

No.

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In the  
**United States Supreme Court**

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Ronnie Y. Conrad,

*Petitioner,*

v.

Rob St. Andre, Warden,

*Respondent.*

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

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**Petition For a Writ Of Certiorari**

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## **Question Presented**

The Sixth Amendment guarantees conflict-free counsel. When counsel labors under a conflict of interest that actually affects his representation, this Court has held, no further prejudice showing is necessary because a presumption of prejudice exists. This Court has not limited that presumption of prejudice to concurrent conflicting interests between clients, even though this Court's cases mostly deal with that situation. Rather, the presumption applies whenever counsel actively represents conflicting interests.

The Ninth Circuit below, however, held that clearly established federal law does not apply this presumption to conflicts between the attorney's own interest and the client's interests—here that Conrad's defense attorney was being prosecuted by the same agency as Conrad. Instead, the Ninth Circuit held, such a conflict claim suffers from a retroactivity problem. Therefore, the questions presented are:

Whether the presumption of prejudice applies to conflict-of-counsel claims when the defense attorney is being prosecuted by the same agency prosecuting his client? If so, is that clearly established by this Court's case law?

## **Parties to the Proceeding**

Ronnie Y. Conrad is the habeas petitioner. Rob St. Andre is warden of High Desert State Prison, California where Conrad is incarcerated. Previous case captions reflected warden T. Foss. *See Fed. R. App. P. 43(c)(2).*

## **Related Proceedings**

U.S. Court of Appeals for the Ninth Circuit

- *Conrad v. Foss*, 22-55083 (Feb. 2, 2024)

U.S. District Court for the Central District of California

- *Conrad v. Foss*, 19-cv-07497, Dockets 57, 63-64 (Dec. 21, 2021)

California Supreme Court

- *In re Ronnie Y. Conrad on Habeas Corpus*, S253693 (Petition for Writ of Habeas Corpus) (July 24, 2019)
- *People v. Conrad*, S249147 (Petition for Review) (Aug. 8, 2018)

California Court of Appeal

- *People v. Conrad*, B284790 (Third Appeal) (May 14, 2018)
- *People v. Conrad*, B266604 (Second Appeal) (May 10, 2017)
- *People v. Conrad*, B256866 (First Appeal) (Feb. 6, 2015)

Los Angeles Superior Court

- *People v. Conrad*, VA128106 (Amended Judgment Entered August 17, 2017, written Aug. 21, 2017)

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**Opinions Below**

The Ninth Circuit's unpublished memorandum is available at 2024 WL 398425 and reproduced at Pet. App. 1a-18a. The remaining state opinions and orders are reproduced at Pet. App. 71a *et seq.*

**Jurisdiction**

The Ninth Circuit issued its memorandum disposition on February 2, 2024. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

**Constitutional and Statutory  
Provisions Involved**

The Sixth Amendment to the Constitution provides that:

In all criminal prosecutions, the accused shall enjoy the right . . .  
to have the assistance of counsel for his defense.

The Fourteenth Amendment, section 1, to the Constitution provides that

No state shall . . . deprive any person of life, liberty, or property,  
without due process of law . . .

## Statement of the Case

### **A. The alleged offense**

Alerted by a report, sheriff's deputies entered a motel room in Bellflower, California and found an injured Tania Garcia tied to Ronnie Conrad, her boyfriend, in a bed. 1-ER-73.<sup>1</sup> They also found two loaded handguns, ammunition, large amounts of methamphetamine and cocaine base, digital scales, several items of drug paraphernalia, and \$926. *Id.* Two deputies and two emergency room nurses said Garcia told them that Conrad had assaulted her. 1-ER-74.

The Los Angeles County District Attorney filed charges against Conrad, as amended, for: mayhem, corporal injury to a cohabitant, possession for sale of controlled substances, torture, possession of a firearm by a felon, possession of ammunition, and various enhancements.

