No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____

ARIEL BENNETT,

Petitioner,

v.

STATE OF WEST VIRGINIA,

Respondent.

_____

On Petition for Writ of Certiorari to the
Supreme Court of Appeals of West Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Mickens v. *Taylor*, 535 U.S. 162 (2002) left unanswered what prejudice standard governs when a criminal defense lawyer has a successive conflict—one where the current client's interests conflict with those of a former client. North Carolina and Nebraska presume prejudice where an actual successive conflict adversely affected the lawyer's performance, per *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980). Kentucky, Idaho, and now West Virginia only reverse if an actual conflict that adversely affected performance also affected the trial's outcome, per *Strickland* v. *Washington*, 466 U.S. 668 (1984). The federal courts also split in 28 U.S.C. § 2254 cases.

The question presented is:

Where a defendant's lawyer owed conflicting duties to her and a former client, should she receive a new trial if the actual conflict adversely affected the lawyer's performance, or must the defendant prove it reasonably likely that unconflicted counsel would have obtained a better outcome at trial?

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Ariel Bennett respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Appeals of West Virginia.

OPINION BELOW

The opinion of the Supreme Court of Appeals of West Virginia (App. 1a–47a) is reported at 881 S.E.2d 406.

JURISDICTION

The Supreme Court of Appeals of West Virginia entered judgment on November 17, 2022. Petitioner invokes the Court's jurisdiction per 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and *to have the Assistance of Counsel for his defense.*

U.S. Const. Amend. VI (*emphasis added*). This is made applicable to the states by the Fourteenth Amendment, which provides in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, § 1 (*emphasis added*).

STATEMENT

For two decades after this Court outlined defense counsel's constitutional obligations in *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980), and *Strickland* v. *Washington*, 466 U.S. 668 (1984), lower courts understood that although most ineffective assistance claims required a reasonable likelihood of a different outcome, conflict cases were different. See *Beets* v. *Scott*, 65 F.3d 1258, 1265–66 (5th Cir. 1995). Most courts would reverse if an actual conflict of interest adversely affected counsel's performance, per *Sullivan*. See *ibid.*

Until *Mickens* v. *Taylor*, 535 U.S. 162 (2002). There, the Court noted that it had presumed prejudice only in concurrent cases, where a lawyer simultaneously represented clients with divergent interests. See *Mickens*, 535 U.S. at 175. As to *successive* conflicts, where a lawyer owes conflicting duties to a current and a past client, the applicable standard remained "an open question." *Id.* at 176.

Courts now split, and West Virginia joined those that require actual prejudice to affirm below. See App. 25a–26a. Petitioner's case is a good vehicle to resolve the split because it involves an actual successive conflict and its outcome hinges on the proper standard. Compare *id.* 27a–28a with *id.* 32a–33a. As concurrent and successive conflicts create the same problem—simultaneous representation of divergent *interests*, if not clients—Petitioner asks the Court to adopt *Sullivan*.

a. Petitioner's lawyer had a conflict of interest that met the *Cuyler* v. *Sullivan* test, but not the prejudice standard from *Strickland* v. *Washington*.

1. *Factual background.* Petitioner lived with her husband and three children in the duplex above her in-laws. App. 10a. Her youngest child was an infant, *id.* at 5a, and it was the family's practice to co-sleep rather than use a crib. *Ibid*; *id.* at 12a.

Petitioner's twelve-year-old niece lived with the in-laws on the floor below. See *id.* at 8a; *id.* at 10a. On November 7, 2015, the niece went upstairs and discovered Petitioner unconscious atop the infant. *Ibid.* Unable to rouse Petitioner, she alerted her guardian and the authorities. *Ibid.* By the time emergency responders arrived, the child had died by asphyxiation. *Id.* at 10a–12a. Petitioner was severely alcohol-impaired, in critical condition, and required hospitalization. See *ibid.*

2. *Trial proceedings.* The State charged Petitioner on one count of child neglect resulting in death and two counts of child neglect resulting in a substantial risk of injury to her other children. App. 5a. The basic facts were difficult to dispute, see App. 12a–13a, but the jury would have to decide causation and whether the death resulted from criminal negligence or a tragic accident. See *id.* at 5a; see also W. Va. Code § 61-8D-1(7).

