No. _____

In the Supreme Court of the United States

SEALED APPELLANT,
Petitioner,

v.

SEALED APPELLEE,
Respondent.

On Petition for Writ of Certiorari to
The United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. When a lawyer is named as a suspect in the same criminal investigation as his client should lower courts review the conflict under *Cuyler v. Sullivan* or *Strickland v. Washington*?

2. Is it structural error when the government has actual knowledge of a conflict and keeps it hidden?

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1. The memorandum opinion of the District Court denying 28 U.S.C. 2255 relief;
2. The memorandum opinion of the District Court granting a certificate of appealability; and
3. The opinion of the Fifth Circuit Court of Appeals.

JURISDICTION

A panel of the Fifth Circuit Court of Appeals released a published opinion on August 17, 2018. A motion for rehearing was denied on September 26, 2018. The jurisdiction of this Court is proper under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case implicates the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

The saddest thing about betrayal is that it never comes from your enemies.

A criminal defense lawyer had a longstanding friendship with a judge. While discussing repairs for an old Mercedes, the lawyer told the judge that he had a mechanic who owed him a favor. The mechanic fixed the judge's car and helped him sell it.

The lawyer had no idea that his mechanic was not a loyal friend; the mechanic was secretly a paid FBI informant. The judge had no idea that the lawyer was not a loyal friend; the lawyer was secretly paying for the car repairs to earn "brownie points" with the judge. And the judge had no idea that his trial lawyers may not have had undivided loyalty; the lawyers were repeatedly mentioned as possible suspects in the same federal investigation they were defending.

The first two betrayals are regrettable; the last betrayal is unforgiveable.

A. Procedural Overview.

Angus McGinty was sentenced to 24 months incarceration on July 15, 2015 after he pleaded guilty to 18 U.S.C. § § 1343 & 1346. ROA.298 - 309. McGinty filed a timely pro se application for writ of habeas corpus under 28 U.S.C. 2255 alleging a conflict of interest. ROA.854-886. Because the FBI's investigation into the Bexar County criminal bar was so broad, McGinty asked the trial court to appoint counsel who practiced outside of San Antonio. ROA.857-585. After counsel was appointed, McGinty filed an

amended writ of habeas corpus, substantiating the conflict of interest using information contained in trial counsels' file. ROA.481-512.

Applying the *Strickland v. Washington,* 466 U.S. 668, 348-50 (1984), standard the district court denied the petition without a hearing. ROA.784-804. Recognizing the conflicting circuit court opinions and the Fifth Circuit's opinion in *Beets v. Scott*, 65 F.3d 1258, 1271 (5th Cir. 1995), the district court granted a certificate of appealability. ROA.823-824. Petitioner filed a timely notice of appeal. ROA.250-251.

The Fifth Circuit did not address the conflict of interest, instead finding an implicit waiver of the right to conflict free counsel. Petitioner sought a rehearing en banc which was denied on September 26, 2018.

B. Case Narrative.

1. The Mechanic and the Lawyer.

[redacted] had a long and troubled arrest history for lying and stealing. ROA.929-930. With a good criminal defense lawyer at his side, his larceny case was dismissed, his theft case was dismissed, and his felony securing the execution of a document case was dismissed. He could only dodge so many crimes of moral turpitude, and he was eventually placed on felony probation for tampering with government records with intent to defraud. *Id.*

The mechanic continued to get into more serious trouble with the law, but found that it was more productive to work for the government than against it. In November 1997, the mechanic became a paid FBI informant in a drug smuggling ring conducting controlled purchases of drugs. ROA.928-929. After his work in drugs, he became a paid

informant in investigations of stolen cars. *Id.* The FBI paid the mechanic $2,700 for his informant work. *Id.*

However, by June 1999, the FBI ended the agreement with the mechanic because he continued to break the law. Though the mechanic was sent to prison for 8 months in June 1999 for theft, he had two other arrests for theft in 2000 that were dismissed, and his theft charges in January 2001 were also dismissed. In March 2001 the mechanic was arrested again for theft, and yet again that April for unauthorized use of a credit card and conspiracy to use unauthorized access devices with intent to defraud. He was sentenced to 10 months in prison. Shortly after he was released, he was back in court on yet another theft case. ROA.928-30.

On November 21, 2001, the mechanic was charged in Bexar County District Court with Theft of Property between $1,500 - $20,000. The case was assigned to [redacted] who denied bond for the mechanic due to his lengthy criminal history. The mechanic's father hired criminal defense lawyer Alberto Acevedo. The lawyer advocated for a bond, and the mechanic was released the following day. ROA.930.

The lawyer told the mechanic that [redacted] did him a favor by releasing him on bond and that the mechanic would have to repay the favor by doing car repairs for [redacted]. *Id.* From January through April 2002, the mechanic said he fixed [redacted] two BMWs and a Volkswagen Bug for free. According to the mechanic, [redacted] and the lawyer would frequently stop by his repair shop. The mechanic also claimed that while his case was pending, the lawyer directed the mechanic to deliver envelopes of cash to [redacted] residence. The mechanic said that he did this between

10-15 times, and that the mechanic claimed the lawyer told him to personally put $1,500.00 in cash in an envelope and deliver it to [redacted]. ROA.930-31.

No details of this story were ever corroborated.

2. The Judge.

Judge Angus McGinty knew none of this history but finds himself accused by the mechanic of the exact same story.

Because there was no trial, the facts of what happened between the mechanic, the lawyer, and the judge can only be understood by reviewing the search warrant applications and returns for the lawyer's cellphone. *See* ROA.928-950; 1029-1038; 1047-1048;1050-1059;1064-1067. While there are hundreds of conspiratorial statements between the mechanic and the lawyer, not a single statement corroborates that the judge knew the lawyer was paying the mechanic out of pocket to fix his car. *See, e.g.* ROA.932-33; 934. Instead, the judge was intentionally led to believe that the mechanic owed the lawyer a favor. On December 10, 2013 when the lawyer debriefed with the FBI he stated that the judge had offered to pay for the repairs himself, but that *he wouldn't let him* because he was owed a favor. There was nothing to pay.

Honest services fraud in the form of bribery requires proof of a quid pro quo. Despite the lawyer's assurances to the judge, the mechanic did not actually owe the lawyer any favors. The lawyer knew this. The mechanic knew this. The judge did not know this, which prevented a quid pro quo. The telephone calls between the mechanic and the lawyer corroborated the judge's innocence. His trial lawyers needed to move to

quash the indictment, file a proposed jury instruction on this legal issue, and present this legal defense at trial.

