Case No. 20-2686

United States Court of Appeals
For the Third Circuit

UNITED STATES,
Plaintiff-Appellee,

v.

DAVID DUNHAM, JR.,
Defendant-Appellant

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA AT READING
DOCKET NO. 5:15-CR-602

OPENING BRIEF OF APPELLANT

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CORPORATE DISCLOSURE STATEMENT AND STATEMENT OF FINANCIAL INTEREST

Pursuant to FRAP 26.1 and Local Rule 26.1, Appellant David Dunham, Jr., makes the following disclosure:

1. For non-governmental corporate parties please list all parent Corporations: **N/A.**

2. For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: **N/A.**

3. If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests: **None.**

4. Does this case arise out of a bankruptcy proceeding: **No.**

Signature: /s/ Shon Hopwood Date: December 14, 2020

Counsel for David Dunham, Jr.

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STATEMENT REGARDING ORAL ARGUMENT

Dunham requests oral argument. This appeal follows a sixteen-day jury trial. The district court's docket contains more than 300 entries, and the issues raised in this appeal were substantially litigated below. The factual background from which this case arises also involves technical matters of biofuel production and three complicated sets of federal legislation.

Dunham also raises issues of surpassing importance in criminal cases: whether the government can exploit a conflict of interest between the defendant and defense counsel, and whether such outrageous conduct violates the defendant's right to due process. Oral argument will therefore aid the Court.

STATEMENT REGARDING JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. This Court has jurisdiction under 28 U.S.C. § 1291 for this timely appeal. (R. 280, Judgment, Aug. 12, 2020), Appx. A1 (R. 282, Notice of Appeal, Aug. 17, 2020).[1]

[1] "Appx." refers to Appellant's Appendix, which is filed herewith. "R." refers to the docket entry number in the district court record. Citations to the Appendix are included in all cases in which the cited material is contained within the Appendix.

ISSUES PRESENTED

I. Whether the district court erred in denying the motion to dismiss the indictment on account of the government's outrageous conduct in exploiting a conflict of interest between Dunham and his defense counsel.

See Appx. A151-A248 (R. 71, Motion to Dismiss), Appx. A7-A14 (R. 112, Memorandum Opinion), Appx. A4 (R. 113, Order), Appx. A15-A22 (R. 145, Memorandum Opinion), Appx. A5 (R. 146, Order).

II. Whether the district court abused its discretion in denying an evidentiary hearing to determine whether the government engaged in outrageous misconduct by exploiting a conflict of interest between Dunham and his defense counsel.

See Appx. A254-A345 (R. 94, Reply), Appx. A395-A416 (R. 139, Motion for Reconsideration), Appx. A7-A14 (R. 112, Memorandum Opinion), Appx. A4 (R. 113, Order), Appx. A15-A22 (R. 145, Memorandum Opinion), Appx. A5 (R. 146, Order).

III. Whether the district court abused its discretion in denying Dunham's motion for a new trial without holding an evidentiary hearing to determine whether the conflict of interest invalidated Dunham's

waiver of his rights under Federal Rule of Criminal Procedure 11(f) and Federal Rule of Evidence 410.

See Appx. A418-A438 (R. 232, Motion for New Trial), Appx. A23-A29 (R. 234, Memorandum), Appx. A6 (R. 235, Order).

RELATED CASES AND PROCEEDINGS

Dunham's co-defendant Ralph Tommaso was sentenced on November 17, 2020, to twelve months and one day of imprisonment and three years of supervised release. *See* Judgment, R. 300 (Dec. 1, 2020). So far, Mr. Tommaso has not filed a notice of appeal.

STATEMENT OF THE CASE

Appellant David Dunham Jr. has worked at the forefront of alternative fuels for the past two decades. His career took roots at age twenty, when he modified his car to run on used cooking oil. Five years later, he founded Smarter Fuel, Inc. (Smarter Fuel), an alternative-fuel processing business, in Wind Gap, Pennsylvania. In 2010, he joined forces with codefendant Ralph Tommaso, launching a new enterprise, Greenworks Holdings, LLC (Greenworks), in which Dunham and Tommaso each held a 50% interest. Apart from running Greenworks, Dunham continued to own and operate Smarter Fuel, and Tommaso continued to own and operate his own company, Environmental Energy Recycling Corporation, LLC (EERC). All these entities dealt in alternative fuels amid a burgeoning regulatory minefield. Among other things, the companies collected, processed, and resold used oil from restaurants, and they participated in EPA, IRS, and USDA programs that provided financial incentives for the production of alternative fuels.

This case arises from Dunham's conduct in connection with those federal programs. On July 18, 2012, following a multi-agency investigation, the government raided Dunham's home and businesses.

The government alleged that Dunham and Tommaso had fraudulently claimed tax credits and subsidies for fuel that was ineligible for such credits, was not actually produced at the claimed quantities, or was double-counted. *See* Appx. A68 (R. 1, Indictment). Dunham proceeded to a jury trial and was convicted on all but one count. *See* R. 202, Verdict.

The great majority of the facts in this case, including the complexities of EPA, IRS, and USDA programs from which Dunham's charges arose, are not in dispute. Rather, this appeal arises primarily from two sources: (1) a conflict of interest that existed—and of which the government was objectively aware—at the time Dunham's former counsel John Brownlee represented Dunham at three key proffer meetings with the government, and (2) the district court's denial of an evidentiary hearing to determine the extent to which the government's exploitation of that conflict of interest tainted Dunham's prosecution. The statement that follows highlights the facts relevant to these issues.

A. Dunham participates in EPA, IRS, and USDA Programs.

As detailed throughout ten pages of the indictment in this case, Appx. A68-A77 (R. 1, Indictment, at 2-11), the biofuel industry is extensively regulated. As directed by the Energy Independence and

Security Act (EISA) of 2007, 42 U.S.C. § 17001 *et seq.*, federal agencies launched several programs to encourage domestic production of renewable fuels by offering tax credits, subsidies, or grants to the producers. This case arises from Dunham's participation in three such programs: the EPA's Renewable Fuel Standard (RFS2) Program, the IRS Alternative Fuel Credit Program, and the USDA Advanced Biofuel Payment Program.

1. The EPA's RFS2 Program

The EISA directed the EPA and IRS to write regulations and administer tax credits to encourage the production and use of renewable fuel. Appx. A459 (Tr. Day 2 at 13). The EPA established the RFS2 program, under which petroleum refiners and importers were obligated to introduce a certain quantity of renewable fuel into the fuel supply each year. *See* 40 C.F.R. § 80.1406. But rather than requiring these entities to produce the renewable fuels themselves, the RFS2 program permitted them to satisfy their obligations by purchasing credits from other entities that produced renewable fuels. These credits, called "renewable identification numbers" (RINs), were available to renewable-fuel producers (such as Dunham's businesses) from the EPA and could then

be sold on the open market to refiners and importers (such as Royal Dutch Shell) who wished to buy RINs to satisfy their obligations under the RFS2 program. Appx. A462 (Tr. Day 2 at 16).

Dunham applied to register Smarter Fuel as a RIN generator in 2010. Appx. A464 (Tr. Day 2 at 18, Gov. Opening Statement), Tr. Day 10 at 2 (Dunham examination). The EPA granted Dunham's application, permitting Dunham to acquire RINs online by reporting how many gallons of renewable fuel Smarter Fuel produced in a given period. Appx. A464 (Tr. Day 2 at 18). Dunham, through his businesses, subsequently received more than $15 million in exchange for RINs acquired from the EPA. The government alleged, however, that Dunham had generated and sold some RINs that were fraudulent either because Dunham had improperly claimed another credit or subsidy for the same gallons of fuel, or because the gallons did not exist at all, or because the underlying gallons were for feedstock rather than actual fuel. Appx. A464-A466 (Tr. Day 2 at 18-20). Feedstock is used oil that is susceptible to being processed into usable fuel (after which RINs may rightly be claimed for the fuel production), but feedstock itself is not a fuel that is eligible for RINs under the RFS2 program. Tr. Day 9 at 51.

2. The IRS Alternative Fuel Credit Program

The EISA also required the IRS to regulate and administer tax credits for petroleum refiners and importers. As a result, the IRS adopted fifty-cent to one-dollar-per-gallon tax credits for making and selling various products including renewable diesel, alternative fuel, and alternative fuel mixtures. Appx. A471 (Tr. Day 2 at 113); *see also* 26 U.S.C. § 6426. As with the EPA program, it was illegal to claim the IRS tax credit more than once for any given volume of fuel. Appx. A476-A477 (Tr. Day 4 at 81-82). The government alleged that, in 2009 through 2011, Dunham claimed tax credits for non-qualified materials in violation of the tax code. Appx. A463 (Tr. Day 2 at 17).

