In The

Supreme Court of Virginia

RECORD NO. 150303

JOSE CRISTINO VELASQUEZ-LOPEZ,

Appellant,

v.

HAROLD CLARKE,

Appellee.

BRIEF OF APPELLANT

John C. Kiyonaga (VSB No. 30982)
ATTORNEY AT LAW
108 North Alfred Street
Alexandria, Virginia 22314
(703) 739-0009 (Telephone)
(703) 836-0445 (Facsimile)
john@johnckiyonaga.com

Counsel for Appellant

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

SCV: Submitted on 07-06-2015 14:40:00 EDT for filing on 07-06-2015

TABLE OF CONTENTS

Page

I. TABLE OF AUTHORITIES ii

II. NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW 1

III. ASSIGNMENT OF ERROR 2

IV. STATEMENT OF THE FACTS 2

V. ARGUMENT 7

AOE: THE CIRCUIT COURT ERRED IN HOLDING THAT APPELLANT'S TRIAL COUNSEL DID NOT PROVIDE INEFFECTIVE ASSISTANCE OF COUNSEL WHERE SHE FAILED TO PERFECT HIS APPEAL 7

Standard of Review for AOE 7

Argument for AOE 8

VI. CONCLUSION AND STATEMENT OF RELIEF SOUGHT 12

VII. CERTIFICATE PURSUANT TO RULE 5:26(h) 13

I. TABLE OF AUTHORITIES

Page(s)

CASES

Jenkins v. Dir. Of Virginia Ctr. For Behavioral Rehab.,
271 Va. 4 (2006) 8

Lewis v. Warden of Fluvanna Corr. Ctr.,
274 Va. 93 (2007) 7

Lovitt v. Warden,
266 Va. 216 (2003) 8

Miles v. Sheriff,
266 Va. 110 (2003) 9

Roe v. Flores-Ortega,
528 U.S. 470 (2000) 9, 10, 12

Strickland v. Washington,
466 U.S. 668 (1984) 8, 9

Yarbough v. Warden of Sussex I State Prison,
269 Va. 184 (2005) 8

OTHER AUTHORITY

Standard 9.2, Virginia Standards of Practice for
Indigent Defense Counsel 9

II. NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

This appeal of the Circuit Court's order denying Mr. Velasquez-Lopez's Amended Petition for Writ of Habeas Corpus in *Jose Cristino Velasquez-Lopez v. Harold W. Clarke*, CL12000791-00, concerns the failure of Mr. Velasquez-Lopez's appointed counsel to perfect his appeal despite a statutory obligation to do so.

On October 19, 2010, Mr. Velasquez-Lopez was indicted on 33 counts of taking indecent liberties while maintaining a custodial/supervisory relationship. He pled guilty to all 33 counts, and the court sentenced him to 156 years of incarceration with all but 18 suspended, followed by 40 years of Uniform Good Behavior and three years of Supervised Probation.

On September 12, 2012, Mr. Velasquez-Lopez, by counsel, filed a Petition for Writ of Habeas Corpus. On September 2, 2014, the Circuit Court held an evidentiary hearing on the petition. At the hearing, Mr. Velasquez-Lopez, Catherine B. Lea, (his trial attorney), and Louis Rivera, (a Spanish interpreter appointed by the trial court), testified. At the close of the hearing, the court took the matter under advisement and, on October 4, 2014, issued an opinion denying the petition and directing respondent to prepare an order reflecting the court's opinion. Pertinent here, the court opined that, as Mr. Velasquez-Lopez had conveyed to his attorney that he

did not want her to file an appeal, she had not been ineffective in failing to perfect his appeal. The Circuit Court's final order was signed, seen and objected to on October 22, 2014.

On February 20, 2015, Mr. Velasquez-Lopez filed a Petition for Appeal with this Court asserting two assignments of error: that his plea was not knowing and voluntary and that his appointed attorney was ineffective for failing to perfect an appeal. This Court granted an appeal on the second assignment, and this Appeal follows.

