18-6423

No. _____

_____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

Marlan Micah McRae, Petitioner

vs.

United States of America, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO

The United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

with Appendix

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Questions Presented for Review

I. Can the unconscionable and illegal actions of an attorney, in addition to a fiduciary conflict of interest between an attorney and his client, amount to ineffective assistance of counsel?

II. By avoiding an application of the "Manifest Necessity" standard, did the District Court violate my Sixth Amendment right to trial, "by an impartial jury," in conjunction with the Due Process Clause?

III. Are District and Circuit Courts violating the Fifth and Sixth Amendments by adhering to the unconstitutionally vague and deficient precedent regarding conflict of interest?

Parties to the Proceeding

The following list identifies all parties appearing before this Court, and before the United States Court of Appeals for the Sixth Circuit:

The Petitioner here and throughout, appearing **pro se**, Marlan Micah McRae.

The Respondent here and throughout, by the United States of America.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

Opinions Below

The opinion of the United States Court of Appeals appears at Appendix A to the petition, and is unpublished.

The opinion of the United States District Court appears at Appendix B to the petition and has been designated for publication, but is not yet reported.

Jurisdiction

The date on which the United States Court of Appeals decided this case was May 23, 2018.

A timely petition for rehearing was denied by the United States Court of Appeals on July 27, 2018, and a copy of the order denying rehearing appears at Appendix C.

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

This case involves the United States Constitution, Amendment Five, regarding issues of Due Process, and the United States Constitution, Amendment Six, regarding issues of Ineffective Assistance of Counsel. The Petitioner, Marlan Micah McRae, was found guilty, at trial, of Federal Statutes 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A)(ii) on May 12, 2011. On January 21, 2015, Petitioner filed a Motion to Vacate/Set Aside/Correct Sentence pursuant to 28 U.S.C. § 2255.

Statement of the Case

Petitioner was charged with Conspiracy to Possess With Intent to Distribute Five Kilograms or More of Cocaine, in violation of 21 U.S.C. 846 & 841 (a)(1) & (b)(1)(A)(ii), in an eleven (11) day jury trial, with two co-defendants, before the Honorable Paul L. Maloney, in the U.S. District Court for the Western District of Michigan, Southern Division. Petitioner was sentenced to a term of 235 months, followed by five years of supervised release. Petitioner appealed his conviction and sentence to the U.S. Court of Appeals for the Sixth Circuit in 2013, which denied Petitioner's appeal. In January of 2015, Petitioner filed, with the U.S. District Court for the Western District of Michigan, a Motion to Vacate/Set Aside/Correct sentence, pursuant to 28 U.S.C. § 2255. In June of 2016, Judge Gordon J. Quist of the U.S. District Court for the Western District of Michigan issued an Order/Opinion denying Petitioner's motion. (Appendix B, PageID#293-303). Petitioner then filed a Notice of Appeal and Request for Certificate of Appealability with the U.S. Court of Appeals for the Sixth Circuit (Appendix F, PageID#316) which was granted on March 24, 2017 (Appendix G, PageID#318-322) as it related to the issue of Ineffective Assistance of Counsel/Financial Conflict of Interest. Oral arguments were heard on March 9, 2018. An Opinion and Order was issued on May 23, 2018 affirming Petitioner's conviction. On July 5, 2018, Petitioner filed a motion for En Banc rehearing, which was denied on July 27, 2018.

Argument I

The question on appeal is whether the egregious and criminal actions of Marvin Barnett, in an attempt to extort $50,000 from Petitioner, created a conflict of interest between himself and his client, meeting the requirements set forth in Cuyler v. Sullivan, 446 U.S. 335, 349-50 (1980), necessitating a finding of ineffective assistance of counsel. A critical examination is needed to determine whether an attorney placing his own financial interest in front of the due process interest of his client amounts to an "actual apparent conflict," pursuant to Sullivan, supra.

Petitioner retained attorney Marvin Barnett to represent him. At trial, Tommie Hodges, a convicted drug dealer and government witness, testified many hours, focusing exclusively on Petitioner. On re-direct examination, when confronted with a question concerning his providing assistance in a separate case, he pled the Fifth and refused to answer further questions, resulting in the trial continuing on. Not until five days later did the trial court address the issue.

