No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MARY ELLEN SAMUELS,

Petitioner,

v.

JANEL ESPINOZA, Warden,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the California Supreme Court unreasonably fail to apply clearly established Supreme Court precedent that requires prejudice to be presumed where an actual conflict of interest adversely affects a lawyer's performance?

2. Did the California Supreme Court unreasonably distort clearly established Supreme Court precedent in finding no ineffective assistance of counsel on the basis that trial counsel might have a sound strategy reason for his misfeasance, where the record refutes any such strategy?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

LIST OF PROCEEDINGS

Samuels v. Espinoza, no. 20-99005, Ninth Circuit Order denying relief and adopting in relevant part the findings of the District Court, December 6, 2021, docket number 52-1, attached as Appendix A.

Samuels v. Espinoza, no. CV-10-3225-SJO, District Court for the Central District of California Order denying in part and granting in part Petition for Writ of Habeas Corpus, November 22, 2019, District Court docket no. 83, attached as Appendix B.

People v. Samuels, 36 Cal.4th 96 (2005), California Supreme Court, case no. S042278, affirming Petitioner's convictions for solicitation to murder and conspiracy to murder. (Pen.Code, §§ 187, subd. (a), 653f, subd. (b), 182, subd. (a)(1)) Los Angeles County Superior Court, case no, PA002269 attached as Appendix C.

Samuels v. California 547 U.S. 1073 (2006), no. 05-8672, United States Supreme Court, petition for writ of certiorari denied April 17, 2006.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner MaryEllen Samuels respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit which affirmed the District Court's denial of her federal habeas corpus petition as to guilt phase relief from her California convictions, although granting relief from the sentence of death. The writ here is sought on the basis that the Ninth Circuit decided important questions of federal law in a way that conflicts with relevant decisions of this Court. U.S. Sup. Ct. Rule 10 (c).

OPINION BELOW

On December 6, 2021, the Ninth Circuit issued an order denying Petitioner's Petition for Writ of Habeas Corpus on the certified claim that Petitioner's attorney had a conflict of interest, giving rise to a presumption of prejudice; granting Petitioner's request to certify an additional claim of ineffective assistance of counsel, but denying that claim; and denying all further relief. (Appendix A.)

JURISDICTION

The Ninth Circuit entered the Order from which this writ is taken on December 6, 2021. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

FEDERAL CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution

provides in relevant part that "No person ...shall be deprived of life, liberty, or property with due process of law..."

The Sixth Amendment to the United States Constitution provides in relevant part that an accused shall be provided with the "Assistance of Counsel" for his defense.

STATEMENT OF THE CASE

I. Introduction

This case presents an important issue regarding whether a State Supreme Court is reasonable in creating exceptions to the rule, clearly established by this Court, that where a criminal defendant was unwittingly represented by a lawyer with a conflict of interest, and the conflict caused an adverse effect, a presumption of prejudice shall be applied.

This case also presents an important issue of whether the clearly established Supreme Court jurisprudence of ineffective assistance of counsel can be circumvented by an unexamined finding of "sound strategy" on the part of trial counsel, which is contradicted by the evidence in the trial record regarding trial counsel's explanation of their strategy.

II. Summary of Facts

Petitioner's attorney, James Robelen, represented both Petitioner and another suspect, James Bernstein, during the

investigation of the homicide of Petitioner's husband, Robert Samuels. Unbeknownst to Petitioner, Bernstein confessed to Robelen that he had, in fact, killed Samuels, but he exonerated Petitioner, and implicated a prosecution witness. The confession was not protected by the attorney-client privilege because third parties were present and heard the communication. Bernstein was then murdered. Petitioner was arrested and accused of hiring Bernstein to kill her husband for financial gain and then hiring others to kill Bernstein because he was going to implicate her in the Samuels homicide.

Robelen continued to represent Petitioner through the preliminary hearing, but never revealed the confession and exoneration of Petitioner, as he believed he had a duty to represent his deceased client's interests in protecting the attorney-client privilege. Petitioner suffered an adverse effect.

Before Petitioner's trial, Robelen, Petitioner's first attorney, shot and killed his girlfriend, who was one of the other witnesses to Bernstein's confession. Petitioner's new counsel talked to Robelen, in prison, and learned about the confession. Trial counsel placed Robelen on the witness list, and brought him from prison to testify at trial.

The District Court found that trial counsel's strategy was to attempt to prove that Bernstein was independently motived to kill Petitioner's husband because Samuels had molested and abused

Nicole, Petitioner's daughter and Bernstein's girlfriend. The defense produced substantial evidence of the abuse, but by the time of trial, Robelen was the only person who could testify to three important elements: that the abuse was the sole motive prompting Bernstein to kill Samuels; that Bernstein exonerated Petitioner of any involvement; and that Bernstein, far from accusing Petitioner of being his accomplice, accused a key prosecution witness of being his accomplice.

At Petitioner's trial, a hearing was held without the jury. Robelen testified as expected, and the trial court agreed he could testify in front of the jury, but trial counsel failed to have Robelen testify in front of the jury, leaving a crucial gap in the defense theory of the case.

III. Summary of Argument

1. Conflict of Interest and Presumption of Prejudice

This Court has clearly established that a petitioner is entitled to a presumption of prejudice where the lawyer actively represented conflicting interests and an actual conflict of interest adversely affected the lawyer's performance. This Court has not created an exception for situations where the other client was deceased, as long as the lawyer was actively representing conflicting interests. The California Supreme Court would have been unreasonable to create such an exception in ruling on Petitioner's state habeas corpus

petition, which it summarily denied, without explanation.

