No. 21-__

IN THE
Supreme Court of the United States

DENNIS SPENCER,
Petitioner,
v.
COLORADO,
Respondent.

On Petition for a Writ of Certiorari to the Colorado Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

MEGAN A. RING
Colorado State Public Defender
SEAN JAMES LACEFIELD
Deputy State Public Defender
1300 Broadway, Suite 300
Denver, CO 80203
(303) 764-1400

NEAL KUMAR KATYAL
Counsel of Record
NATHANIEL A.G. ZELINSKY
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Petitioner

QUESTION PRESENTED

In *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980), this Court held that a defendant alleging ineffective assistance of counsel based on a lawyer's conflict of interest need not demonstrate outcome-determinative prejudice to obtain relief. Instead, a defendant need only show that an "actual conflict of interest adversely affected his lawyer's performance." *Id.* at 350.

The question presented is: Does *Sullivan*'s standard apply only when a defense lawyer represents multiple clients with conflicting interests (as eleven jurisdictions have held), or does *Sullivan* apply to other conflicts—such as personal conflicts of interest (as twenty-one jurisdictions have held)?

PARTIES TO THE PROCEEDING

Dennis Spencer, petitioner on review, was the appellant below.

The State of Colorado, respondent on review, was the appellee below.

RELATED PROCEEDINGS

To counsel's knowledge, all proceedings directly related to this petition include:

- *Spencer* v. *People*, No. 21SC72 (Colo. Sept. 27, 2021); *People* v. *Spencer*, No. 17CA2228 (Colo. App. Dec. 17, 2020); *People* v. *Spencer*, Nos. 01CR1088, 01CR1089 (Colo. Dist. Ct. Oct. 18, 2017).
- *People* v. *Spencer*, No. 12CA2505 (Colo. App. Aug. 20, 2015); *People* v. *Spencer*, Nos. 01CR1088, 01CR1089 (Colo. Dist. Ct. Oct. 25, 2012).

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Dennis Spencer respectfully petitions for a writ of certiorari to review the judgment of the Colorado Court of Appeals in this case.

OPINIONS BELOW

The Colorado Court of Appeals' opinion affirming the denial of Spencer's post-conviction motion is not reported. Pet. App. 1a-10a. The Colorado Supreme Court's denial of Spencer's petition for a writ of certiorari is not reported, but is available at 2021 WL 4481154. Pet. App. 11a-12a. The District Court's opinion denying Spencer's post-conviction motion is not reported. *Id.* at 13a-27a.

JURISDICTION

The Colorado Court of Appeals issued its decision on December 17, 2020. Pet. App. 1a. Spencer filed a timely petition for a writ of certiorari in the Colorado Supreme Court, which that court denied on September 27, 2021. *Id.* at 11a-12a. Justice Gorsuch granted a 30-day extension of the period for filing this petition to January 26, 2022. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment, U.S. Const. amend. VI, provides:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence.

INTRODUCTION

In our criminal justice system, lawyers "are necessities, not luxuries." *United States* v. *Cronic*, 466 U.S. 648, 653 (1984) (internal quotation marks omitted). Among "the most basic of counsel's duties" is "the duty of loyalty." *Strickland* v. *Washington*, 466 U.S. 668, 692 (1984). An attorney must zealously advocate his client's interests—and no one else's. When a lawyer violates this foundational tenant, any resulting "conviction" cannot "be regarded as fundamentally fair." *Mickens* v. *Taylor*, 535 U.S. 162, 167 n.1 (2002).

Forty years ago, *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980), recognized the constitutional necessity of an attorney's undivided loyalty. Normally, when a defendant claims to have received ineffective assistance of counsel in violation of the Sixth Amendment, this Court imposes a high bar: A

defendant must prove that his attorney's objectively unreasonable representation prejudiced the outcome. *Strickland*, 466 U.S. at 687. But *Sullivan* carved out a critical exception for cases involving a conflict of interest: If "an actual conflict of interest adversely affected [the] lawyer's performance," the Court presumes the conflict prejudiced the result. *Id*. at 692 (internal quotation marks omitted).

This petition involves a deep, acknowledged, and irreconcilable split over when to apply *Sullivan*'s "presumption of prejudice." Today, at least twenty-one jurisdictions apply *Sullivan* to a wide variety of conflicts of interest, such as when a lawyer pursues his own financial gain or ideological motives at his client's expense. These jurisdictions include the Second, Third, Fourth, and Seventh Circuits, Alabama, Alaska, Arkansas, the District of Columbia, Florida, Georgia, Illinois, Louisiana, Maryland, Michigan, Missouri, Ohio, Rhode Island, Tennessee, Texas, Utah, and Washington. *See infra* pp.13-19.

By contrast, at least eleven jurisdictions limit *Sullivan* to its facts. These courts apply *Sullivan* in just one circumstance: when a defense lawyer represents multiple clients with conflicting interests. For all other conflicts, these courts require defendants to meet the extraordinarily high bar of proving deficient performance and actual prejudice. These courts include the Colorado court below, the Fifth, Sixth, Ninth, and Eleventh Circuits, California, Idaho, Indiana, Kentucky, North Carolina, and Pennsylvania. *See infra* pp.19-23.

This Court should grant certiorari to resolve the critical question of *Sullivan*'s reach and the Sixth Amendment's scope. In *Mickens* v. *Taylor*, the Court

recognized the "open question" of *Sullivan*'s scope but did not decide it. 535 U.S. at 176. Since then, lower courts' disagreement has grown to encompass nearly half of all criminal jurisdictions in the United States. Today, courts that limit *Sullivan* rely on *Mickens* to do so—despite *Mickens* expressly declining to answer the question. Because the intractable split involves the meaning of this Court's precedents, only this Court can definitively decide the issue.

Courts that limit *Sullivan*—such as the court below—are wrong. This Court has explained that conflicts of interest can permeate every decision an attorney makes, creating a high risk of prejudice. And precisely because conflicts affect everything a lawyer does, "it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." *Strickland*, 466 U.S. at 692. In these cases, the normal Sixth Amendment framework is "inadequate," and *Sullivan* provides a "needed prophylaxis." *Mickens*, 535 U.S. at 176. That rationale applies equally to any type of conflict.

This petition presents an ideal vehicle. Petitioner Dennis Spencer was charged with child sexual assault. A few months before trial, Spencer's counsel sought to withdraw. Counsel had recently become a father and, in light of his intense emotions, felt he could no longer defend Spencer against allegations of child sexual assault. And Spencer could not adequately pay for his defense. But the trial court denied counsel's request. After Spencer was convicted, Spencer sought collateral relief under the Sixth Amendment. In the decision below, the Colorado Court of Appeals relied on *Mickens* to hold that *Sullivan*'s presumption of prejudice never applies

to personal conflicts of interest. That decision misreads this Court's precedent, conflicts with twenty-one other jurisdictions, and is fundamentally unjust. This Court should grant the petition.

STATEMENT

A. Legal Framework

The Sixth Amendment right to effective assistance of counsel "assure[s] fairness in the adversary criminal process," *United States* v. *Morrison*, 449 U.S. 361, 364 (1981), instills confidence in the reliability of the verdict, *Cronic*, 466 U.S. at 655-656, and enables defendants to vindicate fundamental rights, *id.* at 654. When a defendant proves that "a breakdown in the adversary process * * * rendered the result of the proceeding unreliable," the Sixth Amendment requires a court to set aside the resulting conviction or sentence. *Bell* v. *Cone*, 535 U.S. 685, 695 (2002) (internal quotation marks omitted).

