No. 21-53

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES DALE HOLCOMBE,
Petitioner,
v.

STATE OF FLORIDA,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA FIFTH DISTRICT COURT OF APPEAL

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner stated his questions as follows:

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" representations - 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.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED .. 1

STATEMENT OF THE CASE 2

REASONS WHY WRIT SHOULD BE DENIED . 15

CERTIORARI REVIEW SHOULD BE DENIED BECAUSE (1) PETITIONER WAIVED HIS CLAIMS IN FAILING TO ALLEGE IN STATE COURT THAT THE ACTUAL CONFLICT ADVERSELY AFFECTED COUNSEL'S PERFORMANCE; (2) THE UNDERLYING DECISION IS OF AN INTERMEDIATE APPELLATE COURT THAT IS NOT ENTRENCHED; (3) ANY SPLIT IS SHALLOW AT BEST; (4) THERE IS NO DISPUTE AS TO THE LEGAL STANDARD, ONLY ITS APPLICATION TO THESE UNIQUE FACTS; (5) PETITIONER CAN PREVAIL ONLY IF THIS COURT ALSO DECIDES HIS SECOND QUESTION

PRESENTED, WHICH HE DOES NOT CLAIM IS "CERTWORTHY"; (6) THE TWO QUESTIONS PRESENTED ARE NOT DISPOSITIVE BECAUSE ALL FOUR CO-DEFENDANTS WAIVED CONFLICT; AND (7) THE FLORIDA APPELLATE COURT CORRECTLY REFUSED TO AUTOMATICALLY REVERSE, AFTER FINDING NO ADVERSE EFFECT 15

CONCLUSION 35

APPENDIX

PRE-TRIAL HEARING EXCERPTS - 01/2018
Pages A-3

DOCKET SOUNDING EXCERPTS - 05/2018
Pages A-22

DOCKET SOUNDING EXCERPT - 07/2018
Pages A-33

VOIR DIRE TRANSCRIPT EXCERPTS - 08/2018
Pages A-34

SENTENCING HEARING EXCERPTS – 10/2018
Pages A-37

TABLE OF AUTHORITIES

CASES:

Adams v. Robertson,
520 U.S. 83, 117 S.Ct. 1028, 137 L.Ed. 2d 203 (1997) 18

Adams v. United States ex rel. McCann,
317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268 (1942) 30

Cates v. Superintendent, Indiana Youth Ctr.,
981 F.2d 949 (7th Cir. 1992) 24,28

Cuyler v. Sullivan,
446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980) .....*passim*

Florida v. Alexis,
180 So. 3d 929 (Fla. 2015).....18,19

Hoffman v. Leeke,
903 F.2d 280 (4th Cir. 1990) 26,27

Holcombe v. Florida,
312 So. 3d 132 (Fla. 5th DCA 2020),
rev. denied, No. SC20-1536, 2021 WL 317665 (Fla. Feb. 1, 2021).....*passim*

Holloway v. Arkansas,
435 U.S. 475, 98 S.Ct. 1173,
55 L.Ed.2d 426 (1978) . .....*passim*

Johnson v. Zerbst,
304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461
(1938) 30,31,32

Lee v. Florida,
690 So. 2d 664 (Fla. 1st DCA 1997).....16,17

Mickens v. Taylor,
535 U.S. 162, 122 S.Ct. 1237, 152 L.Ed.2d
291 (2002) .....*passim*

New York v. Solomon,
980 N.E.2d 505 (N.Y. 2012) .....*passim*

Pardo v. Florida,
596 So. 2d 665 (Fla. 1992)..... 19

Ross v. Heyne,
638 F.2d 979 (7th Cir. 1980) 25

Ruffin v. Kemp,
767 F.2d 748 (11th Cir. 1985) 26

Smith v. Newsome,
876 F.2d 1461 (11th Cir. 1989) 25,26

Strickland v. Washington,
466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) 29

Thomas v. South Carolina,
551 S.E.2d 254 (S.C. 2001)..... 24

Wheat v. United States,
486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988) 31,33

STATUTES:

28 U.S.C. § 1257 1

§ 895.02(7), Fla. Stat. (2018) 22

OTHER AUTHORITIES:

Sup. Ct. R. 10 1

Fla. R. App. P. 9.200(e) 32

CITATION TO OPINION BELOW

The Florida Fifth District Court of Appeal opinion affirming Petitioner's judgments and sentences on September 14, 2020, is published and is found at Holcombe v. Florida, 312 So. 3d 132 (Fla. 5th DCA 2020). The Florida Fifth District Court of Appeal denied the motion for rehearing *en banc* on October 16, 2020, and the Florida Supreme Court's order declining to accept jurisdiction is unpublished and found at Holcombe v. Florida, No. SC20-1536, 2021 WL 317665 (Fla. Feb. 1, 2021).

JURISDICTION

Petitioner is asserting this Court has jurisdiction pursuant to 28 U.S.C. section 1257. However, pursuant to Rule 10 of the Rules of the Supreme Court of the United States, Petitioner cannot invoke jurisdiction as a matter of right. Given that Petitioner has failed to show a compelling reason for the Florida intermediate appellate court's decision to be reviewed, this Court should not exercise jurisdiction.

CONSTITUTIONAL PROVISION INVOLVED

Respondent, State of Florida (hereinafter "State"), accepts as accurate Petitioner's recitation of the applicable constitutional provision involved.

PROCEDURAL HISTORY AND STATEMENT OF THE CASE AND FACTS

Respondent supplies the following facts given that Petitioner's factual recitation omits relevant facts.

