IN THE SUPREME COURT OF THE UNITED STATES

STEPHON WILLIAMS,	)	
	)	
Petitioner,	)	
v.	)	NO.
	)	
UNITED STATES OF AMERICA	)	

MOTION FOR LEAVE TO PROCEED
INFORMA PAUPERIS

COMES NOW Petitioner, Stephon Williams, and pursuant to Rule 39, Rules of the Supreme Court of the United States, moves this Court for an Order granting him leave to proceed *in forma pauperis*.

1) Petitioner was determined indigent by the district court, pursuant to Title 18 U.S.C. §3006A, and counsel was appointed to represent him on appeal before the United States Court of Appeals for the Eleventh Circuit.

2) Petitioner remains indigent and wishes to seek a writ of certiorari from this Court to the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment of the District Court on February 20, 2020. The timeline for filing this Petition was tolled by the filing of a Petition for Rehearing En Banc, which was denied on May 5, 2020.

WHEREFORE, Petitioner respectfully requests that this Court grant his motion and allow him to proceed in forma pauperis.

Dated: this 3rd day of August, 2020.

Respectfully submitted,

/s/ *Sydney R. Strickland*
SYDNEY R. STRICKLAND
Georgia State Bar No. 418591
Attorney for Stephon Williams

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

STEPHON WILIAMS, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR A WRIT OF CERTORIARI TO

THE ELEVENTH CIRCUIT COURT OF APPEALS

/s/ Sydney R. Strickland
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QUESTION PRESENTED

I. Whether Mr. Williams' Sixth Amendment right to conflict-free counsel was violated when his trial counsel simultaneously represented a witness testifying for the Government in Mr. Williams' trial and refused to cross-examine that witness, despite having an abundance of material for cross-examination.

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SUPREME COURT CASES

PETITION FOR WRIT OF CERTIORARI

Petitioner Stephon Williams respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The opinion of the Eleventh Circuit affirming the decision of the district court is reproduced in the Appendix at Appendix A. The Eleventh Circuit's final opinion was not published, but it can be found at *United States v. Williams*, Case No. 15-12130, manuscript op. (11th Cir. Feb. 20, 2020). The Eleventh Circuit's initial opinion remanding the case for a hearing in the district court is reproduced at Appendix B and may be found at *United States v. Williams*, 902 F.3d 1328 (11th Cir. 2018). The order of the district court on remand is at Appendix C.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on February 5, 2020. Mr. Williams filed a Petition for Panel Rehearing and for En Banc Consideration on March 12, 2020. The Petition was denied on May 5, 2020; that order is included as Appendix D. This Petition is being filed

within 90 days of that Order, pursuant to Supreme Court Rule 13.1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

In November 2013, Stephon Williams, Donterious Toombs, Nathanial Jackson, Johnny Wesley, Eric Willingham, and Tony Wynn were charged with conspiracy to possess with intent to distribute in excess of five kilograms of cocaine and in excess of 280 grams of cocaine base, in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A)(ii) and (iii). (Doc. 1). Mr. Williams and Mr. Toombs went to trial, and both were found guilty of Count One. (Doc. 218). The district court sentenced Mr. Williams to 20 years' imprisonment, pursuant to 21 U.S.C. § 851, followed by 10 years of supervised release. (Doc. 295)

Mr. Williams filed a timely notice of appeal, (doc. 288), and undersigned counsel was appointed to represent him. (Doc. 367). On appeal, Mr. Williams argued, *inter alia*, that his trial attorney, Mr. Kim Minix, labored under an actual conflict of interest that adversely affected his performance, as he simultaneously represented both Mr. Williams and a government witness, T.J. Bennett, and did not cross-examine Bennett due to the conflict. The Eleventh Circuit held that Minix had labored under a conflict of interest, but remanded to the district court "for the limited

purpose of having the district court conduct an evidentiary hearing on whether Mr. Minix's conflict resulted in an adverse effect."

The district court held a hearing on the matter on November 8, 2018, and later entered an order concluding that "Mr. Minix's conflict, as revealed by the Record, did not result in an adverse effect on this performance." After additional briefing, a panel of the Eleventh Circuit consisting of Judge Tjoflat, Judge Jordan, and Judge Huck of the Southern District of Florid, affirmed Mr. Williams convictions in an Opinion dated February 20, 2020.

I. District Court Proceedings

Mr. Williams was convicted of conspiracy to distribute cocaine after a 7-day jury trial. At trial, Mr. Williams was represented by attorney Kim Minix. At the same time, Mr. Minix also represented one of the witnesses against Mr. Williams, Tyree Bennett. Mr. Bennett had been convicted of a related drug conspiracy and was at the time represented by Mr. Minix in his appeal to the Eleventh Circuit. That appeal related to an obstruction of justice enhancement that Bennett received for sending a letter to Mr. Williams' codefendant, Toombs, asking him to cooperate on Bennett's behalf in exchange for a substantial payment, and to market a cooperation-for-hire-scheme to inmates seeking sentence reductions.

At Mr. Williams' trial, Bennett provided important testimony about how the drug conspiracy operated, the quantity of drugs involved, and the role of certain individuals in the conspiracy, although he did not specifically name Mr. Williams. On direct examination, Bennett did not mention, and the government did not ask about, his letter to Toombs or the conduct underlying his obstruction of justice enhancement. Nor did Toombs' counsel ask about these topics on cross-examination.

Although Attorney Minix clearly knew of Bennett's obstructive conduct, he declined to cross-examine Bennett at all. On re-direct, the government asked a few questions about the conduct.

II. Appellate Proceedings

After being convicted, Mr. Williams' argued on appeal that Attorney Minix labored under an actual conflict of interest, as he represented both Mr. Williams—one of two defendants at trial—while simultaneously representing a government witness in that same trial. He argued that the conflict adversely affected counsel's performance because counsel declined to cross-examine his own client even though he knew of the obstructive conduct and cooperation-for-hire scheme that would clearly have a negative impact on Bennett's credibility.

The Eleventh Circuit agreed that Attorney Minix labored under a conflict of interest. (Sept. 4, 2018 Op. at 15). The court also agreed that Mr. Williams had made out "a strong case of adverse effect," as Minix chose not to cross-examine Bennett and cross-examination appeared to have possessed sufficient substance to be a viable alternative given the facts that led to Bennett's obstruction of justice enhancement. (*Id.* at 16). The court noted that:

> Indeed, it appears that there was an agreement or understanding that Mr. Bennett would not testify about Mr. Williams, and this may have been an attempt to eliminate or at least minimize the conflict Mr. Minix faced due to his simultaneous representation.
>
> (*Id.* at 16.)

Nevertheless, the court remanded the case to the district court for an evidentiary hearing. The panel noted that:

> We are cognizant of the possibility that, due to the existence of the attorney-client privilege between Mr. Minix and both of his clients, the district court may not be able to answer all of the questions we have set out in the text (or others it deems relevant). That possibility is one of the reasons why the actual conflict standard does not demand a showing of traditional *Strickland* prejudice. *See Mickens*, 535 U.S. at 168 ("[C]ounsel's conflicting obligations to multiple defendants 'effectively sea[l] his lips on crucial matters' and make it difficult to measure the precise harm arising from counsel's errors") (alterations in original, quoting *Holloway*, 435 U.S. at 489–90). It requires only some "link between the . . . conflict and the decision to forgo the alternative strategy of defense . . . [i.e., a showing] that the alternative defense was

> inherently in conflict with or not undertaken due to [Mr. Minix's] other loyalties or interests." *Freund*, 165 F.3d at 860.

Prior to that hearing, the parties discovered a missing transcript that confirmed just what the court suspected: the parties had an "agreement" or "understanding" that the government would not ask any questions of Bennett "that would create a conflict." (Feb. 20, 2020 Opinion at 13). Attorney Minix added that he wanted to be sure "the government wasn't going to ask him about anything I represented [Bennett] on." (*Id.*).

Despite this objective evidence, the district court credited Attorney Minix's testimony that: "I mean, the simple fact is, whether it was an agreement or not, they didn't – the government didn't ask any him any questions about my client and therefore there was no need to cross examine him." (Doc. 412 at 36). Based on this, the district court concluded that Minix acted in accordance with his "strategy" of not cross-examining witnesses who did not mention Mr. Williams, and not as a result of the clear conflict arising from his simultaneous representation of a defendant and a government witness in the same trial. The Panel accepted this rationale even though it also found that the district court erred in determining that (1) Minix didn't learn that Bennett would be a witness until "days before the

trial started"; and (2) Minix in fact cross-examined three other witnesses who did not name Mr. Williams, not just one. (*Id.* at 33-34).

Despite this clear and objective evidence that Attorney Minix did not have and/or follow his own professed strategy, as well as the fact that Minix had an incentive to claim "strategy" as a post-hoc rationale given that he was at the time dealing with a bar complaint based on his violation of his ethical duties in this case by laboring under a clear conflict of interest, the Panel determined that Mr. Williams had not overcome the district court's credibility determination. (*Id.* at 36). The Panel inexplicably found that there was "no evidence of a real agreement," (*id.*) despite the transcript that confirmed that there was an agreement to avoid a conflict.[1] In the end, the Panel found that "[w]ithout evidence directly contradicting Mr. Minix's testimony," Mr. Williams could not establish adverse effect. (*Id.* at 37).

Mr. Williams filed a Petition for Panel Reconsideration or Rehearing En Banc. This petition was denied on May 5, 2020.

[1] Of course, the conflict existed whether or not the government asked Bennett any questions about Mr. Williams or not. (*See* Sept. 4, 2018 Op. at 13)

REASONS FOR GRANTING THE WRIT

This Court should grant the writ of certiorari pursuant to Supreme Court Rule 10(c) because the Eleventh Circuit has decided Petitioner's case, which involves important federal questions, in a way that conflicts with this Court's precedents regarding the right to conflict-free counsel.

Mr. Williams' trial attorney simultaneously represented both him *and* a government witness who testified against him at trial, pursuant to an "understanding" in which the government and counsel agreed that the government would not ask any questions about Mr. Williams and, therefore, counsel would not question his own client on the stand. As the panel found in its first opinion, counsel had an abundance of material with which to cross-examine his own client, who had tried to create a cooperation-for-hire scheme before testifying. The panel's second opinion repeatedly acknowledged the district court's clearly erroneous factual findings and the discrepancies inherent in trial counsel's testimony, yet it concluded that Mr. Williams had not presented "direct evidence" of the link between the blatant conflict of interests and trial counsel's decision not to cross-examine his client. In affirming Mr. Williams' convictions, the panel has sanctioned a practice that, to Mr. Williams' knowledge, has *never* been permitted in this

country. In so holding, the panel created an impossible burden that is in direct conflict with Supreme Court precedent.

ARGUMENT AND AUTHORITY

1. Mr. Williams' Sixth Amendment right to the effective assistance of counsel was violated because his trial attorney labored under an actual conflict of interest that adversely affected Counsel's performance.

The duty of unfettered loyalty to one's clients is among the most central of a criminal defense attorney's responsibilities. *See Strickland v. Washington*, 466 U.S. 668, 692, 104 S.Ct. 2052, 2067 (1984). Accordingly, a defendant's Sixth Amendment right to the effective assistance of counsel is denied when defense counsel labors under an actual conflict of interest that adversely affects counsel's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 348-49, 100 S.Ct. 1708, 1718 (1980); *see also Mickens v. Taylor*, 535 U.S. 162, 174, 122 S.Ct. 1237 (2002).

In contrast to most ineffective-assistance-of-counsel cases, the foregoing rule governing conflicts of interest is "prophylaxis," *Mickens*, 535 U.S. at 176, 122 S.Ct. 1237, so that the defendant must establish "adverse effect," but "need not demonstrate prejudice in order to obtain relief." *Cuyler*, 446 U.S. at 349–50, 100 S.Ct. 1708. Where there is a "breach[of] the duty of loyalty, perhaps the most basic of counsel's duties," and "it is

difficult to measure the precise effect on the defense of representation corrupted by conflicting interests, ... it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest"—although "the rule [still] is not quite the per se rule of prejudice that exists for [certain other] Sixth Amendment claims." *Strickland*, 466 U.S. at 692, 104 S.Ct. 2052. The question is whether "the verdict [is] unreliable, [irrespective of whether] Strickland prejudice c[ould] be shown." *Mickens*, 535 U.S. at 173, 122 S.Ct. 1237.

i. Counsel labored under a conflict of interest.

Here, trial counsel, Mr. Minix, labored under an actual conflict of interest because he simultaneously represented both Mr. Williams and prosecution witness Tyree Bennett. Bennett was charged in a separate, but substantially related drug conspiracy, and Mr. Minix represented Bennett at sentencing, which had already taken place, and on appeal, which was pending at the time of trial. Bennett testified at Mr. Williams' trial in order to obtain a reduction in his sentence under Federal Rule of Criminal Procedure 35. Indeed, he sent a letter to Mr. Toombs indicating that he was willing to pay for information that would garner him a Rule 35 reduction.

At the time that Bennett was called as a witness, it was clear that his case was thoroughly and inextricably intertwined with the allegations against Mr. Williams. Mr. Williams and Bennett were involved with the same drugs and the same group of people, in the same place at the same time. Counsel and the government recognized that Mr. Minix's simultaneous representation of Bennett and Mr. Williams created a conflict, and attempted to avoid an actual conflict by agreeing that the government would not ask Bennett any questions about Mr. Williams. (Doc. 323 at 158).

While the government did refrain from asking any direct questions about Mr. Williams, it elicited testimony that (1) Bennett and Toombs had known each other for about 20 years; they dealt drugs together and "hung together" nearly every day; (2) Bennett had known Curtis Donaldson for about 20 years; (3) he bought cocaine from Donaldson and Willie Curry; and (3) Donaldson had come over to his house to cook crack cocaine at least 40 to 50 times. (Doc. 323 at 163-64, 167-69).

At that point, Donaldson, the government's main witness, had already testified extensively about his interactions with Mr. Williams, stating that Mr. Williams often drove him during his drug distribution activities and that Mr. Williams and Toombs were often found together. (*See* doc. 321 at 162-

67, 182-87; doc. 322 at 11-140). Additionally, Willie Curry had testified that he had conspired with both Donaldson and Bennett, and had also worked with Mr. Williams. (Doc. 323 at 119-126).

Bennett's testimony therefore conformed with and supported the testimony given by Donaldson and Curry, both of whom directly implicated Mr. Williams. Furthermore, while Bennett never mentioned Mr. Williams, a reasonable juror would assume, in light of the previous testimony about Mr. Williams' relationships with Donaldson and Toombs, that Mr. Williams would have been involved in, or at least present for, some of the drug activity that Bennett testified about. Indeed, because Donaldson testified that Mr. Williams regularly drove him around during his drug activities, a reasonable juror could assume that Mr. Williams was involved in at least one of the 40 to 50 trips to Bennett's house for the purpose of cooking crack cocaine.

Indeed, the Eleventh Circuit agreed that Mr. Minix labored under a conflict of interest:

> At trial, Mr. Minix was "placed in the equivocal position of having to cross-examine his own client as an adverse witness. His zeal in defense of his client the accused [Mr. Williams] [wa]s thus counterpoised against solicitude for his client the witness [Mr. Bennett]." *Castillo v. Estelle*, 504 F.2d 1243, 1245 (5th Cir. 1974) (Wisdom, J.) (concluding that defense counsel's "divided

> loyalties"—the simultaneous representation of a criminal defendant and of the victim/witness of the defendant's alleged crime in unrelated litigation—"amount[ed] to a denial of the right to effective representation essential to a fair trial"). In addition, Mr. Minix faced the possibility that Mr. Bennett "might take umbrage at a vigorous defense of [Mr. Williams] and dispense with [his future] services." *Zuck v. State of Alabama*, 588 F.2d 436, 439 (5th Cir. 1979). *See also Wheat v. United States*, 486 U.S. 153, 163–64, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988) (upholding district court's decision to not allow a defendant to substitute his counsel with counsel for his co-defendants because of the ethical problems which would be faced by the latter in cross-examining his clients if they testified as government witnesses at the defendant's trial). Contrary to the government's argument, *see* Br. for the United States at 32–33, by the time of Mr. Bennett's testimony at Mr. Williams' trial, the conflict was no longer hypothetical.

Williams, 902 F.3d at 1334.

ii. Counsel's conflict adversely affected his performance.

