No.

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES DALE HOLCOMBE,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Petition for Writ of Certiorari
to the Florida Fifth District Court of Appeal

PETITION FOR WRIT OF CERTIORARI

MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227
Email: ufferman@uffermanlaw.com

COUNSEL FOR THE PETITIONER

A. QUESTIONS PRESENTED FOR REVIEW

1. Whether a criminal defendant establishes an “actual” conflict of interest that adversely affects counsel’s representation when the attorney engages in “joint and dual” representation – i.e., simultaneously representing *both* the defendant *and* a key prosecution witness during a trial.

2. Whether the “presumed prejudice” conflict of interest standard applies when the prosecutor (rather than defense counsel) puts the trial judge on notice at the beginning of a trial of defense counsel’s conflict of interest – a conflict which is described by the prosecutor as “not waiveable” – and the judge thereafter fails to inquire into the nature and scope of the conflict.

B. PARTIES INVOLVED

The parties involved are identified in the style of the case.

C. TABLE OF CONTENTS AND TABLE OF CITED AUTHORITIES

1. TABLE OF CONTENTS

A. QUESTIONS PRESENTED FOR REVIEW . i

B. PARTIES INVOLVED ii

C. TABLE OF CONTENTS AND TABLE OF AUTHORITIES iii

1. Table of Contents iii

2. Table of Cited Authorities v

D. CITATION TO OPINION BELOW 1

E. BASIS FOR JURISDICTION 1

F. CONSTITUTIONAL PROVISION INVOLVED 2

G. STATEMENT OF THE CASE 2

H. REASONS FOR GRANTING THE WRIT . . 11

1 There is a split of authority as to whether an attorney's "joint and dual" representation amounts to an "actual" conflict of interest that adversely affects counsel's representation. 11

2. The questions presented are important 28

I. CONCLUSION 35

2. TABLE OF CITED AUTHORITIES

a. Cases

Cates v. Superintendent,
981 F.2d 949 (7th Cir.1992) 24

Cuyler v. Sullivan, 446 U.S. 335 (1980) 15-18

Hoffman v. Leeke,
903 F.2d 280 (4th Cir. 1990) 25

Holcombe v. State,
312 So. 3d 132 (Fla. 5th DCA 2020) 1

Holloway v. Arkansas,
435 U.S. 475 (1978) . . . . *passim*

Jalowiec v. Bradshaw,
657 F.3d 293 (6th Cir. 2011) 20

McFarland v. Yukins,
356 F.3d 688 (6th Cir. 2004) 19-20

Mickens v. Taylor,
535 U.S. 162 (2002) . . . . *passim*

People v. Solomon,
980 N.E.2d 505 (N.Y. 2012) 21-23, 27-28

Porter v. Singletary,
14 F.3d 554 (11th Cir. 1994) 26-27

Ross v. Heyne, 638 F.2d 979 (7th Cir. 1980) 24

Ruffin v. Kemp,
767 F.2d 748 (11th Cir. 1985) 24-25

Selsor v. Kaiser, 81 F.3d 1492 (10th Cir. 1996) . . . 18

Strickland v. Washington,
466 U.S. 668 (1984) 13, 19

Thomas v. State,
551 S.E.2d 254 (S.C. 2001) 24, 26, 33

United States v. Alvarez,
137 F.3d 1249 (10th Cir. 1998) 12-13, 18

United States v. Cronic, 466 U.S. 648 (1984) 13

United States v. Williamson,
859 F.3d 843 (10th Cir. 2017) 17-19

Wood v. Georgia, 450 U.S. 261 (1981) 11

b. Statutes

28 U.S.C. § 1257 1

c. Other

Fed. R. Crim. P. 44(c) 20

U.S. Const. amend. VI . . . . *passim*

Wayne R. LaFave, et. al, 3 Crim. Proc.
(4th ed. 2016 update) 12, 14

The Petitioner, JAMES DALE HOLCOMBE, requests that the Court issue its writ of certiorari to review the judgment of the Florida Fifth District Court of Appeal entered in this case on September 14, 2020 (A-5)[1] (review denied by the Florida Supreme Court on February 1, 2021 (A-3)).

D. CITATION TO OPINION BELOW

Holcombe v. State, 312 So. 3d 132 (Fla. 5th DCA 2020).

E. BASIS FOR JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257 to review the final judgment of the Florida Fifth District Court of Appeal.

