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
Vol. II — Appendices

C. Mark Pickrell, Esq.
Counsel of Record
111 Brookfield Avenue
Nashville, Tennessee 37205
(615) 356-9316

Attorney for Vincent D. White, Jr.

INDEX OF APPENDICES

Vol. II

VINCENT D. WHITE, JR.,
Petitioner-Appellant,
v.
MICHAEL PHILLIPS, Warden,
Respondent-Appellee

United States Court of Appeals for the Sixth Circuit

Decided April 27, 2023; Filed April 27, 2023

No. 21-3546

Reported at: 66 F.4th 615

Appeal from the United States District Court for the Southern District of Ohio at Columbus. No. 2:17-cv-00325—James L. Graham, District Judge.

Counsel: ON BRIEF: C. Mark Pickrell, Nashville, Tennessee, for Appellant. William H. Lamb, OFFICE OF THE OHIO ATTORNEY GENERAL, Cincinnati, Ohio, for Appellee.

Before: SUTTON, Chief Judge; LARSEN and DAVIS, Circuit Judges.

Opinion

LARSEN, Circuit Judge.

Vincent White, Jr., a state prisoner, sought federal habeas relief under 28 U.S.C. § 2254. The district court denied his petition but granted a certificate of appealability on a single issue: whether White had shown that his attorney was laboring under a conflict of interest that required automatic reversal of White's conviction. White's claim depends on facts outside the state court record, so the

Supreme Court's recent decision in *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022), likely precludes relief. But even if we could consider the new facts introduced in federal habeas court, White's claim fails. White's attorney informed White of the facts underlying the purported conflict of interest, and White did not object. So White was required to show that the alleged conflict adversely affected counsel's performance. White has not made such a showing, so we AFFIRM.

I.

A 2012 shooting at a house in Columbus, Ohio left two men dead, and two others injured. *State v. White*, No. 14AP-160, 2015-Ohio-5365, 2015 WL 9393518, at *1 (Ohio Ct. App. Dec. 22, 2015). The surviving victims identified Vincent White, Jr. as one of two shooters. *Id.* An Ohio jury convicted White of four counts of aggravated murder, two counts of attempted murder, two counts of felonious assault, one count of aggravated burglary, three counts of aggravated robbery, and one count of having a weapon while under disability. *Id.* White was sentenced to life in prison without parole. *Id.*

On direct appeal, White argued that he had received constitutionally ineffective assistance of counsel because his trial attorney had a conflict of interest. 2015-Ohio-5365, *Id.* at *2. White asserted that, at the time of his trial, his defense attorney, Javier Armengau, was under indictment in Franklin County, Ohio, for a number of serious criminal offenses. *Id.* White argued that this created a conflict of interest because Armengau "would have been conflicted

over whether to devote time to preparing his own defense or that of his client"; "might have chosen to take a greater percentage of White's financial resources in fees to help finance his own defense"; "would have been reluctant to vigorously represent White for fear of angering the same prosecutor's office that was prosecuting him"; and "might have failed to engage in any plea-bargaining efforts in White's case out of an indignant or vengeful desire to gain a victory over the prosecutor's office." *Id*.

The Ohio Court of Appeals declined to consider White's ineffective-assistance claim on direct appeal, explaining that the record lacked the necessary facts to allow the court to assess the merits. 2015-Ohio-5365, *Id*. at *3. The court said that the direct appeal was "not the vehicle to make such an argument," suggesting that White should raise his claim in a motion for postconviction relief. *Id*. The Ohio Supreme Court declined further review. *State v. White*, 145 Ohio St. 3d 1460, 2016- Ohio 2807, 49 N.E.3d 321 (Table) (Ohio 2016).

Proceeding pro se, White filed a timely federal habeas petition, and an untimely petition for state postconviction relief. The state court dismissed his late-filed petition. *State v. White*, No. 12CR-4418, slip op. (Franklin Cnty. Ct. of Common Pleas, Nov. 30, 2017); *State v. White*, No. 18AP-158, slip op. (Franklin Cnty. Ct. of Common Pleas, Apr. 4, 2018). The federal district court denied White's petition but granted a certificate of appealability on his ineffective assistance claim. *White v. Warden, Ross Corr. Inst.*, No. 2:17-CV-325, 2018 U.S.

Dist. LEXIS 39635, 2018 WL 1250032, at *2 (S.D. Ohio Mar. 12, 2018), *vacated and remanded*, 940 F.3d 270 (6th Cir. 2019).

On appeal, this court held that White had procedurally defaulted his ineffective assistance claim by failing to timely raise it in state postconviction proceedings. *White v. Warden, Ross Corr. Inst.*, 940 F.3d 270, 272-73 (6th Cir. 2019). Yet the *Martinez-Trevino* doctrine excused the default because White lacked counsel during postconviction proceedings, which, under Ohio law, was his first chance to have his substantial claim assessed on the merits. *Id*. at 278; *see also Martinez v. Ryan*, 566 U.S. 1, 14-15, 17-18, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012); *Trevino v. Thaler*, 569 U.S. 413, 429, 133 S. Ct. 1911, 185 L. Ed. 2d 1044 (2013). The panel remanded the case for the district court to review "White's claim de novo, including whether he is entitled to an evidentiary hearing in order to supplement the record." *White*, 940 F.3d at 279.

On remand, the district court granted the State's unopposed motion to expand the record and motion for an evidentiary hearing. *White v. Warden, Ross. Corr. Inst*, 540 F. Supp. 3d 757, 760 (S.D. Ohio 2021). But in lieu of an evidentiary hearing, the parties agreed to a set of stipulated facts. *Id*. One important new fact—which contradicted representations White made in his habeas petition—was that Armengau had told White about Armengau's indictment in the same jurisdiction; yet White had decided to retain Armengau as his counsel anyway. *Id*. at 761-62. Citing our court's precedent, the district court determined that, because White did not object to proceeding with

Armengau as his counsel, he was required to "prove both an actual conflict and an adverse effect o[n] Armengau's performance." *Id*. at 762 (citing *Moss v. United States*, 323 F.3d 445, 455 (6th Cir. 2003)).

White failed both prongs. The district court found no actual conflict of interest, largely because White and Armengau's cases were handled by different judges and were prosecuted by different authorities. *Id*. And White had not pointed to any evidence showing that the purported conflict had affected Armengau's performance. *Id*. at 763. The district court thus denied relief but granted a certificate of appealability on the sole issue now before this court: whether White has shown a conflict of interest sufficient to require automatic reversal without proof that the conflict impaired trial counsel's performance. *Id*. at 765. We review this question *de novo*. *Whiting v. Burt*, 395 F.3d 602, 612 (6th Cir. 2005).

II.

White's ineffective assistance claim depends on facts not found in the state court record. That's why the Ohio Court of Appeals rejected his claim on direct appeal. *White*, 2015-Ohio-5365, 2015 WL 9393518, at *3. And it's also why this court—having found cause to excuse White's procedural default—remanded the case for the district court to determine whether White should be permitted to supplement the record. See *White*, 940 F. 3d at 279. The parties then agreed to a set of stipulated supplemental facts that formed the basis of the district court's

judgment below.

But after appellate briefing in this case was complete, the Supreme Court decided *Shinn v. Ramirez*, 142 S. Ct. 1718, 212 L. Ed. 2d 713 (2022), which is relevant to this appeal. Surprisingly, although both parties are represented by experienced counsel, neither party saw fit to raise the question of whether and how *Shinn* applies in this case. See Fed. R. App. P. 28(j) (allowing parties to file supplemental authorities with the court). Of course, we must follow *Shinn* in any event.

