No. 21-6409

IN THE
SUPREME COURT OF THE UNITED
STATES

♦

STEPHEN HARMER,
Petitioner,
vs.

SUPERINTENDENT FAYETTE SCI *et al*
Respondent(s)

♦

ON PETITION FOR WRIT OF
CERTIORARI TO THE SUPREME COURT
OF THE UNITED STATES

♦

Stephen Harmer, LF-5755
SCI Fayette
50 Overlook Drive
LaBelle, PA 15450

CERTIFICATE OF COMPLIANCE

No._____

STEPHEN HARMER,
Petitioner

vs.

SUPERINTENDENT FAYETTE SCI *et al*,
Respondent(s)

As required by Supreme Court Rule 33.1(h), I certify that the petition for writ of certiorari contains 7,440 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the forgoing is true and correct.

Executed on November 9th, 2021.

Stephen Harmer

Stephen Harmer

Question(s) Presented

1. Does ***Holloway*** demand automatic reversal when a trial judge fails to inquire into a known conflict that a defendant could not object to because his attorney had hidden the conflict from him?

List of Parties

1. Superintendent of State Correctional Facility at Fayette.
2. Attorney General of Pennsylvania.

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment below.

OPINIONS BELOW

- Third Circuit Court of Appeals decision in Harmer v. Superintendent Fayette SCI et al, No. 19-3146 (3d Cir. 2021) (Smith, McKee and Ambro), denying relief.

- The United States District Court for the Eastern District of Pennsylvania Decision. Harmer v. Superintendent Fayette SCI et al, D.C. No. 5-18-cv-00175 (2021), denying habeas relief.

- Opinion of Magistrate Judge Timothy R. Rice of the United States District Court in the Eastern District of Pennsylvania. Harmer v. Capozza, issued at No. 18-175 (July 12, 2019), denying habeas relief.

JURISDICTION

The date on which the United States Court of Appeals decided my case was August 12, 2021. Harmer v. Superintendent Fayette SCI et al, No. 19-3146 (3d Cir. 2021) (Smith, McKee, and Ambro), denying relief.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statement of the Case

Introduction:

The United States Supreme Court has ruled that "in the face of the defense counsel's representation concerning the risk of representing conflicting interests and in the absence of any prospect of dilatory practices the trial judge's failure either to appoint separate counsel deprived the codefendants of the assistance of counsel under the Sixth Amendment and whenever a trial court improperly required joint representation over timely objection, reversal was automatic." ***Holloway v. Arkansas***, 435 US 475 (1978).

A. Facts of the Case

In this case, three defendants, Stephen Harmer and brothers Cody and Kyle Wunder were charged for the murder of Douglas Herr. Attorney Christopher Lyden was appointed counsel for Cody Wunder and billed the State for unspecified representation. Stephen Harmer's family, unable to continue to pay first attorney Mark Walmer's expensive fees, were recommended Lyden and sought to retain him. Lyden accepted the representation of Harmer without any mention that he was, at the time, still appointed counsel for Cody Wunder. Lyden officially motioned to remove himself from Cody Wunder's case and Cody Wunder hired attorney

Corey J. Miller. Lyden never informed Harmer that he had to remove himself from Wunder's case, instead concealing that fact altogether.

A month before trial, Cody Wunder agreed to a plea deal (though he would not be sentenced until after Harmer's case). Represented by Corey Miller, Wunder testified for the State and against Harmer. Cody was crossed-examined by Lyden (his former attorney on the same case).

The Trial Court in this case knew (or should have known) that Lyden put himself in position of owing loyalty to both Cody Wunder and Stephen Harmer. The Trial Court anticipated Cody Wunder testifying for the State against Harmer before the trial commenced. The Trial Judge knew and anticipated that Lyden would be confronted at a critical stage of trial when he would be in position to choose between the interests of Cody Wunder and Stephen Harmer during cross-examination. The Trial Judge knew about the conflict from the docket and from the motions Lyden put in to remove himself as Wunder's attorney and conducted no inquiry into the matter. There is nothing in the record to indicate that Harmer knew about the conflict or waived his right to challenge it. By ignoring the known conflict, the Trial Court contributed to Lyden's ability to conceal it from his client and prevented Harmer from raising a timely and specific objection to being represented by an attorney with competing interests.

Harmer could not object because (1) Lyden never told him about representing Wunder and (2)the Trial Court never inquired into the matter at all. The

Trial Court failed to protect Harmer from proceeding with an attorney whose loyalties were divided. This conflict was most damaging when it came time to cross-examine Wunder (a critical stage of trial) and Lyden could not do so effectively.

Where defense counsel in bad faith conceals a conflict from his own client for his entire representation, when that conflict contaminates a critical stage at trial, and the Trial Court knows or should have known and fails to take the necessary precaution to inquire about the matter, prejudice is presumed and reversal is automatic. No reasonable juror or person can consider such failure fair judicial procedure.

The language in ***Holloway*** does leave provision for those intentionally barred from exercising their right to object to the conflict as well as for those who timely object. This Court should protect the integrity of judicial procedure by ruling that Holloway does demand that the Trial Court inquire into a known conflict that was intentionally hidden from a defendant, thereby preventing him from using his right to object.

