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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 19-1160

**State of West Virginia ex rel.
June Yurish, Kristin Douty, and
Christina Lester,**

Petitioners,

v.

**The Honorable Laura V. Faircloth
Judge of the Circuit Court of Berkeley
County, and the State of West Virginia,**

Respondents.

RESPONSE

**On Petition for a Writ of Prohibition from the
Circuit Court of Berkeley County
(Case Nos. 19-M-7, 19-M-8, 19-M-9)**

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QUESTION PRESENTED

Petitioners frame four questions for this Court, which are set forth on pages one and two of the Petition for a Writ of Prohibition.

STATEMENT OF THE CASE

Petitioners work for the Berkeley County school system. (*See* A.R. at 12). Petitioner Lester is a teacher, and Petitioners Yurish and Douty are aides. (*Id.*) All three Petitioners work together in a special needs classroom. (*Id.*) During the 2018-19 school year, a mother of an autistic, non-verbal six-year-old, prompted by a change in her child's behavior, placed an audio recording device in her child's hair before she went to school. (*Id.*) The recording revealed that while Petitioners were together in the classroom, a person on the recording said, "I am going to punch you in the face" and "shut up." (*Id.*) Police interviewed Petitioners Douty and Yurish, who both "denied having said those things to [the child]." (*Id.*)

Based upon the recording, criminal complaints were issued against each Petitioner for failure to report suspected abuse and neglect, in violation of W. Va. Code § 49-2-812(a). (*See* A.R. at 10-10). The matter was initiated in magistrate court. (*See* Pet. at 4). At that time, Petitioners were not joined as co-defendants because such joinder is not permitted in magistrate court. *See* Rules of Criminal Procedure for Magistrate Courts 16(a)(c).

Attorney Christian Riddell subsequently filed a notice of appearance on behalf of each Petitioner, and, upon Petitioners' motion, all three cases were transferred from magistrate court to circuit court. (*See* Pet. at 4). On October 15, 2019, Attorney Riddell filed a combined Request for a Bill of Particulars on behalf of each Petitioner. (*See generally* Pet. at 8) (referencing the Request).

The circuit court set an initial hearing on these matters for October 21, 2019; however, prior to the hearing, the State filed a Motion to Disqualify Defense Counsel. (*See* A.R. at 22-26). In its motion, the State explained that plea offers had been extended to each Petitioner and the plea offers, if accepted, would require the Petitioner(s) to cooperate with the State and testify against their co-defendants. (A.R. at 23). The State, relying on Rule 1.7 of the West Virginia Rules of Professional Conduct, argued that joint representation created an inherent, non-waivable conflict because the co-defendants were potentially adverse to each other. (A.R. at 23-25). Therefore, Petitioners' counsel would be unable to advise one defendant to testify against a co-defendant, even if it would be in her best interest. (A.R. at 26).

At the October 21 hearing, the State requested a joint trial of Petitioners.¹ (Supp. A.R. at 1-2). The circuit court declined to proceed further in the matter, however, until it ruled upon whether or not defense counsel should be disqualified from jointly representing the Petitioners in order to "preserve the Defendants' rights relative to having counsel." (*Id.*). Petitioners' counsel requested the circuit court withhold ruling on the motion to disqualify him so that he could research and brief the issue. (*Id.*). The circuit court agreed and set a hearing on the State's motion to disqualify counsel for November 18, 2019. (*Id.*). The court also indicated that if it denied the motion, it would "take up scheduling and initial arraignment type matters" thereafter. (*Id.*).

On November 18, 2019, the circuit court heard arguments regarding the State's disqualification motion.² (Supp. A.R. at 3). It acknowledged that each of the Petitioners filed informed consent waivers, indicating their desire to be jointly represented by the same counsel.

¹ Petitioners neglected to include this Order in the Appendix Record. The State has filed a contemporaneous motion to supplement the Appendix Record with this document.

² *See* n.1, *supra*.

