No. 22-6811

IN THE SUPREME COURT OF THE UNITED STATES

ARIEL BENNETT, PETITIONER,

v.

STATE OF WEST VIRGINIA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Supreme Court of Appeals of West Virginia err when it declined to grant Petitioner a new trial because her public defender worked in an office that had previously represented, in an unrelated juvenile proceeding, an immaterial witness against Petitioner at trial?

ADDITIONAL RELATED PROCEEDINGS

Circuit Court for Raleigh County, West Virginia:

State v. Ariel Ladawn Bennett, No. 15-B-502-K (Dec. 1, 2015)

State v. Ariel L. Bennett, No. 16-F-429 (Sept. 15, 2016)

Supreme Court of Appeals of West Virginia:

State v. A.B., No. 20-0744 (Sept. 30, 2020)

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OPINION BELOW

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

JURISDICTION

The Supreme Court of Appeals entered its judgment on November 17, 2022. Petitioner petitioned for certiorari on February 14, 2023. This Court has subject-matter jurisdiction under 28 U.S.C. § 1257(a).

INTRODUCTION

Petitioner Ariel Bennett seeks to turn a collateral witness at trial into a constitutional concern -- but the concern is an imaginary one. Here, the Supreme Court of Appeals of West Virginia applied Strickland v. Washington, 466 U.S. 668 (1984), and rejected Petitioner's claim that a prejudicial conflict of interest arose

because her public defender's office had earlier represented a witness who testified against Petitioner. Petitioner says the Supreme Court of Appeals should have instead used the presumption of prejudice described in Cuyler v. Sullivan, 446 U.S. 335 (1980). But with complicating facts and a limited record, this case is a poor vehicle to take that question on. That reality is reason enough to deny the writ.

Petitioner also overstates the split that she insists now warrants review. In Mickens v. Taylor, 535 U.S. 162 (2002), this Court warned lower federal and state courts not to apply Sullivan "unblinkingly" outside cases involving joint, concurrent representations. And over the last two decades, lower courts have listened and moved to apply Sullivan more narrowly. The Court should allow this issue to continue percolating, as the courts are all moving together in the right direction.

Lastly, the decision below was correct. Preferring Strickland over Sullivan remains faithful to Sullivan's language, context, and underlying policy. And in the end, Petitioner would have lost even under her own standard, as no actual conflict of interest adversely affected her counsel's performance. Petitioner's trial was also fair, so it would satisfy any alternative test that the Court might consider fashioning. No constitutional error occurred.

The Court should deny the Petition.

STATEMENT

1. The Sixth Amendment guarantees criminal defendants "effective" assistance of counsel. U.S. Const. amend. VI; McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970). Counsel is ineffective when (1) "counsel's performance was deficient" and (2) "the deficient performance prejudiced the defense." Strickland, 466 U.S. at 687. These elements ensure "that a defendant ha[d] the assistance necessary to justify reliance on the outcome of the proceeding." Id. at 691-92. And the "general requirement" -- in other words, the default -- is "that the defendant affirmatively prove prejudice." Id. at 693.

In just two "rare circumstances," the Court presumes prejudice from counsel's performance. Rickman v. Bell, 131 F.3d 1150, 1155 (6th Cir. 1997). The first circumstance arises when prejudice "is so likely that case-by-case inquiry is not worth the cost," as when counsel is actively or constructively denied or when the state interferes with the defendant's counsel. Strickland, 466 U.S. at 692 (citing United States v. Cronic, 466 U.S. 648, 659 & n.25 (1984)). Those cases trigger a "per se rule of prejudice." Strickland, 466 U.S. at 692. The second situation applies when "it is difficult to measure the precise effect" of certain facts on the defense -- for instance, when defense counsel labored under an active conflict of interest. Id. (citing Sullivan, 446 U.S. at 344-50). Yet the presumption for this second

category "is not quite the per se rule." Strickland, 466 U.S. at 692. The Court presumes prejudice there "only if the defendant demonstrates that counsel [1] 'actively represented conflicting interests' and [2] that 'an actual conflict of interest adversely affected his lawyer's performance.'" Id. (quoting Sullivan, 446 U.S. at 350). Although Strickland stressed that the second category was not an automatic one, state and federal courts for a time construed that category rather expansively, "unblinkingly" applying the Sullivan test to "all kinds of alleged attorney ethical conflicts." Beets v. Scott, 65 F.3d 1258, 1266 (5th Cir. 1995) (en banc).

About two decades ago, this Court reminded courts that they should presume prejudice in only narrow circumstances, especially when it comes to conflict-of-interest cases. In Mickens v. Taylor, 535 U.S. 162 (2002), the Court questioned whether any presumption of prejudice should apply outside the context of conflicts arising from concurrent representations. See Mark W. Shiner, Conflicts of Interest Challenges Post Mickens v. Taylor: Redefining the Defendant's Burden in Concurrent, Successive, and Personal Interest Conflicts, 60 Wash. & Lee L. Rev. 965, 977 (2003) (suggesting that Mickens was trying to correct lower courts' abuse of Sullivan). Mickens cautioned "that the language of Sullivan itself does not clearly establish, or indeed even support, [the] expansive application" lower courts had been giving it. Mickens,

535 U.S. at 175. Both Sullivan and the cases that preceded it had "stressed the high probability of" prejudice and the difficulty in proving it in cases involving "multiple concurrent representation" of codefendants -- when defense counsel "actively represent[s] conflicting interests." Id. (emphasis in original).

