No. 19-8117

In the Supreme Court of the United States

VINCENT D. WHITE, JR,

Cross-petitioner,

v.

DONNIE MORGAN, WARDEN, ROSS CORRECTIONAL INSTITUTION,

Cross-respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION

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QUESTION PRESENTED BY CONDITIONAL CROSS-PETITION

Should this Court overrule the procedural-default doctrine that it has long held applicable in federal habeas cases?

LIST OF PARTIES

The cross-petitioner is Vincent D. White, Jr.

The cross-respondent is Donnie Morgan, the Warden of the Ross Correctional Institution.

LIST OF RELATED CASES

1. *Ohio v. White*, No. 12CR-4418 (Ct. of Common Pleas, Franklin County, Ohio) (judgment entered January 27, 2014)
2. *Ohio v. White*, No. 14AP-160 (Ohio Ct. App., 10th Dist.) (decision issued December 22, 2015)
3. *Ohio v. White*, No. 2016-184 (Ohio) (jurisdiction declined May 4, 2016)
4. *White v. Warden*, No. 2:17-cv-325 (S.D. Ohio) (March 12, 2018)
5. *Ohio v. White*, No. 18AP-158 (Ohio Ct. App., 10th Dist.) (judgment entered April 4, 2018)
6. *White v. Warden*, No. 18-3277 (6th Cir. 2019) (judgment entered October 8, 2019)
7. *Morgan v. White*, No. 19-1023 (U.S.) (pending)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Rules

INTRODUCTION

In *Morgan v. White*, No. 19-1023, Warden Donnie Morgan petitioned this Court to resolve a circuit split concerning the interaction of the procedural-default doctrine and *Martinez v. Ryan*, 566 U.S. 1 (2012). *See* Petition for Writ of Certiorari ("Pet.") i, 1, 16–23, *Morgan v. White*, No. 19-1023. Specifically, the Warden asked this Court to address the following question: If a petitioner defaults an ineffective-assistance-of-trial-counsel claim with "some merit," does *Martinez v. Ryan* allow a federal court to excuse the procedural default without requiring any further showing of prejudice? Pet.i.

Vincent White has now filed a conditional cross-petition in which he concedes the certworthiness of the Warden's petition. He admits the Warden's petition implicates a circuit split and he "agrees with the State of Ohio that this case is an appropriate vehicle" for resolving that split. Cross-Pet.28, 30. (The ten *amici* States supporting the Warden's petition agree. *See* Br. of *Amici* States Indiana, et al., *Morgan v. White*, No. 19-1023.). In essence, White declines to oppose *certiorari*.

Instead of opposing *certiorari*, White's cross-petition asks this Court to consider eliminating the modern procedural-default doctrine altogether. Cross-Pet.i. This Court should deny the cross-petition for *certiorari*. The question it presents does not implicate a circuit split. And to answer the question presented in White's favor, the Court would have to overrule a habeas doctrine that dates back more than half a century—a doctrine that Congress has declined to change and that is vital to the federalism concerns at the heart of habeas law. This Court should grant the War-

den's petition for *certiorari* in case 19-1023. But it should deny White's conditional cross-petition in this case (case number 19-8117).

STATEMENT

The facts relevant to this cross-petition are, in most respects, the same facts relevant to the Warden's petition in *Morgan v. White*, No. 19-1023. Accordingly, this statement is, in most respects, identical to the statement in the Warden's petition. Any reader familiar with that statement can skip this one.

1. In July 2012, two men barged into a house on 17th Avenue in Columbus, Ohio. They shot four people, killing two of them. The two survivors identified Vincent White—the cross-petitioner here—as one of the two shooters. Pet.App.86a–87a. (All citations to the Pet.App. refer to the appendix filed with the Warden's petition in case 19-1023.)

About a month later, a grand jury indicted White, charging him "with one count of aggravated burglary, three counts of aggravated robbery, four counts of aggravated murder, two counts of attempted murder, two counts of felonious assault, and one count of possessing a firearm while under disability." Pet.App.86a. White pleaded not guilty and went to trial, represented by an experienced attorney named Javier Armengau.