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[1] References to the appendix to this petition will be made by the designation "A" followed by the appropriate page number.

F. CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides that a criminal defendant shall have the right to "the Assistance of Counsel for his defence."

G. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

The Petitioner was convicted – following a jury trial in August of 2018 – of RICO and conspiracy to commit RICO. The record establishes that after the Petitioner was charged in this case, the Petitioner's attorneys agreed to also represent two codefendants: William Hooper and Matthew Angell. During a pretrial hearing on January 8, 2018, the trial court addressed all three defendants and questioned them about the potential conflict of interest in having the same attorney/law firm represent all of them.

However, during the inquiry, the trial court never advised the defendants of their right to retain/obtain separate attorneys. During a subsequent pretrial hearing on May 17, 2018, the trial court discussed with the defendants the possibility of resolving the case pursuant to an open plea. Then, during a pretrial hearing on July 26, 2018, it was announced that codefendants Hooper and Angell would not be proceeding to trial because they had entered pleas and the following was stated on the record:

> THE COURT: All right. Now, the other two codefendants pled, didn't they?
>
> MR. DELGADO [defense counsel]: Yes.
>
> THE COURT: Are they testifying?
>
> MS. SAMMON [the prosecutor]: I haven't decided.
>
> THE COURT: But you've worked that out with him?

MR. DELGADO: They took the depos.

MS. SAMMON: They did. Yes.

THE COURT: Oh, good. Good. All right. Good deal. . . .

(A-30-31).

At the beginning of the August 2018 trial, the following occurred:

THE COURT: All right. Good deal. And then what –

Okay. So I think the State is still concerned about any potential possible conflict –

MS. SAMMON: Yes, Your Honor.

THE COURT: – with the other two fellas?

MS. SAMMON: Yes, Your Honor.

Two of the co-defendants also represented by Mr. Delgado and his firm in this case are testifying on behalf of the State.

And so the issue is Mr. Delgado, or his co-counsel, cross examining their current client in representation of their

current clients on trial in this case.

THE COURT: But how are – and is that Hooper and Angell?

MS. SAMMON: Matthew Angell, yes, Your Honor.

THE COURT: How are they – are they – is it to their detriment? I mean, they've already entered a plea. They just haven't been sentenced yet.

MS. SAMMON: Yes, Your Honor. *Your Honor put off sentencing until after both defendants testified at trial and basically determine whether or not they were cooperative and testified truthfully for the State.*

Therefore, it's in their best interest to cooperate and testify truthfully in order to benefit from the plea discussions that the defendants and their counsel had with Your Honor during the time of their plea.

Their testimony will provide evidence for the State against the defendants. And, therefore, in order to represent his clients, Dale Holcombe and James Holcombe, Mr. Delgado will have to, in the State's position, cross-examine his current clients that he's representing which would be Matthew Angell and

William Hooper.

. . . .

. . . *The circumstances have now changed.* Two of the defendants have entered a plea agreement – or has entered their pleas open pleas to the bench and are now witnesses for the State.

Circumstances now are much different than they were [when the trial court conducted the previous inquiry with the defendants regarding the conflict of interest]. There is a greater conflict that exists, *one that the State's position is not waiveable.*

THE COURT: Well, I disagree. I think it can be waived. I think ultimately defendants can – as long as they're adequately advised, which I think they were – all four were adequately advised, they were told exactly what would happen, and they waived it.

And I do remember looking at the waiver. And I remember having this issue when I was a private attorney – not with four of them, but two – where, you know, theoretically they could be testifying against each other. They both wanted to waive it, and we put it in writing. And we made it and had the

> judge review it.
>
> So I found that the waiver was valid. It was entered into freely, voluntarily, knowingly, intelligently, with full advice of the consequences.
>
> . . . .
>
> Okay. So I find there's no conflict. I accepted the waiver previously somewhere along the line. I discussed it the other day with Hooper and Angell when they were here in front of me for sentencing, and I continued the sentencing, so I'm ready to go.

(A-32-36). After making this ruling, the lead defense attorney suggested that he could withdraw from representing Messrs. Hooper and Angell, but the trial court denied the request:

> MR. DELGADO: And, Judge and what I can do is if – and I don't know Mr. – we'll get to the two witnesses in question today. I mean, I can withdraw from their representation and have a public defender or somebody appointed. I think it would have to be conflict counsel.

