No. _____

IN THE
Supreme Court of the United States

RAYMOND WOODLEY,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

On Petition for a Writ of Certiorari
To the Supreme Court of North Carolina

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Mr. Woodley was tried non-capitally for first-degree murder. His trial began on January 12, 2021, in the midst of a surge in the Covid-19 pandemic. Mr. Woodley's counsel moved to continue the trial, explaining, *inter alia*, that her personal interest in avoiding the risk of infection was in conflict with Mr. Woodley's interest in a fair trial with effective counsel. Counsel told the trial court that she was, at the time, emotionally and mentally unable to proceed as counsel for the defendant due to her concerns about becoming infected. In denying the motion to continue, the trial court acknowledged but did not resolve the conflict raised by counsel.

On appeal, Mr. Woodley argued he was entitled to relief under the *Cuyler v. Sullivan* standard. The State argued that because the conflict did not arise from multiple representation, the issue was governed by *Strickland v. Washington*, and Mr. Woodley was not able to show *Strickland* prejudice. The North Carolina Court of Appeals applied *Strickland* and denied relief.

Against this background, the question presented for review, a question this Court left open in *Mickens v. Taylor*, is:

> When counsel alerts the trial court to a conflict of interest not involving multiple representation, and the trial court fails to resolve the conflict, is the defendant entitled to relief under the *Sullivan* standard upon a showing that the representation was adversely affected by the conflict, or must the defendant show *Strickland* prejudice?

INDEX

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

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Raymond Woodley respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Supreme Court of North Carolina.

OPINIONS BELOW

The opinion of the North Carolina Court of Appeals finding no error in Mr. Woodley's conviction issued on November 15, 2022, is available at *State v. Woodley*, 880 S.E.2d 740 (N.C. Ct. App. 2022). A copy is attached as Appendix A. The order of the Supreme Court of North Carolina dismissing Mr. Woodley's appeal and denying discretionary review entered on October 23, 2023, is available at 892 S.E.2d 607 (N.C. 2023). A copy is attached as Appendix B.

JURISDICTION

The order of the Supreme Court of North Carolina dismissing Mr. Woodley's appeal and denying discretionary review of the decision of the North Carolina Court of Appeals was entered on October 23, 2023. *See* Appendix B. On January 18, 2024, Chief Justice Roberts granted Petitioner's timely-filed motion for an extension of time within which to file this Petition until March 21, 2024. *See* Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257, as Mr. Woodley is asserting a deprivation of his rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth Amendment to the United States Constitution. The Sixth Amendment provides: "In all criminal prosecutions the accused shall . . . have the assistance of counsel for his defense." U.S. Const. amend. VI. The Fourteenth Amendment provides: "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

INTRODUCTION

In *Holloway v. Arkansas*, 435 U.S. 475 (1978), the Court held prejudice would be presumed and a new trial required where defense counsel was required to represent three jointly tried codefendants over counsel's timely objection that the joint representation subjected counsel to a conflict of interest. In *Cuyler v. Sullivan*, 446 U.S. 335 (1980), the Court held that where no conflict-based objection was raised at trial, the automatic reversal rule of *Holloway* did not apply, and "a defendant who

raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Id*. at 348.

Mickens v. Taylor, 535 U.S. 162 (2002) was a capital case where the defendant had been appointed counsel who was representing the decedent in juvenile court at the time of the murder. The appointing judge knew of the dual representation but did not engage in any conflict inquiry. *Id*. at 164-65. The Court rejected the defendant's argument the automatic reversal rule of *Holloway* should apply because of the trial court's failure to conduct an inquiry. The Court held that *Holloway* did not apply, explaining: "*Holloway* . . . creates an automatic reversal rule *only* where defense counsel is forced to represent codefendants over his timely objection, unless the trial court has determined that there is no conflict." *Id*. at 167 (emphasis added). Applying the *Sullivan* standard, the Court affirmed the decision below finding no adverse impact on the representation as a result of the successive dual representation. *Id*. at 173-74.

After announcing the Court's holdings, the *Mickens* opinion explained that the case was argued and decided on the question presented, which assumed the *Sullivan* rule applied, at a minimum. The Court noted that in the years since *Sullivan*, lower courts applied the standard "unblinkingly" to "all kinds of alleged attorney ethical conflicts." The Court explained that both *Holloway* and *Sullivan* involved multiple concurrent representations, stressing both the high probability of prejudice in such representations and the difficulty of proving that prejudice with specificity. The Court added that the purpose of the *Holloway* and *Sullivan* rules is "to apply needed

prophylaxis in situations where *Strickland* [*v. Washington*, 466 U.S. 668 (1984)] itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel." The Court concluded by explaining that its holding did not resolve any question regarding the application of *Sullivan* outside the context of multiple concurrent representation. "Whether *Sullivan* should be extended to such cases remains, as far as the jurisprudence of this Court is concerned, an open question." *Id.* at 176.