During this five-day period, a meeting was held to discuss misconduct by Petitioner's counsel, Mr. Barnett. Chief Judge Maloney directed defense counsel to meet with his colleague, Judge Robert Holmes Bell, to avoid the court having ex parte contact. Judge Bell held the ex parte conference with the three defense attorneys. Attorney Geoffrey Upshaw, counsel appointed for Hodges, reported that Mr. Barnett told him "to

give a "message" to Hodges. (Appendix D, Sealed Ex Parte Transcript, PageID#4113). The "message" was that if Hodges retook the stand and did not continue to invoke his Fifth Amendment privilege, the transcript of what he did to assist the government in this murder investigation would become public record, and Barnett would order that transcript. (Id. at #4113). Barnett also stated to Upshaw that witnesses, such as Hodges, get "assassinated" when such information about the cooperation goes public. Barnett also purportedly told Upshaw that if Hodges persisted in invoking the Fifth Amendment, he would not order the transcript. (Id. at #4119, 4123-24).

Thereafter, Judge Bell provided a transcript of the ex parte conference to Judge Maloney. Immediately after Hodges pled the Fifth in the courtroom corridor, Petitioner asked Mr. Barnett to file a motion for a mistrial. Mr Barnett refused to do so, stating that he would only file such a motion if Petitioner were to pay him an additional $50,000--a clear act of extortion. When Petitioner informed Mr. Barnett that he did not have $50,000, Mr. Barnett, at the next hearing, opposed a mistrial motion brought by the co-defendants, which was denied by the court. Instead, Mr. Barnett moved to have Hodges' testimony struck from the record, and was granted, five days later, after the jury heard the testimony of James Dylan Hayes, a leader of the indictment, during which Hayes was asked and answered several questions about Hodges.

Petitioner was ultimately found guilty.

In 2014, Judge Maloney filed a formal complaint against Barnett with the Michigan Attorney Discipline Board pertaining to his misconduct during Petitioner's trial. The Board suspended Barnett's license for three years, finding that Barnett had engaged in dishonestly, fraud, deceit, misrepresentation, or violation of criminal law, and ordered Barnett to pay Petitioner $47,000 in restitution.

The Sixth Amendment provides that a criminal defendant shall have the right to "the assistance of counsel for his defense." Pursuant to United States v. Cronic, 466 U.S. 648, 658 (1984), the right to effective assistance of counsel is accorded "not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." The Supreme Court has set out standards by which to judge an ineffective assistance of counsel claim in Strickland v. Washington, 466 U.S. 668 (1984). First, the defendant must show that trial counsel's performance was deficient. Id. at 687. Under the first prong, the standard for attorney performance is "reasonable effective assistance." Id. The defendant must show that the trial counsel's representation fell below an objective standard of reasonableness; the inquiry must focus on "whether counsel's assistance was reasonable considering all the circumstances." Id. at 689. The Supreme Court cautioned that "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is,

the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy,'" Id. at 689. Second, the defendant must show that the deficient performance prejudiced the defense; that, but for the deficiency, the outcome of the proceedings would have been different. Id. at 694.

It is expected that a defense counsel must act in a manner that is objectively reasonable and that does not detrimentally prejudice the outcome of the case. Roe v. Flores-Ortega, 528 U.S. 470, 476-77 (2000). Therefore, defense counsel's performance is objectively unreasonable only where "the identified acts or omissions were outside the wide range of professionally competent assistance," as determined by "prevailing professional norms." Strickland, supra at 690. Meanwhile, to establish prejudice, a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability "is a probability sufficient to undermine confidence in the outcome." Ibid.

In certain Sixth Amendment contexts, the court will discharge the defendant's Strickland obligation to demonstrate a probable effect on the outcome and instead presume such prejudice." Moss v. United States, 323 F.3d 445, 455 (CA6, 2003). For example, a court may presume prejudice where a defendant is denied the assistance of counsel entirely or during a critical stage of a proceeding

because under such circumstances "the likelihood that the verdict is unreliable is so high that a case by case inquiry is unnecessary." Mickens v. Taylor, 535 U.S. 162, 166 (2002). Moreover, our Supreme Court has also applied the exception to Strickland's prejudice requirement where a defendant's attorney actively represented conflicting interests.

