No. 19-____

In the
Supreme Court of the United States

VINCENT D. WHITE, Jr.,

Cross-Petitioner,

v.

WARDEN, ROSS CORRECTIONAL INSTITUTION,

Cross-Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In federal habeas cases, whether federal courts should exclusively apply 28 U.S.C. § 2254(b) when evaluating State assertions that a State prisoner has failed to properly raise, and conclude, a federal constitutional issue in the State's courts?

PARTIES TO THE PROCEEDING

Vincent D. White, Jr., an individual.

Donnie Morgan, the Warden of the Ross Correctional Institution, in his official capacity.

RELATED PROCEEDINGS

Franklin County Court of Common Pleas (Franklin County, Ohio); *State v. White*, No. 12CR-4418. Judgment was entered on January 22, 2014.

Ohio Court of Appeals (10th District); *State v. White*, No. 14AP-160. Judgment was entered on December 22, 2015.

Ohio Supreme Court; *State v. White*, No. 2016-184. Denial of review was entered on May 4, 2016.

United States District Court for the Southern District of Ohio; *White v. Warden, Ross Correctional Institution*, No. 2:17-cv-325. Judgment was entered on March 12, 2018.

United States Court of Appeals for the Sixth Circuit; *White v. Warden, Ross Correctional Institution*, No. 18-3277. Judgment was entered on October 8, 2020.

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The unpublished opinion of the United States District Court for the Southern District of Ohio, *White v. Warden, Ross Correctional Institution*, No. 2:17-cv-325 (S.D. Ohio 2018), is located in the Petitioner's Appendix at 25a.

JURISDICTIONAL STATEMENT

The Sixth Circuit entered its judgment in this case on October 8, 2019. The State of Ohio filed a timely petition for rehearing *en banc* on October 17, 2019, which was denied by the Sixth Circuit on November 20, 2020.

The State filed a timely petition for writ of certiorari on February 15, 2020, which was docketed on February 18, 2020.

This conditional cross-petition for writ of certiorari is filed pursuant to Sup. Ct. R. 12.5. The Court possesses jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

". . . To have the Assistance of Counsel . . . ."

U.S. Const., Amdt. VI.

"(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant."

28 U.S.C. § 2254(b)(1).

INTRODUCTION

This is a federal habeas case involving a conflict of interest at Vincent White's murder trial in Franklin County, Ohio. Mr. White's trial attorney, at the time that he represented Mr. White, was himself under indictment in Franklin County on charges of rape, kidnapping, sexual assault and other serious felonies.

Upon finding out about his trial attorney's conflict of interest, Mr. White did everything that he reasonably could to vindicate his federal rights in Ohio's courts and in federal court. He raised the issue on direct appeal. He sought review in the Ohio Supreme Court. He sought post-conviction relief in Ohio's courts. He filed a federal habeas petition in U.S. district court. When that petition was denied, Mr. White appealed to the United States Court of Appeals for the Sixth Circuit, where he secured a vacation (and remand) of the district court's denial of his habeas petition.

This case is about much more than the conflict of interest at Mr. White's Ohio trial, however. It is also, fundamentally, about the legal standards and procedures established by Congress for federal habeas review of State-court criminal cases.

In its Petition for Writ of Certiorari, the State of Ohio asserts that the U.S. Courts of Appeals are in conflict over the legal standards to follow in habeas cases like Mr. White's. Mr. White agrees. The conflict among the Courts of Appeals is salient and palpable.

Despite prevailing below, Mr. White has filed this conditional cross-petition because, respectfully, the Court should consider an existing, statutory solution for resolution of questions of "procedural default" in habeas cases.[1] Congress has already, in 28 U.S.C. § 2254(b), established the appropriate legal standard for evaluating State claims of prisoner procedural default. The statute provides a legal standard that is clear, comprehensive, and reasonable, and it embodies Congress' considered political judgment regarding the balance of State, federal, and individual interests that are necessarily in tension in federal habeas review of State-court criminal decisions.

By granting certiorari in this case, including consideration of the issue presented in this conditional cross-petition, the Court will be able to clarify a vitally important area of federal law, while vindicating Congress' considered political judgment regarding federal habeas review.

[1] For purposes of this case, "procedural default" is a judicial requirement that a prisoner raise a federal legal issue in State court, and see it through to completion, prior to resorting to federal habeas review. The development of the concept is discussed in greater detail, *infra*, in Section II.

