No. 24-7416

In The Supreme Court Of The United States

Courtney B Mathews,

Petitioner,

v.

State of Tennessee,

Respondent.

On Petition For Writ Of Certiorari To The Tennessee Court of Criminal Appeals, Middle District

PETITION FOR A WRIT OF CERTIORARI

Courtney B Mathews. #232626, *pro se*
S.C.C.F.; 555 Forest Ave
Clifton, TN. 38425

QUESTIONS PRESENTED

1) Does a criminal defense attorney becoming a witness against their own client due to that attorney's intentional and deliberate waiver of attorney client privilege, both pretrial and post trial, due to a personal ethical burden that causes them to act against their *own* client's interests *in favor of their client's co-defendant's interests*, create such divergent interests between said attorney and their client, as to rise to the level of an actual conflict of interest as defined in *Cuyler v. Sullivan*, 446 U.S. 335, (1980)?

2) If the answer to this question is yes would multiple trial errors attributable to the documented deficiencies of Counsel, during the actual trial itself, be properly reviewed under the presumed prejudice standard of *Cuyler* or more appropriately reviewed for cumulative prejudice from distinct errors under the Due Process Clause as applied in *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973)?

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PARTIES TO THE PROCEEDING

There are no parties to the proceedings other than those listed in the caption. The Petitioner is Courtney B. Mathews , an inmate. The State of Tennessee is the Respondent.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment below of the Tennessee Court of Criminal Appeals (hereinafter T.C.C.A.)

I. Opinions Below

The opinion of the T.C.C.A. is not reported but is available at *State of Tennessee v. Courtney Mathews*, **M2022-01210-CCA-R3-CD**. **Appendix A (Pet. App. A. 1-35)** The decision of the Tennessee Supreme Court denying the Tenn.R.App.Proc. 11 Application for permission to appeal is not reported but is available at *State of Tennessee v. Courtney Mathews*, **M2022-01210-SC-R11-CD. Appendix D (Pet. App. D. 108)**. The opinion of the Montgomery County Circuit Court Denying the 2nd Motion for new Trial is not reported, but is contained in the Appendix. **Appendix C (Pet. App. C. 37-107)**

II. Jurisdiction

The judgment of the T.C.C.A was entered on September 4th, 2024, and a T.R.A.P. 39 Petition to rehear was also denied on

September 25th, 2024. On February 25th 2025 the Tennessee Supreme Court denied Petitioner's Application for Permission to Appeal. **Pet. App. D. 108**.

Petitioner timely filed the instant petition for writ of certiorari on April 30th, 2025, prior to the expiration of the 90 day statute of limitation. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

III. Statutory and Constitutional Provisions Involved

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides :

> "No State shall. . . deprive any person of life, liberty, or property, without due process of law." U.S. Const XIV

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . .and to have the Assistance of Counsel for his defense." U.S. Const VI

IV. Introduction

For the last 30 years every court that has ever ruled on or presided over Mr. Mathew's case has ignored and/or

misapprehended a simple but critical fact: *to-wit:* during the pre trial period of Mr. Mathews June 1996 trial his former Trial attorneys Isaiah S. Gant and Jim Simmons, initiated and conducted a face to face meeting with Messers Stephanie Gore and Michael Terry, who represented his co-defendant, Mr. David G. Housler

During this meeting Messers Gant and Simmons did three specific things: (i) they told Messers Gore and Terry that Mr. Mathews was guilty and their client [co-defendant Housler] was innocent; (ii) upon further inquiry by Mrs. Gore, Mr, Gant waived privilege further by clearly using hand gestures to indicate that these disclosures were based on privileged conversations he had with Mr. Mathews; and (iii) as if the foregoing weren't bad enough, both Messers Gant and Simmons granted Miss Gore unrestricted access to confidential attorney work product files, case files, internal memos generated by Mr. Mathews' defense team which contained all manner of privileged and confidential information.

Furthermore, these disclosures were made in part because Mr. Gant felt he had an ethical and moral obligation, to disregard his own

client's interests in furtherance of the interests of his client's Co-Defendant David G. Housler.

Once again after that first December 1995 meeting during a period (i.e. January 1996- April 1996) that preceded Mr. Mathews' June 1996 trial both Messer's Gant and Simmons became *de-facto* material witnesses against their client because they waived attorney client privilege for Mr. Mathews, prior to his June 1996 trial.

They did this not only by intentionally and deliberately disclosing confidential communications, during that first pre-trial meeting (i.e. before June 1996) with Messer's Gore and Terry, but more than anything else they did it by literally allowing Miss Gore unrestricted access to privileged attorney work product **prior** to Mr. Mathews June 1996 trial.

To no one's surprise both Messers Gant and Simmons not only became material witnesses based on these disclosures and waivers of privilege, but they literally testified against their client, Mr. Mathews, in official court proceedings on: (i) April 10th, 2000,which was 5 years prior to the initiation of his 1st direct appeal (.i.e. 5 years before Mr.

Mathews' judgments or sentence became final after the April 15th, 2005 denial of his Motion for new trial); (ii) December 2009 during co-Defendant Houlser's Post Conviction proceedings; and (iii) they also gave written statements waving attorney client privilege on multiple occasions. See *David G. Housler, Jr. v. State*, No. M2010-02183-CCA-R3-PC, 2013 WL 5232344 (Tenn. Crim. App. Sept. 17, 2013).

