20-835

No.

IN THE

Supreme Court of the United States

ORIGINAL

WARREN E. ROSENFELD

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit's denial of Petitioner's request for a certificate of appealability pursuant to 28 U.S.C. § 2253(c) was unreasonable and conflicts with the standards for a certificate of appealability to issue as set forth in *Miller-El v. Cockrell*, 537 U.S. 322 (2003), where Petitioner demonstrated a substantial showing of the denial of a constitutional right regarding whether or not the District Court of the Middle District of Florida had Article III subject-matter jurisdiction over Petitioner's case.

2. Whether an Assistant United States Attorney appointed to office by the Department of Justice must be appointed by the Attorney General.

3. Whether an appointee must have a Presidential Commission to complete their appointment to office as an Assistant United States Attorney.

4. Whether a prior oath of office from an original appointment as an Officer of the United States carries over to new appointments.

5. Whether an Assistant United States Attorney has a permanent appointment to office, or must be reappointed after their appointing officer vacates office or there is a new Chief Executive.

6. Whether conclusive competent proof of the investiture to office as an AUSA requires copies of an appointee's: (1) current letter of appointment from the Attorney General; (2) current Presidential Commission for the appointment; and (3) current oath of office.

7. Whether the Eleventh Circuit's denial of Petitioner's request for a certificate of appealability pursuant to 28 U.S.C. § 2253(c) was unreasonable and conflicts with the standards for a certificate of appealability to issue as set forth in *Miller-El*, where Petitioner demonstrated a substantial showing of the denial of the Sixth Amendment right to counsel, when Petitioner's counsel neglected to act on the district court's lack of Article III subject-matter jurisdiction.

8. Whether the Eleventh Circuit's denial of Petitioner's request for a certificate of appealability pursuant to 28 U.S.C. § 2253(c) was unreasonable and conflicts with the standards for a certificate of appealability to issue as set forth in *Miller-El*, where Petitioner demonstrated a substantial showing of the denial of the Sixth Amendment right to counsel when Petitioner's counsel, in violation of attorney-client privilege, provided confidential documents containing the essence of Petitioner's defense to the government attorneys prior to trial.

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption.

PROCEEDINGS DIRECTLY RELATED TO THIS CASE

United States v. Warren Rosenfeld, No. 3:14-cr-00073-MMH-JRK-2, U.S. District Court, Middle District of Florida (Jacksonville) (judgment December 31, 2015) (trial proceeding)

United States v. Warren Rosenfeld, No. 16-10039, U.S. Court of Appeals for the Eleventh Circuit (judgment January 30, 2018) (direct appeal)

United States v. Warren Rosenfeld, No. 16-10039, U.S. Court of Appeals for the Eleventh Circuit (judgment January 30, 2018) (petition for en banc hearing)

Warren Rosenfeld v. United States, No. 3:18-cv-00607-MMH-JRK, U.S. District Court, Middle District of Florida (Jacksonville) (judgment January 24, 2020) (§ 2255 habeas corpus)

Warren Rosenfeld v. United States, No. 20-10321, U.S. Court of Appeals for the Eleventh Circuit (order August 20, 2020) (certificate of appealability application)

Warren Rosenfeld v. United States, No. 20-10321, U.S. Court of Appeals for the Eleventh Circuit (order September 22, 2020) (petition for en banc hearing)

Warren Rosenfeld v. United States, United States Supreme Court (Petition for Writ of Certiorari)

TABLE OF CONTENTS

Page

TABLE OF APPENDICES

Page

TABLE OF APPENDICES (*continued*)

Page

TABLE OF AUTHORITIES

CASES **Page(s)**

TABLE OF AUTHORITIES (*continued*)

TABLE OF AUTHORITIES (*continued*)

TABLE OF AUTHORITIES (*continued*)

TABLE OF AUTHORITIES (*continued*)

CONSTITUTIONAL PROVISIONS

STATUTES

TABLE OF AUTHORITIES (*continued*)

Rules:

Regulations:

TABLE OF AUTHORITIES (*continued*)

U.S. Attorneys' Manual:

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Warren E. Rosenfeld, respectfully requests this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit denying a certificate of appealability.

OPINIONS BELOW

The Eleventh Circuit's denial of Petitioner's motion for reconsideration and rehearing *en banc* in Appeal No. 20-10321-G is provided in Appendix A. The Eleventh Circuit's denial of Petitioner's application for a COA in Appeal No. 20-10321-G is provided in Appendix B. The District Court's order denying Petitioner's § 2255 Motion and denying a certificate of appealability is provided in Appendix C.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 2020. It denied rehearing *en banc* on September 22, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Appointments, Oath, Commissions, and Article III Jurisdiction Clauses as well as pertinent statutory and regulatory provisions are reproduced in the Appendix at 37a-39a.

STATEMENT OF THE CASE

A. Introduction

The Eleventh Circuit's denial of Petitioner's request for a certificate of appealability (COA) was unreasonable and conflicts with this Court's decision in *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003), because Petitioner made the requisite showing for a COA to issue. Petitioner challenges the district court's denial of his petition for habeas corpus pursuant to 28 U.S.C. § 2255 on his claims that the district court lacked Article III subject-matter jurisdiction over his grand jury and trial proceedings as lacking an authorized representative of the United States in the proceedings, and that Petitioner did not receive effective assistance of counsel such that the resulting prejudice produced an unfair trial. The Eleventh Circuit's refusal to issue Petitioner a COA, although he clearly met the standards set forth by this Court, is a compelling reason to grant this petition or to summarily reverse.

