Supreme Court No. S130263

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

Kenneth Earl Gay

On Habeas Corpus

CAPITAL CASE

Superior Court, Los Angeles County No. A392702
Honorable Lance Ito

APPLICATION FOR PERMISSION TO FILE BRIEF OF AMICUS CURIAE ETHICS BUREAU AT YALE AND BRIEF OF AMICUS CURIAE ETHICS BUREAU AT YALE IN SUPPORT OF PETITIONER KENNETH EARL GAY

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TO: THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE OF CALIFORNIA AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to California Rules of Court, rule 8.520(f), the Ethics Bureau at Yale respectfully requests leave of this Court to file a Brief of Amicus Curiae in Support of Petitioner Kenneth Earl Gay.

I. Identification and Interest of Amicus

The Ethics Bureau at Yale ("the Bureau") is a student clinic of the Yale Law School composed of fourteen students supervised by an

experienced practicing lawyer, lecturer, and ethics professor. The Bureau drafts amicus briefs in matters involving lawyer and judicial professional responsibility, aids defense counsel in ineffective assistance of counsel claims that implicate professional responsibility issues, and provides assistance and counselling on a pro bono basis to non-profit legal service providers, courts, and law schools.

The Bureau respectfully submits this brief as amicus curiae. First, it has a strong interest in ensuring that the fiduciary duty of lawyers, the applicable rules of professional conduct, and the Sixth Amendment right to counsel protect the right of every criminal defendant to receive competent and conflict-free representation. Second, it seeks to assure that lawyers and courts act forthrightly to prevent conflicts of interest from affecting the representation of criminal defendants, undermining the integrity of the judicial proceedings, and damaging the public's confidence in the fairness of the legal system as a whole. Third, the Bureau believes that its perspective might assist the court in resolving the issues presented in the pending matter.

The proposed brief was authored exclusively by the Bureau. No party or counsel for a party in the case authored any part of the proposed brief, nor did they or any other person or entity make a monetary contribution intended to fund the preparation or submission of the brief. *See* Cal. Rules of Court 8.200(c)(3).

II. The Proposed Brief of Amicus Curiae Will Provide the Court with an Additional Perspective on a Lawyer's Ethical Obligations and Professional Responsibilities.

By drawing on the Bureau's experience and expertise regarding rules of professional conduct and the legal standards for conflicts of interest and ineffective assistance of counsel claims, the proposed amicus brief will assist the Court in evaluating petitioner's request for relief. In particular, the Bureau believes it can assist the Court by explaining why the Referee's findings of fact are not only inconsistent with the applicable rules of professional conduct and other authorities establishing minimum standards of lawyer conduct, but also inconsistent with the prevailing law surrounding conflicts of interest.

The Bureau believes that the Referee's finding that no actual conflict of interest was present in this case is erroneous. The Bureau's argument is supported by the American Bar Association's Model Rules of Professional Conduct, which establish an objective test for determining when an actual conflict of interest is present. The proposed brief will explain both why an objective test is required and how, under an objective test, petitioner's trial counsel clearly labored under a profound conflict of interest. The Bureau further contends that conflicts of interest that arise from a lawyer's personal interests are one of the most serious conflicts contemplated by rules of professional conduct.

The proposed brief of Amicus Curiae also draws on the Bureau's extensive knowledge of the law surrounding ineffective assistance of counsel claims. Specifically, the Bureau believes that it can aid the Court in determining the correct legal standard for evaluating when a lawyer's conduct deprives a defendant of his Sixth Amendment right to effective assistance of counsel.

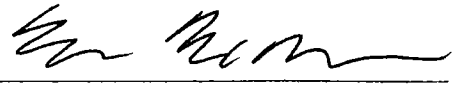
Finally, the proposed brief of Amicus will also assist the Court by highlighting the dangerous ethical and professional implications of allowing the Referee's findings and conclusions to stand uncorrected.

For these reasons, the Bureau respectfully requests that the Brief of Amicus Curiae submitted concurrently with this application be accepted for filing and considered by this Honorable Court.

Dated: October 18, 2016

Respectfully submitted,

ETHICS BUREAU AT YALE

By: 

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Pursuant to rule 8.520(f) of the California Rules of Court, the Ethics Bureau at Yale hereby offers the following amicus curiae brief in support of petitioner Kenneth Earl Gay.

INTRODUCTION

A lawyer who operates under a conflict of interest violates his fiduciary duty of loyalty to his client, perhaps the most fundamental aspect of the attorney-client relationship. *Strickland v. Washington*, 466 U.S. 668,

692 (1984) (citing *Cuyler v. Sullivan*, 446 U.S. 335 (1980)). "It is well-established that a conflict of interest may arise where defense counsel is subject to a criminal investigation." *Moss v. United States*, 323 F.3d 445, 472 (6th Cir. 2003). The reason is simple: when faced with the threat of criminal prosecution, a lawyer is inevitably forced to choose between protecting his own liberty and defending his client.

In this case, Daye Shinn violated his fiduciary duty to his client, Kenneth Gay, by concealing the fact that Mr. Shinn was being criminally investigated for embezzlement by the same District Attorney's Office that was prosecuting his client. Never once did Mr. Shinn disclose this fact to Mr. Gay, even though this conflict created a grave risk that Mr. Shinn was incapable of providing the competent and diligent representation required in a capital case. Throughout the representation, Mr. Shinn had every incentive to place his personal interests ahead of his client's. Neither the Sixth Amendment nor the applicable rules of professional conduct tolerate such a conflicting circumstance.

Nevertheless, the Referee found that Mr. Shinn's misappropriation of client funds, while "unprofessional," did not "constitute a viable criminal prosecution and was therefore not the basis for an actual conflict of interest." Rpt. at 61.[1] This conclusion ignored clear law regarding conflicts

[1] Citations to the Referee's Report and Findings of Fact dated November 16, 2015 are denominated "Rpt. at ___."

of interest and invented a new subjective standard: whether, in hindsight, a concurrent criminal prosecution of counsel turned out to be viable. This test places an impossible burden on defendants, to contest an irrelevant fact—how the counsel's prosecution turned out—when the only relevant fact was the threat of prosecution at all.

