No. 20-7264

IN THE SUPREME COURT OF THE UNITED STATES

GRAHAM SONNENBERG,

Petitioner

v.

LORI DAVIS,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO

THE FIFTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Graham Sonnenberg

Petitioner *pro se*

TDCJ-CID# 1950692

Jester 3 Unit

3 Jester Road

Richmond, Texas 77406-8544

QUESTION PRESENTED

Petitioner alleged that his trial counsel was ineffective for failing to advance a plausible alternative defense that would have exonerated petitioner. Petitioner was convicted, mainly, upon the testimony of Alexis Manley and Barbara Kucharska. Multiple witnesses were available to testify at trial that would have assisted in establishing an alternative defense theory. Brady material was noticed to counsel on March 17, 2014, months in advance of trial. The Brady evidence would have corroborated witness testimony that the injuries claimed by Manley and Kucharska, were not the result of an assault by the petitioner. The Court of Appeals agreed that the omitted Brady page, that trial counsel claimed as the reason for not investigating Brady material, was not material, but only provided more detail of the same. Petitioner retained counsel for $20,000.00 and paid $7,500.00 for counsel's services, four months after the Court appoints him due to indigence. Then, trial counsel tells the petitioner, "If you don't pay me my [*]ucking MONEY, GRAHAM, YOU'RE GOING TO PRISON I CAN PROMISE YOU THAT, PAY ME!!" Counsel labors under an actual conflict of interest between counsel's personal interest of money over petitioner's interest of proving innocence. Petitioner presented evidence of the "adverse affect" as trial transcripts showing trial counsel passing on Brady material, and witnesses vital to the defense. The state and District Courts apply Cuyler, but fail to apply adverse affect. The case thus presents the following question:

Whether the prophylaxis of Cuyler should be extended to define the term "adverse affect" to establish a demonstration test involving actual conflicts between an Attorney's personal interest and his Client's interest.

LIST OF PARTIES

The following are parties that have an interest in the outcome of this case:

Petitioner:	Graham Sonnenberg TDCJ-CID #1950692 Jester 3 Unit 3 Jester Road Richmond, Texas 77406-8544
Respondent:	Lori Davis Former Director for TDCJ-CID 1060 Hwy. 190 East Huntsville, Texas 77340
Respondent:	Bobby Lumpkin Director TDCJ-CID 1060 Hwy. 190 East Huntsville, Texas 77340 Mr. Lumpkin became Director during the pendency of litigation.
Respondent's Counsel:	Nathan Tandema Assistant Attorney General of Texas P.O. Box 12548, Capitol Station Austin, Texas 78711-2548

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PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

The Petitioner, Graham Sonnenberg, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Fifth Circuit Court of Appeals, rendered in these proceedings on June 15, 2020.

OPINION BELOW

The Fifth Circuit Court of Appeals denied the petitioner habeas relief under 28 U.S.C. §2254 in its cause no. 19-50105. The opinion is unpublished, and is reprinted in the appendix to this petition A, infra. The order of the Fifth Circuit Court of Appeals denying rehearing is reprinted in the appendix to this petition as B, infra.

JURISDICTION

The original opinion of the Fifth Circuit Court of Appeals was entered June 15, 2020. A timely motion to that Court for rehearing that was denied on October 01, 2020. Due to COVID-19, under the current 150 day rule, this petition is presented timely.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The following statutory and constitutional provisions are involved in this case.

U.S. CONST., AMEND VI

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

U.S. CONST., AMEND XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(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.

(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.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the Statem 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.

(d) 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 with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--
(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce the part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substance Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel under this section shall be govered by section 3006A of title 18.

STATEMENT OF THE CASE

Petitioner was convicted of aggravated assault bodily injury with a deadly weapon and assault strangulation. According to Alexis Manley, the alleged victim, testfied that, after she had dated petitioner for several months, petitioner came to her house and committed various acts of violence against her. The jury deliberated for four hours finding petitioner guilty. See Sonnenberg v. State, No. 03-14-00530 CR, 2016 WL 3475200 (Tex.App.-Austin 2016, no pet.).

