No. 23-

IN THE

Supreme Court of the United States

JEFFREY FAY PIKE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

RANDOLPH L. SCHAFFER, JR.
Counsel of Record
1021 Main, Suite 1440
Houston, Texas 77002
(713) 951-9555
noguilt@schafferfirm.com

Counsel for Petitioner

116710

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

The prosecution moved to disqualify petitioner's two retained counsel of choice based on a purported conflict of interest arising out of their alleged prior representation of two unnamed potential prosecution witnesses. The magistrate judge disqualified both counsel after considering the prosecution's evidence *ex parte* and rejecting petitioner's offer to have an independent, "walled-off" defense counsel cross-examine any witness whom counsel previously had represented. The district court upheld the disqualification. The prosecution called only one of those witnesses to testify at trial. Petitioner was convicted and sentenced to life imprisonment.

After petitioner's conviction was affirmed on appeal, he sought post-conviction relief on the basis that he was denied his Sixth Amendment right to lead counsel of choice following an *ex parte* proceeding that violated his Fifth Amendment right to due process of law. Petitioner established that (1) the witness who testified at trial previously had been represented by the "second chair" counsel who was not a member of lead counsel's firm and (2) the other potential witness—whom lead counsel previously had represented—did not testify at trial. The district court denied relief, and the Fifth Circuit affirmed.

The Questions Presented are:

I. Does it deny a defendant due process of law to disqualify trial counsel based on a purported conflict of interest following the *ex parte* consideration of the prosecution's evidence and without disclosing the names

of the prosecution witnesses whom counsel allegedly previously had represented?

II. Does it deny a defendant the right to counsel of choice to disqualify trial counsel instead of allowing an independent, "walled-off" defense counsel to cross-examine any prosecution witness whom counsel previously had represented?

III. Does it deny a defendant the right to counsel of choice to disqualify trial counsel based on a purported conflict of interest due to counsel's prior representation of a potential witness whom the prosecution did not thereafter call to testify at trial?

RELATED CASES

- *United States v. Pike*, No. SA-15-CR-820-DAE, United States District Court for the Western District of Texas, San Antonio Division. Judgment entered October 17, 2018.

- *United States v. Pike*, No. 18-50793, United States Court of Appeals for the Fifth Circuit. Judgment entered August 5, 2020. Rehearing denied September 1, 2020.

- *Pike v. United States*, No. 20-6554, United States Supreme Court. Certiorari denied January 25, 2021.

- *Pike v. United States*, No. SA-21-CV-1226-DAE, United States District Court for the Western District of Texas, San Antonio Division. Judgment entered September 29, 2022. Reconsideration denied November 10, 2022.

- *United States v. Pike*, No. 22-51003, United States Court of Appeals for the Fifth Circuit. Judgment entered March 20, 2024.

TABLE OF CONTENTS

Table of Contents

Page

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES

Page

CONSTITUTIONAL PROVISIONS

Cited Authorities

Page

FEDERAL STATUTES

RULES

STATE RULE

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Jeffrey Fay Pike, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion affirming the denial of post-conviction relief under 28 U.S.C. §2255 (App. 1-3) is available at 2024 WL 1192222. The Fifth Circuit's judgment (App. 4-5) is unreported. The United States District Court's order (App. 6-29) is unreported.

JURISDICTION

The Fifth Circuit denied relief on March 20, 2024. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part, "No person shall be . . . deprived of . . . liberty . . . without due process of law."

The Sixth Amendment to the United States Constitution provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

A. Procedural History

Petitioner pled not guilty to multiple counts of RICO conspiracy, racketeering, and assaultive offenses in the United States District Court for the Western District of Texas. The jury convicted him on all counts, and the court sentenced him to life imprisonment on the most serious count and entered a final judgment on October 17, 2018.

The Fifth Circuit affirmed petitioner's convictions on August 5, 2020. This Court denied certiorari on January 5, 2021. *United States v. Pike*, 969 F.3d 144 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 1275 (2021).

Petitioner filed a motion for post-conviction relief pursuant to 28 U.S.C. §2255 on December 13, 2021. The district court denied relief and a certificate of appealability (COA) on September 29, 2022, and denied reconsideration on November 10, 2022. The Fifth Circuit granted a COA but ultimately affirmed the denial of relief on March 20, 2024. *United States v. Pike*, No. 22-51003, 2024 WL 1192222 (5th Cir. March 20, 2024).

