No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOHN BURKE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Now before this Court is one of the most pressing issues that face criminal defendants: would you want an attorney who was afraid of you because of the attorney's perceived feeling of intimidation and your reputation to represent you during your trial, including taking charge of the defense case, and through your appeals process? The resounding answer to that question is no. The Supreme Court has never addressed a case wherein one of the members of a defendant's defense team felt fear and intimidation during the pendency of a defendant's case. And this member of the defense team was in charge of presenting the defense in a RICO case in which withdrawal was the defendant's primary defense, yet the defense failed to call the defendant.

Here, Petitioner, John Burke, suffered under a conflict of interest during his entire representation by his trial and appellate counsel, Ying Stafford.[1] The Second Circuit erred when it determined that no conflict existed when there was prima facie evidence, by way of Ying Stafford's admission before the New York State Appellate Division, First Department's Grievance committee that she felt "fear and intimidation" during her representation of Mr. Burke based on his "behavior and reputation".

Instead of remanding the matter down to the District Court to determine the scope of the conflict, the Second Circuit affirmed the District Court's summary denial of Petitioner's motion to vacate.

Ms. Stafford's actions in the case at bar had a devastating effect on Petitioner's defense at trial, resulting in Petitioner not being called as a witness to present a defense of withdrawal from the Government's allegations that he was a member of the Gambino Crime Family up until the time of his indictment in 2008. It was Petitioner's, and Petitioner's decision alone, that should have controlled in the instant case. And as this Court knows, the only person that can "speak to" the state of mind with regard to Petitioenr's withdrawal, was Petitioner See Smith v. United States, 568 U.S. 106, 113-114 (2013).

We ask this Court to address this pressing concern: should an attorney that is so afraid of her client be allowed to continue representing the client without the client's knowledge of said attorney's fear? The resounding answer to that question, which this Court has never addressed, is no.

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[1] Petitioner did not find out about this conflict until July of 2019, when Ms. Stafford responded to Peitioner's grievance that he filed before the New York State Supreme Court Appellate Division, First Department. Ms. Stafford lied to Petitioner about filing a writ of certiorari to this Court after his conviction was affirmed and then created a fake letter and docket number. Petitioner's 28 U.S. Code § 2255 was untimely due to the misrepresentation by Ms. Stafford. And while Petitioner's 28 U.S. Code § 2255 was ultimately heard on the merit based upon Ms. Stafford's misrepresentations, this revelation did not occur until Petitioner had already filed his initial 28 U.S. Code § 2255.

The following questions are presented.

1. Did the Second Circuit err when it found that there was not an actual conflict without ordering a hearing in the District Court when defense counsel admitted that she was fearful and intimidated during her representation of Appellant?

2. Did the Second Circuit err when it failed to remand the matter for a hearing to determine whether trial counsel rendered ineffective assistance of counsel when trial counsel failed to call Petitioner as a witness to establish his defense of withdrawal?

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I. PETITION FOR WRIT OF CERTIORARI

John Burke petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

II. OPINIONS BELOW

The Second Circuit's summary order affirming the District Court's summary denial of John Burke's 28 U.S.C. 2255 motion to vacate is reported at *Burke v. United States*, 2022 U.S. App. LEXIS 1609 (2d Cir. 2022), and attached as Appendix A. The district court's order denying Petitioner's motion under 28 U.S.C 2255 is unreported, and attached as Appendix B.

III. JURISDICTION

The Second Circuit entered judgment on January 20, 2022. *See* Appendix A. This petition is timely filed pursuant to Supreme Court Rule 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

IV. STATUTORY PROVISIONS INVOLVED

This case involves the relationship between 28 U.S.C. § 2255, the primary avenue for collateral review of federal criminal judgments. The constitutional provisions that is directly at issue here is the 6th Amendment right to effective assistance of counsel.

V. STATEMENT OF THE CASE

A. Introduction

This petition arises from an effort by Petitioner to vacate his life sentence. Petitioner's motion to vacate his conviction and sentence was denied by way of an order, and he was granted certificate of appealability on November 30, 2020, by Judge Sterling Johnson, Jr. of the Eastern District of New York. (Appendix B). The crux of his motion to vacate his conviction lied in his attorney's failure to call him as a witness. During the litigation of his motion to vacate, it became readily apparent that his trial attorney and later appeals attorney, Ying Stafford, who also was in charge of his defense case at trial, failed to file his application for leave to appeal to the Supreme Court of the United States. (Appendix A).[2] Appellant wrote both the District Court and the Grievance Committee for the 1st Department, State of New York on April 8, 2019. This lead to Ms. Stafford's reply to Appellant's grievance.[3]

Petitioner raised the question before the Second Circuit of whether his defense team suffered under a conflict of interest because of Ying Stafford's fear of Petitioner. The secondary issue before the Second Circuit was whether the defense team was ineffective for failing to call Petitioner as a witness in a case wherein his state of mind regarding his withdrawal from the conspiracy was critical. Finally, Petitioner claimed that the District Court err when it failed to hold a hearing to explore the veracity of

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[2] Significantly, the District Court did not even address the claims that Petitioner made with regard to the conflict of interest that existed between he and his former attorney, Ying Stafford.

