No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

BRIAN DORSEY,

Petitioner,

v.

DAVID VANDERGRIFF,

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Missouri

PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

****EXECUTION DATE: APRIL 9, 2024****

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April 1, 2024

QUESTION PRESENTED

When Brian Dorsey faced capital-murder charges, he was appointed counsel who were paid a very low flat fee of $12,000 each. Chris Slusher, having recently opened his own solo practice, emailed the man who would be his co-counsel, Scott McBride, and told him to request appointment, stating, Mr. Dorsey is "easy to work with" and "ready to do what his attorneys advise." What Mr. Dorsey's counsel advised to was to plead guilty to a crime he could not have committed—despite counsel being aware that psychosis was a legal defense to capital murder under Missouri law. After doing no investigation whatsoever, including refusing to work with the investigator that would have been paid for by the public defender office, counsel pressured Mr. Dorsey to agree to plead guilty the morning before a court hearing. The attorneys obtained nothing for Mr. Dorsey in exchange for his guilty plea. Though they assured Mr. Dorsey this guilty plea would help in his sentencing phase proceeding, counsel undertook next to no mitigation investigation and declined to engage a mitigation specialist. Then, when their own expert testified in the sentencing phase that, due to incapacity based on mental disease or defect, Mr. Dorsey was incapable of the deliberation required for first-degree murder, the judge was forced to strike that testimony because Mr. Dorsey, at his attorneys' urging, had already pled guilty. Counsel's decisions, rather than informed by investigation, only make sense in the

context of the conflict under which they were laboring. The flat-fee contract structure pitted their personal financial interests directly against Mr. Dorsey's fundamental rights to assistance of counsel and a fair trial.

In *Cuyler v. Sullivan*, this Court ruled that a defendant alleging ineffective assistance of counsel based on his attorney's conflict of interest need show only that an "actual conflict of interest adversely affected his lawyer's performance." 446 U.S. 335, 350 (1980). But, as this Court has made clear, *Sullivan*'s scope remains an open question. *Mickens v. Taylor*, 535 U.S. 162, 176 (2002).

The question presented is:

Whether, where appointed counsel in a capital case had a flat-fee contract and failed to investigate or challenge a capital murder charge to the client's detriment, counsel had an actual conflict of interest that adversely affected their performance such that *Cuyler v. Sullivan*'s presumption of prejudice applies.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding are listed in the caption. The petitioner is not a corporation.

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PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Brian Dorsey respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Missouri. Concurrently with the filing of this Petition, Mr. Dorsey has filed a motion to stay his execution, which is scheduled for April 9, 2024.

OPINIONS BELOW

Mr. Dorsey filed a petition for writ of habeas corpus pursuant to Missouri Supreme Court Rule 91. The Supreme Court of Missouri's opinion denying Mr. Dorsey's petition is attached here as Appendix A.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The Supreme Court of Missouri entered its judgment on March 20, 2024. This petition for a writ of certiorari is timely pursuant to Supreme Court Rule 13(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

INTRODUCTION

This petition squarely presents what this Court recognized in *Mickens* was an open question: Whether *Cuyler v. Sullivan* should extend to other cases as a necessary prophylaxis in situations where *Strickland* itself is inadequate to vindicate a defendant's Sixth Amendment right to counsel.

There is no dispute regarding the following facts:

1. Mr. Dorsey's appointed attorneys were each paid a flat fee of $12,000 for both a guilt-phase trial and sentencing.

2. They undertook no investigation whatsoever, per their own testimony.

3. They convinced their client to plead guilty in exchange for nothing from the prosecution.

4. They did almost no mitigation investigation, nor worked with a mitigation specialist, even though one would have been provided at the expense of the state public defender office.

5. Their own expert testified in the sentencing phase that Mr. Dorsey was incapable of the deliberation required for first-degree murder due to incapacity based on mental disease or defect. The judge was forced to strike that testimony, as Mr. Dorsey had already pleaded guilty at his attorneys' urging.

This Court should grant certiorari to resolve an intractable circuit split regarding the applicability of *Cuyler v. Sullivan*. The scope of *Sullivan* and its analysis, a much "needed prophylaxis" where the stricter *Strickland v. Washington* test fails to give effect to the pervasive effects of a conflict of interest, is especially necessary here, where appointed attorneys contracted under a flat fee provided

grossly deficient representation in a capital case. Mr. Dorsey is under warrant and will be executed after being denied a guilt-phase proceeding despite having a defense to first-degree murder. Though the duty of loyalty is essential to an adversarial justice system, Mr. Dorsey never received the "undivided allegiance [] for which the Sixth Amendment makes provision." *Von Moltke v. Gillies*, 332 U.S. 708, 725-726 (1948) (plurality op.). Financial constraints, rather than any investigation or informed strategy, influenced every decision counsel made, including all the professional norms they felt "compelled to refrain from doing." *Holloway v. Arkansas*, 435 U.S. 475, 490-491 (1978). *Strickland* evaluates how a lawyer's deficient performance prejudiced the proceedings, but here Mr. Dorsey was denied a guilt-phase proceeding on which to evaluate that performance, and he was denied that proceeding in exchange for nothing. Because the courts below found themselves constricted in reviewing Mr. Dorsey's claim by the narrow facts of *Sullivan*, Mr. Dorsey has been denied relief.