B. Factual Statement[1]

1. The Proceedings In The District Court Relating To The Disqualification Of Trial Counsel

Petitioner, the national president of the Bandidos Outlaw Motorcycle Club (the "Bandidos"), was indicted on December 16, 2015 (ROA.32216). He retained attorneys Kent Schaffer and James Kennedy to represent him. On October 11, 2016, the government filed a motion to disqualify both lawyers based on a purported "unwaivable conflict of interest" (ROA.35075-97). The government alleged that Schaffer and Kennedy were "both members of the same law firm" and that a co-defendant, John Portillo, had stated in wiretapped conversations that (1) petitioner took "paperwork" to Schaffer to review, (2) Portillo sent videotapes depicting a shoot-out involving the Bandidos in Waco, Texas, to Schaffer for petitioner to watch in violation of a state court order, and (3) the Bandidos kept a large amount of funds on retainer with Schaffer (ROA.35078-81). The government also alleged that Schaffer was essentially an "unsworn witness" because he had acted as "in-house counsel" for the Bandidos, and that evidence that the Bandidos had paid him would help establish the existence of the "criminal enterprise" with respect to the RICO counts (ROA.35081). The motion did not allege that Schaffer previously had represented any prosecution witnesses.

---

1. Petitioner will not discuss the evidence at trial because it is irrelevant to the issues raised in the petition. Instead, he will discuss the evidence relevant to the disqualification of his retained counsel of choice based on a purported conflict of interest.

On November 30, 2016, attorney Cynthia Orr filed a response on behalf of Schaffer and Kennedy (ROA.35098). Orr observed that the disqualification motion was filed about ten months after petitioner was indicted (ROA.35099). She contended that (1) the government should not be allowed to manufacture a conflict of interest, (2) petitioner would waive any potential conflict of interest, (3) meaningful alternatives to disqualification existed, and (4) the erroneous disqualification of petitioner's retained counsel of choice is "structural error" requiring reversal on appeal without a showing of harm (ROA.35100-05).

The magistrate judge conducted a hearing on the disqualification motion. For the first time, a prosecutor asserted, "I can tell the Court today that at least two Bandidos that Mr. Schaffer has represented in the past will be testifying at trial" about "enterprise acts" but not about "facts that he represented them on," and that Schaffer and Kennedy could represent petitioner only if these witnesses waived a conflict of interest (ROA.34314-15). The magistrate judge denied the motion without prejudice (ROA.34323).

On December 20, 2016, the government filed a supplemental motion to disqualify Schaffer and Kennedy (ROA.32428-47). The government added the allegation that Schaffer previously had represented two unnamed prosecution witnesses in cases related to the present indictment and that they would not waive a conflict of interest (ROA.32430).

On December 30, 2016, Orr filed a response (ROA.32449-54). She contended that there was no conflict of interest or, alternatively, that an independent

defense counsel could cross-examine these witnesses (ROA.32450).[2]

On January 4, 2017, the government filed a reply (ROA.32455-62). The government asserted that it should not be required to identify the witnesses and that allowing an independent defense counsel to cross-examine them would not remedy any conflict because they would not waive the attorney-client privilege (ROA.32457, 32460).

On January 4 and 5, 2017, Orr filed responses (ROA.32472-78, 32608-15). She represented that Schaffer denied that he had reviewed any "paperwork" for the Bandidos (ROA.32472-73). She requested the names of the witnesses so Schaffer could determine whether he previously had represented them and, if so, whether an independent defense counsel could cross-examine them without violating their attorney-client privilege (ROA.32613, 32629). She objected to the magistrate judge's consideration of any evidence that the government presented *ex parte* (ROA.32611-13).

On January 6, 2017, the magistrate judge conducted another hearing. The magistrate judge announced that he had reviewed the documents that the government had

2. An "independent defense counsel" is a lawyer who is not a member of current counsel's firm, is "walled-off " from any information known to current counsel about any former clients who testify for the prosecution, and is retained solely to cross-examine them. Any conflict of interest would not be imputed to the independent defense counsel. *See Rodriguez v. Chandler*, 382 F.3d 670, 673 (7th Cir. 2004) (Easterbrook, J.) (use of independent defense counsel is reasonable alternative to disqualifying retained trial counsel who previously had represented prosecution witness).

filed *ex parte* under seal and "we . . . do have two witnesses who will be cooperating, who were represented by Mr. Schaffer, Mr. Kennedy, or both, and it was during the course of the conspiracy; that the charges were related to Bandido activity; and, that neither witness would waive the potential conflict of interest if they were cross-examined by their former lawyers" (ROA.32681-83). The magistrate judge acknowledged that the defense had requested the names of the witnesses; that the witnesses did not want their names to be disclosed; and that disclosing their names would be "contrary to [their] interests" (ROA.32683-84). The magistrate judge asked whether the defense really wanted to know their names under these circumstances (ROA.32684). Orr responded that she was "attempting to verify [that] they were actually clients of Mr. Schaffer or Mr. Kennedy or both, rather than just . . . relying on information we don't see, have no idea [about] the credibility of it" (ROA.32685). She asserted that their names should be disclosed in view of the fact that they would testify at trial and that independent defense counsel would cross-examine them (ROA.32685-86).

