No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

PAUL WAGNER, *Petitioner*,

v.

UNITED STATES, *Respondent*.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents an issue on which the Ninth Circuit's has both (1) entered a decision in conflict with the decisions of two other United States Courts of Appeals on the same important matter, and (2) has decided an important question of federal law that has not been, but should be, settled by this Court. Specifically, the Ninth Circuit's decision regarding the actual conflict between Mr. Wagner and his trial attorney is based on the Ninth Circuit's 1994 case of *United States v. Hanoum,* 33 F.3d 1128 (9th Cir. 1994), which itself conflicts with the D.C. Circuit's case of *United States v. Torres,* 115 F.3d 1033 (D.C. Cir. 1997) and the Tenth Circuit's case of *United States v. Johnson,* 12 F.3d 1540 (10th Cir. 1993). It also conflicts with the United States Supreme Court cases of *Cuyler v. Sullivan,* 446 U.S. 335 (1980) and *Mickens v. Taylor,* 535 U.S. 162 (2002).

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I. PRAYER FOR RELIEF

Mr. Paul Wagner respectfully petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review its decision denying his appeal from his conviction and sentence for bank and wire fraud and the district court's denial of his motion for new trial. The basis of this petition is that the Ninth Circuit's has both (1) entered a decision in conflict with the decisions of two other United States Courts of Appeals on the same important matter, and (2) has decided an important question of federal law that has not been, but should be, settled by this Court. Specifically, the Ninth Circuit's decision regarding the actual conflict between Mr. Wagner and his trial attorney is based on the Ninth Circuit's 1994 case of *United States v. Hanoum,* 33 F.3d 1128 (9th Cir. 1994), which itself conflicts with the D.C. Circuit's case of *United States v. Torres,* 115 F.3d 1033 (D.C. Cir. 1997) and the Tenth Circuit's case of *United States v. Johnson,* 12 F.3d 1540 (10th Cir. 1993). It also conflicts with the United States Supreme Court cases of *Cuyler v. Sullivan,* 446 U.S. 335 (1980) and *Mickens v. Taylor,* 535 U.S. 162 (2002).

II. OPINION BELOW

A three-Judge panel of the Ninth Circuit entered judgment that was final and unpublished, and affirmed his conviction and sentence and the district court's denial of his motion for new trial. *United States v. Paul Wagner,* Consolidated Appeals Nos. 13-10419, 17-10056, 17-10199 (9th Cir. October 3, 2018), *Appendix A.* On November 27, 2018, the Ninth Circuit issued an Order denying his Petition for Rehearing En Banc. *Appendix B.*

III. JURISDICTION

On October 3, 2018, the Court of Appeals for the Ninth Circuit delivered an unpublished opinion affirming Mr. Wagner's conviction and sentence and the district court's denial of Mr. Wagner's motion for new trial. *Appendix A.* This is the final judgment for which a writ of certiorari is sought. A Petition for Rehearing En Banc was denied by an Order dated November 27, 2018. *Appendix B.*

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

IV. STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

No person shall…be deprived of life, liberty, or property, without due process of law….

The Sixth Amendment to the United States Constitution provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial…and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

V. STATEMENT OF THE CASE

A. Jurisdiction of Courts of First Instance

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. The Ninth Circuit Court of Appeals had jurisdiction pursuant to 18 U.S.C. §§ 1291 and 3742.

B. Facts Material to the Questions Presented

Mr. Paul Wagner, the owner of Wagner Homes, is a 64 year old builder of homes and subdivisions in Nevada and a minister of his church. He has no prior convictions or even arrests.

He was charged with conspiring to defraud various mortgage lenders by keeping from them the fact that he was offering incentives to buyers to purchase his homes, including offers to pay buyers' down payments and up to the first two years of their mortgage payments. Mr. Wagner obtained an opinion letter from an experienced real estate attorney saying that his actions were legal. They were designed to compete with incentives offered by other area home builders at the time such as free cars and swimming pools. Accordingly, Mr. Wagner widely advertised these incentives on television, billboards, flyers and other public media.

Mr. Wagner underwent a 13 day jury trial represented by a lawyer who filed only one two-sentence motion on a single legal issue (which was never ruled on), failed to make a motion for judgment of acquittal at the end of the government's case even when prompted to do so by the trial judge, failed to offer any witnesses or any defense at all, and failed even to make objections other than routine ones relating to things like the form of questions. In effect, he presented no defense at

all. That defense lawyer, Lawrence Semenza, a former U.S. Attorney in the District of Nevada, was subsequently convicted and served a federal prison sentence for tax offenses, and was suspended from practicing law. *See, e.g., Former U.S. Attorney Gets Prison Time on Tax Charges,* Law Vegas Review-Journal, at http://www.reviewjournal.com/news/las-vegas/former-us-attorney-gets-prison-time-tax-charges. Unknown to either Mr. Wagner or the trial court until after his conviction—because neither Semenza nor the government told him--Semenza was under federal criminal investigation by the government at the time of Mr. Wagner's trial—a fact that he knew before and during Mr. Wagner's trial--and was indicted by the same U.S. Attorney's Office that tried Mr. Wagner just days after he withdrew from Mr. Wagner's case.

Among the issues on appeal was the effect of the actual conflict between Mr. Wagner's now-ex-convict trial attorney, who had a strong personal incentive to please the prosecutor in this case, and the denial of Mr. Wagner's *pro se* motion for new trial and/or an evidentiary hearing based on that actual conflict. That motion alleged not only Semenza's failure to adequately defend him, but also that Semenza handed over confidential client documents to the prosecution, failed to make use of exculpatory evidence provided to him by Mr. Wagner, and failed to pursue a very favorable plea offer, telling Mr. Wagner that it was "unconstitutional."

Mr. Wagner is now serving a 14 year federal prison sentence.

1. **The District Court Ruling on the Motion for New Trial**

Mr. Wagner filed a *pro se* motion for new trial on multiple grounds, including his trial counsel's actual conflict. The district court denied that motion as to the conflict issue with the following ruling:

> **Lawrence Semenza**
>
> Wagner contends the government violated its *Brady* obligations by failing to disclose that Semenza had an actual conflict in that Semenza was "under indictment for tax evasion during the time of the Wagner trial, and was negotiating a disposition with the AUSA."6
>
> > Footnote 6: On August 28, 2014, Semenza waived indictment and pled guilty to three counts of failure to file a tax return for the 2007-2009 calendar years. *See United States v. Semenza,* Case No. 2:14-cr-00271-JCM-PAL (ECF Nos. 2, 5, 6).
>
> (ECF No. 235 at 12.) Wagner reasons that as a result of the government's *Brady* violation, he was represented by conflict counsel in violation of his Sixth Amendment rights. (*Id.*)
>
> The government responds that Semenza was not being investigated by the U.S. Attorney for the District of Nevada ("the Nevada U.S. Attorney's Office") during the course of the trial in this case, and the Nevada U.S. Attorney's Office only learned of the criminal investigation involving Semenza when the matter was referred to it by the Tax Division of the United States Department of Justice ("DOJ Tax Division") on February 6, 2013, for prosecution ("the Referral Letter"). (ECF No. 249 at 8-9.) Wagner counters that because the Referral Letter referenced a letter dated October 25, 2012, criminal investigation into Semenza had been conducted and completed "sufficiently to enable the special agent in charge[] to recommend prosecution of Semenza within 13 days of Wagner's trial." (ECF No. 258 at 2.) This may be true. However, the October 25, 2012, letter is from the Special Agent in Charge of the Las Vegas Field Office of the Criminal Division of the Internal Revenue Service to the Assistant Attorney General for the DOJ Tax Division, not the Nevada U.S.

Attorney's Office. (ECF No. 260-1) That letter does not show that the Nevada U.S. Attorney's Office knew of the criminal investigation involving Semenza. The government represents that the Nevada U.S. Attorney's Office was not aware of the criminal investigation involving Semenza until it received the Referral Letter, which was about three months after the trial and a month after Semenza's representation of Wagner terminated. Accordingly, the government argues that the Nevada U.S. Attorney's Office did not violate any obligations to disclose any conflict, or that Semenza had an actual conflict. (ECF No. 260 at 1-2.)

First and foremost, to the extent Wagner asserts that the newly discovered evidence relates to Semenza's criminal investigation which rendered him ineffective in representing Wagner, Wagner cannot rely on such evidence to support his Motion.7

> Footnote 7: The Court does not reach the legal question of whether disclosure of the criminal investigation relating to Semenza falls within the government's obligations under *Brady* and *Giglio*. Wagner also suggests that Semenza should have disclosed his conflict —that he was being criminally investigated by the IRS. (ECF No. 268 at 2-3.) But Semenza's ethical duties cannot be imputed to the government.

In *United States v. Hanoum,* the Ninth Circuit Court of Appeals held that "a Rule 33 motion based upon 'newly discovered evidence' is limited to where the newly discovered evidence relates to the elements of the crime charged. Newly discovered evidence of ineffective assistance of counsel does not directly fit the requirements that the evidence be material to the issues involved, and indicate that a new trial probably would produce an acquittal." *Hanoum,* 33 F.3d 1128, 1130 (9th Cir. 1994). Thus, the fact that Semenza was being criminally investigated by the IRS during Wagner's trial is not evidence relating to any of the counts in this case to meet the first part of the *Harrington* five-factor test.

Moreover, Wagner offers no evidence that the Nevada U.S. Attorney's Office knew of the IRS's criminal investigation relating to Semenza during the course of Semenza's representation of Wagner. To the contrary, the government has offered evidence that the Nevada U.S. Attorney's Office who prosecuted Wagner was not aware of any such criminal investigation until the criminal matter was referred for local prosecution in February 2013 when Semenza no

longer representing Wagner. Thus, the Nevada U.S. Attorney's Office cannot violate a duty to disclose a potential conflict of which it had no actual knowledge.8

> Footnote 8: The government also relies on *United States v. Baker,* 256 F.3d 855, 859 (9th Cir. 2001), to argue that Wagner fails to show an actual conflict existed because Semenza was not under criminal investigation by the Nevada U.S. Attorney's Office who prosecuted Wagner. (ECF No. 260 at 2.) In *Baker,* the court reiterated that to demonstrate ineffective assistance of counsel, a defendant "must show 'that an actual conflict of interest adversely affected his lawyer's performance[,]'" and "not the mere possibility of conflict." *Id.* at 860 (quoting *United States v Moore,* 159 F.3d 1154, 1157 (9th Cir. 1998). The court found that Baker failed to make this showing of an actual conflict of interest because while representing him in connection with a conviction and an appeal in the Central District of California, Baker's counsel was under investigation and cooperated with the United States Attorney in the Southern District of New York and earning a downward departure for substantial assistance. The Court does not reach the issue of whether Wagner has made a showing of ineffective assistance of counsel since the issue cannot be raised in a motion for a new trial under Rule 33(b). *See Hanoum,* 33 F.3d at 1130.

V. CONCLUSION

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of the Motion.

Wagner fails to offer any evidence to support his contention that the government violated its duty under *Brady* and *Giglio* to disclose material information. Accordingly, the Court denies Wagner's motion for a new trial, as well as Wagner's request for discovery and an evidentiary hearing.

Appendix C at 10-12. A *pro se* motion for reconsideration was also denied.

2. The Ninth Circuit Ruling

On appeal, appointed counsel raised six issues, including that the district court erred in denying Mr. Wagner's motion for a new trial based on his trial counsel's ***actual*** conflict (as noted in the *pro se* new trial pleadings), as well as denying his request for an evidentiary hearing and motion for reconsideration. The arguments and authorities raised by counsel in the Ninth Circuit are those raised in this Petition for Writ of Certiorari, which are set forth in detail below.

The Ninth Circuit's ruling affirming the conviction and sentence and the district court's denial of the motion for new trial, request for an evidentiary hearing, and motion for reconsideration, was as inexplicable as it was unexplained. *Felkner v. Jackson,* 131 S. Ct. 1305 (2011). This is the entire pertinent part:

> Wagner's assertions regarding a failure to disclose his trial counsel's alleged conflict of interest, and counsel's ineffective assistance, are more appropriately the subject of a motion under 28 U.S.C. § 2255. *See United States v. Hanoum,* 33 F.3d 1128, 1130-31 (9th Cir. 1994).
>
> **AFFIRMED.**

Appendix A at 4. The court rejected the subsequent petition for rehearing en banc without addressing the actual issues. *Appendix B.*

VI. REASONS SUPPORTING ALLOWANCE OF THE WRIT

This writ should be granted to allow this Court to (1) correct a decision of the Ninth Circuit that conflicts with and is contrary to this Court's precedents including *Cuyler v. Sullivan,* 446 U.S. 335 (1980) and *Mickens v. Taylor,* 535 U.S. 162 (2002), (2) resolve the Circuit split between the Ninth Circuit's precedent of *United States v. Hanoum,* 33 F.3d 1128 (9th Cir. 1994) and the precedents of the Tenth and D.C.

Circuits in *United States v. Johnson,* 12 F.3d 1540 (10th Cir. 1993) and *United States v. Torres,* 115 F.3d 1033 (D.C. Cir. 1997), and (3) decide an important question of federal law that has not been, but should be, settled by this Court.

Regarding the conflict issue with his trial attorney, once the defendant has proved (1) an actual conflict, and (2) a negative effect upon the representation, prejudice is presumed and a probable effect on the outcome of the trial need not be shown. *Cuyler v. Sullivan,* 446 U.S. 335, 348 350 (1980); *Mickens v. Taylor,* 535 U.S. 162, 172 (2002). To show an "adverse effect," the defendant need only show that "*some effect* on counsel's handling of *particular* aspects of the trial was *likely."* *United States v. Walter-Eze,* 869 F.3d 891, 901 (9th Cir. 2017) (emphasis in original). It is enough to show that as a likely result of the conflict, "counsel failed to put on certain defenses and witnesses…[or] failed to explore the possibility of a plea agreement." *Id.* Moreover, because prejudice need not be shown, "the strength of the prosecution's case is not relevant to whether counsel's performance was adversely affected." *Id.1* And courts take very seriously a defendant's right to counsel free from any conflict of interest. *United States v. Kliti,* 156 F.3d 150 (2d Cir. 1998).

> In exercising its discretion whether to grant an evidentiary hearing, the district court must be guided "by the content of the ***allegations***, including the ***seriousness*** of the ***alleged*** misconduct or bias, and the credibility of the source."… Unless the court is able to determine without a hearing that the allegations are without credibility or that

1 This, among other things, distinguishes claims of actual conflict from claims of ineffective assistance of counsel. Contrary to the government's argument to the panel, this issue is about *actual conflicts,* ***not*** about ineffective assistance—a fact that counsel pointed out repeatedly in the Ninth Circuit.

> the allegations if true would not warrant a new trial, an evidentiary hearing ***must*** be held.

United States v. Navarro-Garcia, 926 F.2d 818, 822 (9th Cir. 1991) (emphasis added, citations omitted).

For example, in a motion for new trial based on newly discovered evidence, it is error to deny an evidentiary hearing where there are allegations that the defendant was prejudiced by the government's failure to inform him of a codefendant's status as a government informer. *United States v. Disston,* 582 F.2d 1108 (7th Cir. 1978).

Mr. Wagner's trial counsel was under federal investigation for tax fraud at the same time he was representing Mr. Wagner at trial, and he was formally indicted and prosecuted by the same U.S. Attorney for the District of Nevada that prosecuted Mr. Wagner shortly after he withdrew following the Wagner trial. It is undisputed that neither defense counsel Semenza nor the government informed either Mr. Wagner or the trial court of the conflict.

There can be little doubt that the conflict was *actual* as opposed to merely potential. As shown by a sworn Declaration signed by Semenza and attached to Mr. Wagner's *pro se* motion for bail pending appeal, Semenza admitted that "[p]rior to my representation of Mr. Wagner, I became aware that I was under federal investigation for alleged tax offenses. I remained aware of this fact during my representation of Mr. Wagner." Semenza ultimately went to prison for this offense.

The fact that defense counsel was under federal investigation for financial crimes at the same time he was trying a financial crimes case in federal court in the

same district where he was under investigation is the very definition of an "actual conflict." *See, e.g., Rugiero v. United States,* 330 F. Supp. 2d 900 (E.D. Mich. 2004) (granting a new trial in a § 2255 case where defense counsel was under investigation for a federal crime during his representation of the federal defendant, finding an actual conflict and applying the prejudice-presumed standard of *Cuyler*).

As for showing an adverse effect upon Semenza's representation of Mr. Wagner, as noted above, Semenza (1) filed only one two-sentence motion on a single legal issue (which was never ruled on), (2) failed to make a motion for judgment of acquittal at the end of the government's case even when prompted to do so by the trial judge, (3) failed to offer any witnesses or defense at all, and (4) failed even to make objections other than routine ones relating to things like the form of questions.

Semenza also failed to cross-examine government witness Alicia Hanna about an email that had been produced to him by the government showing that she was seeking a job with the U.S. Attorney's Office; failed to impeach government witness Roman Nelson about her stealing from Mr. Wagner's company; failed and refused to call as a witness the defense investigator who Mr. Wagner alleges had impeachment and other exculpatory information about government witnesses; told Mr. Wagner to reject a highly favorable 5 year plea offer on the ground that it was "unconstitutional," and failed in general to investigate the exculpatory and impeachment matters that Mr. Wagner informed him about.

And the prosecuting U.S. Attorney himself accused Semenza of failing to

diligently prepare his defense in response to a sixth defense motion to delay the trial, saying **"[t]he defense has not diligently prepared his defense and the motion appears to be a delay[ing] tactic,**" going on to accuse defense counsel of failing to inform the court and the government of any problems and misleading them both to believe that he was working diligently to prepare for trial and would be prepared with each new trial date.

This evidence meets the standard for showing (1) an actual conflict, and (2) a negative effect on counsel's performance. Even if it did not meet the requirements for a new trial (which it does), it would certainly meet the requirements for *an evidentiary hearing*. The contents of the *allegations,* the *seriousness* of the alleged misconduct, and the credibility of the source (including but not limited to Semenza's own sworn declaration), make it impossible to determine without a hearing that the allegations are without credibility or that if true, they would not warrant a new trial—meaning an evidentiary hearing *must* be held. Among other things, Semenza's own testimony might establish all that is needed for a new trial. Under *de novo* review, the Ninth Circuit should have granted Mr. Wagner a new trial. At a minimum, it should have found that the district court abused its discretion by failing to hold an evidentiary hearing on the conflict between Mr. Wagner and his ex-convict trial counsel.

The district court rested its rejection of Mr. Wagner's motion "first and foremost" on *United States v. Hanoum,* 33 F.3d 1128 (9th Cir. 1994) for the proposition that newly discovered evidence relating to ineffective assistance of

counsel cannot be the basis for a motion for a new trial. ER 21. That case is inapposite for several reasons. First, the allegation in the case at bar is actual conflict, not ineffective assistance (although ineffective assistance caused by such conflict is relevant to show "effect" from the conflict under a separate line of cases). Second, *Hanoum* applies the wrong test: it should be the no-prejudice test of *Cuyler* and its progeny. Finally, there is a circuit split on the primary issue the district court cited it for. In *United States v. Torres,* 115 F.3d 1033, 1037 (D.C. Cir. 1997), the D.C. Circuit rejected *Hanoum,* saying:

> We recognize that the Fourth, Fifth, and Ninth Circuits have gone further, holding that even "newly discovered" facts supporting an ineffective assistance claim do not remove a new trial motion from Rule 33's seven-day time limit because such facts do not constitute "evidence" within the meaning of the Rule. *See…United States v. Hanoum,* 33 F.3d 1128, 1130-31 (9th Cir.1994). *But see United States v. Johnson,* 12 F.3d 1540, 1547 (10th Cir.1993) ("[W]here the facts relevant to ineffective assistance are *not* known to the defendant until after trial, they may be raised on a 'newly discovered evidence' motion under Rule 33."). Not presented with newly discovered facts here, we have no need to endorse this *view and, in any event, doubt that it could be reconciled with our precedents*. *See United States v. Kelly,* 790 F.2d 130 (D.C.Cir.1986) (district court abused its discretion by failing to hold a hearing or otherwise resolve factual disputes in new trial motion alleging newly discovered evidence of Sixth Amendment violation); *Marshall,* 436 F.2d at 159 & n. 11.

Id. at 1037 (emphasis added). *Torres* also cited the Tenth Circuit case of *United States v. Johnson,* 12 F.3d 1540, 1548 (10th Cir. 1993), which held that "where the facts relevant to ineffective assistance of counsel are *not* known to the defendant until after trial, they may be raised on a 'newly discovered evidence' motion under

Rule 33." The Ninth Circuit also cited *Hanoum* as the sole case supporting its rejection of Mr. Wagner's appeal.

Had the Ninth Circuit been in accord with other Circuits on this issue, Mr. Wagner would have been entitled to a new trial under the no-prejudice standard of *Cuyler* and *Mickens.*[2]

The panel simply accepted the district court's denial, also citing *Hanoum:*

> [Mr.] Wagner's assertions regarding a failure to disclose his trial counsel's alleged conflict of interest, and counsel's ineffective assistance, are more appropriate the subject of a motion under 28 U.S.C. § 2255. *See United States v. Hanoum*, 33 F.3d 1128, 1130-31 (9th Cir. 1994). **AFFIRMED.**

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2 The district court also accepted the government's assertion that the U.S. Attorney's Office *for the District of Nevada* did not actually know about the investigation at the time of Mr. Wagner's trial--although it cited no authority for the proposition that that was relevant. Mr. Wagner presented evidence that the investigation was ongoing during his trial (the district court said "that may well be true"), that it was the Special Agent in Charge of the criminal branch of the *Las Vegas* IRS that recommended it, and that the recommendation to formally commence the prosecution was made to…the *U.S. Attorney's Office for the District of Nevada in Las Vegas*—which ultimately, in fact, prosecuted both Mr. Wagner and Semenza and put them both in prison. It is beyond rational belief that a years-long *criminal* investigation of a prominent criminal defense attorney and former U.S. Attorney by a *federal* criminal agency *in Las Vegas,* that resulted in his prosecution by the same U.S. Attorney's Office that prosecuted Mr. Wagner shortly after Mr. Wagner's trial, was unknown to the primary federal prosecution agency in the same city that actually prosecuted him very shortly thereafter. Moreover, *Semenza* at least would have known during his representation of Mr. Wagner that if he were prosecuted, it would be by the U.S. Attorney in Las Vegas—which in fact occurred—and this would surely have colored his judgment about how to proceed in the case at bar. In any event, the case law imputes knowledge of investigators and other federal agencies to prosecutors regardless of their actual knowledge. *See, e.g., United States v. Price,* 566 F.3d 900 (9th Cir. 2009); *United States v. Antonakeas,* 255 F.3d 714, 725 (9th Cir. 2001); *United States v. Santiago,* 46 F.3d 885, 893 (9th Cir. 1995); *United States v. Perdomo,* 929 F.2d 967 (3d Cir. 1991); *United States v. Diaz-Munoz,* 632 F.2d 1330, 1333-34 (5th Cir. 1980).

The panel simply accepted the district court's denial, also citing *Hanoum*:

> [Mr.] Wagner's assertions regarding a failure to disclose his trial counsel's alleged conflict of interest, and counsel's ineffective assistance, are more appropriate the subject of a motion under 28 U.S.C. § 2255. *See United States v. Hanoum*, 33 F.3d 1128, 1130-31 (9th Cir. 1994). AFFIRMED.

The Ninth Circuit panel obviously felt it was bound by *Hanoum*. But in the Tenth and D.C. Circuits, Mr. Wagner would have been entitled to a new trial under the no-prejudice standard of *Cuyler* and *Mickens*, or an least an evidentiary hearing on his claim of actual conflict. And this Court is free to re-examine the decision of the Ninth Circuit panel 25 years ago in *Hanoum* and determine whether the law should be as set out in *Cuyler, Mickens,* and the conflicting precedents of the Tenth and D.C. Circuits instead.

VII. CONCLUSION

For the foregoing reasons, Mr. Wagner respectfully asks this Court to grant this Petition for Writ of Certiorari.

Dated: February 22, 2019

Respectfully submitted,

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PAUL WAGNER