Mickens recognized that not "all attorney conflicts present comparable difficulties." Mickens, 535 U.S. at 175. Courts and rules alike had long treated "concurrent representation and prior representation" differently. Id. (citing Sullivan, 446 U.S. at 346 n.10); see also Holcombe v. Florida, 142 S. Ct. 955, 958 (2022) (Sotomayor, J., dissenting from the denial of certiorari) (noting this distinction). Of course, all ethical duties are important. Mickens, 535 U.S. at 176. But Sullivan's focused goal was "to apply needed prophylaxis in situations where Strickland itself is evidently inadequate to assure" effective counsel. Id. All that said, Mickens did "not rule upon the need for the Sullivan prophylaxis in cases of successive representation." Id. Instead, the Court declared that whether "Sullivan should be extended" to those cases was "an open question." Id. That question drives Petitioner's argument here.

2. On a Saturday morning in early November 2015, Petitioner got drunk, fell asleep, and rolled over on top of her five-month-old baby girl, who then died by asphyxiation. Pet.App.5a. In September 2016, a West Virginia grand jury indicted Petitioner on

one count of child neglect resulting in death and two counts of child neglect with risk of serious bodily injury or death (as to two other of Petitioner's children). Id.

Two weeks before Petitioner's February 2020 trial, her public defender, Sarah Smith, moved to withdraw. Pet.App.6a. The attorney reported that she had discovered that a fellow public defender had represented one of the prosecution's minor witnesses, K.S., a few years before in an unrelated juvenile proceeding. Id.; WVSCoA App. 140-42.* K.S. is Petitioner's niece, and she was in Petitioner's home the day of the accident.

At the motion-to-withdraw hearing, Ms. Smith explained that she had learned "information that she would not have had but for K.S.'s representation by her office." Pet.App.7a. She did not say what that information was. Id. But she suggested she could use that unspecified information to cross-examine K.S. because it "would call into question" what K.S. might say and "that sort of thing." Id.; see also WVSCoA App. at 142-43. Ms. Smith never pointed to or produced particular facts or records, and she never argued that K.S.'s records contained privileged information.

The State opposed the motion to withdraw for several reasons. It chiefly argued that no conflict existed because there was no "connection at all between the juvenile proceedings" and

* The State cites the Joint Appendix filed with the Supreme Court of Appeals of West Virginia as "WVSCoA App."

Petitioner's case. WVSCoA App. 150. The State also argued that K.S.'s juvenile records and proceedings were "generally known" and thus not the sort of "confidential information" that conflict-of-interest rules protect. Id. at 152-53. And nothing in K.S.'s juvenile record would be helpful as impeachment evidence. Id. at 145. Lastly, K.S. and K.S.'s guardian said that K.S. "would absolutely give informed consent to testify in this proceeding despite the fact that some other public defender may have represented her." Id. at 151.

The circuit court denied Ms. Smith's motion to withdraw. Pet.App.8a. It acknowledged that Ms. Smith "reasonably believed" that her duty to other clients conflicted with her duties to Petitioner. WVSCoA App. 159. But the key factor for the court was "the subject matter of the representations." Id. Only "the same or substantially[] related matters" would create a conflict -- and these proceedings were "separate entirely." Id. at 159-160. The court also noted that K.S.'s guardian would consent to waiving any potential conflict. Id. Lastly, the court told all parties that they could supplement the record if they needed to. Pet.App.8a; see also WVSCoA App. 161, 162. And everyone agreed that the court would hold an in-camera hearing to resolve any confidentiality or conflict problems if Ms. Smith decided to cross-examine K.S. at trial. Id. at 168.

3. Petitioner was tried in late February 2020. The State mounted a substantial case, presenting "testimony from several witnesses, including emergency responders, investigating law enforcement officers, medical providers, medical experts, and family members who lived in the same home as A.B. at the time of the incident." Pet.App.8a; see also Pet.App.10a-13a (detailing substantial evidence against Petitioner). The State even offered Petitioner's recorded statement made a few days after the incident. WVSCoA App. 593.

K.S.'s testimony proved to be unremarkable in length and substance. She said only 108 words on direct examination, taking up just two-and-a-half of the nearly 200 trial transcript pages comprising the prosecution's case. WVSCoA App. 470-73. Most answers were merely "yes" or "no." Id. She testified she was the victim's cousin. Pet.App.8a. She was 12 years old at the time of the accident and lived on a different floor of Petitioner's house. Id. She walked into the room where Petitioner and her family lived and saw Petitioner on top of the baby. Id. K.S. touched the baby, but the baby wasn't moving or breathing. WVSCoA App. 472. K.S. tried to wake up Petitioner or move the baby, but she couldn't. Pet.App.8a. So K.S. got her grandma, who was downstairs. WVSCoA App. 472. She also called the police and tried to call an ambulance. Id. She saw first responders take the baby away. Id. at 472-73.

