IN THE SUPREME COURT
OF THE UNITED STATES

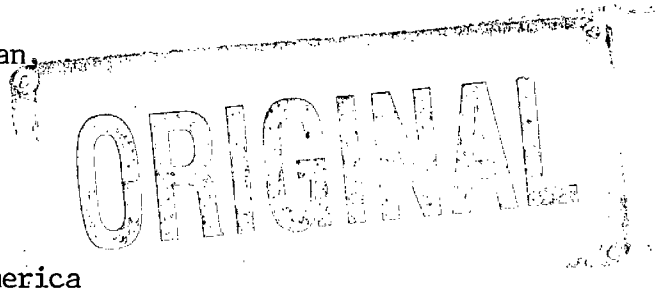
18-9046

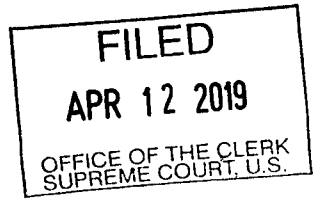
Case No. _____

Richard Shusterman,
Petitioner

v.

United States of America
Respondent.





Petition for Issuance of a
Writ of Certiorari
to the U.S. Court of Appeals
for the Fourth Circuit

By:
Richard Shusterman, pro se
#56916-037
FCI Coleman Low
P.O. Box 1031
Coleman, Florida
33521-1031

QUESTIONS PRESENTED

1. Did the Fourth Circuit Court of Appeals err in denying issuance of a Certificate of Appealability of a 28 U.S.C. § 2255 ruling when the District Court applied the wrong standard for ineffective assistance of counsel, such that reasonable jurists could differ on a result?

LIST OF PARTIES

All parties to the proceedings below are included in the caption of the case.

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OPINIONS BELOW

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment below.

The opinion of the United States Court of Appeals for the Fourth Circuit appears at Appendix A to the petition and is reported at U.S. v. Shusterman, ___ Fed. Appx. ___, 2019 U.S. App. LEXIS 1420, No. 18-6969 (4th Cir. Jan. 16, 2019).

The opinion of the United States District Court for the District of Maryland appears at Appendix B to the petition and is reported at U.S. v. Shusterman, 2018 U.S. Dist. LEXIS 123201, No. JKB-18-0963 (D. Md. July 23, 2018).

JURISDICTION

The date on which the United States Court of Appeals decided the case was January 16, 2019. No petition for rehearing was filed.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1251(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner's right to conflict free counsel under the Sixth Amendment to the U.S. Constitution.

STATEMENT OF THE CASE

In September 2013, Petitioner was indicted on multiple counts of wire fraud and/or conspiracy to commit wire fraud. [Criminal Docket Entry Case No. WDQ-13-0460 ("Cr. D. E.") 1.] Petitioner immediately sought defense counsel for representation both via private means and appointment under the Criminal Justice Act ("CJA"). Thus began the sequence of events that led to Petitioner filing a 28 U.S.C. § 2255 motion premised on ineffective assistance of counsel.

Initially, Petitioner was represented by Angel Cortinas whose representation terminated nearly immediately when Cortinas filed a motion to withdraw. The District Court granted the motion and Joel Hirschhorn entered his appearance. After two months, the government succeeded in having Hirschhorn disqualified based upon a conflict of interest.

David Benowitz next appeared on behalf of Petitioner. Nine months later, Benowitz moved to withdraw because of funding issues. The District Court denied the motion as moot because Benowitz was appointed under the CJA. Despite the denial, Benowitz purportedly stopped work on Petitioner's case.

Seven months after the denial, Benowitz again filed a motion to withdraw, this time based upon Petitioner's intent to retain Jack McMahon. Both the government and the District Court raised concerns over substitution of counsel again at such a late date. [Cr. D. E. 117 and 120.] A conference was held wherein the District Court conducted a lengthy colloquy of McMahon to ensure he understood the ramifications of entering as defense counsel

at that time. [Cr. D. E. 123.] As part of that discussion, the Court cautioned McMahon that discovery had been voluminous, a vast amount of time would be required to prepare the case, and that Petitioner had previously expressed his inability to pay attorney fees and asked for a CJA attorney. McMahon was further warned that he would be obligated to continue his representation even without a guarantee of compensation. Despite the Court's admonitions, McMahon agreed to the representation.

