No.

In the Supreme Court of the United States

MICHAEL RAND,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

MICHAEL RAND
Pro Se
20155 NE 38TH COURT
UNIT 3104
AVENTURA, FL 33180
954-758-0495

QUESTIONS PRESENTED

1. Does a criminal defendant establish that he and his trial attorneys suffered from divergent interests requiring the Court to review the plausibility of foregone strategies and tactics linked to the conflict of interest when, as one example, they argue during trial that a current partner of theirs had committed prosecutorial misconduct four years earlier while serving as the USAO's lead AUSA investigating Defendant? Do these facts and circumstances require a knowing and voluntary waiver from both the Defendant and the USAO? Alternatively, are these facts illustrative of an unwaivable conflict of interest?

2. Can a US Attorney's office evade their obligations under *Brady v. Maryland, Giglio v. United States* and their progeny by having a third party conduct witness interviews and then subsequently share the interviews' findings with the USAO (and SEC)? Is the Court required to conduct an in-camera inspection when a defendant makes a plausible showing of Brady materials' materiality and favorability? Finally, ironically similar to defense counsel, do attorneys working in a USAO suffer from imputed conflicts of interest when (a) their supervisor, the US Attorney, clearly suffers from a direct conflict in a matter and (b) defense claims and provides evidence of tortuous acts by the US Attorney and her staff?

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Petitioner's post-conviction appeal was denied by the Fourth Circuit Court of Appeals on August 26, 2016. Rand's writ of certiorari was denied, originating case 3:10-cr-182. The Western District of North Carolina dismissed with prejudice and denied Petitioner's First Amended Motion to Vacate, Set Aside or Correct a Sentence under 28 U.S.C. § 2255 on March 6, 2020. The Fourth Circuit denied his appeal on March 3, 2021 and the Circuit Court's Order to deny Petitioner's Petition for En Banc Rehearing was entered on July 15, 2021. Appendix 1.

JURISDICTION

The Fourth Circuit denied Petitioner's appeal of his denial of the Certificate of Appealability on April 12, 2021 and subsequent denial of En Banc rehearing on July 15, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment, Sixth Amendment, Fourteenth Amendment

STATEMENT OF THE CASE

While the underlying indictment allegations involve esoteric subjective accounting estimates, the issues presented in this petition involve uncontested facts and cover inexcusable violations and threats to the most basic and recognized constitutional rights of a criminal defendant – the right to effective counsel free from divergent interests and the right to obtain all materially exculpatory and impeachment evidence. Petitioner claims the lower courts committed plain error in its finding that Petitioner and his counsel did not suffer from divergent interests even though defense counsel concluded, and argued at trial, that a current partner of theirs (in the same office) committed prosecutorial misconduct while the investigating AUSA years earlier. Petitioner also challenges as unconstitutional the Court's finding that inarguably materially exculpatory and impeachment evidence shown to the Court to meet a plausible inference was (a) not subject to in-camera inspection; and (b) the Government had no obligation to disclose such information to the Petitioner at the time of trial.

It is clearly established that the Sixth Amendment right to effective assistance includes the right to representation free from conflicts of interest. *Cuyler v. Sullivan*, 446 US. 335, 348-60, 100 S. Ct. 1708, 64 L. Ed 2d 333 (1980). To establish ineffective assistance of counsel based on a conflict of interest, a defendant who raised no objection at trial must demonstrate that (1) counsel operated under an "actual conflict of interest" and (2) this conflict "adversely affected his lawyer's performance. *Id* at 348. If the petitioner satisfies this showing, "prejudice is presumed and he need not demonstrate a reasonable probability that, but for counsel's conflicted representation, the outcome of the proceeding would have been different. *Woodfolk v. Maynard,* 857 F. 3d 531, 553 (4th Cir. 2017). Defense counsel have an ethical obligation to avoid conflicts and to advise the court promptly when a conflict arises during the course of a trial. An actual conflict exists when an attorney's and a defendant's interests are divergent with respect to a material factual or legal issue or a course of action. *Cuyler,* 446 U.S. at 335, 336. "An actual conflict of interest negates the unimpaired loyalty a defendant is constitutionally entitled to expect and receive from his attorney." Other than discussing adverse effects which the District Court in this case never reached a need to address, the above basically represents the entirety of Supreme Court jurisprudence on whether Rand's Sixth Amendment right to effective counsel was violated due to Wilmer's conflict of interest.

Government disclosure of material exculpatory and impeachment evidence is part of the constitutional guarantee to a fair trial under the Fifth and Fourteenth Amendments. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972). The law requires the disclosure of exculpatory and impeachment evidence when such evidence is material to guilt or punishment. *Brady*, 373 U.S. at 87; *Giglio*, 405 U.S. at 154. Because they are Constitutional obligations, *Brady* and *Giglio* evidence must be

disclosed regardless of whether the defendant makes a request for exculpatory or impeachment evidence. *Kyles v. Whitley*, 514 U.S. 419, 432 (1995). *Strickler v. Greene*, 527 U.S. 263 (1999) held that a *Brady* violation occurs when: (1) evidence is favorable to exculpation or impeachment; (2) the evidence is either willfully or inadvertently withheld by the prosecution; and (3) the withholding of the evidence is prejudicial to the defendant.

Petitioner, a CPA, began serving as Beazer's Primary Accounting Officer in June 1998 when the publicly owned Company consisted of less than 20 operating divisions with approximately $1 billion in revenues. The Company's geographic footprint and its revenues grew dramatically (sixfold) through organic growth and acquisitions over the next several years mirroring the growth of other public homebuilders. Each of the divisions maintained its own books and records on the Company's centralized information systems and reported results monthly to Rand and other corporate personnel who had access to all divisional financial statements and data.

Briefly, the primary charges Rand faced in the second trial were that he conspired with others to intentionally overstate reserves (estimates of future homebuilding and land development costs) from 2000 to 2005 in order to manage earnings relative to consensus, and that in 2006 he used excess reserves to meet consensus targets.[1] Rand's defenses included that the early period adjustments to increase reserves were needed on a consolidated basis since many divisions had historically understated reserves, that the adjustments to increase certain homebuilding reserves were

[1] Rand was found innocent of lying to banks and certain obstruction-related counts by the jury after the first trial. The Prosecution dropped a substantive fraud count and an obstruction-related count immediately before the second trial after Rand was given access for the first time to evidence that proved alleged email deletions had not taken place between he and executive officers of the Company pertaining to accounting matters at the heart of the investigation.

in fact supported by the actual loss history, that the financial statements were fairly stated in accordance with Generally Accepted Accounting Principles ("GAAP") and Beazer policy, and that the auditors were aware of and signed off on each basket of reserves performing their own independent inquiries and analyses each period, and that the alleged adjustments themselves were not quantitatively material.

Rand's position at trial was that his responsibility as Chief Accounting Officer overseeing up to 40 divisions was to get the consolidated financial statements reasonably stated. The Government's position articulated through testimony of witness Richard O'Connor was that Rand's responsibility was to get each (individual) division's financials accurate.

In addition, the Government also alleged that Rand entered into a secret side agreement with a counterparty to model sale leaseback agreements which allegedly had the effect of overstating fiscal 2006 revenues and net income. Rand's defense to this claim was both parties were not contractually obligated under these discussions and that the legal agreements contained a merger clause that the entire agreement was included therein in writing. Counsel for the counterparty who drafted the agreement testified on Rand's behalf as to the intent of the parties. The jury verdict form did not identify which (or both) of the conspiracies they found Petitioner guilty of.

In March 2007, a little over a year after the start of the real estate slowdown that resulted in a housing crash in 2008, and weeks after newspaper reports and homebuyers accused Beazer of mortgage fraud, a Charlotte, NC federal grand jury issued a subpoena to Beazer requiring the Company to retain all documents related to mortgages and home sales. Beazer's Audit Committee retained the law firm of Alston & Bird with offices in Atlanta and Charlotte to conduct an internal investigation. The lead attorney from Alston Michael Brown (who suffered from an undisclosed conflict of interest of his own) interviewed Rand during the investigation and Rand told

Brown that he had not "destroyed or deleted any documents since the investigation begun." Subsequent to this interview, Alston learned of email deletions Rand had made between March 28, 2007, and March 30, 2007, prior to Rand's receiving for the first time (and opening) a document hold notice from Beazer inhouse counsel on the afternoon of March 30, 2007. At a second interview in late June 2007, Rand admitted to Brown that he likely deleted emails from certain custodians on the day he received a document hold notice from in-house counsel but could not recall which calendar day the notice was sent. After this interview, Brown received notification from their forensic expert that Rand had deleted thousands of emails to and from Company executives regarding sensitive accounting matters during the week before March 30, 2007 and reconvened with Rand and his counsel to ask about these deletions which Rand did not recall making. Alston recommended to Beazer's Audit Committee that Rand be terminated due to these undisclosed deletions and Rand was terminated the next day. In addition, Alston initially concluded and communicated to Beazer that Rand continued to delete emails in his office several hours after opening the hold notice. However, Alston and their experts erred on both accounts – although Rand was charged and convicted of these executive email deletions at his first trial before finally gaining access to electronic media just before his second trial to prove his innocence.

Alston interviewed close to one hundred current and former employees from May 2007 to June 2008 as part of its Audit Committee mortgage-related investigation which expanded to include possible accounting errors and/or irregularities after emails between Rand and his bosses and Rand and divisional accounting subordinates prompted an investigation into earnings management. As testified by Brown during Rand's first trial (Tr.1 pp 484-485), Alston's role was to "meet with the Government, and to determine the scope of the government's investigation. To try to talk with the Government about their concerns or any information they could give us about their concerns or their interests. And then

to conduct an internal investigation and to cooperate with the Government. That is, to negotiate with the Government for some limitations to the subpoena. And then to do an internal investigation and provide information back to the USAO and the FBI about the items that we had investigated." In the second trial, Brown, again testified about his interviews with Rand and on cross examination claimed attorney-client privilege in explaining to the Court why he refused to meet with Rand's attorneys to discuss Alston's interviews and other matters as Wilmer had requested (Tr 2. P. 687).

As memorialized by Beazer Attorneys Cahill Gordon in a Confidential Memorandum dated June 8, 2008 (the "Memo"), provided to Rand in discovery in his SEC Civil Proceedings, Alston made no fewer than ten presentations to the DOJ and SEC regarding the approximate one hundred interviews they conducted. The Memo also referred to the breadth and depth of responses to requests fielded by Cahill. Contrary to the Government's core allegation (that Rand conspired to perpetrate a cookie jar fraud by overstating reserves from 2000 to 2005), the interviewees, according to the Memo, stated they believed their accounting approach was appropriate. The Memo's wording specified Alston presented a compendium of exculpatory documents and Alston concluded no other executives were complicit.

Rand also received in discovery in the parallel SEC civil proceeding Deloitte audit workpapers containing snippets of the interviews with accounting and executive personnel including interviews of several Government witnesses who testified. These statements to Alston, made after each received Miranda warnings, were completely antithetical to testimony given at both/each trial. During the 2007 and 2008 Alston - conducted interviews of the Company's divisional and corporate accountants and executives, alleged unindicted coconspirators among them, provided explanations as to why their (and Rand's) accounting for reserves was reasonable, in accordance with US GAAP and Company policy and reflected a lack of intent to mislead. In addition, the witnesses explained

that the "targets" the USAO and Alston deemed to be illegitimate or nefarious were lawful.

In April 2008, Rand and several of his then attorneys attended a reverse proffer presentation made by Martens. Rand presented to Wilmer (and ultimately Wilmer in turn presented at trial), how Martens made several false representations regarding the forensic evidence against Rand. Subsequent to the reverse proffer, Rand made roughly nine proffer presentations himself (with attorneys present) to Martens and the USAO, SEC and FBI. Due to Wilmer's conflict, Rand's attorneys never interviewed any of these meetings' attendees despite Rand having received 302s of these proffers he insisted were inaccurate and unreliable because (a) Rand had not made many of the statements claimed and (b) several of the statements Rand did make were taken out of context or the wrong question was documented.

Several months before Rand was indicted in August 2010, Anne Tompkins, an Alston Charlotte Office partner who participated in Alston's Beazer engagement, was appointed US Attorney in the Western District of North Carolina ("WDNC"). Thus, Ms. Tompkins went from representing Beazer against the WDNC USAO to overseeing the WDNC USAO and her subordinates' investigation of Rand – an investigation premised itself on faulty forensic data which led directly to Rand's (wrongful) termination and one in which she and her firm concluded (and presented to the DOJ and SEC) that no executives other than Rand were complicit. However, these same executives (none of whom testified at Rand's trial), and divisional accountants became unindicted co-conspirators according to a bevy of hearsay documents introduced during trial and according to her Prosecution Team's Closing Argument.

