

RECEIVED

JUL 20 2015

S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Spartanburg County

Roger L. Couch, Circuit Court Judge

MICHAEL GONZALES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2011-190809

BRIEF OF PETITIONER

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

INDEX

INDEX.....	i
TABLE OF AUTHORITIES	ii
ISSUE PRESENTED	1
STATEMENT	2
ARGUMENT	4
CONCLUSION	17

TABLE OF AUTHORITIES

Cases

Abrams, 266 A.2d 275 (N.J. 1970) 10

Amiel v. United States, 209 F.3d 195 (2d Cir. 2000) 14

Cuyler v. Sullivan, 446 U.S. 335 (1980) 8

Derrington v. United States, 681 A.2d 1125 (D.C. 1996) 9, 10, 15, 16

Duncan v. State, 281 S.C. 435, 315 S.E.2d 809 (1984) 8, 9

Fuller v. State, 347 S.C. 630, 557 S.E.2d 664 (2001) 8

Hoffman v. Leeke, 903 F.2d 280 (1990) 11, 12

Holloway v. Arkansas, 435 U.S. 475 (1978) 13

Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998) 8

Mickens v. Taylor, 535 U.S. 162 (2002) 8

Quintero v. U.S., 33 F.3d 1133 (9th Cir. 1994) 14, 15

Staggs v. State, 372 S.C. 549, 643 S.E.2d 690 (2007) 8

State v. Bellucci, 410 A.2d 666 (N.J. 1980) 13

State v. Gregory, 364 S.C. 150, 612 S.E.2d 449 (2005) 9

State v. Michael Gonzales, Op. No. 3842 (S.C. Ct. App. Filed July 6, 2004) 2

State v. Norman, 697 A.2d 511 (N.J. 1997) 12, 13

Thomas v. Foltz, 818 F.2d 476 (6th Cir. 1987) 13

Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001) 8

U.S. v. Almany, 621 F.Supp.2d 561 (E.D. Tenn. 2008) 15

United States v. Allen, 831 F.2d 1487 (9th Cir. 1987) 14

United States v. McLain, 823 F.2d 1457 (11th Cir. 1987) 15

Wood v. Georgia, 450 U.S. 261 (1981)..... 10

Zuck v. Alabama, 588 F.2d 436 (5th Cir. 1979)..... 9

Rules

Rule 1.7, RPC, Rule 407, SCACR..... 9

Rule 1.8(f), RPC, Rule 407, SCACR 9

Rule 59(e), SCRCP..... 2

Constitutional Provisions

U.S. Const. amend. VI 8, 9

ISSUE PRESENTED

Did the lower court err in denying Petitioner relief from his conviction and sentence where evidence showed trial counsel had a conflict of interest by representing both Petitioner and Deno Perez because trial counsel had divided loyalties in light of Perez paying trial counsel to represent Petitioner and law enforcement seeking Petitioner's cooperation in its investigation against Perez?

STATEMENT

On June 8, 2002, a Spartanburg County grand jury indicted Petitioner for trafficking in methamphetamine of 400 grams or more. App. 766. Petitioner's trial began on July 22, 2002 before the Honorable Gary E. Clary. Ricky K. Harris represented Petitioner at his trial. App. 1. The jury returned a verdict of guilty. App. 545, lines 16-20. On July 25, 2002, Judge Clary sentenced Petitioner to imprisonment for a period of thirty years and a fine of \$200,000. App. 549; App. 565 lines 12-17. Following his conviction and sentence, Petitioner filed a timely notice of appeal. Tara D. Shurling represented Petitioner on his appeal. 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). Subsequently, the Supreme Court denied the petition for writ of certiorari filed by Petitioner. Remittitur was issued on March 13, 2006. App. 741.

On May 11, 2006, Petitioner filed his application for post-conviction (PCR) relief. App. 566 – 573. He filed an amended application on April 17, 2007. App. 579. Shurling represented Petitioner concerning his PCR application, and S. Prentiss Counts and Suzanne H. White represented the state. App. 582. An evidentiary hearing was 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 issued his order denying relief. App. 740-748. Thereafter, Petitioner moved for reconsideration on January 18, 2011 based upon e-mail correspondence from Judge Couch indicating his intended ruling. App. 749-753. On February 22, 2011, Petitioner moved the court to alter or amend its judgment pursuant to Rule 59(e), SCRCF. App. 754-760. On April 5, 2011, Judge Couch's order denied Petitioner's Rule 59(e), SCRCF motion. App. 764-765.

