

No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

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OSCAR IBARRA,

Petitioner,

vs.

NICK LUDWICK, Warden,

Respondent.

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On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals For The Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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PARRISH KRUIDENIER DUNN BOLES  
GRIBBLE GENTRY BROWN & BERGMANN, L.L.P.

**Alfredo Parrish**

*Counsel of Record*

2910 Grand Avenue

Des Moines, Iowa 50312

Telephone: (515) 284-5737

Facsimile: (515) 284-1704

Email: aparrish@parrishlaw.com

**Adam C. Witosky**

2910 Grand Avenue

Des Moines, Iowa 50312

Telephone: (515) 284-5737

Facsimile: (515) 284-1704

Email: awitosky@parrishlaw.com

## QUESTIONS PRESENTED FOR REVIEW

- I. Does the Sixth Amendment permit an office to represent an indigent defendant in a First Degree Murder case if the office previously represented both an essential State witness and the murder victim?
- II. Can the defendant voluntarily and intelligently waive his right to unconflicted counsel under the Sixth Amendment if he is not advised of the previous representation of the murder victim?
- III. Can the defendant voluntarily and intelligently waive his right to unconflicted counsel under the Sixth Amendment if his only advise is from conflicted court-appointed counsel?
- IV. Is the defendant constitutionally entitled to independent counsel to advise him as to a conflict of interest concerning court-appointed counsel under the Sixth Amendment?
- V. When there is nonverbal communication by a trial spectator toward a juror, causing jurors to fear for their safety, does this require individual voir dire of the jury pursuant to *Remmer v. U.S.*, 347 U.S. 227 (1954)?

## RELATED PROCEEDINGS

- I. *State of Iowa v. Oscar Ibarra*, Case No. FECR245570, Iowa District Court for Polk County; Judgment Entered: 02/20/2012.
- II. *State of Iowa v. Oscar Ibarra*, Case No. 12-0330, Iowa Court of Appeals; Judgment Entered: 02/12/2013
- III. *State of Iowa v. Oscar Ibarra*, Case No. 12-0330, Iowa Supreme Court; Further Review Denied: 04/05/2013
- IV. *Oscar Ibarra v. State of Iowa*, Case No. PCCE074407, Iowa District Court for Polk County; Judgment Entered: 12/02/2014
- V. *Oscar Ibarra v. State of Iowa*, Case No. 14-2007, Iowa Court of Appeals; Judgment Entered: 10/28/2015
- VI. *Oscar Ibarra v. State of Iowa*, Case No. 14-2007, Iowa Supreme Court; Further Review Denied: 01/05/2016
- VII. *Oscar Ibarra v. Nick Ludwick, Warden Fort Madison State Penitentiary*, Case No. 4:16-cv-00214, U.S. District Court for the Southern District of Iowa; Judgment Entered: 04/29/2019
- VIII. *Oscar Ibarra v. Nick Ludwick*, Case No. 19-2024, U.S. Court of Appeals for the Eighth Circuit; Judgment Entered: 08/21/2019, Rehearing Denied: 09/27/2019

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## OPINIONS BELOW

On August 21, 2019, the Eighth Circuit affirmed the U.S. District Court for the Southern District of Iowa's denial of a certificate of appealability of Oscar Ibarra's denied Petition for Writ of Habeas Corpus. App. at 1a.<sup>1</sup> Oscar's Petition for Panel Rehearing was denied on September 27, 2019. App. B at 2a.

## JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1). *See Hohn v. U.S.*, 524 U.S. 236, 239 (1998) (28 U.S.C. §1254(1) provides jurisdiction from denial of certificate of appealability).

## CONSTITUTIONAL PROVISIONS INVOLVED

### Sixth Amendment

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.

## STATEMENT OF CASE

### A. Introduction

Regardless of a defendant's economic condition, they are constitutionally entitled to the assistance of non-conflicted counsel. Oscar Ibarra, an indigent nineteen-year-old Hispanic boy from a primarily Spanish-speaking home with an extensive history of alcohol abuse, was denied this essential constitutional protection

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<sup>1</sup> "App." refers to the Appendix.

while facing life imprisonment, without parole, for First Degree Murder. Oscar's public defenders continued representing him despite having an actual conflict of interest. The conflict arose for their office's prior representation of both an essential State witness as well as the deceased victim. Oscar's counsel refused to acknowledge the existence of a conflict. This willful blindness rendered it impossible for them to advise Oscar sufficiently to obtain a knowing, intelligent, and voluntary waiver of his right to non-conflicted counsel. With these failings, the waiver has been erroneously deemed sufficient. Oscar faced life in prison represented by public defenders subject to a conflict which would have disqualified any private counsel in a criminal case.

