IN THE UNITED STATES SUPREME COURT OF APPEALS

ORIGINAL

No. 21-7113

GERALD WAYNE JAKO, JR.,
PETITIONER

VS.

STATE OF WEST VIRGINIA,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE WEST VIRGINIA SUPREME COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

Filed By:

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One Mountainside Way
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QUESTIONS PRESENTED

I. Attorney Panepinto made two separate "eleventh hour" disclosures before trial, with the latter discussing his prior representation and social relationship with the owners of the robbed establishment. The jury, which contemplated whether the crime was "staged" was presented very little evidence of an "inside job" theory,

A. Under the Sixth Amendment, is the standard enunciated in *Cuyler v. Sullivan* proper when the defendant objects to counsel's representation after the conflict is revealed?

B. Under the Sixth Amendment, did Attorney Panepinto's representation create a scenario mandating a presumption of prejudice given that more evidence reflecting a "staged" crime could have been presented?

II. Petitioner's codefendant/girlfriend agreed to testify against him as part of a plea bargain. She later withdrew her plea, and the Trial Court found that Petitioner procured her unavailability through coercion, while still finding her plea withdrawal to be knowing, voluntary, and intelligent. Her uncontested statement to police was played at his trial.

A. Under the Sixth Amendment, does a witness's unavailability become procured when their decision to "plead the fifth" was knowing, voluntary, and intelligent?

B. Should Petitioner's Sixth Amendment right override his girlfriend's Fifth Amendment right when her statement was the only evidence directly inculpating him?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page, however, they are also briefly denoted below.

Petitioner:

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Respondent:

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OPINION BELOW

On October 18, 2019, the Circuit Court of Ohio County, West Virginia entered a final sentencing order against Petitioner sentencing him to 100 years of incarceration following his conviction of First-Degree Robbery after a four day jury trial. Thereafter, Petitioner filed an appeal with the West Virginia Supreme Court of Appeals. On June 2, 2021, in a 4-1 decision, the West Virginia Supreme Court affirmed Petitioner's conviction. 1 *A.R.* 1-56.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The West Virginia Supreme Court of Appeals decided Petitioner's case on June 2, 2021. Copies of the Memorandum Opinion and Dissenting Opinion are enclosed in the Petitioner's Appendix. *Id.* A Petition for Rehearing was timely filed 1 *A.R.* 57-59 and subsequently denied on September 21, 2021. 1 *A.R.* 60.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment Of The Untied States Constitution

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."

Sixth Amendment Of The United States Constitution

"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 defense."

Fourteenth Amendment Of The United States Constitution

"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.

STATEMENT OF THE CASE

Gerald Jako ("Petitioner") is currently in the custody of the West Virginia Department of Corrections and Rehabilitation pursuant to his conviction in the Circuit Court of Ohio County, West Virginia for First Degree Robbery. 1 *A.R.* 14. Petitioner's conviction and the subsequent affirmation of his disproportionate 100-year determinate sentence were the product of a rogue and unforgiving West Virginia State Court system which cumulatively abolished Petitioner's Sixth and Fourteenth Amendment rights to a fair trial. Specifically, Petitioner is entitled to reversal of the WVSCA's abhorrent decision to affirm the Trial Court's pre-trial rulings wherein it ruled that Attorney Mark Panepinto ("Trial Counsel") was not burdened by an actual conflict

of interest, and it ruled that Petitioner was precluded from cross-examining Samantha England – Petitioner's girlfriend, codefendant, and the only witness whose testimony directly connects Petitioner to the robbery. In the interests of justice, this Honorable Court should review these claims.

On the evening of Sunday, August 19, 2018, Shauna Cobb was the sole clerk on duty at the State Line Cafe, a gambling parlor located in rural Ohio County. 2 *A.R.* 689. Testimony at trial revealed that it was a common practice for businesses like this to keep their doors locked so that a clerk can control access to the business.2 *A.R.* 642. At approximately 11:30 pm, Ms. Cobb began her closing duties after texting some of her friends that she intended to do the same. 2 *A.R.* 170-175. It was at this point in time that the robbery began, with a seemingly innocuous Ms. England entering the parlor to gamble. 2 *A.R.* 738.

