No. 20-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 2020

RYAN JAMES HOYT,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

CAPITAL CASE

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Petitioner's attorney resigned from the California State Bar before Petitioner's sentencing date, and records indicate that during Petitioner's trial she had been working with both a prosecutor's office and the State Bar as a secret informant. Successor counsel sought the ex-attorney's State Bar records for material evidence of actual conflict of interest due to her informant activity, literary rights agreement, and theft of defense funds. The California Supreme Court held that no duty of inquiry was owed, and *in camera* review of the State Bar records was not allowed by state confidentiality laws, and Petitioner had not shown prejudice. *Mickens v. Taylor*, 535 U.S. 162 (2002), left open the question whether a duty of inquiry applies in personal interest conflict cases, and the Federal Circuits are deeply split as to whether prejudice should be presumed in such cases under *Cuyler v. Sullivan*, 446 U.S. 335 (1980). *See* cases, *infra,* at 12-13. The questions before this Court are:

1. Whether California's denial of materiality review violates a capital defendant's due process right of inquiry or his right to compulsory process where the trial court has notice of a conflict of interest with the attorney's personal interest, *inter alia*, to avoid criminal charges?

2. Whether California's application of the *Strickland*-prejudice standard to this conflict of interest violates a capital defendant's Sixth Amendment right to conflict-free counsel as determined by the *Cuyler*-presumption of prejudice?

PARTIES TO THE PROCEEDINGS

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

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ryan James Hoyt respectfully petitions for a writ of certiorari to review the judgment of the California Supreme Court in this capital case.

OPINIONS BELOW

The opinion of the California Supreme Court is reported at 8 Cal. 5th 892 (2020), and is attached hereto as Appendix A.

STATEMENT OF JURISDICTION

The California Supreme Court entered its decision affirming Petitioner's murder conviction and death sentence on January 30, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The petition is timely under this Court's March 19, 2020 Order extending the deadline for filing certiorari petitions to 150 days from the date of the lower court judgment.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right … to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

The Fourteenth Amendment to the Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV.

INTRODUCTION

Petitioner was sentenced to death after a trial where his attorney failed to challenge the voluntariness of his confession with available evidence of his organic brain damage, failed again to present such evidence at the penalty phase, and made a gross error in putting him on the stand. Beyond mere lack of competence, these failures may well have stemmed from a conflict of interest,

because during the trial Petitioner's trial counsel was secretly cooperating with a prosecutor's office and the State Bar, and it was very likely that counsel was doing so because those agencies had evidence that she herself had committed crimes. The conflict was brought to the attention of the trial court when successor counsel subpoenaed the ex-attorney's State Bar records. The California courts held that no materiality review of those records was warranted.

This is an important case for clarifying the role of the trial courts in protecting the Sixth Amendment right to conflict-free counsel. Here, the state court held that the trial judge had no duty to inquire into a conflict of interest involving an attorney's personal interest in avoiding prosecution, and that prejudice should not be presumed. The lower courts are split on these issues, engendering doctrinal confusion with respect to whether such a duty remains a component of due process, and whether the Sixth Amendment prophylaxis of presumed prejudice ever applies to an attorney's breaches of fiduciary duty embedded in ethical obligations such as the duties of loyalty and candor.

STATEMENT OF THE CASE

On November 21, 2001, a Santa Barbara, California jury convicted Petitioner of one count of first-degree murder in violation of California Penal Code section 187 and one count of kidnap committed with the personal use of a firearm in violation of California Penal Code sections 207 and 12022.5, respectively. The jury also found true the special circumstance allegation that the

murder was committed during the course of a kidnapping under California Penal Code section 190.2, subdivision (a)(17)(B). On November 29, 2001, the jury returned a verdict of death. Posttrial motions and formal sentencing were set for February 25, 2002.

A. Trial Counsel Resigns from the California State Bar with Charges Pending Before Petitioner's Sentencing.

On February 13, 2002, Petitioner's retained counsel, Ms. Cheri A. Owen, submitted a tender of resignation, with charges pending, from the State Bar. She resigned from the State Bar, again with charges pending, on April 17, 2002.[1] Petitioner's Appendix A, p. 92. On February 27, 2002, the trial court stated, "apparently Miss Owen, for purposes which are not relevant,[2] is not actively practicing, or is in the process of not practicing, Mr. Crouter,[3] who is also of record in the case, will be representing Mr. Hoyt." (Pet. App. M, p. 202.) New

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[1] *See also* State Bar of California, Attorney Licensee Profile of Cheri Ann Owen #201893, http://members.calbar.ca.gov/fal/Licensee/Detail/201893.

[2] The trial court was informed of Ms. Owen's resignation off-the-record, and no clue appears as to what the court was told of her "purposes which are not relevant." Pet. App. M, p. 202. Evidently, she withdrew from the representation without Petitioner's written consent or entry of an Order. *Cf.* Cal. Code Civ. Proc. § 284.