Oscar's rights were further violated by his attorneys' failure to seek voir dire of the jury following an instance of jury intimidation. Despite reports of jurors being intimidated by the stare of a court-room spectator, a "stare" causing the jurors to take precautions to ensure their safety, no voir dire of the jurors was requested. This failing cost Oscar his right to an impartial jury.

## **B. Facts and Procedural History**

### **1. Criminal Proceedings and Direct Appeal**

Oscar was charged with the First-Degree Murder of Patrick Wilson. (DCD<sup>2</sup> 9-2 at 6.) The Des Moines Adult Public Defender's Office was appointed as Oscar's counsel, with Valerie Wilson (Ms. Wilson) and Jennifer Russell (Ms. Russell) appearing. (DCD 9-7 at 63-64, 135, 160; DCD 9-8 at 14-15.) Oscar filed defenses of justification and intoxication defenses. (DCD 9-8 at 16.)

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<sup>2</sup> "DCD#" refers to the document as numbered in the District Court Docket.

The State moved for hearing to determine whether the public defender's office had a conflict of interest as it concurrently represented Cody Brown, a key State witness against Oscar. (DCD 9-2 at 9-10.) Ms. Russell, on behalf of herself and co-counsel, denied any conflict. (*Id.* at 11.) The written denial came after Ms. Russell's superiors told her no conflict existed. (DCD 9-5 at 82-83; DCD 9-10 at 100-101.) Among the advice appointed counsel obtained from her superiors was "[t]he appointment of other counsel for cross would be better than *losing the case entirely*[" (DCD 9-7 at 208; DCD 9-10 at 101; emphasis added.)

The Des Moines Adult Public Defender's Office had represented Cody on three occasions. (DCD 9-2 at 13.) Three different public defenders from the office had represented Brown, though neither Ms. Russell nor Ms. Wilson had. (*Id.* at 13.) Cody was deposed by Ms. Wilson and Ms. Russell while their office represented him on the probation violations. (*Id.* at 65.) Cody had been deposed prior to the conflict being brought to either Oscar's or the district court's attention. (DCD 9-9 at 56, 60.) Cody stipulated to the violations five days after his deposition. (DCD 9-2 at 65.)

One of the attorneys who represented Cody in August 2011 had also represented Patrick in 2009 on drug charges. (*Id.* at 57-58, 60; DCD 9-7 at 79.) Ms. Russell had not learned of Patrick's prior representation until the day of the conflict hearing, and no evidence shows she discussed it with Oscar. (DCD 9-2 at 62, 64-67.)

A conflict hearing was held. (*Id.* at 55.) The State argued the public defender's office was conflicted because of its representing Cody before and after his deposition. (DCD 9-2 at 56, 58-59.)

Ms. Russell stated she talked to Oscar about the conflict and Oscar would waive it. (*Id.* at 60.) She denied any conflict existed. (*Id.* at 61-62.) Though Ms. Russell testified to discussing the conflict with Oscar in person, her written statement and time slips establish the only conversation she had with Oscar concerning conflict was a half-hour telephone call. (DCD 9-2 at 11; DCD 9-7 at 86-87, 221; DCD 9-8 at 19.)

Ms. Russell testified she “...would have discussed just generally that general situation with Mr. Wilson and Mr. Brown with Oscar” and that “I would have asked [Oscar] – in any case I always ask the client, are you comfortable with us proceeding as your attorneys on that case?” (DCD 9-7 at 69.) Any discussion of a conflict with Patrick would have been impossible as she had not yet learned of that conflict. (DCD 9-2 at 62, 64-67.)

None of Ms. Russell’s advice to Oscar was memorialized. (DCD 9-7 at 60, 78, 85, 87.) Ms. Russell testified because they met in person, which is inaccurate, there was nothing Oscar needed to review. (*Id.*) She took no notes. (*Id.*) No written waiver was signed. (*Id.*) Ms. Russell did not explain neither she nor Ms. Wilson would examine Patrick’s criminal files regarding his past behavior while on drugs. (*Id.* at 102.)

Through leading questions and Oscar’s one-word responses, Ms. Russell’s obtained a waiver on the record regarding *only Cody*. (DCD 9-2 at 64-67.) No waiver of the conflict was obtained concerning Patrick. (*Id.* at 61-62.) None of her questions mention Patrick. (*Id.* at 64-67.) When questioned, Ms. Russell could not articulate what conflicts Oscar waived. (CDC 9-10 at 67-68.) Ms. Russell testified it was hard

for her to answer “because I don’t believe the way we handled this situation, that there would have been a conflict[.]” (DCD 9-7 at 131.)