Testimony at trial revealed the following timeline. At 11:23 pm, someone who was using Jeremiah Dunn's cell phone – later opined to be Ms. England – sent a text message to one of the parlor's off-duty clerks, Kristen Walton, stating "Hey love bug were getting ready to do this sh*t please say a prayer for me. I will text you when it's over with." 2 *A.R.* 908. At 11:42 pm, Ms. England entered the parlor, went back to the gambling machines, and was seen by the clerk whispering on a cell phone. 2 *A.R.* 738; 1033. Around this time, Mr. Dunn's cell phone makes a call to Petitioner's cell phone. 2 *A.R.* 712. Then, at around 11:46 pm and 11:47 pm, Petitioner's cell phone makes two calls to Mr. Dunn's cell phone, *Id*, which lasted sixteen seconds and six seconds respectively. 1 *A.R.* 388; 393. At the time of the second call, two, unidentifiable men, allegedly Petitioner and Mr. Dunn, enter the parlor to commit the robbery as Ms. England is leaving. 2 *A.R.* 740. The two perpetrators stole cash from the register (which had to be opened by

the clerk), cigarettes, and cash from a safe that was left open (purportedly as per Ms. Cobb's training). 2 *A.R.* 764; 1037-1040. Ms. Cobb was threatened with a knife and a gun by the perpetrators to receive the stolen chattels, and then she was zip tied and left alone. 2 *A.R.* 1040. Her cell phone was also taken by the robbers before they left the parlor at 11:52 pm. 2 *A.R. 1057.*

The three individuals made off with over $6,000 in U.S. currency and cigarettes. 1 *A.R.* 551. At 12:02 am on Monday, August 20, 2018, a text message is sent from Mr. Dunn's cell phone to Ms. Walton's phone relaying the fact that the heist was complete. Sixty-eight minutes later, another text message was sent from Mr. Dunn's cell phone to Ms. Walton's cell phone indicating that Ms. England had left her purse – which contained various items of the Petitioner's – inside the parlor. 2 *A.R.* 907-908. Sometime between 11:52 pm and 12:02 am, Ms. Cobb freed herself and called her mother to the Store. 2 *A.R.* 1044-47. Also during that period of time, Ms. England's purse was found by Ms. Cobb, who was wandering throughout the parlor. 2 *A.R.* 1049-50. The police, who were not dispatched until 12:02 am, finally arrived at approximately 12:14 am. 1 *A.R.* 410-11, 460-61; 2 *A.R.* 604-605. The investigation, led by Detective Seifert of the Ohio County Sheriff's office, commenced. 2 *A.R.* 689. At various points in the investigation, Mr. Dunn, Petitioner, Ms. England, and Ms. Walton were all arrested in connection with this crime. Upon arrest, Ms. England gave a statement to police denying Petitioner's involvement. 2 *A.R.* 730.

During the January 2019 term of court, an Ohio County Grand Jury jointly indicted Petitioner, Mr. Dunn, and Ms. England. 1 *A.R.* 6 The indictment was severed pre-trial. On July 10, 2019, a meeting was held between Ms. England; her attorney, Kevin Neiswonger; the State; and Detective Seifert. The meeting was recorded, and Ms. England allegedly cooperated with the

State. 2 *A.R.* 723. Ms. England subsequently entered into a plea agreement wherein she would agree to testify against her boyfriend, the Petitioner, in exchange for the State's recommendation of a forty-year determinate sentence. 1 *A.R.* 7. After the pre-trial hearing where Petitioner learned of Ms. England's cooperation, he arranged for a three-way phone conversation whereby a third party individual would merge Ms. England's and Petitioner's individual phone calls to the third party. This was arranged because of their pre-trial detention in separate correctional facilities. 1 *A.R.* 8.

During the first of several phone calls, Ms. England told the third party – before the phone calls were merged – that she wanted to talk to Petitioner at least twice a day. *Id.* Throughout the course of the many phone calls arranged for the couple to share, Petitioner made several statements to Ms. England that shared a common theme: Petitioner was urging her to remain honest, loyal, and true to him. 1 *A.R.* 9. He further requested that she stop "running her mouth" and telling lies. *Id.* He intimated that if she should fail to comply, he would end their relationship. In fact, during one of these several conversations, Petitioner told his girlfriend:

> Sam, you know, I love you too. I do the right thing by you every day. I could reach out to different people and sh*t...and I don't. I don't ever want to talk to other people unless it's you. I don't ever want to be the reason you shed tears.

1 *A.R.* 10. From the record below, it is unclear how many of these conversations occurred.