[3] Ms. Stafford's reply to Petitioner's grievance was filed with the District Court under seal.

these claims wherein there was prima facie evidence that the defense team was afraid of Petitioner and failed to advise him that it was only his decision to make regarding whether he testified or not.

The Second Circuit concurred with the District Court, finding that there was no conflict of interest, counsel was not ineffective for failing to call Petitioner and that no hearing was needed to determine the merits. (Appendix A)

B. John Burke

Petitioner has been sitting in prison since April of 2001. Moreover, Burke has been incarcerated for practically the duration of the conspiracy that he allegedly took part in. In addition to his incarceration in April of 2001, Petitioner was incarcerated between October 27, 1982 to November 15, 1990[4]; December 15, 1993 to June 1995[5]; September 8, 1999 to September 8, 1998 and November 15, 1999 to November 15, 2000. Thus, Petitioner has been incarcerated for (23) twenty-three of the (28) twenty-eight years of the charged conspiracy.

C. The Federal Prosecution

After an indictment, Petitioner was charged with one count of RICO conspiracy, from in or about, January 1980 through January 2008, one count of murder in the aid of racketeering,[6] one count of murder in furtherance of a criminal enterprise and

[4] In November 15, 1990, Petitioner was granted work release from the state prison system. Petitioner was not paroled until April 26th, 1991.

[5] In December 15, 1993, Petitioner was granted work release from the state prison system. Petitioner was not paroled until December 15, 1996.

[6] The murder in aid of racketeering and the murder in furtherance of a continuing criminal enterprise are in connection with the homicide of John Gebert.

one count of carrying and using a firearm in relation to the racketeering conspiracy.

The federal prosecution of Petitioner was entirely driven by the Government's relentless pursuit of John Gotti, Jr. In 2008, the Government made its final attempt to arrest and convict Gotti, Jr. On July 24, 2008, Gotti Jr., was indicted by a Florida grand jury with, among other charges, the murder of Bruce Gotterup. Prior to Gotti, Jr.'s arrest and indictment, the Government signed cooperation agreements with practically all of Gotti, Jr.'s alleged associates - John Alite, Peter Zucarro, Patsy Andriano and Michael Malone, all of whom had been at liberty since early 2000. Petitioner, also an alleged associate, had been serving a 25 year to life sentence imposed by the state of New York for the murder of Bruce Gotterup since 2001.

In a related Indictment to Gotti, Jr, on July 31st, 2008, Petitioner was indicted with RICO conspiracy. On March 3, 2009, Petitioner's case was transferred from Florida pursuant to Rule 21 of the Federal Rules of Criminal Procedure, to the Eastern District of New York. Gotti Jr. commenced his trial in 2009. Gotti, Jr. argued to the jury that he had withdrawn from the Gambino crime family. In fact, the main witness in his case, John Alite, had fled the country by 2004. Prior to Alite's flight from the country, Gotti, Jr. and Alite had a falling out and had little to do with each other. On December 1, 2009 Gotti, Jr's trial ended in a mistrial. Several years later, Petitioner's trial commenced on May 7, 2012. On June 8th, 2012 a jury convicted Petitioner on all counts in the indictment.

D. The State Prosecution

The essential charges alleged in the federal indictment are identical to the

charges for which Petitioner stood trial for in the State of New York.[7] 30 years later Petitioner was forced to defend himself against the awesome power of the federal government for crimes that he already been tried for in the state. Petitioner had already served seven (7) years of his 25 to life sentence for the murder of Bruce Gotterup – he was destitute and fully acclimated to his life in prison.

After Petitioner's arrest in 2001, he was abandoned by his alleged co-conspirators. The government's own witnesses repeatedly testified that they had not seen Burke since the mid to late 1990's. Obviously, that would be the case - Petitioner was sentenced to spend the rest of his life in prison. After his arrest in 2001, Petitioner no longer had anything to offer the Gambino crime family. In fact, even prior to Petitioner's arrest, and conviction, his alleged co-conspirators discussed plans to kill Petitioner, because "they" were fearful he would cooperate against them. Also, prior to Petitioner's trial, his family was forced to borrow money from family and friends to pay for his legal defense.