(*Id.*). The court noted, however, that the waivers had not been verified.³ (*Id.*; *see also* A.R. at 15, 18, 21). Given this development, the circuit court scheduled a hearing for November 21, during which time it intended to conduct a colloquy with each Petitioner pursuant to Rule 44(c) of the West Virginia Rules of Criminal Procedure. (Supp. A.R. at 3; A.R. at 100).⁴

On the night before the hearing, Petitioners filed Defendants' Supplemental Consolidated Memorandum Regarding Disqualification of Joint Representation. (A.R. at 78). In their brief, Petitioners argued, *inter alia*, that in order for the circuit court to determine whether joint representation will create a conflict, the court should "order the State to provide discovery and a bill or particulars, as requested by Defendants, and then, after delivery of the same and sufficient time to review, hold a supplemental hearing to engage in the Rule 44(c) colloquy." (A.R. at 87).

At the November 21 hearing, the circuit court denied Petitioners' request for discovery and bill of particulars and ruled that "the State would not be ordered to provide discovery or a Bill of Particulars until the issue of whether the Defendants may be represented by the same counsel has been resolved." (A.R. at 100). It rescheduled the hearing to December 10, 2019, to give the State time to respond to Petitioners' briefing. (A.R. at 100-01).

Petitioners filed a petition for a writ of mandamus with this Court on November 18, 2019, which was assigned Case No. 19-1094. In their petition, they sought an order from this Court

³ Petitioners' informed consent waivers were signed in October 2018, but the notarized verification pages were not executed until December 3, 2019. (A.R. at 15, 18, 21).

⁴ Rule 44(c) requires that when defendants seek joint representation, "the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to effective assistance of counsel, including separate representation." W. Va. R. Crim. P. 44(c). The Rule also provides that "[u]nless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel." *Id.*

compelling the circuit court to order the State to produce discovery and a Bill of Particulars prior to the circuit court's Rule 44(c) colloquy with Petitioners. (Pet. at 1 to Case No. 1094).

During the pendency of that proceeding, on December 10, 2019, the Circuit Court convened a Rule 44(c) hearing. (See A.R. at 2). Following the colloquy and a consideration of the arguments of counsel, the court "found that there is good cause to believe a conflict is likely to arise in this case once the Court moves forward and makes rulings on admissibility and the case is set for trial." (A.R. at 2). It determined that "each Defendant being represented by the same counsel would not be in that Defendant's best interest, and the Court must act in the interest of justice." (A.R. at 2). The circuit court ruled that "counsel for Defendants is disqualified from representing any Defendant in this matter[.]" (A.R. at 3). It directed the Defendants to each retain separate counsel and scheduled an arraignment hearing for January 6, 2020. (A.R. at 102).

This petition for a writ of prohibition followed.

SUMMARY OF ARGUMENT

The petition should be denied. The circuit court's determination that counsel was disqualified from representing three co-defendants—either collectively or individually—based upon the likelihood that a conflict would arise was *not* clearly erroneous as a matter of law.

STATEMENT REGARDING ORAL ARGUMENT AND DISPOSITION

Oral argument is unnecessary because Petitioners have failed to establish an entitlement to a writ of prohibition. The petition should be denied.

ARGUMENT

A writ of prohibition "is an extraordinary remedy, the issuance of which is usually reserved for really extraordinary causes." *State ex rel. Davidson v. Hoke*, 207 W. Va. 332, 335, 532 S.E.2d 50, 53 (2000). Such a writ "lies only to restrain inferior courts from proceeding in causes over

which they have no jurisdiction, [or in which] they [have] exceed[ed] their legitimate powers[.]” Syl. Pt. 1, *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953); Syl. Pt. 3, *State ex rel. King v. MacQueen*, 182 W. Va. 162, 386 S.E.2d 819 (1986) (“A writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction exceeds its legitimate powers.”). In *State ex rel. Hoover v. Berger*, this Court identified five factors to consider in determining whether an issuance of a writ is appropriate where a circuit court was alleged to have exceeded or otherwise abused its authority:

(1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal’s order is clearly erroneous as a matter of law; (4) whether the lower tribunal’s order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal’s order raises new and important problems or issues of law of first impression.

Syl. Pt. 4, in part, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996). This syllabus point further provides that “[t]hese factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.” *Id.* at Syl. Pt. 4, 483 S.E.2d at 12.