3. The USDA Advanced Biofuel Payment Program

The USDA established the Advanced Biofuel Payment Program pursuant to provisions of the Food, Conservation, and Energy Act of 2008. *See* 7 U.S.C. § 8105; 7 C.F.R. § 4288. The program paid subsidies to producers of advanced biofuel (a defined set of renewable fuels—not feedstock—derived from any of various renewable biomasses, such as vegetable oil or animal fat) based on the amount of fuel they produced and sold. *See* 7 C.F.R. § 4288.102. Dunham participated in the program

from 2010 to 2012. Tr. Day 10 at 86-87. The government alleged that Dunham made claims and received payments from the USDA for fuel that was in fact feedstock and thus ineligible for the subsidy. Appx. A79 (R. 1, Indictment, at 13).

B. Holland & Knight Represents Dunham Despite An Obvious Conflict of Interest.

The IRS commenced an audit of the renewable-diesel tax credits that Dunham had claimed in 2009. Appx. A479-A498 (Tr. Day 9 at 74-93). At issue was the composition of Dunham's processed fuel and whether Dunham was in fact producing the kind of renewable diesel that qualified for the tax credits he had claimed in 2009. (Dunham had initially been told by the IRS, apparently mistakenly, that he qualified for the credit; this audit resulted in a settlement under which Dunham was permitted to keep credits claimed before, but not after, Dunham learned of the IRS's mistake. *See* Tr. Day 9 at 61-62, 109.) An independent audit of Dunham's businesses, pertaining to RINs sold to Shell, began in 2012. Appx. A234 (R. 71-7, Investigative Report, at 6); Appx. A468 (Tr. Day 2 at 22); Tr. Day 6, Vol. 2, at 48-50 (Tommaso examination).

1. <u>Dunham retains Michael McAdams, a regulatory expert employed by Holland & Knight, to advise him.</u>

Recognizing the complexity of the matters implicated in the IRS audit, Dunham sought the counsel of Michael McAdams, President of the Advanced Biofuels Association and a person whom Dunham believed to be a learned leader in the biofuel industry. Appx. A507 (Tr. Day 9 at 102). McAdams had a law degree, had at one time been admitted to the bar, and, at the time of his initial meeting with Dunham in 2009, worked as a lobbyist for a law firm in Denver. Dunham testified that at their initial meeting, McAdams told him that he was a lawyer and that "no biofuel legislation got written in Washington without his say so." Appx. A481 (Tr. Day 9 at 76). (Later, McAdams himself stated at an interview with government agents, "I am a lawyer, I went to law school but I never practiced law.") Appx. A274-A275 (R. 94-1, Interview Tr., at 11-12).

Dunham testified that he first met with McAdams in December 2009 to seek assistance in navigating the pending IRS audit. Appx. A506 (Tr. Day 9 at 101). This assistance included lobbying Congress to clarify the qualifications for the renewable diesel credit that Dunham (and Tommaso and others) had claimed in 2009. Appx. A190 (R. 71-2, Email, at 2) (conveying agreement by five businessmen, including Dunham, to

pay McAdams a collective $10,000 per month to lobby Congress for "a legislative change to the definition of renewable diesel"). Dunham further testified that it was McAdams who, in 2010, told Dunham of the new RFS2 regulations and "recommended . . . a consultant to help [Dunham] get registered with the [EPA's] RFS2 program." Appx. A505 (Tr. Day 9 at 100); *see also* Appx. A517-A518 (Tr. Day 10 at 10-11).

By 2011, McAdams had joined the law firm of Holland & Knight (as a "Senior Policy Advisor," *see* Appx. 192 (R. 71-3, Engagement Letter, at 2)), though he continued to preside over the Advanced Biofuels Association outside the firm. *See* Appx. A271 (R. 94-1, Interview Tr., at 8). Also in 2011, Dunham and others hired McAdams to "lead the team" at Holland & Knight that would provide "legal services in connection with fuel regulatory support." *See* Appx. A191-A202 (R. 71-3, Holland & Knight engagement letter). McAdams advised Dunham, for example, as to the generation of RINs to receive payment under the RFS2 program. Appx. A235 (R. 71-7, Investigative Report, at 7); Appx. A519-A520 (Tr. Day 10 at 72-73).

In short, though the record is not clear as to whether McAdams held himself out as a practicing lawyer, the record reflects McAdams's status,

at least as of 2011, as an employee of Holland & Knight who was hired to and actually did provide legal services to Dunham.

2. Following the government's raid, Dunham retains Holland & Knight for personal criminal-defense representation.

On July 18, 2012, pursuant to search warrants, the government raided Dunham's home and businesses. Appx. A521 (Tr. Day 10 at 143). When Dunham learned of the raid, his first move was to call McAdams. Appx. A523 (Tr. Day 10 at 145). After Dunham spoke to McAdams, Dunham received a call from John Brownlee, a white-collar criminal-defense attorney also employed by Holland & Knight. Appx. A527 (Tr. Day 10 at 149). McAdams suggested that Dunham should retain Brownlee for his personal criminal defense. Upon doing so, Dunham informed Brownlee that McAdams had provided advice to Dunham concerning his acquisition and sale of RINs and concerning Smarter Fuel's entitlement to tax credits. Appx. A158 (R. 71, Mot. to Dismiss, at 7). Brownlee also discussed Dunham's case with McAdams. Appx. A245 (R. 71-9, Holland & Knight billing records, at 4).

Despite Brownlee's apparent awareness of McAdams's role in advising Dunham, Brownlee overlooked or disregarded the conflict of

interest between his obligations to Dunham and his (and Holland & Knight's) obligations to McAdams. McAdams was, after all, a potential material witness adverse to Dunham—and even a potential target himself—and Holland & Knight thus had a clear interest in protecting McAdams at the expense of vigorous representation of Dunham. Appx. A334 (R. 94-6, Tr. of 2/17/2017 Proceeding, at 6). From the outset, Brownlee represented Dunham without seeking Dunham's informed consent to the conflict. *See* Appx. A303 (R. 94-1, Interview Tr., at 40) (statement of Brownlee's counsel suggesting that the firm had no record of having sought a conflict waiver from Dunham). Brownlee's representation began with Brownlee's urging Dunham to agree to attend proffer meetings with the government and continued until after the third such proffer meeting. Appx. A527-A541 (Tr. Day 10 at 149-63).

C. The government invites Dunham to attend proffer meetings despite the government's awareness of an actual conflict between Holland & Knight's interest in representing Dunham and Holland & Knight's obligations to its employee McAdams.

On June 20, 2013, AUSA Nancy Potts contacted Brownlee to pursue an "off-the-record" proffer meeting with Dunham. Appx. A204 (R. 71-4, Letter, at 2). Dunham elected to participate in the proffer meetings

because he "was hoping to assist in the investigation, and ultimately come up with a reasonable resolution." Appx. A531 (Tr. Day 10 at 153). Dunham testified that he understood that there were "some inconsistencies in things as [they] grew" and that the matters at hand were very complicated, and he wanted to "provide information to the government that would be meaningful." Appx. A546 (Tr. Day 10 at 168).

The first proffer meeting was on July 9, 2013. Appx. A207 (R. 71-5, Report, at 2). In attendance from the government was Special Agent Jennifer Lynn of the EPA (the same agent who had interviewed Dunham on the day of the raid and who had made notes indicating her awareness of Dunham's relationships with both McAdams and Brownlee, *see* Appx. A408-A409 (R. 139-1, Report, at 2-3), Appx. A455-A456 (R. 285-1, Notes, at 2-3), Special Agent Jeff Ross (IRS), Special Agent Steve Flick (USDA), and AUSA Potts. Dunham was represented by Brownlee and by Megan Jeschke, another Holland & Knight attorney. Appx. A207 (R. 71-5, Report, at 2). During this first meeting, Dunham divulged, among other things, that "Michael McAdams of Holland and Knight" had advised him how to draft certain language on his bills of lading as part of his process for obtaining and selling RINs. *Id.* at A213.

The second proffer meeting was on December 5, 2013. Appx. A219 (R. 71-6, Report, at 2). The third and final proffer meeting was on January 2, 2014. Appx. A230 (R. 71-7, Report, at 2). Once again, Dunham brought up his relationship with McAdams and further described McAdams's role in guiding his business operations. *Id*. Dunham later testified that the third meeting became increasingly hostile: "Special Agent Jeffrey Ross was particularly hostile about nearly everything that I had to say. He would throw his notebook and his pen, and raise his voice, and swear at me." Appx. A536 (Tr. Day 10 at 158).