STATEMENT OF THE CASE

Vincent White was indicted for murder in Franklin County, Ohio, on August 30, 2012. (R. 11 at 109.)[2] He pled "not guilty," and, at trial, Mr. White asserted self-defense. (R. 11 at 806-808.) Prior to and at the time of Mr. White's trial, his trial attorney, Javier Armengau, was also under indictment in Franklin County on charges of rape, kidnapping, sexual assault, and other felony charges. (R. 3 at 22.; R. 7 at 39; see also, Sixth Cir. Op., Petitioner's App'x at 3a.)[3]

Mr. White was convicted at trial (R. 11 at 133.), and he appealed his conviction and sentence to the Ohio Court of Appeals. (R. 11 at 136.) In his direct appeal, Mr. White's first issue was the Sixth Amendment violation under the U.S. Constitution for the conflict of interest caused by Armengau's pending charges in Franklin County. (R. 11 at 143.) To support his assertion that Armengau had been under indictment in Franklin County, Mr. White cited to the officially published records of the Supreme Court of Ohio (R. 11 at 161.)(citing In re Armengau, 140 Ohio St.3d 1247, 18 N.E.3d 1220 (Ohio 2014)), as

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[2] References to the Record are to the "Pg ID#" in the federal trial-court record. Court of Appeals documents are noted as such, with page references to the pages of the individual documents, unless they are contained in the Petitioner's Appendix.

[3] Importantly, the State admitted the veracity of these facts in its Answer to Mr. White's federal habeas petition. (R. 11 at 80.).

well as Armengau's trial-court docket. (R. 11 at 163.) Mr. White asserted that the conflict of interest created by the charges against his trial attorney was a structural error that required reversal of his conviction and retrial with new counsel. (R. 11 at 180.) Mr. White also asserted that Armengau's performance was deficient, citing a failure to prepare for his trial by listening to witness interviews, failing to strike a juror who was related to one of the victims, failing to cross-examine witnesses with inconsistent prior testimony, lack of knowledge of the applicable Ohio rules of evidence, failing to object to prosecutorial misconduct, and failing to object to improper jury instructions. (R. 11 at 181-83.)

The Ohio Court of Appeals rejected Mr. White's appeal, concluding that Mr. White had failed to show (through the services of Mr. Armengau) in the State trial-court record that Armengau was under indictment at the time of his representation of Mr. White. (R. 11 at 277.) Mr. White sought review of that decision by the Ohio Supreme Court (R. 11 at 298.), which was denied. (R. 11 at 334.)

Mr. White, *pro se*, filed a timely petition for a writ of habeas corpus in the United States District Court for the Southern District of Ohio. (R. 3 at 22.) The district court possessed jurisdiction pursuant to

28 U.S.C. § 2241. In his petition, Mr. White asserted that his trial attorney had a conflict of interest because Mr. White's trial attorney was under felony indictment at the time of Mr. White's trial. (*Id.*)

Pursuant to the Rules Governing Section 2254 Proceedings, the district court ordered the State of Ohio to show cause why the petition should not be granted. (R. 4 at 35.)

After the show-cause order was entered, Mr. White amended his petition. (R. 7 at 39.) In his amendment, Mr. White asserted,

> Unbeknown to the Petitioner, and at the time of Petitioner's trial in October/November of 2013, his trial counsel, (Javier Armengau), was under indictment in case no. 13CR-2217 for eighteen serious offenses including: six counts of rape, three counts of kidnapping, five counts of sexual battery, three counts of gross sexual imposition and one count of public indecency. He was arrested for some of the criminal offense in April 2013, and was indicted on the eighteen counts on May 20, 2013. Before he was convicted and sentenced to thirteen years of imprisonment on August 26, 2014.

(*Id.*)

In its Answer, the State admitted, "Habeas ground five (amended) sets out the facts of defense counsel's legal difficulties . . . ." (R. 11 at 80.)

While his federal habeas petition was pending, Mr. White filed a post-conviction motion in the State trial court, which was denied as untimely. (See Sixth Cir. No. 34 (Supplemental Brief of the State of

Ohio) at 34.) Mr. White's post-conviction motion, the Ohio trial court held, had been due while his direct State appeal had been pending. (*Id*.)

Mr. White's habeas petition was referred to the U.S. magistrate judge, and the magistrate judge recommended that the district court dismiss the petition. (R. 13 at 1493.) Mr. White filed a timely objection to the Report and Recommendation (R. 22 at 1587), and the district court dismissed Mr. White's petition. (R. 24 at 1605.)

Put simply, Mr. White's trial attorney failed to put the facts of his own conflict of interest into the trial record, and the Ohio Court of Appeals used that failure as the basis to reject Mr. White's Sixth Amendment argument on direct appeal. Furthermore, by the time that the Ohio Court of Appeals issued its decision, the time for filing a State post-conviction motion regarding the constitutional violation had lapsed. These circumstances made it impossible for Mr. White to vindicate his federal rights in Ohio's courts. Nonetheless, the district court dismissed Mr. White's federal habeas petition.