Petitioner appealed, asserting: a double-jeopardy claim; the improper admission of expert testimony; trial error with regard to the denial of petitioner's request to poll the jury; and typographical error in the judgment. Sonnenberg, 2016 WL 3475200, at *1. The appellate court modified the judgment to cite the proper subsection of the Penal Code under which petitioner was convicted and overruled petitioner's other claims for relief. Id. at *5. Petitioner did not seek discretionary review of the appellate Court's decision. Petitioner filed a state writ of habeas corpus, asserting: Petitioner was denied the effective assistance of counsel; a double-jeopardy claim; and a Brady claim. The habeas trial court, which was not the convicting court, denied the writ. The Court of Criminal Appeals denied the writ without written order. Petitioner timely filed his habeas petition under 28 U.S.C. §2254 in Sonnenberg v. Davis, cause no. 1:18-CV-450 for the Western District of Texas Austin Division. Petitioner was denied habeas relief, as well as a requested evidentiary hearing. Petitioner timely filed his request for Certificate of Appealability, denied on June 15, 2020, (APPENDIX A) in its cause 19-50105. Rehearing En Banc is timely filed, denied on October 01, 2020, (APPENDIX B).

At petitioner's trial, Alexis Manley testified that, after she had dated petitioner for several months, petitioner came to her house one night and committed various violent acts, including strangling her with the hands, and standing on her throat while wearing boots. Manley testified that petitioner kicked her in various parts of her body, tore some of her hair out, threw her jewelry at her, slapped her, puched her, bit her, and broke her arm. Manley admits hitting petitioner during the encounter, and testified that petitioner banged his own head against a doorframe.

Petitioner admitted to assaulting Manley in self-defense, after Manley slapped, punched, pushed, and bit petitioner on the face causing bleeding. See APPENDIX C. Petitioner leaves Manley's apartment, calls a Yellow Cab after calling friend Jay Plower, where petitioner went to a club called Polazio's. Jason, the club's owner, gives petitioner a first aid kit to clean off the blood from petitioner's face, as well as scratches from Manley's violent attack. Petitioner remained at Polazio's until about 2:40 a.m. waiting for Jay Plower, who never shows up. Manley texted petitioner begging him to come back. Then, petitioner did so.

Once petitioner arrived at Manley's house, upon entering, petitioner is assulted wityh a ceramic gnome causing bleeding. Manley then takes a knife, cuts petitioner's ear (APPENDIX C), where a wrestling match ensues, to free Manley of the knife. Manley then takes off running out the door. Shortly thereafter, the police show up detaining petitioner.

At the hospital, a female doctor and nurse sees petitioner due to his injuries. Little pieces of gnome were removed from petitioner's head where seven (7) stitches were applied. Stitches were also applied to petitioner's face, ear, petitioner's elbow is also shattered.

Manley recited a fictitious story to police and medical personnel to hide the fact, that Manley was out on bond for a second degree DWI charge, as Manley was intoxicated with multiple drugs in her system, including Cocaine. At the hospital, petitioner informs medical personnel and the police of these facts.

In December of 2012, at the Moontower, a bar in south Austin, petitioner met Barbara Kucharska also known as "Bashka" while petitioner's catering company had an engagement there. Bashka needed a ride home as she had too much to drink. In January of 2013, petitioner moved in with Bashka with petitioner's son Sam. Bashka conceived a plan that petitioner and her should have children together, which petitioner objected to. Shortly thereafter, petitioner moved out of Bashka's home by the end of March. Bashka refused to give petitioner, and his son, their belongings amounting to over $7,000 worth of items leaving petitioner and his son with nothing. Over the next few months, Bashka insisted her and petitioner should be married and have children together. She used this situation to continue to hold belongings of petitioner and petitioner's son, which continued to escalate into a bad situation.

