No. 21-1157

In the

Supreme Court of the United States

DENNIS SPENCER,

Petitioner,

v.

STATE OF COLORADO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In *Mickens v. Taylor*, 535 U.S. 162 (2002), this Court declared that *Cuyler v. Sullivan*, 446 U.S. 335 (1980), "does not clearly establish, or indeed even support" applying the less stringent ineffective assistance of counsel standard for conflicts involving joint concurrent representation to other types of potential attorney conflicts. *Mickens*, 535 U.S. at 175.

Should this Court grant certiorari to state how broadly *Sullivan* applies when courts are converging on limiting *Sullivan* to joint concurrent representation and, in turn, examining actual prejudice from other claimed conflicts?

RELATED PROCEEDINGS

The proceedings related to this petition include:

- *Spencer v. People*, No. 21SC72, 2021 WL 4481154 (Colo. Sept. 27, 2021); *People v. Spencer,* No. 17CA2228, 2020 WL 7867196 (Colo. App. Dec. 17, 2020); *People v. Spencer*, Nos. 01CR1088, 01CR1089 (Denver Dist. Ct. Oct. 18, 2017).
- *People v. Spencer*, No. 15SC834, 2016 WL 1104453 (Colo. Mar. 21, 2016); *People v. Spencer*, No. 12CA2505, 2015 WL 4943898 (Colo. App. Aug. 20, 2015); *People v. Spencer*, Nos. 01CR1088, 01CR1089 (Denver Dist. Ct. Oct. 25, 2012).
- *Spencer v. People,* No. 05SC146, 2005 WL 1077713 (Colo. May 9, 2005); *People v. Spencer*, No. 02CA1992, 2005 WL 82255 (Colo. App. Jan. 13, 2005); *People v. Spencer*, Nos. 01CR1088, 01CR1089 (Denver Dist. Ct. Aug. 23, 2002).

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INTRODUCTION

Most claims of ineffective assistance of counsel are governed by the two-prong framework set forth in *Strickland v. Washington,* 466 U.S. 668 (1984). To prove ineffective assistance of counsel under *Strickland*, a defendant must show that trial counsel's performance was so deficient as to be "outside the wide range of professionally competent assistance," and that the deficient performance prejudiced the defendant such that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 690–94. This familiar and flexible standard applies to the panoply of ineffective assistance of counsel claims that criminal defendants raise from their state and federal convictions. *Strickland* provides a workable standard for resolving a host of potential issues in counsel's performance.

When an attorney in a criminal case actively represents two codefendants, and either counsel or a defendant objects to joint representation, the potential for prejudice is exceedingly high. *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). To reflect this heightened risk, *Sullivan* provides that, to get postconviction relief, a defendant need only meet a somewhat lower standard: that their counsel labored under an actual conflict of interest that adversely affected the lawyer's performance. *Id.* In other words, showing prejudice is unnecessary.

In *Mickens v. Taylor*, this Court questioned the expansion of *Sullivan* to situations other than concurrently representing multiple clients. 535 U.S. 162, 175 (2002). It made clear that *Sullivan* deviates from the ordinary prejudice articulation in

Strickland, but that the purpose of this relaxed standard is not to "enforce the Canons of Legal Ethics." *Id.* at 176. This Court added that "the language of *Sullivan* itself does not clearly establish, or indeed even support, such expansive application" to conflicts other than joint concurrent representation. *Id.* at 175. Instead, *Sullivan* stressed the "high probability of prejudice arising from multiple concurrent representation, and the difficulty of proving that prejudice." *Id.*

Petitioner asks that this Court convert *Sullivan* from a narrow exception to the *Strickland* standard into a blanket rule to enforce the Canons of Legal Ethics. *Mickens* does not support this result.

Certiorari is not appropriate for three reasons. First, recent decisions show that both state and federal courts are converging on the position of limiting *Sullivan* to conflicts of interest involving joint concurrent representation. The limited split below is narrowing after *Mickens*.

Second, this case presents a poor vehicle for deciding the scope of *Sullivan* because Petitioner's claim fails regardless of which standard applies. The postconviction court analyzed Petitioner's claims under *Sullivan*, and it found there was no actual conflict of interest that adversely affected counsel's performance.

Third, the case was correctly decided. Colorado's intermediate appellate court correctly held that *Strickland* controlled Petitioner's claims and that Petitioner's claims failed under *Strickland*.

For these reasons, certiorari should be denied.

STATEMENT OF THE CASE

I. Petitioner was charged with sexually assaulting three children; his counsel's motion to withdraw from representation was denied; and he was convicted as charged.

In 2001, Petitioner was charged with sexually assaulting his fifteen-year-old niece, B.B. Pet. App. 14a. Retained counsel represented Petitioner in the case involving B.B. *Id.* at 63a.

In a separate case, Petitioner was charged with sexually assaulting two other victims in 1992. In that case, the Public Defender's Office initially represented him. *Id.*

A few months before trial, retained counsel moved to withdraw from the case involving B.B., stating that his client no longer had the money to hire an investigator, which counsel believed would be important in the case. *Id.* at 64a–65a. Counsel also said that he had recently had his first child, and he no longer wished to represent clients accused of sexually assaulting children. *Id.* at 65a. Retained counsel also noted that he had represented another client on similar charges, and he felt that the lack of an investigator in that case contributed to a conviction. *Id.*

The court discussed the matter with the Public Defender's Office and learned that if the court granted the motion to withdraw, the public defender could not be ready by the trial date for the case involving B.B. and a continuance would be necessary. *Id.* at 66a. Petitioner never requested that his retained counsel withdraw, nor did Petitioner personally ever

articulate that he believed his counsel had a conflict that prevented representation. The court denied the motion to withdraw. *Id.* By consent, the cases were joined for trial. *Id.* at 14a. Retained counsel represented Petitioner in both cases. *Id.* at 18a. After a jury trial, Petitioner was convicted. *Id.* at 14a.