In most Sixth Amendment cases, this Court applies the standard established in *Strickland* v. *Washington*: A defendant deserves relief if "counsel's representation fell below an objective standard of reasonableness," 466 U.S. at 687-688, and "there is a reasonable probability" of a different outcome "but for counsel's unprofessional errors," *id.* at 694.

In circumstances where the risks are especially grave, this Court has carved out exceptions to *Strickland*'s onerous requirements. If an attorney "fails to subject the prosecution's case to meaningful adversarial testing," the attorney's deficient performance is *per se* prejudicial. *Cronic*, 466 U.S. at 659. A "similar, though more limited, presumption of prejudice" applies to attorney conflicts of interest. *Strickland*, 466 U.S. at 692. Under *Cuyler* v. *Sullivan*,

if a defendant can show that an "actual conflict of interest adversely affected his lawyer's performance," courts presume the lawyer's conflict prejudiced the outcome. 446 U.S. at 350.

The presumption reflects the fact that an attorney's divided loyalties create a high risk of prejudice, and "it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." *Strickland*, 466 U.S. at 692.

This Court has applied *Sullivan*'s test four times. In *Sullivan*, counsel simultaneously represented co-defendants charged with murder in separate trials. *Sullivan*, 446 U.S. at 337-338. In *Wood* v. *Georgia*, the Court applied *Sullivan* to a "third-party fee arrangement." 450 U.S. 261, 270 (1981). An employer paid for the lawyer who represented employees arrested for obscenity. *Id.* at 266-272. In *Burger* v. *Kemp*, two lawyers at the same firm represented co-defendants in separate trials. 483 U.S. 776, 783-784 (1987).

Most recently, in *Mickens* v. *Taylor*, a defendant's lawyer previously represented the victim of the murder. 535 U.S. at 164. The Court assumed without deciding that *Sullivan* applied. In dicta, the Court noted that federal courts of appeals "applied *Sullivan* 'unblinkingly' to 'all kinds of alleged attorney ethical conflicts.' " *Id.* at 174 (quoting *Beets* v. *Scott*, 65 F.3d 1258, 1266 (5th Cir. 1995) (en banc)). The Court stated that "the language of *Sullivan* itself d[id] not clearly establish, or indeed even support, such expansive application," and "[n]ot all attorney conflicts present" the same "high probability of prejudice." *Id*. at 175. But the Court reserved the

issue of *Sullivan*'s scope and labeled it "an open question." *Id.* at 176.

B. Proceedings Below

1. In 2000, Petitioner Dennis Spencer was accused of sexually assaulting his fifteen-year-old niece. Pet. App. 14a, 47a. Shortly thereafter, two sisters claimed Spencer had sexually assaulted them in 1992. *Id.* at 14a. The State of Colorado initiated two separate criminal proceedings against Spencer, one for the niece and the other for the sisters. *Id.*

Spencer maintained the allegations were fabricated. His niece had come to live with his family during the summer of the alleged assault. She had been "having problems" at home in Seattle, including "[t]ruancy in school, fighting, [and] not getting along with her parents," who were in the midst of a messy divorce. *Id.* at 88a. Spencer's niece was fond of Spencer's wife. *Id.* at 76a. Over the course of the summer, Spencer's wife devoted substantial attention to the niece, and the niece begged to remain with the family. *See id.* at 81a, 89a-90a. When Spencer told his niece she could not stay and purchased her a ticket home, she grew upset. *Id.* at 90a-91a. A few days before her scheduled return, she accused Spencer of assault. *See id.* at 83a.

There were inconsistencies in the niece's allegations. The niece claimed that Spencer had sexually assaulted her when she and five other children were sleeping in the same room. *Id.* at 76a-77a. She alleged that, during the incident, she repeatedly told Spencer to stop, and tried to wake her cousin by shaking her. *Id.* at 79a-80a. But despite the commotion, none of the other children woke—not even the baby sleeping between the niece and the cousin

she tried to wake. *Id.* at 83a. Spencer's niece also allegedly claimed that Spencer had locked her in the bedroom. *Id.* at 87a. However, no bedroom in the house could be locked from the outside. *Id.* at 91a-92a.

The niece later wrote Spencer's wife a letter apologizing for her accusation. *Id*. at 71a. Spencer's wife had "the impression" "that she was saying that she made this up." *Id*. Even after the niece accused Spencer, she wanted "to run away from home and come back" to the Spencers in Colorado. *Id*. at 73a.

There were similar inconsistencies about the older allegations. The sisters claimed Spencer assaulted them in 1992. But they continued to visit Spencer's house after the alleged incident, and attended a slumber party where Spencer was present. *Id.* at 93a-94a. The sisters' stories differed in significant respects. For instance, one sister claimed she came back into the room to help her sister, while the other alleged her sister exited the room and did not return. *Id.* at 103a-104a. Moreover, although one sister left Spencer's home shortly after the alleged incident, the other sister chose to stay at the house for multiple days. *Id.* at 105a.

2. A few months before the trials against Spencer were scheduled to begin, Spencer's counsel moved to withdraw for moral and financial reasons. *Id.* at 17a-18a.

Counsel told the trial court that "because of serious personal issues" he could not represent his client. *Id*. at 65a. He had recently become a father, had "a change of heart," and no longer felt comfortable defending child sexual assault cases like Spencer's. *Id*. Counsel felt torn: If the accusers' allegations were

true, he had to protect an individual who sexually assaulted a child. If the allegations were false, "there's something with the accuser that's not right." *Id*. at 119a. Defending child sexual assault cases "just didn't sit right with [him] anymore." *Id.* In his own words, counsel could not be an "effective" or "zealous" advocate "for Mr. Spencer in his cases." *Id*. at 65a.

Counsel also stated that Spencer lacked funds to hire an investigator, and that he could not "represent [Spencer] without an investigator." *Id*. at 64a, 65a. Counsel explained that Spencer would be better served by the public defender's office. But the public defender informed the court that his office could not go to trial in three months. *Id*. at 66a. The court denied counsel's motion to withdraw because the "public defender cannot be ready on the date set." *Id*.

3. Just three days before the first trial, the prosecution moved to consolidate the two cases. *See id.* at 18a. Counsel did not object to joinder, despite it meaning the same jury would consider multiple allegations of sexual assault. *Id*. at 14a. Counsel later admitted that joinder was the most cost-effective way to try the cases, and that his financial concerns likely played a role in agreeing to consolidation. As counsel repeatedly explained, he was "in a business." *Id*. at 154a-155a, 159a-160a; *see id.* at 127a-128a, 148a.

When Spencer's niece testified at trial, Spencer's counsel did not cross-examine her about her letter expressing remorse for lodging the allegation. *Id*. at 20a-21a. Nor did Spencer's counsel investigate the letter ahead of trial. *Id.* at 26a.

Spencer's son also testified. The son stated that the niece had tried to "feel on him" the same night, suggesting that she may have fabricated the

allegations against Spencer to "avoid attention" for her behavior. *Id.* at 32a. The court struck the son's statement because it related to the accuser's prior sexual conduct. *Id*. at 84a-85a. But Spencer's counsel did not attempt to pierce Colorado's rape shield statute and present evidence on the matter. *Id*. at 85a-86a, 130a-131a.

