(ORDER LIST: 595 U.S.)

MONDAY, FEBRUARY 28, 2022

ORDERS IN PENDING CASES

21M81 MATTHEWS, RYAN A. V. LUMPKIN, DIR., TX DCJ

The motion for leave to file a petition for a writ of certiorari under seal with redacted copies for the public record is granted.

21M82 KHURANA, PRAVEEN K. V. ID DEPT. OF HEALTH AND WELFARE

21M83 BELLAMY, JEFFREY E. V. KIJAKAZI, COMM'R, SOCIAL SEC.

The motions to direct the Clerk to file petitions for writs of certiorari out of time are denied.

21-401) ZF AUTOMOTIVE US, INC., ET AL. V. LUXSHARE, LTD.
)
21-518) ALIXPARTNERS, ET AL. V. FUND FOR PROTECTION OF INVESTORS' RIGHTS

The joint motion of the parties for divided argument and for enlargement of time for oral argument is granted. The motion of the Solicitor General for leave to participate in oral argument as *amicus curiae*, for divided argument, and for enlargement of time for oral argument is granted.

21-6022 IN RE ROBERT L. HEDRICK

The motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* is denied.

CERTIORARI GRANTED

21-376) HAALAND, SEC. OF INTERIOR, ET AL. V. BRACKEEN, CHAD E., ET AL.
)
21-377) CHEROKEE NATION, ET AL. V. BRACKEEN, CHAD E., ET AL.
)
21-378) TEXAS V. HAALAND, SEC. OF INTERIOR, ET AL.
)
21-380) BRACKEEN, CHAD E., ET AL. V. HAALAND, SEC. OF INTERIOR, ET AL.

The petitions for writs of certiorari are granted. The cases are consolidated, and a total of one hour is allotted for oral argument. Parties that were plaintiffs/appellees in the lower courts shall file opening and reply briefs in conformity with Rules 33.1(g)(v) and 33.1(g)(vii), under the schedule set forth in Rules 25.1 and 25.3. Parties that were defendants/appellants in the lower courts shall file briefs in conformity with Rule 33.1(g)(vi), under the schedule set forth in Rule 25.2.

CERTIORARI DENIED

21-558 HOWARD JARVIS TAXPAYERS ASSOC. V. CA SECURE CHOICE, ET AL.

21-634 WRIGHT, ZACHARIAH B. V. INDIANA

21-767 WILLIAMS, CLINTON V. UNITED STATES

21-769 LITTLE TRAVERSE BAY BANDS V. WHITMER, GOV. OF MI, ET AL.

21-782 YOUNG, RODNEY R. V. GEORGIA

21-814 CASTAGNA, CHRISTOPHER, ET AL. V. JEAN, HARRY, ET AL.

21-930 SUN, XIU J. V. OBAMA, BARACK H.

21-931 SALAAM, AMEENAH V. McAULEY, JEFFREY A.

21-933 VDARE FOUNDATION V. COLORADO SPRINGS, CO

21-939 BEASLEY, PETER V. SOCIETY OF INFO. MGMT., ET AL.

21-944 TRIPODI, JOSEPHINE, ET AL. V. NORTH COVENTRY TOWNSHIP, PA

21-952 BAGLEY, LAMONT L. V. VIRGINIA

21-965 LOPEZ, ARTHUR V. UNITED STATES

21-1001 BEY, HAKIM V. RIVELLO, SUPT., HUNTINGDON

21-1025 SHEORAN, ASHWANI V. WALMART STORES EAST, ET AL.

21-1030 BRIMELOW, PETER V. NEW YORK TIMES CO.

21-1031 ESTATE OF CHERYL BEAUDRY V. TELECHECK SERV., INC., ET AL.

21-1041 J. P., MICHAEL V. BLUE CROSS BLUE SHIELD, ET AL.

21-1051 LI, MENGYANG V. SHEPHERD UNIVERSITY

21-1059 CITIBANK, N.A., ET AL. V. PICARD, IRVING H., ET AL.