Petitioner's first trial attorneys requested the original Alston interview memorandums and presentations before the first trial in a Rule 17 (c) subpoena. Wilmer sent correspondence to the USAO in January 2014 requesting the same. The USAO

communicated in writing to Wilmer they complied with all Brady obligations and had provided the presentations earlier to Rand's first trial counsel. The USAO also confirmed during trial to the Court they had complied with all *Brady* and *Giglio* obligations. However, Rand avers the documents at issue have not been produced to date, the Government has not shown the Court or Rand otherwise, and the District Court did not request an in-camera inspection of the material sought to review the documents' materiality and favorability. Subsequent to trial, the USAO changed course and claimed privilege under *Upjohn Co. v. United States,* 449 U.S. 383 (1981) with respect to these very same documents in their response to Rand's 2255 Petition ignoring the Fourth Circuit's finding in *In re Martin Marietta Corp.*, 856 F.2d 619 (1988) in which the Court concluded that attorney client privilege was waived as to all non-opinion work product when disclosures made with an express assurance of completeness were made to adversarial parties in a direct attempt to settle controversies.

After successfully handling Rand's first trial appeal, Rand engaged Wilmer in September 2013 to represent him in a second trial, initially slated for April 2014, but delayed until July 2014. Wilmer was of course largely aware at this time of Rand's defenses prior to being formally engaged due to their representation of him the previous 21 months in the appellate matter. They were inarguably aware of the reverse proffer session misrepresentations made by AUSA Martens, the contested 302 versions of Rand's alleged confessions, accusations of witness intimidation and coercion against Martens and AUSA Meyers supported by affidavits from attorneys, and ongoing claims for Brady material which under ethics rules should have been provided "reasonably promptly after is discovered" – thus Martens should have provided Rand (at least) the exculpatory documents sought shortly after indictment in 2010 and the impeachment material a "reasonable time before trial" according to The United States Department of Justice Manual Title 9 Section 5.001 Policy Regarding Disclosure of Exculpatory and Impeachment Information.

Wilmer's lead attorney Brent Gurney provided Rand an acknowledgement letter in October 2013 which is part of the record in this matter (See Exhibit to Gurney Affidavit Included in the Government's Response to Rand's Habeas Petition). Salient excerpts are reproduced below:

- "I am writing to memorialize our conversations concerning Matthew Martens having recently joined WilmerHale as a partner".

- "We believe that we can continue to represent you competently and mount a vigorous defense. We will of course establish a Chinese Wall between your defense team and Martens".

- "However, you previously indicated that you might like to call Martens as a witness or file motions directed at his conduct. As we discussed, we do not think that attacking Martens' conduct personally would be a wise strategy and in your best interest. What we expect to do, and would be willing to do, depending on the evidence, is attack the conduct of the FBI and US Attorney's Office generally, argue that the Government threatened and intimidated you, caused you to believe that you were guilty when you weren't, did not provide you with all the documents that you should have had when you proffered to provide an accurate account, inaccurately brought charges when they shouldn't have, misled you into believing you deleted certain emails when you didn't, and that the case should never have been brought. Again though, we don't see any basis for singling out Martens and/or any benefit from doing so."

- "However, as I indicated during our phone conversation after reviewing the applicable ethics rules, we do not believe that we would be permitted to represent you at trial if you sought to call Martens as a

witness. More broadly, we are not comfortable representing you if your strategy includes attacking Martens, directly or indirectly"

- ".... If the Government were to call Martens as a witness, we would not feel comfortable cross examining him. We think we could probably remain in the case at that point, but co-counsel would have to handle the cross examination of Martens."

- "We know that you have strong feelings about the prosecutors and how the case should proceed, and we feel strongly that you should have 100% confidence in your trial counsel".

- "I understand you have in fact obtained independent legal advice and after considering the matter carefully, have concluded that you would like Wilmer to continue representing you subject to the considerations described above. If that is correct, I would appreciate it if you would confirm your informed consent to our continued representation of you by signing this letter." This self serving statement was not true.

Petitioner submits this letter could not have and did not comply with precedent case law waiver requirements.[2] However, the Court ruled that Wilmer gave notice to Rand of

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[2] A waiver is only knowing and intelligent if made with "sufficient awareness of the relevant circumstances and likely consequences," *Brady v. United States*, 397 U.S. 742, 748 (1970), and as such, a defendant must know the basis for, and potential consequences of, his chosen counsel's alleged conflict in order to make an "intelligent choice" whether to waive the conflict. *United States v. Duklewski*, 567 F.2d 255, 257 (4th Cir. 1977); see also *Hoffman v. Leeke*, 903 F.2d 280, 287 (4th Cir. 1990) ("A defendant cannot knowingly and intelligently waive what he does not know."). Beyond Wilmer's inability to call Martens as a witness, Rand was not apprised of many additional consequences - amongst them their inability (or refusal) to interview other witnesses to the proffer sessions, and arguably their inability to call Rand to testify and uncloak the identity of their conflicted associate.

its potential conflict and the Court relied on Wilmer's representations in the letter and thus the letter sufficed as a valid and knowing waiver even though the Court did not specifically rule as such. The district court relied on Wilmer's unsworn representations in the letter to Rand that they could provide competent counsel and thus in effect the letter sufficed. Notably Rand adds that trial counsel Brent Gurney submitted a declaration the Government included in its response to Rand's 2255 Petition and this declaration did not in any way address or deny Rand's claims of Wilmer's conflict.

The Government's second trial presentation with respect to the core accounting charges was similar to the first trial (except for the additional rebuttal testimony of Rand's alleged confession by an FBI agent present at his proffers Rand claims were made under duress and misrepresentation) with a handful of fewer witnesses due to dropped charges – substantive fraud was charged in the first trial. However, the Government's trial presentation with respect to the conspiracy and wire fraud charges relied heavily on the testimony of Richard O'Connor, a divisional accounting officer who testified as a lay witness that Rand provided him instructions to overstate certain of his divisional reserves versus what was required under US GAAP. No accounting expert testified for the Government nor were actual loss analyses presented versus the amounts the Company reported. The Government's case also significantly hinged on the meaning and interpretation of hearsay-exception admitted business records and emails to and from alleged co-conspirators who were not called to testify.

During trial and appellate proceedings, the Martens conflict of interest surfaced many times, each without a complete and full disclosure to the Court of such conflict by either party. First, Wilmer Hale claimed the USAO (and Martens indirectly) committed prosecutorial misconduct as recognized in the District Court's Order (see p. 12 - "The defense argued that the false deletion accusations constituted material inducement of Petitioner's proffer statements and that the issues are

prosecutorial misconduct") after Gurney told the Court "I hesitate to call my colleague (Martens)... say they have engaged in prosecutorial misconduct (Tr. p. 2069))". Secondly, Martens reverse proffer misconduct formed the basis for Wilmer Hale's instructing Rand not to testify and the FBI Agent's version of the Martens-led proffer sessions highlighted the entire Government case. Thirdly, Wilmer's Appellate attorneys referred to Martens' misconduct (without naming him) sixteen times in their appellate filing. Fourthly, the proffer sessions Martens led allegedly containing "confessions" was a government rebuttal argument focal point, and Wilmer did not subpoena or to Rand's knowledge and belief, interview any witnesses to these sessions due to their conflict of interest because any alleged misconduct would have impugned their partner's integrity and had an impact on their own personal interests. AUSA Meyers however went out of his way to make sure neither the Court nor the jury understood or appreciated the depth of Wilmer's conflict when he told the Court in closing arguments, "I guess he meant me" referring to Wilmer's prior claims of prosecutorial misconduct, knowing full well that Wilmer was unable to inform the Court at this juncture about their conflict and unwilling to risk their $10.5 million insurance fee covered by Beazer's insurance.

The second trial jury found Rand guilty of all five counts. After his appeal was denied by the District Court and Circuit Court and his initial writ certiorari petition, Rand raised several arguments in his 2255 including: both conflict of interest and non-conflict of interest-related Sixth Amendment claims including Wilmer's denying Rand's desire to testify; *Napue* violations (for the USAO's allowing false lay witness testimony with respect to the precise accounting rules at issue, *Brady/Giglio* violations regarding the Alston interview presentations and interview notes, and *Jencks* violations. The District Court denied Petitioner's Habeas Petition and denied issuing a certificate of appealability thereby finding that reasonable jurists would not debate whether the petition would have been resolved in a different matter" *citing Slack v. McDaniel,* 529 U.S. 473, 484 (2000).

Rand presented in his habeas petition several clearly plausible trial strategies foregone specifically by Wilmer due to their patented conflict of interest such as their failure to interview any witnesses to the reverse proffer presentation in which (Wilmer argued) their partner allegedly committed misconduct, their failure to interview any witnesses at proffer sessions in which the FBI testified Rand confessed when Rand viscerally denied such claims upon receiving his 302s years earlier, their failure to raise *Brady/Giglio* violations which date back to Martens' tenure at the USAO, and their failure to raise witness intimidation and coercion claims despite an attorney's affidavit claiming such misconduct took place.

REASONS FOR GRANTING THE WRIT

The saying "You (shouldn't) judge a pro se habeas petition without a certificate of appealability by its cover" applies to this Petition. This section offers several exceptional reasons why the Court should grant the writ.

REASON 1 - CRIMINAL DEFENDANTS' BEDROCK SIXTH AMENDMENT RIGHTS RUN A SIGNIFICANT RISK OF BEING COMPROMISED IF THE DISTRICT COURT'S PRECEDENT ARE NOT REVIEWED BY THIS COURT.

In denying Petitioner's Certificate of Appealability, the District Court refused to so much as acknowledge the existence of Wilmer's acute and disabling conflict which was evidenced itself by their letter of acknowledgment. Instead, the lower Court irrationally held, "The record demonstrates that the interests of Petitioner and counsel were not divergent with respect to a material factual, legal issue, or course of action. The defense strategy was to show that Petitioner's proffer statements were induced by false email accusations. Counsel pursued this strategy vigorously but was ultimately unsuccessful. Counsel informed Petitioner that a claim of prosecutorial misconduct with regards to the false deletion accusation was not in his best interest, but that if it was a

strategy he wished to pursue, he would need to seek alternate counsel. Petitioner chose not to do so. Petitioner's after-the-fact disagreement with counsel's strategic decision that was fully disclosed prior to trial and which Petitioner considered with the benefit of independent legal advice, provides no basis for determining that an actual conflict existed."

Preliminarily, since conflict of interests are mixed questions of law and fact (See *Cuyler* at 342), and since there are generally no facts in dispute with respect to the two issues raised, this petition meets the Court's criteria for consideration. The first question presented deals primarily with the District Court's interpretation (and the Circuit Court's affirmation) of Supreme Court precedent dealing with what constitutes divergent interests or a struggle to serve two masters, which if present, and if accompanied by adverse effects, supports the finding of an actual conflict of interest, and automatic reversal. *Cuyler* at 345-350. Secondarily, question one addresses whether existing conflict of interest Supreme Court and lower court precedent is applicable to conflicts other than those of the multiple representation variety, i.e., imputed conflicts and concurrent personal interest conflicts. This is particularly important because the lower Court's failure to address Rand's trial and appellate counsel's imputed and personal interest conflicts in its Order, and its and the Circuit Court's failure to even hold an evidentiary hearing, was tantamount to a court's finding of irrelevance with respect to these other conflict types.

Rand presented in his Habeas filings and in his Petition for Rehearing several examples of where Circuit Courts have found actual conflicts of interest (and thus by Cuyler precedent divergent interests) in several factually similar, and in other less overt circumstances. "The point is not whether Wilmer's obligation to Rand may, with the benefit of hindsight, be technically negated. Rather, the point is whether Wilmer compromised its duty of loyalty and zealous advocacy to Rand by choosing between or attempting to blend the divergent interests of their partner and current client. See *Strickland v.*

Washington, 104 U.S. 2064-67 (1984).

Wilmer's conduct in this case should alarm the Court. Their accepting representation of Rand, knowing that a partner in their firm committed several acts of misconduct central to their client's defense, some accusations presented to the court, some not, but never disclosing to the court the identity and nature of their conflict, and never remotely adequately disclosing to their client the risks and consequences of their conflict, violated a number of ethical precepts. Wilmer's conflict was no different than a firm representing both victims' families in a double murder case or representing both an alleged attacker and a victim in an action where the alleged attacker's defense was that the victim first attacked the alleged attacker. A ruling that. Rand and his counsel's interests were not divergent simply belies all logic.