It is the contention of Petitioner that, not only did Mr. Barnett create an irreconcilable conflict of interest (Petitioner's right to a fair trial vs. Mr. Barnett's pecuniary interest), but by committing two separate felonious acts (extortion and threatening to assassinate a government witness), Mr. Barnett was effectively absent from the remaining proceedings, thereby denying Petitioner of effective counsel at a critical stage of the trial proceedings.

A defendant's Sixth Amendment right to effective assistance of counsel includes the right to representation by conflict-free counsel. The right to counsel's undivided loyalty is a critical component of the right to effective assistance of counsel; when counsel is burdened by a conflict of interest, he deprives his client of his Sixth Amendment right as surely as if he failed to appear for trial. Holloway v. Arkansas, 435 U.S. 475, 489, 98 (1978). For this reason, a defendant who shows an actual conflict need not demonstrate that his counsel's divided loyalties prejudiced the outcome of his trial. Sullivan, supra at 349-350. The

right to conflict-free counsel is simply too important and absolute "to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Glasser v. United States, 315 U.S . 60, 76 (1942). We should be no more willing to countenance nice calculations as to how a conflict adversely affected counsel's performance. "The conflict itself demonstrate[s] a denial of the 'right to have the effective assistance of counsel.'" Sullivan, 466 U.S. at 349.

In an ineffective assistance of counsel claim, a defendant must demonstrate that (1) the performance of counsel was deficient, and (2) the deficient performance prejudiced the defense and deprived the defendant of a fair trial. Strickland, supra at 687. The analysis is slightly different in conflict of interest cases. When there is an actual conflict of interest, prejudice will be presumed. Id. at 692. However, "[p]rejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance,'" Id. (quoting Sullivan, 446 U.S. at 348.)

In determining whether an actual conflict of interest exists, The Sixth Circuit has held that it "will not find an actual conflict unless appellant can point to specific instances in the record to suggest an actual conflict or impairment of their interests.... Appellants must make a factual showing of inconsistent interests and must

demonstrate that the attorney made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other. If he did not make such a choice, the conflict remained hypothetical.... There is no violation where the conflict is irrelevant or merely hypothetical; there must be an actual significant conflict. United States v. Hall, 200 F.3d 962, 965-66 (CA6, 2000)(emphasis added). To show that such a conflict adversely affected counsel's performance, a petitioner must establish an "actual lapse in representation" that resulted from the conflict. Sullivan, 446 U.S. at 349. This is a two-part showing (1) the petitioner must demonstrate the existence of some plausible alternative defense strategy not taken up by counsel; and (2) the petitioner must show "causation," that is, that the alternative defense was inherently in conflict with or not undertaken emphasized the attorney's other loyalties or interests. LoCascio v. U.S., 395 F.3d 51 (CA2, 2005).

In granting Petitioner's request for a Certificate of Appealability, the Sixth Circuit noted that while "neither the Supreme Court nor the Sixth Circuit has expanded the Cuyler v. Sullivan presumption of prejudice rules to cases involving pecuniary conflicts between an attorney and his client", it also made sure to point out that "there is a colorable argument that Barnett's highly unusual and unethical actions demonstrate that an actual conflict did exist between McRae's interest in due process and Barnett's

interest in personal financial gain. (Appendix G, USCA, PageID#320).

In both the Order granting the Certificate of Appealability and in denying Petitioner's §2255 motion, the Court cites to Faison v. United States, 650 F.App'x 881, 889 (CA6, 2016) to make its points regarding a conflict of interest between a lawyer and his client. The facts of the present case, however, are overwhelmingly different from those of Faison. Here, Mr. Barnett expressed to Petitioner that he would not file a motion for mistrial, which was expressly requested by Petitioner to be done, unless Petitioner paid him an additional $50,000. When Petitioner was unable to pay, Mr. Barnett kept his promise and failed to file the motion, even though Petitioner had the standing and justification to do so. As such, Petitioner can demonstrate that his refusal to pay additional funds adversely affected Mr. Barnett's performance. Moreover, the Sixth Circuit, in granting the Certificate of Appealability, acknowledged that Mr. Barnett "actively represented conflicting interest" by demanding $50,000 to file the Motion and theoretically retry the case and that the conflict adversely affected Mr. Barnett's performance because no motion for mistrial was made and that the decision not to file the motion was arguably caused by the conflict of interest itself. McFarlands v. Yukins, 356 F.3d 688, 706 (CA6, 2004) Also, noting that there is sufficient evidence that counsel's performance would constitute deficient performance under the Strickland

