IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No. 19-1108

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

Case No: 19-M-7
Case No: 19-M-8
Case No: 19-M-9

v.

The Honorable Laura Faircloth
Sittings as Judge of the Circuit Court of Berkeley County

PETITION FOR WRIT OF PROHIBITION

Christian J. Riddell
W.Va. Bar No. 12202
Stedman & Riddell, PLLC
329 South Queen Street
Martinsburg, West Virginia 25401
(304) 267-3949
(304) 267-5411 facsimile

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III. Questions Presented

1. Q: 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.

   A: No. the concurrent conflict raised by the offering of plea deals which are potentially detrimental to co-defendants can be ameliorated pursuant to Rule 1.7(b) via the signed written consent of Defendants, the appointment of separate counsel for the discrete, the severance of Defendant's trials, or any number of other less drastic alternatives which do not infringe upon Petitioner's 6th Amendment Rights. There is no case precedent whatsoever which suggests that the state's desire to induce Defendants to take cooperation plea agreements is sufficient grounds to disqualify defendants' choice of counsel.

2. Q: Must a counsel engaging in joint representation of criminal defendants 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 codefendant.

   A: No. such a proposed conflict is purely speculative and conjectural, has no basis in the record, and, because such a contingency is always a theoretical possibility in every case of joint representation, would amount to a flat prohibition, in all instances, of joint

representation for criminal codefendants, which is clearly at odds with relevant West Virginia and Federal law.

3. Q. Is it necessary for the Court to allow Defendants to receive discovery, when requested, prior to conducting the Rule 44(c) colloquy

   A. Yes. The 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.

4. Q. Was it necessary to disqualify undersigned counsel from representation of any single codefendant simply because he was disqualified from joint representation.

   A. No. Absent specific information that confidential information was actually discussed, a counsel is not conflicted out from representing a Defendant simply because he represented a codefendant in the past.

IV. Statement of the Case

Comes now the Petitioners, Kristin Douty, June Yurish, and Christina Lester, by counsel, Christian J. Riddell, and Petitions this Honorable Court for a Writ of Prohibition prohibiting the Berkeley County Circuit Court, via Judge Laura Faircloth, from disqualifying undersigned counsel from joint representation in the above styled case. Petitioners further request a Writ of Mandamus requiring the production of discovery in this matter.

The matter relates to misdemeanor charges of failure to report abuse, in violation of W.Va. Code § 49-2-812, which were originally brought against the above named Defendants in the Magistrate Court of Berkeley County, West Virginia.

The case is connected to ongoing civil proceedings, also in the Berkeley County Circuit Court, relating to a recording which a parent hid on her intellectually and developmentally disabled daughter's person without said daughter's knowledge, and which, over the course of an eight-hour school day, picked up all statements made by anyone in the vicinity of the child in question, including some alleged abusive statements made by Defendants. The 8-hour long recording was then cut and edited into an approximately 30 second clip highlighting statements made by Defendants, most of which were made to each other in jest but which were subsequently edited together so as to create the impression that they were made directly to children, and was then disseminated across the state and nation, causing widespread anger.

The civil cases in question were filed in February and March of 2019, but it was not until August of 2019 that the Berkeley County Prosecutor's Office, likely under political pressure[1], filed criminal charges in the instant case for failure to report abuse. Undersigned counsel has been involved in representation of two of the Defendants, June Yurish and Kristin Douty, since the civil cases' inceptions. As such, he has become intimately familiar with what is likely the most significant evidentiary issue in both the civil and criminal cases, to wit, whether the

[1] It should be noted that on February 19, 2019 it was reported in the media that Prosecutor Delligati announced, on February 8, 2019, that "a police investigation could not prove that a criminal offense occurred after reviewing the audio recording..." She further stated that she was cooperating with the investigation of the attorney general, who has been vigorously pursuing a human rights action and making frequent announcements regarding the same in the media. As such, Prosecutor Delligati's subsequent decision to file charges in spite of her own investigation's failure to find wrongdoing suggests that the decision to do so was made under pressure, and that that pressure likely came, at least in part, from the attorney general's office. *See* *https://www.heraldmailmedia.com/news/tri_state/west_virginia/w-va-attorney-general-files-human-rights-action-says-students/article_17b39b97-3ec7-5281-b8b1-36a00acb61f1.htm*, Appendix Record (see AR pg. 5) 2 .

recording in question violates the West Virginia Wiretap and Electronic Surveillance Act, W.Va. Code § 62-1D-1 et seq., and is therefore inadmissible under the provisions of the Act. Because of undersigned counsel's familiarity with the civil cases, and given his ongoing practice and familiarity with criminal law, all three Petitioners chose to hire undersigned counsel jointly to represent them in the criminal charges.

The charging documents in question referenced as evidence only the recording discussed above, which is clearly unlawful per the language of W.Va. Code § 62-1D-3 and therefore inadmissible under W.Va. Code § 62-1D-6, and further failed to identify any act of abuse or suspected abuse, as per the elements of a violation of W.Va. Code § 49-2-812, which would have triggered the reporting requirement under § 812 (*See AR. pg. 10*). As such, it was expected by Defendants and undersigned counsel, and likely by the State as well, that there would be significant argument made early in the case on Motions to Dismiss.

Given the complexity and high-profile nature of the legal determination necessary for proper adjudication of this matter as well as the case's connection to other matters currently pending before the Berkeley County Circuit Court, undersigned counsel moved to transfer the case from the Berkeley County Magistrate Court to the Berkeley County Circuit Court, and the request was granted without objection.

