No. 15-9425

In The
Supreme Court of the United States

CHARLES RAY CRAWFORD,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE MISSISSIPPI SUPREME COURT

BRIEF OF THE ETHICS BUREAU AT YALE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Lawrence J. Fox
Counsel of Record
George W. and Sadella D. Crawford
Visiting Lecturer in Law
ETHICS BUREAU AT YALE
127 Wall Street
New Haven, Connecticut 06511
(203) 432-9358
Email: lawrence.fox@yale.edu

Counsel for Amicus Curiae ***Dated: June 16, 2016***

THE LEX GROUP[DC] ♦ 1825 K Street, N.W. ♦ Suite 103 ♦ Washington, D.C. 20006
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INTEREST OF AMICUS CURIAE[1]

The Ethics Bureau at Yale,[2] a clinic composed of seventeen law school students supervised by an experienced practicing lawyer and lecturer, drafts *amicus* briefs in cases concerning professional responsibility; assists defense counsel with ineffective assistance of counsel claims relating to the professional responsibility of lawyers; and offers ethics advice and counsel on a pro bono basis to not-for-profit legal service providers, courts, and law school clinics.

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[1] Counsel of record received timely notice of the intention to file this brief, and all parties have consented to its filing. Letter of consent to the filing of this brief executed by all parties have been lodged with the Clerk of the Court pursuant to Rule 37.2. In accord with Rule 37.6, *amicus* states that no monetary contributions were made for the preparation or submission of this brief, and that this brief was not authored, in whole or in part, by counsel for a party.

[2] The preparation and publication of this document by a Clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.

SUMMARY OF THE ARGUMENT

Any review of the conduct of Petitioner's lawyer in this case would yield the conclusion that the lawyer's performance was adversely affected by the lawyer's conflict of interest. The lawyer exhibited multiple lapses from the level of loyalty that the Constitution, fiduciary duty, and the applicable rules of professional conduct all require. Yet relief for Petitioner has been denied on the ground that the conflict involved here did not arise from a concurrent representation. It is the position of *amicus* that the effect of a conflict of interest, and not its cause, should be the determining factor in the securing of such relief. Furthermore, *amicus* believes that Petitioner's case presents a perfect opportunity for this Court to resolve the significant split among the circuit courts regarding the proper approach to dealing with conflicts of interest that create adverse effects.

ARGUMENT

I. Lower Courts Have Announced Conflicting Rules for Evaluating Conflicts of Interest Arising Outside of the Multiple Representation Context.

In *Cuyler v. Sullivan*, 446 U.S. 335 (1980), this Court announced the clear rule that "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." *Id.* at 349-50. Since this pronouncement, however, lower courts have split over the reach of

the *Cuyler* standard. Some apply the *Cuyler* presumption to all conflicted representations; others restrict *Cuyler*'s reach to the subset of conflicts that involve the representation of multiple clients, requiring a showing of prejudice under the *Strickland* standard for all other conflicts. *See Strickland v. Washington*, 466 U.S. 668, 693 (1984) ("Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice.").

The resulting confusion has created a split among the circuits and an array of conflicting standards. This Court itself has noted the lower courts' confusion, calling the reach of *Cuyler*'s presumption "an open question." *Mickens v. Taylor*, 535 U.S. 162, 176 (2002). As a clinical program specializing in professional responsibility, we are convinced that further guidance is necessary to reconcile this Court's conflict of interest jurisprudence with the varying determinations reached by lower courts.

The Fifth Circuit has expressly refused to apply *Cuyler* to conflicts other than those involving multiple representation. *See Beets v. Scott*, 65 F.3d 1258 (5th Cir. 1995). In *Beets*, a case in which a lawyer agreed to receive the media rights to his client's story in lieu of a fee, the Fifth Circuit determined that *Cuyler* did not "analyze conflicts of interest in a context broader than that of multiple client representation." *Id.* at 1266. Instead, the *Beets* court applied the *Strickland* two-part test to

evaluate a conflict between the lawyer's personal interest and that of his client, requiring the petitioner to demonstrate not only that her counsel rendered deficient performance, but also that she suffered prejudice as a result.