> THE COURT: I'm not going to do that.

(A-37). Ultimately, Messrs. Hooper and Angell both testified at trial as witnesses for the prosecution, and Mr. Delgado cross-examined both witnesses (i.e., at the time that Mr. Delgado cross-examined these two State witnesses, he was both counsel for the Petitioner and counsel for the two witnesses). (A-38-43).

On direct appeal, the Petitioner (represented by new and conflict-free counsel) argued that his trial attorneys had an "actual conflict of interest" at trial. In its opinion, the Florida Fifth District Court of Appeal confirmed the facts set forth above:

> Ultimately, the State charged Appellant with racketeering and conspiracy to engage in a pattern of racketeering. In contrast, Angell and Hooper's charges consisted of multiple counts of dealing in stolen property.
>
> Two attorneys from the same firm were retained to represent Appellant,

Angell, and Hooper. At a pretrial hearing, the trial court addressed the possible conflict of interest stemming from the joint representation of these individuals. The trial court explained to them some of the risks associated with joint representation *but never advised them of the right to obtain separate attorneys.*

Following this hearing, Angell and Hooper entered open guilty pleas to the charges against them. The trial court declined to sentence them until after Appellant's trial.

Prior to the selection of the jury for Appellant's trial, the prosecutor raised the conflict issue in light of Angell and Hooper's pleas. The prosecutor asserted that, in her view, the conflict was now non-waivable. Disagreeing with the prosecutor's position, the trial court concluded that any conflict had already been properly waived.

During the trial, the State called numerous witnesses – including Angell and Hooper – who testified about their interactions with the customers, Appellant's role in the business, how often Appellant was present at the business, and the policies enacted by Appellant. Like other State witnesses, Angell and Hooper were cross-examined by defense counsel. Ultimately, the jury

> found Appellant guilty as charged on both counts, and the trial court sentenced him to a total of ten years in prison.

(A-7-9) (emphasis added). However, the appellate court rejected the Petitioner's conflict of interest argument, concluding that simultaneous representation of a defendant and a State's witness "do[es] not, without more, constitute an actual conflict for Sixth Amendment purposes." (A-12) (citation omitted).

H. REASONS FOR GRANTING THE WRIT

1. There is a split of authority as to whether an attorney's "joint and dual" representation amounts to an "actual" conflict of interest that adversely affects counsel's representation.

a. This Court's conflict of interest jurisprudence.

The Sixth Amendment's guarantee of the right to counsel includes the "right to representation that is free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271 (1981). A conflict of interest is "a division of loyalties that affected counsel's performance." *Mickens v. Taylor*, 535 U.S. 162, 172 n.5 (2002).

A typical potential conflict can arise from joint or multiple representation situations when more than one codefendant is represented by the same attorney. Multiple representation conflicts may arise at any

point in the criminal process, from the plea bargaining stage to sentencing, even if the codefendants' interests initially appear to converge. *See* Wayne R. LaFave, et. al, 3 Crim. Proc. § 11.9(a) (4th ed. 2016 update). Other types of conflicts can arise from an attorney's relationship with other clients, victims, or the prosecution. And although all of the above situations give rise to a "potential" conflict of interest, that potential will only be converted to an "actual" conflict of interest if, over the course of litigation, the defendant's interests actually clash with his attorney's interests. *See id.* This Court has concluded that an actual conflict of interest therefore means a "conflict that affected counsel's performance – as opposed to a mere theoretical division of loyalties." *Mickens*, 535 U.S. at 171. In other words, an actual conflict exists when "counsel [is] forced to make choices advancing

other interests to the detriment of his client." *United States v. Alvarez*, 137 F.3d 1249, 1252 (10th Cir. 1998).

An actual conflict can support an ineffective assistance of counsel claim where the conflict prejudiced the defendant's representation. *See Strickland v. Washington*, 466 U.S. 668, 687-688, 694 (1984). Generally, a defendant must demonstrate prejudice flowing from the conflict, but in some circumstances, a court will presume prejudice when the conflict amounts to the complete denial of counsel. *See id.* at 692; *United States v. Cronic*, 466 U.S. 648, 658-660 (1984).