Petitioner filed a petition for writ of certiorari on October 10, 2011 in the South Carolina Supreme Court. The state filed its return on February 24, 2012. Subsequently, the Supreme Court transferred this case to this Court 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 of this Court granted the petition for writ of certiorari and ordered briefing on the issue presented. This brief follows.

ARGUMENT

The lower court erred in denying Petitioner relief from his conviction and sentence where evidence showed trial counsel had a conflict of interest by representing both Petitioner and Deno Perez because trial counsel had divided loyalties in light of Perez paying trial counsel to represent Petitioner and law enforcement seeking Petitioner's cooperation in its investigation against Perez.

Relevant 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 lines 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 line 23 - App. 613 line 4. Harris accepted representation and Santana paid the fee. App. 613 lines 6-7. Harris successfully represented Perez at trial a few months later. App. 613 lines 7-9.

In January of 2002, Petitioner was arrested on marijuana charges. App. 625 lines 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 lines 5-8. At the time, Petitioner was seventeen-years old. App. 685 lines 23-25. Petitioner and his mother had been living with Perez for years. App. 686 lines 6-16. In fact, Perez had been like a father to Petitioner. App. 686 lines 19-20. When Petitioner was a very young teenager, Perez recruited Petitioner into his drug business. App. 686 lines 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 lines 4-11. On the night Petitioner was arrested, he was delivering the marijuana to Perez and Perez's boss. App. 687 line 21 - App. 688 line 1.

On April 15, 2002, Perez was arrested for trafficking marijuana in excess of one thousand pounds. App. 613 lines 12-15. Santana again met with Harris and asked him to meet with Perez concerning representation. App. 613 lines 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 lines 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 lines 13-14. Deno Perez made the first payment of \$3,220 to Harris to represent Petitioner on the charges. App. 602 line 24 – App. 603 line 1. This payment was from Perez's proceeds relating to a forfeiture action in which Harris had represented Perez. App. 605 lines 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 lines 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 line 25 – App. 691 line 3. Petitioner informed Harris that he had some information about Perez. App. 691 lines 5-7. At the mention of Perez's name, Harris said "he couldn't hear this." App. 691 lines 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 lines 22-23. An attorney from the United States Attorney's Office approached Shurling regarding Petitioner cooperating with the federal authorities against Perez. App. 587 lines 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 lines 16-17; App. 588

line 20 - App. 589 line 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 line 25 – App. 626 line 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 lines 10-16. According to the federal prosecutor, the government's theory was that Perez and Petitioner were co-conspirators. App. 627 lines 22-24. Harris learned that Petitioner had provided a statement against Perez. App. 635 lines 9-10. Harris moved to be relieved from representation of Perez. App. 629 lines 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 line 24 – App. 640 line 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 lines 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 13-16.

Thereafter, Shurling was appointed to represent Petitioner on the marijuana charges. App. 591 lines 1-8. Shurling negotiated a five-year concurrent sentence on a reduced charge relating to the pending marijuana charges, which Petitioner accepted. App. 591 lines 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 lines 9-18. Harris admitted that he did not explore any connection between Perez and Petitioner, but maybe should have. App. 616 lines 11-13. According to Harris, if a conflict existed, he did not recognize it at the time. App. 618 lines 9-10. Harris denied understanding that Perez, Santana, and Petitioner were part of a family unit. App. 605 lines 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 lines 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 lines 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 line 22 – App. 617 line 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 line 21 – App. 658 line 1.

During the PCR hearing, Petitioner called Lieutenant Steve Cooper with the Spartanburg Sheriff’s Department to testify. App. 725 lines 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 lines 20-25. Both of those divisions were interested in turning Petitioner as a state’s witness. App. 729 lines 4-7. Harris’ representation of both Petitioner and Perez hampered the ability of law enforcement to secure Petitioner’s cooperation against Perez. App. 729 lines 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 lines 16-20.

