No. 20-1356

# In the Supreme Court of the United States

EDUARDO LOPEZ, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## QUESTIONS PRESENTED

1. Whether petitioner is entitled to challenge on appeal the district court's pre-plea order disqualifying defense counsel based on conflicts of interest, notwithstanding petitioner's unconditional guilty plea.

2. Whether, if petitioner's disqualification-of-counsel challenge was preserved for appeal, the district court abused its discretion in disqualifying defense counsel.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-4) is not published in the Federal Reporter but is reprinted at 829 Fed. Appx. 949. The order of the district court (Pet. App. 5-7) is not published in the Federal Supplement but is available at 2019 WL 1724048. The order of the magistrate judge (Pet. App. 8-17) is reported at 374 F. Supp. 3d 1326.

## JURISDICTION

The judgment of the court of appeals was entered on November 19, 2020. The petition for a writ of certiorari was filed on March 22, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Georgia, petitioner

was convicted of conspiring to possess with the intent to distribute at least 500 grams of methamphetamine, in violation of 21 U.S.C. 841(b)(1)(A) and 846. Judgment 1. He was sentenced to 156 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-4.

1. In September 2018, a Drug Enforcement Administration task force began investigating a Mexico-based drug-trafficking and money-laundering organization operating in the Atlanta area. D. Ct. Doc. 1, at 7 (Feb. 13, 2019) (Complaint). As part of the investigation, agents obtained a state-court warrant and intercepted phone calls of petitioner, as well as Fredrico Pacheco-Romero and Carlos Martinez, indicating that the three of them were trafficking and distributing methamphetamine. Complaint 2, 7-17. In particular, the investigation revealed that petitioner received a shipment of liquid methamphetamine on February 2, 2019, which others then manufactured into crystal methamphetamine. Complaint 12-13. The investigation also revealed that petitioner received an additional delivery of liquid methamphetamine on February 8, 2019, about 15 kilograms of which was "cooked" into crystal methamphetamine. Complaint 16-17.

On February 9, 2019, law-enforcement officers executed search warrants at the residences of petitioner, Pacheco-Romero, Martinez, and others. Complaint 17-21. At Pacheco-Romero's residence, agents found between $150,000 and $250,000 in cash, as well as firearms and methamphetamine residue on the master bathroom toilet. Complaint 18-19. At Martinez's residence, agents similarly found a large amount of currency, and Martinez's phone contained pictures of methamphetamine that matched photos intercepted

over the wiretap. Complaint 18. At petitioner's home, agents located "scattered cash," surveillance cameras, and a money counter. Complaint 20. And at another address associated with petitioner and his confederates, agents located approximately 100 pounds of a substance that field-tested positive as methamphetamine, as well as numerous boxes of one-gallon Ziploc bags containing suspected methamphetamine. Complaint 19-20. On the same property, agents also located a "shutdown methamphetamine conversion lab." Complaint 20.

2. A federal grand jury indicted petitioner and five codefendants on a single count of conspiring to possess with the intent to distribute at least 500 grams of methamphetamine, in violation of 21 U.S.C. 841(b)(1)(A) and 846. Indictment 1-2.

The case was referred to a magistrate judge, and a single pair of defense attorneys indicated their intention to represent all six codefendants. See D. Ct. Doc. 60 (Feb. 28, 2019). The magistrate judge scheduled a hearing pursuant to Federal Rule of Criminal Procedure 44 to inquire about the propriety of the proposed joint representation, in light of any potential conflicts of interest that it might generate. See D. Ct. Doc. 74 (Mar. 8, 2019). Rule 44 provides that:

> The court must promptly inquire about the propriety of joint representation and must personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless there is good cause to believe that no conflict of interest is likely to arise, the court must take appropriate measures to protect each defendant's right to counsel.

Fed. R. Crim. P. 44(c)(2).

The government thereafter moved to disqualify the two defense attorneys from representing any of the defendants, on the ground that their representation would likely produce conflicts of interest. D. Ct. Doc. 70 (Mar. 12, 2019). The magistrate judge conducted an ex parte conference with defense counsel and each defendant to explore the propriety of a joint representation, and each defendant executed a written waiver affirming that he wanted to be represented by the two identified lawyers. See Pet. App. 10.