2. Ineffective Assistance of Counsel for Failing to Present Crucial Witness

In ruling on claims of ineffective assistance of counsel, this Court has applied a rebuttable presumption that choices made by trial counsel are defensible as "sound trial strategy." The lower courts held that the California Supreme Court could have applied that presumption in deciding that trial counsel was not ineffective for failing to present Robelen's evidence in front of the jury, as he was a felon. But trial counsel knew Robelen was a felon when they based the defense on the theory that Bernstein killed Samuels solely because of the abuse of Nicole. Robelen was the only witness who could testify that this was, in fact, Bernstein's sole motive, and the only witness who could testify that Bernstein, far from threatening to accuse Petitioner of being his accomplice, exonerated her and instead accused a key prosecution witness. Trial counsel stated on the record that he weighed the pros and cons but had decided to present Robelen as a witness because his testimony was necessary to the defense. Thus, any finding of sound strategy is unreasonable.

IV. Procedural History

1. Trial and Sentence

Petitioner's trial in Los Angeles County Superior Court began on

February 17, 1994, case no PA002269. On July 1, 1994, after deliberating for eighteen days, the jury found Petitioner guilty of the murders of Robert Samuels and James Bernstein. The jury found true the special circumstances of financial gain and multiple murders. The jury further found Petitioner guilty of solicitation to murder and conspiracy to murder. (Pen.Code, §§ 187, subd. (a), 653f, subd. (b), 182, subd. (a)(1).) The jury returned a sentence of death and Petitioner was so sentenced.

2. State Court Appellate Proceedings

The judgements were affirmed by the California Supreme Court. *People v. Samuels*, 36 Cal.4th 96 (2005), case no. S042278. (Appendix C.) A State Petition for Habeas Corpus relief was also filed. The State Petition was denied by "postcard" denial on March 10, 2010, which contained no reasoning.

3. District Court Proceedings

A Petition for Habeas Corpus was filed in United States District Court for the Central District of California on March 7, 2011, case no. CV-10-3225-SJO. The Petition asserted the claim that Petitioner was entitled to relief because Robelen had a conflict of interest while representing her, and prejudice should be presumed. The Petition also asserted the claim that trial counsel was ineffective for failing to present Robelen as a trial witness.

On November 22, 2019, the District Court entered an order granting relief with respect to the death penalty, on the basis of ineffective assistance of counsel for failing to object to irrelevant and inadmissible "bad character" evidence; but denying relief with respect to the guilt phase. (Appendix B.) The District Court denied the conflict of interest claim on the basis that, because of Bernstein's death, the representation of Bernstein by Robelen was "successive" and not "concurrent" and that whether the presumption of prejudice applied to successive representation was an open question in this Court's decisions such that the California Supreme Court's denial of the claim could not be unreasonable.

The District Court denied the ineffective assistance of counsel claim for failing to present Robelen as a witness on the basis that the California Supreme Court would have been reasonable for finding that there was a reasonable trial strategy for this failure.

After further briefing, on March 9, 2020, the District Court denied guilt phase relief on the remaining claims. The state opted not to appeal the granting of penalty phase relief and to not retry the penalty phase. On March 31, 2020, Petitioner filed her notice of appeal.

On April 3, 2020 the District Court granted a Certificate of Appealability ("COA") as to the claim that Petitioner's attorney had a conflict of interest which caused an adverse effect.

4. **Proceedings in the Ninth Circuit**

Petitioner timely appealed and filed her opening brief, and request for certification of additional claims, along with excerpts of record on September 22, 2020. Respondent's answering brief and supplemental excerpts of record were filed on April 29, 2021. Petitioner's reply brief and further excerpts of record were filed on June 30, 2021. On September 2, 2021, the Ninth Circuit requested further briefing on certain uncertified claims, including the claim that counsel was ineffective for failing to present Robelen as a witness. Respondent's supplemental answering brief and further supplemental excerpts of record as to the uncertified claims were filed October 14, 2021. Petitioner's supplemental reply brief as to the uncertified claims and further excerpts of record as to uncertified claims were filed November 4, 2021. Oral argument was held on November 18, 2021.

On December 6, 2021, the Ninth Circuit issued an order which expanded the Certificate of Appealability to include the claim that trial counsel was ineffective for failing to present Robelen as a witness, but otherwise denied all relief. (Appendix A.)

On December 28, 2021, the Ninth Circuit entered formal mandate pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

V. Statement of Facts

The body of Robert Samuels, Petitioner's estranged husband, was discovered in his home on December 9, 1988.[1] He had been killed by a shotgun blast. During the months following Samuels' death, the police investigation turned up very little. No forensic evidence was recovered at the scene that had any bearing on the identity of the shooter and the weapon was never found.

James Bernstein was the boyfriend of Petitioner's daughter, Nicole, Samuels' step daughter. Attorney James Robelen originally represented Bernstein with respect to an unrelated charge. From the early stages of the police investigation into the death of Samuels, and while he was representing Bernstein (from March 1989 to June 1989), Robelen also began representing Petitioner, and continued to represent Petitioner, with respect to the death of Samuels. (ER 00476-00477, 01078, 01080.) During this time, Petitioner and Bernstein were both suspects. (ER 00476-00477, 01061.) Petitioner cooperated with the police investigation, providing information as requested and submitting to a polygraph examination, during which she "showed

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[1] Unless otherwise indicated by a reference to the Excerpts of Record (hereinafter "ER"); to the Further Excerpts of Record (hereinafter "FER"); or to the Further Excerpts of Record In Support of Uncertified Claims ("FERU") filed by petitioner in support of her briefing in the Ninth Circuit, the facts set forth have been summarized from the statement of facts appearing in *People v. Samuels*, excluding those facts which are not relevant.

truthful." (ER 00654-00656, 00660-00661, 01280, 01293.) On April 24, 1989, the police placed Petitioner and Bernstein in a room and their conversation was surreptitiously taped. They did not say anything incriminating. (ER 00662-00674.)

