No. 18-8818

In The

Supreme Court of the United States

CORNELL D. REYNOLDS,

Petitioner,

V.

RANDALL HEPP, Warden,

Respondent.

REPLY TO BRIEF IN OPPOSITION

By: CORNELL D. REYNOLDS

Pro se

FOX LAKE CORRECTION INST.

P.O. BOX 200

FOX LAKE, WISC. 53933-0200

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INTRODUCTION

The State cannot credibly deny this one essential fact: after the State terminated Cornell Reynolds' appointed attorney, his attorney refused to conduct any additional investigation or research into Mr. Reynolds claims. Terry Williams Mr. Reynolds' attorney, admitted as much in a sworn affidait- "I had in essence been fired by the Public Defender, deprived of payment for work already completed on his [Mr. Reynolds] behalf, and that I could not bear the expense of running down any new paths of inquiry, as the loss of Public Defender work...had gravely affected my financial position. Had Mr. Reynolds been able to pay for his services, Mr. Williams was willing to work more on his case. (Id.) But, Mr. Reynolds - an indigent teenager - could not and, as a result, Mr. Williams essentially stopped substantive work in the middle of his representation, and as the State admitted, he never made any determination that the additional issue that Mr. Reynolds requested he investigate had no merit. In fact, he did nothing with respect to this issue. Rather, when faced with a choice between his own financial interests and Mr. Reynolds' constitutional rights, Mr. Williams was forced to choose the former. This is a constitutional violation of the highest order. See Cuyler V. Sullivan, 466 U.S. 335, 348 (1980).

ARGUMENT

Review in this case is absolutely necessary not only because of the arguments set out in Mr. Reynolds' Petition to this Court, but as made absolutely clear by the government now, to at least

clarify and/or extend this Court's decision in Cuyler V.Sullivan, 466 U.S. 335 (1980). As set forth in Mr. Reynolds introduction as well in his petition for writ of certiorari, his appellate counsel was undeniably and impermissibly conflicted in his representation. Mr. Reynolds counsel was forced, by the State, to choose between his own financial interests and his representation of Mr. Reynolds. The State as well as the panel majority of the 7th Circuit sidesteps this essential point. Rather, they adopted an impermissibly narrow view of Cuyler V. Sullivan, arguing that Mickens V. Taylor, 535 U.S. 162 (2002) somehow narrowed Sullivan to apply only in cases involving representation of co-defendants. Mickens however, does nothing to eliminate an individual's clearly established right to counsel that is free from conflicts that adversely impact counsel's performance. The only question left "open" by Mickens was **only** whether successive representation (representation of the alleged murderer of a former and now-deceased client) should be governed by the Strickland or Sullivan standard; Mickens 535 u.S. at 176. In such cases, the probability of prejudice is far from certain. Id. at 173. In contrast, in the present case, Mr. Williams was operating under an actual conflict where he had to choose between two masters, and when the **State** made him choose between his own interests and those of Mr. Reynolds, Mr. Reynolds' constitutional protections were violated.

The State as well as the panel majority of the 7th Circuit rest their conclusion on the Mickens dicta's discussion of various factual scenarios in which an "actual conflict" under

Sullivan had been recognized by Courts of Appeals. After reciting examples, such as financial interests in the form of "a book deal," "fear of antagonizing the trial judge," and "teaching classes to Internal Revenue Service agents," Mickens cautioned that Sullivan itself "does not clearly establish, or indeed even support, such expansive application" to that full panoply of scenarios. Id. at 174-75. That conclusion has little application here, because this case is far more straightforward and similar to Sullivan than the situations cited in the Mickens dicta.

If anything is to be learned from this Court's discussion in Mickens, it would be that this Court was specking **"only"** to the fact that the purpose of this Court's exception rule in Holloway and Sullivan was not to enforce the Canons of Legal Ethics, but as this Court put it; "to apply needed prophylaxis in situation where Strickland itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel. Id. at 174-75.