According to the government's recordation of what transpired at the proffer meetings, Dunham disclosed several details that potentially inculpated him.[2] Dunham allegedly stated, for instance, that he was not adding diesel to his product as was required under the terms of the USDA

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[2] Dunham disputed below, and continues to dispute, the accuracy of the government's recordation of what Dunham stated at the proffer meetings. *See, e.g.*, Appx. A399 (R. 139, Opp. to Gov't Mot. in Limine, at 5 n.7). Nothing in this brief constitutes an admission of the truth of the government's recordation of Dunham's proffer statements. Dunham discusses the government's recordation of his proffer statements for two purposes: (1) to show that the indictment charged conduct that mirrored what was allegedly discussed during the proffer meetings, and (2) to show the prejudice that Dunham suffered when the district court granted the government's motion in limine precluding Dunham from testifying contrary to the proffer statements.

program. Appx. A210 (R. 71-5, Report, at 5). This was material to his indictment: Dunham was subsequently charged with "making false claims for payments from the USDA based on non-qualified sales." Appx. A79 (R. 1, Indictment, at 13). Agent Ross also allegedly pushed Dunham to admit, at least equivocally, that he incorrectly "put nine million gallons on the tax credit forms for a program Smarter Fuel [didn't] even qualify for." Appx. A212 (R. 71-5, Report, at 7). This, too, was material to his indictment: Dunham was subsequently charged with "claiming bogus tax credits for sales of non-qualified materials." Appx. A79 (R. 1, Indictment, at 13). And Dunham allegedly conceded both that he "fraudulently claimed RINs" and that some "transactions were clearly double RIN'd." Appx. A219, A225 (R. 71-6, Report, at 2, 8). Dunham was subsequently charged with "generating and selling fraudulent RINs." Appx. A79 (R. 1, Indictment, at 13). Dunham's purported disclosures at the proffer meetings thus directly benefited the government in seeking the indictment that was returned against Dunham. These proffer statements later benefited the government again when the district court granted the government's motion in limine precluding Dunham from testifying

contrary to the proffer statements. *See* R. 134 (Gov't Mot. in Limine), Appx. A5 (R. 146, Order).

During these proffer meetings, Dunham not only addressed the charges at issue, but also pointed out several times that McAdams was an important advisor during the alleged fraud. Appx. A517 (Tr. Day 9 at 165). McAdams, in a later interview, indicated that he did in fact provide information and advice about the tax credits central to the indictment. Appx. A273-A275 (R. 94-1, Interview Tr., at 10-12). And, as mentioned above, Special Agent Lynn's notes from the day of the raid indicated her awareness—a year before the first proffer meeting—of Dunham's relationships with both McAdams and Brownlee. *See* Appx. A408 (R. 139-1, Notes of S.A. Lynn, at 2) ("Dunham indicated . . . Mike McAdams clarified any [RFS] or RINs questions he had"), A409 ("Dunham . . . indicated his attorney was on the phone. At that time, SA Lynn got on the phone and John Brownlee from Holland and Knight . . . requested no more interviews be conducted.").

And yet at no point during or prior to the proffer meetings did the government or Dunham's counsel ask Dunham to waive Brownlee's conflict of interest, nor was Dunham asked whether, for instance, he

knew and understood the risk that Brownlee might provide less than vigorous representation at these proffer meetings because of Brownlee's ethical obligations either to Holland & Knight or to McAdams.

Instead, it was only *after* the third proffer meeting that any party addressed Brownlee's conflict of interest. A conflict waiver provided by AUSA Potts asked Dunham to acknowledge that he understood (1) that McAdams worked for Holland & Knight, (2) that Dunham had informed the government that McAdams had provided advice about how to continue participation in the RFS2 program, (3) that Brownlee "may have a financial interest and/or reputational interest in defending Mr. McAdams," and (4) that "Mr. Brownlee's interests could materially limit his representation of [Dunham]." Appx. A240 (R. 71-8, Acknowledgment and Waiver, at 2). Although Dunham did not sign this waiver, he promptly sought new counsel at that time.

D. Dunham is indicted and goes to trial.

On December 17, 2015, Dunham was charged with one count of conspiracy in violation of 18 U.S.C. § 371, two counts of false statements to the EPA in violation of 18 U.S.C. § 1001, sixty-eight counts of wire fraud in violation of 18 U.S.C. § 1343, twenty-eight counts of false tax

filings in violation of 26 U.S.C. § 7206(1), one count of obstruction of the administration of the IRS in violation of 26 U.S.C. § 7212(a), and one count of obstruction of federal investigation in violation of 18 U.S.C. § 1519. Appx. A67 (R. 1, Indictment). Dunham pleaded not guilty.

Prior to trial, Dunham's new trial counsel moved to dismiss the indictment on the grounds of outrageous government conduct, arguing that the government knew of Brownlee's conflict of interest and exploited it to the government's advantage and at the expense of Dunham's due process rights. *See* Appx. A151-248 (R. 71, Motion to Dismiss). The government sought and received leave for a privilege team to interview McAdams, which it then did. *See* Appx. A275-A306 (R. 94-1, Interview Tr., at 12-43). The government then opposed Dunham's motion primarily on the grounds that McAdams was not, in fact, a licensed and practicing attorney at the time he advised Dunham, and thus there could be no conflict of interest that impaired Dunham's representation. *See* R. 75 (Response).

Dunham replied, emphasizing that a conflict existed regardless of whether McAdams was a licensed and practicing attorney and requesting, at a minimum, that the court should conduct an evidentiary

hearing to determine the extent of McAdams's advice to Dunham, the relationship of that advice to Dunham's charged conduct, the timing of the government's awareness of McAdams's potential involvement in the case, the reason for the government's solicitation of a conflict waiver from Dunham only *after* Brownlee represented him at the three meetings, and the harm that all this caused to Dunham. *See* Appx. A254-A345 (R. 94, Reply). Dunham filed a supplemental memorandum discussing additional evidence that McAdams was in fact a lawyer and that the government knew of Dunham's relationship with McAdams prior to the proffer meetings. *See* Appx. A346-A380 (R. 100, Supp. Memorandum). The government also filed a supplemental memorandum in opposition. *See* Appx. A381-A394 (R. 101, Supp. Summary and Authorities).

The court denied Dunham's motion without an evidentiary hearing, holding that Dunham failed to meet his burden to prove the Government's objective awareness of a conflict prior to the first proffer meeting, that he failed to meet his burden to prove the Government "actively encouraged and exploited" the conflict, and that he had not shown prejudice from any such conduct. *See* Appx. A7-A14 (R. 112, Memorandum Opinion).

The Government subsequently filed a motion in limine seeking to preclude Dunham from testifying contrary to the proffer statements from the three proffer meetings. *See* R. 134 (Motion). Dunham opposed the motion and simultaneously sought reconsideration of the district court's denial of Dunham's motion to dismiss the indictment, primarily on the grounds that the government had only recently disclosed Special Agent Lynn's July 18, 2012 notes (from the day of the raid) indicating her awareness of Dunham's relationships with McAdams and Brownlee (the court's denial of the motion to dismiss had not taken these notes into account). *See* Appx. A395-A406 (R. 139, Opposition to Mot. in Limine), Appx. A407-A409 (R. 139-1, Notes of S.A. Lynn). The court granted the government's motion and denied Dunham's motion for reconsideration, ruling there was "no evidence" to support Dunham's motion to dismiss the indictment. Appx. A21 (R. 145, Memorandum Opinion, at 7). Dunham thus proceeded to jury trial, which spanned sixteen trial days over the course of nearly four weeks.

E. Dunham is convicted and sentenced to 84 months of imprisonment.

The jury returned a guilty verdict on all but one count. Dunham moved for a new trial, and the district court denied the motion. *See* Appx.

A418-A438 (R. 232, Motion), Appx. A23-A29 (R. 234, Memorandum), Appx. A6 (R. 235, Order). The district court sentenced Dunham to 84 months of imprisonment, noting, "it's a very, very complex case, one of the most complex sentences I have ever handled." Appx. A552 (Sent. Tr. at 117). Dunham seeks review of the district court's rulings denying Dunham's motion to dismiss the indictment, denying Dunham's request for an evidentiary hearing as to facts relevant to his motion to dismiss the indictment, and denying Dunham's motion for a new trial. *See* Appx. A7-A14 (R. 112, Memorandum Opinion), Appx. A4 (R. 113, Order), Appx. A15-A22 (R. 145, Memorandum Opinion), Appx. A5 (R. 146, Order), Appx. A23-A29 (R. 234, Memorandum), Appx. A6 (R. 235, Order).

SUMMARY OF ARGUMENT

This Court should reverse the district court's order denying Dunham's motion to dismiss the indictment. The district court erred in denying the motion to dismiss because the government committed outrageous misconduct in exploiting a conflict of interest that afflicted Dunham's defense counsel. As discussed below in Section I of the Argument, this Court's precedents provide two avenues that support reversal.

