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**SC SUPREME COURT**

STATE OF SOUTH CAROLINA  
In The Supreme Court

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CERTIORARI TO THE COURT OF APPEALS  
Appeal From Spartanburg County  
The Honorable Gary E. Clary, Trial Judge  
The Honorable Roger L. Couch, Post-Conviction Relief Judge

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

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Appellate Case No. 2015-001553

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Michael Gonzales,..... Petitioner,

v.

State of South Carolina,.....Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS**

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## **CERTIFICATION OF COUNSEL**

Counsel for Respondent hereby certifies a Petition for Rehearing was filed in the South Carolina Court of Appeals on May 28, 2015 and denied by Order filed June 18, 2015.

## QUESTIONS PRESENTED

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

## STATEMENT OF THE CASE

Petitioner was indicted at the June 2002 term of the Spartanburg County Grand Jury for trafficking methamphetamine (2002-GS-42-2742). (App.pp.766-67). He was represented by Ricky K. Harris, Esquire.

After the State brought the case to trial, Petitioner was found guilty. On July 25, 2002, the Honorable Gary E. Clary sentenced him to thirty (30) years imprisonment. (App.p.565).

A notice of appeal was filed at the South Carolina Court of Appeals. Tara D. Shurling, Esquire represented Petitioner on appeal. The court of appeals affirmed Petitioner's conviction and sentence on July 6, 2004. State v. Gonzales, 360 S.C. 263, 600 S.E.2d 122 (Ct. App. 2004). On March 9, 2006, the South Carolina Supreme Court denied the subsequent petition for writ of certiorari and the remittitur was issued on March 13, 2006.

Petitioner filed an application for post-conviction relief (PCR) on May 11, 2006 (2006-CP-42-1550) and an amended application on April 17, 2007. (App.pp.566-73; p.579). A hearing was held at the Spartanburg County Courthouse on September 20, 2007. (App.pp.582-668). Petitioner was present and represented by Tara D. Shurling, Esquire. At the conclusion of the hearing, the Honorable Roger L. Couch held the record open and additional testimony was taken on November 8, 2007 and January 11, 2010. (App.pp.669-719; pp.722-38). Judge Couch denied relief in an order dated and filed February 11, 2014. (App.pp.740-48). Judge Couch also denied the subsequent Rule 59(e), SCRCR motion by order filed April 5, 2014. (App.pp.764-65).

A notice of appeal was filed at this Court. Susan B. Hackett, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense represented Petitioner. After a petition for writ of certiorari and return to petition for writ of certiorari were filed, the case was transferred to the South Carolina Court of Appeals. The court of appeals granted the petition for writ of certiorari. After oral argument, the court of appeals affirmed the PCR judge's denial of relief. Gonzales v. State, Op. No. 5317 (S.C. Ct. App. filed May 13, 2015). (Supp.App.pp.1-21). Petitioner filed a Petition for Rehearing, which the court of appeals denied by order dated June 18, 2015. (Supp.App.pp.22-34; p.35).

## ARGUMENT

- I. **The court of appeals did not err in holding Petitioner is required to show that trial counsel must recognize an actual conflict of interest in order to show an adverse effect flowing from that conflict.**

Certiorari is not warranted in this case because the court of appeals was correct in finding Petitioner must show trial counsel recognized an actual conflict of interest in order to then show an adverse effect flowed from that alleged conflict.

### A.

Counsel was retained to represent Petitioner in January 2002 on the charge of trafficking marijuana and then again in June 2002 on the charge at issue in this case – trafficking 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.pp.601-02; p.606). Counsel received a subsequent \$25,000 fee for the trafficking in methamphetamine charge, paid partially by a personal check from Dino Perez. (App.pp.602-03). Counsel's knowledge as to the relationship between Petitioner and Perez at the time of being retained was that Lucy Santana was Petitioner's mother and Perez was her friend, boyfriend, or ex-boyfriend. (App.p.608; p.610). Counsel had previously represented Perez on several misdemeanor drug charges in magistrate's court on February 5, 2001. (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 marijuana. (App.p.613). Petitioner's trial for trafficking methamphetamine began July 22, 2002, after which he

was found guilty. (App.p.1; p.615).

**B.**

At the post-conviction relief hearing, Petitioner testified his mother lived with Perez for years, and that Perez had been like a father to him. (App.p.686). Petitioner testified he was thirteen years old when he first met Perez. (App.p.695). Petitioner testified that he was arrested on these charges when he was seventeen years old. (App.p.685). Petitioner testified he told Counsel, while he was at the Spartanburg County jail, that he 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 also have cooperated with authorities and would have wanted his own attorney. (App.p.693).

