No. _____

IN THE

# Supreme Court of the United States

WILLIAM A. NOGUERA,

*Petitioner,*

v.

RON DAVIS, 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

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## QUESTION PRESENTED

In *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980), this Court held that an attorney whose representation is adversely affected by a conflict of interest is constitutionally ineffective under the Sixth Amendment. Once an actual conflict has been demonstrated, prejudice is presumed, since the harm may consist not only of what counsel does, but of what he "finds himself compelled to *refrain* from doing" in his representation of the defendant. *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978) (emphasis in original).

In Noguera's capital trial, counsel labored under a conflict of interest because he was retained by Noguera's mother, who counsel represented during her acrimonious divorce proceedings from Noguera's father just a few months before the homicide. At Noguera's mother's direction, counsel refrained from investigating and presenting alternative motives for the crime or a case for mitigation. The district court found that Noguera was deprived of his Sixth Amendment right to counsel under *Sullivan* and *Wood v. Georgia*. In a split decision, the Ninth Circuit reversed, finding that the underlying state-court decision was reasonable under 28 U.S.C. § 2254(d)(1) because *Sullivan* does not apply to conflicts arising from successive representation.

The question presented is: Did the Ninth Circuit's opinion create a conflict with relevant decisions of this Court in concluding that *Sullivan*'s standard applies only when a defense lawyer concurrently represents multiple clients with conflicting interests?

## PARTIES TO THE PROCEEDING

Warden Ron Davis, respondent on review, was the appellant below.

William A. Noguera, petitioner on review, was the appellee below.

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

Petitioner William Noguera respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## OPINIONS BELOW

On October 12, 2021, the Ninth Circuit Court of Appeals denied Noguera's petition for panel rehearing and rehearing en banc. *See* Petitioner's Appendix (Pet. App.) 1 at 1-2. The petition for rehearing related to the Ninth Circuit's published decision denying Noguera's capital habeas appeal. The Ninth Circuit's opinion, which reversed the district court's grant of guilt-phase and special-circumstance relief and affirmed penalty-phase relief, is reported in *Noguera v. Davis*, 5 F.4th 1020 (9th Cir. 2021). Pet. App. 2 at 3-95. The district court's final judgment is reported in *Noguera v. Davis*, 290 F.Supp.3d 974 (C.D. Cal. 2017). Pet. App. 3; 4 at 98-286.

## JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 2241 and 2254. The Ninth Circuit had jurisdiction under 28 U.S.C. §§ 1291 and 2253. This Court has jurisdiction under 28 U.S.C. § 1254(1). Justice Kagan granted a 60-day extension of the period for filing this petition to March 11, 2022. This petition is timely under Supreme Court Rules 13.1 and 13.3.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**Sixth Amendment to the U.S. Constitution**

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

**Section 1 of the Fourteenth Amendment to the U.S. Constitution**

" . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

**28 U.S.C. § 2254(a)**

"The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

**28 U.S.C. § 2254(d)**

"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."

## INTRODUCTION

In 1983, a brain-damaged teenager and his girlfriend killed her mother, who had been molesting and exploiting her only daughter for years. Contrary to the state's allegations, the murder was not motivated by financial gain—the sole special circumstance alleged by the state. And it certainly was not deserving of the death penalty. Yet the jury found 18-year-old Noguera guilty of capital murder and sentenced him to death.

What the jury didn't know when they convicted and sentenced Noguera is that the murder was in fact motivated by the victim's long-term abuse of her daughter, who pressured Noguera to rescue her from her mother's mistreatment. The jury never heard that Noguera suffered from a lifetime of abuse in addition to frontal-lobe damage and drug addiction, and as a result acted with the impulsivity and paranoia of a teenager in a tragically misguided attempt to protect his girlfriend.

The jury never heard this evidence because trial counsel, an attorney with no experience in capital cases, had represented Noguera's mother in her contentious divorce from Noguera's father just a few months before the homicide. Noguera's mother hired trial counsel to represent her son with the express directive not to present anything she deemed harmful or embarrassing to the family, including relevant mitigating evidence that trial counsel learned during the divorce proceedings.

Counsel abided by his former client's wishes. Rather than zealously representing Noguera by conducting a reasonable investigation into the facts of the

crime and Noguera's background, counsel presented what the district court described as a "doomed" alibi defense despite "overwhelming evidence" of Noguera's participation in the crime. Pet. App. 4 at 128. Nor was the jury presented with substantial evidence that the murder was a crime of passion, and not committed for financial gain as alleged by the state. And instead of hearing a wealth of mitigating evidence in support of a life sentence, the jury was given a thin, inaccurate account of Noguera's supposedly positive childhood. *Id.* Trial counsel's divided loyalties directly resulted in a capital conviction and death sentence for his client.

In *Mickens v. Taylor*, 535 U.S. 162 (2002), the Court addressed a conflict arising from successive representation and assumed without deciding that *Sullivan* applied. In dicta, it recognized, but did not resolve, the "open question" of *Sullivan*'s applicability to other kinds of attorney conflicts. 535 U.S. at 176. In the forty-plus years since *Sullivan*, a circuit split has arisen regarding whether *Sullivan* covers successive representation, and the "open question" comment in *Mickens* has resulted in decades of conflicting jurisprudence in the lower courts. While a number of courts apply *Sullivan* to a wide variety of conflicts of interest, those courts that limit *Sullivan* regularly rely on *Mickens* to do so, despite the fact that the *Mickens* Court expressly declined to address *Sullivan*'s reach.