Moreover, after Petitioner's arrest, he decided to sever all ties with the Gambino crime family. Because, during Petitioner's trial for the murders of Bruce Gotterup and John Gebert, it had become clear that the Gambino crime family was finished with Petitioner. Petitioner also took affirmative steps to communicate to his alleged co-

[7] On November 22, 1982, Petitioner was charged by the State of New York with the murder of Daniel Zahn. On November 15, 1983, Petitioner was acquitted by a jury of the Zahn murder. As stated previously, Petitioner was charged in this case as well, with the conspiracy to murder, and the murder of Daniel Zahn, as racketeering act two of count one. On May 31, 2001, Petitioner was charged with the murders of Bruce Gotterup and John Gebert. On November 27, 2002, Petitioner was convicted by a jury of the murder of Bruce Gotterup, but was acquitted of the murder of John Gebert.

conspirators that he was finished with "the life."[8]

Petitioner has served most of his state sentence at the Shawangunk New York State Correctional Facility ("Shawangunk").[9] He is presently incarcerated at Sullivan Correctional Facility ("Sullivan"). Shawangunk and Sullivan are maximum security prisons located in upstate New York designated for inmates serving life sentences. While in prison, Petitioner did not spend his time furthering the interests of the Gambino crime family. In fact, Petitioner spent most of his time enrolled in prison programs at Shawangunk and now Sullivan.

Petitioner completed several prison programs including aggression replacement training and substance abuse treatment. Later at Shawangunk, Petitioner became an inmate facilitator that assisted in the supervision of inmate groups that were held four hours a day and met five times a week. In order to maintain his position as a facilitator, Petitioner was subject to random drug testing, and prohibited from receiving any major disciplinary infractions. (Tr. 1951-1961). Petitioner continued to serve his life sentence at Shawangunk until he was taken from state custody, by the federal government as part of an effort to finally successfully prosecute and convict John A. Gotti, Jr., in 2008.

E. The Government's Case

The Government's case against Petitioner was premised upon the collective testimony of cooperating witnesses that lacked any indicia of reliability.[10] Each

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[8] At trial there was no evidence presented that Petitioner engaged in any criminal activity on behalf of the Gambino crime family while in prison.

[9] On May 7, 2003, Petitioner was sentenced to a term of imprisonment of 25 years to life by the State of New York for the murder of Bruce Gotterup.

[10] The Government's cooperating witnesses were Anthony Ruggiano ("Ruggiano"), Patsy Andriano ("Andriano"), Michael Malone ("Malone") and Peter Zucarro ("Zucarro").

cooperating witness presented in the case admitted to lying in the past, either to law enforcement and/or a Federal judge. For example, the government's central witness, Zuccaro, admitted to lying under oath at a prior proceeding. Vackner, another important Government witness, testified that since his decision in 2000 to cooperate and assist law enforcement he committed several crimes, lied to law enforcement, and as recently as 2010, violated his cooperation agreement with the government, because he decided to steal a vehicle. More importantly, Mr. Burke submits that the testimony of those witnesses presented at trial, particularly in connection with the murder of John Gebert ("Gebert murder"), was so extraordinarily contradictory that a rational trier of fact would have had to conclude that one or more of the witnesses gave false testimony, and thus, committed perjury.[11]

F. The Defendant's Case

Petitioner called several witnesses on his behalf to establish that he had withdrawn from the Gambino crime family, prior to the statute of limitations period, July 31, 2003. The defense witnesses testified that Petitioner had made reasonable efforts to communicate to his alleged co-conspirators that he was withdrawing from the conspiracy. Specifically, John Alite ("Alite") and Zucarro. In addition, Petitioner called two alibi witnesses to testify on his behalf. Both witnesses testified Petitioner was with them the entire night of the Gebert murder from, approximately 4:30 until after midnight. One witness, Petitioner's ex-wife, also testified at Petitioner's state

[11] Notably, in Ying Stafford's brief for Mr. Burke, she claimed that all of these witnesses were incredible, which makes one wonder why the defense team would not put Mr. Burke on the witness stand to refute these baseless claims from highly interested witnesses.

trial – Petitioner subsequently was acquitted of the Gebert murder.

G. The Government's Rebuttal Case

The government did not call one witness in their rebuttal case. Instead, the government presented the sentencing minutes of Petitioner's narcotics conviction in the 1980's.

H. The Trial and Verdict

On June 1, 2012, after several weeks of trial, the jury began their deliberations. On June 8, 2012, the jury found the Petitioner guilty of all four counts of the Indictment (Tr. 2456-2460).

Motions for acquittal under Fed.R. Crim.P. 29 and a motion for new trial Fed.R.Crim.P. 33 were made after the government and defense rested (Tr. 2461).

I. Sentence

On January 25, 2013, Petitioner was sentenced to life imprisonment plus ten years, as detailed above.

J. Post-Conviction Litigation

On May 28, 2013, Petitioner filed his direct appeal under 2nd Circuit docket number 13-501. See Docket No. 26 of Docket No. 13-501. His direct appeal was drafted by attorney Ying Stafford. The Government responded to Petitioner's appeal on August 27, 2013 and Petitioner replied, via his counsel, Ying Stafford, on September 25, 2013. See Docket No. 13-501, docket entries 52 & 68. After oral argument, the Second Circuit affirmed Petitioner's conviction. See Docket No. 13-501, Document 92.

