ORIGINAL

21-1611

No.

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT KOGER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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A. QUESTIONS PRESENTED FOR REVIEW

1. Whether a criminal defendant establishes an "actual" unwaiveable conflict of interest that adversely affects counsel's representation when defense counsel is the subject of a criminal investigation for crimes associated with the defendant's charged conduct and whether this conflict of interest is a per se violation of the Sixth Amendment.

2. Whether a criminal defendant establishes an "actual" unwaiveable conflict of interest that adversely affects counsel's representation when defense counsel is identified by the government as a witness against the defendant relating to defendant's charged conduct and whether the district court's failure to hold a hearing is grounds for a reversal.

3. Whether the failure of the district court, defense counsel and the government to disclose a conflict of interest to the defendant requires a reversal of the convictions.

B. PARTIES INVOLVED

The parties involved are identified in the style of the case.

C. RELATED PROCEEDINGS

United States of America v. Robert Koger, No. 21-7334 (Fourth Circuit 2022) (1:14-cr-00018-LO-1, Eastern District of Virginia). In re: Robert Koger, No. 21-1576 (Fourth Circuit 2021).

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2. Whether a criminal defendant establishes an "actual" unwaiveable conflict of interest that adversely affects counsel's representation when defense counsel is identified by the government as a witness against the defendant relating defendant's charged conduct and whether the district court's failure to hold a hearing is grounds for a reversal.

3. Whether the failure of the district court, defense counsel and the government to disclose a conflict of interest to the defendant requires a reversal of the convictions.

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a. Cases

b. **Constitutional Provisions and Statutes**

c. Other

The Petitioner, Robert Koger, requests that the Court issue its writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on February 23, 2022, (A-1-2) (en banc hearing denied on April 26, 2022). (A-18).

D. CITATION TO OPINION BELOW

United States of America v. Robert Koger, No. 21-7334 (Fourth Circuit 2022) (1:14-cr-00018-LO-1, Eastern District of Virginia)

E. BASIS FOR JURISDICTION

The court of appeals' judgment was entered on February 23, 2022. On March 4, 2022, Petitioner filed a Petition for Rehearing en banc. On March 10, 2022, the Court of Appeals issued a Temporary Stay of Mandate pursuant to Fed. R. App. P. 41(b). On April 26, 2022, the Petition for Rehearing en banc was denied. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

F. CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides that a criminal defendant shall have the right to "the Assistance of Counsel for his defense."

G. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

Petitioner was arrested on September 5, 2013, after a 15-month investigation by the Department of Justice pursuant to a criminal complaint for mail fraud. Petitioner was denied bail despite having no criminal history. Petitioner refused to waive the Speedy Trial Act (STA). Unbeknownst to Petitioner, on September 17, 2013, the government filed two motions, under seal, which implicated defense counsel in Petitioner's charged conduct, put his reputation at risk and stated that the government would be utilizing defense counsel as a witness against Petitioner. (Dkt. 16, 17). The government asserted that defense counsel's receipt of $900,000 from defendant implicated defense counsel in a "money laundering scheme." The government filed the motion under seal in order to "protect Mr. Greenspun's [defense counsel] reputation." On October 1, 2013, the Honorable Judge Liam O'Grady ordered the motions sealed in order to protect defense counsel's reputation. On October 15, 2013, the government issued a warrant, under seal, to seize funds from defense counsel's bank account. On October 21, 2013, the district court granted, in part, the government's motion to seize funds from defense counsel. On November 4, 2013, defense counsel was served with two grand jury subpoenas, under seal, for documents and testimony.

On December 3, 2013, defense counsel filed a motion, under seal, to quash grand jury subpoenas since the government sought "attorney-client privileged information." On December 3, 2013, the

government filed a motion, under seal, to exclude time for indictment. On December 12, 2013, the government filed a motion, under seal, in response to the motion to quash in which the government restated that defense counsel was the subject of a money laundering investigation and that defense counsel would be called as a witness against Petitioner. (Dkt. 101, Ex. 9). The government also asserted that the Rules of Professional Conduct require defense to withdraw from representing Petitioner. The district court did not hold a hearing on the conflicts of interest. On December 18, 2013, a hearing was held in front of the Honorable Judge Brinkema for both sides to present arguments relative to the grand jury subpoenas. The issue litigated before Judge Brinkema was whether the government was entitled to email communications and correspondence between defense counsel and Petitioner. Judge Brinkema never issued a ruling on the matter.

On January 16, 2014, Petitioner, based on the advice of counsel, entered a plea of guilty to wire fraud and conspiracy to commit wire fraud. Petitioner waived indictment and waived the pre-sentence report (PSR) based on advice of counsel. The fact that defense counsel was identified by the government as co-conspirator and government witness impacted counsel's ability to reasonably assess how the case should be litigated. While Petitioner was being pressured by defense counsel to accept a plea agreement, neither defense counsel nor the government disclosed to Petitioner that defense counsel was the subject of a criminal investigation. Petitioner had communicated to defense counsel that

he intended to go to trial from the onset of the government's investigation. The government sought to exert as much pressure on defense counsel as possible while keeping Petitioner in the dark regarding the criminal investigation of defense counsel. Moreover, it was only disclosed to Petitioner that defense counsel was going to be utilized as a government witness against Petitioner with the waiver language inserted into the final version of the plea agreement.

During the plea colloquy the district court asked Petitioner about defense counsel's conflict of interest as a government witness. There was no disclosure to Petitioner that defense counsel was the subject of a criminal investigation. The following five questions at the plea colloquy represents the totality of the district court's "inquiry" into the conflicts of interest.

The Court: One of the paragraphs in the plea agreement brings up the issue of a conflict of interest between Mr. Greenspun and yourself because, as you I am sure recall, there was an issue as to whether Mr. Greenspun might be a possible witness in this case against you if it went to trial.
Do you recall that conversation?

Defendant: Yes, I do

The Court: And in the agreement you have waived any conflict of interest that may be perceived; is that correct?

