

No. _____

Supreme Court, U.S.

JUL 15 1989

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IN THE
SUPREME COURT OF THE UNITED STATES

DAVID MCCONNELL — PETITIONER
(Your Name)

vs.

STATE OF FLORIDA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Third District Court of Appeal of Florida
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

David McConnell

(Your Name)

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QUESTION(S) PRESENTED

1. Does counsel under the Fourteenth and Sixth Amendment have an obligation to effectively assist a defendant's cooperation with the State in a murder prosecution?
2. What actual conflicting interests exist if the defendant's counsel is being criminally investigated or prosecuted by the same prosecutors office that is prosecuting the defendant?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

State of Florida v. David McConnell, F08-5705, Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida. Judgement entered on July 15, 2009.

State of Florida v. David McConnell, F08-5705, Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida. Judgement entered on September 20, 2017.

David McConnell v. State of Florida, 3D18-909, Third District Court of Appeal for Florida. Judgement entered on January 22, 2020.

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| 11. Levy v. United States , 25 F.3d, 146 (2nd Cir. 1994) | pg. 10 |
| 12. Lowry v. United States , 971 F.2d 55 (7th Cir. 1992) | pg. 10 |
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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the State Post-Conviction court appears at Appendix B to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was 1/22/2020. A copy of that decision appears at Appendix A.

A timely petition for rehearing was thereafter denied on the following date: 2/24/2020, and a copy of the order denying rehearing appears at Appendix C.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 6 Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment 14 Sec.1 [Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On February 14, 2008 Mr. McConnell was arrested for trafficking in phenylthlamines. On October 28, 2008 Mr. McConnell pursuant to counsels advice agreed to plead guilty and enter into a cooperation agreement with the State of Florida where in exchange for aiding the State in prosecuting 3 drug trafficking cases, he would receive 1 year in jail or lower. Mr. McConnell was unable to bring forth any drug cases and instead aided in a homicide investigation against Maximilliano Playfair(#F-08-020649). On February 2009, then counsel Mr. Panunzio was arrested for injuring two people while DUI. He was initially prosecuted by the Miami-Dade county prosecutors office, the same office prosecuting Mr. McConnell. However, 40 days after being charged, Mr. Panunzios case was re-assigned to a different office. Mr. Panunzio was not present for the remainder of Mr. McConnells cooperation, except in court to request continuances. At sentencing Mr. Panunzio did not prepare for or make any mitigating arguments for a lower sentence than the one year recommended by the State. Mr. McConnell was sentenced to a year. The State accepted his homicide cooperation as its basis for going under the 3 year minimum mandatory in his drug case and satisfying the pleas terms.

Around March of 2015, Mr. McConnell discovered that Mr. Panunzio had been criminally prosecuted by the same prosecutors office that Mr. McConnell was cooperating with. Mr. McConnell filed for post-conviction relief on this, and other issues on October 9, 2015 alledging an actual conflict of interest and other ineffective assistance of counsel issues. The circuit court granted evidentiary hearing.

At evidentiary hearing, Mr. McConnells father, Robert McConnell testified that Mr. Panunzio was aware early on in Mr. McConnells case of his homicide information, but did not try to negotiate a plea that included his homicide information. Mr. McConnell Sr. also stated that except for one meeting, Mr. Panunzio was never present during any of the meetings with law enforcement. He was not present with any meetings with Miami-Dade county homicide

detective Solis and that during Mr. McConnells cooperation he dissappeared and was unable to be located by Mr. McConnell or the court. Mr. McConnell Sr. testified that neither Mr. Panunzio, the prosecutor, or the court ever informed Mr. McConnell of Mr. Panunzios DUI felonies prosecution. He also stated that despite Mr. Panunzios assurance of his continual work to secure a better sentence with the prosecutor, no preperation or attempt was made by Mr. Panunzio to argue for a further reduction at sentencing using Mr. McConnells co-operation or other available mitigating factors.

At evidentiary hearing, Mr. Panunzio stated that he told the judge of his pending criminal prosecution, and that the prosecutor also knew, but that no one informed Mr. McConnell. Mr. Panunzio also conceded the he knew of Mr. McConnells homicide information, but made no attempt to negotiate a plea regarding that information. He instead advised Mr. McConnell to accept the standard plea for drug informants at that time, despite doubts on Mr. McConnells ability to meet its terms. He also described the pleas terms as flexible to Mr. McConnell, despite the States insistance that Mr. McConnell had not technically met its terms. Mr. Panunzio also stated that after his arrest he entered into a rehabilitation half-way house and was not in contact with either Mr. McConnell or the detective. Mr. Panunzio disputed the value of Mr. McConnells homicide information, although the State did not assert this position, nor is there any evidence in the record to support this position. Mr. Panunzio also stated that he made an arguement for mitigation for Mr. McConnell in a side-bar with the judge. The sentencing transcripts however, do not support Mr. Panunzios testimony that he side-barred with the judge or made any mitigating arguements at sentencing. Mr. Panunzio also admitted that his pending prosecution tempered the actions he was willing to take on behalf of Mr. McConnells defense because, for unknown considerations, he did not want to aggravate Mr. McConnells judge or prosecutor.

