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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

Appellate Case No. 2021-001426

K.C. Langford Petitioner,

v.

State of South Carolina, ...Respondent.

Appendix Volume III of III

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A standardized conflict resolution procedure would allow the Appellate Division to quickly determine whether a conflict exists and if the office needs to withdraw. When a case is sent on direct appeal to the Appellate Division, the trial court attorney's name should be documented in the Notice of Appeal. If the trial court attorney works for the Appellate Division, a conflict determination should be made immediately, prior to obtaining the transcript. It appears that the Appellate Division has all of the information necessary to do a quick conflict check if this is the case.

If the case is an appeal of the denial of post-conviction relief, the Appellate Division needs to determine quickly if the request for post-conviction relief was predicated, even in part, on the ineffective assistance of counsel and the names of the counsel alleged to be ineffective. If possible, the Appellate Division should not wait until the transcripts have arrived to make this determination. One possible mechanism for identifying potential conflicts for PCR appeals is to determine if the client has been previously represented by the Appellate Division.

Unfortunately, this alone will usually be inadequate because without the transcript there is no way of knowing if ineffective assistance of counsel was an issue and which attorneys were alleged to be ineffective. It could be the trial court attorney only, or the appellate attorney, or both. One option is to require that the NOI of PCR claims include the names of any counsel, whether trial or appellate, alleged to be ineffective, if that is one of the issues raised at the PCR hearing. A standardized court form would be helpful to remind all counsel of the need to provide this information. In fact, a standardized form for a NOI on direct appeals would be helpful as well.

Post-Conviction Relief Claims

Many people with whom we spoke expressed some concerns regarding the current procedure in South Carolina for litigating post-conviction relief claims. While a full discussion and analysis of such systemic problems is beyond the scope of this report, we briefly describe below a few issues in the hope that it may initiate a dialogue among the stakeholders in the system regarding the concerns and potential ways to address them.

The PCR statute in South Carolina establishes a right to file for relief from a "trial or plea" and further provides for a right to counsel in the PCR proceeding.³⁶ We were told that while most PCR petitions are initially filed pro se, most petitions do result in a PCR hearing after an attorney is appointed by the Clerk of the County Circuit Court. However, because PCR proceedings are considered civil in nature, attorneys without any criminal law experience may be appointed to represent a defendant in a PCR trial.³⁷ Under Rule 608(c)(1)(A), in order to be on the list for appointment in criminal matters in a county, an attorney must have at least a minimal background in criminal law by representing "at least three (3) clients before the court of general sessions during a calendar year." The civil list, on the other hand, consists of "all other active members eligible for appointment in the county." As a result, many attorneys who have little to no experience in criminal law or trials are nonetheless appointed to PCR matters in which they are charged with the criminal trial transcript, spotting issues and litigating any post-conviction

³⁶ See S.C. Code § 17-27-60.

³⁷ See S.C. Appellate Court Rule 71.1(c).

claims. This not only jeopardizes the rights of the defendant, but also likely increases the number of no-merit appeals being filed on PCR claims.

Another concern raised by several people is that the PCR hearing system is inefficient and burdensome. We were told that PCR hearings are held one week every two months, but are frequently continued up to five times, causing a delay of ten months before a case is heard. Many attorneys are reportedly requesting multiple continuances of the PCR hearing, but are waiting until the time of the hearings to make the requests. We were told that these continuances are often due to the failure of the attorneys to meet with their clients in advance. Such last-minute delays waste time and resources of the courts, attorneys, witnesses and the sheriffs who must transport the defendants to each hearing.

We understand that there have been discussions of creating a separate PCR trial division under SCCID to handle all PCR hearings. We support such a move, which would help to address at least two of the aforementioned concerns surrounding PCR procedure. First, a PCR trial division would help to ensure adequate representation at the PCR hearing by employing experienced attorneys who are knowledgeable in criminal law and able to effectively advise a client as to any potential claims arising from a criminal case, as opposed to those attorneys across the state who are appointed from the civil lists. Second, having staff attorneys in such an office would likely help to reduce the number of continuances requested since such attorneys would be devoted full-time to the work and more available for court and client meetings.

South Carolina Rules of Professional Conduct Rule 1.10(e)

While not within the immediate scope of this study, we discuss here a serious concern that arose during the course of our work. South Carolina Rules of Professional Conduct Rule 1.10 discusses the imputation of a conflict of interest to a firm – that is, when an entire firm is considered to have a conflict of interest based on current or prior representation of a client by one of the attorneys at that firm. Specifically, Rule 1.10(a) states that all of the lawyers in a firm are prohibited from representing a client when any one of the lawyers in that firm, “practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.” This rule is almost identical to Model Rule 1.10(a), promulgated by the ABA. South Carolina and the ABA rules both define the term “firm” to include “lawyers employed in a legal services organization.”

However, South Carolina Rule 1.10(e) then effectively exempts programs providing legal services to indigent clients from providing conflict-free representation to co-defendants. South Carolina Rule 1.10(e), for which the ABA Model Rules provide no analog, states that “[a] lawyer representing a client of a public defender office, legal services association, or similar program serving indigent clients shall not be disqualified under this Rule because of the program’s representation of another client in the same or a substantially related matter” as long as the lawyer is screened from confidential information relating to the other client, the lawyer does not participate in representation of the other client, and the lawyer retains professional independence in the matter.

ABA Model Rule 1.7(a)(1) and South Carolina Rule 1.7(a)(1) both state a conflict of interest exists if the representation of one client will be directly adverse to another client. ABA and South Carolina Rules 1.7(a)(2) further state that a conflict exists if “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.” Except as provided for in 1.7(b), a lawyer shall not represent a client if a conflict of interest exists.

In a criminal case, co-defendants are likely to have directly adverse interests, and effective representation of one client in most cases will be hampered by the concurrent representation of a co-defendant. For instance, an offer of leniency for one co-defendant to testify or to provide information against another co-defendant may be made, one co-defendant may be more culpable than the other and wish to use that fact in plea bargaining, or the co-defendants may have differing accounts of what occurred, to name just a few examples. Indeed, both the ABA and South Carolina recognize in their comments to Rule 1.7 that “[t]he potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant.”

While the comments to Rule 1.10(e) indicate that the rule was designed to “increase the number of persons to whom each program can provide legal services” – and it certainly increases cost efficiency – the conflict of interest does not disappear by virtue of the rule. Further, such a rule raises a concern regarding the Sixth Amendment and effective assistance of counsel.³⁸

³⁸ See *Holloway v. Arkansas*, 435 U.S. 475 (1978) (the “assistance of counsel” guaranteed by the Sixth Amendment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer should simultaneously represent conflicting interests).

Chapter 3: Findings and Recommendations

Appellate Division Office

1. The Appellate Division is largely staffed with experienced attorneys and generally maintains a positive reputation in the South Carolina criminal justice community. Despite this reputation, the office is struggling to provide adequate representation under crushing caseloads and systemic problems that have existed for some time. While a number of administrative and oversight issues should be addressed within the office, we do not believe that the critical issues regarding the adequacy of appellate representation of indigent persons in South Carolina can be solved without a significant reduction in the workload of the Appellate Division's attorneys, either by an increase in staffing and/or changes in the state's appellate system.
2. A somewhat reluctant administrator, and carrying a full caseload including capital appeals, the Chief Appellate Defender's main focus appears to be on handling cases. The Chief Appellate Defender reacts to administrative and personnel matters when necessary, but does not actively seek to address them before they arise. Greater administrative oversight and proactive measures are needed, such as those described below. Ideally, the Chief should also be working to effectuate reform in the South Carolina appellate system. In order to be a proactive administrator and leader, the Chief Appellate Defender's caseload must be significantly reduced. Similarly, the position of Deputy Chief Appellate Defender should involve some administrative, training and/or supervisory functions beyond the handling of cases.
3. The Appellate Division should create a written personnel manual and performance standards for all staff. A personnel manual for the office should set forth written policies and standards regarding various employment topics such as a code of conduct, office hours, limitations on outside employment, hiring and firing procedures, job descriptions, minimum job qualifications, and leave policies. Such a manual would set forth uniform standards of employment and put all staff on notice of the standards and expectations. Similarly, performance standards clearly set forth minimum requirements and expectations regarding staff performance; they are key to addressing performance problems and taking disciplinary action against employees.
 - a. With regard to formal job descriptions, the allocation of responsibilities and tasks among SCCID and Appellate Division administrative support positions should be made clear in order to resolve confusion and increase efficiency.
 - b. With regard to attorney staff, the Chief Appellate Defender should specifically establish performance standards in accordance with the rules and procedures of the South Carolina appellate courts and rules of professional conduct. Such standards should also create best practices for the office. These standards or policies should cover topics such as caseload standards, procedures for addressing overload, client contact, requests for extension, conflict determinations, transcript and record review, brief format and no-merit versus merit filings.

4. The Appellate Division needs formal training, supervision and evaluations for attorneys and support staff.
 - a. Training and supervision can greatly improve the quality of representation provided to clients and is important to old and new attorneys as well as support staff in the office. For example, new attorneys should be formally trained in appellate practice and procedure and should be assigned an experienced attorney who is willing to act as a mentor. All attorneys, especially those new to the office, should have their substantive merit briefs reviewed by another attorney and should be mooted significant oral arguments. The office should also provide periodic in-house training on various topical issues for all attorney staff.
 - b. Support staff should receive training on writing legal citations and editing legal briefs.
 - c. All employees should receive performance evaluations, at least annually.
5. The Appellate Division needs greater administrative oversight of staff which should largely be performed by the Chief Appellate Defender and the full-time Administrative Coordinator. Despite some personnel (e.g., allocation of work and office hours of some support staff) or performance issues (e.g., attorney performance discussion) existing or reoccurring over time, little oversight or action appears to take place until or unless a complaint is made. Such problems should be addressed with individual staff and may include documentation, performance review, and possible admonition.
6. An overall lack of communication and cohesiveness among the Appellate Division staff contribute to general feelings of isolation and low morale. The Chief Appellate Defender and the full-time Administrative Coordinator should attempt to improve the situation by first instituting regular (a) office-wide meetings, (b) attorney meetings, and (c) support staff meetings. Such meetings should be held to address any number of issues that affect the staff, from personnel and administrative matters to general changes in court or office policy, practice or procedure. In addition, the Chief Appellate Defender should convene regular case conferences for all appellate defenders to discuss cases, brainstorm strategies, receive feedback from colleagues, and generally create a greater atmosphere of camaraderie.
7. The Appellate Division should create a brief bank to allow attorneys greater access to examples of other briefs. Brief banks are used by attorneys in both public and private firms as an invaluable resource to model briefs and arguments on particular legal issues such that attorneys do not need to "reinvent the wheel" when another attorney in the firm has previously dealt with the same or a similar issue. Currently, although the appellate defenders can access each other's work, they need to know the name of another attorney's client in order to locate a sample brief. A brief bank should organize briefs by topic to make them easily accessible. While an appellate defender should be tasked with

maintaining the bank, once created, attorneys should be able to add sample briefs as needed.

8. The Appellate Division does not utilize clear standards for determining entry level salaries for administrative or attorney staff. In addition, the staff of the Appellate Division have not received raises in over four years. The Chief Appellate Defender should create a more transparent and formal procedure regarding salaries. This procedure should include clear, written guidelines with salary ranges for entry level attorneys and administrative staff that reflect the experience level and the duties associated with the position. For current staff, the Chief Appellate Defender along with other supervisors should conduct regular performance evaluations where raises should be a consideration. We were told that performance evaluations will be occurring in the near future.

Case Management System

9. The Appellate Division's case management system needs to either be upgraded to keep track of a few more essential elements of information or replaced altogether. In considering the options, the office should assess whether the current system can be adapted to make use of a planned document management system for the office.
10. The current case management system lacks a readily available reporting feature. The system is not sufficiently documented to readily understand what each of the data elements means, and therefore the reports provided with the system give users very little opportunity to produce meaningful reports. Whether the current system is improved or a new system is selected, access to readily available and meaningful reporting tools should be a priority. Moreover, the database should have separate fields for type of hearing (plea, trial, etc.), charges, and whether the Appellate Division is the respondent or the appellant. The "normal" case category should be further broken down into smaller sections, such as seriousness of offense or type of offense.
11. Recently, the Appellate Division reportedly began tracking the number of cases that involve the appeals of guilty pleas. This is a critical data component for the office's caseload, as described below, and should be maintained permanently. Further, the system should allow for the rare exclusion or separate tracking of appeals of guilty pleas that were not (arguably) facially valid.

Caseload/Workload

12. The Appellate Division needs to reduce the number of cases assigned to its attorneys each year. The office filed 965 briefs in 2007, and an experienced attorney carried an average of 242 open cases and filed an average of 100 briefs per year. In that same year, an average of approximately 100 new cases were assigned to each attorney. As a point of comparison, the NAC recommended that a full-time appellate defender working exclusively on criminal appeals handle no more than 25 cases per year. As a result of the excessive workload, the Appellate Division requested 2.7 extensions per brief and takes an average of 167 days to file a brief once the transcript is complete while 73% of the

briefs filed were still no-merit briefs. Even if the Court granted the relief requested in *Thrift*, the Appellate Division's caseload would still be inordinately high at 80 new cases per attorney per year.

13. A supervising attorney, rather than the support staff, should make case assignments. In making the determination regarding workload, the supervising attorney should look at a number of issues in addition to strict caseload numbers and number of pages in the transcript. Other relevant factors that increase an attorney's workload that the supervising attorney should consider include the complicated nature of the current caseload, the number of issues presented in those existing cases, and the number of oral arguments scheduled in the near future. In PCR appeals, the number of pages should include the pages in the original trial transcript as well as the PCR trial transcript.
14. The high per-attorney caseload further translates into significant workloads for support staff, who must perform a number of administrative tasks on each case. In addition to their regular duties, overload places an extra strain on support staff to do jobs they do not have the qualifications to do such as assigning cases to attorneys. One significant factor in the workload of support staff is the number of extensions being filed in virtually every case in the office. The Appellate Division attorneys are filing 2.7 extensions per brief which translates to over 2600 extension requests per year. Some support staff report filing 10 extensions per attorney each day.

Appellate Practice/Attorney Performance

15. The Appellate Division is overwhelmed with high caseloads. Attorneys simply do not have adequate time to spend on each of their cases. The number of no-merit briefs that need to be filed leaves them with little time to devote to those cases that have meritorious issues. They are struggling to adequately represent each client, often performing the minimum amount of work necessary to get by and meet deadlines, such as reading transcripts at the last minute and filing skeletal briefs. After seeking several extensions of time on nearly every case, the attorneys finally prepare the brief after almost six months when they know that no more extensions are available. By that time, they are working against the clock. Some are filing briefs with blatant typographical and grammatical errors, and some even fail to follow proper procedure.
 - a. Ideally, appellate defenders should be reviewing each other's briefs prior to filing. In the absence of time to do so, the Appellate Division is in need of paralegal staff to review and help improve the quality of attorney's briefs. Paralegals could also assist in conducting research and responding to client correspondence.
 - b. The Appellate Division should provide all attorneys with written rules and procedures for filing briefs, particularly those needing to be filed under the *White* and *King* cases. These may include a checklist to guide the staff on proper procedure.

- c. The Appellate Division should also conform to a standardized brief format, including a Statement of Facts section. This uniformity would make the Appellate Division briefs easily recognizable to the courts and would help ensure that each attorney is filing a quality product. A standardized brief format could be accomplished by having a case management system that generates the initial brief format or use of a template.
16. In addition to the number of guilty-plea appeals, we believe that the high caseloads of the Appellate Division attorneys are a contributing factor to the prevalence of no-merit briefs being filed. Attorneys simply do not have the time to fully explore and brief the merits of all of potential arguments to be raised. In addition, attorneys are not always clear as to what constitutes an issue to be filed under *Anders* or *Johnson*. In reviewing some no-merit filings, especially those sent back by the court for further briefing, we found that some issues that were not “wholly frivolous” were nonetheless submitted in a no-merit brief. While we understand that attorneys’ caseloads are high, nonetheless, as long as an appellate attorney is able to conceive of an issue for appeal that is not “wholly frivolous,” zealous advocacy requires the attorney to raise the issue even if the attorney doubts the chance of success. We recommend that the Appellate Division discuss with the appellate courts and then with attorney staff what is required of them in determining whether to file a merit or a no-merit brief and create a clear, written policy regarding the same.
17. Burdensome caseloads undoubtedly hamper the attorneys’ ability to have greater contact with their clients. Further, cost and time efficiencies prevent appellate defenders from traveling across the state to visit all clients in prison. Nonetheless, greater attorney-client contact should be both encouraged and required pursuant to office policy, which needs to be created and should reflect best practices and attorney’s ethical obligations to clients. For instance:
- a. After reading the transcript, an attorney should send a letter or visit the client to explain the issues that might be raised and to seek any input from the client. Providing an explanation to the client as to why some issues are being raised but not others should help to improve client satisfaction with the representation.
 - b. Ideally, all clients would get an in-person visit from their attorney. However, we recognize the limitations imposed by caseload and time as well as by the geography of the state, and we recommend that attorneys be encouraged to make greater efforts to visit non-capital clients who are housed nearby, especially those requiring particular attention.
 - c. While appellate defenders do not have the time to send substantive letters to all of their clients currently, it should become standard practice once their caseloads are reduced. Our understanding is that most clients are sent form letters or correspondence from a law clerk.
 - d. Phone calls from client calls should be routinely accepted.

- e. For guilty plea appeals, attorneys should inform the client in writing if no issue exists and ask if the client still wishes to continue the appeal. If the client has an issue, but it is not supported in the record, attorneys should briefly explain the PCR procedure. Some clients appeal because they are told they have a right to appeal, not because they are dissatisfied with the result of their case. Others appeal because they want their sentences reviewed and, if informed that is not possible, may withdraw their appeal.
18. In the event that caseloads are reduced, the Appellate Division should endeavor to act as a statewide support system for lawyers practicing indigent defense in the state. In our experience, statewide appellate offices can provide invaluable resources to court-appointed counsel and public defender offices at the trial level. Ideally, the Appellate Division should provide trainings for public defenders and assigned counsel on various topics such as preserving issues for appeal as well as supply updates on recent United States Supreme Court and South Carolina appellate court decisions.

Systemic Issues

Appeals of Facially Valid Guilty Pleas

19. Appellate and judicial resources are being wasted on the direct appeals of facially valid guilty pleas in South Carolina to an extent that is unparalleled in other southeastern states. The Court or legislature should require that a defendant wishing to contest a facially valid guilty plea move directly for relief under the Uniform Post-Conviction Procedure Act. Doing so would reduce the caseload of the Appellate Division and eliminate redundancy in the appellate judicial docket. Currently, direct appeals of guilty pleas reportedly comprise 49% of the Appellate Division's direct appeals caseload, yet they are, with few exceptions, a futile effort that waste time and resources of both the Appellate Division and the appellate courts. While removing the option of a direct appeal, defendants could still file a motion in the trial court to withdraw a guilty plea or to reconsider a sentence prior to seeking post-conviction relief, and further appeal the denial of such a motion. We were told that the South Carolina Supreme Court recently proposed a rule change to require the appellant who is appealing a guilty plea to file a written explanation showing that there exists an appealable issue; if the appellant does not make that showing, then the appeal would be dismissed.
- Relevant law:* S.C. Code § 17-27-20, § 17-27-100 (defendants may file a direct appeal of a guilty plea and then file for post-conviction relief).
- Proposed Rule 203(d)(1)(B)(iv)

Delays in the Appellate Process

20. Appeals are being delayed by incomplete transcripts and records. In order to remedy the problem, the trial courts should maintain a docket sheet that lists every date in which the case was heard, the presiding judge, the clerk, counsel for the defendant and for the state, pleadings filed, and all court reporter(s) in order to assist appellate review. Ideally, this information should be made available online. In capital cases, trial court clerks are

already required to obtain the transcript and maintain the entire record for appeal. However, in cases involving multiple hearings and court reporters, including some capital cases, transcripts of hearings may not be ordered because the Appellate Division is unaware of them.

In addition, Rule 203(d)(1)(B) should be amended to require the trial attorney to list in the NOI: the date, presiding judge, clerk, and court reporter for the trial and all other hearings. The trial court attorney should also be required to include the charging documents, a list of motions filed, including voir dire requests and requests to charge (filed by either party), and a list of exhibits entered during any hearing or trials. Should the lower court maintain a complete and accurate docket sheet, this information should be easy to ascertain from the court.

Relevant statute, rule and order:

- S.C. Code § 16-3-25 (whenever a death sentence is imposed, “[t]he clerk of the trial court, within ten days of receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of South Carolina together with a notice prepared by the clerk and a report prepared by the trial judge”)
- Rule 602(g)(5) (in capital cases, once the record is generated and sent to the Supreme Court, “copies of the transcript will be provided to defendant’s counsel”)
- Chief Justice Finney order of December 12, 1997 (within 10 days after service of notice of appeal, counsel “shall provide the Office of Appellate Defense with a list of all trials and hearings held in the matter,” including dates, county, name of judge, name of court reporter, and brief description of trial or hearing)

21. Appeals are also delayed by late conflict determinations. The Court should amend Rule 227 to require the NOI for PCR cases to state whether ineffective assistance of counsel was at issue and, if so, include the names of any counsel alleged to be ineffective. In this regard, the Court could create a standard form for the NOI in which the attorney can indicate whether ineffective assistance of counsel is an issue and, if so, the name(s) of the attorney(s) alleged to be ineffective. This should allow for a much timelier determination of conflict by the Appellate Division should ineffectiveness of an appellate defender be claimed.

The Appellate Division also needs to draft a conflict policy and implement a standardized conflict resolution procedure that allows for the timely identification and resolution of conflicts.

22. The appellate process could be made more efficient through timely filing of certain paperwork.
 - a. The appellate courts should be required to notify the Appellate Division of an NOI within a certain period of time, and the time for seeking a transcript should not begin to toll until the Appellate Division receives notification from the appellate court. A copy of the NOI and any accompanying memorandum with case information should also be sent to the Appellate Division with all new

appeals. (The Court of Appeals is reportedly late in notifying the Appellate Division of some appeals – on the day of or even after the transcript request is due – and is no longer sending case memos to the division).

- b. In addition, the Court should amend Rule 203(d)(1)(B) to require all defendants to file a copy of the Order of Appointment (if previously represented by court-appointed counsel) or Affidavit of Indigency with the original NOI. Until indigency is determined, the appellate process is delayed. Cases are not opened in the Appellate Division and transcripts are not ordered until indigency is established. By the automatic filing of the Order of Appointment or Affidavit of Indigency with the original appeal, any delay and additional effort on behalf of the Appellate Division to establish indigency could be avoided.
- c. On a related note, although the current statutory scheme places the obligation of determining eligibility on the Appellate Division (S.C. Code § 17-3-360(c)(1)), we generally advise against defense counsel making that determination as it at least raises an appearance of a conflict. Ideally, determinations of indigency should be made by the courts or some other impartial agency (e.g., pre-trial services).³⁹ Requiring the courts to determine eligibility for appellate counsel would be consistent with the current procedure in place in the trial courts where an officer of the court makes the eligibility determination and notifies the Office of the Public Defender if a person is indigent and requires representation.⁴⁰

Relevant rules:

- Appellate Court Rule 602(e)(3) (“the Public Defender or appointed counsel shall assist in representing the accused in any manner necessary to properly perfect the appeal”)
- Appellate Court Rule 602(e)(4) (retained counsel must represent the accused “in any manner necessary to properly establish the indigency of the accused”)
- Appellate Court Rule 71.1 (requiring PCR counsel to “assist the applicant in obtaining representation by the Division of Appellate Defense..,” if the appellant is indigent)
- Appellate Court Rule 602(b) (requiring the courts to determine indigency at the trial level)

³⁹ S.C. Code § 17-3-340(I)(8) states “[t]he commission shall approve and implement programs, services, rules, policies, procedures, regulations, and standards as may be necessary or advisable to fulfill the purposes and provisions of this article in the delivery of indigent services. This includes, but is not limited to, standards for...determining indigence and for assessing and collecting the costs of legal representation and related services.”

Id.

⁴⁰ See S.C. Appellate Court Rule 602(b).

Conflict Representation

23. South Carolina Rules of Professional Conduct Rule 1.10(e) provides less conflict-free representation to public defender clients than to clients of private counsel, raising a concern regarding equal protection and the right to effective assistance of counsel. The rule should be reassessed, as public defender clients should have the same right to conflict-free representation as do clients of private counsel.

Relevant rules:

- ABA Model Rule and South Carolina Rule 1.7(a)(1) (a conflict of interest exists if the representation of one client will be directly adverse to another client)
- ABA Model Rule and South Carolina Rule 1.7(a)(2) (a conflict exists if “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer”)

Post-Conviction Relief

24. While the reform of the PCR procedures is beyond the scope of this report, we briefly raise the following issues for consideration:
- a. PCR proceedings should be considered criminal in nature such that the court-appointed attorneys handling the cases are required to have adequate experience in litigating criminal cases. (Rule 608(c)(1)(A))
 - b. The scheduling of PCR hearings needs to be reassessed. We were told that PCR hearings are held one week every two months. Some attorneys are reportedly requesting four to five continuances, causing a delay of ten months before a case is heard. This may or may not be related to the quality and experience of the PCR attorney. Nonetheless, such delays are burdensome and costly for the courts, the parties, witnesses, and the sheriff’s department who must transport the defendants to the hearings.
 - c. We were told that a number of PCR cases are filed because defendants in South Carolina have no other mechanism to challenge or appeal their sentences. Should such a mechanism be affirmatively created, South Carolina could see a significant reduction in the number of PCR filings.

Chapter 4: Conclusion

In closing, we would like to recognize South Carolina and its many actors including the Chief Justice of the Supreme Court, Supreme Court and Court of Appeals staff members, several current and former Chief Public Defenders, SCCID and its Executive Director, and the Appellate Division employees that have contributed to the advancements in the delivery of indigent defense in South Carolina. Indeed, South Carolina has come a long way in providing indigent defendants with effective counsel. We commend South Carolina for putting forth the effort and resources to adequately fund indigent defense and taking concrete steps to enhance the delivery of services.

The most significant reform of the indigent defense system in South Carolina was the enactment of the new South Carolina Commission on Indigent Defense (SCCID) in 2007. SCCID and its Executive Director have spent significant time over the past few months implementing numerous requirements of the Indigent Defense Act.

We are hopeful that this report on the Appellate Division will be of substantial value in addressing a number of systemic and office reforms set forth in this report.

2020 APR 14 AM 9:31

Exhibit B

STATE OF SOUTH CAROLINA
COUNTY OF EDGEFIELD

COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

Bryan J. Phillips,

CA No.: 2013-CP-19-386

Plaintiff,

vs.

ORDER

State.,

Defendant.

EDGEFIELD COUNTY
CLERK OF COURT
CHARLES L. REEL
2018 MAY 31 PM 12:07

INTRODUCTION

This is a postconviction relief action brought by the Applicant, Bryan Phillips (Phillips), who is currently incarcerated in the South Carolina Department of Corrections under Orders of Commitment issuing from Edgefield County, South Carolina. The State produced for this Court all records concerning Phillips' convictions and sentences as well as a complete Transcript of Phillips' trial. On December 13, 2017, this Court held a hearing in this case at which both Phillips and the State were represented by counsel. Phillips, Phillips' appellate counsel, Lanelle C. Durant (Durant), and Phillips' trial counsel, Randall D. Williams (Williams), testified at the December 13, 2017 hearing.

This Court has reviewed all the records concerning Phillips' convictions and sentences as well as the Transcript of Phillips' trial and has considered all the testimony presented at the December 13, 2017 hearing. This review and consideration convinces this Court that Phillips convictions and sentences violate the Sixth Amendment to the U.S. Constitution because Williams gave Phillips such deficient representation at Phillips' trial that Phillips suffered prejudice. As explained more fully in the following sections of this Order, this Court grants Phillips' Application for postconviction relief and vacates Phillips' convictions and sentences.

FACTS

I. Investigation of the alleged crimes

Four Chinese nationals, Ji Queng Chen, Li Ai Meng, Guang Xing Li, Guan Xin, Selina Li , and Winson Li , who spoke only Mandarin Chinese, reported that they were robbed in Johnston, South Carolina on August 14, 2008. These witnesses alleged that there were three individuals involved in the robbery, but they could not identify the alleged robbers.

An informant, Patrick Stevens (Stevens), reported to Investigator Roosevelt O. Young, III (Young) of the Edgefield County Sherriff's Department (ECSD) that Alvin Phillips, Phillips, and K.C. Langford (Langford) robbed the four Chinese nationals. Johnston Police Department (JPD) personnel detained Alvin Phillips and interrogated him, and Alvin Phillips gave a statement in which he implicated himself, Phillips, and Langford in the robbery of the Chinese nationals.

JPD personnel secured Arrest Warrants charging Phillips with criminal conspiracy, armed robbery, burglary in the first degree, and kidnapping. The Edgefield County Grand Jury true billed Indictments against Phillips that allege criminal conspiracy (2008-GS-19-718), armed robbery (2008-GS-19-723), burglary in the first degree (2010-GS-274), and kidnapping (2010-GS-19-277).

II. Pretrial

The government put Phillips and Langford on trial together. On May 17, 2010, the Court held a pretrial hearing to take up Motions to Dismiss on speedy trial grounds that had been filed by Phillips and Langford. The government presented several justifications for the delay in putting Phillips and Langford on trial. As its principal justification for the delay, the government argued the difficulty that it was having in securing a Chinese language interpreter. The government represented to the Court that South Carolina Court Administration had no certified Chinese interpreters.

On the first day of the trial of Phillips and Langford, September 7, 2010, the trial court entertained additional pretrial matters. Most importantly, the trial judge took up the issue of the qualifications of the Chinese interpreter. The Chinese interpreter engaged by the government was not certified by South Carolina Court Administration. After hearing testimony and explaining the proper role of the interpreter, the trial court qualified the Chinese interpreter under S.C. Code § 15-27-55. (Tr. pp. 140-142)¹ Williams made only a general objection to the interpreter's qualifications. (Tr. p. 138)

III. Trial and Appeal

The Chinese nationals were vitally important witnesses; only their testimony could establish the corpus delicti of the alleged offenses. At several points during cross-examination by defense counsel of the three Chinese nationals that testified at trial, Ji Quing Chen, Li Guan Xin, and Li Ai Ming, the Chinese interpreter engaged in conversations in Chinese with the witnesses that were not confined to the attorney's questions and the witnesses' answers to those questions. (Tr. pp. 188, 209, and 214-215) These extraneous conversations were so obvious that the trial judge admonished the Chinese interpreter three times that his translations had to be verbatim the questions and answers. (Tr. pp. 188, 209, and 214-215) Williams did not retain a defense Chinese interpreter to participate in the trial of Phillips and Langford.

In its case-in-chief, the government presented only the testimony of Alvin Phillips to show that Phillips and Langford participated in the alleged crimes. Defense counsel thoroughly and persuasively cross-examined Alvin Phillips. Defense counsel even presented in evidence a written statement signed by Alvin Phillips in which he stated that Phillips and Langford had no participation in the alleged crime. In the defense case, Williams called Young to testify. During his direct examination of Young, Williams elicited testimony about the double hearsay statement

¹ TR references are to the Transcript of the jury trial of Phillips and Langford.

of the informant Stevens that Alvin Phillips, Phillips, and Langford participated in the robbery of the four Chinese nationals. (Tr. pp. 368-393) The testimony of Young figured prominently in the government's closing argument. (Tr. pp. 477-479, 488, and 490)

The jury convicted Phillips on all counts. The trial judge sentenced Phillips to twenty years for kidnapping, twenty years for armed robbery, twenty years for burglary in the first degree and five years for criminal conspiracy with all sentences to run concurrently. Williams timely filed a Notice of Appeal, and Durant of the Appellate Division of the South Carolina Office of Indigent defense perfected the appeal. The South Carolina Supreme Court issued an unpublished opinion affirming Phillips' convictions and sentences. In footnote one of that opinion the Supreme Court observed that that S.C. Code § 15-27-155(B) "is the statute for interpreters in a civil case, not a criminal one." State v. Phillips, Memorandum Opinion No. 2012-MO-049 (2012), fn. 1.

LAW

I. The test for ineffective assistance of counsel

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687-88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the

result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Rutland v. State, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016) (citing Strickland, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698).

II. Instances of deficient representation

A. The interpreter statute

As the Supreme Court observed in its memorandum opinion affirming Phillips' convictions and sentences, the trial court erroneously qualified the interpreter under the interpreter statute for civil cases, S.C. Code § 15-27-155, instead of the proper interpreter statute for criminal cases, S.C. Code § 17-1-50. State v. Phillips, Memorandum Opinion No. 2012-MO-049 (2012), fn. 1. Evidence was presented at the December 13, 2017 hearing that Williams had a copy of S.C. Code § 17-1-50 that he was referring to during Phillips' trial.

When the trial court announced its ruling qualifying the Chinese interpreter under the wrong statute, Williams made only a general objection as to qualifications. Durant testified at the December 13, 2017 hearing that this objection was much too general to preserve the issue of the proper statute to be used in qualifying an interpreter in a criminal case for appellate review. Williams' failure to preserve the issue of the proper statute for the qualification of an interpreter in a criminal case constitutes deficient representation.

B. Defense Chinese interpreter

On cross-examination at the December 13, 2018 hearing, Williams acknowledged that he knew as of the May 17, 2010 hearing that the government's Chinese interpreter would not be certified by South Carolina Court Administration. During the same cross-examination, he also admitted that the Chinese nationals were critical witnesses because only their testimony could establish the corpus delicti of the alleged crimes.

Williams also testified that an organization known as Foreign Translations with an office in Greenville, SC could have provided defense translation services and that Williams could have had access to South Carolina Commission on Indigent Defense funding for those services. Williams' failure to hire a defense Chinese interpreter was deficient representation when he knew that the government's interpreter would be uncertified and that the testimony of the Chinese nationals was critical to the case.

C. Calling Young as a witness

In presenting Young's testimony, Williams succeeded only in providing an additional connection between Phillips and the alleged crime when the only other connection, Alvin Phillips' testimony, had been weakened by cross-examination and by the introduction in evidence of Alvin Phillips' statement that Phillips and Langford had not participated in the alleged crime. The wound was entirely self-inflicted. The government could not have used Young's testimony about the statement of the informant, Stevens, because testimony by Young on that point would have been double hearsay. Young's testimony about Stevens' statement was allowed in evidence only because Williams' offered it.

At the December 13, 2017 hearing, Williams claimed that he called Young to testify about Stevens' statement as part of his trial strategy. Williams testified that he called Young to show that the early focus on Alvin Phillips originated in an ongoing informant and law enforcement relationship between Stevens and Young. This is not what Young testified to. Williams admitted that he did not interview Young about the circumstances of Stevens' statement before putting Young on the stand. Williams testified that he was acquainted with Young and that he could have spoken with Young before putting him on the stand. Williams' failure to speak with Young before putting him on the stand to testify about the double hearsay statements of the informant, Stevens, constitutes deficient performance.

III. Prejudice

A. The interpreter statute

There is a critical difference in the interpreter statutes. S.C. Code § 15-27-155 permits an interpreter that is an “instructors in a foreign language” or has a sufficient level of fluency in a particular foreign language “to interpret the foreign language of another person.” On the other hand, S.C. Code § 17-1-50 requires that an interpreter be “readily able to interpret simultaneously and consecutively ... from English into the language of the non-English speaking person, or from the language of that person into spoken English.” Because Williams failed to object to the qualification of the Chinese interpreter, there is a reasonable probability that the result of the proceedings against Phillips would have been different in that the interpreter qualified would have been demonstrably more qualified.

Durant testified at the December 13, 2017 hearing that she did not raise the interpreter statute issue in Phillips’ appeal because the issue was undoubtedly not preserved for appellate review because of an insufficient objection. Durant further testified at that hearing that if the interpreter statute issue had been preserved for appellate review, she would have prominently placed it in her appellate brief as the first and most substantial issue on appeal. If Williams had made a sufficient objection on the interpreter statute issue, there is a reasonable probability that the result would have been different in that there is a reasonable probability that Phillips’ convictions and sentences would have been reversed on appeal.

B. Defense Chinese interpreter

During the cross-examinations by defense counsel of the Chinese nationals who testified at trial, the government’s Chinese interpreter engaged in conversations in Chinese with the testifying Chinese nationals that were not restricted to the questions and answers. (Tr. pp. 188, 209, and 214-215) In fact, the trial judge had to warn the government’s Chinese interpreter three times to

confine his statements to the questions and answers. (Tr. pp. 188, 209, and 214-215)

To this day, only the government's Chinese interpreter and the Chinese nationals know for certain what the government's Chinese interpreter said to the testifying Chinese nationals in these extraneous comments. A defense Chinese interpreter would have ensured that the trial judge and all parties to the trial knew what the government's Chinese interpreter said to the testifying Chinese nationals in these comments. Phillips was prejudiced by Williams' failure to hire a defense Chinese interpreter. If Williams had hired such an interpreter, there is a reasonable probability that the result of the trial would have been different.

C. Calling Young as a witness

Young's testimony about his interaction with the informant, Stevens, was, without doubt, adverse to Phillips' case at trial. By calling Young as a witness and questioning him about these matters, Williams did harm to Phillips' case. Because of the double hearsay nature of Young's testimony about what Steven's told Young, the harm done to Phillips' case by Williams' calling and examination of Young was harm done by Williams to Phillips' case that could not have been done by the government alone. Young testified to the effect that Stevens was acting as a good citizen. This testimony and Young's testimony about Stevens' statement figured prominently in the government's closing argument. (Tr. pp. 477-479, 488, and 490) But for Williams' deficient representation in calling and examining Young, there is a reasonable probability that the result of Phillips' trial would have been different.

CONCLUSION

Phillips has demonstrated that Williams gave him deficient representation and that each of the three instances of deficient representation prejudiced Phillips in the sense that there is a probability sufficient to undermine confidence in the outcome of Phillips' trial that, absent the deficient representation, the jury would have had a reasonable doubt respecting Phillips' guilt. For

these reasons this Court GRANTS Phillips' PCR Application and VACATES Phillips' convictions and sentences.

AND IT IS SO ORDERED!

Anderson, SC
May 25, 2018



J. Cordell Maddox, Jr.
Presiding Circuit Court Judge

STATE OF SOUTH CAROLINA

COUNTY OF Edgefield

K.C. Langford, SCDC# 294500,

IN THE COURT OF COMMON PLEAS

EDGEFIELD COUNTY
CLERK OF COURT
CHARLES L. REEL

CIVIL ACTION COVERSHEET

Plaintiff(s)
2020 APR 30 AM 10:16

2020-CP - 19- 00091

vs.