Spencer's son also testified that his sister—who the niece apparently tried to wake during the alleged assault—was a light sleeper. *Id*. at 86a-87a. Spencer's wife confirmed as much during her testimony. *Id.* at 91a. But defense counsel did not "recall interviewing" Spencer's daughter himself, did not hire an investigator to interview her, and did not call her to testify. *Id*. at 136a, 152a-153a.

Finally, multiple witnesses testified that one of the sisters who accused Spencer later listed him as her daughter's godparent. *Id.* at 92a, 109a. During trial, "a juror passed a note to the court reporter explaining how godparents are chosen in" the close-knit church where Spencer and the sisters worshipped. *Id.* at 24a. Spencer's counsel did not move for a mistrial, but instead asked the court to dismiss the juror and interview other jurors about the note. *Id.* at 99a. The court made the juror an alternate. *Id.* at 102a.

The jury convicted Spencer on all counts. *Id.* at 14a.

4. After exhausting his direct appeal, Spencer filed a post-conviction motion alleging ineffective assistance of counsel. The Colorado District Court initially denied Spencer's motion without a hearing, finding that he was not entitled to relief under either *Strickland*'s demanding standard or *Sullivan*'s more lenient one. *See* Pet. App. 49a-61a.

The Colorado Court of Appeals affirmed in part and reversed in part. The court agreed that Spencer could not prevail under *Strickland*. *Id.* at 31a-39a. But it concluded that counsel's moral and financial concerns "may have constituted an actual conflict of interest" that adversely affected the representation. *Id*. at 44a. The Court of Appeals remanded the case for an evidentiary hearing to determine whether Spencer deserved relief under *Sullivan*. *Id.* at 44a-45a. At that stage, the State did not contest that *Sullivan* "applied." *Id*. at 4a.

On remand, Spencer argued that his trial counsel's financial and personal motivations adversely affected five key decisions. Trial counsel had: (1) improperly joined the two trials; (2) failed to investigate and question the niece about her potentially exculpatory letter; (3) declined to pierce the rape shield statute after the son testified; (4) failed to investigate the daughter who was a light sleeper but did not wake up during the alleged assault; and (5) failed to move for a mistrial after the juror passed a note intended for the prosecution. *Id.* at 20a-21a.

The District Court held a hearing, where Spencer's trial counsel testified as the sole witness. *See id*. at 110a-165a. Counsel confirmed that moral and financial concerns had motivated him to withdraw. *Id*. at 118a-119a. But counsel maintained his concerns had not impaired his representation. *See id.* at 129a, 157a-158a.

The District Court denied Spencer's *Sullivan* claims. The court recognized that, under Colorado law, a trial court could not "credit counsel's" after-the-fact "assessments as to why he made a particular decision." *Id*. at 22a. But the court found that

counsel's financial concerns had not risen to the level of a potential conflict of interest. Although the court determined that counsel's moral qualms constituted a potential conflict of interest, the court concluded that any conflict did not adversely affect counsel's performance. *Id*. at 21a-27a.

5. Spencer appealed again. This time, the State "expressly argue[d] that the *Sullivan* analysis should not apply." *Id*. at 5a. The Court of Appeals agreed and affirmed the district court's decision without analyzing Spencer's *Sullivan* claims.

According to the court below, *Sullivan* does not apply "when the conflict of interest claims allege a conflict between counsel's personal interests and the interests of his or her client." *Id*. at 5a-6a. Instead, *Sullivan* governs only Sixth Amendment claims involving "conflict arising from multiple representation"—the specific type of conflict at issue in *Sullivan* itself. *Id.*

To reach this conclusion, the Court of Appeals chiefly relied on *Mickens* and state precedent interpreting *Mickens*. *Mickens* had highlighted language in *Sullivan* stating that the presumption of prejudice applies only where defense counsel "*actively represented* conflicting interests." *Id.* at 6a (emphasis in original) (quoting *Mickens*, 535 U.S. at 175). According to the court below, this language supported narrowing *Sullivan* to only cases involving "multiple representation" of *clients*. *See id.*

One judge specially concurred in the judgment. She concluded instead that Spencer's *Sullivan* claims failed on the merits. *Id.* at 9a-10a.

6. Spencer timely sought and was denied review in the Colorado Supreme Court. Two Justices noted that

they would have taken the case to determine whether *Sullivan* applied to personal conflicts of interest. *Id.* at 11a-12a.

This petition follows.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW DEEPENS A LONGSTANDING SPLIT AMONG FEDERAL AND STATE COURTS.

Since this Court acknowledged the question in *Mickens* in 2002, federal and state courts have grown increasingly divided over when to apply *Sullivan*'s test. Today, at least twenty-one jurisdictions apply *Sullivan* to various types of conflicts, including conflicts arising from a lawyer's personal interests. By contrast, eleven jurisdictions, including the decision below, categorically interpret *Sullivan* as a one-off exception, applying only when a lawyer represents multiple clients with conflicting interests. Meanwhile, ten jurisdictions recognize the open question but have declined to adopt a formal position.

A. Twenty-One Jurisdictions Apply *Sullivan* To Personal Conflicts Of Interest.

Following this Court's decision in *Mickens*, the Second, Third, Fourth, and Seventh Circuits—as well as Alabama, Alaska, Arkansas, the District of Columbia, Florida, Georgia, Illinois, Louisiana, Maryland, Michigan, Missouri, Ohio, Rhode Island, Tennessee, Texas, Utah, and Washington—have continued to apply *Sullivan* broadly.

1. Both before and after *Mickens*, the Fourth Circuit has routinely applied *Sullivan* to personal conflicts. "When lawyers' conflicts of interest adversely affect

their performance, it calls into question the reliability of the proceeding and represents a breakdown in the adversarial process fundamental to our system of justice." *Rubin* v. *Gee*, 292 F.3d 396, 402 (4th Cir. 2002) (Wilkinson, J.). For that reason, the Fourth Circuit applies *Sullivan*'s test not only when lawyers "*formally* represent[]" multiple clients with competing objectives, but also whenever a lawyer "harbor[s] substantial personal interests which conflict with the clear objective of his representation of the client." *United States* v. *Stitt*, 441 F.3d 297, 304 (4th Cir. 2006) (quoting *United States* v. *Tatum*, 943 F.2d 370, 376 (4th Cir. 1991) (Niemeyer, J.)).[1]

The Fourth Circuit has applied *Sullivan* to a range of claims. In *United States* v. *Stitt*, the defense lawyer had allegedly accepted $500,000 in drug money to represent his client. 441 F.3d at 300-301. The lawyer's interest in "avoid[ing] scrutiny" of the fees prevented him from seeking a court-appointed expert during the penalty phase of the trial. *Id.* at 301. In *United States* v. *Magini*, the defense lawyer sought to protect his own fee by encouraging his client to plead guilty and negotiating an agreement that did not contain a forfeiture provision. 973 F.2d 261, 262-263 (4th Cir. 1992). And in *Rubin* v. *Gee*, two attorneys "in the aftermath of a crime schooled their client in the tactics of evasion in order to guarantee their own fee." 292 F.3d at 398.

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[1] After releasing its opinion in *Stitt*, the Fourth Circuit identified a jurisdictional defect in the appeal. *See United States* v. *Stitt*, 459 F.3d 483, 484-485 (4th Cir. 2006). *Stitt* nevertheless provides a comprehensive analysis of the circuit's "uniform precedent." *Stitt*, 441 F.3d at 304.

