No. 12-1302

IN THE
Supreme Court of the United States

MICHAEL GARCIA,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

On Petition for a Writ of Certiorari to the Louisiana Supreme Court

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

In the course of dismissing Mr. Garcia's claim on direct appeal, the Louisiana Supreme Court noted that "this case presents us with issues arising from indigent defense services provided during the restructuring of such services." Pet. App. 57a. The court then provided an overview of the evidentiary hearing on remand regarding the employment status of the attorneys affiliated with the 18th Judicial District Indigent Defender Board ("IDB")—a summary that the State, in its *Brief in Opposition*, parrots to this Court—before concluding that such a determination was "immaterial" to its analysis. Pet. App. 59a. Missing from the Louisiana Supreme Court's analysis, however, was a discussion of the circumstances that compelled the "restructuring" of indigent defense in Louisiana, matters this Court recently confronted in *Boyer v. Louisiana*, 133 S. Ct. 1702 (2013).

After Michael Garcia's arrest but before the jury sentenced him to death, the Louisiana Legislature passed the Public Defender Act of 2007, a comprehensive overhaul of the indigent defense system made necessary because "[f]or years, Louisiana's public defender system was one of the worst in the country." Ari Shapiro, "Louisiana Overhauls Public-Defender System," Morning Edition, National Public Radio (Sept. 14, 2007), http://www.npr.org/templates/story/story.php?storyId=14412362 (last visited June 6, 2013). This crisis originated from the system's chronic underfunding, a reflection of the fact that "Louisiana, unlike all other

states, funds its public defense system primarily through local traffic tickets and other local fees and costs." Frank Neuner, *The Funding Crisis in the Louisiana Public Defender System*, 60 LA. BAR J. 110, 111 (2012). The Act promised substantial reforms—including more oversight and centralization, increased resources, and most relevantly for the purposes of this case, a revamped procedure for assigning representation in capital cases with multiple co-defendants.[1]

The circumstances of Michael Garcia's case unfolded against this backdrop of these "larger, systemic problems in Louisiana" regarding funding for indigent defense.[2] *Boyer*, 133 S. Ct. at 1708

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[1] *See* S.R. 1140 (testimony of John DiGiulio, the trial-level compliance officer of the Louisiana Public Defender Board, explaining: "The procedure we've developed is that if the district defender decides that he or his office will take the first of a co-defendant, then the appointment of conflict defendants is given to us at the State Board and we try to find one of the 501(c)(3) trial level contract offices to handle the co-defendants."); La. Admin. Code tit. 22:XV § 905(D)(2) ("The system will include provisions to ensure that no organization or person responsible for representing a capital defendant shall be responsible for assigning or supervising counsel for another defendant with an antagonistic defense.").

[2] The promise of the Public Defender Act has not been fully realized. Across Louisiana, public defender offices have recently been forced to restrict services, and oftentimes, to compromise clients' interests for the sake of the fiscal health of the IDB. *See, e.g.*, Gerron Jordan, "Calcasieu Public Defenders Office Rolls Out Restriction of Services Plan," *KPLCtv.com* (July 30, 2012), *available at* http://www.kplctv.com/story/19147594/calcasieu-parish-defenders-office-to (last visited June 6, 2013); Joe Gyan, Jr., "Defenders Dwindling, Death Penalty Cases Face Delays," *The Advocate*, June 19, 2012; John Simerman, "Orleans Parish

(Sotomayor, J., dissenting). Just as importantly, the critical point in the prosecution of this case—the provision of counsel for each of the three co-defendants—occurred before any of the reforms contained within the Public Defender Act had been enacted and implemented. Michael Garcia, represented by an attorney (Jerry D'Aquila) who not only represented him in his capital case, but also appointed counsel for his co-defendants, argued on their behalf, and managed the office's financial concerns, is on Louisiana's death row. Co-defendant James Nelson, on the other hand, avoided a capital trial and ultimately received a term-of-years sentence. Nelson's fate may have been much more dire had Mr. Garcia's attorney not advocated on Nelson's behalf at the preliminary examination. Or, if Mr. Garcia's attorney had not withheld capitally-certified counsel from Nelson's defense team, ensuring the State's reduction of the then-capital charges against him. As Mr. D'Aquila steered Nelson clear of a possible death sentence, he necessarily fixed the State's gaze on his client, Michael Garcia. Mr. Garcia's right to conflict-free representation evaporated near the outset of the case, and despite the manifest conflicts, no one intervened.

