No. 19-8499

In The
Supreme Court of the United States

RYAN JAMES HOYT,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

BRIEF OF *AMICI CURIAE* THE ETHICS BUREAU AT YALE AND LEGAL ETHICS, CONSTITUTIONAL LAW, AND CRIMINAL JUSTICE PROFESSORS IN SUPPORT OF PETITIONER

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CONSENT TO FILE AS *AMICI CURIAE*

Pursuant to Rule 37, this brief is filed with the consent of the parties. The brief is submitted by the undersigned law professors and the Ethics Bureau at Yale in support of Petitioner. Letters of consent from both parties to this appeal have been lodged with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

INTEREST OF *AMICI CURIAE*

This brief is filed on behalf of the four undersigned law professors and the Ethics Bureau at Yale.[1] The individuals are teachers at law schools across the country who have taught and written about professional responsibility and criminal procedure.

Amici have no direct interest in the outcome of this litigation. Because this case implicates a lawyer's obligations to faithfully defend her client during the course of representation, *Amici* believe these volunteered views might assist the Court in resolving the important issues presented.

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[1] The Ethics Bureau at Yale is a student clinic of the Yale Law School. The views expressed herein are not necessarily those of Yale University or Yale Law School. This brief was not written in whole or in part by counsel for any party, and no person or entity other than *Amici Curiae* has made a monetary contribution to the preparation and submission of this brief.

Erwin Chemerinsky is the Dean and Jesse H. Choper Distinguished Professor of Law at Berkeley Law at the University of California. He is a nationally prominent expert on constitutional law and civil liberties and is the author of eleven books, including leading casebooks and treatises about constitutional law, criminal procedure, and federal jurisdiction. He frequently argues cases before the nation's highest courts and also serves as a commentator on legal issues for national and local media.

Lawrence Fox is the George W. and Sadella D. Crawford Visiting Lecturer in Law at Yale Law School. He is the former chairman of the ABA Standing Committee on Ethics and Professional Responsibility and the former chairman of the ABA's Section of Litigation. He has lectured at more than thirty-five law schools and is the author and coauthor of seven books on professional responsibility and dozens of articles on many topics related to both ethics and litigation.

Susan Martyn is a Distinguished University Professor and the John. W. Stoepler Professor of Law and Values Emeritus at the University of Toledo College of Law. She was an advisor to the American Law Institute's Restatement (Third) of the Law Governing Lawyers and served on the ABA's Standing Committee on Ethics and Professional Responsibility and the ABA's Ethics 2000 Commission. She has published numerous articles and seven books about legal ethics.

Robert Weisberg is the Edwin E. Huddleson Jr. Professor of Law at Stanford Law School. He also founded and now serves as Faculty Co-Director of the Stanford Criminal Justice Center. Professor Weisberg teaches and writes in the fields of criminal law and criminal procedure. He was a consulting attorney for the NAACP Legal Defense Fund and the California Appellate Project, where he worked on death penalty litigation in the state and federal courts.

SUMMARY OF ARGUMENT

This case calls for the Court to answer a question it left open more than fifteen years ago: whether prejudice is presumed when a lawyer's personal interest conflict actually affects her representation of a client, as it would be if the conflict arose from a joint representation under *Cuyler v. Sullivan*, 446 U.S. 335 (1980). *See Mickens v. Taylor*, 535 U.S. 162, 176 (2003). Because this Court's Sixth Amendment jurisprudence, as well as agency law and legal ethics, make clear that a personal interest conflict is likely to result in prejudice and that such prejudice will be difficult to prove, *Amici* believe that the decision below was wrongly decided and that courts should presume prejudice in these cases.

The Sixth Amendment affords criminal defendants the right to counsel who will act as their agent. The duty of loyalty is one of counsel's most basic duties, and it is fundamentally subverted when counsel plunders the attorney-client relationship for personal gain.