Petitioner testified Counsel came to him while he was in the South Carolina Department of Corrections after his conviction in this case and discussed whether Petitioner would sign a form waiving any potential conflict of interest. (App.p.689). Petitioner acknowledged that when Counsel and another person (subsequently identified as Terry Haselden, Esquire) came to see him at that time, he denied there was any connection between himself and Perez. (App.pp.698-99). Petitioner acknowledged the conflicting statements of his connection to Perez, but claimed he lied to Counsel because previously Counsel did not want to listen to him. (App.p.699). Petitioner also claimed the reason he lied was because he was scared of Perez. (App.p.702).

Counsel testified he did not consider 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 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 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 Petitioner never attempted to discuss with him any information he had about Perez. (App.p.617). Counsel also testified 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 he was led to believe they were two separate unrelated occurrences based on the discovery materials. (App.p.623). Counsel testified that at no time during his representation of Petitioner (or since that time), did Petitioner indicate 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 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 (AUSA) Johnson.<sup>1</sup> (App.pp.626-27). Counsel testified his conversation with AUSA Johnson took place on May 15, 2003, almost one year after Petitioner's conviction for trafficking methamphetamine. (App.p.630). At that time, Counsel testified the United States' Attorney's office threatened him, forced him to withdraw from representing Perez,

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<sup>1</sup> Counsel testified he visited Petitioner after he was sent to prison and brought a local attorney (Terry Haselden) with him on this visit. Counsel testified Petitioner denied any connection with Perez. (App.pp.650-52; pp.708-09).

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.pp.626-27). Counsel testified that sometime after this conversation, he was provided with information to indicate Petitioner had apparently given statements to the authorities against Perez. (App.p.637). Counsel testified he filed a formal motion to be relieved in Petitioner's trafficking marijuana case on July 16, 2004, based predominately on the conversation with AUSA Johnson and subsequent information received from Petitioner's PCR Counsel from 2003 through that date. (App.pp.640-41). Counsel testified his representation of Petitioner on the trafficking methamphetamine charge and Perez on the trafficking marijuana charge did not affect his representation of Petitioner at trial in any way. (App.p.653). Counsel reiterated that, during Petitioner's trial for trafficking methamphetamine, he 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 they had information that could be useful to their case in regards to cooperation, Counsel would have acted on that. (App.p.708).

Terry Haselden confirmed he accompanied Counsel to the South Carolina Department of Corrections to interview Petitioner. (App.p.663). Haselden explained what occurred at this meeting:

[Counsel] advised [Petitioner] that it had been alleged that there might possibly be some sort of connection between him and [Counsel]'s other client. [Petitioner] was adamant that there was no connection of any shape or form between the two, that he knew nothing about Mr. Perez's involvement in any criminal activity, and they just, you know, traveled in different circles as far as that was concerned.

[Counsel] asked him this several times. I think I also asked him as well

and he was repeatedly adamant that there was no connection between the two of them.

(App.p.664).

**C.**

In denying the application for post-conviction relief, the PCR judge found both Counsel's 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 in any way or that Petitioner and Perez were involved in a conspiracy to traffick drugs. (App.p.745). The PCR judge also had independent testimony from Haselden which supported Counsel's testimony that 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 methamphetamine. (App.p.745). The PCR judge also found the consistency of the Petitioner's protestations to Counsel, impartial observers, and even Petitioner's own PCR Counsel that Petitioner knew nothing of Perez's activities or was involved in his activities, supported Counsel's belief that he was not operating under a conflict of interest. (App.p.745).

**D.**

The court of appeals affirmed the PCR judge's denial of relief. The court of appeals found that, while Counsel should have recognized a conflict of interest may have existed, because they were "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." The court of appeals concluded that, "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."

#### E.

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

#### F.

Contrary to Petitioner's assertions, the court of appeals did not find that – in every case – a trial attorney must recognize a conflict of interest in order for a PCR applicant to demonstrate error. Rather, it is clear from the court of appeals' opinion that they were constrained by the PCR judge's finding in this case that Counsel was credible in

determining he was not aware of a conflict of interest at the time he represented Petitioner on the trafficking methamphetamine charge. Counsel's testimony was clear that Petitioner never told him of any relationship between his charges and Perez's charges during the pendency of his representation on the trafficking methamphetamine charge. Counsel testified, in fact, that when they met in the Department of Corrections several months after his conviction, Petitioner affirmatively stated he had no connection to Perez. Haselden confirmed Petitioner "was adamant that there was no connection of any shape or form between the two, that he knew nothing about Mr. Perez's involvement in any criminal activity, and they just, you know, traveled in different circles as far as that was concerned." The PCR judge found their testimony was credible. See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is given to the PCR judge's findings on the credibility of witnesses); see also Kolle v. State, 386 S.C. 578, 593, 690 S.E.2d 73, 81 (2010) (Pleicones, J., concurring) (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); Menne v. Keowee Key Prop. Owners' Ass'n, Inc., 368 S.C. 557, 567, 629 S.E.2d 690, 696 (Ct. App. 2006) ("Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved."). As Counsel's testimony was found credible, the PCR judge clearly believed Counsel was not aware of any potential conflict of interest in this particular case when it went to trial.

