No. 02-1866

IN THE

Supreme Court of the United States

KEITH SHWAYDER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* LEGAL ETHICISTS DAVID LUBAN, L. RAY PATTERSON, RORY K. LITTLE, DEBORAH A. COLEMAN, AND W. WILLIAM HODES, IN SUPPORT OF PETITIONER

ERIK S. JAFFE
Counsel of Record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Amici Curiae

Date: August 27, 2003

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES

Pages

Cases

IN THE

Supreme Court of the United States

KEITH SHWAYDER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

INTEREST OF *AMICI CURIAE*[1]

Amici legal ethicists are professors and practitioners who are experts in legal ethics and professional responsibility.

David Luban is the Frederick J. Haas Professor of Law and Philosophy at the Georgetown University Law Center. He has taught legal ethics since 1980. He is the co-author of LEGAL ETHICS, the editor of THE ETHICS OF LAWYERS, and the recipient of the 1998 American Bar Foundation's Keck Lecturer Award in Legal Ethics and Professional Responsibility. He is a former chair of the AALS Section on Professional Responsibility.

L. Ray Patterson is the Pope J. Brock Professor of Professional Responsibility at the University of Georgia School of

[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

Law. He has taught legal ethics since 1963. He is the author of LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY and a former reporter and consultant for the ABA Commission on Evaluation of Professional Standards.

Rory K. Little is a professor at the University of California Hastings College of Law and has been teaching criminal law and procedure and legal ethics since 1994. He is a past member of the ABA's Standing Committee on Legal Ethics and is a current member of the ABA's Criminal Justice Standards Committee. He is a former vice-chair of the San Francisco Bar Association's Ethics Committee, a former Associate Deputy Attorney General in the U.S. Dept of Justice, and a designer of the Department's Professional Responsibility Officer training program. He was a practicing criminal defense attorney for 3 years and a federal prosecutor for 7 years, and lectures extensively on legal ethics for prosecutors and criminal litigators.

Deborah A. Coleman is a practicing attorney in Cleveland, Ohio who has provided ethics counsel to lawyers for over 20 years. She regularly teaches, writes, and is involved in bar association activities on the topic of legal ethics. She is a past member and chair of both the ABA Standing Committee on Ethics and Professional responsibility and the Cleveland Bar Association Professional Ethics Committee. She is also a past member of the Advisory Committee to the Ohio Attorney General on Ethics and Professional Responsibility.

W. William Hodes is Professor Emeritus of Law at the Indiana University School of Law, where he taught legal ethics and other subjects from 1979 through 1999. He is the coauthor of THE LAW OF LAWYERING, a nationally recognized treatise. He is a former chair of the AALS Section on Professional Responsibility, a former member of the National Conference of Bar Examiners Multi-State Professional Responsibility Examination drafting committee, and was a member of the Advisory Council to the American Bar Association Ethics 2000 Commission. Since 1999 he has been in private practice

with a focus on law-of-lawyering issues and is currently a Director of the Association of Professional Responsibility Lawyers.

Amici individually and collectively have devoted substantial portions of their professional and academic careers to studying the ethical norms surrounding the practice of law and continually strive to improve both the substance and operation of those ethical norms. Their interest in this case is in encouraging this Court to recognize the fundamental and critical importance of the duty of loyalty to the lawyer-client relationship, and to adopt reasonable means of protecting clients from breaches of that duty. By presenting their views in this brief, *amici* hope to assist the Court in safeguarding the fair and impartial administration of justice in the adversarial system and maintaining the necessary public confidence in our criminal justice system.

STATEMENT

This case presents especially apt circumstances for determining whether the presumption of prejudice that applies to conflicts arising from concurrent representation of criminal defendants also applies to conflicts arising from successive representation of clients in connection with the same criminal matter. There is no dispute that petitioner's counsel had an "an actual conflict of interest," and the court of appeals so held. Pet. App. 11a, 13a. There is no dispute that petitioner did not waive that conflict, and the court of appeals even held that the putative waiver form provided by counsel was affirmatively misleading in claiming that no conflict even existed. Pet. App. 5a, 9a, 11a-12a. And there is no dispute that throughout the majority of petitioner's representation, petitioner's counsel cooperated with his former client's new counsel and pursued a joint-defense strategy that was fully in the interest of his former client, but only dubiously in the interest of petitioner. Pet. App. 5a, 13a.