STATEMENT OF THE CASE

I. Legal Principles

Under the Sixth Amendment, criminal defendants are guaranteed the right to effective assistance of counsel in order to "assure fairness in the adversary criminal process," to ensure that the prosecution's case is tested meaningfully, and to instill confidence in the reliability of the verdict. *United States v. Cronic*, 466 U.S. 648, 655–58 (1984) (quoting *United States v. Morrison*, 449 U.S. 361, 364 (1981)). When the criminal process "loses its character as a confrontation between adversaries, that

constitutional guarantee is violated," *id.* at 657, and the resulting verdict cannot stand. *See Bell v. Cone*, 535 U.S. 685, 695 (2002) (internal quotation marks omitted).

For most alleged Sixth Amendment errors, courts apply the two-pronged test for ineffective assistance of counsel this Court announced in *Strickland v. Washington*, 466 U.S. 466 U.S. 668 (1984). Under *Strickland*, ineffective assistance of counsel rises to the level of a constitutional violation when (1) "counsel's representation fell below an objective standard of reasonableness," *id.* at 687–88, and (2) "there is a reasonable probability" of a different outcome "but for counsel's unprofessional errors," *id.* at 694.

In some egregious cases—where, for example, an attorney labored under a conflict of interest—this Court has espoused a more lenient Sixth Amendment test. An attorney whose representation is affected by a conflict of interest inevitably "breaches the duty of loyalty, perhaps the most basic of counsel's duties." *Id.* at 692. When the attorney has a conflict of interest, "it is difficult to measure the precise effect" of those divided loyalties on the attorney's decision-making, and the *Strickland* inquiry requiring a showing of prejudice does not apply. *Id.* Instead, this Court has determined that "prejudice in these circumstances is so likely" that it has presumed prejudice. *Id.*

More specifically, in *Cuyler v. Sullivan*, this Court held that when a defendant establishes that his lawyer had "an actual conflict of interest [that] adversely affected his lawyer's performance," courts should presume that the defendant was prejudiced. 446 U.S. 335, 349–50 (1980). In *Sullivan*, retained counsel represented three co-

defendants throughout post-indictment proceedings. *Id.* at 337. The multiple representation gave rise to a possible conflict that could have worked to Sullivan's detriment. *Id.* at 350. This Court therefore remanded for a hearing on whether Sullivan could show an actual conflict of interest with an adverse effect. *Id.* This Court later clarified that "the *Sullivan* standard is not properly read as requiring inquiry into actual conflict as something separate and apart from adverse effect. An 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance." *Mickens v. Taylor*, 535 U.S. 162, 172 n.5 (2002). And when such a conflict exists, the defendant need not show the conflict had a "probable effect on the outcome" to obtain relief. *Id.* at 166.

This Court has concluded that *Sullivan*'s presumption of prejudice may apply in several circumstances: when counsel simultaneously represents co-defendants in a criminal trial, as occurred in *Sullivan*, 466 U.S. at 349–50; when counsel for criminal defendants is paid by their employer, whose interests diverge from those of the defendants, *Wood v. Georgia*, 450 U.S. 261, 268–74 (1981); and when two lawyers at the same law firm represent co-defendants in separate trials, *Burger v. Kemp*, 483 U.S. 776, 783–84 (1987).

More recently, however, this Court has suggested that lower courts should not "unblinkingly" apply *Sullivan* to all manners of attorney conflicts. *Mickens*, 535 U.S. at 174–75 (internal quotation marks omitted) (noting that *Sullivan*'s text does not support "expansive application" outside the context of multiple representation). But the Court did not clarify when exactly *Sullivan* does apply. Instead, this Court has

left open the question of *Sullivan*'s precise scope. *See id.* at 174–76.

Yet in circumstances such as Mr. Dorsey's, where legal principles mandate heightened scrutiny and procedural safeguards for those under a sentence of death, *Sullivan* must extend when the facts of a case make clear "there was a breakdown in the adversarial process that would justify a presumption that respondent's conviction was insufficiently reliable to satisfy the Constitution." *United States v. Cronic*, 466 U.S. 648, 662 (1984).

II. Proceedings Below

A. Mr. Dorsey's Background and Crime

Mr. Dorsey was almost certainly in the throes of psychosis on the night he killed Sarah and Ben Bonnie.

His psychosis did not emerge randomly. He had struggled since his childhood with mental illness, suicidality, and chemical dependency—all of which were attributable at least in part to factors beyond his control, and all of which contributed to his state on the night of the crime.

Mr. Dorsey was raised in a tumultuous home. The hallmarks of his childhood were his father's alcoholism and accompanying violence against his mother, who was withdrawn and suffering from depression. In the Dorsey home, excessive alcohol consumption was encouraged, and adults started slipping Mr. Dorsey alcohol during parties when he was just a child. Declaration of Kayla Brandt, Appendix B, at 3. Because of his genetic predisposition to alcoholism, early exposure to alcohol, and trauma, Mr. Dorsey started binge drinking in high school. Report from Dr. Edward D. French, PhD, Appendix C, at 3. Further, around age fourteen, he started exhibiting

signs of depression. His binge drinking became necessary to self-medicate for depression, *see* Report from Dr. John Matthew Fabian, PhD, Appendix D at 2, and he drank alcohol every single day from the age of nineteen until the day he turned himself in to the police for the murders. Appendix C at 3; Appendix B at 4.