Even with the District Court's warnings, the relationship between McMahon and Petitioner began to devolve immediately as McMahon began making demands for payment. Petitioner was unable to secure funds to satisfy McMahon and McMahon made it clear he would put little effort in defense of Petitioner absent payment. Apart from undocumented personal and telephonic discussions between Petitioner and McMahon on this topic, numerous e-mails were exchanged demonstrating McMahon's animosity toward his client, beginning on February 3, 2016. McMahon's statements include

a. Richard, I will do what I have to because this judge made it clear that my leap of faith was not reverse able. [sic] I will not move things to clear up next Thursday and Friday [to meet] (February 3, 2016)

b. I'll let you know [about meeting] when you pay the fee as agreed. (February 7, 2016)

c. Richard, your thinking simply amazes me! 7 weeks to a major trial and I have not been paid the agreed fee and you want me to jump to your requests and give up days with clients who have paid. Pay the agreed upon fee and then start all your ideas. (February 7, 2016)

d. My leap of faith is resulting in a tremendous crash and I don't intend to keep hurting myself or my office. (February 7, 2016)

e. Going to the judge now [to obtain new counsel] would be useless and [sic] after all that has transpired would not look to [sic] kindly on your failure to meet your obligations. (February 7, 2016)

f. You respond to me about everything except payment of the fee. "Coals in the fire" at this ridiculously late stage is just not acceptable if you want the work and effort for your freedom. I am conflcited beyond anything in my career. (February 23, 2016)

g. I really don't understand you. What do you expect me to do with this absolutely untenable, absurd and totally unfair situation? Just keep moving ahead to a 5-week jury trial with not being paid as agreed? ...I am stuck because of my own stupidity-instead [sic] of being excited about doing this I am depressed, angry and not looking forward to this chore!!! (February 24, 2016)

h. Another "coal in the fire" with no payment might be straw that breaks camel back [sic]. (February 24, 2016)

i. Amazing - you giving me ethical advice [after Petitioner requested McMahon refrain from verbal abuse and use of offensive names] (March 2, 2016)

j. The word angry does not even come close to describing my feelings towards you. (March 2, 2016)

k. Richard, you have got to get payment to me. Zero payments just plain sucks and not good for you moving forward. Time is of the essence for you. (March 9, 2016)

l. What about payment? ...Richard, get SOMETHING [sic] done! 6 months of updates and promises is just beyond absurd and wearing me down. Being worn down 2 weeks to trial is not where you want me. (March 10, 2016)

m. Richard, I just don't think you want the person that is between you and significant jail to be angry and bitter. I truly want to be enthusiastic but it's impossible with things the way they are. only you can change the dynamic - Now. (March 10, 2016)

n. As the time ticks by to the defining moment of the rest of your life, I get more angry each day when I have not been paid. My enthusiasm for your [sic] and your case wanes with the passing of every day without payment. It's just a rotten uncomfortable feeling. (March 1, 2016)

o. The mere thought of having to get on a train and spend all of Monday on your matter makes me sick. (March 11, 2016)

p. Richard, your friends and mom both answer I [sic] the last few days before trial. One week before trial and I have not been paid- Just think of that for a minute! For your sake and mine, they both better get their loans or it's going to be a disaster!!! (March 21, 2016)

Under this scenario, Petitioner proceeded to trial with McMahon as counsel given McMahon's warning that the judge would not be favorable to yet another attorney change. However, Petitioner could also not resolve McMahon's self-described conflict, being worn down, anger, and bitterness. This was, after all, the "person [] between [Petitioner] and significant jail time."

At trial, McMahon offered only Petitioner's testimony on his own behalf - no other witnesses or counter-expert witnesses.[1] In contrast, the government offered approximately one thousand exhibits. Ultimately, Petitioner was convicted.

Following the trial but before sentencing, on June 24, 2016, McMahon filed a Motion to Withdraw as counsel. Therein, he contended Petitioner had breached a signed fee agreement by not paying McMahon's fee. Further, he alleged Petitioner had perpetrated fraud against him. [Cr. D.E. 206.] He noted he would pursue the matter both criminally and civilly. He further asserted his request to withdraw was due to a "clear and actual conflict between counsel and the Defendant." [Id.] The government opposed McMahon's withdrawal, citing the District Court's prior warnings to McMahon on the issue of payment and his responsibilities to Petitioner regardless of that issue. [Cr. D.E. 205.] Petitioner also submitted a letter requesting McMahon be removed.