21-1063 DAVIS, ELAINE V. UNITED STATES

21-1067 AMEN BEY, RA N. R. K. V. UNITED STATES

21-1073 HAMIDI, KOUROSH K., ET AL. V. SERVICE EMPLOYEES INT'L UNION

21-1081 WOOD, L. LIN V. RAFFENSPERGER, BRAD, ET AL.

21-6073 FALK, JOHN R. V. TEXAS

21-6098 ENAMORADO, HECTOR V. UNITED STATES

21-6374 GUIDRY, HOWARD P. V. LUMPKIN, DIR., TX DCJ

21-6394 MATTHEWS, KYLE S. V. UNITED STATES

21-6397 CHANTHARATH, VIENGXAY V. UNITED STATES

21-6426 WHITE, LEE D. V. UNITED STATES

21-6733 CLEVELAND, FREDDIE V. WAKEFIELD, SUPT., SMITHFIELD

21-6756 MICKS-HARM, TRACY C. V. NICHOLS, WILLIAM P., ET AL.

21-6771 REDDICKS, CHARLES V. MASSACHUSETTS

21-6784 TALBOT, BRIAN J. V. VIRGINIA

21-6808 VIVAS, ZENITH E. V. GARLAND, ATT'Y GEN.

21-6836 LOCUS, DANIEL V. JOHNSON, ADM'R, NJ, ET AL.

21-6856 BUTLER, DARRELL W. V. DIXON, SEC., FL DOC

21-6875 ANDERSON, DONTAIE V. RUSSELL, WARDEN, ET AL.

21-6902 MUHAMMAD, DALIYL R. V. ARMEL, SUPT., FAYETTE, ET AL.

21-6923 DiGIACOMO, RAYMOND V. V. SUPERIOR COURT OF CA

21-6928 MAXBERRY, DENNIS L. V. UNITED STATES

21-6946 LOZADO, GREGORY V. UNITED STATES

21-6948 RAMSEUR, ROBERT E. V. UNITED STATES

21-6951 ADAIR, JACOB A. V. UNITED STATES

21-6956 DELGADO-MONTOYA, ROMAN E. V. UNITED STATES

21-6966 SAMPEL, JUAN V. UNITED STATES

21-6969 JACKSON, ALTON V. UNITED STATES

21-6972 LUZULA, MARIA H. V. UNITED STATES

21-6987 GRUBBS, MARCUS A. V. UNITED STATES

21-6992 LANE, MICHAEL R. V. UNITED STATES

21-6993 WILLIS, DAMON V. UNITED STATES

21-6994 LARA, FERNANDO V. UNITED STATES

21-7003 JOHNSON, LATIQUE V. UNITED STATES

21-7004 WARE, ADAM L. V. UNITED STATES

21-7005 DeVORE, ADAM M. V. BLACK, WARDEN

21-7006 JAIME-GUZMAN, JUAN V. UNITED STATES

21-7013 WOLFE, MICHAEL J. V. OREGON

21-7014 LOPEZ-SANCHEZ, VICENTE V. UNITED STATES

21-7020 GORDON, CHARLES D. V. LIZARRAGA, WARDEN

21-7024 SIERRA-SERRANO, EDGAR M. V. UNITED STATES

21-7025 SAMUELS, DERRICK G. V. UNITED STATES

21-7026 SAMAYOA, NEHEMIAS V. UNITED STATES

21-7032 HUNT, ADRIAN V. UNITED STATES

21-7034 CURRY, JERITON L. V. UNITED STATES

21-7035 WILLIAMS, SEVILLE V. UNITED STATES

21-7038 LILLICH, JEREMY W. V. UNITED STATES

21-7041 ANDREWS, ANTHONY V. DOBBS, WARDEN

21-7052 TAYLOR, LEWIS V. DIXON, SEC., FL DOC, ET AL.

21-7053 WRIGHT, IRAMM V. UNITED STATES

21-7055 WILLIS, EUGENE V. UNITED STATES

21-7060 BILYNSKY, CHRISTOPHER N. V. MAINE

The petitions for writs of certiorari are denied.

21-773 OKLAHOMA V. McCURTAIN, HAROLD D.

21-798 OKLAHOMA V. VINEYARD, STEPHEN T.