In assessing conflict-of-interest claims, the Fourth Circuit has consistently rejected the argument that *Mickens* prevents courts from applying *Sullivan* to an attorney's personal conflicts. *See, e.g.*, *Stitt*, 441 F.3d at 304; *Rubin*, 292 F.3d at 402 n.2. The Fourth Circuit has noted that *Mickens* expressed some doubt that *Sullivan* applies to "every potential conflict of interest." *Stitt*, 441 F.3d at 304 (quoting *Rubin*, 292 F.3d at 402 n.2). But that circuit has observed that *Mickens* "specifically left the scope of *Sullivan* 'open.' " *Id.* (quoting *Mickens*, 535 U.S. at 176).

The Fourth Circuit has likewise rejected concerns that applying *Sullivan* broadly results in unnecessary reversals: *Sullivan*'s presumption of prejudice is warranted only if defendants can demonstrate an *actual* conflict of interest that adversely affected the lawyer's performance. *See id.* at 303. That test "does not lack teeth." *Id*.

In addition to the Fourth Circuit, the Second, Third, and Seventh Circuits have applied *Sullivan* to a variety of contexts, including: a lawyer coercing the defendant to plead guilty, *see United States* v. *Rivernider*, 828 F.3d 91, 109 (2d Cir. 2016); a lawyer facing criminal charges and seeking to ingratiate himself with the prosecution, *see Chester* v. *Comm'r of Pa. Dep't of Corr.*, 598 F. App'x 94, 105-107 (3d Cir. 2015) (per curiam); and a lawyer advancing his own interest in preventing a future malpractice suit, *see United States* v. *Fuller*, 312 F.3d 287, 291-292 (7th Cir. 2002).

2. Texas provides an indicative example of a state that applies *Sullivan* beyond its immediate facts of multiple client representations. The Court of Criminal Appeals—that state's highest court for

criminal cases—has held that *Sullivan* governs all conflict-of-interest claims. *See Acosta* v. *State*, 233 S.W.3d 349, 352-356 (Tex. Crim. App. 2007). In so doing, the Court of Criminal Appeals acknowledged but declined to follow contrary Fifth Circuit precedent limiting *Sullivan* to only circumstances in which a lawyer represents multiple clients with divergent interests. *Id*. at 354.

In *Acosta*, the defendant was accused of molesting his daughter. *See id*. at 350. Despite not representing the defendant's wife, defense counsel took pity on her and agreed to help her maintain custody of her child. At trial, counsel asked questions of a witness for the wife's benefit—and, in the process, solicited graphic details about the defendant's misconduct. *Id*. at 351-352.

The Texas Court of Criminal Appeals held that *Sullivan* governed the defendant's claim that his counsel's emotional conflict of interest impacted his representation. The court observed that "the Supreme Court has yet to decide on the issue of whether *Cuyler* [v. *Sullivan*] is limited to cases of multiple representation." *Id*. at 354. But the court read *Mickens* to support applying *Sullivan* broadly to all kinds of conflicts of interest. *Id*. at 355. In the Court of Criminal Appeals' view, *Mickens* emphasized that the "ultimate question" in a conflict-of-interest case "is whether any such conflict hindered the effective assistance of counsel," irrespective of the precise characterization of the conflict. *Id*.

Since *Acosta*, the Texas Court of Criminal Appeals has applied *Sullivan* to cases where a lawyer engaged in a coercive sexual relationship with his client, *see Ex parte Sanchez*, No. WR-84,238-01, 2017 WL 3380147,

at *1-2 (Tex. Crim. App. June 28, 2017) (per curiam), and where a defendant filed grievances against his lawyer before trial, *see Calvert* v. *State*, No. AP-77,063, 2019 WL 5057268, at *11-12 (Tex. Crim. App. Oct. 9, 2019).

In Alabama, Alaska, Arkansas, the District of Columbia, Florida, Georgia, Illinois, Louisiana, Maryland, Michigan, Missouri, Ohio, Rhode Island, Tennessee, Utah, and Washington, courts likewise apply *Sullivan* liberally to ensure that defendants receive conflict-free representation.

For instance, in 2012, Maryland's highest court unanimously held that *Sullivan* governed a case in which defense counsel had filed suit against his client for unpaid fees. *Taylor* v. *State*, 51 A.3d 655, 657 (Md. 2012). The court noted "that, particularly since *Mickens*, there is no clear rule across jurisdictions." *Id*. at 669 n.13. But it nevertheless joined "those states continuing to apply *Sullivan* to various types of conflicts." *Id*. The court emphasized that "[a] defense attorney's representation must be untrammeled and unimpaired, unrestrained by commitments to others." *Id*. at 668 (internal quotation marks omitted).

In Alaska, meanwhile, courts apply an even stricter standard than *Sullivan* in cases "involving 'egregious' conflicts of interest such as the joint representation of co-defendants." *State* v. *Carlson*, 440 P.3d 364, 384 (Alaska Ct. App. 2019). For "all other conflict of interest claims, the Alaska courts apply the *Cuyler* [v. *Sullivan*] standard." *Id.*; *see id*. at 384 n.52 (collecting Alaska cases). Illinois also applies a more protective *per se* rule when "specific facts about the defense attorney's status, by themselves, create a disabling conflict," such as "when defense counsel was a former

prosecutor who was personally involved in the prosecution of the defendant." *People* v. *Yost*, __ N.E.3d __, 2021 IL 126187, ¶¶ 39, 66 (Ill. 2021). For other conflicts, Illinois courts apply *Sullivan*. *See id.* ¶ 66; *see also, e.g.*, *People* v. *Garcia*, 116 N.E.3d 1082, 1094 (Ill. App. Ct. 2018). Courts in Washington apply *Sullivan* to "*any situation* where defense counsel represents conflicting interests"—including situations where the lawyer advances her own interests over her client's. *State* v. *Regan*, 177 P.3d 783, 786-787 (Wash. Ct. App. 2008) (internal quotation marks omitted). Arkansas similarly applies *Sullivan* whenever a defendant shows that his counsel "actively represented conflicting interests." *Echols* v. *State*, 127 S.W.3d 486, 493 (Ark. 2003) (quoting *Mickens*, 535 U.S. at 166). And, in Alabama, *Sullivan* governs a wide variety of claims, including a claim that a lawyer's personal distaste for a client impaired the representation. *See Brooks* v. *State*, __ So. 3d __, No. CR-16-1219, 2020 WL 3889028, at *37-38 (Ala. Crim. App. July 10, 2020).

