

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ALAN MATTHEW CHAMPAGNE

Petitioner

vs.

STATE OF ARIZONA

Respondent

On Petition for a Writ of Certiorari
to the Supreme Court of Arizona

PETITION FOR A WRIT OF CERTIORARI

GARRETT SIMPSON PLLC

Garrett W. Simpson
State Bar of Arizona No. 5172
Box 6481
Glendale, Arizona 85304
(623) 910-7216
garrettsimpson@outlook.com
Attorney for Petitioner

QUESTION PRESENTED

Whether Arizona follows the rule of *Holloway v. Arkansas* requiring trial courts to make adequate inquiry into a defendant's motion to replace counsel, and to replace counsel where counsel admits there is a bona fide conflict of interest requiring the substitution?

LIST OF PARTIES

All parties hereto appear in the caption of the case on the cover page.

TABLE OF CONTENTS

Question Presented.....	i
List of Parties	ii
Table of Contents	iii
Table of Authorities	v
Opinions Below.	vi
Jurisdiction	vi
Constitutional and Statutory Provisions Involved	vii
Statement of the Case	1
Reasons for Granting this Petition	3
I. Arizona does not follow <i>Holloway</i> ¹ because as it does.	3
not require trial courts to make adequate inquiry into	
defendant’s motion to replace counsel, nor to replace	
counsel where counsel admit there is a bona fide	
conflict of interest requiring the substitution.	
Conclusion	7

List of Appendix Items:

Exhibit A. Opinion of the Arizona Supreme Court (August 9, 2019). (Appendix (App.), pp. 2-36).

Exhibit B. Order Denying Reconsideration of Appeal (September 6, 2019) (App., pp. 37-38).

¹ *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173 (1978)

Exhibit C. First *pro so* Motion to Change Counsel (June 13, 2014). (App., pp. 39-42).

Exhibit D. Hearing on *pro so* Motion to Change Counsel (R.T. July 23, 2014). (App., pp. 43-52).

Exhibit E. Second *pro se* Motion to Change Counsel (letter, October 1, 2014). (App., pp. 53-55).

Exhibit F. Superior Court order filing second *pro se* Motion to Change Counsel (letter, October 2, 2014). (App., pp. 56-58).

Exhibit G. Hearing referring second *pro se* Motion to Change Counsel to Presiding Judge (R.T. October 2, 2014). (App., pp. 59-71).

Exhibit H. Hearing before presiding judge denying second *pro se* Motion for Change of Counsel (R.T. December 1, 2014, 9:06 a.m.). (App., pp. 73-87).

Exhibit I. Petitioner's allocution (R.T. Aug. 29, 2017, p. 85). (App., pp. 88-90).

Exhibit J. Testimony re 700 year sentence netted at earlier trial where trial counsel "slept throughout" (Exhibit C) (R.T. June 26, 2017). (App., pp. 91-95).

Table of Authorities

Cases

<i>Bonin v. California</i> , 494 U.S. 1039, 110 S.Ct. 1506 (1990)	3
<i>California v. Trombetta</i> , 467 U.S. 479, 104 S. Ct. 2528 (1984).	7
<i>Chambers v. Mississippi</i> , 410 U.S. 284 (1973).	6
<i>Chapman v. California</i> , 386 U.S. 18, 87 S.Ct. 824 (1967)	5
<i>Cuyler v. Sullivan</i> , 446 U.S. 335, 100 S.Ct. 1708 (1980)	4
<i>Flanagan v. United States</i> , 465 U.S. 259, 104 S.Ct. 1051	3
<i>Holloway v. Arkansas</i> , 435 U.S. 475, 98 S.Ct. 1173 (1978)..	i, iii, v, 2, 3, 5, 6, 7, 8
<i>Johnson v. Zerbst</i> , 304 U.S. 458, 58 S.Ct. 1019 (1938)	4
<i>Mickens v. Taylor</i> , 535 U.S. 162, 122 S.Ct. 1237 (2002)	7
<i>Monge v. California</i> , 524 U.S. 721, 732-33, 118 S.Ct. 2246	6, 7
<i>State v. Champagne</i> , 247 Ariz. 116, 447 P.3d 297 (2019)	vi, 3
<i>Tumey v. Ohio</i> , 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927).	5
<i>Wood v. Georgia</i> , 450 U.S. 261, 101 S.Ct. 1097 (1981)	4

Federal Statutes

28 U. S. C. § 1257(a).	vi.
-----------------------------	-----

Constitutional Provisions

Amendment VI	vii, 3
Amendment VIII	vii
Amendment XIV	vii

**IN THE
SUPREME COURT OF THE UNITED
STATES PETITION FOR WRIT OF
CERTIORARI**

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The Opinion of the Arizona Supreme Court, the highest state court to review the merits, appears at Exhibit A to the Petition and is published at 247 Ariz. 116, 447 P.3d 297 (2019). (App., p. 1).

