



654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). The right to counsel guaranteed by the constitution, however, means more than just the opportunity to be physically accompanied by a person privileged to practice law. STRICKLAND v. WASHINGTON, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The Sixth Amendment requires counsel to act in the role of advocate. "The right to effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted --- even if the defense counsel may have made demonstratable errors --- the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." CRONIC, 466 U.S. at 656-659. Ordinarily, the burden rests on the accused to show that his attorney's inadequacy caused him prejudice. STRICKLAND, 466 U.S. at 694. On rare occasions however, failures of counsel make the process itself presumptively unreliable, and in such cases, no specific showing of prejudice is required. CRONIC, 446 U.S. at 657. Unless counsel is absent altogether, or the State has somehow interferes in the representation, the only challenge giving rise to a presumption of prejudice is one based upon a conflict of interest on the part of counsel. A conflict, including one deriving from sympathy with government's position, is a breach of the most basic of duties: the duty of loyalty in

the adversarial process. CUYLER v. SULLIVAN, 446 U.S. 335, 349-350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980) (cited in CRONIC, 446 U.S. at 661 n.28); STRICKLAND, 466 U.S. at 692. Such conflict is itself prejudicial, and no additional showing is required. [A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice to obtain relief. HOLLOWAY v. ARKANSAS, 435 U.S. 475, 490-491, 98 S.Ct. 1173, 1181-1182, 55 L.Ed.2d 426 (1978).

The Tenth Circuit summarized all of these holdings well in OSBORN v. SHILLINGER, 861 F.2d 612, 626 (10th Cir. 1988) (quoting STRICKLAND, 466 U.S. at 692) where it stated that:

"[D]efendant can pursue an ineffectiveness claim in two ways. He can assert that the process was not adversarial because of affirmative state interference or a conflict of interest, and/or he can argue that his attorney was so inadequate that he was effectively denied the benefit of full adversarial testing of his guilt. When a defendant challenges the adequacy of counsel's performance, he must meet the Strickland reasonableness and prejudice requirements... When an actual conflict of interest is demonstrated, prejudice is presumed because 'counsel breaches the duty of loyalty'."

Also in OSBORN, 861 F.2d at 629 the court noted that "[a] defense attorney who abandons his duty of loyalty to his client and effectively joins the state in an effort to obtain a conviction... suffers from an obvious conflict of interest". Furthermore, courts have found conflicts of interests and violations of the duty of loyalty based on counsel's

non-strategic concessions of guilt or expressions of disdain for the defendant. See FRANCIS v. SPRAGGINS, 720 F.2d 1190 (11th Cir. 1983); STATE v. HOLLAND, 876 P.2d 357 (Utah 1994). Those cases stand for the proposition that "[a]t a minimum, an attorney's duty of loyalty... requires the attorney to refrain from acting as an advocate against the client...". HOLLAND, 876 P.2d at 359. These principles were also been upheld by the 9th Circuit in FRAZER v. U.S. 18 F.3d 778, 782 (9th Cir. 1994) (quoting CRONIC, 466 U.S. at 666) where it observed that where a defense attorney "adopts and acts upon the belief that his client should be convicted", and effectively joins the State in its efforts, and obvious conflict of interests exists and results in a breakdown of the adversarial process.

I have brought these cases to the court's attention because I believe that my attorney was ineffective due to her violation of the "duty of loyalty" that the Sixth Amendment grants and that she owed to me in this "adversarial process". I am no legal expert, by any means, so I can only bring these cases to the courts attention as I have read and understood them. The issues that I am presenting here are the same ones that I was attempting to raise, of my own accord, during my trial (see pg. 102 of transcripts).

First of all, I was found not guilty of the crime that I was initially arrested for. The police officer who arrested me was acting only on a personal phone call that he received from a

family member. The family member who he received that call from was not even the alleged victim of the crime that the officer was investigating. The officer testified that he detained me for investigation (see pg. 67 of transcripts). During his "initial cursory pat down" the officer found nothing noteworthy on my person. However, several minutes later, without having found any additional evidence or reasons or change in circumstance, the officer decided to arrest me. During the arrest search, drugs were found on my person. However, I do not believe that this, or any other court in the country, allows for investigatory searches (which this clearly was). I was arrested for supposedly threatening this officer's cousin, but the drugs that were found on me, during this investigatory search & seizure, were what I was ultimately found guilty of by the jury. For that reason I believe that "the fruit of the poisonous tree" doctrine may have applicable here. I also believe that my Fourth Amendment right to reasonable search and seizure may have been violated as well.

