No.: 23-7798

IN THE

SUPREME COURT OF THE UNITED STATES

EVAN C. WILHELM,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Evan C. Wilhelm, *pro se*
DC No.: N25549
Madison Correctional Institution
382 S.W. MCI Way
Madison, FL 32340-4430

QUESTION PRESENTED

Whether prejudice should be presumed when a conflict of interest forces Counsel to choose between denigrating their own performance on behalf of their client or protecting their professional reputation?

Considering this Court's holding in *Christeson v. Roper*, 574 U.S. 373, 135 S.Ct. 891, 190 L. Ed. 2d 763 (2015), Mr. Wilhelm argues that the presumption of prejudice established in *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980), is warranted in the exceptional circumstance where Counsel has missed a client's deadline and the only viable strategy for his client is to admit fault and publically denigrate his or her own performance.

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties **do not** appear in the caption of the case on the cove page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

- Campbell, Jack – State Attorney, Florida Second Judicial Circuit
- Cannon, Hope Thai – United States Magistrate Judge, Northern District of Florida
- Carroll, Kevin – Circuit Judge, Florida Second Judicial Circuit
- Ceballos, Alan – Former Counsel for Appellant
- Dixon, Ricky – Secretary, Florida Department of Corrections
- Dobson, Stephen – Former Counsel for Appellant
- Dodson, Charles – Circuit Judge, Florida Second Judicial Circuit
- Hutchins, John – Former Assistant State Attorney, Florida Second Judicial Circuit
- Inch, Mark – Former Secretary, Florida Department of Corrections
- Jordan, Bryan – Assistant Attorney General, State of Florida
- Meggs, William – Former State Attorney, Florida Second Judicial Circuit
- Moody, Ashley – Attorney General, State of Florida
- Osterhaus, Timothy – Florida District Judge, First District Court of Appeal
- Smith, Richard – Former Counsel for Appellant
- Stafford, William - United States District Judge, Northern District of Florida
- Weiss, Kaitlin – Assistant Attorney General, State of Florida
- Wilhelm, Evan – Appellant
- Wilhelm, Robert – Former Counsel for Appellant
- Winsor, Allen – Former Florida District Judge, First District Court of Appeal
- Wolf, James – Former Florida District Judge, First District Court of Appeal

RELATED CASES

- *State v. Wilhelm*, Second Judicial Circuit in and for Leon County, Florida.
  Case No.: 11-CF-00104; Judgment entered April 26, 2012.

- *Wilhelm v. State*, First District Court of Appeal, Tallahassee, Florida.
  Cited as *Wilhelm v. State,* 253 So.3d 736 (Fla. 1st DCA 2018).

- *Wilhelm v. State*, United States District Court, Northern District of Florida, Tallahassee, Florida.
  Case No.: 4:19-CV-00572-WS-HTC; Judgment entered May 13, 2022.

- *Wilhelm v. State*, United States Court of Appeals for the Eleventh Circuit, Atlanta, Georgia
  Case No.: 22-11991; Judgment entered January 31, 2024.

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[X] For cases from **federal courts:**

The opinion of the United States court of appeals appears at **Appendix A** to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but not yet reported; or,

[X] is unpublished.

The opinion of the United States district court appears at **Appendix B** to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but not yet reported; or,

[X] is unpublished.

JURISDICTION

This case comes from the federal courts. The date on which the United States Court of Appeals decided this case was January 31, 2024. No petition for rehearing was timely filed in this case.

The jurisdiction of this Court is invoked under 28 U.S.C § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in pertinent part, "[n]o person shall be ... deprived of life, liberty, or property, without due process of law..."

The Sixth Amendment to the U.S. Constitution provides, in pertinent part,"[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence."

28 United States Code 2254(d), provides, An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim **(1)** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or **(2)** resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

Evan Wilhelm was arrested on January 9, 2011, after a tragic and fatal firearm accident at Florida State University. Mr. Wilhelm was 20 years old at the time. As expected, the incident garnered significant media attention.

The Wilhelm family met with and retained local Tallahassee attorneys Stephen Dobson and Richard Smith the day after the accident. It was apparent from that very first meeting that this case was not defensible at trial because Mr. Wilhelm had called 911 immediately after the accident and admitted responsibility to first-responders. In view of that, Counsel suggested entering a plea and seeking a mitigated sentence. The Wilhelm family agreed.