Following hearing, the district court entered an order stating its difficulty in seeing “how there is not a serious potential conflict of interest - if not an actual conflict of interest” given how both Cody and Patrick’s past criminal history and substance abuse were integral to the trial. (*Id.* at 14-15.) Further troubling the district court was how “neither [Ms. Russell] nor the Appellate Public Defender perceive a conflict of interest.” (*Id.* at 15.)

The district court determined an inquiry was needed into Cody’s waiver of conflict. (DCD 9-2 at 16; DCD 9-9 at 67.) Cody was appointed independent counsel to advise him. (DCD 9-2 at 16.) After he met with independent counsel, Cody filed a written waiver. (*Id.* at 19.) A supplemental order was entered noting the waiver and stating Wilson and Ms. Russell were not disqualified, but remained prohibited from reviewed Cody’s or Patrick’s files. (*Id.* at 17.)

Oscar’s was convicted following jury trial. (9-8 at 26.) He sought a new trial, which was denied. (DCD 9-2 at 33-39, 46-48.) Oscar was sentenced to life in prison, without parole. (DCD 9-2 at 49.)

On direct appeal, Oscar asserted his right to effective assistance of counsel had been violated due to a conflict of interest with his representation by the public defender’s office and failing to make a record and move for a mistrial on improper juror influence. (DCD 9-3.) His conviction was affirmed. App. H at 89a. Oscar sought for further review. (DCD 9-6.) Further review was denied. App. I at 122a.

## 2. Postconviction Proceedings and Appeal

Oscar sought postconviction relief because he had received ineffective assistance of counsel from his appointed attorneys defending him when they should have been disqualified due to conflict of interest. Compounding this was the failure to seek independent counsel to provide Oscar waiver advice. These failings were structural error. (DCD 9-9 at 17-28.)

Oscar testified he did not understand the conflict when told about the prior representations of Cody and Patrick. (*Id.* at 43.) Neither Ms. Russell nor Ms. Wilson talked to him about a conflict prior to the State requesting a hearing. (*Id.* at 42.) He did not attempt to talk to anyone besides his appointed attorneys because he did not understand the importance of the conflicts. (*Id.* at 43.) He was never advised he could seek independent advice, only that he could have a different trial attorney. (*Id.* at 45.) Had he known he could receive independent advice, he would have done so. (*Id.* at 45-46.) He waived the conflict because he thought his appointed attorneys knew what they were doing and he trusted them. (*Id.* at 46.) He did not understand the nature or consequence of the conflict or what he was waiving. (*Id.* at 47.)

Oscar's request for postconviction relief was denied. (DCD 9-9 at 29-38.) Oscar filed a Motion to Enlarge and Amend the Ruling, as it did not expressly address the structural error. (DCD 9-9 at 39-50.) This Motion was denied. (DCD 9-9 at 51.)

Oscar appealed the denial of postconviction relief. (DCD 9-12.) The Iowa Court of Appeals affirmed. App. E at 61a. Rehearing was sought and denied. App. F at 85a. Oscar sought further review. (DCD 9-16.) It was denied. App. G at 87a.

### 3. Habeas Proceedings and Appeal

Oscar timely filed a Petition for Writ of Habeas Corpus. (DCD 1.) Among the grounds raised were the uninformed and involuntary waiver resulting in representation by actually conflicted attorneys and failure to take appropriate action in response to jury intimidation. (DCD 1.) A magistrate Report and Recommendation was issued, recommending the denial of the Petition. (DCD 20.) Oscar objected to the Report. (DCD 21.) The district court adopted the Report in full, including the denial of a certificate of appealability. (DCD 23.)

Oscar sought a certificate of appealability from the Eight Circuit, which was denied. App. A at 1a. A panel rehearing was sought and denied. App. B at 2a.

#### REASONS FOR GRANTING THE PETITION

Oscar, because of his indigency and to save the State money, was pressed into a conflicted representation which would not have been permitted for a non-indigent defendant. A question demanding an answer is how he can be said to have waived a conflict on which he was *never advised*. What must also be addressed, given the number of criminal representations by public defenders across the country, is whether advice from a conflicted public defender alone is constitutionally adequate to obtain a waiver, or if independent counsel is required, must be addressed.

In addition, Oscar's public defenders failed to protect his right to an impartial jury through its failure to invoke procedures under *Remmer v. U.S.*, 347 U.S. 227 (1954) ("*Remmer I*"). Whether the spectator's staring down of a juror constitutes unauthorized contact has created an unresolved circuit split, which this case provides

an optimal avenue to resolve.