### **B. The alleged victim, Garcia, requests the charges be dropped.**

In the following months after Conrad's arrest, Garcia repeatedly requested the charges against Conrad be dropped. 1-ER-74. In a letter, Garcia explained that police "officers interrogated [her] for nearly four hours while simultaneously urging [her] to suggest that the drugs and firearms belonged to Ronnie despite [her] confession of ownership." 2-

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<sup>1</sup> ER" refers to the excerpts of record. These are available on the Ninth Circuit's Pacer page. *See Conrad v. Foss*, 22-55083, Docket 17 (9th Cir.).

ER-113. She “was allowed to walk away freely while Ronnie was arrested for a crime which he did not commit.” *Id.*

Garcia then met with the district attorney and others to discuss the case—seeking the charges against Conrad be dropped. 1-ER-77.

In a follow-up letter, Garcia asked “that no further action be taken in this manner as I am not now nor have I been the victim of domestic abuse or mayhem caused by my boyfriend (Ronnie), the accused.” 2-ER-115. But the district attorney ignored Garcia’s pleas and proceeded to the preliminary hearing.

### **C. Garcia exculpates Conrad at the preliminary hearing**

At the preliminary hearing, Sheriff’s deputies testified to the contents of the motel room. And one testified that Garcia told her Conrad had assaulted her.

But Garcia, for her part, told a very different story. Garcia testified that Conrad was her boyfriend and, on the day in question, the two were in a hotel room together. They had been there for about two months. 3-ER-252-253 (as ultimately read into the record).

Garcia denied receiving any injuries while she was at the motel with Conrad. 3-ER-241-242. She, rather, had been jumped by some girls in the days prior to Conrad’s arrest in the motel room. She was fighting with girls due to Garcia’s gang affiliation. 3-ER-246.

Garcia said that the guns and drugs in the room belonged to her. 3-ER-244. She received the drugs from relatives. 3-ER-250-251. The

scales, spoons, narcotics pipes and cell phones belonged to her, too. 3-ER-251-252. She denied that Conrad used any of the drugs or paraphernalia. 3-ER-251-253.

After Conrad was arrested, Garcia explained to a sheriff's deputy that she had been in a fight with girls prior that week—not Conrad. 3-ER-255-256, 268-272. She denied ever stating that the injuries to her legs were caused by Conrad burning her with an iron or that he broke her nose. 3-ER-270-272.

Garcia said she wrote letters to the district attorney asking that Conrad not be prosecuted and signed a refusal to prosecute form. 3-ER-279-280. Garcia denied that Conrad ever hit or beat her. She wanted the charges for the guns and drugs to be alleged against her because those items belonged to her, not Conrad. 3-ER-281-282.

Despite Garcia absolving Conrad of wrongdoing, the court found sufficient evidence to hold Conrad over for trial.

**D. Attorney Chad Calabria takes over representation of Conrad**

Following the preliminary hearing, Conrad retained attorney Chad Calabria to represent him—taking over for his previous court-appointed counsel.

**E. The trial court declares Garcia unavailable and admits her preliminary hearing testimony.**

After difficulty securing Garcia for trial, the prosecution argued that Garcia was unavailable as a witness for trial and sought to have

her preliminary hearing testimony admitted in her absence. 1-ER-75-82. The district attorney said she contacted Garcia's counsel, Calabria's father and law firm partner, on for assistance in locating Garcia. 1-ER-80; 3-ER-191-192. Over defense objection, the court ruled that Garcia was unavailable and allowed the State to present her preliminary hearing testimony. 3-ER-192. The court also ruled that some of Garcia's statements to the sheriff's deputy and a nurse were spontaneous and admissible. 3-ER-193, 207.

The case then proceeded to trial.

#### **F. The trial**

That trial, however, became delayed due to Calabria's "health problems." 3-ER-219. After Calabria affirmed that he did not feel well enough to proceed, the trial court continued the trial. 3-ER-270-223.

