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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

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Certiorari to Spartanburg County

Roger L. Couch, Circuit Court Judge

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Opinion No. 5317 (S.C. Ct. App. filed May 13, 2015)

06-CP-42-01550

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MICHAEL GONZALES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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# PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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# INDEX

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on June 18, 2015. Supp. App. 35.

## QUESTIONS PRESENTED

I. Did the Court of Appeals err in holding Petitioner was required to show that trial counsel must recognize an actual conflict of interest in order to show an adverse effect flowing from the actual conflict of interest?

II. If Petitioner is required to show that trial counsel recognized an actual conflict of interest in order to show an adverse effect flowing from the actual conflict of interest, did the Court of Appeals err in finding Petitioner failed to make such a showing where the undisputed evidence showed trial counsel represented both Petitioner and Deno Perez, Petitioner's stepfather, in drug cases, Perez paid trial counsel to represent Petitioner, and law enforcement sought Petitioner's cooperation in its investigation against Perez?

## STATEMENT OF THE CASE

On June 8, 2002, a Spartanburg County grand jury indicted Petitioner for trafficking in methamphetamine of 400 grams or more. App. 766. Petitioner was tried on July 22, 2002 before the Honorable Gary E. Clary and a jury. Ricky K. Harris represented Petitioner. App. 1. The jury found Petitioner guilty. App. 545, lines 16-20. On July 25, 2002, Judge Clary sentenced Petitioner to thirty years' imprisonment. App. 549; App. 565 lines 12-17. Petitioner filed a timely notice of appeal, and Tara D. Shurling represented Petitioner. The Court of Appeals affirmed Petitioner's conviction and sentence. State v. Michael Gonzales, Op. No. 3842 (S.C. Ct. App. Filed July 6, 2004). This Court denied his petition for writ of certiorari. Remittitur was issued on March 13, 2006. App. 741.

On May 11, 2006, Petitioner filed an application for post-conviction relief (PCR), which was amended on April 17, 2007. App. 566 – 573; App. 579. Shurling represented Petitioner, and S. Prentiss Counts and Suzanne H. White represented the state. App. 582. Evidentiary hearings were held before the Honorable Roger Couch on September 20, 2007, November 8, 2008, and January 11, 2010. App. 582; App. 669; App. 722. On February 4, 2011, Judge Couch denied relief. App. 740-748. On February 22, 2011, Petitioner moved the court to alter or amend its judgment pursuant to Rule 59(e), SCRCP. App. 754-760. On April 5, 2011, Judge Couch's order denied Petitioner's motion. App. 764-765.

Petitioner filed a petition for writ of certiorari on October 10, 2011 in this Court. The state filed its return on February 24, 2012. This Court transferred the case to the Court of Appeals pursuant to Rule 243(l), SCACR. On September 5, 2013, the Honorable Paul E. Short, Jr., the Honorable H. Bruce Williams, and the Honorable Paula H. Thomas granted the petition for writ of certiorari. Briefing followed, and oral argument was held on December 8, 2014 before the

Honorable Aphrodite K. Konduros, the Honorable Thomas E. Huff, and the Honorable Paul E. Short, Jr. On May 13, 2015, the Court of Appeals issued a divided decision affirming the PCR court's denial of relief. Judge Short dissented. Supp. App. 1-22. Specifically, three judges found that trial counsel labored under an actual conflict of interest during his representation of Petitioner. However, two judges held that "because trial counsel did not recognize the conflict [Petitioner] cannot demonstrate the conflict affected trial counsel's performance." Petitioner sought rehearing of this portion of the majority opinion in his petition for rehearing on May 28, 2015. Supp. App. 22-34. Rehearing was denied on June 18, 2015. Supp. App. 35.

Petitioner now files this petition for writ of certiorari.

## STATEMENT OF FACTS

On February 5, 2001, Deno Perez hired Ricky Harris to represent him on several misdemeanor drug charges in the Spartanburg County Magistrate's Court. App. 612, ll. 15-17. Lucy Santana, who described herself as a close personal friend of Perez, consulted with Harris on Perez's behalf prior to his engagement. App. 612, l. 23 - App. 613, l. 4. Harris accepted representation and Santana paid the fee. App. 613, ll. 6-7. Harris successfully represented Perez at trial a few months later. App. 613, ll. 7-9.