Bernstein's drug dealing partner, David Navarro, with whom Bernstein had a falling out, telephoned the police to implicate Bernstein, Petitioner, and a man named Mike Silva.

During the time period of the investigation, and while both he and Samuels were represented by Robelen (ER 01078), Bernstein visited Robelen's office where he confessed that he (Bernstein) had arranged for Samuels' murder, and that Navarro, along with another unnamed individual, had committed the murder. Bernstein further told Robelen that those who had committed the murder had been paid in cocaine, that Petitioner knew nothing of it, that he had not done it for money, and that Petitioner had never asked him to kill Samuels. (ER 00476-00477, 01046-1047, 01073-01076.)[2] He implicated, instead, Navarro. (ER 01073, 01406.)

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[2] It is not relevant that Robelen originally represented Bernstein on another matter, because Bernstein consulted Robelen about the murder of Robert Samuels, on two occasions, including the one where he confessed. (ER 01083.) "An attorney-client relationship exists for purposes of the privilege whenever a person consults an attorney for the purpose of obtaining the attorney's legal service or advice. (Citation)." *Kerner v. Superior Court,* 206 Cal.App.4th 84, 116–117 (2012).

Bernstein made this confession and the exculpatory statements about Petitioner in the presence of Robelen's secretary, Pamela Puzach, and a third witness, a friend of Bernstein. (ER 01041-01085.) Robelen neglected to preserve the name of this third witness. (ER 01065.)

In June 1989, Bernstein moved in with Anne Hambly and her boyfriend Paul Gaul. Friction developed between Hambly and Bernstein, and she and Gaul spoke of killing Bernstein. (FER 00067-00068, 00074-00078, 00081, 00104-00111). On June 27, 1989, Gaul and another man, Darryl Ray Edwards, lured Bernstein to an isolated area, where Gaul and Edwards beat and strangled Bernstein to death and dumped his body. Gaul and Edwards told Hambly that they had killed Bernstein.

Petitioner was arrested for soliciting both her husband's murder and the murder of Bernstein. Robelen continued to represent Petitioner and represented Petitioner at her preliminary hearing on April 2 to April 12, 1991. All during this time, Robelen withheld from Petitioner, from the police, and from the court, the exculpatory evidence of Bernstein's confession and exoneration of Petitioner. (ER 00476-00477, 01080.) He testified that he "did not divulge it for fear that there may have been" a duty to represent the interests of the deceased Bernstein, and preserve Bernstein's attorney-client

privilege. (ER 01083.) The attorney-client privilege does, unquestionably, survive the death of the client. However, Robelen did not realize that the attorney-client privilege can be waived by having unnecessary third parties present and testified that he did not research the issue. (ER 01083.)

On January 26, 1992, Robelen murdered Puzach, who was his secretary and girlfriend, and one of the witnesses to Bernstein's confession and exoneration of Petitioner. He was convicted of this homicide and incarcerated. (ER 01043-01044.)

At trial, the prosecution's theory was that Petitioner had paid Bernstein to have her husband killed for financial gain, including collecting on life insurance policies, and that Petitioner had paid Gaul and Edwards to have Bernstein killed out of fear Bernstein would go to the police and implicate her in Samuels' murder. Extensive evidence was presented at trial that Petitioner began spending money very freely. A mass of bad character evidence was also admitted against Petitioner, including miscellaneous drug use and irrelevant, lurid, and very specific details of her sex life including photographs of her nude or in sexy poses.

Hambly testified that Petitioner made statements admitting she had hired Bernstein to commit the Samuels murder, and that she had told Bernstein Samuels abused Nicole. Hambly testified that a month

before Samuels was murdered, Bernstein said he wanted Samuels "taken care of permanently" because he (Samuels) was a "child molester and batterer."[3] Various witnesses testified that Petitioner talked about soliciting someone to murder her husband. However, one of the men who was supposedly solicited by Petitioner took the stand and denied any such conversation happened. (FER 00102). Other witnesses testified to incriminating statements made by Bernstein, which also incriminated Petitioner.

At trial, Navarro testified that Bernstein admitted to him that he (Bernstein) and Silva had killed Samuels. According to Navarro, Bernstein said Petitioner paid for the murder because she wanted the insurance money. However, Navarro lied repeatedly to conceal his own illegal activities. (ER 00780-00790.)

The prosecutor presented other witnesses to testify as to Bernstein's state of mind, which the prosecution had placed at issue by arguing that Bernstein's intent to inculpate Petitioner in Samuels' murder was the motive for Petitioner to solicit Bernstein's murder.

Petitioner testified she never wanted to kill Samuels and never asked anyone else to do so. She testified she was not worried about Bernstein talking to the police, because she had nothing to do with

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[3] Hambly did not state that Bernstein exonerated Petitioner from involvement, or that the abuse of Nicole was his sole motive for killing.

Samuels' murder. She stated that Bernstein never threatened or blackmailed her and that she did not want him dead and did not conspire to have him killed.

Defense investigator Robert Birney testified at trial that Gaul told him Hambly, not Petitioner, was the one behind Bernstein's murder. (FER 00107) Birney and two other people testified about Gaul admitting Petitioner was innocent. (Robert Birney (FER 00104-00110)); Wanda Piety (FER 00114-00123) (that the government unconstitutionally intimidated Piety and prevented her from testifying in front of the jury was the subject of an uncertified claim), and Susan Jasso (FER 00135-00143). Birney and Piety also said that Gaul admitted he falsely testified against Petitioner to secure a more lenient plea.