JURISDICTION

The date on which the highest state court decided this case was August 7, 2019. *Id.*

A timely Motion to Reconsider was thereafter denied on September 6, 2019. A copy of the order denying reconsideration appears at Exhibit B. (App., pp . 37) . The present Petition for Certiorari is due on Thursday, December 5, 2019. S. Ct. R. 13.3.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

2. Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

3. Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is a capital case. The Petitioner was convicted of a double murder and the State got the death penalty imposed on one count. However, this trial had been very recently preceded by another, where Petitioner was represented by the same attorneys. It emerged that lead counsel had taken to falling asleep during the first trial, a trial which netted Petitioner a more than 700-year sentence. Exhibit J (App. p. 95). The Petitioner, alarmed at his lawyer's sleeping at trial, moved for new counsel June 13, 2014. Exhibit C. (App., p. 39). The motion was summarily denied by the presiding judge July 23, 2014. Exhibit D. (App., pp. 43-52).

Even so, trial defense counsel had agreed at that hearing that there was "bonafiable" conflict of interest between them and the Petitioner, and asked the court to replace them, but the trial court refused to consider the motion even as counsel avowed,

I believe that my client, Mr. Champagne, didn't put the reasons for why he wants a new attorney in his motion out of respect to me. I have discussed this issue with the State and so I don't believe there's a need for an *ex parte* hearing. Mr. Parzych and I agree that we -- albeit we're not happy about it and we're hesitant about it but **we need to be removed from representing Mr. Champagne any further. We agree that there is a bonafiable [sic] conflict of interest in this case.** It's based on my perceived behavior during Mr. Champagne's trial of his 2012 case before Judge O'Connor back in February and March of this year.

Mr. Champagne has informed me that he has filed or is pursuing a complaint against me. And I think that that

puts us at odds in terms of I will be defending myself at the same time defending Mr. Champagne. In the months

following the events of the 2012 trial, it has come to my attention that Mr. Champagne no longer has confidence in me as his lead attorney in this case and doesn't really want to communicate with me. And so I think **he does have a good faith basis to ask for new counsel** in this matter. Exhibit D, pp. 5-6 (emphasis **added**). (App., pp. 48-49).

The motion was summarily denied. Petitioner soon re-urged the motion becoming explicit, alleging that trial counsel had “slept during...throughout” his first trial and had refused to file a motion for him seeking new counsel. Exhibit E. But after referral again to the presiding judge, Appendices F and G, (App., pp. 56-72), the motion for new counsel was again denied. Exhibit H. (App., pp. 73-87).

On no occasion did the court below make adequate inquiry into the basis for the motion to change counsel that Petitioner and counsel had sought. As it happened, this was about three years before the case would go to trial, where Mr. Champagne would maintain his innocence throughout.

“My name is Alan Matthew Champagne,” he told the jury in his allocution. “I did not kill Brandi nor did I kill Philmon Tapaha.” Exhibit I, Petitioner’s allocution (R.T. Aug. 29, 2017). (App., pp. 88-90).

On appeal, the Arizona Supreme Court affirmed the convictions and sentences, including a death sentence for Count 2. Exhibit A. (App., p. 2, et seq.). Its decision inferentially declined to follow *Holloway* because, under Arizona law, in its words,

Here, “[although the trial court could have engaged in a more searching exploration” of the responses from **Champagne**’s attorney as to the truthfulness behind his claim that she fell asleep during his prior trial and the repercussions of that alleged behavior on their attorney-client relationship ... the court did not abuse its discretion because it sufficiently inquired into the purported conflict... Exhibit A (citations omitted). (App., p. 30, para. 13).

The proper course would have been to adhere to *Holloway*’s requirement that when counsel admits, as an officer of the court, that there is a conflict and asks to be replaced, the court should grant the motion. *Flanagan v. United States*, 465 U.S.259, 268, 104 S.Ct. 1051 (1984), citing *Holloway*.

We hold that the failure (to appoint new counsel), in the face of the representations made by counsel weeks before trial and again before the jury was empaneled, deprived petitioners of the guarantee of "assistance of counsel." *Holloway*, 435 U.S. at 484, 98 S.Ct. at 1178-1179.

Again, the motions—and counsels’concession their replacement was necessary—were made *years* before the case was tried, and the fact that attorney and client were able to get to a verdict and sentence here no more attenuated the conflict below than it did in *Holloway*.

REASONS FOR GRANTING THE PETITION

- I. Arizona does not follow *Holloway* because it does not require trial courts to make adequate inquiry into defendant’s motion to replace counsel, and to replace counsel where counsel admit there is a bona fide conflict of interest requiring substitution with new counsel.

This Court has held that the Sixth Amendment guarantees the right of

individuals to counsel who don't have conflicts of interest. *Bonin v. California*, 494 U.S. 1039, 1041, 110 S.Ct. 1506, 1507 (1990); *Wood v. Georgia*, 450 U.S. 261, 271, 101 S.Ct. 1097, 1103 (1981); *Cuyler v. Sullivan*, 446 U.S. 335, 347, 100 S.Ct. 1708, 1717 (1980), and that a valid waiver of the right to such counsel requires an "intentional relinquishment or abandonment" of that right. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 (1938). The Petitioner never waived his right to conflict-free counsel and his requests for new counsel were twice denied, even though counsel admitted Petitioner was entitled to new counsel because of their "bonafiable" conflict of interest. Exhibit D. (App., p. 49).