The magistrate judge then granted the government's motion to disqualify that pair of defense attorneys. Pet. App. 8-17. The magistrate judge explained that, "[a]lthough a defendant has a presumptive right to be represented by the attorney of his choice, this right is not absolute, but is qualified by the judiciary's independent interest in ensuring that the integrity of the judicial system is preserved and that trials are conducted within ethical standards." *Id.* at 10 (citation and internal quotation marks omitted). The magistrate judge observed that, under this Court's precedent, "counsel may be disqualified from representing a defendant where an actual, or even potential, conflict of interest is present." *Ibid.* (citing, *inter alia*, *Wheat* v. *United States*, 486 U.S. 153, 164 (1988)).

Here, the magistrate judge determined that "disqualification of [the two attorneys] and their firm as counsel for all defendants [was] required" because of a "serious potential, if not actual, conflict of interest in their joint representation of all six defendants." Pet. App. 11. The magistrate judge explained that the criminal complaint described differing roles for each defendant in the conspiracy, "which create[d] a significant potential conflict of interest from joint representation

because each defendant does not stand on equal footing with respect to their potential culpability and opportunity to negotiate a resolution of the pending charges against them," especially in exchange for testimony against their codefendants. *Ibid.* The magistrate judge additionally found that "[i]f the defendants choose to go to trial," another "serious potential conflict of interest" would likely arise, especially if any defendant elected to give testify in his own defense that could inculpate other codefendants. *Id.* at 13. In that circumstance, the defense attorneys "would be faced with the prospect of examining or cross-examining a witness whom [they] represent[ ] and whose interest lies in direct conflict with [their] other client[s]." *Ibid.* (citation omitted); see *id.* at 13-14. Against those potential or actual conflicts, the magistrate judge perceived no strategic advantage for the defendants from the proposed joint representation. See *id.* at 12, 16 n.6.

The magistrate judge further found that disqualification was appropriate, because both attorneys were presumed to have received confidential communication from the defendants during their representation up to that point, such that they could "have 'divided loyalties that prevent [them] from effectively representing the defendant[s].'" Pet. App. 13 (citation omitted; brackets in original). And the magistrate judge found that, in light of the "very obvious" actual or potential conflicts of interest from the proposed joint representation, the defendants' willingness to waive the conflict could not "'ensure the adequacy of representation, * * * protect the integrity of the court, [or] avoid future attacks over adequacy of waiver and fairness of trial.'" *Id.* at 15-16 (citation omitted); see *Wheat*, 486 U.S. at 163 (holding

that "court[s] must be allowed substantial latitude in refusing waivers of conflicts of interest").

The district court subsequently overruled the defendants' objections to the magistrate judge's disqualification order. Pet. App. 5-7. The court explained that the magistrate judge's order adheres to this Court's precedent and "the text of" Rule 44(c)(2), both of which require an inquiry into "whether the conflict is 'likely' or whether there is a 'serious potential' for conflict, not whether the conflict is actual or provable at the time of disqualification." *Id.* at 6 (quoting Fed. R. Crim. P. 44(c)(2) and *Wheat*, 486 U.S. at 164). The court found it "evident from the record that there are at least serious potential conflicts—if not actual ones"—from a joint representation in this case, and that the magistrate judge had "correctly considered the conflict potentials * * * and determined that waivers were not an appropriate remedy." *Ibid.*

3. Petitioner pleaded guilty to the sole count charged against him. See D. Ct. Doc. 218 (Dec. 11, 2019). Before accepting the guilty plea, the district court engaged in an extensive colloquy pursuant to Federal Rule of Criminal Procedure 11. See Pet. App. 21-48. The court ensured that petitioner understood that he had the right to plead not guilty and to have a trial. *Id.* at 26-29. During the colloquy, petitioner acknowledged that, although the government had offered him at least two potential plea agreements, he had decided to plead guilty without an agreement. *Id.* at 43-45. Petitioner also confirmed that, if he wished to go to trial and "had some falling out with" his current lawyer, he could hire his own lawyer, or the court would appoint one at no cost. *Id.* at 28. Petitioner agreed that he was satisfied with the services that his attorney had provided. *Id.* at 42.