At trial, White "admitted that he was at the house and shot some of the people there." Pet.App.87a. But he claimed he acted in self-defense. On his telling, he went to the home to buy drugs and began shooting only when the four victims forced him to kneel and tried to rob him at gunpoint. Pet.App.87a

This story never made much sense. For one thing, one witness testified that White had previously disclosed his plan to rob the house. Pet.App.86a–87a. In addition, "[f]orensic evidence regarding the direction and angles from which some of the victims were shot tended to contradict White's version of the events." Pet.App.87a. For example: "White and the other shooter each fired at least six times and the four victims did not return fire"; one of the victims "was shot as if he were getting up from a seated position" while another "was shot in the back shoulder"; and neither of the "two guns … used in the shooting" were "in the possession of the house occupants." Pet.App.87a.

The jury convicted White on all counts. And, after holding a sentencing hearing, the trial court sentenced White to life without the possibility of parole.

2. White appealed his sentence. He retained a new attorney to assist him in doing so. White claims that, at this point, he learned for the first time that his trial attorney, Javier Armengau, was under indictment for serious crimes while representing White at trial. Pet.App.3a–4a. (It is unclear, at this point, whether White knew of Armengau's legal issues all along. Pet.App.91a.) The same prosecutor's office that prosecuted White indicted Armengau, too. This, White said, created a conflict of interest between Armengau and White that denied White his Sixth Amendment right to counsel. Pet.App.90a.

The state appellate court held that White could not properly raise this issue on direct appeal. The court explained that the record contained "no evidence or information whatsoever about Armengau's particular situation." Pet.App.91a. Nor did

the record contain any information "indicating White was unaware of Armengau's situation" at trial. Pet.App.91a. Given the absence of this information, the court concluded that the issue should have been raised in a postconviction proceeding after developing the facts. "A direct appeal, where the record is limited and where the record contains no mention of any of the relevant facts at issue, is not the vehicle to make such an argument." Pet.App.91a; *accord* Pet.App.108a–09a (Brunner, J., concurring in part and dissenting in part) (agreeing with the majority's analysis of the ineffective-assistance issue).

White sought review in the Supreme Court of Ohio, but the court declined to take his case. Pet.App.84a.

3. By the time the Ohio Court of Appeals issued its decision, the deadline for seeking state-postconviction relief had already expired. White had not filed a protective petition or otherwise tried to initiate state-postconviction proceedings.

White did eventually file a petition for postconviction relief in the state trial court. Not surprisingly, the trial court denied the petition as untimely. Pet.App.82a. White compounded his timeliness problem by failing to timely appeal the trial court's dismissal. Not surprisingly, the appellate court rejected the untimely appeal of White's untimely postconviction petition. Pet.App.81a. White never sought review in the Supreme Court of Ohio.

4. White filed a petition for federal habeas review in the United States District Court for the Southern District of Ohio. That court, which had jurisdiction to hear the case under 28 U.S.C. §§1331, 2241, and 2254(a), denied White's petition on the

merits, applying the deferential standard applicable in federal habeas review. Pet.App.22a (citing §2254(d)).

The Sixth Circuit reversed and remanded with instructions to consider the Sixth Amendment argument *de novo*. Because understanding the Court's reasoning requires understanding the procedural-default doctrine, it is important to pause for a moment and discuss that doctrine.

The procedural-default doctrine bars federal courts from awarding habeas relief for claims "that a state court refused to hear based on an adequate and independent state procedural ground." *Davila v. Davis*, 137 S. Ct. 2058, 2062 (2017). For example, if a petitioner fails to timely raise a claim in state court, and if the state court refuses to hear the claim on that basis, the claim is procedurally defaulted. Federal courts may excuse a procedural default—and review the underlying claim *de novo*—only if the petitioner "can establish 'cause' to excuse the procedural default and demonstrate that he suffered actual prejudice from the alleged error." *Id*. "To establish 'cause,'" a petitioner "must 'show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.'" *Id*. at 2065 (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). Because the conduct of one's lawyer is *usually* attributed to his client, the poor performance of a lawyer *usually* does not constitute "cause" sufficient to excuse a procedural default. *See id*.