A troubled young man with minimal education from a Spanish-speaking household and no significant experience with the criminal system, put his trust in State-appointed counsel whose primary focus was in staying on the case. With his life on the line, this trust was violated from counsels' failure to ensure he was fully advised on two disqualifying conflicts. Counsel then failed to pursue constitutionally mandated procedures to protect his right to an impartial jury. These compelling questions call for this petition for writ of certiorari to be granted.

#### **A. Counsel's Willful Blindness to Conflict Rendered Waiver Involuntary**

The Iowa Court of Appeals determined an actual conflict existed *See* App. D at 39a; App. E at 69a; App. F at 103A. This is the law of the case. *See Davis v. U.S.*, 471 U.S. 333, 342 (1974) (prior determination on direct appeal controls absent change in controlling law). The conflict's existence cannot be disputed, only its impact on Oscar's representation.

Trial counsel's refusal to acknowledge the conflict's existence rightfully troubled reviewing courts (DCD 9-2 at 15; DCD 9-9 at 33), as blindness to conflict rendered counsel *unable to advise* Oscar on its waiver. One cannot advise on a matter one cannot conceive of being present. *Cf. Padilla v. Kentucky*, 559 U.S. 356, 369 (2010) (clarity of issue determines clarity of advice required).

The Sixth Amendment rights to effective assistance and conflict-free counsel are fundamental. *Wood v. Georgia*, 450 U.S. 261, 271 (1981). *Cf. Glasser v. U.S.*, 315 U.S. 60, 70 (1942) (assistance of counsel must mean assistance "untrammelled and



unimpaired” otherwise “a valued constitutional safeguard is substantially impaired.”) This Court must “indulge every reasonable presumption against the waiver of fundamental rights.” *Glasser*, 315 U.S. at 70.

Waiver of conflict-free counsel must be knowing, voluntary, and intelligent. *U.S. v. Poston*, 727 F.2d 734, 738 (8<sup>th</sup> Cir. 1984) *cert. denied*, 466 U.S. 962 (1984). *Cf. Burger v. Kemp*, 483 U.S. 776, 798 (1987) (Blackmun, J., dissenting) (“[T]rial court inquiry into whether the defendant has made a knowing and voluntary waiver of his right to conflict-free representation is strongly encouraged, if not required.”) Oscar had to be made aware of the conflict, realize the consequences of continuing with conflicted counsel, and advised on his right to obtain other counsel. *U.S. v. Edelmann*, 458 F.3d 791, 807 (8<sup>th</sup> Cir. 2006) (*citing U.S. v. Levine*, 794 F.2d 1203, 1206 (7<sup>th</sup> Cir. 1986)). Oscar cannot have been aware of the conflict or its consequences when advised by counsel denying its very existence and failing to consider its significance.

No record of the advice Oscar received exists. The record does show Oscar *could not* have been advised to the conflict with Patrick’s prior representation. (DCD 9-2 at 62, 64-67.) An unadvised waiver cannot be knowing, voluntary, and intelligent. *See Johnson v. Zerbst*, 304 U.S. 458, 464 (waiver is an intentional relinquishment or abandonment of a known right which must be intelligently made). The clarity and specificity required for Oscar’s waiver of conflict toward Cody needed more than a half-hour phone call discussing the matter in general terms. (DCD 9-2 at 11, 62; DCD 9-7 at 12, 16, 29, 25, 47-48, 64, 222; DCD 9-8 at 19.)

Only the advice given and Oscar’s actual understanding of his rights matter

when determining whether Oscar was properly advised or voluntarily made. *See Moran v. Burbine*, 475 U.S. 412, 421 (1986) (waiver requires uncoerced choice and requisite level of comprehension). Oscar's waiver was not knowing and intelligent given counsel's generalities, lack of knowledge of the conflict with Patrick, and the inability to perceive the conflicts.

At a minimum, Oscar needed to consult independent counsel, the exact same opportunity given to the witness against him. (DCD 9-2 at 16.) Requiring advice of independent counsel is prevalent across jurisdictions. *See U.S. v. Iorizzo*, 786 F.2d 52, 58 (2<sup>nd</sup> Cir. 1986) (requiring defendant to made aware of conflict's dangers, a narrative discussion of defendant's understanding, and time to consult independent counsel); *U.S. v. Pergler*, 233 F.3d 1005, 1008 (7<sup>th</sup> Cir. 2000) (valid waiver where defendant declined independent counsel to advise on conflict); *Martinez v. Zavaras*, 330 F.3d 1259, 1264 (10<sup>th</sup> Cir. 2003) (independent counsel appointed to advise on conflict); *Commonwealth v. Connor*, 410 N.E.2d 709, 712 n.5 (Mass. 1980) (sensible to ensure defendant has advice of independent counsel before finding waiver valid); *Ryan v. Eighth Judicial Dist. Court of Nev.*, 168 P.3d 703, 710-11 (Nev. 2007) (requiring defendants be advised on right to independent consultation on conflicts); *Alcocer v. Superior Court*, 206 Cal. App. 3d 951, 961-62 (Cal. App. 2d Dist. 1988) (court should appoint independent counsel to confer with defendant on conflict).

