IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
JOHN MARK FENTON,
Respondent.

No. 84444

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order granting a post-conviction petition for a writ of habeas corpus. Fourth Judicial District Court, Elko County; William A. Maddox, Judge.

Factual and procedural background[1]

Almost 14 years ago, police arrested respondent John Mark Fenton for driving under the influence. Further investigation revealed that Fenton was driving the vehicle of a 71-year-old man found bleeding and injured at a nearby car wash. The State charged Fenton with battery with intent to kill, burglary, grand larceny, and both robbery and battery of a person 60 years or older. Counsel from the Elko County Public Defender's Office (Counsel) represented Fenton on these charges.

Before the trial, Fenton was initially out on bail. He was using drugs during this time. And, one day, Counsel learned that Fenton was using drugs in front of his child. Given the potential imminent dangers of using drugs while caring for the child, Counsel discussed whether to call Nevada's Division of Child & Family Services ("DCFS") for a welfare check with her supervisor at the Public Defender's Office. The supervisor agreed

[1]These facts are taken from the record and undisputed testimony from the hearing on the habeas petition.

that Counsel was under an ethical obligation to call in the welfare check, so Counsel did so. This led to Fenton's arrest and revocation of bail. Fenton remained in jail through trial as a result.

Counsel entertained different defense theories in preparing for trial. One of these theories was that Fenton suffered from "pharmacological delirium." Such delirium, an expert doctor would explain, arose from a combination of drug use, post-traumatic stress from Fenton's military service, and attendant mental health issues. Another theory was that a different individual committed the crime. At trial, Counsel opted for this latter theory. The jury ultimately found Fenton guilty of (1) battery resulting in substantial bodily harm upon a person over 60, (2) burglary, (3) robbery of a person over 60, and (4) grand larceny of a motor vehicle, all of which are category B felonies. The district court sentenced Fenton to an aggregate of 10 to 32 years in prison. This court affirmed the conviction on direct appeal.

Counsel continued to represent Fenton through these sentencing and appellate proceedings. At some point between Fenton's re-arrest and the start of the appeals process, Fenton and Counsel began a romantic relationship. Both agree that the relationship was over by the time this court affirmed Fenton's conviction on appeal.

After exhausting all avenues on direct appeal, Fenton filed a post-conviction petition for a writ of habeas corpus. There was no argument about either Fenton's romantic relationship with Counsel or the welfare check in the first petition. The second amended petition, however, raised the issue of the romantic relationship. In particular, Fenton argued that he did not need to show the typical *Strickland v. Washington,* 466 U.S. 668 (1984), prejudice from alleged ineffective assistance of counsel because the

relationship satisfied *Cuyler v. Sullivan*, 446 U.S. 335 (1980). *Cuyler* applied, according to Fenton, because the relationship evidenced a conflict of interest that "adversely affected [Counsel's] performance and left [Fenton] without constitutionally guaranteed representation." In opposition, the State argued that Fenton could not show the relationship either prejudiced or adversely affected Counsel's representation. Fenton replied, pointing to statements in various phone calls exchanged with Counsel. Such statements, excerpted without context, allegedly evidenced her deficient performance.

The district court then held an evidentiary hearing. Both Fenton and Counsel testified at the hearing. While neither disputed the existence of the relationship at the hearing, they disputed when it began. Fenton alleged that Counsel initiated the relationship shortly after the welfare check and before trial. Counsel maintained that the relationship began after trial but before sentencing. Both agreed, however, that there was no sexual intercourse.

Fenton also discussed the effect of the welfare check at the hearing, stating that he felt trapped in view of the arrest and subsequent relationship. Meanwhile, Counsel explained that she felt compelled to contact DCFS pursuant to her ethical obligations. Counsel also explained that, while she gave Fenton the option to obtain a different attorney after the arrest, Fenton orally consented to Counsel's continued representation. Fenton did not refute either of these points.

Fenton also testified about his objections to Counsel's trial strategy and the decision to not call the expert doctor to discuss Fenton's military service, mental health issues, and drug usage at trial. In contrast, Counsel testified that she made a strategy-based decision not to call the

expert doctor in favor of a theory that Fenton did not commit the crimes charged. Counsel was concerned that Fenton's noncompliance with prescribed medications would have come in had the doctor testified, which could have opened the door to other "bad facts," including VA medical records describing him as "confrontational" and short-tempered.