Some of the relevant background facts are as follows:

> Cash for Cards, a business operated and owned by Appellant, purchased gift cards and sold them to online vendors. Appellant employed various individuals, including William Hooper and Matt Angell. Based on the large volume of cards purchased by the business, law enforcement began an eight-month investigation which resulted in the arrest of Appellant, Hooper, Angell, and others. During the course of that investigation, law enforcement learned that the business knowingly purchased gift cards from individuals who had obtained the gift cards through fraudulent means.
>
> 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.

Holcombe v. Florida, 312 So. 3d 132-33 (Fla. 5th DCA 2020).

On January 8, 2018, a pretrial hearing was held on the issue of potential conflicts of interest. [A-3-21]. The four co-defendants, i.e., Petitioner, his father, Angell, and Hooper, were placed under oath. [A-3]. The trial court explained to the four co-defendants the purpose of the hearing as follows:

> **TRIAL COURT**: All right. Do you understand why we're here? The prosecutor does not really care if one attorney represents all four defendants, but she's right in that we have to make sure y'all understand and agree that it's okay to have one attorney. That's the reason for today's hearing, sort of - and please forgive me for sounding politically incorrect, I've done...I was an Assistant State Attorney back in the late '70's, early '80's; then I was a defense attorney; and then I became a judge in 2000 - started January 2003, but I remember when I would represent co-defendants or a co-defendant I would tell the young man, usually a young man, and usually a violent crime, you can cover your ass or you can cover your friend's ass, but you can't cover both. Make up your mind who's more important.
>
> Now every once in a while there's an occasion where I could possibly represent more than one defendant, but I always - and there's a rule, and I couldn't find it,

that provides - where people understand and recognize potential conflict. Did you - and I didn't know if you had something signed by them, if you wanted to file it.

[A-4]. In response, trial counsel stated the following:

MR. DELGADO: Yeah. Judge, if I could just put something on the record. When they met - - each of them met with me individually and then signed a waiver of conflict are [sic] the Rules Regulating the Florida Bar where we explain to them it might be better for each of them to have independent counsel, that there may become a time where what's best for one is not for the other and that would cause a conflict of interest. After having reviewed that two-page document they each independently signed it.

And then in anticipation - - when this issue kind of first came up, I advised each of them to consult with an independent attorney who I did not arrange for, I did not pay for. Each of them met with an independent attorney, had whatever conversation they had, and then affirmed to me that they wished me to continue representing them and did not believe that was a conflict. So each of the people here would affirm that what I've said is correct without going into the details of our conversation.

> And, again, I've talked with each of them individually and collectively and they would all waive any conflict and wish to proceed together.
>
> What's happening is the State - the State has made some offers about resolving the cases, and I've explained to them that, you know, as long as they testify truthfully that shouldn't really be a problem. It would be if one wants to throw the other under the bus or vice versa. These are father and son plus two life-long friends. So it's not your typical case where you have - and I kind of explained to them, I said think of Pablo Escobar where he wants to control his lieutenants and what they do, you know, that's not my view of the facts of this case, but that's the example I gave them.

[A-5-6]. The trial court then noted it was unusual for this to happen, since the usual course involved one co-defendant agreeing to testify against the others in order to get a better plea deal, especially where the co-defendant is young or, where there is a murder, the driver will "flip" because he never possessed a gun and there would be a potential conflict. [A-7].

In discussing the signed, written waiver, the prosecutor reminded the court that co-counsel, David Damore, had provided a copy to the court and the prosecutor for their review at the last court proceeding. [A-8-9]. However, it had been decided that the waiver should be placed on the record

rather than filed in the court file. [A-8-9]. The court responded, "[t]hat's right, we did." [A-9].

The judge addressed each of the four co-defendants individually starting with the eldest, Petitioner's father, explaining the potential pitfalls of having the same attorney as his co-defendants. [A-9-21]. The court tried to persuade the co-defendants that it would be better for each to have their own attorney. [A-9-12]. The judge asked hypothetically what would happen if during some time in the future Hooper, for example, complained he had been taken advantage of by the Holcombes and gave a statement about how he was taken advantage of. The court pointed out that a conflict would then arise and it would be awkward to have one attorney represent them both. [A-10-11]. When Petitioner's father responded he was "fine with the situation we have," the trial court cautioned him that, "if we go to trial and everybody loses and bad things happen, you can't say...I should never had the same attorney." [A-11]. The judge explained that he did not want this coming back on him and, for example, Petitioner's father later complaining that the court allowed the same attorney to represent him as well as Hooper and Angell. [A-11]. After today, the judge advised them, they could not complain that they were "screwed by Delgado and Damore." [A-11].

The judge then advised Petitioner and his three co-defendants that:

> **TRIAL COURT**: That if y'all have inconsistent - I think this is dangerous

territory. This is - we're on super thin ice. My gut tells me this is a bad thing to do. I trust Mr. Delgado, and I trust Mr. Damore to dot their Is and cross their Ts. I just want to make sure that you understand and comprehend and internalize there may be a conflict between your three co-defendants and you; do you understand that?

[A-12]. The judge asked each co-defendant for their age, and Petitioner advised he was 29. [A-12-14]. The co-defendants advised they understood the judge's concerns, and the judge inquired about the relationship between the four defendants. [A-15]. Trial counsel explained that the two Holcombes are father and son, while the other two are buddies of Petitioner who worked together at a shop where the gift cards were received. [A-15].

The judge reiterated his concerns as follows:

TRIAL COURT: So understand my fear. So we've looked at the - we've looked at the waiver. We've discussed it with them. You understand - traditionally one defendant flips on the other defendant, whoever gets to the prosecutor first gets the best deal, especially statewide prosecution and drug deals.