The government asked the magistrate judge, without disclosing the names of the witnesses, to resolve whether allowing an independent defense counsel to cross-examine them would remedy any potential conflict of interest (ROA.32687). Orr responded that "part of the problem with not knowing the identity of the individuals and the circumstances of their particular case allows the government . . . to make much more of that prior representation and its significance in this case than may, in fact, be true" (ROA.32691). Schaffer said that he previously had represented Bandidos who were involved in bar fights that resulted in a state grand jury's refusal

to indict one client in 2008 and a dismissal of the other client's charge in 2009; that those cases had nothing to do with the allegations in the present federal indictment; that he had nothing to impeach them with; and that he would not provide any confidential information about them to an independent defense counsel (ROA.32698-99).

The magistrate judge expressed concern that the government wanted him to disqualify counsel based on an alleged conflict of interest "without any evidence being presented to the other side" and without counsel knowing the names of the witnesses (ROA.32706). Orr responded that it would violate due process to disqualify Schaffer without disclosing the names of the witnesses and the evidence establishing the alleged conflict and without giving Schaffer the opportunity to confront the evidence that the government filed under seal (ROA.32709-10).

The magistrate judge informed the parties that he would meet *ex parte* with the prosecutors "to see exactly what we've got in front of us and see if anything can be disclosed" (ROA.32710). Thereafter, he returned to the courtroom and announced that he had determined, based on the *ex parte* discussion and his review of the sealed documents, that Schaffer and Kennedy previously had represented the witnesses (ROA.32711). He requested further briefing on whether Schaffer's prior representation of these witnesses was "substantially related" to the present indictment and whether allowing an independent defense counsel to cross-examine them would remedy any potential conflict (ROA.32712-13).

On January 23, 2017, Orr filed a supplemental brief explaining why an independent defense counsel could

cross-examine the witnesses in a manner that would not violate their attorney-client privilege (ROA.32623-32).

On January 26, 2017, the magistrate judge entered an order disqualifying Schaffer and Kennedy (ROA.32633-38). The basis for the disqualification was that they had represented two persons "scheduled to testify as government witnesses" and there was an actual or serious potential conflict of interest that the witnesses would not waive (ROA.32634). The magistrate judge based the disqualification solely on Schaffer's and Kennedy's purported prior representation of the two witnesses rather than the other reasons urged by the Government (ROA.32638). The magistrate judge found that the prior representation was "substantially related" to the present indictment; that counsel could not accept employment adverse to the witnesses' interests in substantially related matters; and that allowing an independent defense counsel to cross-examine the witnesses would be inadequate because that counsel could not be "walled-off " from what Schaffer and Kennedy knew about them (ROA.32636-38).[3]

3. The magistrate judge erroneously assumed that Schaffer and Kennedy, as officers of the court, would violate a court order and disclose to an independent counsel what they knew about the witnesses. Criminal defense lawyers, like civil lawyers, are officers of the court presumed to follow court orders and act ethically and honestly in dealing with the court. *Cf. Holloway v. Arkansas*, 435 U.S. 475, 485-86 & n.9 (1978) (presuming that criminal defense lawyer, as an officer of the court, will be truthful with respect to issue involving conflict of interest); *Geders v. United States*, 425 U.S. 80, 90 n.3 (1976) (holding that defendant was improperly prohibited from conferring with counsel during overnight recess, notwithstanding rule prohibiting counsel and defendant from discussing direct examination testimony before cross-examination, observing that "the judge expressed full

On February 9, 2017, petitioner filed objections to the magistrate judge's disqualification order (ROA.32639-53). Petitioner asserted that the magistrate judge had erred in failing to disclose the names of the witnesses to enable Schaffer and Kennedy to address any potential conflict of interest; that the matters were not "substantially related"; that no actual or serious potential conflict of interest existed; that the witnesses had waived the attorney-client privilege by disclosing the information to the government; and that an independent defense counsel could cross-examine the witnesses and thereby remedy any potential conflict (ROA.32643-51).

On March 2, 2017, the district court entered an order upholding the magistrate judge's ruling (ROA.32750-61). The court confirmed that the disqualification was based solely on Schaffer's prior representation of the unnamed witnesses (ROA.32758). Thereafter, other counsel represented petitioner at his jury trial.