Despite indicia that Hambly was complicit in the murder of Bernstein herself, she received complete immunity in return for her cooperation with the police and the prosecution. (ER 00884-00902, FER 00073) Likewise, Gaul and Edwards were permitted to plead guilty to second degree murder in exchange for testifying against Petitioner. (ER 00829-00914.) Immunity and leniency was also extended to several other prosecution witnesses.

Petitioner was represented by new counsel for trial, who spoke with Robelen in prison. For the first time, trial counsel (and Petitioner)

learned about Bernstein's confession and exoneration of Petitioner. Trial counsel placed Robelen on the witness list and had him brought to the trial to testify. (ER 00476-00477, 01041-01085.)

At a hearing outside the jury's presence, the trial court questioned counsel about presenting Robelen. Counsel told the court that he made a "tactical decision" to present Robelen because Robelen was "an important witness to us because he can establish certain facts that no one else can because certainly Mr. Bernstein cannot speak from where he is at this time. So I've weighed it...." (ER 01048-01049.)

The trial judge asked if counsel was "going to take some of the bad with some of the good and are doing it [i.e. presenting Robelen as a witness] for tactical reasons?" and counsel responded "Yes." (ER 1049.)

Robelen was then called and Robelen testified as expected to Bernstein's confession and exoneration of Petitioner. He explained that he "didn't divulge [the conversation with Bernstein] for fear that there might have been [an attorney-client privilege.]" (ER 01083.)

After this hearing, trial counsel failed to present the testimony of Robelen to the jury. Robelen stated he was never told why his testimony was not presented to the jury. (ER 00477.) Thus, the jury never learned that Bernstein had confessed to the murder of Samuels, had exonerated Petitioner, and had inculpated David Navarro, a major witness against Petitioner.

Trial counsel presented substantial evidence from various witnesses to demonstrate that Samuels physically abused Petitioner and sexually abused Nicole. The trial court warned trial counsel against presenting this evidence since Petitioner was claiming that she was not guilty of Samuels' murder, and was not arguing that she killed him but that she was justified. "I want to make sure you realize, that you are providing the motive for your client to have her husband killed with this questioning." (FERU 00136.) Trial counsel proceeded nonetheless.

Over the prosecutor's objections, the defense questioned Petitioner on the subject at length. (FERU 00121-00135.) Trial counsel brought it up again with Petitioner. (ER 01141). Trial counsel elicited testimony about the abuse from Hambly. (FERU 00020; 00022; 00029-00030.) He called Gabriel Munoz, a neighbor, (FERU 00033-00038) and Annette Bunin-Church, a friend, (FERU 00041) to ask about Samuels physical abuse of Petitioner. He cross-examined Nicole pointedly about the abuse she suffered, (ER 00968-00972, FERU 00049), opening the door to the prosecutor's continued questioning at length on redirect. (FERU 00050-00080.) Trial counsel recalled Munoz to testify in even greater detail. (FERU 00083-00088.)

In closing argument, trial counsel reminded the jury that they had promised in the opening statement to prove abuse, and asserted

that they had done so. (ER 01239.) But trial counsel did not explain to the jury how proving that Samuels abused Nicole supported any defense that Petitioner might have to the charges. Without the testimony of Robelen that the abuse of Nicole was Bernstein's independent reason for killing Samuels, the abuse defense backfired. As the prosecutor argued: "What does (the evidence of abuse) give me as a prosecutor? It gives me a great motive to argue...that [Petitioner] had a motive to kill her husband because she found out that he was abusing her daughter..." (FERU 00290.) In a television show after the verdict, the prosecutor mocked the defense team for putting on evidence of abuse. (ER 00519.)

Importantly for the claims raised here, the District Court denied Petitioner's claim of ineffective assistance of counsel for presenting the evidence of abuse, and providing the jury with an additional motive for Petitioner to have had her husband killed. The District Court opined that the California Supreme Court could have reasonably decided that the defense had a strategy in showing that Samuels had abused Nicole, namely, to provide Bernstein with an independent motive to murder Samuels.

Four years after the trial, trial counsel wrote a note indicating that they decided not to call Robelen during the guilt phase so as to avoid being perceived by the jury as presenting a "phony defense"

which would "do more harm than good." Counsel then specified that Robelen was not called during the penalty phase because of his conviction. (ER 00536.) Petitioner was not granted a hearing or discovery in either state or federal court and therefore the depositions of trial counsel were not taken and trial counsel's change of heart has not been explained.[4]

REASONS FOR GRANTING THE WRIT

VI. The Lawyer Who Represented Petitioner Through The Preliminary Hearing Had An Active, Actual and Concurrent Conflict Of Interest

When a state court has decided a claim on the merits, the federal courts may grant relief if the adjudication "(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. 28 U.S.C. § 2254(d)." The Ninth Circuit decided that the California Supreme Court's decision to deny this claim was not unreasonable or contrary to this Court's jurisprudence on conflict of interest. A review of that case law demonstrates that clearly established precedent of this Court compels relief.

To establish that counsel's representation was constitutionally

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[4] Trial counsel are both now deceased, as is Robelen.

defective, a defendant must show, first, that counsel's performance was deficient, and, second, that there was a reasonable probability that, but for the errors, the result of the proceedings would be different. *Strickland v. Washington,* 466 U.S. 668, 692 (1984). This Court has mandated that where counsel is burdened by a conflict of interest, the second prong, prejudice, is presumed. 466 U.S. at 692.

Clearly established Supreme Court precedent holds that to prove an ineffective assistance of counsel claim premised on a conflict of interest, a petitioner must "establish that an actual conflict of interest adversely affected his lawyer's performance." The petitioner must show an actual conflict of interest, not merely a potential conflict of interest. The petitioner then need only demonstrate that *some effect* on counsel's handling of particular aspects of the trial was *likely*. *Cuyler v. Sullivan,* 446 U.S. 335, 350 (1980). See also *Glasser v. United States*, 315 U.S. 60, 76 (1942) (Court reversed convictions and did not "indulge in nice calculations as to the amount of prejudice" where an actual conflict of interest affected counsel's performance); *Holloway v. Arkansas,* 435 U.S. 475, 481 (1978) (demonstrating this Court's consistent focus on the effect a conflict of interest may have.)