Kucharska (Bashka) claimed at trial that while petitioner was with her in San Antonio, petitioner assaulted her, and damaged a hotel room doing $5,000 in damage. At trial, no documents were provided by the hotel to prove this allegation. Bashka also lied concerning petitioner's whereabouts, since petitioner was in Austin at a barbque with friends Tye and Dawn during the Memorial Day weekend on June 22, 2013. Witnesses Chase and Sheana Lincoln observed Bashka's injuries and how she obtained then while tubbing. See APPENDIX D. The affidavit is quite clear how Bashka's injuries occured. The District Attorney never returned calls from Austin and Sheana, nor did

Chase Lincoln get to recite the actual events of Bashka's injuries. See APPENDIX E of Chase Lincoln. The jury never heard the truth, or the true circumstances, just a story of fiction by the State's witnesses Manley and Bashka, violating the Sixth Amendment's effective counsel provision, and the Fourteenth Amendment's confrontation clause.

In addition, petitioner learned that Bashka befriended Manley. Text messages existed to support the conclusion, that Manley and Bashka conspired to commit perjury in court to, "get me" if petitioner did not surrender to Bashka's demands of getting back together with her. Petitioner submitted an affidavit (APPENDIX F) of these facts in support of petitioner's habeas corpus that the court claimed was not credible. Equally important, all the above facts could have easily been proven had trial counsel completed his duty to advance an alternative defense to the allegations as both evidence and witnesses existed to corroborate petitioner's defense.

Petitioner's witnesses were at trial ready to testify in order to present his defense under the crucible of confrontation. Trial counsel never asks a single defense witness to testify.

A simple inquiry by the State or District Court's during any of the habeas proceeding, would have revealed that trial counsel lied in his affidavit. All of petitioner's witnesses were in the courtroom ready to testify. Exhibit 8 in the habeas record (APPENDIX D in this petition), is an affidavit of Sheana Lincoln, that reveals that Bashka's injuries occured while tubbing at Don's Fish Camp. The affidavit also reveals trial counsel never returned her calls as trial counsel so claimed in his affidavit, "We left a clear message with his office stating we would like to testify in regards to the date of June 22, 2013." The trial court disregarded this affidavit calling it not credible.

Witness Ryan Nail, would have testified that Manley was at Nail's house with petitioner on the day of the alleged assault. Also, that Manley had been drinking, and that Manley's behavior was rude and assaultive. At trial, Manley denied ever being at Nail's home (R.R. Vol. 5 at 59).

Witness Angela Bradley, would have testified that a few days after the incident with petitioner, that Manley told her she obtained her injuries by falling down the stairs. Bradley also would have testified to Manley's character as being dishonest and untrustworthy. Trial counsel refused to call Bradley as a witness, even though counsel claimed he contacted Bradley.

Witness Terrez Townley would have testified that he had witnessed Manley assault petitioner on previous occasions. Townley also, would have testified that Manley was a dishonest person and had openly verbally abused petitioner.

Witness Jay Plower, would have testified that petitioner contacted him after being assaulted by Manley, and that Manley was dishonest and untrustworthy. Plower would have also testified, that Manley verbally abused petitioner, and even threatend petitioner with physical harm.

Witness John Splendorio, would have testified that Manley was a violent person, not credible, nor reliable. Splendorio also would have testified that Manley assaulted him on multiple occasions.

Even though petitioner demanded that all of the above witnesses be at trial to testify, to prove that petitioner did have an alternative defense to Manley's and Kucharska's allegations, trial counsel failed, and refused, to secure these witnesses. The jury never heard the truth, or the true nature of the circumstances. Under the rubic of reasonable doubt, there can be no way to determine the impact such testimony would have had on the jury. Trial counsel

allowed an uncontested State presentation of evidence against petitioner. In Court, witness Dawn Grunwaldt submitted an affidavit of how counsel was not prepard for trial (APPENDIX L), allowing no witnesses to testify. Had witnesses been allowed to testify, the probability exists, the outcome would be different.