However, prior to Defendants making their initial appearance in Circuit Court, undersigned counsel received an email from the State, via Assistant Prosecuting Attorney Kevin Watson, advising that they believed a conflict existed because, "As in all cases with co-defendants we explore cooperation agreements requesting each defendant cooperate against the others. This puts the representation of each defendant in a directly adverse position to the others

in this case. The practical effect is that you are not able to take any cooperation offer to your client and advise her about it because it will involve one making claims about the other."

Undersigned counsel then responded to this email by stating he had addressed the potential conflict issue regarding cooperating plea agreements, and that they had signed informed consent waivers pursuant to Rule 1.7 which include an acknowledgement that their choice of joint representation means that undersigned would be prohibited from negotiating or presenting plea agreements involving cooperation against their co-defendants. (See *AR. pg. 13*).Undersigned also noted that the inadmissibility of the evidence under § 62-1D-6, which was the subject of pending motions in the civil cases, might quickly resolve the criminal case in Defendants favor, and that we might be able to wait until that issue was decided before dealing with the conflict issue.

The prosecution then responded in a subsequent email by stating, "I think having the waiver is good, and we know that admissibility of the audio recording is certainly a fight central to this litigation. However, I don't think that either of those issues make it ok for your joint representation to go forward." He then, in the next paragraph, stated, "I have attached our initial plea offer to each of your clients. As you know, you are required by State v. Becton, and the Rules of Professional Conduct, to provide a copy of these offers to your client and to competently advise them about the offer. Yet, your joint representation prohibits advising/assisting one of your clients to the detriment of another one in this case."

Thereafter, the State filed a Motion to Disqualify (see AR pg. 22), undersigned counsel filed a response (see AR pg. 27), and the State filled a reply (see AR pg. 69). The parties reconvened on November 18, 2019 to argue the Motion, and the Court, on its own initiative and

without prompting by the State determined that, despite the fact that no actual conflict existed, an unwavable potential conflict of interest existed for undersigned counsel because it might theoretically happen, at some point, that one codefendant may have material confidential information that she wishes to share with counsel but not with her other codefendants, and that such information could alter the zealousness with which undersigned counsel might potentially cross examine a certain witness. There was nothing in the record to suggest that this had happened or was likely to happen – the hypothetical proposed was 100% conjectural and speculative – nevertheless the Court found that this theoretical possibility was enough to create an unwavable conflict of interest for undersigned counsel. The Court further found that the conflict could not be cured by appointing separate counsel for the limited purpose of communicating plea agreements, as has been done previously in the Berkeley County Circuit Court, because, to paraphrase "If we're going to do that we might as well just appoint new counsel."[2] The Court then disqualified undersigned counsel, and Ordered Defendants to procure new counsel within 30 days. Undersigned further attempted to request a stay of proceedings pending the filing of a writ of prohibition before the West Virginia Supreme Court, but said request was denied, and the Court indicated that the case would be moving forward.

However, prior to entering its November 18th Order, the Court, realizing that the colloquy required under Rule 44(c) of the West Virginia Rules of Civil Procedure had not been held, set an additional hearing for November 21, 2019 to address Rule 44(c) and held the November 18th Order disqualifying undersigned in abeyance. In preparation of said hearing, undersigned submitted a supplemental brief which (1) addressed the procedural requirements of Rule 44(c),

[2] Undersigned is paraphrasing the Court's language here, as elsewhere, from memory, as the emergency nature of the instant Petition makes it impracticable to obtain transcripts prior to filing. Undersigned would respectfully request permission to supplement the record with transcripts for all relevant hearings as soon as the same are received.

(2) responded to some of the arguments the court had made, *sua sponte*, at the November 18th hearing and (3) requested that discovery be provided to Defendants before the Rule 44(c) colloquy for the purpose of allowing them to plan their trial strategy before engaging in any colloquy as to a potential conflict (see AR pg. 78).

At the November 21st hearing, the Court did not permit oral argument on undersigned's supplemental brief - which had been submitted the day before because said hearing had only been noticed two days prior - but rather continued the hearing until December 10, 2019 to allow the State time to respond (*See AR pg. 89*), which was accepted by Defendants without objection. However, Defendants did, at that time, reiterate their request for discovery prior to the Rule 44(c) hearing be Ordered, and the Court refused (*see AR pg. 100*).

Thereafter, Petitioners filed with the West Virginia Supreme Court of Appeals a Petition for Writ of Mandamus compelling the Circuit Court to order the production of discovery prior to conducting the Rule 44(c) colloquy, along with a concomitant Motion for Expedited Relief Or, in the Alternative, Motion to Stay. Additionally, upon filing said Petition for Writ, Petitioners further filed a Motion to Continue the December 10th hearing on the basis that said Petition was outstanding before the Court. That motion was denied, and the Court held its December 10th hearing, and the prior Petition and Motions remain pending before this Court. Because said Writ has been rendered moot by the Circuit Court's December 10th hearing, Petitioners would respectfully request that the arguments put forth therein simply be incorporated into the instant Petition.

During the December 10th hearing, Judge Faircloth refused to allow oral argument on the issues which had been raised in the supplemental briefings. Undersigned counsel stated that there

were additional points that he wished to make in response to the State's brief before the Court rendered its verdict, and that, if the Court refused to allow oral argument before doing so, he would request the opportunity to make a proffer on the record after the Court had adjourned. This request was also denied on the basis that it would take up the court reporters time. The time of the Judge's ruling was approximately 4 p.m., and there were no other cases on the docket for the remainder of the day.

Before the Court adjourned its December 10th hearing, undersigned counsel requested that he be permitted to represent one of the Co-Defendants – assuming written consent of the others – and the Court rejected this request as well on the basis that counsel had already received attorney client communications (see AR pg. 1).

After the close of hearing, that state submitted a written motion requesting a hearing date, which Defendants objected to on the basis that they needed time to acquire the transcripts and file a writ regarding the disqualification. Over Defendant's Objection, the Court set an arraignment for January 6, 2019 (see AR pg. 102)

Petitioners now bring the instant action before this Court on Petition for Writ of Prohibition.