C. The Conflict.

Rumors of the investigation were leaked from the U.S. Attorney's Office. McGinty learned from local attorney Jay Norton that his name was being mentioned in a federal investigation. Norton and McGinty discussed how to make the situation right and repay the mechanic. ROA.641. McGinty had been led to believe the amounts were minimal. On January 8, 2014 McGinty contacted the mechanic directly, and the following day provided him with a $250.00 check dated June 7, 2013. The fact that McGinty approached the *mechanic* (not Acevedo), and wrote a check to the *mechanic* (not Acevedo) demonstrated that McGinty did not in fact know that Acevedo had paid for the repairs, at all. In his role as FBI informant, the mechanic refused payment from McGinty stating that Acevedo had already paid for the work. ROA.635-36.

Acevedo corroborated this fact. [redacted], he provided information supporting the fact that there was no actual quid pro quo agreement between he and McGinty. Acevedo said that he wouldn't let McGinty pay, telling McGinty instead to cash in on the (made-up) favor owed to Acevedo. [redacted] from the government's main witness, McGinty could have demonstrated at trial that there was no quid pro quo agreement.

[redacted]

[redacted]. Out of the thousands of lawyers in San Antonio in private practice who might be involved in corrupt influence, Acevedo specifically named two: Alan Brown and Jay Norton. This accusation was made a month before they announced they were McGinty's lawyers. Acevedo had no way of knowing that these would be McGinty's lawyers. But the FBI and the government knew of their involvement before they even announced they were representing McGinty.

As the witness interviews and debriefings continued, McGinty's lawyers were listed as persons of interest over and over again. In FBI 302 memos of interviews with cooperating informant Albert Acevedo, Agent Carlisle reports:

> -On December 5, 2013, . . . Acevedo made a myriad of allegations against other individuals, including Alan Brown (Brown) and Jay Norton (Norton). Specifically, Acevedo stated that he was not the only attorney with influence in McGinty's court and gave Brown and Norton as examples of other attorneys who got favorable rulings from McGinty.
>
> -On December 6, 2013, another FBI Special Agent and I once again debriefed Acevedo. . . Acevedo stated that Brown and Norton also made campaign contributions to judges and had more influence with judges than he did."
>
> -"On December 16, 2013, another FBI Special Agent and I conducted a debriefing of Acevedo. Acevedo advised that one of his legal friends had said that Brown had said that he had heard from a local judge that Acevedo was 'debriefing with the Feds on public corruption cases.'

ROA.787-89. In FBI 302 memos of interviews with a criminal defense attorney revealing a corrupt system where lawyers were providing bribes and kickbacks for court appointments, Agent Carlisle reports:

> On March 6, 2014, another FBI Special Agent and I interviewed [redacted] who was interviewed in connection with an investigation conducted by the United States Attorney's Office for the

> Western District of Texas. Among her various allegations, [redacted] alleged that Brown and another person had paid a court coordinator to testify on their behalf in a tax case against them.

ROA.787-89. When the FBI interviewed McGinty's co-workers, Brown and Norton are mentioned again by name:

> -On June 17, 2014, another FBI Special Agent and I interviewed [redacted]. Stiles advised that Norton and another individual were friends of McGinty and spent more time in McGinty's office than other attorneys . . . [including] Norton.

ROA.787-89. This is not a situation in which a peripheral witness happens to mention a lawyer's name in passing. In multiple interviews of multiple witnesses involving the same subject matter, Alan Brown and Jay Norton's names are repeatedly mentioned.

D. The Trial.

McGinty wanted a trial. In his affidavit supporting his pro se § 2255 writ he explains:

> I believed that we were on track to go to trial up until just shortly before the trial date, and believed that my lawyers would call good character witnesses in my behalf. I had spoken to a number of judges, lawyers, police officers, clerks, and other persons who told me that they would testify in my behalf.

ROA. 876.

It is undisputed that McGinty's lawyers later convinced him not to go to trial. As McGinty explains:

> [T]he Government requested a jury instruction relying on the *Grace*[1] case. At this time, [my lawyers] told me that, under the *Grace* case, the Government [] would not have to prove that there was a quid pro quo, but

[1] *United States v. Grace*, 568 F. App'x 344, 350 (5th Cir. 2014), as revised (May 22, 2014).

> that I could be found guilty under a lesser standard.[2] My lawyers stated that under this standard, I would be guilty if I simply knew that Acevedo was trying to influence me, and I failed to stop or report him. At the status conference, the court gave my lawyers two weeks to file a response to the Government's proposed jury instructions and to address the *Grace* case.
> ...
> My lawyers told me that I was facing a six-year sentence[3] under the Guidelines if I were convicted at trial. My lawyers told me that the Government was offering me a sentence of 24 months, and I had two days to accept or reject it. Believing that I had no defense based on my counsels' representations, I felt that I had no choice other than to accept the plea offer.

ROA. 877.

McGinty's lawyers did not file a response to the Government's proposed charge. McGinty's lawyers did not address this legal issue in a pretrial motion to quash the indictment. McGinty's lawyers did not file a motion in limine or draft their own requested jury instructions. Believing he was guilty under the law because his lawyers advised him that he was guilty, McGinty entered a guilty plea.

E. The Writ.

The basis for McGinty's writ involved whether a potential conflict of interest affected his lawyers' advice to plead guilty. A simple case that should have gone to trial became complicated by the specific defense lawyers who were involved and the region in which the accusation was made, for, as it turned out, the FBI was investigating

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[2] *Grace* involved a small town mayor writing a fraudulent letter to be used for private investment in exchange for several thousand dollars. Contrary to the representations made to McGinty, *Grace* requires a corrupt quid pro quo agreement.

[3] The PSR actually scored McGinty at a level 22 (41-51 months). ROA.360.

more than just McGinty - they were investigating the *entire* Bexar County criminal justice system. *See* ROA. 1434-1441; ROA.70-72.

Despite the government's actual knowledge, they never disclosed this potential conflict to the trial court or to McGinty himself prior to McGinty's decision to waive his right to trial. It wasn't until counsel was appointed on his § 2255 writ that McGinty learned for the first time that his own trial lawyers had been repeatedly mentioned as possible suspects in witness interviews given to the very same FBI and U.S. Attorney's Office that had prosecuted him.

ARGUMENT

It is clearly established federal law that the Sixth Amendment right to counsel includes the right to representation free from conflicts of interest. *Strickland,* 466 U.S. at 348-50; *see also Wood v. Georgia,* 450 U.S. 261, 271 (1981); *Holloway v. Arkansas,* 435 U.S. 475, 489-90 (1978); *Glasser v. United States,* 315 U.S. 60, 70-76 (1942). This Court has emphasized that the duty of loyalty is "perhaps the most basic of counsel's duties." *Strickland,* 466 U.S. at 692. In order to establish ineffective assistance of counsel in a conflict of interest situation, a defendant who did not raise an objection at trial "must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 348.