In January of 2002, Petitioner was arrested on marijuana charges. App. 625, ll. 11-14. On January 5, 2002, Petitioner's mother, the above-mentioned Lucy Santana, hired Harris to represent Petitioner on the charges. App. 601, lines 1-12. She paid Harris $25,000 in cash. App. 602 ll. 5-8. At the time, Petitioner was seventeen-years old. App. 685, ll. 23-25. Petitioner and his mother had been living with Perez for years. App. 686, ll. 6-16. In fact, Perez had been like a father to Petitioner. App. 686 ll. 19-20. When Petitioner was a very young teenager, Perez recruited Petitioner into his drug business. App. 686, ll. 21-23. While living at "The Campout" in Campobello, Petitioner's primary jobs were to help unload huge loads of marijuana and guard them. App. 687, ll. 4-11. On the night Petitioner was arrested, he was delivering the marijuana to Perez and Perez's boss. App. 687, l. 21 – App. 688, l. 1.

On April 15, 2002, Perez was arrested for trafficking marijuana in excess of one thousand pounds. App. 613, ll. 12-15. Santana again met with Harris and asked him to meet with Perez concerning representation. App. 613, ll. 19-20. Harris met with Perez and undertook representation of him on the marijuana charges in April of 2002. Shortly after this visit, Santana made arrangements to pay Harris' fees for representing Perez. App. 614, ll. 1-5.

On June 3, 2002, Petitioner was arrested on charges of trafficking methamphetamine. App. 766-767. Again, Harris was retained to represent Petitioner. App. 602, ll. 13-14. Deno Perez made the first payment of $3,220 to Harris to represent Petitioner on the charges. App. 602, l. 24 – App. 603, l. 1. This payment was from Perez's proceeds relating to a forfeiture action in which Harris had represented Perez. App. 605, ll. 4-15. The remaining $22,000 was paid on June 6, 2002 by check drawn on the account of J&M Contractors, who may have been the employer of Perez. App. 603, ll. 2 – 8. While Petitioner was incarcerated pending trial, he asked Harris if he could do anything to help negotiate a better deal for him. App. 690, l. 25 – App. 691, l. 3. Petitioner informed Harris that he had some information about Perez. App. 691, ll. 5-7. At the mention of Perez's name, Harris said "he couldn't hear this." App. 691, ll. 8-9.

Petitioner went to trial on the methamphetamine charges on July 22, 2002 with Harris as his attorney. App. 1-565. Petitioner was convicted of the charges. App. 545. Shurling then represented Petitioner on his direct appeal. App. 586, ll. 22-23. An attorney from the United States Attorney's Office approached Shurling regarding Petitioner cooperating with the federal authorities against Perez. App. 587, ll. 11-6. Although Petitioner initially denied any knowledge of Perez's affairs to Shurling, he eventually agreed, in summer 2003, to provide the government with substantial information in exchange for complete protection. App. 588, ll. 16-17; App. 588, l. 20 - App. 589, l. 24. In other words, when Petitioner had conflict-free counsel, he agreed to provide assistance to the prosecuting authorities against Perez.

While Shurling was representing Petitioner on his appeal from his methamphetamine conviction, Harris continued to represent Petitioner on his pending marijuana charges and Perez on his pending marijuana charges. Eventually, the federal authorities took over Perez's case. App. 625, l. 25 – App. 626, l. 8. On May 15, 2003, Harris received a call from the federal prosecutor who

informed Harris he intended to ask the court to disqualify Harris on the Perez case due to a conflict of interest and that Harris was a potential witness. App. 627, ll. 10-16. According to the federal prosecutor, the government's theory was that Perez and Petitioner were co-conspirators. App. 627, ll. 22-24. Harris learned that Petitioner had provided a statement against Perez. App. 635, ll. 9-10. Harris moved to be relieved from representation of Perez. App. 629, ll. 5-7.

On July 16, 2004, over a year after learning of the government's position concerning the conflict of interest, Harris moved to be relieved from representing Petitioner on the marijuana charges. App. 639, l. 24 – App. 640, l. 7. Harris moved to be relieved based upon an "irreconcilable conflict of interest" due to "certain actions undertaken by [Petitioner] in his own behalf." App. 640, ll. 8-12. When asked to what actions undertaken by Petitioner he referred, Harris responded "engaging in negotiations and, and other – negotiation, interviews, et cetera, with whoever it was." App. 640, ll. 13-16.

Thereafter, Shurling was appointed to represent Petitioner on the marijuana charges. App. 591, ll. 1-8. Shurling negotiated a five-year concurrent sentence on a reduced charge relating to the pending marijuana charges, which Petitioner accepted. App. 591, ll. 11-15.

