No. ________

IN THE

Supreme Court of the United States

SPYROS PANOS

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Cuyler v. Sullivan*, 446 U.S. 335 (1980), this Court held that a defendant alleging ineffective assistance of counsel based on a lawyer's conflict of interest need not demonstrate outcome-determinative prejudice to obtain relief. Instead, a defendant need only show that an "actual conflict of interest adversely affected his lawyer's performance." *Id.* at 350

The questions presented in this Petition are:

1. Whether an unwaivable conflict, of the type at issue in *Cuyler v. Sullivan*, arises when counsel and his client are implicated in the same crime.

2. When counsel is implicated with their client in the same crime, whether the trial court must make findings of fact at an evidentiary hearing before determining whether a per se conflict exists.

3. When an unwaivable conflict is found, whether counsel's assistance is per-se ineffective.

LIST OF PARTIES TO THE PROCEEDING

Spyros Panos, petitioner on review, was the appellant below.

The United States of America, respondent on review, was the appellee below.

PROCEEDINGS BELOW

To counsel's knowledge, all proceedings directly related to this petition include:

- *United States v. Panos*, Nos. (21-3158/21-3188) (2d Cir. Feb. 29, 2024), rehear'g denied June 6, 2024.
- *United States v. Panos*, No. 18 Cr. 581 (S.D.N.Y. Oct. 6, 2021).

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The court of appeals' summary order (Pet. App. 1-10) is unpublished but available at 2022 WL 16936098.

JURISDICTION

The judgment of the court of appeals was entered on February 29, 2024 (App. 1). A timely petition for rehearing and rehearing en banc was denied on June 6, 2024 (App. 6). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

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

Petitioner was charged with wire fraud, health care fraud, and aggravated identity theft, in violation of sections 1343, 1347 and 1028A, respectively, of title 18 of the United States Code. Petitioner, an orthopedic surgeon practicing in Dutchess County, New York, surrendered his license to practice medicine in August 2013 after he was convicted in federal court of health care fraud. All the instant charges relate to allegations that, from September 2013 through October 2017, Petitioner impersonated an ex-colleague, himself a licensed physician, to induce medical peer review companies ("PRCs") to pay him over for conducting peer reviews of patient files.

A final pretrial conference was scheduled for October 29, 2020, with trial to commence on November 2. The October 29 appearance turned into a change-of-plea hearing.

One week prior, on October 22, 2020, Petitioner's lawyer Lawrence Fisher ("Trial Counsel") transmitted to the government a flash drive containing 1,000 proposed defense exhibits. The day before the October 29 appearance, the government filed a letter objecting to approximately fifteen of the exhibits as fraudulent and asking the district court to require authentication of those documents. The court immediately ordered Petitioner to "be prepared to provide the basis to authenticate the exhibits" that the government claimed were fraudulent. Prompted by the government's motion and the court's order, Trial Counsel notified the government that Petitioner intended to plead guilty.

On October 29, 2020, before the plea, the district court held a conflict hearing pursuant to *United States v. Curcio*, 680 F.2d 881 (2d Cir. 1982), on the narrow issue of the conflict having to do with fraudulent trial exhibits. Trial Counsel informed the court that he believed he had an actual conflict because he may become a witness.

The government stated that it had no reason to believe Trial Counsel was involved in any obstruction and that if Petitioner were to accept the new agreement, he "would get coverage for any potential future obstruction of justice charge." Although the government asserted that it did not suspect Trial Counsel of obstructive conduct even though it was he, not Petitioner, who submitted the questioned exhibits, the government declared that it was continuing to investigate the possible obstructive conduct. Based on the government's representation, the district court concluded that Trial Counsel's conflict was waivable because, if the government pursued its investigation, Trial Counsel would be a potential witness. After an extended colloquy with Petitioner, the court determined that Petitioner waived the conflict.

Until October 29, the only plea offer extended by the government, made on June 28, 2018, stipulated a Guidelines range of 75 to 87 months' imprisonment. After Trial Counsel disclosed the questioned exhibits, the government contacted Trial Counsel, notifying him that it had recalculated a new stipulated Guidelines range of 111 to 132 months' imprisonment—factoring in levels for obstruction of justice and excluding credit for acceptance of responsibility. A new plea agreement reflecting the adjusted Guidelines range of 111 to 132 months' imprisonment was drafted on the morning of the plea/conflict hearing. Petitioner pleaded guilty pursuant to that agreement, accepting responsibility for obstruction of justice. The only benefit the agreement conferred to Petitioner was that it would end the government's obstruction investigation.