By the end of the hearing, Fenton agreed to withdraw all the grounds raised in his first petition.[2] Thus, only the conflict-of-interest claim based on the romantic relationship remained; there was no claim premised on *Strickland* prejudice. The district court ultimately granted relief. In doing so, the district court did not resolve the dispute between Counsel and Fenton as to when the relationship commenced. However, it recognized that a conflict of interest arose once Counsel "called the authorities for a welfare check and had [Fenton] arrested" for using drugs in front of Fenton's child. "At this point," the district court explained that Counsel "should have withdrawn regardless of the client's willingness to waive the conflict" because Fenton could no longer have "a candid relationship" with Counsel. In combination with the romantic relationship, the district court found that Fenton and Counsel suffered a "breakdown in communication" that "rose to an actual conflict of interest" under *Cuyler*.

The State now appeals. It argues that *Cuyler* cannot supply relief because the record does not indicate that the romantic relationship or

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[2]Because Fenton withdrew these grounds and the district court similarly did not analyze their merits, we decline to address these grounds here. Relatedly, we do not address whether Fenton's remaining claim would survive the common *Strickland* prejudice analysis. Although the State argued the applicability of *Strickland* briefly below, Fenton did not argue that his claim satisfied *Strickland's* prejudice test. The district court likewise relied on *Cuyler* to grant relief.

the welfare check adversely affected Counsel's representation of Fenton.[3] Meanwhile, Fenton insists that *Cuyler* supports habeas relief here because the "sexual and emotional manipulation" from the purportedly non-consensual relationship invaded every facet of the representation.[4]

Standard of review

In a habeas proceeding, a claim of ineffective assistance of counsel raises mixed questions of law and fact subject to de novo review. *Rubio v. State*, 124 Nev. 1032, 1039, 194 P.3d 1224, 1229 (2008). A district court's factual findings, however, are generally entitled to deference by this court. *Id.* In addition, review of counsel's representation is "highly deferential" in order to "avoid the distorting effects of hindsight." *Evans v. State*, 117 Nev. 609, 622, 28 P.3d 498, 508 (2001), *overruled on other grounds by Lisle v. State*, 131 Nev. 356, 366 n.5, 351 P.3d 725, 732 n.5 (2015).

The district court erred in granting habeas relief

Fundamentally, a criminal defendant is deprived of effective counsel where "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." *Strickland*, 466 U.S. at 686. *Strickland* delineates a two-part

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[3]While the State also argues that relief cannot be granted due to the strength of its case, this argument fails in the context of a *Cuyler* conflict because "the strength of the prosecution's case is not relevant to whether counsel's performance was adversely affected." *United States v. Mett*, 65 F.3d 1531, 1535 (9th Cir. 1995).

[4]Although oral argument revealed that Fenton's parole expired sometime during the pendency of this appeal, we note that the petition is not moot because Fenton filed it while under a sentence of imprisonment. *See* NRS 34.724(1); *see also Martinez-Hernandez v. State*, 132 Nev. 623, 628, 380 P.3d 861, 865 (2016) (holding post-conviction habeas petition does not become moot at completion of sentence if there are continuing collateral consequences, which are presumed to exist).

test to determine whether a defendant is entitled to habeas relief for such a deprivation: they must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *Id.* at 687; *see also Warden v. Lyons*, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting *Strickland*). The latter showing of prejudice is essential, as "a violation of the Sixth Amendment right to *effective* representation is not complete until the defendant is prejudiced." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147 (2006) (internal quotation marks omitted).

Yet, reviewing courts can presume prejudice where a defendant who fails to object to a conflict at trial establishes that "an actual conflict of interest adversely affected his lawyer's performance." *Cuyler*, 446 U.S. at 350. As *Cuyler* explained, it is the "conflict itself" that renders counsel ineffective. *Id.* at 349. Although *Cuyler* concerned a conflict based on joint representation, this court has applied *Cuyler* to alleged conflicts beyond that context. *See, e.g., Clark v. State*, 108 Nev. 324, 326-27, 831 P.2d 1374, 1376 (1992) (applying *Cuyler* where counsel initiated a civil suit against a client they simultaneously represented in a criminal action); *Belcher v. State*, 136 Nev. 261, 270, 464 P.3d 1013, 1025 (2020) (applying *Cuyler* due to alleged prior representation of a witness).[5] But given that the parties relied entirely on *Cuyler* in briefing the alleged conflicts here, we do the same for the purposes of our analysis. Specifically, we address only whether