Shinn left in place the Court-created *Martinez-Trevino* doctrine, which this court previously held excused White's default of his ineffective assistance claim. See *Shinn*, 142 S. Ct. at 1737; *White*, 940 F.3d at 278. But *Shinn* also recognized that Congress, through the Antiterrorism and Effective Death Penalty Act (AEDPA), has restricted federal habeas courts' ability to adjudicate claims using evidence outside the state court record. *Shinn*, 142 S. Ct. at 1736-37. When a prisoner is at fault for failing to develop the state court record, AEDPA says that he may not supplement the record in federal court unless he can show that his claim relies "on (1) a 'new' and 'previously unavailable' 'rule of constitutional law' made retroactively applicable by [the Supreme] Court, or (2) 'a factual predicate that could not have been previously discovered through the exercise of due diligence.'" *Id*. at 1734 (quoting 28 U.S.C. §§ 2254(e)(2)(A)(i), (ii)). Even then, a prisoner "must show that further factfinding would demonstrate, 'by clear and convincing evidence,' that 'no reasonable factfinder' would have

convicted him of the crime charged." *Id*. (quoting § 2254(e)(2)(B)). White has not attempted to satisfy AEDPA's rigorous standards. Thus, *Shinn* likely forecloses our consideration of the parties' stipulated facts. And White's claim fails if we cannot consider any facts outside the state court record.

But even if we could consider the parties' stipulated facts, White's claim for relief does not improve; you might think it gets worse. When we consider the stipulated facts, it becomes apparent that White misled this court, and the district court, about his knowledge of the pending charges against Armengau. Indeed, the district court found that he lied. *White*, 540 F. Supp. 3d at 761-62. In his amended habeas petition, White represented that he did not know that his counsel was under indictment at the time of White's trial. That fact was important to this court in deciding to excuse White's procedural default. See *White*, 940 F.3d at 272-73 (emphasizing that Armengau's pending charges were "unbeknownst to" White, who "did not learn about Armengau's indictment until he began assembling his case for direct appeal"). But the joint stipulation White agreed to on remand reveals that Armengau promptly disclosed his indictment to White, well before White's trial, and that White decided to retain Armengau as counsel anyway. Although we proceed to consider White's claim, we caution that deceiving the court is an ill-advised strategy to convince a court to grant what is inherently equitable relief. *See Brown v. Davenport*, 142 S. Ct. 1510, 1523-24 (2022); *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991) (recognizing a federal court's discretion to dismiss a case pursuant to its "inherent power" to

"fashion an appropriate sanction for conduct which abuses the judicial process" and to "set aside fraudulently begotten judgments"); *First Bank of Marietta v. Hartford Underwriters Ins. Co.*, 307 F.3d 501, 512-14 (6th Cir. 2002) ("*Chambers* should be read broadly to permit the district court to resort to its inherent authority to sanction bad-faith conduct.").

Accepting the stipulated facts as true, circuit precedent squarely forecloses White's claim. In *Smith v. Cook*, we confronted a nearly identical ineffective assistance claim involving the same defense attorney. 956 F.3d 377 (6th Cir. 2020). There, as here, the habeas petitioner argued that "Armengau had a conflict of interest based on his own criminal charges, which were pending while he prepared Smith's defense." *Id.* at 392. We denied relief. We held that Smith could not show an actual conflict of interest because different prosecutors and different judges handled the matters. *Id.* Like White, Smith was prosecuted by the Franklin County Prosecutor's office. But a special prosecutor from the Ohio Attorney General's office handled Armengau's case precisely "to avoid the appearance of either favoritism or bias" stemming from Armegau's "pending cases as opposing counsel with assistant prosecutors from [the County Prosecutor's] office." *Id.* at 382-83 (quoting Notice of Appointment of Special Prosecutor, *State v. Armengau*, No. 13CR-04-2217 (Ohio Ct. C.P. Franklin Cnty. May 6, 2013)). We also noted that the cases proceeded before different judges; to avoid the appearance of bias, "all the Franklin County judges presiding over the active matters Armengau was handling as counsel recused themselves from

Armengau's case." *Id*. The stipulated facts leave no daylight between Smith's asserted conflict and White's asserted conflict, so Smith forecloses White's claim.

And even if there were an actual conflict, it would not result in automatic reversal as White suggests. Rather, because White was aware of the charges against his attorney but did not object, he must show harm—that is, he must show that the conflict caused Armengau to make "specific decisions that prejudiced" White. *Id*. at 392. White has not even attempted to make this showing.

White argues that the Supreme Court's decisions in *United States v. Cronic*, 466 U.S. 648 (1984), *Holloway v. Arkansas*, 435 U.S. 475 (1978), *Glasser v. United States*, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942), and *Mickens v. Taylor*, 535 U.S. 162 (2002), compel automatic reversal here. But none of these cases requires us to break from our precedent. *Smith*, in fact, relied on *Mickens* for the proposition that, absent objection, a defendant must show that the conflict "actually affected the adequacy of his representation." *Smith*, 956 F.3d at 392 (quoting *Mickens*, 535 U.S. at 168). And *Mickens* drew on *Holloway*, clarifying that *Holloway* "create[d] an automatic reversal rule only where defense counsel is forced to represent codefendants over his timely objection, unless the trial court has determined that there is no conflict." 535 U.S. at 168 (emphasis added). *Glasser* doesn't help White either, since that case also involved concurrent representation of codefendants with conflicting interests over counsel's timely objection; whereas here, there was no objection to put the

court on notice of the alleged conflict. *See* 315 U.S. at 68. Finally, *Cronic* involved no alleged conflict of interest at all. In sum, White cites no authority casting doubt on our precedent. Where the defendant or his counsel fails to object to a conflict, only "a showing of (1) an actual conflict; and (2) an adverse effect on his counsel's performance will void the conviction." *Moss*, 323 F.3d at 455 (citing *Mickens*, 535 U.S. at 173-74); *see also Smith*, 956 F.3d at 392. White has not made this showing.

* * *

We AFFIRM.

VINCENT D. WHITE, Jr.,
Petitioner,

v.

WARDEN, ROSS CORRECTIONAL INSTITUTION, Respondent.

United States District Court for the Southern District of Ohio

Decided May 20, 2021; Filed May 20, 2021

Case No. 2:17-cv-325

Reported at 540 F. Supp. 3d 757 (S.D. Ohio 2021)

Counsel: Vincent D. White, Jr., Petitioner, *Pro se*, CHILLICOTHE, OH.*

For Warden, Ross Correctional Institution, Respondent: William H Lamb, LEAD ATTORNEY, Ohio Attorney General, Cincinnati, OH.

Judges: James L. Graham, United States District Judge. Magistrate Judge Michael R. Merz.

Opinion by: James L. Graham

DECISION AND ORDER

This habeas corpus case is before the Court on remand from the Sixth Circuit. *White v. Warden*, 940 F.3d 270 (6th Cir. 2019). The remand directed this Court to consider de novo1 White's Fifth Ground for Relief, to wit, that he suffered ineffective assistance of trial counsel because his trial attorney Javier Armengau labored under a conflict of interest.

* N.B. West Publishing's reporting of this decision as a *pro se* case is an error. Mr. White was represented by C. Mark Pickrell, Esq. in the district court on remand.

The Magistrate Judge has filed a Report and Recommendations and Supplemental Report and Recommendations on the remanded issue (Original Report, ECF No. 62; Supplemental Report, ECF No. 66). Petitioner has objected to both Reports (ECF Nos. 63, 64, 67, and 68).

Whenever a litigant objects to a Magistrate Judge's report and recommendations, the District Judge is obliged to review *de novo* those portions of the report to which substantial objection has been made. Fed.R.Civ.P. 72(b)(3). This Decision is the result of that de novo review and also consideration of White's Fifth Ground for Relief without deference to any state court decision under 28 U.S.C, § 2254(d).

