No. _____

SUPREME COURT OF THE UNITED STATES

ROBERT SHARP,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA

Respondent-Appellee.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE 8TH CIRCUIT

PETITION FOR *CERTIORARI*

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QUESTIONS PRESENTED FOR REVIEW

In his Section 2255 federal post-conviction, Petitioner Robert Sharp alleged an actual conflict after his attorney's former client in the same criminal investigation testified against Mr. Sharp at sentencing about the purpose of that representation, resulting in an obstruction of justice enhancement and loss of acceptance of responsibility.

1. Does the standard in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), which requires only a showing that a conflict of interest adversely affected counsel's performance to establish a Sixth Amendment violation, apply to successive representation conflicts, as held by the Second, Third, and Ninth Circuits, or must defendants demonstrate prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), as required by the Fifth and Eleventh Circuits, with the Fourth, Seventh, and Eighth Circuits expressing uncertainty, given this circuit split?

2. When assessing adverse effect under *Cuyler v. Sullivan* for a conflict of interest, should courts apply a lenient standard focused on whether the conflict influenced counsel's strategic decisions, as adopted by the Second, Third, and Sixth Circuits, or a stringent "objective reasonableness test" requiring proof that an alternative strategy was factually viable, as applied by the Fourth and Eighth Circuits, which

effectively mirrors Strickland's prejudice standard, creating inconsistent Sixth Amendment protections across circuits?

PARTIES TO THE PROCEEDING

Petitioner is Robert Carl Sharp, who was the appellant in the court below. Respondent is the United States of America, which was the appellee in the court below.

RELATED PROCEEDINGS

- *United States v. Sharp*, No. 1:15-CR-31 (N.D. Iowa) (original criminal proceedings).
- *United States v. Sharp*, No. 16-4008 (8th Cir.) (direct appeal, decided Jan. 5, 2018).
- *Sharp v. United States*, No. 1:19-CV-113-LRR-MAR (N.D. Iowa) (Section 2255 proceedings, judgment entered Feb. 17, 2023).
- *Sharp v. United States*, No. 23-1365 (8th Cir.) (appeal from denial of Section 2255 motion, decided Mar. 31, 2025; en banc review denied Apr. 30, 2025).

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The opinion of the United States Court of Appeals for the Eighth Circuit is reported at *Sharp v. United States*, No. 23-1365 (8th Cir. Mar. 31, 2025), and is included in Appendix C. The Eighth Circuit's order denying rehearing en banc is included in Appendix A. The district court's order denying Petitioner's 28 U.S.C. § 2255 motion is reported at *Sharp v. United States*, No. 1:19-CV-113-LRR-MAR (N.D. Iowa Feb. 17, 2023), and is included in Appendix H.

JURISDICTION

Mr. Sharp filed his original motion to vacate his federal criminal judgment under 28 U.S.C. § 2255. The District Court had jurisdiction review federal civil actions. 28 U.S.C. § 1331. The 8th Circuit has jurisdiction over all final federal judgments and sentences. See 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1). The Panel affirmed the District Court court on March 31, 2025. Appx. C. The 8th Circuit denied en banc review on April 30, 2025. Appx. A. This Petition is filed on May 1, 2025, within 90 days of the denial of rehearing, pursuant to Supreme Court Rule 13.1. It is thus timely filed and this Court has jurisdiction to review the Panel decision.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. (Appendix K).

STATEMENT OF THE CASE

Original District Court Proceedings

Petitioner Robert Carl Sharp was convicted in 2015 of conspiracy to manufacture and distribute AB-FUBINACA, a synthetic cannabinoid, and possession with intent to distribute the same, in violation of 21 U.S.C. §§ 841(a)(1) and 846. He pleaded guilty without a plea agreement while represented by attorney Joel Schwartz. Sharp later sought to withdraw his plea, alleging that Schwartz operated under a conflict of interest due to his prior representation of potential witnesses, including Hadi Sharairi and Mohammad and Melissa Al Sharairei, who were implicated in the same synthetic cannabinoid investigation. Sharp retained new counsel, Michael Lahammer, who did not raise the successive representation conflict in the motion to withdraw the guilty plea. Sharp was sentenced to 360 months' imprisonment.