II. The postconviction court found Petitioner's conflict claim failed under *Sullivan*.

After exhausting his direct appeal, Petitioner filed a timely postconviction motion alleging ineffective assistance of counsel. The Denver District Court denied his claims, concluding that he failed to show any conflict which would entitle him to postconviction relief under either *Sullivan* or *Strickland*. Pet. App. 46a–60a.

On appeal, the Colorado Court of Appeals affirmed the denial of Petitioner's *Strickland* claims without an evidentiary hearing, but the court remanded the case for a hearing on the defendant's claims under *Sullivan*. *People v. Spencer*, No. 12CA2505, 2015 WL 4943898 (Colo. App. Aug. 20, 2015) (unpublished); Pet. App. 30a–44a. Colorado argued that Petitioner had not met his burden under *Strickland*'s deficient performance prong.

The postconviction court held a hearing to assess Petitioner's conflict-of-interest claims under *Sullivan* and concluded that no actual conflict adversely affected counsel's representation of Petitioner. Pet. App. 13a–27a.

Petitioner claimed that counsel's personal trepidation and his financial concerns about an investigator were actual conflicts and that it

adversely affected his defense because trial counsel: (1) "improperly agreed to join [the] cases"; (2) "failed to attempt to pierce the [R]ape [S]hield [S]tatute"; (3) "failed to request a mistrial after a juror passed a note to the court reporter" related to "the process for choosing godparents in [Petitioner's] church"; (4) "failed to investigate information that [Petitioner's] daughter . . . was a light sleeper and was present in the room with B.B."; and (5) "failed to investigate and question B.B. at trial about [the] letter she wrote to [Petitioner's] wife." *Id.* at 20a–21a.

At the hearing on Petitioner's claims, Petitioner's trial counsel testified that they maintained a good attorney-client relationship throughout his representation. *Id.* at 118a. Trial counsel explained his initial reasons for moving to withdraw. *Id.* at 118a–119a.

First, during his representation of Petitioner, counsel had his first child, and he decided that he wished to stop representing clients accused of sexually assaulting children. *Id.* He explained that "if the person that's accused did it, it's difficult for me. If the person didn't do it, there's something with the accuser that's not right. It just didn't sit right with me anymore, and so that was one of the reasons." *Id.* at 119a.

Second, trial counsel testified that, during his representation, Petitioner was also charged with sexual assault of the two 1992 victims. For these charges, the public defender, who had the benefit of investigators, represented him. *Id.* Trial counsel hoped that the public defender would take over all of the cases and use its investigators. *Id.*

Third, trial counsel testified that he had tried another case with similar facts shortly before he

represented Petitioner, and he believed that the case suffered from the lack of an investigator. *Id.* Trial counsel shared his concerns with Petitioner, who always said that he "was aware of the need for an investigator" and that he would try to get money to pay one. *Id.*

Trial counsel also testified about the decisions he made leading up to and during trial and explained that none of those decisions were affected by the alleged conflicts. With respect to joining B.B.'s case with the case of involving the 1992 victims, counsel testified that the court had ruled under Colorado Rule of Evidence 404(b), over counsel's objection, that evidence of the assaults would be admissible in the other cases. Pet. App. 127a–128a. He testified that the conversation he had about joinder may have included the lack of investigator but that he would not have agreed to join the cases without his client's consent. *Id.* at 128a–129a. He testified that there were strategic advantages to both joinder and severance. *Id.* at 129a, 158a–159a. Ultimately, his decision to join the cases was not based on any of the potential conflicts. *Id.* at 129a.

As for counsel's decision not to move to pierce the Rape Shield Statute, Counsel testified that he believed that Petitioner's son—who, according to the victim, Petitioner asked to leave the room before he assaulted B.B.—changed his story. *Id.* at 123a. Counsel was not comfortable with the story that the son was telling, but he resolved that conflict by not calling the son in his case-in-chief, though he did cross-examine the son when the prosecution called him. *Id.* at 122a–123a. The basis for potentially seeking to pierce the Rape Shield Statute first arose at trial on a claim that the son had never disclosed despite multiple pretrial interviews. *Id.* at 130a–132a.

Counsel's decision not to pierce the Rape Shield Statute was not motivated by the financial issues involving an investigator. *Id.* at 132a–133a. Counsel also testified that he learned in his career that people in prison did not pay outstanding legal bills, so he had significant incentive to keep his client out of prison rather than to risk conviction. *Id.*

As for the mistrial claim, counsel explained that he did not request a mistrial when a juror sent a note to the court reporter about selecting godparents in Petitioner's church because it was clear that any mistrial request would have been futile. *Id.* at 134a. The judge declined his request to dismiss the juror, but the court made the juror the alternate. *Id.* at 133a–134a, 152a. Counsel testified that no personal or financial conflicts influenced this decision, and he moved for a mistrial later during the proceedings when a witness testified about prior acts. *Id.* at 133a–134a. So financial concerns did not prevent counsel from moving for a mistrial. *Id.*

Counsel also testified that his decision not to put on evidence that one of Petitioner's daughters, who might have witnessed the assault, was a light sleeper was based in trial strategy, not conflict. He recalled the allegation that the assault occurred when Petitioner's daughter was in the same room as B.B. *Id.* at 135a–136a. He declined to put on evidence that the daughter was a light sleeper because Petitioner's son had told interviewers otherwise. *Id.* at 135a–137a. And he thought that the light sleeper testimony was not a persuasive defense considering the other evidence. *Id.* at 137a. His decision not to call her to testify about being a light sleeper was based on strategic decisions and was unrelated to any conflicts. *Id.*

Counsel explained that he limited cross-examination of B.B. about a letter she wrote to Petitioner's wife after she reported the allegations. Counsel remembered the discussion at the motions hearing about a letter B.B. wrote to Petitioner's wife after the charges became public, apologizing for reporting the allegations against Petitioner. *Id.* at 138a. Counsel testified that the letter was not a recantation of the allegations, but instead demonstrated "victim's guilt" because the allegations caused problems in the family and in the church community. Pet. App. 138a. He also testified that B.B. was examined, during both direct and cross-examination, about the letter at trial. *Id.* at 139a.