As the parties have stipulated (ECF No. 55-1), the facts of the underlying crimes were reported by the Ohio Tenth District Court of Appeals:

> On August 30, 2012, a Grand Jury indicted White and an alleged coconspirator. The Grand Jury charged White with one count of aggravated burglary, three counts of aggravated robbery, four counts of aggravated murder, two counts of attempted murder, two counts of felonious assault, and one count of possessing a firearm while under disability. All counts (except the weapon under disability count) contained specifications for the use of a firearm.
>
> The counts in the indictment arose from a single incident. On July 29, 2012, four men were shot in a house located at 1022 East 17th Avenue in Columbus, Ohio. Keith Paxton (aka "Gutter") and Albert Thompson (aka "T") were killed in the attack. Juanricus Kibby and Miguel Williams suffered bullet wounds but recovered.
>
> The case went to trial on October 28, 2013. At the trial, both surviving victims identified White as one of the two shooters. In addition, another witness, Jeffrey Harris, testified that White had told him beforehand about White's plan to rob the house and then afterwards offered Harris a share of the money. Kibby and Williams both had known White for a long time; yet, neither identified him the first time they spoke with police following the

> shooting. Harris, who was initially suspected of having some involvement in the crime, went to the police to clear his name, but he did not tell the police the story he told at trial about White telling him of his plan to rob the house.
>
> White's co-defendant presented an alibi witness, who claimed that the codefendant was not present during the shooting. White admitted that he was at the house and shot some of the people there. However, he claimed that he shot in self-defense because, when he arrived to buy drugs, the four individuals who were subsequently deemed to be the victims, made him get on his knees at gunpoint and were robbing him. Forensic evidence regarding the direction and angles from which some of the victims were shot tended to contradict White's version of the events, as did the fact that White and the other shooter each fired at least six times and the four victims did not return fire. Thompson was shot as if he were getting up from a seated position, and Paxton was shot in the back shoulder. Only two guns were used in the shooting and neither were any of the guns in the possession of the house occupants.
>
> On November 5, 2013, the trial concluded, and the jury began its deliberations. Two days later, the jury announced its verdict. The jury found White guilty on all counts. The trial court also found White guilty of having a weapon while under disability. The trial court held a sentencing hearing on January 22, 2014 and sentenced White to life in prison without parole.

State v. White, 2015-Ohio-5365 (Ohio App. 10th Dist. Dec. 22, 2015).

The central issue in this case, as White now frames it, is whether White's retained defense counsel, Javier Armengau, labored under a conflict of interest that requires an automatic reversal of White's conviction (Brief in Support of Objections to Supplemental Report, ECF No. 68, PageID 1888). The parties have stipulated to the following facts regarding that representation:

> On or about October 18, 2012, the petitioner, Vincent D. White, retained defense counsel, Javier H. Armengau. Mr. Armengau represented the petitioner from that time throughout petitioner's trial and sentencing and did not represent any other co-defendant involved in the crimes alleged against the petitioner.
>
> On April 4, 2013, Javier H. Armengau, was arrested, and that arrest led to an

> indictment on eighteen offenses on May 20, 2013, including six counts of rape, three counts of kidnapping, five counts of sexual battery, three counts of sexual imposition, and public indecency. At the time of the arrest for these offenses, Mr. Armengau was licensed to practice law in Ohio; the women who accused him of sexual misconduct were clients or relatives of clients. Two of the accusers also worked in Mr. Armengau's law offices. Mr. Armengau was convicted of one count of rape, one count of kidnapping, four counts of sexual battery, two counts of gross sexual imposition, and a count of public indecency on July 7, 2014. The trial court, on August 28, 2014, sentenced Mr. Armengau to a total of 13 years confinement. These facts were determined by the Ohio Court of Appeals in *State v. Armengau*, Tenth App. Dist. No. 14AP-679, 2017 Ohio 4452, 2017 Ohio App. LEXIS 2501, 93 N.E.3d 284 (June 22, 2017).
>
> Mr. Armengau disclosed to the petitioner, Vincent D. White, that he (Armengau) had been indicted and was pending prosecution in the same jurisdiction where White was being prosecuted. Mr. Armengau made this disclosure at or around the time of his (Armengau's) indictment during the time period May-June 2013. The petitioner, Vincent D. White, understood that his defense counsel was being prosecuted in the same jurisdiction where he (White) was being prosecuted. Mr. White kept the attorney-client relationship with Mr. Armengau because Mr. Armengau was an aggressive defense counsel and because Mr. Armengau's fee had already been paid. Mr. Armengau did not advise Mr. White that Armengau's pending charges could arguably constitute a conflict of interest. Mr. White did not consult any other attorney at any time during his (White's) trial and sentencing. Mr. White was sentenced prior to Mr. Armengau's trial.
>
> Mr. White's new attorney on direct appeal advised Mr. White that Mr. Armengau's pending charges could arguably have constituted a conflict of interest. Counsel on direct appeal presented that argument to the Ohio Court of Appeals.

(Stipulation, ECF No. 55-1, PageID 1751-52).

As the Sixth Circuit found, the Tenth District Court of Appeals declined to decide this issue on the merits, finding it depended on facts outside the appellate record which, under Ohio law, must be presented by petition for post-conviction relief under Ohio Revised Code § 2953.21. *State v. White*, supra, ¶¶ 9-11. By the time the Tenth District reached this conclusion, White's time to file a post-

conviction petition had expired and his later attempt to do so was dismissed as untimely, as the Sixth Circuit also found. *White v. Warden*, 940 F.3d at 273-74.

On appeal from this Court's judgment, the Warden urged that the claim was procedurally defaulted because of the untimely filing. The Sixth Circuit, however, applying to Ohio for the first time the Supreme Court's decision in *Trevino v. Thaler*, 569 U.S. 413, 133 S. Ct. 1911, 185 L. Ed. 2d 1044 (2013), concluded White had shown excusing cause for the default — lack of counsel in post-conviction -- and remanded the case "for the district court to consider, in the first instance, White's claim de novo, including whether he is entitled to an evidentiary hearing in order to supplement the record." 940 F.3d at 279.

Remand was effective when the Sixth Circuit issued its mandate on June 11, 2020, (ECF No. 43), a week after the Supreme Court of the United States denied the State's petition for writ of certiorari. *White v. Morgan*, 140 S. Ct. 2826 (Jun. 1, 2020). A week later the Warden moved to expand the record:

> In order to demonstrate that White was fully aware of his retained counsel's pending prosecution and that White deliberately chose to continue to retain his counsel, Xavier Armengau, for White's trial, respondent will offer a record of telephone calls from White from the jail to various persons outside the jail at the time just prior to White's trial in the Franklin County Court of Common Pleas.

(Motion, ECF No. 42, PageID 1692). In September, 2020, the Court[2] granted the State's motions to expand and for evidentiary hearing, which Petitioner had not opposed (Order, ECF No. 54). However, in lieu of an evidentiary hearing to develop the factual record on the remanded issue, as the circuit court apparently anticipated, the parties entered into a Stipulation (ECF No. 55-1) and then

briefed the case (ECF Nos. 57-59).

In addition to the stipulated facts about the representation, Magistrate Judge Merz relied on the materials added to the record on the Warden's unopposed motion to expand the record. White objects strenuously to that reliance, claiming those records of White's telephone calls from the jail were somehow withdrawn. Upon a de novo review of the Joint Motion to Vacate (ECF No. 55), the Stipulation (ECF No. 55-1), and Magistrate Judge Vascura's Order granting the Motion to Vacate the evidentiary hearing (ECF No. 56), the Court finds no mention of withdrawing those records, whose addition to the record in this case Petitioner did not oppose.

White's Truthfulness in Pleading Ground Five

Based on the Stipulation and the records of jail telephone calls, Magistrate Judge Merz found that White lied to this Court when he represented in his Fifth Ground for Relief that "[u]nbeknown to the Petitioner, and at the time of Petitioner's trial in October/November of 2013, his trial counsel, (Javier Armengau), was under indictment. . ." (Supporting Facts for Ground Five, Amendment to Petition, ECF No. 7, PageID 39). The basis for finding that this was a lie is (1) the verified admission by White in the Stipulation that Attorney Armengau told White when he was indicted and (2) the numerous telephone calls White made from jail in which he admits knowing Armengau had been indicted. White's counsel objects strenuously to this finding, calling it conjecture by the

Magistrate Judge, reliance on uncross-examined prosecutorial affidavits, "highly improper, unlawful, and completely unfair." (ECF No. 68, PageID 1892).