V. Statement of Facts:

On April 1994, a Montgomery County Grand Jury indicted Mr. Mathews on four counts first-degree felony murder[1] and one count of especially aggravated robbery. On September 30th, 1994 Isaiah S. Gant, was then appointed *pro-hac vice*, as lead Counsel of Record in Petitioner's case; shortly there after James S. Simmons was appointed as co-Counsel. Petitioner had a 14 day capital murder trial, beginning

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[1] Originally Mr. Mathews received a 10 count indictment that had 8 counts of 1st Degree murder, however the premeditated murder counts along with possession of sawed-off shot gun count were dropped.

on June 10th, 1996, and was convicted of 4 counts of 1st degree murder and sentenced to life in prison without parole. See *State v. Courtney B. Matthews*, No. M2005-00843-CCA-R3-CD, 2008 WL 2662450, at *1 (Tenn. Crim. App. July 8, 2008), perm.app. denied (Tenn. Apr. 10, 2015).

In November 1995, co-defendant David G. Housler[2] was indicted by the same Montgomery County Grand Jury for the same exact four counts of first-degree felony murder. See *State v. Housler*, 193 S.W.3d 476 (Tenn. 2006). In December 1995, Messrs Michael Terry and Stephanie Gore were appointed to represent Mr. Housler.

A. Pre-trial waivers of Attorney client privilege by Messers Gant and Simmons

Shortly after their appointment to Housler's case in Mid-winter of 1995, Mr. Terry and Stephanie Gore were personally invited to the Nashville offices of Mr. Gant (lead counsel) and James A. Simmons

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[2] The co-defendant was ultimately granted post-conviction relief from his convictions. See *David G. Housler, Jr. v. State*, No. M2010-02183-CCA-R3-PC, 2013 WL 5232344 (Tenn. Crim. App. Sept. 17, 2013).

(associate Counsel), who were both also engaged in the pretrial preparatory stages for their client Mr. Mathews' June 1996 trial

Mrs. Gore testified specifically that Gant "had requested that we meet with them and the purpose of it was to inform us that we were representing an innocent man." **Appendix F (Pet. App. at 177) (p. 48; L 24-25)**

This is significant because in her own words she states:

> Q. Do you recall when you first became involved in David Housler's case?
>
> A. It was December 1995, Michael Terry, my partner now, was appointed as lead counsel in the case and then I was subsequently appointed as second chair **Appendix F (Pet. App. at 168)(p 11; L 16 – 21]**

Then she describes when and why she first met with Mr. Mathews' Trial Counsel, Mr. Gant and Mr. Simmons, shortly after her December 1995 appointment:

> Q. And did you meet with Mr. Gant. Mr. Simons?
>
> A. Yes

Q. And do you recall when the first time you met with them was?

A. Shortly after Micheal [Terry] and I had been appointed – I believe it would have been in the mid Winter, right after we had been appointed.

Q. And what was the purpose of that meeting with them?

A. They had requested that we meet with them and the purpose of it was to inform us that we were representing an innocent man.

Q. Where did this meeting occur, do you recall?

A. It occurred in Jim Simmons' office downtown Nashville, Tennessee..

Q. And who was present for the meeting?

A. Myself, Michael Terry and [Mr. Mathews trial Counsel] Isaiah Skip Gant and Jim Simmons

Q. And you said that they had some information that they wished to communicate to you?

A. That's correct.

Q. Do you recall the circumstances of how that occurred during that meeting?

A. Mr. Gant was walking around, we were sitting at like a library tale....and Mr. Gant was walking around the table and were talking about the Taco Bell murder and Mr. Mathew...and our client. ...

Appendix F (Pet. App. at 176) (p. 45; L 2 -19)

Q. ....And getting back, you said that Mr. Gant made a communication to you and Mr. Terry.?

A. Yes, the whole purpose of the meeting was so that Mr. Gant and Mr. Simmons could tell us that Mr. Houseler was innocent was not involved in Taco Be..That's correct.

Q. And exactly how did that communication take place, what happened

A. Mr. Gant told me and told Mr. Terry that you are representing an innocent man.

Appendix F (Pet. App. at 177) (p. 48; L 16 -25)

Indeed Miss Gore's uncontested testimony continued as follows:

Q. And how did you respond.?

A. I said how do you know that?...

Q. And what happened?

A. Michael Terry leaned over to me and said Stephanie his client has told him. He can't tell us...he is telling us as best as he can, his client has told him he knows how the murders were committed.

Q. And how did Mr. Gant respond?

A. He went like (indicating)

Q. How would you describe that gesture?

A. Like dah. (indicating) I mean...

Court The witness is indicating the pales of both hands up in a gesture form.

A. Everyone in the room understood it but me, and so it.. just took me a little bit of time to understand it.

Q. Do you thing it was an accident that Mr. Gant told you that?

A. No we were brought there so he could tell us that.

Appendix F (Pet. App. at 177) (p. 49; L 2 -22)

With respect to the waiver of privilege *via* the disclosures of the timeline and other privileged documents, prior to Mr. Mathews June 1996 trial Mrs. Gore stated

Q. At some point, did Mr. Gant and Mr. Simmons provide you with a timeline?

A. Yes.

Appendix F (Pet. App. at 178)(p. 53; L 12 – 15])

Q. And do you recall when that occurred before the David Housler trial..

[A.] It has to have occurred pretty soon after we were appointed because I remember in Winter or Early Spring [of 1996] after our [December 1995] appointment Mr. Gant and Mr. Simmons both saying that they needed to get us a copy of the time line because it would really help us in out investigation of David Housler.

Q. And what do you recall about the circumstances of when you obtained that time line ...**(id. L 15-21)**

A. I went to Jim Simmons' office and I was actually there just to copy documents and gather materials as I had been doing and he called me into his office and said that he has the time line for me ...

