STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Roger L. Couch, Circuit Court Judge

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

06-CP-42-01550

MICHAEL GONZALES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

SUPPLEMENTAL APPENDIX

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

SUZANNE H. WHITE
Assistant Attorney General

P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Michael Gonzales, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2011-190809

ON WRIT OF CERTIORARI

Appeal From Spartanburg County
Roger L. Couch, Circuit Court Judge

Opinion No. 5317
Heard December 8, 2014 – Filed May 13, 2015

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Deputy Attorney General Suzanne Hollifield White, both of Columbia, for Respondent.

KONDUROS, J.: In this post-conviction relief (PCR) action, Michael Gonzales argues the PCR court erred in finding trial counsel was not ineffective for continuing to represent him despite a conflict of interest. We affirm.

FACTS/PROCEDURAL HISTORY

In June 2002, a grand jury indicted Gonzales for trafficking in methamphetamine. In July 2002, a jury convicted Gonzales of trafficking in methamphetamine, and the trial court sentenced him to thirty years' imprisonment and ordered him to pay a two-hundred-thousand-dollar fine.[1] Gonzales filed a direct appeal, and this court affirmed the sentence and conviction. *See State v. Gonzales*, 360 S.C. 263, 600 S.E.2d 122 (Ct. App. 2004), *overruled by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). The supreme court denied Gonzales's petition for a writ of certiorari.

Gonzales filed an application for PCR, alleging trial counsel had a conflict of interest because he also represented Dino Perez.[2] At the PCR hearing, trial counsel testified that in 2001 he represented Perez on several misdemeanor drug charges resulting in the forfeiture of cash. Trial counsel testified Lucy Santana, Gonzales's mother and "Perez's close personal friend," did all the consulting with him regarding Perez's charges because "Perez could not himself [go] into the office because he worked every day and he did not speak very much English." Santana also paid trial counsel's fee for representing Perez.

Trial counsel testified that in January 2002, Santana paid him $25,000 to represent Gonzales in the marijuana trafficking action. Trial counsel stated that in April 2002, Perez was arrested for the same crime, trafficking more than one thousand

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[1]Earlier in June 2002, a grand jury also indicted Gonzales for trafficking in marijuana. In October 2004, with different representation, Gonzales pled guilty to the trafficking in marijuana charge, and the plea court sentenced him to five years' imprisonment to run concurrently with the thirty year sentence.

[2] Tara Shurling represented Gonzales in the PCR action. Gonzales's mother originally retained her to represent Gonzales in his direct appeal of the trafficking in methamphetamine charge. However, the United States Attorney's Office (USAO) approached Shurling and told her to "proffer [Gonzales] up because [it] needed him as a witness in a pending prosecution of [Perez]." The district court then appointed Shurling as Gonzales's counsel on a material witness warrant. Subsequently, the trial court appointed her at her request to represent Gonzales on the outstanding marijuana charge, after which she agreed to represent Gonzales in this PCR action.

pounds of marijuana.[3] Trial counsel stated he visited Perez in jail and thereafter agreed to represent him on his trafficking in marijuana charges while simultaneously representing Gonzales. Trial counsel testified his notes indicated Santana again made arrangements to pay his $25,000 fee for representing Perez on the matter.

Trial counsel testified that in June 2002 he was asked to represent Gonzales in the methamphetamine action. He testified Perez paid $3,220 of the $25,000 fee. Trial counsel explained he and Perez reached an agreement whereby trial counsel would take a portion of the money he had recovered for Perez in the 2001 action as part of his fee for representing Gonzales in his pending methamphetamine action. Trial counsel stated the remaining balance was paid by a check from J & M Contractors (J &M). Trial counsel was unsure if J & M was the employer of Gonzales, Santana, or Perez but stated he thought J & M was one of their employers.

Trial counsel contended he did not know Santana, Perez, and Gonzales were family at the time Perez paid a portion of Gonzales's fees. However, he acknowledged he did not know what relationship Perez had with Gonzales that would make Perez inclined to pay part of the fee for Gonzales's defense. Trial counsel testified, "I was aware, at the time that I began representing . . . Gonzales on the methamphetamine charges, that . . . Santana was his mother[and] that . . . Perez was either . . . Santana's boyfriend or friend or ex-boyfriend or friend. I -- that was the extent of my knowledge about their personal relationships." He further explained,

> I somehow want to think that at some point in time . . . Santana told me that . . . Perez was either her boyfriend or her friend, and I want to think -- my, my impression was they had some kind of romantic relationship, but I mean I didn't, maybe I should [have], I didn't see any need to go into vast detail with . . . Santana about the, her personal relationship with . . . Perez.

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[3] The appendix does not include the indictment for Gonzales's trafficking in marijuana charges or the exact amount of marijuana Gonzales was charged with trafficking. Gonzales refers to the charges as "trafficking large quantities of marijuana."

Trial counsel stated he did not initially consult with Gonzales or Perez regarding waiving the potential conflict of interest. He stated, "[A]s plain as I can put it, I--if a conflict existed, either actual or potential, I did not recognize it at that time." When asked if he recalled ever speaking with Gonzales about his relationship with Perez, trial counsel responded,

> I don't specifically recall asking . . . Gonzales ["]are you in a drug conspiracy with . . . Perez[?"] I, I didn't have any reason to ask that. And you know, I have to just say again, if a potential or actual conflict existed, I, I did not appreciate it. I failed to, to, to apprehend that fact. I - - that's all I can say. I . . . didn't see any reason to go to my client and, and, and interview him on the subject of who are you in a drug conspiracy with.