Mr. Williams demonstrated that counsel's conflict adversely affected his performance. Most significantly, there were issues counsel could have explored on cross-examination that would have benefitted Mr. Williams, but doing so could have harmed his other current client, Bennett. For example, Counsel could have impeached Bennett by asking him about the letter that he sent to Toombs, which demonstrated that he was willing to do almost

anything to reduce his sentence.[2] Counsel clearly knew about the letter, given that Bennett's appeal directly related to the letter. Impeaching Bennett would have been helpful to Mr. Williams' case because Bennett's testimony indirectly implicated Mr. Williams and supported the testimony of Donaldson and Curry.

Counsel chose not to cross Bennett because it could have obviously harmed Bennett's interests. While he had already been sentenced, Bennett was testifying because he hoped to earn a Rule 35 reduction. (Doc. 323 at 162-63). Therefore, Bennett's final sentence would be determined by how much he helped the government prove the case against Mr. Williams and Toombs. The fact that Bennett's sentence would be impacted by the outcome of Mr. Williams' trial demonstrates an actual, harmful conflict.

Furthermore, it is possible that counsel knew even more about Bennett's attempts to reduce his sentence or other impeachment material, but counsel would have been unable to disclose that information because it was subject to the attorney-client privilege. *See Mickens*, 535 U.S. at 168, 122 S.Ct. at 1241 ("[C]ounsel's conflicting obligations to multiple defendants

[2] The letter was eventually brought up in Bennett's testimony, but only after Counsel had declined to cross-examine him. Therefore, the fact that he was impeached with the letter does not mean that the actual conflict did not impact Counsel's performance.

effectively seal his lips on crucial matters and make it difficult to measure the precise harm arising from counsel's errors," which is why prejudice is presumed (quotations and alterations omitted)).

Counsel also could have cross-examined Bennett on whether he had ever seen Mr. Williams, as his testimony and that of the prior witnesses, if true, strongly suggested that Bennett would have interacted with Mr. Williams at some point. Indeed, counsel did pursue this line of questioning with another witness who never mentioned Mr. Williams in his testimony, Officer Will Rogers. (Doc. 323 at 105). After Officer Rogers testified about a traffic stop involving Donaldson and Hill, counsel asked Rogers if he had ever seen Mr. Williams before and whether Donaldson or Hill mentioned him. (*Id.*). Counsel should have pursued this line of questioning with Bennett. Mr. Williams did not know Bennett, and there is no testimony from other witnesses that Mr. Williams was involved with Bennett's drug conspiracy. Furthermore, even if Bennett had seen Williams before, counsel could have questioned him about their interactions to show that Mr. Williams was not involved in any of Bennett's drug activity, despite the fact that he alleged to be involved in drug activity with both Donaldson and Curry.

The only reason Counsel would not have cross-examined Bennett is because he represented him. Counsel's refusal to cross-examine Bennett left the jury to assume that Mr. Williams was also involved in the activity with Donaldson and Toombs, especially where the government called Bennett to testify, and Mr. Minix immediately asked for a bench conference, after which he chose not to ask him any questions at all. (Doc. 323 at 158). Therefore, Counsel's decision to not cross-examine Bennett negatively affected his representation of Mr. Williams.

Moreover, Bennett's case was on appeal on a sentencing issue, and his conduct on the stand in Mr. Williams' trial could be considered under 18 U.S.C. § 3553 in the event that the case was remanded for resentencing. *See* 18 U.S.C. § 3553(a) (in sentencing the court must consider the history and characteristics of the defendant). It was thus possible that Counsel could win Bennett's appeal but end up with the same sentence, or even a greater one, if the government or the court believed that he was lying, which would have made Counsel's efforts on appeal futile.

Because Bennett's case was ongoing, counsel still owed him the unfettered duty of complete, legitimate support, not the task of undermining and tearing down his acceptability. Counsel's "struggle to serve two

masters" cannot be doubted where he completely forgoes the opportunity to cross-examine a client-witness whose testimony implicated the client who is on trial. *Glasser v. United States*, 315 U.S. 60, 75, 62 S.Ct. 457, 467 (1942) (superseded by statute on other grounds, *Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 2775 (1987)).

Indeed, the pretrial transcripts shows that there was an agreement or understanding that Mr. Bennett would not testify about Mr. Williams, and this was an attempt to eliminate or at least minimize the conflict Mr. Minix faced due to his simultaneous representation. The parties expressly entered into an agreement "[t]o avoid any possible conflict of interest." (Doc. 410-1 at 7-8). Accordingly, the agreement was in fact "an attempt to avoid or at least minimize the conflict," as the Eleventh Circuit suspected, and the objective evidence indicates that the parties acted in accordance with the agreement. (*See* Doc. 323 at 158 ("As the Court is aware, I'm representing Mr. Bennett on appeal. . . . I think we had an agreement that there wasn't going to be any questions that create a conflict.")).

Counsel in this case "actively represented conflicting interests," which deprived Mr. Williams of his constitutional right to effective counsel. *Cuyler*, 446 U.S. at 350, 100 S.Ct. at 1719. Mr. Williams' counsel therefore labored

under an actual conflict of interest that adversely affected his representation. Mr. Williams was denied his Sixth Amendment right to effective counsel.. *Id.* at 348-49, 100 S.Ct. at 1718.

2. The Eleventh Circuit Opinion is in conflict with Supreme Court precedent because it creates a new, heightened burden to demonstrate adverse affect.

In holding that Mr. Williams was required to present "direct evidence" of the link between the dual representation and Minix's decision not to cross-examine Bennett, the Eleventh Circuit created a heightened burden that is plainly not supported by existing precedent, likely because it is an impossible burden to meet. Moreover, the court relied on the existence of a strategy that the court had already found was not actually executed at trial, depriving Mr. Williams of any practical way to meet his burden.

i. Under existing precedent, Mr. Williams was not required to present "direct evidence" of the link between the conflict and the adverse effect.

In *Sullivan*, this Court held that a defendant alleging ineffective assistance of counsel due to a conflict of interest must only demonstrate that the "conflict of interest actually affected the adequacy of his representation." *Cuyler,* 446 U.S., at 348–349, 100 S.Ct. at 1708. This is

supposed to be a much lower showing than that required to prove *Strickland*[3] prejudice in a standard ineffective assistance of counsel claim. *See Id.* at 350, 100 S.Ct. at 1709.

Here, Mr. Williams clearly met the requirements of *Cuyler*. He made a factual showing of inconsistent interests—*i.e.*, that discrediting Bennett would benefit him but harm Bennett's interests in his resentencing and his pursuit of a sentence reduction—and he pointed to a specific instance in the record demonstrating actual impairment of his interests—*i.e.*, Minix's failure to cross-examine Bennett despite his knowledge of Bennett's obstructive conduct. Thus, Mr. Williams clearly made the showing required by the precedent of this Court.

The Eleventh Circuit, however, found that Mr. Williams needed to show "direct evidence" (Feb. 20, 2020 Opinion at 35). No case has ever required "direct evidence" of the link between the conflict and the adverse effect. And for good reason—we are told during every criminal trial that "[t]here's no legal difference in the weight you may give to either direct or circumstantial evidence." 11th Cir. Pattern Instruction B4. Direct evidence, defined as testimony of a person that he or she has actual knowledge of a

[3] *Strickland v. Washington*, 466 U.S. 668 (1984)

fact, and circumstantial evidence, defined as "proof of a chain of facts and circumstances that tend to prove or disprove a fact," therefore have the same weight or force behind them. *See id.*

ii. The Eleventh Circuit created an impossible burden for defendants—a burden not supported by any prior precedent.

It is unclear what else a defendant in Mr. Williams's position could point to in order to overcome the district court's inexplicable crediting of the attorney's post-hoc rationalization for decision not to cross-examine his own client. While the Eleventh Circuit's Opinion seems to fault undersigned counsel for not admitting Minix's file into evidence at the evidentiary hearing, it is unclear what the file could possibly contain that would constitute direct evidence contradicting Minix's testimony.[4] It is unrealistic to believe that Minix would turn over notes directly stating that either (1) he did *not* have the strategy he claimed to have in his testimony; or (2) he in fact declined to cross examine his own client due to a clear conflict of interest. It is unrealistic to believe that these notes would exist or that they would be disclosed.

[4] Undersigned counsel attempted to obtain the trial file prior to filing the initial brief, but was unable to obtain it from Minix.

The burden that this Opinion puts on a defendant is virtually impossible to meet. The Opinion essentially requires conflicted counsel to admit that his action, or inactions, were due to the conflict, even where the defendant has shown that counsel has a clear motive to deny that was the reason. As noted above, the burden to prove "direct evidence" requires too much. Regardless, the transcript regarding the "agreement" or "understanding" between Minix and the government *is* direct evidence contradicting Minix's testimony, but even if not, all of the circumstantial evidence in this also demonstrates that Minix did not cross-examine Bennett in an effort to avoid a conflict, which itself is an adverse effect. (*See* doc. 412 at 33) (Minix: the "whole purpose of the discussion with Ms. McEwen and the two discussions with the court *was to avoid a conflict of interest*.)).

iii. Conclusion

The Eleventh Circuit struck bold new ground by holding that it is permissible for a single attorney to represent both a defendant at trial and a government witness against that defendant. Counsel is unaware of any other court to sanction such a practice—and neither the government nor the court has cited any. This simultaneous representation—which the government invited by deciding to call Bennett and then striking an

agreement with Minix—is an appalling practice, even without consideration of the possible grounds of cross-examination. But in this case, where there was ample ground to challenge Bennett's credibility, this practice should be condemned—not affirmed without consequence to any of the attorneys involved. Mr. Williams will sit in federal prison for the next 14 years knowing that he was not given the undivided loyalty of his trial counsel, and that the Court of Appeals did nothing to remedy this gross constitutional violation. This decision erodes what little confidence the public has in the criminal justice system and the judiciary. This Court must not allow it to stand.

In light of the arguments advanced in this Petition, Mr. Williams respectfully requests this Court grant his petition and vacate his conviction and sentence.

Dated: This 3rd day of August, 2020.

Respectfully submitted,

/s/ Sydney R. Strickland
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CERTIFICATION OF WORD COUNT

This document contains 4,487 words, in compliance with all rules of this Court.

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing petition upon opposing counsel by United States Mail to:

Solicitor General of the United States
Room 5616, Department of Justice
950 Pennsylvania Ave N.W.
Washington, D.C. 20530-0001

U.S Attorney's Office
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Macon, GA 31202

Dated: This 3rd day of August, 2020.

Respectfully submitted,

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APPENDIX A: Opinion of the Eleventh Circuit affirming the decision of the district court (*United States v. Williams*, Case No. 15-12130, manuscript op. (11th Cir. Feb. 20, 2020).

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-12130

D.C. Docket No. 1:13-cr-00051-WLS-TQL-4

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

STEPHON WILLIAMS,

Defendant - Appellant.

Appeal from the United States District Court
for the Middle District of Georgia

(February 20, 2020)

Before JORDAN and TJOFLAT, Circuit Judges, and HUCK,* District Judge.

PER CURIAM:

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* Honorable Paul C. Huck, United States District Judge for the Southern District of Florida, sitting by designation.

A jury convicted Stephon Williams of a federal narcotics conspiracy in violation of 21 U.S.C. §§ 846 and 841. At the time of his trial, his attorney, Kim Minix, also represented Tyree Bennett, a government witness who was then appealing his own sentence on a related narcotics conspiracy charge. Mr. Minix did not cross-examine Mr. Bennett at Mr. Williams' trial. On appeal, and represented by new counsel, Mr. Williams contends that his conviction should be vacated because Mr. Minix labored under a conflict of interest that resulted in an "adverse effect."

When we first heard this appeal, we held that Mr. Minix labored under a conflict of interest due to his simultaneous representation of Mr. Bennett and Mr. Williams, but we remanded so that the district court could hold an evidentiary hearing on whether the conflict resulted in an "adverse effect." *See United States v. Williams*, 902 F.3d 1328, 1336 (11th Cir. 2018). Having carefully reviewed the record, the district court's order on remand, and the parties' post-remand briefs, we now affirm Mr. Williams' conviction. We also affirm Mr. Williams' sentence.

I[1]

From the early 1990s and continuing until 2012, Curtis Donaldson and his cousin, Kenneth Reese, along with several others, operated a drug distribution

[1] We set out the evidence at trial in detail, and then turn to the district court's findings following the evidentiary hearing.

organization out of Albany, Georgia. After Mr. Donaldson's arrest in January of 2010, law enforcement agencies began investigating the drug ring. Mr. Donaldson entered a plea deal in which he agreed to cooperate with the government. The investigation led to the arrest and conviction of Mr. Williams, Mr. Bennett, and several others.

A

In September of 2013, pursuant to charges filed in a superseding information, Mr. Bennett pled guilty to conspiracy to possess cocaine and marijuana with the intent to distribute, in violation of 21 U.S.C. § 846. He agreed to cooperate with the government in exchange for the government's consideration of a Rule 35(b) motion to reduce his sentence.

Mr. Williams was indicted later and separately from Mr. Bennett. On November 12, 2013, he was charged—alongside Nathaniel Jackson, Donterius Toombs, Johnny Wesley, Eric Willingham, and Tony Wynn—with one count of conspiracy to possess with intent to distribute cocaine and crack cocaine in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A)(ii) and (iii). The indictment linked Mr. Williams and his co-defendants to the larger conspiracy that included Mr. Donaldson and Mr. Reese at the center and many others. The district court appointed Mr. Minix to represent Mr. Williams on November 20, 2013.

Mr. Minix's involvement in the Donaldson matter expanded in the early months of 2014. On March 24, 2014, the district court appointed him to represent Mr. Bennett for his sentencing, as Mr. Bennett's previous attorney, Oliver Register, had withdrawn due to a potential conflict of interest. Although Mr. Register did not state the source of the conflict, he represented Mr. Wesley in the Williams indictment.

About a month after Mr. Minix was appointed to represent Mr. Bennett, and about seven months after he began representing Mr. Williams, the district court held a pre-trial conference for Mr. Williams and his co-defendants. At that hearing, the government moved for a continuance in order to try all defendants named in the indictment together. On May 15, 2014, the court granted the motion, "agree[ing] that judicial economy would be best served if persons indicted were tried together." Mr. Williams would therefore be tried alongside Mr. Toombs and the others named in his indictment.

A month later, in June of 2014, Mr. Bennett—represented by Mr. Minix—had his sentencing hearing. There, the district court addressed a letter that Mr. Bennett had sent to Mr. Toombs from prison the previous year, asking Mr. Toombs to cooperate on his behalf in exchange for a substantial payment, and marketing a cooperation-for-hire scheme for other inmates seeking sentence reductions. Mr.

Minix did not dispute that Mr. Bennett wrote and sent the letter but argued that it did not constitute obstruction of justice under the Sentencing Guidelines.

In seeking for Mr. Bennett a two-point reduction for cooperation, Mr. Minix informed the district court that he previously "had talks with Ms. McEwen," and explained that "Mr. Bennett is going to offer information and hopefully corroborate some of this in Mr. Toombs' trial, which I think is set to try in October, Your Honor."[2]

The district court imposed an obstruction-of-justice enhancement under U.S.S.G. § 3C1.1, denied Mr. Bennett an acceptance-of-responsibility adjustment under U.S.S.G. § 3E1.1, and sentenced him to 156 months' imprisonment. Mr. Bennett appealed, still represented by Mr. Minix. His appeal was pending in the Eleventh Circuit at the time of Mr. Williams' trial in October of 2014.

On the morning of October 14, 2014, the first day of Mr. Williams' trial, the court held a hearing to address Mr. Wynn's change of plea and to discuss pending trial issues. Mr. Minix and Mr. Williams were present, as were Mr. Toombs and his counsel, Paul Hamilton. When asked if there were remaining issues, Ms. McEwen stated:

> There's one other issue I would like to address. We anticipate calling as one of our witnesses, Tyree Bennett, who is currently represented by Mr. Minix on appeal. To avoid any possible conflict of interest because

[2] Leah McEwen was counsel for the government in the three separate cases against Mr. Donaldson, Mr. Bennett, and Mr. Williams, and their respective co-defendants.

> Mr. Minix is representing a client in this case, I have interviewed Mr. Bennett only as to Mr. Toombs, who is Mr. Hamilton's client[ ], and we do not expect he'll provide any information about Mr. Williams to the jury and I have discussed that with Mr. Minix.