Defendant: That is correct.

The Court: Have you had separate counsel to talk to about that potential conflict of interest?

Defendant: No, I have not.

The Court: Have you fully discussed it with Mr. Greenspun, however?

Defendant: Yes, I have.

The Court: Are you comfortable with that decision and also comfortable with your decision to plead guilty here today?

Defendant: I am comfortable with both decisions, yes.

Petitioner was never advised nor questioned about the conflicts of interest associated with the criminal investigation of defense counsel or the impact to defense counsel's reputation. Petitioner was never advised how the conflicts of interest impacted his constitutional rights since no hearing was held on the matter.

Petitioner was sentenced to 132 months of incarceration on August 19, 2014. After Petitioner was transported to prison, Petitioner requested copies

of the sealed motions from the clerk of court. Petitioner received no response. Petitioner requested his case file in writing fifteen (15) times beginning in August 2015 and defense counsel ignored the request. Petitioner also had phone conversations with defense counsel in which he requested his case file no less than ten (10) times beginning in July 2015. Defense counsel never provided the case file.

Petitioner was released from custody on January 27, 2020. Shortly after release, Petitioner finally gained access to his case file and sealed documents which contained the evidence required to challenge his convictions. Petitioner filed a motion to unseal motions and documents on October 13, 2020. On November 12, 2020, Petitioner filed a coram nobis to vacate convictions based on three separate unwaiveable conflicts of interest (one disclosed, two undisclosed) that violated Petitioner's Sixth Amendment right. On May 28, 2021, the government filed a motion opposing Petitioner's motion to unseal. The government acknowledged that defense counsel was under criminal investigation for crimes associated with the defendant's charged conduct but argued that since defense counsel was not charged with a crime the motions should remain sealed in order to protect his reputation. (Dkt. 111, page 4) On August 17, 2021, the government filed a response to Petitioner's coram nobis. The response stated, "The government's investigation of Greenspun's possible role in the crime produced no evidence that Greenspun was a participant in Koger's crimes, and no charges ever materialized." The government argued "that since no charges were filed against

Greenspun there can be no conflict of interest." (Dkt. 128, page 8).

On August 31, 2021, the district court entered an order denying Petitioner's coram nobis and motion to unseal. (A-3-17). The district court held that no conflict of interest existed because Petitioner did not provide evidence implicating defense counsel in Petitioner's alleged crimes. (A-14). The court's holding is a nuanced version of the government's argument. The court cited no case law to support its ruling that in order for a conflict of interest to exist defense counsel must be indicted. The court "never found evidence of an actual conflict or potential conflict." (A-14). "The court carefully examined Mr. Koger concerning the potential conflict nonetheless and was satisfied that Mr. Koger understood the nature of the potential conflict and had voluntarily and intelligently waived it." (A-14). The district court cites no hearing at which Petitioner was examined or apprised of his rights.

The district court conflated the conflict of interest associated with defense counsel acting as a witness against Petitioner and the criminal investigation of defense counsel. (A-13-14). The district court recites only the five questions posed to Petitioner at the plea colloquy. (A-9-10) The district court did not address Petitioner's argument that the conflict associated with defense counsel acting as a witness was an unwaiveable conflict of interest. The district court did not address Petitioner's argument that defense counsel had a third conflict of interest because the government investigation impacted

defense counsel's reputation, and this created circumstances in which defense counsel was motivated to dispose of the case expeditiously. There is nothing in the record that indicates Petitioner was advised that defense counsel was the subject of a criminal investigation. The district court did not address Petitioner's argument that the convictions should be vacated because there was no hearing regarding the conflicts of interest. The district court did not dispute the fact that Petitioner had no access to the sealed documents which comprised the evidence of the conflicts of interest.

In a four-sentence opinion the Fourth Circuit Court of Appeals upheld the district court's ruling that no conflict of interest existed based on "no reversible error" even though the court's standard of review for an appeal of a coram nobis is de novo. (A-1-2)

H. REASONS FOR GRANTING THE WRIT

1. There is a split of authority as to whether a criminal investigation of defense counsel for crimes associated with the defendant's charged conduct amounts to an "actual" conflict of interest that adversely affects counsel's representation and whether this conflict of interest is a per se violation of the Sixth Amendment.

a. This Court's conflict of interest jurisprudence.

Conflicts of interest for attorneys representing defendants can be segregated into three categories:

concurrent representation of clients with conflicting interests, successive representation of clients with conflicting interests, and conflicts that pit the attorney's personal interests against those of the defendant. The dangers that arise when a conflict implicates the personal interests of defense counsel are different from the dangers that arise when two clients' (or former clients') interest conflict. The Supreme Court has never heard a case involving a conflict of interest involving the "personal interests" of defense counsel and how this may impact the Sixth Amendment right of defendants. The instant case involves defense counsel who was under criminal investigation for crimes associated with the Petitioner's charged conduct. These circumstances created a textbook division of loyalties. Even though the district court was advised, the criminal investigation was withheld from Petitioner. The district court, which acknowledged the criminal investigation of defense counsel, held and the appellate court affirmed that this did not constitute a conflict of interest because defense counsel was not charged with a crime.

Beginning with *Glasser v. United States*, 315 U.S. 60 (1942) the Supreme Court has reviewed a handful of conflict-of-interest cases, however, each of the cases this Court has reviewed have dealt with the issue of "joint representation" and whether the specifics of the case created a conflict of interest which implicated the defendant's Sixth Amendment right. This Court has not considered other types of conflict-of-interest cases including a conflict that involves defense counsel's "personal interests" and the conflict

of interest this may or may not create and the subsequent impact on the defendant's constitutional right to effective counsel.

