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Barnes v. State Appellant's Brief Dckt. 40092

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IN THE SUPREME COURT OF THE STATE OF IDAHO

MARJORY ANN BARNES,)
)
 Plaintiff-Appellant,)
)
 v.)
)
 STATE OF IDAHO,)
)
 Respondent.)
 _____)

NO. 40092

Kootenai Co. CV-2011-1334

APPELLANT'S BRIEF

**APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF KOOTENAI**

HONORABLE FRED M. GIBBLER
District Judge

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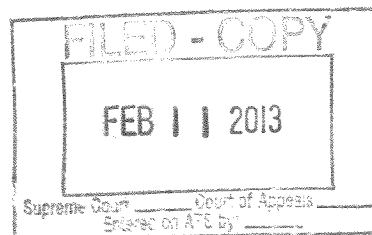


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STATEMENT OF THE CASE

Nature of the Case

Petitioner appeals from the dismissal of his petition for post conviction relief after an evidentiary hearing which raised an ineffective assistance of counsel claim concerning her attorney's conflict of interest due to concurrent representation with the co-defendant.

Statement of the Facts and Course of Proceedings

The facts are succinctly described in the substitute unpublished opinion issued in the direct appeal, *State v. Barnes*, Docket No. 37995 (Ct.App. 5/4/2012):

Following a report of concerns that Barnes and her boyfriend, Gregory Klundt,¹ were manufacturing methamphetamine in their shared residence, law enforcement obtained a warrant to search their house. The search revealed a number of items associated with the manufacture of methamphetamine. The state charged Barnes with conspiracy to traffic in methamphetamine by manufacture, I.C. §§ 37-2732B(a)(3) and 18-204; trafficking in methamphetamine by manufacture, I.C. §§ 37-2732B(a)(3) and 18-204; and possession of a controlled substance, pseudoephedrine, with intent to manufacture methamphetamine, I.C. § 37-2732(a)(1)(A). After trial, a jury found Barnes guilty. Barnes was sentenced to concurrent determinate terms of five years for each count. Barnes appeals.²

[Footnotes]

¹ Klundt was also charged with the same crimes. The district court joined Barnes's and Klundt's cases for trial. However, the cases were not consolidated on appeal.

² Barnes was also found guilty of manufacture of a controlled substance where a child is present, I.C. § 37-2737A, and was sentenced to a consecutive indeterminate two-year term. However, she does not challenge this judgment of conviction or sentence on appeal.

Id. p. 2.

While the Court of Appeals initially vacated the conviction on Count Three due to a double jeopardy violation, upon rehearing it affirmed all of the convictions and sentences. (R. p. 100.)

Ms. Barnes also filed the instant pro se petition for post conviction relief. (R. p. 5-9.) Counsel was appointed. (R. p. 11.) Counsel ultimately filed an amended petition for post conviction relief and affidavit of Petitioner in support. (R. p. 19-23, 24-27.) The state filed an answer and a motion for summary disposition as to some, but not all of the claims and conceded some needed to be resolved at an evidentiary hearing. (R. p. 28-29; 39-40.) Following a hearing in which the Petitioner withdrew some claims, the court entered its order dismissing them but setting the rest for evidentiary hearing. (R. p. 42.)

At the end of the evidentiary hearing the court set a briefing schedule and Petitioner and the Respondent both submitted post-trial briefs. (R. p. 45-90; 91-98.)

The court issued its written order denying post conviction relief. (R. p. 99-112.) A written judgment was entered. (R. p. 113.)

Appellant timely appeals. (R. p. 115.)

ISSUE

Whether the district court erred when it denied post conviction relief after an evidentiary hearing, rejecting Petitioner's assertion that she had received ineffective assistance of counsel due to a conflict of interest arising from her attorney's concurrent representation of a co-defendant.

ARGUMENT

THE DISTRICT COURT ERRED WHEN IT SUMMARILY DENIED THE POST-CONVICTION RELIEF PETITION BECAUSE PETITIONER'S ATTORNEY WAS BURDENED BY A CONFLICT OF INTEREST DUE TO HIS CONCURRENT REPRESENTATION OF A CO-DEFENDANT

A. Standard of Review at Trial and on Appeal

The relevant standards were comprehensively explained in *Medina v. State*, 132 Idaho 722, 979 P.2d 124 (Ct.App. 1999):

In order to prevail in a post-conviction proceeding, the applicant must prove by a preponderance of the evidence the allegations upon which the request for post-conviction relief is based. *Follinus v. State*, 127 Idaho 897, 908 P.2d 590 (Ct. App. 1995); see also I.C. § 19-4907 (stating that all rules and statutes applicable in civil proceedings are available to the parties in a postconviction relief case). Once the district court has denied or granted the post conviction application following a hearing, the evidence must be viewed most favorably to the trial court's findings. *Reynolds v. State*, 126 Idaho 24, 28, 878 P.2d 198, 202 (Ct. App. 1994).