When asked if he ever thought to investigate the connection between Perez and Gonzales given that (1) Gonzales was only seventeen at the time of his charges; (2) Gonzales and Perez were both charged with the same crime—trafficking in a large quantity of marijuana within the same small geographical region—within a relatively short period of time; and (3) trial counsel's attorney's fees for representing Perez and Gonzales were being paid by either Perez or Santana or both, trial counsel explained,

> No, I, I -- maybe I should [have]. Although I can say, at the time, given everything that I knew, the only thing I knew that . . . Gonzales and . . . Perez had in common was . . . Santana. It, it is not uncommon, at least in my experience not uncommon, that individuals that are related to one another or friends with one another, whatever degree of personal relationship they, they have, often wind up in trouble and, and often in the same kind of trouble, but that doesn't mean it's the same trouble.

Trial counsel also testified his dual representation did not have any effect on his representation of Gonzales at trial. He stated he "tried the cases just as hard and the same way [he] would have no matter who [he] represented otherwise."

Trial counsel testified Perez's trafficking in marijuana charges were originally pending in state court but because of the nature of the charges were subsequently

taken over by the federal government and became the subject of a federal prosecution. Trial counsel testified

> I was not aware of [and] did not appreciate, if any existed, any connection to and was never told directly in anyway prior to the trial of . . . Gonzales on methamphetamine trafficking charges that there was any connection at all between . . . Gonzales's marijuana trafficking case and . . . Perez's marijuana trafficking case. . . . I was led to believe it was two totally separate unrelated occurrences[by] the discovery in the case . . . .

Trial counsel further asserted, "I had no information whatsoever, no inkling whatsoever, and was never given any information by the government or anybody else that led me to believe that there was any connection whatsoever [between the two marijuana trafficking cases]."

Trial counsel testified he did not recall law enforcement ever consulting him about the possibility of having Gonzales testify against Perez in exchange for a lesser sentence or negotiating a plea. Further, he stated Gonzales did not discuss with him information concerning Perez that may have been valuable in plea negotiations. Trial counsel stated that after trial, Gonzales actually denied having information about Perez. Trial counsel stated,

> [A]fter consultation with several experts in the field, I went with [an associate to visit Gonzales] and asked him the question directly and told him he need not do anything other than tell me the truth, and he denied that there was any connection, and denied it in the context of saying I've always, I've never had any, anything to do with . . . Perez.

Trial counsel further testified if he had believed Gonzales had information that "could [have been] useful to [Gonzales's] case if presented to the State for a cooperation deal . . . [he] would [have] acted on [that information]" even if it required him to withdraw from the case due to a conflict of interest. He confirmed it is common practice for defense attorneys to pursue plea bargains in cases in which one defendant may be able to provide information to the prosecution concerning "people higher up in the food chain." However, he stated if the

possibility of a plea bargain in exchange for information existed in this case, he "did not appreciate the fact that it did." He explained,

> [I]t would not be my general practice to, in every drug case *I* have, go to law enforcement and say hey, if my client can provide information, will you give him a deal. I, I - - if I have a client who is maintaining his innocence and if I have a client [who has] given me no inkling whatsoever that he has any information to give or any willingness to provide whatever information he may have, I, I do not stand on a client to, to say look, you've got to give it up, you've got to give up the information. . . . [I]f a client though gives me reason to believe that he's willing to do that and some do, or if there's anything about a case that, that alerts me to the, the fact that there may be some substantial benefit to be gained, I wouldn't hesitate to broach that subject with law enforcement or a prosecutor.

Additionally, trial counsel testified Gonzales maintained his innocence and never wanted to plead guilty to any of his pending charges. Trial counsel stated,

> I think what it was, and it's understandable to me, . . . a young man facing 30 years in prison would do anything that, that he thought he could, right or wrong, to help himself. But he was not willing to [cooperate with authorities and give information] and never had given any indication to me or anybody else that he was willing to do that prior to his trial. As a matter of fact, the only thing he told me about that situation was that he was not guilty.

Trial counsel testified that in 2003, the USAO informed him it intended to disqualify him as Perez's attorney due to the conflict of interest. According to trial counsel, the USAO also planned to call trial counsel as a witness or potential witness in the government's case against Perez because the government theorized Perez and Gonzales were co-conspirators in a marijuana trafficking conspiracy. Trial counsel testified, "[T]he conflict that was directly alleged by the federal

government was a conflict that they themselves alleged developed as a result of [Gonzales's] debriefing after his imprisonment for methamphetamine charges."

Trial counsel stated he withdrew from Perez's case after consulting with ethics experts, knowledgeable attorneys, experienced attorneys with the National Association of Criminal Defense Lawyers, experienced attorneys with the state association of criminal defense lawyers, and his clients. After withdrawing, trial counsel was informed Gonzales had given statements against Perez to federal authorities. A DEA form[4], summarizing a prison interview with Gonzales given May 29, 2003, was entered into evidence at the PCR hearing over the State's objection.