[3] Mr. Crouter's presence did not moot the conflict issue. He was appointed to the case only five days before trial and was told (incorrectly) by Ms. Owen that no continuance could be had. He had no prior capital experience (nor, for that matter, did Ms. Owen). Pet. App. F, pp. 136-140. The court ultimately granted Petitioner's request to substitute Mr. Crouter out as attorney-of-record due to a "breakdown in communication."

counsel Robert Sanger was obtained instead of Mr. Crouter, and sentencing was continued until February 7, 2003 to entertain his motion for new trial.

B. Successor Counsel's Subpoena for Ms. Owen's State Bar Records.

On July 18, 2002, Petitioner served a subpoena duces tecum on the California State Bar requesting production of: "Any and all documents pertaining to attorney CHERI A. OWEN, who was admitted to the California State Bar on June 9, 1999, with state bar number 201893. The documents should include but are not limited to all notes, reports, complaints and investigative notes and reports." Pet. App. L, p. 194. Petitioner requested *in camera* review of the return on his subpoena, but the State Bar objected to making any production whatsoever on grounds of privilege under California Business and Professions Code sections 6086.1, subdivision (b), 6094.[4] A hearing was set for October 8, 2002.

In September 2002, the California State Bar Journal published an article which named Ms. Owen as one of eleven California lawyers whom the Bar's newly-constituted "Fast Track Team" had investigated or filed charges against because it considered them "a serious threat to the public." The article noted that Ms. "Sheri" (sic) Owen was one of three lawyers who handled hundreds of clients whose relatives "paid whatever the market could bear — thousands [of dollars] in some cases," and most of the time the attorney did "absolutely nothing" to represent the clients competently. Nancy McCarthy, *Fast Track: 'Bad Apples'*

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[4] The trial court held an *ex parte* conference with the State Bar counsel, but the transcript of that proceeding was lost.

Now Face Fast Discipline, CALIFORNIA BAR JOURNAL (Sept. 2002), http://archive.calbar.ca.gov/archive/Archive.aspx?articleId=35791&categoryId=35056&month=9&year=2002; *see also* Habeas Corpus Resource Center (hereinafter HCRC) Exhibit 208 in Support of Petition for Writ Of Habeas Corpus (Excerpts of Documents Produced by the State Bar of California Filed under Seal), at 5835 (State Bar senior counsel characterized Ms. Owen's misconduct as "especially egregious").

1. Informant Activity.

On October 7, 2002, the day before the hearing, Ms. Owen (through counsel) filed her own motion to quash. There, she made the remarkable claim that the subpoena should be quashed because "production of the records would prejudice ongoing investigations by the State Bar and the Los Angeles County District Attorney, and might jeopardize [her] physical safety." Pet. App. I, p. 160. She asserted that she had been "integrally involved for several months in assisting [both the State Bar and the Los Angeles prosecutor]," and was continuing to assist with "valuable information in both investigations." Pet. App. I, p. 160. This was the first revelation and the only public mention of Ms. Owen's informant activity during Petitioner's capital trial.

Petitioner's counsel advanced three other bases upon which he believed *in camera* review would yield material evidence of an actual conflict and deficient representation, as set out below.

2. Literary Rights Agreement.

Petitioner presented writings showing that Ms. Owen had secured "exclusive literary rights to [Petitioner's] life-story" and a waiver of attorney-client privilege so that Ms. Owen could speak or write freely about his case. Pet. App. K, pp. 189-190. The literary rights agreement was dated February 12, 2002, the day before Ms. Owen resigned from the Bar. Petitioner sought the State Bar records to shed light on the effective date and circumstances of the contract, and argued that the contract, dated one day before Ms. Owen's resignation from practice, was itself a significant breach of trust and the duty of candor.

3. Theft of Defense Funds.

Petitioner presented evidence that Ms. Owen stole at least $20,000 in Santa Barbara County funds which were set aside for his trial defense. George Zeliff, a trial investigator, swore in an affidavit that he and fellow investigator Denny Davis diverted case funds at Ms. Owen's direction to pay for her debts on other cases, in violation of the funding statute, California Penal Code section 987.9. Pet. App. K, pp. 191-192. Ms. Owen obtained a further disbursement of funds from the trial court two days after her resignation from the Bar, and failed to account for $65,000 in Penal Code section 987.9 monies. Petitioner sought the State Bar records to shed light on the extent of her theft, and reasons for it, to show the potential detriment to his defense.