V. Summary of Argument

A Defendants right to choose her own counsel is a right of Constitutional Dimension which is not per se defeated where a defendant chooses to engage in joint representation with a codefendant.

The Circuit Court has therefore violated the Defendants' rights by disqualifying their chosen counsel from engaging in joint representation where no actual conflict existed, and where the only conflicts alleged were a potential conflict regarding the state's inability to present cooperation plea agreements to Defendants and a wholly theoretical and speculative conflict proffered by The Circuit Court, sua sponte, which was based entirely on the 100% speculative and conjectural notion that one of the codefendants *might*, at some point in the future, wish to disclose material information to their attorney while keeping it from the other codefendants.

Because the bases for disqualification in this matter exist as a potentiality in every single instances of criminal defense joint representation, the Circuit Court's ruling effectively overturns existing law by creating a blanket prohibition on any counsel's ability to ever represent criminal co-defendants jointly under any circumstances, and thereby violates Defendant's 6th Amendment right to counsel under the U.S. Constitution as well as his rights under Article 3, section 14 of the West Virginia Constitution. Such a ruling is further at odds with relevant case law, which hold that motions by the state to disqualify a Defendants chosen counsel should be granted sparingly and with extreme caution, and only upon proper consideration of various factors which, in the case at bar, did not inure in favor of disqualification.

The Circuit Court further erred by refusing to grant Defendants Request to have discovery provided prior to conducting the Rule 44(c) colloquy. Said error was all the more egregious because it was based on the State's erroneous assertion that they were not required to provide discovery until 21 days prior to trial – an assertion which was based on magistrate court rules despite the fact that the case was being heard in Circuit Court.

Finally, the Circuit Court erred by refusing to allow undersigned counsel, to argue or otherwise vouch the record as to the supplemental briefings at either the November 21, 2019 or December 10, 2019 hearings.

VI. Statement Regarding Oral Argument

Petitioners aver that Oral Argument is not necessary in this case because the law is clear and the time requirements under which Petitioners are operating are not conducive to oral argument.

VII. Argument

A. THIS COURT HAS ORIGINAL JURISDICTION OVER THE INSTANT PETITION BECAUSE PETITIONERS ARE ENTITLED TO MANDAMUS/PROHIBITION RELIEF.

The writ of prohibition only properly issues to prevent unlawful judicial action by inferior tribunals exercising or assuming to exercise judicial functions. *Bd. Of Educ. Of Davis Dist v. Holt*, 46 S.E. 134, 54 W.Va. 167 (W. Va. 1903). "'Where prohibition is sought to restrain a trial court from the abuse of its legitimate powers, rather than to challenge its jurisdiction, the appellate court will review each case on its own particular facts to determine whether a remedy by appeal is both available and adequate, and only if the appellate court determines that the abuse of powers is so flagrant and violative of petitioner's rights as to make a remedy by appeal inadequate, will a writ of prohibition issue.'" *Weikle v. Hey*, 369 S.E.2d 893, 179 W.Va. 458 (W. Va. 1988) (quoting Syl. pt. 2, *Woodall v. Laurita*, 156 W.Va. 707, 195 S.E.2d 717 (1973); Syl. pt. 1, *State ex rel. Williams v. Narick*, 164 W.Va. 632, 264 S.E.2d 851 (1980)).

Mandamus lies to control the actions of an administrative body in the exercise of its duties when such action is arbitrary or capricious. State ex rel. Board of Educ. of Kanawha County v. Dyer, 179 S.E.2d 577, 154 W.Va. 840 (W.Va., 1971). A writ of mandamus or prohibition will not issue unless three elements coexist—(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." Syl. pt. 2, State ex rel. Kucera v. City of Wheeling, 153 W.Va. 538, 170 S.E.2d 367 (1969). Mandamus will not be denied because there is another remedy, unless such other remedy is equally beneficial, convenient and effective. Syllabus, Point 2, Stowers v. Blackburn, 141 W.Va. 328, 90 S.E.2d 277 (W.Va. 1955).

The West Virginia Rules of Criminal Procedure provide no avenue for the taking of an interlocutory appeal. Moreover, even if such an appeal were permitted under the law, the time frames under which appeals are perfected, responded to, and heard would be inadequately long to address Petitioners' issues. As such, there is no equally beneficial remedy available to Petitioners outside of Mandamus Relief.

Additionally, as will be made clear in the arguments below, Petitioners have a clear right under the law to the relief requested, and the Circuit Court has a clear duty to act in accordance with Petitioner's request.

B. A DEFENDANT'S RIGHT TO CHOOSE HER OWN COUNSEL IS A RIGHT OF CONSTITUTIONAL DIMENSION, AND NEITHER THE RULES OF PROFESSIONAL CONDUCT NOR THE RULES OF CRIMINAL PROCEDURE FORBID JOINT REPRESENTATION IN CRIMINAL MATTERS.

"The 6th Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire." *Luis v. United States*, 136 S.Ct. 1083,

1089 (2016). While a Defendant's right to choose its counsel is not absolute, it has been observed that:

> *This constitutional guarantee generally ensures that a criminal defendant may be represented by any counsel who will agree to take his case. Although "[a] defendant's right to counsel of his choice is not an absolute one," United States v. Ostrer, 597 F.2d 337, 341 (2d Cir.1979), we have consistently recognized that the right of a defendant who retains counsel to be represented by that counsel is "'a right of constitutional dimension.' " United States v. Wisniewski, 478 F.2d 274, 285 (2d Cir.1973), (quoting United States v. Sheiner, 410 F.2d 337, 342 (2d Cir.), cert. denied, 396 U.S. 825, 90 S.Ct. 68, 24 L.Ed.2d 76 (1969) (emphasis added)).*

Ibid.

