No. 21-53

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES DALE HOLCOMBE,
Petitioner,
v.

STATE OF FLORIDA,
Respondent.

On Petition for Writ of Certiorari to the Florida Fifth District Court of Appeal

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227
Email: ufferman@uffermanlaw.com

COUNSEL FOR THE PETITIONER

A. TABLE OF CONTENTS AND TABLE OF CITED AUTHORITIES

1. TABLE OF CONTENTS

A. TABLE OF CONTENTS AND TABLE OF AUTHORITIES ii

1. Table of Contents ii

2. Table of Cited Authorities iii

B. ARGUMENT 1

2. TABLE OF CITED AUTHORITIES

a. Cases

Cates v. Superintendent,
981 F.2d 949 (7th Cir. 1992) 9

Hoffman v. Leeke,
903 F.2d 280 (4th Cir. 1990) 10

Holcombe v. State,
312 So. 3d 132 (Fla. 5th DCA 2020). 6, 8-9, 11

Holloway v. Arkansas, 435 U.S. 475 (1978) . . . 12, 14

People v. Solomon,
980 N.E.2d 505 (N.Y. 2012) 6-11

Ross v. Heyne, 638 F.2d 979 (7th Cir. 1980) 9-10

Ruffin v. Kemp,
767 F.2d 748 (11th Cir. 1985) 10

Thomas v. State, 551 S.E.2d 254 (S.C. 2001) . . . 9, 14

b. Other

U.S. Const. amend. VI . . . . *passim*

B. ARGUMENT

As explained in the Petitioner's certiorari petition, during the trial, the Petitioner's attorneys represented *both* the Petitioner *and* State witnesses William Hooper and Matthew Angell. In its brief in opposition, the State of Florida (hereinafter "the State") relies *extensively* on the pretrial hearing that was held on January 8, 2018, and the trial court's colloquy with the Petitioner and Messrs. Hooper and Angell that occurred during that hearing. But as explained in the certiorari petition, when the trial court conducted this colloquy with the Petitioner, Messrs. Hooper and Angell were still *codefendants* with the Petitioner. It was not until July 26, 2018, that it was announced on the record that Messrs. Hooper and Angell would enter pleas and not proceed to trial with the Petitioner. And undersigned counsel again notes

that it was the *prosecutor* – at the beginning of the August 2018 trial – who brought the conflict to the trial court's attention. The record is clear that at the time of trial, the prosecutor believed that the attorneys had a conflict of interest in representing both the Petitioner and State witnesses Hooper and Angell:

> THE COURT: All right. Good deal. And then what –
>
> Okay. So I think the State is still concerned about any potential possible conflict –
>
> MS. SAMMON [the prosecutor]: Yes, Your Honor.
>
> THE COURT: – with the other two fellas?
>
> MS. SAMMON: Yes, Your Honor.
>
> Two of the co-defendants also represented by Mr. Delgado and his firm in this case are testifying on behalf of the State.
>
> And so the issue is Mr. Delgado, or his co-counsel, cross examining their current client in representation of their current clients on trial in this case.

THE COURT: But how are – and is that Hooper and Angell?

MS. SAMMON: Matthew Angell, yes, Your Honor.

THE COURT: How are they – are they – is it to their detriment? I mean, they've already entered a plea. They just haven't been sentenced yet.

MS. SAMMON: Yes, Your Honor. Your Honor put off sentencing until after both defendants testified at trial and basically determine whether or not they were cooperative and testified truthfully for the State.

Therefore, it's in their best interest to cooperate and testify truthfully in order to benefit from the plea discussions that the defendants and their counsel had with Your Honor during the time of their plea.

Their testimony will provide evidence for the State against the defendants. And, therefore, in order to represent his clients, Dale Holcombe and James Holcombe, Mr. Delgado will have to, in the State's position, cross-examine his current clients that he's representing which would be Matthew Angell and

> *William Hooper.*
>
> . . . .
>
> . . . *The circumstances have now changed. Two of the defendants have entered a plea agreement – or has entered their pleas open pleas to the bench and are now witnesses for the State.*
>
> *Circumstances now are much different than they were. There is a greater conflict that exists, one that the State's position is not waiveable.*

(PA-32-35)[1] (emphasis added). The prosecutor's arguments at the beginning of the trial were correct. As explained by the prosecutor, the circumstances changed from the January 8, 2018, hearing (when the trial court conducted the colloquy with the Petitioner and Messrs. Hooper and Angell) to the August 2018 trial: by the time of the trial, Messrs. Hooper and Angell were no longer codefendants – *they were*

---

[1] References to the documents in the appendix to the Petitioner's certiorari petition will be made by the designation "PA" followed by the appropriate page number.

prosecution witnesses.[2]

Regarding the first question presented in the certiorari petition,[3] the Petitioner continues to assert that there is a split of authority as to whether an attorney's "joint and dual" representation amounts to

---

[2] Contrary to the State's contention that the Petitioner "waived" this claim in his state appellate court briefs, *see* Brief in Opp., p. 16, a review of the Petitioner's briefs establishes that the Petitioner clearly argued to the state appellate court that his trial attorneys had an "actual conflict of interest" at trial because counsel simultaneously represented both the Petitioner and the prosecution witnesses during the trial – which restricted counsel during cross-examination of the prosecution witnesses.