The Court concludes the Magistrate Judge's finding that White lied is not clearly erroneous. That contradiction between "unbeknown to the Petitioner" (Amendment) and "Mr. Armengau disclosed to the petitioner, Vincent D. White, that he (Armengau) had been indicted" (Stipulation) is patent. The Magistrate Judge's finding of what White said on the telephone from jail is based on the transcripts of those calls (ECF No. 44-1, Ex. E); the accompanying declarations, referred to by White's counsel as "uncross-examined prosecution affidavits", are merely authenticating documents. And White has not denied the authenticity of the transcriptions. The admissions he made in those telephone calls occurred in June 2013, four years before he claimed that Armengau's indictment was "unbeknown" to him.

White made this same untrue statement under oath when he filed his Petition for Post-Conviction relief in the Franklin County Court of Common Pleas when he stated:

> I was represented at trial by Javier Armengau. Unknown to me at the time, Mr. Armengau was under indictment at the time for several felony charges including rape and kidnapping. I learned of this fact after my trial. If I would have know [sic] this prior to trial, I would not have allowed him to stay on my case.

(Copy at ECF No. 61, PageID 1829).

Significantly, the Sixth Circuit also believed White did not know of Armengau's indictment. In the first paragraph of her opinion, Judge Daughtrey

writes: White "argues that he was deprived of his Sixth Amendment right to effective counsel when, unbeknownst to him, his trial attorney, Javier Armengau, represented him while also under indictment for several serious offenses." 940 F. 3d at 272 (emphasis supplied). On the next page Judge Daughtrey also wrote "As White tells it, he did not learn about Armengau's indictment until he began assembling his case for direct appeal" 940 F. 3d at 273.

The Court finds White knew from Armengau, well before trial, that his attorney had been indicted on serious felony charges and chose deliberately to continue the representation. White's objection to the Magistrate Judge's finding that White lied in representing the contrary to this Court is overruled.

The Conflict of Interest

The substantive claim before this Court is that White received ineffective assistance of trial counsel because his defense attorney labored under a conflict of interest, he himself having been indicted on serious criminal charges. The Sixth Circuit found that this was a substantial ineffective assistance of trial counsel claim3, 940 F.3d at 276, citing *Moss v. United States*, 323 F.3d 445, 472 (6th Cir. 2003); *United States v. DeFalco*, 644 F.2d 132, 136-37 (3d Cir. 1979); *Reyes-Vejerano v. United States*, 276 F.3d 94, 99 (1st Cir. 2002); *Armienti v. United States*, 234 F.3d 820, 824-25 (2d Cir. 2000); and *Thompkins v. Cohen*, 965 F.2d 330, 332 (7th Cir. 1992).

In *Moss*, co-defendants claimed in a § 2255 proceeding that their joint

representation by the same attorney at trial created an actual conflict of interest. As a general matter the Sixth Circuit held that the prejudice required to be proved by the second prong of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), would be presumed in certain circumstances:

> The presumption of prejudice also arises where the defendant demonstrates that his attorney actively represented conflicted interests. *Mickens*, 122 S. Ct. at 1241-45 (examining with approval *Holloway v. Arkansas*, 435 U.S. 475, 488, 55 L. Ed. 2d 426, 98 S. Ct. 1173 (1978); *Cuyler v. Sullivan*, 446 U.S. 335, 350, 64 L. Ed. 2d 333, 100 S. Ct. 1708 (1980); and *Wood v. Georgia*, 450 U.S. 261, 67 L. Ed. 2d 220, 101 S. Ct. 1097 (1981)). Indeed, where the defendant or his counsel objects to the conflict prior to, or during trial, the trial court must inquire as to the extent of the conflict or subject any subsequent conviction to automatic reversal. Holloway, 435 U.S. at 489-92. See also *Riggs v. United States,* 209 F.3d 828, 831 n.1 (6th Cir. 2000). In the absence of an objection, however, a showing of (1) an actual conflict; and (2) an adverse effect on his counsel's performance will void the conviction. *Mickens*, 122 S. Ct. at 1245.

323 F.3d at 455.

Knowing of Armengau's indictment, White made no objection to proceeding with Armengau as his counsel. Under *Moss*, then, he must prove both an actual conflict and an adverse effect of Armengau's performance.

White has not proven any actual conflict of interest. While he and Armengau both faced charges in the Franklin County Court of Common Pleas, they were before different judges, Judge Holbrook in White's case (see, e.g., Judgment Entry, State Court Record, ECF No. 11-1, Ex. 5) and Judge Fais in Armengau's case (see, e.g., Decision and Entry, State Court Record in Case No. 2:19-cv-1146, Ex. 4). The General Division of that court comprises seventeen judges, so the likelihood that behavior by an attorney which angered one of those judges would

be communicated to another judge handling another case is speculative at best. White was prosecuted by the Franklin County Prosecutor and Armengau was prosecuted by special counsel appointed by the Ohio Attorney General (ECF No. 58, PageID 1777). Both Armengau and White defended their cases on the merits, so there is no indication of possible conflict in plea negotiations.

It is always possible, of course, that an indicted attorney will neglect his criminal clients because he is distracted or because his resources are stretched too thin to defend both cases vigorously. But White offers no evidence that happened in this case.

Nor does White point to any evidence that the posited conflict affected Armengau's performance or that the outcome would have been any different with a different attorney. As the Tenth District summarized the facts of the crime, there were two surviving eyewitness victims who had known White for some time and his self-defense explanation of the shooting was not credible. *State v. White*, *supra*, at ¶¶ 3-4. Applying the standard enunciated in *Moss*, the Court concludes White has not shown Armengau provided ineffective assistance of trial counsel because of any conflict of interest.

The other decisions cited by the Sixth Circuit are from other circuits. In *Reyes-Vejerano*, the First Circuit noted the possibility of a conflict of interest when an attorney is under investigation by the same federal agency which is prosecuting his client. The court held that under those circumstances:

> A defendant who raises no objection at trial must demonstrate in his § 2255 petition that an actual conflict of interest adversely affected the

> adequacy of his representation. *Cuyler v. Sullivan*, 446 U.S. 335, 348-50, 64 L. Ed. 2d 333, 100 S. Ct. 1708 (1980); *Familia-Consoro*, 160 F.3d at 764. That proof of actual conflict (at least in situations where it is not obvious) has two components, each of which the defendant must show: "(1) the attorney could have pursued a plausible alternative defense strategy and (2) the alternative trial tactic was inherently in conflict with or not pursued due to the attorney's other loyalties or interests." Familia-Consoro, 160 F.3d at 764; see also Brien v. United States, 695 F.2d 10, 15 (1st Cir. 1982) (adopting this test).

276 F.3d at 97. The First Circuit found petitioner had shown no actual conflict of interest and affirmed dismissal of his habeas corpus (§ 2255) case. *Reyes-Vejerano* does not support White's theory that an indicted attorney has a per se conflict of interest with his client who is being prosecuted in the same court.

In *Armienti v. United States*, 234 F. 3d 820 (2nd Cir. 2000), petitioner alleged ineffective assistance of trial counsel because his attorney was being criminally investigated by the same government office which was prosecuting him. Petitioner did not allege a per se conflict of interest or that the trial court was aware of the potential conflict. The Second Circuit held petitioner could prevail if he could prove an actual conflict of interest and "remanded the case to the [district] court for an evidentiary hearing on whether Armienti's attorney's alleged conflict constituted an actual conflict that adversely affected his performance as Armienti's counsel." 234 F.3d at 822. Armienti is therefore no authority for the propositions argued by White that (1) there is a per se disqualifying conflict of interest when a defense attorney is facing criminal charges in the same court as his client or (2) that the petitioner does not have to show an adverse effect on the attorney's performance.