##### **1. Opening statements focus on Garcia**

After that continuance, trial began. In her opening statement, the district attorney emphasized Garcia's out-of-court statements incriminating Conrad in seeking conviction on all the charges. 3-ER-224-233.

In his opening, Calabria said that the prosecution "completely gloss[es] over the fact that Ms. Garcia told police she was beat up by girls from another rival gang, and that's how she had these injuries." 3-ER-233. He explained that "[t]he only time she told [the detective] that it was supposedly the defendant is after she kept telling her she's lying, after she threatened to arrest her, and after she took her like she

was going to take her to the station to arrest her [sic].” *Id.* Counsel concluded that “[e]verything about the whole case is Ms. Garcia saying that it wasn’t him, and trying to get them to drop this case, and despite that, despite her testimony they haven’t, and that’s why we’re here.” 3-ER-235. “Every action of hers in this whole case would suggest that he didn’t do it.” *Id.*

**2. The evidence at trial comes down, in large part, to Garcia.**

The trial came down, in large part, to Garcia. Garcia’s preliminary hearing testimony was read into the record. 3-ER-240. Two emergency room nurses testified regarding Garcia’s injuries, and one nurse said that Garcia told him her boyfriend had assaulted her. 3-ER-284-292; 295-298. The lead deputy testified that Garcia told her Conrad assaulted her and inflicted injuries, but also acknowledged when she first met Garcia, Garcia indicated that her injuries resulted from a fight with some girls. *Compare* 1-ER-82, *with* 3-ER-330. A sheriff’s detective testified that Garcia said Conrad caused an injury to her forehead and that the guns in the motel room belonged to him. 3-ER-350-351. And another deputy testified that Conrad’s fingerprints were found on one gun found in the motel room. 3-ER-372-380; 1-ER-73.

During a recess, the court received a call from a person identifying herself as Garcia. 3-ER-321-323. “She told the clerk ‘that she wanted to speak to the court to inform the court that everything

that's being said is not true and nothing happened and that it's all a lie.” 1-ER-75. The clerk told her she had to come in to testify under oath and, according to the clerk, the caller said she didn't want to “because every time she comes in people tell her she lies.” 3-ER-323.

Finally, the jury heard several recorded phone calls between Conrad and Garcia, while Conrad was in jail awaiting trial. 3-ER-385-389.

The defense did not present any evidence. 3-ER-411.

### **3. Closing arguments focus on Garcia.**

For both parties, the case came down to Garcia's statements and credibility. The prosecutor argued that Garcia had no reason to lie to the nurse treating her but that she lied at the preliminary hearing when she said Conrad did not assault her. 4-ER-467-468. She argued that Garcia also lied when she said the guns and drugs were hers, as shown by the recorded phone calls with Conrad. 4-ER-468. And she said the story that Garcia was jumped by girls on the street was not credible. 4-ER-451-457.

Calabria began the defense closing by thanking the jurors for being patient. He said: a “lot of times that you had to wait; it was all because of me and some health issues I've had.” 4-ER-471.

“Health issues” aside, Calabria argued that Garcia “told the truth when she testified at the preliminary hearing regarding what happened.” 4-ER-477. He said “there's no way in the world this case

could have been proven beyond a reasonable doubt when the victim doesn't even show up at the trial, and the only testimony we have from her is that he didn't do these things. And we have no admissions from him that he did these things, nothing." 4-ER-477-478.

Calabria complained that "the People get up here and tell you she lies at the preliminary hearing" but "they want you to believe her when it helps their case, but otherwise she's lying. I mean, they admit she's a liar but you're supposed to believe her." 4-ER-471, 474.

Calabria argued that "Mr. Conrad wasn't the one who inflicted those injuries and he shouldn't be punished for that when we don't even have an opportunity to question his alleged accuser, and the only evidence and all the actions of Ms. Garcia indicate that he wasn't responsible . . ." 4-ER-478. He emphasized Garcia's letters saying "he didn't do this." 4-ER-473. He said Garcia should have been in custody after admitting to selling drugs and possessing the guns. *Id.* He argued that "from all the facts and the testimony of Ms. Garcia you can conclude that Mr. Conrad is innocent of all the charges against her, but at a minimum the case hasn't been proven against him . . ." 4-ER-478.