West Virginia appointed the Raleigh County Public Defender Corporation (PDC) to represent Petitioner. App. 6a. The PDC ran a conflict check, and none of the State's disclosed witnesses flagged any concerns. See Appendix Record (A.R.) 158.[1] However, it took four years for the State to try Petitioner. Compare App. 5a with *id.* at 8a. In that time, two things happened: Petitioner's niece became criminal justice involved, and two weeks before trial, the State included her on a witness list for the first time. See *id.* 6a; A.R. 1366. Though police reports had mentioned the niece, this was the first filing consistent with state discovery rules for witness disclosures. See *ibid.*; App. 7a; see also W. Va. R. Crim. P. 16. The PDC

[1] The Appendix Record is on file with the Supreme Court of Appeals of West Virginia.

ran another conflict check on the new list, and it flagged the niece. App. 7a. The PDC had represented her in juvenile court. App. 6a.

Within days after receiving the witness list, the PDC filed a motion to withdraw. *Id.* 6a–7a. When Petitioner's lawyer learned that her firm had represented the niece, she reviewed that lawyer's files. *Id.* at 7a. She learned information the State had not disclosed with which she could impeach the witness and her adult guardian. *Ibid.*; see also *id.* at 5a–6a. The information would "[a]bsolutely" be useful for cross-examination. A.R. 143–44. As an advocate for Petitioner, she was obligated to use it at trial. App. 7a. But due to her duty to the PDC's former client, she was obligated not to use it at trial. See A.R. 143.

The PDC lawyer could not detail the impeachment information without violating her duty to the former client. See App. 7a; cf. *Holloway* v. *Arkansas*, 435 U.S. 475, 485–86 (1978). But prior to filing the motion, she had contacted the West Virginia Office of Disciplinary Counsel, *ibid*; see A.R. 141, with whom she could be more candid. It advised that she had an unwaivable conflict. *Ibid.* The PDC lawyer could not represent Petitioner after learning undisclosed impeachment material from her firm's prior representation. *Ibid.*

The State objected that the late-filed motion to withdraw was a delay tactic. App. 7a–8a; A.R. 156. It further argued that there was no longer a conflict because the niece's juvenile case had concluded. App. 7a; A.R. 145–46. The trial court ordered the PDC lawyer to stay on the case. App. 8a.

The State then moved to limit the lawyer's confrontation of her firm's former client. *Ibid.* The PDC lawyer acquiesced. *Ibid.* The State argued Petitioner's lawyer could not use the information she gleaned from the PDC file to impeach the niece without weighing the witness's interest in confidentiality against Petitioner's

interest in a fair trial. App. 8a; A.R. 168.[2] The PDC lawyer agreed to this procedure, despite earlier asserting a right to helpful information within the State's juvenile records. App. 5a–6a, 8a–9a.

At trial, the State repeated its demand that Petitioner's lawyer first cross-examine the niece in camera to see if her firm's former client would open the door to impeachment. *Id.* at 9a; A.R. 474. The State said that the PDC lawyer should ask only one question and dictated the substance of that question. App. 9a. The PDC lawyer again acquiesced. *Ibid.* After asking the State witness the prosecutor's proposed question in camera, the PDC lawyer said she was satisfied. *Ibid.* She agreed that the former client had not opened the door and that her interest in confidentiality outweighed other concerns. *Ibid.*; see also A.R. 481. In the jury's view, Petitioner's lawyer did not question the niece's credibility. App. 9a. She did not cross-examine her firm's former client at all. *Ibid.*

b. West Virginia's state court of last resort abandoned its prior reliance on *Sullivan* to join those jurisdictions that require *Strickland* prejudice.