Courts in ten other states have applied *Sullivan* to evaluate a wide range of claims, including: a lawyer advising a client about his own ineffectiveness, *see Lee-Thomas* v. *United States*, 921 A.2d 773, 776-777 (D.C. 2007); *Emmons* v. *Bryant*, 864 S.E.2d 1, 8-10 (Ga. 2021) (similar); a lawyer who allegedly "pursued his own financial and legal interests to the detriment" of his client, *see State* v. *Larzelere*, 979 So. 2d 195, 208 (Fla. 2008) (per curiam); a lawyer who made negative comments about the defendant, including that the defendant was a "drug addict" who would end up in jail, *see State* v. *Fontenelle*, 227 So. 3d 875, 885-886 (La. Ct. App. 2017); a lawyer whose son was suspected of a similar crime, *see People* v. *Adams*, No. 262201,

2006 WL 2924602, at *2 (Mich. Ct. App. Oct. 12, 2006) (per curiam); a lawyer who put his own financial interests and the wishes of the party paying his legal fees over the needs of the client, *Lomax* v. *State*, 163 S.W.3d 561, 564 (Mo. Ct. App. 2005); a lawyer under indictment for serious criminal offenses, *see State* v. *Oteng*, No. 19AP-763, 2020 WL 7706789, at *8-9 (Ohio Ct. App. 2020); a lawyer who allegedly "cover[ed] up" another lawyer's unauthorized practice of law, *see Millette* v. *State*, 183 A.3d 1124, 1131-32 (R.I. 2018); and a lawyer who moved to withdraw after being threatened by his client, *see Johnson* v. *State*, No. W2014-00053-CCA-R3-PC, 2014 WL 7401989, at *1, *4-6 (Tenn. Crim. App. Dec. 29, 2014); *State* v. *Martinez*, 297 P.3d 653, 655-660 (Utah Ct. App. 2013) (similar).

B. Eleven Jurisdictions Have Limited *Sullivan* To Multiple Client Representations.

In addition to the Colorado court below, the Fifth, Sixth, Ninth, and Eleventh Circuits, California, Idaho, Indiana, Kentucky, North Carolina, and Pennsylvania limit *Sullivan* to only those cases in which a lawyer represents multiple clients with competing interests. For all other cases, *Strickland* governs.

1. Before *Mickens*, the Fifth Circuit limited *Sullivan* to conflicts involving multiple representation in *Beets* v. *Scott*, 65 F.3d 1258 (5th Cir. 1995) (en banc). There, an attorney had entered into an unethical "literary and media rights fee arrangement[]" and failed to withdraw despite being a potential witness for his client. *Id*. at 1261-62, 1273. The Fifth Circuit acknowledged that many federal circuits had applied

Sullivan broadly. *Id.* at 1266. But the Fifth Circuit declined to extend *Sullivan* to personal conflicts. Instead, the court concluded that *Strickland* offered the "superior framework." *Id.* at 1265.

According to the Fifth Circuit, multiple representation conflicts present *sui generis* risks. When a lawyer represents multiple clients with divergent interests, there is a "unique, straightforward danger." *Id.* at 1270. The lawyer must decide whether to act in one client's best interest at the expense of the other, or refrain from doing anything, at the expense of both. *Id*. By contrast, conflicts "between a lawyer's self-interest and his duty of loyalty to the client * * * fall along a wide spectrum of ethical sensitivity from merely potential danger to outright criminal misdeeds." *Id*. Because some conflicts involving a lawyer's self-interest may be inconsequential, the Fifth Circuit reasoned, applying a presumption of prejudice to all "ethical problems" would be a "draconian remedy." *Id.* at 1271. Since *Mickens*, the Fifth Circuit has continued to apply *Strickland* to personal conflict-of-interest claims. *See, e.g.*, *United States* v. *Garza*, 429 F.3d 165, 172 (5th Cir. 2005) (per curiam).

Three other federal circuits have likewise adopted narrow readings of *Sullivan*, and have relied on *Mickens* to do so.

Prior to *Mickens*, the Ninth Circuit and Eleventh Circuit had previously applied *Sullivan* to a variety of personal conflicts. *See, e.g.*, *United States* v. *Hearst*, 638 F.2d 1190, 1193 (9th Cir. 1980); *Caderno* v. *United States*, 256 F.3d 1213, 1218 (11th Cir. 2001) (per curiam). But in *Mickens*' wake, both circuits changed course. The Ninth Circuit concluded that *Mickens*

"explicitly limited [*Sullivan*'s] presumption of prejudice for an actual conflict of interest * * * to cases involving 'concurrent representation.' " *Rowland* v. *Chappell*, 876 F.3d 1174, 1192 (9th Cir. 2017) (quoting *Mickens*, 535 U.S. at 175); *see Earp* v. *Ornoski*, 431 F.3d 1158, 1184 (9th Cir. 2005) (same). Similarly, the Eleventh Circuit interpreted *Mickens* as "indicat[ing]" that *Sullivan* "should be limited to situations of multiple concurrent representation where there is an inherent high probability of prejudice." *Cruz* v. *United States*, 188 F. App'x 908, 913 (11th Cir. 2006) (per curiam); *see also Nelson* v. *United States*, No. 15-13813-A, 2015 WL 13888969, at *5 (11th Cir. Dec. 30, 2015).[2]

Following *Mickens*, the Sixth Circuit has likewise declined to extend *Sullivan* beyond its facts. *See, e.g.*, *Lordi* v. *Ishee*, 384 F.3d 189, 193 (6th Cir. 2004). The Sixth Circuit construes *Mickens* as a "limitation on *Sullivan*" and has repeatedly refused to apply *Sullivan* to conflicts other than multiple representation. *Whiting* v. *Burt*, 395 F.3d 602, 618-619 (6th Cir. 2005); *see Harrison* v. *Motley*, 478 F.3d 750, 756 (6th Cir. 2007).

2. Courts in seven states likewise limit *Sullivan*. For instance, the California Supreme Court has limited *Sullivan* based on *Mickens* and the Fifth Circuit's decision in *Beets*. *See People* v. *Doolin*, 198

[2] In some instances, these circuits have also reflexively evaluated claims under *Sullivan*. *See, e.g.*, *Bemore* v. *Chappell*, 788 F.3d 1151, 1161-62 (9th Cir. 2015); *Tuomi* v. *Sec'y, Fla. Dep't of Corr.*, 980 F.3d 787, 796 (11th Cir. 2020); *see also, e.g.*, *Noguera* v. *Davis*, 5 F.4th 1020, 1036-37 (9th Cir. 2021) (assuming *Sullivan* applied); *United States* v. *Walter-Eze*, 869 F.3d 891, 906 (9th Cir. 2017) (concluding that *Sullivan* did not apply to personal conflicts "relegated to a single moment of the representation").

P.3d 11, 41 (Cal. 2009). That court acknowledged that *Mickens*' comments about *Sullivan* were only "dicta." *Id*. at 34 n.20. But it nonetheless relied on *Mickens*' "suggest[ion] that a presumption of prejudice need not attach to every conflict" and determined that "the risk of harm [is] high enough to employ" *Sullivan* only in those cases involving multiple representation. *Id.* at 41 (internal quotation marks omitted).

The Idaho Supreme Court has emphasized the supposedly distinct harms associated with a lawyer's simultaneous representation of clients. *State* v. *Alvarado*, 481 P.3d 737, 748-749 (Idaho 2021). Relying on *Mickens*, that court determined that other conflicts—such as an attorney's prior representation of an adverse witness—do not pose equivalent risks. *Id.* at 749. Pennsylvania and Kentucky likewise require defendants to demonstrate prejudice if their claims do not involve multiple concurrent representation. *See, e.g.*, *Commonwealth* v. *Cousar*, 154 A.3d 287, 310 (Pa. 2017); *Steward* v. *Commonwealth*, 397 S.W.3d 881, 883 & n.4 (Ky. 2012). *But see Zapata* v. *Commonwealth*, __ S.W.3d __, No. 2018-SC-000666-MR, 2020 WL 2091861, at *8-9 (Ky. Apr. 30, 2020) (analyzing conflict-of-interest claim involving disagreements between attorney and client under *Sullivan*).

