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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PATRICK BAYLIS,	)	
	)	
Petitioner,	)	No. C 07-5791 CRB (PR)
	)	
vs.	)	ORDER DENYING PETITION
	)	FOR A WRIT OF HABEAS
JAMES TILTON, Warden,	)	CORPUS
	)	
Respondent.	)	
_____	)	

Petitioner Patrick Baylis, a state prisoner incarcerated at California State Prison, Solano, seeks a writ of habeas corpus under 28 U.S.C. § 2254 challenging a conviction from Alameda County Superior Court. For the reasons set forth below, the petition is denied.

**STATEMENT OF THE CASE**

In October 2003, the District Attorney for the County of Alameda filed an information alleging that petitioner committed four counts of rape (counts 1-4), one count of penetration with a foreign object (count 5), one count of forcible oral copulation (count 6), one count of kidnapping with the intent to commit rape or oral copulation (count 7), and one count of robbery (count 8). The information

1 also alleged enhancements to each of these counts. As to counts one through six,  
2 it alleged that petitioner kidnapped the victim and that the movement of the  
3 victim substantially increased the risk to her, and that petitioner personally used a  
4 firearm. As to counts seven and eight, it alleged that petitioner personally used a  
5 firearm.

6 Well before trial, petitioner requested that the court substitute Richard  
7 Hove as counsel of record in place of appointed counsel Michael Berger. The  
8 trial court denied this motion, and Hove did not represent petitioner at trial. A  
9 jury found petitioner guilty of all eight counts and found that the alleged  
10 enhancements were true. In April 2004, the trial court sentenced petitioner to a  
11 prison term of 44 years to life.

12 Petitioner appealed to the California Court of Appeal, contending that the  
13 trial court erred in denying his motion to substitute counsel and in failing to  
14 instruct the jury on the lesser-included offense of theft.

15 On May 24, 2006, the California Court of Appeal rejected petitioner's  
16 contentions and affirmed the judgment of the trial court. On September 13, 2006,  
17 the California Supreme Court denied review.

18 On November 14, 2007, petitioner filed this petition for a writ of habeas  
19 corpus under 28 U.S.C. § 2254. Per order filed on February 12, 2008, the court  
20 found that the petition, liberally construed, stated cognizable claims under § 2254  
21 and ordered respondent to show cause why a writ of habeas corpus should not be  
22 granted. Respondent has filed an answer to the order to show cause and  
23 petitioner has filed a traverse.

## 24 **STATEMENT OF THE FACTS**

25 The California Court of Appeal summarized the facts of the case as  
26  
27

1 follows:

2 A. *The Prosecution Case*

3 On the morning of February 23, 1997, as the victim was walking to  
4 work, a man she described as Black and heavyset walked toward  
5 her. He grabbed her arm, put his hand over her mouth, and put a  
gun to her cheek. He told her not to scream or he would kill her,  
and he told her to keep walking.

6 They walked through a parking lot and he covered her face with her  
7 jacket. The assailant forced her into a car and drove her to an  
8 apartment in Hayward. He led her to a walk-in closet, covered her  
9 eye with a t-shirt, and told her to take off her clothes. He forced  
10 her to have intercourse in the closet and on a mattress in another  
11 room, and, holding a gun to her head, made her orally copulate him.  
As the assailant handed the victim her clothes, she heard him go  
through her pockets. She later discovered that approximately  
seventeen dollars were missing. The assailant told the victim that  
he should just kill her, led her back to the mattress, and forced her  
to have intercourse again.

12 They left the apartment. The assailant drove for a while and told  
13 the victim to get out of the car. She contacted the police,  
14 describing her assailant as a Black male in his early thirties, five  
feet five inches tall, about 200 pounds, with a full beard and closely  
cut hair.

15 In a photo lineup, the victim picked out defendant's brother,  
16 Rodney Baylis, as her assailant. She was not confident of the  
17 identification, although she did not say so that day to the detective  
18 in charge of the investigation, Frank Daley. She did tell Audrey  
Pinkney, who accompanied her to the police station, that the photo  
she picked out resembled her assailant but that she did not really  
think it was him.

19 One night about a month later, the victim saw the car her assailant  
20 had driven parked across the street from her house. She saw three  
21 men approach the car and told Pinkney, with whom she was living,  
22 that one of the men was her assailant. They called the police, who  
23 arrived soon afterwards and drove the victim and Pinkney to where  
the car had been stopped by other officers. The victim identified  
defendant as her assailant. One of the officers said she was  
confusing defendant with his brother, but the victim never changed  
her mind.