The cycle of depression—Mr. Dorsey had by then been diagnosed with Major Depressive Disorder—and substance use worsened. His depression was resistant to medication, so Mr. Dorsey turned to crack cocaine to help him cope. But the alcohol and cocaine only exacerbated his depression. He was often suicidal and attempted twice to kill himself; both times he ended up in the hospital. Appendix D at 2. One of Mr. Dorsey's suicide attempts, a drug overdose, resulted in a loss of consciousness and likely a toxic brain injury that further aggravated his mental illness. *Id*. at 11.

Mr. Dorsey's attempts to get treatment failed; he continued to succumb to cocaine binges and, during withdrawal, experienced persecutory hallucinations and paranoid delusions. He frequently hallucinated that people, including his own family members, were after him. Appendix B at 3. Because of the regularity and force of his delusions, Mr. Dorsey often locked himself up, away from others, to ride out the psychotic episodes alone. Once in the clutches of these psychotic delusions—a condition neurologically indistinguishable from schizophrenia—Mr. Dorsey was helpless to stop them or alter their trajectory. Appendix C at 4, 5, 9–10, n. 6.

On the night of the murders, Mr. Dorsey was suffering from drug intoxication, sleep deprivation, a toxic brain injury, alcohol blackout, significant neurological deficiencies, and emotional dysregulation. Appendix C at 5; Appendix D at 4, 7, 8, 9–

10, 11, 12. Just hours before the murders, while on a crack cocaine binge, Mr. Dorsey had been held captive in his apartment by drug dealers who demanded that he pay his outstanding drug debts. Trial Transcript Excerpt, Appendix E, at 862, 887. Desperate for help, he called his parents, but they refused to intervene. *Id.* at 862, 888; Appendix B at 4. Instead, his cousin and her husband, Sarah and Ben Bonnie, came to his aid. They gave him money and offered him a place to stay for the night. Mr. Dorsey had tried to keep his drug use away from his family, so the shame and embarrassment of having to beg his relatives for money caused a level of emotional distress that he was not neurologically equipped to handle. Appendix D at 4, 8, 9–10, 11, 12. Although safe from the drug dealers, Mr. Dorsey felt extremely depressed and suicidal with heightened fear, shame, and persecutory delusions. *Id.* at 4; Appendix B at 4.

At that point—immediately before the crime—Mr. Dorsey had not slept for over 72 hours, had just been on a days-long crack cocaine binge, and had consumed ten beers and a bottle of vodka. Appendix C at 5, Appendix D at 7. Several hours had elapsed since the last time Mr. Dorsey had used crack cocaine, so he was also experiencing withdrawal effects—and, as a result, he was psychotic.

The next morning, Sarah Bonnie's parents found their daughter and her husband shot dead in their bedroom. Mr. Dorsey had taken the Bonnies' gun and killed his family members, whom he loved and who had just rescued him. Mr. Dorsey turned himself in to the police two days later. He told the police he was "the right guy" to speak to about the deaths, but because of his psychosis and alcohol blackout

Mr. Dorsey did not recall events of that night and was not able to specifically confess to either of the murders.

B. Representation at Trial

Mr. Dorsey's legal representation was compromised from the start. After Mr. Dorsey was charged with capital murder, the Missouri Public Defender Office appointed counsel for him pursuant to a low, flat-fee contract: Each of his two attorneys was paid a grand total of $12,000 for the entire capital case, both the guilt-phase and sentencing proceedings.

Counsel accepted the case understanding they would be paid the same amount whether they did nothing for Mr. Dorsey or worked the thousands of hours that a typical capital trial demands. Both appointed attorneys would have known how quickly the costs from a capital case could rise, and both appointed attorneys were likely financially vulnerable. Each had recently left the Public Defender Office; Chris Slusher had incorporated his solo law practice less than nine months prior. When Slusher initially emailed Scott McBride, who would become co-counsel, Slusher assured McBride that Mr. Dorsey was "easy to work with" and "ready to do what his attorneys advise." Slusher Law Firm Incorporation, Appendix F.

Mr. Dorsey's counsel pressured their client to plead guilty to two counts of first-degree murder in exchange for nothing, contrary to their colleagues' advice and American Bar Association (ABA) guidance. They sacrificed Mr. Dorsey's right to a guilt-phrase proceeding without obtaining any benefit at all for their client. *See* Declaration of Janet Thompson, Appendix G; American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases,

31 Hofstra L. Rev. 913, 1041 (2003) ("[B]efore entering into plea discussions, counsel does need to have thoroughly examined the quality of the prosecution's case and investigated possible first-phase defenses and mitigation.").[1] At a later hearing, counsel conceded that their strategy was uninformed as they had done no investigation. They also admitted that they intentionally chose not to appoint an investigator or mitigation specialist because it was more "convenient" to use an in-house investigator; that investigator testified he was only ultimately tasked with making four or five phone calls to mitigation witnesses. Post-Conviction Transcript Excerpt, Appendix H, at 558, 571, 574, 579, 662. They pursued their strategy despite the fact that the Missouri Public Defender Office would have offered $4,800 for investigators, separate from counsels' fees. In so doing, they avoided having to spend time working with these investigators and thereby reducing their hourly rate.

