No. 12-

IN THE
Supreme Court of the United States

MICHAEL GARCIA,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

On Petition for a Writ of Certiorari to the Louisiana Supreme Court

PETITION FOR WRIT OF CERTIORARI

Michael Admirand
CAPITAL APPEALS PROJECT
636 Baronne Street
New Orleans, LA 70113

Elisabeth Semel
Bidish Sarma
Ty Alper
DEATH PENALTY CLINIC
396 SIMON HALL
UC BERKELEY SCHOOL OF LAW
Berkeley, CA 94720-7200

William Sothern
Counsel of Record
CONNER & SOTHERN, LLC
3015 Magazine Street
New Orleans, LA 70115
(504) 581-9083
billy@connersothern.com

CAPITAL CASE

QUESTIONS PRESENTED

Jerry D'Aquila, chief defender and supervising attorney for the 18th Judicial District Indigent Defender Board (IDB), was appointed to represent James Nelson on February 13, 2006. Two days later, the court appointed Mr. D'Aquila and the IDB to represent petitioner Michael Garcia and Danil Garcia, Nelson's two co-defendants. As charged, all three men faced the death penalty, thus entitling each of them to two capitally-certified defense lawyers under state law.

Although the prosecutor informed the court that there may be a conflict, the court delegated the responsibility to assign counsel to Mr. D'Aquila. At a joint preliminary examination six days later, Mr. D'Aquila explained that while his office could not provide two certified counsel for each defendant, the cost of paying outside counsel was too great. Neither the court nor the parties revisited the issue again.

With inadequate resources to pay for outside counsel and too few capitally-certified IDB defense attorneys, Mr. D'Aquila assigned the three qualified attorneys in his office, including himself, to represent Michael Garcia. None of the lawyers he assigned to Michael Garcia's co-defendants were qualified to represent individuals facing capital charges. Mr. D'Aquila argued at the preliminary examination that his office would be bankrupted and, on behalf of the two defendants without certified lawyers, that the hearings and the evidence adduced therein would be

nullified if the death penalty was ultimately sought against them. The court agreed. After the hearing, the State reduced the charges against both co-defendants.

Both James Nelson and Danil Garcia ultimately received sentences of less than death. Michael Garcia is now on death row. These circumstances give rise to the following questions:

1. Whether the Court should modify *Mickens v. Taylor* to apply the automatic reversal rule in *Holloway v. Arkansas* where: a) the prosecution advises a trial court that the appointment of a particular lawyer in a capital case to represent multiple defendants may create a conflict of interest; b) the appointed lawyer informs the court that he is financially unable to appoint capitally-certified counsel for each of the co-defendants; c) the court acknowledges these conflicts of interest, but delegates resolution of them to the same lawyer; d) the conflicted attorney then advocates in a manner intended to prevent death sentences for the co-defendants; and e) the trial court declines to intervene?

2. Whether the Louisiana Supreme Court's opinion finding no "actual conflict" in this case demonstrates the need for this Court to address the split in the Circuit Courts concerning the standard for determining whether "an actual conflict of interest adversely affected [a] lawyer's performance," and thereby settle an important question of federal Constitutional law?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Garcia respectfully petitions for a writ of certiorari to the Louisiana Supreme Court in *State v. Garcia*, No. 09-KA-1578 (La. 11/16/12).

OPINIONS BELOW

The majority opinion of the Louisiana Supreme Court is reported at *State v. Garcia*, 09-1578 (La. 11/16/2012); 2012 La. LEXIS 3085 and reprinted at Pet. App. 1a-99a. The unpublished portion of the Court's opinion is reprinted at Pet. App. 100a-200a. Justice Weimer's dissent is reprinted at Pet. App. 201a-230a, and Justice Clark's additional concurrence is reprinted at 231a-239a. The Louisiana Supreme Court's previous order remanding the case for an evidentiary hearing is reported at *State v. Garcia*, 09-1578 (La. 09/23/2011); 80 So.3d 1150, and reprinted at Pet. App. 240a-242a. The Louisiana Supreme Court's denial of rehearing is reprinted at Pet. App. 243a-244a.

JURISDICTIONAL STATEMENT

The judgment and opinion of the Louisiana Supreme Court was entered on November 16, 2012. The Louisiana Supreme Court denied rehearing on January 25, 2013. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

A. Introduction

Michael Garcia, now on death row for a crime involving two other co-defendants, was represented from his arrest to his death sentence by Jerry D'Aquila, the chief defender and supervising attorney for the 18th Judicial District Indigent Defender Board (IDB). At the case's inception, the court appointed Mr. D'Aquila to represent Mr. Garcia's co-defendant, James Nelson, and then also Danil Garcia, another co-defendant, who made his initial appearance with Michael Garcia. All three men faced the death penalty for first degree murder, and the facts presented plausible theories that either Michael Garcia or James Nelson was the most culpable for the charged offense. But, Mr. D'Aquila made clear that his office could only afford to provide the requisite certified capital defense lawyers for one of the defendants, and assigned all three duly qualified lawyers, himself included, to Michael

Garcia.[1] Although this decision effectively undermined the State's ability to pursue the death penalty against James Nelson or Danil Garcia, it positioned Michael Garcia as the lone defendant among the three who could receive the death penalty. For Mr. D'Aquila, however, his gambit was successful; his client was sent to death row, but his office was able to resolve the cases of the co-defendants with sentences less than death without the IDB bearing the expense of obtaining outside counsel.

This case presents two issues that warrant this Court's attention. First, it tests the rationale for limiting the *Holloway* rule of automatic reversal to "only [those cases] where defense counsel is forced to represent codefendants over his timely objection, unless the trial court has determined that there is no conflict." *Mickens v. Taylor*, 535 U.S. 162, 168 (2002). Second, it presents this Court with the opportunity to settle an important question of federal Constitutional law that arises in almost every case in which a defendant claims he was denied conflict-free representation: how should a court determine whether there is an actual conflict that adversely affected counsel's performance?