24 Because Detective Daley had identified Rodney as the primary  
25 suspect in the rape, defendant was not taken into custody. Another  
26 officer who was present during the identification admitted that he  
27 falsely wrote in his report that the victim did not make an  
28 identification. He testified that Daley asked him to write a  
supplemental report falsely stating that the victim reported that the

1 person the police had detained looked like the assailant but that the  
2 assailant was actually shorter (defendant is over six feet tall and  
3 Rodney is approximately five and a half feet tall). A couple of days  
4 later the victim told Daley that defendant was her assailant; he  
5 corrected her, admonishing that her assailant was actually the  
6 defendant's brother, whom she had identified in the photo line-up.

7 In June 1999, DNA analysis of a semen sample on the victim's  
8 underpants excluded Rodney. Defendant and the victim's  
9 boyfriend, Robert Pinkney, could not be excluded as sources of the  
10 semen. Assuming Robert Pinkney was one source of the semen,  
11 the odds of a person taken at random being another contributor  
12 were approximately one in 690 billion Caucasian males and one in  
13 10 billion African-American males. Not assuming that Robert  
14 Pinkney was a source of the semen, the odds of a person taken at  
15 random being on the contributors was one in 8,200 Caucasian  
16 males and one in 890 African-American males.

17 Based on information obtained from a car dealership, the police  
18 determined that the car the assailant drove matched the description  
19 of a 1996 Hyundai registered to a Cathrell Golston. The  
20 investigation led the police to an apartment on Vermont Street in  
21 Hayward, which the victim subsequently identified as the location  
22 where she was raped. The victim's and defendant's fingerprints  
23 were found in the Vermont Street apartment; Rodney's were not.  
24 Golston lived in the Vermont Street apartment but moved out  
25 before February 23, 1997. Golston previously was in a romantic  
26 relationship with defendant. The romantic relationship ended in  
27 December 1996, but she continued to allow defendant to drive her  
28 car and defendant had keys to the Vermont Street apartment.  
Rodney had never been to the apartment.

#### 17 B. *The Defense Case*

18 Defendant challenged the victim's identification. The parties  
19 stipulated that a victim-witness assistance counselor would testify  
20 that the victim never told her that Rodney was not her assailant and  
21 did not express any doubt about the identification of Rodney.  
22 Similarly, defendant's sister testified that she saw the victim at  
23 Rodney's preliminary hearing, and the victim saw defendant and  
24 did not say anything about him.

25 Defendant testified. He denied raping, kidnapping, or having any  
26 contact with the victim. He did admit that he had a key to Golston's  
27 apartment on Vermont Street and that he drove her car with  
28 permission. The night before the victim was kidnapped and raped,  
the defendant picked up Rodney from a BART station and gave  
him Golston's car, as well as the keys to the apartment on Vermont  
Street. Later that night, defendant and two friends, Mike and  
Tanya, went to a bowling alley in Hayward. Afterwards, they went  
to the Vermont Street apartment, and defendant had sex with  
Tanya. Defendant left the apartment early the next morning.

1 In February 1997, defendant's hair was about three or four inches  
2 long, not closely cut. He had a goatee but not a full beard. He  
3 went to the police department voluntarily after he heard the police  
were looking for Rodney. He was interviewed by two detectives  
but was not arrested.

4 *People v. Baylis*, No. A106217, slip op. at 2-5 (Cal. Ct. App. May 24, 2006)  
5 (Resp't Ex. H).

## 6 DISCUSSION

### 7 A. Standard of Review

8 This court may entertain a petition for a writ of habeas corpus "in behalf  
9 of a person in custody pursuant to the judgment of a State court only on the  
10 ground that he is in custody in violation of the Constitution or laws or treaties of  
11 the United States." 28 U.S.C. § 2254(a).

12 The writ may not be granted with respect to any claim that was  
13 adjudicated on the merits in state court unless the state court's adjudication of the  
14 claim: "(1) resulted in a decision that was contrary to, or involved an  
15 unreasonable application of, clearly established Federal law, as determined by the  
16 Supreme Court of the United States; or (2) resulted in a decision that was based  
17 on an unreasonable determination of the facts in light of the evidence presented  
18 in the State court proceeding." *Id.* § 2254(d).