In contrast, the Second Circuit has declined to interpret this Court's "open question" dicta in *Mickens* as limiting *Cuyler*'s holding to multiple representation conflicts. *See Tueros v. Greiner*, 343 F.3d 587, 594 (2d Cir. 2003) ("[T]he discussion of the scope of *Sullivan* is dicta. . . . Although *Sullivan* dealt with a lawyer who owed duties to multiple defendants, it may well be unreasonable not to extend *Sullivan*'s definition of an 'actual conflict' to a lawyer whose conflict was defined by representing the divergent interests of a defendant and an important subpoenaed witness."). Likewise, both the Fourth and Ninth Circuits have not restricted *Cuyler*'s application to multiple representation conflicts after *Mickens*. *See Bemore v. Chappell*, 788 F.3d 1151, 1161-62 (9th Cir. 2015) (applying *Cuyler* to a conflict arising from a lawyer's fraudulent misappropriation of court-issued funds); *United States v. Stitt*, 552 F.3d 345, 350-51 (4th Cir. 2008) (applying *Cuyler* to a conflict arising from a fee agreement between client and lawyer that required the lawyer to pay all case-related expenses out of the lawyer's own pocket).

Some circuits have not been able to articulate a clear stance regarding *Cuyler*'s reach, instead producing intra-circuit inconsistencies. The Eleventh Circuit is one of these confused circuits. In *United States v. Novaton*, which pre-dates *Mickens*, the

Eleventh Circuit applied *Cuyler* to a personal conflict of interest—the defendant's lawyer was under investigation by the same United States Attorney's Office that was prosecuting the defendant. 271 F.3d 968, 1009-12 (11th Cir. 2001). Since *Mickens*, however, the Eleventh Circuit has issued conflicting—and unpublished—opinions addressing the question of *Cuyler*'s reach. In *United States v. Cruz*, the Eleventh Circuit explicitly refused to extend *Cuyler* to a conflict stemming from a lawyer's desire to avoid revealing information about the lawyer's personal drug problems. 188 Fed. App'x 908, 910 (11th Cir. 2006) (per curiam). In doing so, the Eleventh Circuit explained that *Mickens* "indicated that *Cuyler* should be limited to situations of multiple concurrent representation," and that this Court has "explicitly stated that the language in *Cuyler* did not support expansion of the standard into cases involving counsel's personal interests." *Id.* at 913-14. By contrast, in *United States v. Mahibubani-Ladharam*, the Eleventh Circuit applied *Cuyler* to a conflict arising from a lawyer's participation in the trial as a fact witness regarding the client's cooperation with the government. 405 Fed. App'x 429, 430-31 (11th Cir. 2010) (per curiam).

Similarly, the Eighth Circuit has issued conflicting opinions. On the one hand, it has expressly refused to apply *Cuyler* outside of the narrow multiple representation context. *See United States v. Young*, 315 F.3d 911, 914 n.5 (8th Cir. 2003) (noting that when a conflict "involves ethical issues other than multiple or serial representation, this Circuit has held that *Strickland* is still the appropriate standard" (citing *Caban v. United*

States, 281 F.3d 778, 783-84 (8th Cir. 2002)). However, despite this proclamation, the Eighth Circuit articulated in a later opinion that "in this circuit, it is unclear whether we limit application of *Cuyler* to conflicts involving multiple or serial representation." *Covey v. United States*, 337 F.3d 903, 907 (8th Cir. 2004).