2. The Evidence Presented In The Section 2255 Proceeding

This case demonstrates why a district court should not rely on evidence that the government presents *ex parte* to disqualify trial counsel. If the magistrate judge had disclosed the names of the witnesses, Schaffer could have

---

confidence that petitioner's trial attorney would respect the difference between assistance and improper influence"); s*ee also United States v. Allen*, 544 F.2d 630, 633 (4th Cir. 1976) ("We think that all but very few lawyers take seriously their obligation as officers of the court and their proper role in the administration of justice. We think the probability of improper counseling, i.e., to lie or evade or distort the truth, is negligible in most cases.").

demonstrated that he did not have an actual or serious potential conflict of interest with respect to either witness.

Schaffer submitted an affidavit in the Section 2255 proceeding stating that he was a member of the law firm of Bires, Schaffer, and DeBorde in 2016; that Kennedy, a solo practitioner, had rented an office from him for 20 years; that Kennedy was not an employee or partner and had his own clients and stationery; and that he hired Kennedy as a "second chair" on a contract basis in certain cases (ROA.2160). Schaffer did not inform the magistrate judge of the nature of his business arrangement with Kennedy because the magistrate judge led Schaffer to believe that Schaffer had represented both unnamed witnesses (ROA.2162-63).

Schaffer explained in his affidavit that, when he requested the names of the witnesses, the magistrate judge showed him a prosecutor's affidavit stating that Schaffer and Kennedy both represented one witness and that Schaffer alone represented the other (ROA.2161). Schaffer relied on the accuracy of these representations and focused on demonstrating that an independent defense counsel could cross-examine the witnesses without his participation and thereby remedy any potential conflict of interest (ROA.2161-62).

After Schaffer was disqualified and the trial had started, he learned that Daniel Schild and William Ojemann were the two unnamed witnesses (ROA.2162). If Schaffer had known their names during the disqualification hearing, he would have explained to the magistrate judge and offered evidence, if necessary, that he never represented Ojemann; and that he represented Schild for

a few months on a state charge unrelated to the federal indictment, that the charge was dismissed, and that he did not receive any confidential information adverse to Schild (ROA.2163).

a. Daniel Schild

Schild was charged in state court with aggravated assault for hitting a man with a flashlight in June 2008 (ROA.2167). Schaffer substituted as his counsel in December 2008 (ROA.2168-71). The charge was dismissed in August 2009 (ROA.2172-75).

Schaffer's affidavit in the Section 2255 proceeding stated as follows (ROA.2163):

> ...If Mr. Schild had testified for the Government, I did not have any confidential information to impeach him with, as we discussed only the facts of his case—that he defended himself when the complainant attacked him. If I had known that he was one of the witnesses, I would have informed the magistrate judge that I had no confidential information adverse to him and that independent defense counsel could cross-examine him, if necessary. If Mr. Schild had been asked in court whether he would waive any such conflict of interest so I could represent Mr. Pike, I believe that he would have waived it, as he knew that he did not tell me anything that I could impeach him with. Additionally, in view of the fact that the government did not call him to testify at trial, he was not an essential

> witness; Mr. Pike was convicted on all counts without his testimony.

Because the magistrate judge did not disclose Schild's name to the defense, Schaffer did not have an opportunity to demonstrate that he did not have an actual or serious potential conflict of interest with respect to Schild. Furthermore, any alleged conflict of interest was purely hypothetical, as the government did not call Schild to testify at trial.[4]

b. William Ojemann

Ojemann was charged in state court with engaging in organized criminal activity for threatening a man with a knife while acting as a member of the Bandidos in July 2010 (ROA.2176-77). Kennedy represented him (ROA.2178-80). The grand jury refused to indict Ojemann in January 2011 (ROA.2181).

Schaffer's affidavit in the Section 2255 proceeding stated that Ojemann and a co-defendant, Scott Musslewhite, were charged with aggravated assault following a bar fight (ROA.2162). Schaffer represented Musslewhite, who also was not indicted (ROA.2182-85). If the magistrate

---

4. Notably, during a separate pretrial hearing at which the government sought to disqualify Jay Norton, the lawyer who initially represented the co-defendant, Portillo, the same district judge who upheld the magistrate judge's disqualification of Schaffer said that he would not disqualify Norton based on a conflict of interest if his former client was merely a "potential witness" for the government. "That doesn't help me. I'm not going to accept that. He's either a witness, or he isn't. . . . If you're not going to call him, we don't have a conflict" (ROA.7397).

judge had disclosed Ojemann's name, Schaffer would have explained that (1) he represented Musslewhite, (2) Kennedy represented Ojemann, (3) Kennedy was not a member of his firm, and (4) Kennedy did not give him any confidential information about Ojemann (ROA.2162).