Mr. Minix replied that, "[f]or the record, I have discussed the same with Mr. Williams about that, and that is true, everything else Ms. McEwen has said is true."

B

The joint trial of Mr. Williams and Mr. Toombs in October of 2014 lasted several days and involved more than a dozen witnesses.[3]

The evidence showed that from approximately 2010 through 2012, a group of individuals—with Mr. Donaldson and Mr. Reese at the center—agreed to distribute cocaine to overlapping customer bases. To further this goal, co-conspirators took on various roles, including lending money to each other to purchase cocaine, purchasing cocaine, transporting cocaine to a "headquarters" and cooking it there, monitoring for and communicating about law enforcement activity to avoid detection, selling cocaine and crack cocaine, and conducting accountings of relevant financial transactions.

In its case against Mr. Williams, the government sought to prove that he was Mr. Donaldson's "lieutenant" and right-hand man—that he delivered money and

[3] By this point, Mr. Wesley, Mr. Jackson, and Mr. Wynn had pled guilty, and Mr. Willingham had been declared incompetent to stand trial.

drugs for Mr. Donaldson, marketed his product on the streets, and sold the product, all in furtherance of the distribution scheme. Mr. Minix—in his opening statement and closing argument, and through cross-examination of witnesses—sought to demonstrate that Mr. Williams' mere presence around alleged conspirators did not amount to active participation in the conspiracy; that Mr. Williams occasionally ran small "errands" for Mr. Donaldson, including driving him around, without knowledge of the conspiracy; that he knew his co-defendant Mr. Toombs because they were cousins and lived together, and were only coincidentally driving together when they were pulled over; that to the extent Mr. Williams ever purchased drugs, it was in small amounts for personal use; and that the witnesses who testified for the government were convicted felons who "ha[d] motive to say anything the government wants them to."

1

Several witnesses implicated Mr. Williams directly. The first group comprised Donaldson conspirators, including Mr. Donaldson and Mr. Reese, as well as Willie Curry, Fred Shelton, and Demetrius Speed.

On direct examination, Mr. Donaldson testified that Mr. Williams drove him around to buy and sell drugs and to meet with other co-conspirators, that Mr. Williams saw him carrying drugs, and that he paid Mr. Williams in money and drugs for the rides. Ms. McEwen then sought to introduce several recorded conversations

between Mr. Donaldson and Mr. Williams as admissible co-conspirator hearsay statements. Mr. Minix argued at sidebar that the prosecution failed to lay the necessary foundation that Mr. Williams had participated as a co-conspirator or knew of the conspiracy. The district court concluded that there was enough evidence from Mr. Donaldson's testimony alone to infer that Mr. Williams knew of and participated in the conspiracy, and thus allowed the prosecution to introduce the conversations.

In one of the recorded conversations, Mr. Donaldson informed Mr. Williams that he had a new batch of high-quality crack cocaine, which he wanted Mr. Williams to market in the streets. Mr. Donaldson testified that Mr. Williams marketed drugs for him frequently, and that these marketing efforts made the distribution ring more profitable. In another conversation, Mr. Williams informed Mr. Donaldson that a third party wanted $100 of crack cocaine "on credit." In yet another recorded conversation, Mr. Williams told Mr. Donaldson that he was afraid of getting pulled over because he was "trafficking"—that is, driving with 28 grams or more of crack cocaine.

Mr. Minix cross-examined Mr. Donaldson to establish that, while Mr. Williams drove Mr. Donaldson for small payments, he lacked knowledge of the ongoing distribution conspiracy, and that when Mr. Williams purchased drugs from Mr. Donaldson, it was only in small, $20 quantities.

Other co-conspirators also implicated Mr. Williams. Mr. Curry testified that Mr. Williams once delivered to him six ounces of "cut"—i.e., substances mixed into cocaine to increase the quantity—which Mr. Curry used in a batch of cocaine that was later distributed. Mr. Shelton testified that he had met with Mr. Williams one or two times at the headquarters of the conspiracy and supplied him with drugs.

Mr. Minix cross-examined each of these witnesses, trying to establish that they did not know Mr. Williams at all, did not know him well, or did not see him actively participate in the conspiracy. Mr. Minix also tried to elicit that, if the witnesses had seen Mr. Williams purchasing drugs, it was only in small quantities for personal use, and that Mr. Williams only ran small "errands" for Mr. Donaldson, sometimes driving him around or delivering non-illicit substances like creatine. Finally, Mr. Minix attempted to impeach the witnesses' credibility by demonstrating that they were convicted felons, motivated to testify to anything in exchange for sentence reductions.

Three police officers and DEA agents also testified and identified Mr. Williams. Mr. Minix cross-examined each of these three witnesses—Officers Rod Williams, Evan Garlick, and Eugene Davis. Officer Williams' testimony was the most substantial. As a deputized task force officer for the DEA, he was offered as an expert on the drug trade. He was also a lead agent investigating the Donaldson drug ring and assisted in, among other things, obtaining wiretaps of suspects and

orchestrating a traffic stop of Mr. Williams and Mr. Toombs to determine if they were transporting drugs or were in possession of phones identified through the wiretaps.

Mr. Minix conducted a voir dire of Officer Williams, and later cross-examined him about the process and propriety of his investigation. He also elicited that when Mr. Williams and Mr. Toombs were pulled over in the traffic stop, the officers did not find drugs in the car; that the investigation did not yield photographs of Mr. Williams at the headquarters of the Donaldson conspiracy; and that Mr. Williams at one point approached Officer Williams voluntarily and offered to help in the investigation by identifying some low-level drug dealers. Finally, Mr. Minix sought to establish that Officer Williams did not have tangible evidence that Mr. Williams drove Mr. Donaldson in furtherance of the conspiracy.

Officer Davis' and Officer Garlick's testimony was limited to the traffic stop mentioned above. Officer Williams had tipped Officer Davis that Mr. Williams and Mr. Toombs were driving without insurance. Officer Davis pulled them over on that pretext, though as noted above no drugs were found in the car. Officer Davis allowed them to leave the scene without the vehicle, which was then towed to an auto shop nearby. Mr. Minix cross-examined Officer Davis on how he obtained probable cause to stop Mr. Williams and Mr. Toombs.

Officer Garlick was on patrol the night of the stop and was called to the scene. He testified in his direct examination that when he arrived, he saw that Mr. Williams had a cell phone (apparently to establish that this was one of the cell phones identified in the Donaldson wiretap). Mr. Minix cross-examined him to establish that there were several distractions during the traffic stop and that he could not identify the make and model of the cell phone.

The government also called Romanda Brock, an employee at the auto parts shop where Mr. Williams' car was towed after he and Mr. Toombs were pulled over. She authenticated Mr. Williams' invoice and testified that he came into the shop and paid for the release of the vehicle. Mr. Minix did not cross-examine her.

2

The government called several witnesses who did not implicate Mr. Williams directly. Mr. Minix cross-examined some of them, but not others. The only Donaldson conspirator who testified and who did not implicate Mr. Williams by name was Mr. Bennett. As explained below, Mr. Minix did not question him.

As for the others who did not name Mr. Williams specifically, Mr. Minix did not cross-examine Officer Pearson, who testified only about Mr. Donaldson's operations and dealings with Mr. Speed. Officer Will Rodgers, Officer Eric Strom, and DEA Agent Jim Brown testified about the traffic stop of another conspirator, Hydarvis Hill. None mentioned Mr. Williams by name in direct testimony. Mr.

Minix cross-examined Officer Rodgers briefly, only confirming that Mr. Williams was not present at the traffic stop of Mr. Hill and that, during that stop, neither Mr. Donaldson nor Mr. Hill mentioned Mr. Williams. Mr. Minix did not cross-examine Officer Strom or Agent Brown.

Mr. Minix briefly cross-examined Elizabeth Adkins, a forensic chemist for the DEA and government expert witness. She did not identify Mr. Williams, but testified about the DEA's chemical evidence testing, and explained that the evidence obtained from the Donaldson investigation contained cocaine and weighed about 45 grams. Mr. Minix asked her one question about whether a certain cutting agent was a controlled substance. He did not cross-examine Kai Allen, another DEA forensic chemist, who also testified about the weight and drug content of government exhibits and who also did not identify Mr. Williams.

Mr. Minix also questioned Henry Enright, a contractor for AT&T Mobility, who had testified about the government's wiretap records, in order to demonstrate that he only collected records and that he did not have knowledge of the content of the wiretaps. Mr. Minix did not cross-examine Paula Yates, an associate of Mr. Toombs who testified about a dispute she had with Mr. Toombs over money.

3

As Mr. Minix had forecast at Mr. Bennett's sentencing hearing four months earlier, the government called Mr. Bennett to testify. Just before he took the stand, Mr. Minix, Ms. McEwen, and the district court engaged in the following colloquy:

> MR. MINIX: As the Court is aware, I'm representing Mr. Bennett on an appeal. I was his second counsel, and he's been sentenced. I think we had an agreement that there wasn't going to be any questions that would create a conflict.
>
> MS. McEWEN: The government is not going to ask him any questions about Mr. Williams, Mr. Minix's client.
>
> MR. MINIX: I just wanted to be sure the government wasn't going to ask him about anything I represented him on.
>
> MS. McEWEN: We aren't.
>
> THE COURT: I recall that's the understanding.

In his testimony on direct examination, Mr. Bennett did not mention Mr. Williams by name, but supported the government's case by offering details about the drug-distribution conspiracy, as well as his dealings with Mr. Toombs and Mr. Donaldson. For example, he testified about the way that a drug-distribution conspiracy operates, about the types and quantities of drugs distributed in connection with the charged conspiracy, and about the roles or duties of certain individuals in that conspiracy. Mr. Bennett explained that he obtained drugs from Mr. Donaldson, among others. He also said that he had known Mr. Toombs since the two were about twelve years old, that the two dealt drugs they obtained from Mr. Donaldson and

others until Mr. Bennett was arrested in 2011, and that Mr. Toombs and Mr. Donaldson continued selling drugs to his customers while he was incarcerated.

In its direct examination, the government did not question Mr. Bennett about his letter to Mr. Toombs or about his sentencing appeal, but did ask about his other criminal convictions, his plea agreement for participation in the Donaldson conspiracy, and his expectation of receiving a sentence reduction for substantial assistance. Mr. Bennett testified that he decided to cooperate and testify at the trial in search of a reduced sentence.

Mr. Hamilton, counsel for Mr. Toombs, then cross-examined Mr. Bennett about his prior criminal convictions, including an obstruction of justice charge. He asked whether that charge had anything to do with lying to the police or giving a false name, to which Mr. Bennett responded that it did not. Mr. Hamilton subsequently asked he had always been "honest and upright" with law enforcement, to which Mr. Bennett replied, "[y]es, sir."

Mr. Hamilton also questioned Mr. Bennett about his guilty plea and his potential sentence reduction for providing substantial assistance to the government. He also asked whether it was his understanding that, as a result of entering into a plea agreement, that he would get a sentence reduction for acceptance of responsibility. When Mr. Bennett confirmed that this was his understanding, Mr. Hamilton responded, "you received that reduction; did you not?" Mr. Bennett

answered "[n]o, sir." Mr. Hamilton then asked "[a]re you sure?" to which Mr. Bennett answered again "[n]o, sir." Mr. Hamilton did not follow up with questions about the cooperation-for-hire letter to Mr. Toombs.

Mr. Minix then declined to cross-examine Mr. Bennett. On redirect, the government asked questions about Mr. Bennett's letter, the fact that he lost his acceptance-of-responsibility sentence reduction, and his sentencing appeal. The government did not ask Mr. Bennett about receiving a two-level sentence enhancement for obstruction of justice. Mr. Hamilton briefly re-questioned Mr. Bennett about whether he had any animosity toward Mr. Toombs after he lost the three-level acceptance-of-responsibility reduction based on the letter.

C

The jury found Mr. Williams guilty of the conspiracy charge, and the district court later sentenced him to 20 years' imprisonment—the minimum term of imprisonment required pursuant to the information that the government filed pursuant to 21 U.S.C. § 851—followed by 10 years' supervised release.

In February of 2015, after Mr. Williams' trial, but before his sentencing, Mr. Minix submitted Mr. Bennett's brief to the Eleventh Circuit. He argued that the letter to Mr. Toombs was not covered by U.S.S.G. § 3C1.1, and "should not have been construed as illegal conduct" by the district court. Several months later, we

affirmed Mr. Bennett's sentence. *See United States v. Bennett*, 614 F. App'x 403, 406 (11th Cir. 2015).

II

Represented by new counsel, Mr. Williams appealed his conviction and sentence. He argued that Mr. Minix labored under a conflict of interest that adversely affected his performance and that the district court erred by enhancing his sentence under 21 U.S.C. § 851.

We did not address Mr. Williams' sentencing challenge, but only his claim that he was denied effective assistance of counsel due to Mr. Minix's conflict of interest. We held that the undisputed facts—the simultaneous representation of the defendant and a witness for the prosecution—established that Mr. Minix labored under a conflict of interest. *See United States v. Williams*, 902 F.3d 1328, 1335 (11th Cir. 2018).

We then explained that on the existing record, Mr. Williams made a strong case for "adverse effect"—the second prong of the Sixth Amendment conflict-of-interest inquiry—because cross-examining Mr. Bennett "appears to have 'possessed sufficient substance to be a viable alternative'" strategy. *See Williams*, 902 F.3d at 1335 (quoting *Freund v. Butterworth*, 165 F.3d 839, 860 (11th Cir. 1999) (en banc)). We concluded, however, that the record was incomplete and there were several unanswered questions of fact regarding adverse effect. We remanded for the district

court to conduct an evidentiary hearing on that issue, while retaining jurisdiction over the appeal.

A

At the evidentiary hearing, neither Mr. Bennett nor Ms. McEwen took the stand. The parties stipulated that "[i]f Assistant United States Attorney Leah McEwen were called to testify, her testimony would be consistent with, and would add no more to, the statement made to the Court on October 14, 2014, just prior to jury selection, during the trial of Stephon Williams and Donterius Toombs, and in the presence of all Parties, including Stephon Williams." Mr. Williams did not testify or introduce other evidence.

Only Mr. Minix testified. He first explained that he learned that Mr. Bennett would be a witness at Mr. Williams' trial from Ms. McEwen. Although he was not entirely sure when that happened, he believed it was only "a matter of days before the trial started" on October 14, 2014. Mr. Minix also confirmed that during Mr. Bennett's sentencing hearing on June 19, 2014, he had disclosed to the court a previous conversation with Ms. McEwen in which they discussed Mr. Bennett "offer[ing] some information to corroborate some of his . . . claims as in the Toombs' trial."

Mr. Minix testified that he had "looked over" Mr. Bennett's sentencing transcript prior to the evidentiary hearing but stated that he was "not sure [he] even

knew at that point [i.e., June 19, 2014, that] Mr. Toombs and Mr. Williams were going to be tried together." He acknowledged that "he may have known" Mr. Bennett was going to testify for the government at Mr. Williams' trial. But recalling that another co-defendant, Mr. Wynn, pled guilty just days before the trial, Mr. Minix stated that he in fact may not have known Mr. Toombs and Mr. Williams would be tried together.

Mr. Minix testified about announcing to the district court—in Mr. Williams' presence—that Mr. Bennett would testify at trial and that his understanding was that Ms. McEwen was not going to question him about Mr. Williams. Mr. Minix testified that he remembered explaining this to Mr. Williams—that he had "been assured by the government that there's not going to be any questions [posed to Mr. Bennett] related to [Mr. Williams]." He testified that he and Mr. Williams likely had this conversation "just days before the trial."

The government asked Mr. Minix whether he would have cross-examined Mr. Bennett if he had not been his client at the time. Mr. Minix testified that he would not have because, just like four other government witnesses that he did not cross-examine, Mr. Bennett did not implicate Mr. Williams. Mr. Minix also testified that he believed "the government did a pretty good job of demeaning [Mr. Bennett's] credibility on direct, and since there was nothing said about Mr. Williams, his involvement or his alleged involvement in the conspiracy, there wasn't anything to

question him on." Mr. Minix summed up by stating that had Mr. Bennett not been his client, his trial strategy still would have been the same.