The PCR court issued its order denying relief. App. 740-748. The PCR court found Harris' testimony credible and Petitioner's testimony not credible concerning the conflict of interest. App. 745. The PCR court was persuaded to deny relief based upon Harris' testimony that Petitioner never gave Harris any indication that he was aware of or involved with Perez's drug activity. App. 745.

Discussion

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. 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 existed, 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. To demonstrate an actual conflict of interest, Petitioner must show that Harris owed a duty to a party whose interests were adverse to Petitioner's interests. See Staggs, 372 S.C. at 551, 643 S.E.2d at 692; Fuller, 347 S.C. at 633-634, 557 S.E.2d at 665; Thomas, 346 S.C. at 143-144, 551 S.E.2d at 256; Jackson, 329 S.C. at 354-355, 495 S.E.2d at 773; Duncan 281 S.C. at 438, 315 S.E.2d at 811.

The South Carolina Supreme 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).

Petitioner is unaware of any South Carolina case law directly on point;¹ however, Derrington v. United States, 681 A.2d 1125 (D.C. 1996) provides favorable persuasive authority. 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

¹ Although Petitioner found no South Carolina case law directly on the subject, the Rules of Professional Conduct recognize the dangers of conflicts of interests involving concurrent representation and of accepting compensation from a third party for representing a client. A lawyer is not allowed to represent a client if the representation would be directly adverse to another client or if there is a significant risk that representation would be materially limited by the lawyer’s responsibilities to another client, a former client, or a third person unless each affected client gives informed written consent. Rule 1.7, RPC, Rule 407, SCACR. Further, the Rules forbid a lawyer to accept remuneration for representing a client from one other than the client unless “(1) the client gives informed consent; (2) there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected.” Rule 1.8(f), RPC, Rule 407, SCACR. The comments acknowledge that “[l]awyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer in whole or in part.” The danger arises “[b]ecause third-party payers frequently have interests that differ from those of the client... lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer’s independent professional judgment and there is informed consent from the client.” Rule 1.8 cmt. 11, RPC, Rule 407, SCACR.

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.

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). Particularly applicable to Petitioner's case, the Court explained "[o]ne 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)).

Concerning a criminal case from South Carolina, the Fourth Circuit Court of Appeals found defense counsel's joint representation of the defendants created an actual conflict of interest that denied the defendants effective assistance of counsel. Hoffman v. Leeke, 903 F.2d 280 (1990). John Hoffman was convicted of being an accessory before the fact to murder. The prosecution's theory was that Hoffman instigated his brother-in-law, George Moose, and Bill Bryant to recruit a paid killer, Johnny Hamilton, to kill Roy Lowry. Lowry was shot and killed by Hamilton. Id. at 282. When Moose was arrested, Hoffman retained J.M. "Bud" Long to represent Moose. Hoffman's wife paid the fee charged by Long. A month later, Hoffman hired Long to represent him. The day after Hoffman was indicted, Long negotiated a plea agreement for Moose. Hamilton's girlfriend, Kathy Danielson, was arrested, and she also hired Long to represent her. Id. Prior to the start of trial, the judge questioned Hoffman, Moose, and Danielson regarding the potential conflict of interest, and all three agreed to proceed with Long. Id. at 282-283. The following day, Moose and Danielson entered guilty pleas and agreed to testify against Hoffman. Id. at 283. Moose was the state's key witness against Hoffman. Id.

At a hearing on the conflict of interest issue, Moose testified that Long never discussed any conflict of interest with him. The only meeting about the joint representation occurred before the judge. According to Moose, Long told the defendants "to tell the judge that it was all right for Long to represent the three of them." Id. at 284. Hoffman testified that he and Moose met with Long one day in Long's office. Long asked if the two of them saw any conflict in the representation. Both responded negatively. Id. Hoffman believed he and Moose would testify to the same facts, which would exculpate Hoffman. Id. at 285.