Kennedy submitted an affidavit in the Section 2255 proceeding stating that Ojemann hired him after Ojemann was questioned during a drug investigation in 2012 (ROA.2165). Ojemann was not charged in that case before he was charged in the racketeering case in the Western District. Schaffer hired Kennedy as the "second chair" in petitioner's case (ROA.2166).

Assuming *arguendo* that the magistrate judge properly disqualified Kennedy based on his prior representation of Ojemann, the magistrate judge did not properly disqualify Schaffer on this basis, as Schaffer had never represented Ojemann and was not a member of Kennedy's firm.[5] When Ojemann testified at petitioner's trial, Schaffer could have cross-examined him without violating Ojemann's attorney-client privilege with Kennedy or, if the court so ordered, an independent defense counsel could have cross-examined him.

The district court denied post-conviction relief (App. 6-29), and the Fifth Circuit affirmed that decision in a terse opinion (App. 1-3).

---

5. It is well-established that a mere "co-counsel" relationship between two lawyers who are not members of the same firm does not require that one lawyer's conflict of interest be imputed to the other. *See, e.g.*, *American Can Co. v. Citrus Feed Co.*, 436 F.2d 1125, 1129 (5th Cir. 1971).

REASONS FOR GRANTING REVIEW

This Court has recognized that a defendant's Sixth Amendment right to counsel of choice in a criminal case "commands . . . that the accused be defended by the counsel he believes to be best." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006). The right to counsel of choice must yield only if the government proves that counsel has an actual or a serious potential conflict of interest. *Wheat v. United States*, 486 U.S. 153, 164 (1988).[6]

An actual conflict of interest exists when a criminal defense lawyer is compelled to compromise his duty of loyalty or zealous advocacy to the defendant by choosing between or blending the divergent or competing interests of a former or current client. *See Strickland v. Washington*, 466 U.S. 668, 692 (1984). Disqualifying counsel becomes more difficult if the present representation involves only a potential, as opposed to an actual, conflict of interest. *See United States v. Turner*, 594 F.3d 946, 952 (5th Cir. 2010). Additionally, when "counsel's prior representation unambiguously terminated before the second representation began, the possibility that defense counsel's continuing obligation to his former client will impede his representation of his current client is generally much lower." *Perillo v. Johnson*, 205 F.3d 775, 798-99 (5th Cir. 2000). The erroneous disqualification of counsel is a

---

6. Texas Disciplinary Rule of Professional Conduct 1.06(b)(1), which is based on the equivalent provision in the Model Rules of Professional Conduct, provides that a lawyer has a conflict of interest concerning a client if the representation of that client "involves a substantially related matter in which that [client's] interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm."

structural error that is not subject to a harmless error analysis. *Gonzalez-Lopez*, 548 U.S. at 150-52.

Measured against this well-settled precedent, petitioner's case presents important issues that merit a grant of certiorari, as the Fifth Circuit's decision conflicts with decisions of the Sixth and Seventh Circuits.

I. Disqualifying Trial Counsel Based On A Purported Conflict Of Interest, Following The *Ex Parte* Consideration Of The Prosecution's Evidence And Without Disclosing The Names Of The Prosecution Witnesses Whom Counsel Allegedly Previously Had Represented, Denied Petitioner Due Process Of Law.

At the disqualification hearing, Orr requested the names of the two witnesses whom Schaffer and Kennedy allegedly previously had represented so they could determine whether, in fact, these witnesses were former clients; and she objected to the magistrate judge's consideration of any evidence that the government presented *ex parte* (ROA.32611-13, 32629, 32681-87, 32691). Orr argued that it would deny petitioner due process to disqualify Schaffer without disclosing the names of the witnesses and the evidence establishing the alleged conflict so Schaffer could respond (ROA.32709-10). The magistrate judge, after meeting *ex parte* with the prosecutors, announced that he had determined, based on their discussion and his review of the sealed documents, that Schaffer and Kennedy previously had represented these witnesses (ROA.32710-11). The magistrate judge entered an order disqualifying Schaffer and Kennedy on the basis that they had represented the witnesses and

there was an actual or serious potential conflict of interest that the witnesses refused to waive (ROA.32633-34, 32638). However, the magistrate judge did not articulate the precise nature of the conflict.

Before a court can deprive a defendant of his "fundamental" Sixth Amendment right to retained counsel of choice,[7] it must follow procedures commensurate with the importance of that right. *See Matthews v. Eldridge*, 424 U.S. 319, 341 (1976) ("[T]he degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of . . . [the] decisionmaking process."). The Sixth Circuit has recognized that the critical importance of the right to retained counsel of choice ordinarily requires an adversarial hearing before any deprivation of that right:

> When presented with a motion to disqualify, the district court must make a careful inquiry, balancing the constitutional right of the defendant to representation by counsel of his choosing with the court's interest in the integrity of the proceedings and the public's interest in the proper administration of justice. *The inquiry will ordinarily require a hearing at which both parties will be permitted to produce witnesses for examination and cross-examination.*

United States v. Mays, 69 F.3d 116, 121 (6th Cir. 1995) (emphasis added).