The district court informed petitioner during the plea colloquy that "the only rights" that he would "keep after a plea of guilty" are the right to have a lawyer advise and represent him at sentencing, and "to appeal any legal defect in [his] plea or sentence." Pet. App. 29-30. Petitioner stated that he understood those limitations on his rights. *Id.* at 30. He affirmed that he was "pleading guilty because [he was] in fact guilty," *id.* at 42, and that he was entering the plea "voluntarily and of [his] own free will," *id.* at 46.

The district court accepted petitioner's guilty plea. Pet. App. 46. The court found that the "plea of guilty is knowingly, voluntarily and intelligently made," and "is on the advice of competent counsel and has a basis of fact that comprehends each and every element of the offense charged to which [petitioner was] pleading guilty." *Ibid.* The court then sentenced petitioner to 156 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3.

4. Petitioner appealed his conviction and sentence, arguing (*inter alia*) that the district court had erred by disqualifying his original counsel. See Pet. App. 1-2. The court of appeals summarily affirmed. *Id.* at 1-4.

The court observed that it had "long held that '[a] defendant's plea of guilty, made knowingly, voluntarily, and with [the] benefit of competent counsel, waives all nonjurisdictional defects in that defendant's court proceedings.'" Pet. App. 2 (quoting *United States* v. *Yunis*, 723 F.2d 795, 796 (11th Cir. 1984)) (first set of brackets in original). And the court of appeals cited this Court's own recent observation in *Class* v. *United States*, 138 S. Ct. 798 (2018), that "[a] valid guilty plea * * * renders irrelevant—and thereby prevents the defendant from appealing—the constitutionality of case-related

government conduct that takes place before the plea is entered." Pet. App. 2 (quoting 138 S. Ct. at 805); see *id.* at 2-3 ("When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.") (quoting *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973)).

"In light of that authority," the court of appeals found "no substantial question that [petitioner] pleaded guilty knowingly and voluntarily and as a result waived the claims he presents on appeal." Pet. App. 3. The court observed that petitioner had "confirmed at his plea colloquy that he understood that he was under oath, that he was waiving his constitutional rights, and the consequences of pleading guilty," and the court emphasized the "'strong presumption' that a defendant who enters a plea after proceedings that follow the requirements of Fed. R. Crim. P. 11 does so knowingly and voluntarily." *Ibid.* (quoting *United States* v. *Gonzalez-Mercado*, 808 F.2d 796, 800 & n.8 (11th Cir. 1987)). The court further observed that, although petitioner could have preserved appellate review of his non-jurisdictional objection to the disqualification of his counsel by entering a conditional guilty plea pursuant to Rule 11(a)(2), he did not do so. *Ibid.*

**ARGUMENT**

Petitioner contends (Pet. 9-17) that the court of appeals erred in finding that his unconditional guilty plea precluded his appellate challenge to the district court's pre-plea order disqualifying his original counsel. The decision below is correct, and while two other courts of appeals reached contrary conclusions prior to this Court's

decision in *Class* v. *United States*, 138 S. Ct. 798 (2018), those decisions have been superseded by *Class* and they do not present any conflict among the courts of appeals that currently warrants this Court's review. Petitioner additionally contends (Pet. 17-36) that the district court abused its discretion in disqualifying his counsel. But even if petitioner's claim were not waived, his factbound argument lacks merit and does not warrant this Court's review. The petition for a writ of certiorari should be denied.

1. Petitioner first contends (Pet. 9-17) that the court of appeals erred by determining that his guilty plea relinquished his objection to the district court's disqualification of his original counsel. Petitioner is incorrect.

a. This Court has held that "a valid guilty plea 'forgoes not only a fair trial, but also other accompanying constitutional guarantees.'" *Class*, 138 S. Ct. at 805 (citation omitted). The plea "renders irrelevant—and thereby prevents the defendant from appealing—the constitutionality of case-related government conduct that takes place before the plea is entered." *Ibid.*; see *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973) ("[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process."). The Court in *Class* explained that generally only a narrow category of claims are not relinquished by an unconditional guilty plea: those that "would extinguish the government's power to 'constitutionally prosecute' the defendant if the claim were successful." *Class*, 138 S. Ct. at 806 (quoting *United States* v. *Broce*, 488 U.S. 563, 575 (1989)); see *id.* at 804-806. Examples of that narrow category include (1) a claim that the statute of conviction was unconstitutional, *id.* at 803 (discussing *Haynes* v. *United States*, 390 U.S. 85 (1968)), (2) a vindictive-

prosecution claim, *ibid.* (discussing *Blackledge* v. *Perry*, 417 U.S. 21 (1974)), and (3) a double-jeopardy claim, *id.* at 803-804 (discussing *Menna* v. *New York*, 423 U.S. 61 (1975) (per curiam)).