If the Referee had focused as an objective matter on the relevant facts, the Referee could have only concluded that Mr. Shinn faced a conflict of interest by virtue of the fact that he misappropriated over $120,000 from client funds, Rpt. at 61; that, accordingly, he was the target of a criminal investigation by the same office prosecuting his client; that the conflict could not be waived, because Mr. Shinn could not possibly have provided competent and diligent representation under these circumstances; that, in any event, Mr. Shinn did not seek the informed consent required to waive the conflict; that the conflict continued throughout the representation of Mr. Gay; and that Mr. Shinn's conflicted conduct prejudiced Mr. Gay's case. Under threat of criminal prosecution and disbarment, Mr. Shinn had every incentive to place his interests ahead of his client's.

As a result, the Referee's analysis must be corrected. If allowed to stand, it would render the constitutional right to conflict-free counsel an empty promise. After reviewing the uncontested facts of Mr. Gay's representation, the only conclusions one can reach are that Mr. Shinn's conflict of interest was profound, infecting every aspect of the

representation, and that the Referee's handling of the conflict was so inconsistent with the rules of professional conduct that this case cries out for intervention by this Honorable Court. This Court should feel compelled to disapprove of Mr. Shinn's conduct, and, moreover, should use these terrible facts to clarify that this type of conflict is unacceptable and inconsistent with a lawyer's ethical duties.

ARGUMENT

When properly analyzed under the standards established by *Cuyler v. Sullivan*, 446 U.S. 335, Mr. Shinn's conduct violated Mr. Gay's Sixth Amendment right to conflict-free counsel. The Referee's conclusion to the contrary resulted from his application of an improper, subjective standard. This standard is inconsistent with the law governing lawyers. The Referee's error not only deprived Mr. Gay of his constitutional rights, but also creates serious consequences for criminal defendants and the adversarial system upon which our criminal justice system depends.

I. The Referee Failed To Apply the Appropriate Objective Standard To Determine Whether Kenneth Gay's Lawyer Was Operating Under a Profound Conflict of Interest.

The first step in adjudicating Mr. Gay's claim of ineffective assistance of counsel involves an inquiry into whether Mr. Shinn labored under an actual conflict of interest. In the view of *Amicus*, courts will benefit greatly by referring to the ethical and professional standards that

govern the legal profession to guide the conflict of interest inquiry.[2] The California Rules of Professional Conduct—just like the ABA Model Rules of Professional Conduct and Restatement of the Law Governing Lawyers—provide clear guidance to courts in identifying conflicts of interest. These ethical rules consistently dictate that courts must apply an objective standard in evaluating whether a conflict existed. The court must ask what a reasonable lawyer would believe in the given situation, not what the individual lawyer subjectively believed at the time.

Under an objective standard, the lawyer's own belief about the existence of a conflict is irrelevant. Rather, if the reasonably available facts suggest a significant risk that the lawyer's personal interests will adversely affect the representation, the lawyer is conflicted.

The Referee in this case failed to conduct such an objective inquiry. Instead, the Referee drew repeated, unsupported inferences about Mr. Shinn's state of mind. He concluded, without grounds, that Mr. Shinn did not subjectively believe he was conflicted and therefore was conflict-free. Not only are the Referee's findings unsupported by the factual record, but

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[2] Indeed, the Referee stated that "attorneys and trial courts would benefit from clear guidance from the appellate courts" in determining whether a conflict exists where a lawyer is under investigation by the same prosecution agency that has formally charged the lawyer's client. Rpt. at 59-60. The California and Model Rules of Professional Conduct, in fact, provide clear and precise guidance in identifying such conflicts. The Referee thus would have benefitted from reference to the ethical rules in identifying Mr. Shinn's conflict of interest.

his reliance on a subjective standard to resolve a conflict of interest claim also ignores the prevailing standards established by the ethical rules.

A. Courts Must Apply an Objective Standard To Determine Whether a Conflict of Interest Exists.

Authorities on legal ethics consistently evaluate possible conflicts of interest by using an objective standard. The California Rules of Professional Conduct restrict representation where the lawyer has a personal "interest in the subject matter of the representation." Cal. Rules of Prof'l Conduct r. 3-310(B)(4). This Court has recognized that the "primary purpose" of rule 3-310(B)(4) "is to prevent situations in which an attorney might compromise his or her representation of the client in order to advance the attorney's own financial or personal interests." *Santa Clara Cty. Counsel Attys. Ass'n v. Woodside*, 7 Cal. 4th 525, 546 (1994). Rule 3-310(B)(4) makes no reference to the lawyer's subjective beliefs in determining whether a conflict exists. Rather, the rule identifies a conflict where there is an objective risk that the lawyer's personal interests will be adverse to the best interests of the client.

Similarly, rule 3-310(B)(3) employs an objective standard in determining the existence of conflicts of interest. This rule restricts representation where a lawyer "knows *or reasonably should know*" that the lawyer's personal interests would be "affected substantially" by the representation of a client. Cal. Rules of Prof'l Conduct r. 3-310(B)(3)

(emphasis added). Thus, rule 3-310(B)(3) recognizes that a conflict of interest may exist even if the conflicted lawyer subjectively believes that he is conflict-free. As long as the lawyer "reasonably should know" under the circumstances that the lawyer's personal interests are adverse to the client's interests, the California Rules of Professional Conduct recognize that the lawyer is operating under a conflict of interest. *Id.*

The California Rules of Professional Conduct are similar to the ABA Model Rules of Professional Conduct in this regard.[3] Under ABA Model Rule 1.7, a lawyer is conflicted if "there is a significant risk" that his personal interests will interfere with a representation. Model Rules of Prof'l Conduct r. 1.7(a)(2). Rule 1.7 also imposes on lawyers an affirmative duty to promptly resolve conflicts of interest if and when they arise. *Id.* cmt. 3.