In the years since *Mickens*, the Court has not answered that open question. Lower courts have developed a split of authority on the answer to this question, which is a commonly recurring one.

The instant case involves a conflict of interest that did not arise from multiple representations. Rather, counsel's personal interest in avoiding exposure to Covid was in conflict with the defendant's right to a fair trial. The case was tried in January, 2021, during a surge in the Covid pandemic and at a time before effective vaccinations were generally available.[1] Counsel moved to continue, explaining that her fear of infection would severely limit her ability to represent the defendant, who was being tried for first-degree murder and faced a sentence of life without parole. Counsel bluntly told the trial court she was not then mentally or emotionally fit to represent the defendant, due to her fear of infection. The trial court acknowledged concern over

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[1] The first Covid vaccination in the United States was administered on December 14, 2020. The protocol required two shots at least 23 days apart. When the trial commenced on January 12, 2021, counsel had already received her first shot, but there had not been sufficient time for her to get a second shot yet. (Tpp. 28-29).

counsel's statements and did not find that counsel was insincere or lacked credibility in expressing her position. Nevertheless, the trial court denied relief, neither continuing the trial nor removing counsel from the representation.

During the trial that followed, counsel's representation was adversely affected by the conflict in at least two ways. Counsel failed to preserve violations of Mr. Woodley's right to an open and public trial, resulting in the forfeiture of the issue on appeal. Counsel also failed to object to a deviation from the statutorily mandated jury selection procedure, which would have required the State to pass a full panel of twelve jurors before the defense began to question the jury or exercise its own challenges. Counsel's performance was also inexplicably deficient in other ways throughout the trial.

On appeal, Mr. Woodley argued the *Sullivan* standard should apply because counsel timely raised the issue before the trial court and because the conflict adversely impacted the entire trial representation. The State argued that because the conflict did not involve multiple representation, binding state precedent dictated that the issue be reviewed under *Strickland* standard. The State argued Mr. Woodley could not establish *Strickland* prejudice. The North Carolina Court of Appeals reviewed the issue under *Strickland* and denied relief.

Although the case does not involve multiple representations, it does involve a personal conflict between counsel and the defendant that affected the entire course of the trial representation. This case thus presents a suitable vehicle for the Court to resolve the question it left open in *Mickens*.

STATEMENT OF THE CASE

A. *Trial*

Prior to trial, Mr. Woodley's attorney filed a motion to continue the trial due to concerns about her ability to properly represent Mr. Woodley during a then-current surge in the Covid-19 pandemic. The written motion alleged, *inter alia*, that "counsel[']s concerns for her own health will deprive the Defendant of effective assistance of counsel. . . . Covid-19 affects individuals in different ways with the most severe outcome being death. Counsel should not be required to expose herself to such risks simply for the State to have the ability to complete a murder trial." The motion also forecast that due to health and safety concerns, "the courthouse will not be able to afford the Defendant a 'public hearing.'" (Rpp. 29-33).

In arguing the motion to continue, counsel amplified her concerns about Covid, and explained why those concerns created a conflict of interest between her and Mr. Woodley. Counsel explained she is a single parent, and if she became ill with Covid, "the illness would wipe me and my family out." (Tp. 17). With respect to her representation of Mr. Woodley, counsel argued: "I'm concerned about being put in a position where I would be forced to try a case and make a decision, do I take my mask off to communicate to a jury, or do I keep it on because I feel incredibly unsafe sitting in a jury room trying a case without a mask[.]" (Tp. 13). "I'm being forced to choose between my health and well-being and effective representation, and I don't think that is appropriate when you are dealing with life without parole for a 21-year-old man." (Tp. 14). "I feel like I'm being asked to compromise my safety and well-being so the

State can get a case tried." (Tp. 18). "[H]ow can I be effective as this young man's trial attorney when I am concerned, do I wear my mask, don't wear my mask? Will that affect the jury if I take my mask off or don't? . . . I'm concerned about all of these things and I'm concerned about my family. . . . I do not think it's appropriate to ask me to make such serious decisions, [when] the young man is looking at life without parole." (Tpp. 19-20).