Petitioner's counsel in this case had previously represented one of petitioner's co-defendants during the pre-indictment phase of this case. Even after that representation ended and his former client obtained new counsel, petitioner's counsel continued to have ongoing duties of loyalty and confidentiality to his former client. Following the indictment, petitioner's counsel opted for a basic strategy of a joint defense between his past and present clients, and pursued that strategy throughout the pre-trial phase of the case and for the first month of the trial itself. Pet. App. 5a; Pet. 7. It was not until his former client pled guilty halfway through trial, and turned on petitioner in an effort to reduce his sentence, that petitioner's counsel was forced to switch strategies mid-stream and attempt to mitigate the damage caused by the earlier alignment among the defendants.

In the latter part of the trial, therefore, petitioner's counsel was forced to implicitly repudiate the joint defense position that none of the defendants had done anything improper. With his own and his client's credibility shattered, petitioner's counsel was left with defensive *post-hoc* efforts to limit the consequences of his former client's plea bargain. Trial preparation, the opening statement, and the first month in court thus were wasted, or even counter-productive, and the second half of trial was spent in an effort to dig petitioner out of the hole dug by his counsel's choice of strategy.

Given the defective joint defense strategy employed in this case, counsel's successive representations took on many of the damning characteristics of a concurrent representation, raised the same high risks of skewed judgment found in concurrent representation, and generated the same difficulties of proof for the disserved defendant forced to establish that a non-conflicted lawyer would have adopted a different defense approach. Indeed, counsel's continuing duties of loyalty and confidentiality to his former client, regarding the same matters at issue in the subsequent criminal trial, deprived petitioner of counsel's undivided loyalty and generated conflict-

ing *concurrent duties* notwithstanding the nominal end of the prior *representation*.

The clear actual conflict and the many similarities to a case of concurrent representation thus make this case a highly appropriate vehicle for deciding whether the presumption of prejudice adopted in *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980), should apply to such conflicted successive representation and for deciding the standard for demonstrating the adverse effect necessary to trigger the *Sullivan* presumption of prejudice.

SUMMARY OF ARGUMENT

1. Conflicts of interest arising from successive representations by the same attorney of different persons connected to the same criminal matter are frequently occurring events. Such conflicts have arisen in numerous cases throughout the country and are likely to continue to occur at a significant rate. The frequent occurrence of such conflicts suggests that any additional guidance from this Court in resolving the divergent views of the lower courts on the proper treatment of such conflicts would have substantial impact on the criminal justice system and thus would be a highly valuable use of this Court's resources.

2. The Ninth Circuit in this case applied an inappropriately high burden for proving an adverse effect from a clear and substantial conflict of interest arising from successive representation of two defendants with palpably inconsistent interests. The divided loyalties inherent in such successive representations can influence a defense attorney in numerous, and often subtle, ways, clouding his judgment and dulling his zeal. Such effects can be hard to discern and even harder to prove from a cold trial transcript. And the effects on preparation and strategy can remain unseen despite a defendant's diligent *post hoc* investigation.

Given such inherent difficulties of proof, requiring a defendant to prove what strategy or degree of zeal his attorney *would have* employed but for the conflict will inevitably leave

significant Sixth Amendment violations unremedied. Instead of the approach used by the Ninth Circuit, this Court should adopt the more lenient burden of proof used by the majority of circuits and hold that a defendant whose lawyer was burdened with a conflict of interest arising from successive representation need only demonstrate some plausible alternative defense strategy or tactic that *might have been pursued* but that was inherently in conflict with, or not undertaken because of, the attorney's divided loyalties or interests. That standard takes into account the difficulties of proof caused, in part, by the conflict of interest itself yet still requires a sufficient showing by defendants so as to avoid wholly unnecessary expenditure of judicial resources.