In *Holloway v. Arkansas*, 435 U.S. 475 (1978), the Court reversed a defendant's conviction where his attorney, who jointly represented him and two co-

[1] At the time of the appointment, the record suggests that Jerry D'Aquila and Tom Nelson were certified to serve as counsel in a capital case. At some point during the prosecution, Tommy Thompson also became certified.

defendants, had requested that the trial court appoint separate counsel because there may be a conflict of interest, and the court "failed either to appoint separate counsel or to take adequate steps to ascertain whether the risk was too remote to warrant separate counsel." *Id.* at 484. The Court found that "whenever a trial court improperly requires joint representation over timely objection reversal is automatic." *Id.* at 488.

In *Cuyler v. Sullivan*, 446 U.S. 335 (1980), the Court noted that "*Holloway* requires state trial courts to investigate timely objections to multiple representation," and indicated that "special circumstances" could also trigger the trial court's duty to inquire. *Id.* at 346. The Court determined that "[u]nless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry." *Id.* at 347. After *Sullivan* found that the trial court had no duty to inquire in that case, it held that in order to prevail, the defendant "must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 348.

In *Mickens*, the Court noted that *Sullivan* "addressed separately" the duty to inquire and the defendant's burden of proof. *Mickens*, 535 U.S. at 168. It rejected what it characterized as the petitioner's "proposed rule of automatic reversal when there existed a conflict . . . but the trial judge failed to make the *Sullivan*-mandated inquiry," and held that the "failure to make the *Sullivan*-mandated inquiry does not reduce the petitioner's burden of proof." *Id.* at 172, 173-74. Thus, after

Mickens, a defendant must "establish that the [actual] conflict of interest adversely affected his counsel's performance" in all conflict cases except those in which a defense attorney timely objects to joint representation and the trial court fails to inquire. *Id.* at 174.

The Louisiana Supreme Court here adopted a narrow view of *Holloway*'s applicability, over a dissent that recognized that this case "fits neither the standard of review of *Holloway* (because there was no formal objection) nor the standard of review of *Sullivan* (because the district court raised the issue of conflicted representation but did not inquire or act further on the issue)," and was unaddressed in *Mickens*. Pet. App. 211a.

The majority opinion failed to address critical evidence from the pretrial record: the prosecutor explicitly raised the conflict to the court; Mr. D'Aquila informed the court that he considered it financially impossible for his office to withdraw from any of the co-defendants' cases or otherwise provide non-conflicted, capitally-certified counsel from outside the district; the trial court nonetheless made Mr. D'Aquila solely responsible for resolving the resource and conflict issues; and the trial court failed to intervene when Mr. D'Aquila acted to prevent death-eligibility for Mr. Garcia's co-defendants (thereby increasing the likelihood that Mr. Garcia would be sentenced to death). Moreover, the majority failed to address the trial court's concession, in post-

conviction proceedings, that it was aware of a potential conflict of interest. *See* S.R. 752-53.[2]

The Louisiana Supreme Court also denied relief under the *Sullivan* standard, but articulated no test for determining whether an actual conflict adversely affected counsel's performance. It also ignored evidence that the adverse effect materialized before trial.

B. Facts of the Offense

In the early morning hours of February 8, 2006, Michael Garcia, James "Fatboy" Nelson, and Danil Garcia committed a series of "violent and disturbing" crimes against Matthew Millican and M.T.[3] Pet. App. 3a. After taking their money, "the trio, with [Michael Garcia] leading Matt and Nelson leading M.T., marched their victims deep into the woods." Pet. App. 6a. Once there, "the three men tied Matt and M.T. to a tree, using Matt's bootlaces as ligatures." Pet. App. 7a. The three men beat Millican and took turns raping M.T. Pet. App. 8a-9a.

Michael Garcia subsequently "untied Matt from the tree, and with Nelson holding Matt up on the other side . . . marched Matt further into the woods"

---

[2] All citations labeled "S.R. __" refer to the supplemental record on appeal that lodged with the Louisiana Supreme Court following the remand hearing. All citations labeled "CH-__" refer to the corresponding exhibits admitted at that hearing. All citations labeled "O.R. __" refer to the original record on appeal.

[3] Consistent with the Louisiana Supreme Court's opinion, Mr. Garcia will identify the female victim in this case by her initials.

to a nearby river bank. Pet. App. 10a. Danil Garcia stayed behind with M.T. After an unknown period of time, Nelson and Michael Garcia returned to Danil and M.T., without Millican. Pet. App. 11a.

The co-defendants, "still armed with knives and machetes, then marched M.T. back to the abandoned gas station." Pet. App. 11a-12a. Before allowing her to go to sleep, Nelson again raped M.T. Pet. App. 12a.

M.T. escaped from the abandoned gas station later in the morning and quickly called the police. Pet. App. 13a. The police took M.T.'s statement about the events of the early morning and brought her to a hospital "for a rape examination. Vaginal swabs taken from M.T. subsequently tested positive for semen matching the DNA profile of James Nelson, II." Pet. App. 14a.

The police subsequently found Millican's body in the nearby river. He had sustained a fatal stab wound to his chest. The police launched a search for the three men immediately after discovering Millican's body. Nelson was apprehended that same day. Pet. App. 16a. Three days later, on February 11, 2006, the Garcia brothers were arrested. *Id.*

C. Pre-Trial Proceedings and Trial

James Nelson appeared in court first. On February 13, 2006, the trial court appointed the "Indigent Defender" to represent him, and Nelson was informed that Jerry D'Aquila and Tom Nelson would be his attorneys. CH-109 at 3; *see also* S.R.

1169-70. Two days later, the trial court appointed the IDB to represent Michael Garcia and Danil Garcia. *See* Feb. 15, 2006 Tr. at 3-5. At that hearing, the prosecutor stated, "[I]f there is a conflict – we do plan to seek the death penalty on this case on both of these guys, so if there's any other Public Defender's Office that can represent the other one, we plan to have a full blown [preliminary examination] hearing Friday." *Id.* at 5. The trial court elected to "go ahead and appoint specifically Jerry D'Aquila, Tom Nelson, and Tommy Thompson to represent these three guys. They can split them up how they want to." *Id.* at 6-7.