Although Harris had been paid fees to represent Petitioner and Perez in drug cases and the fees, or at the very least a portion of the fees, for both cases had been paid by Santana and a portion of the fees for Petitioner were paid by Perez, Harris did not consider whether he had a conflict of interest in representing Petitioner and Perez. App. 615, ll. 9-18. Harris admitted that he did not explore any connection between Perez and Petitioner, but maybe should have. App. 616, ll. 11-13. According to Harris, if a conflict existed, he did not recognize it at the time. App. 618, ll. 9-10. Harris denied understanding that Perez, Santana, and Petitioner were part of a family unit. App. 605, ll. 19-21. Harris admitted that when he began representing Petitioner on the methamphetamine

charges, he knew that Santana was his mother and that Perez "was either Lucy Santana's boyfriend or friend or ex-boyfriend or friend." App. 608, ll. 21-25. Harris testified that after the United States Attorney alleged a conflict, he asked Petitioner about his relationship with Perez and Petitioner denied any relationship. App. 651, ll. 9-12. During the PCR hearing, Harris testified that if law enforcement ever consulted with him concerning Petitioner providing information against Perez, he did not have a record of it or "it was so thinly veiled that [he] failed to appreciate it." App. 616, l. 22 – App. 617, l. 1. Harris admitted that he did not have any conversations with law enforcement concerning Petitioner working with them or providing them with any information in an effort to earn a favorable position. App. 657, l. 21 – App. 658, l. 1.

During the PCR hearing, Petitioner called Lieutenant Steve Cooper with the Spartanburg Sheriff's Department to testify. App. 725, ll. 15-16. Lt. Cooper testified that Perez was a person of interest to the narcotics and violent crimes divisions at the time of Petitioner's original arrest. App. 728, ll. 20-25. Both of those divisions were interested in turning Petitioner as a state's witness. App. 729, ll. 4-7. Harris' representation of both Petitioner and Perez hampered the ability of law enforcement to secure Petitioner's cooperation against Perez. App. 729, ll. 15-19. Lt. Cooper further testified that based on the information Petitioner provided, the Department would have been willing to ask the solicitor's office to offer Petitioner a better deal. App. 732, ll. 16-20.

## ARGUMENT

I. The Court of Appeals erred in holding Petitioner was required to show that trial counsel must recognize an actual conflict of interest in order to show an adverse effect flowing from the actual conflict of interest.

The Court of Appeals unanimously held that trial counsel labored under an actual conflict of interest during his representation of Petitioner. However, according to two judges, Petitioner failed to prove that trial counsel's conflict of interest adversely affected his performance because Petitioner could not show trial counsel recognized the conflict. In other words, the Court of Appeals established a rule that in order for a PCR applicant to show that an actual conflict of interest adversely affected trial counsel's performance, the PCR applicant must demonstrate that trial counsel *recognized* the existence of the conflict.[1] Neither Petitioner nor the state challenged the Court of Appeals' determination that trial counsel labored under an actual conflict of interest; however, a discussion of the general law governing conflicts of interest is informative to the ultimate issue before this Court – whether a PCR applicant must show that trial counsel *recognized* the conflict in order to demonstrate the conflict adversely affected trial counsel's performance.

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to conflict-free counsel. Mickens v. Taylor, 535 U.S. 162, 168 (2002); Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). In post-conviction proceedings, a criminal defendant must show his counsel had an actual conflict of interest that adversely affected his performance in representing him. Cuyler, 446 U.S. at 348; Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 691 (2007); Fuller v.

[1] Petitioner is unaware of any other South Carolina case (or any other state or federal case) requiring the attorney *recognize* the conflict in order for the client to prevail on a Sixth Amendment claim.

State, 347 S.C. 630, 633, 557 S.E.2d 664, 665 (2001); Thomas v. State, 346 S.C. 140, 142, 551 S.E.2d 254, 255 (2001); Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d 768, 773 (1998); Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984). Where an actual conflict of interest exists , Petitioner need not show prejudice resulting from that conflict. Cuyler, 446 U.S. at 348-350; Duncan, 281 S.C. at 438, 315 S.E.2d at 811. This Court explained that an actual conflict of interest occurs:

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

Duncan, 281 S.C. at 437-438, 315 S.E.2d at 810-811(quoting Zuck v. Alabama, 588 F.2d 436, 439 (5th Cir. 1979)). The rationale of the test is rooted in the "'belief that the Sixth Amendment requires that a defendant may not be represented by counsel who might be tempted to dampen the ardor of his defense in order to placate his other client.... This possibility is sufficient to constitute an actual conflict as a matter of law.'" State v. Gregory, 364 S.C. 150, 153, 612 S.E.2d 449, 450-451 (2005)(quoting Zuck, 588 F.2d at 440).