19 "Under the 'contrary to' clause, a federal habeas court may grant the writ if  
20 the state court arrives at a conclusion opposite to that reached by [the Supreme]  
21 Court on a question of law or if the state court decides a case differently than  
22 [the] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*,  
23 529 U.S. 362, 412-13 (2000). "Under the 'reasonable application clause,' a  
24 federal habeas court may grant the writ if the state court identifies the correct  
25 governing legal principle from [the] Court's decisions but unreasonably applies  
26 that principle to the facts of the prisoner's case." *Id.* at 413.

1 "[A] federal habeas court may not issue the writ simply because the court  
2 concludes in its independent judgment that the relevant state-court decision  
3 applied clearly established federal law erroneously or incorrectly. Rather, that  
4 application must also be unreasonable." *Id.* at 411. A federal habeas court  
5 making the "unreasonable application" inquiry should ask whether the state  
6 court's application of clearly established federal law was "objectively  
7 unreasonable." *Id.* at 409.

8 The only definitive source of clearly established federal law under 28  
9 U.S.C. § 2254(d) is in the holdings (as opposed to the dicta) of the Supreme  
10 Court as of the time of the state court decision. *Id.* at 412; *Clark v. Murphy*, 331  
11 F.3d 1062, 1069 (9th Cir. 2003). While circuit law may be "persuasive authority"  
12 for purposes of determining whether a state court decision is an unreasonable  
13 application of Supreme Court precedent, only the Supreme Court's holdings are  
14 binding on the state courts and only those holdings need be "reasonably" applied.  
15 *Id.*

16  
17 B. Claims & Analysis

18 Petitioner raises two claims for relief under § 2254: (1) that the trial court  
19 erred in denying his motion to substitute counsel, and (2) as to count 8 (robbery),  
20 that the trial court erred in failing to instruct the jury sua sponte on the lesser-  
21 included offense of theft.

22 1. Denial of substitution of counsel

23 Petitioner claims that the trial court violated his Sixth Amendment right to  
24 choice of counsel when it denied his motion to substitute in Richard Hove as his  
25 lawyer. Pet. 6. This claim is without merit.

26 The "essential aim" of the Sixth Amendment "is to guarantee an effective  
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1 advocate for each criminal defendant rather than to ensure that a defendant will  
2 inexorably be represented by the lawyer whom he prefers." *Wheat v. United*  
3 *States*, 486 U.S. 153, 159 (1988). The Amendment comprehends the right to  
4 select and be represented by one's preferred attorney, but that right is  
5 circumscribed in several respects. *Id.* at 159. The presumption that a criminal  
6 defendant may have counsel of his choice "may be overcome not only by a  
7 demonstration of actual conflict [of interest] but by a showing of a serious  
8 potential for conflict." *Id.* at 164. Where a defendant seeks to waive any such  
9 conflict, trial courts are allowed "substantial latitude" in refusing such a waiver in  
10 order to preserve the integrity of the proceedings. *Id.* at 162-63.

11 The state trial court denied petitioner's request to substitute in Richard  
12 Hove as his counsel because it found a conflict of interest. Hove had represented  
13 petitioner's brother Rodney Baylis, and the defense strategy at trial was likely to  
14 be that Rodney, rather than petitioner, had committed the crimes. The court also  
15 found that Rodney had not adequately waived the conflict of interest.

16 The California Court of Appeal summarized the facts underlying  
17 petitioner's claim as follows:

18 In 2003, well before trial, defendant requested that Richard Hove  
19 be substituted as counsel of record in place of appointed counsel  
20 Michael Berger. The prosecution opposed the request on the  
21 ground that Hove had previously represented Rodney in  
22 prosecutions for sexual assaults that occurred in Alameda in August  
23 1996 and in Oakland in April 1997. The rape at issue in this case  
24 occurred in Hayward in February 1997. Originally Rodney was  
25 charged with the Hayward offenses as well, and the victim  
26 identified Rodney as her assailant at the preliminary hearing, but  
27 the charges were dismissed after DNA analysis implicated  
28 defendant.