Under the Model Rules, it is the objective existence of risk—not the lawyer's subjective appreciation of it—that infects the representation. Rule 1.7(a)(2) makes no reference to the lawyer's subjective beliefs in diagnosing the existence of a conflict of interest. Moreover, while rule 1.7(b) contains a narrow exception for waiving conflicts of interest, this

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[3] We analyze the conflict in this case using the ABA Model Rules of Professional Conduct because these are nationally recognized standards. Currently, 49 states and the District of Columbia have adopted the ABA Model Rules, including 40 states that have adopted both the ABA Model Rules and the Comments. *See State Adoption of the ABA Model Rules of Professional Conduct and Comments*, Am. Bar Ass'n (May 23, 2011), http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/comments.authcheckdam.pdf.

exception requires, among other things, that the lawyer "*reasonably* believe" that there will be no adverse effects on the representation. *Id.* 1.7(b)(1) (emphasis added). Thus, the test requires the court to evaluate conflicts from the perspective of a disinterested and reasonably prudent lawyer. *See id.* 1.0(h) (defining "reasonable" as the conduct of a "reasonably prudent and competent lawyer").

The Restatement of the Law Governing Lawyers, a product of the American Law Institute, similarly concludes that there must be an objective, not subjective, determination of whether a conflict exists. *See* Restatement (Third) of the Law Governing Lawyers § 121 (identifying a conflict whenever "there is a substantial risk" that a representation will be adversely affected by the lawyer's personal interests). A comment clarifies that the propriety of a representation must be determined by the "facts and circumstances that the lawyer knew *or should have known* at the time of undertaking or continuing a representation." *Id.* § 121, cmt. c(iv) (emphasis added). Therefore, if the information reasonably available to the lawyer indicates a substantial risk that the lawyer's interests will interfere with his representation, the lawyer is conflicted regardless of his subjective beliefs.

The objective test exists for good reason. First, lawyers jeopardize their clients whenever they work under a conflict of interest—not merely when they consciously acknowledge the conflict. Second, a lawyer operating under a personal conflict of interest is the *last* person capable of

reliably determining its impact on his performance and the client's interests. Indeed, this is why a lawyer must alert the court of any potential conflict—so that the court can make an objective determination as to its existence. *Cf. Holloway v. Arkansas*, 435 U.S. 475, 485-86 (1978). Third, the objective test facilitates review of a lawyer's ethical decision-making. If lawyers could absolve themselves of responsibility by simply denying their subjective awareness of the conflict, lawyer ethics—and all of the client's substantive rights that the ethical rules help to secure—would become effectively voluntary. Violators could—and surely many would—successfully avoid disciplinary proceedings by refusing to acknowledge ethical defects in their conduct.

These concerns become especially serious in the context of a criminal defendant's Sixth Amendment right to effective assistance of counsel. This right is violated when a defense lawyer's personal interests adversely affect his representation, regardless of whether the lawyer recognizes the conflict. Moreover, habeas courts applying a subjective test face the same evidentiary problem as their professional discipline counterparts. Only petitioners with conscientious and contrite trial lawyers would have any hope of establishing ineffective assistance predicated on a conflict of interest because lawyers could brazenly deny the existence of a conflict in order to terminate the inquiry to avoid discipline and malpractice

claims. In the view of *Amicus*, courts reviewing Sixth Amendment claims simply cannot rely on the subjective conclusions of conflicted lawyers.

B. The Referee Failed To Apply the Proper Objective Standard To Evaluate Mr. Shinn's Conflict of Interest.

The Referee failed to apply the proper objective standard to evaluate Mr. Shinn's conflict of interest. On the one hand, the Referee ignored the objective circumstances surrounding Mr. Shinn's representation of Mr. Gay. On the other hand, the Referee repeatedly relied on inferences about Mr. Shinn's subjective beliefs regarding the conflict. Further, the Referee failed to cite to any legal authority supporting his approach. Because the Referee failed to apply the appropriate standard, this Court should reject the Referee's conclusions.

The Referee failed to recognize that the objective circumstances surrounding Mr. Shinn's representation of Mr. Gay created a serious conflict of interest. Instead, the Referee relied heavily on his finding that the criminal investigation "did not constitute a viable criminal prosecution and therefore was not the basis for an actual conflict of interest." Rpt. at 61. The Referee focused on Mr. Shinn's subjective beliefs about the prosecution's viability, concluding that Mr. Shinn was unconcerned about the criminal investigation into his activities. Rpt. at 56-57.

The evidence cited for this conclusion is weak at best. For example, the Referee quoted Mr. Shinn's statement made after being confronted by

the Deputy District Attorney Albert MacKenzie to ask about missing client funds. Mr. Shinn stated, "I've got the money, but I can't get Oscar to take the money." Rpt. at 56. Without further analysis, the Referee summarily concluded that "[t]he tenor of Shinn's comment does not suggest concern about a criminal prosecution." *Id.* The Referee then quoted a conversation between Mr. Shinn and the defense investigator, where Mr. Shinn discussed that his client "had showed up and was upset that there was a mall where his house used to be and refused to accept the check or the money." Rpt. at 57. Without scrutiny, the Referee immediately accepted this conversation as evidence that Mr. Shinn was not worried about a criminal prosecution. *Id.* ("Similar to the first comment Shinn made to MacKenzie, the tenor of this comment does not suggest concern about criminal prosecution.").