After that terse testimony, Ms. Smith asked to cross-examine K.S. on matters in her juvenile file. WVSCoA App. 473. The court thus held an in-camera hearing to see whether Ms. Smith could use K.S.'s juvenile history on cross-examination. Id. at 473-77. K.S.'s juvenile proceeding stemmed from a 2017 truancy case. Id. at 477-78. Psychological evaluations conducted then said K.S. abused "both alcohol and marijuana." Id. at 478. After Ms. Smith admitted that the evaluation did not say when K.S. used marijuana or alcohol, the court questioned how the evidence was relevant. Id. Ms. Smith suggested that if K.S. had been using marijuana or alcohol "at the time" of the accident, that information "would be relevant to what [K.S.] remembers happening" -- in short, it could evidence faulty memory. Id.; see also Pet.App.9a. The prosecutor thus proposed that Ms. Smith could establish the needed foundation by asking K.S. whether she was under the influence when the incident happened. WVSCoA App. at 479. Ms. Smith and the court agreed that would suffice. Id. at 479-80. When Ms. Smith then asked K.S. whether she had used any alcohol or drugs on the day of the incident or the day before, K.S. responded, "No." Pet.App.9a. Given that answer, Ms. Smith recognized that none of K.S.'s records were relevant. Id. So she determined not to cross-examine K.S. Id.

The jury convicted on all counts. Pet.App.13a. In July 2020, the court sentenced Petitioner to consecutive terms of three to

fifteen years in prison for child neglect resulting in the death of her infant daughter, and one to five years for the two non-fatal child neglect counts related to her other children. Id.

4. Petitioner appealed, arguing -- among other things -- that the public defender office's prior representation of K.S. denied her effective assistance of counsel. Pet.App.14a.

Although the parties had assumed Sullivan would apply, the Supreme Court of Appeals determined that the ordinary Strickland standard would instead govern "constitutional claims of ineffective assistance of counsel based upon successive representation." Pet.App.26a. The case undeniably involved successive representation: "Ms. Smith represented A.B. during this criminal proceeding, and a different attorney from the [Public Defender Corporation] represented K.S. in an earlier, unrelated juvenile proceeding." Pet.App.22a. And after surveying authorities from federal and state courts across the country, the Court was "persuaded" that the "warning" found in Mickens was meaningful -- Sullivan's logic did not work for successive representation. Pet.App.25a.

The Court then easily found Strickland's test satisfied. Pet.App.27a. K.S.'s testimony was unimportant, and the few meaningful points it offered were echoed in other evidence. Id. "Simply put, there was overwhelming evidence, other than K.S.'s brief testimony, that demonstrated [Petitioner]'s guilt to all

three counts." Id. Given that, Petitioner had not established prejudice. Id.

Two justices dissented. While noting the "seeming lack of any defense on the part of the [Petitioner]," those justices concluded that Petitioner "did not receive a fair trial because she was represented by counsel with an actual conflict of interest." Pet.App.32a. Apparently breaking from even the standard in Sullivan, the dissenting justices would have presumed prejudice from the mere fact of this conflict. Pet.App.32a-33a. They also would have adopted a new rule that a "court must allow [an] attorney to withdraw from the representation" whenever "an attorney represents to a court that he or she has an actual conflict of interest." Pet.App.37a. And they questioned how the court could resolve the ineffective-assistance claim on direct appeal considering the court did not have "the benefit of counsel's testimony as to what she did or didn't do and why." Pet.App.44a.

ARGUMENT

The Court should not grant the Petition. The unique circumstances of this case make it a poor vehicle for review. Petitioner's split is overstated, as a growing consensus of courts declines to apply Sullivan to successive representations. And the Supreme Court of Appeals was right: Sullivan's exception should be limited to joint, concurrent representation of codefendants. Even if Sullivan did apply, the State still would have prevailed

under that test. And fundamentally, the trial below was fair under any standard. Given all that, the Court should deny Petitioner's request for a writ.

A. This case presents a poor vehicle to review the conflict-of-interest issue.

The facts -- involving an imputed conflict of interest from the public defender office's prior representation of a witness, rather than a direct conflict -- present real complications. This Court "has never extended Sullivan to circumstances involving either successive representation or imputed conflicts, much less to circumstances involving both." Houston v. Schomig, 533 F.3d 1076, 1086 (9th Cir. 2008). Petitioner's counsel also did not learn the information about the witness during the prior attorney-client relationship or from communications with that witness, and no one suggests the information was "privileged" in the ordinary sense. Thus, at least some concerns that animate conflict-of-interest protections may not exist here. Even the involvement of a public defender's office presents an important wrinkle, as it remains an open question how courts should treat such conflicts across such an office. See, e.g., Campanelli v. Illinois, 138 S. Ct. 2652 (2018) (denying writ of certiorari from case holding that public defender's office could concurrently represent co-defendants with adverse interests). So even if the Court thought

it right to revisit Sullivan's reach, it should wait for a vehicle with fewer fact-bound complications.

The case also arrives at this Court on direct appeal, which usually represents a poor time to review a claim of ineffective assistance of counsel. See Massaro v. United States, 538 U.S. 500, 504-06 (2003). Even the Supreme Court of Appeals has repeatedly warned counsel against bringing ineffectiveness claims on direct appeal. See, e.g., State ex rel. Daniel v. Legursky, 465 S.E.2d 416, 420 n.1 (W. Va. 1995) (explaining that "a defendant who presents an ineffective assistance claim on direct appeal has little to gain and everything to lose" because of inevitable deficiencies in the record). Although ineffective-assistance claims can sometimes appear on the face of the record, those cases are few and far between. Massaro, 538 U.S. at 508. Petitioner took the risk here anyway -- virtually ensuring that the decision below rested on a necessarily underdeveloped record. The Court often "finds it premature to resolve ... constitutional question[s] on [a] less than fully developed record." Youngberg v. Romeo, 457 U.S. 307, 329 (1982) (Blackmun, J., concurring); see also Hidalgo v. Arizona, 138 S. Ct. 1054, 1057 (2018) (Breyer, J., respecting denial of certiorari) (noting that the parties "may have the opportunity to fully develop a record," and that "this petition will be better suited for certiorari with such a record").

