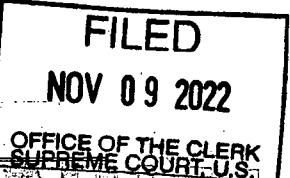


22-6065

No.



IN THE
Supreme Court of the United States

SAMIRKUMAR SHAH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

Samirkumar Shah (*Pro Se*)
Register No. 37943-068
FCI Fort Dix
P.O. Box 2000
Joint Base MDL, NJ 08640

November 7, 2022

QUESTIONS PRESENTED

The situation in this case raises the question of whether the Petitioner, Samirkumar Shah, a practicing cardiologist whose former attorney, Tina Miller, switched sides to become a supervisory Assistant U.S. Attorney while Petitioner's criminal proceeding was underway, was afforded a meaningful and fair adversarial process when the district court arbitrarily denied his motion to disqualify the United States Attorney's Office that Ms. Miller supervised, and doing so without convening an evidentiary hearing to properly assess the merits of Petitioner's disqualification motion.

Looking at the situation through a logical lens while approaching the extremely important disqualification issue with an abundance of caution due to the underlying complexity of human behavior that is involved, the circumstances leading up to Ms. Miller switching sides and becoming the supervising AUSA over the attorneys who prosecuted Petitioner warranted disqualification of the entire United States Attorneys' Office. The district court concluded that it did not, citing a "fully developed" record as basis for its decision—a record that is devoid of any meaningful input from the defense which sought a continuance in order to convene an evidentiary in order to *develop* the record. Had the district court convened an evidentiary rather than arbitrarily concluding that it did not "see any issue of any facts demonstrating a conflict of [interest]," (Appendix 5), it would have discovered that Ms. Miller was in fact motivated to obtain a conviction against Petitioner from the time she represented him and that she maintained that desire throughout the course of Petitioner's trial.

Therefore, because there was ample evidence that Ms. Miller interfered with the prosecution of Petitioner's criminal case—a case that she declared not to have interfered with after becoming a supervisory AUSA over the very office that prosecuted Petitioner, Petitioner's motion to disqualify the entire AUSA office on grounds of impartiality and conflict of interest was improperly denied.

The question for review then is presented as follows:

On the matter of disqualification with regards to federal Assistant United States Attorneys in particular, and an entire United States Attorney's Office in general, whether the appropriate standard in making a disqualification determination is an abuse of discretion when an argument that the district court acted arbitrarily is presented (*cf. Wheat v. United States*, 486 U.S. 153 (1988); *United States v. Stewart*, 185 F.3d 112 (3rd Cir. 1999) & *United States v. Whittaker*, 268 F.3d 185, 193-94 (3rd Cir. 2001)); whether the appropriate barometer for assessing such a disqualification claim either in a general context or relative to a particular federal prosecuting attorney is founded upon the requirements set forth in a state constitution (Pa. Const. art. V § 10) and state rules of professional conduct (W.D. Pa. L. Civ. R. 83.3(A)(2) & 204 Pa. Code R. 1.11(d)) rather than through the lens of this Court's holding in *Wheat v.*

United States, 486 U.S. 153 (1988), which accurately balances the management of incurring unnecessary loss of taxpayers' dollars and the defendant's right to a fair and meaningful adversarial process when deciding a disqualification motion. Id. at 164.

Similarly, since our system of justice is set up to ensure that all parties are afforded a just, fair, and meaningful adversarial process as this Court explained in Lockhart v. Fretwell, 506 U.S. 364 (1993),¹ should the basis of achieving that objective turn on the possible (but not likely) financial cost to the government?

¹ Explaining that “[a]bsent competent counsel, ready and able to subject the prosecution's case to the ‘crucible of meaningful adversarial testing,’ there can be no guarantee that the adversarial system will function properly to produce just and reliable results.” Lockhart v. Fretwell, 506 U.S. at 377, citing United States v. Cronic, 466 U.S. 648, 656 (1984).

PARTIES TO THE PROCEEDING

The Petitioner is Samirkumar Shah, a federal prisoner currently confined at a Federal Correctional Institution in New Jersey (FCI Fort Dix) located in Pemberton Township, New Jersey. Mr. Shah is the defendant below.

Respondents are the Department of Justice, the Attorney General of the United States, and the United States Attorney's Office for the Western District of Pennsylvania, and they are being represented by the Office of the United States Solicitor General, which is an extension of the United States Department of Justice.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

SAMIRKUMAR SHAH, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
(Appeal No. 21-2581)

The Petitioner, Samirkumar Shah, respectfully asks that a writ of certiorari be issued to review the judgment and opinion of the Third Circuit Court of Appeal in Case Number 21-2581, filed on July 22, 2022.

OPINION BELOW

The opinion and judgment of the Third Circuit which is published, was issued on July 22, 2022, and is attached hereto as Appendix 1-19. A subsequent Order denying Mr. Shah's request for rehearing *en banc* was issued on August 15, 2022 and is attached hereto as Appendix 20-21. The judgment of the district court entered on August 10, 2021, is attached hereto as Appendix 22-29.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1251(b)(2) and 1254(1). The Third Circuit Court had jurisdiction under 28 U.S.C. § 1291. The decision of the Third Circuit for which Mr. Shah seeks review was issued on July 22, 2022. A petition for rehearing *en banc* was subsequently denied on August 15, 2022. The judgment of the district court issued pursuant to 18 U.S.C. § 1347 and § 3231 was entered on August 10, 2021. This petition therefore is filed within 90 days of the Third Circuit's final judgment and opinion denying Mr. Shah's appeal, in accordance with Rules 13.3 and 29.2 of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment 5 provides in part:

No person shall be ... deprived of life, liberty, or property, without due process of law ...