But the jury disagreed, finding Conrad guilty of all charges and enhancements. 4-ER-416, 488-491.

**G. Post-trial state proceedings.**

- 1. The trial court grants Conrad's new trial motion based on the conflict of interest arising from counsel being prosecuted by the same agency prosecuting Conrad.**

Two weeks after the verdicts, two attorneys replaced Calabria as Conrad's counsel and moved for a new trial. 4-ER-496-497. They did so, because it turns out that Calabria was facing prosecution by the same entity that was prosecuting Conrad, the Los Angeles County District Attorney. 1-ER-102; 4-ER-508-509; 5-ER-642-643. New counsel discovered this fact when a colleague observed Calabria at the jail, in custody. 4-ER-538.

At a hearing on the motion for a new trial, Calabria testified that he never retained an investigator or visited the crime scene; that trial was delayed two days because of his health problems; that he has two cases in drug court; and that he was not currently allowed to practice law. 4-ER-513-514, 524-525. He said he was unaware he had a case in the system when he was trying Conrad's case and claimed he didn't have a drug case pending then because it had been resolved. 4-ER-525-526, 531. He refused to answer questions about his cases without his lawyer present. 4-ER-525.

His cases, however, were troubling. A few months before Conrad's charge, the district attorney charged Calabria in a drug case—with Calabria pleading guilty with deferred entry of judgment. But, right before entering an appearance for Conrad, Calabria was

convicted of this charge. And, around this time, a complaint was lodged against Calabria with the State Bar. 1-ER-87.

Thereafter, the district attorney charged Calabria for forgery and a probation violation. These matters remained open throughout Conrad's trial. But, only weeks after Conrad's trial concluded, Calabria pleaded guilty to forgery, and he suffered further probation problems due to testing positive for opiates and barbiturates. 1-ER-87.

The upshot of these charges was this: during Conrad's trial, Calabria was facing a criminal charge and a probation violation from the same district attorney's office prosecuting his client. 1-ER-87.

Because of those charges, the trial court analyzed a recent state court decision that found a conflict where the attorney was being prosecuted by the same district attorney's office as his client. 1-ER-103; 4-ER-528; *see Harris v. Superior Court*, 225 Cal. App. 4th 1129 (2014). Based on that decision, the trial court ordered a new trial, but clarified it was not finding actual prejudice from the conflict but did not think that was required. 4-ER-543.

## **2. The California Court of Appeal reverses and requires a showing of actual prejudice on remand**

The Court of Appeal reversed on the ground that Conrad had to prove prejudice to obtain relief on his conflict claim, i.e., prove that "it is reasonably probable the result of the proceeding would have been different" "absent counsel's deficiencies arising from the conflict." 1-

ER-105. The court remanded for the trial judge to make a prejudice determination. *Id.*

3. **The second hearing on Conrad's new trial motion, which additionally points out that Calabria's firm represented both Garcia and Conrad, and Calabria was intoxicated and unconscious during trial.**

On remand, the trial court held a second hearing on the motion for new trial, where Conrad presented further evidence. 4-ER-568-612; 5-ER-653-660. By then, Calabria had died. 4-ER-569.

Conrad added evidence that Calabria was intoxicated and unconscious during trial. As the bailiff testified:

on three or four occasions, while witnesses were on the stand Mr. Calabria was writing on a yellow legal pad, his pen stopped moving, his eyes closed and his head dropped slowly towards the table until it was three inches from the surface. Mr. Calabria remained in that position with his eyes closed for five-minute stretches. [The bailiff] opined Mr. Calabria's demeanor was consistent with being under the influence of narcotics: "His gait was slow and unsteady. His voice was weak. His speech pattern was delayed, somewhat strung out. Physically he seemed extremely frail and as if he had a lack of balance, coordination." While the trial was in progress, [The bailiff] heard that Mr. Calabria had "issues" with drug use.