Section 2255 Proceedings

Sharp filed a 28 U.S.C. § 2255 motion, alleging ineffective assistance of counsel under *Cuyler v. Sullivan*, 446 U.S. 335 (1980), due to Schwartz's successive representation conflict and Lahammer's failure to raise this issue. The

district court denied the motion, finding that Sharp failed to show that Schwartz's conflict adversely affected his representation or that Lahammer's performance was deficient under *Strickland v. Washington*, 466 U.S. 668 (1984). The Eighth Circuit affirmed, holding that Sharp's claims failed under both *Cuyler* and *Strickland* because he did not demonstrate that Schwartz's conflict led to the abandonment of an objectively reasonable alternative defense strategy, such as proceeding to trial or entering a cooperation agreement. *Sharp v. United States*, No. 23-1365, slip op. at 6-8 (8th Cir. Mar. 31, 2025) (Appendix C).

8th Circuit Proceedings

The Eighth Circuit noted uncertainty about whether *Cuyler* applies to successive representation conflicts, stating: "It is unclear whether *Cuyler* applies to all kinds of alleged conflicts of interest, or only those involving the joint representation of multiple codefendants. . . . Since Sharp's claim fails under both, we need not choose between the *Strickland* and *Cuyler* standards." *Id.* at 6. The court applied an "objective reasonableness test," requiring Sharp to "identify a plausible alternative defense strategy or tactic that defense counsel might have pursued, show that the alternative strategy was objectively reasonable under the facts of the case, and establish that the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict." *Id.* (quoting *Winfield v. Roper*, 460 F.3d 1026, 1039 (8th Cir. 2006)).

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to resolve two significant circuit splits that undermine uniform application of the Sixth Amendment's guarantee of conflict-free counsel. First, the circuits are divided on whether *Cuyler v. Sullivan*'s relaxed standard—requiring only a showing that a conflict adversely affected counsel's performance—applies to successive representation conflicts, or whether the stricter *Strickland* prejudice standard governs. Second, the circuits diverge in their application of the "objective reasonableness test" for adverse effect under *Cuyler*, with some treating it as functionally equivalent to *Strickland*'s prejudice requirement, while others apply a less demanding standard. These splits create inconsistent protections for defendants' Sixth Amendment rights and warrant this Court's intervention.

I. The Circuits Are Split on Whether *Cuyler v. Sullivan* Applies to Successive Representation Conflicts

In *Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980), this Court held that a defendant who shows that a conflict of interest "actually affected the adequacy of his representation" need not demonstrate prejudice to establish a Sixth Amendment violation. *Cuyler* addressed a conflict arising from joint representation of codefendants, but its scope—particularly whether it extends to successive representation conflicts—remains unresolved. The Eighth Circuit acknowledged

this ambiguity, noting that it "has not decided whether an alleged conflict of interest arising out of successive representation . . . requires a defendant to show deficient performance and prejudice under Strickland or whether the defendant need only show that the conflict actually affected the adequacy of his representation under Cuyler." *Sharp v. United States*, No. 23-1365, slip op. at 6 (citing *United States v. Roads*, 97 F.4th 1133, 1137 (8th Cir. 2024)).