In matters concerning the Sixth Amendment right to counsel, the standard used to evaluate the conduct of counsel is an objective one. See Strickland v. Washington, 466 U.S. 668 (1984). There is no reason to impose a different standard when the matter concerns a defendant's right to conflict-free counsel under the Sixth Amendment.[2] "Defense counsel have an ethical obligation to

[2] Psychological research compels using an objective standard. "[R]esearch demonstrates that ... a set of motivations causes systematic deviations from full ethicality and professional responsibility when conflicts of interest are present." Tigran W. Eldred, The Psychology of Conflicts of Interest in Criminal Cases, 58 U. Kan. L. Rev. 43, 71 (Oct. 2009).

avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial." Cuyler, 446 U.S. at 346. [3] However, "[t]he existence of an actual conflict cannot be governed solely by the perceptions of the attorney; rather, the court itself must examine the record to discern whether the attorney's behavior seems to have been influenced by the suggested conflict." Sanders v. Ratelle, 21 F.3d 1446, 1452 (9th Cir. 1994). "Human self-perception regarding one's own motives for particular actions in difficult circumstances is too faulty to be relied upon, even if the individual reporting is telling the truth as he perceives it." United States v. Shwayder, 312 F.3d 1109, 1119 (9th Cir. 2002). "[A]fter-the-fact testimony by a lawyer who was precluded by a conflict of interest from pursuing a strategy or tactic is not helpful. Even the most candid persons may be able to convince themselves that they actually would not have used that strategy or tactic anyway, when the alternative is a confession of ineffective assistance resulting from ethical limitations." United States v. Malpiedi, 62 F.3d 465, 470 (2nd Cir. 1995).

A review of conflict cases throughout the country supports the use of an *objective* standard for evaluating whether the conflict adversely affected the conflicted counsel's performance. Although the Supreme Court has not defined the elements of the "adverse effects" test, most federal circuits that have examined the issue require the defendant prove (1) existence of some plausible alternative defense strategy or tactic that might have been pursued; and (2) that the alternative strategy or tactic was inherently in conflict with or not undertaken due to the attorney's other interests or loyalties. United States v. Infante, 404 F.3d 376, 392-393 (5th Cir. 2005); United States v. Sotomayor-Vazquez, 249 F.3d 1, 15 (1st Cir. 2001); Hess v. Mazurkiewicz, 135 F.3d 905, 910 (3d Cir. 1998); United States v. Levy, 25 F.3d 146, 157 (2nd Cir. 1994); United States v.

[3] See Rule 1.7, RPC, Rule 407, SCACR; Rule 1.8(f), RPC, Rule 407, SCACR.

Fahey, 769 F.2d 829, 836 (1st Cir. 1985). Other circuits have included the additional requirement that a defendant show the alternative strategy was objectively reasonable under the facts and circumstances of the case. See e.g., Covey v. United States, 377 F.3d 903, 908 (8th Cir. 2004); Rubin v. Gee, 292 F.3d 396, 404 (4th Cir. 2002); Freund v. Butterworth, 165 F.3d 839, 860 (11th Cir. 1999).

Under these formulae, the defendant need not show that the plausible alternative would necessarily have been successful if it had been used, but only "that it possessed sufficient substance to be a viable alternative." Fahey, 769 F.2d at 836; see also Winkler v. Keane, 7 F.3d 304, 309 (2nd Cir. 1993); United States v. Gambino, 864 F.2d 1064, 1071 (3rd Cir. 1988); United States v. Rodrigues, 347 F.3d 818, 823 (9th Cir. 2003). As one court has explained:

> This is not a test that requires a defendant to show that the alternative strategy or tactic not adopted by a conflicted counsel was reasonable, that the lapse in representation affected the outcome of the trial, or even that, but for the conflict, counsel's conduct of the trial would have been different. Rather, it is enough to show that a conflict existed that "was inherently in conflict with" a plausible line of defense or attack on the prosecution's case. Once such a showing is made, Strickland's "fairly rigid" presumption of prejudice applies.

Malpiedi, 62 F.3d at 469. "[A] defendant has a right to an attorney who can make strategic and tactical choices free from any conflict of interest." Malpiedi, 62 F.3d at 469. An attorney whose ethical obligations or own compelling self-interests may prevent him or her from pursuing a strategy or tactic "is hardly an objective judge of whether that strategy or tactic is sound trial practice." Id. Upon a showing that counsel was influenced in his basic strategies by a conflicting interest under this standard, it is of no moment if un-conflicted, objectively reasonable counsel might have made precisely the same tactical decisions. Thomas v. Folz, 818 F.2d 476, 483 (6th Cir. 1987); Hall v. United States, 371 F.3d 969, 974 (7th Cir. 2004).