Based on the evaluation of these two statements alone, there is no reason to credit the Referee's inference that Mr. Shinn was unconcerned about criminal prosecution. In fact, one could just as easily draw the opposite inference: as a person who knew he was under investigation by the District Attorney, Mr. Shinn had every incentive to portray himself as unconcerned, and thus innocent, to the prosecutor and investigator. It is equally, if not more likely that Mr. Shinn's comments reflected his desire to appear calm and aloof in order to give the impression of innocence. Furthermore, the Referee's whole line of reasoning assumes—without any basis—that Mr. Shinn was in a position to assess the viability of a potential

criminal prosecution. Even if Mr. Shinn sincerely believed that he would avoid prosecution, that belief would have been totally uninformed.

Even more troubling than the Referee's lack of evidence is the total absence of any legal authority for his approach. The Referee did not cite a single legal authority for the proposition that a criminal investigation that does not ultimately "constitute a viable criminal prosecution" cannot serve as the "basis for an actual conflict of interest." Rpt. at 61. Moreover, the Referee failed to explain why the viability of the prosecution against Mr. Shinn should in hindsight have any bearing on the existence of a conflict of interest at the time the District Attorney's Office was investigating Mr. Shinn's conduct, which was also the time during which Mr. Shinn was providing Mr. Gay with a defense. If anything, the fact that the District Attorney's Office was actively investigating Mr. Shinn suggests that it was entirely reasonable for all parties involved to believe that the District Attorney's Office might file criminal charges against Mr. Shinn during his representation of Mr. Gay. The conflict was not created by the ultimate viability of the claim based on hindsight, but by Mr. Shinn's inevitable anxiety while the result was unknown. Mr. Shinn was incentivized to do anything he could to ensure that the criminal investigation into his embezzlement scheme did not lead to an indictment.

The Referee's analysis reveals the danger of relying on a subjective test to determine if a conflict of interest exists. Instead of objectively

analyzing the risks posed by the District Attorney's investigation of Mr. Shinn, the Referee attempted to access Mr. Shinn's state of mind by evaluating out-of-context statements that Mr. Shinn made over thirty years ago. Ultimately, the Referee engaged in nothing more than guesswork in determining Mr. Shinn's supposed belief that he was conflict-free. But even if the Referee is correct that Mr. Shinn subjectively believed he was conflict-free, that subjective belief should have no bearing on the resolution of Mr. Gay's claims. There is no reason to rely on Mr. Shinn's subjective appraisal of the investigation against him in determining whether his representation of Mr. Gay was conflicted.

C. Under the Proper Objective Standard, Mr. Shinn's Representation of Kenneth Gay Was Profoundly Conflicted.

The objective facts surrounding Mr. Shinn's representation of Mr. Gay demonstrate a plain conflict of interest. During the entire representation, Mr. Shinn was facing an investigation into serious criminal charges by the same District Attorney's Office that was prosecuting his client. At any moment during the representation, Mr. Shinn might have been charged with a felony, and if so, he would have been prosecuted by the same office that was prosecuting Mr. Gay. As long as the threat of prosecution loomed over him, Mr. Shinn was severely conflicted.

No lawyer in Mr. Shinn's position could ignore the fact that he might soon be sitting in a prison cell. No lawyer in his position could be

expected to place the zealous representation of his client before his own physical liberty. The conflict in this case thus arose from "the existence of this undeniable uncertainty regarding [the lawyer's] own liberty and financial interests before and during Petitioner's trial and [the lawyer's] knowledge of this uncertainty." *Rugiero v. United States*, 330 F. Supp. 2d 900, 907 (E.D. Mich. 2004); *see also United States v. Levy*, 25 F.3d 146, 156 (2d Cir. 1994); *Thompkins v. Cohen*, 965 F.2d 330, 332 (7th Cir. 1992) ("[When] the criminal defendant's lawyer himself [is] under criminal investigation . . . [i]t may induce the lawyer to pull his punches in defending his client lest the prosecutor's office be angered . . . and retaliate against the lawyer.").

The California Rules of Professional Conduct identify a conflict when a lawyer's interests might compromise his representation of a client. *See* Cal. Rules of Prof'l Conduct r. 3-310(B)(3)-(4). The Model Rules of Professional Conduct similarly recognize that a lawyer is conflicted when there is a risk that the lawyer's personal interests would materially limit the lawyer's representation of his client. *See* Model Rules of Prof'l Conduct r. 1.7(b). As noted above, *see supra* Part I.A, the objective existence of this risk—rather than the lawyer's subjective beliefs—infects the representation. Mr. Shinn was clearly conflicted under the rules of professional conduct. Once Mr. Shinn knew he was under investigation by the District Attorney's Office's—the same office prosecuting his client—

Mr. Shinn had reason to do everything in his power to avoid criminal charges. For example, Mr. Shinn had every incentive to curry favor and goodwill from the prosecutor's office that was investigating his own criminal misconduct and every disincentive to aggressively represent his client. These circumstances constitute precisely the types of risks that the rules of professional conduct guard against.

The Referee dismissed this possibility by noting that the prosecutor from the Major Crimes Division in Mr. Gay's case later testified that he was unaware of the investigation of Mr. Shinn by the Major Frauds Division. But this fact has no bearing on the objective existence of a conflict at the time of the representation. From Mr. Shinn's perspective, it was the investigation that affected his representation. The prosecutor's knowledge was irrelevant. The Referee also relied on the fact that Mr. Shinn was never prosecuted. But that too would only be relevant if the prosecution were dropped with prejudice *before* the representation of Mr. Gay began. Rather, the inquiry must focus on the objective existence of risk *at the time of the representation itself* when Mr. Shinn faced the very real possibility that the Los Angeles County District Attorney's Office—the same office prosecuting his client—could file criminal charges against him.