The circuit courts are divided on this issue:

- **Circuits Applying *Cuyler* to Successive Representation**: The Second, Third, and Ninth Circuits apply *Cuyler* to successive representation conflicts, requiring only a showing of adverse effect without prejudice. *See, e.g.*, *United States v. Malpiedi*, 62 F.3d 465, 469 (2d Cir. 1995) (applying *Cuyler* where counsel previously represented a government witness, finding adverse effect due to limited cross-examination); *United States v. Moscony*, 927 F.2d 742, 750 (3d Cir. 1991) (applying *Cuyler* to successive representation of a witness, reversing due to counsel's failure to call witnesses); *United States v. Miskinis*, 966 F.2d 1263, 1268 (9th Cir. 1992) (extending *Cuyler* to successive representation conflicts).
- **Circuits Requiring *Strickland* for Successive Representation**: The Fifth and Eleventh Circuits require defendants to meet *Strickland*'s prejudice standard for successive representation conflicts, limiting *Cuyler* to joint

representation. *See, e.g.*, *Beets v. Scott*, 65 F.3d 1258, 1272-73 (5th Cir. 1995) (en banc) (holding that *Strickland* governs successive representation conflicts unless the conflict involves joint representation); *Quince v. Crosby*, 360 F.3d 1259, 1263-64 (11th Cir. 2004) (applying *Strickland* to successive representation of a witness).

- **Circuits Expressing Uncertainty**: The Fourth, Seventh, and Eighth Circuits have declined to definitively resolve the issue, often analyzing successive representation claims under both standards. *See, e.g.*, *Mickens v. Taylor*, 240 F.3d 348, 360-61 (4th Cir. 2001) (en banc), *aff'd on other grounds*, 535 U.S. 162 (2002); *States v. Horton*, 845 F.2d 1414 (7th Cir. 1988); *Sharp v. United States*, No. 23-1365, slip op. at 6 (8th Cir. 2025).

In *Horton*, the Seventh Circuit addressed a conflict of interest where the trial court was notified of a potential conflict involving defense counsel but failed to conduct an adequate inquiry, as required under *Holloway v. Arkansas*, 435 U.S. 475 (1978), and *Wood v. Georgia*, 450 U.S. 261 (1981). The court applied *Cuyler v. Sullivan*, 446 U.S. 335 (1980), to assess whether an actual conflict adversely affected counsel's performance, emphasizing that no prejudice showing was required if such a conflict was established. The case did not involve successive representation, focusing instead on a conflict noticed during trial, and thus does not directly conflict with the Eighth Circuit's approach in *Sharp v. United States*, No.

23-1365 (8th Cir. Mar. 31, 2025), which expressed uncertainty about *Cuyler*'s applicability to successive representation conflicts and applied a stringent "objective reasonableness test" for adverse effect. However, *Horton*'s application of *Cuyler* without requiring prejudice aligns with circuits like the Second, Third, and Ninth (e.g., *United States v. Malpiedi*, 62 F.3d 465 (2d Cir. 1995)), which extend Cuyler to successive representation without a prejudice requirement, and contrasts with the Fifth and Eleventh Circuits (e.g., *Beets v. Scott*, 65 F.3d 1258 (5th Cir. 1995)), which mandate *Strickland*'s prejudice standard for such conflicts. While *Horton* does not directly conflict with the Eighth Circuit due to its distinct context, its adherence to *Cuyler*'s no-prejudice standard for noticed conflicts highlights the broader circuit split on *Cuyler*'s scope, particularly when compared to the Eighth Circuit's cautious dual analysis under *Cuyler* and *Strickland* in Sharp.

This split creates disparate outcomes for defendants. In the Second Circuit, Sharp's claim that Schwartz's prior representation of Sharairi and the Al Sharaireis impaired his advice to plead guilty might have succeeded under *Cuyler* if he showed an adverse effect, such as forgoing a trial defense. In the Fifth Circuit, Sharp would have needed to prove prejudice—a reasonable probability that the outcome would have differed—under *Strickland*. This inconsistency undermines the Sixth Amendment's uniform application and warrants this Court's clarification of *Cuyler*'s scope.

II. The Circuits Are Split on Whether the "Objective Reasonableness Test" for Adverse Effect Under *Cuyler* Is Functionally Equivalent to *Strickland*'s Prejudice Standard.