The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. *Larkin v. State*, 115 Idaho 72, 764 P.2d 439 (Ct. App. 1988). On appeal, findings of fact made by the trial court shall not be set aside unless clearly erroneous. I.R.C.P. 52 (a); *Russell v. State*, 118 Idaho 65, 794 P.2d 654 (Ct. App. 1990). Findings supported by competent and substantial evidence produced at the hearing will not be disturbed. *Sanchez v. State*, 127 Idaho 709, 711, 905 P.2d 642, 644 (Ct. App. 1995). However, this Court freely reviews the legal conclusions drawn by the trial court from the facts found. *Id.*

Id. at p. 724-725.

B. Standard of Review Regarding a Claim of Ineffective Assistance of Counsel

The standard for evaluating a claim of ineffective assistance of counsel is well established, being set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). The "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

Strickland set forth a two-prong test which a defendant must satisfy in order to be entitled to relief. The defendant must demonstrate both that his counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Id.* at 687-88; *State v. Charboneau*, 116 Idaho 129 (1989); *Gibson v. State*, 110 Idaho 631 (1986).

C. The Evidentiary Hearing and the Court's Rulings

The background of the claims is explained in the court's Opinion and Order Re: Post Conviction Relief (hereinafter Opinion):

In the underlying criminal case Barnes was initially represented by John Redal. Redal also represented the co-defendant, Gregory Klundt. The joint representation continued through the motion to suppress which was made on behalf of both defendants and which was denied. Following the decision on the motion to suppress Redal withdrew as Barnes' attorney and Michael Palmer was appointed to represent her. Palmer substituted in as counsel for Barnes on May 7, 2010. The joint trial of both defendants began on May 25, 2010. One of the issues at trial concerned the results of the prosecution's re-testing of evidence by the state drug laboratory

with the results provided to Barnes' attorney just days prior to the trial.

Opinion p. 2. (R. p. 100.)

Petitioner alleged various claims arising from the above situation. The most important claim, and the only one pursued in this appeal, is ineffective assistance of counsel due to the conflict of interest arising from counsel representing both co-defendants through the majority of the case. This led to additional problems, because counsel's late advice of his conflict of interest caused Petitioner to obtain appointed counsel just weeks before the jury trial. This in turn led to appointed counsel being unprepared for the trial (which he conceded at the evidentiary hearing) and his specific failings included his failure to have the inconsistent lab results retested, his failure to interview and call requested witnesses, and his failure to move to sever the co-defendants' trials. But again, Appellant is only pursuing the main conflict of interest claim in this appeal.

Petitioner's post trial brief did a good job of explaining the relevant evidence was produced at the evidentiary hearing.

. . . Ms. Barnes testified that she and her codefendant, Greg Klundt, were charged with the same crimes encompassing the same basic underlying criminal conduct; drug trafficking in methamphetamine or amphetamine by manufacture, controlled substance manufacture, deliver or posses when children are present, possession of a controlled substance with intent to manufacture methamphetamine, and drug trafficking in methamphetamine. The manufacturing and trafficking offenses carried with them a mandatory minimum period of imprisonment of five years. Ms. Barnes testified that John Redal represented her and her co-defendant until May 4, 2010, when Mr. Redal withdrew as attorney of record. Ms. Barnes indicated that Mr. Redal met with her and her co-defendant but never discussed the possibility of testifying

against her co-defendant, or presenting evidence of limited culpability based on a defense implicating her co-defendant as the principal. Mr. Redal failed to alert the Court to a potential conflict of interest in Ms. Barnes' case and the Court did not inquire about the conflict of interest between the two jointly represented co-defendants.

