No. 19-1023

In the Supreme Court of the United States

DONNIE MORGAN, WARDEN,

Petitioner,

v.

VINCENT D. WHITE, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The procedural-default doctrine bars federal courts from awarding habeas relief for claims "that a state court refused to hear based on an adequate and independent state procedural ground." *Davila v. Davis*, 137 S. Ct. 2058, 2062 (2017). Federal courts may excuse a procedural default only if the petitioner "can establish 'cause' to excuse the procedural default *and* demonstrate that he suffered actual prejudice from the alleged error." *Id.* (emphasis added). In *Martinez v. Ryan*, 566 U.S. 1 (2012), the Supreme Court held that petitioners can, in narrow circumstances, establish "cause" by showing that the absence or ineffective performance of state-postconviction counsel caused them to procedurally default an ineffective-assistance-of-trial-counsel claim that had "some merit." *Id.* at 14.

This case presents the following question: If a petitioner defaults an ineffective-assistance-of-trial counsel claim with "some merit," does *Martinez v. Ryan* allow a federal court to excuse the procedural default without requiring any further showing of prejudice?

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REPLY

The Court should grant *certiorari* in this case to decide the following question: If a habeas petitioner procedurally defaults an ineffective-assistance-of-trial-counsel claim with "some merit," does *Martinez v. Ryan*, 566 U.S. 1 (2012), allow a federal court to excuse the procedural default without requiring any further showing of prejudice? Pet.i.

The parties and ten *amici* States agree that the circuits are split on this question, and they agree that this case provides a sound vehicle for resolving the split. Pet.16–26; Response Br.1, 30–31, 35; *Amicus* Br. of Indiana, *et al.*, 9–15. And the answer to the question presented is important. It affects the frequency with which federal courts may upend state convictions—an action that "disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (internal quotation omitted).

Because Vincent White agrees with the Warden that the Court should grant *certiorari*, the Warden has little to say in this reply. He is submitting this brief to make just three points.

I. The Court should deny White's cross-petition.

The Warden continues to oppose White's cross-petition in case 19-8117, which asks the Court to abolish the procedural-default doctrine altogether. *See* Cross-Pet., *White v. Morgan*, No. 19-8117. White's response brief consists mainly of arguments

supporting his own cross-petition. The Warden already responded to those arguments in a Brief in Opposition to the cross-petition. *See* Warden's BIO, *White*, No. 19-8117.

II. White's discussion of prejudice is irrelevant to the question presented and legally incorrect.

In his response brief, White insists that he was *per se* prejudiced by his trial counsel's alleged conflicts of interest. *See* Response Br.14–15, 31–32 That argument, however, is both irrelevant to the Warden's petition and wrong on the law. *See* Warden's BIO.14–18, *White*, No. 19-8117.

Start with the irrelevance. Again, this case presents the following question: "If a petitioner defaults an ineffective-assistance-of-trial-counsel claim with 'some merit,' does *Martinez v. Ryan* allow a federal court to excuse the procedural default without requiring any further showing of prejudice?" Pet.i. The Sixth Circuit held that the answer to this question was "yes." Thus, it never considered whether White made a showing of prejudice over and above the "some merit" showing. As a result, this Court can answer the question presented and review the judgment below without deciding whether White's trial counsel prejudiced him. If the answer to the question presented is "yes"—if the Sixth Circuit properly excused White's procedural default without requiring him to show any prejudice beyond the "some merit" showing—this Court will affirm the judgment below. If the answer to the question presented is "no"—if White needed to show some degree of prejudice in excess of the "some merit" showing—then this Court can decide what showing was re-

quired and remand to the Sixth Circuit to decide in the first instance whether White made the necessary showing. Either way, whether White's trial counsel prejudiced him makes no difference to the only question pending before this Court.

Indeed, and as the Warden explained in his petition, one of the things that makes this an ideal vehicle for reviewing the question presented is the fact that the Sixth Circuit never considered whether White showed prejudice aside from the "some merit" showing. Had the Sixth Circuit held that White showed a greater degree of prejudice, the question whether it was required to do so could have become academic. Pet.23–24. But because the Sixth Circuit failed to consider whether White showed prejudice beyond the "some merit" showing, the question whether it had to do so is squarely presented: the *only* issue before this Court is whether White, to have his procedural default excused, had to show prejudice in excess of the "some merit" showing required by *Martinez* itself.