This Court has explained that *Sullivan*'s presumption of prejudice is warranted because of "the high probability of prejudice arising from multiple concurrent representation, and the difficulty of proving that prejudice." *Mickens*, 535 U.S. at 175. This rationale applies even more forcefully to personal interest conflicts. Personal conflicts are more likely to cause prejudice than are joint representation conflicts because they implicate the lawyer's own interests. At the same time, the lawyer's professional judgment becomes clouded by bias. It is also more difficult to prove resulting prejudice: the nature of the lawyer's interests and how they impact a representation will often be murkier than in a conflict arising from another criminal case.

Unfortunately, this case illustrates these risks all too well. While Cheri Owen represented Petitioner in a capital case brought by the State of California, she was under investigation by the State Bar of California; she was working with both the Los Angeles District Attorney's office and the State Bar as a secret informant; and her financial and disciplinary issues threatened to, and ultimately did, end her legal practice. These personal conflicts affected the representation by leading Ms. Owen to divert thousands of dollars from Petitioner's investigation fund and preventing her from adequately preparing for either the guilt or penalty phases of his trial. The California Supreme Court held that Petitioner was required to prove his trial had been prejudiced, and that he had not done so.

In light of these considerations, *Amici* urge this Court to grant certiorari and reverse the judgment of the court below.

ARGUMENT

I. Counsel Who Labors Under a Personal Conflict of Interest that Affects the Adequacy of the Representation Violates the Most Basic Principles of Agency Law, Warranting a Presumption of Prejudice

The Sixth Amendment guarantees a defendant the right to counsel for his defense. U.S. Const. amend. VI. The right to counsel is fundamental to ensure the accused has a fair trial. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). However, the mere presence of counsel is not enough to vindicate the right to a fair trial. *Strickland v. Washington*, 466 U.S. 668, 685 (1984). The lawyer must act as the client's agent. *See Comm'r of Internal Revenue v. Banks*, 543 U.S. 426, 436 (2005) (describing the attorney-client relationship as "a quintessential principal-agent relationship"). As the client's agent, the lawyer owes her client undivided loyalty. *See* Restatement (Third) of Agency § 8.01 (Am. Law Inst. 2006).

A lawyer does not act as a faithful agent when she labors under a personal conflict of interest. *See id.* cmt. b. Such a conflict occurs when "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

Model Rules of Prof'l Conduct r. 1.7(a)(2) (Am. Bar Ass'n 2019). Generally, when a defendant brings an ineffective assistance of counsel claim, he must prove that his lawyer's deficiencies prejudiced his defense. *Strickland*, 466 U.S. at 687-88, *692*. In *Cuyler v. Sullivan*, however, this Court recognized an exception for conflicts arising from a lawyer's joint representation of two or more clients: in such cases, a defendant who shows that "the conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." 446 U.S. 335, 349-50 (1980). The Court has justified this exception based on "the high probability of prejudice arising from multiple concurrent representation, and the difficulty of proving that prejudice." *Mickens v. Taylor*, 535 U.S. 162, 175 (2002).

The *Mickens* Court explicitly reserved the question of whether *Sullivan* applies to conflicts other than those arising from joint representations. *Id.* at 176 ("In resolving this case on the grounds on which it was presented to us, we do not rule upon the need for the *Sullivan* prophylaxis in cases of successive representation."). But *Sullivan*'s rationale applies even more forcefully when the lawyer labors under a personal conflict of interest—wherein she privileges her personal interests over those of the client—and that conflict actually affects the representation. This Court should grant certiorari to consider whether *Sullivan*'s presumption of prejudice applies to such pernicious personal conflicts.

A. A Lawyer Whose Personal Conflict Affects Her Representation of a Client Violates Her Obligations of Loyalty by Prioritizing Her Own Interests Over Those of Her Client

Principles of agency law prohibit a lawyer from privileging her interests over those of her client. Agency "arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." Restatement (Third) of Agency § 1.01 (Am. Law Inst. 2006). At the heart of the agency relationship is the concept of "fiduciary duty," which was developed in its modern form in early English common law. *See* David J. Seipp, *Trust and Fiduciary Duty in the Early Common Law*, 91 Boston U. L. Rev. 1011 (2011). As a fiduciary, the lawyer "must act loyally in the principal's interest as well as on the principal's behalf." Restatement (Third) of Agency § 8.01 (Am. Law Inst. 2006). As this court observed in *Von Moltke v. Gillies*, "[t]he right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client." 332 U.S. 708, 725 (1948).