This Court should grant certiorari to make two things clear: the *Sullivan* standard encompasses successive conflicts of interest, and courts that limit *Sullivan* to concurrent representation, such as the court below, are wrong.

## STATEMENT OF THE CASE

### I. LEGAL FRAMEWORK

### A. The law governing conflict-of-interest claims

It is axiomatic that "the assistance of counsel is among those 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.'" *Holloway*, 435 U.S. at 489 (quoting *Chapman v. California*, 386 U.S. 18, 23 (1967)). The right to counsel's undivided loyalty and the right to assistance of counsel are inextricably intertwined; "when counsel is burdened by a conflict of interest, he deprives his client of his Sixth Amendment right as surely as if he failed to appear at trial." *Bonin v. California*, 494 U.S. 1039, 1044 (1990) (Marshall, J., dissenting).

In most cases, a defendant alleging ineffective assistance of counsel must show that his attorney was objectively deficient and it is reasonably probable that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984). However, as this Court recognized in *Sullivan*, 446 U.S. 335, an exception to this general rule arises in cases involving a conflict of interest. Such claims differ in kind from standard ineffective assistance of counsel claims because the duty of loyalty, "perhaps the most basic of counsel's duties," *Strickland*, 466 U.S. at 689, has been undermined. Thus, a defendant who shows an actual conflict adversely affected his attorney's performance need not demonstrate that his attorney's divided loyalties prejudiced the outcome of his trial. *Sullivan*, 446 U.S. at 349-50. An adverse effect exists where counsel was influenced in his basic strategic decisions by the conflict, including

what he refrained from doing in order to protect the conflicting interest. *See Holloway*, 435 U.S. at 490.

Where conflicting interests affect the representation, "it is difficult to measure the[ir] precise effect on the defense." *Strickland*, 466 U.S. at 692. "The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters." *Holloway*, 435 U.S. at 490. Thus, *Sullivan* must be applied not just when one attorney simultaneously represents clients with competing interests, but "in situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel." *Mickens*, 535 U.S. at 176.

In *Sullivan*, an attorney simultaneously represented co-defendants charged with murder in separate trials. 446 U.S. at 337-38. Since *Sullivan*, this Court has addressed the scope of *Sullivan*'s conflict-of-interest test on only a few occasions, each presenting a different type of conflict. In *Wood*, the Court, applying *Sullivan*, recognized that third-party fee arrangements can become the functional equivalent of unconstitutional concurrent representation. 450 U.S. 261, 267, 271-72 (1981). In *Nix v. Whiteside*, the Court refused to expand *Sullivan*'s framework to include a situation where an attorney advised his client he could not suborn client's stated desire to commit perjury and would seek to withdraw if his client insisted on presenting perjured testimony. 475 U.S. 157, 174-76 (1986). In *Burger v. Kemp*, co-defendants were represented in separate capital murder trials by two attorneys who

were partners in the same firm and assisted each other in preparing for and conducting the trials and subsequent appeals. 483 U.S. 776, 783-84 (1987). And most recently, in *Mickens*, a defendant in a homicide case was represented at trial by an attorney who had previously represented the murder victim. 535 U.S. at 164.

In dicta, the *Mickens* Court noted that since *Sullivan*, federal courts of appeals had moved beyond the concurrent representation scenario addressed in *Sullivan* and "applied *Sullivan* 'unblinkingly' to 'all kinds of alleged attorney ethical conflicts.'" *Id.* at 174 (quoting *Beets v. Scott*, 65 F.3d 1258, 1266 (5th Cir. 1995) (en banc)). The Court cautioned that "[n]ot all attorney conflicts present" the same "high probability of prejudice" as that presented in cases of concurrent representation. With regard to the successive representation conflict at issue in *Mickens*, the Court assumed that *Sullivan*'s framework applied, and instead focused on whether the defendant established that the conflict adversely affected his attorney's performance. *Id.* at 174-75. *Mickens* remains the Court's last word on *Sullivan*'s conflict standard.

**B. AEDPA Standards**

Because Noguera filed his federal habeas petition after AEDPA's effective date, his petition is governed by AEDPA. *Woodford v. Garceau*, 538 U.S. 202, 205, 210 (2003). To obtain relief under AEDPA, a petitioner must show that § 2254(d) does not bar relief on any claim adjudicated on the merits in state court. Under § 2254(d), a habeas petition challenging a state court judgment must demonstrate that the state court's adjudication of the claim either "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established

Federal law," or "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." 28 U.S.C. § 2254(d)(1), (2).

AEDPA does not "require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Carey v. Musladin*, 549 U.S. 70, 81 (2006) (Kennedy, J., concurring in judgment). "Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts 'different from those of the case in which the principle was announced.'" *Panetti*, 551 U.S. at 953 (quoting *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003)).

When a federal court concludes that the state court decision is contrary to or an unreasonable application of federal law, or is based on an unreasonable factual determination, it reviews the claim de novo in assessing whether the petitioner's constitutional rights were violated. *Panetti v. Quarterman*, 551 U.S. 930, 953-954 (2007).

## II. PROCEEDINGS BELOW

In 1983, Jovita Navarro was found dead in her home. The cause of death was asphyxiation from an object pressed against her throat. Although the victim's clothing was removed, there was no evidence of rape; and although the bedroom appeared ransacked, nothing of value was missing. Pet. App. 4 at 104. After months of investigation, police arrested 18-year-old William Noguera and Navarro's daughter, 16-year-old Dominique, on suspicion of her murder. Noguera was accused of first-degree murder with a special circumstance of financial gain.