On July 30, 2019, just prior to Ms. England's plea hearing, she advised her attorney, Kevin Neiswonger, that she did not wish to enter into the guilty plea. 1 *A.R.* 7-8. A meeting was held between Ms. England, the State, and Mr. Neiswonger wherein Ms. England reported that she would assert her Fifth Amendment right against self-incrimination if called to testify against the Petitioner. 1 *A.R.* 93-94. At the plea hearing, Ms. England maintained her position.

Ultimately, the circuit court found that Ms. England made her decision to withdraw the plea and assert her Fifth Amendment right against self-incrimination "knowingly, intelligently, and without threat of coercion, force, or duress." 1 *A.R.* 8.

Despite the Trial Court's ruling, the State decided to capitalize on Ms. England's assertion of her constitutional *right* not to testify: they moved to admit Ms. England's July 10, 2019 statement into Petitioner's trial under the forfeiture-by-wrongdoing doctrine, based on her newfound "unavailability," which came secondary to her Fifth Amendment assertion. On August 15, 2019, a hearing was held on the issue. At this hearing, Attorney Neiswonger was cross-examined regarding the July 10, 2019 hearing:

By Mark Panepinto

Q. During the plea hearing discussions, when that, I guess, blew up, for lack of a better word, what was [Ms. Engalnd's] position at that point?

A. During the plea hearing discussions, where [the State] was present, which would be the only discussions I would be permitted to testify to today, she indicated an unwillingness to accept the plea agreement, is what she said. She said, her words were "I can't do it." She repeatedly said, "I cannot do it."

Q. Did she say why?

A. No.

Q. She didn't say she was threatened or coerced by Mr. Jako?

A. No, she did not say that.

Q. She did not offer that she was in fear of Mr. Jako?

A. Well, she did when she was asked directly by [the State]. [The State] said, "Are you afraid of Mr. Jako?" And [Ms. England] said something to the extent of "absolutely" or "definitely".

Q. Well, that was upon questioning by [the State]; correct? Ms. England didn't offer that voluntarily?

A. Well, I would say that both [the State] and I asked her that, essentially. But, no, she did not volunteer that. No.

Q. Okay. And she didn't volunteer that she was afraid of Mr. Jako voluntarily either?

A. During the conversation, I do not believe so, no.

Q. Okay. She didn't voluntarily indicate that Mr. Jako had threatened her?

A. No, she never said that.

Q. She didn't voluntarily indicate that Mr. Jako had coerced her?

A. No.

1 *A.R.* 99-100. In direct contravention of this testimony and it's prior order, the Trial Court found that Petitioner "by his wrongdoing, has coerced or manipulated [Ms. England] into renouncing her plea agreement, and thus wrongfully sought to 'obtain her absence.'" 1 *A.R.* 11. Therefore, Ms. England's July 10, 2019 statement, which inculpated the Petitioner, was allowed to be played at trial without allowing an opportunity for cross-examination. It was recently discovered that Ms. England pled guilty with no testimony requirement, and she received a maximum sentencing exposure of five years pursuant to her new plea deal. 1 *A.R.* 61-68.

On the first day of trial, Trial Counsel decided that it was the appropriate time to reveal a potential conflict of interest. In Counsel's "eleventh-hour-and-fifty-ninth-minute disclosure," he revealed that, among other potential conflicts, he frequently vacations with the owner of the State Line Cafe, Larry Lewis. Furthermore, Counsel's past client and current vacationing buddy, Garry Glessner, owns the real estate that the parlor sits on. In fact, Trial Counsel revealed that the three have vacationed together in the past. The Trial Court found no conflict of interest, over Petitioner's objection. 1 *A.R.* 198-200.

During trial, Counsel put on an "identity" defense, that being nobody could affirmatively identify the Petitioner as one of the individuals that robbed the gambling parlor. 1 *A.R.* 166; 2 *A.R.* 1080. During jury deliberations, the Trial Court had to, among other things, read an *Allen* instruction to the jury, 2 *A.R.* 1180-82, and answer a question regarding whether they could find Petitioner guilty of First Degree Robbery if they thought that the crime was staged. 2 *A.R.* 1182. Petitioner was ultimately convicted and sentenced to a determinate term of 100 years. 1 *A.R.* 14.

On appeal, the WVSCA found that the record was not developed enough to make a ruling

on the conflict of interest claim. 1 *A.R.* 33. They also affirmed the Trial Court's ruling that Petitioner committed wrongdoing to procure Ms. England's unavailability at trial. 1 *A.R.* 31. The one justice dissent notes that there was no legal basis for this ruling, given the benign, non-threatening nature of Petitioner's statements to Ms. England. 1 *A.R.* 38-56. The Court denied rehearing in a unanimous decision. 1 *A.R.* 60.