MR. DELGADO: And I've explained that what - and we've discussed that if there becomes a conflict I will have to withdraw, they have to - you know, and I'm not going to allow....But we've made it very clear to them. I mean, we're not going to - if we

> perceived a conflict, we would not be here. Based on my understanding and my negotiations with the State, which I know you don't want to get involved in, and our conversations, I feel like this - all these cases are probably going to resolve within a certain margin of error that we're prepared to accept as a group. And some people may get slightly better or different deals based on their culpability, but collectively we all agree on a current strategy, and I'm not aware of any particular conflict based on our current strategy.

[A-16-17]. The trial court expressed its concern that it placed both the court and the prosecutor in an awkward spot, since it is scary territory. [A-18]. The judge noted that it was uncommon but not unethical so long as the appropriate waiver was discussed and signed. [A-18].

The trial court again addressed each co-defendant individually, asking each if he had any questions for the court. [A-18-19]. As the other three had, Petitioner answered, "No, sir." [A-18-19]. The State agreed that, "I think we got everybody agreeing to any waiver." [A-19].

At the close of the hearing, Mr. Delgado inquired of the court whether this was consistent with what they had previously talked about, and the judge agreed it was, but noted that he had wanted to look the four co-defendants "eyeball to eyeball" and "face to face" to make sure. [A-20]. The prosecutor advised the court that the case was set

for trial and Mr. Delgado explained that they were trying to set up four proffers, and asked for a continuance. [A-21].

Five months later, at a May 17, 2018, docket sounding, the State explained that a plea offer had been extended to the two less culpable defendants (i.e., Hooper and Angell) who had been charged with dealing in stolen property rather than RICO, and that the two had not scored out to prison time. [A-22-23]. The State also recognized that the two might want to enter open pleas. [A-22]. The State informed the court that the Holcombes, who were charged with RICO offenses, scored a minimum of 55.5 months in prison and the State's recommended sentence, should the Holcombes agree to enter a plea, was 60 months in prison followed by probation. [A-23]. Counsel for the defense, Mr. Blake Taelman, who was with the law firm of Delgado and Romanik, formerly Damore, Delgado, and Romanik, advised the court that none of the four had a prior record. [A-23-25-26]. When the judge expressed a desire to get this case to trial since the case was one of the court's oldest cases, Mr. Taelman advised the court he had just received discovery. [A-23]. The judge asked if they could reach a resolution that did not include prison. [A-23]. However, the court was concerned that would put Hooper and Angell and their counsel in an awkward spot assuming they would testify for the State. [A-23]. Mr. Taelman advised the court that would be fine, that they had all waived. [A-24]. Mr. Taelman was given time to chat with his clients in

order to "run over everything." [A-25]. The State advised the court that both sides had tried to resolve all of these cases, but negotiations broke down. [A-25]. After a four hour recess, the hearing resumed. [A-25-26-27].

Mr. Taelman believed they had a statutory basis for a downward departure sentence, especially since none of the four had a criminal record. [A-24]. However, the Holcombes were both charged with two first degree felonies each so there could be no withhold of adjudication, they scored out to state prison time, but the State was not willing to reduce those charges, so the Holcombes had decided they preferred to go to trial after discussing the benefits and risks with counsel. [A-27-28].

The court explained to Petitioner that even if it wanted to, pursuant to Florida law, it could not withhold adjudication[1] because he was charged with first degree felonies. [A-28-32]. The judge further explained that he had hoped to figure out a way that all four of them could avoid prison, since none of the four co-defendants had a prior record. [A-28]. While the court could not withhold adjudication on the Holcombes, it could for the other two co-defendants. [A-27-29]. Because Hooper

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[1] At sentencing, Petitioner explained that, "among other things," because he and his wife potentially planned on adopting a child and/or he might be returning to school, such considerations had "fueled his desire to go to trial" since that "would be very difficult" "with a conviction." [A-37].

and Angell were not charged with first degree felonies, the court agreed to withhold adjudication of guilt and not impose an incarcerative sentence. [A-27-29-31].

The State advised the court that the attempt to conduct proffers with the four co-defendants was unsuccessful because there was a lack of candor. [A-30]. Mr. Taelman disputed that characterization by the State, advising that "they got scared early and then clammed up." [A-30]. When the judge suggested they do whatever they wanted to do on two of the four, and they would pick a jury for two on Monday, Mr. Taelman advised that was what they wanted, too. [A-31].

After a second recess, the court announced it was continuing the trial date because, *inter alia*, the Holcombes were entitled to depose the other two co-defendants since they had entered pleas. [A-31-32].

Two months later, at a July 26, 2018, docket sounding, the State advised it was undecided whether to use the two co-defendants who had entered pleas. [A-33].

Before jury selection began on August 6, 2018, Mr. Delgado responded to the conflict concerns expressed by the prosecution as follows:

> **MR. DELGADO**: Judge, I mean, I think we've twice had hearings on this matter, and I think Your Honor inquired of the gentlemen. We gave you a signed waiver that we reviewed. We did that twice.
>
> You know, I understand the State's

concern. I assume that the clients would testify truthfully. And, you know, I've heard their testimony now several times. I don't think that I have any, you know, secret weapon that would rely on privileged communications that would be used to their detriment.

I mean, I suppose I could withdraw from representing Mr. Angell and Mr. Hooper, and the Court could appoint counsel for them. Although, I don't know that that cures –

****

To be honest, I walked in and, you know, to -- you know, I don't know -- but the comment about, you know, my bar license and one of my clients makes me a little bit concerned. I mean, my clients have already....My clients haven't voiced any concerns. I thought we had a waiver that we've gone over.