Rather, as testified to by Mr. Redal, he withdrew as counsel mere weeks before trial when he determined that the case was bound for trial and representation of both co-defendants would be problematic. Mr. Michael Palmer testified that he was appointed on May 7, 2010, and likely did not obtain information relating to the case until days later. Trial was set for May 25, 2010. Ms. Barnes testified that she only met with Mr. Palmer once before the pre-trial conference on May 21, 2010, and at that fifteen minute meeting Mr. Palmer had not had an opportunity to review the discovery in the case and was unable to discuss with Ms. Barnes the state's evidence. Ms. Barnes testified that she met with Mr. Palmer the day before the pretrial conference on May 21, 2010 and then just moments before the her [sic] trial began on May 25, 2010. Ms. Barnes indicated that at she had requested Mr. Palmer to seek a continuance at the pretrial conference but was told the prosecutor was ready so the case was going to proceed. Ms. Barnes gave Mr. Palmer and Mr. Redal the names of potential witnesses but there is no indication that Mr. Palmer or Mr. Redal made any effort to investigate or interview her witnesses. Ms. Barnes testified that Mr. Palmer never went over the state's evidence with her, specifically, the photos taken of the inside of her home and used as evidence at trial, nor did he discuss her trial rights. Mr. Palmer testified that the state disclosed, the day before trial, lab results which were positive for the presence of methamphetamine where previously the results had been negative. Mr. Palmer did not seek independent testing of the substances given the conflicting laboratory results, nor did he seek a continuance of the trial due to the late disclosure of the laboratory results.

Mr. Palmer did not meet with any of Ms. Barnes' witnesses, did not use the assistance of an investigator, did not attempt to have independent testing of substances, and inadequately educated himself on the manufacturing methamphetamine process in order to intelligently and effectively cross examine the state's expert witnesses. Furthermore, Mr. Palmer did not move to have the case severed for trial. Mr. Palmer testified that proceeding to trial with Ms. Barnes' codefendant was error, and prejudiced Ms. Barnes' ability to present a defense.

Additionally, the court's Opinion described the relevant evidence presented as follows:

At the post-conviction trial Redal testified that he was retained by Klundt and Barnes in 2009. He did not recall whether he initially discussed potential conflicts of interest with them. It was his usual practice to do so, but he could not specifically recall doing so in this case. When it became apparent that the cases were going to trial he discussed the conflict of interest with Barnes, and she elected to have the Kootenai County Public Defender's office represent her. Palmer was then appointed.

Attorney Anne Taylor testified she believes it is a conflict of interest to represent two individuals charged with the same crimes, that she would have moved to sever the trial of the co-defendants and if, as was the case here, the state had evidence of inconsistent laboratory drug tests she would have advised the client and requested a continuance of the trial.

Palmer testified that based on his late entry into the case he did not have time to prepare for trial and that when he became aware the state had inconsistent laboratory drug tests he should have requested a continuance and sought an independent drug test. He testified he did not know why he did not do so in this case. He testified it was his usual practice to request a severance of trials for co-defendants, and he could not recall why he did not do so here.

Barnes testified she met with Redal only three times, and the substance of the case against her was not discussed. Redal never discussed the possibility of her testifying against Klundt. Redal never told her there was a conflict of interest until after the decision on the motion to suppress, and she then applied for the public defender to represent her. She met with Palmer on May 10 or May 11 and again prior to trial. She testified that trial strategy and witnesses were not discussed. . . .

Opinion p. 3-4. (R. p. 101-102.)

In its findings of fact and conclusions of law, the court found as follows:

Barnes contends she is entitled to a presumption of prejudice. This is not a case where there has been a complete denial of counsel at a critical stage of trial. The record shows that Redal, at the suppression hearing, and Palmer, at trial, subjected the prosecution's case to meaningful adversarial testing. Competent

counsel could, and did, provide effective assistance. The claim based on presumptive prejudice is denied.

Redal represented Barnes through the suppression hearing. No claim has been made that Redal failed to effectively represent her at that hearing. The claim against Redal is that his joint representation of Klundt and Barnes created a conflict of interest prejudicing Barnes. No facts were presented by Barnes to show that in connection with the suppression hearing her interests were different from those of Klundt or that Redal failed to present facts or arguments on her behalf at the suppression hearing. *Daugherty v. State*, 102 Idaho 782, 640 P.2d 1183 (1982) held:

A lawyer or law firm should carefully consider the potential for conflict of interest before representing multiple defendants in a criminal case. However, representation of multiple criminal defendants does not constitute a "*per se*" violation of the constitutional guaranty of effective assistance of counsel. As the Idaho Supreme Court stated in *Roles v. State*, 100 Idaho 717, 719, 604 P.2d 731 (1979):

Absent a showing there was at least a possible conflict of interest between the co-defendants ***at the time the joint representation existed*** which may have inhibited the attorney's ability to act for the best interests of each codefendant at all times during that representation, there is no basis for the defendant's claim that his sixth amendment right to effective counsel was abridged.