Petitioner now presents this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

The United States Constitution "defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment," although it is the Fourteenth Amendment's Due Process Clause that guarantees a state criminal defendant the right to a fair trial. *Strickland v. Washington* 466 U.S. 668, 684-85 (1984). It is the Petitioner's right to a fair trial that is heavily implicated in this Petition.

This case is of fundamental importance for this Court to review because pre-trial rulings such as the ones made by the Circuit Court of Ohio County are substantial constitutional issues which are only present because of a flagrant and egregious abuse of justice in the West Virginia State Court system. Not only was Petitioner not afforded the ability to cross-examine the *only* witness whose testimony connected him to the crime, but her prior statements were inconsistent with that which was played at trial. Further complicating the issue, the Trial Court found – through two separate orders – that her unavailability was both coerced by Petitioner and voluntarily made.

The Court also found that Trial Counsel was not burdened by a conflict of interest that mandated that counsel withdraw. 1 *A.R.* 200. The conflict was revealed on the day of trial, just

before jury selection. 1 *A.R.* 198. Allegedly, Trial Counsel did not realize that his vacationing friends were the individuals who owned the parlor and property that were allegedly robbed until the night before trial. When this conflict was revealed, the court did nothing, and the WVSCA claimed that the record, which was well developed in the court below it, was not developed well enough to make a decision.

Furthermore, the standards set forth by this Court's prior jurisprudence are not sufficient for review of these claims, and new standards need to be announced to protect criminal defendants from lower courts who wish to use the Petitioner's case as precedent. As to Petitioner's first question, the current standard only addresses what should happen when an objection is not lodged to counsel's representation. However, in Petitioner's case, he objected. When a criminal defendant objects to a claim, it should be reviewed by a less stringent standard. Since Petitioner maintained his pre-trial objection to Attorney Panepinto's representation, 1 *A.R.* 157-160, his claim should be reviewed under a less stringent standard than the present standard.

Finally, the current case law states that when a witness properly asserts their Fifth Amendment right, a petitioner's Sixth Amendment right must always yield. However, when that witness is the only witness to place the defendant at the crime scene, a different standard must be used. This is especially so when that witness's prior statements were inconsistent with the statement that was played at trial. Petitioner asserts that in such a scenario, a trial judge should carefully balance the two, and decide on a case-by-case basis whose rights should prevail, and whose rights should submit. Each question will be addressed in turn.

I. CONFLICT OF INTEREST

The Sixth Amendment of the United States Constitution provides that defendants have

the right to the "Assistance of Counsel" for their defense in all criminal prosecutions. This right was unequivocally imbued to the states by way of the Fourteenth Amendment in *Gideon v. Wainwright* 372 U.S. 225, 344 (1963). The right to counsel is the right to "effective assistance of competent counsel." *Padilla v. Kentucky* 559 U.S. 356, 364 (2010). When a criminal defendant alleges counsel's incompetence, the defendant must show that counsel's performance was objectively unreasonable, *Strickland* at 688, and that prejudice ensued, resulting in an unreliable or fundamentally unfair outcome in the proceeding. *Id* at 698-700. Courts should shy away from using "the benefit of hindsight" to aid in making decisions. *Yarborough v. Gentry* 540 U.S. 1, 8 (2003)(per curiam).

Under the performance prong, "[a] court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Harrington v. Richter* 562 U.S. 86, 104 (2011). Persuasively, the WVSCA has held that "[this] presumption is simply inappropriate if counsel's strategic decisions are made after an inadequate investigation," Syl. Pt. 3 *State ex rel. Daniel v. Legursky* 465 S.E.2d 416 (W.Va. 1995), because "counsel has a duty to make reasonable investigations, or to make a reasonable decision that makes investigations unnecessary." *Strickland* at 691.

Under the prejudice prong, this Court has identified a narrow set of circumstances in which prejudice is presumed: (1) when there has been an "[a]ctual or constructive denial of the assistance of counsel altogether," *Strickland* at 692; (2) when counsel is burdened by an actual conflict of interest, *Cuyler v. Sullivan* 446 U.S. 335, 350 (1980); (3) when there are "various types of state interference with counsel's assistance," *United States v. Cronic* 466 U.S. 648, 660 (1984); or (4) when counsel "entirely fails to subject the prosecution's case to meaningful

adversarial testing." *Cronic* at 659. If prejudice is not presumed, a criminal defendant must show that they were prejudiced by showing that there is a reasonable probability that, but for the errors of counsel, the outcome of the proceedings would have been different. *Strickland* at 694.