4. Illness and Impairment.

Petitioner presented evidence that Ms. Owen swore in a malpractice case answer that she was too ill to meet a filing deadline one week before she took Petitioner's case in late August, 2000. He noted Ms. Owen's absence from one day of jury voir dire and another day of trial testimony when she met with her own attorney, at a time when she had up to 50 complaints filed against her. He sought the State Bar records to establish the competing demands on Ms. Owen's time and attention, and the disincentives she faced to mounting his defense. He also sought evidence that Ms. Owen had convinced other ill-prepared clients to take the stand as a means of covering up her own derelictions under the guise of "invited error." Pet. App. J, pp. 165-173; Pet. App. K, pp. 174-188; *see also* Pet. App. E, pp. 120-133. In sum, Ms. Owen was engulfed in seeking to prevent her own criminal prosecution and loss of livelihood in losing her bar license to practice.

C. Trial court denies Petitioner's request to review the State Bar records for materiality and quashes his subpoena.

At the October 8, 2002 hearing, the trial court had this colloquy with Petitioner's counsel:

> [Counsel]: […] I mean, this is a travesty the way this thing was handled. And we're finding –
>
> The Court: If you know that it's a travesty, Mr. Sanger, you don't need this information. Obviously, you know what your problems are.
>
> [. . .]

> [Counsel]: [. . .] We're not asking to use innuendo, rumor, or anything else, we're asking to have the Court, first of all, look at the things *in camera* and determine which of them pertain to the time period and the conduct of counsel.
>
> [. . .]
>
> The Court: Well, as far as I'm concerned the issue of whether or not Miss Owen competently performed her duties in relating to Mr. Hoyt is not going to be – the issue is best framed by looking at what Miss Owen did or did not do in connection with this case.

Pet. App. H, pp. 148-153. For "good cause" shown, the trial court denied Petitioner's motion for *in camera* materiality review. Pet. App. G, pp. 141-142.

On February 7, 2003, the trial court denied Petitioner's motion for new trial based on Ms. Owen's conflict of interest and deficient representation, and imposed the death sentence. Pet. App. D, pp. 109-111, 119.

D. Petitioner's Direct Appeal.

On February 19, 2009, during the state appeal, the trial court denied Petitioner's renewed request for *in camera* review of the State Bar records. On April 13, 2009, the trial court ordered the State Bar to preserve the records. Pet. App. A, p. 93, n.13. In March 2017, the State Bar complied with a subpoena for Ms. Owen's records issued by HCRC, which represents Petitioner in separate state habeas corpus proceedings, and produced over 12,000 pages of responsive documents to HCRC.

HCRC obtained the State Bar records subject to a protective order which limited dissemination of the records to filing under seal with the California

Supreme Court and service on Respondent, California Attorney General's Office, and excluded Petitioner's appellate counsel from access. On February 7, 2019, HCRC filed a redacted pleading in the state habeas proceeding which included 41-redacted pages from the State Bar records which support HCRC's separate habeas allegation that Ms. Owen's representation was unconstitutionally burdened by conflicting interests.[5]

On May 24, 2019, Petitioner applied to the California Supreme Court for an order under authority of *Gardner v. Florida*, 430 U.S. 349 (1977) partially unsealing HCRC Exhibit 208 and related briefing for purposes of his appeal. On November 12, 2019, the California Supreme Court denied the application. *People v. Hoyt*, 2019 Cal. LEXIS 8534 (November 12, 2019); Pet. App. B, p. 104.

On January 30, 2020, the California Supreme Court affirmed Petitioner's conviction and death sentence on appeal. Pet. App. A, pp. 1-103. It found no error in the trial court's decision on privilege and relevance grounds to quash Petitioner's subpoena for Ms. Owen's records. The California Supreme Court denied Petitioner's claim on the basis that "looking at a complaint made by someone else would have no bearing on the adequacy of her performance in defendant's case." Pet. App. A, p. 93. Moreover, "numerous provisions of law

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[5] On April 24, 2019, the California Supreme Court accepted under seal HCRC Exhibit 208 (Volumes XIV-XVI), the pertinent excerpts of Ms. Owen's State Bar records, to which the redactions relate. On April 25, 2019, HCRC served Respondent with Exhibit 208 and HCRC's unredacted pleading. Petitioner's habeas corpus petition was filed in the California Supreme Court on March 24, 2014 and remains pending in that court since the reply to the informal response was filed on March 29, 2016.

establish the privileged and confidential status of the information defendant sought from the State Bar[,]" including California Business and Professions Code sections 6086.1, subdivision (b), and 6094, which provide that State Bar disciplinary investigations are confidential until charges are filed, and complaints regarding attorney misconduct are privileged. Pet. App. A, p. 93. The Court distinguished *Pennsylvania v. Ritchie*, 480 U.S. 39, 57-58 (1987) on the ground that complaints made by others about Ms. Owen's performance as their lawyer were not relevant to Petitioner's case or whether she committed prejudicial errors in his trial representation. Pet. App. A, p. 94.