Q. And what was ..is the time line? What is contained within it?

A. The time line was ..their investigation of the Courtney Mathews' case and their interviews, basically starting from before the Taco Bell murders were committed, days before ..what Courtney was doing days before the murders were committed, what he was doing while the murders were

committed, and what happened after the murders were committed

Q. When he gave you that time line,.....did Mr. Simmons place any other limitations or restrictions on your access to that file record?

A. No. .

Appendix F (Pet. App. at 178)(p 53; L 25; p. 54; L 1 -23)

Q. Did he [Jim Simmons] ever put any restrictions on what you could access

A. No.

Appendix F (Pet. App. at 179)(p 56; L 12 14)

This uncontested testimony is critical because Miss Gore is clearly explaining that the first face-to-face meeting she had with Mr. Mathews' defense Counsel, occurred ".... in Winter or Early Spring [of 1996] .." after her December 1995 "... appointment ..." to represent co-defendant David Housler.

Petitioner must emphasize that this dual pre trial waiver of privilege was undisputed in the state court record.

B. Post-trial waivers of Attorney client privilege by Messers Gant and Simmons

However, the extent of the waiver of attorney client privilege did not end with the pretrial disclosures to Messer's Gore and Terry.

Quite to the contrary, these actions continued after Mr. Mathews' June 21st, 1996 conviction, but PRIOR to his August 14th, 1996 sentencing hearing on his Esp. Agg. Robbery conviction.

Which is to say that prior to Mr. Mathews August 14th, 1996 sentencing hearing, both Messer's Gant and Simmons, after having already waived privilege prior to the June 1996 trial itself, proceeded to then physically visit the private residence of then presiding Judge John H. Gasaway and deliberately waived privilege once again by telling the Judge: (i) Mr. Mathews was guilty, (ii) co-defendant Houser was innocent: (iii) they knew this based on privileged communications with Mr. Mathews; and most surprising of all (iv) a highly prejudicial inculpatory piece of evidence (i.e. the black ¾ length denim jacket introduced at trial, as Exhibit #9) wasn't Petitioner's jacket at all.

In describing the substance of the disclosures made during the post trial *ex parte* meeting Judge Gasaway testified as follows:

> Q. Okay. And explain, if you will , ..how that [pre August] 1996 meeting took place...I mean what happened **Appendix G (Pet. App. at 251)(p. 155; L 8-10)**

A. ...so the conversation, they were there maybe 30-minutes, maybe a little longer. **Appendix G (Pet. App. at 252 (p. 159; 8)**

.....

.Oh. I remember one thing that he said that he did attribute to Mr. Mathews and it was Mr. Mathews said: I don't know why this guy wants to get in on this, but he can't[sic] but if...that's what he wants, ...that's fine with me, words to that affect**.....[Id.; p. 159, L 20-23]**

5 years prior to the same presiding Judge denying Mr. Mathews M4NT on March 15th, 2005, his trial Counsel Jim Simmons actually testified During an April 21st 2000 hearing at co-defendant Housler's Motion for new trial (M4NT) proceeding.

During said hearing Judge Gasaway made pronouncements from the bench which irrefutably demonstrated the why the conflict of Messers Gant and Simmons resulted in their inability to defend Petitioner Mathews' interests:

Court. Mr. Gant and Mr. Simmons.....communicated to the court that because they .....**had a burden on them** that they said they wanted to tell the court [and] did not know who else to tell it to ....
And it was that their investigation led them to conclude that Mr. Housler was not at the Taco Bell and that that was based upon information that they had received, in part, directly from Mr.

Mathews..." **Appendix H (Pet. App. at 271)(p. 66. L 1-9]**

In specifically addressing the implications of such disclosures Judge Gasaway plainly testified:

> Q. And it was—is it fair to say it was your indication that they were violating attorney/client privilege by talking to you about the subject matter that they were?
>
> A. You know that...that was my initial thought. **Appendix G. (Pet. App. at 252)(p. 160; p. L 17-21]**
>
> [the impact of their disclosures] was enough for me to say [to them] whoo [sic], anything you tell me I'm telling the lawyers. And in fact you need to beat me to it....you need to go tell them . **Appendix G (Pet. App. at 252)(p. 161; L 20-22]**

Judge Gasaway memorialized his understanding of the magnitude of Messers Gant and Simmons' conflict of interest, when he wrote:

> "In sum , the Court acknowledges the difficulties associated with its resolution of the privilege issue. Particularly, the Court is aware that present counsel for Mr. Mathews [Robert Marlow] has expressed concern over the ability of any communications for which the attorney-client privilege has been deemed waived in this case to be used in any future proceedings involving Mr.

Mathews. The resolution of that issue must wait for another day, as the Court has recused itself from all proceedings in which Mr. Mathews is a party. However, in [Housler's] case, the Court finds that.....[Messrs Gant and Simmons]...did not safe guard privileged communication between themselves and Mr. Mathews. In the Court's view, [they] waived attorney-client privilege as to all information pertaining to Taco Bell..." **Appendix O (Pet. App. at 370)(¶ 3)**

C. The deliberate pre-trial waiver of attorney client privilege created a conflict between the personal interests of Messers Gant and Simmons and that of their client

In describing the extent of the conflict of interest that adversely effected him Counsel Gant testified as follows:

> Gant: ....I remember one day saying you know what..here's a man [co-defendant David Houlser] who potentially could get the death penalty or life in prison. And I felt that if that happened I had an obligation to do something because I knew, based on my investigation of the case, that he [Mr. Housler] had nothing to do with it.
>
> ...so I could sit and do nothing and at some later point it...surfaces that I knew something but this man [Mr. Housler] is locked up or is dead because I didn't do anything; or I could say look, why should I walk around with this weight; let somebody else deal with this. That's how I was feeling[sic]..
>
> **Appendix G (Pet. App. at 223)(p. 219; L 13-23]**