The motions of respondents for leave to proceed *in forma pauperis* are granted. The petitions for writs of certiorari are denied.

21-6979 JOHNSTON, ANDREW J. V. UNITED STATES

The petition for a writ of certiorari is denied. Justice Barrett took no part in the consideration or decision of this petition.

HABEAS CORPUS DENIED

21-7087 IN RE WESLEY THOMPSON

The petition for a writ of habeas corpus is denied.

21-7047 IN RE DAREN K. GADSDEN

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of habeas corpus is dismissed. See Rule 39.8.

MANDAMUS DENIED

21-6773 IN RE ROBERT L. HEDRICK

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of mandamus is dismissed. See Rule 39.8.

21-6778 IN RE MARK T. GARRETT

The petition for a writ of mandamus and/or prohibition is denied.

REHEARINGS DENIED

21-315 BOUAZIZI, JACQUELYN V. HILLSBOROUGH CTY. SERV., ET AL.

21-416 ANDERSON, DARELL A. V. UNITED STATES

21-611 HAMILTON, GERTRUDE, C. F. V. UNITED STATES, ET AL.

21-655 BUTLER, MAX R. V. PORTER, S., ET AL.

21-5961 HORSLEY, DAVID K. V. OHIO

21-6066 WOODS, R. SUSAN V. ALINA'S REAL ESTATE, LLC

The petitions for rehearing are denied.

SUPREME COURT OF THE UNITED STATES

GORDON COLLEGE, ET AL., *v.* MARGARET DEWEESE-BOYD

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 21–145. Decided February 28, 2022

The petition for a writ of certiorari is denied.

Statement of JUSTICE ALITO, with whom JUSTICE THOMAS, JUSTICE KAVANAUGH, and JUSTICE BARRETT join, respecting the denial of certiorari.

The Religion Clauses of the First Amendment sometimes forbid "courts to intervene in employment disputes involving teachers at religious schools who are entrusted with the responsibility of instructing their students in the faith." *Our Lady of Guadalupe School* v. *Morrissey-Berru*, 591 U. S. ___, ___ (2020) (slip op., at 1); see also *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. 171 (2012). The Supreme Judicial Court of Massachusetts held that this "ministerial exception" did not apply to a professor at a religious college who "did not teach religion or religious texts," but who was still expected to "integrate her Christian faith into her teaching and scholarship." 487 Mass. 31, 33, 163 N. E. 3d 1000, 1002 (2021). Although the state court's understanding of religious education is troubling, I concur in the denial of the petition for a writ of certiorari because the preliminary posture of the litigation would complicate our review. But in an appropriate future case, this Court may be required to resolve this important question of religious liberty.

I

Petitioner Gordon College is a Christian college in Wenham, Massachusetts. The college's bylaws state that it

"strives to graduate men and women distinguished by intellectual maturity and Christian character." App. to Pet. for Cert. 133a (emphasis deleted). As "a Christian community of the liberal arts and sciences," the college "is dedicated to:

- The historic, evangelical, biblical faith;
- Education, not indoctrination;
- Scholarship that is integrally Christian;
- People and programs that reflect the rich mosaic of the Body of Christ;
- Life guided by the teaching of Christ and the empowerment of the Holy Spirit;
- The maturation of students in all dimensions of life: body, mind and spirit;
- The application of biblical principles to transform society and culture." *Ibid.* (emphasis deleted).

The college requires all of its faculty to sign a "Christian Statement of Faith," which affirms that the "66 canonical books of the Bible as originally written were inspired of God" and that there "is one God, the Creator and Preserver of all things, infinite in being and perfection." *Id.*, at 114a (internal quotation marks omitted). The faculty handbook explains that the college's professors are expected "to engage students in their respective disciplines from the perspectives of Christian faith" and "to participate actively in the spiritual formation of its students into godly, biblically-faithful ambassadors for Christ." *Id.*, at 118a. The handbook also states that the most important task of the "Christian educator" is the "integration" of faith and learning. *Id.*, at 119a.