On January 24, 2021, after firing Trial Counsel, Petitioner moved to withdraw his guilty plea and requested a hearing at which Trial Counsel would give evidence. The district court denied the motion on October 6, 2021.

The Court of Appeals for the Second Circuit affirmed the district court by summary order. That court had jurisdiction under 28 U.S.C. § 1291. The court recognized that a per-se, unwaivable conflict exists when an attorney is implicated in the crimes of his client. But, as the district court did, the court of appeals relied on the government's representation that Trial Counsel was not a suspect. On that basis, the court determined that a waivable conflict existed and affirmed the district court.

REASONS FOR GRANTING THE WRIT

I. Trial Counsel's Patent Self-Interest in Having Petitioner Plead Guilty Pursuant to an Agreement that Conferred No Practical Benefit Was the Result of an Unwaivable Conflict

The decisions below were based on the finding that Trial Counsel was not suspected of wrongdoing. That finding was based solely on the government's own assessment that, at the time of the *Curcio* hearing, it believed that Trial Counsel was an unwitting conduit of the purportedly fraudulent exhibits. But no finding was ever made establishing who created the exhibits. And, even if Trial Counsel did not create the exhibits but merely passed them from Petitioner to the government, he may have known of their falsity, which would have opened him to professional censure. *See* Model Rules of Pro. Conduct r. 1.2 cmt. 10 (Am. Bar Ass'n, Discussion Draft 1983) ("The lawyer is required to avoid assisting the client . . . by drafting or delivering documents that the lawyer knows are fraudulent . . . ."); Model Rules of Pro. Conduct 3.3 (Am. Bar Ass'n, Discussion Draft 1983) (duty of candor to the tribunal). As the Third Circuit has reasoned, even the risk of professional censure creates an actual, per se conflict. *See, e.g.*, *Gov't of Virgin Islands v. Zepp*, 748 F.2d 125, 135–36 (3d Cir. 1984) ("Even if not criminally charged for such events, trial counsel could have faced severe disciplinary consequences if it were ever known that he was involved in the destruction of evidence."); *see also United States v. Fumo*, 504 F. Supp. 2d 6, 31 (E.D. Pa. 2007).

Under the Second Circuit's own precedent, Trial Counsel had an unwaivable, per se conflict. In *United States v. Fulton*, 5 F.3d 605 (2nd Cir. 1993), the court held that an actual conflict of interest exists where the attorney is implicated in criminal misconduct related to the charges for which his client is on trial. The defendant was accused of conspiracy to possess and import heroin. *Id.* at 606. In the midst of one of its witnesses' testimony, the government disclosed that the witness claimed he had once imported heroin for defense counsel. *Id.* at 606-07.

The government explained that its investigation of the allegation had just begun and it did not know if it was true. The district court carefully explained the nature of the conflicts to the defendant: defense counsel's personal interest in avoiding/minimizing reputational damage and criminal accusations, and counsel being a potential witness in favor of the defendant by denying the accusation. *Id.* at 608. After being afforded an opportunity to consult and decide, the defendant waived any conflict. *Id.* Following the defendant's conviction and sentencing, the district court denied his 2255 petition alleging deprivation of his Sixth Amendment right to counsel. *Id.*

Reversing, the Second Circuit noted that when an attorney is accused of criminal or ethical misconduct related to his client's case, "the same core problem" arises as when an attorney represents more than one defendant in a case or is paid legal fees by a co-defendant. In such cases "the defendant's interests . . . diverge with respect to a material factual or legal issue or to a course of action." *Cuyler v. Sullivan*, 446 U.S. 335, 356 n. 3 (1980).

In describing the nature of the conflicts and the impact upon the right to counsel, the *Fulton* court spoke directly to the untenable position the defendant was placed in by the conflicts of his attorney:

> When a government witness alleges that the defendant's counsel engaged in criminal conduct related to the charges for which the defendant is on trial, it creates one of two actual conflicts. First, if the allegations are true, concerns we expressed in [*United States v.*] *Cancilla*[, 725 F.2d 867 (2nd Cir. 1984)] arise: the attorney may fear that a spirited defense could uncover convincing evidence of the attorney's guilt or provoke the government into action against the attorney. Moreover, the attorney is not in a position to give unbiased advice to the client about such matters as whether or not to testify or to plead guilty and cooperate since such testimony or cooperation from the defendant may unearth evidence against the attorney.
>
> Second, even if the attorney is demonstrably innocent and the government witness's allegations are plainly false, the defense is impaired because vital cross-examination becomes unavailable to the defendant. Ordinarily, a witness's blatantly false allegations provide a rich source for cross-examination designed to cast doubt on the witness's credibility; but, when the allegations are against the defendant's attorney, this source cannot be tapped. An attorney cannot act both as advocate for his client and a witness on his client's behalf . . . And in questioning a witness concerning his allegations against the attorney, the attorney effectively becomes an unsworn witness.