It is apparent from Wilmer's acknowledgement letter to Rand that Wilmer was trying to protect their own partner's Martens' reputation by their reluctance and resistance to impugn his integrity or otherwise attack his earlier prosecutorial actions "We are confident in stating as an initial proposition that if it is true that counsel was trying to protect (a party) in this manner, then counsel was operating under a conflict of interest" *Flores v. Gramley*, ND No 94 C 2076 (ND Ill. 2007). Using the words of Justice Breyer, Wilmer's representation of Rand suffered from the "kind of representation incompatibility that is egregious on its face."

It is also important for Petitioner to aver that he did not engage or otherwise ask independent counsel to evaluate the risks and consequences of Wilmer's conflict or otherwise provide independent legal advice. Rand can and would provide declarations and/or affidavits from the independent counsel referred to in the letter at a future date should the Court be interested in such support. Rand could not have engaged counsel as he did not have the financial wherewithal to even entertain that possibility. An attorney willing to provide advice on Wilmer's conflict in a complex matter such as this case

would have charged a considerable sum.

Yet, despite their reluctance to impugn his integrity, Wilmer still argued at trial that their partner Martens committed prosecutorial misconduct at the reverse proffer and insinuated that he did as well during the proffer sessions in contesting the FBI agent's version of the alleged confessions during cross examination. By requesting specific documents referred to as Brady material in their USAO correspondence before the second trial which was never delivered to Petitioner by the Government before, during or after trial one or two (or to date), Wilmer also believed months before trial that their partner committed yet another form of misconduct, one with potential legal repercussions, thus explaining why these exculpatory documents and impeachment material was not further pursued. Wilmer's knowledge of Brady material known to and received personally by Martens and their failure to pursue a *Brady* type claim (or further pursue the documents themselves otherwise) is another textbook example of divergent interests the drafters of the Sixth Amendment intended to protect criminal defendants from suffering from.

By ruling an actual conflict of interest never existed, the District Court failed to consider Petitioner's demonstration of adverse effect - several clearly plausible strategies not taken directly tied to the conflict. The Court justified this counterintuitive conclusion by relying on (a) the conflicted attorneys' unsworn representations to Rand included in the acknowledgement letter and (b) the fact that Wilmer's conflict argument during trial was unsuccessful. These findings should not justify the Court's conclusion that no conflict existed in the first place, because Wilmer felt compelled to inform Rand of the conflict (without addressing most of the conflict's consequences) and offered to resign precisely due to this conflict. "An attorneys' admission that a conflict existed, if it is clear and explicit, is the type of direct evidence that might overcome the strong presumption that counsel was competent." *Flores v. Gramley*, ND No 94 C 2076 (ND Ill. 2007) citing *Reynolds v. Chapman*, 00-12207.1337, 1347 (11th Cir.

2001). The Court's second line of reasoning is equally problematic. Whether an attorney's argument is successful as it relates to a conflicted matter is inconclusive and irrelevant to a finding of divergent interests, because a review of counsel's performance for a conflict of interest and prejudice includes actions not taken at trial – *Holloway v. Arkansas*, 435, U.S. 475, 490, 98 S. Ct. 1173, 1181 (1978). Rand provided the District and Circuit Courts a plethora of plausible strategies not undertaken directly tied to their conflict.

In addition, Rand presented in his 2255 Petition several (typically) non-conflict oriented examples of ineffective assistance of counsel including their failure to properly cross examine witnesses who testified falsely as to the accounting principles at issue, their failure to introduce evidence of the auditors' conclusions with respect to the accounting estimates at issue as documented in the auditors' workpapers, their undisclosed error which led to Rand's losing his experienced accounting expert, their decision forcing Rand not to testify notwithstanding his repeatedly expressed desire to do so, their failure to submit a properly narrowed subpoena for accounting records, and their failure adequately to confront the testimony about Rand's alleged confession and to introduce evidence of the impact of the government's misconduct during the reverse proffer. Each of these were evaluated by the Court using the higher Strickland standard, but arguably some, if not all these shortcomings were directly or indirectly linked to their untenable conflict of interest.

In a broadly analogous set of circumstances where an attorney switched sides in a case, the Ninth Circuit ruled in *Maiden v. Brunnell*, 35 F. 3d 477 (1994), "Determining whether an attorney (who switched sides) has an actual conflict involves a close examination of the facts of each particular case, with a particular eye to whether the attorney will, in the present case, be required to undermine, criticize or attack his or her own work product from the previous case". The Ninth Circuit's ruling, when applied to the facts of this case, infers a bygone conclusion – that Wilmer suffered from an unwaivable conflict.

Just as the lower Court did not address Petitioner's imputed and personal interests conflict of interest claims, the Court similarly sidestepped Rand's Brady claim. Even though Rand made more than a plausible showing of the unprovided documents' exculpatory and impeachment value, the Court failed to perform an in-camera inspection of the documents as guided by the Supreme Court in *Pennsylvania v. Ritchie,* 480 US 39 (1987). Rand was shocked by the District Court's reasoning, "Petitioner also failed to demonstrate that the lack of any desired evidence was due to any impropriety by the Government" footnoting the Government's *Brady* and *Giglio* obligations. Rand proved to the Court each of the requirements for a successful *Brady* claim the Court ruled in *Strickler* were met: the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued. The Court however, cited, "Moreover, Petitioner has failed to demonstrate a reasonable probability of a different outcome but for counsel's alleged deficient performance with regards to any of the foregoing in light of the strong evidence of his guilt". However, Rand presented third party evidence to the District Court that the Government's key witness, Richard O'Connor, made statements to Alston under oath that were completely antithetical to his trial testimony and would have manifestly impeached his testimony. In addition, Rand has copies of the Deloitte workpaper interview snippets that he can provide the Court further demonstrating the sought documents' undeniable materially exculpatory and impeachment value. The District Court seemingly used the Strickland prejudice standard without even considering the potential (and real) exculpatory and impeachment value of the sought documents. The Court did this by referring to the implied waiver rules instead of assessing the documents' exculpatory value via an in-camera inspection as per *Pennsylvania v. Ritchie* or by holding an evidentiary hearing. The district court ruled Rand did not have a claim to the waived documents at the time of his

second trial "because the SEC investigation occurred later." This statement was false as Rand has argued and presented to the circuit court the DOJ and SEC investigations were handled collaboratively and contemporaneously. But this finding completely ignores the exculpatory nature of the (waived) privileged materials and the government has an obligation to disclose *Brady* material even if disclosed in privileged communications.

Under 28 U.S.C. §2255 "[U]nless 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." as cited in *Armienti v. United States*, 234 F.3d 820 (2d Cir. 2000) In any event, reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong, and as per *Slack v. McDaniel*, Rand's certificate of appealability should have been granted by the Fourth Circuit Court of Appeals.

The Supreme Court ruled in *Kyles v. Whitley*, 514 US 419 (1995) that the burden shifts to the Government they have complied with *Brady/Giglio* obligations when a defendant produces evidence to support inferences of a Brady violation as Rand has done. "Syllogistically, there's a basic line of reasoning that if your attorneys were incompetent in not obtaining the (*Brady*) material, surely you have the right to the evidence to support your claim" The words of Justice Roberts on December 8, 2021, during oral arguments in *Shinn v. Martinez* (citation pending). Wilmer simply did not pursue either the *Brady* material Alston shared with the Government or *Giglio* statements made by Government witnesses - arguably because doing so would question their partner's ethics and integrity. Thus, Rand has a right to support his claim (and of course to the evidence).

Lastly, while the District Court and Fourth Circuit did not address the adequacy of Wilmer's acknowledgement letter as a

knowing and voluntary waiver, its decision impliedly eviscerates the need for a conflicted attorney to ever provide an adequate knowing and voluntary waiver - by elevating the bar to an unreasonable standard to prove divergent interests and by limiting attorneys' risks and consequences disclosure requirements.

Each of these facets of the Fourth Circuit's decision set dangerous precedents and legal workarounds/wrangling to limit Sixth Amendment rights and privileges in the future.

REASON #2. SEVERAL FACETS OF THE FOURTH CIRCUIT COURT DECISION IN THIS CASE CREATE A SQUARE CONFLICT WITH OPINIONS OF OTHER CIRCUITS

While the definition of divergent interests is widely accepted across all circuits and only the Fourth Circuit's ruling in this case cannot be reconciled with precedents of this Court and other Circuits, the Circuit's rejection of a model imputed conflict of interest as a Sixth Amendment violation contravenes other circuits. The Eleventh Circuit held in *Reynolds v. Chapman,* 253 F. 3d 1337 (2001) "It is well established in this circuit that a lawyer's confidential knowledge and loyalties can be imputed to his current partners and employees" citing *Kitchin,* 592 F. 2d 900, 904 (5th Cir. 1979) and *Cox v. American Cast Iron Pipe,* 847, F. 2d 725, 729 (11th Cir. 1988).

In addition, the Fourth Circuit's reliance on Wilmer's acknowledgement letter to conclude that the conflict did not affect counsel's representation sets a dangerous precedent and conflicts with Second Circuit Law. "A court cannot rely on the views of the attorney whose conflict is at issue for an assurance that the conflict is waivable or would be waived. *United States v. Levy,* 25 F. 3d 146, 158 (2d Cir 1994). Indeed, "An attorney who is prevented from pursuing a strategy or tactic because of the canon of ethics, is hardly an objective judge of whether that strategy is sound trial practice. Counsel's inability to make such a conflict-free decision is itself

a lapse in representation". *United States v. Malpiedi*, 62 F. 3d 465, 469 (2d Cir. 1995).

The acknowledgment letter itself for one identified a key strategy Rand was compelled to forego due to Wilmer's conflict – calling Martens as a witness. But equally important, the Fourth Circuit's analysis undermines Sixth Amendment protections by holding Rand to a decision based on a representation that was tainted by their conflict. "A conflicted attorney's advice regarding these decisions is likely to provide a conduit for influence by the attorney's outside interests. The attorney's advice is likely to be influenced, even subconsciously, by the attorney's own interests. And that advice in turn is likely to be extremely influential to the client". Ironically, these words are from an amicus brief submitted by WilmerHale on pages 16 and 17 of their amicus brief in December 2018 in the matter of *Acklin v. Alabama* before this Court.

REASON # 3 - THERE ARE SIGNIFICANT INCONSISTENCIES BETWEEN SEVERAL OF THE AMERICAN BAR ASSOCIATION AND THE STATES' RULES OF CONDUCT, THE FINDINGS IN THIS CASE AND PRECEDENT LAW COVERING LAWYER DISQUALIFICATION

Conflict of interest malpractice claims and related ethics complaints are among the most rapidly increasing types of allegations lodged against lawyers today.

Rand avers that not only did the District Court rule incorrectly on whether Rand and his trial and appellate attorneys had divergent interests under Cuyler, but each party violated not just one or two but several ABA Model Rules of Conduct. For this reason alone, Petitioner makes a compelling argument that the lower courts need additional guidance and direction on what exactly constitutes a conflict of interest requiring either informed waivers or recusal. Moreover, the High Court should take notice that Rand's second trial Attorneys were not a small or unsophisticated group of attorneys, but a large

international firm with hundreds of Ivy League schooled lawyers with a deep understanding of ethics and ABA rules of conduct.

Several of the ABA's Model Rules of Conduct (adopted by North Carolina and most, if not all, fifty states) confirm Wilmer suffered from a conflict of interest Rule 1.7 states a concurrent conflict of interest exists if there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, former client, a third person or by a personal interest of the lawyer. The rule further requires that an attorney obtain informed consent from each affected party. Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of their client.

Wilmer's representation was clearly limited by their relationship with Martens. Wilmer itself represented such in their own letter. Under the above rule, Wilmer was required to inform Rand of the material and reasonably foreseeable ways that the conflict could have adverse effects on Rand. The letter only mentioned their inability to call Martens as a witness and certainly did not address the potentially adverse effects of this restriction.

Rule 1.9 addresses restriction on lawyers to represent another person in the same or substantially related manner in which that person's interests are materially adverse to the interest of the former client unless the former client gives informed consent in writing. Rand recently received representation from Wilmer in writing that Wilmer did not inform the USAO of their conflict nor did they obtain anything in writing from Martens acknowledging the conflict.

Rule 1.11 requires the Government agency for which the former employee worked to give informed consent in writing to the representation, for the attorney to be timely screened and for written notice and certifications of compliance to be

provided to the Agency. The USAO did not provide consent in writing. While Wilmer promised to erect a Chinese Wall, Rand observed Martens in an adjacent conference room next to his team's conference room while his preliminary trial strategy was written on his team's conference room white board during his first visit. No certifications of compliance or other forms of notice were provided to the WDNC USAO.

Although breach of an ethical standard does not necessarily make out a denial of a Sixth Amendment right, 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 US 157, 165-66 (1986).

