No. 22-5574

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

GREGORY L. BLACKMON — PETITIONER
(Your Name)

vs.

MARK INCH, et. al., — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Gregory Lamar Blackmon
(Your Name)

5964 U.S. Hwy 90
(Address)

Live Oak, Fla 32060
(City, State, Zip Code)

n/a
(Phone Number)

QUESTION(S) PRESENTED

Whether the Appellate courts' Err[ed] by Rephrasing A certified question AFter being brieFed and ORAl Argued AS Requested by the State, CiRcumventing this Courts Decision In HolloWAy.

~~See Appendix -~~

LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

TABLE OF AUTHORITIES CITED

CASES — PAGE NUMBER

STATUTES AND RULES

OTHER

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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

[✓] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[✓] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix A to the petition and is

[ ] reported at _____; or,
[✓] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[✓] reported at 98 So.3d 200 1st DCA 2012; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the per curiam 1st DCA 2012 court appears at Appendix C to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[✓] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was MAY 19th 2022.

[ ] No petition for rehearing was timely filed in my case.

[✓] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: June 7 2022, and a copy of the order denying rehearing appears at Appendix 23.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

6th Amendment conflict Free Counsel

8th Amendment Antecedent error of Law.

STATEMENT OF THE CASE

Attachment B
4.

REPLY ARGUMENT

ISSUE I

> Whether Mr. Blackmon's appellate counsel was ineffective for failing to argue the trial court erred in its treatment of Mr. Blackmon's decision to be jointly represented by his co-defendant's counsel, and whether the state court's ruling on this claim was contrary to or an unreasonable application of clearly established federal law or was based on an unreasonable determination of the facts.

The Appellee presents a strange argument. First, the Appellee criticizes the Court for the manner in which it framed the issues certified for appeal and then reframes the issues to suit its desires. (AB at ECF 29-30). The Appellant did not frame the issues for appeal. The Appellant merely satisfied his duty to address the issues certified by the Court as worthy for review.

Next, the Appellee claimed that Appellant "has abandoned any contention" that the state appellate court's "adjudication of this claim on the merits contravenes" 18 U.S.C. § 2254(d). (AB at ECF 26, 30). Section 2254(d) provides, in part, that habeas relief is not available from a state court judgment unless the adjudication on the merits "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." 18 U.S.C. § 2254(d)(1). In this vein, the Appellee asserts that Appellant's claim was reasonably construed, specifically by the district court

and hypothetically by the state appellate court, as a challenge to the propriety of a consolidated trial rather than joint representation. (AB at ECF 39-40).

The Appellee overlooks the point that construing Appellant's claim as an objection to consolidated trials, rather than the dangers of joint representation, is an unreasonable application of the clearly established law of the Supreme Court in *Holloway v. Arkansas*, 435 U.S. 475 (1978), and *Cuyler v. Sullivan*, 446 U.S. 335 (1980). *See* (IB at ECF 46-56). As argued in Appellant's initial brief, Blackmon's habeas petition clearly presented the claim that appellate counsel was ineffective for failing to argue that the trial court erred by failing to advise him of the dangers of joint representation. (ECF 6 at 3; ECF 33 at 6). And as argued in the initial brief, the record shows that construing the claim as a challenge to consolidated trials is an unreasonable application of *Holloway* and *Cuyler v. Sullivan*. Under *Holloway*, the record shows that the trial court was on notice of a probable conflict of interest and had the duty to advise Blackmon of the dangers of joint representation. And under *Cuyler v. Sullivan*, an actual conflict of interest arose during trial and thereby required the trial court to advise Blackmon of the dangers of joint representation.

The trial court's failure to advise Blackmon of the dangers of joint representation is an error antecedent to the ultimate question whether Blackmon received ineffective assistance of counsel due to appellate counsel's failure to raise

the issue on direct appeal. The antecedent error of law means, under *Panetti v. Quarterman*, 551 U.S. 930 (2007), that the state court's adjudication denying Blackmon's claim of ineffective assistance of appellate counsel is entitled to no deference under AEDPA. *Id.* at 953.

The Appellee's reliance on *Panetti v. Quarterman* is misplaced as the Appellee misinterprets and misapplies that decision. (AB at ECF 29,41,45). According to the Appellee, *Panetti*, stands for the proposition that "only if the federal habeas court finds that the petitioner satisfied his burden under AEDPA does it take the final step of conducting an independent review of the merits of the petitioner's claims. (AB at ECF 29, citing *Panetti*, 551 U.S. 930 at 953). That is a misinterpretation of the pronouncement in *Panetti*. The correct passage follows:

> Under AEDPA, a federal court may grant habeas relief, as relevant, only if the state court's "adjudication of [a claim on the merits] ... resulted in a decision that ... involved an unreasonable application" of the relevant law. When a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in § 2254(d)(1) is satisfied. A federal court must then resolve the claim without the deference AEDPA otherwise requires.