Legal ethics rules are codifications of common law agency principles. *See* Restatement (Third) of the Law Governing Lawyers § 1 (Am. Law Inst. 2000) ("[M]ost of the core concepts of lawyer conflicts of interest . . . were already well developed and applied through common-law decisions . . . long before jurisdictions officially adopted lawyer codes stating

rules about the same concepts."). A lawyer derives authority to act on behalf of the client once the client has so consented, and she must carry out the client's wishes concerning the objectives of the representation. Model Rules of Prof'l Conduct r. 1.2(a). Loyalty is an "essential element[] in the lawyer's relationship to the client." Model Rules of Prof'l Conduct r. 1.7 cmt. 1. Laboring under a conflict of interest is therefore prohibited due to this duty of loyalty. Model Rules of Prof'l Conduct r. 1.7.

This Court's Sixth Amendment jurisprudence is also grounded in agency law. *See*, *e.g.*, *Garza v. Idaho*, 139 S. Ct. 738, 746 (2019) (finding that when "a defendant has expressly requested an appeal, counsel performs deficiently by disregarding the defendant's instructions"); *McCoy v. Louisiana*, 138 S. Ct. 1500, 1505 (2018) (holding that "it is the defendant's prerogative, not counsel's, to decide on the objective of his defense"); *Maples v. Thomas*, 565 U.S. 266, 283-85 (2012) (characterizing counsels' abandonment of their client as the severing of an agency relationship); *Holland v. Florida*, 560 U.S. 631, 659 (2010) (Alito, J., concurring) (noting that "a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word"). Furthermore, this Court has recognized that the duty of loyalty is "perhaps the most basic of counsel's duties" and encompasses "a duty to avoid conflicts of interest." *Strickland*, 466 U.S. at 688, 692.

Personal interest conflicts can sever or severely threaten the lawyer's status as the client's agent. Such conflicts can arise, for example, when "the

lawyer has a significant adverse financial interest in the object of the representation," when the lawyer has a personal relationship with an opposing party, or when the lawyer seeks employment with an opposing party or law firm. Restatement (Third) of the Law Governing Lawyers § 125 cmts. c & d (Am. Law Inst. 2000); *see also Developments in the Law: Conflicts of Interest in the Legal Profession*, 94 Harv. L. Rev. 1244, 1284-91 (1981) (discussing types of personal interest conflicts). A personal conflict may also arise when a criminal defense lawyer is being prosecuted by the same district attorney's office that is prosecuting her client. *See*, *e.g.*, *Campbell v. Rice*, 302 F.3d 892, 897 (9th Cir. 2002); *United States v. Novaton*, 271 F.3d 968, 1012 (11th Cir. 2001). These conflicts can have profound, pervasive effects because the lawyer will likely be guided by "self-serving bias" and protect her own interests, rather than those of her client, at various stages of the representation. *Rugiero v. United States*, 330 F. Supp. 2d. 900, 906 (E.D. Mich. 2004). Personal interest conflicts can therefore seriously undermine the duty of loyalty.

B. Laboring Under Such a Conflict is Presumptively Prejudicial

As this Court recognized in *Strickland*, conflict of interest claims should not require a defendant to show prejudice. Defendants are typically required to prove that their counsel's deficient performance prejudiced the outcome of their case because many errors are "utterly harmless." *Strickland*, 466 U.S. at 693. Thus, in a normal representation, "counsel is strongly presumed to have . . . made all significant decisions in the exercise of reasonable professional

judgment." *Id.* at 690. But when "counsel is burdened by an actual conflict of interest, . . . counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties." *Id.* at 692. In other words, "the presumption of ethical behavior that we afford to attorneys must necessarily fade where . . . counsel explicitly favors his own pecuniary interests above his client's interests." *United States v. Walter-Eze*, 869 F.3d 891, 902 (9th Cir. 2017). "Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to 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. Thus, when counsel labors under a personal conflict that actually affects the representation, courts should presume prejudice.

