No. 12-1270

In the Supreme Court of the United States

CORVET T. WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

After he was indicted for armed bank robbery and related firearms offenses, petitioner sent an envelope to his attorney requesting that the attorney hand-deliver to petitioner's cousin a sealed letter instructing the cousin to provide a false alibi for petitioner. The attorney disclosed petitioner's attempt to suborn perjury to the district court, moved to withdraw, and later testified at trial about petitioner's attempt to procure false alibi testimony. The question presented is whether the court of appeals correctly concluded that the former attorney's actions in withdrawing did not violate petitioner's Sixth Amendment right to the effective assistance of counsel.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-39) is reported at 698 F.3d 374.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 2012. A petition for rehearing was denied on November 20, 2012 (Pet. App. 54-55). On January 15, 2013, Justice Kagan extended the time for filing a petition for a writ of certiorari to April 19, 2013, 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 Northern District of Illinois, petitioner was convicted on two counts of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), and two counts of

using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). He was sentenced to 684 months of imprisonment, to be followed by five years of supervised release. Pet. App. 43-45. The court of appeals affirmed. *Id.* at 1-39.

1. Petitioner and co-defendant Brian Austin robbed two federally insured banks in Rockford, Illinois during a two-week period in 2006. On August 23, 2006, petitioner and Austin—who were armed and wore ski masks and gloves—drove a stolen car to an Alpine Bank branch located inside a supermarket. The two left the car running and went straight to the bank branch. Once inside, Austin jumped over a desk to get behind the teller counter while petitioner pointed a silver, semi-automatic handgun at the bank's employees and customers to force them to the ground. Petitioner then stood guard as Austin emptied the teller drawers of more than $12,000. The two men fled on foot, abandoning the stolen car that they had left running. Presentence Investigation Report (PSR) 4; Gov't C.A. Br. 3.

On September 5, 2006, petitioner and Austin robbed an Associated Bank branch in similar fashion. See Pet. App. 2 (the "modus operandi of the robbers" was "so similar" that the robberies, committed "two weeks apart, [were] pretty obviously committed by the same two persons"). Aided this time by getaway driver Edward Walker, petitioner and Austin pulled up in front of the bank in a stolen car that they left running. Armed and again wearing ski masks and gloves, petitioner and Austin entered the bank, after which Austin jumped over the teller counter as petitioner forced bank employees and customers to the ground at gunpoint. Austin took almost $14,000 from the teller drawers, and the two men fled on foot. They then hopped a fence and

entered a second vehicle driven by Walker, who later drove them in a third car to the nearby apartment of Austin's girlfriend to allocate the robbery proceeds. PSR 4; Gov't C.A. Br. 4-5.

Later that day, law enforcement officers investigating the bank robbery stopped petitioner and his girlfriend as they were driving a short distance from her residence. A consent search of the car revealed more than $4500 in cash in the girlfriend's purse, including ten bait bills stolen from the Associated Bank branch earlier than day. At the time of the vehicle search, petitioner was wearing muddy shoes that were similar to those worn by one of the robbers. The tread on his shoes also was consistent with footprints that one of the robbers had left in the mud when fleeing the bank, and the shoes were stained on top with a blue dye similar in color to the jumpsuits worn by the Associated Bank robbers. During a subsequent search of the girlfriend's apartment (where petitioner had stayed the night before the robbery), officers found a silver, semi-automatic handgun, which the girlfriend's roommate identified as belonging to petitioner. Pet. App. 6; Gov't C.A. Br. 5-9.

2. Petitioner was charged in a superseding indictment with two counts of armed robbery of a federally insured bank, in violation of 18 U.S.C. 2113(a) and (d), and two counts of using and carrying firearms during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A). 3:06-cr-50055 Docket entry No. (Docket entry No.) 11 (N.D. Ill. Dec. 12, 2006). Attorney Dennis Ryan was appointed to represent petitioner. Docket entry No. 2 (Minute Entry). Ryan, however, moved to withdraw as petitioner's counsel in January 2007. Docket entry No. 28; Pet. C.A. Supp. App. 1-4.

In an affidavit accompanying his motion to withdraw, Ryan explained that, in December 2006, he had received an envelope from petitioner marked "Legal Mail." Pet. C.A. Supp. App. 3.[1] Inside the envelope was a note requesting that Ryan hand-deliver to petitioner's family a smaller, unstamped envelope addressed to petitioner's cousin. *Ibid.* Suspicious of the smaller envelope's contents, Ryan opened it. *Ibid.*; Pet. App. 7. The letter inside instructed the cousin how to provide petitioner with a false alibi for one of the bank robberies by testifying that petitioner had been involved in a marijuana deal on the day of the robbery. *Ibid.*

Without determining whether the facts set forth in Ryan's affidavit were "true or false," Docket entry No. 333, at 2 (Hrg. Tr.), a magistrate judge granted Ryan's motion to withdraw and appointed the federal public defender to represent petitioner. *Id.* at 3; Docket entry No. 26 (Minute Entry). The case then proceeded to trial, at which Ryan testified for the government, without objection, and described petitioner's attempt to obtain false alibi testimony. Docket entry No. 129, at 877-882 (Trial Tr.); Gov't C.A. Br. 17 n.2. The jury convicted petitioner on all counts. Pet. App. 2. The court of