The Court's seminal conflict of interest case, *Cuyler v. Sullivan*, 446 U.S. 335 (1980), outlined the test for determining when concurrent representation produces ineffective assistance of counsel. The Court announced a new test requiring that, absence a timely trial objection, a defendant must show that there was (1) an actual conflict of interest, and (2) that this conflict adversely affected counsel's performance. *Id* at 348. An actual conflict of interest occurs if the interests of the lawyer and the client diverge during the representation in regard to "a material factual or legal issue or to a course of action." *Id* at 356. The Court held, that counsel must have "actively represented" conflicting interests in order for a defendant to establish a constitutional violation. *Id* at 350 (citing *Glasser v. United States*, 315 U.S. 60, 72-75 (1942)). The Supreme Court determined that the burden of establishing ineffective assistance of counsel in *Cuyler* was lower than the one established in *Strickland*.[1] *Cuyler* sowed confusion in the lower courts as the they began to apply the *Cuyler* test to all types of conflicts of interest cases rather than only multiple representation cases. This was precipitated by a ruling in *Wood v. Georgia*,[2] one year later, due to the wording of a key sentence – "If the court finds that an actual conflict of interest existed ... it must hold a new revocation hearing ..." that was interpreted both literally and more loosely. See *Mickens v. Taylor*, 535

[1] *Strickland v. Washington*, 446 U.S. 668 (1984)

[2] *Wood v. Georgia*, 450 U.S. 261 (1981)

U.S. 162, 172 (2002) (explaining the confusion over the choice of wording in the *Wood* opinion).

The Court held in *Cuyler* that the trial court had a duty to investigate potential conflicts, if it knows or reasonably should know that a potential conflict exists. *Id.* The Supreme Court created the standards to apply in conflict-of-interest challenges, however, the Court did not specify when each test should apply. See *United States ex. Rel. Duncan v. O'Leary*, 806 F.2d 1307, 1312 (7th Cir. 1986) (noting that the Supreme Court has not established the scope of the *Cuyler* test). Several circuits developed expansive framework extending the *Cuyler* test to virtually all types of conflicts even though the Supreme Court only addressed concurrent representation conflicts.[3] Conversely, other circuits implemented a more limited framework applying it only to concurrent representation conflicts of interest.[4] The different standards applied in the lower courts led to an uneven application of justice across the country.

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[3] See *Riggs v. United States*, 209 F.3d 828, 831 n.1 (6th Cir. 2000) (stating *Cuyler* applies to all Sixth Amendment conflict-of-interest situations); *Winkler v. Keane*, 7 F.3d 304, 307-08 (2d Cir. 1993) (applying *Cuyler* to a contingency fee arrangement and asserting that *Cuyler* applies to all conflict of interest situations); *Buenoano v. Singletary*, 963 F.2d 1433, 1438 (11th Cir. 1992) (applying *Cuyler*, without discussion, to a contract giving the defendant's attorney book and movie rights to the defendant's story).

[4] See *Beets v. Scott*, 65 F.3d 1258, 1266 (5th Cir. 1995) (en banc) (noting that the Supreme Court has not addressed a conflict situation outside of the multiple representation realm.) *United States ex. Rel. Duncan v. O'Leary*, 806 F.2d 1307, 1312 (7th Cir. 1986) (noting that the Supreme Court has not established the scope of the *Cuyler* test).

The Supreme Court in *Cuyler* stated that a trial court has a duty to inquire when it "knows or reasonably should know" about a potential conflict of interest. *Cuyler* at 347. The Supreme Court in *Holloway* made clear that when a trial court forces a defense attorney to represent conflicting interests after her objection, then the defendant is entitled to automatic reversal. *Holloway v. Arkansas*, 435 U.S. 475 (1978). However, the Supreme Court has not addressed what consequences there were when a trial court discovered on its own, and not by defendant's objection, a potential conflict of interest and failed to inquire into it. This led to confusion in the district and circuit courts. For example, the Second, Seventh and Ninth Circuits had automatic reversal rules in place if the trial court had notice of a potential conflict and failed to inquire. On the other hand, the First and Eighth circuits applied *Cuyler* regardless of the type of conflict if the trial court failed to conduct an appropriate inquiry when it knew or should have known of the potential conflict.

The most recent case this Court has heard, *Mickens v. Taylor*, 535 U.S. 162 (2002), regarding conflicts of interest left open a host of issues dealing with "divergent interests." The Court held, that the trial court's failure to conduct an inquiry into a potential conflict does not reduce a defendant's burden of proof. *Id* at 173-74. The *Mickens* court limited the automatic reversal rule in *Holloway* to cases when the trial court requires the defense attorney to represent co-defendants despite a timely objection. The Supreme Court justified the limitation because the defense counsel is best able to know of the

problems a potential conflict might cause, and the objection is an assertion that these problems are insurmountable. *Id.* While this may be a reasonable standard when joint representation is involved, it is hardly a reasonable standard when the personal interests of defense counsel are the basis of the potential conflict of interest. Unfortunately, the *Mickens* ruling addressed a very narrow question and the confusion in the lower courts is as great now as it was pre-*Mickens*.

The *Mickens* court narrowed the *Cuyler* framework and clarified the rulings in *Wood* and *Holloway*, however, the *Mickens* ruling has swung the pendulum entirely to the other end of the spectrum in which the lower courts mostly ignore conflicts of interest arguments especially ones in which the conflict is not associated with joint representation. While it can be argued that some circuits had liberally construed the holdings in *Cuyler* and *Wood*, the lower courts have no definition or guidance around divergent interests and conflicts of interest, outside of joint representation. As a result, the lower courts have failed to properly deal with a host of conflict-of-interest issues especially ones that involve a conflict between the defendant and defense counsel's personal interests. The ruling in *Mickens* has emboldened district courts and circuits courts to dismiss or paper over potential conflicts of interest since the defendant's burden established in *Mickens* is much higher than in *Cuyler*, *Holloway* or *Wood*. The majority found that some circuit courts had applied *Cuyler* to situations other than concurrent or successive representation, extending its application

to the conflicts involving the "counsel's personal or financial interests." *Id* at 174-75. The majority asserted that these expansions of *Cuyler* by the circuit courts were not supported by either *Cuyler* or by other Supreme Court precedent. *Id* at 175. This has left district and appellate courts without any guidance when it comes to other types of conflicts of interest.