Respondent Margaret DeWeese-Boyd was hired as a faculty member in Gordon College's department of social work in 1998. DeWeese-Boyd's application for employment at Gordon College acknowledged "personal agreement with Gordon's Statement of Faith, stated her Christian beliefs,

described her pilgrimage as a Christian, [and] explained how her Christian commitment affected her scholarship." *Id.*, at 122a. Her application also mentioned her Christian missionary work in the Philippines and indicated that she had earned an advanced degree in theology. *Id.,* at 124a. In 2009, when DeWeese-Boyd applied for tenure, she submitted a paper titled "Reflections on Christian Scholarship" that discussed her "integration of the Christian faith into her work." *Id.*, at 126a (internal quotation marks omitted).

In 2016, DeWeese-Boyd applied for promotion to full professor, and that application explained that she thought the "work of integration" required "pursuing scholarship that is faithful to the mandates of Scripture, the vocational call of Christ, and the dictates of conscience." Joint Exhs. App. for Summary Judgment in No. 1777cv01367, p. 195 (Super. Ct. Essex Cty., Mass., Sept. 17, 2010). Student evaluations, also included in the 2016 application, stated that she "did a great job of connecting class materials with Christian faith" and "calling our thoughts to a higher level of Christian responsibility." App. to Pet. for Cert. 128a, 130a–131a (internal quotation marks omitted).

Gordon College denied her 2016 application for a promotion, citing lack of scholarly productivity, among other things. She sued in the Superior Court of Massachusetts, alleging that the college and its agents had actually denied her a promotion because of "her vocal opposition to [the college's] policies and practices regarding individuals who identify as lesbian, gay, bisexual, transgender, or queer." 487 Mass., at 34, 163 N. E. 3d, at 1003. The parties cross-moved for summary judgment on the question whether the ministerial exception barred DeWeese-Boyd's claims. The trial court ruled in favor of DeWeese-Boyd, and the Supreme Judicial Court of Massachusetts granted an application for direct appellate review of the summary-judgment ruling.

The Supreme Judicial Court affirmed. It concluded that

DeWeese-Boyd was not a "minister" under this Court's decisions in *Our Lady of Guadalupe School*, 591 U. S. ___, and *Hosanna-Tabor Evangelical Lutheran Church and School*, 565 U. S. 171. The court reasoned that DeWeese-Boyd did not "undergo formal religious training, pray with her students, participate in or lead religious services, take her students to chapel services, or teach a religious curriculum." 487 Mass., at 53, 163 N. E. 3d, at 1017. Though the court recognized that she was required to "integrate the Christian faith into her teaching, scholarship, and advising," the court reasoned that this integrated teaching was "different in kind" from religious instruction. *Ibid.*

The college filed a petition for certiorari, essentially asking us to decide whether the ministerial exception bars the present lawsuit.

II

In *Our Lady of Guadalupe School*, we explained that the "ministerial exception" protects the "autonomy" of "churches and other religious institutions" in the selection of the employees who "play certain key roles." 591 U. S., at ___ (slip op., at 11). We recognized that "educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school." *Id.,* at __ (slip op., at 18). Because the teachers in that case had been, among other things, "entrusted most directly with the responsibility of educating their students in the faith," we concluded that the ministerial exception applied to such educators. *Id.,* at ___ (slip op., at 21).

The Massachusetts Supreme Judicial Court thought that DeWeese-Boyd was not a religious educator because she did not "teach religion, the Bible, or religious doctrine." 487 Mass., at 49, 163 N. E. 3d, at 1014. Though it acknowledged her responsibility "to integrate the Christian faith into her

teaching, scholarship, and advising," the state court asserted that this responsibility was "different in kind" from the kind of religious education at issue in *Our Lady of Guadalupe School* and insufficient to make DeWeese-Boyd a minister. 487 Mass., at 53, 163 N. E., at 1017.