Trial counsel testified that after he learned the federal government thought there was a connection between Gonzales and Perez, he visited Gonzales in jail and asked him to sign a waiver after full disclosure of the conflict of interest. Trial counsel testified that during the visit, Gonzales denied any connection or dealings with Perez but did not sign the form because he wanted to think about it. Trial counsel testified Perez also denied any connection to Gonzales and "[a]cted like he didn't know what [trial counsel] was talking about." An attorney who accompanied trial counsel during the jail visit with Gonzales testified Gonzales "was adamant that there was no connection of any shape or form between [Perez and him], that he knew nothing about Perez's involvement in any criminal activity, and they just . . . traveled in different circles." In 2004, trial counsel moved to withdraw from Gonzales's marijuana trafficking case, citing "an irreconcilable conflict of interest so as to preclude his further representation."

A former federal prosecutor who handled Perez's prosecution testified Shurling was eventually able to solicit Gonzales's cooperation in Perez's prosecution. The former prosecutor testified that after meeting with Shurling, Gonzales gave extensive debriefings to various federal agencies concerning Perez's drug organizations. He indicated a potential benefit of providing information that is substantially beneficial in a federal prosecution includes a "motion for downward departure at the time of sentencing [or a] motion for a reduction in their sentence"

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[4] The parties never articulate what they are referring to when they discuss the "DEA 6" form. Presumably, in this context, DEA refers to the Federal Drug Enforcement Administration. Shurling indicated the DEA 6 form is a transcript or written report of an interview. She stated it is "a shorthand form [and] DEA statement[]s are referred to as DEA 6's."

if the informant has already been sentenced. The former prosecutor further testified federal prosecutors could have appealed to the local authorities and recommended Gonzales receive favorable treatment in the plea bargaining process as a result of his extensive cooperation. He testified that in his experience, defense attorneys encouraged their clients to provide any information with which they had to barter during the plea negotiation process. Regarding whether a conflict of interest existed in Gonzales's case, the former prosecutor testified, "[B]ased on [the USAO's] view of the case, it was apparent . . . there was, at the very least, a potential conflict and possibly a real conflict in [trial counsel] representing both . . . Perez and . . . Gonzales" and as a result the USAO asked trial counsel to remove himself from the case.

Gonzales testified Perez was dating and living with his mother in 2002. Gonzales stated he met Perez when he was about thirteen years old, Perez was a father figure for him, and Perez got him involved in the drug business. He testified he was delivering the narcotics to Perez on the night he was arrested for trafficking marijuana. He stated his mother and Perez then used Perez's money to hire trial counsel to represent him on the charges. He testified that at that time, trial counsel did not discuss any potential conflicts of interest or ask him to sign any waivers. He testified Perez also hired and paid trial counsel to represent him on the methamphetamine charges. Gonzales asserted that after Perez was arrested for trafficking marijuana, Gonzales asked trial counsel if anything could be done to negotiate a better deal because he had information to use against Perez. Gonzales stated trial counsel responded, "he couldn't hear this."

Gonzales testified that if trial counsel would have "from the beginning, told [him] that [he] might be able to get a good deal for [himself] if [he] agreed to cooperate with the state and federal authorities and tell them everything [he] knew about the drug business," he would have cooperated. He asserted he would have wanted a different lawyer had trial counsel indicated there could be a problem representing both him and Perez.

Gonzales testified Shurling encouraged him to fully cooperate with state and local authorities by telling them everything he knew about the drug business. Gonzales testified Shurling also advised him to convince his mother to leave Perez and cooperate with federal and state authorities. Further, Gonzales testified he was "[v]ery afraid of . . . Perez" and believed he was "extremely violent and a dangerous man."

Finally, a lieutenant from the narcotics unit of the Spartanburg County Sheriff's Department (the Department) testified regarding the value of cooperating witnesses in narcotics investigations. The lieutenant explained cooperating witnesses are "one of the most important tools that [the narcotics unit] use[s]. [Informants] . . . are very valuable when it comes to investigating cases." He testified one lawyer would not normally represent two individuals involved in a drug case. He testified the dual representation would "hamper [the State's] ability to secure the cooperation from a player in a given scenario if the lawyer was also representing one of the higher-ups in the drug organization." The lieutenant testified both the narcotics and homicide divisions of the Department were interested in "turning" Gonzales as a State's witness against Perez and trial counsel's representation of Gonzales and Perez hampered the State's ability to secure Gonzales as a witness. He testified young people are particularly difficult in criminal prosecutions when charged with serious crimes. He explained that in his experience, young people are generally fearful and "their mothers [and] fathers kind of . . . interfere[] with law enforcement. Not, not wanting them to come forward . . . . [M]inors are definitely a problem when it comes to sitting down [and] actually interviewing them . . . ." He stated in this case it was critical for Gonzales to have his own attorney given Gonzales's age and Perez's status as *in loco parentis* at the time of Gonzales's charges.

Additionally, the lieutenant testified the information Gonzales provided to the Department after trial counsel was relieved and Gonzales was represented by Shurling was "very good reliable information that was corroborated through different outsourcing." He stated based on that information, his office would have been willing to go to the State's office on Gonzales's behalf to attempt to get Gonzales a deal.