United States v. Fulton, 5 F.3d at 610 (internal citations omitted).

Explaining application of its "per se rule" for establishing a Sixth Amendment violation, the court noted that this rule does not apply anytime a court learns that an attorney may have committed a crime: "The per se rule applies [only] when an attorney is implicated in the crimes of his or her client since, in that event, the attorney cannot be free from fear that a 'vigorous defense should lead the prosecutor or the trial judge to discover' evidence of the attorney's 'own wrongdoing.'" *Id.* at 611 (citations omitted). Citing *Wheat v. United States*, 486 U.S. 153 (1988), the court also found that the federal courts' "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that the legal proceedings appear fair to all who observe them" required invalidation of the waiver. *Fulton*, 5 F.3d at 612-13.

> Where a government witness implicates defense counsel in a related crime, the resultant conflict so permeates the defense that no meaningful waiver can be obtained. In such case, we must assume that counsel's fear of, and desire to avoid, criminal charges, or even the reputational damage from an unfounded but ostensibly plausible accusation, will affect virtually every aspect of his or her representation of the defendant.

Id. at 613.

Here, the government stated that it had no reason to suspect Trial Counsel as the source of the allegedly forged exhibits. But, as in *Fulton*, the government had not concluded its investigation. Thus, Trial Counsel's criminal or professional liability remained an open question. Here as well, Petitioner waived the conflict. But, in *Fulton*, even a full hearing in open court probing the dimensions of the conflict was insufficient to waive the conflict because it was a per se conflict like the one that arose in that case.

The Second Circuit's decision here was an extreme departure from the usual course of judicial proceedings in the Courts of Appeals. Petitioner's guilty plea cannot stand. Trial Counsel acknowledged that he had an actual conflict mere moments before Petitioner pleaded guilty. As established above, the conflict here between counsel's own interest in self-preservation and the client's right to impartial advice could not have been starker.

Under the Second Circuit's own precedent, an unwaivable conflict existed here. Certiorari is appropriate when "a United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." *Kalamazoo Cnty. Rd. Comm'n v. Deleon*, 574 U.S. 1104, 1104 (2015) (Alito, J., dissenting from denial of certiorari) (alterations in original) (quoting Sup. Ct. R. 10(a)).

II. Certiorari Is Required to Resolve a Split in the Circuits Over Whether Actual Conflicts Arising from an Investigation into whether Counsel Participated in a Client's Crimes Are Per Se Unwaivable

This case raises significant issues regarding the Sixth Amendment's requirements when defense counsel's personal interests conflict with those of the client, particularly in the decision of whether to go to trial or plead guilty. The courts of appeals and the states' highest courts have taken varied approaches to similar conflicts of interest between defense attorneys and their clients.

It appears that at least the Second and Third Circuits and the States of California and New Hampshire apply a per-se rule. *Fulton*, 5 F.3d 605; *Zepp*, 748 F.2d 125; *In re Gay*, 8 Cal. 5th 1059, 1085, 457 P.3d 502, 521 (2020); *State v. Cyrs*, 129 N.H. 497, 502–03, 529 A.2d 947, 951 (1987). The D.C. Circuit has stated in *dicta* that it would have applied a per se rule in a suitable case. *United States v. Lopesierra-Gutierrez*, 708 F.3d 193, 201 (D.C. Cir. 2013). The Eleventh Circuit has rejected the per se rule on analogous facts. *Pegg v. United States*, 253 F.3d 1274, 1279 (11th Cir. 2001).

The Fifth Circuit has held that a per se rule of prejudice is inapplicable outside of conflicts arising from multiple representation. *Beets v. Scott*, 65 F.3d 1258, 1265 (5th Cir. 1995) (en banc). After this Court decided *Mickens v. Taylor*, 535 U.S. 162 (2002), the Ninth Circuit concluded that *Mickens* "explicitly limited [*Sullivan's*] presumption of prejudice for an actual conflict of interest . . . to cases involving 'concurrent representation."' *Rowland v. Chappell*, 876 F.3d 1174, 1192 (9th Cir. 2017) (quoting *Mickens*, 535 U.S. at 175). Similarly, the Eleventh Circuit interpreted *Mickens* as "indicat[ing]" that *Sullivan* "should be limited to situations of multiple concurrent representation where there is an inherent high probability of prejudice." *Cruz v. United States*, 188 F. App'x 908, 913 (11th Cir. 2006) (per curiam).

