No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2022

VINCENT D. WHITE, Jr.,
Petitioner,

v.

MICHAEL PHILLIPS, Warden,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a criminal-defense attorney, under indictment on charges of rape, kidnapping, and sexual assault, has a conflict of interest when simultaneously representing clients accused of crimes in the same locality?

2. Whether the Sixth Amendment is violated by a known concurrent conflict of interest on the part of trial counsel, requiring "automatic reversal" on federal habeas review, absent a waiver of the conflict and absent any inquiry into the conflict by the trial court?

3. Whether the "adverse effect" test for successive, potentially adverse clients, as used by the Court in *Mickens v. Taylor*, 535 U.S. 162 (2002), is also appropriate for Sixth Amendment cases involving a known or apparent concurrent conflict of interest?

LIST OF PARTIES

1. Vincent D. White, Jr., an individual.

2. Michael Phillips, Warden, official of the State of Ohio.

There is no parent or subsidiary company. Cf. Sup. Ct. R. 29.6.

RELATED CASES

State of Ohio v. White, No. 12CR-4418, Court of Common Pleas, Franklin County, Ohio. Judgment entered January 27, 2014.

State of Ohio v. White, No. 14AP-160, Court of Appeals of Ohio, Tenth Appellate District. Decision entered December 22, 2015.

State of Ohio v. White, No. 2016-0184, Supreme Court of Ohio. Jurisdiction declined May 4, 2016.

White v. Warden, Ross Correctional Institution, No. 2:17cv325, United States District Court for the Southern District of Ohio. Judgment (initial) entered March 12, 2018; judgment (following remand) entered May 20, 2021.

State of Ohio v. White, No. 12CR-4418, Court of Common Pleas, Franklin County, Ohio. Dismissed on Apr. 4, 2018.

White v. Warden, Ross Correctional Institution, No. 18-3277, United States Court of Appeals for the Sixth Circuit. Decision entered October 8, 2019.

Morgan v. White, Nos. 19-1023, 19-8117, United States Supreme Court. Petition (and cross-petition) denied June 1, 2020.

White v. Phillips, No. 21-3546, United States Court of Appeals for the Sixth Circuit. Decision entered April 27, 2023.

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CITATIONS OF THE OPINIONS BELOW

The official report of the opinion of the United States Court of Appeals for the Sixth Circuit is located at *White v. Phillips*, 66 F.4th 615 (6th Cir. 2023). A copy of the opinion is included as Appendix A, Vol. II at 2. The official report of the opinion of the United States District Court for the Southern District of Ohio is located at *White v. Warden*, 540 F. Supp. 3d 757 (S.D. Ohio 2021). A copy of the opinion is included as Appendix B, Vol. II at 12.

STATEMENT OF JURISDICTION

Mr. White filed a timely petition for writ of habeas corpus in the United States District Court for the Southern District of Ohio on April 19, 2017. (R. 3, Petition.) The district court possessed subject-matter jurisdiction over Mr. White's case pursuant to 28 U.S.C. § 2241. The district court denied Mr. White's petition and certified his case for appeal (R. 69, Opinion and Order), and Mr. White filed a timely notice of appeal to the United States Court of Appeals for the Sixth Circuit on June 11, 2021. (R. 72, Notice of Appeal.) The Court of Appeals possessed subject-matter jurisdiction pursuant to 28 U.S.C. §§ 1291, 2253.

The Court of Appeals rejected Mr. White's appeal on April 27, 2023. *White v. Phillips*, 66 F.4th 615 (6th Cir. 2023) (Appendix A, Vol. II at 2). Mr. White filed a timely petition for panel rehearing (R. 26, Petition) and a timely petition for rehearing *en banc* (R. 27, Petition) on May 11, 2023. The Court of Appeals denied Mr. White's rehearing petitions on May 31, 2023. (R. 30, Order; Appendix

C, Vol. II at 28.)

The Court possesses jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence."

U.S. Const., Amdt. VI.

"(a) Writs of habeas corpus may be granted by . . . the district courts . . . within their respective jurisdictions. . . . (c) The writ of habeas corpus shall not extend to a prisoner unless -- . . . (3) He is in custody in violation of the Constitution or laws or treaties of the United States; . . . ."

28 U.S.C. § 2241.

"A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

. . .

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

28 U.S.C. § 2243.

"(b)(1) 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 unless it appears that -- . . . (B)(ii) circumstances exist that render such [State corrective] process ineffective to protect the rights of the applicant."