This case presents questions regarding a federal court's Article III subject-matter jurisdiction vis-à-vis persons authorized to represent the United States in litigation, and the circumstances under which a defense counsel's actions constitute deficient performance that results in prejudice to a defendant. First, can a federal court's Article III subject-matter jurisdiction be invoked by persons unauthorized to represent the United States in litigation when the United States is a party? Second, is it required that the Attorney General of the United States (Attorney General) make the appointment of an AUSA when the appointment is made by the Department of Justice (DOJ)? Third, is a Presidential commission required to prove the completion of the appointment of a

nominee to the office of Assistant United States Attorney (AUSA) as an inferior Officer of the United States? Fourth, may an AUSA, as an Officer of the United States, be granted a permanent appointment to office, and if not, what determines the term of an AUSA's appointment? Fifth, what documentation is required to provide conclusive competent proof of the appointment to office of an AUSA as an Officer of the United States? Sixth, does the failure of defense counsel to examine a federal court's subject-matter jurisdiction constitute ineffective assistance of counsel and cause prejudice to a defendant when subject-matter jurisdiction is lacking? Seventh, does counsel's revelation of confidential information in violation of attorney-client privilege, that causes a breakdown in the adversarial process, constitute ineffective assistance of counsel under the Sixth Amendment and result in per se prejudice?

B. Procedural History

Petitioner was a federal prisoner that served a total term of 60-months imprisonment for one count of conspiring to commit wire fraud and three counts of committing wire fraud and aiding and abetting wire fraud. After conviction in a jury trial in the District Court of the Middle District of Florida, and unsuccessfully pursuing a direct appeal, Petitioner filed a 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence, which, as amended, raised three claims for relief:

1) the district court lacked subject-matter jurisdiction over Petitioner's case because the government attorneys who signed his indictment and prosecuted his case were not validly appointed AUSAs;

2) trial counsel was ineffective for failing to act on the lack of subject-matter jurisdiction, with resulting prejudice; and,
3) trial counsel was ineffective for providing confidential documents with the essence of Petitioner's defense to the prosecution prior to trial, with resulting prejudice.

After the government responded and Petitioner replied, the district court issued an order denying all claims in Petitioner's amended § 2255 motion and denying Petitioner a certificate of appealability (COA). (App. C). Petitioner appealed and moved the Eleventh Circuit for a COA. On August 20, 2020, the Eleventh Circuit denied Petitioner's motion for a COA on all claims. (App. B). On September 22, 2020, the Eleventh Circuit denied Petitioner's petition for rehearing or hearing *en banc*. (App. A).

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit improperly denied Petitioner a COA pursuant to 28 U.S.C. § 2253(c). Under 28 U.S.C. § 2253(c)(l)(B), in order for Petitioner to appeal the district court's dismissal of a petition for a writ of habeas corpus, a circuit justice or judge must first issue a COA. "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To obtain a COA, a movant must demonstrate that an issue is debatable among jurists of reason or that the question deserves encouragement to proceed further. *Miller-El*, 537 U.S. at 327. This Court has held that "a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received

full consideration, that petitioner will not prevail." *Id.* at 338. The claims sought to be appealed must be "debatable among jurists of reason," or different courts must be able to resolve the claims "in a different manner." *Id.* at 336 (citing *Barefoot v. Estelle*, 463 U.S. 880 (1983)). The determination as to whether to issue a COA should be a threshold inquiry into whether the district court's decision was debatable and does not require a decision on the merits. *Id.* at 342. Therefore, a movant does not have to demonstrate that the appeal would succeed to obtain a COA. *Id.* at 337 ("Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate entitlement to relief.").

Petitioner has made a substantial showing of the denial of his constitutional rights because: (1) Official government documents provided by the Executive Office of United States Attorneys (EOUSA) indicate that the grand jury and trial proceedings leading to Petitioner's conviction were conducted without a properly appointed representative of the United States, thus depriving the district court of jurisdiction; (2) Petitioner's counsel failed to act on the district court's lack of jurisdiction; and (3) Petitioner's counsel violated attorney-client privilege by revealing confidential documents, which resulted in a lack of meaningful adversarial testing of the prosecution's case and an unfair trial. Such issues are debatable among jurists of reason and meets the standards for a COA.

I. The District Court Lacked Article III Subject-Matter Jurisdiction

The Constitution grants judicial power over all cases, in law and equity and over all controversies to which the

United States is a party (U.S. Const., Art. III § 2) and grants original jurisdiction to the district courts of the United States (18 U.S.C. § 3231). "Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies," and "[t[his case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990).

Under 18 U.S.C. § 3231, a federal court's subject-matter jurisdiction is asserted when an indictment or information is filed under the signature of "an attorney for the government." Federal Rules of Criminal Procedure (FRCrP) Rule 1(b)(1)(A,B). The phrase "subject-matter jurisdiction" means "the court's statutory or constitutional power to adjudicate the case." *U.S. v. Cotton*, 535 U.S. 625, 630 (2002). An "attorney for the government" means: "(A) the Attorney General or an authorized assistant; (B) a United States attorney or authorized assistant." FRCrP Rule 1(b)(1)(A, B).

"[T]he conduct of litigation in which the United States...is a party...is...reserved to officers of the Department of Justice, under the direction of the Attorney General." 28 U.S.C. § 516; See also *U.S. v. Singleton*, 165 F.3d 1297, 1299-1300 (10th Cir. 1999) (en banc) ("[O]nly officers of the Department of Justice or the United States Attorney can represent the United States in the prosecution of a criminal case. 28 U.S.C. §§ 516, 547 (1994).").

In this case, when A. Tysen Duva and Karen L. Gable (government attorneys) signed Petitioner's Indictment they represented themselves as AUSAs, inferior Officers of the United States in the Department of Justice authorized

to represent the United States in litigation and invoke the Article III subject-matter jurisdiction of the district court. (App. D at 30a). An AUSA seeks to exercise a court's Article III jurisdiction by claiming standing to represent the United States when signing their name, with the title of AUSA, to an indictment or information. FRCrP Rule 12(a).

