No.

IN THE SUPREME COURT OF THE UNITED STATES

PAUL WAGNER

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it gave rise to disqualifying conflict of interest, in violation of Petitioner's Sixth Amendment right to counsel, that his trial attorney knew he was under federal criminal investigation during and in the same district as Petitioner's prosecution?

RELATED PROCEEDINGS

(1) United States District Court, District of Nevada;
United States v. Wagner, Nos. 2:10-cr-00399-MMD-GWF and 2:19-cv-01540-MMD (June 7, 2022)

(2) United States Court of Appeals for the Ninth Circuit;
United States v. Wagner, No. 22-15925 (May 21, 2024)

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The court of appeals issued a memorandum decision at *United States v. Wagner*, 2024 WL 2287196 (9th Cir. 2024).

JURISDICTION

The court of appeals filed its decision on May 21, 2024. *See* App.[1] This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

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

STATEMENT OF THE CASE

In 2010, the government charged Paul Wagner with mortgage fraud offenses related to his operation of a Las Vegas home building company. CR 1. Attorney Lawrence J. Semenza represented Mr. Wagner through the conclusion of his jury trial. CR 16, 18, 74, 121, 137. The record reflects that Semenza performed nearly no work on Mr. Wagner's case for

[1]As used herein, App. refers to Petitioner's consecutively-paginated Appendix; "CR" to the district court clerk's record; and "ECF No." to the Ninth Circuit's docket.

approximately two years, resulting in a judicial finding on the eve of trial that he failed to diligently prepare. *See generally* ECF No. 15 at 2-7.

After the jury convicted Mr. Wagner, he learned that Semenza had been under criminal investigation by Nevada IRS agents throughout his entire representation in this case, and that Semenza knew as much. *Id.* at 7-8. Ultimately, the IRS referred Semenza for prosecution less than two weeks after Mr. Wagner's trial, and Semenza pled guilty to three counts of tax evasion; he received an 18-month sentence. *Id.*

After Mr. Wagner lost his direct appeal and the district court denied relief under 28 U.S.C. § 2255, the court of appeals certified one issue for appeal: whether Semenza violated Mr. Wagner's Sixth Amendment right to conflict-free counsel. ECF No. 10. On appeal, Mr. Wagner argued that Semenza's IRS investigation gave rise to a disqualifying conflict of interest because it gave Semenza (i) an incentive to please local prosecutors, (ii) a motive to delay his own prosecution, and/or (iii) insufficient attention to devote to Mr. Wagner. ECF No. 15. In addition, Mr. Wagner argued that the conflict adversely affected Semenza's performance because he never disclosed the investigation to his client or the court, did virtually no work on the case despite claiming a significant fee, needlessly disparaged Mr.

Wagner in court to cover his own tracks, failed to prepare a defense, and incurred adverse findings about his diligence. *Id.*

The Ninth Circuit disagreed. The court first held that Semenza's legal predicament gave rise to "a possibility of conflict, but not an 'actual' one." App. 3. Second, the court concluded that "there is no evidence that Semenza's conduct [in this case] was connected in any way to the criminal investigation into his tax evasion[,]" and thus the court would not "hold based on speculation that the alleged conflict was the cause of any inaction by Semenza." App. 4 (cleaned up).

ARGUMENT

The Court should grant certiorari to address two interrelated issues unanswered by its precedent, the first of which is the subject of a longstanding circuit split, *see* Sup. Ct. R. 10: (1) whether an intra-district criminal investigation into defense counsel constitutes an "actual" conflict of interest under the Sixth Amendment, and (2) what degree of causation must be shown between the attorney's conflict of interest and any adverse effects on his performance in the case?

In general, defendants alleging ineffective assistance of counsel under the Sixth Amendment must demonstrate prejudice, that is, "a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Mickens v. Taylor*, 535 U.S. 162, 166 (2002). An exception to that requirement exists "where assistance of counsel has been denied entirely or during a critical stage of the proceeding[,]" which can occur "when the defendant's attorney actively represented conflicting interests." *Id.* In such cases—*i.e.*, where "an actual conflict of interest adversely affected [the] lawyer's performance[,]" *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980)—prejudice is presumed. *Mickens*, 535 U.S. at 166.

