

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

RECEIVED

JUL 05 2016

SC SUPREME COURT

MICHAEL GONZALES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001553

REPLY BRIEF OF PETITIONER

Susan B. Hackett
Appellate Defender

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

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....ii

ARGUMENT IN REPLY

I. The Court of Appeals erred in holding Petitioner was required to show that trial counsel must recognize an actual conflict of interest in order to show an adverse effect flowing from the actual conflict of interest.1

II. If Petitioner is required to show that trial counsel recognized an actual conflict of interest in order to show an adverse effect flowing from the actual conflict of interest, the Court of Appeals erred in finding Petitioner failed to make such a showing where the undisputed evidence showed trial counsel represented both Petitioner and Deno Perez, Petitioner’s stepfather, in drug cases, Perez paid trial counsel to represent Petitioner, and law enforcement sought Petitioner’s cooperation in its investigation against Perez.....5

CONCLUSION.....8

TABLE OF AUTHORITIES

Cases

Barnes v. Thompson, 58 F.3d 971 (4th Cir. 1995) 2

Clanton v. Bair, 826 F.2d 1354 (4th Cir. 1987)..... 2, 3

Rompilla v. Beard, 545 U.S. 374 (2005) 3, 4

Rules

Rule 59(e), SCRPC.....1

ARGUMENT IN REPLY

Petitioner filed his brief on May 19, 2016, raising two issues. Respondent filed its brief on June 22, 2016.¹ Petitioner now files this reply.

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

In its brief, Respondent continued to maintain, as it did in the return, that “the court of appeals did not find that invariably and in every case a trial attorney must recognize a conflict of interest in order for a PCR applicant to demonstrate error.” BOR at 11. “Rather, the court of appeals recognized in its opinion that it was 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.” BOR at 11-12 (emphasis in original). While Petitioner respectfully disagrees with this reading of the opinion as explained in the Brief of Petitioner, such a reading appears to require Petitioner to prove something that no other PCR applicant would be required to prove. The Court of Appeals held that “[a]lthough an actual conflict existed, because trial counsel did not recognize the conflict, [Petitioner] cannot demonstrate the conflict affected trial counsel’s performance.” Supp. App. 16. Thus, if Respondent’s argument is correct that the Court of Appeals did not hold that all PCR applicants

¹In its Brief, Respondent stated that “Judge Couch denied relief in an order dated and filed February 11, 2014.” BOR at 4. The order denying relief was filed on February 4, 2011, and signed by Judge Couch on February 4, 2010. App. 740-748. Petitioner believes Respondent simply made a typographical error in its brief and only mentions the error in the event there is a question about the timeline of events. Along these same lines, Respondent stated “Judge Couch also denied the subsequent Rule 59(e), SCRCP motion by order filed April 5, 2014.” BOR at 4. The order was filed on April 5, 2011. App. 764-765. Again, this seems to be a simple typographical error.

must show that trial counsel recognized the conflict in order to show an adverse effect, but made such a requirement of Petitioner, then an additional hurdle was placed before Petitioner that is not and will not be placed before other PCR applicants. Certainly, the Court of Appeals did not intend to place an additional burden upon Petitioner, which would be placed upon no other PCR applicant.

Respondent relied upon two cases from the Fourth Circuit to support its position that trial counsel's alleged reliance upon Petitioner's refusal to inform him that he had information helpful to the police against Perez was reasonable. Specifically, Respondent cited Barnes v. Thompson, 58 F.3d 971 (4th Cir. 1995) and Clanton v. Bair, 826 F.2d 1354 (4th Cir. 1987). BOR at 13. While the Fourth Circuit noted that a trial attorney may rely on the truthfulness of his client and those whom he interviews in deciding how to pursue his investigation, the Court used this premise to explain that trial counsel's "decision to limit his investigation and to not present certain mitigating evidence was reasonable, based on his assessment of the law and his interviews with Barnes and his family." Barnes, 58 F.3d at 979-980. Barnes' lawyer decided on a strategy to focus on preventing a finding of "future dangerousness." Id. at 980. The lawyer "did not seek evidence of childhood abuse or mental impairment because there was no indication such evidence existed and because such evidence would not have been 'germane to [his] defense.'" Id. (alterations in original). Trial counsel "believed that evidence of pathology would have been counterproductive to his strategy." Id. In Clanton, the Fourth Circuit held trial counsel's knowledge that "Clanton as a boy had been shuffled from the custody of one parent to that of another [was] much too slender a reed upon which to require that the lawyer's suggestion of a psychiatric evaluation be pressed to the point of stout insistence." 826 F.2d at 1358.

Clanton told the lawyer about his childhood, which he described as normal, and did not suggest any abuse. Id. Further, there was no evidence to support Clanton's version of events expressed during a federal habeas corpus hearing that he suffered substantial abuse at the hands of his parents. Id. at 1356. Clanton's counsel's reliance on Clanton's claim that he suffered no abuse as a child was reasonable where there was no other evidence that would lead counsel to think otherwise.

However, the conflict of interest present in Petitioner's case revealed itself at every turn despite Petitioner's alleged protestations otherwise – in the financial arrangements, in the nature of the pending charges (drugs), in Lucy Santana, in Petitioner's youth, in the large quantities of drugs, in the evidence revealed at trial about Petitioner's drug dealing family, and in the evidence revealed at trial that Perez was Petitioner's stepfather. Additionally, trial counsel had no, and could have no, reasonable trial strategy for failing to investigate the obvious red flags of a conflict of interest. The only interests protected by no investigating the conflict were of Perez and trial counsel.