[5]We recognize that *Cuyler* might not reach any of the alleged conflicts of interest in this case. *See Mickens v. Taylor*, 535 U.S. 162, 175 (2002) ("It must be said, however, that the language of [*Cuyler*] itself does not clearly establish, or indeed even support, such expansive application."); *see also Earp v. Ornoski*, 431 F.3d 1158, 1184 (9th Cir. 2005) ("The Supreme Court has never held that the [*Cuyler*] exception applies to conflicts stemming from intimate relations with clients.").

the district court's conclusion—that the romantic relationship and "narrow fact" that the welfare check led to Fenton's arrest caused a "breakdown in communication"—satisfies *Cuyler*.

This conclusion identifies two purported conflicts of interest: (1) the romantic relationship and (2) the welfare check. Both parties, as well as the district court, initially assessed each in view of the Rules of Professional Conduct. The State acknowledges on appeal that the romantic relationship violated Rule 1.8, which bars sexual relations with clients, though Fenton and Counsel agreed there was no sexual intercourse. *See* RPC 1.8(j). The parties similarly centered their discussion of the welfare check before the district court in terms of Rule 1.6, as it generally bars disclosure of "information relating to representation of a client," *see* 1.6(a), and the district court concluded that Counsel's continued representation after the disclosure created a conflict of interest.[6]

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[6]While we agree with the district court's observation at the hearing that Counsel was required to disclose Fenton's conduct to the authorities under Rule 1.6, we disagree with the conclusion that Counsel's continued representation created a conflict of interest on these facts. Fenton did not dispute that Counsel acknowledged having called in the welfare check and gave Fenton the option to obtain different counsel following the arrest and Fenton agreed to continued representation. Such informed consent, though ideally in writing, remedied Counsel's potential need to withdraw from the representation. *See* RPC 1.0(e) (defining informed consent as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct"); *see also* Restatement (Third) of the Law Governing Lawyers § 66 cmt. f (Am. Law Inst. 2000) (explaining that an attorney must withdraw following a 1.6 disclosure "unless the client gives informed consent to the lawyer's continued representation notwithstanding the lawyer's adverse use or disclosure of information").

Cuyler's standard, however, is not satisfied simply because an alleged conflict of interest is contrary to the ethical rules. Rather, whether a conflict of interest satisfies *Cuyler* and whether it amounts to an ethical violation are separate inquiries. *See Beets v. Scott*, 65 F.3d 1258, 1269 (5th Cir. 1995) ("Founding constitutional doctrine on the lawyer's 'duty of loyalty' is an enterprise set in shifting sand."). Thus, even if either alleged conflict of interest here implicated Nevada's ethical rules, *Cuyler* provides relief only if the conflict of interest rises to an "actual" one. *See* 446 U.S. at 348. And a conflict of interest becomes "actual" only where it "actually affected the adequacy of his representation." *Cuyler*, 446 U.S. at 349; *see also Mickens*, 535 U.S. at 171 ("[W]e think an actual conflict of interest meant precisely a conflict *that affected counsel's performance*—as opposed to a mere theoretical division of loyalties.") (internal quotation marks omitted).

This has been characterized as a "substantial hurdle," *see Maiden v. Bunnell*, 35 F.3d 477, 481 (9th Cir. 1994), requiring the petitioner to show both (1) "some plausible alternative defense strategy or tactic [that] might have been pursued but was not" and (2) that this "alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests," *Noguera v. Davis*, 5 F.4th 1020, 1037 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 1695 (2022). Thus, a qualifying adverse effect depends on some showing of the "particular aspects of the trial" that may have been different. *See United States v. Miskinis*, 966 F.2d 1263, 1268 (9th Cir. 1992). Such an effect may arise, for example, from joint representation of co-defendants, which risks "inconsistent pleas; factually inconsistent alibis; conflicts in testimony; . . . tactical admission of evidence; . . . and impeachment of witnesses." *Harvey v. State*, 96 Nev. 850, 852, 619 P.2d

1214, 1216 (1980). This court has also discerned an adverse effect where the attorney did not disclose exonerating information due to attorney-client confidentiality concerns with a former client. *Mannon v. State*, 98 Nev. 224, 225-26, 645 P.2d 433, 433-34 (1982). In both circumstances, the underlying conflict of interest caused "an adverse effect in the *Cuyler* sense" by "significantly worsen[ing] counsel's representation of the client before the court or in negotiations with the government." *See Mett*, 65 F.3d at 1535.