When a criminal defendant has alleged that counsel was ineffective based on a conflict of interest (absent an objection), the defendant can demonstrate a Sixth Amendment violation by showing: (1) an active representation of conflicting interests, and (2) an adverse effect on specific aspects of counsel's representation. *Cuyler* at 348-50. This Court has used the term "conflict of interest" to describe "a division of loyalties that affected counsel's performance." *Mickens v. Taylor* 535 U.S. 162, 172 n. 5 (2002). It goes on to clarify that "[a]n 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance." *Id.* The First Circuit Court of Appeals has provided some additional clarification, stating, "A potential division of loyalties rises to the level of an actual conflict only where defendants show that the conflict actually affected the adequacy of his representation." *Yeboah-Sefah v. Ficco* 556 F.3d 55, 73 (1st Cir. 2009). This Court has yet to provide any guidance, however, on what standard should apply when counsel continues to represent a criminal defendant over the defendant's objection.

A. The Legal Standard

Typically, when a party fails to timely object, an alleged error is only reviewed for plain error. *See United States v. Olano* 507 U.S. 725, 731 (1993); *Puckett v. United States* 556 U.S. 129, 133-34 (2009). In this context, *Cuyler v. Sullivan* sets forth a two part standard to determine whether a criminal defendant is entitled to reversal on a conflict of interest claim when there has been no objection. When an objection has been lodged, a less stringent standard than the one set

forth in *Cuyler* should be applied, just as a less stringent standard than plain error is applied by courts of review when errors are objected to in trial courts.

A careful review of the language in *Cuyler* and *Mickens* reveals that, when a defendant fails to object to conflicted representation, the issue is reviewed with the benefit of hindsight. Without hindsight, there would be no way to determine whether the conflict *actually* affected counsel's representation or not. Because a court should shy away from making decisions "with the benefit of hindsight" in an ineffective assistance claim, *Yarborough* at 8, the standard for deciding a conflict of interest claim, to which the criminal defendant timely objected, should also shy away from using the benefit of hindsight.

Thus, in the spirit of this Court's past ineffective assistance of counsel jurisprudence, the reasonable probability standard should prevail. That is, the potential conflict should be addressed based on whether there is a reasonable probability that the conflict would have impacted the attorney's representation. Again, in the spirit of this Court's *Strickland* jurisprudence, just as a defendant need not *prove* that the outcome would have been different, *Woodford v. Visciotti* 537 U.S. 19, 22 (2002), a defendant should not need to *prove* that defense counsel's conflict would have impacted their representation, merely that there is a reasonable probability that it would have. It is under this standard that Petitioner's claims should be governed.

B. The Presumption of Prejudice

Petitioner asserts that counsel was constitutionally ineffective under this standard. Counsel actively represented the Petitioner and had prior representation of individuals potentially involved in this case 1 *A.R.* 198-200. On the day of trial, Defense Counsel revealed that, although they were not to be called as witnesses in the Petitioner's trial, Larry Lewis, the owner of the

business that was robbed, and Gary Glessner, the owner of the property that the business sits on, are all good friends. In fact, the record reveals that Defense Counsel, Mr. Lewis, and Mr. Glessner know each other "quite well," 1 *A.R.* 199, and have taken vacations with each other in the past. *Id.* Furthermore, Defense Counsel asserted that he has represented Mr. Glessner in the past. However, Defense Counsel states that he has no qualms with representing the Petitioner in the robbery case 1 *A.R.* 200. Yet, at this same hearing, Counsel curiously states:

> The discussion last week was that one of the victims of what's being investigated as a homicide, Miss Jenkins was a former client of mine. I actually looked at the document between last week's hearing and today. I think it was dated sometime in May of 2014. So sometime in 2014, I represented Miss Jenkins. Throughout the course of the trial I didn't recognize the name, nor the fact that I represented that person until Miss Turak brought it to my attention back over the summer, and I had promptly shared that with Mr. Jako...In addition to that, the other victim in that case who also has died is a Mr. Trevor Vossen. Mr Vossen's family, through Tri-State Exterminating, and his uncle, I believe, is one of my clients not just from the past, but presently. In fact, I had had a conversation with Mr. Vossen as recent as just a couple of days ago, and I brought to his attention that fact that I represent Mr. Jako, that we're proceeding to trial on this case today, and if ultimately the other case does come down to charges that I would have no intention nor would I feel comfortable in representing Mr. Jako.