On October 2, 2015, Petitioner filed a petition, affidavit and memorandum in support of his motion to vacate his conviction pursuant to 28 U.S.C. 2255. In

Petitioner's motion, he argued that he wanted to testify in his defense, and he received ineffective assistance of counsel when his attorneys failed to put him on the witness stand to support his position that he had withdrawn from the conspiracy that the Government alleged he was involved with.[12] Significantly, Petitioner pointed out that none of his attorneys informed him that it was his decision, alone, whether to testify.

As a significant point in the case at bar, Petitioner claimed that his motion to vacate his conviction was timely as Ying Stafford, his appellate attorney, had filed his petition for certiorari before this Court was filed on October 6, 2014 under United States Supreme Court docket number 13-9973.

On January 8, 2016, the Government responded to Petitioner's motion. The Government argued that Petitioner's motion to vacate was not timely[13] and his lawyers were not ineffective. In support of the Government's application, the Government attached an affidavit from Richard Jasper and Ying Stafford. Ying Stafford stated that she was appointed to represent Petitioner and was in charge of the defense case, which included Petitioner's alibi defense. Ms. Stafford stated that she never heard Petitioner state that he wanted to testify but never stated in her affidavit that she told Petitioner it was *his decision to testify*. Richard Jasper's

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[12] Mr. Burke also argued that he was denied effective assistance of counsel when his trial attorneys did not object to certain arguments on summation. This argument was apparently argued on his direct appeal and, therefore, procedurally barred.

[13] The Government refuted Petitioner's claims that he filed a petition for certiorari to the Supreme Court and conducted a PACER search of Supreme Court docket no. 13-9973, cited by Petitioner. This search revealed that the docket number did not relate to Petitioner, but rather to a petitioner by the name of Zvi Goffer. The Government further searched the Supreme Court's overall docket and it revealed no evidence of any petition filed by Petitioner.

affidavit detailed his representation of Petitioner and that he was not aware that Petitioner wanted to testify. He also stated that it was a defense team decision to not have Petitioner testify. Like Ms. Stafford, Mr. Jasper never stated in his affidavit that he informed Petitioner that the decision to testify was his decision alone.

On March 30, 2016, Petitioner filed an affidavit in support of his motion to vacate. In Petitioner's affidavit he stated that he was unprepared to testify during his pretrial hearing and that he had stated to his trial counsel he wanted to avoid that same mistake. Yet, no one came to see him the weekend before he would have testified on his own behalf. Additionally, no one informed him that it was his decision to make as to whether to testify. Petitioner ended his affidavit stating that Ying Stafford was aware that he wanted to testify.

Petitioner also filed a memorandum in further support of his arguments. In his memorandum, Petitioner made it clear that the District Court should order an evidentiary hearing to resolve issues of fact.

On January 30, 2017, Petitioner wrote the District Court providing evidence that his appellate counsel created a fake letter from this Court with a fake index number indicating that she filed Petitioner's petition for certiorari to this Court.

On April 8, 2019, Petitioner wrote the District Court and the 1st Department Grievance in New York State, among other entities. In that letter Petitioner detailed how Ms. Stafford failed to file his petition to this Court *and* covered up her failure to file the petition by creating a fake docket number that was linked to a different case.

On July 23, 2020, Petitioner, by way of the undersigned, filed a supplemental memorandum adopting Petitioner's arguments in his motion to vacate and arguing

that Ying Stafford's presence on the defense team caused a conflict of interest. In support of that claim, Petitioner submitted Ms. Stafford's response to Petitioner's complaint to the Grievance Committee and claimed that she was terrified of Burke because of his "behavior and reputation". That letter was entitled as Exhibit A in Petitioner's supplemental motion to vacate and was sealed, as it was marked Personal and Confidential. Interestingly, Ms. Stafford did not dispute Petitioner's claims that she failed to file his petition and created a fake document and docket number in order to have him believe that she actually filed his petition of certiorari to the Supreme Court.

On September 15, 2020, the Government responded to this memorandum. Petitioner replied on September 29, 2020.

The District Court denied Petitioner's motion and granted certificate of appealability. (Appendix B) Notably, while the District Court did not find that Mr. Burke met the standard set in Strickland v. Washington, the Court did not address Petitioner's conflict of interest claims. Petitioner then filed a timely notice of appeal. (Appendix B).

The Second Circuit affirmed the District Court's decision. The Second Circuit held that a conflict of interest did not exist because the fear and intimidation that Ms. Stafford suffered occurred during Petitioner's appellate proceedings. The Second Circuit also found that defense counsel was not ineffective for failing to call Petitioner as a witness at trial. Finally, the Second Cirucit held that the District Court did not abuse its discretion when it did not conduct a hearing. (Appendix A)

VI. REASONS FOR GRANTING THE WRIT

This Court's intervention is necessary to first clearly define when defense counsel should call defendants during RICO and conspiracy cases when there is a withdrawal defense, but most importantly, address the clear conflict of interest in this case. No attorney in the shoes of Ying Stafford should represent a client. Her actions during her representation and after showed that not only did she fear Petitioner, but also that she was completely willing to put her interest above his.