In *Thompkins v. Cohen*, 965 F.3d 330 (7th Cir. 1992), petitioner was charged with murder and his trial attorney was under investigation for bribing police officers. The Seventh Circuit held this presented only a potential conflict of interest, but even assuming a conflict existed:

> The existence of a conflict does not automatically entitle the defendant to habeas corpus on the ground that he was deprived of his constitutional right to the effective assistance of counsel. Unless the conflict was brought to the trial judge's attention, the defendant must point to specific instances in which the lawyer would have done something different in his conduct of the trial had there been no conflict of interest. *Cuyler v. Sullivan*, 446 U.S. 335, 348, 64 L. Ed. 2d 333, 100 S. Ct. 1708 (1980); *United States v. Cirrincione*, 780 F.2d 620, 630-31 (7th Cir. 1985).

965 F.3d at 332. Thompkins also does not support relief for White. While the Seventh Circuit recognized the possibility of a conflict of interest in the situation where defense counsel is under criminal investigation, it held the petitioner still had to show something the attorney would have done differently had there been no such conflict. Because Thompkins had not made that showing, the Seventh Circuit affirmed dismissal of the habeas petition. White has also made no such showing.

In the last case referenced by the circuit court, *United States v. De Falco*, 644 F.2d 132 (3rd Cir. 1979), the Third Circuit remanded an indicted defense attorney conflict of interest claim "for a hearing on whether DeFalco knew of his lawyer's indictment and nonetheless acquiesced in the representation." 644 F.2d at 136-37. This Court now knows, by White's Stipulation, that Armengau told him of the indictment and that White acquiesced in the representation.

In addition to the cases cited by the Sixth Circuit as suggestive of a disqualifying conflict of interest here, White relies in his latest Objections on a number of Supreme Court cases:

> The Supreme Court's decisions in *Glasser [v. United States*, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942)]; *Holloway [v. Arkansas*, 435 U.S. 475, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978)]; *[United States v.] Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984); *Cuyler [v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)]; and *Mickens [v. Taylor*, 535 U.S. 16 (2002)] are well-established and clear: the Sixth Amendment requires representation by unconflicted counsel. When a concurrent conflict is present, unless it is waived, "automatic reversal" is required.

(ECF No. 68, PageID 1893).

The Magistrate Judge distinguished *Glasser* as follows:

> In *Glasser* the trial judge on the day of trial appointed the attorney for one defendant to represent a second defendant, over the attorney's protest. It is true the Supreme Court declined to assess whether the defendant was prejudiced, but it did not purport to create a general rule that prejudice need never be shown in such a case. It did not employ "structural" error as an analytical concept. *Glasser* was a case of concurrent representation of two defendants, not an indicted defense counsel situation.

(Supplemental Report, ECF No. 66, PageID 1881, noting also that *Glasser* was decided forty-two years before *Strickland*, the modern font of effective assistance law). *Holloway* also involved concurrent representation of three defendants over counsel's protests. *Id.* at PageID 1882. The *Magistrate Judge also found Cronic was not in any way a conflict of interest case. Id. Cuyler* holds the burden of proof of an actual conflict of interest is on the petitioner, a burden White has not met here.

The Supplemental Report notes that *Mickens* holds "[Tlhe presumed prejudice standard of *Cuyler* is clearly established only when the conflict is due to multiple concurrent representations"; absent concurrent representation of co-defendants, the petitioner is required to show the conflict affected counsel's

performance (ECF No. 66, PageID 1882).

White summarizes his reliance on these concurrent representation cases by arguing that the conflict of interest in an indicted attorney case "is GREATER than when he is representing two separate clients with conflicting interests." (Objections, ECF No. 68, PageID 1892; emphasis *sic*). However White cites no federal case law adopting that position.

Nor is this Court, considering the matter *de novo*, persuaded to adopt such a rule. It would allow a defendant such as White, who knew of the possible conflict and acquiesced in it, to obtain vacation of a conviction without proving either an actual conflict of interest or any adverse effect on attorney performance or case outcome.

Based on the foregoing analysis, the Report and Recommendations (ECF No. 62) and the Supplemental Report and Recommendations (ECF No. 66) are ADOPTED AND Petitioner's Objections (ECF Nos. 63, 64, 67, and 68) are OVERRULED. The Clerk shall enter judgment dismissing the Petition with prejudice.

Certificate of Appealability

A habeas corpus petitioner cannot appeal an adverse judgment without a certificate of appealability. 28 U.S.C. § 2253(c). To obtain a certificate of appealability, a petitioner must show at least that jurists of reason would find it debatable whether the petition states a valid claim of denial of a constitutional

right. *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). That is, it must find that reasonable jurists would find the district court's assessment of the petitioner's constitutional claims debatable or wrong or that they warrant encouragement to proceed further. *Banks v. Dretke*, 540 U.S. 668, 705, 124 S. Ct. 1256, 157 L. Ed. 2d 1166 (2004); *Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003); *Dufresne v. Palmer*, 876 F.3d 248 (6th Cir. 2017),

White has cited no cases from any court adopting his positions that (1) there is a *per se* conflict of interest when defense counsel is indicted in the same court where he is defending a petitioner; (2) the indicted defense attorney case is equivalent to concurrent representation of codefendants, requiring automatic reversal. Nonetheless, because this case is on remand from the Sixth Circuit which believed it represented at least a possible case of ineffective assistance of trial counsel because of conflict of interest, White deserves encouragement to proceed further. He is therefore GRANTED a certificate of appealability on the question of whether he has shown a conflict of interest sufficient to require automatic reversal in the absence of proof the conflict impacted trial counsel's performance.

Date: May 20, 2021
James L. Graham
United States District Judge

Footnotes

- 1

The circuit court found this Court had incorrectly applied the deferential

standard of review under AEDPA. See Opinion and Order, ECF No. 23, PageID 1602. The AEDPA standard, codified at 28 U.S.C. § 2254(d), applies only when the state courts have decided the relevant constitutional issue on the merits which did not happen in this case.

- 2

Per Magistrate Judge Chelsey M. Vascura, to whom the case was at that time referred. The Magistrate Judge reference in the case was later transferred to Magistrate Judge Merz to help balance the Magistrate Judge workload in the District.

- 3

This finding that the ineffective assistance of trial counsel claim is substantial — is a necessary predicate to applying the *Martinez-Trevino* exception to the procedural default doctrine as stated in *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). See *Martinez*, 566 U.S. at 17.

No. 21-3546

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED MAY 31, 2023
DEBORAH S. HUNT, Clerk

VINCENT D. WHITE, Jr.	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	ORDER
	)	
MICHAEL PHILLIPS, WARDEN,	)	
	)	
Respondent-Appellee.	)	

BEFORE: SUTTON, Chief Judge; LARSEN and DAVIS, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s Deborah S. Hunt, Clerk

*Judge Murphy recused himself from participation in this ruling.

STATE OF OHIO,
Plaintiff-Appellee,

v.

VINCENT D WHITE,
Defendant-Appellant.

Court of Appeals of Ohio, Tenth Appellate District,
Franklin County

No. 14AP-160

Before Dorrian, J. Luper Schuster, J., concurs. Brunner, J. concurs in part and dissents in part.

Counsel: Ron O'Brien, Prosecuting Attorney, and Laura M. Swisher, for appellant. Yeura R. Venters, Public Defender, and John W. Keeling, for appellant.

DORRIAN, J.

Defendant-appellant, Vincent D. White ("White"), appeals from a final judgment of the Franklin County Court of Common Pleas that convicted him of, among other crimes, two counts of aggravated murder and sentenced him to life in prison without the possibility of parole. The judgment followed a jury trial in which White and a co-defendant were found guilty of several offenses arising from a robbery. White argues that his trial counsel was ineffective due to a conflict, that the trial court gave improper instructions to the jury, and that ex parte communications between law enforcement and the trial court led to his being restrained during the trial in a way that denied him his right to a fair trial. We overrule all of White's assignments of error and affirm the judgment of the trial court.

I. FACTS AND PROCEDURAL HISTORY

On August 30, 2012, a Grand Jury indicted White and an alleged coconspirator. The Grand Jury charged White with one count of aggravated burglary, three counts of aggravated robbery, four counts of aggravated murder, two counts of attempted murder, two counts of felonious assault, and one count of possessing a firearm while under disability. All counts (except the weapon under disability count) contained specifications for the use of a firearm.

