No. 21-1157

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

BRIEF FOR AMICI CURIAE DUE PROCESS INSTITUTE, HUMAN RIGHTS DEFENSE CENTER, IDAHO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND NATIONAL ASSOCIATION FOR PUBLIC DEFENSE IN SUPPORT OF PETITIONER

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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)?

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INTERESTS OF AMICI CURIAE[1]

Amici curiae are national organizations dedicated to protecting the constitutional rights of criminal defendants and ensuring the fair administration of the criminal legal system. The Colorado Court of Appeals' decision in *Spencer* illustrates the growing split among lower courts regarding the proper legal standard for determining ineffective assistance of counsel when a lawyer has a personal conflict. If the minority view followed by the Colorado Court of Appeals in *Spencer* remains in effect, it would leave criminal defendants in those jurisdictions more vulnerable to false conviction, incarceration, and even execution, and denies them effective representation of counsel, in direct violation of the Sixth Amendment. *Amici curiae* write to protect those individuals' Constitutional rights.

Due Process Institute is a nonprofit, bipartisan, public interest organization that works to honor, preserve, and restore procedural fairness in the criminal legal system because due process is the guiding principle that underlies the Constitution's solemn promises to "establish justice" and to "secure the blessings of liberty." U.S. Const. pmbl.

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[1] Pursuant to Supreme Court Rule 37, amici states that no counsel for any party authored this brief in whole or in part, and that no entity or person other than amici and its counsel made any monetary contribution toward the preparation and submission of this brief. Under Supreme Court Rule 37.2(a), counsel of record for all parties received timely notice of the intent to file this brief and both of the parties have consented to the filing of this brief.

The Idaho Association of Criminal Defense Lawyers (IACDL) is a non-profit, voluntary organization of attorneys with more than 400 lawyer members. IACDL's membership includes both public defenders and private counsel, attorneys who work in both state and federal court, and attorneys who focus on trials, appeals, post-conviction, and federal habeas proceedings. One of IACDL's primary goals is to improve the quality of representation provided to criminal defendants in Idaho, especially those who cannot afford counsel. For these reasons, IACDL has a strong commitment to ensure that constitutional protections are afforded to all criminal defendants.

The National Association for Public Defense (NAPD) is an organization of more than 21,000 practitioners dedicated to the effective legal representation of persons accused of crimes who cannot afford to retain private counsel. The Association's membership includes all categories of professionals necessary to providing a robust public defense: lawyers, social workers, case managers, investigators, sentencing advocates, paralegals, researchers, and legislative advocates. These professionals often represent the interests of the most marginalized and stigmatized communities in the United States. NAPD aims to de-stigmatize poverty, eradicate racial discrimination in the criminal justice system, and to promote constitutional principles critical to the fair administration of justice.

The Human Rights Defense Center is a nonprofit charitable corporation headquartered in Florida that advocates in furtherance of the human rights of people held in state and federal prisons, local jails, immigration

detention centers, civil commitment facilities, Bureau of Indian Affairs jails, juvenile facilities, and military prisons.

SUMMARY OF ARGUMENT

The Sixth Amendment guarantees criminal defendants the effective assistance of counsel. U.S. Const. amend. VI; *Gideon v. Wainwright*, 372 U.S. 335 (1963). Indeed, the Court has long recognized that the criminal legal system cannot *function* without "the fundamental safeguards of liberty" accorded in the Bill of Rights, including the Sixth Amendment right to counsel. 372 U.S. at 341. If a criminal defendant's attorney has a *personal* conflict of interest that affects his representation of his client, can he truly provide effective assistance of counsel to his client? For the reasons that follow, the answer is no.

An attorney has a duty to zealously advocate for his client's interest—which a lawyer cannot do when he is also considering his own interest. "From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law." *Gideon*, 372 U.S. at 344. As Petitioner explains, "the duty of loyalty is essential, not incidental, to the adversarial justice system." Pet. at 25. The right to counsel is "crucial" in the adversarial system, because "access to counsel's skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution." *Strickland v. Washington*, 466 U.S. 668, 684 (1984). And a fair trial is "one in which

evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." *Id.* (internal citations omitted).