Mr. Dorsey's counsel's performance was so lacking that they did not take the time to talk to Mr. Dorsey about the night of the crime or his past history of drug use. Counsel appears to have been aware that psychosis would have been a defense under

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[1] The American Bar Association ("ABA") Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ("ABA Guidelines" or "Guidelines"), first adopted in 1989, were revised and updated in 2003 to accurately reflect current death penalty law and practice required to ensure effective representation under the Constitution. 31 Hofstra L. Rev. 913 (2003). This Court has consistently relied upon guidelines from the ABA and similar professional groups to inform the inquiry into reasonable practice and professional conduct. *See, e.g., Padilla v. Kentucky*, 559 U.S. 356, 366–67 (2010) ("We long have recognized that the '[p]revailing norms of practice as reflected in American Bar Association standards and the like…are guides to determining what is reasonable…'" (omissions in original) (quoting *Strickland*, 466 U.S. at 688)); *see also Bobby v. Van Hook*, 558 U.S. 4 (2009) (per curiam); *Rompilla v. Beard*, 545 U.S. 374, 387 & n.7 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524–25 (2003).

Missouri law to capital murder. *See* Mo. Rev. Stat. § 552.010, § 552.030; Appendix H at 665, 666. However, counsel never bothered to ask their client the most basic questions about the time of the crime. Counsel therefore never learned about Mr. Dorsey's long history of psychosis during crack cocaine withdrawal. Then, knowing nothing about Mr. Dorsey's state of mind at the time of the crime, they encouraged him to plead guilty to capital murder—and they gave him only an hour before a scheduled court hearing to consider whether to plead. Mr. Dorsey had no opportunity to discuss the weighty decision with his family or friends. Instead, he could only speak to his counsel, the people for whom skipping a guilt-phrase proceeding was most financially advantageous.

Relying on his counsel's advice, Mr. Dorsey pleaded guilty to a crime of which he was statutorily innocent and went directly into the sentencing phase. Mr. Dorsey's counsel alleged that their strategy was to focus on preventing a death sentence, yet they conducted next to no mitigation investigation. Having urged Mr. Dorsey to forego his guilt-phase proceeding and face a capital-sentencing phase, counsel did next to nothing to attempt to save Mr. Dorsey's life.

If Mr. Dorsey's counsel had done the bare minimum investigation required of capital defense attorneys, they would have quickly learned that Mr. Dorsey did not possess the requisite intent for first-degree murder. Like Major Depressive Disorder, psychosis can constitute a defense for capital murder under Missouri law. Both disorders render those suffering from them incapable of deliberation. Mr. Dorsey was under the influence of both on the night of the murders. But counsel failed to identify

this compelling and credible narrative, which would have rendered Mr. Dorsey ineligible for death. Rather than undertaking any investigation that could have explained Mr. Dorsey's action, counsel chose to present the crime as "unexplainable"—when they could not explain the crime solely because they had failed to investigate it. Appendix E at 1014. The choice to describe Mr. Dorsey's crime as "unexplainable" is, itself, only explainable in the context of counsel's pay structure. While the approach did nothing for their client, it did maximize their hourly rate.

Indeed, defense counsels' own expert was able to explain what was unexplainable. During the sentencing phase, he testified that Mr. Dorsey was suffering from diminished capacity due to mental disease or defect at the time of the murders. The judge was forced to strike that testimony, because it contradicted the guilty plea that Mr. Dorsey's attorneys had convinced him to take. *Id.* at 971-72.

After a two-day sentencing proceeding, Mr. Dorsey was sentenced to death by a jury who had heard nothing about how his struggles with depression, addiction, and psychosis led to his crime.

C. Procedural History

Mr. Dorsey appealed to the Missouri Supreme Court, which affirmed the death sentences. *State v. Dorsey*, 318 S.W.3d 648 (Mo. 2010). Mr. Dorsey appealed again to the Missouri Supreme Court after denial of his Amended Motion to Vacate, Set Aside, or Correct the Judgment and Sentences pursuant to Mo. S. Ct. R. 29.15, where he raised several claims related to his ineffective counsel. *Dorsey v. State*, 448 S.W.3d 276 (Mo. 2014) (Appendix I). Without any fact-finding on the claim that counsel's conflict of interest violated the Sixth Amendment, the Missouri Supreme Court

dismissed Mr. Dorsey's claim. The Missouri Supreme Court held, "No Missouri court has found that a flat fee arrangement creates a conflict of interest, and Mr. Dorsey does not demonstrate an actual conflict that adversely affected counsel's performance." *Dorsey v. State*, 448 S.W.3d 276, 300 (Mo. 2014).

Mr. Dorsey then filed a petition for writ of habeas corpus under 28 U.S.C. § 2554 in the Western District of Missouri, challenging his convictions and death sentences and raising claims related to counsel's ineffective assistance. The district court denied Mr. Dorsey's claim of a conflict of interest from a flat-fee agreement, explaining that "*Cuyler* [*v. Sullivan*] . . . has not been extended by the Supreme Court beyond cases in which an attorney has represented more than one defendant, and [the Eighth Circuit] has never determined whether it should be applied to other cases." *Dorsey v. Steele*, 2019 WL 4740518 at *4 (W.D. Mo. Sept. 27, 2019) (citations omitted). The district court's decision therefore hinged on the fact that *Sullivan*'s scope is not certain, i.e., that this Court has not "squarely addresse[d]" or given a "clear answer" as to whether a flat-fee agreement can create a conflict of interest under *Sullivan*. *Id.*

The Eighth Circuit Court of Appeals then denied Mr. Dorsey relief, and this Court denied his petition for a writ of certiorari. On the same date his petition was denied by this Court, the State of Missouri moved the Missouri Supreme Court to set an execution date.

The Missouri Supreme Court issued an order and a warrant for execution on December 13, 2023, setting Mr. Dorsey's execution date for April 9, 2024.