Mr. Wilhelm was born on May 2, 1990, and was 20 years old when the accident occurred. At that time, Florida's Youthful Offender law allowed qualified defendants to seek a mitigated sentence limited to 6 years so long as they were sentenced before their 21st birthday.[1] Since Counsel were simply seeking mitigation, they had nearly four months to timely advise Mr. Wilhelm of his right to seek Youthful Offender prior to his 21st birthday on May 2, 2011. They failed to do so.

On October 26, 2011, Mr. Wilhelm and his parents again went to Tallahassee to meet with Dobson and Smith. At this meeting, Counsel specifically and explicitly recommended seeking Youthful Offender. Because he had no criminal record and this was an accidental crime for which he admitted responsibility, Counsel advised the Wilhelm family that Evan was "the ideal candidate", the person "for whom the statute was written". Considering the 38 year maximum and 10.8 minimum guideline sentence that Mr. Wilhelm faced, the family was elated with such promising news.

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[1] *See* Fla. Stat. § 959.04(1), (2010)

Nevertheless, on November 11, 2011, Wilhelm's father, Robert Wilhelm (a Florida civil attorney since 1974 with no experience in criminal law), learned that the Youthful Offender statute required that Evan be sentenced by his 21st birthday, and thus that the deadline had been missed by more than five months. When Robert Wilhelm drove to Tallahassee and confronted Dobson and Smith about their error in the parking lot of their office, they admitted that they mistakenly thought that Evan was 19 years old when the accident occurred. Wilhelm's father promptly filed his own Notice of Appearance, and instructed Dobson and Smith to do no work on the case until further notice. Dobson and Smith described their relationship with the Wilhelm family as "acrimonious" after the discovery of their error.

Upon discovering that their error had cost Mr. Wilhelm any opportunity to pursue the strongest mitigation of sentence, Dobson and Smith were obligated by state and federal law to put that information into the record by way of either a Motion for Substitution of Counsel or a formal written Waiver of their conflict of interest.[2] They did neither, keeping their predicament (and certainly their client's as well) out of the official record of proceedings.

On January 27, 2012, Wilhelm's father and Jacksonville attorney Alan Ceballos, who appeared in the case as additional counsel, met with attorney Dobson in his Tallahassee office. At that meeting, Wilhelm's father received a promise and handshake from Dobson that he would: (1) confess to the court as mitigation on Evan's behalf his error in missing Youthful Offender, (2) explain that he and his partner had always considered Evan the "ideal" candidate for Youthful Offender and had recommended pursuing it without realizing the deadline had

[2] *See, e.g., Holloway v. Arkansas*, 98 S.Ct. 1173, 1178-1179 (1978); *and Wood v. Georgia*, 101 S.Ct. 1097, 1104 (1981). ABA Standards for the Defense Function, Standard 4-1.7(a),(c), (4th Edition), *and* Florida Bar Rules 4-1.7, 4-1.16

expired, and (3) ask the court for a lesser sentence that resembled a Youthful Offender type sentence of 6 years.

Dobson's promise to "right his wrong" seemed to be the best way of presenting this critical mitigating evidence, especially since they were highly regarded criminal defense lawyers in Tallahassee who were familiar with the local judges, prosecutors, rules of court, etc. The alternative was to terminate counsel and call them as a potentially adverse witness. Wilhelm's father reminded Dobson and Smith of their promise on at least two occasions prior to sentencing, and described this strategy as an important effort to make something positive out of the bad situation created by the missed deadline. Counsel admitting fault became the central feature of the defense strategy.

Shortly before the sentencing hearing, Dobson filed a sentencing memorandum which outlined mitigating factors that were already a matter of record and well known to the prosecution. Remarkably, the memorandum omitted any reference to the fact that the Youthful Offender deadline was missed by the lawyers. Instead, in a most disingenuous if not offensive way, Dobson merely lamented that the statute, as rewritten in 2008, might conceivably deny some defendant, someday, somewhere, the ability to seek Youthful Offender if unable to be sentenced before their 21st birthday:

> It is respectfully submitted that profound injustices can occur when a Defendant commits an offense at an eligible age under the [Youthful Offender] Act and must then abandon a diligent defense in order to be sentenced while still eligible under the Act.... defense counsel can be placed in the impossible situation of having to elect between a thorough and competent defense or alternatively to rush to a sentencing hearing.

But that didn't happen here. Dobson and Smith did not grapple with some impending sentencing deadline brought on by the Youthful Offender statute. Instead, they completely

overlooked any such deadline and were *completely unaware* of it until well after it had expired. The memorandum failed to mention the fact that it was Counsels' mistake, and not the language of the statute, that deprived Mr. Wilhelm of his eligibility.