As discussed below, the underlying facts and circumstances driving this case illustrates that Mr. Shah was deprived due process of law when, during a critical phase of his criminal proceeding, his retained attorney who, during the course of Mr. Shah's criminal case, became the supervisory prosecutor over the very office that prosecuted his case, continuously tried to convince him to abandon his desire to proceed to trial and instead enter a guilty plea while she represented Mr. Shan, and later *after* she withdrew as his attorney. This led to Mr. Shah filing a motion to disqualify the entire United States Attorney's Office due to an apparent conflict and in order to avert the likelihood that Mr. Shah would not be afforded a fair process. The district court, however, denied the motion without convening an evidentiary hearing which would have developed the required factual basis needed for the court to assess the merits of Mr. Shah's disqualification request properly and accurately.

United States Constitution, Amendment 6 provides, in part:

An accused is guaranteed the right to know ... the nature of the charges and evidence brought against him. As this Court has long explained, criminal defendants have the right to the assistance of counsel for their

defense. *See* U.S. Const. amend. VI. Thus, when, as here, a defendant's attorney switch sides and become part of the defendant's prosecution during the most critical stage¹ of the criminal proceeding, the outcome is a *per se* Sixth Amendment violation because privilege information about the defendant and his case that the attorney obtained before switching sides will ultimately be used against the defendant, especially when, as here, the attorney who switched sides display an uncanny desire to obtain a conviction, even when she represented the defendant. This is fundamentally unfair to the defendant and inherently prejudicial, and it deprives the defendant of his right to a fair trial because any form of defense that he plans to put forth will be compromised. *See United States v. Schell*, 775 F.2d 559, 566 (4th Cir. 1985) (explaining that "due process is violated when an attorney represents a client and then participates in the prosecution of that client with respect to the same matter."); *United States v. Cronic*, 466 U.S. 648, 659, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

Rule 11(b) Fed. R. Civ. P. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the

¹ In *Van v. Jones*, 475 F.3d 292 (6th Cir. 2007), the Sixth Circuit explained that a stage is critical when "there [is] a reasonable probability that [the defendant's] case would suffer significant consequences from his total denial of counsel at that stage." *Id.* at 313. It is difficult dispute that an attorney who was defending a criminal defendant during a critical stage of his case later switched sides to become part of the prosecution will not utilize privileged information obtained from the defendant during the time she represented him. In this case, the district court alluded to the Pennsylvania Supreme Court's Rules of Professional Conduct (W.D. Pa. L. Civ. R. 83.3(A)(2)) as the appropriate safeguard against such possibility, and credited declarations submitted by Mr. Shah's former attorney turned prosecutor and two other AUSAs without having heard from Mr. Shaw and his witnesses. On review, the Third Circuit ultimately determined that the district court's actions were neither arbitrary nor did they constitute an abuse of discretion because the record was "fully developed." This Court and other court of appeals, when confronted with a similar issue, have all concluded that "[s]uch switching of sides is fundamentally unfair and inherently prejudicial" because it deprives "the client[] [of his] right to a fair trial," *Schell*, 775 F.2d at 566 (4th Cir. 1985), while "undermin[ing] confidence in the integrity of the criminal proceeding." *Young v. United States ex rel.*, 481 U.S. 787, 790 (1987). In order to effectively prevent such a likely and egregious outcome whenever a legitimate claim of disqualification is made, the district court is required to convene an evidentiary hearing to fully establish the facts driving the claim so that it can make an informed and just decision as to whether disqualification is warranted. As this Court explained in *Young, supra*, "[a] concern for actual prejudice in such circumstances misses the point, for what is at stake is the public perception of the integrity of our criminal justice system." *Young*, 481 U.S. at 811. That the district court in this case declined to convene an evidentiary hearing deprived Mr. Shah of the ability and the opportunity to present evidence in support of his disqualification claim.

best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances.

In the case here, the declaration submitted by Mr. Shah's former attorney turned prosecutor failed to tell the entire story and therefore was an inadequate basis upon which to conclude that the record was fully developed.

Mr. Shah's former attorney turned supervisory AUSA, along with the two AUSAs who prosecuted his criminal case, submitted declarations indicating that Mr. Shah's former attorney had no involvement in, or oversight over, his criminal prosecution. However, what the declarations failed to mention was that Mr. Shah's former attorney repeatedly showing up during his trial to look in on things and conferred with the two AUSAs prosecuting the case. An evidentiary hearing would have properly ferret out and analyzed the motive behind this particular incident, as well as pre-trial interactions that occurred between Mr. Shah and his former attorney turned prosecutor.

STATEMENT OF THE CASE

I. Background and Proceedings in the District Court

On May 17, 2016, a federal indictment was returned against Mr. Shah, charging him with two counts of healthcare fraud in violation of 18 U.S.C. § 1347. (Indict., ECF No.1). The charges stemmed from allegations that Mr. Shah, a certified cardiologist, executed a scheme to defraud health care benefit programs with regards to billings for External Counter Pulsation therapy (“ECP”). As outlined in the indictment, Count One alleges that Mr. Shah caused billings for ECP treatments to be sent to Medicare, Medicaid, Highmark, UPMC and Gateway, representing that the patients suffered from Class III or IV angina, while knowing that many patients did not suffer from Class III or IV angina and that no physician was present during the ECP treatment. (Indict., ECF No.1). Count Two of the indictment alleges that Mr. Shah caused “unbundled billings” for ECP, electrocardiographs, Doppler tests and pulse oximetry to be sent to the insurers, knowing that generic code G0166 was a bundled code that included payment for all these tests. (Indict., ECF No.1 at ¶ 10).

