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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Even the brief in opposition admits this case involves a staggeringly large split. According to Respondent Colorado, eighteen jurisdictions broadly apply *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980), and thirteen apply it narrowly. Opp. 10-23. Petitioner's count is twenty-one to eleven. Pet. 3. Based on either assessment, this split—which implicates critical and recurring questions of attorney conflicts of interest in the criminal setting—deserves this Court's review.

Colorado nonetheless argues this split "is both not yet sufficiently developed and disappearing over time." Opp. 23-24. Both claims are wrong. Court

after court has staked out dueling positions. Colorado's chief defense is that the minority of courts which changed position since 2002 have narrowed their application of *Sullivan*. That is a red herring. Until *Mickens* v. *Taylor*, 535 U.S. 162 (2002), nearly every court applied *Sullivan* broadly. The only possible change most courts could have made was to limit *Sullivan*. But instead, twenty-one courts—including high courts as far-flung as Texas and Maryland—apply *Sullivan* broadly, even post-*Mickens*. That persistence demonstrates why this entrenched divide will not resolve itself.

This case presents an ideal vehicle to put to rest an "open question" in this Court's "jurisprudence." *Id*. at 176. Colorado does not dispute the question was fully litigated and provides the sole basis for the judgment below. Instead, Colorado suggests it might win on remand. Colorado is wrong again. The best indication of the weakness of Colorado's merits case is that the Colorado Court of Appeals declined to accept Colorado's arguments below—even as an alternative holding. In any event, this is "a court of review, not of first view," *McLane Co.* v. *EEOC*, 137 S. Ct. 1159, 1170 (2017) (internal quotation marks omitted), and Colorado courts must apply *Sullivan* on remand. Based on the incorrect decision below, however, Petitioner never had the chance to be heard before the Colorado Court of Appeals. This Court should give that opportunity to him—and to defendants in nearly a dozen other jurisdictions that incorrectly limit *Sullivan*.

ARGUMENT

I. THE SPLIT AMONG FEDERAL AND STATE COURTS IS DEEP AND PERSISTENT.

Colorado cannot deny that courts across the country disagree sharply over whether *Sullivan* applies to a lawyer's personal conflict of interest. Colorado nevertheless insists the split is shallow, and that courts are "uniformly moving in the direction of" restricting *Sullivan*. Opp. 15. That is incorrect.

1. Start by assuming that everything Colorado says about the case law is true. Colorado identifies eighteen jurisdictions that it claims continue to apply *Sullivan* broadly in some form since *Mickens*.[1] And Colorado highlights thirteen jurisdictions that it says apply *Sullivan* narrowly.[2] Colorado's assessment of lower-court precedent isn't accurate. But even if it were, this case presents a fierce debate over the meaning of our federal Constitution that cries out for this Court's intervention.[3]

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[1] According to Colorado: the Second and Seventh Circuits, Alabama, Alaska, Arizona, the District of Columbia, Hawaii, Louisiana, Missouri, Montana, New Mexico, New York, Rhode Island, South Carolina, Tennessee, Utah, Virginia, and West Virginia. Opp. 13, 20, 22-23.

[2] According to Colorado: the Fifth, Sixth, and Eleventh Circuits, Arkansas, California, Colorado, Florida, Indiana, Kentucky, Nevada, North Carolina, Pennsylvania, and Wisconsin. Opp. 8, 10, 15-16, 19.

[3] In describing the broad side of the split, Colorado includes decisions (for instance) applying *Sullivan* to the *successive* representation of multiple clients. Petitioner conservatively listed only those decisions applying *Sullivan* to personal conflicts—the precise type of conflicts here. Petitioner does not dispute that applying *Sullivan* beyond "multiple *concurrent*

Colorado nonetheless asks the Court to stay its hand. Its arguments do not hold merit.

First, Colorado is wrong about the trendline: Courts are not "uniformly moving in the direction of limiting *Sullivan*." Opp. 19. A peek at precedent shows why. For instance, in thorough decisions, Texas's and Maryland's high courts have declined to follow jurisdictions that limit *Sullivan*. *Acosta* v. *State*, 233 S.W.3d 349, 352-356 (Tex. Crim. App. 2007); *Calvert* v. *State*, No. AP-77,063, 2019 WL 5057268, at *11-12 (Tex. Crim. App. Oct. 9, 2019) (applying *Acosta* to personal conflict); *Taylor* v. *State*, 51 A.3d 655, 669 n.13 (Md. 2012). These decisions are recent and unambiguous, yet Colorado omits them entirely.

