

**FILED**  
**January 12, 2022**

EDYTHE NASH GAISER, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**STATE OF WEST VIRGINIA**  
**SUPREME COURT OF APPEALS**

**Daniel C.,**  
**Petitioner Below, Petitioner**

vs.) **No. 20-0754** (Mercer County 16-C-242-WJS)

**Donnie Ames, Superintendent,**  
**Mount Olive Correctional Complex,**  
**Respondent Below, Respondent**

**MEMORANDUM DECISION**

Petitioner Daniel C.,<sup>1</sup> by counsel Matthew Brummond, appeals the September 17, 2020, order of the Circuit Court of Mercer County denying his petition for a writ of habeas corpus. Respondent Donnie Ames, Superintendent, Mount Olive Correctional Complex, by counsel Patrick Morrissey and Benjamin F. Yancey III, filed a response in support of the circuit court's order. Petitioner filed a reply.

The Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

In 2012, the West Virginia State Police initiated an investigation upon receiving allegations that petitioner inappropriately touched his three minor daughters as well as their minor cousin. In

---

<sup>1</sup>Consistent with our long-standing practice in cases with sensitive facts, we use initials where necessary to protect the identities of those involved in this case. *See In re K.H.*, 235 W. Va. 254, 773 S.E.2d 20 (2015); *In re Jeffrey R.L.*, 190 W. Va. 24, 435 S.E.2d 162 (1993); *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990).

a statement to the state police, “petitioner admitted to inappropriately touching the children.” *State v. Daniel C.*, No. 15-0152, 2016 WL 143887, at \*1 (W. Va. Jan. 11, 2016) (memorandum decision). Thereafter, the Mercer County grand jury indicted petitioner on six counts of first-degree sexual abuse; one count of first-degree sexual assault; and five counts of sexual abuse by a parent, guardian, custodian, or person in position of trust to a child. The indictment charged that the sexual crimes occurred at various times beginning in 2006 through 2012, all with victims under twelve years old.

Petitioner did not testify at trial. A jury convicted petitioner on all counts, including the lesser included offense of first-degree sexual abuse for count nine of the indictment.<sup>2</sup> By amended order entered on March 13, 2015, the trial court sentenced petitioner to an aggregate sentence of thirty-five to 100 years of incarceration. Petitioner appealed his convictions and sentence in *Daniel C.* and raised the following issues: erroneous evidentiary rulings, insufficient evidence, erroneous admission of petitioner’s statement to the state police, excessive leading questions to the minor victims, and excessive sentence. *Id.* at \*2-5. This Court rejected petitioner’s assignments of error and affirmed petitioner’s convictions and sentence. *Id.*

In 2016, petitioner filed a petition for a writ of habeas corpus. Habeas counsel was appointed, who filed an amended habeas petition raising numerous grounds for relief.<sup>3</sup> Thereafter, the habeas court held an omnibus hearing on December 10, 2018. Petitioner presented the testimony of himself and his wife. Respondent presented the testimony of petitioner’s trial counsel. By order entered February 11, 2020, the habeas court denied the amended petition. On September 17, 2020, the habeas court reentered its order denying the amended petition for the purpose of allowing petitioner to appeal the denial of habeas relief.

Petitioner now appeals the habeas court’s September 17, 2020, order. This Court reviews a circuit court’s order denying a habeas petition under the following standard:

“In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions

---

<sup>2</sup>Count nine of the indictment charged petitioner with first-degree sexual assault.

<sup>3</sup>The eighteen grounds for relief set forth in the amended petition were (1) denial of a speedy trial; (2) mental competency at the time of the crimes; (3) mental competency at time of trial; (4) denial of counsel; (5) incomplete criminal appeal; (6) coerced confession; (7) pre-indictment delay; (8) refusal to subpoena witnesses; (9) mental incompetence at the time of the crimes due to intoxication; (10) constitutional errors in evidentiary rulings; (11) prejudicial statements by prosecutor; (12) insufficient evidence; (13) severer sentence than expected; (14) excessive sentence; (15) lack of an impartial jury; (16) cruel and unusual punishment during incarceration at the Southern Regional Jail; (17) ineffective assistance of trial counsel; and (18) cumulative error. Petitioner’s ineffective assistance of trial counsel claim included ten subparts, including an alleged conflict of interest.

of law are subject to a *de novo* review.” Syl. Pt. 1, *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006).