Mickens emphasized that a presumption of prejudice is appropriate for cases involving "multiple concurrent representation[s]," but it noted that the Court's cases do "not clearly establish" that presumed prejudice should necessarily apply outside that particular context. *Id.* at 174-75. Lower courts, by contrast, have applied presumptive prejudice "to all kinds of alleged attorney ethical conflicts," including counsel's obligations to former clients, as well as myriad other personal and financial considerations. *Id.* (cleaned up).

Mr. Wagner's case addresses one recurring scenario left open by *Mickens*: a federal criminal investigation into defense counsel, during his

representation of the defendant and known to the attorney, within the same judicial district as the defendant's case. The courts of appeals recognize that a "conflict of interest may arise where defense counsel is subject to a criminal investigation." *White v. Warden, Ross Correctional Institution*, 940 F.3d 270, 276 (6th Cir. 2019). That is because the lawyer "may, consciously or otherwise, seek the goodwill of the [prosecutor] for his own benefit[,]" even though the "lawyer's attempt to seek the goodwill of the prosecutor may not always be in the best interest of the lawyer's client." *Armienti v. United States*, 234 F.3d 820, 825 (2d Cir. 2000). In addition, a criminal investigation can give the attorney an incentive to drag his feet in the client's case to delay his own prosecution. *See United States v. McLain*, 823 F.2d 1457, 1463-64 (11th Cir. 1987), *overruled on other grounds as recognized in United States v. Watson*, 866 F.2d 381, 385 n.3 (11th Cir. 1989). Finally, a lawyer under federal criminal investigation may easily become "preoccupied with his own" legal and financial peril, at his client's expense. *See United States v. Greig*, 967 F.2d 1018, 1024 (5th Cir. 1992).

At least two circuits have held that a conflict of interest arises when a defense lawyer is subject to investigation by the same law enforcement authorities as the client. *See McLain*, 823 F.2d at 1463-64 (actual conflict

due to lawyer's investigation for unrelated charges by same U.S. Attorney's office prosecuting client); *United States v. Edelmann*, 458 F.3d 791, 807-08 (6th Cir. 2006) (same). The Ninth Circuit, by contrast, took a different view in Mr. Wagner's case, and the Seventh Circuit has as well. *See United States v. Montana*, 199 F.3d 947, 949 (7th Cir. 1999) (recognizing split from *McLain*, and holding that "[t]he mere fact of being under investigation by the prosecutors of the lawyer's client does not create a fatal conflict"). This Court should grant certiorari to provide guidance to the courts of appeals on this important and (regrettably) recurrent issue in criminal cases. Sup. Ct. R. 10(a).

The Court should also take this opportunity to clarify what nexus must exist between the attorney's conflict of interest and any adverse effects on his professional performance. As noted above, the Ninth Circuit applied a strict standard in Mr. Wagner's case that required him to produce smoking-gun evidence that the attorney's conflict of interest "was the cause of any inaction[.]" App. 4. Notably, however, that standard conflicts even with the standard applied in other Ninth Circuit cases, which stress instead that a defendant "needs only to show that some effect on counsel's handling of particular aspects of the trial was 'likely[,]'" *Lockhart v. Terhune*, 250

F.3d 1223, 1230 (9th Cir. 2001) (quotation marks omitted). As Mr. Wagner's case itself shows, the standard a court applies can make a world of difference. Here again, this Court should grant certiorari to provide necessary guidance on this important issue in criminal cases.

CONCLUSION

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

Respectfully submitted,

Dated: August 9, 2024

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APPENDIX

NOT FOR PUBLICATION

FILED

MAY 21 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. PAUL WAGNER, Defendant - Appellant.	No. 22-15925 D.C. No. 2:10-cr-00399-MMD-GWF-1 2:19-cv-01540-MMD MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Miranda M. Du, Chief District Judge, Presiding

Submitted May 17, 2024**
San Francisco, California

Before: S.R. THOMAS, CALLAHAN, and SANCHEZ, Circuit Judges.

Defendant-Appellant Paul Wagner appeals the district court's denial of his motion to vacate, set aside, or correct his sentence for bank and wire fraud pursuant to 28 U.S.C. § 2255. Wagner alleges that he was denied his Sixth

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Amendment right to conflict-free counsel because his trial attorney, Lawrence J. Semenza, was under investigation for tax evasion while he was representing Wagner, and the district court erred by declining to hold a hearing on his § 2255 motion. We have jurisdiction under 28 U.S.C. § 2253. We affirm.