The PCR court found Gonzales failed to prove trial counsel had a conflict of interest during Gonzales's trial for trafficking in methamphetamine. Specifically, the PCR court found Gonzales, Perez, and Santana did not tell trial counsel the marijuana cases were related or that Gonzales and Perez were involved with each other's charges. Additionally, the PCR court found trial counsel's testimony was credible and Gonzales's testimony was not credible with regard to the alleged conflict of interest. The PCR court found, "Although [trial] [c]ounsel acknowledged that he was first hired to represent [Gonzales] against charges of trafficking in marijuana, the trial for trafficking in methamphetamine was called first and is ultimately the only charge [Gonzales] proceeded on with [trial] [c]ounsel." Therefore, the PCR court found no conflict of interest existed because

Gonzales's charges at the time were unrelated to any charges Perez faced, Gonzales denied knowledge of Perez's drug involvement, and there were no adverse interests. The PCR court also noted Gonzales and Perez were not named as coconspirators or codefendants in any discovery obtained by trial counsel. Accordingly, the PCR court denied the PCR application and dismissed the action with prejudice. Gonzales filed a Rule 59(e), SCRCP, motion to alter or amend, which the PCR court denied. Gonzales petitioned for a writ of certiorari, which this court granted.

STANDARD OF REVIEW

"This [c]ourt gives great deference to the PCR court's findings of fact and conclusions of law." *Miller v. State*, 379 S.C. 108, 115, 665 S.E.2d 596, 599 (2008). The existence in the appendix of any evidence of probative value is sufficient to uphold the PCR court's ruling. *Caprood v. State*, 338 S.C. 103, 109-10, 525 S.E.2d 514, 517 (2000). "This [c]ourt . . . will reverse the decision of the PCR court when it is controlled by an error of law." *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012) (internal quotation marks omitted). If matters of credibility are involved, then this court gives deference to the PCR court's findings because this court lacks the opportunity to directly observe the witnesses. *Foye v. State*, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999).

LAW/ANALYSIS

Gonzales argues the PCR court erred because it found trial counsel was not ineffective for continuing to represent Gonzales despite a conflict of interest. We disagree.

Counsel must provide "reasonably effective assistance" under "prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Reviewing courts presume counsel was effective. *Id.* at 690. Therefore, to receive relief, the petitioner must show (1) counsel departed from professional norms resulting in (2) prejudice. *Id.* at 690, 693. "The defendant must first demonstrate that counsel was deficient and then must also show this deficiency resulted in prejudice. To satisfy the first prong, a defendant must show counsel's performance fell below an objective standard of reasonableness." *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012) (citation and internal quotation marks omitted). Prejudice is defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id.* at 700.

"The first essential element of effective assistance of counsel is counsel's ability and willingness to advocate fearlessly and effectively on behalf of his client." *Derrington v. United States*, 681 A.2d 1125, 1133 (D.C. 1996) (internal quotation marks omitted). "[A] defendant may not be represented by counsel who might be tempted to dampen the ardor of his defense in order to placate his other client. This possibility is sufficient to constitute an actual conflict as a matter of law." *State v. Gregory*, 364 S.C. 150, 153, 612 S.E.2d 449, 450-51 (2005) (alteration, emphasis, and internal quotation marks omitted). "The danger of an attorney's conflict of interest is that the attorney may forego efforts he would ordinarily undertake on behalf of one client, in order that the other client may not thereby be harmed." *Derrington*, 681 A.2d at 1133 (internal quotation marks omitted). "An attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial. . . . [D]efense attorneys have the obligation, upon discovering a conflict of interests, to advise the court at once of the problem." *Holloway v. Arkansas*, 435 U.S. 475, 485-86 (1978) (citation and internal quotation marks omitted).

> [A]n 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 v. State, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984) (alterations and internal quotation marks omitted); *see also Staggs v. State*, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007) ("An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's.").

In a PCR proceeding, the applicant who claims his or her attorney had a conflict of interest bears the burden of demonstrating he or she is entitled to relief. *Jordan v. State*, 406 S.C. 443, 449, 752 S.E.2d 538, 541 (2013). "Until [an applicant] 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 of "a conflict of interest is insufficient to impugn a criminal conviction." *Lomax v. State*, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008). "While unconstitutional multiple representation is never harmless error, multiple representation standing alone is not violative of the Sixth Amendment." *Vance v. State*, 275 S.C. 162, 163, 268 S.E.2d 275, 275 (1980) (citation omitted). Additionally, "breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel." *Nix v. Whiteside*, 475 U.S. 157, 165 (1986).

"To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest *adversely affected his attorney's performance.*" *Thomas v. State*, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001) (emphasis added).

When an actual conflict of interest exists,

> [C]ounsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. . . . Prejudice is presumed *only* if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest *adversely affected his lawyer's performance.*

Strickland, 466 U.S. at 692 (emphases added) (citation and internal quotation marks omitted); *see also State v. Sterling*, 377 S.C. 475, 480, 661 S.E.2d 99, 101

(2008) (holding prejudice is presumed when an actual conflict *adversely affects* pretrial strategies as well as the defense at trial). "[A] defendant must establish that an actual conflict of interest *adversely affected his lawyer's performance.*" *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980) (emphasis added). "The *Sullivan* standard requires a showing that (1) petitioner's lawyer operated under a conflict of interest and (2) *such conflict adversely affected his lawyer's performance.* If the petitioner makes this showing, prejudice is presumed and nothing more is required for relief." *United States v. Nicholson*, 611 F.3d 191, 205 (4th Cir. 2010) (emphasis added) (citation and internal quotation marks omitted).