Mr. Dorsey then filed a state habeas petition under Missouri Supreme Court Rule 91 on December 22, 2023, challenging that court's determination of the conflict-of-interest claim. The Missouri Supreme Court denied relief. After finding the claim procedurally barred as an abuse of the writ, the court referred to its prior opinion that applied *Strickland* in all but name and reiterated that analysis by focusing on the reasonableness of counsels' actions and holding that Mr. Dorsey was not prejudiced. *State ex rel. Dorsey v. Vandergriff*, No. SC 100388, 2024 WL 1194417, at *6 (Mo. Mar. 20, 2024) (citing Dorsey, 448 S.W.3d at 300). In denying an analysis of the flat fee conflict of interest, the Missouri Supreme Court pointed to the facts of *Sullivan*, stating that *Sullivan* does not support a claim for relief because the holding applies only when an attorney represents more than one defendant. *Id.*

REASONS FOR GRANTING THE WRIT

I. There is a deep and intractable split among federal and state courts as to whether to evaluate flat-fee contracts under *Sullivan*.

Since this Court decided *Sullivan* decades ago, federal and state courts have repeatedly considered whether *Sullivan* applies to flat-fee arrangements for defense counsel—and have come to starkly different conclusions. While some courts evaluate flat-fee contracts and counsel's other potential financial conflicts of interest under *Sullivan*, other courts have adopted the narrowest reading of *Sullivan* and apply *Strickland* to such potential conflicts. The lack of guidance from this Court on *Sullivan*'s reach has led to inconsistent and conflicting decisions across the country.

A. Several jurisdictions apply *Sullivan* to flat-fee contracts in criminal cases.

Several jurisdictions apply *Sullivan* to flat-fee contracts or to potential financial conflicts of interest.

First, at least two courts—the Kansas and New Mexico Supreme Courts—have applied *Sullivan* when evaluating a flat-fee arrangement in a capital case. Kansas recognized that *Mickens* had questioned whether *Sullivan* extended to financial conflicts of interested but nevertheless applied *Sullivan* when an attorney was paid a $50,000 flat fee for a capital case. *State v. Cheatham*, 292 P.3d 318, 338–41 (Kan. 2013). The state high court found that such a flat-fee arrangement "pit[s] the client's interests against the lawyer's interest in doing no more than what is minimally necessary to qualify for the flat payment." *Id.* at 340 (internal quotation marks omitted). The court further found that the conflict of interest adversely affected the lawyer's performance, as evidenced by his failures to adequately investigate the case and to present alibi testimony. *Id.* at 341. Under *Sullivan*, then, the attorney's actual conflict of interest meant that Cheatham was entitled to a new trial. *Id.* at 341. Similarly, the New Mexico Supreme Court found that in a particularly complex capital case where defense counsel was paid a flat fee, counsel had not received adequate compensation, "thus giving rise to a presumption of ineffective assistance of counsel." *State v. Young*, 172 P.3d 138, 139–42 (N.M. 2007).[2]

[2] In addition, at least two jurisdictions have construed statutory payment schemes

Similarly, the Fourth Circuit has applied *Sullivan* to various sorts of financial conflicts. *See, e.g.*, *Rubin v. Gee*, 292 F.3d 396, 401–03 (4th Cir. 2002) (conducting an inquiry under *Sullivan*, and affirming the grant of a habeas petition, when counsel caused their client to act suspiciously and delay her surrender to police because of counsel's "desire to secure a $105,000 fee"); *United States v. Magini*, 973 F.2d 261, 262–64 (4th Cir. 1992) (applying *Sullivan* when defense counsel encouraged his counsel to plead guilty and negotiated a plea agreement without a forfeiture provision—all to protect counsel's fee). In doing so, the Fourth Circuit has dismissed the argument that after *Mickens*, financial conflicts do not fall within *Sullivan*'s scope. *See United States v. Stitt*, 441 F.3d 297, 304 (4th Cir. 2008) (declaring that "*Mickens* does not state, let alone hold, that *Sullivan* does not apply to private conflict of interest cases" and moreover that "the *Mickens* Court specifically left the scope of *Sullivan* open" (internal quotation marks omitted)), *withdrawn on other grounds*.

Other courts have adopted the same approach as the Fourth Circuit with respect to financial conflicts of interest. At least four other federal circuits have deployed *Sullivan* to assess such conflicts. *See, e.g.*, *Familia-Consoro v. United States*, 160 F.3d 761, 763–64 (1st Cir. 1998) (using *Sullivan*

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for defense counsel as *not* imposing fee limits, as the imposition of fee limits would violate the Sixth Amendment. *See Bailey v. State*, 424 S.E.2d 503, 505–08 (S.C. 1992) (holding that low statutory payment amounts for capital-defense attorneys could not be treated as payment caps, because such caps would violate the Sixth Amendment); *Simmons v. State Public Defender*, 791 N.W.2d 69, 88 (Iowa 2010) (holding that a state-law provision did not authorize a hard-fee cap in criminal cases).