B. Vehicle problems aside, Petitioner oversells the degree of discord in the courts below. Since Mickens, federal and state courts have "severely cut back the frequency with which they used [Sullivan]." Thompson v. United States, No. 6:13-CR-30, 2017 WL 9403333, at *3 (E.D. Ky. Mar. 30, 2017). They no longer apply Sullivan's exception "unblinkingly" to "all kinds of alleged attorney ethical conflicts." Mickens, 535 U.S. at 174 (cleaned up). The principle holds especially true when it comes to successive representations. Given that the courts have been listening to the warning that the Court issued in Mickens, the Court need not involve itself in the question again here.

1. Although Sullivan was once the normal rule in successive-representation cases, many federal circuit courts have significantly curtailed their use of Sullivan over time. For example, several federal circuits have concluded it is a reasonable application of federal law to apply Strickland to successive representations. See, e.g., Noguera v. Davis, 5 F.4th 1020, 1035–36 (9th Cir. 2021); McCargo v. Adm'r E. Jersey State Prison, No. 18-2963, 2019 WL 11770871, at *1 (3d Cir. 2019); Schwab v. Crosby, 451 F.3d 1308, 1325 (11th Cir. 2006); Lordi v. Ishee, 384 F.3d 189, 193 (6th Cir. 2004); Montoya v. Lytle, 53 F. App'x 496, 498 (10th Cir. 2002). Other circuits -- faced with cases in which the standard made no difference to the outcome -- have adopted a neutral position. See Johnson v. Wilson, 960 F.3d 648, 653 n.1

(D.C. Cir. 2020) ("Neither the Supreme Court nor our Court has decided whether [Sullivan] applies to successive as opposed to concurrent representations."); accord United States v. Dehlinger, 740 F.3d 315, 322 (4th Cir. 2014); United States v. DeCologero, 530 F.3d 36, 77 (1st Cir. 2008). The Eighth Circuit, for its part, seems to be deciding where it stands. Compare United States v. Young, 315 F.3d 911, 915 (8th Cir. 2003) (saying Sullivan applies to conflicts involving successive representation), with Noe v. United States, 601 F.3d 784, 790 (8th Cir. 2010) ("[W]e have not yet determined whether [Sullivan's] presumed prejudice analysis extends beyond conflicts arising from multiple representation."). But to the State's knowledge, no federal circuit court has read Sullivan more expansively after Mickens than it did before.

Petitioner incorrectly suggests that three circuits have effectively accepted Sullivan as the standard in cases involving purported conflicts arising from successive representations. Pet.11-12. A closer read confirms that these circuits have not created a meaningful split.

The Second Circuit, to start, has not rushed to read Sullivan into the successive-representations context. True, in one case, the court rejected the notion that Mickens itself compelled state courts to apply Strickland -- not Sullivan -- in a successive-representation case. See Tueros v. Greiner, 343 F.3d 587, 593-94 (2d Cir. 2003); see also Schwab, 451 F.3d at 1326 (calling these

statements dicta). But it also "h[e]ld that the state court was not required to apply Sullivan," either. Tueros, 343 F.3d at 592. Instead, it stressed that its opinion did "not entail stating [its] opinion as to the proper division between the cases in which Strickland and Sullivan should apply." Id. Likewise, in United States v. Blount, 291 F.3d 201, 211-12 (2d Cir. 2002), the court did not consider whether Strickland properly applied to a successive-representation case; it only held that the defendant had not met the lesser Sullivan standard. And in another more recent case, the Second Circuit also read Sullivan to speak directly to only "multiple concurrent representations," and it recognized that this Court has simultaneously "cautioned against an expansive application of Sullivan." Hyman v. Brown, 927 F.3d 639, 670 n.30 (2d Cir. 2019) (cleaned up; emphasis added). Read together, these cases show that the Second Circuit is taking the same careful approach towards Sullivan that other courts are.

The story repeats in the Fifth Circuit. There, a case decided not long after Mickens -- and relying on pre-Mickens precedent -- applied the Sullivan standard where a conflict arose from intimately related joint representations. United States v. Infante, 404 F.3d 376, 391 n.12 (5th Cir. 2005). But the "prior" representations in that case "had not been unambiguously terminated," suggesting they were not truly successive. Id. at 392. The Fifth Circuit later treated the relevant standard for

successive-representation conflicts as an open question. See Chambers v. Quarterman, 191 F. App'x 290, 294 (5th Cir. 2006), vacated on other grounds by 127 S. Ct. 2126 (2007). Given that the Fifth Circuit has long been "one of the leading examples of a circuit court limiting [Sullivan]," that circuit seems primed to revisit its pre-Mickens precedent and take a different route. Shiner, supra, at 981.