This Court has addressed whether a lawyer with a conflict of interest can provide effective assistance of counsel four times. *See Cuyler v. Sullivan*, 446 U.S. 335, 349 (1980); *Wood v. Georgia*, 450 U.S. 261, 207 (1981); *Burger v. Kemp*, 483 U.S. 776, 782 (1987); *Mickens v. Taylor*, 535 U.S. 162, 175 (2002). In *Sullivan*, the Court explained that a lawyer's actual conflict of interest was a denial of the right to have the effective assistance of counsel. 446 U.S. at 349 (*citing Glasser v. United States*, 315 U.S. 60, 76 (1942)). However, there is a growing circuit split among lower courts on when to apply *Sullivan*, as illustrated by *Spencer*. Indeed, a minority of courts, including the *Spencer* decision, improperly limit the application of *Sullivan* to its unique facts—i.e., multiple concurrent client representations. But this narrow interpretation of *Sullivan* articulated in the *Spencer* decision is wrong and, most importantly, fails to adequately vindicate criminal defendants' Sixth Amendment rights.

The American Bar Association's Model Rules of Professional Conduct recognize: "Loyalty and independent judgement are essential elements in the lawyers' relationship to a client." Model Rule of Pro. Conduct 1.7 (Am. Bar Ass'n). A conflict can arise between the client and "the lawyer's own interest," because the "lawyer's own interest should not be permitted to have an adverse effect on representation of a client." *Id.* Colorado's Rules of Professional Conduct

similarly recognize that a conflict can occur between a client and the personal interest of a lawyer. *See* Colo. R. Pro. Conduct 1.7.

When there is an actual conflict between the interests of a criminal defendant and his attorney, particularly when that attorney acknowledges that conflict, it is difficult, if not impossible, for that attorney to provide his client effective assistance of counsel as guaranteed by the Sixth Amendment. To find otherwise will require attorneys to somehow disregard their personal conflicts of interest in order to provide their clients with effective assistance of counsel. The risks of asking attorneys to do this are high—clients whose attorneys cannot are left to bring their claims under the *Strickland* standard and prove actual prejudice, when the attorneys' conflicts of interest may very well have permeated every aspect of their representation. Ultimately, unless the Court resolves this significant and growing split in authority, criminal defendants in certain jurisdictions will be denied the right to effective assistance of counsel, and more innocent Americans will be incarcerated for crimes they did not commit.

Spencer's petition provides this Court with the opportunity to eliminate a split in authority relating to application of *Sullivan*, address a violation of constitutional rights, and avoid the severe consequences that follow. Accordingly, the Court should grant the petition for writ of certiorari and make clear that *Sullivan* applies when an attorney has a personal conflict of interest, and not just when an attorney is concurrently representing multiple defendants.

ARGUMENT

I. DEFENSE ATTORNEYS CANNOT COMPLETELY IGNORE AN ACTUAL PERSONAL CONFLICT OF INTEREST.

As Petitioner explained, courts are divided on whether the *Sullivan* standard applies to all cases in which the defense attorney had a conflict of interest, or only those where the conflict of interest stemmed from the representation of multiple clients. Pet. at 13–14; *see also Ellis v. Harrison*, 947 F.3d 555, 559 (9th Cir. 2020) ("The Supreme Court has never addressed [a personal conflict of interest] claim, and a state court may reasonably choose one possible legal standard over another where the controlling law is uncertain."). In practice, this means that criminal defendants are entitled to a different level of assistance of counsel depending on the jurisdiction. A criminal defendant in one of the minority jurisdictions can have his conviction sustained even if his lawyer's personal conflict of interest is demonstrated to have affected his representation, but a criminal defendant in the majority of jurisdictions cannot.