Ultimately, the following exchange took place between counsel and the trial court:

> [DEFENSE COUNSEL]: . . . I have grave concerns and I do not believe that I can be effective for Mr. Woodley. I have explained that to Mr. Woodley. I have explained that, you know, my mind is all over the place as it relates –
>
> THE COURT: You mentioned that a couple of times. Is it your position to the Court that you are emotionally and mentally unable to proceed as counsel for this defendant?
>
> [COUNSEL]: At this point, yes.
>
> THE COURT: Okay. And so you are calling into question your own competency to represent him?
>
> [COUNSEL]: Yes, sir.

(Tpp. 24-25).

Prior to ruling on the motion to continue, the trial court summarized its understanding of the issue. "I don't see any reason not to go forward with this trial, with the exception of one thing. I just had a defense counsel . . . tell me that she is not competent physically [sic] or emotionally to proceed with the trial on behalf of her client. . . . I am incredibly concerned about that." (Tp. 30).

Despite the trial court's expression of concern, the court denied the motion to continue without making any findings of fact or conclusions of law to resolve the

conflict of interest raised by Mr. Woodley's motion and counsel's supporting arguments. The trial court's comments gave no indication that the court doubted the credibility or sincerity of counsel's assertions.

B. Appeal

On appeal, Mr. Woodley argued, *inter alia*, that because counsel alerted the trial court to the conflict of interest and the trial court failed to resolve the conflict, the issue should be governed by *Holloway v. Arkansas*, 435 U.S. 475 (1978) and *Cuyler v. Sullivan*, 446 U.S. 335 (1980), and Mr. Woodley was entitled to relief upon a showing that the conflict adversely affected counsel's representation. (*State v. Woodley*, COA21-670, defendant-appellant's brief at 15-20).

Mr. Woodley pointed to several areas where counsel's representation was materially and adversely affected by the conflict. These include, *inter alia*, failing to object on constitutional public trial grounds to two obvious public trial violations despite anticipating in the written motion to continue that Mr. Woodley's constitutional right to a public trial in open court would be violated. Specifically, counsel failed to object when the trial court announced the motion to continue would be heard in a back room in the courthouse instead of in the publicly accessible courtroom. "Typically what we would do is send you out. But because of the social distancing and the difficulty with that, we're going to go in the back in another room and we're going to hear these motions outside your presence." (Tp. 10).

In response, the State argued that because trial counsel's conflict did not involve multiple representation, Mr. Woodley was required to show prejudice under

the *Strickland* standard. The State further argued that Mr. Woodley had not done so. (*State v. Woodley*, COA21-670, State's brief at 12).

The North Carolina Court of Appeals applied the *Strickland* standard without any discussion of Mr. Woodley's argument that the issue was governed by *Holloway* and *Sullivan*. *Woodley*, 880 S.E.2d at 747-48. The court ruled that Mr. Woodley could not meet either prong of the *Strickland* test. *Id*. at 748. The court made no attempt to reconcile this holding with its holding that trial counsel failed to preserve Mr. Woodley's constitutional public trial claim arising from the exclusion of his father from the courtroom during jury selection. *Id*. at 749-50. That claim would have amounted to structural error if properly preserved. *See Presley v. Georgia*, 558 U.S. 209 (2010) (*per curiam*).

The North Carolina Supreme Court summarily denied review of the case. *State v. Woodley*, 892 S.E.2d 607 (N.C. 2023). This Petition follows.

REASONS FOR GRANTING THE PETITION

1. This case presents an issue this Court recognized as an open question in *Mickens v. Taylor*, 535 U.S. 162, 176 (2002). The issue is what standard applies to a defendant's claim that his attorney labored under a conflict of interest not arising from multiple concurrent representations. Since *Mickens*, lower courts have splintered on the issue, resulting in an entrenched split of authority and a need for further guidance from this Court.

Mickens addressed a situation in which petitioner's court-appointed counsel had represented the decedent in juvenile court at the time of the murder. The judge

who appointed counsel knew or should have known about that representation but failed to make any conflict inquiry. The Court held that in the absence of any objection at trial, the judge's failure to conduct a conflict inquiry did not trigger a presumption of prejudice under *Holloway v. Arkansas*, 435 U.S. 475 (1978), rejecting petitioner's argument that *Wood v. Georgia*, 450 U.S. 261 (1981) imposed such a trigger any time a trial court with reason to know of a potential conflict fails to conduct an inquiry. *Mickens*, 535 U.S. at 170-74. Rather, the Court held, the trial court's failure to conduct an inquiry did not relieve the petitioner of his burden under *Cuyler v. Sullivan*, 446 U.S. 335 (1980), to show an actual conflict resulting in deficient performance by trial counsel. The Court affirmed the court below which found no such effect. *Mickens*, 535 U.S. at 173-74.