Long testified that he inquired of Hoffman and Moose about a possible conflict of interest prior to accepting representation of Hoffman. Both told Long they had nothing to do with the

murder and there was no conflict of interest. Long claimed he told the three defendants that if they wanted another lawyer, “it was all right.” Id. Long saw no conflict between Moose and Hoffman, however. Id. In fact, he testified he would have done nothing differently at trial if he had not been representing Moose. Id. Long admitted, however, that Moose’s statement was a critical link to Hoffman, and the state’s case against Hoffman would not have gone to the jury without it. Id.

The Fourth Circuit found that Long was laboring under a conflict of interest – an “inescapable and unavoidable conclusion.” Id. at 285-286. Long represented Hoffman and Moose when Long negotiated a plea agreement for Moose in which Moose agreed to testify for the state and give a statement to the police, which implicated Hoffman. Id. at 286. The conflict adversely affected Long’s representation of Hoffman because Long negotiated a plea bargain for Moose to implicate Hoffman and Long failed to advise Hoffman what Moose’s testimony would be. Further, Long’s representation of Moose prevented him from cross-examining Moose in a way to attack his credibility. Long could not question his own client’s truthfulness. Id. at 286-287. The prosecutor’s repeated references to Long’s representation of all three defendants was evidence of the adverse effect of the conflict. Id. at 287.

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 appropriate where 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.

The Ninth Circuit Court of Appeals held a federal defendant in habeas corpus proceedings 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. Quintero v. U.S., 33 F.3d 1133, 1135 (9th Cir. 1994).² The defendant demonstrated his attorney actively represented conflicting interests based upon the fee arrangement. Specifically, the court stated “[a] drug conspiracy case involving large quantities of cocaine, fees paid by unknown third parties, and the potential for unindicted co-conspirators may be sufficient to demonstrate active representation of conflicting interests.” Id. Concerning how counsel’s conflict affected performance, the court determined the defendant was entitled to a hearing concerning his allegation that counsel’s advice to reject a plea bargain was the result of the conflict. “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.” Id. at 1136 (quoting United States v. Allen, 831 F.2d 1487, 1497 (9th Cir. 1987)). If the third party paying for the defendant’s attorney were involved in the narcotics transaction, then the defendant’s guilty plea and cooperation may have implicated that person. Id. at 1136-1137.

² The Second Circuit also held a habeas petitioner was entitled to an evidentiary hearing on her claim that her mother, who was her co-defendant, paid her trial counsel’s fees. The petitioner alleged trial counsel advised her not to testify even though testifying was in her best interests because her testimony would inculcate her mother. The Court held that if the facts were established at a hearing, then the habeas petitioner would be entitled to relief on the ground that trial counsel abdicated a duty of loyalty by permitting a third party who paid the fee to influence the lawyer’s judgment. Amiel v. United States, 209 F.3d 195, 198-199 (2d Cir. 2000).

Therefore, the attorney's advice may have been motivated by the need to keep the defendant from implicating the third party. Id. at 1137.³

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.

Petitioner's case is almost identical to that presented in Derrington, *supra*. The instant case evidences an attorney who suffered from an actual conflict of interest. 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

³ The defendant claimed his attorney stated, "I've never worked, and will not work for a "snitch," am I working for one now?" Quintero v. United States, 33 F.3d 1133, 1137 (9th Cir. 1994).

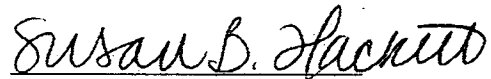
any conflict of interest. Like the attorney in Derrington, Harris may not rely upon Petitioner's denial of any connection to Perez where Harris engaged in no plea negotiations on Petitioner's behalf, failed to discuss with Petitioner the possibility of him cooperating with prosecutors in any capacity, and never approached the prosecutors to seek leniency in exchange for Petitioner's cooperation. In fact, when Petitioner mentioned 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.

The PCR court neglected to consider that (1) Harris knew there was a close personal relationship between Petitioner's mother and Perez; (2) Harris' \$25,000 fee for representing Petitioner in his methamphetamine case had been paid, at least partially, by Perez; (3) Harris' \$25,000 fee for representing Perez in his marijuana case had been paid by Santana, Petitioner's mother; (4) Harris' \$25,000 fee for representing Petitioner in his marijuana case had been paid by Santana; and (5) Harris knew Petitioner and Perez were charged with trafficking large quantities of marijuana in the same geographic area. Consideration of these factors indicates that Harris placed himself in a situation inherently conducive to divided loyalties by representing Petitioner and Perez simultaneously. Harris's representation of Petitioner was compromised by the duties he owed to Perez creating an actual conflict of interest. This conflict adversely affected Petitioner because Harris failed to pursue plea negotiations or consult with authorities regarding lenient treatment for Petitioner in exchange for information concerning Perez.