standard, a position the Panel expressed once again in its last Order. In doing so, the court highlighted the fact that counsel's license to practice law was suspended as a result of the actions in this case and that he is required to pay forty-seven thousand dollars in restitution to Petitioner as evidence that counsel's actions were not reasonable under the prevailing professional norms, nor evidence of sound trial strategy. (see Appendix E.)

It is important to note the holding in Lugo v. United States, 349 F.App'x 484, 486, (CA11, 2009). Lugo held that, to apply the Sullivan standard, it must be shown that "(1) his attorney had an actual conflict of interest, and (2) the conflict adversely affected the attorney's performance." Id. at 486. Pursuant to Lugo, to meet Sullivan's second prong, Petitioner must show "(1) his attorney could have pursued a plausible alternative strategy, (2) the alternative strategy was reasonable, and (3) the alternative strategy was not followed because it conflicted with the attorney's own interests." Id. at 487. In this instance, Petitioner is able to meet all of these requirements. It is painfully obvious that a Motion for a Mistrial would have been appropriate in Petitioner's case, and therefore was a reasonable and plausible alternative strategy, as opposed to only striking the testimony a full five days after the jury had heard the testimony. Moreover, it is also obvious that Mr. Barnett's reasons for not pursuing the motion for a mistrial were for his own pecuniary interest, and had nothing

to do with Petitioner's due process wants or needs. Mr. Barnett clearly thought a mistrial was appropriate or he would not have asked for $50,000 to try the case over again, if the Motion was granted.

As the Supreme Court has noted "[u]ndivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision." Von Moltke v. Gillies, 332 U.S. 708, 725-26 (1948). In a situation such as this, where this is a financial conflict of interest, it is as if an attorney simultaneously serves two masters, in that he may be forced to choose between competing interests to the detriment of the client. A competent lawyer is one who zealously advocates for the client, and prioritizes the client's interest about all others. An attorney's duty of loyalty to his client is fundamental. If the attorney does not observe his client's best interests, who will? Yet, Mr. Barnett failed to live up to this standard, and in doing so denied Petitioner his due process right to the effective assistance of counsel. Mr. Barnett knew that there was justifiable reasons for a mistrial, yet only would file for one if he was generously compensated, above and beyond what he had already been paid to serve as trial counsel. The egregious conduct by Mr. Barnett allowed the jury to digest Mr. Hodges' testimony for a full five days before the Court ultimately struck it from the record, allowing the jury to subconsciously use the testimony against Petitioner, further

adding to the prejudice he suffered. Mr. Barnett's actions are the type of egregious actions Sullivan was supposed to protect a criminal defendant from. The facts and circumstances here meet those requirements, in addition to the standards set forth in Strickland, supra.

Finally, Petitioner points to the holding in Jae Lee v. United States, Supreme Court of the United States 2017 U.S. Lexis 4045 No. 16-327, that "a defendant was deprived of a proceeding altogether." In light of the "totality of the evidence" and facts surrounding the case, Petitioner's attorney, Marvin Barnett, deprived him of a proceeding altogether. Williams v. Taylor, 529 U.S. 362, 391, 120 S.Ct. 1495, 146 L.Ed.2d 389.

Argument II

The question on appeal is why did Judge Maloney wait approximately two years to address the Constitutional violations that occurred throughout Petitioner's trial, when he could have settled the issues by declaring a mistrial under precedent set forth in U.S. v. Perez, 22 U.S. (9 Wheat.) 579, 6L.Ed 165 (1824).

