final. On September 18, 2020, Applicant, through PCR counsel, timely served and filed objections to the conditional order and requested a hearing on the State's motion to dismiss. The State filed its response to Applicant's objections on October 2, 2020.

On November 13, 2020, this Court convened a hearing into the State's motion to dismiss via WebEx. Applicant was present and represented by Counsel Grose. Assistant Attorney General Meadows again represented the State. At the conclusion of the hearing, this Court took the matter under advisement. Both parties submitted post-hearing briefs.

On December 11, 2020, this Court issued an order granting an evidentiary hearing solely on the issue of whether Appellate Defender LaNelle DuRant labored under an actual conflict of interest during her representation of Applicant. This Court dismissed the remaining issues for the reasons set forth in the conditional order of dismissal. On January 11, 2021, the State filed a timely motion to alter or amend pursuant to Rule 59(e), SCRCP. Applicant filed a response. By order signed January 29, 2021, and filed February 3, 2021, this Court denied the State's motion.

At the conclusion of the evidentiary hearing on April 27, 2021, this Court granted the State's request to keep the record open to allow Counsel DuRant to fully review her file from OAD.⁵ On May 1, 2021, Counsel DuRant notified Assistant Attorney General Meadows that she finished reviewing her file from OAD, which was sent to her via flash drive. Counsel DuRant

⁵ Because she is retired, Counsel DuRant was initially only able to review the transcripts and records provided by the Attorney General's Office rather than her OAD file.

discovered a note regarding a phone call between her and Mr. Langford. On July 22, 2021, this Court convened a WebEx hearing and admitted the note into the record as Court's Exhibit #1. This Court requested proposed orders by both parties.⁶

III. SUMMARY OF TESTIMONY FROM EVIDENTIARY HEARINGS

Counsel DuRant

Counsel DuRant testified she worked for the Richland County Public Defender's Office for six years before becoming an appellate defender in 2006. (2021 PCR Tr. 7–8). She retired from the OAD in 2019. (2021 PCR Tr. 8). Counsel DuRant was first asked on direct examination about OAD's filing system. (2021 PCR Tr. 11). She testified that, during her time at OAD, there was a large file room where all files were stored until the cases were closed. (2021 PCR Tr. 10–11). Once she began working on a case, Counsel DuRant kept the case files in her office. (2021 PCR Tr. 11). She testified that most attorneys did the same or returned their files to the file room after submitting their brief. (2021 PCR Tr. 11). However, each attorney's files were not kept separate from one another within the file room. (2021 PCR Tr. 11).

She further testified that the attorneys did not usually lock their offices. (2021 PCR Tr. 11). Chief Appellate Defender Robert Dudek had an open door policy. (2021 PCR Tr. 11). She explained that the attorneys could close their doors if they were working on an argument, but that everyone's doors were usually open. (2021 PCR Tr. 11–12). Regarding the computer system, Counsel DuRant testified that each individual had access to his or her own profile but that there

⁶ Applicant argues in his 59(e) motion he was denied adjudication by a judicial officer because "the reasoning in the order is entirely that of an advocate and not an independent judicial officer, which violates the separation of powers." This Court requested proposed orders from both parties and gave careful consideration to both sides before issuing its final order.

was a general database where research and case files were located. (2021 PCR Tr. 12–13). Counsel DuRant was then asked whether there was any effort to screen one attorney's access to another attorney's cases in the computer system. (2021 PCR Tr. 13). She stated that she could not remember exactly, but that she believed they had to get special permission to access other attorneys' files. (2021 PCR Tr. 13).

Counsel DuRant testified that Mr. Dudek reviewed all cases when they first came in before assigning them out.⁷ (2021 PCR Tr. 15–16). Mr. Dudek never shared with anyone how he assigned cases. (2021 PCR Tr. 16). Regarding co-defendants, Counsel DuRant testified OAD routinely represented co-defendants. (2021 PCR Tr. 14). Counsel DuRant was then asked what procedures were in place to screen the attorneys from confidential information. (2021 PCR Tr. 16). She testified she did not remember anything in particular other than the attorney's honor. (2021 PCR Tr. 16). When co-defendants' cases were pending on appeal at the same time, the appellate defenders who represented them routinely discussed their cases with one another because they all had the same transcript. (2021 PCR Tr. 14, 16). However, an attorney's notes were considered work product, which they did not share. (2021 PCR Tr. 17). Additionally, any letters between the attorney and client were privileged. (2021 PCR Tr. 17).

Counsel DuRant testified the situation was different if an appellate defender represented an individual on direct appeal and another appellate defender was assigned to represent that individual on PCR appeal. (2021 PCR Tr. 17). If the former attorney was still working at OAD, she explained, the policy was to speak with Mr. Dudek and see if there was a conflict of interest.

⁷ Counsel DuRant testified that Mr. Dudek's procedure differed from the previous chief appellate defender, Joey Savitz, who did not review cases before they were assigned. (2021 PCR Tr. 15). At that time, cases were immediately assigned to an appellate defender on a rotating basis. (2021 PCR Tr. 15–16).

(2021 PCR Tr. 18). She stated that she personally sent a couple of cases to the South Carolina Supreme Court to determine if there was a conflict because the other prior attorney was still at OAD. She testified the Court developed a very liberal policy in these matters. (2021 PCR Tr. 18). Counsel DuRant recalled one case where the Court held that, even if the attorney was still in the office, there was no conflict. (2021 PCR Tr. 18).

Counsel DuRant confirmed that the conflict of interest criteria utilized by OAD was more vigilant than the South Carolina Supreme Court required. (2021 PCR Tr. 19). Counsel Durant provided a general overview of the process to determine if there was a conflict. (2021 PCR Tr. 19). If the former attorney no longer worked at OAD, she clarified there was no conflict of interest. (2021 PCR Tr. 19). However, if the former attorney was still working at OAD, Mr. Dudek had to conduct a thorough conflict check. (2021 PCR Tr. 19). Counsel DuRant explained that the basic criteria required Mr. Dudek to determine if he thought the OAD's representation of the client would be harmful or cause prejudice to the client. (2021 PCR Tr. 19–20). However, she emphasized that the specific criteria for determining whether a conflict of interest existed was entirely based upon Mr. Dudek's discretion. (2021 PCR Tr. 19). Once Mr. Dudek determined that there was not a conflict, Counsel DuRant testified that the attorneys at the OAD knew not to discuss the case with the former attorney. (2021 PCR Tr. 20). She further testified that, when a conflict involved Mr. Dudek, OAD drafted and filed a memorandum with the South Carolina Supreme Court requesting they determine if a conflict of interest prevented their office from representing a client. (2021 PCR Tr. 21–22). Finally, Counsel DuRant testified that screening between appellate defenders was simply based on the honor system. (2021 PCR Tr. 22).

Counsel DuRant testified that Phillips and Applicant were tried jointly. She represented Phillips on direct appeal and Betsy Franklin-Best represented Langford on direct appeal. (2021

PCR Tr. 22). She explained that the South Carolina Supreme Court held oral arguments in both cases, which were heard back-to-back on the same day. (2021 PCR Tr. 23). Langford's oral argument went first, and the appeal concluded with a published opinion on the speedy trial and docket control issues. (2021 PCR Tr. 23).

In Phillips' case, Counsel DuRant raised three issues, including the issue raised in Langford's case. (2021 PCR Tr. 23). She noted that she raised two issues not raised in Langford's direct appeal. (2021 PCR Tr. 24). She further explained that Phillips' case concluded with an unpublished opinion based partially on the holding in Langford's opinion. (2021 PCR Tr. 23). Ultimately, Counsel DuRant noted, the Supreme Court affirmed the convictions and sentences for both Langford and Phillips. (2021 PCR Tr. 24).

Counsel DuRant confirmed that Langford applied for post-conviction relief, which was denied by Judge Griffith. (2021 PCR Tr. 24). Langford appealed the denial of his PCR application and the case was assigned to Counsel DuRant at the OAD. (2021 PCR Tr. 24). Counsel DuRant explained that, while she had represented Phillips on direct appeal and Counsel Franklin-Best represented Langford, she did not believe there was a conflict because (1) Phillips' case was closed and (2) Franklin-Best no longer worked at OAD. (2021 PCR Tr. 24–25). She therefore did not seek further guidance from Mr. Dudek. (2021 PCR Tr. 25). In fact, she believed her previous representation of Phillips would benefit Langford since she was already so familiar with the case. (2021 PCR Tr. 26). While she did not have the explanation in writing, Counsel DuRant testified that she informed Mr. Langford that she had represented Mr. Phillips in his direct appeal. (2021 PCR Tr. 26). Counsel DuRant testified that she was aware that the rule for concurrent representation required full disclosure and informed consent in writing. (2021 PCR Tr. 27). Counsel DuRant further acknowledged that there were no formal policies in place at OAD to

implement Rule 1.10(e) of the South Carolina Rules of Professional Conduct,⁸ which requires a public defender appointed to represent a client in the same or a substantially related matter as another client represented by the public defender's office be screened in a timely manner from access to confidential information relating to and from any participation in the representation of the other client. (2021 PCR Tr. 27–28). However, she explained that this was not an issue because the appellate defenders did not share confidential information about co-defendants with one another. (2021 PCR Tr. 28). While she noted that there were no policies to prevent OAD attorneys from accessing each other's files in the file room, she explained that the honor system and nature of an appellate defender's caseload prevented the need for any formal policy in accordance with Rule 1.10(e). (2021 PCR Tr. 30–31).

In regard to the caseload, Counsel DuRant testified that she often had to work on weekends to be able to meet filing deadlines. (2021 PCR Tr. 31) Despite the Supreme Court order discouraging deadline extensions, she explained that the overwhelming caseloads often led to OAD attorneys filing for extensions. (2021 PCR Tr. 31) She further testified that there were no OAD policies limiting the number of cases an attorney could have at any given time. (2021 PCR Tr. 31–32) Counsel DuRant noted that at the time she was handling Mr. Langford's PCR appeal, her caseload was heavy, but she was not overwhelmed. (2021 PCR Tr. 32)

⁸ In his Rule 59(e) motion, Applicant pointed out that this Court mistakenly referred to the Model Rules of Professional Conduct instead of the South Carolina Rules of Professional Conduct. The Court corrects this error. To the extent Applicant argues that this Court does not address other issues raised in his proposed order, this Court finds that S.C. Code Ann § 17-27-80 only requires that the PCR court "shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." Applicant's other arguments do not relate to the sole issue on appeal, that being whether Appellate Defender LaNelle DuRant had an actual conflict of interest during her representation of Applicant. Therefore, this Court declines to address them.

Counsel DuRant recalled that Langford's appeal piqued her interest for two reasons: (1) she was familiar with the case from her work with Phillips' and (2) Langford had two fact witnesses to testify. (2021 PCR Tr. 32). She testified it was uncommon to have witnesses other than the applicant, trial counsel, and solicitor testify in PCR cases. (2021 PCR Tr. 32). She recalled previous PCR cases where fact witnesses testified and the court granted relief. (2021 PCR Tr. 33) Counsel DuRant explained that, in her experience, if she believed an issue was particularly significant, the best strategy is to focus on strengthening that single issue rather than bringing the Court's attention to additional, weaker issues. (2021 PCR Tr. 33–34). She testified that while Langford had raised claims of ineffective assistance of appellate counsel, case law allows her to pick the most significant issue rather than raise every single issue that might be meritorious. (2021 PCR Tr. 34).