1 *A.R.* 197-98. If Counsel feels that he cannot represent Petitioner in the murder case based on representing the victim's family, how can he turn around and say that he feels comfortable representing Petitioner? This is an exceptionally important question, given that the owner of the property that the cafe sits on – Mr. Glessner – is a client of Defense Counsel and contemporaneously an individual with a potential stake in the outcome of these proceedings.

Furthermore, the business owner – Mr. Lewis – and Mr. Glessner are close friends and vacationing buddies with Defense Counsel. Given that the safe was found unlocked, and testimony at trial revealed that this was the business's common practice, the jury *needed* Mr. Lewis's testimony as to his business practices in *his* business regarding *his* safe, which held *his*

money, especially when two of his employees testified at trial that there was no policy or procedure regarding the safe, because no reasonable person would buy a safe to store money in just to leave it unlocked all of the time; it flouts the very purpose of a safe.

However, Mr. Lewis was not called by Defense Counsel and an "inside job" theory was not presented at trial. In fact, presenting an "inside job" theory at trial would have meant challenging the business practices of his friend and his friend's employees quite rigorously. It would have involved hiring an investigator (something the Petitioner had requested, 1 *A.R.* 158) to check into the financial records of Mr. Lewis and his employees to try and find the stolen money. Defense Counsel did none of these things because he would not want to challenge his vacationing buddy's business practices and ruin their relationship. However, one can reasonably presume that this was an inside job because of Ms. Walton's involvement in the crime.2 *A.R.* 840. Furthermore, the jury's question to the Trial Court reflects twelve individual's contemplation of an inside job without evidence of the same being presented at trial. 2 *A.R.* 1182.

Given this information, there is a reasonable probability that Attorney Panepinto's personal relationship with Mr. Lewis impacted his representation, as there is a reasonable probability that an inside job theory of the case would have been presented at trial had their friendship not prevented it. Furthermore, Counsel's potential conflict created a scenario in which meaningful adversarial testing was not possible, thus mandating a presumption of prejudice; counsel was unable to effectively cross-examine the right witnesses, and was unable to call a key witness for the Petitioner: Mr. Lewis. Compounding this issue is the WVSCA's failure to do a merits analysis of this claim, arguing that the record was not well developed. However, the Trial Court record makes the conflict quite clear.

The cumulative effect of these issues mandates a presumption of prejudice, and the Petitioner is entitled to reversal based on this claim.

II. FORFEITURE-BY-WRONGDOING

The Sixth Amendment of the United States Constitution provides, in relevant part, that "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him...." "Nothing can be more essential [to this right] than the cross-examining of witnesses," *Crawford v. Washington* 541 U.S. 36, 49 (2004)(quoting R. Lee, LETTER IV BY THE FEDERAL FARMER (Oct. 15, 1787)) This clause, commonly referred to as the Confrontation Clause, applies to the States through the Fourteenth Amendment's Due Process clause. *Pointer v. Texas* 380 U.S. 400, 403 (1965). The Confrontation Clause "prohibits the 'admission of testimonial statements of a witness who does not appear at trial unless he is unavailable to testify, and the defendant has had a prior opportunity for cross-examination.'" *United States v. Hano* 922 F.3d 1272, 1286 (11th Cir. 2019)(quoting *Crawford* at 53-54); *Giles v. California* 554 U.S. 353, 358 (2008)("A witness who makes testimonial statements admitted against a defendant will ordinarily be present at trial for cross-examination, and that if the witness is unavailable, his prior testimony will be introduced only if the defendant had a prior opportunity to cross-examine him."). "A statement cannot fall within the confrontation clause unless it's *primary* purpose was testimonial."*Cody v. Commonwealth* 812 S.E.2d 466, 476 (V.A. Ct. App. 2018). Testimonial statements "cause the declarant to be a 'witness.'" *Davis v. Washington* 547 U.S. 813, 821 (2006). The Framers intended that the Confrontation Clause would prevent a "civil-law mode of criminal procedure" whereby *ex parte* examinations could be used as evidence against an accused. *Crawford* at 50.