Panetti, 551 U.S. at 953.

Here, consistent with *Panetti* and as argued in the initial brief, the record shows that the state court's adjudication of the claim of ineffective assistance of

appellate counsel was dependent on the resolution of an antecedent issue—whether Blackmon was entitled to advice on the dangers of joint representation. And the record shows the resolution of that issue was "contrary to, or an unreasonable application of" the clearly established law of the Supreme Court in *Holloway* and *Cuyler v. Sullivan*. Given the unreasonable application of federal law, the federal court must then resolve the claim without the deference AEDPA otherwise requires. *Panetti*, 551 U.S. at 953.

Specifically, by federal habeas petition, Mr. Panetti argued that his impending execution would violate the Eight Amendment because he was not competent to be executed as required by the Amendment. In fact, the Texas courts had ruled him competent to be executed. He argued, however, that the Texas competency proceedings were deficient because he was not permitted to present the testimony of his own psychiatric experts, as required by *Ford v. Wainwright*, 477 U.S. 399 (1986). The Supreme Court ruled that *Panetti*, indeed, was erroneously denied the procedural protection required by *Ford*. *Id.* at 950-53. Although the state courts had found Panetti competent to be executed, that finding was an "unreasonable application of federal law," i.e., *Ford*. The denial of the process required by *Ford* undermined the state's ultimate determination of competency and was sufficient to satisfy the burden imposed by § 2254(d)(1). *Panetti*, 551 U.S. at 953. As a result,

the federal court must resolve the ultimate issue of Panetti's competence "without the deference AEDPA otherwise requires. *Id.*

The present case is analogous to *Panetti.* Here, the ultimate federal issue is whether Blackmon was denied effective assistance of counsel on appeal for failure to argue the trial court erroneously failed to advise him of the dangers of joint representation. The antecedent question is whether Blackmon was entitled to the procedural safeguard of advice on the dangers of joint representation. In this vein, the Appellee argues that the district court found, and the state appellate court could have found, that Blackmon's trial objection was to the lack of separate juries, not the lack of separate counsel. Appellant agrees. But as argued in his initial brief, that interpretation of the record was erroneous. Specifically, that interpretation of the record was contrary to, or an unreasonable application of *Holloway*, because of probable conflict of interest, and *Cuyler v. Sullivan*, because of actual conflict of interest. Because of this antecedent error of clearly established federal law, the presumed reasonableness of the state court's ruling on the question of ineffective assistance of appellate counsel has been undermined, and the "federal court must then resolve the claim without the deference AEDPA otherwise requires." *Panetti*, 551 U.S. at 953.

Even if the Court applies the standard of AEDPA deference articulated in *Harrington v. Richter*, 562 U.S. 86 (2011), Blackmon still prevails. In *Richter*, the Supreme Court explained that the "unreasonable application" of clearly established federal law creates a standard different from, and stricter than, an incorrect application of federal law. *Id.* at 101. Second, habeas relief is unavailable if "fairminded jurists could disagree" on the correctness of the state court's decision. *Id.*, quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). Third, much depends on the specificity of the federal rule. "The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Id.* Finally, a habeas court must determine what argument or theories could have supported the state court's decision and then ask whether fairminded jurists could disagree that those arguments or theories are inconsistent with a clearly established federal law. *Richter*, 562 U.S. at 102. Section 2254(d) "preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with" the Supreme Court's precedents. *Id.*

Blackmon did not abandon any claim that the state court's ruling was "contrary to, or an unreasonable application of" the clearly established precedent of the Supreme Court because his argument addressed each of the points articulated in *Richter*. The state appellate court denied "on the merits" Blackmon's claim that

appellate counsel was ineffective for failing to argue that the trial court erred by failing to advise him of the dangers of joint representation. In the initial brief, however, Blackmon argued the following.

> The [state] appellate court's decision was contrary to, or was an unreasonable application of, clearly established federal law because there was nothing in the record to show that Blackmon made a knowing and voluntary waiver of the right of conflict-free counsel; [appellate] counsel should have known Blackmon did not waive the right of conflict-free counsel; [appellate] counsel should have known that the trial court was under a duty to advise Blackmon of the dangers of joint representation, and; the failure to obtain an effective waiver warranted automatic reversal under *Holloway*.

(AB at ECF 43).