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[1] The cover page of attorney Ryan's motion to withdraw states that the attached affidavit—in which he describes petitioner's effort to arrange for false alibi testimony—qualified for "restricted status" under Northern District of Illinois Local Rule 26.2, which governs the filing of sealed documents. Pet. C.A. Supp. App. 1. The entry on the district court's electronic docket similarly states that Ryan sought authorization to file the affidavit under seal. Docket entry No. 28 ("MOTION [of petitioner] for withdrawal of appointed counsel and motion for restricted status on the attached affidavit."). Thus, while petitioner is correct (Pet. 5) that Ryan ultimately failed to file his affidavit under seal, the district court docket indicates that he attempted to do so.

appeals reversed on the ground that the district court had improperly denied petitioner's request for a pre-trial continuance. *United States* v. *Williams*, 576 F.3d 385 (7th Cir. 2009).

On remand, a seven-day jury trial was held before a different district judge, who appointed petitioner another new attorney. Docket entry No. 151. The government gave pre-trial notice that it again intended to call Ryan to testify about the letter through which petitioner attempted to arrange for false alibi testimony. Docket entry Nos. 196 (Notice of R. 404(b) Ev.), 210 (Gov't Possible Witness List). Petitioner's trial counsel did not object to Ryan's testimony either before or at trial. Ryan testified at the re-trial as to the circumstances of the false-alibi letter, and the prosecutor read the contents of the letter to the jury. Pet. C.A. Supp. App. 5-21; Pet. App. 7. Petitioner testified in his own defense, admitting on cross-examination that his goal in writing the letter had been to induce his cousin to lie for him. Pet. App. 7. The jury again found petitioner guilty on all counts. The district court sentenced him to 684 months of imprisonment, to be followed by five years of supervised release. *Id.* at 2.

3. The court of appeals affirmed. Pet. App. 1-39.

As relevant here, petitioner argued for the first time on appeal that he was denied his Sixth Amendment right to the effective assistance of counsel when Ryan, in the course of withdrawing, disclosed petitioner's efforts to obtain false alibi testimony without first attempting to dissuade petitioner from his proposed course of conduct. Pet. C.A. Br. 20-36; Pet. C.A. Reply Br. 4-16. The court of appeals rejected that claim. Pet. App. 7-16.[2]

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[2] The court of appeals also rejected (Pet. App. 16-18) petitioner's claim that the sentence imposed after retrial was vindictive and thus

As an initial matter, the court determined that Ryan's disclosure did not violate the attorney-client privilege. Pet. App. 7-8. "When information is transmitted to an attorney with the intent that the information will be transmitted to a third party . . . , such information is not confidential." *Id.* at 8 (quoting *United States* v. *Lawless*, 709 F.2d 485, 487 (7th Cir. 1983)).

The court of appeals next concluded that, "in the unusual circumstances of this case," Ryan had not violated any ethical rules or norms when he disclosed petitioner's attempt to suborn perjury. Pet. App. 12; see *id.* at 7-12. The court pointed out that "[l]awyers enjoy a broad discretion in responding to litigation misconduct by their clients," *id.* at 12, and that the local district court rule in place at the time of Ryan's withdrawal "placed no limitations on a lawyer's reporting the intention of his client to commit a crime," *id.* at 9; see N.D. Ill. L.R. 83.51.6(c) (2006) (reprinted in App., *infra*, 1a).

Moreover, the court explained, "more than an *intention* was involved," for petitioner "had already committed the crime of attempting to suborn perjury by preparing the letter to his cousin and asking the lawyer to forward it," and he still intended two other crimes (his own perjury and that of his cousin). Pet. App. 9. Because multiple criminal acts involving the integrity of court proceedings were at issue, the court concluded, Ryan's withdrawal and disclosure were consistent with both the former local rule governing professional conduct and a model ethical rule authorizing disclosure when a lawyer knows that a client "intends to engage, is engaging or has engaged in criminal or fraudulent con-

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unconstitutional. Petitioner does not renew that claim before this Court.

duct related to the proceeding." *Id.* at 11 (quoting Model Rules of Prof'l Conduct R. 3.3(b) (2007)).

In so concluding, the court of appeals acknowledged that "[t]he literature on the ethical duties of lawyers counsels that a lawyer should attempt to dissuade his client from illegal conduct before disclosing his client's intentions to the court or to law enforcement authorities." Pet. App. 9. The court agreed that this standard, though phrased "as a recommendation rather than as a flat command, * * * makes sense in the usual case." *Id.* at 9-10. But the court concluded that this was "not the usual case," because petitioner had already taken "a substantial step toward procuring a false witness and having embarked on that course had other means of reaching his destination even if the lawyer prevented the cousin from testifying." *Id.* at 10.

