IN THE SUPREME COURT OF THE UNITED STATES

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LOUIS DANIEL SMITH,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Sixth Amendment right to conflict-free counsel forbid multiple attorneys in the same law firm from concurrently representing non-consenting clients that have adverse interests, where one client is a grand jury witness in the same criminal proceeding in which the other is a criminal defendant?

2. Does the automatic reversal rule from *Holloway v. Arkansas*, 435 U.S. 475 (1978), apply when before trial a trial court forces an objecting criminal defendant to be represented by counsel whose office concurrently represents another client with adverse interests when defense counsel does not join in the objection, and also when the trial court fails to inquire into a conflict after the defendant objects again at trial?

3. Does the Sixth Amendment right of self-representation extend to extraordinary circumstances that arise during the course of trial and the defendant requests to finish the trial without counsel?

4. Do federal criminal defendants have a statutory right to meaningful appellate review under 28 U.S.C. § 1291; if so, what minimum standards should be met that ensure meaningful appellate review has been satisfied when a court of appeals resolves an appeal in an unpublished disposition; and did the Ninth Circuit meet those standards?

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Petitioner/Defendant, Louis Daniel Smith, (hereinafter Smith) respectfully prays that a writ of certiorari issue to review the unpublished Memorandum from the United States Court of Appeals for the Ninth Circuit entered on November 14, 2017.

ORDERS BELOW

The Ninth Circuit affirmed Smith's convictions in an unpublished Memorandum filed on November 14, 2017. Appendix (App.) 1-12. The Ninth Circuit denied Smith's petition for rehearing and suggestion for rehearing *en banc* on February 6, 2018. App. 13.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1). This petition is timely.

PERTINENT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution states in pertinent part: “No person shall be ... deprived of life, liberty, or property, without due process of law....”

The Sixth Amendment to the United States Constitution states in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury ..., and to be informed of the nature and cause of the accusation; ... to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

PERTINENT FEDERAL STATUTORY PROVISIONS

For text of the cited statutory provisions see Appendix at 59-60. Sup. Ct. R. 14.1(f) and (i)(v).

PERTINENT MISCELLANEOUS RULE PROVISIONS

For the text of cited miscellaneous rules see Appendix at 61-62. Sup.Ct. R. 14.1(f) and (i)(v).

STATEMENT OF THE CASE

A jury convicted Smith on five of six felony counts charged in a federal indictment in the Eastern District of Washington. He appealed to the Ninth Circuit challenging each conviction, claiming: (1) each charge that alleged fraud was insufficient for failing to also allege materiality and knowledge of falsity, two necessary components of fraud; (2) jury instructions were legally deficient; and (3) evidence at trial was insufficient to support each count of conviction.

In addition, Smith raised constitutional claims, including that his right to effective assistance of counsel under the Sixth Amendment was violated due to his defense counsel laboring under an actual conflict of interest adversely affecting counsel’s performance. He also maintained that he was deprived his right to a fair trial. He asserted that his Fifth and Sixth Amendment rights to due process, to present a defense, and compulsory process were violated at trial due to the district court’s failure to grant a continuance, and its failure to allow him to put on a defense *pro se*, after defense counsel rested without calling a single witness, over Smith's objections.

The Ninth Circuit's unpublished Memorandum either sidestepped issues, decided issues on a misapplication of the facts or the law, and/or completely ignored issues.

This petition raises important questions of constitutional and federal law. Smith requests this Court to determine whether minimum standards should be set to guide the United States Courts of Appeals and ensure that criminal defendants' statutory right to appellate review under 28 U.S.C. § 1291 is meaningful when an appeal is resolved in an unpublished disposition.

Smith operated Project GreenLife (PGL), a company that sold health products through an Internet online store. PGL sold Miracle Mineral Solution (MMS). MMS was made by mixing a chemical called sodium chlorite with water. Sodium chlorite is commonly used to purify water and used to control odor in municipal waste water treatment plants.

PGL sold bottled MMS with bottled citric acid. These two products were shipped to customers with a brochure. The brochure explained that combining the two solutions created chlorine dioxide, and chlorine dioxide could combat disease-causing pathogens if ingested.

The Food and Drug Administration (FDA) commenced an investigation into PGL's activities and online sales of MMS. The FDA suspected that manufacturing MMS failed to meet FDA requirements. The investigation resulted in a six count indictment.

The indictment charged four counts of felony misbranding in violation of 21 U.S.C. §§ 331(a) and 333(a)(2), one count of fraudulently importing sodium chlorite from Canada to the United States contrary to law pursuant to 18 U.S.C. § 545, and one count of conspiracy to commit those offenses, and to defraud the United States in violation of 18 U.S.C. § 371. App. 63-83. A jury convicted Smith on all but one count in the indictment.[1]

Ineffective Assistance of Trial Counsel due to Conflict of Interest & Denial of the Right to Present a Defense

At Smith's arraignment, an attorney from the local federal defender's office (FDO) notified the magistrate that the FDO could not represent Smith or any co-defendant due to a conflict of interest. App. 85. The FDO's managing attorney represented Linda Bridegman, an employee of PGL who testified for the government during the grand jury proceedings. App. 154-55. The magistrate appointed a member of the Criminal Justice Act panel (CJA attorney) as counsel for Smith.

The district court subsequently permitted Smith to represent himself. The CJA attorney was ordered to remain as standby counsel. App. 87-88

Smith represented himself with the CJA attorney as standby counsel throughout pretrial proceedings for nearly two years. A month before the scheduled March 2, 2015 trial date, Smith informed the district court that he wanted to obtain trial counsel. After Smith moved to continue the trial date for that purpose, the district court dismissed the CJA attorney as standby counsel and ordered appointment of "new CJA counsel to serve in a full representative capacity or as standby counsel."[2] App. 14-15.

The district court then asked the magistrate to inquire of the FDO whether it could accept an appointment as standby counsel. App. 122. The FDO indicated it could accept the appointment

[1] The jury acquitted Smith on Count 5 which alleged another felony misbranding.

[2] CJA attorney informed the district court that he would need at least six months to prepare for trial if he was appointed as Smith's trial counsel. App. 110. This is the reason the district court dismissed him as standby counsel. App. 30.

since the prosecutor would not be calling Bridgeman as a witness at Smith's trial. App. 42,161,163. The magistrate appointed the FDO as standby counsel. Attorney Campbell was assigned. App. 112

Smith objected to the FDO's appointment due to a conflict and asked for reinstatement of CJA attorney. App. 113-23. The district court denied his request. App. 17-119,112-13.

Campbell moved for a six month continuance of the trial. The district court denied Campbell's motion, but continued the trial from March 2 to May 18, 2015. App. 19.

On April 15, 2015, Smith sent an email to the FDO's director and Campbell, requesting that the FDO withdraw from their representation of him. App. 172-84. The FDO did not ask to withdraw. Instead, Campbell filed a status report. He reported that Smith requested the FDO to withdraw due to the conflict created by their joint representation of Bridgeman. App. 125-28. He requested a hearing. *Id.*

On April 23, 2015, Smith filed a witness list that included Bridgeman. App. 129-30. On the same day, the district court held a hearing on Campbell's status report. Smith addressed his concerns about the FDO's conflict. App. 132-24. The district court informed Smith that he did not have a right to choose appointed counsel. App. 136.

Campbell then filed two supplemental status reports. App. 137-44. Campbell explained that he had been "walled-off" from Bridgeman's file at the FDO. App. 141 & 144.

Eleven days before trial, Smith moved for appointment of trial counsel, citing recent health concerns. App 145. In the motion, Smith addressed the FDO's conflict of interest. App. 146. The district court granted the motion, and the magistrate again appointed the FDO. Campbell remained as Smith's trial counsel.

Campbell immediately moved to continue the trial for six months to allow him time, now as trial counsel, to prepare. The district court denied that request. App. 24-35. Campbell then moved to withdraw as Smith's trial counsel. App. 147-51.

Campbell claimed that his interests conflicted with Smith's interests because Campbell did not have sufficient time to prepare, thus, it was in Smith's interest to claim that Campbell was ineffective. Campbell explained that it was in his interest to do the opposite. App. 150. [3] The district court denied Campbell's request to withdraw. App. 36-39.

Five days before trial, Smith renewed his "request for the Court to provide immediate and effective assistance of counsel and without waiver of any previously stated and established conflict with the Federal Defenders." App. 153. Just three days before trial, Campbell filed a "Motion to resolve conflict." App. 154-56.

