No. 02-1866

In the Supreme Court of the United States

KEITH SHWAYDER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a defendant's showing that an attorney had a conflict of interest that adversely affected the attorney's performance is sufficient to establish a Sixth Amendment violation when the conflict stems from representation of a former client.

2. Whether the court of appeals applied the correct legal standard for determining whether there was an adverse effect on performance arising from an attorney's conflict of interest.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-21a), as amended (Pet. App. 26a-28a), is reported at 312 F.3d 1109, as amended at 320 F.3d 889.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 2002. A petition for rehearing was denied on February 24, 2003 (Pet. App. 26a-28a). On May 15, 2003, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including June 24, 2003, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Nevada, petitioner was convicted of one count of racketeering, in violation of 18 U.S.C. 1962(c); one count of RICO conspiracy, in violation of 18 U.S.C. 1962(d); three counts of securities fraud, in violation of 15 U.S.C. 78j(b); two counts of wire fraud, in violation of 18 U.S.C. 1343; 13 counts of engaging in unlawful monetary transactions, in violation of 18 U.S.C. 1957; and one count of conspiracy, in violation of 18 U.S.C. 371. He was sentenced to 87 months' imprisonment, to be followed by three years of supervised release.

1. Petitioner was the president of Teletek, Inc., a telephone sales and installation company. Pet. App. 2a. Michael G. Swan contacted petitioner about the possibility of merging Teletek and United Payphone, a telephone company in which Swan had a controlling interest. *Ibid.* Petitioner agreed to the merger. *Id.* at 3a. Swan, petitioner, and co-defendant Kevin Orton (Teletek's accountant), engaged in a nationwide securities fraud scheme, pursuant to which they bribed stockbrokers to promote Teletek stock to unsuspecting public investors. Pet. App. 3a; Gov't C.A. Br. 4-5; Gov't Resp. Pet. Reh'g 1-2.

After the merger with United Payphone, petitioner remained with Teletek for approximately nine months. Pet. App. 3a. Working with an unscrupulous stock promoter, petitioner sold his personal holdings of Teletek stock at fraudulently inflated prices. Gov't C.A. Br. 4. As a result, petitioner realized more than $600,000 from the sale of his Teletek stock. *Id.* at 5. Eventually, the price of Teletek stock collapsed, the company went

bankrupt, and investors were left with worthless stock. Pet. App. 3a.

2. From October 1994 through May 1995, attorney John Schlie represented Swan in a grand jury investigation of bribes that Swan had paid to stockbrokers who promoted Teletek and United Payphone stock. Pet. App. 4a. Before petitioner was indicted in November 1996, he asked Schlie to represent him in legal proceedings arising from Teletek's activities. *Ibid.* Schlie ultimately agreed to represent petitioner after receiving from both Swan and petitioner written waivers of conflicts arising from Schlie's prior representation of Swan. *Id.* at 5a. Swan's waiver states that it does not authorize the disclosure of any information subject to the attorney-client privilege. *Ibid.*

At the beginning of their joint trial, petitioner, Swan, and Orton entered into a joint defense agreement. Pet. App. 5a. That agreement waived any potential conflict that might arise if one defendant ultimately decided to cooperate with the government. Gov't C.A. Br. 10. The agreement further specified that each defense attorney owed a duty of loyalty only to his individual client. *Ibid.*

In his opening statement, Schlie planted the seed for a defense in which Swan could be blamed for Teletek's illegal activities while petitioner remained ignorant of them. Gov't C.A. Br. 10. Schlie stated:

> And what you'll see is that this entire case boils down to knowledge. It boils down to knowledge, who knew exactly what it was was going on and what was told to them. Now as the Judge told you yesterday, you need to make your decision on each individual defendant independently, but the question is going to be knowledge.

Ibid.

Midway through the trial, Swan pleaded guilty and agreed to testify for the government. Pet. App. 5a. After Orton's counsel cross-examined Swan and vigorously attacked his credibility, Schlie cross-examined Swan on petitioner's behalf. *Ibid.* During Schlie's cross-examination, Swan admitted that often "he would not tell [petitioner] what was going on" and that "he had told [petitioner] that many of the issuances of stock were for legitimate purposes when they were not." *Ibid.* Schlie also elicited that Swan was testifying as part of a plea agreement with the government, that his decision to plead guilty reduced his sentence significantly, and that the government could move to have his sentence reduced even further. *Id.* at 6a.

