No. _____

In the
Supreme Court of the United States of America

WESTLEY KENNEDY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On a Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

Petition for Writ of Certiorari

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Question Presented

The Sixth Amendment guaranteed Westley Kennedy the right to counsel with undivided loyalties. The government knew that Kennedy's court-appointed lawyer was also representing, in a related case, Tawan Carter, a cooperating defendant who incriminated Kennedy. Both men were charged with identical methamphetamine-distribution conspiracies (possibly the same conspiracy) and both pleaded guilty, but Carter got a 46-month sentence while Kennedy got 20 years.

Did the denial Kennedy's right to conflict-free counsel, which the prosecution could have cured at any stage but did not, constitute either a structural error or a breakdown of the adversarial process that requires vacatur of Kennedy's guilty plea without any additional showing of prejudice?

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Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

Westley Kennedy respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in United States v. Westley Kennedy, No. 18-11624, which affirmed the judgment and commitment of the United States District Court for the Southern District of Georgia.

Opinion Below

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Georgia, is appended to this Petition.

Basis for Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the Court of Appeals for the Eleventh Circuit was entered on January 16, 2020. This petition is timely filed pursuant to Supreme Court Rule 13.1 and the Court's order of March 19, 2020, extending the usual deadline for such petitions. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291, which provides that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

Provisions of Law Involved

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statement of the Case

Westley Kennedy was effectively unrepresented throughout his felony prosecution because his appointed lawyer had an actual conflict of interest, which the prosecution knew about from the start yet never did anything to cure. This case asks whether the government had a duty to tell the district court that the lawyer it assigned to Kennedy already represented a client providing prosecutors incriminating information about Kennedy.

Throughout this case, the government has maintained that its prosecutors had no such duty. Both on direct appeal and in this § 2255 habeas action, Kennedy maintained that the conspiracy between prosecutors and his appointed lawyer totally denied him assistance of counsel, requiring vacatur without any further showing of harm. The government disagreed and insisted that Kennedy was not prejudiced by his lawyer's conflict.

The Eleventh Circuit likewise treated Kennedy's argument as an ordinary ineffective-assistance-of-counsel claim and denied that his lawyer's concurrent representation of Kennedy and a witness against him necessarily gave rise to a conflict of interest. It held that Kennedy was not entitled to any relief because his twenty-year sentence was reasonable relative to his maximum possible exposure *assuming* all the indictment's allegations to be true. Kennedy had argued that the reasonableness of his 240-month sentence was properly assessed in comparison with the 46-month sentence his lawyer's *other* client, who was charged with similarly serious offenses, got.

Kennedy's conviction was obtained unconstitutionally, but the import of this case is that the government sees nothing wrong with not alerting a district court that it has appointed a conflicted lawyer to represent an accused. That, along with the government's

efforts to conceal the conflict in this case, suggests that prosecutors conspiring with defense lawyers against their own clients may be widespread in the Southern District of Georgia if not the nation. There is no way to know how widespread this is because the government, which is alone in a position to have this crucial information, does not believe it has to reveal it in any case. The court of appeals and the district court were not troubled enough by this utter breakdown in adversarial processes to investigate.

Zeh's Representation of Carter

Eight months before the government indicted Westley Kennedy, it indicted Tawan Carter on conspiracy and substantive charges relating to methamphetamine distribution. The indictment specified that other "known and unknown" conspirators participated in Carter's crimes. The district court appointed Billy Reid Zeh III to represent Carter on August 15, 2013. Two weeks later, Zeh filed 16 boilerplate motions on Carter's behalf. The government never responded to these motions.

By October 10, 2013, two weeks before the government made its first discovery production, Carter had already decided to plead guilty. Carter's plea agreement provided that, in exchange for his cooperation, the government let him plead to only a lesser-included offense and agreed to a downward variance from the recommended guideline sentence. The agreement specified a guideline range of 37 to 46 months and was signed by the prosecutor, Carter, and Zeh. Carter pleaded guilty on November 13, 2013.

