

IN THE SUPREME COURT OF FLORIDA

FILED
THOMAS D. HALL

NYDIA PEREZ,
Petitioner,

2013 MAY 20 PM 1:44

CLERK, SUPREME COURT

v.

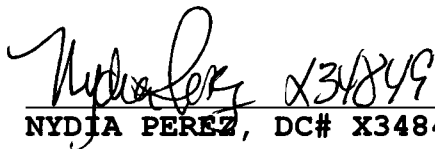
CASE NO.: _____ BY _____

KENNETH TUCKER, SECRETARY,
DEPARTMENT OF CORRECTIONS,
Respondent.

PETITIONER'S JURISDICTIONAL BRIEF

On Review from the District Court of Appeals
Fifth District
State of Florida
DCA CASE NO.: 5D13-863

Submitted by:

 X34849

NYDIA PEREZ, DC# X34849

Homestead Correctional Institution
19000 S.W. 377th Street, Suite 200
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MAY 13 2013

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STATEMENT OF CASE AND FACTS

The Petitioner did file a Writ of Habeas Corpus on April 17, 2013 asserting actual conflict where she and her then boyfriend, Marcos [Garcia] did retain the legal services of one Alfredo Horta (Bar No.: 475726) to represent her and Garcia at trial. However, they did enter into a joint plea where after fulfilling the terms of the agreement they were sentenced to two (2) consecutive terms of thirty (30) years (the maximum term allowable for the charged offense) in the Department of Corrections; this sentence which was opposed to the negotiated plea agreement (see Writ of Habeas Corpus Statement of Case and Facts for full disclosure).

Upon denial of the Petitioner's motion on May 3, 2013, she filed a timely Notice of Appeal, then upon her review, realized she had to file a Notice to Invoke Jurisdictional Review and thereafter did file said motion on May 10, 2013. The Petitioner would ask this Honorable Court to keep in mind that she is a pro se litigant, a layman, and unskilled in the law.

Accordingly, this Brief follows:

SUMMARY OF ARGUMENT

The Petitioner's Sixth and Fourteenth constitutional amendment rights were violated due to actual conflict of interest where counsel: represented adverse interest; failed to obtain an informed consent; and failed to explain advantages and/or risks of multiple representations.

ARGUMENT ONE
**THE PETITIONER WAS SUBJECT TO ACTUAL
CONFLICT OF INTEREST WHERE COUNSEL
REPRESENTED ADVERSE INTEREST.**

A lawyer suffers from an actual conflict of interest when he or she **"actively represent conflicting interest."** Cuyler v. Sullivan, 100 S.Ct. 1708. And in order to establish a claim premised on an alleged conflict of interest, the defendant must establish that an actual conflict of interest adversely affected counsel's performance. Counsel in this cause advised the Petitioner that her only option of getting out of jail would be to enter into a joint plea agreement which included Petitioner and Garcia agreeing to participate in an Agreement Regarding Substantial Assistance; where both would cooperate with authorities to help yield prosecutable cases. If they cooperated, the State would waive the minimum mandatory but agree to twenty-two (22) State prison followed by fifteen (15) years probation. For each case yielded more years would be taken off, all followed by fifteen (15) years probation. (See Argument of Habeas motion). Immediately upon signing plea both Petitioner and Garcia were released on bond. The stipulation of the plea was if one refused to enter the agreement, the plea was voided.

The conflict arises where counsel told Petitioner even though she had an additional charge, all the evidence pointed

towards Garcia, that she had to help him by signing this plea. In all this counsel never explained any viable defenses, any discovery material or what evidence actual existed against her. Only that her best and only option was this joint plea deal.

The Florida Bar 4-1.7(a) states **"A lawyer shall not represent a client if: (1) the representation of 1 client will be directly adverse to another client; or (2) there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client..."**

Horta knew that representing either Garcia or Petitioner would adversely affect the others defense, which severely limited each of his clients case, rendering his assistance ineffective. And it is well known that a major part of effective assistance is devoid conflict of interest. Loyalty and independent judgment are essential key elements of a lawyer's duty, and counsel burdened by any conflict of interest breaches his duty of loyalty to his client especially the most basic on duties which is defending the client's interests.

Strickland v. Washington, 466 U.S. 668 (1984)

In satisfying prejudice in this cause the right to effective assistance of counsel encompasses the right to representation from actual conflict **Cuyler**.

