

18-7440

No.: 18A368

IN THE
SUPREME COURT OF THE UNITED STATES

Christopher Whitman,
petitioner,

ORIGINAL

Supreme Court, U.S.
FILED

DEC 23 2018

OFFICE OF THE CLERK

versus

United States of America,
respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Christopher Whitman #97202-020
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QUESTIONS PRESENTED

Question One

The Constitution guarantees a person the effective assistance of counsel for a first appeal of right. Effective counsel necessarily contemplates an unconflicted attorney. On appeal, the Eleventh Circuit learned Mr. Whitman's trial attorney concealed a juror bribery scheme. Nonetheless, the Eleventh Circuit refused to disqualify the conflicted attorney.

Should the appeals court have appointed an attorney who did not have a conflict of interest?

Question Two

This Court held that a plain-error determination involves applying the law at the time of review rather than the law at the time of the alleged error. **Henderson v. United States**, 568 U.S. 266 (2013). At trial, the district court did not conduct the relevant conduct analysis required by Guidelines section 1B1.3 (Amendment 790). Despite the retroactive nature of the Guidelines amendment and obviousness of the error, the Eleventh Circuit refused to recognize and cure the error.

Does the principle announced in **Henderson** extend to retroactive changes in the sentencing law?

LIST OF PARTIES INVOLVED

All parties appear in the caption of the case on the cover page.

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OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Eleventh appears at Appendix "1";

The Judgement & Commitment appears at Appendix "2"; and

the grant by this Court for an extension of time appears at Appendix "3".

JURISDICTION

The date on which the Eleventh Circuit Court of Appeals decided my case was April 24th, 2018. A copy of that published decision appears at Appendix "1".

An extension of time to file the petition for a writ of certiorari was granted up to and including December 25th, 2018. A copy of that grant appears at Appendix "3".

STATEMENT OF THE CASE
(Procedural History)

In January 2014, Christopher Whitman was indicted in the Middle District of Georgia, Albany Division (App. at 1) in violation of 18 U.S.C. §§ 1343, 1346, wire fraud and honest services fraud. (App. "1").

In October 2014, the government filed a superseding indictment which contained a total of 54 counts filed against Mr. Whitman and others. (App. "1"). The government coined the alleged illegal conduct the "Transportation Scheme" which included bribery of a public official in violation of 18 U.S.C. § 201(b)(1); obstruction of an official proceeding in violation of 18 U.S.C. §§ 641 and 2. (App. "1").

In January 2015, Mr. Whitman proceeded to trial. The trial lasted six weeks, and on March 3rd, 2015, the jury found Mr. Whitman guilty on all 54 counts. (App. "1").

In September 2015, a sentencing hearing was conducted before the Honorable Judge W. Louis Sands. At the end of the hearing Mr. Whitman was sentenced to 264 months on all counts to be served concurrently except for count 53 which is to be served consecutive to all other counts. (App. "1").

Mr. Whitman filed a timely notice of appeal to the Eleventh Circuit Court of Appeals. (App. "1").

In March 2018, Mr. Whitman sought to discharge his appellate counsel for a conflict of interest.

On April 24, 2018, the Eleventh Circuit Court of Appeals in a published opinion affirmed Mr. Whitman's conviction. (Appendix at ____).

Mr. Whitman filed a motion to extend the time to file a petition for certiorari. This Court granted that request up to and included December 25th, 2018. (Appendix "2").

STATEMENT OF THE FACTS

In 2008, Mr. Whitman founded a trucking company called United Logistics. (App. "1"). The government alleges (and the jury found) that Mr. Whitman during the course of business bribed three employees of the Defense Logistics Agency on a Marine Corps base to use his trucking company to ship military equipment around the country. (App. "1").

The alleged schemers used tactics to boost the profits of United Logistics at the expense of the United States taxpayer. For example: United Logistics shipped a single pallet of elastic cord from Albany, New York, to Canada for a cost of \$12,000. Because the shipment was designated "exclusive use", no other cargo could accompany the single pallet, even though it filled only about one-fiftieth of the space in a trailer. the conspirators, however, loaded the trailer with various goods, including consolidating elastic cord orders, thus receive payment for multiple shipments even though only one shipment was made.