B. Procedural History

In 2013, a jury convicted Harmer of second-degree murder, robbery, burglary and conspiracy to commit robbery and burglary. Harmer was sentenced to mandatory life imprisonment. Attorney Christopher Lyden was privately retained to represent Harmer at trial and on direct appeal. Lyden never

disclosed to Harmer that he represented original and eventual cooperating witness Cody Wunder, a conflict of interest that went undiscovered until federal habeas proceedings began.

After direct appeal proceedings proved unsuccessful, Harmer timely sought post-conviction relief in which he raised several claims not at issue in this appeal. Post-conviction relief was denied in state court proceedings and the Supreme Court of Pennsylvania denied leave to appeal. ***Commonwealth v. Harmer***, 2017 WL 2615898 (Pa. 2017).

Harmer filed a *pro se* habeas corpus petition in which he raised several claims and requested additional time to submit a supporting memorandum of law. After Counsel Silverman entered his appearance, Harmer timely filed a supplemental habeas petition raising one additional unexhausted claim: that Lyden had an actual conflict of interest in representing Harmer after previously representing in this same case original co-defendant and eventual Commonwealth witness Cody Wunder.

An evidentiary hearing was held before Magistrate Judge Timothy R. Rice on February 15, 2019 when the bulk of the testimony, including that of Lyden, was adduced. On February 25, 2019, the parties made oral argument. On July 12, 2019, shortly after taking the testimony that day of an additional witness summoned by the Court, Magistrate Judge Rice issued his report in which he found that Lyden's

testimony that he disclosed to Harmer his near-simultaneous representation of Cody Wunder lacked credibility and that initial post-conviction counsel's ineffective assistance in failing to identify the conflict claim constituted "cause" under ***Martinez v. Ryan***, 566 US 1 (2012) to excuse the default, but recommended that habeas relief be denied and that no certificate of appealability be issued.

Harmer filed timely objections on the ground that the magistrate judge erred in limiting his conflict analysis to whether Harmer could directly prove that Lyden's conflicting loyalties to Cody Wunder actually caused Lyden to temper his representation of Harmer without considering the second manner in which a litigant in this Circuit can prove adverse effect. Whether Lyden bypassed plausible alternatives on behalf of Harmer that themselves were inherently in conflict with Lyden's loyalties to his former client who was now cooperating against his current client. By Order dated August 29, 2019, District Judge Mark A. Kearney sustained that particular objection but nonetheless denied relief.

The District Court issued a Certificate of Appealability (COA) on the issue whether Lyden's inherent conflict "automatically" required a finding of ineffective assistance based on an undisclosed successive representation of a codefendant in the same criminal case.

Appellate Counsel Silverman never argued that such a finding was "automatically" required but chose instead to demonstrate that Lyden's conflict adversely

affected his performance based out of a misapplication that only in-court objections to conflict can guarantee relief.

Accordingly, the Third Circuit assumed without deciding that ***Cuyler*** applies in cases such as Harmer, and was denied relief because Petitioner could not demonstrate any adverse affect that trial counsel Lyden himself was concealing. The panel chose to favor Lyden's testimony even though Magistrate Rice exposed Lyden as untruthful in related areas, and affirmed judgment of the District Court on August 12, 2021. Stephen M. Harmer v. Superintendent Fayette SCI; The District Attorney of the County of Lancaster; The Attorney General of the Commonwealth of Pennsylvania. No. 19-3146 (3d Cir. Aug. 12, 2021) (Smith, McKee, and Ambro).

Harmer now comes before this Honorable Court to decide whether ***Holloway*** demands automatic reversal for when a trial court knew of a conflict and failed to inquire into that conflict that trial counsel concealed from the defendant, intentionally barring him from objecting timely.

REASONS FOR GRANTING APPEAL

It is unquestionable that ***Holloway v. Arkansas***, 435 US 475 (1978) demands automatic reversal when a trial judge fails to inquire into joint representation over timely objection, but the language in ***Holloway*** also makes provision for defendants that were unable to object to joint representation due to the intentional concealment of the conflict by the attorney involved in the conflict.

"The Sixth Amendment guarantee of the assistance of counsel is among those constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." ***Holloway***, at 4.

"When a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic."

"Defense attorneys have an obligation, upon discovering a conflict of interest, to advise the court at once of the problem"

Petitioner asserts that when Trial Attorney Lyden failed to object in court, especially before cross-examining codefendant Cody Wunder, he failed petitioner during a critical stage of trial and concealed the entire conflict from the defendant in bad faith, not only deprived the defendant the presence and assistance of his attorney, but also without question barred defendant himself from objecting. Reversal is automatic.

Reversal is not just automatic because of Lyden's failure to object to his own conflict and concealing it from Harmer, especially in known anticipation of Cody Wunder testifying (See T.T. August 5, 2013, p. 11), but because the trial judge knew of Lyden's appointment to represent Cody Wunder and knew that Wunder was going to be called by the Commonwealth to testify against Harmer.[1] (See Exhibit A.) The Trial Court knew that the moment Lyden began to cross-examine Cody Wunder, that initiated more than just a conflict of interest but an undisputed divergence of interests between Lyden's representation. The Trial Court failed "to take adequate steps to ascertain whether the risk of a conflict of interests arising from the joint representation is too remote to warrant separate counsel." ***Holloway***, at 1.