The district court did, however, grant a certificate of appealability as to one issue: "Was the Petitioner denied the effective assistance of

counsel based on his attorney's conflict of interest and the trial court's failure to conduct any inquiry on the issue?" (R. 23 at 1604.)

Mr. White appealed to the United States Court of Appeals for the Sixth Circuit. (R. 26 at 1612.) The Sixth Circuit possessed jurisdiction pursuant to 28 U.S.C. §§ 1291, 2253.

After briefing by the parties, the Sixth Circuit ordered that counsel be appointed to represent Mr. White, "because this case raises a complex issue of habeas corpus." (Sixth Cir. No. 23 at 3a.) The Sixth Circuit ordered the parties to address the application of *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), to Mr. White's case. Additionally, the Court of Appeals ordered: "The parties are further directed to supplement their initial briefing on the merits of the underlying conflict-of-interest-of-trial-counsel claim."

In his supplemental brief, Mr. White asserted the application of 28 U.S.C. § 2254(b) to his case as the primarily legal basis for the district court's and the court of appeal's standard of review of Mr. White's habeas petition. (Sixth Cir. No. 28 at 15-20.) In addition, Mr. White argued that the application of *Martinez* and *Trevino* to his case justified federal review of the Ohio courts' rejection of his Sixth Amendment argument. (*Id*. at 1, 8-9, fn. 3, and 17-18.) Under either

line of reasoning, Mr. White argued, he was entitled to federal habeas relief.[4]

Relying upon *Trevino* (and not *Martinez*) the Sixth Circuit vacated the judgment of the district court and remanded for further consideration by the district court. *White v. Warden*, *Ross Correctional Institution*, 970 F.3d 270 (6th Cir. 2019). (Petitioner's App'x at 3a.)

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[4] In its Petition, the State asserts that the Sixth Circuit "asked" for "more briefing" and "requested" supplemental briefing of the application of *Martinez* and *Trevino*. (Petition at 9.) To be clear, the Sixth Circuit's Order directed the parties "to provide supplemental briefing on what, if any, effect *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), have on the resolution of the instant petition." (Sixth Cir. No. 23 at 3a.) The Order also mandated, "The parties are further directed to supplement their initial briefing on the merits of the underlying conflict-of-interest-of-trial-counsel claim." *Id*.

Pursuant to the Sixth Circuit's Order, Mr. White first argued the applicability of Section 2254(b) to his case. (Sixth Cir. No. 28 at 15-20.) He then argued the application of *Martinez* and/or *Trevino* to his case at three different points of his supplemental brief. (Sixth Cir. No. 28 at 1, 8-9, fn. 3, and 17-18.).

In its supplemental brief, the State failed to address Mr. White's statutory arguments, failed to address the primary substantive case relied upon by Mr. White (*United States v. Cronic*, 466 U.S. 648 (1984)), failed to even mention *Trevino* (now relied upon by the State in its Petition at 10), and failed to mention *Davila v. Davis*, 137 S. Ct. 2058 (2017), which is also now relied upon by the State in its Petition at 11. The State ultimately did cite *Davila* to the Sixth Circuit, in its petition for rehearing *en banc* (Sixth Cir. No. 39 at 1.), to no avail.

The specifics of the argumentation below, outlined here, are not just for factual clarification. They highlight the difficulties that litigants, even Attorneys General, as well as lower federal courts, have in grappling with the parameters, scope, limits, and exceptions to "procedural default." Mr. White will argue *infra* (and, if given the opportunity, on the merits) that litigants' and federal courts' difficulty with "procedural default" is a function of the vagaries of the legal concept itself, and that Congress' habeas statute alone is a reasonable and sufficient (superior, even) foundation for federal habeas review of State criminal cases. This foundation includes, specifically, Congress' legal standards for federal review of State prisoners' efforts to raise federal questions in the State-court system, and to see them through to completion. The divisions among the Courts of Appeals, discussed more fully below, are actually reflective and emblematic of the arguments that have taken place in this case to date.

The State filed a timely petition for rehearing, or rehearing *en banc*, which was denied by the Court of Appeals on November 20, 2019. (Petitioner's App'x at 127a.)

The State filed its timely petition for a writ of certiorari on February 15, 2020, which was docketed on February 18, 2020. Mr. White now files this conditional cross-petition pursuant to Sup. Ct. R. 12.5.