Initially, all three men were charged with first degree murder. Pet. App. 18a. On February 17, 2006, the trial court "observed a problem with the same office representing three capital defendants":

> . . . [A]ll three of them are charged with first degree murder and other charges. As everyone knows, first degree murder does carry possible death penalty, depending on what the jury decides. I appointed the Indigent Defender's office to represent these three individuals. But we have to have two Indigent Defender Board certified public defenders to represent each one of them, which means we need six. We have eight [public defenders] in the district. All eight are not certified [for capital cases] by the Indigent Defender Board. So that being the case, we have to continue this matter until Tuesday to give some opportunity to look into this

> matter and see who can represent who and try to get the logistics of that worked out."

Pet. App. 18a-19a. The District Court then tasked Mr. D'Aquila with, in the Louisiana Supreme Court's words, "solving the problem." Pet. App. 19a. Mr. D'Aquila assured the court, "We'll take care of that internally in the office, Judge." Pet. App. 20a.

When court reconvened four days later for the preliminary examination, Mr. D'Aquila informed the court that the three IDB lawyers with capital defense credentials—he, Tommy Thompson, and Thomas Nelson—would represent Mr. Garcia. He further informed the court that he had assigned two non-certified lawyers to represent each co-defendant. Pet. App. 20a-21a. The trial court then notified Mr. D'Aquila that a certified capital defense lawyer had called him and said that he had a qualified team ready if necessary. Pet. App. 21a. After Mr. Thompson said that it would cost the IDB "about forty grand" to engage that team, Mr. D'Aquila made clear that the office did not have the money needed to provide certified capital attorneys to all three defendants, explaining: "We don't have those funds in our district." Pet. App. 22a. As the Louisiana Supreme Court noted:

> The District Court then commented on the issue of financial cost: "Let me say this: of course, you know, trying a first degree murder case is not cheap. Any time you talk about trying a person for their life, money cannot be the

> overriding factor in determining what to do." However, after declaring cost should not preclude independent representation, the District Court did not alter its previous pronouncement attorneys of the Indigent Defender Board would have to decide whether outside counsel was needed.

Pet. App. 22a. The trial court never revisited the issue.

Before the preliminary examination began, Mr. D'Aquila argued that the proceedings would not be valid against the co-defendants because they did not have capitally-certified counsel:

> That's what I was going to point out to the Court, Your Honor: since Michael Garcia is the only one – Mr. Nelson and I are the only ones qualified or certified to represent someone for first degree murder, that's what was discussed Friday. Mr. Kimball and Mr. Parks are not. So if we proceed, [the lawyers] are not qualified and, right now, [James Nelson and Danil Garcia] are booked with first degree murder. They [Kimball and Parks] are not qualified to sit at any aspect of this case, if they are going to seek the death penalty against them.

O.R. 943. The court agreed: "I see no problem [proceeding] with Mr. Michael Garcia," but it told the State "you may not be able to use it against these

other two persons from today's proceedings. We may have to do it again is what I'm saying, possibly for those two." *Id.* The preliminary examination went forward that day.[4]

After Mr. D'Aquila assigned them uncertified counsel, the State reduced the charges against both James Nelson and Danil Garcia. Only Michael Garcia's case proceeded capitally. According to the Louisiana Supreme Court, at Mr. Garcia's trial, "[t]he only detail in dispute was whether defendant or Nelson wielded the knife that killed Matt." Pet. App. 69a. The State called Nelson to the stand, and "[t]hrough . . . this testimony and evidence the State sought to establish defendant intentionally killed Matt with his K-bar knife during the perpetration of an armed robbery and aggravated kidnapping." Pet. App. 48a-49a. As the dissent noted, the issue of who actually inflicted the fatal stab wound was critical:

---

[4] Criminal defendants have a state constitutional right to a preliminary examination. *See* La. Const. art. I § 14. The Louisiana Supreme Court has emphasized its importance, noting that the hearing is to be "full-blown and adversary, and one in which the defendant is entitled to confront witnesses against him and to have full cross-examination of them." *State v. Jenkins*, 338 So.2d 276, 279 (La. 1976). *See also* Ginger R. Berrigan, LOUISIANA CRIMINAL TRIAL PRACTICE, § 11-1 (3d ed. 1998) ("Even if probable cause is a foregone conclusion, a preliminary hearing can still provide an excellent opportunity for defense counsel to learn, with minimal harm, the strength of the state's case."). Mr. D'Aquila's objection created a potential windfall for James Nelson and Danil Garcia, who received the full benefit of discovery and cross-examination against the primary witness against them, without the downside of M.T.'s testimony being admissible at trial if the State pursued the death penalty against them.

"nothing less than Defendant's life potentially hung in the balance of how the jury viewed Nelson's testimony against the Defendant." Pet. App. 206a.

The guilt phase of Michael Garcia's trial lasted two days. The jury returned a verdict of guilty of first degree murder. Pet. App. 2a. The penalty phase of the trial began the following morning, and the jury returned a verdict of death against Michael Garcia that day. Pet. App. 2a. The trial court formally sentenced him to death on July 8, 2008. Pet. App. 3a.

James Nelson and Danil Garcia fared significantly better than Michael Garcia. Nelson, whose charges had already been reduced once, received a second charge reduction because of his testimony at Mr. Garcia's trial. He ultimately pled guilty to reduced charges and received a sentence of sixty years in prison, with parole eligibility after twenty-five. Danil Garcia pled guilty to being a principal to second-degree murder and received a life sentence.

D. Appeal to the Louisiana Supreme Court

Michael Garcia appealed his conviction and sentence to the Louisiana Supreme Court. Among other things, he argued that as the director of the IDB, appointed to provide counsel for each of the men initially facing the death penalty, Mr. D'Aquila had an actual conflict of interest in his representation of Mr. Garcia. Mr. D'Aquila's interest, made clear on the record, was for the co-defendants' cases to become non-capital so that his IDB could avert the apparently dire costs of contracting with

certified capital counsel. Avoiding a capital prosecution for Nelson and Danil Garcia was in the best interests of the IDB as well as the other two co-defendants, one of whom was able to plea bargain down to a term of years for his testimony against Mr. Garcia—testimony essential to the State's first degree murder case. Nelson's deal was perhaps the very worst thing that could have happened to Mr. Garcia's defense, but Mr. D'Aquila oversaw both cases at the outset. Mr. Garcia also argued that the simultaneous representation of co-defendants by lawyers in the same IDB violated his right to conflict-free counsel, given the imputation of conflicts under the Louisiana Rules of Professional Conduct.