3. *Post-conviction proceedings.* The jury convicted Petitioner and she appealed to the Supreme Court of Appeals of West Virginia. See App. 4a. In prior cases, it had adopted the *Sullivan* test for conflicts, including successive ones. *Id.* at 22a–23a. In reliance, both parties briefed the case presuming that standard applied. *Id.* at 21a. However, the court declined to address the case as briefed. *Ibid.*

A divided court construed the dicta in *Mickens* as a "warning" to lower courts. *Id.* at 25a. It found that successive conflicts may not always produce the same immeasurable harm. *Ibid.* In concurrent conflicts, "the 'evil is in what the attorney finds himself compelled to refrain from doing[.]'" *Id.* at 25a–26a (quoting *Whiting*

[2] But see *Davis* v. *Alaska*, 415 U.S. 308, 320 (1974) ("The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness.").

v. *Burt*, 395 F.3d 602, 617 (6th Cir. 2005)). The majority did not examine whether the PDC's duty to its past client compelled Petitioner's lawyer to refrain from doing anything. It ruled that although *Sullivan* may apply in other contexts, *Strickland* governs all successive conflict cases. App. 3a; *id.* at 26; *id.* at 31a.

Two of the court's five justices dissented. *Id.* at 32a. Given the magnitude and impact of the PDC lawyer's conflict, they were uncertain whether the majority was even correct that Petitioner failed to meet *Strickland*'s prejudice standard. *Ibid.* But in any event, they saw no reason to depart from the court's prior law applying *Sullivan*. App. 32a–34a. In the dissent's view, a zealous advocate, "'whose allegiance to his client is not diluted by conflicting interests[,]'" App. 35a (quoting *People* v. *Rhodes*, 165 N.E.3d 556, 560 (Ill. App. Ct. 2020)), is essential to due process, reliable truth-finding, and the criminal justice system's legitimacy. *Id.* at 34a–35a. The dissenting justices would have reversed because "it is beyond dispute that the petitioner's counsel had an actual conflict of interest[.]" *Id.* at 35a.

REASONS FOR GRANTING THE PETITION

In *Mickens* v. *Taylor*, the Court declined to rule which prejudice standard governs successive conflicts. See App. 25a. Lower courts have split on whether this Court's rule from *Sullivan* or *Strickland* should fill that gap. Petitioner asks the Court to grant certiorari because I) only this Court can end the entrenched split, II) successive conflicts are a common problem in criminal cases that warrant a consistent rule, and III) Petitioner's case is a good vehicle for the Court to intervene.

The Sixth Amendment to the United States Constitution gives criminal defendants the right to a lawyer's assistance. U.S. Const. Amend. VI. The government must provide assistance if the defendant cannot afford a lawyer. *Gideon* v. *Wainwright*, 372 U.S. 335, 344–45 (1963). This right implies an entitlement to adequate assistance from conflict-free counsel. *Strickland*, 466 U.S. at 686.

However, the right exists due to the impact counsel has on the fairness and reliability of trials, not for its own sake. *Ibid.* Therefore, absent certain exceptions, a defendant who challenges his or her lawyer's performance must show actual prejudice: "[A] reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

The Court has carved out an exception for concurrent conflicts. See *Mickens*, 535 U.S. at 175–76. Where a lawyer must actively represent the divergent interests of two clients, and the conflict adversely affects his or her performance, the disadvantaged client need not prove actual prejudice. *Id.* at 175; See also *Sullivan*, 446 U.S., at 350. When a defendant meets those criteria—an actual conflict and an adverse effect—the likelihood of prejudice is high, yet difficult to prove, justifying the presumption. *Mickens*, 535 U.S. at 175–76.

Mickens declined to rule whether this presumption extends to conflicts other than concurrently represented clients. *Ibid.* Since then, some lower courts, like West Virginia, have distinguished successive conflicts from concurrent ones and require defendants to prove *Strickland* prejudice in addition to an adverse effect. See*, e.g.*, App. 25a. However, these courts tend to overlook an uncrossable logical chasm.