The rules of legal ethics constantly underscore the severity of certain personal conflicts. In general, a lawyer should withdraw from representation when she cannot "reasonably believe" that she "will be able to provide competent and diligent representation to each affected client." Model Rules of Prof'l Conduct r. 1.7(b)(1). A personal conflict can rise to this level when it "significantly limit[s] the lawyer's ability to pursue the client's interest." Restatement (Third) the Law Governing Lawyers § 125 cmt. b (Am. Law Inst. 2000). If there is "a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's financial or other personal interests," the lawyer may not ethically represent the client. *Id*. at § 125.

The rationale for *Sullivan*'s presumption of prejudice that the Court provided in *Mickens*—"the high probability of prejudice arising from multiple concurrent representation, and the difficulty of proving that prejudice"—applies even more forcefully to personal interest conflicts than to those arising from joint representations. 535 U.S. at 175.

First, that a lawyer's own interests are at stake creates a high likelihood that her personal conflict will prejudice the outcome of her client's case. In some instances of joint representation, prejudice will not arise because the concurrent representation makes the lawyer better able to advocate for both clients; in other words, a "common defense . . . gives strength against a common attack." *Holloway v. Arkansas*, 435 U.S. 475, 482-83 (1978). However, this is not the case with personal interest conflicts. When the lawyer's personal interests are directly opposed to her client's, it is impossible for the lawyer to satisfy her interests while remaining loyal to the client. In fact, the lawyer's incentives to protect her own livelihood and reputation may be even stronger than her incentive to help one client at a concurrent client's expense. Once the lawyer's personal conflict actually affects the representation, there is a high probability that the client's interests have been prejudiced.

Second, personal conflicts infect representations in ways that make detection and impact nearly impossible to assess. A lawyer who proceeds with a representation despite an obvious personal conflict may be blind to her inability to carry out her duties of "loyalty, vigor, and confidentiality" to the client. Restatement (Third) of the Law

Governing Lawyers § 122 cmt. b (Am. Law Inst. 2000). Moreover, her personal conflict may have pervasive effects that are difficult to measure. When a significant conflict occurs in representation, prejudice will not be confined to the lawyer's actions: "the evil [of a conflicted representation] . . . is in what the advocate finds himself compelled to *refrain* from doing." *Holloway*, 435 U.S. at 490. The client may not know the full extent of the tainted representation, as he "could be harmed by the attorney's actions or inactions that are known only to the attorney." *Rugiero*, 330 F. Supp. 2d. at 906. Assembling a record to show prejudice is difficult, since the "client is less likely to be aware of the facts underlying" a conflict between his interests and the lawyer's interests. Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 Fordham L. Rev. 71, 81 (1996). This is exacerbated by the fact that defendants generally must prove prejudice during post-conviction proceedings, where there is no constitutional right to counsel. *See Coleman v. Thompson*, 501 U.S. 722, 753 (1991).

Moreover, communications between the lawyer and client regarding strategic decisions will be wrapped up in confidentiality and attorney-client privilege, making it difficult to discern whether the lawyer even disclosed the conflict to her client. *See*, *e.g.*, Fed. R. Evid. 502. It is fundamentally unfair to require a client to waive these protections in order to prove—often, without the aid of counsel—that a lawyer who was never his agent in the first place prejudiced his case.

When a lawyer's personal conflicts actually affect the representation, there is a high probability that the client will be prejudiced in ways that are difficult to measure. Thus, this Court's rationale for why prejudice should be presumed under *Sullivan* applies with particular force to personal conflicts.