By the Trial Court failing to simply inquire, he failed to provide opportunity for the defendant to object. The Trial Court DID improperly require joint representation because of his failure to do his duty and inquire, and "prejudice is presumed regardless of whether it is independently shown." ***Glasser v. United States***, 315 US 60, (1942).

Holloway's ruling is centered around what the Trial Court did or did not do, and although Petitioner

[1] It is naturally assumed that an attorney's loyalty of interest for a defendant he represents continues long after official representation has ended, at least in regard to the criminal charges to which the attorney represented the defendant on. It is this former extended duty of loyalty within the particular facts of former representation that has extended Lyden's loyalty to Cody Wunder well into Lyden's representation of Harmer, thereby forming competing loyalties not just in theory but in actual conflicting duties to a pair of opposing defendants.

does assert that Attorney Lyden did fail and was audaciously unethical for concealing his representation of and loyalty to Cody Wunder from Harmer, the Trial Court was fully aware and assisted in the concealment of the conflict from Harmer by neglecting his duty to inquire. It is the Trial Court's duty that's called into question here, not the ineffectiveness of trial counsel or any inherently adverse effect and that makes this case distinguishable from ***Cuyler v. Sullivan***, 446 US 335 (1980) and ***Mickens v. Taylor***, 535 US 162 (2002).

Holloway and ***Cuyler*** differ greatly by their standard for relief, but truly the only interpretation that separates them is whether or not there was a timely objection before the court. Petitioner's question to this High Court is: Does ***Holloway*** mandate an automatic reversal when the Trial Court and defense counsel both know about a conflict and the Trial Court does not inquire and defense counsel keeps his client from objecting by not informing him of the conflict?

It was not the intent of ***Holloway*** or ***Cuyler*** to punish a defendant for being unable to object when his attorney acted in bad faith and concealed the conflict and when the Trial Court was aware and could have inquired. ***Holloway*** makes room for barred objection as well as timely objection and Petitioner asks this Court to expound upon the distance between the standards for reversal set by ***Holloway*** and ***Cuyler*** and decide that a reasonable application of the Holloway precedent is required in the present situation. Specifically, Petitioner seeks

automatic reversal under ***Holloway*** because applying ***Cuyler*** in these circumstances is illogical.

Cuyler focuses on how deficient the performance of an attorney, in and of itself, does not impugn a criminal conviction. Also, ***Cuyler's*** perimeter is narrowed in on multiple representation particularly. The language suggests that a trial judge need not initiate an inquiry into the propriety of multiple representation unless a trial court knows that a particular conflict exists, because it is an adequate presumption that during a proceedings where defendants are aware that their attorney is, in fact, representing the interest of their co-defendants as well as theirs, that the defendant has already minutely waived a basic multiple representation claim on the basis that no foreseeable conflict might arise. The trial judge, then with a finer brush would be able to outline any particular potential conflict and inquire into it, such as whether or not one of these defendants involved in the multiple representation would be potentially testifying against another defendant. That did not happen in ***Cuyler*** and there was never any potential for it to occur, but in Petitioner's case, the cross-examination of the co-defendant was bound to happen and its potential was always anticipated.

This is not the same logic that should be applied to Harmer, who was utterly unaware that Attorney Lyden had divided his loyalties, was about to enter into a critical stage with a lawyer who had divided loyalties, an attorney who in bad faith concealed this conflict, and a Trial Court who knew

the entire time that this was going on and refused to inquire. Because the context in which the conflict arose was markedly different from the context considered in ***Cuyler***, the case should have been reviewed under the ***Holloway*** standard.

Unreasonably applying ***Cuyler*** to all conflict issues that lacked in-court objections despite particular facts that are so far removed from the circumstances of ***Cuyler*** is what contributes to reoccurring issues before the court involving trial judges failing to do their duty to inquire for the sake of convenience of their proceeding.

The question of whether ***Holloway*** demands a trial judge to inquire into a conflict which was known or reasonably should have been known when defense counsel concealed the conflict barring the defendant's ability to timely object demanding automatic reversal cannot be adequately addressed under ***Cuyler***. ***Cuyler*** is centered around whether trial counsel's performance was adversely affected, but the question posed here is centered on the trial judge's inaction and whether it compromised the trial and rendered it fundamentally untrustworthy. To the extent that ***Cuyler*** is now the conflict of interest trash bin despite the circumstances is unreasonable. Circumstances like the ones presented in the case *sub judice*, where the defendant cannot object to a conflict that was intentionally hidden from him, without interference by the trial judge who was aware.

That is why ***Holloway*** addresses whether or not relief should be granted due to the trial judge's failure and the circumstances in the case at bar should

not to muddied with an offshoot interpretation of ***Holloway*** posed to the specific facts of ***Cuyler*** where there was a lack of objection to multiple representation, that was always laid bare for all parties and defendants to see.