28 U.S.C. § 2254.

STATEMENT OF THE CASE

Introduction

This is a federal habeas case involving Vincent White's Sixth Amendment claim that his trial attorney labored under a personal conflict of interest, mandating "automatic reversal" of his conviction on federal habeas review. After the Court's decision in *Mickens v. Taylor*, 535 U.S. 162 (2002), the question whether the "adverse effect" test is appropriate for concurrent-conflict Sixth Amendment cases (particularly personal conflicts on the part of trial counsel) has persisted, with piquant and increasing force.

This is an important constitutional question affecting a myriad of criminal cases in the State criminal-justice systems and the federal-court habeas docket each year. There is a marked split among the lower courts regarding this issue. Furthermore, this issue has received voluminous commentary in the legal academy, with many scholars observing inconsistencies and illogic regarding this issue.

Procedural History -- State Court Proceedings

Vincent White was indicted in Franklin County, Ohio, on August 30, 2012, on charges of aggravated murder during the commission of a robbery. (R. 11, Ex. 1; Indictment at 109.)[1] He pled "not guilty" and, at trial, Mr. White asserted self-defense. (R. 11, Ex. 7; Trial Tr. at 806-808.) At the time of Mr. White's trial, his trial attorney, Javier Armengau, was under indictment in Franklin County on charges of rape, kidnapping, sexual assault, and other felonies. (R. 55-1, Joint Stipulation at 1749, 1751.)

The judges in Franklin County were well-aware of Armengau's situation. Every trial judge in Franklin County handling Armengau's matters recused themselves from Armengau's criminal case. (Decision of the Court of Appeals, Appendix A, Vol. II at 9.) A separate judge was then appointed to preside over Armengau's case. (Decision of the District Court, Appendix B, Vol. II at 20.) Furthermore, the local prosecutor in Armengau's case was replaced with an external State prosecutor appointed by the Attorney General. (*Id*. at 21.)

While Armengau's personal conflict of interest was addressed in dramatic fashion by the judges and prosecutors in *his* case, the trial court in Mr. White's case took no steps, whatsoever, to address the conflict of interest arising from Armengau's indictment. No mention of Armengau's conflict of

[1] Page citations are to the page references in the district court record, unless they are made regarding factual assertions by the district or the court of appeals made from outside Mr. White's record, in which case the page citations are to the respective court decisions in the appendices to the Petition.

interest was made in Mr. White's case by the court, the prosecutor, or the conflicted defense attorney.

Mr. White was convicted at trial (R. 11, Ex. 5; Judgment at 133), and he appealed his conviction and sentence to the Ohio Court of Appeals. (R. 11, Ex. 6; Notice of Appeal at 136.)

In the Ohio Court of Appeals, Mr. White's first issue was the Sixth Amendment violation under the United States Constitution for the conflict of interest caused by Armengau's pending charges. (R. 11, Ex. 8; Appellant Brief at 143.) To support his assertion that Armengau was under indictment during his representation of Mr. White, Mr. White cited to the officially published records of the Supreme Court of Ohio (*id*. at 161 (citing *In re Armengau*, 140 Ohio St.3d 1247, 18 N.E.3d 1220 (Ohio 2014))), as well as Armengau's trial-court docket. (*Id*. at 163.) Mr. White asserted that the conflict of interest created by the pending charges against Armengau was a structural error that required reversal of his conviction and retrial with new counsel. (*Id*. at 180.)

The Ohio Court of Appeals rejected Mr. White's appeal, basing its decision on the fact that Armengau had failed to introduce evidence of his own indictment into Mr. White's State-court record. (R. 11, Ex. 9; Decision at 277.) Mr. White sought review of that decision by the Ohio Supreme Court (R. 11, Ex. 10; Notice of Appeal at 298.), which was denied by the Ohio Supreme Court on May 4, 2016. (R. 11, Ex. 13; Entry at 334.)

When the Ohio Court of Appeals issued its ruling, and when the Ohio Supreme Court refused to take Mr. White's case, no other procedural vehicle existed under Ohio law for Mr. White to vindicate his Sixth Amendment rights in State court.