During closing argument, Schlie blamed Swan for the fraudulent transactions and branded Swan a liar:

> Who signs all the documents filed with the [SEC]? Michael Swan. Who makes all the decisions on funding with all these brokers? Michael Swan. . . .
>
> And I asked him, "You would tell [petitioner] that these things were for promotional services, consulting services, investment banking agreements?" "That's right." That's what he was telling [petitioner] and he covered it with agreements that made the transactions, every one of them, look legitimate. There isn't one shred of evidence in his testimony or in this record that he told [petitioner] what was going on. . . .
>
> [Petitioner is] a 60 year old man who never had legal problems before this. For nine months of his life he got involved with Michael Swan trying to do a business deal. Michael Swan abused that situation. Michael Swan lied to his wife. He lied to his

> lawyer. He lied to his friends. He lied to his business associates. He lied to [petitioner]. He lied to everyone. That's just the state of the evidence.

Pet. App. 8a-9a (brackets in original). The jury found petitioner guilty on all but three of the counts against him. *Ibid.*

3. Petitioner retained new counsel and filed a motion for new trial. Pet. App. 9a. The motion revealed Schlie's prior representation of Swan and maintained that Schlie had an actual conflict of interest that affected petitioner's trial. *Ibid.* At an evidentiary hearing, Schlie testified that the decision to enter into a joint defense agreement initially was not affected by Schlie's prior representation of Swan, but by his "belief, based in part on information gathered from mock jurors, that a finger-pointing strategy would not be successful in this case and that the best chance of acquittal for petitioner and Orton was to acquit Swan." *Id.* at 9a-10a.

The district court denied petitioner's motion for a new trial. Pet. App. 22a-23a. The district court determined that petitioner had failed to demonstrate that there was an actual conflict of interest, or that the alleged conflict adversely affected Schlie's performance. *Id.* at 23a. The court explained that "there was really nothing Schlie failed to do or did in representing [petitioner] which was based on or [a]ffected by his prior representation of Swan." *Ibid.* Petitioner's motion for reconsideration was denied. *Id.* at 24a-25a.

4. The court of appeals affirmed. Pet. App. 1a-21a. See *Id.* at 26a-28a (amending opinion). The court first determined that petitioner's waiver of his attorney's conflict of interest was not valid. *Id.* at 11a-12a. The court of appeals also concluded that there was an actual

conflict of interest. *Id.* at 12a-13a. The court explained that "[b]y shifting the blame to Swan through cross-examination concerning matters on which [Schlie] had previously represented [Swan], Schlie could have breached his duty of loyalty to Swan—or at least could have feared that he would appear to do so and therefore avoided certain areas of inquiry." *Id.* at 13a.

The court of appeals concluded, however, "that although Schlie had an actual conflict of interest, his former representation of Swan did not adversely affect [Schlie's] representation of [petitioner]." Pet. App. 16a. The court held that "[t]o show that an actual conflict had an adverse effect, the defendant must establish that it 'affected the counsel's performance, as opposed to a mere theoretical division of loyalties.'" *Id.* at 13a (quoting *Mickens* v. *Taylor*, 535 U.S. 162, 171 (2002)). The court further explained that "[t]he showing must be that 'counsel was influenced in his basic strategic decisions by the interests [of the former client],' as where the conflict 'prevents an attorney . . . from arguing * * * the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing'" the other. *Ibid.* (brackets in original) (quoting *Wood* v. *Georgia*, 450 U.S. 261, 272 (1981), and *Wheat* v. *United States*, 486 U.S. 153, 160 (1988) (quoting *Holloway* v. *Arkansas*, 435 U.S. 475, 490 (1978)). The court held that petitioner had failed to satisfy that standard, because "Schlie carried out precisely the type of representation [petitioner] maintained that his trial attorney could not and did not provide because of his conflict." *Id.* at 15a. The court explained that Schlie informed the jury in his opening statement that it should assess the guilt or innocence of each defendant independently, questioned witnesses with a goal of establishing that only Swan was to blame

for the crimes, elicited statements from Swan that he never told petitioner he was paying off stockbrokers, and made the jury aware that Swan would receive a much lower sentence by pleading guilty. *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 12-15) that this case presents an opportunity to address a question left open by *Mickens* v. *Taylor*, 535 U.S. 162, 176 (2002): whether the rule in *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980), that a presumption of prejudice arises in joint representation cases in which an attorney has a conflict of interest that actually affects the adequacy of the attorney's performance, should be extended to cases of subsequent representation. See *Mickens*, 535 U.S. at 176. This case, however, does not present an appropriate vehicle for resolving that question.

