No. 02-636

In the Supreme Court of the United States

D&J ENTERPRISES, INC., 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, in order to establish a conflict of interest in violation of the Sixth Amendment, a defendant must show that the conflict adversely affected counsel's performance, where the government brought the potential conflict to the attention of the district court before trial, and the court declined to inquire into the conflict or to disclose it to the defendant.

2. Whether the courts below erred in rejecting petitioner's conflict-of-interest claim without conducting an evidentiary hearing.

3. Whether the exclusion of petitioner from a pretrial, in-chambers conference at which the district court rejected the government's request for a hearing to inquire into defense counsel's alleged conflict of interest constituted structural error in violation of the Due Process Clause, U.S. Const. Amend. V.

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OPINION BELOW

The per curiam opinion of the court of appeals (Pet. App. 31-32) is unreported, but the judgment is noted at 136 F.3d 140 (Table).

JURISDICTION

The judgment of the court of appeals was entered on April 25, 2002. The petition for rehearing was denied on July 2, 2002 (Pet. App. 33-34). On September 10, 2002, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including October 30, 2002. The petition for a writ of certiorari was filed on October 25, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A jury in the United States District Court for the Southern District of Florida found petitioner guilty of conspiring to release Freon into the atmosphere and to conceal the release from the United States Environmental Protection Agency and the Army Corps of Engineers, in violation of 18 U.S.C. 371; and of releasing Freon into the atmosphere, in violation of the Clear Air Act, 42 U.S.C. 7413(c)(1), 7671g(c)(1), and 40 C.F.R. 82.154(a). Following the jury's determination of guilt, the district court granted petitioner a judgment of acquittal on both counts. The government appealed and the court of appeals reversed, ordering reinstatement of the jury verdicts. *United States* v. *D&J Enters., Inc.*, 136 F.3d 140 (11th Cir. 1998) (Table). Thereafter, petitioner moved for a writ of coram nobis, asserting that its trial counsel had a conflict of interest and had provided ineffective assistance. The district court denied the motion. The court then sentenced petitioner to a fine in the amount of $250,000 and a five-year term of probation. The court of appeals affirmed the judgment of conviction and held that the appeal from the denial of coram nobis was moot. Pet. App. 32.

1. As part of the cleanup operation following Hurricane Andrew, the Army Corps of Engineers retained petitioner D&J Enterprises as a subcontractor to demolish housing units at the Homestead Air Force Base in Florida. The contract required petitioner to use EPA-certified technicians to recapture Freon from the hundreds of air conditioners in the housing units, instead of releasing the freon into the air. Rather than recapturing the freon, petitioner allowed Freon from 94 air conditioners to escape. In two letters to the prime contractor on the cleanup, petitioner attempted to

cover up those environmental and contractual violations. Gov't C.A. Br. 7-8.

2. In a sealed pre-trial motion, the government informed the district court that Fred A. Schwartz, petitioner's trial counsel, was a "subject" of a grand jury investigation in an unrelated matter in the Southern District of Florida. The government requested the court to conduct a hearing for the purpose of advising petitioner of that fact, explaining to petitioner the nature of the potential conflict of interest, and informing petitioner of its right to seek new counsel or to have new counsel appointed upon a proper finding of indigency. Pet. App. 2-8. The sealed motion was served on defense counsel. In a sealed response, defense counsel asserted that a hearing was not required because he was only a "subject" of a grand jury investigation. *Id.* at 9. The district court considered the matter in chambers without the presence of petitioner, and it decided that no hearing was required. Gov't C.A. Br. 25.

3. After the court of appeals ordered reinstatement of the guilty verdicts, petitioner, assisted by new counsel, obtained access to the sealed submission relating to the conflict-of-interest issue. Before being sentenced on the convictions, petitioner filed a petition for a writ of coram nobis, claiming that its original trial counsel labored under a conflict of interest. Pet. App. 12. Petitioner argued that, in light of the district court's failure to conduct a hearing on the conflict after being alerted to the matter by the government, petitioner was entitled to automatic reversal. *Id.* at 18-19. In the alternative, petitioner argued that the conflict adversely affected counsel's performance. In particular, petitioner argued that counsel's legal problems contributed to his inability at trial to "concentrate, recall names or places,

or discern critical issues that would have supported not guilty verdicts." *Id.* at 24.