After briefing, the Louisiana Supreme Court noted Mr. Garcia's "claims that the defendant was represented at trial by counsel laboring under conflicts of interest," ordered a remand "for a hearing to determine the employment status of the attorneys representing the three defendants," and retained jurisdiction over the assignments of error. Pet. App. 240a-241a.

Although the remand hearing focused on the employment status of IDB lawyers, evidence emerged that the conflict of interest was known to the court and the parties from the outset of the proceedings; the prosecution notified the trial court about the possibility of a conflict at Michael Garcia's first appearance, after the court had already appointed the IDB to represent his co-defendant, James Nelson. Mr. Garcia adduced further evidence that Mr. D'Aquila faced an actual financial conflict and established that "[e]verybody was well aware

that this parish couldn't afford three first degree murder cases to go on at one time." S.R. 801-02.

After presenting significant evidence of the IDB's chronic underfunding—particularly as it related to its ability to handle first degree murder cases—Mr. Garcia elicited uncontradicted testimony from John DiGiulio, the trial-level compliance officer with the Louisiana Public Defender Board and an experienced Louisiana capital defense attorney. Mr. DiGiulio testified about the manner in which indigent defense funding shortages, like the one in this case, can be used tactically by defense counsel to persuade the State to refrain from seeking the death penalty:

> If I've got a capital defendant and let's say there's no money for me to hire a second chair or experts or mitigation, and then I file a motion, a *Citizen*[5] motion which says, either, Judge, find me the money or stay this prosecution, it is not uncommon for the district attorney to say – especially in the smaller jurisdictions where it can break the bank anyway, to say, I'll tell you

[5] *State v. Citizen*, 04-1841 (La. 04/01/05); 898 So.2d 325, makes clear that, notwithstanding lack of funding, a trial court should appoint the necessary lawyers to provide representation to a defendant at his first appearance and then, upon motion from appointed counsel, stay the case if a funding source to pay for counsel cannot be identified. The *Citizen* case and its implications on the representation of indigent defendants in Louisiana was a central subject of the briefing in *Boyer v. Louisiana*, 133 S. Ct. 420 (2012) (No. 11-9953), a case currently pending before this Court.

> what, we'll offer you life or we'll reduce it to second without an offer.

S.R. 1150. Questioned by the trial court as to whether this approach was indeed a defense "tactic," Mr. DiGiulio responded in the affirmative, stating that it may well be "part of a strategy to try to keep somebody off death row," especially in the smaller, financially-strapped districts. *Id.*[6]

The remand also yielded abundant evidence about the IDB's supervisory structure. Testimony from each of the attorneys, secretaries, and affiliated IDB personnel revealed that Mr. D'Aquila had a legal, statutory, professional, and organizational obligation to assign cases to attorneys, approve their funding requests, and monitor their work.[7] *See*

---

[6] *See, e.g.*, Equal Justice Initiative of Alabama, Alabama Defense Trial Manual at 6 (1997 Ed.) ("No matter how bad the case, several factors that are always present may cause the prosecutor to consider a plea disposition. One is the time and expense involved."). Scholars have also observed this defense tactic to remove the possibility of a death sentence. *See, e.g.*, Carol S. Steiker & Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. CHI. LEGAL F. 117, 161 (2010) ("[T]he cost argument has a self-propelling power, by influencing present-day decisions to seek death."); Ashley Rupp, *Note, Death Penalty Prosecutorial Charging Decisions and County Budgetary Restrictions: Is the Death Penalty Arbitrarily Applied Based on County Funding?*, 71 FORDHAM L. REV. 2735, 2758 (2003) ("Most small counties cannot adequately prepare for the up-front costs presented by a death penalty charge as the trials are thankfully rare.").

[7] Mr. Garcia also presented evidence concerning Louisiana's new method of administering conflict cases, implemented after Mr. Garcia's legal proceedings began. *See, e.g.*, S.R. 1140

generally S.R. 1178-1203 (argument of counsel, summarizing evidence adduced at hearing).

At the conclusion of the evidentiary hearing, the trial court found that all of the attorneys who worked with the public defender were "independent contractors." Pet. App. 59a.[8]

After remand, the parties filed supplemental briefs with the Louisiana Supreme Court. Mr. Garcia asserted that the trial court's finding on employment status was erroneous. Additionally, he claimed that the trial court's failure to inquire into a conflict about which it knew required reversal under *Holloway*, and that an actual conflict adversely affected Mr. D'Aquila's representation of Mr. Garcia because Mr. D'Aquila took steps to ensure that these cases would not bankrupt his office, which in turn made it more likely that the death penalty would be pursued against Mr. Garcia (while his co-defendants would be spared a similar fate).

(testimony of Mr. DiGiulio, explaining that now, "[t]he procedure [the Louisiana Public Defender Board has] developed is that if the district defender decides that he or his office will take the first of a co-defendant, then the appointment of conflict defendants is given to us at the State Board . . . .").

[8] Unrebutted testimony on remand established that Mr. D'Aquila designated IDB attorneys as "independent contractors" specifically to avoid the expenses entailed in contracting with independent and non-conflicted attorneys when conflicts arose in multiple-defendants cases. *See* S.R. 736 ("It was my understanding we signed the contracts because . . . it was necessary that we be independent contractors so that we could handle conflict cases.").

In its opinion, the Louisiana Supreme Court decided that "the employment status of the indigent defenders is immaterial" to the defendant's conflict claims. Pet. App. 59a. It declined to recognize that this case presents circumstances that trigger the *Holloway* rule of automatic reversal. Although it found that "the District Court knew of the potential conflict arising from the representation of all three capital defendants by the same Indigent Defender Board" and "had the duty to make a *Holloway* inquiry when it knew 'a particular conflict existed,'" the court relied on *Mickens* to require proof of an actual conflict that had an adverse effect. Pet. App. 67a.

The Louisiana Supreme Court cited no test for how it determined that there was no actual conflict that adversely affected counsel's performance. It did not consider Mr. Garcia's evidence showing the early pre-trial manifestation of an actual conflict here. Instead, it focused exclusively on what occurred "at trial," and based its denial of relief upon this narrow view of adverse effect. Pet. App. 68a.