The sentencing hearing was held on June 15, 2012, in the largest courtroom of the Leon County Courthouse and was packed with reporters and attendees. Dobson himself stated that the atmosphere throughout was as heated, highly charged, and as vitriolic towards his client as anything he had seen in more than 34 years of practice.

Regardless of the mitigation presented at sentencing, Dobson was again confronted with his duty to reveal the conflict when the prosecutor argued in open court that Mr. Wilhelm himself chose to forego Youthful Offender, stating:

> "Clearly, youthful offender does not apply. The defendant at the time this happened was twenty years old. Had he made the decision to come in and enter a plea, he would have been able to get sentenced pursuant to that statute. *But he chose not to.*"

Upon hearing this gross misrepresentation by the State, Dobson and Smith were undoubtedly ethically bound to rise and reveal the truth. But there was no objection and no response.

When given a final opportunity to stand in closing argument and reveal the powerful circumstance that could save his client years of imprisonment, Dobson's shirked his responsibility in order to avoid embarrassment and damage to his own professional reputation, and instead proceeded with the most ironic of closing arguments – highlighting Evan's good character for taking responsibility for his mistakes. As was later discovered, Dobson and Smith's legal malpractice policy also precluded them from admitting their error, as such an admission would void coverage.

Mr. Wilhelm was ultimately sentenced to 20 years prison and 10 years probation.

After sentencing, Mr. Wilhelm timely filed his "Corrected Rule 3.850 Motion for Post-Conviction Relief" in the Florida Second Judicial Circuit. The motion alleged, in pertinent part, that Counsel was ineffective where they allowed his Youthful Offender eligibility to expire, and that their error created an actual conflict of interest.

An evidentiary hearing was held on January 14 and 15, 2016, during which Dobson and Smith admitted that they missed Youthful Offender due to their mistaken assumption regarding Mr. Wilhelm's age, and that their failure deprived him of eligibility consideration. Dobson also acknowledged that he did in fact promise to admit fault, but when asked why he failed to uphold his agreement at sentencing, he offered two contradictory explanations: first, that he forgot about the agreement; and then, that he elected not to mention the error because he felt that sufficient mitigation had been presented. This would mean that Counsel somehow "lost sight" of their ethical duty and the requirements of the American and Florida Bar Rules for a full seven months. Notably, Dobson and Smith's malpractice attorney was at the hearing.

The Post-Conviction Court held:

> The testimony is clear that attorneys Dobson and Smith mistakenly believed their client was 19 at the time of the offense and that as result youthful offender status was not discussed with the client or his family (or meaningfully pursued) prior to its expiration on May 2, 2011. All witnesses' testimony at the hearing was consistent to this point. It also appears that while potential Youthful Offender sentencing was discussed with Mr. Wilhelm and his family, those discussions occurred after the time had run, but before the running had been discovered by defense counsel.

Although the court held that Counsel's representation with respect to Youthful Offender was deficient, it denied Mr. Wilhelm's claims, finding that the error made no difference in the outcome of the proceedings. The denial order made no mention of the conflict of interest issue.

The Florida First District Court of Appeal affirmed this decision, and despite the lower court's silence on the conflict found "no merit to the argument that counsel's failure to own up to miscalculating Mr. Wilhelm's age at the sentencing hearing created a conflict of interest and ineffective assistance." However, this opinion plainly misstated the issue at hand: Mr. Wilhelm did not allege that Counsel's failure to admit their error at sentencing *created* a conflict of interest; he alleged that Counsel's failure to admit their error at sentencing was the *result* of the conflict of interest created by the missed deadline and promise to make up for it, which is meaningfully different.

Mr. Wilhelm timely filed a petition pursuant to 28 U.S.C. § 2254 which raised these same issues. On February 28, 2022, the Magistrate Judge issued a Report and Recommendation, finding that Counsel's representation was deficient but that it made no difference in the outcome, and recommending that Mr. Wilhelm's § 2254 petition be denied and that a Certificate of Appealability be denied. Mr. Wilhelm objected to the Report and Recommendation. On May 13, 2022, the District Court, the Hon. William Stafford, entered an order accepting the Report and Recommendation but granting a Certificate of Appealability on the following issues: (1) Whether Mr. Wilhelm was denied Due Process of law under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution where Counsel allowed his Youthful Offender eligibility to expire due to a careless error; (2) Whether Mr. Wilhelm was denied Due Process of law under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution where Counsel labored under an actual conflict of interest.

On January 31, 2024, the Eleventh Circuit Court of Appeals affirmed the District Court's Order Denying Mr. Wilhelm's Petition for Writ of Habeas Corpus.