On cross-examination, Counsel DuRant reiterated that she was appointed to represent Langford well after Phillips' appeal had concluded. (2021 PCR Tr. 35). However, when selecting the issues to proceed on in Phillips' case, she explained that she believed the most significant issue was the solicitor's comment on Phillips' decision not to testify. (2021 PCR Tr. 36–37). Counsel Durant that the speedy trial issue was insignificant because it had not been extensively discussed at trial according to the transcript. (2021 PCR Tr. 37). She also noted that she believed the Supreme Court would find the interpreter issue more significant than it did. (2021 PCR Tr. 37).

Counsel DuRant proceeded by providing a brief overview of the procedural history of Langford's and Phillips' direct appeals. (2021 PCR Tr. 38–42). She explained that while Langford and Phillips were co-defendants and their oral arguments were scheduled on the same day back-to-back, they were separate cases with their own records on appeal. (2021 PCR Tr. 38). In his application for post-conviction relief, Langford raised several issues. (2021 PCR Tr. 39). However,

Counsel DuRant could not recall much about his allegation of ineffective assistance of appellate counsel against Counsel Franklin-Best. (2021 PCR Tr. 39–40). Counsel DuRant further testified that she did not believe there was a conflict of interest on the basis that Franklin-Best previously worked at OAD or that OAD was involved in both Phillips’ and Langford’s cases. (2021 PCR Tr. 40). She explained that the office policy designated that there was no conflict of interest as long as the prior attorney no longer worked in the office. (2021 PCR Tr. 40). Since Franklin-Best left OAD in 2012, there was no conflict of interest. (2021 PCR Tr. 40). She further explained that she did not believe Phillips and Langford had opposing interests that would amount to a conflict of interest on her part. (2021 PCR Tr. 40). She reiterated that she believed her representation of Phillips would be beneficial to Langford because she knew the case so well. (2021 PCR Tr. 40–41).

Counsel DuRant testified that there was never any overlap between her representation of Phillips on direct appeal and Langford on PCR appeal. (2021 PCR Tr. 41). Her appellate strategy was focused solely on the strongest issue in Langford’s case—which she believed was the alibi issue. (2021 PCR Tr. 41). Throughout her representation of Langford, Counsel DuRant never felt that her duty to Phillips interfered with her ability to represent Langford. (2021 PCR Tr. 41–42). In fact, she noted that even if she did gain any confidential information from working on the Phillips case, it was irrelevant because she was bound by what was in the appellate record. (2021 PCR Tr. 42).

On re-direct examination, Counsel DuRant testified that she raised three issues in Phillips’ direct appeal. (2021 PCR Tr. 42). She further acknowledged that she had raised more than one issue in previous PCR appeals. (2021 PCR Tr. 42). While she was not very familiar with federal habeas, she understood and explained to her clients that federal habeas was the next step. (2021 PCR Tr. 43–45). Counsel DuRant reiterated that she believed all three issues that she raised in

Phillips' direct appeal to be meritorious. (2021 PCR Tr. 45).

At the July 22, 2021, hearing, this Court admitted into the record a note dated February 5, 2018, that Counsel DuRant discovered in her OAD file.⁹ See Court's Exhibit #1. "K.C. Langford" and the date are written at the top of the note. It states, in relevant part:

"He said he knew that I represented Bryan on his direct appeal but he had no problem with that."

The bottom of the note includes Counsel DuRant's initials in her handwriting. She further testified to its authenticity.

With the note refreshing her memory, Counsel DuRant recalled Applicant calling her to notify her that he had been transferred from Evans Correctional Institution to Allendale Correctional Institution. He also told her about a training program he was working on. She brought up the possible conflict to Applicant at that time. Specifically, she told Applicant that she previously represented Phillips on direct appeal, and asked him if he had any concerns. Applicant indicated to her that he was aware of her prior representation of Phillips, but that he did not have any concerns.

Counsel DuRant testified she reviewed the OAD file in its entirety, and did not discover anything else in the file regarding her representation of Phillips or a possible conflict of interest.

Applicant

⁹ Counsel DuRant testified that she contacted Mr. Dudek at the conclusion of the April hearing. Mr. Dudek first searched through Langford's OAD file and found the note. Counsel DuRant's former assistant then mailed her a flash drive which included a copy of Langford's entire OAD file. Counsel DuRant then reviewed the file.

At the April hearing, Applicant confirmed that Counsel DuRant represented him in his prior PCR appeal. (2021 PCR Tr. 49). Throughout her representation, Applicant testified that he was never informed that Counsel DuRant previously represented Phillips. (2021 PCR Tr. 49). In fact, he did not receive any verbal or written notice of her previous representation of Phillips. (2021 PCR Tr. 49). Additionally, Applicant explained that he was never asked to sign a document waiving any potential conflict. (2021 PCR Tr. 50). Applicant testified that he did not learn of Counsel DuRant's previous representation of Phillips until his current attorney informed him of the conflict. (2021 PCR Tr. 50). In light of this information, Applicant would have sought a new "independent" lawyer. (2021 PCR Tr. 50).

At the July hearing, Applicant testified he did not recall the February 5, 2018, phone conversation reflected in Counsel DuRant's note.

IV. STANDARD OF REVIEW

An applicant may seek PCR upon the following types of allegations:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ,

motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A). “The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence.” Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

V. FINDINGS OF FACT & CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the PCR hearing, observed the witnesses, passed upon their credibility, and weighed their testimony accordingly. After hearing the testimony presented and considering the legal arguments by counsel, as well as the records incorporated by way of the State’s return, this Court proceeds to the sole claim of whether Counsel DuRant labored under an actual conflict of interest based on her prior representation of Phillips and finds it to be without merit. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings of facts and conclusions of law based upon all of the probative evidence presented.

1. Credibility

As an initial matter, this Court does not find credible Applicant’s testimony that (1) he was never informed that Counsel DuRant previously represented Phillips; (2) that he did not receive any verbal or written notice of Counsel DuRant’s previous representation of Phillips; and (3) that he did not learn of Counsel DuRant’s previous representation of Phillips until Counsel Grose informed him of the conflict. Although, as discussed below, this Court finds no actual conflict of interest existed based on Counsel DuRant’s previous representation of Phillips, this Court finds Counsel DuRant’s note dated February 15, 2018, directly contradicts Langford’s sworn testimony.

Although, Ms. DuRant did not obtain consent confirmed in writing, from Mr. Langford regarding her prior representation of Mr. Phillips, this Court finds that Ms. Durant did inform Mr. Langford via telephone call and documented it as such. In contrast, this Court finds credible and persuasive the testimony of Counsel DuRant, who presented well-recalled testimony regarding her representation of both Phillips and Langford.

2. Sixth Amendment Conflict of Interest

The Sixth Amendment guarantees criminal defendants the right to “assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.” *Strickland v. Washington*, 466 U.S. 668, 685 (1984). “Representation of a criminal defendant entails certain basic duties[, including] a duty of loyalty [and] a duty to avoid conflicts of interest.” *Id.* at 688 (citing *Cuyler v. Sullivan*, 446 U.S. 335, 346 (1980)). In *Cuyler v. Sullivan*, the United States Supreme Court held that “[i]n order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer’s performance.” 446 U.S. at 350; *accord. Jackson v. State*, 329 S.C. 345, 495 S.E.2d 768 (1998). “An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant’s.” *Staggs v. State*, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007).

The Court later clarified in *Mickens v. Taylor*, that an “actual conflict,” for Sixth Amendment purposes, is a “conflict that [adversely] *affected counsel’s performance*—as opposed to a mere theoretical division of loyalties.” 535 U.S. 162, 171 (2002); *see United States v. Gantt*, 140 F.3d 249, 254 (D.C. Cir. 1998) (internal quotations marks and citations omitted) (explaining that the “adverse effect” element of the *Cuyler* test requires the defendant “to demonstrate that the conflict had some negative effect upon his defense (defined as an actual lapse in representation)”). “The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a

criminal conviction,” *State v. Gregory*, 364 S.C. 150, 152–53, 612 S.E.2d 449, 450 (2005), and an actual conflict of interest does not arise from an irrelevant or “hypothetical conflict having no effect on trial counsel’s representation . . .” *United States v. Taylor*, 139 F.3d 924, 931 (D.C. Cir. 1998). The two requirements—an *actual conflict* of interest resulting in an *adverse effect* on counsel’s performance—“are often intertwined, making the factual analyses of them overlap.” *United States v. Tatum*, 943 F.2d 370, 375–76 (4th Cir. 1991).

Here, this Court finds Langford failed to demonstrate—“as a threshold matter”—that Counsel DuRant was ever “required to make a choice advancing [her] own or [Phillips’] interests to the detriment of [Langford]’s interests.” *United States v. Bruce*, 89 F.3d 886, 893 (D.C. Cir. 1996) (citation omitted); *see id.* (“It is the competition between these interests, rather than some independent failure of the attorney, that gives rise to the ‘conflict.’ ”). Although Langford and Phillips did not raise identical *issues* on direct appeal, no *diverging interests* arose that could have prejudiced Langford. None of the issues DuRant rose in Phillips’ direct appeal were inconsistent with the issues DuRant chose *not* to raise in Applicant’s PCR appeal. *See Fuller v. State*, 347 S.C. 630, 634, 557 S.E.2d 664, 666 (2001) (finding that no actual or potential conflict of interest was shown where defendants had consistent defenses); *Gilbert v. Moore*, 134 F.3d 642, 652 (4th Cir. 1998) (*en banc*) (explaining that, to prove an actual conflict of interest, a defendant “must show that [his] interests diverge[d] with respect to a material factual or legal issue or to a course of action”).

3. Successive Representation

Further, Langford’s alleged conflict is one of successive—rather than concurrent—representation. *See United States v. Shepard*, 675 F.2d 977, 979 (8th Cir. 1982) (recognizing that conflicts “may arise when an attorney simultaneously represents clients with differing interests [—

] concurrent representation [—] or when an attorney representing a defendant has previously represented codefendants or trial witnesses [—] successive representation”). In the context of concurrent or joint representation, the *Cuyler* standard “is more easily satisfied because “when an attorney represents two clients with opposing interests, the attorney cannot serve both clients adequately. . . . [The attorney] must fail one or do nothing and fail both.” *United States v. Taylor*, 139 F.3d 924, 930 (D.C. Cir. 1998) (alterations in original) (citations omitted). In other words, it is generally more difficult to show an actual conflict resulting from successive representation because the attorney is no longer beholden to the former client. *Mannhalt v. Reed*, 847 F.2d 576, 580 (9th Cir. 1988); see *United States v. Trevino*, 992 F.2d 64, 66 (5th Cir. 1993) (explaining that typically “the potential for a multiple representation conflict exists when codefendants are represented by the *same* attorney” at the *same* time) (emphasis added); accord, e.g., *McConico v. State of Ala.*, 919 F.2d 1543, 1546 (11th Cir. 1990).