Noguera's mother, Sarita Salinas, entered into a third-party fee agreement with attorney Lorenzo Pereyda to represent her son in his capital murder trial. Pereyda, a criminal and family law attorney who had never litigated a capital case, was "not totally familiar with capital litigation, particularly penalty phase strategy and tactics." Pet. App. 8 at 317. His second-chair counsel, Benjamin Campos, also had very little experience in criminal law. *Id.* Pereyda was well-known to Noguera and his family, as he had previously represented Salinas in divorce proceedings against Noguera's father, Guillermo. *Id.* at 315-17; Pet. App. 9 at 327-29. The acrimonious divorce proceedings lasted years, concluding only a few months before the homicide. Pet. App. 8 at 315-16.

As Salinas's divorce attorney, Pereyda learned confidential information regarding Noguera's "awful" home life, as well as the mental and emotional problems suffered by Noguera and his parents. *Id.* at 316-17; Pet. App. 9 at 328. Pereyda knew Salinas and the children suffered from Guillermo's violent behaviors and bad temper; he also knew that Salinas was concerned about how the constant exposure to violence and instability harmed Noguera. According to Salinas, "through representing me and dealing with my husband and children, Mr. Pereyda knew all about our troubles" and "witnessed through the years how crazy our family was." Pet. App. 9 at 328.

Pereyda recognized that he was potentially a penalty phase witness in light of everything he knew about the family, and he was aware that "there was a legal conflict in [him] representing [Noguera] because [he] had previously represented his

mother in a divorce action." Pet. App. 8 at 317. However, he "never explained [that conflict] to [Noguera]" and "never obtained from him a waiver of that conflict." *Id.*

The problems with Pereyda's acknowledged conflict were compounded by Salinas's insistence on controlling the defense. When she hired Pereyda, she "still considered him [her] attorney and obligated first to [her]." Pet. App. 9 at 328. Salinas told Pereyda "that in defending Billy, he was not to bring out any of our family problems or anything about Billy which would embarrass me." *Id.* at 328-29. Salinas also told Pereyda that it "was a condition of accepting the case that Bill was to be proven innocent." *Id.* at 328. According to Salinas, Pereyda agreed to that arrangement. *Id.*

Noguera's wife at the time of the trial, Francesca Mozqueda, confirmed this conflict. According to Mozqueda, "Ms. Salinas made it very clear . . . that she was in charge of the case[,] i.e., the defense attorneys, because she was paying the attorneys to do whatever she said." Pet. App. 11 at 342. When Mozqueda questioned Salinas "on several occasions why she had chosen to hire her divorce attorney, Mr. Pereyda, to handle Bill's murder case," Salinas told Mozqueda "that she only trusted him because he would protect the family. . . . [N]o one was going to say that her Billy killed anyone, that she would not allow anyone to say anything bad about her family" and that "Mr. Pereyda would do whatever she wanted." Pet. App. 11 at 341-42.

Because Salinas wanted to protect her family's reputation at all costs, she barred investigation into the family's troubled background and Noguera's mental

health: "From the moment I retained Mr. Pereyda, he understood that all he knew about Billy and the family through witnessing us as my attorney, was not to be used in my son's defense." *Id.* As a result, Pereyda "never asked [about] or discussed Billy's mental problems and the hell my son experienced in growing up in our family." *Id.*; Pet. App. 8 at 317-18. Yet according to people close to Noguera at the time, and even to Noguera himself, his mental issues were evident and needed further investigation. Pet. App. 9 at 335; Pet. App. 11 at 344-46, 349. At one point, Mozqueda told Pereyda and Campos that Noguera "had serious mental problems," but the attorneys "brushed off [her] concerns." *Id.* at 349. When Mozqueda told Noguera that she was concerned about the approach his attorneys were taking with his case, Noguera told her that if he didn't go along with his mother's wishes, she would stop paying for his defense. *Id.* at 346.

Salinas knew that her son "had a serious drug problem" and "serious mental problems," but she nevertheless refused to allow a psychiatric examination of Noguera before the trial. Pet. App. 9 at 335. She ordered Noguera to "listen to my attorney" and not to talk about a "mental defense." *Id.* at 335-36. When Noguera told his mother that he had admitted to his defense team that he killed Navarro and that he wanted to pursue a psychiatric evaluation and a mental defense, Salinas told him "it did not matter, that [her] attorney [Pereyda] was going with the innocence defense." *Id.* at 336. And when Noguera told Pereyda that he wanted to pursue mental health defenses and to try and understand why he committed the crime, Pereyda told him to "concentrate on looking for people who could say he was

a great guy, not crazy" because "there was no evidence or eyewitnesses against [Noguera]." Pet. App. 11 at 344.

In accordance with his former client's wishes, "[t]he defense [counsel] presented was that Navarro was not an obstacle to Bill and Dominique's relationship and that Bill did not commit the crime." Pet. App. 8 at 320. Pereyda and Campos "focused all of [their] investigative efforts on trying to prove those two points." *Id.* Counsel's chosen defense was belied by the facts. In truth, Noguera and Dominique had a fraught relationship with Navarro. Pet. App. 4 at 106-07. Navarro physically and sexually abused her daughter. Pet. App. 2 at 22; Pet. App. 9 at 329-30. Navarro repeatedly tried to get Dominique to end her relationship with Noguera, and she forced Dominique to abort Noguera's unborn child against Dominique and Noguera's wishes. Pet. App. 2 at 11; Pet. App. 9 at 332. Navarro hated Noguera so much that she once threatened to hire a hit man to kill him. Pet. App. 2 at 11. For months before the murder, Dominique pressured Noguera to kill Navarro in order to protect her from Navarro's ongoing abuse.