(i) Trial Counsel Gant admitted that in light of his conflict of interest he owed no obligation as appellant Mathews' defense attorney to protect his client

Trial Counsel Gant gave testimony during the following exchange with the Post conviction court which clearly demonstrated he felt no obligations to protect his client, Mr. Mathews', interests:

> Court. ..and your obligation as a lawyer to protect your client[Courtney Mathews]...versus a third party.. who [do] you own the obligation to...
>
> Mr. Gant I owe the obligation to myself[sic]....
>
> Court: I am sure that's what the "canons of ethic's say **Appendix G (Pet. App. at 223)(p. 222; L 11-14)**

In these candid statements Mr. Gant unequivocally acknowledged that, during critical stages in Appellant Mathews' pretrial and post trial criminal proceedings, while he "had an obligation to do something" to help co-defendant Housler, he had no corresponding duty nor "obligation" to "protect [his own] client.." [Id.]

With respect to co-counsel Simmons' deficient performance, he candidly admitted that:

> in his view a conflict of interest preventing effective representation by Mr. Mathews attorney's 'probably lingered for a while' long before Mr. Simmons filed his [July 11th, 2005] Motion to withdraw. Counsel testified he was unsure why he waited as long as he did to file a motion to withdraw...." **Appendix G (Pet. App. at 240) [P.C. Hrg; Vol. XII; p. 113; L 7 - 21]**

In the instant case the uncontested proof in the record clearly demonstrates that trial counsel, Gant and simmons while still representing Mr. Mathews during his criminal trial proceedings: [i] waived privilege on behalf of their client prior to both the June 1996 trial itself, and his August 14th, 1996 sentencing hearing; [ii] became material witnesses against their own-client; **Appendix H (Pet. App. at 265-267) Transcript of April 21st, 2000 M4NT Hrg.; p. 26];** [iii] eventually had to retain their own counsel, Mr. John Olivia, to represent their own interest's in co-Defendant Housler's case **(.id)** [iv] openly admitted that they "....had an obligation to do something [to help Appellant's co-defendant].." **Appendix G (Pet. App. at 223)(p. 219);** all the while candidly admitting that they owed no

"obligation as a lawyer to protect [their own] client [Mr. Mathews]."

Appendix G (Pet. App. at 223)(p. 222)

Messers Gant and Simmons both knew that attorney-client privilege would be "waived by voluntary disclosure of private communications . . . to third parties." Therefore, by intentionally and deliberately waiving attorney-client privilege, and becoming material witnesses against their client, both pretrial and post-trial, they created such divergent interests between Mr. Mathews and themselves as to create a conflict of interest, that did in fact adversely effect their performance.

(ii) By waiving privilege deliberately pretrial and post trial, Messers Gant and Simmons were aware of the fact that they could no longer assert privilege to protect their client's interests, as they were *henceforth* subject to both being subpoenaed and compelled to testify against Mr. Mathews

The pertinent facets of law are crystal clear, once Counsel waived attorney client privilege they became material witness against Petitioner Mathews, as there was no legal mechanism preventing their

being Subpoenaed and forced to give further incriminating testimony against their client. See *Uptain v. United States*, 692 F.2d 8 (5th Cir. 1982). (Defendant was denied effective assistance of counsel when his attorney, had been compelled to testify as chief witness for prosecution during bail-jumping trial.) *United States v. Ellison*, 798 F.2d 1102 (7th Cir. 1986), cert. denied, 479 U.S. 1038, 107 S. Ct. 893, 93 L. Ed. 2d 845 (1987)(Defendant was denied effective assistance of counsel where conflict of interest adversely affected counsels performance in that counsel not only testified against defendant but, without counsel)

Hence, this is a case of first impression in the sense that there are no opinions from this Court which address facts as bizarre and troubling as Petitioner's case; *to-wit:* his trial Attorneys intentionally and deliberately waived privilege both pre-trial and post trial, and became a material witnesses against him, and who felt they had no overriding obligation to protect their client's interests. *Cuyler v. Sullivan*, 446 U.S. 335, 352 n.3, 100 S. Ct. 1708, 64 L. Ed. 2d

333 (1980)(An "actual conflict" occurs when, during the course of the representation, the attorney's and the defendant's interest diverge with respect to a material factual or legal issue or to a course of action.)

The minute that Mr. Gant told Messers Gore and Terry that Mr. Mathews was guilty, Mr. Housler was innocent, and that these disclosures were based on privileged communications from Mr. Mathews, and gave Miss Gore unrestricted access to Petitioner's case files, this constituted an unqualified waiver of attorney client privilege and instantly turned Messer Gant and Simmons into witnesses against their client. See *In re Grand Jury Proceedings October* 12, 1995, 78 F.3d 251, 254 (6th Cir. 1996.) *Pac. Pictures Corp. v. United States Dist. Court,* 102 U.S.P.Q.2d (BNA) 1390, 2012 U.S. App. LEXIS 7643 (9th Cir. Apr. 17, 2012)(Attorney waived attorney-client privilege by voluntarily disclosing privileged documents to federal government in response to subpoena solicited by attorney; and thereby foreclosing theory of selective waiver)

As a result they could not and did not function effectively as advocates on behalf of their client, and this is evidenced by their documented deficiencies during the June 1996 trial.

D. The T.C.C.A.s findings irrefutably demonstrate that there were multiple instances of deficient performance inherent in Messers Gant and Simmons representation at the June 1996 trial

As a matter of undisputed fact reflected in the state court record , there were multiple instances of deficient performance by trial counsel, found by both the trial court and the T.C.C.A.