The District Court and the Ninth Circuit held that the California Supreme Court was not unreasonable for finding that clearly established precedent of this Court requires that the

representation of conflicting interests must be concurrent, and that Robelen's representation of Bernstein's interests and Petitioner's interests was not concurrent because Bernstein was dead before Petitioner's Sixth Amendment right to counsel attached. The lower courts thus conflated the concurrent representation of *conflicting interests* with the concurrent representation of *living clients with conflicting interests.*

This Court, however, has always addressed its jurisprudence to the representation of conflicting *interests*, even where the other client is deceased. See *Mickens v. Taylor,* 535 U.S. 162 (2002). It is axiomatic that some interests, such as the attorney-client privilege, survive the death of the client. Thus, the Ninth Circuit decided an important question of federal law in a way that conflicts with relevant decisions of this Court. U.S. Sup. Ct. Rule 10 (c).

The following cases demonstrate that the law regarding conflict of interest and adverse effect was clearly established before the post card denial of Petitioner's habeas corpus petition. The precedent of this Court is wholly incompatible with an exception for situations where one of the clients is dead, as long as (a) the conflict of interest persisted such that it existed concurrently with the representation of the petitioner, (b) was actual, not merely potential, and (c) an adverse effect was suffered as a result of the conflict of interest.

The case of *Cuyler v. Sullivan, supra,* clearly established that the petitioner must demonstrate an actual conflict of interest, as opposed to a potential conflict of interest, and that the conflict of interest adversely affected his lawyer's performance. "[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." *Sullivan,* 446 U.S. at 348-350.

In *Sullivan*, the attorneys did not concurrently represent all the defendants in one proceeding, but rather represented them in three separate, successive proceedings. This fact in no way mitigated the actual conflict of interest. Rather, this Court remanded the case for further proceedings as the relevant question had not been considered.

That a "concurrent conflict of interest" does not equate with "actively representing living clients with conflicting interests, as counsel of record, in the same proceeding" was made even more clear by *Wood v. Georgia*, 450 U.S. 261 (1981). In that case, the conflict was between the attorney's three clients, on the one hand, and their employer, on the other hand. The employees worked in a theater and a bookstore that offered obscene materials. The employer, the owner of the theater and bookstore, was not charged with any crime and was not represented by the attorney in either proceeding, but was paying the attorney's fees.

The three employee/clients were convicted, in two separate trials, on separate charges, of distributing obscene materials and sentenced to periods of probation on the condition that they make installment payments toward the satisfaction of substantial fines. They failed to pay the installments and proved at the probation revocation hearings that they were unable to do so. They testified that they had expected their employer to pay the fines. Probation was revoked, setting up an appeal on the basis that imposing fines beyond the means of the defendant to pay was a violation of due process.

As the *Wood v. Georgia* Court recognized, the employer had an interest in having this principle of Constitutional law established, as fines for obscenity would thereby be limited to what a lowly employee could pay, not the very much greater amount that the employer could pay. But the employees risked going to prison by virtue of this strategy.

This Court found that if the attorney's actions on behalf of his clients were influenced by the employer's interest in pursuing a test case, there could be a conflict of interest. Indeed, even if the employer's motives were unrelated to its interest in establishing a precedent, its refusal to pay the fines put the attorney in a position of conflicting obligations.

The state court was instructed to hold a hearing to determine whether the conflict of interest actually existed and if so, the state court must hold a new probation revocation hearing, "untainted by a legal representative serving conflicting interests." 450 U.S. at 273-274. This Court also recognized that if a petition for habeas corpus was filed, the remedy could include reversing the convictions. 450 U.S. at 274, ftnt. 21.

In short, the *Wood v. Georgia* Court recognized that the Constitutional analysis required an examination of the interests involved, and the effect of conflicting obligations on the lawyer, not whether the lawyer represented two or more living clients at the same time in the same proceeding. Indeed, the ownership of the establishments, thus the identity of the employer, had changed during the pendency of the case, and the employer had never been identified, not even whether the interest to which the attorney gave deference was held by a person or a corporation. 450 U.S. at 267, ftnt. 12.

Strickland v. Washington, supra, was decided in 1984, and reiterated that where counsel is burdened by a conflict of interest, and is shown to be ineffective, prejudice is presumed. 466 U.S. at 692.

In *Burger v. Kemp,* 483 U.S. 776 (1987) this Court said that while not every instance of multiple representation requires the presumption of prejudice, the presumption is required where counsel

"actively represented conflicting interests and ...an actual conflict of interest adversely affected [the]lawyer's performance." (internal quotes omitted.) 483 U.S. at 787.

In *Burger*, this Court found that there was no active representation of competing interests because the lawyer's actions were found to have a "sound strategic basis." Here, there is no argument that Robelen had a sound strategic basis for his silence and failure to preserve evidence. He was quite clear that he didn't research the issue and was acting out of fear and ignorance. (ER 01083.)

The *Burger* court also held that the presumption of prejudice requires a finding that the lawyer's action was motivated by the conflict of interest. In that case, the lawyer testified that his decisions were not affected by the supposed conflict. Here, the exact opposite is true. Robelen testified that the conflict was his motivation for his dereliction of duty.