The application of the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(d) (2012), has further muddied the lower courts' conflicts jurisprudence. For example, in one case involving a conflict arising from a lawyer's intimate relationship with her client, the Ninth Circuit held that the state court's determination that the conflict did not give rise to ineffective assistance of counsel was neither contrary to, nor an unreasonable application of, clearly established federal law under AEDPA. *Earp v. Ornoski*, 431 F.3d 1158, 1185 (9th Cir. 2005). However, in reaching this conclusion, the court took care to note that while the Ninth Circuit has expanded *Cuyler*'s reach beyond joint representation conflicts, *Mickens* "specifically and explicitly concluded that *Sullivan* was limited to joint representation." *Id.* at 1184. The court then remarked that even though it might have reached a different conclusion if it had addressed this challenge on direct review, AEDPA "forecloses the option of reversing a state court determination simply because it conflicts with established circuit law." *Id.* at 1185. In short, against the backdrop of AEDPA, the "open question" left unanswered by *Mickens*, has spawned and entrenched widely disparate understandings of how courts should

evaluate Sixth Amendment challenges to the effectiveness of conflicted counsel.

The Mississippi Supreme Court's decision in this case evinces and exacerbates the pervasive uncertainty and confusion regarding this Court's conflict jurisprudence. The Ethics Bureau at Yale is dedicated to promoting the professional responsibility of lawyers and to protecting the right to effective assistance of conflict-free counsel. We believe that this Court's intervention is absolutely necessary to resolve the conflict amongst the circuits, to establish clear guidance on the standards for reviewing lawyer conflicts of interest, and ultimately, to secure greater compliance with the loyalty obligations of lawyers to their clients.

II. The *Cuyler* Presumption of Prejudice Should Extend to All Conflicted Representations Where the Client Can Demonstrate an Adverse Effect.

The Sixth Amendment of the U.S. Constitution establishes the minimum requirements for a fair criminal trial. U.S. Const. amend. VI. In particular, the Constitution guarantees a defendant's right "to have the Assistance of Counsel for his defence." *Id.* As this Court has explained, the right to counsel is the touchstone of the Sixth Amendment; effective legal representation is crucial to prevent the other trial rights from becoming hollow letters. "Lawyers . . . are the means through which the other rights of the person on trial are secured. Without counsel, the right to a trial itself would be 'of little avail' . . . ." *United States v. Cronic*,

466 U.S. 648, 653 (1984) (quoting *Powell v. Alabama*, 287 U.S. 45, 53 (1932)).

The Sixth Amendment compels this Court to presume that a defendant has been prejudiced whenever a lawyer's conflict of interest causes an adverse effect with respect to the lawyer's performance. Breaches of the duty of loyalty effectively deny counsel to the accused and resist easy detection and correction by the courts.

A. A Conflicted Lawyer Cannot Provide Constitutionally Adequate Assistance to His Client.

The Constitution establishes an adversarial system of criminal justice. When this system works as intended, it produces fair trials and just outcomes. And, as this Court has observed, "[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *United States v. Cronic*, 466 U.S. 648, 655 (1984) (quoting *Herring v. New York*, 422 U.S. 853, 862 (1975)). The Sixth Amendment is premised on the notion that zealous, adversarial advocacy will produce just results.

The assistance of counsel is the lynchpin of an adversarial system. The adversarial process simply cannot work if the advocates do not behave as adversaries. As this Court explained in *Cronic*, "[t]he right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case

to survive the crucible of meaningful adversarial testing. . . . [I]f the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." 466 U.S. at 656-57. The adversarial system depends on the centripetal force of opposed counsel; without the right to the assistance of counsel, the whole Sixth Amendment scheme would unravel. *See Strickland v. Washington*, 466 U.S. 668, 685 (1984) ("The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275 (1942)).

For a lawyer to serve his essential function, the lawyer must first and foremost remain loyal to his client's interests. *See Strickland*, 466 U.S. at 692 (referring to the duty of loyalty as "perhaps the most basic of counsel's duties"). Without actual, conflict-free assistance, the lawyer cannot fulfill this constitutional function. *See id.* at 688 ("Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest."). The Model Rules of Professional Conduct accord with this constitutional demand. A lawyer operates under a conflict of interest—and therefore breaches his duty of loyalty—whenever there is a "significant risk" that his representation will be "materially limited" by divided loyalties to another client, a third party, or the lawyer himself. Model Rules of Prof'l Conduct R. 1.7(a)(2). These conflicts are *unwaivable* whenever

the proverbial reasonable lawyer could not conclude "that the lawyer will be able to provide competent and diligent representation to each affected client." Model Rules of Prof'l Conduct R. 1.7(b)(1). In the language of *Cuyler*, any conflict that produces an adverse effect on the representation is unwaivable and therefore a per se breach of the duty of loyalty.