In a series of cases beginning with *Holloway v. Arkansas*, 435 U.S. 475 (1978), the Court has applied the "presumed prejudice" rule for conflicts of interest in multiple representation cases. In *Holloway*, the Court established that whenever a trial court improperly

requires counsel to represent multiple codefendants over counsel's timely objection, reviewing courts will apply an "automatic reversal" rule. *Id.* at 476-491. The Court explained that while "joint representation [ ] is not *per se* violative of constitutional guarantees of effective assistance," defendants are entitled to representation free of a conflict of interest. *Id.* at 482. Thus, a court has a "duty to inquire" into a potential joint representation conflict of interest when defense counsel informs the court of the alleged conflict prior to trial, and "whenever a trial court improperly requires joint representation over timely objection reversal is automatic." *Id.* at 488. *See also* LaFave, *supra*, at § 11.9(b).

Two years later, however, the Court declined to apply the automatic reversal rule when the defendant did not raise the conflict of interest prior to trial. In

Cuyler v. Sullivan, 446 U.S. 335 (1980), the Court distinguished *Holloway*, noting that trial courts necessarily rely on the judgment of defense counsel to bring these matters to their attention, and that counsel "is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial." *Id.* at 347. Therefore, "[u]nless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry." *Id.* (quoting *Holloway*, 435 U.S. at 485). Stated another way, absent a credible indication of an actual conflict of interest before trial, a trial court's duty to inquire is limited – prejudice will not be presumed, and the automatic reversal rule will not apply.

Finally, in *Mickens*, the Court considered a conflict of interest raised on habeas review. Mickens's

lead defense counsel had been representing the juvenile victim on unrelated charges when he was allegedly murdered by Mickens. The juvenile court judge who dismissed the pending charges against the victim upon the victim's death then appointed the same defense counsel to represent Mickens on the murder charge. Counsel did not disclose his prior representation, and Mickens only discovered the alleged conflict when a clerk mistakenly produced the victim's file to Mickens's federal habeas counsel. The Court clarified its previous holdings that a violation of *Holloway's* duty to inquire required automatic reversal. The Court also held that if the defendant did not raise a timely objection to the conflict (as in *Cuyler*), the defendant must prove that his attorney was laboring under an actual conflict of interest for the court to reverse his conviction. *See id.* at 170-174. The Court

rejected the defendant's request to extend the automatic reversal rule to cases in which the trial court was unaware of a potential conflict, stating that such a position "makes little policy sense" because a judge's awareness of a potential conflict neither makes it more likely that counsel's performance will be affected by the conflict nor makes it more difficult for a reviewing court to determine if counsel's performance was negatively impacted by the conflict. *Id.* at 172-174. Nor does the "vague, unspecified possibility of conflict" trigger a duty to inquire absent special circumstances. Ultimately, the Court concluded that "automatic reversal [was not] an appropriate means of enforcing [*Cuyler's*] mandate of inquiry." *Id.* at 173.

As explained by the Tenth Circuit Court of Appeals in *United States v. Williamson*, 859 F.3d 843, 853 (10th Cir. 2017), when read together, this Court's

decisions in *Holloway*, *Cuyler*, and *Mickens* establish a bifurcated standard for addressing conflict of interest claims in the multiple representation context:

> First, if the defendant objects to the alleged conflict prior to trial, prejudice is presumed if the trial court failed to inquire into the nature and scope of the conflict and required the defendant to proceed with the same attorney. In such instances, reversal is automatic. *See Holloway*, 435 U.S. at 484; *Selsor v. Kaiser*, 81 F.3d 1492, 1500, 1504, 1506 (10th Cir. 1996) (applying *Holloway* and holding automatic reversal was warranted because the district court did not inquire into the timely objection to the multiple representation).
>
> But if the defendant does not object to the alleged conflict at trial, he must demonstrate on appeal that an actual conflict adversely affected his representation. Only if the defendant's demonstration is sufficient is prejudice presumed. *See Cuyler*, 446 U.S. at 348-349; *see also Alvarez*, 137 F.3d at 1251. In this context, the defendant has the burden to show specific facts to support his allegation of an actual conflict adverse to his interests. If the defendant's demonstration is insufficient,

> then traditional *Strickland* review will apply: the defendant must establish his counsel performed deficiently and that performance affected the outcome of trial. *Strickland*, 466 U.S. at 687-688, 694.