The state court found, in pertinent part, that Petitioner had shown only a theoretical potential for conflict of interest in the literary rights agreement which Ms. Owen and he executed in February 2002. "[N]othing in the record shows that the parties had been operating under any comparable agreement previously, while [Ms.] Owen was still representing defendant at trial." Pet. App. A, p. 102. Thus, "the record neither shows that [Ms.] Owen labored under a potential conflict of interest during the course of her representation of defendant, nor shows that 'the conflict of interest . . . resulted in obvious prejudice' to defendant's case[.]" Pet. App. A, p. 102-103.

Lastly, the state court found no abuse of discretion in the trial court's denial of Petitioner's conflict of interest claim that Ms. Owen was acting as an informant for the Los Angeles District Attorney and diverted investigation funds to satisfy other obligations rather than investigate his case. "The trial court

rejected these arguments on the grounds that the claims were unsupported by the record and, even if true, would not have established that defendant was prejudiced by [Ms.] Owen's deficient performance." Pet. App. A, p. 103.

REASONS FOR GRANTING THE PETITION

The California Supreme Court held that Petitioner had no right to *in camera* review of his trial attorney's State Bar records to determine whether it contains material evidence that the ex-attorney's service as a prosecutor's informant while under criminal investigation, and resignation from the Bar with charges pending, and/or her literary rights agreement and diversion of case funds, constituted an actual conflict of interest. That ruling merits review by this Court. The state supreme court's approach conflicts with this Court's due process duty-of-inquiry jurisprudence as developed in *Cuyler v. Sullivan*, 446 U.S. 335 (1980) and *Wood v. Georgia*, 450 U.S. 261 (1981), and the right to materiality review which this Court recognized in *Pennsylvania v. Ritchie*, 480 U.S. 39.

The state court's decision also merits review by this Court to resolve an important question left open in *Mickens v. Taylor*, 535 U.S. 162 (2002), as to which there is a deep split among the Federal Circuits: whether prejudice should be presumed upon a showing of actual conflict with the attorney's personal interest in avoiding prosecution. *Compare United States v. Stitt*, 441 F.3d 297, 303-05 (4th Cir. 2006) (*Cuyler* applies); *Reyes-Vejerano v. United States*, 276 F.3d 94, 99 (1st Cir.), *cert. denied*, 537 U.S. 985 (2002); *United States v. Levy*, 25

F.3d 146 (2d Cir. 1994); *United States v. McLain*, 823 F.2d 1457, 1463-64 (11th Cir. 1987); *Thompkins v. Cohen*, 965 F.2d 330, 332 (7th Cir. 1992) *with United States v. Walter-Eze*, 869 F.3d 891 (9th Cir. 2017) (*Strickland v. Washington*, 466 U.S. 668 (1984) applies); *Schwab v. Crosby*, 451 F.3d 1308 (11th Cir. 2006); *United States v. Newell,* 315 F.3d 510, 516 (5th Cir. 2002); *Gibson v. State*, 133 N.E.3d 673, 698 (Ind. 2019). The split highlights an area of doctrinal confusion with respect to how lower courts categorize conflicts of such magnitude that prejudice a petitioner's Sixth Amendment right to counsel and ability to receive a fair trial should be presumed. *See, e.g.*, *United States v. Walter-Eze,* 869 F.3d at 905-06 (Ninth Circuit applies *Cuyler*-presumption only if the precise moment or extent to which counsel's performance was impaired is "impossible to pinpoint"). This Court should resolve that confusion for the benefit of the lower courts, the legal profession, and the public at large.

Rule 10(c) of the Rules of the Supreme Court provides that this Court may choose to review a decision of a state court of last resort when that court has "decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." The state court's decision warrants this Court's review under both provisions of Rule 10(c).

An important and oft-repeated principle of American law is that "the state trial on the merits, whether in a civil or criminal case, is the 'main event,' and not simply a 'tryout on the road' to appellate review." *Freytag v. Commissioner*, 501

U.S. 868, 895 (1991) (Scalia, J., concurring in part and concurring in judgment); *see also McFarland v. Scott*, 512 U.S. 849, 859 (1994) (internal quotation marks omitted); *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977) (Rehnquist, J.). This conflict issue surfaced in the trial court in 2002, during the "main event," when Petitioner's attorney resigned from practice with charges pending. It was therefore incumbent upon the trial court to meet its duty of inquiry at that crucial time when Petitioner's rights were being determined. Habeas consideration at some time in the future and under collateral standards of review is neither adequate nor effective to safeguard Petitioner's trial rights.

I. CALIFORNIA'S DENIAL OF MATERIALITY REVIEW CONFLICTS WITH THIS COURT'S JURISPRUDENCE RECOGNIZING PETITIONER'S RIGHT TO INQUIRY WHERE THE TRIAL COURT HAS NOTICE OF A CONFLICT OF INTEREST, AND HIS RIGHT TO MATERIALITY REVIEW.