The court denied relief to Mr. McConnell. The court stated that no conflict of interest existed because Mr. Panunzio was eventually prosecuted by a different office and that Mr. McConnell had begun cooperating prior to Mr. Panunzios DUI prosecution. The court adopted the States position and found that Mr. McConnell was at fault for not aiding in 3 drug trafficking cases, although it is undisputed that the State had accepted his homicide cooperation and that Mr. Panunzio did not explain the pleas terms correctly. Despite a clear on the record showing that a better sentence was possible under the pleas terms, the judge ruled that Mr. McConnell received the lowest sentence under the plea. The court also overruled Mr. McConnells objections over what objective performance counsel owed to a cooperating defendant reasoning instead that counsel was not required to do anything for a cooperating defendant, although the State never argued for such a standard.

REASONS FOR GRANTING THE PETITION

1. This case may have been decided using a different standard of law if litigated in a different jurisdiction. The Supreme Court of the United States should grant certiorari to determine if the assumed position in this case, or the 9th circuit court of appeals, or the 8th circuits interpretation is correct, to resolve this split in legal opinion. This is also a matter of general judicial importance regarding the Sixth Amendments application to counsels assistance to the defendant when cooperating for a reduced sentence. While both parties in this case implicitly agreed that pre-sentencing cooperation is a critical stage of criminal proceedings, what that necessarily entails remains in dispute, and may have far reaching implications for the thousands of defendants that agree to cooperate with authorities every year after being charged with a crime.

This court holds that "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland v. Washington* 466 U.S. 668, 688, 80 L.Ed. 2d 674, 104 S. Ct. 2052(1984)

The 9th circuit holds that "[T]he pre-sentencing cooperation period is a critical stage of the criminal process and that obtaining a substantial assistance motion from the government represents a particularly critical point in that process..." *Leonti v. United States* 326 F.3d 1111, 1114 (9th Cir. 2003). This conclusion was reached "Because defendants are entitled to competent counsel "at every stage of a criminal proceeding were substantial rights... may be affected" 326 Leonti at 1116(citing *Mempa v. Rhay* 389 U.S. 128, 134, 19 L. Ed. 2d 336, 88 S. Ct. 254(1967)) and "that the profound effect a substantial assistance motion can have on a defendant's sentence qualifies the cooperation period as a "critical stage" of the criminal process." 326 Leonti at 1117. In other words, because Mr. McConnell has a right to counsel when cooperating for a reduced sentence, counsel must be effective as a substantial right during this stage. ("As substantial assistance has become the last,

best hope of so many defendantns, the guarentee of competent counsel must apply to the process of seeking such a recommendation.") 326Leonti at 1117.

While both parties implicitly found that the effective assistance of counsel applies to cooperation, controversy surrounds 'what is the prevailing professional norms of counsel assisting cooperation?' The State of Florida argued that Mr. McConnell did not specifically complete the exact terms of his plea because he provided substantial assistance on a murder and not the 3 agreed to drug cases. However, that is not a Sixth amendment arguement because it fails to explain what assistance counsel owed to his cooperating client and how that was or was not fulfilled. Mr. McConnell argued that counsel was required to attempt to negotiate a plea for his known homicide information, provide oversight for his meetings with the homicide detective, facilitate clear communication with the prosecution on his behalf, and if unable to reach a consensus with the prosecution, then argue at sentencing the merits of his cooperation to the judge in order to obtain the best possible sentence.

The circuit court however, overruled 'Sua Ponte' Mr. McConnells position and held that nothing was required of counsel and that the sole burden of cooperation was the defendants responsibility, even though the State never advocated that position. This ruling is in direct conflict with the 9th Circuits holding that "an attorney's assistance is critical to the cooperation process in a number of respects, including, but not limited to, facilitating communication between the defendant and the government, attending proffer sessions, ascertaining the governments expectations of whether the defendant is satisfying them, communicating the client's limitations to the government, and establishing a record of attempts to cooperate." Leonti v. United States 326 F.3d 1111, 1119 (9th Cir. 2003). The 8th Circuit subsequently held that a narrower criteria of performance was expected of counsel that is assisting in cooperation. Tinajero-Ortiz v. United States 635 F.3d 1100, 1105 (8th Cir..2011) ("...[W]e fail to see what more counsel should have done. He secured

a proffer letter letter and sought to obtain a potential downward departure motion."). Clarification is needed from the Supreme Court of the United States to determine which jurisdiction has the correct legal standard for analyzing "prevailing professional norms" for counsels assistance of a cooperating defendant.