"The joint representation by counsel of two or more accused, jointly indicted and tried is not improper per se;" Syllabus, State v. Haddix, 375 S.E.2d 435, 180 W.Va. 71 (W.Va. 1988) (quoting Syl pt. 3, *State ex rel. Postelwaite v. Bechtold*, 158 W.Va. 479, 212 S.E.2d 69 (1975)).

Rule 1.7 states that, "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.*

Although none of these clients are materially adverse to each other, undersigned acknowledges that a concurrent conflict exists in his joint representation of the defendants pursuant to Rule 1.7(a)(2) insofar as his representation of each Defendant is materially limited by the fact that he cannot broker a cooperation plea agreement for any of the Defendants. However, Defendants have an absolute right to be fully informed of said limitation in their choice of criminal defense

counsel and to, in turn, agree to joint representation under these conditions by waiving, upon informed consent, said concurrent conflict. Rule 1.7(b) states that,

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.*

Defendants aver that each of the elements necessary for waiver exists fully in the instant case. Undersigned believes fully that he will be able to provide competent and diligent representation to each affected client for as long as they all continue to refuse to consider a cooperation plea agreement, as their positions are entirely aligned. Further, the representation is not prohibited by law, and it does not involve the assertion of a claim by one client against another client. Moreover, each Defendant has provided informed consent to the joint representation in writing, and has specifically acknowledged an understanding that the choice precludes them from entertaining cooperation plea agreements made by the state.

Nevertheless, the State claimed that an unwaivable conflict existed because "the official comments on this Rule directly warn against allowing co-defendant representation," and then cited to Comments 23 and 29 of Rule 1.7, which states that "the potential 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," and that, "In some situations, the risk of failure

is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated." State's Motion to Disqualify pp. 3-4, AR . The Circuit Court ultimately agreed.

Of course, Comments 23 and 29 cannot be construed to mean that all codefendants must necessarily and always be represented by different counsel, even where they choose joint representation and provide informed written consent waiving any conflict. In fact, the comments themselves, like the Rule it modifies, imply through its language that such representation may, in some cases, be acceptable. This is made all the more plain once Rule of Criminal Procedure 44(c) is taken into account, which provides an entire procedure to be followed where joint representation exists – a fact which demonstrates unequivocally that joint representation is contemplated.

Rule 44(c) states that,

> *Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, 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. Unless 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.*

"The standard for taking some affirmative action under subdivision (c) is the trial court's belief that a conflict of interest is ***likely*** to arise." *Cole v. White*, 180 W.Va. 393 (1988). Moreover, "When a trial court fails to follows the requirements of subdivision (c) the court will review the record to determine if any conflict likely existed between the jointly represented parties rather than to determine whether there was an actual conflict. If, after reviewing the record, the court

determines no conflict likely existed between the jointly represented parties, such representation will not be deemed reversible error." *State v. Mullins*, 181 W.Va. 415 (1989).

In addition, the West Virginia Supreme Court has further pointed out that Rule 44(c) contemplates use of alternatives to disqualification. As alternatives to disqualification, The *Cole* Court identified (1) appointment of separate counsel (as I suggested at the prior hearing), (3) execution of written waivers (as has been done in this case), and severance of trials. *Cole*, supra, 180 W.Va. at 604. In fact, Cole explicitly endorsed utilization of separate trials as a choice favored over disqualification where doing so can avoid a conflict which would otherwise likely arise. "The utilization of separate trials has been recognized in *Cuyler* as a technique that may "significantly reduce the potential for a divergence in [codefendants] interests." *Ibid.*

Defendants adamantly dispute that the instant situation is one where multiple representation is "plainly impossible," as the state suggested. Defendants are not at all in a situation where contentious litigation or negotiations between them are "imminent or contemplated." While the State would very much like to make such negotiations imminent or contemplated, Defendants have not, even for a second, entertained such a possibility. To the contrary, they were made keenly aware that their choice of counsel would preclude this possibility, and agreed in writing to move forward anyway.

Because the only potential conflicts even alleged were that one of the Codefendants may at some point be interested in taking a cooperation plea agreement or that one of them may eventually wish to share material information they didn't want shared with their codefendants – two possibilities which are theoretically present in every single instance of joint defense – the

defendants are entirely capable of waiving the potential and theoretical conflicts which were alleged by the State and court, respectively.

What's more, if the Court's ruling is to be allowed to stand, it will amount to a wholesale evisceration of prior precedent which does not find joint representation to be per se objectionable. Unless and until there is some basis in the record to believe that one defendant may cooperate and testify against another, or that one has material confidential information not to be shared with the others, this potentiality remains only theoretical and conjectural, and not "likely," as the rules require. If this were enough to work disqualification, than every single case of joint representation in criminal matters would be expressly disallowed, and there would be no point of the Rule 44(c) colloquy at all. As the *Haddix* and *Postelwaite* cases make clear, this is not the case because joint representation is "not per se objectionable."

C. CASE PRECEDENT FROM THE U.S. AND WEST VIRGINIA SUPREME COURT INVEIGH HEAVILY AGAINST DISQUALIFICATION IN THE INSTANT CASE

"A circuit Court, upon motion of a party, by its inherent power to do what is reasonably necessary for the administration of justice, may disqualify a lawyer from a case because the lawyer's representation in the case presents a conflict of interest where the conflict is such as clearly to call in question the fair or efficient administration of justice." However, "such motion should be viewed with extreme caution because of the interference with the attorney client relationship." State ex rel. *Blake v. Hatcher*, 624 S.E.2d 644, 218 W.Va. 407 (W.Va. 2005).