But there is a narrow exception to this rule. In *Martinez v. Ryan*, 566 U.S. 1 (2012), this Court recognized that the general rule disadvantages petitioners convicted in States that forbid defendants from raising ineffective-assistance-of-*trial*-

counsel claims on direct appeal. In those States, "the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim." *Id*. at 11. As a result, a petitioner convicted in one of these States, if he defaults such a claim because he lacks effective state-postconviction counsel, might be barred from ever obtaining an adjudication of his claim, no matter how meritorious it might be.

To avoid this, the Court carved out a narrow exception available to such petitioners. These parties may establish "cause" to excuse a default under the cause-and-prejudice test by establishing that they had:

(1) an ineffective-assistance-of-trial-counsel claim that was "substantial," in the sense of having "some merit"; and

(2) either no counsel during state-postconviction proceedings, or counsel that "was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668."

Martinez, 566 U.S. at 14.

Soon after announcing its decision in *Martinez*, the Court expanded the opinion's scope in *Trevino v. Thaler*, 569 U.S. 413 (2013). *Martinez* initially applied only to petitioners convicted in States where it is *impossible* to raise an ineffective-assistance claim on direct appeal. *Trevino* expanded the exception so that it now applies to petitioners convicted in States whose "procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial

counsel on direct appeal." *Id*. at 429. Thus, after *Trevino*, the *Martinez* exception applies to petitioners who could have raised, but would have had too hard a time raising, an ineffective-assistance-of-trial-counsel claim on direct appeal.

Now return to the Sixth Circuit proceedings. The Sixth Circuit determined that White procedurally defaulted his claim by failing to properly raise it in state-court proceedings. Pet.App.8a–9a. But the court held that White's procedural default could be excused under the narrow *Martinez* exception. *Martinez*, the Sixth Circuit reasoned, applied to White's case because Ohio law effectively barred White from raising his ineffective-assistance-of-trial-counsel claim on direct appeal. Pet.App.11a–15a. And the Court concluded that White had satisfied *Martinez*'s requirements: (1) he had an ineffective-assistance-of-trial-counsel claim that was "substantial" in the sense of being "not without 'any merit'"; and (2) he "was without counsel during his state collateral proceedings." Pet.App.10a–11a (internal quotation omitted).

Martinez and *Trevino*, by their express terms, pertain only to the "cause" component of the cause-and-prejudice test; neither opinion purports to modify the "prejudice" component. But as the Warden explained in his own petition—and as the ten *amici* States supporting that petition confirmed—the circuits are split regarding whether *Martinez* and *Trevino* eliminate or modify the actual-prejudice prong of the cause-and-prejudice test. Pet.16–23; Br. of *Amici* States of Indiana, et al., 9–14. The Sixth Circuit deepened that split. It concluded that White was entitled to have his procedural default forgiven simply by establishing "cause" under *Martinez*. In

so holding, the Sixth Circuit joined the Third and Seventh Circuits in holding that a petitioner who satisfies *Martinez*'s "some merit" showing is not required to make any other showing of prejudice to have his default forgiven. Pet.App.15a; *Workman v. Superintendent Albion SCI*, 915 F.3d 928, 940 (3d Cir. 2019); *Brown v. Brown*, 847 F.3d 502, 513 (7th Cir. 2017); *see also* Pet.22–23. This is in contrast to the approach taken in the Fifth, Ninth, and Eleventh Circuits. Each of those courts always or generally require some showing of prejudice beyond the "some merit" showing. Pet.16–22; *Canales v. Stephens*, 765 F.3d 551, 571 (5th Cir. 2014); *Wessinger v. Vannoy*, 864 F.3d 387, 391 (5th Cir. 2017); *Ramirez v. Ryan*, 937 F.3d 1230, 1241 (9th Cir. 2019); *Raleigh v. Sec'y Fla. Dep't of Corr.*, 827 F.3d 938, 957–58 (11th Cir. 2016); *see also United States v. Lee*, 792 F.3d 1021, 1024 (8th Cir. 2015).