The *Iorizzo* conflict was similar to Oscar's case, with trial counsel conflicted with a witness, though that involved direct representation. 786 F.2d at 54. New trial was required because all substantive inquiry was done "by the very attorney whose

capacity to act in the defendant's interests was under challenge[.]” with no explanation of the risks, and only “yes” or “no” questions. *Id.* at 59. Critically, defendant was forced to decide immediately, without the possibility of independent counsel, rendering the waiver invalid. *Id.*

Oscar lost his right to effective counsel without being afforded the protections necessary to ensure a knowing, voluntary, and intelligent waiver. Among the advice appointed counsel obtained from the State Public Defender was “[t]he appointment of other counsel for cross would be better than *losing the case entirely*[.]” (DCD 9-7 at 208; DCD 9-10 at 101; emphasis added.) This was counsel’s approach before the court, with argument focused on disputing the conflict’s existence, with Oscar’s waiver an afterthought even compared to obtaining a waiver from Brown. There was no waiver colloquy from the trial court with Oscar. (DCD 9-2 at 64.) Counsel conducted a “yes or no” inquiry. (*Id.* at 64-67.) No question concerned the conflict with Patrick, invalidating any waiver. Oscar was forced to make an on-the-spot decision, without independent advice, or even the offer of such counsel. This resulted in his case being subjected to both structural error and actual error.

One rationale for structural error is when “the effects of the error are simply too hard to measure” exemplified by the loss of the right to select an attorney. *Weaver v. Massachusetts*, 137 S.Ct. 1899, 1903 (2017) (*citing U.S. v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006)). Being indigent, Oscar’s right to unconflicted counsel required court action. *Wheat v. U.S.*, 486 U.S. 153, 159 (1988). This right to counsel is, without question, a right to unconflicted counsel. *Id.* at 161 (“[E]ssential aim of the

[Sixth] Amendment is to guarantee an effective advocate for each criminal defendant[.]”) Error may be structural even if fundamental unfairness does not result in every case. *Weaver*, 137 S.Ct. at 1903 (*citing Gonzalez-Lopez*, 548 U.S. at 149 n.4).

Because Oscar could not afford other counsel, and no other was appointed to advise him, the only advice available was from conflicted counsel. *See Gonzalez-Lopez*, 548 U.S. at 150 (“[L]ittle trouble concluding that erroneous deprivation of the right to counsel of choice...unquestionably qualifies as ‘structural error.’”). The deprivation of conflict-free counsel is structurally the same as depriving a defendant of retained counsel, as “different attorneys will pursue different strategies” and approaches in all aspects of a defense making it “impossible to know what different choices...would have made, and then to quantify the impact of those different choices on the outcome....” *Gonzalez-Lopez*, 548 U.S. at 150.

At nineteen-years-old, with his life on the line, Oscar was forced to rely on counsel blind to the conflicts of interest before them to advise him on those conflicts. The conflict hearing misdirected its focus on the *witness* over the *defendant* as to who needed protection from conflict. (DCD 9-2 at 67.) The first focus must be on ensuring the defendant, Oscar, unconflicted counsel. That Cody Brown, not Oscar, received independent counsel exemplifies the subtle prejudice from structural error. *Castillo v. Estelle*, 504 F.2d 1243, 1245 (5th Cir. 1974).

The concerns implicated here are like those addressed in *Glasser*, which faulted the trial court for not “jealously guarding” defendant’s rights, but rather was “responsible for creating a situation” impairing those rights. *Glasser*, 315 U.S. at 71.

The trial court in *Glasser* appointed counsel to represent a client's co-defendant in the same trial. *Id.* at 68. This violation of the right to unconflicted counsel is similar in kind to what occurred here because Oscar's rights, more so than the witness against him, needed protecting. The court is duty bound to see "trial is conducted with solicitude for the essential rights of the accused" while exercising "sound and advised discretion...with a caution increasing in degree as the offenses dealt with increase in gravity." *Id.* at 71.