In *Mickens* the Court held, "lest today's holding be misconstrued, we note that the only question presented was the effect of a trial court's failure to inquire into a potential conflict upon the [*Cuyler*] rule that deficient performance of counsel must be shown." *Id* at 174. The Court, although reserving a decision for another day, discussed the propriety of extending *Cuyler* to cases of successive representation and to conflicts based upon the attorney's personal interests. *Mickens* at 176 (stating that "[w]hether [*Cuyler*] should be extended to such cases remains, as far as ... this Court is concerned, an open question"). While this Court has reviewed conflict of interest cases involving joint representation there is widespread interpretation within the lower courts with respect to the definition of "divergent interests" and how and when they impact the rights of the defendant. The *Mickens* court clearly went out of their way to limit *Cuyler* to joint representation conflict of issue cases.

In *Mickens* the Court clarified its precedent in *Cuyler* and stated that some courts may be applying the wrong standard in certain conflicts. While the interpretation of *Cuyler* in some circuits was, perhaps, too wide the interpretation of *Mickens* across all circuits today is much too narrow. The *Mickens*

court left open the issue of conflicts of interest between the defendant and defense counsel's personal interests. Most circuits have used *Mickens* in support of a position that limits *Cuyler* only to concurrent representation.[5] *Mickens v. Taylor*, 535 U.S. 162, 176 (2002) (stating that the test for successive representation remains an open question). The lower courts have determined that the Mickens ruling has shifted the responsibility regarding personal interest conflicts of interest from the district court to defense counsel. *Mickens* at 173 (stating that the trial court's awareness has no impact on the likelihood that the counsel's performance will be ineffective). *Id* at 177-78 (Kennedy, J., concurring) (noting the question should turn on the acts of the attorney and not the court). These statements by the majority in *Mickens* shifting the burden of identifying conflicts of interest to defense counsel seemingly contradict *Wood*. The district court cannot rely on the views of the attorney whose conflict is at issue for an assurance that the conflict is waivable or should be waived. *Wood v. Georgia*, 450 U.S. 261 (1981). A conflicted attorney's advice regarding these decisions is likely to provide a conduit for influence by the attorney's personal interests. "An attorney who is prevented from pursuing a tactic or strategy because of the canon of ethics is hardly an objective judge of whether that

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[5] *United States v. Blount*, 291 F.3d 201, 211-12 (2d Cir. 2002) (stating that *Mickens* requires the defendant to at least meet the *Cuyler* test on appeal); see also *Holleman v. Cotton*, 301 F.3d 737, 743 (7th Cir. 2002) (noting that *Mickens* casts doubt on whether *Cuyler* should be applied to cases where trial judges have failed to inquire into conflicts of interest in successive representation situation).

strategy is sound trial practice. Counsel's inability to make such a conflict-free decision is itself a lapse in representation." *United States v. Massino*, 302 F. Supp.2d 1 (E.D.N.Y. 2003) (quoting *United States v. Malpiedi*, 62 F.3d 465, 469 (2d Cir. 1995)). Should defense counsel even be in a position where he must determine how a criminal investigation of defense counsel will impact the advice he provides to his client?

The case presented involves a conflict of interest in which defense counsel was the subject of a criminal investigation for crimes associated with the defendant's charged conduct. Defense counsel continued representing the defendant even though the government advised defense counsel and the district court that defense counsel was under investigation. The defendant was not apprised of the existence of the investigation until he was released from custody and gained access to sealed documents articulating the government's investigation. A personal interest conflict tests an attorney's loyalty to one client. The danger is that the attorney might be compromised in his representation of the client because of the possibility of personal enrichment, avoidance of embarrassment, criminal charges, reputational damage or financial loss. A conflict of interest has constitutionally detrimental effects before trial, just as during trial, because of what it tends to prevent the attorney from doing." *Holloway v. Arkansas*, 435 U.S. at 489-90 (1978).

This case also presents the Court with an opportunity to define divergent interests for the lower

courts, define the criteria for a per se violation of the Sixth Amendment and determine whether certain types of conflicts of interest are unwaiveable.

b. Does a criminal investigation of defense counsel for crimes associated with the defendant's charged conduct constitute an actual conflict of interest and a per se violation of the Sixth Amendment?

The complete denial of representation and certain other situations of state interference can infringe the right to counsel. *Strickland v. Washington*, 466 U.S. 668, 692 (1984). This type of denial is per se violative of the right to counsel, and the defendant need not show any effect on the trial to obtain a reversal of the conviction. *Id.* Encompassed in the right to effective assistance of counsel is the right to counsel unencumbered by a conflict of interest. *Glasser v. United States*, 315 U.S. 60, 70 (1942) ("[T]he Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests."). Petitioner asserted that when the government initiated a criminal investigation of defense counsel for crimes associated with the defendant's charged conduct this constituted "state interference" as contemplated by *Strickland* in addition to a conflict of interest that is a per se violation of the Sixth Amendment as articulated by the Second, Fifth and Ninth circuits and this Court. The Sixth Amendment's guarantee of the right to counsel includes the "right to representation that is free from

conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271 (1981). A conflict of interest is "a division of loyalties that affected counsel's performance." *Mickens v. Taylor*, 535 U.S. 162, 172n.5 (2002). Counsel is inexorably conflicted when representing a defendant that threatens their professional reputation and livelihood. *Christeson v. Roper*, 574 U.S. 373 (2015).

Less than two weeks after Petitioner's arrest the government filed multiple motions under seal alleging that defense counsel was complicit in defendant's alleged fraud. These motions and the attendant evidence of the criminal investigation of defense counsel was sealed and withheld from Petitioner. Upon release from prison Petitioner finally gained access to the sealed documents. Petitioner subsequently filed a coram nobis to vacate his convictions based on three separate conflicts of interest (one disclosed, two undisclosed) that denied Petitioner his constitutional right to effective counsel. In response to Petitioner's coram nobis, the government acknowledged that defense counsel was the subject of a criminal investigation for crimes related to the defendant's charged conduct but argued that no conflict of interest existed since defense counsel was not ultimately charged with a crime. (Dkt. 128). Petitioner argued that defense counsel labored under a conflict of interest that constituted a per se violation of the Sixth Amendment which required vacatur of the convictions. The fact that defense counsel was the subject of a criminal investigation for crimes associated with Petitioner's charged conduct is not disputed. The dispute is

whether the investigation of defense counsel constituted an actual conflict of interest as asserted by Petitioner.