The counts in the indictment arose from a single incident. On July 29, 2012, four men were shot in a house located at 1022 East 17th Avenue in Columbus, Ohio. Keith Paxton (aka "Gutter") and Albert Thompson (aka "T") were killed in the attack. Juanricus Kibby and Miquel Williams suffered bullet wounds but recovered.

The case went to trial on October 28, 2013. At the trial, both surviving victims identified White as one of the two shooters. In addition, another witness, Jeffrey Harris, testified that White had told him beforehand about White's plan to rob the house and then afterwards offered Harris a share of the money. Kibby and Williams both had known White for a long time; yet, neither identified him the first time they spoke with police following the shooting. Harris, who was initially suspected of having some involvement in the crime, went to the police to clear his name, but he did not tell the police the story he told at trial about White telling him of his plan to rob the house.

White's co-defendant presented an alibi witness, who claimed that the codefendant was not present during the shooting. White admitted that he was at the house and shot some of the people there. However, he claimed that he shot in self-defense because, when he arrived to buy drugs, the four individuals who were subsequently deemed to be the victims, made him get on his knees at gunpoint and were robbing him. Forensic evidence regarding the direction and angles from which some of the victims were shot tended to contradict White's version of the events, as did the fact that White and the other shooter each fired at least six times and the four victims did not return fire. Thompson was shot as if he were getting up from a seated position, and Paxton was shot in the back shoulder. Only two guns were used in the shooting and neither were any of the guns in the possession of the house occupants.

On November 5, 2013, the trial concluded, and the jury began its deliberations. Two days later, the jury announced its verdict. The jury found White guilty on all counts. The trial court also found White guilty of having a weapon while under disability. The trial court held a sentencing hearing on January 22, 2014 and sentenced White to life in prison without parole. White now appeals.

II. ASSIGNMENTS OF ERROR

White advances four assignments of error:

I. THE DEFENDANT WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION BASED UPON THE ACTUAL AND POTENTIAL CONFLICTS OF INTERESTS THE DEFENDANT'S TRIAL COUNSEL HAD IN THIS CASE.

II. THE TRIAL COURT ERRED WHEN IT INSTRUCTED THE JURORS THAT IT HAD TO FIND THE DEFENDANT NOT GUILTY OF AGGRAVATED MURDER BEFORE IT COULD CONSIDER THE DEFENDANT'S GUILT OF THE LESSER-INCLUDED OFFENSE OF MURDER, THE SOCALLED "ACQUITTAL FIRST" INSTRUCTION THAT WAS HELD TO BE IMPROPER IN *STATE V. THOMAS*, 40 OHIO ST. 3d 213, 533 N.E.2d 286, (1988), AND FURTHER ERRED WHEN IT INSTRUCTED ON THE AGGRAVATED MURDER CHARGES IN COUNTS SEVEN AND EIGHT WITHOUT ALSO INSTRUCTING ON THE LESSER OFFENSE OF MURDER AND DEFENSE COUNSEL WAS INEFFECTIVE BY FAILING TO OBJECT TO THESE INSTRUCTIONS.

III. WHEN THE STATE CLAIMED THAT THE DEFENDANT FLED THE SCENE DUE TO A CONSCIOUSNESS OF GUILT, WHILE THE DEFENDANT MAINTAINED THAT HE FLED THE SCENE OF THE SHOOTING OUT OF FEAR FOR HIS SAFETY, IT WAS PREJUDICIAL CONDUCT FOR THE JUDGE, OVER OBJECTION, TO PICK A SIDE AND INSTRUCT THE JURY ONLY WITH RESPECT TO THE STATE'S THEORY OF GUILT AND TO INSTRUCT ONLY ON THE INFERENCES REQUESTED BY THE STATE AND TO EMPHASIS [sic] AND GIVE UNDUE PROMINENCE ONLY TO THE FACTS THAT SUPPORTED THE STATE'S THEORY.

IV. THE TRIAL COURT ERRED WHEN IT VIOLATED THE RULES AGAINST HAVING EX PARTE COMMUNICATIONS WITH THE STATE WHERE THE COURT WAS TOLD EXTREMELY PREJUDICIAL ALLEGATIONS CONCERNING THE DEFENDANTS WHICH SO FRIGHTENED THE COURT THAT IT ORDERED, WITHOUT A PROPER HEARING, EXTRAORDINARY SECURITY MEASURES FOR THE COURTROOM AND THE TRIAL, AND THE ALLEGATIONS WERE SO PREJUDICIAL THAT THEY AFFICETED [sic] THE RIGHTS OF THE DEFENDANT TO A FAIR TRIAL FROM AN IMPARTIAL JUDGE.

III. DISCUSSION

A. First Assignment of Error — Whether White was Deprived of the Right to Conflict-Free Counsel in Violation of the Sixth Amendment

White asserts that, at the time of the trial, his trial attorney, Javier Armengau, was under indictment in Franklin County and facing very grave challenges to his own freedom, finances, and license to practice law. White argues that this situation created a conflict of interest. That is, White suggests that Armengau would have been conflicted over whether to devote time to preparing his own defense or that of his client; Armengau might have chosen to take a greater percentage of White's financial resources in fees to help finance his own defense rather than hire an investigator in White's case; and Armengau would have been reluctant to vigorously represent White for fear of angering the same prosecutor's office that was prosecuting him, or even, conversely, might have failed to engage in any plea-bargaining efforts in White's case out of an indignant or vengeful desire to gain a victory over the prosecutor's office.

White argues that there is nothing in the record to show that he was properly advised of the potential conflict of interest or that he waived this potential for conflict on the record or in writing. Plaintiff-appellee, State of Ohio, argues that there is no information in the record of this case regarding Armengau's indictment, conviction, or disciplinary proceedings. No. 14AP-160 5

"'A reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter.'" *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110,

P 13, 818 N.E.2d 1157, quoting *State v. Ishmail*, 54 Ohio St.2d 402, 377 N.E.2d 500 (1978), paragraph one of the syllabus. Though White's brief asserts facts about Armengau's difficulties, the record in this direct appeal contains no evidence or information whatsoever about Armengau's particular situation. Although White refers to the caption of Armengau's criminal case and the caption of his disciplinary case before the Supreme Court of Ohio, he does not expressly request that we take judicial notice of the same. Nevertheless, even if we were to take judicial notice of the fact that Armengau was indicted for a number of serious criminal offenses before White's trial and was convicted and imprisoned for them after White's trial, the record would still be devoid of any factual details regarding Armengau's licensure issues. Furthermore, there is nothing in the record of this direct appeal indicating White was unaware of Armengau's situation. In short, while we understand White's argument, that his counsel may have been distracted and conflicted by the fact that he was suffering severe legal and personal difficulties at the same time that he was engaged in litigating White's murder trial, we lack the necessary facts to fully consider such a matter in a direct appeal. A direct appeal, where the record is limited and where the record contains no mention of any of the relevant facts at issue, is not the vehicle to make such an argument.

White's first assignment of error is overruled.

B. Second Assignment of Error — Whether the Trial Court Gave an Impermissible Acquit First Instruction

The Supreme Court of Ohio has held:

> If a jury is unable to agree unanimously that a defendant is guilty of a particular offense, it may proceed to consider a lesser included offense upon which evidence has been presented. The jury is not required to determine unanimously that the defendant is not guilty of the crime charged before it may consider a lesser included offense.

State v. Thomas, 40 Ohio St.3d 213, 533 N.E.2d 286 (1988), paragraph three of the syllabus. The Supreme Court adopted this rule because, though the risk of coerced decisions may be present in any jury deliberation, an "acquittal first" instruction exacerbates such risk. *Id*. at 219-20. "'When the jury is instructed in accordance with the "acquittal first" instruction, a juror voting in the minority probably is limited to three options upon deadlock: (1) try to persuade the majority to change its opinion; (2) change his or her vote; or (3) hold out and create a hung jury.'" *Id*. at 220, quoting *State v. Allen*, 301 Ore. 35, 39, 717 P.2d 1178, 1180 (1986).