North Carolina's Supreme Court has concluded that *Mickens* "carefully cabined" the "applicability of the *Sullivan* line of cases." *State* v. *Phillips*, 711 S.E.2d 122, 137 (N.C. 2011); *see State* v. *Barksdale*, 768 S.E.2d 126, 130 (N.C. Ct. App. 2014). And while the Indiana Supreme Court has left open the possibility that *Sullivan* can govern other conflicts, after *Mickens* that court expressed extreme

"reluctan[ce] to depart from [the *Strickland*] analysis beyond multiple-representation conflicts." *Gibson* v. *State*, 133 N.E.3d 673, 699 (Ind. 2019).

3. In the decision below, the Colorado Court of Appeals relied on *Mickens* to limit *Sullivan* to the multiple representation context. The court recognized that *Mickens* left the question of *Sullivan*'s scope open. Pet. App. 5a-6a. But the court noted that *Mickens* had highlighted language in *Sullivan* referring to defense counsel who "*actively represented* conflicting interests." *Id*. at 6a (emphasis in original) (quoting *Mickens*, 535 U.S. at 175). The court below implied this meant *Sullivan* only applies in cases involving a lawyer *representing* multiple *clients*—not other types of conflicts. *See id*.

The court also noted that the Colorado Supreme Court had similarly "interpreted *Mickens* as 'question[ing] the assumption that *Strickland* should not govern claims of ineffectiveness based on alleged conflicts resulting from other forms of divided loyalty.' " *Id*. (quoting *West* v. *People*, 341 P.3d 520, 530 n.8 (Colo. 2015)). And quoting another Colorado appellate decision, the court below indicated "that '[a]pplying *Sullivan* in cases" involving a "lawyer's self-interest would undermine the uniformity and simplicity of *Strickland*.' " *Id*. at 7a (quoting *People* v. *Huggins*, 463 P.3d 294, 301 (Colo. App. 2019)).[3]

[3] The Colorado Court of Appeals is not bound by its own precedent. *Chavez* v. *Chavez*, 465 P.3d 133, 138 (Colo. App. 2020) (per curiam). Older cases had applied *Sullivan* outside the multiple representation context. *See, e.g.*, *People* v. *Ragusa*, 220 P.3d 1002, 1006 (Colo. App. 2009). But in light of the decision below, *West*, and *Huggins*, Colorado courts will likely continue to apply *Sullivan* narrowly.

C. Ten Jurisdictions Have Acknowledged The Issue But Have Not Adopted A Firm Position.

Since 2002, at least ten jurisdictions have acknowledged the question *Mickens* left open but declined to resolve *Sullivan*'s scope.

1. Before *Mickens*, the First, Eighth, Tenth, and D.C. circuits liberally applied *Sullivan*. For instance, these courts used *Sullivan* to assess: a lawyer teaching classes to members of the agency investigating his client, *United States* v. *Michaud*, 925 F.2d 37, 40 (1st Cir. 1991); a lawyer's "personal desire to devote his time" to academic studies instead of the defendant's trial, *United States* v. *Andrews*, 790 F.2d 803, 811 (10th Cir. 1986); and a lawyer prioritizing his own professional reputation over his client's interests, *United States* v. *Taylor*, 139 F.3d 924, 932-933 (D.C. Cir. 1998); *see also Atley* v. *Ault*, 191 F.3d 865, 870 n.4 (8th Cir.1999) (indicating that *Sullivan* is not limited to the multiple representation context).

After *Mickens*, these circuits have adopted a more cautious approach. They have acknowledged the question *Mickens* left open but assumed without deciding that *Sullivan* applies beyond its immediate facts. *See, e.g.*, *United States* v. *DeCologero*, 530 F.3d 36, 77 n.24 (1st Cir. 2008); *Noe* v. *United States*, 601 F.3d 784, 790 (8th Cir. 2010); *United States* v. *Williamson*, 859 F.3d 843, 854, 857 (10th Cir. 2017); *United States* v. *Wright*, 745 F.3d 1231, 1233 (D.C. Cir. 2014) (Kavanaugh, J.).

2. Post-*Mickens*, Connecticut, Iowa, Minnesota, and Mississippi have similarly assumed without deciding that *Sullivan* applies because a defendant would lose under that standard. *See, e.g.*, *Skakel* v. *Comm'r of*

Corr., 159 A.3d 109, 170 n.37 (Conn. 2016), *superseded on reconsideration on other grounds*, 188 A.3d 1 (Conn. 2018); *State* v. *Williams*, 652 N.W.2d 844, 849 & n.3 (Iowa Ct. App. 2002). These jurisdictions acknowledge *Mickens*' "concern" with "applying *Sullivan* to 'all kinds of alleged attorney ethical conflicts.' " *Taylor* v. *State*, No. A17-1892, 2018 WL 6165291, at *3 n.3 (Minn. Ct. App. Nov. 26, 2018) (quoting *Mickens*, 535 U.S. at 174)*; see also Crawford* v. *State*, 192 So. 3d 905, 917-920 (Miss. 2015).

The remaining two jurisdictions—Nebraska and Kansas—have explicitly refused to decide *Sullivan*'s scope. Nebraska has admitted that its "case law *post-Mickens* does not reveal a clear standard for ineffective assistance of counsel claims involving conflicts of interest." *State* v. *Avina-Murillo*, 917 N.W.2d 865, 876 (Neb. 2018). But instead of "adopt[ing] a bright-line rule," Nebraska determines whether *Sullivan* applies to personal conflicts of interest "on a case-by-case basis." *Id.* at 878.

Kansas has expressly left open the question and refers to it as "the *Mickens* reservation." *Sola-Morales* v. *State*, 335 P.3d 1162, 1170 (Kan. 2014). But in some cases, Kansas has evaluated personal conflicts of interest under *Sullivan* because the government did not contest its application, and the defendant would "benefit[] from the lower standard." *Id.* at 1178 (citing *State* v. *Cheatham*, 292 P.3d 318, 338 (Kan. 2013)).

II. THE DECISION BELOW IS WRONG.

The court below was wrong to limit *Sullivan* to only those cases in which a lawyer represents multiple clients. The duty of loyalty is essential, not incidental, to an adversarial justice system. When a lawyer violates that fundamental tenet, the lawyer

undermines confidence in the proceedings. *Sullivan*'s presumption of prejudice is necessary to vindicate defendants' Sixth Amendment rights. None of this Court's precedents justifies limiting *Sullivan* to a particular subset of conflicts of interest.

A. *Sullivan* Should Govern All Conflicts.

1. *Sullivan* guards against the uniquely grave risks that conflicts of interest pose. "Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision." *Von Moltke* v. *Gillies*, 332 U.S. 708, 725-726 (1948) (plurality op.). Conflicts of interest directly threaten "the most basic of counsel's duties." *Strickland*, 466 U.S. at 692. When faced with a conflict, lawyers must choose whether to advocate a client's "interests single-mindedly," or whether to advance that other interest at the client's expense. *Wood*, 450 U.S. at 271-272.