In June of 2016, Mr. Shah hired Attorney Tina O. Miller² to defend him against the charges filed against him. Shortly after Ms. Miller was hired, her primary focus and objective was set on getting Mr. Shah to abandon his desire to proceed to trial and instead enter a guilty plea notwithstanding the fact that Mr. Shah, (a) had hired her to help him defend his innocence, and (b) he repeatedly professed to her that he is innocent of the charges, explaining that any discrepancy with regards to his billing practice was not a result of systemic and purposeful fraud but instead is consistent with occasional mistakes or diagnostic differences of opinion between cardiologists who performed similar tasks. But despite Mr. Shah’s repeated assertions of his innocence, Ms. Miller continued to push him to plead guilty, and even threatening to ensure that if he proceeded to trial, she would see to it that not only is he found guilty, but also that he would end up with a substantial prison sentence.

Quite naturally, the attorney-client relationship between Mr. Shah and Ms. Miller broke down, resulting in Ms. Miller filing a motion on February 16, 2017 to withdraw as Mr. Shah’s attorney. (ECF No. 36). However, that

² Ms. Miller later became the supervisory Assistant U.S. Attorney over the very United States Attorney’s Office that was prosecuting Mr. Shah.

did not stop her from harassing Mr. Shah. Even after withdrawing as Mr. Shah's attorney, Ms. Miller continued to maintain contact with him and at times reached out to members of his family encouraging them to convince Mr. Shah to abandon his desire to proceed to trial.³

In May of 2017 while Mr. Shah was on pretrial status and was being detained at an Ohio detention facility pending his trial, he received an unexpected visit from Ms. Miller. The visit was unexpected because, as indicated above, in February of 2017, Ms. Miller withdrew as Mr. Shah's attorney. So when she visited him at the Ohio detention facility in May of 2017, she was no longer representing him.

During the visit, Ms. Miller presented Mr. Shah with a plea document which she instructed him to sign. Mr. Shah naturally refused, which led to Ms. Miller threatening him that she would see to it that he remains in prison for a long time. The Ohio detention facility where Mr. Shah was being detained is a secured facility that recorded each detainee's visits. Therefore, there is a record of Ms. Miller showing up at the facility to visit with Mr. Shah in May of 2017. This record, which could have easily been obtained by Mr. Shah's trial attorney had there been an evidentiary hearing, would have contributed to establishing the requisite factual basis demonstrating that Ms. Miller was both motivated and predisposed towards ensuring that a finding of guilt was returned against Mr. Shah.

Approximately ten months after Ms. Miller's motion to withdraw as Mr. Shah's attorney was filed, she became a supervisory Assistant United States Attorney ("AUSA") in the very same United States Attorney's Office that was prosecuting Mr. Shah. Quite naturally, concerns as to whether Mr. Shah would be afforded a fair and complete trial process emerged.

On June 3, 2019, one day prior to jury selection, Mr. Shah, through his new attorney, filed a motion to disqualify the United States Attorney's Office from prosecuting his case, arguing that because his former attorney, Ms. Miller, was now the Deputy United States Attorney and Chief of the Criminal Division of the Western District of Pennsylvania, there was "both a conflict

³ As explained below, Mr. Shah's motion to disqualify the United States Attorney's Office would have benefited from the district court convening an evidentiary hearing because these incidents that occurred outside the record, such as Ms. Miller's inappropriate contact with members of Mr. Shah's family *after* she was no longer representing Mr. Shah, would have provided sufficient evidentiary matter to demonstrate that Ms. Miller was highly predisposed towards ensuring that a guilty verdict was returned against Mr. Shah.

of interest and an appearance of a loss of impartiality.” (ECF No. 144 & 145 at 7). Without hearing from the AUSA’s office or from Ms. Miller herself, the district court denied the motion, noting that it did not “see any issue of any facts demonstrating a conflict of [interest]” and emphasized the need to avoid delaying the trial. (Appendix 5).

Mr. Shah’s trial began on June 4, 2019. The Government did not call any expert witnesses to testify against Mr. Shah. Instead, the Government called twelve ECP patients to testify that they did not have angina. The Government also called an ECP bed supplier, insurers, Mr. Shah’s third-party billing service, and several law enforcement officers.

On June 13, 2019, Mr. Shah’s trial concluded. At that point, Mr. Shah’s trial attorney orally moved for a judgment of acquittal as to Count Two of the indictment, arguing that according to the testimonies elicited during the trial, the “unbundled billing” that was the basis of the Government’s allegation of fraud was an inadvertent error and that Mr. Shah stopped the “unbundled billing” after the insurers notified him about the error. Therefore, according to Mr. Shah’s attorney, no fraud occurred, and Count Two should be dismissed. The district court, however, disagreed and denied the motion for judgment of acquittal. The following day, June 14, 2019, the jury returned guilty verdicts on both counts. (ECF No. 152).