As a result, a conflicted advocate is no advocate at all. this Court persuasively articulated in *Strickland*, "[t]hat a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the constitutional command." 466 U.S. at 685. Instead, the Sixth Amendment guarantees a criminal defendant not just the presence of a lawyer nominally assigned to his case, but rather "counsel acting in the role of an advocate." *Anders v. California*, 386 U.S. 738, 743 (1967).

The text of the Sixth Amendment commands that the defendant receive "Assistance" with the purpose of aiding "his defence." U.S. Const. amend. VI. The Sixth Amendment demands *assistance*, not "merely the provision of counsel to the accused." *Cronic*, 466 U.S. at 654. This Court has observed that "[i]f no actual 'Assistance' 'for' the accused's 'defence' is provided, then the constitutional guarantee has been violated." *Id.* "To hold otherwise 'could convert the appointment of counsel into a sham . . . .'" *Id.* (quoting *Avery v. Alabama*, 308 U.S. 444, 446 (1940)). In short, a breach of the duty of loyalty turns a lawyer into a prop and the proceedings into a show trial.

To avoid injustice, this Court has refused to require a showing of prejudice when the assistance of counsel has been denied. "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." *Holloway v. Arkansas*, 435 U.S. 475, 488 (1978). The showing of an adverse effect proves that a defendant's counsel operated under an unwaivable conflict of interest that denied the accused the *assistance* of an advocate. Once assistance is denied, the "infraction can never be treated as harmless error." *Id.* at 489 (quoting *Chapman v. California*, 386 U.S. 18, 23 (1967)). Therefore, the *Cuyler* presumption of prejudice must extend to all breaches of counsel's duty of loyalty that produce adverse effects.

B. Courts Must Presume Prejudice in Conflicted Representations When Their Pervasive Effects Are Too Difficult to Measure.

As the Court negotiates the intersection between conflicts of interest and the Sixth Amendment right to effective assistance of counsel, it is important to recognize that the *cause* of any particular conflict of interest is essentially irrelevant. Rather, the inquiry must focus on whether the *effect* of the conflict is so severe and difficult to measure that the court should presume prejudice upon proof of an adverse effect. *Strickland*, 466 U.S. at 692. In *Mickens*, this Court acknowledged that both *Cuyler* and *Holloway* "stressed the high probability of prejudice arising

from multiple concurrent representation, and the *difficulty of proving that prejudice*." 535 U.S. 162, 175 (2002) (emphasis added). However, multiple representation conflicts are by no means the only types of conflicts that give rise to substantial effects on lawyer performance that are difficult to measure or prove with any precision.

What makes proving prejudice in the concurrent representation context so difficult is that concurrent representation conflicts are *pervasive*—they pull lawyers away from the best interests of at least one of their clients *at each and every step of the representation*. *See Holloway v. Arkansas*, 435 U.S. 475, 490 (1978) ("[I]n a case of joint representation of conflicting interests the evil . . . is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process."). Thus, when a lawyer labors under a conflict of interest that pervades the entirety of her representation of a client, the *cumulative* effect of the conflict may be prejudicial even when no individual instance of action or inaction on the part of the lawyer was prejudicial on its own.

However, to prove that the cumulative impact of a pervasive conflict of interest was prejudicial, a petitioner would have to pinpoint exactly what the lawyer would have done differently, under conflict-free conditions, at each step in the representation. Then, the petitioner would have to show that there was a reasonable probability that his lawyer's unburdened representation would have led to a different outcome. In *Holloway*, this Court incisively

explained the difficulty inherent in proving that the cumulative effects of a pervasive conflict of interest were prejudicial:

> [E]ven with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to 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.