5. The Warden petitioned for *en banc* review, arguing that habeas petitioners who satisfy *Martinez* must prove actual prejudice—or, at least, *some* prejudice in addition to the "some merit" showing—to have their procedural defaults forgiven. The Sixth Circuit denied the Warden's *en banc* petition on November 20, 2019. The Warden, after obtaining a stay of the mandate, timely filed a petition for a writ of *certiorari* in *Morgan v. White*, No. 19-1023. Instead of filing a brief in opposition, White filed his conditional cross-petition.

REASONS FOR DENYING THE CROSS-PETITION

The parties and ten *amici* States all agree that the Warden's petition, *Morgan v. White*, No. 19-1023, presents a certworthy question. The question is this: If a petitioner defaults an ineffective-assistance-of-trial-counsel claim with "some merit,"

does *Martinez v. Ryan* allow a federal court to excuse the procedural default without requiring any further showing of prejudice? The Court should grant *certiorari* to decide that question.

The Court should deny, however, White's cross-petition for *certiorari*. The cross-petition presents no circuit split or other important issue worthy of this Court's review. Indeed, White's cross-petition asks this Court to overrule decades of decisions, notwithstanding the force of statutory *stare decisis*. The Court should decline White's invitation to eliminate a doctrine that has promoted comity and protected federalism for decades.

I. The procedural-default doctrine is well-established, critically important, and ought not be overruled.

The procedural-default doctrine prohibits federal courts from awarding habeas relief based on legal theories "that a state court refused to hear based on an adequate and independent state procedural ground." *Davila v. Davis*, 137 S. Ct. 2058, 2062 (2017). "This doctrine, like the federal habeas statute generally, is designed to ameliorate the injuries to state sovereignty that federal habeas review necessarily inflicts," as it gives "state courts the first opportunity to address challenges to convictions in state court." *Id*. at 2070. The doctrine has fulfilled this important role for more than half a century. *See, e.g.*, *Fay v. Noia*, 372 U.S. 391, 399 (1963); *Wainwright v. Sykes*, 433 U.S. 72, 91 (1977). And Congress, despite making major changes to federal habeas review in the intervening years, *see, e.g.*, Antiterrorism

and Effective Death Penalty Act of 1996 ("AEDPA"), 104 Pub. L. 132, 110 Stat. 1214, has never modified or eliminated the doctrine.

White, in his cross-petition, asks the Court to abandon this long-established doctrine. He argues that, instead of asking whether a petitioner procedurally defaulted, courts should ask *only* whether the petitioner adequately exhausted his claims in state court. And that inquiry, he says, ought to be driven exclusively by §2254(b), which says:

> (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.
>
> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
>
> (3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

The Court should not grant *certiorari* to consider this argument. As an initial matter, because the question requires overturning Supreme Court precedent, there is no circuit split on the question whether the procedural-default doctrine ought to be replaced with §2254(b). Nor is the question important enough to consider without any confusion in the lower courts. Simply put, there is no good argument that §2254(b) justifies abandoning the procedural-default doctrine.

As an initial matter, any argument for abandoning the procedural-default doctrine would have to be quite compelling. The reason is the heightened form of *stare decisis* that this Court applies to its statutory decisions. *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015). Unlike erroneous constitutional decisions, which can be dealt with only by a constitutional amendment or a decision of this Court, "Congress can correct any mistake it sees" in a statutory decision. *Id.* As a result, the Court is generally loath to reconsider statutory precedents. And it is equally loath to reconsider "'judicially created doctrine[s]' designed to implement a federal statute." *Id.* (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 274 (2014)). Such doctrines "effectively become part of the statutory scheme, subject (just like the rest) to congressional change." *Id.*

The procedural-default doctrine is a doctrine designed to implement the habeas statutes. It is thus entitled to a heightened form of *stare decisis*. Nothing in White's cross-petition suggests he will be able to overcome so high a hurdle were this Court to grant review.