Curiously, while the disqualification motion was pending before the district court, rather than staying the trial and conducting an evidentiary hearing to properly ascertain the merits of the claims raised in the motion, the district court instead decided to proceed with the trial, emphasizing the need to avoid unnecessary delay. In other words, what the district court was saying is that it was more important to preserve time than to protect the integrity of the trial process. The integrity of the trial process would have benefited from an evidentiary hearing because while Mr. Shah’s trial was underway, Ms. Miller would occasionally stop by the courtroom and look in. And on occasion, she was seen conferring with the attorneys prosecuting Mr. Shah. Indeed, had there been an evidentiary hearing, these incidents would have been highlighted and appropriately addressed in a manner that is commensurate with ensuring that Mr. Shah was afforded a fair trial process.

After the district court denied Mr. Shah’s motion to disqualify the AUSA’s office, the Government decided to file declarations from Ms. Miller and the two AUSAs on Mr. Shah’s case. (ECF No. 150). In Ms. Miller’s declaration, she stated that she did not discuss employment with the United

States Attorney's Office when she represented Mr. Shah, and once she joined the United States Attorney's Office, she had no discussions about or involvement in any cases in which she had played a role while in private practice. Ms. Miller went on to state that she divulged no confidential information learned during her representation of Mr. Shah to any United States Attorney's Office employee or investigative agency. (Appendix 5). However, what Ms. Miller failed to mention in her declaration was that *after* she withdrew from Mr. Shah's case in February of 2017, several months later she visited Mr. Shah while he was detained at an Ohio detention facility and attempted to get him to enter a guilty plea. And when Mr. Shah refused, she threatened him.

As for the declarations filed by the two AUSAs who prosecuted Mr. Shah, they both indicated that Ms. Miller was not involved in Mr. Shah's prosecution and did not divulge any client confidential information. One of the AUSAs added that her only discussion with Ms. Miller regarding Mr. Shah's prosecution involved her telling Ms. Miller that she was unable to assist on a separate matter because she, unbeknownst to Ms. Miller, "would be in ... the trial of [Mr. Shah]." (Appendix 5).

At a sentencing hearing held on August 5, 2021, the district court, in calculating the loss amount attributed to Mr. Shah, heard testimony from FBI Special Agent Brooklynn Riordan. The Government ultimately recommended reducing the total loss amount by fifty percent, which the district court accepted. The court then sentenced Mr. Shah to 78 months' imprisonment and three years of supervised release. The court also ordered Mr. Shah to pay \$1,234,983.60 in restitution. Mr. Shah timely appealed.

II. Proceedings in the Third Circuit Court of Appeals

On appeal, Mr. Shah challenged, (a) the district court's order denying his motion to disqualify the United States Attorney's Office that prosecuted him; (b) the district court's order denying his motion for a continuance to conduct additional discovery; and (c) the district court's denial of his motion for judgment of acquittal on Count Two.

Starting with the district court's denial of Mr. Shah's disqualification motion, the Third Circuit determined that the "[d]istrict court properly denied [the] motion to disqualify the entire USAO" after carefully assessing the circumstances underlying the motion. (Appendix 7). Therefore, according to the Third Circuit, the "[d]istrict court's decision was not arbitrary." Id.

The panel of the court also determined that “the [d]istrict court did not abuse its discretion” in denying Mr. Shah’s motion to disqualify, explaining that the district court’s reliance on “the Pennsylvania Supreme Court’s Rules of Professional Conduct,” which is an appropriate barometer for evaluating such types of attorney misconduct claims that Mr. Shah complained about, along with the declarations submitted by Ms. Miller and the two AUSAs who prosecuted Mr. Shah, established that the attorneys acted appropriately and that there was insufficient evidence presented to disqualify the “entire prosecutor’s office” as opposed to “just the conflicted attorney.” (Appendix 8-9). The panel also agreed with the district court’s reasoning that to have disqualified the entire AUSAs office as Mr. Shah requested “would [have] impose[d] substantial costs on taxpayers because it would trigger the need to appoint special prosecutors each time a member of the defense bar switches sides.” (Appendix 9), *citing Commonwealth v. Miller*, 422 A.2d 525, 529 (Pa. Super. Ct. 1980); *Commonwealth v. Harris*, 460 A.2d 747, 749 (Pa. 1983) (calling such an approach “simply not viable”).

Secondly, as to the district court’s denial of Mr. Shah’s motion for a continuance claim, the panel held that the district court did not abuse its discretion in denying the motion. (Appendix 12). According to the panel, Mr. Shah did not demonstrate that the sought-after continuance was warranted. *Id.* Therefore, the district court did not abuse its discretion in denying this claim. (Appendix 13).

Third, as to Mr. Shah’s claim that the district court erred in denying his motion for judgment of acquittal on Count Two, the panel concluded that “[t]he District Court properly denied [the] motion,” (Appendix 14), finding that, based on the evidence presented at trial, and viewing the evidence in the light most favorable to the Government, “a reasonable jury could have found Shah acted with intent to defraud.” *Id.*

Finally, as to Mr. Shah’s challenge involving the district court’s loss calculation which triggered a sixteen-level increase in his base offense level under U.S.S.G. § 2B1.1(b)(1)(I), crediting the testimony of FBI Special Agent Riordan, the panel concluded that not only did Mr. Shah’s procedural challenge failed, (Appendix 18), but he also failed to demonstrate that the sentence imposed was substantively unreasonable. *Id.*

On August 4, 2022, Mr. Shah filed a petition for rehearing *en banc* and petition for panel rehearing, (Appendix 30-43), arguing principally that the panel, in deciding against his disqualification claim, overlooked the crucial

fact that the record *was not fully developed* in the district court and therefore the panel could not have reached the decision that it did on the basis that the record in the district court was fully developed. Mr. Shah also argued that the decision reached by the panel on his disqualification claim is contrary to this Court's decisions in Wheat v. United States, 486 U.S. 153 (1988) and Young v. United States ex rel., 481 U.S. 787, 790 (1987), as well as the Third Circuit's decision in United States v. Stewart, 185 F.3d 112 (3rd Cir. 1999).