Mickens v. Taylor, 535 US 162 (2002) raised two points about ***Cuyler*** that clarifies why ***Cuyler*** should not apply in this case. (1) Cuyler did not allege that state officials knew or should have known that his lawyers had a conflict of interest. Harmer is alleging that the Trial Court knew or should have known. (2) Nothing in the circumstances of this case indicates that the trial court had a duty to inquire whether there was a conflict of interest. Harmer is alleging that because the Trial Court appointed Lyden to Wunder before Lyden was hired to represent Harmer, the Trial Court had a duty to inquire into whether Harmer wanted to waive any conflicts of interest before moving ahead to trial.

Cuyler listed multiple reasons as to why a trial judge was not obligated to inquire or rather why "The Sixth Amendment right to the effective assistance of counsel imposes no affirmative duty on a state court to inquire," and these reasons are connected to the specific facts and circumstances at issue in ***Cuyler***: "During a criminal trial of a particular defendant into the existence of a conflict of interest arising from an attorney's multiple representation, in separate criminal trial, of two other criminal defendants charged with the same crime, where (1) providing separate trials for the co-defendants significantly reduced the potential for a divergence in their interests." In Petitioner's

case, trial counsel had hidden his representation of Cody Wunder on the exact same charges as Petitioner, and then Cody Wunder ended up testifying as a witness for the state against Petitioner and so a clear divergence of interests is underscored. "(2) no participant in the defendant's trial ever objected to the multiple representation." In Petitioner's case, Attorney Lyden covered up his representation of Wunder and, in doing so, prevented his client from objecting to the problem of divided loyalty. The Trial Court knew, however, and should have inquired. "(3) Opening argument outlined a defense compatible with the view that none of the defendants were connected with the crime." In Petitioner's case, it was never in dispute that all co-defendants participated in the burglary, however it was always the defense that the murder occurred after the commission of that burglary in an act of vengeance for a wounded brother, an act that Harmer did not participate. "(4) The critical decision of defense counsel to rest the defendant's case after presenting no evidence was, on its face, a reasonable tactical response to the weakness of the circumstantial evidence presented by the prosecutor." In Petitioner's case, however, trial counsel could have no tactics for not being able to fully impeach the witness on cross-examination, a witness that trial counsel must also protect client-attorney privilege for. Lyden's failure to demonstrate that Cody Wunder was a liar committing perjury and instead chose to promote that Cody Wunder's testimony conflicting with Kyle Wunder's police statement was just due to shock, is extremely telling

that Lyden is also attempting to protect Cody Wunder's plea deal. See Evidentiary Hearing, February 15, 2019, pp. 263, 267. See T.T. Aug. 8, pp. 560, 571 and Aug. 12 pp. 724-725.

It is without a doubt that these reasons forth in ***Cuyler*** as to why a trial court was not obligated to inquire in that specific set of circumstances greatly deviated from the circumstances Harmer was in. Even some Justices of the ***Cuyler*** opinion would agree.

With admirable foresight, Justice Brennen opined in ***Cuyler*** the exact duty of a trial judge, in order to preserve the future integrity of a fair proceeding that can be considered trustworthy by the people. He asserted that ***Holloway*** established that a defendant must always have a knowing and intelligent choice to share counsel with a codefendant, and the trial judge MUST ENSURE that choice was made intelligently. Id. ***Cuyler***, at 19. Justice Brennan goes on to write, "that the court cannot delay until a defendant or an attorney raises a problem, for the constitution also protects defendants whose attorneys fail to consider, or choose to ignore, potential conflict problems." Id. ***Cuyler***, at 19. Petitioner asserts that he has not been provided this constitutional protection that is the more natural explanation than an appeal court shifting the burden of proving adverse affect against an attorney who cannot be compelled to reveal his interest and action of duty to Cody Wunder, when this conflict could have been addressed with a simple inquiry by the trial judge.

Justice Brennan established the duty of a trial judge to protect a lay defendant and that logic leans into the very issue presented in this case. Brennan emphasizes that even though a defendant might be aware of joint representation, a trial judge should still determine whether there was a proper waiver of rights to counsel. How much more so should this inquiry be imposed in order to provide constitutional protection to a defendant when his own counsel in bad faith keeps secret the conflict in order to prevent this "must need" objection?

The way the language in ***Cuyler*** has been recklessly applied implies that when a defendant who has been deceived by his own attorney and was thereby barred from objecting, that defendant should be punished by having to prove extra burdens out of an attorney who has already been proven to be suspect, when in reality the trial judge knew of the conflict and helped a suspect attorney secret that conflict by opting not to inquire. It is that judge's duty to protect the defendant from being stripped of his Sixth Amendment rights by his own attorney.

If Justice Brennan was concerned about a defendant like ***Cuyler***, who even knew that his own lawyer represented other co-defendants, being unable to completely comprehend that the attorney who has to calculate the interests of others, might cuase any absolute loyalty to be divided, resulting in averted representation, then it is essential for a trial judge to advise the Petitioner that his attorney had been representing Cody Wunder on the same case and that he was still obligated to protect Wunder's interests.