2. This court has held that "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan* 446 U.S. 335, 348, 100 S. Ct. 1708, 1718, 64 L. Ed. 2d 333(1980). This court has addressed conflicts of interests involving concurrent representation of defendants. *Holloway v. Arkansas*, 435 U.S. 475, 98 S. Ct. 1173, 55 L. Ed. 2d 426(1978). Successive representation of clients. *Mickens v. Taylor* 535 U.S. 162, 152 L. Ed. 2d 291, 122 S. Ct. 1237(2002). And conflicts of interests between outside third parties and the defendant. *Wood v. Georgia* 450 U.S. 261, 67 L. Ed. 2d 220, 101 S. Ct. 1097 (1981). This court however, has yet to address the circumstance of personal conflicts of interests between counsel and the defendant, and as a matter of general judicial importance should do so. The ambiguity surrounding this issue has also resulted in a circuit split between the 7th Circuit Court of Appeals and most other Federal Appeals courts that the Supreme Court should resolve. Additionally, the State of Florida applied the '*Cuyler v. Sullivan*' conflict of interest standard incorrectly to the facts of this case. Clarification is needed from the Supreme Court of the United States to determine what actually conflicting interests exist when the defendants counsel is being criminally investigated or prosecuted by the same prosecutors office that is prosecuting the defendant.

The First circuit held that counsels personal interests needed to diverge from the defendants during counsels investigation for there to be a conflict of interest. *Reyes-Vejerano v. United States* 276 F.3d 94, 99(1st Cir. 2002).

The Second circuit found that an attorney may have an interest in tempering their defense of the client to curry favor with the prosecution in their own case. Levy v. United States 25 F.3d 146, 155(2nd Cir. 1994); Armienti v. United States 234 F.3d 820, 825(2nd Cir. 2000).

The Seventh circuit also found that counsel may refrain from action in the defendants case to curry favor with the prosecution or also that counsel may become unduly hostile to the prosecution in the defendants case because of their investigation or prosecution of counsel. Lowry v. United States 971 F.2d 55, 61(7th Cir. 1992). The Seventh circuit also found conflicting interests due to counsel "pulling his punches" due to fear of retaliation, but strangely and likely erroneously has held that "presumably the fear would have to be shown before a conflict of interest could be thought to exist." Thompkins v. Cohen 965 F.2d 330, 332(7th Cir. 1992); Lafuente v. United States 617 F.3d 994, 946(7th Cir. 2010).

In Edelmann v. United States 458 F.3d 791, 807-808(8th Cir. 2006) the Eighth circuit adopted both the Second circuits reasoning that counsel may curry favor with the prosecutor by temporing the clients defense in order to obtain leniency in their own case and the Seventh circuits reasoning that fear of retaliation by the prosecutor in counsels investigation/prosecution can lead counsel to pull his punches, which are both possible conflicts of interests.

The Eleventh circuit found an actual conflict of interest when counsel made harmful strategic decisions in the defendants case to benefit counsels legal position in their own investigation, and employed preferential strategic decisions in his own case that precluded employing the same tactic on the defendants behalf. McLain v. United States 823 F.2d 1457, 1464 (11th Cir. 1987)(To avoid being indicted, Counsel delayed the defendants trial which precluded the use of negotiating a plea directly with the DOJ for the defendant when counsel was using that tactic for himself is an actual conflict of interest)Overruled on other grounds as recognized in United States v. Watson 866 F.2d 381, 385(11th Cir. 1989)

The Fifth circuit found the same conflicting strategic decisions as the Eleventh when counsel in Greig v. United States 967 F.2d 1018, 1024-26(5th Cir. 1992) was facing disciplinary proceedings for witness tampering in the defendants case and to preserve his law license choose to defend himslef over his client.(Counsel was more concerned with defending himself in interactions with the witness then cross-examining the witness for his client, and allowed his client to make inculpatory statements at counsels disciplinary hearing to protect himself from sanction, that resulted in an obstruction of justice enhancement for his client at sentencing).