In exchange for steering (these type of) profitable contracts to United Logistics, Mr. Whitman paid these government employees in random amounts of cash and various goods, like gift cards and Applebee restaurant dinners. The appeals court concluded that although these employees never discussed with each other the specifics of their individual arrangements, they knew about the criminal conduct of their colleagues. Simply, by wind and nod they were all in it together. (App. "1").

In 2012, agents for the Naval Criminal Investigation Service informed these employees that they were under criminal investigation because of their relationship with Mr. Whitman. (App. "1").

At trial, Mr. Whitman defended himself by arguing that he was being extorted and that the money he paid was paid because these government employees [Mr. Potts and Mr. Philpot] threatened to blackball him and to eliminate him as a carrier. During an interview with Mr. Philpot, he was asked whether Mr. Whitman was a little slow in compensating him. Mr. Philpot stated that he would need to remind Mr. Whitman to pay him, and that Mr. Philpot had to offer/threaten Mr. Whitman that Mr. Philpot would turn Mr. Whitman off if Mr. Whitman did not continue to pay him. (App. "1").

Mr. Whitman requested the district court to instruct the jury that the defendant could not be guilty of the offense of bribery if he paid money to federal official, but did so as a result of coercion, and not with a corrupt motive. Mr. Whitman requested that the lesser-included offense of gratuity be added to the jury verdict form instead of convicting Mr. Whitman of bribery, the jury could find that there was not a specific purpose. After a week of deliberation the jury convicted Mr. Whitman on 43 counts of wire fraud, five counts of bribery, one count of theft of government property, four

counts of obstruction of justice and one count of obstructive destruction of records.

At the conclusion of the criminal trial, Mr. Whitman learned that a member of the jury had received a bribe. The juror had received a partial payment on a \$20,000.00 bribe to ensure a hung jury. Because the additional payment had not been made, the juror appears to have reversed her position and "ensured" Mr. Whitman was imprisoned.

Mr. Whitman told his attorney, Ed Garland, of the situation. Mr. Garland instructed Mr. Whitman to remain silent; otherwise, the judge would order a mistrial. And Mr. Garland did not reveal that the problem with a mistrial is that another trial would ensue. A trial in which Mr. Garland could not get paid, since Mr. Whitman's funds were subject to forfeiture and the district court would inevitably believe that the \$2 million dollars fee was sufficient to cover two trials.

A substantial issue of constitutional law requires this Court's attention and authority: Does a person have the right to unconflicted counsel during the direct-appeal stage of a criminal case?

REASONS FOR GRANTING THE WRIT

The exploration of Mr. Whitman's eligibility for Criminal Justice Act assistance would reveal that Mr. Garland attempted to personally benefit by having Mr. Whitman conduct a pre-forfeiture transaction with forfeitable assets. (App. 1). In addition, the CJA process would expose several transactions with Mr. Garland's co-counsels that permitted a million dollars in fees to be paid with assets that should have been forfeited.

All in all, Mr. Garland's interests had diverged from Mr. Whitman's; otherwise Mr. Garland would have informed the trial court of the bribery scheme, instead of telling Mr. Whitman in essence to cover it up.

Once imprisoned, despite many attempts by phone, email, and family Mr. Whitman never had any other communications with Mr. Garland. Mr. Garland prepared and submitted the appeal without consulting with Mr. Whitman. Similarly, Mr. Garland did not consult with nor advise Mr. Whitman about when to disclose the information about the bribed juror.

In prison, Mr. Whitman decided to learn about the legal system. He discovered that a trial is unfair when the jury is not impartial. Further, he learned that any attempt to bribe the jury adulterates the trial even if the attempt is unsuccessful. Additionally, he came to understand that an attorney concealing that a juror was bribed constitutes a fraud upon the court.

Mr. Whitman sent several communications to Mr. Garland about his concern, that failure to disclose the bribed juror was detrimental, if not illegal. Mr. Garland ignored the communication.

Finally, Mr. Whitman notified the appeals court of the conflict caused by Mr. Garland's advise to deceive the district court.

By this time Mr. Whitman also had surmised that Mr. Garland's financial interests were the cause of Mr. Garland's refusal to seek a mistrial and Mr. Garland's advice that Mr. Whitman deceive (by silence) the district court. Accordingly, Mr. Whitman asked the appeals court to discharge Mr. Garland and either allow Mr. Whitman to proceed pro se, or to appoint unconflicted counsel.