You know, I don't know what I can do at this point, you know, or what the remedy would be.

[A-34-35]. The court asked whether a waiver had been filed, and Mr. Delgado advised that if it had not been filed in the court file, it had been reviewed *in camera* by the trial court. [A-35].

When the State contended that with the new facts, i.e., the entry of the pleas by two of the co-defendants who were going to testify for the State, the conflict could no longer be waived, the court

disagreed with that in cases where the defendants were adequately advised before waiving the conflict. [A35-36]. The judge recalled reviewing the waiver and finding it was valid, i.e., "entered into freely, voluntarily, knowingly, and intelligently, with full advice of the consequences." [A-35-36]. The court found there was no conflict, and noted that the court had accepted the waiver previously. [A-35-36].

The Fifth District Court of Appeal set out the following additional facts:

> 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.

Holcombe, 312 So. 3d at 133.

During the sentencing hearing, Petitioner admitted to feeling terrible that because of his businesses his father and friends were arrested, all of whom he considered to be good people. [A-37].

On appeal, the Florida Fifth District Court of Appeal explained that Petitioner contended that he was entitled to

> a "per se" reversal based on his attorney's

> conflict of interest. He claims that his attorney's joint representation of him, Angell, and Hooper during the trial resulted in an actual conflict of interest, which he did not validly waive due to insufficient advisements by the trial court. According to Appellant, he need only show a conflict existed—not that the conflict adversely affected his counsel's performance.

Holcombe, 312 So. 3d at 133 (footnotes omitted). The Florida Fifth District Court of Appeal further noted that Petitioner "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." Holcombe, 312 So. 3d at 134.

The Florida Fifth District Court of Appeal affirmed Petitioner's convictions and sentences in its September 14, 2020, opinion. Holcombe v. Florida, 312 So. 3d 132 (Fla. 5th DCA 2020). His motion for rehearing and for certification of conflict was denied on October 16, 2020. Id. The Florida Supreme Court declined to accept jurisdiction on February 1, 2021. Holcombe v. Florida, No. SC20-1536, 2021 WL 317665 (Fla. Feb. 1, 2021).

REASONS FOR DENYING THE WRIT

CERTIORARI REVIEW SHOULD BE DENIED BECAUSE (1) PETITIONER WAIVED HIS CLAIMS IN FAILING TO ALLEGE IN STATE COURT THAT THE ACTUAL CONFLICT ADVERSELY AFFECTED COUNSEL'S PERFORMANCE; (2) THE UNDERLYING DECISION IS OF AN INTERMEDIATE APPELLATE COURT THAT IS NOT ENTRENCHED; (3) ANY SPLIT IS SHALLOW AT BEST; (4) THERE IS NO DISPUTE AS TO THE LEGAL STANDARD, ONLY ITS APPLICATION TO THESE UNIQUE FACTS; (5) PETITIONER CAN PREVAIL ONLY IF THIS COURT ALSO DECIDES HIS SECOND QUESTION PRESENTED, WHICH HE DOES NOT CLAIM IS "CERTWORTHY"; (6) THE TWO QUESTIONS PRESENTED ARE NOT DISPOSITIVE BECAUSE ALL FOUR CO-DEFENDANTS WAIVED CONFLICT; AND (7) THE FLORIDA APPELLATE COURT CORRECTLY REFUSED TO CREATE AN AUTOMATIC REVERSAL RULE AFTER FINDING NO ADVERSE EFFECT.

This case fails to satisfy any of the compelling reasons justifying review by this Court. Petitioner contends that there was an actual conflict and an adverse effect should be assumed because counsel represented both Petitioner and a so-called "key" prosecution witness at trial. In actuality, Petitioner is seeking a *per se* or

automatic reversal in the context of multiple representation - even where there was a waiver the trial court found to be freely, voluntarily, and knowingly made - without being required to establish any adverse effect. However, the Florida Fifth District Court of Appeal properly refused to apply a *per se* or automatic reversal rule and, after reviewing the record, found no adverse effect upon counsel's representation. Petitioner does not provide any compelling reason for this Court to accept jurisdiction. Certiorari review should be denied.

A. SINCE ADVERSE EFFECT WAS NOT DISCUSSED IN PETITIONER'S BRIEFING IN THE STATE APPELLATE COURT, PETITIONER HAS WAIVED HIS CLAIMS

Petitioner failed to allege in the state appellate court that the "actual conflict" he asserted adversely affected defense counsel's representation, as required by Cuyler v. Sullivan, 446 U.S. 335, 348 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980) ("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."), and Mickens v. Taylor, 535 U.S. 162, 171, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002). Instead, Petitioner argued that the trial court's inquiry into the waiver of conflict was insufficient in reliance upon Lee v. Florida, 690 So. 2d 664 (Fla. 1st DCA 1997). However, the lack of adverse effect in counsel's representation was the basis for the

state appellate court's decision below. Before distinguishing the Lee case (primarily on the grounds that it predated Mickens and the Florida Supreme Court case, Florida v. Alexis, 180 So. 3d 929 (Fla. 2015)), the Florida Fifth District Court of Appeal wrote:

> 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.

Holcombe, 312 So. 3d at 134.

Had Petitioner wished to assert some case-specific effect on counsel's trial performance stemming from the conflict—or even that an adverse effect *always* occurs when this type of conflict arises—he could have raised the argument in his briefs in the state appellate court, or at the very least in a motion for rehearing. He did neither. In fact, the words "adverse effect" or "adversely affected" appear nowhere in his lower court briefing.