Refusal to even recognize the conflict disqualified appointed counsel from advising Oscar regarding its existence, meaning, and resulting prejudice. Appointed counsel never recommended, let alone sought, independent counsel to advise Oscar. Absent independent advice, Oscar could not waive the conflict. Forcing a poor nineteen-year-old facing life in prison to be defended by conflicted counsel is structural error. *Gonzalez-Lopez*, 548 U.S. at 150.

When an indigent young man with limited education facing life imprisonment is told "no conflict exists" by appointed counsel with the goal of keeping the case in the public defender's office, he cannot be expected to see the need for new counsel. *Cf. Johnson*, 304 U.S. at 467 (deprivation of counsel from defendant unable to obtain a lawyer and "incapable of preserving his legal and constitutional rights" required habeas relief). This reality undermines the conflict hearing provided, creating actual prejudice.

Two factual findings pervade the State court decisions at every level: the existence of an actual conflict of interest and counsels' blindness to it. (DCD 9-2 at

14-15; 9-5 at 15; 9-9 at 33, 35; 9-15 at 8.) An actual conflict is one affecting counsel's performance. *Mickens v. Taylor*, 535 U.S. 162, 171 (2002). The Iowa Court of Appeals made clear the conflict issue extended beyond Brown and included Patrick. (DCD 9-5 at 15.) There is nothing "potential" about the conflict. Where conflict affects the adequacy of representation, prejudice need not be shown to obtain relief. *Mickens*, 535 U.S. at 171. Habeas review presumes underlying fact findings are correct, which must be rebutted by clear and convincing evidence they are unsupported by the record. *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005). These factual findings, amply supported in the record, are binding.

Counsel's "performance" for an actual conflict extends to critical pre-trial actions. *See Holloway v. Arkansas*, 435 U.S. 475, 489-90 (1978) (performance in negotiation of plea agreement which implicates Sixth Amendment protections). *Holloway* recognizes "when a defendant is deprived of the presence and assistance of his attorney...during a critical stage...reversal is automatic." *Id.* at 489. The Sixth Amendment guarantees the right at all critical stages of the criminal proceedings. *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009). It extends to proceedings where legal assistance is needed to counterbalance the risk of prosecutorial overreach. *U.S. v. Ash*, 413 U.S. 300, 315 (1973). A conflict hearing is such a critical stage.

Counsel's actual conflict *affected* the conflict hearing due to counsel's refusal to recognize the conflict. This refusal *affected* the counsel's ability to advise Oscar of the conflict. This affect leads directly to the invalidity of the waiver obtained.

As for trial representation, counsel independent of the public defender's office

would have been free to perform a deeper inquiry into the criminal histories of Cody and Patrick. Their files, while still restricted to some degree, could have been sought for review for exculpatory information. New counsel would not have been hampered to avoid areas of inquiry touching on the public defender's prior representation. This is particularly of relevance to Patrick, as he could not be questioned on his behavior. He was known substance abuser, including methamphetamine. (DCD 9-2 at 57-58; 9-7 at 74, 79.) Evidence his regarding behavior while on methamphetamine, coming from a non-family source, has a probability of supporting Oscar's justification defense. Independent counsel would have developed information about Oscar's history of alcohol abuse which trial counsel did not pursue, boosting the strength of his intoxication defense. Failure to pursue such information undermined Oscar's defense and led to a First-Degree Murder conviction.

**B. Counsel Was Ineffective in Response to Jury Intimidation**

On the fifth day of the criminal trial, a juror left a voice message for the trial court expressing concerns regarding comments overheard from a fellow juror. (DCD 9-1 at 608-609.) The reporting juror explained she overheard another juror telling several others "she stared him down really good so that should take care of that." (*Id.* at 610.) It was the reporting juror's assumption Oscar was the "him" referred to. (*Id.* at 611.)

The original juror's identity was determined by court staff. (*Id.* at 616.) The original juror was questioned by the court as to her comment, and explained the "him" was not Oscar, but instead a spectator sitting directly behind a prosecutor. (*Id.* at

617-19.) It was reported “we all felt like this person has been staring at us, like, through the whole thing trying to intimidate us maybe.” (*Id.* at 618.) She added the jurors decided to walk to the parking garage together because they felt intimidated. (*Id.* at 619.)

Counsel did not request and the court did not examine this juror or any other regarding the impact of the intimidation on the jurors ability to render a fair and impartial verdict. No cautionary instructions or assurances of safety were given, only an admonishment to everyone present to be careful in what they do. (*Id.* at 620.) The reporting jurors impression of Oscar being involved was never corrected. The spectator, whose identity was never determined, was never questioned as to his actions nor to his intentions.