Neither the rules of professional conduct nor the Sixth Amendment tolerate such an egregious conflict of interest. As long as Mr. Shinn could have been charged with a crime, he faced an actual conflict of interest in his

representation of Mr. Gay. The Referee's professed belief that Mr. Shinn's conduct was "unprofessional" but "did not constitute a viable criminal prosecution and was therefore not the basis for an actual conflict of interest" is unsupported by objective evidence and by the applicable law. Rpt. at 61. No criminal defendant should be represented by a lawyer laboring under investigation by the very same office prosecuting his client.

II. Mr. Shinn's Conflict-Burdened Performance Denied Kenneth Gay His Sixth Amendment Right to Effective Assistance of Counsel.

A. *Sullivan* Provides the Correct Standard To Determine Whether Kenneth Gay's Representation Was Inadequate Under the Sixth Amendment.

In *Strickland v. Washington*, the U.S. Supreme Court established the general standard for evaluating whether a lawyer's deficient performance constituted ineffective assistance of counsel in violation of the Sixth Amendment. 466 U.S. 668 (1984). The Court held that in order to prove a lawyer's performance was constitutionally ineffective, the defendant must establish: 1) "that counsel's representation fell below an objective standard of reasonableness," *id.* at 688, and 2) "that [counsel's] deficient performance prejudiced the defense." *Id.* at 687.

A claim that a lawyer's deficient performance stemmed from an impermissible conflict of interest is a specific type of ineffective assistance of counsel claim. The U.S. Supreme Court has applied different standards to some of these conflict challenges. In evaluating a conflict arising out of a

lawyer's concurrent representation of two co-defendants, the Court in *Cuyler v. Sullivan* held that success on an ineffective assistance of counsel claim requires a defendant to show that there was 1) an actual conflict of interest; and 2) that this conflict adversely affected counsel's performance. 446 U.S. at 348. Importantly, the *Sullivan* standard does not require a defendant to prove prejudice. *Strickland*, 466 U.S. at 693. Prejudice is presumed when a lawyer "actively represented conflicting interests" and when "an actual conflict of interest adversely affected his lawyer's performance," *Sullivan*, 446 U.S. at 350, a standard that is easier to meet than the standard applied to typical ineffective assistance of counsel claims. *Strickland*, 466 U.S. at 692-93.

After *Sullivan* and *Strickland*, there was some confusion regarding the correct standard for evaluating conflicts of interest that did not arise out of concurrent representations. In *Mickens v. Taylor*, the Supreme Court applied the *Sullivan* standard to a conflict that arose from successive, rather than concurrent, representations. 535 U.S. 162 (2002). In its opinion, the Court specifically reserved the question of whether *Sullivan* was in fact the correct test to apply to successive representation cases. *Id.* at 176. The Court observed that circuit courts had applied *Sullivan* "unblinkingly" to all categories of conflicts of interests, *id.* at 174, including conflicts involving "counsel's personal or financial interests," *id.* at 174, and asserted that these extensions of *Sullivan* were not *necessarily* supported by Supreme Court

precedent. *Id.* at 175 (emphasis added). The *Mickens* majority explained the rationale behind the lower burden in *Sullivan*: conflicts arising from concurrent representations are highly likely to lead to prejudice, and this prejudice would be difficult to prove. *Id.*; *see also People v. Doolin*, 45 Cal. 4th 390, 418 (2009) (agreeing that "the presumption of prejudice is a prophylactic measure established to address situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel") (citation and internal quotation marks omitted).

While it may be an open question whether or not the *Sullivan* standard should be applied to all personal interest conflicts, *see Doolin*, 45 Cal. 4th at 418 n.20, the *Mickens* reasoning provides an answer here. The *Sullivan* standard should be applied to concurrent personal interest conflicts—like those that arise when a lawyer is being investigated by the same agency prosecuting his client—because concurrent personal interest conflicts are at least as likely to cause prejudice as concurrent conflicting representations of two defendants. *See United States v. Manuel Ramos*, 350 F. Supp. 2d 413, 420 (S.D.N.Y. 2004) (noting that "the lawyer's position as a target of criminal investigation while representing a criminal defendant [is] a situation of conflict of loyalties analogous to representation of multiple clients"). Indeed, there is strong precedent for doing so. The Ninth Circuit has applied *Sullivan* to personal interest conflicts. *See, e.g.*, *Bemore*

v. Chappell, 788 F.3d 1151, 1161-62 (9th Cir. 2015) (applying *Sullivan* to a conflict of interest arising from defense counsel's fraudulent bill-padding and misappropriation of funds); *United States v. Hearst*, 638 F.2d 1190, 1193-94 (9th Cir. 1980) (holding that *Sullivan* should be applied when a lawyer had a personal pecuniary interest that conflicted with the client's interests). While the conflicts that arise from joint or successive representations of criminal defendants can give rise to the most serious conflicts of interest, it is not just in those situations that one would presume prejudice. The world of conflicts of interest is vast, and some conflicts are far more serious than those involving joint or successive representations. If confronted with one of those outrageous conflicts of interest, one would have to conclude under the *Mickens* rationale that the *Sullivan* standard should be applied, even though the conflict does not involve a joint or successive representation.

In this case, the fact that Mr. Shinn was being investigated by the same office that was prosecuting his client gave rise to a "personal" conflict of interest, rather than one stemming from a concurrent or prior representation. However, this case also presents a concurrent conflict of interest because at the same time Mr. Shinn was representing Mr. Gay he was representing his own interests in a criminal investigation. It is bad enough for a lawyer to be forced to choose between loyalty to two clients; but a choice between a client's interest and the lawyer's own self-interest is

guaranteed to result in prejudice to the client, even if the lawyer asserts otherwise. Because the District Attorney's Office was investigating Mr. Shinn for embezzlement, he had both the incentive and the opportunity to "pull his punches" and take actions that would curry favor with the office in hope of avoiding an indictment and formal charges. *Thompkins*, 965 F.2d at 332.