REASON FOR GRANTING THE PETITION

It has long been recognized that the Sixth Amendment protects the right to counsel whose undivided loyalties lie with the client. When an attorney is placed, or places themselves, in a situation inherently conducive to divided loyalties, a conflict of interest exists because action on behalf of one will, of necessity, adversely affect the other.

In *Strickland v. Washington,*[3] this Court determined that in most Sixth Amendment ineffectiveness cases, a defendant must show that counsel's performance was both deficient and had a prejudicial effect on the case. In some cases, however, prejudice is presumed if there is a conflict of interest. In *Cuyler v. Sullivan,*[4] (hereafter referred to as "*Sullivan*"), this Court established a separate test which presumes prejudice when a defendant demonstrates that an "actual conflict of interest adversely affected his lawyer's performance".[5] Adverse effect is shown when there is a link between counsel's conflict and a plausible alternative defense strategy that might have reasonably been pursued, but for the conflict.[6] It is also not necessary to prove that the alternative strategy would have been successful, only that it is a viable alternative.[7]

Significant to this case, an adverse effect is not always revealed by a review of what counsel has done. "The harm from representing conflicting interests lies not just in what the attorney does but also 'in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process.'"[8] Thus, the existence of an actual conflict cannot be governed solely by the perceptions of the

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[3] See *Strickland v. Washington*, 104 S. Ct. 2052 (1984)
[4] See *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)
[5] *Id.* at 348.
[6] See *Freund v. Butterworth*, 165 F.3d 839, 860 (11th Cir. 1999) (*en banc*)
[7] See *Winkler v. Keane*, 7 F.3d 304, 309 (2nd Cir. 1993)
[8] See *United States v. Jones*, 52 F.3d 924, 926 (11th Cir. 1995)(citing *Holloway v. Arkansas,* 98 S.Ct. 1173, 1182 (1978))

attorney; the court itself must examine the record to discern whether the attorney's behavior seems to have been influenced by the suggested conflict.[9]

Though *Sullivan* dealt specifically with a conflict of interest stemming from the joint representation of multiple clients, the Circuit Courts have applied the *Sullivan* standard to numerous conflicts beyond multiple representation. A majority of these conflict of interest cases involved the interests of clients against counsel's personal interests.

The Second Circuit, in *Winkler v. Keane*[10], applied *Sullivan* to a conflict between the interest of the lawyer and the interest of his client. The *Winkler* Court held that counsel's contingency fee (that trial counsel would earn an extra $25,000 only if Winkler was acquitted or otherwise not found guilty) created an actual conflict of interest for trial counsel because Winkler's interests in effective representation were pitted against counsel's monetary interests. Specifically, the Second Circuit stated that "[t]rial counsel had a disincentive to seek a plea agreement, or to put forth mitigating defenses that would result in conviction of a lesser included offense. Plainly the contingency fee agreement created an actual conflict of interest."[11] Importantly, to determine whether an actual conflict existed, the *Winkler* court focused only on the objective divergence of interests between the lawyer and his client.

Two years later, in *Lopez v. Scully*,[12] the Second Circuit again applied *Sullivan* to a personal conflict of interest between attorney and client. After sentencing, Lopez moved to withdraw his plea and alleged that counsel coerced him through threats and misinformation. For counsel to argue in favor of the motion, it would require admitting serious ethical violations and would possibly subject him to liability for malpractice. On the other hand, "any contention by

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[9] See e.g. *Sanders v. Ratelle*, 21 F.3d 1446, 1452 (9th Cir. 1994)
[10] See *Winkler v. Keane*, 7 F.3d 304 (2d Cir. 1993)
[11] *Id.* at 307-308
[12] See *Lopez v. Scully*, 58 F.3d 38 (2nd Cir. 1995)

counsel that defendant's allegations were not true would...contradict his client."[13] As it happened, the attorney denied the allegations, attacked Lopez's credibility, and later abdicated his role as advocate during sentencing. Because grounds for leniency existed and the judge had the discretion to impose a lower sentence, the *Lopez* Court held that an actual conflict of interest adversely affected the attorney's performance and that prejudiced should be presumed.[14]

The Fourth Circuit, in *United States v. Tatum*,[15] held that an actual conflict does not necessarily require that an attorney "formally represent" hostile interests. An attorney will labor under an actual conflict of interest sufficient to trigger the *Sullivan* presumption when he "harbor[s] substantial personal interests which conflict with the clear objective of his representation of the client."[16] Defense counsel at Tatum's trial for bankruptcy fraud belonged to the same law firm that represented Tatum during his preceding bankruptcy. The Fourth Circuit held that conflict existed where Tatum's counsel could not (and did not) shift responsibility to his firm by arguing that Tatum relied on his firm's erroneous advice as doing so would cause great embarrassment and further increase the risk of civil malpractice liability by, in effect, calling himself to testify against himself. [17]