"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 he prefers." *Hatcher*, 624 S.E.2d at 850. (Quoting *Wheat v. United States*, 486

U.S. 153, 159 (1988). As such, "Courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings are fair to all who observe them. *Id.* at 851 (quoting *Wheat*, supra, at 160). Nevertheless, "In making a motion for disqualification of a criminal defendant's chosen defense counsel, the **State bears a heavy burden of proving disqualification is necessary and justified**. *Id.* at 852 (quoting *U.S. V. Diozzi*, 807 F.2d 10, 16 (1st Cir. 1986). (emphasis added). Moreover, "**Because disqualification of a criminal defendant's chosen counsel raises problems of a constitutional dimension, it is a harsh remedy that should be invoked infrequently**." *Ibid.* (emphasis added). Thus, "Upon the state's motion to disqualify counsel, a trial court 'must balance two Sixth Amendment 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.'" *Ibid.*

As such, in determining "whether a conflict of interest should overcome the presumption in favor of defendant's choice of counsel," the circuit court must balance 7 competing interests:

> *(1) the defendants right to be represented by the counsel of his choice; (2) the defendants right to a defense conducted by an attorney who is free of conflicts of interest; (3) the court's interest in the integrity of its proceedings; (4) the witnesses interest in protection of confidential information; (5) the public's interest in the proper administration of justice; (6) the probability that continued representation by counsel of choice will provide grounds for overturning a conviction; and (7) the likelihood that the state is attempting to create a conflict in order to deprive the defendant of his counsel of choice.*

Id. at 854.

Moreover:

> *Factors which the circuit court should weigh in conducting this balance include, but are not liinited to: (1) the potential for use of confidential information by defendant's counsel cross-examining the State's witness; (2) the potential for less than zealous cross examination by Defendant's counsel fo the State's witness; (3) the defendant's interest in*

having the undivided loyalty of his or her counsel; (4) the State's right to a fair trial; and (5) the appearance of impropriety should the jury learn of the conflict.

Ibid.

While the State does have the right to challenge a defendant's choice of representation, "[w]hen the conflict is such as to clearly call in question the fair or efficient administration of justice...***such an objection should be viewed with caution, for it can be misused as a technique of harassment.***" *Hatcher*, 624 S.E.2d at 850 (quoting W.V. R.P.C. 1.7 Comments) (emphasis added).

The state alleges in this case a supposed unwavable conflict based on nothing more than the fact that the state would like to persuade the Defendants to testify against each other in exchange for a plea deal. In furtherance of this aim, and in order to ensure that such a conflict arises as quickly as possible, the State in this matter took unusual step of offering a plea agreement to all three defendants weeks before said Defendant's initial appearance before the Court. Moreover, these pleas were offered immediately after undersigned informed Assistant Prosecutor Watson, via email, that he would not be recusing himself and did not believe disqualification was warranted. As such, the intent of the State to try to find a way to force the Defendants into separate representation – a sort of "divide and conquer" strategy – was clear.

However, each defendant has an absolute right not to accept a plea offer from the state. See W.Va. Rule Crim Procedure 11(a)(1) ("In general. — A defendant may plead not guilty, guilty, or nolo contendere."). Thus, while the State is hoping to turn one or more of these codefendants into a witness, they have not done so at this time and have no right to insist that such be the case, given each Defendant's 5th Amendment right to remain silent. It is especially worth noting that **there is no precedent whatsoever for the idea that codefendants are**

precluded from engaging and attorney in joint representation simply because the state wishes to offer them cooperation plea agreements. Despite the multiple briefings on the issue, the state has offered not a single case which would support their theory of disqualification in this matter. They offered only vague allusions to the rules of professional conduct which are clearly not dispositive on the instant matter.

Defendants will turn now *Hatcher* factors, and will address each in turn

(1) The defendant's right to be represented by the counsel of his choice.

Obviously, this interest weighs heavily against disqualification. Defendants have made clear that they wish to engage undersigned in joint representation, and have done so even after being informed that such joint representation will have the effect of cutting off their ability to negotiate a plea agreement which involves cooperation against their co-defendants, an alternative which they have made clear they are not interested in.

(2) The defendant's right to a defense conducted by an attorney who is free of conflicts of interest;

Without informed consent of the issue regarding cooperation plea negotiations, this interest would weigh in favor of disqualification. However, based on Defendant's clear choice, made in writing, to forego any such cooperation deal, this interest now weighs against disqualification.

(3) The court's interest in the integrity of its proceedings;

This interest is neutral as to disqualification because the integrity of these proceedings are not in any way threatened by the disqualification issue. The Court, in

holding a hearing on this matter, has fulfilled its duties under the law and no question can be raised as to the proceeding's integrity

(4) The witnesses' interest in protection of confidential information;

This interest weighs against disqualification because, although the state would very much like it to be otherwise, there are no state witnesses for whom undersigned counsel is in possession of confidential information. None of the Defendants are state witnesses, and, so long as they continue to remain uninterested in a plea agreement (which is wholly and entirely their choice) none of them will be.

(5) The public's interest in the proper administration of justice;

This interest weighs against disqualification because the proper administration of justice requires that these Defendants be allowed to exercise their Sixth Amendment rights through the retention of their chosen defense counsel. If doing so means that they will preclude themselves from entertaining plea deals which contemplate state cooperation and testimony, that is their right (so long as they are properly informed of the risk and so consent – as they have done in the case at bar).

(6) The probability that continued representation by counsel of choice will provide grounds for overturning a conviction;

This interest weighs against disqualification because, as the above analysis demonstrates, the law clearly inveighs in favor of allowing these defendants to maintain joint representation for as long as they wish under these circumstances (i.e. until one or more of them decided to entertain the possibility of cooperating against their co-defendants).