Even though Pereyda spent "the vast majority" of his preparation on guilt-phase issues, neither he nor Campos investigated the relationship between Noguera, Dominique, and Navarro. Pet. App. 8 at 317-18. Counsel conducted no investigation "to determine whether through his emotionally impoverished history or background we could explain to the jury the environmental or genetic factors that could have led to the crime." *Id.* at 318. Instead, they presented an alibi defense

that the district court described as "doomed" and contrary to the "overwhelming evidence" of Noguera's participation in the crime. Pet. App. 4 at 128.

Counsel's penalty phase defense was similarly stunted by the arrangement with Salinas. Pereyda spent 24 to 30 hours preparing for the penalty phase, while Campos spent 7.5. Pet. App. 8 at 318; Pet. App. 10 at 339. Counsel's penalty phase strategy "was to present Bill in a positive light to the jury." Pet. App. 8 at 318. Therefore, counsel only "looked for witnesses who could say good things about him," and "did not explore his family situation or background to obtain potentially mitigating evidence." *Id.* Accordingly, counsel failed to investigate or present a wealth of mitigation evidence: Noguera's childhood was replete with physical and emotional trauma. Pet. App. 2 at 44-45. He was routinely and brutally beaten by his parents. *Id.*; Pet. App. 9 at 334; Pet. App. 12 at 356-57. His mother and father were physically violent with each other in front of the children, and his father made them watch as he beat and tortured animals, including the family dog. Pet. App. 2 at 20; Pet. App. 12 at 356-57. Psychological abuse was also routine. Salinas would leave the house, threatening to abandon them or kill herself if the children misbehaved. Pet. App. 12 at 353-54. According to one post-conviction expert, this behavior was "severely destructive" to Noguera's mental health and amounted to "psychological torture." Pet. App. 2 at 21.

Counsel "did not have [Noguera] or any member of his family interviewed by a mental health professional" in preparation for the penalty phase. Pet. App. 8 at 317-18; Pet. App. 10 at 339. If they had, they would have discovered that Noguera

suffers from organic brain damage, likely caused by childhood head injuries, and attention deficit disorder. Pet. App. 2 at 50. Counsel also would have learned that Noguera's mental state was affected by his long-term abuse of steroids and other substances, and the fact that he was under the influence of steroids and other mind-altering drugs at the time of the crime. Pet. App. 2 at 77.

Because of the arrangement with Salinas, counsel also failed to investigate or present evidence that rebutted the state's allegations of financial gain. The state's primary evidence supporting the financial gain special circumstance included proceeds from a life insurance policy and possession of Navarro's home, both of which would go to Dominique upon her mother's death. Pet. App. 2 at 49; Pet. App. 8 at 320-21. Regarding the financial-gain special circumstance, Pereyda believed "the motives alleged by the prosecution did not seem sufficient to result in parricide." Pet. App. 8 at 321. Nonetheless, "[they] did not investigate Dominique or her family to determine whether she had any other motives for killing her mother. There was no strategic reason for not doing so." *Id.* at 320. Had counsel known that Navarro abused Dominique, "[the] defense would probably have been very different." *Id.* at 321. In Pereyda's opinion, "This powerful evidence would have made the special circumstance of murder for financial gain much more vulnerable to attack" and "the defense could have made a plausible argument to the jury for second degree murder." *Id.* This "valuable" evidence would also have provided a "very strong argument" against the death penalty. *Id.*

The jury heard none of the evidence countering the special circumstance allegations or supporting a case for life. In 1987, Noguera was convicted of capital murder and sentenced to death.[1]

The California Supreme Court affirmed the judgment on appeal, rejecting claims not at issue here. Pet. App. 7.

In his 1992 state habeas petition, Noguera presented the claim that he was denied his rights under the Sixth and Fourteenth Amendments rights to effective, conflict-free counsel were violated due to his attorney's conflict of interest. The California Supreme Court summarily denied on the entirety of the petition on the merits. Pet. App. 5.

Noguera's operative federal petition, the Fourth Amended Petition, was filed in 2009. On November 17, 2017, the federal district court issued its opinion and judgment granting Noguera guilt phase, special circumstance, and penalty phase relief on several claims of ineffective assistance of counsel, including the conflict of interest claim addressed herein. Pet. App. 4.

The State appealed the district court's order. On July 20, 2021, in a 2-1 decision, the Ninth Circuit reversed the district court's grant of relief on all claims except ineffective assistance of counsel at the penalty phase. Pet. App. 2. With regard to the conflict of interest claim, the panel majority found that the district court's grant of relief under *Sullivan* was wrong because there is no clearly

[1] Noguera's co-defendant, Dominique, was tried for first degree murder and conspiracy to commit murder as a juvenile; she was convicted and sentenced to the custody of the Youth Authority. Pet. App. 2 at 14.

established federal law holding that successive representation constitutes an actual conflict under *Sullivan*. Pet. App. 2 at 47, 49. As to the ineffectiveness claims, the court assumed that Pereyda and Campos were deficient in their representation of Noguera; however, the panel majority found that Noguera suffered no prejudice at the guilt or special circumstance phases of his trial.

Judge Sidney R. Thomas dissented, concluding that counsel had an actual conflict of interest that adversely affected his performance. *Id.* at 69-70. Judge Thomas also found that Noguera cleared the § 2254(d)(1) relitigation bar because his petition provided sufficient evidence for a reasonable factfinder to conclude that he is eligible for relief under *Sullivan* and *Wood*. *Id.* at 70-71.

Noguera timely sought and was denied a petition for rehearing and rehearing en banc. Pet. App. 1. This petition follows.

