

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DANIEL TISONE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether an attorney's requirement that a criminal defendant execute a non-disparagement agreement as a condition of representation creates an actual conflict of interest that presumptively prejudices the defendant under *Cuyler v. Sullivan*, or constitutes a constructive denial of counsel under *United States v. Cronin*, thereby obviating the need to prove prejudice under *Strickland v. Washington*?

LIST OF PARTIES

The parties to the judgment from which review is sought are the Petitioner and appellant in the lower court, Daniel Tisone, and the Respondent and appellee in the lower court, the United States of America.

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OPINION BELOW

The United States Court of Appeals for the Eleventh Circuit entered an order denying a certificate of appealability that was directed at the summary denial of a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 by the United States District Court for the Middle District of Florida. *Tisone v. United States*, No. 25-12104, 2026 WL 905212 (11th Cir. Mar. 30, 2026). The Eleventh Circuit's order is attached hereto as Appendix A. The district court's opinion and order is attached as Appendix B.

GROUND FOR JURISDICTION

On May 19, 2025, the United States District Court for the Middle District of Florida entered an opinion and order summarily denying the Petitioner's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. On March 30, 2026, the United States Court of Appeals for the Eleventh Circuit denied a timely filed application for a certificate of appealability directed at the district court's order. Petitioner seeks the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1) through the filing of the instant petition for a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

The instant Petition arises from an unusual and extraordinary scenario in which the Petitioner's defense counsel in a criminal case required him, as a condition of continued representation, to enter into a non-disparagement agreement that effectively precluded the Petitioner from expressing any dissatisfaction with the attorney's representation. As the Petitioner later asserted in his 28 U.S.C. § 2255 motion, he entered a guilty plea on the insistence of his trial counsel because he feared that disagreeing with his attorney's advice or expressing that his attorney had not advised him of potential defenses to the case would violate the terms of the non-disparagement agreement.

Appellant Daniel Tisone was indicted in the United States District Court for the Middle District of Florida, Ft. Myers Division, on four counts of wire

fraud pursuant to 18 U.S.C. §§ 1343 and 2; six counts of bank fraud affecting a financial institution pursuant to 18 U.S.C. §§ 1344 and 2; two counts of aggravated identity theft pursuant to 18 U.S.C. §§ 1028A(1)(a) and 2; five counts of illegal monetary transactions pursuant to 18 U.S.C. §§ 1957 and 2; and one count of possession of ammunition by a convicted felon pursuant to 18 U.S.C. §§ 922(g)(1) and 924(a)(2). (Dist. Ct. Crim. Doc. 19.) All counts with the exception of the section 922/924 count arose from allegedly fraudulently obtained loans that stemmed from the CARES Act. (Dist. Ct. Crim. Doc. 19.)

While the case was pending in the district court, a contentious relationship developed between Mr. Tisone and his counsel. (Dist. Ct. Civ. Doc. 1 at 6.) Mr. Tisone became frustrated that his attorney did not review discovery with him nor discuss potential defenses to the Government's allegations. (Dist. Ct.

Civ. Doc. 1 at 6.) He thereby requested his business attorney, Scott Weiselberg, to seek a refund of the fees he had paid his criminal defense counsel. (Dist. Ct. Civ. Doc. 1 at 6.) The criminal defense attorney declined to refund any of the fees. (Dist. Ct. Civ. Doc. 1 at 6.) Mr. Tisone then impulsively obtained an internet domain titled, www.markeiglarshreviews.com.¹ (Dist. Ct. Civ. Doc. 1 at 6.) The Assistant United States Attorney prosecuting the case learned of the purchase of the domain name and thereafter informed the defense attorney of that fact. The prosecutor's disclosure of that information to the defense attorney exacerbated the already contentious relationship between Mr. Tisone and his counsel. (Dist. Ct. Civ. Doc. 1 at 6.)

¹ The website name included the name of Mr. Tisone's counsel in the criminal case.