The State argues in its Brief in Opposition that federal circuit courts since Mickens have held that this Court's "clearly established precedent has not applied the Sullivan Standard outside the context of counsel's concurrent representation of more than one defendant." Citing McElrath V. Simpson, 595 F.3d 624, 631 n.7 (6th Cir. 2010), Leonard V. Warden, Ohio State Penitentiary, 846 F.3d 832, 844 (6th Cir. 2017); Schwab V. Crosby, 451 F.3d 1308, 1324-28 (11th Cir. 2006); Earp V. Ornoski, 431 F.3d 1158, 1183-85 (9th Cir. 2005), and Tueros V. Greiner, 343 F.3d 587, 597 (2nd Cir. 2003). (State's brief at p.7)

The Seventh Circuit's majority in the present case came to the same conclusion and also took it a step further in finding that neither "Sullivan, or any constitutional analysis of the conflict of interest doctrine extends to financial conflicts between attorney and client." (decision at p.14) (emphasis added).

Significantly, as the majority opinion stated, "before Mickens, we have at least assumed that Sullivan extends to financial conflicts of interests." Citing United States V. Marrera, 768 F 2d. 201, 206-07 (1085). However, the Court went on to conclude that now "Mickens makes it very difficult, though, to take that step in a habeas corpus challenge to a state conviction governed by § 2254(d)(1)." (Panel's decision at p.15-16)

In any event, Mickens certainly never hinted or comtemplated that the Sullivan rule lacked sufficient clarity to address a clear conflict arising when a State's financial pressure on counsel causes counsel to abruptly cease additional work to actively protect his interests. To the contrary, in Mickens, this Court has held that Sullivan would apply to additional situations beyond the particular facts in Sullivan; to "situations where Strickland itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel," including where counsel "actively represented conflicting interests." Mickens, 535 U.S. at 175-76. Under Sullivan and Mickens, the only reasonable conclusion is that this is just such a situation.

It should be noted that in the aftermath of Mickens, federal court have been reluctant to apply the Sullivan rule to conflicts

of interest that do not involve multiple representation. The confusion lies in what types of conflicts of interest the Sullivan standard applies to. This Court should grant review and conclude that the Sullivan rule is applicable to Reynolds conflict of interest claim, and claims like it. A failure of this Court to grant review in this case would very likely threaten the fairness of criminal appellate proceedings for indigent defendants. Sending States the implicit message that if states wish to cut off payment to appointed lawyers mid-appeal, they can do so without much fear that any abrupt cessation of work will be characterized as a violation of the right to counsel. That result should not be acceptable to this Court.

II.

The state makes the claim that this case is not a proper vehicle for addressing the issues presented. Claiming in cases governed by AEDPA, this Court has consistently refused to decide whether to extend its precedent, noting that direct review is the proper time for this Court to resolve that kind of issue.

The state argument here has no merit. In the cases the state cite (see Brief in Opposition p.9) along with cases similar to them, this Court was faced with cases where parties were in dispute of, and/or an actual issue of failure to extend against the last state court of jurisdiction was raised. In those case this Court has consistently refused review noting that the issues could be appropriately addressed on direct review. That is not the case here. As the majority opinion recognized the last state

court of jurisdiction, here, the Wisconsin Court of Appeals, accepted Sullivan as stating the controlling federal rule. (Decision at p.13 ¶2)

The dispute of whether or not Sullivan is the controlling federal rule was raised for the first time by the State of Wisconsin in the United States Court of Appeal for the Seventh Circuit. Thus a petition for review to this Court following a decision from the Seventh Circuit is the proper vehicle for review of the issues presented.

However, to be clear, Reynolds makes no argument that Cuyler V. Sullivan, needs to be extended or that the issue Reynolds brings before this Court today is one of first impression. Reynolds wholeheartedly believes as chief judge Wood in her disent, that Sullivan itself is the proper federal rule to be applied here. However out of respect to the seventh circuit's majority opinion in this case Reynolds has presented the issue of first impression and/or extending, as the court itself poses the question throughout it's decision.

CONCLUSION

For all these reasons, Reynolds respectfully request that this Court grant certiorari.

Respectfully submitted,

CORNELL D. REYNOLDS