As a direct result of Wilmer's conflict, the jury and the judge based their decisions on a fundamental misunderstanding of the facts in this case. The acknowledgment letter was evidence that there was a conflict which tainted the proceedings. See *Rubin v. Gee*, 292 F. 3d 396, 402, 405-406 (4th Cir. 2002) granting habeas relief when two attorneys' conflicts of interest "tainted" trial counsel's performance and noting that nothing in the record suggests that the defendant waived or even understood the conflict of interest".

U.S. v. Ross, 33 F. 3d 1507 (11th Cir. 1994) and *U.S. v. Kitchin*, 592 F. 2d 900, 904 (5th Cir. 1979) are oft cited cases where Courts have found circumstances requiring disqualification due to conflicts of interest. The Eleventh Circuit found in *Ross* "If one attorney in a firm has an actual conflict of interest, we impute that conflict to all the attorneys in the firm, subjecting the entire firm to disqualification." Martens, under every set of ethics rules was not allowed to represent Rand in his second trial under all Circuits' jurisprudence. Wilmer would have been disqualified by these Circuits and several others. Petitioner asks the High Court, "How can another Circuit Court rule interests weren't even divergent under the same set of facts and circumstances?'

REASON 4: SEVERAL COURTS HAVE REQUESTED GREATER GUIDANCE ON CONFLICT-OF-INTEREST JURISPRUDENCE FROM THE SUPREME COURT

Beyond the Supreme Court's historical reluctance to guide lower courts whether to use the Cuyler lower standard or the higher Strickland standard for multiple representation conflict of interest cases and the resulting inconsistent treatment amongst the Circuit Courts in this specific area, the Supreme Court has left several key terms such as actual conflict open to different interpretations. For example, the 7th Circuit Court cited in *Reynolds v. Hepp*, 902 F. 2d 699 in 2018 "the Supreme Court has not given lower courts much guidance as to what counts as an "adverse effect" under *Sullivan*, as distinct from a "reasonable probability of a different outcome under Strickland". The Fifth Circuit cited in *Beets v. Scott*, 65 F. 3d 1258, 1265 (5th Cir. 1995), "the precise nature of *Cuyler v. Sullivan's* 'actual conflict' and 'adverse effect' elements is rather vague."

The *Kitchin* Court ruled "In deciding whether the actual or potential conflict warrants disqualification, we examine whether the subject matter of the first representation is substantially related to that of the second." *Kitchin* at 904. The *Kitchin* Court added "It is also true that disqualification is equally appropriate if the conflict could deter the defense attorney from intense probing of the witness on cross examination, to protect privileged communications with the former client or to advance the attorney's own personal interest". Again, Wilmer had significant pecuniary and other personal interests not to attack their partner's integrity rendering Rand without zealous representation. A "significant conflict of interest" arises when an attorney's "interest in avoiding damage to [his] own reputation" is at odds with his client's "strongest argument." *Christeson v. Roper*, 574 U.S. 373 (2015)

REASON #5 - CONTINUED PROSECUTORIAL OVEREACH AND SECOND GUESSING OF REASONABLE JUDGMENTS OF ACCOUNTANTS WHO WORK FOR AND AUDIT PUBLIC COMPANIES HAS NEGATIVE LONG-TERM IMPLICATIONS ON BOTH THE PROFESSION AND INVESTORS' INTERESTS

Harvard MBA Ethics Professor Eugene Soltes reviewed the Government's case against Rand and formed his own opinions and conclusions as to the Governments overreach in, "Why They Do It. Inside the Mind of the White-Collar Criminal," Public Affairs, New York, 2016. - a book used in MBA classrooms. "It turns out an estimate can be both reasonable and fraudulent". Rand asks the Court. Is this even possible?

REASON # 6 THE SUPREME COURT AND THE COURTS IN GENERAL SHOULD USE JUDICIAL REVIEW TO PROVIDE A CHECK AND BALANCE OF THE USAO'S ACTIONS TO DETER IMMORAL, UNETHICAL AND PERHAPS ILLEGAL PROSECUTORIAL PRACTICES

The WDNC USAO went out of its way to lie to the defendant in writing and misrepresenting to the Court whether they complied with their Fifth Amendment obligations. Rand asserts that the USAO's denial of *Brady/Giglio* material was intended to neutralize his ability to raise potential tortuous and/or negligent professional conduct claims against both the USAO and Alston & Bird, the US Attorney's former firm's which led Beazer's and indirectly the DOJ's initial investigation of Rand.

REASON #7 – THIS CASE SHOULD SHOCK THE CONSCIENCE OF THE COURT FOR THE MANY WAYS PETITIONER'S SUBSTANTIVE DUE PROCESS RIGHTS WERE VIOLATED

How could a prominent firm accept a $10.5 million fee knowing that key defenses involve claiming a current senior partner committed prosecutorial misconduct? How could the same firm (and the Government) fail to appropriately disclose

this conflict to the court? How can the firm camouflage the conflict by simply not disclosing the name of the culpable prosecutor and their current partnership with him? How could the same firm fail to obtain informed consent from their client and fail to communicate the risks and consequences of their conflict? How could the firm fail to apprise the Government of the conflict in writing? How could a private attorney conduct an investigation, conclude various individuals' innocence, cooperate with the government and share findings and work product, then be appointed US Attorney and allow, or worse, possibly influence, their staff to claim the same individuals were unindicted coconspirators. How could the same US Attorney allow or worse, possibly influence their staff, not to provide materially exculpatory documents and impeachment material to a defendant while her staff represents to the court all material and prior witness statements have been provided?

In 2021, Rand filed a Bar Complaint with the Washington DC Bar against Wilmer counsel with respect to their ethical shortcomings with respect to their conflict of interest. The High Court should be aware that the DC Bar rejected Rand's complaint writing, "We decline to further investigate this matter. It appears that you raised your concerns before a court, which determined that there was no conflict. We will not second-guess the court's decision". Should the High Court agree with Petitioner on whether Wilmer committed ethical violations or alternatively whether Wilmer suffered from divergent interests from Rand, the Court should realize the dramatic impact lower Court decisions have on the entire spectrum of conflict of interest law and policy.

Tompkins violated the Financial Conflict/Personal Conflict policies of the Department of Justice in this case. See the policy addressed in the Office of Inspector General's Report "Notification of Concerns Regarding Lack of Department Policy Requiring Express Authorization for Department Attorneys to Participate in the Criminal or Civil Investigation of Former Clients" dated August 24, 2021 in Appendix 2. Under current policy, Rand's case would have

been required to be transferred to another District because of her untenable conflict. A partner of hers, Michael Brown was a testifying eyewitness and Rand's alleged lies to him formed the entire basis of a count. Perhaps even more imprudent and scandalous, the presentations her firm Alston made to the USAO and SEC (which she possibly participated in) and which clearly contained materially exculpatory information directly contrasting with the Prosecution's closing argument in this case, remain the subject of an outstanding Brady claim. Access to these documents continues to be denied thirteen and a half years later by the SEC and EOUSA through Rand's ongoing FOIA requests without any reason provided or other communication. The USAO's conduct has "caused damage to the public's perception of the Department's integrity in the pursuit of the case which is the type of harm the relevant federal ethics regulations seek to avoid". The words of Michael Horowitz in the above report.

And lastly but perhaps most importantly, how could a judge rule Wilmer and Rand did not suffer from divergent interests, based on the fact one argument raised by Wilmer (the only one argued of several available to Wilmer) concerning their conflicted partner was not successful at trial, and because Wilmer represented to Rand three weeks into a 9-month engagement they believed they could provide competent counsel?

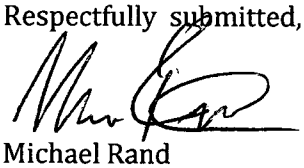
CONCLUSION

The decision of the District Court as confirmed by the Fourth Circuit cries out for plenary review (or summary reversal) by this Court. The District Court decision conflicts at the most basic levels of principles with decisions of this Court, and of all federal courts of appeals and district courts as to how the definition of divergent interests is to be interpreted. Citing *United States v. Olano*, 507 U.S. 725, 736 (1993), "there is a need to correct errors that seriously affect the fairness, integrity or public reputation of judicial proceedings".

The High Court needs to ensure those who practice law and

those who serve as judicial checks and balances adequately comprehend the ethics rules governing conflicts and prosecution's *Brady* and *Giglio* obligations. This case is unparalleled in its potential to afford the Court an opportunity to do so.

Respectfully submitted,



Michael Rand
20155 NE 38th Court
Unit 3104
Aventura, FL 33180
954-758-0495

December 13, 2021

Appendix

FILED: July 7, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6393
(3:10-cr-00182-RJC-DSC-1)
(3:17-cv-00687-RJC)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

MICHAEL T. RAND

Defendant - Appellant

ORDER

The court grants the motion to exceed length limitations and denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Gregory, Judge Niemeyer, and Judge Harris.

For the Court

/s/ Patricia S. Connor, Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6393

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MICHAEL T. RAND,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Robert J. Conrad, Jr., District Judge. (3:10-cr-00182-RJC-DSC-1; 3:17-cv-00687-RJC)

Submitted: February 22, 2021 Decided: March 3, 2021

Before GREGORY, Chief Judge, and NIEMEYER and HARRIS, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Michael T. Rand, Appellant Pro Se.

PER CURIAM:

Michael T. Rand seeks to appeal the district court's order denying relief on his 28 U.S.C. § 2255 motion. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(B). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 137 S. Ct. 759, 773-74 (2017). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the motion states a debatable claim of the denial of a constitutional right. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that Rand has not made the requisite showing. Accordingly, although we grant Rand's motion to exceed the length limitations for his informal brief, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

Rand v. United States

Decided Mar 6, 2020

3:17-cv-687-RJC 3:10-cr-182-RJC-DSC-1

03-06-2020

MICHAEL T. RAND, Petitioner, v. UNITED STATES OF AMERICA, Respondent.

Robert J. Conrad, Jr. United States District Judge

ORDER

THIS MATTER is before the Court on Petitioner's First Amended Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255 filed by counsel.[1] (Doc. No. 10); see (Doc. No. 14) (Memorandum in Support); (Doc. No. 30) (Amended Statement of Disputed Fact). The Government has filed a Response opposing relief, (Doc. No. 21), and Petitioner has filed a Reply, (Doc. No. 27). The parties have filed evidence in support of their respective positions.

[1] Counsel withdrew from representation after filing a Reply on Petitioner's behalf and Petitioner is again proceeding *pro se*. See (Doc. Nos. 31, 33).

I. BACKGROUND [2]

[2] This Section is not exhaustive. Additional facts will be included, as relevant, in the Discussion section.

Petitioner, a certified public accountant, was indicted in the underlying criminal case for accounting fraud based on earnings mismanagement and improper accounting practices while acting as the Chief Accounting Officer ("CAO") at Beazer Homes USA, Inc. ("Beazer"), a home-building company, from 2000 to 2007. He was also charged with obstructing an investigation into Beazer's mortgage origination practices. The charges were: Count (1), conspiracy to commit offenses against the United States; Count (2), mail/wire fraud conspiracy; Count (3), securities *2 fraud; Counts (4)-(5) false statements to a bank; Count (6), obstruction of justice; Count (7), destruction of records; Counts (8)-(9), misleading conduct to hinder an investigation; Count (10), witness tampering; and Count (11), obstruction of an official proceeding. (3:10-cr-182, Doc. No. 3).

The factual background of the case, as summarized by the Fourth Circuit Court of Appeals, is as follows:

In 2010, the government charged Michael Rand with accounting fraud based on his work at Beazer Homes USA, Inc. ("Beazer"), a home-building company, from 2000 to 2007 and with obstructing an investigation into Beazer's mortgage origination practices. Rand, a certified public accountant, was Beazer's controller and later its chief accounting officer from 1999 to 2007. He reported to Beazer's CEO and CFO.

The government's accounting charges concerned earnings management: it believed that Rand attempted to adjust Beazer's reported earnings over time so that Beazer would hit consensus—that is, the quarterly earnings amount that Wall Street predicted. This practice involved "cookie jar" accounting with respect to Beazer's reserve accounts, where funds are set aside for future expenditures or revenue. It is generally accepted that the amount put into a reserve account is what the company reasonably anticipates needing to meet the expected expense. It is not appropriate to increase or decrease funds in reserve accounts to understate or inflate its actual earnings. Instead, if a company determines that it does not need the reserve funds, those funds "are to be taken back as income as soon as [the company] know[s] that they are no longer required." J.A. 1260.