Petitioner's only line of defense against Cody Wunder (the only witness that countered the defense that the murder took place after the commission of the crime), who should be fully impeached and x-rayed for lies, was Lyden, but Lyden could not commit to this line of attack because he still owed extended loyalty to the state witness on those same charges. Again, the focus is drawn back to the trial judge. "The Court must at least affirmatively advise the defendants that joint representation creates potential hazards which the defendants should consider before proceedings with the representation." Id., ***Cuyler*** at 20. Justice Brennan and others would agree that Petitioner was robbed of the chance to consider any potential hazards because the Trial Court opted not to affirmatively advise the defendant.

As put forth, the petitioner's specific facts of not being able to object to something that had been hidden but the trial judge knew of and failed to inquire, cannot be lumped into the misapplied language of ***Cuyler***. When we misapply ***Cuyler*** to any case where there was no in-court objection to the conflict, it actually encourages judges to avoid inquiry, remain silent in the face of conflict, and to kick the issue down the road to where the now-convicted defendant would then have to demonstrate adverse affect in hindsight against an already suspect attorney. This misapplied practice to lump all non-objection conflict cases into ***Cuyler*** does not weigh the impact of the public trust and belief in a fair judicial proceeding where a defendant is entitled to a fully loyal attorney.

The error of representing a defendant despite the fact that you represent the co-defendant DOES belong to Lyden, the error of concealing that conflict from the defendant throughout the entire representation and especially during a critical stage of trial where a direct divergence of interest will result DOES belong to Lyden, but the error of not performing an inquiry into which a conflict was known or reasonably should have been known, especially before a divergence of interest at a critical stage, DOES solely belong to the trial judge, and that error is NOT harmless error.

For Justice Marshall states in ***Cuyler***, "Accordingly, in ***Holloway*** we emphatically rejected the suggestion that a defendant must show prejudice in order to be entitled to relief. For the same reasons, it would usually be futile to attempt to determine how counsel's conduct would have been different if he had not been working under conflicting duties." Id. ***Cuyler*** at 22. Because, as Marshall explains, "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. ***Cuyler*** at 22. Knowing this, it is almost an intentional Catch-22 for a defendant to have to meet this level of difficulty to intelligently prove impact because ***Cuyler*** has become a conflict junkyard, and cannot apply to where a defendant was in the dark about a conflict that his attorney and the trial court were aware of.

Justice Marshall gives insight as to the resistance one could expect from an attorney later on during appeal: "In the usual case, however, we might expect the attorney to be unwilling to give such supportive testimony, thereby impugning his professional efforts." Id. ***Cuyler*** at 22. Once again, another Justice has shown incredibly foresight and predicted exactly what Petitioner has been facing during his appellate process.

The evidentiary hearing in front of Magistrate Rice exposed Trial Counsel Lyden as either horrendously ineffective or downright malicious. See Evidentiary Hearing, Feb. 15, 2019, pp. 109-304. That any reasonable jury member or person reading the record of the evidentiary hearing would agree that Lyden's testimony was at least suspicious is irrefutable, and yet the challenging snare of being reviewed under a misapplied ***Cuyler*** prejudice standard allows a reviewing Court to credit Lyden's testimony explaining that, "I didn't view [Cody Wunder] as a - - as a former client. I didn't view him as a former client. I didn't think there was an attorney-client relationship there." See Evidentiary Hearing, Feb. 15, 2019, p. 129. Lyden had the nerve to say this despite the fact that he charged the Commonwealth a fee for his representation of Wunder. When pressed, Lyden claimed he could not remember what he billed the Commonwealth for, and as explained by Justice Marshal, now neither can we.

The Trial Court had a duty to protect Petitioner from having to carry this burden and instead

subjected him to it by not inquiring. The Trial Court has failed under ***Holloway***.

The closest question posed to this Court is the one in ***Mickens v. Taylor,*** 535 US 162 (2002), but ***Mickens*** significantly differs from Harmer as explained below.

In ***Mickens*** this Court was split 5-4 on whether or not a trial judge grossly overlooking a known conflict of interest that would deny a defendant his Sixth Amendment rights should not inquire into that conflict unless there arose a formal objection. The majority decided that it is better to punish the lay defendant who was left in the dark about the conflict and instead of holding judges to their judicial duty when trial counsel falls short of adequate representation – (not in strategy but falls short in their duty) – the majority washed their hands from scrutinizing the absolute duty of trial judges, by instead trapping the defendant in a catch-all to prove adverse affect, *i.e.*, to somehow now elicit the very substance that Mickens' attorney was intentionally concealing in the first place.

Petitioner asserts that in instances where a defendant was informed of a possible conflict but chose to proceed with his attorney anyways then the ***Cuyler*** standard should be applied. Although in cases where the defendant was robbed their right to fully loyal counsel by their very own counsel hiding that which makes him disloyal, ***Holloway's*** automatic reversal rule should be applied, when the trial judge knew or should have known and failed his most basic

duty to inquire into the conflict, sifting through the sand before the concrete was poured over it.