There were no further docket entries in Carter's case until April 29, 2014, when the district court scheduled Carter's sentencing. During that nearly six-month pause in the public

proceedings, Zeh and Carter participated in debriefings with federal authorities and, as the government admits, Carter implicated Kennedy.

Zeh's Concurrent Representation of Kennedy

Those same federal authorities indicted Kennedy on April 3, 2014, and Zeh accepted the appointment to represent him a few days later. At the time, both he and the prosecutors knew full well that Zeh's other client, Carter, was incriminating Kennedy to get leniency from those prosecutors.

Zeh filed the same 16 boilerplate motions on Kennedy's behalf that he had filed for Carter. The motions in the two cases were essentially identical, suggesting that Zeh did no real work on Kennedy's case. For example, the only difference between the three-page motions to dismiss the indictment in each case was the defendant's name and the case number; neither is supported by argument or citation to authority. Just as in Carter's case, the government never responded to Zeh's motions.

On June 19, 2014, Zeh was at Kennedy's side for Kennedy's arraignment on a superseding indictment. Six days later, Zeh was at Carter's side for Carter's sentencing. Despite these opportunities, neither the prosecutors nor Zeh disclosed the conflict to the district court. The court sentenced Carter to a 46-month term, later reduced to 37 months.

Two weeks after Carter's sentence, Kennedy and Zeh signed Kennedy's plea agreement with the government. Kennedy agreed to plead guilty to a lesser-included offense of the superseding indictment's drug-dealing conspiracy count. The government agreed not to seek an enhanced penalty under 21 U.S.C. § 851. The agreement waived Kennedy's right to appeal or to seek collateral review, to prevent any review of the case.

Kennedy pleaded guilty on July 15, 2014. His presentence investigation report, issued on October 24, 2014, listed Carter's prosecution as a related case. PSI:3. Still, no one alerted the district court to the conflict.

By the time of Kennedy's sentencing on February 18, 2015, Zeh had withdrawn all the objections he had raised to Kennedy's presentence investigation report, except for an one regarding the interpretation of a particular telephone call that Kennedy insisted upon. The court overruled the objection but nonetheless found that Kennedy was entitled to the acceptance-of-responsibility adjustment.

During the hearing, the government called a DEA agent to testify and Zeh cross-examined him, feigning ignorance—solely for the judge's and Kennedy's benefit—that his other client, Carter, had incriminated Kennedy:

> [ZEH]: And you have testified that a number of co-defendants have either spoken to you or you have interviewed. Is that after they have pled guilty in this case?
>
> [AGENT]: Yes, sir. Some before and some after.
>
> [ZEH]: And all those individuals that provided you information about Mr. Kennedy they are going to get some sort of acknowledgment at the time of their sentencing, right, for what they provided you information on Mr. Kennedy, is that right?
>
> [AGENT]: Depending on what they provided.
>
> [ZEH]: They had an incentive to tell you things about Mr. Kennedy, would you agree with that?
>
> [AGENT]: I would agree, yes.
>
> MR. ZEH: That is all I have, Judge.

DE672:17–18. The prosecutor then volunteered that Zeh set up a debriefing for Kennedy with the agent even though Kennedy was not interested in cooperating:

> [E]arly on Zeh asked the agent to meet with Kennedy and I showed up, too, and Kennedy was pretty firm in his statement that he did not want to cooperate and I implored him. I said, I know you're going to be a career

> offender, I know you've got four prior drug convictions Really, you are going to be looking at a lot of time unless you cooperate.

This was very unusual. Because debriefings with prosecutors and law-enforcement agents entail substantial risks to an accused person, criminal defense attorneys generally do not schedule debriefings until the client decides, with a full appreciation of the inherent risks, that he wants to speak with the authorities.

Kennedy received a 20-year sentence. Zeh billed the U.S. Treasury $10,142 for representing Kennedy, in addition to the $6,935 he billed for representing Carter.