Mr. Williams' new counsel cross-examined Mr. Minix at the evidentiary hearing. She asked whether he had declined to cross-examine Mr. Bennett "because the government had lived up to its bargain," to which Mr. Minix responded that "there was no need to cross examine him, he didn't implicate my client in any way . . . he didn't even identify him." Mr. Minix reiterated that whether the understanding with the government was really an "agreement," the government did not ask Mr. Bennett questions about Mr. Williams, and "there was no need to cross examine [Mr. Bennett]." Mr. Minix reiterated that the government had already done a "a pretty good job" of attacking Mr. Bennett's credibility on direct.

Mr. Minix also testified that "the goal of [his] discussions with the government" and the court was "to avoid any possible conflict of interest." He acknowledged that if the government had asked Mr. Bennett about Mr. Williams, "then [he] would have to have cross examined him," but was not sure whether that would have been a conflict of interest. Mr. Minix explained that, nonetheless, "the whole purpose of the discussion with Ms. McEwen and the two discussions with the Court was to avoid a conflict of interest" and that as soon as he found out about Mr. Bennett potentially testifying at trial, he did "everything that [he] thought [he] needed to do to avoid that conflict; number one, talking to Mr. Williams about it,

assuring from the government what kind of questions she was going to have, having two – two conversations on the record with the Court about that."

Mr. Minix further testified about a bar complaint that had been filed against him that had not yet been resolved. He explained that Mr. Williams did not initiate the complaint, but that it had been filed by the office of general counsel—likely after we issued our initial decision in *United States v. Williams*, 902 F.3d 1328 (11th Cir. 2018)—and that the complaint dealt with the Georgia bar rules governing conflicts of interest.

B

The district court determined that Mr. Minix was truthful and credible, and made the following factual findings.

The district court found that "Mr. Minix first learned Mr. Bennett would be a witness at [Mr.] Williams' trial 'just a matter of days before the trial started.'" As we explain below, this finding is incorrect because Mr. Minix knew that Mr. Bennett would be a witness months before the trial. The district court also found that Mr. Minix informed Mr. Williams of the simultaneous representation, and that the two understood that "the government interviewed Mr. Bennett only as to [Mr.] Williams'

co-conspirator, Mr. Toombs, and not as to [Mr.] Williams." As the parties stipulated, Mr. Williams was not afforded a *Garcia* hearing.[4]

The district court also found that Ms. McEwen represented to Mr. Minix that she had not questioned Mr. Bennett about Mr. Williams, and that she did not expect Mr. Bennett would provide information about Mr. Williams at trial. Ms. McEwen did not, however, state that the parties had any "agreement." Only Mr. Minix used the term "agreement," and it was not until right before Mr. Bennett's testimony; the district court therefore acknowledged that the parties had only an informal "understanding" which did not bind Mr. Minix or guide his trial strategy.

Regarding the trial strategy, the district court found that Mr. Minix had reasons, aside from divided loyalties, to forgo cross-examination of Mr. Bennett, and that he would have made the same decision even if Mr. Bennett had not been his client. The court found that Mr. Minix's strategy was not to cross-examine government witnesses who did not mention Mr. Williams. For that reason, he had not cross-examined four other government witnesses who did not testify to the culpability of Mr. Williams, except for Officer Rodgers, to whom Mr. Minix posed only one question. That question was whether he knew Mr. Williams, to which Officer Rodgers simply answered "no." However, as we discuss below, this finding

[4] A *Garcia* hearing is held to determine whether an actual or potential conflict of interest exists in the representation of a defendant, and, if so, whether the conflict can be knowingly and intelligently waived. *See United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975).

is also not technically correct because Mr. Minix cross-examined two other witnesses who did not testify about Mr. Williams.

Regarding Mr. Bennett, the district court found that his appeal concerned the purely legal issue of whether the court should have denied him credit for acceptance of responsibility in light of his "undisputed post-detention deceptive conduct" in sending the letter to Mr. Toombs. The district court found that Mr. Bennett's appeal strategy did not involve denying that he had sent the letter.

The district court also made factual inferences and conclusions of law, which we discuss further in our analysis.

III

Under the Sixth Amendment, a criminal defendant has the right to the effective assistance of trial counsel. *See Strickland v. Washington*, 466 U.S. 668, 684–85 (1984). This right includes having counsel whose work is not hampered by a conflict of interest. *See Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). A defendant claiming ineffective assistance due to a conflict of interest must establish an "actual conflict"—that is, a "conflict [that] adversely affected his counsel's performance." *Mickens v. Taylor*, 535 U.S. 162, 174 (2002). *See also id*. at 171 (explaining that an "actual conflict" is "a conflict that affected counsel's performance—as opposed to a mere theoretical division of loyalties").

To demonstrate adverse effect, a defendant must point to some "plausible alternative defense strategy or tactic that might have been pursued." *Freund*, 165 F.3d at 860 (alteration and internal quotation marks omitted). A plausible alternative strategy is "reasonable under the facts," but that does not mean the defendant must prove that strategy "would necessarily have been successful." *Id.* He only needs to demonstrate that the alternative strategy "possessed sufficient substance to be a viable alternative." *Id.*

Finally, a defendant must show "some link" between the conflict and the decision to forgo the plausible alternative strategy. *See id.* *See also Porter v. Singletary*, 14 F.3d 554, 560–61 (11th Cir. 1994) (requiring a defendant to "point to specific instances in the record which suggest an impairment or compromise of his interests for the benefit of another party"). Unlike the standard ineffective-assistance-of-counsel case, however, the defendant "need not demonstrate prejudice in order to obtain relief." *Sullivan*, 446 U.S. at 349–50.

"Because adequacy of counsel is a mixed question of law and fact, we conduct a plenary review of the district court's conclusions." *Porter*, 14 F.3d at 558. The district court's underlying factual findings can be reversed only if they are clearly erroneous, while conclusions about the constitutional effect of counsel's conflict are reviewed *de novo*. *See McConico v. State of Ala.*, 919 F.2d 1543, 1545 (11th Cir. 1990). A factual finding that has no support in the record is clearly erroneous. *See*

Day v. Persels & Assocs., LLC, 729 F.3d 1309, 1327 (11th Cir. 2013); *Jones v. Beto*, 459 F.2d 979, 980 (5th Cir. 1972).

Whether an attorney had some tactical reason to forgo an alternative strategy is a question of historical fact, but it is a mixed question whether the alternative strategy was "plausible" or "reasonable." *See Jefferson v. GDCP Warden*, 941 F.3d 452, 474 (11th Cir. 2019) (explaining that under *Strickland* we "review the reasonableness of a strategic decision *de novo*, while the antecedent inquiry of whether the action was in fact a strategic one, rather than the result of neglect, is a question of fact, and the district court's determination in that respect is presumed to be correct unless it's clearly erroneous") (internal quotations marks and citations omitted).

Likewise, the question of whether there was "some link" between a conflict and an attorney's decision to forgo a strategy involves both historical facts and mixed questions. There may be material facts about what the attorney did, when, and why. Those facts are reviewed for clear error. *See id.* But whether an attorney's reasons and actions establish the "link" between his conflict and his decision to forgo a tactic cross-examination (in other words, whether the "link" was sufficient to demonstrate an "adverse effect") is a mixed question, subject to *de novo* review. *Cf. Freund*, 165 F.3d at 859 ("[O]nce the petitioner paints the factual picture of the two

representations and what the lawyer did in each, a relatively dry and common sense evaluation ensues to determine whether they are sufficiently linked.").

IV

A

The district court concluded that there was no conflict of interest due to Mr. Minix's simultaneous representation of Mr. Bennett and Mr. Williams. Because Mr. Bennett was not challenging the fact of his "undisputed post-detention deceptive conduct" in his appeal, the district court reasoned that there was "[n]o actual opposing litigation position between the subject of Mr. Bennett's appeal and [Mr.] Williams' charged conduct." That inference led to the conclusion that Mr. Minix did not labor under a conflict of interest.

In our initial opinion, however, we held that Mr. Minix labored under a conflict of interest. *See Williams*, 902 F.3d at 1335 ("Here the undisputed facts establish a conflict of interest: Mr. Minix represented two clients concurrently, and when one of them testified at the other's trial, Mr. Minix had to decide whether to cross-examine."). To the extent the district court concluded otherwise, it was mistaken. *See Westbrook v. Zant*, 743 F.2d 764, 768 (11th Cir. 1984) ("[F]indings of fact and conclusions of law by an appellate court are generally binding in all subsequent proceedings in the same case in the trial court or on a later appeal.").

In any event, nothing in the expanded record convinces us that our prior conclusion was wrong. Even if cross-examination would not have directly undermined Mr. Bennett's appeal strategy, cross-examining one's client can still be "inherently antagonistic." *McConico*, 919 F.2d at 1543, 1547–48. *See also Porter*, 14 F.3d at 561 ("An attorney who cross-examines a former client inherently encounters divided loyalties"). Here, cross-examination would have involved attacking Mr. Bennett's character and impugning his honesty. An attorney may be hesitant to do that to a client, even if doing so would not necessarily elicit self-incriminating information harmful to the client's criminal defense or sentencing/appellate strategy.

B

In evaluating the second prong—whether the conflict of interest had an adverse effect on Mr. Minix—we suggested in our prior opinion that cross-examination "appears to have possessed sufficient substance to be a viable alternative given the facts that led to Mr. Bennett's obstruction of justice enhancement." *Williams*, 902 F.3d at 1335 (internal quotation marks omitted). We refrained, however, from making any definitive conclusion.

After the evidentiary hearing, the district court concluded that cross-examination of Mr. Bennett was not a reasonable alternative strategy. This legal conclusion was based on two factual inferences. First, Mr. Bennett's testimony

alone would not make out a *prima facie* case against Mr. Williams and the government had other witnesses establishing his participation in the conspiracy. Second, cross-examination could have "backfire[d]," as it would have given Mr. Bennett the opportunity to implicate Mr. Williams. In other words, according to the district court, the risks of cross-examination substantially outweighed the benefits. The district court concluded therefore that conflict-free counsel likely would not have accepted this "avoidable risk" and "cross-examination of Mr. Bennett was not a reasonable alternative under the facts and in those circumstance."

In our view, cross-examination was a viable alternative strategy. When Mr. Minix had the opportunity to cross-examine Mr. Bennett, neither the government nor Mr. Hamilton had questioned Mr. Bennett specifically about his post-detention letter to Mr. Toombs, which resulted in an obstruction of justice enhancement. Even though Ms. McEwen eventually brought up the letter in her redirect examination, there is no evidence that Mr. Minix knew she would. The record shows that the prior "understanding" between Ms. McEwen and Mr. Minix was that she would not question Mr. Bennett about Mr. Williams, not that she would raise the letter or impeach Mr. Bennett's credibility at trial in the event Mr. Minix or Mr. Hamilton declined cross-examination on the issue. *See Proffitt v. Wainwright*, 685 F.2d 1227, 1247 (11th Cir. 1982) ("[T]he assistance rendered must be evaluated from the perspective of counsel, taking into account all of the circumstances of the case, but

only as those circumstances were known to him at the time in question.") (internal quotation marks omitted).[5]

The district court underestimated the benefit of cross-examination. At that moment, Mr. Minix had an opportunity to introduce new and highly probative evidence that Mr. Bennett—a witness testifying for the government—was not credible. It is true that the government and Mr. Hamilton had already broached the subjects of Mr. Bennett's prior criminal history, current plea deal, and expectation of receiving sentencing reduction. But Mr. Bennett's attempt to enlist co-conspirators to participate in a cooperation-for-hire scheme was perhaps even more powerful evidence that his testimony, generally, should not have been trusted. Moreover, Mr. Bennett had testified that he had always been honest and forthright with law enforcement, but neither the government nor Mr. Hamilton pointed out that he had received an obstruction-of-justice sentence enhancement for sending the letter.

It is also true that Mr. Bennett did not identify or implicate Mr. Williams directly and, as the district court concluded, that the government would not have been able to prove Mr. Williams' guilt solely based on Mr. Bennett's testimony. But

[5] During its direct examination of Mr. Donaldson, and before Mr. Bennett took the stand, the government presented to the jury a recorded conversation in which Mr. Donaldson informed Mr. Toombs that he had received a letter from Mr. Bennett from prison. Mr. Donaldson was not asked and did not testify, however, that Mr. Bennett was trying to enlist him in the cooperation-for-hire scheme.

that does not mean Mr. Bennett's testimony was not helpful to the government's case against Mr. Williams. Mr. Bennett corroborated details about the charged conspiracy and implicated Mr. Williams' co-defendant, which could have had potential spill-over effect as to Mr. Williams. *See Zafiro v. United States*, 506 U.S. 534, 539 (1993) (explaining that "evidence of a codefendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty"). Any evidence that cast doubt on Mr. Bennett's credibility would therefore have been helpful to Mr. Williams, at least to some extent, even if it would not have changed the outcome of the trial. To satisfy this prong of *Sullivan*, a defendant does not need to prove that an alternative strategy would have carried the day, but only that it was viable and reasonable—that it was "realistically available." *United States v. Mers*, 701 F.2d 1321, 1331 (11th Cir. 1983).

In some cases, an ostensibly reasonable strategy may come with such great risk as to make it unreasonable under the circumstances. *See Foster v. Schomig*, 223 F.3d 626, 631 (7th Cir. 2000) (a decision not to call a witness is sound "if it is based on the attorney's determination that the testimony the witnesses would give might on balance harm rather than help the defendant"); *United States v. Sheneman*, No. 3:10-CR-126 JD, 2015 WL 4139247, at *20 (N.D. Ind. July 8, 2015) ("It was well within the range of reasonable trial strategy to decline to call such a risky and, likely, harmful witness."). But we disagree with the district court's factual inference here

that cross-examination of Mr. Bennett could have "backfired" and therefore was prohibitively risky. This factual inference has no support in the record and is therefore clearly erroneous. *See Day*, 729 F.3d at 1327; *Jones*, 459 F.2d at 980.

For one, there is no evidence that cross-examination would have given Mr. Bennett the opportunity to implicate Mr. Williams, particularly if Mr. Minix limited his questions to the letter. Mr. Bennett would have been constrained to answer Mr. Minix's questions during cross-examination and would not have been free to discuss Mr. Williams. The strategy could have backfired if Mr. Williams had received a copy of the letter, such that Mr. Bennett might mention this fact when asked about the letter on cross-examination. But there is no evidence whatsoever that Mr. Williams received the letter.

The strategy may also have backfired if for some reason it provoked Ms. McEwen to question Mr. Bennett about Mr. Williams on redirect examination. But Ms. McEwen did not testify, so there is no evidence about what she would have done had Mr. Minix decided to cross-examine Mr. Bennett about the letter. Moreover, it appears doubtful that the district court would have permitted redirect examination of Mr. Bennett on the new topic of Mr. Williams' involvement in the conspiracy. *See United States v. Riggi*, 951 F.2d 1368, 1375 (3d Cir. 1991) (explaining that while the scope of redirect examination is committed to the sound discretion of the district court, "[t]he tradition in the federal courts has been to limit the scope of redirect

examination to the subject matter brought out on cross-examination," and "[i]deally, no new material should be presented on redirect, because litigants will in theory have presented all pertinent issues during the direct examination."); *United States v. Terry*, 187 F.3d 650 (9th Cir. 1999) ("As a general rule, the scope of redirect examination is limited to the scope of cross-examination.") (internal quotation marks omitted). Moreover, if Mr. Minix's cross-examination were going to motivate Ms. McEwen to bring up Mr. Williams on redirect, that would suggest their "understanding" was broader than represented—that Mr. Minix explicitly agreed not to cross-examine Mr. Bennett and that Ms. McEwen would penalize him for not holding up his end of the bargain. This would contradict the district court's factual finding that the understanding was only that the government would not question Mr. Bennett about Mr. Williams.

Finally, and most importantly, Mr. Minix himself did not testify about any potential dangers to cross-examining Mr. Bennett. He testified only that, during trial, he believed "there wasn't anything to question [Mr. Bennett] on" in light of the government's direct examination and "there was no need to cross examine him" because he did not implicate Mr. Williams.