In order to establish an actual conflict, *Cuyler v. Sullivan* provides guidance:

> Since a possible conflict inheres in almost every instance of *multiple representation,* a defendant who objects to multiple representation must have the opportunity to show that potential conflicts impermissibly imperil his right to a fair trial. *But unless the trial court fails to afford such an opportunity,* a reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance of counsel.

Cuyler v. Sullivan, 446 U.S. 335, 348 (1980) (emphasis own).

We ask this Court to grant review to address two questions raised in *Cuyler* that should be settled by this Court. First, is there something different about a potential conflict of interest between a lawyer and client that creates an actual conflict similar to a multiple representation conflict, and second, whether the consequence for failing to inform the trial court of a potential conflict should penalize the government or the defendant.

I. THE COURT SHOULD DECIDE THAT CUYLER IS THE APPROPRIATE STANDARD WHEN A LAWYER IS A POTENTIAL CO-DEFENDANT WITH HIS CLIENT.

When analyzing conflicts, trial-counsel-as-criminal-suspect cases are divided into two categories:

1. Trial counsel is arrested for an *unrelated* offense to the defendant, and trial counsel is prosecuted by the same prosecutor's office as the defendant

2. Trial counsel is a suspect or potential co-defendant with the defendant in the alleged crime *that gave rise to their attorney-client relationship*

The first type of suspect-attorney conflicts creates the potential for actual harm to the client. The lawyer's unrelated prosecution might cause the lawyer to "pull his punches" in hopes of minimizing his own criminal exposure in his *separate* case. He *might* sandbag to curry favor with his prosecutors. He *might* not vigorously advocate for his client in hopes of getting a better deal. But an adverse effect is uncertain and prejudice cannot be presumed.

The second type of suspect-attorney cases are so rare – and so serious – that it results in a structural Sixth Amendment violation. A lawyer's self-interest in shifting blame away from himself in the same or related investigation is too great to engage in detached calculations to determine whether the lawyer's decisions protected his client or his own interests. It corrodes the integrity of what the public believes is just, neutral, and loyal when a lawyer represents a client.

A. *Strickland* Applies To Limitless Potential Conflicts Arising From A Trial Lawyer's Negligence; *Cuyler* Applies To The Rare Potential Conflicts Of Interest Arising From The Same Criminal Investigation.

1. *Strickland* is the appropriate standard when analyzing allegations unrelated to the client's pending criminal charge.

Trial lawyers are often embattled by personal troubles that *may* upset their duty of loyalty to a potential client. Lawyers with legal troubles caused by drugs and alcohol are unfortunately common. Felony drug possession and DWI are the bedfellows of lawyers battling drug and alcohol addiction. To apply the *Cuyler* standard when a lawyer has an addiction is too broad. There must be proof of deficient performance tied to that particular case to support a finding of ineffective assistance of counsel.

2. *Cuyler* is the appropriate standard for analyzing allegations of potential conflicts of interests related to the client's pending criminal charges.

Unlike habeas applications that involve a credibility battle between attorney and client, the trial-counsel-as-criminal-suspect subset of cases allows for objective verification. Any type of law enforcement document naming the trial counsel as a possible suspect provides objective corroboration not present in other types of attorney conflict cases.

This category presents an extremely rare but particularly egregious situation where a lawyer is a potential co-defendant with his client. In *Beets v. Scott*, the Fifth Circuit created a useful framework in distinguishing straightforward conflicts and those that "fall along a wide spectrum of ethical sensitivity." *Beets*, 65 F.3d at 1271. In a

footnote in *Beets*, the Fifth Circuit invited this Court's review: "A powerful argument can be made that a lawyer who is a potential co-defendant with his client is burdened by a 'multiple representation' conflict that ought to be analyzed under *Cuyler*." *Beets* at n.17.

The First, Second, Third, Fourth, and Ninth Circuits appear to apply *Cuyler* when a lawyer has an incentive to minimize his own criminal exposure:

	CASE	REASONING
FIRST CIRCUIT	*United States v. Segarra-Rivera*, 473 F.3d 381, 385-86 (1st Cir. 2007)	An attorney who has committed misconduct . . . would have a very powerful incentive to "sweep it under the rug."
SECOND CIRCUIT	*LoCascio v. United States*, 395 F.3d 51, 56–57 (2d Cir. 2005)	A lawyer's interest in self-preservation would seriously hamper his ability to act as a zealous advocate for his client.
THIRD CIRCUIT	*Chester v. Comm'r of Pa. Dep't of Corr.*, 58 Fed. Appx. 94, 105 (3d Cir. 2015)	Lawyer might "pull his punches" in hopes of minimizing his own criminal exposure.
FOURTH CIRCUIT	*Rubin v. Gee*, 292 F.3d 396, 403 (4th Cir. 2002)	Lawyers' personal interests in avoiding their own prosecution created a fundamental conflict of interest.
NINTH CIRCUIT	*Campbell v. Rice*, 408 F.3d 1166, 1169 (9th Cir. 2005)	Used *Cuyler's* framework to determine if a petitioner was denied the effective assistance of counsel when his trial counsel was arrested for felony drug possession two days before the trial of petitioner's case (but denied relief).

Further, the Seventh and Tenth Circuits--along with the U.S. Navy-Marine Corps Court of Criminal Appeals--have applied the *Cuyler* broadly to conflict cases outside of multiple representation. *United States v. Lafuente*, 426 F3d 894, 898 (7th Cir. 2005) (analyzing a potential conflict under *Cuyler* where petitioner's lawyer briefly represented a potential government witness); *United States v. Flood*, 713 F.3d 1281, 1287 (10th Cir. 2013) (analyzing under *Cuyler* when potentially adverse party paid for petitioner's defense).

The Fifth Circuit declined to apply *Cuyler* in the self-interest context, instead finding that a person can "implicitly waive" the right to undivided loyalty by trial counsel. *Sealed Appellee v. Sealed Appellant*, 900 F.3d 663 (5th Cir. 2018). Recently in *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), and *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), this Court categorized certain Sixth Amendment violations as "structural" errors. Certain rights - like the right to conflict-free counsel - are not designed simply to protect the defendant from erroneous conviction but instead to protect an interest in fundamental fairness.

The structural error in this case originates from the federal criminal investigation mentioning McGinty's trial lawyers as suspects. The government knew the trial lawyers were mentioned as persons of interest. The FBI knew. McGinty's lawyers knew. The two people with the greatest interest in the integrity of the process - McGinty and the trial judge - were left in the dark.