The dissent found that "what transpired in the district court precisely fits the pattern of neither the *Holloway* standard nor the *Sullivan* standard" and was not addressed in *Mickens*. Pet. App. 208a-209a. The dissent would have applied the *Holloway* reversal rule here because it found (1) "a conflict has been explicitly raised before the court"; (2) the court failed to assume "responsibility to examine the nature of the conflict and its possible ramifications"; and (3) the adversarial process "has fully collapsed when one group of counsel attempted to prevent a

death sentence for the Defendant and another group from the same IDB brokered a deal for Nelson to testify against the Defendant as a key witness in the state's effort in obtaining Defendant's death sentence." Pet. App. 209a-212a (internal quotations and citations omitted).

The dissent also found an actual conflict. Contrary to the majority, the dissent evaluated the defense's evidence of adverse effect and found that the "IDB [] had a powerful economic incentive to de-capitalize the cases of Danil Garcia and James Nelson to avoid the expense of obtaining outside counsel." Pet. App. 223a-224a. Relying on this financial conflict and evidence of antagonistic defenses that emerged at the preliminary examination, the dissent stated its view that "[t]he adversarial system simply is not functioning properly if any incentive exists for defense counsel to determine whom among two or more defendants accused of the same capital crime is entitled to receive qualified capital defense counsel or, instead, which defendant(s) counsel must refrain from providing qualified capital defense counsel." Pet. App. 229a.

The Louisiana Supreme Court denied relief on November 16, 2012 and denied Mr. Garcia's application for rehearing on January 25, 2013. Pet. App. 243a. This petition ensues.

REASONS FOR GRANTING THE WRIT

In this case, the Louisiana Supreme Court found that the trial court knew that counsel had a potential

conflict of interest, and in fact, had created the probability that a conflict of interest would materialize. Notwithstanding its explicit acknowledgement of this conflict, and notwithstanding the State's suggestion that the court appoint a separate public defender office to represent the co-defendants, the trial court delegated its authority to resolve the probable conflict to the chief defender of the single office it appointed to represent all three co-defendants. Pet. App. 20a. Operating under this conflict, Mr. D'Aquila assigned non-certified counsel to represent Michael Garcia's co-defendants, saving the IDB the cost of contracting with certified out-of-jurisdiction lawyers, but also effectively taking death off the table for the two co-defendants and leaving Mr. Garcia as the State's sole remaining death penalty target.

The trial court's awareness of this probable conflict, and its role in creating that conflict, give rise to circumstances the *Mickens* Court did not envision. Forced to either object to the arrangement—to the benefit of his client—or to act in the interests of the IDB and those of his client's co-defendants, Mr. D'Aquila chose the latter. The trial court was in a position to prevent this conflict from materializing, and instead of inquiring, it delegated its responsibility to conflicted counsel. These circumstances should prompt the Court to modify its holding in *Mickens*, and to craft a narrow exception to the general requirement that defense counsel must object for a defendant to receive the protections of *Holloway*'s automatic reversal rule.

In denying relief, the Louisiana Supreme Court also failed to articulate the test upon which it relied in determining that Mr. Garcia did not demonstrate that an actual conflict adversely affected counsel. Although it cited this Court's conflict jurisprudence, it nevertheless employed a standard that comes perilously close to the Sixth Amendment prejudice standard—even though this Court has "spared the defendant the need of showing probable effect upon the outcome, and have simply presumed such effect" when the defendant's attorney labored under a conflict of interest. *Mickens*, 535 U.S. at 166. The failure to set forth a test underscores a critical gap in the conflict jurisprudence: this Court has never settled the important federal Constitutional question of what constitutes an actual conflict and adverse effect. The Court's long-term silence has created considerable confusion in the lower courts. Some courts are split about what test should apply; others, like Louisiana, use no test at all. In this case, the Louisiana Supreme Court's analysis overlooked all pre-trial evidence of actual conflict, even though this Court has emphasized that the right to the effective assistance of counsel encompasses more than the right to that assistance at trial. *See Missouri v. Frye*, 132 S. Ct. 1399 (2012); *Lafler v. Cooper*, 132 S. Ct. 1376 (2012); *Padilla v. Kentucky*, 559 U.S. 356 (2010).

This Court should take this opportunity to reassess *Mickens* and recalibrate *Holloway*'s reach to better elucidate trial courts' responsibilities and ensure that the logic underlying the automatic reversal rule is not artificially cabined. Even if automatic reversal is not warranted, however, this

Court should grant certiorari to set out a clear test for actual conflict and adverse effect which, consistent with its precedents in *Lafler*, *Frye*, and *Padilla*, encompasses trial counsel's duties throughout the arc of criminal proceedings rather than simply at the trial, and thereby provides meaningful and much-needed guidance to the lower courts.

I. *HOLLOWAY*'S AUTOMATIC REVERSAL RULE SHOULD APPLY IN LIMITED CIRCUMSTANCES BEYOND THOSE IN WHICH DEFENSE COUNSEL IS COMPELLED TO CONTINUE JOINT REPRESENTATION OVER A TIMELY OBJECTION

A. A Defense Objection Should Not Be the Exclusive Trigger for the Automatic Reversal Rule

This Court should grant certiorari to resolve a tension within its own conflict jurisprudence. On one hand, this Court has recognized that defense attorneys are often in "'the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial.'" *Holloway*, 435 U.S. at 485 (quoting *State v. Davis*, 514 P.2d 1025, 1027 (Ariz. 1973)). Additionally, defense counsel "has an ethical obligation to advise the court of any problem, and [] his declarations are 'virtually made under oath.'" *Mickens*, 535 U.S. at 167-68 (quoting *Holloway*, 435 U.S. at 485-86). For these reasons, this Court has sanctioned automatic reversal where a trial court

failed to inquire into a potential conflict of interest after defense counsel had affirmatively objected. *See Mickens*, 535 U.S. at 173-74.