The district court acknowledged that defense counsel was the subject of a criminal investigation, however, the court held that since Petitioner did not provide evidence implicating defense counsel in defendant's crimes then no actual conflict of interest could exist. (A-13-14). The district court cited no case law supporting its holding. The appellate court affirmed this holding. Furthermore, the district court held that "there was no reason for the court to intercede, as it never found evidence of an actual conflict or a potential conflict of interest." (A-14). The fact that funds were seized from defense counsel's bank account does not comport with this reasoning. Moreover, this statement by the district court indicates that three conflicts of interest (one disclosed, two undisclosed) asserted by Petitioner which included a criminal investigation of defense counsel for crimes associated with the defendant's charged conduct did not constitute even a potential conflict of interest. This was the basis for the district court's denial of Petitioner's coram nobis. (A-13-14). The appellate court affirmed. The district court held, "Mr. Koger was well aware of the potential conflict, as he was working in Mr. Greenspun's office when the seizure of the $900,000 took place." (A-13). This statement does not comport with the facts since the seizure of the $900,000 took place on October 15, 2013, while Petitioner was housed in a maximum-security jail.

The very next statement by the court also contradicts the facts of the case, "The Court carefully examined Mr. Koger concerning the potential conflict nonetheless and was satisfied that Mr. Koger understood the nature of the potential conflict and had voluntarily and intelligently waived it." (A-14). There was no hearing in which Petitioner was examined. The so-called waiver related to the one disclosed conflict of interest in which defense counsel was identified as a government witness against Petitioner. This conflict of interest was disclosed to Petitioner through a paragraph that was inserted into the final version of the plea agreement while the conflict associated with the criminal investigation of defense counsel was not disclosed. The district court conflated Petitioner's arguments regarding the three conflicts of interest. (A-13-14). The court did not offer evidence in support of the statement that the court "carefully examined Mr. Koger," since the court failed to hold a hearing in which Petitioner was apprised of his rights. The district court did not provide evidence that the criminal investigation was disclosed to Petitioner.

Petitioner addresses the failure to disclose the criminal investigation of defense counsel later in this writ as a separate question. The disclosure or lack thereof is irrelevant to whether the criminal investigation of defense counsel constituted an actual conflict of interest and a per se violation of the Sixth Amendment. It has been undisputed by the government and the district court that the evidence articulating the criminal investigation of defense counsel and the government's statements that

defense counsel would be a witness for the government was contained in sealed documents inaccessible to Petitioner during the term of his incarceration. As a result, Petitioner filed a petition to vacate his convictions at the earliest possible moment.

The Second, Fifth and Ninth Circuits have held that a criminal investigation of defense counsel for crimes associated with the defendant's charged conduct constitutes an actual conflict of interest and a per se violation of the Sixth Amendment which requires automatic reversal. *United States v. Cancilla*, 725 F.2d 867 (2d Cir. 1984); *United States v. Fulton*, 5 F.3d 605 (2d Cir. 1993); *United States v. White*, 706 F.2d 506 (5th Cir. 1983); *Mannhalt v. Reed*, 847 F.2d 576 (9th Cir. 1988). The Supreme Court has described as a "per se" violation of the Sixth Amendment, a showing of adverse effect is not necessary, and the underlying conviction must be reversed. *United States v. Cronic*, 466 U.S. 648, 659-60 (1984). The Supreme Court has recognized only three categories of per se violations of the Sixth Amendment: (1) "the complete denial of counsel;" (2) "counsel entirely fail[ing] to subject the prosecution's case to meaningful adversarial testing;" and (3) where "the likelihood that any lawyer, even a fully competent one, could provide effective assistance of counsel is so small that a presumption of prejudice is appropriate." *Id.* The *Cronic* case was not a conflict-of-interest case, however, it is the only case in which the Court provides framework regarding a per se violation of the Sixth Amendment.

"A conflict of interest is established once the investigation is initiated against defense counsel regardless of the outcome of the investigation." *Fulton; Cancilla.*

United States v. Fulton, 5 F.3d 605 at 610-611 (2d Cir. 1993):

> Whether the allegations created an actual conflict of interest does not turn on whether they are true or false or with or without "some foundation." However viewed, the allegations present an actual conflict. Lateju told the government that lead trial counsel received a portion of the shipment of heroin that Lateju brought into the United States, and also that he had information that lead trial counsel was involved in heroin trafficking on his own. Either lead trial counsel was involved with Fulton's alleged co-conspirators in a crime closely related to that for which Fulton was on trial, or the allegations were false, and lead trial counsel was precluded from challenging Leteju's credibility based on the falsity of the accusations. In either circumstance, Fulton's and lead trial counsel's interests diverged during the trial, and, therefore, lead trial counsel had an actual conflict of interest.

United States v. Cancilla, 725 F.2d 867 at 870 (2d Cir. 1984):

> What could be more of a conflict than a concern over getting oneself into trouble with criminal law enforcement authorities?

In the instant case, the government responded to Petitioner's motion to unseal, (Dkt. 111, page 4):

> Under the circumstances here, disclosure could harm those who were investigated but never charged, and openness "does not play a significant role in the functioning of investigations," as further reinforced by the fact that the warrant application is "*ex parte* in nature and occur at the investigative, pre-grand jury, pre-indictment phase of what may or may not mature into an indictment. The warrant and affidavit are part of an investigation that led to no charges and should be kept under seal. ..... It is manifest, however that unsealing the warrant materials [and motions] could harm the reputation of those affected by the warrant, even though, again, no charges were ever brought.