The court of appeals correctly applied those principles here in finding that petitioner's guilty plea relinquished an appeal of the district court's order disqualifying his original counsel. The district court's thorough plea colloquy makes clear that petitioner "knowingly, voluntarily, and intelligently" entered that plea. Pet. App. 46. And unlike the narrow category of claims that *Class* identified as surviving a valid guilty plea, a claim alleging that the district court abused its discretion in disqualifying counsel would not "extinguish the government's power to 'constitutionally prosecute' the defendant if the claim were successful." 138 S. Ct. at 806 (citation omitted). Regardless of whether a district court erred at an earlier stage of the proceedings by disqualifying counsel, such "case-related constitutional defects" are made "'irrelevant to the constitutional validity of the conviction'" by a guilty plea "[b]ecause the defendant has admitted the charges against him" in the plea and waived his right to a fair trial. *Id.* at 804-805 (citation omitted).

b. Petitioner's arguments to the contrary (Pet. 9-17) lack merit. He asserts that "the right to counsel of choice" is not necessarily relinquished by a guilty plea because it is a "'privilege[] which exist[s] beyond the confines of the trial.'" Pet. 9 (quoting *Class*, 138 S. Ct. at 805). Petitioner is incorrect. While the right to counsel of choice extends beyond the trial itself, nothing about that entitlement suggests that a defendant cannot waive that right by conceding his guilt and forgoing a

trial, just as a knowing and intelligent guilty plea "relinquishe[s] * * * the privilege against compulsory self-incrimination, the jury trial right, and the right to confront accusers." *Class*, 138 S. Ct. at 805.

Petitioner acknowledges that a valid guilty plea precludes the defendant from appealing "the constitutionality of case-related government conduct that takes place before the plea is entered," Pet. 9-10 (quoting *Class*, 138 S. Ct. at 805), but he contends that *Class* limited such preclusion "'to the admissibility of evidence obtained in violation of the Fourth Amendment'" and "some procedural issues, such as the grand jury selection process." Pet. 10-11 (citation omitted). That is not an accurate description of *Class*. While the Court in *Class* identified asserted Fourth Amendment and grand-jury errors as *among* the types of pre-plea issues that are relinquished by a guilty plea, the Court did not hold that *only* those pre-plea issues are relinquished. Instead, as described above (see pp. 9-10, *supra*), the Court recognized that a valid guilty plea generally relinquishes all objections to matters that occurred before the plea, except those few claims that "call into question the Government's power to 'constitutionally prosecute'" the defendant altogether. *Class*, 138 S. Ct. at 805 (citation omitted).*

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* Petitioner "submits" (Pet. 11 n.5) that his disqualification-of-counsel claim would, if successful, extinguish the government's power to prosecute him. Petitioner is incorrect. Even if his claim succeeded, he would be entitled at most to vacatur of his guilty plea and remand for new proceedings. See, *e.g.*, *United States* v. *Gonzalez-Lopez*, 399 F.3d 924, 935 (8th Cir. 2005) ("remand[ing] the case for a new trial" upon finding a violation of defendant's right to counsel of choice), aff'd and remanded, 548 U.S. 140 (2006); *United States* v. *Smith*, 618 F.3d 657, 667 (7th Cir. 2010) (similar). Petitioner's claim would not establish that "the charge [against him] is

Petitioner next asserts (Pet. 11) that his objection to the disqualification of counsel survives his valid guilty plea because an erroneous deprivation of the right to counsel of choice qualifies as a structural error. See *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 150 (2006). But "the term 'structural error' carries with it no talismanic significance as a doctrinal matter." *Weaver* v. *Massachusetts*, 137 S. Ct. 1899, 1910 (2017). "It means only that the government is not entitled to deprive the defendant of a new trial by showing that the error was 'harmless beyond a reasonable doubt.'" *Ibid.* (citation omitted). It does not mean that the error is unwaivable or that it categorically invalidates a subsequent plea. In *Tollett* v. *Henderson*, for example, this Court held that "a criminal defendant [who] pleads guilty, on the advice of counsel, * * * is not automatically entitled to federal collateral relief on proof that the indicting grand jury was unconstitutionally selected," 411 U.S. at 266, even though racial discrimination in the selection of a grand jury is a structural error, see *Vasquez* v. *Hillery*, 474 U.S. 254, 263-264 (1986).