Trial counsel claimed in his affidavit, that petitioner's witnesses, "would not be terribly useful" and "might even be harmful." The State habeas court was allowed by the Federal District Court to pass on the self-defense issue. The State habeas court never inquired concerning trial counsel's lack of explanation in his affidavit, of why he failed to present an alternative defense, even though the substance of witness testimony, would have been useful to establish a defense to the allegations. Trial counsel's so-called trial strategy to forego witnesses, violated the confrontation clause, as the trial itself was highly unreliable (APPENDIX L NOTED). Prejudice was injected during the trial that influenced the jury.

State documentary evidence of photographs (APPENDIX G) exhibits 55 and 63 were downloaded from a previous auto accident. The State used these photos to convince the jury petitioner caused Manley's injuries on October 29, 2012. The State left these photographs on the projector for extended periods of time witnesses by Holly Moffitt (APPENDIX H).

Appendicies M and N are affidavits from petitioner's brothers Chase Lincoln and William Lincoln, who were never contacted by counsel to get their statement, or asked to testify at trial.

Documentary evidence existed to verify witness accounts on Manley's drunken, drugged state; a toxicology report that would have proven Manley lied to police, the jury, and falsified reports in order to convict petitioner. No confrontation from trial counsel existed at any part of the trial.

Several months prior to petitioner's trial, the State filed a "Notice of Disclosure of Brady Material" stating: "In the medical records from Texas Orthopedics, [Alexis Manley] told medical staff on November 07, 2012, that she sustained the injury to her left forearm by falling down some stairs." See APPENDIX I. At petitioner's trial, trial counsel claims he never received the Brady material until the day of trial. A fact omitted by the District Court, and the Fifth Circuit, is that the trial court gave trial counsel every opportunity to take a recess to consider his course of action. Trial counsel declined (R.R. Vol. 5 p. 213-214). Under the Brady Notice on April 10, 2014, medical staff from Austin Regional Clinic was told by Barbara Kucharska, that she had injured her collarbone because she tripped over her high heels and "fell directly forward onto her collarbone." Barbara Kucharska's admission, in addition to the Lincoln's testimonies (APPENDICIES D and E), exonerates petitioner by reasonable doubt of the alleged assaults on Manley and Kucharska. This additional documentary evidence corroborated eyewitness accounts.

The Court of Appeals in their opinion agreed that trial counsel had Brady Notice months before trial; that the omitted page was not material as to why counsel never investigated the Brady material: "... only provided more detail to this differing account." See Court of Appeals Opinion page 9 paragraph 1 (unable to obtain). To emphasize, the missing page was not in any way material of why trial counsel never investigated, nor introduced the Brady material to the jury. The Brady material was a crucial evidence, because it places reasonable doubt before the jury with the witnesses testimony.

Actual Conflict of Interest

The main reason why trial counsel failed to advocate petitioner's case is over money. Trial counsel labored under an actual conflict of interest over

funds that petitioner owed him as retained counsel. When petitioner became indigent, the court-appointed the same trial counsel to petitioner. On October 16, 2013, the court enters it order appointing JON EVANS as petitioner's counsel. See APPENDIX J. Exhibit 2 in the habeas record explains how the actual conflict developed.

Petitioner agreed to a $20,000.00 retainer to defend petitioner as business was good at the time. Petitioner believed he could pay trial counsel the agreed retainer. After several threats from trial counsel, Vickie Lincoln on February 12, 2014, after being appointed by the Court, pays trial counsel $7,500.00. APPENDIX K is Vickie Lincoln's Affidavit with the receipt from trial counsel's office for the paid legal services receipt number 730136, submitted during the habeas proceeding as Exhibit 3. Trial counsel's interest in petitioner's case was money, not advocating petitioner's innocence, which explains why trial counsel never proceeded to present a defense as any lawyer would.