1-ER-88-89 (cleaned up). The bailiff added that he had never seen another attorney under the influence in the same manner in his 15 years as a bailiff. 4-ER-588, 591.

On the issue of concurrently representing both the purported victim and Conrad, her alleged assaulter, the parties stipulated that Calabria and his father were members of the same law firm. 4-ER-598.

The trial court, however, denied the new trial motion. 4-ER-612. The court ruled that Calabria's conflicts in being prosecuted at the time of Conrad's trial, and in simultaneously representing both Garcia and Conrad, did not affect his performance at trial and did not result in actual prejudice to Conrad. *Id.*

Thereafter, Conrad filed another motion for new trial and presented evidence that Calabria told Garcia not to come to court. 4-ER-622-628. Garcia stated that she intended to testify at Conrad's trial consistent with her preliminary hearing testimony; but Calabria told her if she so testified she could be prosecuted for making false statements to law enforcement officers; and as a result of Calabria's advice, she did not appear at trial. Further, she stated, Calabria's father knew how to contact her, but never told her she was needed at trial. 1-ER-86. The trial court denied the motion to reopen the new trial hearing and sentenced Conrad to two life terms plus 20 years. 1-ER-86; 4-ER-628-630.

**4. Additional state appeals, finding a lack of prejudice, and habeas proceedings.**

Conrad appealed. The Court of Appeal found that Calabria's prosecution did create an actual conflict. 1-ER-87-88. But it found that Conrad had not shown prejudice. 1-ER-86-89. The court conditionally reversed for the trial court to determine whether Calabria was ineffective for failing to file a motion to suppress evidence and, if so, whether Conrad was prejudiced as a result. 1-ER-97, 100. The court

also remanded for resentencing but otherwise affirmed the judgment. 1-ER-98-100.

On remand, the trial court ruled that Calabria was not ineffective for failing to file a motion to suppress, denied the motion for new trial, and resentenced Conrad to 14 years plus 16 years to life. 5-ER-665, 679-680, 687-691.

In the third appeal, the Court of Appeal ruled that Conrad suffered no prejudice from counsel's failure to file a suppression motion and affirmed the judgment. 1-ER-69-70.

Thereafter, Conrad filed a petition for review in the California Supreme Court. But that court denied review. 1-ER-55. He subsequently filed a habeas corpus petition in the California Supreme Court, but again, the court summarily denied the habeas petition. 1-ER-54.

#### **H. Federal habeas proceedings**

Conrad timely filed a *pro se* federal habeas corpus petition. But the district court denied relief. *See Pet App. 19a-70a.* Conrad appealed.

On appeal, among other claims, Conrad raised a conflict claim for Calabria being prosecuted by the same district attorney's office that was prosecuting Conrad. He contended that, by actively having a conflict in this manner, that conflict triggered the presumption of prejudice under this Court's cases. *See Mickens v. Taylor*, 535 U.S. 162 (2002); *Cuyler v. Sullivan*, 446 U.S. 335 (1980).

But the Ninth Circuit found this claim barred by the anti-retroactivity rule of *Teague v. Lane*, 489 U.S. 288 (1989). Pet. App. 8a. The court explained that a “finding of a conflict of interest based on an attorney’s prosecution by the same agency prosecuting his client would create a new rule. Courts have not applied a presumption of prejudice from a conflict of interest outside the context of an attorney’s concurrent representation of multiple clients with divergent interests.” Pet. App. 9a (citing cases). Therefore, the court denied relief.

### Reasons for Granting the Writ

1. **This Court’s cases establish a presumption of prejudice anytime an attorney actively represents conflicting interests, not only during concurrent representations.**

The Sixth Amendment guarantees the assistance of counsel in all criminal prosecutions. U.S. Const. Amend. VI. The right ensures not just counsel’s assistance, but his effective assistance, which includes the right to representation free from conflicts of interest.