Petitioner filed Freedom of Information Act (FOIA) requests with the EOUSA for all documents relating to any appointments as AUSAs for the government attorneys to investigate the validity of their jurisdictional claims. (App. E at 31a; App. F at 32a). The only records produced by the EOUSA were titled "Appointment Affidavits" that only contained an Oath of Office, an Affidavit as to Striking Against the Federal Government, and an Affidavit as to Purchase and Sale of Office, dated August 20, 2007 for Mr. Duva and May 2, 1994 for Ms. Gable. (App. G at 33a; App. H at 34a).

As the EOUSA was unable to produce a copy of a current letter of appointment from the Attorney General, a current Presidential commission, and a current oath of office for the government attorneys, Petitioner believed that the government attorneys were not properly appointed as AUSAs. See *National Archives v. Favish*, 541 U.S. 157, 174 (2004). ("There is also a presumption of legitimacy given to official conduct of the EOUSA and its FOIA responses."); *Hobbs v. Blackman*, 752 F.2d 1079, 1081-82 (11th Cir. 1985) ("Official records...are entitled to a presumption of regularity and are accorded great evidentiary weight.").

Petitioner challenged the District Court's jurisdiction over the grand jury proceedings, the validity of the indictment, and the District Court's jurisdiction over

Petitioner's criminal proceedings under 28 U.S.C. § 2255 as lacking an authorized representative of the United States in the proceedings. This Court has definitively ruled on the limits of a federal court's jurisdiction and placed the burden of proof that jurisdiction exists squarely on the party exerting jurisdiction. See *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 376, 377 (1994):

> Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, see *Willy v. Coastal Corp.*, 503 U.S. 131, 136-137 (1992); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986), which is not to be expanded by judicial decree, *American Fire Casualty Co. v. Finn*, 341 U.S. 6 (1951). It is to be presumed that a cause lies outside this limited jurisdiction, *Turner v. Bank of North-America*, 4 Dall. 8, 11 (1799), and the burden of establishing the contrary rests upon the party asserting jurisdiction, *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182-183 (1936).

Under this Court's established (and unbroken) line of Appointments Clause jurisprudence, AUSAs, as Officers of the United States, must be appointed by the Attorney General when receiving DOJ appointments, must receive Presidential commissions to complete their appointment to office, must take an oath of office to complete investiture to office, and may not be granted permanent appointments to office. As no official records have been produced to uphold the government attorney's jurisdictional claims, the government attorneys in Petitioner's proceedings were not authorized to represent the United States in litigation, thus the district court lacked

jurisdiction over Petitioner's proceedings. See *U.S. v. Providence Journal Co.*, 485 U.S. 693, 708 (1988), ("Absent a proper representative of the Government as a petitioner in ... criminal prosecution, jurisdiction is lacking...")

A. The Appointment of AUSAs in the DOJ Can Only be Made by the Attorney General

The Eleventh Circuit's ruling that the document titled "Appointment Affidavits" is sufficient to prove a valid appointment of an AUSA ignores the fact that the document contains no references to the Appointing Officer. As the Constitution requires that AUSAs, as inferior officers of the United States, be appointed only by the United States Attorney General as head of the DOJ, then without an affirmation in the document that the Attorney General made the appointment, then there is no proof that the appointment was made by the Attorney General. See *Lucia v. Sec. & Exch. Comm'n*, 138 S. Ct. 2044, 2051 (2018), ("The Appointments Clause prescribes the exclusive means of appointing "Officers." Only the President, a court of law, or a head of department can do so. See Art. II, § 2, cl. 2."); See also *Ex Parte Duncan N. Hennen*, 38 U.S. 230, 255 (1839) ("The Constitution of the United States declares that the executive power is in the President; and the limitation of appointments is a diminution of that power, and it is to be strictly construed.").

As there are no documents showing the appointment of the government attorneys as AUSAs by the Attorney General in the EOUSA's response to Petitioner's FOIA request for all appointment documents, and given the fact that the district and appellate court's have refused to order the production of such documents, there is no proof that the government's attorneys have been

appointed by the head of the DOJ. See *U.S. v. Mouat*, 124 U.S. 303, 307 (1888):

> Unless a person in the service of the Government, therefore, holds his place by virtue of an appointment by the President, or of one of the courts of justice or heads of Departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States.

And, as the government's attorneys were not Officers of the United States, they were not authorized to represent the United States in Petitioner's proceedings. *See* 28 U.S.C. § 516 ("[T]he conduct of litigation in which the United States...is a party...is...reserved to officers of the Department of Justice, under the direction of the Attorney General.").

Because the government's attorneys were not officers of the United States, then they were merely employees and private citizens, and lacked the authority to represent the United States and invoke a federal court's jurisdiction. See *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) "[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."; See also *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013):

> A case becomes moot--and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—'when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.' *Murphy v. Hunt*, 455 U.S. 478, 481, 102 S. Ct. 1181, 71 L. Ed. 2d 353 (1982) (per curiam).

In consideration, it is appropriate to ask the question: Why did the EOUSA not return letters showing the Attorney General had appointed the government attorneys prosecuting Petitioner's case as AUSAs in response to Petitioner's FOIA request for such documents? The obvious and simple answer is that no letters of appointment from the Attorney General exist.

An examination of the process under which the DOJ hires AUSAs, and makes their appointment to office permanent, reveals why the existence of an appointment from the Attorney General would not exist. At the forefront of the DOJ's hiring process is an unconstitutional departmental rule/regulation which attempts to delegate the appoint power of the Attorney General to another officer in the DOJ who is not head of department, specifically the Deputy Attorney General. *See* 28 CFR § 0.15(b)(1)(v), which in relevant part, states:

> [T]he Deputy Attorney General shall... exercise the power and authority vested in the Attorney General to take final action in matters pertaining to... [t]he appointment... of Assistant United States Attorneys.