A. Response to Question 1.

Petitioners ask this Court to resolve the following question:

Must a counsel engaging in joint representation of criminal defendants be disqualified, upon motion by the State, where no actual conflict exists and where the only potential conflict raised is that plea agreements which require Defendant’s cooperation have been extended?

(Pet. at 1).

Better fashioned, this question asks: “Whether or not counsel may be disqualified from jointly representing multiple criminal defendants where a potential conflict has arisen?” The answer to that question is “Yes.” The circuit court’s ruling disqualifying Attorney Riddell from representing three co-defendants was a proper exercise of its discretion and fully comports with each Defendant’s right to the effective assistance of counsel. The ruling was not legally erroneous for the following reasons.

Both the West Virginia and federal constitutions guarantee a criminal defendant the right to the effective assistance of counsel. U.S. Const. Amend. VI; W. Va. Const. art. III, § 14. By its very nature, the constitutional right to the effective assistance of counsel includes the right to conflict-free counsel. *Cole v. White*, 180 W. Va. 393, 395, 376 S.E.2d 599, 601 (1988) (“[W]here a constitutional right to counsel exists, under W. Va. Const. art. III § 14, there is a correlative right to representation that is free from conflicts of interest.”) (internal quotations omitted); *State ex rel. Blake v. Hatcher*, 218 W. Va. 407, 415, 624 S.E.2d 844, 852 (2005) (noting that the Sixth Amendment balances two rights, “(1) the right to be represented by counsel of choice and (2) the right to a defense conducted by an attorney who is free of conflicts of interest.”). Nonetheless, a criminal defendant may, in limited circumstances, waive his or her right to conflict-free counsel in order to be represented by the attorney of his or her choosing. This right, however, is far from absolute and trial courts have substantial discretion to refuse waivers of conflict of interests. *See, e.g., United States v. Thomas*, 977 F. Supp. 771, 775 (N.D. W. Va. 1997) (citing *Wheat v. United States*, 486 U.S. 153 (1988)); *see generally Blake*, 218 W. Va. at 409, 624 S.E.2d at 846 (recognizing that a circuit court has the authority to disqualify an attorney on the basis that a conflict has arisen or is likely to arise). This discretion exists because, “while the right to select and be represented by one’s preferred attorney is comprehended by the Sixth Amendment, the

essential aim of the Sixth Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom [s]he prefers.” *Wheat*, 486 U.S. at 159;⁵ *Thomas*, 977 F. Supp. at 775 (citing *United States v. Williams*, 81 F.3d 1321 (4th Cir. 1996)); *Blake*, 218 W. Va. at 413–14, 624 S.E.2d at 850–51 (“Where representation is affected by an actual conflict of interest, the defendant can not be said to have received effective assistance of counsel as required by the Sixth Amendment.”).

The State and federal constitutional rights to the effective assistance of counsel are not the only considerations that play into this calculus—a circuit court also has an independent obligation to ensure “that criminal trials are conducted within the ethical standards of the profession and that legal proceedings are fair to all who observe them.” *Blake*, 218 W. Va. at 414, 624 S.E.2d at 851; *United States v. Williams*, 81 F.3d 1321, 1324 (4th Cir. 1996) (observing that “the Supreme Court emphasized that the Sixth-Amendment right to counsel has more to do with ensuring the fairness and integrity of the adversarial process generally than with vindicating a defendant’s desire to have the particular lawyer that she or he most wants.”). These factors alone may necessitate the removal of counsel due to a perceived conflict. *See Williams*, 81 F.3d at 1324 (explaining that Supreme Court precedent “requires a district court to exercise its own independent judgment as to whether the proceedings are likely to have the requisite integrity if a particular lawyer is allowed to represent a party.”); *see also Blake*, 218 W. Va. at 414, 624 S.E.2d at 851. Thus, the discretion afforded to the circuit courts of this State ensures that criminal proceedings maintain their integrity while at the same time safeguards a defendant’s constitutional right to an effective advocate.