Two cases from the Fourth Circuit best illustrate the point. In United States v. Swartz, 975 F.2d 1042, 1046-1048 (4th Cir. 1992), the Fourth Circuit found an attorney had an actual conflict of interest that adversely affected his performance despite the attorney's statement that he had no conflict of interest. In fact, the judge informed the attorney, "I think you are – you've got a serious conflict of interest." However, the attorney denied any conflict. Id. at 1049. The Fourth Circuit based its findings of the actual conflict and its adverse effect on the attorney's performance "[f]or largely the same reasons." Id. at 1048. The court explained that "[w]hen the attorney is actively engaged in legal representation which requires him to account to two masters, an actual conflict exists when it can be shown that he took action on behalf of one. The effect of his action of necessity will adversely affect the appropriate defense of another." Id. (internal quotation omitted).

Likewise, the Fourth Circuit found defense counsel's joint representation of the defendants created an actual conflict of interest that denied the defendants effective assistance of counsel despite trial counsel's repeated claims that he saw no conflict resulting from his representation of multiple defendants in Hoffman v. Leeke, 903 F.2d 280 (1990). Trial counsel represented three individuals allegedly involved in a murder-for-hire. Id. at 282. Repeatedly, trial counsel stated he saw no conflict between the defendants. Id. In fact, he testified he would have done nothing differently at trial if he had not been representing one of the defendants who testified against the others. Id. The Fourth Circuit found that trial counsel was laboring under a conflict of interest – an "inescapable and unavoidable conclusion." Id. at 285-286. The conflict adversely affected his representation of the defendant because he negotiated a plea bargain for one defendant to implicate the other. Id. at 286-287.

The Circuit Court for the District of Columbia's decision in Derrington v. United States, 681 A.2d 1125 (D.C. Cir. 1996) provides favorable persuasive authority for how to analyze the conflict

of interest presented in Petitioner's case. Attorney Wood represented Derrington concerning drug charges. Id. at 1127. At the same time, he represented Donald "Pig" Taylor regarding murder charges. Id. The two cases were not related. Id. After Taylor had entered a plea of guilty but before sentencing, Wood discovered Derrington may be a witness against Taylor. Id. at 1127-1128. Wood asked Derrington if he was the informant on the murder case and Derrington denied it. Id. at 1127. Wood continued with the representation. Id. at 1128. Derrington was convicted. Id. at 1129. During post-conviction proceedings, Derrington revealed that he believed he had provided information that led to the arrest of Taylor. Id. at 1130. The court held that an actual conflict of interest existed because Derrington needed an attorney who would use his status as an informant as a bargaining chip with the prosecution. Id. at 1134. Wood never discussed with Derrington the possibility of him cooperating with the prosecutors, and Wood never approached the prosecutors to request favorable treatment of Wood in exchange for his cooperation. Id. The court further held that the conflict adversely affected Wood's performance because he did not attempt to plea bargain with the prosecution. Id. at 1138. Notably absent from the opinion is any discussion of whether Wood recognized he had a conflict. In fact, Derrington denied he was the informant when asked by Wood. Thus, it is clear that recognition of the conflict of interest by trial counsel is unnecessary to establish "adverse effect" of the conflict.

Similarly, the District Court for the Eastern District of Tennessee found an attorney representing a defendant on drug charges had a conflict of interest because he represented another defendant who was involved in the drug conspiracy. The conflict arose because cooperation with the government of one client would affect the other. The attorney's lack of any "real effort" to explore a plea agreement or to suggest the defendant cooperate with the government was, "in itself, strong evidence of a conflict." U.S. v. Almany, 621 F.Supp.2d 561, 569-570 (E.D. Tenn. 2008). It

is the obligation of a defense attorney to explore possible plea negotiations, which "'is easily precluded by a conflict of interest.'" Id. at 570 (quoting United States v. McLain, 823 F.2d 1457, 1464 (11th Cir. 1987)). The Court explained that "[f]ulfilling this obligation requires more than simply sitting back and waiting to see what the Government offers." Id.