Accordingly, Petitioner failed to apprise the Florida appellate court of the reasons it was allegedly wrong in evaluating the adverse effect

prong. Petitioner's claims should not be considered by this Court. Adams v. Robertson, 520 U.S. 83, 86, 117 S.Ct. 1028, 1029, 137 L.Ed. 2d 203 (1997) ("With 'very rare exceptions,' Yee v. Escondido, 503 U.S. 519, 533, 112 S.Ct. 1522, 1531, 118 L.Ed.2d 153 (1992), we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review.") (citations omitted).

B. THIS CASE INVOLVES THE DECISION OF AN INTERMEDIATE STATE APPELLATE COURT, NOT ANY CONCLUSIVE DECISION BY THE STATE SUPREME COURT, AND THE FLORIDA SUPREME COURT PROPERLY RECITED THE RULE ESTABLISHED BY THIS COURT.

This case presents a good example of why decisions of intermediate state appellate courts do not serve to create or widen a split of authority: the decision of the intermediate court is not the law of the State and may be overruled by the state supreme court. And the intermediate courts of the state may disagree on the proper resolution of the question. In that instance, leaving the matter to the state supreme court to resolve is the better course. In other words, the alleged split is not "intractable" in this circumstance. Here, the Florida Supreme Court appears to have properly

recited the rule from Holloway/Cuyler/Mickens. See Florida v. Alexis, 180 So. 3d 929 (Fla. 2015).

C. PETITIONER IS EXAGGERATING ANY SPLIT OF AUTHORITY AS THE DECISION BELOW IS THE ONLY CASE PETITIONER CITED THAT FALLS ON THE OTHER SIDE OF THE SPLIT.

Even assuming a decision of an intermediate appellate court could count toward the split, the decision below is the only case Petitioner can cite that falls on the other side of the split. Petitioner cites to six cases on the other side of the Holcombe opinion. However, the intermediate appellate court's decision below is not entrenched as it is not clear how the Florida Supreme Court would rule on the issue should the state supreme court decide it in a future case. Cf. Pardo v. Florida, 596 So. 2d 665, 666-67 (Fla. 1992) (District Courts of Appeal are bound by Florida Supreme Court opinions, but between District Courts of Appeal, another district's opinion is merely persuasive). There is, at most, a split of authority between the Fifth District Court of Appeal's opinion and one of the six opinions invoked as constituting a split of authority; however, that case is an outlier and distinguishable.

1. New York v. Solomon, 980 N.E.2d 505 (N.Y. 2012), is the only case Petitioner relies upon in support of his split of authority argument that was issued after Mickens and the sole case where a split of authority could be argued. In Solomon, the prosecution witness, who was also represented by

the defendant's attorney, was one of two investigators who had obtained a partial confession from the defendant to raping his daughter. Despite acknowledging that the state court had previously refused to impose a *per se* rule where a defendant's lawyer simultaneously represents a prosecution witness, the Solomon court seemingly chastised the government and the lower court for finding no actual conflict on the basis that counsel's cross-examination was not affected by the dual representation. The court stated that it refused 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." Id. at 509.

Arguably, this language could be in conflict with Holcombe to the extent that the court believed the adequacy of or effect on counsel's representation was irrelevant, which ignores this Court's repeated holdings that an actual conflict exists only when the conflict adversely affects counsel's performance.

Even assuming this language created a split in authority between Solomon and Holcombe, Solomon is distinguishable from Holcombe not only because the inquiry into the waiver was not plainly insufficient in Holcombe, but Petitioner's characterization of the two witnesses, Hooper and Angell, as key prosecution witnesses is an exaggeration. In Solomon, counsel had advised the court before a pre-trial hearing that she also represented one of the state's witnesses in an

unrelated civil matter, that the petitioner respected the nature of that representation, and agreed to waive any conflict. Id. at 506. The trial court's inquiry solely consisted of asking if counsel's representations were correct, and Solomon responding "Yes, sir." Id. at 506. The court found this inquiry inadequate in that "not even the nature of defense counsel's simultaneous representation of [the investigator] was placed on the record[.]" Id. at 507. Here, on the other hand, the trial court conducted an in depth inquiry of the four co-defendants' waiver, found they had freely, voluntarily, and knowingly waived any conflict, reviewed a written waiver *in camera*, and had been advised that all four had been required to consult with independent counsel of their choosing before proceeding with Mr. Delgado's firm. Later on, the trial judge relied upon the written waiver, the prior inquiry, and counsel's representation that he had no special weapon based upon privileged information that could be used to his clients' detriment. As the inquiry here was not inadequate, the cases are distinguishable.

In addition, Hooper and Angell were not key prosecution witnesses, unlike the investigator who was one of two who obtained Solomon's partial confession to raping his daughter. In fact, the prosecution was not even certain a month before trial whether it intended on using their testimony at trial.

It was revealed that Hooper and Angell had worked as employees for Petitioner and were two of

the four employees who testified for the State at trial pursuant to plea agreements. The other two employees were not represented by Mr. Delgado's firm. Hooper and Angell were involved in half of the gift card sales that were recorded by an undercover officer, the audio and video recordings were published at trial, and the undercover officer testified at trial about the transactions.

All four employees testified that Petitioner was the business owner of the businesses they worked for, they all had been or were friends with Petitioner, they all were familiar with the policies enacted by Petitioner, and that Petitioner had advised all of his employees (not just the four who testified) that if they were arrested Petitioner would bail them out and obtain a lawyer for them. One of the four employees, not Hooper or Angell, testified that he had voiced his concerns to Petitioner that something suspicious was going on at the businesses, and that he had overheard Petitioner on the phone frantically trying to change the business's passwords while they were at the jail.