The government attempted to prove that Rand manipulated the accounting to reduce earnings when Beazer was beating consensus. E.g., J.A. 3720 ("If you have more than 100k extra, hide it."); id. at 3722 ("To achieve the 'goal' $ for this year, let's squirrel $ away in places which will turn around in the next year; not be so 'open.' "); id. at 1982-83 ("We may have $5 million to squirrel away, so if you have ant [sic] ideas, let me know. Joavan's cookie jar has no more room."). This practice resulted in a misrepresentation of Beazer's earnings in many quarters, including each quarter in fiscal year 2006.

The government also alleged that Rand improperly accounted for transactions involving model homes Beazer sold to and leased back from GMAC, an investment company. In 2005, Beazer sought to enter into model-home sale-leaseback agreements. Under these agreements, Beazer would sell model homes to investors and rent the homes back from the investors until the subdivision was complete and the model home could be sold to a third party.

3 *3

Generally, a seller cannot count the transaction as a sale and recognize revenue until "all risks and rewards of ownership" are transferred to the buyer. J.A. 2056. A seller may not have any "continuing involvement" with the property for it to be counted as a sale. Id. A transaction is not counted as a sale if the seller retains the ability to share in the appreciation of the home after it is sold.

Deloitte & Touche ("Deloitte") served as Beazer's auditors. Rand consulted with Deloitte senior manager, Corbin Adams, about a potential sale-leaseback arrangement with GMAC. In December 2005, Rand sent Adams a draft Master Sale and Rental Agreement ("MSRA") that did not include any provision for Beazer to benefit from later appreciation in the value of the homes. He later confirmed that Beazer would not be able to "participate in appreciation of [the] leased assets." Id. at 2074. Meanwhile, Rand was assuring Beazer's employees that Beazer would share in the upside—the future profits from appreciation in value before GMAC eventually sold them. The same day Beazer entered into the MSRA, a Property Management Agreement ("PMA") between GMAC entities was executed, providing that Beazer would share in the upside of any consumer transactions. In the next nine months, Beazer entered into two more MSRAs, followed by PMAs, agreeing that Beazer would share in appreciation when the model homes sold. Beazer received $117 million for the model homes it sold and reported $24.8 million in total profit.

Finally, Rand was charged with obstruction of justice stemming from his allegedly deleting emails following a grand jury subpoena. In March 2007, the FBI began investigating Beazer for mortgage fraud. On March 23, 2007, a federal grand jury issued a subpoena requiring Beazer to retain all documents, including emails, related to mortgages or home sales.

On March 28, Beazer initiated an "email dumpster," which would save all deleted emails from permanent deletion. Beginning March 29, all deleted emails were caught in this dumpster without the employee's knowledge. At 2:58 p.m. on March 30, Beazer's CEO Ian McCarthy sent a memorandum to Rand and other senior management notifying them that Beazer was providing documents in response to the subpoena and would be providing an updated document-retention memorandum. Around 4:20 p.m., Deborah Danzig, an in-house attorney, sent an email to all employees in the corporate office, including Rand, with this memorandum, instructing them not to destroy any records. Danzig also testified that she told Rand directly that "he was required to keep everything and destroy nothing." Id. at 975.

Between 5:55 p.m. on March 29 and 5:45 p.m. on March 30, 2007, Rand deleted nearly 6,000 emails dating back to 1999. Some of the emails were responsive to the grand jury's subpoena and contained evidence of mortgage fraud. Other emails that Rand deleted were related to the cookie-jar accounting scheme. Others still appeared irrelevant to either set of charges.

4 *4

Shortly after the subpoena was issued, Beazer's audit committee hired the law firm Alston & Bird to conduct an internal investigation. Mike Brown, a partner at Alston & Bird, interviewed Rand as part of that investigation. On June 15, 2007, during their first interview, Rand told Brown that he had not destroyed or deleted any documents or emails since the investigation had begun. On June 26, 2007, Brown met with Rand again. Brown had learned that the email dumpster had recovered thousands of emails that Rand had attempted to delete. At that meeting, Rand initially provided that he did not delete any emails, but he eventually admitted that he might have deleted "a couple of emails" to reduce the size of his mailbox. Id. at 1072. On further questioning, Rand said that he deleted "a series of emails" from one particular coworker on March 30. Id. at 1073.

Beginning July 2008, the FBI conducted between six and eight interviews with Rand as part of a proffer. During these interviews, conducted by FBI Agent Douglas Curran and others, Rand admitted to manipulating Beazer's earnings, admitted that that was illegal, and expressed remorse. Curran testified that he also asked Rand about the GMAC transaction, and Rand admitted that there was a "verbal side agreement to share in the appreciation of the model homes when they were ultimately sold." Id. at 2780.

Curran also asked Rand about the email deletions. Curran testified that Rand admitted that "he was certain that by March 27th he was for sure at the latest aware that there was a federal investigation in Charlotte." Id. at 2784. Rand also admitted that he had spoken with Danzig and understood that the document-retention memorandum applied to him, when he "went back to his office and started performing mass deletions of emails." Id. at 2784-85. Explaining that he was "essentially in a state of panic," he deleted the emails because "[t]here were a lot of stressful events going on in his life at that time, and on top of that he was aware of the federal grand jury investigation that was focused in Charlotte and he did not want to be associated with that investigation in any way." Id. at 2785. Rand admitted that he "understood that he was deleting evidence pertinent to the investigation" and "[h]e knew it was wrong." Id. at 2786.

Rand went to trial twice. Before the first trial, Rand sought leave to subpoena computer forensic evidence of Rand's email deletions and records from Beazer's accounting system to show Rand's accounting was reasonable and justified and to contextualize and refute the prosecution's accounting records. The district court denied both requests.

In the first trial, the government presented evidence of emails relevant to the grand jury's investigation into Beazer's mortgage division and that Rand deleted from his Beazer email account. Aaron Philipp, a computer forensics expert, testified that based on Beazer's backup tapes, 3,272 emails were deleted between March 23 and 28, while another 5,936 were deleted on March 30, after the email dumpster was put into place.

5 *5

> The jury deliberated for twenty hours and returned a split verdict, convicting Rand on seven counts and acquitting on four. A new trial was later granted due to juror misconduct.
>
> In advance of the second trial, Rand again sought to subpoena Beazer to obtain records from its accounting system. Again, the district court denied the request. Rand also tried again to get the backup tapes from Beazer of the March 23-28 email deletions, and this time, the court granted the request. Rand's expert examined the data on the backup tapes and concluded that approximately 2,500 of the approximately 3,200 emails that Philipp testified during the first trial were deleted between March 23 and March 28, 2007 (prior to the dumpster being in place), were not, in fact, deleted, explaining that "there [were] various technical explanations why Mr. Philipp could not find them on the tape the first time." Id. at 719.
>
> The government dropped Philipp from its witness list, halted all efforts to prove the March 23-28 deletions, and moved to strike parts of the indictment relating to those deletions. The government also moved to preclude Rand from introducing evidence or mentioning the false accusations at the retrial. The court granted the prosecution's request ruling that the evidence was irrelevant and excludable under Federal Rule of Evidence 403 as distracting or confusing because the prosecution was no longer seeking to prove the March 23-28 deletions.

United States v. Rand, 835 F.3d 451, 456-59 (4th Cir. 2016) (footnotes omitted).

In the second trial, the jury found Petitioner guilty of Counts (1), (2), (6), (9), (11).[3] (Id., Doc. No. 357). Although the advisory guidelines called for 900 months of imprisonment, the Court sentenced Petitioner to a total of 120 months' imprisonment (60 months for Count (1) and 120 months for Counts (2), (6), (9), and (11), concurrent) followed by three years of supervised release. (Id., Doc. Nos. 380, 381); see (Id., Doc. No. 387) (Amended Judgment reflecting that the Court will decline to order restitution).

[3] Counts (3) and (7) were dismissed on the motion of the United States. (Id., Doc. Nos. 326, 338).

Petitioner argued on direct appeal that the exclusion of evidence that the Government falsely accused him at a reverse proffer session of deleting a large number of emails hampered his constitutional right to present a defense; that several of the Court's other evidentiary rulings were *6 improper including its decision to quash Petitioner's Rule 17(c) subpoena to Beazer; that the Government made improper statements in its rebuttal closing argument about Petitioner's wealth and silence; that the Government improperly vouched for rebuttal witness FBI Special Agent Curran's credibility;[4] and that the sentence is procedurally unreasonable. The Fourth Circuit Court of Appeals affirmed, finding that the exclusion of evidence did not violate due process, that the Court's denial of Petitioner's third-party document subpoena was not an abuse of discretion; that the prosecutor's comments on Petitioner's wealth was harmless; that the prosecutor did not improperly comment on Petitioner's silence; and that the sentence was not procedurally unreasonable. United States v. Rand, 835 F.3d 451 (4th Cir. 2016). The United States Supreme Court denied certiorari on November 28, 2016. Rand v. United States, 137 S.Ct. 525 (2016).

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[4] Curran was permitted to testify in the Government's rebuttal pursuant to the third exception in the immunity agreement, to impeach, rebut or counter a defense. (3:10-

cr-182, Doc. No. 411 at 14-15). Curran testified that Petitioner admitted having knowingly engaged in illegal acts, including his manipulations of earnings were material and that there was a right to ask to share GMCA upside in a verbal side agreement, and expressed remorse.

Petitioner argues in his First Amended Motion to Vacate, (Doc. No. 10), that (renumbered and restated): (1) counsel was ineffective for (A) operating under an actual conflict of interest due to the defense law firm's hiring of former prosecutor Matthew Martens; (B) failing to prepare Petitioner to testify at trial and refusing to allow him to testify; (C) failing to correct the Government's false, misleading, and erroneous accounting testimony; (D) failing to obtain and present exculpatory evidence; (E) failing to object to the prosecution's "Indict the Industry" theory that shifted the burden of proof and failing to request an appropriate jury instruction; and (F) providing deficient performance in additional ways; and (2) prosecutorial misconduct deprived Petitioner of a fundamentally fair trial. Petitioner requests an evidentiary hearing.

The Government has filed a Response, (Doc. No. 21), arguing that Petitioner's claims of ineffective assistance of counsel are meritless, that his claims
7 of prosecutorial misconduct fail as *7 a matter of law, and that his remaining claims (that the Court denied him his right to testify and that permitted the United States to assert a defense that effectively shifted the burden of proof), are procedurally defaulted, and that the § 2255 Motion to Vacate should be denied without an evidentiary hearing.

In the Reply, Petitioner reiterates his arguments about defense counsel's alleged conflict of interest, ineffective cross examination about accounting rules, failing to present exculpatory and impeachment evidence, failing to prepare Petitioner to testify and refusing to allow him to testify at trial, that Petitioner was deprived of constitutionally adequate representation at his proffer, that counsel was ineffective for switching expert witnesses, failing to call Deloitte & Touche witnesses at trial, counsel failed to prepare Petitioner for sentencing, that counsel's deficient performance prejudiced him, and that any procedural default is excused by cause and prejudice and/or actual innocence.

II. STANDARD OF REVIEW

A federal prisoner claiming that his "sentence was imposed in violation of the Constitution or the laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a).

Rule 4(b) of the Rules Governing Section 2255 Proceedings provides that courts are to promptly examine motions to vacate, along with "any attached exhibits and the record of prior proceedings . . ." in order to determine whether the petitioner is entitled to any relief on the claims set forth therein. The parties have submitted evidence in support of their respective positions. However, after examining the record in this matter, the Court
8 has determined that it can dispose of *8 this case based on the record and governing case law and thus no evidentiary hearing is required. See Raines v. United States, 423 F.2d 526, 529 (4th Cir. 1970).

III. DISCUSSION [5] (1) Ineffective Assistance of Counsel

[5] When counsel appeared for Petitioner, the Court permitted counsel to file a superseding amended § 2255 petition on Petitioner's behalf but specifically disallowed hybrid representation. (Doc. No. 7). Counsel then filed a First Amended Motion to Vacate, (Doc. No. 10), and Memorandum in Support, (Doc. No. 14). Attached to the First Amended Motion to Vacate is a 50-page "Declaration" by Petitioner, (Doc. No. 10-1), that is nearly

identical to Petitioner's *pro se* § 2255 Motion to Vacate and was stricken because it violated the spirit of the Court's Order disallowing hybrid representation and was otherwise defective. (Doc. No. 29). Counsel subsequently filed "Petitioner's Amended Statement of Disputed Facts," (Doc. No. 30), which is signed by counsel, not Petitioner, and refers to the stricken Declaration. Counsel will not be permitted to make an end-run around the Court's rulings and the stricken Declaration will not be considered. Further, to the extent that the Court does not specifically address each of the claims and examples asserted in Petitioner's voluminous filings, they have been considered and rejected.