First, under *United States v. Voigt*, 89 F.3d 1050 (3d Cir. 1996), this Court should reverse because (1) the government was "objectively aware" of a conflict of interest between Dunham and his defense counsel, John Brownlee; (2) the government deliberately "intruded" into that relationship when it invited Dunham to participate in three proffer meetings despite its objective awareness of that conflict; and (3) the government's conduct prejudiced Dunham because Dunham's proffer statements led to the indictment against him and precluded Dunham from testifying contrary to the proffer statements at trial. The crux of the conflict was that Brownlee represented Dunham during three proffer sessions even though Brownlee was an attorney with Holland & Knight,

the same firm that employed Michael McAdams—a lobbyist whom the government knew to be a potential suspect in the same conduct for which Dunham was charged. Brownlee's interest in representing Dunham was thus at odds with his (and his firm's) interest in protecting McAdams from potential exposure. Both state law and the record below support the existence of the conflict; the record also reflects the government's exploitation thereof and the resulting prejudice to Dunham.

Second, under *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978), this Court should reverse on the grounds that the government's knowing exploitation of Brownlee's conflict of interest undermined the "fundamental fairness" of the proceedings against Dunham. It was fundamentally unfair for the government to bring Dunham into three proffer sessions and knowingly exploit a conflict of interest between him and his defense counsel when that exploitation greatly prejudiced Dunham's defense. Regardless of which of these two avenues this Court chooses, it should reverse the district court's denial of Dunham's motion to dismiss.

Alternatively, this Court should reverse and remand for an evidentiary hearing for two reasons. First, as discussed in Section II, the

district court abused its discretion in denying an evidentiary hearing to determine whether the government engaged in outrageous misconduct in exploiting the above-described conflict. Despite Dunham's allegations and evidentiary submissions, the district court ruled that "no evidence" supported Dunham's outrageous-misconduct argument, without even holding an evidentiary hearing. Appx. A21 (R. 145, Opinion, at 7). This was an abuse of discretion because Dunham amply cleared the pleading hurdle to warrant an evidentiary hearing.

Second, as discussed in Section III, the district court abused its discretion in denying Dunham's motion for new trial without holding an evidentiary hearing to determine whether the above-described conflict invalidated Dunham's waiver of his rights under Federal Rule of Criminal Procedure 11(f) and Federal Rule of Evidence 410. A waiver of these rights must be not only voluntary but also knowing, and the government bore the burden of proving that Dunham's waiver, which he signed prior to entering the proffer sessions, was in fact made knowingly. Yet, despite this Court's teachings on the importance of ensuring that a defendant acts knowingly in waiving constitutional rights, the district

court denied Dunham even an evidentiary hearing on the issue. This, too, was an abuse of discretion.

Thus, if this Court disagrees with Dunham's primary argument in Section I, it should remand for an evidentiary hearing, with instructions either to (1) dismiss the indictment if Dunham shows that the government knowingly exploited a conflict of interest and thereby caused Dunham prejudice, or (2) grant Dunham a new trial if the district court determines that Dunham unknowingly waived his rights prior to entering proffer sessions with the government.

ARGUMENT

The district court erred in denying Dunham's motion to dismiss the indictment due to the government's outrageous misconduct in exploiting a conflict of interest between Dunham and his prior counsel during several proffer sessions held with the government. At the very least, the court abused its discretion by not holding an evidentiary hearing to determine: (1) when the government's lawyers first learned that there was a serious conflict of interest between Dunham and his defense lawyer, and (2) whether Dunham had validly waived his rights under

Federal Rule of Criminal Procedure 11(f) and Federal Rule of Evidence 410.

STANDARD OF REVIEW ON APPEAL

The standard of review for Dunham's principal issue—whether the district court erred in denying his motion to dismiss the indictment, discussed below in Section I—is "mixed." *United States v. Voigt*, 89 F.3d 1050, 1064 (3d Cir. 1996). This Court exercises "plenary review of the district court's legal conclusion." *Id.* (citing *United States v. Driscoll*, 852 F.2d 84, 85 (3d Cir. 1988)). But this Court reviews underlying factual findings for clear error. *Id.*

This Court reviews Dunham's remaining issues—the denial of evidentiary hearings, discussed below in Sections II and III—for abuse of discretion. *United States v. Scripps*, 961 F.3d 626, 631 (3d Cir. 2020). If Dunham's filings below "demonstrate[d] a 'colorable claim' for relief," then the district court abused its discretion in denying an evidentiary hearing. *Voigt*, 89 F.3d at 1067 (quoting *United States v. Brink*, 39 F.3d 419, 424 (3d Cir. 1994) (remanding for hearing where Brink alleged facts that, if true, "could violate a defendant's rights")).

All the issues raised herein were preserved for appeal when they were raised and briefed before the district court. *See* Appx. A151-A248 (R. 71, Motion to Dismiss), Appx. A254-A345 (R. 94, Reply in Support of Motion to Dismiss), Appx. A346-A380 (R. 100, Memorandum in Support of Motion to Dismiss), Appx. A395-A416 (R. 139, Amended Response to Gov't Motion in Limine; Motion for Reconsideration of Dunham's Motion to Dismiss), Appx. A418-A438 (R. 232, Motion for New Trial).

I. THE DISTRICT COURT ERRED IN DENYING DUNHAM'S MOTION TO DISMISS THE INDICTMENT ON ACCOUNT OF THE GOVERNMENT'S OUTRAGEOUS CONDUCT IN EXPLOITING A CONFLICT OF INTEREST THAT AFFLICTED DUNHAM'S COUNSEL.

A. Both the Supreme Court and this Court have recognized a Due Process Claim for Outrageous Prosecutorial Misconduct.

The Due Process Clause of the Fifth Amendment constrains the extent to which the government may deprive an individual of his liberty. Though law enforcement officers enjoy considerable discretion in the "often competitive enterprise of ferreting out crime," *Johnson v. United States*, 333 U.S. 10, 14 (1948), the Due Process Clause forbids outrageous misconduct that undermines the "fundamental fairness" of a prosecution. *United States v. Russell*, 411 U.S. 423, 432 (1973) (quoting *Kinsella v.*

United States, 361 U.S. 234, 246 (1960)); *cf. Rochin v. California*, 342 U.S. 165, 169 (1952); *Betts v. Brady*, 316 U.S. 455, 473 (1942) (recognizing that the "Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right").

In *United States v. Twigg*, 588 F.2d 373, 380 (3d Cir. 1978), this Court had "no trouble" detecting "a demonstrable level of outrageousness" in the government's investigatory conduct and holding that "fundamental fairness" therefore required reversal of the defendants' convictions. *Twigg*, 588 F.2d at 382 (reversing convictions where government agents provided defendants with supplies and expertise necessary to produce drugs they were charged with conspiring to produce). Though the government's misconduct in *Twigg* was more akin to entrapment than to the interference with an attorney-client relationship as alleged in this case, *Twigg* holds that government misconduct is a defense to prosecution when it is "outrageous"—that is, when it undermines the fundamental fairness of the prosecution. *Id.* at 379 (distinguishing the fundamental-fairness defense from an entrapment defense, and clarifying that "fundamental fairness will not

permit *any* defendant to be convicted of a crime in which police conduct was 'outrageous.'" (emphasis added)).

Twigg has stood more than four decades, during which this Court has reiterated that "the [Supreme] Court continues to recognize a due process claim premised upon outrageous law enforcement investigative techniques." *United States v. Voigt*, 89 F.3d 1050, 1064 (1996). The fundamental-fairness "defense is available in this Circuit," and, when it is raised, "[t]he only relevant question for [this Court] is whether this is a proper case for its application." *United States v. Lakhani*, 480 F.3d 171, 181 (3d Cir. 2007) (citing *Twigg* and *Voigt*).

Caselaw does not sharply define the contours of a fundamental-fairness claim based on outrageous government conduct. *United States v. Jannotti*, 673 F.2d 578, 606 (3d Cir. 1982) (en banc) ("A delineation of the conduct circumscribed by the due process defense is, at best, elusive."). But this Court has created two avenues that support reversal here. First, this Court has produced a three-part test that determines when governmental intrusion into an attorney-client relationship amounts to outrageous conduct. *See, e.g.*, *Voigt*, 89 F.3d at 1068; *United States v. Kossak*, 178 F. App'x 183, 184 (3d Cir. 2006). This doctrine is discussed

below in Section I.B. Second, *Twigg* and its progeny support reversal even without resort to the three-part test set forth in *Voigt* and *Kossak*. This argument is discussed below in Section I.C.

B. Dismissal of the indictment was warranted because the government was "objectively aware" of an actual conflict of interest afflicting Dunham's counsel, the government exploited that conflict for its own benefit, and the government's conduct adversely affected Dunham.