As a general rule, the Sixth Circuit, in *Riggs v. United States*,[18] held that "although the [*Sullivan*] standard was laid out in the context of conflicts of interest arising from multiple

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[13] *Id.* at 41, citing *United States v. Ellison*, 798 F.2d 1102 (7th Cir. 1986)
[14] *Id.* at 42-43
[15] See *United States v. Tatum*, 943 F.2d 370 (4th Cir. 1991)
[16] *Id.* at 376
[17] *Id.*
[18] See *Riggs v. United States,* 209 F.3d 828, (6th Cir. 2000)

representation, this circuit applies the [*Sullivan*] analysis to all Sixth Amendment conflict-of-interest claims".[19]

The Seventh Circuit, in *United States v. Ellison*,[20] held that an actual conflict of interest existed when the pursuit of client's interests would lead to evidence of attorney's malpractice. There, counsel was not able to pursue his client's best interests free from the influence of his concern about possible self-incrimination. In testifying against his client, counsel acted as both counselor and witness for the prosecution, roles which are inherently inconsistent. Ultimately, the *Ellison* Court held that although conflicts of interest usually occur in cases involving joint representation, a conflict may also arise "when a client's interest conflicts with that of his attorney."[21]

The Ninth Circuit, in *United States v. Hearst*,[22] found a conflict of interest where counsel had a book deal involving his client's case. The *Hearst* Court held that despite the fact that the case was "based on private financial interests" of the lawyer and that the conflict in *Sullivan* was based on multiple representation, *Sullivan* was "directly applicable" because "these differences are immaterial."[23] The Ninth Circuit has continued this trend, even holding that their own

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[19] *Id.* at 831. See also *United States v. Knight*, 680 F.2d 470 (6th Cir. 1982) (Using the *Sullivan* analysis to evaluate a claim of conflict of interest stemming from attorneys' knowledge that they were under investigation for stealing documents during trial.)

[20] See *U.S. v. Ellison*, 798 F.2d 1102 (7th Cir. 1986)

[21] *Id.* at 1106-07. See also *United States v. Horton*, 845 F.2d 1414, 1418-21 (7th Cir. 1988) (applying *Sullivan* to conflict generated by defense attorney's candidacy for U.S. Attorney); *United States v. Stoia*, 22 F.3d 766, 769-70 (7th Cir. 1994); *United States v. Marrera*, 768 F.2d 201, 205-09 (7th Cir. 1985) (employing *Sullivan* framework to claim predicated on "conflict of interest between [the] lawyer's financial interest in proceeds from the movie rights and [defendant's] interest in acquittal")

[22] See *United States v. Hearst*, 638 F.2d 1190 (9th Cir. 1980)

[23] *Id.* at 1193

precedent requires the presumption of prejudice in conflicts between a defendant's and the attorney's own personal interests.[24]

Nevertheless, other Circuit Courts, such as the Eleventh Circuit in the instant case, differ in their opinion of the application of *Sullivan*, holding that it only applies to joint representation. Interestingly, while this Court has never expressly extended the *Sullivan* exception to conflicts other than joint representation, it has also never overruled any decision that did so.

It is important to note two cases in which this Court touched on the scope of *Sullivan*.

First, four years after the *Sullivan* decision, this Court held in *Wood v. Georgia*[25] that a relationship between counsel and a third party – not jointly represented – can be the functional equivalent of joint representation. When three employees of an adult movie theater were prosecuted for distributing obscenity, the theater paid for their representation. Yet, the employer refused to pay the resulting fines, even as it paid other fines and paid to keep the employees free on bond. This Court was troubled by the lawyer's apparent decision to undertake a strategy (advancing an equal protection claim) that benefitted the theater at the expense of the employees. Both the theater and the employees expected counsel to advance their interests, yet to serve one might require him to fail the other, while doing nothing could harm both. This Court ultimately remanded the case for consideration of a possible conflict of interest: whether a lawyer paid by an employer, but representing an employee, suffered from an "actual conflict" under *Sullivan*. Remand was necessary because "petitioners were represented by their employer's lawyer, who may not have pursued their interests single-mindedly."[26] Since the opinion did not discuss

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[24] See *e.g. Mannhalt v. Reed*, 847 F.2d 576, 580-81 (9th Cir. 1988); *United States v. Miskinis,* 966 F.2d 1263 (9th Cir. 1992); and *Garcia v. Bunnell*, 33 F.3d 1193, at 1198 n.4 (9th Cir. 1994)

[25] See *Wood v. Georgia*, 450 U.S. 261, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981)

[26] *Id.* at 271-272

whether the lawyer "formally represented" the employer, *Wood* suggests that relationships other than representation of another client or defendant by counsel create actual conflicts.