The instant case evidences an attorney who suffered from an actual conflict of interest as found by a unanimous Court of Appeals. Harris could not engage in plea discussions on Petitioner's behalf because of his duty to Perez. Harris should have inquired as to the relationship between Petitioner and Perez in light of the glaring red flags. Not only were Petitioner and Perez arrested on charges stemming from substantial quantities of marijuana in the same geographical area within a short period of time, the two were connected by Santana, and Perez paid Harris' fee for representing Petitioner. Harris' position that none of these factors led him to recognize or appreciate an actual or potential conflict is untenable as he was willfully ignorant of any conflict of interest.[4] Like the attorney in Derrington, Harris may not rely upon Petitioner's denial of any connection to Perez where Harris engaged in no plea negotiations on Petitioner's behalf, failed to discuss with Petitioner the possibility of him cooperating with prosecutors in any capacity, and never approached the prosecutors to seek leniency in exchange for Petitioner's cooperation. Not only do the overwhelming majority of criminal cases results in guilty pleas, but most drug cases involve witnesses cooperating against others "higher in the food chain." See e.g., Lafler v. Cooper, 132 S.Ct. 1376 (2012); Missouri v. Frye, 132 S.Ct. 1399 (2012). In fact, when Petitioner mentioned

[4] Any objectively reasonable attorney would have recognized the conflict of interest based on the payment arrangements, the involvement of the same person – Lucy Santana – in the representation agreements and payment arrangements, the familial relationship among the parties, Petitioner's age at the time of the arrests, the nature of the charges – large quantities of drugs, and common sense litigation techniques in drug cases.

Perez's name, Harris told Petitioner he could not hear that. The only explanation for such failures was Harris' duty of loyalty to Perez, which required that he not expose Perez to additional criminal charges.

Trial counsel's claim that he did not recognize the conflict cannot shield him from the only conclusion to be drawn from the undisputed facts – the conflict adversely affected his performance. To the extent his claim can be believed, it demonstrates his willful, even stubborn, ignorance. Petitioner need not show that trial counsel *actually recognized* the conflict of interest; rather, Petitioner need only show that an objectively reasonable attorney would have recognized the conflict and that the conflict adversely affected trial counsel's performance. This state's conflict jurisprudence focuses on the harm arising to the client from the conflict of interest; it does not recognize the myopia of conflicted counsel as a trump card to deny relief. Here, all of the facts pointed directly to an actual conflict of interest and any objectively reasonable attorney would have recognized the conflict.

II. If Petitioner is required to show that trial counsel recognized an actual conflict of interest in order to show an adverse effect flowing from the actual conflict of interest, the Court of Appeals erred in finding Petitioner failed to make such a showing where the undisputed evidence showed trial counsel represented both Petitioner and Deno Perez, Petitioner's stepfather, in drug cases, Perez paid trial counsel to represent Petitioner, and law enforcement sought Petitioner's cooperation in its investigation against Perez.

If this Court determines it is necessary to demonstrate trial counsel actually recognized the conflict in order to show the conflict adversely affected trial counsel's performance, then Petitioner has satisfied this requirement based on the undisputed evidence in the record.

The first matter to discuss concerns the Court of Appeals' insistence that its conclusion was "bound by the PCR court's finding trial counsel's testimony credible that he did not recognize the conflict." According to the Court of Appeals, this finding required a determination that the actual conflict did not adversely affect his performance. However, a close reading of the PCR court's order reveals no credibility determination concerning whether trial *recognized* the conflict; instead, the PCR court focused on the credibility of trial counsel concerning whether he was *told* of the connection between the cases by any of the parties. The order focused solely on whether Petitioner, his mother, or his stepfather *told* trial counsel about the conflict of interest and the inter-relatedness of the cases. Specifically, the order stated as follows:

> This Court finds Counsel's testimony was credible and that [Petitioner]'s testimony was not credible respecting the alleged conflict of interest. This Court finds that Counsel *was not told* by [Petitioner], Mr. Perez, or [Petitioner]'s mother, that the cases were related or that either defendant was involved with the others' charges. Counsel's testimony was credible that [Petitioner] *never gave* him any indication that he was aware of or involved with Mr. Perez's drug activity. In fact, this Court finds that [Petitioner] even denied any involvement with Mr. Perez after the trial, after Counsel was made aware of the potential conflict. ... This Court finds that this additional testimony further supports Counsel's consistent testimony that Counsel

> *was unaware of and unapprised of* [Petitioner]'s knowledge of or involvement with Mr. Perez's activities. ... This Court finds that the consistency of [Petitioner]'s protestations to Counsel, impartial observers, and even [Petitioner]'s own PCR Counsel, that [Petitioner] knew nothing of Mr. Perez's activities or was involved in his activities, supports Counsel's claims that he was not operating under a conflict of interest.

