No. 19-515

In the
Supreme Court of the United States

BALDASSARE AMATO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

This case presents as clear-cut a case of the violation of a criminal defendant's constitutionally guaranteed Sixth Amendment right to the effective assistance of conflict-free counsel and the wholesale failure by the trial court to ensure that right as any that ever has come before this Court for review.

It is exactly the kind of case for which the automatic reversal rule developed by this Court in *Holloway v. Arkansas*, 435 U.S. 475, 484 (1978) was intended to apply. Indeed, as the record reflects, all parties have agreed that prior to this Court's decision in *Mickens v. Taylor*, 535 U.S. 162 (2002), Mr. Amato's judgment of conviction and sentence would have been automatically reversed [App. 164].

The case perfectly frames the vitally important and recurring question of when *Holloway's* automatic reversal rule, which has continued viability even after *Mickens*, *see Mickens*, 535 U.S. at 168, is triggered. This is a question over which there is significant uncertainty in the lower courts.

Specifically, the case asks this Court to decide whether *Holloway's* automatic reversal rule is triggered when (1) conflicted defense counsel brings his conflict to the trial court's attention (twice) and insists that a conflict hearing is required in order for him to proceed as defense counsel (and that he can only proceed by foregoing a line of defense that would implicate his conflict); (2) government counsel unequivocally advises the trial court that defense counsel's conflict of interests requires his disqualification; (3) the defendant is kept completely

in the dark about the conflict and its implications; and (4) the trial court refuses to have a hearing or in any way bring the conflict to the defendant's attention.

Even if the Court were not to apply *Holloway's* automatic reversal rule, the evidence of adverse impact from defense counsel's conflict of interests could not be more direct or more compelling.

Among the many other overwhelming examples of adverse impact demonstrated below, after first openly assuring the trial court that he would refrain from any line of defense for Mr. Amato that would in any way implicate his own conflicts, defense counsel then affirmatively stipulated with the prosecution that the defense would not use the single most critical piece of defense evidence - notes from defense counsel's other client (now turned government cooperating witness) that completely put the lie to the government's only substantive witness against Mr. Amato. [See ECF ## 725; App. 307].

When defense counsel was directed by the trial court to provide an affidavit (in lieu of the evidentiary hearing Mr. Amato requested) to explain his reason for stipulating that he would not use this most powerful piece of defense evidence - both exculpatory and devastatingly impeaching in nature - defense counsel was unable to provide any reason whatsoever [App. 533].

Meanwhile, as the trial court was advised, defense counsel advised post-conviction counsel for Mr. Amato, that he would not voluntarily provide the evidence by affidavit that would have revealed the adverse impact his conflict actually had and the true reasons for his actions and omissions because he did

not think he should have to be his own "executioner." [App. 537]. The trial court simply ignored this.

And now, in response to this Petition, the government, after opposing an evidentiary hearing as vigorously as possible, asks the Court to assume a possible strategic reason for defense counsel stipulating not to use his other client's own words that would have completely undercut the government's case against Mr. Amato, despite defense counsel's own admission that he could not think of any reason for what he did. This is a disgrace and should not be countenanced.

This is a case in which, consistent with its overriding interest in seeing justice done and its independent interest in ensuring the integrity of the criminal process, the government should have conceded error and either dismissed the charges or retried Mr. Amato. Instead, the government has chosen to oppose the requested relief every step of the way. That decision was wrong.

In its response to Mr. Amato's petition before this Court, however, the government has gone well beyond simply opposing the petition; the government repeatedly has misled this Court on material record facts and in some particularly material instances, has absolutely misrepresented the record below.

That is inexcusable by any measure and is especially offensive in this procedural posture when the government well knows that the Court is relying on the parties' representations as to record facts to a great extent in evaluating the petition. The most significant examples of the government's conduct in this regard will be noted and addressed in this section of the reply.

THE GOVERNMENT'S RESPONSE MISSTATES THE RECORD

1. At Page 4 of its Response, the government minimizes its insistence in the trial court that defense counsel was operating under an actual conflict of interest and had to be disqualified from representing Mr. Amato.

As chronicled in a July 4, 2013 letter to the district judge, [ECF # 33]. the government requested eight separate extensions of time in the district court during these §2255 proceedings, purportedly to scour the record to see if there ever were a proceeding at which the district judge orally was made aware of defense counsel's conflict. After the eighth extension, government counsel wrote to the court for the express purpose of describing the chronology of events surrounding notice to the district court of defense counsel's conflict [ECF # 24].

Conspicuously absent from the government's submission was reference to a conference held before the court, memorialized in a transcript, during which government counsel unequivocally advised the court that defense counsel had to be disqualified based on his conflict of interests, reminding the court that it had disqualified other counsel in a related case under the same circumstances [App. 344-345].

In its Response before this Court, the government asserts that its position in the district court was that White only had to be disqualified if Massino refused to waive the continuing privileges and duties White owed to him [Response at 4]. That just is not true. In fact, after noting that the government had not yet heard from Massino's lawyer on the matter of the waiver, government counsel unequivocally advised

the district court that its position was that Massino did not waive the privilege he shared with White and that White had to be disqualified [App. 344]. And of course, Massino never did waive the privilege [Pet. App. 19a].

