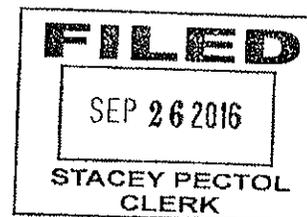


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BEFORE THE ARKANSAS SUPREME COURT
COMMITTEE ON PROFESSIONAL CONDUCT
PANEL B

IN RE: HERBERT C. SOUTHERN
Arkansas Bar ID #99105
CPC Docket No. 2016-094



FINDINGS AND ORDER

The formal charges of misconduct against Herbert C. Southern upon which this Findings and Order is based arose from a grievance filed by Marcio De Oliveira.

Mr. Southern represented Mr. De Oliveira in U.S. District Court, Western District of Arkansas (Fayetteville), 5:09-cr-50035.

On August 28, 2009, Mr. De Oliveira and Mr. Southern signed off on a plea agreement with the Assistant United States Attorney in which Mr. De Oliveira agreed to enter a guilty plea to two counts. Also on August 28, 2009, De Oliveira and Southern appeared before Judge Hendren on the change of plea. In the course of this proceeding, Judge Hendren asked De Oliveira if he knew the foreign nationals he employed were illegal aliens. De Oliveira answered "no." Southern then stated "Well, you did know that you didn't have verification that they were legal..." De Oliveira answered "yes." Southern then asked "So it's reasonable to say that you did know, or should have known, that they were illegals; is that correct?" De Oliveira answered "That is correct." The exchange continued, and Judge Hendren asked Southern "Do you concede, Mr. Southern, that he admits on the record he knew they were illegal aliens?" Southern replied "Yes, Your Honor, I do." Judge Hendren accepted the plea, and the matter was set for sentencing.

On January 27, 2010, De Oliveira, through new counsel, filed a Motion to Withdraw Guilty Plea. The motion claimed the "plea agreement was made under duress or otherwise

coerced through the fear instilled in him by his counsel...” Additionally the motion stated “that during the discussion with the Court [De Oliveira] wanted to state to the Court that he was not guilty but, according to defendant, his counsel advised him to stick with the plea.” Also on January 27, 2010, Southern filed a Motion to Withdraw as Counsel of Record which was granted.

On February 1, 2010, De Oliveira appeared with new counsel and received a sentence of fifty-one (51) months imprisonment. On February 5, 2010, De Oliveira filed Notice of Appeal. On November 10, 2010, the Eighth Circuit Court of Appeals issued a mandate affirming in part, reversing in part, and remanding for resentencing. De Oliveira received a reduced sentence of 33 months in prison.

On March 1, 2012, De Oliveira filed a Motion under 28 U.S.C. §2255 to Vacate, Set Aside, or Correct a Sentence by a Person in Federal Custody. De Oliveira alleged that Southern “failed to meaningfully investigate the case, thus precluding his realization that defendant had sub-contracted the alien status background checks of the employees to a third-party provider who cleared the employees. As to the deportation consequences, counsel failed to properly advise defendant that he would face deportation if he pleaded guilty. The plea was accordingly not rendered knowingly, intelligent, and voluntary.” On March 30, 2012, the United States filed a Response to Defendant’s Motion to Vacate. Also on March 30, 2012, De Oliveira filed an Emergency Motion to Compel Herbert Southern to Provide Case File. De Oliveira mailed Southern a letter on March 5, 2012, requesting his case file because of his ongoing motions with a time-sensitive nature. When De Oliveira did not hear back from Southern, he filed the motion. On April 3, 2012, the Magistrate Judge granted De Oliveira’s Emergency Motion to Compel

Herbert Southern to Provide Case File and ordered that a Southern deliver De Oliveira's case file to him by April 9, 2012.

On September 3, 4, and 6, 2013, an evidentiary hearing took place. Southern testified that De Oliveira did not admit to knowing the individuals were illegal. Southern admitted that his question ("So it's reasonable to say that you did know, or should have known, that they were illegals. Is that correct[?]") to De Oliveira at the plea hearing was "a misstatement of the knowledge element[.]"

From the September hearing, Magistrate Judge entered a Report and Recommendation which recommends granting De Oliveira's §2255 Motion. The Magistrate Judge stated that "Southern's representation fell below an objective standard of reasonableness" and De Oliveira's "claim that Mr. Southern provided ineffective assistance of counsel in misadvising him as to the knowledge element of the offense is a meritorious claim and that [De Oliveira] is entitled to relief on this claim." The Judge adopted the Magistrate Judge's Report and Recommendation, granted De Oliveira's Motion to Vacate, and vacated De Oliveira's guilty plea and sentence.

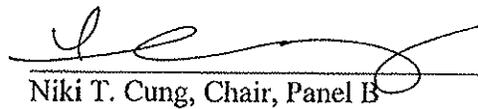
Upon consideration of the formal complaint and attached exhibit materials, the response to it, and other matters before it, and the Arkansas Rules of Professional Conduct, Panel B of the Arkansas Supreme Court Committee on Professional Conduct finds:

1. Herbert Southern's conduct violated Arkansas Rule 1.1 as (a) Southern was not sufficiently aware of the mental states requirements for the charge faced by his client, Marcio De Oliveira and (b) Southern provided advice that did not reflect the legal knowledge and thoroughness to provide an informed basis upon which De Oliveira could enter a guilty plea.

2. Herbert Southern's conduct violated Arkansas Rule 1.4(b) as Southern did not sufficiently explain matters and mental states requirements to his client, Marcio De Oliveira, to provide an informed basis upon which De Oliveira could enter a guilty plea.

WHEREFORE, it is the decision and order of the Arkansas Supreme Court Committee on Professional Conduct, acting through its authorized Panel B, that Herbert C. Southern, Arkansas Bar ID# 99105 be, and hereby is, **CAUTIONED** for his conduct in this matter, and assessed \$50 costs. The costs assessed herein shall be payable by cashier's check or money order payable to the "Clerk, Arkansas Supreme Court" delivered to the Office of Professional Conduct within thirty (30) days of the date this Findings and Order is filed of record with the Clerk of the Arkansas Supreme Court.

ARKANSAS SUPREME COURT COMMITTEE
ON PROFESSIONAL CONDUCT - PANEL B



Niki T. Cung, Chair, Panel B

August 29, 2016

Date