It is clear that the nature of the case and element to be proven by the State's created a substantial risk where the representation of both Petitioner and Garcia materially limited counsel's responsibilities between the two. It is also clear that counsel was unable to raise a proper defense independently as to the Petitioner without ineffectively placing knowledge and guilt on Garcia and vice versa. This conflict adversely affected the Petitioner's defense strategy and case. The Petitioner deserves relief and this prejudice is in direct conflict with Cuyler and Strickland.

ARGUMENT TWO
**THE PETITIONER'S SIXTH AMENDMENT RIGHT TO
CONFLICT FREE REPRESENTATION WAS VIOLATED
WHERE COUNSEL FAILED TO OBTAIN AN INFORMED
CONSENT.**

The American Bar Association [ABA] Standards states that a lawyer should not undertake multiple representation **"if the duty to one of the defendants may conflict with the duty to another."** The code of Professional Responsibilities forbids multiple representations **"if it would be likely to involve the lawyer in representing differing interest of each unless the lawyer can adequately represent each client and obtains the informed consent of each."** Even though the ABA Standards do not define the Constitutional standard, it does coincide with the definition that the Constitution gives for actual conflict, and is consistent with Glasser v. United States, 315 U.S. 60, 76, 62 S.Ct. 457, 467, 86 L.Ed. 680, emphasis on the interests of the defendants and the corresponding duties owed by the attorney, rather than on the empirical question of the effect of the conflict on the attorney's performance.

Actual conflict of interest arises here where counsel failed to obtain an informed consent from each affected client, either confirmed in writing or clearly stated on the record at a hearing. The Florida Bar is clear on its exception to Rule 4-1.7(b) which states Pursuant to Florida Rules of Court, Bar Rule

4-7, Conflict of Interest, "(b) Notwithstanding the existence of a conflict of interest under subdivision (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing."

However, counsel failed to explain to the Petitioner that in order for him to represent both her and Garcia consent in writing should have been offered. **Glasser** established that unconstitutional multiple representation of conflicting interest against which the Sixth Amendment protects a defendant, he need go no further than to show the existence of an actual conflict. While **Holloway v. Arkansas**, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978) also established that defendant's usually have the right to share a lawyer if they so choose, but that choice must always be knowing and intelligent. "The trial judge therefore, must play a positive role in ensuring that the choice was made intelligently. The court cannot delay until a defendant or an attorney raises a problem, for the Constitution

also protects defendants whose attorney fails to consider, or chooses to ignore potential conflict problem."

"Upon discovery of joint representation, the duty of the trial court is to ensure that the defendants have not unwittingly given up their constitutional right to effective counsel. This is necessary since it is usually the case that defendants will not know what their rights are or how to raise them. This is surely true of the defendant who may not be receiving the effective assistance of counsel as a result of conflict duties owed to other defendants. Therefore, the trial court cannot safely assume that silence indicates a knowledgeable choice to proceed jointly. The court must at least affirmatively advise the defendants that joint representation creates potential hazards which the defendants should consider before proceeding with the representation." citing Justice Brenner in Cuyler.

The Florida Bar and American Bar Association are implicit in its standard which states: 4-3.5(c)(i)(ii) conflict interest, (c) Except for preliminary matters such as initial hearings or applications for bail, defense counsel who are associated in proactive should not undertake to defend more than one defendant in the same criminal case if their duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so

grave that ordinarily defense counsel should decline to act for more than one of several codefendants except in unusual situations when, after careful investigation, it is clear either that no conflict is likely to develop at trial, sentencing, or at any other time in the proceeding or that common representation will be advantageous to each of the codefendants represented and, in either case, that: (i) the several defendants give an informed consent to such multiple representation; and (ii) the consent of the defendants is made a matter of judicial record. In determining the presence of consent by the defendants, the trial judge should make appropriate inquiries respecting actual or potential conflicts of interest of counsel and whether the defendants fully comprehend the difficulties that defense counsel sometimes encounters in defending multiple clients."

Although this standard and the law are clear, counsel did not attempt to obtain any consent. The trial court failed to uphold the ethics of the Constitution by not making appropriate inquiries thus denying Petitioner of her guaranteed Right to conflict free counsel and due process of law. This grave injustice is in direct conflict with **Glasser** and **Holloway** and deserves instant relief.