Conflicts of interest for attorneys representing criminal defendants are generally grouped into three categories: (1) concurrent representation of clients with conflicting interests; (2) successive representation of clients with conflicting interests; and (3) conflicts that pit the attorney's personal interests against those of the defendant.[6] *See* Mark W. Shiner, "*Conflicts of Interest Challenges Post* Mickens v. Taylor*: Redefining the Defendant's Burden in Concurrent, Successive, and Personal Interest Conflicts*," 60 WASH. & LEE L. REV. 965, 971-72 (2003). The third type of conflict, a personal interest conflict, is at issue in this

[6] The crux of the issue is the degree of risk to the attorney's undivided loyalty to her client in any particular conflict, which defies easy classification.

case. Within that type, the situation of a criminal defendant's lawyer herself being under criminal investigation has, regrettably, occurred before. *See, e.g.*, *Thompkins v. Cohen*, 965 F.2d at 332; *United States v. Balzano*, 916 F.2d 1273, 1292-93 (7th Cir. 1990); *United States v. Levine*, 794 F.2d 1203 (7th Cir. 1986); *United States v. DeFalco*, 644 F.2d 132 (3d Cir. 1979) (federal mail fraud charges create 'inherent emotional and psychological barriers' to counsel's ability to compete 'vigorously with the government'). Rarer, perhaps, and more extreme no doubt, is the case of the defense lawyer who provides "significant cooperation" in secret to a prosecutor's office while defending a capital case. A secret conflict like that is more pernicious than one which is open because the attorney also violates a fundamental duty of candor to her client.

A trial judge who knows or reasonably should know that a conflict of interest exists on the part of a criminal defendant's counsel — definitely with respect to counsel's concurrent representation of competing interests, and presumably with respect to a conflict as serious as this — is under the duty to inquire into the conflict, and assess its threat to the fairness of the proceeding. *See Wheat v. United States*, 486 U.S. 153, 160 (1988); *Wood v. Georgia*, 450 U.S. 261; *Cuyler v. Sullivan*, 446 U.S. at 347-48. In *Mickens*, this Court noted that, while "Courts of Appeals [] have applied [*Cuyler v.*] *Sullivan* 'unblinkingly' to 'all kinds of alleged attorney ethical conflicts,'" the extent to which there is a duty to inquire with respect to conflicts arising from circumstances other than

concurrent representation remains "an open question." *Mickens*, 535 U.S. at 174-76. This issue merits review by this Court.

As *Cuyler, Wood,* and *Mickens* illustrate, there are compelling reasons why the *Cuyler/Wood*-duty of inquiry should apply when the trial court is aware of a conflict of interest stemming from the attorney's personal interest in cooperating with a prosecutor's office to avoid criminal prosecution or conviction and losing her license due to multiple serious bar investigations. In *Cuyler*, 446 U.S. at 348, a multiple representation case on federal habeas review, this Court held that, under the Sixth Amendment, "a defendant who objects [] must have the opportunity to show that potential conflicts impermissibly imperil his right to a fair trial. But unless the trial court fails to afford such an opportunity, a reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance of counsel." *Id.* at 348-49. In *Wood*, 450 U.S. 261, the attorney was hired and paid for by a third party adult bookstore owner whose own interests may have influenced the attorney's decision not to contest the client-employees' obscenity fines. On certiorari review of the state court conviction, this Court took up the Fourteenth Amendment due process issue *sua sponte*, and remanded the matter so the trial court could determine whether the conflict of interest "actually existed," *id.* at 273-74, which *Mickens* clarified meant "actually affected the adequacy of the representation." *Cuyler*, 446 U.S. at 349-50. The salient issue in *Wood* was that this Court could not tell from the record whether counsel was

influenced in his basic strategic decisions by the interests of the employer who hired him. Therefore, a hearing was needed. *Wood*, 450 U.S. at 272.

Similarly, here, the clarion fact before the trial court was that Ms. Owen was "integrally involved for several months" with the Los Angeles prosecutor and the State Bar, providing "valuable information" by inference to avoid or lessen her own criminal jeopardy. *See* Pet. App. I, p. 160. That inference is unmistakable from Ms. Owen's assertions (as a basis to quash), *inter alia*, that she was assisting in ongoing investigations of the State Bar, relating to attorneys accused of misconduct, and the Los Angeles County District Attorney's Office, relating to accusations against non-attorneys[.] [and] has cooperated fully in these matters and is continuing in assist in these investigations." Pet. App. I, p. 160.