In Florida, the State need only prove two predicate offenses in order to obtain a conviction for RICO. See § 895.02(7), Fla. Stat. ("Pattern of racketeering activity" means engaging in at least two incidents of racketeering conduct.). There were 25 predicate offenses submitted to the jury, and 22 were found by the jury to have been proven beyond a reasonable doubt in this case. The majority of the predicate offenses involved two sellers, neither of

whom was represented by Mr. Delgado, and who both admitted that the cards they sold to Petitioner's businesses were stolen. The State presented multiple co-defendants and witnesses who were involved in every step of the scheme including other sellers, shoplifters or thieves, and those who returned to the stores to redeem the stolen property for gift cards.

In addition, the State presented both record and testimonial evidence establishing the numerous transactions since second-hand dealers in Florida are required to submit daily records of all transactions to the county sheriff's office. These records reflected the sheer number of gift cards the same sellers were bringing into the store on a daily basis - in fact, one seller sold over 600 gift cards at Petitioner's businesses. Finally, law enforcement had advised Petitioner's business not to accept gift cards from one seller, yet, even though a note in the business's customer file reflected that they were not to purchase any cards from that seller, the business continued purchasing cards from him.

Hooper's and Angell's testimony, for the most part, supported Petitioner's defense that he was an absentee owner who was unaware that his employees were receiving gift cards that had been obtained through nefarious means. As the Solomon court recognized, "[s]ometimes 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." 980 N.E.2d at 509. Petitioner's identification of them as "key prosecution witnesses" is an exaggeration that further distinguishes Holcombe from Solomon rather than creating a split of authority.

The remaining cases relied upon by Petitioner in the so-called split of authority were issued without the benefit of Mickens and are not in conflict with or create a split of authority with the holding in Holcombe.

2. For example, the state court in Thomas v. South Carolina, 551 S.E.2d 254 (S.C. 2001), did not apply a *per se* rule in the context of an attorney representing both a defendant and a prosecution witness and the facts are distinguishable. In Holcombe, the two co-defendants did not enter pleas taking complete responsibility so that the other co-defendants's charges were dismissed, as was the case in Thomas. In fact, the original plan was that all four co-defendants would enter pleas, but, unlike the two co-defendants who pled, Petitioner could not avoid an adjudication of guilt by entering a plea, and he went to trial.

3. Likewise, no *per se* rule was applied in Cates v. Superintendent, Indiana Youth Center, 981 F.2d 949, 956 (7th Cir. 1992), wherein counsel never informed his two co-defendants of the potential for conflicts of interest in his representation of both men or obtained a waiver of any potential conflict. Id. at 951. Later, when only one co-defendant, Hathaway, was offered a plea

agreement with the condition that he assist the government in its case against Cates, counsel notified Cates he had withdrawn from representation of Cates on the grounds that the plea resulted in a conflict of interest. Id. The Cates court concluded, in the context of representation of multiple criminal defendants, that "where there is no showing of prosecutorial overreaching, or that counsel chose to help only one client when options were available for both, or that counsel provided the state with privileged information, the conflict of interest does not violate the Sixth Amendment." Id. at 956. This holding does not create any conflict or a split of authority with Holcombe because, unlike in Cates, all four co-defendants were informed of the potential conflicts, had waived conflict, and the two co-defendants who pled and testified did not agree to provide and did not provide information resulting in additional charges against Petitioner.

4. Ross v. Heyne, 638 F.2d 979 (7th Cir. 1980), involved an attorney representing a co-defendant who was in a partnership with another attorney who represented two different co-defendants, both of whom had entered a plea agreement to provide evidence against Ross in exchange for favorable treatment by the state. Id. at 983. The court did not apply a *per se* rule, and concluded that Ross's attorney's failure to impeach the two co-defendants/witnesses when credibility was so important was due to counsel's fear in using information counsel had learned in partnership with the co-defendants'/witnesses' attorney. Id. at

984-85. Thus, an actual conflict was demonstrated because counsel's representation was adversely affected. Here, there had been a valid waiver and the Holcombe court concluded that counsel's representation was not adversely affected after a review of the record.

5. The Eleventh Circuit, in Smith v. Newsome, 876 F.2d 1461 (11th Cir. 1989), clarified Ruffin v. Kemp, 767 F.2d 748 (11th Cir. 1985), a case cited by Petitioner, where the appellate court pointed to the key factor being that the prosecutor in Ruffin was open to plea negotiations but the attorney had negotiated a plea bargain for one of his two clients to the exclusion of the other. Id. at 1463. See Ruffin, 767 F.2d at 752. In Newsome, "joint representation did not prevent effective plea bargaining on behalf of either client." Id. at 1463. Similarly herein, counsel attempted to negotiate a plea for all four and the State had made plea offers to all four, but all four co-defendants' proffers failed and Petitioner was unwilling to enter a plea because he wanted a withhold of adjudication, which was not possible based on the level of offense and the State's refusal to reduce the charges.