24 Hove never represented Rodney in relation to the Hayward  
25 offenses. Rodney's attorney at the preliminary hearing on the  
26 charges arising out of the Alameda, Oakland, and Hayward  
27 incidents was Roger Patton. Hove represented Rodney at trial for  
28 the Alameda and Oakland incidents. Hove raised a mistaken  
identity defense and pointed to Patrick as the assailant who

1 committed the Oakland sexual assault. Rodney testified that the  
2 last time he had seen the gun used in the Oakland assault Patrick  
3 had it. Hove attempted to question Rodney about the  
4 misidentification in *this* case, but the trial court did not allow the  
5 questioning. Hove called Patrick as a witness, and he admitted  
6 ownership of the gun used in the Oakland assault but refused to  
7 answer whether he took the gun to the store where the rape took  
8 place; the trial court struck Patrick's testimony about the gun. In  
9 closing, Hove argued that Patrick was responsible for the Oakland  
10 assault. Rodney was convicted of both the Alameda and Oakland  
11 offenses.

12 The trial court found that an actual conflict of interest would exist  
13 were Hove to represent defendant. The trial court explained:  
14 "Rodney Baylis, defendant's brother, was originally identified as  
15 the perpetrator of the crimes for which defendant now stands  
16 accused. The sexual assault in Oakland, for which Rodney Baylis  
17 was convicted, occurred within a few months of the instant  
18 incident. Therefore, notwithstanding the alleged DNA evidence,  
19 mistaken identification remains a potentially viable defense in this  
20 case. Defendant admits that he may introduce evidence that his  
21 brother Rodney Baylis, committed the offenses in this case . . . Mr.  
22 Hove will be placed in the untenable position of presenting  
23 evidence inculpatory his former client, Rodney Baylis, directly  
24 contradicting the position taken at Rodney Baylis' trial, in which  
25 Mr. Hove attempted to prove that Patrick Baylis committed this  
26 rape. (The Court notes that double jeopardy has not attached to  
27 Rodney Baylis in this case.) [¶] Other potential conflicts of interest  
28 exist. The District Attorney asserts that he may call Mr. Hove as a  
witness in this case because, during Mr. Hove's representation of  
Rodney Baylis, Mr. Hove had discussions with the defendant  
Patrick Baylis regarding the events involving the instant charges.  
Those discussions are not privileged attorney client  
communications because the defendant was not Mr. Hove's client at  
the time. Furthermore, the District Attorney points out the  
possibility that Mr. Hove's privileged communications with Rodney  
Baylis may be subject to disclosure at trial, given that Rodney  
Baylis, as Hove's former client, must also waive the conflict."

Defendant submitted two declarations purporting to waive the  
conflict of interest. The court appointed independent counsel to  
advise defendant regarding the conflict. Independent counsel was  
charged with explaining to defendant the "existence, implications,  
and ramifications of having Mr. Hove represent him in this manner  
and to explain the consequences of defendant's purported waiver of  
conflict-free counsel." The trial court held two hearings on the  
issue and questioned defendant extensively regarding his  
understanding of Hove's conflict of interest at each hearing.  
Ultimately, the trial court found that defendant knowingly and  
intelligently waived the conflict of interest.

However, the trial court denied the substitution request because it



1 found that Rodney had not adequately waived the conflict. The  
2 court concluded that the Rules of Professional Conduct required  
3 Hove to obtain Rodney's consent before undertaking the  
4 representation of defendant. The court emphasized its  
5 "independent interest in ensuring that criminal trials are conducted  
6 within the ethical standards of the profession and that legal  
7 proceedings appear fair to all who observe them." The sum of  
8 Rodney's declaration read, "I understand that Patrick Baylis is now  
9 seeking to have Mr. Hove represent him. Since I was represented  
10 by Mr. Hove and was charged with these offenses, I have been  
11 advised that a conflict of interest may exist with Mr. Hove  
12 representing Patrick Baylis. I am aware of this and hereby [sic]  
13 waive any conflict of interest regarding same." After explaining  
14 the inadequacy of Rodney's waiver and reviewing case authority,  
15 the trial court concluded: "Mr. Hove's former client, Rodney  
16 Baylis, has not submitted an intelligent and knowing waiver of the  
17 conflict of interest nor has he waived the confidentiality of his  
18 attorney-client communications. When representing Rodney, Mr.  
19 Hove attempted to place responsibility for the instant charges upon  
20 defendant. Now, he seeks to implicate his former client for these  
21 crimes. To that end, Mr. Hove will have the benefit of what he  
22 learned when he represented Rodney at trial. Mr. Hove may be  
23 called to testify in this case and could possibly be forced to disclose  
24 privileged communications. Under these facts, the Court finds  
25 Rodney Baylis' written waiver to be wholly insufficient and further  
26 find that Mr. Hove's representation of Patrick Baylis, if allowed,  
27 poses a significant threat to the integrity of the judicial process."