That conclusion reflects a troubling and narrow view of religious education. What many faiths conceive of as "religious education" includes much more than instruction in explicitly religious doctrine or theology. As one *amicus* supporting the college explains, many religious schools ask their teachers to "show students how to view the world through a faith-based lens," even when teaching nominally secular subjects. See Brief for Jewish Coalition for Religious Liberty et al. as *Amici Curiae* 6. For example, a professor teaching a course on the civil rights movement at a secular college might concentrate on the political, economic, and sociological aspects of the struggle for racial justice, while a professor at a Christian college might also highlight Dr. Martin Luther King Jr.'s faith and the biblical arguments in his famous Letter from Birmingham Jail. Similarly, an English professor at a secular college might see nihilism and skepticism in Shakespeare's King Lear, while a professor at a Catholic school might present it as a pilgrimage to redemption. See Brief for Association of Christian Schools International as *Amicus Curiae* 6–8 (listing other examples).

Faith-infused instruction of this kind might complement student instruction in explicitly religious subjects. For example, Gordon College requires all of its students to take required courses on the Old Testament, the New Testament, and Christian Theology; they must also earn "Christian Life and Worship" credits for attending chapel services (or other similar faith-based events). But religious education at Gordon College does not end as soon as a student passes those required courses and leaves the chapel. In-

stead, the college asks *each* member of the faculty to "integrate" faith and learning, *i.e.,* "to help students make connections between course content, Christian thought and principles, and personal faith and practice." App. to Pet. for Cert. 119a.

For those reasons, I have doubts about the state court's understanding of religious education and, accordingly, its application of the ministerial exception. But DeWeese-Boyd argues that because the Supreme Judicial Court of Massachusetts affirmed the trial court's summary-judgment ruling in an interlocutory posture, its ruling is not a "final judgment" under 28 U. S. C. §1257. Gordon College responds that the decision is a reviewable final judgment under *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975), but at the very least this threshold jurisdictional issue would complicate our review. The brief in opposition notes, however, that "[i]f DeWeese-Boyd prevails in the trial court, there is nothing that would preclude Gordon [College] from appealing at that time, including seeking review in this Court when the decision is actually final." Brief in Opposition 16. On that understanding, I concur in the denial of certiorari.

SUPREME COURT OF THE UNITED STATES

JAMES DALE HOLCOMBE *v.* FLORIDA

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

No. 21–53. Decided February 28, 2022

The petition for a writ of certiorari is denied.

JUSTICE SOTOMAYOR, dissenting from the denial of certiorari.

An attorney jointly represented four codefendants in a criminal case. As trial neared, two of the defendants accepted plea deals and agreed to testify against the other two: James Dale Holcombe, the petitioner here, and his father, Dale Chester Holcombe.[1] This created a conflict of interest that even the prosecutor deemed nonwaivable. Nevertheless, the trial court refused defense counsel's offer to withdraw from representing the cooperating codefendants and neglected to conduct a detailed inquiry into the nature and extent of the conflict. The case went to trial, and Holcombe's attorney cross-examined his two cooperating clients, whose sentences depended on the quality of the testimony they provided against Holcombe. Holcombe was convicted, and the Florida Court of Appeal affirmed. Because this Court's precedents require vacating Holcombe's conviction, I would summarily reverse.

I

At the outset of his criminal prosecution, Holcombe, Dale, and their two codefendants were represented by the same counsel. During a pretrial conference, defense counsel advised the trial court that he would be representing all four codefendants. He explained that he had advised each of the

[1] For clarity, I refer to Dale Chester Holcombe by his given name and to the petitioner by his surname.

defendants to consult with an independent attorney about the joint representation; that the defendants had done so; and that they wished to waive any conflict and have their counsel continue representing them. The trial judge discussed some of the risks of joint representation with the defendants, expressing concern that they were in "dangerous territory" and "on super thin ice." App. to Brief in Opposition A–12. The attorney responded that "all these cases are probably going to resolve within a certain margin of error that we're prepared to accept as a group," and that he was "not aware of any particular conflict based on our current strategy." *Id.*, at A–16 to A–17. Counsel noted, however, "that if there becomes a conflict I will have to withdraw." *Id.*, at A–16. The court ultimately concluded that the arrangement was not illegal or unethical because the defendants had discussed it and signed a conflict waiver.

As trial approached, however, the nature of the conflict shifted. During another pretrial hearing, defense counsel informed the trial court that two of Holcombe's codefendants had entered pleas. Soon thereafter, the prosecution decided to call them as witnesses against Holcombe and Dale at trial. All four of the codefendants were still represented by the same counsel.