Campbell reported that on May 14, 2015, he had asked Bridgeman's attorney for an interview of Bridgeman who was under subpoena. *Id*. Bridgeman's attorney "informed him that Bridgeman "would not agree to an interview," nor would she agree to being questioned by Campbell at Smith's trial. *Id*. Bridgeman said she "would not waive her right to conflict-free representation." *Id*. Bridgeman objected because Campbell, "as a member of the same law firm as her counsel ... owe[d] Ms. Bridgman (sic) the same duties of loyalty and confidentiality as Ms. Rubin." *Id.*

Campbell reported that "[t]here is an apparent conflict between the rights of, and duties owed to, Linda Bridgman (sic) and Daniel Smith." *Id*. The district court disagreed. App. 40-42,163.

It concluded that there was no "irreconcilable conflict." The court stated, "*this is just another matter of a witness who has been subpoenaed* who may or may not testify" and informed Campbell

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[3] Campbell did not move to withdraw due to a conflict of interest with FDO's joint representation of Bridgeman.

that if Bridgeman refused to appear to testify on her subpoena, she would face possible sanctions to include incarceration. App. 163 (emphasis added).

On the first day of trial, the district court denied an oral motion by Campbell to continue the trial and to allow him to withdraw. App. 177-78. Smith filed an emergency declaration in support of Campbell's motions. Smith complained that Campbell had not prepared for trial, and he objected to Campbell's representation of him due to the FDO's representation of Bridgeman. App. 165-75. The district court denied Campbell's motion. App. 178. It also entered a written order denying Campbell's earlier motion to resolve conflict. App. 40-42.

Campbell represented Smith at trial. At the close of the government's case-in-chief, Campbell informed the district court that he would rest without calling any witnesses. He said,

> based on ... the lack of investigation time, preparation time, I am not prepared to present a case in defense. I know Mr. Smith is unhappy with that. I know he objects to that, but as his counsel, I have to make decisions based on the circumstances that I'm faced with. So, ... we will be resting ... It is not a strategic decision or a tactical decision being made by a well-informed lawyer. So, I do not think it will be entitled to *Strickland* deference. App. 205.

Smith objected and requested an ex parte hearing before Campbell rested. App. 206. The district court denied the request for an immediate hearing. Instead, the court prompted Campbell to rest in the presence of the jury and Campbell rested. App. 207.

The district court then held an ex parte hearing. App. 208-14. Smith informed the district court that there were "a number of witnesses, including an expert ... who were standing by today to testify." App. 211. Smith also stated:

> from at least February ... my intent was not to go to trial on my own. And ... I objected to the Federal Defenders taking on the case because of conflict, which they did not perceive as actual conflict at the time, contrary to multiple objections and facts that would state otherwise that are on the record. And I informed both the

Federal Defenders of that from the very first meeting, [and] again, on April 15...

> ... lo and behold, the issue with Ms. Bridgeman showed up again, ...Mr. Campbell clearly said for the court there was a conflict, and Ms. Bridgeman couldn't be interviewed by my attorney while being represented by another attorney in the Federal Defenders Office. And, so, not being able to -- being able to interview a witness for a conflict issue just because the government says, oh, it's not really a conflict, that's not satisfactory. App. 213.

The district court construed Smith comments as a request for new counsel, stating "the appellate court can work that out. To the extent anybody is going to consider this a motion for new counsel, it is denied. It is not a timely motion." App. 214.

The next day before closing arguments, Campbell informed the district court that Smith requested the court to remove Campbell as counsel, permit his self-representation, and requested the reopen his trial. App. 216. The district court denied the requests as untimely. *Id.*

On appeal, Smith maintained that an actual conflict of interest manifested clearly when Campbell was prevented from interviewing Bridgeman and from calling her as a witness at trial.[4] Smith maintained his circumstances required application of the "automatic reversal rule" in *Holloway v. Arkansas*, 435 U.S. 475 (1978).

The conflict prevented Campbell from interviewing Bridgeman and calling her as a defense witness. Campbell's decision to refrain from calling Bridgeman at Smith's trial promoted her interest in avoiding sanctions if she continued in her refusal to cooperate with Campbell. Refraining

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[4] Washington State Rules of Professional Conduct (RPC) prohibit representation of joint clients when: "(1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibility to another client ..." RPC 1.7(a)(1) and (2). RPC 1.7 operates the same for multiple lawyers in a law firm as if a single lawyer is responsible for the joint representation. RPC 1.10(a). The RPCs require an attorney to withdraw where representation has commenced and it is discovered that continued representation would result in a violation of the Rules of Professional Conduct. RPC 1.16(a)(1).

from calling Bridgeman conflicted with Smith's interest in presenting a defense. The Ninth Circuit's unpublished Memorandum completely ignored *Holloway*. App. 9-11.

Smith also claimed that he was denied his right to present a defense when the district court denied Campbell's motions to continue the trial and Campbell rested without calling any witnesses. After Campbell unilaterally rested, the district court denied Smith's request to reopen his case and allow him to present a defense *pro se*. [5] App. 214.

The Memorandum concluded that "Smith was clearly responsible for the delay in counsel's appointment, counsel's ability to fully engage in active trial preparation, and counsel's lack of insight into the evidence, strategies, and theories of the case." App. 11. Therefore, "we need not reach the issue of whether the denial of a continuance resulted in ineffective assistance of counsel." App. 12 The Memorandum did not address Smith's assertion that he was deprived the due process right to a fair trial. This included violations of his Fifth Amendment right to present a defense and his Sixth Amendment right to compulsory process when Campbell's rested without calling any witnesses in Smith's defense, and the district court denied Smith's requests to reopen his case and to represent himself in order to put on a defense.

<u>Statutory Right to Meaningful Appellate Review is Further Denied</u>

In addition to the above constitutional issues that were summarily rejected in the unpublished Memorandum, Smith raised meritorious issues on each of the counts of conviction. In large part, the Memorandum either sidestepped issues, or ignored issues, or misapplied facts or applicable law.

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[5] In the hearing on Campbell's motion to resolve conflict, he informed the district court that he had to rely on Smith's input on what witnesses to call at trial. Campbell said, "Mr. Smith had [Bridgeman] on his witness list back when he filed it. As the court is aware, to some extent I'm relying on Mr. Smith, as he's had this case for several years." App _.

Appeal Issues on Counts 2 through 4, Felony Misbranding.

On three occasions in November 2010 undercover FDA agents ordered MMS and citric acid from PGL. The products were shipped from Spokane, Washington to California. In each of the packages, the agents received the instruction brochure on how to convert the two solutions to chlorine dioxide to help fight diseases. These three controlled buys made up Counts 2 through 4, charging felony misbranding of drugs under 21 U.S.C. §§ 331(a) and 333(a)(2). App. 80.

A misbranding offense increases from a misdemeanor to a felony under § 333(a)(2) "if any person commits [a § 331(a)] violation ... with the intent to defraud or mislead...." 21 U.S.C. § 333(a)(2). The indictment charged that Smith, "with intent to defraud or mislead, introduced ... into interstate commerce ... a drug, MMS, that was misbranded ... in that the drug was manufactured in an establishment which was not registered with the Secretary of Health and Human Services..."[6] App. 80.

Before the district court and on appeal, Smith claimed that the allegations and proof of "intent to defraud or mislead" under § 333(a)(2) had to be connected to the failure to register the MMS manufacturing facility, the alleged misbranding activity. Smith moved to dismiss the felony misbranding counts for failing to allege materiality and knowledge of misbranding. App. 91-94, 95. Smith claimed that materiality and knowledge of misbranding were components necessary to support the intent to defraud or mislead under § 333(a)(2) connected to in the alleged misbranding activity, the failure to register the MMS manufacturing facility. App. 97.

After trial, Smith moved to vacate his convictions on Counts 2 through 4 because the

[6] The indictment also alleged misbranding due to faulty labeling. App. 80. Only the failure to properly register the manufacturing facility was pursued at trial by the government. App. 228.

evidence failed to prove an intent to defraud or mislead that was connected to the failure to register the manufacturing facility with the Secretary of Health and Human Services. App. 247-50. In denying the motion, the district court wrote: "Smith misunderstands the crime for which he was convicted." App. 45. "The intent element applies to the act of introducing misbranded drugs into interstate commerce, *not to the act of misbranding the drugs*." App. 46 (emphasis added).

On appeal, Smith claimed that the allegations in the indictment, proof at trial and the jury instructions should have required that "intent to defraud or mislead" be connected to the alleged misbranding activity, the lack of registration of the manufacturing facility. He argued that the district court erred in denying his motion to dismiss, and in denying the motion for judgement of acquittal for that reason.

He also argued that the elements instruction for felony misbranding was plainly erroneous. The instruction required the jury to find that "intent to defraud or mislead when [Smith] introduced MMS products into interstate commerce." App. 229. This instruction is contrary to circuit authority which holds that intent to defraud or mislead must be connected to the misbranding activity.