ARGUMENT THREE
**THE PETITIONER'S SIXTH AND FOURTEENTH
AMENDMENT RIGHTS WERE VIOLATED WHERE COUNSEL
FAILED TO EXPLAIN ADVANTAGES AND/OR RISK OF
MULTIPLE REPRESENTATION.**

It is well known that an attorney must keep their client abreast of its charge and information concerning and/or surrounding his case. And that absent this knowledge is to deny the accused the right to effective assistance. The same is true when an accused is joined in the representation under one attorney, that attorney must explain any relevant matter concerning that said attorney representation of him whether it is under multiple representation or singular; any matter must be explained and/or disclosed. The Florida Bar and American Bar Association are clear of an attorney standard under 4-3.5(b); which states: "Defense counsel should disclose to the defendant at the earliest feasible opportunity any interest in or connection with the case or any other matter that might be relevant to the defendant's selection of counsel to represent him or her or counsel's continuing representation. Such disclosure should include communication of information reasonably sufficient to permit the client to appreciate the significance of any conflict or potential conflict of interest."

It is clear in this case that counsel prejudiced the Petitioner by failing to explain the risk of multiple

representation where he failed to inform the Petitioner of any viable defenses, and that he would not be able to use any defense or evidence because it would considerably harm either client to advocate such which is why Petitioner's only and best option was the joint plea deal, because it blanketed counsel's error and still harmed the Petitioner and Garcia where both was sentenced to the maximum sentence allowable by law. Counsel further prejudiced the Petitioner by purposely allowing the multiple representation to go unnoticed and remain unintelligently known by being silent and not obtaining consent. Due process of law not only guarantees an accused the right to a just and fair trial, but to a just and fair Justice System. Counsel blatantly refused to uphold any rules of conduct, code of ethics, or Constitutional Rights. Counsel virtually got paid and failed to help his clients but did help aid the law enforcement by using his clients and still the plea that was purposed was not honored. Counsel did nothing but fail, not only the Petitioner, but failed the people on which the justice system stands and those it promises to protect. This injustice is in direct conflict with the Florida and American Bar Association, and even though this conflict has never been addressed, it deserves being addressed on its merits.

CONCLUSION

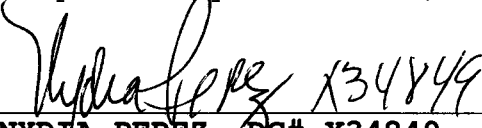
Counsel did enter into a conflicting situation by representing both the Petitioner and Garcia, materially limiting his representation of the petitioner, and by failing to obtain consent for such, did not inform her that she had viable defenses, but mislead Petitioner into a plea to assist Co-defendant Garcia.

The Petitioner has demonstrated how Counsel represented conflicting interests, and that the actual conflict adversely affected Counsel's performance. Had Counsel not labored under claimed conflict, he could have employed a different defense strategy, one which would not have hindered the Petitioner but benefited her cause.

The Petitioner has also demonstrated how each argument is in direct conflict with the U.S. Supreme Court cases defining the Constitutional standard on actual conflict. The Petitioner deserves equal treatment as that of her co-defendant Garcia.

The Petitioner prays this Honorable Court shows her mercy and address these issues, and accepts jurisdiction of this matter granting her relief that is deemed just and proper.

Respectfully Submitted,



NYDIA PEREZ, DC# X34849

CERTIFICATE OF SERVICE


I HEREBY CERTIFY THAT I PLACED THIS **PETITIONER'S JURISDICTIONAL BRIEF** IN THE HANDS OF **HOMESTEAD CORRECTIONAL INSTITUTION'S** MAILROOM STAFF FOR MAILING TO:

The Supreme Court of Florida
500 South Duval St.
Tallahassee, FL 32399-1925

(And to)

Attorney General
444 Seabreeze Blvd.
5th Floor,
Daytona Beach, FL 32118

On this 13th day of May, 2013

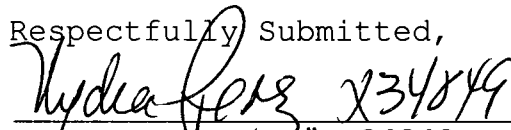


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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the font requirement of Fla.R.App.P. 9.210, Courier New 12.

Respectfully Submitted,



NYDIA PEREZ, DC# X34849