The government's response to Petitioner's coram nobis, (Dkt. 128, page 8):

> The government's investigation of Greenspun's possible role in the crime produced no evidence that Greenspun was a participant in Koger's crimes, and no charges ever materialized.

The district court held, (A-14):

> Mr. Koger presented no evidence in this petition that Mr. Greenspun assisted him in his crimes while working at his offices or otherwise. If he had evidence that would support such an actual conflict he surely would have presented it herein. The absence of any such allegation demonstrates that there is none.

Both the government and the district court argued that Petitioner did not provide evidence of defense counsel's complicity in the crimes therefore no conflict can exist. Petitioner has never argued that defense counsel committed any crimes. (Dkt. 101). Moreover, Petitioner provided voluminous evidence in his coram nobis regarding Petitioner's actual innocence. Petitioner asserted that he was forced to take a plea by defense counsel since the government was exerting an enormous amount of pressure on defense counsel as a result of the investigation of defense counsel. As shown by *Fulton* and *Cancilla*, the mere allegations or the fact that an investigation was opened and disclosed to defense counsel creates

an actual conflict of interest and a per se violation of the Sixth Amendment. The fact that no charges were filed against defense counsel or that Petitioner provided no evidence does not eliminate the obvious conflict of interest. The government also argued that the fourteen (14) sealed motions on Petitioner's docket (16-22, 24-31) should remain sealed. (Dkt. 111). The district court agreed. If the criminal investigation was an insignificant matter, why has the government fought for 8 years to keep these documents sealed? They are a relevant part of Petitioner's case as it sheds light on why Petitioner unexpectedly accepted a plea deal despite Petitioner's intention to go to trial.

United States v. Fulton, 5 F.3d 605, 611 (2d Cir. 1993) at 612):

> In short, when a government witness alleges that he has direct knowledge of criminal conduct by defense counsel, for purposes of constitutional analysis, we must treat such allegations as if they are credible. Accordingly, assuming the worst, Lateju's allegations that lead trial counsel was engaged with him in heroin trafficking created an actual conflict of interest of the sort that requires application of the per se rule, and therefore, Fulton need not prove that his representation was adversely affected to establish a Sixth Amendment violation.

In *Fulton* the Second Circuit concluded that allegations by a government witness that defense counsel engaged in heroin trafficking related to the heroin charge for which his client was on trial, created an actual conflict of interest that did not require the showing of adverse effect, but was a per se violation of the Sixth Amendment requiring an automatic reversal of the convictions. If there is a mere possibility that allegations against defense counsel are true then the district court and appellate court must assume the worst. *Fulton* at 612. In *White* the Fifth Circuit concluded that where defense counsel was being investigated for helping his client escape, and his client was on trial for that same escape, this constituted an actual conflict of interest requiring disqualification regardless of any showing of actual prejudice. In *Cancilla*, the Second Circuit held that the per se rule applied because of the "similarity of counsel's criminal activities to Cancilla's schemes and the link between them." *Cancilla* at 870. In *Mannhalt* the Ninth Circuit held that "when an attorney is accused of crimes similar or related to those of his client, an actual conflict of interest exists because the potential for diminished effectiveness in representation is so great." Each of these circuits have determined that this type of conflict of interest cannot be waived. The Fourth Circuit's affirmation of the district court's determination that a conflict of interest did not exist when defense counsel was the subject of a criminal investigation for crimes related to the defendant's charged conduct, contravenes rulings in three other circuits.

Intertwined with the conflict associated with the criminal investigation of defense counsel was one that impacted defense counsel's reputation and incentivized defense counsel to dispose of the case quickly even though Petitioner asserted his innocence and wanted to go to trial. The government and the district court sought to protect defense counsel's reputation by sealing the motions, orders, warrants and subpoenas as it related to the criminal investigation of defense counsel. In 2021, eight years after the motions were sealed the government continued to argue "that unsealing the warrant materials could harm the reputation of those affected by the warrant even though again, no charges were ever brought." (Dkt. 111, page 4). When an attorney's reputation is at risk this creates an actual conflict of interest and a per se violation of the Sixth Amendment. *Fulton* at 611. This Court held that an actual conflict of interest exists when counsel's reputation is at risk. *Christeson*, supra at 378-379. The district court did not address Petitioner's argument that the criminal investigation of defense counsel impacted his reputation thereby creating an actual conflict of interest and a per se violation of the Sixth Amendment. The Fourth Circuit's affirmation of the district court's holding contravenes the Second Circuit's holding in *Fulton* and this Court's holding in *Christeson*.

The Fourth Circuit has licensed the government's actions in this case. The government initiated a criminal investigation against defense counsel, the government did not request a hearing regarding the conflict to apprise Petitioner of the

conflict and inform Petitioner of his rights and the government did not file a motion for defense counsel to withdraw because they wanted the pressure to build on defense counsel so that counsel would pressure Petitioner to plead guilty. The appellate court has handed the government a blueprint for obtaining guilty pleas from obstinate defendants. Based on the egregious facts in this case and the circuit court's affirmation there seems to be no conflict of interest pertaining to defense counsel's "personal interests" that would merit disqualification in the Fourth Circuit short of defense counsel being indicted during the pendency of Petitioner's case. Suppose defense counsel's brother was under investigation for crimes associated with Petitioner's charged conduct. Based on the district and appellate courts' holdings this would not create an actual conflict of interest unless defense counsel's brother was charged with a crime during the pendency of Petitioner's case. The positions held by the district and appellate courts have weakened important protections for criminal defendants.

Petitioner asserted that the per se rule applied because the criminal investigation of defense counsel involved crimes associated with Petitioner's charged conduct that created an unwaiveable conflict of interest similar to *Fulton*, *Cancilla*, *White* and *Mannhalt*. The district court disagreed, and the Fourth Circuit affirmed.

