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

AMICUS BRIEF OF LEGAL ETHICS SCHOLARS AND LAW PROFESSORS IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici curiae are professors and legal ethicists at law schools throughout the United States. They teach, write, or practice in the field of legal ethics and professional responsibility for attorneys. They have a professional interest in the clear, consistent, and fair application of rules in ethics and professional responsibility—their interest is at its height in criminal law cases, where an attorney's strict adherence to norms of professional responsibility is crucial to the administration of justice.

Amici submit this brief to emphasize two overarching points. First, Amici write to emphasize the centrality of the duty of loyalty to a lawyer's defense of a client. This duty is at its height in criminal cases, where the defendant is on trial for his liberty and where the consequences are potentially so severe.

Second, Amici write to note that the principles of legal ethics do not limit the reach of the duty of loyalty to co-defendant situations like the court below held. To the contrary, legal ethicists generally see no important distinction between the representation of multiple clients found to be problematic in *Cuyler v. Sullivan*, 446 U.S. 335 (1980) and cases involving other kinds of conflicts that place the lawyer's loyalty in question. In

[1] No counsel for any party has authored this brief in whole or in part, and no person other than the amici or their counsel have made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this amicus brief. All parties were given 10 days notice of the filing of brief.

each of those cases, as the Petition argues, the rule should be that prejudice is presumed when counsel actively represented conflicting interests and that an actual conflict of interest "adversely affected the lawyer's performance." *Strickland v. Washington*, 466 U.S. 668, 692 (1984).

Under those foundational legal ethics rules, and this Court's own decisions, the problem posed in this case and other cases involving conflicts present exactly the same difficulties as *Sullivan* presented. Amici believe leaving the rule the court below announced untouched would harm the fair and impartial administration of justice in the adversarial system, and therefore urge this Court's review.

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SUMMARY OF ARGUMENT

Petitioner Dennis Spencer's counsel in this case stated that he could not properly defend Spencer against allegations of child sexual assault because of his own emotions after becoming a father. Counsel later explained that he felt he was in a no-win situation. If Spencer were guilty, he was being forced to represent an individual who sexually assaulted a child—now extremely difficult for counsel because of the change in his life circumstances. If Spencer were innocent, then he was forced to believe "there's something with the accuser that's not right." Pet. App. at 9a (quoting Pet. App. at 119a). Together, these feelings made Counsel sure he could not be an "effective" or "zealous" advocate for "Mr. Spencer in his cases." Pet. App. at 65a.

This is exactly the kind of conflict in the duty of loyalty that a lawyer cannot and should not proceed with. Under the Model Rules, if he could not "go all the way in" with his representation, then he must withdraw. David Luban, *Fiduciary Legal Ethics, Zeal, and Moral Activism*, 33 Geo. J. Legal Ethics 275, 287 (2020). But the district court forced counsel to continue representing Spencer. The results were predictable. Although one can never know in the cold light of day every single decision that was influenced by counsel's

lack of zeal, the record shows several times when counsel who did not feel a conflict would have acted more vigorously.

Despite this clear conflict of interest, the court below held that this Court's long-standing rule in *Cuyler v. Sullivan*, 446 U.S. 335, 346 (1980)—which recognized the centrality of an attorney's undivided loyalty—did not extend beyond co-defendant situations. That result is flatly inconsistent with the rules of legal ethics, rules which form the basis of this Court's Sixth Amendment jurisprudence. Amici, a group of legal ethicists and scholars, write to explain to the Court that the wall the court below erected between one kind of conflict of interest and all the others cannot withstand serious scrutiny. This Court should grant certiorari in this case and resolve the important split presented.

ARGUMENT

I. Counsel's loyalty to their client has always been paramount when defending a criminal case.

A. The duty of loyalty is the lawyer's central obligation.

This Court has recognized for more than a century that lawyers owe their clients the highest duty of loyalty. Constitutionally effective assistance of counsel "entails certain basic duties" to the client, including a "duty of loyalty" and a corresponding "duty to avoid

conflicts of interest." *Strickland*, 466 at 688. The duty of loyalty is the most fundamental of all fiduciary duties the legal profession owes to its clients. *See*, *e.g.*, *id.*, 466 U.S. at 692 (describing the duty of loyalty as "perhaps the most basic of counsel's duties").

The lawyer's duty of loyalty stands perhaps alone in its intensity among other legally recognized duties. "Few" business relations of life, the Court noted, are "more anxiously guarded by the law, or governed by sterner principles of morality and justice." *Stockton v. Ford*, 52 U.S. 232, 248 (1851). This duty requires the lawyer as agent to treat "his principal with the *utmost* . . . loyalty and good faith—in fact to treat the principal as well as the agent would treat himself." *Burdett v. Miller*, 957 F.2d 1375, 1381 (7th Cir. 1992) (emphasis added).