The Sixth Amendment to the U.S. Constitution guarantees that in all criminal prosecutions, the accused has the right to the assistance of counsel for his defense. See U.S. Const. Amend. VI. To show ineffective assistance of counsel, Petitioner must first establish deficient performance by counsel and, second, that the deficient performance prejudiced him. See Strickland v. Washington, 466 U.S. 668, 687-88 (1984). The deficiency prong turns on whether "counsel's representation fell below an objective standard of reasonableness ... under prevailing professional norms." Id. at 688. A reviewing court "must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." Harrington v. Richter, 562 U.S. 86, 104 (2011) (quoting Strickland, 466 U.S. at 689). The Strickland standard is difficult to satisfy in that the "Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." See Yarborough v. Gentry, 540 U.S. 1, 8 (2003). The prejudice prong inquires into whether counsel's deficiency affected the judgment. See Strickland, 466 U.S. at 691. A petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable
9 probability is a *9 probability sufficient to undermine confidence in the outcome." Id. at 694. In considering the prejudice prong of the analysis, a court cannot grant relief solely because the outcome would have been different absent counsel's deficient performance, but rather, it "can only grant relief under ... Strickland if the 'result of the proceeding was fundamentally unfair or unreliable.'" Sexton v. French, 163 F.3d 874, 882 (4th Cir. 1998) (quoting Lockhart v. Fretwell, 506 U.S. 364, 369 (1993)). Under these circumstances, the petitioner "bears the burden of affirmatively proving prejudice." Bowie v. Branker, 512 F.3d 112, 120 (4th Cir. 2008). If the petitioner fails to meet this burden, a reviewing court need not even consider the performance prong. Strickland, 466 U.S. at 697.

(A) Conflict of Interest

Petitioner argues that his defense team from WilmerHale had an actual conflict of interest because a former prosecutor in Petitioner's case, Matthew Martens, was hired at WilmerHale before Petitioner's second trial. Petitioner claims that Martens' employment at the firm caused counsel to refuse to call Martens at trial to testify about the Government's allegation at a reverse proffer session that Petitioner had deleted a large number of emails, which turned out to be false, and that this false accusation coerced Petitioner to concede his actions were illegal and that he was remorseful. Petitioner further argues that the Government made a "false claim" at trial[6] that Petitioner "confessed" to intentionally engaging in criminal activity and failed to call Petitioner to testify about this evidence to reveal Martens' misconduct and explain his state of mind upon entering the proffers due to Martens' prosecutorial
10 misconduct. (Doc. No. 14 at 15). Petitioner *10 contends that counsel declined to bring this conflict to the Court's attention because it did not want to lose Petitioner's lucrative representation.[7]

[6] This is an apparent reference to Agent Curran's rebuttal testimony.

7 Petitioner blames nearly every perceived deficiency by counsel on defense counsel's alleged conflict with Martens. Petitioner's other claims of ineffective assistance of counsel that do not relate directly to Martens, including the allegation that counsel interfered with Petitioner's right to testify, will be considered in separate sections.

"[I]t is clearly established that the [Sixth Amendment] right to effective assistance includes the right to representation free from conflicts of interest." Rubin v. Gee, 292 F.3d 396, 401 (4th Cir. 2002) (citing Cuyler v. Sullivan, 446 U.S. 335, 348-50, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)). To establish ineffective assistance of counsel based on a conflict of interest, a defendant who raised no objection at trial must demonstrate that (1) counsel operated under an "actual conflict of interest;" and (2) this conflict "adversely affected his lawyer's performance." United States v. Dehlinger, 740 F.3d 315, 322 (4th Cir. 2014) (quoting Cuyler, 446 U.S. at 348). If the petitioner satisfies this showing, "prejudice is presumed and [he] need not demonstrate a reasonable probability that, but for counsel's conflicted representation, the outcome of the proceeding would have been different." Woodfolk v. Maynard, 857 F.3d 531, 553 (4th Cir. 2017) (citing United States v. Nicholson, 611 F.3d 191, 195 (4th Cir. 2010)).

An actual conflict exists when an attorney's and a defendant's interests are divergent with respect to a material factual or legal issue or a course of action. Cuyler, 446 U.S. at 335, 356 ("An actual conflict of interest negates the unimpaired loyalty a defendant is constitutionally entitled to expect and receive from his attorney."). "A defendant has established an adverse effect if he proves that his attorney took action on behalf of one client that was necessarily adverse to the defense of another or failed to take action on behalf of one because it would adversely affect another." Mickens v. Taylor, 240 F.3d 348, 360 (4th Cir. 2001) (*en banc*). A showing of adverse effect requires the petitioner to: (1) "identify a plausible alternative

11 defense strategy or tactic that his *11 defense counsel might have pursued;" (2) show that this strategy "was objectively reasonable under the facts of the case known to the attorney at the time," and (3) show "that the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict." Dehlinger, 740 F.3d at 322 (quoting Mickens, 240 F.3d at 361). Because an actual conflict of interest requires not only a theoretically divided loyalty, but also a conflict that actually affected counsel's performance, the actual conflict and adverse effect inquiries are often intertwined. Jones v. Polk, 401 F.3d 257, 267 (4th Cir. 2005).

The Government has filed a letter dated October 15, 2013 from defense counsel Brent Gurney to Plaintiff memorializing their conversation about Martens having recently joined WilmerHale as a partner "and confirming that [Petitioner] wish[es] to continue with WilmerHale as [his] counsel," after having discussed the matter with independent counsel. (Doc. No. 21-1 at 1). The letters states that the firm will establish a Chinese Wall between the defense team and Martens and notes that Petitioner previously indicated that he may like to call Martens as a witness or file motions directed at his conduct. Gurney states in the letter that the defense team "do[es] not think that attacking Martens' conduct personally (either by calling him as a witness, questioning other witnesses about his conduct, or filing motions based on his conduct) would be a wise strategy and therefore in your best interest." (Id.). Depending on the evidence, the defense does, however, expect to attack the conduct of the FBI and U.S. Attorney's Office generally, argue that the Government threatened and intimidated him, caused him to believe he was guilty when he was not, and demonstrate that inaccurate accusations about email deletions misled him into thinking that he deleted certain emails that he did not delete, and that this case never should have been brought. However, "we don't see any basis for singling out Martens and/or any benefit from doing so." (Id.). Further, the

applicable ethical rules would not permit
12 WilmerHale to represent Petitioner *12 if he sought to call Martens as a witness, and the firm is not comfortable representing Petitioner if his strategy includes attacking Martens directly or indirectly. Gurney concludes in the letter that Petitioner "shouldn't continue with us if you are not comfortable that we can defend you as you wish to be defended [and] ... if you are or think you may be uncomfortable with us, you should find other counsel now, while the case is still in its early stages, and that you may wish to get independent legal advice - from Steve Councill, your former lawyers (Samuel and Gardner), or other lawyers you may know or we can recommend - about whether having WilmerHale represent you is in your best interest." (Doc. No. 21-1 at 2).

Consistent with Gurney's letter, defense counsel attempted repeatedly to gain admission of evidence about the false email deletion accusation at trial.[8] When the Court granted the Government's request to introduce evidence of Petitioner's proffer session statements, the defense sought again to introduce evidence that the Government made false deletion accusations at the reverse proffer session, but the Court found that the door had not been opened. (3:10-cr-182, Doc. No. 411 at 16). The defense argued that the false deletion accusations constituted material inducement of Petitioner's proffer statements and that the issues are prosecutorial misconduct and Petitioner's state of mind. (Id., Doc. No. 411 at 20). Gurney told the Court that he "hesitate[s] to call [his] colleagues - say they have engaged in prosecutorial misconduct," and in any event, "the issue is not the prosecutor's good faith," but rather, "Mr. Rand's state of mind ... [a]nd he should be allowed to testify as to why he was induced into proffering
13 before the United States *13 government." (Id., Doc. No. 411 at 20-21). The Court held that Petitioner "can do that without reference to the fact that years later some of the information that he was confronted with turned out to be false." (Id., Doc. No. 411 at 21).

[8] See (3:10-cr-182, Doc. No. 395 at 12-20) (opposing the Government's Motion in Limine regarding the false deletion allegation), (Id., Doc. No. 405 at 13) (continuing objection regarding the prohibition of raising false email deletion accusations); (Id., Doc. No. 396 at 91) (proffering cross examination that the defense would have pursued absent the ruling on false email deletion); (Id., Doc. No. 406 at 6) (continuing objection regarding false email deletion); (Id., Doc. No. 398 at 5) (arguing that the Government opened the door to evidence about the false email deletion allegation); (Id., Doc. No. 409 at 15) (defense arguing that it should be permitted to raise the false email deletion allegations); (Id., Doc. No. 411 at 16-24) (the Court reasserting its ruling about the admission of false email deletion allegations despite finding that Curran can testify about the proffer sessions, denying defense motion to suppress).

Petitioner has failed to demonstrate that defense counsel labored under an actual conflict of interest. The record demonstrates that the interests of Petitioner and counsel were not divergent with respect to a material factual, legal issue, or course of action. The defense strategy was to show that Petitioner's proffer statements were induced by false email accusations. Counsel pursued this strategy vigorously but was ultimately unsuccessful. Counsel informed Petitioner that a claim of prosecutorial misconduct with regards to the false deletion accusation was not in his best interest, but that if it was a strategy he wished to pursue, he would need to seek alternate counsel. Petitioner chose not to do so. Petitioner's after-the-fact disagreement with counsel's strategic decision that was fully disclosed prior to trial and which Petitioner considered with the benefit of independent legal advice, provides no basis for

determining that an actual conflict existed. See, e.g., United States v. Reyes-Bosque, 596 F.3d 1017, 1034 (9th Cir. 2010) (finding no conflict of interest where the attorney-client conflict "centered on the fact that [the client] was unhappy with counsel's performance"); United States v. Fields, 483 F.3d 313, 353 (5th Cir. 2007) ("mere disagreement about strategic litigation decisions is not a conflict of interest.").

Nor has Petitioner demonstrated any adverse effect. Counsel informed Petitioner that a prosecutorial misconduct claim against Martens as an unsound strategy. This assessment was borne out at trial, with the Court finding that no prosecutorial misconduct occurred. See (3:10-cr-182, Doc. No. 395 at 42) (the Court finding that no knowing or deliberate misconduct occurred and precluding the defense from making any argument regarding the false accusations about email deletions). No adverse effect can be found from counsel's reasonable strategic decision under these
14 *14 circumstances. See Burger v. Kemp, 483 U.S. 776, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987) (finding that counsel's decisions not to present a "lesser culpability" argument on appeal was not due to a conflict, but had a reasonable strategic basis where it was rejected by the lower court); Mickens, 240 F.3d at 348 (rejecting a conflict of interest claim where many of the petitioner's attempts to show adverse effect were not viable defense strategies and strategies that were viable were not linked to the alleged conflict); see also Powell v. Kelly, 562 F.3d 656, 670 (4th Cir. 2009) (once counsel conducts a reasonable investigation of law and facts, his strategic decisions are "virtually unchallengeable.")(quoting Strickland, 466 U.S. at 688).

Petitioner has not demonstrated the existence of an actual conflict or any adverse effect, and therefore, his conflict of interest claim will be denied.[9]

[9] Petitioner suggests that counsel, due to a conflict of interest, failed to call Martens and/or Petitioner to testify that Curran lied about Petitioner's admission of guilt and expression of remorse at a proffer session. However, this argument is inconsistent with Petitioner's admission that Mr. Glaser never told Petitioner to lie in the proffer statements, and to the contrary, told him only to tell truth and that Petitioner did, in fact, state in the proffer sessions that his actions were illegal and that he was remorseful. (Doc. No. 27 at 12-13). Counsel cannot be deemed ineffective for failing to call Petitioner, Martens, or any other witness to challenge the veracity of Curran's testimony in this regard because Petitioner has admitted that it is true. See, e.g., Turk v. White, 116 F.3d 1264, 1265 (9th Cir. 1997) (counsel could not be deemed ineffective for failing to investigate an incompetence defense would have directly conflicted with the self-defense theory that counsel reasonably selected after investigating the case; " [p]ursuit of these conflicting theories would have confused the jury and undermined whatever chance [defendant] had of an acquittal."); Scott v. Dugger, 891 F.2d 800, 805 (11th Cir. 1989) (counsel in a capital case was not ineffective for failing to present mitigating evidence under a theory that would have been "completely false.").

(B) Petitioner's Right to Testify

Petitioner contends that counsel failed to prepare Petitioner to testify by adequately reviewing discovery with him and refused to allow him to testify despite his repeated expressions of desire to do so. Petitioner further argues that counsel's "horrible decision[s]" effectively forced him to refrain from testifying. (Doc. No. 14 at 27). Petitioner has filed his SEC deposition from May 8, 2018 in support of this claim, (Doc. No. 28), in
15 which he provided "straightforward, simple, *15 and irrefutable explanation for many of the allegations at issue in this case" that he would have provided at trial had he been permitted to take the stand. (Doc. No. 14 at 1, n.1).