And the Seventh Circuit followed much the same course. Just after Mickens, that court acknowledged that this Court had "recently … cast doubt" on whether the Sullivan standard applied to successive representations. Holleman v. Cotton, 301 F.3d 737, 743 (7th Cir. 2002). The court acknowledged Mickens's warnings again in Hall v. United States, 371 F.3d 969 (7th Cir. 2004), though it applied Sullivan because the representations were not really successive. Id. at 974 (explaining that the "representations … were just ten days apart and were also closely interrelated"); see also United States v. Lake, 308 F. App'x 6, 9 (7th Cir. 2009) (remarking that the Seventh Circuit had merely "assumed" Sullivan applies in successive-representation cases). And it has more recently warned against extending Sullivan too far in the habeas context, as "Mickens makes it very difficult" to do so. Reynolds v. Hepp, 902 F.3d 699, 709 (7th Cir. 2018). In fact, the Seventh Circuit has long imposed special requirements for the few successive-representation claims it had entertained even pre-

Mickens: a defendant must "show that [his lawyer]'s representation of [a witness] was substantially and particularly related to his representation of [the witness] or that [the lawyer] learned particular information from his representation of [the witness] that was relevant to [the defendant]'s case. Enoch v. Gramley, 70 F.3d 1490, 1497 (7th Cir. 1995). So the Seventh Circuit does not genuinely show a "Sullivan friendly" side of a split, either.

In short, since Mickens, federal circuit courts moved away from using Sullivan in successive-representation cases to generally employing Strickland or staying neutral.

2. State courts have reacted to Mickens in different ways, but one key, overarching theme can be gleaned: Those state courts that have reached the issue have increasingly tended to limit Sullivan's reach.

Many States have newly limited Sullivan in some way post-Mickens. For example, eight States that applied Sullivan broadly before Mickens have since overruled those precedents, narrowed them, or become agnostic on which standard applies. See, e.g., People v. Doolin, 198 P.3d 11, 36 n.22, 41 (Cal. 2009); 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); Steward v. Commonwealth, 397 S.W.3d 881, 883 & n.4 (Ky. 2012); People v. Bigger, No. 313830, 2014 WL 4214904, at *2 (Mich. Ct. App. Aug. 26, 2014); Simpson v. State, No. 64529, 2015 WL 5311109,

at *6 (Nev. Sept. 10, 2015); State v. Barksdale, 768 S.E.2d 126, 130 (N.C. Ct. App. 2014); Commonwealth v. Cousar, 154 A.3d 287, 310-11 (Pa. 2017); State v. McDowell, 681 N.W.2d 500, 516 (Wis. 2004). Along with West Virginia, other state high courts applied Sullivan broadly just after Mickens but then reversed course or limited Sullivan's reach later on. See, e.g., Lowery v. State, 621 S.W.3d 140, 147 (Ark. 2021); Chavez v. State, 12 So.3d 199, 212 (Fla. 2009); Crawford v. State, 192 So. 3d 905, 919–20 (Miss. 2015). At least one court refused to extend Sullivan to the successive representation context for the first time. State v. Alvarado, 481 P.3d 737, 748 (Idaho 2021). And still other state high courts that favored narrow interpretations of Sullivan pre-Mickens continue to do so. See, e.g., Gibson v. State, 133 N.E.3d 673, 699 (Ind. 2019). Indeed, there does not appear to be a single jurisdiction that before Mickens narrowly applied Sullivan and now applies it broadly -- the trend is all the other way.

In contrast, Petitioner suggests a split exists at the state level by looking at four States: North Carolina, Nebraska, Colorado, and Kansas. Pet.9-10. But here again, these States have not meaningfully split from their sister States -- at least not in a way calling out for review here.

North Carolina offers no indication of a hardened split. That Court has only noted its own Mickens cases, which applied Sullivan to successive conflicts just as many other courts had. State v.

Phillips, 711 S.E.2d 122, 137 (N.C. 2011). But the court did not purport to re-adopt Sullivan in the face of Mickens's warning -- it did not acknowledge Mickens's admonition at all. Nothing suggests that anyone has ever put the question of Strickland versus Sullivan before that court. Considering how often North Carolina courts have resisted extending Sullivan in recent years, see State v. Barksdale, 768 S.E.2d 126, 130 (N.C. Ct. App. 2014), it seems unlikely that North Carolina will be eager to fight off Mickens's obvious import when the issue is squarely presented.

Nebraska is also not on the wrong side of a split. The Supreme Court of Nebraska observed that its "own case law post-Mickens does not reveal a clear standard for ineffective assistance of counsel claims involving conflicts of interest." State v. Avina-Murillo, 917 N.W.2d 865, 876 (Neb. 2018). But the court appears to favor Strickland in all but the most extreme cases, id. at 876, 878, and it applies a more flexible analysis in those few cases. Cf. State v. Ehlers, 631 N.W.2d 471, 483 (Neb. 2001) (finding that "no actual conflict" could arise because the case involved "a case of successive representation," not "direct or concurrent representation"), overruled on other grounds by Heckman v. Marchio, 894 N.W.2d 296 (2017). Considering how Nebraska has declined to extend Sullivan to personal conflicts, recognized that concurrent representations are different from successive ones, and acknowledged this Court's admonition in Mickens, it seems unlikely

that it will crystallize a split by applying Sullivan to all successive-representation scenarios, as Petitioner wants. Avina-Murillo, 917 N.W.2d at 876-78.