The importance of resolving a split in authority is particularly high, when as true here, criminal defendants' freedom and lives are at stake. *See Alito Reflects on his Role on the High Court*, Law.com (Aug. 8, 2007) (indicating that the Supreme Court "aim[s] to resolve conflicts in lower courts," and indicating that "in some criminal cases, the court should not wait for conflicts among the lower courts, because the wait means people are serving extra prison time for convictions that could

turn out to be flawed."). As the Court recognized in *Sullivan*, defense counsel has an ethical obligation to avoid conflicting representation and must promptly notify the court when a conflict of interest arises during the course of trial. 446 U.S. at 339. In *Glasser v. United States*, the Court explained that once there is an actual conflict affecting the representation, determining the "precise degree of prejudice" would be "at once difficult and unnecessary." The Court refused to "indulge in nice calculations as to the amount of prejudice" attributable to the conflict. 315 U.S. 60, 72–76 (1942), *superseded by statute as stated in Bourjaily v. United*, 483 U.S. 171 (1987). Instead, the conflict itself demonstrates a denial of the right to effective assistance of counsel. *Id.*

It is difficult and perhaps impossible to quantify the extent to which a lawyer's conflict of interest affected his representation of his client and the outcome of a trial. *See id.* That, at the very least, requires the lawyer to be completely forthcoming about how strongly he feels about a personal conflict of interest. Even then, when lawyers have come forward and asked to withdraw because of an actual personal conflict of interest with a client, their requests are sometimes denied. A number of examples below highlight the difficulty of this situation.

In *Thomas v. Crosby*, defendant's counsel moved to withdraw because he had a "close and intimate relationship" with the mother of one of the victims. No. 03CV1526ORL-31, 2005 WL 2862076, at *2 (M.D. Fla. Nov. 1, 2005). The state trial judge denied the motion to withdraw and found that there was no conflict of interest. *Id.* Later, the federal district court considering the

defendant's habeas petition found that this was not an improper application of *Strickland*. *Id.* at *4.

In *Fualaau v. White*, the defendant physically assaulted his attorney in open court. No. C14-0751, 2015 WL 5007695, at *3 (W.D. Wash. Mar. 2, 2015), *report and recommendation adopted*, 2015 WL 4994277 (W.D. Wash. Aug. 19, 2015). The defendant became agitated during the cross-examination of a witness, so the judge asked the jury to leave and for defendant's attorney to calm him down, but before the jury left, the defendant lunged at his counsel and physically assaulted him. *Id.* After a correctional officer intervened, the attorney immediately moved for a mistrial and requested to withdraw as defendant's counsel, but his motion to withdraw was denied. *Id.*

In *Hale v. Gibson*, 227 F.3d 1298, 1312 (10th Cir. 2000), the defense attorney attempted to immediately withdraw once appointed because he suspected the defendant had previously burglarized his office. *Id.* at 1310. Defense attorney acknowledged in the application that he had a "personal dislike, distrust and animosity toward the Defendant which will prevent the desirable communication and trust that is necessary to an attorney-client relationship." *Id.* The trial court denied the application to withdraw and wrote that it was "of the opinion that the attorney will not permit personalities to effect [sic] his relationship or representation of defendant." *Id.* The Tenth Circuit held that because the defendant could not demonstrate that his attorney "actively represented conflicting interests," there was no conflict. *Id.* at 1313.

These decisions, particularly *Hale*, emphasize that unrealistic expectations can be placed on attorneys with a personal conflict of interest, at the expense of their clients. Attorneys are asked to ignore their personal conflicts and effectively advocate for their clients, as the Sixth Amendment demands, even when those same attorneys tell the court that they cannot do so. It is difficult to have confidence that an attorney who was physically assaulted by his client or who knows the mother of the victim will nonetheless be able to provide truly effective counsel. But under *Strickland*, it would not be enough to show that these attorneys openly acknowledged a conflict of interest and that the conflict affected their performance. To obtain a reversal, their clients would have to show that their lawyer's performance was objectively unreasonable and had a substantial likelihood of affecting the outcome of the case. This high standard reduces the incentive for trial courts to carefully detect and address conflicts of interest by defense counsel because the likelihood of a reversal on account of the conflict is diminished. But this function of policing actual conflicts of interest is a crucial one; courts who refuse to apply *Sullivan* to personal conflicts of interest are simply setting them up to fail. Ultimately, lawyers are not infallible, lawyers are human beings subject to, and motivated by their emotions. The criminal legal system cannot operate on the assumption that lawyers are superhuman and immune to actual personal conflicts of interest. Even worse, the consequences for an attorney's failure in these circumstances fall almost entirely on his client, who is then forced to pursue a *Strickland* claim for

ineffective assistance of counsel to avoid wrongful imprisonment.