Counsel testified that while there were some things he would have done differently with more than a decade of hindsight, there was nothing that the alleged conflicts prevented him from doing or that he would have done differently at the time. *Id.* at 126a–127a.

The postconviction court found that there was no conflict of interest that adversely affected counsel's performance under *Sullivan*, so the court denied the motion for postconviction relief. *Id.* at 13a–27a.

III. The Colorado Court of Appeals determined that *Sullivan* did not apply to Petitioner's claims.

Petitioner appealed that denial and, during the pendency of his case, a division of the Colorado Court of Appeals held that *Sullivan* is limited to situations involving multiple-client representation. Pet. App. 6a (citing *People v. Huggins*, 463 P.3d 294, 300–01 (Colo. App. 2019), *cert. denied*, 2020 WL 2766453 (Colo. May

26, 2020)). A recent decision from the Colorado Supreme Court also suggested that *Sullivan* should not be read broadly to encompass all conflict scenarios, based on this Court's language in *Mickens*. Pet. App. 6a (citing *West v. People*, 341 P.3d 520, 530 n.8 (Colo. 2015)). Based on these recent decisions, and a full reading of *Sullivan* and *Mickens*, the Colorado Court of Appeals held that *Strickland* controlled Petitioner's claims. Pet. App. 6a–7a. The court further held that Petitioner's claims were properly denied. Pet. App. 8a.

One judge specially concurred and said that she would have affirmed because the record supported the postconviction court's findings that the alleged financial conflict of interest was only a potential conflict, not an actual conflict, and counsel's representation was not affected by any of the potential conflicts. *Id.* at 9a–10a. Thus, according to the concurring judge, even if *Sullivan* applied, Petitioner's claims lacked merit.

Petitioner moved the Colorado Supreme Court for a writ of certiorari, which was denied, though two justices would have granted his petition. Pet. App. 11a–12a.

REASONS FOR DENYING THE PETITION

I. Appellate courts have heeded this Court's warning in *Mickens*.

A. Federal courts of appeals do not apply *Sullivan* "unblinkingly" and are narrowing *Sullivan*'s reach.

In *Mickens*, this Court cautioned that the federal courts of appeals had "applied *Sullivan* 'unblinkingly' to 'all kinds of alleged attorney ethical conflicts.'" *Mickens*, 535 U.S. at 174 (quoting *Beets v. Scott*, 65 F.3d 1258, 1266 (5th Cir. 1995) (en banc)). That is no longer the case. Every federal court of appeals has either narrowed *Sullivan*'s reach on direct or state habeas review, or is beginning to question whether *Sullivan* should apply to conflicts other than joint concurrent representation. Thus, the courts of appeals are heeding the warning in *Mickens*, and this Court's intervention is unnecessary.

Petitioner concedes that four courts of appeals—the Fifth, Sixth, Ninth (on state habeas review), and Eleventh Circuits—have limited *Sullivan* to the multiple representation context. Pet. at 19–21 (citing *United States v. Garza*, 429 F.3d 165, 172 (5th Cir. 2005) (per curiam); *Harrison v. Motley*, 478 F.3d 750, 756 (6th Cir. 2007); *Rowland v. Chappell*, 876 F.3d 1174, 1192 (9th Cir. 2017); *Cruz v. United States*, 188 F. App'x 908, 913 (11th Cir. 2006)).

Additionally, the Second and Seventh Circuits have restricted *Sullivan* in the state habeas context. Petitioner cites *United States v. Rivernider*, 828 F.3d 91, 109 (2d Cir. 2016), and *United States v. Fuller*, 312

F.3d 287, 291–92 (7th Cir. 2002), to argue that those circuits apply *Sullivan* broadly. Pet. at 15. But both courts have refused to allow *Sullivan* to control conflict-of-interest claims not related to concurrent representation for habeas petitioners convicted in state court. In *Hyman v. Brown*, the Second Circuit noted that this Court "cautioned against an 'expansive application' of *Sullivan*" and stated that the court had "expressly relied on *Mickens* in refusing to extend *Sullivan* to circumstances involving an attorney's ethical obligation to correct false testimony." 927 F.3d 639, 670 n.30 (2d Cir. 2019) (quoting *Mickens*, 535 U.S. at 175). And the Seventh Circuit wrote that while it has "*assumed* that *Sullivan* extends to financial conflicts of interests[,] . . . *Mickens* makes it very difficult" to apply that assumption on state habeas review. *Reynolds v. Hepp*, 902 F.3d 699, 708–09 (7th Cir. 2018) (emphasis added).

The remaining courts of appeals have not decided *Sullivan*'s reach. Petitioner acknowledges that the First, Eighth, Tenth, and D.C. Circuits have not yet taken a position on whether *Sullivan* should govern conflicts that do not involve joint concurrent representation. Pet. at 24 (citing *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)); *but see United States v. Beckman*, 787 F.3d 466, 490 n.14 (8th Cir. 2015)

(stating that the court would not follow *Noe* because it conflicted with an earlier decision).[1]

For direct review cases, the Ninth Circuit has also not yet decided the issue. *United States v. Walter-Eze*, 869 F.3d 891, 900–07 (9th Cir. 2017) (noting this Court's cautionary language in *Mickens*, but stating that "even if *Sullivan*'s presumption can extend, as a matter of law, beyond the case of multiple concurrent representations," the defendant's financial conflict claims did not warrant applying *Sullivan*).