Nor do Colorado and Kansas courts say anything helpful for Petitioner. In Petitioner's favored Colorado case, the Supreme Court of Colorado merely "assume[d], without deciding, that the Sullivan standard applies to alleged conflicts arising from successive representation." West v. People, 341 P.3d 520, 530 (Colo. 2015) (emphasis added). But at least one intermediate Colorado court has since "agreed with th[o]se authorities" that "have declined to extend Sullivan to conflict situations not involving multiple concurrent representation." People v. Huggins, 463 P.3d 294, 300 (Colo. Ct. App. 2019). Meanwhile, in Kansas, "it remains unsettled whether [the] successive representation subcategory is to be viewed under the deficient performance test from Strickland, or the adverse effect test from Cuyler v. Sullivan." State v. Bowen, 323 P.3d 853, 861 (Kan. 2014). The Kansas courts have not taken a firm position simply because the State has never thought it necessary to press the issue there. See State v. Stovall, 312 P.3d 1271, 1281 (Kan. 2013). That quiet stasis suggests no reason for this Court to grant a writ.

3. Canvassing the cases shows that the Court should let this issue keep percolating. The courts that have addressed these issues after Mickens are moving in one direction. Odds are, they

will continue coalescing around a more restrained understanding of Sullivan as more courts address the question with Mickens in mind. That likely agreement obviates the need for the Court to get involved in this case or any future case. At the very least, "the likelihood that" Sullivan's reach "will be resolved correctly may increase if this Court allows other tribunals to serve as laboratories in which the issue receives further study before it is addressed by this Court." Brown v. Texas, 118 S. Ct. 355, 357 (1997) (Stevens, J., respecting the denial of the petition for writ of certiorari) (cleaned up); accord Spears v. United States, 555 U.S. 261, 270 (2009) (Roberts, C.J., dissenting).

Bad consequences could follow if the Court acts too soon. "[A] premature Supreme Court ruling that fails to appreciate or properly to weigh all relevant aspects of the constitutional issue could have a severe adverse impact." Eugene Gressman, et al., Supreme Court Practice 503-04 (9th ed. 2007). Often, the "certainty that is supposed to come from speedy resolution may prove illusory if a premature decision raises more questions than it answers." California v. Carney, 471 U.S. 386, 399-400 (1985) (Stevens, J., dissenting) (cleaned up). Sullivan itself might offer an example of that situation, as the case took on new meaning when the full spectrum of potential conflicts became known over time. And especially when the Court "formulate[s] and refine[s]" constitutional rules "in the painstaking scrutiny of case-by-case

adjudication" -- as in conflict-of-interest law -- allowing lower courts to fully hash out details "facilitate[s] a reasoned accommodation of the conflicting interests." Id. at 400.

What's more, conflict-of-interest cases are fact-intensive and beset with policy questions. Perillo v. Johnson, 205 F.3d 775, 782 (5th Cir. 2000) (explaining that these cases are "tightly bound to the particular facts at hand"). Tests that govern complex subject matter tend to be complex or nuanced, too. So even if the Court decides that it should take this question up at some point, it should collect all the data it can from the lower courts before it crafts a new test or draws a clearer line for Sullivan's scope. See Michael Coenen & Seth Davis, Percolation's Value, 73 Stan. L. Rev. 363, 390 (2021) (describing how percolation helps the Court gain information in several important ways). Even the limited data already available counsels for restraint; Petitioner notes that the public defender's office alone participates in 64,000 cases a year just in West Virginia, so an aggressive new conflict-of-interest regime could raise issues in a host of cases. Pet.14.

Petitioner insists that Sixth Amendment conflict-of-interest issues are important. Pet.13-15. True. Yet "[t]he more important an issue is, the more the Court would benefit by allowing the issue to percolate so [the Court] can avail itself of the wisdom of other courts before settling a momentous matter." Gressman, supra, at 503-04; see also, e.g., Lackey v. Texas, 115 S. Ct. 1421, 1422

(1995) (Stevens, J., respecting denial of certiorari) ("Petitioner's claim, with its legal complexity and its potential for far-reaching consequences, seems an ideal example of one which would benefit from such further study."). In other words, while uniformity may be important, the Court need not "eradicate disuniformity as soon as it appears" for any number of good reasons. Samuel Estreicher & John. E. Sexton, A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study, 59 N.Y.U. L. Rev. 681, 716 (1984).

Perhaps for many of these same reasons, this Court has repeatedly refused to weigh in on how far Sullivan's exception to Strickland might go in recent years. See Spencer v. Colorado, 142 S. Ct. 2708 (2022); Koger v. United States, 143 S. Ct. 119 (2022); Amato v. United States, 140 S. Ct. 982 (2020); Bustamante v. United States, 139 S. Ct. 171 (2018). Nothing has changed since then. The Court should deny the Petition here, too.

C. The lower court was also right on the merits. Sullivan's presumption of prejudice does not extend to cases like this one. Even if it did, the same result would follow.