In an order filed on August 15, 2022, the court rejected Mr. Shah's rehearing petition in its entirety, finding that because "no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court *en banc*, is denied." (Appendix 44-45).

This petition for certiorari now follows.

REASON FOR GRANTING THE PETITION

- I. The bases upon which the Third Circuit Court of Appeals relied in affirming the district court's denial of Mr. Shah's motion to disqualify the Office of the United States Attorney are in conflict with this Court's holding in Wheat v. United States, 486 U.S. 153 (1988), Young v. United States ex rel., 481 U.S. 787 (1987), along with the Third Circuit's own rulings in United States v. Whittaker, 268 F.3d 185, 193-94 (3rd Cir. 2001) and United States v. Stewart, 185 F.3d 112 (3rd Cir. 1999), and similar decisions consistent with Wheat that have been reached by other court of appeals in ruling on similar disqualification claims.⁴ Therefore, in order to maintain uniformity within the circuits on this very important issue, and to clarify and, if necessary, expand the Court's decision announced in Wheat, this Court should grant Mr. Shah's request for certiorari and ultimately vacate and remand the judgment of the Third Circuit Court of Appeals.

A. Discussion of Authorities and Relevant Law

In Young v. United States ex rel., 481 U.S. 787 (1987), the attorney who represented a trademark holder was later appointed as special counsel to represent the United States to prosecute defendants in a criminal contempt action for violating the trademark. Id. This Court exercised its supervisory power and found that the lower court "erred in appointing ... counsel for an interested party." Id. at 802. Such an error, according to this Court, is "fundamental" because "it undermines confidence in the integrity of the criminal proceeding." Id. at 810. The Court reasoned that:

Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life. For

⁴ Mr. Shah further asserts that this petition for writ of certiorari involves a question of exceptional importance—that is, the issue of disqualification in matters involving the U.S. Attorney's Office. Cf. Fed. R. App. P. 35; 3rd Cir. L.R. 35.

this reason, we must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice.

Id. at 814.

Crucial to the discussion of the facts underlying this case is what this Court stated next in Young:

A concern for actual prejudice is such circumstances misses the point, for what is at stake is the public perception of the integrity of our criminal justice system. Justice must satisfy the appearance of justice, and a prosecutor with conflicting loyalties presents the appearance of precisely the opposite.

Id. at 811 (emphasis added) (internal quotations and marks omitted).

Similarly, in Wheat v. United, 486 U.S. 153 (1988), this Court made clear that when determining a motion to disqualify, courts should consider “not only [] a demonstration of actual conflict but also a showing of a serious *potential for conflict.*” Id. 164 (emphasis added). The reason for this, according to the Court, is because “the courts have an independent interest in assuring compliance with ethical standards and *the appearance of fairness.*” Id. at 153 (emphasis added).

B. Discussion of Facts and Authorities

As indicated above, on the first day of trial, Mr. Shah moved to disqualify the entire United States Attorney’s Office that prosecuted his case on the grounds that Ms. Miller, the attorney who he had initially hired to represent him, had become a supervisory Assistant U.S. Attorney in the very same office that was prosecuting him and that this unique and rare occurrence posed “both a conflict of interest and [the] appearance of a loss of impartiality.” (Appendix 5). The district court denied the motion without first hearing from the Government,⁵ and without convening an evidentiary hearing

⁵ As mentioned above, the Government later submitted declarations from Ms. Miller and the two AUSAs who prosecuted Mr. Shah’s case. But by this time, the damage had already been done because Mr. Shah’s disqualification motion had already been denied without a hearing, and the actions taken by the district court after the fact were, in essence, attempts to justify its denial rather than ensuring that the merits of Mr. Shah’s claim was properly vetted and assessed.

as Mr. Shah had requested in order to properly develop the facts and circumstances surrounding his disqualification claim.

The Third Circuit, during appellate review, concluded that the district court's actions were neither arbitrary nor an abuse of its discretion. The court reached this conclusion by incorrectly finding that the record before the district court was fully developed which provided sufficient information for the district court to have properly decided Mr. Shah's disqualification claim. The Government, in a Motion to Designate Panel Opinion as Precedential⁶ filed on July 25, 2022, successfully moved the Third Circuit to designate its decision as precedential notwithstanding the fact that the panel's ruling, as explained below, wholly conflicts with this Court's ruling in Wheat v. United States, 486 U.S. 153 (1988), Young v. United States ex rel., 481 U.S. 787 (1987), and with similar other rulings rendered by the Fourth Circuit in United States v. Schell, 775 F.2d 559, (4th Cir. 1985) and by various state court rulings on the issue of disqualification such as State v. Tippecanoe County Court, 432 N.E.2d 1377 (Ind. S. Ct. 1982),⁷ each of which held that "due process is violated when an attorney represents a client and then participates in the prosecution of that client with respect to the same matter." Wheat, 486 U.S. at 566. The Fourth Circuit, in Schell, emphasized that "[s]uch switching of sides is fundamentally unfair and inherently prejudicial[] ..." because "the client's right to a fair trial, secured by the due process clauses of the fifth and fourteenth amendments, is compromised under these circumstances." Id. at 565.