Procedural History -- Federal Proceedings

Mr. White filed a timely petition for a writ of habeas corpus in the United States District Court for the Southern District of Ohio on April 19, 2017. (R. 3; Petition at 22.) The district court possessed subject-matter jurisdiction pursuant to 28 U.S.C. § 2241. In his petition, Mr. White asserted that his trial attorney, Javier Armengau, had a conflict of interest because Armengau was under indictment at the time of Mr. White's trial. (*Id*. at 22.)

The district court dismissed Mr. White's petition and granted a certificate of appealability. (R. 24; Judgment at 1605; R. 23; Opinion at 1604.) Mr. White filed a timely Notice of Appeal, his first federal appeal. (R. 26, 28, Notice of Appeal at 1612, 1616.) The Court of Appeals vacated the district court's denial of Mr. White's habeas petition and remanded his case for further proceedings. *White v. Warden*, 940 F.3d 270 (6th Cir. 2019), *cert. denied sub nom Morgan v. White*, 140 S. Ct. (2020).

On remand, the parties agreed to stipulated factual findings, obviating the need for an evidentiary hearing. (R. 55-1, Joint Stipulation at 1749.) Included within that Joint Stipulation are the following key facts:

1. Vincent White was indicted on October 18, 2012, on charges of aggravated murder during a robbery, in Franklin County, Ohio. (*Id.* at 1751.)

2. On May 20, 2013, Mr. White's attorney, Javier Armengau, was indicted on charges of rape, kidnapping, sexual assault, and other felonies in Franklin County, Ohio. (*Id.*)

3. Armengau told Mr. White about Armengau's indictment, but Armengau did not advise Mr. White that the pending charges against him (Armengau) arguably constituted a conflict of interest. (*Id.*)

4. Armengau continued to represent Mr. White through Mr. White's trial and sentencing. (*Id.*)

5. Armengau was convicted of rape, kidnapping, sexual assault, and other felonies on July 7, 2014. (*Id.* at 1752.)

6. Mr. White was first advised that Armengau's indictment arguably constituted a conflict of interest by his appellate attorney on direct appeal. (*Id.* at 1751-52.)

The district court referred Mr. White's case to the magistrate judge (R. 60, Transfer Order at 1805), who recommended that Mr. White's habeas petition be dismissed. (R. 62, Report and Recommendation at 1845.) Mr. White filed a timely objection to the Report and Recommendation (R. 63, Objection at 1863.), and the district court re-referred the case to the magistrate judge for further consideration. (R. 65, Order at 1875.) The

magistrate judge again recommended that the district court dismiss Mr. White's petition (R. 66, Supplemental Report and Recommendation at 1876), and Mr. White again timely objected to the Report and Recommendation. (R. 67, Objection at 1885.)

The district court dismissed Mr. White's petition, but the court granted Mr. White a certificate of appealability, explicitly encouraging Mr. White to pursue the issue presented in his case on appeal. (R. 69, Opinion and Order at 1897; Appendix B, Vol. II at 12.)

Mr. White filed a timely notice of appeal. (R. 72, Notice of Appeal at 1914.) The Court of Appeals possessed subject-matter jurisdiction pursuant to 28 U.S.C. §§ 1291, 2253.

Specifically relying on the Court's decision in *Mickens v. Taylor*, the Court of Appeals rejected Mr. White's appeal (Appendix A, Vol. II at 2), and Mr. White sought panel and *en banc* rehearing of his appeal. (R. 26, Petition for panel rehearing; R. 27, Petition for *en banc* rehearing.) The Court of Appeals rejected Mr. White's petitions for rehearing on May 31, 2023. (Appendix C, Vol. II at 28.)

Mr. White now requests that the Court grant this petition for writ of certiorari. To address the issue reserved by the Court in *Mickens v. Taylor*, 535 U.S. 162 (2002), the Court should, respectfully, decide whether "automatic reversal" on federal habeas review is appropriate in cases involving a known concurrent conflict of interest on the part of trial counsel,

in the absence of a waiver of the conflict by the defendant or adequate inquiry by the trial court.

REASONS FOR GRANTING THE PETITION

This case involves the question of the suitability of the Court's "automatic reversal" rule for concurrent conflict-of-interest cases. This is an extremely important Sixth Amendment question relevant to thousands of cases in the criminal-justice system across the United States each year.