A conference was later conducted between Mr. Tisone, his business attorney, and his criminal defense attorney. (Dist. Ct. Civ. Doc. 1 at 6.) During that conference, the defense attorney admitted to having been cavalier in his dealings with Mr. Tisone. (Dist. Ct. Civ. Doc. 1 at 6.) He nonetheless stated that, as a condition of continued representation, he would require Mr. Tisone to enter into a non-disparagement agreement in which Mr. Tisone would agree not to disparage counsel. (Dist. Ct. Civ. Doc. 1 at 6.) At that point, Mr. Tisone lacked sufficient financial means to retain other counsel. (Dist. Ct. Civ. Doc. 1 at 6.) Mr. Tisone thereby entered into the non-disparagement agreement, believing that he would be without legal counsel if he did not do so. (Dist. Ct. Civ. Doc. 1 at 6.)

The agreement was titled “Confidentiality and Non-Disparagement Agreement” and included the following clause:

The Parties understand and agree that, at all times following the execution of this Agreement and even after the Action comes to a conclusion and the Parties no longer have an Attorney-Client relationship, the Parties shall use reasonable and good faith efforts to ensure that neither party engages in any vilification of the other, and shall refrain from making any false, negative, *critical or disparaging statements, implied or expressed, concerning the other.*

(Dist. Ct. Civ. Doc. 16-1 at 2 (emphasis added)). Mr. Tisone signed that agreement by July 20, 2022, just over one month prior to when he would enter a guilty plea in the criminal case. (Dist. Ct. Civ. Doc. 16-1 at 1-4.)

Following the entry of the non-disparagement agreement, defense counsel advised Mr. Tisone to enter a guilty plea pursuant to a plea agreement with the Government. (Dist. Ct. Civ. Doc. 1 at 5-6.) To that point, Mr. Tisone's counsel had not discussed with him available lack of *mens rea* defenses to the fraud, theft, and illegal monetary transactions charges. (Dist. Ct.

Civ. Doc. 1 at 5.) Mr. Tisone believed, on the contrary, that he had no possible defense at trial. (Dist. Ct. Civ. Doc. 1 at 5.) In addition, to that point, Mr. Tisone's counsel had not discussed with him in any significant detail how the Sentencing Guidelines would operate in his case or how the Guidelines range would be calculated using intended losses that would include the amounts of applied for loans that were never actually funded. (Dist. Ct. Civ. Doc. 1 at 5.) Despite his ignorance as to those critical matters, Mr. Tisone felt that he had no choice but to enter into a guilty plea given the non-disclosure agreement he entered into with his counsel. (Dist. Ct. Civ. Doc. 1 at 6.) Under the terms of the non-disparagement agreement, Mr. Tisone believed that he would be violating the agreement if he went against his counsel's advice or made any statements or representations to the court

suggesting that his counsel had failed to discuss any pertinent issues with him. (Dist. Ct. Civ. Doc. 1 at 6.)

On August 26, 2022, Mr. Tisone entered guilty pleas to two counts of wire fraud, two counts of bank fraud, one count of illegal monetary transaction, and the count of possession of ammunition by a convicted felon. (Dist. Ct. Crim. Doc. 55, 56.) Mr. Tisone entered the pleas pursuant to a plea agreement in which the Government agreed to move to dismiss the remaining charges at sentencing. (Dist. Ct. Crim. Doc. 54 at 4.) The plea agreement contained a waiver of appeal clause that stated that Mr. Tisone could not appeal his sentence unless the court were to impose a sentence that exceeded the statutory maximum sentence, exceeded the applicable Sentencing Guidelines range, or violated the Eighth Amendment. (Dist. Ct. Crim. Doc. 54 at 17.) Again, because of the terms of the non-disparagement agreement, Mr. Tisone did not express

any dissatisfaction with his trial counsel during the change of plea hearing. (Dist. Ct. Civ. Doc. 1 at 6.)

On February 23, 2023, the district court imposed concurrent sentences of 87 months of imprisonment to be followed by three years of supervised release on each count.