I told my attorney that I would like her to address those issues on my behalf at a 3.5 suppression hearing, but she refused to ask for a suppression hearing or to challenge any of the evidence that was being presented by the State. While it is not on the record that I requested it, it is on record that no 3.5 hearing was never conducted. These types of circumstances are the kind that lay the groundwork behind the observations in cases like CRONIC, 466 U.S. at 666, where the court pointed out why the

right to counsel is so "pervasive" in the first place. I could not assert my right to challenge the possible Fourth Amendment violation without my counsel's advice and expertise. However, in this case, she refused to provide me with either one. Also, without that specific challenge having been made, I was left in a position where I had virtually no defense to the possession charge that had been filed against me. This was made clear by the prosecutor in his closing statement (pg. 172-173) where he stated that, "I'm not going to rebut anything with respect to the issue of possession of methamphetamine because there wasn't any argument on that because there really is no --- there's nothing to argue about."

I had only one move to make, as far as my defense to the possession charge went, and that was to challenge the probable cause for the search and my subsequent arrest. Unfortunately, for me, my own counsel stifled whatever argument I may have had before the trial court could even take a look at it. And, as was stated in STRICKLAND, 466 U.S. at 685, my right to counsel meant more than "just the opportunity to be physically accompanied by a person priveleged to practice law". Why would my own attorney, who is supposed to defending me to the best of her ability, and with MY best interests in mind, refuse to even attempt to have the evidence supressed?

I believe that, if it takes into consideration the case law that I have presented, and what is described therein, that this

court can determine that a conflict of interest did arise here because my attorney failed in her duty of loyalty towards me. Having presented no defense to the charge that carried the most significant sentence of the three that were filed, and refusing to even make any sort of attempt towards surmounting an argument in regards to the probable cause etc., clearly indicates that she felt some type of sympathy towards the government's position. Her actions demonstrate that she believed that I should be convicted of at least the possession charge. As far as strategy goes, "strategically" it would not make any sense to concede guilt to the greatest charge (possession), in order to attempt to bolster a defense against the other two lesser charges in the information. To make that sort of assertion (that it was "strategic" in some way) would be inane at best. The defense that was provided, to the two remaining charges, was merely a transparent and vain attempt by my attorney to convince the trial court that she was indeed providing the assistance, answering her obligations, and following through with the duty of loyalty that the Sixth Amendment requires her to lend me.

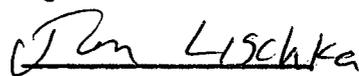
Lastly, all of these arguments should lead this court to see that a breakdown in the adversarial process did occur at my trial. My attorney did not defend me, but did, instead, only stand by my side as she automated her way through the motions of process and procedure of the trial court. I don't see how the proceeding can be described as "adversarial" when there was no

"test" of the prosecution's case. My defense counsel's concession of guilt to the greatest charge was the defining element of my trial and sentencing. Her defense tactics towards the two lesser charges has little relevance when one considers that the sentences that those two charges carry would, at the very worst, be run concurrently with the charge that she had already conceded my guilt upon.

I put a question to this court: If the charges were Murder and Theft, would it be sufficient to allow for a defense attorney to concede to her client's guilt on the Murder charge, but to defend him (with ALL of her guile and skill) against the theft charge? Would the defendant's right to counsel be fully accommodated? And would his guilt, in such a situation, have been submitted to the type of adversarial testing that the Sixth Amendment envisioned? I believe that the case laws that I have presented for this court's consideration hold otherwise. And, while my charges are far less substantial than crimes like Murder, do I not still have the same rights as any other criminal defendant? For all of those reasons that I have stated here, I do submit that my defense attorney's lack of loyalty to my cause created a conflict of interest, and because of that, I did not receive a fair trial.

June 10, 2013.

Respectfully Submitted,



Jonathan Lischka