The T.C.C.A. held:

> We previously held that the trial court's failure to instruct the jury on lesser-included offenses was harmless error and that trial counsel's failure to pursue instructions [while deficient under *Strickland*] did not result in prejudice, **[Appendix A (Pet. App. 34-36)**
>
> We also held that ... if the Defendant was absent when the trial court provided the jury with the supplemental jury instruction on criminal responsibility, the error was harmless and that any failure by trial counsel to secure the Defendant's presence did not result in prejudice. ***Id.*** This court determined that the cumulative effect of trial counsel's deficiencies during the trial did not result in prejudice....
>
> We conclude that the inclusion of the trial court's failure to provide an enhanced identification instruction in accordance with *Dyle* [and by necessity Trial Counsel's

failure to request the instruction] does not alter our conclusion that the Defendant is not entitled to relief when such errors are considered individually or cumulatively in light of the overwhelming evidence establishing the Defendant's guilt. **(id. 34-35)**

(ii) the cumulative errors of trial counsel, are not in dispute in the state Court record

The undisputed factual record clearly demonstrates that both the T.C.C.A. and the trial court have unequivocally identified multiple substantive U.S. Constitutional errors and corresponding instances of deficient performance of trial counsel at Mr. Mathews' 1996 trial; *to-wit*:

i. Mathews was denied his right to full jury charge when the court failed to give lesser included offense instructions. **Appendix E (Pet. App. at 154)** ("..We agree ... that the trial court should have instructed the jury on these lesser-included offenses..")

ii. Mathews was denied his right to give rebuttal arguments to the Judges *sua sponte* supplemental jury instruction that introduced a new prosecutorial theory the defense was

literally prevented from addressing during trial. ("..the trial court should have given Mr. Mathews' attorney's the opportunity to make this explicit argument to the jury...") **Appendix A (Pet. App. 22)**

iii. Mathews was denied his due process right to be present at every stage of the proceedings (".. any error associated with the Petitioner's purported absence from the court room .. was harmless.) **Appendix E (Pet. App. at 162)**

iv. Mathews was denied his right to have a *Dyle* instruction given to the jurors. ("... .. trial court should have given the *Dyle* instruction. However, this Court concludes the failure to give the instruction did not prejudice the Defendant..") **Appendix C (Pet. App. at 82)**

v. Mathews due process rights were violated by both the trial court and trial Counsel. ("...In addition to the inexcusable delay in the Petitioner's motion for new trial proceedings and the trial judge's and trial counsels' unethical behavior...") **Appendix E (Pet. App. at 144);**

vi. Mathews was denied his right to have proper and scientifically accurate Jury instructions given on Finger prints that didn't improperly invade the province of the jurors. **("....** the pattern instruction's language .... improperly intrude[d] upon the province of the jury...") **Appendix C (Pet. App. at 105)**

vii. The black denim jacket admitted lacked a sufficient indicia of reliability and should have been suppressed. ("... The Court concludes any error in admitting the jacket and the resulting forensic evidence was harmless...") **Appendix C (Pet. App. at 78)**

(i) An instance of deficient performance of trial counsel attributable to their Conflict of interest that was ignored by the T.C.C.A.; *to-wit:* Trial Counsel failed to put forth available evidence to credibly rebut Mathews' presence at the crime scene

Aside from the documented instances of deficient performance already found by the Post Conviction Court and the T.C.C.A. there was other instances of deficient performance wherein trial counsel Gant

failed to credibly rebut Appellant's presence at the crime scene by utilizing the exculpatory evidence available to the defense at the June 1996 trial to prove:

(1) the Black Denim ¾ length Jacket/coat introduced as Trial exhibit #9 was not Appellant Mathews' Jacket

(2) the clothing Mathews wore that evening had no trace evidence (i.e. blood) connecting him to the gang related homicides

One of the factual predicates of this instance of deficient performance was clearly established by former presiding trial Judge Gasaway himself who testified that Messers Gant and Simmons specifically told the him face to face, during the 1996 *ex parte* meeting:

> Gasaway. We know that the jacket that they found on the side of the road...that the state thinks was Mr. Mathew's jacket, it's not his jacket. It's a jacket that was on the side of the road, but it wasn't the jacket [Mr. Mathews owned]....
> **Appendix G (Pet. App. at 251,251)(p. 158; L 23-25; p. 159, L 1,2)**

A quintessential component of the state's case rested in large part on connecting Petitioner to this jacket because the State argued that it was definitive proof that Mr. Mathews either committed the murders personally or actively participated in their commission; in part, because it had the victim Kevin Campell's blood on it:

> Garrette: Now I want to talk a little bit about the...black coat. ....J.W. Hunt tells you it has been my experience that people throw things off the bridge....and they find this black coat.....That Saturday night, when the defendant got off to work and proceeded to change i[n]to layered clothing, he stood in front is of his roommate Carl Ward, and Patrick Cooper, ... [Appellant Mathews] ..said 'people, look at these clothes . This is the last time you are going to see them....the officers recovered the coat..." **Appendix I (Pet. App. at 280)(p. 10; L 7-25; p. 11. L 1)**
>
> DA Carney " ...What did that coat have on it[?] Courtney Mathews coat.....the substance of Kevin Cambell's life's blood was on that coat. And it got on that coat when a nine millimeter round was fired through his head. ...." **Appendix I (Pet. App. at 291)(p. 56; L 14-21)**

However, trial Counsel choose not to utilize the exculpatory evidence that was available during trial to credibly prove what they

themselves personally admitted to Judge Gasaway that they knew to be true; *to wit:* that the Black Denim Jacket introduced as trial exhibit #9 was not Petitioner Mathews' jacket. **Appendix G (Pet. App. at 251)**