REASONS FOR GRANTING THE WRIT

The writ should issue so that the Court may clarify and make uniform the procedural requirements for federal review of State-court criminal cases. Even though Mr. White's trial attorney labored under a clear conflict of interest that violated the Sixth Amendment to the United States Constitution, the courts of Ohio were unable to vindicate Mr. White's federal rights, and the federal courts below necessarily grappled with the existing uncertainty over the appropriate legal standard to apply to Mr. White's case. Furthermore, the other Courts of Appeals, as shown by the Petitioner, are having difficulty determining, and disagree about, the appropriate legal standards to apply to current habeas cases. This is particularly true now with regard to the parameters of "excusable" procedural default, since the Court decided *Martinez* and *Trevino*.

In addition to the reasons cited by the State, this case is appropriate for resolution of the questions presented to the Court because: (1) the facts are not in dispute, (2) the structural violation of the Sixth Amendment in this case is clear under long-standing Court precedent, in which prejudice is presumed, and (3) Mr. White did

everything that he reasonably could to vindicate his federal rights in State and federal courts.

I. SUBSTANTIVE BACKGROUND -- SIXTH AMENDMENT

In *United States v. Cronic*, 466 U.S. 648 (1984), the Court reaffirmed its prior decisions holding that attorney conflicts of interest are *structural* violations of the Sixth Amendment. With regard to any need for a showing of prejudice flowing from the conflict of interest, the Court reiterated, "There are . . . circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Id*. at 658. With this decision, the Court reaffirmed its prior decisions, including *Holloway v. Arkansas*, 435 U.S. 475 (1978), and *Glasser v. United States*, 315 U.S. 60 (1942), involving attorney conflicts of interest and the necessity for federal courts to presume prejudice arising from such conflicts.

In *Holloway*, the Court had held, "[A] rule requiring a defendant to show that a conflict of interests . . . prejudiced him in some specific fashion would not be susceptible of intelligent, even-handed application." *Holloway*, 435 U.S. at 490. As the Court explained,

> [I]n a case of joint representation of conflicting interests the evil -- it bears repeating -- is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing

> process. It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client.

Id. at 490-91.

And in *Glasser*, the Court had held,

> [T]he 'Assistance of Counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired.
>
> . . . .
>
> To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. *The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial*.

315 U.S. at 70, 75-76 (emphasis added).[5]

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[5] In *Cuyler v. Sullivan*, 446 U.S. 335 (1980), the Court held that, in situations of a *potential* conflict of interest by a defense attorney, such as when multiple criminal defendants are represented by the same attorney, the State prisoner on federal habeas review must prove that an actual conflict existed, and that prejudice resulted from the conflict. While *Cuyler* was on appeal, Congress approved Fed. R. Crim. P. 44(c)(2), which provides: "The court must promptly inquire about the propriety of joint representation and must personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless there is good cause to believe that no conflict of interest is likely to arise, the court must take appropriate measure to protect each defendant's right to counsel." Act of July 31, 1979, Pub. L. 96-42, 93 Stat. 326.

The same day that *Cronic* was decided, the Court also established a separate test for claims of *deficient* (as opposed to structurally defective) attorney performance: (1) an objective failure of performance by defense counsel, taking into consideration different reasonable strategic choices by counsel; and (2) prejudice flowing from the attorney's deficient performance. *Strickland v. Washington*, 466 U.S. 668 (1984).

With *Cronic* and *Strickland*, the Court established two, bifurcated categories of Sixth Amendment violations: structural violations involving actual attorney conflicts of interest,[6] and effectiveness violations involving deficient attorney performance. In the first category, defendants need not show prejudice, because prejudice may exist and nonetheless be impossible to show. In the second category, defendants must show prejudice flowing from the attorney's performance, because the attorney may have had a considered, objectively reasonable strategic reason for his or her trial decisions.

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[6] Examples of other *structural* trial errors, applicable to the States, that the Court has clearly established are prosecutorial misconduct, e.g., *Brady v. Maryland*, 373 U.S. 83 (1963); racial discrimination in jury selection, e.g., *Flowers v. Mississippi (Flowers VI)*, 139 S. Ct. 2228 (2019); gender discrimination in jury selection, e.g., *J.E.B. v. Alabama*, 511 U.S. 127 (1994) ; and Confrontation Clause violations, e.g., *Crawford v. Washington*, 541 U.S. 36 (2004); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

In this case, Mr. White's attorney was operating under a direct, personal conflict -- negotiating with the Franklin County prosecutor on behalf of Mr. White at the same time that he was negotiating on behalf of himself. The conflict of interest present when a defense attorney is under indictment is palpable, well-settled, and universally recognized. E.g., *United States v. DeFalco*, 644 F.3d 132 (3d Cir. 1979); *United States v. Levy*, 25 F.3d 146 (2d Cir. 1994).) *See also*, 1 Criminal Trial Error and Misconduct [Gershman] § 3-5(b)(3)(ii)("When counsel faces criminal or disciplinary charges, an actual conflict arises because he must defend both himself and his client, and he is likely to be preoccupied with defending his own conduct.")(emphasis added).