Moreover, the Circuit Court's concern about being overturned because of a theoretical conflict regarding one codefendant potentially, in the future, wishing to divulge material information to one defendant not to be shared with the others is flatly contradicted by the language of relevant habeas cases. "***[O]ne who claims ineffective assistance of counsel by reason of conflict of interest in the joint representation must demonstrate that the conflict is actual and not merely theoretical or speculative.***" *State v. Haddix*, 375 S.E.2d 435, 180 W.Va. 71 (W.Va. 1988) (quoting Syl pt. 3, *State ex rel. Postelwaite v. Bechtold*, 158 W.Va. 479, 212 S.E.2d 69 (1975)). Moreover, conjecture and surmise will not suffice to brand counsel, appointed or retained, ineffective in the representation of one accused of crime." *Postelwaite, 158 W.Va.* at 437. The potentiality identified by the Court is the very definition of conjectural, theoretical, and speculative.

(7) The likelihood that the state is attempting to create a conflict in order to deprive the defendant of his counsel of choice.

The state in this matter clearly and unequivocally attempted to create a conflict for undersigned counsel by offering plea deals well before they would normally be offered in the normal course of a Circuit Court criminal defense case, and by doing so explicitly in response to undersigned's assertions that he would not be withdrawing. This was done because, as stated above, the State's only hope of securing a conviction in this matter - given that the only evidentiary basis for the charges, to wit, an audio which purports to depict teachers saying offensive or threatening things to students (but which, in reality, mostly involves teachers making mock threats to each other in jest), in inadmissible under the West Virginia Wiretap and Electronic Surveillance Act - was to persuade one of Defendants to provide inculpatory testimony against the others. This

tactic was made unworkable by the joint representation the defendants had entered into, and the State endeavored to change that.

Of course, the state is not at all entitled to have any of these defendants enter into such a deal – it is a decision wholly within the prerogatives of the Defendants - and they demonstrated clearly, through their signed written consent waivers – that they had no interest in doing so.

As to the additional factors which must be considered:

(1) The potential for use of confidential information by defendant's counsel cross-examining the State's witness;

As stated above, the state has no witnesses for which undersigned is in possession of confidential information, and this Court is not permitted to contemplate the potential for a conflict with witnesses the state does not have simply because they wish it otherwise.

(2) the potential for less than zealous cross examination by Defendant's counsel of the State's witness;

Again, though they would prefer otherwise, the state is in possession of no witness for which this would be relevant. The Court erred by deciding that, because this could theoretically happen in the future, joint representation was precluded. Were this the case, there would be no situation where codefendants could ever undertake joint representation.

(3) The defendants interest in having the undivided loyalty of his or her counsel;

Because none of the co-defendants in this matter have any interest in entertaining a cooperation plea agreement in this case, as made plain by the written informed consent affidavits, there is no undivided loyalty of any kind. In all other respects, the co-defendants interests are entirely aligned.

(4) The State's right to a fair trial;

The state's right to a fair trial is not in any way threatened by their inability to coerce or persuade these co-defendants into a cooperation plea agreement, because they have no right to the same. It is the defendants right, not the states, to decide how they wish to plead in this matter. As such, in all respects, the State's right to a fair trial is preserved.

(5) The appearance of impropriety should the jury learn of the conflict.

Although, if the Defendants engage in a joint trial, the jury will obviously be made aware that all three co-defendants are represented by the same counsel, the grounds for disqualification alleged in the instant motion, to wit, the state's inability to negotiate a cooperation plea agreement, are not the sort which a jury would discover. Moreover, even if they did, such knowledge would have no effect whatsoever on the jury's belief in the propriety of the proceedings.

D. THE BERKELEY COUNTY CIRCUIT COURT ERRED IN REFUSING TO ALLOW DEFENDANTS TO OBTAIN DISCOVERY PRIOR TO CONDUCTING THE RULE 44(C) COLLOQUY BECAUSE IT WILL PREVENT DEFENDANTS FROM PROPERLY FORMULATING THEIR RESPECTIVE TRIAL STRATEGIES, AND MUST BE COMPELLED TO DO SO.

W.Va. Rule of Criminal Procedure 44(c) states that:

Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, 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. Unless 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.

"The standard for taking some affirmative action under subdivision (c) is the trial court's belief that a conflict of interest is ***likely*** to arise." *Cole v. White*, 180 W.Va. 393 (1988). Moreover, "When a trial court fails to follow the requirements of subdivision (c) the court will **review the record** to determine if any conflict likely existed between the jointly represented parties rather than to determine whether there was an actual conflict. If, **after reviewing the record**, the court determines no conflict likely existed between the jointly represented parties, such representation will not be deemed reversible error." *Id.* at 605; *State v. Mullins*, 181 W.Va. 415 (1989) (Emphasis added).

As noted above, the West Virginia Supreme Court has further noted that Rule 44(c) contemplates potential use of alternatives other than disqualification, such as appointment of separate counsels or the execution of written waivers. "The rule does not specify what actions may be taken, but presumably may include disqualification of counsel, appointment of separate counsel, or requiring the defendants to execute written waivers of the right to counsel." *Cole, supra*, 276 S.E.2d at 605 (quoting 8B J. Moore, Moore's Federal Practice § 44.08 at 73). The potentiality of these alternatives shows why it is so important for the Court to make a detailed inquiry of a defendants contemplated trial strategy during a rule 44(c) colloquy. In other words, it will be impossible for the Court to determine whether a less drastic alternative to

disqualification would suffice unless the Defendants are given the opportunity to evaluate the State's case