[3] The first question presented in this case is whether a criminal defendant establishes an "actual" conflict of interest that adversely affects counsel's representation when the attorney engages in "joint and dual" representation – i.e., simultaneously representing *both* the defendant *and* a key prosecution witness during a trial. In its brief in opposition, the State asserts that "Petitioner Can Prevail Only If this Court Also Decides His Second Question Presented." Brief in Opp., p. 29. The State is incorrect – the Petitioner will prevail on the merits if the Court agrees that simultaneous representation at trial of a defendant and a prosecution witness establishes an "actual" conflict of interest that adversely affects counsel's representation.

an "actual" conflict of interest that adversely affects counsel's representation. In its decision below, the state appellate court held:

> Appellant merely asserts that there was an "actual conflict" because defense counsel represented Appellant as well as Angell and Hooper during the trial. He emphasizes that defense counsel cross-examined Angell and Hooper, whom counsel still represented. *However, such facts do not, without more, constitute an actual conflict for Sixth Amendment purposes.*

Holcombe v. State, 312 So. 3d 132, 134 (Fla. 5th DCA 2020) (emphasis added). And as explained in the certiorari petition, in *People v. Solomon*, 980 N.E.2d 505, 508-509 (N.Y. 2012), the Court of Appeals of New York held that simultaneous representation of both a defendant and a key prosecution witness during a trial amounts to an "actual" conflict of interest:

> There was an actual conflict of interest between defendant and Kuebler here.

Kuebler testified that defendant had confessed to raping his daughter. It was very much in defendant's interest either to discredit that testimony or to show that the confession had been obtained by some unlawful or unfair means; Kuebler's interest was the opposite. . . .

The People argue, and the Appellate Division held, that reversal is not necessary because defendant has not shown that the conflict "affected the conduct of the defense." Nothing in the record, the People say, proves that counsel was less effective in cross-examining Kuebler than she would have been had Kuebler not been her client. We assume that this is correct; it seems from the transcript that the cross-examination was competently performed. Defendant now suggests a number of lines of inquiry that counsel might have pursued, but did not. Such after-the-fact suggestions, however, can probably be made about almost every significant cross-examination in almost every case.

But we have never held, and decline now to hold, that the simultaneous representation of clients whose interests actually conflict can be overlooked so long as it seems that the lawyer did a good job. Our cases, and the United States Supreme Court's, make clear that, where such an actual conflict

> exists and is not waived, the defendant has been deprived of the effective assistance of counsel.

(Citations omitted).[4] In its brief in opposition, the

---

[4] In *Solomon*, the court stated:

> Sometimes there will be no actual conflict between the defendant and a prosecution witness – for example, where the witness testifies only about a trivial or uncontroversial issue, or where the witness, testifying reluctantly for the People, really wants the defendant to be acquitted. More typically, however, a prosecution witness's interest will actually conflict with the defendant's. In such cases, we have held that the same attorney cannot simultaneously represent both, unless the conflict is validly waived.

Solomon, 980 N.E.2d at 508 (citations omitted). And contrary to the State's argument in its brief in opposition, *see* Brief in Opp., p. 21, the opinion below establishes that Messrs. Hooper and Angell did *not* merely testify about trivial or uncontroversial issues:

> During the trial, the State called numerous witnesses – including Angell and Hooper – who testified about their interactions with the customers, Appellant's role in the business, how often Appellant was present at the business, and the policies

State *concedes* that there is a conflict between the decision below and *Solomon.* " *See* Brief in Opp., p. 20 ("Arguably, this language [in *Solomon*] could be in conflict with *Holcombe* to the extent that the court believed the adequacy of or effect on counsel's representation was irrelevant . . . ."). By granting the certiorari petition in the instant case, the Court will have the opportunity to resolve this split in authority.[5]

---

enacted by Appellant.

Holcombe, 312 So. 3d at 133.