As explained above, while Ms. Miller represented Mr. Shah, she repeatedly attempted to get him to change his plea to guilty despite Mr. Shah

⁶ According to the Government, the "publication of the opinion will help to direct not only [the Third Circuit], but district courts within the Third Circuit that may face the question of disqualification in matters involving the U.S. Attorney's Office." (Mot. to Designate Panel Opinion as Precedential at 2). By filing and granting such a rare motion, respectively, both the Third Circuit and the Government have unequivocally acknowledged that the disqualification issue involves questions of *exceptional importance*.

⁷ In State v. Tippecanoe County Court, 432 N.E.2d 1377 (Ind. S. Ct. 1982), the court held that the trial court properly disqualified the entire staff of the prosecutor's office where habitual offender charge against the accused was based upon two prior theft cases in which elected prosecuting attorney previously represented the accused, and the prosecutor had administrative control over the entire staff of his office. *See also People v. Shinkle*, 415 N.E.2d 909 (N.Y. Ct. App. 1980) (prior participation in a defendant's case by an attorney in the prosecutor's office disqualifies all office attorneys from prosecuting the case). Judging by the consistency in the decisions regarding disqualification reached by these various courts, including this Court, it is clear that the Third Circuit stands apart in deciding how this very crucial issue should be handled.

continuously asserting his innocence. Mr. Shah further explained that Ms. Miller would at times threaten that she would see to it that not only was he found guilty, but also that he received a substantial prison sentence if he proceeded to trial. Even *after* Ms. Miller no longer represented Mr. Shah, she contacted his family in order to get them to encourage him to change his plea, and she later visited with him at an Ohio detention facility in an effort to get him to sign documents denoting his acceptance of a plea agreement.

In addition to that, while Mr. Shah's trial was underway, Ms. Miller, on occasion, would stop by the courtroom to look in on the trial, and at times was seen in discussion with the AUSAs prosecuting Mr. Shah's case. That the Third Circuit, relying on the affidavits/declarations submitted by Ms. Miller and "the two AUSAs who tried Shah," (Appendix 10), sided with the district court's finding that Ms. Miller "has not participated in the [Shah] case in any manner," that conclusion was only reached because an evidentiary hearing was never conducted to properly developed the record. United States v. Voigt, 89 F.3d 1050, 1075 (3rd Cir. 1996) (explaining that when "the court makes a 'reasoned determination on the basis of *a fully prepared record*,' its decision will not be deemed arbitrary.") (emphasis added).

Mr. Shah correctly filed a motion asking the district court to convene an evidentiary hearing on his disqualification issue and to hold the trial in abeyance pending the outcome of the hearing. However, without having heard from the Government, the district court incorrectly denied the motion, noting that it did not "see any issue of any facts demonstrating a conflict of [interest]" and emphasized the need to avoid delaying the trial. (Appendix 5). As indicated, the Third Circuit concurred with the district court's decision and concluded that the district court neither acted arbitrarily nor did it abused its discretion, especially in light of the fact that "disqualifying an entire prosecutor's office, rather than just the conflicted attorney, would impose substantial costs on taxpayers because it would trigger the need to appoint special prosecutors each time a member of the defense bar switches sides." (Appendix 9). But this analysis completely ignores the crux of the issue at hand—*i.e.*, "the public perception of the integrity of our criminal justice system," Young, 481 U.S. at 811; the fact that "[j]ustice must satisfy the appearance of justice," *id*; and, in achieving these goals, whether the court "held a hearing and properly balanced the factors for and against disqualifying [the AUSA's Office]," United States v. Stewart, 185 F.3d 112, 120 (3rd Cir. 1999), and whether Mr. Shah was prejudiced by the switching of sides. Instead, the district court and the Third Circuit focused on a potential "costs on taxpayers" that disqualification will incur which can *only*

occur *after* the determination of disqualification is made, at which point, the “fundamental” need to protect “the integrity of the criminal proceeding” would take precedence. Cf. Young, 481 U.S. at 790 (emphasizing that such an error is “fundamental” as “it undermines confidence in the integrity of the criminal proceeding.”); *see also State v. Tippecanoe County Court*, 432 N.E.2d 1377 (Ind. S. Ct. 1982) (trial court properly disqualified the entire staff of the prosecutor’s office where habitual offender charge against the accused was based upon two prior theft cases in which elected prosecuting attorney previously represented the accused, and the prosecutor had administrative control over the entire staff of his office); People v. Shinkle, 415 N.E.2d 909 (N.Y. Ct. App. 1980) (prior participation in a defendant’s case by an attorney in the prosecutor’s office disqualifies all office attorneys from prosecuting the case).