State of South Carolina

Defendant(s)

Submitted By: Charles GroseAddress: 404 Main Street, Greenwood, SC 20646SC Bar #: 66063Telephone #: 864-538-4466Fax #: 864-538-4405

Other: _____

E-mail: charles@groselawfirm.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing cases that are NOT E-Filed. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint. **This form is NOT required to be filed in E-Filed Cases.**

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to **ARBITRATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts ☐ Constructions (100) ☐ Debt Collection (110) ☐ General (130) ☐ Breach of Contract (140) ☐ Fraud/Bad Faith (150) ☐ Failure to Deliver/Warranty (160) ☐ Employment Discrim (170) ☐ Employment (180) ☐ Other (199) _____	Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) Previous Notice of Intent Case # 20 ____-NI-_____ ☐ Notice/ File Med Mal (230) ☐ Other (299) _____	Torts - Personal Injury ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Wrongful Death (360) ☐ Assault/Battery (370) ☐ Slander/Libel (380) ☐ Other (399) _____	Real Property ☐ Claim & Delivery (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499) _____
Inmate Petitions ☒ PCR (500) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599) _____	Administrative Law/Relief ☐ Reinstate Drv. License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture-Petition (840) ☐ Forfeiture—Consent Order (850) ☐ Other (899) _____	Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Transfer of Structured Settlement Payment Rights Application (760) ☐ Confession of Judgment (770) ☐ Petition for Workers Compensation Settlement Approval (780) ☐ Incapacitated Adult Settlement (790) ☐ Other (799) _____	Appeals ☐ Arbitration (900) ☐ Magistrate-Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Public Service Comm. (990) ☐ Employment Security Comm (991) ☐ Other (999) _____
Special/Complex /Other ☐ Environmental (600) ☐ Automobile Arb. (610) ☐ Medical (620) ☐ Other (699) _____ ☐ Sexual Predator (510) ☐ Permanent Restraining Order (680) ☐ Interpleader (690)			

Submitting Party Signature: _____

Date: April 22, 2020

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCF, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

Effective January 1, 2016, Alternative Dispute Resolution (ADR) is mandatory in all counties, pursuant to Supreme Court Order dated November 12, 2015.

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

Pursuant to the ADR Rules, you are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs.
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

EDGEFIELD COUNTY
CLERK OF COURT
CHARLES L. REEL

THE STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF EDGEFIELD) FOR THE ELEVENTH JUDICIAL CIRCUIT

2020 APR 30 AM 10:16

K.C. Langford, SCDC# 294500,) Case No. 2020-CP-19-00091
Applicant,)
vs.) **First Amended¹**
) **Application for Post-Conviction Relief**
)
State of South Carolina,)
Respondent.)

Pursuant to the Uniform Post-Conviction Relief Act, S.C. Code Ann. § 17-27-10 *et. seq.*, K.C. Langford submits this application for post-conviction relief.²

- 1) Mr. Langford is confined at the Evans Correctional Institution.
- 2) The Honorable William P. Keesley, Presiding Judge for Edgefield County, imposed the sentences.
- 3) The co-defendants were Bryan Phillips and Alvin Phillips.
- 4) On September 9, 2010, Judge Keesley imposed concurrent sentences of five years for criminal conspiracy (2008-GS-19-00673), twenty years for first-degree burglary (2010-GS-19-00272), twenty years for armed robbery (2010-GS-19-00273), and twenty years for

¹ This application is amended to delete references to the State of South Carolina not appealing the order granting post-conviction relief in *Bryan Phillips v. State*, Case No. 2013-CP-19-00386, *see* Exhibit B to original PCR Application, as undersigned counsel mistakenly believed that the State had not appealed that order. Exhibit numbers in this amended application refer to the exhibits to the original PCR application.

² This pleading is based on Form 5, Revised 3/2003, which can be found on the South Carolina Judicial Department website. Mr. Langford reserves the right to amend this pleading as provided by law. Rule 71.1(d), SCRCP; S.C. Code Ann. § 17-27-90 (expressly contemplating supplemental or amended PCR application); *Mangal v. State*, 421 S.C. 85, 99, 805 S.E.2d 568, 575 (2017) (“[T]he interests of justice require PCR courts to be flexible with procedural requirements *before* PCR applicants suffer procedural default on substantial claims.”); *Love v. State*, 428 S.C. 231, 834 S.E.2d 196 (2019) (denial of motion to amend application for post-conviction relief was abuse of discretion).

kidnapping (2010-GS-19-00278).

5) Please see number 4 above for the date and terms of the sentences.

6) The sentences were imposed after a plea of not guilty and trial by jury.

7) Mr. Langford appealed his convictions and sentences.

8) Mr. Langford appealed to the South Carolina Court of Appeals. Pursuant to Rule 204(b), SCACR, the Supreme Court of South Carolina certified the case. On November 21, 2012, the Supreme Court affirmed the convictions and sentences. *State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012). The Supreme Court of the United States denied Mr. Langford's petition for a writ of *certiorari* on October 7, 2013. *Langford v. South Carolina*, 571 U.S. 831 (2013).

9) Not applicable because Mr. Langford appealed.

10) Grounds for Relief:

a) 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).

b) 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).

11) Supporting Facts:

a) Trial counsel's performance was deficient and prejudicial for the following

reasons:

(i) Trial counsel rendered deficient and prejudicial assistance of counsel by failing to obtain a certified Chinese interpreter.

(ii) 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.

b) Appellate counsel's performance was deficient and prejudicial for the following reasons:

(i) Appellate counsel during the appeal of Mr. Langford's prior post-conviction relief case had a conflict of interest because of her representation of co-defendant 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, pp. 35-36, 47, a copy of which is attached as Exhibit A.

(ii) 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, a copy of which is attached as Exhibit B.

12) Prior to filing this application, Mr. Langford filed a petition for post-conviction relief in the Court of Common Pleas for Edgefield County. *Langford v. State*, Case No. 2014-CP-19-00002. By written order dated June 15, 2017, the Honorable Eugene C. Griffith, Jr, dismissed this application. On October 8, 2019, the Supreme Court of South Carolina denied Mr. Langford's petition for writ of *certiorari*. *Langford v. State*, Appellate Case No. 2017-001397. The Remittitur issued on October 23, 2019.

Contemporaneously with filing his original PCR application in this case, Mr. Langford filed a petition for writ of *habeas corpus* in the United States District Court for the District of South Carolina. *Langford v. Stonebreaker*, C/A No. 9:20-cv-01298-DCC-BM.

13) Please see the response to number twelve above or the nature of prior petitions, name and locations of courts, dispositions, dates of dispositions, and citations.

14) The grounds set forth in paragraphs 10(a) and 11(a) were included in Mr. Langford's prior application for post-conviction relief and addressed in the order of dismissal. Appellate counsel for Mr. Langford abandoned these two issues on appeal. This Court can consider these issues because of the conflict of interest of appellate counsel during the appeal of the prior post-conviction relief case. *Carter v. State*, 293 S.C. 528, 530, 362 S.E.2d 20, 21 (1987) ("Absent a showing that the applicant was specifically advised of the hazards of being represented by trial counsel at the post-conviction hearing and that the applicant consented to such an arrangement, a successive post-conviction application, alleging ineffective assistance of trial counsel, should not be barred.").

15) Please see number 14 above for the grounds that have been previously presented and the proceedings in which each ground was raised.

16) The grounds presented in paragraphs 10(b) and 11(b) have not been presented to

this or any other state court because Mr. Langford did not realize his appellate counsel had a conflict of interest until after the Supreme Court denied his petition for writ of *certiorari*. This Court can consider these issues because of the conflict of interest of appellate counsel during the appeal of the prior post-conviction relief case. *Carter, supra*.

17) Prior Counsel:

- a) Mark R. Calhoun represented Mr. Langford during his jury trial.
- b) Elizabeth A. Franklin-Best, Elizabeth Franklin-Best, P.C., 2725 Devine Street, Columbia, SC 29205, and Breen Stevens, First Circuit Public Defender Orangeburg County Courthouse, PO Box 1112, Orangeburg, SC 29116-1112, represent Mr. Langford during his direct appeal to the Supreme Court of South Carolina.
- c) Ms. Franklin-Best represented Mr. Langford on appeal to the Supreme Court of the United States.
- d) Charles T. Brooks, III, Law Office of Charles T. Brooks, III, 309 Broad St., Sumter, SC 29150, represented Mr. Langford at the evidentiary hearing in the prior post-conviction relief case.
- e) LaNelle Cantey DuRant, 1668 Lamar Cantey Drive, Manning, SC 29102, formally of the Appellate Division of the South Carolina Commission on Indigent Defense, represented Mr. Langford during the appeal of his prior post-conviction relief case.

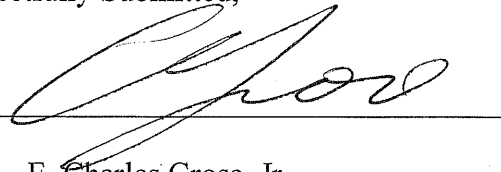
18) Please see response to number 17 above for names and contact information for Mr. Langford's prior attorneys.

19) 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.

20) Mr. Langford is not under sentence of any other court that he has not challenged.

Respectfully Submitted,

By



E. Charles Grose, Jr.
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(864) 538-4405 (fax)
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Attorney for K.C. Langford

April 22, 2020
Greenwood, South Carolina

EDGEFIELD COUNTY
CLERK OF COURT
CHARLES L. REEL

THE STATE OF SOUTH CAROLINA)

COUNTY OF EDGEFIELD)

K.C. Langford, SCDC# 294500,)

Applicant,)

vs.)

State of South Carolina,)

Respondent.)

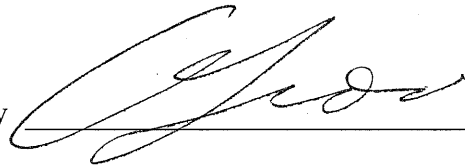
IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

Case No. 2020-CP-19-00091

I certify that I have served a copy of this pleading on the State of South Carolina by placing a copy in the US Mail, postage prepaid, on the date reflected below, addressed to

Megan Harrigan Jameson, Esquire
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

By



E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466

April 22, 2020
Greenwood, South Carolina



ALAN WILSON
ATTORNEY GENERAL

July 16, 2020

The Honorable Charles L. Reel
Clerk of Court, Edgefield County
Post Office Box 34
Edgefield, South Carolina 29824

Re: **K.C. Langford, #294500 v. State of South Carolina**
2020-CP-19-091

Dear Mr. Reel:

Enclosed please find the State's original **Return and Motion to Dismiss** and accompanying attachments in the above-captioned case for filing in your office.

Sincerely,



Lillian L. Meadows
Assistant Attorney General

LLM/ch

cc: E. Charles Grose, Jr., Esquire

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF EDGEFIELD	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
	)	
K.C. Langford, SCDC #294500,	)	Case No. 2020-CP-19-0091
	)	
Applicant,	)	
	)	
v.	)	RETURN AND MOTION TO DISMISS
	)	(COUNSEL RETAINED)
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	
	)	

In response to the post-conviction relief (PCR) action commenced by K.C. Langford (Applicant) on April 14, 2020, and amended on April 30, 2020, the State would show this court:

I. FACTS & PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. 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 (Trial Counsel), 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 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”¹ 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 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

¹ This is the term Alvin used to describe the victims.

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 & Subsequent 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 of the South Carolina Commission on Indigent Defense – Appellate Division (SCCID). 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 Applicant's co-defendant, Bryan Phillips. Following further 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 case was returned to the circuit court 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 PCR 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, Trial Counsel, and Assistant Solicitor Maye all testified at the hearing. On June 15, 2017, Judge Griffith issued an order denying the application on all grounds and dismissing with prejudice.

Applicant filed a timely notice of appeal. Appellate Defender LaNelle Cantey DuRant of SCCID perfected Applicant's appeal by filing a petition for writ of certiorari, raising the following issues:

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.

The State filed a return and motion for summary judgment on June 29, 2020. This matter is currently pending.

II. CURRENT APPLICATION

In his 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.”

Attached to this return and incorporated by reference are the records of the Edgefield County Clerk of Court regarding the subject convictions; Applicant’s records from the South Carolina Department of Corrections; Applicant’s direct appeal records, including the trial transcript; Applicant’s prior post-conviction relief records challenging this conviction and the appeal therefrom; and the records of the current PCR action. The State reserves the right to amend this return upon receipt of any relevant materials.

III. MOTION TO DISMISS

The State moves for summary dismissal pursuant to section 17-27-70 of the South Carolina Code of Laws on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing. Because there is no question of law or fact to necessitate a hearing, the State requests this Court issue a conditional order of dismissal indicating the Court’s intent to dismiss the application and its reasons for so doing.² See S.C. Code Ann. § 17-27-70(b) (establishing procedure for summary disposition of PCR applications); *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (summary disposition appropriate when there is no need to develop facts and the applicant is not entitled to relief). Respondent moves for summary dismissal for the following reasons:

A. Statute of Limitations

Applicant’s allegations of ineffective assistance of trial counsel based on failure to obtain a certified Chinese interpreter and failure to object to the alleged hearsay testimony of Investigator

² A proposed Conditional Order of Dismissal consistent with this return and motion to dismiss is concurrently submitted for the Court’s consideration.

Young should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act (Act). S.C. Code Ann. § 17-27-10 to -160 (2014).

Specifically, the Act requires as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A).

Our Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. *Peloquin v. State*, 321 S.C. 468, 469 S.E.2d 606 (1996). A motion for summary judgment may properly be used to raise the defense of statute of limitations. *McDonnell v. Consolidated School District of Aiken*, 315 S.C. 487, 445 S.E.2d 638 (1994). Additionally, section 17-27-70(c) authorizes this Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *See also Leamon*, 363 S.C. at 434, 611 S.E.2d at 495 (summary disposition appropriate when there is no need to develop facts and the applicant is not entitled to relief).

Applicant was convicted on September 9, 2010, and the United States Supreme Court issued its order denying his petition for writ of certiorari was issued on October 7, 2013. This application was filed on April 14, 2020—almost *seven years* after the requisite filing period expired. Therefore, Applicant’s allegations of ineffective assistance of trial counsel should be summarily dismissed for failure to file within the time mandated by the Act.

B. Successive

Applicant’s allegations of ineffective assistance of trial counsel based on failure to obtain

a certified Chinese interpreter and failure to object to the alleged hearsay testimony of Investigator Young should further be summarily dismissed because these exact issues were raised in Applicant's previous PCR application. Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application. *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981); *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can indicate a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. *See Aice v. State*, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991 ("[Applicant] has filed an original PCR application, and has been allowed to seek review of the ruling against him. We refuse to grant his request for a second chance, and again we do so in order to effectuate the purposes of the Act and rules.")). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." *Id.* at 450, 409 S.E.2d at 394. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. *Id.* Applicant bears the burden of showing the allegations could not have been previously raised. *Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980).

Applicant's current allegations of ineffective assistance of trial counsel were raised in the proceeding based on Applicant's prior application for post-conviction relief; thus, these allegations are successive and barred under S.C. Code Ann. § 17-27-90. Therefore, Applicant's allegations pertaining to trial counsel should be summarily dismissed as successive to Applicant's previous PCR action.

C. Res Judicata

Applicant's allegations of ineffective assistance of trial counsel based on failure to obtain a certified Chinese interpreter and failure to object to the alleged hearsay testimony of Investigator Young are similarly barred by the doctrine of *res judicata*. *Res judicata* prohibits subsequent actions by the same parties on the same issues. *Bell v. Bennett*, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. *Foran v. USAA Casualty Ins. Co.*, 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that could have been raised in the former action. *Id.*; see also *Foxworth*, 275 S.C. 615, 274 S.E.2d 415.

In *Foxworth v. State*, the appellants—Myron Foxworth and Gary Wilson—were convicted of armed robbery and sentenced to twenty-two years imprisonment. Both men appealed their convictions, which were affirmed and their appeals dismissed. *Id.* at 616, 274 S.E.2d at 415. They then filed *pro se* petitions for writs of habeas corpus relief in the South Carolina Federal District Court, without exhausting their state PCR remedies. The District Court considered “the trial record and the numerous allegations raised in the petitions ... and [it] dismissed [the petitions] on the merits.” *Id.* Both men then filed *pro se* PCR applications, but the PCR judge found their applications were without merit. He further found that *res judicata* barred claims raised in the applications, as well as those that *could have* been raised. *Id.* at 616-17, 274 S.E.2d at 415-16

(emphasis added). Our Supreme Court agreed. Relying upon section 17-27-90 and its prior decisions construing that statute, the Court held:

The language of Section 17-27-90 is not restricted to State proceedings but rather refers to “any other proceeding” where relief might be sought prior to the submission of a subsequent application. We, therefore, extend the reasoning espoused in *Land v. State*, *supra*, to the situation where, as here, an application in the State court follows a federal habeas corpus adjudication. The burden is on the applicant to prove that the alleged grounds for relief could not have been raised in federal court.

Id. at 618, 274 S.E.2d at 416.

Applicant had a full opportunity to litigate all of his allegations of ineffective assistance of trial counsel in his prior action. The finality of the previous court rulings should be respected, and this Court should summarily dismiss these allegations as barred by the principles of *res judicata*.

D. Failure to State a Claim

Applicant’s contention he received ineffective assistance of appellate counsel on his prior post-conviction relief action is not a cognizable ground for relief, regardless of the results of his co-defendant’s post-conviction relief action.³ As an initial matter, there is no constitutional right to appointed counsel for collateral review of a conviction. *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *see also Coleman v. Thompson*, 501 U.S. 722 (1991) (finding that the Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions). Once a post-conviction relief applicant obtains a complete adjudication on the merits of his original application, including an appeal, he may not make successive applications based on ineffective assistance of post-conviction relief counsel. *Aice*, 305 S.C. 448, 409 S.E.2d 392.

The only recognized exception to the rule barring claims of ineffective assistance of post-

³ The State’s appeal of co-defendant Bryan Phillips’ post-conviction relief action is currently pending. *See Bryan J. Phillips v. State*, Appellate Case No. 2020-000568.

conviction relief counsel is found in *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). *Austin* recognizes a general exception to this rule where prior post-conviction relief counsel fails to appeal the denial of the application. *Id.* *Austin* “is limited to its particular factual situation” and is only applicable in limited circumstances to correct procedural defects where an applicant is denied his “one full bite at the apple.” *Id.*; *Aice*, 305 S.C. at 452, 409 S.E.2d at 394.

Moreover, the United States Supreme Court’s opinion in *Martinez v. Ryan*, 566 U.S. 1 (2012), held that “[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a *federal habeas court* from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.” Our Supreme Court has held that “*Martinez* is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions.” *Kelly v. State*, 404 S.C. 365, 365, 745 S.E.2d 377, 377 (2013). Nor does *Martinez* “afford [PCR applicants] the right to file a successive PCR application by merely alleging ineffective assistance of prior PCR counsel.” *Robertson v. State*, 418 S.C. 505, 516, 795 S.E.2d 29, 34 (2016) (allowing a successive PCR application in the narrow situation where initial PCR counsel was not qualified to represent a capital PCR applicant in violation of S.C. Code Ann. § 17-27-160(B)).

Here, Applicant received a hearing in his first post-conviction relief action and timely appealed to the South Carolina Supreme Court therefrom. Following the filing of the State’s return to the petition for a writ of certiorari, the Court carefully considered the record as required by law. The Court, upon review of the decision of a lower court in a post-conviction relief action, has the power to set aside procedural bars based on issue preservation and remand for further proceedings where dismissal would be fundamentally contrary to the interests of justice. *See, e.g., Simmons v.*

State, 416 S.C. 584, 788 S.E.2d 220 (2016).

It is clear Applicant enjoyed a complete adjudication on the merits of his original application—“one full bite at the apple.” Applicant’s complaint that appellate counsel should have raised every issue ruled on by the PCR court is meritless. *See Jones v. Barnes*, 463 U.S. 745 (1983) (“[An] indigent defendant has [no] constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points.”). Therefore, Applicant’s allegations of ineffective assistance of post-conviction relief appellate counsel do not fall within any exception to the rule barring such claims, and this Court should dismiss the claim for failing to state a cognizable claim upon which relief can be based.

1. Conflict of interest

The Rules of Professional Conduct, whose purpose is to regulate and guide the legal profession in ethical conduct, do not have any bearing on assessing a claim of ineffective assistance of counsel 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.”).

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); *Fuller v. State*, 347 S.C. 630, 557 S.E.2d 664 (2001). Until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for a claim of ineffective assistance of counsel arising from multiple representation.

Langford v. State, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993). “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). Once an actual conflict of interest is shown, applicant does not have to demonstrate prejudice. *Thomas v. State*, 346 S.C. 140, 145, 551 S.E.2d 254, 256-57 (2001). Additionally, where defendant waives *potential* conflict, once actual conflict arises, counsel must withdraw from representing one or both clients or acquire another waiver covering the specific conflict. *Id.*

Applicant first contends DuRant had a conflict of interest solely because she represented Applicant’s co-defendant on his direct appeal. Notwithstanding the fact that Applicant never raised this issue during his PCR appeal, no conflict existed because Applicant and Phillips did not have conflicting interests on direct appeal or otherwise. In fact, the Supreme Court consolidated Applicant’s direct appeal with Phillips’ because the cases involved identical issues and interests. DuRant therefore *never* represented interests adverse to Applicant’s as a result of her representation of Phillips. *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); *cf. Mickens v. Taylor*, 240 F.3d 348, 355 (4th Cir. 2001) (To establish ineffective assistance of counsel on conflict of interest grounds, a petitioner must establish that (1) his attorney labored under an actual conflict of interest that (2) adversely affected his lawyer’s performance.) (citing *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980)).

Applicant further contends DuRant had a conflict of interest because of his claims of ineffective assistance of appellate counsel against Franklin-Best in his PCR action, which were not pursued on appeal. DuRant and Franklin-Best were both employed by SCCID during their respective representations of Applicant, although Franklin-Best left SCCID several years before

Applicant's PCR appeal. Nevertheless, Applicant has failed to present any evidence that an actual conflict of interest existed as a result of DuRant's representation.⁴

E. Frustration of Finality of Convictions

As a final matter, both the United States Supreme Court and the South Carolina Supreme Court have emphasized the necessity for finality of litigation in criminal cases. The Court in *Aice* explained that:

Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. At some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice. *See Butler v. State*, 397 S.E.2d 87 (S.C.1990). **We can envision successive PCR applications filed for the purpose of delaying a just execution in a capital case, as well as other abuses of the reviewing system Aice urges that we establish.** For these reasons, we hold the contention that prior PCR counsel was ineffective is not per se a "sufficient reason" allowing for a successive PCR application under § 17-27-90. This Court has implied such a holding in the past. *See Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980) (applicant pointed to his attorney's "inadequate" performance; held not a "sufficient reason" warranting a successive application).

Aice, 305 S.C. at 451, 409 S.E.2d at 394 (emphasis added).

The United States Supreme Court has explained that "the principle of finality ... is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect." *Teague v. Lane*, 489 U.S. 288, 309 (1989). In his concurring and dissenting opinion in *Mackey v. United States*, 401 U.S. 667, 691 (1971), Justice Harlan wrote:

Finality in the criminal law is an end which must always be kept in plain view. . . . At some point, the criminal process, if it is to function at all, must turn its attention from whether a man ought properly to

⁴ It is questionable whether the allegations against Franklin-Best would have even been preserved on appeal, given Applicant's failure to present the testimony of 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.

be incarcerated to how he is to be treated once convicted. If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the question litigants present or else it never provides an answer at all. Surely it is an unpleasant task to strip a man of his freedom and subject him to institutional restraints. But this does not mean that in so doing, we should always be halting or tentative. No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation.

Mackey, 401 U.S. at 691 (Harlan, J., concurring in judgments in part and dissenting in part). Seven years after *Mackey*, the South Carolina Supreme Court quoted Justice Harlan's Opinion with approval in *Anderson v. Leeke*, 271 S.C. 435, 441–42, 248 S.E.2d 120, 123 (1978). Applicant's attempt to litigate his successive and time-barred application is contrary to the recognized need for finality of litigation.

IV. ALL OTHER CLAIMS

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this return is hereby denied.

[Conclusion and signature on following page]

V. CONCLUSION

WHEREFORE, having made its return, the State moves to summarily dismiss the application 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 Applicant's claims are otherwise without merit.

Respectfully submitted,

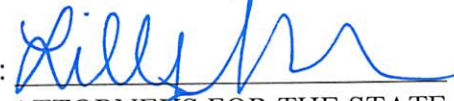
ALAN WILSON
Attorney General

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LILLIAN L. MEADOWS
Assistant Attorney General

By:



ATTORNEYS FOR THE STATE

Office of the Attorney General

P.O. Box 11549

Columbia, S.C. 29211

July 16, 2020

STATE OF SOUTH CAROLINA
COUNTY OF EDGEFIELD

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

K.C. Langford, #294500

Applicant,

v.

State of South Carolina

Respondent,

)
)
) Case No.: 2019-CP-19-091
)
)

) Certificate of Service by Mail
)
)
)
)

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return and Motion to Dismiss** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

**E. Charles Grose, Jr., Esquire
Grose Law Firm
404 Main Street
Greenwood, SC 29646**

DATED this the 16th day of July, 2020.



Camille Henry, Legal Assistant
For Respondent



ALAN WILSON
ATTORNEY GENERAL

September 9, 2020

E. Charles Grose, Jr., Esquire
Grose Law Firm
404 Main Street
Greenwood, South Carolina 29646

Re: K.C. Langford, #294500 v. State of South Carolina
2020-CP-19-0091

Dear Mr. Grose:

Enclosed please find a filed copy of the Conditional Order of Dismissal signed by the Honorable Walton J. McLeod, IV, in the above-captioned post-conviction relief matter.

Sincerely,

s/LillianMeadows

LILLIAN L. MEADOWS
Assistant Attorney General

LLM/ch
Enclosure

EDGEFIELD COUNTY
CLERK OF COURT
CHARLES D. REEL

STATE OF SOUTH CAROLINA)
COUNTY OF EDGEFIELD)
2020 SEP -4 AM 11:14)

K.C. Langford, SCDC #294500,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

Case No. 2020-CP-19-0091

CONDITIONAL ORDER OF DISMISSAL

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. The State made its return on July 16, 2020, requesting the application be summarily dismissed.

I. FACTS & PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. 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 (Trial Counsel), 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 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”¹ 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 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

¹ This is the term Alvin used to describe the victims.

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 & Subsequent 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 of the South Carolina Commission on Indigent Defense – Appellate Division (SCCID). 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 Applicant's co-defendant, Bryan Phillips. Following further 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 case was returned to the circuit court 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 PCR 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, Trial Counsel, and Assistant Solicitor Maye all testified at the hearing. On June 15, 2017, Judge Griffith issued an order denying the application on all grounds and dismissing with prejudice.

Applicant filed a timely notice of appeal. Appellate Defender LaNelle Cantey DuRant of SCCID perfected Applicant's appeal by filing a petition for writ of certiorari, raising the following issues:

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.

The State filed a return and motion for summary judgment on June 29, 2020. This matter is currently pending.

II. CURRENT APPLICATION

In his 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.”

Before this Court are the records of the Edgefield County Clerk of Court regarding the subject convictions; Applicant’s records from the South Carolina Department of Corrections; Applicant’s direct appeal records, including the trial transcript; Applicant’s prior post-conviction relief records challenging this conviction and the appeal therefrom; and the records of the current PCR action.

III. FINDINGS OF FACT & CONCLUSIONS OF LAW

This Court has reviewed the pleadings, the records submitted to it by the parties, and the applicable law. This Court finds there is no genuine issue of material fact which would necessitate an evidentiary hearing. *See* S.C. Code Ann. § 17-27-70(b) (establishing procedure for summary disposition of PCR applications); *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (summary disposition appropriate when there is no need to develop facts and the applicant is not entitled to relief). Pursuant to South Carolina Code Annotated Sections 17-27-70 and -80, this Court informs the parties of its intent to dismiss the application based upon the following findings:

A. Statute of Limitations

This Court finds Applicant’s allegations of ineffective assistance of trial counsel based on failure to obtain a certified Chinese interpreter and failure to object to the alleged hearsay testimony of Investigator Young must be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act (Act). S.C. Code Ann. § 17-27-10 to -160 (2014). Specifically, the Act requires as follows:

An application for relief filed pursuant to this chapter must be filed

within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A).

Our Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. *Peloquin v. State*, 321 S.C. 468, 469 S.E.2d 606 (1996). A motion for summary judgment may properly be used to raise the defense of statute of limitations. *McDonnell v. Consolidated School District of Aiken*, 315 S.C. 487, 445 S.E.2d 638 (1994). Additionally, section 17-27-70(c) authorizes this Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *See also Leamon*, 363 S.C. at 434, 611 S.E.2d at 495 (summary disposition appropriate when there is no need to develop facts and the applicant is not entitled to relief).

Applicant was convicted on September 9, 2010, and the United States Supreme Court issued its order denying his petition for writ of certiorari was issued on October 7, 2013. This application was filed on April 14, 2020—almost *seven years* after the requisite filing period expired. Therefore, Applicant’s allegations of ineffective assistance of trial counsel must be summarily dismissed for failure to file within the time mandated by the Act.

B. Successive

This Court further finds Applicant’s allegations of ineffective assistance of trial counsel based on failure to obtain a certified Chinese interpreter and failure to object to the alleged hearsay testimony of Investigator Young must be summarily dismissed because these exact issues were raised in Applicant’s previous PCR application. Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could

not have been earlier raised in a previous application. *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981); *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can indicate a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. *See Aice v. State*, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991 ("[Applicant] has filed an original PCR application, and has been allowed to seek review of the ruling against him. We refuse to grant his request for a second chance, and again we do so in order to effectuate the purposes of the Act and rules."). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." *Id.* at 450, 409 S.E.2d at 394. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. *Id.* Applicant bears the burden of showing the allegations could not have been previously raised. *Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980).

Applicant's current allegations of ineffective assistance of trial counsel were raised in the proceeding based on Applicant's prior application for post-conviction relief; thus, these allegations are successive and barred under S.C. Code Ann. § 17-27-90. Therefore, Applicant's allegations pertaining to trial counsel must be summarily dismissed as successive to Applicant's previous PCR

action.

C. Res Judicata

This Court finds Applicant's allegations of ineffective assistance of trial counsel based on failure to obtain a certified Chinese interpreter and failure to object to the alleged hearsay testimony of Investigator Young are similarly barred by the doctrine of *res judicata*. *Res judicata* prohibits subsequent actions by the same parties on the same issues. *Bell v. Bennett*, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. *Foran v. USAA Casualty Ins. Co.*, 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that could have been raised in the former action. *Id.*; *see also Foxworth*, 275 S.C. 615, 274 S.E.2d 415.

In *Foxworth v. State*, the appellants—Myron Foxworth and Gary Wilson—were convicted of armed robbery and sentenced to twenty-two years imprisonment. Both men appealed their convictions, which were affirmed and their appeals dismissed. *Id.* at 616, 274 S.E.2d at 415. They then filed *pro se* petitions for writs of habeas corpus relief in the South Carolina Federal District Court, without exhausting their state PCR remedies. The District Court considered “the trial record and the numerous allegations raised in the petitions ... and [it] dismissed [the petitions] on the merits.” *Id.* Both men then filed *pro se* PCR applications, but the PCR judge found their applications were without merit. He further found that *res judicata* barred claims raised in the applications, as well as those that *could have* been raised. *Id.* at 616-17, 274 S.E.2d at 415-16 (emphasis added). Our Supreme Court agreed. Relying upon section 17-27-90 and its prior decisions construing that statute, the Court held:

The language of Section 17-27-90 is not restricted to State proceedings but rather refers to “any other proceeding” where relief might be sought prior to the submission of a subsequent application. We, therefore, extend the reasoning espoused in *Land v. State*,

supra, to the situation where, as here, an application in the State court follows a federal habeas corpus adjudication. The burden is on the applicant to prove that the alleged grounds for relief could not have been raised in federal court.

Id. at 618, 274 S.E.2d at 416.

Applicant had a full opportunity to litigate all of his allegations of ineffective assistance of trial counsel in his prior action. The finality of the previous court rulings should be respected, and this Court must summarily dismiss these allegations as barred by the principles of *res judicata*.

D. Failure to State a Claim

This Court finds Applicant's contention he received ineffective assistance of appellate counsel on his prior post-conviction relief action is not a cognizable ground for relief, regardless of the results of his co-defendant's post-conviction relief action.² As an initial matter, there is no constitutional right to appointed counsel for collateral review of a conviction. *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *see also Coleman v. Thompson*, 501 U.S. 722 (1991) (finding that the Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions). Once a post-conviction relief applicant obtains a complete adjudication on the merits of his original application, including an appeal, he may not make successive applications based on ineffective assistance of post-conviction relief counsel. *Aice*, 305 S.C. 448, 409 S.E.2d 392.

The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). *Austin* recognizes a general exception to this rule where prior post-conviction relief counsel fails to appeal the denial of the application. *Id.* *Austin* "is limited to its particular factual situation" and is only

² The State's appeal of co-defendant Bryan Phillips' post-conviction relief action is currently pending. *See Bryan J. Phillips v. State*, Appellate Case No. 2020-000568.

applicable in limited circumstances to correct procedural defects where an applicant is denied his “one full bite at the apple.” *Id.*; *Aice*, 305 S.C. at 452, 409 S.E.2d at 394.

Moreover, the United States Supreme Court’s opinion in *Martinez v. Ryan*, 566 U.S. 1 (2012), held that “[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a *federal habeas court* from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.” Our Supreme Court has held that “*Martinez* is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions.” *Kelly v. State*, 404 S.C. 365, 365, 745 S.E.2d 377, 377 (2013). Nor does *Martinez* “afford [PCR applicants] the right to file a successive PCR application by merely alleging ineffective assistance of prior PCR counsel.” *Robertson v. State*, 418 S.C. 505, 516, 795 S.E.2d 29, 34 (2016) (allowing a successive PCR application in the narrow situation where initial PCR counsel was not qualified to represent a capital PCR applicant in violation of S.C. Code Ann. § 17-27-160(B)).

Here, Applicant received a hearing in his first post-conviction relief action and timely appealed to the South Carolina Supreme Court therefrom. Following the filing of the State’s return to the petition for a writ of certiorari, the Court carefully considered the record as required by law. The Court, upon review of the decision of a lower court in a post-conviction relief action, has the power to set aside procedural bars based on issue preservation and remand for further proceedings where dismissal would be fundamentally contrary to the interests of justice. *See, e.g., Simmons v. State*, 416 S.C. 584, 788 S.E.2d 220 (2016).

It is clear Applicant enjoyed a complete adjudication on the merits of his original application—“one full bite at the apple.” Applicant’s complaint that appellate counsel should have

raised every issue ruled on by the PCR court is meritless. *See Jones v. Barnes*, 463 U.S. 745 (1983) (“[An] indigent defendant has [no] constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points.”). Therefore, Applicant’s allegations of ineffective assistance of post-conviction relief appellate counsel do not fall within any exception to the rule barring such claims, and this Court must dismiss the claim for failing to state a cognizable claim upon which relief can be based.

1. Conflict of interest

The Rules of Professional Conduct, whose purpose is to regulate and guide the legal profession in ethical conduct, do not have any bearing on assessing a claim of ineffective assistance of counsel 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.”).

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); *Fuller v. State*, 347 S.C. 630, 557 S.E.2d 664 (2001). Until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for a claim of ineffective assistance of counsel arising from multiple representation. *Langford v. State*, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993). “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). Once an actual conflict of interest is

shown, applicant does not have to demonstrate prejudice. *Thomas v. State*, 346 S.C. 140, 145, 551 S.E.2d 254, 256-57 (2001). Additionally, where defendant waives *potential* conflict, once actual conflict arises, counsel must withdraw from representing one or both clients or acquire another waiver covering the specific conflict. *Id.*

Applicant first contends DuRant had a conflict of interest solely because she represented Applicant's co-defendant on his direct appeal. Notwithstanding the fact that Applicant never raised this issue during his PCR appeal, no conflict existed because Applicant and Phillips did not have conflicting interests on direct appeal or otherwise. In fact, the Supreme Court consolidated Applicant's direct appeal with Phillips' because the cases involved identical issues and interests. DuRant therefore *never* represented interests adverse to Applicant's as a result of her representation of Phillips. *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); *cf. Mickens v. Taylor*, 240 F.3d 348, 355 (4th Cir. 2001) (To establish ineffective assistance of counsel on conflict of interest grounds, a petitioner must establish that (1) his attorney labored under an actual conflict of interest that (2) adversely affected his lawyer's performance.) (citing *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980)).

Applicant further contends DuRant had a conflict of interest because of his claims of ineffective assistance of appellate counsel against Franklin-Best in his PCR action, which were not pursued on appeal. DuRant and Franklin-Best were both employed by SCCID during their respective representations of Applicant, although Franklin-Best left SCCID several years before Applicant's PCR appeal. Nevertheless, Applicant has failed to present any evidence that an actual conflict of interest existed as a result of DuRant's representation.³

³ It is questionable whether the allegations against Franklin-Best would have even been preserved on appeal, given Applicant's failure to present the testimony of Franklin-Best at the evidentiary hearing or produce

Accordingly, Applicant's allegations of ineffective assistance of appellate PCR counsel must be summarily dismissed.

E. Frustration of Finality of Convictions

As a final matter, this Court would note that both the United States Supreme Court and the South Carolina Supreme Court have emphasized the necessity for finality of litigation in criminal cases. The Court in *Aice* explained that:

Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. At some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice. *See Butler v. State*, 397 S.E.2d 87 (S.C.1990). **We can envision successive PCR applications filed for the purpose of delaying a just execution in a capital case, as well as other abuses of the reviewing system *Aice* urges that we establish.** For these reasons, we hold the contention that prior PCR counsel was ineffective is not per se a "sufficient reason" allowing for a successive PCR application under § 17-27-90. This Court has implied such a holding in the past. *See Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980) (applicant pointed to his attorney's "inadequate" performance; held not a "sufficient reason" warranting a successive application).

Aice, 305 S.C. at 451, 409 S.E.2d at 394 (emphasis added).

The United States Supreme Court has explained that "the principle of finality ... is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect." *Teague v. Lane*, 489 U.S. 288, 309 (1989). In his concurring and dissenting opinion in *Mackey v. United States*, 401 U.S. 667, 691 (1971), Justice Harlan wrote:

Finality in the criminal law is an end which must always be kept in plain view. . . . At some point, the criminal process, if it is to function at all, must turn its attention from whether a man ought properly to be incarcerated to how he is to be treated once convicted. If law, criminal or otherwise, is worth having and enforcing, it must at some

any evidence aside from mere speculation that the outcome of his direct appeal would have been different had a reply brief been filed.

time provide a definitive answer to the question litigants present or else it never provides an answer at all. Surely it is an unpleasant task to strip a man of his freedom and subject him to institutional restraints. But this does not mean that in so doing, we should always be halting or tentative. No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation.