II. *STRICKLAND* IS INSUFFICIENT TO PROTECT A CRIMINAL DEFENDANT FROM HIS LAWYER'S PERSONAL CONFLICT OF INTEREST.

The split in authority on the application of *Sullivan* means that criminal defendants in minority jurisdictions do not receive effective assistance of counsel, because they may be represented by a partial attorney whose interests conflict with his client's interests. If a criminal defendant cannot rely on the *Sullivan* standard when his lawyer's conflict of interest compromised his ability to provide effective assistance of counsel, he must avail himself to the much higher *Strickland* standard. Under *Strickland*, a petitioner must show (1) that his counsel's performance was deficient in that it fell below an objective standard of reasonableness; and (2) that the deficient performance prejudiced the defense. 466 U.S. at 689–94. To demonstrate deficiency, a petitioner must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. The Court explained that the reviewing court must be "highly deferential" and operate under a strong presumption that counsel's performance was "within the wide range of reasonable professional assistance." *Id.* at 669.

As the Court has recognized, "[s]urmounting *Strickland's* high bar is never an easy task." *Harrington v. Richter*, 562 U.S. 86, 105 (2011); Marc L. Miller, *Wise*

Masters, 51 Stan. L. Rev. 1751, 1786 (1999) (stating that under *Strickland's* "infamous and miserly 'cause' and 'prejudice' standard," an ineffective assistance of counsel claim will normally fail so long as the "lawyer . . . [had a] pulse"). Indeed, *Strickland* remains a "formidable obstacle to defendants alleging that they were deprived of their Sixth Amendment right to the effective assistance of counsel." John H. Blume & Sheri Lynn Johnson, *Gideon Exceptionalism?*, 122 Yale L.J. 2126, 2138–39 (2013). Courts have interpreted *Strickland's* statement that counsel is strongly presumed to have rendered adequate assistance as a shield for counsel's behavior against judicial scrutiny. Carissa Byrne Hessick, *Ineffective Assistance at Sentencing*, 50 B.C. L. Rev. 1069, 1074 (2009). This is true even when the attorney provides seemingly egregious ineffective assistance of counsel—e.g., courts have found effective assistance of counsel when counsel conceded her client's guilt, counsel failed to make any closing argument, counsel referred to a client by a racial slur, counsel represented the defendant while drunk, and counsel hinted that death was an appropriate sentence during closing argument. *Id.* at 1076. Under *Strickland*, even a lawyer who slept through trial might be found to have provided effective assistance of counsel. Ellen Yaroshefsky & Laura Schaefer, *Defense Lawyering and Wrongful Convictions*, *in Examining Wrongful Convictions: Stepping Back, Moving Forward* 123 (Allison D. Redlich et al. eds., 2014).

Under *Sullivan*, however, if a defendant demonstrates an actual conflict of interest that "adversely affected [the] lawyer's performance," the

defendant need not show prejudice—prejudice is assumed. 446 U.S. at 348; *Strickland*, 466 U.S. at 692 ("Prejudice is presumed only if the defendant demonstrates that counsel "actively represented [a] conflicting interest" and that "an actual conflict of interest adversely affected his lawyer's performance." (citation omitted)).

Strickland is insufficient to protect Sixth Amendment rights when the attorney has a personal conflict of interest. As the Ninth Circuit recently acknowledged, these types of conflicts can "infect" the entire representation. *Ellis*, 947 F.3d at 556. This makes it difficult to determine the precise cumulative effect of the conflict of interest on the attorney's representation, much less on the outcome of the proceeding. *Sullivan* incentivizes trial courts to more seriously consider conflicts of interest, and it is in the best interest of the judicial system and criminal defendants alike if trial courts perform a conflict of interest analysis carefully.