Because this case involves Mr. White's trial attorney's severe conflict of interest, it involves a structural error under *Cronic* for which prejudice is presumed under the Court's long-standing precedents.

II. SECTION 2254 & PROCEDURAL DEFAULT

Congress established federal habeas jurisdiction with regard to federal prisoners in the Judiciary Act of 1789. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73. In 1867, Congress extended federal habeas jurisdiction to encompass prisoners incarcerated by the several States. Act of Feb. 5, 1867, ch. 28, 14 Stat. 385.

A. Section 2254

In 1948, Congress codified the federal habeas statute. Act of June 25, 1948, Pub. L. 89-711, ch. 646 § 2, 62 Stat. 967. In the 1948 codification, Congress established a new section of the United States Code, 28 U.S.C. § 2254, entitled "State custody; remedies in State courts." The new section of the Code provided,

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

With this new codification, Congress specifically addressed State prisoners' obligation to raise, and to pursue to completion, federal questions in State court prior to seeking (or receiving) habeas relief. Importantly, Congress also preserved federal habeas review of federal claims for which: 1) there is "an absence of available State corrective process;" or 2) there is "the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." With this

section, Congress anticipated that there would be circumstances in which States' judicial systems would be "ineffective to protect the rights of the prisoner." In those cases, Congress intended that prisoners' federal rights be vindicated by federal courts. Balancing all the interests inherent in federal habeas review of State-court criminal cases -- federalism, finality, comity, efficiency, cost, individual rights -- Congress chose to protect, ultimately, "the rights of the prisoner."

Since 1948, Congress has faced much academic commentary[7] and political lobbying directed toward eliminating federal habeas review of State criminal cases, or toward significantly curtailing its availability.[8] In the face of this pressure and lobbying, Congress has continued to weigh the balance of competing political interests involved in federal habeas jurisdiction in favor of the individual defendant. In particular, in its amendments to Section 2254 in 1966 and 1996, Congress has been able to curtail abuses of the Great Writ while fundamentally

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[7] E.g., Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963); Desmond, *Federal Habeas Corpus Review of State Court Convictions - Proposals for Reform*, 9 Utah L. Rev. 18 (1964); P.J.W., *The Burden of Federal Habeas Corpus Petitions from State Prisoners*, 52 Va. L. Rev. 486 (1966).

[8] An excellent law review article detailing the academic commentary, political lobbying (often by federal judges) and political manouevering regarding federal habeas review of State criminal cases, from the 1948 Act through its amendment in 1996, is Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 Tul. L. Rev. 443 (2007).

preserving State prisoners' continued access to federal courts for violations of federal law.

First, in 1966, Congress amended Section 2254 to assure that federal habeas review could not be based upon State law, but could only be based on violations of the "Constitution or laws or treaties of the United States." Act of November 2, 1966, Pub. L. 89-711, 80 Stat. 1105.

In the 1966 amendment, Congress changed the catchline of Section 2254 from "State custody; remedies in State courts," to "State custody; remedies in Federal court," reaffiming that the emphasis in the statute is in providing a remedy to State prisoners in federal court.

Furthermore, and more importantly, with regard to the pre-existing requirement that State prisoners first raise and pursue their federal claims in State court, Congress in 1966 chose to specifically outline circumstances in which, in Congress' judgment, "no adequate State remedy" under the 1948 codification should be deemed to be available. Congress added a new subsection, subsection (d), to Section 2254, which specifically outlined those circumstances in which "no adequate State remedy" should be deemed to exist by the federal courts: 1) when the merits of a factual have not been resolved; 2) when

the prisoner has not had "a full and fair hearing"; 3) when the facts have not been adequately developed in State court; 4) when the State courts have lacked jurisdiction; 5) when the State has failed to appoint counsel for indigent defendants; 6) when the State hearing was not "full, fair, and adequate"; 7) when the prisoner has otherwise been denied due process; or 8) when a factual determination in State court is not supported by the record.