---

7. *Luis v. United States*, 578 U.S. 5, 11 (2016).

The magistrate judge's refusal to allow adversarial testing of the government's allegations of a conflict of interest in petitioner's case violated due process. The "Due Process Clause . . . speak[s] to the balance of forces between the accused and his accuser." *Wardius v. Oregon*, 412 U.S. 470, 474 (1973). Both sides in a criminal case must have equal access to relevant evidence for there to be constitutionally adequate process. As this Court observed in *Greene v. McElroy*, 360 U.S. 474, 496 (1959):

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has the opportunity to show that it is untrue.

Thus, it was fundamentally unfair to deny petitioner his Sixth Amendment right to retained counsel of choice without affording him access to the same evidence that the government presented *ex parte* to the magistrate judge to determine whether a conflict of interest existed.

The magistrate judge had no valid reason to withhold the names of the witnesses in view of the fact that the government represented to the court that the witnesses would testify at trial.[8] The government has a privilege to

8. The district court faulted petitioner for failing to "offer any controlling precedent holding that due process requires the disclosure of the identity of witnesses under the specific circumstances presented in this case" (App. 21). This criticism is untenable, as there can be no "controlling precedent" when

withhold the identity of persons who provide information to law enforcement to encourage citizens to report crimes while preserving their anonymity. *Roviaro v. United States*, 353 U.S. 53, 59 (1957). However, when the disclosure of an informer's identity "is relevant and helpful to the defense of an accused or is essential to a fair determination of a cause, the privilege must give way." *Id.* at 60-61. The district court may require disclosure and, if the government withholds the information, dismiss the case. *Id.* at 61.

Once the government moved to disqualify Schaffer and Kennedy on the basis that they previously had represented two prosecution witnesses who would testify at trial, the government was obligated to disclose their names to give Schaffer and Kennedy an opportunity to fully respond.[9] If the government had refused to do so, the magistrate judge should have denied the disqualification. *Cf. Roviaro*, 353 U.S. at 61.

The magistrate judge's ruling, which the district court adopted, was illogical. On the one hand, if the government did not intend to call either or both of the witnesses at trial, there was no basis to disqualify Schaffer and Kennedy with regard to the uncalled witness(es), assuming

---

it appears that the government has disclosed the names of the witnesses to the defense in the other cases in which it moved to disqualify trial counsel based on a conflict of interest.

9. If Schaffer had been given the opportunity to respond, he would have demonstrated that he never represented Ojemann and that he represented Schild on an aggravated assault charge that was dismissed in 2009 and had no confidential information adverse to Schild (ROA.2163).

arguendo that the prior representation created an actual or serious potential conflict of interest. On the other hand, if the government intended to call the witnesses at trial, there was no legitimate basis to refuse to disclose their names. Absent this disclosure, Schaffer could not fully respond to the government's allegations that he had a conflict of interest. The magistrate judge's ruling was fundamentally unfair.

The Fifth Circuit held that the failure to disclose the witnesses' names did not deny due process because the Supreme Court has "long permitted the use of *in camera* proceedings to determine whether an informant's identity should be revealed" (App. 3). The Fifth Circuit cited circuit court cases that addressed the refusal to disclose the name of a confidential informant—who would not testify at trial—rather than the disqualification of trial counsel based on his prior representation of a witness who purportedly would testify at trial.[10] Thus, these cases are inapposite to petitioner's case.

In sum, the district court denied petitioner due process by disqualifying Schaffer without disclosing the names of the prosecution witnesses after considering evidence that

10. The Fifth Circuit found "no due-process violation where, as here, certified public records confirmed the conflict, and the defendant was given a hearing and the opportunity to present argument in opposition to disqualification" (App. 3). To the contrary, the "certified public records" reveal that Schaffer represented Schild—who did not testify—but did not represent Ojemann—who did testify (ROA. 2162-63). Furthermore, the so-called "opportunity to present argument in opposition to disqualification" was meaningless because Schaffer could not fully respond without knowing the names of the witnesses.

the Government presented *ex parte*. Schaffer should have had an opportunity to demonstrate that he did not have an actual or serious potential conflict of interest––much less one that could not be remedied by having an independent, "walled-off" defense counsel cross-examine any witness whom he previously had represented.