In *Ellis*, the Ninth Circuit addressed an ineffective assistance of counsel claim based on a personal conflict of interest. There, Ellis argued that he was deprived of the right to effective assistance of counsel because of a conflict of interest that stemmed from his attorney's racial prejudice. 947 F.3d at 559. As the Ninth Circuit described, the attorney was "disloyal and entirely indifferent to the fate of his non-white clients." *Id.* at 556. His "utter contempt for people of color infected his professional life." *Id.* at 557. Ellis first learned of his attorney's racism in 2003, when a friend sent him a newspaper article outlining the attorney's "shoddy work" as a defense attorney. *Id.* at 557–58.

After learning of his lawyer's personal conflict of interest, Ellis petitioned the state court for habeas relief. *Id.* at 558. The state court rejected Ellis's ineffective assistance of counsel claim because he did not show actual prejudice from his attorney's conflict of interest, as was required under *Strickland*. *Id.* The Ninth Circuit initially denied Ellis's habeas petition. *Id.* at 556. However, after Ellis petitioned for a rehearing en banc, California reversed its position and agreed that the decision should be overturned. *Id.* As a result, Ellis eventually received relief on his claim in the federal system, but it took him nearly twenty years. *Id.* at 558. Relief was only granted because the state of California was willing to change its position. *Id.* If the California courts had applied *Sullivan* in the first instance, Ellis's ineffective assistance of counsel claim may have been immediately granted. Ellis would have regained his freedom and judicial resources would not be wasted on twenty years of extensive litigation.

In *Osborne v. Terry*, Osborne, an African American defendant on death row, filed for habeas relief based on multiple grounds, including that his defense attorney's racial animus towards him deprived him of the effective assistance of counsel because his defense attorney allegedly failed to inform him of a plea deal offer. 466 F.3d 1298, 1316 (11th Cir. 2006). In support of his claim, Osborne presented an affidavit from one of his defense attorney's incarcerated white clients. The white client—who barely knew the defendant beyond a single "verbal argument"—claimed that the defense attorney stated that the "little n***** deserves the death penalty," though the case "had not gone to trial yet." *Id.* Osborne's

defense attorney also told the white client that he "wouldn't believe the amount of money he was going to spend" on the white client's case, making sure to "hire a private investigator and get expert witnesses." *Id.* The "money he would spend on" the white client "was going to be a lot more than he would spend on [the defendant] because that little n***** deserves the chair." *Id.* The court applied *Strickland* to and denied Osborne's habeas claims. *Id.* Those claims are likely evidence of just *how deeply* Osborne's attorney's personal conflict of interest had permeated his defense—the defense attorney failed to provide expert rebuttal testimony regarding ballistics; failed to challenge the state's crime scene reconstruction expert; and failed to conduct a background investigation into mitigating evidence. *Id.*

Osborne's defense attorney died in 2001 and Osborne was executed in 2008. But his defense attorney's behavior is still being considered. Recently, the Eleventh Circuit found that the defense attorney had unreasonably failed to investigate yet another African American death-row defendant's traumatic upbringing, failed to present a broad range of available mitigating evidence, and ultimately left his mentally disabled client with nothing to rely on but "naked pleas for mercy." *Pye v. Warden, Georgia Diagnostic Prison*, 853 F. App'x 548, 569 (11th Cir.), *vacated on reh'g*, 9 F.4th 1372, 1372 (11th Cir. 2021) (en banc). The claims are an eerie echo of the nearly identical allegations that the court ignored in *Osborne* while applying the *Strickland* standard.