App. 745 (emphasis added). Even if this Court were to defer to the PCR court's credibility determinations, those determinations extend only to whether anyone *told* trial counsel about the conflict, not whether trial counsel recognized the conflict from abundant record evidence. Thus, deferring to the PCR court's actual credibility findings does not prohibit a finding by a reviewing court that trial counsel's conflict of interest adversely affected his performance.

If the PCR judge made an adverse credibility determination concerning trial counsel's recognition of the conflict of interest, the record does not support such a finding as Petitioner has defeated the credibility determination through the irrefutable evidence in the record, including, but not limited to the trial transcript in which co-defendant's counsel and a law enforcement witness detailed the familial and drug business relationship between Petitioner and Perez. See Harres v. Leeke, 282 S.C. 131, 133 318 S.E.2d 360, 361 (1984)(holding that in post-conviction proceedings, the court must look at the entire record, not just the post-conviction relief hearing transcript to adjudicate the claims).

At the very least, trial counsel should have recognized the conflict of interest based on the financial arrangements. The United States Supreme Court acknowledged "the inherent dangers that arise when a criminal defendant is represented by a lawyer who is hired and paid by a third party, particularly when the third party is the operator of the alleged criminal enterprise." Wood v. Georgia, 450 U.S. 261, 268-269 (1981). "One risk is that the lawyer will prevent his client from

obtaining leniency by preventing the client from offering testimony against his former employer or from taking other actions contrary to the employer's interest." Id. at 269.

> It is inherently wrong to represent both the employer and the employee if the employee's interest may, and the public interest will, be advanced by the employee's disclosure of his employer's criminal conduct. For the same reasons, it is also inherently wrong for an attorney who represents only the employee to accept a promise to pay from one whose criminal liability may turn on the employee's testimony.

Id. at 271 n.15 (quoting In re Abrams, 266 A.2d 275, 278 (N.J. 1970)).

The Supreme Court of New Jersey granted a criminal defendant relief from his murder conviction and sentence based upon a conflict of interest where the defendant's lawyer and his co-defendant's lawyer had an "unusual fee arrangement." The defendant was arrested for murder and gave a statement indicating he and his co-defendant shot at the deceased. The co-defendant was arrested and gave a statement indicating the defendant shot the deceased. State v. Norman, 697 A.2d 511, 514 (N.J. 1997). Thereafter, the co-defendant retained lawyer #1 to represent him. Lawyer #1 agreed to be paid out of the $25,000 bail that the co-defendant's family had posted. Id. The co-defendant expressed to lawyer #1 that the defendant also needed an attorney. Lawyer #1 suggested his friend, lawyer #2, with whom he shared office space. Id. at 514-515. Lawyer #1 and lawyer #2 agreed to split equally the co-defendant's $25,000 as their fees. Id. at 515. The defendant and the co-defendant were convicted in separate trials. Id. at 515-517.

Regarding the "unusual fee agreement," the New Jersey Supreme Court held "[t]here can be no question that that fee arrangement created a potential conflict." Id. at 525. The defendant's knowledge of the fee agreement was not sufficient to constitute waiver of a conflict of interest. Id. The fact that lawyer #1 held the funds, rather than the co-defendant, was immaterial because the monies for both fees originated with the co-defendant. Id. In prior decisions, the New Jersey court

had "recognized the importance and pervasive practice of plea bargaining" in the representation of criminal defendants. Thus, "'[t]o effectively advise his client as to what pleas should be entered, defense counsel must be free to explore all possibilities, including pretrial negotiations.'" Id. (quoting State v. Bellucci, 410 A.2d 666 (N.J. 1980)); see also Thomas v. Foltz, 818 F.2d 476, 481 6th Cir. 1987)(finding that "foregoing such plea negotiations is proof of an actual conflict of interest); Holloway v. Arkansas, 435 U.S. 475, 490 (1978)(explaining that a conflict of interest arising from multiple representation may prevent an attorney "from exploring possible plea negotiations and the possibility of an agreement to testify for the prosecution").

Reversal was required in the case because the defendant and the co-defendant were drug dealers in business together, one of the two killed the deceased, and the defendant had substantial knowledge of the shooting and of the co-defendant's drug dealings so that the prosecution would have been interested in his cooperation. The only reason the court could surmise as to why the co-defendant would pay for the defendant's defense was that the co-defendant was concerned about the defendant's potential cooperation. Norman, 697 A.2d at 526; see also Quintero v. United States, 33 F.3d 1133, 1135-1136 (9th Cir. 1994)(finding a habeas corpus petitioner was entitled to an evidentiary hearing on his claim that his attorney had a conflict of interest where the attorney was paid by an unidentified third person to represent the defendant and the attorney advised the defendant to reject a plea offer). "'In a case of joint representation of conflicting interests the evil ... is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to pretrial plea negotiations.'" Quintero, 33 F.3d at 1136 (quoting United States v. Allen, 831 F.2d 1487, 1497 (9th Cir. 1987)).