The Fifth, Ninth and Eleventh Circuits' decisions fly in the face of this Court's rulings. This Court has provided a specific test for whether a defense attorney with a conflict of interest has met the Sixth Amendment's requirement for representation by counsel. To establish a Sixth Amendment violation, "a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Strickland v. Washington*, 466 U.S. 668, 692 (1984) (internal quotation marks omitted) (quoting *Sullivan*, 446 U.S. at 348). In *Wood v. Georgia*, 450 U.S. 261 (1981), the Court applied this principle in a case where the defendants' employer, an adult bookstore, paid the attorney's fees in a prosecution arising from their employment. The Court noted that this arrangement could mean that the lawyer "may not have pursued their interests single-mindedly," *id.* at 271-72, and remanded the case for findings on "whether counsel was influenced in his basic strategic decisions by the interests of the employer who hired him," *id.* at 272.

Counsel's advice is crucial when a defendant pleads guilty. A guilty plea involves a comprehensive waiver of trial rights, making the decision to plead guilty the most important and often the most challenging decision a criminal defendant faces. In *McMann v. Richardson*, 397 U.S. 759 (1970), the Court explained that "the decision to plead guilty before the evidence is in frequently involves the making of difficult judgments." *Id.* at 769. Much depends on counsel's opinion of untested and often uncertain evidence and witnesses, however subjective and uncertain that opinion may be. *Id.* at 769-70.

Especially given the nature of counsel's role, a defendant is entitled to the single-minded loyalty of their attorney when being advised to plead guilty. *Cf. Strickland*, 466 U.S. at 692 (the duty of loyalty is "perhaps the most basic of counsel's duties"). Moreover, unlike many strategic decisions a lawyer must make during trial, the decision to plead guilty or go to trial is uniquely and emphatically the defendant's. When, as in this case, the attorney has strong personal reasons to avoid trial, there is a serious risk that those interests will influence the attorney's judgment about whether the defendant should plead guilty or go to trial, as well as how the lawyer explains that advice. An attorney might sincerely believe they can set aside personal concerns and provide impartial advice despite their own strong interest in avoiding trial. Or, after the fact, the attorney may rationalize that they did set aside their concerns. But the risk is too great that the attorney's judgment will be compromised, even if the specific bias is difficult to identify.

For reasons like these, the Court should clearly establish a per se rule allowing a defendant to withdraw a guilty plea if, when their lawyer advised them to plead guilty, the attorney was under an actual conflict between their own interests and those of the client. The case for such a per se rule is compelling when counsel is under a threat of prosecution from the same prosecutor that is prosecuting the client. In such situations, the client is close to incapable of proving prejudice. This is because litigation is an art form, the paths to effective assistance of counsel are multiple, and the barren record does not tell the courts what could have been done, what should have been done, and what was not undertaken because of the conflict of interest. It may be that even the transgressing lawyer, blind to the conflict of interest, does not know how the conflict skewed the lawyer's performance was skewed.

Conflicts of interest infect the lawyer-client relationship in subtle ways, leaving the entire representation suspect. As this Court has recognized, a legal representation "contains a myriad of occasions for the exercise of discretion, each of which goes to shape the record in a case, but few of which are part of the record." *Young v. United States*, 481 U.S. 787, 812-13 (1987) (discussing the effect of a biased prosecutor). Unlike other ethical or representational failures, which are discrete and whose effects are manifest and readily measured, a conflict of interest casts a shadow over every aspect of the lawyer-client relationship. A breach of the duty of loyalty affects every decision in the representation.

Depending on the conflict and the representation, this breach can blunt a lawyer's advocacy, undermine a lawyer's independent professional judgment, and inhibit a lawyer's creativity and zeal. While conflicts always cast these shadows on the representation, the problem is particularly acute in criminal representations. There is no way to recreate what might have, could have, or should have happened if the accused were represented by a lawyer with undivided loyalty.

Moreover, *Sullivan* rejects an outcome-based prejudice standard when defense counsel is under an actual conflict of interest. *Sullivan* requires only the defendant to "demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Sullivan*, 446 U.S. at 348. Here, Trial Counsel could not provide impartial advice on whether Petitioner should plead guilty, and when he advised Petitioner to plead guilty, Trial Counsel admitted that he had an actual, rather than potential, conflict. An actual conflict is all that *Sullivan* requires for a valid Sixth Amendment claim.

