

Ringang v. Chiang, 16 ROP 129 (2009)

**JULIO RINGANG,
Appellant,**

v.

**TING FENG CHIANG,
Appellee.**

CIVIL APPEAL NO. 08-002
Civil Action 07-329

Supreme Court, Appellate Division
Republic of Palau

Decided: February 9, 2009¹

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Counsel for Appellant: Jeffrey Beattie, Attorney General, ROP

Counsel for Appellee: Oldiais Ngiraikelau

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; ALEXANDRA F. FOSTER, Associate Justice; ROSE MARY SKEBONG, Associate Justice Pro Tem.

Appeal from the Trial Division, the Honorable LOURDES F. MATERNE, Associate Justice, presiding.

FOSTER, Justice:

This is an appeal of an order of the Trial Division, which granted Appellee's petition for habeas corpus and ordered Appellee's immediate release from custody. Appellee Ting Feng Chiang ("Appellee") was convicted on April 23, 2007, of ten counts of people trafficking, ten counts of exploiting a trafficked person, one count of advancing prostitution, two counts of violation of the Foreign Investment Act, nine counts of violation of the tax code, and ten counts of violation of the labor laws. Subsequently, he was sentenced to 20 years imprisonment, a \$50,000 fine and ordered to pay restitution in the amount of \$18,611.07. On November 12, 2007, Justice Salii recused herself from consideration of the writ of habeas corpus. On December 27, 2007, Justice Materne issued the writ of habeas corpus on the grounds that Appellee had received ineffective assistance of counsel in his criminal case. Specifically, the court ruled that Appellee's attorney had an actual conflict of interest which adversely affected his performance.

¹Despite the parties' request for oral argument, the parties' detailed briefs and the record in this case adequately present all legal and factual issues on appeal. Accordingly, oral argument would not assist in the judicial resolution of this case. This case is decided without oral argument, pursuant to Rule 34(a) of the Rules of Appellate Procedure for the Courts of the Republic of Palau.

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Appellant Attorney General Jeffrey Beattie (“Appellant”) seeks to overturn the grant of habeas corpus, arguing that there was no actual conflict and Appellee’s attorney provided effective assistance.

BACKGROUND

On November 14, 2008, the Appellate Division decided Criminal Appeal 07-001, the direct appeal of Appellee’s conviction. In that decision, the Appellate Division reversed Appellee’s conviction, along with that of his co-defendant Baiyue Wang, and remanded for a new trial. *Pamintuan v. ROP*, Crim. App. 07-001. The appeal was based on the violation of Appellee’s and Wang’s rights to understand the p.131 trial proceedings (due to the lack of a translator), as well as the trial court’s failure to conduct a conflict of interest analysis with regard to Appellee’s representation.² *Id.* at 36.

MOOTNESS ISSUE

Because the direct appeal determined, as a final matter, that Appellee’s conviction was unconstitutional and that a new trial was required, appellate review of the writ of habeas corpus no longer presents a live case or controversy. However, unlike the United States Judiciary, which is constitutionally limited to deciding cases and controversies, the Judiciary of the Republic of Palau has judicial power extending to all matters in law and equity. PALAU CONST., Article X, Section 5. Accordingly, review of the issuance of the writ is within the jurisdictional authority of the Supreme Court of Palau. The case is worthy of the Court’s attention, despite the lack of live case or controversy, because of the importance of its subject: a criminal defendant’s right to legal representation free from conflicts or divided loyalties. Although it has been determined conclusively that Appellee is entitled to a new trial because of the constitutional defects of his first trial, the issue of whether there was an actual conflict has not yet been finally decided.

²Appellee’s petition for habeas corpus was based on both the translation issue and ineffective assistance of counsel. However, the trial court found that the ineffective assistance grounds were sufficient to justify the writ and did not discuss the translation issue in the habeas decision. In the direct appeal of the criminal conviction, Appellee raised both the translation and ineffective assistance of counsel issues. However, the Appellate Division distinguished the ineffective assistance issue on direct appeal from that on habeas review; the court stated that the issue on direct appeal is not ineffective assistance of counsel, but the trial court’s treatment of this conflict. *Civ. App. 07-001* at 29. The Appellate Division reversed Appellee’s conviction on the interpreter issue and the trial court’s failure to conduct a conflict of interest analysis.