In addition, APPENDIX K reveals the tension between trial counsel and petitioner, as these accounts were revealed to petitioner's mother Vickie Lincoln. The hostile manner in which trial counsel treated petitioner is well noted in APPENDIX K. Since petitioner could no longer pay trial counsel what he demanded, trial counsel refused to investigate the case. Trial counsel tells petitioner, "If you don't pay me my FUCKING MONEY GRAHAM YOU'RE GOING TO PRISON I CAN PROMISE YOU THAT, PAY ME!!" Petitioner broke down in tears telling trial counsel he is indigent. Petitioner never sees trial counsel again.

Petitioner informs Judge Corronado of the incident via a letter to the Judge, who refused to assign new counsel regardless of the conflict over money, even though counsel is appointed. Exhibit 2 in the habeas record shows the trial court was well aware of the conflict.

Due to trial counsel's "All or nothing" representation, where counsel's interest in money becomes more important than pursuing viable evidence to provide an alternative defense, is evidence that trial counsel's performance was being adversely affected. Once adverse affect is demonstrated, under Supreme Court law, an evidentiary hearing must be conducted to inquire into counsel's performance, to test the adverse affect prong as required. The Fifth Circuit commits reversable error, by failing to hold a De Novo review of the submitted habeas evidence (as shown above) for adverse affect. It is evident, even to a layperson, that the State habeas court held all of the submitted evidence by petitioner as not credible, is judicial bias to protect trial counsel.

Affidavits of eye witnesses to the events is credible and necessary for the defense. A receipt from JON EVANS'S office for $7,500.00 for legal services is credible to demonstrate adverse affect. A Court Order is credible to prove trial counsel is receiving money from petitioner's family AFTER he is appointed by the court with threats of prison if petitioner does not pay is equal to extortion. How can the District Court, and the Fifth Circuit, pass on such a miscarriage of justice. Documentary evidence of Manley's real injuries to prove petitioner is innocent is credible evidence that corroborates witness accounts. Adverse affect is proven with credible evidence.

REASONS FOR GRANTING THE WRIT

I. WHETHER THE PROPHYLAXIS OF CUYLER SHOULD BE EXTENDED TO DEFINE THE TERM "ADVERSE AFFECT" TO ESTABLISH A DEMONSTRATION TEST INVOLVING ACTUAL CONFLICTS BETWEEN AN ATTORNEY'S PERSONAL INTEREST AND HIS CLIENT'S INTEREST

The Sixth Amendment guarantees the right to effective assistance of counsel in criminal prosecutions. Padilla v. Ky., 559 U.S. 356, 364 (2010) (6th Amendment right to counsel is right to effective counsel); McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)(same).

Under the prophylaxis of Cuyler v. Sullivan, 446 U.S. 355, 100 S. Ct. 1708 (1980), when an attorney's representation of multiple defendants, though not objected to at trial, results in an actual conflict of interest that adversely affects the attorney's performance, the defendant's Sixth Amendment rights have been violated, even without a showing that the conflict caused the defendant to lose his or her case (emphasis added throughout) Id. at 349-350 ("Thus, a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief.").

In Justice Marshall's separate opinion in Cuyler, written to challenge the adverse affect prong of the test, endeavors to define "conflict of interests." Id. at 355 n.3 (Marshall, J., concurring in part and dissenting in part). In each of the ethics codes to which he refers, Justice Marchall cites only the canon or rule dealing with multiple client representation. It seems, the Supreme Court refused to expand Cuyler, or its progeny, to cases like petitioner's, beyond the ethical problems of multiple representation.

