No. ____

IN THE
Supreme Court of the United States

EARNEST EUGENE PADILLOW,
PETITIONER,

v.

SCOTT CROW, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS,
RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Robert L. Sirianni, Jr., Esq.
Counsel of Record
BROWNSTONE, P.A.
P.O. Box 2047
Winter Park, Florida 32790-2047
robertsirianni@brownstonelaw.com
(o) 407-388-1900
(f) 407-622-1511

Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

Whether the United States District Court For The Northern District Of Oklahoma and subsequently the Tenth Circuit Court of Appeals erred in defaulting Petitioner Padillow's claims because he did not raise them on direct appeal at the state court level, despite the fact that Petitioner Padillow had not received state court hearing or the opportunity to call witnesses?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before this court are as follows:

Earnest Eugene Padillow.

The State of Oklahoma

Joe Allbaugh, Director.

Scott Crow, Oklahoma Department of Corrections,

Interim Director.

LIST OF PROCEEDINGS

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA
Case No. 4:18-CV-00122-TCK-CDL
EARNEST EUGENE PADILLOW v. SCOTT CROW
Petition for Writ of Habeas Corpus and Certificate of Appealability DENIED. Judgment Dated March 24, 2021. Judgment not reported but reproduced in the Appendix.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
Case No. 21-5064
EARNEST EUGENE PADILLOW v. SCOTT CROW
Ordering DENYING Certificate of Appealability. Judgment is not reported but reproduced in the Appendix.
Judgment dated June 1, 2022.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

PETITION FOR A WRIT OF CERTIORARI

The Petitioner respectfully requests that a Writ of Certiorari be issued to review the United States District Court For The Northern District of Oklahoma's denial of a Certificate of Appealability, which was affirmed by the United States Court Of Appeals For The Tenth Circuit.

OPINIONS BELOW

The March 24, 2021, order denying Petitioner Padillow's Petition for Habeas Corpus from the United States District Court For The Northern District Of Oklahoma, is reproduced in the Appendix ("Pet. App. 22b"). This order is not published

The June 1, 2022, order from the United States Court Of Appeals For The Tenth Circuit is reproduced in the Appendix. ("Pet. App. 1a"). This order is not published.

BASIS FOR JURISDICTION IN THIS COURT

The United States Court Of Appeals For The Tenth Circuit entered judgment on June 1, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a 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 offence 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.

U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution provides:

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

U.S. Const. amend. VI.

STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C.§ 2253(c)(1)-(3) provides:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c)(1)-(3).

Title 28 U.S.C.§ 2254(d)(1)-(2) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits

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

28 U.S.C. § 2254(d)(1)-(2).

STATEMENT OF THE CASE

A. Concise Statement of Facts Pertinent to the Questions Presented.

The Incident In Question

In August of 2008, allegations that Padillow's ten-year-old great-niece had been sexually assaulted the year before were reported to the police, but the investigation was halted. ("Pet. App. 24b"). In 2010, Padillow's cousin alleged that he sexually abused her, but the charge was dismissed. ("Pet. App. 25b"). In 2011, Padillow babysat his niece and her siblings. His niece was taken to the hospital for a rape kit, where the DNA found on swabs was inconclusive. ("Pet. App. 25b").

B. Procedural History

Petitioner Padillow was charged with three counts of first-degree rape and two counts of rape by instrumentation in Tulsa County District Court. Mr. Padillow was convicted on all counts by a jury and sentenced to two consecutive life sentences without the possibility of parole and three consecutive 20-year sentences.

During the trial, before Mr. Padillow was to testify, his attorneys stated, outside the jury's presence, that Mr. Padillow would not cooperate in preparing his testimony and wished to represent himself. However, Mr. Padillow explained to the court that his attorneys failed to recall specific witnesses

who had already testified. The trial court denied his request.

In March 2016, Mr. Padillow filed pro se seeking post-conviction relief in the trial court, raising several issues, including ineffective assistance of counsel at both the trial and appellate level, trial court error in denying his motion to dismiss defense counsel, and that the jury's verdict lacked sufficient evidence. The trial court denied his application for relief without a hearing, rejecting on its merits his claim that appellate counsel was ineffective, and holding that his other claims were procedurally barred because Mr. Padillow had not raised them on direct appeal. The court also denied Mr. Padillow's request for appointment of counsel.

Mr. Padillow appealed the denial of his application to the OCCA, which affirmed on the grounds relied on by the trial court.

On February 26, 2018 Mr. Padillow filed his federal petition for writ of habeas corpus. On March 24, 2021, Mr. Padillow's petition for writ of habeas corpus was denied by without granting a Certificate of Appealability.