To state a fundamental-fairness defense based on the government's exploitation of an attorney-client relationship, the defendant "must demonstrate an issue of fact as to each of the three following elements: (1) the government's objective awareness of an ongoing, personal attorney-client relationship [including] the defendant; (2) deliberate intrusion into that relationship; and (3) actual and substantial prejudice." *Voigt*, 89 F.3d at 1067-69 (holding that the defendant could not prove the first element where there was no evidence "that the government was or should have been aware of a personal attorney-client relationship between" the defendant and an attorney who was a confidential informant), 1070 (holding, alternatively, that the defendant could not prove the third element because he had "failed to demonstrate

that he suffered any ill effects flowing from the government's allegedly improper investigative activity").

The *Voigt* test has been articulated with slight variations depending on the context of its application. In *Voigt*, this Court articulated the first element of the test as "the Government's objective awareness of an ongoing personal attorney-client relationship between *its informant* and the defendant." 89 F.3d at 1067 (emphasis added). But this "informant" language is not essential to a claim of outrageous government conduct; it appears in *Voigt* and in certain other cases only because those cases happen to contain allegations of government misconduct involving a confidential informant, as opposed to some other strain of government misconduct. *See, e.g.*, *United States v. Hoffecker*, 530 F.3d 137, 154 (3d Cir. 2008) (stating the three-element outrageous-misconduct test exactly as worded in *Voigt* and applying it to a case where the defendant alleged that the government used the defendant's former lawyer as a confidential informant); *United States v. Kennedy*, 225 F.3d 1187, 1195 (10th Cir. 2000) (same). This Court has also applied the *Voigt* test without hesitation to claims—like Dunham's—that are based on the government's exploitation of an attorney-client conflict and that have

nothing to do with the use of a confidential informant. *See United States v. Kossak*, 178 F. App'x at 184 (restating *Voigt*'s articulation of the outrageous-misconduct test but applying it to a claim that the government committed misconduct when it failed to inform the defendant of a potential conflict of interest arising from his attorney's potential status as a suspect in the charged conduct).

Other courts have streamlined the language of the *Voigt* test to meet the occasion. *See, e.g.*, *United States v. Stringer*, 535 F.3d 929, 941 (9th Cir. 2008) (articulating the first element simply as whether "the government was objectively aware of an ongoing, personal attorney-client relationship," without any "informant" language); *United States v. Haynes*, 216 F.3d 789, 797 (9th Cir. 2000) (applying *Voigt* but quoting and employing only the following language from *Voigt* rather than the three-element test: "a claim of outrageous government conduct premised upon deliberate intrusion into the attorney-client relationship will be cognizable where the defendant can point to actual and substantial prejudice").

Regardless of the precise formulation of the *Voigt* test, its three elements squarely fit the facts of this case. First, the government was

"objectively aware" of Dunham's attorney-client relationship with John Brownlee and of a conflict of interest that affected Brownlee's representation of Dunham. Second, the government "intruded" into Dunham's attorney-client relationship when it invited Dunham to cooperate with the government at three proffer meetings despite its awareness of the conflict. Third, Dunham suffered "actual and substantial prejudice" in two ways: (1) he was charged in an indictment with conduct that paralleled what Dunham allegedly disclosed during the proffer meetings, and (2) the government successfully moved in limine to preclude Dunham from giving trial testimony that differed from his proffer statements.

Because Dunham satisfies the *Voigt* test for outrageous misconduct, the district court should have dismissed the indictment against him. *See Voigt*, 89 F.3d at 1066 (citing *United States v. Marshank*, 777 F. Supp. 1507 (N.D. Cal. 1991), as an example of a court that "has ordered that an indictment be dismissed due to preindictment intrusion into the attorney-client relationship"). Instead, the district court denied the motion to dismiss, summarily concluding that "no evidence" supported Dunham's argument. Appx. A21 (R. 145, Opinion, at 7). The

district court erred in denying Dunham's motion to dismiss. This Court should reverse.

1. <u>The government was "objectively aware" of a conflict of interest afflicting Dunham's counsel, John Brownlee.</u>

The first element of the *Voigt* test requires, at a minimum, that the government was "objectively aware" of a defendant's attorney-client relationship that the defendant claims the government exploited. 89 F.3d at 1067. In the context of a claim based on the government's exploitation of an attorney-client *conflict*, this Court has required the defendant to show that "an actual conflict existed" and that "the Government had knowledge of any such actual conflict." *Kossak*, 178 F. App'x at 186 (denying the defendant's claim because he could not show that an actual conflict of interest affected his attorney, whom he claimed "may also have been suspected of wrongdoing," or that the government knew about such potential conflict).

Dunham easily satisfies the first element of the *Voigt* test, either as this Court articulated it in *Voigt* or as this Court applied it in *Kossak*. That is because an actual conflict of interest affected Dunham's counsel, John Brownlee, at the time that Brownlee represented Dunham, and the

government was aware of this conflict as of the date of its raid of Dunham's home and businesses.

a. An actual conflict of interest affected Dunham's counsel, John Brownlee, at the time that Brownlee represented Dunham in this matter.

As set forth in the Statement of the Case, *supra* at 3-21, Dunham's counsel labored under an actual conflict of interest while representing Dunham prior to and during the three proffer meetings. The conflict was clear: for years, Dunham had received advice concerning fuel credits and subsidies from Michael McAdams (a lobbyist whom Dunham reasonably believed to be a lawyer); prior to the raid, McAdams joined the law firm of Holland & Knight; following the raid, Dunham called McAdams, who suggested that John Brownlee (a Holland & Knight lawyer) represent Dunham; and Brownlee did in fact represent Dunham, notwithstanding the fact that Holland & Knight had an interest in protecting McAdams from exposure—an interest that was directly adverse to its interest in representing Dunham. Appx. A527-A529 (Tr. Day 10 at 149-51). This conflict of interest was cognizable under Pennsylvania state law, it was *eventually* acknowledged (at least to some degree) by the government, and it was acknowledged by the district court.

State Law. Under Pennsylvania Rules of Professional Conduct (which apply because all relevant conduct here occurred in Pennsylvania),

> [A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: [. . .] (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibility to another client, a former client, or a third person.

Pa. R. Prof. Cond. 1.7(a). Here, there was a "significant risk" that Brownlee's representation of Dunham was "materially limited" by Brownlee's responsibility to a third person: McAdams. Alternatively, under the rule of imputation of conflicts, Brownlee's representation was materially limited by Holland & Knight's responsibility to McAdams. Pa. R. Prof. Cond. 1.10. Either way, McAdams was potentially a material witness against Dunham or even a suspect in the same conduct with which Dunham was charged (after all, McAdams had not only advised Dunham in navigating his IRS audit but also counseled Dunham to participate in the EPA's RFS2 program). Appx. A505 (Tr. Day 9 at 100); *see also* Appx. A517-A518 (Tr. Day 10 at 10-11).

The Government. In the proceedings below, the government's initial opposition to Dunham's motion to dismiss the indictment was

based on its assertion that "*McAdams is not an attorney and was not at the time he interacted with Dunham*." Appx. A249 (R. 90, Response, at 1) (emphasis in original). But that response missed the point: Brownlee was subject to a conflict of interest regardless of whether McAdams was, at that moment, engaged in the practice of law. That is because McAdams was still a Holland & Knight employee and, more to the point, was still providing "legal services" to Dunham and others on behalf of Holland & Knight. *See* Appx. A192-A202 (R. 71-3, Holland & Knight engagement letter). Thus, Holland & Knight had an interest in protecting McAdams from exposure, potentially at the expense of vigorous representation of Dunham.

Notably, after the third proffer meeting, it was the government that informed Dunham about the conflict of interest. After squeezing three meetings of information out of Dunham, AUSA Potts asked Dunham to acknowledge that he understood several "circumstances" and "risks," including the following: (1) McAdams worked for Holland & Knight, (2) Dunham had informed the government that McAdams had provided advice about how to continue participation in the RFS2 program, (3) Brownlee "may have a financial interest and/or reputational interest

in defending Mr. McAdams," and (4) "Mr. Brownlee's interests could materially limit his representation of [Dunham]." Appx. A240 (R. 71-8, Acknowledgement and Waiver, at 2). Though the government disputed the timing of *when* it learned of the conflict, the government appears to have acknowledged, at least to some extent, that an actual conflict existed. Notably, the government's provided waiver form used wording like "risks" and "materially limit" that closely tracks the language of Rule 1.7(a) of the Rules of Professional Conduct on concurrent conflicts. Dunham did not sign the waiver form but rather sought new counsel.

The District Court. For its part, the district court also acknowledged the existence of an actual conflict—and recognized that the conflict did not turn on whether McAdams was a practicing lawyer or instead a non-lawyer providing in quasi-legal services:

> THE COURT: But the conflict is, you know, putting the attorney – whatever his name is, Brownlee – putting his firm's interest in conflict with his client's interest.
>
> MR. GALLAGHER: And that's one part of the equation, your Honor.
>
> THE COURT: And that doesn't really hinge on whether McAdams was giving legal advice or not legal advice, as far as I can see it.