This usurpation of the Constitutional appointment power continues by executive edict under the aegis of the U.S. Attorneys' Manual, Title 3: EOUSA 3-2.000 – Assistant United States Attorneys, which reads in relevant part:

> Assistant United States Attorneys are appointed by the Attorney General and may be removed by that official. See 28 U.S.C. Sec. 542. The Deputy Attorney General exercises the power and authority vested in the Attorney General to take final action in matters pertaining to the employment, separation,

> and general administration of Assistant United States Attorneys. See 28 C.F.R. Sec 0.15. Such authority may be, and has been, delegated to the Director, Executive Office for United States Attorneys.
>
> Authority to appoint Assistant United States Attorneys may be, and has been delegated to the Director, Office of Attorney Personnel Management. Authority to effect reprimands, suspensions, and/or removal for Assistant United States Attorneys may be, and has been, delegated to the Director, EOUSA.

This delegation of the Attorney General's power to appoint AUSAs by executive fiat is unconstitutional because the Appointments Clause only allows the appointment of inferior officers by the "heads of departments", not other officers in the department. "Congress has plenary power to decide not only what inferior officers will exist but also who (the President or a head of department) will appoint them." *Seila Law LLC v. Consumer Financial Protection Bureau,* No. 19-7, at *72 (June 29, 2020). This limitation on the dilution of the appointment power was also clearly delineated by the Court in *Freytag v. Commissioner,* 501 U.S. 868, 883-84 (1991):

> Despite Congress' authority to create offices and to provide for the method of appointment to those offices, 'Congress' power . . . is inevitably bounded by the express language of Article II, cl. 2, and unless the method it provides comports with the latter, the holders of those offices will not be "Officers of the United States." *Buckley* [v. Valeo], 424 U.S. [1,] 138-

> 139 [(1976)] (discussing Congress' power under the Necessary and Proper Clause).

While reviewing an attempt to delegate the appointment power from the head of an Executive Department to "department heads" within each Executive Department, this Court stated: "We cannot accept ... that every part of the Executive Branch is a department, the head of which is eligible to receive the appointment power." *Freytag*, 501 U.S. at 885.

The necessity of limiting the appointment power to safeguard the proper functioning of government was made clear by this Court when it ruled that:

> The Appointments Clause prevents Congress from distributing power too widely by limiting the actors in whom Congress may vest the power to appoint. The Clause reflects our Framers' conclusion that widely distributed appointment power subverts democratic government. [] The Framers recognized the dangers posed by an excessively diffuse appointment power and rejected efforts to expand that power.

Id. at 885.

Further, the Appointments Clause "is more than a matter of etiquette or protocol; it is among the significant structural safeguards of the constitutional scheme." *Edmond v. U.S.*, 520 U.S. 651, 659 (1997).

This Court has been unwavering in its rulings regarding the dilution of the appointment power. See *Weiss v. U.S.*, 510 U.S. 163, 186-87 (1994):

But although they allowed an alternative appointment method for inferior officers, the Framers still structured the alternative to ensure accountability and check governmental power: any decision to dispense with Presidential appointment and Senate confirmation is Congress's to make, not the President's, but Congress's authority is limited to assigning the appointing power to the highly accountable President or the heads of federal departments, or, where appropriate, to the courts of law.;

Freytag, 501 U.S. at 883:

The "manipulation of official appointments had long been one of the American revolutionary generation's greatest grievances against executive power, see G. Wood, The Creation of The American Republic 1776-1787, p. 79 (1969) (Wood), because "the power of appointment to offices" was deemed "the most insidious and powerful weapon of eighteenth century despotism." *Id.*, at 143. Those who framed our Constitution addressed these concerns by carefully husbanding the appointment power to limit its diffusion. [] The Framers understood ..., that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people. [] Even with respect to "inferior Officers," the Clause allows Congress only limited authority to devolve appointment power on the President, his heads of departments, and the courts of law.;

Id, at 880:

> The Appointments Clause prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint. Because it articulates a limiting principle, the Appointments Clause does not always serve the Executive's interests. For example, the Clause forbids Congress to grant the appointment power to inappropriate members of the Executive Branch. Neither Congress nor the Executive can agree to waive this structural protection. [] The structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic.

Because the Eleventh Circuit ignored Petitioner's legitimate argument that it could not be assumed that the government attorneys in Petitioner's proceedings were appointed as AUSAs by the Attorney General, and no proof that the governments attorneys were appointed by the Attorney General has been forthcoming from the EOUSA or the courts, this Court should grant certiorari to correct this error so that the district court's jurisdiction, or lack thereof, can be properly determined.

B. A Presidential Commission is Required to Complete the Appointment of an AUSA

An AUSA is an inferior Officer of the United States. This Court has defined an "inferior officer" as one "whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Edmond*, 520 U.S. at 663. AUSAs discharge their duties under the supervision and

direction of the Attorney General. 28 U.S.C. §§ 515, 519. Moreover, the attorney general is a principal officer and head of department, who is appointed by presidential nomination with the advice and consent of the Senate. *Id.* at § 503.

As inferior Officers, the appointment of AUSAs by the DOJ must be performed in compliance with Article II, § 2, cl. 2 of the Constitution of the United States (Appointments Clause). *Lucia*, 138 S. Ct. at 2051, ("The Appointments Clause prescribes the exclusive means of appointing "Officers."). This appointment is made pursuant to 28 U.S.C. § 542(a) ("the Attorney General may appoint one or more assistant United States Attorneys in any district when the public interest so requires.").

The appointee must receive a Presidential commission under U.S. Const. Art. II, § 3 ("[The President] shall commission all officers of the United States.") (Commissions Clause), pursuant to 5 U.S.C. § 2902(c):

> The commissions of judicial officers and United States attorneys ... and other commissions shall be made out and recorded in the Department of Justice under the seal of that department and countersigned by the Attorney General. The department seal may not be affixed to the commission before the commission has been signed by the President."); See also *U.S. v. Le Baron*, 60 U.S. 73, 78 (1856) (When a nominee's "commission has been signed by the President, and the seal of the United States is affixed thereto, his appointment to that office is complete.