On August 26, 2021 Mr. Padillow appealed this District Court's decision not to issue a Certificate of Appealability to the Court of Appeals for the Tenth Circuit. ("Pet. App. 1a"). The Tenth circuit denied the appeal on June 1, 2022. ("Pet. App. 1a").

This Petition for Writ of Certiorari followed.

REASONS TO GRANT THIS PETITION

I. THE DISTRICT COURT AND TENTH CIRCUIT ERRED WHEN BOTH FOUND THAT MR. PADILLOW WAS NOT ENTITLED TO THE ISSUANCE OF A CERTIFICATE OF APPEALABILITY FOR INEFFECTIVE ASSISTANCE OF COUNSEL UNDER EITHER *STRICKLAND* OR AEDPA.

A court may issue a Certificate of Appealability ("COA") when an applicant makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). If a district court denies a petitioner's habeas petition on procedural grounds "without reaching the merits of the petitioner's constitutional claim," the district court *must* issue a COA if the petitioner at least shows that: (1) jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and (2) that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *See Slack v. McDaniel,* 529 U.S. 473, 483–84 (2000) (citing 28 U.S.C. § 2253(c)); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). The movant does not need to show that he would prevail on the merits, but rather show that the issues he presents are subject to *debate among jurists of reason*, such that a court could resolve the issues differently or the issues are worthy of encouragement to proceed further. *See id.*; *see also Buck v. Davis*, 137 S. Ct. 759, 781 (2017) (Thomas, J., dissenting) ("A court may grant a COA even if it might ultimately conclude that

the underlying claim is meritless, so long as the claim is debatable.").

Recently, this Court addressed the standards for issuing a COA in the Fifth Circuit. *See Buck*, 137 S. Ct. at 773. In *Buck v. Davis*, this Court reversed the Fifth Circuit based on the Fifth Circuit's failure to issue a COA. *See id.* at 780. Regarding the COA standard, this Court explained:

> The COA inquiry, we have emphasized, is not coextensive with a merits analysis. . . . [The] threshold question should be decided without full consideration of the factual or legal bases adduced in support of the claims. When a [court] sidesteps the COA process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.

Id. at 773 (citations omitted). This Court noted that a claim can be debatable "even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 744.

Furthermore, a district court should resolve any doubts about whether to grant a COA in favor of the movant. *See Miller v. Johnson*, 200 F.3d 274, 280-81 (5th Cir. 2000), *cert. denied*, 531 U.S. 849 (2000). In making this inquiry, the court take into consideration the severity of the prisoner's penalty. *See id.*

In order to qualify for an evidentiary hearing, a petitioner must have made a reasonable attempt to develop the factual record in prior state court proceedings and the additional alleged facts, if proven at the hearing, would entitle the petitioner to relief. See 28 U.S.C. § 2254(e)(2). When determining whether a petitioner failed to develop his claims in state court, the focus is on whether the petitioner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims, not whether such efforts would have been successful. *Williams v. Taylor*, 529 U.S. 420, 435 (2000) (Williams II). If a defendant diligently sought, but was denied, the opportunity to present evidence in the state court proceedings, he should not be found to have failed to develop the relevant facts. *Id.* at 437.

Petitioner has been diligent in his efforts to develop the relevant facts throughout the state direct appeal and post-conviction proceedings. Petitioner's pre-trial investigation was hindered by the failure of his counsel to seek exculpatory evidence. And appellate counsel prevented Petitioner from fully developing the factual bases of his claims at that stage. *Id.* at 434 (the concealment of certain facts can be an indication that a claim was pursued with diligence but remained undeveloped in state court).

Further, Petitioner can show that the trial and appeal was riddled with ineffective counsel and conflicts of interest. All his prior counsel's representation fell below "an objective standard of reasonableness," *Strickland*, 466 U.S. at 688, which could be not construed as part of a "sound trial strategy," *id.* at 689, and was "so serious as to deprive

the defendant of a fair trial . . . ." *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993).

Before determining that a claim is procedurally barred, the district court was required to analyze whether the state procedural rule that prevented the review constitutes an "adequate" basis for barring federal habeas review. *James v. Kentucky*, 466 U.S. 341, 348 (1984). To meet this requirement, a rule must be "firmly established and regularly followed." *Lee v. Kemna*, 534 U.S. 362, 376 (2002) (citation omitted); accord *Beard v. Kindler*, 130 S. Ct. 612, 617 (2009); James, 466 U.S. 348. State procedural rules that impede federal habeas review must provide the defendant with fair notice and must not be arbitrary, inconsistent or unpredictable. See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958); see also *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 293-302 (1964).