The district court denied petitioner's motion for a writ of coram nobis. The court concluded that such relief was unavailable because petitioner could raise the conflict-of-interest claim on appeal from petitioner's final judgment of conviction. The court found that the record was sufficiently developed for the court of appeals to resolve the conflict-of-interest claim based on the current record. Gov't C.A. Br. 28-29. Following the issuance of the final judgment of conviction, petitioner filed two appeals—one from the denial of its motion for a writ of coram nobis, and one from the final judgment. The appeals were consolidated in the court of appeals.

4. In a per curiam opinion, the court of appeals summarily affirmed the judgment of conviction. Pet. App. 31-32. The court held (*id.* at 32) that petitioner had failed to demonstrate that any conflict of interest "adversely affected" defense counsel's performance at trial, as required by *Mickens* v. *Taylor*, 122 S. Ct. 1237 (2002). In light of its disposition of the conflict-of-interest claim on direct appeal, the court held that the petition for a writ of coram nobis was moot. Pet. App. 32.

ARGUMENT

1. Petitioner contends (Pet. 5-13) that the court of appeals erred in requiring petitioner to establish that its attorney's alleged conflict of interest adversely affected counsel's performance. In petitioner's view, where, as here, the government brings a possible conflict to the court's attention before trial, and the court fails to conduct an inquiry into the allegation or to disclose the conflict to the defendant, automatic reversal of a conviction is required.

This Court's decision in *Mickens* v. *Taylor*, 122 S. Ct. 1237 (2002), makes clear that petitioner's claim lacks merit. In that case, Mickens was convicted of premeditated murder following the commission of forcible sodomy. After his trial, he learned that one of his attorneys had represented the victim of his crime on a different matter. Based on that discovery, Mickens filed a federal habeas petition alleging that the attorney had a conflict of interest in violation of the Sixth Amendment. In particular, Mickens argued that because the trial court knew or had reason to know about his attorney's conflict of interest and failed to conduct an inquiry into the conflict, automatic reversal of his conviction was required. This Court rejected that claim, holding that where a trial court fails to inquire into a potential conflict of interest about which it knew or reasonably should have known, a defendant must show, at a minimum, that the conflict adversely affected his counsel's performance. *Id.* at 1243-1245. The Court explained that a rule of automatic reversal would "make[ ] little policy sense" because a "trial court's awareness of a potential conflict neither renders it more likely that counsel's performance was significantly affected nor in any other way renders the verdict unreliable." *Id.* at 1244.

Mickens's reasoning is controlling here. In order to establish a Sixth Amendment violation, petitioner was required to show, at a minimum, that its attorney's alleged conflict of interest adversely affected counsel's performance. The fact that the government alerted the district court to a potential conflict does not support a rule of automatic reversal because that fact "neither renders it more likely that counsel's performance was significantly affected nor in any other way renders the verdict unreliable." *Mickens*, 122 S. Ct. at 1244. Because petitioner failed to establish that defense

counsel's asserted conflict of interest adversely affected counsel's performance, the court of appeals correctly rejected petitioner's conflict-of-interest claim.

Holloway v. *Arkansas*, 435 U.S. 475 (1978), on which petitioner relies, does not suggest otherwise. There, *defense counsel* objected to being required to represent three co-defendants in the same matter because the co-defendants allegedly had divergent interests. The trial court denied the motion without inquiry and required defense counsel to represent the co-defendants. This Court held that, where a trial court fails to conduct an inquiry into defense counsel's claim that multiple representation would give rise to a conflict of interest, automatic reversal is required. *Id.* at 487-491. The Court reasoned that a defense counsel is in the best position to ascertain whether he labors under a disabling conflict, *id.* at 485-486, and that joint representation of co-defendants raises distinct concerns, *id.* at 489. *Holloway* therefore creates a narrow exception to the general rule that a defendant asserting a conflict of interest must demonstrate, at a minimum, that the conflict adversely affected his lawyer's performance. As the Court explained in *Mickens*, *Holloway* "creates an automatic reversal rule only where defense counsel is forced to represent codefendants over his timely objection, unless the trial court has determined that there is no conflict." 122 S. Ct. 1241-1242. Because defense counsel in this case did not object to representing petitioner, and because defense counsel was not in the position of representing multiple defendants, *Holloway* is inapposite here.