Further demonstrating the effects of Messers Gant and Simmons' deficient performance attributable to their conflict of interest, during the May 2017 P.C. hearing Petitioner Mathews introduced the *Attorney Work Product Memorandum, Dated February 2nd, 1995* **Appendix J (Pet. App. at 294)** which clearly explained that there was clothing that witnesses reported Mr. Mathews had on that evening, were actually retrieved[3] from Appellant's former apartment, at 362 Ryder Ave. These clothing items which consisted of

> "....a black necktie with thin gray stripes, a black hooded jacket with a draw string belt, a pair of orange and green sweatpants

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[3] State witness Carl Ward testified that Appellant put on these very same articles of clothing the night of the offense, prior to leaving his residence; a Black/dark pair of denim Jeans, (Tr. Vol.XXXII;6-10-96; p.70;L. 7) a White dress shirt, Tie,[Id.;p. 71; L 3-5] with a green and orange Miami Hurricanes Nike type sweatsuit.(Id., p.128); see also testimony of Patrick Cooper(C.E. Vol.II;6-12-96; p.187; L 13-14);black pants(Id. p.188; L 20). *State v. Courtney Mathews,* CCA No. M2005-00843-CCA-R3-CD (Tenn. Crim. App. July 8th, 2008)

bearing the name chilly...with a matching orange and green Nike jacket..." **Appendix J (Pet. App. at 294)**

Furthermore, Counsel Gant failed to inform the jurors that the black denim "Major Damage jeans" that Appellant had on that evening were taken by the TBI and tested, and had no blood on them. See **Appendix K (Pet. App. at 295)** *Official Serology Report; Dated 06/07/94.*

Third-Chair Counsel Denise Banks[4] further verified on April 12th, 1996 –two months prior to the June 1996 trial, that the defense team had Appellant Mathews' clothes that from the evening in question-including the black denim jacket that was left in Petitioner's Apartment. **Appendix L (Pet. App. at 296)**

Appellant acknowledges of course, that proving the jacket was not his or that his clothes had no trace evidence (i.e. blood) on them,

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[4] Co -Counsel of record Denies Banks, appeared on behalf of Defendant Mathews during the June 19th, 1996 proceedings, **Appendix N (Pet. App. at 318)** However, two months prior to making her appearance Counsel Banks submitted yet another Defense memo highlighting the fact that the defense was in possession of Mr. Mathews's actual jacket and other clothing items that he had on the night of the murders. **Appendix L (Pet. App. at 296)**

would not have necessarily resulted in him being found actually innocent and acquitted of any and all charges -however, the defense at trial had nothing to do with arguing that Appellant Mathews was actually innocent of any and all degrees of culpability. **Appendix L Pet. App. at 308)(p. 43 L 6 - 16)**

Appellant testified in the lower court:

> The first consideration is the defense theory. Honestly speaking , based on the evidence vide that was presented at my 1996 trial no reasonable juror would have concluded that I was innocent of any and all culpability in that offense. Nor were they going to simply acquit me and find me innocent and let me go. so the defense didn't try to insult the juror's intelligent by arguing that I was innocent of any and all culpability.
>
> Out defense was that, A, the State failed to prove that I personally shot the victim, and two, that on the night in question I never acted with the requisite *mens reas* element of intent. That was inherent in our defense of a sufficiency of evidence the State's failure to prove it's case. **Appendix L Pet. App. at 303)(p. 24 L 11 - 25)**

The jacket and clothing described in the memo, were clearly dispositive of a material fact at issue; during trial *to wit:* whether or not Mr. Mathews was ever physically present in the restaurant actively

participating[5] in the offense as a criminally responsible party. **Appendix L (Pet. App. at 308)(p. 43 L 6 - 16)**

(iii) the preponderance of evidence clearly demonstrates that trial counsel's failure to introduce Petitioner's clothing from that evening constituted deficient performance, and this deficiency was caused by their inherent conflict

Despite Petitioner properly and squarely presenting this issue to both the T.C.C.A. and the post conviction Court, both courts have completely ignored and side stepped this issue. **APPENDIX O (Pet. App. at 420 -423)**. They have done this by choosing to not address in anyway [1] trial counsel's failure to introduce Petitioner's black coat or other articles of clothing retrieved from his residence; and [2] how these collective failures constituted deficient performance pres.**(id)**

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3 The jury decided that Appellant Mathews was guilty by way of vicarious liability not the actual gunman. Thus, Appellant's clothing not having any of the victims blood, would have been probative of the fact that Appellant, despite facilitating the crime, was never inside of the restaurant that evening participating in the offense as a criminally responsible party. **Appendix O (Pet. App. at 474)**

E. The T.C.C.A. concluded that this Court's Presumed prejudice standard applied only to the conflict of interest created by the post-trial waivers of privilege and all of the pre-trial waivers of privilege were irrelevant for the purposes of presumed prejudice or conflict of interest during the actual June 1996 trial itself

While none of these facts are refuted in the state Court record the T.C.C.A. concluded that *Cuyler's* presumed prejudice standard applied only to the conflict of interest created by the post-trial waivers of privilege and all of the pre-trial waivers of privilege were irrelevant in terms of: (a) whether there was a conflict of interest; and (b) to what extent the documented deficiencies/errors of trial counsel during the actual trial itself were subject to the presumed prejudice standard. **APPENDIX E (Pet. App. at 140)**

In explaining this rational the T.C.C.A. concluded that the cumulative trial errors of Messer's Gant and Simmons were subject to the *due process* harmless error analysis not *Cuyler's* presumed prejudice standard when it held:

> Finally, the Defendant argues that he is entitled to a new trial due to the prejudice accruing from the cumulative effect of the errors...."