Mackey, 401 U.S. at 691 (Harlan, J., concurring in judgments in part and dissenting in part). Seven years after *Mackey*, the South Carolina Supreme Court quoted Justice Harlan's Opinion with approval in *Anderson v. Leeke*, 271 S.C. 435, 441-42, 248 S.E.2d 120, 123 (1978). Applicant's attempt to litigate his successive and time-barred application is contrary to the recognized need for finality of litigation.

IV. CONCLUSION

Pursuant to S.C. Code Ann. § 17-27-70(b), this Court intends to dismiss this application with prejudice unless Applicant provides specific reasons, factual or legal, why the application should not be dismissed in its entirety. Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final. Applicant shall file any reasons he may have with the Edgefield County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Lillian L. Meadows, Esquire
Post-Conviction Relief Division -- 11th Circuit
Post Office Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Edgefield County Clerk of Court and opposing counsel within twenty (20) days, and this Court

will not consider any issues raised in his response if not so timely filed and served.⁴

AND IT IS SO ORDERED this 28 day of JULY, 2020.


WALTON J. MCLEOD, IV
Chief Administrative Judge
Eleventh Judicial Circuit

Lexington, South Carolina

⁴ Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file a response to this Order. See Rule 11, SCRCP.

STATE OF SOUTH CAROLINA
COUNTY OF EDGEFIELD

K.C. Langford, SCDC #294500,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

Case No. 2020-CP-19-0091

Certificate of Service

1. Undersigned is counsel of record for the Respondent in the above-captioned action.
2. Pursuant to the South Carolina Supreme Court's Order "RE: Operation of the Trial Courts During the Coronavirus Emergency" (Appellate Case No. 2020-000447), dated April 3, 2020), "a lawyer admitted to practice law in this state may serve a document on another lawyer admitted to practice law in this state using the lawyer's primary email address listed in the Attorney Information System (AIS)."
3. Undersigned has served a filed copy of the **Conditional Order of Dismissal** in the above-captioned matter on opposing counsel by emailing a copy to the email address as listed in the AIS:

E. Charles Grose, Jr., Esquire
charles@groselawfirm.com

DATED this 9th day of September, 2020.

s/LillianMeadows
LILLIAN L. MEADOWS
Assistant Attorney General

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
LillyMeadows@scag.gov

The Grose Law Firm, LLC
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Web: GroseLawFirm.com

September 18, 2020

The Honorable Charles L. Reel
Clerk of Court, Edgefield County
P.O. Box 34
Edgefield, SC 29824

Re: *K.C. Langford v. State of South Carolina*
Case Number 2020-CP-19-00091

Dear Mr. Reel:

Enclosed for filing, please find Mr. Langford's Objections to Conditional Order of Dismissal and Request for this Court to Convene a Hearing on the State's Motion to Dismiss, along with a certificate of service. Because this action seeks post-conviction relief, I understand there is not a filing fee and electronic filing is not applicable.

By copy of this letter to the Honorable Walton J. McLeod, IV, and Ms. Meadows, I am providing a copy of this pleading to the Court and serving the State of South Carolina.

Thank you for your attention to this matter. Please let me know if you have any questions or require additional information.

With kindest regards, I am

Yours very truly,

s/E. Charles Grose, Jr.
E. Charles Grose, Jr.

cc: The Honorable Walton J. McLeod, IV (via Email)
Mr. K.C. Langford (via US Mail)
Lillian Loch Meadows, Esquire (via Email)

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
COUNTY OF EDGEFIELD	)	
	)	Case No. 2020-CP-19-00091
K.C. Langford, SCDC# 294500,	)	
Applicant,	)	
	)	Objections to Conditional Order of Dismissal
vs.	)	and Request for this Court to Convene a
	)	Hearing on the State's Motion to Dismiss
	)	
State of South Carolina,	)	
Respondent.	)	
_____	)	

To: The Honorable Walton J. McLeod, IV, Chief Administrative Judge, Eleventh Judicial Circuit

K.C. Langford objects to this Court's conditional order of dismissal, dated July 28, 2020 and filed on September 4, 2020, announcing the Court's intent to dismiss with prejudice his application for post-conviction relief ("PCR"). Undersigned counsel received notice of this order by email from the Attorney General's Office on August 31, 2020 and received filed copies of this order from the Clerk of Court for Edgefield County, postmarked on September 4, 2020, and by email from the Attorney General's office on September 9, 2020.

Mr. Langford additionally requests this Court convene a hearing on the State's motion to dismiss.

A. Objections to the Procedure Followed by the Court.

As a threshold matter, Mr. Langford objects to the procedure followed by this Court for the following reasons.

1) The procedure followed by the Court risks denying Mr. Langford an opportunity to have his PCR claims adjudicated by a judicial officer. "S.C. Code Ann. §17-27-80 (1976), requires the PCR court to 'make specific findings of fact, and state expressly its conclusions of law, relating

to each issue presented.”” *McCray v. State*, 305 S.C. 329, 330, 408 S.E.2d 241, 241 (1991). *See also Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992). This Court did not do that, but rather delegated that responsibility to the Attorney General’s Office. This Court signed the proposed conditional order of dismissal, drafted by the Attorney General’s Office, without making a single change. Significantly, the conditional order of dismissal is identical to the State’s Return and Motion to Dismiss, with the exceptions of the opening paragraph, conclusion, and changing the heading of Section III from “Motion to Dismiss” to “Findings of Fact & Conclusions of Law.” Addressing section 17-27-80 in the context of a capital post-conviction relief case, our Supreme Court “strongly encourage[d] PCR judges to draft their own findings of fact and conclusions of law.” *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004). Section 17-27-80, however, makes no distinction between capital and non-capital cases.¹

2) Delegating this judicial responsibility to the Attorney General, and executive officer, violates the Separation of Powers. S.C. Const. art. I, § 8; *State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012).

3) In South Carolina, there is no statute or rule that authorizes the Court to issue a conditional order of dismissal. Such a procedure deprives a litigant of notice and opportunity to

¹ Other PCR applications are raising this issue. The petition for a writ of *certiorari* in *Stephen Corey Bryant v. State*, S. C. Supreme Court Appellate Case No. 2019-000610, a capital post-conviction relief case, raises the following issue:

Should this Court require post-conviction relief judges to draft the final orders in PCR cases in order to ensure the findings of fact and conclusions of law, required by S.C. Code Ann. §17-27-80, are those of the court, rather than an advocate, and to preserve the separation of powers between the judicial branch and executive branch as required by S.C. Const. Art. I, §8?

be heard on the State’s motion to dismiss and, therefore, violates due process. U.C. Const. Am. XIV; S.C. Const. Art. I, § 3.

B. Specific Objection to the Conditional Order of Dismissal.

K.C. Langford filed his PCR application on April 14, 2020 and amended it on April 30, 2020. The State served its Return and Motion to Dismiss on July 16, 2020. This Court signed a conditional order of dismissal on July 28, 2020. The conditional order of dismissal dismisses Mr. Langford’s PCR application as outside the statute of limitations (pp. 10-11), successive (pp. 11-13), barred by the doctrine of res judicata (pp. 13-14), for failure to state a claim (pp. 14-18), and frustration of finality of convictions (pp. 18-19). For the reasons set forth below, this Court should convene a hearing on the State’s motion to dismiss, vacate the conditional order of dismissal, and schedule this matter for an evidentiary hearing.

1. The Conditional Order of Dismissal uses an improper standard for a motion to dismiss.

The conditional order of dismissal applies an improper standard for a motion to dismiss by viewing the evidence in a light most favorable to the State, which is the moving party, and entreating inferences favorable to the State.

PCR proceedings are governed by the South Carolina Rules of Civil Procedure. *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005).² To that end, Rule 12(b)(6), SCRCPP, allows the defendant to move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action. *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). The inquiry on such a motion is restricted; “the trial court must base its ruling solely on allegations set forth in

² See also S.C. Code Ann. § 17-27-80 (“All rules and statutes applicable in civil proceedings are available to the parties [in a PCR action]”); Rule 71.1, SCRCPP (“The South Carolina Rules of Civil Procedure shall apply to the extent that they are not inconsistent with the [Uniform Post-Conviction Procedure] Act.”).

the complaint.” *Id.* “If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on *any theory*, then the grant of a motion to dismiss for failure to state a claim is improper.” *Id.* (citing *Baird v. Charleston Cnty.*, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999)) (emphasis added).

The Supreme Court of South Carolina has expressly recognized the importance and propriety of applying these basic Rule 12(b)(6) principles in the context of a motion to summarily dismiss a PCR application. In *Leamon v. State*, the Supreme Court noted that “[s]ummary dismissal of a PCR application without a hearing is appropriate only when (1) it is apparent *on the face of the application* that there is no need for a hearing to develop any facts and (2) the applicant is not entitled to relief.” 363 S.C. at 434, 611 S.E.2d at 495 (citing S.C. Code Ann. §§ 17-27-70(b), (c)) (emphasis added). “When considering the State’s motion for summary dismissal of an application, where no evidentiary hearing has been held, the circuit court must assume facts presented by an applicant are true and view those facts in the light most favorable to the applicant.” *Id.*

As a general rule, “novel questions of law should not ordinarily be resolved on a Rule 12(b)(6) motion.” *Chestnut v. AVX Corp.*, 413 S.C. 224, 227, 776 S.E.2d 82, 84 (2015). Similarly, “an affirmative defense ordinarily may not be asserted in a motion to dismiss under Rule 12(b)(6) unless the allegations of the complaint demonstrate the existence of the affirmative defense.” *Spence*, 368 S.C. at 123, 628 S.E.2d 869 at 878 (citations omitted). Despite these well-established legal principles, the State has asked this Court to summarily dismiss an arguably novel question of law and find that Mr. Lanfords’s PCR Application is barred *as a matter of law* by a number of affirmative defenses. This Court should decline the State’s invitation to eschew fundamental rules of civil procedure and should allow Mr. Langford to gather and present evidence on the well-pled

allegations of his PCR Application. This Court, accordingly, should withdraw the conditional order of dismissal and allow this case to proceed.

2. Mr. Langford was entitled to conflict-free counsel during the appeal of the dismissal of his prior PCR application, and our State’s post-conviction procedures allow successive PCR applications, outside the statute of limitations, when the State abridges the right to conflict-free counsel in a PCR case. Mr. Langford, accordingly, states a cognizable claim for relief.

In most PCR cases, our Supreme Court “refuse[s] to excuse the pleading and issue-preservation requirements that apply in all civil cases.” *Mangal v. State*, 421 S.C. 85, 97, 805 S.E.2d 568, 574 (2017). Our Supreme Court does not relax the procedural requirements on the grounds that initial PCR counsel was ineffective. *Aice v. State*, 305 S.C. 448, 488, 409 S.E.2d 392, 393 (1991). Nevertheless, “*Aice* acknowledged that there may be ‘unique’ circumstances, where a PCR counsel’s assistance could be challenged in a successive application.” *Robertson v. State*, 418 S.C. 505, 514, 795 S.E.2d 29, 33 (2016) (quoting *Aice*, 305 at 451, 409 S.E.2d at 394). S.C. Code Ann. § 17-27-90 grants an applicant the opportunity to “point to a ‘sufficient reason’ why the new grounds for relief he asserts were not raised, or were not raised properly.” *Aice*, 305 S.C. at 450, 409 S.E.2d at 394. *Aice* recognized that our state’s PCR procedures “contemplate an adjudication on the merits of the original petition, one bite at the apple as it were.” 305 S.C. at 452, 409 S.E.2d at 395 (quoting *Gamble v. State*, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989)).

Three opinions from our Supreme Court are instructive on what constitutes “sufficient reasons” to allow a successive PCR application for Mr. Langford. First, in *Carter v. State*, 293 S.C. 528, 362 S.E.2d 20 (1987), Carter was represented at the PCR hearing by a member of the same law firm as the lawyer that had represented him during his jury trial. Our Supreme Court held, “Absent a showing that the applicant was specifically advised of the hazards of being represented by trial counsel at the post-conviction hearing and that the applicant consented to such

an arrangement, a successive post-conviction application, alleging ineffective assistance of trial counsel, should not be barred.” *Id.* 293 at 530, 362 S.E.2d at 21. Second, in *Odom v. State*, our Supreme Court held, “Odom never received a complete ‘bite at the apple’ because both of his PCR applications were summarily dismissed before he was appointed legal counsel.” 337 S.C. 256, 262, 523 S.E.2d 753, 756 (1999). Third, in *Robertson*, our Supreme Court remanded for a hearing to determine whether Robertson’s PCR counsel met the requirements to serve as counsel in a capital PCR case pursuant to S.C. Code Ann. § 17-27-160. Thus, our Supreme Court holds no counsel, conflicted counsel, and unqualified counsel to be “sufficient reason” to allow a successive PCR application. Assistance of counsel, after all, is the cornerstone of our state’s PCR procedure. Rule 71.1, SCRPC provides:

If, after the State has filed its return, the application presents questions of law or fact which will require a hearing, the court shall promptly appoint counsel to assist the applicant if he is indigent. Counsel shall be given a reasonable time to confer with the applicant. Counsel shall insure that all available grounds for relief are included in the application and shall amend the application if necessary.

And see S.C. Code Ann. § 17-27-90 (providing, “All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application”). Our Supreme Court, therefore, distinguishes cases where the applicant had no counsel, conflicted counsel, or unqualified counsel, such as in *Carter*, *Odem*, and *Robertson*, from cases where the applicant had ineffective PCR counsel, such as in *Aice* and *Mangal*. In the former category, the applicant did not get a “bite at the apple” with assistance of counsel. In the latter category, the applicant got opportunity to get a “bite at the apple” with the assistance of counsel.³

³ An applicant receiving ineffective of PCR counsel still has an opportunity to seek review of “substantial claims” in a federal petition for writ of *habeas corpus* pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012). *See Mangal, Robertson, and Kelly v. State*, 404 S.C. 365, 365, 745 S.E.2d 377 (2013).

In the First Amended Application for Post-Conviction Relief, ¶ 14, Mr. Langford alleges an exception to the statute of limitations and the rule prohibiting successive PCR applications:

The grounds set forth in paragraphs 10(a) and 11(a) were included in Mr. Langford's prior application for post-conviction relief and addressed in the order of dismissal. Appellate counsel for Mr. Langford abandoned these two issues on appeal. This Court can consider these issues because of the conflict of interest of appellate counsel during the appeal of the prior post-conviction relief case. *Carter v. State*, 293 S.C. 528, 530, 362 S.E.2d 20, 21 (1987) ("Absent a showing that the applicant was specifically advised of the hazards of being represented by trial counsel at the post-conviction hearing and that the applicant consented to such an arrangement, a successive post-conviction application, alleging ineffective assistance of trial counsel, should not be barred.").

Our Supreme Court consistently holds that a PCR applicant's right to one full bite at the apple includes the right to conflict-free representation. As seen, in *Carter*, our Supreme Court held:

When an applicant is represented on post-conviction relief by his trial counsel, there is no waiver of the issue of ineffective assistance of counsel. *See Commonwealth v. Via*, 455 Pa. 373, 316 A.2d 895 (1974). Absent a showing that the applicant was specifically advised of the hazards of being represented by trial counsel at the post-conviction hearing and that the applicant consented to such an arrangement, a successive post-conviction application, alleging ineffective assistance of trial counsel, should not be barred.

293 S.C. at 530, 362 S.E.2d at 21. *Via* observed, "The law will not assume that counsel has advised his client of his inadequacies or those of his associates." 455 Pa. at 377, 316 A.2d at 898. There is no reason to think that our Supreme Court would prohibit conflicted counsel in the circuit court and allow it in the appellate courts. By citing *Carter*, Mr. Langford, accordingly, states a cognizable claim for relief. The conditional order of dismissal does not even address *Carter*, even though Mr. Langford cited that case in his PCR application. To the extent that conflicted appellate counsel might be viewed as a novel claim in South Carolina, summary dismissal is not an appropriate remedy. *Chestnut, supra*. This Court, accordingly, should withdraw the conditional order of dismissal and allow this case to proceed.

3. The doctrine of res judicata and state policy regarding frustration of finality of convictions are subservient to the public policy that allows a person one bite at the PCR apple with conflict-free counsel.

As seen, the conditional order of dismissal does not even address *Carter*, even though Mr. Langford cited that case in his PCR application. Nor does the conditional order of dismissal cite any cases holding the doctrine of res judicata and state policy regarding frustration of finality of convictions trump the right to one bite at the PCR apple with conflict-free counsel. Nor could it because such a ruling is contrary to *Carter*, *Odem*, *Robertson* and the other cases cited in this pleading. This Court, accordingly, should withdraw the conditional order of dismissal and allow this case to proceed.

C. Conclusion.

For the foregoing reasons, this Court should convene a hearing on the State's motion to dismiss, vacate the conditional order of dismissal, and schedule this matter for an evidentiary hearing.

Respectfully Submitted,

By s/E. Charles Grose, Jr.

E. Charles Grose, Jr.
S.C. Bar Number 66063
The Grose Law Firm, LLC
404 Main Street
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(864) 538-4466
(864) 538-4405 (fax)
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Attorney for K.C. Langford

September 18, 2020
Greenwood, South Carolina

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
COUNTY OF EDGEFIELD	)	
	)	Case No. 2020-CP-19-00091
K.C. Langford, SCDC# 294500,	)	
Applicant,	)	
	)	
vs.	)	
	)	
State of South Carolina,	)	
Respondent.	)	
_____	)	

I certify that I have served a copy of this pleading on the State of South Carolina, pursuant to South Carolina Supreme Court Order No. 2020-04-22-01, Section (c)(13), by emailing at copy to counsel, at their AIS email address, as reflected below:

Lillian Loch Meadows, Esquire
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211
lillymeadows@scag.gov

By s/E. Charles Grose, Jr.

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466

September 18, 2020
Greenwood, South Carolina

EDGEFIELD COUNTY
CLERK OF COURT
THE STATE OF SOUTH CAROLINA REEL)
COUNTY OF EDGEFIELD)
200 SEP 28 PM 12:29)
K.C. Langford, SCDC# 294500,)
Applicant,)
vs.)
State of South Carolina,)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

Case No. 2020-CP-19-00091

**Objections to Conditional Order of Dismissal
and Request for this Court to Convene a
Hearing on the State's Motion to Dismiss**

To: The Honorable Walton J. McLeod, IV, Chief Administrative Judge, Eleventh Judicial Circuit

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A. Objections to the Procedure Followed by the Court.

As a threshold matter, Mr. Langford objects to the procedure followed by this Court for the following reasons.

1) The procedure followed by the Court risks denying Mr. Langford an opportunity to have his PCR claims adjudicated by a judicial officer. "S.C. Code Ann. §17-27-80 (1976), requires the PCR court to 'make specific findings of fact, and state expressly its conclusions of law, relating

to each issue presented.” *McCray v. State*, 305 S.C. 329, 330, 408 S.E.2d 241, 241 (1991). *See also Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992). This Court did not do that, but rather delegated that responsibility to the Attorney General’s Office. This Court signed the proposed conditional order of dismissal, drafted by the Attorney General’s Office, without making a single change. Significantly, the conditional order of dismissal is identical to the State’s Return and Motion to Dismiss, with the exceptions of the opening paragraph, conclusion, and changing the heading of Section III from “Motion to Dismiss” to “Findings of Fact & Conclusions of Law.” Addressing section 17-27-80 in the context of a capital post-conviction relief case, our Supreme Court “strongly encourage[d] PCR judges to draft their own findings of fact and conclusions of law.” *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004). Section 17-27-80, however, makes no distinction between capital and non-capital cases.¹

2) Delegating this judicial responsibility to the Attorney General, and executive officer, violates the Separation of Powers. S.C. Const. art. I, § 8; *State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012).

3) In South Carolina, there is no statute or rule that authorizes the Court to issue a conditional order of dismissal. Such a procedure deprives a litigant of notice and opportunity to

¹ Other PCR applications are raising this issue. The petition for a writ of *certiorari* in *Stephen Corey Bryant v. State*, S. C. Supreme Court Appellate Case No. 2019-000610, a capital post-conviction relief case, raises the following issue:

Should this Court require post-conviction relief judges to draft the final orders in PCR cases in order to ensure the findings of fact and conclusions of law, required by S.C. Code Ann. §17-27-80, are those of the court, rather than an advocate, and to preserve the separation of powers between the judicial branch and executive branch as required by S.C. Const. Art. I, §8?

be heard on the State's motion to dismiss and, therefore, violates due process. U.C. Const. Am. XIV; S.C. Const. Art. I, § 3.

B. Specific Objection to the Conditional Order of Dismissal.

K.C. Langford filed his PCR application on April 14, 2020 and amended it on April 30, 2020. The State served its Return and Motion to Dismiss on July 16, 2020. This Court signed a conditional order of dismissal on July 28, 2020. The conditional order of dismissal dismisses Mr. Langford's PCR application as outside the statute of limitations (pp. 10-11), successive (pp. 11-13), barred by the doctrine of res judicata (pp. 13-14), for failure to state a claim (pp. 14-18), and frustration of finality of convictions (pp. 18-19). For the reasons set forth below, this Court should convene a hearing on the State's motion to dismiss, vacate the conditional order of dismissal, and schedule this matter for an evidentiary hearing.

1. The Conditional Order of Dismissal uses an improper standard for a motion to dismiss.

The conditional order of dismissal applies an improper standard for a motion to dismiss by viewing the evidence in a light most favorable to the State, which is the moving party, and entreating inferences favorable to the State.

PCR proceedings are governed by the South Carolina Rules of Civil Procedure. *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005).² To that end, Rule 12(b)(6), SCRCP, allows the defendant to move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action. *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). The inquiry on such a motion is restricted; "the trial court must base its ruling solely on allegations set forth in

² See also S.C. Code Ann. § 17-27-80 ("All rules and statutes applicable in civil proceedings are available to the parties [in a PCR action]"); Rule 71.1, SCRCP ("The South Carolina Rules of Civil Procedure shall apply to the extent that they are not inconsistent with the [Uniform Post-Conviction Procedure] Act.").

the complaint.” *Id.* “If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on *any theory*, then the grant of a motion to dismiss for failure to state a claim is improper.” *Id.* (citing *Baird v. Charleston Cnty.*, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999)) (emphasis added).

The Supreme Court of South Carolina has expressly recognized the importance and propriety of applying these basic Rule 12(b)(6) principles in the context of a motion to summarily dismiss a PCR application. In *Leamon v. State*, the Supreme Court noted that “[s]ummary dismissal of a PCR application without a hearing is appropriate only when (1) it is apparent *on the face of the application* that there is no need for a hearing to develop any facts and (2) the applicant is not entitled to relief.” 363 S.C. at 434, 611 S.E.2d at 495 (citing S.C. Code Ann. §§ 17-27-70(b), (c)) (emphasis added). “When considering the State’s motion for summary dismissal of an application, where no evidentiary hearing has been held, the circuit court must assume facts presented by an applicant are true and view those facts in the light most favorable to the applicant.” *Id.*

As a general rule, “novel questions of law should not ordinarily be resolved on a Rule 12(b)(6) motion.” *Chestnut v. AVX Corp.*, 413 S.C. 224, 227, 776 S.E.2d 82, 84 (2015). Similarly, “an affirmative defense ordinarily may not be asserted in a motion to dismiss under Rule 12(b)(6) unless the allegations of the complaint demonstrate the existence of the affirmative defense.” *Spence*, 368 S.C. at 123, 628 S.E.2d 869 at 878 (citations omitted). Despite these well-established legal principles, the State has asked this Court to summarily dismiss an arguably novel question of law and find that Mr. Lanfords’s PCR Application is barred *as a matter of law* by a number of affirmative defenses. This Court should decline the State’s invitation to eschew fundamental rules of civil procedure and should allow Mr. Langford to gather and present evidence on the well-pled

allegations of his PCR Application. This Court, accordingly, should withdraw the conditional order of dismissal and allow this case to proceed.

- 2. Mr. Langford was entitled to conflict-free counsel during the appeal of the dismissal of his prior PCR application, and our State's post-conviction procedures allow successive PCR applications, outside the statute of limitations, when the State abridges the right to conflict-free counsel in a PCR case. Mr. Langford, accordingly, states a cognizable claim for relief.**

In most PCR cases, our Supreme Court “refuse[s] to excuse the pleading and issue-preservation requirements that apply in all civil cases.” *Mangal v. State*, 421 S.C. 85, 97, 805 S.E.2d 568, 574 (2017). Our Supreme Court does not relax the procedural requirements on the grounds that initial PCR counsel was ineffective. *Aice v. State*, 305 S.C. 448, 488, 409 S.E.2d 392, 393 (1991). Nevertheless, “*Aice* acknowledged that there may be ‘unique’ circumstances, where a PCR counsel’s assistance could be challenged in a successive application.” *Robertson v. State*, 418 S.C. 505, 514, 795 S.E.2d 29, 33 (2016) (quoting *Aice*, 305 at 451, 409 S.E.2d at 394). S.C. Code Ann. § 17-27-90 grants an applicant the opportunity to “point to a ‘sufficient reason’ why the new grounds for relief he asserts were not raised, or were not raised properly.” *Aice*, 305 S.C. at 450, 409 S.E.2d at 394. *Aice* recognized that our state’s PCR procedures “contemplate an adjudication on the merits of the original petition, one bite at the apple as it were.” 305 S.C. at 452, 409 S.E.2d at 395 (quoting *Gamble v. State*, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989)).

Three opinions from our Supreme Court are instructive on what constitutes “sufficient reasons” to allow a successive PCR application for Mr. Langford. First, in *Carter v. State*, 293 S.C. 528, 362 S.E.2d 20 (1987), Carter was represented at the PCR hearing by a member of the same law firm as the lawyer that had represented him during his jury trial. Our Supreme Court held, “Absent a showing that the applicant was specifically advised of the hazards of being represented by trial counsel at the post-conviction hearing and that the applicant consented to such

an arrangement, a successive post-conviction application, alleging ineffective assistance of trial counsel, should not be barred.” *Id.* 293 at 530, 362 S.E.2d at 21. Second, in *Odom v. State*, our Supreme Court held, “Odom never received a complete ‘bite at the apple’ because both of his PCR applications were summarily dismissed before he was appointed legal counsel.” 337 S.C. 256, 262, 523 S.E.2d 753, 756 (1999). Third, in *Robertson*, our Supreme Court remanded for a hearing to determine whether Robertson’s PCR counsel met the requirements to serve as counsel in a capital PCR case pursuant to S.C. Code Ann. § 17-27-160. Thus, our Supreme Court holds no counsel, conflicted counsel, and unqualified counsel to be “sufficient reason” to allow a successive PCR application. Assistance of counsel, after all, is the cornerstone of our state’s PCR procedure. Rule 71.1, SCRCP provides:

If, after the State has filed its return, the application presents questions of law or fact which will require a hearing, the court shall promptly appoint counsel to assist the applicant if he is indigent. Counsel shall be given a reasonable time to confer with the applicant. Counsel shall insure that all available grounds for relief are included in the application and shall amend the application if necessary.

And see S.C. Code Ann. § 17-27-90 (providing, “All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application”). Our Supreme Court, therefore, distinguishes cases where the applicant had no counsel, conflicted counsel, or unqualified counsel, such as in *Carter*, *Odem*, and *Robertson*, from cases where the applicant had ineffective PCR counsel, such as in *Aice* and *Mangal*. In the former category, the applicant did not get a “bite at the apple” with assistance of counsel. In the latter category, the applicant got opportunity to get a “bite at the apple” with the assistance of counsel.³

³ An applicant receiving ineffective of PCR counsel still has an opportunity to seek review of “substantial claims” in a federal petition for writ of *habeas corpus* pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012). *See Mangal, Robertson, and Kelly v. State*, 404 S.C. 365, 365, 745 S.E.2d 377 (2013).

In the First Amended Application for Post-Conviction Relief, ¶ 14, Mr. Langford alleges an exception to the statute of limitations and the rule prohibiting successive PCR applications:

The grounds set forth in paragraphs 10(a) and 11(a) were included in Mr. Langford's prior application for post-conviction relief and addressed in the order of dismissal. Appellate counsel for Mr. Langford abandoned these two issues on appeal. This Court can consider these issues because of the conflict of interest of appellate counsel during the appeal of the prior post-conviction relief case. *Carter v. State*, 293 S.C. 528, 530, 362 S.E.2d 20, 21 (1987) ("Absent a showing that the applicant was specifically advised of the hazards of being represented by trial counsel at the post-conviction hearing and that the applicant consented to such an arrangement, a successive post-conviction application, alleging ineffective assistance of trial counsel, should not be barred.").

Our Supreme Court consistently holds that a PCR applicant's right to one full bite at the apple includes the right to conflict-free representation. As seen, in *Carter*, our Supreme Court held:

When an applicant is represented on post-conviction relief by his trial counsel, there is no waiver of the issue of ineffective assistance of counsel. *See Commonwealth v. Via*, 455 Pa. 373, 316 A.2d 895 (1974). Absent a showing that the applicant was specifically advised of the hazards of being represented by trial counsel at the post-conviction hearing and that the applicant consented to such an arrangement, a successive post-conviction application, alleging ineffective assistance of trial counsel, should not be barred.

293 S.C. at 530, 362 S.E.2d at 21. *Via* observed, "The law will not assume that counsel has advised his client of his inadequacies or those of his associates." 455 Pa. at 377, 316 A.2d at 898. There is no reason to think that our Supreme Court would prohibit conflicted counsel in the circuit court and allow it in the appellate courts. By citing *Carter*, Mr. Langford, accordingly, states a cognizable claim for relief. The conditional order of dismissal does not even address *Carter*, even though Mr. Langford cited that case in his PCR application. To the extent that conflicted appellate counsel might be viewed as a novel claim in South Carolina, summary dismissal is not an appropriate remedy. *Chestnut, supra*. This Court, accordingly, should withdraw the conditional order of dismissal and allow this case to proceed.

3. The doctrine of res judicata and state policy regarding frustration of finality of convictions are subservient to the public policy that allows a person one bite at the PCR apple with conflict-free counsel.

As seen, the conditional order of dismissal does not even address *Carter*, even though Mr. Langford cited that case in his PCR application. Nor does the conditional order of dismissal cite any cases holding the doctrine of res judicata and state policy regarding frustration of finality of convictions trump the right to one bite at the PCR apple with conflict-free counsel. Nor could it because such a ruling is contrary to *Carter*, *Odem*, *Robertson* and the other cases cited in this pleading. This Court, accordingly, should withdraw the conditional order of dismissal and allow this case to proceed.

C. Conclusion.

For the foregoing reasons, this Court should convene a hearing on the State's motion to dismiss, vacate the conditional order of dismissal, and schedule this matter for an evidentiary hearing.

Respectfully Submitted,

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September 18, 2020
Greenwood, South Carolina

THE STATE OF SOUTH CAROLINA
COUNTY OF EDGEFIELD

K.C. Langford, SCDC# 294500,
Applicant,

vs.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

Case No. 2020-CP-19-00091

2020 SEP 28 PM 12: 29

EDGEFIELD COUNTY
CLERK OF COURT
CHARLES L. REEL

I certify that I have served a copy of this pleading on the State of South Carolina, pursuant to South Carolina Supreme Court Order No. 2020-04-22-01, Section (c)(13), by emailing at copy to counsel, at their AIS email address, as reflected below:

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September 18, 2020
Greenwood, South Carolina

EDGEFIELD COUNTY
CLERK OF COURT
CHARLES L. REEL

STATE OF SOUTH CAROLINA)
COUNTY OF EDGEFIELD)
2020 OCT 13 AM 8:16)

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

K.C. Langford, SCDC #294500,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

Case No. 2020-CP-19-0091

**RESPONSE TO APPLICANT'S
OBJECTIONS TO CONDITIONAL
ORDER OF DISMISSAL**

This matter comes before this 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. 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 Applicant's claims are otherwise without merit. Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a Conditional Order of Dismissal filed September 4, 2020, provisionally denying and dismissing this action, while giving Applicant twenty days from the date of service of said order in which to show why the dismissal should not become final.

On September 18, 2020, Applicant timely served a document entitled "Objections to Conditional Order of Dismissal and Request for this Court to Convene a Hearing on the State's Motion to Dismiss" on the undersigned. The State would respectfully show unto this Court the following in response to Applicant's objections:

A. Procedural Objections

1. Applicant first objects to the routine practice in PCR cases for the prevailing party

to prepare a proposed order and submit it to the presiding judge. As an initial matter, Applicant misrepresents the quoted portion of the Supreme Court's opinion in *Hall* by omitting the second half of the sentence: "Although we strongly encourage PCR judges to draft their own findings of fact and conclusions of law in death penalty cases, **we also acknowledge that in all other cases, it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency.**" *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004).

2. Applicant similarly states that "[s]ection 17-27-80 makes no distinction between capital and non-capital cases" and provides *Bryant v. State*—a capital case—as an example of "other PCR applications raising this issue." *Bryant* is pending appellate review because the PCR court rejected this issue in his initial action. In a successive action, Bryant again raised this issue to the Supreme Court by way of a Rule 243(c), SCACR explanation after the PCR court summarily dismissed the action. On February 9, 2017, the Court dismissed the appeal, finding Bryant failed to show an arguable basis that the PCR court's dismissal of his successive action was improper.

3. As recently as 2019, our Supreme Court has again recognized that the practice of calling for proposed orders from litigants remains routine, though the "finalization of [the] order is often a collaborative effort." *Fishburne v. State*, 427 S.C. 505, 516, 832 S.E.2d 584, 589 (2019). Our Supreme Court has never required or even suggested that a PCR judge must write his or her orders from scratch, even in capital cases. The process of submitting proposed orders is built into our rules, (see Rule 5(b)(3), SCRCP), and custom, *Hall*, 360 S.C. at 365, 601 S.E.2d at 341. If the PCR judge—after careful consideration—adopts the language offered, that language becomes the Court's order. The judge is free to accept or reject a proposed phrasing or finding as the Court

deems appropriate.¹

4. Applicant next cites the Supreme Court's opinion from his direct appeal, which he contends somehow supports his assertion that the preparation of proposed orders by the Attorney General's Office violates the Separation of Powers. *State v. Langford* dealt with the specific issue of the statutorily delegated duty of the solicitor—codified in section 1–7–330 of the South Carolina Code—to prepare the dockets for general sessions and determine the order in which the cases are called for trial. 400 S.C. 421, 735 S.E.2d 471 (2012). The Court concluded the statute violated the separation of powers because it delegated an inherently judicial function² *exclusively* to a member of the executive branch. *Id.* at 435, 735 S.E.2d at 478. *Langford* is inapplicable to this situation, partially because the preparation of proposed orders is not exclusively delegated to the Attorney General's Office. Rather, the PCR court has the option to request proposed orders from either party.

5. Applicant further objects, stating “there is no statute or rule that authorizes the Court to issue a conditional order of dismissal.” Applicant is correct that the specific term “conditional order of dismissal” does not appear in any of the PCR statutes; however, the issuance of a conditional order and subsequent procedure fully comports with the requirements of section 17–27–70(b).³ See e.g., *Leamon v. State*, 363 S.C. 432, 611 S.E.2d 494 (2005).

¹ Similarly, federal law does not prohibit adoption of a proposed order. See *Jefferson v. Upton*, 560 U.S. 284, 293–94 (2010) (acknowledging prior holdings that “verbatim adoption of findings of fact prepared by prevailing parties” should be treated as findings of the court though recognizing it had “also criticized that practice.”) (citing *Anderson v. Bessemer City*, 470 U.S. 564, 572 (1985)).

² “A court’s power to hear and decide cases ‘carries with it the inherent power to control the order of its business.’” *Langford*, 400 S.C. at 435, 735 S.E.2d at 478 (quoting *Williams v. Bordon’s, Inc.*, 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980)).

³ “When a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings, it may indicate to the parties its intention to dismiss the application and

6. Nor does the summary dismissal procedure violate due process. This Court's conditional order gave Applicant the opportunity to respond within twenty days, clearly giving him notice and the ability to challenge whether the action should be dismissed. Applicant filed objections, which this Court will consider in deciding whether to convene a hearing or dismiss the action entirely. Applicant has not specified how anything about this procedure violates due process, he merely states that it does.

B. Specific Objections to the Conditional Order of Dismissal

1. Applicant contends this Court's applied the improper standard for a motion to dismiss although nothing in the conditional order suggests this Court "viewed the evidence in a light most favorable to the State" in determining whether to summarily dismiss the action. *Cf. Mose v. State*, 420 S.C. 500, 505–06, 803 S.E.2d 718, 720 (2017) ("When considering the State's motion for summary dismissal of an application, where no evidentiary hearing has been held, the PCR judge must assume facts presented by the applicant are true and view those facts in the light most favorable to the applicant."). Nor did the State move to dismiss pursuant to Rule 12(b)(6), SCRPC as Applicant seems to suggest. *See* Rule 71.1, SCRPC ("The South Carolina Rules of Civil Procedure shall apply to the extent that they are not inconsistent with the Act."). Rather, the State moved for summary dismissal and properly followed the procedure under section 17–27–70.

2. As to Applicant's claim he is entitled to proceed with this second PCR, an elementary concept of PCR litigation is that "[a]ll grounds for relief available to an applicant . . . must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised . . . may not be the basis for a subsequent application, unless the

its reasons for so doing. The applicant shall be given an opportunity to reply to the proposed dismissal."

court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application." S.C. Code Ann. § 17-27-90 (emphasis added); *Graham v. State* 378 S.C. 1, 3, 661 S.E.2d 337, 338 (2008) ("In order to be entitled to a successive PCR application, the applicant must establish that the grounds raised in the subsequent application could not have been raised in the previous application.").

3. This is not a case where an applicant is even attempting to raise new grounds for relief in a successive PCR action. Here, Applicant is attempting to raise grounds fully litigated and **finally adjudicated** in his initial PCR action. As to the two ineffective assistance of trial claims counsel is attempting to re-raise through this action, the PCR court found the following:

Applicant argues his trial counsel should have objected to the court interpreter not being certified. The record in this case shows his attorney did in fact object, and the Court outlined the specific reasons why it was finding the interpreter qualified. (Record on Appeal p. 64, l. 18 - p. 70, l. 11.)

This Court finds Applicant has failed to meet his burden of proving counsel's performance was deficient or that he was prejudiced thereby and, accordingly, finds this allegation is denied.