What is more, the actual-prejudice inquiry is not nearly as cut and dried as White suggests. And this is where White's prejudice discussion goes wrong on the law: White is simply incorrect that his counsel's conduct *per se* created a conflict of interest or caused *per se* prejudice.

It is true that White's experienced defense attorney was under indictment by the same prosecutor's office as White himself. But such circumstances do not *per se* establish a conflict of interest. When a defense attorney is under investigation or indictment, even by the same office as his client, the question whether that creates an actual conflict of interest

turns on a fact-specific inquiry—it is not an automatic conflict. *See Reyes-Vejarano v. United States*, 276 F.3d 94, 99 (1st Cir. 2002); *Armienti v. United States*, 234 F.3d 820, 824–25 (2d Cir. 2000); *United States v. Montana*, 199 F.3d 947, 949 (7th Cir. 1999); *Briguglio v. United States*, 675 F.2d 81, 82 (3d Cir. 1982). And regardless, a conflict of interest is not *per se* prejudicial. Instead, to win an ineffective-assistance-of-trial-counsel claim based on an actual conflict of interest, White would have to *prove* prejudice by showing that the conflict "adversely affected his lawyer's performance." *Cuyler v. Sullvian*, 446 U.S. 335, 348 (1980); *accord Taylor v. United States*, 985 F.2d 844, 846 (6th Cir. 1993) (*per curiam*); *Reyes-Vejarano*, 276 F.3d at 99; *United States v. Levy*, 25 F.3d 146, 157 (2d Cir. 1994). White has not done that, and the Sixth Circuit never considered whether he could have. Moreover, White very likely could not make that showing, given the strength of the case against him. Pet.4–5. To further complicate matters here, "there is nothing in the record … indicating White was unaware" of the charges against his trial counsel. Pet.App.91a. Especially since trial counsel was retained, not appointed, White's knowledge of the supposed conflict would waive any ability to cry foul. *See United States v. De Falco*, 644 F.2d 132, 137 (3d Cir. 1979) (*en banc*).

*

In sum, the factbound question whether White was actually prejudiced by his trial counsel's conduct can be left for remand. And it *should be* left for remand, because it presents the sort of complicated issue that this Court is generally disinclined to consider in the first instance. Thus, the possibility that White was actually prejudiced presents no impedi-

ment to this Court's granting the Warden's petition for *certiorari*.

III. White's complaints about the phrasing of the question presented are misguided.

White quibbles with the wording of the Warden's question presented, but his quibbles are meritless. *See* Response Br.31–33. White takes particular issue with the Warden's citing *Martinez v. Ryan*, 566 U.S. 1, but not *Trevino v. Thaler*, 569 U.S. 413 (2013), in the question presented. *See* Response Br.31. This complaint makes little sense. As an initial matter, neither the Court nor White is bound by the Warden's phrasing of the question presented. More fundamentally, *Trevino* is simply an application of the exception to the procedural-default doctrine that *Martinez* created. *See Trevino*, 569 U.S. at 416–17. Thus, it does not matter that the Warden's question presented cited *Martinez* but not *Trevino*. The question presented would have had the very same meaning if, instead of asking about the circumstances in which "*Martinez v. Ryan*" allows federal courts to excuse procedural defaults, it instead asked about the circumstances in which "*Martinez v. Ryan* and *Trevino v. Thaler*" allow federal courts to excuse procedural defaults. (Similarly, the question presented would mean the same thing if it never mentioned *Martinez*, and instead cited *Trevino* alone.)

White says the Sixth Circuit relied on *Trevino* but not *Martinez* in its decision below. *See* Response Br. 31. As just explained, that would make no difference if it were true: the *Trevino* exception to the procedural-default doctrine and the *Martinez* exception to that doctrine (as interpreted by *Trevino*) are the same. Regardless, White is wrong that the Sixth

Circuit ignored *Martinez*. In fact, the Sixth Circuit relied upon *Martinez* and cited that decision throughout its opinion. Pet.App.9a, 10a, 14a, 15a, 16a.

Finally, White says the question whether he was actually prejudiced by trial counsel's alleged conflicts of interest ought to be deemed part of the question presented. *See* Response Br.32. As explained in the previous section, however, the question whether White was prejudiced by trial counsel is not before this Court.

CONCLUSION

The Court should grant the Warden's petition for a writ of *certiorari*.

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