⁵ This Court recognized as much in *Blake*. 218 W. Va. at 413, 624 S.E.2d at 850.

Rule 44(c) of the West Virginia Rules of Criminal Procedure balances these considerations, imbuing the circuit courts of this State with discretion to determine whether multiple co-defendants may be represented by the same attorney or law firm. *Cole*, 180 W.Va. at 397, 376 S.E.2d 603 (“[O]ne of the practical purposes of [Rule 44] is to ensure that in advance of trial or other disposition of the case, any joint representation will be inquired into by the court so as to avoid a conflict problem that could result in reversal.”). Under Rule 44(c), when criminal defendants who are either charged as co-defendants or joined for trial are represented by the same attorney or firm, the circuit court “*shall promptly* inquire with respect to such joint representation.” W. Va. R. Crim. P. 44(c) (emphasis added). The circuit court must also perform a colloquy to “personally advise each defendant of the right to effective assistance of counsel, including separate representation.” *Id.* In addition, Rule 44(c) compels a circuit court “to take such measures as may be appropriate to protect each defendant’s right to counsel,” unless it appears that “no conflict of interest is likely to arise[.]” *Id.* Indeed, a circuit court is obligated to take “affirmative action” under Rule 44(c) where it believes “a conflict is likely to arise.” Syl. Pt. 6, in part, *Cole v. White*, 180 W. Va. at 394, 376 S.E.2d at 600.

Because of the likelihood of conflict, joint representation of co-defendants in a criminal matter is greatly disfavored, and many conflicts are not “waivable” under either the Constitution or the Rules of Professional Conduct. By way of example, the West Virginia Rules of Professional Conduct, enacted in 1989, notes that “[t]he potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant.” W. Va. R. Prof. Conduct Rule 1.7 cmt. 23.

Rule 1.7 provides that:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

W. Va. R. Prof. C. 1.7. As Rule 1.7(b) makes plain, many conflicts are nonconsentable, and a conflict waiver will not cure the conflict. *Id.*; *see also* Cmt. 14 to Rule 1.7. When “clients are aligned directly against each other in the same litigation,” a nonconsentable conflict arises. *Id.* at Cmt. 17.

With this background in mind, it is evident Petitioners are incorrect in their conclusion that a concurrent conflict may be resolved by a conflict waiver. (*See* Pet. at 1). This is particularly true given that, in order to be entitled to the issuance of a writ, Petitioners must demonstrate that the circuit court erred as a matter of law. Syl. Pt. 4, in part, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996).

First and foremost, the conflict is blatant and allowing counsel to jointly represent all three defendants would place Petitioners’ counsel (and his clients) in the very situation that Rule 44(c) and both the state and federal constitutions seek to avoid. For instance, it is impossible for Petitioners’ counsel to objectively analyze discovery and competently advise one client to either

accept or reject a plea agreement—or develop a complete defense to the charges—without compromising the confidence of another client.

Petitioners contend that the waivers they have executed ameliorates this concern. But that is not true. “Even when a defendant seeks to proceed with conflicted counsel by waiving the conflict, a district court retains authority to reject the proffered waiver to preserve ethical standards and ensure a fair trial.” *United States v. Evanson*, 584 F.3d 904, 909 (10th Cir. 2009) (citing *Wheat*, 486 U.S. at 160). Here, each waiver indicates that each Petitioner has agreed to waive her right to be represented by Attorney Riddell during the course of their plea negotiations. (A.R. at 13, 16, 19). Such a waiver runs afoul of the constitutional safeguards discussed above—it drives a wedge between client and counsel—and is the very type of waiver decried by the Rules of Professional Conduct. In fact, the waiver expressly acknowledges a concurrent conflict and acknowledges that this conflict disqualifies Attorney Riddell from fully and reasonably representing each individual defendant by virtue of his joint representation:

My attorney [Christian J. Riddell] has informed that, pursuant to Rule 1.7 of the West Virginia Rules of Professional Conduct, the possibility of [] a plea agreement creates for him a concurrent conflict of interest as to joint representation because **he will be unable to negotiate any such plea agreement on my behalf because of his ongoing representation and duties as to my co-defendants.**

(A.R. at 13, 16, 19) (emphasis added). This is not a valid waiver and flies in the face of Rule 1.7 and its commentary. Petitioners’ counsel cannot reasonably and fully represent each Petitioner and he admits as much. (A.R. at 13, 16, 19). This scenario is precisely what the Constitution and the Rules of Professional Conduct seek to avoid, and is also why the circuit court has an obligation to promptly engage with each defendant to ascertain whether a conflict (or even the potential for a conflict) necessitates the disqualification of counsel (which the circuit court did). W. Va. R. Crim. P. 44(c).

