

No. 17-624

**In the Supreme Court of the
United States**

ENRICO PONZO,
Petitioner,

v.

UNITED STATES,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
REPLY BRIEF FOR PETITIONER	1
I. The Decision To Waive the Sixth Amendment Right Testify (and Exercise the Fifth Amendment Right to Remain Silent) Cannot Be “Knowing” and “Informed” Where a Defendant Expresses His Desire to Testify But First Requests That the Judge Inform Him Whether the Government Will Be Allowed to Impeach Him With His Prior Record	1
II. A Defendant Who Objects, Before Trial, To a Perceived conflict of Interest On the Part of His trial Counsel Should Bear a Lesser Burden Than A Defendant Who Objects Only After Trial	3
CONCLUSION.....	7
APPENDIX.....	App.1

TABLE OF AUTHORITIES

<i>Casiano-Jiminez v. United States</i> , 817 F.3d 816 (1st Cir. 2016)	3
<i>Glasser v. United States</i> , 315 U.S. 60 (1942)	4
<i>Holloway v. Arkansas</i> , 435 U.S. 475 (1978)	5
<i>Mickens v. Taylor</i> , 535 U.S. 162 (2002)	6
<i>Owens v. United States</i> , 483 F.3d 48 (1st Cir. 2007)	3
<i>Rock v. Arkansas</i> , 483 U.S. 44 (1987)	2
<i>United States v. Bezanson-Perkins</i> , 390 F.3d 34 (1st Cir. 2004)	2
<i>United States v. Guzman</i> , 603 F.3d 99 (1st Cir. 2010)	1
<i>United States v. Lipscomb</i> , 702 F.2d 104 (D.C. Cir. 1983)	2

REPLY BRIEF FOR PETITIONER

This case presents important constitutional issues that warrant this Court's review. Resolution of the Questions Presented would have a material impact on the administration of criminal justice throughout the country.

I. The Decision To Waive the Sixth Amendment Right to Testify (and Exercise the Fifth Amendment Right to Remain Silent) Cannot Be "Knowing" and "Informed" Where a Defendant Expresses His Desire to Testify But First Requests That the Judge Inform Him Whether the Government Will Be Allowed to Impeach Him With His Prior Record

Respondent contends that Petitioner did not raise this issue in the District Court. Br. In Opp. 10. That contention is wrong. Petitioner very clearly raised the issue in the District Court and specifically asked the judge whether the Government would be allowed to use his prior convictions against him if he testified. Pet. 8.

Much of Respondent's remaining arguments rely on a plain error standard of review for unpreserved issues. However, because Petitioner raised the issue in the District Court and in the First Circuit he is entitled to de novo review. *United States v. Guzman*, 603 F.3d 99, 106 (1st Cir. 2010); *United States v. Bezanson-Perkins*, 390 F.3d 34, 39 (1st Cir. 2004).

Respondent argues that Petitioner cites no legal authority holding that a decision whether to exercise or waive the right is not knowing or voluntary “simply because of uncertainty concerning how a judge would resolve evidentiary disputes that might arise later in the trial if the defendant elected to exercise the right in question. Br. In Opp.12. Respondent either unwittingly or by design misinterprets Petitioner’s argument. Petitioner stated “The Question Presented is a not whether a Court must make advance rulings on other evidentiary issues or unsettled areas of law. It does not.” Pet. 9-10.

The decision on whether to testify, of course, is a critical one. *Rock v. Arkansas*, 483 U.S. 44, 51-53 (1987). Virtually every criminal defendant who has a prior record will want to know if his record can be used against him when making his or her decision on the constitutional right to testify and the constitutional right to remain silent. “[w]hen a defendant seeks an advance ruling on admission of a prior conviction, it is reasonable to presume that the ruling will be an important factor in his decision whether to testify.” *United States v. Lipscomb*, 702 F.2d 1049, 1069 (D.C. Cir. 1983).