POINT I

AN ACTUAL CONFLICT OF INTEREST EXISTED BECAUSE YING STAFFORD WAS AFRAID OF HER CLIENT AND FAILED TO INFORM ANYONE OF THIS FEAR UNTIL 2019.

In the present case, one of Petitioner's attorneys at trial, Ying Stafford, failed to apprise Petitioner, the rest of the defense team or the District Court that she felt threatened by and afraid of Petitioner and, therefore, could not continue with her representation of Petitioner. Ying Stafford had no business representing Petitioner at all, let alone her position as the person in charge *of Petitioner's defense*. Her representation violated Petitioner's right to counsel under the 6th Amendment. Cuyler v. Sullivan, 446 U.S. 335 (1980).

Effective assistance of counsel is defined as "representation that is reasonably competent, conflict-free and single-mindedly devoted to the client's best interests." People v. Longtin, 92 N.Y.2d 640, 644 (1998); see also Wood v. Georgia, 450 U.S 261, 271 (1981) (holding that the Sixth Amendment guarantees conflict free counsel); Holloway v. Arkansas, 435 U.S. 475, 482 (1978) (holding same); United States v. Jiang, 140 F.3d 124, 127 (2d Cir. 1998)(holding same); United States v. Levy, 25 F.3d

146, 152 (2d Cir. 1994)(holding same)).

A claim that counsel was conflicted is in essence a claim of ineffective assistance of counsel. United States v. Stantini, 85 F.3d 9, 15 (2d Cir. 1996); Glasser v. United States, 315 U.S. 60, 70 (1942). Generally, a defendant who claims ineffective assistance of counsel must show prejudice to prevail upon this claim. Strickland v. Washington, 466 U.S. 668, 686 (1984).

"A situation in which the attorney's own interests diverge from those of the client presents the same core problem presented in the multiple representation cases: the attorney's fealty to the client is compromised. Therefore, courts have held that the presumption of prejudice set forth in Cuyler applies as well to situations where the personal interests of the attorney and the interests of the client are in actual conflict." United States v. Fulton, 5 F.3d 605, 609 (2d Cir. 1993) (See, e.g. United States v. McLain, 823 F.2d 1457, 1463-64 (11th Cir. 1987) (actual conflict when counsel, unbeknownst to defendant, had been under investigation for bribery); United States v. Ellison, 798 F.2d 1102, 1106-08 (7th Cir. 1986) (actual conflict between lawyer and client when pursuit of client's interests would lead to evidence of attorney's malpractice)).

In the instant case, over six years after Petitioner's trial, his attorney, Ying Stafford admitted that she was terrified of her client because she was subjected to "fear and intimidation...during her representation of [Petitioner] based on his behavior and reputation..."[14] While there is no case on point with regard to an

[14] While Ms. Stafford did not write the response, she verified it in a separate letter.

attorney's fear[15] of his or her client, the New York Rules of Professional conduct are very clear. Ms. Stafford was required to withdraw her representation of Petitioner under the New York Rules of Professional Conduct, RPC 1.7 and 1.16. Attorneys are advised to do such by the New York State Bar Association Committee on Professional Ethics. See New York Ethics Opinion 592, 1988 WL 236150.

Specifically, N.Y. RPC 1.7(a)(2) is directly on point in the case at bar:

> (a) Except as provided in paragraph (b), a lawyer *shall* not represent client if a reasonable lawyer would conclude that either:
> (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other *personal interests*. (emphasis added)

The necessity of the attorney's withdrawal of her representation is only rebutted in certain instances:

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.

See N.Y. RPC 1.7(b)(1-4).

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[15] The Government and Second Circuit pointed to United States v. John Doe #1, 272 F.3d 116 (2d Cir. 2001) but that case is inapposite. In that case, the defendant is the party that created the conflict by threatening his attorney. In the case at bar, Ms. Stafford alleged no threat by Petitioner – the first time that Petitioner found out that Ms. Stafford was afraid of him was through her letter to the Grievance Committee. She was "afraid" of him because of his reputation and decided to represent him through his appeals process. She lied to Petitioner and then attempted to use Petitioner, amongst others, as a scape goat as to why she lied to Petitioner. She, frankly, through her filing in the Grievance Committee, has established prima facie evidence that she will lie to protect her interests and thinks very little of her client's interest.