(One citation omitted).

b. The Court should resolve the following question for which the courts in this country are split: whether a criminal defendant establishes an "actual" conflict of interest that adversely affects counsel's representation when the attorney engages in "joint and dual" representation – i.e., simultaneously representing *both* the defendant *and* a key prosecution witness during a trial.

The courts of this country have issued conflicting decisions regarding whether "joint and dual" representation[2] – i.e., simultaneously representing *both*

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[2] While the terms used to describe a lawyer's representation of two or more clients under circumstances alleged to give rise to a conflict of interest are often used interchangeably by courts, the Sixth Circuit Court of Appeals shed some light on the distinct meanings of the terms in *McFarland v. Yukins*: "joint and dual representation refer to simultaneous representation occurring in the same proceeding, while multiple representation refers to simultaneous representation in

the defendant *and* a key prosecution witness during a trial[3] – amounts to an "actual" conflict of interest that adversely affects counsel's representation. The Florida Fifth District Court of Appeal falls on one side of the split. In its decision below, the state appellate court held:

> Appellant merely asserts that there was an "actual conflict" because defense

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separate proceedings." 356 F.3d 688, 701 (6th Cir. 2004). *Cf. Jalowiec v. Bradshaw*, 657 F.3d 293, 315 (6th Cir. 2011) (defining successive representation as a situation "where defense counsel has previously represented a codefendant or trial witness," while concurrent representation "occurs where a single attorney simultaneously represents two or more codefendants").

[3] The facts of the instant case are distinguishable from *Mickens,* which involved *prior* representation – not concurrent representation. *See Mickens*, 535 U.S. at 175 ("Thus, the Federal Rules of Criminal Procedure treat concurrent representation and prior representation differently, requiring a trial court to inquire into the likelihood of conflict whenever jointly charged defendants are represented by a single attorney (Rule 44(c)), but not when counsel previously represented another defendant in a substantially related matter, even where the trial court is aware of the prior representation.").

> counsel represented Appellant as well as Angell and Hooper during the trial. He emphasizes that defense counsel cross-examined Angell and Hooper, whom counsel still represented. *However, such facts do not, without more, constitute an actual conflict for Sixth Amendment purposes.*

(Emphasis added).

On the other side of the split are the decisions from both state and federal courts holding that the simultaneous representation of both a defendant and a key prosecution witness during a trial amounts to an "actual" conflict of interest. For example, in *People v. Solomon*, 980 N.E.2d 505, 508-509 (N.Y. 2012), the Court of Appeals of New York held:

> There was an actual conflict of interest between defendant and Kuebler here. Kuebler testified that defendant had confessed to raping his daughter. It was very much in defendant's interest either to discredit that testimony or to show that the confession had been obtained by some unlawful or unfair

means; Kuebler's interest was the opposite. . . .

The People argue, and the Appellate Division held, that reversal is not necessary because defendant has not shown that the conflict "affected the conduct of the defense." Nothing in the record, the People say, proves that counsel was less effective in cross-examining Kuebler than she would have been had Kuebler not been her client. We assume that this is correct; it seems from the transcript that the cross-examination was competently performed. Defendant now suggests a number of lines of inquiry that counsel might have pursued, but did not. Such after-the-fact suggestions, however, can probably be made about almost every significant cross-examination in almost every case.

But we have never held, and decline now to hold, that the simultaneous representation of clients whose interests actually conflict can be overlooked so long as it seems that the lawyer did a good job. Our cases, and the United States Supreme Court's, make clear that, where such an actual conflict exists and is not waived, the defendant has been deprived of the effective

assistance of counsel.

(Citations omitted).[4] Other courts have reached a

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[4] In *Solomon*, the court stated:

> Sometimes there will be no actual conflict between the defendant and a prosecution witness – for example, where the witness testifies only about a trivial or uncontroversial issue, or where the witness, testifying reluctantly for the People, really wants the defendant to be acquitted. More typically, however, a prosecution witness's interest will actually conflict with the defendant's. In such cases, we have held that the same attorney cannot simultaneously represent both, unless the conflict is validly waived.

Solomon, 980 N.E.2d at 508 (citations omitted). The opinion below establishes that Messrs. Hooper and Angell did *not* merely testify about "trivial or uncontroversial issues":

> During the trial, the State called numerous witnesses – including Angell and Hooper – who testified about their interactions with the customers, Appellant's role in the business, how often Appellant was present at the business, and the policies enacted by Appellant.