In this case, the trial court instructed on the offense of aggravated murder and then gave the following instruction:

> If you find the State has failed to prove prior calculation and design beyond a reasonable doubt, you must find the Defendant not guilty of Aggravated Murder and consider the lesser offense of Murder.

(Tr. 1012.)

White argues that this constitutes a prohibited "acquit first" instruction in violation of *Thomas*. (Appellant's Brief, 39-46.) Nonetheless, the state points out that both this court and the Supreme Court of Ohio have previously found that nearly identical instructions were not so improper as to require reversal, even

though they were poorly written and though better instructions would have incorporated the "inability to agree" language adopted by *Thomas*. See, e.g., *Thomas* at 220-21; *State v. Wright*, 2001-Ohio-4084 (2001); *State v. Greene*, 10th Dist. No. 90AP-646, 1998 Ohio App. LEXIS 1371 (Mar. 31, 1998); *State v. Hawkins*, 10th Dist. No. 97AP-740, 1998 Ohio App. LEXIS 1111 (Mar. 24, 1998); *State v. Roe*, 10th Dist. No. 92AP-334, 1992 Ohio App. LEXIS 4882 (Sept. 22, 1992). As the Supreme Court outlined in *Thomas*, the preferred approach upon giving instructions to a jury under these circumstances would have been a holding that is easily adaptable to an instruction:

> [You, the] jury must unanimously agree that the defendant is guilty of [aggravated murder] before returning a verdict of guilty on that offense. If [you are] unable to agree unanimously that a defendant is guilty of [aggravated murder], [you] may proceed to consider [the] lesser included offense [of murder] upon which evidence has been presented. [You are] not required to determine unanimously that the defendant is not guilty of the crime [of aggravated murder] before [you] consider a lesser included offense.

Thomas at 220, quoting and adopting *State v. Muscatello*, 57 Ohio App.2d 231, 387 N.E.2d 627 (8th Dist.1977), paragraph three of the syllabus. Moreover, the Ohio Jury Instructions include their own version of what amounts to the *Thomas* instruction:

> If all of you are unable to agree on a verdict of either guilty or not guilty of (insert greater offense charged), then you will continue your deliberations to decide whether the state has proved beyond a reasonable doubt all the essential elements of the lesser included offense of (insert lesser offense).

Ohio Jury Instructions, CR Section 425.09 (Rev. May 2, 2015).

In this case, trial counsel failed to object to the trial court's instruction or

to request a proper *Thomas* instruction. Thus, we cannot take notice of this error unless we find that it constituted plain error. "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B). The Supreme Court of Ohio has recently reiterated that:

> [This rule places] "three limitations on a reviewing court's decision to correct an error despite the absence of a timely objection at trial. First, there must be an error, i.e., a deviation from a legal rule. * * * Second, the error must be plain. To be 'plain' within the meaning of Crim.R. 52(B), an error must be an 'obvious' defect in the trial proceedings. * * * Third, the error must have affected 'substantial rights.' We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial."

State v. Lynn, 129 Ohio St.3d 146, 2011-Ohio-2722, P 13, 950 N.E.2d 931, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002 Ohio 68, 759 N.E.2d 1240 (2002); see also *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, P 62, 781 N.E.2d 88. In this case, considering existing case law in which similar instructions to those given here were not reversed, we cannot say that this error is plain. Under these circumstances, we overrule White's second assignment of error.

C. Third Assignment of Error — Whether the Trial Court Erred in Instructing that Flight Could be Considered as Evidence of Guilt Where Defendant Claimed Self-Defense and Presented Other Factual Explanations for his Flight

At trial, it was undisputed that White left the scene of the shooting on foot, disposed of the gun in the trash, checked into a hotel under someone else's name, and stayed there for several days, spending time with his daughter and

consulting with an attorney before voluntarily turning himself in to police. The prosecution argued that this behavior was not the behavior of a person who had acted in self-defense and that it showed consciousness of guilt. The defense argued that White fled the scene initially because he was afraid for his life and that he stayed in the hotel under an assumed name to give himself the opportunity to retain and consult with a lawyer and spend some time with his daughter before surrendering himself. The trial court, over objection by the defense, instructed the jury as follows:

> In this case, there was evidence that the Defendant Vincent White fled from the scene. You are aware — I mean — you are instructed that you may not presume the Defendant guilty from such evidence. You may, however, infer a consciousness of guilt regarding the evidence of the Defendant's alleged flight. An accused's flight and related conduct can be considered evidence of consciousness of guilt and thus of guilt itself.

(Tr. 1021.)

White argues that it was error for the trial court to have given an instruction on flight in this case because there were explanations for his behavior after the shooting other than consciousness of guilt and that the trial court, in giving such an instruction, was granting a judicial imprimatur of the prosecution's view of the facts. Essentially, White argues that, in giving that instruction and only that instruction, the judge picked a side and implicitly recommended a factual inference to the jury. The state responds that giving a flight instruction is a matter of discretion, and the word "may" in the instruction leaves open the possibility that the jury could have chosen not to infer "consciousness of guilt" and instead credit White's explanation. The

determination of whether or not to give a flight instruction is a matter within the trial court's discretion. See, e.g., *State v. Hill*, 8th Dist. No. 98366, 2013-Ohio-578, P 48-49. Under typical circumstances, as the state argues, if there is sufficient evidence to show that a defendant attempted to avoid apprehension, a flight instruction is proper. *Id*. at P 49. However, White does not argue that there was insufficient evidence in the record to justify an instruction about flight; he argues that it was improper to give a flight instruction that endorsed only the inference preferred by the state where the facts supported more than one inference about his conduct, and each side argued for a different inference.

In support of his assignment of error, White cites cases regarding jury instructions about factual inferences that may be drawn from a refusal to take a breath test in an OVI case. (Appellant's Brief, 48-53, citing *Maumee v. Anistik*, 69 Ohio St.3d 339, 1994 Ohio 157, 632 N.E.2d 497 (1994); *Columbus v. Maxey*, 39 Ohio App.3d 171, 530 N.E.2d 958 (10th Dist.1988).) The facts in these cases are not analogous to the facts in the case before us. Here, after shooting the victims, White left the scene, disposed of the gun, stayed in a hotel under another's name, and turned himself in.

More factually analogous to the case at bar is *State v. Shepherd*, 10th Dist. No. 07AP-223, 2007-Ohio-5405. In that case, the appellant was charged with robbery. The evidence presented at trial showed that the appellant and his passenger drove away from the scene after the passenger robbed a gas station. The appellant admitted that he was driving the car but that he had picked up

the passenger on the side of the road and knew him only as "Willie." *Id*. at P 3. On appeal, the appellant argued that the trial court erred when it instructed the jury on flight as evidence of guilt by giving the following instructions: "Flight or its analogous conduct may be considered by you as consciousness of guilt." *Id*. at P 5. The appellant argued that the court should have given the instruction outlined in the Ohio Jury Instructions1 at the time. This court determined, after comparing the given instruction to the instruction suggested by the appellant, that the trial court did not abuse its discretion. The court noted that, while the Ohio jury instruction is "more detailed and explicit, the instruction given by the trial court is not incorrect and does not conflict with the suggested OJI instruction." *Id*. at P 8. The court further observed that the given jury instruction "substantially mirrors the language from paragraph six of the syllabus in *State v. Eaton*, 19 Ohio St.2d 145, 160, 249 N.E.2d 897 (1969), in which the court stated that "'flight from justice, and its analogous conduct, have always been indicative of a consciousness of guilt."'" *Shepherd* at P 18. The court also observed that: (1) the given instruction indicated that the jury "may" find flight demonstrated consciousness of guilt and left open the possibility that there may have existed other motivations to move appellant to leave the scene; and (2) jury instructions must be considered as a whole and the court had also instructed the jury that it was it's sole function to judge the disputed facts.2 *Id*.