Here, elimination of provisions 2 and 3 can easily done. Provision three does not apply. Provision two and one, in the instant case, can be eliminated under the standards set forth in Cuyler and Strickland as they are interrelated. If Ms. Stafford's ability to represent Petitioner was affected by her fear, she was required to recuse herself because her representation of Petitioner was a violation of Petitioner's Sixth Amendment right to effective assistance of counsel. Clearly, by Ms. Stafford's letter, she admitted that Petitioner's behavior and reputation caused her fear and intimidation. Finally, we know that Petitioner had no clue about this fear and intimidation until July 19, 2019. As such provision four does not apply. Ms. Stafford was clearly required to recuse herself under NY RPC 1.7.

But that is not the only Rule of Professional Responsibility that Ms. Stafford was required to recuse herself under. Under RPC 1.16(b), an attorney shall withdraw from representation of a client when:

> (1) the lawyer knows or reasonably should know that the representation will result in a violation of these Rules or of law; (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; (3) the lawyer is discharged; or (4) the lawyer knows or reasonably should know that the client is bringing the legal action, conducting the defense, or asserting a position in the matter, or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person.

Here, Ms. Stafford's representation of Petitioner violated both provisions one and two of RPC 1.16(b). By way of her letter, she admitted that her fear of Petitioner affected her representation of him, so much so, that she created a fake letter to fool him into believing that she filed his petition of certiorari in the United States Supreme Court. She was *required* to either not take him on as a client or withdraw

her representation of him. And most certainly, she should not have been involved in his defense at trial.

The plain language of these statutes dictates that Ms. Stafford was required to withdraw from her representation of Petitioner immediately and not represent him throughout trial and his appellate process. See King v. Burwell, 576 U.S. 473, 486 (2015) (citing Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 251 (2010).

While it is Petitioner's position that an actual conflict did, in fact, exist in this case, Petitioner argued both before the District Court and the Second Circuit that he was entitled to a hearing, as he presented prima facie evidence that a conflict existed. Pham v. United States, 317 F.3d 178, 186 n.2 (2d Cir. 2003) (Sotomayor concurring) ("wholesale rejection of petitioner's affirmations in support of the 2255 petitioner is improper where there might be other evidence corroborating the petitioner's contentions. The resolution of credibility determinations against a petitioner based solely on the district court's previous interactions with petitioner...rather than on a full evidentiary record concerning material issues, would be an abuse of discretion"); United States v. Levy, 25 F.3d 146, 153 (2d Cir. 1994) (This Court has mandated that "[w]hen a district court is sufficiently appraised of even the possibility of a conflict of interest," as the Court is here, the "court must investigate the facts and details of the attorney's interests to determine whether the attorney in fact suffers from an actual conflict, a potential conflict, or no genuine conflict at all").

POINT II

THE ACTUAL CONFLICT IN THIS CASE IMPAIRED THE ATTORNEY HANDLING PETITIONER'S DEFENSE AND CAUSED THE DEFENSE TEAM TO IGNORE A PLAUSIBLE DEFENSE STRATEGY: PETITIONER'S TESTIMONY

WITH REGARD TO HIS STATE OF MIND

As was stated above, Petitioner has presented evidence, from Ying Stafford's own mouth, that her representation of Petitioner was compromised and in violation of NY RPC 1.7 and 1.16. Once the attorney's conflict of interest is established, which it has here, "prejudice is presumed, for courts will not enter into nice calculations as to the amount of prejudice resulting from the conflict." United States v. Schwarz, 283 F.3d 76, 90 (2d Cir. 2002); quoting People v. Mattison, 67 N.Y.2d 462, 468 (1986) (internal citations omitted), see also People v. Gomberg, 38 N.Y.2d 307 (1975).

A defendant claiming he was denied his right to conflict-free counsel based upon an actual conflict need not establish a reasonable probability that, but for the conflict or deficiency in counsel's performance, the outcome of the trial would have been different. Rather, he need only establish (1) an actual conflict of interest existed, and it effected counsel's performance; and (2) that some "plausible alternative defense strategy or tactic might have been pursued." United States v. Rivernider, 828 F.3d 91, 109 (2d Cir. 2016) (citing United States v. Davis, 239 F.3d 283, 286 (2d Cir. 2001); United States v. Levy, 25 F.3d 146, 157 (2d Cir. 1994)).

Here, Petitioner met both prongs – Stafford should have recused herself. The second prong of the "conflict analysis" is plainly met here: **Petitioner had a plausible defense strategy or tactic that should have been pursued.** Petitioner should have testified in such a hotly contested case wherein his state of mind was key, and it was Petitioner's burden to prove his withdrawal.[16] Smith v. United States, 568 U.S. at

[16] This Court should remember that the jury deliberated for roughly a week.

110-112. Ying Stafford's involvement, by her own admission, tainted the defense team's opinion of Petitioner, which is why he did not testify.