Mr. Garcia's case raises two important questions this Court should consider; the State's *Brief in Opposition* ("BIO") refutes none of the reasons for granting certiorari. The State responds to

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Public Defender's Office Cuts Staff Amid Budget Crunch," *NOLA.com | The Times-Picayune* (Feb. 2, 2012), *available at* http://www.nola.com/crime/index.ssf/2012/02/orleans_parish_public_defender_4.html (last visited June 6, 2013).

the first question by mischaracterizing the unusual circumstances surrounding the conflict in an effort to argue that the Court's opinion in *Mickens v. Taylor*, 535 U.S. 162 (2002), precludes automatic reversal here. It responds to the second question by relying on the same crabbed approach the Louisiana Supreme Court adopted, thereby disregarding the considerable evidence of an adverse effect that materialized in the crucial pretrial period—evidence that takes on increased importance in the wake of this Court's decisions in *Padilla v. Kentucky*, 559 U.S. 356 (2010), *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), and *Missouri v. Frye*, 133 S. Ct. 1399 (2012). The State's responses are unavailing; the conflict issues here are well-preserved and timely. Notwithstanding the State's contrary assertions, Mr. Garcia was deprived of his constitutional right to conflict-free representation when his lawyer appointed counsel for him and his co-defendants in a manner that rendered him the only possible death penalty target, a maneuver that grew directly out of the "larger, systemic problems in Louisiana" regarding funding for indigent defense. *Boyer*, 133 S. Ct. at 1708 (Sotomayor, J., dissenting). This Court's intervention is necessary.

I. THE STATE'S EFFORTS TO ALIGN THIS CASE WITH *MICKENS* ARE UNAVAILING

The *BIO* mischaracterizes both the nature of the conflicts and the nature of the claims that emerge from the parties' and trial court's cursory engagement with those conflicts.

According to the State, the conflict here is "a potential conflict by virtue of the attorneys' employment status . . . ." *BIO* at 6. However, the conflicts had nothing to do with employment status. *See* Pet. App. 59a (explaining that, for purposes of analyzing the conflict of interest, "the employment status of the indigent defenders is immaterial.").[3] Instead, they arose from: Mr. D'Aquila's simultaneous representation of all three defendants at the preliminary examination; Mr. D'Aquila's on-the-record disclosure that his indigent defense office could not afford capitally-certified lawyers for all three capitally-charged co-defendants; and Mr. D'Aquila's role as the director of the IDB responsible for appointing counsel, including himself, to each of the three capitally-charged co-defendants.[4] Despite

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[3] The *BIO* dwells at length on the employment status of the attorneys associated with the Eighteenth Judicial District Indigent Defender Board, *BIO* at 8-20, apparently seeking to rebut a state law claim leveled by Mr. Garcia before the Louisiana Supreme Court that the IDB is a law firm for conflict of interest purposes and therefore the multiple representation in this case created impermissible imputed conflicts. To be clear, while Mr. Garcia maintains that the Louisiana Rules of Professional Conduct barred the IDB from engaging in multiple representation in this case notwithstanding the employment status of the attorneys, *see Brief for the Ethics Bureau at Yale as Amicus Curiae* 13-16, the questions presented in Mr. Garcia's petition for certiorari are predicated on immediate rather than imputed conflicts of interest. For this reason, Mr. Garcia forbears addressing this section of the *BIO* in this reply.

[4] Indeed, during the hearing on remand, the trial court acknowledged that the IDB's "defending all three [co-defendants] together was a conflict . . . ." S.R. 752. *See also* S.R. 753 (trial judge acknowledges "potential conflict" in the multiple representation).

the State's characterization, this is not a case about a few public defenders from the same office separately representing co-defendants. It is a case that involves multiple representation—and all its risks—and a capital defendant's lawyer balancing competing obligations to his client, his client's adversely-situated co-defendants, and his fiduciary duty to the office. No lawyer should find himself so conflicted. More importantly, no defendant appointed a lawyer saddled with divided loyalties should be denied constitutional protections at every turn.

The State's characterization of Mr. Garcia's claim that reversal should be automatic, like its depiction of the nature of the conflicts, is unfounded. The *BIO* positions Mr. Garcia's case in terms of *Mickens*. Its assertion that Mr. Garcia seeks relief on the grounds that "the trial court created the purported conflict because it appointed the counsel in question" so completely strips Mr. Garcia's claim of its factual context that the State's rendition bears no relation to the first Question Presented. *BIO* at 7. The State fails to address, much less refute, five critical facts that cement the distance between Mr. Garcia's case and *Mickens*: a) the prosecutor here notified the trial court about a conflict issue at Mr. Garcia's very first hearing; b) the appointed lawyer informed the court that he was financially unable to appoint capitally-certified counsel for each of the co-defendants; c) the court acknowledged that a probable conflict existed when it appointed counsel; d) Mr. Garcia's counsel advocated on behalf of the co-defendants at the preliminary examination, and, by so doing, positioned Mr. Garcia to become the only defendant against whom the State would seek the

death penalty; and e) the trial court declined to intervene. Pet. for Cert. i.

Although it tries to turn Mr. Garcia's conflict claim into the one the defendant advanced in *Mickens*, the State's alchemy is unsuccessful. Mr. Garcia does not seek to re-litigate *Mickens*, and he has not asked this Court to reverse that decision. Instead, as Justice Weimer's dissent below explained, this case falls beyond what this Court addressed in *Mickens*. *See* Pet. App. 208a-09a (Weimer, J., dissenting) ("The majority fails to recognize what the record shows—that what transpired in the district court precisely fits the pattern of neither the *Holloway* standard nor the *Sullivan* standard."). Simply stated, the trial court here created a conflict of interest in assigning Mr. D'Aquila and his office to represent each of the three co-defendants—a conflict of interest that even drew the prosecution's concern. The trial court then compounded that conflict by delegating the authority to resolve it to the most conflicted attorney in the district, whose loyalties were divided among the three co-defendants, the subordinate attorneys in his office, and most constrictively, the financial interests of the IDB.