In June 2014, three years before this case went to trial, Petitioner moved for new counsel based on lead trial counsel's "sleeping throughout" her representation of Appellant in the just-completed trial of unrelated charges, a multi-count standoff/hostage case, that was tried in a different division of the trial court. Appendices C and E. The Petitioner's first motion to change counsel, Exhibit C, (App., p. 39), was filed June 13, 2014, the month after he was sentenced to over 700 *consecutive years* in prison in the earlier case where counsel slept. Exhibit J. (App., pp. 91-95). The Criminal Presiding Judge, who heard the motion in present case, was also advised that Petitioner was filing a bar complaint against trial counsel on the basis of incidents that had occurred involving trial counsel during the earlier trial. Exhibit D. (App., pp. 5-6). Yet, the court summarily dismissed the motion for substitution

without making any inquiry, even though trial counsel admitted there was a conflict that required new counsel.

The courts below denied the motions without the further inquiry required by *Holloway*. Reviewing courts will presume that there is prejudice and reverse, even absent showing of actual conflict of interest, under the Sixth, Eighth, and Fourteenth Amendments, where the trial court refuse to inquire adequately into possible conflict of interest when timely objection made. As this Court states in *Holloway*,

[I]t is clear that the prejudice is presumed regardless of whether it was independently shown. *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927), for example, stands for the principle that "[a] conviction must be reversed if [the asserted trial error occurred], even if no particular prejudice is shown and even if the defendant was clearly guilty." *Chapman v. California*, 386 U.S. 18, 43, 87 S.Ct. 824, 837, 17 L.Ed.2d 705 (1967) (Stewart, J., concurring);..." *Holloway*, 435 U.S. 475, 489, 98 S.Ct. at 1181.

In *Javor v. United States*, 724 F.2d 831 (9th Cir. 1984), the circuit court acknowledged that under *Holloway*, "Today we conclude that when an attorney for a criminal defendant sleeps through a substantial portion of the trial, such conduct is inherently prejudicial and thus no separate showing of prejudice is necessary. See *Holloway v. Arkansas*, 435 U.S. 475, 489-91 (1978)." Javor's Sixth Amendment right to counsel was violated not because of specific legal errors or omissions indicating incompetence, but because he had no legal representation while his lawyer

slept. *Javor*, 724 F.2d at 833.

That is what happened here. Trial counsel slept throughout parts of Petitioner's first trial, a non-capital case where he was convicted and sentenced to *centuries* of imprisonment. Exhibit J. (App., pp. 91-96). When Petitioner's second case, the capital double-murder, soon arose, the same trial counsel was re-appointed, which led Petitioner, in his loss of confidence, to move for new counsel to be appointed. Trial counsel *agreed*, avowing to the trial court that there was a "bonafidable" conflict that required her withdrawal. Yet the trial court refused to act. Appendices D and H, even though it would be nearly three years until trial.

Prejudice is inherent in this case because an unconscious or sleeping counsel is equivalent to no counsel at all. "The mere physical presence of an attorney does not fulfill the sixth amendment entitlement to the assistance of counsel," *Holloway*, 435 U.S. at 490, 98 S.Ct. at 1181. The conflict is distinct here because the client reasonably feared he could not, going forward, consult with his attorney or receive informed guidance from her during the course of the trial because of the attorney's past conduct, that is, sleeping during trial.

"Moreover, a trial attorney must be present and attentive in order to adequately test the credibility of witnesses on cross-examination, a matter of constitutional importance. U.S. Const. amend. VI (confrontation clause). See *Chambers v. Mississippi*, 410 U.S. 284, 294-95 (1973)." *Javor*, 724 F.2d 834. *Monge v. California*, 524 U.S. 721, 732-33, 118 S.Ct. 2246 (1998) requires heightened procedural fairness in death penalty cases. That need for fairness, with literally three years to spare, should have prompted the courts below

to take counsel at their word appoint new counsel.

This Court has held that the due process clause of the Fourteenth Amendment requires "that criminal defendants be afforded a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 2532 (1984). The goal of a meaningful opportunity to test the state's case is a functional impossibility where there is a conflict of interest, especially where the conflict is based on the lawyer's regrettable history of sleeping at trial. Petitioner urges that *Mickens v. Taylor*, 535 U.S. 162, 122 S.Ct. 1237 (2002) is distinguishable because the lawyer there did not disclose the conflict.

CONCLUSION

Arizona's refusal to follow this Court's direction in *Holloway* should, respectfully, impel this Court to exercise its discretionary jurisdiction, grant certiorari, and reverse for a new trial with conflict-free counsel awake and alert.

The petition for writ of certiorari should be granted.

RESPECTFULLY SUBMITTED November 29, 2019.

Garrett W. Simpson
Counsel of Record

Garrett Simpson PLLC
P.O. Box 6481
Glendale, Arizona 85312
(623) 910-7216
State Bar No. 005172
garrettsimpson@outlook.com

Attorney for Petitioner