Syl. Pt. 1, *Anstey v. Ballard*, 237 W. Va. 411, 787 S.E.2d 864 (2016).

On appeal, petitioner raises a single issue: that his trial counsel had an actual conflict of interest that adversely affected the adequacy of representation. Due to the nature of petitioner’s claim, he further argues that the test set forth in *Culyer v. Sullivan*, 446 U.S. 335 (1980)—instead of the *Strickland/Miller* test that generally applies to claims of ineffective assistance of counsel—governs this case. Respondent counters that the circuit court properly rejected petitioner’s ineffective assistance claim pursuant to the *Strickland/Miller* test and properly denied the amended habeas petition. We agree with respondent.

This Court first adopted the *Strickland/Miller* test in Syllabus Point 5 of *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995):

In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-prong test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel’s performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.

A different test applies when trial counsel had an actual conflict of interest that adversely affected the adequacy of representation. In this regard,

[t]he *Strickland* Court recognized that a claim of ineffective assistance of counsel arising from counsel’s conflict of interest presents a special case subject to the standard articulated by [*Sullivan*]. . . . To establish ineffective assistance of counsel on conflict of interest grounds, a petitioner must establish that (1) his attorney labored under “an actual conflict of interest” that (2) “adversely affected his lawyer’s performance.” See *Sullivan*, 446 U.S. at 348. After a petitioner satisfies this two-part test, prejudice is presumed. *Sullivan*, 446 U.S. at 349[-50]. . . .

*Mickens v. Taylor*, 240 F.3d 348, 355 (4th Cir. 2001), *aff’d*, 535 U.S. 162 (2002).

Here, in petitioner’s criminal case, his former wife Daphne C. testified for the State, and his former father-in-law, Daphne C.’s father Paul M., testified on petitioner’s behalf. Prior to petitioner’s criminal case, his trial counsel represented Daphne C. in an unrelated criminal case in

2008 that was dismissed<sup>4</sup> and represented Paul M. in a social security matter.<sup>5</sup> During petitioner's criminal case, his trial counsel filed a motion to obtain records from the time that Daphne C. sought counseling in 2006. Although the motion was filed, trial counsel failed to pursue the matter and the counseling records were not obtained by petitioner in his criminal case.

Daphne C.'s counseling records were obtained as a part of the instant habeas proceeding. According to the records, on September 7, 2006, Daphne C. informed a counselor that

when I was five, my father [Paul M.] was an alcoholic real bad, him asking me to come in and lay down next to him without my clothes on. I just said, "No, I'm watching TV" and that was it. I know that I knew it was bad, and I knew what it meant.

The person I had the intake with said that my mind is protecting me. She said I must know something was wrong if I am so protective of my kids. We live with my father and I don't allow them to spend any time alone with him. The kids sleep in the same room as me.

At the omnibus hearing, trial counsel's recollections of his prior representations of Daphne C. and Paul M. were poor. Trial counsel failed to recollect his representation of Daphne C. until he was shown the relevant court documents during his cross-examination. With regard to Paul M., trial counsel misidentified him as Daphne C.'s former husband rather than her father until being corrected on cross-examination. Trial counsel further testified that he had no knowledge of Daphne C.'s allegation against Paul M. from her childhood until petitioner's habeas proceeding. Trial counsel stated that Paul M. "never brought [the allegation] up in my interview of him" and that Daphne C. "never testified about [the allegation]" during trial. Finally, trial counsel was asked, "to the best your knowledge, did [Daphne C.] ever disclose [the allegation] to the police or the State or anyone else?" Trial counsel answered, "Not that I know of."

As petitioner acknowledges, the habeas court made a finding that took his claim outside the ambit of the *Sullivan* test. The habeas court found that the conflict trial counsel had with Daphne C. and Paul M. being witnesses at petitioner's trial was "potential" rather than actual. As was specifically held in *Sullivan*, "the possibility of conflict is insufficient to impugn a criminal conviction." 446 U.S. at 350. In *Sullivan*, two attorneys jointly represented the petitioner in that case, who was convicted of two murders, and his codefendants who were acquitted at separate trials. *Id.* at 338. In reversing the grant of habeas relief to the petitioner in *Sullivan*, the Supreme Court held that there must be "an actual conflict of interest [that] adversely affected his lawyer's performance." *Id.*

---

<sup>4</sup>In Daphne C.'s dismissed criminal case, the charge was for fraudulently obtaining property.