In *Mickens v. Taylor, supra,* petitioner was charged with the murder of a minor. Coincidentally, petitioner's attorney had been representing the minor on unrelated juvenile court charges at the time of the murder. The lawyer did not reveal this to petitioner. The *Mickens* Court held that an "actual conflict," for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance. "[W]e have used 'conflict of interest' to mean a division of

loyalties *that affected counsel's performance."* 535 U.S. at 172, ftnt 5. (emphasis added by the *Mickens* Court.)

This Court in *Mickens* relied on the fact that the attorney had met with the minor only once for 15 to 30 minutes on a matter wholly unrelated to the minor's homicide, and counsel did not learn anything in the brief time he spoke with the decedent that had any bearing on the defense of the petitioner. For that reason, and *not* because the prior client was dead, the *Mickens* Court found no actual conflict in counsel's earlier representation of the decedent.

Thus, *Mickens* clearly establishes the test for whether a conflict of interest adversely affects counsel's performance for the purpose of applying the lower prejudice standard, and very specifically for fact patterns involving a deceased client who is the victim of the murder charge at issue. Did the representation concern the same crime and did the attorney learn anything from the deceased client that had any bearing on the defense of petitioner? In *Mickens,* the answer was "no."

But here, Robelen's representation of the decedent, Bernstein, was, with respect to the confession and exoneration conversation, for the same crime for which Petitioner was tried. Robelen *had* learned something from speaking with Bernstein that had a crucial bearing on the defense of Petitioner. Disclosure of that communication would greatly bolster Petitioner's defense to the murder of her husband,

would strongly tend to disprove her alleged motive for the murder of Bernstein, and would implicate and discredit a key prosecution witness, Navarro. Robelen's failure to disclose, in deference to Bernstein's attorney-client privilege, was inarguably a conflict of interest that caused an adverse effect as to Petitioner. *All* the factors relied upon by the *Mickens* Court to reach its conclusion of "no conflict" point the other way here.

In short, this Court in *Mickens* did not hold, or even imply, that there could be no conflict merely because the other client was dead. If that had been the ruling, then no discussion of the circumstances of the attorney's representation of the minor, or whether the attorney learned anything important, would have been necessary. All this Court would have said is that the prior client was deceased, and therefore *Sullivan* does not apply. This Court said no such thing.

The Ninth Circuit and the District Court misconstrued the discussion in *Mickens* where this Court noted that it's holding was limited to the issue of a trial court's failure to inquire into a potential conflict.[5] 535 U.S. at 174. This Court, in dicta, listed cases, some of which were referred to generally as "former client" cases[6] and some of

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[5] Since the trial court in this case could not have been aware of the conflict, a duty to inquire does not arise.

[6] *Beets v. Scott,* 65 F.3d 1258 (5th Cir 1995) (*Strickland* not *Sullivan*

(Continued...)

which involved other types of fact patterns. With these decisions as backdrop, this Court quoted *Sullivan*, 466 U.S. at 350, for the proposition that until "a defendant shows that his counsel *actively represented* conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." 535 U.S. at 175. (emphasis added by the *Mickens* Court).

The insistence on "active representation" and the clear reference to that representation being of "conflicting interests" not "prior clients" can only mean that the comments of this Court regarding successive representation are directed at the situation where the attorney had previously represented a conflicting interest but was *not* representing that interest at the time he or she represented the petitioner.

This Court stated that it was not ruling "upon the need for the *Sullivan* prophylaxis in cases of successive representation" and [w]hether *Sullivan* should be extended to such cases remains, as far as

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applied where lawyer entered into literary and media rights fee arrangements with clients during pendency of representation); *Perillo v. Johnson*, 205 F.3d 775 (5th Cir 2000) (where the district court found both successive and concurrent representation of the other client, and the 5th Circuit found that even if the representation was successive, the presumption applied because *Sullivan* itself was a case of successive representation); *Freund v. Butterworth*, 165 F.3d 839 (11th Cir 1999)(court found that petitioner need only show that the subject matters of the present and prior representations are substantially related, and court will irrebuttably presume that relevant confidential information was disclosed); *Mannhalt v. Reed*, 847 F.2d 576 (9th Cir. 1988) (no conflict based on unrelated prior representation); and *U.S. v. Young*, 644 F.2d 1008 (4th Cir. 1981) (at issue was trial court's duty to conduct hearing where conflict raised by trial counsel, in case where the two defendants were tried together, remanded for hearing).

the jurisprudence of this Court is concerned, an open question." 535 U.S. at 175.

In this case, Petitioner is not asking that *Sullivan* be extended. Petitioner's circumstance is the very one comprehended by *Sullivan*. Robelen concurrently, and actively, represented conflicting interests and that conflict caused an adverse effect.

That *Sullivan* applies to this situation was made clear by Justice Kennedy concurring in *Mickens*, joined by Justice O'Connor. Justice Kennedy noted that "the District Court conducted an evidentiary hearing on the conflict claim and issued a thorough opinion, which found that counsel's brief representation of the victim had no effect whatsoever on the course of petitioner's trial." As the concurring opinion emphasized, this was so precisely because the attorney in *Mickens* "did not believe he had any obligation to his former client." 535 U.S. at 177. The district court had concluded "as a factual matter" that the attorney did not believe that any continuing duties to a former client might interfere with his consideration of all facts and options for his current client. Justice Kennedy explicitly relied upon the district court's finding that "nothing the attorney learned was relevant to the subsequent murder case" and that the district court "found that [the attorney] labored under the impression he had no continuing duty at all to his deceased client." *Id.*

In *Mickens,* unlike this case, the attorney testified that "as far as [he] was concerned, his allegiance to [the prior client] '[e]nded when I walked in the courtroom and they told me he was dead and the case was gone.'" Justice Kennedy noted that "While [the attorney's] belief may have been mistaken, it establishes that the prior representation did not influence the choices he made during the course of the trial." 535 U.S. at 177-178. Importantly, the concurrence then opined that in order to grant relief "**[w]e would be required to assume that [the attorney] believed he had a continuing duty to the victim.**" 535 U.S. at 177 (emphasis added.)