Mr. McConnell finds the First circuits explanation of this personal conflict of interest to be the clearest. Counsels investigation or prosecution does not automatically create a conflict of interest. Rather a motive, or conflicting interest can only be identified in this situation if it can be linked to an adverse effect. Mickens v. Taylor 535 U.S. 162, 171, 122 S. Ct. 1237, 152 L. Ed. 2d 291(2002)(“We think an actual conflict of interest meant precisely a conflict that affected counsel’s performance- as opposed to a mere theoretical division of loyalties”). The 7th circuits 3rd prong that counsel must have a “fear” is thus wrong because fear is only a possible motivation if linked to an adverse effect in this situation, but not a neccessary component for an actual conflict of interest to exist.

Likewise, the Florida circuit court in Mr. McConnells case created a “per se” rule that subsequent prosecution by a different prosecutors office of counsel does not amount to a conflict of interest, without examining the adverse effects, in clear violation of both Cuyler v. v. Sullivan and Mickens v. Taylor. While precedent does exist where an investigation or prosecution of counsel in a different jurisdiction did not amount to a conflict of interest. Taylor v. United States 985 F.2d 844, 846(6th Cir. 1993); Baker v. United States 256 F.3d 855, 861(9th Cir. 2001). That was because the defendants in these cases failed to show how the situation created a conflict of interest, and thus can not identify any adverse effects.

Aiello v. United States 900 F.2d 528, 532(2nd Cir. 1990)(Defendant "has proffered no basis upon which to believe that [counsel's] conduct of [his] defense in one District was intended to curry favor with the prosecutors in another District.") Mr. McConnell however did identify the conflicting interests and adverse effects in his case.

Mr. McConnell had an interest that his counsel guide and oversee his cooperation in the murder prosecution with Detective Solis, when counsel abruptly disappeared without notice. Counsel, unbeknown to Mr. McConnell at the time, had been arrested for multiple felony charges stemming from a DUI incident were counsel had seriously injured two other people. He was being prosecuted by the same Miami-Dade county office as Mr. McConnell, but Mr. Panunzios case was transferred 40 days later to a different prosecutors office. When counsel disappeared he entered into a half-way house rehad as a strategy to mitigate the punishment in his own case. Where this strategy caused counsel to be absent in Mr. McConnells homicide cooperation with little more then his brief appearances in court, it adversely effected Mr. McConnells cooperation strategy. Greig v. United States 967, F.2d 1018, 1024-25(5th Cir. 1992)(Counsels focus on defending himself for obstruction of justice with the witness rather then effectively cross-examining him at trial for his client is an adverse effect); McLain v. United States 823 F.2d 1457, 1464(11th Cir. 1987)(Counsels failure to negotiate a cooperation plea for the defendant when counsel had an interest in a long trial to avoid being indicted is an adverse effect).

Contrary to the Florida circuit courts finding, a lower sentence was acceptable under the terms of Mr. McConnells plea agreement, with obtaining a lower and more lenient sentence an obvious interest to Mr. McConnell. When ex-counsel was questioned at evidentiary hearing he admitted to temporizing his defense of Mr. McConnell due to his own pending prosecution. While it seems likely he was afraid, it appears "that inherent emotional and psychological barriers created an impermissible potential of preventing... counsel from competing vigorously with the government." DeFalco v. United States 644 F.2d 132, 136-37(3rd Cir. 1979),

which would be a conflicting interest to Mr. McConnells interest in vigorous and untainted persuit for leniency at sentencing. *Wood v. Georgia* 450 US 261, 269-270, 67 L. Ed. 2d 220, 101 S. Ct. 1097(1981). This conflict was an actual conflict of interest because it precluded counsels preparation for Mr. McConnells sentencing, and precluded counsels arguements for mitigation on Mr. McConnells behalf, including argueing cooperation for the murder at sentencing. *Greig v. United States* 967 F.2d 1018, 1025-26(5th Cir. 1992)(Counsel did not advise defendant to remain silent during counsels disciplinary hearing which resulted in an obstruction of justice enhancement at defendants sentencing); See *Holloway v. Arkansas* 435 U.S. 475, 490, 98 S. Ct. 1173, 1181, 55 L. Ed. 2d 426(1978)(Conflicts of interests may preclude adequate representation at sentencing).

While the Supreme Court is primarily a court of law, not fact, the record is sufficiently developed to invite a clarification of law regarding personal conflicts of interests. Conflicts of interests seriously affect the publics perception of the integrity and fairness of the judicial system. While only "actual" conflicts are per se reversible, lower courts would benefit from the Supreme Courts instruction as to when there exists conflicting interests between a defendant and counsel, because this type of personal conflict occurs frequently enough to require uniformity of the application of the *Cuyler v. Sullivan* standard as a matter of law and general public importance. It would also correct a circuit split.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

David McConnell

Date: July 19, 2020

APPENDIX A: DECISION OF STATE COURT OF APPEALS