This is because the relationship between the lawyer and the client is one of total client dependence: the lawyer has all the knowledge of both the law and the justice system. This special position of dependence and trust makes breaches of the duty of loyalty substantively different than other kinds of ethical breaches. A breach of loyalty "can blunt a lawyer's advocacy, undermine a lawyer's independent professional judgment, inhibit a lawyer's creativity, and compromise a lawyer's zeal." Lawrence Fox, *The Gang of Thirty-Three: Taking the Wrecking Ball to Client Loyalty*, 121 Yale L.J. Online 567 at 571 (2012), http://www.yalelawjournal.org/forum/the-gang-of-thirty-three-taking-the-wrecking-ball-to-client-loyalty.

This duty of loyalty—so central to the lawyer's task—is not limited by norms of professional responsibility to some narrow category of conflict. From the beginning of legal ethics lawyers have been exhorted to put aside their interests or the interests of others in favor of that of their client. Lord Henry Brougham's exhortation that the lawyer must "not regard the alarm, the torments, the destructions which he may bring upon others" is typical of how the duty of zeal and loyalty is expressed. *See* 2 CAUSES CELEBRES: TRIAL OF QUEEN CAROLINE (1874). Lawyers are to defend their clients—no matter the consequences to society, to the opposing party, or even to the lawyer's own sense of ethics. The proper solution to the lawyer's "moral objections" (whether as to tactics or to the case itself) is "not for the lawyer to take the case and then to deny the client his rights" but to "refuse to take the case." Monroe H. Freedman & Abbe Smith, UNDERSTANDING LAWYERS' ETHICS (4TH ED. 2010).

When the first formal ethics codes were adopted in the United States, much the same language was used. The 1908 ABA ethics code demanded that lawyers owe "*entire* devotion to the interest of the client. . . ." CANONS OF PROFESSIONAL ETHICS, Canon 15 (1908) (emphasis added). The second ABA code from 1969 emphasizes to lawyers that their duty is to "seek any lawful objective through legally permissible means." MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Canon 7 (1969).[2]

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[2] *See generally*, Luban, *Zeal*, at 287.

Modern ethics codes follow the same path. The Model Rules of Professional Conduct, for example, speaks of a conflict of interest existing where the representation clashes with a "personal interest of the lawyer." MODEL RULES OF PROFESSIONAL CONDUCT R. 1.7(b). The Model Code of Professional Responsibility discusses the lawyer's "own financial, business, property, or personal" and "differing interests." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(A), 5-105(A) (1983) (Model Code). And the Restatement refers to a "lawyer's own interests" or "the lawyer's duties to another current client, a former client, or a third person." Restatement (Third) of Law Governing Lawyers § 121 (American Law Institute 1999).

Consistent with that text, legal ethics boards around the United States have concluded that lawyers face impermissible conflicts in situations that go far beyond co-defendant situations. *ABA Formal Ethics Opinion* 04-432 (2004) (concluding that posting bail for a client implicates a conflict of interest); *D.C. Legal Ethics Opinion* 354 (2010) (significant financial obligations to client could create conflict of interest); *Wisconsin Formal Ethics Opinion* EF-19-01 (concluding that job negotiations with opposing party can cause conflict). These decisions are not outliers, but in the mainstream of legal ethics interpretations.

B. The duty of loyalty has even greater bite in the context of a criminal case.

The duty of loyalty has special bite in criminal cases, where the client's resources are often extremely limited, and the consequences they are facing especially high. *See generally* Abbe Smith, *Burdening the Least of Us: "Race-Conscious" Ethics in Criminal Law*, 77 Tex. L. Rev. 1585, 1585-86 (1999) (describing the unique burdens of criminal defense in terms of legal ethics). *See also* Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 Stan. L. Rev. 589, 605 (1985) (recognizing that "the case for undiluted partisanship is most compelling" in criminal defense). The "unique stigma" of conviction demands the highest degree of loyalty and zeal. *See* Schwartz, *The Zeal of the Civil Advocate*, in THE GOOD LAWYER (D. Luban ed. 1984).

Precisely because of the high importance of criminal defense, this Court has also long recognized that prevailing "norms of practice as reflected in the American Bar Association and the like . . . are guides to determining what is reasonable." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). Particularly in the context of evaluating conflicts of interest, this Court has regularly looked to prevailing norms of practice and professional responsibility. *See*, *e.g.*, *Wood v. Georgia*, 450 U.S. 261, 270-271 & n.17 (1981); *Holloway v. Arkansas*, 435 U.S. 475, 485-486 & n.8 (1978).

Although "breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel," canons of ethics

and professional codes carry significant if not dispositive weight when "virtually all of the sources speak with one voice." *Nix v. Whiteside*, 475 U.S. 157, 165-166 (1986). Thus, for example, this Court relied on principles of legal ethics to hold that the attorney-client privilege "continues after death," *Swidler & Berlin v. United States*, 524 U.S. 399, 406-407 (1998), and was led by those standards to evaluate counsel's response to a client who will perjure himself on the stand, *Nix*, 475 U.S. at 165-166. And Justice Marshall "adopted" the American Bar Association's definition of "Conflict of Interests" in *Sullivan*, 446 U.S. at 346.

