[J-122-2011] [MO: Saylor, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 614 CAP
	:	
Appellee	:	Appeal from the Order entered on July 23, 2010 in the Court of Common Pleas, Criminal Division of Lebanon County at
v.	:	No. CP-38-CR-0000898-1993
	:	
	:	
CAROLYN ANN KING,	:	
	:	
Appellant	:	SUBMITTED: November 29, 2011

CONCURRING OPINION

MR. CHIEF JUSTICE CASTILLE **DECIDED: November 26, 2012**

I join the thorough Majority Opinion, subject to the following reservations concerning appellant's sub-claim premised upon a novel conflict of interest theory purportedly sounding under United States v. Cronic, 466 U.S. 648 (1984) and Cuyler v. Sullivan, 446 U.S. 335 (1980). Appellant's theory posits that court-appointed trial counsel labored under an actual conflict of interest due to the allegedly low-capped fee paid to counsel at the time of trial in 1994; the fact of the supposedly inadequate fee alone, appellant says, is enough to prove the actual conflict, thus sparing appellant the necessity of proving either actual deficient performance by counsel or resulting prejudice. Appellant cites no controlling case from this Court or from the U.S. Supreme Court – for there are none – that holds, or even suggests, that a cognizable Sixth Amendment conflict of interest, establishing an entitlement to Cronic/Sullivan relief, can arise solely from the level of remuneration provided to court-appointed counsel.

The Majority accurately notes that appellant's theory seems to seek recognition of yet another species of structural error (in a brief where multiple broadly-framed theories overlap), and evaluates the theory on its merits because the U.S. Supreme Court has treated actual conflicts of interest as potentially resulting in prejudice. In the course of its analysis, the Majority notes that it "credits" appellant's argument "to the degree it proposes that it is possible for an underpaid attorney's financial interest in undertaking other, more remunerative work, to impinge on his or her full devotion to the interests of the client at issue – at least in the sense that the attorney may be incentivized to spend less time and fewer resources representing the client as a result of such extrinsic financial pressures." The Majority then provides an extensive discussion of appellant's novel conflict theory in the context of governing law from the High Court, ultimately holding that the theory must fail because, *inter alia*, the Court has made clear that alleged conflicts arising from counsel's "personal or financial interests" cannot form the basis for a claim under Sullivan. See Majority Slip Op. at 14-19.

I write separately only to express my personal and perhaps greater skepticism concerning appellant's novel theory where, as here, it is offered in a collateral attack upon counsel as a basis for "automatic reversal." Brief for Appellant at 14, 21. In my recent Concurring Statement in Commonwealth v. Lopez, 51 A.3d 195, 196-201 (Pa. 2012), I addressed a different, but no less novel, claim of attorney conflict arising from counsel's personal or financial interests, the interest being a pending disciplinary investigation into trial counsel's handling of an unrelated matter. My concurrence noted:

> [A]ny question of whether appellant's trial counsel was actually conflicted must be measured by the governing law as it existed when this matter was tried. As members of the bar, lawyers are obligated to recognize and avoid actual conflicts in the first instance, just as they are obligated not to pursue baseless or frivolous claims . . . . Appellant's current counsel is essentially claiming that trial counsel was obliged, at the time of trial, to inform the court

> that he had a conflict because of the pending disciplinary investigation and to seek to withdraw from representation of appellant. But nothing in the law, either at the time of appellant's trial or now, remotely suggests that counsel was bound to view his own unrelated personal disciplinary issues, which were evidently public knowledge in the Lehigh County legal community, as creating an actual conflict with his client. In short, appellant proposes a novel and unprincipled expansion of what amounts to "actual conflict." Even if a court someday were to adopt such an odd rule, however, that new rule could not be used to retroactively condemn trial counsel's conduct decades ago.

Id. at 200-01. In this case, appellant's trial counsel did not perceive or pursue a claim that the circumstances of her appointment, and the fee paid to her, created a conflict with her client. As in Lopez, I believe that the novel conflict theory appellant poses must be deemed a non-starter on a collateral attack.