In none of the well recognized Supreme Court cases: Wood v. Georgia, 450 U.S. 261, 101 S. Ct. 1097 (1981); Nix v. Whiteside, 485 U.S. 157, 106 S. Ct. 988 (1986); Burger v. Kemp, 483 U.S. 776, 107 S. Ct. 3114 (1987); Holloway v. Arkansas, 435 U.S. 475, 98 S. Ct. 1173 (1978); or Mickens v. Taylor, 535 U.S. 162, 122 S. Ct. 1237 (2002), is the term "adverse affect" defined, nor does the Supreme Court provide a "demonstration test" in order to obtain relief. The Cuyler adverse affect prong has never been extended to cases involving single client representation ethical issues like petitioner's. The majority only gets part way by stating:

> "Thus, a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief."

Cuyler, 466 U.S. at 349-50. The Supreme Court never defines "adverse affect" only defining "adequacy of representation" to mean the conflict caused the attorney's choice, not that the choice was prejudicial in any other way." See Thomas v. Foltz, 818 F.2d 476, 481-82 (6th Cir. 1987). In Mickens, the Supreme Court modified the "effect on representation" test by putting both the cause and effect elements in the phrase "actual conflict":

> "The Sullivan standard is not properly read as requiring inquiry into actual conflict as something separate and apart from adverse affect. An "actual conflict," for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance."

See Mickens, 535 U.S. at 172 n.5. The Supreme Court never defines the term "adverse effect" and never extends the prophylaxis of Cuyler beyond multiple representation cases. Assuming arguendo, that Cuyler can be applied to cases like petitioner's, as the State and Federal habeas proceedings did do, no definition exists on how a defendant must demonstrate the adverse affect in

order to obtqin relief. The Circuit Courts are left to interpret and apply Cuyler to their whim of judicial opinion, without the Supreme Court defining how demonstration must take place. In petitioner's case, the State habeas Court, who is not the trial Court, labels all of petitioner's affidavits and evidence as not credible. How then can a defendant "demonstrate" the adverse affect of his counsel's interests over the interest of the client? The Court in petitioner's case, cut-off petitioner's limbs with no guiding principals of law. Meanwhile, an innocent person languishes in prison for decades, because the Federal Court system under 28 U.S.C. §2254, will not consider petitioner's evidence, even under the miscarriage of justice exception.

The Sixth Circuit recognized in Thomas, the reasonableness of counsel's choice can be relevant as a factor in proving the choice was caused by the conflict. Causation can be proved circumstantially, through evidence that the lawyer did something detrimental or failed to do something adventageous to one client that promoted a client's interests. Thomas, 818 F.2d at 483. The problem still exists with the circuit courts, because the Supreme Court has never extended Cuyler beyond multiple representation cases.

The Habeas Process Violated The Confrontation Clause

In Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004), the Court recognized the right to confront ones accuser goes back to Roman times. Id. at 43. Affidavits are recognized as "extrajudicial statements" Id. 541 U.S. at 52. The Crawford Court recognized formulations, like affidavits, "all share a common nucleus and then define the clause's coverage at various levels of abstraction around it." Id. Therefore, being exception to heresay. It is true that the submitted affidavits were testimonial in nature, but to "demonstrate" the knowledge each witness had to confront the allegations

against petitioner (emphasis added). The Crawford Court explains that the clause's ultimate goal is to "ensure reliability of evidence." Id. 541 U.S. at 61. The reliability must be assessed in a particular manner:

"by testing in the crucible of cross-examination."

Crawford, 541 U.S. at 61. When a Court denies extrajudicial affidavits without testing its reliability, the Court denies the procedural guarantee of the Sixth Amendment's Confrontation Clause, thus, violating petitioner's rights. The witness affidavits were from witnesses whom were not in custody, or were suspects, nor had a stake in the case making their testimony reliable. See Crawford, 541 U.S. at 63. It is no wonder why the State habeas court used no guiding principals of law to discredit all of petitioner's affidavits.

The Crawford Court considers a witness to be reliable, "... eye witness with direct knowledge of the events." The attached affidavits represent such a condition in which Crawford's majority refers. For the State habeas court in petitioner's case to deem eyewitness affidavits "not credible" without testing their reliability, at least at an evidentiary hearing, is evidence of judicial bias, and should be considered an unreasonable application of law to the facts under 28 U.S.C. §2254(d)(1); as it violates Crawford's direction held by the majority of the U.S. Supreme Court.