*Wood v. Georgia*, 450 U.S. 261, 271 (1981) (*citing Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Holloway v. Arkansas*, 435 U.S. 475, 481 (1978)).

This Court’s decisions in *Sullivan* and *Mickens* explain how to adjudicate such a conflict claim. *Sullivan* held that “a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely effected his lawyer.” *Sullivan*, 446 U.S. at 348. But unlike an ordinary ineffective-assistance-of-counsel-claim, 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.” *Id.* at 349-350. Rather, “prejudice is presumed when counsel is burdened by an actual conflict of interest.” *Strickland v. Washington*, 466 U.S. 668, 692 (1984).

The Court reiterated this standard in *Mickens*. *Mickens* explained that the presumption of prejudice applies when defense “counsel actively represented conflicting interests . . .” *Mickens v.*

*Taylor*, 535 U.S. 162, 175 (2002) (original emphasis); *see id.* at 166, 171 (reiterating this same language).

While most of the Court's decisions have dealt with concurrent representation, the Court observed that the Courts of Appeal had expansively applied this rule to, for example, situations where counsel's own financial or personal interests created the conflict. *See Mickens*, 535 U.S. at 174-175 (*citing United States v. Hearst*, 638 F.2d 1190, 1193 (9th Cir. 1980)). Although *Mickens* could have outright rejected this approach, it didn't go quite that far. Instead, the Court took the same approach it always has, requiring only the active representation of conflicting interests to establish a conflict claim:

It must be said, however, that the language of *Sullivan* itself does not clearly establish, or indeed even support, such expansive application. Until, it said, a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.

*Mickens*, 535 U.S. at 175 (cleaned up). *Mickens* went on to stress the high probability of prejudice in concurrent conflicting representation, as juxtaposed by successive representation. *Id.* at 175-176. In other words, the *active* representation of competing interests is more pernicious than the *successive* representation of conflicting interests.

The upshot of *Sullivan* and *Mickens* is simple: the presumption of prejudice applies whenever counsel actively labored under a conflict of interest that actually affected the adequacy of his representation. The Court has not limited this rule to only active representation of co-

defendants. Rather, the rule encompasses all active representation of conflicting interests. Such a conflict can therefore occur due to the active conflict of interests between the lawyer and his client.

The Ninth Circuit, however, found that the presumption was limited to situations of concurrent conflicting representation. Pet. App. 8a-9a. That finding impermissibly narrows the above rule from *Sullivan* and *Mickens* that applies the presumption whenever counsel *actively represented* conflicting interests. Therefore, the Ninth Circuit's decision contravenes *Sullivan* and *Mickens*.

**2. Lower courts are divided about whether to apply the presumption of prejudice when a defense attorney is being prosecuted by the same agency prosecuting his client.**

Notwithstanding the rule in *Sullivan* and *Mickens*, lower courts are divided about whether the presumption of prejudice applies when a defense attorney is being prosecuted by the same agency prosecuting his client—particularly within the Ninth Circuit.

The Ninth Circuit in *Campbell*, for instance, was faced with a defense attorney being prosecuted by the same agency prosecuting her client. *Campbell v. Rice*, 408 F.3d 1166, 1168-1169 (9th Cir. 2005) (en banc). Although ultimately affirming on a lack of adverse effect, the Court seemed to apply the *Sullivan* and *Mickens* analysis to the claim—i.e. the analysis requiring a presumption of prejudice. *Id.* at 1170-1171. And, as an AEDPA case, the Court could only rely on

clearly established law from this Court. Thus, it appears that the Ninth Circuit found that *Sullivan* and *Mickens* are the clearly established federal law barring conflicts based on the defense attorney being prosecuted by the same agency as his client. *But see id.* at 1170 n.2. (“*Holloway*’s mandate of automatic reversal applied only to situations where a defense counsel had objected to the multiple representation of co-defendants and the trial court did not conduct an inquiry concerning this potential conflict.”).