Whether to presume prejudice depends upon the high likelihood of prejudice paired with the difficulty of proving it. See *Mickens*, 535 U.S. at 175. But to distinguish successive conflicts from concurrent ones, courts eschewing *Sullivan* can only point to the relative difficulty of proving an actual conflict—*i.e.*, one that adversely affects counsel. See*, e.g.*, *State* v. *Alvarado*, 481 P.3d 737, 748–49 (Idaho 2021). They cannot explain why an actual conflict—if it exists—is less likely to be prejudicial simply due to the order of representation. *E.g.*, *ibid.*

These courts are not entirely wrong. Compared to concurrent conflicts, present and former clients are less likely to have divergent interests. *E.g.*, *U.S.* v.

Blount, 291 F.3d 201, 212 (2d Cir. 2002). Even if the interests do diverge, counsel may risk ethical issues with the former client and side with the current one. See *Hall* v. *U.S.*, 371 F.3d 969, 975–76 (7th Cir. 2004) (remanding for hearing to determine if actual conflict had an adverse effect). But if a successive conflict does meet both criteria—it is actual and had an adverse effect—it is no different from a concurrent one. The defendant's counsel "actively represented conflicting *interests*[.]" *Sullivan*, 446 U.S. at 349–50 (*emphasis added*). Actual prejudice is just as likely, and just as difficult to prove. See *Tueros* v. *Greiner*, 343 F.3d 587, 594 (2d Cir. 2003).

West Virginia therefore joined the wrong side of the split. See *ibid.* Her lawyer simultaneously represented the former client's interests alongside her own. App. 35a. When their interests conflicted, she protected the former client by restraining her advocacy for Petitioner. See *Ibid.*

I. In the years after *Mickens* left open the standard for successive conflicts, a clear jurisdictional split has emerged that only the Court can resolve.

Lower courts are unsure whether this Court's standard from *Sullivan* or this Court's standard from *Strickland* should fill the gap created by *Mickens*. Only this Court can resolve the split by adopting one or the other.

1. West Virginia, Kentucky, and Idaho require actual prejudice under *Strickland*, but North Carolina, Nebraska, Colorado, and Kansas apply *Sullivan*.

Successive conflicts as troubling as this one should not require appellate intervention. See *State* v. *Stovall*, 312 P.3d 1271, 1274 (Kan. 2013) (quoting lower court's description of an "obvious" conflict where counsel previously represented a state witness). Even still, seven states have explicitly considered which standard governs successive conflicts after *Mickens*. Some have entrenched a split by taking a side in the debate. Others took a wait and see approach. All of them would benefit from this Court's intervention.

West Virginia followed Kentucky, App. 23a, which held in a footnote that *Strickland* governs successive conflicts. See *Steward* v. *Com.*, 397 S.W.3d 881, 883, n. 4 (Ky. 2012). Kentucky found that *Mickens* called into question *Sullivan*'s scope because successive conflicts may not be as prejudicial, but conducted no other analysis. See *Steward*, 397 S.W.3d at 883, n. 4. Rather, it noted that the Sixth Circuit applied *Strickland* to successive conflicts in 28 U.S.C. § 2254 habeas cases. See *ibid.* "[U]nder the guidance of the Sixth Circuit," Kentucky held that successive conflicts require a showing of actual prejudice. *Ibid.*

Idaho has also held that "claims of conflict of interest relating to successive representation require a showing of actual prejudice." *Alvarado*, 481 P.3d at 748–49. It reasoned that successive conflicts are less likely to be actual or adversely affect performance. See *id.* at 748. The court did not explain why a defendant, whose lawyer must simultaneously represent divergent interests, is less prejudiced simply because one of those interests is a duty owed to a former client. See *ibid.*

Other states have preferred to apply *Sullivan* until this Court weighs in. North Carolina declined to extend *Sullivan* to lawyers' personal conflicts, like financial or romantic entanglements. See *State* v. *Phillips*, 711 S.E.2d 122, 137 (NC 2011). In so holding, the court acknowledged that it resolves successive conflicts under *Sullivan* post-*Mickens*. See *ibid.* Simultaneous representation of two clients creates a high risk of hard-to-measure prejudice. See *ibid*. But that distinguishes conflicts between clients with lawyers' personal conflicts. See *ibid*. Whether an actual conflict results from concurrent or successive representation, if the lawyer resolves it adversely to the present client, the prejudice is the same. See *ibid.*