Equally important, the eye witnesses were at trial, in the courtroom ready to testify, but due to counsel's ongoing interest of money, rather than, his interest in his client's innocence, not a single defense witness is called. This is why petitioner urges this Court now, to define "Adverse Affect" and define a "demonstration" test to prevent court's from discounting evidence in order to demonstrate adverse affect as required for relief.

II. THE CIRCUIT COURTS DO NOT AGREE HOW TO APPLY THE TERM "ADVERSE AFFECT" IN A CONSISTENT WAY IN ORDER TO OBTAIN RELIEF

There is a difference of opinion among the Circuits about when foregoing an available defense because of a conflict of interest constitutes evidence of "adverse affect." Some Circuits hold that whenever counsel failed to pursue a "plausible defense" that was inherently in conflict with or not undertaken due to the attorney's other loyalties," (the case here) there is sufficient evidence of adverse affect to show a Sixth Amendment violation. Winkler v. Keane, 7 F.3d 304, 309 (2d Cir. 1993); United States v. Gambino, 864 F.2d 1064, 1070 (3d Cir. 1988)(same); United States v. Fohey, 769 F.2d 829, 836 (1st Cir. 1985)(same). Other Circuits also require that the foregoing defense be "reasonable." Freund v. Butterworth, 165 F.3d 839, 860 (11th Cir. 1999)(en banc)(showing adverse affect requires proof of tactic forgone, of reasonableness of tactic on facts, and of a causal link between conflict and decision to forego tactic); Mickens, 240 F.3d at 361 (same).

Jon Evans, trial counsel, demanded money from petitioner after he is court-appointed, violating every legal ethic in the books. Then, when petitioner cannot meet his demands, Evans intentionally refuses to bring forth any defense witnesses, documentary evidence, or expert medical personnel to testify in regards to the Brady material; all of which, was needed to advance a plausible alternative defense.

The Supreme Court never identifies, or explains in Cuyler what is deemed as a "demonstration" of adverse affect. If the logic of adverse affect follows the Circuits interpretation as:

> "whenever counsel failed to pursue a "plausible defense" that was inherently in conflict **with** or **not** undertaken due to the attorney's other loyalties," there is sufficient evidence of adverse affect to show a Sixth Amendment violation.'" (emphasis added)

Winkler, supra; Beets v. Collins, 65 F.3d 1258 (5th Cir. 1995)(en banc) quoting Winkler 65 F.3d at 1284, to address a single conflict between the lawyer's self-interest, and his client's interest; Gambino, supra; Butterworth, supra, the Supreme Court should now bring forth the proper test for "demonstration" of adverse affect, where cases like petitioner's, may obtain relief without affects of judicial bias that petitioner's case has unduly suffered.

How can a legal fee receipt, eye witness accounts of the events, expert testimony of Brady material that corroborates witness testimony, all be named "not credible," and still be a legal process? The Crawford Court recognizes the absolute right to confrontation since Roman times. A definition by the Supreme Court now, would eliminate innocent people from becoming imprisoned when a lawyer decides money is more important than innocence!

Equally important, the Supreme Court should synthesize the Circuit Courts by extending the "Adverse Affect" prong in Cuyler to cases like petitioner's. People of the Republic of the United States have a vested interest in the Constitution, and a vested interest in true justice being brought forth.

CONCLUSION

Since the inception of Cuyler, the Supreme Court has never addressed the proposed question as presented by petitioner. People of a civilized society have a vested interest in justice by the people, and for the people, not to be made a mockery thereof, by an attorney who comes to court to represent his own interest of money.