Kennedy's Direct Appeal

On February 19, 2015, Zeh filed a notice of appeal at Kennedy's insistence. The judgment was docketed four days later. On March 3, 2015, Kennedy filed a *pro se* notice of appeal and simultaneously moved *pro se* to vacate the sentence under § 2255, claiming *inter alia* that Zeh had labored under a conflict of interest. The district court granted a government motion to stay the § 2255 action.

In the meantime, Kennedy asked the U.S. Court of Appeals to appoint new counsel "based on clear and obvious conflict," explaining that he had discovered, after pleading guilty, Zeh's divided loyalties. "The appellant after signing the plea and again reviewing his discovery materials found that Attorney B. Reid Zeh, III, did also appear with co-defendant, Tawan Carter during a proffer/debriefing hearing wherein Tawan Carter gave incriminating statements against the appellant." The Eleventh Circuit required Zeh to respond. He *opposed* the appointment of replacement counsel and wrote: "I do not believe it is appropriate to provide relevant and specific facts in this correspondence as to why I do not believe there is

a conflict based on Kennedy's claims." He added that he intended to file on Kennedy's behalf a brief denying that there were any issues meriting appeal (pursuant to *Anders v. California*, 386 U.S. 738 (1967)).

Despite Zeh's objection, the Circuit Court appointed undersigned counsel. The order stated: "To the extent that Kennedy claims this conflict invalidates his guilty plea or otherwise implicates his conviction, the claim is one of ineffective assistance of counsel, which is more appropriately brought in a collateral attack."

Undersigned counsel, however, did not raise an ineffective assistance of counsel claim. Instead, Kennedy's brief argued that, because the prosecution did not bring Zeh's conflict to the court's attention, the plea agreement was unconscionable and the government obtained both it and the guilty plea in violation of the Sixth Amendment. Consequently, both the agreement and the guilty plea were void. This argument did not depend on Zeh's effectiveness, which Kennedy maintained could not be evaluated post-hoc under this Court's precedent. Rather, the brief argued that the government's violation of its duty to inform the district court of Zeh's conflict was structural error, requiring no showing of prejudice or further development of the record.

Rather than responding on the merits, the government moved to dismiss the appeal, relying on the appellate waiver in the plea agreement that Kennedy accused the government of obtaining unconstitutionally. The government conceded it did not to inform the district court of Zeh's conflict. Nonetheless, it insisted that the plea agreement that Zeh negotiated for Kennedy, including the appellate waiver, was enforceable and that Kennedy's guilty plea "waived his conflict-of-interest claim." Strangely, the government offered not to enforce the

waiver of Kennedy's right to seek collateral review if the court of appeals dismissed the appeal. The government's motion also noted that it planned to argue in any § 2255 action "that Kennedy's guilty plea, standing alone, bars his claim that Zeh had a conflict."

Kennedy responded that the record established structural error already and explained that a § 2255 would be unavailing because Kennedy would not be entitled to appointed counsel (*see Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987)), would not be guaranteed a hearing (*see* 28 U.S.C. § 2255(b)), and would not be guaranteed the right to participate in any hearing (*see* 28 U.S.C. § 2255(c)).

In a one-paragraph *per curiam* order, the Eleventh Circuit granted the government's motion. Misconstruing Kennedy's brief as raising an ordinary ineffective-assistance-of-counsel claim, it ruled that the record "was not sufficiently developed to allow meaningful review ... on direct appeal" and dismissed Kennedy's appeal "without prejudice to his ability to raise his conflict of interest claim on collateral review."

Kennedy petitioned for rehearing, explaining that the panel misconstrued his argument. Kennedy's brief argued that the government's decision to keep the district court in the dark about Zeh's concurrent representation of adverse defendants entirely deprived Kennedy of his right to conflict-free counsel. Because that error is structural, Kennedy was entitled to vacatur without any additional showing of prejudice. The Eleventh Circuit denied rehearing without comment, and this Court denied Kennedy's petition for a writ certiorari.