Stafford's feelings lie at the center of the conflict. She was *biased against her own client because of her fear*. Interestingly, Stafford's opinion of Petitioner streamlines with her lies regarding her failure to file his petition to the Supreme Court and, in an effort to cover up her lies, she created fraudulent documents that Petitioner submitted to the District Court. Ms. Stafford put her interests above her clients', or, at the very least, Petitioner's. She believed Petitioner was a murderer and liar – why would she support putting him on the witness stand. Her affidavit rings hollow as self-serving, just as her letter to the Grievance Committee. There is no question that her performance during the trial was affected.

As far as Petitioner, he had no idea. Neither did the Court. When "the court is sufficiently apprised of even the possibility of a conflict of interest, the court has an inquiry obligation, and must disqualify the attorney or obtain a waiver from his or her client if the inquiry reveals that an actual or potential conflict exists." Rivernider, 828 F.3d at 109 (quoting United States v. Armienti, 234 F.3d 820, 823 (2d Cir. 2000) (alterations, citation, and internal quotation marks omitted).

The fact that such a crucial decision was left in the hands of someone who was compromised needed to be explored *at the time the decision was made*. Mickens v. Taylor, 535 U.S. 162 (2002); Cuyler v. Sullivan, 446 U.S. 335 (1980).

The only way to satisfy Petitioner's right to due process is to, at the very least, grant a hearing or vacate the conviction and order a new trial. The Second Circuit failed to do either.

POINT III

DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO PUT PETITIONER ON THE WITNESS STAND TO EXPLAIN HIS STATE OF MIND

Even by the Second Circuit's standards, which it failed to follow with regard to Petitioner, the right to testify is "personal" and "the decision to testify belongs to the defendant and may not be made for him by defense counsel." Brown v. Artuz, 124 F.3d 73, 78 (2d Cir. 1997). Petitioner has gone on record to swear that he wanted to testify at the trial. Only to be told that it would impose a risk to the case, and defense counsel unilaterally decided Petitioner would not be testifying. Petitioner simply wanted the lawyers to prepare him to testify, so the risk would be minimum. Instead, Petitioner was told he would not be taking the stand. Therefore, Petitioner's defense that he had withdrew from organize crime went by the wayside.

The law is well settled that the Petitioner alone had the right to decide whether to testify or not. Rock v. Arkansas, 483 U.S. 44, 51, 52 (1987); Farretta v. California, 422 U.S. 806, 819, n.15 (1975). The trial attorneys' failure to make it certain Petitioner knew it was his choice, whether he should testify or not is a violation of that right. Then the only question left to decide is whether the attorneys erred to such a degree that Petitioner is entitled to a new trial.

Indeed, the results of the proceeding would have been different. Had Petitioner took the stand at trial and swore he had withdrew from organized crime -- the conspiracy -- the jury would have evidence to evaluate and determine its probative value. Without Petitioner's testimony, the jury had no direct evidence from the "horse's mouth" that Petitioner had withdrew from the organization and no longer

was doing their bidding. The jury was led to believe that Petitioner was still operating as a Gambino soldier during the times mentioned in the indictment. Even though the truth was otherwise.

In a case where all the evidence against Petitioner amounted to the testimony of cooperating witnesses, Petitioner's testimony regarding his state of mind and the affirmative actions he took was paramount as to when he withdrew from the conspiracy that he was charged with being involved in. Timing *was critical*. The burden of proof Petitioner withdrew from organized crime rested on Petitioner's shoulders. See Smith v. United States, 568 U.S. 106, 110-112 (2013). No reasonable attorney would raise the affirmative defense then fail to present material evidence to meet its burden.

As stated by Petitioner in the District Court papers, had he been allowed to testify he would have been able to explain to the jury that he withdrew from the charged RICO conspiracy five years before he was indicted on these charges. He would also have been able to demonstrate how he became the scapegoat for John Gebert's murder, even though he was acquitted in state court of the Gerbert's murder. Petitioner could have corroborated his alibi witness testimony placing him at their home at the time Gerbert was killed.

He could have also provided evidence as to his state of mind at the time of withdrawal, and the steps he took to withdraw from the conspiracy. Had the jury heard this personal testimony, there is a "reasonable probability" the outcome of the trial would have been different.

Here, the attorneys of record decided on their own not to present the only direct

evidence the defense had due to their failure to prepare Petitioner to testify. The Government's only direct evidence of Petitioner's involvement in the conspiracy he was charged with happened in 1996-1997. Only Petitioner could have provided direct evidence as to when he withdrew from the criminal organization and any conspiracy resulting therefrom.

There is a reasonably probability that Petitioner's testimony would have changed the outcome of the trial. The jury took a week to convict without hearing from Petitioner, had Petitioner testified there is ample reason to conclude the result with have been different. Reasonable probability under Federal Law constitutes a "fairly low threshold." Riggs v. Fairman, 399 F.3d 1179, 1183 (9th Cir. 2005) (citing Sanders v. Rattle, 21 f.3d 1446, 1461 (9th Cir. 19094) (stating that a "reasonable probability" is actually a lower standard than preponderance of the evidence)).