While the United States Supreme Court has never specifically addressed successive representation in the context of *Cuyler*, the Court in *Mickens* pointed out that *Cuyler* involved the concurrent representation of multiple defendants by the same attorneys. See, e.g., *Smith v. Hofbauer*, 312 F.3d 809 (6th Cir. 2002) (holding in the context of a habeas petition that “[*Cuyler*] applied only to joint representation and the Supreme Court has yet to extend [*Cuyler*]’s reach to any other type of conflict.”). The Court admonished the lower courts for applying *Cuyler* “‘unblinkingly’ to ‘all kinds of alleged attorney ethical conflicts,’ ” including “conflicts rooted in counsel’s obligations to *former* clients,” i.e. successive representation cases. *Mickens*, 535 U.S. at 174 (quoting *Beets v. Scott*, 65 F.3d 1258, 1266 (5th Cir. 1995)). Therefore, the conflict of interest standards have been developed in the context of concurrent representation of co-defendants, a situation much more likely to raise a conflict of interest because of the lawyer’s concurrent and

clear obligations to both clients.

An actual conflict may nonetheless exist in cases of successive representation if counsel “harbor[s] substantial personal interests which conflict with the clear objective of his representation of the client” or counsel’s “continuing duty to former clients interfere[s] with his consideration of all facts and options for his current client.” *Tatum*, 943 F.2d at 376; *cf. Taylor*, 139 F.3d at 930 (explaining that when conflicts other than those arising from joint representation “are alleged to have impaired counsel’s performance, the defendant’s burden is to show that counsel actually acted in a manner that adversely affected his representation by doing something[—]or refraining from doing something[—]that a non-conflicted counsel would not have done”).

Here, even if Langford and Phillips at some point had diverging interests, this Court finds Langford failed to show Counsel DuRant *actively* represented conflicting interests based on her prior representation of Phillips because Phillips’ direct appeal concluded *several years* before Langford’s PCR appeal. *Trevino*, 992 F.2d at 66; *see Perillo v. Johnson*, 205 F.3d 775, 798–99 (5th Cir. 2000) (“Where . . . defense counsel’s prior representation unambiguously terminated before the second representation began, the possibility that defense counsel’s continuing obligation to his former client will impede his representation of his current client is generally much lower.” (citations omitted)). Specifically, Counsel DuRant testified her representation of Phillips concluded in November 2012 while Langford’s notice of appeal from his PCR was filed in June of 2017. Langford ultimately failed to demonstrate that any continuing duty to Phillips interfered with her consideration of all facts and options for Langford in his PCR appeal.

4. Appeal

This Court further finds the fact that DuRant represented both Phillips and Applicant on *appeal* rather than *trial* significantly reduced the possibility of a potential conflict ripening into an

actual conflict. An actual conflict is more likely to arise in cases involving *trial* counsel because the fear in successive representation cases is that the lawyer “will fail to cross-examine the former client rigorously for fear of revealing or misusing privileged information.” *Moss v. United States*, 323 F.3d 445, 460 (6th Cir. 2003) (citations omitted); see *United States v. Massimino*, 832 F. Supp. 2d 510, 515 (E.D. Pa. 2011) (explaining that “loyalty would be divided between a current client and a former client because an attorney who cross-examines former clients inherently encounters divided loyalties”). The most common example of an actual conflict of interest arising from successive representation occurs where an attorney’s former client serves as a government witness against the attorney’s current client at trial. *Moss*, 323 F.3d at 460 (citations omitted).

In *Harbison v. Bell*, the Sixth Circuit Court of Appeals addressed the issue of whether the defendant’s appellate counsel labored under a conflict of interest based on his prior representation of a client who was an initial suspect in the murder of which the defendant was ultimately convicted. 408 F.3d 823, 836 (6th Cir. 2005). In addition to finding the defendant failed to demonstrate any prejudice attributable to his appellate counsel’s alleged conflict, the Court found that the mere fact that counsel represented the defendant “during his motion for a new trial and on direct appeal, rather than during the trial, would reduce the danger posed by any conflict.” *Id.* Like the defendant in *Harbison*, Langford fails to cite any specific instances in the record where his interests were impaired by Counsel DuRant’s prior representation of Phillips. The fact that Phillips later prevailed at the *circuit court level*¹⁰ based on PCR issues Counsel DuRant did not raise in Langford’s PCR appeal is not probative on the conflict of interest issue.

¹⁰ This matter is currently pending appellate review.

In *Vega v. Johnson*, Vega alleged he was denied due process because the attorney representing the State on direct appeal had represented Vega in a previous trial on unrelated charges. 149 F.3d 354, 357–59 (5th Cir. 1998). The Fifth Circuit Court of Appeals rejected Vega’s claim, in part because the ethical duty of loyalty prevents counsel from acting against his client’s interests in the course of a single litigation matter. *Id.* at 358 (“That duty, however, lasts only as long as the litigation matter.”). The Court explained that, once the trial of the other defendant ended, [counsel]’s only duty was to protect confidential information he received in his capacity as attorney.” *Id.*

The Court further rejected Vega’s conflict claim based on the following:

Unlike the multiple representation standard addressed in *Holloway*,¹¹ where prejudice is both likely and difficult to identify, **the situation here presents little risk of harm to [the defendant]’s interests, and there is an easy way to spot abuse should it occur.**

[Counsel] was limited to the trial record on appeal and could not supplement it with facts or observations taken from his prior representation. The only way to abuse his confidential information would be to introduce such extraneous information and hope that the appellate court, while pretending to ignore it as outside the record, would be influenced. Yet Vega fails to point out any instances in which information outside the record was introduced on appeal. Because we could easily identify such a use of confidential information were it present, the argument against harmless error set forth in *Holloway* does not apply.”

¹¹ In *Holloway v. Arkansas*, 435 U.S. 475 (1978), trial counsel objected that he could not adequately represent the divergent interests of three codefendants. Without inquiry, the trial court denied counsel’s motions for the appointment of separate counsel and refused to allow counsel to cross-examine any of the defendants on behalf of the other two. Deferring to the judgment of counsel regarding the existence of a disabling conflict, and recognizing that a defense attorney is in the best position to determine when a conflict exists, the Court held that prejudice is presumed when defense counsel is forced to represent codefendants over his timely objection unless the trial court has determined that there is no conflict. In other words, the harmless error inquiry does not apply on appellate review of such situations. *Id.* at 488.

Id.

Here, Applicant's situation with DuRant is even less likely than Vega's to result in an actual conflict because DuRant was limited only to the record on appeal for *both Phillips and Applicant*. Any potential confidential information DuRant received from Phillips could not have had any effect on either appeal because such "extra-record" information may not be introduced on appeal. Counsel DuRant confirmed that, even if she did gain any confidential information from working on the Phillips case, it was irrelevant because she was bound by what was in the appellate record.

5. Office of Appellate Defense

Langford further argues a conflict of interest existed based on Counsel Franklin-Best and Counsel DuRant both being employed by OAD during their respective representations of Langford. Specifically, Langford contends Counsel DuRant had a conflict of interest because he raised a claim of ineffective assistance of appellate counsel against Counsel Franklin-Best in his PCR, which Counsel DuRant did not pursue on PCR appeal.¹²

Langford specifically refers to Rule 1.10(e) of the South Carolina Rules of Professional Conduct, which "provides a public defender may continue representing a client, even with an imputed conflict of interest, if there is proper screening to prevent the exchange of confidential information." *State v. Wright*, 424 S.C. 335, 340, 818 S.E.2d 236, 238 (Ct. App. 2018). Counsel DuRant explained that, while she had represented Phillips on direct appeal and Appellate Defender Franklin-Best represented Langford, she did not believe there was a conflict because (1) Phillips' case was closed and (2) Franklin-Best no longer worked at OAD. While Counsel DuRant

¹² This Court would note that it is questionable whether the allegations against Counsel Franklin-Best would have even been preserved on appeal, given Langford's failure to present testimony from Franklin-Best at the evidentiary hearing or produce any evidence aside from mere speculation that the outcome of his direct appeal would have been different had a reply brief been filed.

acknowledged that there were no formal policies in place at OAD to implement Rule 1.10(e), she explained that any “screening” between appellate defenders was simply based on the honor system. *See id.* (“We read Rule 1.10(e) as providing a way to ensure the public defender's office is not conflicted out, but we do not read it as requiring any specific procedures to ensure the absence of a conflict.”). Specifically, she testified that an appellate defender’s notes were considered work product, which they did not share with one another. Additionally, any letters between the attorney and client were privileged.

Applicant cites to Rule 1.10(e) of the South Carolina Rules of Professional Conduct, which in turn refers to Rule 1.0(n) of the South Carolina Rules of Professional Conduct to define when a lawyer is deemed screened from an imputed conflict of interest. Rule 1.0(n) states:

“Screened” denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are *reasonably adequate under the circumstances* to protect information that the isolated lawyer is obligated to protect under these Rules or other law. (*Emphasis added*)

Of note, the screening process is subject to the qualification that it is “reasonably adequate under the circumstances.” *Id.* The Court finds that under the screening procedures of OAD were reasonably adequate under the circumstances.

The dire financial straits of public defender offices, and the accompanying strains in managing caseloads, are so well documented they are axiomatic. The Office has a limited budget to hire more attorneys and staff to avoid conflicts, limited office space to store client materials, and high caseloads per appellate attorney. Next, the de minimis nature of the alleged conflict, shown by Applicant’s verbal consent, further supports the reasonableness of the Office’s screening procedures. Finally, the Court considers the public interest nature of the Appellate Defenders work. Imposing a stringent screening process would result in harm to indigent defendants by making it

even harder for them to obtain counsel, which defeats the purpose of public defenders and would be unreasonable under the circumstances which OAD operates.¹³

Our Supreme Court has held that the Rules of Professional Conduct, whose purpose is to regulate and guide the legal profession in ethical conduct, “have no bearing on the constitutionality of a criminal conviction” and “[n]othing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such duty.” *Langford v. State*, 310 S.C. 357, 426 S.E.2d 793 (1993) (citing Rule 407, SCACR); *see* Rule 407, Scope of RPC (“Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached.”). However, this Court recognizes that many conflict of interest determinations are “premised in part upon analogous ethical rules, which may be informative but are not determinative with respect to whether there is an actual conflict for Sixth Amendment purposes.” *Perillo*, 205 F.3d at 798 (citing *Strickland*, 466 U.S. at 688).