> ..This court determined that the cumulative effect of trial counsel's deficiencies during the trial did not result in prejudice in light of the "overwhelming" evidence of the Defendant's guilt. *Id.* at *40.
>
> We conclude that .... the Defendant is not entitled to relief when such errors are considered individually or cumulatively in light of the overwhelming evidence establishing the Defendant's guilt. **Appendix A (Pet. App. at 34-35)**

VI. Reasons for Granting the Writ

It is against this backdrop that the crux of the issues are made plain; *to-wit:* all parties at the State court level and involved with the State appellate proceedings have agreed that Messers Gant and Simmons performed deficiently at the 1996 trial (i.e. they were found to have committed several errors which satisfied *Strickland's* first prong of deficiency) Therefore, the question being presented to this court is real simple: As a case of first impression does becoming a witness against their client due to a deliberate waiver of Attorney client privilege by a criminal defense attorney both pretrial and post trial, due to personal ethical burdens (i.e. a compulsion to help their client's co-defendant at the expense of their own clients interests)

create such divergent interests between said attorney and their client, as to rise to the level of an actual conflict of interest as defined in *Cuyler v. Sullivan*, 446 U.S. 335, 350, 64 L. Ed. 2d 333, 100 S. Ct. 1708 (1980).

If the answer to this question is yes would multiple trial errors attributable to the documented deficiencies of Counsel, during the actual trial itself, be properly reviewed under the presumed prejudice standard of *Cuyler* or more appropriately reviewed under the Due Process Clause in terms of (i) whether or not prejudice from cumulative errors rendered the criminal defense 'far less persuasive,' as held by this court in *Chambers v. Mississippi*, 410 U.S. 284, 294,(1973); and (ii) thereby had a 'substantial and injurious effect or influence' on the jury's verdict, as required by *Brecht v. Abrahamson*, 507 U.S. 619, 637, 638 n.9 (1993))?

This Honorable Court pursuant to S.Ct. Rule 10(c) should grant the instant writ because the T.C.C.A. has decided an important question of federal law that has not been, but should be, settled by this

Court. Additionally the T.C.C.A. has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Furthermore this Honorable Court pursuant to S.Ct. Rule 10(b) should grant the instant writ because the T.C.C.A "..has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;.." (id)

A. Case law on the scope of "actual conflict's of interests" stemming from divergent interests, as opposed to those stemming from multiple or serial representations, has never been squarely addressed or resolved by this Court

At the outset it must be plainly stated that this Court has never *expressly* limited *Cuyler* to conflicts arising from multiple or serial representations. Indeed, the only time this Court even considered the question of whether *Cuyler* is limited to a particular type of conflict, it concluded that the issue was "an open question." *Mickens v. Taylor,* 535 U.S. 162, 176; 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002).

Accordingly, to this day, the uncertainty remains: "The precise scope of the category of claims to which the *Cuyler* standard applies

has not been definitively stated by the Supreme Court." *O'Leary*, 806 F.2d at 1312.

While this Court has not ruled on the issue of whether *Cuyler* is limited to multiple-representation conflicts, it has voiced support for the more essential point that the ultimate question is whether any such conflict hindered the effective assistance of counsel at trial:

> This is not to suggest that one ethical duty is more or less important than another. The purpose of our *Holloway* and [*Cuyler*] exceptions from the ordinary requirements of *Strickland*, however, is not to enforce the Canons of Legal Ethics, but to apply needed prophylaxis in situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel.... Accordingly, we conclude that the proper standard by which to analyze conflict of interest claims, absent a timely objection, is the rule set out in *Cuyler*...." *Mickens*, 535 U.S. at 176

B. There is a split among the Circuit's and Many State Appellate Courts, with respect to whether or not *Cuyler's* presumed prejudice applies outside the context of multiple representations

The Supreme Court has not specifically addressed whether *Cuyler* applies to cases involving conflicts stemming from sources other than multiple representation. See *Illinois v. Washington*, 469

U.S. 1022, 1023, 83 L. Ed. 2d 367, 105 S. Ct. 442 (1984) (White, J., dissenting from denial of certiorari).

However, every circuit court facing the issue, has applied the rule of *Cuyler* to many types of conflicts of interest. In fact, the Seventh, Ninth, and Eleventh Circuits have applied the *Cuyler* framework to conflicts stemming from media rights contracts. See *United States v. Marrera,* 768 F.2d 201, 205-09 (7th Cir. 1985) (employing Cuyler framework to claim predicated on "conflict of interest between [the] lawyer's financial interest in proceeds from the movie rights and [defendant's] interest in acquittal"),; *Zamora v. Dugger,* 834 F.2d 956, 960 (11th Cir. 1987) (noting that "the standard developed in *Cuyler* has been applied to cases in which defendants argue that their lawyers were more interested in publicity than in obtaining an acquittal," and employing the *Cuyler* analysis); *United States v. Hearst,* 638 F.2d 1190, 1193 (9th Cir. 1980) (recognizing that the conflict in *Cuyler* was based on multiple representation, and observing that the case before it was "based on private financial interests" of the lawyer, but applying *Cuyler* because "these differences are