The Majority explains that this Court is not at liberty, absent further guidance from the U.S. Supreme Court, to apply Sullivan to find structural error premised upon appellant's novel theory of conflict of interest. Majority Slip Op. at 19. I agree. I would merely add that, given that questions alleging a violation of the Sixth Amendment right to counsel require us to view counsel's conduct under standards in existence when counsel acted, I view it as unlikely that the High Court would embrace this sort of novel theory of actual conflict upon collateral review, and then fault trial counsel under the new conflict rule. On the separate question of whether to credit aspects of appellant's underlying theory, given my reservations above concerning the cognizability of the claim on a collateral attack, I view the query as unnecessary to decide. Moreover, as the Majority makes clear, "there is little evidence of record to suggest that the fee cap resulted in an actual conflict," and, indeed, trial counsel denied the accusation. Majority Slip Op. at 17, n.13. The absence of any such evidence perhaps explains why appellant poses her argument in absolutist terms declaring, as if the point could not even be disputed, that "the

fee-cap created a conflict of interest" and that the cap "inevitably" affected counsel's performance in an adverse way.

Of course, there are a multitude of personal and financial circumstances which might impede any lawyer's trial performance, and in extreme cases, those circumstances may operate to render an attorney actually ineffective. See, e.g., Commonwealth v. Duffy, 394 A.2d 965, 967 & n.5 (Pa. 1978) (potential prejudice to defendant if allegation was elicited at trial that trial counsel was to receive stolen guns (fruits of the crime) as payment for representation created insurmountable conflict of interest). More prosaically, as this Court sees on its Miscellaneous docket, attorney lapses from such circumstances can extend to simple matters such as filing deadlines. But, as the Majority explains, the High Court's decisional law in the Sullivan/Sixth Amendment conflict of interest area has focused narrowly on dual representation of clients with diverging interests, a circumstance the Court has deemed "inherently suspect." Until the Court provides otherwise, I view conflict claims arising from counsel's personal circumstances differently, and as sounding under Strickland v. Washington, 466 U.S. 668 (1984), which requires a claim-specific showing of deficient performance and actual prejudice, rather than the application of the *per se* rule appellant asks us to innovate and retroactively enforce, premised upon a fee-cap and her broad assumptions and assertions about the "inevitable" effect of such a cap.

There are aspects of appellant's broad and *per se* theory of conflict with which I take particular issue, to wit, the theory assumes that the fee here was inadequate and that low fees mean counsel performed incompetently. But, whether a capped fee from decades ago is inadequate or not is a subjective matter, requiring consideration of the time, the place, the professional expectations and devotion of the attorney involved, and even the attorney's personal financial situation. In this case, it may be possible to

compare the fee to counsel's ordinary fee in other matters, but we have no basis to comment upon its objective adequacy or inadequacy for the time or the place or the task. I suspect that in many counties in Pennsylvania in 1994, assistant district attorneys and public defenders earned comparably modest hourly wages.

But, that difficulty is less important than the difficulty that the theory seeks recognition of a controlling **assumption** of actual conflict and incompetence. *Pro bono* counsel often work for no fee; are they therefore to be presumed incompetent on suspicion or insinuation that, in pursuit of remuneration from paying clients, they must invariably have sabotaged their *pro bono* clients' causes? Appellant's absolutist theory – and that is all it is – reflects a cynical and unsupportable view of the legal profession. I do not doubt that the vast majority of attorneys, regardless of financial status, consider themselves duty-bound to live up to their professional obligation when called upon for court appointment. Many lawyers consciously choose careers, in public service or elsewhere, offering relatively modest compensation, because they are drawn to the importance of the cause. This is just as applicable to the criminal defense bar. The fact that it happens is a credit to the profession as a whole. In this case, appellant's conflict of interest "theory" entails a rank speculative assumption that the fact of the fee cap, alone, created a conflict of interest because "for each hour [counsel] worked on the case, she lost money." Appellant's Brief at 19. Quite simply, this is a farfetched leap of logic.

Finally, I emphasize that my circumspection regarding appellant's *per se* Sixth Amendment conflict theory as a basis to automatically negate her conviction does not mean that I fail to recognize the importance of the issue of adequate compensation for indigent criminal defense. The fact that most appointed counsel meet the challenge does not mean that compensation levels are, or have been, appropriate or reasonable. Nor does it mean that there have not been cases where attorney compensation and

support for defense investigative services have compromised counsel's ability to mount a constitutionally adequate defense. The issue of compensation is a systemic one implicating the executive branch, which is obliged to fund indigent defense services, the courts, and the criminal defense bar. As criminal defense funding is left to individual counties in Pennsylvania, and the circumstances in individual counties vary considerably, there is no easy solution to the problem; but nobody with experience in these matters would dispute that the problem exists. For purposes of the collateral review decision here, however, and for the reasons I have stated, I simply do not believe that the Sixth Amendment, as construed by the High Court, embraces the absolutist conflict theory forwarded here.