The district court clearly understood that the government had insisted on White's disqualification at that pre-trial conference; but it found, without citation to any authority, that it was acceptable for the government simply to have changed its mind on collateral review and to argue that White had performed well after all. [See 18a, n.2].

Perhaps the government began changing its mind after White agreed to stay away from any area of defense that would implicate his conflict of interests, or after White agreed not to use Massino's notes that would have impeached the government's primary witness against Mr. Amato directly on the question of guilt or innocence, or perhaps it was after securing the conviction. The government was duty-bound to move for White's disqualification as it did in the pre-trial conference and there is no legally cognizable basis for its change of position on collateral review, after securing a conviction with conflicted counsel.

2. At Pages 4 and 12-13 of its Response, the government attempts to minimize the third occasion on which the district court was advised that White suffered under a conflict of interests that had to be addressed with Mr. Amato, by emphasizing that White represented to the court that he (White) would refrain from pursuing any defense which would in any way implicate the conflicting interests arising from his representation of Massino and further

represented to the court that White was prepared to waive his conflicts.

In doing so, the government ignores two fundamental principles of Sixth Amendment conflict jurisprudence:

First, It is axiomatic that an attorney's participation, over a claim of conflicts, cannot be conditioned on foregoing the pursuit of some avenue of defense. *U.S. v. Levy*, 25 F.3d 146, 158 (2d Cir. 1994); *U.S. v. Cancilla*, 725 F.2d 867, 871 (2d Cir. 1984); *Massino*, 303 F. Supp. 2d at 262-263, *citing, U.S. v. Malpiedi*, 62 F.3d 465, 469 (2d Cir. 1995); *U.S. v. Iorizzo*, 782 F.2d 52, 59 (2d Cir. 1986); *U.S. v. Schwarz*, 283 F.3d 76, 92 (2d Cir. 2002). It is of no legal significance that Massino did not testify at trial. *Levy*, 25 F.3d at 156-158.

In the instant case, of course, this assurance by White played out in the most damaging way possible for Mr. Amato; for White inexplicably entered into an agreement with the government, memorialized in a letter, [ECF # 725 in the underlying criminal case], that he would refrain from using notes that had been produced, in which Massino directly advised that the government's sole witness implicating Mr. Amato in a murder for which he was convicted, absolutely was lying. That witness, Vitale, based his inculpatory testimony exclusively on what he claimed Massino had told him. White well knew that Massino had completely put the lie to Vitale's testimony; but he made an agreement with the government, inexplicably and without consulting Amato, not to use Massino's notes, in order to avoid implicating his

conflict, arising from the privilege and duties he owed to Massino.[1]

Secondly, the government ignores a second fundamental conflict jurisprudence principle - that by definition, a court cannot rely on the views of the attorney whose conflict is at issue for an assurance that the conflict is waiveable or would be waived. *See Wood v. Georgia,* 250 U.S. 261, 265 n.5 (1981)*; U.S. v. Levy*, 25 F.3d 146, 158 (2d Cir. 1994); *U.S. v. Iorizzo*, 786 F.2d 52, 59 (2d Cir. 1986).

White's second letter, advising the court that he would not have co-counsel assisting him, as he earlier had represented would be the case, and that he would avoid any line of defense that implicated Massino's privileged communications, and therefore implicated his conflict, clearly should have alerted the court to

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[1] The district court opined, in denying Mr. Amato's §2255 motion that perhaps Massino had "repudiated" his notes and that White opted not to take a chance on Massino by calling him as a witness. The district court also out of whole cloth, concocted its own theory that perhaps White refrained from calling Massino as a witness because it was "much more likely" that Massino's testimony would have been damaging to Mr. Amato. [Pet. App. 8a]. This was outrageous, wholly supported speculation by the district court judge. The court refused to grant an evidentiary hearing at which White could have been made to answer for his stipulation under oath. Moreover, White himself, in the affidavit he provided at the court's direction in response to the §2255 motion, had no explanation whatsoever, for why he refrained from using Massino's notes [App. 533]. Finally, the government had Massino in its exclusive control before, during, and after the §2255 proceedings as a cooperating witness. At no time has the government ever produced even so much as a suggestion from Massino that he ever has in any way repudiated his notes concerning Vitale's false testimony against Mr. Amato.

the absolute imperative of disqualifying White and it must be deemed an objection for purposes of the automatic reversal rule under *Holloway v. Arkansas*, 435 U.S. 475, 484 (1978).

The district court had two letters from conflicted counsel insisting that a conflict hearing was necessary and the oral insistence from the government that White had to be disqualified. Moreover, the court expressly was told by White that if he stayed in the case, he would forego what turned out to be the single most important line of defense in the case. The district court ignored it all, held no hearing, and kept Mr. Amato in the dark about it all. The district court characterized this fundamental error, denying Mr. Amato's Sixth Amendment rights, as a "regrettable" "oversight." [Pet. App. 44a].