If the payment arrangements did not provide ample notice to an objectively reasonable attorney of an actual conflict of interest, the testimony during Petitioner's trial unquestionably

placed trial counsel, and any objectively reasonable attorney, on notice of the conflict. During Petitioner's trial, co-defendant's attorney questioned an investigating officer regarding the relationship between Petitioner and Perez:

Q: Do you have prior knowledge of ... [Petitioner] prior to this case?

A: Yes, sir, I do.

....

Q: And do you know him to be a marijuana drug dealer by prior arrests?

A: Yes, sir.

....

Q: Would you classify [Petitioner]'s business - - or excuse me, his family as a drug dealing family?

A: I don't really know his mother.

Q: Do you know his stepfather ... Perez?

A: Yes, sir.

Q: Has [Perez] been arrested - -

A: Yes, sir, he has.

Q: - - to your knowledge[?] And what for?

A: Marijuana. Trafficking in marijuana.

App. 402, line 5 – App. 403, line 8.

Trial counsel was present for this cross-examination during the trial. He heard every word; yet, trial counsel made no mention of a conflict of interest to the trial judge and maintained years later at the PCR hearing that he did not "recognize" the conflict of interest. Trial counsel even had the benefit of the trial transcript at the PCR hearing, but still he maintained he did not recognize the

conflict of interest because he was unaware of any relationship between Petitioner and Perez. His testimony is implausible in light of the clear record evidence, which will be discussed in greater detail below.

The payment arrangements indicated a close connection among Perez, Petitioner, and Santana. Trial counsel testified that he was aware of the connection and even described it as a familial one after initially trying to say that he was not aware of the exact nature of the connection. The nature of the charges and Petitioner's age indicated the necessity of attempting to determine Petitioner's role in the drug business and to determine any benefits Petitioner may gain from his knowledge in the business. Finally, the trial transcript disclosed irrefutable proof that trial counsel was aware and recognized the conflict of interest despite his implausible testimony at the PCR hearing. Co-defendant's attorney questioned the investigating officer specifically about Petitioner's relationship with Perez. The officer was aware of Gonzales being a marijuana dealer based on prior arrests. Co-defendant's attorney described the affair as a drug-dealing family business, which was not refuted by the investigating officer. Finally, the officer agreed with co-defendant's attorney's characterization of Perez as Petitioner's stepfather.

It is unfathomable that trial counsel was not made aware of the conflict of interest when this cross-examination occurred. Clearly, trial counsel was present at the trial for this cross-examination. He had to have heard every word. Despite the obvious conflict of interest, trial counsel made no mention of a conflict of interest to the trial judge. Even years later at the PCR hearing, trial counsel made the untenable claim that he did not "recognize" the conflict of interest because no one "told" him of a relationship between Petitioner and Perez. His testimony is indefensible and unworthy of any reliance upon its veracity in light of the clear record evidence.

Petitioner's case presents clear evidence of the adverse effect the conflict of interest had on trial counsel's performance in light of the ability to juxtapose the plea bargain Petitioner received in exchange for his cooperation in the marijuana case when he had conflict-free counsel and the sentence he received following his trial in the methamphetamine trial when he was represented by conflicted counsel.

## CONCLUSION

This Court should hold the Court of Appeals erred in holding that Petitioner must show that trial counsel "recognized" the actual conflict of interest in order to show the conflict adversely affected trial counsel's performance. As a result, this Court should reverse Petitioner's conviction and sentence and grant him a new trial due to trial counsel's actual conflict of interest. In the alternative, if this Court determines that Petitioner was required to show that trial counsel "recognized" the actual conflict of interest, then this Court should reverse Petitioner's conviction and sentence and grant him a new trial where persuasive evidence demonstrated that trial counsel indeed recognized the conflict.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER.

This 20th day of July, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Spartanburg County

Roger L. Couch, Circuit Court Judge

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Opinion No. (S.C. Ct. App. filed )
06-CP-42-01550

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MICHAEL GONZALES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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CERTIFICATE OF SERVICE

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I certify that a true copy of the petition for writ of certiorari and a copy of the supplemental appendix, in this case has been served on Suzanne H. White, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Michael Gonzales #285903, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, and the S.C. Court of Appeals this 20th day of July, 2015.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 20th day
of July, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022