[Cr. D.E. 208.] Therein, Petitioner detailed the extensive conflict with McMahon and counsel's refusal to exert any effort other than in seeking recompense.

The District Court held a hearing on McMahon's Motion to Withdraw on July 1, 2016. At that time, and in granting McMahon's motion, the trial court addressed its self-described "powerful question" of whether "any lawyer, no matter how skilled they are, ... could actually get past the circumstances and feelings that truly are in play," a statement premised upon McMahon's allegation of having been "victimized" and "criminally defrauded by his own client [Petitioner]." [Cr. D.E. 321-3, at p. 11.] However, the Court did not stop there. Without further inquiry or acceptance of evidence (such as the e-mail statements cited previously), the Court opined a conclusion that the conflict did not affect McMahon's performance at trial in defense of Petitioner. Specifically, the Court said

> And my conclusion is that while Mr. McMahon may have had some real frustration with his client through the trial, that I didn't know about at the time, I don't think he fully formed this conclusion that he had been criminally defrauded while the trial was itself still underway. I just saw absolutely no evidence of a lawyer who was, you know, at war with his client. I saw a lawyer who was frankly fighting like hell.
> [Cr. D.E. 321-3, at pp. 12:21-13:3.]
> In fact, at that time, the lawyer appointed to Petitioner stated to the District Court, "I don't think the standard is Strickland. I think the standard is Cuyler." [Cr. D.E. 321-3, at p. 16:2-3.] He cautioned the Court that, "it concerns me that the court is making findings on a very imperfect record about Mr. McMahon's performance." [Cr. D.E. 321-3, at p. 16: 14-15.]

After sentencing, McMahon sent correspondence to Petitioner expressing McMahon's pleasure at seeing Petitioner convicted and

sentenced to prison.

Within the appropriate timeframe, petitioner submitted his Motion to Vacate his sentence under 28 U.S.C. § 2255, wherein he raised the issue of violation of his Sixth Amendment right to conflict-free counsel. The District Court denied the motion, stating

> Of greater significance [than the trial court being aware of any attorney-client issues] is the question of whether any conflict between attorney and client resulted in prejudice.

[Cr. D.E. 332, at p. 1.] It then proceeded to reference the "email string" Petitioner has proferred, which the Court characterized as "disturbing and unprofessional." Moreover, the Court stated that "[w]hile the Court is unable to opine that defense counsel expended exactly the same effort as he would have if paid in full, without a doubt his preformance far exceeded the bar set in Strickland v. Washington, 466 U.S. 668, 104 S.G. 2052, 80 L.Ed.2d 674 (1994)." [Cr. D.E. 332.] The Court's order was silent as to issuance of a Certification of Appealability.

Subsequently, Petitioner sought the Certificate of Appealability from the Fourth Circuit Court of Appeals. Issuance was denied. In so doing, the Appellate Court stated Petitioner "has not made the requisite showing" that reasonable jurists would debate the District Court's assessment of his constitutional claims. [Appendix A hereto.] To reach this determination, the Appellate Court "independently reviewed the record." [Id.]

Petitioner has now timely filed for issuance by this Hon-

orable Supreme Court of a Writ of Certiorari to review the Fourth Circuit's erroneous decision.

Factually, Petitioner also requests this Honorable Court take judical notice that, apart from Petitioner's name, the Fourth Circuit's opinion is verbatim identical to more than two to three-thousand other denials of COAs. See, e.g., U.S. v. Bell, 2018 U.S. App. LEXIS 24340, No. 18-6393 (4th Cir. Aug. 28, 2018); U.S. v. Benjamin, 2018 U.S. App. LEXIS 24733, No. 18-6337 (4th Cir. Aug. 30, 2018); U.S. v. Graham, 2018 U.S. App. LEXIS 23319, No. 18-6610 (4th Cir. Aug. 21, 2018); U.S. v. Riley, 2018 U.S. App. LEXIS 23327, no. 18-6717 (4th Cir. Aug. 21, 2018); U.S. v. Pierre, 2018 U.S. App. LEXIS 21172, No. 18-6365 (4th Cir. July 31, 2018).