The question is whether the spectator’s actions affected the jury’s deliberations. *U.S. v. Olano*, 507 U.S. 725, 739 (1993). Oscar has the right to a public trial by an impartial jury. U.S. Const. Amend. VI. Private communication, contact, or tampering, either directly or indirectly, with a juror during trial is presumptively prejudicial. *Remmer I*, 347 U.S. at 229. The rebuttal burden rests heavily upon the Government to establish, after hearing, that such contact with was harmless. *Id.* This is true even when contact is unintentional or not intended to influence the jury. *Gold v. U.S.*, 352 U.S. 985, 985 (1957). A presumption arises when the contact bears “even remotely on the trial.” *Id.*

A hearing on the circumstances of the contact and its impact must be held to determine the existence of prejudice. *Remmer I*, 347 U.S. at 229-230. Here, the



evidence in the record demonstrates the jury was intimidated to the point of walking as a group. (DCD 9-1 at 619.) The record developed, however, was unconstitutionally sparse. While the originating juror was examined and the audience admonished, this occurred outside the presence of the other jurors. The reporting juror continued with the impression Oscar was involved. The other jurors were left to speculate on the spectator's intent and whether a threat existed.

Given evidence of jurors' real fear, it cannot be assumed the jury impartially adjudicated the case on the evidence presented as this Court requires a prejudice inquiry "even when there was no evidence that a particular juror was biased;...has not always required a particularized showing of prejudice; and has strongly presumed that contact with a juror initiated by a third party is prejudicial." *Smith v. Phillips*, 455 U.S. 209, 227 (1982). The purpose of a *Remmer* hearing is to explore "the entire picture...and the incident complained of[,] and its impact. *Remmer v. U.S.*, 350 U.S. 377, 379 (1956) ("*Remmer II*"). Due process requires a jury to decide the case on the evidence and a court watchful in preventing prejudicial occurrences and, when arising, determining their effect. *Smith*, 455 U.S. at 217.

The remand for hearing in *Remmer I* was a direct result of "the paucity of information relating to the entire situation coupled with the presumption which attaches to the kind of facts alleged by petitioner which, in our view, made manifest the need for a full hearing." *Remmer II*, 350 U.S. at 379-380. A similar "paucity" of information existed following the limited examination which occurred here. The juror's attention was diverted from the evidence presented and the merits, or lack

thereof, of the State's case. The sanctity of the jury must be beyond reproach, above suspicion, and any practice placing proceedings under suspicion is to be prohibited.

There is a circuit split regarding whether nonverbal conduct alone is considered “unauthorized contact” triggering the prejudice presumption under *Remmer I*. Compare *U.S. v. Brown*, 923 F.2d 109, 112 (8<sup>th</sup> Cir. 1991) (stares insufficient to trigger presumption) with *U.S. v. Rutherford*, 371 F.3d 634, 644 n.8 (9<sup>th</sup> Cir. 2004) (“Glaring and staring at jurors on a regular basis may” trigger prejudice presumption). See also *U.S. v. Baptiste*, 596 F.3d 214, 221 n.3 (4<sup>th</sup> Cir. 2010) (recognizing split); *Stouffer v. Trammell*, 738 F.3d 1205, 1217 (10<sup>th</sup> Cir. 2013) (noting circuit disagreement on contours of prejudice presumption).

There is unity amongst circuits, however, that a court-led inquiry is required when it “learns of an incident that may have improperly influenced the jury.” *U.S. v. Hall*, 877 F.3d 800, 806 (8<sup>th</sup> Cir. 2017). See also *Brown*, 923 F.2d at 112 (individual questioning of jurors with prosecutor and defense attorney present on report of juror comments to feeling intimidated by spectator); *U.S. v. Tejeda*, 481 F.3d 44, 48-49 (1<sup>st</sup> Cir. 2007) (individual voir dire of jurors witnessing spectator, an “obviously frail appearing, old man”, make throat-slitting gesture toward jury); *U.S. v. Bufalino*, 576 F.2d 446, 451 (2<sup>nd</sup> Cir. 1978) (individual examination of jurors reporting glaring by spectators at jury); *U.S. v. Vega*, 285 F.3d 256, 266 (3<sup>rd</sup> Cir. 2002) (court examination of juror reporting feeling threatened by stare from spectator); *U.S. v. Ramos*, 71 F.3d 1150, 1153 (5<sup>th</sup> Cir. 1995) (examination of juror who reported being followed by a defense witness); *Jackson v. Bradshaw*, 681 F.3d 753, 766-67 (6<sup>th</sup> Cir. 2012) (juror

examined by court after reporting having found her garage door open and two men standing in her driveway as she returned home); *U.S. v. Martin*, 692 F.3d 760, 765-66 (7th Cir. 2012) (jurors and third-party properly questioned about third-party's brief presence in jury room); *Rutherford*, 371 F.3d at 644 (requiring hearing as to IRS agents stares at jurors); *Stouffer*, 738 F.3d at 1217 (hearing necessary for non-verbal communication between juror and husband).