This summary of the argument, more fully explained in the body of the brief, addresses all the salient points discussed in *Richter*. Fairminded jurists could not disagree on the correctness of the state court's decision on the merits. There is nothing in the record to indicate a waiver of the right to conflict-free counsel. A demand for separate juries after an order to consolidate the trials, over objection, is an entirely separate matter and does not address the dangers of joint representation. Next, the more general the rule the more leeway the courts have in reaching outcomes in case-by-case determinations. But *Holloway* established a bright-line rule: Where the trial court is on notice of a probable conflict of interest between

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co-defendants, the court must either appoint separate counsel or advise the defendants of the dangers of joint representation. Here, there is no doubt as to the probable conflict of interest, and the trial court had no discretion but to advise Blackmon of the dangers of joint representation. Next, under *Holloway*, there are no other arguments or legal theories which would authorize the trial court to withhold advice on the dangers of joint representation. Appellate counsel should have been aware of these considerations.

The trial court's failure to advise Blackmon of the dangers of representation was preserved for appellate review by the motions to withdraw filed by Blackmon's prior attorneys and Blackmon's complaints about "conflicts." Appellate counsel should have known the issue was preserved for review. And while the procedural safeguard of *Holloway* requires an objection at trial, the Florida law provided even broader protection. That is, the trial court's failure to advise the defendant of the dangers of joint representation could be raised on appeal even without a timely objection at trial. *See Toneatti v. State*, 805 So. 2d 112 (Fla. 4th DCA 2002); *Franks v. State*, 293 So. 3d 1068 (Fla. 2d DCA 2020). Blackmon's appellate counsel should have been aware of the Florida law.

On the question of prejudice, the trial court's failure to advise the defendant of the dangers of joint representation, over objection, would have resulted in

See Appendix C

automatic reversal under *Holloway*. The appellate court had no discretion. Reversal would have been automatic. A new trial would have been required. In other words, fairminded jurists could not have disagreed about the trial court's error in failing to advise Blackmon of the dangers of joint representation. This satisfies the requirement, articulated in *Richter*, that the challenger must demonstrate "a reasonable probability that, but for counsel's professional errors, the result of the proceedings would have been different. *Richter*, 562 U.S. at 104.

The Appellee should be estopped from arguing that the district court erred by examining portions of the record not considered by the Florida appellate court. First, the Appellee does not know how much of the record was considered by the Florida appellate court. The Florida court did not say. Claims of ineffective assistance of counsel generally require review of all relevant parts of the record and the totality of the circumstances. There is no reason to believe the entire trial proceeding was not available to, and considered by, the Florida appellate court—the same court that considered Blackmon's direct appeal. Second, the Appellee should be estopped from arguing that the district court should have confined its consideration to the parts of the record actually attached to Blackmon's habeas petition. That is because it was the Appellee that provided the complete record to the district court in an effort to defeat Blackmon's habeas petition. The Appellee

thought the complete record was relevant and admissible in the proceedings below and should not be heard to argue the record should be limited in some manner now on appeal.

Finally, it is noteworthy that the Appellee offers no response to the merits of Appellant's argument that, under *Holloway*, the trial court failed in its duty to advise Blackmon of the dangers of joint representation and appellate counsel was ineffective for failing to raise the issue on direct appeal. Similarly, the Appellee offers no response to the merits of the alternative argument under *Cuyler v. Sullivan.* When an actual conflict of interest arose at trial, the trial court failed in its duty to advise Blackmon of the dangers of joint representation and appellate counsel was ineffective for failing to raise the issue on direct appeal.

See, Appendix D

ISSUE II

> Whether Mr. Blackmon's trial counsel was ineffective for failing to object to the prosecutor's comments in closing about the truthfulness of Michael Chester's testimony, and whether the state postconviction court's ruling was contrary to or an unreasonable application of clearly established federal law or was based on an unreasonable determination of the facts.

Nothing added.

See, Appendix C

REASONS FOR GRANTING THE PETITION

The reason For Granting this Petition goes beyond the merits, but to the very integrity of the Rule of law And the courts' Impartiality. Every citizen in the Jurisdiction of Democracy as 'Justice Brown' said is Afforded Due Process and the right to effective Assistance of counsel in This Country. It is of great Public interest to end any State Court representive apparent Ability to sway A Higher Courts to Change it's certified Quetians' After it has been Briefed and Orally Argued So that A Citizens Merits could be circumvented or totally ignored because it's lower court did not Follow This Courts Rule of Law In the case at Bar the 11th Circuit ignored it's own Ruling in Hamilton in which Petitioners case mirrored in Facts and Law and This Courts Decision In Holloway. meet Both Courts legal Standard.

CONCLUSION

This Court should protect All Citizens 6th Amendments Right And Reverse this Petition AND/OR Rule on the Merits of the claim presented to the Federal Courts.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Gregory L Blackmon

Date: 8-6-22