

No. 20 - _____

IN THE SUPREME COURT OF THE UNITED STATES

CARLOS GARCIA-TORO,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE EIGHTH DISTRICT COURT OF APPEALS OF OHIO

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Mr. Garcia-Toro is sentenced to life in prison; his Cuyahoga County Public Defenders had a clear conflict of interest by representing two other suspects in this Aggravated Murder and Attempted Murder.

The shooter was dressed in black with a black mask as he ambushed the victims sitting in a parked car. The homicide victim was shot several times and the surviving victim was wounded. However, the survivor could not identify the shooter because of his black disguise.

There was no physical or forensic evidence linking any person to this shooting. Only Facebook messages and communications under a fake name were linked to Mr. Garcia-Toro and then only by the homicide victim's vengeful brother. No experts linked the Facebook account to Mr. Garcia-Toro and he was not arrested until more than a year after the crimes.

It was thus critical for defense counsel to point to other suspects, including two men named Lopez, that the Cuyahoga County Public Defenders represented or had represented recently.

Instead of timely withdrawing and asking the Court to appoint non-conflicted counsel, the Public Defenders asked Mr. Garcia-Toro to waive his right to conflict free counsel as the jury panel entered the courtroom to commence voir dire. The trial judge acquiesced.

Does the Sixth and Fourteenth Amendment of the federal Constitution guarantee the right to conflict free counsel if defense counsel represents multiple suspects in the same homicide?

LIST OF RELATED CASES

1. State v. Garcia-Toro, Supreme Court of Ohio, Jurisdiction declined, Case No. 2020-0202, 4-14-20
2. State v. Garcia-Toro, Ohio Eighth District, 2019 Ohio 5336, Case No. CA 107940

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PETITION FOR WRIT OF CERTIORARI

Petitioner Carlos Garcia-Toro respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Ohio Eighth District Court of Appeals.

OPINION BELOW

The order declining jurisdiction by the Supreme Court of Ohio is *State v. Garcia-Toro*, Case No. 2020-0202, and is reproduced at Pet. App. A-1. The Eighth District, Cuyahoga County, opinion denying relief is reported at *State v. Garcia-Toro*, 2019 Ohio 5336, CA 107940 and is reproduced at Pet. App. B-1.

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of Ohio was entered April 14, 2020 and this Court's jurisdiction is invoked pursuant to 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment

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.

Fourteenth Amendment: Section 1.

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.

SUMMARY OF THE ARGUMENT

Mr. Garcia-Toro's Public Defenders represented two other suspects in this Aggravated Murder, i.e. Angel and Andrew Lopez. Rather than timely present the issue to the trial judge and seek leave to withdraw and have non-conflicted counsel appointed, the Public Defenders presented the issue to the trial judge as the jury panel entered the courtroom for voir dire and then sought a waiver from Mr. Garcia-Toro as to the conflict.

An alibi was presented but rejected by the jury. The State's evidence was weak with no eyewitnesses, no DNA evidence and no forensic evidence linking Mr. Garcia-Toro to this case. The Public Defenders failed to emphasize the Lopez men as other suspects in an effort to undermine the State's case. The divided loyalties of the Public Defenders deprived Mr. Garcia-Toro of counsel as guaranteed by the Sixth Amendment.

STATEMENT OF THE CASE

Who shot and killed one victim and injured the other? The State had the burden of proving the identity of the shooter and presented no eyewitnesses who identified anyone at the crime scene and no DNA or forensic evidence linking any person to the shooting.

On March 9, 2016 someone dressed in all black waited for the victims to leave their employment at W. 43rd and Clark Avenue in Cleveland, Ohio; then as one victim sat in the driver's seat of his car, the shooter approached and shot the victim several times killing him; a front seat passenger was struck by one of the bullets but survived. He could not identify the shooter because the shooter wore a black mask and clothing.

The shooter fled on foot. Mr. Garcia-Toro was arrested more than a year later. However, the police received numerous leads as to who the shooter could be; the only leads the State depended on at trial came from the homicide victim's family members.

The victims' family told the police about disturbing messages they received on Facebook from someone claiming to be the shooter who taunted, teased and threatened the family while admitting to being the shooter. These Facebook communications are the primary evidence on which the State relied to convict Mr. Garcia-Toro.