Like wise, the Memorandum concluded, "Smith's criminal intent to defraud or mislead is *linked to his introduction of MMS into interstate commerce*, which is sufficiently detailed in the indictment." App. 3 (emphasis added). In dismissing Smith's challenge to the elements instruction, the Memorandum stated, "[t]he [district] court did not err in giving Jury Instruction 10, which was an accurate statement of the law and consistent with the charged statutes."[7] App. 5-6.

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[7] Smith also claimed that the evidence did not prove that he had knowledge of the misbranding activity, thus, intent to defraud was not proved. He also claimed that the jury should have been instructed that to find Smith guilty of felony misbranding, they had to find he had knowledge of the misbranding activity, i.e., lack of registration by ANI as required by the FDCA. *See*, *Mitcheltree*, 940 F.2d at 1349 ("knowledge of the essential nature of the alleged fraud is a

The Memorandum sidestepped Smith's argument that the evidence did not prove an intent to defraud or mislead that was connected to the lack of registration. It concluded, "there was sufficient evidence from which a rational jury could conclude that *Smith intended to mislead suppliers and authorities about the intended use of MMS* by customers. This challenge fails." App. 4-5 (emphasis added). The "intended use of MMS" had nothing to do with the alleged misbranding, nor with the issues raised by Smith on appeal.

The FDCA requires that the allegations, proof at trial, and jury instructions relating to "intent to defraud or mislead" be connected to the particular alleged misbranding activity - here, manufacturing MMS in an unregistered facility. The district court's and the Ninth Circuit's legal conclusions directly conflict with its own Ninth Circuit authority, and with case law from the Eighth and Tenth Circuits. *See*, *United States v. Mitcheltree*, 940 F.2d 1329 (10th Cir. 1991); *United States v. Hiland*, 909 F.2d 1114 (8th Cir. 1990); *United States v. Geborde*, 278 F.3d 926, 930 (9th Cir. 2002); and *Roseman v. United States*, 364 F.2d 18 (9th Cir. 1964).

In *Mitcheltree*, the Tenth Circuit held: "the specific intent requirement in § 333(a)(2) requires not only proof of misbranding under § 331, but also proof of an intent to mislead or defraud which is *connected to the misbranding violation under § 331*." 940 F.2d at 1349 (emphasis in original) (citing *United States v. Hiland*, 909 F.2d at 1128). In *Roseman*, the Ninth Circuit observed: "[u]nder the FDCA *it is not the transportation in interstate commerce which constitutes the offensive activity, but it is misbranding* ..." *Roseman*, 364 F.3d at 25 (emphasis added). "The *transportation in*

component of the intent to defraud," a defendant cannot act with intent to mislead or defraud under § 333(a)(2) without some knowledge of the misbranding. *Hiland*, 909 F.2d at 1128; *Industrial Laboratories*, 456 F.2d at 910 (jury should have been instructed that "defendant knew that several tests had not been made")). The Memorandum never addressed these issues.

interstate commerce is essentially a jurisdictional requirement ....” *Id.* (emphasis added).

The Ninth Circuit later held: “[t]o prove a case of felony failure to register [under the FDCA], the government had to prove that the failure to register was committed with fraudulent intent.” *Geborde*, 278 F.3d at 930. “Congress ... required that the failure to register be activated by the specific intent to defraud or mislead..” *Id.*

The Memorandum never referenced *Mitcheltree*, *Hiland*, *Geborde* or *Roseman*. App. 2-6. Each case establishes that the intent to defraud or mislead in 333(a)(2) must be connected to the alleged misbranding activity, just as Smith maintained before the trial court and on appeal.

Smith maintained that the evidence was totally absent regarding intent to defraud or mislead in relation to the failure to register the MMS manufacturing company, “American Nutraceuticals, Inc. (ANI). Just as in *Geborde*, “there was no evidence of [Smith’s] intent in failing to register, assuming he even knew he was required to register.” 278 F.3d at 930. The Ninth Circuit upheld the convictions on Counts 2 through 4 based on a conclusion that Smith defrauded his suppliers and the FDA by misleading them on the “intended use” of MMS. App. 4-5. Smith’s “intended use” of MMS was not the misbranding activity alleged, nor was that presented as the misbranding activity at trial - again, it was the failure to register the MMS manufacturing facility. App. 232.

If the felony misbranding convictions are reversed, then Smith’s misbranding convictions would generally be sustained as misdemeanor violations, assuming evidence was sufficient to prove the alleged misbranding activity. *See*, *Geborde*, 278 F.2d at 930 (reversing and remanding with instructions to amend the judgement from felony to misdemeanor misbranding). Smith, however, claimed that the government’s evidence failed to prove that ANI lacked registration at the time the alleged misbranding offenses were committed in November 2010, and failed to establish that ANI lacked registration with the required agency, the Secretary of Health and Human Services.

If Smith prevailed on this issue, not even misdemeanor misbranding convictions could have been sustained on appeal. Smith claimed that the evidence at trial on ANI's lack of registration came only from the testimony of Elizabeth Miller, supervising safety officer with the FDA. App. 179-203.

In limited testimony on registration, the prosecutor asked Miller - "Have you heard of a company called ... ANI? Miller responded, "Yes." App. 191. Using the present tense, the prosecutor asked Miller "*Is* ANI a registered manufacturer of drugs?" *Id.* (emphasis added). Using the present tense, Miller answered, "No, *it is not.*" App. 192 (emphasis added).

Consequently, Smith argued that the government failed to prove misbranding, i.e., that ANI was not a registered manufacturing facility in November 2010. He argued Miller's testimony only established ANI lacked FDA registration on the date she testified in May 2015.[8] He also claimed that Miller's testimony failed to establish with whom ANI was required to register, i.e., the Secretary of Heath and Human Services. The Memorandum summarily rejected Smith's contention.

The Memorandum stated, "testimony at trial, viewed as a whole, established at the time of the investigation, the facility in which MMS was made was not a registered manufacture of drugs as required...." App. 4. But, the Memorandum failed to point out any facts from Miller's scant testimony, or point to any other part of the trial record, that would support a finding that ANI lacked registration with the Secretary of Health and Human Services as a manufacturing facility in November 2010. In spite of that, the Memorandum concluded, "Smith's assertions to the contrary are without merit." App. 4.

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[8] 21 U.S.C. § 360(b)(1) requires drug manufacturing establishments to register annually between October 1 through December 31 each year. App. 60.

Appeal Issues on Count 6, Fraudulently Importing Merchandise Contrary to Law.

Smith's conviction for fraudulently importing merchandise contrary to law under 18 U.S.C. § 545 involved a single importation of sodium chlorite from Canada to the United States on May 18, 2011. App. 236 & 239. Stanely Nowak owned a chemical company in Canada. He imported the sodium chlorite, and prepared the documents used to gain entry of the sodium chlorite into the United States. App. 239-46.

The government maintained the importation documents were fraudulent because they noted that the sodium chlorite entering the United States was intended for use in odor control and a chlorine dioxide generator. App. 245-46. The documents did not state that the intended use for the sodium chlorite by PGL was to produce the MMS. App. 239-46.

The indictment did not allege that Smith had knowledge of any false information in the importation documents.[9] The indictment did not allege that Smith was an aider or abettor, or that he "caused" a fraudulent importation under 18 U.S.C. § 2(a) or (b). The jury instructions for Count 6 did not instruct the jury that Smith may be convicted as an "aider and abettor" or as a "causer" under § 2(a) or (b),[10] nor did the government prosecute Smith on any theory under § 2.

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[9] Paragraph 43 of the indictment alleged, "Sodium Chlorite was shipped by commercial carrier from Canada to the State of Washington. These shipments of Sodium Chlorite were invoiced by the import broker to 'PGL Wastewater Systems.' Material Data Safety Sheets provide by the Alberta, Canada complany indicated the Sodium Chlorite was intended for us in wastewater treatment. The indictment did not allege Smith's knowledge of these facts. App. 73.

[10] Section 545 includes two alternative violations. It is a violation to either fraudulently or knowingly import merchandise contrary to law, *or* to receive merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law. App. 59. At trial, the government did not pursue a theory that Smith or PGL received the sodium chlorite knowing it was imported contrary to law. App. 236. Thus, it had to prove Smith actually imported sodium chlorite under the first alternative in § 545. *Id.*

The government prosecuted Smith on the theory that Nowak and Smith were coconspirators, and therefore, Smith could be convicted based on coconspirator liability under *Pinkerton v. United States*, 328 U.S. 640 (1946).[11] App. 217-18 & 225. The distinction here is important.