C. The Court Should Clarify *Sullivan*'s Reach to Eliminate Inconsistency Among the Circuit Courts

Lower courts are split over the reach of the *Sullivan* presumption of prejudice standard. Some circuits apply *Sullivan* to certain personal interest conflicts, such as conflicts between the client's interests and the lawyer's financial interests or interest in avoiding prosecution. *See Walter-Eze*, 869 F.3d at 902; *Bemore v. Chappell*, 788 F.3d 1151, 1161-62 (9th Cir. 2015); *United States v. Stitt*, 552 F.3d 345, 350-51 (4th Cir. 2008); *United States v. Levy*, 25 F.3d 146, 156 (2d Cir. 1994); *United States v. Hearst*, 638 F.2d 1190, 1193-94 (9th Cir. 1980). One circuit expressly limits *Sullivan* to the subset of conflicts that involve the representation of multiple clients, requiring a showing of prejudice under the *Strickland* standard for all other conflicts. *Beets v. Scott*, 65 F.3d 1258, 1260 (5th Cir. 1995). Still other circuits have produced inconsistent guidance on *Sullivan*'s reach to personal interest conflicts. *Compare United States v. Mahibubani-Ladharam*, 405 F. App'x 429, 430-31 (11th Cir. 2010) (per curiam) (*Sullivan* applies) *with United States v. Cruz*, 188 F. App'x 908, 910 (11th Cir. 2006) (per curiam) (*Sullivan* does not apply).

Settling *Sullivan*'s reach is vitally important to the fairness and efficient functioning of the criminal legal system. In some circuits, a lawyer may violate the rules of professional conduct by laboring under a conflict of interest but be found constitutionally "effective" simply because the client cannot meet the burden of demonstrating that the representation was prejudiced under *Strickland*. In *Mickens*, this Court recognized that the purpose of *Sullivan* is "to apply needed prophylaxis in situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel." 535 U.S. at 176. The effective assistance of conflict-free counsel is among the most important rights of a criminal defendant. *Strickland* is inadequate to protect that right to counsel when counsel represents a client while (i) under a personal conflict with the interests of the client, or (ii) owing a duty to a representative of the state prosecutorial system, the adversarial party in defendant's criminal case.

This Court should clarify *Sullivan*'s application to personal interest conflicts. Lawyers and lower courts look to the Supreme Court to clarify the rights of criminal, and especially capital, defendants. It is therefore essential that the court step in and establish clear guidance on the standards for reviewing lawyer conflicts of interest. It can do this by finally resolving the "open question" in *Mickens* to extend the *Sullivan* presumption to personal conflicts, as well. 535 U.S. at 176. The Court can then assuredly protect the right of criminal defendants to faithful counsel.

II. Petitioner's Lawyer Was Conflicted, and the California Court Should Have Found as Such

Petitioner's lawyer, Cheri Owen, labored under many significant personal conflicts. At the time of the representation, she was under investigation by the State Bar of California, she was working with both a prosecutor's office and the State Bar as an informant, and her financial and disciplinary issues threatened to end her legal practice. These personal conflicts affected the representation by causing Ms. Owen to divert thousands of dollars from Petitioner's investigation fund and preventing her from adequately preparing for his trial. Nevertheless, the California Supreme Court concluded that there was no actual conflict of interest and, even if there was, the defense did not prove prejudice under *Strickland*. Pet. App. 103. The court should have found that, in light of Ms. Owen's pernicious personal conflicts, Petitioner was not required to prove prejudice.

A. Ms. Owen Labored Under Numerous Personal Conflicts of Interest

Ms. Owen's interests and loyalties prevented her from acting as Petitioner's agent. During the representation of Petitioner, she was under a "fast-track" investigation by the State Bar of California for her role in a scheme that misappropriated client funds. Pet. Br. 5. She was working with the State Bar and the Los Angeles prosecutor as a secret informant, reporting on attorney and non-attorney activities. Pet. App. 160. She faced mounting debts and, with her lawyer's license on the line, she risked losing her

livelihood. These serious personal conflicts actually affected Ms. Owen's representation of Petitioner.