> In order to prevail on a conflict claim, a habeas petitioner must establish, under the second prong of *Cuyler*, that the actual conflict of interest *compromised his attorney's representation.* This occurs when an attorney takes action for one client that is necessarily adverse to another, or when an attorney fails to take action for one client for fear of injuring another. In analyzing this issue, we use the three-factor test described in *Mickens v. Taylor*[, 240 F.3d 348, 361 (4th Cir. 2001), *aff'd*, 535 U.S. 162 (2002)]:
>
> First, the petitioner must identify a plausible alternative defense strategy or tactic that his defense counsel might have pursued. Second, the petitioner must show that the alternative strategy or tactic was objectively reasonable under the facts of the case known to the attorney at the time of the attorney's tactical decision. [To demonstrate objective reasonableness,] the petitioner must show that the alternative strategy or tactic was clearly suggested by the circumstances. Finally, the petitioner must establish that *the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict.*

Stephens v. Branker, 570 F.3d 198, 209 (4th Cir. 2009) (second alteration by court) (emphases added) (citation and internal quotation marks omitted).

> A defendant has established an adverse effect if he proves that his attorney took action on behalf of one client that was necessarily adverse to the defense of

> another or failed to take action on behalf of one because it would adversely affect another. Thus, both taking action and failing to take actions that are clearly suggested by the circumstances can indicate an adverse effect. An adverse effect can arise at any stage of the litigation including pretrial investigation or entry of a plea.

Mickens, 240 F.3d at 360 (citations and internal quotation marks omitted).

Gonzales cites *Derrington*, 681 A.2d at 1127-38, in support of his petition and contends the two cases have very similar facts. The *Derrington* court held the petitioner was denied effective assistance due to a conflict because his attorney had another client charged with a crime about which the petitioner might have had information. *Id.* at 1130, 1138. Trial counsel contended although he initially sought to withdraw from representing the petitioner, he investigated once the petitioner was named and determined he was not an informant on the case. *Id.* at 1127-28, 1130.

However, trial counsel learned of a possible conflict before the petitioner's trial when the petitioner was mentioned as an informant during the trial of another of trial counsel's clients. *Id.* at 1127, 1130. Although the petitioner initially denied he had information, he acknowledged otherwise to trial counsel before his trial began. *Id.* at 1138. Additionally, the prosecutor confirmed the petitioner was a source. *Id.*

In a recent conflict of interest case from our supreme court, the court found:

> At the PCR hearing, [trial counsel] testified that he was introduced to, and came to represent, Petitioner by way of Summers. [Trial counsel] was actively representing Summers. While Summers was not charged in relation to this methamphetamine seizure, she was the initial focus of law enforcement's investigation. In fact, the investigation was initiated only upon officers' receipt of a tip naming Summers as the individual manufacturing methamphetamine. Moreover, at trial, the evidence of Summers' guilt was such that the trial judge permitted [trial counsel] to proceed on a theory of Summers' third-

> party guilt, but [trial counsel] never pursued this theory. [Trial counsel] testified at the PCR hearing that he "was trying to throw mud any place [he] could that it would stick." That testimony is fundamentally at odds with [trial counsel's] failure to pursue a third-party guilt defense as to Summers.
>
> We find as a matter of law that [trial counsel's] concurrent representation of Petitioner and Summers constituted an actual conflict of interest. The effect of this actual conflict of interest is best illustrated by [trial counsel's] refusal to pursue a third-party guilt defense as to Summers, especially after being invited by the trial judge to do so. Because of the actual conflict of interest, Petitioner was not required to demonstrate resulting prejudice.

Jordan, 406 S.C. at 450, 752 S.E.2d at 541 (fourth from last alteration by court).

In the present case, several incidents occurred between January 2002, when trial counsel began representing Gonzales, and July 2002, when the trial court sentenced Gonzales in the methamphetamine action, that should have led a reasonable attorney to question the existence of a conflict of interest in representing both Perez and Gonzales and take action to resolve the conflict. Specifically, those facts include (1) trial counsel knew or should have known of the familial relationship between Perez and Gonzales[5]; (2) Gonzales was seventeen at

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[5] Trial counsel stated:

> I somehow want to think that at some point in time . . . Santana told me that . . . Perez was either her boyfriend or her friend, and I want to think -- my, my impression was they had some kind of romantic relationship, but I mean I didn't, maybe I should [have], I didn't see any need to go into vast detail with . . . Santana about the, her personal relationship with . . . Perez.

the time of the charges, indicating his drug involvement could have been associated with an older role model such as Perez; (3) within a few months both Perez and Gonzales were charged with trafficking a very large quantity of marijuana in the same small geographical location; (4) either Perez or Gonzales's mother, Santana, was paying trial counsel's substantial attorney's fees for representing Perez and Gonzales, indicating a connection between the individuals; and (5) trial counsel and Perez agreed trial counsel would apply towards trial counsel's fees for representing Gonzales the funds he recovered for Perez in the forfeiture action involving drug charges. Despite receiving this information, trial counsel did not consult with Gonzales or Perez as to their connection or whether either party wished to waive any potential conflict of interest before Gonzales's trafficking in methamphetamine trial. Trial counsel simply remarked, "[I]f a conflict existed, either actual or potential, I did not recognize it at that time.