to assess any conflict when defense counsel was paid by a potential co-perpetrator); *Winkler v. Keane*, 7 F.3d 304, 307–08 (2d Cir. 1993) (holding that *Sullivan* applied when a defendant alleged that his attorney's contingency-fee agreement created a conflict of interest); *United States v. Schwarz*, 283 F.3d 76, 90–95 (2d Cir. 2002) (finding a Sixth Amendment violation using *Sullivan*'s standard when counsel had a personal and financial conflict); *Rich v. Calderon*, 187 F.3d 1064, 1069 (9th Cir. 1999) (applying *Sullivan*'s inquiry to counsel's alleged economic conflict); *Earp v. Ornoski*, 431 F.3d 1158, 1885 (9th Cir. 2005) (recognizing that circuit precedent applies *Sullivan* outside the multiple-representation context); *United States v. Flood*, 713 F.3d 1281, 1286–87 (10th Cir. 2013) (assessing counsel's alleged financial conflict of interest under *Sullivan*). And state high courts have done the same. For example, the Court of Appeals of Maryland ruled that *Sullivan* provided the appropriate inquiry when defense counsel had, at the time of trial, brought suit against his client for unpaid fees. *Taylor v. State*, 51 A.3d 655, 657 (Md. 2012). Despite *Mickens*, the court concluded that *Sullivan*'s presumption of prejudice should still apply to "various types of conflicts" because "counsel's loyalty must be undivided." *Id.* at 668 & 669 n.13 (internal quotation marks omitted); *see also, e.g.*, *State v. Larzelere*, 979 So.2d 195, 208–09 (Fla. 2008) (per curiam) (applying *Sullivan* to a financial conflict-of-interest claim).

Finally, a number of other jurisdictions have made clear that *Sullivan* applies to nearly all conflicts of interest, which would include alleged financial

conflicts. *See, e.g.*, *Acosta v. State*, 233 S.W.3d 349, 352–56 (Tex. Crim. App. 2007) (holding that *Sullivan* governs all conflict-of-interest claims and noting in particular that while "*Cuyler* [*v. Sullivan*] was in fact a case of multiple representation, that fact is always secondary to the primary issue in all conflict of interest cases: whether the conflict asserted actually resulted in ineffective assistance of counsel to the defendant"); *State v. Carlson*, 440 P.3d 364, 384 (Alaska Ct. App. 2019) (explaining that in Alaska, *Sullivan* governs all conflict-of-interest claims except when, in some egregious cases, an even stricter state-law standard applies).

B. Several other jurisdictions instead apply *Strickland* to financial conflicts of interest.

While numerous courts apply *Sullivan* and presume prejudice when there is an "actual" financial conflict with "adverse effects," many other courts limit *Sullivan* exclusively to multiple-representation cases. When considering other conflicts, including financial ones, these courts apply *Strickland*, which requires deficient performance and a probable effect on the outcome for counsel to be deemed ineffective.

The Fifth Circuit, for instance, has long limited *Sullivan* to its specific facts. In *Beets v. Scott*, the en banc court considered whether defense counsel's fee arrangement based on media rights to his capital murder client's story should be assessed under *Sullivan* or *Strickland*. 65 F.3d 1258, 1260 (5th Cir. 1995) (en banc). The court held that "*Strickland* offers a superior framework for addressing attorney conflicts outside the multiple or serial client context"

for three reasons: (1) the Supreme Court had not expanded *Sullivan*'s presumption of prejudice to other situations; (2) multiple-representation cases, which require an attorney to represent clients' conflicting interests, differ from cases "in which the lawyer's self-interest is pitted against the duty of loyalty to his client"; and (3) applying *Sullivan* liberally "undermines the uniformity and simplicity of *Strickland*." *Id.* at 1265–66. The court therefore confined *Sullivan* to multiple-representation cases. *Id.* at 1272.

At least two sister circuits have followed the Fifth Circuit's lead. The Sixth Circuit has concluded that *Mickens* constrained *Sullivan* and that *Sullivan* applies only to concurrent multiple representation. *Whiting v. Burt*, 395 F.3d 602, 618–19 (6th Cir. 2005) (citing circuit precedent); *see also McRae v. United States*, 734 F. App'x 978, 981–83 (6th Cir. 2018) (reiterating that *Sullivan* does not apply to a financial conflict). The Eleventh Circuit has likewise noted that "*Mickens* indicated that *Cuyler* [*v. Sullivan*] should be limited to situations of multiple concurrent representation where there is an inherent high probability of prejudice." *Cruz v. United States*, 188 F. App'x 908, 913–14 (11th Cir. 2006) (applying *Strickland* to a conflict-of-interest claim even when both parties agreed that the *Sullivan* standard governed).[3]

Several state high courts have similarly declined to apply *Sullivan* to financial, or other non-multiple-representation, conflicts of interest. For

[3] Prior to *Mickens*, the Eleventh Circuit had applied the *Sullivan* standard to a financial conflict of interest that arose when defense counsel entered into a media contract about his client's case. *See Buenoano v. Singletary*, 963 F.2d 1433, 1438–39 (11th Cir. 1992).

instance, the California Supreme Court held that, to obtain relief for any conflict created by counsel's compensation agreement, the defendant had to prove prejudice under *Strickland*. *People v. Doolin*, 193 P.3d 11, 428–29 (Cal. 2009) ("adopt[ing] the reasoning from *Beets* and therefore conclud[ing] that, because the asserted conflict does not arise from multiple concurrent representation, a presumption of prejudice is not appropriate"); *see also, e.g.*, *Commonwealth v. Cousar*, 154 A.3d 287, 310–11 (Pa. 2017) (refusing to apply *Sullivan* even when counsel represented clients with potentially conflicting interests serially, as opposed to concurrently); *State v. Phillips*, 711 S.E.2d 122, 137 (N.C. 2011) (holding that the "applicability of the *Sullivan* line of cases has been carefully cabined by the United States Supreme Court" and that *Strickland* provided the appropriate inquiry for a non-multiple-representation conflict). Of course, the Supreme Court of Missouri held the same below: "The holding in *Cuyler* [*v. Sullivan*] has not been extended by the Supreme Court beyond cases in which an attorney has represented more than one defendant in a criminal matter, which was not the source of the alleged conflict of interest in Dorsey's case. *Cuyler* [*v. Sullivan*], therefore, does not support Dorsey's claim for relief." *State ex rel. Dorsey* at *7 (internal quotation marks and citations omitted).