CONCLUSION

This Court should hold the PCR court erred in denying Petitioner relief from his conviction and sentence where evidence showed trial counsel had a conflict of interest by representing both Petitioner and Perez because trial counsel had divided loyalties in light of Perez paying trial counsel to represent Petitioner and law enforcement seeking Petitioner's cooperation in its investigation against Perez. Petitioner respectfully requests this Court reverse the decision of the PCR court and grant Petitioner a new trial.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of September, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Spartanburg County
Roger L. Couch, Circuit Court Judge

MICHAEL GONZALES,

PETITIONER,

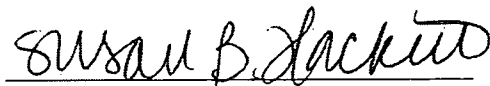
v.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

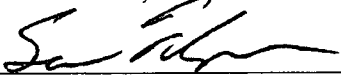
I certify that a true copy of the brief of petitioner, in this case has been served on Suzanne H. White, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC, 29201, and Mr. Michael Gonzales #285903, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 22nd day of November, 2013.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 22nd day
of November, 2013.

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

STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

JUL 20 2015

Appeal from Spartanburg County

The Honorable Roger L. Couch, Circuit Court Judge

S.C. Supreme Court

Appellate Case No. 2011-190809

Michael Gonzales.....Petitioner,

v.

The State of South Carolina.....Respondent.

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

SUZANNE H. WHITE
Assistant Deputy Attorney General
SC Bar No. 78225
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEY'S FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....1

STATEMENT OF ISSUE ON APPEAL.....2

STATEMENT OF THE CASE.....3

STANDARD OF REVIEW.....5

ARGUMENT

 The PCR Court properly held that Counsel was not ineffective in his representation of Petitioner on a charge of trafficking in methamphetamine based upon an alleged conflict of interest resulting from Counsel representing both Petitioner and another client named Dino Perez.....6

CONCLUSION.....13

TABLE OF AUTHORITIES

Cases

<u>Butler v. State</u> , 286 S.C. 441, 334 S.E.2d 813 (1985)	5, 7
<u>Cherry v. State</u> , 300 S.C. 115, 386 S.E.2d 624 (1989)	5, 7, 8
<u>Clanton v. Bair</u> , 826 F.2d 1354 (1987)	12
<u>Cuyler v. Sullivan</u> , 446 U.S. 335, 350, 100 S. Ct. 1708, 1719, 64 L. Ed. 2d 333 (1980)	12
<u>Duncan v. State</u> , 281 S.C. 435, 315 S.E.2d 809 (1984)	11
<u>Langford v. State</u> , 310 S.C. 357, 426 S.E.2d 793 (1993)	11
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984)	7
<u>Thomas v. State</u> , 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001)	11
<u>United States v. Taft</u> , 221 F. App'x 277, 279 (4th Cir. 2007)	11

STATEMENT OF ISSUE ON APPEAL

Did the PCR Court properly hold that Counsel was not ineffective in his representation of Petitioner on a charge of trafficking in methamphetamine based upon an alleged conflict of interest resulting from Counsel representing both Petitioner and another client named Dino Perez?

STATEMENT OF THE CASE

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. The Petitioner was indicted at the June 2002 term of the Spartanburg County Grand Jury for trafficking in methamphetamine (2002-GS-42-2742). He was represented by Ricky K. Harris, Esquire. On July 22 - 25, 2002, Petitioner proceeded to trial and was found guilty as indicted. He was sentenced by the Honorable Gary E. Clary, to confinement for a period of thirty (30) years.¹

A timely Notice of Appeal was filed on Petitioner's behalf and an appeal was perfected. Tara D. Shurling represented the Petitioner in his appeal. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Michael Gonzales, Op. No. 3842 (S.C. Ct. App. filed July 6, 2004). On March 9, 2006, the South Carolina Supreme Court denied the Petition for Writ of Certiorari filed on Petitioner's behalf. The Remittitur was issued March 13, 2006.