The District Court's Denial of Counsel and an Evidentiary Hearing

With the case back in the district court, the government responded on May 24, 2017, to Kennedy's original *pro se* § 2255 petition, which had been held in abeyance. The

government admitted in that response that "[a]ttorney Zeh represented a defendant, Tawan Carter, who provided information against" Kennedy. Zeh provided the government an affidavit to support its opposition to Kennedy's § 2255 motion in which he claimed to be unaware of the conflict. Zeh knew that Carter implicated a person called "KK" in drug crimes but stated, "At no time during my representation of Kennedy did I ever determine that Tawan Carter was referring to Westley Kayeon Kennedy, when he mentioned the individual known as 'KK' in his proffer." That is hard to believe. First, Kennedy's indictment referred in the style of the case to Kennedy's alias, "K.K." Second, Kennedy confirmed on the record at his change of plea that his nickname is "K.K." Third, Kennedy's PSI listed Carter's case as a related prosecution. Of course, the prosecution knew precisely whom Carter meant when he implicated "KK," yet kept silent about that before the district court.

Kennedy's appellate lawyer, who resided in Florida rather than Georgia, twice, as *amicus curiae*, advised the district court that it should appoint a Georgia attorney to help Kennedy develop his conflict-of-interest claim. The magistrate judge refused.

Proceeding *pro se*, Kennedy alleged that his conviction was invalid because his lawyer labored under a conflict of interest. He also alleged that the government failed to produce exculpatory evidence and other discoverable materials and that Zeh's representation was deficient in various ways. The government responded that Kennedy's claims were "conclusory."

Without appointing counsel or conducting an evidentiary hearing, the magistrate judge issued a 32-page report recommending that the district judge deny Kennedy's § 2255 motion. Inexplicably, the magistrate judge erroneously found that Zeh's representation of

Kennedy was successive to his representation of Carter, when they were actually concurrent. As a result, he applied a legal standard less favorable to Kennedy's position. He also recommended denying a certificate of appealability to foreclose any appeal. The court adopted the report and its recommendations.

Undersigned counsel, who had been monitoring the § 2255 case, then moved to appear *pro hac vice* to perfect an appeal and for reconsideration of the denial of a certificate of appealability. Relying on the court dockets of Carter's and Kennedy's cases, the motion detailed how Zeh concurrently urged Kennedy to plead guilty while representing Carter in his debriefings and sentencing negotiations with the government. The motion faulted the magistrate judge for finding Zeh's self-serving affidavit credible without an evidentiaary hearing and accused the government of conspiring with Zeh to not disclose Zeh's actual, concurrent conflict to the district court. Significantly, the government filed no response.

The district court granted the motions and certified three issues for appeal.

Kennedy's § 2255 Appeal

On appeal, again represented by undersigned counsel, Kennedy first argued that the magistrate judge abused his discretion in denying Kennedy counsel and an evidentiary hearing and that the magistrate judge's clearly erroneous factual findings and consequent application of the wrong legal standard showed that these mistakes prejudiced Kennedy. Second, Kennedy argued that the government's failure to disclose the conflict amounted to totally depriving Kennedy of his right to assistance of counsel, which is a structural error requiring, without any further showing, vacatur of Kennedy's conviction and sentence.

Kennedy also argued that the government's lack of candor represented a total breakdown of the adversary system, which deprived Kennedy of due process.

The government responded to Kennedy's constitutional arguments as though Kennedy had raised an ineffective assistance of counsel claim rather than a claim that his right to counsel was *entirely* denied—a structural error under this Court's precedents and a claim that the prosecution's and Zeh's agreement to keep the conflict secret represented a complete breakdown of adversarial due process.

The Eleventh Circuit also (again) recast Kennedy's appeal. Rather than address whether the prosecution's and Zeh's agreement to deprive Kennedy of conflict-free counsel constituted structural error, the court of appeals instead analyzed the strawman question of whether Zeh was ineffective. It concluded "that Kennedy benefitted by pleading guilty instead of going to trial."