*Applicant next argues his counsel should have objected on the basis of hearsay to witness Detective Roosevelt's testimony. The record shows the State did not call Detective Roosevelt; instead, Applicant's co-defendant was the one to call Detective Roosevelt to the stand. (Record on Appeal, p. 297.) Applicant's co-defendant used Detective Roosevelt's testimony to present the jury information about how the investigation ended up focusing on Applicant and his co-defendant. Applicant's co-defendant used Detective Roosevelt's testimony to show an alleged informant who had a pending legal problem called Detective Roosevelt and offered information on Applicant and his co-defendants. (Record on Appeal, pp. 297- 307.) "[A]n out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken." *State v. Brown*, 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994). Thus, Applicant has failed to establish any prejudice in Detective Roosevelt's testimony.*

This Court finds Applicant has failed to meet his burden of proving counsel's performance was deficient or that he was prejudiced thereby and, accordingly, finds this allegation is denied.

4. Notably, these are the only two substantive claims Applicant raises in this action. Applicant states he deserves another “bite at the apple” because his PCR appellate counsel “abandoned issues”—**of ineffective assistance of trial counsel**—“that ultimately resulted in relief” for his co-defendant. It goes without saying that this Court need not follow the precedent of another circuit court judge. Nonetheless, Applicant believes he is entitled to re-litigate these ineffective assistance of trial counsel claims because of an alleged conflict between his appellate counsels.

5. Even assuming there was a conflict of interest, the **only ineffective assistance of appellate counsel claim** raised in Applicant’s initial PCR action—i.e. **the only claim that could have possibly been affected by any possible conflict of interest**—was that Franklin-Best failed to file a reply brief. As discussed above, the remaining issues—and the issues Applicant raises now—relate to trial counsel only. Therefore, should this Court grant Applicant a hearing, this Court should allow Applicant to proceed **only** on the issue of ineffective assistance of appellate counsel and dismiss the previously-litigated claims.

6. Applicant contends this Court should allow his successive PCR action to go forward because he was “entitled to conflict-free counsel during the appeal of his prior PCR application” and that the State “abridge[d] [his] right to conflict-free counsel” in his PCR case. Applicant does not specify how the State is at fault for an alleged internal conflict between its opposing counsels; however, as an initial matter, both the United States and South Carolina Supreme Court have repeatedly held no constitutional right to counsel in collateral review actions exists. *See, e.g., Coleman v. Thompson*, 501 U.S. 722 (1991) (finding that the Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions); *Alice v. State*, 305 S.C. 448, 452, n.2 409 S.E.2d 392, 395 n2. (1991). Similarly, once a PCR applicant

obtains a complete adjudication on the merits of his original application, including an appeal, he may not make successive applications based on ineffective assistance of post-conviction relief counsel. *Id.*, 305 S.C. 448, 409 S.E.2d 392.

7. The State would further note that Applicant offers nothing more—both in his application and objections to the conditional order—than conclusory statements of perceived conflicts of interest without any evidence in the record to support such a conclusions. Typically, “the potential for a multiple representation conflict exists when codefendants are represented by the *same* attorney” at the *same* time. *United States v. Trevino*, 992 F.2d 64, 66 (5th Cir. 1993). Although DuRant represented Phillips in his direct appeal, she was never “asked to serve two masters,” *Langford v. State*, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993), nor did she ever “*actively* represent conflicting interests” by way of her representation of Applicant, in part because Phillips’ direct appeal concluded long before Applicant’s PCR appeal. *Trevino*, 992 F.2d at 66.

8. As discussed in this Court’s conditional order, Applicant and Phillips were tried together, and both claimed they did not participate in the crimes alleged. The Supreme Court consolidated Applicant’s direct appeal with Phillips’ because the cases involved identical issues and interests. DuRant therefore *never* represented interests adverse to Applicant’s as a result of her representation of Phillips. *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).

9. Nor has Applicant presented anything more than a perceived potential conflict of interest between his appellate counsels. As an initial matter, Franklin-Best left the Office of Appellate Defense (OAD) several years before Applicant’s PCR appeal even came across DuRant’s desk. Applicant raised a sole allegation of ineffective assistance of appellate counsel

against Franklin-Best for failure to file a reply brief. A possible explanation DuRant did not raise this issue is because DuRant filed a reply brief on behalf of Bryan Phillips in his direct appeal. Because Applicant's co-defendant did not benefit in any conceivable way from the filing of reply brief, it would have been difficult to show prejudice.

10. Yet Applicant appears to assume some unarticulated "duty" between DuRant and Franklin-Best—simply by virtue of the fact that they were both at some point employed by OAD—may have tended to lead DuRant to disregard her sworn duty of loyalty to her client and choose not to raise a meritorious issue. Surely, it demeans all public defenders to suggest that they presumptively value their personal relationships with colleagues more highly than their duties to their clients. Adoption of this reasoning would, in effect, amount to the creation of a presumption that an appellate defender, because of possible feelings of loyalty or respect toward a fellow appellate defender or simply to avoid offending a colleague, would ignore his or her ethical obligations to a client.

11. That is not to say an actual conflict would not exist if, for example, an applicant raises allegations of ineffective assistance of counsel against another member or partner of his PCR counsel's firm. Unlike attorney-partners in private law firms, public defenders do not have any personal or financial stake in whether an office colleague or co-employee is successful in representing a client. *See Trevino*, 992 F.2d at 66 n.4 ("The 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."). Instead, a public defender's office is comprised of individual attorneys exercising individual judgment in representing their clients.

12. Applicant repeatedly complains that this Court did not address *Carter v. State* in its

conditional order of dismissal. 293 S.C. 528, 362 S.E.2d 20 (1987). The suggestion that the PCR court—or any other court for that matter—must specifically address each case cited in a pleading is unreasonable at best. Nonetheless, the circumstances in *Carter* are nowhere near comparable to Applicant's. Our Supreme Court in that case allowed the applicant to file a successive PCR action because his trial counsel represented him in his initial PCR action—thereby precluding him from raising any claim of ineffective assistance of counsel. *Id.* at 530, 362 S.E.2d at 21. Applicant incorrectly states that Carter was “represented at the PCR hearing by a member of the same law firm that had represented him during his jury trial.” That is simply not the case. *Carter* dealt solely with the rare situation where trial counsel also serves as PCR counsel because “attorneys cannot argue their own ineffectiveness.” *Gray v. Pearson*, 526 F. App'x 331, 334 (4th Cir. 2013)

13. Applicant's comparison of his case to *Odom* and *Robertson* is similarly unconvincing. The applicant in *Odom* was denied a “full bite at the apple” because both of his *pro se* PCR actions were summarily dismissed as untimely before he was appointed counsel.⁴ 337 S.C. 256, 262, 523 S.E.2d 753, 756 (1999). The Court reversed and remanded his second *pro se* PCR action for an evidentiary hearing pursuant to *Austin v. State*, 409 S.E.2d 395 (S.C.1991), to determine whether Odom knowingly and intelligently waived his right to appellate review of his first PCR action. *Id.* at 263, 523 S.E.2d at 756.

⁴ Another caveat in Odom's case was that his initial PCR was dismissed prior the Supreme Court's decision in *Peloquin v. State*, 321 S.C. 468, 469 S.E.2d 606 (1996). In *Peloquin* the Court held that PCR applicants convicted before July 1, 1995, the effective date of S.C. Code Ann. § 17-27-45(A), should be allowed to file an application for PCR within one year after the effective date of the statute. *Id.* at 469, 469 S.E.2d at 606. The Court in *Odom* explained that, had Odom appealed the first PCR order dismissing his application, the Court would have reversed and remanded for an evidentiary hearing pursuant to *Peloquin* because Odom was convicted before July 1, 1995, and he filed his first PCR application before July 1, 1996. *Odom*, 337 S.C. at 259, 523 S.E.2d at 754.

14. In *Robertson*,—a capital PCR action—the applicant was represented in his initial action by two court-appointed attorneys who he later alleged were not statutorily qualified under section 17-27-160(B). 418 S.C. 505, 516–17, 795 S.E.2d 29, 35 (2016). The Court concluded that Robertson’s allegation he was “denied a state-created right to qualified counsel constitute[d] a ‘sufficient reason’ to permit a successive PCR application under section 17-27-90.” *Id.* at 516, 795 S.E.2d at 35. The Court remanded for a hearing to determine whether (1) PCR counsels were no in fact qualified and (2) if not statutorily qualified, whether Robertson was prejudiced by counsel’s lack of qualification pursuant to *Strickland*. *Robertson*, 418 S.C. at 521, 795 S.E.2d at 37.⁵

C. Conclusion

The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (per curiam) (citing *Bell v. Cone*, 535 U.S. 685, 702 (2002); *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986); *Strickland v. Washington*, 466 U.S. 668, 689; *United States v. Cronin*, 466 U.S. 648, 656 (1984)). This action is no more than a blatant attempt to reap the benefit of hindsight because his co-defendant was granted relief on issues which were fully and fairly adjudicated in Applicant’s initial action. Characterizing the alleged conflict of interest between his appellate counsels as a “novel question of law” does not entitle him to re-litigate these claims against trial counsel in a successive application

For the foregoing reasons—and because Applicant not entitled to any more bites at what is left of the apple—this Court should deny Applicant’s motion to convene a hearing and issue a

⁵ Notably, the Court reaffirmed its decision in *Kelly v. State*, 404 S.C. 365, 745 S.E.2d 377 (2013)—holding that *Martinez* did “not afford [Robertson] a right to file a successive PCR application by merely alleging ineffective assistance of prior PCR counsel.” *Robertson*, 418 S.C. at 516, 795 S.E.2d at 34.

final order of dismissal. In the alternative, this Court should convene a hearing **only on the issue of ineffective assistance of appellate counsel for failing to file a reply brief** and dismiss the remaining claims for the reasons set forth in the conditional order of dismissal.

Respectfully submitted,

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October 2, 2020

STATE OF SOUTH CAROLINA
COUNTY OF EDGEFIELD

K.C Langford, SCDC #294500

Applicant,

v.

State of South Carolina

Respondent,

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

Case No.: 2020-CP-19-0091

Certificate of Service

EDGEFIELD COUNTY
CLERK OF COURT
CHARLES L. REEL
2020 OCT 13 AM 8:16

1. Undersigned is counsel of record for Respondent in the above-captioned action.
2. Pursuant to the South Carolina Supreme Court's Order "RE: Operation of the Trial Courts During the Coronavirus Emergency" (Appellate Case No. 2020-000447), dated April 3, 2020), "a lawyer admitted to practice law in this state may serve a document on another lawyer admitted to practice law in this state using the lawyer's primary email address listed in the Attorney Information System (AIS)."
3. Undersigned has served a copy of the **Response to Applicant's Objections to Conditional Order of Dismissal** in the above-captioned matter on opposing counsel by emailing a copy to the email address as listed in the AIS:

E. Charles Grose, Esquire
charles@groselawfirm.com

DATED this 2nd day of October, 2020.

s/LillianMeadows
LILLIAN L. MEADOWS
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF EDGEFIELD	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
	)	
	)	
K.C. Langford, SCDC #294500,	)	Case No. 2020-CP-19-0091
	)	
Applicant,	)	
	)	
v.	)	POST-HEARING BRIEF IN SUPPORT
	)	OF THE STATE’S MOTION TO DISMISS
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	
	)	

This matter comes before this 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. 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 Applicant’s claims are otherwise without merit. Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a Conditional Order of Dismissal filed September 4, 2020, provisionally denying and dismissing this action, while giving Applicant twenty days from the date of service of said order in which to show why the dismissal should not become final.

This Court convened a hearing into the State’s motion to dismiss via WebEx on November 13, 2020, before the Honorable Debra R. McCaslin. Applicant was present at the hearing and represented by E. Charles Grose, Jr., Esquire. Assistant Attorney General Lillian L. Meadows appeared on behalf of the State. Applicant contends he was denied his one full “bite at the apple” based on an alleged conflict of interest regarding Appellate Defender LaNelle DuRant. DuRant

represented Applicant's co-defendant, Bryan Phillips, on direct appeal. She subsequently represented Applicant on appeal from his initial PCR action. The State would respectfully show unto this Court the following on the issue of whether DuRant labored under an actual conflict of interest during her representation of Applicant.

A. Introduction

As an initial matter, the State reasserts its position that this claim is a non-cognizable allegation of ineffective assistance of PCR appellate counsel that should be summarily dismissed. *See, e.g., Coleman v. Thompson*, 501 U.S. 722 (1991) (holding that the Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions); *Aice v. State*, 305 S.C. 448, 452 n.2 409 S.E.2d 392, 295 n.2 (1991); *see also Wainwright v. Torna*, 455 U.S. 586 (1982) (holding that where there is no constitutional right to counsel there can be no deprivation of effective assistance); *cf. Kelly v. State*, 754 S.E.2d 377, 377 (S.C. 2013) (holding *Martinez v. Ryan*, 566 U.S. 1 (2012),¹ is “not applicable to state post-conviction relief actions”) (reaffirmed by *Robertson v. State*, 795 S.E.2d 29, 31 (S.C. 2016)).

Whether DuRant made the “correct choice” in determining which issue to raise in Applicant's PCR appeal is an entirely different question—and again one of ineffective assistance of PCR appellate counsel—than whether her actions were motivated by divided loyalties based on her representation of Phillips on direct appeal. Any further hearing or development of the record inquiring into how DuRant decided which issues to raise in Applicant's PCR appeal and why she did not raise others would be essentially an evidentiary hearing on ineffective assistance of

¹ The State would note that the Supreme Court in *Martinez* explicitly refused to extend its “narrow exception” to “attorney errors in other kinds of proceedings, *including appeals from initial-review collateral proceedings*.” 566 U.S. 1, 16. The Court explained that “the limited nature” of its holding “reflect[ed] the importance of the right to the effective assistance of *trial* counsel,” which is “a bedrock principle in our justice system.” *Id.* at 12, 16.

counsel.

Nor is such a hearing necessary for purposes of determining whether a conflict of interest existed such that this Court should allow Applicant to proceed with this successive PCR action. The fact that Phillips prevailed on the issues DuRant did not raise—which have not yet been reviewed on appeal—is not probative on the conflict of interest issue. Further, any finding of an actual conflict of interest would require this Court to attribute DuRant’s motivation for not raising the Chinese interpreter² and Investigator Young issues to her representation of Phillips.

Applicant offers nothing more than the conclusory statement that “he has the right to conflict-free counsel during the appeal of his prior PCR application.” However, even assuming Applicant’s Sixth Amendment right extends to PCR counsel, the fact that Applicant’s alleged conflict involves one of successive representation on appeal essentially forecloses the possibility of prejudice.

B. Sixth Amendment Conflict of Interest

The Sixth Amendment guarantees criminal defendants the right to effective assistance of counsel, including the right to representation free of conflicts. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). 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. 335, 350 (1980). 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 State v. Gregory*, 364 S.C. 150, 152-53, 612 S.E.2d 449, 450 (2005) (“The mere possibility defense counsel may have a conflict of interest is

² Although not probative on the conflict of interest issue, DuRant likely did not raise the Chinese interpreter issue in Applicant’s PCR appeal because she unsuccessfully raised it on Phillips’ behalf.

insufficient to impugn a criminal conviction.”); *Beets v. Scott*, 65 F.3d 1258, 1268 (5th Cir. 1995) (en banc) (noting that “not every potential conflict, even in multiple representation cases, is an ‘actual’ one for Sixth Amendment purposes”). 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).

C. Successive Representation

Applicant’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 conflict of interest “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”). The United Supreme Court has never specifically addressed successive representation. *See, e.g., Smith v. Hofbauer*, 312 F.3d 809 (6th Cir.2002) (holding in the context of a habeas petition that “*Sullivan* applied only to joint representation and the Supreme Court has yet to extend *Sullivan*’s reach to any other type of conflict.”).

However, the *Mickens* court pointed out that *Sullivan* involved the concurrent representation of multiple defendants by the same attorneys. The Court admonished the courts of appeals for applying *Sullivan* “‘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 *Bees*, 65 F.3d at 1266). 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.); *Gillard*

v. Mitchell, 445 F.3d 883, 891 (6th Cir. 2006); *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).

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. *See e.g., McConico v. State of Ala.*, 919 F.2d 1543, 1546 (11th Cir. 1990) (noting that “it is generally easier to prove actual conflict arising from simultaneous representation than from successive representation”). An actual conflict may nonetheless exist in cases of successive representation where for example, “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.

Here, DuRant never *actively* represented conflicting interests based on her prior representation of Phillips, in part because Phillips’ direct appeal concluded *several years* before Applicant’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)).

Upon further review of the record, the undersigned agrees with Applicant that Phillips raised additional issues on direct appeal. DuRant, on Phillips’ behalf, raised the Chinese interpreter issue and an issue regarding the solicitor’s comment during closing about “Phillips” taking the stand.³ Neither of these issues involve Applicant.

³ It was unclear at the time whether the solicitor was referring to Alvin or Bryan Phillips since Alvin testified for the prosecution.

The crucial point is that, although Applicant and Phillips did not raise identical *issues* on direct appeal, no diverging *interests* arose that could have prejudiced Applicant. 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”).

D. Appeal

Additionally, 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 (6th Cir. 2003) (citations omitted).

In *Harbison v. Bell*, the Sixth Circuit Court of Appeals addressed the issue of whether the defendant’s appellate counsel suffered from a conflict of interest based on his prior representation of a client who was an initial suspect in the murder of which defendant was 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 fact that appellate 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.*

In *Vega v. Johnson*, the defendant alleged he was denied due process because the attorney representing the State on direct appeal had represented the defendant in a previous trial on unrelated charges. 149 F.3d 354, 357–59 (5th Cir. 1998). The Court rejected Applicant'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.") "Once the matter ended, [counsel]'s only duty was to protect confidential information he received in his capacity as attorney." *Id.*

The Court further rejected the defendant's conflict claim based on the following regarding appellate counsel:

Still more divorced from existing precedent is the scenario presented here. **Not only have we never held that a defendant's former attorney may not handle an appeal against him in a subsequent case,** but we would be unlikely to do so without applying a harmless error standard. Unlike the multiple representation standard addressed in *Holloway*,⁴ 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

⁴ 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 ("[W]henver a trial court improperly requires joint representation over timely objection reversal is automatic").

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.”

Id.

Here, Applicant’s situation with DuRant is even less likely to result in an actual conflict—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. Nor has Applicant identified any instance in the record that suggest an actual conflict or impairment of his interests based on any continuing duty DuRant may have had to Phillips.

E. Rules of Professional Conduct

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.”).

Applicant is correct that our Supreme Court often cites to our ethics rules in its decisions. There is obviously overlap in some cases involving both ethics rules violations and constitutional violations based on ineffective assistance of counsel or prosecutorial misconduct. However, any alleged ethics rules violation on DuRant’s part is irrelevant for purposes of determining whether

this Court should summarily dismiss this action. *Cf. Perillo v. Johnson*, 205 F.3d 775, 798 (5th Cir. 2000) (explaining 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.”) (citing *Strickland*, 466 U.S. at 688).

F. *Carter v. State*, 293 S.C. 528, 362 S.E.2d 20 (1987)

Finally, the State submits our Supreme Court’s decision in *Carter* is inapplicable. Carter unknowingly waived allegations of ineffective assistance of trial counsel because he was represented by the same attorney in his trial and direct appeal. The Court therefore allowed Applicant to proceed on the merits in a successive PCR action raising ineffective assistance of trial counsel claims.

In other words, *Carter* dealt solely with the rare situation where trial counsel also serves as PCR counsel because “attorneys cannot argue their own ineffectiveness.” *Gray v. Pearson*, 526 F. App’x 331, 334 (4th Cir. 2013). Had DuRant represented Applicant on *direct appeal and PCR appeal*, *Carter* would possibly allow Applicant to proceed with a successive action on claims of ineffective assistance of appellate counsel. Applicant’s case simply does not involve rare procedural circumstances like that in *Carter* such that he is entitled to proceed with this action on the merits. *See Matthews v. Evatt*, 105 F.3d 907, 915 (4th Cir. 1997) (citing *Carter*) (“The Supreme Court of South Carolina, however, has entertained successive applications in cases in which the successive claims potentially could have been raised in the first PCR application. These cases involve very rare procedural circumstances.”), *abrogated on other grounds by United States v. Barnette*, 644 F.3d 192 (4th Cir. 2011).

G. Conclusion

Based on the foregoing, the State submits no conflict of interest existed such that Applicant is entitled to proceed with a successive PCR action. 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. This Court should therefore dismiss this action for the reasons set forth in the conditional order of dismissal.

Respectfully submitted,

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November 24, 2020

STATE OF SOUTH CAROLINA
COUNTY OF EDGEFIELD

EDGEFIELD COUNTY
CLERK OF COURT
CHARLES E. COO

IN THE COURT OF COMMONS PLEAS
ELEVENTH JUDICIAL CIRCUIT
2020 DEC 16 PM 4:48

K.C. Langford III, SCDC #294500,

Case No. 2020-CP-19-0091

Applicant,

v.

ORDER

The State of South Carolina,

Respondent.

This matter is assigned to The Honorable Debra R. McCaslin to hear and rule upon all pending motions and preside over future hearings until a final order is recorded in this case.

IT IS SO ORDERED.



Walton J. McLeod, IV
Chief Administrative Judge

December 8, 2020
Lexington, SC

STATE OF SOUTH CAROLINA)
COUNTY OF EDGEFIELD)

IN THE COURT OF COMMONS PLEAS
ELEVENTH JUDICIAL CIRCUIT

K.C. Langford III, SCDC #294500,)

Case No. 2020-CP-19-00091

Applicant,)

v.)

ORDER

The State of South Carolina,)

Respondent.)

EDGEFIELD COUNTY
CLERK OF COURT
CHARLES L. REEL
2020 DEC 23 AM 10:25

This matter comes before the Court through a post-conviction relief (PCR) action brought by K.C. Langford (“the Applicant”) on April 14, 2020, the application for which was amended on April 30, 2020. The State filed its return on July 16, 2020, and moved to have the action summarily dismissed. The Honorable Walton J. McLeod issued a Conditional Order of Dismissal filed September 4, 2020, and granted the Applicant twenty (20) days to show why the Order should not become final. On September 18, 2020, the Applicant filed his Objections to the Conditional Order of Dismissal. On October 2, 2020, the State filed its Response to the Applicant’s Objections to the Conditional Order of Dismissal. On November 13, 2020, a hearing on this matter was held via WebEx Videoconference with the consent of all parties. Present on behalf of Applicant was Charles Grose, Jr., and on behalf of the State was Assistant Attorney General Lillian Meadows.

FACTUAL BACKGROUND

The Applicant is currently incarcerated in Evans Correctional Institution by the South Carolina Department of Corrections. On September 9, 2010, Applicant was convicted, together

with his codefendant Bryan Phillips, in Edgefield County in a jury trial before the Honorable William P. Keesley. Applicant was convicted of first-degree burglary (2010-GS-19-0272), armed robbery (2010-GS-19-0273), and kidnapping (2010-GS-0278) stemming from the robbery of the owners of a Chinese food restaurant in 2008.¹ At trial, Applicant was represented by Mark R. Calhoun, Esq. (Trial Counsel), prosecuting on behalf of the state was Assistant Solicitor Ervin J. Maye of the Eleventh Circuit Solicitor's Office. Applicant was convicted as indicted and sentenced to concurrent terms of twenty years' imprisonment for kidnapping, twenty years for armed robbery, and five years for criminal conspiracy.

Applicant subsequently filed a timely notice of appeal, and was represented on appeal by Appellate Defender Elizabeth A. Franklin-Best of the South Carolina Commission on Indigent Defense- Appellate Division (SCCID). On direct appeal, the South Carolina Supreme Court affirmed both the convictions of Applicant and his codefendant in published opinions issued November 21, 2012. *State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012); *State v. Phillips*, No. 2010-173307, 2012 WL 10907975 (Nov. 21, 2012). Applicant's subsequent petition to the United States Supreme Court for a writ of certiorari was denied on October 7, 2013.

On January 3, 2014, Applicant filed his first PCR application, and sought relief on the grounds of ineffective assistance of both trial and appellate counsel. Applicant was represented by Charles T. Brooks, III, Esq., and the State was represented by Senior Assistant Deputy Attorney General Johanna C. Valenzuela. On February 1, 2017, the PCR Court held an evidentiary hearing before the Honorable Eugene C. Griffith, Jr., who subsequently denied the PCR application on all grounds and dismissed the matter with prejudice on June 15, 2017. Applicant timely filed notice of appeal, and was represented by Appellate Defender LaNelle

¹ For a more complete factual summary of the evidence adduced at trial, see Conditional Order of Dismissal, September 4, 2020 (McLeod, J.).

Cantey DuRant of SCCID on appeal of the PCR denial.² On appeal, Applicant asserted the PCR erred failing to find trial counsel was ineffective for failing to conduct a sufficient investigation into two apparent alibi witnesses, Veronica and Vanessa Phillips, who testified at the PCR hearing that Applicant was with them on the date of the alleged incident on August 14, 2008. The case was transferred to the Court of Appeals pursuant to Rule 243(l), SCACR, and on October 8, 2019, the Court of Appeals issued an Order denying certiorari. 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, and this matter is current pending.

Subsequent PCR Application

On April 14, 2020, Applicant filed this subsequent PCR action and asserted that he is entitled to relief on the following grounds:

1. Applicant was denied his right to effective assistance of trial and appellate counsel in violation of his Sixth and Fourteenth Amendment Rights.
2. Trial counsel rendered deficient and prejudicial assistance of counsel by failing to obtain a certified Chinese interpreter.³
3. 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.
4. Appellate counsel Lanelle DuRant, who represented Applicant on appeal of his first PCR denial, had a conflict of interest because of her representation of co-defendant Bryan Phillips during the direct appeal of his initial conviction. Additionally,

² Attorney DuRant also represent Applicant's codefendant Bryan Phillips on the direct appeal of his initial conviction.

³ The three Chinese victims who testified at Applicant's trial did not speak English, and an interpreter was required to present their testimony.

Applicant asserts Appellate counsel had a conflict of interest because Applicant's application for post-conviction relief alleged ineffective assistance of Appellate counsel during the direct appeal of his initial conviction, when direct appeal counsel and Appellate counsel both worked for the SCCID, Appellate Division during their respective representations of Applicant.

5. Appellate counsel abandoned issues on appeal of the denial of Applicant's initial PCR application that led to a successful post-conviction relief claim for co-defendant Bryan Phillips.⁴

Before this Court are the records of the Edgefield County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, Applicants direct appeal records, Applicant's prior PCR application records and the appeal therefrom, and the records of the current PCR action.

FACTUAL FINDINGS AND CONCLUSIONS OF LAW

Based on the findings of the Conditional Order of Dismissal filed September 4, 2020, this Court must consider whether Applicant has provided sufficient legal or factual reasons why Applicant's application should not be dismissed in its entirety. Applicant argues this court should vacate the Conditional Order of Dismissal and schedule this matter for an evidentiary hearing. The State argues this matter should be dismissed as outside the statute of limitations, as an improper successive PCR, barred by the doctrine of *res judicata*, that the Applicant has failed to state a claim for which relief can be granted, and as an improper attempt to frustrate the finality of Applicant's convictions. Based on the record before this Court and the arguments and briefs of counsel, this Court finds that the Applicant has raised a genuine question of material fact as to

⁴ See *Bryan Phillips v. State*, Case No. 2013-CP-19-00386; Order of the Honorable J. Cordell Maddox (May 25, 2018) (currently being appealed by the State before the S.C. Court of Appeals)

the issues concerning Applicant's PCR Appellate Defender, and that an evidentiary hearing should be scheduled solely with respect to these issues. The remaining issues raised by the Applicant should be dismissed in accordance with the Conditional Order of Dismissal filed on September 4, 2020.

Applicant's Procedural Objections

Applicant makes a preliminary objection to the preparation of the Conditional Order of Dismissal, on the basis that the Order signed by Judge McLeod was fundamentally the same as the State's proposed order submitted to the Court. Applicant objects to this process on the grounds that our state's Supreme Court has previously discouraged the preparation and utilization of such proposed orders in death penalty cases. *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004). In *Hall*, the Supreme Court also acknowledged that in non-capital cases, including the present action, "it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency". *Id.* Appellant contends that this practice constitutes a "delegation of judicial responsibility to the Attorney General" and violates the Separation of Powers enshrined in our state's Constitution. *See S.C. Const. art. I, § 8*. This Court disagrees.

The practice of litigants preparing and submitting proposed orders has routinely been recognized by our Supreme Court. *See Fishburne v. State*, 427 S.C. 505, 516, 832 S.E.2d 584, 589 (2019). (recognizing the preparation and finalization of a PCR order is often a collaborative effort, with the prevailing party often prepares a proposed order for the PCR court) (*citing Hall v. Catoe*, at 365, 601 S.E.2d at 341 (2004))).

Applicant further objects to the issuance of a Conditional Order of Dismissal in a PCR case, arguing that the PCR statutes do not contemplate or authorize the issuance of such an order. The State argues that the Conditional Order of Dismissal is procedurally proper under the PCR

statutes, specifically S.C. Code Ann. § 17-27-70(b). This Court agrees, and finds the Conditional Order of Dismissal was properly issued and is not improper under our state's PCR statutes.

Section 17-27-70(b) expressly contemplates such a dismissal:

“When a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings, it may indicate to the parties its intention to dismiss the application and its reasons for so doing. The applicant shall be given an opportunity to reply to the proposed dismissal. In light of the reply, or on default thereof, the court may order the application dismissed or grant leave to file an amended application or direct that the proceedings otherwise continue.”

Additionally, a Court reviewing a PCR application may issue an order of dismissal prior to an evidentiary hearing when it is apparent on the face of the application that there is no need for a hearing to develop any facts and the applicant is not entitled to relief. *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005). Accordingly, this Court finds no procedural fault in the issuance of the Conditional Order of Dismissal, and therefore proceeds to consider Applicant's substantive objections to the dismissal of this PCR action.

Applicant's Substantive Objections

I. Whether Applicant's claims of ineffective trial counsel should be dismissed

Applicant's first substantive claim in this action for post-conviction relief deals with the claims of ineffective assistance of trial counsel. For the reasons established in the Conditional Order of Dismissal issued in this matter on September 4, 2020, this Court orders that this portion of Applicant's claim be dismissed. Applicant previously brought a prior action for post-

conviction relief asserting ineffective assistance of trial counsel, which was heard and denied by the Honorable Eugene Griffith on June 15, 2017. Applicant's claims against his trial counsel have been previously heard and denied, and must be dismissed in accordance with the Conditional Order of Dismissal on grounds of *res judicata*, as being barred by the statute of limitations, and as barred as an improper successive PCR action.

II. Whether Applicant's claims against appellate counsel in his initial post-conviction relief action should be dismissed.

Applicant also brings claims against counsel who represented Applicant in his appeal of his initial PCR action. For the reasons below, this Court finds Applicant has raised sufficient issues to merit an evidentiary hearing as to whether Applicant's PCR Appellate counsel rendered ineffective assistance of counsel.

Applicants for post-conviction relief are entitled to a full and fair opportunity to present claims in one application. *Odom v. State*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999). Successive PCR applications and appeals are generally disfavored because they allow an applicant to receive more than 'one bite at the apple'. *Id.* In a successive application for post-conviction relief, the applicant has the burden of showing that a new ground for relief could not have been raised in a previous application, and if the Applicant meets this burden, a hearing must be afforded despite the successiveness of the application. *Case v. State*, 277 S.C. 474, 289 S.E.2d 413 (1982). Our State has recognized that the right to effective assistance of counsel, including the right to conflict-free counsel, extends to appellate counsel as well as trial counsel. *Southerland v. State*, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999).

Here, Applicant contends he was denied his "bite at the apple" through the ineffective assistance of his PCR appellate counsel based on both the alleged conflict of interest of

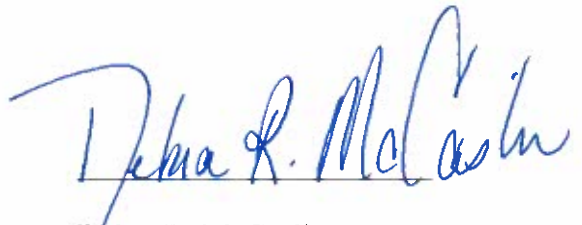
Appellate Defender LaNelle DuRant and her failure to raise certain issues on appeal of the original denial of Applicant's PCR application. DuRant represented Applicant's co-defendant, Bryan Phillips, on direct appeal. Durant subsequently represented Applicant on appeal from his initial PCR action. Applicant contends Durant failed to raise issues in appealing Applicant's post-conviction relief action which resulted in relief for his co-defendant. Applicant argues he has met his burden to merit a successive PCR action on the grounds that he was unable to raise these issues in his prior post-conviction relief action. Based on the allegations presented by the Applicant, this Court finds there is sufficient justification in this matter to merit an evidentiary hearing to determine DuRant rendered ineffective assistance of counsel or otherwise labored under an actual conflict of interest during her representation of Applicant which would entitle Applicant to relief.

CONCLUSION

THEREFORE, IT IS HEREBY ORDERED THAT an evidentiary hearing be scheduled in this matter limited to the issue of whether Applicant's counsel in appealing his initial post-conviction relief action rendered ineffective assistance of counsel which would entitle Applicant to relief.

IT IS SO ORDERED.

December 11, 2020
Lexington, SC



Debra R. McCaslin
Circuit Court Judge



ALAN WILSON
ATTORNEY GENERAL

January 11, 2021

The Honorable Charles L. Reel
Clerk of Court, Edgefield County
Post Office Box 34
Edgefield, South Carolina 29824

Re: K.C Langford, # 294500 v. State of South Carolina
2020-CP-19-0091

Dear Mr. Reel:

Enclosed please find the State's **Motion to Alter/Amend/Reconsider** in the above-captioned case for filing in your office.

Sincerely,

s/LillianMeadows
LILLIAN L. MEADOWS
Assistant Attorney General

LLM/hb
Enclosure

cc: E. Charles Grose, Esquire (via email)
The Honorable Debra R. McCaslin (via email)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF EDGEFIELD	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
	)	
	)	
K.C. Langford, SCDC #294500,	)	Case No. 2020-CP-19-0091
	)	
Applicant,	)	
	)	
v.	)	RULE 59(e), SCRPC, MOTION TO
	)	ALTER, AMDEND, AND RECONSIDER
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	
	)	

In response to this Court’s order filed December 23, 2020, and received by the State on December 30, 2020 the State moves pursuant to Rule 59(e), SCRPC, for the Court to alter, amend, and reconsider its judgment denying the State’s motion to dismiss and granting an evidentiary hearing on Applicant’s claims of ineffective assistance of PCR appellate counsel and conflict of interest.

As an initial matter, the State reasserts its position that this claim is a non-cognizable allegation of ineffective assistance of PCR appellate counsel. *See, e.g., Coleman v. Thompson*, 501 U.S. 722 (1991) (holding that the Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions); *Aice v. State*, 305 S.C. 448, 452 n.2 409 S.E.2d 392, 295 n.2 (1991); *see also Wainwright v. Torna*, 455 U.S. 586 (1982) (holding that where there is no constitutional right to counsel there can be no deprivation of effective assistance); *cf. Kelly v. State*, 754 S.E.2d 377, 377 (S.C. 2013) (holding *Martinez v. Ryan*, 566 U.S. 1 (2012),¹ is “not

¹ The State would note that the Supreme Court in *Martinez* explicitly refused to extend its “narrow exception” to “attorney errors in other kinds of proceedings, *including appeals from initial-review*

applicable to state post-conviction relief actions”) (reaffirmed by *Robertson v. State*, 795 S.E.2d 29, 31 (S.C. 2016)).

The State submits an evidentiary hearing necessary for purposes of determining whether a conflict of interest existed such that this Court should allow Applicant to proceed with this successive PCR action. Whether DuRant made the “correct choice” in determining which issue to raise in Applicant’s PCR appeal is an entirely different question—and again one of ineffective assistance of PCR appellate counsel—than whether her actions were motivated by divided loyalties based on her representation of Phillips on direct appeal. The fact that Phillips prevailed on post-conviction relief on issues DuRant did not raise—which have not yet been reviewed on appeal—is not probative on the conflict of interest issue. Any further hearing or development of the record inquiring into how DuRant decided which issues to raise in Applicant’s PCR appeal and why she did not raise others is an evidentiary hearing on the non-cognizable issue of ineffective assistance of PCR appellate counsel.

Based on the foregoing, this Court should alter or amend its previous order, vacate it, and issue a new order denying Applicant’s successive post-conviction relief action in full and dismissing with prejudice.

collateral proceedings.” 566 U.S. 1, 16. The Court explained that “the limited nature” of its holding “reflect[ed] the importance of the right to the effective assistance of *trial* counsel,” which is “a bedrock principle in our justice system.” *Id.* at 12, 16.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

LILLIAN L. MEADOWS
Assistant Attorney General

January 1, 2021

By: s/LillianMeadows
ATTORNEYS FOR THE STATE
Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF EDGEFIELD	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
	)	
K.C Langford, SCDC #294500	)	
	)	Case No.: 2020-CP-19-0091
Applicant,	)	
	)	
v.	)	Certificate of Service
	)	
State of South Carolina	)	
	)	
Respondent,	)	
_____	)	

1. Undersigned is counsel of record for Respondent in the above-captioned action.
2. Pursuant to the South Carolina Supreme Court’s Order “RE: Operation of the Trial Courts During the Coronavirus Emergency” (Appellate Case No. 2020-000447), dated April 3, 2020), “a lawyer admitted to practice law in this state may serve a document on another lawyer admitted to practice law in this state using the lawyer’s primary email address listed in the Attorney Information System (AIS).”
3. Undersigned has served a copy of the **Motion to Alter/Amend/Reconsider** in the above-captioned matter on opposing counsel by emailing a copy to the email address as listed in the AIS:

E. Charles Grose, Esquire
charles@groselawfirm.com

DATED this 11th day of January 2021

s/LillianMeadows
LILLIAN L. MEADOWS
Assistant Attorney General

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
LillyMeadows@scag.gov

STATE OF SOUTH CAROLINA)
COUNTY OF EDGEFIELD)

IN THE COURT OF COMMONS PLEAS
ELEVENTH JUDICIAL CIRCUIT

K.C. Langford III, SCDC #294500,)

Case No. 2020-CP-19-00091

Applicant,)

v.)

ORDER

The State of South Carolina,)

Respondent.)

2021 FEB -3 AM 9:56

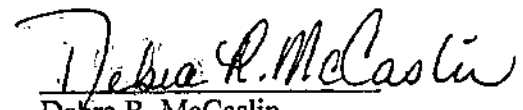
EDGEFIELD COUNTY
CLERK OF COURT
CHARLES L. REEL

This matter comes before the Court by way of the State's motion to reconsider filed on January 11, 2021. The State moves this Court to reconsider this Court's Order filed on December 23, 2020, which granted a limited evidentiary hearing to Applicant in his pending PCR application. Neither counsel requested a hearing on the State's motion, therefore, the Court decides this issue without oral arguments.