Petitioner then filed an Application for Post-Conviction Relief on May 11, 2006, and an Amended Application on April 17, 2007. The Respondent made its Return on or about October 31, 2006. An evidentiary hearing into the matter was originally convened on September 20, 2007. The record was held open and additional testimony was taken on November 8, 2008, and January 11, 2010, at the Spartanburg County Courthouse. Tara D. Shurling, Esquire, represented the Petitioner. S. Prentiss Counts, Esquire, and

¹ In June 2002 the Petitioner was also indicted in Spartanburg County for trafficking in marijuana. Tara D. Shurling represented him on that charge. On October 7, 2004, the Petitioner pled guilty to the lesser-included offense of trafficking in marijuana, 10-100 lbs. He was sentenced by the Honorable D. Garrison Hill to confinement of five years to be served concurrently with the sentence for trafficking in methamphetamine. Petitioner did not challenge this conviction or sentence in the post-conviction relief application.

Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, both represented the Respondent.

At the first hearing, the Petitioner testified on his own behalf. Petitioner also called Isaac Johnson, Esquire to testify on his behalf. Lieutenant Steve Cooper testified on Petitioner's behalf at the second hearing. Terry Haselden, Esquire, and Ricky Harris, Esquire, testified on behalf of the State. The Honorable Roger Couch denied and dismissed the application by written order dated February 4, 2011. Petitioner also filed a 59(e) Motion, which was dismissed by Judge Couch by written order filed on April 5, 2011.

A timely Notice of Appeal was filed on Petitioner's behalf and a Petition for Writ of Certiorari and Respondent's Return to the Petition were submitted. The Supreme Court of South Carolina granted the Petition for Writ of Certiorari on April 4, 2012. A Brief of Petitioner was filed and this Brief of Respondent follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge’s findings. Cherry v. State, 300 S.C. 115, S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

- I. **The PCR Court properly held that Counsel was not ineffective in his representation of Petitioner on a charge of trafficking in methamphetamine based upon an alleged conflict of interest resulting from Counsel representing both Petitioner and another client named Dino Perez.**

In this matter, Counsel was retained to represent Petitioner in January 2002 on a charge of trafficking in marijuana and then subsequently in June 2002 on the charge of trafficking in methamphetamine. (App. p. 602). Counsel was retained originally by Petitioner's mother, Lucy Santana, who paid the \$25,000 fee for the trafficking in marijuana charge sometime around January 25, 2002. (App. p. 601-2; 606). Counsel received a subsequent \$25,000 fee for the trafficking in methamphetamine charge, paid partially by a personal check from Dino Perez. (App. p. 602-3). Counsel's knowledge as to the relationship between Petitioner and Mr. Perez at the time of being retained was that Lucy Santana was Petitioner's mother and Mr. Perez was a friend, boyfriend, or ex-boyfriend of Lucy's. (App. p. 608; 610). Counsel had represented Perez on several misdemeanor drug charges in Magistrate's Court on February 5, 2001, which resulted in no convictions, but forfeiture of over \$6,000 in cash. (App. p. 612). Counsel was also retained to represent Perez in April 2002 after he and two other individuals were arrested for an unrelated charge of trafficking in marijuana. (App. p. 613). Petitioner's trial for trafficking in methamphetamine began July 22, 2002, at which time he was found guilty of the charge. (App. p. 1; 615).

Petitioner argues that Counsel had a conflict of interest because he represented both Perez and Petitioner. Petitioner also argues that Counsel refused to negotiate with

the State on Petitioner's behalf based on information that Petitioner could provide against Perez because of Counsel's relationship with Perez.

In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of Counsel is alleged as a ground for relief, the Petitioner must prove that "Counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that Counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. The Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of Counsel. First, the Petitioner must prove that Counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland). Second, Counsel's deficient performance must have prejudiced the Petitioner such that "there is a reasonable probability that, but for Counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at

625. Here, Petitioner has failed to meet either prong of the Strickland test and has failed to show that Counsel was ineffective.