In general, in order to establish a violation of the Sixth Amendment right to effective assistance of counsel, a defendant must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland* v. *Washington*, 466 U.S. 668, 694 (1984). In *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980), the Court established a less-demanding burden when the defendant alleges that ineffective assistance has been caused by a defense counsel's conflict of interest in representing multiple defendants concurrently. In that context, the defendant must show that "an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 350. Once that showing is made, "prejudice is presumed." *Strickland*, 466 U.S. at 692.

In the wake of *Sullivan*, many courts of appeals extended the *Sullivan* rule to cases in which the defendant alleged a conflict based on counsel's duties to

former clients. See *Mickens*, 535 U.S. at 174-175 (citing decisions). In *Mickens*, the Court averted to that line of cases and suggested that such an extension might not be warranted. *Ibid.* The Court explained that *Sullivan* had "stressed the high probability of prejudice arising from multiple concurrent representation, and the difficulty of proving that prejudice." *Id.* at 175. The Court also observed that "the Federal Rules of Criminal Procedure treat concurrent representation and prior representation differently, requiring a trial court to inquire into the likelihood of conflict whenever jointly charged defendants are represented by a single attorney (Rule 44(c)), but not when counsel previously represented another defendant in a substantially related matter, even where the trial court is aware of the prior representation." *Ibid.* The Court did not resolve that issue in *Mickens*, because the parties had presented the case to the Court on the assumption that *Sullivan* applied unless an even more lenient standard applied. *Id.* at 176. Thus, "[w]hether *Sullivan* should be extended to [successive representation] cases remains, as far as the jurisprudence of this Court is concerned, an open question." *Ibid.*

This case similarly does not present an appropriate occasion to resolve that issue. Consistent with the way the case was presented to it, the court of appeals in this case applied *Sullivan*'s "adverse effect on performance" standard, rather *Strickland*'s "reasonable probability" of effect on the outcome standard, in deciding whether there was a Sixth Amendment violation in this case. The court ruled against petitioner on the ground that he failed to show that counsel's conflict adversely affected his performance. Pet. App. 16a.

The court of appeals' choice of the *Sullivan* standard, rather than the *Strickland* standard, operated to peti-

tioner's advantage. It is easier for a defendant to show that a conflict has adversely affected counsel's performance than it is to demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Where, as here, a defendant fails to satisfy the *Sullivan* standard, it follows, *a fortiori*, that he cannot satisfy the more demanding *Strickland* standard. Because petitioner was not aggrieved by the court of appeals' selection of the *Sullivan* rather than the *Strickland* standard, petitioner has no basis for petitioning from that aspect of the decision.

Petitioner also errs in suggesting (Pet. 13) that there is a conflict between the decision below and the decisions in other circuits on whether *Sullivan* applies to successive representation cases. In *Moss* v. *United States*, 323 F.3d 445, 462 (2003), the Sixth Circuit held that the *Sullivan* rule applies when the successive representation involves a matter that is "nearly identical" to the prior representation. Because the court of appeals in this case and the Sixth Circuit both applied the *Sullivan* rule, rather than the *Strickland* rule, there is no conflict between the decisions warranting review.

Petitioner suggests that a conflict with *Moss* exists because the Ninth Circuit stated in a different case that it is "more difficult for a defendant to show that counsel actively represented conflicting interests in successive rather than simultaneous representation." Pet. 13 (quoting *United States* v. *Christakis*, 238 F.3d 1164, 1169 (9th Cir. 2001)). Since the Ninth Circuit did not make that observation in this case, its validity is not at issue here. In any event, the Sixth Circuit made precisely the same observation in *Moss*. 323 F.3d at 459.