Second, eighteen years after *Sullivan*, in *Mickens v. Taylor*,[27] this Court expanded *Sullivan*'s presumption of prejudice to include cases of *successive* representation. In that decision, this Court referenced the numerous Circuit Courts that have applied the presumption of prejudice "unblinkingly" to various kinds of attorney conflicts, and cautioned that the *Sullivan* exception does not necessarily extend to conflicts other than joint representation because "*Sullivan* itself does not clearly establish, or indeed even support such expansive application".[28] However, this Court also made clear that "whether *Sullivan* should be extended to such cases remains, as far as the jurisdiction of this Court is concerned, an open question."[29]

Despite the caution from the *Mickens* Court, Circuit Courts have continued applying *Sullivan* to conflicts outside of multiple representation. This includes the Fourth Circuit, from which *Mickens* originated.[30]

Based on the above, Mr. Wilhelm prays that this Court revisit the question left open by *Mickens*, and seeks an exceptionally narrow expansion of Sullivan's presumption of prejudice: when a conflict of interest forces Counsel to choose between denigrating their own performance

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[27] See *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002)
[28] *Id.* at 1246
[29] *Id.*
[30] See *e.g. Rubin v. Gee*, 292 F.3d 396 at 402 n.2 (4th Cir. 2002) (The *Sullivan* standard applies to cases involving private conflicts of interest because the Supreme Court "has never indicated that *Sullivan* would not apply to a conflict as severe as the one presented here."); *Vinson v. True*, 436 F.3d 412, 418 (4th Cir. 2006) (Applying *Sullivan* even when there was no multiple representation.); and *U.S. v. Stitt*, 441 F.3d 297 (4th Cir. 2006) (holding that counsel labored under an actual conflict of interest that adversely affected his representation during the penalty phase of Stitt's trial because counsel's *personal and financial interests* prevented him from asking the district court to appoint a qualified mitigation expert.)

on behalf of their client or protecting their professional reputation. In support of this argument, Mr. Wilhelm points to this Court's decision in *Christeson v. Roper*.[31]

The *Christeson* Court recognized that a conflict of interest arises when counsel has missed a client's deadline and counsel's best argument for the client is the admission of that failure. In *Christeson*, two attorneys, Horwitz and Butts, were appointed to represent Christeson in his federal habeas petition, but failed to meet with Christeson, let alone file the petition, until more than six weeks *after* it was due. Christeson's best argument and only hope for securing review of the merits of his habeas claims was to file a motion under Federal Rule of Civil Procedure 60(b) seeking to reopen final judgment on the ground that the time should have been equitably tolled due to the attorneys' own failure to satisfy the AEDPA's statute of limitations. Counsel later admitted that the failure to timely file the petition resulted from a simple miscalculation of the AEDPA limitations period. Horwitz and Butts acknowledged the nature of their conflict to the Missouri Supreme Court when providing the status of Christeson's collateral proceeding:

> "Because counsel herein would be essential witnesses to factual questions indispensable to a *Holland* inquiry, there may be ethical and legal conflicts that would arise that would prohibit counsel from litigating issues that would support a *Holland* claim. Unwaivable ethical and legal conflicts prohibit undersigned counsel from litigating these issues in any way. *See Holloway* v. *Arkansas*, 435 U.S. 475, 485-486, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978). Conflict free counsel must be appointed to present the equitable tolling question in federal district court."

Yet, in their response to the District Court's order to address the Christeson's motion for substitution counsel, Horwitz and Butts characterized the potential arguments in favor of

[31] See *Christeson v. Roper*, 135 S.Ct. 891 (2015)

equitable tolling as "ludicrous" and asserted that they had "a legal basis and rationale for the [erroneous] calculation of the filing date."