6. In Hoffman v. Leeke, 903 F.2d 280 (4th Cir. 1990), counsel represented two co-defendants, and negotiated a plea deal for Hoffman's co-defendant the day after the warrant issued for Hoffman, and in return for the deal, Hoffman's co-defendant agreed to testify for the state and gave a statement that implicated Hoffman in the murder. Id. at 286. Rather than applying a *per se* rule, the

court reviewed the record in order to conclude that "such a conflict existed and it did adversely affect [counsel]'s representation." Id. at 286. Specifically, that the co-defendant's statement implicating Hoffman was critical, a fact that the attorney admitted when he testified that, in counsel's opinion, without the co-defendant's statement the case against Hoffman would not have gone to the jury. Id. The court also identified the co-defendant as "the state's star witness." Id. at 288. Finally, the Hoffman court found Hoffman's waiver was insufficient. Id. at 289. Here, on the other hand, the Holcombe court never referred to the two co-defendants as the state's star witnesses and, as previously explained, not only were Hooper and Angell not the State's star witnesses, but the case would have gone to the jury without their testimony since the State had numerous other witnesses and was not even certain of using the two until just before trial.

Except for Solomon - which primarily focused on the inadequate waiver - all of the cases, including Holcombe, did not apply a *per se* or automatic reversal rule. And even assuming this were an actual six to one split, it is not entrenched because it is not clear how the Florida Supreme Court would view the issue were it to decide it in a future case. Assuming this Court views the issue narrowly, i.e., based upon the unique facts of each case, it might be at best a one to one split with Solomon. However, the Solomon court's opinion is an outlier to the extent that it ignores this Court's

rule that an actual conflict exists when the conflict adversely affects counsel's representation.

D. AS THERE IS NO DISPUTE AS TO THE LEGAL STANDARD, RATHER ITS APPLICATION TO THESE UNIQUE FACTS, PETITIONER IS ASKING THIS COURT TO ENGAGE IN SHEER ERROR CORRECTION.

The Florida Fifth District Court of Appeal applied the correct legal standard set forth in Cuyler/Holloway. It explained, for instance, that it would be improper to assume that an actual conflict occurred simply because of the joint representation, as Cuyler and Mickens require that "an actual conflict of interest adversely affected his lawyer's performance." Holcombe, 312 So. 3d at 134. Petitioner merely says the court applied it improperly by misconstruing what it means to be "adversely affected." That is sheer error correction of the sort this Court does not engage in. This Court exists to resolve disputes of law, not fact-bound applications of law.

Indeed, the facts of Petitioner's case highlight that "ineffective assistance claims stand or fall on the particular facts of the case." Cates, 981 F.2d at 955. That is particularly true in this context where a reviewing court must ask whether the actual conflict "actually affected the adequacy of [defense counsel's] representation." Mickens, 535 U.S. at 171, 122 S.Ct. 1237.

E. PETITIONER CAN PREVAIL ONLY IF THIS COURT ALSO DECIDES HIS SECOND QUESTION PRESENTED, WHICH HE DOES NOT CLAIM IS "CERTWORTHY":

In the multiple representation context, 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." Cuyler, 446 U.S. at 348, 100 S.Ct. 1708. Once that predicate is established, a defendant is not required to establish prejudice, because "unconstitutional multiple representation is never harmless error." Id. at 349, 100 S.Ct. 1708 (citing Glasser v. United States, 315 U.S. 60, 76, 62 S.Ct. 457, 86 L.Ed. 680 (1942)). Thus, the presumption of prejudice in this context means that the defendant whose right to the assistance of counsel has been violated is not required to show an effect on the outcome, i.e., the prejudice prong of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Mickens, 535 U.S. at 166–67, 122 S.Ct. 1237.

Notably, Petitioner fails to raise a specific claim of prejudice in his second Question Presented; he appears to rely exclusively on the "presumed prejudice" rule. Thus, he can win on the merits only if this Court agrees to review his second Question Presented. Yet, Petitioner offers no reasons to believe that the second Question Presented is certworthy: it is not the basis of a split of authority, it was never discussed by the state

appellate court below, further percolation would be warranted, and this Court is not concerned about error correction in a particular case. Because this Court should not grant certiorari on the second Question Presented, it likewise should not grant on the first Question Presented because a win on that issue will not ultimately help Petitioner.

F. THE QUESTIONS PRESENTED ARE NOT DISPOSITIVE BECAUSE ALL FOUR CO-DEFENDANTS WAIVED THE CONFLICT KNOWING THAT ONE OR MORE MIGHT PLEAD GUILTY, PROVIDE A STATEMENT BLAMING THE CO-DEFENDANTS WITH MORE CULPABILITY, AND THAT ALL FOUR CO-DEFENDANTS WERE NOT EQUALLY CULPABLE.

This Court has recognized that a defendant may waive the Sixth Amendment right to conflict-free counsel. Holloway v. Arkansas, 435 U.S. 475, 483 n.5, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). That is because the purpose of the Sixth Amendment guarantee is to grant a right rather than impose an obligation, and therefore a defendant may waive the right if "he knows what he is doing and his choice is made with eyes open." Adams v. United States ex rel. McCann, 317 U.S. 269, 279, 63 S.Ct. 236, 87 L.Ed. 268 (1942). But "[w]hile an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court." Johnson v. Zerbst, 304 U.S. 458, 465, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). "This protecting duty imposes the serious

and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." Id. Trial courts have broad latitude in conducting the requisite inquiry into conflict and waiver. See, e.g., Johnson, 304 U.S. at 464, 58 S.Ct. 1019 ("The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."); Wheat v. United States, 486 U.S. 153, 162, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). (according trial courts "substantial latitude").