At any rate, Petitioner's factual circumstances differ greatly from ***Mickens*** even though they are alike in the sense that (A) Trial Counsel was working under conflict; (B) the Trial Court knew (or should have known) of the conflict; (C) Trial Counsel did not inform the defendant of the conflict; (D) Trial Counsel did not object to his own conflict; (E) The Trial Court did not conduct an inquiry into the conflict.

The crucial difference between ***Mickens*** and the case at bar that while Mickens' attorney Saunders represented the deceased victim a day before he represented the alleged killer of the victim on the victim's death, Saunders was not confronted with having to cross-examine a former client on behalf of a present client and, therefore, no "special circumstance" occurred during trial where the Trial Court might start to see the tangles of the conflict knot up. Here, in Harmer, Cody Wunder was always anticipated to testify against Harmer for the State. (See T.T. Aug. 5, 2013, p. 11 – Before trial, ADA Brown, Trial Counsel Lyden, and the Trial Court discuss Cody's upcoming testimony.) In other words, the Trial Court knew of a conflict, did not inquire into that conflict, had ample warning that for every bit of the term "special circumstance," Lyden would be representing Harmer as well as cross-examining Cody Wunder – his client on the exact same case just a couple months prior. For this failure to inquire into this conflict when it was about to infect a critical stage

of trial on cross-examination, clearly a special circumstance, Petitioner should be resent back to this procedure where the violation occurred and be given a re-trial that is fair and non-conflicted for that is what ***Holloway*** demands when a trial judge has failed to do his most basic duty to protect the defendant.

For these reasons, ***Holloway*** provides automatic reversal, "the trial judge's failure either to separate counsel or to take adequate steps to ascertain whether the risk of a conflict of interests was too remote to warrant separate counsel deprived the co-defendants of the guarantee of the assistance of counsel under the Sixth Amendment, and whenever a trial court improperly requires joint representation over a timely objection, reversal was automatic." Id. ***Holloway***, at 1. ***Holloway*** provides provision to those defendants that were barred their right ot object by their own attorney where the trial judge knew of the conflict, a special circumstance like cross-examination occurs for the judge to be put on notice regardless of objection, and fails his duty to inquire thereby contributing to the defendant not having the ability to object. It is abundantly clear that ***Holloway*** was focused on the performance of the Trial Court and not the defendant's ability to speculate accurately about what cards are up an attorney's sleeve.

The majority in ***Mickens*** holds, "only in circumstances of the magnitude of a denial of the assistance of counsel entirely, or during a critical stage of the proceeding in which circumstances the likelihood that the verdict is unreliable is so high that a case-by-case inquire is unnecessary – does the

United States Supreme Court forego individual inquiry into whether counsel's inadequate performance undermined the reliability of the verdict." Id. ***Mickens***, at 7-8.

"There is an exception to this general rule we have spared the defendant the need of showing probable effect, where assistance of counsel has been denied entirely or DURING A CRITICAL STAGE OF THE PROCEEDING. When that has occurred, the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary. ... But only in 'circumstances of that magnitude' do we forego individual inquiry into whether counsel's inadequate performance undermined the reliability of the verdict." (Emphasis added.) Id. ***Mickens***, at 12-13.

It is clear from these two holdings in ***Mickens*** that provision has been made for those denied during a critical stage of the proceeding despite an objection to the conflict, ***Holloway*** leaves provision for those barred by objection as long as the conflict at least infects a critical stage like the one here in Harmer, cross-examination. Reversal is automatic.

Petitioner avers that by trial counsel and trial judge interfering with the defendant's ability to object, undermined the adversarial process. ***Holloway*** presumed, moreover, that the conflict 'which [the defendant] and his counsel tried to avoid by timely objections to the joint representation,' ... undermined the adversarial process." Id. ***Mickens***, at 13. "The presumption was justified because joint representation of conflicting obligations to multiple defendants 'effectively seal his lips on crucial matters' and MAKE

IT DIFFICULT TO MEASURE THE PRECISE HARM ARISING FROM COUNSEL'S ERRORS." (Emphasis added.) Id. ***Mickens***, at 13.

Petitioner's case is peculiar in the sense that although trial counsel Lyden can be considered Cody Wunder's former attorney, he actually represented Wunder on the exact same charges as Harmer, therefore, because of extended duty and loyalty, Lyden suffers from conflict of joint representation of Cody Wunder and Stephen Harmer, when he represents Harmer at trial and cross-examines Cody Wunder at Harmer's trial, when he represented both of them on the same charges. "Thus, the Federal Rules of Criminal Procedure treat concurrent representation differently, requiring a trial court to inquire into the likelihood of conflict whenever jointly charged defendants are represented by a single attorney (Rule 44(c)), but not when counsel previously represented another defendant in a substantially related matter, even where the trial court is aware of the prior representation." Id. ***Mickens***, at 16-17. As established Harmer's counsel Lyden, did represent both defendants charged jointly, and Lyden representing Cody Wunder was not just substantially related, it was DIRECTLY RELATED, and in direct conflict during cross-examination.