Autonomy was the bedrock for Sixth Amendment relief under *McCoy*. McGinty's autonomy was imperiled when the government and his trial counsel withheld material

information about his relationship with counsel, thus depriving McGinty of his Sixth Amendment right to choose whether his lawyers' interests affected his own. We seek this Court's review to decide the important question whether a lawyer who is named as a potential suspect in the same criminal investigation involving his client is a straightforward conflict or can be implicitly waived by the defendant.

B. Conflicts Arising From *Self-Preservation* Are Straightforward; Conflicts Arising From *Self-Interest* Fall Along A Continuum.

While a defendant must show prejudice under the *Strickland* standard, under *Cuyler* prejudice is presumed. *Cuyler*, 446 U.S. at 345 - 350. The rationale behind *Cuyler*'s presumption-of-prejudice rule is two-fold: (1) there is a high probability of prejudice arising from the conflict, and (2) it is difficult to produce proof.

1. There is a high probability of prejudice when trial counsel may be implicated in an ongoing federal criminal investigation.

"What could be more of a conflict than a concern over getting oneself into trouble with criminal law enforcement authorities?" *United States v. Cancilla*, 725 F.2d 867, 870 (2d Cir. 1984) (new trial granted —even though there was overwhelming evidence of guilt and no evidence of deficient performance—where appellant's trial counsel was later implicated in the same scheme for which appellant was tried). In these extremely rare situations, a defendant need not show prejudice due to the inherent seriousness of the breach and the difficulty in "measur[ing] the precise effect on the defense of representation corrupted by conflicting interests." *Cuyler*, 446 U.S. at

348. Rather, "[p]rejudice is presumed ... if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance." *Id.*

Unless the lawyer was at the scene of the crime, *Cuyler* will rarely apply in state criminal cases. By the time the suspect is arrested, the investigation is completed. In the state criminal justice system, *Cuyler* applies in *egregious* cases. However, in federal criminal investigations, *Cuyler* applies in *specific* cases. When the federal investigation involves judicial bribery and corruption, any lawyer that has provided any judge with "a peppercorn" could fall within the scope of the investigation. Even legal campaign contributions could cause a lawyer to be concerned that his proper financial donation could be viewed suspiciously.[4]

By all accounts, the Bexar County courthouse corruption investigation had a much wider focus than Judge Angus McGinty. This was not an investigation initiated for the sole purpose of arresting him. [redacted] The *potential* of being named as a co-defendant creates an actual conflict. When a lawyer *could* be implicated in a criminal investigation, the conflict is established: he does not want to antagonize the prosecutor or cast suspicion on himself.

[4] At sentencing the government argued, "It doesn't matter if it's cash, if it's car repair, if it's home repairs, if it's someone dropping off a bottle of Scotch at the courthouse for the judge, someone providing tamales to the judge at the courthouse, someone paying for the lunch of the judge at the courthouse, that is bribery. It doesn't matter if you are giving a peppercorn to a judge, if you are doing it to curry favor with the judge, that is bribery." ROA. 317.

a. There is a no difference between being a potential suspect and actual suspect for a lawyer who wants to avoid his own indictment.

In both the Third and Fourth Circuits, the government has unsuccessfully argued an actual conflict only arises upon the trial lawyer's arrest. In *Government of Virgin Islands v. Zepp*, 748 F.2d 125 (3rd Cir. 1984) the court explained:

> It is the government's position that there was no *actual* conflict of interest because Zepp's trial attorney was never subject to any criminal charges as a result of his conduct on December 18, 1982 and thus faced no potential liability. We conclude that an *actual* conflict of interest is present on this record.

Id. at 136. The Fourth Circuit similarly considered whether a suspect-lawyer needed to be charged – or guilty – to pose an actual conflict requiring disqualification:

> And especially when his client's testimony might implicate the attorney himself, we think it unrealistic to assume the attorney can vigorously pursue his client's best interests entirely free *from the influence of his concern* to avoid his own incrimination. We do not assume Mr. Whitehead is involved in the wrongdoing under investigation. It is for the Grand Jury to decide.. . . But we cannot also not say with any assurance that Mr. Whitehead is not *in a position to frustrate the grand jury's inquiry into his own participation.*

In re Investigation Before Feb., 1977, Lynchburg Grand Jury, 563 F.2d 652, 656 – 657 (4th Cir. 1977) (emphasis added).

When a hearing is held upon learning of a possible conflict, the district court *couldn't* know whether the suspect-lawyer would eventually be charged. In *United States v. Salinas*, 618 F.2d 1092 (5th Cir. 1980), *cert. denied*, 449 U.S. 961 (1980), the district court only *believed* the suspect-lawyer was a target of investigation. He disqualified the lawyer accordingly. The same result occurred in *In re Investigation Before Feb., 1977, Lynchburg Grand Jury*: the prosecutor alerted the court to the conflict at the grand jury

stage, the defendants attempted to waive the conflict, and the district court disqualified the lawyer over the defendants' and the lawyers' objections. *Supra* at 563 F.2d at 654 - 655.

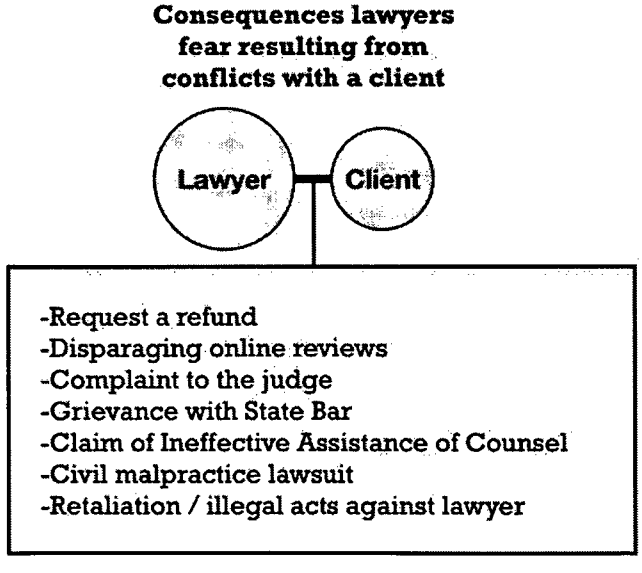
Several reasons support the legal conclusion that an actual conflict is created once the potential for prosecution emerges.

i. **An actual conflict of interest exists even if a trial lawyer is exonerated from any accusation of wrongdoing.**

While the zenith of an actual conflict occurs when a trial lawyers is a co-defendant with his client, an actual conflict begins with an allegation. A lawyer does not have to *actually* be under investigation to create a conflict; merely having a belief that he could be under investigation creates "an influence of concern." *See In re Investigation Before Feb., 1977, Lynchburg Grand Jury, supra.* A conflict of interest exists even when the court concludes that counsel, who was under investigation while representing the defendant, was not actually involved in improper conduct. *See* Anne Poulin, *Conflicts of Interest in Criminal Cases: Should the Prosecution Have a Duty to Disclose?* 43 American Criminal Law Review 164 (2010). If counsel was aware that he was suspected of criminal wrongdoing while representing the defendant, the later determination that the suspicion was baseless does not retroactively neutralize the conflict. *Id.* The conflict exists because of the accusatory relationship between the prosecution and counsel while the investigation is ongoing, at a time when neither side knows whether it will culminate in charges against counsel. *Id.*

ii. The conflict results from the attorney's *perception* that he may be a target of an FBI investigation, not whether he was *actually* a suspect.