The district court's conclusion about the risk of cross-examination also depends on the implicit factual inference that Mr. Bennett had inculpatory information about Mr. Williams. If Mr. Bennett had never seen Mr. Williams before

or had never witnessed him actively participating in the conspiracy, however, cross-examination could never have "backfired," even if it for some reason prompted Ms. McEwen to ask questions about Mr. Williams on redirect. There is no information in the record regarding what Mr. Bennett knew or would have said about Mr. Williams. As noted earlier, Mr. Bennett did not testify at the evidentiary hearing, and Mr. Minix was not asked any questions about his discussion (or lack thereof) with Mr. Bennett as to Mr. Williams.[6]

The district court's legal conclusion about the reasonableness of cross-examination therefore depends on unsupported factual inferences about the risks and rewards of the strategy. Removing those inferences from the equation, the legal conclusion does not add up. Mr. Minix had a chance to introduce evidence harmful to the credibility of an adverse witness, and to do so without any apparent risk to Mr.

[6] One of the co-conspirators, Mr. Shelton, testified at trial that on one occasion Mr. Williams drove Mr. Donaldson to meet with him at Mr. Bennett's house. There is no direct testimony, however, that Mr. Williams knew he was driving to Mr. Bennett's house on that trip, that he went into the house with Mr. Donaldson, or that he ever met Mr. Bennett. Indeed, Mr. Donaldson testified that Mr. Williams generally would "drop [him] off" at the destinations, and then "leave and come back" when Mr. Donaldson was ready to go. Mr. Donaldson also offered specific examples of times when Mr. Williams waited in the car while he transacted business.

Assuming that Mr. Bennett and Mr. Williams knew each other—perhaps through Mr. Toombs—we still have not found direct evidence that Mr. Bennett witnessed Mr. Williams participating in the conspiracy. Notably, the government introduced several intercepted phone conversations between Mr. Donaldson and Mr. Williams, and others, but it did not introduce any calls on which Mr. Bennett participated, as he had already been incarcerated by the time the wiretap was authorized.

Williams. The strategy was therefore reasonable and realistically available under the circumstances.

C

The district court concluded that Mr. Williams failed to establish the requisite "link" between Mr. Minix's decision to forgo cross-examination and his conflict of interest. It rejected the notion that Mr. Minix made his decision based on any "agreement" with the government and concluded that Mr. Minix's trial strategy motivated his decision. The standard of review on appeal and the limitations of the record compel us to the affirm the district court's conclusion on this prong of the analysis.

1

Although the district court committed two errors in its analysis, its ultimate credibility determination and its findings regarding Mr. Minix's trial strategy were not clearly erroneous. We address each error in turn.

First, the district court found on remand that Mr. Minix learned that Mr. Bennett would be a witness at Mr. Williams' trial "just a matter of days before the trial started," i.e., in October of 2014. This factual finding was clearly erroneous. *See United States v. Clarke*, 562 F.3d 1158, 1165 (11th Cir. 2009) (explaining that there is clear error when "we are left with a definite and firm conviction that a

mistake has been committed").[7] Mr. Minix knew that Mr. Bennett would likely testify against Mr. Toombs at least by June 9, 2014, when he disclosed as much to the district court during Mr. Bennett's sentencing hearing, but perhaps as early as March of 2014, when he first took over Mr. Bennett's case. He also knew that Mr. Williams and Mr. Toombs were going to be tried together by May of 2014, when the court granted the government's motion to try the defendants in the indictment together. Taking these two undisputed facts collectively, Mr. Minix knew about the potential conflict at least by June of 2014, four months before the trial.[8]

Second, Mr. Minix cross-examined three other witnesses (other than Mr. Bennett) who did not name his client, and not just one, as the district court found. As the court recognized, Mr. Minix briefly cross-examined Officer Rodgers, who did not directly implicate Mr. Williams. But he also cross-examined Ms. Adkins, the DEA forensic chemist who testified about chemical evidence testing and samples from the Donaldson investigation, and Mr. Enright, the AT&T contractor who testified about wiretap records, even though neither named Mr. Williams in their direct examination. Nevertheless, these witnesses did not have any specific

[7] Although Mr. Williams does not raise this error on appeal or otherwise argue for reversal based on when Mr. Minix learned of the potential conflict, we address the error here on our own.

[8] We are not convinced by Mr. Minix's explanation during the evidentiary hearing that he may not have known Mr. Toombs and Mr. Williams would be tried together based on Mr. Wynn pleading guilty days before the trial. It is not clear what Mr. Wynn's plea had to do with Mr. Toombs and Mr. Williams being tried together, which had been decided in May of 2014, and Mr. Minix was not pressed further on his explanation.

incriminating information about Mr. Williams, so Mr. Minix did not run a risk of harming his client by questioning them.

We are not convinced that either of these errors is grounds for reversing the district court. We accept that Mr. Minix in fact had a general trial strategy not to cross-examine witnesses who did not implicate Mr. Williams and that he would not have cross-examined Mr. Bennett even if he had not been his client. The district court was aware of Mr. Minix's ongoing disciplinary proceedings, *see United States v. Malpiedi*, 62 F.3d 465, 470 (2d Cir. 1995) (observing that "after-the-fact testimony by [a conflicted] lawyer … is not helpful," as "[e]ven the most candid persons may be able to convince themselves that they actually would not have used that strategy or tactic anyway"), but nevertheless found him credible, and that credibility choice is not clearly erroneous. Without more information we defer to the district court's credibility determination and its findings regarding Mr. Minix's strategy. *See McGriff v. Dep't of Corr.*, 338 F.3d 1231, 1238 (11th Cir. 2003) ("Absent evidence of clear error, we consider ourselves bound by a district court's findings of fact and credibility determinations.").

2

In our view, more important than the two errors in the district court's analysis is the fact that there is no direct evidence in the record establishing the necessary "link" to complete the showing of "adverse effect." For example, we do not have

Mr. Minix's notes, files, or any other work product that could have shed more light on his trial strategy. We also do not have any testimony from Ms. McEwen, Mr. Minix, or Mr. Bennett about what Mr. Bennett knew about Mr. Williams.

Mr. Williams focuses on two pieces of evidence that he argues establish an "agreement" that tied Mr. Minix's hands. He points first to the hearing at which the parties informed the district court of the potential conflict and, second, to Mr. Minix's testimony at the evidentiary hearing. But other than Mr. Minix's casual use of the word "agreement" prior to trial, there is no other evidence of a real agreement. Nor is there evidence that he based his trial strategy on such an agreement. Mr. Minix testified he was not motivated by an agreement, but only by the fact that Mr. Bennett did not implicate Mr. Williams: "I mean, the simple fact is, whether it was an agreement or not, they didn't – the government didn't ask any him any questions about my client and therefore there was no need to cross examine him." The district court credited this testimony, and its credibility finding is not clearly erroneous. *See McGriff*, 338 F.3d at 1238; *Porter*, 14 F.3d at 561 (finding that the district court did not clearly err where (1) an attorney testified that he did not refrain from cross-examining a witness, who was a former client, because of the prior representation and (2) there was no affirmative evidence to contradict that testimony).

Without evidence directly contradicting Mr. Minix's testimony, which the district court found credible, we cannot say that Mr. Williams established an adverse effect, and his conflict-of-interest claim must fail.

V

We now turn to Mr. Williams' arguments regarding his sentence enhancement under 21 U.S.C. § 851.

A

Mr. Williams first argues that the district court erred in concluding that the government complied with the service requirements under 21 U.S.C. § 851(a)(1) for a mandatory minimum sentence enhancement under 21 U.S.C. § 841(b)(1)(A). We disagree.

Under § 841(b)(1)(A), any person convicted of possession with intent to distribute more than 5 kilograms of cocaine "shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life." If the defendant "commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment." *Id.*

In order for the court to impose an enhanced sentence based on prior convictions, the government must comply with § 851(a)(1), which requires it to "file[ ] an information with the court (and serve[ ] a copy of such information on the

person or counsel for the person) stating in writing the previous convictions to be relied upon." We demand "strict compliance with the mandatory language of the procedural requirements of [§] 851(a)." *United States v. James*, 642 F.3d 1333, 1339 (11th Cir. 2011) (quoting *United States v. Weaver*, 905 F.2d 1466, 1481 (11th Cir. 1990)).

Mr. Williams claims that the government failed to "serve" a copy of the notice of enhancement on him or his counsel, as it filed the notice on the district court's electronic filing system. Although Mr. Williams concedes he was timely informed of the potential enhancement one month before trial, he claims that the service was not adequate under the statute because it was filed electronically.

We review *de novo* the adequacy of notice under § 851. *See United States v. Ladson*, 643 F.3d 1335, 1341 (11th Cir. 2011). We note, however, that Mr. Williams' co-defendant, Mr. Toombs, raised the same argument in his appeal, and we rejected it in *United States v. Toombs*, 748 F. App'x 921, 928 (11th Cir. 2018). We find that decision persuasive and affirm Mr. Williams' sentence for the same reasons.

Like Mr. Toombs, Mr. Williams concedes that § 851 service via the court's electronic filing system is permissible if the local rules permit it, but he argues that the relevant local rules of the Middle District of Georgia do not include the district court's electronic filing procedures. We disagree. Under the local rules of the

Middle District of Georgia, filing a document electronically for a given case "constitutes service on all users registered as participants in that case." *Id.*

Here Mr. Minix was admitted to practice before the district court, entered a notice of appearance electronically in the case on November 20, 2013—becoming a registered user in the case who consented to service via CM/ECF filing, *see* D.E. 282-1 at 1—and remained Mr. Williams' attorney well past September 19, 2014, the date that the government filed the notice in question. Accordingly, the government satisfied § 851's service requirement.

B

Mr. Williams raises another argument that we rejected in *Toombs*—that district court erred by enhancing his sentence under § 851 because the prior conviction was too old to be fairly considered and the enhancement was imposed as a penalty for exercising his Sixth Amendment right to a trial. More specifically, Mr. Williams argues his prior conviction for marijuana distribution was thirty years old, that marijuana is now legal in many states, and that the Attorney General at time, Eric Holder, had issued a memorandum that prosecutors should decline to file § 851 enhancements unless "the case is appropriate for severe sanctions."

As we said in *Toombs*, Mr. Williams "cannot rely on the internal Department of Justice policy memorandum to which he refers because, rather than establishing binding norms, the memorandum leaves prosecutors 'free to consider the individual

facts in the various cases that arise.'" *Toombs*, 748 Fed. App'x at 929 (quoting *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1377 (11th Cir. 1983)). *See also United States v. Wasserman*, 504 F.2d 1012, 1016 (5th Cir. 1974) (finding "no basis for prohibiting prosecutions which violate internal Department of Justice policy memoranda" and rejecting the contention that the government prosecuted the defendants "in contravention of a Department of Justice policy memorandum"); *United States v. Strong*, 844 F.3d 133, 136 (2d Cir. 2016) (rejecting precisely Mr. Williams' argument as to the same DOJ memo).

Mr. Williams' argument that the enhancement was an unconstitutional punishment for his exercise of his Sixth Amendment rights also fails. Notwithstanding its recognition that "punish[ing] a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort," *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978), the Supreme Court has held that the government may freely encourage criminal defendants to plead guilty "in the 'give-and-take' of plea bargaining" by offering "a lenient sentence or a reduction of charges" for pleading guilty or by dangling increased penalties or additional charges for failing to plead guilty. *See id.* To hold to the contrary, *Bordenkircher* observed, "would contradict the very premises that underlie the concept of plea bargaining itself." *Id.* at 365. Thus we rejected this Sixth Amendment argument in *Toombs*, *see* 748 Fed. App'x at 929–30, and other courts of appeals have uniformly rejected

the same type of challenges. *See United States v. Kent*, 649 F.3d 906, 913 (9th Cir. 2011); *United States v. Jenkins*, 537 F.3d 1, 5 (1st Cir. 2008); *United States v. Morsley*, 64 F.3d 907, 920 (4th Cir. 1995); *United States v. Mosley*, 14 F.3d 54 (5th Cir. 1994). We do so again here.

VI

For the foregoing reasons, we affirm Mr. Williams' conviction and sentence.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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February 20, 2020

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 15-12130-GG
Case Style: USA v. Stephon Williams
District Court Docket No: 1:13-cr-00051-WLS-TQL-4

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Joseph Caruso, GG at (404) 335-6177.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Djuanna H. Clark
Phone #: 404-335-6151

OPIN-1 Ntc of Issuance of Opinion

APPENDIX B: The Eleventh Circuit's initial opinion remanding the case for a hearing in the district court (*United States v. Williams*, 902 F.3d 1328 (11th Cir. 2018)).

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-12130

D.C. Docket No. 1:13-cr-00051-WLS-TQL-4

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

STEPHON WILLIAMS,

Defendant-Appellant.

Appeals from the United States District Court
for the Middle District of Georgia

(September 4, 2018)

Before TJOFLAT and JORDAN, Circuit Judges, and HUCK,* District Judge.

JORDAN, Circuit Judge:

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* Honorable Paul C. Huck, United States District Judge for the Southern District of Florida, sitting by designation.

Divided loyalties often prove to be a source of mischief in human relations. As this case illustrates, they can also cause serious trouble for an attorney and his client.

Following a seven-day trial, a jury convicted Stephon Williams of a federal narcotics conspiracy offense. *See* 21 U.S.C. § 846. Kim Minix represented Mr. Williams at trial. At the time of trial, Mr. Minix was also representing Tyree Bennett, a government witness who was then appealing his own sentence after pleading guilty to federal narcotics charges. Although Mr. Minix knew that Mr. Bennett had been found to have obstructed justice in his own criminal case, he did not ask him about the obstruction scheme at Mr. Williams' trial. In fact, Mr. Minix asked Mr. Bennett no questions whatsoever.

On appeal, Mr. Williams—represented by different counsel—contends that he is entitled to a new trial because Mr. Minix, due to his simultaneous representation, passed up a valuable opportunity to cross-examine and impeach Mr. Bennett. We conclude that Mr. Minix labored under a conflict, and that Mr. Williams is entitled to an evidentiary hearing to explore whether this conflict adversely affected Mr. Minix's performance. [1]

I

[1] Donterius Toombs was tried and convicted together with Mr. Williams. We consolidated the appeals of Mr. Toombs and Mr. Williams for briefing and oral argument, but now sever the appeals, and decide Mr. Toombs' appeal in a separate opinion.

We begin by summarizing the proceedings in the cases of Mr. Williams and Mr. Bennett.

A

In September of 2013, Mr. Bennett, pursuant to charges filed in a superseding information, pled guilty to conspiring with others to possess cocaine and marijuana with the intent to distribute, in violation of 21 U.S.C. § 846. The information alleged that the conspiracy, which was based in southern Georgia, lasted from sometime in 2009 to December of 2011. After entry of the plea, the district court appointed Mr. Minix to represent Mr. Bennett at sentencing. **[**One month later, in November of 2013, a grand jury charged Mr. Williams with participating with others (including Mr. Toombs) in a conspiracy to possess cocaine and crack cocaine with the intent to distribute, in violation of 21 U.S.C. § 846. The conspiracy, according to the indictment, was based in Albany, Georgia, and spanned from January of 2010 to December of 2012. The district court appointed Mr. Minix to represent Mr. Williams. The sentencing hearing for Mr. Bennett took place in early 2014. At the hearing, the district court imposed an obstruction of justice enhancement on Mr. Bennett pursuant to U.S.S.G. § 3C1.1 and denied him an acceptance of responsibility adjustment pursuant to U.S.S.G. § 3E1.1. These two decisions were based on a letter that Mr. Bennett sent in July of 2013 to Mr. Toombs—Mr. Williams' alleged co-conspirator—asking him to

cooperate on Mr. Bennett's behalf as a third party in exchange for a substantial payment, and to market a cooperation-for-hire scheme to inmates seeking sentence reductions. The district court sentenced Mr. Bennett to 156 months' imprisonment, and he appealed. Mr. Bennett's appeal, which was handled by Mr. Minix, was pending in the Eleventh Circuit at the time of Mr. Williams' trial in October of 2014.

B

The joint trial of Mr. Williams—still represented by Mr. Minix—and Mr. Toombs lasted seven days. The jury heard testimony from more than a dozen witnesses, including a number of persons who had been charged with narcotics offenses and were cooperating with the government.

The evidence presented by the government showed that from approximately 2010 through 2012 a group of individuals—with one Curtis Donaldson at the center—agreed to work together to distribute cocaine to their overlapping customer bases. To further this goal, the co-conspirators took on various and shifting roles in fulfilling the scheme's necessary tasks, including lending money to each other to purchase cocaine from suppliers, making purchases of cocaine, transporting the cocaine to a "headquarters" and cooking it there, monitoring for and communicating about law enforcement activity to avoid detection, selling cocaine and crack cocaine, and conducting accountings of relevant financial transactions.