This Court finds *Langford* failed to demonstrate a conflict of interest existed between his appellate counsels. Although Ms. DuRant testified all the Appellate Defenders share the same file room, have access to the electronic files of the other attorneys, offices of individual appellate

¹³ This Court also notes that our Supreme Court has held that a violation of the South Carolina Rules of Professional Conduct “*have no bearing on the constitutionality of a criminal conviction*.” *Langford v. State*, 310 S.C. 357, 360, 426 S.E.2d 793, 795 (1993) (emphasis added); *Nix v. Whiteside*, 475 U.S. 157, 165 (1986) (breach of ethical standard not tantamount to denial of defendant’s Sixth Amendment rights); *see also Whelchel v. Bazzle*, 489 F. Supp. 2d 523, 535 (D.S.C. 2006) (“[P]rofessional conduct rules have no bearing on whether a criminal conviction is constitutional . . .”); *Moss v. Kohn*, 323 F.3d 445, 449 (6th Cir. 2003) (noting that the Sixth Amendment constitutional analysis is independent of attorney rules of professional conduct); *Lambert v. Blodgett*, 393 F.3d 943, 986 (9th Cir. 2004) (“[T]he Supreme Court has never applied the ethical imputed disqualification rule in Sixth Amendment analysis.”). Even if this Court were to find a violation of the South Carolina Rules of Professional Conduct, there is still no proof of an actual conflict of interest that would have affected Ms. DuRant’s performance. Instead, what exists in this case is “a mere theoretical division of loyalties.” *Mickens v. Taylor*, 535 U.S. 162, 171 (2002).

attorneys are not locked to prevent access by other appellate attorneys, and office policy frowns on the appellate attorneys closing their doors, Counsel DuRant testified that Counsel Franklin-Best left OAD several years before she received the notice of appeal of Langford's PCR. She testified that the general policy at OAD was, if the former attorney no longer worked at OAD, there was no conflict of interest concerns. Counsel DuRant recalled personally sending several cases to the South Carolina Supreme Court to determine if there was a conflict because the other prior attorney was still at OAD. She testified the Court developed a very liberal policy in these matters, and recalled one case where the Court held that, even if the attorney was still in the office, there was no conflict.

As discussed above, the potential for a multiple representation conflict typically exists when codefendants are represented by the *same* attorney. In *Trevino*, the Fifth Circuit Court of Appeals noted that "[t]he potential for such conflicts . . . does not necessarily exist when . . . codefendants are represented by different attorneys, albeit in the same public defender office. The duty of loyalty runs only to that attorney's client; the attorney is in no way being asked to serve two masters." 992 F.2d at 66. The Court went on to note that "[t]he potential for conflict is even less in a public defender's office for a simple reason: no attorney there depends upon the clients for his/her salary. As a result, loyalty to one's own client cannot take a back seat to the financial qualms posed by defendant's and co-defendant's relative abilities to pay." *Id.* at 66 n.2.

VI. CONCLUSION

Based on the evidence presented at the PCR hearing and a thorough review of the record, this Court finds and concludes Applicant failed to demonstrate a conflict of interest existed such that Applicant is entitled to proceed with a successive PCR action or appeal of his first PCR action.

See Rule 71.1(e), SCRCP (“The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence.”). Although DuRant represented Phillips in his direct appeal, she was never “asked to serve two masters,” *Langford*, 310 S.C. at 359, 426 S.E.2d at 795, nor did she ever “*actively* represent conflicting interests” at the time she represented Applicant, in part because Phillips’ direct appeal concluded long before Applicant’s PCR appeal. *Trevino*, 992 F.2d at 66. Therefore, based on the foregoing, this Court denies relief on all allegations and dismisses this PCR action with prejudice.

Applicant must file and serve a notice of appeal within thirty days from PCR counsel’s receipt of written notice of entry of judgment to secure the appropriate appellate review pursuant to Rule 203, SCACR. Applicant has a right to appellate counsel’s assistance in seeking review of the denial of PCR. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant’s behalf. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.

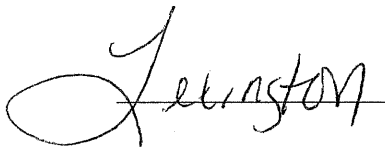
IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of the State.

AND IT IS SO ORDERED this 8 day of November, 2021.



DEBRA R. MCCASLIN
Presiding Judge
Eleventh Judicial Circuit

 Lexington, South Carolina

Rec 9/9/2021

STATE OF SOUTH CAROLINA
COUNTY OF EDGEFIELD

) IN THE COURT OF COMMON PLEAS
) FOR THE ELEVENTH JUDICIAL CIRCUIT
)
)

K.C. Langford, SCDC #294500,

) Case No. 2020-CP-19-0091
)

Applicant,

v.

) **ORDER OF DISMISSAL**
)
)

State of South Carolina,

Respondent.

_____)

This matter comes before the Court by way of a post-conviction relief (PCR) action commenced by K.C. Langford (Applicant) on April 14, 2020, and amended on April 30, 2020. On April 27, 2021, this Court convened an evidentiary hearing via Cisco WebEx Meetings in accordance with the Chief Justice's administrative memorandum, *Court Operations*, dated September 14, 2020.¹ A second evidentiary hearing convened via WebEx on July 22, 2021. Applicant was present at the hearings and represented by E. Charles Grose, Jr., Esquire. Assistant Attorney General Lillian L. Meadows represented the State. Applicant and Counsel DuRant both testified at both hearings.

The sole issue before this Court is whether Appellate Defender LaNelle DuRant labored under an actual conflict of interest during her representation of Applicant. In addition to the

¹ See S.C. Sup. Ct. Memorandum dated September 14, 2020 ("Judges . . . have discretion to determine whether it is appropriate to conduct a hearing using remote communication technology. Consent of the parties or counsel is not required. Please use WebEx, the conferencing platform supported by the Judicial Branch.").

pleadings in this action, this Court has before it a copy of the Edgefield County Clerk of Court records regarding the subject convictions; Applicant's records from the South Carolina Department of Corrections; a full and complete record of Applicant's direct appeal, including the trial transcript; Applicant's prior post-conviction relief records challenging these convictions and the appeal therefrom; and the records of the current PCR action. Additionally, this Court has before it a full and complete record of Bryan Phillips' direct appeal and post-conviction relief records.

After hearing the testimony and evidence presented at the PCR hearing, along with the record in its entirety, this Court finds no conflict of interest existed based on Counsel DuRant's prior representation of Applicant's co-defendant, Bryan Phillips, such that Applicant was denied his one full "bite at the apple." For the reasons discussed below, this Court denies relief and dismisses this action with prejudice.

I. FACTS & PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant orders of commitment of the Edgefield County Clerk of Court. During its December 2008 term, the Edgefield County Grand Jury indicted Applicant for criminal conspiracy (2008-GS-19-0673). Applicant was subsequently indicted for first-degree burglary (2010-GS-19-0272); armed robbery (2010-GS-19-0273); and kidnapping (2010-GS-19-0278) in May 2010.

On September 7, 2010, Applicant proceeded to a jury trial before the Honorable William P. Keesley. Mark R. Calhoun, Sr., Esquire (Counsel Calhoun), represented Applicant and Assistant Solicitor Ervin J. Maye of the Eleventh Circuit Solicitor's Office prosecuted the case.

A. Summary of Evidence Adduced at Trial

The victims in this case were the husband, wife, and son, who ran a Chinese Restaurant, along with the son's wife. (PCR App'x 203, 216, 232). While they toiled away in their restaurant,

Bryan Phillips (Phillips) and Alvin Phillips watched and plotted robbing the victims of their hard-earned cash for their own easy profit. (PCR App'x 242–46). Applicant jumped at the opportunity to join this venture. (PCR App'x 248). They robbed the victims outside the restaurant and grabbed a bag of cash from the victims' house. (PCR App'x 205–07, 210, 213, 218–19, 224, 233, 250–53). The three Chinese-speaking victims likely seemed perfect prey because they knew virtually no English. (PCR App'x 214, 219, 222, 321).

Alvin Phillips testified he lived with his sister, Veronica Phillips, and her children about a minute away from the restaurant. He was finishing eleventh grade at Strom Thurmond High School. Alvin and his cousin, co-defendant Bryan Phillips, both noticed that the “Chinese people”² never seemed to go to the bank when they closed the restaurant, but rather always brought a black bag with them to their nearby home instead. So, Alvin and Bryan deduced that the Chinese people were bringing their cash home from the restaurant. They made plans to rob the Chinese people. Bryan called Alvin one night, August 14, 2008. Alvin got his gun and ski mask. Bryan brought his own ski mask and met Alvin. Veronica is mother to Applicant's child. Applicant arrived at the house and Alvin and Bryan told him what they were planning. Applicant wanted to join in, so Applicant went into the house to grab a blue shirt to tie around his head as a mask. (PCR App'x 239–48).

They went to the Chinese restaurant as the family closed their restaurant. Alvin pointed a gun at the husband outside the restaurant. The robbers kept demanding money, but could not understand the husband. They demanded money from the son when he came out of the house, but the robbers could not understand him either. Bryan hit one of the victims over the head with his

² This is the term Alvin used to describe the victims.

fist. Applicant ran into the house and came back out with a bag of money. They fled and later divided the money amongst themselves, and Alvin got about \$800. Then, Alvin and Applicant got in the car with Veronica, who was leaving to pick up Alvin's mother, Vanessa Phillips, and take her to work. They were stopped by an officer who asked to see Veronica's and Applicant's identification. The officer let them go afterwards. Applicant stayed at Alvin's house that night. (PCR App'x 251–58).

Alvin testified he was telling the truth and denied he was telling the story the solicitor wanted. (PCR App'x. 292). Of course, the truth was not what Applicant wanted. He brought two statements claiming Applicant and Bryan were not involved and wanted Alvin to sign them so Applicant and Bryan would not get in trouble. Applicant told Alvin if he signed those statements, nobody would get in trouble. Alvin admitted this did not turn out to be good advice. But, Alvin admitted Applicant and Bryan were his friends. He never wanted them to get in trouble. It was not easy for Alvin to testify against them. He admitted he wished the whole thing would go away for all of them. The statements he signed for Applicant were false. In contrast, he testified the truth was Applicant and Bryan were with him for the robbery and further, that the prosecution and law enforcement never asked Alvin to say anything but the truth. (PCR App'x 296–99). On re-cross examination, Alvin agreed he did not want to sign the statements and was forced to sign them. (PCR App'x 301).

Deputy Zach Strom stopped Veronica's vehicle, and he corroborated Alvin's account of the traffic stop. He was responding to a bulletin about a larceny at the restaurant which described the suspects as three black males with no other details. The stop was about fifteen minutes after the bulletin and was near where the robbery occurred. (PCR App'x 308–13).

Bryan called Investigator Roosevelt Young as a defense witness. Investigator Young

received the tip that broke the case. Joseph Patrick Stevens, an acquaintance of Investigator Young's, provided the tip. Investigator Young knew Stevens' family and had known Stevens for a long time. On direct examination, Investigator Young described Stevens as a good citizen. Stevens had a bench warrant served on him and called Investigator Young for information. During the conversation, he indicated Alvin, Bryan, and Applicant committed the robbery. Young thought Stevens was related to one or more of the co-defendants. (PCR App'x 368–92, 397, 400–01). Young testified he had no influence over the disposition of Stevens' warrant. (PCR App'x 396). Furthermore, the record does not indicate Stevens was seeking assistance with his bench warrant or charge in exchange for the information he gave. Young also testified he had Alvin moved from the Edgefield detention center to the Saluda detention center because he was concerned Alvin was being intimidated and influenced into not testifying against his co-defendants. (PCR App'x 403).