At the post-conviction relief hearing, Petitioner testified that his mother lived with Dino Perez for years and that Perez had been like a father to him. (App. p. 686). Petitioner testified that he was thirteen years old when he first met Perez. (App. p. 695). Petitioner testified that he was arrested when he was seventeen years old on these charges. (App. p. 685). Petitioner testified that he told Counsel, while he was being housed in Pod 6, that Petitioner had information about Perez that could perhaps help him on the charges, but Counsel told him that he could not hear the information. (App. p. 691). Petitioner claimed that if Counsel had talked with him about cooperating with police to get a deal before Perez was indicted or after Perez was arrested and indicted, Petitioner would have cooperated with authorities and would have wanted his own attorney. (App. p. 693).

Petitioner testified that Counsel came to him at Perry Correctional Institution after the conviction for trafficking in methamphetamine and discussed whether or not Petitioner would sign a form waiving any potential conflict of interest. (App. p. 689). Petitioner acknowledged that when Counsel and another person (Terry Haselden, Esquire) came to see Petitioner at Perry at that time, Petitioner denied there was any connection between himself and Perez. (App. p. 699). Petitioner acknowledged the conflicting statements of his connection to Perez, but claimed that he lied to Counsel at Perry because previously Counsel did not want to listen to him. (App. p. 699). Petitioner also claimed that the reason he lied was because he was scared of Perez. (App. p. 702).

Counsel testified that he did not consider that there was a conflict of interest in representing Petitioner and Perez because to his knowledge, the only thing they had in common was Lucy Santana. (App. p. 616). Counsel testified that it is not uncommon in his experience for friends or individuals related to each other to wind up in the same *kind* of trouble, but that did not mean that it was the same trouble. (App. p. 616). Counsel also testified that he had no recollection or record of being approached by law enforcement regarding the possibility of Petitioner testifying against Perez. (App. p. 616). Furthermore, Counsel testified that Petitioner never attempted to discuss with him any information he had pertaining to Perez. (App. p. 617). Counsel also testified that he was never aware of any connection between Petitioner's marijuana trafficking case and Perez's marijuana trafficking case. (App. p. 623). In fact, Counsel testified that he was led to believe that they were two separate unrelated occurrences based on discovery provided in the case. (App. p. 623). Counsel testified that at no time during his representation of Petitioner or since that time did Petitioner indicate that he knew of Perez's drug activities, was part of those activities, or was part of any drug activity at all. (App. p. 633).

Counsel testified that the first time he heard of any potential conflict was following his demand for full discovery in the Perez case from Assistant United States' Attorney (A.U.S.A) Johnson. (App. p. 626-7). Counsel testified that his conversation with A.U.S.A. took place on May 15, 2003, almost one year following Petitioner's conviction for trafficking in methamphetamine. (App. p. 630). At that time, Counsel testified that the United States' Attorney's office threatened Counsel, forced him to withdraw from representing Perez, and forced him to acknowledge a conflict in his

representing Perez because of the office's theory of a conspiracy between Petitioner and Perez. (App. p. 626-7). Counsel then testified that sometime after that conversation, he was provided with information to indicate that Petitioner had apparently given statements to the authorities against Perez. (App. p. 637). Counsel testified that he filed a formal motion to be relieved in Petitioner's trafficking marijuana case on July 16, 2004, based predominately on the conversation with Johnson and subsequent information received from Ms. Shurling from 2003 through that date. (App. p. 640-1). Counsel testified that his representation of Petitioner on the trafficking in methamphetamine charge and Perez on the marijuana trafficking charge did not affect his representation of Petitioner at trial at all. (App. p. 653). Counsel reiterated the fact that during the Petitioner's trial for trafficking in methamphetamine, Counsel was not aware of a connection between Perez and Petitioner. (App. p. 652). Counsel testified that had Petitioner, or any other client in a similar situation, said that they had information that could be useful to their case in regarding to cooperation, Counsel would have acted on that. (App. p. 708).