After announcing the Court's holding, the *Mickens* opinion went on to point out that the question presented presupposed, at a minimum, that the rule in *Sullivan* applied to the case, *i.e.*, that upon a showing of an actual conflict having an adverse impact on the representation no further showing of prejudice would be required. The Court noted that its decisions in both *Holloway* and *Sullivan* focused on the high probability of prejudice arising from multiple concurrent representations and the inherent difficulties in establishing *Strickland* prejudice in such situations. 535 U.S. at 175. The Court also recognized the Courts of Appeals had applied *Sullivan* "unblinkingly" to "all kinds of alleged attorney conflicts" not involving multiple concurrent representations, including successive representation and direct personal or financial conflicts between defendant and counsel. *Id*. at 174 (quoting *Beets v.*

Collins, 65 F.3d 1258, 1266 (5th Cir. 1995) (en banc)). The Court concluded by saying: "Whether *Sullivan* should be extended to such cases[2] remains, as far as the jurisprudence of this Court is concerned, an open question." *Id*. at 176.

In the years since *Mickens*, the Court has not answered this open question. Nor has the Court answered the related question implicit in *Mickens* of whether, and if so, how *Holloway* applies to such cases – *i.e.*, what standard applies when a defendant raises a non-concurrent-representation conflict issue before the trial court and the trial court fails either to alleviate the conflict or to find as a matter of fact, after inquiry, that no such conflict exists.

2. Since *Mickens*, the federal courts of appeals and state courts of last resort have developed an entrenched split of authority over whether *Sullivan* is strictly limited to cases involving multiple concurrent representations. Some courts have strictly limited the application of *Sullivan* to such cases, while others have applied *Sullivan* to at least some other categories of attorney conflicts. Some courts have issued inconsistent opinions, and others have noted the open question but declined to resolve it.

At one end of the spectrum, even before *Mickens,* the Fifth Circuit strictly limited the application of *Sullivan* to cases involving multiple representation and held that *all* conflict claims involving an attorney's self-interest must be judged under

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[2] In context, "such cases" explicitly refers to cases involving successive prosecutions, and implicitly also encompasses conflicts not involving multiple representations at all.

the *Strickland* standard. *Beets v. Collins*, 65 F.3d 1258 (5th Cir. 1995) (en banc). Since *Mickens*, the Fifth Circuit has continued to adhere to this rule. *E.g., United States v. Gentry*, 941 F.3d 767 (5th Cir. 2019).

The First, Sixth, Tenth and Eleventh Circuits have also expressly declined to extend *Sullivan* to conflicts not involving multiple representation. *United States v. Mota-Santana*, 391 F.3d 42, 46 (1st Cir. 2004); *McRae v. United States*, 734 Fed. Appx. 978, 983-84 (6th Cir. 2018); *United States v. Williamson*, 859 F.3d 843, 856 (10th Cir. 2017); *Cruz v. United States*, 188 Fed. Appx. 908, 913-14 (11th Cir. 2006).

Some state courts of last resort have also expressly limited *Sullivan* to conflicts involving multiple representation. *See*, *e.g.*, *State v. A.B.*, 881 S.E.2d 406, 415-16 (W. Va. 2022) (limiting *Sullivan* to multiple concurrent representations); *State v. Alvarado*, 481 P.3d 737, 748-49 (Idaho 2021); *Steward v. Commonwealth*, 397 S.W.3d 881, 883 (Ky. 2012) (limiting *Sullivan* to multiple concurrent representations); *People v. Doolin*, 198 P.3d 11, 41-42 (Cal. 2009) (adopting reasoning of *Beets* and disavowing prior cases stating a more favorable standard under state constitution). Critically, as the State argued below, the North Carolina Supreme Court has held that the *Strickland* standard applies to conflicts not involving multiple representations. *State v. Phillips*, 711 S.E.2d 122, 137-38 (N.C. 2011).

The Fourth Circuit expressly rejected the notion that *Sullivan* is limited to conflicts arising from multiple representations. *Rubin v. Gee* 292 F.3d 396, 402 (4th Cir. 2002). In *Rubin*, the Court granted habeas relief under the AEDPA standard based on an unreasonable application of *Sullivan* in a case not involving multiple

representation. While acknowledging the doubt expressed in *Mickens* about applying *Sullivan* to personal conflicts, the court concluded "the Court has never indicated that *Sullivan* would not apply to a conflict as severe as the one presented here." *Id*. at 402, n.2.