15 *People v. Baylis*, slip op. at 6-9 (emphasis in original) (footnotes omitted).

16 The California Court of Appeal agreed with the trial court that there was a  
17 conflict of interest requiring waiver. The court explained:

18 Defendant contends that the trial court erred in concluding that  
19 there was a conflict requiring a waiver from Rodney. We disagree.  
20 Professional ethics demand that an attorney avoid conflicts of  
21 interest in which duties owed to different clients are in opposition.  
22 (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 282 & fn. 2 (*Flatt*);  
23 State Bar Rules Prof. Conduct, rule 3-310.) A conflict of interest  
24 may arise from an attorney's concurrent or successive  
25 representation of clients with adverse interests. (*Flatt*, at ¶. 283-  
26 284.) These two situations implicate distinct ethical concerns and  
27 public policies. (*Ibid.*)

24 The trial court focused exclusively on rule 3-310(C), which relates  
25 to concurrent representation and requires informed written consent  
26 from clients where an attorney seeks to represent in a single matter  
27 multiple clients with potential or actual conflicts or where an  
28 attorney seeks to represent clients with adverse interests in separate  
29 matters. (Rule 3-310(C).) Concurrent representation of clients  
30 with adverse interests compromises an attorney's duty of loyalty.

1 (People ex rel. Dept of Corporations v. Speedee Oil Change  
2 Systems, Inc. (1999) 20 Cal.4th 1135, 1146 (Speedee Oil).)  
3 Defendant contends that his substitution request did not implicate  
4 rule 3-310(C) because Hove did not seek to represent defendant and  
5 Rodney concurrently either in a single matter or in separate matters.  
6 Respondent counters only that the "record does not affirmatively  
7 show that Hove was not representing Rodney in some capacity" at  
8 the time the trial court considered the substitution request. On this  
9 record, we cannot determine whether the substitution request would  
10 have created a concurrent representation conflict implicating rule 3-  
11 310(C).

7 Whether or not granting the substitution request would have led to  
8 a concurrent representation, it is clear that the substitution request  
9 implicated ethical concerns applicable to the successive  
10 representation of clients with adverse interests. (See rule 3-  
11 310(E).) In the successive representation context, "the chief  
12 fiduciary duty value jeopardized is that of client *confidentiality*,"  
13 not loyalty. (*Flatt, supra*, 9 Cal.4th at p. 283; accord, *Speedee Oil*,  
14 *supra*, 20 Cal.4th at p. 1146.) The former client's expectation of  
15 confidentiality must be preserved to ensure "the right of every  
16 person to freely and fully confer and confide in one having  
17 knowledge of the law, and skilled in its practice, in order that the  
18 former may have adequate advice and a proper defense." (*Speedee*  
19 *Oil*, at p. 1146.) The attorney must maintain those confidences  
20 inviolate and preserve them at every peril to himself or herself.  
21 (Bus. & Prof. Code, § 6068, subd. (e).) Because of this duty, an  
22 attorney in actual possession of material confidential information  
23 from a former client may not represent an adverse party without the  
24 former client's consent. (Rule 3-310(E).) Rule 3-310(E) addresses  
25 the conflict between a lawyer's duty to use all information at his or  
26 her disposal in order to represent a current client competently and  
27 the lawyer's continuing duty of loyalty to a former client with  
28 respect to information obtained during the course of the prior  
representation. (See State Bar Com. Prof. Resp., Ethics Opn. 1998-  
152 at p. 5.)

19 When a conflict arises out of the successive representation of a  
20 former and a current client, disqualification turns on whether there  
21 is a substantial relationship between the former representation and  
22 the current representation. (*Speedee Oil, supra*, 20 Cal.4th at p.  
23 1146; *Flatt, supra*, 9 Cal.4th at p. 283.) "Where the requisite  
24 substantial relationship between the subjects of the prior and the  
25 current representations can be demonstrated, access to confidential  
26 information by the attorney in the course of the first representation  
27 (relevant, by definition, to the second representation) is *presumed*  
28 and disqualification of the attorney's representation of the second  
client is mandatory. . . ." (*Flatt*, at p. 283.) A substantial  
relationship is said to exist when it appears, by virtue of the nature  
of the former representation or the relationship of the attorney to  
his former client, that confidential information material to the  
current representation "would normally have been imparted to the