Petitioner waived any potential or actual conflict of interest. When the issue originally arose, the trial court interviewed all four of the co-defendants with great care, and determined that the waiver was valid. When the issue arose again before jury selection, the trial court, in reliance upon its previous *in camera* review of the written waiver and discussion on the record with the co-defendants "eyeball to eyeball" and "face to face," along with counsel's reassurance that he had "no secret weapon that would rely on privileged communications that would be used to their detriment," [A-20-34], found there was no conflict and reaffirmed its finding that the waiver was "entered into freely, voluntarily, knowingly, and intelligently, with full advice of the consequences." [A35-36]. The trial court's findings should be relied upon because the written waiver was never

included in the state appellate court record on appeal, even though it is well established that the burden is on the appellant to ensure the record on appeal is complete. See, e.g., Johnson, 304 U.S. at 465, 58 S.Ct. 1019; see also Fla. R. App. P. 9.200(e) ("The burden to ensure that the record is prepared and transmitted in accordance with these rules shall be on the petitioner or the appellant.").

G. DECISION BELOW IS CORRECT.

As recognized by the Florida Fifth District Court of Appeal in Holcombe, this Court has decided that for Sixth Amendment purposes in the context of multiple representation of criminal defendants there is no *per se* or automatic reversal rule for a conflict of interest without demonstrating an adverse effect on counsel's representation. Mickens v. Taylor, 535 U.S. 162, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002). This Court has also recognized that a defendant may waive the Sixth Amendment right to conflict-free counsel. Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). In Holcombe, the Florida Fifth District correctly refused Petitioner's attempt to apply a *per se* or automatic reversal rule where Petitioner had not even alleged an adverse effect, and the appellate court, after reviewing the record, found no adverse effect.

NO ADVERSE EFFECT:

A review of this Court's well established law in this area reveals that it is accepted that representation of multiple criminal defendants by the same attorney raises potential conflict risks.

See, e.g., Wheat, 486 U.S. at 159, 108 S.Ct. 1692. However, this Court has held that these risks, without more, cannot require reversal for "multiple representation does not violate the Sixth Amendment unless it gives rise to a conflict of interest." Cuyler v. Sullivan, 446 U.S. 335, 348, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Thus, 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." Cuyler, 446 U.S. at 348, 100 S.Ct. 1708. Even when the claim is that the trial court failed to conduct an inquiry about a potential conflict which it knew or should have known about, the defendant is still required to show that a conflict of interest adversely affected counsel's performance. Mickens, 535 U.S. at 170–72, 122 S.Ct. 1237. Showing an effect on counsel's performance is essential to showing an actual conflict of interest because a potential conflict is almost always present in cases of multiple representation. Id. at 169–70, 122 S.Ct. 1237. Here, Petitioner is, in actuality, attempting to have this Court establish a *per se* or automatic reversal rule, because, as the Fifth District Court explicitly held, "he does not point to, nor does the record reflect, any adverse affect." Holcombe, 312 So. 3d at 134.

However, this Court has refused to adopt a *per se* or automatic reversal rule without a showing of an adverse effect on counsel's representation in the context of multiple representation of criminal

defendants. For example, in Mickens, this Court rejected the petitioner's argument that a showing of an adverse effect was not required in order to demonstrate actual conflict. Id. at 170-71, 122 S.Ct. 1243. In rejecting this argument, this Court wrote: "[W]e think 'an actual conflict of interest' meant precisely a conflict *that affected counsel's performance*—as opposed to a mere theoretical division of loyalties. It was shorthand for the statement in Sullivan that 'a defendant who shows that a conflict of interest *actually affected the adequacy of his representation* need not demonstrate prejudice in order to obtain relief.'" Mickens, 535 U.S. at 171, 122 S.Ct. 1237 (quoting Cuyler, 446 U.S. at 349–50, 100 S.Ct. 1708) (emphasis added in original). Here, Petitioner is hoping this Court allows him to do just that, i.e., rely upon a mere theoretical division of loyalties in order to have an actual conflict.

There is one exception but that exception applies in a very limited context, i.e., "where defense counsel is forced to represent codefendants over his timely objection, unless the trial court has determined that there is no conflict." Mickens, 535 U.S. at 162, 168 122 S.Ct. 1241-42 (citing Holloway, 435 U.S. at 488, 98 S.Ct. 1173 ("[W]henever a trial court improperly requires joint representation over timely objection reversal is automatic")). And, in Cuyler, this Court declined to extend Holloway's automatic reversal rule to the situation where an attorney represents multiple defendants at trial without objection and it appeared the defendant's

interests were aligned. Cuyler, 446 U.S. at 348–349, 100 S.Ct. 1708. (Absent objection, a defendant must demonstrate that "a conflict of interest actually affected the adequacy of his representation."). Petitioner does not qualify for the Holloway exception as he did not object at trial, did not identify any adverse effect on counsel's representation in state court, the state appellate court found no adverse effect, and the state trial court found no conflict and a valid waiver. Thus, he is left with the argument that an adverse effect is found *ipso facto* where an attorney represents both a defendant and a prosecution witness at trial (since the witness was not a key state witness). Petitioner's attempt to obtain a *per se* or automatic reversal rule ignores this Court's rule that an actual conflict exists when the conflict adversely affects counsel's representation.

In conclusion, this Court should decline to take jurisdiction in this case. There is no compelling reason for this Court to accept jurisdiction as Petitioner failed to allege adverse effect in his briefing with the Florida appellate court where the appellate court based its decision on the lack of adverse effect, the decision is one by an intermediate state appellate court which is not entrenched as the Florida Supreme Court could reach a different resolution, there is at best a shallow split of authority between two state appellate courts, there is no dispute as to the legal standard, only its application to these unique fact, the second Question Presented fails to raise a

specific claim of prejudice, the Questions Presented are not dispositive because all four co-defendants waived any conflict, and the Florida intermediate appellate court's decision is correct.

CONCLUSION

For these reasons, Respondent respectfully asks this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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