Petitioner also asserts (Pet. 14-15) that he did not knowingly and voluntarily waive his appellate rights, because the district court failed to instruct him that the entry of a guilty plea would limit those rights. That assertion is misplaced. The principle that a valid guilty plea relinquishes most pre-plea issues applies even

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one which the [Government] may not constitutionally prosecute" at all. *Class*, 138 S. Ct. at 804 (quoting *Menna*, 423 U.S. at 63 n.2). His argument that "the government engaged in a pattern of intentional and deliberate interference with [p]etitioner's Sixth Amendment rights" that requires dismissal of the indictment with prejudice, Pet. 33; see Pet. 32-36, is unsupported by the record and was not addressed by the lower courts.

without a "conscious waiver * * * with respect to each potential defense relinquished by [the] plea of guilty." *Broce*, 488 U.S. at 573. "Relinquishment," this Court has explained, "derives not from any inquiry into a defendant's subjective understanding of the range of potential defenses, but from the admissions necessarily made upon entry of a voluntary plea." *Id.* at 573-574.

Furthermore, to the extent petitioner suggests that the district court affirmatively misled him, that fact-bound suggestion is incorrect. Petitioner expressly acknowledged at his plea colloquy that he understood that his plea waived his right to the assistance of counsel for his defense, Pet. App. 28, and that, as a consequence of pleading guilty, he would be precluded from appealing any claims except those asserting a "legal defect in [his] plea or sentence," *id.* at 30. Petitioner's disqualification-of-counsel claim, which arose before his plea, does not assert any defect in his plea or sentence. Petitioner was thus on notice at the time of his plea that he was relinquishing an appeal of the disqualification of his former counsel.

Finally, contrary to petitioner's contention (Pet. 16-17), the court of appeals did not hold that Federal Rule of Criminal Procedure 11(a)(2) establishes "the exclusive procedure for a defendant to preserve a constitutional claim following a guilty plea." Pet. 16 (quoting *Class*, 138 S. Ct. at 806). The court instead correctly identified the principle recognized in *Class*: a guilty plea waives *nonjurisdictional* defects that occurred "before the plea is entered"—like the right-to-counsel error that petitioner asserts here—unless the defendant uses the procedure in Rule 11(a)(2) to enter a conditional guilty plea. Pet. App. 2 (quoting *Class*, 138 S. Ct. at 805); see *id.* at 3 (explaining that "a defendant who

pleads guilty can preserve appellate review of a non-jurisdictional defect" by entering a conditional plea under Rule 11(a)(2)).

c. Petitioner asserts (Pet. 12-13) that this Court should grant a writ of certiorari because the decision below conflicts with decisions of other federal courts of appeals, emphasizing in particular the Fifth Circuit's decision in *United States* v. *Sanchez Guerrero*, 546 F.3d 328, 331-332 (2008), cert. denied, 556 U.S. 1172 (2009). There is no conflict that warrants this Court's review.

In the first place, with the exception of *Sanchez Guerrero*, none of the decisions cited by petitioner involved the disqualification of counsel or suggested that a claim like petitioner's here could be raised on appeal following a valid guilty plea. Moreover, each of the decisions cited by petitioner pre-dates this Court's decision in *Class*, which clarified that a guilty plea waives all but a narrow category of claims. See 138 S. Ct. at 804-805. Other courts of appeals, like the Eleventh Circuit here, have recognized that, after *Class*, "the 'fundamental distinction' between claims that survive a guilty plea" and claims that do not survive because they "challenge case-related constitutional defects that occurred prior to the entry of the guilty plea" is "whether [the] claim challenges" "the government's power to prosecute [the defendant] *in the first instance*." *United States* v. *Lozano*, 962 F.3d 773, 779 (4th Cir. 2020) (citation omitted); see *United States* v. *Chavez-Diaz*, 949 F.3d 1202, 1206-1207 (9th Cir. 2020).