This risk associated with relying on *Strickland* is even more pronounced when, as is true here, the attorney tries to withdraw before or during the trial. If

trial counsel is not allowed to withdraw and the criminal defendant is ultimately convicted, the defendant must wait until the decision is final to bring his *Strickland* claim. This means that a defendant is required to wait, in jail, to bring a claim under *Strickland*, when all along his attorney acknowledged there was a conflict of interest that precluded him from providing effective assistance to his client. Under *Sullivan*, however, a criminal defendant who raises an ineffective assistance of counsel claim based on his attorney's conflict of interest would not have to show prejudice, and courts would be more likely to resolve the question at an earlier stage. While the *Sullivan* standard exists only in post-conviction proceedings, both courts and prosecutors would be more likely to seriously consider conflicts of interest between a defense attorney and his client if they know ignoring such a conflict may ultimately lead to a conviction being reversed. And it is certainly in the best interest of the criminal legal system as a whole if trial courts more carefully consider actual personal conflicts of interest.

III. INEFFECTIVE ASSISTANCE OF COUNSEL LEADS TO MORE WRONGFUL CONVICTIONS, WHICH HAS DETRIMENTAL EFFECTS TO SOCIETY AND INDIVIDUAL DEFENDANTS.

The Court should grant certiorari because allowing the Colorado Court of Appeals' ruling to stand will undermine the "procedural and substantive safeguards" that ensure defendants receive a fair trial and lead to the conviction of innocent people. *Gideon*, 372 U.S. at 344. In *Spencer*, the Colorado Court of Appeals found that the

Strickland test was sufficient to protect Spencer's Sixth Amendment right to counsel and declined to apply *See* Pet. at 11–12. Ultimately, the Colorado Court of Appeals affirmed the trial court's denial of Spencer's post-conviction petition because he failed to show that he was prejudiced, as was required by *Strickland.* Pet. App. 31a-39a.

But, as explained above, *Strickland* provides insufficient protection when the attorney's personal conflict of interest permeates the entire representation. Indeed, in *Mickens*, the Court recognized that the "purpose of our *Holloway* and *Cuyler* exceptions … [is] … to apply needed prophylaxis in situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel." 535 U.S. at 175–76. *Spencer* denies criminal defendants their right to the effective assistance of counsel by failing to adequately remedy the consequences of attorneys providing conflicted representation and by reducing the incentive to police representation by conflicted attorneys, making it easier for prosecutors to convict, and to defend convictions of, innocent persons. *Spencer*'s holding is contrary to Americans' correct understanding that it would be a grave miscarriage of justice to tolerate a judicial system that permits the incarceration of innocent people. Cato Institute, *Blackstone's Ratio: Is it more important to protect innocence or punish guilt?* (2016), https://www.cato.org/policing-in-america/chapter-4/blackstones-ratio.

Ineffective assistance of counsel is the "most frequently raised claim in federal habeas corpus litigation." Tom Zimpleman, *The Ineffective Assistance*

of Counsel Era, 63 S.C. L. Rev. 425, 438 (2011) (discussing the King, Cheesman, and Ostrom study on the basis for habeas corpus petitions in federal court); Carrie Leonetti, *The Innocence Checklist*, 58 Am. Crim. L. Rev. 97, 100 (2021) ("There is consensus among scholars, advocates, and inquiry commissions about the primary causes of wrongful convictions, including . . . ineffective assistance of counsel . . . ."); Bruce A. Green & Ellen Yaroshefsy, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 Ohio St. J. Crim. L. 467, 515 (2009) (noting "that ineffective assistance of counsel is a rampant criminal justice problem and among the leading causes of wrongful convictions"). And unsurprisingly, ineffective assistance of counsel leads to higher levels of wrongful convictions. A study by the Innocence Project found that out of 255 DNA exonerees, about one in five first raised ineffective assistance of counsel claims. Emily M. West, *Court Findings of Ineffective Assistance of Counsel Claims in Post-Conviction Appeals Among the First 255 DNA Exoneration Cases*, Innocence Project (Sept. 2010), https://www.innocenceproject.org/wp-content/uploads/2016/05/Innocence_Project_IAC_Report.pdf. Of those ineffective assistance of counsel claims, approximately 80% were denied. *Id.* at 3. *Strickland* does not even adequately protect the factually innocent.