The fact that petitioner had already committed the crime of attempted subornation of perjury, the court of appeals explained, also distinguished this case from *Nix* v. *Whiteside*, 475 U.S. 157 (1986). Pet. App. 11. In that case, "in which [perjury] had merely been proposed," the Court noted agreement among ethical authorities "that *at a minimum* the attorney's first duty when confronted with a proposal for perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct." *Ibid.* (quoting *Nix*, 475 U.S. at 169). The court understood this passage to mean that "the lawyer's *minimum* duty to the court—to the law—is to try to dissuade his client from committing perjury," and that "[t]he maximum would be to withdraw and testify against" the client, as Ryan did here. *Ibid.*

The court of appeals concluded in the alternative that petitioner was not entitled to relief even if Ryan had behaved unethically. Noting that "[e]xclusionary rules

* * * are no longer favored," the court questioned as an initial matter whether exclusion of Ryan's trial testimony would be a proper remedy for any ethical breach that he had committed in the course of withdrawing. Pet. App. 12. The court noted that "[r]ejection of an exclusionary rule does not mean that there is no remedy for misconduct by a lawyer" because "[l]awyers are subject to professional discipline up to and including disbarment, and the threat of discipline should deter willful violations." *Id.* at 13. And the testimony itself could not have violated petitioner's constitutional rights, the court determined, because "a lawyer's actions after withdrawing from a litigation can[not] give rise to a claim of ineffective assistance by a party he formerly represented." *Id.* at 14.

The court of appeals held, in any event, that even if "there was error in allowing the lawyer to testify," petitioner was not entitled to relief "because the other evidence against [him] was overwhelming." Pet. App. 14. The court explained that, "[a]lthough the eyewitness identification of [petitioner] was not conclusive, * * * the other evidence against him—the money, the shoes, the gun—constituted overwhelming evidence of guilt." *Id.* at 14-15.

In reaching that conclusion, the court of appeals noted that the government had at one point characterized Ryan's testimony as "'essential' to its case." Pet. App. 15.[3] The court disagreed with that characterization,

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[3] The court of appeals appears to have referred to the government's statement at oral argument that Ryan's testimony was "essential" within the meaning of Model Rule of Professional Conduct 3.8(e). That model rule provides in relevant part that prosecutors should not subpoena a lawyer to testify about a past or present client "unless the prosecutor reasonably believes * * * the evidence

explaining that "[t]he jury may not even have given much weight to" that evidence and that, while the lawyer's testimony "could only hurt the defendant," it did not do so "critically in this case * * * because of the weight of the other evidence against [petitioner]." *Id.* at 15.

b. Judge Hamilton dissented in part. Pet. App. 18-39. In his view, attorney Ryan had the right to withdraw when faced with petitioner's attempted subornation of perjury, but he breached "his professional duties of loyalty and confidentiality to his client" by withdrawing in a public filing that eventually "gave the prosecutor full access to" the false-alibi letter. *Id.* at 20. He also believed that the Sixth Amendment continued to apply to Ryan in his capacity as a former attorney for petitioner and that exclusion of his testimony would be an appropriate remedy for his ethical breaches. *Id.* at 34-37.

Judge Hamilton said that "[t]he strong evidence against [petitioner]" made it "a close question" whether petitioner could satisfy "[t]he prejudice prong" of the test set forth in *Strickland* v. *Washington*, 466 U.S. 668 (1984). Pet. App. 37; see *id.* at 19. He chose, however, to "give more weight" to the government's characterization of Ryan's testimony as "'essential' to its case" and

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sought is essential to the successful completion of an ongoing investigation or prosecution." Model Rules of Prof'l Conduct R. 3.8(e)(2) (2007). Under questioning at oral argument, the government stated its view that presentation of Ryan's testimony was consistent with that rule because it was not "cumulative" of other evidence and was relevant to a disputed issue, *viz.*, petitioner's identity as one of the robbers. See Audio recording: Docket No. 11-1022, 4/10/12 Oral Arg. 22:45-23:00 (available at: http://media.ca7.uscourts.gov/sound/2012/migrated.orig. 11-1002_04_10_2012.mp3).

to "resolve the close question in favor of a new trial." *Id.* at 38-39.

ARGUMENT

Petitioner principally contends (Pet. 11-21, 26-28) that his Sixth Amendment right to the effective assistance of counsel was violated when lawyer Ryan, in the course of withdrawing as his attorney, disclosed petitioner's attempt to suborn perjury without first trying to dissuade petitioner from his criminal conduct. The court of appeals' fact-bound conclusion that Ryan did not render constitutionally deficient assistance was correct and does not conflict with decisions of this Court or any other court of appeals. Further review is unwarranted.

1. The court of appeals correctly concluded (Pet. App. 7-16), under the unique circumstances of this case, that attorney Ryan did not render constitutionally deficient performance when, after learning of petitioner's attempt to suborn perjury, he moved to withdraw without first attempting to persuade petitioner against further criminal conduct.

a. Under *Strickland* v. *Washington*, 466 U.S. 668 (1984), a defendant can show constitutionally ineffective assistance of counsel only if he establishes both that counsel's performance was deficient, which means that "counsel's representation fell below an objective standard of reasonableness," *id.* at 688, and that the deficient performance prejudiced the defendant, which means that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694. The Court in *Strickland* explained that "[j]udicial scrutiny of counsel's performance must be highly deferential" and that reviewing courts should make "every effort * * * to eliminate the distorting effects of hindsight, to recon-

struct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689.