But below, the Ninth Circuit found that to apply *Sullivan* and *Mickens* here would create a retroactivity problem, because courts haven’t applied these cases beyond concurrent conflicting representation. Pet. App. 8a-9a. Thus, the case below creates internal conflict within the Ninth Circuit.

It also creates a split with other circuits. The Second Circuit, for example, has held that when a defense attorney is being prosecuted by the same agency as their client, an actual conflict might exist, that could trigger the presumption of prejudice. *See, e.g., Armienti v. United States*, 234 F.3d 820, 824 (2nd Cir. 2000) (remanding for an evidentiary hearing in a 28 U.S.C. § 2255 case, due to a plausible actual conflict, because the same U.S. Attorney’s office was prosecuting the defendant and defense counsel); *see also Martinez v. Kirkpatrick*, 486 F. App’x 158, 161 (2nd Cir. 2012) (same in a 28 U.S.C. § 2254 case on de novo review). The Seventh Circuit has applied *Sullivan* to a

defense attorney's prosecution by the same entity as his client. *See Thompkins v. Cohen*, 965 F.2d 330, 332 (7th Cir. 1992) (Posner, J.). And the Eleventh Circuit found an actual conflict when defendant's counsel was under investigation by the same U.S. Attorney's Office prosecuting defendant. *United States v. McLain*, 823 F.2d 1457, 1463-1464 (11th Cir. 1987).

While these cases arose in different contexts, they rely on the same clearly established federal law regarding conflicts based on a defense attorney's prosecution by the same entity prosecuting his client—*Sullivan*. Because the Ninth Circuit disagrees that *Sullivan* clearly established this rule, the circuits suffer from a split.

### **3. This type of conflict is precisely why we presume prejudice in actual conflict cases.**

Conflicts between client's interests and an attorney's own interests are universally condemned as unethical. *See, e.g.*, ABA Model Rules of Prof. Conduct 1.7(a)(2); Cal. Rules of Prof. Conduct 1.7(b). That is so, because it "breaches the duty of loyalty, perhaps the most basic of counsel's duties." *Strickland*, 466 U.S. at 692.

Not only does it breach the duty of loyalty, it creates the tendency to evade judicial review, because an attorney's own interests will only ever be fully known to them. *See* Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 Fordham L. Rev. 71, 81 (1996). Evading judicial review is precisely the policy reason behind presuming prejudice when certain conflicts occur. *See Holloway*, 435

U.S. at 490-491. As the Court put it in *Strickland*, “it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests,” therefore, given the ethical and court obligations to avoid these conflicts, “it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest.” *Strickland*, 466 U.S. at 692.

For that same reason, the presumption of prejudice should apply to active conflicts between the interests of the lawyer and the client.

#### **4. This case is a perfect vehicle to address this issue.**

Finally, this case presents a perfect vehicle to address this issue. The state court found that Calabria’s prosecution did create an actual conflict. 1-ER-87-88. That finding, to the extent it involved any factual determinations, is presumed correct. *See* 28 U.S.C. § 2254(e)(1). Therefore, the sole question presented by this case is whether the presumption of prejudice applies when the client’s interest conflicts with his attorney’s interest.

\* \* \*

The answer is yes. The Constitution entitled Conrad to counsel not laboring under a conflict of interest. And that conflict of interest carried all the same evils this Court has identified as justifying a presumption of prejudice: from pulling punches, to not calling witnesses, to not litigating issues, to even avoiding aggravating the

prosecutor. Conrad, under the Sixth Amendment, deserved better than this.

Not only did Conrad deserve better, the legal profession deserved better. The entire profession is damaged by courts condoning an attorney being prosecuted by the same agency that's prosecuting his client—much less one that's high during trial, simultaneously representing the purported victim, and falling asleep.

### **Conclusion**

For these reasons, the Court should grant Conrad's petition, vacate the Ninth Circuit's judgment, and remand.

Respectfully submitted,  
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*/s/ Dale F. Ogden*

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