Nebraska took a more nuanced approach. See *State* v. *Avina-Murillo*, 917 N.W.2d 865, 878 (Neb. 2018). It eschews bright-line tests for either successive or personal conflicts. *Avina-Murillo*, 917 N.W.2d at 878. But in general, it presumes prejudice in successive cases if the conflict is actual—that is, if the lawyer did have

divided loyalties and sided with the former client. See *id.* at 876. It found that concurrent representation is more likely to place the clients' interests at odds than successive representation. *Id.* at 875. If the present and former client do not have interests that actually conflict, there is no need to presume prejudice. See *id.* at 876. But if their interests do conflict and counsel disadvantages the current client, then the successive conflict is no different from a concurrent one. See *id.* at 876–77.

Finally, two states have not expressly adopted a standard, but continue to apply *Sullivan* to err on the side of caution. Colorado's high court has left the question open, but presumes *Sullivan* applies to successive cases until persuaded otherwise. *West* v. *People*, 341 P.3d 520, 530 (Colo. 2015). Kansas, too, continues to apply *Sullivan* because the State has not argued against the standard despite multiple opportunities since *Mickens*. See *Stovall*, 312 P.3d at 1281; see also *State* v. *Galaviz*, 291 P.3d 62, 77 (Kan. 2012).

2. Circuits split on whether *Sullivan* or *Mickens* is the controlling federal law in 28 U.S.C. § 2254 cases, but none apply *Strickland* to federal defendants.

The Supreme Court of Appeals of West Virginia also relied on federal court cases, App. 24a, but the circuit courts have only applied *Strickland* to successive conflicts in 28 U.S.C. § 2254 habeas cases. See *Lordi* v. *Ishee*, 384 F.3d 189, 193 (6th Cir. 2004); *Noguera* v. *Davis*, 5 F.4th 1020, 1035–36 (9th Cir. 2021); *Schwab* v. *Crosby*, 451 F.3d 1308, 1328 (11th Cir. 2006). Those courts are simply acknowledging that per *Mickens*, there is no "clearly established Federal law" that *Sullivan* applies outside of concurrent conflicts. *Ibid.*; see also 28 U.S.C. § 2254(d)(1). This is no indication of what they would hold in criminal cases brought in federal court. See *Stewart* v. *Wolfenbarger*, 468 F.3d 338, 351 (6th Cir. 2006). Nor is the view universal. The Court can use Petitioner's case to resolve a circuit split as to the controlling law when federal courts review state convictions.

Though most circuits that have addressed the issue ruled that *Strickland* applies to successive conflicts in § 2254 cases, the Second Circuit reads *Mickens* differently. In *Tueros* v. *Greiner*, a defense lawyer mistakenly believed she had a conflict with a witness she never represented. *Tueros*, 343 F.3d at 588. The court applied *Strickland* because there was no real conflict to analyze under *Sullivan*. *Id.* at 592. But the court explained it did so only on those peculiar facts: the language in *Mickens* did not bind it. *Id.* at 593. The "postscript" to *Mickens* was dicta, and thus itself not clearly established federal law. *Ibid.* If *Sullivan*, "by its own terms[,]" applied to cases other than concurrent representation, then it controls. *Ibid.* Dicta in a later case cannot "un-establish" what the Court had already held. *Id.* at 593–94. And by its own terms, *Sullivan* would apply to a lawyer representing multiple *interests* simultaneously, even if not the clients themselves. See *id.* at 594; see also *Rubin* v. *Gee*, 292 F.3d 396, 402, n. 2 (4th Cir. 2002) (state court correctly identified *Sullivan* as the controlling federal law because "the Court has never indicated that *Sullivan* would not apply to a conflict as severe as the one presented here.").