Government witness Tommie Hodges testified before the jury on Wednesday, May 4, 2011. After Hodges received Barnett's "message" that "witnesses get assassinated," Mr. Hodges informed his counsel, Mr. Upshaw, that he would not be coming back to finish his testimony. It was not until five days later, on Tuesday, May 10, 2011, that his entire testimony was struck from the record and the court instructed the jury to disregard Mr. Hodge's testimony, which, realistically, was impossible. In the middle of this Fifth Amendment debacle, Judge Maloney ordered an ex parte conference be held by Judge Robert Holmes Bell concerning Mr. Barnett's felonious conduct. Proof that Judge Maloney was aware the situation was becoming a Constitutional violation is the ex parte conference's testimony, and an excerpt of Judge Bell's comments from that conference--evidence that was sealed and unknown to Petitioner until July 20, 2018--follow:

> "It is prejudicial"..."It's done. You can't unring the bell, so to speak."..."The only remedy that the Judge has left is to have you have for a mistrial, mistry the case, and the Judge throwing Barnett off the case."..."I don't know exactly how this can be rectified. I mean, obviously a mistrial is an easy

solution." (Appendix D, PageID#23, 30)

In light of Judge Bell's comments, it is clear that once Hodges put forth testimony in front of the jury, then later pled the Fifth, prejudice should have been presumed. However, rather than adjourn the trial to resolve the issue, Judge Maloney ordered the trial to continue on, causing greater prejudice by taking in further testimony. It was during this period that James Dylan Hayes, a leader of the indictment, testified. Several of the questions he was asked centered around Hodges, whose testimony had yet to be struck, a sequence of events that undoubtedly confused the jury.

It wasn't until the 2014 attorney grievance hearing before the Attorney Grievance Commission (A.G.C.) that Judge Maloney himself admitted that he foresaw a mistrial as the most reasonable course of action:

> [Judge Maloney:] "I was anticipating motions for mistrial"..."I ruled that it was an improper invocation of the Fifth Amendment, and given trial, I anticipated motions for mistrial from defense lawyers."
>
> [Counsel for the A.G.C.:] "Taking the totality of the circumstances into consideration, if Mr. Barnett had filed a motion for mistrial, do you believe it would have been based on--grounded on fact and law?"
>
> [Judge Maloney:] "Oh certainly there was an argument--certainly there was an argument on behalf of Mr. McRae for a mistrial." (Appendix A, PageID#333)

The U.S. Supreme Court first articulated the "Manifest Necessity" doctrine in U.S. v. Perez, supra. Petitioner asserts here that once Mr. Hodges' counsel informed Judge

Maloney that his client was not going to continue his testimony, it created a "Manifest Necessity" situation. Given the number of days that progressed before striking the testimony, along with the Judge not adjourning the trial, there was a "high degree" of necessity for a declaration of a mistrial. Also, during the A.G.C. hearing in 2014, Judge Maloney admits that Petitioner suffered "substantial prejudice" in light of the nature of Tommie Hodges' testimony, and that he "anticipated motions for mistrial from defense lawyers." Under the Perez approach, however, where no final determination of guilt or innocence has been made, Judge Maloney would have been justified in recognizing the "Manifest Necessity" to declare a mistrial upon his own initiative. The question to Judge Maloney, asked by counsel for the A.G.C. is identical to what Perez prescribes: "Taking into account all the facts and circumstances to determine whether there was a manifest (i.e. a 'high degree' of) necessity for the mistrial declaration." (Harpster v. State of Ohio, 128 F.3d at 328)(6th Cir. 1997).

Argument III

The question on appeal is why are the District and Circuit courts continuously neglecting to expand the conflict of interest rules/precedent, when Petitioner's Constitutional rights are blatently violated as a direct result? In denying Petitioner's §2255 motion, the Sixth Circuit Panel stated: "The Supreme Court directed courts to exercise restraint in extending Sullivan to conflicts that do not involve multiple representation." Also, the Panel held that neither the Supreme Court nor the Sixth Circuit has applied Sullivan to the type of conflict in the present matter, and that the Supreme Court has explicitly cautioned against "applying Sullivan 'unblinkingly' to 'all kinds of alleged attorney ethical conflicts.'" Mickens v. Taylor, 553 U.S. 162, 174 (2002). The Panel further held that the rationale behind the Sullivan standard: that in cases of multiple representation "it is difficult to measure the precise effect on the defense of the representation corrupted by conflicting interest" Strickland, 446 U.S. at 692; does not apply in the present matter because, in their opinion, there is no difficulty identifying the specific harm caused by the conflict here. In reaching this conclusion, the court relies on United States v. Walter-Eze, 869 F.3d 891, 906 (CA9, 2017), a Ninth Circuit case, which held that "where...the actual conflict is relegated to a single moment of the representation and resulted in a single identifiable decision that adversely

affected the defendant, the Supreme Court's reasoning regarding when prejudcice should be presumed does not control."