Justice Kennedy's concurring opinion in ***Mickens***, "The trial judge's failure to inquire into a suspected conflict is not the kind of error requiring a presumption of prejudice," is clearly not accurate considering ***Holloway*** requires just that. Nevertheless, while the court in ***Mickens*** might be

able to presume that Saunders was telling the truth when he said that his allegiance to Hall, 'Ended when I walked in the courtroom and they told me he was dead and the case was gone.' Id. ***Mickens***, at 19. The same cannot be said for Lyden, when Cody Wunder walked in the courtroom after him and testified against Harmer for the State. Which engaged Lyden in direct conflict during a critical stage of trial.

Justice Kennedy explains that, "while Saunders' belief [about his allegiance to Hall ending] may have been mistaken, it established that the prior representation did not influence the choices he made during the course of trial." Id. ***Mickens***, at 19. Likewise, that same cannot be said for Lyden. For while Saunders like Lyden is wrong about their allegiance to Hall and Cody Wunder ending, Saunders did not have to have a critical stage contaminated with conflict by having the deceased testify against Mickens.

Justice Kennedy's opinion in the matter conflicts with ***Cuyler*** in any event. He denies Mickens relief because Mickens attempted to demonstrate "roads not taken" by Saunders during trial due to the conflict, but what Justice Kennedy describes as entailing "two degrees of speculation," is actually what the ***Cuyler*** mandate demands in order to prove adverse affect, to speculate as to what trial counsel cannot be forced to unveil.

Although the majority's ruling in ***Mickens*** does not apply to Petitioner because Petitioner's trial was actually infected with the conflict of interest when Lyden cross-examined Cody Wunder, thereby meeting

the special circumstance requirement for the trial judge to be put on notice during a critical stage of trial. In this case it is important to also consider the sound logic from the dissenting side of ***Mickens***.

Justice Stevens states, "about a fundamental component of our criminal justice system the constitutional right of a person accused of a capital offense to have the effective assistance of counsel for his defense. The first is whether a capital defendant's attorney has a duty to disclose that he was representing the defendant's alleged victim at the time of the murder. Second is whether, assuming disclosure of the prior representation, the capital defendant has a right to refuse the appointment of the conflicted attorney. Third is whether the trial judge, who knows or should have known of such prior representation, has a duty to obtain the defendant's consent before appointing that lawyer to represent him. Ultimately, the question presented by this case is whether, if these duties exist and if all of them are violated, there exist 'circumstances that are so likely to prejudice the accused that the rest of the litigating their effect in a particular case is unjustified.' ***United States v. Cronic***, 466 US 648, 658 (1984). Here, (1) Lyden had a duty to disclose to Harmer that he represented Cody Wunder on the exact same charges, Lyden failed to do that. (2) Petitioner does have a right to refuse the representation of a conflicted attorney, whether he is appointed or a hired attorney. (3) the Trial Court did have a duty to obtain Petitioner's consent for Lyden to continue

representing him in lieu of the anticipated cross-examination of Cody Wunder.

These three duties do exist and all of them were violated. Here exists "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. ***United States v. Cronic***, *supra.* Setting the conviction aside is the only remedy "dictated by our holdings in ***Holloway v. Arkansas***, 435 US 475 (1978), ***Cuyler v. Sullivan***, 446 US 335 (1980), and ***Wood v. Georgia***, 450 US 261 (1981). In this line of precedent, our focus was properly upon the duty of the trial court judge to inquire into a potential conflict, this duty was triggered either *via* defense counsel's objection, as was the case in Holloway, or some other 'special circumstances' whereby the serious potential for conflict was brought to the attention of the trial judge." Id. ***Cuyler***, at 346. As was unambiguously stated in ***Wood***, ***Cuyler*** mandates a reversal when the trial court has failed to make an inquiry even though it knows or reasonably should have known that a particular conflict exists." Id. ***Mickens***, at 21.

The essence of the question here is properly upon the trial judge to inquire into the potential conflict "triggered" by the "special circumstance" of the impending cross-examination of Cody Wunder testifying for the state. A "serious potential for conflict" was truly brought to the attention of the trial judge as he sat back and watched Lyden cross-examine, whom of which Lyden still owed duty, loyalty, and confidentiality to, on at least the exact

same charges that Lyden represented Cody Wunder on, if not in unrelated matters.

That the trial court has a duty to inquire is "something more than the general responsibility to rule without committing legal error; it is an affirmative obligation to investigate a disclosed possibility that defense counsel will be unable to act with uncompromised loyalty to his client. It was the judge's failure to fulfill that duty of care to inquire further and do what be necessary that the ***Holloway*** Court remedied by vacating the defendant's subsequent conviction. ...This occurred when the judge failed to act, and the remedy restored the defendant to the position he would have occupied if the judge had taken reasonable steps to fulfill his obligation." Id. ***Mickens***, at 29.

The only reason why the Petitioner's case hasn't been overturned under ***Holloway*** is because Petitioner was barred from making an in-court objection. Though there is nothing legally crucial about an objection by defense counsel to tell the trial judge that conflicting interests may impair the adequacy of counsel's representation when trial judge anticipated Cody Wunder testifying at trial, knew of Lyden representing Cody Wunder on the exact same charges, and knew that the two would face on cross-examination, a critical stage for Stephen Harmer at trial. This put the trial judge on ample notice that the conflict became two trains heading towards each other, a "trigger" into a severely prejudicial cross-examination, thereby highlighting the necessity to then inquire.