Colorado's core claim that jurisdictions are converging on a narrow application of *Sullivan* rests on a sleight of hand. Until 2002, virtually every federal and state court applied *Sullivan* to a range of conflicts. Extremely few courts—chiefly, the Fifth Circuit—had limited *Sullivan*. *See Beets* v. *Scott*, 65 F.3d 1258, 1265-66 (5th Cir. 1995) (en banc). The split deepened as some courts mistakenly read *Mickens* to narrow *Sullivan*. The majority, however, have taken the opposite approach and stayed the course. It is therefore technically true that the minority of courts changing position moved "uniformly in one direction." Opp. 13. But that is because there was only one possible direction those courts *could* have moved. The split persists because a larger majority continue to apply *Sullivan* broadly and reject Colorado's approach.

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representation" of co-defendants is a broad application of *Sullivan*. *Mickens*, 535 U.S. at 175 (emphasis added).

Second, Colorado takes the wrong lesson from the fact that numerous courts have recognized the question *Mickens* expressly left open. *See* Opp. 11-12, 17-21. That acknowledged confusion in this Court's precedent underscores, not undermines, the need for this Court's intervention. Only this Court can provide the definitive interpretation of its own precedent.

Third, Colorado likewise suggests the split is undeveloped because some state high courts have yet to weigh in. Opp. 19-20. That is incorrect. By Colorado's (incomplete) count, the highest courts in *sixteen states* have decided this issue. Opp. 15-16, 22-23. This Court routinely resolves splits involving far fewer courts. *See, e.g.*, *Chaidez* v. *United States*, 568 U.S. 342, 347 n.2 (2013) (noting split involving four circuits and two state high courts); *Maryland* v. *King*, 567 U.S. 1301, 1302 (2012) (acknowledging a "reasonable probability" the Court would review a split among two circuits and two state courts, which it later did). This case is thus a far cry from one in which neither a state "[s]upreme [c]ourt nor any federal tribunal has yet addressed the question." *Riggs* v. *California*, 525 U.S. 1114 (1999) (Stevens, J., respecting the denial of certiorari).

That so many additional "state intermediate appellate courts have [also] taken a position" reinforces why further percolation is unnecessary. Opp. 20. This issue has been fully ventilated in a diverse array of lower courts. It is time for this Court to pick a side.

2. Given the magnitude of the split that even Colorado acknowledges, this Petition merits review. But Colorado's reading of the precedent is also flawed. The split is worse than Colorado lets on.

a. Start with federal circuits. The Second, Third, Fourth, and Seventh Circuits broadly apply *Sullivan* to personal conflicts, while the Fifth, Sixth, Ninth, and Eleventh Circuits limit *Sullivan* to multiple representation. Pet. 3.

Colorado claims "the Second and Seventh Circuits have restricted *Sullivan* in the state habeas context." Opp. 10. But that unique context is subject to the extremely deferential review imposed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Accordingly, both cases Colorado cites asked whether this Court had "clearly established" that *Sullivan* applies to financial conflicts. *Hyman* v. *Brown*, 927 F.3d 639, 670 n.30 (2d Cir. 2019); *Reynolds* v. *Hepp*, 902 F.3d 699, 707 (7th Cir. 2018). Given that *Mickens* acknowledged *Sullivan*'s reach was an open question, the Second Circuit suggested (in dicta) and the Seventh Circuit held that the answer was "no." *See Brown*, 927 F.3d at 670 n.30; *Reynolds*, 902 F.3d at 707. Colorado does not contest that these Circuits apply *Sullivan* broadly outside the AEDPA context. If anything, the fact that these courts may apply different standards for federal and state convictions further confirms the need for "clearer guidance from the Supreme Court." *Reynolds*, 902 F.3d at 707.

Colorado suggests the Third and Fourth Circuits "have not taken a firm position." Opp. 13. Wrong again. In *McCargo* v. *Adm'r E. Jersey State Prison*, No. 18-2963, 2019 WL 11770871, at *1 (3d Cir. 2019), the Third Circuit applied AEDPA deference and determined that a state court had not unreasonably applied this Court's precedent. By contrast, where "AEDPA deference does not apply," the Third Circuit

evaluates personal conflicts under *Sullivan*. *Chester* v. *Comm'r of Pa. Dep't of Corr.*, 598 F. App'x 94, 101 n.6, 105 (3d Cir. 2015) (per curiam).

Meanwhile, in *United States* v. *Dehlinger*, 740 F.3d 315, 321-322 (4th Cir. 2014), the Fourth Circuit noted that *Mickens* had reserved the question of *Sullivan*'s scope and held that a defendant would lose under *Sullivan*. To be sure, *Dehlinger* did not cite Fourth Circuit precedent holding that, after *Mickens*, *Sullivan* definitely applies to personal conflicts. *See, e.g.*, *Rubin* v. *Gee*, 292 F.3d 396, 402 n.2 (4th Cir. 2002) (Wilkinson, C.J.). But *Dehlinger*'s oversight—which did not affect the outcome in that case—does not negate that precedent's authority. And the Fourth Circuit has recently applied *Sullivan* to personal conflicts. *See, e.g.*, *United States* v. *Glover*, 8 F.4th 239, 246-247 (4th Cir. 2021) (confirming that "actual conflict[s]" under *Sullivan* include personal conflicts); *United States* v. *Shusterman*, 712 F. App'x 253, 253-254 (4th Cir. 2018) (per curiam) (applying *Sullivan* to financial conflict).