While not necessarily expanding the protections for State prisoners in new subsection (d) (because State prisoners were already protected by the statute's "no adequate State remedy" language), Congress' adoption of subsection 2254(d) in 1966 made abundantly clear that federal habeas review was to remain robust, and that many circumstances could exist in the several States' judicial systems that would warrant federal habeas review even when State prisoners did not raise, or did not see to completion, federal claims in State courts. Cf. Sen. R. 1797, 89th Cong., 2d Sess., 1966 U.S. Code, Cong. & Admin. News at 3663 ("This ground [i.e., a claim that the prisoner is confined in violation of the Constitution or laws or treaties of the United States] would, <u>of course</u>, <u>always</u> be open to a petitioner to assert in the Federal

court after he had exhausted his State remedies or if he had no adequate State remedy.")(emphasis added).

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act, 110 Stat. 1218, Pub. L. 104-132, Title I, § 104. In its amendments to Section 2254, Congress took steps to eliminate abuses of the writ: providing a statute of limitations (28 U.S.C. § 2244(d)(1)), restricting second (or successive) petitions (28 U.S.C. § 2244(a)), eliminating retroactivity (28 U.S.C. § 2254(d)(1)), providing a heightened substantive standard for habeas review (28 U.S.C. § 2254(d)(1)), and providing a heightened standard for federal review of State factual findings (28 U.S.C. § 2254(d)(2)).

With regard to raising, and seeing to completion, federal claims in State court, Congress specifically retained Section 2254(b)'s three-pronged approach: prisoners must 1) raise a federal claim and see it through to completion in State court, unless 2) no remedy for the federal claim exists at all, or 3) "circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1).

B. Procedural Default

In 1948, Congress distilled the Court's prior 88-year jurisprudence into one, brief section of the United States Code. With this simple section, Congress' intention was to maintain, in substance, the Court's prior jurisprudence regarding federal habeas review of State-court criminal cases. See H. Rep. No. 80-308 at A180 (1947)(Section 2254 "is declaratory of existing law as affirmed by the Supreme Court."). Since Section 2254's codification, particularly in its amendments of 1966 and 1996, Congress has further defined, by statute, the legal requirements and standards for federal habeas review of State-court criminal cases. At this point in time, Congress, in Sections 2241 through 2254, has fully set out, in great detail, the legal standards and procedures for federal courts to follow in federal habeas review of State-court criminal cases.

Importantly, from 1948 through 1996 (and to today), Congress has not established or codified any separate statutory basis or outline for State claims of "procedural default" in federal habeas cases.

During the entire period that Congress has been establishing the statutory standards for federal habeas review of State-court criminal cases, the Court has developed an entirely separate Procedural Default Doctrine. Mr. White asks the Court to reconsider that approach to

federal habeas jurisprudence. If a writ of certiorari is granted on the State's petition, Mr. White would appreciate the opportunity to argue that the Court can clarify and unify federal habeas law by having the federal courts exclusively rely on Congress' statutory enactments for adjudicating federal habeas cases, rather than creating a separate set of non-statutory, judicial doctrines.

To briefly explain: the Court's Procedural Default Doctrine is rooted in two largely contradictory decisions, *Fay v. Noia*, 372 U.S. 391 (1963), and *Wainwright v. Sykes*, 433 U.S. 72 (1977). Yet those two decisions were unified in their near-disregard of the specific language in Congress' 1948 statute, and that jurisprudential approach has led to extraordinary legal confusion in this area of law. The conflict among the Courts of Appeals, outlined by the State of Ohio in its Petition, is emblematic of this confusion.

Fay v. Noia

In *Fay v. Noia*, 372 U.S., the Court confronted a case in which the State criminal defendant did not raise the issue of a coerced confession on State direct appeal, but did raise the issue in a State post-conviction collateral attack. 372 U.S. at 394. The State courts rejected the

defendant's collateral attack because the defendant's argument could have been raised on direct appeal. 372 U.S. at 435.

The Court nonetheless permitted federal habeas review of the defendant's claim. *Id.* at 438. In its decision, the Court rejected the argument that, ". . . if the state court declines to entertain a federal defense because of a procedural default, then the prisoner's custody is actually due to the default, rather than to the underlying constitutional infringement . . . ." *Id.* at 427. Instead, the Court held, ". . . the jurisdiction of the federal courts on habeas corpus is not affected by procedural defaults incurred by the applicant during state court proceedings . . . ." *Id.* at 438. The Court held further, ". . . the federal judge may, in his discretion, deny relief to an applicant who has deliberately bypassed the orderly procedure of the state courts." *Id.*

With regard to Congress' statutory language in Section 2254 (from the 1948 codification), the Court stated, "We hold that § 2254 is limited in its application to failure to exhaust state remedies still open to the habeas applicant at the time he files his application in federal court." *Id.* at 434-35. Importantly, in "limiting" Section 2254, the Court said nothing about the unexhausted federal claims explicitly *permitted* by

Congress in Section 2254. That failure has had profound implications for this area of law.