435 U.S. at 490-91. Because of the difficulty of proving prejudice in this context, this Court held in *Cuyler* that prejudice should be presumed when a petitioner can show that his lawyer labored under a conflict of interest that adversely affected the lawyer's performance. *Cuyler*, 446 U.S. at 335.

However, it is clear that other types of conflicts of interest can also give rise to profound and pervasive effects on lawyer performance. One example is when a criminal defense lawyer is being prosecuted by the same district attorney's office that is prosecuting the lawyer's client. *See*, *e.g.*, *Campbell v. Rice*, 302 F.3d 892, 897 (9th Cir. 2002); *United States v. Novaton*, 271 F.3d 968 (11th Cir. 2001). This is a so-called "personal" conflict because the lawyer's personal interests are opposed to that of her client's—in order to avoid being indicted and/or

convicted of a crime, the lawyer has strong incentives to curry favor with the prosecutor by pulling her punches in her representation of her client. And like a concurrent representation conflict, this conflict has profound *pervasive* effects. Indeed, the desire to avoid criminal charges pulls the lawyer away from the client's best interests at every step of the representation. Thus, prejudice is just as difficult to prove in this context as it is in the concurrent representation context.

Other conflicts that can give rise to severe and pervasive effects on a defense lawyer's representation include when the lawyer is paid to represent a criminal defendant by a third party with conflicting interests, when the lawyer obtains a contract for the media rights to the defendant's story that are only valuable if the defendant goes to trial, and when the lawyer becomes romantically involved with the defendant or, worse yet, the defendant's spouse.. The logic behind *Cuyler* is that prejudice should be presumed upon a showing of adverse effect because the *effects* of a conflict of interest are both severe and difficult to prove; therefore, this Court should not exclude all non-multiple representation conflicts of interest from *Cuyler*'s reach merely based on the *causes* of these conflicts.

The *Strickland* standard cannot adequately protect the Sixth Amendment right to counsel when that counsel operates under a conflict of interest significant enough to generate an adverse effect. This is because the *Strickland* standard rests on a foundation of judicial trust in lawyers' loyalty. The *Strickland* Court reasoned that, in a normal

representation, "counsel is strongly presumed to have . . . made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. Crucially, however, in the case of conflicted counsel, the lawyer's conflict *rebuts the presumption* that "reasonable professional judgment" motivated the lawyer's decisions. A conflicted lawyer cannot be trusted to use his professional judgment to assist his client's interests; rather, he has compelling reasons to use his skills to serve other, conflicting interests instead.

The *Cuyler* presumption of prejudice provides a much more appropriate standard to evaluate the constitutionality of conflicted counsel. Unlike "effectiveness," conflicts are objective and easily identifiable ex ante. *See Strickland*, 466 U.S. at 692 ("Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, . . . it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest." (internal citation omitted)). This Court need not be worried, as it was in *Strickland*, about the difficulty of establishing a judicially created "set of detailed rules for counsel's conduct." *Id.* at 688. Happily, those ethical guidelines already exist in the rules of professional conduct.

III. Mr. Crawford's Lawyer Labored Under a Serious Conflict of Interest and Breached His Duty of Loyalty to His Client.

The issues raised by Mr. Crawford's challenge to the professional conduct of his lawyer, Mr. Fortier, provide a perfect vehicle for this Court to address the circuit split identified earlier in favor of a *Cuyler* test that turns on adverse effect. Egregious ethical violations occurred here. While *amicus* recognizes that not every violation of an applicable rule results in the denial of Sixth Amendment rights, we remind the Court that the rules of professional conduct are not simply hortatory. Rather, they have been adopted by every state supreme court and every federal circuit and district court as rules of discipline, the violation of which can result in disbarment and other serious sanctions. *See* Ellen J. Bennett et al., Annotated Model Rules of Professional Conduct 5 (8th ed. 2015) (listing the types of sanctions that can follow from violations of the Rules). Furthermore, many of the rules are simply codifications of fundamental fiduciary obligations of lawyers, such as confidentiality and loyalty. *See id.* at 7 ("[M]ost courts do look to the ethics rules as evidence of standards of conduct and care . . . ."). These rule violations can result in violations of Sixth Amendment due process rights as well. *See*, *e.g.*, *id.* at 170 (discussing the Sixth Amendment issues raised by "third-party payment of a defendant's legal fees" in the context of Model Rule 1.8).