As noted, this Court, in Wheat v. United States, 486 U.S. 153 (1985), made it clear that when making a determination on a motion to disqualify, courts should consider “not only [] a demonstration of actual conflict but [] a showing of serious *potential for conflict*.” *Id.* at 164 (emphasis added). The Court reached this conclusion because, as it explained, “the courts have an independent interest in assuring compliance with ethical standards and *the appearance of fairness*.” *Id.* at 153. (emphasis added). Interestingly, the Third Circuit followed this guidance in Stewart where it found that the *entire office* of the law firm Christie Pabarue representing prosecution witnesses in parallel civil RICO actions in which they were defendants were disqualified from representing the defendant in the criminal case. United States v. Stewart, 185 F.3d at 122. The Third Circuit reasoned that “[b]ecause the Christie Pabarue attorneys would have been part of a team of attorneys required to cross-examine the four individuals testifying for the government, Stewart’s right to effective counsel could have been compromised by the divided loyalties of his own attorney.” *Id.* 121. Citing Wheat, the court went on to state that it must base its determination “not only [on] a demonstration of actual conflict but [also on] a showing of a serious potential for conflict.” *Id.* The court also explained that “[t]he evaluation of the facts and circumstances of *each case* under this standard must be left primarily to the *informed judgment* of the trial court.” *Id.*

Yet, in this case, the Third Circuit held that “actual taint must be shown, [and] *the mere ‘appearance of impropriety’* is insufficient to support disqualification of an entire office,”” (Appendix 9) (emphasis added), which evidently contravene with this Court’s analysis in Wheat that “a showing of

a serious *potential for conflict*⁸ is sufficient to support a disqualification claim. Wheat, 486 U.S. at 164 (emphasis added).

Not only is it that the “each case”⁸ standard of review not followed by the Third Circuit in affirming the district court’s denial of Mr. Shah’s disqualification claim but given the circumstances underlying Mr. Shah’s interaction with Ms. Miller, it is apparent that the record that the district court based its decision was demonstratively not “informed.”

In reaching the conclusion that the district court’s denial of Mr. Shah’s disqualification claim was neither arbitrary nor an abuse of discretion, the Third Circuit reasoned that “because disqualifying an entire prosecutor’s office[] rather than just the conflicted attorney, [doing so] would impose substantial costs on taxpayers because it would trigger the need to appoint special prosecutors each time a member of the defense bar switches sides.” (Appendix 9). This reasoning, however, is functionally flawed and is in tension with the standard of assessing disqualification claims put forth by this Court in both Wheat and Young, *supra*, where the Court explained that when making a determination on a motion to disqualify, courts should consider “not only [] a demonstration of actual conflict but [also] a showing of serious *potential for conflict*,” Wheat, 486 U.S. at 164 (emphasis added), and that “[a] concern for actual prejudice in such circumstances misses the point, for what is at stake is the public perception of the integrity of our criminal justice system.” Young, 481 U.S. at 811; *cf. Schell*, 775 F.2d at 566 (“due process is violated when an attorney represents a client and then participates in the prosecution of that client with respect to the same matter”).

As noted, rare is a situation of “conflict of interest and an appearance of a loss of impartiality” (Appendix 5) due to an attorney switching sides in the middle of a criminal proceeding, as in the case here, because such an occurrence hardly ever occur, which essentially negates both the district court’s and the Third Circuit’s reasoning regarding disqualification seemingly resulting invariably in a “substantial cost[] on taxpayers because it would trigger the need to appoint special prosecution *each time* a member of the defense bar switches sides.” (Appendix 9) (emphasis added). This reasoning suggests that motions for disqualification are frequently filed; they are not simply because a legitimate motion to disqualify would only be filed by a competent defense attorney who has identified a reliable factual basis

⁸ This phrase is expounded upon in the last paragraph on this page.

upon which to support such a motion.⁹ And rarely does such a factual basis exists simply because it is rare that a criminal defense attorney switches sides in the middle of a trial to become part of his client's prosecution team. So any concerns about the district court adequately assessing a properly filed motion to disqualify "would impose substantial costs on taxpayers" is simply a red herring.

Also, what the Third Circuit seems to be saying is that even if there is a sufficient factual basis for disqualification, avoiding "substantial costs [to] taxpayers" outweigh the need to maintain the "perception of [] integrity of our criminal justice system." Young, 481 U.S. at 811. But as explained, before a finding of disqualification can be made, a *careful analysis* of the facts and circumstances upon which the defendant's disqualification requests rest must first be conducted, which brings us to the next leg of the Third Circuit's analysis in this case—that is, whether (a) the record upon which Mr. Shah's disqualification claim rests was in fact "fully prepared" as the Third Circuit concluded,¹⁰ (Appendix 8); and (b) whether the Third Circuit's finding that "actual taint must be shown [rather than] the mere 'appearance of impropriety'" in order "to support disqualification of an entire office" (Appendix 9) is consistent with this Court's analysis in Wheat and Young.

As discussed, the record was not fully developed. At the beginning of trial, Mr. Shah moved to disqualify the entire United States Attorney's Office on the grounds that the attorney who he had originally hired to represent him on his medical fraud criminal case had become the supervisory prosecuting attorney on the same case which posed a conflict of interest and the appearance of a loss of impartiality. Rather than stopping the trial and conducting an evidentiary hearing to properly and adequately examine the bases of Mr. Shah's disqualification claim, the district court instead denied Mr. Shah's motion, noting that it did not "see any issue of any facts demonstrating a conflict of [interest]." Id. Later on, it decided to revisit the disqualification issue after receiving affidavits from the Government on the matter. Even though the foundation of the disqualification claims were largely based on the interaction that occurred between Mr. Shah and Ms.