If the government's position in this case is accepted, all relevant parties - conflicted defense counsel and unscrupulous government counsel intent on securing a conviction at any cost, will be given a powerful incentive to simply keep the defendant in the dark about the conflict and its implication, as well as his options. By doing so, the defendant would never even be in a position to object on his own and under the government's construction of the decision in *Mickens v. Taylor*, 535 U.S. 162 (2002), the automatic reversal rule cannot be applied.

This Court surely did not go that far in *Mickens* and clearly what happened in this case triggers the underlying interests in *Holloway*'s operative automatic reversal rule.

THE UNCERTAINTY AND SPLIT BELOW IS REAL

3. In urging this Court to grant review in this case to, *inter alia*, resolve the question of when *Holloway's* automatic reversal rule is to be applied after *Mickens*, Mr. Amato referred to cases from the First, Fifth, Sixth, and Tenth Circuits which made clear that even after *Mickens*, where there has been an objection to conflicted defense counsel's representation and the trial court makes no inquiry, the automatic reversal rule still applies [Pet. at 16].

At Page 13 of its Response, the government suggests that two of these cases do not support this side of the split of authority Mr. Amato identified because they declined to vacate the convictions in the cases before them. The government misunderstands the principle for which they were cited or misreads the decisions at issue.

In *U.S. v. Williamson*, 859 F.3d 843, 853 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 1324, 200 L. Ed. 2d 516 (2018), exactly as Mr. Amato asserted in his Petition at 16, the Tenth Circuit expressly wrote that in multiple representation conflict situations, where an objection to the alleged conflict is raised and the district court fails to inquire, prejudice is presumed and *Holloway's* automatic reversal rule is applied.

The second cited case with which the government attempts to take issue in its Response at 13, is *Moss v. U.S.*, 323 F.3d 445, 455 (6th Cir. 2003). And again, the government's off-point reason for taking issue with Mr. Amato's reliance on the case is that the defendant lost. But the government completely misses the point.

Mr. Amato cited the post-*Mickens* decision in *Moss* simply for the proposition that in the Sixth Circuit, *Holloway's* automatic reversal rule survived *Mickens* and that it does not matter whether it is the defendant himself or defense counsel who apprises the trial court of the conflict and makes the objection [Pet. at 16] That is exactly what the Sixth Circuit held in *Moss*, 323 F.3d at 455 ("Indeed, where the defendant or his counsel objects to the conflict prior to, or during trial, the trial court must inquire as to the extent of the conflict or subject any subsequent conviction to automatic reversal. *Holloway*, 435 U.S. at 489-92. *See also Riggs v. U.S.*, 209 F.3d 828, 831 n.1 (6th Cir. 2000).").

Ironically, a decision from the district judge in Mr. Amato's case, in connection with the government's motion to disqualify one of Massino's lawyers in his own case before he became a cooperating witness, reflects the district judge's own view that *Holloway*'s automatic reversal rule applies in full force after *Mickens*, where the conflict is brought to the court's attention (even without an objection by the defendant) and the court fails to immediately inquire. *See U.S. v. Massino*, 303 F. Supp. 2d 258, 260 (E.D.N.Y. 2003)(Garaufis, J.).

Each case cited in the Petition stands for exactly the proposition for which it was cited.

THE GOVERNMENT BADLY MISSTATES MR. AMATO'S ARGUMENT

4. The government's most offensive misrepresentation of Mr. Amato's submission in this case is its wholly false assertion that "[P]etitioner does not suggest that any other court of appeals would have found a Sixth Amendment violation under

Sullivan's actual-conflict standard on the facts here." [Response at 16]. Nothing in the context of this case could be further from the truth. In fact, the exact opposite is true.

At every stage in the proceedings in this case, Mr. Amato has argued with full support from decisions around the country that *every* court in the nation would vacate the judgment of conviction in this case under *Cuyler v. Sullivan*, 446 U.S. 335 (1980) based on the actual-conflict demonstrated by the operative facts - if the court were to actually apply the well-settled law to the facts.

The record speaks for itself in this regard and indeed, Mr. Amato's Petition at 28-33, under the heading "The Lower Court's Analysis under *Cuyler v. Sullivan* is Wrong" expressly makes the point. *See also* Petition at 19-28 (demonstrating why the case was wrongly decided and that review should be granted in light of the miscarriage of justice reflected in the proceedings below, including the overwhelming evidence of adverse impact from the actual conflict and the denial of an evidentiary hearing, against the weight of all relevant authority).

CONCLUSION

In short, for the reasons set forth in the Petition and in this Reply, this case presents the perfect vehicle for resolving constitutionally significant, regularly recurring, open questions over which there is a mature split of authority among the lower courts.

Review also should be granted because the case was wrongly decided, resulting in a miscarriage of justice, with a defendant who was wholly denied the Sixth Amendment right to conflict-free effective

assistance of counsel, facing a sentence of life imprisonment.

Respectfully Submitted,

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