This Court found that Counsels' contentions were "directly and concededly contrary to their client's interest", and "manifestly served their own professional and reputational interests".[32] Horwitz and Butts could not file such a motion on Christeson's behalf, as any argument for equitable tolling would be premised on their own malfeasance in failing to file timely the habeas petition. Arguing that Christeson was entitled to the equitable tolling would have required Horwitz and Butts to publically denigrate their own performance. As Chief Justice Roberts wrote,

> "Counsel cannot reasonably be expected to make such an argument, which threatens their professional reputation and livelihood. [] Thus, as we observed in a similar context in *Maples v. Thomas*, [] a 'significant conflict of interest' arises when an attorney's 'interest in avoiding damage to [his] own reputation' is at odds with his client's 'strongest argument'"[33]

Considering this Court's holding in *Christeson*, Mr. Wilhelm argues that the presumption of prejudice established in *Sullivan* is warranted in the exceptional circumstance where Counsel has missed a client's deadline and the strongest argument is to admit fault and publically denigrate his or her own performance.

Sullivan's limited presumption of prejudice is reserved to remedy the structural flaw that occurs when a lawyer is placed in the untenable situation of being required to serve two masters. When counsel's strongest argument for his client is to admit fault and publically denigrate his or her own performance, he faces two clearly competing interests: (1) fully advocate for his client and admit his mistake or (2) remain silent and protect himself from malpractice. Counsel has to

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[32] *Id.* at 895
[33] *Id.* at 894 [Citation Omitted]

choose to testify or not testify. He either defends his client or defends himself, and Counsel cannot help but be torn between the two duties. Thus, when Counsel has to speak against himself, admit fault, or denigrate his own performance in order to most effectively advocate for his client, the problem is just as clear as in joint representation. The risk of conflict and harm is as certain as it is in multiple representation. A lawyer cannot help being tempted to sacrifice his client's best interest for his own benefit, and this temptation alone is a serious threat to Counsel's duty of loyalty.

Already this Court has recognized that a joint representation of conflicting interests is suspect because "the evil is in what the advocate finds himself compelled to refrain from doing" (vigorously defending his client) and that "the advocate's conflicting obligations have effectively sealed his lips on crucial matters."[34] If representing multiple clients effectively gags counsel from properly representing a client, how much more is counsel silenced by his self-interest when he cannot admit fault without fear of threatening his reputation or future livelihood? Since, as Chief Justice Roberts acknowledged, an attorney cannot be expected to testify against himself, a conflict of interest exists when an attorney must admit fault on behalf of his client's best defense. A "fall on the sword" strategy only works when counsel does not have a competing self interest.

As in *Christeson*, Mr. Wilhelm's Counsel admittedly missed the Youthful Offender deadline due to a miscalculation. Counsel believed Mr. Wilhelm to be "the ideal candidate" for Youthful Offender, "the one for whom the statute was written," and recommended that he enter an open plea to seek Youthful Offender sentencing. However, through their admitted carelessness, they allowed Mr. Wilhelm's eligibility to expire. After it was revealed to them that they had missed the deadline to pursue their recommended Youthful Offender strategy, Counsel

[34] See *Holloway v. Arkansas*, 435 U.S. 475, at 490, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978) (emphasis deleted)

had an ethical duty to divulge their error and conflict on the record and to either seek a formal waiver or withdraw from representation. In the event of a conflict, the United States Supreme Court, the ABA Standards, and the Florida Rules of Professional Conduct impose clear ethical requirements upon the attorney: they must either withdraw from the case or seek a formal waiver on the record.[35] When a lawyer has a duty to withdraw and testify in favor of his client, but does not do so, "such a decision would raise serious questions about either the lawyer's competence or about the effect of a conflict of interest."[36] In a situation where a lawyer can provide favorable testimony material to his client's case, his failure to withdraw and testify is an actual conflict.

The general rule against conflicts of interest provides that "[a] lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, *or by the lawyer's own interests.*"[37] The reason for this rule is clear: just as an attorney's loyalty may be pulled in different directions by multiple clients' divergent interests, an attorney's loyalty can be sorely tested when his own self-interest runs counter to the interests of his client. This potential for a conflict rooted in the attorney's self-interest is so severe that the Model Rule of Professional Conduct is devoted almost entirely to prohibitions and restrictions aimed at preventing such conflicts.

Interestingly, the decision to apply a presumption of prejudice in *Sullivan* was heavily based on the rules of professional conduct governing multiple representation. Yet, the Model

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[35] *Id.* at 1179; also ABA Standards for the Defense Function, Standard 4-1.7(a),(c), (4th Edition), *and* Florida Bar Rules 4-1.7, 4-1.16. (When a lawyer learns that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw.)