## REASONS FOR GRANTING THE PETITION

### I. THE DECISION BELOW DEEPENS A LONGSTANDING SPLIT AMONG FEDERAL AND STATE COURTS THAT IS IN NEED OF THIS COURT'S ATTENTION.

In *Mickens*, this Court assumed, without deciding, that *Sullivan* applies to successive representation cases. In the twenty years since *Mickens*, federal and state courts have grown increasingly divided over this question. Sup. Ct. R. 10(a), (c).

Prior to *Mickens*, a number of circuit courts of appeal, including the Fourth, Fifth, Sixth, Ninth, and Eleventh Circuits, routinely applied *Sullivan* to conflicts arising from successive representation. *See, e.g., Mannhalt v. Reed*, 847 F.2d 576, 580 (9th Cir. 1988); *Perillo v. Johnson*, 205 F.3d 775, 797-799 (5th Cir. 2001); *Riggs*

*v. United States*, 209 F.3d 828, 831 n.1 (6th Cir. 2000); *Freund v. Butterworth*, 165 F.3d 839, 858-860 (11th Cir. 1999); *United States v. Young*, 644 F.2d 1008, 1013 (4th Cir. 1981). Likewise, the First, Eighth, Tenth, and D.C. Circuits liberally applied *Sullivan* to cases not involving concurrent representation. *See, e.g., United States v. Michaud*, 925 F.2d 37, 40 (1st Cir. 1991) (lawyer served as a teacher to members of the agency investigating his client); *United States v. Andrews*, 790 F.2d 803, 811 (10th Cir. 1986) (lawyer's academic studies interfered with the representation); *United States v. Taylor*, 139 F.3d 924, 932-33 (D.C. Cir. 1998) (lawyer prioritized his own professional relationship over his client's interests); *Atley v. Ault*, 191 F.3d 865, 870 n.4 (8th Cir. 1999) (acknowledging that *Sullivan* was not limited to the multiple representation context).

Since *Mickens*, courts are deeply divided on whether successive representation conflict claims are properly evaluated under the *Sullivan* framework. For example, post-*Mickens*, the Fifth Circuit has indicated that it sees no basis for a distinction between concurrent and successive representation conflicts so long as "defense counsel is compelled to compromise his or her duty of loyalty or zealous advocacy to the accused by choosing between or blending the divergent or competing interests of a former or current client." *Wilkins v. Stephens*, 560 Fed. Appx. 299, 309 (5th Cir. 2014) (quotations omitted), *cert. denied*, 135 S. Ct. 1397 (2015); *United States v. Infante*, 404 F.3d 376, 391 n.5 (5th Cir. 2005). Similarly, the Third and Fourth Circuits have indicated that *Sullivan* is not limited to concurrent representation cases. *Tillery v. Horn*, 142 Fed. Appx. 66, 70 (3rd Cir. 2005), *cert.*

*denied*, 546 U.S. 1043 (2005); *Rubin v. Gee*, 292 F.3d 396 (4th Cir. 2002), *cert. denied*, 537 U.S. 1048 (2002). The Fourth Circuit has explicitly held that because *Sullivan*'s presumption of prejudice is warranted only if defendants can demonstrate an actual conflict of interest that adversely affected counsel's performance, concerns about an overbroad application of *Sullivan* are unwarranted. *See United States v. Stitt*, 441 F.3d 297, 303 (4th Cir. 2006).

Other circuits, including the First, Eighth, Tenth, and D.C. Circuits, continue to express their uncertainty regarding how to apply *Sullivan*, often assuming without deciding that *Sullivan* applies to cases beyond concurrent representation. *See, e.g., United States v. DeCologero,* 530 F.3d 36, 77 n.24 (1st Cir. 2008); *Dansby v. Hobbs*, 766 F.3d 809, 837 (8th Cir. 2014), *cert. denied*, 136 S. Ct. 297 (2015); *United States v. Williamson*, 859 F.3d 843, 854, 857 (10th Cir. 2017); *United States v. Wright*, 745 F.3d 1231, 1233 (D.C. Cir. 2014).

And still more Circuits, including the court below, are internally divided on whether a successive representation conflict can constitute an actual conflict under *Sullivan*. For example, the Ninth Circuit applied the *Sullivan* standard to a conflict based on successive representation in *Lewis v. Mayle*, 391 F.3d 989 (9th Cir. 2004). But in Noguera's case, the panel held that "the *Sullivan* standard applies to conflicting *concurrent* representations." Pet. App. 2 at 27 (emphasis in original); *see also, e.g., Rowland v. Chappell*, 876 F.3d 174, 1192 (9th Cir. 2017) (same).

Similar intra-circuit conflicts exist in the Second and Sixth Circuits. For example, the Second Circuit held in *Tueros v. Greiner*, 343 F.3d 587, 593-94 (2nd

Cir. 2003), *cert. denied*, 541 U.S. 1047 (2004) that "it may well be unreasonable not to extend *Sullivan*'s definition of an 'actual conflict'" to a lawyer who actively owed duties to more than one person. But in *Amato v. United States*, 763 Fed. Appx. 21, 25 (2019), the court deferred to *Mickens* and refused to apply *Sullivan* to a case involving successive representation. Similarly, the Sixth Circuit in *Harris v. Carter* held that post-*Mickens*, *Sullivan* applies to all Sixth Amendment conflict claims. 337 F.3d 758, 762 (6th Cir. 2003). However, in subsequent cases, the Sixth Circuit has declined to apply *Sullivan* to conflicts arising from successive representation. *See, e.g., Moss v. United States*, 323 F.3d 445 (6th Cir. 2003); *United States v. Taylor*, 489 Fed. Appx. 34, 41 (6th Cir. 2012).