The other two cases cited by petitioner (Pet. 13) did not even involve successive representation. In *United States* v. *Young*, 315 F.3d 911, 914-915 & n.4, cert. denied, 123 S. Ct. 2108 (2003), the Eighth Circuit applied the *Strickland* standard when a defendant alleged that his attorney had a conflict of interest because he shared office space with his co-defendant's attorney. In dicta, the Eight Circuit stated that the *Sullivan* standard applies to successive representation cases. *Id.* at 914 n.5. In *Rubin* v. *Gee*, 292 F.3d 396, 402-404 & n.2, cert. denied, 123 S. Ct. 637 (2002), the Fourth Circuit applied the *Sullivan* standard when two attorneys had a severe conflict of interest arising from their personal interest in avoiding criminal prosecution that caused them to fail to function as their client's advocates. Since neither case involved successive representation, neither conflicts with the decision in this case.

2. Petitioner next contends (Pet. 15-29) that this Court should grant review to resolve a circuit conflict on the proper standard for finding an adverse effect on performance under *Sullivan*. In particular, petitioner contends that the decision below conflicts with other decisions that apply some variation of the "alternative defense strategy" standard. Under those decisions, a defendant seeking to demonstrate an adverse effect must show that his attorney failed to pursue a "seemingly valid" or "reasonable" alternative strategy as a result of a conflict of interest. See Pet. 16-17 (citing decisions).*

* Petitioner divides the alternative defense strategy decisions into two camps: those that examine whether there is a "seemingly valid" alternative defense strategy, and those that examine whether there is a "reasonable" alternative defense strategy. Pet. 16-17. The difference between the two is highly theoretical. It is difficult to imagine a seemingly valid, but unreasonable defense

For several reasons, review of petitioner's second question is not warranted. First, the court of appeals applied the correct legal standard for determining whether there is an adverse effect on performance; second, there is no necessary inconsistency between that standard and an alternative defense strategy standard; third, there is no post-*Mickens* conflict on the standard for determining adverse effect on performance; and fourth, the Ninth Circuit determined that petitioner's attorney pursued the very alternative defense strategy that petitioner suggested that counsel did not pursue because of his conflict.

a. The court of appeals in this case announced the correct standard for determining whether counsel's prior representation of Swan adversely affected his representation of petitioner. The court's holding that a defendant "must establish that [the conflict] 'affected the counsel's performance, as opposed to a mere theoretical division of loyalties'" repeats the formulation of the standard set forth in *Mickens*. Pet. App. 13a (quoting *Mickens*, 535 U.S. at 171). Similarly, the court of appeals' holding that "[t]he showing must be that 'counsel was influenced in his basic strategic decisions by the interests [of the former client]'" repeats the formulation of the standard set forth in *Wood*. *Ibid.* (quoting *Wood*, 450 U.S. at 272). Moreover, in *Mickens*, the Court equated the *Wood* standard with the *Sullivan* adverse effect standard. *Mickens*, 535 U.S. at 170-172.

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strategy; and it is equally difficult to imagine an invalid but reasonable defense strategy. Petitioner does not identify any case that turns on the difference between those two formulations of the alternative defense strategy test.

Petitioner suggests (Pet. 18) that the court of appeals incorrectly stated that a defendant must show that a conflict "prevents an attorney * * * from arguing * * * the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing that of another." *Ibid.* (quoting *Holloway*, 435 U.S. at 490). But the court of appeals gave that as one example of when a conflict adversely affects performance; it did not use that formulation as a description of the legal standard itself. *Ibid.* (introducing that example with the phrase "as where"). Moreover, that example tracks an example that this Court has given in two prior cases. See *Wheat*, 486 U.S. at 169; *Holloway*, 435 U.S. at 490. And while petitioner apparently objects (Pet. 17) to the use of the word "prevents" in the example, that is just another way of saying that the "conflict of interest actually affected the adequacy of [counsel's] representation." *Mickens*, 535 U.S. at 171 (quoting *Sullivan*, 446 U.S. at 349).