The Third and Fourth Circuits likewise have not taken a firm position. Petitioner claims that these two courts have applied *Sullivan* to conflicts other than concurrent representation. Pet. at 13–15 (citing *Chester v. Comm'r of Pa. Dep't of Corr.*, 598 F. App'x 94, 105–07 (3d Cir. 2015) (per curiam); *United States v. Stitt*, 441 F.3d 297, 304 (4th Cir. 2006)). But in more recent opinions, both courts have acknowledged the question remains open. *McCargo v. Adm'r E. Jersey State Prison*, No. 18-2963, 2019 WL 11770871, at *1 (3d Cir. 2019) ("We note that it is 'an open question' whether a presumption of prejudice standard is applicable to attorney conflicts other than 'multiple concurrent representation.'" (citation omitted)); *United States v. Dehlinger*, 740 F.3d 315, 322 (4th Cir. 2014) (stating that "[t]he Supreme Court has specifically reserved the question," while "not determin[ing] . . . whether [defense counsel's]

[1] In *Beckman*, the Eighth Circuit stated that it would not apply *Noe*, but instead "must follow the earliest opinion," *Ausler v. United States*, 545 F.3d 1101 (8th Cir. 2008), which was decided two years before *Noe*. *Beckman*, 787 F.3d at 490 n.14. But even if the Eighth Circuit has an internal disagreement about how broadly to apply *Sullivan*, that court can await an appropriate case to resolve any intra-circuit conflict en banc.

representation was successive"); *see also* Pet. at 15 (noting that, in *Stitt*, the Fourth Circuit stated that the question was "open").

Additionally, the courts of appeals are moving uniformly in one direction—the direction of adhering to this Court's admonition in *Mickens*.

Petitioner concedes that the Ninth and Eleventh Circuit overruled previously broad applications of *Sullivan*. Pet. at 20–21 (citing *Rowland*, 876 F.3d at 1192; *Cruz*, 188 F. App'x at 913). And, as described above, the Second and Seventh Circuits are beginning to question whether *Sullivan* should apply more broadly. *See Hyman*, 927 F.3d at 670 n.30; *Reynolds*, 902 F.3d at 708–09.

Even federal courts of appeals that have not yet adopted a position post-*Mickens* had applied *Sullivan* broadly pre-*Mickens*. As noted above, the First, Third, Fourth, Tenth, and D.C. Circuits have not decided this question since *Mickens*. *See DeCologero*, 530 F.3d at 77 n.24; *McCargo*, 2019 WL 11770871, at *1; *Dehlinger*, 740 F.3d at 322; *Williamson*, 859 F.3d at 854, 857; *Wright*, 745 F.3d at 1233.

But those courts applied *Sullivan* more broadly before *Mickens*. *See United States v. Michaud*, 925 F.2d 37, 40 (1st Cir. 1991) (being open to applying *Sullivan* when an attorney taught classes to IRS auditors); *Gov't of Virgin Islands v. Zepp*, 748 F.2d 125, 135 (3d Cir. 1984) ("[O]ur decision must not be construed so narrowly as to encompass only those factual situations where counsel simultaneously represents different defendants."); *Stitt*, 441 F.3d at 303 ("According to the Government, all non-multiple representation conflict of interest claims must meet the Strickland prejudice requirement. The Supreme Court has never so held, and we have repeatedly

rejected this approach."); *United States v. Andrews*, 790 F.2d 803, 811 (10th Cir. 1986) (applying *Sullivan* to a conflict "generated by [counsel's] personal desire to devote his time and attention to pre-med studies"); *United States v. Taylor*, 139 F.3d 924, 930 (D.C. Cir. 1998) ("In the context of joint representation, [the *Sullivan*] standard is more easily satisfied," but *Sullivan* can apply "when other conflicts are alleged."). Petitioner acknowledges that some of these courts have begun to question the reach of *Sullivan*. *See* Pet. at 24.

And federal courts of appeals that restricted *Sullivan* before *Mickens* continue to do so since *Mickens*. *See, e.g.*, *Garza*, 429 F.3d at 172 (adhering to *Beets*).

Petitioner does not cite a single court of appeals that has moved in the direction of broadening *Sullivan*'s application.

Although some courts of appeals have not yet had occasion to decide this issue, the state of those courts is not as it was when this Court decided *Mickens*. No federal court of appeals currently "'unblinkingly'" applies *Sullivan* to conflicts that do not involve concurrent representation. *Mickens*, 535 U.S. at 174 (quoting *Beets*, 65 F.3d at 1266). The courts of appeals either apply *Sullivan* narrowly (in line with this Court's admonition in *Mickens*), have yet to decide the issue, or are actively narrowing *Sullivan*'s reach. Because it is less than clear that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter," this Court's review is not warranted. Sup. Ct. R. 10(a). This Court should wait until a clear conflict arises before deciding whether to address this issue.

B. State courts are similarly limiting *Sullivan*.

Since this Court decided *Mickens*, state courts have moved towards limiting *Sullivan* to conflicts involving joint concurrent representation. The state courts, like the federal courts of appeals, are uniformly moving in the direction of embracing this Court's admonition in *Mickens*. This Court need not intervene while this split is resolving.