Motions to alter, amend, or reconsider a judgment pursuant to Rule 59(e), SCRPC, should be granted only when the court's judgment is controlled by some error of fact or law. Based on a review of the Court's Order, and the record before the Court, this Court declines to alter, amend, or reconsider its ruling in the December 23, 2020 Order, as the Court finds no controlling error of fact or law meriting alteration of the Court's Order. Therefore, the State's Motion is therefore **DENIED**.

IT IS SO ORDERED.

January 29, 2021
Lexington, SC


Debra R. McCaslin
Circuit Court Judge

1 State of South Carolina) Court of Common Pleas
 2 County of Edgefield) Eleventh Judicial Circuit
 3
 4 K.C. Langford,) Transcript of Record
)
 5 Applicant,)
 vs.) 2020-CP-19-00091
 6)
 State of South Carolina,)
 7)
 Defendant.)

8
 9 April 27, 2021
 10 Lexington, South Carolina
 (Via WebEx Videoconferencing)

11 B E F O R E:

12 The Honorable Debra R. McCaslin, Judge
 13

14 A P P E A R A N C E S:

15 E. Charles Grose, Jr., Esquire
 On behalf of the Applicant
 16

17 Lillian L. Meadows, Assistant Attorney General
 Taylor Smith, Assistant Attorney General
 18 On behalf of the State of South Carolina
 19

20 Proceedings recorded by DCRP

21 Transcribed by: Stacy S. Johnson,
 22 Circuit Court Reporter
 23
 24
 25

I N D E X

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E X H I B I T S

NO EXHIBITS WERE INTRODUCED

1 (The following proceedings were held April 27, 2021,
2 beginning at 9:07 AM.)

3 THE COURT: I can't -- I can't hear you.

4 MR. LANGFORD: Can you hear? Do I need to get
5 someone to --

6 THE COURT: No. Can you scoot up a little closer?

7 MR. LANGFORD: Can you hear me now?

8 THE COURT: Now -- I can hear you now. That's good,
9 Mr. Langford.

10 MR. LANGFORD: How you doing, Judge?

11 THE COURT: Good morning to you. Let me just ask
12 you, we're on video and we're here to do an evidentiary
13 hearing on your PCR. And obviously we're back on WebEx,
14 so I'm gonna ask you do you agree to go forward on WebEx
15 with this hearing?

16 MR. LANGFORD: Yes, ma'am.

17 THE COURT: And you see Mr. Grose on the screen?

18 MR. LANGFORD: Yes, ma'am.

19 THE COURT: All right. If at any time you need to
20 speak with him, just let me know and I'll make sure that
21 you get a telephone and you can talk to him in private,
22 okay?

23 MR. LANGFORD: Yes, Judge.

24 THE COURT: All right. Thank you.

25 Okay. This is Langford versus the State of

1 South Carolina. Case Number 2020-19-00091. It's an
2 evidentiary hearing concerning a conflict issue.
3 Specifically, Mr. Langford's PCR attorney represented
4 a co-defendant in this case on his direct appeal and so
5 I'm gonna let Mr. Grose take it from there.

6 MR. GROSE: Do -- do we have Ms. DuRant here?
7 Because I don't know that we can do it without her.

8 MS. MEADOWS: She said she's waiting to -- she says
9 she's waiting for -- she said she's in Judge McCaslin's
10 courtroom waiting for it to begin, so I told her to try
11 refreshing the page because she may -- if you go to
12 WebEx before like the scheduled time, it won't let you
13 log in.

14 THE COURT: All right. Bruce, can we find -- I'm
15 sitting here looking. Who is Sonia Thomas?

16 MR. GROSE: Judge, that -- that's Mr. Langford.
17 That is the SCDC.

18 THE COURT: Oh, okay. I don't -- I don't see her
19 on here.

20 MR. GROSE: She's not, Judge. I think that maybe
21 she's in another virtual courtroom by mistake, I'm --
22 I'm not sure, but I can e-mail her a direct link if
23 you --

24 MS. MEADOWS: I can -- I can give her a call.

25 MR. GROSE: Okay.

1 THE COURT: I'm sorry about that, Mr. Grose.
2 You're exactly right. We can't go forward without
3 her.

4 MR. GROSE: That's all right. That's the new real
5 world we're living in, I guess, so.

6 THE COURT: I know it. I have to look at this
7 little list over here to see who exactly is on here.
8 Sometimes there's people on here and you don't even
9 know it. I don't see her though.

10 MS. MEADOWS: She didn't answer, but she just
11 texted me back a minute ago, so. I tried -- I told her
12 to try and refresh the page.

13 THE COURT: Well, if you have her e-mail, it might
14 be easier for us to mail her a link to --

15 MS. MEADOWS: I just sent her a -- let's see. Hold
16 on one second. She just e-mailed me.

17 Bruce, I think she's logged in.

18 LAW CLERK: She just popped up. I'm adding her in
19 now.

20 MS. MEADOWS: Okay.

21 Okay. He's -- he's adding you now.

22 MS. DuRANT: There you've got it. Okay. I think
23 I'm on. Okay. Thanks. Bye-bye. I guess we can hang
24 up now.

25 Okay.

1 THE COURT: Good morning, Ms. DuRant.

2 MS. DuRANT: Good morning, Judge McCaslin. How
3 are you?

4 THE COURT: I am good. I hope you are.

5 MS. DuRANT: I am.

6 THE COURT: I've already -- just to catch you up,
7 I've already called the case and this is an evidentiary
8 hearing for Mr. Langford.

9 MS. DuRANT: Yes, ma'am.

10 THE COURT: The issue being a conflict because you
11 represented him on his PCR and the co -- his co-defendant
12 on a direct appeal.

13 MS. DuRANT: Yes, ma'am.

14 THE COURT: I put it in hands of Mr. Grose, so I'm
15 gonna let him proceed.

16 MS. DuRANT: Okay. Good morning, Mr. Grose.

17 MR. GROSE: Good morning.

18 I would -- I would call Ms. DuRant at this time.

19 THE COURT: Okay.

20 Ms. DuRant, do you want to raise your right hand?
21 I'm gonna put you under oath.

22 (Whereupon, LaNelle Cantey DuRant was duly sworn
23 by the Court.)

24 THE COURT: Okay. Thank you.

25 Go ahead, Mr. Grose.

1 LaNELLE CANTEY DuRANT,
2 having been duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 BY MR. GROSE:

5 Q. All right. If I could get you to state your full name
6 for the record and spell your last name, please.

7 A. LaNelle Cantey DuRant, D-u-R-a-n-t.

8 Q. And are you an attorney?

9 A. I am.

10 Q. All right. And where did you go to law school?

11 A. University of South Carolina.

12 Q. And what year did you graduate?

13 A. 1996.

14 Q. And after you graduated in 1996, can you summarize
15 your work history from then to the present?

16 A. Certainly. The first year I went and stayed with my
17 mother who had been diagnosed with terminal cancer and I
18 was her primary caregiver for the first year. Following
19 that -- law school is my second career. After that I
20 went to work with Blue Cross Blue Shield in -- manager of
21 their Medicare secondary payer program where we collected
22 third-party payments from attorneys throughout the United
23 States and I managed a staff of twenty-six people at that
24 point. From there I went to the public defender's office
25 because I wanted litigation experience and I was there

1 approximately five years, then I went to work for a private
2 attorney in Sumter for a brief period, but realized I liked
3 criminal law better and I returned to the public defender's
4 office, and from there after about -- I think I was there a
5 total of six years, then I went to work with appellate
6 defense in the later part of 2001. I was there twelve and
7 a half years and I retired from there in June of 2019.

8 Q. All right. And which --

9 A. I said 2001. I think it was 2006. 2006 when I went
10 to work with appel -- appellate defense. I'm sorry.

11 Q. Which -- which public defender's off -- office did you
12 work at?

13 A. Richland county.

14 Q. And that was both tours through the PD office?

15 A. Yes. Yes.

16 Q. Okay. And so you were at appellate defense
17 approximately twelve and a half years?

18 A. Correct. Yes.

19 Q. And -- and you said -- which year do you think you
20 started? Was it --

21 A. I believe it was the end -- I think it was December of
22 2006, I believe.

23 Q. Okay. So appellate defense has been through several
24 organizational structures. At one point it had its -- its
25 own commission that was separate from the indigent defense

1 commission. Did you work for appellate defense during that
2 period?

3 A. They were with the commission of indigent defense when
4 I started.

5 Q. Okay. And when you started, that would have been
6 before the implementation of the Indigent Defense Act of
7 2007?

8 A. Yes.

9 Q. Okay.

10 A. I started just before that, yes.

11 Q. All right. And when you -- when you started, were the
12 indigent defense main offices and appellate defense in the
13 same building or did you start when they were in separate
14 locations?

15 A. No, they were in the same building on Lady Street.

16 Q. Okay. All right. And so when -- when you started
17 there, can you -- can you sort of describe the layout of
18 the -- the office space?

19 A. You mean physically the layout?

20 Q. Yes, ma'am.

21 A. The physical layout? Well, we always entered the
22 back door from the parking garage and there was a long hall
23 and most of the attorneys' offices were on the right and
24 each attorney had their own office and the assistants'
25 offices -- the file room was on the left and then the

1 assistants' offices were on the left as you proceeded and
2 the head of the office was at the very end of the -- end of
3 that hall.

4 Q. All right. And then if you went -- or turned left and
5 went around that hall, there would have been offices for
6 the indigent defense portion of the operation?

7 A. Well, the first part was -- well, you know, there was
8 a kitchen and a library, that sort of thing, then you began
9 the indigent defense -- the commission on the other side,
10 yes.

11 Q. Okay. And then if you continued around that hall you
12 would have gotten to the front door where the --

13 A. Correct.

14 Q. -- the public would have come in?

15 A. Correct.

16 Q. Okay. All right. Now you -- you said that when you
17 came through the back door there was a -- a file room?

18 A. Yes.

19 Q. All right. Can you describe the file room?

20 A. Well, it changed over the years. I'll see if I can
21 remember exactly what it was like. There was a door --
22 you proceeded a few steps and then there was a door to the
23 left and there -- the files were just in rows. It was
24 just a large room with these rows of file cabinets. That's
25 all I can tell you about that. Was there something in

1 particular?

2 Q. All right. Well, I -- I guess one of the things I
3 need to know is -- is were all the attorney files kept in
4 the same file room?

5 A. Once we had -- what I did, I kept the files I was
6 working on in my office and I think most of the attorneys
7 did that or we had pending cases we kept in our office.
8 Sometimes I would keep the ones that I was waiting for an
9 opinion from the Court to be returned, but generally files
10 went to the file room until they were closed. Now some
11 attorneys may have put their files in the file room while
12 -- once they had written the brief. It just varied with
13 individuals.

14 Q. Okay. But -- but all the attorneys --

15 A. Kept all in the same file room. There was one file
16 room.

17 Q. Okay. So -- so each attorney's files were not kept
18 separate from other attorneys' files?

19 A. No, unless they kept them in their own office.

20 Q. Okay. And did the attorneys keep their offices
21 locked?

22 A. Not usually. We would -- Mr. Dudek's policy was that
23 we did not have our doors closed, that people's offices
24 were usually open, so most -- unless you were working on an
25 argument, an oral argument, you could close your door, but

1 usually the doors were open.

2 Q. Okay. And do you know why he had that policy? Was
3 there a reason?

4 A. I do not know.

5 Q. You mentioned that the support staff was on the, I
6 guess, left side of the hall if you came in from the
7 parking garage?

8 A. Correct.

9 Q. Is that right?

10 A. Yes.

11 Q. All right. How -- how was -- how was support staff
12 assigned to the attorneys?

13 A. Usually they would have two or three attorneys per
14 support staff. Usually two they tried to go for, but
15 depending on the number of staff attorneys sometimes they
16 would have three attorneys.

17 Q. Okay.

18 A. And Mr. Dudek assigned the attorneys to each
19 assistant.

20 Q. Okay. And the -- the computer system, how was that
21 set up?

22 A. Gosh, I've been retired for two years. I'll do my
23 best to remember. Well, each person had their own access
24 to the computer, their own page, but there was a general
25 software database where we did research and where cases

1 were kept.

2 Q. Okay. So were -- was there any effort to screen one
3 attorney's access to another attorney's cases on the
4 computer system?

5 A. We usually did not have access to other attorneys'
6 files unless we asked them or some -- I don't remember
7 exactly, but we may have had to get special permission to
8 do that. I -- I think it was possible to access other
9 attorneys' files.

10 Q. Okay. I'm sorry. Say that again.

11 A. I said I think you could have if you had permission to
12 access other attorneys' files.

13 Q. Okay. All right. As far as --

14 A. To the best -- to the best of my memory, Mr. Grose.

15 Q. Fair enough. As far as support staff, was there any
16 procedure for screening them from cases if two attorneys in
17 the office had co-defendants?

18 A. I don't think so, but, I mean -- let me back up. I
19 think -- I'm not sure I understand your question, but if --
20 co-defendants were kept separate and usually you did not
21 have the same assistant.

22 Q. Okay. You say usually. Was there a procedure for
23 that?

24 A. I don't remember a formal procedure. I think
25 Mr. Dudek assigned that sort of thing, but usually if you

1 had co-defendants one attorney would have it -- I mean, he
2 would divide and separate -- assign to different attorneys
3 and usually they did not have the same assistant.

4 Q. Okay. Going back to the file room, you said that it
5 changed some over the years. How did it change?

6 A. Not in procedural ways. They just combined,
7 consolidated, tried to make it more accessible, more
8 organized basically is what the issue was, but the
9 procedure did not change.

10 Q. Okay. All right. And so regarding co-defendants, in
11 your twelve and a half years at appellate defense did the
12 agency routinely represent co-defendants?

13 A. Yes.

14 Q. Okay. And what was the -- what was the policy with
15 regards to representing co-defendants?

16 A. Well, there wasn't a problem with discussing the cases
17 if you had co-defendants if you were on direct appeal
18 unless there -- you didn't really -- all right. Let me
19 back up. I'm trying to remember, Mr. Grose. Well, we
20 could talk about them, but if there was an issue -- all
21 right. Co-defendants you could do it. We could -- we
22 could talk about cases and issues with each other on
23 co-defendants, but I think what you're getting to is once
24 a case has been determined and decided and you got another
25 issue on it, you did not discuss that new case with the

1 prior attorney.

2 Q. Okay.

3 A. You were not allowed to do that.

4 Q. All right. Well, let -- let's -- I actually want to
5 get at -- at both things, so let -- let's start with the --
6 when the office has, you know, two co-defendants at -- at
7 one time.

8 A. Right.

9 Q. Say that there's a direct appeal. And how would --
10 how would the -- those co-defendants' cases be assigned?

11 A. Mr. Dudek assigned those.

12 Q. Okay.

13 A. The chief --

14 Q. And are they assigned -- all right. And then so when
15 you're referring to Mr. Dudek, he was pretty much, if not
16 all of the period, he was the chief appellate defender?

17 A. Most of the years I was there. He was not in the
18 beginning.

19 Q. All right. That was -- that was Mr. Savitz then?

20 A. Yes.

21 Q. Okay. So when a -- when a new appeal comes into the
22 office, it's not immediately assigned to an attorney, is
23 it?

24 A. Once they got the information from the court of
25 appeals, it was assigned to attorney, yes, and Mr. Dudek

1 made the assignments. Mr. Savitz did not. It was done on
2 a rotation basis then.

3 Q. Okay. When you say when you got the information, was
4 that -- that was when the appeal was brand new before the
5 transcripts come in?

6 A. Right.

7 Q. Okay. And so what was -- I understand that Mr. Dudek
8 made the assignments. What do -- what were the procedures
9 for how he would assign co-defendants? I mean, was there
10 any procedure or was it just come down to his discretion?

11 A. It was totally in Mr. Dudek's discretion. He never
12 shared with anyone his -- his -- how he assigned cases.

13 Q. Okay. All right. And so once the -- the office -- in
14 a co-defendant case, you indicated that it was okay for the
15 lawyers to discuss the cases amongst them?

16 A. Okay. Pending co-defendants at the same time, yes.

17 Q. Okay. All right. What procedures were in place
18 to screen the lawyers from the -- the confidential
19 information?

20 A. I don't remember anything in particular other than
21 just an attorney's honor, but we discussed -- we could
22 discuss the issues with each other on a pending case,
23 co-defendants. We all had the same transcript.

24 Q. Okay. And, of course, the -- the transcript would not
25 be the confidential information --

1 A. Right.

2 Q. -- correct?

3 A. Right. We all had access to each attorney's --
4 whatever trial attorney is joint trials, you had all the
5 information in the transcript as far as any objections by
6 any attorney.

7 Q. Right. But -- but your -- your notes or any lawyer's
8 notes, that would be considered work product?

9 A. Right, and we did not share -- we didn't exchange
10 notes to see what each attorney had written.

11 Q. Okay. And the -- the letters between the attorney and
12 the client would be privileged information, correct?

13 A. Right.

14 Q. Now I -- I understand that you -- you didn't -- you're
15 testifying that you didn't share that information, but was
16 there any procedure in place to screen one lawyer from
17 another lawyer's work product and privileged information?

18 A. There was not a formal procedure, no.

19 Q. Okay. All right. Now you mentioned when the client
20 had another issue. What did you mean by that? Can you
21 give me an example or explain that a little bit more?

22 A. No, what I was thinking was if they had another
23 case --

24 Q. Okay.

25 A. -- which would be totally different.

1 Q. All right. So explain to me what you mean by that.

2 A. For example, if one attorney handled a person on
3 direct appeal and then the PCR came in and was assigned to
4 a different attorney would have -- if that former attorney
5 was still in the office, the policy at that point was we
6 would go to Bob and see if it was a conflict and there were
7 a couple of cases that I sent to the South Carolina Supreme
8 Court to determine if it was a conflict if the other prior
9 attorney was still working in the office, and the Court
10 became very liberal with that through the years and I can
11 remember one case where they said no, it was not a conflict
12 even if the attorney was still in the office because the
13 office policy was if the prior attorney was no longer
14 working there, there was no conflict.

15 Q. Okay. So -- so what criteria -- what was the office's
16 criteria for determining whether there was a conflict when
17 the -- the client had a second case in the office?

18 A. Well, we took it to Bob Dudek and he made that
19 decision. I don't know what his criteria were.

20 Q. Okay. So --

21 A. I assume it would be in particular if it would be
22 harmful to the other client.

23 Q. Well, did -- did every case where the client had a
24 subsequent case, did every case go to Mr. Dudek for that
25 determination?

1 A. All of the attorneys were instructed if that happened
2 that they were to make Mr. Dudek aware of that.

3 Q. Okay. And so Mr. Dudek would review all of those
4 cases?

5 A. Yes.

6 Q. And you may have already answered this, but what was
7 the criteria that Mr. Dudek applied to determine whether
8 there was a conflict?

9 A. The only criteria I'm aware of and, of course, this
10 varied with the case, was if the prior attorney was still
11 in the office that's where you had to be very careful to
12 see if there was a conflict if the prior attorney was still
13 working there. If the prior attorney was no longer in the
14 office working, employed there, then generally there was no
15 conflict. That was the basic criteria.

16 Q. All right. And so if the -- if the prior attorney was
17 working there, what were the considerations at that point?

18 A. If -- if he thought it would be harmful to the client
19 in any way. I mean, benefiting the client was our main
20 purpose for existing and we did everything we could to
21 make sure the client was treated fairly and got the best
22 representation they could, but other than that I do not
23 know what Mr. Dudek's criteria would have been.

24 Q. Okay. And when you say if the client would be harmed,
25 what was the test to determine whether or not the client

1 would be harmed?

2 A. That was totally Mr. Dudek's decision. I guess if
3 there was any prejudice to the client or if their attorney
4 and the prior attorney could keep it separate, not discuss
5 it. We knew not to discuss the case if the prior attorney
6 was still there and he determined it was not a conflict.

7 Q. Well, I mean, right there that -- that seems to be
8 kind of a problem because if -- for example, if I have a --
9 a PCR case and, you know, I've never been involved in it
10 before, the client comes to me, I'm able to talk with all
11 the client's former counsel, but you're saying that that
12 wouldn't be the case if that lawyer was still employed with
13 appellate defense?

14 A. If we -- if the client was alleging ineffective
15 assistance of trial counsel -- I mean, of former appellate
16 -- direct appeal counsel, then we had to ensure that we
17 would not discuss the case with that client -- I mean,
18 with that attorney. It didn't have anything to do with the
19 PCR attorney talking to all of the other attorneys. It's
20 simply --

21 Q. Well, I mean, at that point --

22 A. Pardon me?

23 Q. But, I mean, at that point you were PCR appellate
24 attorney and, you know -- and so then you had a limitation
25 on what prior counsel you talked to.

1 A. Right.

2 Q. Okay. What -- what was the policy when Mr. Dudek was
3 the prior counsel? For example, if Mr. Dudek had handled
4 the direct appeal and now that former client was alleging
5 -- or that former client had a PCR case in your office?

6 A. Okay. Could you -- say that again, please --

7 Q. Okay.

8 A. -- to make sure I understand you.

9 Q. All right. So -- so -- so Mr. Dudek handles his own
10 caseload?

11 A. Right. Yes.

12 Q. And so in the situation where Mr. Dudek represented a
13 client on direct appeal, the conviction and sentence was
14 affirmed, that client goes through PCR and now has a PCR
15 appeal in the office, what was Mr. Dudek's policy for
16 determining whether or not the office had a conflict?

17 A. Well, we could have written, and we did on several
18 occasions, asked the Supreme Court to make the decision if
19 it were a conflict and, as I said, previously they had
20 written back and said no on one of the cases I had.

21 Q. Okay. All right. I mean, and -- I mean, I don't mean
22 to sound, you know, sarcastic asking this question, but how
23 would the -- the Supreme Court know if there was a conflict
24 if they hadn't had access or -- or they didn't know all the
25 issues involved in the case? I mean, how would they know

1 at the beginning of the case if there was a conflict?

2 A. Well, we had to write a memorandum to the Court and a
3 motion and -- not a motion, a memorandum to the Court and
4 ask them and you had to give certain details, not a lengthy
5 transcript and not a brief totally, but you had to give
6 certain details as to what the issues might be or that this
7 was the situation.

8 Q. Okay. All right. So in the -- in the situation
9 where the office represented a PCR client that they had
10 previously represented, other than the understanding that
11 you don't talk to the prior lawyer, were there any formal
12 screening policies in place?

13 A. As far as a PCR counsel? PCR?

14 Q. That would -- the -- the PCR appellate lawyer being
15 screened from the direct appeal lawyer other than the honor
16 system.

17 A. Basically it was the honor system. That was basically
18 it.

19 Q. All right. So I want to talk about Bryan Phillips
20 and K.C. Langford. Did you represent Mr. Phillips on his
21 direct appeal?

22 A. I did, yes.

23 Q. Okay. And do you know who represented Mr. Langford on
24 his direct appeal?

25 A. Betsy Franklin.

1 Q. Okay. And then when Mr. Langford had -- well, let me
2 back up. Mr. Langford's direct appeal case resulted in a
3 published opinion; is that correct?

4 A. Yes.

5 Q. And Mr. Phillips case resulted in an unpublished
6 opinion?

7 A. Right, relying on Mr. Langford's case. We had oral
8 arguments back to back in the Supreme Court --

9 Q. Right.

10 A. -- but Mr. Langford's case went first and they -- the
11 Supreme Court issued an opinion on Mr. Phillips' case and
12 referred to Mr. Langford's case --

13 Q. Now --

14 A. -- on some of the issues.

15 Q. -- you know, in Mr. -- well, that was my question, on
16 certain issues, because the -- the -- the main issue -- let
17 me -- let me rephrase that. Do you recall how many issues
18 Mr. Langford raised on direct appeal?

19 A. Well, I went back and read the opinion this morning
20 and the Court only ruled on the one issue about the speedy
21 trial and the docket control issue.

22 Q. Okay. And in Mr. Phillips' case, you raised that same
23 issue, correct?

24 A. Yes, along with two others.

25 Q. All right. And that was gonna be my question. You

1 raised issues that were not raised in Mr. Langford's direct
2 appeal?

3 A. Yes.

4 Q. Okay. And the Supreme Court affirmed the conviction
5 and sentences for both Mr. Langford and Mr. Phillips?

6 A. Correct.

7 Q. All right. And so then Mr. Langford -- well, both of
8 them, but specifically talking about Mr. Langford, went
9 into post-conviction relief?

10 A. Right.

11 Q. And there was -- he was -- he was denied relief by the
12 PCR judge; is that right?

13 A. Yes.

14 Q. Okay. And he appealed the denial of that relief and
15 his case came to the Office of Appellate Defense?

16 A. Right.

17 Q. All right. And you were assigned Mr. Langford's case?

18 A. Yes.

19 Q. Okay. What was done to determine whether or not you
20 had a conflict between representing Mr. Langford because
21 you had also represented Mr. Phillips on direct appeal?

22 A. Well, first of all, Betsy Franklin was no longer
23 working there, so there was no conflict as far as my
24 representing Mr. Langford on that. I did not see a
25 conflict because the direct appeal of Mr. Phillips had long

1 been decided and his case was closed in the office, so I
2 took Mr. Langford's PCR. I did not see a conflict.

3 Q. All right. But -- but, of course, you -- you know,
4 you -- I mean, again, I don't mean to sound sarcastic, but
5 you were not screened from yourself obviously.

6 A. Can you explain that, please?

7 Q. Well, you -- you had access to Mr. Phillips' file on
8 your computer system, right?

9 A. Well, yes, we had the same --

10 Q. Uh-huh.

11 A. I mean, we did the oral arguments back to back. We
12 had the same transcript -- trial transcript, they were
13 tried together, so, yes.

14 Q. But they -- but you -- you would have had your own
15 notes from Mr. Phillips' case, correct?

16 A. Yes.

17 Q. And I'm -- I'm not gonna ask you anything that you and
18 Mr. Phillips discussed either in writing or over the phone,
19 but I assume that you had attorney/client conversations
20 with Mr. Phillips?

21 A. Yes.

22 Q. And I assume that there were attorney/client letters
23 exchanged between you and Mr. Phillips?

24 A. Yes, I assume there were. I can't remember
25 specifically, but I assume there were, yes.

1 Q. Okay. Well, that -- that would happen in most cases?

2 A. Right. Right.

3 Q. Did you talk with Mr. Dudek to determine whether or
4 not it was a conflict to represent Mr. Langford after
5 having represented Mr. Phillips?

6 A. No, because the main concern would have been the fact
7 if the prior attorney, Betsy Franklin, was still working in
8 the office. I definitely would have gone to him with that,
9 but she was not there, and if Mr. Phillips' case had been
10 pending, I probably would have gone and talked with him,
11 but Mr. Phillips' case was closed and Mr. Langford's was
12 open.

13 Q. Okay. But, I mean, you did recognize that
14 Mr. Langford and Mr. Phillips were co-defendants?

15 A. Oh, yes, I knew that. In fact, I saw it as a --

16 Q. Okay.

17 A. -- benefit because I knew the case.

18 Q. Okay. Well, did you ever discuss it with
19 Mr. Langford, disclose to him that you had previously
20 represented his co-defendant?

21 A. I think I did ask Mr. Langford. I just wanted to make
22 sure he was aware. Well, he knew that I had represented
23 Mr. Phillips and my procedure would have been to ask him
24 if there were any problems. I don't have it in writing
25 anywhere.

1 Q. Well, and -- and that was gonna be my next question.
2 Even though the -- the rules requires full disclosure and
3 informed consent, correct?

4 A. Right.

5 Q. And so there -- there's not a -- a writing that --
6 that meets that qualification, is there?

7 A. Not -- not to my knowledge, no. I discussed it with
8 him just to make sure he knew that I had represented
9 Mr. Phillips, but I don't have that in writing.

10 Q. All right. I mean, have you reviewed your file for
11 today?

12 A. Most of it, yes. I cannot say I read every word, no.

13 Q. All right. Are there any notes in that file from that
14 conversation?

15 A. No, but I don't have the entire file. I have some of
16 it.

17 Q. Okay. What was the policy of appellate defense
18 for getting written informed consent to represent
19 co-defendants?

20 A. Co-defendants at the same time there was no letter
21 acknowledging that that I remember.

22 Q. Okay. Are you familiar with -- with Rule 1.10 of the
23 Rules of Professional Conduct?

24 A. Could you read it to me, Mr. Grose, please? I may be
25 familiar with the rule, but not the number necessarily.

1 MR. GROSE: All right. Your Honor, if I could
2 have the ability to share my screen, I could put it
3 on the screen.

4 THE COURT: You may.

5 BY MR. GROSE:

6 Q. Are you able to see that?

7 A. Yes, I see it.

8 Q. Okay. That's the rule there. I'll give you just a
9 second to look at it.

10 A. Okay.

11 Q. All right. Having had an opportunity to look at that,
12 are you familiar with that rule?

13 A. Well, basically, yes.

14 Q. All right. And, specifically, subparagraph (e), were
15 there any written or formal policies at appellate defense
16 to implement that paragraph (e)?

17 A. Okay. So what was your question about paragraph (e)?

18 Q. Well, was there any policies -- formal policy in place
19 to implement that?

20 A. Well, basically it says it's not a problem if we don't
21 share confidential information and attorneys did not --

22 Q. Well --

23 A. -- share confidential information in the office about
24 co-defendants.

25 Q. Well, it -- well, what it says is the lawyer is

1 screened in a timely manner from access --

2 A. Right.

3 Q. -- to confidential information related to any
4 participation in the representation of the other client.
5 So it's -- the way that I understand the rule, you know,
6 not only would the lawyer be screened from talking about
7 the confidential information, the lawyer should be screened
8 from having access to the confidential information, and --
9 and that's my question. I mean, there -- there was no
10 policy for screening or -- or preventing access to another
11 lawyer's file in the file room, right?

12 A. No, but I think the major issue is you have to define
13 confidential information, especially in an office like
14 appellate defense, so --

15 Q. What do you mean especially --

16 A. Well, because if you had five co-defendants in one
17 case that were tried together, are they -- I guess the
18 confidential information would be, what, the letters that
19 they wrote or the conversations between the attorney and
20 their client? That -- that would be considered
21 confidential information and I don't know that I would
22 have access to the attorney's notes, work notes. Those
23 were not kept --

24 Q. Well, I mean --

25 A. -- in the file room unless they put them in the file.

1 Q. Well, I mean, what --

2 A. That would be -- I'm sorry.

3 Q. Well, I mean, what would -- what would -- other than
4 the honor system, what would stop a lawyer from being
5 able to walk in the file room and -- and look in another
6 lawyer's file to see if there were attorney notes in there?

7 A. No, they could do that. You're right. They could do
8 that. Everyone had access to the file room.

9 Q. And -- and what would stop another lawyer other than
10 the honor system of being able to walk into another
11 lawyer's office where the policy was to keep the doors open
12 and look to see if there was any confidential notes or --
13 or attorney/client letters?

14 A. Well, let's be honest, Mr. Grose. If you worked in
15 appellate defense, the cases were so overwhelming no
16 attorney had time to go check on another person's file.
17 There wasn't time. There was no reason to do that. That's
18 why the honor system worked. For one reason we were so
19 overwhelmed with getting our own cases done, we were not
20 asking for additional cases, but the access was there.

21 Q. All right. What do you mean --

22 A. You're right. The access was there, but the honor
23 system worked. For one reason, we were all overworked.

24 Q. All right. Well -- well, tell me about being
25 overwhelmed and overworked. What do you mean by that?

1 A. Well, you would probably be aware that there are
2 always deadlines and attorneys had to meet the deadlines
3 to make sure the appeal for their client was preserved
4 and at that -- most of the time I was there, there -- they
5 were able to get money and hire additional attorneys the
6 year before I left, but you had an overwhelming number of
7 cases. It was -- I worked weekends most of the time to
8 meet deadlines.

9 Q. Uh-huh. Right.

10 A. In fact, most of our attorneys did.

11 Q. And -- well, and -- and the -- you know, the --
12 because of the caseload, was it common to extend those
13 deadlines?

14 A. Yes, we did as -- numerous times we extended the
15 deadline.

16 Q. And at some point did the Supreme Court issue an
17 administrative order encouraging that lawyers not seek as
18 many extensions of the deadlines?

19 A. Yes.

20 Q. Okay. Were -- were there any guidelines on the number
21 of cases that a lawyer could have at a -- at any given time
22 to work at appellate defense?

23 A. No. Not that I remember, no. As I said, Mr. Dudek
24 assigned the cases.

25 Q. Okay. There was -- there was nothing in writing as

1 far as -- or a formal policy regarding the amount of cases?

2 A. No.

3 Q. Okay. At the time that you were handling
4 Mr. Langford's PCR appeal, what was your caseload?

5 A. I do not remember, Mr. Grose. I really do not. I
6 would hate to venture a number to you.

7 Q. All right. Would you consider it overwhelming?

8 A. I would not say overwhelming. It was a heavy caseload
9 all -- the entire time, the entire twelve and a half years
10 I was there, but --

11 Q. Okay. Well -- well --

12 A. -- it was not something we could not manage because
13 we did.

14 Q. I mean, earlier you used the term "overwhelming" and I
15 -- I'm just trying to get a sense of what you mean by that.

16 A. Well, that's a good question.

17 MS. MEADOWS: Judge, I don't -- I just object on the
18 basis of relevance. I don't see how, you know, appellate
19 defense manages their workload is relevant for this -- for
20 purposes of this issue.

21 MR. GROSE: Well --

22 THE COURT: I understand --

23 MR. GROSE: Well, then --

24 THE COURT: -- where Mr. Grose is -- is going,
25 but, I mean, she's testified she's been busy the whole

1 time she was there for twelve and a half years and had
2 a heavy caseload. I think she's pretty much answered
3 that question.

4 MR. GROSE: All right. Fair -- fair enough.

5 BY MR. GROSE:

6 Q. What -- what do you remember about Mr. Langford's PCR
7 appeal?

8 A. Well, I remember receiving the case and I was -- it
9 was of particular interest to me because I had handled
10 Mr. Phillips' case and knew the case --

11 Q. Uh-huh.

12 A. -- and I -- I was impressed with his PCR and that he
13 had two witnesses testify, which was highly unusual in the
14 numerous PCRs I had handled and a couple of previous PCRs
15 I'd had when witnesses actually came and testified, the PCR
16 was granted, so I was excited that that had happened and I
17 was hoping that that would be a winning issue for him and
18 that was the reason I chose that issue because I felt that
19 it would be a winning issue.

20 Q. All right. That was the -- the only issue that you
21 appealed?

22 A. Yes, and because in the twelve -- in the years that I
23 had arguments before the Supreme Court I felt that if you
24 had a really significant issue you did not want to weaken
25 it with other not as significant issues. You wanted the

1 Court to focus on that issue as they did in Mr. Langford's
2 direct appeal. There could have been other issues, but
3 actually only chose one issue, so I felt like that --

4 Q. Well --

5 A. -- would help it be a more better chance of being a
6 winning issue.

7 Q. Well, and -- and, of course, you know, Mr. Langford
8 had raised grounds of ineffective assistance of appellate
9 counsel, correct?

10 A. Right.

11 Q. And are you familiar with Supreme Court caselaw that
12 seems to suggest that, you know, every potentially
13 meritorious issue is supposed to be briefed in a PCR
14 appeal?

15 A. No, because it said attorneys could not -- they had to
16 choose what they feel is the most significant issue. They
17 did not have to brief every issue.

18 Q. All right. And with regard to -- well, are you aware
19 that -- that Mr. Phillips has been granted relief on two of
20 the issues that you chose to brief?

21 A. Well, just recently I became aware of that, yes.

22 Q. All right. And one of the issues --

23 A. That had not -- that had not happened --

24 Q. Well, isn't it one --

25 A. -- at the time I wrote Mr. Langford's PCR.

1 Q. And -- and -- and one of the issues that he was
2 granted relief on was --

3 MS. MEADOWS: Judge, I object again. I think
4 we're getting into issues of ineffective assistance of
5 PCR appellate counsel, which I thought we were trying
6 to --

7 THE COURT: We're here for a conflict issue only.
8 A conflict issue only.

9 MR. GROSE: Okay. All right. Well, fair enough.
10 That -- that's all the -- the questions I have at
11 this time.

12 THE COURT: Okay. Do you have any -- let me ask
13 you, Mr. Grose, can you make the screen back to normal?

14 MR. GROSE: I can. I'm sorry.

15 THE COURT: That's okay. I just want to be able
16 to see everybody.

17 Okay. All right. Do you have -- Ms. Meadows, do
18 you have any cross?

19 MS. MEADOWS: Yes, ma'am. Just one second.

20 CROSS-EXAMINATION

21 BY MS. MEADOWS:

22 Q. Okay. Ms. DuRant, do you recall what year you were
23 appointed to represented Mr. Langford in his PCR appeal?

24 A. I think it was 2014. Is that correct? What was the
25 year?

1 Q. I thought it was in '17.

2 A. '17? Is that -- I think that's when I filed it, was
3 '17.

4 Q. Okay. Let me see.

5 A. Let me see. I filed it in -- you're right. I filed
6 it in 2017. I don't remember the exact year I received the
7 case.

8 Q. Okay. All right. And then do you recall about what
9 time you were appointed to represent Mr. Phillips in his
10 direct appeal?

11 A. Oh, no, I do not remember the year.

12 Q. Okay. But it was well after Mr. -- you were appointed
13 to represent Mr. Langford well after Mr. Phillips' appeal
14 had completed, correct?

15 A. Yes. Yes.

16 Q. Okay. Now just briefly on the issues you raised on
17 Mr. Phillips' behalf, which -- was there a particular
18 issue you felt was strongest or thought that -- you felt
19 confident was a winning issue?

20 MR. GROSE: If -- if I'm not supposed to -- to go
21 into issue select -- selection, then I object to the
22 Attorney General being able to do that.

23 THE COURT: Well, you -- I'm gonna -- I'm gonna
24 tell you, Mr. Grose, you brought all that out on direct
25 and I let it go, so I'm gonna let her -- I'm not gonna

1 let her go long on it, but I'm gonna let her go.

2 You-all had it up -- brought it up on direct. I think
3 she has a right to cross her on it.

4 Go ahead, Ms. Meadows.

5 MS. MEADOWS: And I was -- I was just asking
6 Ms. DuRant if the issues she raised on Mr. Phillips'
7 behalf in his direct appeal, whether there were any
8 that she thought was a particularly strong issue or she
9 believed could possibly be a winning -- winning issue.