Even though the Second Circuit does not require a showing of prejudice in cases of unwaivable conflict, Trial Counsel's conflict decidedly affected his representation of Petitioner. As the government itself conceded before the Second Circuit, "no hearing or trial on obstruction would occur if Panos chose to accept the 2020 Plea Agreement." But that is precisely the point. Innocent or not, most participants in government investigations – be they witnesses, targets or subjects –

take part reluctantly if at all. *See Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 814 (1987) ("Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor. . . . Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life.").

Lawyers, even when cleared of wrongdoing, want to avoid at all costs the public airing of potential professional shortcomings lest they risk reputational harm. Thus, avoiding an investigation was its own incentive to advise Petitioner to plead pursuant to the plea agreement. And, as demonstrated above, merely by being derelict in his duty to at least review and vet the materials he attempted to pass off as trial evidence, Trial Counsel was already subject to at least reputational harm. Thus, the government's accusation of criminal conduct provided a motive for Trial Counsel to preempt an investigation. A convenient means of accomplishing that goal was to coerce Petitioner to accept the 2020 plea agreement whether or not it was in Petitioner's best interest.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

/s

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Appendix

2024 WL 852812
Only the Westlaw citation is currently available.
United States Court of Appeals, Second Circuit.

UNITED STATES of America, Appellee,
v.
Spyros PANOS, Defendant-Appellant.

22-3158(L), 22-3188(Con)
|
February 29, 2024

Appeal from a November 30, 2022 judgment of conviction of the United States District Court for the Southern District of New York (Karas, *J.*), and a December 14, 2022 judgment of revocation of supervised release of the United States District Court for the Southern District of New York (Román, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgments of the district court are **AFFIRMED**.

Attorneys and Law Firms

For Appellee: Margery Feinzig (David Abramowicz, on the brief), Assistant United States Attorneys, for Damian Williams, United States Attorney for the Southern District of New York, New York, NY.

For Defendant-Appellant: Ezra Spilke, Law Offices of Ezra Spilke, PLLC, Brooklyn, NY.

Present: Richard C. Wesley, Denny Chin, Eunice C. Lee, Circuit Judges.

SUMMARY ORDER

***1** Spyros Panos appeals from (1) a judgment of conviction imposed on November 30, 2022 (Karas, *J.*); and (2) a judgment of revocation of supervised release entered on December 14, 2022 (Román, *J.*), both in the United States District Court for the Southern District of New York.

After having been convicted of health care fraud in 2013, Panos was sentenced to 54 months' imprisonment followed by two years of supervised release, as well as being required to surrender his license to practice medicine. The government alleges that prior to his surrender in 2014, and while on supervised release from 2016 to 2018, Panos defrauded medical peer review companies ("PRCs") by using another doctor's credentialing information without their permission and wrote reports for various PRCs under the guise of being a licensed doctor.

Following his arrest in 2018 on these new allegations, Panos pleaded guilty in October 2020 to a three-count indictment which charged him with wire fraud, in violation of 18 U.S.C. § 1343, health care fraud, in violation of 18 U.S.C. § 1347, and aggravated identity theft, in violation of 18 U.S.C. § 1028A. The district court (Karas, *J.*) sentenced Panos to 111 months' imprisonment, to be followed by three years' supervised release. Following the sentencing, the district court (Román, *J.*) found that Panos had violated the terms of his supervised release from the prior conviction and sentenced him to a term of 12 months' imprisonment, to be served consecutively to his sentence of 111 months' imprisonment.

On appeal, Panos argues that the district court erred in denying his motion to withdraw his guilty plea because it was involuntary due to ineffective assistance of counsel and because he was denied due process, that the district court improperly denied Panos's post-plea motion to dismiss the indictment, that the district court abused its discretion in denying Panos's motion for a return of property, and that the district court erred in sentencing Panos on his revocation of supervised release by not allowing him adequate opportunity to address the court.[1] We assume the parties' familiarity with the remaining underlying facts and the record of prior proceedings, to which we refer only as necessary to explain our decision to affirm.

* * *

I. Panos's Motion to Withdraw His Plea

Panos argues that the district court erred in denying his motion to withdraw his guilty plea because, *inter alia*, his plea was not voluntary, as his attorney was conflicted and therefore provided ineffective assistance of counsel, and he was denied due process in his hearing under *United States v. Curcio*, 680 F.2d 881 (2d Cir. 1982) (a "*Curcio*" hearing).