By granting the petition for writ of certiorari in this instant case, the Court will have the opportunity to resolve the split in authority cited above. The split

of authority is clear and in present need of resolution before the split widens even more. In addition, the facts of this case present the Court with an opportunity to review for the first-time a per se violation of the Sixth Amendment.

2. The Court should resolve the question of whether an "actual" unwaiveable conflict of interest that adversely affects counsel's representation is established when defense counsel is identified by the government as a witness against the defendant related to the charges for which defense counsel is representing the defendant and whether the absence of a hearing is grounds for a reversal.

Petitioner signed a plea agreement acknowledging and waiving the conflict of interest associated with defense counsel acting as a witness against the defendant. Despite Petitioner's strong desire to go to trial, defense counsel convinced Petitioner to accept a plea agreement and agree to the waiver language. Petitioner, in the coram nobis, argued that the conflict of interest associated with defense counsel acting as a witness is an unwaiveable conflict of interest. Petitioner argued that the waiver was unknowing, unintelligent, and involuntary. Despite the fact that no hearing was held regarding the conflicts of interest, the district court held, "Mr. Koger understood the nature of the potential conflict and had voluntarily and intelligently waived it." (A-14). To validly waive a conflict of interest, the defendant must possess "a knowledge of the crux of the conflict *and* an understanding of its implications."

United States v. Brown, 202 F.3d 691, 698 (4th Cir. 2000) (emphasis in original).

Petitioner was generally aware that defense counsel was a potential witness for the government, however, Petitioner was not aware of its implications. Since there was no hearing the district court never explicitly confirmed that Petitioner understood that Greenspun's conflict could negatively impact the quality of his legal representation. The district court held "He was present at each of the pre-trial hearings where the potential conflict was discussed." (A-13). This statement does not comport with the facts of the case since there were a total of five hearings (Petitioner present at four) and only one hearing even mentioned the conflict of interest. During this motions hearing on October 4, 2013, AUSA Golder argued, "We wanted to resolve these facts before we make a pretty serious allegation that Mr. Greenspun should be disqualified. We do think there is a very good basis for doing so right now, which I can explain." (Dkt. 75, page 6, lines 1-5). The district court concluded, "And I understand that. And the disqualification issue is one that, you know, we're going to handle one time, we're going to handle it after we understand all the facts. And talking about it now is fine, but that's note ripe for a decision." (Dkt. 75, page 26, lines 3-7). At no time during the hearing was Petitioner questioned by the court. At no time subsequent to this hearing was the conflict ever discussed in court with Petitioner present. The conflict of interest discussed at this hearing involved defense counsel acting as witness for the government. Furthermore, at no time was it disclosed to Petitioner

that defense counsel was the subject of a criminal investigation even though the government had filed multiple motions under seal alleging defense counsel's complicity in Petitioner's charged conduct.

There was no language in the plea agreement referencing the conflicts of interest associated with the criminal investigation of defense counsel and potential reputational damage to defense counsel. The court failed to hold a hearing regarding this or any conflict of interest to apprise Petitioner of his rights. Petitioner asserted that when the government sought to utilize defense counsel as a witness against Petitioner this conflict of interest was unwaiveable pursuant to *United States v. Urutyan*, 564 F.3d 679 (4th Cir. 2009); *United States v. Tatum*, 943 F.2d 370 (4th Cir. 1991); *United States v. Howard*, 115 F.3d 1151, 1155 (4th Cir. 1997). ("A lawyer is prohibited, of course, from being a witness while serving in a representative capacity at trial.... A district court has an obligation to foresee problems over representation that might arise at trial and head them off beforehand."); See also *Byrd v. Hopson*, 2004 WL 1770261, at *2 (4th Cir. 2004) (finding no abuse of discretion where the district court concludes that an attorney's dual role as advocate and witness presented a conflict of interest that required his disqualification" because the attorney "would 'most certainly be called as a witness' at trial" (citing *Int'l Woodworkers of Am. v. Chesapeake Bay Plywood Corp.*, 659 F.2d 1259, 1273 (4th Cir. 1981). ("The roles of witnesses and advocate are fundamentally inconsistent and when ... a lawyer ought to testify as a witness for his client, he must as a rule withdraw

from advocacy."); *United States v. Morris*, 714 F.2d 669, 671 (7th Cir. 1983) (explaining that the general prohibition against counsel acting both as an advocate and as a witness "eliminates the possibility that the attorney will not be a fully objective witness"); Virginia Rule of Professional Conduct 3.7(a) (stating that "[a] lawyer should not act as an advocate in an adversarial proceeding in which the lawyer is likely to be a necessary witness" unless certain exceptions apply).

The district court held that Petitioner waived the conflict of interest based on the language in the plea agreement and the five questions the court asked Petitioner during the plea colloquy. (A-14). The district court did not address Petitioner's argument that the conflict was unwaiveable pursuant to Fourth Circuit precedent. The district court did not address Petitioner's argument that the district court was required to hold a hearing to apprise Petitioner of his rights pursuant to *Wood v. Georgia*, 450 U.S. 261 (1981). The Fourth Circuit affirmed the district court's holding contravening their own precedent.

Petitioner previously mentioned how the *Mickens* court's narrow and limiting decision has afforded district and circuit courts license to paper over or ignore conflicts. The Fourth Circuit contravened their own precedent in *Urutyan* when the court affirmed the district court's ruling that a conflict associated with defense counsel acting as a government witness did not constitute an actual conflict of interest. Furthermore, the appellate court affirmed the district court's determination that

Petitioner knowingly and intelligently waived the conflict despite the ruling in *Urutyan* that held that this type of conflict is unwaiveable.