The California Supreme Court, for example, limited *Sullivan*'s reach and overruled past decisions that had applied *Sullivan* in contexts other than concurrent representation. *Compare People v. Frye*, 959 P.2d 183, 241–42 (Cal. 1998) (applying *Sullivan* to conflict involving defense counsel's suspension from practicing law), *with People v. Doolin*, 198 P.3d 11, 36 n.22, 41 (Cal. 2009) (overruling *Frye* and limiting *Sullivan* to concurrent representation). Courts in

Arkansas,[2] Florida,[3] Kentucky,[4] Nevada,[5] North Carolina,[6] Pennsylvania,[7] and Wisconsin[8] have likewise narrowed *Sullivan*'s application.

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[2] *Compare Echols v. State*, 127 S.W.3d 486, 493–94 (Ark. 2003) (noting that *Sullivan* could apply outside the concurrent representation context), *with Lowery v. State*, 621 S.W.3d 140, 147 (Ark. 2021) (writing that *Mickens* "explain[s] that the rule presuming prejudice has not been extended beyond cases in which an attorney has represented more than one defendant" and requiring a showing of prejudice when defense counsel "had worked for a child-advocacy agency prior to representing Lowery and was outwardly hostile to him"). Petitioner claims that *Echols* shows that Arkansas applies *Sullivan* broadly, Pet. at 18, but *Lowery* postdates *Echols*.

[3] *Compare State v. Larzelere*, 979 So. 2d 195, 208–09 (Fla. 2008) (per curiam) (analyzing a conflict claim involving financial interests under *Sullivan*), *with Chavez v. State*, 12 So.3d 199, 212 (Fla. 2009) (holding that a "any alleged internal debate over strategy" did not merit applying *Sullivan*). Thus, although Petitioner claims that Florida is applying *Sullivan* to "a wide range of claims," Pet. at 18, the Florida Supreme Court appears to be moving in the direction of limiting *Sullivan*'s application.

[4] *Compare Humphrey v. Commonwealth*, 836 S.W.2d 865, 869–70 (Ky. 1992) (appearing open to applying *Sullivan* to successive representation conflict), *with Steward v. Commonwealth*, 397 S.W.3d 881, 884 & n.4 (Ky. 2012) (applying *Strickland* and rejecting *Sullivan* for a case involving successive representation).

[5] *Compare Clark v. State*, 831 P.2d 1374, 1376 (Nev. 1992) (having "no doubt" that a fee arrangement conflict merited applying *Sullivan*), *with Simpson v. State*, No. 64529, 2015 WL 5311109, at *6 (Nev. Sept. 10, 2015) (unpublished disposition) (citing *Mickens*, *Beets*, and *Doolin* and refusing to apply *Sullivan* to a fee arrangement conflict).

[6] *Compare State v. Loye*, 289 S.E.2d 860, 862–63 (N.C. Ct. App. 1982) (holding that defense counsel being under investigation for

[Footnote continued on next page]

Also similar to the federal courts of appeals, many state courts that have not yet decided this question post-*Mickens* previously applied *Sullivan* more broadly, showing that courts are heeding this Court's warning in *Mickens*.

Courts in Connecticut, Michigan, and Washington have not taken a position. *See 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); *People v. Bigger*, No. 313830, 2014 WL 4214904, at *2 (Mich. Ct. App. Aug. 26, 2014); *State v. Dhaliwal*, 79 P.3d 432, 439 n.8 (Wash. 2003).[9] But pre-*Mickens*, courts in all three states applied *Sullivan* to a variety of claims. *See Phillips v. Warden, State Prison*, 595 A.2d 1356, 1368–69 (Conn.

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his participation in the defendant's criminal conduct warranted a presumption of prejudice), *with State v. Barksdale*, 768 S.E.2d 126, 130 (N.C. Ct. App. 2014) (refusing to extend *Sullivan* "beyond cases involving representation of adverse parties").

[7] *Compare Commonwealth v. Padden*, 783 A.2d 299, 309–11 (Pa. Super. Ct. 2001) (applying *Sullivan* to a conflict involving the same law firm representing the defendant and the victim), *with Commonwealth v. Cousar*, 154 A.3d 287, 310–11 (Pa. 2017) (refusing to apply *Sullivan* to successive representation).

[8] *Compare State v. Love*, 594 N.W.2d 806, 808 (Wis. 1999) (applying *Sullivan* to "a defendant[] who [wa]s represented at a sentencing hearing by an attorney previously involved in the prosecution of the same case"), *with State v. McDowell*, 681 N.W.2d 500, 516 (Wis. 2004) (refusing to apply *Sullivan* where defense counsel "switch[ed] from the question and answer format to the narrative format" when the defendant was testifying).

[9] Petitioner contends that the Michigan and Washington intermediate appellate courts apply *Sullivan* broadly. *See* Pet. at 18–19. But, as described below, a more recent decision from the Michigan Courts of Appeals and a decision from the Washington Supreme Court have noted that *Sullivan*'s reach is an open question.

1991) (noting that *Sullivan* "is equally applicable in other cases where a conflict of interest may impair an attorney's ability to represent his client effectively" (internal quotation marks omitted)); *People v. Wagner*, No. 218484, 2001 WL 1134669, at *4 (Mich. Ct. App. Sept. 21, 2001) (asking whether there was an actual conflict when counsel represented the victim a few years earlier); *State v. Regan*, 177 P.3d 783, 786 (Wash. Ct. App. 2008) (citing pre-*Mickens* decisions that applied *Sullivan* broadly).

And while Minnesota and Mississippi courts initially applied *Sullivan* broadly post-*Mickens*, those courts later reversed themselves on their own accord. These corrections show that state courts are open to reexamining their own precedent at any time and could be influenced by decisions from other jurisdictions. *Cf. State v. Discola*, 184 A.3d 1177, 1189 (Vt. 2018) ("We join these states and overrule our past case law insofar as it includes witness certainty as a factor in assessing the reliability of a witness identification made in suggestive circumstances."); *Scott v. Universal Sales, Inc.*, 356 P.3d 1172, 1179 (Utah 2015) ("We overrule the [prior] line of cases [in part] because . . . a strong majority of other states follow the Restatement rule.").