While actual conflict cannot be conclusively presumed, *see Mickens*, 535 U.S. at 172-73, Ms. Owen's activities are facially incompatible with the foundational duties of loyalty and honesty which any attorney — not least, a capital trial defense attorney — owes her client.[7] Secret cooperation with a prosecutor creates an arm-in-arm relationship where the client reasonably

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[7] "A breach of the duty of loyalty is not only worse than other ethical breaches because it is a breach of the most fundamental fiduciary duty owed to a client, but it is also a substantively different type of breach because it affects—and it does so surreptitiously—every decision in the representation. . . . [it] can blunt a lawyer's advocacy, undermine a lawyer's independent professional judgment, inhibit a lawyer's creativity, and compromise a lawyer's zeal." Lawrence Fox, "*The Gang of Thirty-Three: Taking the Wrecking Ball to Client Loyalty*," 121 YALE L.J. Online 567 (2012), http://yalelawjournal.org/forum/the-gang-of-thirty-three-taking-the-wrecking-ball-to-client-loyalty.

expects, and is deceived by believing exists, an arm's-length one. To be in league with a prosecutor skews the defense attorney's interests in ways which are difficult, if not impossible, for the client to document without materiality review. "[The lawyer's] principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the government and to oppose it in adversary litigation." *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979).

The trial record shows that Ms. Owen did not proactively apprise the court of her secret cooperation with a prosecutor's office and the State Bar with respect to the disciplinary charges pending against her, and that Petitioner also was not told. The literary rights agreement and waiver of attorney-client privilege Ms. Owen obtained under the implied false pretense that she would continue to represent Petitioner were in further breach of trust and her duty of candor.

Presented with Ms. Owen's belated disclosure of her double identity as well as her self-interested literary rights agreement, and theft of defense funds, the trial court could have no way — other than by recourse to the subpoenaed State Bar records — to know the extent of her conflict, her deception, and her impairment and how it led to her refraining from taking certain actions in the defense of Petitioner due to her "struggle to serve two masters." *Glasser v. United*

States, 315 U.S. 60, 75 (1942).[8] Like a conflict due to joint representation, the actual conflict here may well lie in what Ms. Owen would find herself "compelled to refrain from doing," given the inherent uncertainties of her own liberty and livelihood. *Holloway v. Arkansas*, 435 U.S. 475, 489-490 (1978).

The California courts erred by viewing Petitioner's subpoena through the prism of ineffective representation under *Strickland*, rather than conflict of interest inquiry due process under *Cuyler* and *Wood*. Due process entitles Petitioner to meaningful judicial inquiry where the risk of actual conflict in this situation was evident, and remand for such inquiry is required by the Fourteenth Amendment. *Wood*, 450 U.S. at 272; M*ickens*, 535 U.S. at 171-72. HCRC's 41-page redacted submission (one snippet of which was State Bar counsel's comment that Ms. Owen's conduct was "especially egregious") underscores the reality that Ms. Owen's State Bar records *do* contain material evidence of her actual conflict of interest. The California courts erred by refusing *in camera* review of that evidence in connection with Petitioner's new trial motion and appeal. *Cf. Mickens*, 535 U.S. at 177 (Kennedy, J., concurring) (deference due district court's credibility judgment made *after* hearing testimony of counsel and other witnesses).

In *Pennsylvania v. Ritchie*, 480 U.S. 39, this Court held that due process requires disclosure of statutorily-privileged information which is material to the

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[8] Consistent with due process, the trial court could not meet its duty of inquiry by unreported *ex parte* conference with the State Bar counsel. *See Gardner v. Florida*, 430 U.S. 349, 361-62 (1977).

defense and would warrant a new trial. The issue was the reviewability of a victim's confidential child protective services records for use in generating possible witness leads for the defense at trial on sex abuse charges. *Id.* at 44. As in *Wood*, under *Ritchie*, where materiality cannot be determined from the trial record, due process requires a remand to the trial court to conduct *in camera* materiality review.

In *United States v. Zolin*, 491 U.S. 554, 572 (1989), this Court held that the proponent of *in camera* review must show a "'factual basis adequate to support a good faith belief by a reasonable person,' (citation omitted), that such review of the materials *may* reveal evidence to establish the claim that [the crime-fraud exception to attorney-client privilege under Federal Rules of Evidence 104(a), 501] applies" (emphasis supplied). Under the *Ritchie* threshold, the State Bar's notes, reports, and complaints about Ms. Owen *may* (to apply *Zolin*) – and evidently *do*[9] - contain material evidence that her conflict of interest adversely affected the representation. The records may clarify, for instance, Ms. Owen's mental or physical illnesses and debt, in the midst of which – and despite her lack of capital experience – Ms. Owen took on Petitioner's case; and when and why Ms. Owen engendered over 50 complaints. The records also may explain why Ms. Owen put Petitioner on the stand at the guilt phase, if, for example, this tactic of "invited error" was her "*modus operandi*" in other cases; or would increase the

[9] *Cf.* HCRC Exh. 208 at 5835 (State Bar senior counsel characterized Ms. Owen's misconduct as "especially egregious").