More recently, in the Fourth Circuit's 44-page decision in *United States v. Purpera*, 19-4158 *8-17 (4th Cir. 2021), the court held that "despite the district court's colloquy, Appellant did not validly waive Brownlee's conflict of interest." *Id* at 11. In *Purpera* the district court held a hearing regarding the conflict of interest and the Fourth Circuit ruled that "while it is clear that Appellant was aware of the potential conflict of interest, we are not convinced that he was aware of its implications." *Id* at 11. Petitioner never had a hearing, yet the district court held that the waiver associated with defense counsel acting as a witness for the government was valid. The appellate court affirmed. In *Purpera*, defense counsel was under investigation by the DEA for witness tampering. The Fourth Circuit denied Purpera's argument that a per se violation of the Sixth Amendment existed, citing *Cancilla* and *Fulton* as the basis for denial, the same cases Petitioner cited in the coram nobis and appeal. The *Purpera* court held, "in those cases, the substantial similarity between the attorney's misconduct and the clients' misconduct is clear. In contrast, the potential witness tampering that led the DEA to subpoena Brownlee's phone records and the fraudulent behavior underlying Appellant's criminal convictions are completely different types of misconduct." *Purpera* at 14. The facts in Petitioner's case meet the criteria that the Fourth Circuit indicated *Purpera* did not meet. To wit, that in order for a *per se* violation to exist the criminal

investigation of defense counsel must be associated with the defendant's charged conduct. Despite this language in *Purpera*, the appellate court's four-sentence ruling in the instant case, affirmed the district court's holdings that no actual conflict existed and therefore no per se violation of the Sixth Amendment.

By granting the petition for writ of certiorari in this instant case, the Court will have the opportunity to resolve the issue of whether an actual conflict of interest exists when the government identifies defense counsel as a witness against the defendant and whether this type of conflict can be waived and whether the absence of a hearing to apprise the defendant of his rights is grounds for reversal. The Court can also provide framework regarding the criteria for a valid waiver.

3. The Court should determine whether the failure of the district court, defense counsel and the government to disclose a conflict of interest to the defendant requires a reversal of the convictions.

The district court and the government have acknowledged that defense counsel was under criminal investigation. (Dkt. 111, 128, A-3-17). However, there is no evidence in the record to reflect that the Petitioner was apprised of this conflict of interest. In addition, there is no evidence that Petitioner, who was remanded, was provided with copies of the sealed motions during the pendency of his case. The district court conflated the conflict of interest associated with the defense counsel acting as

a witness against Petitioner and defense counsel being the subject of a criminal investigation. The district court held, "he was carefully examined at his Rule 11 plea colloquy about the potential conflicts. He was present when Mr. Greenspun repeated to the Court that he had shared all of the pleadings with Mr. Koger, and Mr. Koger did not disagree." (A-13). The plea colloquy consisted of five questions which were related to the witness conflict of interest only. (A-9-10). Furthermore, Petitioner could not "disagree" about receiving documents he had no knowledge of. The government had ample opportunity to obtain an affidavit from defense counsel Greenspun confirming that the criminal investigation of defense counsel was communicated to Petitioner and that defense counsel had shared the sealed motions with Petitioner while Petitioner was being held in a maximum-security jail pending trial. No such affidavit or statement from defense counsel was included in the government's response to Petitioner's coram nobis.

"*Sullivan mandates* a reversal when the trial court has failed to make an inquiry even though 'it knows or reasonably should know that a conflict exists.'" *Wood v. Georgia*, 450 U.S. 261 at 272 (1981) (emphasis in original, quoting *Cuyler v. Sullivan*, 446 U.S. 335 (1980). When a conflict situation becomes apparent to the government, the government has a duty to bring the issue to the court's attention and, if necessary, move for disqualification of counsel. *Cf. United States v. Augurs*, 427 U.S. 97 (1976) (although the government attorney must prosecute with "earnestness and vigor," he must also "be faithful to his client's overriding interest that 'justice shall be

done'"). (citation omitted). Finally, defense counsel has an obligation to withdraw from representation when a conflict-of-interest manifests pursuant to the Virginia Rule of Professional Conduct 3.7. All fifty states and the District of Columbia impose identical or substantively equivalent requirements. *See* ABA, *Variations of the ABA Model Rules of Professional Conduct.* Although "breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel," canons of ethics and professional codes carry significant if not dispositive weight when "virtually all of the sources speak with one voice." *Nix v. Whiteside*, 475 U.S. 157, 165-166 (1986). Petitioner did not have the ability to assess the impact of this conflict of interest on his rights because Petitioner was not apprised of the conflict nor did the court make an inquiry.

The possibility of a conflict of interest in the early stages of a proceeding is sufficient to affect the defendant's due process right to representation free from conflicts of interest which requires the court to inquire further. *Wood v. Georgia*, 250 U.S. at 262 (1981). While a defendant can fairly be saddled with the characteristically difficult burden of proving adverse effects of conflicted decisions after the fact when the judicial system was not to blame in tolerating the risk of conflict, the burden is indefensible when a judge was on notice of risk but did nothing. *Mickens v. Taylor*, 535 U.S. 162 at 1261 (2002). The district court had knowledge of the criminal investigation of defense counsel based on the sealed motions yet chose not to inquire further.

All of the evidence associated with the conflicts of interest and more particularly the conflict of interest associated with the criminal investigation of defense counsel were sealed and remain sealed to this day. Petitioner had no access to this evidence until his release from custody in 2020.

In this case, defense counsel labored under three separate conflicts of interest. The criminal investigation of defense counsel was not communicated to the Petitioner by the district court, the government or defense counsel. The record supports this statement. The Petitioner was compelled to accept a plea agreement by an attorney who should have been removed from the case. When material information is withheld from the defendant regarding the defendant's case then the defendant's due process rights are abrogated.

By granting the petition for writ of certiorari in this instant case, the Court will have the opportunity to resolve the issue of whether a defendant's convictions should be vacated when the district court, government and defense counsel fail to advise the defendant of a conflict of interest.

The overall issue of conflicts of interest regarding the personal interests of defense counsel has been inconsistently applied across the circuits. The importance of guidance on this topic from the Supreme Court cannot be overstated. The Court should grant review to ensure the proper and uniform

application of the Sixth Amendment's guarantee of conflict-free counsel.

I. CONCLUSION

The Petitioner requests the Court grant the petition for writ of certiorari.

Respectfully submitted,

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