

No. 20-5304

IN THE

SUPREME COURT OF THE UNITED STATES

STEPHON WILLIAMS, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO

THE ELEVENTH CIRCUIT COURT OF APPEALS

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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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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PETITIONER’S REPLY TO BRIEF FOR UNITED STATES IN OPPOSITION

Petitioner Stephon Williams respectfully submits this Reply in support of his petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case. This Court should grant certiorari in this case in order to address a circuit split regarding the proof that a defendant must show in order to establish “adverse effect” as required for a claim that his Sixth Amendment right to conflict-free counsel was violated.

I. With the opinion below, the 11th Circuit established a “direct evidence” test that is in conflict with the standards used by other circuits.

The Eleventh Circuit rejected Mr. Williams’ conflict of interest claim finding that there was no “direct evidence” that counsel’s simultaneous representation of Mr. Williams and a government witness in his trial had an adverse effect on the representation. *United States v. Williams*, 805 F. App’x 672, 689-09 (11th Cir. 2020); Appendix A to Petition for Writ of Certiorari at 35-37. Specifically, the court held that, while counsel did labor under a conflict of interest, and there was evidence that counsel could have used to attack his client-witness’s credibility through cross-examine that counsel chose not to utilize, Mr. Williams’ claim failed because “there is no direct

evidence in the record establishing the necessary 'link' [between the conflict and counsel's decision to forgo cross-examination] to complete the showing of adverse effect." *Williams*, 805 F. App'x at 689; Appendix A to Petition for Writ of Certiorari at 35.

The Eleventh Circuit's demand that a defendant show "direct evidence" that counsel's decision was due to the conflict of interest is in direct conflict with the standard employed by other circuits. The Sixth Circuit in particular has explicitly stated that "[a] defendant or habeas petitioner does *not* have to produce direct evidence, such as the lawyer's testimony, that the lawyer chose to do one thing rather than another in order to accommodate another client's interests. Causation can be proved circumstantially, through evidence that the lawyer did something detrimental or failed to do something advantageous to one client that protected another client's interests." *Boykin v. Webb*, 541 F.3d 638, 644 (6th Cir. 2008) (emphasis added).

Similarly, the Fourth Circuit has rejected the idea that the lawyer's testimony as to his subjective reasons for his conflicted decisions can refute objective evidence that the lawyer's decision was in fact linked to the conflict of interest. See *United States v. Nicholson*, 611 F.3d 191, 212 (4th Cir. 2010)

("Nevertheless, the court erred by rejecting Nicholson's proof on the link issue and instead relying on Babineau's testimony about his subjective motives to withhold relief from Nicholson on his actual conflict of interest claim."). Likewise, the Second Circuit has relied on circumstantial evidence to show the requisite adverse effect. *United States v. Williams*, 372 F.3d 96, 106-07 (2d Cir. 2004) (finding that the defendant demonstrated adverse effect by showing that his conflicted counsel failed to make any significant effort to negotiate a plea or cooperation agreement on his behalf).

The Eleventh Circuit's "direct evidence" test is therefore much more onerous than the standards used in other circuits to grant relief where an attorney represented the defendant while laboring under a conflict of interest.¹ Had Mr. Williams been convicted in the Sixth, Fourth, or Second Circuit, his convictions would have been vacated based on his counsel's actual conflict of interest. Indeed, the Eleventh Circuit found that Mr. Williams had shown that his counsel chose to forgo a viable line of cross-examination when confronted with the opportunity to cross-examine his own client who was testifying in Mr. Williams' trial in hopes of earning a

¹ While the Government points to *United States v. Infante*, 404 F.3d 376 (5th Cir. 2005) as a case that resolved this issue similarly to the Eleventh Circuit, the district court's decision on adverse effect in that case was not appealed. It is therefore unknown how the Fifth Circuit would have ruled on the issue.

sentence reduction. This showing would be sufficient to show adverse effect in these other circuits.

It is only because the Eleventh Circuit imposed an almost impossible burden that Mr. Williams is still serving his sentence on this conviction. Under the Eleventh Circuit's standard, the conflicted attorney is essentially required to admit to his own deficient performance, which allows the lower courts to ignore the objective evidence that demonstrates an actual conflict of interest, like the overwhelming evidence present in this case. Therefore, the Eleventh Circuit's "direct evidence" requirement should be rejected and this Court should grant the writ to clarify the standard for showing adverse effect in a conflict of interest claim.

II. The 11th Circuit opinion also appears to require that the defendant show that counsel's conflicted decision was objectively unreasonable, a standard used by the Eighth Circuit.

In evaluating adverse effect, the Eleventh Circuit accepted the district court's finding that Mr. Williams' conflicted counsel had a trial strategy that he would not cross-examine witnesses who did not directly implicate Mr. Williams (although the Eleventh Circuit noted that counsel did, in fact, cross-examine three other witnesses who did not mention Mr. Williams), and that counsel would have applied this strategy even absent the conflict. *Williams*,

805 F. App'x at 689; Appendix A to Petition for Writ of Certiorari at 34-35. The Eleventh Circuit's opinion thus appears to impose a burden similar to the one that has been used by the Eighth Circuit: "If a reasonable attorney would have adopted the same trial strategy absent a conflict, [a defendant] cannot show [his lawyer's] performance was *adversely* affected by that conflict." *Caban v. United States*, 281 F.3d 778, 786 (8th Cir.2002) (emphasis in original).

This standard is clearly far more demanding than utilized by the circuits discussed above. It is also far more onerous than the burden this Court imposed in *Sullivan v. Culyer*, 466 U.S. 335 (1980), where the Court held that the burden for proving ineffective assistance in a conflict of interest claim is *lesser* than that required under *Strickland*. See *Mickens v. Taylor*, 535 U.S. 162, 174, 122 S.Ct. 1237, 1245 (1980) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984)).

III. The "direct evidence" test is binding precedent in the Eleventh Circuit.

Notably, although *Williams* is an unpublished decision, the Eleventh Circuit has imposed this "direct evidence" standard in prior published opinions. Indeed, the *Williams* court cited the Eleventh Circuit's published opinion in *Porter v. Singletary*, 14 F.3d 554 (11th Cir. 1994) in denying Mr.

Williams' claim, noting that in that case "there was no affirmative evidence to contradict" the attorney's testimony that his failure to cross-examine a former client was not due to the conflict of interest. *Williams*, 805 F. App'x at 689; Appendix A to Petition for Writ of Certiorari at 36. The "direct evidence" test used in this case is thus binding precedent in the Eleventh Circuit. Accordingly, this Court should not decline to grant the writ here simply because the instant decision was not published.

IV. Conclusion

Because the circuits have established varying standards for deciding the important issue of whether a defendant's Sixth Amendment rights have been violated due to his counsel laboring under a conflict of interest, this Court should grant the writ and provide crucial guidance to all lower courts on the correct standard for finding a conflict of interest that violates a defendant's Sixth Amendment right to the effective assistance of counsel.

Dated: This 29th day of January, 2021.

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

This document contains 1,235 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
Reply upon opposing counsel by United States Mail to:

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Dated: This 29th day of January, 2020.

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