"literary value" of the rights she purported to acquire; or, why she did not challenge the voluntariness of his confession with available organic brain syndrome evidence; or present such evidence in mitigation at penalty phase. The records may shed light on whether the two prosecuting agencies knew of Ms. Owen's activities with the other, and the course of her cooperation in breach of her duties of loyalty and candor to Petitioner. Lastly, the records of Ms. Owen's "especially egregious" misconduct in other cases may rebut the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. In these respects, the State Bar records may be – or may lead to - material evidence of Ms. Owen's actual conflict and deficient representation. By discounting these well-founded theories of materiality in the face of hypothesized "plausible" tactical reasons for counsel's acts and omissions, the California court ignored this Court's teaching that "the true strength of the prosecution's proof cannot be assessed without considering challenges to the reliability of the prosecution's evidence." *Holmes v. South Carolina*, 547 U.S. 319, 330 (2006).

II. CALIFORNIA STATE LAW PRIVILEGES MUST YIELD TO PETITIONER'S DUE PROCESS AND COMPULSORY PROCESS RIGHT TO MATERIAL EVIDENCE WHICH UNDERMINES THE FAIRNESS OF TRIAL.

The California Supreme Court cited the existence of "numerous provisions of law [which] establish the privileged and confidential status of the information [Petitioner] sought from the State Bar." Pet. App. A, p. 93. But, under *Ritchie*,

480 U.S. at 57-58, conditional privileges must yield to Petitioner's due process and compulsory process right to materiality review. The California courts' analysis exalted state law privilege over fundamental constitutional rights.[10] This issue merits this Court's review.

California Business and Professions Code sections 6044.5 and 6086.1, subdivisions (b)(1)-(2), the statutes cited by the California Supreme Court (Pet. App. A, p. 93), establish privileges which may be waived by the Chief Trial Counsel or the President of the State Bar "when an investigation [] concerns alleged misconduct which may subject a member to criminal prosecution for [] any lesser crime committed during the course of the practice of law, or in any manner that the client of the member was a victim."[11] Under Rule 2302(d) of the Rules of Procedure of the State Bar of California, those same officers may also waive confidentiality "when the necessity for disclosing information outweighs the necessity for preserving confidentiality" under circumstances including harm to a client, the public, or the administration of justice. In deciding waiver, the

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[10] In *Ritchie*, 480 U.S. at 56, this Court analyzed the issue under the Fourteenth Amendment Due Process Clause, and did not decide whether or how the guarantees of the Sixth Amendment Compulsory Process Clause differ from those of the Fourteenth Amendment. Here, Petitioner's right to information material to the fairness of the trial and his right to conflict-free counsel implicates both provisions of the United States Constitution.

[11] Had the State Bar issued a notice to show cause on its pending charges prior to Ms. Owen's resignation, the records would have been public. *See* Cal. Bus. & Prof. Code § 6086.1(a)(1). Continued secrecy may have been one of the perquisites of Ms. Owen's "significant cooperation" with the State Bar and the Los Angeles County prosecutor, in dereliction of Petitioner's due process rights.

State Bar is charged with considering, *inter alia*, the gravity and number of allegations against the member, which in the case of Ms. Owen were exceedingly large. And, the State Bar may disclose "documents and information concerning disciplinary inquiries, complaints and investigations [] to other governmental agencies responsible for the enforcement of civil or criminal laws" or "to any other person or entity to the extent that such disclosure is authorized by [] any other law." Cal. State Bar R. Proc. 2302(4)(e)(4), (9).

Under *Ritchie*, *in camera* review furthers *both* Petitioner's due process right to material evidence *and* the state's conditional privilege to protect the confidentiality of those involved in State Bar investigations. Petitioner is entitled to such review to determine whether Ms. Owen's State Bar records contain or would lead to information that shows an actual conflict of interest, or otherwise might have changed the new trial motion outcome. *Ritchie*, 480 U.S. at 58.

III. HAVING DENIED MATERIALITY REVIEW, CALIFORNIA'S ASSERTION THAT PETITIONER'S CONFLICT OF INTEREST CLAIM WAS "UNSUPPORTED BY THE RECORD" AND "INADEQUATE TO SHOW PREJUDICE" UNDER *STRICKLAND* VIOLATES DUE PROCESS AND *CUYLER*'S PRESUMPTION OF PREJUDICE.

The California Supreme Court denied Petitioner's conflict of interest claim on appeal in one-sentence, holding that it was both "unsupported by the record" and, even if true, would not establish prejudice under *Strickland*. Pet. App. A at p. 103. The state court's short-shrift decision conflicts with the *Cuyler*-standard

of presumed-prejudice, which is the appropriate constitutional standard under the circumstances of this case.