In addressing deficient performance, courts may consider as "guides" "[p]revailing norms of practice as reflected in American Bar Association standards and the like." *Strickland*, 466 U.S. at 688. But the Court has cautioned that such standards "are only guides," *ibid.*, not "inexorable commands," *Bobby* v. *Van Hook*, 558 U.S. 4, 8 (2009); see *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1482 (2010), and that "breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel." *Nix* v. *Whiteside*, 475 U.S. 157, 165 (1986). "[T]he performance inquiry" in every case, the Court has made clear, is simply the fact-specific question of "whether counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688; see *id.* at 690 ("[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.").

b. Under these settled standards, the court of appeals correctly held (Pet. App. 12) that attorney Ryan's "conduct fell within the wide range of professional responses to threatened client perjury acceptable under the Sixth Amendment." See *Nix*, 475 U.S. at 166. As the court explained, prevailing professional norms did not preclude an attorney whose client had already committed a crime that undermines the integrity of the justice system—attempted suborning of perjury—from withdrawing from representation long before trial and disclosing the client's criminal conduct to the tribunal. See *id.* at 170 ("[T]he Model Rules and the commentary

* * * expressly permit withdrawal from representation as an appropriate response of an attorney when the client threatens to commit perjury."); cf. Model Rules of Prof'l Conduct R. 1.16(b) (2007) (counsel may withdraw when "the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent," or when "the client has used the lawyer's services to perpetrate a crime or fraud").

"The crime of perjury in this setting is indistinguishable in substance from the crime of threatening or tampering with a witness or a juror," and any "defendant who informed his counsel that he was arranging to bribe or threaten witnesses or members of the jury would have no 'right' to insist on counsel's assistance *or silence*." *Nix*, 475 U.S. at 174 (emphasis added). Believing that petitioner had tried to make him an unwitting participant in conduct that "equated to witness tampering and obstruction of justice," Pet. C.A. Supp. App. 3-4, attorney Ryan acted reasonably under the circumstances in withdrawing and disclosing petitioner's proceeding-related misconduct to the district court.

Contrary to petitioner's suggestion (Pet. 19-21), Ryan could reasonably have believed that withdrawal and disclosure were consistent with the then-governing ethical rules. Cf. *Strickland*, 466 U.S. at 690 ("[T]he reasonableness of counsel's challenged conduct" must be assessed "on the facts of the particular case, viewed as of the time of counsel's conduct"). The local district court rule in effect in January 2007 provided that "[a] lawyer may use or reveal * * * the intention of a client to commit a crime" even when not necessary to prevent death or serious bodily harm, see N.D. Ill. L.R. 83.51.6(c)(2) (2006) (reprinted in App., *infra*, 1a); Pet. App. 8. That rule by its terms "placed no limitations on

a lawyer's reporting the intention of a client to commit a crime," Pet. App. 9, and the ABA's Model Rules of Professional Conduct require an attorney who knows a client "intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding [to] take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Model Rules of Prof'l Conduct R. 3.3(b) (2007); see *id.* cmt. 12 (an attorney must disclose "whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding").

Petitioner contends (Pet. 19-21) that the commentary to these rules, along with other ethical guides, required an attorney in Ryan's situation first to attempt to dissuade the client against the criminal conduct and, if those efforts failed, to limit the effect of any disclosures. But as the court of appeals explained (Pet. App. 12), the cited sources do not specifically address the scenario in which the client has already taken substantial steps to make the lawyer complicit in suborning perjury. Rather, those guides call for an effort to persuade the client only "[w]here practical," American Bar Association, *ABA Standards for Criminal Justice: Prosecution and Defense Function*, Standard 4-3.7, cmt. (3d ed. 1993), or in the "ordinar[y]" case, Restatement (Third) of Law Governing Lawyers § 120, cmt. g (2000). See Pet. App. 9-10. And they provide that "a disclosure adverse to the client's interest should be no greater than *the lawyer reasonably believes necessary* to accomplish the purpose." Model Rules of Prof'l Conduct R. 1.6, cmt. 14 (2007) (emphasis added).

Given petitioner's effort to undermine the judicial proceedings through Ryan's services, Ryan could have

reasonably believed that petitioner "was unlikely to hearken to an ethics lecture by his lawyer" and that disclosure of petitioner's conduct to the district court was necessary to forestall further attempts to corrupt the proceedings. See Pet. App. 10-12. Indeed, "[h]ad [Ryan] merely refused to forward the letter, [petitioner] might have found a different means of conveying his unlawful request to his family (maybe orally in jail to a visiting family)—perhaps with instructions to find someone other than the cousin to be the false alibi witness, someone the lawyer had never heard of and therefore would have no basis for refusing to call as a witness." *Id.* at 10. The court of appeals' fact-bound conclusion that Ryan acted reasonably is correct and does not merit further review.