(A-9).

similar conclusion. *See e.g.*, *Thomas v. State*, 551 S.E.2d 254, 256 (S.C. 2001) ("In this case, an actual conflict of interest arose when the solicitor offered a plea bargain that would allow the charge against one spouse to be dismissed if the other spouse would plead guilty to the entire amount of the cocaine."); *Cates v. Superintendent*, 981 F.2d 949, 955 (7th Cir.1992) ("[N]egotiating a plea agreement for one client with a condition that he testify against another creates an actual conflict of interest."); *Ross v. Heyne*, 638 F.2d 979, 983 (7th Cir. 1980) ("A conflict of interest would also exist where one attorney represents co-defendants and one defendant agrees to provide evidence against the other in return for an advantageous plea bargain."); *Ruffin v. Kemp*, 767 F.2d 748 (11th Cir. 1985) (holding that an attorney who had been appointed to represent codefendants and who

attempted to arrange for plea bargain whereby one of them would be guilty and testify against the other labored under actual conflict of interest); *Hoffman v. Leeke*, 903 F.2d 280 (4th Cir. 1990) (holding that defense counsel's joint representation of defendant and codefendant created an actual conflict of interest where counsel advised codefendant to enter into plea bargain which required codefendant to implicate defendant at trial).

In the instant case, counsel's representation of both the Petitioner and Messrs. Hooper and Angell was initially only a "potential" conflict – counsel represented three equally-situated codefendants who were facing trial. But counsel's representation turned into an "actual" conflict when Messrs. Hooper and Angell entered into plea agreements to become prosecution witnesses against the Petitioner at his

trial. Although the Petitioner had initially waived a conflict of interest when he and Messrs. Hooper and Angell were all similarly-situated codefendants, once it became clear that an actual conflict existed due to the plea agreements of Messrs. Hooper and Angell, counsel should have either withdrawn from representing the Petitioner or acquired another waiver covering this specific conflict. *See, e.g., Thomas*, 551 S.E.2d at 256 ("Although petitioner initially waived a conflict of interest, once it became clear an actual conflict existed due to the plea bargain, counsel should have either withdrawn from representing one or both of them or acquired another waiver covering this specific conflict."). As explained by the Eleventh Circuit Court of Appeals in *Porter v. Singletary*, 14 F.3d 554, 561 (11th Cir. 1994), "[a]n attorney who cross-examines a former client inherently encounters

divided loyalties." *See also Holloway*, 435 U.S. at 490 ("But in a case of joint representation of conflicting interests the evil – it bears repeating – is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process.") (emphasis in the original).

By granting the petition for writ of certiorari in the instant case, the Court will have the opportunity to resolve the split in authority cited above.[5] The split of

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[5] As explained above, in *Solomon*, the Court of Appeals of New York held:

> But we have never held, and decline now to hold, that the simultaneous representation of clients whose interests actually conflict can be overlooked *so long as it seems that the lawyer did a good job*. Our cases, and the United States Supreme Court's, make clear that, where such an actual conflict exists and is not waived, the defendant has been deprived of the effective

authority is clear and in present need of resolution before the split widens even more.

2. The questions presented are important.

As explained above, there is a split in authority regarding the first question (i.e., whether a criminal defendant establishes an "actual" conflict of interest

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> assistance of counsel.

Solomon, 980 N.E.2d at 509 (emphasis added). This holding is clearly in conflict with the following language from the opinion below:

> Here, Appellant does not point to, *nor does the record reflect, any adverse performance on the part of defense counsel*. Appellant merely asserts that there was an "actual conflict" because defense counsel represented Appellant as well as Angell and Hooper during the trial. He emphasizes that defense counsel cross-examined Angell and Hooper, whom counsel still represented. However, such facts do not, without more, constitute an actual conflict for Sixth Amendment purposes.

(A-12).

that adversely affects counsel's representation when the attorney engages in "joint and dual" representation – i.e., simultaneously representing *both* the defendant *and* a key prosecution witness during a trial). The Petitioner prays the Court to exercise its discretion to consider this important question. This is an issue that has the potential to impact numerous criminal cases nationwide.

The second question presented in this case is also important:

> Whether the "presumed prejudice" conflict of interest standard applies when the prosecutor (rather than defense counsel) puts the trial judge on notice at the beginning of a trial of defense counsel's conflict of interest – a conflict which is described by the prosecutor as "not waiveable" – and the judge thereafter fails to inquire into the nature and scope of the conflict.