Indeed, White's argument fails on its own terms. Again, he seeks to replace the procedural-default doctrine with strict reliance on §2254(b). But §2254(b) has nothing to do with the procedural-default doctrine. Instead, it codifies this Court's "longstanding exhaustion doctrine." *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). (The previous version of §2254(b) did the same. *See* 28 U.S.C. §2254(b) (1994)). That doctrine is similar to, but distinct from, the procedural-default doctrine. The exhaustion doctrine requires habeas petitioners to "exhaust available

state remedies before presenting his claim to a federal habeas court." *Davila*, 137 S. Ct. at 2064. The procedural-default doctrine, on the other hand, bars habeas courts from awarding relief on any claim—including any claim for which the petitioner exhausted his state remedies—that state courts rejected "based on an adequate and independent state procedural rule." *Davila*, 137 S. Ct. at 2064. Both doctrines have long existed alongside one another, performing distinct yet complementary roles. *See, e.g.*, *Murray v. Carrier*, 477 U.S. 478, 488-89 (1986).

This doctrinal setting "was the backdrop against which Congress was legislating," *Voisine v. United States*, 136 S. Ct. 2272, 2281 (2016), when it enacted the modern version of §2254(b) as part of AEDPA in 1996. Given that both doctrines had long existed alongside one another, it is tough to buy the suggestion that Congress eliminated the procedural-default doctrine in a statute dealing exclusively with the exhaustion doctrine—Congress must be presumed to have known that the two doctrines were distinct. *Voisine*, 135 S. Ct. at 2280. The sell becomes harder still given the principle that "Congress … does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Given the undoubted significance of the longstanding procedural-default doctrine, one would expect Congress to have *expressly* eliminated the doctrine if it had wished to do so. Certainly Congress should not be presumed to have hidden an elephant like the elimination of the procedural-default doctrine in a mousehole like a statute (§2254(b)) dealing with a different doctrine (exhaustion).

If anything, the fact that Congress has significantly amended the habeas statutes without expressly modifying the procedural-default doctrine signals Congress's implicit approval of the doctrine. *See Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2520 (2015).

The final problem with White's argument is that it contradicts the objective purpose of AEDPA—the act that created the modern §2244(b). It is obvious on AEDPA's face that AEDPA was passed to *limit* the availability of habeas relief. *See Harrington v. Richter*, 562 U.S. 86, 102 (2011). It would be strange indeed if Congress had eliminated the procedural-default doctrine—a doctrine that has long protected state convictions from undue federal interference—in a law that everyone agrees was designed to insulate state convictions from federal interference.

In sum, White has given this Court no good reason to consider whether it ought to take the drastic step of eliminating the current procedural-default doctrine. The Court should deny the cross-petition for *certiorari*.

II. It is irrelevant, for purposes of the questions presented by the Warden's petition and White's cross-petition, whether White was prejudiced by his trial counsel's alleged conflicts of interest.

White dedicated a few pages of his cross-petition to an argument that is both irrelevant and incorrect. Cross-Pet.11–14. Recall that White's trial attorney, during his representation of White, had been indicted by the same prosecutor's office that was prosecuting White. According to White, this created a *per se* conflict of interest that *per se* prejudiced White. Even assuming White were right on the law and the facts, his argument would have no bearing on the decision whether to grant *certio-*

rari in case 19-1023 or in this case. Regardless, White is wrong on the law, and the facts make it impossible to say at this stage whether White has a winning claim of prejudice. The Court can and should leave this debate for remand.

A. White's argument is legally irrelevant at this stage of the case.

The biggest problem with White's argument is its irrelevance. Simply put, the question whether White's trial attorney labored under a conflict of interest, and the related question whether that conflict prejudiced White, will have no bearing on the questions presented for review.

First, consider the question presented by White's cross-petition: whether to keep or retain the procedural-default doctrine. The answer to that question will not, and could not possibly, be affected by the answer to the question whether White was prejudiced by his trial counsel's performance.