This Court has ruled that conclusive evidence of the appointment of an officer of the United States is when the Presidential commission for the appointment is completed. See *Marbury v. Madison*, 5 U.S. 137, 158 (1803):

> The signature [of the President] is a warrant for affixing the great seal to the commission; and the great seal is only to be affixed to an instrument which is complete. It attests, by an act supposed to be of public notoriety, the verity of the presidential signature. It is never to be affixed till the commission is signed, because the signature, which gives force and effect to the commission, is conclusive evidence that the appointment is made.

The fact that the Appointments and Commissions Clauses are separate and distinct acts was explained by the Court in *Marbury*, 5 U.S. at 156 ("The acts of appointment to office, and commissioning the person appointed, can scarcely be considered one and the same; since the power to perform them is given in two separate sections of the Constitution."). This distinction underpins the necessity of producing both an appointment letter and a Presidential commission when an AUSA is legitimately called upon to substantiate their jurisdictional claims.

The Appointments Clause and Commissions Clause "contemplates cases where law may direct the President to commission an officer appointed ... by the heads of departments ..." *Id.* This is the case with the government attorneys in Petitioner's proceedings, as a DOJ appointment of an AUSA comes from the Attorney General, the head of department, rather than from the President.

"Of consequence, the constitutional distinction between the appointment to an office and the commission of an officer who has been appointed, remains the same as if in practice the president had commissioned officers appointed by an authority other than his own." *Id.*

"[I]t should be supposed, that the solemnity of affixing the seal is necessary not only to the validity of the commission, but even to the completion of an appointment, still when the seal is affixed the appointment is made, and the commission is valid." *Id.*, at 158-159.

Once the appointment by the Attorney General has been completed with the issuance of a Presidential commission, the appointee must take an oath of office under U.S. Const. Art. VI, cl. 3 ("[A]ll executive and judicial Officers ... of the United States ... shall be bound by Oath or Affirmation ... to support the Constitution...") (Oath Clause), pursuant to 28 U.S.C. § 544 ("Each United States attorney, assistant United States attorney, and attorney appointed under section 543 of this title, before taking office, shall take an oath to execute faithfully his duties."). See *Le Baron*, 60 U.S. at 78:

> Congress may provide ... that certain acts shall be done by the appointee before he shall enter on the possession of the office under his appointment. These acts then become conditions precedent to the complete investiture of the office; ... and when the person has performed the required conditions, his title to enter on the possession of the office is also complete.

Once investiture to office has been completed, AUSAs are authorized to represent the United States in

litigation as officers in the Department of Justice. *See* 28 U.S.C. § 516.

In this case, however, the Eleventh Circuit has ruled that documents titled "Appointment Affidavits" (App. G at 33a; App. H at 34a), that only contain an Oath of Office, an Affidavit as to Striking Against the Federal Government, and an Affidavit as to Purchase and Sale of Office "indicated valid appointments" of the government attorneys as AUSAs. (App. B at 7-8a). The documents have no references to an appointment to office by the Attorney General or references to the Presidential Commission for an appointment to office. And, although the "Appointment Affidavits" document contained the oath of office required for investiture to office, those oaths were for past alleged appointments, and not for appointments to office under the then current Attorney General and Chief Executive. In practical terms, the Eleventh Circuit's ruling is that when considering a federal court's jurisdiction, when jurisdiction has been invoked by a purported AUSA as an Officer of the United States, that no proof is required that the Attorney General actually made an appointment to office for that AUSA, that no commission to office is necessary to prove the validity of a claimed appointment as an AUSA, and that oaths of office from past appointments as Officers of the United States are valid for new appointments.

The Eleventh Circuit provided no rationale or precedent justifying its deviation from the constitutional provisions and congressional statutes governing the appointments of officers of the United States, which is understandable as indeed none exist.

The Eleventh Circuit's opinion is in stark contrast to Justice Alito's concurring opinion when he wrote: "Under the Constitution, all officers of the United States must take an oath ... and ... must receive a commission." *Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1235 (2015). In *Id.* at 1235, Justice Alito emphasizes that:

> Both the Oath and Commission Clauses confirm an important point: Those who exercise the power of Government are set apart from ordinary citizens. Because they exercise greater power, they are subject to special restraints. There should never be a question whether someone is an officer of the United States because, to be an officer, the person should have sworn an oath and possess a commission.

As no Presidential commission, nor a current oath of office, showing competent conclusive proof that the government attorneys were properly appointed AUSAs has been produced by the EOUSA, or by any other source, and the federal courts have so far declined to order the production of such documents, the facts indicate that Petitioner's proceedings lacked an authorized representative of the United States and the District Court lacked jurisdiction. See *Singleton*, 165 F.3d at 1299-1300:

> Indeed, a federal court cannot even assert jurisdiction over a criminal case unless it is filed and prosecuted by the United States Attorney or a properly appointed assistant. See *United States v. Providence Journal Co.*, 485 U.S. 693, 699-708 (1988) (dismissing petition for certiorari for lack of jurisdiction where the petition was filed by a government lawyer acting without the authority to

> do so); *United States v. Durham*, 941 F.2d 886, 892 (9th Cir. 1991) (whether Special AUSA had been properly appointed went to jurisdiction of the district court). Therefore, the government's sovereign authority to prosecute and conduct a prosecution is vested solely in the United States Attorney and his or her properly appointed assistants. Of course, it cannot be otherwise because the government of the United States is not capable of exercising its powers on its own; the government functions only through its officers and agents.

Because the Eleventh Circuit's ruling contravenes the constitutional provisions upon which the jurisdiction of every federal court in the United States may be invoked, this Court should grant certiorari to correct the Eleventh Circuit's error.

C. AUSAs Do Not Have Permanent Tenure to Office as Officers of the United States

The second sentence of Article III, Section 1 of the Constitution of the United States, says: "The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour..."