On appeal, Smith claimed that all the government proved was that Smith and Nowak had a buyer-seller relationship. Smith contended that failing to instruct the jury on a buyer-seller relationship prevented him from defending against *Pinkerton* liability on Count 6 which constituted plain error. He also maintained that his conviction on Count 6 should have been reversed as a matter of law for the evidence did not prove that he and Nowak were coconspirators. Smith contended that since he paid for the sodium chlorite, up-front, before the shipment was processed by Nowak, and Nowak had no stake in PGL's business success, Nowak was merely a seller of the product; and Smith was not a coconspirator, he was merely a buyer.[12]

The Memorandum sidestepped the buyer-seller issue altogether as it related to the sufficiency of evidence on Count 6. Instead, it summarily dismissed the issue. Addressing the buyer-seller instruction issue, it stated, "Smith next asserts that the jury instructions were deficient because they

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[11] "Under *Pinkerton* [328 U.S. at 647-48] ..., a co-conspirator is vicariously liable for reasonably foreseeable substantive crimes committed by coconspirators in furtherance of the conspiracy." " *United States v. Fonseca-Caro*, 114 F.3d 906, 907 (9th Cir. 1997). In closing argument, the prosecutor relied solely on a *Pinkerton* liability theory on Count 6. He said, "[f]irst, let's talk about smuggling[,] ... the judge just instructed you, the defendant is responsible for the acts of his coconspirators." The defendant is just as guilty as Stan Nowak is" App 217-18.

[12] *See*, *United States v. Loveland*, 825 F.3d 555, 561 (9th Cir. 2016). "A relationship of mere seller and buyer, with the seller having no stake in what the buyer does with the goods, shows an absence of conspiracy, because it is missing the element of an agreement for redistribution." *Id*. at 562. Buyer-seller relationships "do not qualify as conspiracies." *Id*. (quoting *United States v. Brown*, 726 F.3d 993, 1001 (7th Cir. 2013)). A primary factor in determining whether a mere buyer-seller relationship exists is whether the seller sells the product to the buyer on credit or on consignment. *Loveland*, 825 F.3d at 562 There was no evidence that established Smith purchased the sodium chlorite on credit or on consignment.

failed to include a buyer-seller instruction. In this case, the buyer-seller instruction was not warranted by the evidence presented at trial. This claim is without merit." App. 9.

The Memorandum ignored Smith's argument that the evidence established that Nowak and he were not co-conspirators, thus, he was not guilty on Count 6 under *Pinkerton*. Instead, the Memorandum flipped theories, stating: "there was sufficient evidence at trial to establish that Smith *caused* shipments of sodium chlorite to be imported or brought into the United States from Canada, contrary to law." App. 7 (emphasis added).

Concluding that Smith "*caused*" sodium chlorite to be imported, changed from *Pinkerton* liability to "causer" liability under 18 U.S.C. § 2(b).[11] Smith was not charged under § 2(b) with "*causing*" Nowak to import the sodium chlorite. More importantly, the jury was not instructed under § 2(b) that it could convict on Count 6 if it found that Smith "*caused*" Nowak to import the goods. Thus, the Ninth Circuit affirmed Smith's conviction on a completely separate theory of liability of which he was not charged, and on a theory of liability that was never given to the jury to consider.

The Memorandum failed to address Smith's other appeal issues on Count 6. He claimed that the indictment failed to allege materiality and knowledge of purported false statements in Nowak's importation documents that supported the fraud allegations. Smith also claimed that the evidence on Count 6 was insufficient because it did not establish his knowledge of false statements in Nowak's importation documents. Finally, he claimed the evidence did not prove that Smith imported the sodium chlorite into the United States. The Memorandum did not address these issues.

The only issue the Memorandum addressed was on Smith's claim that the jury instructions

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[11] 18 U.S.C. § 2(b) provides for principal liability for persons who "willfully causes an act to be done which if directly performed by him or another would be an offense against the United States..." App. 59.

for Count 6 were deficient because they did not require the jury to find that he had knowledge of falsities in the documents that were prepared by Nowak. App. 7. Smith contended this deficiency constituted plain error.

Addressing this issue, the Memorandum stated: "'[f]raudulently' importing ... with the intent to defraud requires specific intent, while 'knowingly' committing an act requires only general intent. Thus, specific intent is a more stringent standard and encompasses the lower standard of general intent. The court did not err by requiring proof of intent to defraud, a specific intent standard, which is more rigorous to prove than knowledge, a general intent standard." App. 7 (citations omitted). This missed the point.

Smith contended that a necessary component of intent to defraud is a defendant's knowledge of material falsehoods or omissions that support the fraud allegations. *See*, *Mitcheltree*, 940 F.2d at 1349 ("knowledge of the essential nature of the alleged fraud is a component of the intent to defraud..."); *Hiland*, 909 F.2d at 1128 (same) (citing *United States v. Industrial Laboratories Co*., 456 F.2d 908, 909 (10th Cir. 1972)). Smith argued that his conviction on Count 6 could not be upheld without an allegation, without a jury instruction, and without proof at trial that he had knowledge of any material falsehoods or omissions in the importation documents prepared by Nowak. The Memorandum either ignored or sidestepped each of these legal issues.

Appeal Issues on Count 1, Conspiracy to Commit Offense Against the United States and Conspiracy to Defraud the United States.

On appeal, Smith maintained that if his convictions on Counts 2 through 4 and on Count 6 were reversed, his conviction on conspiracy based on offenses committed against the United States should also require reversal.[12] As such, Smith raised issues in relation to the conviction for conspiracy to defraud the United States. In that regard, the Memorandum observed that "Smith challenge[d] the sufficiency of the indictment, the sufficiency of evidence and the jury instructions" in relation to the conspiracy to defraud. The Memorandum concluded that addressing those issues was unnecessary since "count one's other two objectives are unchallenged on appeal." App. 8.

Smith did challenge the other two objectives on appeal. The other two objectives were the substantive misbranding counts (Counts 2 through 4) and the fraudulent importation count (Count 6). App. 80-81. If those convictions were reversed based on any issue raised by Smith, then challenges to the conspiracy to defraud the United States were viable. In his briefing to the Ninth Circuit, Smith stated, "[i]f evidence is insufficient to sustain Smith's convictions for ... [Counts 2-4] ... [and] if the evidence is insufficient to sustain Smith's conviction for [Count 6], then the evidence is also insufficient to sustain a conviction for conspiracy to commit th[ose] offense[s]." *United States v. Smith,* CA9 No. 15-30332 (Docket No. 56 at 96). In reply, Smith stated "[a] reversal of the convictions on Counts 2-4 and 6 would affect the conviction for conspiracy to commit offenses against the United States." *Id.* (Docket No. 82 at 28).

In his pretrial motion to dismiss Count 1's conspiracy to defraud, Smith claimed that the

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[12] The district court instructed the jury that its decision on whether Smith was guilty or not guilty on conspiracy to commit offenses against the United States rested on the jury's decisions on the misbranding and fraudulent importation counts. App. 220. On appeal, Smith maintained that a reversal of the convictions on the substantive counts would necessitate reversal of the conspiracy to commit offenses against the United States. *See*, *United States v. DeLuca*, 692 F.2d 1277, 1281 (9th Cir. 1982) ("If the judge instructs the jury that it need find only one of the multiple objects, and the reviewing court holds any of the supporting counts legally insufficient, the conspiracy count also fails."), *see also*, *United States v. Carman*, 577 F.2d 556 (9th Cir.1978) ("The one-is-enough charge makes it impossible to know precisely what the jury considered [and] [n]ot knowing, a reviewing court must overturn the conspiracy conviction.").

indictment failed to allege specific intent to defraud. App. 102. The indictment simply alleged that Smith and the others conspired to "*knowingly* defraud the United States and its agencies..." App. 68 (emphasis added). The Ninth Circuit holds that intent to defraud is a required element of conspiracy to defraud the United States. *United States v. Tuohey*, 867 F.2d 534, 537 (9th Cir. 1989) ("Three elements establish a conspiracy under section 371: An agreement to achieve an unlawful objective, an overt act in furtherance of the illegal purpose, and *the requisite intent to defraud the United States*.") (emphasis added). Count 1 did not allege intent to defraud the United States. It simply alleged knowledge. The Memorandum did not address this issue. App. 8.

Additionally, Smith contended that the evidence did not establish that he and others conspired to make, or conspired to cause a third party to make misrepresentations to the FDA. The "conspiracy criminalized by § 371 is 'most importantly' defined by the 'target of the conspiracy." *United States v. Licciardi*, 30 F.3d 1127, 1132 (1994) (quoting *Tanner v. United States*, 483 U.S. 107, 130 (1987)). Evidence that conspirators caused a third party to make misrepresentations to a federal agency is sufficient proof that the agency was the target. *Tanner*, 483 U.S. at 132. Smith relied on the Ninth Circuit's *Licciardi* decision that held:

> we cannot speculate as to what the government might have proved when it did not make the effort to show that Licciardi had "conspired to cause" Delicato to provide false information to the BATF. Because this kind of proof was not offered, the basis suggested in *Tanner* for upholding the conviction of the Seminole defendants is lacking.