If a lawyer does make a fateful choice to sacrifice his duty of loyalty, it is paradoxically "difficult to measure the precise effect" of the corruption on the lawyer's performance. *Strickland*, 466 U.S. at 692. A lawyer's divided loyalties can influence every action he takes, from how he negotiates plea deals to what witnesses he calls. *See Holloway* v. *Arkansas*, 435 U.S. 475, 490-491 (1978). Indeed, a conflict can even influence "what the advocate finds himself compelled to *refrain* from doing." *Id*. But the trial record will often provide little evidence of those subtle failures to act. *Id*. As a result, courts cannot reliably quantify the precise effect of a conflict on the lawyer's performance and the proceeding's outcome. *Id.* And that means courts cannot reliably apply *Strickland*, which requires

evaluating how a lawyer's deficient performance prejudiced the proceedings.

As this Court has explained, because *Strickland* is generally "inadequate" in conflict-of-interest cases, *Sullivan*'s presumption of prejudice provides a much "needed prophylaxis." *Mickens*, 535 U.S. at 176. Once a defendant proves that "an actual conflict of interest adversely affected his lawyer's performance" to some measurable degree, the court presumes prejudice occurred. *Sullivan*, 446 U.S. at 348.

This framework makes sense. Once a lawyer allows a conflict to undermine one aspect of his representation, there is a substantial risk that other aspects of the lawyer's representation were similarly harmed. But importantly, *Sullivan* does not require automatic reversal in every case. Indeed, the mere "possibility of conflict is insufficient to impugn a criminal conviction." *Id*. at 350. Instead, *Sullivan*'s test has real "teeth." *Stitt*, 441 F.3d at 303. A defendant must demonstrate that the lawyer affirmatively violated the duty of loyalty before the presumption arises. *Sullivan*'s presumption thus carefully balances the real risk that a conflict poses with other values—such as the finality of convictions.

Sullivan's presumption also creates positive incentives for the criminal justice system and the legal profession. Because *Sullivan* lowers the threshold for remedying conflicts of interest, *Sullivan* encourages trial courts "to inquire into a potential conflict" and "replac[e] a conflicted attorney" at the earliest possible opportunity. *Mickens*, 535 U.S. at 173; *see Strickland*, 466 U.S. at 692.

2. There is no principled reason to limit *Sullivan* to those narrow circumstances in which a lawyer

represents multiple clients. As Maryland's highest court has observed, the "same concern that led to the presumption of prejudice in multiple representation conflict cases * * * is equally present in personal interest attorney conflict cases." *Taylor*, 51 A.3d at 668-669. Anytime a conflict undermines the lawyer's "performance, it calls into question the reliability of the proceeding and represents a breakdown in the adversarial process fundamental to our system of justice." *Rubin*, 292 F.3d at 402 (Wilkinson, J.).

In some circumstances, personal conflicts can actually pose a greater risk than multiple representation. A lawyer representing multiple clients with competing objectives can objectively gauge the situation and measure the risks. By contrast, a lawyer harboring a personal conflict of interest "cannot reasonably be expected" to act as a neutral party. *Christeson* v. *Roper*, 574 U.S. 373, 378-379 (2015) (per curiam). "For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice." *Model Rules of Pro. Conduct* r. 1.7 cmt. 10 (2020).

The effects of a personal conflict on a lawyer's representation can also be especially difficult to prove, making the *Sullivan* presumption particularly appropriate. *See Taylor*, 51 A.3d at 669 ("[T]he precise degree of prejudice to the outcome of the trial that could result from an actual attorney-created conflict is too difficult to determine * * * ."). For instance, in cases in which a lawyer is unethically compensated with publication rights, it can be extremely difficult to determine "whether counsel took some action that might have promoted the commercial value of the

forthcoming publication at the expense of the accused's representation." 3 Wayne R. LaFave, et al., *Criminal Procedure* § 11.9(d) (4th ed. 2021 update). Similarly, if an attorney sexually coerces a client, *see, e.g.*, *Ex parte Sanchez*, 2017 WL 3380147, at *2, it can cause a complete breakdown in the attorney-client relationship. And because personal conflicts such as this form of coercion can involve particularly sanctionable conduct, a lawyer may be even less willing to "concede that he had" acted "improperly." *Wood*, 450 U.S. at 265 n.5.

Indeed, this Court has applied *Sullivan* in a case involving a lawyer's financial conflict of interest. In *Wood* v. *Georgia*, an employer paid for its employees' defense. But the employer had an interest in transforming the defendants' prosecution into "a test case" that could establish favorable "precedent." *See id*. at 267-268. The Court noted that "the party paying the fees may have had a long-range interest in establishing a legal precedent and could do so only if the interests of the defendants themselves were sacrificed." *Id*. at 269-270. The defense lawyer thus faced a conflict between his financial incentive to please the party paying his fee and pursuing the defendants' interests.

3. This case demonstrates the serious risks that personal conflicts pose to the integrity of the criminal justice system.

Spencer's counsel admitted his financial interest in "running a business" influenced his decision to agree to consolidate the cases for trial. Pet. App. 160a. As counsel put it, one trial was "less expensive than doing two." *Id*. at 148a. But joinder was not in Spencer's best interest. For instance, joinder allowed the same

jury to adjudicate multiple claims of sexual misconduct. This waived any arguments against presenting evidence about both allegations to a jury adjudicating just one incident. And joinder prevented the defense from exploiting any "inconsistencies" between the witnesses testimonies that "can really help you win a case." *Id*. at 155a.

Meanwhile, because he placed his emotional qualms and his business interests ahead of his client's case, counsel presented a lackluster defense. Counsel failed to investigate a key minor witness—Spencer's daughter—who was sleeping in the same room and could have undermined the prosecution's case. Counsel completely failed to move for a mistrial when a juror passed a note directed to the prosecution *in the middle of trial*. He failed to cross-examine Spencer's niece about a letter which indicated she had fabricated the assault. And he likewise did not attempt to pierce Colorado's rape shield statute and argue that the niece had lied to cover up her own misdeeds the same evening.[4] *See supra* pp.8-10.

This case also illustrates *Sullivan*'s salubrious incentives. Spencer's counsel clearly explained his moral qualms and financial concerns when he sought to withdraw and have the public defender take over. *See supra* pp.8-9. But the trial court did not even

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[4] In reaching an opposite conclusion, the Colorado trial court incorrectly applied *Strickland* in all but name, focusing on the reasonableness of counsel's actions and the prejudice to the outcome. The court also repeatedly took counsel at his word, despite Colorado law requiring courts not to rely on "the attorney's subjective assessment of his representation." *West*, 341 P.3d at 532-533. Notably, the majority below refused to defend the trial court's opinion, even as an alternative holding. *See* Pet. App. 4a-8a.

probe counsel's conflicts. Had it been clear that *Sullivan*'s presumption of prejudice applied, the trial court and the prosecution may have sought to resolve the conflict and prevent any error from occurring.

B. The Court Below Misread This Court's Precedent.

The Colorado court below offered three rationales for limiting *Sullivan*: An overbroad reading of *Mickens*, a cramped interpretation of *Wood* v. *Georgia*, and its belief that *Strickland* offers a superior standard. None of these arguments holds water.

1. *Mickens* does not support limiting *Sullivan*.