Here the facts presented are the very facts that the *Mickens* concurrence said would compel relief. Unlike in *Mickens*, Robelen *did* learn something in the course of that representation that was very relevant to the charges faced by Petitioner. Robelen, unlike the attorney in *Mickens*, did believe he had a continuing duty to the deceased Bernstein, a belief which Justices Kennedy and O'Connor shared, and which is, of course, correct. The death of a client does not destroy the attorney-client privilege but transfers it to the estate representative. California. Cal. Evid. Code § 953(c).

Here, an attorney representing only the interests of Petitioner would have researched the issue and advocated for the (correct) position that the privilege did not apply because of the presence of the

third parties during the conference at Robelen's office. *Behumin v. Sup. Ct. (Schwab)*, 9 Cal.App.5th 833, 843-844 (2017) (where third party present for communication between client and attorney the presumption of confidentiality does not apply); Cal. Ev. Code §§ 952, 912(d).

In stark and direct contrast to the attorney in *Mickens*, Robelen did not reveal the confidence of his other client, Bernstein, precisely *because* of the duty he owed, and believed he owed, to that other client. As summarized by the concurring opinion, the "constitutional question must turn on whether trial counsel had a conflict of interest that hampered the representation...." 535 U.S. at 179.

Also in contrast to *Mickens*, Robelen's omission adversely affected Petitioner because the evidence was not, in fact, preserved at the preliminary hearing. By the time of trial, Robelen was a compromised witness, an incarcerated felon, who had committed homicide. Puzach, one of the other witnesses, was dead, the victim of that homicide. And the other third party witness was unidentifiable.[7] Had Robelen preserved the testimony of the two other witnesses to the same conversation, that testimony would have been available to Petitioner, and would at least have been available to support Robelen

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[7] While Robelen was able to provide a physical description of the individual, who had driven Bernstein to the meeting, he did not recall the name. (ER 01062-01066.)

at the trial, making him more credible, even given his status as a convicted felon.

If the jury had been told that Bernstein made statements exonerating her for the murder of Samuels, they may well have been unable to find that Petitioner had, beyond a reasonable doubt, been involved in Robert Samuels' murder. The jury might have rejected the prosecution's theory of the case, namely that Bernstein was threatening to turn Petitioner in to the police, and might have concluded that she, in fact, had no motive to arrange for the murder of Bernstein.

Too, the testimony of a key government witness, Navarro, would have been subject to very strong doubt. Bernstein accused Navarro, not Petitioner, of being involved. The jury could have used this information to reject Navarro's self-serving testimony.

A state court decision is contrary to federal law if it applies a rule that contradicts the governing law set forth in Supreme Court cases, or unreasonably applies that law to the facts of the case before it. *See, Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). To hold that relief should be denied in a factual situation explicitly described by the United States Supreme Court as one where relief would be granted is an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States, applying a rule

of law different from that set forth in the relevant Supreme Court holdings, or making a contrary determination on materially indistinguishable facts as those discussed in the Supreme Court decisions. *Cullen v. Pinholster*, 563 U.S. 170 (2011); *Harrington v. Richter*, 562 U.S. 86 (2011).

VII. Defense Counsel Were Ineffective In Failing To Present Robelen to Testify Before the Jury

To establish that counsel's representation was constitutionally defective, a defendant must show both that counsel's performance was deficient, i.e., that it fell below an objective standard of reasonableness and there was a reasonable probability that but for the errors, the result of the proceedings would be different. *Strickland v. Washington,* 466 U.S. at 692. *Strickland* holds that a petitioner must overcome a presumption that under the circumstances the challenged action might be considered sound trial strategy. 466 U.S. at 690.

But, if courts may simply cite "sound strategy," where that conclusion is contradicted by the record of what trial counsel said his strategy was, and is inconsistent with other findings of the same court, then the requirement that the strategy be "sound" is eliminated from the *Strickland* standard.

The Ninth Circuit granted a COA on this issue but affirmed the District Court denial of this claim "because the California Supreme

Court could reasonably have concluded that this was a reasonable strategic decision by trial counsel." (Appendix A.) The Ninth Circuit did not independently attempt to explain the so-called strategy. Rather, the Order denying relief adopted the reasoning of the District Court, which found that, since Robelen was a felon, it was sound trial strategy not to present his testimony. (Appendix B.)

The circumstances here demonstrate that the failure to present Robelen as a witness in front of the jury could not be part of any sound trial strategy.

As mentioned above, the District Court found, in the course of deciding another ineffective assistance claim concerning presenting evidence of abuse, that it was trial counsel's strategy to put on the evidence that Samuels abused Nicole in order to show that Bernstein killed Samuels for that reason alone, and not because Petitioner asked him to kill Samuels or paid him to do so. (Appendix B). The record reflects that trial counsel did indeed present a great deal of evidence about the abuse of Nicole and the Petitioner by Samuels. But if this was trial counsel's strategy in presenting all the abuse evidence, as the District Court found, then Robelen's testimony was necessary to the success of that strategy. He was the only one who could testify that Bernstein admitted the abuse was his sole motive, and that he exonerated Petitioner from all involvement. It cannot be sound

strategy to fail to present the only witness that can provide the facts necessary to establish the selected defense.

Moreover, the District Court's explanation that it was sound strategy not to present Robelen in the guilt phase because Robelen was a felon, cannot be correct. Robelen was already a felon long before trial started, before trial counsel adopted the strategy of trying to show that the abuse was Bernstein's motive to kill Samuels. Robelen was a felon when he was placed on the defense witness list and, obviously, he was a felon at the time trial counsel applied to have him brought from prison to testify.