After *Mickens*, courts in both states continued to apply *Sullivan* to different types of claims. *Schroeder v. State*, No. A03-1479, 2004 WL 1445074, at *3 (Minn. Ct. App. June 29, 2004) (applying *Sullivan* to successive representation); *Kiker v. State*, 55 So. 3d 1060, 1067 (Miss. 2011) (holding that there was a conflict for *Sullivan* purposes when counsel "represent[ed] Kiker and a witness against him"). But, in both states, courts now adopt no position. *See Taylor v. State*, No. A17-1892, 2018 WL 6165291, at *3 n.3 (Minn. Ct. App. Nov. 26, 2018); *Crawford v.*

State, 192 So. 3d 905, 917–20 (Miss. 2015); *see also supra* nn. 2 & 3 (highlighting courts in Arkansas and Florida that have restricted *Sullivan*, even when compared to earlier cases decided after *Mickens*).

Consistent with this Court's language in *Mickens*, state courts that narrowly applied *Sullivan* before *Mickens* continue to do so. *See, e.g.*, *Gibson v. State*, 133 N.E.3d 673, 699 (Ind. 2019) (relying, in part, on pre-*Mickens* precedent and stating that "Indiana Courts have long been reluctant to depart from the traditional [*Strickland*] analysis beyond multiple-representation conflicts").

And, as with the federal courts of appeals, Petitioner does not cite a single state court that has broadened *Sullivan*'s reach since *Mickens*.

State courts are not only uniformly moving in the direction of limiting *Sullivan*, but also many state courts are still deciding exactly how to implement this Court's admonition in *Mickens*. Petitioner recognizes that many state high courts have not yet adopted a position on the scope of *Sullivan*. *See* Pet. at 24–25. But he understates how many state high courts have not weighed in. Twenty-two state high courts have not yet addressed whether *Sullivan* applies to conflicts that do not involve joint concurrent representation. This Court should allow state courts to continue to coalesce around a common position before deciding whether to take up this issue.

First, eight state high courts, including Colorado, have recognized the question, but not yet answered it. Along with Colorado, Petitioner correctly notes that Connecticut, Kansas, Mississippi, and Nebraska fall into this category. Pet. at 23–25 (citing *West*, 341 P.3d at 530 n.8; *Skakel*, 159 A.3d at 170 n.37; *Sola-Morales v. State*, 335 P.3d 1162, 1170 (Kan. 2014); *Crawford*,

192 So. 3d at 917–20; *State v. Avina-Murillo*, 917 N.W.2d 865, 876 (Neb. 2018)). Additionally, the Delaware and Vermont Supreme Courts have not yet taken a position. *Purnell v. State*, 254 A.3d 1053, 1112–13 (Del. 2021); *In re Burke*, 212 A.3d 189, 200 n.5 (Vt. 2019). Petitioner also claims that the Washington Court of Appeals has applied *Sullivan* to a broad range of conflicts. Pet. at 18 (citing *Regan*, 177 P.3d at 786–87). But, as noted above, the Washington Supreme Court has said that the question remains open. *Dhaliwal*, 79 P.3d at 439 n.8.

Second, although seven state intermediate appellate courts have taken a position on whether *Sullivan* applies to more than just multiple representation conflicts, the high courts of those states have not discussed the issue. Petitioner correctly notes that the Alabama, Alaska, Louisiana, Missouri, and Tennessee intermediate appellate courts are part of this grouping. Pet. at 17–19 (citing *Brooks v. State*, __ So. 3d __, No. CR-16-1219, 2020 WL 3889028, at *37–38 (Ala. Crim. App. July 10, 2020); *State v. Carlson*, 440 P.3d 364, 384 (Alaska Ct. App. 2019); *State v. Fontenelle*, 227 So. 3d 875, 885–86 (La. Ct. App. 2017); *Lomax v. State*, 163 S.W.3d 561, 564 (Mo. Ct. App. 2005); *Johnson v. State*, No. W2014–00053–CCA–R3–PC, 2014 WL 7401989, at *1, *4–6 (Tenn. Crim. App. Dec. 29, 2014). Additionally, intermediate appellate courts in Arizona and Virginia have applied *Sullivan* broadly, but the high courts in those states have not weighed in. *State v. Ortiz*, No. 1 CA-CR 15-0624, 2016 WL 7103371, at *2–3 (Ariz. Ct. App. Dec. 6, 2016); *Uzzle v. Commonwealth*, No. 0386-19-1, 2020 WL 7702593, at *7 (Va. Ct. App. Dec. 29, 2020).

Third, in four states—Iowa, Michigan, Minnesota, and Oregon—the intermediate appellate

courts have noted that this issue is undecided, but have not taken a position. Petitioner stresses decisions from the Iowa and Minnesota intermediate appellate courts. Pet. at 25 (citing *State v. Williams*, 652 N.W.2d 844, 849 & n.3 (Iowa Ct. App. 2002); *Taylor*, 2018 WL 6165291, at *3 n.3). Similarly, the Oregon Court of Appeals has not yet decided the scope of *Sullivan*. *Clark v. State*, 340 P.3d 757, 761 (Or. Ct. App. 2014). And Petitioner claims that the intermediate appellate court in Michigan has applied *Sullivan* broadly. Pet. at 18–19 (citing *People v. Adams*, No. 266201, 2006 WL 2924602, at *2 (Mich. Ct. App. Oct. 12, 2006)). But, as described above, a more recent decision from that same court has noted that "[i]t remains an open question whether a presumption of prejudice should apply to successive representation claims rather than *Strickland*." *Bigger*, 2014 WL 4214904, at *2.

