

No. 21A_____

IN THE
Supreme Court of the United States

DENNIS SPENCER,

Applicant,

v.

COLORADO,

Respondent.

**APPLICATION FOR AN EXTENSION OF TIME TO FILE A
PETITION FOR A WRIT OF CERTIORARI
TO THE COLORADO COURT OF APPEALS**

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November 30, 2021

APPLICATION

To the Honorable Neil Gorsuch, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Tenth Circuit:

Pursuant to Rule 13.5 of the Rules of this Court and 28 U.S.C. § 2101(c), Applicant Dennis Spencer respectfully requests a 30-day extension of time, to and including January 26, 2022, within which to file a petition for a writ of certiorari to review the judgment of the Colorado Court of Appeals in this case.

1. The Colorado Court of Appeals issued its decision on December 17, 2020. *See People v. Spencer*, No. 17CA2228 (App. 1a-10a). After the Court of Appeals denied Applicant's request for rehearing, Applicant timely filed a petition for a writ of certiorari with the Colorado Supreme Court. The Colorado Supreme Court denied the petition on September 27, 2021, *see Spencer v. People*, No. 21SC72, 2021 WL 4481154 (App. 11a-12a), and the Court of Appeals issued its mandate the same day (App. 13a). Unless extended, the time to file a petition for certiorari will expire on December 27, 2021. This application is being filed more than ten days before a petition is currently due. *See* Sup. Ct. R. 13.5. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1257.

2. Spencer is a criminal defendant currently incarcerated in Colorado. In 2001, Spencer was charged in two separate cases with multiple counts of sexual assault against minors. Just a few months before the trials were scheduled to begin, Spencer's trial counsel moved to withdraw on the grounds that (1) there were not enough funds to hire an investigator, and (2) he no longer felt comfortable defending

child sexual assault cases, given that he and his wife now had a child of their own. The district court denied the motion. Both matters proceeded to trial, where a jury convicted Spencer on all counts.

3. After the Colorado Court of Appeals affirmed his convictions on direct appeal, Spencer filed a post-conviction motion alleging ineffective assistance of counsel under *Cuyler v. Sullivan*, 446 U.S. 335 (1980)—which establishes a standard for ineffective assistance of counsel claims concerning conflicts of interest. To obtain relief under *Sullivan*, a defendant must demonstrate that “a conflict of interest actually affected the adequacy of his representation.” *Id.* at 349-350. If the defendant satisfies that burden, courts will presume that the lawyer’s ineffective assistance prejudiced the proceedings. *See id.* The *Sullivan* standard represents an exception to the more demanding test that generally applies to ineffective assistance of counsel claims, *see Strickland v. Washington*, 466 U.S. 668, 694 (1984), under which defendants must show actual, outcome-determinative prejudice, *see id.* at 692, 694. In the instant case, Spencer asserted that his counsel’s moral and financial concerns created personal conflicts of interest that impaired the adequacy of his representation. The Colorado District Court rejected this argument and denied Spencer’s motion.

4. A division of the Colorado Court of Appeals affirmed the District Court’s decision. The Colorado Court of Appeals held that Spencer could not assert a claim for ineffective assistance of counsel under *Sullivan*. According to the Court of Appeals, *Sullivan*’s presumed prejudice standard applies solely to conflicts of interest arising from an attorney’s multiple representation of clients—not to the personal

conflicts that Spencer alleged. *See* App. 5a (¶ 10). Instead, the Court of Appeals applied *Strickland*'s more exacting standard, requiring Spencer to demonstrate that his counsel's conflict of interest prejudiced the result of the proceedings. *See id.* at 5a-7a (¶¶ 10-14). The Court of Appeals concluded that Spencer's claims could not satisfy *Strickland*, and affirmed the denial of his postconviction motion. *Id.* at 6a-8a (¶¶ 13-15).

5. Spencer timely filed a petition for a writ of certiorari in the Colorado Supreme Court, challenging the Court of Appeals' conclusion that *Sullivan* does not apply to an attorney's personal conflicts of interest. The Colorado Supreme Court denied the petition. Two justices noted that they would have taken the case to determine whether *Sullivan* applied in cases like Spencer's. *See id.* at 11a-12a.

6. This Court's review is urgently needed to address the proper scope of *Sullivan*, and this case presents an ideal vehicle to do so. Almost two decades ago, this Court in *Mickens v. Taylor*, 535 U.S. 162 (2002), recognized that the extent of *Sullivan*'s reach remains "an open question." *Id.* at 176. Since then, federal and state courts have grown increasingly divided. Some jurisdictions—including Colorado—apply *Strickland*'s onerous test to counsel's personal conflicts of interest. *See, e.g., United States v. Garza*, 429 F.3d 165, 172 (5th Cir. 2005) (per curiam) (declining to apply *Sullivan* in cases other than multiple representation); *Steward v. Commonwealth*, 397 S.W.3d 881, 883 & n.4 (Ky. 2012) (same). By contrast, other jurisdictions apply *Sullivan*'s more lenient standard to personal conflicts of interest. *See, e.g., United States v. Fuller*, 312 F.3d 287, 291-292 (7th Cir. 2002) (applying *Sullivan* to a

counsel's personal conflict of interest); *State v. Cheatham*, 292 P.3d 318, 340 (Kan. 2013) (same).

7. This deep and ongoing split undermines public confidence in the fairness of criminal justice proceedings, and calls into question the Sixth Amendment's fundamental constitutional guarantee to effective assistance of counsel. To be effective, counsel must be "devoted solely to the interests of his client." *Von Moltke v. Gillies*, 332 U.S. 708, 725 (1948). But it is often "difficult to measure the precise effect on the defense of representation corrupted by conflicting interests," *Strickland*, 466 U.S. at 692, and that is exactly why this Court has relaxed the prejudice requirement in cases where an attorney has "breache[d] the duty of loyalty, perhaps the most basic of counsel's duties," *id.*; see also *Holloway v. Arkansas*, 435 U.S. 475, 490-491 (1978). If Colorado's rule remains, and defendants whose counsel possess a personal conflict of interest must prove actual prejudice, many defendants will be unable to vindicate their Sixth Amendment right to conflict-free counsel.

8. Neal Kumar Katyal of Hogan Lovells US LLP, Washington, D.C., was recently retained on behalf of Applicant to file a petition for certiorari in this Court. Over the next several weeks, counsel is occupied with briefing deadlines for a variety of matters, including: (1) a reply brief in *Association of Deputy District Attorneys for Los Angeles County v. Gascon*, No. B310845 (Cal. App. 2d Dist.) due December 6, 2021; (2) a petition for certiorari in *First Reliance Standard Life Insurance Co. v. Giorgio Armani Corp.*, No. 20-55314 (9th Cir.) to be filed by December 7, 2021; (3) a reply brief in *Five Star Electric Corp. v. A.J. Pegno Construction Co., Inc. / Tully*

Construction Co., Inc., Nos. 2021-02404, 2021-02405, 2021-02740 (N.Y. App. Div., 1st Dept.) due December 17, 2021; (4) a response brief in *Myers v. California State Board of Equalization*, Nos. B307981, B311322 (Cal. App. 2d Dist.) due January 3, 2022; and (5) a reply brief in support of certiorari in *William Beaumont Hospital v. United States ex rel. Felten*, No. 21-443 (U.S.) due January 4, 2022. Applicant requests this extension of time to permit counsel to research the relevant legal and factual issues and to prepare a petition that fully addresses the important questions raised by the proceedings below.

9. For these reasons, Applicant respectfully requests that an order be entered extending the time to file a petition for certiorari to and including January 26, 2022.

Respectfully submitted,

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