The rules contemplate that there may come a time when lawyers and clients wish to part company. Clients can dismiss their lawyer at any time without any grounds, so long as the court approves. *See* Model Rules of Prof'l Conduct R. 1.16 cmt. 4 ("A client has a right to discharge a lawyer at any time, with or without cause . . . ."). Lawyers, too, can withdraw from a representation for no reason whatsoever, so long as the client is not prejudiced; or, if the lawyer has grounds, he may withdraw even if it would prejudice the client. Model Rules of Prof'l Conduct R. 1.16(b). If failure to withdraw would result in a violation of law or the rules of professional conduct, then the lawyer is ethically compelled to withdraw, with the court's permission. Model Rules of Prof'l Conduct R. 1.16(a)(1).

There are certain ethical requirements that every withdrawing lawyer must observe. First, the affected client must be notified. Model Rules of Prof'l Conduct R. 1.16(d). Second, the lawyer must treat the client as a client until the court grants the withdrawal. *Cf.* Bennett et al., *supra*, at 182-83 (discussing cases that have addressed when legal representation has ended and noting that different Rules govern a lawyer's relationship with current clients). Third, after withdrawal, the client is entitled to all the protections owed to a former client. *See* Model Rules of Prof'l Conduct R. 1.9 cmt. 1 ("After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest . . . ."). Fourth, the duty of confidentiality to present and former clients must be observed. *See* Bennett et al., *supra*, at 288 ("A lawyer must protect client

confidences when moving to withdraw and thereafter."). Fifth, if any confidential information must be disclosed, the client must be given an opportunity to prevent disclosure, and any disclosure must be minimized to the greatest extent practicable—and if possible, done ex parte—so the court and the client's adversary learn no sensitive information regarding the client. *See id.* (providing that if the court requires explanation regarding the withdrawal, "the lawyer must take steps to limit disclosure"); *People v. Hagos*, 250 P.3d 596 (Colo. App. 2009) (holding that where the lawyer seeks to withdraw because the client insists on perjuring himself and must reveal that reason to the court, "counsel should make a record of the disagreement outside the presence of the trial court" because "[t]his procedure maintains client confidences and the integrity of the trial"); *In re Gonzalez*, 773 A.2d 1026, 1032 (D.C. 2001) (admonishing lawyer who revealed client secrets and holding that in seeking to withdraw, the lawyer could have "minimize[d] the possibility of harm" by "submitt[ing] his documentation *in camera*" and redacting "the material most potentially damaging to his clients"); *see also* Model Rules of Prof'l Conduct R. 1.6 (establishing the circumstances under which confidential client information can be revealed).

All of those principles were violated as a result of the profound and significant conflict between Mr. Fortier and his client. The client was not notified. The client was not present at the proceedings. The client was not represented at the hearing. The alleged grounds for the withdrawal were fully disclosed. The lawyer stopped

representing the client with no notice. The lawyer started helping the prosecution. The rules governing loyalty and confidentiality and the underlying fiduciary duties were ignored. If any case underscores the need to clarify *Cuyler*'s reach beyond multiple representation conflicts, Mr. Crawford's experience is surely that case.

CONCLUSION

For the foregoing reasons, *amicus* respectfully prays that this Court grant the petition for writ of certiorari.

Respectfully submitted,

Lawrence J. Fox
Counsel of Record
George W. and Sadella D. Crawford
Visiting Lecturer in Law
Ethics Bureau at Yale
127 Wall Street
New Haven, CT 06511
Tel: (203) 432-9358
Email: lawrence.fox@yale.edu
Counsel for Amicus Curiae

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