Law enforcement first brought Veronica to the station because her name was one of the names Stevens provided Young. (PCR App'x 397). Then, Alvin came to the station. (PCR App'x 398–99). Because Alvin knew Young, he was more comfortable with Young. Alvin confessed to Young, implicated himself completely in the robbery, and admitted he was the gunman. He also implicated Bryan and Applicant. He did not attempt to minimize his involvement. (PCR App'x 399–401). The information Alvin gave was exactly the same information Stevens previously told Young. (PCR App'x 400).

The three victims testified at trial through an interpreter. The father, Ji, testified that he, his wife, and their son left the restaurant at about 10:30 p.m. The others went ahead of him. He was then confronted by three black men, one pointing a gun at him. He was hit in the head and was "pressed" down on the ground. His son, Li Guan, came out of the house. He was also "pressed" down. The robbers took Ji's wallet containing his license, credit card, and \$300 cash. One of the

robbers went into the house and took a bag of money. The robbers ran away. (PCR App'x 202–10).

Li Guan, the son, testified through the interpreter that the bag had \$3,000 in it. At gun point, he was made to kneel on the ground and forced to tell the robbers the bag of money was in the house. (PCR App'x 216–19). One of the robbers then went into the house to get the bag. After the robbers took the bag, the men ran away and Li Guan called 911. (PCR App'x 219–20).

Li Ai, Ji's wife and Li Guan's mother, testified through the interpreter a black guy with his face covered ran into the house and took the money bag. Li Guan then called 911. (PCR App'x 230–37).

B. Verdict & Direct Appeal

On June 9, 2008, the jury convicted Applicant as indicted. Judge Keesley sentenced Applicant to concurrent terms of twenty years' imprisonment for kidnapping, twenty years for first-degree burglary, twenty years for armed robbery, and five years for criminal conspiracy.

Applicant filed a timely notice of appeal, which was perfected on his behalf by Appellate Defender Elizabeth A. Franklin-Best (Counsel Franklin-Best) of the South Carolina Commission on Indigent Defense, Division of Appellate Defense (OAD). Both parties submitted briefs on the following issue:

Did the trial court judge err when he did not dismiss [Applicant's] case in May 2010 when [Applicant] motioned for dismissal for violating his right to a speedy trial, and when the state sought a continuance of that trial so it could further pressure a formerly cooperating co-defendant, who elected to assert his right to remain silent under the 5th Amendment of the federal Constitutional, into testifying for the state at the subsequent trial?

Following initial briefing, the case was certified to the Supreme Court pursuant to Rule 204(b), SCACR, and Applicant's case was consolidated with that of his co-defendant, Bryan

Phillips. Following final briefing and oral argument, the Supreme Court issued a published opinion affirming Applicant's convictions and sentences on November 21, 2012. *State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012). Applicant's subsequent petition for rehearing was denied. The remittitur was issued on December 20, 2012.

Applicant then petitioned to the United States Supreme Court for a writ of certiorari. By written order dated October 7, 2013, the United States Supreme Court denied the petition.

C. Initial Post-Conviction Relief Action and Subsequent Appeal: 2012-CP-37-0076

On January 3, 2014, Applicant filed his initial PCR application, raising the following grounds for relief:

1. Ineffective assistance of trial counsel
 - a. For failing to investigate two potential alibi witnesses: Veronica and Vanessa Phillips;
 - b. For failing to challenge the composition of the jury pool;
 - c. For failing to request a continuance to hire a certified interpreter;
 - d. For failing to object to the non-certified interpreter;
 - e. For allowing the State to proffer the State's key witness;
 - f. For failing to call John Patrick Stevens as a witness;
 - g. For failing to object to the alleged hearsay testimony of Investigator Roosevelt Young;
 - h. For failing to pursue Alvin Phillips' claim that he had no plea deal with the prosecutor;
 - i. For asking Alvin Phillips' during his testimony about the mandatory minimum sentence for armed robbery;
 - j. For failing to object or move to dismiss the kidnapping indictment before trial;
 - k. For referencing a pending assault and battery with intent to kill (ABWIK) charge during his closing argument;
 - l. For focusing too much on the victims in his closing argument;
 - m. For failing to object to the solicitor commenting on Applicant's silence;
 - n. For failing to object to Investigator Young vouching for Joseph Stevens;
 - o. For failing to object to solicitors vouching and

- bolstering for the credibility of numerous witnesses;
- p. For failing to object to co-defendant's counsel quoting Bible verses in his closing argument;
- q. For failing to present a case to include Applicant's testimony;
- r. For failing to object to premature deliberations by the jury;
- s. Due to trial counsel's cumulative errors
- 2. Ineffective assistance of appellate counsel
 - a. For failing to file a reply brief concerning inadmissible testimony presented on appeal

The State made its return on March 19, 2015. On February 1, 2017, the PCR court convened an evidentiary hearing before the Honorable Eugene C. Griffith, Jr. Applicant was present at the hearing and represented by Charles T. Brooks, III, Esquire. Senior Assistant Deputy Attorney General Johanna C. Valenzuela appeared on behalf of the State. Applicant, Veronica Phillips, Vanessa Phillips, Counsel Calhoun, and Assistant Solicitor Maye all testified at the hearing.³ On June 15, 2017, Judge Griffith issued an order denying the application on all grounds and dismissing the action with prejudice.

Applicant filed a timely notice of appeal. Appellate Defender LaNelle Cantey DuRant (Counsel DuRant) of OAD perfected Applicant's appeal by filing a petition for writ of certiorari, raising the following issue:

The PCR court erred by not finding trial counsel ineffective for failing to conduct a sufficient investigation into [Applicant] Langford's case by not interviewing the two alibi witnesses, Veronica and Vanessa Phillips, who testified at the PCR hearing that [Applicant] Langford was with them during the incident on August 14, 2008.

³ Notably, Counsel Franklin-Best did not testify despite Applicant raising a claim of ineffective assistance of appellate counsel.

The State made its return to the petition on July 9, 2018. Thereafter, the case was transferred to the Court of Appeals pursuant to Rule 243(l), SCACR. On October 8, 2019, the Court of Appeals issued an order denying certiorari. The case was returned to the circuit court on October 23, 2019.

D. Federal Habeas Corpus Action: 9:20-cv-1298-DCC-BM

On April 6, 2020, Applicant filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court, District of South Carolina. In his petition, Applicant raises the following grounds for relief:

- I. Trial court erred when it did not dismiss defendant's case for violating his right to speedy trial.
- II. Petitioner was prejudiced by the Solicitor docket control which violated due process.
- III. PCR court erred in finding that trial counsel was not ineffective for not interviewing the two alibi witnesses.
- IV. Counsel failed to secure a certified Chinese interpreter.
- V. Trial counsel was deficient by failing to object to the testimony of Investigator Roosevelt Young that included hearsay.
- VI. Petitioner had a conflict of interest in the appeal of his PCR because his attorney represented his co-defendant in his initial appeal.
- VII. Appellate counsel during appeal of his prior PCR abandoned issues that ultimately resulted into relief for his co-defendant.

On April 7, 2020, Mr. Langford moved to stay these proceedings pending exhaustion of state remedies because he planned to file a successor PCR application. Respondent filed a return and motion for summary judgment on June 29, 2020. On December 15, 2020, the District Court granted this motion. This matter is currently stayed pending the resolution of the instant post-conviction relief action.

II. ISSUES BEFORE THIS COURT

On April 14, 2020, Mr. Langford filed this successor PCR application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following reasons:

1. Mr. Langford was denied his right to the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984); *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018).
 - a. Trial counsel rendered deficient and prejudicial assistance of counsel by failing to obtain a certified Chinese interpreter.
 - b. Trial counsel rendered deficient and prejudicial assistance of counsel by failing to object to the testimony of Investigator Roosevelt Young, including testimony that constituted hearsay and violated the Confrontation Clause.
2. Mr. Langford was denied the right to effective assistance of appellate counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985); *Smith v. Robbins*, 528 U.S. 259 (2000); *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999); *Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609 (2002).
 - a. Appellate counsel during the appeal of Mr. Langford's prior post-conviction relief case had a conflict of interest because of her representation of codefendant Bryan Phillips during the direct appeal of his convictions and sentences. *State v. Phillips*, No. 2010-173307, 2012 WL 10907975 (S.C. Nov. 21, 2012). Counsel also had a conflict of interest because Mr. Langford's application for post-conviction relief alleged ineffective assistance of appellate counsel during the direct appeal of his convictions and sentences, when direct appeal counsel and post-conviction appellate counsel both worked for the South Carolina Commission on Indigent Defense, Appellate Division, during their respective representations of Mr. Langford. See *The Spangenburg Group, South Carolina Commission on Indigent Defense: Appellate Division Review, Final Report*, February 14, 2008.
 - b. Appellate counsel during the appeal of his prior post-

conviction relief case abandoned issues that ultimately resulted in relief for co-defendant Bryan Phillips. *Bryan Phillips v. State*, Case No. 2013-CP-19-00386. *See also* Order of the Honorable J. Cordell Maddox dated May 25, 2018.

Applicant requests relief as follows:

“This Court should order a new trial. In the alternative, this Court should allow Mr. Langford to appeal the issues abandoned by appellate counsel during the appeal of his prior post-conviction relief case.”

The State made its return on July 16, 2020, requesting the application be summarily dismissed because it was filed after the statute of limitations had expired; it is successive to Applicant’s prior PCR action; it is barred by the doctrine of *res judicata*; and for failing to state a cognizable claim under the Uniform Post-Conviction Procedure Act⁴ (the Act).

Pursuant to this request, the Honorable Walton J. McLeod, IV, acting in his capacity as Chief Administrative Judge, issued a conditional order of dismissal signed July 28, 2020, and filed September 4, 2020, provisionally denying and dismissing the application while giving Applicant twenty days to show why the dismissal should not become final. On September 18, 2020, Applicant, through PCR counsel, timely served and filed objections to the conditional order and requested a hearing on the State’s motion to dismiss. The State filed its response to Applicant’s objections on October 2, 2020.

On November 13, 2020, this Court convened a hearing into the State’s motion to dismiss via WebEx. Applicant was present and represented by Counsel Grose. Assistant Attorney General Meadows again represented the State. At the conclusion of the hearing, this Court took the matter

⁴ S.C. Code Ann. § 17-27-10 to -160.

under advisement. Both parties submitted post-hearing briefs.

On December 11, 2020, this Court issued an order granting an evidentiary hearing solely on the issue of whether Appellate Defender LaNelle DuRant labored under an actual conflict of interest during her representation of Applicant. This Court dismissed the remaining issues for the reasons set forth in the conditional order of dismissal. On January 11, 2021, the State filed a timely motion to alter or amend pursuant to Rule 59(e), SCRCP. Applicant filed a response. By order signed January 29, 2021, and filed February 3, 2021, this Court denied the State's motion.

At the conclusion of the evidentiary hearing on April 27, 2021, this Court granted the State's request to keep the record open to allow Counsel DuRant to fully review her file from OAD.⁵ On May 1, 2021, Counsel DuRant notified Assistant Attorney General Meadows that she finished reviewing her file from OAD, which was sent to her via flash drive. Counsel DuRant discovered a note regarding a phone call between her and Mr. Langford. On July 22, 2021, this Court convened a WebEx hearing and admitted the note into the record as Court's Exhibit #1.