Lastly, Colorado claims (at 12) the Ninth Circuit has left *Sullivan*'s scope an open question for "direct review cases" and cites *United States* v. *Walter-Eze*, 869 F.3d 891 (9th Cir. 2017). But as the concurring judge in that case noted, *Walter-Eze*'s majority opinion is quite "confusing." *Id*. at 915 (Nguyen, J., concurring in the judgment). At bottom, *Walter-Eze* held that *Sullivan*'s presumption of prejudice does not apply where a "conflict is relegated to a single moment of the representation and resulted in a single identifiable decision that adversely affected the defendant." *Id*. at 906. Meanwhile, other Ninth Circuit cases interpret *Mickens* as "specifically and

explicitly conclud[ing] that *Sullivan* was limited to joint representation." *Earp* v. *Ornoski*, 431 F.3d 1158, 1184 (9th Cir. 2005). The Ninth Circuit has recently reaffirmed its view that *Mickens* "explicitly limited" *Sullivan* to multiple representation conflicts. *Rowland* v. *Chappell*, 876 F.3d 1174, 1192 (9th Cir. 2017).

b. Colorado's attempt to minimize the state-court split is equally misguided. Most obviously, Texas, Maryland, Georgia, and Illinois have squarely applied *Sullivan* to personal conflicts since *Mickens*. Pet. 15-18 (collecting cases). Colorado just ignores them.

Colorado asserts (at 22-23) that another *nine* state high courts "have applied *Sullivan* broadly," but claims these decisions are irrelevant because they "did not cite *Mickens*" or "cited *Mickens*, but have not discussed whether this Court's note of caution in *Mickens* should limit *Sullivan*." It is folly to assume, as Colorado would, that these nine high courts were unaware of what *Mickens* said. The reality is that these courts did not deem *Mickens* conclusive because it left *Sullivan*'s scope "an open question." *Mickens*, 535 U.S. at 176.

Finally, Colorado claims (at 16-17) that Arkansas and Florida have limited *Sullivan*'s reach, while courts in Michigan and Washington have declined to adopt a firm position. That, too, is inaccurate.

In *Lowery* v. *State*, 621 S.W.3d 140 (Ark. 2021), the Arkansas Supreme Court briefly stated—in a pro se appeal—that "[a]n actual conflict of interest occurs when counsel represents the conflicting interests of third parties." *Id.* at 147. The Arkansas Supreme Court did not engage in a thorough discussion of *Sullivan*. Nor did it purport to overrule its precedent

applying *Sullivan* to personal conflicts. *See, e.g.*, *Echols* v. *State*, 127 S.W.3d 486, 494-495 (Ark. 2003). As a result, it is unclear what effect, if any, *Lowery* has on prior Arkansas cases interpreting *Sullivan*'s reach.

The Florida Supreme Court, for its part, has not limited *Sullivan*. Colorado points to *Chavez* v. *State*, 12 So. 3d 199 (Fla. 2009) (per curiam). Yet that case merely held that a defense team's "alleged internal debate over strategy" did not amount to an actual conflict of interest. *Id.* at 212-213. And the Florida Supreme Court has continued to apply *Sullivan* to personal conflicts since *Chavez*. *See State* v. *Dougan*, 202 So. 3d 363, 384-387 (Fla. 2016) (per curiam) (applying *Sullivan* where lawyer engaged in extra-marital affair with client's sister).

Colorado's arguments concerning Michigan and Washington fare little better. Colorado claims that neither state has decided the issue, since both jurisdictions have acknowledged the "open" question of *Sullivan*'s application to a lawyer's successive representation of multiple clients. Opp. 20-21. But in both Michigan and Washington, courts continue to apply *Sullivan* to conflicts involving a lawyer's self-interest, like the ones at issue here. *See, e.g.*, *People* v. *Alexander*, No. 350816, 2021 WL 3573795, at *5-6 (Mich. Ct. App. Aug. 12, 2021) (per curiam); *State* v. *Fualaau*, 228 P.3d 771, 779-780 (Wash. Ct. App. 2010).

The upshot is this: State courts are not converging. They are deeply divided and will remain so unless this Court intervenes. Until the Court does, criminal defendants will live under different rules from one

jurisdiction to the next, even though the conflict of interest questions are the same.