Jonathan DeJesus, the brother of the homicide victim, is a convicted felon, drug trafficker and knew how to use a gun. He wanted to kill Mr. Garcia-Toro according to his own testimony. He testified he knew Mr. Garcia-Toro before the shooting as he sold drugs to him. He was the only witness who knew Mr. Garcia-Toro before the shooting. He claimed to have communicated with Mr. Garcia-Toro on Facebook after the shooting. Importantly, he testified he recognized the

face (nose) of Mr. Garcia-Toro and his voice.

Jadiris Dejesus, the sister of the homicide victim and the mother of the Attempted Murder victim, testified also about her Facebook communications with Mr. Garcia-Toro. Her Facebook name was Your Worst Nightmare. However, she did not know Mr. Garcia-Toro before the shooting. She never saw him before testifying in court. She testified that she wanted to solve the crime; she flirted with the person communicating with her by Facebook. She received photos from that person and he taunted and teased her about the shooting and confessed to being the shooter.

The Facebook “name” Jonathan and Jadiris communicated with was Gabriel Ruiz. The State claims Mr. Garcia-Toro used this account and/or false name rather than his own. However, there was no independent or expert evidence linking the Gabriel Ruiz Facebook account to Mr. Garcia-Toro. There was no independent evidence revealing the identity of Gabriel Ruiz or linking the use of this account to Mr. Garcia-Toro. There were Messenger/texts exchanged and photos.

Only Jonathan knew Mr. Garcia-Toro, allegedly, before the shooting and could identify the photo and his voice he heard through one short audio communication on Facebook. But who was using the Gabriel Ruiz Facebook account? Only Jonathan’s testimony made the link to Mr. Garcia-Toro.

There was one independent witness near the crime scene, Ronald Mansour, who saw the gunman running from the scene and yelling, in English, to another person nearby, that he had to get rid of the gun. No gun was ever recovered.

Mr. Garcia-Toro speaks only Spanish; the DeJesus siblings speak Spanish; all Facebook communications were in Spanish. Interpreters were used throughout the trial.

Mr. Garcia-Toro denied he was the shooter; he presented an alibi that he was living in Connecticut when the shooting took place. But he was convicted of Aggravated Murder and Attempted Murder with a firearm and sentenced to serve in prison 47 years to life.

PROCEEDINGS BELOW

Mr. Garcia-Toro had a jury trial and was convicted of Aggravated Murder with a firearm and other felonies. The Cuyahoga County Public Defenders Office was appointed to represent Mr. Garcia-Toro at trial due to his indigent status. One attorney from the private bar was appointed too. The private attorney had no involvement in the “conflict waiver.”

After the jury convicted Mr. Garcia-Toro, the trial judge imposed a life sentence.

A timely direct appeal was perfected to the Ohio Eighth District Court of Appeals; the convictions were affirmed. The Supreme Court of Ohio declined jurisdiction in a timely appeal as involving no substantial constitutional question on April 14, 2020. This Petition follows:

REASONS FOR GRANTING THE WRIT

As the jury panel was entering the Court to begin voir dire, the Cuyahoga County Public Defenders representing Mr. Garcia-Toro brought to the Court's attention for the first time a conflict of interests. The Public Defender's office also represented two other suspects in this homicide investigation. Named in the police reports as suspects were two clients of the Public Defender's office, i.e. Angel and Andrew Lopez. (TR 124-130). It is not clear if either of these men speak English. A witness near the crime scene heard the shooter yell in English to another man that he had to get rid of the gun. Mr. Garcia-Toro speaks only Spanish.

The two assistant Public Defenders, Mr. Roberson and Ms. Del Valle, informed the court that they discussed the conflict with the Cuyahoga County Public Defender and his first assistant who assured them the conflict could be waived. Mr. Garcia-Toro then purportedly "waived" the conflict of interests. The following took place on the record:

THE COURT: All right. And you understand that there could be a potential for a conflict of interest with your attorneys and the other suspects named in the documents that could cause your attorneys to be in a position where they may not give you the best advice because of that potential conflict? Do you understand that?

THE DEFENDANT: Yes.

THE COURT: All right. And have you had an opportunity to discuss that potential conflict with Mr. Roberson and Ms. Del Valle?

THE DEFENDANT: Yes.

THE COURT: Do you have any questions for me about it?

THE DEFENDANT: No.

THE COURT: Do you understand that your attorneys are suggesting that you waive, give up any potential legal issue with respect to that conflict? Are you willing to do that?