Mr. Williams and Mr. Donaldson bought and transported drugs and paraphernalia together numerous times. Mr. Williams acted as a marketer for Mr. Donaldson's crack cocaine, and he once went alone, on behalf of Mr. Donaldson, to deliver an ingredient for another individual to use in cooking crack cocaine.

Mr. Bennett, still represented by Mr. Minix, was one of the government witnesses at Mr. Williams' trial. Just before Mr. Bennett took the stand, Mr. Minix, the prosecutor, and the district court engaged in the following colloquy:

> MS. McEWEN: Government calls Tyree Bennett, Your Honor.
> MR. MINIX: Your Honor, may we approach real quick?
> THE COURT: Yes.
> (Bench conference as follows.)
> MR. MINIX: As the Court is aware, I'm representing Mr. Bennett on an appeal. I was his second counsel, and he's been sentenced. I think we had an agreement that there wasn't going to be any questions that would create a conflict.
> MS. McEWEN: The government is not going to ask him any questions about Mr. Williams, Mr. Minix's client.
> MR. MINIX: I just wanted to be sure the government wasn't going to ask him about anything I represented him on.
> MS. McEWEN: We aren't.
> THE COURT: I recall that's the understanding.
> (Bench conference ends.)
> THE COURT: All right. You may proceed.
> MS. McEWEN: Thank you, Your Honor.

D.E. 323 at 158.[2]

[2] We have not been able to locate anything in the record that documents a prior discussion or agreement regarding the scope of Mr. Bennett's testimony. Nor have we found any indication in

Mr. Bennett told the jury that he decided to cooperate with the government by testifying in Mr. Williams' trial in pursuit of the same goal that inspired him to appeal—a reduced sentence. In his testimony on direct examination, Mr. Bennett did not mention Mr. Williams by name. But he supported the government's case against both Mr. Williams and Mr. Toombs by directly describing (and by corroborating other witnesses' testimony concerning) the drug-distribution conspiracy alleged in the indictment. For example, Mr. Bennett testified about the general way that a drug-distribution conspiracy operates, about the types and quantities of drugs distributed in connection with the charged conspiracy, and about the roles or duties of certain individuals in that conspiracy. Mr. Bennett further explained that he obtained drugs from Mr. Donaldson, among others. He also said that he had known Mr. Toombs since the two were about 12 years old; that he and Mr. Toombs dealt drugs that they obtained from Mr. Donaldson and others named in the Donaldson-led conspiracy until he was arrested in late 2011; and that Mr. Toombs and Mr. Donaldson continued selling drugs to his customers when he was incarcerated.

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the record that Mr. Williams was aware of the possibility that Mr. Minix had a conflict due to his simultaneous representation of Mr. Bennett, let alone any indication that he knowingly and intelligently waived his right to conflict-free counsel. *See United States v. Alred*, 144 F.3d 1405, 1411 (11th Cir. 1998) (describing the waiver process).

On direct examination, Mr. Bennett made no mention of his letter to Mr. Toombs or how he had received an obstruction of justice enhancement at sentencing. When Mr. Toombs' counsel cross-examined Mr. Bennett, he did not ask about any of these topics either. Mr. Minix declined to cross-examine Mr. Bennett on behalf of Mr. Williams.

The government, in its re-direct examination, posed about a dozen questions to Mr. Bennett concerning the letter and the obstruction of justice enhancement. Mr. Bennett's testimony concluded with this exchange:

> BY MR. HAMILTON:
> Q: So you lost that three level reduction; is that correct?
> A: Yes, sir.
> Q: And that was as a result of a letter that you wrote?
> A: Yes, sir.
> Q: To Toombs? Does that perhaps leave you with any animosity toward Mr. Toombs?
> A: No, sir.
> Q: So you and him are straight even though you wrote that letter?
> A: Yes, sir.
> MR. HAMILTON: No further questions, Your Honor.
> MS. McEWEN: Nothing further of this witness, Your Honor.
> THE COURT: Any --
> MR. MINIX: Nothing, Your Honor.
> THE COURT: All right. Any reason this witness cannot be excused?
> MS. McEWEN: None from the government, Your Honor.
> THE COURT: Any objection?
> MR. HAMILTON: No objection.
> MR. MINIX: No objection.
> THE COURT: All right.

D.E. 323 at 183–84.

Mr. Minix called one witness in Mr. Williams' defense case. That witness testified that Mr. Williams drove her to work each day for several years. Between her direct examination and cross-examination, the witness' testimony spanned just over five of the roughly 1,000 pages in the trial transcript.

C

The jury found Mr. Williams guilty of the § 846 conspiracy charge. The district court sentenced him to 20 years' imprisonment—the minimum term of imprisonment required pursuant to the information that the government filed pursuant to 21 U.S.C. § 851—followed by 10 years' supervised release.

In February of 2015, after Mr. Williams' trial but before sentencing, Mr. Minix submitted Mr. Bennett's initial brief to the Eleventh Circuit. Several months later, we affirmed Mr. Bennett's sentence. *See United States v. Bennett*, 614 F. App'x 403 (11th Cir. 2015).

II

Mr. Williams contends that Mr. Minix had a conflict of interest due to his simultaneous representation of Mr. Bennett, and that this conflict had an adverse effect on his performance at trial. This "conflict of interest claim is subject to *de novo* review." *Mills v. Singletary*, 161 F.3d 1273, 1287 (11th Cir. 1988).

A

Under the Sixth Amendment, a defendant in a criminal case has the right to the effective assistance of trial counsel. *See Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Freund v. Butterworth*, 165 F.3d 839, 858 (11th Cir. 1999) (en banc). This right includes having counsel whose work is not affected by a conflict of interest. *See Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980). A defendant claiming that his counsel rendered ineffective assistance due to a conflict of interest must, except in rare cases, establish an "actual conflict," i.e., a "conflict [that] adversely affected his counsel's performance." *Mickens v. Taylor*, 535 U.S. 162, 174 (2002). *See also id*. at 171 (an "actual conflict" is "a conflict that affected counsel's performance—as opposed to a mere theoretical division of loyalties") (emphasis omitted).[3]

To demonstrate adverse effect, Mr. Williams must point to some "plausible alternative defense strategy or tactic that might have been pursued." *Freund*, 165 F.3d at 860 (alteration and internal quotation marks omitted). To be "plausible," the alternative strategy or tactic must have been "reasonable under the facts. . . . [But Mr. Williams] need not show that the defense would necessarily have been

[3] Under *Holloway v. Arkansas*, 435 U.S. 475 (1978), an "automatic reversal rule"—pursuant to which we conclusively presume that the conflict affected counsel's representation—applies "only where defense counsel is forced to represent codefendants over his timely objection, unless the trial court has determined that there is no conflict." *Mickens*, 535 U.S. at 168.

successful [if the alternative strategy or tactic] had been used[;] rather he only need prove that the alternative possessed sufficient substance to be a viable alternative." *Id.* (citations and internal quotation marks omitted). Finally, Mr. McWilliams "must show some link between the . . . conflict and the decision to forgo the alternative strategy of defense. In other words, he must establish that the alternative defense was inherently in conflict with or not undertaken due to [Mr. Minix's] other loyalties or interests." *Id.* (citation and internal quotation marks omitted). *See also Porter v. Singletary*, 14 F.3d 554, 561 (11th Cir. 1994) (requiring that a defendant "point to specific instances in the record which suggest an impairment or compromise of his interests for the benefit of another party").

In contrast to most ineffective-assistance-of-counsel cases, the foregoing rule governing conflicts of interest is "prophylaxis," *Mickens*, 535 U.S. at 176, so that the defendant must establish "adverse effect," but "need not demonstrate prejudice in order to obtain relief." *Cuyler*, 446 U.S. at 349–50. Where there is a "breach[of] the duty of loyalty, perhaps the most basic of counsel's duties," and "it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests, . . . it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest"—although "the rule [still] is not quite the per se rule of prejudice that exists for [certain other] Sixth Amendment claims." *Strickland*, 466 U.S. at 692.

The question is whether "the verdict [is] unreliable, [irrespective of whether] *Strickland* prejudice c[ould] be shown." *Mickens*, 535 U.S. at 173.

B

As we have just said, an "actual conflict" is one that adversely affected counsel's performance. *See Mickens*, 535 U.S. at 171, 173–74. As we have done in some of our post-*Mickens* cases, *see, e.g.*, *Ferrell v. Hall*, 640 F.3d 1199, 1244 (11th Cir. 2011), we think it is useful to first determine whether there was a conflict, and then to analyze whether that conflict ripened into an "actual conflict" because it had an adverse effect on counsel's performance.

On the issue of conflict, i.e., divided loyalties, the record before us—though not fully developed—shows several things. First, at the time of Mr. Williams' trial, Mr. Minix represented both Mr. Williams and Mr. Bennett (whose appeal on the obstruction of justice issue was pending before the Eleventh Circuit). Second, Mr. Bennett testified on behalf of the government in Mr. Williams' trial. So Mr. Minix simultaneously represented a defendant in a criminal trial and a witness for the prosecution at that trial. Third, Mr. Minix was faced with the choice of whether to cross-examine one of his clients (Mr. Bennett) while representing another (Mr. Williams). These undisputed facts allow us to begin to address Mr. Williams' conflict of interest claim. *See United States v. Camacho*, 40 F.3d 349, 355 (11th Cir. 1994) ("Generally, we do not consider claims of ineffective

assistance of counsel on direct appeal, because there usually has been insufficient opportunity to develop the record regarding the merits of these claims. We will, however, consider an ineffective assistance of counsel claim on direct appeal if the record is sufficiently developed.") (citation omitted).

"A conflict may arise from a lawyer's simultaneous or successive representation of adverse interests." *McConico v. State of Alabama*, 919 F.2d 1543, 1546 (11th Cir. 1990). As we explain below, Mr. Minix had a conflict of interest at Mr. Williams' trial.

The governing ethical canons of the legal profession, *see, e.g.*, *Waters v. Kemp*, 845 F.2d 260, 263 (11th Cir. 1988), provide that, except under specified circumstances, "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest," i.e., if "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[.]" Model Rules Prof'l Conduct R. 1.7(a)(2) (2014). We have noted that "[a]n attorney who cross-examines a former client inherently encounters divided loyalties." *Lightbourne v. Dugger*, 829 F.2d 1012, 1023 (11th Cir. 1981). Here the situation was more problematic because Mr. Bennett was Mr. Minix's current client.

At trial, Mr. Minix was "placed in the equivocal position of having to cross-examine his own client as an adverse witness. His zeal in defense of his client the

accused [Mr. Williams] [wa]s thus counterpoised against solicitude for his client the witness [Mr. Bennett]." *Castillo v. Estelle*, 504 F.2d 1243, 1245 (5th Cir. 1974) (Wisdom, J.) (concluding that defense counsel's "divided loyalties"—the simultaneous representation of a criminal defendant and of the victim/witness of the defendant's alleged crime in unrelated litigation—"amount[ed] to a denial of the right to effective representation essential to a fair trial"). In addition, Mr. Minix faced the possibility that Mr. Bennett "might take umbrage at a vigorous defense of [Mr. Williams] and dispense with [his future] services." *Zuck v. State of Alabama*, 588 F.2d 436, 439 (5th Cir. 1979). *See also Wheat v. United States*, 486 U.S. 153, 163–64 (1988) (upholding district court's decision to not allow a defendant to substitute his counsel with counsel for his co-defendants because of the ethical problems which would be faced by the latter in cross-examining his clients if they testified as government witnesses at the defendant's trial). Contrary to the government's argument, *see* Br. for the United States at 32–33, by the time of Mr. Bennett's testimony at Mr. Williams' trial, the conflict was no longer hypothetical.

In *McConico*, a simultaneous representation case similar in some ways to this one, we noted that "[t]he inherently antagonistic task of cross-examining a client was made more serious" because the cross-examination "called into question" the litigation position that the very same attorney was advancing for that

client. *McConico*, 919 F.2d at 1543, 1547–48. James McConico was charged with the murder of his brother-in-law, Ricky Morton, and claimed self-defense. James' wife, Brenda—who was Ricky's sister—retained the same attorney who was representing James on the murder charge to recover insurance proceeds from Ricky's insurance policy. That policy, however, contained an exclusion that denied payment if the death was related to Ricky's commission of an assault or felony—such as what would have prompted James to kill Ricky in self-defense. Prior to trial, the insurance company paid Brenda and the attorney some of the proceeds from the policy. After James' trial, Brenda and her other brother Rodney signed a document releasing the insurance company from any further liability arising out of the insurance claim. *See id.* at 1544–45.

At James' trial, the attorney argued that James shot Ricky (who was allegedly the aggressor) in self-defense. Brenda testified for the prosecution at trial, so the attorney who represented both her (on the insurance matter) and James (on the murder charge in the criminal case), and who was asserting contradictory theories on behalf of each client, had to cross-examine her. The jury found James guilty, and the trial court sentenced him to life imprisonment. *See id.* at 1545.

On these facts, we held that the opposing litigation positions of James and Brenda McConico presented "a situation of inherent conflict." *Id.* at 1547. We noted that the attorney "did not vigorously impeach" or otherwise attack Brenda's

testimony as much as he might have. *Id*. at 1549. Indeed, we said that the conflict "forced [him] to choose evidence less convincing for [James'] case . . . than was available." *Id*. at 1547.

As in *McConico*, here the undisputed facts establish a conflict of interest: Mr. Minix represented two clients concurrently, and when one of them testified at the other's trial, Mr. Minix had to decide whether to cross-examine.

C

That leaves the question of adverse effect. Mr. Williams argues that the conflict faced by Mr. Minix adversely affected his performance, and his argument proceeds as follows: Mr. Minix failed to cross-examine Mr. Bennett; cross-examination was a viable option, given that, for example, Mr. Bennett left himself open to impeachment based on his post-detention criminal activity, which reflected a willingness to lie to the government; and it would have been impossible for Mr. Minix to cross-examine Mr. Bennett on this matter without both violating his duty of loyalty to Mr. Bennett and undermining his ongoing attempt to obtain a reduced sentence in the pending appellate proceedings (or, the reason that Mr. Minix did not cross-examine Mr. Bennett was *specifically* that he did not wish to violate his duty of loyalty to him, or that he did not wish to undermine Mr. Bennett's ongoing attempt to reduce his sentence). *See Freund*, 165 F.3d at 860.

As noted earlier, an adverse effect resulting from a conflict is not the same thing as prejudice in the run-of-the-mill *Strickland* sense. *See Mickens*, 535 U.S. at 173; *Cuyler*, 446 U.S. at 349–50; *Freund*, 165 F.3d at 860. We conclude that, on the existing record, Mr. Williams has made out a strong case of adverse effect. Mr. Minix chose not to cross-examine Mr. Bennett and, in the words of *Freund*, cross-examination appears to have "possessed sufficient substance to be a viable alternative" given the facts that led to Mr. Bennett's obstruction of justice enhancement. 165 F.3d at 860 (internal quotation marks omitted). In addition, cross-examination appears to have been "inherently in conflict with . . . [Mr. Minix's] other loyalties or interests" or appears to have "'not [been] undertaken due to th[os]e . . . other loyalties or interests.'" *Id.* Indeed, it appears that there was an agreement or understanding that Mr. Bennett would not testify about Mr. Williams, and this may have been an attempt to eliminate or at least minimize the conflict Mr. Minix faced due to his simultaneous representation. *See McConico*, 919 F.2d at 1547–49; *Castillo*, 504 F.2d at 1245. We note, as well, that "it is generally easier to prove actual conflict arising from simultaneous representation than from successive representation." *McConico*, 919 F.2d at 1546.

The government argues that there was no harm, and therefore no foul, because Mr. Bennett stayed away from directly incriminating Mr. Williams during his testimony. As a result, says the government, there was "nothing to be gained"

from cross-examination. *See* Br. for the United States at 33. This argument mistakenly applies the general *Strickland* prejudice standard to Mr. Williams' conflict of interest claim. What matters is whether cross-examination "possessed sufficient substance to be a viable alternative." *Freund*, 165 F.3d at 860. The government's argument also overlooks the fact that Mr. Bennett's testimony helped establish the existence of the charged conspiracy (one of the key elements of the § 846 offense) and the role of various players in the scheme. Impeaching Mr. Bennett with his obstructive conduct (which involved deception) would have at least served the purpose of undermining his credibility (and possibly a portion of the government's case). The government's argument might be on more solid footing if Mr. Williams were required to show *Strickland* prejudice, but that is not a burden that he shoulders. The same goes for the fact that the government, on re-direct examination, asked Mr. Bennett some questions about the obstruction of justice enhancement. *See, e.g., Cuyler*, 446 U.S. at 349–50.