III. SUMMARY OF TESTIMONY FROM EVIDENTIARY HEARINGS

Counsel DuRant

Counsel DuRant testified she worked for the Richland County Public Defender's Office for six years before becoming an appellate defender in 2006. (2021 PCR Tr. 7–8). She retired from the OAD in 2019. (2021 PCR Tr. 8). Counsel DuRant was first asked on direct examination about OAD's filing system. (2021 PCR Tr. 11). She testified that, during her time at OAD, there was a large file room where all files were stored until the cases were closed. (2021 PCR Tr. 10–11). Once she began working on a case, Counsel DuRant kept the case files in her office. (2021 PCR Tr. 11).

⁵ Because she is retired, Counsel DuRant was initially only able to review the transcripts and records provided by the Attorney General's Office rather than her OAD file.

She testified that most attorneys did the same or returned their files to the file room after submitting their brief. (2021 PCR Tr. 11). However, each attorney's files were not kept separate from one another within the file room. (2021 PCR Tr. 11).

She further testified that the attorneys did not usually lock their offices. (2021 PCR Tr. 11). Chief Appellate Defender Robert Dudek had an open door policy. (2021 PCR Tr. 11). She explained that the attorneys could close their doors if they were working on an argument, but that everyone's doors were usually open. (2021 PCR Tr. 11–12). Regarding the computer system, Counsel DuRant testified that each individual had access to his or her own profile but that there was a general database where research and case files were located. (2021 PCR Tr. 12–13). Counsel DuRant was then asked whether there was any effort to screen one attorney's access to another attorney's cases in the computer system. (2021 PCR Tr. 13). She stated that she could not remember exactly, but that she believed they had to get special permission to access other attorneys' files. (2021 PCR Tr. 13).

Counsel DuRant testified that Mr. Dudek reviewed all cases when they first came in before assigning them out.⁶ (2021 PCR Tr. 15–16). Mr. Dudek never shared with anyone how he assigned cases. (2021 PCR Tr. 16). Regarding co-defendants, Counsel DuRant testified OAD routinely represented co-defendants. (2021 PCR Tr. 14). Counsel DuRant was then asked what procedures were in place to screen the attorneys from confidential information. (2021 PCR Tr. 16). She testified she did not remember anything in particular other than the attorney's honor. (2021 PCR Tr. 16). When co-defendants' cases were pending on appeal at the same time, the appellate

⁶ Counsel DuRant testified that Mr. Dudek's procedure differed from the previous chief appellate defender, Joey Savitz, who did not review cases before they were assigned. (2021 PCR Tr. 15). At that time, cases were immediately assigned to an appellate defender on a rotating basis. (2021 PCR Tr. 15–16).

defenders who represented them routinely discussed their cases with one another because they all had the same transcript. (2021 PCR Tr. 14, 16). However, an attorney's notes were considered work product, which they did not share. (2021 PCR Tr. 17). Additionally, any letters between the attorney and client were privileged. (2021 PCR Tr. 17).

Counsel DuRant testified the situation was different if an appellate defender represented an individual on direct appeal and another appellate defender was assigned to represent that individual on PCR appeal. (2021 PCR Tr. 17). If the former attorney was still working at OAD, she explained, the policy was to speak with Mr. Dudek and see if there was a conflict of interest. (2021 PCR Tr. 18). She stated that she personally sent a couple of cases to the South Carolina Supreme Court to determine if there was a conflict because the other prior attorney was still at OAD. She testified the Court developed a very liberal policy in these matters. (2021 PCR Tr. 18). Counsel DuRant recalled one case where the Court held that, even if the attorney was still in the office, there was no conflict. (2021 PCR Tr. 18).

Counsel DuRant confirmed that the conflict of interest criteria utilized by OAD was more vigilant than the South Carolina Supreme Court required. (2021 PCR Tr. 19). Counsel Durant provided a general overview of the process to determine if there was a conflict. (2021 PCR Tr. 19). If the former attorney no longer worked at OAD, she clarified there was no conflict of interest. (2021 PCR Tr. 19). However, if the former attorney was still working at OAD, Mr. Dudek had to conduct a thorough conflict check. (2021 PCR Tr. 19). Counsel DuRant explained that the basic criteria required Mr. Dudek to determine if he thought the OAD's representation of the client would be harmful or cause prejudice to the client. (2021 PCR Tr. 19–20). However, she emphasized that the specific criteria for determining whether a conflict of interest existed was entirely based upon Mr. Dudek's discretion. (2021 PCR Tr. 19). Once Mr. Dudek determined that there was not a

conflict, Counsel DuRant testified that the attorneys at the OAD knew not to discuss the case with the former attorney. (2021 PCR Tr. 20). She further testified that, when a conflict involved Mr. Dudek, OAD drafted and filed a memorandum with the South Carolina Supreme Court requesting they determine if a conflict of interest prevented their office from representing a client. (2021 PCR Tr. 21–22). Finally, Counsel DuRant testified that screening between appellate defenders was simply based on the honor system. (2021 PCR Tr. 22).

Counsel DuRant testified that Phillips and Applicant were tried jointly. She represented Phillips on direct appeal and Betsy Franklin-Best represented Langford on direct appeal. (2021 PCR Tr. 22). She explained that the South Carolina Supreme Court held oral arguments in both cases, which were heard back-to-back on the same day. (2021 PCR Tr. 23). Langford's oral argument went first, and the appeal concluded with a published opinion on the speedy trial and docket control issues. (2021 PCR Tr. 23).

In Phillips' case, Counsel DuRant raised three issues, including the issue raised in Langford's case. (2021 PCR Tr. 23). She noted that she raised two issues not raised in Langford's direct appeal. (2021 PCR Tr. 24). She further explained that Phillips' case concluded with an unpublished opinion based partially on the holding in Langford's opinion. (2021 PCR Tr. 23). Ultimately, Counsel DuRant noted, the Supreme Court affirmed the convictions and sentences for both Langford and Phillips. (2021 PCR Tr. 24).

Counsel DuRant confirmed that Langford applied for post-conviction relief, which was denied by Judge Griffith. (2021 PCR Tr. 24). Langford appealed the denial of his PCR application and the case was assigned to Counsel DuRant at the OAD. (2021 PCR Tr. 24). Counsel DuRant explained that, while she had represented Phillips on direct appeal and Counsel Franklin-Best represented Langford, she did not believe there was a conflict because (1) Phillips' case was closed

and (2) Franklin-Best no longer worked at OAD. (2021 PCR Tr. 24–25). She therefore did not seek further guidance from Mr. Dudek. (2021 PCR Tr. 25). In fact, she believed her previous representation of Phillips would benefit Langford since she was already so familiar with the case. (2021 PCR Tr. 26). While she did not have the explanation in writing, Counsel DuRant testified that she informed Mr. Langford that she had represented Mr. Phillips in his direct appeal. (2021 PCR Tr. 26). Counsel DuRant testified that she was aware that the rule for concurrent representation required full disclosure and informed consent in writing. (2021 PCR Tr. 27). Counsel DuRant further acknowledged that there were no formal policies in place at OAD to implement Rule 1.10(e) of the Model Rules of Professional Conduct, which requires a public defender appointed to represent a client in the same or a substantially related matter as another client represented by the public defender's office be screened in a timely manner from access to confidential information relating to and from any participation in the representation of the other client. (2021 PCR Tr. 27–28). However, she explained that this was not an issue because the appellate defenders did not share confidential information about co-defendants with one another. (2021 PCR Tr. 28). While she noted that there were no policies to prevent OAD attorneys from accessing each other's files in the file room, she explained that the honor system and nature of an appellate defender's caseload prevented the need for any formal policy in accordance with Rule 1.10(e). (2021 PCR Tr. 30–31).

In regard to the caseload, Counsel DuRant testified that she often had to work on weekends to be able to meet filing deadlines. (2021 PCR Tr. 31) Despite the Supreme Court order discouraging deadline extensions, she explained that the overwhelming caseloads often led to OAD attorneys filing for extensions. (2021 PCR Tr. 31) She further testified that there were no OAD policies limiting the number of cases an attorney could have at any given time. (2021 PCR

Tr. 31–32) Counsel DuRant noted that at the time she was handling Mr. Langford’s PCR appeal, her caseload was heavy, but she was not overwhelmed. (2021 PCR Tr. 32)

Counsel DuRant recalled that Langford’s appeal piqued her interest for two reasons: (1) she was familiar with the case from her work with Phillips’ and (2) Langford had two fact witnesses to testify. (2021 PCR Tr. 32). She testified it was uncommon to have witnesses other than the applicant, trial counsel, and solicitor testify in PCR cases. (2021 PCR Tr. 32). She recalled previous PCR cases where fact witnesses testified and the court granted relief. (2021 PCR Tr. 33) Counsel DuRant explained that, in her experience, if she believed an issue was particularly significant, the best strategy is to focus on strengthening that single issue rather than bringing the Court’s attention to additional, weaker issues. (2021 PCR Tr. 33–34). She testified that while Langford had raised claims of ineffective assistance of appellate counsel, case law allows her to pick the most significant issue rather than raise every single issue that might be meritorious. (2021 PCR Tr. 34).

On cross-examination, Counsel DuRant reiterated that she was appointed to represent Langford well after Phillips’ appeal had concluded. (2021 PCR Tr. 35). However, when selecting the issues to proceed on in Phillips’ case, she explained that she believed the most significant issue was the solicitor’s comment on Phillips’ decision not to testify. (2021 PCR Tr. 36–37). Counsel Durant that the speedy trial issue was insignificant because it had not been extensively discussed at trial according to the transcript. (2021 PCR Tr. 37). She also noted that she believed the Supreme Court would find the interpreter issue more significant than it did. (2021 PCR Tr. 37).

Counsel DuRant proceeded by providing a brief overview of the procedural history of Langford’s and Phillips’ direct appeals. (2021 PCR Tr. 38–42). She explained that while Langford and Phillips were co-defendants and their oral arguments were scheduled on the same day back-

to-back, they were separate cases with their own records on appeal. (2021 PCR Tr. 38). In his application for post-conviction relief, Langford raised several issues. (2021 PCR Tr. 39). However, Counsel DuRant could not recall much about his allegation of ineffective assistance of appellate counsel against Counsel Franklin-Best. (2021 PCR Tr. 39–40). Counsel DuRant further testified that she did not believe there was a conflict of interest on the basis that Franklin-Best previously worked at OAD or that OAD was involved in both Phillips’ and Langford’s cases. (2021 PCR Tr. 40). She explained that the office policy designated that there was no conflict of interest as long as the prior attorney no longer worked in the office. (2021 PCR Tr. 40). Since Franklin-Best left OAD in 2012, there was no conflict of interest. (2021 PCR Tr. 40). She further explained that she did not believe Phillips and Langford had opposing interests that would amount to a conflict of interest on her part. (2021 PCR Tr. 40). She reiterated that she believed her representation of Phillips would be beneficial to Langford because she knew the case so well. (2021 PCR Tr. 40–41).