Appx. A342 (R. 94-6, Tr. of 2/17/2017 Proceeding, at 14:1-8). *See also* Appx. A8-A9 (R. 112, Order denying Mot. to Dismiss Indictment, at 2-3) ("Since McAdams and Brownlee were associated with the same firm, a conflict of interest was clearly possible, as Brownlee may have attempted to shield McAdams and/or [Holland & Knight] from any liability.").

It is undisputed that no one informed Dunham of this conflict—let alone asked him to acknowledge and waive the risk that Brownlee was providing less than vigorous representation of Dunham's interests—until after Dunham cooperated with the government at three proffer meetings.

b. The government was aware of the conflict as early as the date on which it raided Dunham's home and businesses, more than a year prior to the first of three proffer meetings.

One of the agents who spoke with Dunham on July 18, 2012 (the date on which the government raided Dunham's home and businesses) was Special Agent Jennifer Lynn of the EPA's Criminal Investigation Division. Special Agent Lynn took notes on that day that reflect her conversations with Dunham—and her awareness at that time of Dunham's relationships with both McAdams and Brownlee. *See* Appx. A408 (R. 139-1, Notes of S.A. Lynn, at 2) ("Dunham indicated . . . Mike McAdams clarified any [RFS] or RINs questions he had"), A409

("Dunham . . . indicated his attorney was on the phone. At that time, SA Lynn got on the phone and John Brownlee from Holland and Knight . . . requested no more interviews be conducted."). The district court did not have these notes before it when it initially denied Dunham's motion to dismiss the indictment, evidently because the government did not timely disclose the existence of the notes. *See* Appx. A397-A398 (R. 139, Response to Gov't Mot. in Limine, at 3-4). Other notes in the record include a copy of Special Agent Lynn's handwritten notes from the date of the raid, which refer to "Mike McAdams" and "Holland & Knight." *See* Appx. A456 (R. 285-1, Notes, at 3).

Special Agent Lynn was also the "reporting official" at Dunham's first proffer meeting a year later, on July 9, 2013. *See* Appx. A207 (R. 71-5, Report, at 2). During this first meeting, Dunham divulged, among other things, that "Michael McAdams of Holland and Knight" had advised him how to draft certain language on his bills of lading as part of his process for obtaining and selling RINs under the EPA's RFS2 program. *Id.* at A213. In short, the government was aware of Dunham's relationships with both McAdams and Brownlee and was thus "objectively aware" of the conflict of interest under which Brownlee

labored while representing Dunham. This satisfies the first element of the *Voigt* test.

2. The government "deliberately intruded" into Dunham's attorney-client relationship when it invited Dunham to participate in three proffer meetings despite its objective awareness of the conflict.

The second element of the *Voigt* test is the government's "deliberate intrusion" into Dunham's attorney-client relationship. *Voigt*, 89 F.3d at 106. In *Kossak*, where the defendant's claim was based on the government's exploitation of a conflict of interest, the second element failed because Kossak could not show "purposeful intrusion" into his attorney-client relationship; essentially, Kossak had alleged, at most, that his lawyer was also a potential suspect in wrongdoing, but did not allege that the government did anything wrong or somehow acquired information that it should not have acquired. *Kossak*, 178 F. App'x at 186. Here, in contrast, the government purposefully extended an invitation for Dunham to attend three proffer meetings with numerous government agents when the government knew full well that Dunham was represented by compromised counsel. This inured to the government's benefit when the government extracted information from Dunham that he may not have disclosed had he been represented more vigorously,

rather than by an attorney who actively encouraged Dunham to cooperate with the government.

In the district court's denial of Dunham's motion to dismiss, the court stated that "there is no authority imposing an affirmative duty on the government to inform a suspect that he has a potential conflict of interest with his attorney." Appx. A14 (R. 112, Order, at 8) (citing *Kossak*, 178 F. App'x at 186). But Dunham is not arguing that there is such a duty. Rather, Dunham is arguing a much narrower point: not that the government must root out and discover potential conflicts of interest, but simply that the government may not *knowingly exploit* an *actual* conflict of interest. Such a ruling would have few if any consequences in future cases because, fortunately, fact patterns like Dunham's (where the government knowingly exploits an actual conflict of interest) are vanishingly rare. Thus, this Court may apply the rules of *Twigg*, *Voigt*, and *Kossak* without imposing any "new" duties upon the government and without opening the floodgates to "new" claims in the future.

In fact, the government's own conduct after the third proffer meeting corroborates that Dunham is not seeking to impose a novel duty upon the government. As the government stated in one of its responses

opposing Dunham's motion to dismiss, following the third proffer meeting, "[t]he government immediately advised Attorney Brownlee of its concerns that Dunham might have implicated McAdams and, therefore, Dunham *must agree* to a waiver of any privilege before the government could continue its discussions with Dunham." Appx. A383 (R. 101, Gov't. Supp. Authority, at 3).[3] The government would have no reason to state that Dunham "must agree" to such a waiver unless the government already believed that it had at least some existing obligation to take this meager step against trampling Dunham's due-process rights.[4] *See also United States v. Moscony*, 927 F.2d 742, 747 (3d Cir.

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[3] The government disputed whether the conflict had yet "ripened." But, at worst, that dispute presented a factual question that the district court should have resolved with an evidentiary hearing. *See* Section II, *infra*.

[4] The only real dispute is whether the government learned about the conflict during (or prior to) the first proffer meeting, as Dunham has argued, or whether it learned about the conflict only after the third proffer meeting, as it argued below. *See* Appx. A383 (R. 101, Gov't. Supp. Authority, at 3). The district court did not clearly rule on this point, ruling only that Dunham did not "produce sufficient evidence to prove that the government knew a conflict existed . . . before [the] first proffer" meeting. Appx. A12 (R. 112, Order, at 6). But the district court did not rule on whether the government learned of the conflict *at* the first proffer meeting, in which case the government still knowingly exploited the conflict by proceeding to a second and third proffer meeting in the months that followed.

1991) (noting that defendants had received "several warnings from the government that . . . multiple representation might pose a conflict of interest"). All Dunham seeks is a ruling that, because the government knew about the conflict prior to this third proffer meeting, the government should not have knowingly exploited the conflict by continuing to meet with Dunham and *then* tendering a privilege waiver after the third meeting. There is no jurisprudential reason militating against reversal here.

3. The government's conduct adversely affected Dunham because Dunham's proffer statements led to the indictment against him and precluded Dunham from testifying contrary to the proffer statements at trial.

The third element of the *Voigt* test is "actual and substantial prejudice" to Dunham. *Voigt*, 89 F.3d at 1067. Here, the prejudice was twofold. First, the information disclosed by Dunham at the proffer sessions arguably led to his indictment. *See* Appx. A68-79 (R. 1, Indictment, at 1-13); *see also* Statement of the Case, *supra*, at 17-19. Second, prior to entering the proffer sessions with the government, while represented by Brownlee, Dunham signed waivers of rights that waived protections under Fed. R. Crim. P. 11(f) and Fed. R. Evid. 410. Because of those waivers, the government was subsequently successful in moving

in limine to preclude Dunham from testifying contrary to what was recorded in the proffer statements from those three proffer sessions. *See* R. 134 (Gov't Mot. in Limine), Appx. A5 (R. 146, Order). In order to be valid, however, such a waiver must have been "knowing and voluntary." *United States v. Mayfield*, 361 F. App'x 425, 431 (3d Cir. 2010) (citing *United States v. Mezzanatto*, 513 U.S. 196, 210 (1995)). Dunham does not dispute the voluntariness of his signature, but it was certainly *not* "knowing"—that is, "made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." *Mayfield*, 361 F. App'x at 431 (quoting *United States v. Velasquez*, 885 F.2d 1076, 1084 (3d Cir. 1989)). Dunham's waiver was unknowing because Dunham was unaware of the conflict under which his attorney labored and could only have known that he was abandoning the right to proceed with uncompromised counsel if in fact someone other than Brownlee had advised him of the conflict. *Cf. United States v. Kolodesh*, 2012 U.S. Dist. LEXIS 49169, at *32-33 (E.D. Pa. April 5, 2012).

In sum, Dunham satisfies the *Voigt* test for outrageous misconduct, and the district court should have ordered that the "indictment be dismissed due to preindictment intrusion into [Dunham's] attorney-

client relationship." *Voigt*, 89 F.3d at 1066 (quoting *United States v. Marshank*, 777 F. Supp. 1507 (N.D. Cal. 1991)). Because the district court did not, this Court should reverse.

C. Alternatively, dismissal of the indictment was warranted because the government's exploitation of an actual conflict of interest afflicting Dunham's counsel undermined the fundamental fairness of Dunham's prosecution.