It is clear that the situation presented here represents a conflict far more serious than many raised in joint or successive representations. After all, certain personal conflicts of interest, where the interests of the client are directly opposed to the interests of the lawyer, can never benefit the client and therefore are particularly pernicious. *See, e.g., United States v. Cancilla*, 725 F.2d 867, 870 (2d Cir. 1984). When the interests of the lawyer are directly adverse to the best interests of the client, there is no basis for expecting that the lawyer will be selfless. Rather, one can anticipate with a high level of confidence that, consciously or not, the lawyer will put the lawyer's interests first, even if the lawyer rationalizes the betrayal by insisting that such an untoward result has not occurred. So too here, a presumption of prejudice is particularly appropriate where the conflict is so pervasive that it infects the entire representation, and therefore would be difficult to measure in hindsight.

This is especially true in this case, where the personal interest at stake was beyond mere pecuniary interest. Because Mr. Shinn was being

investigated for alleged criminal activity, he was facing potential imprisonment, a deprivation of liberty. Furthermore, an indictment for embezzling client funds would have enormous negative reputational and practical consequences for his career as a lawyer, as he could have been disbarred, suspended, or reprimanded in other ways by the California State Bar.[4] Given Mr. Shinn's strong interest in avoiding these staggering consequences, his conflict here cannot be described as anything other than "serious." And given the high likelihood of prejudice arising from Mr. Shinn's conflict of interest, this Court should apply *Sullivan* to evaluate whether the conflict gave rise to constitutionally ineffective assistance of counsel.

B. Under *Sullivan*, Kenneth Gay Was Deprived of Effective Assistance of Counsel.

Under *Sullivan*, Mr. Gay must establish that there was an actual conflict that adversely affected Mr. Shinn's performance. Sadly, Mr. Shinn's conduct easily passes this test. Defense counsel was burdened by an egregious conflict of interest, *see supra* Part I, and Mr. Gay presented ample evidence of adverse performance.

Under *Sullivan*, establishing an actual conflict and showing an adverse effect on counsel's performance are not two separate requirements.

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[4] Indeed, Mr. Shinn was later disbarred for his misappropriation of client funds—precisely the conduct for which the District Attorney's Office was actively investigating him.

See Mickens, 535 U.S. at 172 n.5 ("[T]he *Sullivan* standard is not properly read as requiring inquiry into actual conflict as something separate and apart from adverse effect."); *Hovey v. Ayers*, 458 F.3d 892, 908 (9th Cir. 2006) ("An actual conflict . . . need not be established separately from adverse effect.") (citing *Mickens*, 535 U.S. at 172 n.2). Instead, courts have defined an actual conflict as "a conflict of interest that adversely affects counsel's performance." *Id.* (quoting *Mickens*, 535 U.S. at 172 n.2); *Alberni v. McDaniel*, 458 F.3d 860, 872 (9th Cir. 2006) ("It is . . . necessary for [petitioner] to demonstrate that an actual conflict of interest existed. That is, he must show that [his lawyer's] performance was adversely affected.").

To show that Mr. Shinn was laboring under an actual conflict of interest that adversely affected his performance, Mr. Gay must demonstrate "that some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." *United States v. Wells*, 394 F.3d 725, 733 (9th Cir. 2005) (quoting *United States v. Stantini*, 85 F.3d 9, 16 (2d Cir. 1996)). However, he "need not prove that the actual conflict 'was the cause'" of any particular decision to take or refrain from a specific action. *Lockhart v. Terhune*, 250 F.3d 1223, 1231 (9th Cir. 2001) (quoting *United States v. Miskinis*, 966 F.2d 1263, 1268 (9th Cir. 1992)). Instead, Mr. Gay only needs to demonstrate "that some effect on counsel's handling of particular aspects of

the trial was 'likely,'" in order to establish an adverse effect. *United States v. Baker*, 256 F.3d 855, 860 (9th Cir. 2001) (quoting *Miskinis*, 966 F.2d at 1268).

In this case, Mr. Gay can easily establish that it was likely, if not certain, that Mr. Shinn's conflict of interest caused him to choose one defense strategy over another in order to further Mr. Shinn's own interests—to the detriment of Mr. Gay's defense. One particular "strategy" that Mr. Shinn embraced stands out as a particularly pernicious example of Mr. Shinn's placing his own interests ahead of Mr. Gay's: Mr. Shinn's urging Mr. Gay to confess to the commission of the robberies alleged in this case. Mr. Shinn falsely advised Mr. Gay that if Mr. Gay confessed to the robberies, the defense might be able to work out an agreement with the prosecutor for Mr. Gay to be a prosecution witness. Mr. Shinn also wrongly assured Mr. Gay that the prosecutors would not be able to use the audiotaped confession against him if they decided not to use him as a witness. Most appallingly, Mr. Shinn advised Mr. Gay to confess to robberies with which he was not even charged. Mr. Shinn's actions were so egregious that this Court found that Mr. Shinn "induced [Mr. Gay] to confess to the charged and uncharged robberies," acting "as a second prosecutor by creating the evidence that led to [Mr. Gay's] conviction of the robberies." *In re Gay*, 19 Cal. 4th 771, 791, 793 (1998).

Given Mr. Shinn's strong interest in avoiding criminal charges, it is difficult to imagine how such clearly deficient performance could be attributable to incompetence alone. It is difficult to even conceive of the possible strategic benefits of admitting to uncharged robberies. Indeed, it is much more likely that Mr. Shinn's actions were an attempt to curry favor with the District Attorney's Office. The timeline of events further supports this reasoning: On March 1, 1994, Mr. Shinn was interrogated by the prosecutor and investigator for an accounting of his client's funds. Rpt. at 5. Less than one month later, on March 29, 1994, Mr. Shinn induced Mr. Gay to confess. Rpt. at 56. By serving Mr. Gay up on a silver platter, Mr. Shinn must have hoped that in return, the District Attorney's Office would be more likely to end their investigations of his embezzlement without pursuing an indictment.