10 THE WITNESS: Well, I thought one of the biggest
11 issues, and the Supreme Court did not agree with me,
12 was the fact that the solicitor commented on
13 Mr. Phillips not testifying. I thought that was a
14 significant issue. I thought that the interpreter
15 issue would have been more significant than it was
16 under the Supreme Court. I did not think the speedy
17 trial issue was as significant because it wasn't
18 really brought out that much in the trial. I think
19 it was brought out in the trial, it wasn't really
20 preserved.

21 BY MS. MEADOWS:

22 Q. Okay. And I believe Mr. Phillips, his -- the opinion
23 was unpublished, but do you remember what the reasoning was
24 as to why they affirmed based on the Chinese interpreter
25 issue that you raised?

1 A. Well, they really did not go into an analysis.

2 Q. Okay.

3 A. They made a footnote that it was the wrong statute,
4 but they did not say that was an error --

5 Q. Okay.

6 A. -- when they affirmed.

7 Q. Okay. And Mr. Langford's and Mr. Phillips' cases were
8 consolidated on direct appeal, correct?

9 A. Well, there had --

10 Q. Could you just give a brief overview about the whole
11 situation?

12 A. Okay. Consolidated may not be the correct word, if
13 you don't mind.

14 Q. Okay.

15 A. They were held together, but the oral arguments were
16 scheduled on the same day back to back, but they had their
17 own records on appeal, so that was not consolidated.

18 Q. Okay.

19 A. They were separate cases.

20 Q. Okay. So basically they were just, I guess,
21 consolidated in that they were co-defendants so they --

22 A. Right.

23 Q. -- were on Mr. Langford's --

24 A. Right.

25 Q. -- opinion?

1 A. Right. Correct.

2 Q. Okay. And then do you recall specifically what
3 Mr. Langford raised in -- on his PCR as far as appellate
4 counsel?

5 A. Well, there were numerous issues that he raised of
6 the --

7 Q. Well, that the Court ruled -- that the Court
8 ultimately decided --

9 A. On his PCR?

10 Q. Yes.

11 A. Well, basic -- well, basically they just ruled on the
12 issue that I raised, which was the two co-defendant -- I
13 mean, the two witnesses testifying that he wasn't there,
14 that he was with them. Is that --

15 Q. Okay.

16 A. -- what you're asking me?

17 Q. Well, I thought that there was an -- if I'm not
18 mistaken an appellate counsel issue raised in
19 Mr. Langford's PCR appeal regarding Ms. Franklin-Best.
20 Let me see if I can --

21 A. Regarding what? I'm sorry.

22 Q. I'm sorry. Like direct appeal counsel, Ms. -- because
23 it was -- it was Ms. Franklin-Best, correct?

24 A. Correct.

25 Q. Okay. And he -- he did raise that issue on -- in

1 PCR, right, or do you --

2 A. I don't remember his ranking because I don't have the
3 list in front of me.

4 Q. Okay. All right. Well, then by the time you got
5 Mr. Langford's PCR appeal, did you believe there was a
6 conflict because -- on that basis that she used to work at
7 OID or because she -- you know, appellate defense was
8 involved in both cases or is that something that you said
9 earlier that Mr. Dudek handles?

10 A. Well, the policy in the office the entire time I
11 was there was if the prior attorney no long worked in
12 the office, then there was no conflict regardless and
13 Ms. Franklin-Best left the office in 2012.

14 Q. Okay. And then -- let me see. And I believe you
15 said that you -- one reason you didn't think there was a
16 conflict was because when you got Mr. Langford's case is --
17 was because the -- they didn't have any opposing interest,
18 correct?

19 A. Right. I saw no opposing interest at all. Nothing
20 in representing Mr. Lang -- Mr. Phillips would harm
21 Mr. Langford.

22 Q. Okay.

23 A. I saw nothing there that would have been any opposing
24 interest at all.

25 Q. Okay. And you say you actually thought it would be

1 beneficial since you knew the case so well already?

2 A. Right, and -- and then at the oral argument for
3 Mr. Langford heard before with their questions, so I
4 thought that would be beneficial.

5 Q. Okay. And then earlier you talked about how, you
6 know, generally if you believe there's a strong issue, I
7 mean, you said I think it depends on the case, but that
8 the best strategy you believed was to raise just the one
9 issue instead of raising every possible issue?

10 A. Exactly. And the fact that two witnesses testified at
11 the PCR hearing was so significant.

12 Q. Right.

13 A. That was very, very rare to happen. I really wanted
14 to focus on that for the Court.

15 Q. Right. And that issue was kind of what the majority
16 of the hearing was on, correct?

17 A. Yes.

18 Q. Okay. Now let's see. So I believe that you were
19 appointed to represent Mr. Phillips in 2011 and
20 Mr. Langford in 2017. Was there ever any overlap at all?

21 A. No.

22 Q. Okay. And at any time did you feel that your -- any
23 continuing duty you had to Mr. Phillips even though his
24 appeal was concluded interfered with your ability to
25 represent Mr. Langford?

1 A. No, there was no problem.

2 Q. Okay. And did you ever -- well, I think you said
3 that you may have had some -- you know, learned some
4 confidential information from Mr. Phillips when you
5 represented him, but in both situations you're bound by
6 what's in the record anyway, correct?

7 A. Absolutely.

8 Q. All right. Okay. So even if you did know anything
9 extra it wouldn't really matter because --

10 A. Right, totally -- right, it would be totally
11 irrelevant. You can never bring in additional information.

12 Q. Right.

13 MS. MEADOWS: Okay. I think that's all the
14 questions I have, Judge.

15 THE COURT: Okay. Any redirect, Mr. Grose?

16 MR. GROSE: Just briefly.

17 REDIRECT EXAMINATION

18 BY MR. GROSE:

19 Q. Following up on -- on the Attorney General's question
20 about the Phillips direct appeal, you did raise three
21 issues in that direct appeal, didn't you?

22 A. Yes, I did.

23 Q. Okay. Have you ever raised more than one issue in a
24 PCR appeal?

25 A. I have.

1 Q. Okay. Are you aware of what consequences your
2 decisions raised or rather not raised an issue in a PCR
3 appeal and, therefore, Federal habeas?

4 A. Yes. Well, we didn't do Federal habeas, so I can't
5 say specifically that I was very familiar with it, no.

6 Q. Okay. Do you know -- well, what -- what do you know
7 about your -- the consequences of your decision to raise --
8 or let me rephrase that. With regard to Federal habeas, if
9 you decide not to raise an issue in a PCR appeal, do you
10 know what kind of consequences --

11 MS. MEADOWS: Judge, I don't know how a habeas is
12 relevant here, so I'd just object on that basis.

13 MR. GROSE: Well, this is in follow-up about their
14 questions following up on mine about issue selection.

15 MS. MEADOWS: Okay. Well, I didn't bring up the
16 Federal habeas.

17 THE COURT: I -- I don't think she brought up
18 Federal habeas either. I mean, where are you going
19 with it, Mr. Grose? You're -- you're trying to figure
20 out what -- her decisions and what consequences it had
21 to Mr. Langford?

22 MR. GROSE: Well, and -- and they brought up harm
23 to a client and -- and I think the -- the decisions on
24 which issues to brief can result in a harm to a client.

25 MS. MEADOWS: Judge, I was talking about in the

1 context of a -- of a conflict, not which issues were
2 raised.

3 MR. GROSE: Well, I mean, we're alleging that
4 there's a conflict. I don't think there's any dispute
5 that she represented both co-defendants and -- and --
6 that stood trial. There was a third co-defendant, but
7 I don't believe there's any dispute that she represented
8 co-defendants.

9 MS. MEADOWS: I agree, but I did not go into in --
10 ineffective assistance of counsel talking about how --
11 what she knows about how her --

12 THE COURT: I -- I just think he's trying to
13 establish some kind of harm that was done because of
14 a conflict. I'll allow it, but Mr. Grose leave out
15 the Federal habeas because we didn't talk about anything
16 about that. You can ask her what harm her decision
17 would have on Mr. Langford.

18 MR. GROSE: Okay.

19 BY MR. GROSE:

20 Q. Do you know whether or not the decisions about what
21 issues you raise can end up having harm to a client?

22 A. Well, I think it is possible the next step would be
23 Federal habeas, but I want to specify to you, Mr. Grose,
24 and to everyone, even though we were very busy and
25 overworked, defending the client and getting what was best

1 for the client, getting fairness for the client was always
2 the ultimate goal, and I did it because I hate injustice
3 and if I did -- if I made an error that hurt Mr. Langford,
4 I hope he gets a new trial because what is right for him,
5 it has to be right, and I would do everything I could to
6 help him and every client have a winning case. Now
7 hopefully he can go to Federal habeas and I hope he would
8 win there and I've told every client in a PCR that that
9 would be -- have to be the next step.

10 Q. And just -- just one final question. She asked you
11 about the three issues that you raised in Mr. Phillips'
12 direct appeal. Is it fair to say you considered all of
13 those issues to be meritorious?

14 A. Well, yes.

15 MR. GROSE: All right. That's all I have.

16 THE COURT: Okay.

17 Do you have another witness that you want to call,
18 Mr. Grose?

19 MR. GROSE: I -- if I could have a -- a recess to
20 confer with Mr. Langford. He would be my only other
21 witness, but we need to discuss whether or not he wants
22 to testify.

23 THE COURT: Okay. That's -- why don't we take a
24 fifteen minute recess.

25 Ms. DuRant --

1 MS. DuRANT: Yes, ma'am.

2 THE COURT: -- I don't have -- I don't want you
3 to leave just yet only --

4 MS. DuRANT: Okay.

5 THE COURT: -- only because we're gonna take
6 recess, there's something I want to go look at, and I
7 might have a question for you.

8 MS. DuRANT: Okay.

9 THE COURT: Okay.

10 All right. So let's be -- let's be in recess for
11 about -- well, I'll give you a little bit of time. Why
12 don't we come back -- it's 10:19. Why don't we come
13 back at twenty till. That will give you about twenty
14 minutes.

15 MR. GROSE: Okay.

16 THE COURT: Or we can come back at a quarter till.
17 I don't know how long it's gonna take for the officer to
18 hook up Mr. Langford.

19 Mr. Langford, is the officer there with you?

20 MR. LANGFORD: They're right outside of the door.
21 I can contact them.

22 THE COURT: Okay. And then that way you might
23 want to get a phone number from the officer, Mr. Grose,
24 so you could call him and talk to him.

25 MR. GROSE: Or I can -- either I can call them or

1 they can call me. Either way.

2 THE COURT: All right. Mr. Langford, if you would
3 go and knock on the door and ask them to come in here.

4 MS. MEADOWS: And, Judge, I believe Bruce may know,
5 but there's supposedly some feature where they can go
6 into a --

7 THE COURT: Breakout room.

8 MS. MEADOWS: Right.

9 THE COURT: I got you. Bruce is gonna take care --

10 Ms. MEADOWS: I don't know anything about it, but --

11 MR. GROSE: I'd -- I'd rather just do the phone
12 because my capabilities are -- are limited, so.

13 THE COURT: Okay. Well, then I'm gonna tell you
14 this. Once the guard comes in, I'm going to -- I don't
15 know where that phone is, but I'm gonna have my law
16 clerk make sure that that room is muted and then,
17 Mr. Grose, you can go to any room you want to and call
18 him.

19 MR. GROSE: Okay. Thank you.

20 THE COURT: Okay. All right. We'll be in recess
21 until, let's say, a quarter till. That will give you
22 fifteen -- about thirty minutes, okay?

23 Thanks.

24 MR. GROSE: All right. Thank you.

25 (Recess taken at 10:20 AM.)

1 (Back on the record at 10:48 AM.)

2 MR. GROSE: Ma'am, can you hear me?

3 THE COURT: I can hear you.

4 Ms. Meadows?

5 MS. MEADOWS: Yes, ma'am.

6 THE COURT: I can hear you.

7 Ms. DuRant, I heard you.

8 MS. DuRANT: Okay. Yes, ma'am.

9 THE COURT: Mr. Langford, can you hear me?

10 MR. LANGFORD: Yes, ma'am. I can hear you.

11 THE COURT: Okay. Make sure you scoot up close
12 because you're almost to a whisper there.

13 All right. Mr. -- let me make sure I've got
14 everybody. Do I have -- I've got the court reporter.

15 Melinda, are you there?

16 She's here.

17 Okay. Mr. Grose, is your client gonna testify?

18 MR. GROSE: Yes, ma'am.

19 At this time I'd call Mr. Langford.

20 THE COURT: All right. Mr. Langford, can I get you
21 to raise your right hand.

22 (Whereupon, K.C. Langford was duly sworn by the
23 Court.)

24 THE COURT: Okay. Thank you.

25 Go ahead, Mr. Grose.

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K.C. LANGFORD,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GROSE:

Q. All right. If you could, please state your full name
and spell your last name for the record.

A. First name, K.C. Initials K-C. Last name, Langford,
L-A-N-G-F-O-R-D.

Q. And are you the Applicant in this case?

A. Yes, sir.

Q. All right. And when you filed your prior PCR appeal,
who was the attorney who represented you?

A. Charles Grose.

Q. No, no, no. In the -- in the prior appeal, not the
current PCR.

A. Okay. The prior, Ms. DuRant.

Q. Okay. All right. And when Ms. DuRant represented
you, did you and her ever have a conversation about the
fact that she had represented Bryan Phillips in his direct
appeal?

A. No, sir, I wasn't informed that she represented Bryan
Phillips.

Q. Did she ever send you a letter explaining that she had
represented Bryan Phillips in his direct appeal?

A. No, sir, I never received any letter.

1 Q. All right. Did she ever ask you to sign anything
2 waiving the potential of a conflict because she had
3 represented Mr. Phillips in his prior direct appeal?

4 A. No, sir.

5 Q. All right. When did you learn that it was a potential
6 conflict for her to have represented Mr. Phillips in his
7 prior direct appeal and you in your PCR appeal?

8 A. Well, after I was denied relief in my PCR, she was
9 appointed my case and I was asking her to -- to raise some
10 issues and she already informed me that she raised some
11 issues and that's when you took my case and you notified
12 me that it was a conflict because she represented
13 Mr. Phillips. I know I never knew it existed.

14 Q. And had you known it at the time that you filed your
15 direct -- I mean, I'm sorry. Let me rephrase that
16 question. Had you known it at the time you filed your PCR
17 appeal that she had represented Mr. Phillips, would you
18 have wanted a lawyer who had represented Mr. Phillips?

19 A. No. No, sir.

20 Q. And would you have wanted an independent lawyer?

21 A. Yes, sir. Yes, sir.

22 Q. Okay. So you -- so you would have wanted somebody
23 who was the person -- the person who had represented
24 Mr. Phillips?

25 A. Can you restate that, Mr. Grose? I didn't hear that.

1 Can you restate it?

2 Q. Would you -- would you have wanted somebody who had
3 represented Mr. Phillips previously or would you have
4 wanted somebody who had not represented Mr. Phillips
5 previously?

6 A. I would have wanted someone who didn't represent
7 Mr. Phillips previously.

8 MR. GROSE: Thank you. That's all the questions
9 I have.

10 THE COURT: Okay. Ms. Meadows.

11 MS. MEADOWS: I don't have any questions for
12 Mr. Langford. I would just ask that we keep the record
13 open to allow Ms. DuRant to fully check her file and
14 just make sure that there isn't a note or something
15 indicating she talked to Mr. Langford and that's all I
16 would ask.

17 THE COURT: Okay. Ms. DuRant, where is the rest
18 of the file? I know you testified you only had a
19 partial file.

20 MS. DuRANT: Well, it would be in the Office of
21 Appellate Defense. I am now retired from there, so I
22 don't have full access to it. I would have to make
23 special arrangements to do that.

24 THE COURT: And how long does that take to do,
25 Ms. Meadows?

1 MS. MEADOWS: Judge, I don't -- I don't know about,
2 you know, their procedure for that. I -- of course,
3 I'm happy to work with Ms. DuRant on, you know, about
4 coming to Columbia and about, you know, trying to
5 coordinate her reviewing the file.

6 THE COURT: And so are you asking me to continue
7 this hearing until she gets the rest of her file?

8 MS. MEADOWS: No, I don't think it needs to be
9 continued, but just if we could keep the record open to
10 verify -- she can verify whether or not there's a note
11 or anything.

12 THE COURT: And then you're gonna notify the
13 Court --

14 MS. MEADOWS: Yes, ma'am.

15 THE COURT: -- before I make a decision?

16 MS. MEADOWS: Yes, ma'am. If that's -- that's
17 okay with Your Honor.

18 THE COURT: I just -- I need to --

19 MR. GROSE: Are you ready to hear from me, Your
20 Honor?

21 THE COURT: Yes, Mr. Grose.

22 MR. GROSE: I mean, given the way the testimony
23 came out, I -- I think it's, you know, in your
24 discretion as to whether you keep the -- the hearing
25 open or not. I would just ask that we have some sort

1 of finite timetable on this so this doesn't become one
2 of those PCRs that exists now where we're still trying
3 to tie up loose ends.

4 THE COURT: Absolutely. I -- I agree with you
5 because trying to get you-all even scheduled for this
6 it took us a couple of months to do so and I hate to do
7 that to Mr. Langford.

8 Let -- just for a few housekeeping questions, let
9 me ask you has the Phillips appeal been decided?

10 MS. MEADOWS: It has not (transmission distortion)
11 this case, so I'll let you know the status on that.

12 THE COURT: Okay. Bruce, can you mute your mic so
13 I can hear? There's an echo.

14 LAW CLERK: Yes, ma'am. It's coming from
15 Ms. DuRant. I just muted her.

16 THE COURT: Okay. Thank you.

17 Mr. Grose, do you know the status of that?

18 MR. GROSE: According --

19 THE COURT: We could look it up, but our -- our
20 system's down and we couldn't -- we couldn't find out.

21 MS. MEADOWS: Taylor's representing the State, so
22 he may --

23 MR. GROSE: According to C-Track, it's Appellate
24 Case Number 2020-000568. It was transferred to the
25 Court of Appeals on March 29th of this year, which was

1 the same month that, I guess, the reply to the return
2 to the cert petition was filed, so I imagine it will be
3 pending for quite some time just based on my experience
4 with PCR appeals.

5 THE COURT: Right. Well, you know, it's interesting
6 because I went back and I pulled Mr. Langford's PCR that
7 Mr. Brooks originally had. I mean, he pretty much named
8 the same issues as Phillips did in his PCR, he just got
9 two different Circuit Court judges ruling two different
10 ways is what it looks like to me.

11 As far as the conflict, Ms. DuRant, let me -- let
12 me ask you because I know this isn't the first time this
13 has come up. We've had plenty of co-defendants. I --
14 I did criminal defense for twenty-nine years and I knew
15 that when I went to go represent somebody I always got a
16 waiver of a conflict signed. I think this might -- but
17 these are like two different total proceedings; one's a
18 direct appeal, one's a PCR. And you're telling me that
19 as long as the prior lawyer was not there, then in your
20 office considered it was not a conflict?

21 MS. DuRANT: That is correct, Your Honor. And if
22 I may add at this point to what you're saying, one of
23 the issues in my mind was that these were two different
24 proceedings; one was a direct appeal where you're
25 looking for --

1 THE COURT: Right. Right.

2 MS. DuRANT: -- whether the judge made error and
3 the other's a PCR related to the trial attorney and my
4 understanding of conflict has always been if there are
5 opposing interests between the two clients and I saw no
6 opposing interests. My representation of Mr. Phillips
7 did not harm my handling Mr. Langford's case in any way
8 at all in my mind. The issue of the interpreter had
9 already been to the Supreme Court. They saw it as really
10 not significant and they could have ruled on it if they
11 chose to do that, so I do not consider them --

12 THE COURT: Well, it looks like --

13 MS. DuRANT: I'm sorry.

14 THE COURT: It looks to me like when I looked at
15 his PCR -- let me make sure I have this straight in my
16 mind because I wasn't a PCR lawyer and so -- I certainly
17 have been PCR'd in my day, but I've -- I've got the
18 original PCR from Mr. Brooks and from that you did
19 that appeal and you looked at all these issues in this
20 PCR and it looks to me like one of the issues is one of
21 the issues that Mr. Phillips won his PCR on, which would
22 be the interpreter.

23 MS. DuRANT: Right.

24 THE COURT: You went with the witness because it
25 had already been determined once by a Circuit Court

1 judge and then you went ahead and appealed it up and --
2 and we don't know what that -- what that's gonna be as
3 far as Mr. Phillips because we're still waiting on it,
4 so.

5 MS. DuRANT: If I may add something, Your Honor?

6 THE COURT: Yes, ma'am.

7 MS. DuRANT: In my mind the reason I did not raise
8 the interpreter issue with Mr. Langford is because as
9 you and I both know the Supreme Court, if they see an
10 error, they will rule on that. They -- if they felt
11 the statute was a problem, the wrong statute, they would
12 have admonished, they would have sent out instructions
13 for attorneys if they felt that it was a significant
14 issue, but they didn't do that.

15 THE COURT: Right.

16 MS. DuRANT: They simply made a footnote.

17 THE COURT: I -- I want to say, Ms. DuRant, I
18 remember this being on the direct appeal in this case.
19 Correct me if I'm wrong. I know I read it somewhere,
20 and I went to go look for it, about the interpreter,
21 and they pretty much just brushed right over that.

22 MS. DuRANT: Exactly. They did not see it as
23 significant even though they knew --

24 THE COURT: Right.

25 MS. DuRANT: -- admitted that it was the wrong

1 statute, but that wasn't significant to them. And the
2 Supreme Court, whether it's preserved or not, they rule
3 on the issues.

4 THE COURT: Right. I -- I remember reading that
5 about the interpreter, so I thought well, if the Supreme
6 Court said it, that probably wouldn't be my strongest
7 argument and let me move onto something else.

8 MS. DuRANT: Right.

9 THE COURT: So I -- I guess is that -- was that
10 your strategy?

11 MS. DuRANT: Yes, ma'am.

12 THE COURT: And then go ahead and get the two
13 potential alibi witnesses, I think, for Mr. Langford;
14 is that right?

15 MS. DuRANT: Yes, because they testified and I
16 felt that was the strongest issue.

17 THE COURT: Okay. I just wanted to make sure I
18 was thinking right.

19 All right. Let me see. Ms. Meadows, I am gonna
20 put a time limit on this because I do want to give
21 Ms. DuRant the opportunity to look over her whole file
22 to see if she made any note or -- whatsoever that she
23 talked to Mr. Langford and informed him that, you know,
24 you know that I represented your co-defendant in the
25 direct appeal, which I'll have to say the Langford case

1 was a pretty big case that came down as far as from
2 the Supreme Court. I remember when it came down, but
3 maybe not for how Mr. Langford wanted it to come down,
4 but as far as the control of the docket. It would be
5 hard for me to think that he couldn't have known that
6 you represented Mr. Phillips.

7 MS. MEADOWS: And, Judge, just if I may expand on
8 that -- am I echoing?

9 THE COURT: You are.

10 Bruce, fix her echo. Bruce can fix anything on a
11 computer.

12 MS. MEADOWS: Okay.

13 LAW CLERK: It's -- I'm just keeping Ms. DuRant
14 muted. It's -- it's coming from Ms. DuRant's microphone.

15 THE COURT: Oh, okay.

16 MS. MEADOWS: So as far as the -- you know, whether
17 she told him, there may be some -- it's our position
18 that there may be some ethics rule that suggests that,
19 but as far as, you know, a conflict for PCR purposes the
20 standard's much higher and, you know, you still have to
21 prove that -- still have to prove that Ms. DuRant act --
22 actively represented conflicting interests and that an
23 active -- and that an actual conflict adversely affected
24 her performance, and I believe that's Gonzales.

25 THE COURT: Right.

1 MS. MEADOWS: So as far as that, I mean, even --
2 you know, just for the record, even if, you know, we
3 don't find anything we don't know, I just wanted to
4 put that out there.

5 THE COURT: Well, I know that, you know, it is
6 an issue that comes up when you talk about appellate
7 defense. I mean, it -- this issue came up, you know,
8 when I was practicing law because they get -- they do,
9 they get everybody thrown in their office to represent,
10 and I know that there's been some caselaw on it that
11 says it's not a conflict, but I'm gonna give her the
12 opportunity. I think she deserves the opportunity to
13 look at her file because I think she's kind of at a
14 disadvantage if the file's tucked away somewhere and
15 she doesn't get to look at it, and I do want to give
16 her that opportunity.

17 Let me tell you I'm going to -- on 5-31 I'm
18 doing, again, PCRs and civil, but it's gonna be for
19 the Thirteenth Circuit, but I know I could either -- I
20 don't know that we have to have a hearing.

21 Ms. Meadows, if you could just let Mr. Grose --
22 if you-all find anything, send us a note. If -- of
23 course, if Mr. Grose wants to call Ms. DuRant again,
24 I'll let him do that, but --

25 MS. MEADOWS: And that's kind of what I was

1 thinking as far as, you know, finishing up everything
2 here. I don't think another hearing's necessary, you
3 know, unless --

4 THE COURT: Mr. Grose?

5 MR. GROSE: I -- I can't -- I can't answer that
6 question until I know what, if anything --

7 THE COURT: If they find it.

8 MR. GROSE: -- is gonna be produced.

9 THE COURT: Okay. Well --

10 MR. GROSE: I mean, so I think that's premature.

11 THE COURT: Right. Well, I'm gonna tell you,
12 Mr. Grose, if we can -- if we -- if we need a hearing,
13 we'll do another hearing. We'll do it the week of
14 May 31st. If we don't, please let me know if you can
15 accept whatever it is that she sends to you, Mr. Grose.

16 If there's anything, and there might not be
17 anything in her file, okay, but I am gonna give her
18 that opportunity to look.

19 MR. GROSE: That -- that all sounds reasonable.
20 Thank you.

21 THE COURT: And then I'm gonna tell, Ms. Meadows
22 and Mr. Grose, I'm gonna ask both sides for proposed
23 orders, so if you-all can -- that gives you plenty of
24 time notwithstanding whether there's some kind of
25 written notice, which wouldn't take long. That way we

1 can get this case going. I don't want to keep it too
2 much longer. It needs to be decided and done with.

3 MS. MEADOWS: Yes, ma'am. I just -- I'm still a
4 little confused on the relief that would be available.

5 THE COURT: Well, you know, we were talking about
6 that, too, so what if there is a conflict? We're going
7 back to an appeal, Mr. Grose? Where are we going from
8 here? What's the goal?

9 MR. GROSE: Well, the -- the relief would be to
10 have a new appeal because that's where the conflict
11 was. Just like --

12 THE COURT: A new appeal from his old PCR where
13 Mr. Brooks represented him?

14 MR. GROSE: Correct.

15 THE COURT: Okay.

16 MS. MEADOWS: And I don't know of any --

17 THE COURT: You know, it just kind of feels
18 strange. It -- it sounds like I'm instructing the
19 Court of Appeals to rehear this case is what it sounds
20 like to me.

21 MR. GROSE: Well -- well, you know, regardless of
22 how you rule, there's gonna be another layer of this
23 and so the appellate court is gonna, you know, pass on
24 whether or not, you know, he gets another appeal. I
25 would just say that the -- you know, the remedy at the

1 circuit court level when you have conflicted counsel
2 is, is a new PCR without conflicted counsel, and that
3 would be one circuit court judge telling the circuit
4 court to rehear it again. You know, I -- I don't know
5 that -- you know, it's -- I can see why it would --
6 would seem that way, but I think that that would be
7 the -- the remedy, is that you go back to the point
8 where the problem occurred and start over.

9 THE COURT: Yeah, well, I'm gonna -- I'm gonna
10 look into that remedy because it really does sound like
11 I'm telling the Court of Appeals you need to rehear
12 this thing and they're probably not gonna be real
13 happy with me if I ruled that way. Not that it makes
14 a hill of beans when it comes to you, Mr. Langford,
15 because I certainly want to do the right thing.

16 All right. Let's -- Ms. DuRant, if you could look
17 at your file.

18 Ms. Meadows, if you can -- it might be easier for
19 you if you'd get her file and make it available to her.
20 It might speed things along. And I'm gonna ask both of
21 you-all to work on proposed orders and let me know by
22 May 31st.

23 MR. GROSE: Now -- now we -- we would object to
24 the -- the file going directly to the attorney general's
25 office --

1 THE COURT: Okay. Well --

2 MR. GROSE: -- you know, and I know we're --

3 MS. MEADOWS: I don't care about the file. I just
4 meant as far as helping Ms. DuRant have access to the
5 file since she --

6 THE COURT: I'm just --

7 MS. MEADOWS: -- isn't in Columbia. I don't care
8 anything about seeing it or looking through it, but --

9 MR. GROSE: Well, what -- what -- what I imagine
10 can happen because I just recently got some files from
11 appellate defense on a current client that they had
12 represented previously on -- on another case. They --
13 in all likelihood the file is -- the file is in their
14 storage, which is part of the -- the State archives or
15 storage system and they would be able -- they would have
16 to request that and they would be able to get it back
17 and, you know, they've been able to make the file
18 available to me, you know, by scanning them in, you
19 know, so if it's possible that, you know, they could
20 get it and scan it and send it to her or -- or mail it
21 to her or -- or whatever they could do to work it out.

22 THE COURT: Okay. Well, let's do this, Ms. DuRant.
23 If you'll call them and see if they can do that. If
24 you have any problem, then how about call my office and
25 I'll see what I can do to help you get them.

1 MS. DuRANT: Yes, ma'am. I will do that.

2 THE COURT: And that way I'll leave Ms. Meadows
3 out of it and Mr. Grose and -- and, Ms. DuRant, we'll
4 help you if you need the help.

5 Okay. Well, then let's plan on the week of the
6 31st if we need a hearing. You-all need to let me know
7 before then, okay --

8 MS. MEADOWS: Okay.

9 THE COURT: -- then we'll get this case settled.

10 MS. MEADOWS: Okay. And when would you like the
11 proposed orders by?

12 THE COURT: Let me tell you. How about by
13 May 17th? That's a Monday.

14 MS. MEADOWS: Okay.

15 THE COURT: Just sometime that week so I can look
16 over it before the 31st, okay?

17 MS. MEADOWS: Okay. That works for me.

18 THE COURT: All right. Well, Ms. DuRant, good to
19 see you again.

20 MS. DuRANT: Good to see you, Judge. Thank you
21 very much.

22 THE COURT: Thank you.

23 Mr. Grose, good to see you.

24 Ms. Meadows, I'll see you tomorrow.

25 MS. MEADOWS: Yes, ma'am.

1 THE COURT: And, Mr. Langford, thank you.

2 MR. LANGFORD: You're welcome. Thank you.

3 THE COURT: All right. Mr. Smith, I'll see you
4 tomorrow.

5 MR. SMITH: See you then.

6 THE COURT: All right. Have a good evening.

7 MR. GROSE: Thank you, Your Honor.

8 THE COURT: Thank you.

9 (Whereupon, the proceedings were concluded at
10 11:13 AM.)
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C E R T I F I C A T E

I, Stacy S. Johnson, Official Court Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned case in Circuit Court on the 27th day of April, 2021, recorded by the Digital Court Reporter Program via WebEx Video conferencing, and transcribed by me to the best of my ability.

This transcript may contain quoted material. Such material is reproduced as read by the speaker. This transcript may also contain transmission interruptions and/or technical difficulties and inaudible or unintelligible indications due to being conducted remotely via videoconferencing.

I do further certify that I am neither of kin, counsel, nor have an interest to any party hereto.

July 12, 2021

/s/ Stacy S. Johnson
STACY S. JOHNSON
CIRCUIT COURT REPORTER

2-5-18

DC Langford

transferred to Allendale prison

if no trouble in history, then
can go there for preparation,
he doing NVAC
+ dog training in...

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

SW

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF EDGEFIELD	)	2020-CP-19-00091
	)	
	)	
	)	
	)	
K.C. LANGFORD,	)	
PLAINTIFF,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
STATE OF SOUTH CAROLINA,	)	
DEFENDANT.	)	
_____	)	

July 22, 2021
WebEx

B E F O R E:

THE HONORABLE DEBRA R. MCCASLIN, JUDGE.

A P P E A R A N C E S:

CHARLES GROS, ESQ.
Attorney for the Plaintiff

LILLIAN L. MEADOWS, ESQ.
Attorney for the Defendant

Penny M. Johnson
Court Reporter III

I N D E X

(PW) - Denotes Plaintiff's Witness
(DW) - Denotes Defense Witness

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<u>(DW) K. C. LANGFORD:</u>	
Direct Examination by Mr. Grose.....	10

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
	(Court's Exhibits)		
1	Handwritten Note	6	

All Exhibits were retained by the Clerk of Court for Edgefield County.

P R O C E E D I N G S

1
2 THE COURT: Let me call this case. This is Langford v.
3 The State of South Carolina. It's case number
4 2020-CP-19-00091. This is an evidentiary hearing that we
5 scheduled, I think it was back in March. I might be wrong.
6 And Ms. Durant was here to testify as to whether there was a
7 conflict, I believe that was the issue. The only issue
8 we're talking about now is whether there was a conflict in
9 her representation of Mr. Langford.

10 We had a -- we put this hearing on pause for Ms. Durant
11 to look at her file. She did and I guess it was -- because
12 this is not dated, but I received some handwritten notes
13 from her file where she made a note specifically stating
14 that Mr. Langford knew that I represented, I guess, Brian on
15 his direct appeal, but he had no problem with that. That
16 was a note that was sent to me. I was going to go ahead and
17 decide that case, but then Mr. Grose asked for a hearing on
18 the matter.

19 Anything you want to add to what I just said, Ms.
20 Meadows?

21 MS. MEADOWS: No, ma'am, I think you covered it.

22 THE COURT: Mr. Grose?

23 MR. GROSE: I don't think so. I think when we
24 adjourned the hearing initially, it was contemplated that if
25 anything else was going to be put in the record, you know,

1 we could resume the hearing. And I don't want this document
2 going in without any testimony corresponding to it. So that
3 extent, it's correct, we did want a hearing.

4 THE COURT: So let me ask you, are you planning to have
5 Mr. Langford testify?

6 MR. GROSE: It depends upon what the State does because
7 I'm objecting to this unauthenticated document going into
8 the record without any testimony authenticating it and
9 opportunity to cross-examine.

10 THE COURT: I just wanted to know so I could get him
11 sworn in.

12 Out of an abundance of caution, Ms. Huggins, can you
13 please swear in Mr. Langford before Mr. Grose starts?

14 MS. MEADOWS: Your Honor, I was planning on getting
15 some testimony from Lanelle. I don't know what you want to
16 do first.

17 THE COURT: Let me just go ahead --

18 Mona, if you'd swear in both of them. Let's do Mr.
19 Langford first and I'll remind him that he's under oath if
20 he testifies. And we could swear in, also, Ms. Durant.

21 K. C. LANGFORD

22 after being duly sworn, testified as follows:

23 LANELLE DURANT

24 after being duly sworn, testified as follows:

25 THE COURT: Thank you, Mona.

1 Mr. Grose, I'll let you go first. I know Ms. Meadows
2 is the one who requested the hearing, but --

3 MR. GROSE: Well, no, I requested the hearing. If they
4 want this to go in, then they need to authenticate it and
5 give me an opportunity to cross-examine. I have no
6 intention of calling witnesses unless I'm doing it in
7 response to something that the government does.

8 THE COURT: Okay. Well, I'll let Ms. Meadows go then.
9 If you will authenticate this document for us if you can.

10 MS. MEADOWS: All right, Judge. We call Ms. Durant.

11 And I'm not sure what's easiest for the court reporter
12 for purposes of marking it or what the easiest thing to do
13 is over WebEx.

14 THE COURT: She's going to be with me here tomorrow. I
15 can get it marked tomorrow and put it into the record.

16 DIRECT EXAMINATION

17 BY MS. MEADOWS:

18 Q Ms. Durant, did you have the opportunity to look
19 through your file from appellate defense for Mr. Langford's
20 PCR appeal file?

21 A I had my former assistant send the file to me, but he
22 had talked with Mr. Dudek. I had called and Mr. Dudek went
23 through their computer file and found the note that I
24 needed. But then I had them send me the file on a flash
25 drive and I went through the entire file myself and found

1 this note that I forwarded to you.

2 Q Okay. And do you recognize this document?

3 A Yes, and it's in my handwriting. I document my phone
4 calls on a legal pad usually, was my procedure, and then
5 they were filed in the client's file. And I did this on
6 February the 5th, 2018. It indicates that I talked to Mr.
7 Langford, who told me he was transferred to Allendale from
8 Evans.

9 During the conversation, I wanted to make sure he knew
10 that I had represented Brian Phillips on his direct appeal.
11 And the notes says he knew that I represented Brian and that
12 he has no problem with that. And it has my initials on it.

13 MS. MEADOWS: We would just move to admit the note
14 based on Ms. Durant's testimony.

15 THE COURT: I think this would be like the first
16 Court's Exhibit in this case, so it would be Court's Exhibit
17 No. 1 or Exhibit No. 1?

18 MS. MEADOWS: I think so.

19 THE COURT: Let me ask you, Mr. Grose, any objection?

20 MR. GROSE: No objection.

21 THE COURT: Okay. I'm going to mark it as Court's
22 Exhibit No. 1.

23 (Court's Exhibit No. 1 was admitted into evidence.)

24 THE COURT: Is that all, Ms. Meadows? Are you going to
25 call anyone else?

1 MS. MEADOWS: No, ma'am, that's it.

2 THE COURT: Okay.

3 Mr. Grose, I'll leave it to you.

4 MR. GROSE: Thank you, Your Honor, may it please the
5 Court.

6 CROSS-EXAMINATION

7 BY MR. GROSE:

8 Q Ms. Durant, did I understand you correctly that you
9 reviewed the entire file that was provided to you digitally?

10 A Yes, on a flash drive.

11 Q Okay. And other than this note, was there any other
12 documentation in that file related to discussing the
13 conflict of interest?

14 A No, I did not find anything else.

15 Q And you were looking through the whole file to see if
16 there was anything related one way or the other?

17 A Yes.

18 Q And this document that you presented to the Court is
19 dated February 5th of 2018; is that right?

20 A Yes.

21 Q And do you have any reason to doubt that that's the
22 date of the conversation?

23 A No.

24 Q All right. Do you recall the date that your
25 representation of Mr. Langford began?

1 A No, I don't remember that.

2 Q Do you know what the February 5th, 2018 date, what that
3 date was in relation to filing the petition for certiorari?

4 A I don't know the specific date, but I would gather from
5 the conversation that I had not filed a petition at that
6 point.

7 Q Okay. But you don't know -- can you testify together
8 whether you had already been working on the petition or how
9 close the petition was to becoming due or anything like
10 that?

11 A Well, I had been working on it, but that's the most I
12 can say at this point.

13 Q Okay. At the bottom, the last handwritten thing on
14 this note is what appears to be initials; is that correct?

15 A Yes, those are my initials.

16 Q Okay. I just wanted to make sure of that. This is not
17 -- Mr. Langford did not initial this document or sign this
18 document, did he?