The specification that Article III judges "hold their offices during good behaviour" has been established as meaning that these judges have permanent tenure to their appointment to office. *O'Donoghue v. U.S.*, 289 U.S. 519, 529-30 (1933) ("the great underlying purpose which the framers of the Constitution had in mind ... [led] them to incorporate in [the Constitution] the provision ... of ... permanent tenure of office...[for Art. III judges]"); *Evans v.*

Gore, 253 U.S. 245, 252 (1920) (Alexander Hamilton referred to the "permanent tenure of their offices" [] in explanation and support of the Constitutional provision that judges 'shall hold their offices during good behavior'".); *U.S. v. Woodley*, 751 F.2d 1008, 1018 (9th Cir. 1985) ("[T]he Framers included in Article III the requirement that federal judges have permanent tenure...").

The permanent tenure granted to federal judges is synonymous with the principle of lifetime tenure. *Palmore v. U.S.*, 411 U.S. 389, 406 (1973) ("Relying heavily on congressional intent, the Court considered that Congress, by consistently providing the judges of these courts with lifetime tenure..."); *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59 (1982) ("The 'good Behaviour' Clause guarantees that Art. III judges shall enjoy life tenure...").

This permanent/life tenure to office that is Constitutionally granted to federal judges may not be granted to any other Officers of the United States, including AUSAs. In considering the power to remove an officer of the United States from his appointed office, this Court stated: "It cannot, for a moment, be admitted, that it was the intention of the Constitution, that those offices which are denominated inferior offices should be held during life." *Ex Parte Duncan N. Hennen*, 38 U.S. 230, 259 (1839); See also *Shurtleff v. U.S.*, 189 U.S. 311, 316 (1903) ("The tenure of the judicial officers of the United States is provided for by the Constitution, but with that exception no civil officer has ever held office by a life tenure since the foundation of the government.").

Regardless of the Constitutional prohibition for a permanent appointment of an officer of the United States, other than for federal judges, the DOJ is making permanent appointments of AUSAs through their internal hiring practices. The United States Department of Justice, Justice Manual, Title 3: EOUSA, § 3-4.213(1) ("Assistant United States Attorneys appointed to United States Attorneys' offices (USAOs), are excepted from the competitive service under the aegis of 28 U.S.C. § 542...").

In fact, the Office of Personnel Management of the DOJ specifies in their postings for non-term AUSA job openings that the appointments are permanent. (App. I at 35a) Under special unrelated circumstances, there are some temporary job openings for an AUSA that specify a term of appointment. (App. J at 36a).

The view that the DOJ appointments of government attorneys as AUSAs are permanent is promulgated by the Eleventh Circuit's ruling that the government attorneys, Ms. Gable and Mr. Duva, that signed Petitioner's indictment and prosecuted his case "were sworn into office on May 1, 1994, and August 19, 2007, respectively"; and by virtue of being sworn in on that date held "valid appointments" during Petitioner's proceedings. (App. B at 7-8a). Ongoing appointments as Officers with continuing tenure of twenty-six and thirteen years without any end for those appointments, can hardly be interpreted as anything other than permanent appointments.

The statute that establishes the office of an AUSA, 28 U.S.C. § 542, does not fix a term of office, but clearly their appointments cannot be permanent. The question then becomes: under what conditions does an AUSA's appointment to office end, such that they would need to be

reappointed or vacate their office? Clearly, that event horizon must be tied to the appointment power granted in the Appointments Clause. As the head of department, the Attorney General has the exclusive power to appoint, or remove from office, an AUSA. 28 U.S.C. § 542. As such, it would seem that an AUSA's tenure to office is tied to the tenure of the Attorney General that appointed them. This view is supported by this Court's ruling in *De Castro v. Board of Comm.*, when it ruled that when "an Act is silent as to their terms of office, they can presumably be appointed for any term not exceeding that of the officer appointing them." 322 U.S. 451, 463 (1944). Further support of this position is offered in *Kalaris v. Donovan*, where it was stated that *Shurtleff* and *De Castro* "conclusively demonstrate that, in the absence of a congressional statement to the contrary, inferior officers . . . serve indefinite terms at the discretion of their appointing officers." 797 F.2d 376, 396-97 (D.C. Cir. 1983). The *Kalaris* reference to the "indefinite terms" of inferior officers is of course logical, because they serve at the "discretion of their appointing officers," and the terms of their appointing officers will vary with circumstances, such as the exit from office of the head of department when a Presidential inauguration ushers in the leader of a different political party. Once their appointing officer's term ends, then an AUSA's term ends. There is no great administrative burden required to reappoint AUSA's upon the termination of their appointments when their appointing officer leaves office, and provisions already exist that accommodate the transition period when appointments to office are Constitutionally or statutorily terminated.

Of additional consideration is the fact that the Attorney General's ability to appoint an AUSA to office is

facilitated by their appointment to office by the President, with the advice and consent of the Senate. 28 U.S.C. § 503. As such, even assuming arguendo that an AUSA's appointment somehow survives the exit of an individual as the head of a department, it would seem impossible that the appointment of an AUSA can survive the change in a Presidency from which the head of department draws their appointment power. This is because a head of department "discharges a political duty of the President..." *Myers v. U.S.*, 272 U.S. 52, 134 (1926). If the political aims of a new President are different than those of their predecessor, than how can the new Chief Executive be expected to effectively implement new enforcement policies in the Department of Justice if the AUSAs appointed by the previous head of department are not aligned with the new Executive's aims? While discussing the meaning of the Appointments Clause with regard to inferior officers, this Court stated that:

> in the context of a Clause designed to preserve political accountability relative to important Government assignments, we think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate. This understanding of the Appointments Clause conforms with the views of the first Congress.

Edmond, 520 U.S. at 663

It is axiomatic that the Chief Executive needs alignment with his political aims in the officers of the Executive Branch whose appointments stem from the Heads of Departments nominated by the Chief Executive.

Nothing in the Framers writings or federal jurisprudence indicates otherwise.

In making its ruling, the Eleventh Circuit has perpetuated the unconstitutional precept that AUSAs can receive permanent appointments. This Court should grant certiorari to facilitate correction of the current unconstitutional practice of granting AUSAs permanent appointments, and prevent unauthorized persons from unconstitutionally invoking a federal court's Article III subject-matter jurisdiction.