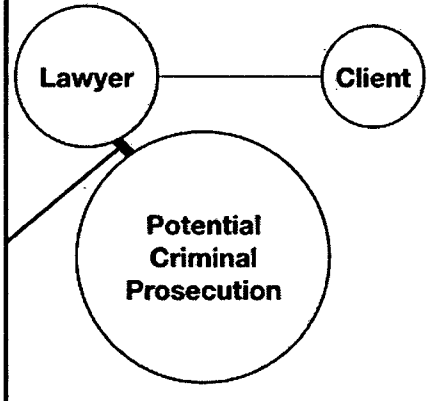
In normal attorney-client relationships, the client is in control over the most important decisions. The lawyer is in charge of strategy. A lawyer feels stress when there are conflicts *within* the relationship: a client wants to proceed to trial when the lawyer believes the outcome will be worse; the client wants to testify over the attorney's advice; the client wants to present a defense that the lawyer feels is unpersuasive. Conflicts that "fall along a wide spectrum of ethical sensitivity" arise when external factors may improperly influence a lawyer's advice to a client: how much the lawyer is being compensated, the lawyer's personal problems, or an inappropriate relationship with the client. While the power dynamic between attorney and client has never been equal, these type of conflicts do not fundamentally alter the *bipolar* relationship between the parties. The consequences of conflicts that "fall along the ethical spectrum" are confined to the relationship:



However, the fear of criminal prosecution creates a new relationship. Once the possibility of criminal prosecution arises, the attorney-client relationship is eclipsed. The consequences of a possible federal criminal investigation are more serious, less defined, and nearly limitless in scope:

Consequences lawyers fear resulting from possible federal investigation

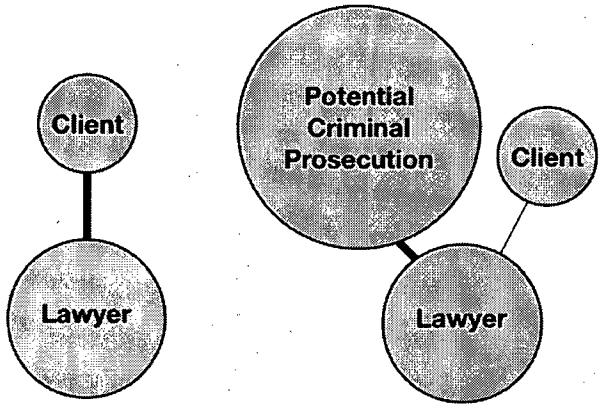
-Is the FBI monitoring my cellphone?
-Is the FBI monitoring my email?
-Is the FBI reviewing all of my financial transactions?
-Has the FBI interviewed former clients?
-Is a potential client working undercover to try and incriminate me?
-Is a current client working undercover to try and incriminate me?
-Are fellow lawyers debriefing against me?
-Are judges debriefing against me?
-Who can I trust?
-Should I retain a lawyer?
-If I retain a lawyer, will it make me look like I did something wrong and I am guilty?
-What happens to my law practice if I am indicted?
-What happens to my family once this comes out in the newspaper?
-Should I confide in my spouse?



Multipolarity

The bipolar attorney-client relationship is destroyed simply by the introduction of the *possibility* of a federal investigation. The client is no longer the focus because the client has no control over the FBI's investigation decisions. The client has no control over offering immunity to other witnesses, applying for a Title III warrant, or issuing search warrants. The client has no control over the prosecutor's decision to charge his criminal

defense lawyers for obstruction of justice. Any consequence of a conflict with the client is obscured; the lawyer is no longer accountable to the client in the same way.



iii. More harm may result from the fear of potential prosecution than when the details of the prosecution are known.

We do not fear the unknown; we fear what we *think* about the unknown.

Unlike a family law attorney facing federal criminal prosecution, an experienced federal criminal defense attorney knows *exactly* what to expect in a federal criminal investigation. Fear of prosecution can be rational or irrational. But the fear is what creates the divergent interest between lawyer and client. In the best-case scenario, the lawyer's fears are unfounded; there was not enough evidence to prosecute -- or he did nothing wrong. In the worst-case scenario, the lawyer has good reason to fear investigation.

Beets used the word "potential." Other circuit courts similarly discuss "concern" and "interest." All of these words describe the same emotion: fear. The fear of investigation or prosecution has a much larger scope than the actual prosecution. Fear causes a trial lawyer in a conflicted relationship to be more self-centered, more risk-averse, and more likely to abdicate an advocacy role.

b. Conflicts where a defendant's lawyer is his potential co-defendant present greater harm than ordinary multiple representation conflicts.

Fifteen years before Nobel Laureate Daniel Kahneman's book *Thinking Fast and Slow* was published, the dissent in *Beets* understood the problems of heuristics, cognitive bias, loss aversion, and hindsight bias:

> There are exceptional conflicts involving the attorney's self-interest that, human nature being what it is, are far more likely to impair the lawyer's ability to satisfy his duty of loyalty to his client than are the more ordinary conflicts between clients.

Beets 65 F.3d at 1297–1299. Trial lawyers are prone to cognitive errors that are part of our human nature. Even if the trial lawyer is not formally charged with the same crime as his client, the limbic system activates the fight or flight response. The prefrontal cortex struggles to maintain control. Self-preservation is the first law of nature.

i. Trial counsel as possible co-defendant is a subset of a multiple representation conflict.

If the premise behind a multiple representation conflict is that it involves a zero-sum equation between two clients, this conflict undoubtedly exists when trial counsel is effectively one of the clients. The lawyer is simply representing himself *pro se*. When a

client is represented by two lawyers who have *both* been implicated in the scope of a federal criminal investigation, the conflict is even greater.

ii. Self-interest in a zero-sum equation results in a scale always tilted in the lawyer's favor.