Under *Cuyler*, 446 U.S. at 349-50, "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." The rationale behind *Cuyler*'s presumption-of-prejudice rule is (1) the high probability of prejudice arising from the conflict; and (2) the difficulty of proving that prejudice. *See Mickens*, 535 U.S. at 175. *Mickens* clarified that "an actual conflict is defined by its effect on counsel" and reserved the extension of the presumed prejudice rule to conflicts outside of joint representation. *Id.* at 172 n.5, 174-75. The presumed prejudice rule, as Justice Scalia wrote, was not intended "to enforce the Canons of Legal Ethics, but to apply needed prophylaxis in situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel." *Id.* at 176. But, that phrase was surely not intended to mean that the Canons of Legal Ethics have no application to Sixth Amendment analysis.

Indeed, the prophylaxis of *Cuyler*'s presumed-prejudice standard is needed most when a capital defense attorney who is under criminal investigation leads a double life by cooperating with a prosecutor during the client's pretrial and trial proceedings. The Federal Circuit Courts of Appeals are split as to whether prejudice should be presumed in such a case or must be proven (as the Court held here) under *Strickland*. *Compare United States v. Stitt*, 441 F.3d at 303-05

(*Cuyler* applies to counsel's duty of loyalty breach in foregoing expert to avoid scrutiny of his own fees); *Reyes-Vejerano v. United States*, 276 F.3d at 99 (*Cuyler* applies but not met where it was unclear whether counsel was being investigated by law enforcement, or was aware of it)*, cert. denied*, 537 U.S. 985 (2002); *United States v. Levy*, 25 F.3d 146 (*Cuyler* applies to counsel's representation of co-conspirator and suspected aiding of that client's escape from the country, and his own prosecution on unrelated criminal charges); *United States v. McLain*, 823 F.2d at 1463-64 (*Cuyler* applies to counsel's failure to inform client that counsel was under investigation by same prosecutor which fact might affect his judgment); *Thompkins v. Cohen*, 965 F.2d at 332 (*Cuyler* applies to counsel who was immunized by the same prosecutor in exchange for cooperation) *with United States v. Walter-Eze*, 869 F.3d 891 (*Strickland* applies and not met where counsel had to choose between being fined and potentially facing a bar investigation or going to trial for which he was unprepared); *Schwab v. Crosby*, 451 F.3d 1308 (*Strickland* applies and not met where counsel refused to cross-examine members of his own office, but testimony related to a collateral matter); *United States v. Newell*, 315 F.3d at 516 (*Strickland* applies to all attorney-client conflicts other than multiple representation, their range being "virtually limitless"); *Gibson v. State*, 133 N.E.3d at 698 (*Strickland* applies and not met where public defender counsel was also responsible for apportioning public funds to other cases). This Court should review the California Supreme Court's decision in this case to decide whether, after *Mickens*, the *Cuyler*

standard applies to this case on remand. Serious breaches of the Canons of Legal Ethics in furtherance of the attorney's personal interests warrant that "needed prophylaxis" where, as here, counsel's disloyalty and dishonesty may have tainted her every decision, but hinder Petitioner from showing probable effect upon the outcome of trial.

Rugiero v. United States, 330 F. Supp. 2d 900 (E.D. Mich. 2004) illustrates the need for such prophylaxis. There, counsel LeRene was under federal investigation during pretrial and trial proceedings, and was indicted between petitioner's trial and sentencing. Here, Ms. Owen resigned from practice with charges pending in that same interval and revealed that she had led a double life by informing to a prosecutor during trial. In *Rugiero*, the district court applied the *Cuyler*-standard because of the intrinsic nature of the conflict, where counsel went to trial with his own freedom and livelihood in the balance. *Rugiero*, 330 F. Supp. 2d at 906. The court identified the source of the actual conflict as the inherent uncertainty of the attorney's predicament. *See also Taylor v. United States*, 985 F.2d 844, 846 (6th Cir. 1993); *United States v. Levy*, 25 F.3d at 156; *Thompkins v. Cohen*, 965 F.2d at 332; *United States v. McLain*, 823 F.2d at 1463-64.

The rationale behind *Cuyler*'s presumption-of-prejudice rule is (1) the high probability of prejudice arising from the conflict; and (2) the difficulty of proving that prejudice. *See Mickens*, 535 U.S. at 175. When an attorney is the subject of a criminal investigation, there is a high probability of prejudice to the client as the

result of the attorney's self-serving bias in protecting her own liberty and livelihood. Yet, such prejudice is difficult to prove because the client can be harmed by the attorney's actions or inactions in ways that are known only to the attorney. Like attorney LaRene, Ms. Owen "was faced with an uncertain situation with respect to [her] own criminal liability, *i.e.*, not knowing when, how, or if, the Government was going to prosecute [her]." *Rugiero*, 330 F. Supp. 2d at 907. But unlike *Rugiero*, the trial court's failure to make the *Cuyler/Wood*-mandated inquiry meant that Petitioner lacked material evidence to show actual conflict. Essentially, the California courts held that Petitioner failed to show evidence of an actual conflict, while denying Petitioner review of *the* evidence from which he could make such a showing. This was a denial of due process.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: May 12, 2020

Respectfully submitted,

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