Petitioner has found no other case upholding the disqualification of trial counsel based on a purported conflict of interest in which counsel was not informed of the name of the prosecution witness whom he allegedly previously had represented. The names of the witnesses would have been disclosed to petitioner if his case were in the Sixth Circuit. *Mays*, 69 F.3d at 121. The Court should grant certiorari to resolve this important question of federal law that has not been, but should be, settled by the Court. SUP. CT. R. 10(c).

II. Disqualifying Trial Counsel, Instead Of Allowing An Independent, "Walled-Off" Defense Counsel To Cross-Examine Any Prosecution Witness Whom Counsel Previously Had Represented, Denied Petitioner His Right To Counsel Of Choice.

Schild was charged in state court with aggravated assault for hitting a man with a flashlight in June 2008 (ROA.2167). Schaffer substituted as his counsel in December 2008 (ROA.2168-71). The charge, which was dismissed in August 2009 (ROA.2172-75), was not "substantially related" to petitioner's federal indictment. Thus, Schaffer had a brief attorney-client relationship with Schild that terminated over six years before petitioner was

indicted. Disqualifying Schaffer denied petitioner his Sixth Amendment right to counsel of choice.[11]

A prosecutor acknowledged at the disqualification hearing that the two unnamed Bandidos would not testify about "facts that [Schaffer] represented them on" (ROA.2389-90). Thus, the government knew before trial that it would not offer evidence of the 2008 aggravated assault charge that had been dismissed in 2009 (ROA.2172-75). True to its word, the government did not offer any testimony about that incident at trial. Thus, the government's contention that Schaffer would have a conflict of interest if he had to cross-examine Schild was illusory.

Furthermore, Schaffer did not have any confidential information adverse to Schild that he would have been obligated to use to represent petitioner effectively. Schaffer's affidavit in the Section 2255 proceeding stated that Schild "discussed only the facts of his case––that he defended himself when the complainant attacked him . . . I had no confidential information adverse to him . . . " (ROA.2163). The government did not offer any evidence to contradict Schaffer's sworn statement. Thus, any purported conflict of interest with regard to Schild was,

11. Neither the district court nor the Fifth Circuit addressed whether the disqualification of Schaffer based on Kennedy's prior representation of Ojemann violated the Sixth Amendment. Accordingly, petitioner does not address whether a conflict of interest existed based on Kennedy's prior representation of Ojemann. However, assuming *arguendo* that a conflict existed, and that it could be imputed to Schaffer, the district court also erred by refusing to allow an independent, "walled-off " defense counsel to cross-examine Ojemann.

at best, hypothetical. Indeed, neither the government nor the magistrate judge articulated the precise nature of the alleged conflict.

Assuming *arguendo* that an actual or serious potential conflict of interest existed, petitioner offered to have an independent, "walled-off" defense counsel cross-examine any witness whom Schaffer previously had represented, and Schaffer promised not to give that counsel any confidential information about the witness (ROA.32450, 32698-99). That alternative would have remedied any conflict of interest, if one had existed. It was unreasonable for the magistrate judge to reject that alternative, which would have protected petitioner's Sixth Amendment right to counsel of choice. Judge Easterbrook emphasized the efficacy of using independent defense counsel to cross-examine a witness in ordering post-conviction relief in his well-reasoned opinion in *Rodriguez v. Chandler*, 382 F.3d 670, 673 (7th Cir. 2004) ("Rodriguez had two lawyers and offered to have Brent's co-counsel conduct any cross-examination of McMurray. . . . Having co-counsel cross-examine McMurray would have eliminated all risks; and this easy solution (which the state judiciary ignored) makes it unreasonable for the state to have denied Rodriguez the benefit of Brent's services."). Thus, the disqualification of Schaffer based on his prior representation of Schild in an unrelated case six years earlier was unwarranted and denied petitioner his Sixth Amendment right to counsel of choice.

The district court concluded that Schaffer had a serious potential conflict of interest because (1) the indictment alleged that petitioner was the president of the Bandidos, (2) Bandidos had committed aggravated

assaults in furtherance of the "criminal enterprise," (3) Schaffer's representation of petitioner was "clearly adverse to Schild's interest in a substantially related matter," and (4) allowing an independent defense counsel to cross-examine Schild would "not fully resolve the conflict inherent in an attorney representing clients with clearly adverse interests," even if it could protect against the disclosure or use of confidential information (App. 23-24). The district court did not articulate any factual basis to support these conclusions.

The Fifth Circuit side-stepped this issue, erroneously asserting, "Schaffer conceded that he previously represented Bandidos members, and that he reviewed all their case files" (App. 3). Schaffer made no such concession in his affidavit and affirmatively denied it in responding to the disqualification motion (ROA.2160-63, 32472-73). The court also erroneously asserted, "Certified public records confirmed that Schaffer, and a member of his firm, represented the government's cooperating witnesses during the RICO conspiracy" (App. 3). To the contrary, the record clearly established that Kennedy—who had represented Ojemann—merely rented an office from Schaffer and had never been Schaffer's employee or partner (ROA.2160-66).