The bottom line is that the duty of loyalty is a central aspect of a proper understanding of the Sixth Amendment right to counsel. And under well-established legal ethics rules, the duty of loyalty is wide and all-encompassing. A lawyer is required to provide his or her client with the strongest and most zealous representation, no matter the facts.

II. There is no reason to cabin *Sullivan* to just one type of conflict of interest.

The court below held, consistent with some other courts around the United States, that the rule of *Sullivan* applies only to co-defendant situations. Thus, *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." Pet. App. 5a-6a. Rather, *Sullivan* governs only Sixth

Amendment claims involving "conflict arising from multiple representation." *Id.*

This conclusion is incorrect, as a matter of this Court's own precedents, as the Petition argues, but also because the logic of *Sullivan* should apply with equal force to other conflict of interest cases.

Perhaps the most important reason this is true is the question of proper review. One of the animating reasons for the *Sullivan* rule is that figuring out the prejudice where there is a failure of the duty of loyalty is extraordinarily difficult. As this Court has emphasized, the "right to have the assistance of counsel is too fundamental and absolute" to allow courts to indulge in "nice calculations" as to the amount of prejudice arising from its denial. *Glasser v. U.S.*, 315 U.S. 60, 76 (1942). *See also Snyder v. Com. of Mass*, 291 U.S. 97, 116 (1934) ("True, indeed, it is that constitutional privileges or immunities may be conferred so explicitly as to leave no room for an inquiry whether prejudice to a defendant has been wrought through their denial"); *Tumey v. State of Ohio*, 273 U.S. 510, 535 (1927) ("No matter what the evidence was against him, he had the right to have an impartial judge"). Or, as one Court of Appeals has noted, a "cold record" cannot be expected to disclose the "erosion of zeal which may ensue from divided loyalty." *Castillo v. Estelle*, 504 F.2d 1243, 1245 (5th Cir. 1974).

The facts of this case neatly illustrate the problem. As the Petition explains, Counsel admitted that he could not be an "effective" or "zealous" advocate for Mr.

Spencer in his cases. And as the Petition lays out, even the cold record shows counsel made several decisions that are suspect, including his decision to agree to consolidate Spencer's case with others, his failure to cross-examine Spencer's niece about a letter expressing remorse for lodging the allegations, Pet. App. 20a-21a, and his decision not to interview Spencer's daughter about her testimony. Can we know to any certainty that counsel's attitude led the jury to convict? Of course not—not even counsel may know in truth what he would have done. But the risk that they did is exactly what the legal ethics rules are meant to prevent.

III. Leaving the decision below undisturbed hurts clients and the public's trust in the legal system.

This Court should step in to correct the decision below and to protect prevailing ethics norms. Most important, making sure *Sullivan* covers all conflicts of interest in criminal cases protects public trust in both the justice system and in the legal profession. Indeed, one reason given by the drafters for the 1908 ABA canons was to create a "system for establishing and dispensing Justice" such that "the public shall have absolute confidence in the integrity and impartiality of its administration." 1908 Canons, pmbl. *See also* Audrey I. Benison, *The sophisticated client: A proposal for the reconciliation of conflicts of interest standards for attorneys and accountants*, 13 Geo. J. of Legal Ethics 699, 711 (2000) (observing that failing to impose prophylactic rules on conflicts is "so detrimental to the

truth-seeking process that it is better to err on the side of prohibition").

If it can be true that a criminal defendant cannot receive relief—even after his lawyer publicly stated they cannot represent the client with zeal and there was some positive proof that the representation was harmed—then the public will no longer believe that lawyers are completely dedicated to representing them. "If a lawyer chooses to represent a client . . . it would be immoral as well as unprofessional . . . to deprive the client of lawful rights that the client elects to pursue after appropriate counseling." Monroe H. Freedman, *Religion is not totally irrelevant to Legal Ethics*, 66 Fordham L. Rev. 1299, 1304 (1998). That immorality and unprofessionalism cannot be the basis for a properly functioning criminal defense system.

Second, the rule announced below creates incentives for lawyers not to report their moral qualms and other serious conflicts. Fred C. Zacharias, *Integrity Ethics*, 22 Geo. J. of Legal Ethics 541, 553 (2009) (noting that "ethics codes" create rules in part to "provide incentives . . . to motivate lawyers to honor the demands of the legal system and . . . enable lawyers to justify their special conduct to clients and the outside world"). If by reporting the lawyer exposes themselves to ethical scrutiny, but will do their client no good, then of course it is less likely that counsel will report their misgivings. Similarly, by lowering the standard for reversal, *Sullivan* incentivizes judges and prosecutors to accommodate a defense attorney who raises objections to their representation, because the risk of overturning

the conviction would increase. These incentives are additional reasons why *Sullivan* must be understood to cover all conflict scenarios.

CONCLUSION

This Court should reverse and remand this case.

Respectfully submitted,

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