In a multiple representation conflict, the lawyer may take an action beneficial to one client but harmful to another. The lawyer may justify his actions in myriad strategic ways: one client was facing more serious charges than the other; one client was innocent and the other guilty; one client needed the evidence and the prejudicial effect on the other client was minimal. The conflict causes harm to one client, but it is difficult to predict *which* client will be harmed.

In a multiple representation scenario where the lawyer is one of the parties whose interest he is protecting, it is easy to predict how the lawyer will resolve any zero-sum equation. By his very agreement to serve as trial counsel, he has chosen to place his own interests ahead of his client.

First, representation creates a power dynamic. While the client determines whether to have a trial or plead guilty, the lawyer exerts tremendous influence over the decision. When the lawyer advises the client to plead guilty, the client presumes the advice has only the client's best interest in mind.

However, when a client knows he and his lawyer are both co-defendants, they are equals. The client is acutely aware that the lawyer may be providing advice that serves his own interests and can accept or reject the lawyer's advice accordingly

without being internally conflicted. The disclosure of self-interest allows clients to make informed decisions.

Second, the lawyer is the client's agent. The lawyer has the ability to communicate the client's purported statements to the prosecutor, the lawyer has authority to disclose attorney-client communications, and the lawyer controls every strategic decision. The lawyer is privy to the client's secrets. Access to the client's mental impressions, alone, illustrates an adverse interest. When a client knows his lawyer is his potential co-defendant, the client has every incentive to protect himself from making incriminating statements to a person who might be in a position of power to use those statements against him.

Finally, a non-suspect attorney provides objectively reasonable advice to consult with independent counsel if a potential conflict arises. Outside counsel scrutinizes the lawyer's advice and work product. If a lawyer does not want to be subject to this scrutiny, he does not refer the client to seek an independent opinion.

The lawyer does not have to actively thwart a client's defense in order for harm to occur. The continued representation *is* the harm.

c. Self-interest against criminal prosecution is the most severe type of conflict of interest.

Circuit courts have recognized that a lawyer's interest in self-preservation—specifically in avoiding criminal prosecution, mitigating criminal penalties, or limiting severe ethical redress—is *at least* as fundamental of a conflict as multiple representation. These "exceptional conflicts involving the attorney's self-interest ... are far more likely to

impair the lawyer's ability to satisfy his duty of loyalty to his client than are the more ordinary conflicts between clients." *Beets* at 1299; *Cancilla,* at 870 ("The Court in *Cuyler* was concerned with the effect of multiple representation, a situation that invariably raises the possibility of harmful conflict that often does not exist in fact. [Suspect-lawyer cases] involve[] a different type of conflict for a lawyer, which is always real, not simply possible, and which, by its nature, is so threatening as to justify a presumption that the adequacy of representation was affected.").

With the exception of contempt, overzealous advocacy does not result in the lawyer being personally liable. The more a lawyer invests his own emotion, personal belief, and conviction in his client's defense, the more selfless the lawyer's defense becomes.

Ineffective assistance of counsel requires courts to look through the lens of under-zealous advocacy. The lawyer concerned about his own criminal involvement has the greatest temptation to use his client as a human shield. Once the client pleads guilty, the lack of zealous advocacy is then objectively defensible (the client was guilty), purportedly beneficial to the client (acceptance of responsibility results in a lower guideline range), and beneficial to the suspect lawyer (with the case resolved all further investigative efforts likely cease). The habeas petitioner is then left with the nearly impossible task of trying to prove the lawyer's decisions were motivated by self-interest.

It is not the innocent lawyer who poses the greatest risk. He is the one most likely to withdraw as counsel upon allegation of a conflict. An innocent lawyer would have

no incentive to remain involved and would likely heed the warning of the prosecutor. It is the lawyer who is concerned about his own involvement who poses the greatest risk. After all, such a conflict of interest creates one strategic avenue which the suspect-lawyer will *never* pursue: admitting his own guilt to exonerate his client.

d. Even when the lawyer is only mentioned as a possible suspect, the lawyer and the client's interests still diverge substantially.

The following chart illustrates the conflicting interests:

	CLIENT-DEFENDANT'S INTERESTS	SUSPECT-ATTORNEY'S INTERESTS
CASE STATUS	No charges filed.	Client formally charged.
INVESTIGATION STATUS	Completed.	Ongoing.
GOAL	No conviction, or in the alternative, smallest amount of punishment.	Prevent being charged.
RESOLUTION OPTION: IMMUNITY	Highly agreeable.	Highly disagreeable. Client can implicate the lawyer; client has immunity and lawyer doesn't.
RESOLUTION OPTION: TRIAL	Agreeable.	Highly discouraged. Trial could lead to further investigation which could implicates suspect-attorney.

RESOLUTION OPTION: DISPOSITIVE PRETRIAL MOTIONS	Agreeable.	Discouraged. Goal is to get through the case as smoothly as possible. Do not rock the boat with pretrial motions, do not allow potential info to leak out about suspect-attorney.
COOPERATION WITH FBI	Agreeable. Cooperation could reduce sentence through 5k1.1 agreement.	Any cooperation by any witness could results in criminal investigation focusing more closely on suspect attorney. Best case scenario is for investigation to end with no witness agreeing to cooperate.
UNDERCOVER COOPERATION WITH FBI	Agreeable. Working in undercover capacity that could lead to arrest of other bad actors could reduce sentence through 5k1.1 agreement.	Disagreeable. Potentially places suspect-attorney at risk. Could my own client be cooperating against me?
MORE DEFENDANTS BEING ARRESTED	Highly agreeable. Reduces sentence through 5k1.1 agreement and more culpable defendants would reduce client's comparative culpability. The more people that could be investigated and charged the better.	Highly disagreeable. Could implicate suspect-attorney.

Once a defendant has been charged, the investigation against that defendant is completed. But until the statute of limitations runs, the investigation against any other potential co-defendant is ongoing. This is why federal investigation conflicts are uniquely suited to the *Cuyler* standard.

2. There is difficulty in proving prejudice because a client is not privy to his lawyer's actual motives, the conversations between his lawyers, or the conversations between his lawyers and the prosecutor.

Prejudice is difficult to prove when the client could be harmed by the attorney's actions or inactions that are known only to the attorney.

First, the trial lawyer has an even greater incentive to cooperate with the government in post-conviction proceedings. If the lawyer is concerned about his own possibly illegal conduct that occurred within the statute of limitations, what better way to curry favor with the prosecutor than by providing an affidavit against his former client? Further, such an affidavit is self-serving and effectively immunizes the trial lawyer from further investigation or prosecution.