3. Maintaining a conflict-free system of criminal justice, and remedying such conflicts when they nonetheless occur, is of paramount importance to the integrity of our judicial system. Both the actual and perceived fairness of that system are necessary to ensure public confidence in, and support of, the criminal law. Where the state has brought to bear the power of the criminal justice system against an individual, only the undivided loyalty of defense counsel can stand as an adequate restraint upon that power. Once an admitted conflict of interest has undermined the integrity of the adversarial process, placing too-high a burden on defendants to prove the practical consequences of that breakdown renders empty the Sixth Amendment's right to counsel and threatens the fairness and effectiveness of the entire system. The petition thus raises questions of great national importance that should be resolved by this Court.

ARGUMENT

I. CONFLICTS OF INTEREST FROM SUCCESSIVE REPRESENTATIONS ARE A FREQUENTLY RECURRING PROBLEM IN THE CRIMINAL JUSTICE SYSTEM.

The questions presented in this case involve a common problem in the criminal justice system: conflicts of interest arising from a defense attorney's successive representation of different persons connected to an alleged crime. The numerous cases cited in the petition give an initial sense of the hardiness of the issue. *See* Pet. 13-14 (citing cases). Further evidence of the breadth of the issue can be found in the 161 cases discussing conflicts and successive representation, 74 of which were in the last five years.[2] In fact, this Court's most recent case involving a conflict from successive representation, *Mickens* v. *Taylor*, 535 U.S. 162 (2002), has been cited in 123 cases in the seventeen months since it was decided.

Determinations of whether conflicted representation had an adverse effect on a defendant likewise arise frequently, both in successive and concurrent representation cases. Once again, the petition itself cites numerous cases addressing the "adverse effect" requirement, and the well-developed split on the standard for proving such an effect testifies to the recurrence of the issue. Pet. 15-19. Furthermore, those portions of *Cuyler* v. *Sullivan* discussing the adverse impact of a conflict and the presumption of prejudice therefrom have been cited in 1766 cases, 492 of which were in the last five years.[3]

---

[2] Based on an August 26, 2003 Westlaw search of all federal and state cases for "successive /2 representation /30 conflict" run both with and without the date restriction of "da(aft August 26, 1998)."

[3] Based on an August 26, 2003 Westlaw Keycite search limited to federal and state cases and Headnotes 19 and 21, run both with and without the date restriction of August 26, 1998.

The sheer frequency with which these issues have arisen, and have continued to arise over the last five years, suggests an ongoing and significant problem with conflicts of interest in the criminal justice system, the importance of the questions presented, and the utility of this Court devoting its resources to this aspect of the law.

II. VINDICATING SIXTH AMENDMENT RIGHTS REQUIRES A LESS RESTRICTIVE AND MORE OBJECTIVE STANDARD OF ADVERSE EFFECT FROM CONFLICTED SUCCESSIVE REPRESENTATION GIVEN THE DIFFICULTY OF ASSESSING THE RECORD MADE BY THE CONFLICTED ATTORNEY.

The questions presented by the petition also warrant this Court's review because the Ninth Circuit's restrictive view of what constitutes an adverse effect from conflicted representation and that court's still more restrictive treatment of successive representation cases are insufficiently protective of fundamental Sixth Amendment rights. Because conflicts of interest can infect the lawyer-client relationship in subtle ways, and can cause shifts in judgment and strategy that generate a plausible, but not optimal, defense, imposing a restrictive and subjective burden on a defendant to show that the conflicted lawyer was in fact influenced by the conflict in his basic strategy will leave many a distorted defense unremedied.

Many such shifts in judgment or strategy will not be readily evident in the record and may not ever be detectable by the defendant. As this Court has recognized, a legal representation "contains a myriad of occasions for the exercise of discretion, each of which goes to shape the record in a case, but few of which are part of the record." *Young* v. *United States ex rel. Vuitton et Fils S. A.*, 481 U.S. 787, 812-13 (1987) (plurality opinion) (discussing the effect of a non-disinterested prosecutor). A breach of the duty of loyalty, such as at issue in this case, can affect invisibly almost every decision in the representation. It can blunt the lawyer's advocacy, undermine

his independent professional judgment, and inhibit his creativity. Assessing the actual consequences of such inhibition can be daunting. In fact, there often is no way to recreate what might have, could have, or should have happened if the accused were represented by a lawyer with undivided loyalty. *Cf. In re Richardson*, 675 P.2d 209, 214 (Wash. 1983) ("[T]o assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.").