Not only are those cases easily distinguishable from the present one, it is hard to square those cases with the United States Supreme Court's opinion in Rompilla v. Beard, 545 U.S. 374 (2005). In general, Rompilla's contribution was minimal as he was not interested in helping his attorneys develop a mitigation case. He told trial counsel his childhood was normal. At times, he actively obstructed counsel by sending them off on false leads. Id. at 381. Trial counsel interviewed five family members, who indicated they did not know Rompilla well because he spent much of his adult years and some of his childhood years in custody. Id. at 381-382. The three mental health witnesses who examined Rompilla offered nothing useful either. Trial

counsel made no further efforts to investigate a mitigation case. Id. at 382. However, post-conviction counsel for Rompilla uncovered multiple sources of mitigation evidence, including school records, incarceration records, and a history of alcohol dependence. Id. The Court concluded trial counsel's failure to even examine Rompilla's prior conviction file fell below the level of reasonable performance. Id. at 383. The file concerned Rompilla's prior conviction for rape and assault, which trial counsel knew would be used by the prosecution. Id.

The Court held trial counsel had a duty to make all reasonable efforts to learn what they could about the prior offense, and that reasonable efforts included obtaining the readily available file to learn what the prosecution knew, to discover any mitigating evidence, and to anticipate the details of the aggravating evidence. Id. at 385. Thus, it appears likely the Fourth Circuit opinions from the 1980s and 1990s may be overruled by the United States Supreme Court's decision in Rompilla, supra.

The Court of Appeals erred in holding that Petitioner must show that trial counsel *recognized* the conflict of interest in order to show an adverse effect. Respondent has pointed to no authority to support the Court of Appeals' opinion, and likely can point to no authority for such a position. This Court should reverse the Court of Appeals to clarify that a PCR applicant need not show trial counsel recognized a conflict of interest in order to demonstrate counsel labored under an actual conflict of interest that adversely affected counsel's representation.

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

As indicated in the Brief of Petitioner, the PCR court's credibility findings extended only to whether trial counsel was *told* of the connection between the cases, not on whether trial counsel *recognized* the conflict of interest. As such, to the extent a PCR applicant must show that trial counsel recognized the conflict of interest, the PCR court's credibility findings have no bearing on an appellate decision. Respondent's brief did not address this distinction between what the Court of Appeals held and what the PCR judge actually found. Rather, Respondent relied upon trial counsel's testimony that he was not aware of a conflict of interest. According to Respondent, "[a]side from the fact that Perez paid a portion of the fee, Counsel had no way to know there was a conflict." BOR at 17. As such, Respondent recognized the ample case law supporting the conclusion the payment arrangements serve as significant red flags to alert counsel to conflicts of interest. Despite such apparent recognition, Respondent maintained trial counsel "had *no way* to know there was a conflict." BOR at 17 (emphasis added). The record refuted this claim.

Trial counsel's continued denial of any awareness of a conflict or connection between Petitioner and Perez and Respondent's reliance upon such a denial are incomprehensible in light of the record. During Petitioner's trial, co-defendant's attorney *actually* questioned an investigating officer regarding the *relationship* between Petitioner and Perez. According to the officer, he was

aware of Petitioner prior to the methamphetamine case because Petitioner was a dealer of marijuana and because Petitioner's stepfather, Perez, was also a dealer of a marijuana. The lawyer called them a *drug dealing family*. App. 402, line 5 – App. 403, line 8. Trial counsel's denials and Respondent's reliance on those denials in light of this record are inexplicable.

Continuing to maintain that Petitioner could not “point to any portion of the trial transcript that indicate[d] Counsel was less than a zealous advocate.” BOR at 17-18. Although Petitioner pointed to numerous portions of the record where trial counsel failed to interpose objections, Respondent argued those instances had “no bearing on whether [trial counsel's] representation of Petitioner was limited.” BOR at 18. According to Respondent, “it is equally likely that Counsel's actions were supported by sound trial strategy that has no relation to Counsel's representation of Perez on separate trafficking charges.” BOR at 18. What Respondent failed to acknowledge was that Petitioner's argument that the conflict of interest did not motivate trial counsel to lose Petitioner's case or provide less than zealous advocacy. Rather, the conflict motivated trial counsel to protect Perez by preventing Petitioner from cooperating with police. In fact, the case presented clear evidence of the adverse effect because this Court can juxtapose the plea agreement Petitioner received in the marijuana case when he had conflict-free counsel and the sentence he received following his methamphetamine trial. Petitioner presented evidence that the police were very interested in working with Petitioner to obtain evidence against Perez at the time that trial counsel was representing him. App. 728, ll. 20-25; App. 729, ll. 10-14. Certainly, this evidence demonstrated that trial counsel's conflict adversely affected trial counsel's performance.

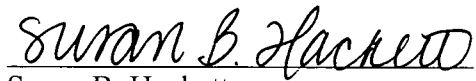
This Court should reverse the Court of Appeals and find that trial counsel's actual conflict of interest adversely affected his performance in light of his inability to negotiate a plea agreement on

Petitioner's behalf due to his loyalties to Perez. The record is clear that the police hoped to "flip" Petitioner against Perez, and that the police ultimately did so when Petitioner had conflict-free counsel.

CONCLUSION

Petitioner respectfully requests this Court reverse the decision of the Court of Appeals and grant him a new trial.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of July, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

MICHAEL GONZALES,

PETITIONER,

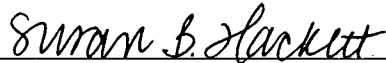
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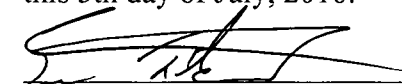
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Reply Brief of Petitioner in the above referenced case has been served upon Alicia Olive, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Reply Brief of Petitioner has been served on Michael Gonzales #285903 at Lieber Correctional Institution, 136 Wilborn Ave, Ridgeville, SC, 29472, this 5th day of July, 2016.



Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 5th day of July, 2016.



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