Fourth, there are three states in which, since this Court announced *Mickens*, no court has cited *Mickens* or *Sullivan* to decide whether a presumption of prejudice applies outside the multiple representation context. Those states are Maine, North Dakota,[10] and South Dakota.

From these categories, twenty-two state high courts have not yet weighed in on whether *Sullivan*

[10] The only case from North Dakota citing *Sullivan* and *Mickens* is *State v. Keener*, 755 N.W.2d 462 (N.D. 2008). There, the North Dakota Supreme Court cited *Mickens* and wrote, "However, unlike other Sixth Amendment ineffective assistance of counsel cases, which apply the *Strickland* standard, in cases where the defendant alleges there was a conflict of interest due to multiple or joint representation, the defendant does not have to show" prejudice. *Id.* at 466–67. But *Keener* involved joint representation, so it is unclear whether the North Dakota Supreme Court would apply *Sullivan* in other contexts.

applies to conflicts that do not involve multiple representation.[11] In the past, this Court has denied certiorari when it is "prudent . . . to await review by other courts before addressing the issue." *Riggs v. California*, 525 U.S. 1114, 119 S. Ct. 890, 892 (1999) (Stevens, J., respecting the denial of the petition for a writ of certiorari). The Court should do the same here and allow further percolation of this issue in state and federal courts.

Additionally, even among state high courts that have applied *Sullivan* broadly, it is unclear whether those courts considered this Court's language in *Mickens*. Eleven jurisdictions fall into this category.

For example, the New Mexico Supreme Court applied *Sullivan* where defense counsel also represented a prosecution witness. *Rael v. Blair*, 153 P.3d 657, 660 (N.M. 2007). But the New Mexico Supreme Court did not cite *Mickens*, so it is unclear whether, or to what extent, the New Mexico high court considered this Court's instruction in *Mickens* or whether the outcome would be different with the benefit of such language. *See also Millette v. State*, 183 A.3d 1124, 1131–32 (R.I. 2018); *State v. Griffin*, 384 P.3d 186, 205–07 (Utah 2016).

In six other jurisdictions—the District of Columbia, Hawaii, Montana, New York, South Carolina, and West Virginia—the high courts have applied *Sullivan* broadly and cited *Mickens*, but have not discussed whether this Court's note of caution in *Mickens* should limit *Sullivan*. *See Lee-Thomas v.*

[11] It is also unlikely that the high courts in Massachusetts and New Jersey will adjudicate this issue because state law provides a more lenient standard to many conflict claims. *See Commonwealth v. Cousin*, 88 N.E.3d 822, 831 n.9 (Mass. 2018); *State v. Cottle*, 946 A.2d 550, 562 (N.J. 2008).

United States, 921 A.2d 773, 775–79 (D.C. 2007); *State v. Harter*, 340 P.3d 440, 459–60 (Haw. 2014); *State v. Glick*, 203 P.3d 796, 800 (Mont. 2009); *People v. Solomon*, 980 N.E.2d 505, 507–08 (N.Y. 2012); *State v. Sterling*,661 S.E.2d 99, 101–02 (S.C. 2008); *Bennett v. Ballard*, No. 16-0535, 2017 WL 3821805, at *7 (W.V. Sept. 1, 2017) (memorandum decision).

And the New Hampshire and Oklahoma high courts applied *Sullivan* broadly before *Mickens*, but have not decided the issue since. *State v. Mountjoy*, 708 A.2d 682, 684 (N.H. 1998); *Livingston v. State*, 907 P.2d 1088, 1091–92 (Okla. Crim. App. 1995).

State courts largely understand this Court's warning in *Mickens*, as shown by those courts' willingness to reverse or question past decisions. And many state courts are still grappling with the question of when to apply *Sullivan*. With so many state high courts having "not yet appeared to address" the issue "head on," this is not the right time or the right case for this Court to determine to which conflicts *Sullivan* should apply. *St. Hubert v. United States*, 140 S. Ct. 1727, 1728 (2020) (Sotomayor, J., respecting the denial of certiorari).

In sum, Petitioner exaggerates the split among the federal courts of appeals and understates how many state high courts have not yet decided this question. And courts across the nation—both federal and state—are uniformly moving in the direction of adhering to this Court's warning "that the language of *Sullivan* itself does not clearly establish, or indeed even support" applying the more lenient ineffective assistance of counsel standard for attorney conflicts outside the joint concurrent representation context. *Mickens*, 535 U.S. at 175. Because any split among lower courts is both not yet sufficiently developed and

disappearing over time, this Court should deny certiorari.

II. This case is a poor vehicle because the outcome is the same whether or not *Sullivan* applies.

Here, though the case did not involve multiple concurrent client representation, the Colorado Court of Appeals first remanded the case for a *Sullivan* inquiry. The courts below concluded that Petitioner's claims failed under either *Strickland* or *Sullivan,* because he could not show that trial counsel actively represented conflicting interests that adversely affected his performance. Under either standard, the result is the same: Petitioner's claims fail. It is thus a poor vehicle for resolving any tension left after *Mickens*.

The postconviction court applied *Sullivan,* conducted an evidentiary hearing, and found no actual conflicts of interest that adversely affected counsel's performance. Pet. App. 21a–27a. The court held that, even applying *Sullivan*, Petitioner was not entitled to relief. Pet. App. 21a–27a.

Though the Colorado Court of Appeals concluded that *Strickland* was the appropriate standard to use to review Petitioner's claims, the finding below that Petitioner lost even under *Sullivan* counsels against review here.