III. ASSIGNMENT OF ERROR

THE CIRCUIT COURT ERRED IN HOLDING THAT PETITIONER'S TRIAL COUNSEL DID NOT PROVIDE INEFFECTIVE ASSISTANCE OF COUNSEL WHERE SHE FAILED TO PERFECT HIS APPEAL.

(Objection to error preserved at Circuit Court Final Order) (App. at 264)

IV. STATEMENT OF THE FACTS

Mr. Velasquez-Lopez, a native of El Salvador with a single year of schooling, hearing transcript (hereinafter "Hr'g Tr.") at 64, Appendix (hereinafter "App") at 178, confessed to his priest that he had molested his step-daughter, trial transcript (hereinafter "Trial Tr.") at 124, 146-47, App at 85, 87-88. After the priest indicated that he was required to report Mr. Velasquez-Lopez's confession to the authorities, Mr. Velasquez-Lopez reported himself to the Department of Social Services and confessed to the

police. Trial Tr. at 150-51, App at 89-90. An Indictment followed his confession, and the Circuit Court appointed Catherine B. Lea, Esq. as his attorney.

When Mr. Velasquez-Lopez's inability to understand the proceedings and difficulties with English became apparent, the court appointed Dr. Fracher to evaluate his competency to stand trial. The report prepared by Dr. Fracher concluded the Mr. Velasquez-Lopez was incompetent to stand trial based on a factual deficiency. *See* Dr. Facher Competency Evaluation, App at 270. After the Commonwealth's evaluator, Dr. Stesjkal, prepared a contrary evaluation, the court held a competency hearing on May 13, 2010. Trial Tr. at 57, App at 22. The court found Mr. Velasquez-Lopez competent, but provided time for Ms. Lea and an interpreter to meet with Mr. Velasquez-Lopez to alleviate his factual deficits. Trial Tr. at 99-100, App at 24-25. Even after these meetings, Ms. Lea testified that it was fair to say that a proper appreciation of process would be a challenge for Mr. Velasquez-Lopez. Hr'g Tr. at 130, App at 231.

Throughout the proceedings, Mr. Velasquez-Lopez's inability to speak English was consistently acknowledged by the court. Trial Tr. at 58, 106, 115 & 116, App at 23, 27, 29 & 30. The court also acknowledged the

inability of Ms. Lea to confer with Mr. Velasquez-Lopez without the assistance of a Spanish/English interpreter. Trial Tr. at 100, App at 25.

On June 9, 2010, Mr. Velasquez-Lopez executed a written Plea of Guilty. Ms. Lea filled out the form as she explained it to Mr. Velasquez-Lopez with the help of the interpreter. Hr'g Tr. at 34 & 47, App at 176A & 176B. On the following day, Mr. Velasquez-Lopez and his counsel executed a Plea Agreement, and the Circuit Court accepted Mr. Velasquez-Lopez's plea of guilt for all 33 counts. Ultimately, the court sentenced Mr. Velasquez-Lopez to 156 years of incarceration with all but 18 suspended, followed by 40 years of Uniform Good Behavior and three years of Supervised Probation.

On October 4th, Mr. Velasquez-Lopez wrote Ms. Lea from jail as follows:

> The reason for this letter is to tell you that I do not feel satisfied with your work. My brothers want to do something better for me but I would like to ask you if you could reopen the case. They want to appeal my case but we need you to open the case so that another attorney can do something for me. I called you on Sunday, October 3rd so that you could come and see me and on October 4th but you have not come. You know I am not okay with you work. One, I expected my wife would testify in front of the Judge and that did not happen. Well I hope that you will come see me soon and I will explain whats to follow.

App at 252.