1 attorney." (*Pour Le Bebe, Inc. v. Guess? Inc.* (2003 112  
2 Cal.App.4th 810, 823 (*Pour Le Bebe*)).) The court should focus on  
3 the similarities in the facts involved in the two representations, the  
4 legal question posed, and the nature and extent of the attorney's  
5 involvement in each case. (*Ibid.*)

6 Here, the trial court stated, "When representing Rodney, Mr. Hove  
7 attempted to place responsibility for the instant charges upon  
8 defendant. Now, he seeks to implicate his former client [Rodney]  
9 for these crimes. To that end, Mr. Hove will have a benefit of what  
10 he learned when he represented Rodney at trial." Reasonably  
11 interpreted, this is an implicit finding that due to a substantial  
12 relationship between the two representations, it can be presumed  
13 that Hove obtained confidential information material to the  
14 prosecution of defendant.

15 Defendant contends that there is no substantial relationship between  
16 the two representation because the charges against Rodney for the  
17 Hayward rape had been dismissed by the time Hove became  
18 Rodney's attorney. But defendant disregards the undisputed facts  
19 that, in representing Rodney, Hove sought to implicate defendant in  
20 the Oakland sexual assault and to introduce evidence of the  
21 misidentification of Rodney in the Hayward case. Both  
22 representations involved the Hayward offenses, the subsequent  
23 police investigation, and misidentification by the victim; both  
24 representations involved the legal strategy of mistaken identity  
25 between the brothers; and Hove was intimately involved with the  
26 former representation as trial counsel for Rodney on the Alameda  
27 and Oakland offenses. (See *Pour Le Bebe, supra*, 112 Cal.App.4th  
28 at p. 823.) In preparing for trial, Rodney would normally have  
imparted confidences to Hove, for example, regarding his  
whereabouts at the time of the Hayward kidnapping and rape; any  
involvement he had before, during, or after the crime; his  
knowledge of any of the persons or locations involved in the crime;  
any information inculpatory or exculpatory defendant in the  
offenses; and any insights he had about mounting a defense based  
on the physical similarities between the brothers. On the  
undisputed facts, the trial court properly concluded that there is a  
substantial relationship between the former representation of  
Rodney and the proposed representation of defendant. Hove was  
disqualified from representing defendant, absent an effective  
waiver of the conflict by Rodney.

*People v. Baylis*, slip op. at 9-12 (emphasis in original) (footnotes omitted).

The California Court of Appeal also agreed with the trial court that  
Rodney's waiver of the conflict of interest was inadequate:

Defendant contends that even if there was a conflict of interest  
arising from Hove's former representation of Rodney, Rodney  
waived the conflict. The trial court concluded that Rodney's brief

1 written waiver was inadequate, stating "[Rodney's waiver] is not  
2 the full and complete, knowing and intelligent waiver that this  
3 Court believes is required here. Rodney Baylis does not  
4 acknowledge the possibility that his brother, Patrick, will seek to  
5 inculpate him as the perpetrator of these offenses. The waiver  
6 makes no mention of the possibility that the District Attorney may  
7 attempt to call Mr. Hove as a witness or that Mr. Hove may be  
8 forced to disclose otherwise privileged attorney-client  
9 communications made to Mr. Hove. . . . The waiver is silent as to  
10 the possibility that information that Mr. Hove gained while  
11 representing Rodney may be used to assist Patrick, to Rodney's  
12 possible detriment. In sum, in contrast to Patrick Baylis' waiver,  
13 Rodney's waiver contains no evidence that he is aware of the  
14 drawbacks to waiving the conflict of interest."

15 Denial of defendant's substitution request was effectively a  
16 determination that Hove was disqualified from representing Patrick.  
17 The trial court's power to disqualify an attorney derives from Code  
18 of Civil Procedure section 128, subdivision (a)(5), which authorizes  
19 a trial court to "control in furtherance of justice, the conduct of its  
20 ministerial officers, and of all other persons in any manner  
21 connected with a judicial proceeding before it. . . ." (See *People v.*  
22 *Jones* (2004) 33 Cal.4th 234, 244, fn. 2 (*Jones*)). This section  
23 applies in criminal cases, and the trial court's decision is reviewed  
24 for abuse of discretion. (*Ibid.*) The trial court's authority to deny a  
25 motion to substitute rests on similar grounds and should be given  
26 similar deference on appeal.

