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Green v. State Appellant's Reply Brief Dckt. 43750

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IN THE SUPREME COURT OF THE STATE OF IDAHO

ALESHA ANN GREEN,)	
)	
Petitioner-Appellant,)	NO. 43750
)	
v.)	ADA COUNTY NO. CV 2015-11223
)	
STATE OF IDAHO,)	REPLY BRIEF
)	
Respondent.)	
_____)	

REPLY BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA**

HONORABLE MELISSA MOODY
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Alesha Ann Green appealed from the Judgment dismissing her Amended Petition for Post-Conviction Relief, asserting the district court erred when it addressed the potential conflict of interest in her case because it did not adequately inquire into whether the circumstances demonstrated a significant likelihood of prejudice. Ms. Green's trial counsel in the underlying criminal case and her post-conviction counsel worked for the same public defender's office, and Ms. Green's post-conviction petition raised ineffective assistance of counsel claims against trial counsel. The district court recognized there was a potential conflict of interest, but it did not adequately inquire into whether the circumstances of Ms. Green's case demonstrated a significant likelihood of prejudice.

In its Respondent's Brief, the State argued Ms. Green "has not shown that the district court failed to make an adequate inquiry into whether [Ms.] Green's post-conviction counsel had a conflict of interest[]." (Resp. Br., p.7.) This Reply Brief is necessary to show the district court did not adequately inquire into whether the circumstances of Ms. Green's case demonstrated a significant likelihood of prejudice.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Ms. Green's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUE

Did the district court err when it addressed the potential conflict of interest in Ms. Green's case, because it did not adequately inquire into whether the circumstances demonstrated a significant likelihood of prejudice?

ARGUMENT

The District Court Erred When It Addressed The Potential Conflict Of Interest In Ms. Green's Case, Because It Did Not Adequately Inquire Into Whether The Circumstances Demonstrated A Significant Likelihood Of Prejudice

A. Introduction

Ms. Green asserts the district court erred when it addressed the potential conflict of interest in her case because it did not adequately inquire into whether the circumstances demonstrated a significant likelihood of prejudice. The district court recognized there was a potential conflict of interest because Ms. Green's trial counsel and post-conviction counsel both worked for the same office and Ms. Green's petition raised ineffective assistance of counsel claims against trial counsel. However, the district court did not adequately inquire into whether the circumstances demonstrated a significant likelihood of prejudice, because it did not ask post-conviction counsel questions such as whether his office had set up effective measures to prevent communication of confidential client information between lawyers employed on behalf of individual defendants.

B. The District Court Did Not Adequately Inquire Into Whether The Circumstances Of Ms. Green's Case Demonstrated A Significant Likelihood Of Prejudice

Ms. Green asserts the district court erred when it addressed the potential conflict of interest in her case. The State argues the district court's *sua sponte* inquiry was more than adequate to protect Ms. Green's nonexistent right to conflict-free counsel on post-conviction. (Resp. Br., p.3.) However, the district court did not conduct an adequate inquiry.

As a preliminary matter, the State appears to have misunderstood Ms. Green's assertions on appeal. Ms. Green has not argued "that appointing the public defender's office in post-conviction proceedings automatically triggers some duty to inquire about potential conflicts in every case where a separate public defender served as trial counsel." (See Resp. Br., p.7.) The potential conflict of interest arises here from the facts that Ms. Green's post-conviction petition raised ineffective assistance of counsel claims against trial counsel, *and* post-conviction counsel worked for the same office as trial counsel. (See R., pp.5-6, 23, 49.) Because of that potential conflict of interest in this particular case, the district court should have conducted an adequate inquiry into whether the circumstances demonstrated a significant likelihood of prejudice.

The State also argues Ms. Green has contended "she has some amorphous due process right that requires the court to inquire into conflicts." (Resp. Br., p.5.) While Ms. Green has noted the Idaho Court of Appeals has held a post-conviction petitioner has an interest in securing assistance to adequately present his claims for purposes of procedural due process (App. Br., p.8 (quoting *Rios-Lopez v. State*, 144 Idaho 340, 342 (Ct. App. 2007))), she asserts on appeal a district court should inquire into potential conflicts of interest in post-conviction matters "by analogy to the constitutional standard, and to preserve the petitioner's opportunity to work with post-conviction counsel." (App. Br., p.9.)

Under the statutory standard for the appointment of post-conviction counsel, if a petitioner alleges facts that raise the possibility of a valid claim, the district court should appoint counsel to give the petitioner an opportunity to work with counsel and "properly allege the necessary supporting facts." See *Charboneau v. State*, 140 Idaho 789, 792

(2004). The statutory opportunity to work with counsel would be hollow if post-conviction counsel with a conflict were allowed to stay on a petitioner's case. *Cf. Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012).

To present a claim of ineffective assistance at trial in accordance with the State's procedures . . . a prisoner likely needs an effective attorney. . . . A prisoner's inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel. The right to the effective assistance of counsel is a bedrock principle in our justice system.