Nevertheless, we do not award Mr. Williams the relief he seeks—a new trial—at this time. We think it is best to remand the case to the district court so that it can hold an evidentiary hearing and flesh out all of the relevant facts relating to Mr. Williams' conflict of interest claim. *See, e.g., Burden v. Zant*, 871 F.2d 956, 957 (11th Cir. 1989) (remanding for an evidentiary hearing to determine the facts concerning a conflict of interest claim). Among other things, we do not know if

Mr. Minix told Mr. Williams about his simultaneous representation of Mr. Bennett, or if Mr. Williams, having been so informed, was afforded a hearing under *United States v. Garcia*, 517 F.2d 272, 278 (5th Cir. 1975), or given the opportunity to seek independent legal advice about the conflict. We do not know the specifics of the agreement or understanding amongst the parties and the district court to limit Mr. Bennett's testimony at trial. We do not know if there were any discussions between Mr. Minix and Mr. Bennett concerning the latter's testimony at Mr. Williams' trial. And we do not know what other reasons Mr. Minix might have had—aside from the divided loyalties resulting from his simultaneous representation—to forgo cross-examination of Mr. Bennett.[4]

III

We remand for the limited purpose of having the district court conduct an evidentiary hearing on whether Mr. Minix's conflict resulted in an adverse effect. Once the district court has concluded the evidentiary hearing, it should prepare an

[4] We are cognizant of the possibility that, due to the existence of the attorney-client privilege between Mr. Minix and both of his clients, the district court may not be able to answer all of the questions we have set out in the text (or others it deems relevant). That possibility is one of the reasons why the actual conflict standard does not demand a showing of traditional *Strickland* prejudice. *See Mickens*, 535 U.S. at 168 ("[C]ounsel's conflicting obligations to multiple defendants 'effectively sea[l] his lips on crucial matters' and make it difficult to measure the precise harm arising from counsel's errors") (alterations in original, quoting *Holloway*, 435 U.S. at 489–90). It requires only some "link between the . . . conflict and the decision to forgo the alternative strategy of defense . . . [i.e., a showing] that the alternative defense was inherently in conflict with or not undertaken due to [Mr. Minix's] other loyalties or interests." *Freund*, 165 F.3d at 860.

order detailing its findings and conclusions and transmit that order, along with a supplemental record, to the clerk of this court. The panel will retain jurisdiction over the appeal and permit the parties, at the appropriate time, to file supplemental briefs.[5]

REMANDED WITH INSTRUCTIONS.

[5] At this time we choose not to address the other issues Mr. Williams raises on appeal.

APPENDIX C: The order of the district court on remand.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

UNITED STATES OF AMERICA,	:	
	:	
	:	
v.	:	
	:	Case No. 1:13-CR-51 (WLS)
STEPHON WILLIAMS,	:	
	:	
Defendant.	:	
	:	

ORDER

This case is before the Court on a limited remand from the Eleventh Circuit Court of Appeals. The Eleventh Circuit remanded this case to this Court for the purpose of holding an evidentiary hearing regarding the facts related to Defendant Stephon Williams' conflict of interest claim against his attorney, Mr. Ken Minix. On appeal, Defendant Williams "contends that he is entitled to a new trial because Mr. Minix, due to his simultaneous representation, passed up a valuable opportunity to cross-examine and impeach [Tyree Bennett, a government witness]." (Doc. 400 at 2.) The limited issue of the evidentiary hearing is "whether Mr. Minix's conflict resulted in an adverse effect." (*Id.* at 18.)

The evidentiary hearing was held on Thursday, November 8, 2018. At the hearing the Court heard testimony from Mr. Minix and accepted a written stipulation from the Parties. The Parties thereafter briefed the issues surrounding Defendant Williams' allegation that his trial attorney labored under a conflict which adversely affected his attorney's performance. As requested by the Circuit Court, the Court makes the following findings of facts relating to Defendant Williams' conflict of interest claim. If the Circuit Court, as this Court believes, also intended this Court to determine in the first instance whether Mr. Minix's conflict resulted in an adverse effect, the Court also includes its conclusions of law in that regard based on the facts found herein and the Record in the case.

FINDINGS OF FACT

According to the Record, the Court first learned of any possible conflict of interest regarding Mr. Minix's representation of Defendant Williams on October 14, 2014, a few days before Defendant Williams' trial. (*See* Doc. 259.) During the change of plea hearing for one of Defendant Williams' co-defendants, Tony Wynn, the following exchange occurred between Assistant U.S. Attorney Leah McEwen, Mr. Minix, and the Court:

> THE COURT: What we'll do about the questionnaires, since this is a drug case, the jurors will be given written questionnaires to speak about prior drug experience or things of that matter. I know everybody has some questions along that line and they are proper, but it is proper to ask those first by way of questionnaire. Then after they respond, we'll bring those persons in chambers to ask further questions to determine their qualifications for the jury. I don't think there's anything else of a sensitive nature that affects the case.
> MS. McEWEN: I don't think so. There's one other issue I would like to address. We anticipate calling as one of our witnesses, Tyree Bennett, who is currently represented by Mr. Minix on appeal. To avoid any possible conflict of interest because Mr. Minix is representing a client in this case, I have interviewed Mr. Bennett only as to Mr. Toombs, who is Mr. Hamilton's clients [sic], and we do not expect he'll provide any information about Mr. Williams to the jury and I have discussed that with Mr. Minix.
> MR. MINIX: For the record, I have discussed the same with Mr. Williams about that, and that is true, everything else Ms. McEwen has said is true.
> THE COURT: All right. Okay. All right. Anything further, Mr. Hamilton?[1]

(*Id.* at 5–6.) The second discussion with the Court regarding any possible conflict of interest regarding Mr. Minix's representation of Defendant Williams occurred during the trial on October 20, 2014, immediately prior to Mr. Bennett's testimony. (*See* Doc. 323.) The following exchange occurred:

> THE COURT: You may call your next witness.
> MS. McEWEN: Government calls Tyree Bennett, Your Honor.
> MR. MINIX: Your Honor, may we approach real quick?
> THE COURT: Yes.
> (Bench conference as follows:)
> MR. MINIX: As the Court is aware, I'm representing Mr. Bennett on an appeal. I was his second counsel, and he's been sentenced. I think we had an agreement that there wasn't going to be any questions that would create a conflict.
> MS. McEWEN: The government is not going to ask him any questions about Mr. Williams, Mr. Minix's client.

[1] Mr. Hamilton, counsel for co-defendant Toombs, was also present during the exchange.

> MR. MINIX: I just wanted to be sure the government wasn't going to ask him about anything I represented him on.
> MS. McEWEN: We aren't.
> THE COURT: I recall that's the understanding.
> (Bench conference ends)
> THE COURT: All right. You may proceed.
> MS. McEWEN: Thank you, Your Honor.

(Doc. 323 at 158.) As represented, the government did not ask Mr. Bennett any questions about Defendant Williams specifically. After Mr. Bennett was cross-examined by counsel for Donterius Toombs, Defendant's co-defendant, the Court called on Mr. Minix. (*Id.* at 181.) In response, Mr. Minix replied "No questions, Your Honor." (*Id.*) On the government's redirect, Mr. Bennett confirmed that he did not get any credit for acceptance of responsibility in his case because of a letter he wrote to Mr. Toombs, Defendant Williams' co-defendant at trial. (*Id.* at 181–183.)

At the evidentiary hearing on November 8, 2018, the Parties presented to the Court a Joint Stipulation Following Remand. (Doc. 410.) In the stipulation, the Parties agreed on two facts. (Doc. 410-1.) First, the Parties agreed that "[i]f Assistant United States Attorney Leah McEwen were called to testify, her testimony would be consistent with, and would add no more to, the statement made to the Court on October 14, 2014, just prior to jury selection, during the trial of Stephon Williams and Donterius Toombs, and in the presence of all Parties, including Stephon Williams." (*Id.* at 1.) Second, the Parties agreed that Defendant Williams was not afforded a hearing under *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975) prior to trial, advising him of the details of his attorney's possible conflict and the potential perils of such conflict. (*Id.*)

Mr. Minix then testified at the evidentiary hearing. (Doc. 412.) At the hearing, Mr. Minix confirmed that his representation of Mr. Bennett and Defendant Williams overlapped; he learned Mr. Bennett would be a witness in Defendant Williams' trial a few days before trial began; he explained to Defendant Williams that Mr. Bennett would testify; that his decision not to cross-examine Mr. Bennett would not have been handled differently if he had not been a client; and that his reason for not cross-examining Mr. Bennett was because he did not implicate Defendant Williams, not because of an "agreement" Mr. Minix had with

the government. (*Id.* at 13, 16, 17, 27.) The Court does not find, taken in context and the supporting facts and circumstances, Mr. Minix to be untruthful or lacking credibility due to his pending disciplinary action. (*See* Doc. 416 at 4.) Other than examining Mr. Minix and the submitted joint stipulations, Defendant Williams presented no testimony or other evidence at the hearing.

The Court finds that Mr. Minix told Defendant Williams about his simultaneous representation of the government's witness, Mr. Bennett. (*See* Doc. 259 at 5–6; Doc. 412 at 16.) Mr. Minix first learned that Mr. Bennett would be a witness at Defendant Williams' trial "just a matter of days before the trial started." (Doc. 412 at 13.) The Court finds that the understanding amongst Mr. Minix and Defendant Williams was that the government interviewed Mr. Bennett only as to Defendant Williams' co-conspirator, Mr. Toombs, and not as to Defendant Williams. (Doc. 259 at 5–6.)

As the Parties have stipulated, the Court finds that "[Defendant] Williams was not afforded a separate hearing prior to trial, in which he was advised by the Court of the details of his attorney's possible conflict and the potential perils of such a conflict, as required by *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975), *overruled on other grounds, Flanagan v. United States*, 465 U.S. 259 (1984)."[2] (Doc. 410-1 at 1.)

The Court further finds that counsel for the government represented to the Court that she had not questioned Mr. Bennett as to Defendant Williams, but only as to co-defendant Toombs and that counsel did not expect that Mr. Bennett would provide any information about Defendant Williams to the jury, which she had discussed with Mr. Minix. She did not state to the Court that the Parties had an agreement. Mr. Minix added that he had discussed the government's representation with Defendant Williams and acknowledged the truthfulness of government counsel's representation to the Court. (Doc. 259 at 5–6.) It was only immediately before Mr. Bennett's testimony at trial that Mr. Minix referred to the government counsel's representation as an "agreement." (Doc. 323 at 158.) Counsel for the

[2] The Eleventh Circuit has adopted as binding precedent all decisions issued by the former Fifth Circuit prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F. 2d 1206, 1209 (11th Cir. 1981) (en banc).

government reconfirmed that it would not ask Mr. Bennett questions about Defendant Williams. The Court acknowledged that was the "understanding." (*Id.*)

The Court finds that Mr. Minix had other reasons—aside from the asserted divided loyalties resulting from his simultaneous representation—to forgo cross-examination of Mr. Bennett. Mr. Minix testified that even if Mr. Bennett was not his client at the time, he would not have handled the opportunity to cross-examine Mr. Bennett differently. (Doc. 412 at 17.) At trial, Mr. Minix did not cross-examine four other government witnesses. (*Id.*) According to Mr. Minix, he did not cross-examine Mr. Bennett and four other government witnesses because they did not testify about the culpability of Defendant Williams. (*Id.*; Doc. 414-1 at 8.) However, Mr. Minix cross-examined one witness, Will Rodgers of the Webster County Sheriff's Office, who did not mention Defendant Williams. (Doc. 413 at 20, *citing* Doc. 323 at 105.) During the brief cross-examination of Mr. Rodgers, Mr. Minix asked whether Mr. Rodgers had ever seen or heard of Defendant Williams before, to which Mr. Rodgers confirmed he had not. (*Id.*) Mr. Minix acknowledged that there would be no need to consult with the government regarding a possible conflict if he did not simultaneously represent Mr. Bennett and Defendant Williams. (Doc. 412 at 18.) His discussions with the government served to avoid any possible conflict of interest. (*Id.* at 32.) However, he did not cross-examine Mr. Bennett primarily because of his trial strategy of choosing not to cross-examine witnesses who did not implicate his client. (*Id.* at 18, 22.)

CONCLUSIONS OF LAW

The Eleventh Circuit clearly outlined the relevant case law this Court must apply in determining whether Mr. Minix's conflict resulted in an adverse effect. As the Circuit Court has determined there was a conflict, the Court proceeds to the issue of adverse effect, not merely an effect. An actual conflict is a "conflict [that] adversely affected his counsel's performance." *Mickens v. Taylor*, 535 U.S. 162, 174 (2002). As an initial matter, to prove adverse effect, Defendant Williams must point to some "plausible alternative defense strategy or tactic that might have been pursued." *Freund v. Butterworth*, 165 F.3d 839, 860 (11th Cir. 1999). "To be 'plausible,' the alternative defense strategy or tactic must have been "reasonable under the facts. … [But Defendant Williams] need not show that the defense

would necessarily have been successful [if the alternative strategy or tactic] had been used[;] rather he only need prove that the alternative possessed sufficient substance to be a viable alternative." *Id.* Defendant "must show some link between the … conflict and the decision to forgo the alternative strategy of defense. In other words, he must establish that the alternative defense was inherently in conflict with and not undertaken due to [Mr. Minix's] other loyalties or interest." *Id.* A defendant must "point to specific instances in the record which suggest an impairment or compromise of his interest for the benefit of another party." *Porter v. Singletary*, 14 F.3d 554, 561 (11th Cir. 1994). Defendant must establish "adverse effect" but "need not demonstrate prejudice in order to obtain relief." *Cuyler v. Sullivan*, 446 U.S. 335, 349–50 (1980).

The government contends that Defendant Williams failed to show adverse effect because cross-examination of Mr. Bennett would not have been helpful and not cross-examining Mr. Bennett did not harm Defendant Williams. (Doc. 414-1 at 9.) The government maintains that Mr. "Minix's decision to forego cross-examination of [Mr.] Bennett was a strategically appropriate decision to make." (*Id.* at 11.) In Response, Defendant Williams argues that the government urges the Court to reach a conclusion previously rejected by the Eleventh Circuit. (Doc. 416 at 2.) Defendant Williams emphasizes and asserts that to show adverse effect "[t]he question is not whether Mr. Minix's refusal to cross-examine his own client was a reasonable strategic decision, but instead whether there was 'some link' between the conflict and the decision to forgo cross-examination." (*Id.* at 3.) Defendant Williams contends in part that: (1) "[b]ecause [Mr.] Minix could not advocate for one client without simultaneously damaging the interests of his other client, his loyalties were inherently in conflict, which is sufficient to meet the adverse effect requirement"; and (2) the transcript of the initial discussion regarding a potential conflict of interest—not included in the prior appellate record—demonstrates that Mr. Minix's refusal to cross-examine his own client was due to his divided loyalties, adversely affecting his performance at Defendant Williams' trial. (Doc. 413 at 14–21.) In Response, the government argues that Mr. Minix's decision not to cross-examine Mr. Bennett was not due to his dual representation, but

because Defendant Williams' criminal liability was not implicated by Mr. Bennett's testimony. (Doc. 415 at 3.)