This Court's caselaw establishes that automatic

reversal is required under the Sixth Amendment only when the trial court refuses to inquire into a conflict of interest *over defendant's or counsel's objection. See Holloway*, 435 U.S. at 484, 487. But in the instant case, it was the prosecutor who objected and asked the trial court to inquire into the conflict – a conflict that the prosecutor described as "not waiveable" because it had changed from a potential conflict (i.e., representation of the Petitioner and his similarly-situated codefendants) to an actual conflict (i.e., representation of the Petitioner and two of the prosecution's key witnesses at trial):

> THE COURT: All right. Good deal. And then what –
>
> Okay. *So I think the State is still concerned about any potential possible conflict –*
>
> MS. SAMMON [the prosecutor]: *Yes, Your Honor.*

THE COURT: – with the other two fellas?

MS. SAMMON: Yes, Your Honor.
Two of the co-defendants also represented by Mr. Delgado and his firm in this case are testifying on behalf of the State.
And so the issue is Mr. Delgado, or his co-counsel, cross examining their current client in representation of their current clients on trial in this case.

THE COURT: But how are – and is that Hooper and Angell?

MS. SAMMON: Matthew Angell, yes, Your Honor.

THE COURT: How are they – are they – is it to their detriment? I mean, they've already entered a plea. They just haven't been sentenced yet.

MS. SAMMON: Yes, Your Honor. *Your Honor put off sentencing until after both defendants testified at trial and basically determine whether or not they were cooperative and testified truthfully for the State.*
Therefore, it's in their best interest to cooperate and testify truthfully in order to benefit from the plea discussions that

> *the defendants and their counsel had with Your Honor during the time of their plea.*
>
> *Their testimony will provide evidence for the State against the defendants. And, therefore, in order to represent his clients, Dale Holcombe and James Holcombe, Mr. Delgado will have to, in the State's position, cross-examine his current clients that he's representing which would be Matthew Angell and William Hooper.*
>
> . . . .
>
> . . . *The circumstances have now changed. Two of the defendants have entered a plea agreement – or has entered their pleas open pleas to the bench and are now witnesses for the State.*
>
> *Circumstances now are much different than they were. There is a greater conflict that exists, one that the State's position is not waiveable.*

(A-32-35) (emphasis added). Yet, despite being put on notice of the conflict in this case, the trial court failed to conduct a proper inquiry: (1) the trial court failed to inquire into the nature and scope of the conflict – a conflict which was different than the one previously

addressed by the trial court during the January 2018 pretrial hearing (i.e., a hearing that was conducted *before* Messrs. Hooper and Angell became prosecution witnesses)[6] – and (2) the trial court failed to inform the Petitioner of his right to proceed with conflict-free counsel:

> Okay. So I find there's no conflict. I accepted the waiver previously somewhere along the line. I discussed it the other day with Hooper and Angell when they were here in front of me for sentencing, and I continued the sentencing, so I'm ready to go.

(A-36).

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[6] As stated above, although the trial court conducted a pretrial inquiry with the Petitioner in January of 2018 (when the Petitioner and Messrs. Hooper and Angell were all similarly-situated codefendants), a new inquiry was required after Messrs. Hooper and Angell entered into plea agreements with the State and agreed to become prosecution witnesses against the Petitioner. *See, e.g., Thomas*, 551 S.E.2d at 256 ("Although petitioner initially waived a conflict of interest, once it became clear an actual conflict existed due to the plea bargain, counsel should have either withdrawn from representing one or both of them or acquired another waiver covering this specific conflict.").

Pursuant to *Holloway*, if there is a credible indication of an actual conflict of interest before trial, a trial court has a duty to inquire. The Petitioner submits that it is irrelevant as to whether it is defense counsel, the defendant, or the prosecution who notifies the trial court of the conflict – the question is simply whether "the trial court knows or reasonably should know that a particular conflict exists." *Holloway*, 435 U.S. at 485.

By granting the petition for writ of certiorari in the instant case, the Court will have the opportunity to consider this important question.

I. CONCLUSION

The Petitioner requests the Court to grant the petition for writ of certiorari.

Respectfully Submitted,

MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227
Email: ufferman@uffermanlaw.com

COUNSEL FOR THE PETITIONER