Id. 102 Idaho at 783-84, 640 P.2d at 1184-85 (citations omitted) (emphasis added).

In *Roles v. State*, 100 Idaho 717, 604 P.2d 731 (1979) an attorney represented co-defendants. Roles alleged on post-conviction relief that this constituted a conflict of interest denying him the effective assistance of counsel. The Court rejected this contention, holding:

However, while an actual conflict of interest might have occurred if Roles had proceeded to trial with his original court appointed counsel, his guilty plea prevented that conflict from ever materializing. Joint representation of co-defendants does not of itself constitute denial of a criminal defendant's right to effective counsel.

Id. at 719, 604 P.2d at 733.

Barnes has not shown that "at the time of the joint representation" a conflict of interest existed which inhibited Redal's ability to act in her best interests.

Opinion p. 7-9 (R. p. 107-109.)

C. The Court Erred in Denying Post Conviction Relief

Appellant asserts that the district court erred when it summarily dismissed the petition for post conviction relief which was based on the attorney's conflict of interest arising from concurrently representing co-defendants. The relevant law as explained by various Idaho cases is described below. First is the explanation by the Idaho Supreme Court in *State v. Lovelace*, 140 Idaho 53 (2003):

The right to conflict-free representation derives from the Sixth Amendment as applied to the states by the Due Process Clause of the Fourteenth Amendment. *Powell v. Alabama*, 287 U.S. 45, 68, 77 L. Ed. 158, 53 S. Ct. 55 (1932). This right has been accorded "not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Mickens v. Taylor*, 535 U.S. 162, ___, 152 L. Ed. 2d 291, 122 S. Ct. 1237 (2002), citing *United States v. Cronin*, 466 U.S. 648, 80 L. Ed. 2d 657, 104 S. Ct. 2039 (1984). It follows from this that assistance which is ineffective in preserving fairness does not meet the constitutional mandate. See *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

Whenever a trial court knows or reasonably should know that a particular conflict may exist, the trial court has a duty of inquiry. See *Wood v. Georgia*, 450 U.S. 261, 272-73, 67 L. Ed. 2d 220, 101 S. Ct. 1097 (1981); *Cuyler v. Sullivan*, 446 U.S. 335, 347, 64 L. Ed. 2d 333, 100 S. Ct. 1708 (1980). The scope and nature of the affirmative duty of the trial judge to assure that criminal defendants are not deprived of the effective assistance of counsel by joint representation of conflicting interests is second only to the concern as to how strong a showing of conflict must be made before a court will conclude that the defendants have been deprived of their right to effective assistance. See *Holloway v. Arkansas*, 435 U.S. 475, 483, 55 L. Ed. 2d 426, 98 S. Ct. 1173 (1978). "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*, 446 U.S. at 348. However, "until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." *Id.* at 350.

Id. p. 60, 61.

The relevant law was also discussed by the Idaho Court of Appeals in *State v. Koch*, 116 Idaho 571 (Ct. App. 1989):

The multiple defendant issue requires more elaborate discussion. Matsuura represented both Koch and a co-defendant. Under the Sixth Amendment, an accused has the right to representation free from conflicts of interest. *Wood v. Georgia*, 450 U.S. 261, 271, 101 S.Ct. 1097, 1103, 67 L.Ed.2d 220 (1981). Joint representation is not a per se violation of this right. *Holloway v. Arkansas*, 435 U.S. 475, 482, 98 S.Ct. 1173, 1177, 55 L.Ed.2d 426 (1978); *Roles v. State*, 100 Idaho 717, 719, 604 P.2d 731, 733 (1979). However, the courts have recognized that "a possible conflict [of interest] inheres in almost every instance of multiple representation." *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S.Ct. 1708, 1718, 64 L.Ed.2d 333 (1980) (emphasis added).