It is without question that the issues the District Court and Circuit Court labeled defaulted were encompassed in the ground raised in state court that was not deemed defaulted. Moreover, Petitioner requested that his appellate counsel in state court raise these issues on appeal. Appellate counsel failed to do so – now federal courts are improperly barring Petitioner from bringing valid claims. These strikes right at the heart of what federal habeas relief is designed to protect. Given that his appellate counsel was ineffective, Petitioner had no choice but to raise these issues in postconviction proceedings. But, the state postconviction court deprived him the opportunity to be heard and flush out these claims and call witnesses. Importantly, the issues that are

"defaulted" are not entirely and uniquely distinct from those are not defaulted. Rather, it seems that the Courts below are basing their judgment off the headings in the state proceeding filings, rather than the substance. An issue this Court must address.

Moreover, the claims presented are not solely that appellate counsel was ineffective for failing to allege that trial counsel was ineffective – this is a misunderstanding by the Tenth Circuit. Rather, the claim is that all counsel was ineffective for failing to review and investigate exculpatory evidence. This is not a strategic decision. This is a failure to act as counsel.

In this case, the District Court should have issued a COA because the issues of the dismissal of Mr. Padillow's § 2254 petition could be debated by reasonable jurists on both substantive and procedural grounds. Specifically, Mr. Padillow has made a significant showing that he was denied effective assistance of his trial counsel under (1) *Strickland v. Washington*, 466 U.S. 668 (1984) and (2) the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").

This Court has held that "[t]he benchmark of judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial [court] cannot be relied on having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Under *Strickland*, a defendant demonstrates ineffective assistance of counsel by showing that (1) the trial counsel's performance was

deficient, meaning that he or she made errors so egregious that they failed to function as the "counsel guaranteed the defendant by the Sixth Amendment," and (2) the deficient performance prejudiced the defendant enough to deprive him of due process of law. *See id.* at 686; *Guidry v. Lumpkin*, 2 F.4th 472, 489 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 1212 (2022). To establish prejudice, the defendant must show that there "is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695. This Court also has stated that "[the' result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 694.

In *Martinez*, this Court established that "[where], under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Martinez v. Ryan*, 132 S. Ct. 1309, 1320 (2012). To that end, this Court established a two-prong test to show cause to overcome a procedural default. *See id*. First, collateral counsel must have been ineffective when presenting or failing to present an ineffective assistance of trial counsel claim. *See id.* at 1318-19.

The second prong requires the petitioner to "demonstrate that the underlying ineffective assistance of trial counsel claim is a substantial one,

which is to say that the prisoner must demonstrate that the claim has some merit," meaning that the defendant had suffered prejudice from the representation. *Id.*

This Court has granted COA in cases involving ineffective assistance of counsel in cases where counsel failed to present substantial mitigating evidence. *Williams v. Taylor*, 529 U.S. 362 (2000). Petitioners in the Tenth Circuit have been able to obtain a COA in cases involving ineffective assistance of counsel

Petitioner Padillow's *Strickland* claim has merit. Mr. Padillow met state procedural requirements. Even if Mr. Padillow had not met state procedural requirements, the Tenth Circuit determined, in *Smith v. Workman*, that a habeas petitioner's waiver of claims not raised on direct appeal does not bar a habeas court from reviewing ineffective assistance of trial counsel. 550 F.3d 1258, 1274 (10th Cir. 2008). Claims of ineffective assistance of trial counsel not raised on direct appeal are waived only when (1) trial counsel and appellate counsel are different, and (2) "the ineffectiveness claim can be resolved upon the trial record alone." *English v. Cody*, 146 F.3d 1257, 1264 (10th Cir. 1998). While Mr. Padilow's trial counsel and appellate counsel are different, the trial record alone does not resolve ineffective assistance of counsel.

Mr. Padillow's trial counsel committed numerous errors that fell below an objective standard of reasonableness under prevailing professional norms. Significantly, trial counsel failed to obtain and

introduce a video of a victim's medical examination, failing to locate and call witness Regina Johnson, and failing to object to the admission of crucial evidence against Mr. Padillow. These failures clearly caused Mr. Padillow prejudice, because the crucial evidence was admitted against him at trial, and crucial evidence in his favor was not presented at trial.