Given the critical importance of an unbiased jury to criminal proceedings, when a jury is so affected by a stare it feels the need to travel as a group, a hearing on this contact is an absolute requirement. Counsel had a duty to protect Oscar's constitutional rights, and failed. Individual voir dire of the jurors was necessary to assess the impact of the contact. *See U.S. v. Bradshaw*, 281 F.3d 278, 290-291 (1<sup>st</sup> Cir. 2002) (individual voir dire when unredacted indictment provided to jury); *U.S. v. Corrado*, 227 F.3d 528, 537 (6<sup>th</sup> Cir. 2000) (remanding for *Remmer* hearing with opportunity to question jurors individually under oath); *U.S. v. Vasquez-Ruiz*, 502 F.3d 700, 705-706 (7<sup>th</sup> Cir. 2007) (reversible error to not hold individual voir dire after a note stating defendant was guilty found in juror room). This case is the appropriate vehicle for resolving the split, and definitively stating such nonverbal contact is presumably prejudicial. And while the court does possess discretion in how a hearing is to be held, a more extensive hearing was required here.

If jurors were affected, counsel should then have moved for a mistrial. At a minimum, counsel should have requested an instruction assuring the jurors were safe and not to let the stare affect deliberations. *See U.S. v. Warner*, 498 F.3d 666, 683

(7<sup>th</sup> Cir. 2007) (well-tailored curative instruction coupled with excusing offending jurors sufficient to address prejudice); *U.S. v. Wacker*, 72 F.3d 1453, 1467 (10<sup>th</sup> Cir. 1995) (excusing juror and issuing cautionary instruction to cure possible prejudice).

The Iowa Court of Appeals failed to apply *Remmer*'s strong presumption of prejudice, and instead found a failure to establish prejudice. (DCD 9-5 at 33.) In doing so, it failed to consider the *context* of the prejudice. *See Virgil v. Dretke*, 446 F.3d 598, 612 (5<sup>th</sup> Cir. 2006) ("Expressed in *Strickland* terms, the deficient performance of counsel denied Virgil an impartial jury, leaving him with one that could not constitutionally convict, perforce establishing *Strickland* prejudice with its focus upon reliability."); *Hughes v. U.S.*, 258 F.3d 453, 463 (6<sup>th</sup> Cir. 2001) (when a biased juror is impaneled, prejudice under *Strickland* is presumed); *Johnson v. Armontrout*, 961 F.2d 748, 755 (8<sup>th</sup> Cir. 1992) ("Trying a defendant before a biased jury is akin to providing him no trial at all. It constitutes a fundamental defect in the trial mechanism itself."). *Cf. Lafler v. Cooper*, 566 U.S. 156, 163 (2012) ("In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice.").

Being presented under the rubric of ineffective assistance, Oscar's loss of the prejudice presumption is itself prejudicial, as the force of a presumption is the additional weight it gives to data not itself sufficiently probative to require the finding of the fact presumed, with presumptions providing this abnormal weight to meet some judicially felt need or to accomplish a judicially desirable purpose. FRANCIS H. BOHLEN, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof*, 68

U. Pa. L. Rev. 307, 313 (1920). The harm of this lost presumption is inherent in the underlying concern with the “fundamental fairness” of a criminal proceeding focusing on the reliability of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 696 (1984). When a counsel’s error involves the “basic, constitutional guarantees that should define the framework of any criminal trial” this reliability is shaken. *Weaver*, 137 S.Ct. at 1907.

The burden shifting from the presumptions loss is a harm which this Court has recognized as unreasonable. *See Kimmelman v. Morrison*, 477 U.S. 365, 382 n.7 (1986) (no reasonable lawyer would fail to litigate a meritorious issue where by such failure “counsel shifts the burden to the defendant to prove that there exists a reasonable probability that, absent his attorney's incompetence, he would not have been convicted.”) Losing the presumption and flipping the burden due to counsel’s errors creates such prejudice as to show a reasonable probability of a different result had they been applied.

### **CONCLUSION**

Oscar has shown a reasonable dispute exists as to his receiving ineffective assistance from criminal counsel. The Petition for a writ of certiorari should be granted.