Moreover, none of the authority Petitioners rely upon support their position. Rather, the authority cited by Petitioners demonstrates the inherent conflicts associated with joint representation in criminal cases and illustrates that the proper time to assess whether joint representation will adversely impact the defendants is at the outset of litigation. *Fryar v. United States*, 404 F.2d 1071, 1073 (10th Cir. 1968) (finding that co-defendants' right to effective counsel was not infringed because although defendants appointed same counsel, no evidence of conflict existed); *Campbell v. United States*, 352 F.2d 359, 361 (D.C. Cir. 1965) (reversing conviction and finding that joint representation prejudiced defendant because counsel's representation of less culpable defendant was much less effective); *United States v. Foster*, 469 F.2d 1, 4–5 (1st Cir. 1972) (requiring trial courts to discuss risks of joint representation with defendants early in litigation); *United States v. Alberti*, 470 F.2d 878, 881 (2nd Cir. 1972) (finding no prejudice when defendant's counsel previously represented state's witness, but ordering lower courts conduct hearings to determine whether conflict is likely).

Petitioners brazenly contend that “[t]here is no case precedent whatsoever which suggests that the [S]tate’s desire to induce Defendant to take cooperation plea agreements is sufficient grounds to disqualify defendants’ choice of counsel.” (Pet. at 1). But this argument ignores the purpose of the body of law discussed above, all of which is designed to ensure that a defendant receives full and complete representation by counsel. At its core, Attorney Riddell admits he is unable to provide Petitioners with representation during the course of plea negotiations. (A.R. at 13, 16, 19). This constitutes an admission that he cannot perform the role of a zealous advocate on behalf of each defendant individually—which is what the Constitutions demand and the Rules of Professional Conduct require. For these reasons, the circuit court did not err when it ruled that Attorney Riddell could not adequately represent all three Defendants jointly.

Finally, Petitioners' argument that the absence of an "actual conflict" means their counsel can jointly represent them is misplaced. Rule 44(c) imbues the circuit court with authority to disqualify counsel when it determines that a conflict is "likely to arise." W. Va. R. Crim. P. 44(c). Thus, a circuit court need not find that an actual conflict has arisen in order to find disqualification is appropriate.

B. Response to Question 2.

Petitioners frame this question as:

Must counsel engaging in joint representation of criminal defendant be disqualified where it is theoretically possible that one codefendant may, in the future, wish to provide material confidential information to counsel which she does not want shared with her co-defendant[?]

(Pet. at 1). The answer to this question is unequivocally, "Yes." An attorney who represents three clients in the same criminal proceeding cannot "hide" information given to him by one client from his other clients. A simple hypothetical bears this out:

Counsel jointly represents three defendants charged with murder. Client A tell counsel that he killed the victim and that Clients B and C were not involved. Clients B and C tell counsel that neither of them killed the victim. Client A divulges this confession with the insistence that counsel maintain this confession in confidence and not share it with Clients B and C. It is axiomatic that counsel cannot keep this confession in confidence because doing so would prevent Clients B and C from advancing a complete defense at trial, but revealing it would violate privilege and infringe upon Client A's right to effective counsel. To suggest that counsel could keep this critical piece of evidence away from Clients B and C is absurd. This is axiomatic.