1. Sullivan focused on joint, concurrent representations. The case involved two lawyers representing three co-defendants all together. 446 U.S. at 337. Sullivan challenged his conviction, arguing that his "lawyers represented conflicting interests." Id. As relevant here, Sullivan discussed the tension of concurrent or

"multiple representation" at some length. Id. at 348 (using that phrase four times in four sentences). But it decided against a blanket presumption of ineffective assistance in all multiple-representation cases because sometimes a "common defense" helps defendants. Id. (cleaned up); see also See Brian R. Means, Third Category of Cases: Conflicts of Interest That Adversely Affected Counsel's Performance -- Types of Conflicts, in Postconviction Remedies § 35:31 (Aug. 2022 update) ("[J]oint representation, at times, can be beneficial."). So a defendant claiming that his Sixth Amendment rights were violated must show "an actual conflict of interest adversely affected his lawyer's performance." Sullivan, 446 U.S. at 350. As an example of such a violation, it described a case in which a defense attorney represented multiple defendants in the same trial. Id. at 349-50 (discussing Glasser v. United States, 315 U.S. 60 (1942)). A "contrasting situation," it said, was seen in a case in which defense counsel concurrently but separately represented "codefendants on an unrelated charge"; in that case, the Court saw insufficient evidence that a "lapse" in representation occurred. Sullivan, 446 U.S. at 349-350. (discussing Dukes v. Warden, 406 U.S. 250 (1972)).

Sullivan never engaged with successive representations. Although it discusses "multiple representation" a dozen times, it never addresses a constitutional violation arising from anything but a joint, concurrent representation. Sullivan's facts and the

facts of every case it relied on or cited -- Holloway v. Arkansas, 435 U.S. 475 (1978), Glasser, and Dukes -- involve defense counsel representing codefendants in a single trial. See Mickens, 535 U.S. at 168 ("Sullivan addressed … multiple representation."). State and federal courts have pointed out these concurrent and co-defendant elements for years. See, e.g., State v. Regan, 177 P.3d 783, 786 (Wash. App. 2008); Winfield v. Roper, 460 F.3d 1026, 1039 (8th Cir. 2006). So stretching Sullivan's exception to cover successive representation would rewrite the decision. Worse, it would allow the exception to begin to swallow Strickland's prejudice requirement.

Common sense, the Model Rules of Professional Conduct, and "[g]eneral ethics principles" tell us that joint, concurrent representation of codefendants in the same matter is more dangerous than the successive representation of a government witness and defendant in different matters. Shiner, supra, at 998 ("[C]oncurrent representation is more troublesome than successive representation."). As most every court recognizes, not all conflicts are created equal. Mickens's central point of caution is that the "rationale" justifying the Sullivan exception to the prejudice requirement "does not necessarily hold true for other types of conflicts." Id. at 992-93. Indeed, federal courts of appeals have said for decades that "it is generally more difficult to demonstrate an actual conflict resulting from successive

representation" than from joint representation. Enoch, 70 F.3d at 1496. And as Mickens and Sullivan note, Federal Rule of Criminal Procedure 44(c) requires the Court to inquire into joint representations to ensure the proceedings are fair. It does not do the same for successive representations. Shiner, supra, at 998 ("[T]here is not as much need for a strong prophylaxis [with successive representation] as with concurrent representation."). That difference in treatment signals the substantive difference, too.

In ineffective assistance cases, "prejudice may be presumed" in only "rare circumstances." Johnson v. Mahoney, 424 F.3d 83, 91 n.7 (1st Cir. 2005); accord Purvis v. Crosby, 451 F.3d 734, 740 (11th Cir. 2006) ("The Supreme Court in Strickland instructed us that in all but three exceptional circumstances prejudice must be shown before an ineffective assistance of counsel claim merits relief."). Confining Sullivan to its appropriate realm ensures that the exceptions remain appropriately rare. The Supreme Court of Appeals was right to do just that.

2. Yet even if Sullivan did apply here, the Court still should not grant certiorari because the State would still prevail. Contra Pet.15-17. The Court refuses writs when it is "not clear that [the Court's] resolution of the constitutional question will make any difference even to these litigants." Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 122 (1994) (dismissing the writ); see

also Calderon v. Coleman, 525 U.S. 141, 152 (1998) (Stevens, J., dissenting) (explaining that the writ should have been denied where the decision was "unlikely to change the result below"). That proves to be just so here.

To justify a presumption of prejudice, Petitioner must show "an actual conflict of interest existed." Mickens, 535 U.S. at 171. A "mere theoretical division of loyalties" is not an actual conflict. Id. And "[a]n 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance." Id. at 172 n.5.

A conflict adversely affects counsel's performance when she "fail[s] to pursue [an alternate] strategy or tactic" and that failure is "linked to the actual conflict." Mickens v. Taylor, 240 F.3d 348, 361 (4th Cir. 2001); cf. United States v. Burgos-Chaparro, 309 F.3d 50, 53 (1st Cir. 2002) (requiring "some adverse action or inaction"); Noguera, 5 F.4th at 1037 (same). But as courts have often recognized, this path not taken must have been "plausible." United States v. Cardona-Vicenty, 842 F.3d 766, 773 (1st Cir. 2016); see also, e.g., Williams v. Ludwick, 761 F.3d 841, 846 (8th Cir. 2014); Armienti v. United States, 234 F.3d 820, 824 (2d Cir. 2000). Put another way, Petitioner must show that "a specific and seemingly valid or genuine alternative strategy was available to defense counsel, but it was inherently in conflict

with his duties to others or to his own personal interests." United States v. Migliaccio, 34 F.3d 1517, 1526 (10th Cir. 1994).