Before jury selection began, the prosecutor told the trial court that, in her opinion, "[t]he circumstances [had] changed" and that Holcombe's two codefendants' decisions to accept plea deals created a "greater conflict that . . . is not waiveable." App. to Pet. for Cert. A–34 to A–35. The prosecutor explained that, because the trial court had postponed the two codefendants' sentencing until after they testified against Holcombe and Dale, the sentences they received would depend on the quality of their testimony. See *id.*, at A–34 ("[I]t's in their best interest to cooperate and testify truthfully in order to benefit from the plea discussions"). Yet in order to represent Holcombe and Dale at trial, the defense attorney would be required to cross-

examine those other two codefendants—his "current clients," whose sentences would be determined based on how "cooperative" they were with the State. *Ibid.* In other words, the shared attorney's divided loyalties might result in a less-than-exhaustive cross-examination of the cooperating witnesses, to Holcombe's and Dale's detriment. Upon hearing the prosecutor's explanation, defense counsel offered to withdraw from representing the two codefendants and have conflict counsel appointed instead. Defense counsel proceeded to explain that he "d[id]n't know that [withdrawing would] cur[e]—," at which point the trial judge interrupted. App. to Brief in Opposition A–34.

Despite being made aware of this patent conflict, the trial judge did not question the remaining two defendants, encourage them to speak to an unconflicted attorney, or advise them that they had a right to separate representation. Instead, the court simply rejected defense counsel's offer to withdraw, concluding that any conflict had been properly waived earlier in the proceedings, before the two codefendants accepted the plea deals and began cooperating with the prosecution. The trial proceeded; Holcombe's two codefendants testified against him and Dale on behalf of the prosecution (and were cross-examined by their shared attorney); and Holcombe was convicted and sentenced to 10 years in prison.[2]

The Florida Court of Appeal affirmed. It concluded that an attorney's simultaneous representation of both a criminal defendant and two prosecution witnesses, and his cross-examination of those witnesses, does not, without more, create an actual conflict for the purpose of the Sixth Amendment. Because Holcombe had not shown any adverse effect on defense counsel's performance, the court held that reversal was unwarranted.

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[2] Dale was convicted as well. See Tr. 1147–1148.

II

Although a joint representation of codefendants "is not *per se* violative of constitutional guarantees of effective assistance of counsel," this Court has recognized that a "[j]oint representation of conflicting interests is suspect" because "the advocate finds himself compelled to refrain" from vigorously defending his clients. *Holloway* v. *Arkansas*, 435 U. S. 475, 482, 489, 490 (1978) (emphasis deleted). Courts therefore bear a responsibility to investigate if they "kno[w] or reasonably should know that a particular conflict exists." *Cuyler* v. *Sullivan*, 446 U. S. 335, 347 (1980); accord, *Holloway*, 435 U. S., at 483 (explaining that a trial court has an "affirmative duty . . . to assure that criminal defendants are not deprived of their right to the effective assistance of counsel by joint representation of conflicting interests"). When a trial court is made aware of an actual conflict before trial and fails to inquire into the nature and scope of the conflict, reversal of a defendant's conviction is automatic. See *Mickens* v. *Taylor*, 535 U. S. 162, 167–168 (2002); *Holloway*, 435 U. S., at 488–490.

In this case, the trial court properly discharged its obligation at the outset of proceedings, but failed to fulfill its renewed obligation after an actual conflict arose. At the outset, the trial court was made aware of a "possible" or "potential" conflict—that is, one that had not fully materialized because the codefendants' interests could diverge but had not yet done so. See *Wheat* v. *United States*, 486 U. S. 153, 163 (1988) (noting that a "potential" conflict "may or may not burgeon into an actual conflict as the trial progresses"); *Sullivan*, 446 U. S., at 348 ("[A] possible conflict inheres in almost every instance of multiple representation . . . "). The trial court appropriately responded by inquiring into the codefendants' consent to the joint representation, expressing well-founded concern that they were in "dangerous territory," and approving the joint representation based on the codefendants' waivers and counsel's representation that

any conflict remained hypothetical. App. to Brief in Opposition A–12.