Wainwright v. Sykes

In *Wainwright*, 433 U.S., the Court was confronted with a defendant's failure to make an objection at trial. He lost on State direct appeal, due to the State's "contemporaneous objection" requirement. *Id*. at 72-73. Rejecting its decision in *Fay v. Noia*, the Court held that a State procedural default may only be excused on federal habeas review if "cause" for the default, and "prejudice" from the default, are demonstrated by the applicant. *Id*. at 87.

Wainwright is the foundation of the Court's entire Procedural Default Doctrine. Forebodingly, the Court "[left] open for resolution in future decisions the precise definitions of the "cause" and "prejudice" standard." *Id*. Also of great significance is the fact that the Court in *Wainwright* was faced with a situation in which the prisoner expressly waived any claim that his trial attorney's failure to object itself constituted deficient performance under the Sixth Amendment. *Id*. at 75, fn. 4.

In the intervening years since the Court decided *Wainwright*, allegations of Sixth Amendment violations at trial, on direct appeal, or on State post-conviction collateral attacks have drastically burdened the federal judicial system due to the Procedural Default Doctrine. Cf., Jeffries & Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. Chi. L. Rev. 679, 680 (1990)("[The law governing federal collateral review of claims not properly raise in state court] is anything but simple. It is a piecemeal doctrinal construction, each part more readily explained by the circumstances of its addition than by its relation to a coherent whole. The accumulation of category and exception threatens to obscure the underlying objectives of federal habeas corpus and to oppress its administration.").

"Exhaustion of Remedies" vs. "Procedural Default"

The Court's near-disregard, in *Fay v. Noia* and *Wainwright*, of Section 2254's specific language is problematic because, conceptually, "exhaustion of remedies" and "procedural default" are entirely overlapping concepts. In each line of cases, the exact same question applies: Did the defendant in State court properly raise a federal question and see it through to its conclusion, and, if not, may the

federal courts nonetheless grant the defendant habeas relief? With the exact same concept[9] covered by two different potential sources of authority, one statutory and one judicial, there has, necessarily, been rife confusion in this area of law.

In both *Fay v. Noia* and *Wainwright*, the Court was candid about the difficulty of establishing a workable set of principles in this area of federal law. As the Court noted in *Fay v. Noia*, 372 U.S. at 411-12, "Our development of the law of federal habeas corpus has been attended, seemingly, with some backing and filling." And in *Wainwright*, 433 U.S. at 81, the Court noted, with regard to exhaustion of remedies, "[T]his line of authority has not been without historical uncertainties and changes in direction on the part of the Court."

The many procedural-default cases that the Court has confronted since *Wainwright*, respectfully, have continued the "backing and filling" and "historical uncertainties" acknowledged by the Court in *Fay v. Noia* and *Wainwright*. Most recently, the Court's decisions in *Martinez* and *Trevino* have created great confusion and uncertainty. Cf., Bohnert, *Wrestling with Equity: Identifiable Trends as the Federal*

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[9] The Court in *Wainwright* acknowledged that exhaustion of remedies and procedural default are questions that that are "to a degree interrelated with one another." *Id*. at 87.

Courts Grapple with the Practical Significance of Martinez v. Ryan *&* Trevino v. Thaler, 43 Hofstra L. Rev. 945, 950 (2015)("Thus far, the federal courts appear to be vexed by what standard to use for assessing *Martinez/Trevino* arguments.")

In its Petition, the State of Ohio outlines the current division among the Courts of Appeals regarding federal habeas review in the wake of the Court's recent decisions in *Martinez*, *Trevino*, and *Davila*. The State's solution to the current conflict appears to involve further delineation (in the favor of the several States) of the Procedural Default Doctrine. Given the opportunity, Mr. White would assert, instead, that there is a better way for the federal courts to decide Section 2254 cases: simply, directly, and exclusively follow the statute passed by Congress. For that reason, should the Court decide to grant the State's petition, it should grant Mr. White's cross-petition. With Mr. White's question presented, the parties can directly address, and the Court can decide, whether Congress' statutory scheme is now, particularly after the AEDPA, sufficiently comprehensive to be the exclusive basis for federal habeas review of State-court criminal cases.

Application of Section 2254 to Mr. White's case

Applying Section 2254(b)(1) to Mr. White's case is quite direct. Following the statutory language enacted by Congress, the district court would ask, "Did Mr. White exhaust (i.e., raise and conclude) the remedies available in the courts?" Mr. White certainly raised the federal issue on direct appeal immediately upon finding out about the problem, and he concluded that process before filing his federal habeas petition. When the Ohio Court of Appeals declined to address Mr. White's federal claim (because of his trial attorney's failure to put the facts of his own indictment into the record in Mr. White's case), there was certainly no other State procedure available for redress of his federal claim.