27 We conclude that the trial court did not abuse its discretion in  
28 requiring an *informed* waiver from Rodney in the circumstances of  
this case. Where a defendant seeks to waive his counsel's conflict  
of interest, the waiver must be a knowing and intelligent act "done  
with sufficient awareness of the relevant circumstances and likely  
consequences." (*People v. Mroczko* (1983) 35 Cal. 36 86, 109-  
110.) A waiver may be properly taken where the court has assured  
itself that (1) the defendant has discussed the potential drawbacks  
of joint representation with his attorney or outside counsel, (2) the  
defendant has been made aware of the dangers and possible  
consequences of joint representation in the case, (3) the defendant  
knows of his right to conflict-free representation, and (4) the  
defendant voluntarily wishes to waive that right. (*Id.* at p. 110).  
That exacting standard is calculated to ensure a legitimate waiver of  
a defendant's constitutional right to conflict-free counsel and to  
insulate any conviction from a later challenge on appeal based on  
the conflict. (See *Alcocer v. Superior Court* (1988) 206 Cal.App.3d  
951, 959.)

Also instructive is the standard for former client consent under the  
Rules of Professional Conduct. Rule 3-310(E) requires the former  
client's "informed written consent" to any subsequent adverse  
representation implicating the duty of confidentiality. Such  
consent requires the former client's written agreement to the

1 representation following written disclosure of the relevant  
2 circumstances and of the actual and reasonably foreseeable adverse  
3 consequences to the former client. (Rule 3-310(A).) The  
4 "informed written consent" requirement of rule 3-310(E) may not  
5 literally apply here. The State Bar's Standing Committee on  
6 Professional Responsibility and Conduct has indicated that the fact  
7 that a court presumes that counsel possesses material confidential  
8 information due to a substantial relationship between two  
9 representations does not necessarily mean that absent consent the  
10 counsel is subject to discipline under rule 3-310(E), because the  
11 rule requires the *actual* possession of confidential information.  
12 (State Bar Com. Prof. Resp., Ethics Opn. 1998-152, at p. 8, fn. 7 &  
13 fn.8.) Nevertheless, the extent of disclosure required under the rule  
14 indicates that only an *informed* waiver of rights is adequate to  
15 protect the former client's interests.

9 Under any standard or definition of informed waiver, the trial court  
10 did not abuse its discretion in finding Rodney's waiver inadequate.  
11 The waiver simply states that "I have been advised that a conflict of  
12 interest may exist with Mr. Hove representing Patrick Baylis. I am  
13 aware of this and herby [sic] waive any conflict of interest  
14 regarding same." This language reflects no awareness of the  
15 nature and seriousness of the conflict involved. As the trial court  
16 pointed out, the waiver does not specifically address any of the  
17 potential adverse consequences of the representation, including that  
18 Hove's representation of defendant would likely involve an effort to  
19 implicate him in the Hayward rape, including by undermining the  
20 DNA evidence that exonerated Rodney. At the second to last  
21 hearing on the motion to substitute, the trial court told Hove that he  
22 should consider supplementing Rodney's "fairly general" written  
23 waiver, but Hove declined to obtain a more detailed waiver. In the  
24 circumstances of this case, the trial court did not err in concluding  
25 that Rodney's waiver was inadequate and denying the motion to  
26 substitute on that ground.

18 *People v. Baylis*, slip op. at 12-14 (emphasis in original) (footnotes omitted).<sup>1</sup>

19 The court of appeal concluded that, "[w]here a trial court preparing for a criminal  
20 trial is confronted with an actual conflict of interest that may affect the integrity  
21 of those proceedings, the trial court is not obligated to accept as adequate a  
22 consent or waiver in whatever form it appears." *Id.* at 15.

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24 <sup>1</sup>The state courts also expressed concern that the waiver signed by Rodney  
25 was too similar to a waiver that was the subject of a reversal by the Ninth Circuit  
26 in another case involving Hove and his representation of a criminal defendant  
27 where Hove had a conflict. See *People v. Baylis*, slip op. at 12 n.8 (citing  
28 *Lockhart v. Terhune*, 250 F.3d 1223 (9th Cir. 2001)).