2. Contrary to petitioner's contention (Pet. 12-19), the court of appeals' decision does not conflict with the "reasoning" of this Court's decision in *Nix*, *supra*, or the decisions of other appellate courts. Nor would this case be an appropriate vehicle for resolving any such conflict.

a. The question in *Nix* was "whether the Sixth Amendment right of a criminal defendant to assistance of counsel is violated when an attorney refuses to cooperate with the defendant in presenting perjured testimony at his trial." 475 U.S. at 159. When Whiteside (who was accused of second-degree murder) changed his story a week before trial and proposed giving perjured testimony at trial, his attorney told Whiteside that the attorney could not permit that testimony to be presented, that he would have to inform the judge that the testimony was false, and that he would seek to withdraw from the representation if Whiteside insisted on committing perjury. *Id.* at 160-161. Whiteside ultimately testified without making the proposed false statement,

and the jury found him guilty. *Id.* at 161-162. This Court held that, whether the attorney's "conduct is seen as a successful attempt to dissuade his client from committing the crime of perjury, or whether seen as a 'threat' to withdraw from representation," the attorney's actions fell "well within accepted standards of professional conduct and the range of reasonable professional conduct acceptable under *Strickland*." *Id.* at 171.

In reaching its conclusion, the Court first reviewed "the norms of professional conduct," which it explained had long precluded "counsel * * * from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law." *Nix*, 475 U.S. at 166. The Court noted that relevant sources recognized the "special duty of an attorney to prevent and disclose frauds upon the court" and that ethical codes "do not merely *authorize* disclosure by counsel of client perjury; they *require* such disclosure." *Id.* at 168-169 (citing Model Rules of Prof'l Conduct R. 3.3(a)(4) (1983), and Model Code of Prof'l Responsibility DR 7-102(B)(1) (1980)); see also 2 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* § 29.14A (2013 supp.) (2 Hazard & Hodes) ("Where failure to speak out would further a client's crime or fraud on the tribunal, silence is tantamount to lying on the client's behalf."). The Court further noted "universal[] agree[ment] that at a minimum the attorney's first duty when confronted with a proposal for perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct." *Nix*, 475 U.S. at 169.

Focusing on this last observation, petitioner contends (Pet. 13) that the court of appeals "contorted this Court's reasoning" and held that an attorney faced with client perjury is "free to ignore any potential opportuni-

ty to counsel his client, and [can] instead choose immediately to incriminate his client through public disclosure and testimony." The court of appeals did not adopt any such rule.

The court of appeals acknowledged that an initial effort to dissuade the client from illegal conduct "makes sense in the usual case." Pet. App. 10. The court, though, viewed this case as an unusual one in which the client had already taken substantial steps toward suborning perjury (and thus had already committed a crime), had tried to make the lawyer an unwitting participant in that crime, had other means of accomplishing his illegal objective if the lawyer merely refused to cooperate, and was "unlikely to hearken to an ethics lecture by his lawyer." *Ibid.* The court therefore deemed it reasonable under those circumstances for the lawyer to withdraw and disclose the criminal act without first attempting persuasion. *Id.* at 10-11; cf. *id.* at 20 (Hamilton, J., dissenting) (agreeing that counsel had right to withdraw). Petitioner disagrees (Pet. 21) that the present context is "materially different" from the one in *Nix* that led the Court to note the general duty to persuade against criminal conduct. But that disagreement with the court of appeals' assessment of the facts does not establish a conflict warranting this Court's review. See *Strickland*, 466 U.S. at 690 (reasonableness is to be determined "on the facts of the particular case" and "in light of all the circumstances").

Nor does the court of appeals' decision conflict with a supposed suggestion in *Nix* (Pet. 13-14) "that a disclosure adverse to the client should *never* be made before perjured testimony is actually offered." Petitioner derives that purported disclosure bar from this Court's statement "that an attorney's revelation of his client's

perjury to the court is a professionally responsible and acceptable response to the conduct of a client who has actually given perjured testimony," and its citation to the commentary to Model Rule of Professional Conduct 3.3 (1983). *Nix*, 475 U.S. at 169-170. But the Court in *Nix* elsewhere concluded that an attorney is not limited to rectifying criminal conduct that has already occurred. In explaining why defense counsel's conduct was reasonable even if viewed "as a 'threat' to withdraw from representation and disclose [Whiteside's] illegal scheme" to the court, *id.* at 171, the Court analogized perjury to the crimes of witness intimidation and jury tampering. It then explained that "[a] defendant who informed his counsel that he was arranging to bribe or threaten witnesses or members of the jury would have no 'right' to insist on counsel's assistance or silence," and that "[c]ounsel would not be limited to advising against that conduct." *Id.* at 174. "An attorney's duty of confidentiality," the Court stated, "does not extend to a client's announced plans to engage in future criminal conduct." *Ibid.* That reasoning applies *a fortiori* to the facts of this case, in which petitioner not only proposed future criminal conduct but "had *already* committed the crime of attempting to suborn perjury by preparing the letter to his cousin and asking the lawyer to forward it." Pet. App. 9 (emphasis added).

b. Petitioner is also incorrect (Pet. 14-19) in asserting that the court of appeals' decision conflicts with decisions of other courts of appeals and state courts of last resort.