Counsel DuRant testified that there was never any overlap between her representation of Phillips on direct appeal and Langford on PCR appeal. (2021 PCR Tr. 41). Her appellate strategy was focused solely on the strongest issue in Langford’s case—which she believed was the alibi issue. (2021 PCR Tr. 41). Throughout her representation of Langford, Counsel DuRant never felt that her duty to Phillips interfered with her ability to represent Langford. (2021 PCR Tr. 41–42). In fact, she noted that even if she did gain any confidential information from working on the Phillips case, it was irrelevant because she was bound by what was in the appellate record. (2021 PCR Tr. 42).

On re-direct examination, Counsel DuRant testified that she raised three issues in Phillips’ direct appeal. (2021 PCR Tr. 42). She further acknowledged that she had raised more than one issue in previous PCR appeals. (2021 PCR Tr. 42). While she was not very familiar with federal

habeas, she understood and explained to her clients that federal habeas was the next step. (2021 PCR Tr. 43–45). Counsel DuRant reiterated that she believed all three issues that she raised in Phillips’ direct appeal to be meritorious. (2021 PCR Tr. 45).

At the July 22, 2021, hearing, this Court admitted into the record a note dated February 5, 2018, that Counsel DuRant discovered in her OAD file.⁷ *See* Court’s Exhibit #1. “K.C. Langford” and the date are written at the top of the note. It states, in relevant part:

“He said he knew that I represented Bryan on his direct appeal but he had no problem with that.”

The bottom of the note includes Counsel DuRant’s initials in her handwriting. She further testified to its authenticity.

With the note refreshing her memory, Counsel DuRant recalled Applicant calling her to notify her that he had been transferred from Evans Correctional Institution to Allendale Correctional Institution. He also told her about a training program he was working on. She brought up the possible conflict to Applicant at that time. Specifically, she told Applicant that she previously represented Phillips on direct appeal, and asked him if he had any concerns. Applicant indicated to her that he was aware of her prior representation of Phillips, but that he did not have any concerns.

Counsel DuRant testified she reviewed the OAD file in its entirety, and did not discover anything else in the file regarding her representation of Phillips or a possible conflict of interest.

⁷ Counsel DuRant testified that she contacted Mr. Dudek at the conclusion of the April hearing. Mr. Dudek first searched through Langford’s OAD file and found the note. Counsel DuRant’s former assistant then mailed her a flash drive which included a copy of Langford’s entire OAD file. Counsel DuRant then reviewed the file.

Applicant

At the April hearing, Applicant confirmed that Counsel DuRant represented him in his prior PCR appeal. (2021 PCR Tr. 49). Throughout her representation, Applicant testified that he was never informed that Counsel DuRant previously represented Phillips. (2021 PCR Tr. 49). In fact, he did not receive any verbal or written notice of her previous representation of Phillips. (2021 PCR Tr. 49). Additionally, Applicant explained that he was never asked to sign a document waiving any potential conflict. (2021 PCR Tr. 50). Applicant testified that he did not learn of Counsel DuRant's previous representation of Phillips until his current attorney informed him of the conflict. (2021 PCR Tr. 50). In light of this information, Applicant would have sought a new "independent" lawyer. (2021 PCR Tr. 50).

At the July hearing, Applicant testified he did not recall the February 5, 2018, phone conversation reflected in Counsel DuRant's note.

IV. STANDARD OF REVIEW

An applicant may seek PCR upon the following types of allegations:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to

collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A). “The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence.” Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

V. FINDINGS OF FACT & CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the PCR hearing, observed the witnesses, passed upon their credibility, and weighed their testimony accordingly. After hearing the testimony presented and considering the legal arguments by counsel, as well as the records incorporated by way of the State’s return, this Court proceeds to the sole claim of whether Counsel DuRant labored under an actual conflict of interest based on her prior representation of Phillips and finds it to be without merit. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings of facts and conclusions of law based upon all of the probative evidence presented.

1. Credibility

As an initial matter, this Court does not find credible Applicant’s testimony that (1) he was never informed that Counsel DuRant previously represented Phillips; (2) that he did not receive any verbal or written notice of Counsel DuRant’s previous representation of Phillips; and (3) that he did not learn of Counsel DuRant’s previous representation of Phillips until Counsel Grose informed him of the conflict. Although, as discussed below, this Court finds no actual conflict of interest existed based on Counsel DuRant’s previous representation of Phillips, this Court finds Counsel DuRant’s note dated February 15, 2018, directly contradicts Langford’s sworn testimony.

Although, Ms. DuRant did not obtain consent confirmed in writing, from Mr. Langford regarding her prior representation of Mr. Phillips, this Court finds that Ms. Durant did inform Mr. Langford via telephone call and documented it as such. In contrast, this Court finds credible and persuasive the testimony of Counsel DuRant, who presented well-recalled testimony regarding her representation of both Phillips and Langford.

2. Sixth Amendment Conflict of Interest

The Sixth Amendment guarantees criminal defendants the right to “assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.” *Strickland v. Washington*, 466 U.S. 668, 685 (1984). “Representation of a criminal defendant entails certain basic duties[, including] a duty of loyalty [and] a duty to avoid conflicts of interest.” *Id.* at 688 (citing *Cuyler v. Sullivan*, 446 U.S. 335, 346 (1980)). In *Cuyler v. Sullivan*, the United States Supreme Court held that “[i]n order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer’s performance.” 446 U.S. at 350; *accord. Jackson v. State*, 329 S.C. 345, 495 S.E.2d 768 (1998). “An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant’s.” *Staggs v. State*, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007).

The Court later clarified in *Mickens v. Taylor*, that an “actual conflict,” for Sixth Amendment purposes, is a “conflict that [adversely] affected counsel’s performance—as opposed to a mere theoretical division of loyalties.” 535 U.S. 162, 171 (2002); *see United States v. Gantt*, 140 F.3d 249, 254 (D.C. Cir. 1998) (internal quotations marks and citations omitted) (explaining that the “adverse effect” element of the *Cuyler* test requires the defendant “to demonstrate that the conflict had some negative effect upon his defense (defined as an actual lapse in representation)”). “The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a

criminal conviction,” *State v. Gregory*, 364 S.C. 150, 152–53, 612 S.E.2d 449, 450 (2005), and an actual conflict of interest does not arise from an irrelevant or “hypothetical conflict having no effect on trial counsel’s representation . . .” *United States v. Taylor*, 139 F.3d 924, 931 (D.C. Cir. 1998). The two requirements—an *actual conflict* of interest resulting in an *adverse effect* on counsel’s performance—“are often intertwined, making the factual analyses of them overlap.” *United States v. Tatum*, 943 F.2d 370, 375–76 (4th Cir. 1991).

Here, this Court finds Langford failed to demonstrate—“as a threshold matter”—that Counsel DuRant was ever “required to make a choice advancing [her] own or [Phillips’] interests to the detriment of [Langford]’s interests.” *United States v. Bruce*, 89 F.3d 886, 893 (D.C. Cir. 1996) (citation omitted); *see id.* (“It is the competition between these interests, rather than some independent failure of the attorney, that gives rise to the ‘conflict.’ ”). Although Langford and Phillips did not raise identical *issues* on direct appeal, no *diverging interests* arose that could have prejudiced Langford. None of the issues DuRant rose in Phillips’ direct appeal were inconsistent with the issues DuRant chose *not* to raise in Applicant’s PCR appeal. *See Fuller v. State*, 347 S.C. 630, 634, 557 S.E.2d 664, 666 (2001) (finding that no actual or potential conflict of interest was shown where defendants had consistent defenses); *Gilbert v. Moore*, 134 F.3d 642, 652 (4th Cir. 1998) (*en banc*) (explaining that, to prove an actual conflict of interest, a defendant “must show that [his] interests diverge[d] with respect to a material factual or legal issue or to a course of action”).

3. Successive Representation

Further, Langford’s alleged conflict is one of successive—rather than concurrent—representation. *See United States v. Shepard*, 675 F.2d 977, 979 (8th Cir. 1982) (recognizing that conflicts “may arise when an attorney simultaneously represents clients with differing interests[—

[concurrent representation[—]or when an attorney representing a defendant has previously represented codefendants or trial witnesses[—]successive representation”). In the context of concurrent or joint representation, the *Cuyler* standard “is more easily satisfied because “when an attorney represents two clients with opposing interests, the attorney cannot serve both clients adequately. . . . [The attorney] must fail one or do nothing and fail both.” *United States v. Taylor*, 139 F.3d 924, 930 (D.C. Cir. 1998) (alterations in original) (citations omitted). In other words, it is generally more difficult to show an actual conflict resulting from successive representation because the attorney is no longer beholden to the former client. *Mannhalt v. Reed*, 847 F.2d 576, 580 (9th Cir. 1988); see *United States v. Trevino*, 992 F.2d 64, 66 (5th Cir. 1993) (explaining that typically “the potential for a multiple representation conflict exists when codefendants are represented by the *same* attorney” at the *same* time) (emphasis added); accord, e.g., *McConico v. State of Ala.*, 919 F.2d 1543, 1546 (11th Cir. 1990).

While the United States Supreme Court has never specifically addressed successive representation in the context of *Cuyler*, the Court in *Mickens* pointed out that *Cuyler* involved the concurrent representation of multiple defendants by the same attorneys. See, e.g., *Smith v. Hofbauer*, 312 F.3d 809 (6th Cir. 2002) (holding in the context of a habeas petition that “[*Cuyler*] applied only to joint representation and the Supreme Court has yet to extend [*Cuyler*]’s reach to any other type of conflict.”). The Court admonished the lower courts for applying *Cuyler* “‘unblinkingly’ to ‘all kinds of alleged attorney ethical conflicts,’ ” including “conflicts rooted in counsel’s obligations to *former* clients,” i.e. successive representation cases. *Mickens*, 535 U.S. at 174 (quoting *Beets v. Scott*, 65 F.3d 1258, 1266 (5th Cir. 1995)). Therefore, the conflict of interest standards have been developed in the context of concurrent representation of co-defendants, a situation much more likely to raise a conflict of interest because of the lawyer’s concurrent and

clear obligations to both clients.

An actual conflict may nonetheless exist in cases of successive representation if counsel “harbor[s] substantial personal interests which conflict with the clear objective of his representation of the client” or counsel’s “continuing duty to former clients interfere[s] with his consideration of all facts and options for his current client.” *Tatum*, 943 F.2d at 376; *cf. Taylor*, 139 F.3d at 930 (explaining that when conflicts other than those arising from joint representation “are alleged to have impaired counsel’s performance, the defendant’s burden is to show that counsel actually acted in a manner that adversely affected his representation by doing something[—]or refraining from doing something[—]that a non-conflicted counsel would not have done”).

Here, even if Langford and Phillips at some point had diverging interests, this Court finds Langford failed to show Counsel DuRant *actively* represented conflicting interests based on her prior representation of Phillips because Phillips’ direct appeal concluded *several years* before Langford’s PCR appeal. *Trevino*, 992 F.2d at 66; *see Perillo v. Johnson*, 205 F.3d 775, 798–99 (5th Cir. 2000) (“Where . . . defense counsel’s prior representation unambiguously terminated before the second representation began, the possibility that defense counsel’s continuing obligation to his former client will impede his representation of his current client is generally much lower.” (citations omitted)). Specifically, Counsel DuRant testified her representation of Phillips concluded in November 2012 while Langford’s notice of appeal from his PCR was filed in June of 2017. Langford ultimately failed to demonstrate that any continuing duty to Phillips interfered with her consideration of all facts and options for Langford in his PCR appeal.