State courts are also divided on this issue, and in some cases have interpreted *Sullivan* in a manner contrary to precedent set by their circuit court of appeals. The Court of Criminal Appeals in Texas, for example, has held that *Sullivan* governs *all* conflict of interest claims. *See Acosta v. State*, 233 S.W.3d 349, 352-56 (Tex. Crim. App. 2007). Courts in Alaska, Arkansas, Illinois, Washington, and Alabama likewise apply *Sullivan* to any case where counsel actively represented conflicting interests. *See State v. Carlson,* 440 P.3d 364, 384 n.52 (Alaska Ct. App. 2019); *Echols v. State*, 127 S.W.3d 486, 493 (Ark. 2003); *People v. Garcia*, 116 N.E.3d 1082, 1094 (Ill. App. Ct. 2018); *State v. Regan*, 177 P.3d 783, 786-787 (Wash. Ct. App. 2008); *Acklin v. State*, 266 So. 3d 89, 106-07 (Ala. Crim. App. 2017).

In contrast, a number of other states, including California, Colorado, Idaho, Indiana, North Carolina, and Pennsylvania, limit *Sullivan* to only those cases in which a lawyer concurrently represents multiple clients with competing interests. *See People v. Doolan*, 198 P.3d 11, 41 (Cal. 2009); *West v. People*, 341 P.3d 520, 530 n.8 (Colo. 2015); *State v. Alvarado*, 481 P.3d 737, 748-749 (Idaho 2021); *Commonwealth v. Cousar*, 154 A.3d 287, 310 (Pa. 2017); *State v. Phillips*, 711 S.E.2d 122, 137 (N.C. 2011).

Indiana has declined to depart from *Strickland* for conflict of interest claims beyond cases of concurrent representation while simultaneously acknowledging that *Mickens* explicitly left open the possibility of broader application of the *Sullivan* framework. *See Gibson v. State*, 133 N.E.3d 673, 699 (Ind. 2019). Nebraska and Kansas refuse to decide *Sullivan*'s scope. *See State v. Avina-Murillo*, 917 N.W.2d 865, 876, 878 (Neb. 2018); *Sola-Morales v. State*, 335 P.3d 1162, 1170 (Kan. 2014). But appellate courts in Connecticut, Iowa, Minnesota, and Mississippi have issued opinions assuming without deciding that *Sullivan* applies. *See*, *e.g.*, *Skakel v. Comm'r of Corr.*, 159 A.3d 109, 170 n.37 (Conn. 2016), *superseded on reconsideration on other grounds*, 188 A.3d 1 (Conn. 2018); *State v. Williams*, 652 N.W.2d 844, 849 & n.3 (Iowa Ct. App. 2002); *Taylor v. State*, No. A17-1892, 2018 WL 6165291, at *3 n.3 (Minn. Ct. App. Nov. 26, 2018); *Crawford v. State*, 192 So. 3d 905, 917-20 (Miss. 2015).

As the above cases illustrate, lower courts continue to disagree about how to read *Sullivan*. It is necessary for this Court to step in and clarify its precedent so this ambiguity will not recur.

## II. THE DECISION BELOW IS WRONG.[2]

### A. *Sullivan* should govern successive conflicts of interest.

As numerous courts around the country have long recognized, *Sullivan*'s holding properly encompasses successive representation conflicts, and the Ninth Circuit was wrong to find otherwise. The same concerns present in cases of multiple concurrent representation can arise with equal force in cases of successive representation. When faced with either of these conflicts, lawyers must choose whether to advocate one client's "interests single-mindedly," or whether to advance another client's interest at the other client's expense. *Wood*, 450 U.S. at 271-72. When a lawyer violates his duty of loyalty in this manner, *Sullivan*'s presumption of prejudice must apply any time that breach leads to "an actual conflict of interest [that] adversely affect[s] [the] lawyer's performance." *Mickens*, 535 U.S. at 176.

The notion that conflicts arising from successive representation are properly reviewed under the *Sullivan* standard is evident from its holding. *Sullivan* cautions that "[u]ntil a defendant shows that his counsel *actively* represented conflicting interests, he has not established the constitutional predicate for his claim of

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[2] Although certiorari is generally not granted to engage in "error correction" in individual cases, this Court has recognized that "in death cases, the exercise of our discretionary review for just this purpose may be warranted." *Calderon v. Thompson*, 523 U.S. 538, 569 (1998) (Souter, Stevens, Ginsburg, Breyer, JJ., dissenting).

ineffective assistance." 446 U.S. at 350 (emphasis added). And in the cases where this Court has addressed the *Sullivan* framework, it has stressed the importance of active representation of conflicting interests. *See Holloway*, 435 U.S. at 489-90; *Wood*, 450 U.S. at 272; *Mickens*, 535 U.S. at 176. Thus, *Sullivan* reasonably applies to successive representation cases, as an attorney's duty of loyalty and confidentiality does not end when the representation ends. *See, e.g., Nix v. Whiteside*, 475 U.S. 157, 188 n.7 (Blackmun, J., concurring) (lawyers have a continuing obligation to their former clients not to reveal confidential information received during the course of the prior representation); Lowenthal, *Successive Representation by Criminal Lawyers*, 93 Yale L. J. 1 (1983).[3] Those conflicting duties between former and current clients can adversely affect every decision an attorney makes. Because such conflicts are often as difficult to measure in cases of successive representation as they are in cases of concurrent representation, the normal Sixth Amendment framework must give way to the "needed prophylaxis" *Sullivan* provides. *Mickens*, 535 U.S. at 176. There is no principled reason not to

[3] Ethics rules are in accord. *See, e.g.*, Model Rules of Pro. Conduct r. 1.9(a) (2020) ("A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing."); Restatement (3d) of the Law Governing Lawyers, § 132 ("Unless both the affected present and former clients consent to the representation under the limitations and conditions provided in § 122 (client consent to a conflict of interest), a lawyer who has represented a client in a matter may not thereafter represent another client in the same or a substantially related matter in which the interests of the former clients are materially adverse.").

extend *Sullivan*'s definition of an "actual conflict" to a lawyer, like Pereyda, whose conflict was defined by representing the divergent interests of his current and former clients, especially where the former client retained defense counsel, directed the representation, and was important witness in the criminal case.