The Eleventh Circuit disagreed. "A lot." *Schwab* v. *Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006). The court directly engaged the Second Circuit's decision in *Tueros* and rejected its reasoning. See *Schwab*, 451 F.3d at 1325–27. It considered *Mickens* an authoritative statement by the Court on the scope of its past cases. See *ibid*. The Sixth and Ninth circuits also apply *Strickland* to state prisoners. See *Lordi*, 384 F.3d at 193; *Noguera*, 5 F.4th at 1035–36.

Though split on the standard in 28 U.S.C. § 2254 cases, the circuits tend to follow their pre-*Mickens* case law for federal prosecutions. Petitioner has not found any case where a circuit court has applied *Strickland* to a federal defendant who has shown an actual successive conflict that adversely affected counsel's performance. The circuits who have addressed *Mickens* (minus the Second) all believe

Sullivan is the proper standard under the Sixth Amendment but feel compelled to apply *Strickland* to state prisoners. Only this Court can resolve that tension.

The Fifth Circuit, whose criticism of *Sullivan*'s overuse this Court quoted in *Mickens*, see *Mickens*, 535 U.S. at 174, continues to apply *Sullivan* to successive conflicts because they present the same dangers inherent to concurrent conflicts. In *U.S.* v. *Infante*, it found an actual conflict where a lawyer could have advanced his current client's interests by discrediting two former ones testifying for the government. *U.S.* v. *Infante*, 404 F.3d 376, 392–93 (5th Cir. 2005). The Court noted *Mickens* but continued to apply its former case law. See *id.* at 391, n. 12. At least where counsel could have impeached a former client with information learned from that representation, *Sullivan* applies. See *ibid.*

In *U.S.* v. *Blount*, the Second Circuit applied *Sullivan* to a defendant's claim that his lawyer had a conflict due to his firm's prior representation of a hostile witness. See *U.S.* v. *Blount*, 291 F.3d 201, 211–12 (2d Cir. 2002). Like the Fifth Circuit, it applied the *Sullivan* standard. See *Blount*, 291 F.3d at 212. But unlike *Infante*, in *Blount* the lawyer was only vaguely aware of his firm's former client. *Ibid.* Without confidential information for impeachment, the potential conflict could not have adversely affected performance. *Ibid.*

In *Hall* v. *U.S.*, the Seventh Circuit said that it too would continue to apply *Sullivan* despite *Mickens*. See *Hall*, 371 F.3d at 974. "[A]n attorney's prior representation of another client leads to an actual conflict when the attorney faces the possibility of having to cross-examine his former client." *Ibid.* "A corollary danger is that the lawyer will fail to cross-examine the former client rigorously for fear of revealing or misusing privileged information." *Ibid.* It may be harder to show an actual conflict and adverse effect in successive cases than concurrent ones, but if a defendant meets that showing there is no basis for requiring actual prejudice. See *id.* at 975.

Finally, several circuits have avoided the issue in anticipation of this Court settling the matter. In *U.S.* v. *Ponzo*, the First Circuit acknowledged *Mickens'* dicta but declined to adopt a standard. *U.S.* v. *Ponzo*, 853 F.3d 558, 575 (1st Cir. 2017). The court affirmed because under either *Strickland* or *Sullivan*, the defendant's claim failed. *Ponzo*, 835 F.3d at 576. The Eighth, Fourth, and DC Circuits have ruled likewise. See *Morelos* v. *U.S.*, 709 F.3d 1246, 1252 (8th Cir. 2013) (citing *Covey* v. *U.S.*, 377 F.3d 903, 907 (8th Cir. 2004)); *U.S.* v. *Dehlinger*, 740 F.3d 315, 322 (4th Cir. 2014); *U.S.* v. *Wright*, 745 F.3d 1231, 1233 (D.C. Cir. 2014). The Sixth Circuit in *Moss* v. *U.S.* also distinguished the conflict to avoid ruling on *Mickens*. See *Moss* v. *U.S.*, 323 F.3d 445, 462 (6th Cir. 2003). It went on to predict that "a Supreme Court decision lingers on the horizon" to resolve this issue. *Ibid.* Petitioner suggests that this time has come.