Numerous state high courts have continued to apply *Sullivan* to personal conflicts between counsel and the defendant, at least in some circumstances. *See, e.g., Diaz v. Comm'r of Corr.*, 279 A.3d 147, 158 (Conn. 2022); *Hall v. Jackson*, 854 S.E.2d 539 (Ga. 2021); *State v. Harter*, 340 P.3d 440 (Haw. 2014); *Taylor v. State*, 51 A.3d 655, 669 (Md. 2012); *Acosta v. State*, 233 S.W.3d 349 (Tx. Ct. Crim. App. 2007); *Brown v. State*, 894 So.2d 137, 157 (Fla. 2004). In *Acosta*, the Texas Court of Criminal Appeals held it would continue to apply the *Sullivan* standard to all attorney conflicts. The court explained: "it does not seem difficult to glean a workable standard out of [*Sullivan*] without limiting it to the multiple representation context. Its essential holding is . . . the appellant must show that an actual conflict of interest existed and that trial counsel actually acted on behalf of those other interests during the trial." *Id*. at 355. The court expressly disagreed with the Fifth Circuit's reasoning in *Beets*, *id*. at 354, reaffirming its pre-*Mickens* expression of the rule: "An 'actual conflict of interest' exists if counsel is required to make a choice between advancing his client's interest in a fair trial or advancing other interests (perhaps counsel's own) to the detriment of his client's interest." *Id*. at 355 (quoting *Monreal v. State*, 947 S.W.3d 559, 564 (Tx. Ct. Crim. App. 1997)).

Other courts have adopted more nuanced positions or have shifted positions over time. In *State v. Avina-Murillo*, 917 N.W.2d 865 (Neb. 2018) the Nebraska Supreme Court declined to limit *Sullivan* to multiple representations. While the court stated that *Strickland* should apply in most personal conflict situations, it concluded "we can envision a situation in which the conflict is so serious that the defendant should be relieved of the obligation to show [*Strickland* prejudice]. Thus, we think the better approach is to determine the standard on a case-by-case basis." *Id*. at 878.

In *People v. Payton*, 4 N.E.3d 352 (N.Y. 2013), the conflict arose because at the time of trial, the defendant's attorney was under criminal investigation by the same office prosecuting the defendant. Although the court rejected an automatic reversal rule for this conflict, the court also vacated the summary denial of the defendant's motion to set aside his conviction and remanded for a hearing at which the defendant would be entitled to relief if he could show "the conduct of his defense was in fact affected by the operation of the conflict of interest," *i.e.*, under the *Sullivan* standard. *Id*. at 355.

In *United States v. Walter-Eze*, 869 F.3d 891 (9th Cir. 2017) the Ninth Circuit addressed a conflict that arose when the trial court offered to allow a requested continuance of defendant's trial only if defense counsel paid certain costs associated with the delay. Counsel turned down the trial court's offer. The Ninth Circuit declined to categorically limit *Sullivan* to multiple representations, instead explaining: "Assuming without deciding that *Sullivan*'s rule of presumed prejudice as a matter of law can extend to a case of a pecuniary conflict, we hold that under the facts

presented, *Sullivan* does not control this case." *Id*. at 900. The court reasoned this was not a case "where every interaction with or decision made by counsel is tainted by the conflict. Rather, . . . the actual conflict is relegated to a single moment of the representation and resulted in a single identifiable decision that adversely affected the defendant." As a result, there was no difficulty in applying the *Strickland* prejudice test and thus no need to resort to the prophylactic protection of the *Sullivan* standard. *Id*. at 906.

Shortly after *Mickens*, the Second Circuit expressly rejected the argument that *Mickens* limited *Sullivan*'s application to cases of multiple representation, explaining that "the discussion of the scope of *Sullivan* is dicta." *Tueros v. Greiner*, 343 F.3d 587, 593 (2nd Cir. 2003) (Sotomayor, J.). *Tueros* recognized that *Wood v. Georgia* represented an application of *Sullivan* potentially outside the context of multiple representations. "*Wood* suggests that relationships other than representation of defendant by counsel may create actual conflicts." *Id*. at 594, n.4. Subsequently, however, in an opinion that ignores *Tueros*, the Second Circuit held that after *Mickens*, *Sullivan* is limited to multiple representation conflicts. *Torres v. Donnelly*, 554 F.3d 322, 326 (2nd Cir. 2009).