Further, the only clues to trial counsel's thinking that are *actually in the trial record* reflect the opposite of the District Court's conclusion. Trial counsel acknowledged that Robelen was a flawed witness, but told the trial court he had made a "tactical decision" to present Robelen because Robelen was "an important witness to us because he can establish certain facts that *no one else can* because certainly Mr. Bernstein cannot speak from where he is at this time. So I've weighed it...." He told the court he was willing to take the good with the bad. (ER 01048-01049, emphasis added.)

Trial counsel's long-after-the-fact, self-serving note specifies Robelen's conviction as the reason he was not called as a witness during the penalty phase, but makes no reference to the conviction as a

reason Robelen was not called in the guilt phase. Trial counsel appears to have been aware he could not use the conviction as a justification for failing to present Robelen during the guilt phase.

Rather, the trial record reflects that at the hearing held outside the presence of the jury, that Robelen did testify as expected, and in conformity with counsel's offer of proof. There is nothing in the record to explain a sudden change of heart. Trial counsel did not, after Robelen testified, abandon the "abuse" strategy. Instead, trial counsel continued to argue that Samuels had abused Nicole and Petitioner. Without Robelen's testimony, this evidence became a potent weapon for the prosecution. Again, the deliberate structuring of a defense that depended entirely on the testimony of one witness, *knowing full well* that the witness was a convicted felon, and to then fail to present that witness *because* he was a convicted felon, is ineffective assistance of counsel. *Luna v. Cambra*, 306 F.3d 954 (9th Cir. 2002), amended, 311 F.3d 928 (failure to present defense witness is ineffective).

The District Court's explanation also fails because the prosecution's case was saturated with testimony from various felons. The testimony of convicted and self-confessed murderers was the backbone of the prosecution's case against Petitioner. Unlike the three main prosecution witnesses, Hambly, Gaul and Edwards, Robelen's crime (a drunken crime of passion) had nothing to do with the present

case. Immunity and leniency was extended to several other prosecution witnesses, which the prosecutor acknowledged publicly "makes them suspect, as it should, to members of the jury" but in such "long, ongoing" conspiracy cases "you don't often have credible witnesses." (ER 00515.) But unlike those prosecution witnesses, Robelen had no stake in the outcome, and nothing to gain or lose.

Petitioner suffered prejudice by the failure to present Robelen. The statement would have been admissible as a statement against penal interest and as showing the state of mind and motive of Bernstein, which the prosecutor had put in issue. Bernstein's state of mind and motive was integral to the prosecution of Petitioner for the murder of Bernstein, and the prosecutor herself presented a number of witnesses to testify about what Bernstein said to them about his role, and Petitioner's role, in the murder of Samuels.

Everyone connected with the trial understood that the failure to present Robelen left the defense in disarray. The trial court said trial counsel was "providing the motive for your client to have her husband killed with this questioning." (FERU 00136.) Without Robelen's testimony, that is exactly what the abuse evidence did, it provided Petitioner with a strong, additional motive. The prosecutor seized on this, arguing in closing: "What does (the evidence of abuse) give me as a prosecutor? It gives me a great motive to argue...that she had a

motive to kill her husband because she found out that he was abusing her daughter..." (FERU 00290.) And without Robelen's testimony, the prosecutor was free to castigate Petitioner for pointlessly besmirching her dead husband's reputation. (ER 00275-00277.)

Petitioner was further prejudiced in that Robelen's testimony would have sown reasonable doubt about the damaging testimony of Navarro. Robelen was the only person who could testify that Bernstein accused prosecution witness Navarro of having been the actual accomplice, thus, at the very least, neutralizing Navarro's hearsay testimony that Bernstein accused Petitioner.

There is a reasonable likelihood that the presentation of Robelen's testimony would have raised a reasonable doubt as to guilt, given the numerous contradictions in the plea-induced testimony against Petitioner, and the purely circumstantial, gossip-laden nature of the case against her. If Robelen was believed, the jury would have had to consider whether Bernstein did murder Samuels, as the prosecution claimed, but for a very different reason, without any involvement by Petitioner. Again, this testimony, if believed, would also eliminate the supposed motive that Petitioner had to conspire to murder Bernstein.

A state court decision is contrary to federal law if it applies a rule that contradicts the governing law set forth in Supreme Court

cases, or unreasonably applies that law to the facts of the case before it. *See, Williams v. Taylor*, 529 U.S. at 405-406. To hold that relief on a claim of ineffective assistance of counsel should be denied on the basis of an unarticulated, and irrational "strategy" flies in the face of clearly established precedent of this Court, and is an unreasonable application of clearly established federal law, as determined by this Court, applying a rule of law different from that set forth in the relevant Supreme Court holdings, or making a contrary determination on materially indistinguishable facts as those discussed in the Supreme Court decisions. *Cullen v. Pinholster*, 563 U.S. *passim*; *Harrington v. Richter*, 562 U.S. *passim*.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that this Court grant the Petition for a Writ of Certiorari, reverse the judgment of the Ninth Circuit and grant Petitioner guilt phase relief from her California state court convictions.

Dated: February 17, 2022

JOEL LEVINE, A PROFESSIONAL CORPORATION

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CERTIFICATE OF COMPLIANCE

I certify that the accompanying Petition for Writ of Certiorari ("Petition") complies with the word count limitations of Supreme Court Rule 33(g) in that it contains 8,320 words, based on the word count function of Microsoft Word - Office 365, including foot notes and excluding material not required to be counted by Rule 33(d). I also certify that the Petition complies with the page count limitations of the Supreme Court in that it contains 38 pages.

Dated: February 17, 2022

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