In *Eaton*,3 the appellant was charged with first-degree murder during an attempted robbery. The appellant claimed the shooting was accidental. Evidence

was presented that the appellant left the scene "without attempting to aid the person whom he claims was accidentally killed." *Id*. at 160. In considering whether the jury was properly instructed on the element of intent to commit homicide, the Supreme Court held that: "Flight from justice, and its analogous conduct, may be indicative of a consciousness of guilt." Id. at paragraph six of the syllabus. The Supreme Court noted that: "'Flight from justice, and its analogous conduct, has always been indicative of a consciousness of guilt. It is today universally conceded that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct are admissible as evidence of consciousness of guilt, and thus of guilt itself.'" *Id*. at 160, quoting 2 Wigmore, Evidence, Section 276 (3 Ed.) at 111, and cases cited.

In *State v. Taylor*, 78 Ohio St.3d 15, 29-30, 1997 Ohio 243, 676 N.E.2d 82 (1997), the appellant was charged with aggravated murder. Evidence was presented at the trial that, after shooting the victim, the appellant and an accomplice left the scene and while leaving, the appellant yelled out of the car window: "It was self-defense." The Supreme Court of Ohio considered whether the following instruction was given in error: "Flight, in and of itself, does not raise a presumption of guilt, but unless satisfactorily explained, it tends to show consciousness of guilt or a guilty connection with the crime." *Id*. at 27. The Supreme Court held that, despite the appellant's claims, the instruction was "neither arbitrary nor unreasonable, and did not create an improper mandatory

presumption." *Id*. The Supreme Court quoted from Eaton in stating: "'Flight from justice * * * may be indicative of a consciousness of guilt.'" *Id*.

In consideration of our precedent in *Shepherd* and the Supreme Court's observations in *Eaton*, *Harris*, and *Taylor*, we cannot say that the trial court abused its discretion in giving this instruction. Accordingly, we overrule White's third assignment of error.

D. Fourth Assignment of Error — Whether the Trial Court Erred in Imposing Security Measures Upon Defendant Without a Hearing Based Upon Out-of-Court Communications from Jail Officials

White argues that the trial court engaged in impermissible ex parte communications regarding the threat White and his co-defendant posed to courtroom safety, as well as communications about inappropriate social media (Facebook) posts by a relative of White. White argues that the trial court improperly used this information, without the benefit of a hearing to order that White and his co-defendant be shackled (leg irons only)4 during the trial. White urges us to find that this shows that he did not receive a fair trial from an impartial judge, according to his right.

Rule 2.9 of The Code of Judicial Conduct states that a "judge shall not initiate, receive, permit, or consider ex parte communications." The state, citing Black's Law Dictionary, argues that communications from sheriff's deputies at the jail are not ex parte communications in the relevant sense. The current edition of Black's Law Dictionary defines "ex parte communication" as: "A

communication between counsel and the court when opposing counsel is not present." Black's Law Dictionary (10th Ed.2014). However, notwithstanding Black's definition, the comments to Rule 2.9 suggest that the term is not to be read so narrowly in this context. Comment 3 to Jud.Cond.R. 2.9 reads: "The proscription against communications concerning a proceeding includes communications with lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted by this rule." We therefore cannot agree with the state. Sheriff's deputies stationed at the jail are in a unique position to gather information about persons in their custody. Were their communications beyond the reach of this rule, a deputy could overhear a confession or even a malicious rumor and relay that to the judge ex parte without any opportunity for the defense to challenge the matter (or even be aware of it). Law enforcement officers (who are associated with the state or government by their very nature) are not privileged to engage in substantive ex parte communications with a judge about pending cases any more than a defense attorney's secretary, paralegal, or investigator could do so.

However, even though communications from sheriff deputies at the jail can be characterized as ex parte communications, there are specified exceptions within the rule that support communications to a judge by sheriff's deputies. One that we find relevant (and that will consistently be relevant to proper communications between a judge and courthouse or jail security) is this: "When circumstances require it, an ex parte communication for scheduling,

administrative, or emergency purposes, that does not address substantive matters or issues on the merits, is permitted, provided the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication." Jud.Cond.R. 2.9(A)(1). Here, the communications in question were not about the merits of the case, they were about proper emergency or administrative security issues. Rather, the deputies overheard comments about taking over the courtroom or otherwise disrupting proceedings. Therefore, it was proper to bring these emergency/administrative concerns to the trial court's attention ex parte. Whether the court's response was appropriate is a different question.

The usual practice is for a defendant to appear in court while free of shackles. *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, P 79, 776 N.E.2d 26, citing *State v. Woodards*, 6 Ohio St.2d 14, 23, 215 N.E.2d 568 (1966). This is the accepted procedure because the presence of restraints tends to erode the presumption of innocence. *Id.*, citing *State v. Carter*, 53 Ohio App.2d 125, 131, 372 N.E.2d 622 (4th Dist.1977). But it is widely accepted that a prisoner may be shackled where there is a danger of violence or escape. *Id.*, citing *Woodards* at 23. The decision to shackle is left to the sound discretion of the trial court. *Id.*, citing *State v. Richey*, 64 Ohio St.3d 353, 358, 1992 Ohio 44, 595 N.E.2d 915 (1992).

In this case, it is clear that, notwithstanding having received some information about the potential risk White and his co-defendant might have posed to the safety of the courtroom and persons present, along with

recommended restraints as a precaution, the trial court was mindful of how implementing these recommendations might be viewed by the jury. The transcript reads in relevant part as follows:

> THE COURT: Okay. I was informed -- it was last Thursday -- that there had been some discussions by the two Defendants relative to the possibility of trying to hijack the courtroom. This was by a witness that was investigated by the sheriff's department. Don't know if those words were ever transposed [sic] between you guys, but I'm going to be up on utmost security because of it.
>
> At that point in time, I had a discussion with Corporal Davis from the sheriff's office. I've also had discussions with [the] Sheriff.
> * * *
> I have some concerns about security. We went though the various options. There's some precautions I took. It's my understanding that Mr. Boone currently has a belt on him * * *. Okay. Now, you guys will be manacled together underneath the table. * * *
> * * *
> Now, we're going to leave the front rows empty, and basically everybody will be checked coming in, okay?
> Now, Corporal Davis, did I misstate anything in what I put on the record?
>
> CORPORAL DAVIS: No, Your Honor, you didn't.
>
> THE COURT: Okay. Gentlemen, the question I have left is, do I handcuff you?
> Now, we have to have an understanding here. It's the deputies' request that I handcuff you, but I want you to have a fair trial, okay? I won't do anything about the manacles. I've got two of you, so that's got to be between the two of you, okay? If I have any problems, the cuffs are going on, guys, okay?
>
> [APPELLANT]: Yes, sir.
> * * *
> CORPORAL DAVIS: Just for the record, on behalf of the sheriff's department, Corporal Thomas Davis, I would like to formally request on behalf of the sheriff's office, due to both these individuals being in enough physical altercations and fights in the jail, that they've both been placed in administrative segregation, which is 23-hour lockdown because they don't get along safely with other people that are in the jail,

> when they're moved about, they're both moved by two deputy supervisors, handcuffs, leg irons, and with a marked chain, which is, what we call, a belly chain, on behalf of the sheriff's office, I would request that they both wear that. I know that Your Honor has his discretion to do whatever you want, but on the record for the sheriff's office, I would like to request that.
>
> THE COURT: Okay. Well, as of now, I expect them to act appropriately. If I have one inkling, I have no problem putting them on, okay? My job is to give you a fair trial, but, gentlemen, I'm not going to have anybody turn this courtroom upside down.

(Tr. 46-48.)

The trial court did not abuse its discretion by engaging in permitted ex parte communications with the Sheriff's Office regarding emergency and administrative security matters or when it held a hearing at which it acted upon the advice of the Sheriff's Office by manacling the defendants' legs under the table in a way that would not have been obvious to the jury. White's fourth assignment of error is overruled.

IV. CONCLUSION

For the foregoing reasons, appellant's four assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

LUPER SCHUSTER, J., concurs.

BRUNNER, J., concurs in part and dissents in part [n.b., dissent omitted as inapplicable to the federal issue].