The nexus between the nature of the conflict of interest and the deficient performance is clear, unambiguous, and aptly expressed by this Court's use of the phrase "second prosecutor" in condemning Mr. Shinn's actions. *In re Gay*, 19 Cal. 4th at 793. Instead of fulfilling his constitutional and professional duties to defend his client with the utmost competence and diligence, Mr. Shinn manipulated his client and acted as an arm of the prosecutor's office. Incompetence alone cannot explain such a drastic turn; while deficient *inaction* may sometimes be attributable to sheer incompetence, here Mr. Shinn took affirmative action to turn his client in.

Other courts have found adverse effect when a lawyer has a conflict of interest and his decisions have no possible tactical justifications. For example, in *Lockhart v. Terhune*, trial counsel labored under a conflict of interest when he concurrently represented two defendants, Galbert and Lockhart, charged with the same murder. 250 F.3d at 1223. The court held that counsel's decision not to inform the jury that Galbert had been accused of shooting the victim had no tactical justification, and thus concluded that counsel was likely motivated by a desire to protect Galbert. *Id.* at 1232.

Mr. Gay's case closely parallels *Lockhart*. First, Mr. Shinn was hampered by a serious conflict of interest that gave him clear incentives to avoid aggravating the District Attorney's Office and to do all he could to curry their favor. Second, there was no conceivable tactical justification for inducing Mr. Gay to confess to the robberies, particularly the uncharged robberies. Thus, the only reasonable conclusion is that Mr. Shinn was, at a minimum, likely to have been motivated by a desire to protect himself from criminal prosecution.

III. Allowing the Referee's Findings To Stand Would Be a Grave Miscarriage of Justice.

Important public policy reasons support the prohibition contained in all rules of professional conduct against conflicted representations. These prohibitions are particularly salient with respect to cases in which a lawyer's self-interest is squarely at odds with the duty of loyalty owed to

his client. An egregious example is when, as here, the defense lawyer is being investigated by the same District Attorney's Office that is prosecuting the lawyer's client. *See, e.g.*, *United States v. McLain*, 823 F.2d 1457, 1463 (11th Cir. 1987), *overruled on other grounds by United States v. Watson*, 866 F.2d 381, 385 n.3 (11th Cir. 1989).

A. The Actual Conflict in this Case Was So Serious that Permitting the Conviction To Stand Would Undermine Confidence in the Judicial System and the Integrity of the Adversarial Process.

Mr. Shinn was clearly conflicted under Rule 1.7 and the standards of this Court. Every criminal defendant has a right to conflict-free counsel, *see Wood v. Georgia*, 450 U.S. 261 (1981), and this right is violated whether or not his lawyer acknowledges the fact or the extent of a conflict. Here, the Referee erroneously relied on Mr. Shinn's subjective and self-interested belief that he was not conflicted. Moreover, if allowed to stand, the Referee's findings set a dangerous precedent. To avoid compliance with these conflict rules, lawyers could simply deny that they had recognized a conflict, or state that they were never seriously concerned about criminal investigations into their conduct.

Courts reviewing Sixth Amendment claims cannot rely on allegedly ineffective lawyers' own conclusions that they performed adequately. As long as there was a possibility that Mr. Shinn could be charged with a serious crime, he faced an actual conflict of interest in his representation of

Mr. Gay. His professed belief—unsupported by objective evidence—that he did not face a conflict is irrelevant.

The U.S. Supreme Court has repeatedly turned to the rules governing the profession to inform its Sixth Amendment jurisprudence. *See, e.g.*, *Swidler & Berlin v. United States*, 524 U.S. 399, 406-07 (1998); *Wheat v. United States*, 486 U.S. 153, 160 (1988); *Nix v. Whiteside*, 475 U.S. 157, 165-66 (1986); *Sullivan*, 446 U.S. at 346; *see also Michigan v. Harvey*, 494 U.S. 344, 367 n.12 (1990) (Stevens, J. dissenting). This reliance reflects both the time-tested virtues of the professional rules and the Supreme Court's independent interest in maintaining the legitimacy of the judicial system.

Public confidence in the outcome of cases depends on confidence in the lawyers who argue them; this faith is predicated on a conception of lawyers as zealous and independent advocates for their clients. Ensuring that lawyers avoid conflicted representations is one way for courts to protect their "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat*, 486 U.S. at 160. Just as the U.S. Supreme Court has done previously, this Court should rely on the accumulated wisdom of the profession—wisdom distilled into guiding precepts—to define the contours of the Sixth Amendment right in this case.

Legal ethics rules also insist on an objective test to identify actual conflicts of interests because it facilitates review of lawyers' ethical decision-making. If lawyers could absolve themselves of responsibility for conflicts of interest by simply denying that they believed they had been conflicted, professional responsibility would become effectively voluntary. Violators could simply deny that they had recognized ethical defects in their conduct. Allowing for conflicted counsel to so easily abdicate their conflicts would undermine the very principles of legal ethics and the integrity of the adversarial system it seeks to protect.

B. The Referee's Findings Place Criminal Defendants at Risk, Depriving Defendants of Their Right to Conflict-Free Counsel.

Any lawyer being investigated by a prosecutor's office, whether guilty or innocent, would recognize that his personal interests were very much at stake and would feel a strong need to protect himself—a goal that will inevitably place the lawyer's own interests at odds with the best interests of a client who is being prosecuted by the same office. "There are few, if any, lawyers who could easily disregard the possibility of disbarment or criminal proceedings against them personally, even if their client's interests demanded it." *People v. Konstantinides*, 14 N.Y.3d 1, 16 (2009) (Smith, J., dissenting). After all, "[w]hat could be more of a conflict than a concern over getting oneself into trouble with criminal law enforcement authorities?" *Cancilla*, 725 F.2d at 870. No criminal defendant

should be represented by a lawyer laboring under threat of prosecution, as counsel's "desire to avoid[] criminal" sanction presumptively infects "virtually every aspect" of his "representation." *United States v. Fulton*, 5 F.3d 605, 613 (2d Cir. 1993).