Here, the choice of strategies was: (1) cross-examine Mr. Bennett solely to emphasize his post-detention deception for the purpose of impeachment or (2) decline to cross-examine Mr. Bennett at all because he did not implicate Defendant Williams. When counsel for Defendant's co-conspirator cross-examined Mr. Bennett, he did not elicit any information regarding Mr. Bennett's obstruction of justice enhancement.[3] At that point, Mr. Minix could have cross-examined Mr. Bennett and questioned him about his post-detention conduct that resulted in the denial of a guideline deduction for acceptance of responsibility. Defendant Williams points to Mr. Bennett's letter to co-defendant Toombs as a subject of available cross-examination to show deceptive conduct on Mr. Bennett's part, arguably further bringing his credibility into question. The Eleventh Circuit notes that "[i]mpeaching Mr. Bennett with his obstructive conduct (which involved deception) would have at least served the purpose of undermining his credibility (and possibly a portion of the government's case)." (Doc. 400 at 18.) However, it is questionable whether cross-examination in full context was indeed plausible, or reasonable under the circumstances. The Circuit Court notes that Mr. Bennett aided the government in establishing a conspiracy. (*See id.* at 7.) However, no prima facie case against Defendant Williams could be established based on Mr. Bennett's testimony. The government relied on other witnesses and evidence to support Defendant Williams' alleged participation in the conspiracy. Further, there are risks associated with cross-examining a witness who does not implicate one's client. *See Stevenson v. Newsome*, 774 F.2d 1158, 1563 (11th Cir. 1985) (noting that there was no reason for an attorney to impeach a witness who did not implicate the defendant.) It is not implausible that Mr. Minix's cross-examination of Mr. Bennett was "likely to backfire." *Mickens*, 535 U.S. at 178–79 (Kennedy, J., concurring) ("[A] theoretical conflict does not establish a constitutional violation, even when the conflict is one about which the trial judge

[3] Mr. Bennett received an obstruction of justice enhancement at his sentencing in early 2014 because he sent a letter to Defendant Williams' alleged co-conspirator Toombs asking him to participate in and market, for payment, a cooperation-for-hire scheme to inmates seeking sentence reductions. Specifically, Mr. Bennett was denied a guideline deduction for acceptance of responsibility based on his post-detention conduct.

should have known"). The question is whether cross-examination was "realistically available" to Mr. Minix. *Freund*, 165 F.3d at 867. If Mr. Minix cross-examined Mr. Bennett, he would risk giving Mr. Bennett the opportunity to implicate Defendant Williams regarding the charged conduct. Under the same circumstances, the same risk would arise for counsel who was not conflicted. At the moment Mr. Minix decided to forgo cross-examination of Mr. Bennett, he had to decide whether to accept such a risk for Defendant Williams if he attempted to further impeach Mr. Bennett. Based on the Court's review, conflict-free counsel would have chosen to forgo cross-examination of Mr. Bennett because he did not implicate Defendant Williams. *See id.* at 868. Conflict-free counsel would not likely accept an avoidable risk that was likely or even possibly likely to backfire. Therefore, taking into account the risk, cross-examination of Mr. Bennett was not a reasonable alternative under the facts and in those circumstances.

In its remand, the Circuit Court, citing *Mickens*, stated: "The question is whether 'the verdict [is] unreliable [irrespective of whether] *Strickland* prejudice c[ould] be shown.'" 535 U.S. at 173. Thus, this Court must consider whether the plausible alternative strategy was inherently in conflict, that is, resulted in an adverse effect on counsel's performance. It must view the alternative strategy and the strategy chosen by counsel. In order to determine if there is an inherent conflict, the Court must identify the specific nature and substance of the underlying interests of the relevant parties as shown by the evidence and Record, not merely identify a theoretical inherent conflict. Ultimately the question is, did counsel's choice result in an adverse effect that resulted in the verdict in Defendant Williams' case being unreliable? Assuming cross-examination of Mr. Bennett was a reasonable alternative strategy, we must next examine whether Mr. Minix's decision to forgo cross-examination of Mr. Bennett was linked to his simultaneous representation of Defendant Williams and Mr. Bennett, that is, were the interests of Mr. Bennett and Defendant Williams, inherently in conflict?

Defendant Williams fails to establish that defense counsel's decision to forgo cross-examination was linked to the actual conflict. The review and evaluation of the factual scenario here, to no small degree, is made difficult because in the context of simultaneous representation, there were at least two possible reasons Mr. Minix chose not to cross-

examine Mr. Bennett: (1) The "agreement" with the government that the government had not and would not question Mr. Bennett regarding Defendant Williams' involvement in the charged conduct, which Defendant Williams argues is the only issue, and (2) Mr. Minix's decision upon the conclusion of Mr. Bennett's testimony not to cross-examine when Mr. Bennett in fact did not give testimony relating to Defendant Williams. It is the latter which Mr. Minix states as his actual reason not to cross-examine Mr. Bennett within the specific circumstances of Mr. Bennett's testimony at trial. This latter choice was prohibited only if Mr. Bennett's and Defendant Williams' interests were inherently in conflict.

The circumstances surrounding the alternatives involved a seven (7) day trial and testimony of several other witnesses. As to Mr. Bennett, the evidence included Mr. Bennett's plea agreement, his sentence, admitted guilt, the fact that he had appealed his sentence, and his admitted desire that his testimony at Defendant Williams' trial against his co-defendant, Mr. Toombs, would result in a reduction of his own sentence. Thus, Mr. Bennett's testimony was impeached in the first instance and on multiple grounds, including additional prior felony convictions.

At the evidentiary hearing, Mr. Minix testified that his decision not to cross-examine Mr. Bennett would not have been handled differently if he had not been a client and that his reason for not cross-examining Mr. Bennett was because he did not implicate Defendant Williams, not because of the government's representation that it would not question Mr. Bennett about Defendant Williams. (Doc. 412 at 17, 27.) At trial, Mr. Minix also did not cross-examine four other government witnesses because they too did not give culpable testimony about Defendant Williams' alleged role in the conspiracy. (Doc. 412 at 17; Doc. 414-1 at 8.) Mr. Minix did not represent any of the other four government witnesses he did not cross-examine. If Mr. Minix did not represent Mr. Bennett and chose not to cross-examine him, there would be no merit to Defendant Williams' claim. His choice of trial tactic would be plausible and reasonable. Thus, it is only Mr. Minix's simultaneous representation of Mr. Bennett and Defendant Williams that even places his decision to forgo cross-examination of Mr. Bennett in question.

The Record in this case not only identifies the subject of the alternative strategy but clearly identifies the subject and particulars of the cross-examinee's appeal, allowing this Court to review and determine if the Parties' interests were actually inherently in conflict. Mr. Bennett's appeal, to the extent it was relevant, concerned Mr. Bennett's assertion that the trial Court should not have denied crediting him for acceptance of responsibility for undisputed post-detention deceptive conduct, not that he denied the conduct itself, which he acknowledged at Defendant Williams' trial. This conclusion is directly supported by Mr. Bennett's testimony as follows when cross-examined at trial by counsel for Defendant Williams' co-defendant:

> MR. HAMILTON: If your case is appealed, the Court of [A]ppeals might adjust your sentence?
> MR. BENNETT: Yes, sir.
> MR. HAMILTON: The other way is to cooperate with the government, correct?
> MR. BENNETT: Yes, sir.
> MR. HAMILTON: And you've chosen to cooperate with the government; is that right?
> MR. BENNETT: Yes, sir.
> MR. HAMILTON: So in your plea agreement that was introduced into evidence as Government's 82 --
> THE COURT: Just a minute, Mr. Hamilton. The Court doesn't have an issue with you or anybody, but I want the jury to understand something. When he says the Court of Appeals may reduce a sentence, the Court of Appeals does not routinely reduce sentences to see whether they agree or not. They may find that there was an error by the Court or that the Court did not properly make that determination and sometimes they will just send it back. Sometimes they will determine what they believe to be, under limited circumstances, be the proper sentence. So it is not like a person can be sentenced in this Court and just go ask for no reason for another Court to give them a different sentence than what they got. It has to be based on some procedural or legal reason based on an appeal. I just want to make sure that you understand it. It can happen, but it doesn't happen as a -- as a routine review or as a second choice, so to speak, behind this Court's sentence. You may continue, Mr. Hamilton.

(Doc 323 at 176–177.) In fact, Mr. Bennett admitted to deceptive conduct and further clarified his position on the government's redirect:

> MS. McEWEN: Mr. Bennett, you currently have an appeal of your sentence in place to the Court of Appeals, don't you?
> MR. BENNETT: Yes, ma'am.

MS. McEWEN: That appeal deals solely with the issue of acceptance of responsibility; is that right?
MR. BENNETT: Yes, ma'am.
MS. McEWEN: And so you didn't get any credit for acceptance of responsibility in your case, did you?
MR. BENNETT: No, ma'am.
MS. McEWEN: And you don't believe that that was correct, you are asking the Court of Appeals to look over the Judge's decision as it relates your acceptance of responsibility?
MR. BENNETT: Yes, ma'am.
MS. McEWEN: And, in fact, you didn't receive acceptance of responsibility in this case for what reason? Why did you not receive your acceptance?
MR. BENNETT: Well, I had -- I wrote a letter explaining what I -- you know, the tactic that I was -- that supposed to been done, and I reckon it was written up wrong and read wrong, so.
MS. McEWEN: Who was the letter to?
MR. BENNETT: Mr. Toombs.
MS. McEWEN: And why were you writing a letter to Mr. Toombs that ultimately caused you to lose your acceptance of responsibility?
MR. BENNETT: Basically because I involved a payment that I would give him to do what was required -- what was asked for me, but I didn't know that it was wrong for me to involve.
MS. McEWEN: What was it you were asking Mr. Toombs to do for you that you were going to give him this side payment for?
MR. BENNETT: Make a controlled buy from some local drug dealers.
MS. McEWEN: And you had written that out in a letter after you plead [sic] guilty in this case; is that right?
MR. BENNETT: Naw. It was before.
MS. McEWEN: And what was it that you thought that you might get if Mr. Toombs made some controlled buys for you from local drug dealers?
MR. BENNETT: Well, it was explained to me that if you can get controlled buys or family members or loved ones to cooperate on your behalf that you probably can get a sentence reduction.
MS. McEWEN: And having that understanding, the person that you asked to do that for you was Mr. Toombs?
MR. BENNETT: Yes, ma'am.
MS. McEWEN: Nothing further, Your Honor.
THE COURT: All right. Any further recross, Mr. Hamilton?

(*Id.* at 181–183.) As Mr. Bennett confirmed, his appeal focused on the district court's decision regarding his acceptance of responsibility, not a denial of the facts underlying the district court's decision or of the facts surrounding his own case or the validity of his plea of guilty. *United States v. Bennett*, 614 F. App'x 403, 404–05 (11th Cir. 2015).

Unlike the parties in *McConico v. State of Alabama*, as cited by the Circuit Court, Mr. Bennett's appeal was not a challenge to facts found by the sentencing Court related to allegations in Defendant Williams' trial, but a challenge to the correctness of the Court's imposition of a sentencing enhancement for post-detention conduct resulting in the denial of acceptance of responsibility. 919 F.2d 1543. Thus, the alleged conflict of interest issue before the Court is not the classic situation where the subject of the cross-examination of the testifying witness was the same alleged or related conduct which was the subject of the defendant's trial. No actual opposing litigation position between the subject of Mr. Bennett's appeal and Defendant Williams' charged conduct was present with regard to Mr. Bennett's testimony or admitted post-detention conduct. The Record, including hearing on remand, does not establish that the interests of Mr. Bennett's appeal and Defendant Williams' defense were, in fact, inherently in conflict.

Defendant Williams argues that the "agreement" that the government would not ask Mr. Bennett any questions relating to Defendant Williams, and that alone, led to Mr. Minix's decision not to cross-examine Mr. Bennett, thus in his view, conclusively creating an adverse effect. (Doc. 416 at 4.) This reasoning, however, does not coincide with and does not erode Mr. Minix's decision to forgo cross-examination of four other government witnesses whose testimony similarly did not implicate Defendant Williams or delegitimize the strategy he chose. Contrary to Defendant Williams' argument, cross-examination of Mr. Bennett regarding his appeal would not necessarily threaten it. His appeal did not assert a denial of conduct related to the charged conduct at Defendant Williams' trial. His appeal was about unrelated post-detention conduct, which he has not denied, used to enhance his sentence. Put simply, his appeal challenged whether an enhancement by way of the denial of acceptance of responsibility for that conduct was correct.

The Court finds that Mr. Minix could plausibly and reasonably choose the strategy not to cross-examine a witness who had not given testimony adverse to his client where the subject of the cross-examination was not inherently in conflict with Defendant Williams' defense. He chose the same strategy with respect to four other such witnesses and as to Mr. Bennett, avoiding the inherent risk of cross-examining an already impeached witness who

had not testified adversely to his client's interest. "[I]t matters not what a conflict-free lawyer *could* have done, but what he or she *would* have done." *Freund v. Butterworth*, 165 F.3d at 869. The Record demonstrates that Mr. Bennett did not provide any evidence against Defendant Williams. It is not simply any subject cross-examination that results in an adverse effect, but only one that is inherently in conflict. Mr. Bennett's appeal, as shown by the facts and Record was not inherently in conflict with Defendant Williams' defense. While the concern over what trial counsel at least perceived as a potential conflict led Mr. Minix at trial to confirm with the government that Mr. Bennett would not be asked any questions regarding Defendant Williams, that concern did not define the actual conflict. Neither was it the reason Mr. Minix did not cross-examine Mr. Bennett.[4]

Defendant Williams must prove by the preponderance of evidence that Mr. Minix would have cross-examined Mr. Bennett, but for his simultaneous representation of Mr. Bennett. He must identify an inherent conflict of interest. Defendant Williams fails to meet his burden to show a sufficient link between the actual conflict identified and a decision based on the conflict to forgo the alternative strategy of defense. Mr. Minix's trial strategy

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[4] Although it is clear that Mr. Minix wanted to avoid any possible conflict, a close review of his hearing testimony also discloses that he had not actually concluded that any cross-examination of Mr. Bennett was an inherent conflict:

Q: Mr. Minix, what you just read into the record, you agree that the goal of your discussions with the government was to avoid any possible conflict of interest?
A: With the government and with the Court.
Q: Right, that the goal is to avoid any possible conflict of interest?
A: That is correct.
Q: And do you agree that it would have been a conflict of interest for you to cross examine your own client? You do not agree that would be a conflict of interest for you to cross examine a client that you were currently representing?
A: I'm not really sure how to answer that. You know, Mr. Bennett, I was representing him on appeal, and I'm not sure, I just don't think so.
Q: You don't think it would be a conflict of interest for you to cross examine your own client at a trial?
A: Well, your –it possible [sic] could. I'm just not sure, but, you know, the whole purpose of the discussion with Ms. McEwen and the two discussions with the Court was to avoid a conflict of interest. I had –as soon as I found out Mr. Bennett was going to testify, you know, I did everything that I thought I needed to do to avoid that conflict; number one, talking to Mr. Williams about it, assuring from the government what kind of questions she was going to have, having two – two conversations on the record with the Court about that. (Doc. 412 at 32–33.)

Mr. Minix's attempt to avoid any possible conflict at trial does not change the character of the actual conflict. Instead, the question of the existence of an inherent conflict of interest is determined by the actual interests of the Parties as shown by the Record.

motivated his decision. Adverse effect, in determining unreliability of the verdict, must be determined by the actual underlying nature of the source of conflict as shown by the Record of the case and its further development on remand. The Record supports the finding that the verdict is not unreliable because Mr. Minix did not choose the alternative strategy due to an inherent conflict. Therefore, Mr. Minix's conflict, as revealed by the Record, did not result in an adverse effect on his performance.

The Clerk of Court of the District Court for the Middle District of Georgia is **DIRECTED** to transmit this Order, along with a supplemental Record—including the transcript of the remand hearing (Doc. 412) and the transcript of proceedings as to Tony Wynn (Doc. 259)—to the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit.

SO ORDERED, this 30th day of August, 2019.

/s/ W. Louis Sands
W. LOUIS SANDS, SR. JUDGE
UNITED STATES DISTRICT COURT

APPENDIX D: Order denying Petition for Panel Rehearing or for En Banc Consideration.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-12130-GG

D.C. Docket No. 1:13-cr-00051-WLS-TQL-4

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

STEPHON WILLIAMS,
a.k.a. Corndog,
a.k.a. Lieutenant,
a.k.a. L.T.,
DONTERIUS TOOMBS,

Defendants - Appellants.

Appeal from the United States District Court
for the Middle District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: JORDAN and TJOFLAT, Circuit Judges, and HUCK,* District Judge.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

*Honorable Paul C. Huck, United States District Judge for the Southern District of Florida, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

May 05, 2020

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 15-12130-GG
Case Style: USA v. Stephon Williams
District Court Docket No: 1:13-cr-00051-WLS-TQL-4

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Joseph Caruso, GG
Phone #: (404) 335-6177

REHG-1 Ltr Order Petition Rehearing