Ms. Lea testified that she visited Mr. Velasquez-Lopez at jail on October 6 and he told her not to file an appeal. Hr'g Tr. at 132, App at 233. There is no indication in the transcript that an interpreter was present for this meeting. *See generally* Hr'g Tr. at 96, App at 197. The record contains no indication Ms. Lea generated any correspondence to her client or to the Circuit Court memorializing this alleged instruction. Nor, it is worth noting, did Mr. Velasquez-Lopez ever commit this alleged instruction to writing. This notwithstanding the record contains no fewer than six written communications from him to the Circuit Court and to his counsel. App at 38, 41, 45, 73, and at 252, 254, respectively. The next day, Mr. Velasquez-Lopez's brother called Ms. Lea and told her to file the appeal:

> [Attorney for Mr. Velasquez-Lopez]: And his brother told you that Jose Cristino, the defendant, wanted you to note the appeal, correct?
>
> A: No.
>
> Q: What did he say?
>
> A: He told me that they had an attorney but would I file the appeal.

Hr'g Tr. at 130, App at 231.

In response to her conversation with Mr. Velasquez-Lopez on October 6, Ms. Lea noted Mr. Velasquez-Lopez's appeal on October 7, 2010.

The next day, Mr. Velasquez-Lopez sent Ms. Lea another letter, writing as follows:

> I am writing you to let you know that I am giving you authorization to give my new lawyer any paperwork that he requests. I thank you for your time and concern on the matter.

Hr'g Tr. at 132, App at 233. No attorney ever contacted Ms. Lea, Hr'g Tr. at 133, App at 234, and Ms. Lea failed to file a petition for appeal as required by the Virginia Court of Appeals. Accordingly, on January 28, 2011, Mr. Velasquez-Lopez's appeal was dismissed.

Ms. Lea testified that she was aware that, under the statute, she was appointed through appeal or until relieved. Hr'g Tr. at 131, App at 232. And she testified that she was never given leave to withdraw. Hr'g Tr. at 133, App at 234. Ms. Lea also testified that she was aware that Mr. Velasquez-Lopez had difficultly comprehending the legal process. Hr'g Tr. at 130, App at 231. Indeed, even at the most recent hearing, it is clear that the distinction between merely noticing an appeal and perfecting an appeal is lost on Mr. Velasquez-Lopez:

> [COMMONWEALTH]: Did you when the case was – when you had come to court and been convicted and then sentenced, from that point on did you at any point tell Ms. Lea that you wanted her to file an appeal for you?
>
> A: I don't understand at what time.

> Q: After you had been sentenced in the period where you still could have filed an appeal.
>
> A: Yes, I was at the jail. I asked that she re-open my case.
>
> Q: But you specifically say you wanted her to appeal the case?
>
> A: Yes, to reopen the case. Reopen my case.

Hr'g Tr. at 60, App at 177.

On September 12, 2012, Mr. Velasquez-Lopez filed a Habeas Petition, which the Circuit Court denied after holding an evidentiary hearing. Specifically, the Circuit Court found that Mr. Velasquez-Lopez had conveyed to his attorney that he did not want her to file an appeal, and thus, his attorney had not provided deficient performance. Opinion at 5. App at 259. The Final Order was signed, seen and objected to on October 22, 2014.

V. ARGUMENT

AOE: THE CIRCUIT COURT ERRED IN HOLDING THAT APPELLANT'S TRIAL COUNSEL DID NOT PROVIDE INEFFECTIVE ASSISTANCE OF COUNSEL WHERE SHE FAILED TO PERFECT HIS APPEAL.

Standard of Review for AOE

The issue of whether counsel provided ineffective assistance at trial presents a mixed question of law and fact. Lewis v. Warden of Fluvanna Corr. Ctr., 274 Va. 93, 112 (2007). This Court defers to the lower court's

factual findings "unless they are plainly wrong or without evidentiary support," but reviews any consequent legal conclusions *de novo*. Yarbrough v. Warden of Sussex I State Prison, 269 Va. 184, 195 (2005) (citing Lovitt v. Warden, 266 Va. 216, 229 (2003)).