Therefore, the district court would also ask, using the language of the statute, and assuming that Mr. White had arguably not properly raised his federal claim in State court, "Was there an absence of available State corrective process, or did circumstances exist that render the State's process ineffective to protect the rights of the applicant?" Here the answer to that question is an undeniable "yes," due to the fact that Mr. White's trial attorney, while under a conflict of interest that clearly violated the Sixth Amendment, failed to include

the facts of his own indictment into the record so that Mr. White could be protected by the Ohio courts, under their rules, from the federal constitutional violation.

Whether under subsection(b)(1)(A) or subsection (b)(1)(B), it would be abundantly clear to a district judge that Congress intended that the federal courts review Mr. White's federal claim on its merits. The district court need only apply the statute passed by Congress rather than, as the Sixth Circuit's decision below had to consider, and as the district court has now been tasked to further consider, whether federal habeas relief is available to Mr. White under the Court's Procedural Default Doctrine.

III. THE CONFLICT AMONG THE COURTS OF APPEALS

Mr. White agrees with the State of Ohio that a clear conflict exists among the Courts of Appeals regarding the legal standards for "excusable" procedural default, particularly with regard to the acceptable causes for default, and with regard to the nature of the prejudice that must be proven in the wake of such default.

IV. THE IMPORTANCE OF THE QUESTIONS PRESENTED

The State of Ohio couches its petition in arguments about State sovereignty, finality of State-court judgments, and comity between the federal and State judicial systems. Those are certainly important interests. From Mr. White's perspective, those interests are opposed in this case by both federal supremacy and individual rights under the U.S. Constitution, which are also of great importance. Further, Congress' national role in balancing competing political interests like these is also, in itself, an important interest that is fundamentally implicated in this case.

Mr. White would only add that this case, should the Court so choose, can be much more beneficial to the nation's system of justice than simply adding another rung to the Procedural Default Doctrine ladder. This case provides the Court the opportunity to simplify, clarify, and unify this large, incoherent, and overly-complex area of federal law. That opportunity alone makes the questions presented in the State's petition, and in this conditional cross-petition, of great importance.

V. THE SUITABILITY OF THIS CASE FOR REVIEW

Mr. White agrees with the State of Ohio that this case is an appropriate vehicle for the Court to address the question presented by the State.

This case is also an excellent vehicle for the Court's consideration of Mr. White's question presented, because: (1) the facts in this case are not in dispute, (2) the structural violation at trial of the Sixth Amendment in this case is clear under long-standing Court precedent, in which prejudice is presumed, and (3) Mr. White did everything that he reasonably could to vindicate his federal rights in State and federal courts.

CONCLUSION

The writ should issue. The Court should consider the issue presented by the State of Ohio in its petition, as well as the issue presented by Mr. White in this conditional cross-petition. By accepting these petitions, the Court will be able to unify and clarify this important area of federal law, while giving due deference to Congress' considered political judgment regarding the proper balance of the competing interests inherent in federal habeas cases.

Respectfully Submitted.

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March 19, 2020

APPENDIX

No.18-3277
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VINCENT D. WHITE, JR.,	)
	)
Petitioner-Appellant,	)
	)
v.	)
	)
WARDEN, ROSS CORRECTIONAL INSTITUTION,	)
	)
Respondent-Appellee.	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

ORDER

Before: DAUGHTREY, GRIFFIN, and STRANCH, Circuit Judges.

Vincent D. White, Jr., a pro se Ohio prisoner, appeals the district court's denial of his petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. White moves this court for the appointment of counsel, and both parties request that we take judicial notice of various facts and documents. This court GRANTS petitioner's motion for the appointment of counsel because this case raises a complex issue of habeas corpus and because an appointment is in the interests of justice. See 18 U.S.C. § 3006A(a)(2)(B). Following the appointment of counsel, the Clerk's office is directed to issue a briefing

schedule and the parties are directed to provide supplemental briefing on what, if any, effect *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), have on the resolution of the instant petition, including the possibility of supplementing the record. The parties are further directed to supplement their initial briefing on the merits of the underlying conflict-of-interest-of-trial-counsel claim.

To the extent the parties request that this Court take judicial notice of facts and documents not in the record or otherwise publicly available, the court reserves judgment on those requests.

ENTERED BY ORDER OF THE COURT.

Deborah S. Hunt, Clerk.