<sup>5</sup>The habeas court found that petitioner's trial counsel's prior representation of Paul M. occurred "some years prior to" petitioner's criminal case.

Here, we find that the record does not support petitioner's contention that trial counsel had an actual conflict of interest that adversely affected his performance. In petitioner's case, where there were successive representations, "the concern [is] that privileged information obtained from the former client[s] might be relevant to cross-examination and thereby affect the attorney's advocacy." *State ex rel. Youngblood v. Sanders*, 212 W. Va. 885, 889, 575 S.E.2d 864, 868 (2002) (internal quotations and citations omitted) (footnote omitted). Accordingly, we find that trial counsel would have to have known of Daphne C.'s allegation against Paul M. from her childhood for an actual conflict to exist under *Sullivan*. If trial counsel knew of the allegation and decided to protect Daphne C. and/or Paul M. from its disclosure, trial counsel would not have filed a motion to obtain Daphne C.'s counseling records. A motion to obtain the records was filed by trial counsel. Trial counsel's testimony at the omnibus hearing further establishes that counsel had no knowledge of the allegation until the instant habeas proceeding.

Based upon our review of trial counsel's testimony and the record as a whole, we find that the habeas court properly found that trial counsel did not have an actual conflict of interest that adversely affected his performance. Accordingly, we further find that the habeas court properly utilized the *Strickland/Miller* test that requires not only deficient performance, but also a reasonable probability that, but for trial counsel's deficient performance, the result of petitioner's criminal case would have been different. *Miller*, 194 W. Va. at 6, 459 S.E.2d at 117, syl. pt. 5. In addition, a "[f]ailure to meet the burden of proof imposed by either part of the *Strickland/Miller* test is fatal to a habeas petitioner's claim." *State ex rel. Vernatter v. Warden, W. Va. Penitentiary*, 207 W. Va. 11, 17, 528 S.E.2d 207, 213 (1999) (citing *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 321, 465 S.E.2d 416, 423 (1995)).

With regard to deficient performance, the habeas court found that trial counsel failed to inform petitioner of his prior representations of Daphne C. and Paul M. and failed to obtain a ruling on the motion for Daphne C.'s counseling records. However, the habeas court determined that having the counseling records would not have changed the result of petitioner's criminal case as the crucial testimony was not provided by Daphne C., but by the four minor victims of petitioner's sexual abuse. Petitioner argues that the credibility of the minor victims would have been undermined if Daphne C.'s counseling records were used at trial to offer Paul M. as an alternative perpetrator of the sexual abuse. We find petitioner's argument to be without merit. Daphne C.'s allegation against Paul M. did not involve any of the four minor victims in petitioner's case. Rather, in a counseling session, Daphne C. recalled that Paul M. behaved inappropriately toward her when she was five years old—approximately thirty years prior to the first allegations against petitioner set forth in the indictment.<sup>6</sup> Furthermore, in petitioner's criminal case, the jury had before it not only the testimony of the four minor victims, but also petitioner's statement to the state police, in which he "admitted to inappropriately touching the children." *Daniel C.*, 2016 WL 143887, at \*1. The admission of petitioner's January 3, 2013, statement into evidence was affirmed by this Court in *Daniel C. Id.* at \*4. Therefore, we find that the habeas court properly rejected petitioner's ineffective assistance claim as having Daphne C.'s counseling records would not have changed the result of petitioner's criminal case. Accordingly, we conclude that the habeas court did not

---

<sup>6</sup>The first allegations against petitioner set forth in the indictment were from 2006, and, based upon Daphne C.'s counseling records, she was thirty-five years old in September of 2006.

abuse its discretion in denying the amended petition.

For the foregoing reasons, we affirm the circuit court's September 17, 2020, order denying petitioner's petition for a writ of habeas corpus.

Affirmed.

**ISSUED:** January 12, 2022

**CONCURRED IN BY:**

Chief Justice John A. Hutchison  
Justice Elizabeth D. Walker  
Justice Tim Armstead  
Justice Evan H. Jenkins  
Justice William R. Wooton