The Sixth Amendment Counsel Clause applies equally to state and federal defendants. See *Gideon*, 372 U.S. at 344–45. The defendants' right to counsel is the same. Their respective sovereigns' duty to provide assistance is the same. There is no compelling reason those lawyers' obligations to their clients should be different. But states are torn between this Court's decisions in *Strickland* and *Sullivan*. Federal courts believe the Sixth Amendment requires one thing, but that *Mickens* requires them to do another for state prisoners. Only this Court can end the stalemate.

II. The Court should resolve the split because conflicts of interest are an important and recurring problem in the criminal justice system.

The criminal justice system relies upon a finite pool of lawyers to accept appointments, making successive conflicts a common problem without a unified standard. Petitioner asks the Court to resolve the split so that the Sixth Amendment's guarantee of counsel means the same thing in West Virginia as North Carolina, and for state prisoners as well as federal.

Criminal defendants have a paramount interest in conflict-free lawyers. The presence of counsel is so "essential to a fair trial" that case-by-case analysis of counsel's necessity is unjustified. *Gideon*, 372 U.S. at 340. The right is among the most fundamental since it is the mechanism that ensures most other rights to the accused. See *Johnson* v. *Zerbst*, 304 U.S. 458, 462–63 (1938). But that presumes the lawyer has a free hand to pursue their immediate client's interests. See *Holloway*, 435 U.S. at 489–90. Assigning a lawyer who "actively represent[s] conflicting interests" is little different from denying one entirely. See *Mickens*, 535 U.S. at 166–67 (citing *U.S.* v. *Cronic*, 466 U.S. 648, 659 (1984)).

The government, too, has an interest in a zealous defense bar taking appointments to meet its constitutional obligation. See*, e.g.*, Joanna Landau, *Gideon at 56 in Utah: Utah's Public Defenders and the Indigent Defense Commission*, Utah B.J., 32-AUG UTBJ 38, 39 (July/August 2019). As the criminal justice system's duty to provide counsel has grown, see *id.* at 38, state and federal governments have turned to a small number of careerist lawyers to handle most cases. See Carrie Dvorak Brennan, *The Public Defender System: A Comparative Assessment*, 25 Ind. Int'l & Comp. L. Rev. 237, 238–39 (2015).

West Virginia's experience is not atypical. In 2017, Public Defender Services disbursed funds to 140 full time public defenders and 700 private attorneys taking criminal appointments. Dana F. Eddy, *"Best Practices" for Indigent Defense Counsel,* W. Va. Law., 2018-SUM WVLAW 40, 40 (Summer 2008). It also appoints lawyers in juvenile, mental hygiene, child abuse and neglect, state habeas, and appellate proceedings, accounting for 64,000 closed cases that year. *Ibid.* This is in addition to guardians ad litem compensated directly by the judiciary. See W. Va. Trial Ct. R., 21.06. Many of these cases overlap and require appointments for multiple interested parties. See*, e.g.*, *In re K.P.*, 772 S.E.2d 914, 918 (W. Va. 2015).

As a result, successive conflicts are common. A 2004 report from the American Bar Association expressed concern for indigent access to conflict-free counsel. See Diane E. Courselle, *When Clinics Are "Necessities, Not Luxuries": Special Challenges of Running A Criminal Appeals Clinic in A Rural State*, 75 Miss. L.J. 721, 728 (2006) (citing Standing Committee on Legal Aid and Indigent Defendants, American Bar Association, *Gideon's Broken Promise: America's Continuing Quest For Equal Justice, a Report On The American Bar Association's Hearings on the Right to Counsel in Criminal Proceedings*, 19 (2004)). A study conducted on a "typical" urban public defender office found "a substantial risk that conflicts of interest occur frequently." Gary T. Lowenthal, *Successive Representation by Criminal Lawyers*, 93 Yale L.J. 1, 11 (1983). And public defenders' role in the criminal justice system has only grown since then. See Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 Ind. L.J. 363 (1993). The problem may be worse in rural communities. Courselle, 75 Miss. L.J. at 729.