"Why excuse a judge's breach of judicial duty just because a lawyer has fallen down in his own ethics or is short on competence? Transforming the factually sufficient trigger of a formal objection into a legal necessity to any breach of judicial duty is irrational." Id. ***Mickens***, at 34.

If the lawyer on whom the conflict of interest is charged is unlikely to concede that he improperly acted as counsel, then the petitioner and cases like his where he is barred the ability to object due to that lawyer himself hiding the conflict; when the trial judge was aware and brought to notice by special circumstance of the impending cross-examination; and Petitioner is punished by carrying the burden of convincing counsel to now finally concede after all the commitment counsel went through to conceal the conflict, is denied relief simply because that same counsel did not object to himself, then review for relief is an irrational scheme designed for failure within the mechanics of an impossible catch-all.

"The incentive [to inquire] is needed least when defense counsel points out the risk with a formal objection, and needed most with the lawyer who keeps risks to himself, quite possibly out of self-interest." Id. ***Mickens***, at 35.

In conclusion, Petitioner's case should be viewed under the ***Holloway*** mandate. It is the only legal scope that can be applied to the particular facts of the instant case. There is nothing legally binding in ***Holloway*** that would suggest an in-court objection is the only avenue for relief under ***Holloway***. Like here, a known conflict was brought home to the court

by a triggering of a special circumstance, when the conflict begins to infect a critical stage of trial during cross-examination, it is an adequate replacement for an in-court objection from the very attorney who is so adamant about concealing the conflict in the first place. ***Holloway*** leaves provision for defendants barred the ability to object because of his counsel, in bad faith, hides the conflict, to which the trial court knew of conflict and failed to inquire.

Accordingly, due to trial counsel's failure to object, due to the trial judge's failure to inquire, due to the conflict infecting the cross-examination of the only witness presenting evidence contrary to the defense, due to all three of these reasons together, ***Holloway*** demands an automatic reversal.

Holloway held, in the face of the defense counsel's representations concerning the risk of representing conflicting interests and in the absence of any prospect of dilatory practices, ... (1) the trial judge's failure either to appoint separate counsel or to take adequate steps to ascertain whether the risk of a conflict of interest was too remote to warrant separate counsel deprives the co-defendants of the guarantee of the assistance of counsel under the Sixth Amendment. (In short, failure to inquire.) (2) Whenever a trial court improperly required joint representation over timely objection, reversal was automatic. Id. ***Holloway***, at 1.

Petitioner's case falls under this holding. In Petitioner's case: (1) Trial judge knew that Lyden had represented Cody Wunder because he is the very same who appointed Lyden as Cody Wunder's counsel, and

so knew of the conflict. (2) Trial Judge did not take adequate steps to ascertain whether the risk of a conflict of interest was too remote to warrant separate counsel, (trial judge failed to inquire). (3) Trial Judge did not appoint separate counsel. (4) Trial Judge did improperly require the joint representation by failing to inquire, thereby not providing the opportunity for the defendant himself to object. (5) Petitioner could not lodge a timely objection because Trial Counsel Lyden, in bad faith, failed his duty to notify the defendant that he represented Cody Wunder who would then appear to testify against the Petitioner. Petitioner could not lodge a timely objection because the trial judge (who knew of the conflict) failed to ensure that his proceeding met the fundamental fairness demanded by the constitution. However, the conflict WAS brought home to the Court and the trial judge WAS put on notice when the special circumstances triggered the requirement for the trial judge to inquire despite an in-court objection, when the conflict infected a critical stage of trial because Lyden cross-examined his former client on the exact same charges, to whom he still owed duty, loyalty, and confidentiality for, at least on those same charges.

The special circumstance triggering the judge's duty into action is ample replacement for a timely objection by an attorney who has already acted in bad faith by hiding the conflict from the defendant. Both, the in-court objection and the triggered special circumstance, would happen during the course of trial, making both pre-conviction timely. Both would

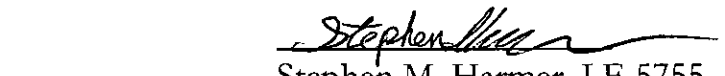
call for the trial judge to inquire and both call for automatic reversal when the trial judge fails to inquire.

It is the trial judge's constitutional duty to make sure that the trial is fair and, maybe not without error, but without blatant injustice. It is the trial judge's duty to make sure that an officer of the court doesn't violate his own client's constitutional rights. When the trial judge fails to do both, reversal is automatic.

Conclusion

The case at bar offers the factual scenario necessary to produce a comprehensive opinion governing this topic. Therefore, this Court should grant this petition for a Writ of Certiorari to settle the debate about whether ***Holloway*** should be applied to defendants who were prevented from objecting due to the trial judge's failure to inquire, and the constantly reoccurring issues caused by a misapplication of ***Cuyler***.

Respectfully submitted,



Stephen M. Harmer, LF-5755
SCI Fayette
50 Overlook Drive
LaBelle, PA 15450