Yes, Petitioner consulted with counsel during the colloquy. But his question was not one for counsel – it was a question that only the judge could answer. The Circuit’s and Respondent’s reliance on *Casiano-Jiminez v. United States*, 817 F.3d 816 (1st Cir. 2016) and *Owens v. United States*, 483 F.3d 48 (1st Cir. 2007) is misplaced. Clearly, the duty to inform a

defendant that he has the right to testify belongs to the lawyer. Those cases do not deal with the Question Presented.

In the absence of a preliminary ruling, a defendant's decision is nothing more than a roll of the dice on how he or she thinks the trial judge would have ruled. Constitutional guarantees should not be relegated to a high-risk gamble.

If this Court does not provide guidance to the trial courts of the nation, then there will be arbitrary application of an important constitutional principle: some defendants will be given the important information while others will not. Some defendants will have their convictions reversed on appeal, while others will have their convictions affirmed. The lower courts, prosecutors, defense attorneys, and judges desperately need guidance from this Court.

II. A Defendant Who Objects, Before Trial, To a Perceived conflict of Interest On the Part of His trial Counsel Should Bear a Lesser Burden Than A Defendant Who Objects Only After Trial

The Sixth Amendment right to counsel means the right to counsel who does not have a conflict of interest. *Glasser v. United States*, 315 U.S. 60, 75 (1942).

Respondent attempts to minimize the conflict of interest in two ways, neither of which are persuasive. First, Respondent plays down the fact that counsel's former client tried to kill the Petitioner in connection with the charges for which Petitioner was about to be tried by declaring the fact as a mere 'assertion.' "Petitioner has asserted that a man named David Clark intended to kill him but killed Romano instead." Br. In Opp. 3. That the Petitioner was the intended target of the murder is not a mere assertion, rather it is a fact. A fact that memorialized by a federal lawsuit filed by the Estate of Michael Romano against the United States of America. Civil Complaint, United States District Court for the District of Massachusetts Docket Number 1:17-cv-12057 (App. 1-8). The Complaint alleges, inter alia:

¶10. Mr. Romano was killed when he was mistakenly identified as Enrico Ponzo, the intended target of the shooting.

¶13. The FBI also knew, or should have known, that Frank Salemme and Informant Rossetti, among others, were planning, prior to Michael Romano Jr's murder, to seize control of organized crime in the Boston area and to kill Enrico Ponzo, among others, as part of that plan.

¶17. Agents of the FBI knew or should have known of the intended shooting of

Enrico Ponzo that led to the death of Michael Romano, Jr. through their regular contacts with Rossetti and other informants for the FBI.

The second way Respondent attempts to minimize the conflict of interest is by ignoring the fact counsel represented the former client in connection with a murder that was related to his attempted murder of Petitioner.

It is immaterial that counsel in this case opined that he did not have a conflict of interest. It not counsel's opinion that is determinative. Counsel's opinion is subjective.

Respondent argues that Petitioner must show adverse impact on counsel's performance. Petitioner was able to and did show an adverse impact on counsel's performance. The "evil" in a conflict scenario "is in what the advocate finds himself compelled to *refrain* from doing..." *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978). Here, counsel refused to accuse his former client of attempting to murder his current client. In the abstract, that is perfectly understandable. Virtually no lawyer would want to be put in the position of accusing a former client of murder, especially when the murder is related to another murder the former client committed on the same day. That is precisely why counsel had a conflict. This Court should provide much needed guidance to the lower courts on the issue of conflict of interest.

This case is an excellent vehicle to address the questions left open by *Cuyler v. Sullivan*, 446 U.S. 335 (1980) and *Mickens v. Taylor*, 535 U.S. 162 (2002). What showing must a defendant make who objects, before trial, to show a conflict of interest on the part of his lawyer? Adverse impact as indicated in *Cuyler*? Or division of loyalties as alluded to in *Mickens*? Can an ineffective assistance of counsel rationale save an otherwise conflicted lawyer?

This case is an excellent vehicle for addressing this issue for another reason. Counsel in this case took three separate actions because of his conflict. First, counsel refused to call his former client as a witness and accuse him of attempting to murder his current client. Second, counsel filed a Motion to preclude the Government from introducing the evidence he himself did not want to present. Third, during the trial itself, counsel continued to protect his former client by objecting when the Government questioned a witness about who had been the intended target of the Romano murder.