Consequently, a conflict of interest arising from an attorney's representation of multiple defendants has been expressly excepted from the requirement that actual prejudice be shown. See *Strickland*, 466 U.S. at 686, 688, 104 S.Ct. at 2064. This exception reflects the Supreme Court's holding in *Cuyler*, that prejudice is presumed when defense counsel is burdened by an actual conflict of interest. However the narrowness of this exception must be emphasized. A presumption of prejudice is triggered only by an actual conflict of interest. The conflict itself must be shown; it will not be presumed. As stated in *Cuyler*, prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and "that an actual conflict of interest adversely affected his lawyer's performance." 446 U.S. at 346, 348, 100 S.Ct. at 1717, 1718. Thus, there is not a double presumption of conflict and prejudice in a multiple representation case. *McNeeley v. State*, 111 Idaho 200, 722 P.2d 1067 (Ct.App.1986).

Id. p. 574.

The district court's ruling on the conflict issue will be repeated for this

Court's convenience:

Redal represented Barnes through the suppression hearing. No claim has been made that Redal failed to effectively represent her at that hearing. The claim against Redal is that his joint representation of Klundt and Barnes created a conflict of interest prejudicing Barnes. No facts were presented by Barnes to show that in connection with the suppression hearing her interests were different from those of Klundt or that Redal failed to present facts or arguments on her behalf at the suppression hearing. *Daugherty v. State*, 102 Idaho 782, 640 P.2d 1183 (1982) held:

A lawyer or law firm should carefully consider the potential for conflict of interest before representing multiple defendants in a criminal case. However, representation of multiple criminal defendants does not constitute a "per se" violation of the constitutional guaranty of effective assistance of counsel. As the Idaho Supreme Court stated in *Roles v. State*, 100 Idaho 717, 719, 604 P.2d 731 (1979):

Absent a showing there was at least a possible conflict of interest between the co-defendants **at the time the joint representation existed** which may have inhibited the attorney's ability to act for the best interests of each codefendant at all times during that representation, there is no basis for the defendant's claim that his sixth amendment right to effective counsel was abridged.

Id. 102 Idaho at 783-84, 640 P .2d at 1184-85 (citations omitted) (emphasis added).

In *Roles v. State*, 100 Idaho 717, 604 P.2d 731 (1979) an attorney represented co-defendants. Roles alleged on post-conviction relief that this constituted a conflict of interest denying him the effective assistance of counsel. The Court rejected this contention, holding:

However, while an actual conflict of interest might have occurred if Roles had proceeded to trial with his original court appointed counsel, his guilty plea prevented that conflict from ever materializing. Joint representation of co-defendants does not of itself constitute denial of a criminal defendant's right to effective counsel.

Id. at 719, 604 P.2d at 733.

Barnes has not shown that "at the time of the joint representation" a conflict of interest existed which inhibited Redal's ability to act in her best interests.

Opinion, p. 7-9. (R. p. 107-109.)

The court seems to misunderstand the claim. The point is not that the co-defendants had different interests at the suppression hearing or that Redal failed to do something at the suppression hearing due to the conflict. Rather, the point is that throughout the joint representation the co-defendants had different interests and the attorney's ability to act in the best interest of Ms. Barnes was inhibited by the attorney's duties to Mr. Klundt.

The basic reason for this is there was a different level of culpability between the co-defendants (and a different expected punishment). In other words, as is so common in drug cases, the boyfriend is the prime mover in the offense, and the girlfriend is the follower. This was the case here, as was established in both the criminal case and the evidentiary hearing on the post conviction.

At the evidentiary hearing, Mr. Palmer testified, albeit in the context of the failure to bring a motion to sever, about the relative culpability of the co-defendants:

. . . I believe that the culpability here in this particular case and the evidence that I had rested with the codefendant. My client happened to sort of just be there riding along. And they lived together. They shared the same room together. There was certainly evidence that they were doing the same drugs together. But he was probably the principal in the manufacturing of it. . . .

Tr. p. 90, ln. 24--p. 91, ln. 6.

Also relevant was Petitioner's minor criminal history. The prosecutor established at the evidentiary hearing that Ms. Barnes had only a minor criminal history with several misdemeanors, to wit, a DUI in 1994 and a driving without privileges in 2005. (Tr. p. 117.)

Further relevant was the fact that two of the charged offenses carried a five year mandatory minimum sentence (and another charge required a two year consecutive sentence). (R. p. 49.)

At the sentencing in the criminal case, the court made basically the same findings.¹ At sentencing, the prosecutor requested the shortest amount of fixed time possible, 5 years, followed by 5 years indeterminate. (Tr., 7/29/2101, p. 362.) The court actually imposed an even shorter sentence. The court sentenced Ms. Barnes to 5 years fixed with no indeterminate time on three counts to run concurrent (two of which required a mandatory minimum sentence of five years), followed by two years indeterminate for a count which was required to run consecutive. (Tr., 7/29/2101, p. 367.) In short, the court imposed the shortest sentence that it possibly could given the five year mandatory minimum sentence and the two year mandatory consecutive sentence.