4. Appeal

This Court further finds the fact that DuRant represented both Phillips and Applicant on *appeal* rather than *trial* significantly reduced the possibility of a potential conflict ripening into an

actual conflict. An actual conflict is more likely to arise in cases involving *trial* counsel because the fear in successive representation cases is that the lawyer “will fail to cross-examine the former client rigorously for fear of revealing or misusing privileged information.” *Moss v. United States*, 323 F.3d 445, 460 (6th Cir. 2003) (citations omitted); see *United States v. Massimino*, 832 F. Supp. 2d 510, 515 (E.D. Pa. 2011) (explaining that “loyalty would be divided between a current client and a former client because an attorney who cross-examines former clients inherently encounters divided loyalties”). The most common example of an actual conflict of interest arising from successive representation occurs where an attorney’s former client serves as a government witness against the attorney’s current client at trial. *Moss*, 323 F.3d at 460 (citations omitted).

In *Harbison v. Bell*, the Sixth Circuit Court of Appeals addressed the issue of whether the defendant’s appellate counsel labored under a conflict of interest based on his prior representation of a client who was an initial suspect in the murder of which the defendant was ultimately convicted. 408 F.3d 823, 836 (6th Cir. 2005). In addition to finding the defendant failed to demonstrate any prejudice attributable to his appellate counsel’s alleged conflict, the Court found that the mere fact that counsel represented the defendant “during his motion for a new trial and on direct appeal, rather than during the trial, would reduce the danger posed by any conflict.” *Id.* Like the defendant in *Harbison*, Langford fails to cite any specific instances in the record where his interests were impaired by Counsel DuRant’s prior representation of Phillips. The fact that Phillips later prevailed at the *circuit court level*⁸ based on PCR issues Counsel DuRant did not raise in Langford’s PCR appeal is not probative on the conflict of interest issue.

⁸ This matter is currently pending appellate review.

In *Vega v. Johnson*, Vega alleged he was denied due process because the attorney representing the State on direct appeal had represented Vega in a previous trial on unrelated charges. 149 F.3d 354, 357–59 (5th Cir. 1998). The Fifth Circuit Court of Appeals rejected Vega’s claim, in part because the ethical duty of loyalty prevents counsel from acting against his client’s interests in the course of a single litigation matter. *Id.* at 358 (“That duty, however, lasts only as long as the litigation matter.”). The Court explained that, once the trial of the other defendant ended, [counsel]’s only duty was to protect confidential information he received in his capacity as attorney.” *Id.*

The Court further rejected Vega’s conflict claim based on the following:

Unlike the multiple representation standard addressed in *Holloway*,⁹ where prejudice is both likely and difficult to identify, **the situation here presents little risk of harm to [the defendant]’s interests, and there is an easy way to spot abuse should it occur.**

[Counsel] was limited to the trial record on appeal and could not supplement it with facts or observations taken from his prior representation. The only way to abuse his confidential information would be to introduce such extraneous information and hope that the appellate court, while pretending to ignore it as outside the record, would be influenced. Yet Vega fails to point out any instances in which information outside the record was introduced on appeal. Because we could easily identify such a use of confidential information were it present, the argument against harmless error set forth in *Holloway* does not apply.”

⁹ In *Holloway v. Arkansas*, 435 U.S. 475 (1978), trial counsel objected that he could not adequately represent the divergent interests of three codefendants. Without inquiry, the trial court denied counsel’s motions for the appointment of separate counsel and refused to allow counsel to cross-examine any of the defendants on behalf of the other two. Deferring to the judgment of counsel regarding the existence of a disabling conflict, and recognizing that a defense attorney is in the best position to determine when a conflict exists, the Court held that prejudice is presumed when defense counsel is forced to represent codefendants over his timely objection unless the trial court has determined that there is no conflict. In other words, the harmless error inquiry does not apply on appellate review of such situations. *Id.* at 488.

Id.

Here, Applicant's situation with DuRant is even less likely than Vega's to result in an actual conflict because DuRant was limited only to the record on appeal for *both Phillips and Applicant*. Any potential confidential information DuRant received from Phillips could not have had any effect on either appeal because such "extra-record" information may not be introduced on appeal. Counsel DuRant confirmed that, even if she did gain any confidential information from working on the Phillips case, it was irrelevant because she was bound by what was in the appellate record.

5. Office of Appellate Defense

Langford further argues a conflict of interest existed based on Counsel Franklin-Best and Counsel DuRant both being employed by OAD during their respective representations of Langford. Specifically, Langford contends Counsel DuRant had a conflict of interest because he raised a claim of ineffective assistance of appellate counsel against Counsel Franklin-Best in his PCR, which Counsel DuRant did not pursue on PCR appeal.¹⁰

Langford specifically refers to Rule 1.10(e) of the Model Rules of Professional Conduct, which "provides a public defender may continue representing a client, even with an imputed conflict of interest, if there is proper screening to prevent the exchange of confidential information." *State v. Wright*, 424 S.C. 335, 340, 818 S.E.2d 236, 238 (Ct. App. 2018). Counsel DuRant explained that, while she had represented Phillips on direct appeal and Appellate Defender Franklin-Best represented Langford, she did not believe there was a conflict because (1) Phillips' case was closed and (2) Franklin-Best no longer worked at OAD. While Counsel DuRant

¹⁰ This Court would note that it is questionable whether the allegations against Counsel Franklin-Best would have even been preserved on appeal, given Langford's failure to present testimony from Franklin-Best at the evidentiary hearing or produce any evidence aside from mere speculation that the outcome of his direct appeal would have been different had a reply brief been filed.

acknowledged that there were no formal policies in place at OAD to implement Rule 1.10(e), she explained that any “screening” between appellate defenders was simply based on the honor system. *See id.* (“We read Rule 1.10(e) as providing a way to ensure the public defender’s office is not conflicted out, but we do not read it as requiring any specific procedures to ensure the absence of a conflict.”). Specifically, she testified that an appellate defender’s notes were considered work product, which they did not share with one another. Additionally, any letters between the attorney and client were privileged.

Applicant cites to Rule 1.10(e) of the Model Rules of Professional Conduct, which in turn refers to Rule 1.0(n) to define when a lawyer is deemed screened from an imputed conflict of interest. Rule 1.0(n) states:

“Screened” denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are *reasonably adequate under the circumstances* to protect information that the isolated lawyer is obligated to protect under these Rules or other law. (*emphasis added*)

Of note, the screening process is subject to the qualification that it is “reasonably adequate under the circumstances.” *Id.* The Court finds that under the screening procedures of OAD were reasonably adequate under the circumstances.

The dire financial straits of public defender offices, and the accompanying strains in managing caseloads, are so well documented they are axiomatic. The Office has a limited budget to hire more attorneys and staff to avoid conflicts, limited office space to store client materials, and high caseloads per appellate attorney. Next, the de minimis nature of the alleged conflict, shown by Applicant’s verbal consent, further supports the reasonableness of the Office’s screening procedures. Finally, the Court considers the public interest nature of the Appellate Defenders work. Imposing a stringent screening process would result in harm to indigent defendants by making it

even harder for them to obtain counsel, which defeats the purpose of public defenders and would be unreasonable under the circumstances which OAD operates.

Our Supreme Court has held that the Rules of Professional Conduct, whose purpose is to regulate and guide the legal profession in ethical conduct, “have no bearing on the constitutionality of a criminal conviction” and “[n]othing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such duty.” *Langford v. State*, 310 S.C. 357, 426 S.E.2d 793 (1993) (citing Rule 407, SCACR); *see* Rule 407, Scope of RPC (“Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached.”). However, this Court recognizes that many conflict of interest determinations are “premised in part upon analogous ethical rules, which may be informative but are not determinative with respect to whether there is an actual conflict for Sixth Amendment purposes.” *Perillo*, 205 F.3d at 798 (citing *Strickland*, 466 U.S. at 688).

This Court finds Langford failed to demonstrate a conflict of interest existed between his appellate counsels. Although Ms. DuRant testified all the Appellate Defenders share the same file room, have access to the electronic files of the other attorneys, offices of individual appellate attorneys are not locked to prevent access by other appellate attorneys, and office policy frowns on the appellate attorneys closing their doors, Counsel DuRant testified that Counsel Franklin-Best left OAD several years before she received the notice of appeal of Langford’s PCR. She testified that the general policy at OAD was, if the former attorney no longer worked at OAD, there was no conflict of interest concerns. Counsel DuRant recalled personally sending several cases to the South Carolina Supreme Court to determine if there was a conflict because the other prior attorney was still at OAD. She testified the Court developed a very liberal policy in these matters, and

recalled one case where the Court held that, even if the attorney was still in the office, there was no conflict.

As discussed above, the potential for a multiple representation conflict typically exists when codefendants are represented by the *same* attorney. In *Trevino*, the Fifth Circuit Court of Appeals noted that “[t]he potential for such conflicts . . . does not necessarily exist when . . . codefendants are represented by different attorneys, albeit in the same public defender office. The duty of loyalty runs only to that attorney’s client; the attorney is in no way being asked to serve two masters.” 992 F.2d at 66. The Court went on to note that “[t]he potential for conflict is even less in a public defender’s office for a simple reason: no attorney there depends upon the clients for his/her salary. As a result, loyalty to one’s own client cannot take a back seat to the financial qualms posed by defendant’s and co-defendant’s relative abilities to pay.” *Id.* at 66 n.2.

VI. CONCLUSION

Based on the evidence presented at the PCR hearing and a thorough review of the record, this Court finds and concludes Applicant failed to demonstrate a conflict of interest existed such that Applicant is entitled to proceed with a successive PCR action or appeal of his first PCR action. *See* Rule 71.1(e), SCRPC (“The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence.”). Although DuRant represented Phillips in his direct appeal, she was never “asked to serve two masters,” *Langford*, 310 S.C. at 359, 426 S.E.2d at 795, nor did she ever “*actively* represent conflicting interests” at the time she represented Applicant, in part because Phillips’ direct appeal concluded long before Applicant’s PCR appeal. *Trevino*, 992 F.2d at 66. Therefore, based on the foregoing, this Court denies relief on all allegations and dismisses this PCR action with prejudice.

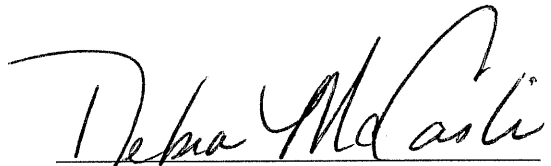
Applicant must file and serve a notice of appeal within thirty days from PCR counsel’s

receipt of written notice of entry of judgment to secure the appropriate appellate review pursuant to Rule 203, SCACR. Applicant has a right to appellate counsel's assistance in seeking review of the denial of PCR. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of the State.

AND IT IS SO ORDERED this 27 day of August, 2021.


DEBRA R. MCCASLIN
Presiding Judge
Eleventh Judicial Circuit

 Edgelfield, South Carolina