If a criminal defendant is convicted, he faces an uphill battle to show that his trial counsel was ineffective and that he was prejudiced as a result. Because there is no right to a lawyer beyond direct appeal, most post-conviction petitions are filed *pro se* by inmates "who could not conduct an investigation even if they had the

skills and resources to do so," making it difficult for criminal defendants to prevail on these claims. Andrea D. Lyon, *The Promise of Effective Assistance of Counsel: Good Enough Isn't Good Enough*, Nat'l Ass'n of Def. of Crim. Def. Law. (June 2012), https://www.nacdl.org/Article/June2012-ThePromiseofEffectiveAssistance.

Criminal defendants pursuing a post-conviction claim face the added challenge of bringing their claim years after their initial trial, often after evidence and witnesses have become stale. For claims of ineffective assistance of counsel, these challenges are reduced somewhat if, as laid out in *Sullivan*, prejudice is presumed upon a showing of a conflict that affected the counsel's performance.

The ability to overturn wrongful convictions stemming from ineffective assistance of counsel is vital because wrongful convictions remain a serious problem in the United States. Since 1989, approximately 2,795 individuals have been exonerated after being wrongfully convicted for crimes they did not commit. Nat'l Registry of Exonerations, *25,000 Years Lost to Wrongful Convictions* 1 (June 14, 2021), https://www.law.umich.edu/special/exoneration/Documents/25000%20Years.pdf. Wrongful convictions offer no positive benefits to public safety, cost taxpayers billions of dollars, and unnecessarily put the liberty and lives of innocent people at risk.

Wrongful convictions also have an economic impact on the community. States pay incarceration costs and civil litigation costs including costs for lawyers and

experts. In sum, thirty-six states and the District of Columbia have paid an estimated $2.9 billion in compensation from wrongful convictions. Innocence Project, *DNA Exonerations in the United States*, https://innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited Mar. 21, 2020). One study performed by the Better Government Association and the Center on Wrongful Convictions found that the financial costs of wrongful convictions in Illinois between 1989 and 2010 cost Illinois taxpayers over $300 million. John Conroy & Rob Warden, *Special Investigation: The High Costs of Wrongful Convictions*, Better Gov't Ass'n (June 18, 2011), https://www.bettergov.org/news/special-investigation-the-high-costs-of-wrongful-convictions/. The financial costs for the wrongfully convicted are also high. Those persons lose years of employment, and have difficulty finding gainful employment, even after exoneration. Nat'l Registry of Exonerations, *25,000 Years Lost*, *supra*, at 1.

The direct consequences of a wrongful conviction are not limited to prison time. The Equal Justice Initiative found that approximately one person on death row has been exonerated for every nine people executed in the United States since 1973. Equal Just. Initiative, *Death Penalty*, https://eji.org/issues/death-penalty/ (last visited Mar. 21, 2022). Sometimes, the exoneration does not come quickly enough. There have been several contemporary instances of individuals who were executed, but whose guilt was later seriously called into question. *See, e.g.*, *Pye*, 853 F. App'x at 550 (overturning the conviction of a criminal defendant because of

ineffective assistance of counsel, the same counsel that represented the already executed Osborne).

Less tangible than the loss of time, life, or economic resources is the societal cost of wrongful convictions in undermining the public's faith in the criminal legal system. That loss of faith is likely increased by the fact that wrongful convictions are likely secured disproportionately against people of color. As of December 2021, 67% of the 237 people exonerated through the work of the Innocence Project have been people of color, 58% of them Black. Innocence Project, *Explore the Numbers: Innocence Project's Impact*, https://innocenceproject.org/exonerations-data/ (last visited Mar. 21, 2022).

Ultimately, the wrongful conviction of the innocent remains a problem in the American justice system. Depriving criminal defendants of the effective assistance of counsel only exacerbates that problem, as most criminal defendants cannot mount a full defense without the assistance of competent counsel.

CONCLUSION

Defendants across the country are receiving different levels of assistance of counsel due to the growing circuit split. The Courts should grant the petition for writ of certiorari to resolve the split and ensure that all defendants receive the effective assistance of counsel that the Sixth Amendment guarantees.

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

Respectfully submitted,

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