However, Gonzales has not shown the conflict of interest adversely affected trial counsel's performance due to the PCR court's credibility findings. The PCR court found trial counsel credible and Gonzales was not credible. Throughout the PCR hearing, trial counsel remained adamant he was not aware of the familial connection between Perez and Gonzales, did not know their trafficking in marijuana charges were related, and did not know Gonzales wanted to provide information against Perez in order to gain bargaining power in plea negotiations. Additionally, trial counsel indicated Gonzales unwaveringly denied any involvement in or having any information about Perez's charges when he met with Gonzales after trial. *See Strickland*, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."). Although an actual conflict existed, because trial counsel did not recognize the conflict, Gonzales cannot demonstrate the conflict affected trial counsel's performance.

We are troubled by trial counsel's failure to recognize the interests of Gonzales and Perez were sufficiently adverse because trial counsel had a duty to Gonzales to use information Gonzales could have provided against Perez in Perez's marijuana

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Additionally, codefendant's counsel referred to Perez as Gonzales's "stepfather" during trial and an investigating officer acknowledged Gonzales's family's drug business.

action, which would have been detrimental to Perez. *See Duncan*, 281 S.C. at 438, 315 S.E.2d at 811 ("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."). Although Gonzales's trafficking in methamphetamine charges proceeded to trial before Gonzales's trafficking in marijuana charge, trial counsel represented Perez and Gonzales on their respective trafficking in marijuana charges for several months prior to Gonzales's trial. *See Sterling*, 377 S.C. at 480, 661 S.E.2d at 101 (noting a defendant suffered a Sixth Amendment violation when counsel acted under a conflict of interest from the pre-indictment stage until the conclusion of the defendant's trial).

Additionally, at the PCR hearing, Gonzales contended that before trial, he told trial counsel he had information to use as an informant against Perez in Perez's trafficking case. Gonzales asserted he asked trial counsel if that information could be used as a bargaining tool to lessen his sentence or potentially lead to a plea deal in his trafficking in methamphetamine action. Gonzales testified trial counsel replied, "I can't hear [that]," indicating that at that time trial counsel also owed a duty to Perez, whose interests were adverse to Gonzales's. *See Thomas*, 346 S.C. at 144, 551 S.E.2d at 256 ("Although petitioner initially waived a conflict of interest, once it became clear an actual conflict existed due to [a] plea bargain, counsel should have either withdrawn from representing one or both of them or acquired another waiver covering this specific conflict."). However, Gonzales admitted he later denied to trial counsel he could have provided information against Perez. The PCR court found Gonzales uncredible, and we must defer to the PCR court's findings on credibility matters. *See Foye v. State*, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999) (stating if matters of credibility are involved, this court gives deference to the PCR court's findings because this court lacks the opportunity to directly observe the witnesses); *see also Hyman v. State*, 397 S.C. 35, 45, 723 S.E.2d 375, 380 (2012) (stating the appellate court's deference to the PCR court's credibility findings is so great that it required the court to uphold the PCR court's determination even when the trial record unequivocally contradicted the testimony at the PCR hearing).

We also note that throughout trial, trial counsel portrayed Gonzales as a "very young person" unable to make responsible decisions.[6] Likewise, the Department

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[6] At trial, trial counsel repeatedly remarked to the jury Gonzales was a "very young person." After the State's case and during an *in camera* proceeding, Gonzales's codefendant examined an investigating officer as follows:

> [Codefendant]: [D]o you have prior knowledge of . . . Gonzales prior to this case?
>
> [Officer]: Yes, sir, I do.
>
> . . . .
>
> [Codefendant]: And do you know him to be a marijuana drug dealer by prior arrests?
>
> [Officer:] Yes, sir.
>
> . . . .
>
> [Codefendant]: Would you classify [Gonzales's] business -- or excuse me, his family as a *drug dealing family*?
>
> [Officer]: I don't really know his mother.
>
> [Codefendant]: Do you know his *stepfather* . . . Perez?
>
> [Officer]: Yes, sir.
>
> [Codefendant]: Has [Perez] been arrested --
>
> [Officer]: Yes, sir, he has.
>
> [Codefendant]: --to your knowledge[?] And what for?
>
> [Officer]: Marijuana. Trafficking in marijuana.

Lieutenant testified regarding the difficulty in working with young offenders such as Gonzales and their fearfulness when involved in serious crimes. *See Graham v. Florida*, 560 U.S. 48, 78 (2010) (noting the features distinguishing juveniles from adults that put young defendants at a significant disadvantage in criminal proceedings: "[Young defendants] mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense. Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions by [the young person]." (citations omitted)). Given Gonzales's age and relationship to Perez, there are several reasons why he would have later denied having information to trial counsel after initially telling trial counsel he had the information. *See Wood v. Georgia*, 450 U.S. 261, 268-69 (1981) (noting "the inherent dangers that arise when a criminal defendant is represented by a lawyer hired and paid by a third party, particularly when the third party is the operator of the alleged criminal enterprise"); *Derrington*, 681 A.2d at 1138 (rejecting the contention counsel's representation of the other party did not adversely affect counsel's performance in petitioner's case because the petitioner denied being an informant in the other party's case and reasoning that "one predictable consequence of [counsel's] representation of the [other party], and [petitioner's] knowledge of that representation, would be to inhibit [petitioner] from being candid with [counsel], especially regarding [petitioner's] activities as an informant, for fear of reprisal from the [other party]"). Additionally, at trial, an investigating officer connected Gonzales's and Perez's marijuana charges, acknowledged Perez as Gonzales's stepfather, and indicated the family was a "drug dealing family."