Mr. Tisone thereafter took a direct appeal in United States Court of Appeals for the Eleventh Circuit, raising two grounds for relief: 1) whether the district court erred in determining the loss amount attributable to him under the Sentencing Guidelines when it relied on intended losses rather than actual loss and 2) whether the Government breached the plea agreement when it argued at sentencing in favor of a loss amount that relied on facts that the Government omitted from the factual basis of the plea agreement. On November 15, 2023, the Eleventh Circuit dismissed the appeal based on the waiver of

appeal clause contained in the plea agreement. *United States v. Tisone*, No. 23-10715, 2023 WL 7687554 (11th Cir. 2023).

On November 14, 2024, Mr. Tisone filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. (Dist. Ct. Civ. Doc. 1.) The motion raised four grounds for relief, including that an actual conflict of interest existed between Mr. Tisone and his trial counsel due to the non-disparagement agreement. (Dist. Ct. Civ. Doc. 1 at 5-6.) Mr. Tisone asserted that the conflict resulted in him entering the guilty pleas unknowingly, unintelligently, and involuntarily. (Dist. Ct. Civ. Doc. 1 at 5-6.) Mr. Tisone asserted that the agreement effectively precluded him from voicing concerns during the change of plea hearing over what he viewed as his counsel's inadequate and ineffective representation. (Dist. Ct. Civ. Doc. 1 at 6.) Mr. Tisone

submitted a copy of the non-disparagement agreement in the lower court. (Dist. Ct. Civ. Doc. 16-1.) The Government never disputed its existence or its authenticity.

On May 19, 2025, the district court entered an opinion and order summarily denying the motion to vacate. App. B. In denying the actual conflict ground, the court held that Mr. Tisone did not establish that he suffered prejudice pursuant to *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The court reasoned that “[t]he record conclusively establishes that Tisone understood the consequences of pleading guilty—including the potential prison sentences the Court might impose—regardless of the status of his relationship with [trial counsel] Eiglarsh.” App. B at 11.

Mr. Tisone went on to file an Application for a Certificate of Appealability in the United States Court

of Appeals for the Eleventh Circuit. On March 30, 2026, the Eleventh Circuit denied the motion. In its order, the Eleventh Circuit succinctly stated as its basis for the denial of relief: “Tisone’s motion for a COA is DENIED because he has not made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).” App. A at 1-2.

This Petition follows.

REASONS FOR GRANTING THE PETITION

I.

THE QUESTION OF WHETHER A PETITIONER IS REQUIRED TO PROVE PREJUDICE UNDER *STRICKLAND V. WASHINGTON* WHEN HE OR SHE ASSERTS THAT A CONFLICT AROSE FROM A NON-DISPARAGEMENT AGREEMENT THAT THE PETITIONER'S CRIMINAL DEFENSE COUNSEL REQUIRED THE PETITIONER TO ENTER INTO?

The question presented in this case is a question that will have far reaching effects and will impact criminal cases in all courts across the Nation. In the instant case, neither the lower courts, nor the Government, ever questioned the authenticity of the non-disparagement agreement that the Petitioner's counsel required him to enter into. The district court below, in denying relief under 28 U.S.C. § 2255, saddled the Petitioner with a burden of proving that the non-disparagement agreement prejudiced him in the underlying case. The Eleventh Circuit then

denied a certificate of appealability on the issue. In doing so, the lower courts have effectively approved of a practice that allows a criminal defense attorney to require his or her client to enter into an agreement that precludes the client from ever criticizing or critiquing the attorney's assistance or advice. Endorsing such a procedure could allow unscrupulous attorneys to essentially abandon their clients with no repercussions. Indeed, had Petitioner Tisone not had the courage to disclose the non-disparagement agreement, its existence never would have come to light. It remains to be seen if such non-disparagement agreements have been entered into in the course of other criminal cases where the clients never disclosed the existence of the agreements. To be sure, under the terms of such agreements, clients would surely be silenced out of fear that disclosing the existence of the agreement would violate the very terms of the

agreement. In such circumstances, the non-disparagement agreement benefits the attorney alone and inherently prejudices the client.