As petitioner appears to acknowledge (Pet. 14-15), the two federal cases he cites establish at most that a lawyer acts in accordance with prevailing professional norms when he attempts to dissuade a client from com-

mitting perjury and limits the scope of any disclosure adverse to the client. See *United States* v. *Omene*, 143 F.3d 1167, 1168, 1171-1172 (9th Cir. 1998) (attorney did not perform deficiently by informing court mid-trial that defendant's upcoming testimony posed an ethical problem, asking to withdraw, and revealing at *ex parte* hearing his "'overwhelming' belief his client would give perjurious testimony"); *United States* v. *Long*, 857 F.2d 436, 440-447 & n.6 (8th Cir. 1988) (noting, in remanding case for an evidentiary hearing, that defense counsel's "disclosure to the trial [judge] was quite explicit," and stating that, before a lawyer discloses "a belief of impending client perjury," he must both "have a firm factual basis for the belief" and "have attempted to dissuade the client from committing the perjury"); see also *United States* v. *Jackson*, 928 F.2d 245 (8th Cir.) (affirming denial of post-conviction relief following evidentiary hearing ordered in *Long*), cert. denied, 502 U.S. 828 (1991). Neither case holds that the converse is true, *i.e.*, that a lawyer necessarily violates the Sixth Amendment by publicly moving to withdraw based on the client's criminal conduct related to the proceedings. And neither of the cases (both of which involved counsel's mid-trial disclosure of potential perjury to the judge) addressed the unusual situation faced here by the court of appeals, which (as explained above) expressly recognized that the initial step of attempting dissuasion "makes sense in the usual case." Pet. App. 10; see p. 16, *supra*.

For similar reasons, no conflict exists between the decision below and the state court opinions (Pet. 17-19) that petitioner cites. Many of those cases recite, in a variety of procedural and factual contexts, the general ethical guidelines listed by petitioner. Some simply

quote or summarize this Court's decision in *Nix*, see *State* v. *McDowell*, 681 N.W.2d 500, 513 (Wisc.), cert. denied, 543 U.S. 938 (2004); *People* v. *Guzman*, 755 P.2d 917, 933 (Cal. 1988), cert. denied, 488 U.S. 1050 (1989), while others recite the language of the state rules of professional conduct, *e.g.*, *State* v. *Chambers*, 994 A.2d 1248, 1261 n.16 (Conn. 2010); *Shockley* v. *State*, 565 A.2d 1373, 1378 (Del. 1989). And many do so where the primary issue on appeal concerned the practice (questioned by the Court in *Nix*, 475 U.S. at 170 & n.6) of having defendants suspected of perjury testify in narrative form, see *Brown* v. *Commonwealth*, 226 S.W.3d 74, 84 (Ky. 2007), or the quantum of knowledge an attorney should have before disclosing potential client perjury to the court, see, *e.g.*, *McDowell*, 681 N.W.2d at 514; *People* v. *Calhoun*, 815 N.E.2d 492, 502 (Ill. App. Ct. 2004); *Shockley*, 565 A.2d at 1379. None of the cases, however, purports to decide that an attorney's failure to attempt persuasion or to minimize disclosure in a particular manner constitutes constitutionally deficient performance, much less in a context similar to the one addressed by the court of appeals in this case. Accordingly, no conflict warranting the Court's review is present.

c. In any event, this case would not be an appropriate vehicle for addressing a defense attorney's duties when faced with client perjury, for several reasons.

i. As an initial matter, petitioner failed to object to Ryan's testimony at trial. As the government argued in the court of appeals (Gov't C.A. Br. 15-16, 21-23), to the extent petitioner challenges admission of that testimony as a violation of the Sixth Amendment, he is entitled to relief only if he can establish plain error. See Fed. R. Crim. P. 52(b).

ii. Second, even a decision in petitioner's favor on the deficient performance component of the *Strickland* test would not affect the result of this case because petitioner cannot satisfy that test's prejudice element. See *Strickland*, 466 U.S. at 697 (explaining that "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies," and that "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed"); see also *Nix*, 475 U.S. at 184 (Blackmun, J., concurring in the judgment). Petitioner fails to establish that if Ryan had taken the course petitioner contends he should have, *i.e.*, urge petitioner not to suborn perjury, that petitioner would have heeded that advice and changed his plan, rather than simply finding another means of executing it. Cf. Pet. App. 10 (noting that petitioner "was unlikely to hearken to an ethics lecture by his lawyer"). Nor can petitioner establish prejudice from admission of Ryan's testimony, given that "the other evidence against [petitioner] was overwhelming." *Id.* at 14; see pp. 22-23, *infra*.

iii. The unusual factual and procedural background of this case also make it a poor vehicle for addressing more generally the duties of defense lawyers when faced with potential or completed client perjury. Unlike most of the decisions addressing the question of potential client perjury, which involve an attorney's handling of that problem during or just before trial, this case involves criminal conduct (attempted subornation of perjury) that defense counsel identified long before trial and that thus permitted withdrawal and appointment of new, conflict-free counsel. Compare 2 Hazard & Hodes

§ 29.16 ("If defense counsel learns well in advance of trial that the client is bent upon perjuring himself, most authorities agree that the lawyer must refuse to accept the employment or withdraw."), with *id.* § 29.17 (discussing additional difficulties that arise when client perjury is a "surprise and late-discovered").