The requirement of a defense objection, however, is at odds with this Court's acknowledgement that "[j]oint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing." *Holloway*, 435 U.S. at 489-90; *see also id.* at 490 ("But in a case of joint representation of conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process.") (emphasis in original). Just as a conflict of interest may prevent defense counsel from exploring possible plea negotiations, so, too, it may prevent defense counsel from raising an objection to that conflict. *See* Tigran W. Eldred, *The Psychology of Conflicts of Interest in Criminal Cases*, 58 KAN. L. REV. 43, 76-77 (2009) ("While some lawyers will be able to act consistent with their clients' interests, many others will be unable to make accurate assessments when deciding whether a conflict of interest is present. In addition, all will find it difficult in hindsight to provide an accurate assessment about whether a conflict had an adverse effect on the representation provided to a client.").

This Court's jurisprudence has thus created a paradox: a defendant must always rely on conflicted counsel to object to the conflict to earn the protection of *Holloway*'s automatic reversal rule. Following this Court's precedents, lower courts "rely on counsel to

act ethically, but many conflict cases arise because counsel fails to make appropriate and timely disclosure. . . . Even when the conflict issue is raised and addressed in open court, conflicted counsel sometimes aggressively seeks to remain in the case." Anne Bowen Poulin, *Conflicts of Interest in Criminal Cases: Should the Prosecution Have a Duty to Disclose?*, 47 AM. CRIM. L. REV. 1135, 1179-80 (2010). Thus, although this Court's reliance on a defense objection is generally well-placed, its reach should not be absolute.

This Court recently examined a similar tension within its judicial conflict-of-interest jurisprudence, noting that although a judge's subjective inquiry into actual bias deserves deference, "[t]he difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883 (2009). The need for "objective rules" applies as forcefully to attorney conflicts of interest as it does to judicial conflicts of interest.

B. *Holloway*'s Automatic Reversal Rule Should Apply When the Trial Court's Actions Create a Probable Conflict of Interest

Mickens premised its restrictive reading of *Holloway* in part on the fact that a "trial court's awareness of a potential conflict neither renders it more likely that counsel's performance was

significantly affected nor in any other way renders the verdict unreliable." *Mickens*, 535 U.S. at 173.[9]

This rationale holds less force, however, when the trial court itself is responsible for creating the conflict of interest. In such cases—including this one—the trial court is not merely aware of the conflict, rather the court is directly responsible for a "conflict of interest that hampered representation." *Id.* This is one of the "special circumstances," undefined in *Sullivan* and unanticipated by *Mickens*, where a trial court should have a duty to inquire into the conflict, even when conflicted defense counsel does not object. That is particularly true in situations like these, where the trial court is aware of the probable conflict, but nevertheless fails to intervene when that conflict materializes.

This narrow exception to the holding in *Mickens* is firmly rooted in prior jurisprudence. This Court long ago recognized that the trial court possesses "the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. . . . The trial court should protect the right of an accused to have the assistance of counsel." *Glasser v. United States*, 315 U.S. 60, 71 (1942). This Court further stated, "[o]f equal importance" is the trial court's "duty to refrain from embarrassing counsel . . . by

---

[9] In his concurring opinion, Justice Kennedy elaborated on this specific point: "The constitutional question must turn on whether trial counsel had a conflict of interest that hampered representation, not on whether the trial judge should have been more assiduous in taking prophylactic measures." *Id.* at 179 (Kennedy, J., concurring).

insisting, or indeed, even suggesting, that counsel undertake to concurrently represent interests which might diverge from those of the first client, when the possibility of that divergence is brought home to the trial court." *Id.* at 76. That duty serves not only to protect the defendant's interest in conflict-free counsel, but also the "independent interest in the rendition of just verdicts in criminal cases." *Wheat v. United States*, 486 U.S. 153, 160 (1988). For that reason, "a court confronted with and alerted to possible conflicts of interest must take adequate steps to ascertain whether the conflicts warrant separate counsel." *Id.* at 160.

When a trial court affirmatively disregards this "protective duty" by knowingly creating a probable conflict of interest, delegating responsibility for resolving the probable conflict to the conflicted lawyer, and then failing to intervene when the probable conflict ripens into an actual conflict, the responsibility for any ensuing Sixth Amendment violations rests as firmly on the trial court's shoulders as on the conflicted defense counsel's. In these special circumstances, a defendant should not be deprived of *Holloway*'s protections merely because his conflicted attorney did not object. Indeed, automatic reversal for the trial court's failure to inquire into the probable conflict it created is as appropriate as it is for a trial court's deprivation of counsel of choice:

> Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury,

> presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the "framework within which the trial proceeds," [*Arizona v.*] *Fulminante*, 499 U.S. 279, 310 (1991)—or indeed on whether it proceeds at all. It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings. Many counseled decisions . . . do not even concern the conduct of the trial at all. Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe.

United States v. Gonzalez-Lopez, 548 U.S. 140, 150 (2006). In fact, the remedy exists because it "would be virtually impossible," in many cases, "to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations." *Holloway*, 435 U.S. at 491.

C. This Case Provides an Appropriate Vehicle for the Court to Reconsider the Scope of its Holding in *Mickens*

As a result of a lengthy evidentiary hearing regarding the structure of the 18th Judicial District IDB, Mr. Garcia's case presents an unusually developed direct appeal record. The remand ordered by the Louisiana Supreme Court provided some opportunity to develop the factual record regarding the conflicts of interest; there are no procedural bars to this Court's resolution of the question presented.

The rationale undergirding *Mickens*'s limitation of *Holloway* and *Sullivan* loses its controlling force when it confronts the circumstances presented in this case. An objection by counsel should not be required on these facts. This Court should grant certiorari to consider whether automatic reversal is appropriate when a trial court knowingly creates a probable conflict of interest and either fails to inquire into it or secure a waiver.

II. THIS COURT SHOULD ARTICULATE A TEST TO ASSESS WHETHER AN ACTUAL CONFLICT ADVERSELY AFFECTED AN ATTORNEY'S PERFORMANCE

This Court has made clear that a defendant alleging his attorney labored under a conflict of interest need not prove prejudice to prevail if he "shows that a conflict of interest actually affected the adequacy of his representation . . . ." *Sullivan*, 446

U.S. at 349; *see also Mickens*, 535 U.S. at 173. However, this Court has never explained what a defendant must show to establish a Sixth Amendment actual conflict—that is, "a conflict of interest that adversely affects counsel's performance." *Mickens*, 535 U.S. at 172 n.5. This has created substantial confusion in the courts below.