Argument for AOE

In his habeas petition, Mr. Velasquez-Lopez argued that his attorney Ms. Lea provided constitutionally ineffective assistance by failing to perfect his appeal. The Circuit Court denied the claim, holding that Ms. Lea did not provide deficient performance because Mr. Velasquez-Lopez "had clearly conveyed his wishes that he did not want her to file an appeal for him." Opinion at 5, App at 259. As elaborated below, this finding was plainly wrong.

Under Strickland, a petitioner demonstrates his attorney was constitutionally ineffective by showing (a) that the attorney's performance fell below an objectively reasonable standard, and (b) that prejudice flowed from this deviation. Strickland v. Washington, 466 U.S. 668, 687-88 & 694 (1984). These requirements are commonly referred to as the performance and prejudice prongs of Strickland, and a petitioner must ordinarily satisfy both to prevail on his claim. Jenkins v. Dir. of Virginia Ctr. for Behavioral Rehab., 271 Va. 4, 17 (2006). Prejudice, however, may be presumed

where – as here – counsel's deficient performance deprived a defendant of an appeal. Id. (favorably citing Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000)).[1] As such, only an examination of the performance prong of Strickland is necessary for this appeal.

For the purpose of Strickland's performance prong, the Virginia Standards of Practice for Indigent Defense Counsel set forth an objective standard of reasonableness by which to judge Ms. Lea's performance:

> If the client advises counsel that he or she wishes to note an appeal, counsel shall take all necessary steps to perfect such appeal in a timely fashion pursuant to the Rules of the Supreme Court of Virginia. If trial counsel is relieved in favor of other appellate counsel, trial counsel shall cooperate in providing information to appellate counsel concerning the proceedings in the trial court.

Standard 9.2, Virginia Standards of Practice for Indigent Defense Counsel. The circumstances of this case clearly fall within the statute's contemplation. The Circuit Court appointed Ms. Lea as Mr. Velasquez-Lopez's attorney. Mr. Velasquez-Lopez asked Ms. Lea to reopen his case and note his appeal. Hr'g Tr. at 130-33, App at 231-234. (Moreover, on the very day Ms. Lea noted Mr. Velasquez-Lopez's appeal, his brother told Ms. Lea to file an appeal. Hr'g Tr. at 130, App at 231.) And

[1] Indeed, prejudice is presumed even though "the range of potential grounds for appeal following a guilty plea is limited in Virginia." Miles v. Sheriff, 266 Va. 110, 116-17 (2003).

even though she was never relieved and aware of her obligations under the statute, Hr'g Tr. at 131, App at 232, Ms. Lea did not perfect Mr. Velasquez-Lopez's appeal. Hr'g Tr. at 133, App at 234.

Nonetheless, despite the clear statutory mandate and Ms. Lea's awareness of it, the Circuit Court found her failure to perfect the appeal reasonable because Mr. Velasquez-Lopez "had clearly conveyed his wishes that he did not want her to file an appeal for him." Opinion at 5, App at 259. In reaching its conclusion, the Circuit Court relied on Roe v. Flores-Ortega, wherein the Supreme Court reaffirmed that an attorney cannot be said to be constitutionally deficient for failing to file an appeal where a defendant "explicitly tells [him] not to file an appeal." Flores-Ortega, 528 U.S. at 477. In its reliance, however, the Circuit Court forgot the principal instruction of Flores-Ortega: that a court is to "judge the reasonableness of counsel's challenged conduct on the facts of the *particular* case." Id. (emphasis added). Context matters, in other words.