"We review a district court's denial of a motion to withdraw a guilty plea for abuse of discretion and any findings of fact in connection with that decision for clear error." *United States v. Juncal*, 245 F.3d 166, 170–71 (2d Cir. 2001). It is important to note that "a defendant has no absolute right to withdraw his plea of guilty," *United States v. Gonzalez*, 647 F.3d 41, 56 (2d Cir. 2011) (alteration adopted) (quoting *United States v. Torres*, 129 F.3d 710, 715 (2d Cir. 1997)), and "[t]he defendant bears the burden of showing that there are valid grounds for withdrawal," *United States v. Rivernider*, 828 F.3d 91, 104 (2d Cir. 2016) (internal quotation marks omitted).

a. Relevant Background

***2** Trial was set to begin on November 2, 2020, with a pretrial conference set for October 29. At that point, the only plea agreement conveyed by the government, offered on June 28, 2018, contained a stipulated Guidelines range of 75 to 87 months' imprisonment. On October 28, Panos's counsel (Lawrence Fisher) notified the court and the government that Panos planned on pleading guilty. However, the government had just filed a letter with the court indicating that it believed some of the potential exhibits for trial that Panos had provided them, through his counsel, were in fact fraudulent. The government contacted Fisher, informing him that it had calculated a new stipulated Guidelines range of 111 to 132 months' imprisonment—adding levels for obstruction of justice and not giving Panos credit for acceptance of responsibility. Fisher then notified the district court and the government that he wished to be removed as counsel due to a conflict of interest, as he might be a witness should the government decide to pursue obstruction charges against Panos. Fisher further indicated that a new plea agreement might be appropriate. The government drafted a new plea agreement containing a stipulated Guidelines range of 111 to 132 months' imprisonment.

At the October 29, 2020 hearing, the district court made inquiries about Fisher's conflict. The government indicated that it had "no reason to believe" Fisher was involved in any obstruction, and that if Panos were to plead pursuant to the new agreement, he "would get coverage for any potential future obstruction of justice charge." App'x at 67. After discussion with the government and Fisher, the court concluded that Fisher might have a waivable, potential conflict that would only become an actual conflict if the government were forced to prove the allegations of obstruction and "Mr. Fisher [became] part of either the prosecution's case or the defense case." App'x at 73. The district court allowed Panos and Fisher to confer, stressing that "we're not in a rush here" and that the court "want[ed] to make sure that Mr. Panos is comfortable with whatever decision he makes." App'x at 77.

After conferring with Panos, Fisher stated that Panos wished to proceed with the plea. Panos signed the plea agreement, but the court advised that prior to taking the plea, it needed to conduct a *Curcio* hearing to ensure Panos was willing to go forward with Fisher as his attorney. The court conducted a lengthy hearing, where it explained Fisher's potential conflict, how it could possibly affect his advice on this plea deal, and that Panos had a right to be represented by a different lawyer for the purposes of the *Curcio* hearing. The court affirmed that Panos understood the issue by having Panos explain in his own words the contours of Fisher's potential conflict.

After Panos confirmed that he understood the potential conflict and his rights, Panos stated that he did not want a different lawyer to represent him, that he did not want more time to think, and that he was satisfied with Fisher's representation. Finally, the court informed Panos that by deciding to keep Fisher as his lawyer, he would be waiving any future argument that his plea was invalid due to a conflict. Panos confirmed that he understood this. The court then went on to conclude that Fisher's conflict was waivable and that Panos expressed his desire to waive it. It then gave Panos and Fisher another recess to confer and "make sure he wants to go forward with the plea." App'x at 123. After the recess, Panos confirmed he understood the new plea agreement and pleaded guilty pursuant to it.

On January 24, 2021, Panos moved to withdraw his guilty plea. The district court denied that motion on October 6, 2021.

b. Claims of Ineffective Assistance of Counsel

We evaluate conflict of interest claims as ineffective assistance of counsel cases, submitting them to the two-part test defined by *Strickland v. Washington*. 466 U.S. 668, 687 (1984) (holding that to prove ineffective assistance of counsel, a defendant must show that counsel's performance was deficient *and* that the "deficient performance prejudiced the defense"). It follows that for a defendant to prove that the conflict violated their Sixth Amendment right, they must show prejudice. *See* *Winkler v. Keane*, 7 F.3d 304, 307 (2d Cir. 1993). "However, prejudice is presumed when a defendant establishes that her attorney had an actual conflict of interest that adversely affected the attorney's performance." *Id.*

***3** While we review claims of ineffective assistance of counsel *de novo*, *see* *United States v. Kliti*, 156 F.3d 150, 152–53 (2d Cir. 1998), when those claims are based on allegations of a conflict, "[t]he evaluation of the facts and circumstances of each case ... must be left primarily to the informed judgment of the trial court," *Wheat v. United States*, 486 U.S. 153, 164 (1988).