Even if this Court disagrees that the *Voigt* test applies to Dunham's case (or that Dunham satisfies its three elements), this Court should still reverse under *Twigg*, because the government's knowing exploitation of Brownlee's conflict of interest undermined the "fundamental fairness" of the proceedings against Dunham. *Twigg*, 588 F.2d at 382. In *Twigg*, this Court reversed convictions where government agents provided defendants with supplies and expertise necessary to produce drugs they were charged with conspiring to produce. *Id.* This was not an "entrapment" defense (the jury had rejected entrapment, *see Twigg*, 588 F.2d at 376) but rather a bar to conviction based on outrageous government misconduct. *Id.* at 379 ("fundamental fairness will not permit any defendant to be convicted of a crime in which police conduct was 'outrageous.'").

Dunham's claim arises under the Fifth Amendment's Due Process Clause, not the Sixth Amendment's Right to Counsel Clause under which ineffective-assistance-of-counsel claims arise. Nevertheless, a litany of such cases supports the proposition that a conflict of interest like the one that afflicted Brownlee undermines the fundamental fairness of a criminal prosecution. *See, e.g.*, *Strickland v. Washington*, 466 U.S. 668, 697 (1984) ("An ineffectiveness claim, however, [. . .] is an attack on the fundamental fairness of the proceeding whose result is challenged."); *Virgin Islands v. Zepp*, 745 F.2d 125, 139 (3d Cir. 1984) (holding that when the defendant demonstrates "an actual conflict of interest," "prejudice may be presumed"); *Moscony*, 927 F.2d at 748 (agreeing with the district court's determination that "fairness" to the defendant "dictated the disqualification of the [entire] firm" where one of the firm's lawyers had previously represented multiple suspects including the defendant); *United States v. Hess*, 135 F.3d 905, 910 (3d Cir. 1998) (noting that "an actual conflict of interest" arises when defense counsel's "interests diverge," such as when there was a "plausible defense strategy that could have been pursued" but that "inherently conflicted with, or was rejected due to, [defense counsel's] other loyalties or interests").

Here, it is certainly plausible that defense counsel may have steered Dunham away from cooperating with the government at the proffer meetings, but that Brownlee's interest in pursuing such a strategy conflicted with Brownlee's (or Holland & Knight's) interest in protecting McAdams.

Other *Twigg* cases also support a finding of fundamental unfairness here. For example, in *United States v. Nolan-Cooper*, 155 F.3d 221, 225 (3d Cir. 1998), this Court affirmed the district court's dismissal of a motion to dismiss the indictment where the defendant claimed that the undercover agent who was investigating her had "insinuated himself into a close social relationship with [her], which culminated, on one occasion, in sexual intercourse." *Id.* at 224. The defendant claimed this was outrageous misconduct, and this Court disagreed, but only because the sexual encounter was a single isolated incident that did not serve an investigatory purpose and was not directed by the agent's supervisors. *See id.* ("Had the sexual misconduct been present throughout the investigation (with the actual or constructive knowledge of supervisory personnel), a different situation would be presented."). This Court's language in *Nolan-Cooper* is telling: even when an undercover agent's

romantic involvement with a target serves no investigatory purpose, it could still constitute outrageous misconduct that undermines the fundamental fairness of a prosecution, if it is sufficiently prolonged or directed by the government. *See id.* at 230.

Here, the government's misconduct in exploiting the conflict of interest cuts far closer to the core of fundamental fairness than did the undercover agent's conduct in *Nolan-Cooper*. Far from mere "passive tolerance" of a defect in the prosecution, the government engaged in "active encouragement of impropriety" when it exploited the conflict for its benefit. *Voigt*, 89 F.3d at 1066; *see* Appx. A13 (R. 112, Order, at 7) (quoting *Voigt*). Other cases have similarly drawn a line between permissible "passive" misconduct and impermissible "conscious direction" of misconduct. *Marshank*, 777 F. Supp. at 1523 (quoting *United States v. Simpson*, 813 F.2d 1462, 1468 (9th Cir. 1987)).

Finally, none of the caselaw cited by the government in the proceedings below counsels against reversal here. In its supplemental memorandum opposing Dunham's motion to dismiss, the government cited twenty-one cases. Appx. A385-A388 (R. 101 at 5-8). These cases include some relevant cases discussed above, such as *Twigg*, *Voigt*,

Kossak, *Hoffecker*, and *Nolan-Cooper*. But they also include at least a dozen cases that are entirely inapposite: cases that essentially raise failed entrapment defenses repackaged as due-process defenses. *See United States v. Ward*, 793 F.2d 551 (3d Cir. 1986) (undercover agents met with defendant in federal prison and planned drug-distribution scheme); *United States v. Martino*, 825 F.2d 754 (3d Cir. 1987) (undercover operation); *United States v. Driscoll*, 852 F.2d 84 (3d Cir. 1988) (agents solicited defendant to order child pornography by mail); *United States v. Pitt*, 193 F.3d 751 (3d Cir. 1999) (sting operation); *United States v. Barbosa*, 271 F.3d 438 (3d Cir. 2001) (undercover operation); *United States v. Rodriguez*, 54 F. App'x 739 (3d Cir. 2002) (agents induced defendant to rob vehicle); *United States v. Lakhani*, 480 F.3d 171 (3d Cir. 2007) (sting operation); *United States v. Stewart*, 378 F. App'x 201 (3d Cir. 2010) (agents paid confidential informant); *United States v. Christie*, 624 F.3d 558 (3d Cir. 2010) (agents paid former fugitive informant to distribute child pornography in order to target defendant); *United States v. Talentino*, 486 F. App'x 286 (3d Cir. 2012) (government used informant to induce defendant to criminal activity); *United States v. Dennis*, 826 F.3d 683 (3d Cir. 2016) (same); *United States v. Stimler*, 864 F.3d 253 (3d

Cir. 2017) (undercover operation). None of these cases has anything to do with Dunham's assertion of outrageous misconduct based on governmental exploitation of a conflict of interest. And just because numerous defendants have previously attempted to raise so-called *Twigg* claims under dubious circumstances does not mean that Dunham's claim is any less meritorious.

Whether this Court applies the three-part *Voigt* test or simply applies *Twigg*'s fundamental-fairness doctrine, the result is the same: the government's knowing exploitation of a conflict of interest amounted to outrageous misconduct that undermined the fundamental fairness of Dunham's prosecution. Despite the evidence of a conflict, the government's exploitation of that conflict, and the harm to Dunham, the district court nevertheless ruled that Dunham could not "produce sufficient evidence to prove that the government knew a conflict existed . . . before Defendant's first proffer." Appx. A12 (R. 112, Order, at 6). And the district court held *arguendo* that Dunham "presented no evidence that the government, once aware of the conflict, encouraged it for the government's own purposes." *Id.* at A13. The district court thus erred in

denying Dunham's motion to dismiss the indictment. This Court should reverse.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING AN EVIDENTIARY HEARING TO DETERMINE WHETHER THE GOVERNMENT ENGAGED IN OUTRAGEOUS MISCONDUCT BY EXPLOITING A CONFLICT OF INTEREST.

Assuming this Court agrees with the foregoing argument that the district court erred in denying Dunham's motion to dismiss the indictment, then the appeal ends there: this Court should reverse Dunham's conviction and sentence and remand for the district court to dismiss the indictment. If, however, this Court disagrees, then the next issue is whether the district court abused its discretion in denying Dunham's request for an evidentiary hearing to determine when, if at all, the government became aware of Brownlee's conflict of interest; whether the government knowingly allowed Brownlee to proceed as Dunham's counsel through some or all of the proffer meetings despite that conflict; and the extent to which this conduct caused Dunham prejudice. *See* Appx. A255-A256 (R. 94, Reply, at 2-3) (requesting evidentiary hearing on these and other issues).

Dunham bore the burden of stating a claim of government misconduct, but the burden was slight: if Dunham's filings below "demonstrate[d] a 'colorable claim' for relief," then the district court abused its discretion in denying an evidentiary hearing. *Voigt*, 89 F.3d at 1067 (quoting *United States v. Brink*, 39 F.3d 419, 424 (3d Cir. 1994) (remanding for hearing where Brink alleged facts that, if true, "could violate a defendant's rights")); *see also United States v. Soberon*, 929 F.2d 935, 941 (3d Cir. 1991) (observing that "the proper course would have been to hold an evidentiary hearing" if the district court had even "reasonable suspicion" of "prosecutorial misconduct").

Dunham amply met his slight burden to state a claim below, not only alleging sufficient facts to warrant an evidentiary hearing but also submitting substantial documentation in support of those allegations. Consider the following:

Motion to Dismiss. Dunham set forth the conflict that existed throughout Brownlee's representation of him, alleged that the "government deliberately, or at least with willful blindness, exploited" the conflict, and attached documentation demonstrating Dunham's relationship with McAdams and Special Agent Lynn's awareness of the

conflict. *See* Appx. A151-A187 (R. 71, Motion), Appx. A189-A248 (R. 71-1 through 71-9, Attachments).