Second, the client has no way of knowing what his lawyer told the prosecutor during the pendency of the case. A lawyer seeking to limit his own criminal exposure has tremendous incentive to exaggerate his client's guilt and deflect from any inquiry into his own conduct. For example, a prosecutor may be told by the defense lawyer, "I have a difficult client who is having difficulty accepting the evidence against him." The prosecutor knows that there will not be a trial. The defense lawyer knows there will not be a trial. But the client erroneously assumes that his case will be going to trial.

Finally, a client has no way of knowing what was discussed between members of his trial team. Did the lawyers discuss their own possible exposure? How did they react when learning that they were named as possible subjects? A client is at a

significant disadvantage if he has to marshal evidence of prejudice against his lawyer before the trial court will grant an evidentiary hearing.

C. A Bright-Line Rule Applying *Cuyler* is Feasible, Practical, and Self-Enforcing.

Unlike internal conflicts between a lawyer and his client, these situations can be verified by the government. If this Court applies *Cuyler* instead of *Strickland*, the prosecutor has an incentive to raise the potential conflict with the trial court immediately. Similar to a prosecutor's problem making a materiality decision in determining whether or not evidence constitutes *Brady* material, the easiest solution is to err on the side of disclosure.

The bright-line rule is simple: if a trial lawyer is implicated in the same criminal investigation as his client, no matter how slight, the *Cuyler* standard applies:

LEAST					GREATEST
Lawyer mentioned as possibly involved	Lawyer mentioned as definite suspect	Lawyer becomes focus of investigation	Probable cause to search lawyer	Probable cause to arrest lawyer	Lawyer is actually charged

There is no functional difference between the adverse conflict that occurs from one end of the spectrum to the other; the lawyer's primary interest is in self-preservation at every stage. The trial court should not have to parse out where the suspect-attorney finds himself in the wide spectrum of the stages of investigation in order to apply *Cuyler* or *Strickland*.

II. WHEN THE GOVERNMENT KNOWS OF A POTENTIAL CONFLICT AND KEEPS IT HIDDEN, IT IS STRUCTURAL ERROR.

When a conflict of interest is raised by counsel, the trial court has an affirmative duty to inquire into the potential conflict to determine the breadth and scope of the conflict. *Holloway,* 435 U.S. at 484. If the trial court fails to inquire into raised potential conflicts of interest and the defendant is then convicted, he has been deprived of effective assistance of counsel and his conviction must be reversed. *Id.* Under the Due Process Clause of the Fourteenth Amendment, a criminal defendant has a right to conflict free counsel, and a criminal conviction may be reversed if the parties ignore the issue. *Wood v. Georgia,* 450 U.S. at 273-74.

This case presents the question whether structural error occurs when the lawyers know of the potential conflict but never inform the defendant or the trial judge to conduct a hearing.

A. Trial Courts Must Conduct a Hearing to Determine Whether a Conflict Can be Waived.

The standard for measuring an effective waiver of a constitutional right requires that a waiver must be an "intentional relinquishment or abandonment of a known right." *Johnson v. Zerbst,* 304 U.S. 458 (1938). Valid waivers must be "knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Id.* In an adversarial system, the government has a vested interest in

arguing that citizens have waived their rights. To prevent the government from arguing that a person implicitly waived their rights, this Circuit requires trial courts to conduct an evidentiary hearing to determine whether a defendant competently and intentionally waived a Sixth Amendment protection. *United States v. Garcia*, 517 F.2d 272, 276 (5th Cir. 1975). The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. This must occur through an evidentiary hearing to ensure the defendant has actual knowledge of the potential conflict.

An implicit waiver doctrine requires a post hoc and ad hoc analysis to determine the occurrence of a valid conflict waiver in suspect-lawyer cases - which is exceedingly difficult without the benefit of a hearing. Under the Court of Appeals opinion, appellate courts now become the fact-finder and must analyze who the defendant was, what the defendant is accused of, the defendant's occupation, and then attempt to attempt to glean from the transcript circumstantial evidence of whether a knowing, voluntary, and intelligent conflict could be inferred by his choice of counsel. "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Holloway*, 435 U.S. at 488, *quoting Glasser*, 315 U.S. at 76.

B. Applying *Strickland* Incentives Silence.

The court of appeals infers that McGinty may not have been able to waive this type of conflict had it been disclosed in district court. *Sealed Appellant* at 900 F.3d at 672; *see, e.g. Wheat v. United States*, 486 U.S. 153, 163 (1988) ("the district court must be allowed substantial latitude in refusing waivers of conflicts of interest"). The conflict McGinty couldn't waive in the trial court is the same albatross now used to deny him relief. McGinty never had a trial, which is the harm he seeks to vindicate. It is difficult to understand how it is fair for the government to benefit through McGinty's guilty plea when failing to disclose what they *actually* knew and yet arguing McGinty should be prevented from having a trial based on what he *should have* known when choosing his lawyers.

1. The conflicted lawyer has no incentive to raise the issue with the trial court.

[redacted] The trial lawyer

would not want any of these facts to be brought out at a hearing before the trial court. The conflicted lawyer has a personal incentive to avoid a conflict hearing.

Once Brown and Norton contact the U.S. Attorney to announce they are representing McGinty, it complicated matters for the prosecution. First, it forces the government to tip its hand. If Norton and Brown are potential targets, the U.S. Attorney has to notify them that representation may be improper due to a conflict of interest. This advanced notice gives trial counsel control, access to inside information, and most importantly, an audience and a relationship with the prosecutor. Second, trial counsel gains an opportunity to defend his involvement under the guise of remaining as trial counsel. The prosecutor is put in a defensive situation: seek an immediate indictment in order to have a hearing on the conflict, or continue to work with the trial counsel in hopes that a plea agreement could be reached and a complicated case can be resolved. Every conversation between trial counsel and the prosecutor about McGinty made it increasingly difficult for the government to object to the representation.

2. The prosecutor has no incentive to raise the issue with the trial court.

Despite the court of appeals opinion reminding prosecutors to "promptly and fully to disclose a potential conflict to the district court," the holding incentivizes the exact opposite behavior. When the government wants an effective but potentially conflicted lawyer removed, the prosecutor files a motion and notifies the trial court. When the government is content with an ineffective but potentially conflicted lawyer to remain as trial counsel, the prosecutor can safely remain silent. The government – with

actual knowledge of a potential conflict -now has the ability to usurp the trial court's role in ensuring the fairness of trials through the implicit waiver doctrine.