⁹ The same deference of integrity and judicial responsibility that the Third Circuit imputed to AUSAs and relying on the Pennsylvania Supreme Court's Rules of Professional Conduct in doing so should also be afforded to criminal defense attorneys who are similarly bound by the same rules of professional conduct. (Appendix 8).

¹⁰ If the record was not developed, as Mr. Shah contends, then the district court's decision should have been deemed arbitrary. Here, the Third Circuit missed the mark. (Appendix 8).

Miller, the district court decided that an evidentiary hearing was not warranted which was the only way that the court would have been able to hear from Mr. Shah. Indeed, the point of an evidentiary hearing is to develop the very record that the district court incorrectly concluded was fully developed. (Appendix 8). Cf. United States v. McCoy, 410 F.3d 124, 131 (3rd Cir. 2005) (explaining that an evidentiary hearing must be held to resolve issues of fact falling outside the record of the case). Moreover, conducting an evidentiary hearing meant that the district court would have heard from Mr. Shah as he explained his interactions with Ms. Miller while she represented him *and* after she was no longer his attorney; the court would have heard about Ms. Miller's constant threats in trying to get Mr. Shah to enter a guilty plea; her visiting with Mr. Shah at a detention facility in Ohio for the sole purpose of trying to get him to enter a guilty plea, and that she did well after she was no longer Mr. Shah's attorney; and the court would have heard testimony of Ms. Miller repeatedly showing up at the courtroom during Mr. Shah's trial evidently to assess the status of the case.¹¹ All of these incidents demonstrate impartiality on Ms. Miller's part in particular, and on the part of the AUSAs office in general over which Ms. Miller held supervisory power, ultimately illustrating that Ms. Miller was predisposed towards obtaining a finding of guilt against Mr. Shah.

That the district court later revisited the issue and was provided with affidavits/declarations from Ms. Miller herself, along with the two AUSAs who prosecuted Mr. Shah's case, did nothing to cure the prejudice that had already occurred because nowhere in the record is it stated that Ms. Miller had engaged in inappropriate contact with Mr. Shah *after* she was no longer representing him—a fact that was crucial to the merits of Mr. Shah's disqualification claim. Nor is it stated in the record that Ms. Miller was bent on getting Mr. Shah to change his not guilty plea to guilty while she was representing him notwithstanding the fact that Mr. Shah repeatedly professed his innocence to her and had paid her to defend him.

To avoid a potential swearing contest between Mr. Shah and Ms. Miller, the record of the Ohio detention facility that illustrates the date and time of Ms. Miller's visit with Mr. Shah at the Ohio detention facility could have easily been subpoenaed, thus leading to Ms. Miller being compelled to explain her purpose for visiting with Mr. Shah when she was no longer representing him. Similarly, affidavits and actual testimonial evidence from

¹¹ On this point, the Third Circuit concluded that “[t]here is no indication [...] that Miller had any discussions about Shah with anyone. (Appendix 11).

Mr. Shah's family members who Ms. Miller contacted and tried to get them to encourage Mr. Shah to plead guilty are also factual content that contravene with the district court's finding that the record of this case was fully developed. It simply was not.

Finally, as can be gleaned from the Third Circuit's opinion, the court gave substantial weight to the affidavits/declarations submitted by the Government in reaching its conclusion. Yet nowhere in the court's opinion did it point to any information provided by the defense in support of the disqualification claim other than to allude to an oral objection that was made by Mr. Shah's attorney. This hardly constitutes as a fully developed record. And for an issue as important as this one to be decided in the manner that it was, especially considering the precedential value that is placed on it by the Government, more was needed.

In sum, as in the case here, when a defendant raises a credible allegation of a prosecutor's conflict of interest or other relationship that would create the appearance of an improper motivation in the prosecution, the court must undertake a "careful balancing" of proper considerations of judicial administration against the United States' right to prosecute the matter through counsel of its choice" in order to ensure that the interest of all involved are properly protected. United States v. Whittaker, 268 F.3d at 194-95 (3rd Cir. 2001). These interests include the defendant's right to a fair trial free from improper prosecutorial motives, the government's interest in retaining its chosen counsel, and the court's interest in protecting the integrity of the proceedings and maintaining public confidence in the judicial system. Id. However, none of these interests were protected in this case as is clear from the district court's failure to appropriately balance proper considerations in denying Mr. Shah's motion to disqualify, and in refusing to hold an evidentiary hearing as it was required to do under the circumstances of this case. As a result, the Third Circuit incorrectly held, contrary to this Court's holding in Wheat and Young, *supra*, that "the District Court did not abuse its discretion in denying Shah's disqualification motion,"¹² (Appendix 12), and that the district court's actions were not arbitrary.

The July 22, 2022 precedential opinion and judgment rendered by the Third Circuit in this case, as it relates to the issue of disqualification, wholly

¹² Contrary to the Third Circuit's review, Mr. Shah did not "concede[] that he has no evidence that the denial of the disqualification motion prejudiced him in any way" (Appendix 11), and as shown, the court has not pointed to where in the record Mr. Shah gave such a concession.

contravenes with this Court's precedent on that important issue, along with similar decisions reached by other circuits. Equally important, the Third Circuit's opinion, if left unchecked, holds the possibility of undermining the public's confidence in the integrity of the judicial system, and it opens up the possibility (if not the likelihood) of criminal defendants' due process right to a fair and meaningful adversarial process being reduced to an exercise in dicta.

CONCLUSION

The Court should grant this petition for certiorari.

Respectfully submitted,

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