The U.S. Supreme Court has a duty to the people to ensure that judicial processes are reliable as the majority has recognized in other cases to be a violation of constitutional right when the fundamental judicial process becomes unreliable. Petitioner's case is an excellent example of why the question should be resolved today. To extend Cuyler involving single client representation cases, provides a service to the people of the United States. If attorney's want to use the justice system as their pet playground to rake in vasts amount of money, even if it means extortion, then the Supreme Court must take a stand to rectify the harm. Petitioner's trial counsel, even after being court-appointed, extorted $7,500.00 from petitioner's family: Pay me, or else. Making a demand for something under a threat, is extortion, and trial counsel Jon Evans, should have been disbared.

By the Court granting Certiorari today, the American Bar Association could be asked to submit a brief on this issue, which would guide the Court into a proper decision, that extending Cuyler to cases like petitioner's serves in the interest of the people. Innocent people, such as petitioner, are being placed in prisons all over America without adequate due process. Petitioner is then placed in the judicial system, as a one-armed gladiator against a corrupt political system, who is sacrified at the judicial alter.

What does the term "demonstrate" mean, what must happen to demonstrate adverse affet, how should a court weight submitted evidence, should a court be allowed to wipe away submitted evidence as "not-credible" even though it violated the dictates of Crawford's Confrontation Clause requirements? None of these questions can be answered, because the U.S. Supreme Court, has never addressed the issue.

If the Circuit Courts' are correct in their interpretation of Adverse Affect, then petitioner has overwhelmingly provided enough evidence to show, or demonstrate, adverse affect. The habeas process at any level, has never made trial counsel answer to his so-called strategy to forego witnesses, or Brady evidence, or expert testimony in regards to the Brady evidence. A simple evidentiary hearing, that petitioner requested, would have revealed that trial counsel lied on his affidavit to the Court, and that foregoing such evidence was not "reasonable" as one Circuit Court puts it. The conflict could also be addressed: Why did you accept $7,500.00 after being appointed by the Court? The habeas process failed to make Jon Evans answer this simple question. This is why it is paramount, that the U.S. Supreme Court now answer petitioner's question.

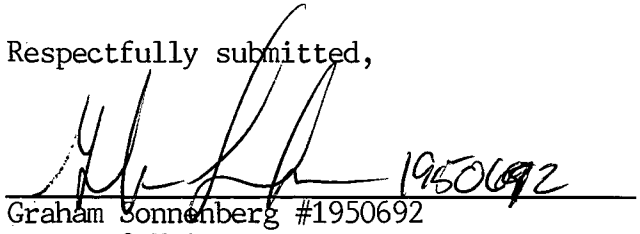
The Fifth Circuit had a responsibility to address petitioner's case in a De Novo review, and examine all evidence that petitioner submitted, and the trial transcripts. Even on the record, as petitioner pointed out in his Petition For Rehearing En Banc page 3, how trial counsel intentionally foregoes credible Brady evidence in pursuit of his own interests. What reasonable attorney would forego evidence that could prove innocence? The Fifth Circuit could have remanded for an evidentiary hearing, because petitioner's claims were supported by the record.

If petitioner's submitted affidavits are now given proper review, a review not given by the Federal District Court, or the Fifth Circuit, what is highly obervable, is how trial counsel passes on witnesses due to the conflict of interest. Petitioner's witnesses could have placed reasonable doubt before the jury, as Manley and Kucharska perjured themselves in court. Had witnesses been heard properly, the documentary evidence by medical staff in regards to the Brady evidence, the jury would have heard the true story. A probability exists that the outcome would have been different. Yet, the affidavit evidence has never been given proper review.

In conclusion, petitioner urges the U.S. Supreme Court to address the question petitioner presents today. An extension of Cuyler to cases like petitioner's is in the public interest to ensure a reliable judicial process. Petitioner is innocent, has been in prison over eight (8) years for a crime in which he did not commit. Defining Adverse affect, and how it must be so demonstrated, is a critical question the majority should resolve.

WHEREFORE, petitioner prays that this Court **GRANTS** Certiorari to now address the question petitioner submits in the interest of justice.

Respectfully submitted,



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