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ANALYSIS

A. Standard of Review

The question of defense counsel's conflict is a mixed question of law and fact. *U.S. v. Monson*, 359 F.3d 110, 119 (2d Cir. 2004) ("Whether an attorney's representation of a defendant violated the Sixth Amendment right to effective assistance of counsel is a mixed question of law and fact.") Accordingly, it is reviewed *de novo*. *In re Estate of Kamitelong*, 7 ROP Intrm. 94, 95 (1998).

B. Legal Standard for Evaluating Actual Conflict

The right to counsel, guaranteed in Article IV, Section 7 of the Constitution, has been construed to "confer a right to effective assistance of counsel... and to give rise to a constitutional claim, where counsel's performance was deficient and the deficiency prejudiced the defense." *Saunders v. ROP*, 8 ROP Intrm. 90, 91 (1999). Generally, ineffective assistance of counsel is very difficult for a defendant to prove; there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland v. Washington*, 104 S. Ct. 2052, 2065 (1984). A defendant typically must show "a reasonable p.132 probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 2052. However, if a defendant can show that his attorney had an actual conflict of interest, meaning a conflict of interest that actually affected counsel's performance, prejudice is presumed. *Cuyler v. Sullivan*, 100 S. Ct. 1708, 1719 (1980). If there was no prejudice or harm to the defendant, then there was no constitutional violation.

Appellant argues that, to determine if an actual conflict of interest existed, the reviewing court must apply a three prong standard. The standard, from the Court of Appeal's decision in *Mickens v. Taylor*, requires a petitioner to (1) identify a plausible alternative defense strategy or tactic, (2) show that tactic to be "clearly suggested by the circumstances" and (3) establish a link between the attorney's failure to follow that strategy and the conflict. Appellant's Op. Br. at 7 (quoting *Mickens v. Taylor*, 240 F.3d 348, 361 (4th Cir. 2001)). Each part must be shown by a preponderance of the evidence. *Id.*

However, Appellant is incorrect; this burdensome standard is not the correct way to analyze Petitioner's case. First, it should be noted that the quoted standard is from the Fourth Circuit decision, not the United States Supreme Court review of that decision. The Supreme Court stated simply that "it was at least necessary, to void the conviction, for petitioner to establish that the conflict of interest adversely affected his counsel's performance" and affirmed the Court of Appeals' decision because the petitioner had not made that showing. The Supreme Court did not adopt the three-prong standard. *Mickens v. Taylor*, 122 S. Ct. 1237, 1245 (2002).

Second, the facts of the *Mickens* case make it inapposite from the present case. In *Mickens*, the alleged conflict stemmed from the fact that petitioner's court-appointed attorney had previously represented the victim, unbeknownst to the court, petitioner or co-counsel. *Id.* at 1240. In this case, defense counsel concurrently represented two co-defendants in front of the

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same fact finder, at the same trial. The Supreme Court specifically distinguished concurrent representation from prior representation, in evaluating the likelihood of a conflict, noting “the high probability of prejudice arising from multiple concurrent representation, and the difficulty of proving that prejudice.” *Id.* at 1245. The court clearly rejected the idea that petitioners alleging conflict based on concurrent representation would have to meet a more onerous standard than that in *Cuyler*.³

The trial court reviewing Appellee’s habeas claim explicitly applied the *Cuyler* standard. Noting the difficulty in measuring “the precise effect on the defense of representation corrupted by conflicting interests,” the court correctly stated that Appellee need only show a conflict that affected counsel’s performance for his habeas petition to succeed. Tr. Court. Op., dated 12/17/07, at 4 (quoting *Strickland v. Washington*, 104 S. Ct. 2052, 2067 (1984)). Appellant’s argument that the court applied the p.133 wrong standard must fail.