The Eighth Circuit has moved in the opposite direction from the Second Circuit. Initially, the court reaffirmed its pre-*Mickens* precedent limiting *Sullivan* to multiple representation cases. "[W]here the alleged conflict involves ethical issues other than multiple or serial representation, this Circuit has held that *Strickland* is still the appropriate standard." *United States v. Young*, 315 F.3d 911, 914, fn.5 (8th

Cir. 2003) (citing *Caban v. United States*, 281 F.3d 778 (8th Cir. 2002)). Subsequently, however, the Court retreated from this position, describing this portion of *Young* as dicta, and stating "[i[n this circuit, it is unclear whether we limit application of [*Sullivan*] to conflicts involving multiple or serial representation," *Covey v. United States*, 377 F.3d 903, 907-08 (8th Cir. 2004).[3]

Finally, in *Ausler v. United States*, 545 F.3d 1101 (8th Cir. 2008), the court addressed a conflict claim not involving multiple representations under the *Sullivan* standard where counsel raised the issue prior to trial. "When [counsel] timely raised a possible conflict of interest that did not involve representation of multiple defendants, the district court had a duty to determine whether [counsel]'s representation was compromised by an actual conflict of interest. But when the court concluded otherwise, to obtain post-conviction relief Ausler must at least show (i) that a conflict of interest existed, and (ii) that the conflict adversely affected [counsel]'s subsequent performance." *Id*. at 1104. Ultimately, Ausler's claim failed on the merits under the *Sullivan* standard because he could not show an actual conflict.

The Kansas Supreme Court has also shifted its position over time. In *State v. Cheatham*, 292 P.3d 318, 337 (Kan. 2013) the court analyzed a conflict claim arising from counsel's flat fee agreement with the defendant in a capital case under *Sullivan*, not *Strickland*. The court held that the fee agreement, which created a disincentive

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[3] Despite *Covey*, at least two subsequent courts in other jurisdictions have continued to group the Eighth Circuit among jurisdictions strictly limiting *Sullivan* to conflicts arising from multiple representations based on *Young*. *See Diaz*, 279 A.3d at 158, citing *McRae*, 734 Fed. Appx. at 983.

for counsel to spend time and resources on defendant's case, created a conflict of interest between the defendant and counsel's personal interests. The court vacated the defendant's capital convictions because that conflict adversely affected counsel's representation of the defendant. *Id.* at 340-41.

Subsequently, however, Kansas has treated the issue of whether *Sullivan* or *Strickland* applies to conflicts not arising from multiple representations – which it calls the "*Mickens* reservation" issue – as unsettled. In *Sola-Morales v. State*, 335 P.3d 1162 (Kan. 2014) the court remanded for an evidentiary hearing on defendant's conflict claim arising from counsel's lack of candor towards the defendant and the court regarding certain motions. The court left it for the remand court "to determine which test is applicable in this *Mickens* reservation analysis: The standards of [*Sullivan*] (adverse effect on counsel's representation) or *Strickland* (prejudice[.])." *Id*. at 1178. Following remand, the Kansas Court of Appeals noted that the *Mickens* reservation remains an open question in Kansas, and held it was not necessary to resolve the question in the case before it. *Sola-Morales v. State*, 335 P.3d 887, 2019 Kan. App. Lexis 746 (Kan. App. 2019) (unpublished).

3. The split of authority is entrenched and openly acknowledged and can only be resolved by this Court. As noted above, in *Acosta*, the Texas Court of Criminal Appeals expressly disagreed with the Fifth Circuit's opinion in *Beets*. Similarly, in *Diaz*, the Connecticut Supreme Court noted that its position is in conflict with a majority of federal courts of appeals consisting of the First, Second, Fifth, Sixth, Eighth, Tenth and Eleventh Circuits, all of which limit *Sullivan* to multiple

representation conflicts, but consistent with the Fourth, Seventh, and Ninth Circuits, which recognize that *Sullivan* may apply more broadly. *Diaz*, 279 A.3d at 158.

The split of authority and the recognition that this Court has left the question open since *Mickens* has also been the subject of scholarship. *See, e.g.,* Tyler Daniels, Note, *Presumed Prejudice: When Should Reviewing State Courts Assume a Defendant's Conflicted Counsel Negatively Impacted the Outcome of the Trial?* 49 Fordham Urb. L.J. 221 (2021); Sheri Lynn Johnson, *Racial Antagonism, Sexual Betrayal, Graft, and More: Rethinking and Remedying the Universe of Defense Counsel Failings*, 97 Wash. U. L. Rev. 57, 88-95 (2019); Anne Bowen Poulin, *Conflicts of Interest in Criminal Cases: Should the Prosecution Have a Duty to Disclose?* 17 Am. Crim. L. Rev. 1135 (2010).