When presented with a possibility of a conflict of interest, a district court has two obligations. First, it must conduct an inquiry into the conflict, investigating the facts to determine if an actual or potential conflict exists. *See* *United States v. Levy*, 25 F.3d 146, 153 (2d Cir. 1994). Second, if the district court determines a potential conflict of interest is present, "the court should follow the procedures set out in *Curcio*, 680 F.2d at 888–90, in order to obtain directly from the defendant a valid waiver of his right to a non-conflicted lawyer." *Id.*

Panos argues on appeal that Fisher's conflict was actual, not potential, and therefore was unwaivable. "[T]he class of cases in which an attorney conflict is truly unwaivable is a very narrow one[.]" *United States v. Cain*, 671 F.3d 271, 294 (2d Cir. 2012) (internal quotation marks omitted). We have previously held that a *per se* unwaivable conflict exists "when an attorney is implicated in the crimes of his or her client." *United States v. Fulton*, 5 F.3d 605, 611 (2d Cir. 1993).

As the district court noted, the government did "not suspect that Mr. Fisher had anything to do with the doctoring of those documents .... [T]hat's what distinguishes this case from those where the lawyer basically was suspected of being involved in the very same crime." App'x at 119. It is true that if Panos had not pleaded guilty and the government had pursued obstruction charges, Fisher *may* have been called to testify. This is exactly why, however, the conflict was *potential.* Panos provides no authority, nor are we aware of any, which holds the mere *possibility* of an attorney being called to testify in a hearing involving their client amounts to a *per se* unwaivable conflict. Hence, we cannot find that "the district court exceeded the broad latitude which must be accorded it in ... deci[ding]" that Fisher's conflict was waivable. *Cain*, 671 F.3d at 296 (internal quotation marks omitted).

Panos also contends that Fisher made various missteps that rose to the level of ineffective assistance of counsel. These include, among other allegations, that Fisher failed to advise Panos that the plea agreement did not provide him with a benefit, as he was still punished for obstructing justice, and that Fisher failed to advise Panos he had a colorable trial defense to count two (health care fraud) of the indictment. None of these allegations overcome the "strong presumption that counsel's representation was within the wide range of reasonable professional assistance." *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (internal quotation marks omitted).

Panos did in fact receive a benefit from the plea agreement. In *United States v. Lutchman*, 910 F.3d 33 (2d Cir. 2018), on which Panos relies in his briefing, this Court noted that one reason a plea agreement gave no benefit to the defendant was that "the government [had] not articulated or identified any additional counts that could have been proven at trial." *Id.* at 38. That is definitely not the case here, where Panos avoided the additional charge of obstruction of justice by entering into the plea agreement.

***4** Panos's claim that Fisher was deficient in failing to advise him that he could mount a trial defense claiming PRCs do not qualify as "healthcare benefit programs," such that Panos did not commit health care fraud, is equally meritless. Appellant Br. at 26. We have previously found that "Congress intended for [18 U.S.C. § 1347] to include within its scope a wide range of conduct so that all forms of health care fraud would be proscribed." *United States v. Lucien*, 347 F.3d 45, 51 (2d Cir. 2003). Given our broad interpretation of the statute, it is far from certain that this trial argument was colorable at all, and we cannot find that Fisher was ineffective in failing to pursue it. *See* *United States v. Kirsh*, 54 F.3d 1062, 1072 (2d Cir. 1995) (reasoning that an attorney's failure to "pursue certain motions that lacked merit ... must be considered strategic" and does not amount to ineffective assistance of counsel).

c. Due Process Claims

Panos complains that the district court erred in denying his motion to withdraw his plea because he was not given sufficient time to contemplate the risks of Fisher's alleged conflict and consider the plea agreement. This argument is belied by the record. At a *Curcio* hearing, the court must advise a defendant of the risks of the conflict, determine that the defendant understands those risks through questioning, and "give the defendant time to digest and contemplate the risks after encouraging him or her to seek advice from independent counsel." *United States v. Arrington*, 941 F.3d 24, 40 (2d Cir. 2019) (quoting *United States v. Iorizzo*, 786 F.2d 52, 59 (2d Cir. 1986)).

Curcio, however, did not delineate a specific amount of time that a defendant must be given. On the record before us, we see a district court that gave Panos many opportunities to take more time to consider his options, explicitly noting that it was "not in a rush." App'x at 77. The court also conducted an extensive *Curcio* hearing, ensuring that Panos understood the contours of Fisher's potential conflict by having Panos explain the nature and possible consequences of the conflict back to the court. Panos has presented no evidence that the court did not give him sufficient time to understand and contemplate the risks of Fisher's potential conflict or consider the plea.