1           The California Court of Appeal's rejection of petitioner's choice of counsel  
2 claim was neither contrary to, nor an unreasonable application of, clearly  
3 established Supreme Court precedent, nor did it involve an unreasonable  
4 determination of the facts. *See* 28 U.S.C. § 2254(d). The court of appeal  
5 reasonably concluded that Hove could not effectively represent petitioner  
6 because of his duties to Rodney Baylis. If Hove represented petitioner, there  
7 would be a significant possibility that he would have to draw upon, if not divulge,  
8 confidential information obtained in the course of his representation of Rodney.  
9 Hove, however, was obligated not to enter into a relationship that would  
10 jeopardize the duty of confidentiality that he owed to his clients. *Cf. United*  
11 *States v. Stites*, 56 F.3d 1020, 1025 (9th Cir. 1995) (attorney is "bound by her  
12 duty to her former client not to enter into a relationship where she would, almost  
13 by necessity, have to draw on knowledge that she had obtained in the earlier  
14 relationship"). The court of appeal reasonably concluded that this conflict of  
15 interest disqualified Hove from representing petitioner. *Accord Wheat*, 486 U.S.  
16 at 164 (defendant's choice of counsel may be overcome by showing of "actual  
17 conflict" or "potential for conflict").

18           The California Court of Appeal also reasonably declined to accept the  
19 proffered waivers. A valid waiver of conflict must be voluntary, knowing, and  
20 intelligent. *See Edwards v. Arizona*, 451 U.S. 477, 482 (1981); *Lockhart v.*  
21 *Terhune*, 250 F.3d 1223, 1232 (9th Cir. 2001) (en banc). To be knowing and  
22 intelligent, it must be given with full awareness of its consequences. *Id.* The  
23 court of appeal's determination that Rodney's brief waiver "reflects no awareness  
24 of the nature and seriousness of the conflict involved" is amply supported by the  
25 record. And Hove's refusal to obtain a more detailed waiver from Rodney further  
26 supports this conclusion. The court of appeal found petitioner's waiver valid, but  
27  
28

1 rejected petitioner's choice of counsel claim in light of Rodney's invalid waiver.  
2 This rejection was neither contrary to, nor an unreasonable application of, clearly  
3 established Supreme Court precedent. *See* 28 U.S.C. § 2254(d). After all, the  
4 Supreme Court has clearly held that where "a court justifiably finds an actual  
5 conflict of interest," as the court of appeal did here, "there can be no doubt that it  
6 may decline a proffer of waiver." *Wheat*, 486 U.S. at 162. Petitioner is not  
7 entitled to federal habeas relief on his choice of counsel claim.

8  
9 2. Instructional error

10 In connection with the robbery count, petitioner claims that the trial court  
11 erred by failing to instruct the jury sua sponte on the lesser-included offense of  
12 theft. Pet. 6. This claim is without merit.

13 The California Court of Appeal rejected petitioner's instructional error  
14 claim on the ground that "there was no substantial evidence from which the jury  
15 could have concluded that the offense was less than robbery." *People v. Baylis*,  
16 slip op. at 22. The court of appeal's rejection was neither contrary to, nor an  
17 unreasonable application of, clearly established Supreme Court precedent. 28  
18 U.S.C. § 2254(d). Although the Supreme Court has held that a defendant may be  
19 entitled to instructions for lesser-included offenses in a capital case, it has  
20 expressly declined to decide whether that holding extends to non-capital cases.  
21 *See Beck v. Alabama*, 447 U.S. 625, 638 n.14 (1980). Because the Court has  
22 "expressly left this issue an 'open question,'" the California Court of Appeal did  
23 not unreasonably apply clearly established federal law in rejecting petitioner's  
24 claim that the trial court's refusal to instruct the jury on theft as a lesser included  
25 offense of robbery violated his right to due process. *Alberni v. McDaniel*, 458  
26 F.3d 860, 866 (9th Cir. 2006); *see, e.g., Larson v. Palmateer*, 515 F.3d 1057,

1 1066 (9th Cir. 2008) (because Supreme Court expressly reserved the question of  
2 whether using evidence of prior crimes to show propensity for criminal activity  
3 could ever violate due process, state court's rejection of claim did not  
4 unreasonably apply clearly established federal law). Petitioner is not entitled to  
5 federal habeas relief on this claim because the "right [he] asserts has not been  
6 clearly established by the Supreme Court, as required by [28 U.S.C. § 2254(d)]."  
7 *Alberni*, 458 F.3d at 867.

8  
9 **CONCLUSION**

10 After a careful review of the record and pertinent law, the court is satisfied  
11 that the petition for a writ of habeas corpus must be DENIED.

12 The clerk shall enter judgment in favor of respondent and close the file.

13 SO ORDERED.

14 DATED: June 18, 2009

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17 CHARLES R. BREYER  
18 United States District Judge  
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