The fact that Ms. Owen was under investigation gave her an incentive to please the prosecution. A lawyer who is on thin ice with a prosecutor's office and the State Bar would be reluctant to upset government actors and call further attention to herself. Ms. Owen thus had an incentive to "pull [her] punches in defending [Petitioner] lest the prosecutor's office be angered by an acquittal and retaliate against [her]." *Thompkins v. Cohen*, 965 F.2d 330, 332 (7th Cir. 1992). Doing so violates the lawyer's duty to "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf," despite "opposition, obstruction, or personal inconvenience to the lawyer." Model Rules of Prof'l Conduct r. 1.3 cmt. 1.

Moreover, Ms. Owen knew that she was being investigated while she was representing Petitioner, yet nothing in the record suggests that she informed Petitioner of this key fact. She had a duty to tell Petitioner about the investigation because it is a material fact of which a reasonable client had a right to be informed. Restatement (Third) The Law of Agency § 8.11 (Am. Law Inst. 2006). She was also obligated to communicate this fact to Petitioner because the investigation could draw her time and attention away from the case, thus "materially limit[ing]" the representation. Model Rules of Prof'l Conduct r. 1.4(a)(1), 1.7. If he had known about Ms. Owen's investigation, Petitioner might have chosen different counsel. *See* Restatement (Third) The Law of Agency § 8.11 cmt. b (Am. Law Inst. 2006) (noting

that "if an agent provides the principal with notice that the agent will be unable to perform as previously directed, the principal may choose another agent or take action directly").

Ms. Owen had serious financial problems during her representation of Petitioner. She faced mounting debts stemming from prior representations, and she was under investigation by the State Bar precisely because of her mishandling of client funds. Pet. Br. 5. Later reporting revealed that Ms. Owen was one of three lawyers who handled hundreds of cases where the clients' relatives "paid whatever the market could bear — thousands [of dollars] in some cases," and often the lawyer did "absolutely nothing" to represent the clients competently. Nancy McCarthy, *Fast Track: 'Bad Apples' Now Face Fast Discipline*, Cal. B. J. (Sept. 2002), http://archive.calbar.ca.gov/archive/Archive.aspx?articleId=35791&categoryId=35056&month=9&year=2002.

By all appearances, Ms. Owen's legal practice was falling apart. She swore in a malpractice case that she was too ill to meet a filing deadline in August 2000, just one week before she took Petitioner's case. Pet. Br. 8. During Petitioner's case, she was absent from one day of jury voir dire and another day of trial testimony in order to meet with her own attorney, at a time when she had over fifty complaints filed against her. *Id*. Ms. Owen was at risk of losing her lawyer's license and her source of livelihood.

Based on the record,[2] it is unsurprising that Ms. Owen failed to be a faithful agent to Petitioner. Yet it is particularly egregious that Ms. Owen was not only deficient in carrying out her duties to Petitioner, but also tried to use the representation to benefit herself at his expense. On the day before Ms. Owen tendered her resignation to the State Bar, she had Petitioner sign an agreement granting her exclusive literary rights to his case and waiving attorney-client privilege. Pet. App. 189-90. Ethical rules prohibit lawyers from making such agreements prior to the conclusion of the representation. *See* Model Rules of Prof'l Conduct r. 1.8(d). This general "prohibition does not prevent an informed client from signing a publication contract *after* the lawyer's services have been performed." Restatement (Third) of the Law Governing Lawyers § 36 cmt. d (Am. Law Inst. 2000) (emphasis added). However, Petitioner was not properly informed because he did not know that Ms. Owen would resign from the Bar and withdraw from his case. The trial court acknowledged that the agreement "grant[ed] [Ms. Owen] exclusive rights to exploit her client's story for her benefit." *People v. Hoyt*, 456 P.3d 933, 987 (2020).