19 A No, the initials are LCD, which are my initials.

20 Q There's not a letter in your file signed by you or Mr.
21 Langford giving full disclosure as to what the conflicts
22 could be and having Mr. Langford sign a waiver, is there?

23 A No, I did not find such.

24 Q And if there was, you would have -- if you had found
25 it, you would have presented it to us; is that correct?

1 A Yes.

2 Q And do you know how it came up in the conversation that
3 you represented Mr. Phillips? By that, did you bring it up
4 or did he bring it up or something else?

5 A No, I brought it up.

6 Q Okay. And do you recall exactly what you said to him?

7 A Well, he had called me to let me know he had been
8 transferred to somewhere else. And he told me about his
9 training program. So I took advantage of the opportunity, I
10 said, I wanted you to know that I had represented Brian
11 Phillips and now I'm representing you and I just wanted to
12 make sure you knew that and if you had any concerns about
13 that.

14 Q Okay. And other than that, did you state anything to
15 Mr. Langford?

16 A Not that I remember.

17 Q Okay. And this note indicated that he had been
18 transferred to Allendale, right?

19 A Yes.

20 Q And you're aware that Allendale is the only prison in
21 the state where every dorm is a character dorm?

22 A It's been a long time since I worked there, Mr. Grose,
23 and I can't say I knew all of that.

24 MR. GROSE: That's all I have.

25 Thank you, Judge.

1 THE COURT: Ms. Meadows, do you have anybody else you'd
2 like to call?

3 MS. MEADOWS: No, ma'am.

4 THE COURT: Mr. Grose?

5 MR. GROSE: I'd call Mr. Langford.

6 THE COURT: Mr. Langford, I'm going to remind you that
7 you're under oath.

8 MR. LANGFORD: Yes, ma'am.

9 THE COURT: All right. Mr. Grose, go ahead and
10 proceed.

11 DIRECT EXAMINATION

12 BY MR. GROSE:

13 Q Mr. Langford, do you have any recollection of that
14 conversation?

15 A No, sir.

16 MR. GROSE: That's all I have, Your Honor.

17 THE COURT: Anything, Ms. Meadows?

18 MS. MEADOWS: No, ma'am.

19 THE COURT: Okay. Well, then I guess that concludes
20 this hearing.

21 Unless you'd like to make an argument, Ms. Meadows, I'd
22 be glad to hear it.

23 MS. MEADOWS: No, that's all I have.

24 MR. GROSE: Your Honor, at one point, you had requested
25 the parties to provide proposed orders and had set a

1 schedule for that. And I think we both e-mailed you and
2 agreed it would be difficult for us to do the proposed
3 orders until we got through this part of the process. Do
4 you still want us to do that?

5 THE COURT: I do. How long do you think it would take
6 you, Mr. Grose, to get me a proposed order?

7 MR. GROSE: Could I have two weeks?

8 THE COURT: You may.

9 How about you, Ms. Meadows?

10 MS. MEADOWS: That works for me as well.

11 THE COURT: Okay. All right. Well then, in two weeks
12 -- let's see. Why don't we make them due by August the 6th?
13 That will give you just a little over two weeks. That's a
14 Friday.

15 MR. GROSE: That's good. Thank you.

16 THE COURT: If anybody needs additional time, just
17 contact me, okay?

18 All right. Good seeing all of y'all. Hope you have a
19 good weekend.

20 Ms. Durant, good to see you again.

21 Ms. Meadows, I guess I'll be seeing you some time
22 shortly.

23 MS. MEADOWS: Yes, Your Honor.
24
25

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

I, PENNY M. JOHNSON, Official Court Reporter for the
Second Judicial Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true, accurate, and
complete Transcript of Record of the proceedings had and the
evidence introduced in the hearing of the captioned case,
relative to appeal, in the Court of Common Pleas for
Edgefield County, South Carolina, on the 22nd day of July,
2021.

I do further certify that I am neither of kin, counsel,
nor interest to any party hereto.

February 6, 2022

Penny M. Johnson
Penny M. Johnson
Official Court Reporter

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), SCRCPP (“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.

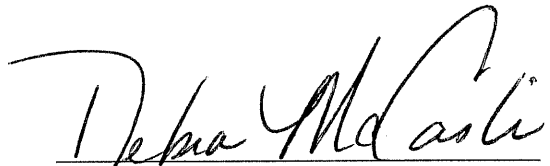
Applicant must file and serve a notice of appeal within thirty days from PCR counsel’s

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

EDGEFIELD COUNTY
CLERK OF COURT
OPAL L. REEL

The Grose Law Firm, LLC
404 Main Street, Greenwood, South Carolina 29646

E. Charles Grose, Jr.
Phone: 864-538-4466 Fax: 864-538-4405
E-mail: charles@groselawfirm.com
Web: GroseLawFirm.com

September 20, 2021

The Honorable Charles L. Reel
Clerk of Court, Edgefield County
P.O. Box 34
Edgefield, SC 29824

Re: *K.C. Langford v. State of South Carolina*
Case Number 2020-CP-19-00091

Dear Mr. Reel:

Enclosed for filing, please find Mr. Langford's Rule 59(e), SCRCF Motion and Proffer of Proposed Orders, along with a certificate of service.

Thank you for your attention to this matter. Please let me know if you have any questions or require additional information.

With kindest regards, I am

Yours very truly,

s/E. Charles Grose, Jr.
E. Charles Grose, Jr.

cc: The Honorable Debra R. McCaslin (via Email)
Mr. K.C. Langford (via US Mail)
Lillian Loch Meadows, Esquire (via Email)

EDGEFIELD COUNTY
CLERK OF COURT
CHRISTOPHER REEL

2021 OCT -7 PM 3:50

THE STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF EDGEFIELD) FOR THE ELEVENTH JUDICIAL CIRCUIT

K.C. Langford,)
Applicant,) Case No. 2020-CP-19-00091

vs.) **Rule 59(e), SCRCP Motion and Proffer of**
) **Proposed Orders¹**

State of South Carolina,)
Respondent.)

To: The Honorable Debra R. McCaslin, Presiding Judge, Eleventh Judicial Circuit

Pursuant to Rule 59(e), SCRCP, K.C. Langford moves this Court for an order reconsidering its order dismissing his application for post-conviction relief (“PCR”) dated August 27, 2021 and filed on September 7, 2021 (herein after “order of dismissal” or “order”),² withdrawing that order, and entering an order granting him post-conviction relief.

PROCEDURAL HISTORY

The State of South Carolina charged K.C. Langford with criminal conspiracy, first-degree burglary, armed robbery, and kidnapping for an incident occurring on August 14, 2008, involving the owners of a Chinese restaurant in Johnston, South Carolina. A.³ 855-66. On May 17, 2020, the

¹ Mr. Langford’s proposed order is attached as Exhibit A. The State’s proposed order is attached as Exhibit B.

² Undesigned counsel received notice of entry of this order by receiving a copy in the United States Mail, from the Clerk of Court of Edgefield County, on Thursday, September 9, 2021, thereby making this motion due on Munday, September 20, 2021. Rule 6(a), SCRCP. Undersigned received an additional copy of this order by email, from the Attorney General’s Office, on Friday, September 10, 2021.

³ “A.” refers to the Appendix filed in the Supreme Court of South Carolina contemporaneously with Mr. Langford’s petition for writ of *certiorari* to review the dismissal of his application for post-conviction relief in *Langford v. State of South Carolina*, Appellate Case No. 2017-001397.

Honorable William P. Keesley, Presiding Judge for the Court of General Sessions for Edgefield County, convened a pre-trial hearing. A. 1-16. From September 7-9, 2020, the State tried Mr. Langford and co-defendant Bryan Phillips before Judge Keesley and a jury. A. 17-567.⁴ Ervin J. Maye of the Eleventh Circuit Solicitor's Office represented the State. Mark R. Calhoun represented Mr. Langford. Randall D. Williams represented Mr. Phillips. On September 9, 2010, the jurors found Mr. Langford and Mr. Phillips guilty as charged. For both defendants, Judge Keesley imposed concurrent sentences of five years for criminal conspiracy, twenty years for first-degree burglary, twenty years for armed robbery, and twenty years for kidnapping. A. 565, 855-66.

Mr. Langford appealed the convictions and sentences to the Court of Appeals of South Carolina. Elizabeth A. Franklin-Best, of the Appellate Division of the South Carolina Commission on Indigent Defense, represented Mr. Langford. David Spencer represented the State. After Mr. Langford filed his initial brief of appellant, the South Carolina Public Defender Association petitioned for leave to file an *amicus curie* brief. On October 11, 2011, the State filed a return opposing the Public Defender Association's petition. On October 12, 2011, then Chief Judge of the Court of Appeals John Cannon Few granted the motion. On October 19, 2011, the State petitioned Judge Few to rehear the petition because the court failed to consider the State's return. On November 10, 2011, Judge Few rescinded the prior order, considered the State's return, and once again granted the petition.

Pursuant to Rule 204(b), SCACR, Mr. Langford petitioned the Supreme Court of South Carolina to certify his case from the Court of Appeals. Bryan Phillips, who was represented by

⁴ The cover page of the trial transcript (A. 17) reflects the trial occurred on January 23, 2011; however, this date is an error. On February 28, 2012, the State moved to correct the date appearing on the transcript. Ex. 1. On March 2, 2012, Mr. Langford consented to the correction. Ex. 2. On March 5, 2012, the Supreme Court granted the motion. Ex. 1, p. 2, and 3.

LaNelle Cantey DuRant, of the of the Appellate Division of the South Carolina Commission on Indigent Defense, petitioned the Supreme Court of South Carolina to certify his appeal form the Court of Appeals, moved for his appeal to be consolidated with Mr. Langford's appeal, and requested the *amicus* brief of the Public Defender Association be incorporated into his appeal. On November 3, 2011, the Supreme Court of South Carolina granted these motions. On February 6, 2012, the Supreme Court of South Carolina expedited Mr. Langford's appeal, set a briefing schedule, and scheduled oral arguments for April 18, 2012.

On March 21, 2012, Mr. Langford filed the Final Brief of Appellant, asserting a single issue:

Did the trial court judge err when he did not dismiss Langford's case in May 2010 when Langford 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 formally cooperating co-defendant, who elected to assert his right to remain silent under the Fifth Amendment of the United States Constitution, into testifying for the state at the subsequent trial.⁵

On March 22, 2012, the State filed the Final Brief of Respondent. Also on March 22, 2012, the Public Defender Association filed its *amicus curiae* brief. A. 790-828. On April 16, 2012, Mr. Langford and Mr. Phillips requested the Supreme Court of South Carolina take judicial notice of various documents relevant to the speedy trial issue. Also on April 16, 2012, the Public Defender Association submitted a supplemental citation letter. On April 17, 2012, the South Carolina Solicitor's Association filed its *amicus curiae* brief. A. 829-54.

⁵ The Supreme Court of South Carolina stated the issues on appeal as follows:

(i) Is section 1-7-330 constitutional?

(ii) Did Langford suffer any prejudice as a result of the solicitor controlling when his case would be called for trial?

State v. Langford, 400 S.C. 421, 432, 735 S.E.2d 471, 477 (2012); *see also* Slip Opinion, A. 770.

On April 18, 2012, the Supreme Court of South Carolina convened oral arguments in the consolidated appeals. On November 21, 2012, the Supreme Court of South Carolina declared unconstitutional S.C. Code § 1-7-330, which vested Solicitors with control of the General Sessions Court dockets but held Mr. Langford did not suffer prejudice. *State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012); *see also* Slip Opinion, A. 766-85 (S.C.S.Ct. Opinion No. 27195 (filed November 21, 2012)). The Supreme Court of South Carolina denied cross-petitions for rehearing on December 20, 2012 (A. 786-88) and issued the remittitur on December 20, 2012 (A. 789). At the same time, the Supreme Court of South Carolina affirmed Mr. Phillips' convictions and sentences in an unpublished opinion. *State v. Phillips*, No. 2010-173307, 2012 WL 10907975 (S.C. Nov. 21, 2012).

On March 18, 2013, Mr. Langford filed a petition for a writ of *certiorari* in the Supreme Court of the United States, raising the following issue:

Did the South Carolina Supreme Court err when it held that Langford, an indigent defendant who spent nearly 2 years in pre-trial detention, failed to establish he was prejudiced for purposes of analyzing his federal speedy trial right, even though Langford filed two pro se motions invoking his right to a speedy trial, and when the Solicitor, who controlled the docket system, simply did not call the case for trial because it was not prepared to go forward?

Ms. Franklin-Best represented Mr. Langford. On April 8, 2013, the Public Defender Association filed an *amicus curiae* brief. On May 31, 2013, the State filed its brief in opposition to the petition for a writ of *certiorari*. Salley W. Elliott represented the State. On October 7, 2013, the Supreme Court of the United States denied the petition for a writ of *certiorari*. *Langford v. South Carolina*, 571 U.S. 831 (2013).

On January 3, 2014, Mr. Langford filed an application for post-conviction relief ("PCR") in the Court of Common Pleas for Edgefield County (A. 568-607) and supplemented it on January 13, 2017 (A. 608), raising the following grounds for relief:

10(a)(1)&11(a)(1) The Applicant was denied effective assistance of trial counsel by counsel's failure to object to the composition of the jury.

10(a)(2)&11(a)(2) The Applicant was denied effective assistance of trial counsel by counsel failing to ask for a continuance to obtain a certified interpreter.

10(a)(3)&11(a)(3) The applicant was denied effective assistance of trial counsel by counsel allowing the State to do a proffer, with the state's key witness (Alvin Phillips) on the witness stand, listening to the argument pertaining to the proffer.

10(a)(4)&11(a)(4) The Applicant was denied effective assistance of trial counsel by not securing the defense key witness (Joseph Patrick Stevens). Applicant was denied the right to confront his accuser.

10(a)(5)&11(a)(5) Trial counsel was ineffective for helping assist the state in laying the foundation for their case.

10(a)(6)&11(a)(6) The Applicant was denied effective assistance of trial counsel by counsel's failure to object to Officer Roosevelt Young testifying to hearsay testimony.

10(a)(7)&11(a)(7) The Applicant was denied effective assistance of trial counsel by counsel asking co-defendant Alvin Phillips about the mandatory minimum of his charge.

10(a)(8)&11(a)(8) The Applicant was denied effective assistance of trial counsel by counsel failing to object to the kidnapping indictment.

10(a)(9)&11(a)(9) The Applicant was denied effective assistance of trial counsel by counsel arguing charges [Mr. Langford] was not on trial for.

10(a)(10)&11(a)(10) The Applicant was denied effective assistance of trial counsel by counsel commenting on applicant's silence.

10(a)(11)&11(a)(11) The Applicant was denied effective Assistance of trial counsel by failing to object to the Solicitor commenting on Applicant's silence.

10(a)(12)&11(a)(12) The Applicant was denied effect[ive] assistance of trial counsel by [counsel] failing to object to Police Officer Roosevelt Young vouching for Joseph Stevens.

10(a)(13)&11(a)(13) The Applicant was denied effective assistance of trial counsel by counsel quoting *Bible* scripture during closing argument.

10(a)(14)&11(a)(14) Trial counsel was ineffective for failing to object to the Solicitor's vouching and bolstering for the credibility of numerous of its witnesses in closing argument.

10(a)(15)&11(a)(15) The Applicant was denied effective assistance of trial counsel by trial counsel failing to object to premature deliberations by the jury.

10(a)(16)&11(a)(16) The Applicant was denied effective assistance of appellate counsel for counsel failing to file a reply brief concerning inadmissible testimony presented at Applicant's trial.

10(a)(17)&11(a)(17) The Applicant was denied the right to effective assistance of trial counsel due to counsel's cumulative errors.

10(b)(1)&11(b)(1) Prosecution Misconduct: By the Solicitor denying that a deal exist[ed] between the [State and] Applicant's co-defendant (Alvin Phillips).

10(b)(2)&11(b)(2) Prosecution Misconduct: By using inflammatory and irrelevant testimony in closing argument.

Supplemental Ground: Applicant alleges that trial counsel failed to investigate two potential alibi witnesses, Veronica and Vanessa Phillips.

Langford v. State, Case No. 2014-CP-19-00002. A. 568-608. On February 1, 2017, the Honorable Eugene C. Griffith, Jr., convened and evidentiary hearing. A. 616-750. Charles T. Brooks, III represented Mr. Langford. Johanna Valenzuela, of the South Carolina Attorney General's Office, represented the State. On June 15, 2017, Judge Griffith dismissed Mr. Langford's PCR application. A. 753-65.

Mr. Langford appealed the Supreme Court of South Carolina. LaNelle Cantey DuRant, of the Appellate Division of the South Carolina Commission on Indigent Defense, represented Mr. Langford. Kelley Oppenheimer, of the South Carolina Attorney General's Office, represented the State. On February 22, 2019, Ms. Durant filed Mr. Langford's petition for a writ of *certiorari*, raising a single issue:

Did the PCR court err by not finding trial counsel ineffective for failing to conduct a sufficient investigation into Petitioner Langford's case by not interviewing the two alibi witnesses, Veronica and Vanessa Phillips, who testified at the PCR

hearing that Petitioner Langford was with them during the incident on August 14, 2008?

On July 9, 2018, the State filed a return. On July 24, 2019, the Supreme Court of South Carolina transferred the appeal to the Court of Appeals of South Carolina, pursuant to Rule 243(l), SCACR. On October 8, 2019, the Court of Appeals of South Carolina denied the petition. The remittitur issued on October 23, 2019 and was filed in the Court of Common Pleas for Edgefield County on October 28, 2019.

Meanwhile, Bryan Phillips was challenging his convictions and sentences. On July 19, 2014, Mr. Phillips filed a PCR application in the Court of Common Pleas for Edgefield County, which he amended several times. On May 4, 2015, the State filed a return. On December 13, 2017, the Honorable J. Cordell Maddox, Jr. convened an evidentiary hearing. On May 25, 2018, Judge Maddox granted Mr. Phillips post-conviction relief on two issues. First, Judge Maddox held Mr. Phillips' trial counsel deficient for not adequately objecting to the trial judge improperly qualifying the State's Chinese interpreter and failing "to hire a defense Chinese interpreter [] when he know that the government's interpreter would be uncertified and that the testimony of the Chinese nations was critical to the case." Judge Maddox also found prejudice because a proper objection to the qualifications of the interpreter would have properly preserved that issue for appeal and "the government's Chinese interpreter engaged in conversations in Chinese with the testifying Chinese nations that were not restricted to the questions and answers," reasoning "[a] defense Chinese interpreter would have ensured that the trial judge and all parties to the knew what the government's Chinses interpreter said to the testifying Chinese nationals in these comments." Second, Judge Maddox held Mr. Phillips' trial counsel deficient for his questioning of Johnston Police Department Investigator Roosevelt Young about statements made to him by a non-testifying informant, Joseph Patrick Stevens, because the questioning of Investigator Young "succeeded only

in providing an additional connection between Phillips and the alleged crime” when “[t]he government could not have used [Investigator] Young’s testimony about the statement of the informant.” Judge Maddox also found prejudice because Investigator Young testified the informant “was acting as a good citizen” and this testimony about the informant’s statement “figured prominently in the government closing argument.”

On June 19, 2018, the State filed a Rule 59(e), SCRCF motion. On November 18, 2019, Judge Maddox denied the State’s motion. On April 3, 2020, the State appealed to the Supreme Court of South Carolina. On October 20, 2020, the State’s petition filed a writ of *certiorari*. On March 5, 2021, Mr. Phillips filed a return. On March 12, 2021, the State replied. On March 29, 2021, the Supreme Court transferred the appeal to the Court of Appeals.

On April 6, 2020, Mr. Langford filed a petition for writ of habeas corpus in the United States District Court for the District of South Carolina. 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. On December 15, 2020, the District Court granted this motion.

On April 14, 2020, Mr. Langford filed this successor PCR application in the Court of Common Pleas for Edgefield County. On April 22, 2020, he amended his PCR application. The current PCR action presents the following issues:

10(a) 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).

11(a) Trial counsel’s performance was deficient and prejudicial for the following reasons:

(i) Trial counsel rendered deficient and prejudicial assistance of counsel by failing to obtain a certified Chinese interpreter.

(ii) 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.

10(b) 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).

11(b) Appellate counsel's performance was deficient and prejudicial for the following reasons:

(i) Appellate counsel during the appeal of Mr. Langford's prior post-conviction relief case had a conflict of interest because of her representation of co-defendant 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, pp. 35-36, 47 (Ex. 3).

(ii) 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 (Ex. 1).

On July 23, 2020, the State filed a motion to dismiss. On September 4, 2020, the Honorable Walton H. McLeod, IV issued a conditional order of dismissal. On September 18, 2020, Mr. Langford objected to the conditional order of dismissal. On October 13, 2020, the State responded to Mr. Langford's objections. By written order dated December 8, 2020, Judge McLeod assigned this Court jurisdiction "to hear and rile upon all pending motions and preside over future hearings until a final order is recorded in this case." On November 13, 2020, via WebEx, this Court convened a hearing on the Mr. Langford's objections to the conditional order of dismissal. By written order dated December 23, 2020, this Court vacated the conditional order of dismissal,

denied the State's motion to dismiss, and allowed an evidentiary hearing on whether PCR appellate counsel had a conflict of interest. By written order dated January 29, 2021, this Court denied the State's Rule 59(e), SCRCP motion.

On April 27, 2021, via WebEx, this Court convened an evidentiary hearing. Charles Grose represented Mr. Langford, who was present. Lillian L. Meadows, of the South Carolina Attorney General's Office, represented the State. Ms. DuRant and Mr. Langford testified. On July 22, 2021, via WebEx, this Court re-convened the evidentiary hearing and received additional testimony from Ms. DuRant and Mr. Langford. Chief Appellate Defender Robert M. Dudek attended this hearing, but he did not testify.

LEGAL DISCUSSION

The Sixth Amendment right to the effective assistance of counsel guarantees conflict-free representation. *Glasser v. United States*, 315 U.S. 60, 69 (1942). Thus, trial courts "have a duty to take such measures as are appropriate to protect criminal defendants against counsel's conflicts of interest." *Wheat v. United States*, 486 U.S. 153 (1988). A defendant's ostensible waiver of a counsel's conflict need not be accepted when the conflict is severe or when a defendant may not fully comprehend the effects of the waiver. *Id.* at 160-63. "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel [but for the court's appointment]. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938) (discussing waiver of counsel). "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness

of the relevant circumstances and likely consequences.” *Brady v. United States*, 397 U.S. 742, 748 (1970).

A. Threshold Matter: The findings of fact and conclusions of law are those of an advocate and not the Court.⁶

As a threshold matter, the procedure followed by this Court denied Mr. Langford an opportunity to have his post-conviction relief claims adjudicated by a judicial officer. “S.C. Code Ann. §17-27-80 (1976), requires the PCR court to ‘make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.’” *McCray v. State*, 305 S.C. 329, 330, 408 S.E.2d 241, 241 (1991); *see also Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992). Addressing section 17-27-80 in the context of a capital post-conviction relief case, our Supreme Court “strongly encourage[d] PCR judges to draft their own findings of fact and conclusions of law.” *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004). Although the Attorney General addressed the merits of each issue, presented during the hearing, the reasoning in the order is entirely that of an advocate and not an independent judicial officer, which violates the separation of powers. S.C. Const. Art. I, § 8. The admonitions in *Hall*, *Pruitt*, and *McCray* are consistent with this Court’s responsibility, as an independent branch of government, to “safeguard the rights of litigants.” *State v. Langford*, 400 S.C. 421, 429, 735 S.E.2d 471, 475 (2012).

Our Supreme Court expressed its ongoing frustration with the validity of final orders in PCR cases during the oral argument in *Kevin S. Epting v. State*, Appellate Case No. 2017-000696, on November 21, 2019, at 11:17 – 13:05.⁷ One Justice referred to the Attorney General’s Office

⁶ A copy of the State’s proposed order is attached as Exhibit B. The order signed by this Court is identical to the State’s proposed order, except for a few minor changes.

⁷ <http://media.sccourts.org/videos/2017-000696.mp4> (last viewed June 22, 2020). *Epting* involved the Attorney General’s Office drafting the final order, the PCR judge signing the order

drafting the final PCR order as “the classic case of the fox guarding the henhouse,” observed PCR applicants have the right to have their issues litigated, and called on the criminal defense bar “to fix this problem.” Another Justice stated the entire Court shares these concerns. In *Fishburne v. State*, our Supreme Court recognized the significant issues involved in drafting PCR orders:

[B]ecause the United States Constitution’s Sixth Amendment guarantee to a defendant’s right to effective assistance of counsel is engrained in PCR cases, we cannot continue to permit a party’s procedural shortcoming—such as the failure to file a Rule 59(e) motion—to prevent this Court from remanding claims of ineffective assistance of counsel when the PCR court’s order does not comply with section 17-27-80.

427 S.C. 505, 516, 832 S.E.2d 584, 589 (2019). *Fishburne* set a lofty goal for “[t]he preparation and finalization of a PCR order [to be] a collaborative effort.” 427 S.C. at 516, 832 S.E.2d at 589 (2019). The final order in this case was not a “collaborative effort.” The final order is an advocacy position drafted by “the fox guarding the henhouse,” rather than true judicial findings of fact and conclusions of law.

Mr. Langford’s PCR case illustrates exactly why a PCR court should not delegate the judicial function of drafting final PCR orders to an advocate. This Court, therefore, should withdraw this order and make its own findings of fact and conclusions of law.

B. The order of dismissal does not address the matters raised by Mr. Langford’s proposed order.

The order of dismissal does not address all of the matters raised by Mr. Langford’s proposed order. Exhibit A.

First, Mr. Langford’s proposed order identifies five facts that are beyond dispute. Exhibit A, at 10. The order of dismissal does not address the fact that Ms. Durant did not brief all of the

that failed to address all the issues, and the applicant’s attorney not filing a Rule 59(e), SCRCP motion. On December 4, 2019, the Supreme Court dismissed *certiorari* as improvidently granted.

claims raised by Mr. Langford in his PCR application. Nor did it raise the fact that Mr. Langford's co-defendant—Bryan Phillips—was granted post-conviction relief on two of the claims that are identical to two of the claims raised in Mr. Langford's PCR application. The facts beyond dispute are necessary for understanding the prejudice to Mr. Langford.

Second, Mr. Langford's proposed order also points out, "Additionally, it is undisputed that Ms. DuRant did not obtain informed consent, confirmed in writing, from Mr. Langford regarding her prior representation of Mr. Phillips and obtain his informed consent." Exhibit A, at 10. Although the order of dismissal, at 19, discusses Mr. Durant's testimony at the July 22, 2021 hearing, regarding her hand written notes,⁸ this Court never addresses the requirement that the consent be "informed" and "confirmed in writing." *See* Exhibit A, at 12 (discussing Rule 402, SCACR, Rule 1.7, RPC). Because this Court overlooked or misapprehended Rule 1.7, the Courts finding that "Counsel Durant's note dated February 15, 2018, directly contradicts Langford's sworn testimony" carries no legal significance. Stated another way, although this Court can believe Ms. Durant's testimony about the note and rely on her note, there is no basis in the record to support a finding that Ms. Durant complied with the provisions of Rule 1.7.⁹

Third, Mr. Langford's proposed order raised Rule 402, SCACR, Rule 1.10(e), RPC. Exhibit A, at 12-13. The order of dismissal does not address our state's rule but rather refers to Rule 1.10(e) of the Model Rule of Professional Conduct. *See, e.g.*, Order, at 16, 28-29. Thus, this

⁸ *See* Court's Exhibit 1 ("He said he know that I represented Bryan Phillips on his direct appeal but had not problem with that.").

⁹ By allowing the Attorney General's Office to draft its order, this Court is treading down a slippery slope. The order, at, 21, refers to Mr. Langford's testimony that he did not receive any verbal or written notice of Counsel Durant's previous representation of Phillips." There is no evidence in the record to justify the implication that Mr. Langford ever received written notice as required by Rule 1.7.

Court overlooked the significance of Rule 1.10(e) to our state's practice. For example, when the order of dismissal, at 16, states Ms. Durant "Acknowledged that there were no formal policies in place at OAD to implement Rule 1.10(e) of the Model Rules of Professional Conduct," this Court mistakenly implies South Carolina never adopted this rule. By not recognizing the existence of Rule 1.10(e), this Court also overlooks the screening requirements set forth in that rule. *See* Exhibit A, at 12-13 (discussing screening requirements). The order of dismissal recognizes that the Office of Appellate Defense does not have procedures for the implementation of Rule 1.10(e). Ms. Durant's testimony further confirms that Appellate Defense does not have screening procedures in place that comply with Rule 1.10(e).

Fourth, Mr. Langford's proposed order also discussed South Carolina Bar Ethics Advisory Opinion 09-02, which provides guidance about the application of Rule 1.10(e), RPC. The order of dismissal does not even mention this ethics opinion. Perhaps the order of dismissal overlooks this ethics opinion because the order of dismissal does not even recognize the existence of Rule 1.10(e).

Fifth, Mr. Langford's proposed order also discusses *Carter v. State*, 293 S.C. 528, 362 S.E.2d 20 (1987). *E.g.*, Exhibit A, at 11, 13. The order of dismissal does not even address *Carter*. *Carter* is significant for two reasons. First, *Carter* requires a waiver of the conflict on the record. Second, *Carter* provides guidance about the remedy this Court should provide Mr. Langford, to wit: a new appeal of his prior PCR with conflict free counsel.

Once this Court considers the matters contained in the Mr. Langford's proposed order but overlooked in the order of dismissal, the need to grant post-conviction relief is apparent.

C. The order of dismissal recognizes a troubling professional culture existing at Appellate Defense, which this Court improperly endorses a separate and unequal criminal justice system for indigent defendants.

When discussing Ms. Durant's evidentiary hearing testimony, the order of dismissal recognizes a troubling professional culture that exists at Appellate Defense regarding conflicts of interest and the lack of screening. *See, e.g.*, Order, at 13 ("each attorney's files were not kept separate from one another in the file room"); 13 ("attorneys did not usually lock their offices"); 13 (the Chief Appellate Defender prohibited attorneys from shutting their doors unless they were working on an oral argument); 13 (the Chief Appellate Defender "never shared with anyone how he assigned cases"); 13 ("OAD routinely represented co-defendants"); 13 (the only "procedures in place to screen attorneys from confidential information" was the honor system); 14 ("the basic criteria [for a conflict check] required Mr. Dudek to determine if he thought the OAD's representation of the client would be harmful or cause prejudice to the client."); 14 ("she emphasized that the specific criteria for determining whether a conflict of interest existed was entirely based upon Mr. Dudek's discretion."); and 15 ("screening between appellate defenders was simply based on the honor system").

This troubling professional culture at Appellate Defenses raises three legal issues this Court does not address. First, it confirms Appellate Defense does not have policies in place to comply with Rule 402, SCACR, Rule 1.10, RPC. Second, despite routinely representing co-defendants, Appellate Defense did not have any procedures, known by all appellate defenders, for determining whether a conflict existed, other than the discretion of the Chief Appellate Defender. Third, because only the Chief Appellate Defender could determine whether a conflict existed, the assigned Assistant Appellate Defender did not "retain[] authority over the objectives of the representation pursuant to Rule 5.4(c)," as required by Rule 1.10(e)(2).

Instead of addressing these three legal issues, the order of dismissal, at 14, concludes “the conflict of interest criteria utilized by OAD was more vigilant than the South Carolina Supreme Court required.” This Court never explains how Appellate Defense is “more vigilant” than our supreme court when the uncontested evidence establishes Appellate Defense was not in compliance with Rule 1.10(e). Instead, the order of dismissal concludes lack of funding and understaffing justifies this troubling professional culture:

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 caseload per appellate attorney.

Order, at 29; *but see* S.C. Bar Ethics Opinion 2004 04-12 (“A public defender may not undertake or maintain a caseload that results in the attorney violating ethical obligations of competence (Rule 1.1), diligence (Rule 1.3), and communication (1.4).”). The order of dismissal then “considers the public interest in the nature of the Appellate Defenders work” and concludes “[i]mposing an stringent screening process would result in har 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.” Order, at 29-30.

Through its findings of fact and conclusions of law, this Court endorses a separate and unequal criminal justice system for indigent defendants. Our supreme court’s vigilance preventing conflicts of interest is contained in Rule 1.10, RPC. Our supreme court even provided an exception to the general rule for public defender offices in Rule 1.10(e), provided certain screening criteria are met. As this Court recognized, Appellate Defense does not have procedures for complying with Rule 1.10(e). The public interest is not served by a state agency ignores Rule 1.10(e) because it is underfunded and understaffed. Nor does this Court consider how the underfunding and

understaffing of Appellate Defense prejudiced Mr. Langford when his appellate defender did not brief two meritorious issues raised by his PCR application.

CONCLUSION

For the foregoing reasons, this Court should issue an order reconsider reconsidering its order dismissing Mr. Langford's PCR application, withdraw that order, and enter an order granting him post-conviction relief.

Respectfully Submitted,

By s/E. Charles Grose, Jr.

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September 20, 2021
Greenwood, South Carolina

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
COUNTY OF EDGEFIELD	)	
	)	Case No. 2020-CP-19-00091
K.C. Langford, SCDC# 294500,	)	
Applicant,	)	
	)	
vs.	)	
	)	
State of South Carolina,	)	
Respondent.	)	
_____	)	

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 CLERK OF COURT
 11th Judicial Circuit
 Greenville, SC

I certify that I have served a copy of this pleading on the State of South Carolina, pursuant to South Carolina Supreme Court Order No. 2021-08-27-01, Section (e), by emailing at copy to counsel, at their AIS email address, as reflected below:

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By s/E. Charles Grose, Jr.

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September 20, 2021
 Greenwood, South Carolina

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CHARTER REEL

Exhibit A

2021 OCT -7 PM 3:35

CLERK OF COURT
COUNTY OF EDGEFIELD

THE STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
2021 OCT -7 PM 3:25) FOR THE ELEVENTH JUDICIAL CIRCUIT
COUNTY OF EDGEFIELD)
K.C. Langford,) Case No. 2020-CP-19-00091
Applicant,)
vs.) **Order Granting Post-Conviction Relief**
State of South Carolina,)
Respondent.)
_____)

This matter is before this Court on K.C. Langford's application for post-conviction relief. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings of fact and conclusions of law.

PROCEDURAL HISTORY

The State of South Carolina charged K.C. Langford with criminal conspiracy, first-degree burglary, armed robbery, and kidnapping for an incident occurring on August 14, 2008, involving the owners of a Chinese restaurant in Johnston, South Carolina. A.¹ 855-66. On May 17, 2020, the Honorable William P. Keesley, Presiding Judge for the Court of General Sessions for Edgefield County, convened a pre-trial hearing. A. 1-16. From September 7-9, 2020, the State tried Mr. Langford and co-defendant Bryan Phillips before Judge Keesley and a jury. A. 17-567.² Ervin J. Maye of the Eleventh Circuit Solicitor's Office represented the State. Mark R. Calhoun represented

¹ "A." refers to the Appendix filed in the Supreme Court of South Carolina contemporaneously with Mr. Langford's petition for writ of *certiorari* to review the dismissal of his application for post-conviction relief in *Langford v. State of South Carolina*, Appellate Case No. 2017-001397.

² The cover page of the trial transcript (A. 17) reflects the trial occurred on January 23, 2011; however, this date is an error. On February 28, 2012, the State moved to correct the date appearing on the transcript. Ex. 1. On March 2, 2012, Mr. Langford consented to the correction. Ex. 2. On March 5, 2012, the Supreme Court granted the motion. Ex. 1, p. 2, and 3.

Mr. Langford. Randall D. Williams represented Mr. Phillips. On September 9, 2010, the jurors found Mr. Langford and Mr. Phillips guilty as charged. For both defendants, Judge Keesley imposed concurrent sentences of five years for criminal conspiracy, twenty years for first-degree burglary, twenty years for armed robbery, and twenty years for kidnapping. A. 565, 855-66.

Mr. Langford appealed the convictions and sentences to the Court of Appeals of South Carolina. Elizabeth A. Franklin-Best, of the Appellate Division of the South Carolina Commission on Indigent Defense, represented Mr. Langford. David Spencer represented the State. After Mr. Langford filed his initial brief of appellant, the South Carolina Public Defender Association petitioned for leave to file an *amicus curie* brief. On October 11, 2011, the State filed a return opposing the Public Defender Association's petition. On October 12, 2011, then Chief Judge of the Court of Appeals John Cannon Few granted the motion. On October 19, 2011, the State petitioned Judge Few to rehear the petition because the court failed to consider the State's return. On November 10, 2011, Judge Few rescinded the prior order, considered the State's return, and once again granted the petition.

Pursuant to Rule 204(b), SCACR, Mr. Langford petitioned the Supreme Court of South Carolina to certify his case from the Court of Appeals. Bryan Phillips, who was represented by LaNelle Cantey DuRant, of the of the Appellate Division of the South Carolina Commission on Indigent Defense, petitioned the Supreme Court of South Carolina to certify his appeal form the Court of Appeals, moved for his appeal to be consolidated with Mr. Langford's appeal, and requested the *amicus* brief of the Public Defender Association be incorporated into his appeal. On November 3, 2011, the Supreme Court of South Carolina granted these motions. On February 6, 2012, the Supreme Court of South Carolina expedited Mr. Langford's appeal, set a briefing schedule, and scheduled oral arguments for April 18, 2012.

On March 21, 2012, Mr. Langford filed the Final Brief of Appellant, asserting a single issue:

Did the trial court judge err when he did not dismiss Langford's case in May 2010 when Langford 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 formally cooperating co-defendant, who elected to assert his right to remain silent under the Fifth Amendment of the United States Constitution, into testifying for the state at the subsequent trial.³

On March 22, 2012, the State filed the Final Brief or Respondent. Also on March 22, 2012, the Public Defender Association filed its *amicus curiae* brief. A. 790-828. On April 16, 2012, Mr. Langford and Mr. Phillips requested the Supreme Court of South Carolina take judicial notice of various documents relevant to the speedy trial issue. Also on April 16, 2012, the Public Defender Association submitted supplemental citation letter. On April 17, 2012, the South Carolina Solicitor's Association filed its *amicus curiae* brief. A. 829-54.