THE DEFENDANT: Yes.

The right to counsel means the right to counsel who is free from a conflict of interests.

The Court never advised Mr. Garcia-Toro that he had a right to conflict-free counsel.

This court has addressed several fact patterns concerning this basic principle. See Holloway v. Arkansas, 435 U.S. 475 (1978)(creates an automatic reversal rule only where defense counsel is forced to represent co-defendants over his timely objection, unless the trial court has determined that there is no conflict); Cuyler v. Sullivan, 446 U.S. 335 (1980)(respondent was one of three defendants accused of murder who were tried separately, represented by the same counsel. Neither counsel nor anyone else objected to the multiple representation, and counsel's opening argument at Sullivan's trial suggested that the interests of the defendants were *aligned*. The Court declined to extend Holloway 's automatic reversal rule to this situation and held that, absent objection, a defendant must demonstrate that "a conflict of interest actually affected the adequacy of his representation."); Wood v. Georgia, 450 U.S. 261 (1981)(remanded for the trial court "to determine whether the conflict of interest that this record strongly suggests actually existed); Glasser v. United States, 315 U.S. 60 (1942)(Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused.)

In Ohio, counsel is bound by the requirements of the Ohio Rules of Professional Conduct. State v. Obermiller, 147 Ohio St.3d 175, 2016 Ohio 1594, para. 86; Disciplinary Counsel v. Jacobs, 109 Ohio St.3d 252, 2006 Ohio 2292, para. 8 (a lawyer's duty to provide undivided loyalty to a client is paramount); Connelly v. Balkwill, 160 Ohio St. 430, 440 (1954)(fiduciary is bound to the exercise of the utmost good faith and loyalty).

Courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them. Wheat v. United States, 486 U.S. 153, 160 (1988); State v. Dillon, 74 Ohio St.3d 166, 167-68, 1995 Ohio 169 (lawyer and trial court have an affirmative duty to ensure that a defendant's representation is conflict-free); See *Ohio Rules of Professional Conduct* 1.7, 1.8, 1.9.(Conflict of Interest, Current and Former Clients and comments therein)

Concurrent representation of suspects creates a high probability of prejudice. Mickens v. Taylor, 535 U.S. 162, 175 (2002).

The trial court's duty is to ensure conflict free counsel and not to obtain a dubious "waiver" as the jury panel is filing into the courtroom. The purported "waiver" is invalid especially, as here, where the two assistant public defenders with the conflict/divided loyalties were counseling Mr. Garcia-Toro to waive the conflict and no written waivers were obtained from the Lopez men/other suspects or Mr. Garcia-Toro as required by the Ohio Professional Rules of Conduct.

The convictions must be vacated so Mr. Garcia-Toro can proceed with conflict free counsel in plea negotiations or at trial where counsel can present the evidence of the Lopez men as other suspects in this case as well as the alibi.

The right to conflict free counsel includes plea bargaining or negotiations with conflict free counsel. See Lafler v. Cooper, 566 U.S. 156 (2012) and Missouri v. Frye, 566 U.S. 134 (2012).

The Ohio courts ignored the Ohio Rules of Professional Conduct in spite of Wheat v. United States, supra.

A conflict of interests exist when defense counsel places himself in a position conducive to divided loyalties. See United States v. Infante, 404 F.3d 376 (5th Cir. 2005); United States v. Medina, 161 F.3d 867, 870 n.1 (5th Cir. 1998). Here, the Public Defenders did just that.

Ohio Rule of Professional Conduct 1.9 states:

- (a) Unless the former client gives informed consent, confirmed in writing, a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client.
- (b) Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client where both of the following apply:
 - (1) the interests of the client are materially adverse to that person;
 - (2) the lawyer had acquired information about the client that is protected by Rules 1.6 and 1.9(c) and material to the matter.
- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter do either of the following:
 - (1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client or when the information has become generally known;
 - (2) reveal information relating to the representation except as these rules would permit or require with respect to a client.

An actual conflict of interest for Sixth Amendment purposes is a conflict that adversely affects counsel's performance. Mickens at 172. Here, the Public Defenders represented the two Lopez men who were suspects in *this* Aggravated Murder and Attempted Murder case. The only issue at the trial was the identity of the shooter.