C. Without this Court's guidance, confusion on the important issue whether *Sullivan* applies to flat-fee contracts and other financial conflicts will persist.

In *Mickens*, this Court acknowledged the widespread confusion over

Sullivan's outer bounds. This Court questioned the breadth of cases in which lower courts had applied *Sullivan*, suggested that "the language of *Sullivan* itself does not clearly establish . . . such expansive application," and decreed *Sullivan*'s scope "an open question." That open question has continued to fester for over two decades since *Mickens*, leaving an intractable split across courts. Some courts buckled down post-*Mickens* and continued to apply *Sullivan* to financial and other conflicts of interest, while others read *Mickens* to cabin *Sullivan*. *Compare, e.g.*, *Acosta*, 233 S.W.3d at 354 ([T[he Supreme Court has never expressly limited *Cuyler* [*v. Sullivan*] to [multiple-representation] cases."), *with*, *e.g.*, *Beets*, 65 F.3d at 1260. And yet others studiously avoid deciding the question. *See Caban v. United States*, 281 F.3d 778, 781–83 (8th Cir. 2002) (discussing the dissonance across circuits and within the Eighth Circuit and then "refrain[ing] from adopting either [the *Sullivan* or *Strickland*] standard as law of this circuit" for non-multiple-representation conflicts); *see also Covey v. United States*, 377 F.3d 903, 907–08 (8th Cir. 2004) (same). As the Seventh Circuit commented, "how to apply conflict-of-interest doctrine . . . to financial conflicts raises [a] challenging question[] that the Supreme Court simply has not addressed." *Reynolds v. Hepp*, 902 F.3d 699, 709 (7th Cir. 2018). This question arises in jurisdiction after jurisdiction, and it arises frequently. It is time for this Court to answer this question and thereby resolve the inconsistent treatment of financial conflicts across state and federal courts.

II. The Supreme Court of Missouri's decision was wrong.

Sullivan must apply to a flat-fee contract in these circumstances. The Supreme Court of Missouri failed to appreciate the pervasive nature of corrupting influences on every single decision that counsel in Mr. Dorsey's trial made, and crucially did not, make. In holding there was no actual conflict here, they fundamentally misunderstood the Sixth Amendment protections required of capital defense counsel.

An attorney must zealously advocate his client's interests—and no one else's. When a lawyer violates this foundational tenant, any resulting "conviction" cannot "be regarded as fundamentally fair." *Mickens*, 535 U.S. at 167 n.1. Courts that limit *Sullivan*—such as the court below—are wrong. This Court has explained that conflicts of interest can permeate every decision an attorney makes, creating a high risk of prejudice. And precisely because conflicts affect everything a lawyer does, "it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." *Strickland*, 466 U.S. at 692. In these cases, the normal Sixth Amendment framework is "inadequate," and *Sullivan* provides a "needed prophylaxis." *Mickens*, 535 U.S. at 176. That rationale applies especially to conflicts in capital case, which demand heightened reliability. *Romano v. Oklahoma*, 512 U.S. 1, 20–21 (1994).

This Court has applied *Sullivan*'s test four times, once in a financial interest case. In *Wood v. Georgia*, the Court applied *Sullivan* to a "third-party fee arrangement." 450 U.S. 261, 270 (1981). An employer paid for the lawyer who

represented employees arrested for obscenity. *Id.* at 266-272. Because fee arrangements and compensation influence every single decision an attorney must make or not make, using a *Strickland* test which can only evaluate an attorney's performance, rather than their non-performance, fail to protect the Sixth Amendment right at stake.

This Court has repeatedly ensured there are appropriate guardrails against unreliable death sentences: requiring state death sentencing regimes to appropriately narrow the class of people to whom death may apply; widening the scope of the mitigating facts that juries can and must hear; putting the ultimate sentence entirely in the hands of a jury of one's peers; requiring effective counsel to meet objective professional norms. *See e.g.*, *Loving v. United States*, 517 U.S. 748, 755 (1996); *Zant v. Stephens*, 462 U.S. 862, 877 (1983); *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989); *Ring v. Arizona*, 536 U.S. 584 (2002); *Strickland*, 466 U.S. at 688.

This Court must intervene again to protect against unreliable death sentences of defendants who are not the most culpable, but rather were appointed conflicted counsel by underfunded state defense systems. In "circumstances of magnitude" where "the likelihood that the verdict is unreliable is so high," courts must evaluate Sixth Amendment claims with an eye towards protecting the integrity of the process. *Mickens*, 535 U.S. at 166 (quoting *Cronic*, 466 U.S. at 659, n. 26); *Strickland*, 466 U.S. at 694. Where the loss of rights that are so fundamental to our American concepts of justice and fairness have then endangered the adversarial process, prejudice may be presumed. *Id.*; *Cronic*, 466 U.S. at 658–59; *Sullivan*, 446 U.S. at 350 (1980). And

without guidance from this Court expanding the scope of cases *Sullivan* applies to, federal courts will be proscribed from protecting the rights of those most vulnerable defendants facing the most final of punishments. *See e.g.*, *Earp v. Ornoski*, 431 F.3d 1158, 1185 (9th Cir. 2005); *Dorsey v. Steele*, 2019 WL 4740518, at *4 (W.D. Mo. Sept. 27, 2019).