Mr. White will demonstrate that: 1) Mr. White's trial attorney labored under a personal conflict of interest; 2) Mr. White did not waive the conflict of interest; and 3) the trial judge was aware of the conflict of interest but made no inquiry regarding it. On habeas review, under *Wood v. Georgia*, 450 U.S. 261, 272 (1981), and even in the wake of in *Mickens v. Taylor*, 535 U.S. 162 (2002), "automatic reversal" on federal habeas review is appropriate under the Court's long-established precedents in *Glasser v. United States*, 315 U.S. 60 (1942), *Holloway v. Arkansas*, 435 U.S. 475 (1978), and *Cronic* v. *United States,* 466 U.S. 648 (1984).

The constitutional issue presented in this case is the subject of a clear split and division among the lower courts, and it has been the subject of voluminous critical commentary in the legal academy.

Importantly, Mr. White's case is well-suited for the Court to consider this issue. The facts of this case are clear, and the legal issue central to this

case was exhausted in the State courts and properly presented at each step of the federal system on habeas review. There are no procedural bars for the Court to address this issue, which Mr. White has diligently pressed since he first was represented by an unconflicted attorney on direct appeal in State court.

Respectfully, the Court should grant Mr. White's petition, issue the writ, and resolve whether "automatic reversal" on federal habeas review is appropriate in cases involving a known or apparent concurrent conflict of interest on the part of trial counsel.

I. LEGAL BACKGROUND

On May 14, 1984, the Court issued two seminal decisions regarding violations of the Sixth Amendment's right to counsel, which followed in the wake of *Gideon v. Wainwright*, 372 U.S. 335 (1963). In those two cases, *United States v. Cronic*, 466 U.S. 648 (1984), and *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court re-affirmed the Court's long-standing standards for review of *structural* violations of the Sixth Amendment (*Cronic*), while setting a new standard for *performance* violations of the Sixth Amendment (*Strickland*).

In *Cronic*, the Court emphasized, "There are . . . circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic*, 466 U.S. at 658. In that case, the Court reiterated that prejudice is presumed by reviewing courts when

"counsel labors under an actual conflict of interest." *Id.* at 662, n. 31 (citing *Cuyler v. Sullivan*, 446 U.S. 335 (1980)).

With its *Cronic* decision, the Court reaffirmed the Court's many prior decisions involving *structural* violations of the Sixth Amendment. For example, in *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978), the Court held, "[A] rule requiring a defendant to show that a conflict of interests . . . prejudiced him in some specific fashion would not be susceptible of intelligent, even-handed application." As the Court explained,

> [I]n a case of joint representation of conflicting interests the evil -- it bears repeating -- is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. 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. at 490-91.

In *Glasser v. United States*, 315 U.S. 60 (1942), the Court held,

> [T]he 'Assistance of Counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired.

Glasser, 315 U.S. at 70. The Court explained further,

> To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.

Id. at 75-76.

The courts' conflict cases have often involved simultaneous representation of co-defendants, which has posed peculiar difficulties for courts to disentangle. After all, as the actual embodiment of the "Prisoners' Dilemma,"[2] there are many circumstances where co-defendants mutually benefit from representation by the same attorney. With the same attorney, a united front can be maintained by all co-defendants. If the common interest of all defendants diverges, however, then continued representation of co-defendants is untenable. In the federal system, therefore, in light of this potential for either a benefit or a detriment from concurrent representation, Fed. R. Crim. P. 44(c) was added in 1979, requiring, *inter alia*, "The court must promptly inquire about the propriety of joint representation and must personally advise each defendant of the right to effective assistance of counsel, including separate representation."

Shortly after Rule 44 was amended, in *Wood v. Georgia*, 450 U.S. 261, 272 (1981), the Court held that, in a situation where the trial attorney's personal financial interests may have diverged from the clients' interests, "the possibility of a conflict of interest was sufficiently apparent . . . to impose upon the court a duty to inquire further." The Court remanded the case so that the court could "hold a hearing to determine whether the conflict of interest that this record strongly suggests actually existed . . . . If the court

[2] Cf., e.g., Poundstone, Prisoner's Dilemma: John von Neumann, Game Theory, and the Puzzle of the Bomb, Knopf Doubleday Publishing, New York, 1993.

finds that an actual conflict of interest existed at that time, and that there was no valid waiver of the right to independent counsel, it must hold a new [] hearing that is untainted by a legal representative serving conflicting interests." *Id* at 273-74.