This situation is present in the case below. As Petitioners note in their Petition, the State extended individual guilty plea offers to each of them. (*See* Pet. at 5). As part of each agreement, any defendant wishing to plead guilty would be required cooperate with the State and be called as

a State's witness should the cases against any of the other defendants proceed to trial. (*Id.*). The dilemma this creates for defense counsel is that he has a serious conflict when it comes to advising each defendant, individually, as to the parameters, benefits, and consequences of each plea agreement because doing so reasonably operates to the detriment of the other co-defendants.⁶

The *likelihood* that this scenario will lead to a conflict constituted a sufficient basis for the circuit court to disqualify counsel. W. Va. R. 44(c). The circuit court possessed the lawful discretion to determine whether or not a conflict has arisen or was likely to arise. W. Va. R. Crim. P. 44(c); *see also United States v. Harmon*, 914 F. Supp. 275, 277 (N.D. Ill. 1996) (quoting *Wheat*, 486 U.S. at 163). (“[A] trial court faced with a conflict can require separate counsel to represent codefendants in spite of defendants’ waivers. This is so even where the conflict has not materialized, but is merely a possibility. As the Supreme Court stated in *Wheat*, ‘the district court must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential conflict exists which may or may not burgeon into an actual conflict as the trial progresses.’”); *see also id.* at 278 (noting that “the court is not omniscient and cannot foresee what conflicts may arise in the future. *Wheat* allows the court to take steps to ensure that a potential conflict does not materialize into an actual one.”). The circuit court held a hearing on the matter, reviewed the waivers, heard arguments from the parties, and engaged in a colloquy with each Defendant. (*See* A.R. at 1-3). Given these considerations, the court was within its authority to determine that a conflict was “very likely to arise,” and that it was appropriate to disqualify counsel from joint representation.

⁶ And, as outlined above, the “conflict waivers” do not lawfully remedy this conflict.

In addition, Petitioner's discussion and application of the seven factor test outlined by this Court in *State ex rel. Blake v. Hatcher* is inapposite. (See Pet. at 19-23). That test evaluates whether counsel's former representation of a State's witness precludes that same counsel from representing a defendant in which that witness may be called. Syl. Pt. 4, *State ex rel. Blake v. Hatcher*, 218 W. Va. 407, 624 S.E.2d 844 (2005). *Blake* is not applicable to Petitioners' contention that they are entitled to concurrent, joint representation. Finally, Petitioners' reliance upon *State v. Haddix* and other "relevant habeas cases" are not relevant at all. When a petitioner in a habeas corpus proceeding raises a claim of ineffective assistance of counsel based upon a perceived conflict of counsel, the petitioner must establish an actual conflict. Syl. Pt. 1, *State v. Haddix*, 180 W. Va. 71, 375 S.E.2d 435 (1988) (per curiam). This is an entirely different framework than a trial court's pre-trial ruling disqualifying counsel on the basis that a conflict is likely to arise. This Court recognized as much in *Cole v. White*. 180 W. Va. 393, 398, 376 S.E.2d 599, 604 (1988) ("It is important to note that the standard for taking some affirmative action under Rule 44(c) is the trial court's belief that a conflict of interest is likely to arise. This is a lower standard than the Sixth Amendment's requirement of demonstrating an actual prejudice[.]"). The dynamics implicated in a pretrial ruling on the disqualification of counsel (as opposed to post-conviction habeas corpus proceedings raising a claim of ineffective assistance of counsel) have also been eloquently explained by the United States Supreme Court in *Wheat*:

Unfortunately for all concerned, a district court must pass on the issue whether or not to allow a waiver of a conflict of interest by a criminal defendant not with the wisdom of hindsight after the trial has taken place, but in the murkier pre-trial context when relationships between parties are seen through a glass, darkly. The likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials. It is a rare attorney who will be fortunate enough to learn the entire truth from his own client, much less be fully apprised before trial of what each of the Government's witnesses will say on the stand. A few bits of unforeseen testimony or a single previously unknown or unnoticed document may significantly shift the relationship between multiple

defendants. These imponderables are difficult enough for a lawyer to assess, and even more difficult to convey by way of explanation to a criminal defendant untutored in the niceties of legal ethics. Nor is it amiss to observe that the willingness of an attorney to obtain such waivers from his clients may bear an inverse relation to the care with which he conveys all the necessary information to them.