II. Counsel's Actions Constitute Ineffective Assistance of Counsel

A. Counsel Failed to Address the District Court's Lack of Jurisdiction

From arraignment through judgment, Petitioner was represented by Mitchell A. Stone (counsel). Counsel was ineffective when he failed to: (1) perform any due diligence regarding the government attorney's alleged jurisdictional facts; (2) consult with Petitioner regarding any potential jurisdictional issues; and (3) object to the district court's jurisdiction. (*Warren Rosenfeld v. United States*, District Court Case No. 3:18-cv-00607-MMH-JRK, United States District Court for the Middle District of Florida, Jacksonville Division (§ 2255 Motion), Doc. 9 at 8, 21-22). Counsel's failure to act cannot be excused if counsel was ignorant of the district court's lack of jurisdiction. "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 571 U.S. 263, 274 (2014).

"The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). "Prevailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable..." *Id.*

Under the American Bar Association's (ABA's) Model Rules of Professional Conduct, counsel's inaction violated: (1) Rule 1.1: Competence, where counsel failed to "provide competent representation" by not exercising "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); (2) Rule 1.3: Diligence, where counsel failed to "act with reasonable diligence and promptness in representing a client."; (3) Rule 1.4(a)(2): Communications, where counsel failed to "reasonably consult with the client about the means by which the client's objectives are to be accomplished."; and, (4) Rule 3.1: Meritorious Claims & Contentions, where counsel failed to "defend the proceeding as to require that every element of the case be established.").

Under the ABA's Standards for Criminal Justice: Prosecution and Defense Function 3d ed. (1993), counsel's inaction violated: (1) Standard 4- 1.2(b) The Function of Defense Counsel, where counsel failed in his "basic duty ... to serve as the accused's counselor ... to render effective, quality representation."); (2) Standard 4- 3.6 Prompt Action to Protect the Accused, where counsel failed to "protect and preserve [] important rights of the accused ... by prompt legal action. Defense counsel [failed to] inform the accused of his ... rights at the earliest opportunity and take all necessary action to vindicate such rights. Defense

counsel [failed to] consider all procedural steps which in good faith may be taken..."); and, (3) Standard 4- 5.1(a) Advising the Accused, counsel failed to "advise the accused with complete candor concerning all aspects of the case...").

In considering counsel's inaction on the district court's lack of jurisdiction, the Eleventh Circuit stated that "reasonable jurists would not disagree that [Petitioner's] counsel was not ineffective for failing to raise the issue of subject-matter jurisdiction based on AUSA appointments. This issue was not meritorious, so counsel did not offer ineffective assistance for failing to raise it." (App. B at 8a).

As the Eleventh Circuit ruled in error that the documents titled "Appointment Affidavits" constituted competent proof that the government attorneys were duly appointed inferior Officers of the United States as AUSAs, then the Eleventh Circuit's ruling that counsel's actions were not ineffective because of a nonmeritorious Appointments Clause claim is also incorrect.

B. Counsel Failed to Subject the Prosecution's Case to Meaningful Adversarial Testing

Counsel provided ineffective assistance when he violated Petitioner's attorney-client privilege by providing the government attorneys, prior to trial, six documents prepared by Petitioner that included Petitioner's research, strategy, ideas, understanding of the charges, and tactics that addressed the seminal elements of the indictment, and were the primary communications with counsel for formulating Petitioner's defense. These six documents, collectively referred to as "confidential documents", were named: (1) "Mischaracterization of the Unistate CD as an

Investment Vehicle," (2) "FINRA Registrations & Licenses are not required for Holland & Rosenfeld," (3) "DTC Issues resolved - Details," (4) "Review of Unistate Agreement," (5) "CUSIP Allegation Issues Resolved," and (6) "Summary of Fraudulent $200 M CD to Sayar." (§ 2255 Motion, Doc. 9, Attachment 1 at 1-2, (a)(i)(A); Doc. 3 at 1-2, (2)(i-vi)); Doc. 14 at 1-2, (3)(i-vi); Doc. 14, Exhibit 12-17).

In its ruling, the Eleventh Circuit states that Petitioner "has not established that he was prejudiced by the disclosure [of the confidential documents] because [Petitioner] has not pointed to facts showing prejudice..." (App. B at 5a).

The record shows otherwise. Petitioner referenced extensive facts in the record showing multiple instances in which the prosecutor's case showed significant deviation from the allegations in the indictment. (§ 2255 Motion Doc. 13 at 3-6, (II)(A)(1)(b), (II)(A)(1)(c)); and the deviation from the allegations in the indictment were consistent with the arguments in Petitioner's confidential documents.

The Eleventh Circuit only addressed actual-prejudice when stating that "the record reflects that the government did not use the exhibits in question during [Petitioner]'s trial." (App. B at 5a). By only taking into account that the confidential documents were not produced as exhibits by the government attorneys, the Eleventh Circuit failed to considered Petitioner's claim of *per se* prejudice where the government attorneys had the opportunity to use knowledge gleaned from the confidential documents throughout the trial to guide their witness questioning and to avoid areas in which allegations in the indictment could be impeached.

Under the circumstances created by counsel, whereby the government attorneys had the ability to use the knowledge they possessed from the confidential documents against Petitioner in every phase of the trial, Petitioner was denied "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. " *U.S. v. Cronic*, 466 U.S. 648, 656 (1984); See also *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979) ("Indeed, an indispensable element of the effective performance of [defense counsel's] responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation").