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 Fed. Appx. 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 (1980).

"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 for the Fourth Circuit found no deficient performance 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. See 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 he discussed any possible deals with the Solicitor on the case and discussed the case thoroughly with his client. Counsel testified Petitioner's position prior to and during his trial was that he was not guilty. (App.p.661). Counsel testified 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 trial – which would have allowed Counsel the opportunity to file a motion for new trial or motion for reconsideration. However, as the PCR judge concluded, Petitioner never provided Counsel any information that his case and Perez's case were at all related. See Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995) (“What decision [counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless, after more than a decade, for [counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.”). The PCR judge was correct in determining Counsel provided credible testimony and the court of appeals was correct that, as such, Counsel did not recognize a conflict of interest in this case.

#### G.

Accordingly, the court of appeals did not err in finding Counsel did not recognize a conflict of interest in this case. The court of appeals was further correct in determining Petitioner failed to meet his burden of proving both parts of the Strickland analysis. Petitioner failed to meet his burden of proving he was entitled to relief. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (“The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.”).

**II. The court of appeals did not err in finding Petitioner failed to meet his burden of proving an adverse effect flowing from an actual conflict of interest.**

Certiorari is not warranted in this case because the court of appeals was correct in finding Petitioner failed to meet his burden of proving the existence of an adverse effect flowing from an alleged conflict of interest.

**A.**

The court of appeals found Petitioner “has not shown the conflict of interest adversely affected trial counsel’s performance due to the PCR court’s credibility findings.” The court of appeals concluded that “[b]ecause [Petitioner] has not shown trial counsel’s conflict adversely affected counsel’s performance, he has not shown prejudice.”

**B.**

The court of appeals was correct in finding Petitioner failed to demonstrate there were any adverse effects from Counsel’s alleged conflict of interest. “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)). “[A] defendant must establish that an actual conflict of interest adversely affected his lawyer’s performance.” Cuyler v. Sullivan, 446 U.S. at 350, 100 S. Ct. at 1719. “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. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland v. Washington, 466 U.S. at 689, 104 S. Ct. at 2065. "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690, 104 S. Ct. at 2066.

Petitioner cannot demonstrate there was any adverse effect from Counsel's representation. Petitioner was convicted on the trafficking methamphetamine charge almost one year before Counsel's meeting with AUSA Johnson about Perez's trafficking marijuana charge. Even at this point, Petitioner continued to vehemently deny there was any connection between his charges and Perez's charges. Counsel could not have offered to broker a deal with the State for Petitioner's potential information about Perez's case prior to Petitioner's trial because he was not aware of any connection between the two. Petitioner cannot demonstrate that Counsel's representation of him was in any way affected by Perez. Rather, the record indicates Counsel represented Petitioner effectively with the facts and information known to him at the time. Petitioner cannot point to any portion of the trial transcript that indicates Counsel was less than a zealous advocate. Petitioner cannot show Counsel treated his case as less serious than Perez's case. Petitioner cannot show Counsel employed any form of argument or strategy that was to his detriment but also Perez's advantage. Without showing any adverse effects, Petitioner cannot establish he suffered a Sixth Amendment violation. See Thomas v.

State, 346 S.C. at 143, 551 S.E.2d at 256.

C.

Accordingly, the court of appeals did not err in concluding Petitioner was not entitled to relief because he failed to demonstrate that he suffered an adverse effect from an alleged conflict of interest. Petitioner failed to meet his burden of proving he was entitled to relief. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

**CONCLUSION**

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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By:

  
ATTORNEYS FOR RESPONDENT

September 4, 2015

STATE OF SOUTH CAROLINA  
In The Supreme Court

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CERTIORARI TO THE COURT OF APPEALS  
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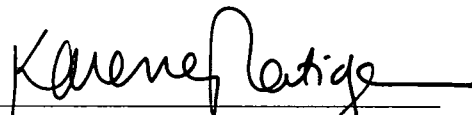
**CERTIFICATE OF SERVICE**

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I, Karen C. Ratigan, certify that I have today served the within Return to Petition for Writ of Certiorari to the Court of Appeals upon Petitioner by depositing a copy of the same in interagency mail, addressed to:

Susan B. Hackett, Esquire  
S.C. Comm'n on Indigent Defense, Division of Appellate Defense  
Post Office Box 11589  
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I further certify that all parties required by Rule to be served have been served.  
This 4th day of September, 2015.

  
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