A criminal defendant has a fundamental constitutional right to testify on his or her own behalf at trial. United States v. Midgett, 342 F.3d 321, 325 (4th Cir. 2003). A defendant's waiver of this right, like that of any other constitutional right, is "personal" and must be made voluntarily and knowingly. Sexton, 163 F.3d at 881. In order to prove ineffective assistance of counsel based on his claim that his attorney prevented him from exercising his right to testify, a petitioner must show both that his attorney violated his right to testify and that his testimony had a reasonable probability of changing the outcome. See United States v. Rashaad, 249 Fed. Appx. 972, 973 (4th Cir. 2007).

Petitioner's contention that he wanted to testify at trial but that counsel prevented him from doing so is conclusively refuted by the record. At Petitioner's first trial, the Court conducted an exhaustive colloquy informing Petitioner that his right to testify or not testify at trial is a constitutional one and that it is his alone to make:

> THE COURT: ...Mr. Rand, the sole purpose of my talking to you right now is to make sure that you understand your options in this case. You have a constitutional right to testify in your own defense, and that is something that obviously you should consult with your attorneys about. But at the end of the day it's a choice that's peculiarly yours to make.
>
> You also have a right - a constitutional right not to testify. And you've heard me instruct the jury, both in the selection process and in the preliminary instructions, that they can't hold that against you if you exercised that right.
>
> And I'm not trying to persuade you one way or the other. I recommend that you talk to your attorneys about the options that you have available to you. But I wanted to make sure that you understood those options.
>
> DEFENDANT RAND: Yes I do, Your Honor.
>
> *16
>
> THE COURT: And then at some later point I will ask you whether you've made your - whether you've chosen your option or not. But at this point I just wanted to make sure that you understood that.
>
> DEFENDANT RAND: (Nodding head.)

(3:10-cr-182, Doc. No. 421 at 25-26).

After the defense rested, Petitioner exercised his personal constitutional right not to testify:

> THE COURT: ... Having considered your options, have you made a decision as to whether you wish to testify in your own defense or not?
>
> DEFENDANT RAND: Yes, I have made a decision and I do not choose to testify.

(3:10-cr-182, Doc. No. 421 at 26).

At Petitioner's second trial, the Court again informed Petitioner of his right to testify or not testify which is a personal constitutional right:

> THE COURT: ... You have a right not to testify if you don't wish to testify, and I think you've heard me explain that to the jury, that you have a presumption of innocence and with that presumption there's a requirement that the burden is on the government to prove its case. You don't have a burden. Having said that, you also have a right to testify if you wish to testify. That's a personal right which I'm sure you've discussed with your attorneys. But I wanted to make sure on the record that you understood the choice you have, whether to testify or not.
>
> Do you understand that choice?
>
> THE DEFENDANT: I do, Your Honor.
>
> THE COURT: All right. And I'm not going to ask you this evening what you're going to do but I will ask your attorneys - well, we'll meet back here at 9:00 and at that point the defense will put on any evidence it wishes to put on, including if you choose to testify, your testimony. But if you choose not to testify, you should know that I will again instruct the jury that that's your constitutional right.
>
> Do you understand that?
>
> THE DEFENDANT: Yes. Thank you, Your Honor.

(3:10-cr-182, Doc. No. 400 at 139-40). *17

Counsel announced the intent to rest the defense case after having presented several witnesses but without having called Petitioner. Petitioner, who was present in the courtroom, did not say anything about wishing to testify. (3:10-cr-182, Doc. No. 411 at 116). After conferring with Petitioner following the Government's rebuttal case, defense

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counsel rested for a second time and Petitioner again remained mute. (3:10-cr-182, Doc. No. 402 at 22).

The foregoing reveals that Petitioner was well aware of his constitutional right to testify or not to testify, that he understood his right was personal, and that he chose not to testify in his own defense. Any suggestion that Petitioner did not understand his rights or did not knowingly waive his right to testify is conclusively refuted by the record and his present self-serving contentions to the contrary will be rejected. See generally Blackledge v. Allison, 431 U.S. 63, 74 (1977) ("Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."); see, e.g., United States v. Lemaster, 403 F.3d 216, 221-22 (4th Cir. 2005) (§ 2255 petitioner's sworn statements during the plea colloquy conclusively established that his plea agreement and waiver were knowing and voluntary). To the extent that Petitioner suggests that counsel's representation was so deficient that counsel *de facto* deprived him of the option of testifying is likewise rejected. The record reflects that counsel provided a vigorous, well-prepared, and thorough defense.

Moreover, Petitioner has failed to demonstrate prejudice. None of the proposed testimony that Petitioner ostensibly would have provided had a reasonable probability of resulting in a different outcome in light of the voluminous evidence of his conspiratorial, fraudulent, and obstructive content, the most damning of which were Petitioner's own emails and email deletions that plainly set forth his fraudulent earnings management activities, arrangement of a GMAC
18 deal *18 that he knew was in violation of accounting principles, and his attempts to avoid the attention of auditors and investigators.[10] There is no reasonable probability that, had Petitioner testified at trial, there would have been a different trial outcome.

[10] The Court recognizes the myriad differences between trial testimony and an SEC deposition. See generally (3:10-cr-182, Doc. No. 411 at 11-12) (addressing several considerations with regards to SEC depositions at trial).

Petitioner's claims of deficient performance and prejudice with regards to his right to testify are meritless and will be denied.

(C) False, Misleading, and Erroneous Accounting Evidence

Petitioner contends that counsel was ineffective for allowing false material testimony with regards to accounting principles to be adduced at trial without subjecting it to any meaningful confrontation. Petitioner has presented Declarations from two expert witnesses, John L. Campbell, (Doc. No. 14-1), and Steven Sapp, (Doc. No. 27-1), analyzing five passages of exchanges between the prosecutor and Government witnesses addressing contingency accounting, a CAO's responsibilities with respect to individual transactions, individual reserves, and individual divisions, adjusting reserves with the effect of hitting a target and/or moving a company closer to consensus, defining reserves, expenses, and matching principles, and defining "material." Petitioner claims that the Declarations explain why each of the exchanges between witnesses and the prosecutor adduced testimony that was false, misleading, and erroneous, that counsel should have known that this testimony was wrong, and should have confronted the Government about putting this evidence before the jury. Petitioner argues that an evidentiary hearing is required to determine whether the witnesses intentionally testified falsely, but that the testimony was unquestionably erroneous and material, which requires the conviction to be vacated.

A conviction obtained through the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable
19 likelihood that the false testimony could *19 have affected the judgment. Napue v. Illinois, 360 U.S. 264 (1959); United States v. Chavez, 894 F.3d 593, 601 (4th Cir. 2018). To prevail on a claim that the prosecution knowingly introduced perjured testimony at trial, a petitioner must demonstrate: (1) the testimony was false; (2) the government knew the testimony was false, and (3) there is a reasonable probability that the false testimony could have affected the verdict. See United States v. Roane, 378 F.3d 382, 400 (4th Cir. 2004). A meritorious Napue claim requires "a showing of the falsity and materiality of the testimony." Daniels v. Lee, 316 F.3d 477, 493 (4th Cir. 2003).

As a preliminary matter, this claim is barred to the extent that the Fourth Circuit found on direct appeal that the Court did not err by allowing the Government to have Beazer employees testify as lay witnesses about the propriety of complex accounting practices. See Rand, 835 F.3d at 464. It is well settled that a criminal defendant cannot "circumvent a proper ruling ... on direct appeal by re-raising the same challenge in a § 2255 motion." United States v. Dyess, 730 F.3d 354, 360 (4th Cir. 2013) (quoting United States v. Linder, 552 F.3d 391, 396 (4th Cir. 2009)); see also United States v. Roane, 378 F.3d 382, 396 n. 7 (4th Cir. 2004) (noting that, absent "any change in the law," defendants "cannot relitigate" previously decided issues in a § 2255 motion); Boeckenhaupt v. United States, 537 F.2d 1182, 1183 (4th Cir.1976) (holding criminal defendant cannot "recast, under the guise of collateral attack, questions fully considered by this court [on direct appeal]"). To the extent that Petitioner attempts to re-cast this rejected claim as one of ineffective assistance of counsel, the claim is denied.

This claim also fails on the merits. Counsel cannot be deemed ineffective for failing to raise a Napue claim because Petitioner has not demonstrated that any false testimony was knowingly presented by the Government or that there is a reasonable probability that the false testimony could have affected the verdict. A number of Petitioner's
20 former colleagues at Beazer *20 testified about job duties, conduct that Petitioner carried out and/or instructed them to carry out, and their understanding of the propriety of various actions and instructions under accounting principles and Beazer's policies. Petitioner has failed to demonstrate that any of the Government's testimony was demonstrably false or knowingly presented as such.[11]

[11] Petitioner has also failed to demonstrate that the prosecution withheld exculpatory or impeachment evidence. See Section (D), *infra*.

The Declarations submitted by Petitioner do not alter this conclusion. Campbell's Declaration is based on just five exchanges between prosecutors and witnesses. From that limited review, Campbell opines that "the lawyers asked questions in ways that did not reflect that GAAP inherently requires management judgment and estimates" and second that "the witnesses did not appear to understand GAAP and its application in the corporate setting." (Doc. No. 14-1 at 2). Sapp, in turn, reviewed Campbell's Declaration and filed his own Declaration concurring with Campbell's conclusions. (Doc. No. 27-1). Nothing in these Declarations reveals that the Government presented demonstrably false testimony or that it knowingly did so.[12]

[12] Nor do the Declarations set forth any evidence that had a reasonable probability of resulting in a different trial outcome had it been presented to the jury.

The record further refutes Petitioner's suggestion that counsel meaningfully challenged the Government's evidence. The defense cross examined the Government's witnesses on their recollections of the timing of various events, their preparation with prosecutors and review of transcripts from the first trial, the breadth and

complexity of Petitioner's job, and the complexity of the applicable accounting rules. The defense also called former Beazer employees Robert Gentry and Christine Malta to testify about the Beazer Way accounting policies and accounting activities; accounting expert Todd Bailey to testify about the propriety of various journal entries including adjustments to reserves and accounting for the GMAC transactions; and economic expert
21 *21 Sanjay Unni to testify that the challenged accounting adjustments did not significantly affect Beazer's stock prices. The jury had competing evidence before it and resolved the issues in the Government's favor; Petitioner has failed to demonstrate that, had counsel challenged the Government's evidence in certain ways would have had a reasonable probability of a different trial outcome. The lack of prejudice is especially clear in light of the other evidence of Petitioner's guilt, including his emails and statements explicitly outlining fraudulent practices in which he was engaged and directed others to carry out, as well as his efforts to avoid scrutiny by auditors and investigators.

Absent any showing of a Napue error, counsel cannot be deemed ineffective for failing to raise this meritless claim. See generally Knowles v. Mirzayance, 556 U.S. 111, 123 (2009) ("this Court has never required defense counsel to pursue every claim or defense, regardless of its merit, viability, or realistic chance for success.").

(D) Defense Evidence

Petitioner contends that counsel failed to obtain "critically important exculpatory evidence" including accounting records from Beazer, Alston & Bird internal investigation witness interviews, and testimony from a Deloitte & Touche representative about its audit findings. (Doc. No. 14 at 32). Petitioner claims that defense counsel failed and refused to adhere to the well-settled legal standard for subpoena that would have obtained relevant records and evidence, that counsel failed to obtain and use exculpatory and impeaching statements from Alston & Bird witness interviews, and that counsel failed to call a representative from Deloitte & Touche to testify to key material exculpatory facts concerning their audit findings from "2000 to 2007 and beyond...," even though Petitioner requested that they do so.
22 (Doc. No. 14 at 35). *22

Petitioner's claims are barred to the extent that Petitioner the Fourth Circuit rejected claims on direct appeal that the Court abused its discretion by quashing Petitioner's Rule 17(c) subpoena to Beazer and by prohibiting Petitioner's expert from testifying about work papers prepared by Deloitte & Touche because they were not reliable. Petitioner may not recast these rejected claims as ones of ineffective assistance of counsel. See Dyess, 730 F.3d at 360.

