

No. 17-6373

IN THE
Supreme Court of the United States

BRETT WILLIAMSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The Tenth Circuit

Petitioner's Reply Brief

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PETITIONER'S REPLY BRIEF

This Court should grant Mr. Williamson's petition to resolve whether the automatic reversal rule in *Holloway v. Arkansas*, 435 U.S. 475 (1978), applies where a defendant objects in the district court to a conflict of interest that does not involve counsel's joint representation of codefendants. This case is a particularly good vehicle to address this issue, as Mr. Williamson timely objected to his representation by his appointed attorney who co-parented a child with the prosecuting attorney. The district court never addressed the conflict, and Mr. Williamson was forced to represent himself at trial. After guilty verdicts, he received a life sentence.

This Court should further grant Mr. Williamson's petition to resolve whether the Sixth Amendment requires a district court to readmonish, after trial, a pro se criminal defendant of his right to counsel prior to sentencing. This case highlights the importance of this issue. Mr. Williamson sought counsel for sentencing, to no avail, and without the district court ever advising him of his right to have appointed counsel at sentencing. And federal sentencing is complex. A pro se defendant should not have to wade through it without assistance. Without counsel, Mr. Williamson was sentenced to serve the rest of his natural life in prison. If ever a case highlighted the need for readmonishment, this is it.

I. This Court Should Grant This Petition To Resolve Whether *Holloway's* Automatic-Reversal Rule Applies to Preserved Conflicts Of Interests Outside of the Joint-Representation Context.

The government argues that this Court need not take up the question of how far *Holloway's* automatic-reversal rule extends because, according to the government, this Court has already restricted *Holloway* to its facts in *Mickens v. Taylor*, 535 U.S.

162 (2002). BIO 13-16. The government further argues that this Court's review is unnecessary because the Tenth Circuit held that Mr. Williamson's conflict-of-interest claim failed under the standards of either *Strickland v. Washington*, 466 U.S. 668 (1984), or *Cuyler v. Sullivan*, 446 U.S. 335 (1980). BIO 17. In making these arguments, the government misapprehends crucial differences between *Holloway* on the one hand, and *Strickland*, *Sullivan*, and *Mickens* on the other. The government's arguments themselves thus illustrate the need for this Court to step in and bring clarity to this important area of Sixth Amendment law.

Of all four of these cases, *Holloway* was the only one in which (1) a conflict of interest (2) was raised on direct appeal (3) after having been timely raised before the trial judge by counsel himself, who, as an officer of the court, stated that he faced an actual conflict of interest that impaired his ability to represent the defendant. *Sullivan* and *Mickens*, in contrast, were cases in which (1) a conflict of interest (2) was raised in collateral proceedings (3) having never been raised before the trial judge by counsel. *Sullivan*, 446 U.S. at 348 ("In order to establish a violation of the Sixth Amendment, a defendant *who raised no objection at trial* must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.") (emphasis added); *Mickens*, 535 U.S. at 172-73 (describing *Sullivan* adverse-effect standard as applying "when the judge is not aware of the conflict"; declining to apply automatic-reversal rule where counsel never claimed at trial to be operating under a conflict). And *Strickland* did not involve or purport to rule on the standard for reviewing conflicts of interest (whether raised before the trial judge or not). See 466 U.S. at 693

(“*Conflict of interests claims aside*, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice.”) (emphasis added). To sum up:

Case	Posture in which standard applies	Showing required for reversal
<i>Holloway v. Arkansas</i> , 435 U.S. 475 (1978)	On direct appeal, challenging the trial judge’s failure either to appoint separate counsel or to ascertain the risk created by counsel’s joint representation of codefendants—an issue timely raised by trial counsel (an officer of the court)	Prejudice is presumed and reversal is automatic
<i>Cuyler v. Sullivan</i> , 446 U.S. 335 (1980)	In a federal habeas proceeding attacking a state conviction, challenging counsel’s joint representation of codefendants—an issue never raised by trial counsel	Counsel (1) actively represented conflicting interests that (2) adversely affected counsel’s performance
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	In motions for new trial, on direct appeal, or in collateral proceedings raising claims of actual ineffective assistance of counsel—other than a conflict of interest	Counsel’s performance (1) was deficient, and (2) prejudiced the defendant such that there is a reasonable probability that, but for counsel’s errors, the result would have been different
<i>Mickens v. Taylor</i> , 535 U.S. 162 (2002)	In a federal habeas proceeding attacking a state conviction, challenging counsel’s former representation of the victim—an issue never raised by trial counsel	Counsel (1) actively represented conflicting interests that (2) adversely affected counsel’s performance