Licciardi, 30 F.3d at 1132. Smith contended that the evidence at trial did not establish that Smith conspired with others to cause misrepresentations to reach the FDA in relation to PGL's activities. The unpublished Memorandum failed to address this issue. App. 8.

REASONS FOR GRANTING THE WRIT

1. This Court should take the opportunity to resolve the question of whether the Sixth Amendment forbids concurrent multiple representation of adverse clients by different lawyers in the same law firm when one client is a prosecution's grand jury witness in the same proceeding as the defendant. Resolution of this question will ensure that the Sixth Amendment right to conflict-free counsel is applied properly by the lower courts under varying circumstances, and necessary to correct a decision from the Ninth Circuit that conflicts with decisions from the Court.

"The Sixth Amendment provides that a criminal defendant shall have the right to 'the Assistance of Counsel for his defence [and] [t]his right has been accorded ... not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.'" *Mickens v. Taylor*, 535 U.S. 162, 166 (2002) (quoting *United States v. Cronic*, 466 U.S. 648, 658 (1984)). "Upon the trial judge rests a duty of seeing that the trial is conducted with solicitude for the essential rights of the accused..... The Court should protect the right of an accused to have assistance of counsel." *Holloway*, 435 U.S. at 484 (quoting *Glasser v. United States*, 315 U.S. 60, 71 (1942)).

Federal Rule of Criminal Procedure 44 requires a federal trial court to inquire about possible conflicts of interests where "(A) two or more defendants have been charged jointly ... or have been joined for trial...; and (B) the defendants are represented by the same counsel, or counsel who are associated in law practice." Fed. R. Crim. P. 44(c). Under this rule, a federal trial court's duty of inquiry applies only when "*two or more defendants* have been charged jointly" or "have been joined for trial." *Id.* (emphasis added).

A Rule 44(c) inquiry is not triggered if counsel represents both a defendant and a grand jury witness involved in the same proceeding. Under Criminal Justice Act (CJA) policies, grand jury witnesses are entitled to court appointed counsel "where there is a reason to believe, either before or during testimony, that the witness could be subject to a criminal prosecution, a civil or criminal contempt proceeding, or face loss of liberty." *Guide to Judiciary Policy*, Vol. 7A, Ch. 2 § 210.20.20(c).

The CJA policies only to discourage the appointment of a single counsel to represent co-defendants when "more than one defendant," or "two or more defendants" are charged "in the same or similar transactions." *Guide to Judiciary Policy*, Vol. 7A, Ch. 2 § 220.40(a). *See*, App. 62. CJA policies do not apply to concurrent multiple representations when one client is a grand jury witness in the same proceeding as another client who is charged with a federal offense by the grand jury. Thus, the federal rules and policies do not address Sixth Amendment concerns for conflict-free counsel in these circumstances.

In fact, the district court here said: "*this is just another matter of a witness who has been subpoenaed* who may or may not testify." App. 163 (emphasis added). The district court did not seem to view the grand jury witness appointment, in relation to a conflict of interest, in the same light as perhaps it would have had the situation involved joint representation of codefendants.

Having threatened Bridgeman with potential sanctions, the district court placed Campbell in a position of choosing between one client's interests over the other. Campbell could have chosen to enforce the subpoena against Bridgeman's demands. She could have been sanctioned if she still refused to cooperate. Campbell could choose to refrain from calling Bridgeman, contrary to Smith's due process interest in presenting a defense at trial. Campbell chose not to call Bridgeman.[13]

[13] Recall, Campbell had earlier told the court his decision to rest was not a reasoned strategic decision, but made due to a lack of preparedness. App. 205.

The Sixth Amendment right to conflict-free counsel should apply under all circumstances of multiple representation, including where one client is a criminal defendant, and the other is a grand jury witness in the same criminal proceeding.

This question also involves a criminal defendant's Sixth Amendment right to conflict-free representation where multiple clients with adverse interests are represented by different lawyers working in the same law firm. Resolving this question will further protect the Sixth Amendment right to conflict-free counsel under varying circumstances, including those present in this case. To the extent the question presented here is consistent with *Campanelli v. Illinois*, this petition incorporates by reference the legal authority and the reasons set out for granting *certiorari* in that case as support for granting *certiorari* in this case. *See, Campanelli v. Illinois*, S. Ct. No. 18-1225 (pending response on petition for writ of certiorari on May 9. 2018).[14]

The district court's written order denying the motion to resolve conflict emphasized that Campbell had "been walled of from Ms. Bridgman's file at the [FDO], and that his office had resolved any apparent conflict." App. 42. As *Campanelli* aptly observes:

> For many .... reasons, it is widely accepted that ethical screens do not ameliorate conflicts between current clients. Screens do not reduce the pull of divided loyalties between attorneys and clients – the driving force behind the

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[14] Pending before this Court is the petition for writ of certiorari in *Campanelli v. Illinoisi,* S. Ct. No. 18-1225. The question presented in *Campanelli* is: "Does the Sixth Amendment right to conflict-free counsel forbid multiple attorneys in a single public defender's office from concurrently representing non-consenting, adverse co-defendants?" *Id.* at i. *Campanelli* notes that neither federal courts, nor state courts, that follow Federal Rule of Criminal Procedure 44(c) are implicated in the question it presents since the rule requires the trial courts to inquire into possible conflicts when two or more defendants are represented by a single attorney or by different members of a single law firm. *Campanelli*, No. 18-1225 at 10 n. 1. This case presents a similar question presented in *Campanelli* since Rule 44(c) does not address multiple representation when one client is a grand jury witness and the other is a defendant in the same proceedings.

> imputation of conflicts. See Model Rule of Prof'l Conduct 1.10, cmt. 2. The duty of loyalty to a client – as well as the more subtle duty to an attorney's professional colleagues – persists regardless of the strength of the wall erected.

Campanelli, S. Ct. No. 18-1225 at 26-27. This case demonstrates the point.

Walling-off Campbell did not erase the reasons underlying FDO's appointment to represent Bridgeman, i.e., to protect her from potential prosecution or potential loss of liberty. The wall did not erase the potential consequences Bridgeman faced if she failed to testify in Smith's defense if Campbell chose to enforce her subpoena.

Likewise, walling-off Campbell did not erase Smith's interest in calling Bridgeman in his defense, regardless of whether she refused to cooperate with Campbell and faced likely sanctions. The FDO's attempt here to build an ethical wall did not "reduce the pull of [the] divided loyalties between clients." *Campanelli*, S. Ct. No. 18-1225 at 26.

In *Holloway*, this Court recognized that "[j]oint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing." *Holloway*, 435 U.S. at 489-90. An ethical wall in this case did not solve this problem.

The wall assuredly magnified the conflict of interest. It forced Campbell to refrain from his Sixth Amendment obligation to conduct an investigation. *See*, *Strickland v. Washington*, 466 U.S. 668, 691 (1984) ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary"). The wall and Smith's supervising attorney's representation of Bridgman placed Campbell in a direct conflict with his duty of undivided loyalty to Smith.[15]

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[15] "To the extent that a conflict of interest prevents a public defender from 'working with appropriate vigor in the client's behalf, the client's expectations of effective representation ... could be compromised.' Restatement, § 121, cmt. b." *Campanelli*, S. Ct. No. 18-1225, Brief in

The Ninth Circuit's conclusion that Smith did not establish a conflict of interest diverges from the teachings in *Strickland* and *Holloway*. This Court should grant *certiorari* to resolve the important constitutional question presented. This Court has not addressed a question that involves the Sixth Amendment right to conflict-free counsel from the joint representation of adverse clients where one is a grand jury witness and the other client is a defendant in the same a criminal proceeding. This case provides an ideal vehicle to resolve the question presented.

2. This Court should resolve the question of whether the "automatic reversal rule" set out in *Holloway* applies when a criminal defendant objects to defense counsel's joint representation due to a conflict of interest, when defense counsel neither joins in the objection nor seeks to withdraw, and the trial court later fails to inquire into the conflict after the defendant renews the objection at trial. Resolution of this question is important for the protection of the Sixth Amendment right to conflict-free counsel, and to correct a decision by Ninth Circuit that conflicts with relevant decisions of the Court.

This Court holds that the Sixth Amendment does not require trial courts to "inquire into the propriety of multiple representation" by counsel if there is no objection. *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). A defendant who fails to object to multiple representation by counsel must "demonstrate that an actual conflict of interest adversely affected his lawyer's performance" in order to prevail on appeal. *Id*.

The Ninth Circuit applied this non-objecting defendant rule from *Sullivan* to Smith. App. 10 (citing *Mickens*, 535 U.S. at 171) (using the *Sullivan* test). The Memorandum concluded that Smith failed to establish that Campbell "actively represented conflicting interests." *Id.*

Support of Certiorari of *Amicus Curiae* Legal Ethics Scholars, *et al*, at 8.