The court explained at sentencing:

That's somewhat less of a sentence than I imposed upon Mr. Klundt. He had certainly a longer prior record and, I suspect, was perhaps more intimately involved in the crime than you were. The difference in the sentence is not significant, but yours is less than what I sentenced him to.

¹ The transcript of the underlying criminal case was admitted at the evidentiary hearing. (R. p. 102.) Appellant has contemporaneously herewith requested this Court take judicial notice of it.

Tr., 7/29/2101, p. 367, lns. 17-22.

Some of the court's further reasoning for the sentence imposed included that it was Ms. Barnes first serious crime and her prior record was just the misdemeanors. (Tr., 7/29/2101, p. 366.) More significant was the court's statement that the facts of the case showed the court that while being guilty of the charges, Ms. Barnes was not manufacturing methamphetamine for sale or distribution, it was simply for personal use. (Tr., 7/29/2101, p. 366.)

Finally as to the sentencing, as Mr. Palmer argued, had Ms. Barnes just gone out and bought the methamphetamine, they would probably be talking about a withheld judgment and probation given the quantities and her prior record. (Tr., 7/29/2101, p. 362.)

Given all this, what was in the best interest for Petitioner was for her to enter into an early plea bargain in the case which would avoid the 5 year mandatory minimum sentence and/or the two year mandatory consecutive sentence. Again, the state requested only the mandatory minimum fixed time even after a jury trial and the court imposed the shortest possible sentence. Given this, as well as the relative culpability of the co-defendants, Petitioner's criminal history, and because the manufacturing was for personal use rather than for sale, it cannot be seriously believed that the parties could not have resolved this case via an early plea bargain that would have resulted in a shorter prison sentence.

But Petitioner's attorney could not advise her to enter into such a plea bargain because it would have been directly adverse to the co-defendant he also

represented.² Had she pled guilty, Ms. Barnes could have been called to testify again Mr. Klundt in the jury trial since she would no longer have a 5th amendment right against self incrimination. Even if the state did not desire to proceed with live testimony given the boyfriend/girlfriend situation, Mr. Barnes' change of plea hearing transcript where she would admit to whatever offense could be admitted in Mr. Klundt's trial. This would sink him just as handily without the necessity of Petitioner's live testimony.

In short, in order to adequately represent Mr. Klundt, Redel could not advise Ms. Barnes to plead guilty as she should. Thus, Redel actively represented conflicting interests and an actual conflict of interest adversely affected his performance and so prejudice is presumed.

While Redel ultimately recognized his conflict of interest and Ms. Barnes obtained her own lawyer mere weeks before the trial date, this did not cure the adverse affect of the conflict because by that time the opportunity for an early plea bargain was gone.

To summarize, given the differing culpability and criminal records of the two co-defendants, there was an inherent conflict of interest in concurrent representation. Given her position in all of this and the presence of charges requiring mandatory minimum sentences, Petitioner should have been advised to enter into a plea bargain which would have resulted in less prison time, but she was represented by the same attorney who also represented the more culpable defendant who would be harmed by this course of action. Thus, there

² At the evidentiary hearing, neither Redel nor Petitioner testified that plea bargains were ever discussed.

was an actual conflict which adversely affected Petitioner and so prejudice is presumed and her convictions must be vacated.

CONCLUSION

Wherefore, for the reasons as stated above, Appellant/Petitioner respectfully requests that the district court's denial of post conviction relief be reversed and that Ms. Barnes' convictions be vacated.

DATED this 11th day of February, 2013.



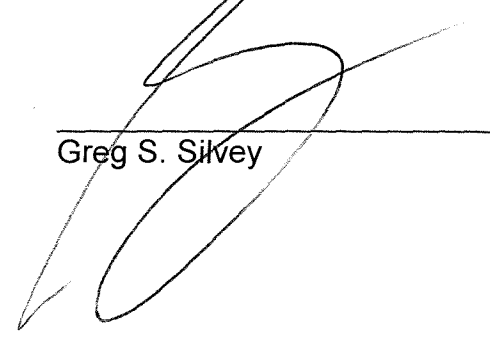
Greg S. Silvey
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of February, 2013, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by the method as indicated below:

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Greg S. Silvey