In fact, reliance on the record of the trial to determine whether actual conflicts had adverse effects on the representation will systematically cause courts to underestimate the negative effect of such conflicts because the effects may be sins of omission not easily reflected in the record. And the subjective inquiry into what counsel *would have done* absent the conflict improperly focuses on the self-serving rationalizations of the conflicted attorney himself, fostering unreliable determinations of adverse effect.

A breach of loyalty may be apparent, but this Court and the lower courts have repeatedly recognized that the effects of a breach are not: "[I]t is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." *Strickland* v. *Washington*, 466 U.S. 668, 692 (1984). Other courts agree, observing that when a defense lawyer has a conflict of interest, "the prejudice may be subtle, even unconscious." *Castillo* v. *Estelle*, 504 F.2d 1243, 1245 (CA5 1974). Because a cold record cannot be expected to disclose "the erosion of zeal which may ensue from divided loyalty," *id*., the *Castillo* court refused to require that the defendant identify specific instances in which his lawyer's conflicting loyalties adversely affected his representation. *See also State* v. *Watson*, 620 N.W.2d 233, 236 (Iowa 2000) ("'A cold, dispassionate appellate transcript simply cannot provide an adequate basis for assessing [defense counsel's] performance, for

subtle variations in demeanor and depth of cross-examination cannot be reflected in the pages of a transcript.'") (quoting *Zuck* v. *Alabama*, 588 F.2d 436, 440 (CA5), *cert. denied*, 444 U.S. 833 (1979)).

The problems with imposing a substantial hurdle for the proof of an adverse effect are apparent from this case. Prior to trial, defendant's attorney, Schlie, in cooperation with his former client's new attorney, refrained from pursuing a strategy of shifting the full blame to his former client, Swan, who was the alleged, and eventually admitted, central actor in the bribery scheme. Instead, Schlie opted for a joint defense strategy designed to vindicate his former client and to deny the underlying criminal conduct. Pet. App. 5a. That strategy was a disaster and had to be abandoned mid-trial when Swan pled guilty and switched sides to testify for the government against petitioner. Pet. App. 5a.

Whether a non-conflicted lawyer would have adopted the same strategy *ex ante*, despite the palpable risks, is impossible to prove with any certainty. But what is eminently clear is that the original choice of strategy in this case was necessarily made through the clouded lens of Schlie's conflict of interest. The decision to join forces with his former client's new counsel in a sink-or-swim-together approach could not help but have been influenced by Schlie's continuing loyalty to his former client, and inevitably detracted from Schlie's loyalty to petitioner.

Schlie's subsequent explanations and defense of his strategic choice simply cannot be considered independent of the divided loyalty stemming from the conflict of interest. For example, the claim that use of mock jurors led to abandonment of a finger-pointing strategy, Pet. App. 9a-10a, simply raises more questions than it answers. It seems more than likely that Schlie's presentation of the alternative strategy to those jurors was skewed by Schlie's conflict-causing loyalty to his prior client and hence his unwillingness or inability to attack him with vigor. Similarly, Schlie's interpretation of

the responses and reactions of the mock jurors necessarily flowed through the tainted lenses of his past efforts to prevent Swan's indictment in connection with the very same bribery scheme.

Given that Schlie would have been in an awkward or impossible position if he had elected to attack his former client from the outset, his judgment regarding strategy was highly suspect, and his explanation of his strategic choices cannot be accepted at face value. *See United States* v. *Malpiedi*, 62 F.3d 465, 470 (CA2 1995) ("[A]fter-the-fact testimony by a lawyer who was precluded by a conflict of interest from pursuing a strategy or tactic is not helpful. Even the most candid persons may be able to convince themselves that they actually would not have used that strategy or tactic anyway, when the alternative is a confession of ineffective assistance resulting from ethical limitations."). Indeed, Schlie's divided loyalties and distorted judgment is evident from his unbelievable failure to recognize or admit the clear conflict of interest even *after* his former client flipped sides and began testifying for the government *against* petitioner. Pet. App. 10a, 12a, 14a n. 5.

In light of the almost inevitable bias created by conflicts such as the one in this case, the Ninth Circuit's restrictive and subjective burden of proof "is unfair to the accused, for who can determine whether his representation was affected, at least, subliminally, by the conflict." *People* v. *Stoval*, 239 N.E.2d 441, 444 (Ill. 1968); *cf. Glasser* v. *United States*, 315 U.S. 60, 76 (1942) ("The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.").