Even while acknowledging the clear errors in the magistrate judge's report, the appellate court affirmed his denial of an evidentiary hearing because Kennedy, who was *pro se* and incarcerated, failed to object to the report. A-7. The record, however, showed that Kennedy sought additional time to object to the magistrate judge's 32-page report, explaining that he had not formulated objections "[d]ue to Movant now being held in S.H.U. (Special Housing Unit) waiting to be tranfered [*sic*], Movant still have limiting [*sic*] access to legal meterials [*sic*] needed to properly respond with the objections to the Magistrate Judge's Report and Recommendation." Despite the lack of objection from the government, the district court denied the motion because "Kennedy has not sufficiently explained why he needs another extension."

Finally, the Eleventh Circuit concluded, in violation of this Court's precedents, that Kennedy's due-process claim was indistinguishable from his right-to-counsel claim. Alternatively, it held that "nothing in the record suggests" that Zeh "complete[ly] fail[ed] to subject the prosecution's case to meaningful adversarial testing" because "he filed a bevy of motions," "objected on numerous grounds to Kennedy's PSI," and because Kennedy received an acceptance-of-responsibility reduction at sentencing. The court of appeals disregarded (although Kennedy's brief pointed it out) that Zeh filed only frivolous, boilerplate motions that the government routinely ignores.

The court gave no weight to the fact that Kennedy's 20-year sentence was wildly disproportionate to Carter's initial 46-month sentence, let alone the 37-month sentence he ultimately served. Carter, like Kennedy, was charged in a methamphetamine-distribution conspiracy that carried a potential life sentence.

Reasons for Allowance of the Writ

While Westley Kennedy's lawyer was advising him to plead guilty and negotiating, supposedly on his behalf, with federal prosecutors, he was also negotiating a huge sentencing reduction for another client with the same prosecutors as a reward *for incriminating Kennedy*. This case asks whether Kennedy's guilty plea is nonetheless valid because he is unable to explain how his case would have unfolded differently if he had been afforded the conflict-free lawyer the Constitution guaranteed him. *See Wood v. Georgia*, 450 U.S. 261, 271 (1981) ("Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest.").

This Court's cases regarding a defense attorneys' conflicts do not address this important question. *Mickens v. Taylor* held that a defendant convicted of murder who later learned that his lawyer had represented the decedent in an unrelated case was required to show "that the conflict of interest adversely affected his counsel's performance." 535 U.S. 162, 173–74 (2002). Not only was the conflict successive rather than concurrent in *Mickens*, but the decision's rationale applies only to cases tried to a jury, not those resolved by plea. The majority began from the premise that "defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation." 535 U.S. at 166. It reasoned that it would be possible for "reviewing courts to determine conflict and effect, particularly since those courts may rely on evidence and testimony whose importance only becomes established at the trial." 535 U.S. at 173. Moreover, *Mickens* noted that automatic reversal is still required "where defense counsel is forced to represent codefendants over his timely objection." *Id.* at 168; *see Holloway v. Arkansas*, 435 U.S. 475, 488 (1978).

More recently, this Court held that a court's erroneous denial of a criminal defendant's right to retain counsel of his own choosing is structural error, requiring no showing of prejudice. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006). The majority distinguished *Mickens* based on the nature of the claims in each case; Mickens brought an ineffective-assistance-of-counsel claim while Gonzalez-Lopez argued that he was entirely deprived of his chosen advocate:

> The requirement that a defendant show prejudice in effective representation cases arises from the very nature of the specific element of the right to counsel at issue there—*effective* (not mistake-free) representation. Counsel cannot be "ineffective" unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that they have). Thus, a violation of the Sixth Amendment right to effective representation is not "complete" until the defendant is prejudiced.
>
> The right to select counsel of one's choice, by contrast, has never been derived from the Sixth Amendment's purpose of ensuring a fair trial. It has been regarded as the root meaning of the constitutional guarantee.

