IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 93-1583
Summary Calendar
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JAMES HERBERT GOTTLICH,

Petitioner-Appellant,

versus

JAMES A. COLLINS, ET AL.,

Respondents-Appellees.

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Appeal from the United States District Court for the
Northern District of Texas
(4:92-CV-607-Y)
_____

(January 18, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM[*]

I

On November 29, 1990, a Texas jury found Gottlich guilty of
indecency with a child and sentenced him to life imprisonment.
Gottlich moved for a new trial, alleging that he had a substantial
conflict of interest with his trial counsel, that counsel should
have withdrawn prior to jury selection, and that counsel's failure

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to do so denied Gottlich his Sixth Amendment right to effective assistance of counsel.

The alleged conflict arose from a November 15, 1989 letter Gottlich wrote to the Tarrant County District Attorney accusing trial counsel, Jack Beech, of coercing him into participating in an insurance fraud scheme, which also involved Beech's son and his son's girlfriend. Gottlich offered to testify against Beech in exchange for probation in his pending aggravated sexual assault case. Beech learned about the letter from the prosecutor. Following a hearing at which Gottlich and Beech testified, the state trial court denied the motion without explanation.

On direct appeal, Gottlich raised the ineffective-assistance claim premised on the alleged conflict of interest. The appeals court refused to address the claim on the merits, stating that "any motion made after trial has ended, complaining of a conflict of interest between a client and his attorney, is untimely. We find that because Gottlich did not raise the issue of a conflict of interest until his motion for new trial, he waived this point." Gottlich v. State, 822 S.W.2d 734, 737 (Tex. Ct. App. 1992, pet. ref'd) (citations omitted). The court also observed that even if Gottlich had timely objected, it would have found the claim meritless because Gottlich failed to prove the existence of an actual conflict and acquiesced in the representation.

After moving for state postconviction relief, Gottlich filed his § 2254 petition alleging that he was denied effective assistance of counsel and due process as a result of the conflict of interest. The magistrate judge recommended dismissing the petition without prejudice because Gottlich's state habeas corpus proceeding was pending, or alternatively, denying the petition on the ground that the claim was procedurally barred from federal habeas review. Over Gottlich's objections, the district court adopted the magistrate judge's recommendation to deny the petition on the ground that the claim was procedurally barred.

On appeal, Gottlich reiterates his allegations concerning the conflict of interest and argues that to the extent Texas law required him to raise the conflict issue prior to trial or waive it, it is inconsistent with Supreme Court precedent.

### III

The district court correctly concluded that Gottlich's claim is procedurally barred from federal habeas review. Absent a showing of cause and prejudice, a federal habeas court may not reach the merits of procedurally defaulted claims "in which the petitioner failed to follow applicable state procedural rules in raising the claims." Sawyer v. Whitley, ___ U.S. ___, 112 S.Ct. 2514, 2518, 120 L. Ed. 2d 269 (1992). Gottlich first raised his conflict of interest claim in his motion for a new trial, and the trial court denied it without explanation. He then presented the

claim to the Texas Court of Appeals on direct appeal. That court held that Gottlich had waived the claim by failing to raise it prior to trial. Gottlich, 822 S.W.2d at 737. Thus, the last reasoned opinion addressing the claim explicitly rejected it on the ground of procedural default. See Ylst v. Nunnemaker, ___ U.S. ___, 111 S.Ct. 2590, 2594, 115 L. Ed. 2d 706 (1991). The appeals court also noted, in the alternative, that Gottlich's claim lacked merit, but the court's discussion of the merits does not remove the bar. "[W]here a state court finds that a federal claim is procedurally barred, but goes on to reach the merits of that claim in the alternative, the state court's reliance on the procedural default still constitutes an independent and adequate state ground which bars federal habeas review." Sawyers v. Collins, 986 F.2d 1493, 1499 (5th Cir.), cert. denied, 113 S.Ct. 2405 (1993). Gottlich has not attempted to show cause for his default.

Gottlich argues that requiring defendants to raise conflict of interest issues before trial is inconsistent with Wood v. Georgia, 450 U.S. 261, 101 S.Ct. 2097, 67 L. Ed. 2d 220 (1981). This argument lacks merit. Wood was a direct criminal appeal, not a habeas proceeding. The case did not involve a procedural default resulting from the defendants' failure to present properly a claim to the state courts. Gottlich correctly points out that the Supreme Court raised, sua sponte, the issue of a possible violation of the defendants' rights to due process resulting from a conflict of interest with their attorney. The potential conflict arose

because the attorney was hired by the defendants' employer, and the Court believed that the employer, a merchant in the field of "adult entertainment," might be using the defendants to create a test case.  Id. at 266-67.  The Court determined it could consider the issue because it was apparent from the record and because it had been raised in the trial court.  Id. at 264-65 & n.5.  The case has no application here and consequently affords Gottlich no relief.

<div align="center">IV</div>

For the reasons stated in this opinion, the judgment of the district court is

<div align="right">A F F I R M E D.</div>