The State is correct that the facts of this case are distinguishable from those in *State v. Severson*, 147 Idaho 694 (2009), because this is a case involving representation of the same client by two attorneys at the same office, rather than representation of different clients. (See Resp. Br., pp.6-7.) However, it does not follow that an inquiry into whether the office in this case set up effective measures to prevent communication of confidential client information between lawyers employed on behalf of individual defendants is, as the State suggests (see Resp. Br., pp.6-7), irrelevant. Because trial counsel and post-conviction counsel both represented Ms. Green as employees of the same office, and Ms. Green raised ineffective assistance of counsel claims against trial counsel, this case presents a classic conflict. See *Adams v. State*, 380 So. 2d 421, 422 (Fla. 1980) (per curiam) ("The public defender . . . would be faced with the dilemma of vigorously asserting the petitioner's claim or defending the professional reputation of his office. This would be at least as great a conflict as having the same office represent two defendants with conflicting interests")

Further, the Idaho Rules of Professional Conduct do not indicate that the principles governing conflicts of interest in concurrent representation are inapplicable to potential conflicts of interest like the one at issue here. See Idaho R. Prof. Conduct 1.7

& 1.10. A concurrent conflict of interest exists if “there is a significant risk that the representation of one or more client will be materially limited . . . by the personal interests of the lawyer” Idaho R. Prof. Conduct 1.7(a)(2). A public defender’s concurrent conflict of interest may be imputed to his or her entire office on a case-by-case basis. See *Severson*, 147 Idaho at 706; cf. Idaho R. Prof. Conduct 1.10(a) (containing the general rule, not applicable here, that a lawyer’s concurrent conflicts of interest are necessarily imputed to his or her entire firm).

Contrary to the State’s argument, the principles governing conflicts of interest in concurrent representation apply to potential conflicts of interest like the one at issue here. For example, Ms. Green would submit that comment 10 to Idaho Rule of Professional Conduct 1.7, with its statement that “if the probity of a lawyer’s own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice,” would apply to instances where two attorneys from the same office represented the same client and the first attorney’s conflict was imputed to the entire office. See Idaho R. Prof. Conduct 1.7 cmt. 10 & 1.10(a)(1); see also *Keats v. State*, 115 P.3d 1110 (Wyo. 2005) (“There is . . . some indication that it is not appropriate or expected for one to raise one’s own ineffectiveness. We too have identified that such a practice is questionable.” (citations omitted)).

Such considerations would likewise apply where a public defender’s conflict was imputed to his or her entire office on a case-by-case basis. See *Severson*, 147 Idaho at 706; see also *Cannon v. Mullin*, 383 F.3d 1152, 1173 (10th Cir. 2004) (“If a criminal defendant is represented by trial and appellate counsel from the same office, appellate counsel’s assessment of trial counsel’s performance may be less than completely

objective. An understandable, although inappropriate, regard for collegiality may restrain appellate counsel from identifying and arguing trial attorney-error.”). Thus, faced with a potential conflict of interest such as the one in this case, a district court should conduct an adequate inquiry into whether the circumstances demonstrated a significant likelihood of prejudice.

The State further contends the district court’s superficial inquiry here was adequate because the district court “discover[ed] that there was in fact no conflict of interest.” (See Resp. Br., pp.5-6.) But the district court’s inquiry failed to show there was no conflict of interest.

The district courts questioned whether the case was not sent out for conflict counsel because post-conviction counsel had not been the trial attorney, and post-conviction counsels answered, “That’s what my boss tells me, Your Honor,” (Tr., p.8, Ls.9-14), did not resolve whether there was a conflict. That part of the inquiry did not demonstrate post-conviction counsel had been effectively “firewalled” or prevented from communicating with trial counsel regarding confidential client information. See *Severson*, 147 Idaho at 707. Nor did it dispel any possible concerns about post-conviction counsel harboring an interest in not having another attorney from his office be found ineffective. See *Cannon*, 383 F.3d at 1173 (“Arguing ineffective assistance with respect to a colleague’s performance is saying that the performance was not only inferior, but unreasonable. . . . Presenting an ineffective-assistance-of-counsel claim may well damage the reputation of the trial attorney and the office for which both trial and appellate counsel work.”).

Post-conviction counsel's affirmative response to the district court's question on whether he had discussed with Ms. Green that he was representing her as a member of the Ada County Public Defender's Office (Tr., p.8, Ls.17-22), also did not resolve whether there was a conflict. The answer to that question did not indicate that Ms. Green had waived the potential conflict of interest by giving her "informed consent, confirmed in writing." See Idaho R. Prof. Conduct 1.7(b)(4) & 1.10(c). The district court's superficial inquiry did not lead it to discover there was no conflict of interest.

Despite the State's arguments, the district court did not adequately inquire into whether the circumstances here demonstrated a significant likelihood of prejudice. Thus, the district court erred when it addressed the potential conflict of interest in Ms. Green's case. The judgment dismissing Ms. Green's amended post-conviction petition should be vacated and the matter should be remanded to the district court for a proper conflict determination. If the district court determines there is a conflict of interest imputed to post-conviction counsel, Ms. Green should receive conflict-free counsel to preserve her opportunity to work with counsel and properly allege the necessary supporting facts for her post-conviction claims. See *Charboneau*, 140 Idaho at 793.

CONCLUSION

For the above reasons, as well as the reasons contained in the Appellant's Brief, Ms. Green respectfully requests this Court vacate the judgment dismissing her amended post-conviction petition and remand her case to the district court for further proceedings.

DATED this 24th day of May, 2016.

_____/s/_____
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 24th day of May, 2016, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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_____/s/_____
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