Contrary to the State's assertions, *Mickens* did not address this situation. In the unique circumstances present here, the rule of automatic reversal set out in *Holloway* should apply.

II. THE BRIEF IN OPPOSITION UNDERSCORES THE NEED FOR THIS COURT'S DIRECTON IN CLARIFYING WHETHER AN ACTUAL CONFLICT ADVERSELY AFFECTED AN ATTORNEY'S PERFORMANCE

None of the State's responses to the second Question Presented provide reasons to deny certiorari. The second Question Presented asks this Court to clarify not only the test for determining when there is an "actual conflict" that "adversely affects" the attorney's performance, but also the degree to which this Court's recent decisions in *Padilla*, *Lafler*, and *Frye*—emphasizing the importance of effective counsel in the pretrial stage—affect a reviewing court's analysis of an actual conflict of interest.[5] Moreover, the *BIO* does not address Mr. Garcia's contention that the opinion below, which cited no test at all, exemplifies the lower courts' need for direction. Rather than respond to the reasons Mr. Garcia identified for granting certiorari, the State simply quotes the Louisiana Supreme Court opinion at length and argues that this merits ruling ends the inquiry. *BIO* at 20-21. However, the opinion begins the only truly relevant inquiry—whether this Court should give the lower courts guidance about what the Court means by "actual conflict" and "adverse effect."

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[5] Of course, this Court has long held that the Sixth Amendment's right to effective assistance of counsel extends to the pretrial context. *Hill v. Lockhart*, 474 U.S. 52 (1985).

The *BIO*'s bold claim that "[t]here is no conflict that has or can be articulated which would have impaired counsel's performance" relies upon the same mistaken premise as the Louisiana Supreme Court's opinion. *BIO* at 5. The flawed premise is that any and all pretrial evidence of actual conflict can be set aside in favor of a trial-focused assessment. This Court's recent reaffirmations in *Padilla*, *Lafler*, and *Frye* that the right to the effective assistance of counsel extends not only to trial but also to pretrial representation, expose the constitutional shortcomings of the State's position.

Mr. Garcia set out clear proof of the actual conflict: Mr. D'Aquila stacked all capitally-certified attorneys on Mr. Garcia's team; invoked the office's financial constraints to resist providing independent counsel; and advocated on behalf of Mr. Garcia's co-defendants at the preliminary examination, arguing that their lack of certified counsel meant the hearing would be nullified if the State insisted on seeking the death penalty against them. Mr. Garcia presented this robust evidence that divided loyalties adversely affected Mr. D'Aquila's performance squarely to the Louisiana Supreme Court. But the court, like the State in its *BIO*, ignored this evidence and focused instead on counsel's conduct at trial, by which point the die had already been cast.

The contrast between Mr. Garcia's case and the *Boyer* case is illustrative. In *Boyer*, the petitioner was charged with first degree murder for shooting a man twice in the face during the course of an armed robbery in Sulphur, Louisiana. *Brief for Petitioner* at 10, *Boyer v. Louisiana*, 133 S. Ct. 1702 (2013) (No.

11-9953). While the petitioner fled the state, his brother, who was present during the offense, was charged with obstruction of justice and appointed counsel from the local public defender's office. *Id.* at 6. Following the petitioner's arrest and indictment for first degree murder, which carries a possible death sentence, the conflict created by that earlier appointment led to the appointment of outside counsel for the petitioner. *Id.* at 10. However, the parish did not have adequate funds for the two requisite certified capital lawyers (outside the staff of the public defender's office) or for expert services for the petitioner's defense in a death penalty case. *Id.* at 11-14. For the next four years, the defense unsuccessfully sought the necessary funds for a capital case until the State relented and reduced the charges to non-capital second degree murder, allowing the petitioner to go to trial without risk of the death penalty. *Id.* at 14-28. As Justice Alito observed in his concurrence in *Boyer*, "It is also quite clear that the delay caused by the defense likely worked in petitioner's favor." *Boyer*, 133 S. Ct. at 1703 (Alito, J., concurring).

Mr. Garcia's case likely would have proceeded similarly had his case been referred to outside, certified counsel following the IDB's prior appointment to represent James Nelson. The pervasive state indigent defense funding crisis suggests that efforts to provide adequate funding for outside counsel would have been equally unavailing, and may well have precipitated a similar reduction from capital to non-capital charges. Indeed, James Nelson and Danil Garcia realized that benefit after Mr. D'Aquila refused to obtain outside, certified

counsel for them because of the fiscal constraints, and then advocated on their behalf at the preliminary hearing. In reaching their decision that there was no actual conflict, the lower court ignored all of this evidence.

The lower court's myopic view of how adverse effect should be assessed and the more-widespread confusion about what constitutes an actual conflict of interest make this case an important one. And, as the *BIO* amply demonstrates, the record here is unusually well-developed because of the post-trial evidentiary hearing.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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