Courts have held that a reasonable probability exist whenever the chances of a different outcome are "better than negligible," United States ex. Rel. Hampton v. Laibach, 347 F.3d 219, 246 (7th Cir. 2003), even if "the chance of acquittal would still be significantly less than 50 percent." Miller v. Anderson, 255 F.3d 455, 459 (7th Cir. 2001). Or that prejudice is shown whenever the possibility of a different outcome is "more than mere speculation." United States v. Berryman, 322 Fed. Appx, 216, 222 (3d Cir. 2009); accord Ouber v. Guarino, 293 F.3d 19, 26 (1st Cir. 2002) (reasonable probability "may be less than fifty percent," so long as it is "substantial"); United States v. Nelson, 921 F.Supp. 105, 120 (E.D.N.Y 1996) (finding that a 33 precent chance amounted to a reasonable probability).

Here, any reasonable person would conclude the affirmative defense in this case

required Petitioner to testify about when he withdrew from the conspiracy. Absent such testimony, the defense could not meet its burden, plain and simple. Petitioner received ineffective assistance of counsel under well-established precedents. He should have been put on the stand to testify as he had every right to do so.

It is a widely accepted by trial attorneys and legal scholars that the most effective means in which to both successfully establish a withdrawal defense and to prevail at trial is for a defendant to testify. For instance, during oral arguments before the United States Supreme Court in Smith v. United States, 568. U.S. 106 (2013) (a case addressing the burden of proof in withdrawal defenses), the late Justice Ruth Bader Ginsberg posed the question to A.J. Kramer, counsel for petitioner on appeal: "What would you — what would you have to produce to get over your threshold of satisfying the burden of production?" Kramer answered: "...the defendant — in most. Cases, I would think the defendant himself would have to testify..."

Petitioner was deprived the only defense he had, the right to testify and explain to the jury the facts. This court should find ineffective assistance of counsel on the record or remand the matter for a hearing to further explore these claims.

POINT IV

PETITIONER'S RIGHT TO DUE PROCESS WAS VIOLATED WHEN HE WAS DENIED A HEARING

Ineffective assistance of counsel claims 'ordinarily' require a hearing, especially when they involve off the record interactions with trial counsel. Chang v. United States, 250 F.3d 79, 85 (2d Cir. 2001). A hearing is also warranted if the motion "set[s] forth specific facts supported by competent evidence, raising detailed and controverted issues

of fact that, if moved at a hearing, would entitle him to relief." Gonzalez v. United States, 722 F.3d 118, 131 (2d Cir. 2013).

Petitioner's sworn allegations contain direct statements that he was not informed by his attorneys that the right to testify was his decision alone to make. That he was never prepped by his attorneys to testify at the trial; that his attorneys prohibited him from testifying at trial. These off the record discussions with defense counsel "cannot be determined by examining the motion, files, and records before the district court." Chang v. United States, 250 F.3d at 85. In such cases, and "[w]here there is a factual dispute, the habeas court must hold an evidentiary hearing to determine the truth of the petitioner's claims." Turner v. United States, 68 F.3d 238 (6th Cir. 1999).

Here, the Government presented sworn affirmations from the attorneys who represented Petitioner at trial and appeal. Nowhere in those affidavits does it say that the attorneys ever advised Petitioner that the decision to testify or not, at the trial was a decision he alone had to make. Although counsel should always advise the defendant about the benefits and hazards of testifying and of not testifying and may strongly advise the course that counsel thinks best, counsel must inform the defendant that the ultimate decision whether to take the stand belongs to the defendant, and counsel must abide by the defendant's decision on this matter. Brown v. Artuz, 124 F.3d 73, 79 (2d Cir. 1997) (emphasis supplied). Thus, "the issue ... is not whether petitioner knew he had the right to testify, but whether he knew that ultimately it was his choice to make, not that of his attorney." Brown, 124 F.3d at 80.

Consequently, on this basis alone a hearing is warranted:

"Unless the motion and the files and records of the

> case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." 28 U.S.C. § 2255 (b). To warrant a hearing on an ineffective assistance of counsel claim, the defendant need establish only that he has a "plausible" claim of ineffective assistance of counsel, not that "he will necessarily succeed on the claim." Armienti v. United States, 234 F.3d 820, 823 (2d Cir. 2000) (quoting United States v. Tarricone, 996 F.2d 1414, 1418 (2d Cir.1993)).

Puglisi v. United States, 586 F.3d 209,213 (2d Cir. 2009).

VII. CONCLUSION AND PRAYER FOR RELIEF

The Circuits need guidance as to how to handle cases where an attorney's fear pervades their representation of a client. Additionally, this Court should address the necessity of a defendant's testimony in cases wherein there is a withdrawal defense.

This Court should grant certiorari to review the Seond Circuit's judgment affirming the District Court's summary denial of Petitioner's 28 U.S.C. §2255 motion to vacate, or grant such other relief as justice requires.

Respectfully submitted,

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