The better approach is that taken by the majority of courts, which requires only that a disserved client point to a plausible alternative strategy that would have been foreclosed by the conflict. Whether or not counsel would have in fact pursued that strategy absent the conflict is irrelevant, because

counsel never had the opportunity to make such a conflict-free determination. *See, e.g.*, *Malpiedi*, 62 F.3d at 469 ("Counsel's inability to make * * * a conflict-free decision is itself a lapse in representation."). The majority approach has the benefit of focusing on the objective criteria of what strategies were available but incompatible with the conflict, thus offering a more reliable means of remedying Sixth Amendment violations.[4]

III. THE PETITION PRESENTS QUESTIONS OF NATIONAL IMPORTANCE TO THE OPERATION OF THE CRIMINAL JUSTICE SYSTEM AND THE PUBLIC'S CONFIDENCE IN THAT SYSTEM.

As this Court has often recognized, the judicial system in general, and the criminal justice components of that system in particular, depend both on ensuring that proceedings are in fact fair and also on ensuring that they be seen by the public as being fair. For the criminal justice system to serve its varied functions and maintain social stability, the public must have confidence in the fairness of that system. The importance of avoiding improper influences on jurists goes without saying, and this Court has even recognized the importance in having the prosecutor – necessarily adverse in interest to the defendant – not be improperly biased against his opponent.

---

[4] *Amici* note that the majority approach to demonstrating an adverse effect from a conflict still only triggers the *Mickens* presumption of prejudice. In appropriate circumstances that presumption could be overcome. Additionally, this case involves a clear conflict of interest not waived by the defendant. A case involving an *effective* waiver would present different considerations, as would a case in which a defendant purposely sand-bagged the court and the prosecution by concealing a conflict that had not been waived only to play that "trump" card in the event the trial went badly. There are no allegations of such sand-bagging in this case, and the facts as described by the Ninth Circuit suggest quite the opposite – that petitioner was misled by his attorney who denied that a conflict even existed and failed to disclose the limits imposed by his former client.

See Young, 481 U.S. at 811-812 (plurality opinion) ("[W]hat is at stake is the public perception of the integrity of our criminal justice system. '[J]ustice must satisfy the appearance of justice,' * * * and a prosecutor with conflicting loyalties presents the appearance of precisely the opposite.") (citation omitted). But the importance of having the defendant's own lawyer free from the taint of conflict is of even greater importance to the integrity of our adversarial system because that lawyer is the only person tasked with dedication to the defendant's interests above all others.

Where the one person on a defendant's side cannot be trusted, and a defendant cannot obtain relief even after having demonstrated an actual conflict of interest, the public's faith in the fairness of the system is sure to suffer. A suspect representation, which could have failed in so many places and at so many levels, produces a verdict that has not been tested adequately by the adversarial process and, thus, cannot be trusted. Members of the public will likely conclude from such a failure not only that they cannot have confidence in the result in the specific case itself, but also in all future cases in which they or persons they know may have the misfortune of being the object, rightly or wrongly, of the criminal justice system. *Cf. United States* v. *Olano*, 507 U.S. 725, 736 (1993) (discussing the need to correct errors that seriously affect the "'fairness, integrity or public reputation of judicial proceedings'"). "The dynamics of litigation are far too subtle, the attorney's role in that process is far too critical, and the public's interest in the outcome is far too great to leave room for even the slightest doubt concerning the ethical propriety of a lawyer's representation in a given case." *Emle Indus., Inc.* v. *Patentex, Inc.*, 478 F.2d 562, 571 (CA2 1973).

As this Court recognized in *Wheat* v. *United States*, 486 U.S. 153, 160 (1988), the "Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." Anything

less than an effective remedy for genuine conflicts of interest undermines not only the lawyer-client relationship and the Sixth Amendment right to counsel, but also public support for the justice system. In light of the damage to the system as a whole from unremedied conflicts of interest, the questions presented by the petition are of great national importance and should be resolved by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,

ERIK S. JAFFE
Counsel of Record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Amici Curiae

Dated: August 27, 2003.