Because our state rules were modeled, and in fact copied virtually verbatim, on the federal rules, it is instructive to look at the precedent which has developed around Federal Rule of Criminal Procedure 44(c). In fact, the West Virginia Supreme Court has expressly linked our state's own Rule 44(c) to its federal counterpart, and has used the federal Advisory Committee commentary as legal authority. See *Cole*, supra, 376 S.E.2d at 603 ("Our Rule 44(c) is the same as Rule 44(c) of the Federal Rules of Criminal Procedure. In 8B J. Moore, Moore's Federal Practice § 44.08 at 73, this statement is made with regard to the purpose of the rule and a summary of the rather lengthy commentary made by the Advisory Committee:"). Federal jurisprudence on the issue similarly requires a court to look at what is *likely* (not speculative or conjectural, but likely based on the evidence and record available) prior to trial to determine whether action need be taken. "Although joint representation 'is not per se violative of Constitutional Guarantees of effective assistance of counsel, *Holloway v. Arkansas*, supra, it would not suffice to require the court to act only when a conflict of interest is then apparent, for it's not possible "to anticipate with complete accuracy the course that a criminal trial may take." *Fryar v. United States*, 404 F.2d 1071 (10th Cir. 1968).

As such, the Court must make an inquiry of Defendants and of their counsel regarding the possibility of a conflict of interest developing based on the nature of the contemplated defenses. *Rule 44 Notes of Advisory Committee on Rule – 1944*. See also *Campbell v. United States*, 352 F.2d 359 (D.C. Cir. 1965) (where joint representation, court "has a duty to ascertain whether each defendant has an awareness of the potential risks of that course and nevertheless has

knowingly chosen it"). Obviously, no course can be intelligently plotted without access by a Defendant to the evidence the State intends to use against them.

Whenever it is necessary to make a more particularized inquiry into the nature of the contemplated defense, the court should "pursue the inquiry with defendants and their counsel on the record but in chambers" so as to "avoid the possibility of prejudicial disclosures to the prosecution." *United States v. Foster*, 469 F.2d 1 (1st Cir. 1972). See also *Notes on Advisory Committee on Rules – 1979 Amendment*. In doing so, "it is important that each defendant be 'fully advised of the facts underlying the potential conflict and is given an opportunity to express his or her views.'" *United State v. Alberti*, 470 F.2d 878 (2d Cir. 1972). Obviously, any discussion of these facts would necessarily involve a review of the relevant facts as laid out in the State's discovery.

From the back end of this inquiry, i.e. on petition for habeas relief, The West Virginia Supreme Court has made clear that ineffective assistance of counsel claims deriving from joint representation and potential conflicts of interest revolve around whether, at the outset of the case, a Defendant's trial strategy was likely to create a conflict of interest for the attorney. The analysis must be based on the evidence available at the time of trial and cannot be based on theoretical speculation or conjecture – which thereby necessitates an inquiry into trial strategy. The W.Va. Supreme Court stated as much in *State v. Haddix*, 375 S.E.2d 435, 180 W.Va. 71 (W.Va. 1988) when it held that,

> *The joint representation by counsel of two or more accused, jointly indicted and tried is not improper per se; and, one who claims ineffective assistance of counsel by reason of conflict of interest in the joint representation must demonstrate that the conflict is actual and not merely theoretical or speculative.*

The *Haddix* Court, in determining that trial counsel was not ineffective because of a conflict of interest, found so expressly on the basis that counsel's trial strategy was sound and presented no conflict. Said the Court:

> *Appellate counsel's retrospective theory of the case simply does not correlate with the evidence available to trial counsel at the time of trial. It is pure conjecture to assume that the dual representation caused Haddix to testify as he did.*
>
> *Haddix maintained his innocence, contrary to the testimony of his alleged co-conspirators, Workman and Kennedy. Moore did not testify against Haddix, and in fact, all evidence in the record suggests that during the investigation of the burglary, Moore never implicated Haddix.*

Id. at 437.

As such, a Circuit Court, in reviewing the likelihood of a conflict under Rule 44(c), is to place its primary focus on evaluating a Defendant's trial strategy, and must base its perception of a conflict on actual facts in the record, and not on pure speculation or conjecture. Such a focus on trial strategy and likelihood of conflicts at the time of said strategy's creation has been upheld by the West Virginia Supreme Court even where actual conflicts arose later during the course of trial, so long as the trial strategy was sound and free of conflicts at the time it was formulated. In *State ex rel. Postelwaite v. Bechtold*, 158 W.Va. 479, 212 S.E.2d 69 (1975), a conflict was alleged based on joint counsel's inability, following some highly damaging trial testimony, to shift blame from one codefendant to another because of his joint representation. Said the Court:

> *When damaging testimony developed in trial, counsel felt 'hampered' and obliged to pursue 'a middle-of-the-road course,' so as not to prejudice either client for the possible benefit of one. All these considerations could have been of crucial significance if the defense strategy had been to place blame upon the other codefendant. That, however, was not the game plan adopted and pursued by these experienced trial counsel with the acquiescence of their clients ...* ***The courts have not been too receptive to retrospective appraisals of trial strategy... A total appraisal of the evidence in this case, we believe, clearly indicates a decisive and informed choice to unify the defense against the prosecution along the defense lines of credibility and veracity, giving no quarter to admission, defection, or consortium. Under such circumstances, therefore, it is difficult if not impossible to perceive how, other than by conjecture or surmise, defense counsel, by the dual representation, slighted the defense of one defendant in favor of the other.***

Id. at 73-76 (emphasis added).

It was with the above law in mind that undersigned moved, prior to the Court's planned Rule 44(c) inquiry, to have the state produce its discovery and its bill of particulars prior to the Court's colloquy. Petitioners argued that it would be difficult if not impossible to fully articulate a trial strategy prior to reviewing discovery, and it therefore would be of little benefit to the Court to conduct said inquiry without it.