The court of appeals, moreover, assessed the reasonableness of attorney Ryan's public withdrawal against the backdrop of a since-replaced local rule that the court understood to "place[] no limitations on a lawyer's reporting the intention of his client to commit a crime." Pet. App. 9. And while petitioner correctly points out (Pet. 20 n.3) that the court considered sources other than the local rule, the breadth of the local rule at the time of Ryan's actions was plainly a central factor in the court's conclusion that Ryan acted reasonably under the circumstances. See Pet. App. 8-9, 11.

3. Petitioner also contends (Pet. 22-25) that the court of appeals applied an incorrect standard for determining prejudice under *Strickland* and that the Court should remand for application of the correct standard. That contention lacks merit.

To establish prejudice under *Strickland*, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694; see also, *e.g.*, *Berghuis* v. *Thompkins*, 130 S. Ct. 2250, 2264 (2010). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. In the context of a challenge to a conviction, "the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695. A court making that determination

"must consider the totality of the evidence before the judge or jury," and "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 695-696.

Where the evidence (apart from the evidence admitted pursuant to claimed deficient performance) is overwhelming, there is no "reasonable" probability of a different outcome if the case were retried and, therefore, no *Strickland* prejudice. See *Strickland*, 466 U.S. at 696 (explaining that a verdict with "overwhelming record support" is less likely to be affected by counsel's errors); cf. *Yates* v. *Evatt*, 500 U.S. 391, 405 (1991) (constitutional error is harmless if the other evidence is "so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the [error]"). See also, *e.g.*, *United States* v. *De La Cruz*, 514 F.3d 121, 140-141 (1st Cir. 2008) (collecting cases requiring courts to consider the strength of the evidence in determining *Strickland* prejudice, and finding no prejudice where evidence of guilt "was overwhelming"), cert. denied, 129 S. Ct. 2858 (2009). And as the court of appeals concluded, the evidence against petitioner here was "overwhelming." Pet. App. 14; see *id.* at 38 (Hamilton, J., concurring and dissenting in part) ("The circumstantial evidence against [petitioner] was certainly strong.").

Specifically, testimony from getaway driver Walker implicating petitioner in the second robbery was corroborated by compelling circumstantial evidence of petitioner's guilt, including (i) the bait bills found, among thousands of dollars in cash, in the purse of petitioner's girlfriend hours after the robbery; (ii) testimony that a silver handgun found in the apartment where petitioner

stayed the night before the second robbery—and that was similar to the gun used in the robberies—belonged to petitioner; (iii) petitioner's muddy shoes, whose tread was consistent with footprints left at the second robbery and which were stained with a blue dye that appeared to have bled over from clothes like the jumpsuits worn by the robbers; (iv) cell phone records placing petitioner in the area of both banks at the time of the robberies and confirming that he was in constant contact with co-defendant Austin; (v) surveillance videos showing the taller robber wearing gloves with white lettering similar to those seen by police in a car parked outside the apartment of Austin's girlfriend shortly after the second robbery; and (vi) testimony from petitioner's former girlfriend identifying him from bank surveillance videos by his mannerisms, movements, and body shape. See Gov't C.A. Br. 31-34. Given the totality of this proof, there was neither a "risk that [petitioner] was convicted falsely," Pet. App. 15, nor "a reasonable probability that, absent the [false-alibi evidence], the factfinder would have had a reasonable doubt respecting guilt," *Strickland*, 466 U.S. at 695.

Petitioner notes (Pet. 24-25) that the court of appeals declined to give weight to the government's supposed concession that attorney Ryan's testimony was "essential" to its case. As explained above, see n.3, *supra*, the government stated under questioning at oral argument that Ryan's testimony qualified as "essential" for purposes of an ethical rule that limits subpoenas of defense attorneys to those situations in which "the prosecutor reasonably believes * * * the evidence sought is essential to the successful completion of an ongoing investigation or prosecution." Model Rules of Prof'l Conduct R. 3.8(e)(2) (2007). In the same exchange, however, the

government rejected petitioner's suggestion (see Pet. C.A. Reply Br. 13-14) that its understanding of Model Rule 3.8(e) was inconsistent with its position on *Strickland* prejudice. See Audio recording: Docket No. 11-1022, 4/10/12 Oral Arg. (available at: http://media.ca7.uscourts.gov/sound/2012/migrated.orig.11-1002_04_10_2012.mp3). And in any event, in deciding the separate legal question of *Strickland* prejudice, the court of appeals was not bound by the government's position on the meaning and application of the model ethical rule. See *Colorado Republican Fed. Campaign Comm.* v. *FEC*, 518 U.S. 604, 622 (1996) (Court is "not bound to decide a matter of constitutional law based on a concession by the particular party before the Court as to the proper legal characterization of the facts") (opinion of Breyer, J.).[4]