Reviewing the district court's findings of facts for "clear error," we cannot find any "abuse of discretion" in the district court's decision to deny Panos's motion to withdraw his plea. *Juncal*, 254 F.3d at 170–71.

II. Panos's Post-Plea Motion to Dismiss the Indictment

Panos claims that the district court erred in denying his request to dismiss the indictment against him, arguing, *inter alia*, that there were deficiencies in the grand jury proceedings and he is actually innocent. The district court denied this request, stating "there's just no merit to it." App'x at 236. Indeed, "[i]t is well settled that a defendant's plea of guilty admits all of the elements of a formal criminal charge, and ... waives all challenges to the prosecution except those going to the court's jurisdiction." *Hayle v. United States*, 815 F.2d 879, 881 (2d Cir. 1987) (internal citation omitted). As Panos's claims are not jurisdictional, he has waived his claims challenging the indictment by pleading guilty.

III. Panos's Motion for Return of Property

Panos contends on appeal that the district court erred in denying his post-plea motion for return of property, which sought the return of a medical license reinstatement packet, prescription pads, and a medical bag containing medical examination tools and instruments. We review the grant or denial of a motion for return of property for "abuse of discretion, but review *de novo* any legal conclusion underlying such a decision." *United States v. Zaleski*, 686 F.3d 90, 92 (2d Cir. 2012).

***5** "A person aggrieved ... by the deprivation of property may move for the property's return." Fed. R. Crim. P. 41(g). However, "contraband" does not fall under the types of property that must generally be returned. *United States v. David*, 131 F.3d 55, 59 (2d Cir. 1997) (quoting *United States v. Francis*, 646 F.2d 251, 262 (6th Cir. 1981)). "[D]erivative contraband" has been defined by one of our sister circuits as "things that are not ordinarily illegal ... [but] become forfeitable because of their relationship with a criminal act." *United States v. 37.29 Pounds of Semi-Precious Stones*, 7 F.3d 480, 485 (6th Cir. 1993), *abrogated on other grounds by* *United States v. James Daniel Good Real Prop.*, 510 U.S. 43 (1993).

The prescription pads are properly categorized as derivative contraband. The district court articulated that "[Panos] doesn't have an entitlement to access the very tools that he might use to commit more fraud pretending to be a doctor" and that it was "not going to risk him hurting people." App'x at 236. We find no abuse of discretion in the district court's reasoning that Panos no longer had an entitlement to the prescription pads, given that his very crime was to pose as a licensed doctor. [2]

IV. Panos's Sentencing for Violation of Supervised Release

Panos argues that the district court did not allow him sufficient opportunity to address the court before imposing a 12-month sentence of incarceration for violating his terms of supervised release. This argument is without merit. Federal Rule of Criminal Procedure 32.1(b)(2)(E) provides that a defendant facing revocation must be given "an opportunity to make a statement." However, resentencing is not required if a judge who "announce[s] a sentence before giving the defendant an opportunity to speak" repairs their mistake and immediately "offer[s] the defendant the right of allocution." *United States v. Margiotti*, 85 F.3d 100, 103 (2d Cir. 1996) (per curiam).

That is precisely what happened here. The court (Román, *J.*) began to sentence Panos, but immediately stopped, asking defense counsel if they wished to be heard. The court then heard from defense counsel, the government, and Panos himself, and even announced that it was starting with a "blank slate." App'x at 317. After hearing from Panos, the court announced his sentence of 12 months' imprisonment to run consecutively to the sentence for 111 months' imprisonment. Given that the court immediately corrected its mistake, we find no error in the revocation proceeding.

* * *

We have considered Panos's remaining arguments and find them to be without merit. For the foregoing reasons, the judgments of the district court are **AFFIRMED**.

All Citations

Not Reported in Fed. Rptr., 2024 WL 852812

Footnotes

1 Panos raised additional arguments in *pro se* briefing to supplement his counsel's briefing. We have considered all of Panos's arguments, whether they were submitted by counsel or *pro se.*

2 As to the other items subject to the motion, the government contended that it never seized and was not in possession of the medical license reinstatement packet and the medical bag. Given that Panos has filed no affidavit claiming otherwise, and those items are also arguably derivative contraband as Panos does not have a license to practice medicine, we decline to hold that the district court abused its discretion in denying Panos's motion as a whole.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 6th day of June, two thousand twenty-four.

United States of America,

Appellee,

v.

Spyros Panos,

Defendant - Appellant.

ORDER

Docket Nos: 22-3158 (Lead)
22-3188 (Con)

Appellant, Spyros Panos, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk