

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JUANITA GARCIA

Petitioner.

v.

DEBORAH JOHNSON, Warden

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

G. MICHAEL TANAKA
Attorney at Law
Counsel of Record
12400 Wilshire Blvd., Suite 400
Los Angeles, CA 90025
(323) 825-9746
Michael@mtanakalaw.com

Attorney for Petitioner

QUESTION PRESENTED

In order to obtain federal habeas relief for a violation of the Sixth Amendment right to the effective assistance of counsel, *Strickland v. Washington*, 466 U.S. 668 (1984), requires the habeas petitioner demonstrate (1) that counsel performed deficiently and (2) that the deficient performance resulted in prejudice. Where deficient performance is shown, must a habeas petitioner also show that absent the error, no other evidence supported the verdict?

TABLE OF CONTENTS

QUESTION PRESENTED	i
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..	2
STATEMENT	3
A. State court proceedings	4
B. Federal court proceedings	6
REASONS FOR GRANTING THE WRIT	7
A. <i>Strickland</i> and the prejudice prong	7
B. The continuing misapplication of the prejudice prong	9
1. The conflict and its impact on counsel's performance ..	9
2. The prejudice to petitioner's defense	11
CONCLUSION	18
APPENDIX	
Court of appeals decision (Aug. 21, 2018)	1a
Order denying rehearing (Nov. 13, 2018)	5a
California court of appeal opinion	6a
Report and recommendation of magistrate	13a
California court of appeal opinion	44a
Judgment of district court	45a

TABLE OF AUTHORITIES

Cases

<i>Cuyler v. Sullivan</i> , 446 U.S. 335 (1980).....	8
<i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963)	8
<i>Harrington v. Rich-ter</i> , 562 U.S. 86 (2011).....	9
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)..... <i>passim</i>	
<i>Thomas v. Chappell</i> , 678 F.3d 1086 (9th Cir. 2012).....	15
<i>United States v. Hay</i> , 122 F.3d 1233 (9th Cir. 1997).....	16
<i>United States v. Haynes</i> , 729 F.3d 178 (2d Cir. 2013)	15
<i>Wood v. Georgia</i> , 450 U.S. 261 (1981)	8

Federal Statutes and Constitution

28 U.S.C. § 1254(1)	2
28 U.S.C. § 2254	6
28 U.S.C. § 2254(d).....	2
U.S. Const. amend VI	2, 8

State Statutes

Cal. Penal Code section 187	4
Cal. Penal Code section 190.2(a)(1).....	4

In the Supreme Court of the United States

JUANITA GARCIA

V.

DEBORAH JOHNSON

*ON PETITION FOR A WRIT OF CERTORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

Juanita Garcia respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The memorandum disposition of the court of appeals is not reported in the Federal Reporter, but is available online at 735 Fed.Appx. 402 (9th Cir. 2018). App., *infra*, 1a-4a.

JURISDICTION

The Ninth Circuit entered its memorandum decision and judgment on August 21, 2018. On November 13, 2018, the court denied Ms. Garcia's petition for rehearing. App, *infra*, 5a. This petition is timely filed pursuant to Sup. Ct. R. 13. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution reads:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, 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.

28 U.S.C. § 2254(d) reads:

An application for a writ of habeas corpus on behalf of

a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim— (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT

Petitioner was convicted of first degree murder for killing her husband for financial gain and sentenced to life imprisonment without the possibility of parole. Although petitioner did not dispute that she shot him, the underlying circumstances were fiercely contested. The prosecution argued it was pure greed, motivated by her desire to secured the proceeds of the trust that the victim had established, naming petitioner as the beneficiary. The defense presented a multitude of evidence that the shooting was a culmination of highly abusive relationship and in response to the victim's threats of violence, made

real by the more than a dozen firearms he had scattered throughout the house.

The critical evidence, as argued by the prosecutor, was that petitioner had contacted the trust in an attempt to secure the proceeds. Her lawyer could not challenge that evidence, because he was the person who contacted the trust, without authorization from petitioner, to secure the funds for his payment. His financial conflict, disabling him from contesting the inference of greed, constituted ineffective assistance of counsel, violating petitioner's Sixth Amendment rights.

A. State court proceedings

Petitioner was convicted, following a jury trial, in Los Angeles County Superior Court of first degree murder in violation of California Penal Code section 187. The jury further found true the special circumstance of murder committed for financial gain within the meaning of California Penal Code section 190.2(a)(1) and the personal use of a firearm. On December 18, 2006, the court sentenced her to life in prison without the possibility of parole consecutive to a sentence of 25 years to life.

Petitioner appealed the judgment to the California Court of Appeal. On May 13, 2009, the appellate court issued its decision affirming in part, but remanding the matter to the trial court. The opinion instructed the trial court to offer petitioner the opportunity to discharge her trial counsel in order to pursue a motion for new trial based on her counsel's conflict of interest.

On remand, the trial court held a hearing and then denied the motion for new trial. Petitioner again appealed, and the California Court of Appeals affirmed the denial. The state appellate court found that the Sixth Amendment claim failed. Because other evidence showed petitioner had asked for money from her husband, David Zweig, her attorney's conflict, disabling him from challenging evidence that he sought the trust proceeds on her behalf—showing a financial motive—did not meet *Strickland's* prejudice standard.¹ Petitioner filed a petition for review in the California Supreme Court, and the Court denied review on September 12, 2012.

¹ *Strickland v. Washington*, 466 U.S. 668 (1984).

B. Federal court proceedings

Petitioner initially filed a pro se federal habeas petition on September 18, 2013 under 28 U.S.C. § 2254. After the court appointed counsel, petitioner filed the second amended petition, the operative pleading, alleging that her custody under the California judgment, finding her guilty of first degree murder with the special circumstance of murder for financial gain and sentencing her to life in prison without the possibility of parole, violated the United States Constitution.

The petition raised five claims for relief, including that defense counsel's clear conflict of interest prejudiced petitioner and denied her the Sixth Amendment right to the effective assistance of counsel. The district court denied the petition, dismissing it with prejudice. App., *infra*, 44a-45a.

Petitioner appealed to the Ninth Circuit Court of Appeals. The appeal argued that the state court's rejection of the Sixth Amendment claim was both an unreasonable application of *Strickland* and contrary to it. The state-court decision correctly stated the *Strickland* standard of prejudice but misapplied it in placing the burden on petitioner that

absent the conflict, there would have been a more favorable result.

The Ninth Circuit affirmed the denial of the writ. It found that although there was “imprecision” in the state court’s articulation of the *Strickland* prejudice standard, it applied the correct standard. Further, it agreed with the state court that other evidence supported the state court’s determination that petitioner had failed to show a reasonable probability that, but for the asserted conflict, the result of the proceeding would have been different.” App., *infra*, 4a.

REASONS FOR GRANTING THE WRIT

This Court should grant this petition to clarify and reaffirm that the prejudice prong of *Strickland*, requiring a showing that “there is a reasonable probability but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. Both the state court and the Ninth Circuit purported to apply that standard, but its application shows a fundamental misunderstanding. That those courts and others continue to misapply the standard requires this Court to affirm the original meaning of *Strickland*. This case presents a paradigm example of the misapplication and a perfect vehicle for correcting that continuing fundamental error.

A. *Strickland* and the prejudice prong

The Sixth Amendment of the Constitution, as applied to the states through the Fourteenth Amendment, guarantees criminal defendants the right to the assistance of counsel. U.S. Const. amend VI, XIV; *Gideon v. Wainwright*, 372 U.S. 335 (1963). Where a defendant has a right to counsel, the Sixth Amendment also provides a “correlative right to representation that is free from conflicts of interest.” *Wood v. Georgia*, 450 U.S. 261, 2710 (1981). An attorney whose representation is adversely affected by a conflict of interest is ineffective within the meaning of the Constitution. *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980).

Strickland established a two-part test: the defendant must show (1) counsel’s performance was deficient, and (2) the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. Under *Strickland*, the court must ask “whether there is a reasonable probability that, absent the errors [by counsel], the factfinder would have had a reasonable doubt respecting guilt.” 466 U.S. at 695, A reasonable probability is “sufficient to undermine confidence in the outcome” and must be substantial, not just conceivable. *Id.* at 693–94. But this

standard does not mean a petitioner must demonstrate “that counsel’s actions more likely than not altered the outcome.” *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (citing *Strickland*, 466 U.S. at 693 (internal quotation marks omitted)). That, however, is what the Ninth Circuit and California state court required here.

B. The continuing misapplication of the prejudice prong

1. The conflict and its impact on counsel’s performance

Defense counsel Benjamin Wasserman had a conflict of interest. In assuming representation of petitioner regarding the trust, his single interest was to obtain the proceeds of the trust. His interest was intensely personal (and unrelated to any interest of petitioner who disclaimed any interest in the trust proceeds) because he was to be paid from the trust proceeds. He had a direct interest in successfully obtaining funds from the trust. This directly conflicted with petitioner’s interest in effective representation in the criminal matter to minimize any possible or potential financial motive for her admitted shooting of Zweig.

The conflict adversely affected his representation of petitioner in the criminal matter. The money in the trust was central to the prosecu-

tion's case. The prosecution's timeline of the crime-presented in closing argument-started and ended with the trust. According to the prosecutor, the crime began on February 1, 2002 when petitioner learned Zweig was creating a trust. And the story ended, coming "full circle" after Zweig died, with Wasserman making demands on the trust for Zweig's money. The prosecutor, in effect, used Wasserman as a witness against petitioner.

Wasserman's conflict prevented him defending against this evidence. The trial evidence showed Petitioner's only personal contact with Lanuti concerned using the trust's proceeds on behalf of Zweig, not herself. Although Wasserman made this point during closing argument, the prosecutor could characterize that as a "crock," because Petitioner, through Wasserman, sought the money after Zweig died. Evidence that Wasserman's demands on the trust were motivated by his interest in having his legal fees paid would have sapped the evidentiary foundation for the prosecution's argument on motive. But Wasserman could not and would not testify that he sought the money for his own benefit. His conflict had an adverse effect on his performance.

2. The prejudice to petitioner's defense

Petitioner is serving a term of life imprisonment without the possibility of parole. Her confinement for the rest of her life resulted from the jury's true finding of the special circumstance of intentional murder carried out for financial gain. Under California law, the financial-gain special circumstance is applicable only where the defendant committed the murder in the expectation of obtaining a financial gain.

The decisive evidence on this issue was the "evidence" of Zweig's trust. In early February 2002, Zweig, facing potentially life-threatening surgery, summoned attorney Vito Lanuti to prepare a living trust. Under the terms dictated by Zweig, the trust would contain most of his assets (about 2.1 million dollars after taxes), and petitioner would have the power to make decisions about it if he became incapacitated and would eventually be entitled to the proceeds upon his death. Petitioner was not present when Lanuti and Zweig discussed the terms of the trust. Zweig signed the trust documents on February 4, 2002.

Zweig was hospitalized on October 13, 2002 following the shooting. Petitioner was arrested but not charged, and she did not remain in custody. She retained Wasserman to represent her on the criminal case. That same weekend Petitioner called Steve Yohai, Zweig's finan-

cial planner and told him she shot Zweig, seriously injuring him. A day or two later, Petitioner called Lanuti to see if the trust would pay Zweig's medical bills. Zweig died on November 17, 2002. Petitioner called Lanuti and asked if the trust could pay his funeral expenses.

Although Wasserman began representing Petitioner with respect to the trust, Petitioner wanted no part of it, and was unaware of Wasserman's control. On November 26, 2002, Wasserman called Lanuti. He wanted the trust to pay distributions to Petitioner. Under its terms, Petitioner was to be paid \$100,000 upon Zweig's death and \$6000 per month thereafter. During the next several months, there were other demands from Wasserman on the trust. Petitioner never authorized Wasserman to make those demands and, in some cases, was unaware he was doing so.

Over the next several months, Wasserman also contacted Detective Paul Edwards, the investigating detective, to determine whether charges would be filed. The reason for the inquiry was connected to the trust. Wasserman actively litigated in early 2003 in the Superior Court in an attempt to force the trust to disburse proceeds to Petitioner. Murder charges were filed in June 2003 after Wasserman had made

several claims against the trust.

The prosecution successfully argued that petitioner's claims on the trust, after Zweig died, demonstrated that she killed him in order to gain those funds. This evidence was absolutely essential to the true finding of the financial-gain special-circumstance that doomed petitioner to living the rest of her life in prison with no possibility of parole.

As shown above, and not seriously disputed by the state court or the court of appeals, defense counsel's conflict disabled him from countering this evidence. Yet, the courts denied the petition on the ground that his deficient performance was not prejudicial. That the courts came to this result, notwithstanding the primacy of this evidence and its undoubted role in diminishing for the jury the defense evidence showing petitioner had never sought Zweig's money and actively disclaimed other opportunities to enrich herself shows the misapplication and misunderstanding of *Strickland*.

First, much of the evidence supported that petitioner shot Zweig, because she feared him. Zweig engaged a dog trainer to train his dogs to hurt people and told the trainer he wanted to "blow [petitioner] away," threats the trainer conveyed to petitioner. RT 1535- 1540, 1543,

1567. Zweig drank heavily and often yelled hateful insults mixed with threats. Zweig displayed irrational paranoia, installing steel security shutters on every window and a video surveillance system in every room. He had upwards of 15 guns in the house. So petitioner had ample reason to fear violence, and, even if it did not rise to the level of justified self-defense, it provided a reasoned explanation or motive for her shooting of Zweig.

Second, many witnesses testified that petitioner was not concerned about money. She had been gainfully employed; she declined a \$100,000 share of her father's estate; and she declined expensive jewelry from Zweig. App., *infra*, 11a.

Third, the case was closely balanced. The jury deliberated three days without reaching a verdict. the, it submitted a question specifically about the financial-gain special circumstance. Later, the jury asked whether its failure to reach a verdict on the financial-gain special circumstance meant that it was hung. These were all objective factors indicating that even with defense counsel's failure to refute the inference of greed from the unchallenged evidence of the demands on the trust, the jury had difficulty reaching a verdict. *See, e.g., United*

States v. Haynes, 729 F.3d 178, 197 (2d Cir. 2013) (lengthy jury deliberations and jury note asking for help because of deadlock showed case was close and errors prejudicial); *Thomas v. Chappell*, 678 F.3d 1086, 1103 (9th Cir. 2012) (lengthy jury deliberations indicate close case).

Given the closeness of the case, counsel's deficient performance in failing to challenge the prosecution's paramount argument in favor of a killing for financial gain was undoubtedly prejudicial. The prosecutor emphasized and highlighted Wasserman's contacts with the trust in urging the jury to find a murder for financial gain:

But in January and February, defense starts making demands on the trust to the attorney. She wants the money. Hey, give me the money under the trust. He's dead now. I want that money. And then the defense attorney Mr. Wasserman starts calling on the defendant's behalf. Are charges going to be filed? She wants her money. It really comes full circle. Starts with motive and ends with a [sic] money.

ER 187. *See, e.g., United States v. Hay*, 122 F.3d 1233, 1237 (9th Cir. 1997) (prosecutor's heavy reliance on inadmissible evidence in closing argument demonstrates prejudice).

Strickland requires only that petitioner show a reasonable probability that absent the Sixth Amendment error, the jury might have had a reasonable doubt. Had counsel performed adequately, the prosecution would have been bereft of its theory of motive. Combined with the defense evidence already calling that theory into question, the result well could have been different.

The California appellate court and the Ninth Circuit reached a contrary conclusion by misapplying *Strickland*. Thus, the state court pointed to the prosecution's other evidence, namely that petitioner had demanded money she believed Zweig owed her and that she knew of the trust. The state court said this showed there was "ample evidence to support a finding of financial motive." App., *infra*, 12a. But that does not honor the principle of *Strickland*. The issue is not whether the remaining evidence was sufficient. It is, instead, whether there is a reasonable probability the error could have affected the verdict. Those are very different questions. Citing the correct standard means nothing if the court misapplies it. Review is required.

The same is true for the Ninth Circuit's decision. Instead of focusing on the impact of counsel's error, the court of appeals echoed

the state court's analytical error, quoting the facts establishing that Ms. Garcia knew of the trust, knew that she was a beneficiary and had contacted the trust attorney about paying Zweig's medical and funeral expenses. App., *infra*, 4a. That ignored the likely decisive difference had the jury known that defense counsel was not acting as petitioner's agent when he went after the trust proceeds, and that it was for his benefit, not hers. Absent Wasserman's unauthorized actions, the evidence showed only petitioner's knowledge of the trust. Any inference that the trust motivated the killing was attenuated. Wasserman's actions provided a direct link, a link that would not have otherwise existed. There was at least a reasonable probability that absent counsel's deficient performance the outcome could have been different. That both courts relied on much weaker evidence of financial motive to find counsel's failure was not prejudicial, when the entire record was contrary shows the continuing misapplication and misapprehension of *Strickland*. This Court should grant the petition to clarify the proper understanding and application of *Strickland*.

CONCLUSION

For all the foregoing reasons, petitioner submits that the petition

for a writ of certiorari should be granted.

Respectfully submitted,

DATED: February 11, 2019

s/G. Michael Tanaka
G. MICHAEL TANAKA
Attorney at Law
Counsel of Record

Attorney for Petitioner