2. Petitioner contends (Pet. 13-14) that its conflict-of-interest claim should not have been denied in the absence of an evidentiary hearing. The district court held that an evidentiary hearing was unnecessary be-

cause the record was sufficiently developed to enable the court of appeals to adjudicate the conflict-of-interest claim on petitioner's direct appeal. The court of appeals agreed with that assessment and rejected petitioner's conflict-of-interest claim on the merits. Petitioner does not identify any basis for disturbing the judgment of two courts below that the record was sufficiently developed to permit a resolution of petitioner's claim without the need for an additional evidentiary hearing.*

Petitioner contends (Pet. 13-14) that the decision below conflicts with *Armienti* v. *United States*, 234 F.3d 820 (2d Cir. 2000). There is, however, no such conflict. In that case, Armienti moved for collateral relief under 28 U.S.C. 2255, alleging that his trial counsel had a conflict of interest because he was under investigation by the same United States Attorney's office that was prosecuting Armienti. The district court denied the motion without an evidentiary hearing. The court of appeals vacated the judgment and remanded for an evidentiary hearing to determine whether there was an actual conflict of interest and, if so, whether the conflict adversely affected the lawyer's performance. 234 F.3d at 825.

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* In *Massaro* v. *United States*, cert. granted, 123 S. Ct. 31 (2002) (No. 01-1559), this Court granted certiorari to resolve the question whether a defendant who did not raise a claim of ineffective assistance of counsel on direct appeal must satisfy the cause and prejudice standard in order to obtain vacation of his conviction under 28 U.S.C. 2255. Although this case confirms (as the government argues in *Massaro*) that some ineffective assistance claims are capable of resolution on direct appeal, the procedural default issue in *Massaro* is not presented here. There is therefore no need to hold the present petition pending the decision in *Massaro*.

Armienti did not hold that an evidentiary hearing is necessary to resolve every conflict-of-interest claim. Rather, it held that such a hearing was necessary *in that case* because the record was not sufficiently developed to permit a resolution of the defendant's claim. The fact that the court of appeals in *Armienti* did not regard the record on appeal in that case as sufficiently developed to enable it to review the conflict-of-interest claim has no bearing on whether the record in this case was sufficiently developed to enable the court of appeals to resolve petitioner's conflict-of-interest claim.

3. Finally, petitioner contends (Pet. 14-15) that its exclusion from the pre-trial conference at which the district court determined that it did not need to conduct an inquiry into defense counsel's potential conflict constituted a structural due process violation. In support of that contention, petitioner relies on the Ninth Circuit's decision in *Campbell* v. *Rice*, 302 F.3d 892 (2002). In that case, the Ninth Circuit rejected the defendant's claim that defense counsel had an unconstitutional conflict of interest because counsel was being investigated by the same United States Attorney's office that was prosecuting the defendant. *Id.* at 896-898. The court reasoned that defendant had failed to show that the alleged conflict adversely affected counsel's performance. *Ibid.* The court went on to hold, however, that the exclusion of the defendant from an in-chambers conference concerning the alleged conflict constituted a structural due process violation requiring automatic reversal. *Id.* at 898-900.

Petitioner did not argue in either the district court or the court of appeals that its exclusion from the pre-trial conference constituted a structural due process violation, and neither one of those courts addressed that issue. Accordingly, that question is not properly pre-

sented here. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). Moreover, because the court of appeals had no occasion to address the issue, there is no conflict between the decision below and *Campbell*.

Petitioner's structural error argument is also without merit. A structural defect is one that affects "the framework within which the trial proceeds" and involves "basic protections, [without which] a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991) (quoting *Rose* v. *Clark*, 478 U.S. 570, 577-578 (1986)). Under that standard, any error in excluding petitioner from the pre-trial conference on defense counsel's possible conflict would not constitute structural error. Because counsel's alleged conflict of interest did not adversely affect his performance, the exclusion of petitioner from the pre-trial conference did not compromise the fairness or reliability of petitioner's trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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