The Ninth Circuit misread this Court's precedent when it found that *Mickens* supports limiting *Sullivan* only to cases of concurrent representation. In what the Second Circuit described as a "postscript to its holding," *Mickens* questioned, in dicta, whether *Sullivan* may apply to cases not involving concurrent representation. *Tueros*, 343 F.3d at 593 (2d Cir. 2003); *Mickens*, 535 U.S. at 174-75. Notably, the Court did not overrule any prior decisions, including *Wood*, that applied *Sullivan* to conflicts other than joint representation. *Mickens*, 535 U.S. at 175. Ruminations set forth in dicta do not provide an adequate basis for lower courts, including the Ninth Circuit, to definitively determine that *Sullivan* can never apply except in cases of concurrent representation. Instead, the key takeaway from the *Mickens* decision is the well-understood and long-applied proposition that a defendant alleging conflict of interest must show that the conflict "actually affected the adequacy of his representation." *Sullivan*, 446 U.S. at 349-50. This rule is entirely consistent with applying *Sullivan* to cases of successive representation.

### B. This case demonstrates why it is important for this Court to clarify that Sullivan's scope extends to conflicts arising from successive representation.

"An 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance." *Mickens*, 535 U.S. at 172 n.5. "Adverse effect" means that "some plausible alternative defense strategy or tactic

might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." *Foote v. Del Papa*, 492 F.3d 1026, 1029-30 (9th Cir. 2007) (internal quotations omitted). "The central question" in assessing adverse effect is "what the advocate [found] himself compelled to refrain from doing because of the conflict." *Lockhart v. Terhune*, 250 F.3d 1223, 1231 (9th Cir. 2001) (internal citations and quotations omitted); *Holloway*, 435 U.S. at 490-91.

Here, Noguera answered this "central question" with evidence that counsel refrained from investigating and presenting available alternative defenses due to the conflict, including evidence about Noguera's mental illness, background, and non-financial motives. As the district court below correctly recognized, Pereyda failed to be an effective advocate at every stage of Noguera's trial due to his conflicting loyalties. For example, at the guilt phase, counsel "failed to investigate and present evidence that [Noguera] may have suffered from brain-damage and mental illness that may have influenced his decision-making" and that he was "under the influence of steroids and other substances when he committed the homicide." Pet. App. 4-128. Counsel also failed to investigate and present "evidence which could have undermined the prosecution's theory of the case as death eligible." *Id.* at 127. At the penalty phase, the conflict caused Pereyda to "focus[] his penalty phase investigation on the positive aspects of [Noguera's] life," rather than present available persuasive mitigation evidence regarding Noguera's mental health, drug use, and troubled upbringing. *Id.* at 127-29. Pereyda "thereby obscured extensive

available mitigating evidence . . . in favor of presenting Ms. Salinas in the most positive light." *Id.* at 129.

This is exactly the risk the Supreme Court warned about in *Wood* and *Sullivan*. *See Wood*, 450 U.S. at 269-70; *Sullivan*, 446 U.S. at 349-50; *see also* Pet. App. 4 at 129 ("[The] dangers [noted in *Wood*] manifested in [Noguera's] case."). In *Wood*, the Court noted "the inherent dangers that arise when a criminal defendant is represented by a lawyer hired and paid by a third party"—in that case, the defendants' former employer. *Wood*, 450 U.S. at 268-69. For example, the lawyer may prevent the defendant from offering testimony unfavorable to the paying party. *Id.* Or the lawyer may defer to the third-party's goals while sacrificing the defendant's best interests. *Id.* Citing *Sullivan*, the Court remanded the case for a hearing in light of the "clear possibility of [an actual] conflict of interest."[4] *Id.* at 267; 274.

Like the employer in *Wood* who paid defense counsel and steered the litigation to serve his interests, Salinas paid Pereyda and directed his representation of Noguera to satisfy her interest in preserving her family's reputation. Because Salinas was his former client, Pereyda had an on-going ethical and legal duty to her, which included a fundamental obligation not to reveal

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[4] *Wood* was technically decided under the due process clause rather than the Sixth Amendment, as only the former provision sets constitutional bounds on parole revocation hearings. The Court analogized appellant's rights in *Wood* to those in *Sullivan* because where a defendant has a right to counsel, "our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest." *Wood*, 450 U.S. at 271.

information disclosed in confidence during Salinas's contentious divorce proceedings from Noguera's father. That information should have been an essential component of Noguera's defense. But because Pereyda promised Salinas he would not investigate or present anything that would embarrass the family, he could not simultaneously abide by his duty of loyalty to both clients.