What makes the Referee's findings so perplexing is that the client-centered consequences of a conflict like Mr. Shinn's—that of a lawyer being investigated by the same office prosecuting his client—are abundantly clear. A lawyer's self-interest in such cases must trump his allegiance to his client, breeding "failures" to investigate, object and "vigorously cross-examine." *Armienti v. United States*, 234 F.3d 820, 825 (2d Cir. 2000). It could also cause him to "devote less time" to the representation and render him "ill-prepared" and "distracted" at trial. *Id.* "A lawyer in these circumstances, while dealing on behalf of her client with the office that is prosecuting her personally may, consciously or otherwise, seek the goodwill of the office for her own benefit." *Id.* And that "may not always be in the client's best interest." *Id.*; *see also United States v. Marin*, 630 F. Supp. 64, 66 (N.D. Ill. 1985) (stating that trial counsel "may have done less than he might otherwise have done for his client" in a "desire to ingratiate himself" with prosecutor "representatives" or in "fear of offending them"). In such cases, conflicted counsel might be inclined to "temper" his zeal, fearing that a "spirited defense" will spur the government to pursue his own charges with "greater vigor." *Levy*, 25 F.3d at 156; *see*

also State v. Cottle, 194 N.J. 449, 464-65 (2008) (pending indictment may chill counsel's "zeal to engage in a bruising battle with the very prosecutor's office . . . weighing her fate").

Another "potential risk[] involved" when a defense lawyer is being investigated by the same office that is prosecuting his client is that it "may induce the lawyer to pull his punches in defending his client lest the prosecutor's office be angered by an acquittal and retaliate against the lawyer." *Thompkins*, 965 F.2d at 332; *see also Armienti*, 234 F.3d at 825; *Levy*, 25 F.3d; *Briguglio v. United States*, 675 F.2d 81, 83 (3d Cir. 1982) (per curiam). Alternatively, a criminal defendant may also be at risk in a situation where the defense attorney is the target of a criminal investigation because "the prosecutor may be less willing to offer the defendant the opportunity to cooperate if the prosecutor regards as a criminal the lawyer through whom the communication would flow." Anne Bowen Poulin, *Conflicts of Interest in Criminal Cases: Should the Prosecution Have a Duty to Disclose?*, 47 Am. Crim. L. Rev. 1135, 1164 (2010). Indeed, the desire to avoid criminal charges pulls the lawyer away from the client's best interests at every step of the representation.

In the view of *Amicus*, the need for such special relief is particularly acute here because Mr. Shinn not only labored under a conflict of interest, but also withheld this information from his client. In doing so, Mr. Shinn deprived Mr. Gay of his right to un-conflicted counsel. There is no possible

benefit to the client in not being informed about his lawyer's conflict; by failing to disclose his conflict, Mr. Shinn breached a clear requirement of the applicable rules of professional conduct, rules that are in effect in every American jurisdiction.

Allowing the Referee's finding of no conflict to stand places criminal defendants at risk. Lawyers could effectively hide conflicts from their clients by denying their existence while failing to provide zealous representation. No defendant would choose to be represented by conflicted counsel. In cases like Mr. Gay's, the client has been robbed of the opportunity to make one of the most important decisions specifically delegated to the client, solely to satisfy the selfish ends of the lawyer who wants to continue a representation.

The Referee mistakenly relied on the fact that the prosecution of Mr. Shinn did not pan out to incorrectly conclude that there was no conflict. One cannot conclude—in hindsight—that counsel subjectively thought a prosecution was not viable. All Mr. Shinn knew for sure was that he was being investigated, and the knowledge that he might be indicted left him in an uncertain position. Mr. Shinn's concerns for his own liberty, license to practice law, and criminal liability created an actual conflict of interest. This is all we can know with certainty. It is impossible to determine whether under different circumstances Mr. Shinn might have done a different and/or better job in his representation of Mr. Gay. Defendants

have the right to both the fact and appearance of unwavering and exclusive loyalty on the part of lawyers who represent them. Defendants have a right to have confidence in the integrity of the system that convicts them, incarcerates them, and sentences them to die.

CONCLUSION

A lawyer facing criminal charges while simultaneously representing a criminal defendant inevitably labors under divided loyalties, particularly when the same prosecutor's office is handling both his own and his client's case. Such a lawyer breaches his fiduciary duties when, to further his own interests, he neglects to inform the client and the court of the conflict. Mr. Gay was oblivious to the grave conflict of interest that was compromising his defense, he placed his trust in a lawyer secretly betraying him; and he is now sentenced to die. Allowing the Referee's erroneous findings to stand would sanction a violation of Mr. Gay's fundamental rights and would leave courts confused about how to assess conflicts of interest in cases like Mr. Gay's. Future criminal defendants would be at risk of suffering the same grave miscarriage of justice.

Dated: October 18, 2016

Respectfully submitted,

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By: _____

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.504(d), I certify that, based on the word count feature of the Word Processing program used to prepare this Brief of Amicus Curiae Ethics Bureau at Yale in Support of Petitioner Kenneth Earl Gay, it contains 7,492 words (excluding the tables).

Dated: October 18, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is Drinker Biddle & Reath LLP, 1800 Century Park East, Suite 1500, Los Angeles, California 90067.

On **October 19, 2016**, I served the foregoing document described as: **APPLICATION FOR PERMISSION TO FILE BRIEF OF AMICUS CURIAE ETHICS BUREAU AT YALE AND BRIEF OF AMICUS CURIAE ETHICS BUREAU AT YALE IN SUPPORT OF PETITIONER KENNETH EARL GAY** on the interested parties in this action by placing a true copy thereof in a sealed envelope addressed as follows:

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