Since this Court decided *Sullivan* over thirty years ago, the lower courts have struggled with how to determine whether a defendant has shown an actual conflict existed. In the federal courts, some circuits have set out tests that require the defense to make particularized showings. But, a split between the circuits emerged, providing uneven protection of the right to conflict-free counsel. And, while some states have adopted tests created in the federal circuits, other states and circuits have failed altogether to set out a test, instead deciding conflict claims in an *ad hoc* fashion and leaving lower courts and litigants with no guidance. This state of affairs calls for this Court's intervention.

A. A Number of Courts of Last Resort Have Split on What Test Should Apply

"The circuits are divided as to how a defendant may demonstrate that a conflict adversely affected his counsel's performance." *Eisemann v. Herbert*, 401 F.3d 102, 107 (2d Cir. 2005). On the one hand, the First, Second, and Third Circuits have adopted the following test:

> In order to establish an actual conflict the petitioner must show two elements.

> First, he must demonstrate that some plausible alternative defense strategy or tactic might have been pursued. He need not show that the defense would necessarily have been successful if it had been used, but that it possessed sufficient substance to be a viable alternative. Second, he must establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.

United States v. Fahey, 769 F.2d 829, 836 (1st Cir. 1985); *see also United States v. Gambino*, 864 F.2d 1064, 1070 (3d Cir. 1989) (adopting this test); *Winkler v. Keane*, 7 F.3d 304, 309 (2d Cir. 1993) (same).

Other circuits, however, "have taken a slightly more demanding approach, requiring suggestion of a defense that was objectively reasonable." *Eisemann*, 401 F.3d at 107. Under the Fourth Circuit's approach:

> First, the petitioner must identify a plausible alternative defense strategy or tactic that his defense counsel might have pursued. Second, the petitioner must show that the alternative strategy or tactic was objectively reasonable under the facts of the case known to the attorney at the time of the attorney's tactical decision. . . . Finally, the petitioner must establish that the

> defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict.

United States v. Stitt, 441 F.3d 297, 303 (4th Cir. 2006) (quoting *Mickens v. Taylor*, 240 F.3d 348, 361 (4th Cir. 2001) (en banc), aff'd, 535 U.S. 162 (2002)). The Eighth and Eleventh Circuits have adopted this more rigorous test. *See Covey v. United States*, 377 F.3d 903, 908 (8th Cir. 2004) (adopting the Fourth Circuit test); *Quince v. Crosby*, 360 F.3d 1259, 1264-65 (11th Cir. 2004) (same).

The difference in these two tests has been replicated and compounded in the state courts. *Compare e.g., State v. Vega*, 788 A.2d 1221, 1231 (Conn. 2002) (adopting the Second Circuit test) *and Woods v. State*, 701 N.E.2d 1208, 1223 (Ind. 1998) (adopting the Second Circuit test) *with State v. Smitherman*, 733 N.W.2d 341, 349 (Iowa 2007) (relying upon the Fourth Circuit test).

Additionally, other circuits have noted that the jurisprudence leaves them with little guidance. As the Fifth Circuit has observed, "*Cuyler*'s 'actual conflict' and 'adverse effect' elements have been described as 'rather vague.' Even a brief review of the precedent reveals that any categorical treatment of when an actual conflict exists is difficult." *Perillo v. Johnson*, 205 F.3d 775, 782 (5th Cir. 2000) (internal citations omitted). The Tenth Circuit expressed a similar concern: "'Actual conflict' and 'adverse effect' are not self-defining phrases . . . ." *United States v. Bowie*, 892 F.2d 1494, 1500 (10th Cir. 1990).

Both the split itself and the confusion across the circuits underscore the lower courts' need for this Court's intervention.

B. Other Courts, Including the Louisiana Supreme Court, Have Decided Conflict-of-Interest Claims Without Explaining What Is Required to Demonstrate an Actual Conflict and Adverse Effect

Several state courts of last resort fail to identify what test—if any—they are relying on when they decide claims of actual conflict. Rather than explain what the defendant must prove, these courts simply invoke excerpts from *Holloway*, *Sullivan*, and *Mickens* and proceed to conduct a cursory analysis of the issue presented. For example, the Supreme Court of Arkansas has held that "[a] petitioner has the burden of proving a conflict of interest, and showing its adverse effects." *Brantley v. State*, 2007 Ark. LEXIS 545, *8 (2007). But, instead of setting out a test, that court confuses conflict of interest and traditional ineffective assistance claims, holding "[t]he *prejudice* must be real, and have a demonstrable detrimental effect and not merely some abstract or theoretical effect." *Id.* (emphasis added). The Kansas Supreme Court similarly employs this Court's language, but does not explain how it will determine whether there is an actual conflict. *See Boldridge v. State*, 215 P.3d 585, 591 (Kan. 2009) ("To demonstrate that a conflict of interest resulted in ineffective assistance of counsel, a defendant has the burden of proving a reversible conflict—that is, (1) a conflict of interest (2) that

affected the adequacy of the attorney's representation.") (citing *Mickens*, 535 U.S. at 168).

Like the courts in Kansas and Arkansas, the Louisiana Supreme Court here ruled without articulating any test. The Court noted that "'an actual conflict of interest' means 'precisely a conflict that affected counsel's performance—as opposed to a mere theoretical division of loyalties.'" Pet. App. 66a (citing *Mickens*, 535 U.S. at 171). Rather than rely on a test that distinguishes "the potential conflict" the court found in this case from an actual conflict, the Louisiana Supreme Court found "for reversal under *Mickens*, defendant must demonstrate the conflict of interest . . . adversely affected his counsel's performance." Pet. App. 67a, 68a. The court did not identify or engage with the evidence of actual conflict Mr. Garcia set out below. Instead, it held that "[t]he trial record clearly shows defendant's representation was not adversely affected." Pet. App. 68a. With no test upon which to ground its analysis, the Louisiana Supreme Court focused exclusively on trial counsel's actions "at trial," citing a few examples of trial counsel's actions that, to the court, appeared unencumbered by conflict or were otherwise effective. This analysis led the court to the conclusion that no actual conflict existed. *See id.*

This Court's failure to articulate a test has resulted in widespread confusion and uneven application. It has enabled the Louisiana Supreme Court to look past all of the actual conflict evidence Mr. Garcia marshaled without explanation, and to focus instead on evidence that purportedly demonstrated counsel's effectiveness and fidelity at

trial. *See, e.g.*, Pet. App. 69a. Without guidance, lower courts have been unable to effectuate the Sixth Amendment protections described in *Sullivan* and *Mickens*.