On April 18, 2012, the Supreme Court of South Carolina convened oral arguments in the consolidated appeals. On November 21, 2012, the Supreme Court of South Carolina declared unconstitutional S.C. Code § 1-7-330, which vested Solicitors with control of the General Sessions Court dockets but held Mr. Langford did not suffer prejudice. *State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012); *see also* Slip Opinion, A. 766-85 (S.C.S.Ct. Opinion No. 27195 (filed November 21, 2012)). The Supreme Court of South Carolina denied cross-petitions for rehearing on December 20, 2012 (A. 786-88) and issued the remittitur on December 20, 2012 (A. 789). At

³ The Supreme Court of South Carolina stated the issues on appeal as follows:

- (i) Is section 1-7-330 constitutional?
- (ii) Did Langford suffer any prejudice as a result of the solicitor controlling when his case would be called for trial?

State v. Langford, 400 S.C. 421, 432, 735 S.E.2d 471, 477 (2012); *see also* Slip Opinion, A. 770.

the same time, the Supreme Court of South Carolina affirmed Mr. Phillips' convictions and sentences in an unpublished opinion. *State v. Phillips*, No. 2010-173307, 2012 WL 10907975 (S.C. Nov. 21, 2012).

On March 18, 2013, Mr. Langford filed a petition for a writ of *certiorari* in the Supreme Court of the United States, raising the following issue:

Did the South Carolina Supreme Court err when it held that Langford, an indigent defendant who spent nearly 2 years in pre-trial detention, failed to establish he was prejudiced for purposes of analyzing his federal speedy trial right, even though Langford filed two pro se motions invoking his right to a speedy trial, and when the Solicitor, who controlled the docket system, simply did not call the case for trial because it was not prepared to go forward?

Ms. Franklin-Best represented Mr. Langford. On April 8, 2013, the Public Defender Association filed an *amicus curiae* brief. On May 31, 2013, the State filed its brief in opposition to the petition for a writ of *certiorari*. Salley W. Elliott represented the State. On October 7, 2013, the Supreme Court of the United States denied the petition for a writ of *certiorari*. *Langford v. South Carolina*, 571 U.S. 831 (2013).

On January 3, 2014, Mr. Langford filed an application for post-conviction relief ("PCR") in the Court of Common Pleas for Edgefield County (A. 568-607) and supplemented it on January 13, 2017 (A. 608), raising the following grounds for relief:

10(a)(1)&11(a)(1) The Applicant was denied effective assistance of trial counsel by counsel's failure to object to the composition of the jury.

10(a)(2)&11(a)(2) The Applicant was denied effective assistance of trial counsel by counsel failing to ask for a continuance to obtain a certified interpreter.

10(a)(3)&11(a)(3) The applicant was denied effective assistance of trial counsel by counsel allowing the State to do a proffer, with the state's key witness (Alvin Phillips) on the witness stand, listening to the argument pertaining to the proffer.

10(a)(4)&11(a)(4) The Applicant was denied effective assistance of trial counsel by not securing the defense key witness (Joseph Patrick Stevens). Applicant was denied the right to confront his accuser.

10(a)(5)&11(a)(5) Trial counsel was ineffective for helping assist the state in laying the foundation for their case.

10(a)(6)&11(a)(6) The Applicant was denied effective assistance of trial counsel by counsel's failure to object to Officer Roosevelt Young testifying to hearsay testimony.

10(a)(7)&11(a)(7) The Applicant was denied effective assistance of trial counsel by counsel asking co-defendant Alvin Phillips about the mandatory minimum of his charge.

10(a)(8)&11(a)(8) The Applicant was denied effective assistance of trial counsel by counsel failing to object to the kidnapping indictment.

10(a)(9)&11(a)(9) The Applicant was denied effective assistance of trial counsel by counsel arguing charges [Mr. Langford] was not on trial for.

10(a)(10)&11(a)(10) The Applicant was denied effective assistance of trial counsel by counsel commenting on applicant's silence.

10(a)(11)&11(a)(11) The Applicant was denied effective Assistance of trial counsel by failing to object to the Solicitor commenting on Applicant's silence.

10(a)(12)&11(a)(12) The Applicant was denied effect[ive] assistance of trial counsel by [counsel] failing to object to Police Officer Roosevelt Young vouching for Joseph Stevens.

10(a)(13)&11(a)(13) The Applicant was denied effective assistance of trial counsel by counsel quoting *Bible* scripture during closing argument.

10(a)(14)&11(a)(14) Trial counsel was ineffective for failing to object to the Solicitor's vouching and bolstering for the credibility of numerous of its witnesses in closing argument.

10(a)(15)&11(a)(15) The Applicant was denied effective assistance of trial counsel by trial counsel failing to object to premature deliberations by the jury.

10(a)(16)&11(a)(16) The Applicant was denied effective assistance of appellate counsel for counsel failing to file a reply brief concerning inadmissible testimony presented at Applicant's trial.

10(a)(17)&11(a)(17) The Applicant was denied the right to effective assistance of trial counsel due to counsel's cumulative errors.

10(b)(1)&11(b)(1) Prosecution Misconduct: By the Solicitor denying that a deal exist[ed] between the [State and] Applicant's co-defendant (Alvin Phillips).

10(b)(2)&11(b)(2) Prosecution Misconduct: By using inflammatory and irrelevant testimony in closing argument.

Supplemental Ground: Applicant alleges that trial counsel failed to investigate two potential alibi witnesses, Veronica and Vanessa Phillips.

Langford v. State, Case No. 2014-CP-19-00002. A. 568-608. On February 1, 2017, the Honorable Eugene C. Griffith, Jr., convened and evidentiary hearing. A. 616-750. Charles T. Brooks, III represented Mr. Langford. Johanna Valenzuela, of the South Carolina Attorney General's Office, represented the State. On June 15, 2017, Judge Griffith dismissed Mr. Langford's PCR application. A. 753-65.

Mr. Langford appealed the Supreme Court of South Carolina. LaNelle Cantey DuRant, of the Appellate Division of the South Carolina Commission on Indigent Defense, represented Mr. Langford. Kelley Oppenheimer, of the South Carolina Attorney General's Office, represented the State. On February 22, 2019, Ms. Durant filed Mr. Langford's petition for a writ of *certiorari*, raising a single issue:

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

On July 9, 2018, the State filed a return. On July 24, 2019, the Supreme Court of South Carolina transferred the appeal to the Court of Appeals of South Carolina, pursuant to Rule 243(l), SCACR. On October 8, 2019, the Court of Appeals of South Carolina denied the petition. The remittitur issued on October 23, 2019 and was filed in the Court of Common Pleas for Edgefield County on October 28, 2019.

Meanwhile, Bryan Phillips was challenging his convictions and sentences. On July 19, 2014, Mr. Phillips filed a PCR application in the Court of Common Pleas for Edgefield County, which he amended several times. On May 4, 2015, the State filed a return. On December 13, 2017, the Honorable J. Cordell Maddox, Jr. convened an evidentiary hearing. On May 25, 2018, Judge Maddox granted Mr. Phillips post-conviction relief on two issues. First, Judge Maddox held Mr. Phillips' trial counsel deficient for not adequately objecting to the trial judge improperly qualifying the State's Chinese interpreter and failing "to hire a defense Chinese interpreter [] when he know that the government's interpreter would be uncertified and that the testimony of the Chinese nationals was critical to the case." Judge Maddox also found prejudice because a proper objection to the qualifications of the interpreter would have properly preserved that issue for appeal and "the government's Chinese interpreter engaged in conversations in Chinese with the testifying Chinese nationals that were not restricted to the questions and answers," reasoning "[a] defense Chinese interpreter would have ensured that the trial judge and all parties to the knew what the government's Chinese interpreter said to the testifying Chinese nationals in these comments." Second, Judge Maddox held Mr. Phillips' trial counsel deficient for his questioning of Johnston Police Department Investigator Roosevelt Young about statements made to him by a non-testifying informant, Joseph Patrick Stevens, because the questioning of Investigator Young "succeeded only in providing an additional connection between Phillips and the alleged crime" when "[t]he government could not have used [Investigator] Young's testimony about the statement of the informant." Judge Maddox also found prejudice because Investigator Young testified the informant "was acting as a good citizen" and this testimony about the informant's statement "figured prominently in the government closing argument."

On June 19, 2018, the State filed a Rule 59(e), SCRCP motion. On November 18, 2019, Judge Maddox denied the State's motion. On April 3, 2020, the State appealed to the Supreme Court of South Carolina. On October 20, 2020, the State's petition filed a writ of *certiorari*. On March 5, 2021, Mr. Phillips filed a return. On March 12, 2021, the State replied. On March 29, 2021, the Supreme Court transferred the appeal to the Court of Appeals.

On April 6, 2020, Mr. Langford filed a petition for writ of habeas corpus in the United States District Court for the District of South Carolina. 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. On December 15, 2020, the District Court granted this motion.

On April 14, 2020, Mr. Langford filed this successor PCR application in the Court of Common Pleas for Edgefield County. On April 22, 2020, he amended his PCR application. The current PCR action presents the following issues:

10(a) 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).

11(a) Trial counsel's performance was deficient and prejudicial for the following reasons:

(i) Trial counsel rendered deficient and prejudicial assistance of counsel by failing to obtain a certified Chinese interpreter.

(ii) 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.

10(b) 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).

11(b) Appellate counsel's performance was deficient and prejudicial for the following reasons:

(i) Appellate counsel during the appeal of Mr. Langford's prior post-conviction relief case had a conflict of interest because of her representation of co-defendant 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, pp. 35-36, 47 (Ex. 3).

(ii) 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 (Ex. 1).

On July 23, 2020, the State filed a motion to dismiss. On September 4, 2020, the Honorable Walton H. McLeod, IV issued a conditional order of dismissal. On September 18, 2020, Mr. Langford objected to the conditional order of dismissal. On October 13, 2020, the State responded to Mr. Langford's objections. By written order dated December 8, 2020, Judge McLeod assigned this Court jurisdiction "to hear and rile upon all pending motions and preside over future hearings until a final order is recorded in this case." On November 13, 2020, via WebEx, this Court convened a hearing on the Mr. Langford's objections to the conditional order of dismissal. By written order dated December 23, 2020, this Court vacated the conditional order of dismissal, denied the State's motion to dismiss, and allowed an evidentiary hearing on whether PCR appellate counsel had a conflict of interest. By written order dated January 29, 2021, this Court denied the State's Rule 59(e), SCRCR motion.

On April 27, 2021, via WebEx, this Court convened an evidentiary hearing. Charles Grose represented Mr. Langford, who was present. Lillian L. Meadows, of the South Carolina Attorney

General's Office, represented the State. Ms. DuRant and Mr. Langford testified. On July 22, 2021, via WebEx, this Court re-convened the evidentiary hearing and received additional testimony from Ms. DuRant and Mr. Langford. Chief Appellate Defender Robert M. Dudek attended this hearing, but he did not testify.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The sole issue before this Court is whether Mr. DuRant had a conflict of interest when she represented Mr. Langford in the appeal of the order dismissing his PCR application. The following facts are beyond dispute:

1. Ms. Franklin-Best, of the Appellate Division of the South Carolina Commission of Indigent Defense, represented Mr. Langford during his direct appeal of his convictions and sentences;
2. Ms. DuRant, of the Appellate Division of the South Carolina Commission of Indigent Defense, represented Mr. Phillips during his direct appeal of his convictions and sentences;
3. Ms. DuRant represented Mr. Langford during the appeal of the order dismissing his PCR application;
4. Ms. DuRant did not brief all of the claims raised by Mr. Langford in his PCR application; and
5. The Court of Common Pleas granted Mr. Phillips post-conviction relief on two issues that are identical to two of the claims raised in Mr. Langford's PCR application, neither of which were briefed by Ms. Durant.

Additionally, it is undisputed that Ms. DuRant did not obtain informed consent, confirmed in writing, from Mr. Langford regarding her prior representation of Mr. Phillips and obtain his informed consent. When this Court reconvened the evidentiary hearing on July 22, 2021, Ms. DuRant identified a handwritten note from her file documenting a February 5, 2018 telephone call with Mr. Langford stating, in pertinent part, "He said he knew that I represented Bryan on his direct appeal, but he had no problem with that." Ms. DuRant had no other independent recollection

of that portion of the conversation. At the same hearing, Mr. Langford testified he has no recollection of that conversation.

Although this matter appears to be an issue of first impression, *Carter v. State*, 293 S.C. 528, 362 S.E.2d 20 (1987), is instructive and guides this Court's decision. In 1982, a jury convicted Carter of murder, and the trial court sentenced him to life imprisonment. In 1984, Carter filed a PCR application. At the PCR hearing, Carter was represented by the same attorney who represented him at his jury trial. The PCR court denied relief. In 1986, Carter filed a second PCR application, which was dismissed as successive. Although noting "successive applications for post-conviction relief are viewed with disfavor," our supreme court held:

Absent a showing that the applicant was specifically advised of the hazards of being represented by trial counsel at the post-conviction hearing and that the applicant consented to such an arrangement, a successive post-conviction application, alleging ineffective assistance of trial counsel, should not be barred.

Id., 293 S.C. at 530, 362 S.E.2d at 21. A conflict of interest can arise from representing two clients in the same matter, absent informed consent confirmed in writing.⁴ Rule 402, SCACR, Rule 1.7, RPC; *see also Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008) (counsel's simultaneous representation of both defendant and her husband during guilty pleas which arose out of related offenses constituted a conflict of interest) *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." Rule 402, SCACR, Rule 1.10, RPC. Conflicts of interest are ordinarily imputed to members of the same law firm.

⁴ This Court notes Mr. Langford and Mr. Phillips had separate and independent counsel at their jury trial because of the conflict of interest for one lawyer representing both.

This Court finds and concludes that Ms. DuRant had a conflict of interest based on her prior representation of Mr. Phillips and based on the Appellate Division's prior representation of Mr. Langford. The note documenting the February 5, 2018 telephone conversation does not constitute informed consent, confirmed in writing. Nothing contained in the note details what Mr. DuRant informed Mr. Langford regarding the hazards of representing a co-defendant in the same matter. This note, however, is some evidence that Ms. DuRant was aware of the conflict of interest.

Having determined Mr. DuRant had a conflict of interest, this Court must determine whether Rule 402, SCACR, Rule 1.10(e), RPC is applicable to the facts of this case. Rule 1.10(e) provides:

A lawyer representing a client of a public defender office, legal services association, or similar program serving indigent clients shall not be disqualified under this Rule because of the program's representation of another client in the same or a substantially related matter if:

- (1) the lawyer is screened in a timely manner from access to confidential information relating to and from any participation in the representation of the other client; and
- (2) the lawyer retains authority over the objectives of the representation pursuant to Rule 5.4(c).

South Carolina Bar Ethics Advisory Opinion 09-02 explains, "If the requirements of Rule 1.10(e), which are exceptions to Rule 1.10(a), are satisfied, the attorneys need not refer to Rule 1.7." And, "Provided that the appropriate screening and autonomy requirements are met, the attorneys do not need the consent confirmed in writing required by Rule 1.7." This Court finds and concludes the Appellate Division does not have procedures satisfying Rule 1.10(e)(1). Comment 9 to Rule 1.10 refers to Rule 1.0(n) for the screening procedures required by Rule 1.10(e)(1). 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.

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 frows on the appellate attorneys closing their doors. She additionally testified attorneys share support staff. According to Ms. DuRant, only the honor system prevents Appellate Defenders from accessing confidential information of another Appellate Defender representing a co-defendant. Although the honor system is admirable, it does not satisfy the requirements of Rules 1.0(n) and 1.10(e)(1).

This Court further finds and concludes that Mr. Langford was prejudiced by the conflict of interest because Ms. Durant did not raise on appeal the two issues the Circuit Court granted Mr. Phillips post-conviction relief.

Finally, this Court must determine the remedy. Once again, *Carter* provides guidance. This Court notes that the conflict of interest in *Carter* occurred at the circuit court level, and the remedy fashioned by our supreme court was a successive PCR application. Here the conflict occurred at the appellate court level. This Court, accordingly, finds and concludes that a new PCR appeal is the appropriate remedy. Although arising in the context of a PCR attorney not filing an appeal, our supreme court already recognizes a successive PCR application as the vehicle for obtaining belated appellate review in *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991).

Therefore, it is ordered that K.C. Langford shall receive a new appeal, with conflict free counsel, of the order dismissing his PCR application in case number 2014-CP-19-00002.

(signature on next page)

IT IS SO ORDERED.

_____, 2021
Lexington, South Carolina

Debra R. McCaslin
Presiding Judge, Eleventh Judicial Circuit

EDUCATION CITY
CLERK OF COURT
CHANDLER REEL

Exhibit B

2021 OCT -7 PM 3:36

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF EDGEFIELD	)	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.	)	
	)	
_____	)	

2021 OCT -7 PM 3:35
 CLERK OF COURT
 JUDICIAL BRANCH

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(I), 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.

Respondent filed a return and motion for summary judgment on June 29, 2020. This matter is currently stayed pending the resolution of the instant post-conviction relief action.

II. ISSUES BEFORE THIS COURT

In his second and current 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 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

⁴ S.C. Code Ann. § 17-27-10 to -160.

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). 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).

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.

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 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).

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).

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.

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

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.

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. 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.

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:

⁸ This matter is currently pending appellate review.

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.”

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

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.

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 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.

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

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.

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. 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), SCRCF ("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), SCRCF, 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 ____ day of _____, 2021.

DEBRA R. MCCASLIN
Presiding Judge
Eleventh Judicial Circuit

_____, South Carolina

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

Case No. 2020-CP-19-0091

**RETURN TO APPLICANT'S
RULE 59(E), SCRCP MOTION**

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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. 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.

Following the July 22, 2021, hearing, 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. In response, the State makes this return:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant

orders of commitment of the Edgefield County Clerk of Court. On September 9, 2010, Applicant was convicted of first-degree burglary (2010-GS-19-0272); armed robbery (2010-GS-19-0273); kidnapping (2010-GS-19-0278); and criminal conspiracy (2008-GS-19-0673) following a jury trial before the Honorable William P. Keesley. 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. Appellate Defender Elizabeth A. Franklin-Best (Counsel Franklin-Best) of the South Carolina Commission on Indigent Defense, Division of Appellate Defense (OAD) represented him. Applicant's convictions were affirmed on appeal by the South Carolina Supreme Court. *State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012).

On January 3, 2014, Applicant filed his initial PCR application, to which 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. 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. 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.

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. This matter is currently stayed pending the resolution of the instant post-conviction relief action.

II. CURRENT PROCEEDINGS

In his second and current 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 Act¹ (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

¹ S.C. Code Ann. § 17-27-10 to -160.

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.² 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. RESPONSE TO APPLICANT'S MOTION TO ALTER OR AMEND

A. Procedure

Applicant first contends this Court "denied Mr. Langford an opportunity to have his claims adjudicated by a judicial officer" because "the reasoning in [its] order is entirely that of an advocate." Applicant specifically asserts that the procedure followed by this Court—which included the submission of proposed orders by *both parties*—somehow denied him the opportunity to have his claims adjudicated by a judicial officer and violated both the separation of powers and

² 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.

statutory provisions of the Uniform Post-Conviction Procedure Act. Applicant's argument is premised on a faulty assumption that this Court failed to conduct its own review of both proposed orders and simply adopted the State's proposed order in full without an adequate review. This is directly refuted by the record, which clearly and unequivocally establishes this Court thoroughly reviewed all evidence presented, listened to the arguments of the parties, and issued its order accordingly.

As this Court stated in its order granting Applicant an evidentiary hearing, the routine practice of requesting the parties prepare proposed orders in non-capital post-conviction relief cases does not violate the separation of powers under article I, section 8 of the South Carolina Constitution. While the "delineation of powers amongst the branches "prevents the concentration of power in the hands of too few, and provides a system of checks and balances," *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 312, 295 S.E.2d 633, 636 (1982), it "does not require that the branches of government be hermetically sealed." *S.C. Pub. Int. Found. v. S.C. Transp. Infrastructure Bank*, 403 S.C. 640, 649, 744 S.E.2d 521, 526 (2013) (quoting 16A Am. Jur. 2d *Constitutional Law* § 244).

In *S.C. Pub. Int. Found. v. S.C. Transp. Infrastructure Bank*, our Supreme Court noted that

[o]ur founding fathers embraced the celebrated writings of Montesquieu, yet concluded that a certain amount of encroachment was permissible, even under his ideology:

[I]t may clearly be inferred that, in saying "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," or, "if the power of judging be not separated from the legislative and executive powers," [Montesquieu] did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the *whole* power of

one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.

Id. at 649–50, 744 S.E.2d at 526 (quoting *The Federalist* No. 47, at 250–51 (James Madison) (The Gideon ed., 2001)).

In *Langford*, our Supreme Court held that S.C. Code Ann. § 1-7-330³ usurped the court’s “inherent power to control the order of its business” by “[v]esting a member of the executive branch with the *exclusive* authority to perform an inherently judicial function.” 400 S.C. 421, 435, 735 S.E.2d 471, 478 (2012). The Court noted that the rule of separation of powers “is not fixed and immutable, however, as there are grey areas which are tolerated in complex areas of government.” *Id.* at 434, 735 S.E.2d at 478 (internal quotation marks and citations omitted). “There consequently is “some overlap of authority and some encroachment to a limited degree.” *Id.*; see 16A Am. Jur. 2d Constitutional Law § 235 (“[T]he rule of separation of governmental powers cannot always be rigidly applied, since the state government is not divided in any such way that all acts of the nature of the functions of one department can never be exercised by another department; such a division is impracticable, and if carried out would result in the paralysis of government.”).

It is unclear how *Langford* is implicated in this case given that both parties submitted proposed orders for the Court’s consideration—the matter was not *exclusively* delegated to the State. South Carolina’s civil rules expressly allow either party to submit proposed orders for the court’s consideration so long as opposing counsel is duly served. See Rule 5(b)(3), SCRC (“Any

³ “Preparation of the dockets for general sessions courts shall be *exclusively vested in the circuit solicitor* and the solicitor shall determine the order in which cases on the docket are called for trial.”

party providing a proposed order . . . to the court for its consideration in any pending matter shall serve the same on all counsel of record at the same time and by the same means.”); Commentary to Section 3B(7), CJC, Rule 501, SCACR (“A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.”). The judge is free to adopt or strike verbiage submitted in any proposed order. Here, this Court adopted the State’s order while adding additional findings of fact and conclusions of law where it deemed necessary.

Applicant nonetheless asks this Court to vacate its order of dismissal and “make its own findings of fact and conclusions of law,” citing our Supreme Court’s opinions in *McCray*,⁴ *Pruitt*,⁵ and *Hall*⁶ in support. Applicant appears to contend that no proposed order should be accepted from the State on any action in which it is a party—a request that goes much further than the precedent upon which he relies.

In both *McCray* and *Pruitt*, the Supreme Court reversed and remanded to the PCR court because the PCR court’s conclusions regarding ineffective assistance of counsel were insufficient for appellate review and fail to meet the standard set forth in S.C. Code Ann. § 17-27-80. Here, Applicant admits that this Court’s order addresses the merits of each issue presented. Therefore, neither *Pruitt* nor *McCray* are relevant to Applicant’s position that the findings of fact and conclusions of law in the order are those of an advocate rather than a judicial officer.

Applicant is correct that our Supreme Court has “encourage[d] PCR judges to draft their own findings of fact and conclusions of law in death penalty cases,” as it did in *Hall*. 360 S.C. at

⁴ *McCray v. State*, 305 S.C. 329, 408 S.E.2d 241 (1991).

⁵ *Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992).

⁶ *Hall v. Catoe*, 360 S.C. 353, 601 S.E.2d 335 (2004).

365, 601 S.E.2d at 341. In that case, Hall argued on appeal that the “PCR judge erred in adopting the state’s proposed order because the order did not resolve issues of fact, indicating that the judge did not render an independent judicial judgment.” *Id.* at 364, 601 S.E.2d at 341. Rejecting Hall’s argument, the Court found “the evidence sufficiently indicate[d] that the PCR judge spent an adequate amount of time reviewing the order before adopting it.” *Id.* at 365, 601 S.E.2d at 341. The Court further “acknowledge[d] that in [non-capital PCR] cases, it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency. *Id.*

As recently as 2019, our Supreme Court has recognized that the practice of calling for proposed orders from litigants remains routine, though the “finalization of [the] order is often a collaborative effort.” *Fishburne v. State*, 427 S.C. 505, 516, 832 S.E.2d 584, 589 (2019). The process of submitting proposed orders is built into our rules, (see Rule 5(b)(3), SCRCP), and customs, *Hall*, 360 S.C. at 365, 601 S.E.2d at 341. If the PCR judge—after careful consideration—adopts the language offered, that language becomes the Court’s order. The judge is free to accept or reject a proposed phrasing or finding as the Court deems appropriate.⁷

Here, Applicant fails to present any evidence indicating this Court failed to sufficiently review the proposed order before adopting it. The order was issued over a month after the parties submitted their proposed orders and includes findings and testimony not included in the State’s proposed order. Thus, Applicant’s claim that he was somehow denied the opportunity to have his claims adjudicated by a judicial officer is baseless.

⁷ Similarly, federal law does not prohibit adoption of a proposed order. *See Jefferson v. Upton*, 560 U.S. 284, 293–94 (2010) (acknowledging prior holdings that “verbatim adoption of findings of fact prepared by prevailing parties” should be treated as findings of the court though recognizing it had “also criticized that practice.”) (citing *Anderson v. Bessemer City*, 470 U.S. 564, 572 (1985)).

B. S.C. Code Ann § 17-27-80

Applicant next complains that this Court's order "does not address the matters raised by Mr. Langford's *proposed order*." Section 17-27-80 requires only that the PCR court "shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." As aforementioned, Applicant admits that the order addresses each issue properly presented. He cites no authority indicating or suggesting that a PCR court's order must address every single aspect of a particular argument or issue regardless of its relevance to the court's ultimate findings. Nonetheless, the five matters this Court purportedly failed to address have either previously been rejected or are irrelevant to the conflict issue.

Specifically regarding Applicant's claim that this Court filed to "address the fact that Ms. DuRant did not brief all of the issues raised by Mr. Langford in his PCR application," this fact is irrelevant to the sole issue before this Court—whether Appellate Defender LaNelle DuRant labored under an actual conflict of interest during her representation of Applicant.⁸ Whether DuRant made the "correct choice" in determining which issue to raise in Applicant's PCR appeal is an entirely different question—and one of ineffective assistance of PCR appellate counsel—than whether her actions were motivated by divided loyalties based on her representation of Phillips on direct appeal. *See, e.g., Coleman v. Thompson*, 501 U.S. 722 (1991) (holding that the

⁸ This claim would nonetheless fail based on the standard of ineffective assistance of appellate counsel because "appellate counsel is not required to raise every nonfrivolous issue that is presented by the record." *Thrift v. State*, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990); *see Jones v. Barnes*, 463 U.S. 745, 754 (1983) ("For [courts] to second-guess reasonable professional judgments and impose on [appellate] counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . ."); *see also Smith v. South Carolina*, 882 F.2d 895, 899 (4th Cir.1989) (counsel's failure to raise a weak constitutional claim may constitute an acceptable strategic decision designed "to avoid diverting the appellate court's attention from what [counsel] felt were stronger claims").

Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions); *Aice v. State*, 305 S.C. 448, 452 n.2 409 S.E.2d 392, 295 n.2 (1991); *see also Wainwright v. Torna*, 455 U.S. 586 (1982) (holding that where there is no constitutional right to counsel there can be no deprivation of effective assistance); *cf. Kelly v. State*, 754 S.E.2d 377, 377 (S.C. 2013) (holding *Martinez v. Ryan*, 566 U.S. 1 (2012), is “not applicable to state post-conviction relief actions”) (reaffirmed by *Robertson v. State*, 795 S.E.2d 29, 31 (S.C. 2016)).

Nor is the fact that another circuit court judge granted Applicant’s co-defendant relief—on grounds fully litigated and finally adjudicated in Applicant’s first PCR action—material to the *sole issue* of whether DuRant labored under an actual conflict of interest during her representation of Applicant. There is simply nothing in the record to indicate that DuRant’s decision not to raise these two issues Applicant believes in hindsight were meritorious was somehow motivated by her previous representation of Phillips.

Second, Applicant complains that DuRant did not obtain “informed consent, confirmed in writing, from Mr. Langford regarding her prior representation of Mr. Phillips and obtain his informed consent.” This particular fact was not addressed simply because this Court found no conflict existed and therefore DuRant was under no obligation to obtain Applicant’s informed consent. Applicant nonetheless repeatedly refers to the “requirement” that she obtain Applicant’s informed consent under Rule 1.7, RCP. Notwithstanding the fact that our Supreme Court has unequivocally held the Rules of Professional Conduct have no bearing on the constitutionality of a criminal conviction, this Court found that Applicant’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”). Rule 1.7 of the South Carolina Rules of Professional Conduct applies only to *concurrent* conflicts of interest.

This Court discussed Counsel Durant’s note and testimony not because it was “legally significant” in the context of Rule 1.7. In other words, the note was never offered to prove Counsel DuRant followed the procedure required by Rule 1.7 because the rule *does not apply*. Rather, the note was introduced because it directly refuted Applicant’s own testimony that he was unaware Counsel DuRant represented Phillips on direct appeal.

It is unclear how this Court’s order referring to Applicant’s testimony that he did not receive any verbal or written notice of Counsel Durant’s previous representation of Phillips leads to the conclusion that allowing the State to draft a proposed order shows the “Court is treading down a slippery slope.” To whatever extent Applicant takes issue with this Court’s finding in this regard, Applicant’s own counsel elicited the following testimony on direct examination:

- Q. Okay. All right. And when Ms. DuRant represented you, did you and her ever have a conversation about the fact that she had represented Bryan Phillips in his direct appeal?
- A. No, sir, I wasn’t informed that she represented Bryan Phillips.
- Q. Did she ever send you a letter explaining that she had represented Bryan Phillips in his direct appeal?
- A. No, sir, I never received any letter.

(PCR Tr. 49). Any issue Applicant takes with this Court addressing his lack of credibility or its “legal significance” is baseless.

Next, to the extent Applicant claims this Court failed to address the South Carolina Bar Ethics Advisory Opinion 09-02, this opinion was not referred to or presented to the Court at the PCR hearing. Further, Applicant’s claim that this Court mistakenly referring to the “Model Rules

of Professional Conduct” rather than the “South Carolina Rules of Professional Conduct” somehow implies that this Court refuses to recognize the existence of Rule 1.10(e) is so absurd that it need not be addressed.

Regarding Applicant’s complaint that this Court failed to address *Carter v. State*, 293 S.C. 528, 362 S.E.2d 20 (1987), in its order, again section 17-27-80 requires only that the PCR court “shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.” It does not require a full analysis on why a particular case referred to by one of the parties does not apply.

However, the circumstances in *Carter* are nowhere near comparable to Applicant’s. Our Supreme Court in that case allowed the applicant to file a successive PCR action because *his trial counsel represented him in his initial PCR action—thereby precluding him from raising any claim of ineffective assistance of counsel. Id.* at 530, 362 S.E.2d at 21 (emphasis added). *Carter* dealt solely with the rare situation where trial counsel also serves as PCR counsel because “attorneys cannot argue their own ineffectiveness.” *Gray v. Pearson*, 526 F. App’x 331, 334 (4th Cir. 2013). *Carter*’s waiver requirement applies solely to PCR applicants appearing at hearings who are represented by their trial counsel. 293 S.C. at 530, 362 S.E.2d at 22. It does not apply where, as is the case here, there is no conflict. Nor does it support Applicant’s position that the proper remedy in this case is a new PCR appeal—a remedy never recognized by our appellate courts outside the context of *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991) (recognizing a general exception to the rule barring claims of ineffective assistance of post-conviction relief counsel where prior post-conviction relief counsel fails to appeal the denial of the application).

C. Rules of Professional Conduct and the Office of Appellate Defense

The majority of Applicant's complaints about this Court's order pertain to the South Carolina Rules of Professional Conduct rather than the constitutional standards set forth by our appellate courts and the United States Supreme Court. As aforementioned, our Supreme Court has unequivocally 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. Langford v. State*, 310 S.C. 357, 360, 426 S.E.2d 793, 795 (1993) (emphasis added); *see Mickens v. Taylor*, 535 U.S. 162, 176 (2002) (purpose of *Cuyler v. Sullivan* exception is "not to enforce the Canons of Legal Ethics"); *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 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.").

"Nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such duty." *Id.* (citing Rule 407, SCACR). In fact, an introductory provision of the Rules states the following:

Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. *The Rules are designed to provide guidance to lawyers and to provide a structure*

for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, *does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule.* Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

Scope, RPC, Rule 407, SCACR (emphasis added).

Applicant seeks to invoke the Rules of Professional Conduct as a procedural weapon aimed at the Office of Appellate Defense in an effort to secure a second “bite at the apple” in the form of a second PCR appeal. *Cf. In re Appeal of Infotechnology, Inc.*, 135 Vt. 585, 582 A.2d 215, 220 (Del. 1990) (“[T]he Rules [of Professional Conduct] are to be enforced by a disciplinary agency, and are not to be subverted as procedural weapons.”). Applicant repeatedly refers to this Court allegedly “confirm[ing] Appellate Defense does not have policies in place to comply with Rule 40[7], Rule 1.10, RPC” based on unspecified “uncontested evidence.” This Court never made such a finding. Contrary to Applicant’s assertion, the question before this Court is not whether OAD’s practices and procedures comport with Rule 1.10(e), RPC. Rather, the only question before this Court was whether DuRant labored under an actual conflict of interest within the context of the Sixth Amendment during her representation of Applicant. This Court correctly held that Applicant failed to demonstrate either divided loyalties or an actual conflict of interest. *State v. Childers*, 373 S.C. 367, 372, 645 S.E.2d 233, 235 (2007); *see Mickens*, 535 U.S. at 171 (“‘[A]n actual conflict of interest’ mean[s] precisely a conflict *that affected counsel’s performance*—as opposed to a mere theoretical division of loyalties.”).

Applicant further mischaracterizes this Court's order, which neither "recognizes a troubling professional culture existing at Appellate Defense nor "endorses a separate and unequal criminal justice system for indigent defendants." None of Applicant's three "legal issues" he claims this Court improperly failed to address have any bearing on the Sixth Amendment, and again are all based on alleged violations of the Rules of Professional Conduct.

As an initial matter, our appellate courts have never required public defenders to follow a specific screening procedure, particularly where the alleged conflict is with a former client rather than a current client. In *State v. Wright*, the Court of Appeals expressly rejected the defendant's claim that the "trial court erred by not relieving the public defender's office from representing him because . . . his attorney's supervisor represented a witness against him in his trial, and no screening mechanism protected him as required by Rule 1.10(e) of the Rules of Professional Conduct." 424 S.C. 335, 339, 818 S.E.2d 236, 238 (Ct. App. 2018). The Court explained

While we agree with Wright that an explicit screening mechanism or addition of outside counsel would be the best remedy for this situation, we do not agree that the absence of an explicit screening mechanism creates an incurable conflict of interest such that the public defender's office should have been removed from handling his case.

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.*"

Id. at 340, 818 S.E.2d at 238 (emphasis added).

Here, Applicant complains about OAD's lack of procedure regarding conflicts of interest while criticizing OAD's procedure—that Chief Appellate Defender Bob Dudek screens all cases for a conflict before assigning them out—because the appellate defenders of whom he is screening

from conflicts are not privy to the specific factors considered by Mr. Dudek. Applicant specifically finds “troubling” Counsel DuRant’s testimony that she was unaware of the criteria Mr. Dudek examined in conducting a conflict check. However, Applicant chose not to call Mr. Dudek—who was present at the July hearing—as a witness or question him about the conflict procedure he follows. *See Pauling v. State*, 503 S.E.2d 468, 470 (S.C. 1998) (“In a post-conviction proceeding, the burden is on the applicant to prove the allegations in his application.”).

Applicant’s further asserts that Mr. Dudek’s policy of reviewing cases and checking for conflicts before assigning them to an appellate defender violates Rule 1.10(e) because it prevents the assigned attorney from “retain[ing] authority over the objectives of the representation pursuant to Rule 5.4(c).” Rule 1.10(e)(2), RPC, Rule 407, SCACR. Rule 5.4(c) provides that “[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services.” There is nothing in the record to support Applicant’s claim that Mr. Dudek somehow prevents the appellate defenders from exercising their own professional judgment in how they choose to handle their cases.

Applicant further claims that the Court “concludes the conflict of interest criteria utilized by OAD was more vigilant than the South Carolina Supreme Court required.” This was not a finding, but rather a recitation of DuRant’s testimony and opinion based on her experience.

D. Conclusion

As the United States Supreme Court pointed out in *Burger v. Kemp*, courts “generally presume that [a] lawyer is fully conscious of the overarching duty of complete loyalty to his or her client. Trial courts appropriately and ‘necessarily rely in large measure upon the good faith and good judgment of defense counsel.’ ” 483 U.S. 776, 783–84 (1987) (quoting *Cuyler v. Sullivan*,

446 U.S. 335, 347 (1980)); *see Enoch v. Gramley*, 70 F.3d 1490, 1498 (7th Cir. 1995) (noting that the trial court's reliance on defense counsel's own assessment regarding the potential for conflict is reasonable because the attorney is in the best position professionally and ethically to determine whether a conflict exists or if there is a risk of one arising (citations omitted)). Applicant cannot now claim he was prejudiced by an alleged conflict where he was aware of DuRant's prior representation of Phillips on direct appeal. Thus, this Court should deny Applicant's motion to alter or amend pursuant to Rule 59(e), SCRCP.

Respectfully submitted,

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Attorney General

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October 1, 2021

EDGFIELD COUNTY
CLERK OF COURT
CHARLES GROSE

STATE OF SOUTH CAROLINA)
COUNTY OF EDGEFIELD) 20 OCT -7 PM 2:50) IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

K.C Langford, SCDC #294500)

Applicant,)

v.)

State of South Carolina)

Respondent,)

Case No.: 2020-CP-19-0091

Certificate of Service

1. Undersigned is counsel of record for Respondent in the above-captioned action.
2. Pursuant to the South Carolina Supreme Court's Order "RE: Operation of the Trial Courts During the Coronavirus Emergency" (Appellate Case No. 2020-000447), as amended August 27, 2021, "a lawyer admitted to practice law in this state may serve a document on another lawyer admitted to practice law in this state using the lawyer's primary email address listed in the Attorney Information System (AIS)."
3. Undersigned has served a copy of the **Return to Applicant's Rule 59(e), SCRC Motion** in the above-captioned matter on opposing counsel by emailing a copy to the email address as listed in the AIS:

E. Charles Grose, Jr., Esquire
charles@groselawfirm.com

DATED this 1st day of October 2021

s/LillianMeadows
LILLIAN L. MEADOWS
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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 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.

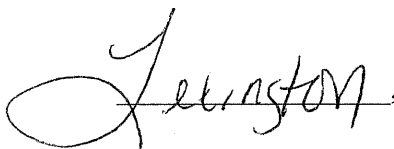
IT IS THEREFORE ORDERED:

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