548 U.S. at 147–48 (footnotes and citations omitted). The Court's reasoning implied that, in a case resolved by plea rather than trial, the prejudice flowing from the denial of the right to chosen counsel or conflict-free counsel would be unknowable and, hence, unprovable:

> [T]he choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the framework within which the trial proceeds—or indeed on whether it proceeds at all. It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings. *Many counseled decisions, including those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all. Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe.*

548 U.S. at 150 (citations and quotation marks omitted; emphasis added).

In this case, Kennedy pleaded guilty, so there is no trial record with which to measure his attorney's effectiveness. His lawyer's conflict was actual and ongoing and not, as in *Mickens*, the vestige of a prior representation. His lawyer, Billy Reid Zeh III, simultaneously negotiated with the government the terms of Kennedy's guilty plea and the substantial sentencing benefit that Tawan Carter, also Zeh's client, would get for incriminating Kennedy. Zeh and the prosecutors colluded to keep Kennedy and the district court in the dark about the actual conflict. In the end, Kennedy got a 20-year sentence while Carter got 46 months.

Kennedy maintained throughout his direct appeal and this § 2255 case that his plea is invalid as tantamount to uncounseled under *Gonzalez-Lopez* or, alternatively, represents "an actual breakdown of the adversarial process" involving "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *United States v. Cronic*, 466 U.S. 648, 657 (1984). The government maintained that its prosecutors had no duty whatsoever to alert the court to Zeh's conflict and that Kennedy was not prejudiced by his lawyer's collusion with prosecutors on Carter's behalf and at Kennedy's expense. The lower courts disregarded the government's failure to raise the conflict, applied *Mickens*' rationale, and denied relief because the ultimate sentence Kennedy received was reasonable relative to the maximum possible sentence. Appendix at A-6, A-44. That comparison, of course, assumed that Kennedy is guilty of *all* the government's allegations, not just what he admitted at his change of plea.

I. Courts assume that federal prosecutors will support them in giving Sixth Amendment rights full effect, but the government's position in this case shows that confidence is misplaced.

Courts have a duty to assign indigent defendants an independent lawyer, but fulfilling that duty becomes inordinately difficult without the prosecution's help. The government's position in this case that it has no obligation to bring defense counsel's conflicts to the court's attention is, consequently, of paramount importance to the Judicial Branch. Federal courts generally assume that prosecutors do have such a duty. "It is the duty of a prosecuting attorney to assist in giving a fair trial to a defendant. The government cannot afford to convict its citizens by unfair means." *Read v. United States*, 42 F.2d 636, 645 (CA8 1930). Courts operate under the belief that lawyers, including federal prosecutors, will alert the judge if they believe a party's counsel, whether retained or appointed, has a conflict of interest. *See United States v. Levy*, 25 F.3d 146, 152 (CA2 1994) (faulting prosecutors for "neglect[ing] to apprise [a newly assigned judge] of [defense counsel's possible conflict], thereby permitting the judge to walk unwittingly into the 'mine field'"); *In re Gopman*, 531 F.2d 262, 265 (CA5 1976) ("When an attorney discovers a possible ethical violation concerning a matter before a court, he is not only authorized but is in fact obligated to bring the problem to that court's attention.").

The government's position in this case is inconsistent with statements it made to this Court long ago acknowledging its duty of candor. Forty years ago, the government grandiloquently stated that prosecutors are *especially* obligated to alert courts to defense attorneys' conflicts: "[T]here is a vital public interest in the integrity of our system of criminal justice and of the defense bar—and in preserving the public confidence in that integrity—that

is not present in a case between private parties. The prosecutor accordingly *has an obligation*, on behalf of the public and *to ensure that justice is done*, to move for disqualification of defense counsel who is confronted with a conflict of interest." Brief for the United States as Amicus Curiae, *In re Multi-piece Rim Products Liability Litigation*, No. 79-1420, 1980 WL 339812, at 15 (16 Aug. 1980) (emphases added). As this accurately implies, the government's refusal to honor its slef-professed obligation in this case undermined the integrity of the criminal justice system, compromised the judiciary's ability to do justice in this case, and eroded public confidence in the courts.