Each of these separate actions could be analyzed for adverse impact, thereby providing added guidance to the lower courts as to what might and might not be adverse impact, as opposed to a case with a single questionable action.

CONCLUSION

For the foregoing reasons and the reasons stated in the petition, the writ of certiorari should be granted.

Respectfully Submitted,
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January, 2018

App. 1

UNITED STATES DISTRICT COURT DISTRICT
OF MASSACHUSETTS

MICHELLE O'NEILL, individually
and as administrator of the Estate of
Michael Romano, Jr., MICHAEL O'NEILL,
MICHAYLA O'NEILL, and DARLENE
ROMANO, as administrator of the Estate
of Michael Romano,
Plaintiffs,

v.

UNITED STATES OF AMERICA, Defendant.

COMPLAINT

Plaintiffs, Michelle O'Neill and Darlene Romano, as
agents/administrators of the Estate of Michael
Romano, Jr., hereby file this complaint to recover
damages resulting from his murder based on the
wrongful actions of the United States acting through
the Federal Bureau of Investigations and its agents.
Michelle O'Neill, formerly Michael Romano's wife,
and Michael O'Neill and Michayla O'Neill, his
children, are pursuing this complaint to recover for
loss of consortium resulting from Michael Romano,
Jr.'s passing.

App. 2

PARTIES

1. Michelle O'Neill is an individual who resides at 235 Bowdoin Street, Winthrop, Massachusetts. She is pursuing this matter individually and in her capacity as an agent/administrator of Michael Romano, Jr.'s estate

2. Darlene Romano is an individual who resides in Massachusetts. She is pursuing this matter as an agent

administrator of Michael Romano, Jr.'s estate.

3. Michael O'Neill is an individual who resides at 235 Bowdoin Street, Winthrop, Massachusetts.

4. Michayla O'Neill is an individual who resides at 235 Bowdoin Street, Winthrop, Massachusetts.

5. The United States of America is the appropriate defendant under the Federal Torts Claims Act and was at all times material to this complaint the employer of the FBI agents at issue.

JURISDICTION AND VENUE

6. Jurisdiction exists under 28 U.S.C. § 1331 because this case is brought under the Federal Tort Claims Act, 42 U.S.C. § 2671, et seq.

7. Venue is appropriate pursuant to 28 U.S.C. § 1392(b).

App. 3

ALLEGATIONS

8. On diverse dates between a date unknown to claimant or before September 1, 1994 on which agents of the Federal Bureau of Investigation ("FBI") entered into an informant and/or cooperating witness relationship with Mark Rosetti ("Informant Rosetti") and Stephen Flemmi ("Flemmi"). Both of those individuals had been close criminal associates of Frank Salemme ("Salemme").

9. Michael Romano, Jr. was shot and killed on or about September 1, 1994 by Stephen Rosetti who acted in a conspiracy with, and at the direction of, Frank Salemme ("Salemme") and Informant Rosetti.

10. Mr. Romano was killed when he was mistakenly identified as Enrico Ponzio, the intended target of the shooting.

11. Agents of the FBI whose identity is not known to the plaintiffs, developed relationships with Stephen Flemmi and Informant Rosetti as informants and/or cooperating witnesses for the FBI.

12. The FBI was aware, through its relationship with Stephen Flemmi and Informant Rosetti, of the criminal activities of Frank Salemme, Stephen Flemmi, and Informant Rosetti, including information that Salemme, Flemmi and Informant Rosetti were responsible for multiple murders in the Boston area.

13. The FBI also knew, or should have known, that

App. 4

Frank Salemme and Informant Rossetti, among others, were planning, prior to Michael Romano Jr's murder, to seize control of organized crime in the Boston area and to kill Enrico Ponzo, among others, as part of that plan.

14. Due to their criminal records and criminal activities, including crimes of violence and murders, their unreliability, their mendacity, their lack of credibility, the danger they posed to public safety, their intentions to continue to break the law, all of which were known to the Agents of the FBI and their superiors, Informant Rossetti was not qualified, suitable or appropriate to serve either as a cooperating witness or informant for the FBI.