In *Mickens v. Taylor*, 535 U.S. 162 (2002), a case which has caused extreme confusion in the lower courts (see Section IV below), the Court faced a situation involving a potential *successive* conflict of interest in unrelated cases, and where, importantly, the district court on habeas review had held an evidentiary hearing and determined that the potential conflict had not affected trial counsel (*id*. at 177 (Kennedy, J. concurring)). *Mickens* did not involve a concurrent conflict of interest, and the Court appears to have reserved judgment for a future case involving concurrent interests. *See Holcombe v. Florida*, ___ U.S. __, 142 S. Ct. 955 (2022) (Sotomayor, J., dissenting from the denial of a writ of *certiorari*)(". . . *Mickens* concerned only a potential conflict resulting from successive representations, rather than the type of joint (concurrent) representation addressed in *Holloway* or the actual conflict identified here.")

There appears to be a possible scrivener's error in *Mickens*, 535 U.S. at 177, where the Court concludes by stating, " . . . we do not rule upon the need for the *Sullivan* prophylaxis in cases of successive representation." In light of the Court's discussion in *Mickens* of the fact that the case involved successive representation, it appears that the Court may have anticipated the question

of the application of *Sullivan* to a concurrent conflict of interest for another day. Justice Sotomayor's dissent from the denial of *certiorari* in *Holcombe* appears to support this view. In the alternative, if there was no scrivener's error in *Mickens*, then Justice Scalia, writing for the Court in that case, simply assumed that the duty of inquiry on the part of trial courts in *Wood* applies with continued force for known concurrent conflicts, the reserved question remaining after *Mickens* being whether "automatic reversal" applies to a future, actual (as opposed to potential) successive conflict of interest. Either way, the Court, respectfully, should clarify whether "automatic reversal" applies to known or apparent concurrent conflicts of interest.

The lower courts' various treatments of *Mickens* in subsequent cases involving concurrent conflicts-of-interest (actual or potential) will be shown more fully below in Section IV. Suffice it to say, however, that the question that the *Mickens* Court anticipated would need to be addressed in a future case (or, at a minimum, the key question that still needs to be clarified) is presented cleanly in Mr. White's case.

II. THE CONFLICT OF INTEREST

The conflict of interest present when a criminal-defense attorney is under indictment is palpable and well-settled. *E.g., United States v. DeFalco*, 644 F.2d 132, 136 (3d Cir. 1979) (attorney under indictment) ("[I]f any circumstance impedes the unqualified participation by an attorney, the adjudicatory function is inhibited, ultimately threatening the object of the

function, justice in the cause at hand."); *United States v. Levy*, 25 F.3d 146 (2d Cir. 1994)(attorney under indictment)("The right to counsel under the Sixth Amendment entails 'a correlative right to representation that is free from conflicts of interest.'"). *See also*, 1 Criminal Trial Error and Misconduct [Gershman] § 3-5(b)(3)(ii)(2019)("When counsel faces criminal or disciplinary charges, an actual conflict arises because he must defend both himself and his client, and he is likely to be preoccupied with defending his own conduct.").

While there may be situations when a defense attorney, facing minor charges like a traffic ticket or minor misdemeanor, may not labor under a conflict of interest of constitutional import, the salient fact of this case is that Armengau was faced with charges of rape, kidnapping, sexual assault, and other serious felonies. As in *Holloway* and *Glasser,* the potential *undetectable* prejudice of this conflict of interest, whether on plea negotiations, trial preparation, or trial conduct, is simply too powerful for the courts to contemplate approving any aspect of the resulting criminal proceeding.

III. WAIVER & DUTY OF INQUIRY

In criminal cases, waiver of a constitutional right requires "a knowing and intelligent relinquishment or abandonment of a known right or privilege." *Edwards v. Arizona*, 451 U.S. 477, 482 (1981). In this case, the parties stipulated that Mr. White was not informed of his Sixth Amendment right to unconflicted counsel, or of the potential effect of such a conflict, until advised so by his appellate attorney on direct appeal. (R. 55-1, Joint

Stipulation at 1751-52.) While Mr. White was aware, prior to his trial, of Armengau's own indictment, Mr. White was not advised about the legal implications of Armengau's indictment for his case, much less with sufficient information to knowingly and intelligently relinquish an important constitutional right. Since being informed of his rights under the Sixth Amendment, by unconflicted counsel on direct appeal, Mr. White has persistently and continuously sought to vindicate his Sixth Amendment rights in Ohio's courts and in the federal courts on habeas review. He did not waive his rights.

In *Wood v. Georgia,* 450 U.S. 261 (1981), the Court held that trial courts, when aware of an apparent conflict of interest, have a duty to inquire into the conflict. In this case, the trial judge knew of Armengau's conflict of interest, because the trial judge recused himself from Armengau's own criminal case. (See Decision of the Court of Appeals, Appendix A, Vol. II at 9.) The trial judge did not, however, conduct a *Wood* inquiry in Mr. White's case.

Because Mr. White did not waive his Sixth Amendment right to unconflicted counsel, and because the trial court, knowing of Armengau's indictment, did not inquire into the conflict of interest or prophylactically advise Mr. White of his Sixth Amendment rights, the reach of *Mickens* to a known or apparent concurrent conflict of interest is directly implicated in this case.

IV. THE DIVISION AMONG THE LOWER COURTS

The application of *Mickens*, when applied to known or apparent concurrent conflicts, has been the subject of significant lower-court division. Since the Court acknowledged an open question in *Mickens*, federal and State courts have grown increasingly divided over whether to apply, in the words of Justice Scalia in *Mickens*, "*Sullivan* prophylaxis." At least twenty-one jurisdictions apply *Mickens* broadly, to various types of conflicts, including concurrent conflicts arising from a lawyer's personal interests. By contrast, at least eleven jurisdictions apply "*Sullivan* prophylaxis" as a one-off exception, applying only when a lawyer simultaneously represents multiple defendants with potential conflicting interests.

After the Court's decision in *Mickens*, the Second, Third, Fourth, and Seventh Circuits, as well as Alabama, Alaska, Arkansas, the District of Columbia, Florida, Georgia, Illinois, Louisiana, Maryland, Michigan, Missouri, Ohio, Rhode Island, Tennessee, Texas, Utah and Washington, have applied *Mickens* broadly. See *Chester v. Commissioner Pa. Dept. of Corr.*, 598 F. Appx. 94, 105-07 (3d Cir. 2015); *United States v. Fuller*, 312 F.3d 287, 291-92 (7th Cir. 2002); *Brooks v. State of Alabama*, __ So. __, 2020 WL 3889028 at *37-38 (Ala. Ct. Crim. App. 2020); *State of Alaska v. Carlson*, 440 P.3d 364, 384 (Alaska Ct. App. 2019); *Echols v. State of Arkansas*, 127 S.W. 3d 486, 493 (Ark. 2003); *Lee-Thomas v. United States*, 921 A.2d 773, 776-77 (D.C. 2007); *Emmons v. Bryant*, 864 S.E.2d 1, 8-10 (Ga. 2021); *State of Florida v.*

Larzelere, 979 So.2d 195, 208 (Fla. 2008); *People of Illinois v. Yost*, __ N.E.2d __, 2021 IL 12617 ¶¶ 39, 66 (Ill. 2021); *State of Louisiana v. Fontenelle*, 227 So. 3d 875, 885-86 (La. Ct. App. 2017); *Taylor v. State of Maryland*, 51 A.3d 655, 657 (Md. 2022); *People of Michigan v. Adams*, 2006 WL 2924602 at *2 (Mich. Ct. App. Oct. 12, 2006); *Lomax v. State of Missouri*, 163 S.W.3d 561, 564 (Mo. Ct. App. 2005); *State of Ohio v. Oteng*, 2020 WL 7706789 at * 8-9 (Ohio Ct. App. 2020); *Millette v. State of Rhode Island*, 183 A.3d 1124, 1131-32 (R.I. 2018); *Johnson v. State of Tennessee*, WL 7401989 at *1 (Tenn. Ct. Crim. App. Dec. 29, 2014); *Acosta v. State of Texas*, 233 S.W.3d 349, 352-56 (Tex. Ct. Crim. App. 2007); *United States v. Rivernider*, 828 F.3d 91, 109 (2d Cir. 2016); *State of Utah v. Martinez*, 297 P.3d 653, 655-660 (Utah Ct. App. 2013); *State of Washington v. Regan*, 177 P.3d 783, 786-87 (Wash. Ct. App. 2008).

In contrast, at least eleven jurisdictions have taken a limited view of the reach of *Mickens*. See *United States v. Garza*, 429 F.3d 165, 172 (5th Cir. 2005); *Whiting v. Burt*, 395 F.3d 602, 618-19 (6th Cir. 2005); *Rowland v. Chappell*, 876 F.3d 1174, 1192 (9th Cir. 2017); *Cruz v. United States*, 188 F. Appx. 908, 913 (11th Cir. 2006); *People of California v. Doolin*, 198 P. 3d 11, 41 (Cal. 2009); *West v. People of Colorado*, 341 P.3d 520, 530 n. 8 (Colo. 2015); *State of Idaho v. Aldarado*, 481 P.3d 737, 748-49 (Id. 2021); *Gibson v. State of Indiana*, 133 N.E.3d 673, 699 (Ind. 2019); *Steward v. Commonwealth of Kentucky*, 397 S.W.3d 881, 883, n. 4 (Ky. 2012); *State of North Carolina v.*

Phillips, 711 S.E.2d 122, 137 (N.C. 2011); *Commonwealth of Pennsylvania v. Cousar*, 154 A.2d 287, 310 (Pa. 2017).

In light of this divergence of opinion, some jurisdictions have avoided the issue entirely, or leave the discretion of applying "*Sullivan* prophylaxis" on a case-by-case basis. See *United States v. DeCologero*, 530 F.3d 36, 77 n. 24 (1st Cir. 2008)(limiting *Sullivan* to its immediate facts); *Noe v. United States*, 601 F.3d 784, 790 (8th Cir. 2010)(same); *United States v. Williamson*, 859 F.3d 843, 854-57 (10th Cir. 2017)(same). See also, *State of Nebraska v. Avina-Murillo*, 917 N.W.2d 865, 876 (Neb. 2018)("case law post-*Mickens* does not reveal a clear standard for ineffective assistance of counsel claims involving conflicts of interest"); *Sola-Mirales v. State of Kansas*, 335 P.3d 1162, 1170 (Kan. 2014)(refraining from deciding the "open question" of "the *Mickens* reservation").

This issue has percolated well and long in the lower courts, without resolution.

V. CONSIDERATION OF THE ISSUE IN THE LEGAL ACADEMY

Appellate courts are not the only legal thinkers who have struggled with the implications of "the *Mickens* reservation."

The Court's decision in *Mickens* received immediate criticism, and has received continuing criticism within the legal academy. See, e.g., Herbert, *Off the Beaten Path: An Analysis of the Supreme Court's Surprising Decision in Mickens v. Taylor*, N. Car. L. Rev. 81(3) (March 1, 2003); Glassman, *Mickens v. Taylor, the Court's New Don't Ask, Don't Tell Policy for Attorneys Faced with a Conflict of Interest*, J. Civ. Rights & Econ. Dev. 18(3) (Summer 2004); Finkelstein, *Better Not Call Saul: The Impact of Criminal Attorneys on their Client's Sixth Amendment Right to Effective Assistance of Counsel*, U. Cinc. L. Rev. 83(4) (August 2015).

With regard to the specific issue of a concurrent personal conflict on the part of trial counsel, legal scholars have encouraged clarification of the law post-*Mickens*. See, e.g., Shiner, *Conflicts of Interest Challenges Post Mickens v. Taylor*, Wash. & Lee L. Rev. 60(3) (June 1, 2003); Daniels, *Presumed Prejudice: When Should Reviewing State Courts Assume a Defendant's Conflicted Counsel Negatively Impacted the Outcome of a Trial?*, Ford. Urban L. J., 49(1) (2021).

VI. SUITABILITY OF THIS CASE FOR REVIEW BY THE COURT

This case is well-suited for resolution of the "*Mickens* reservation." The facts of this case are clear, and the question at issue has been fully litigated below. Most importantly, the Court of Appeals, in a prior appeal, resolved the procedural hurdles that can often obscure the constitutional substance in habeas cases.

With regard to the facts of this case:

1. Armengau's "difficulties"[3] during White's case were stipulated to by the parties in the district court. (R. 55-1, Joint Stipulation at 1751.)

2. The trial judge in Mr. White's case was aware of Armengau's indictment, because, as the Court of Appeals observed, every trial judge in Franklin County handling Armengau's matters recused themselves from Armengau's criminal case. (Decision of the Court of Appeals, Appendix A, Vol. II at 9.)

3. The trial judge's failure to inquire into the effect of Mr. Armengau's indictment on his representation of Mr. White, and the trial judge's failure to inform Mr. White of the implications of, and alternatives to, representation by Mr. Armengau, was stipulated to by the parties in the district court, as Mr. White was first apprised about the conflict of interest by his appellate attorney on direct appeal. (R. 55-1, Joint Stipulation at 1751-52 .)

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[3] This is the euphemism employed by the Ohio Court of Appeals to describe Armengau's indictment on rape and kidnapping charges. (Appendix D, Vol. II at 34.)

4. Armengau's failure to advise Mr. White regarding the conflict of interest presented by his own indictment, precluding the possibility of a waiver of his constitutional rights as a matter of law, was stipulated to by the parties in the district court. (*Id.*)

5. Armengau's failure to preserve the record on appeal so that Mr. White could advance his Sixth Amendment claim in the Ohio Court of Appeals, once advised of that claim by his unconflicted counsel on direct appeal (*id.*), is evidenced by the Ohio Court of Appeals decision itself. (Decision of the Ohio Court of Appeals, Appendix D, Vol. II at 29.)[4]

After being advised of Argmengau's conflict of interest, Mr. White has fully litigated the issue in Ohio's courts and in the lower federal courts on habeas review. That habeas review has included multiple proceedings in the district court (including a remand from the Court of Appeals), multiple recommendations (objected to) by the magistrate judge, multiple Sixth Circuit appeals, and even a prior petition and cross-petition in this Court. Through it all, the fundamental Sixth Amendment problem caused by trial counsel's criminal indictment during Mr. White's criminal case has persisted.

Importantly, there is no issue of comity with the State courts presented

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[4] One would have to be extraordinarily cynical to believe that the Ohio Court of Appeals simply chose to blind itself to the realities of Armengau's rape and kidnapping charges, or that the Franklin County trial judge, knowing of Armengau's conflict of interest, intentionally failed to inquire in open court and allocute Mr. White regarding Armengau's conflict, under *Wood v. Georgia*. To the extent that the Court clarifies the continued applicability of *Wood* after *Mickens*, at least for concurrent conflict cases, any such potential concern could be minimized in future cases. Cf., *Mickens v. Taylor*, 535 U.S. at 206 (Souter, J., dissenting)(the rule articulated in *Mickens* reduces "inducement to judicial care").

in this case, because the Ohio courts were simply unable, under their own appellate rules and post-conviction procedures, to address Mr. White's Sixth Amendment rights once Armengau had failed to establish a record of this issue in the trial court.

Given the chance, Mr. White would argue that *Wood* is consistent with the Court's decisions in *Glasser*, *Holloway*, and *Cronic*, and *Wood* should remain in full force and effect post-*Mickens*. When a trial court is aware that a concurrent conflict of interest exists, or that an apparent *potential* concurrent conflict of interest exists, the Sixth Amendment demands inquiry by the trial court into the conflict. This Sixth Amendment duty of inquiry under *Wood* is just like the duty of inquiry prescribed in Fed. R. Crim. P. 44(c). The Court's decision in *Mickens*, in which the trial court was unaware of a potential conflict of interest regarding separate, successive representations, should not be read to apply to situations where the trial court is aware of a potential or actual concurrent conflict of interest.

As shown in Section IV above, *Mickens* has sown significant confusion among the lower courts. The Court should grant this petition so that the Court can eliminate this confusion, at least in the context of a known, unwaived concurrent conflict. *Wood* and *Mickens* are logically reconcilable, Mr. White would argue, but the Court must do the work of reconciliation. After so many years and so many divergent cases across the country, the *Mickens* morass in the lower courts is simply too great for the lower courts to

resolve this issue consistently. Most importantly, by reconciling *Wood* and *Mickens*, the Court will be able to reinforce and vindicate the Sixth Amendment principles embedded in *Glasser*, *Holloway*, and *Cronic*, fulfilling Congress' mandate in the Habeas Statute that the federal courts on habeas review "dispose of the matter as law and justice require." 28 U.S.C. § 2243.

CONCLUSION

Respectfully, the Court's decision in *Mickens* has caused much confusion among State courts and the lower federal courts. This confusion can be disentangled by reconciling *Mickens* with *Wood*. Mr. White's case -- with its clear lack of a waiver of the conflict of interest by Mr. White, coupled with the demonstrated fact that the trial judge knew of Armengau's indictment on rape and kidnapping charges -- is the perfect case to reconcile *Mickens* and *Wood*.

The petition should be granted, the writ should issue, and the Court should address the unresolved, important constitutional question presented in this case.

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