This Court should impose a bright line rule that prevents the government from benefiting from silence. This rule is already effective in multiple-representation cases. Knowing a conflict will likely result in post-conviction relief under *Cuyler*, the government has an incentive to immediately bring the potential conflict to the trial court's attention. The government is risk-averse when failure to disclose could invalidate a guilty plea. Under an implicit waiver doctrine promulgated by the court of appeals, the government is inclined to be far more risk-tolerant of a Sixth Amendment violation.

C. Implicit Waivers are Antithetical to the Protections Afforded to the Remedy for Structural Error.

The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. *Weaver* at 1907. When McGinty's lawyers advised him to plead guilty, and the government knew they were named as potential suspects in the same FBI investigation and this may come out at trial, this was structural error. Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind this Court has labeled structural; when present, such an error is not subject to harmless-error review. *McCoy* at 1511.

First, the conflict of interest affected the framework within which the trial proceeds and not simply an error in the trial process itself. *Arizona v.*

Fulminante, 499 U.S. 279 (1991). When a lawyer is named as a potential suspect in the same criminal investigation involving his client, this is a straightforward conflict that affects the entire framework. *Beets* at n.17.

Second, the effects of the conflict are too hard to measure. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006). A lawyer seeking to limit his own criminal exposure has tremendous incentive exaggerate his client's guilt and deflect from any inquiry into his own conduct. A lawyer with conflicted interests has every incentive to encourage a client to plead guilty: any uncertainty about the lawyer's own liability is radically diminished by the client's unqualified admission of guilt.

Third, when the attorney is a suspect in the same federal investigation as his client, this always results in fundamental unfairness. *Government of Virgin Islands v. Zepp*, 748 F.2d 125 (3rd Cir. 1984); *In re Investigation Before Feb., 1977, Lynchburg Grand Jury*, 563 F.2d 652 (4th Cir. 1977). "There are exceptional conflicts involving the attorney's self-interest that, human nature being what it is, are far more likely to impair the lawyer's ability to satisfy his duty of loyalty to his client than are the more ordinary conflicts between clients." *Beets*, 65 F.3d at 1297-1299. The innocent lawyer is likely to withdraw as counsel upon allegation of a conflict; he has no incentive to stay involved and would likely heed the warning of the prosecutor or trial judge. The lawyer that is concerned about his own involvement is most likely to remain as counsel to maintain control.

A defendant must be allowed to make his own choices about the proper way to protect his own liberty. *Faretta* at 834. Autonomy requires access to information to

make an independent choice. When the government does not disclose information that would be relevant for the person to intelligently make that choice, it is not an autonomous choice. In this unique situation involving potential conflicts, the Sixth Amendment requires the assistance of the trial court because neither the government nor the conflicted defense attorney can properly and independently advise the defendant.

D. McGinty was Harmed by the Government's Silence.

1. Government disclosure would have resolved the conflict.

Had the government disclosed the potential conflict to the trial judge, it is doubtful he would allow the lawyers to continue to represent McGinty. Even if he wanted to waive the conflict the trial judge's interest in fundamental fairness allows him to disqualify counsel. Whether McGinty wished to seek new counsel or whether the trial judge disqualified counsel, the result after a hearing would have been the same: McGinty's lawyers would not be representing him at trial.

2. McGinty was precluded from presenting a defense.

It is not difficult to imagine the closing argument at McGinty's trial:

> As Texans, we value manners and respect and generosity. Culturally in South Texas, we especially value family and relationships and reciprocity. We are kind to one another, and in turn, people are kind to us. That's why we live in the South.
>
> The convenience store owner who regularly gives a free cup of coffee to a neighborhood police officer certainly hopes that the officer pays extra attention to the safety of his store and parking lot as the officer makes his

> nightly rounds. But we would never consider the shop owner to be bribing the officer because he had no expectation of a specific benefit in exchange for that cup of coffee. It's just part of being a community.
>
> The prosecutors from the government don't see the world this way. They only see a world where people keep tally of favors, and that nobody every does something just to be a good neighbor or friend or fellow human being. Show them by your verdict that this is not the way community works. Show them that kindness is not corruption.

Preferably, McGinty's case would resolve before trial through a motion to quash the indictment. Giving something merely with a "generalized hope or expectation of ultimate benefit on the part of the donor" is not a bribe. Albert W. Alschuler, Criminal Corruption: Why Broad Definitions of Bribery Make Things Worse, 84 Fordham L. Rev. 463, 474 (2015). Were that shop owner accused of bribery, then, he would have a valid legal defense under *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398 (1999), *Citizens United v. FEC*, 558 U.S. 310 (2010), *McConnell v. FEC*, 540 U.S. 93, 297 (2003), and *Skilling v. United States*, 561 U.S. 358 (2010). Honest services fraud in the form of bribery requires proof of a quid pro quo and, therefore, the Government must prove "a specific intent to give or receive something of value in exchange for an official act." *Sun-Diamond* at 404-05.

McGinty deserves the right to present his defense by counsel who is unconcerned with potential criminal prosecution. Allowing persons to be prosecuted for receiving anything of value absent intent to engage in a specific quid pro quo arrangement is a misuse of the honest services statute. The trial judge in this case even rebuked the government for this theory. ROA. 318-319. This theory criminalizes an

endless swath of ordinary behavior involving government officials and employees, including a tremendous amount of behavior protected by the First Amendment.[5] Attempting to "influence" government officials is much of the point of several clauses of the First Amendment, and anyone who has ever given "anything" of value to a government official or their family—a gift, dinner, a job or internship, a campaign contribution, public support or endorsement, etc. —would rightly be chilled from any further involvement in attempting to influence government action lest their earlier behavior be construed by a prosecutor or jury as intended to influence the recipient.[6]

McGinty was advised to plead guilty by his lawyers, and McGinty did what we want clients to do: trust their lawyers. McGinty had the right to know that his own lawyers were being named in the federal investigation . And McGinty is right to question his lawyer's advice knowing what he now knows.

It is eminently reasonable for him to be allowed to withdraw his plea.

CONCLUSION

McGinty has a valid legal defense that was never presented. He sits in prison bearing the direct consequence of the government's silence and his lawyers' divided loyalty. This Court should grant review to resolve an important issue on how trial

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[5] Brief of Amicus Curiae James Madison Center for Free Speech Supporting Petitioner, *Suhl v. United States of America*, No. 17-1687 (July 20, 2018) at 2.
[6] *Id.*

lawyers should handle potential conflicts of interest so this never happens to another client.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that today, February 28, 2019 this Petition of Writ of Certitiori was served upon the Assistant United States Attorney Paige Messec, counsel for Appellee, via first class mail to:

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