In North Carolina, the rule promulgated by the North Carolina Supreme Court in *Phillips* and applied below is in conflict with the rule the Fourth Circuit applied in *Rubin v. Gee*. Similarly, in Texas, the rule promulgated by the Texas Court of Criminal Appeals directly conflicts with the rule applied by the Fifth Circuit based on *Beets*. Until and unless this Court answers the question it left open in *Mickens*, defendants' right to conflict-free counsel will receive different levels of protection depending on both location and whether the case arises in state or federal court.

4. This case presents a suitable vehicle to resolve the question left open in *Mickens*. There are two reasons for this. First, the issue was squarely raised below. In litigating Mr. Woodley's motion to continue, trial counsel alerted the trial court that her personal interest in avoiding exposure to Covid conflicted with Mr. Woodley's

right to a fair trial with effective, conflict-free counsel. In North Carolina, a pretrial motion to continue is an appropriate vehicle to raise a claim that proceeding to trial would violate the defendant's constitutional right to counsel. *See*, *State v. Rogers*, 529 S.E.2d 671, 674-75 (N.C. 2000). The trial court engaged with counsel regarding the conflict, recognizing the significance of counsel's assertions. By denying the motion without findings of fact, the trial court neither found there was no actual conflict nor relieved Mr. Woodley of the burden of proceeding to trial with conflicted counsel. The issue was directly presented and fully briefed in Mr. Woodley's appeal, and the appellate court ruled against Mr. Woodley, reviewing his argument under *Strickland* rather than *Sullivan*.

The second reason this case presents a suitable vehicle is that Mr. Woodley's conflict claim fits comfortably within any of the various rationales discussed by courts that continue to apply *Sullivan* to at least some personal conflicts between counsel and defendant. That makes this case a good vehicle to delineate what specific circumstances might make it appropriate to apply *Sullivan* outside the multiple representation context.

In *Holloway*, the Court explained that the trial court should have accorded deference to counsel's representations that a conflict existed. Defense counsel "is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial." 435 U.S. at 485 (citation omitted). As an officer of the court, defense counsel's pronouncements "should be given weight commensurate with the grave penalties risked for misrepresentation."

Id. at 486, fn.9. In *Mickens*, the Court emphasized that deference to counsel's assessment was part of the justification for *Holloway*'s automatic reversal rule. *Mickens*, 535 U.S. at 167-68. Indeed, counsel raising the conflict before the trial court is the very factor that distinguishes *Holloway*'s automatic reversal rule from *Sullivan*'s presumption of prejudice that arises only upon a showing of an actual conflict that adversely affects the representation.

Several courts that have addressed personal conflicts under the *Sullivan* standard have done so in situations where counsel raised the issue before the trial court, affording the trial court an opportunity to ameliorate any conflict prior to trial. *See Ausler*, 545 F.3d at 1104 (noting that to obtain relief when counsel timely raised a personal conflict issue before the trial court, the defendant would need to show (i) an actual conflict existed, (ii) that adversely affected counsel's performance – *i.e.*, meet the *Sullivan* standard); *Harter*, 340 P.3d at 325-26. ("The exchange between [counsel] and [the trial court] demonstrates that counsel believed her representation of Harter would be adversely affected by this conflict of interest. [Counsel's] opinion regarding her ability to provide effective assistance of counsel should have been afforded significant consideration by the trial court.").

Some courts open to the application of *Sullivan* to personal conflicts have recognized that the seriousness of the conflict is an appropriate consideration for applying *Sullivan*. In *Rubin*, for example, the court repeatedly described the conflict as "severe" or "serious," including in its explanation of why it was applying *Sullivan* notwithstanding the doubts expressed by this Court in *Mickens*. *Rubin*, 292 F.3d at

402, n.2; *see also*, *id*. at 406. Similarly, the Nebraska Supreme Court identified seriousness of the conflict as a factor that might justify reviewing a particular personal conflict under *Sullivan* rather than under *Strickland*. *Avina-Murillo*, 917 N.W.2d at 878.

Finally, some courts continue to apply *Sullivan* to personal conflicts that infect the entire representation. In *Holloway*, the Court explained that the evil in joint representation is "in what the advocate finds himself compelled to *refrain* from doing." 435 U.S. at 490. The Court recognized that measuring prejudice arising from actions not taken throughout the representation "would require, unlike most cases, unguided speculation." *Id*. at 491. Similarly, in *Mickens*, the Court explained: "Both *Sullivan* itself and *Holloway* stressed the high probability of prejudice arising from multiple concurrent representation, *and the difficulty of proving that prejudice*. Not all attorney conflicts present comparable difficulties." 535 U.S. at 175 (cleaned up, emphasis added). The Court further explained: "The purpose of our *Holloway* and *Sullivan* exceptions from the ordinary requirements of *Strickland*, however, is . . . to apply needed prophylaxis in situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel." *Id*. at 176.