15. The Agents, and their superiors failed to follow proper procedures and guidelines with respect to the selection of cooperating witnesses and informants in the selection and employment of Informant Rossetti and with respect to monitoring and approving the activities of Informant Rossetti, with the result that as an Informant Rossetti was allowed and/or encouraged to engage in illegal activities including murder and conspiracy to commit murder.

16. Such activities, including the intended murder of Enrico Ponzo that resulted in the murder of Michael Romano, Jr., were neither suitable nor appropriate, nor legal, for FBI informants or cooperating witnesses.

17. Agents of the FBI knew or should have known of the intended shooting of Enrico Ponzo that led to the death of Michael Romano, Jr. through their regular

App. 5

contacts with Rossetti and other informants for the FBI.

18. Despite such knowledge, the Agents failed to take any steps to prevent the shooting and failed to properly control the activities of their cooperating Informant Rossetti.

19. As a direct and proximate result of those failures, Michael Romano, Jr. was murdered on or about September 1, 1994.

20. FBI supervisors of the Agents responsible for the activities of Informant Rossetti, negligently and/or knowingly failed to properly supervise the FBI agents in the management of Informant Rossetti as cooperating witnesses and/or informants.

21. FBI supervisors also failed to prevent the improper employment of Rossetti as an informant and/or cooperating witnesses and failed to prevent the Agents responsible for their supervision from allowing and/or encouraging Salemme and Informant Rossetti to commit illegal acts, including ordering acts murder.

22. The murder of Michael Romano, Jr. was the direct and proximate result of the torts of wrongful death, negligence and gross negligence by FBI agents including superiors.

23. None of the acts as alleged that were the proximate cause of Michael Romano, Jr.'s death constitute a discretionary function and/or entitle the actors to qualified immunity under applicable laws.

App. 6

24. Plaintiffs have satisfied the prerequisites as to filing the claim under the Federal Tort Claims Act.

Count I(Negligence/Wrongful Death/Gross Negligence; Darlene Romanoand Michelle O'Nei ll, as Agents/Administrators: Federal Tort Claims Act)

25. Plaintiffs, Michelle O'Neill, and Darlene Romano, incorporate the allegations of paragraphs 1 through 24 as if fully set forth herein.

26. The United States had an obligation to act in compliance with its duty of care.

27. It, however, failed to do so.

28. As a result, its conduct and that of its agents resulted in the death of Michael Romano, Jr. such that Plaintiffs are entitled to an amount to be determined at trial.

Count II(Loss of Consortium; Michelle O'Neill, Michael O'Neill, and Michayla O'Neill; Federal Tort Claims Act)

29. Plaintiffs, Michelle O'Neill, Michael O'Neill and Michayla O'Neill, incorporate the allegations of paragraphs 1 through 28 as if fully set forth herein.

30. As a result of Mr. Romano's death resulting from the misconduct of the defendant and its agents, the O'Neill plaintiffs have suffered loss of consortium.

31. They have suffered damages in an amount to be determined at trial.

App. 7

WHEREFORE, Plaintiffs, Darlene, Romano, Michelle O'Neill, Michael O'Neill and Michayla O'Neill, pray that the Court:

1. Enter judgment in favor of Plaintiffs, Darlene Romano and Michelle O'Neill, and against Defendant on Count I in an amount to be determined at trial.
2. Enter judgment in favor of Plaintiffs, Michelle O'Neill (individually), Michael O'Neill and Michayla O'Neill, and against Defendant on Count II in an amount to be determined at trial.
3. Award Plaintiffs their attorney's fees.4. Award Plaintiffs interest and costs, which include attorney's fees.5. Award such other and further relief as the court deems appropriate.

PLAINTIFFS DEMAND A TRIAL BY JURY ON ALL CLAIMS SO TRIABLE.

DARLENE ROMANO, as agent/administrator of the Estate of Michael Romano, Jr., MICHELLE O'NEILL, individually and as agent/administrator of the Estate of Michael Romano, Jr., MICHAEL O'NEILL and MICHAYLA O'NEILL,

App. 8

By their attorney,

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Dated: October 20, 2017