Once he had new representation, Gonzales eventually provided information against Perez to state and federal authorities as part of plea negotiations and pled guilty to the trafficking in marijuana charges pursuant to the plea deal. A DEA representative testified Gonzales was "extremely cooperative" with federal authorities. A Department representative testified Gonzales ultimately provided to the narcotics unit "very good reliable information that was corroborated through different outsourcing." The representative testified based on that information, his office would have been willing to go to the State on Gonzales's behalf to attempt to get Gonzales a better deal in his methamphetamine charge. Moreover, trial counsel eventually acknowledged the conflict and withdrew from Perez's

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(emphases added).

marijuana trafficking at the recommendation of the USAO. Trial counsel also eventually withdrew from Gonzales's marijuana trafficking action in 2004, conceding "an irreconcilable conflict of interest . . . preclude[d] his further representation."

Based on all of this, counsel should have recognized the conflict and even if he did not, the conflict could have made Gonzales less inclined to tell trial counsel he had information about Perez. However, all of the case law indicates the conflict must have adversely affected trial counsel's performance. Gonzales cannot show this without showing trial counsel recognized the conflict. Because we are bound by the PCR court's finding trial counsel's testimony credible that he did not recognize the conflict, we must find trial counsel's conflict did not adversely affect his performance. Although Shurling later procured a deal for Gonzales on another charge in turn for his testimony against Perez, because trial counsel did not know of the conflict, we cannot find the conflict was the reason he did not pursue a deal in the methamphetamine trafficking case in return for information about Perez.

The present case differs from most of the South Carolina cases on conflict of interest because those cases involved codefendants. *See Lomax*, 379 S.C. at 97, 103, 665 S.E.2d at 166, 169 (holding the PCR court erred in failing to find a conflict of interest existed when plea counsel simultaneously represented both the petitioner and her husband during guilty pleas that arose out of related offenses) (citing *Thomas*, 346 S.C. at 143-45, 551 S.E.2d at 256 (holding the petitioner in PCR proceeding demonstrated actual conflict of interest that affected her counsel's performance given counsel jointly represented the petitioner and her husband in a case in which solicitor offered a plea bargain that would allow the charge against one spouse to be dismissed if the other spouse would plead guilty to the entire amount of cocaine); *Staggs*, 372 S.C. at 551-52, 643 S.E.2d at 691-92 (holding the petitioner in PCR proceeding demonstrated an actual conflict of interest that adversely affected counsel's trial performance when his counsel, who represented him on the charge of murder, also simultaneously represented the petitioner's father, mother, and brother on related accessory after the fact of murder charges); Allan L. Schwartz, *Circumstances Giving Rise to Conflict of Interest Between or Among Criminal Codefendants Precluding Representation by Same Counsel*, 34 A.L.R.3d 470 (1970 & Supp. 2008) (outlining cases that consider what particular circumstances give rise to conflict of interest when a single counsel represents multiple codefendants)).

This case also differs from *Jordan*, 406 S.C. at 450, 752 S.E.2d at 541. Although the petitioner's girlfriend in *Jordan* was not a codefendant, "she was the initial focus of law enforcement's investigation" and at trial, the evidence of her guilt was such that the trial court permitted trial counsel to proceed on a theory of her third-party guilt, but trial counsel never pursued this theory. *Id.* This case also is distinguishable from *Derrington* because in that case, trial counsel did not dispute he knew the petitioner was named as an informant in the case against his other client. *See* 681 A.2d at 1134 ("The first prong of the *Cuyler* test requires [the petitioner] to establish that [trial counsel] had an actual conflict of interest during the time that he served as [the petitioner's] trial attorney. [The petitioner's] task is made substantially easier by the fact that [trial counsel] himself identified the conflict at the initial status hearing . . . .").

Because Gonzales has not shown trial counsel's conflict adversely affected counsel's performance, he has not shown prejudice. Accordingly, the PCR court's denial of PCR is

AFFIRMED.

HUFF, J., concurs.

SHORT, J: I respectfully dissent. I find Gonzales has shown the conflict of interest adversely affected trial counsel's representation. Although I find credible trial counsel's testimony that he zealously represented Gonzales, I find his failure to timely recognize the conflict of interest adversely affected his performance. Trial counsel portrayed Gonzales as a "very young person" unable to make responsible decisions, which should have more timely heightened counsel's awareness to the possibility of a conflict of interest. In light of the government officials' testimony of the far more favorable treatment Gonzales could have obtained, I find the conflict of interest adversely affected trial counsel's performance.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

MICHAEL GONZALES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2011-190809

Appeal from Spartanburg County

Roger L. Couch, Circuit Court Judge

Opinion No. 5317

PETITION FOR REHEARING

On May 13, 2014, in a 2-1 decision, this Court affirmed the PCR court's denial of relief to Petitioner. Pursuant to Rule 221(a), SCACR, Petitioner respectfully requests this Court rehear this matter due to the significant points overlooked and/or misapprehended as described below. Three judges of this Court 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 requests rehearing of this portion of the majority opinion.

According to the majority, Petitioner could not show that trial counsel's conflict of interest adversely affected his performance because Petitioner could not show trial counsel recognized the conflict. In other words, 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. The majority rested its conclusion that trial counsel did not recognize the conflict entirely upon an erroneous view that the PCR court judged trial counsel's credibility regarding whether trial counsel "recognized" the conflict. Specifically, the majority stated, "Because we are bound by the PCR court's finding trial counsel's testimony credible that he did not recognize the conflict, we *must* find trial counsel's conflict did not adversely affect his performance." (emphasis added).

Petitioner seeks rehearing on this aspect of the majority's holding on three separate, but related, grounds. First, it was unnecessary for Petitioner to demonstrate that trial counsel *actually recognized* the conflict of interest in order to show the conflict had an adverse effect on his performance; rather, Petitioner need only show that trial counsel *should have recognized* the conflict as any objectively reasonable attorney would have recognized the conflict – and all three judges here recognized the conflict. Second, if it were necessary to demonstrate trial counsel actually recognized the conflict in order to show the conflict adversely affected trial counsel's performance, the PCR judge's credibility findings do not inhibit this Court from finding that trial counsel recognized the conflict. Third, if the PCR judge made an adverse credibility determination concerning trial counsel's recognition of the conflict of interest, 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).

I. **Recognition of the actual conflict of interest**

Petitioner need not show that trial counsel *actually recognized* the conflict of interest; rather, Petitioner need only show that an objectively reasonable attorney standard would have recognized the conflict of interest and that the conflict adversely affected trial counsel's performance. Petitioner is unaware of any South Carolina case requiring the attorney recognize the conflict of interest in order for the client to prevail on a Sixth Amendment claim.[1] This state's conflict jurisprudence focuses on the harm arising to the client from the conflict of interest; it does not recognize the pigheadedness 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.

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

[1] See e.g., Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001)(holding trial counsel had an actual conflict of interest where counsel represented a husband and wife charged with drug trafficking and negotiated for wife to pled guilty to the entire amount of the drugs in exchange for the charges being dropped against husband); Edgemon v. State, 318 S.C. 3, 455 S.E.2d 500 (1995)(finding an actual conflict of interest where counsel represented three co-defendants, negotiated for one of the co-defendants to plead guilty and testify against another co-defendant, and convinced the prosecutor that two co-defendants were less culpable than the third, but making no finding concerning whether counsel was aware of the conflict of interest).

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.

In matters concerning the Sixth Amendment right to counsel, the standard is an objectively reasonable attorney. See Strickland v. Washington, 466 U.S. 668 (1984). There is no reason to impose a different standard in conflict of interest cases when the matter concerns a defendant's right to conflict-free counsel under the Sixth Amendment. 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 to the sentencing judge 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).

"Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial." Cuyler v. Sullivan, 446 U.S. 335, 346 (1980). 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.

The conflict of interest adversely affected trial counsel's performance because he failed to initiate or engage in plea negotiations on Petitioner's behalf. 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). Numerous cases support Petitioner's claim that trial counsel's failure to engage in plea negotiations was the adverse result of trial counsel's actual conflict of interest. In Derrington v. United States, 681 A.2d 1125, 1127 (D.C. 1996), Attorney Wood represented Derrington concerning drug charges. 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.

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.

As three judges of this Court found, trial counsel labored under an actual conflict of interest. Trial counsel could not engage in plea discussions on Petitioner's behalf because of his duty to Perez. Trial counsel should have inquired as to the relationship between Petitioner and Perez in light of the glaring red flags. 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 mulish, ignorance. 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 Trial counsel's fee for representing Petitioner.

II. Credibility determinations by PCR court

The PCR court's order failed to address trial counsel's credibility concerning whether he *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).

In light of the factual findings made by the PCR court concerning credibility, this Court could defer to the PCR court's credibility findings that trial counsel was never told that he had a conflict of interest and yet find that trial counsel recognized the conflict of interest based on the clear and unambiguous evidence in the record demonstrating the conflict of interest. Trial counsel was paid by the same person – Lucy Santana – to represent Petitioner and Perez. She created an obvious connection between the two. Funds trial counsel recovered in a forfeiture action on behalf of Perez were used at Perez's explicit instruction to pay for Petitioner's representation. Again, this created an obvious connection between Petitioner and Perez. Petitioner was very young and involved in a large-scale drug operation. Common sense and legal experience would dictate that someone of such a tender age was unlikely to be the "boss" of a large-scale drug cartel. In fact, trial counsel's strategy at trial was to deflect blame from Petitioner based on his youth and inexperience. Finally, during Petitioner's trial on the methamphetamine charge, co-defendant's attorney questioned the investigating officer about the relationship between Perez and Petitioner. The questioning made clear that Petitioner and Perez were part of a family unit – "a drug dealing family."

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.

III. **Overcoming credibility determination**

If the PCR judge found trial counsel's testimony that he did not recognize the conflict credible, the record simply cannot support this finding. 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. Unless he was not paying attention, 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.

For these reasons, Petitioner respectfully requests this Court rehear this matter pursuant to Rule 221(a), SCACR.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

This 28th day of May, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Roger L. Couch, Circuit Court Judge

MICHAEL GONZALES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Suzanne H. White, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Michael Gonzales # 285903, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 28th day of May, 2015.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 28th day
of May, 2015.

(L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.

The South Carolina Court of Appeals

Michael Gonzales, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2011-190809

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas E. Huff J.

Paul G. Short, Jr. J.

J.

Columbia, South Carolina

FILED

June 18, 2015

cc:
Suzanne Hollifield White, Esquire
Susan Barber Hackett, Esquire
Alan McCrory Wilson, Esquire
The Honorable Roger L. Couch

JUN 18 2015