Petitioner also challenges (Pet. 17) a statement in a prior Ninth Circuit decision that an "adverse effect" is one that "significantly worsens counsel's representation." *United States* v. *Mett*, 65 F.3d 1531, 1535-1536 (9th Cir. 1995), cert. denied, 519 U.S. 870 (1996). The court of appeals, however, did not repeat that statement in this case. In any event, the *Mett* statement accurately anticipated this Court's statement in *Mickens* that the *Sullivan* standard is satisfied "only if the conflict has *significantly affected* counsel's performance —thereby rendering the verdict unreliable, even though *Strickland* prejudice cannot be shown." 535 U.S. at 173 (emphasis added).

b. While petitioner asserts that the Ninth Circuit's "basic strategic decisions" standard conflicts with the "alternative defense strategy test," there is no inherent

inconsistency between the two. Examining whether defense counsel failed to pursue an alternative defense strategy because of a conflict can simply be another way of asking whether counsel was influenced in his basic strategic decisions by the interests of his former client. Indeed, the Sixth Circuit and the Fourth Circuit have equated the two standards. *Moss*, 323 F.3d at 446; *Mickens* v. *Taylor*, 240 F.3d 348, 360-361 (4th Cir. 2001) (en banc), aff'd, 535 U.S. 162 (2002). No circuit has stated that its alternative defense strategy test is different from the "basic strategic decisions" standard articulated by the Ninth Circuit in this case.

c. In future cases, circuits that use an alternative-defense-strategy test can be expected to do so in a way that is consistent with *Mickens* and with the Ninth Circuit's decision in this case. *Mickens* clarified that a defendant must show that a conflict "significantly affected counsel's performance—thereby rendering the verdict unreliable." 535 U.S. at 173. Courts of appeals can be expected in the future to conform their alternative-defense-strategy tests to that standard, even if their pre-*Mickens* decisions were less demanding. Consistent with that expectation, the post-*Mickens* decisions cited by petitioner do not conflict with the decision below.

As discussed above, in *Moss*, the Sixth Circuit applied the same "basic strategic decisions" standard applied by the court in this case. And, like the court in this case, the *Moss* court found that defendant failed to show an adverse effect on performance under that standard. 323 F.3d at 471. In *United States* v. *Burgos-Chaparro*, 309 F.3d 50, 53 (2002), cert. denied, 123 S. Ct. 922 (2003), the First Circuit found that the defendant had failed to establish an adverse effect under the First Circuit's pre-*Mickens* decisions. It therefore did not

address whether *Mickens* required a modification of those decisions. *Ibid.* In *Armienti* v. *United States*, 313 F.3d 807, 811 (2002), the Second Circuit found that the defendant failed to show that his attorney had a conflict. It therefore did not reach the question whether the alleged conflict adversely affected counsel's performance. *Ibid.*

In *Rubin*, the only post-*Mickens* case to find a Sixth Amendment violation, the Fourth Circuit applied the "alternative defense strategy" standard from its decision in *Mickens*. 292 F.3d at 404. As noted above, the Fourth Circuit in *Mickens* equated that standard with the "basic strategic decisions" standard applied by the court of appeals in this case. Moreover, the findings in *Rubin* demonstrate that the standard applied by the Ninth Circuit was satisfied. In *Rubin*, the only issue at defendant's trial for murder was premeditation and deliberation, and two of defendant's attorneys failed to take the stand to testify that they instructed the defendant to make the shooting look more premeditated and more deliberate. 292 F.3d at 405-406. The Fourth Circuit explained that:

> [the attorneys'] conflict of interest was so severe that it led to a corruption of the adversarial process that our system relies on to produce just results. It is hard to imagine a case that would call the fundamental fairness of a trial into more question than this one. What happened here should never happen in our system.

Id. at 406. Accordingly, none of the post-*Mickens* cases cited by petitioner conflicts with the decision below.

d. Finally, while the Ninth Circuit did not use the phrase "alternative defense strategy," it carefully examined petitioner's claim that defense counsel failed

to pursue an alternative defense strategy because of his conflict of interest, and rejected that claim on the merits. The court specifically found that petitioner's counsel "carried out precisely" the type of blame-Swan defense that petitioner "maintained that his trial attorney could not and did not provide because of his conflict." Pet. App. 15a. Petitioner argues (Pet. 19-21) that the court erred in reaching that conclusion. But the record amply supports the court of appeals' determination. In particular, petitioner's attorney informed the jury in his opening statement that it should assess the guilt or innocence of each defendant independently; he sought to establish through the questioning of witnesses that only Swan was to blame for the crimes; he elicited statements from Swan that Swan withheld information from petitioner about the crimes; he made the jury aware that Swan would receive a much lower sentence by pleading guilty; and he gave a summation that blamed Swan for the fraudulent transactions and branded Swan a liar. In any event, petitioner's fact-bound challenge to the court of appeals' assessment of the strategy pursued by petitioner's counsel does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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