Second, the supposed conflicts of interest and prejudice are equally irrelevant to the question presented by the Warden's petition. Again, the Warden's petition asks whether petitioners who make the "some merit" showing under *Martinez* must make any other showing of prejudice in order to have their procedural defaults excused. Pet.i. To answer that question, the Court need not consider whether White was prejudiced by his trial counsel's supposed conflicts of interest. Instead, the Court must decide only whether petitioners like White—in other words, habeas petitioners seeking to excuse a procedural default under *Martinez*—must show some degree of prejudice over and above the "some merit" showing. If the answer is no, the Court will affirm the Sixth Circuit without regard to the question whether

White's lawyer prejudiced him. If the answer is yes, the Court can simply reverse, leaving for remand the question whether White established the necessary degree of prejudice—a question the Sixth Circuit never considered. Indeed, one of the things that makes this a great vehicle for resolving the circuit split is that the Sixth Circuit did not consider whether White had or could established prejudice over and above the "some merit" showing. Pet.23–24. That allows the Court to address the circuit split without having to consider *at all* whether White proved the prejudice needed to excuse his procedural default. Pet.23–24.

Further, there is no reason the Court *should* take up the prejudice issue at this stage. This is a "court of review, not of first view." *McWilliams v. Dunn*, 137 S. Ct. 1790, 1801 (2017). In other words, the Court will usually leave for remand issues the lower court failed to address. This principle dovetails nicely with "the cardinal principle of judicial restraint—if it is not necessary to decide" an issue, "it is necessary not to decide" it. *PDK Labs. Inc. v. United States DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment). Combined, these principles counsel in favor of leaving for remand any issues surrounding trial counsel's performance and their bearing on White's ability to litigate his procedurally defaulted ineffective-assistance-of-trial-counsel claim.

B. White's argument misrepresents the law and ignores important factual disputes.

The preference for letting lower courts address issues in the first instance makes especially good sense here, as the question whether White's trial counsel committed

a prejudicial Sixth Amendment violation is a good deal more complicated than White seems to think. White claims that his attorney *per se* prejudiced him by representing him while under indictment. According to him, every attorney who represents clients while being investigated or prosecuted by the same office as his client is *per se* laboring under an actual conflict of interest that *per se* violates his clients' Sixth Amendment rights.

That argument, in addition to being legally irrelevant at this stage, *see above* 13–15, is wrong in all respects. First, the fact that a lawyer is under indictment or investigation, even by the same office as his client, does not *automatically* constitute an actual conflict of interest. Whether it does or not is a fact-specific inquiry. *See, e.g.*, *Reyes-Vejerano v. United States*, 276 F.3d 94, 99 (1st Cir. 2002); *Armienti v. United States*, 234 F.3d 820, 824–25 (2d Cir. 2000); *United States v. Montana*, 199 F.3d 947, 949 (7th Cir. 1999); *Briguglio v. United States*, 675 F.2d 81, 82 (3d Cir. 1982).

Second, even if the defendant proves that his attorney represented him while laboring under an "actual conflict," that does not automatically establish the requisite degree of prejudice. *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). To the contrary, the defendant must show that the conflict "adversely affected his lawyer's performance." *Id.*; *accord Taylor v. United States*, 985 F.2d 844, 846 (6th Cir. 1993) (*per curiam*); *Reyes-Vejerano*, 276 F.3d at 99; *United States v. Levy*, 25 F.3d 146, 157 (2d Cir. 1994) (cited at Cross-Pet.14) (An aside: Even if the existence of an actual conflict *did* automatically establish prejudice for Sixth Amendment purposes, it is not

clear that the "prejudice" required to win a Sixth Amendment claim is the same as the "prejudice" required to excuse a procedural default under the cause-and-prejudice test. The Warden will put that issue to the side, however, for purposes of this brief.)

Assuming White could prove an actual conflict and show that the conflict adversely affected his trial lawyer's performance, he *still* may not be able to prove prejudice. The reason is this: "there is nothing in the record … indicating White was unaware" of his trial counsel's situation when he voluntarily retained Armengau to represent him at trial. Pet.App.91a. As White's own sources suggest, a criminal defendant who retains a lawyer that he *knows* has been indicted may waive any Sixth Amendment argument resting on that indictment. *See United States v. De Falco*, 644 F.2d 132, 137 (3d Cir. 1979) (*en banc*) (cited at Cross-Pet.14). The question whether White made such a waiver would have to be addressed on remand.