In *Mickens*, this Court reaffirmed *Sullivan*'s importance as a "needed prophylaxis" for cases involving a "high probability of prejudice," and where it is difficult for defendants to prove outcome-determinative harm. 535 U.S. at 175-176. Personal conflicts pose those same core concerns. *See supra* pp.27-29. But in "a postscript to its holding," *Mickens* questioned whether *Sullivan* should apply in all cases. *Tueros* v. *Greiner*, 343 F.3d 587, 593 (2d Cir. 2003) (Sotomayor, J.); *Mickens*, 535 U.S. at 174-175. This Court noted that the Federal Rules of Criminal Procedure impose special requirements for cases involving concurrent representation. *Mickens*, 535 U.S. at 175. And this Court suggested that "[n]ot all attorney conflicts present comparable difficulties." *Id*.

Mickens' dicta is hardly an authoritative weighing of the various risks that different types of conflicts of interest pose. The Court expressly declined to define *Sullivan*'s scope and confirmed that it remained "an open question." *Id.* at 176. Indeed, *Mickens* did not even involve a personal conflict. Rather, a lawyer had represented a client accused of murder after

previously representing the victim. *Id*. at 164. This Court held that the trial court's failure to investigate the potential conflict did not require automatic reversal, and assumed that *Sullivan* would govern instead. *Id*. at 172-174. The Court had no need to consider the types of risks personal conflicts of interest can pose.

The court below latched onto *Mickens*' suggestion that *Sullivan*'s "language" might not require applying the presumption outside of cases involving multiple representation. Pet. App. 6a. *Mickens* had quoted *Sullivan*'s rule that "[u]ntil * * * a defendant shows that his counsel *actively represented* conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." 535 U.S. at 175 (emphasis in original) (quoting *Sullivan*, 446 U.S. at 350). The decision below emphasized this passage to suggest that *Sullivan* only applies when a lawyer actively represents multiple *clients*. *See* Pet. App. 6a.

But this Court's opinions are not statues. Read in context, *Sullivan* had simply restated the rule that a defendant must show that the conflict "actually affected the adequacy of his representation." *Sullivan*, 446 U.S. at 349-350. In any event, this passage is entirely consistent with applying *Sullivan* to personal conflicts. A lawyer "actively represents conflicting *interests*" when his conflict pits his client's interests against his own. *Tatum*, 943 F.2d at 375-376 (emphasis added).

2. The court below also concluded that *Wood* v. *Georgia* involved "divided loyalty resulting from multiple representation." Pet. App. 7a (quoting *West*, 341 P.3d at 529 n.7).

Not so. In *Wood,* this Court was concerned with a personal conflict of interest. The Court described the defense lawyer as "hired and paid by a third party," and in "an ongoing employment arrangement with the employer." 450 U.S. at 266 n.8, 268-269. The lawyer accordingly faced a conflict between his financial interests in pleasing the employer, and the defendants' interests in pursuing a different legal strategy. *See supra* p.29.

What's more, if the conflict at issue in *Wood* is difficult to categorize, that difficulty highlights the fatal flaw in limiting *Sullivan* to a subset of conflicts: Courts that limit *Sullivan* must classify every conflict to determine what doctrinal test to apply. That approach requires drawing arbitrary lines. By contrast, applying *Sullivan* to all conflicts is simple and easy to administer. The court below was thus wrong when it suggested that its result preserved the "uniformity and simplicity of *Strickland*." Pet. App. 7a (internal quotation marks omitted). Instead, it is courts that limit *Sullivan* that create a complex and confusing system.

III. THIS PETITION IS AN IDEAL VEHICLE TO RESOLVE THIS IMPORTANT AND RECURRING QUESTION.

The question presented is of immense importance. Whether a court chooses to apply *Sullivan* can make the difference between vindicating the Sixth Amendment and not. The current disuniformity among nearly half of the criminal jurisdictions in the United States is deeply unjust. The right to counsel is the foundation of the criminal justice system, and that bedrock guarantee should not vary if a defendant is tried in Denver or Richmond. Because the lower

courts are divided over how to read this Court's precedent, only this Court can resolve the question. This petition offers the Court an ideal vehicle to do so.

1. Whether *Sullivan*'s presumption applies to personal conflicts is not an abstract question. Courts applying *Sullivan* will grant relief in situations that other courts, applying *Strickland,* will not. This is because *Strickland* is often "inadequate" in conflict-of-interest cases. *Mickens*, 535 U.S. at 176. Only by applying *Sullivan* can courts properly guard against the harms of conflicted representation.

Real-world evidence bears out *Sullivan*'s importance. For instance, in *State* v. *Cheatham*, a defense lawyer in a death-penalty case used an unethical flat-fee arrangement that incentivized counsel to do no more "than what [was] minimally necessary to qualify for the flat payment." 292 P.3d at 340 (internal quotation marks omitted). Counsel spent an "appallingly low" number of hours on the case, failed to investigate leads, and failed to withdraw despite being an alibi witness, because it would have meant forgoing his flat fee. *Id*. at 341. The lower court applied *Strickland* and denied relief. *Id*. at 337-338. But the Kansas Supreme Court applied *Sullivan*, found that counsel's conflict adversely affected his performance, and reversed. *Id*. at 337-341; *see also, e.g.*, *Acosta* v. *State*, No. 04-03-00583-CR, 2008 WL 138076, at *1 (Tex. App. Jan. 16, 2008) (ordering new trial under *Sullivan*, after higher court reversed a prior decision finding that defendant could not satisfy *Strickland*'s prejudice requirement).

The right to counsel should not vary depending on whether a jurisdiction applies *Sullivan* or not. Yet today, whether a defendant receives conflict-free

representation turns on the accident of which court hears his claim. This discrepancy is particularly glaring in Texas. A Texas state court will apply *Sullivan*'s necessary prophylaxis. *See Acosta*, 233 S.W.3d at 356. But a federal court in Texas will apply *Strickland*. *See Beets*, 65 F.3d at 1272. This Court should eliminate that arbitrary disparity. *See* Sup. Ct. R. 10.

2. This Court should intervene now. Since this Court decided *Mickens*, nearly half of all criminal jurisdictions in the United States have taken a position on the question presented. Further percolation would have diminishing returns and not provide any additional clarity.

Indeed, because the lower courts disagree about how to read this Court's precedent, only this Court can resolve the ambiguity. Until this Court does decide *Sullivan*'s scope, the question presented will recur in case after case. Almost twenty years ago, *Mickens* recognized the question's importance and noted the conflict. *See* 535 U.S. at 174-176. Since *Mickens*, the disagreement has grown to include at least thirty-two courts. *See supra* pp.13-23. This deep split will remain until this Court intervenes.

3. This case is an ideal vehicle to decide the question presented. The question was fully litigated at every stage of the proceedings and was squarely decided by the Colorado Court of Appeals. *See* Pet. App. 2a-8a. The issue is outcome determinative in this case. If *Sullivan* applies, petitioner will merit relief. But the Court of Appeals did not even consider petitioner's claim, because it refused to apply *Sullivan*. Additionally, this Court need not decide the merits itself. Instead, the Court would only need to answer

the purely legal question it left open in *Mickens*. As it did in *Sullivan*, this Court can allow the lower court to address the specifics of petitioner's *Sullivan* claim on remand. *See* 446 U.S. at 350.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MEGAN A. RING
Colorado State Public Defender
SEAN JAMES LACEFIELD
Deputy State Public Defender
1300 Broadway, Suite 300
Denver, CO 80203
(303) 764-1400

NEAL KUMAR KATYAL
Counsel of Record
NATHANIEL A.G. ZELINSKY
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Petitioner

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