immaterial."), *Garcia v. Bunnell*, 33 F.3d 1193, 1198 n.4 (9th Cir. 1994) (applying the *Cuyler* standard to conflict created by attorney accepting job with prosecution office prior to trial, but noting that "it is not logically necessary that the approach of [Cuyler] also apply to conflicts between a defendant's and the attorney's own personal interests; however, we conclude that precedent so requires"); *Winkler v. Keane*, 7 F.3d 304, 307 (2d Cir. 1993) (applying *Cuyler* to conflict created by attorney working on contingency fee in criminal case) *United States v. Sayan*, 296 U.S. App. D.C. 319, 968 F.2d 55, 64-65 (D.C. Cir. 1992) (upholding application of *Cuyler's* adverse effect test to alleged conflict created by lawyer's fear of antagonizing judge); *United States v. Michaud*, 925 F.2d 37, 40 (1st Cir. 1991) (analyzing conflict of interest stemming from attorney's association with prosecuting IRS under *Cuyler* framework); *United States v. Horton*, 845 F.2d 1414, 1418-21 (7th Cir. 1988) (applying Cuyler to conflict generated by defense attorney's candidacy for U.S. Attorney); *United States v. Andrews*, 790 F.2d 803, 811 (10th Cir. 1986) (finding that Cuyler applies in situations involving "counsel's ability to represent his

client fairly, loyally or impartially"), cert. denied, 481 U.S. 1018, 95 L. Ed. 2d 505, 107 S. Ct. 1898 (1987); *Roach v. Martin*, 757 F.2d 1463, 1479 (4th Cir.) (applying *Cuyler* when alleged conflict of interest was rooted in fact that defense attorney was under investigation by state bar grievance committee), *Ware v. King,* 694 F.2d 89, 92 (5th Cir. 1982) (per curiam) (using *Cuyler* framework to analyze claim of conflict of interest stemming from separate civil and criminal lawsuits pending between defense counsel and prosecutor), cert. denied, 461 U.S. 930, 77 L. Ed. 2d 302, 103 S. Ct. 2092 (1983); *United States v. Knight*, 680 F.2d 470, 471 (6th Cir. 1982) (per curiam) (undertaking *Cuyler* analysis in evaluating claim of conflict of interest stemming from attorneys' knowledge that they were under investigation for stealing documents during trial)

C. To avoid erroneous deprivations of the right to counsel, this Court should clarify the "conflict of interest" standard under *Cuyler* that applies when an attorney, due to an ethical burden, waives attorney client privilege and becomes a *de facto* witness against their own client

It is well-settled that "where a constitutional right to counsel exists . . . there is a correlative right to representation that is free from conflict of interest." *Wood*, 450 U.S. at 271; see also Cuyler, 446 U.S. at 335; *Holloway v. Arkansas*, 435 U.S. 475, 55 L. Ed. 2d 426, 98 S. Ct. 1173 (1978).

As stated earlier this Honorable Court revisited *Cuyler* in *Wood v. Georgia*, 450 U.S. 261, 67 L. Ed. 2d 220, 101 S. Ct. 1097 (1981), and it applied its framework to a conflict created by a third-party's payment of counsel. After examining the record, the Court noted that the defendants' employer had paid for the defendants' legal assistance, for the defendants' bond fees, and for some of the other fines that the defendants incurred, but it had failed to pay the fines which resulted in the defendants' incarceration. *Wood*, 450 U.S. at 267.

D. The questions presented are exceptionally important and warrant review in this case because

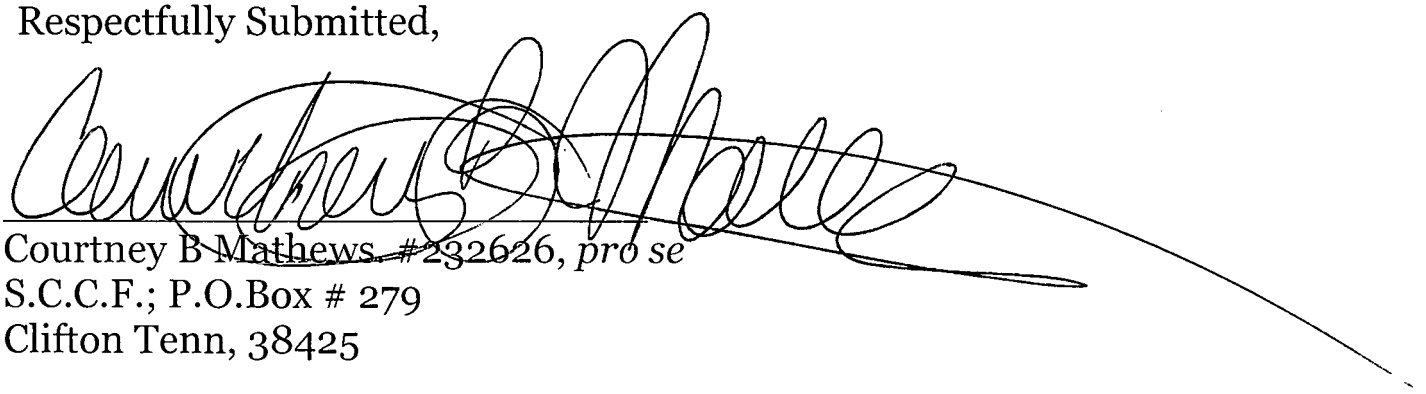
the T.C.C.A. 's opinion, *ipso facto,* establishes an irrational precedent which holds that presumed prejudice applies to conflict of interests caused by an attorney's post trial waivers of privilege but not to ones caused by pretrial waivers thereof

If this Court concludes, as the T.C.C.A. did, that *Cuyler's* presumed prejudice does not apply to the several documented instances of deficient performance of trial counsel, then we end up with a situation wherein a defense Counsel's pre trial waivers of privilege fails to creates a conflict that's subject to presumed prejudice, but the same waiver's of privilege post trial do in fact create a conflict of interest that is subject to presumed prejudice standard.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,



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