II. THE DECISION BELOW IS WRONG.

The court below held that *Sullivan* should not extend to personal conflicts of interest. That is wrong, and Colorado fails to offer any meaningful justification for limiting *Sullivan*.

First, Colorado claims (at 27) that "*Mickens* forecloses" any argument that *Sullivan* should apply to personal conflicts. Not so. *Mickens* "was presented and argued on the assumption that * * * *Sullivan* would be applicable," and the Court left *Sullivan*'s scope "an open question." *Mickens*, 535 U.S. at 174, 176. This Court should reject Colorado's efforts to elevate *Mickens*' dicta into a drive-by holding. Colorado also completely ignores that this Court applied *Sullivan* to a personal conflict in *Wood* v. *Georgia*, 450 U.S. 261, 266 n.8, 268-269 (1981); *see* Pet. 33.

Second, Colorado incorrectly downplays the "high probability of prejudice" that results from a lawyer's personal conflicts of interest. Opp. 27 (quoting *Mickens*, 535 U.S. at 175). The "relationship between the lawyer and the client is one of total client dependence." Legal Ethics Scholars and Law Professors ("Legal Academics") Br. 5. Once a lawyer's personal interest adversely affects that representation, a court cannot calculate every "erosion of zeal" from a "cold record." *Id*. at 10 (internal quotation marks omitted). Nor will that lawyer likely "be completely forthcoming about how strongly he fe[lt] about a personal conflict of interest." Due Process Institute et al. Br. 7. This is precisely the

circumstance in which *Sullivan*'s presumption of prejudice is necessary.

Third, Colorado dismisses (at 28) the importance of legal codes of ethics in evaluating the risks of prejudice. As *amici* explain, "prevailing norms of practice and professional responsibility" support applying *Sullivan* to personal conflicts, and under this Court's Sixth Amendment jurisprudence, that fact carries "significant if not dispositive weight." Legal Academics Br. 8-9.

Fourth, Colorado suggests (at 27) that applying *Sullivan* to personal conflicts might open the floodgates. But *Sullivan* has proved perfectly workable in the many jurisdictions that apply it broadly. Meanwhile, applying *Sullivan* to personal conflicts will inspire public confidence in the legal system and incentivize "judges and prosecutors to accommodate a defense attorney" who needs to withdraw—as should have happened in this case when Petitioner's counsel sought to have Colorado's public defenders replace him. Legal Academics Br. 12.

III. THIS CASE IS AN IDEAL VEHICLE.

This Petition presents an ideal vehicle. Colorado does not contest that the issue of *Sullivan*'s scope was fully litigated and provides the sole basis for the judgment below. *See* Pet. 35.

Colorado instead claims that—if this Court decides that *Sullivan* applies—the State might later prevail on the merits. Opp. 24. That would not preclude the Court from deciding the recurring question of law in this case. And it is not true: The State's merits case is weak, which is likely why the Colorado Court of

Appeals declined to rule on the merits and instead held that *Sullivan* did not apply. Only a Colorado trial court has addressed Petitioner's *Sullivan* claim. It erred as a matter of law by taking conflicted counsel at his word, contrary to established Colorado law, and applying *Strickland* v. *Washington*, 466 U.S. 668 (1984), in all but name. *See* Pet. 30 n.4; *People* v. *Villanueva*, 374 P.3d 535, 548 (Colo. App. 2016) ("In this inquiry, it is unnecessary—and even inappropriate—to accept and consider evidence of any benign motives for the lawyer's tactics, including the lawyer's testimony about his subjective state of mind." (internal quotation marks omitted)). Colorado offers no defense of the trial court's legally flawed analysis.

Consider one flaw (there are more): Counsel sought to withdraw because he did not feel comfortable representing someone in Petitioner's position: "[I]f 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." Pet. App. 119a. And at trial, counsel failed to cross-examine Petitioner's accuser about her letter expressing remorse for her accusation.

Yet the trial court and the State parrot counsel's post-hoc rationalization that the letter might have been best interpreted not as "a recantation of the allegations, but instead demonstrated 'victim's guilt.' " Opp. 8 (quoting Pet. App. 138a); *see* Pet. App. 26a; *see also id*. at 72a (describing letter's contents). The State had every right to advocate that interpretation to the jury. But it is defense counsel's job to zealously present the evidence in the light most favorable to his client. Here, counsel "did not hire an investigator to" talk to the accuser about the letter, nor did he use the letter to elicit potentially

exculpatory testimony when the accuser took the stand. Pet. App. 153a. In light of that lackluster investigation and counsel's efforts to withdraw because of his "serious personal issues," *id.* at 65a, counsel's claim that his emotions played no part in his decision rings hollow. Petitioner deserves to have his *Sullivan* claim fully heard by Colorado's courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

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