Wheat, 486 U.S. at 162–63 (1988). Thus, the considerations at play in a court’s pretrial ruling on whether counsel must be disqualified due to a conflict—or a likely conflict—is quantitatively different than the burden a petitioner in a habeas corpus proceeding faces when challenging his conviction on the basis that his Sixth Amendment right to conflict-free counsel was violated. *Cole*, 180 W. Va. at 398, 376 S.E.2d at 604. For these reasons, Petitioners reliance on *Haddix* and its progeny are misplaced.

C. Response to Question 3.

In Question 3, Petitioners ask: “Is it necessary for the [circuit c]ourt to allow Defendants to receive discovery when requested, prior to conducting the Rule 44(c) colloquy[?]” The answer to that question is “no.”

Petitioners insist that “case law makes clear that a Defendant’s trial strategy is a key component of any inquiry into whether a conflict requiring disqualification exists, and said trial strategy cannot be properly formulated in the absence of discovery.” (Pet. at 1). This is a remarkable declaration considering *none* of the authority cited in Petitioners’ brief requires discovery occur before the Rule 44(c) colloquy. Given that the law does not require that to which Petitioners claim entitlement, a writ should not be issued.

To be clear, Petitioners’ counsel contends that he, on behalf of his [now former] clients, is entitled to receive and review discovery from the State (and that the State must provide a bill of particulars) in order to defend against the State’s motion to disqualify him *and* that the circuit court be ordered to compel the State to do so before the court conduct a Rule 44(c) colloquy. (Pet. at 2,

23). *There is no such law to support that position.* Indeed, Petitioners cite *no legal authority* that requires circuit courts to order the State to produce discovery and a bill of particulars before ruling upon whether a conflict of interest necessitated defense counsel's disqualification. If anything, the opposite is true, as this Court recognizes that "trial court[s] should be afforded considerable latitude in making its determination to disqualify a criminal defense attorney due to a conflict of interest," *Blake v. Hatcher*, 218 W. Va. at 418, 624 S.E.2d at 855 (citing *Wheat v. United States*, 486 U.S. 153 (1988)), and Rule 44(c) requires the circuit court to act "promptly" to evaluate the potential for a conflict. W. Va. R. Crim. P. 44(c). Given this, a writ should not issue because Petitioners have failed to supply any direct authority supporting their position, and, therefore, it cannot be said that the circuit court engaged in an error of law.

D. Response to Question 4.

In Question 4, Petitioners ask: "Was it necessary to disqualify undersigned counsel from representation of any single codefendant simply because he was disqualified from joint representation?" (Pet. at 1). The issue raised in this question is whether or not the circuit court properly exercised its discretion when it determined that Petitioners' counsel was disqualified from representing any single co-defendant because counsel has—since the inception of this case—represented all defendants. The answer to this question is: "Yes," for either of two reasons.

First and foremost, the circuit court found that defense counsel has already "conceded that failure of joint representation will require withdrawal from all three cases." (A.R. at 2). Thus, this claim should not be reviewed by the Court because counsel for Petitioners conceded the issue below.

Second, whether or not it is *hypothetically* possible that counsel *could* represent a single defendant despite the fact that he has represented all three since the inception of this case is not

the standard upon which the propriety of representation is viewed. At its core, the circuit court has the independent authority to determine whether counsel's extensive, long-standing representation of all three defendants fairly called into question the integrity of the proceedings and that disqualification was appropriate. *See, e.g., United States v. Pacheco-Romero*, 374 F. Supp. 3d 1326, 1329 (N.D. Ga. 2019) (gathering authority and recognizing that the right to counsel of one's choosing "is not absolute, but is qualified by the judiciary's independent interest in ensuring that the integrity of the judicial system is preserved") (internal quotations and subsequent history omitted). This obligation exists as part of the court's Sixth Amendment "conflict" analysis. *See id.*; *see also Williams*, 81 F.3d at 1324. The circuit court made that determination and disqualified counsel based upon his long-standing representation of all three individuals. (A.R. at 2). This ruling was an appropriate exercise of the court's authority and was not legally erroneous.