In *Sanchez Guerrero*, the Fifth Circuit relied on the "structural" characterization of the asserted counsel-of-choice error to conclude that the defendant's guilty plea did not relinquish his right to appeal the district court's order disqualifying his counsel. See 546 F.3d at 331-332

(citation omitted). And the Seventh Circuit indicated similarly in *United States* v. *Smith*, 618 F.3d 657 (2010), although the government had not pressed the preclusion point in that case. See *id.* at 663-664 (stating that, if the government had pressed preclusion, the court would not have found that the defendant's challenge to the district court's denial of his motion to substitute counsel had been waived by his guilty plea). But neither court has revisited the issue in light of *Class*'s clarification that a guilty plea relinquishes asserted errors that occurred before entry of the plea and do not implicate the government's power to prosecute the defendant. See 138 S. Ct. at 805-806.

This Court's review is accordingly unwarranted here—particularly in light of the infrequency with which the issue of preclusion of a counsel-disqualification claim appears to arise. And in any event, this case would be an unsuitable vehicle for addressing that issue because it would not change the outcome of this case. As discussed below, petitioner has not identified any error in the district court's decision to disqualify his counsel in light of the obvious and significant conflicts of interest that likely would have arisen from the proposed joint representation here.

2. Petitioner's renewed contention (Pet. 17-36) that the district court erred by disqualifying his counsel was not addressed on the merits by the court of appeals, so the decision below does not conflict with any decision of another court of appeals. Even aside from that, the district court did not abuse its discretion in disqualifying petitioner's counsel, and his factbound assertion of error does not warrant this Court's review.

a. While the Sixth Amendment includes a qualified right to counsel of the defendant's choice, "the essential

aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat* v. *United States*, 486 U.S. 153, 159 (1988). Thus, when a defendant chooses to be represented by counsel, he does so subject to reasonable standards governing the qualifications and conduct of counsel, including ethical standards necessary to preserve the fairness and integrity of the administration of justice and the appearance of such fairness and integrity. *Id.* at 160. As this Court observed in *Wheat* v. *United States*, "[f]ederal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Ibid.* Accordingly, the presumption in favor of a defendant's counsel of choice "may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict." *Id.* at 164.

In *Wheat*, this Court explained "that multiple representation of criminal defendants engenders special dangers of which a court must be aware." 486 U.S. at 159. While "'permitting a single attorney to represent codefendants . . . is not *per se* violative of constitutional guarantees of effective assistance of counsel,' a court confronted with and alerted to possible conflicts of interest must take adequate steps to ascertain whether the conflicts warrant separate counsel." *Id.* at 159-160 (quoting *Holloway* v. *Arkansas*, 435 U.S. 475, 482 (1978)). The Court identified several dangers inherent in a single counsel representing multiple codefendants, including disincentives for counsel to challenge the admission of evidence prejudicial to one client but favorable to another, or to make arguments at sentencing

based on the relative involvement and culpability of other clients. *Id.* at 160. Such conflicts may also prevent defense counsel from "exploring possible plea negotiations and the possibility of an agreement to testify for the prosecution." *Holloway*, 435 U.S. at 490.

In addition, "trial courts confronted with multiple representations face the prospect of being 'whip-sawed' by assertions of error no matter which way they rule." *Wheat*, 486 U.S. at 161. "If a district court agrees to the multiple representation, and the advocacy of counsel is thereafter impaired as a result, the defendant may well claim that he did not receive effective assistance." *Ibid.* Accordingly, in light of courts' independent interest in fair and sustainable outcomes, and the overall concerns that multiple representations present, Federal Rule of Criminal Procedure 44(c)(2) directs a district court to "promptly inquire about the propriety of joint representation," to "personally advise each defendant of the right to the effective assistance of counsel, including separate representation," and to "take appropriate measures to protect each defendant's right to counsel" "[u]nless there is good cause to believe that no conflict of interest is likely to arise." See p. 3, *supra*.