Smith, however, objected to the conflicting joint representation occasioned by the FDO's concurrent representation of Bridgeman. Thus, the Ninth Circiut's reliance on the *Sullivan* test as it relates to a non-objecting defendant is misplaced. In that regard, the Memorandum conflicts with this Court's decisions in *Holloway* and in *Sullivan*.

Holloway holds: "whenever a trial court requires joint representation over timely objection reversal is automatic." 435 U.S. at 488. On appeal, Smith contended that his case fit squarely into the rule requiring automatic reversal in *Holloway*. The Ninth Circuit completely ignored *Holloway* in its unpublished Memorandum. App. 9-11.

Since *Holloway*, this Court has recognized two scenarios that justify application of the "automatic reversal rule." *See*, *Mickens*, 535 U.S. at 168 (referring to "an automatic reversal rule"). The first scenario is carved out in *Sullivan*.

Sullivan recognized that in situations where "a defendant [] objects to multiple representation, [the defendant] must have the opportunity to show that potential conflicts impermissibly imperil his right to a fair trial." *Sullivan*, 466 U.S. at 348 (citing *Holloway*, 435 U.S. at 482-83). *Sullivan* instructs that trial courts have a duty to inquire into potential conflicts when defense counsel represents multiple defendants and one defendant objects to the joint representation. *Id*. Thus, *Sullivan* would apply *Holloway*'s "automatic reversal rule" if a trial court failed to give an objecting defendant "an opportunity to show that potential conflicts impermissibly imperil his right to a fair trial." *Id.* (citing *Holloway*, 435 U.S. at 483-83) (ineffective assistance of counsel is not presumed "*unless the trial court fails to afford such an opportunity*" to an objecting defendant) (emphasis added)).

Secondly, *Mickens* recognized that "*Holloway* ... creates an automatic reversal rule *only* *where* defense counsel is forced to represent codefendants over his timely objection, unless the trial court has determined that there is no conflict." 535 U.S. at 168 (citing *Holloway*, 435 U.S. at 488) (emphasis added). *Mickens* seems to suggest that the *Holloway's* "automatic reversal rule" only applies if defense counsel objects to conflicting multiple representations. *Id.* In this case, Campbell did not object to representing Smith based on a conflict with the FDO's representation of Bridgeman, but Smith did.[16]

Mickens should not be read to limit *Holloway*'s "automatic reversal rule" to instances where only the defense counsel objects. *Id.* The actual language from *Holloway* on which *Mickens* relied states:"whenever a trial court improperly requires joint representation over timely objection reversal is automatic." *Mickens*, 535 U.S. at 168 (quoting *Holloway*, 435 U.S. at 488). This passage implies that an objection by a defendant should invoke the "automatic reversal rule," even if defense counsel does not object to conflicting multiple representations.

Similarly, *Mickens* should not limit *Holloway's* "automatic reversal rule" when a trial court "has determined that there is no conflict." *See*, *Mickens*, 535 U.S. at 168 (stating automatic reversal applies only if defense counsel objects, "*unless the trial court has determined that there is no conflict*.") (emphasis added). Again, a literal application of this passage from *Mickens* would limit the broader holding in *Holloway*, and disqualify Smith from the "automatic reversal rule" since the district court in this case "determined there [was] no conflict." *Holloway*, 435 U.S. at 488.

Smith continuously objected to Campbell's appointment, first as standby counsel, and as trial

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[16] At the hearing on the motion to resolve conflict. Campbell informed the district court "[t]o be candid, I'm not quite sure .. how to resolve it, so honestly I don't know exactly what the remedy is." App. 160-61. He never objected the FDO's joint representation.

counsel. Smith objected on the first day of trial. App. 165-68.[17]

In addition, the "automatic reversal rule" applies because the district court failed to inquire further into a conflict after Smith objected at trial to Campbell's decision to rest without calling any witnesses, objecting again due to Campbell's conflicting representation of Bridgeman. App. 206.

When Campbell chose to rest without calling any witness, including Bridgeman, Smith immediately objected and requested a hearing. *Id*. The district court refused to hold the hearing before Campbell rested . App. 207. The court held an ex parte hearing only after Campbell rested.

At the hearing, Smith strenuously objected to Campbell's conflicting representation. App. 213-14. Rather than inquire of Campbell as to why he refrained from calling witnesses, particularly Bridgeman, the district court rejected Smith's objection, stating "[t]o the extend anybody is going to consider this a motion for new counsel, it is denied [-] [i]t is not a timely motion." App. 214.

The district court should have given Smith an opportunity to show how the conflict affected his right to a fair trial. *Sullivan*, 466 U.S. at 348 (citing *Holloway*, 435 U.S. at 482-83). The district court knew that Bridgeman was on Smith's witness list and under subpoena. Campbell informed the district court at the telephonic hearing three days prior to the trial that he would be relying on Smith's input regarding the witnesses to be called in his defense. App.163.

Armed with these facts, *Sullivan* required further inquiry by the district court. Specifically, inquiry should have been made of Campbell about what transpired between the telephonic hearing

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[17] In his emergency declaration supporting Campbell motion to continue trial and to withdraw, Smith wrote: "Mr. Campbell informed the Court that a particular witness on my list, Linda Bridgeman, being represented by an attorney in the same office, does not waive conflict and refuses to be interviewed by my counsel." App. 166. Smith said, "I also informed the Court of the conflict in a motion reconsider [appointment of the FDO], which it denied." App. _167. He further stated: "I also asked the [FDO] office over a month ago to withdraw so I could exercise my right to conflict free counsel." *Id.*

and trial regarding Bridgeman since she was on Smith's witness list, and under subpoena. No such inquiry was made. In addition, the district court did not provide Smith an opportunity to explore his concerns about the conflict, with Campbell having just failed to call Bridgeman in his defense. The "automatic reversal rule" should be applied for this reason.

This case gives the Court an opportunity to examine and resolve questions relating to *Holloway*'s "automatic reversal rule." This case also provides the Court an opportunity to examine and resolve questions relating to a trial court's duty to inquire under *Sullivan*. The Ninth Circuit's unpublished Memorandum decision conflicts with both *Holloway* and *Sullivan*. This case is an ideal vehicle for the Court to reenforce its prior decisions, and to promote consistent and uniform application of Sixth Amendment rights by lower state and federal courts.

3. The Court should resolve the question of whether the Sixth Amendment right of self-representation extends to extraordinary circumstances that arise during the course of trial and the defendant requests to finish the trial without counsel. This issue implicates important constitutional rights, including Fifth Amendment rights due process, to present a defense and to a fair trial and Sixth Amendment rights to self-representation and to compulsory process. The Court should resolve this question to ensure that criminal defendants' constitutional rights are fully protected under varying circumstances confronted by trial courts, and to promote consistent application of the Sixth Amendment right to counsel of choice and to the right of self-representation.

There is "nearly a universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so." *Faretta v. California*, 422 U.S. 806, 817 (1975). "The right to defend is personal[,] ... [a]nd ... [the defendant's] choice must be honored out of 'that respect for the individual which is the lifeblood of the law'" *Id.* at 834 (quoting *Illinois v. Allen*, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring)).

As long as a defendant is "made aware of the dangers and disadvantages of self-representation[,] and the record establishes that the defendant 'knows what he is doing and his choice is made with open eyes[,]' a trial court cannot force counsel upon the defendant 'against his will.'" *Id.* Trial courts must grant a request to self-representation if it determines the defendant is competent, and the decision is made voluntarily and knowingly. *Faretta.*, 422 U.S. at 835-36. "[T]he right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." *Id.* at 819-20.

Moreover, "[t]he right to offer the testimony of witnesses, and to compel their attendance ... is in plain terms the right to present a defense ..." *Washington v. Texas*, 388 U.S. 14, 19 (1967). Just as an accused has the right to confront the prosecution's witnesses ... , he has the right to present his own witnesses to establish a defense." *Id.*" "This right is a fundamental element of due process of law." *Id.*

The district court's denial of Smith's request at trial, after Campbell rested without presenting witnesses in Smith's defense, violated his Fifth and Sixth Amendment rights to self-representation, to compulsory process, to present a defense and to a fair trial. *Id.* The district court concluded that Smith's requests were not timely. App. 216.

Federal courts of appeal have uniformly interpreted *Faretta* to require defendants to request self-representation well in advance of trial. For example, recognizing that *Faretta* did not establish a "timeliness" rule, the Sixth Circuit observed: "*Faretta* did not establish a bright-line rule for timeliness." "Thus, to the extent that *Faretta* addresses timeliness, .. it can only be read to require a court to grant a self-representation request when the request occurs weeks before trial." *Hill v. Curtin*, 792 F.3d 670, 678–79 (6th Cir. 2015).[18]

Following *Hill*, the Sixth Circuit held: "The right to self-representation is not absolute; it can be outweighed by other concerns like the timing of the request." *Jones v. Bell*, 801 F.3d 556, 565 (6th Cir. 2015) (citations and quotations omitted). "No Supreme Court case has filled the gap between requests made weeks before trial and the day of trial, so courts have 'leeway' 'in reaching outcomes in case-by-case determinations.'" *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86 (2011); (citing *Hill*, 792 F.3d at 678–79).