These errors are coupled and exacerbated by the conflict of interest present in this case. Mr. Padillow's defense counsel possessed a conflict of interest throughout the period he represented Petitioner, thus depriving Petitioner of due process and his Sixth Amendment right to conflict-free counsel. See *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Mickens v. Taylor*, 535 U.S. 162 (2002). Where a trial court is or should be aware that trial counsel possesses "a probable risk of a conflict of interests" (*Holloway v. Arkansas*, 435 U.S. 475, 484 (1978)), and the trial court fails to make an appropriate inquiry into the conflict, reversal is required if the conflict adversely affected counsel's performance. *Mickens*, 535 U.S. at 174. When a conflict exists, it is the attorney's duty to promptly advise the court. *Cuyler*, 446 U.S. at 346. Trial counsel possesses a conflict of interest if he is not in a position both professionally and personally to represent his client with undivided loyalty. *Cuyler*, 446 U.S. at 350; see also *Frazer v. United States*, 18 F.3d 778, 787 (9th Cir. 1994); *Stoia v. United States*, 109 F.3d 392, 395 (7th Cir. 1997). Thus trial counsel cannot represent a defendant whose interests are contrary to counsel's own interests. *Mannhalt v. Reed*, 847 F.2d 576, 579-580 (9th Cir. 1988). An actual conflict exists "if the defense attorney was required to

make a choice advancing his own interests to the detriment of his client's interests." *Stoia*, 109 F.3d at 395 (internal quotation marks omitted). Trial counsel possesses a conflict if he is or is likely to be "influenced in his strategic decisions by ... improper considerations." *Wood v. Georgia*, 450 U.S. 261, 268, n. 14 (1981).

Sullivan held that if a defendant did not object to his attorney representing a codefendant, the "mere possibility of a conflict" is not enough to establish ineffective assistance of counsel; the non-objecting defendant must demonstrate "that an actual conflict of interest adversely affected his lawyer's performance." 446 U.S. at 345, 348. However, and importantly, once a defendant shows that a conflict "actually affected the adequacy of [ ] representation," he "need not demonstrate prejudice in order to obtain relief." *Id*. at 349–50.

Notably, Mr. Padillow was represented by four different attorney's from the public defender's office before being appointed private counsel. Before trial Mr. Padillow and his private appointed counsel, Mr. Cagle and Mr. Lee, were engaged in a disagreement that resulted in a physical altercation involving Mr. Cagle.

Throughout the trial proceedings, this conflict was clearly weighing on Mr. Padillow given that he repeatedly waivered between proceeding pro se and proceeding with representation. On the first day of trial in the middle of voir dire, Mr. Padillow requested that Mr. Cagle and Mr. Lee step in to represent him. Finally, after the prosecution presented its case and

just before Mr. Padillow was to testify, he again asked to represent himself based on disagreements with his lawyers. The trial court denied this request.

The trial court was required to ensure that Mr. Padillow had conflict-free counsel. And by allowing the law firm that was involved in a physical altercation with a defendant to proceed as counsel of record during trial is reversible error. The actual prejudice from this denial of a constitutional right is evidence by the ineffectiveness detailed above.

Notably – A district court is not obliged to accept every defendant's invocation of the right to self-representation." *United States v. Purnett*, 910 F.2d 51, 55 (2d Cir.1990); *Wilson v. Gomez*, 105 F.3d 668 (9th Cir. 1996) (holding that defendant waived his right to self-representation by making equivocal requests regarding self-representation). These cases demonstrate that a waiver or a termination of the right to self-representation may occur without the defendant's knowledge or consent. In fact, a waiver or termination may result merely from the defendant's equivocation. See *Munkus v. Furlong*, 170 F.3d 980, 984 (10th Cir. 1999).

However, there was no such waiver. And there was no inquiry on whether Mr. Padillow was intelligently waiving his right to counsel. Largely because he had done so before, and the court allowed him to proceed pro se. Then, at the end when the "chips were down" the Court unequivocally denied such a request without reason or merit. This runs amuck this Court's cemented law and the law of the

circuits. See *Moore v. Haviland*, 531 F.3d 393, 402-04 (6th Cir. 2008).

These errors alone should raise questions of adequacy and conflict of interest under the "reasonable jurists" standard found in *Miller-El*. 537 U.S. at 327. Consequently, this Court should grant Mr. Padillow's petition for a COA under *Strickland* so that he may continue to seek justice under the law.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Robert L. Sirianni, Jr., Esq.
Counsel of Record BROWNSTONE, P.A.
P.O. Box 2047
Winter Park, Florida 32790-2047
(o) 407-388-1900
robertsirianni@brownstonelaw.com

Counsel for Petitioner

Dated: September 29, 2022.