Bearing this in mind, the Confrontation Clause is not a means by which a defendant can procure or coerce "silence from witnesses and victims[.]" *Davis* at 833. When a defendant engages in "conduct designed to prevent [a] witness from testifying" their statement(s) may be admissible at trial. *Giles* at 360. This rule is called the forfeiture-by-wrongdoing doctrine. The typical case involving this doctrine is one where the witness is killed in order to prevent them from testifying, although there are still some cases wherein the wrongful conduct is "expanded to include threats, intimidation, and bribery." *People v. Reneaux* 264 Cal. Reptr. 3d 459, 480 (Cal. Ct. App. 2020)(Duarte, J. dissenting); *People v. Smart* 23 N.Y.3d 213, 218 (N.Y. Ct. App. 2014) ("However, where it has been shown that the defendant procured the witness's unavailability through violence, threats, or chicanery, the defendant may not assert either the constitutional right of confrontation or the evidentiary rules against the admission of hearsay in order to prevent the admission of the witness's out-of-court declarations, including the witness's grand jury testimony.").

"*Giles* established the *mens rea* aspect of the forfeiture-by-wrongdoing exception: The defendant must *intend* that a witness be made unavailable to testify." *Reneaux* at 472; *Brown v. State* 618 S.W.3d 352, 361 (T.X. Crim. App. 2021)("The defendant must have engaged in misconduct aimed at least in part at preventing the witness from testifying and that misconduct must have been a significant cause of the witness's decision not to testify."). Finally, "the Sixth Amendment right to confrontation must yield when a witness properly asserts a Fifth Amendment right against self-incrimination." *Vann v. Dir., Tex. Dep't of Crim. Justice-Corr. Insts. Div.* No. 4:16-cv-0508, 2019 U.S. Dist. LEXIS 88871 *12 (E.D. T.X., Apr. 24, 2019)(citing *Alford v. United States* 282 U.S. 687, 694 (1931)).

A. Forfeiture-By-Wrongdoing

Under the Sixth Amendment's Confrontation Clause and Forfeiture-By-Wrongdoing jurisprudence, when a criminal defendant's codefendant makes a knowing, voluntary, and intelligent decision to assert their constitutional *right* not to testify, the State should not be able to capitalize on this and submit to the Trial Court that the criminal defendant has procured the codefendant's unavailability *especially* when no procurement exists *and* the codefendant had a tactical reason for not entering into the plea agreement.

In the majority decision below, the WVSCA ruled that while Petitioner "did not make an overt threat of violence to Ms. England, his statement certainly intimated the possibility. [Petitioner] told Ms. England that he could 'reach out to different people and sh*t...'" 1 *A.R.* 10. Indeed, when seen only in light of a criminal defendant talking to a witness, the passage quoted by the majority may suggest that harm may have come to Ms. England, and an individual could certainly stretch their imagination to see this. However, this statement was taken grossly out of context. When this statement is seen in context, one can see the full intent behind Petitioner's statement:

> Sam, you know, I love you too. I do the right thing by you every day. I could reach out to different people and sh*t...and I don't. I don't want to talk to other people unless it's you. I don't ever want to be the reason you shed tears.

Id. From this statement, it is apparent that Petitioner is conveying the fact that he could be in a relationship with anyone he wants, but instead he wants to be with Ms. England. Petitioner is not exactly sure how this even remotely reflects an intimation of violence. This so called "reasonable inference" by the majority is not only wrong, but also negligent. *See e.g.* People v. Reneaux at 479 (Duarte, J. dissenting)(rejecting a contention that a defendant's requests for his girlfriend

stop lying combined with his statements that he loved her, wanted to marry her, and wanted to be with her rose to the level of wrongdoing).

The majority below, in effect, "clos[ed] its eyes to the reality of criminal law at the trial court level." 1 *A.R.* 50. Moreover, the majority below employed the use of divination and speculation to create meaning in statements where no such meaning existed. This is impermissible. *See e.g.,* Brown v. State, *supra* (declining to allow a court's discretion as an excuse to use speculation to conclude that appellant procured a witness's unavailability); *State v. Dobbs* 320 P.3d 705, 713 (W.A. 2014)(Wiggins, J. Dissenting)(dissenting to the majority's use of "mere speculation" to explain a witness's unavailability for trial in light of "multiple plausible theories" for the witness's absence).

Furthermore, the human element of criminal law was effectively excised from this case, and it is a vital element for giving context to the Petitioner's telephone statements. When significant others are pitted against each other by the prosecution in an adversarial process, relational strain and conflict arise, especially when that conflict is premised on the lies of one of the individuals in the relationship. The State attempted to ascertain a conviction through manufactured relational conflict, which is what caused the telephone conversations. The conversations were not a nefarious attempt to preclude trial testimony, they were a desperate attempt to save a relationship that the State vitiated.