The Eighth Circuit applied an "objective reasonableness test" to assess adverse effect under *Cuyler*, requiring Sharp to "identify a plausible alternative defense strategy or tactic that defense counsel might have pursued, show that the alternative strategy was objectively reasonable under the facts of the case, and establish that the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict." *Sharp v. United States*, No. 23-1365, slip op. at 6 (quoting *Winfield v. Roper*, 460 F.3d 1026, 1039 (8th Cir. 2006)). Sharp argued that Schwartz's conflict led him to forgo two strategies: (1) proceeding to trial and calling Sharairi and the Al Sharaireis as witnesses to support an advice-of-counsel defense, and (2) entering a cooperation agreement to mitigate his sentence by testifying against Sharairi or the Al Sharaireis. *Id.* at 6-7. The Eighth Circuit rejected both, finding them not objectively reasonable because the Al Sharaireis were fugitives and Sharairi's testimony contradicted Sharp's defense. *Id.* at 7. Sharp contends that this test is "just *Strickland* by another name," as it closely resembles *Strickland*'s requirement to show a reasonable probability that the outcome would have differed but for counsel's errors. The circuits are split on how to apply the adverse effect test under *Cuyler*:

- **Circuits Treating Adverse Effect as Similar to *Strickland* Prejudice**: The Fourth and Eighth Circuits impose a rigorous "objective reasonableness"

test, requiring a plausible strategy that a reasonable attorney would have pursued absent the conflict, effectively mirroring *Strickland*'s outcome-focused inquiry. *See, e.g.*, *Mickens v. Taylor*, 240 F.3d 348, 361 (4th Cir. 2001) (requiring a "viable" alternative strategy); *Winfield v. Roper*, 460 F.3d 1026, 1039 (8th Cir. 2006). In *Sharp*, the Eighth Circuit's rejection of Sharp's proposed strategies due to their factual unviability suggests a high bar akin to proving prejudice. *Sharp v. United States*, No. 23-1365, slip op. at 7.

- **Circuits Applying a Less Demanding Adverse Effect Standard**: The Second, Third, and Sixth Circuits apply a more lenient test, focusing on whether the conflict influenced counsel's decisions, without requiring the alternative strategy to be likely to succeed. *See, e.g.*, *United States v. Malpiedi*, 62 F.3d 465, 469-70 (2d Cir. 1995) (finding adverse effect where counsel's prior representation limited cross-examination, without assessing outcome); *United States v. Moscony*, 927 F.2d 742, 750 (3d Cir. 1991) (adverse effect shown by counsel's failure to call witnesses due to loyalty to former clients); *McFarland v. Yukins*, 356 F.3d 688, 705-06 (6th Cir. 2004) (adverse effect where conflict led to omission of a defense strategy, without requiring proof of success).

This split affects defendants' ability to vindicate their Sixth Amendment rights. In the Second Circuit, Sharp's claim that Schwartz's conflict led him to forgo calling Sharairi or pursuing a cooperation agreement might have succeeded if he showed the conflict influenced Schwartz's advice, without proving the strategies' likely success. In the Eighth Circuit, Sharp's claim failed because the court deemed the strategies factually unviable, a standard that approximates *Strickland*'s prejudice requirement. This inconsistency creates uncertainty and inequity in evaluating conflict-based ineffective assistance claims.

III. The 8th Circuit's Stringent Strickland-Like Objective Reasonable Test Actually Impacted the Result for Mr. Sharp.

Mr. Sharp likely would have succeeded in 2nd, 3rd, 6th and probably the 7th Circuit. The difference lies in the meaning of the term "plausible". To establish adverse effect, plausible means that it would reasonable choice to make. The 8th Circuit says that it was what is doing, but in fact, required Mr. Sharp to show that the alternative strategy would have succeeded under the rubric of "objective reasonableness". That's no different than *Strickland*'s prejudice standard. For example, consider the 8th Circuit's rejection of his trial attorney's failure to recommend cooperation against other Schwartz clients. The 8th Circuit rejected that because Mr. Sharp failed to show that cooperation would have been offered to Mr. Sharp.