This case offers this Court an opportunity to square the right to counsel of choice with the right to self-representation under the Sixth Amendment. *Wilson v. Mintzes*, 761 F.2d 275, 279 (1985) (" Many of the concerns supporting an accused's right to choose to represent himself also support an accused's right to counsel of choice."). Just as *Faretta* recognizes the Sixth Amendment right to self-representation, so long as a timely request is voluntary and knowing, this Court recognizes the Sixth Amendment right to counsel of choice for defendants who can afford retained counsel. *United States v. Gonzalez-Lopez,* 548 U.S. 140 (2006) (denial of choice of retained counsel

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[18] Citing, *Marshall v. Taylor*, 395 F.3d 1058, 1060–61 (9th Cir.2005) (discussing *Faretta*'s "timing element"); *see also United States v. Young*, 287 F.3d 1352, 1354 (11th Cir.2002) ("The [*Faretta*] Court mentioned the timeliness of the request in both the opening paragraphs and the breadth with which the Court announced its decision."); *Stenson v. Lambert*, 504 F.3d 873, 884 (9th Cir.2007) ("*Faretta* does not articulate a specific time frame pursuant to which a claim for self-representation qualifies as timely.... The Supreme Court has never held that *Faretta*'s 'weeks before trial' standard requires courts to grant requests for self-representation coming on the eve of trial."); *Miller v. Thaler*, 714 F.3d 897, 903 n. 5 (5th Cir.2013) (denying habeas relief on a claim that the state court violated *Faretta* in denying the defendant's self-representation request "a few hours before jury selection").

is structural error). Just as *Faretta* requests must be timely before trial, circuit court authority holds that motions to substitute retained counsel must be timely. *Wilson*, 761 F.2d at 280.

Authority among the circuits consistently hold that a defendant does not have an absolute right to substitute retained counsel "in mid-trial." *Id.* *Wilson* stated: "When an accused seeks substitution of counsel in mid-trial, he must show good cause such as a conflict of interest, a complete breakdown in communication or an irreconcilable conflict with his attorney in order to warrant substitution." *Id.*[19] This passage should equally apply when a defendant seeks to substitute appointed counsel during trial and seeks to complete the trial through self-representation.

In this case, Smith immediately objected to Campbell resting without presenting a defense. Campbell's decision to rest was not based on any reasonable trial strategy, but due to being unprepared. Campbell, however, had earlier informed the district court he would be relying on Smith to determine what witnesses would be called. App. 163

During the ex parte hearing after Campbell rested, Smith informed the district court that he

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[19] Citing *United States v. Brown*, 744 F.2d 905, 908 n. 2 (2d Cir.1984); *United States v. Morris*, 714 F.2d 669, 673 (7th Cir.1983); *United States v. Welty*, 674 F.2d 185, 188 (3d Cir. 1982); *McKee v. Harris*, 649 F.2d 927, 931 (2d Cir.1981); *United States v. Hart*, 557 F.2d 162, 163 (8th Cir.1977); (to warrant substitution, accused must show justifiable dissatisfaction with counsel); *United States v. Calabro*, 467 F.2d 973, 986 (2d Cir.1972) ("if on discovering justifiable dissatisfaction a court refuses to replace the attorney, the defendant may then properly claim denial of his Sixth Amendment right"). *United States v. Sullivan*, 431 F.3d 976, 980 (6th Cir. 2005); *United States v. Mack*, 258 F.3d 548, 556 (6th Cir.2001); *United States v. Panardi Alvarez*, 816 F.2d 813, 816 (1st Cir. 1987) ("When a defendant attempts to substitute counsel at the eleventh hour or in mid-trial, he must show good cause such as a conflict of interest, a breakdown in communication or an irreconcilable dispute with his attorney.") (citing *United States v. Torres*, 793 F.2d 436, 440 (1st Cir. 1986); *Wilson*, 761 F.2d at 280-81); and *United States v. Morris*, 714 F.2d 669, 672-73 (7th Cir.1983)).

had witnesses standing by to testify, including an expert witness.[20] App. 211. Before closing arguments, Campbell on behalf of Smith moved to allow Smith to represent himself, reopen the trial, and allow him to present a defense. The district court denied the request as "not timely." App. 216. This foreclosed any chance Smith had to present a defense on his own behalf.

Smith said he did not know that Campbell was going to rest until Campbell announced his intentions just prior to resting. App. 209. Smith attempted to prevent resting his case before the district court prompted Campbell to rest, and before Campbell rested. Thus, Smith's requests to substitute his self-representation to present a defense could not been made until after Campbell rested.

Smith did not seek to substitute counsel with self-representation for purposes of delay. It was to exercise his Fifth Amendment right to present a defense at trial. His desire to present a defense squarely conflicted the Campbell's desire to rest due to his unpreparedness.

Judge Ferguson from the Ninth Circuit appropriately observed:

> I write only to explain that while courts of appeal have adopted a timely requirement to a *Faretta* motion..... The Court did not require that the right be exercised before trial. During the course of a trial, counsel may become incapable for many reasons—injury, disbarment, misconduct. For any number of reasons a defendant ... may want to represent himself during the balance of the trial. *Faretta* grants him that right.

Moore v. Calderon, 108 F.3d 261, 265 (1997) (Ferguson, J., concurring).

The circumstances in this case establish a breakdown in communication between counsel and defendant that manifested during trial. When Smith's wishes to present a defense, collided with

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[20] At the telephonic hearing on his motion to resolve conflict, Campbell informed the district court that "to some extent [he was] relying on Mr. Smith" as to what witnesses to use at trial. App. 163. Campbell's decision to rest, therefore, ran contrary to what he had informed the court just three days before trial commenced.

Campbell's refusal to do so based on his lack of preparedness, extraordinary circumstances arose that should have required the district court to protect Smith's rights to present a defense and to a fair trial under the Fifth Amendment.

Smith attempted to protect his due process rights at that moment by requesting substitution of counsel with his Sixth Amendment right of self-representation, and requesting the district court reopen his defense. Circuit court authority supports the notion that the district court failed to protect Smith's right to self-representation and due process rights in this instance. Smith's request to represent himself during trial was justified by urgent circumstances confronting him when Campbell rested against Smith desires, prompting Smith to make the request at his trial.

This case presents the type of extraordinary circumstances that would require lower courts to permit a substitution of counsel on a defendant's Sixth Amendment request of self-representation during trial. This case provides an excellent vehicle for the Court to square circuit authority relating to the Sixth Amendment right to counsel of choice with the Sixth Amendment right of self-representation. Resolution of the question will also promote uniform application of Fifth and Sixth Amendment rights do due process, to present a defense, to a fair trial, to compulsory process and to self-representation by lower state and federal courts.

4. This Court should resolve the question of whether federal criminal defendants have a right to meaningful appellate review under 28 U.S.C. § 1291; if so, determine what minimum standards should be met by the courts of appeals to ensure the right to a meaningful appellate review has been satisfied when an appeal is resolved through an unpublished disposition, and whether the Ninth Circuit met those standards here.

The Ninth Circuit decided issues in a manner that ignored or conflicted with prior decisions of this Court, ignored or conflicted with its own authority, or ignored or conflicted with other circuit authority. The Ninth Circuit either ignored, glossed over, or sidestepped issues Smith raised on appeal. The Ninth Circuit decided other issues on a misapplication of fact or law. The Ninth Circuit's review in this case has so far departed from the accepted and usual course of judicial proceedings that Petitioner Smith calls for an exercise of the Court's supervisory power.

The Court has recognized that in cases involving a death sentence, "appellate review plays an essential role in eliminating the systemic arbitrariness and capriciousness ... and hence [] some form of *meaningful appellate review is constitutionally required*." *Pulley v. Harris*, 465 U.S. 37, 54 (1984) (Stevens, J., concurring) (emphasis added). Moreover, this Court has recognized that "refusal to afford full appellate review solely because of poverty [is] a denial of due process and equal protection." *Griffin v. Illinois*, 351 U.S. 12, 15 (1956). This Court is now asked to determine whether criminal defendants' appellate review pursuant to 28 U.S.C. § 1291 are entitled to some minimum due process standards to ensure that review is meaningful, particularly where federal courts of appeal decide appeals in unpublished dispositions.