Reply in Support of Motion to Dismiss. Following the government's interview of McAdams, Dunham later submitted a transcript of the interview to the court, along with other documentation establishing Dunham's reasonable belief either that McAdams was a lawyer or that McAdams held himself out as a lawyer. *See* Appx. A254-A263 (R. 94, Reply), Appx. 264-A328 (R. 94-1 through 94-5, Attachments). Dunham's reply also made clear exactly what factual disputes existed that the court could resolve by means of an evidentiary hearing. *See* Appx. A255-A256 (R. 94 at 2-3) (listing six factual matters to determine).

Supplemental Memorandum. Dunham then submitted even more evidence in support of the existence of the conflict of interest and showing that McAdams had in fact advised Dunham as to the programs in connection with which Dunham's charged conduct arose. *See* Appx. A346-A351 (R. 100, Memorandum), Appx. A352-A380 (R. 100-1 through 100-6, Attachments).

Motion for Reconsideration. Following the district court's denial of his motion to dismiss and following the discovery of notes from Special

Agent Lynn relating her conversations with Dunham on the date of the raid, Dunham moved for reconsideration, attaching those notes as further evidence of the government's awareness of the conflict. *See* Appx. A403-A405 (R. 139, Amended Response to Gov't Motion in Limine; Motion for Reconsideration of Dunham's Motion to Dismiss, at 9-11).

Motion for New Trial. Finally, in Dunham's motion for new trial, Dunham submitted the entire notebook of a government witness, Connie Lausten, to corroborate the extent to which McAdams advised Dunham and thus faced potential exposure himself, creating a conflict of interest for Brownlee. *See* Appx. A434 (R. 232, Motion, at 17), R. 232-4 through 232-6 (Notebook).

Despite these submissions, the district court denied Dunham's motion to dismiss without holding an evidentiary hearing, concluding that Dunham "cannot produce sufficient evidence to prove that the government knew a conflict existed . . . before Defendant's first proffer in July of 2013." Appx. A12 (R. 112, Order, at 6). This was an abuse of discretion because the district court should have held the hearing to see what Dunham produced, rather than summarily determining that Dunham could not meet his burden of production. Moreover, the court

addressed only whether the government knew of a conflict "before" the first proffer meeting and not whether the government learned of the conflict "at" the first proffer meeting and *then* exploited it by forging ahead. The district court also held that Dunham "presented *no evidence* that the government, once aware of the conflict, encouraged it for the government's own purposes." *Id.* at A13. But Dunham provided evidence that the government sought Dunham's participation in proffer meetings so that the government could learn what Dunham was willing to share. Finally, the district court acknowledges that Dunham "makes many allegations of prejudice"—which is all Dunham had to do to make a colorable claim as to the third element of the *Voigt* outrageous-misconduct test—but nevertheless concludes that Dunham would fail the third element because "it is *possible* that the government may have obtained [the information it received from Dunham] from other sources." *Id.* at A13-A14. Again, rather than opine on what was possible, the district court should have held an evidentiary hearing.

On reconsideration, the district court likewise concluded that there was "*no evidence*" of deliberate intrusion into Dunham's attorney-client relationship, and that "there was *no evidence* of actual and substantial

prejudice." Appx. A21 (R. 145, Opinion, at 7) (emphases added). At minimum, there were genuine factual disputes about these matters, which were plainly material to whether the government committed outrageous misconduct that undermined the fundamental fairness of Dunham's prosecution and thus warranted dismissal of the indictment.

The district court thus abused its discretion in denying Dunham an evidentiary hearing. This court should remand with instructions to hold an evidentiary hearing and to dismiss the indictment if, at the hearing, Dunham shows that the government knowingly exploited a conflict of interest in a way that caused Dunham actual and substantial prejudice.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING DUNHAM'S MOTION FOR NEW TRIAL WITHOUT HOLDING AN EVIDENTIARY HEARING TO DETERMINE WHETHER THE CONFLICT OF INTEREST INVALIDATED DUNHAM'S WAIVER OF HIS RIGHTS UNDER FED. R. CRIM. P. 11(F) AND FED. R. EVID. 410.

Finally, as an alternative to the foregoing arguments, this Court should hold that the district court abused its discretion in denying Dunham's motion for new trial without holding an evidentiary hearing on the question whether Dunham knowingly waived his rights under Fed. R. Crim. P. 11(f) and Fed. R. Evid. 410. *See* Appx. A217 (R. 71-5, Proffer Letter, at 12). If this Court so rules, it should remand with

instructions for the district court to hold an evidentiary hearing and, if the court determines that Dunham's waiver was unknowing, to grant Dunham's motion for a new trial in which the government is not permitted to rely on the proffer statements that the government obtained as a result of Dunham's unknowing waiver of his rights.

Dunham raised this issue in response to the government's motion in limine to preclude Dunham from testifying contrary to the proffer statements. *See* Appx. A399-A401 (R. 139, Response, at 5-7) (arguing that Dunham's waiver of rights was not knowing, because of the conflict of interest, and was thus invalid). At this point, it was the government that had the burden to prove that Dunham's waiver in fact *was* knowing. *See United States v. Mayfield*, 361 F. App'x 425, 431 (3d Cir. 2010) ("The Government bears the burden of showing, by a preponderance of the evidence, that the waiver was voluntary and knowing." (citing *Colorado v. Connelly*, 479 U.S. 157, 168 (1986))). Instead, the district court again rejected Dunham's argument without even holding an evidentiary hearing to test whether the government could meet its burden. *See* Appx. A19 (R. 145, Opinion, at 5) ("The mere allegation of a conflict with his

chosen counsel is not enough to invalidate a waiver that he knowingly agreed to.").

The district court's rejection of Dunham's argument without holding an evidentiary hearing is particularly problematic in light of this Court's caselaw reiterating the importance of ensuring that a defendant acts knowingly in waiving important constitutional rights. *Cf., e.g.*, *United States v. Salemo*, 61 F.3d 214, 219 (3d Cir. 1995) (when a defendant waives the right to counsel, the trial judge must "make a thorough inquiry and . . . take all steps necessary to insure the fullest protection of this constitutional right") (quoting *Von Moltke v. Gillies*, 332 U.S. 708, 722 (1948) (Black, J., plurality opinion)); *United States v. Welty*, 674 F.2d 185, 187 (3d Cir.1982) (when a defendant seeks substitute counsel, "a trial judge cannot be permitted to go forward when a defendant does not fully appreciate the impact of his actions on his fundamental constitutional rights"); *United States v. Jackson*, 523 F.3d 234, 243 (3d Cir. 2008) (when a defendant enters a Rule 11 plea agreement, a district court must "confirm" that the defendant understands that the defendant is waiving constitutional rights such as the right to appeal). Here, the district court took no steps to confirm that

Dunham had knowingly waived his rights prior to entering the proffer sessions with the government. Thus, it was an abuse of discretion for the district court to deny Dunham's motion for new trial without at least holding an evidentiary hearing to determine whether Dunham's waiver was knowing. This Court should reverse and remand for such a hearing.

CONCLUSION

For the foregoing reasons, this Court should vacate Dunham's conviction and reverse the district court's denial of Dunham's motion to dismiss the indictment. Alternatively, this Court should remand the case to the district court with instructions to hold an evidentiary hearing and to dismiss the indictment if, at the hearing, Dunham shows that the government knowingly exploited a conflict of interest in a way that caused Dunham actual and substantial prejudice. This Court should also remand for an evidentiary hearing to determine whether Dunham knowingly waived his rights under Fed. R. Crim. P. 11(f) and Fed. R. Evid. 410 when he agreed to meet with the government in proffer sessions, and, if the district court determines that Dunham's waiver was unknowing, to grant Dunham's motion for new trial without permitting

the government to rely on the proffer statements that the government obtained as a result.

December 14, 2020

Respectfully submitted,

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COMBINED CERTIFICATIONS

1. Pursuant to Local Appellate Rule 46.1(e), I hereby certify that I am counsel of record and am a member of the bar of the United States Court of Appeals for the Third Circuit.

2. I certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,949 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

3. I certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Century Schoolbook, Size 14.

4. I certify that on December 14, 2020, I electronically filed the foregoing Brief. Notice of this filing was sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

5. I certify that the text of the electronically filed brief is identical to the text of the paper copies that will be dispatched for delivery within

five days to the Clerk of the Court of the United States Court of Appeals for the Third Circuit.

6. I certify that on December 14, 2020, I caused a virus check to be performed on the electronically filed copy of this brief using the following virus software: Windows Defender Antivirus, version 1.329.219.0. No virus was detected.

December 14, 2020

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