Against all this, White gives no good reason for concluding that his attorney's conflicts must be regarded as *per se* prejudicial. He relies primarily on *United States v. Cronic*, 466 U.S. 648 (1984). But that case did not involve actual conflicts at all. Instead, *Cronic* addressed the claims of a defendant arguing that his attorney had insufficient time to prepare for trial. And it held that the defendant had to *prove* prejudice—the courts would not *presume* prejudice. *Id*. at 649–50, 666–67.

White additionally points to *Holloway v. Arkansas*, 435 U.S. 475 (1978), and *Glasser v. United States*, 315 U.S. 60 (1942). According to White, both cases stand

for the broad proposition that any criminal defendant whose lawyer had an actual conflict of interest "need not show prejudice" to win relief under the Sixth Amendment. Cross-Pet.13. That is not what *Holloway* and *Glaser* say. Both cases involved joint defendants with conflicting interests who, before trial, objected to being represented by a single lawyer. In those narrow circumstances, *Holloway* and *Glasser* held, trial courts must either appoint separate counsel or "take adequate steps to ascertain whether the risk" of conflicting interests is "too remote to warrant separate counsel." *Holloway*, 435 U.S. at 484; *accord Glasser*, 315 U.S. at 75–76. If a trial court fails to do so, its failure will be presumed prejudicial. *Holloway*, 435 U.S. at 484. That is as far as *Holloway* and *Glasser* go. Neither case stands for the broad proposition that *all* actual conflicts of interests will be presumed prejudicial. *Contra* Cross-Pet.13.

Indeed, this Court has expressly limited *Holloway* and *Glasser*'s *per se* prejudice rule to circumstances involving joint representations to which a defendant objects before trial. In *Cuyler*, the Court held that "a defendant who raised no objection at trial must demonstrate that an actual conflict of interest *adversely affected his lawyer's performance*." 446 U.S. at 348 (emphasis added); *see also Mickens v. Taylor*, 535 U.S. 162, 168 (2002). Courts apply the *Cuyler* rule to determine whether representation by a lawyer who is facing legal troubles of his own violates the Sixth Amendment. *See, e.g.*, *Taylor*, 985 F.2d at 846; *Reyes-Vejerano*, 276 F.3d at 99. White's own authorities say so. *See Levy*, 25 F.3d at 157 (cited at Cross-Pet.14).

* * *

The point of all this is not to seek a resolution of the question whether trial counsel's conduct prejudiced or otherwise adversely affected White. Instead, the point is that the issue is a lot more complex than White lets on. That is all the more reason to leave it for remand.

III. The Court should treat White's cross-petition as his response in case 19-1023, and grant *certiorari* in that case without requesting, and waiting for White to file, a response.

This Court should grant *certiorari* in case 19-1023 without ordering any further *certiorari*-stage briefing in that case. White filed his cross-petition in this case without simultaneously filing a response to the Warden's petition for *certiorari* in case 19-1023. But the cross-petition at issue here performs the same functions as a Response to a Petition for a Writ of *Certiorari* under Rule 15. In particular, it addresses the question presented by the Warden's *certiorari* petition, conceding that the question implicates a circuit split deserving this Court's attention. White additionally concedes that case 19-1023 is a sound vehicle for resolving that split. The cross-petition thus contains all the information that would normally be included in a *certiorari*-stage response. *See, e.g.*, The Florida Bar's Response to Petition for Writ of Certiorari, *Williams-Yulee v. The Florida Bar*, No. 13-1499, 2014 U.S. S. Ct. Briefs LEXIS 2933 (U.S., August 22, 2014) (agreeing the Court should grant *certiorari*). Therefore, the Court should grant *certiorari* in case 19-1023 without requesting White to file a response in that case.

CONCLUSION

The Court should grant the petition for *certiorari* in *Morgan v. White*, No. 19-1023, but deny White's cross-petition in *White v. Morgan*, 19-8117.

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