Sullivan provides the most appropriate standard in death penalty cases, especially when defense counsel have been appointed under a flat fee. The Texas Court of Criminal Appeals, in applying *Sullivan*, noted that some cases offered "a clear example of how the danger of ineffective assistance via a conflict of interest is not strictly limited to the codefendant context." *Acosta*, 233 S.W.3d at 354. This is such a case, where every single decision counsel made to not adhere by prevailing professional norms to the detriment of Mr. Dorey is best and perhaps only understood as a result of conflicting financial interests. *See also State v. Cheatham*, 296 Kan. 417, 453 (2013) (holding that "[ABA] Guidelines unequivocally disapprove of flat fees in death penalty cases precisely because such fee arrangements pit the client's interests against the lawyer's interest in doing no more than what is minimally necessary to qualify for the flat payment."); *State v. Young*, 143 N.M. at 4 (holding that as "the gravity of the death penalty and its requisite heightened scrutiny require a significantly greater degree of skill and experience on the part of defense counsel than is required in a noncapital case" a flat fee was not adequate compensation).

Broadly applying *Sullivan* would not result in unnecessary reversals. It is

simply best formulated to measure the effect of corruption on a lawyer's performance. As the Fourth Circuit has pointed out, *Sullivan*'s presumption of prejudice is warranted only if defendants can demonstrate an actual conflict of interest that adversely affected the lawyer's performance. *United States v. Stitt*, 441 F.3d at 303. That test "does not lack teeth." *Id.* Moreover, it is most appropriate in a capital context, where counsel's divided loyalty "calls into question the reliability of the proceeding and represents a breakdown in the adversarial process fundamental to our system of justice." *Rubin v. Gee*, 292 F.3d 396, 402 (4th Cir. 2002) (Wilkinson, J.).

"Flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases." ABA Guideline 9.1(B)(1) at 981. This case illustrates *Sullivan*'s beneficial incentives on state court appointment systems. Had it been clear that *Sullivan*'s presumption of prejudice applied, the Missouri Public Defender Office may have brought itself into conformity with the ABA Guidelines earlier, ensuring the finality and reliability of Missouri capital verdicts.

III. The exceptional circumstances in this case warrant this Court's review.

Mr. Dorsey is about to be executed after being denied a guilt-phase proceeding, having been convinced by his attorneys to plead guilty to a crime he could not have committed in exchange for nothing. He never received representation in a key proceeding for which he should have had loyal, unconflicted counsel that zealously presented the facts of his innocence of the death penalty.

Defendants have a right to counsel at every critical stage of a criminal trial.

This Court has applied the presumption of prejudice to exceptional cases where defense counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing," or where there is "the complete denial of counsel" at a "critical stage of [the] trial." *Cronic*, 466 U.S. at 659. Mr. Dorsey experienced both because of the financial conflict under which his appointed attorneys labored. No state or lower federal court has been able to give those deeply troubling facts legal effect without this Court's clarity on the scope of *Sullivan*.

This case is the ideal vehicle in which to address whether *Sullivan* is broader than the facts that undergird that opinion. If this Court finds that *Sullivan* covers this type of conflict of interest, then the res judicata barring Mr. Dorsey from getting relief no longer applies. *See e.g.*, *State ex rel. Johnson v. Blair*, 628 S.W.3d 375 (Mo. 2021).

The Missouri Supreme Court's initial holding that serves as the procedural bar erroneously concluded that there was no actual conflict. *Dorsey*, 448 S.W.3d at 300-01. In determining so, the court still applied a *Strickland* framework, albeit not by name, to determine if there was a conflict at all. The court, in denying an actual conflict, found that counsel could have accessed services had they wanted to, were able to articulate a strategy that was "reasonable," that "both attorneys expressed a sincere desire to provide an effective defense,"[4] and Mr. Dorsey was not prejudiced. *Id*. *Strickland*'s deficient performance and prejudice is not the standard for determining *whether a conflict exists*, and the court should have credited all that

[4] This is not even a correct articulation of *Strickland*, which looks to the objective reasonableness of counsel's decision. 466 U.S. at 687-88.

counsel did not do as evidence of that actual conflict. *See Holloway*, 435 U.S. at 490 (emphasizing that with conflicted counsel "the evil—it bears repeating—is in what the advocate finds himself compelled to refrain from doing").

The lower state court opinion fundamentally misunderstood the nature of the conflict. Every hour of work that an attorney dedicates to an indigent client under a flat-fee structure is not only lowering the hourly wage of each hour worked on that case, but it also constitutes a loss of an hour that the attorney could have dedicated to paid work. The financial incentives for appointed counsel are to do as little work as possible on a flat fee case, though the prevailing professional norms require the opposite: "Due to the extraordinary and irrevocable nature of the penalty, at every stage of the proceedings counsel must make 'extraordinary efforts on behalf of the accused.'" ABA Guidelines at 923 (internal citation omitted).

Resolving the question presented in this case results in a different outcome for Mr. Dorsey. Because the res judicata behind the Missouri Supreme Court's recent opinion procedurally barring Mr. Dorsey's conflict of interest claim hinged on that earlier and incorrect finding of no actual conflict, should this Court find an actual conflict, that bar to relief falls away.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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