Moreover, Pereyda's third-party fee agreement with Salinas created the functional equivalent of multiple representation. *See Wood*, 450 U.S. at 263, 267. Noguera was adversely affected because Pereyda was bound to serve the conflicting interests of Salinas (who paid and sought to avoid embarrassment) and Noguera (who faced death at age 18 and was entitled to, but did not receive, a reasonable investigation). *Id.* at 271-72 (citing *Sullivan*, 446 U.S. at 348). As a result, Pereyda operated under an unwaived, actual, and active conflict of interest in representing Noguera—a conflict that was no different in kind or in effect from cases where a lawyer concurrently represents clients with competing interests. The Ninth Circuit acted contrary to *Sullivan* and its progeny when it held that the state court did not act unreasonably in denying Noguera's conflict-of-interest claim. *See Carey*, 549 U.S. at 81 (AEDPA does not "require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.").

Furthermore, it is notable that the court below unanimously determined that trial counsel was deficient in failing to investigate the special circumstance and mitigation. This finding establishes that pursuing such evidence was at least "plausible," thereby demonstrating the "adverse effect" required by *Sullivan*. *See*

*Foote*, 492 F.3d at 1029-30. However, instead of upholding the relief rightly granted by the district court pursuant to *Sullivan* and *Wood*, the panel majority deferred to counsel's ultimate choice of defense, finding no conflict or adverse effect because "the defense's [alibi] trial strategy was sound." Pet. App. 2 at 31. Such deference flipped conflict precedent on its head by holding, contrary to *Holloway* and *Sullivan*, that it doesn't matter if plausible alternative defenses existed because what trial counsel did present may also have been plausible.[5] This approach is essentially a *Strickland* prejudice analysis, not the analysis required by *Sullivan*.

Noguera did not need to demonstrate that counsel's chosen strategy was deficient or worse than the unpursued ones. Nor did he have to show he was prejudiced by the defense presented. *Sullivan*, 446 U.S. at 350. By finding no conflict or adverse effect because "the defense's [alibi] trial strategy was sound," the lower court further erred by ignoring evidence of plausible alternative strategies, acting contrary to established precedent, and holding Noguera to an impermissibly high standard.

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[5] The alibi defense was not sound. The panel unanimously concluded that counsel was deficient in failing to investigate, meaning that counsel was uninformed when he chose it. As a result, Pereyda never learned key evidence that in his words would have led him to "reassess[] the entire defense strategy," including the alibi. Pet. App. 8 at 320-21. As Chief Judge Thomas explained, "[m]inimal investigation . . . would have unveiled an entirely different case: one in which no alibi was likely to hold up on court, but one where the death penalty probably should have been off the table." Pet. App. 2 at 77.

## III. THIS PETITION IS AN IDEAL VEHICLE FOR THIS COURT TO CLARIFY THAT CONFLICTS OF INTEREST ARISING FROM SUCCESSIVE REPRESENTATION ARE PROPERLY ADDRESSED WITHIN THE *SULLIVAN* FRAMEWORK .

The question presented in this petition, which goes to the heart of the Sixth Amendment guarantee of effective assistance of counsel, has regularly confounded the lower courts and is vitally important to resolve. *Mickens* recognizes that *Strickland* is often "inadequate" in conflict of interest cases. 535 U.S. at 176. But because of the confusion surrounding the reach of *Sullivan*'s presumption of prejudice, courts routinely apply *Strickland* in cases involving successive representation which should rightfully be governed by *Sullivan*. Only by resolving this longstanding question and applying *Sullivan* to cases like Noguera's can this Court properly protect defendants against the harms of successive representation.

Without this Court's intervention, lower courts will continue to disagree about how to read and apply *Sullivan*'s precedent. And the question of whether a defendant's Sixth Amendment right to conflict-free representation will be adequately protected will turn on whether his jurisdiction applies *Sullivan* to successive-representation conflicts. Here, counsel's undisclosed conflict of interest based on successive representation permeated every aspect of Noguera's trial and led to him wrongfully serving over 30 years on death row. It is therefore an ideal vehicle to finally resolve the issue and vindicate the Sixth Amendment's bedrock guarantee of the right to unconflicted counsel.

Alternatively, should this Court choose not to decide the merits of Noguera's claim, it could instead answer only the purely legal question left open in *Mickens*

and allow the lower court to address the specifics of Noguera's *Sullivan* claim on remand. *See Sullivan*, 446 U.S. at 350.

Finally, the importance of this issue is demonstrated by the fact that there is currently another petition for certiorari pending which also asks this Court to resolve the question of *Sullivan*'s scope. *See Spencer v. Colorado*, No. 21-1157 ("Question Presented[:] . . . Does *Sullivan*'s standard apply only when a defense lawyer represents multiple clients with conflicting interests (as eleven jurisdictions have held), or does *Sullivan* apply to other conflicts—such as personal conflicts of interest (as twenty-one jurisdictions have held)?"). Because the issues and arguments raised in the *Spencer* petition and in this case are so similar, a possible alternative to granting Noguera's petition outright would be to grant and hold this petition until *Spencer* is resolved.

## CONCLUSION

For the reasons discussed herein, the petition for certiorari should be granted.

Respectfully submitted,

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DATED: March 11, 2022

By:_____
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No. _____

IN THE

# Supreme Court of the United States

WILLIAM A. NOGUERA,

*Petitioner,*

v.

RON DAVIS,

*Respondent.*

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

## CERTIFICATE PURSUANT TO RULE 33

Pursuant to Rule 33.2, I hereby certify that this petition is less than 40 pages, and therefore complies with the page limit set out in Rule 33. This brief was prepared in 12-point Century Schoolbook font.

Respectfully submitted,

CUAUHTEMOC ORTEGA
Federal Public Defender

DATED: March 11, 2022

By: _____
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