Reasons for Granting the Petition

I. The Fourth Circuit Erred in Denying Issuance of a Certificate of Appealability

As a pro se litigant, Petitioner requests his petition be construed liberally. Haines v. Kerner, 404 U.S 519 (1972).

To obtain a Certificate of Appealability ("COA") presents less of a hurdle to a petitioner than actually succeeding on the merits because, at that stage, he only must demonstrate that his claim of constitutional violation was such that jurists of reason could debate the District Court's disposition of the issue. Miller-El v. Cockrell, 537 U.S. 322, 336 (2003)(quotation marks omitted)(quoting Slack v. McDaniel, 529 U.S. 473, 484 (2001)). As a result, the appellate court is charged with reviewing the case only through that prism and, thus, must make only a general assessment of the merits. See, Buck v. Davis, 580 U.S. ___, 137 S. Ct. 759, 197 L.Ed.2d 1 (2017). It must determine this threshhold question without full consideration of the factual or legal bases adduced in support of the claim, Buck, 197 L.Ed.2d at 16, and only ask if the district court's decision was debatable. Id., at 17. The Fourth Circuit doubly erred under this standard when it denied Petitioner a COA by finding the district court's assessment was not debatable by reasonable jurists when it delved into the merits of the issue by conducting an "independent [] review [] [of] the record" to reach its conclusion.

As a general matter, it is clearly established that the Sixth Amendment right to counsel is the right to effective cou-

nsel. See, Strickland v. Washington, 466 U.S. 680 (1984). It is also clearly established that the right to effective counsel includes the right to representation that is free from conflicts of interest. See, Cuyler v. Sullivan, 446 U.S. 335 (1980). In order to establish a conflict of interest claim, a defendant "must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Id., at 348. Yet, an adverse effect cannot be presumed solely from the existence of a conflict of interest. See, Mickens v. Taylor, 535 U.S. 162 (2002). If the record does not conclusively show than an actual conflict did not exist and that the conflict did not adversely impact counsel's performance, an evidentiary hearing is mandated. U.S. v. Young, 644 F.2d 1008, 1013 (4th Cir. 1981)(citing 28 U.S.C. § 2255). As such, a conflict-of-interest claim applies the adverse-effects test under Sullivan while a deficient-performance claim applies the prejudice test under Strickland. Further, a conflict of interest may arise when an attorney and client have divergent interest, Stoia v. U.S., 109 F.3d 392 (7th Cir. 1996), in which case the attorney makes choices advancing his own interests over those of his client.

Under typical claims premised on ineffective assistance of counsel, a court is to employ the two-part test established under Strickland: that a lawyer provided defective representation and that a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. 466 U.S. at 694. However, when cou-

nsel is burdened by an actual conflict, he "breaches the duty of loyalty, perhaps the most basic of counsel's duties." Id., at 692. In that situation, a defendant need not show prejudice due to the inherent seriousness of the breach and the difficulty in "measuring the precise effect on the defense of representation corrupted by conflicting interests," Id. Rather, "prejudice is presumed" if the defendant demonstrates counsel's conflicting interests and that an actual conflict adversely affected his lawyer's performance. Sullivan, at 348.

In the instant case, Petitioner brought his § 2255 motion predicated upon his attorney (McMahon) providing ineffective assistance given the actual conflict of interest that arose almost immediately after his appearance. Petitioner established this actual conflict via McMahon's e-mail tirades and exhortations over two months leading up to trial. Afterall, McMahon was more concerned with being paid than meeting with his client to prepare a defense; was not intending to continue hurting himself or his office; was depressed and angry and not moving ahead toward trial absent his payment; personally admitted he was "conflcited beyond anything in [his] career;" threatened Petitioner that failing to provide payment would "not [be] good for [Petitioner] moving forward;" threatened that "you [don't] leave the person that is between you and significant jail to be angry and bitter;" and stated that "for your sake...they both better get their loans or it's [trial] going to be a disaster!!!"