The government's new position is not only at odds with its professed belief decades ago but also conflicts with this Court's holdings. This Court has specifically held that federal prosecutors must cooperate with the courts in doing justice and upholding the Constitution and certainly may not withhold crucial information from the judiciary.

> [A] "primary constitutional duty of the Judicial Branch is to do justice in criminal prosecutions." Withholding materials from a tribunal in an ongoing criminal case when the information is necessary to the court in carrying out its tasks "conflicts with the function of the courts under Art. III." Such an impairment of the "essential functions of another branch," is impermissible.

Cheney v. United States District Court, 542 U.S. 367, 384 (2004) (quoting *United States v. Nixon*, 418 U.S. 683, 707 (1974)) (citations and brackets omitted); *see also, e.g.*, *Wood*, 450 U.S. at 265 n.5, 273 & n.20 (noting approvingly that the state solicitor general called a conflict of interest to the attention of the court).

Whether the government was correct in 1980 when it said prosecutors are obligated to raise known conflicts in court or whether it is correct now when it argues that no such obligation exists, district courts need to know whether prosecutors view raising conflicts as

a duty or a mere tactic used to gain an advantage in negotiations or at trial. "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused." *Glasser v. United States*, 315 U.S. 60, 71 (1942). If the government's conduct in this case was ethical and proper, courts will realize they can expect no help from prosecutors in upholding Sixth Amendment rights and might, for example, subject every defense lawyer to a colloquy designed to ferret out any potential or actual conflicts. On the other hand, if the government's conduct was as unethical and unconstitutional as it appears, Kennedy's conviction must be vacated so that the government understands that it must immediately cease withholding from courts information they need to perform their core judicial function.

Either way, a clear rule from this Court is necessary because the public cannot be expected to have faith in a judicial system that allows court-appointed lawyers to collude with prosecutors to benefit one client at another's expense. This Court's has described the interest in maintaining the public's faith in judicial integrity as a paramount concern: "[P]ublic perception of judicial integrity is 'a state interest of the highest order.'" *William-Yulee v. Florida Bar*, 575 U.S. 433, 446 (2015) (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009)). Indeed, this Court unanimously agreed that preventing people like Kennedy from being railroaded by unethical lawyers is a core judicial responsibility:

> Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them. Not only the interest of a criminal defendant but the institutional interest in the rendition of just verdicts in criminal cases may be jeopardized by unregulated multiple representation.

Wheat v. United States, 486 U.S. 153, 160 (1988) (citations omitted); *see id.* at 166 (Marshall, J., dissenting) ("[A] trial court may in certain situations reject a defendant's choice of counsel on the ground of a potential conflict of interest, because a serious conflict may indeed destroy the integrity of the trial process."); *id.* at 173 (Stevens, J., dissenting) ("[I] agree with the Court's premise that district judges must be afforded wide latitude in passing on motions of this kind ... ."). If federal prosecutors no longer believe they share in the responsibility of ensuring that prosecutions are fair, appear fair, and are justly resolved, courts must be warned to take measures to countervail the Department of Justice's change in position.

II. Federal criminal prosecutions cannot be counted on to be fair or reach just results if the government can exploit conflicts of interest to ensure that a defense lawyer does little or nothing to contest its allegations.