The question remains what to make of this Court’s pronouncement in *Mickens* that “*Holloway* thus creates 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. This statement came at the end of a paragraph describing the circumstances of *Holloway*, in a section summarizing this Court’s conflict-of-counsel cases to date. *Id.* The statement simply describes the limits of what *Holloway* itself actually held. It does not go further and conclude that *Holloway*’s automatic reversal rule will never be applicable where defense counsel is forced to represent the defendant over a timely objection that he faces a different sort of conflict. That question was not presented in *Mickens*, where defense counsel did not assert any conflict to the trial judge. But that question is presented here, and this Court should take this opportunity to answer it.

II. This Court Should Grant This Petition To Resolve Whether District Courts Must Readmonish Pro Se Criminal Defendants Of Their Constitutional Right To Counsel Prior To Sentencing.

The government claims that there is no conflict in the Circuits over whether (or when) a district court must readmonish a pro se criminal defendant of his right to counsel prior to sentencing. BIO 18, 20-23. But that position is an untenable reading of precedent. The Third Circuit has plainly adopted a per se rule that district courts need never readmonish a pro se defendant of his right to counsel prior to sentencing. *United States v. Washington*, 341 F.2d 277, 286 (3d Cir. 1965) (“it has been held that waiver of counsel at the time of arraignment is an implied waiver of that assistance during the sentencing proceeding”). The government’s suggestion to the contrary is incorrect. *See, e.g., U.S. ex rel. Mazewski v. Myers*, 359 F.2d 940, 949 (3d Cir. 1965) (Freedman, J., dissenting) (disagreeing with “the ultimate premise of the Court’s

conclusion . . . that petitioner’s waiver of counsel at his trial carried over automatically to the sentencing proceeding”).

Additionally, the government is incorrect that the Tenth Circuit below did not adopt this identical per se no-readmonishment rule. In a footnote, without saying anything further, the Tenth Circuit rejected Mr. Williamson’s readmonishment rule as “unworkable.” Pet. App. 35a. n.9. In doing so, the Tenth Circuit cited its prior decision in *United States v. Vann*, 776 F.3d 746, 764 (10th Cir. 2015). There, the Tenth Circuit commented:

Vann points to no case holding that an earlier, in-depth *Faretta* hearing cannot satisfy the constitutional standard when a defendant later waives his right to counsel. In the same vein, we have found nothing authoritative that requires a separate hearing of equal depth each time the option of proceeding pro se arises. Such a rule would be unworkable.

Id.

The government somehow reads *Vann* as declaring something less than a per se rule because *Vann* noted that “the district court had correctly assessed ‘the totality of the circumstances . . . in concluding that Vann’s waiver was knowing and intelligent.” BIO 23. But that reading of *Vann* is nonsensical. *Vann* holds that an earlier *Faretta*¹ colloquy negates the need for readmonishment so long as that earlier colloquy was *sufficient*. 776 F.3d at 764. If the earlier colloquy was sufficient, says *Vann*, a readmonishment is unnecessary. *Id.* It is this per se no-readmonishment rule, which the Tenth Circuit reaffirmed in this case, Pet. App. 35a. n.9, that conflicts with published decisions from at least two other courts of appeals, Pet. 20 (citing

¹ *Faretta v. California*, 422 U.S. 806 (1975).

cases from the Seventh and Ninth Circuits holding that readmonishment is necessary despite an earlier (sufficient) *Faretta* inquiry where circumstances have sufficiently changed).

The government also claims, incorrectly, that Mr. Williamson did not request counsel prior to sentencing. BIO 20. But nine months before sentencing, Mr. Williamson made clear his wish for appointed counsel at sentencing. R1.121 at 7 (“Judge Vratil is a party to this conspiracy against the defendant and refuses to appoint him new counsel.”). Then, at the beginning of the sentencing hearing, Mr. Williamson again objected to proceeding pro se. R2.192 at 73 (objecting that the district court “still refused to give me counsel”). Despite all of this, the district court never readmonished Mr. Williamson of his right to counsel (and certainly never considered appointing counsel for him at sentencing). A pro se Mr. Williamson was then sentenced to serve the rest of his natural life in prison. Pet. App. 10a.