C. Any Test Should Meaningfully Account for the Range of Important Tasks Counsel Performs Over the Course of the Representation

Whatever test this Court adopts, it should meaningfully reflect the wide range of critical responsibilities counsel must perform from the time representation begins. In this case, the Louisiana Supreme Court's opinion diminished the role of counsel because it disregarded the evidence Mr. Garcia offered to demonstrate that an actual conflict arose, which adversely affected trial counsel, well before the trial. This narrow view of the Sixth Amendment right comports with neither the Court's long-standing conflict jurisprudence nor its recent emphasis on the right to effective assistance of counsel.

The insidious effects of an attorney's conflict of interest may pervade the representation but elude the trial record. The Court warned that it would be difficult "to assess the impact of a conflict" in part because "the evil . . . is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations . . . ." *Holloway*, 435 U.S. at 490 (emphasis in original). Conflicts thus do not emerge only "at trial," Pet. App. 67a, but may influence a range of counsel's "options, tactics, and decisions in plea negotiations."

Holloway, 435 U.S. at 491. The Sixth Amendment thus requires a conflict test that responds to the many ways in which counsel must effectively assist the client.

A narrow, trial-focused test would exclude from its reach the overwhelming majority of criminal cases. "The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages." *Frye*, 132 S. Ct. at 1407. As this Court recently recognized in the traditional ineffective assistance context, the Sixth Amendment "constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding . . . ." *Lafler*, 132 S. Ct. at 1385.

Nowhere are plea bargains more "central to the administration of justice" and to defense counsel's "adequate assistance" than in a capital case.[10] The imperative of settlement has been the subject of statewide and national counsel guidelines as well as articles by death penalty litigators for over three

[10] Importantly, nowhere is the evidence of Mr. D'Aquila's conflict more apparent than in his approach to plea negotiations. Asked whether it occurred to him to take Mr. Garcia's case to the State to seek reduced charges and ask the State to pursue capital charges against James Nelson instead, Mr. D'Aquila responded, "It never entered my mind . . . . Why would I go to the State and tell them to pursue the death penalty against Nelson?" S.R. 1067.

decades. *See, e.g.*, Guideline 10.9.1, American Bar Ass'n, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003 Ed.) ("Counsel at every stage of the case have an obligation to take all steps that may be appropriate in the exercise of professional judgment in accordance with these Guidelines to achieve an agreed-upon disposition."); Louisiana Death Penalty Defense Manual, § A-V. (1994 ed.) (". . . [A] plea of guilty in exchange for a life sentence is often a major victory in a capital case. . . . one must marshal all of the convincing reasons why a sentence less than death is appropriate."); Equal Justice Initiative of Alabama, Alabama Defense Trial Manual at 4 (1997 Ed.) ("One of the most important aspects of capital litigation is plea bargaining. In many cases, obtaining a sentence other than death may be the best victory possible."); Std. 11.6.1, Nat'l Legal Aid & Defender Ass'n, Standards for the Appointment and Performance of Counsel in Death Penalty Cases (1988 Ed.) *and* Guideline 11.6.1, American Bar Ass'n, Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989 Ed.) (both advising that "[c]ounsel should explore with the client the possibility and desirability of reaching a negotiated disposition of the charges rather than proceeding to a trial").

This Court should articulate a test that is appropriately sensitive to the reality that conflicts can influence counsel before trial. The alternative—the trial-focused approach the Louisiana Supreme Court took here—disregards both this Court's recognition that the Sixth Amendment requires effective lawyering at the pretrial stages of a case

and the rule in *Sullivan* that a showing of prejudice is not required where trial counsel labored under an actual conflict of interest. *See Frye,* 132 S. Ct. at 1407; *Lafler,* 132 S. Ct. at 1385; *Sullivan*, 446 U.S. at 349. Counsel's conflicting loyalties adversely affect the representation not only when he fails to vigorously cross-examine a witness, but also when he seeks a deal for one client at the expense of the other. A defendant suffers not only when his lawyer fails to challenge inculpatory evidence supplied by one of his other clients, but also when that lawyer's "divergent allegiances" cause him to refrain from raising a conflict to protect his financial interests, thereby advancing the interests of the co-defendants, but harming his client. Pet. App. 213a. The integrity of the adversarial process requires this Court to squarely address the "adverse effect" of conflicts of interest at all critical stages of a capital case.

On any test the Court may set forth, Mr. Garcia's claim warrants relief. Mr. D'Aquila's actual conflict materialized early in the pretrial proceedings, depriving Mr. Garcia of the protections that flow from the right to conflict-free representation. Mr. D'Aquila placed all of the capitally-certified lawyers on Mr. Garcia's defense team and argued that proceedings against the co-defendants were null so long as the State prosecuted them capitally. The alternative strategy available to Mr. D'Aquila was both plausible and objectively reasonable; he could have refused to represent more than one defendant and requested that the court manage the assignment of counsel for the co-defendants. Mr. D'Aquila did not take this approach because he did not want to bankrupt the IDB. His actual conflict adversely

affected his representation and reversal is the appropriate remedy.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

Michael Admirand
CAPITAL APPEALS PROJECT
636 Baronne Street
New Orleans, LA 70113

Elisabeth Semel
Bidish Sarma
Ty Alper
DEATH PENALTY CLINIC
396 SIMON HALL
UC BERKELEY SCHOOL OF LAW
Berkeley, CA 94720-7200

*William Sothern
Counsel of Record
CONNER & SOTHERN, LLC
3015 Magazine Street
New Orleans, LA 70115
(504) 581-9083
billy@connersothern.com