In *Strickland*, 466 U.S. at 692 this Court explained that: "In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. See *United States v. Cronic*, ante, at 659, and n. 25.". Conditions in which counsel has provided government attorneys, prior to trial, confidential documents containing the essence of Petitioner's defense must certainly rise to the level of a constructive denial of the assistance of counsel, with resulting *per se* prejudice, as contemplated in *Strickland* and *Cronic*. Every meaningful step by, and every meaningful question from, the government attorneys was done throughout the trial with foreknowledge of Petitioner's defense posture. Some changes in the government's prosecution of the case were subtle, but some were blatantly obvious. For example, the confidential documents held Petitioner's analysis that showed grievous errors in the indictment's allegations regarding investment and securities violations. Suddenly, after gaining possession of the confidential documents, the government attorneys cancelled the key testimony of

Shane Wilkerson of FINRA from their witness list (Criminal Case No. 3:14-cr-73-J-MMH-JRK Doc. 117), which was their only scheduled testimony on an instrumental element of the indictment concerning securities, investments and licensing for those activities. (§ 2255 Motion Doc. 13 at 4, (II)(A)(1)(c)(2)).

And yet, the Eleventh Circuit entirely failed to rule on Petitioner's *per se* prejudice claim. When counsel gave the government attorneys confidential documents that contained extensive insight into Petitioner's defense posture, counsel ceased to function as Petitioner's advocate at a critical stage of the trial, and counsel failed to subject the prosecutor's case to meaningful adversarial testing throughout the entirety of the trial. See *Cronic*, 466 U.S. at 659:

> The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if 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.

It is inconceivable to think that the possession of the confidential documents by the government attorneys, whose contents touched every important element of the indictment and served as the primary communication from Petitioner to counsel in crafting a defense, does not constitute a complete failure on the part of counsel to subject the prosecution's case to meaningful adversarial testing throughout the trial, and is a condition under

which the entire process has been contaminated such that Petitioner was unable to receive a fair trial.

As their ruling failed to take into account the *per se* prejudice claims of Petitioner, the Eleventh Circuit's conclusions may be wrong and reasonable jurists could debate whether the petition should have been resolved in a different manner.

III. THIS CASE IS THE IDEAL VEHICLE TO RESOLVE THE QUESTIONS PRESENTED

A. The Appointments, Oath, and Commissions Clauses are Fundamental in Maintaining the Integrity of Article III Jurisdiction

This case cleanly presents the important and recurring questions regarding whether AUSAs, who are Officers of the United States, must be appointed by the Attorney General pursuant to the Appointments Clause, must receive a Presidential commission to office, must have a current oath of office, and whether they have permanent appointments to office. Ultimately, the answers to these questions determines whether or not a federal court's jurisdiction is legitimate.

The Constitutional scheme for appointing Officers of the United States in the Appointment, Oath, and Commissions Clauses protects the functioning of the Judiciary by ensuring that unauthorized individuals are unable to invoke a federal court's Article III subject-matter jurisdiction by requiring "all officers of the United States [to] take an oath ... and ... receive a commission. *Dep't of Transp.*, 135 S. Ct. at 1235. So important are the "structural" interests implicated by an Appointments

Clause challenge is that they can "be considered on appeal whether or not they were ruled upon below." *Freytag*, 501 U.S. at 878-79. Because these important structural interests warrant review even where such a challenge has been waived, see *Id.* at 879-80, they manifestly warrant review here, where the issues were properly presented in and actually decided by both the Eleventh Circuit and the District Court of the Middle District of Florida.

The constitutionality of proceedings in federal courts is not only important to the functioning of the Judicial Branch, but to the rights of individuals compelled to defend themselves in federal courts.

The questions presented are also tightly focused. The government attorneys that prosecuted Petitioner's case have not been appointed by the President, the head of a department, or a court of law. The only appropriate remedy for an Appointments Clause violation here is vacatur of Petitioner's conviction and dismissal of the indictment. *U.S. v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (defect in the appointment of Officer is "an irregularity which would invalidate a resulting order"); See also *Arbaugh v. Y H Corp.*, 546 U.S. 500, 514 (2006) ("[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety."). The Eleventh Circuit has not argued that the Appointments, Oath, or Commissions Clause violations could be excused under a harmless-error, ratification, de facto officer, or any other similar doctrine. (App. B at 2a-8a). And because this case involves a petition for review of an order from the Eleventh Circuit, the decision and order under review can be defended only on the grounds articulated by the Eleventh Circuit, and the government cannot raise any new grounds for the first time in this

Court. See *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943). For example, the categorization of AUSAs as inferior officers of the United States has never been disputed by any party in this case and thus these are not arguments available to the government here.

The constitutionality of the improper appointment of AUSAs has been raised in a number of pending proceedings, and in multiple jurisdictions. The question as to whether competent proof of appointment as an AUSA requires the production of a current appointment by the Attorney General, a current Presidential commission, and a current oath of office, and whether AUSAs carry a non-permanent term of office, admits of only one answer in each case. These disputes will grow no more ripe, and the issues no better developed, with time. This Court should grant certiorari now, in this case.

In discussing jurisdiction under § 3231, this Court stated that: "Moreover, courts, including this Court, have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999)." *Arbaugh*, 546 U.S. at 514.; "[The] concept of subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived. Consequently, defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court." *Cotton*, 535 U.S. at 630.

B. Meaningful Adversarial Testing is Necessary to Maintain the Integrity of Criminal Proceedings in the Judiciary

Also focused is the question as to whether or not prejudice, such that trial proceedings are rendered unfair, results when counsel violates attorney-client privilege by providing government prosecutors with confidential documents that represent defendant's primary communication with counsel in formulating a defense against criminal charges.

Attorney-client privilege is grounded in the interest and administration of justice. See *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981) ("The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. ")

Counsel's violation of this trust constitutes constructive denial of assistance at a critical stage of the trial, which allowed the prosecution to utilize privileged information in the prosecution of their case throughout the trial. By definition, this circumstance is the very essence of a failure to subject the prosecution's case to meaningful adversarial testing.

By issuing certiorari, this Court can establish definitively the requirement that counsel must diligently protect confidential documents whose disclosure would result in a fundamental breakdown in the adversarial process.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant this petition for certiorari.

Respectfully submitted.

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