A right so fundamental, facing a problem so pervasive, calls for a unified standard. Yet, although the State's obligation to provide counsel is universal, whether it has met that obligation despite a successive conflict is unsettled.

III. Petitioner's case is a good vehicle because her case is unusually clear and the correct standard—*Strickland* or *Sullivan*—is outcome determinative.

The circuits and state courts of last resort are awaiting this Court's resolution of the split. See*, e.g.*, *Moss*, 323 F.3d at 462; *Stovall*, 312 P.3d at 1281 ("[*Mickens*] intimates that the choice will be between [*Sullivan*'s] adversely affected test and [*Strickland*]. But what is the binding effect when such a holding is not made, but left open?"). And Petitioner's case is an ideal opportunity to address the question *Mickens* left unanswered. It is a true successive representation case, the conflict is actual, and whether *Sullivan* or *Strickland* applies is outcome determinative.

Petitioner's case presents the exact question *Mickens* left open. There, the Court declined to adopt a standard because the parties had presumed *Sullivan*. *Mickens*, 535 U.S. at 174–76. Here, the parties agree Petitioner's case concerns successive representation and can clash over *Mickens*' import at the merits stage. See App. 21a. If the Court grants certiorari, it can address this issue upon full adversarial briefing.

Also, the conflict is actual. If the PDC lawyer had screened herself, the case would only concern a potential conflict ill-suited to resolving the split. See *Blount*, 291 F.3d at 211–12. But she did not. App. 7a. She reviewed the PDC's files and learned information that "[a]bsolutely" would be useful for cross-examination. *Ibid.*; A.R. 143–44. Her duty to Petitioner compelled her to impeach the State's eyewitnesses. App. 7a. But her duty to her firm's former client compelled her not to reveal the information. See A.R. 143. There was no way to simultaneously honor the *interests* of both her current and former client. See *Hall*, 371 F.3d at 973.

And finally, the correct standard is outcome determinative because the PDC lawyer resolved the conflict adversely to Petitioner. See *id.* at 974. The majority below found that Petitioner failed to show *Strickland* prejudice. App. 26a–28a. But, per the dissent, she showed an actual conflict—*i.e.*, one that adversely affected her lawyer's performance. App. 32a. And the bizarre trial ritual that ensued shows that when the trial court forced the PDC lawyer to represent conflicting interests, she chose to protect her firm's former client.

At the motion hearing, the PDC lawyer believed the evidence would "[a]bsolutely" be useful at trial. A.R. 143–44. She had even requested juvenile records during discovery. App. 5a–6a. Thus, she knew Petitioner had the right to impeach juvenile witnesses the same as adults. Yet when the prosecutor proposed that the witness's confidentiality outweighed Petitioner's right to a fair trial, the PDC lawyer acquiesced. App. 8a–9a.

The lawyers conflated a screening procedure for discovering *Brady*[3] material contained in a confidential file with its use at trial. Compare *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 54 (1987) *with id.* at 58. But this Court's law is plain: No witness's interest in avoiding embarrassment can ever trump the right to cross-examine one's accusers. *Davis*, 415 U.S. at 319–20. Credibility is always at issue, see WVRE 611(b); FRE 611(b), and no one need "open the door" as the prosecutor suggested and the conflicted PDC lawyer accepted. See A.R. 479. In the end, the PDC lawyer said she was so satisfied that the former client's rights trumped Petitioner's that she did not seek to admit the evidence. App. 9a. In the jury's view, she did not cross-examine her firm's former client at all. *Ibid.*

The State's proposed procedure, that the PDC lawyer so readily accepted, was illegal and served no purpose other than to hamper the defense. See *Davis*, 415 U.S. at 320. The most reasonable explanation for counsel's stunning acquiescence is she hoped it would obviate the conflict. All it did was illustrate it.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[3] *Brady* v. *Maryland*, 373 U.S. 83 (1963).