The government's belief that it did nothing wrong in this case raises the concern that lawyers like Zeh and federal prosecutors are working out among themselves who the winners and losers are in a casino-like game of arbitrarily sacrificing or rewarding defendants. Prosecutors secure convictions without having to even bother responding to the boilerplate motions the defense lawyer can bill the Treasury for each time they are filed. The concern is not that every guilty plea resulting from this horse-trading was necessarily coerced. Indeed, for all anyone knows, Kennedy would not have been sentenced to less than 20 years' time no matter who his lawyer had been. The point is, there is no way to know what would have happened if he had been afforded his right to the assistance of an unconflicted lawyer:

> Conflict-of-interest claims thus differ in kind from standard ineffective-assistance-of-counsel claims. This Court has, with respect to the latter, indulged in the presumption that counsel's conduct was the result of strategic decisions made in accordance with the client's best interests. Such a presumption is arguably tenable in those cases because counsel's basic loyalty

> to his client is not in question. When a known conflict undermines counsel's duty of loyalty, "perhaps the most basic of counsel's duties," however, that presumption is inapplicable; instead, a court must presume that counsel's divided loyalties adversely affected his performance on behalf of his client. When the effects of a constitutional violation are not only unknown but unknowable, the Constitution demands that doubts be resolved in favor of a criminal defendant.

Bonin v. California, 494 U.S. 1039, 1045–46 (1990) (Marshall, J., dissenting from the denial of a writ of certiorari) (quoting *Strickland v. Washington*, 466 U.S. 668, 689, 692 (1984)); *see also Holloway*, 435 U.S. at 489 ("[T]his Court has concluded that the assistance of counsel is among those 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.'").

This Court's duty of ensuring that every defendant, rich or poor, is advised by an independent lawyer is impossible to fulfill if prosecutors are free to exploit a defense attorney's multiple representations to gain a tactical advantage. The record of this case shows that is what happened. The government knew it could rely on Zeh to encourage Kennedy to plead guilty and cooperate, just as he had with Carter. Because it was to their advantage to hide the conflict rather than expose it, the prosecutors said nothing. In contrast, thirty years ago, the United States moved to disqualify another lawyer in essentially the same circumstance, alleging "a serious conflict of interest." *Wheat*, 486 U.S. at 155.

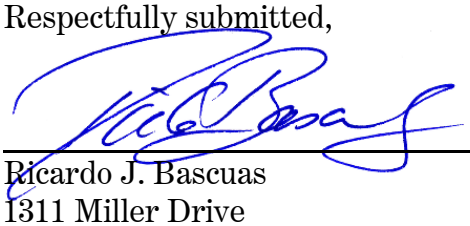
Serious is right. The prosecution and Zeh knew that Zeh's other client, Carter, had an interest in Kennedy pleading guilty and that Zeh could never be put in the position of having to cross-examine Carter or even attack the information Carter provided. It knew it did not have to bother responding to Zeh's frivolous motions, just as it ignored those same motions when he filed them in Carter's case. Although the lower courts failed to recognize it, there

was nothing adversarial about Zeh's representation of Kennedy. It was nothing but an act put on for Kennedy and the district judge's benefit—culminating in a sham cross-examination at Kennedy's sentencing hearing in which very punch was pulled. "[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Cronic*, 466 U.S. at 659. Indeed, this Court would not approve even a *civil settlement* reached in these circumstances but the Eleventh Circuit affirmed a 20-year prison sentence. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 863 (1999).

Faulting the government for not disclosing the conflict in this case is nothing more than holding it to its own logic. In *Mickens*, the United States argued as amicus curiae that a showing of prejudice was necessary to avoid "provid[ing] the defense with a *dis*incentive to bring conflicts to the attention of the trial court, since remaining silent could afford a defendant with a reliable ground for reversal in the event of conviction." 535 U.S. at 205 n.10 (Souter, J., dissenting). Although *Mickens* turned out the way the government urged, it has not interpreted the holding to require candor in federal court. Instead, it sees the case as a license to conceal conflicts of interest from trial courts and then fault the accused for being unable to show prejudice if, against all odds, the conflict should come to light.

WHEREFORE this Court should grant this petition for a writ of certiorari to the Court of Appeals for the Eleventh Circuit to clarify whether an accused who is counseled to plead guilty by a lawyer in league with prosecutors must show prejudice to have his conviction vacated.

Respectfully submitted,



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