[36] Charles W. Wolfram, *Modern Legal Ethics* 7.5.2, at 381 (1986)

[37] See Model Rules of Professional Conduct Rule 1.7(b), *Emphasis Added*; See also Charles W. Wolfram, *Modern Legal Ethics* 7.1.2, at 315 (describing how an older version of the rules governing conflicts "dealt with two central situations -- when a lawyer's personal interests clash with those of a client and when a lawyer represents at the same time clients with differing interests")

Rules of Professional Conduct do not single out multiple representations as the only cause of conflict. Said differently, there is no reason to believe that only third parties cause conflicts based on divergent interests. In multiple representation cases, counsel is forced to choose the interest of one client at the expense of the other. In this instance, counsel is forced to choose his own interest at the expense of his client's. Mr. Wilhelm argues that in this particular instance, a conflict of interest between a defendant's self interest and an attorney's malpractice self-interest reaches the same level as multiple representation.

Logically, conflicts between a lawyer's self-interest and the interests of his client fall along a wide spectrum of ethical sensitivity, and not all possible conflicts of interest have the same consequences. For this reason, Mr. Wilhelm does not seek to extend *Sullivan's* lessened standard of proof to any attorney conflicts outside this highly particularized and focused type of conflict: when a conflict of interest forces Counsel to choose between denigrating their own performance on behalf of their client or protecting their professional reputation. This is a highly unique situation not frequently or normally encountered in the practice of law, yet is one in which the divergence of interests poses an extraordinary threat to the lawyer's duty of loyalty.

In Mr. Wilhelm's case, rather than seeking a formal waiver or withdrawal from representation counsel stayed on the case and promised that they would admit their error at sentencing: in effect, they – to use the language of Christeson – promised to *publicly denigrate their own performance.* Counsel put themselves in a position to choose between advocating for Mr. Wilhelm by denigrating their own performance or protecting their professional reputation. Unsurprisingly, Counsel did not uphold their promise and made no mention of their error to the court. Rather than risk professional embarrassment and a potential malpractice, Counsel stayed silent. Counsel had multiple chances to admit his mistake but still chose not to. This is especially

true where the Prosecution argued that Mr. Wilhelm, of his own accord, *chose* not to seek Youthful Offender:

> "Clearly, youthful offender does not apply. The defendant at the time this happened was twenty years old. Had he made the decision to come in and enter a plea, he would have been able to get sentenced pursuant to that statute. *But he chose not to.*"

At this point Dobson, whose sole responsibility was to admit fault, consciously allowed the State's mischaracterization to go uncorrected. This goes to the very heart of the matter: when an attorney bites his tongue to preserve his own interests to the detriment of his client, he operates under an actual conflict of interest. Like with multiple representation, the evil is in what counsel finds himself compelled to *refrain* from doing, not only at trial, but also as to possible pretrial plea negotiations and in the sentencing process.[38] As Chief Justice Roberts stated in *Christeson*, such a situation is an actual conflict of interest because Counsel is forced to choose between Mr. Wilhelm's best interests and their own professional interests.

It should be noted that the sentencing court, having already found that considerable mitigating evidence had been presented, would have been faced with the dramatic effect of Dobson's revelation in the crowded courtroom. The court would then have had to squarely face the weight of such a revelation not only as to the severity of Mr. Wilhelm's sentence, but also the damage to the professional reputation of two prominent local attorneys who regularly practice there.

Aside from the effect that such an admission would have had on the sentence hearing itself, which is reasonable enough, Counsel's plain admission of their error and conflict would have had a major impact on the proceedings. This Court holds that when defense counsel discloses a lapse in effective assistance or a possible conflict with the defendant, the trial court

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[38] See *Holloway v. Arkansas*, 435 U.S. 475, 490, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978) (emphasis deleted)

must conduct an inquiry to determine whether the defendant's rights have been impaired and, if necessary, appoint substitute counsel. Accordingly, the admission of Counsel's error and conflict with respect to Youthful Offender would have led the trial court to halt the sentencing proceeding, conduct an inquiry, and remedy the error.

Overall, Counsel had an ethical duty to divulge their conflict to the court and to either seek a formal waiver or withdraw from representation. By promising that they would admit their error at sentencing Counsel's loyalty became even further divided. Counsel engaged in a course of conduct inconsistent with Mr. Wilhelm's best interest when he continued to represent him, failed to withdraw, and otherwise testify as a witness on Mr. Wilhelm's behalf.

CONCLUSION

As this Honorable Court has done in years past, and due to the open question of the *Sullivan* exception as well as the Circuit Courts' divergent applications thereof, Mr. Wilhelm respectfully prays that a Writ of Certiorari be issued to review the Order of the United States Court of Appeal for the Eleventh Circuit.

Respectfully submitted,

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