These claims also fail on the merits. The record demonstrates that counsel zealously attempted to obtain Beazer, Alston & Bird, and Deloitte & Touche records for trial. These matters were the subject of extensive pretrial proceedings. See, e.g., (3:10-cr-182, Doc. Nos. 69, 215, 223, 224) (Rule 17(c) subpoenas for Beazer records); (Id., Doc. No. 222) (motion to compel records from Beazer); (Id., Doc. Nos. 253, 317) (motions to quash by Beazer); (Id., Doc. No. 212) (Rule 17(c) subpoena for Alston & Bird interview memorandum); (Id., Doc. No. 234, 236, 248) (notices of appeal regarding magistrate judge's order on motion for discovery). Nor has Petitioner demonstrated what more counsel could have done to obtain documents from Beazer despite its vigorous opposition to Petitioner's attempts, from Alston & Bird with regards to an internal investigation,[13] or from Deloitte & Touche that would have been relevant notwithstanding Petitioner's omissions and misrepresentations to auditors. See (3:10-cr-182, Doc. No. 401 at 7) (limiting defense expert testimony with regards to Deloitte & Touche work papers because Corbin Adams testified that he was not provided sufficient information, and thus, it is not reliable); see generally Pruett v. Thompson, 996 F.2d 1560, 1571 n.9 (4th Cir. 1993) (decisions

about what types of evidence to introduce "are ones of trial strategy, and attorneys have great latitude on where they can focus the jury's attention and what sort of mitigating evidence they
23 can choose not to *23 introduce."). Petitioner has also failed to demonstrate that the lack of any desired evidence was due to any impropriety by the Government.[14] Moreover, Petitioner has failed to demonstrate a reasonable probability of a different outcome but for counsel's alleged deficient performance with regards to any of the foregoing in light of the strong evidence of his guilt. Therefore, this claim will be denied.

[13] Petitioner's claim that Alston & Bird interviews were disclosed to the SEC during a later investigation is irrelevant to the defense attempts to obtain those statements for trial. See generally Upjohn Co. v. United States, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981) (communications made by company's employees to counsel for the company at the direction of corporate superiors to secure legal advice from counsel were privileged).

[14] The prosecution's "suppression ... of evidence favorable to the accused" violates due process. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1198, 10 L.Ed.2d 215 (1963); see Giglio v. United States, 405 U.S. 150, 153-54, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) (applying Brady to impeachment evidence).

(E) Shifting the Burden

Petitioner contends that counsel was ineffective for failing to object to the Government's "indict the industry" approach. He claims that this theory shifted the burden of proof to the defense to establish the legitimacy of his accounting practices, and that counsel was ineffective for failing to object to this theory of prosecution or request jury instructions to address the issue.

It is well settled that "prosecutors must refrain from making burden-shifting arguments which suggest that the defendant has an obligation to produce any evidence or to prove innocence." United States v. Saint Louis, 889 F.3d 145, 156 (4th Cir. 2018) (quoting United States v. Simon, 964 F.2d 1082, 1086 (11th Cir. 1992)). As a general matter, a district court has an obligation to give instructions to the jury that "fairly state[] the controlling law." United States v. Cobb, 905 F.2d 784, 789 (4th Cir.1990).

Petitioner's contention that counsel should have objected to the Government's burden-shifting theory of the case is refuted by the record. The Government presented evidence that Petitioner conspired to manipulate Beazer's accounting records with regards to the company's earnings and GMAC proceeds. Nothing about the Government's theory of the case or presentation of evidence shifted the burden to Petitioner, and
24 Petitioner has failed to identify any improper *24 comments or arguments that could have shifted the burden of proof. Further, the Court repeatedly instructed the jury that the burden of proof was on the Government and that Petitioner had no burden to prove his innocence or to present any evidence or testify. (3:10-cr-182, Doc. No. 405 at 14); (Id., Doc. No. 403 at 32, 33). The jury is presumed to have followed these instructions. See Jones v. United States, 427 U.S. 373, 394, 119 S. Ct. 2090, 2105, 144 L. Ed. 2d 370 (1999). The instructions that the Court provided on the burden of proof were legally correct and adequately addressed the issues at hand and Petitioner fails to explain what instruction counsel should have requested. Petitioner has failed to show that counsel was deficient in any way or that prejudice resulted from the alleged deficiency.

(F) Additional Allegations of Ineffective Assistance

Petitioner argues that he was denied effective representation in several other areas that prejudiced him.[15] This claim is too vague and

conclusory to support relief and alternatively fails on the merits. **(i)** Petitioner suggests that Richard Glaser, the attorney who was representing him at the time of the proffer session, was ineffective.

15 Although post-conviction counsel cites solely to Petitioner's stricken Declaration in support of this claim, the Court will address several examples in an abundance of caution.

The Sixth Amendment right to counsel is intended to protect a criminal defendant during "critical confrontations" with the government. United States v. Payne, 954 F.2d 199, 203 (4th Cir. 1992). This right attaches "at or after the time that judicial proceedings have been initiated ... 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" Fellers v. United States, 540 U.S. 519, 523, 124 S.Ct. 1019, 157 L.Ed.2d 1016 (2004) (quoting Brewer v. Williams, 430 U.S. 387, 398, 97 S.Ct. 25 1232, 51 L.Ed.2d 424 (1977)). *25

Petitioner entered into the proffer agreement with the Government on July 17, 2008, but he was not indicted until August 18, 2010. (3:10-cr-182, Doc. No. 73-1). Because judicial proceedings had not yet commenced, Petitioner's right to counsel had not yet attached and Mr. Glaser cannot be deemed ineffective for any advice he provided to Petitioner during the proffer sessions. See, e.g., United States v. Hornsby, 666 F.3d 296, 309 (4th Cir. 2012) (use of undercover government agent before charges were filed does not implicate the Fifth Amendment, and there was no Sixth Amendment violation because there were no judicial proceedings initiated against defendant at the time).

(ii) Sentencing

Petitioner contends that counsel failed to adequately prepare him for sentencing or allow him to provide any input on the matter.[16]

16 Mr. Gurney vehemently denies these allegations in his Affidavit, (Doc. No. 21-3), however the Court's resolution of this claim is not dependent on Mr. Gurney's Affidavit. --------

This claim is too vague and conclusory to support relief because Petitioner fails to explain what specific actions counsel should have taken that had a reasonable probability of affecting the outcome of the proceedings. See Dyess, 730 F.3d at 354 (vague and conclusory allegations contained in a § 2255 petition may be disposed of without further investigation by the district court). Indeed, counsel obtained a downward variance sentence from the advisory guideline range of 900 months to just 120 months' imprisonment. Petitioner has failed to explain what more counsel could have done that had a reasonable probability of further reducing his sentence.

(iii) Expert Witness

Petitioner also contends that counsel was ineffective for failing to call Duross O'Brien as a defense expert. He contends that the expert who testified at trial for the defense, Todd Bailey, did not present the issues as well and failed to address 26 key issues. *26

Defense counsel called several witnesses at trial including Mr. Bailey, a CPA and former auditor with construction experience who explained that the contingency entries and adjustments were reasonable and proper, that the disputed journal entries are inconsistent with cookie-jar accounting, and that the GMAC transaction had no continuing involvement and was handled appropriately under accounting principles. Mr. Bailey and other defense witnesses addressed these issues at trial. Petitioner has failed to demonstrate that counsel's decision to use Mr. Bailey instead of Mr. O'Brien was an unreasonable decision or that there is a reasonable probability that the jury would have embraced the defense theory had counsel called Mr. O'Brien at trial instead of Mr. Bailey.

(2) Substantive Error

Petitioner contends that the Government engaged in misconduct that rendered his trial and conviction fundamentally unfair. This includes the alleged withholding of exculpatory and impeachment material, putting on erroneous evidence regarding accounting principles and other material factual issues that the prosecution knew or should have known was wrong or outright false. The Government has argued that these claims are procedurally defaulted from § 2255 review because Petitioner failed to raise these claims on direct appeal and that he has failed to demonstrate cause and prejudice or actual innocence. In his Reply, Petitioner claims that he can show cause and prejudice through his claims of ineffective assistance of counsel and, further, Petitioner maintains his factual innocence of the charges of conviction.

"Habeas review is an extraordinary remedy and will not be allowed to do service for an appeal." Bousley v. United States, 523 U.S. 614, 621 (1998) (internal citations omitted); United States v. Sanders, 247 F.3d 139, 144 (4th Cir. 2001). In order to collaterally attack a conviction or sentence based upon errors that could have been but were not pursued on direct appeal, a petitioner
27 *27 must show cause and actual prejudice resulting from the errors of which he complains or he must demonstrate that a miscarriage of justice would result from the refusal of the court to entertain the collateral attack. See United States v. Frady, 456 U.S. 152, 167-68 (1982); United States v. Mikalajunas, 186 F.3d 490, 492-93 (4th Cir. 1999); United States v. Maybeck, 23 F.3d 888, 891-92 (4th Cir. 1994). Actual prejudice is then shown by demonstrating that the error worked to petitioner's "actual and substantial disadvantage," rather than just creating a possibility of prejudice. See Satcher v. Pruett, 126 F.3d 561, 572 (4th Cir. 1997) (quoting Murray v. Carrier, 477 U.S. 478, 494 (1986)). To establish cause based upon ineffective assistance of counsel, a petitioner must show that the attorney's performance fell below an objective standard of reasonableness and that he suffered prejudice as a result. See Murray, 477 U.S. at 488; Strickland, 466 U.S. at 687. In order to demonstrate that a miscarriage of justice would result from the refusal of the court to entertain the collateral attack, a petitioner must show actual innocence by clear and convincing evidence. See Murray, 477 U.S. at 496.

Petitioner failed to raise his claims of substantive error on direct appeal and therefore they are procedurally defaulted from § 2255 unless he can demonstrate cause and prejudice or actual innocence, which he has failed to do.

First, Petitioner contends that counsel's ineffective assistance demonstrates cause and prejudice. While a meritorious claim of ineffective assistance of counsel can be "cause" to excuse procedural default of a claim, no such showing has been made here. All of Petitioner's ineffective assistance claims are meritless, having demonstrated neither deficient performance nor prejudice. Therefore, ineffective assistance of counsel cannot excuse Petitioner's procedural default of these substantive
28 claims. *28

Second, Petitioner's reliance on the actual innocence exception is misplaced. That exception requires a petitioner to come forward with clear and convincing evidence of his factual innocence. Petitioner has failed to come forward with clear and convincing evidence of his innocence and offers only his own self-serving contentions in support of his actual innocence claim. Petitioner has not satisfied his burden of demonstrating cause and prejudice or actual innocence, and therefore, his claims of substantive errors are procedurally defaulted from § 2255 review.

IV. CONCLUSION

For the foregoing reasons, the Court will dismiss and deny Petitioner's First Amended Motion to Vacate.

IT IS, THEREFORE, ORDERED that:

1. Petitioner's First Amended Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255, (Doc. No. 10), is **DISMISSED** with prejudice and **DENIED.**

29

2. **IT IS FURTHER ORDERED** that pursuant to Rule 11(a) of the Rules Governing Section 2254 and Section 2255 Cases, this Court declines to issue a certificate of appealability. See 28 U.S.C. § 2253(c)(2); Miller-El v. Cockrell, 537 U.S. 322, 338 (2003) (in order to satisfy § 2253(c), a petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong); Slack v. McDaniel, 529 U.S. 473, 484 (2000) (when relief is denied on procedural grounds, a petitioner must establish both that the dispositive procedural ruling is debatable and that the petition states a debatable claim of the denial of a constitutional right).

*29

Signed: March 6, 2020

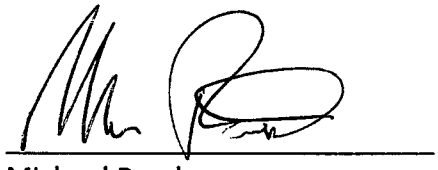
/s/

Robert J. Conrad, Jr.

United States District Judge

CERTIFICATE OF COMPLIANCE

I hereby certify that the accompanying Petition for Writ of Certiorari, United States v. Rand, No. 20-6393 complies with the word count limitations of Supreme Court Rule 33 (g) in that it contains 8,652 words based on word count functions of Microsoft Word – Office 365 including footnotes and excluding material not required to be counted by Rule 33 (d).



Michael Rand

CERTIFICATE OF SERVICE

I, Michael Rand, hereby certify that on the 13th day of December 2021 I caused to be served three (3) copies of the Petition for Writ of Certiorari in United States v. Rand, by U.S. first class mail, postage pre-paid upon counsel for the Respondent listed below:

Solicitor General of the United States
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Department of Justice
Room 5614
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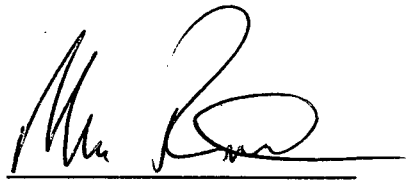

Michael Rand

Additional material from this filing is available in the Clerk's Office.