The government also muddles our claim when it states that we do not seek a per se rule requiring readmonishment where the defendant seeks counsel prior to sentencing. BIO 23. The section of the petition cited by the government merely notes our acknowledgment that not all stages of a criminal proceeding require readmonishment. Pet. 22. But we immediately explained thereafter why sentencing, in light of its complexities, is the exception to this rule. Pet. 23-24. Additionally, this portion of the government’s brief is based on the same false premise explored above – that Mr. Williamson did not, in fact, ask for an attorney prior to sentencing (he did, R1.121 at 7; R2.192 at 73).

Finally, the government claims that this case would be a poor vehicle to address the question presented because, even under a changed-circumstances test, Mr. Williamson would lose. BIO 24-26. But this is not a valid reason to deny certiorari in this case for two reasons. First, we have asked for a per se rule of readmonishment, not a change-circumstances test. Pet. 22-24. And second, assuming that this Court adopted a changed-circumstances test, because the Tenth Circuit never applied that test below, the proper remedy would be to remand to the Tenth Circuit for application of that test.

Alternatively, if this Court were to adopt a changed-circumstances test (rather than a per se rule of readmonishment, as we suggest), and then apply it to the facts of this case (rather than remand to the Tenth Circuit), Mr. Williamson would be entitled to relief. Pet. 25.² As an initial matter, the government's claim that we have somehow waived review under such a standard is meritless for two reasons. BIO 25.

First, the government below never claimed that we waived the issue by failing to raise it, but instead addressed the claim on its merits (although perfunctorily and in a footnote). Gov't Br. 57 n.18. The Tenth Circuit follows the well-established rule that, by failing to argue waiver, the government "waives the waiver." *See, e.g., United States v. Reider*, 103 F.3d 99, 103 n.1 (10th Cir. 1996); *United States v. Heckenliable*, 446 F.3d 1048, 1049 n.3 (10th Cir. 2006); *United States v. White*, 584

² In a footnote, the government asserts that our second claim "assumes that [Mr. Williamson's] counsel was conflict-free." BIO 24 n.1. But we have no idea why the government thinks that assumption exists. Our first claim is premised on a valid conflict of interest. Moreover, Mr. Williamson was pro se at this point in the proceedings, so it makes little sense for the government to speak in terms of Mr. Williamson's counsel.

F.3d 935, 947 (10th Cir. 2009); *United States v. De Vaughn*, 694 F.3d 1141, 1155 (10th Cir. 2012); *United States v. Ray*, 704 F.3d 1307, 1316 (10th Cir. 2013). As do other courts of appeals. *See, e.g., United States v. Gonyer*, 761 F.3d 157, 166 n.4 (1st Cir. 2014); *United States v. Carthorne*, 726 F.3d 503, 509 n.5 (4th Cir. 2013); *United States v. Boudreau*, 564 F.3d 431, 435 (6th Cir. 2009); *United States v. Garcia-Lopez*, 309 F.3d 1121, 1123 (9th Cir. 2002); *United States v. Archambault*, 62 F.3d 995, 998 (7th Cir. 1995); *United States v. Quiroz*, 22 F.3d 489, 490-491 (2d Cir. 1994) (per curiam); *United States v. Menesses*, 962 F.2d 420, 425-26 (5th Cir. 1992); *United States v. Beckham*, 968 F.2d 47, 54 n.5 (D.C. Cir. 1992).

Second, after the government argued that the Tenth Circuit should affirm “[b]ecause there was no substantial change in circumstances,” Gov’t Br. 57 n.18, we had every right to reply to this argument in our reply brief. Our reply did not “raise a new issue,” as Tenth Circuit precedent prohibits, *see, e.g., White v. Chafin*, 862 F.3d 1065, 1067 (10th Cir. 2017), but instead replied to the government’s response to an issue that we properly raised in our opening brief. That is, after all, the function of a reply brief. Fed.R.App.P. 28(c) (“The appellant may file a brief in reply to the appellee’s brief.”). To hold such an argument “waived” would be to render useless any reply brief; the appellant would be left to regurgitate only those arguments made in the opening brief.

On the merits, Mr. Williamson’s sentencing took place almost one year after he waived his right to counsel at trial. During that time period, he made clear to the district court that he wanted counsel at sentencing, but the district court never

addressed the request. Mr. Williamson was then faced with representing himself at an entirely different stage of the proceedings (and one the district court obviously did not address during the initial pre-trial colloquy), the result of which was a sentence of life imprisonment. Pet. 25. On this record, even assuming this Court adopts something less than a per se rule of readmonishment, the district court should have readmonished (or, more accurately, admonished) Mr. Williamson of his right to counsel at sentencing.

Respectfully submitted,

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