The Eighth Circuit's requirement that Sharp prove the government would have offered a cooperation agreement as part of the "objective reasonableness test" under *Cuyler v. Sullivan*, 446 U.S. 335 (1980), is absurd because it imposes an impractical, speculative burden that is nearly impossible for a defendant to meet. To demonstrate that the government would have accepted a cooperation deal, Sharp would have needed to access internal prosecutorial decision-making processes, which are opaque and discretionary. This could theoretically involve calling government attorneys to testify about hypothetical plea negotiations—an unrealistic scenario, as prosecutors are unlikely to disclose such deliberations, and courts rarely compel such testimony due to privilege and separation-of-powers concerns. Alternatively, Sharp would need documentary evidence of a formal offer that never materialized, which is inherently unavailable when the strategy was not pursued due to counsel's conflict. The petition highlights that Schwartz's prior representation of Hadi Sharairi and the Al Sharaireis likely deterred him from advising Sharp to pursue cooperation, as it could harm his former clients, a conflict starkly illustrated by Sharairi's attorney having no qualms about Sharairi testifying against Sharp. In circuits like the Second, Third, and Sixth (e.g., *United States v. Malpiedi*, 62 F.3d 465 (2d Cir. 1995)), Sharp needed only to show that a cooperation strategy was plausible and that Schwartz's conflict led him to forgo it, not that the government would have agreed. The fact that Sharairi's non-conflicted

attorney secured testimony against Sharp underscores the plausibility of cooperation as a strategy, satisfying Cuyler's adverse effect standard in these circuits by demonstrating the conflict's direct impact on Schwartz's strategic choices.

The harm stemming from Schwartz's conflict of interest, arising from his prior representation of Hadi Sharairi, was not hypothetical. The conflict metastasized into actual harm when Sharairi testified against Robert Sharp, directly undermining Sharp's defense and resulting in an obstruction enhancement a sentencing. *Sharp v. United States*, No. 23-1365 (8th Cir. Mar. 31, 2025). This testimony vividly illustrates the adverse effect of Schwartz's conflict, as his loyalty to a former client likely deterred him from pursuing strategies like aggressive cross-examination or a cooperation deal that could have mitigated Sharairi's damaging testimony. Yet, the Eighth Circuit's misapplication of *Cuyler v. Sullivan*, 446 U.S. 335 (1980), dismissed this as insufficient to show adverse effect, erroneously requiring Sharp to prove the factual viability of alternative strategies. This misunderstanding of *Cuyler*'s focus on the conflict's influence on counsel's performance, rather than outcome-altering prejudice, warrants Supreme Court intervention to align the Eighth Circuit with the Second, Third, and Sixth Circuits' more faithful application of *Cuyler*'s standard and this Court's precedent.

CONCLUSION

The petition for a writ of certiorari should be granted to resolve the circuit splits regarding the application of *Cuyler v. Sullivan* to successive representation conflicts and the proper standard for assessing adverse effect. The Court should clarify whether *Cuyler* extends beyond joint representation and whether the "objective reasonableness test" aligns with *Cuyler*'s intent to presume prejudice in conflict cases, thereby ensuring uniform protection of Sixth Amendment rights.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I, Rockne Cole, counsel for Petitioner, hereby certify that, on May 2, 2025, I mailed an original and 10 copies to the Supreme Court via United States Postal Service 1st Class Mail to:

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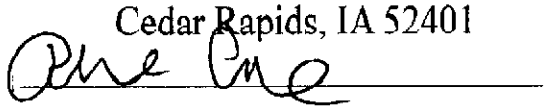
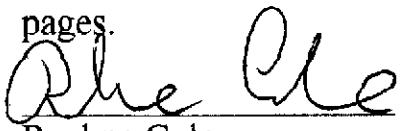


CERTIFICATE OF WORD COUNT

I, Rockne Cole, certify that the above Petition includes 2784 words and was prepared in 14 Point New Times Roman and therefore, complies with US Supreme Court Rule 33.1, and it also complies with Rule 33.2 as it contains less then 40 pages.



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