On this record, we conclude that Fenton failed to show an adverse effect. Fenton merely offers conclusory statements in his appellate briefing that relief exists under *Cuyler* because the romantic relationship excuses any burden under *Strickland*'s prejudice prong. Fenton also advances this argument without much focus on the district court's finding that Counsel's calling DCFS for a welfare check largely contributed to *Cuyler's* applicability. In this way, Fenton rests on the severity of the alleged ethical issue. But *Cuyler* does not propose a balancing test. Instead, Fenton, as the petitioner below, had to independently show an adverse effect. *See State v. Cheek*, 361 P.3d 679, 692 (Utah Ct. App. 2015) (rejecting a conflict of interest based on a sexual relationship as sufficient to grant relief under *Cuyler* absent evidence that "trial counsel was required to make a choice advancing his own interests to [the defendant's] detriment"). Contrary to the district court's conclusion, Fenton did not fulfill this obligation.

At oral argument, Fenton also pointed to the "breakdown in communication" identified by the district court. But this breakdown, based on Fenton's own thoughts and hesitations in being candid with Counsel, does not compel a different result. A perceived breakdown in communication is too generalized in contrast to the specific showings of

inadequacy this court has recognized, such as failing to offer exculpatory evidence, raise a certain defense, or hire special experts. *See Mannon*, 98 Nev. at 226, 645 P.2d at 434; *see also Clark*, 108 Nev. at 327, 831 P.2d at 1376. Nor does it evince a specific detriment on par with "inconsistent pleas, factually inconsistent alibis, conflicts in testimony, . . . [or] impeachment of witnesses" that may arise from joint representation. *See Harvey*, 96 Nev. at 852, 619 P.2d at 1216.

Without more, there is no specific showing of what "particular aspects of the trial" may have been different had Counsel and Fenton maintained an ability to communicate candidly. *See Miskinis*, 966 F.2d at 1268. In fact, at the hearing on the petition, the district court expressed, "I don't know that I could specifically point to things that [Counsel] failed not to do" and that Counsel represented Fenton well. Such observations indicate that the breakdown in communication did not "significantly worsen[ ] counsel's representation of the client before the court or in negotiations with the government" as is necessary for relief under *Cuyler*. *See Mett*, 65 F.3d at 1535. The conflict thus fails to meet *Cuyler*'s adverse effect requirement. Because we conclude that Fenton failed to demonstrate an adverse effect as necessary to establish an actual conflict of interest, we likewise conclude that the district court erred in granting habeas relief.[7]

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[7]To the extent Fenton pointed to other potential adverse effects before the district court, such as the phone-call statements or the alternative defense strategy, such effects are neither included in the district court order nor raised in Fenton's answer on appeal. *See Summa Corp. v. Brooks Rent-A-Car*, 95 Nev. 779, 780, 602 P.2d 192, 193 (1979) ("This court will not comb the record to ascertain matters which should have been set forth in respondent's brief."). Moreover, even if these positions underlie Fenton's global adverse-effect argument, the district court's conclusion that Counsel represented Fenton well after hearing Counsel's testimony about the

Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

_____, J.
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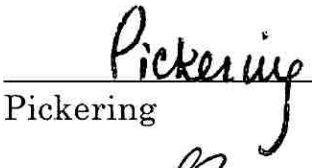

_____, J.
Pickering

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Bell

cc: Chief Judge, The Fourth Judicial District Court
Hon. William A. Maddox, Senior Judge
Attorney General/Carson City
Elko County District Attorney
Silver State Law LLC
Elko County Clerk

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defense strategy belies an argument that there was an actionable detriment as a result of the conflict of interest. *See Noguera*, 5 F.4th at 1037 (requiring that the petitioner show both that a plausible alternative defense strategy existed but was not pursued *and* that the alternative strategy was "in conflict with or not undertaken due to the attorney's other loyalties or interests").