In essence, the Panel was stating that since the Sixth Circuit has never ruled in the way Petitioner was asking, they will not rule that way now despite the Constitutional violation.

However, Petitioner contends that this case is of multiple representations. Attorney Marvin Barnett was representing Petitioner and Marvin Barnett, the civilian, in his personal capacity. The Sixth Circuit Panel acknowledges the presence of Marvin Barnett the civilian in their "deference" analysis, while denying the present motion, noting: "Under the circumstances, because Barnett was pursuing his own financial interests, there was no exercise of professional judgment deserving of deference." (Appendix A, PageID#338). With the Sixth Circuit Panel's analysis, Sullivan should automatically apply to this current conflict of interest issue, without an extension. Petitioner also contends that once an attorney is paid for his or her services, and trial starts, everything the attorney does should be "of professional judgment, deserving of deference." Whether Marvin Barnett the civilian was on trial or not, he was definitely being represented by Attorney Marvin Barnett, and it is evident that the well being of Barnett the civilian was more important to him than Petitioner's due process interests. The Sixth Circuit noted

in granting the COA:

> "[A]n actual conflict did exist between McRae's interest in due process and Barnett's interest in personal financial gain." ... "McRae can demonstrate that Barnett 'actively represented conflicting interests' by demanding $50,000 to retry the case, and that the conflict adversely affected his lawyer's performance, because Barnett did not in fact move for a mistrial on McRae's behalf." ... "The decision not to file the motion was arguably caused by the conflict of interest itself." McFarland v. Yukins, 356 F.3d 688, 706 (6th Cir. 2004)(stating that Sullivan "requires a choice by counsel, caused by the conflict of interest," and that "[c]ausation can be proved circumstantially.")..."Barnett's actions at least arguably fit within that narrow category of conflicts that not only present a potential ethical concern, but deprive defendants of Constitutionally adequate representation." ... "Reasonable jurists would also debate whether or not Barnett's refusal to move for a mistrial without an additional $50,000 constituted deficient performance under Strickland."

The "presumption of prejudice" also applies in particular circumstances when defense counsel operates under a conflict of interest. Holloway v. Arkansas, 435 U.S. 475 (1978) and Cuyler v. Sullivan, 446 U.S. 335 (1980), two cases in which one attorney represented multiple co-defendants, the Supreme Court held that "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." This precedent is confusing for the following reasons: The rule does not state that conflict of interest must involve two or more defendants; and the rule does not state that it cannot apply to representation of one defendant--the rule

simply states "a defendant," meaning one person at a time.

Unfortunately, as how the present conflict of interest precedent stands, it flouts and violates the first essential of due process. The current conflict of interest precedent needs to be expanded because it leaves grave uncertainty about how to measure prejudice or conflict. Furthermore, it invites decisions that are arbitrary and capricious--decisions such as the District Court's and Sixth Circuit's, noting the Sixth Circuit Panel's opinion of Judge Maloney's testimony: "Although Judge Maloney stated he thought McRae could have made 'an argument' for mistrial." What did the Panel mean by "he thought"? Was the Panel implying that Chief Judge Maloney's sworn testimony was incompetant? Moreover, the narrowness of the conflict of interest precedent was enacted only for multiple representations, which is "unconstitutionally vague" because "actual apparent conflicts" are much broader than multiple representations, and this current precendent deprives defendants of their Fifth and Sixth Amendment rights during trials and plea deals. Johnson v. United States, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015).

Conclusion

Petitioner respectfully requests that this Honorable Court consider the extraordinary circumstances surrounding this case, where the record reflects that several of Petitioner's Constitutional rights were violated.

For the above-stated reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted this 9th day of October, 2018

Marlan Micah McRae

Marlan MICAH McRae
Petitioner