Use of unpublished opinions have been criticized by members of the Court. For example, Justice Thomas, joined by Justice Scalia, criticized the Fourth Circuit's use of an unpublished opinion because "an unpublished opinion [] preserves its ability to change course in the future." *Plumley v. Austin*, __U.S.__, 135 S. Ct. 828, 831 (2015) (Thomas, J., dissenting). Justice Thomas observed that nonpublication "in itself is yet another disturbing aspect of the Fourth Circuit's decision, *and yet another reason to grant review*." *Id.* (emphasis added). Justice Blackmun, joined by Justice O'Connor and Justice Souter, previously cautioned that "[n]onpublication must not be a convenient means to prevent review." *Smith v. United States*, 502 U.S. 1017, 1020 (1991)

(Blackmun, J., dissenting). "An unpublished opinion may have a lingering effect in the Circuit and surely is as important to the parties concerned as is a published opinion." *Id.*

In a previous interview, the New York Times reported that Justice Stevens "said he was more likely to vote to grant review of [unpublished] rulings 'on the theory that occasionally judges will use the unpublished opinion as a device to reach a decision that might be a little hard to justify." *See*, *Courts Write Decisions That Elude Long View*, Adam Liptak, New York Times, www.nytimes.com /2015/02/03/us/justice-clarence-thomas-court-decisions-that-set-no-precedence (Feb. 2, 2015), App. 284-87. This article also reported that "Judge Kozinski of the Ninth Circuit explained in 2004 that courts of appeals 'can make sure that a[n] [unpublished] disposition reaches a correct result and adequately explains to the parties why they won or lost, but we don't have the time to consider how the language of the disposition might be construed (or misconstrued) when applied in the future.'" App. 286. The goals of unpublished dispositions that were mentioned by Judge Kozinski were not present in this case.

If unpublished dispositions are aimed at "reach[ing] a correct result and adequately explain[ing] why a party won or lost," then what should the courts of appeals do to ensure those goals are met when a criminal defendant exercises the statutory right under 28 U.S.C. § 1291? This case demonstrates that minimum standards should be set to ensure that a defendant who exercises the right to appeal granted under § 1921 knows why the court of appeals believes it "reache[d] the correct result and adequately explain[ed] why [the defendant] ... lost."

As of 2013, nearly ninety percent of appeals filed in the federal courts were decided in unpublished dispositions. App. 288. In 2009, Professor David R. Cleveland, in a Marquette Law Review article, "calculated that litigants had asked [the] Court to consider the 'constitutionality or propriety' of designating an opinion as unpublished in at least 36 petitions seeking review[,] [b]ut the [C]ourt has never ruled on the issue." App. 287.

This petition is not questioning the "constitutionality or propriety" of unpublished opinions. This petition asks whether minimum standards should be established to ensure that criminal defendants receive meaningful appellate review when a court of appeals' disposition is unpublished. This case presents an ideal vehicle to resolve this question.

This petition outlines a multitude of issues Smith raised on appeal to the Ninth Circuit, and has shown that the Ninth Circuit did not reach a correct decision on substantial issues. There are ample reasons that show why Smith cannot discern why he lost the appeal in its entirety.

The Ninth Circuit completely ignored Smith's claim that the *Holloway* "automatic reversal rule" applied to his situation. App.9-11. Likewise, the Memorandum failed to address Smith's claim that he was denied the right to present a defense, the right to compulsory process, and the due process right to a fair trial by the district court's denial of his request to present a defense *pro se*, and to continue his trial. App. 11-12. The Ninth Circuit dismissed his due process issues, simply by blaming Smith for creating Campbell's unpreparedness and lack of investigation. App. 11.

Likewise, in sustaining Smith's convictions on each count, the unpublished Memorandum was deficient in addressing the issues. In relation to the convictions on Counts 2 through 4, it decided the issue relating to the element of intent to defraud or mislead in a manner that directly conflicted with other circuit authority and inconsistent with its own authority. Moreover, the Memorandum did not reference its own authority in *Roseman* and *Geborde*, nor did it mention the Tenth and Eighth Circuit cases, *Mitcheltree* and *Hiland. See*, *Geborde*, 278 F.3d at 930 ("Congress ... required that the failure to register *be activated by the specific intent to defraud or mislead*.")

(emphasis added); *Michelltree*, 940 F.2d at 1349 (same). It completely sidestepped Smith's claim on the erroneous conclusion that the "intent to defraud or mislead" in § 333(a)(2) had to be connected to the interstate commerce jurisdictional element, contrary to all circuit authority cited by Smith. App. 2-6.

On Count 6, the Memorandum strayed from the issues presented. The Ninth Circuit upheld Smith's conviction on a theory that was uncharged and never presented to the jury. The jury was not instructed on a theory that Smith "caused" a fraudulent importation contrary to law as provided in 18 U.S.C. § 2(b). Yet, the unpublished Memorandum concluded that there was sufficient evidence "to establish that Smith *caused* shipments of sodium chlorite to be imported..." App. 6-7 (emphasis added).

The Court's decision in *Pereira v. United States*, 347 U.S. 1 (1954) is instructive. There the defendant was charged with mail fraud for having "caused" the mailing. *Id.* at 7. The Court held under 18 U.S.C. § 2(b) that the defendants could be convicted "if they caused [the mailing] to be done," consistent with the mail fraud statute. *Id.* at 8. The Court also reviewed a conviction for transporting stolen property in interstate commerce.

Significantly on that count, the jury was instructed on an aiding and abetting theory under 18 U.S.C. § 2(a)(1). *Id.* at 9. The government argued that the evidence established a conspiracy, thus, the conviction could also be upheld on *Pinkerton* liability. This Court noted, "[t]he *Pinkerton* case ... is inapplicable here since *the jury was not instructed in terms of that theory*." *Id.* at 9 (emphasis added).

The Ninth Circuit strayed from reviewing Smith's issues on *Pinkerton* liability relating to sufficiency of evidence. The government based its prosecution on Count 6 on *Pinkerton* in its closing argument referencing the *Pinkerton* jury instruction. App. 217-18, 225. Yet, the Ninth Circuit sustained Smith's conviction on the theory that he "caused" a fraudulent importation, a separate theory of liability. 18 U.S.C. § 2(b).; App. 6-7. Section 2(b) was not applicable since the jury was not instructed on that theory. *Pereira*, 347 U.S. at 9.

If evidence was insufficient to establish that Nowak and Smith were coconspirators to support a conviction on Count 6 under the *Pinkerton* theory, then the jury could only have convicted him if the evidence proved he imported the sodium chlorite. The government did not prosecute Smith at trial for receipt of the sodium chlorite under 18 U.S.C. § 545. App. 228. Smith did not import the sodium chlorite.

In addition, on appeal, Smith claimed the evidence did not establish he had knowledge of the contents of Nowak's import documents, and the jury should have been instructed on such knowledge.[21] The Ninth Circuit glossed over this issue by concluding "intent" was a greater mental state than "knowledge," thus, including a knowledge element was not necessary. App. 7. This conclusion effectively deprived Smith review on the precise issue that knowledge of falsity is a necessary component to establish fraud.

The Ninth Circuit also avoided addressing Smith's issues relating to the charge of conspiracy to defraud the United States in Count 1. It did so concluding that Smith left unchallenged the first two objectives of the conspiracy charge. App. 8. The first two objectives were the five substantive charges in the indictment, charging felony misbranding and fraudulently importing merchandise

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[21] *See*, *Mitcheltree,* 940 F.2d at 1349 ("[b]ecause 'knowledge of the essential nature of the alleged fraud is a component of the intent to defraud,' a defendant cannot act with intent to mislead or defraud under § 333(a)(2) without some knowledge of the misbranding." (quoting *Hiland*, 909 F.2d at 1128 (citing *Industria Laboratories*, 456 F.2d at 910 ("jury should have been instructed that 'defendant knew that several tests had not been made'").

contrary to law in Counts 2 through 6. App. 80-81.

Smith did challenge those two objectives. By concluding that Smith had not challenged the first two objections of the conspiracy charged in Count 1, the Ninth Circuit deprived Smith review on these appeal issues. This included his claims that the Count 1 failed to allege "intent to defraud," the jury was not instructed properly on intent to defraud; his claim that the evidence established a buyer-seller relationship with Nowak, and the evidence did not establish that Smith or any other person attempted to deceive, or attempted to provide materially false information to the FDA.

In order for defendant-appellants to understand why they lost in unpublished dispositions, such dispositions should include an accurate statement of the issue, citation to case authority that drives resolution of the issue, including some citation to facts contained in the trial court record that either distinguishes relevant authority or supports the courts' conclusions. The Ninth Circuit's unpublished Memorandum did not meet these minimum requirements. This Court is urged to determine whether minimum standards that would satisfy defendant-appellants' statutory right to meaningful appellate review should be established when courts of appeal resolves appeals through unpublished dispositions.

CONCLUSION

Therefore, it is requested that the Court grant this petition for writ of certiorari.

Respectfully submitted,

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