[5] As explained in the certiorari petition, the opinion below is in conflict with *numerous* state and federal courts decisions finding that the simultaneous representation of both a defendant and a prosecution witness during a trial amounts to an "actual" conflict of interest. *See Thomas v. State*, 551 S.E.2d 254, 256 (S.C. 2001) ("In this case, an actual conflict of interest arose when the solicitor offered a plea bargain that would allow the charge against one spouse to be dismissed if the other spouse would plead guilty to the entire amount of the cocaine."); *Cates v. Superintendent*, 981 F.2d 949, 955 (7th Cir. 1992) ("[N]egotiating a plea agreement for one client with a condition that he testify against another creates an actual conflict of interest."); *Ross v. Heyne*, 638 F.2d 979, 983 (7th

In its brief in opposition, the State contends that the attorneys' conflict in the Petitioner's case did not adversely affect the Petitioner. But as explained by the Court of Appeals of New York in *Solomon*:

> [W]e have never held, and decline now to hold, that the simultaneous representation of clients whose interests actually conflict can be overlooked *so long as it seems that the lawyer did a good job*. Our cases, *and the United States Supreme Court's*, make clear that, where such an actual conflict exists and is not waived, the defendant has been deprived of the

---

Cir. 1980) ("A conflict of interest would also exist where one attorney represents co-defendants and one defendant agrees to provide evidence against the other in return for an advantageous plea bargain."); *Ruffin v. Kemp*, 767 F.2d 748 (11th Cir. 1985) (holding that an attorney who had been appointed to represent codefendants and who attempted to arrange for plea bargain whereby one of them would be guilty and testify against the other labored under actual conflict of interest); *Hoffman v. Leeke*, 903 F.2d 280 (4th Cir. 1990) (holding that defense counsel's joint representation of defendant and codefendant created an actual conflict of interest where counsel advised codefendant to enter into plea bargain which required codefendant to implicate defendant at trial).

effective assistance of counsel.

Solomon, 980 N.E.2d at 509 (emphasis added). This holding is *clearly* in conflict with the following language from the opinion below:

> Here, Appellant does not point to, *nor does the record reflect, any adverse performance on the part of defense counsel*. Appellant merely asserts that there was an "actual conflict" because defense counsel represented Appellant as well as Angell and Hooper during the trial. He emphasizes that defense counsel cross-examined Angell and Hooper, whom counsel still represented. However, such facts *do not*, without more, constitute an *actual conflict* for Sixth Amendment purposes.

Holcombe, 312 So. 3d at 134 (emphasis added). This clear split of authority regarding whether the simultaneous representation of clients whose interests actually conflict amounts to an "actual" conflict – and whether such representation adversely affects counsel's performance – should be resolved by the Court before

the split of authority widens even more.

Regarding the second question presented in the certiorari petition,[6] the Petitioner continues to assert that it is irrelevant as to whether it is defense counsel, the defendant, or the prosecution who notifies the trial court of an attorney conflict – the question is simply whether "the trial court knows or reasonably should know that a particular conflict exists." *Holloway v. Arkansas*, 435 U.S. 475, 485 (1978). In the instant case, it was the prosecutor who objected and asked the trial court to inquire into the conflict – a conflict that the prosecutor described as "not waiveable" because it

---

[6] The second question presented in this case is whether the "presumed prejudice" conflict of interest standard applies when the prosecutor (rather than defense counsel) puts the trial judge on notice at the beginning of a trial of defense counsel's conflict of interest – a conflict which is described by the prosecutor as "not waiveable" – and the judge thereafter fails to inquire into the nature and scope of the conflict.

had changed from a potential conflict (i.e., representation of the Petitioner and his similarly-situated codefendants) to an actual conflict (i.e., representation of the Petitioner and two of the prosecution's key witnesses at trial). (PA-32-35). Yet, despite being put on notice of the conflict in this case, the trial court *failed* to conduct a proper inquiry: (1) the trial court failed to inquire into the nature and scope of the conflict – a conflict which was *different* than the one previously addressed by the trial court during the January 2018 pretrial hearing (i.e., a hearing that was conducted *before* Messrs. Hooper and Angell became prosecution witnesses)[7] – and (2) the

---

[7] As stated above, although the trial court conducted a pretrial inquiry with the Petitioner in January of 2018 (when the Petitioner and Messrs. Hooper and Angell were all similarly-situated codefendants), a new inquiry was required after Messrs. Hooper and Angell entered into plea agreements with the State and agreed to become prosecution witnesses against the Petitioner. *See, e.g.,*

trial court failed to inform the Petitioner of his right to proceed with conflict-free counsel. (PA-36). Pursuant to *Holloway*, if there is a credible indication of an actual conflict of interest before trial, a trial court has a duty to inquire. By granting the petition for writ of certiorari in the instant case, the Court will have the opportunity to consider this important question.

Accordingly, the Petitioner submits that it is necessary for the Court to again address the standard for resolving Sixth Amendment conflict of interest claims and to provide clarity regarding how the standard applies to multiple/simultaneous representation cases. The Petitioner's case is the appropriate case for the Court to address this matter –

Thomas, 551 S.E.2d at 256 ("Although petitioner initially waived a conflict of interest, once it became clear an actual conflict existed due to the plea bargain, counsel should have either withdrawn from representing one or both of them or acquired another waiver covering this specific conflict.").

the Petitioner's attorneys *simultaneously* represented *both him and two prosecution witnesses at trial.* For all of the reasons set forth above and contained in the certiorari petition, the Petitioner prays the Court to grant certiorari in this case.

Respectfully Submitted,

MICHAEL UFFERMAN
COUNSEL FOR THE PETITIONER