The only alternative tactic that one might discern from this record is a theory that K.S.'s drug use could have been used in cross-examination. But as the in-camera hearing showed, that approach was not viable under the ordinary rules of evidence -- so the theory was not plausible. No matter how a lawyer learns about it, a witness's drug use is not admissible unless the defendant can lay a foundation for it by showing that the witness was impaired at the time of the relevant events. See, e.g., State v. Johnson, 584 S.E.2d 468, 471 (W. Va. 2003) (affirming decision to exclude evidence of witness's drug use); accord Jackson v. United States, 210 A.3d 800, 809–10 (D.C. 2019) ("[F]or evidence of an individual's drug use to be admissible for impeachment purposes, a sufficient foundation must be laid to show that the individual in fact was under the influence of drugs at the relevant time." (cleaned up)); State v. Polak, 422 P.3d 112, 117 (Mont. 2018) (same); State v. D'Alessio, 848 A.2d 1118, 1125 (R.I. 2004) (same). Petitioner's counsel made a run at establishing that foundation, but she was ultimately unable to do so.

Petitioner has not otherwise named an alternative that her conflicted counsel abandoned. Ms. Smith told the circuit court that K.S.'s "conduct records, that sort of thing," included material she "absolutely" would use during cross-examination.

WVSCoA App. 144. But despite the circuit court's repeated invitations, id. at 161, she never offered affidavits, records, or any other materials for in camera review to flesh out the alleged conflict. Even before this Court, Petitioner can speak in only generalities about what was supposedly missing. See Pet.16-17 (arguing that the court's actions were a "bizarre trial ritual," and Ms. Smith's "stunning acquiescence" allowed a "former client's rights" to "trump[] Petitioner's"). Petitioner obliquely refers to her "right to impeach" K.S., insisting several times that Ms. Smith should have impeached K.S. using her juvenile records. Id. But she never explains how. And she says that the adverse effect was shown "per the dissent." Pet.16. Yet the dissent never identified an adverse effect that traced directly to the conflict. Quite the opposite: it insisted that it was impossible to do so on this record. Pet.App.43a-44a.

Alternatives aside, recall that K.S., through her guardian, waived any conflict arising from confidential information in her juvenile records. WVSCoA App. 151. This stipulation effectively gave Ms. Smith a free hand to question as thoroughly as she chose. So even if Ms. Smith had left something on the table, that deficiency could not be traced to the alleged conflict. See, e.g., United States v. Benjamin, No. CR 3:21-0525-MGL-1, 2022 WL 1462974, at *4 (D.S.C. May 9, 2022) (after witness waived a conflict, the lawyer could "zealously cross-examine [the witness] … without

abandoning any duty of loyalty, because that duty of loyalty no longer constrain[ed] him").

Courts have sometimes applied a multi-factor test to decide whether an actual conflict exists, see, e.g., United States v. Hernandez, 690 F.3d 613, 619 (5th Cir. 2012), but those factors confirm that no actual conflict arose here. See Means, supra, § 35:31 (surveying cases to crystalize the factors); see also Barbara Van Arsdale, et al., Right to Counsel Free From Conflict of Interest, Generally, 9 Fed. Proc., L. Ed. § 22:620 (Mar. 2023 update) (same). Four of the five factors favor a finding of "no conflict," while the fifth is neutral. First, the cases were not that close in time; this case is not Hall, 371 F.3d at 974, for example, where mere days separated the representations. Second, the cases are substantively unrelated; a juvenile truancy matter has nothing to do with a felony child-abuse case. Third, Ms. Smith had no "pecuniary interest" in representing K.S.; she was a public defender. And fourth, as explained above, Ms. Smith never had to or did divide her loyalties; she pursued the only avenue of attack against K.S. without concern for the prior relationship. The last factor -- whether defense counsel has confidential information -- is neutral. Although Ms. Smith did have confidential information, she had no appropriate way to use it in Petitioner's case, so that knowledge was a nonissue.

At bottom, Sullivan and the other Strickland exceptions are meant to ensure proceedings' reliability, Strickland, 466 U.S. at 691-92 -- that is, "to keep a trial fundamentally fair," Tyler Daniels, Presumed Prejudice: When Should Reviewing State Courts Assume a Defendant's Conflicted Counsel Negatively Impacted the Outcome of Trial, 49 Fordham Urb. L. J. 221, 257 (2021). So "the key trait of a" case that warrants Sullivan's "presumption of prejudice is pervasiveness -- that is, the conflict is so pervasive throughout the representation that its impact is too difficult to detect." Id. at 249; cf. United States v. Gonzalez-Lopez, 548 U.S. 140, 150 (2006) (using similar "pervades" language).

Yet these proceedings were reliable and fair, not pervaded by conflict. K.S.'s and Petitioner's proceedings were unrelated and separated by time. Another public defender, not Ms. Smith, previously represented K.S. The State used K.S.'s about 100 words of testimony not to show elements of Petitioner's crimes, but as res gestae narrative evidence. K.S.'s allegedly confidential records revealed a single confidential fact about K.S.: K.S. previously abused substances. The trial court then let Ms. Smith pursue her impeachment theory based on that fact as much as the law would allow. K.S. waived any conflict resulting from the public defender's past representation, giving Ms. Smith the chance to do what she needed to do in her cross-examination. And prejudice is not hard to measure here. It did not pervade the

proceedings in subtle ways -- all the relevant facts were out in the open.

* * * *

This case does not warrant the Court's involvement. The vehicle is poor. The split is illusory. And the result would still be the same.

CONCLUSION

The Court should deny the Petition.

Respectfully submitted.

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