Schild asserted that he acted in self-defense in the aggravated assault case in which Schaffer represented him. The state court prosecutor obviously agreed, as the charge was dismissed. The government announced at the disqualification hearing that it did not intend to ask the unnamed witnesses about the facts of the cases in which Schaffer had represented them (ROA.2389-90). If Schild had testified, allowing an independent, "walled-

off" defense counsel to cross-examine him would have remedied any potential conflict, as neither party would have had any reason to ask him about this dismissed charge. The Fifth Circuit failed to explain why this viable alternative—endorsed by the Seventh Circuit—would not have remedied any serious potential conflict of intent arising out of Schaffer's prior representation of Schild, if one had existed.

Relief would have been granted if petitioner's case were in the Seventh Circuit. The Court should grant certiorari because the Fifth Circuit's decision conflicts with *Rodriguez*. SUP. CT. R. 10(a).

III. Disqualifying Trial Counsel Based On A Purported Conflict Of Interest Due To Counsel's Prior Representation Of A Potential Witness Whom The Prosecution Did Thereafter Call To Testify At Trial Denied Petitioner His Right To Counsel Of Choice.

The government persuaded the magistrate judge to disqualify Schaffer, and the district court to uphold that decision, based on its assurance that the two unnamed witnesses would testify. Ojemann testified at trial, but Schild did not.

The disqualification of trial counsel based on a conflict of interest due to his prior representation of a prosecution witness cannot be upheld when the witness did not testify at trial. *See Rodriguez*, 382 F.3d at 671-72. In *Rodriguez*, the trial court disqualified counsel, who also represented a detective in an unrelated real estate matter, based on the prosecutor's assurance that the detective would testify. Thereafter, the detective did not testify at trial.

Id. at 671. The Seventh Circuit commenced its analysis with the observation that "the risk of non-persuasion rests with the prosecution rather than the defendant." *Id.* at 672. The disqualification was improper because (1) counsel would not have been placed "in a conflicted or compromised position," as co-counsel could have cross-examined the detective; (2) the prosecution did not contend that counsel received privileged information from the detective that he could have passed on to co-counsel; and (3) the disqualification was based on the mistaken premise that the detective would testify. *Id.*

The district court in petitioner's case concluded that the Seventh Circuit's subsequent decision in *Weaver v. Nicholson*, 892 F.3d 878 (7th Cir. 2018), trumped *Rodriguez* (App. 24-25). The district court was clearly mistaken, as *Weaver* involved a factual scenario entirely distinct from *Rodriguez*.

The disqualified counsel in *Rodriguez* previously had represented a potential prosecution witness in a civil matter that had fully concluded. *Rodriguez*, 382 F.3d at 671. Conversely, the disqualified counsel in *Weaver* previously had represented a potential prosecution witness in a criminal case and, one month before the disqualification hearing, had spoken to that witness in jail about his pending criminal case. *Weaver*, 892 F.3d at 883. The state habeas trial court found that counsel's jail visit could be considered as concurrent representation that created a *per se* conflict of interest. *Id.* *Weaver* distinguished *Rodriguez* on the basis that, as a result of counsel's concurrent representation of the witness, counsel could have pressured the witness to testify favorably to Weaver to the detriment of his own pending criminal

case or, alternatively, could have gone easy on cross-examination so the witness would not incriminate himself or disclose matters harmful to his own case. *Id.* at 884. *Weaver* neither overruled nor undermined *Rodriguez*, which held that the disqualification was improper because counsel's prior representation of the witness had fully concluded, and the witness did not testify at trial.

Schaffer did not *simultaneously* represent petitioner and Schild. Schaffer's representation of Schild had concluded six years before petitioner was indicted. An independent, "walled-off" defense counsel could have cross-examined Schild if he had testified, but he did not. Accordingly, *Rodriguez* is the relevant authority. And, as the district court had previously observed with regard to the government's pretrial request to disqualify co-defendant Portillo's counsel, "If you're not going to call [the witness], we don't have a conflict" (ROA.7397). Thus, the district court erred in disqualifying Schaffer based on his prior representation of Schild.

The Fifth Circuit simply ignored this issue. Relief would have been granted if petitioner's case were in the Seventh Circuit. The Court should grant certiorari to address this issue. SUP. CT. R. 10(a).

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

RANDOLPH L. SCHAFFER, JR.
Counsel of Record
1021 Main, Suite 1440
Houston, Texas 77002
(713) 951-9555
noguilt@schafferfirm.com

Counsel for Petitioner

May 2024