B. Ms. Owen's Personal Conflicts of Interest Negatively Affected Her Performance

Ms. Owen made a collection of decisions that had an adverse effect on Petitioner's case. These decisions were clearly to Ms. Owen's benefit, in

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[2] The facts are troubling enough to warrant disclosure of the State Bar investigation records sought by Petitioner. Pet. Br. 23.

light of her own investigation, informant activity, and financial interests.

Ms. Owen stole at least $20,000 from the Santa Barbara County funds set aside for Petitioner's defense. Pet. Br. 7. She diverted these funds to pay back debts for her prior clients' cases. Pet. App. 124. The depletion of funds seriously hampered Petitioner's defense. For example, Ms. Owen chose not to interview witnesses and even instructed her investigator to refrain from interviewing Petitioner and all other witnesses. Pet. App. 98.

At several key stages of the representation, Ms. Owen failed to mount a meaningful defense for Petitioner. During the guilt phase, her lack of investigation prevented her from discovering and presenting evidence of Petitioner's organic brain damage, which she could have used to seek suppression of his confession on the grounds that it was involuntary. Pet. App. 129. She also failed to adequately prepare Petitioner for testimony: she simply informed him that he needed to testify, without explaining the potential benefits or drawbacks of taking the stand in his own defense. Pet. App. 127.

Ms. Owen's lack of preparation continued in the penalty phase. She neglected to present mitigation evidence, such as evidence of Petitioner's adjustment to county jail and his organic brain damage. Pet. App. 129-30. She presented only limited evidence of the impact of alcoholism, drug addiction and violence on his childhood. Pet. App. 130-31. She also failed to prepare witnesses to adequately testify

at the penalty phase. Pet. App. 131. One witness did not know she would testify until just before she was called to the stand. Pet App. 183. Had Ms. Owen prepared these witnesses, they could have told the jury about Petitioner's character and the challenges he experienced during childhood. Pet. App. 182-83.

Ms. Owen's deficiencies were a result of her various personal conflicts: her own investigation, informant activity, and pecuniary interests. Given her personal problems, she was blinded by her own burdens and unable to prepare a meaningful defense. If she had used Petitioner's defense funds to investigate his case, she would still have faced crushing debts from prior cases. If she had engaged in extensive trial preparation, she would have had less time to manage the State Bar investigation and her flailing legal practice. If she had mounted a more zealous defense, she would have risked upsetting the prosecutor. Ms. Owen breached her obligations by consistently putting her own interests ahead of Petitioner's.

C. These Adverse Effects Were Not Mitigated by the Presence of Appointed Co-counsel

Ms. Owen was given appointed co-counsel under *Keenan v. Superior Court*, 640 P.2d 108 (allowing the use of court funds to pay for a second attorney in capital cases). However, this did not mitigate the adverse effects of her deficient performance. Ms. Owen consulted *Keenan* counsel a year after the representation began, and the court officially appointed him only days before the trial. Pet.

App. 136. That left plenty of time for Ms. Owen to woefully mishandle the pre-trial investigation. Further, the record demonstrates that Ms. Owen's dishonesty permeated even her relationship with co-counsel and kept him from intervening to remedy her prejudicial conduct: she lied about critical matters such as the request for a change of venue, Pet. App. 138, hiring a jury consultant, Pet. App. 123, and the reason why a court filing had been rejected, Pet. App. 137. Ms. Owen's lack of candor with *Keenan* counsel violates rules of legal ethics. *See* Model Rules of Prof'l Conduct r. 1.4 cmt. 7 ("A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person."); *see also Johnson v. Thurmer*, 624 F.3d 786, 792 (7th Cir. 2010) (acknowledging that a lawyer's failure to meet the "duty of candor to his client" can lead to an ineffective assistance of counsel finding). Given Ms. Owen's pernicious personal conflicts and their adverse effects on the representation, it is clear that *Keenan* counsel was asked to right a ship that had all but sunk.

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"The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed [her] lips on crucial matters." *Holloway*, 435 U.S. at 490. Petitioner should not have to prove prejudice when his lawyer was blinded by her own personal interests, as documented in the trial court record.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

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