This Court has observed that "[t]he evaluation of the facts and circumstances of each case under this standard must be left primarily to the informed judgment of the trial court," *Wheat*, 486 U.S. at 164, and a district court's judgment on the point is subject to review only for abuse of discretion, *id.* at 157-158. Furthermore, because a district court often must assess a potential multiple representation pretrial, before all facts are known, this Court has instructed that "the district court must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where

an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses." *Id.* at 163.

The district court correctly applied those principles here, and it acted well within its "substantial latitude" in disqualifying petitioner's original counsel. *Wheat*, 486 U.S. at 163. The court adopted, as "evident from the record," Pet. App. 6, the magistrate judge's determination that the facts and circumstances here did not give rise to "good cause to believe that no conflict of interest is likely to arise." Fed. R. Crim. P. 44(c)(2); see Pet. App. 11. On the contrary, the magistrate judge explained why defense counsels' proposal to represent all six codefendants in this charged drug-trafficking conspiracy was likely to produce "a serious potential, if not actual, conflict of interest." Pet. App. 11. The criminal complaint made clear that the defendants did "not stand on equal footing with respect to their potential culpability," which would likely have affected their "opportunity to negotiate a resolution of the pending charges against them." *Ibid.*; see *Holloway*, 435 U.S. at 490 (observing that multiple representation may prevent defense counsel from "exploring possible plea negotiations and the possibility of an agreement to testify for the prosecution"). In addition, if the defendants were to go to trial, another "serious potential conflict of interest" was likely to arise in the event that any defendant elected to testify in his own defense in a way that could be harmful to other defendants. Pet. App. 13; see also *Wheat*, 486 U.S. at 160 (noting the potential for similar conflicts).

Those well-founded concerns about conflicts of interest—conflicts that the magistrate judge found to be incapable of resolution by waiver, in light of the

court's independent obligation to ensure the adequacy of representation of all defendants, Pet. App. 15-16—amply justified the district court's decision to deny the proposed joint representation. And the magistrate judge further determined that disqualification was the necessary remedy in light of counsels' presumed awareness of confidential information pertaining to all six defendants, which called into question counsels' ability to represent any defendant adequately. See *id.* at 16 n.7.

b. Petitioner offers no sound basis for further review of the district court's factbound disqualification order.

Petitioner asserts (Pet. 20-22) that the district court misapplied Rule 44(c)(2) by finding that disqualification was justified by "hypothetical potential conflicts." Pet. 21. But this Court recognized in *Wheat* that district courts commonly confront cases "where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses," and that trial courts are given "substantial latitude in refusing waivers of conflicts of interests" even when no actual conflict yet exists. 486 U.S. at 163. The magistrate judge here explained why the multiple conflicts likely to arise from the proposed joint representation were highly plausible, not merely hypothetical. See p. 18, *supra*. Petitioner's suggestion (Pet. 28-31) that *Wheat*'s holding is limited to a situation where a defense attorney "endeavors to represent a criminal defendant in a jury trial during which another of the attorney's clients will testify as an adverse witness" is belied by the Court's lengthy discussion of the "special dangers" of the "multiple representation" of codefendants and "potential conflicts" in addition to actual ones. See *Wheat*, 486 U.S. at 159-163.

Petitioner also asserts (Pet. 21) that the magistrate judge's decision here "evince[s] an intent to frustrate Petitioner's chosen strategy of employing pretrial motions." That argument cannot be squared with the decision itself, which describes how defense counsel were unable at the Rule 44(c)(2) hearing to explain any way in which their joint representation would offer a tactical advantage to the defendants, including with respect to pretrial motion practice. See Pet. App. 16 n.6. The magistrate judge also explained that the decision whether to pursue pretrial motions as opposed to a plea agreement could have consequences for the defendants' ability to secure favorable plea terms, and that it was necessary for the defendants to make their judgments individually given that they were not similarly situated with respect to their culpability in the conspiracy and the volume of the evidence against them. See *id.* at 12-13 & n.4.

Finally, petitioner errs in suggesting (Pet. 25-28) that the district court was required to accept the defendants' waiver of the conflicts of interest identified by the magistrate judge. The magistrate judge examined those waivers and explained why they were "suspect to the extent they relied on" defense counsels' "dubious representations" about their "'unique'" ability to represent these defendants jointly, especially in light of the defendants' "limited education" and lack of "prior experience with the United States criminal justice system." Pet. App. 16 n.6 (citation omitted).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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