Here, examining the particular facts – the context – of the case, it is manifest that Mr. Velasquez-Lopez's instructions to his counsel were anything but clear or explicit and that Ms. Lea's failure to follow the statute's instruction was not a reasonable response to them. It is patently relevant to the clarity of Mr. Velasquez-Lopez's instructions that he required

the services of an interpreter throughout the trial and an interpreter was not present during Ms. Lea's discussion with Mr. Velasquez-Lopez. *See*, *generally*, Trial Tr. at 58, 106, 115, 116, App at 23, 27, 29, 30 and Hr'g Tr. at 96, App at 197. Likewise relevant is the fact that Ms. Lea had requested a competency evaluation based on Mr. Velasquez-Lopez's comprehension of the trial proceedings, Trial Tr. at 40, App at 20B, and that that evaluation initially found Mr. Velasquez-Lopez incompetent for lack of basic comprehension, *see* Dr. Facher Competency Evaluation. App at 270. Ms. Lea was aware that Mr. Velasquez-Lopez had an imperfect understanding of the legal process, Hr'g Tr. at 130, App at 231, when he indicated his intent to appeal.

In light of these facts, clearly established and uncontested, the Circuit Court erred by relying on the legal distinction between filing an appeal and perfecting an appeal when examining Mr. Velasquez-Lopez's instructions to Ms. Lea. Reliance on this distinction is particularly inappropriate when the client in question, even years later, cannot recognize a difference between reopening a case and filing an appeal:

A: Yes, I was at the jail. I asked that she re-open my case.

Q: But you specifically say you wanted her to appeal the case?

A: Yes, to reopen the case. Reopen my case.

Hr'g Tr. at 60, App at 177.

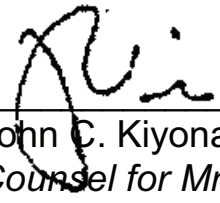
In sum, looking to the facts of the specific case, Flores-Ortega, 528 U.S. at 477, compels a conclusion at odds with the Circuit Court's: there was nothing "clear" about Mr. Velasquez-Lopez's directions to Ms. Lea. And where such ambiguities exist, they should not be interpreted in favor of the attorney. Such indulgence is particularly inappropriate where, as here, a statute expressly describes the appropriate action an attorney is take.

The Circuit Court erred when it found that the failure of Ms. Lea to perfect an appeal despite Mr. Velasquez-Lopez's – admittedly inartful – request to do so, was not a deficient performance.

VI. CONCLUSION AND STATEMENT OF RELIEF SOUGHT

Accordingly, for the reasons elaborated above Mr. Velasquez-Lopez asks this Court to award him a belated appeal.

Respectfully submitted,



John C. Kiyonaga
Counsel for Mr. Velasquez-Lopez
Va. Bar No. 30982
108 N. Alfred St.
Alexandria, VA 22314
T: (703) 739-0009
F: (703) 836-0445
john@johnckiyonaga.com

VII. CERTIFICATE PURSUANT TO RULE 5:26(h)

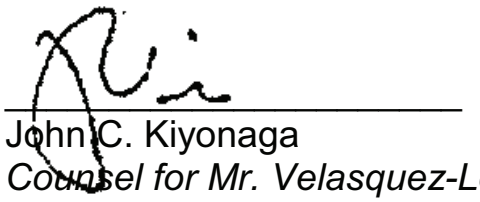
Pursuant to Sup. Ct. Rule 5:26(h), I hereby certify as that there has been compliance with this rule as follows.

(1) Electronic copies of the Brief of Appellant and Appendix have been filed, via VACES, and ten copies of this Brief of Appellant and three copies of the Appendix have been hand-delivered to the Clerk of this Court on this 6th day of July, 2015;

(2) A electronic copy of this Brief of Appellant was served, via email, and an electronic copy on CD of the Brief of Appellant and Appendix has been served, via UPS Ground Transportation, to the counsel for Appellee on this 6th day of July, 2015, to the following address:

Robert H. Anderson, III
OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, VA 23219
randerson@oag.state.va.us

(3) Exclusive of the Cover, Table of Contents, Table of Authorities and Certificate, this Brief contains 2,570 words, does not exceed 50 pages and is produced in Arial size 14 font.



John C. Kiyonaga
Counsel for Mr. Velasquez-Lopez