Mr. Garcia-Toro's counsel had a duty to point out the evidence that related to the Lopez men through cross examination and presentation of such evidence, to issue subpoenas and to otherwise undermine the weak evidence presented by the State. See Holmes v. South Carolina, 547 U.S. 319 (2006)(Evidence of third party guilt admissible; right to present a complete defense).

Counsel did present an alibi that Mr. Garcia-Toro was in another state at the time of the shooting. The additional evidence of the Lopez men as other suspects would have strengthened the alibi defense. But the conflict of interests and duty of loyalty to the Lopez men prevented Mr. Garcia-Toro from having the effective assistance of counsel guaranteed by the Sixth Amendment. The convictions must be vacated and a new trial ordered.

This Court must, in the alternative, order an evidentiary hearing to determine the adverse effect of the Public Defenders representing the two men named Lopez and Mr. Garcia-Toro. See Hall v. United States, 371 F.3d 969 (7th Cir. 2004)(remanding for evidentiary hearing in a case where there was a guilty plea/conflict of interests); Wood v. Georgia, 450 U.S. 261, 273 (1981) (remanding case to the trial court "to determine whether the conflict of interest that this record strongly suggests actually existed.") See also Mickens v. Taylor, *supra*.

As this Court held in Strickland v. Washington, 466 U.S. 668, 688, (1984)

Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest.

See also Hoffman v. Leeke, 903 F.2d 280, 285 (4th Cir.1990) ("[T]he Sixth Amendment right to counsel includes the right to effective assistance free of conflicts of interest[.]").

A state bar's professional rules of conduct have a role to play. Indeed, because state ethical rules are, as this Supreme Court has noted, "only guides" in the context of the Constitutional right to counsel, compliance with a state ethical rule will not always satisfy the Sixth Amendment. The converse is also true, for a "breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel." Nix v. Whiteside, 475 U.S. 157, 165 (1986).

A number of factors may help determine whether a conflict of interest exists. These factors include (i) "whether the attorney has confidential information that is helpful to one client but harmful to another"; (ii) "whether and how closely the subject matter of the multiple representations is related"; (iii) "how close in time the multiple representations are related"; and (iv) "whether the prior representation has been unambiguously terminated." United States v. Infante, 404 F.3d 376, 392 (5th Cir.2005).

Importantly, the Sixth Amendment applies not only when a defense lawyer has an actual conflict of interest, but also "in the more common cases" where a serious potential for conflict exists. Wheat, 486 U.S. at 163.

The above factors all favor a reversal of Mr. Garcia-Toro's convictions due to a conflict of interest of his Public Defenders. The Lopez men and Mr. Garcia-Toro were suspects in the same Aggravated Murder. Where do the loyalties of the Public Defenders lie?

While there might be a circumstance where a waiver of the conflict could be obtained, the trial court has an interest that the proceedings be fair to all who observe them. Wheat, supra. Ultimately, the defendant must know "the crux of the conflict and [have] an understanding of its implications ... even if the defendant does not know each detail concerning the conflict." United States v. Brown, 202 F.3d 691, 698 (4th Cir.2000).

Here, the dubious waiver obtained as the jury panel entered the courtroom to commence the trial was constitutionally inadequate if only because the attorneys who advised him to waive the conflict were the attorneys who possessed the conflict of interests. The one private attorney had no involvement in the "conflict waiver."

In spite of the trial court's colloquy, Mr. Garcia-Toro was entitled to the "best advice" from his counsel under the Sixth Amendment. Mr. Garcia-Toro did not waive his right to counsel; he also did not want to represent himself. In this case, counsel suffered from conflicts of interest and divided loyalties involving two other suspects which denied Mr. Garcia-Toro his right to conflict free counsel.

Given the proliferation of Public Defender Offices throughout the country, this issue is likely to take place repeatedly and this Court should resolve this issue to provide clarity in the law. Where does counsels' loyalty lie? With Angel Lopez, Andrew Lopez or Mr. Garcia-Toro?

Conclusion

For the foregoing reasons and pursuant to Sup Ct. R. 10(c), the petition for writ of certiorari should be granted.

Respectfully submitted,

/s/John P. Parker *

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PETITION FOR WRIT OF CERTIORARI

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was served by regular U.S. Mail postage prepaid to Michael O'Malley, Cuyahoga County Prosecutor, 1200 Ontario Street, Justice Center-8th Floor, Cleveland, OH 44113 this 27th day of August 2020.

/s/John P. Parker
Counsel for Petitioner