The District Court, in evaluating Petitioner's § 2255

claims focused with "greater significance" on whether any conflict "resulted in prejudice," and concluded it had not under Strickland. This, however, was the improper inquiry. The District Court should have applied the Sullivan analysis as set forth in Petitioner's initial and reply briefs, i.e. existence of an actual conflict and an adverse effect on counsel's performance. Under Sullivan, the prejudice upon which the District Court placed so much emphasis would have been presumed because the adverse effect on counsel's performance was not limited to trial.

In the case at bar, counsel acknowledged via e-mail his intense conflict - an actual conflict wherein counsel placed his and his firm's financial interest ahead of Petitioner's interest. Moreover, counsel also noted the adverse effect this conflict had on his performance: not meeting with his client, not working on the case,[2] concern that it would impact counsel who stood between Petitioner and jail, and, ultimately, a "they better or else" ultimatium. The District Court ignored all of the evidence offered, relying instead on the pre - § 2255 determination as to counsel's trial performance wherein it "saw absolutely no evidence of a lawyer" conflicted with his client and who fought "like hell," a finding premised upon an incomplete record at the time and which wholly ignored counsel's conduct leading to trial.

Subsequently, when Petitioner sought the COA, the Appellate Court applied the standard set forth in Slack v. McDaniel, yet ignored the dictates of Buck v. Davis. Reasonable jurists

beginning with the justices of this Court - would debate with the District Court's determination given the application of an erroneous standard. See, e.g., Sullivan. That, alone, should have been sufficient for issuance of a COA to encourage further discussion.

Unfortunately for Petitioner, the Fourth Circuit Court of Appeals then proceeded further - too far - by conducting a full de novo review of the record. While the Appellate Court's final opinion was that Petitioner had not made the "requisite showing" after its independent review of the record, it was required under Buck to avoid such a full determination and only decide if the issues were debatable. Given the erroneous standard applied, there can be no doubt the decision was debatable and a COA should have issued.

Furthermore, Petitioner asserts the record was in no way conclusive that no actual conflict existed and counsel's performance was not impacted. This issue was not solely counsel's performance at trial, since § 2255 is silent as to those words and no court has held that Sullivan only applies to at-trial performance. Petitioner's contentions were overall performance given the actual conflict. As a result, the District Court was required to conduct an evidentiary hearing. Afterall, it stated it was "unable to opine" the extent of counsel's efforts expended. Given Sullivan, the District Court was required to opine on that very topic rather than limiting itself solely to counsel's trial performance. A COA should have issued to, at the very least, remand for such a hearing.

Conclusion

The Sixth Amendment right to conflict-free counsel is of such vital importance in the criminal justice system. "Conflict-free" includes an attorney placing his clisnt's interest ahead of his own. It includes not threatening a client with "pay or else" ultimatums. And, it includes one being able to trust counsel's actions and not be concerned that counsel is protecting his own firm through frugality. Afterall, no defense attorney who truly put in his best, and every effort on behalf of a client should "rejoice" with statments akin to McMahon's expression of joy at Petitioner receiving a lengthy sentence.

These were the exact issues the District and Appellate Courts avoided when they utilized the Strickland standard to deny Petitioner's § 2255 motion and request for COA. Instead, Sullivan should have been applied due to counsel's actual conflict.

Wherefore, Petitioner respectfully requests this Honorable Court issue a Writ of Certioari to review the opinion of the Fourth Circut Court of Appeals.

DATED: April 12, 2019

Respectfully Submitted,

Richard Shusterman
#56916-037
FCI Coleman Low
P.O. Box 1031
Coleman, Florida
33521-1031

Endnotes

1 Though there is no evidence as yet available to Petitioner, other than his own e-mails, he nevertheless asserts that he provided McMahon with an extensive list of potentially favorable witnesses to interview and, eventually, subpoena for trial; McMahon ignored this information and called none of the possible witnesses. Further, lists of defense exhibits and suggested expert witnesses were produced, yet none of the material or experts were introduced at trial. While Petitioner recognizes that these issues may be classified as counsel's "strategic decisions," Petitioner contends they may, just as likely, be acts undertaken by McMahon to protect his and his firm's financial interest and, thus, should have been considered by the lower courts.

2 McMahon's failure to put in time and effort to prepare a defense based upon anything more than a cursory cross-examination of government witnesses is as likely premised upon his actual conflict with Petitioner over payment of fees as any alternative reason.