Certainly, if the WVSCA's ruling is upheld, then it will set a precedent that relational issues must be placed on hold while a criminal case is pending because if a relationship is terminated (or initiated for that matter) by the wrong party, then it may be seen as a nefarious attempt to procure a witness's unavailability. Any type of change in relationship status would

make it so that the prosecution could admit a potentially prejudicial statement at trial, uncontested, as they did in Petitioner's case.

Even assuming that this is not the case, affirming the WVSCA's decision allows for a trial court to rule in whatever manner it pleases, regardless of whether two rulings contravene each other or not. In this case, for example, the Trial Court entered an order which stated that Ms. England knowingly, voluntarily, and intelligently decided to assert her Fifth Amendment right at Petitioner's trial. 1 *A.R.* 8. Then, after testimony was presented that Ms. England had to be *prompted* to reveal that she was "afraid" of Petitioner, 1 *A.R.* 99-100 – even though she *wanted* to talk to him twice per day, 1 *A.R.* 8 – the Trial Court ruled that the Petitioner coerced her and thus caused her unavailability.

In the aftermath of this ruling, it was later revealed that Ms. England accepted a new plea agreement that did not have a testimony requirement, and carried substantially less time. 1 *A.R.* 61-68. Recognizing, as Justice Wooton did, that a forty year plea bargain is "no deal at all," 1 *A.R.* 50. Ms. England would have said anything to get out of her original plea bargain, and Petitioner suffered the consequences; Ms. England played the State by using Petitioner as a means of withdrawing her plea agreement so that she did not have to testify *and* would receive a lesser sentence than what was originally bargained for.

B. Fifth Amendment – Sixth Amendment Conflict

Alford v. United States has stood the test of time, and there has been little (if any) analysis on it's points of law. Specifically, this Court has not, to Petitioner's knowledge, analyzed the case at all beyond what is in the actual *Alford* opinion. In *Alford*, a witness's Fifth Amendment right to be free from self-incrimination trumps a criminal defendant's right to confront adverse witnesses

under the Sixth Amendment. However, what happens when the adverse witness is a criminal defendant's actual accuser, the only individual who can place said defendant at the crime scene uncircumstantially?

As is the issue in this case, Ms. England was the only testifying individual who uncircumstantially placed the Petitioner at the scene of the crime during the crime. Ms. England's inculpatory statement – which was inconsistent with a prior statement she gave – was played at Petitioner's trial, and he was not given an opportunity to cross-examine her on these inconsistencies, which may have exculpated the Petitioner. Given that, as discussed above, there was no wrongdoing that procured her unavailability, Petitioner should have been given the opportunity to cross-examine her, especially since she is the only individual that connects Petitioner to the crime.

Allowing Ms. England's changed statement into Petitioner's trial was one of many errors that rendered his trial fundamentally unfair. It allowed him to be accused and convicted on what was essentially an *ex parte* examination, the very thing that the Confrontation Clause was designed to prevent. Furthermore, the statement should not have been excluded from trial because Petitioner did not coerce Ms. England into not testifying; she made a knowing and voluntary tactical decision to "plead the fifth." Petitioner should not be held liable for her tactical decisions.

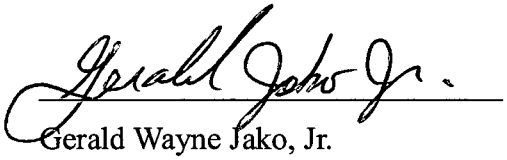
CONCLUSION

The Petitioner has suffered an abhorrent violation of his right to a fair trial. The cumulative effect of counsel's conflict of interest and the erroneous application of forfeiture-by-wrongdoing have caused Petitioner to be erroneously convicted and egregiously sentenced. Ms.

England played the State of West Virginia, and Attorney Panepinto potentially represented conflicting interests, which prevented him from acting in Petitioner's best interests. Had it not been for these errors, the outcome of the proceedings would have been vastly different.

For the foregoing reasons, Petitioner humbly requests this Honorable Court grant him a Writ of Certiorari, and any other relief deemed just and proper. The Petitioner understands that this Court will act within the confines of justice.

Respectfully Submitted,
Gerald Wayne Jako, Jr., *pro se*



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