The state, for its part, argued that The Rules of Procedure for Magistrate Court did not require the production of discovery until 21 days prior to trial. However, Petitioners are not before the Berkeley County Magistrate Court. They are before the Berkeley County Circuit Court upon a motion to transfer to which was granted unopposed. Rule 1 of the W.Va. Rules of Criminal Procedure for Magistrate Courts, Titled "Scope," states that, "These rules govern the procedure in all criminal proceedings in the magistrate courts of the State of West Virginia." As such, the magistrate court rules have no bearing whatsoever on the issue. Moreover, Petitioner requested discovery months prior, in August of 2019, and its request for a bill of Particulars in October of 2019. There is no legitimate reason that these discovery requests have not yet been provided, as The Rules of Criminal Procedure place no time constraints whatsoever on a Defendants request for discovery.

Nevertheless, the Court flatly denied Petitioners request for discovery prior to the Rule 44(c) colloquy, and stated that it would not demand production of discovery any earlier than was required under the rules (apparently making the same misapprehension as to the relevant rules as the State). In response to Petitioners' arguments regarding the need for such discovery in order to

determine and communicate to the Court its pretrial strategy, the Court stated only, "I disagree," and gave no further basis for its rejection of this request.

E. THE COURT WAS FURTHER IN ERROR TO PROHIBIT UNDERSIGNED COUNSEL FROM REPRESENTATION OF ANY INDIVIDUAL CODEFENDANT.

Despite the fact that the Court had no information whatsoever which would lead it to believe that confidential information was actually discussed, the Court prohibited undersigned counsel from engaging in individual representation of any of the Co-Defendants.

The West Virginia Supreme Court has been clear that "Before disqualification of counsel be ordered on grounds of conflict arising from confidences presumably disclosed in the course of discussion regarding a prospective attorney-client relationship, the court must satisfy itself form a review of the available evidence, including affidavits and testimony of affected individuals, that confidential information was in fact discussed." Syl. Pt. 6, *State v. Rogers*, 744 S.E.2d 317 (W.Va. 2013) (quoting State ex rel. Youngblood v. Sanders, 212 W.Va. 885, 575 S.E.2d. 864 (2002).

Moreover, when the information that is the subject of a disqualification motion predicated on prospective representation was "generally known,' or otherwise disclosed to individuals other than prospective counsel, the information cannot serve as a basis for disqualification. *Id* at. Syl. Pt. 7.

While undersigned counsel concedes that all three clients had formally entered into official attorney client relationships with undersigned, and while the Syllabus points quoted above relate to prospective clients, this law has been used to find that no conflict existed in actual attorney client relationship situations. In the Rogers case, cited above, the Petitioner argued that

his due process rights had been violated when he was represented by an attorney who had realized, three weeks before trial, that four of the states possible witnesses had been represented by other lawyers in his firm, the Kanawha County Public Defenders Office. *Id.* at 322. The Court, in response to Petitioners argument, stated, "Although in this case the attorney-client relationship was already well-established between the Petitioner and his attorney before a potential conflict of interest was discovered, for guidance on the conflict of interest issue raised, the Court turns to syllabus point three of State ex Rel Youngblood v. Sanders..." Id at. 324. The Court then further cited to *Blake v. Hatcher*, supra, for the holding that "More than a mere possibility of a conflict, however, must be shown." *Ibid.*

As such, it is clear that, as recently as 2013, the West Virginia Supreme Court believed that it must be a matter of record that confidential information was actually discussed which would preclude the attorney's representation. In this case, no such record exists, no such confidential information was discussed, and there is no basis for disqualification of undersigned counsel from individual representation of one of the Codefendants.

F. THE CIRCUIT COURT WAS FURTHER IN ERROR IN PROHIBITING DEFENDANTS COUNSEL TO MAKE ORAL ARGUMENT OR VOUCH THE RECORD AS TO THE FULL BASIS OF DEFENDANTS OBJECTIONS TO DISQUALIFICATION.

The purpose of vouching the record is to place upon the record excluded evidence, or to show upon the record what the excluded evidence would have proved in order that the appellate court may properly evaluate the correctness of the trial court's ruling excluding it. *State v. Rissler*, 165 W.Va. 640, 270 S.E.2d 778 (W. Va. 1980).

In *Rissler*, the Court found that Defendants right to vouch the record as to excluded evidence because, "while the exchange of which counsel complains is at best confusing and

unenlightening, it does not represent a denial of his right to vouch the record. The proof of this is in the fact that we can clearly determine from the record what it was that counsel desired to prove." Id. at 784. In the case at bar, however, undersigned was completely forbidden, at both the November 21st hearing as well as the December 10th hearing, from making any argument whatsoever. There is no basis in the record at all as to what undersigned counsel would have argued or how Defendant might have responded to the State's Response to Defendant's Supplemental Consolidated Memorandum. Because of this, Defendants' due process rights and right to appeal were meaningfully violated, and no recourse short of mandamus and prohibition relief will suffice.

VIII. Conclusion

For all the reasons stated above, Petitioners request that this Honorable Court GRANT its Petition for Writ of Prohibition/Mandamus and prohibit the Berkeley County Circuit Court from Disqualifying undersigned counsel on the grounds alleged and further to compel the Berkeley County Circuit Court to Order the production of Discovery and a Bill of Particulars as requested by Petitioners with sufficient time to allow a thorough review of the same prior to conducting the Colloquy under Rule 44(c) of the West Virginia Rules of Criminal Procedure.

Respectfully,

Defendants Lester, Douty, and Yurish,

By Counsel:

/s/ Christian J. Riddell
Christian J. Riddell (#12202)

Law Offices of Stedman and Riddell
329 S. Queen Street Martinsburg, WV 25401
(304)267-3949