Even assuming that *Sullivan* could apply to the alleged conflicts here, this case does not rise to the level of an actual conflict of interest that adversely affects counsel's performance, and under either *Strickland* or *Sullivan* the result is the same. For the reasons explained by postconviction court and

concurring judge in the Colorado Court of Appeals, counsel did not represent conflicting interests. Pet. App. 21a–27a, 9a–10a. The postconviction court determined that trial counsel testified credibly that any potential conflicts did not impact the decisions that Petitioner challenged in his postconviction petition. Instead, counsel's decisions were based in sound trial strategy and the realities of Petitioner's case. *Id.* at 21a–27a.

Petitioner argued that the only reason counsel chose not to make certain strategic decisions—like joining cases or not requesting a mistrial—was his potential conflicts. The record does not support that contention. Instead, counsel's testimony showed that his decisions were based on the court's rulings and the limitations of the evidence in the case, not on any potential conflicts. So Petitioner's claims failed under any standard. *Cf. Noe*, 601 F.3d at 790 ("We need not decide whether [*Sullivan*] applies here, because Noe's ineffective assistance of counsel claim fails under either [*Sullivan*] or *Strickland*.").

III. This case was correctly decided.

In ineffective assistance of counsel claims, a presumption of prejudice standard applies to limited categories of cases including the complete "deni[al of] counsel at a critical stage" or counsel's "fail[ure] to subject the prosecution's case to meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 658–59 (1984).

Sullivan's presumed prejudice standard applies only to cases in which counsel represents multiple clients concurrently and where "the defendant demonstrates that counsel 'actively

represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Strickland*, 466 U.S. at 692 (quoting *Sullivan*, 446 U.S. at 350).

Whenever a trial court improperly requires counsel to represent codefendants over counsel's timely objection, reviewing courts will apply an "automatic reversal rule. *Mickens*, 535 U.S. at 168 (citing *Holloway v. Arkansas*, 435 U.S. 475, 476–91 (1978)). Joint representation does not per se violate the Sixth Amendment. *Holloway*, 435 U.S. at 482. But because defendants are entitled to representation free of a conflict of interest, courts have a "duty to inquire" into joint representation before trial, subject to the limitations of *Sullivan*. *See Sullivan*, 446 U.S. at 346–48 (reviewing *Holloway*).

Recognizing this balance, the *Sullivan* Court declined to apply the automatic reversal rule when the defendant did not raise the issue before trial. *Id.* at 347. The court distinguished *Holloway*, concluding that a postconviction court should not apply the presumption of prejudice or automatic reversal unless the trial court had a credible indication of an actual conflict before trial. *Id.*

In *Mickens*, this Court noted that *Sullivan* has been "applied 'unblinkingly' to 'all kinds of alleged ethical conflicts.'" 535 U.S. at 174 (quoting *Beets*, 54 F.3d at 1266). "It must be said, however, that the language of *Sullivan* itself does not clearly establish, or indeed even support, such expansive application." *Id.* at 175. Thus, "until a defendant shows that his counsel *actively represented* conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." *Sullivan*, 446 U.S. at

350 (emphasis added); *see also Mickens*, 535 U.S. at 175 (reiterating the same language).

Mickens forecloses Petitioner's arguments. This Court emphasized that its cases do not "establish, or indeed even support" an "expansive application" of applying *Sullivan* to conflicts that do not involve joint concurrent representation. *Id.* at 175. The Court explained that both *Sullivan* and *Holloway* "stressed the high probability of prejudice arising from multiple concurrent representation, and the difficulty of proving that prejudice." *Id.* This Court specifically suggested that *Sullivan* should not be applied "'unblinkingly'" to conflicts involving "counsel's personal or financial interests." *Id.* (quoting *Beets*, 65 F.3d at 1266). Those are exactly the types of conflicts that Petitioner alleges here. This Court's case law does not support "the need for the *Sullivan* prophylaxis" for the potential conflicts presented here, and, indeed, *Mickens* militates against such an application. *Id.* at 176.

If this Court were to apply *Sullivan* "unblinkingly" to all possible conflict scenarios beyond the multiple representation context, "'the nature of appeals in criminal cases would be dramatically altered. The odds are that many an unsuccessful defendant would be found nursing some disagreement with counsel.'" *Williamson*, 859 F.3d at 855–56 (quoting *United States v. Mata-Santana*, 391 F.3d 42, 46 (1st Cir. 2004)). This result is not supported by *Holloway* or *Sullivan*. Nor is it consistent with this Court's admonition "stress[ing] the high probability of prejudice in the multiple concurrent representation context," and that "[n]ot all attorney conflicts present comparable difficulties." *Mickens*, 535 U.S. at 175.

As this Court explained in *Mickens*, "[t]he purpose of [the] *Holloway* and *Sullivan* exceptions from the ordinary requirements of *Strickland* . . . is not to enforce the Canons of Legal Ethics, but to apply needed prophylaxis when *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel." *Id.* at 176. Petitioner's proposed rule violates that clear directive from *Mickens*.

The Colorado Court of Appeals decided this case in accordance with *Sullivan*, *Holloway*, and *Mickens*, and there is no deviation from existing precedent to warrant review.

Sullivan does not apply to situations involving counsel's personal and financial interests, and it does not apply to potential conflicts. *Mickens*, 535 U.S. at 171–72, 174. So, here, where Petitioner's claims turn on purported personal and financial conflicts, *Sullivan* is not the appropriate standard. Under this Court's admonition in *Mickens*, such conflicts do not warrant *Sullivan*'s presumption of prejudice. Petitioner was the sole defendant in his case and did not and does not allege any conflict involving multiple-client representation.

This case was a correct application of existing precent and was an unpublished, nonprecedential decision by an intermediate appellate court. There was no deviation from existing precedent, and a decision here will make no difference to its resolution because no conflicts affected counsel's decisions. Thus, it is a poor vehicle for resolving any lingering tension following *Mickens*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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