C. Application of Law to Facts

The court evaluating Appellee’s habeas case highlighted “numerous decisions and failures” to show that counsel’s performance was adversely affected by his representation of Appellee and Pamintuan. Tr. Court Op., dated 12/17/07, at 5. According to the Opinion, counsel did not interview any of the witnesses against Appellee and did not call a single witness on his behalf. Additionally, counsel did not explain to Appellee the testimony against him, met with him only three or four times in the seven months before trial, and did not vigorously pursue his client’s rights to arraignment or translation. Most importantly, the court stated that counsel elicited testimony from Pamintuan that was damaging to Appellee, portraying him as the “culpable party and mastermind.” *Id.*

However, upon *de novo* review of the record, this court does not agree that counsel’s performance was shown to be affected by his joint representation of Appellee and Pamintuan. The theories that counsel advanced as to defendants’ defense were not inconsistent: counsel argued that Pamintuan was entirely uninvolved, past aiding in the recruitment of waitresses, and that Chiang was a figurehead, named at the top of this enterprise but unaware of any criminal activity. The testimony elicited by counsel from Pamintuan supported these theories: she incriminated only Defendant Eriich. The court decision concludes that the “inescapable inference” created by the theory that Pamintuan had “clean hands” is that “the culpable party and mastermind was Chiang.” Tr. Court. Op. at 5. However, as Pamintuan’s testimony makes no reference to Appellee and, instead incriminated a different defendant, this conclusion is erroneous. Prosecution’s closing statement, summarizing the evidence against Appellee, makes no mention of Pamintuan’s testimony, which supports the argument that Pamintuan’s testimony was irrelevant to the case against Appellee.

The other decisions highlighted by the court similarly fail to show that counsel’s representation of Pamintuan affected his representation of Appellee. Counsel’s decision not to

³As described above, the *Cuyler* standard requires a petitioner to show that the conflict actually affected his representation in some tangible way, even if that effect did not change the outcome of the case. *See* 100 S. Ct. at 1719.

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put Appellee on the stand was shown neither to be a bad decision nor related to his representation of Pamintuan. Similarly, counsel's decision not to call witnesses on Appellee's behalf, the frequency of counsel's pretrial meetings with Appellee, issues relating to arraignment and translation, and any other arguable deficiencies in counsel's representation are not shown to have any connection to counsel's simultaneous representation of Pamintuan.

As Appellant points out, counsel urged Appellee to accept a plea offer which would have allowed him to avoid jail time, in exchange for testimony against the other defendants. Although Appellee ultimately rejected the plea offer, counsel's action shows that his representation of Pamintuan did not limit his representation of Appellee. As seen above, the court's conclusion that "counsel took 'positive steps on behalf of one client prejudicial to another'" is unsupported in the record, as is any evidence for an actual conflict of interest.

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CONCLUSION

For the foregoing reasons, the trial court's decision that Appellee established an actual conflict of interest, which violated his right to effective assistance of counsel, was factually wrong. It should be noted that Appellee likely could have demonstrated his entitlement to habeas corpus on different grounds, but this Court takes no opinion on alternate possibilities; this Court's role is limited to a review of the trial court's decision. As described above, this Court already determined that Appellee's trial was constitutionally defective, in that the lack of an interpreter violated Appellee's due process rights. *See Pamintuan v. ROP*, Crim. App. No. 08-002.

This opinion should not be read to indicate that joint representation of criminal defendants is constitutionally allowable. As noted in the comments to Rule 1.7 of the ABA Annotated Model Rules of Professional Conduct, "[t]he potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant."⁴ The constitutional guarantee of assistance of counsel requires assistance that is both effective and loyal. *See Strickland v. Washington*, 104 S. Ct. 2052, 2067 (1984). This assistance is "necessary to ensure that the trial is fair." *Id.* at 2063.

⁴That rule, incorporated into Palau's Disciplinary Rules and Procedures for Attorneys, requires attorneys who engage in such representation to obtain informed, written consent from each client, to ensure that clients are aware of the dangers inherent in joint representation.

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However, in this case, Appellee failed to show that the joint representation had a discernible impact on the quality of counsel's representation or the loyalty provided Appellee. Accordingly, Appellee is not entitled to a writ of habeas corpus on the ground of actual conflict.