By way of example, in *Wheat*, the United States Supreme Court determined that an attorney who had previously represented a co-defendant, Bravo, could not represent Mr. Wheat at his criminal trial. *Wheat*, 486 U.S. at 153. "The Court reasoned that if the government called Bravo as a witness (which it ultimately did), [counsel] would not be able to conduct a 'vigorous cross-examination' and would thereby provide ineffective assistance to Wheat." *United States v. Evanson*, 584 F.3d 904, 910 (10th Cir. 2009) (quoting *Wheat*, 486 U.S. at 164 & n.4).

In addition, Petitioners' counsel cannot represent one Petitioner because doing so would necessarily require him to rely upon insight and knowledge gained during the course of his long-standing representation of all three Petitioners. It strains credulity to suggest otherwise. For instance, if counsel were permitted to continue to represent Defendant Yurish in the criminal case and Defendant Douty was called to testify at Defendant Yurish's trial, counsel would be required to cross-examine Douty, (who, at a minimum is his former client, but also, upon information and

belief, continues to be represented by the same counsel in the parallel civil action) in order to effectively advocate on behalf of his other client, Defendant Yurish. But counsel owes duties to both Douty and Yurish (either as current or former clients), and his advocacy would be shackled. Counsel cannot use insight gained during the course of representing one client to the advantage (or disadvantage) of a separate client. *See, e.g., Wheat*, 486 U.S. at 156. The same is true under any combination of defendants. It is also true regardless of counsel's role in the civil proceedings given his long-standing, joint representation of all three Petitioners in the underlying matter because he would be required to cross-examine either his former clients or current clients.

Petitioners' reliance upon *State ex rel. Youngblood v. Sanders* is misplaced. There, this Court explained that "[t]he law is clear that potential conflicts of interest are raised when an attorney undertakes to represent an individual charged with the same crime for which he or she has represented or is representing a co-defendant." 212 W. Va. 885, 889, 575 S.E.2d 864, 868 (2002). The assumption that a conflict exists when an attorney engages in successive representation "arises based on the concern that privileged information obtained from the former client might be relevant to cross-examination and thereby affect the attorney's advocacy." *Youngblood*, 212 W. Va. at 889, 575 S.E.2d at 868 (citations omitted). *Youngblood* while illustrative, presented a markedly different set of facts than those presented in this case, as it involved a case where an attorney obtained confidential information from a brief encounter with a prospective client before he was ultimately retained by a co-defendant. *See id.* at 890, 575 S.E.2d at 869. Here, Petitioner's counsel has represented all three defendants for several months (and, upon information and belief, *continues* to represent two of them in the on-going civil action). For this reason, *Youngblood* does not apply to the case at hand.

Moreover, while *Youngblood* outlines the considerations a circuit court should take into account when considering whether a concurrent conflict exists due to an attorney's brief relationship with a prospective client, the circuit court still has an independent obligation to safeguard the fairness of the proceedings, and permitting counsel to represent a single defendant *after* he has spent months also representing all three defendants stains the integrity of the criminal process. *See generally Wheat*, 486 U.S. at 162 ("Such representation not only constitutes a breach of professional ethics and invites disrespect for the integrity of the court, but it is also detrimental to the independent interest of the trial judge to be free from future attacks over the adequacy of the waiver or the fairness of the proceedings in his own court and the subtle problems implicating the defendant's comprehension of the waiver."); *Thomas*, 977 F. Supp. at 775; *see generally Blake*, 218 W. Va. at 409, 624 S.E.2d at 846 (recognizing that a circuit court has the authority to disqualify an attorney on the basis that a conflict has arisen or is likely to arise). The circuit court's determination that justice would not be served by permitting Petitioners' counsel to remain counsel for one defendant was an appropriate exercise of its discretion, supported by the facts of this case, and endorsed by the law.

Given this, the circuit court was correct to find under Rule 44(c) that the likelihood for a conflict prohibited counsel from representing any single defendant and that he was disqualified—entirely—from the case.

CONCLUSION

For the foregoing reasons, the Respondent requests this Court to deny the Petition for a Writ of Prohibition.

Respectfully submitted,

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