A district court's decision to deny a motion under § 2255 is reviewed de novo. *See United States v. Rodriguez*, 49 F.4th 1205, 1211 (9th Cir. 2022). "A district court's decision to deny an evidentiary hearing on a § 2255 motion is reviewed for abuse of discretion." *Id*. (citing *United States v. Chacon-Palomares*, 208 F.3d 1157, 1158-59 (9th Cir. 2000)).

1. The Sixth Amendment guarantees criminal defendants the effective assistance of counsel, including the "right to conflict-free counsel." *United States v. Baker*, 256 F.3d 855, 859 (9th Cir. 2001) (citation omitted). To prevail on a Sixth Amendment claim based on a conflict of interest, a defendant must show that "an actual conflict of interest adversely affected his lawyer's performance." *See Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980). "An attorney has an actual, as opposed to a potential, conflict of interest when, during the course of the representation, the attorney's and the defendant's interests diverge with respect to a material factual or legal issue or to a course of action." *Baker*, 256 F.3d at 860 (citation omitted). To establish an adverse effect, a defendant must show "that some plausible alternative defense strategy or tactic might have been pursued but

was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." *United States v. Walter-Eze*, 869 F.3d 891, 901 (9th Cir. 2017) (citation omitted).

Wagner has failed to establish that the criminal investigation into Semenza created an actual conflict of interest that adversely affected Semenza's performance.[1] Wagner "must demonstrate an actual conflict, not the mere possibility of conflict, 'through a factual showing on the record.'" *Baker*, 256 F.3d at 860 (quoting *United States v. Moore*, 159 F.3d 1154, 1157 (9th Cir. 1998)). While Wagner was being prosecuted by the Nevada United States Attorney's Office (USAO), Semenza was under investigation by the Internal Revenue Service for tax evasion. Wagner speculates that Semenza, as a former United States Attorney, knew that the USAO would eventually handle his prosecution for tax evasion. Accordingly, Wagner postulates that Semenza was likely motivated to ingratiate himself with the Nevada USAO, prolong Wagner's trial, and direct his attention to his own legal troubles. Wagner's arguments demonstrate a possibility of conflict, but not an "actual" one. *See Baker*, 256 F.3d at 860.

[1] Wagner requests that the Court take judicial notice of the plea and judgment in Semenza's criminal case and a press release announcing Semenza's sentence. Wagner's request for judicial notice is denied because "the materials [] are not relevant to the disposition of this appeal." *Cuellar v. Joyce*, 596 F.3d 505, 512 (9th Cir. 2010).

Wagner also fails to demonstrate that Semenza's performance was adversely affected by any alleged conflict. "The central question that we consider in assessing a conflict's adverse effect is what the advocate found himself compelled to refrain from doing because of the conflict." *Walter-Eze*, 869 F.3d at 901 (citation omitted) (cleaned up). Wagner does not point to any "plausible alternative defense strateg[ies] or tactic[s]" Semenza might have pursued in the absence of the alleged conflict. *See id.* Instead, Wagner contends that Semenza performed limited work on his case, failed to adequately advise him about a plea agreement, did not prepare for trial, and "squandered precious time and money" on an expert witness. However, there is no evidence that Semenza's conduct was connected in any way to the criminal investigation into his tax evasion. We "cannot hold based on speculation that [the alleged conflict] was the cause of any inaction[]" by Semenza. *See Bragg v. Galarza*, 242 F.3d 1082, 1087 (9th Cir. 2001).

2. A district court may deny a § 2255 motion without an evidentiary hearing "if the movant's allegations, viewed against the record, either do not state a claim for relief or are so palpably incredible or patently frivolous as to warrant summary dismissal." *United States v. Burrows*, 872 F.2d 915, 917 (9th Cir. 1989) (citations omitted). As explained above, Wagner's allegations, viewed against the record, satisfy neither prong of the test for a Sixth Amendment claim based on a

conflict of interest. Because "the files and records conclusively demonstrate" that Wagner "is not entitled to relief" on his conflict-of-interest claim, the district court did not abuse its discretion by declining to hold an evidentiary hearing on his § 2255 motion. *See Molina v. Rison*, 886 F.2d 1124, 1132 (9th Cir. 1989) (citation omitted).

AFFIRMED.