Courts that have continued to apply *Sullivan* broadly have recognized that multiple concurrent representation is not the only conflict situation where measuring prejudice is difficult and necessarily speculative. Rather, at least some personal

conflicts also "present comparable difficulties." This is particularly true when a personal conflict between counsel and client permeates the entire trial.

In *Acosta*, for example, the Texas Court of Appeals quoted the "needed prophylaxis" language from *Mickens* and stated the same rationale applied to the conflict presented there, one that did not arise from multiple concurrent representations. *Acosta*, 233 S.W.3d at 355, (quoting *Mickens*, 535 U.S. at 176). In *Rubin*, the conflict arose because on the night of the murder, counsel advised the defendant in a manner that exposed counsel to criminal liability for obstruction of justice, resulting in both a grand jury investigation and an Attorney Grievance Commission inquiry. 292 F.3d at 403-04. Nevertheless, counsel continued to represent the defendant throughout the trial process, rendering themselves unavailable as witnesses to explain that defendant's post-shooting conduct, which appeared quite inculpatory, was taken on advice of counsel. *Id*. at 403. In applying *Sullivan*, the court noted that this conflict, like the conflict in *Holloway*, was detrimental "because of what it tends to prevent the attorney from doing." *Id*. at 405, quoting *Holloway*, 435 U.S. at 489-90. Ultimately, counsel's interest in minimizing their exposure for their own misconduct tainted the entire process. "At all times, the attorneys' fidelity to their own interests superseded any sense of obligation they may have had to their client." *Id*. at 404.

In contrast, in *Walter-Eze*, the Ninth Circuit addressed the converse situation. Trial counsel's personal conflict with the defendant did not taint the entire proceeding but, rather, only impacted one specific decision made by counsel, the decision to forego

a continuance upon counsel paying the associated costs. "This case does not present an example of a situation . . . where every interaction with or decision made by counsel is tainted by the conflict." *Walter-Eze*, 869 F.3d at 906. Because counsel's single conflicted decision was amenable to review under *Strickland's* prejudice framework, the situation did not call for the prophylactic protection of *Sullivan*'s presumption of prejudice.

In this case, counsel told the trial court she was mentally and emotionally unfit to represent the defendant at that time due to the conflict between her interest in avoiding exposure to Covid and Mr. Woodley's interest in a fair trial with effective representation. As in *Holloway* and *Harter*, the trial court failed to accord counsel's concerns the weight commensurate with her status as an officer of the court. Unless the trial court doubted the credibility of counsel's protestations – and there is no finding or other indication from the record that this was the case – the trial court should have taken action to relieve Mr. Woodley from the impact of counsel's self-acknowledged conflict of interest.

This conflict permeated the entire trial. While Mr. Woodley identified at least two discrete areas where counsel's performance was adversely affected by the conflict – counsel's failure to object to violations of his constitutional right to a public trial and her failure to object to the trial court's violation of the statutorily mandated jury selection protocol – Mr. Woodley also noted additional circumstances where counsel's performance was inexplicably substandard. (*State v. Woodley*, COA21-670, defendant-appellant's brief at 19-20).

The conflict also was serious and severe. As a result of the conflict, Mr. Woodley was forced to proceed to trial on a charge of first-degree murder, carrying a mandatory sentence of life without parole, while represented by counsel who announced that she was mentally and emotionally incapable of representing him effectively at that time. Short of an attorney intentionally sabotaging a defendant's position, it is hard to imagine a more severe conflict. In *Rubin*, the court concluded by observing "[i]t is hard to imagine a case that would call the fundamental fairness of a trial into more question than this one. What happened here should never happen in our system." 292 F.3d at 406. The same is true in this case. No defendant facing life without parole should be required to proceed to trial with counsel who has openly declared herself unfit to represent him due to her personal interests.

Because Mr. Woodley's case satisfies all of the criteria used by various courts to explain the circumstances in which it is appropriate to apply the *Sullivan* presumption of prejudice in cases involving personal conflicts of interest, the case provides a suitable vehicle for this Court to address which, if any, of those circumstances either singly or in combination should trigger the *Sullivan* presumption of prejudice.

CONCLUSION

This case presents a commonly recurring issue that this Court has left open, and on which there is an entrenched split of authority among the lower courts. For the reasons set forth above, this Court should grant Mr. Woodley's Petition for a Writ of Certiorari.

Respectfully submitted,

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