Finally, petitioner contends (Pet. 25) that, under *Cuyler* v. *Sullivan*, 446 U.S. 335, 348-350 (1980), he should not have had to prove prejudice at all because attorney "Ryan's conduct amounted to a breach of loyalty." The court of appeals, having found no breach, did not address this issue, and this Court need not do so in the first instance. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). But petitioner's contention lacks merit in any event. As the Court made clear in *Nix*,

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[4] Petitioner is also wrong to suggest (Pet. 24 n.4) that the government's statement of position at oral argument was a "judicial admission" that the court of appeals was required to treat "as 'binding and conclusive.'" *Ibid.* (quoting *Christian Legal Soc.* v. *Martinez*, 130 S. Ct. 2971, 2983 (2010)). The category of "judicial admissions" is limited "to unequivocal statements as to matters of fact which otherwise would require evidentiary proof; it does not extend to counsel's statement of his conception of the legal theory of a case, i.e., legal opinion or conclusion." 30B Michael H. Graham, *Federal Practice and Procedure: Evidence* § 7026, at 325-326 & n.13 (2011 Interim ed.).

supra, the presumption of prejudice that applies under *Cuyler* when an attorney is operating under an actual conflict of interest does not extend to situations in which a defendant creates an ethical conflict by "propos[ing] to commit the crime of fabricating testimony." *Nix*, 475 U.S. at 176. Here, the ethical conflict was generated by petitioner's attempt to make his attorney an unwitting participant in a scheme to suborn perjury, and petitioner was later represented by conflict-free counsel at trial. He was therefore obligated to demonstrate prejudice. See, *e.g.*, *Torres* v. *Donnelly*, 554 F.3d 322, 326 (2d Cir. 2009).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

Local Rules (2006)

LR83.51.6. Confidentiality of Information

(a) Except when required under section (b) or permitted under section (c), a lawyer shall not, during or after termination of the professional relationship with the client, use or reveal a confidence or secret of the client known to the lawyer unless the client consents after consultation.

(b) A lawyer shall reveal information about a client to the extent it appears necessary to prevent the client from committing an act that would result in death or serious bodily harm.

(c) A lawyer may use or reveal:

(1) confidences or secrets when permitted under these rules or required by law or court order;

(2) the intention of a client to commit a crime in circumstances other than those enumerated in LR83.51.6(b); or

(3) confidences or secrets necessary to establish or collect the lawyer's fee or to defend the lawyer or the lawyer's employees or associates against an accusation of wrongful conduct.

(d) The relationship of trained intervenor and a lawyer or a judge who seeks or receives assistance

through the Lawyers' Assistance Program, Inc., shall be the same as that of lawyer and client for purposes of the application of this rule and LR83.58.3.

(e) Any information received by a lawyer in a formal proceeding before a trained intervenor, or panel of intervenors, of the Lawyers' Assistance Program, Inc., shall be deemed to have been received from a client for purposes of the application of this rule and LR83.58.3.

Committee Comment. *General.* The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

The observances of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frank-

ly with the lawyer even as to embarrassing or legally damaging subject matter.

The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by these rules of professional conduct or other law. *See also* the discussion under the heading "Scope of the Rules of Professional Conduct" in the Comment section of LR83.50.1.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Authorized Disclosure. A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a

fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client. The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.

Several situations must be distinguished.

First, the lawyer must never counsel or assist a client in conduct that is criminal or fraudulent. *See* LR83.51.2(d). Similarly, a lawyer has a duty under LR83.53.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in LR83.51.2(d) to avoid assisting a client in criminal or fraudulent conduct.

Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not

violated LR83.51.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

Third, the lawyer may learn that a client intends prospective conduct that is criminal and likely to result in imminent death or substantial bodily harm. As stated in section (b), the lawyer has the professional obligation to reveal information in order to prevent such consequences. The lawyer must make such disclosure in order to prevent homicide or serious bodily injury which the lawyer reasonably believes is intended by a client, even though it is very difficult for the lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a change of mind.

Fourth, the lawyer may learn that a client intends to commit some other crime. As stated in section (c)(2), the lawyer has professional discretion to reveal that information. The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question.

In any instance in which the lawyer learns of a client's intention to commit a crime, where practical the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by section (c)(2) does not violate this rule.

Withdrawal. If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in LR83.51.16(a)(2).

After withdrawal the lawyer is required to refrain from making disclosure of the client's confidence, except as otherwise provided in LR83.51.6. Neither this rule nor LR83.51.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

Where the client is an organization, the lawyer may be in doubt whether the contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this rule, the lawyer may make inquiry within the organization as indicated in LR83.51.13(b).

Dispute Concerning a Lawyer's Conduct. Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Section (c)(3) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion.

The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate the innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by section (c)(3) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation to limit disclosure to those having the need to know it, and to obtain protective orders or

make other arrangements minimizing the risk of disclosure.

Disclosures Otherwise Required or Authorized. The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, section (a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

The rules of professional conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. *See* LR83.51.2(g), LR83.52.3, LR83.53.3, and LR83.54.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provisions of law supersedes LR83.51.6 is a matter of interpretation beyond the scope of these rules, but a presumption should exist against such a supersession.

Former Client. The duty of confidentiality continues after the client-lawyer relationship has terminated.