Mr. Garland, although not admitting any misconduct—but not denying the bribed juror events—moved to withdraw as counsel. The Eleventh Circuit, in a classic example of an "opaque and unilluminating" order denied the withdrawal and required Mr. Whitman to proceed with conflicted counsel, that is, with Mr. Garland. Cf. generally, **Carter v. Stanton**, 405 U.S. 699, 671 (1972).

American sensibilities and this Court's precedents suggest that the Eleventh Circuit's order was wrong. Mr. Whitman finds no authority to support the validity of requiring a person to proceed with conflicted counsel.

At the outset it is important to realize why there was no reason to hurry the appeal—Mr. Whitman was in prison and no evidence was spoiling or wasting. Thus, if the appeal had to be redone from scratch, no party would be harmed. Nevertheless, the appeals court refused to discharge the conflicted attorney. This violated both Mr. Whitman's right to choose counsel and his right to effective assistance of counsel.

This Court has long recognized that fundamental fairness requires the assistance of unconflicted counsel, **Wood v. Georgia**, 450 U.S. 261, 263 n.3 (1981), and that fair play requires allowing an accused to choose his own attorney (at least when that accused can afford it). See **Farretta v. California**, 422 U.S. 806 (1975). The Eleventh Circuit vaporized both principles with its decision to require Mr. Whitman to proceed with conflicted counsel. This Court should issue the writ, reverse the Eleventh Circuit, and cement the principle that a federal court must always, (unless physically impossible) ensure a criminal-case defendant has an unconflicted attorney.

A clarifying Guideline Amendment applies retroactively. A sentencing court's failure to apply a clarifying amendment constitutes plain error. The district court did not determine the extent of the jointly-undertaken activity, the foreseeability of the loss, etc. In other words, the district court did not comply with the Guidelines procedure for determining loss and relevant conduct. See U.S.S.G. § 1B1.3 and Amendment 790 (clarifying a district court's procedural duties under the Sentencing Guidelines).

At sentencing, defense counsel did not object to the district court's erroneous procedure (quite likely because of the previously discussed conflict on interest). Therefore, the sentencing error was unpreserved for direct appeal. Nevertheless, this Court's decisions indicate that plain procedural error should be corrected on direct appeal, even when the parties overlooked the error. See, e.g., **Rosales-Mireles v. United States**, 138 S. Ct. 1897 (2018); **Kimbrough v. United States**, 552 U.S. 85 (2007).

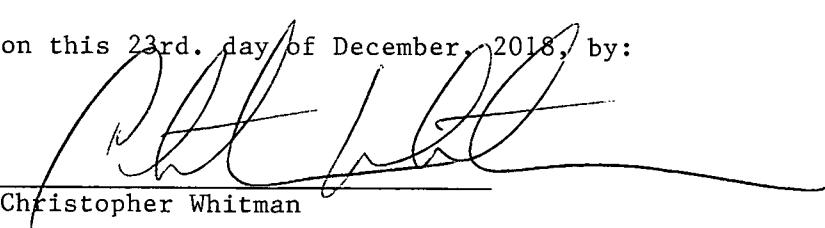
The Eleventh Circuit knew of the district court's procedural deficiencies. (App. 1 at __) but chose to act expediently and allow the plain error to remain. In doing so, the appellate court denied Mr. Whitman a fair trial, due process of law, and effectuated a rule that conflicts with the principle underlying this Court's rulings in **Henderson v. United States**, 133 S. Ct. 1121 (2013).

CONCLUSION

The Eleventh Circuit permitted the district court to ignore the procedural safeguards required by the Sentencing Guidelines even though the record reveals the obvious deficiency.

An obvious error that makes poignant the Eleventh Circuit's inexplicable requirement that Mr. Whitman use conflicted counsel on appeal. This Court should issue the writ, vacate the Eleventh Circuit's opinion, and direct the Eleventh Circuit to remand the case for a new sentencing hearing with unconflicted counsel.

Prepared with the assistance of Frank L. Amodeo and respectfully submitted on this 23rd day of December, 2018, by:



Christopher Whitman