Once notified that the codefendants' interests had parted ways, however, the trial court was obligated to inquire further. That divergence of interests sharpened the potential conflict into an "actual" conflict—that is, one in which "the defendants' interests . . . diverge with respect to a material factual or legal issue or to a course of action." *Sullivan*, 446 U. S., at 356, n. 3 (Marshall, J., concurring in part and dissenting in part). Such a conflict actually "affect[s] counsel's performance," unlike "the mere theoretical division of loyalties" presented by a possible conflict. *Mickens*, 535 U. S., at 171 (emphasis deleted).

Here, the prosecutor unequivocally identified an actual conflict, different in kind from the potential conflict the trial court had previously considered, by explaining that Holcombe's codefendants' decisions to testify against him created an unwaivable conflict. Her concerns were well founded. The codefendants' pleas put defense counsel in an impossible dilemma: If the attorney successfully undermined the codefendants' testimony, he would aid Holcombe's defense, but potentially jeopardize the codefendants' ability to obtain lenient sentences. Holding back against the codefendants, on the other hand, would improve their chances at sentencing, but allow the State's key witnesses to provide damning evidence against Holcombe. Once notified of this conflict, the trial court had an obligation to inquire further into its nature and extent. At minimum, given that the potential conflict had matured into an actual conflict, the court should have taken the precaution of advising the defendants to confer again with unconflicted counsel regarding the propriety of the representation and should have directly explained the serious dangers of continuing with an actually conflicted attorney. Because it did not, reversal of Holcombe's conviction on appeal should have been automatic. See *Sullivan*, 446 U. S., at 350; see

also *Holloway*, 435 U. S., at 488.

The Florida Court of Appeal erred by concluding that Holcombe bore the additional burden of proving an adverse effect on his representation. The court relied on *Mickens*, but that case declined to apply *Holloway*'s "automatic reversal rule," *Mickens*, 535 U. S., at 168, for two reasons not present here. First, the Court in *Mickens* distinguished *Holloway* on the ground that defense counsel failed to object to "his inability simultaneously to represent multiple defendants" before the trial court. *Mickens*, 535 U. S., at 173. Second, *Mickens* concerned only a potential conflict of interest resulting from successive representations, rather than the type of joint (concurrent) representation addressed in *Holloway* or the actual conflict identified here. See *Mickens*, 535 U. S., at 175 (distinguishing "the high probability of prejudice arising from multiple concurrent representation" from other attorney conflicts, including "prior representation").

Unlike *Mickens*, this case concerns an actual conflict created by a simultaneous joint representation that was timely brought to the trial court's attention. That it happened to be the prosecutor who first raised the conflict does not affect whether *Holloway*'s automatic reversal rule applies. This Court's precedents hold that the duty to inquire is a duty of the trial court—not of any particular party. *Sullivan*, 446 U. S., at 347; *Mickens*, 535 U. S., at 168–169; *Holloway*, 435 U. S., at 483. Consistent with this principle, the key question is whether the trial court was alerted to the conflict, not by whom. See, *e.g.*, *Wood* v. *Georgia*, 450 U. S. 261, 272–273 (1981) ("Any doubt as to whether the court should have been aware of the [conflict] is dispelled by the fact that the State raised the conflict . . . explicitly and requested that the court look into it"); see also *Mickens*, 535 U. S., at 168 (where "[n]either counsel nor anyone else objected to the multiple representation," *Holloway*'s rule did not apply); *Sullivan*, 446 U. S., at 347 (where "[n]o participant in

[the defendant's] trial ever objected to the multiple representation," the Sixth Amendment did not obligate the trial court to inquire). A contrary rule would offer less protection to those defendants whose counsel is so severely conflicted that even the prosecution is compelled to voice its concern.

Decades ago, this Court explained that "[t]he mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters." *Holloway*, 435 U. S., at 490. The proceedings below failed to protect that core constitutional guarantee. For these reasons, I would summarily reverse the judgment of the Florida Court of Appeal.