The court found both Counsel and Haselden's testimony to be credible. (App. p. 745). The court also found it credible that Petitioner, his mother, and Perez never informed Counsel that their cases were related or that Petitioner and Perez were involved in a conspiracy to traffic drugs. (App. p. 745). The court had independent testimony from Mr. Haselden, which supported Counsel's testimony that again, Petitioner denied any involvement with or knowledge of Perez's drug activities. Additionally, the fact that Petitioner's PCR Counsel herself acknowledged that Petitioner initially denied knowledge to her supported Counsel's testimony that Petitioner never disclosed any connection to him prior to, during, or after the trial for trafficking in methamphetamine.

(App. p. 745). The court also found that the consistency of the 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. p. 745).

The mere possibility of a conflict of interest is insufficient to challenge a criminal conviction. Langford v. State, 310 S.C. 357, 426 S.E.2d 793 (1993). "To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representations, 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) (citing Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Duncan v. State, 281 S.C. 435, 315 S.E.2d 809 (1984)). Respondent submits that Petitioner failed to present any evidence or testimony at the hearing to support his claims that the alleged conflict of interest affected Counsel's performance in representing Petitioner on his charge of trafficking of methamphetamine.

The Fourth Circuit has addressed many issues related to conflict of interest and these cases are persuasive in this case. Although an attorney's overlapping representation of two clients can affect representation when an actual conflict of interest is created, the mere fact that overlapping representation exists is insufficient to create a Sixth Amendment violation. United States v. Taft, 221 F. App'x 277, 279 (4th Cir. 2007) (holding that defendant's right to effective counsel was not violated when former trial counsel also represented a government witness for a short overlapping period).

"[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective

assistance.” Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S. Ct. 1708, 1719, 64 L. Ed. 2d 333 (1980). Respondent notes that the majority of cases regarding conflict of interest deal with an attorney’s simultaneous representation of co-defendants in the same case. However, as indicated by the testimony from this PCR hearing, Petitioner was convicted of trafficking in methamphetamine, charges which were unrelated to Perez and his charges.

Additionally, Counsel must rely on the information provided to him by his clients. “Counsel’s actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant.” Barnes v. Thompson, 58 F.3d 971, 979 (4th Cir. 1995) (citing Strickland, 466 U.S. at 690-91, 104 S.Ct. at 2066). In Barnes, the court found that Counsel might rely on the truthfulness of his client and others he interviews when making strategic trial and defense decisions. Id. at 979-80. The United States Court of Appeals, Fourth Circuit, found no deficient performance in Clanton v. Bair, when the client told his attorney about his good childhood, which led the attorney to not seek a psychiatric evaluation, but the client later changed his story. Clanton v. Bair, 826 F.2d 1354 (1987) (finding no deficiency when the attorney had no reason to doubt his client’s truthfulness). Counsel testified that he discussed any possible deals with the Solicitor on the case and discussed the case thoroughly with his client. Counsel testified that Petitioner’s position prior to and during his trial was that he was not guilty. (App. p. 661). Counsel testified that Petitioner never indicated to Counsel a willingness to plead guilty to anything. (App. p. 661).

Petitioner had ample opportunity to share his knowledge of Perez’s drug activities with Counsel either before trial or even after and allow Counsel the opportunity to file a

motion for new trial or motion for reconsideration. However, Petitioner did not provide that information to Counsel and thereby, Counsel was not operating under any conflict of interest that affected his representation of Petitioner at his trial.

Clearly, Petitioner has failed to meet his burden of proof as to this argument.

CONCLUSION

For the reasons stated above, this Court should affirm the lower court's ruling.

Respectfully submitted,

ALAN WILSON
Attorney General

SUZANNE H. WHITE
Assistant Deputy Attorney General
SC Bar #78225

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

By: 
ATTORNEYS FOR THE RESPONDENT

March 26, 2014.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

The Honorable Roger L. Couch., Circuit Court Judge

MICHAEL GONZALES,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

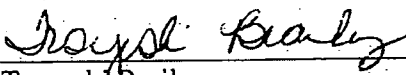
RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Brief of Respondent** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Susan B. Hackett, Esquire
1330 Lady St. Suite 401
Columbia, SC 29201

This 26th day of March, 2014



Troyesh Brailey
LEGAL ASSISTANT for the Respondent