A. The Importance of the Question Presented

Any holding that would approve of the use of a non-disparagement agreement as a condition of representation of a client in a criminal case is an existential threat to the Sixth Amendment right to the effective assistance of counsel. The problems with a criminal defense attorney requiring a non-disparagement agreement are abundantly clear. First, an attorney confronting a client with such an agreement is preying on the client's vulnerability. Such an attorney is certainly not acting in the client's interests. When an attorney presents a client with such an agreement, the client and the attorney are not on equal ground. An individual facing a criminal charge, particularly an individual facing a serious

federal felony offense, relies on his or her attorney for advice and counsel in what are often the most vulnerable times of the client's life. When, as in this case, the client has already retained counsel, developed a relationship with counsel, and exhausted all available funds necessary to retain counsel, the client is not in a position to negotiate terms of continued representation when the attorney proposed renegotiating the terms. In the end, such an agreement benefits only the attorney. Its existence flies in the face of the Sixth Amendment right to the effective assistance of counsel.

Even more critical is the impact such an agreement can have on an attorney's representation of the client. Under the non-disparagement agreement that was used in the instant case, the attorney prevents the client from ever critiquing the attorney's performance in any way. If, at any point,

the attorney misadvises the client, renders ineffective assistance of counsel, or even renders no counsel at all, the client is precluded from taking any action in response. In the instant case, the Petitioner did not even feel that he could question his attorney's advice as to critical stages of the case such as whether to enter a guilty plea or proceed to trial. The agreement leaves the client stuck to abide by whatever the attorney advises even if the attorney fails to render objectively reasonable assistance of counsel. Raising a claim of ineffective assistance of counsel, much less proving prejudice in such a claim, violates the very terms of the non-disparagement agreement. Consequently, the non-disparagement agreement renders the protections of 28 U.S.C. § 2255 moot and leaves the Sixth Amendment right to the effective assistance of counsel toothless. For all of those reasons, the question of whether the entry into a non-

disparagement agreement by an attorney and his counsel in a criminal case creates an actual conflict of interest is a question of great importance that will likely arise frequently in lower courts in the future.

B. The Need for a Distinction to be Drawn Between *Cronic* and *Strickland* in Cases where an Attorney Requires a Client to Enter into a Non-Disparagement Agreement

An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases "are necessities, not luxuries."² Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to a trial itself would be "of little avail,"³ as this Court has recognized repeatedly. "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have."⁴

² *Quoting Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S.Ct. 792, 796, 9 L.Ed.2d 799 (1963).

³ *Quoting Powell v. Alabama*, 287 U.S. 45, 68-69, 53 S.Ct. 55, 63-64, 77 L.Ed. 158 (1932).

⁴ *Quoting Schaefer*, *Federalism and State Criminal Procedure*, 70 Harv.L.Rev. 1, 8 (1956).

United States v. Cronin, 466 U.S. 648, 653-54, 104 S.Ct. 2039, 2043-44, 80 L.Ed.2d 657 (1984).

Unfortunately, when, as in the instant case, the attorney takes action that benefits only the attorney and leaves the accused to stand by and simply do as the attorney says without allowing any opportunity to raise concerns over ineffective assistance of counsel, the attorney has effectively abandoned his role as an advocate for his client. In such a scenario, the attorney is looking out only for himself, not for his client.

Under *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980), a court must presume that a defendant suffered prejudice if a petitioner makes a showing that an actual conflict of interest existed that adversely affected his counsel's performance. *Id.* at 348. The Eleventh Circuit has held that a petitioner establishes that an actual

conflict of interest existed if he or she “make[s] a factual showing of inconsistent interests or point[s] to specific instances in the record to suggest an actual impairment of his or her interests.” *Freund v. Butterworth*, 165 F.3d 839, 859 (11th Cir. 1999) (en banc). To then prove the “adverse effect” prong, the Eleventh Circuit has held that a petitioner must establish three elements:

First, he must point to “some plausible alternative defense strategy or tactic [that] might have been pursued.” *United States v. Fahey*, 769 F.2d 829, 836 (1st Cir. 1985); *see also Porter [v. Wainwright]*, 805 F.2d 930, 939–40 (11th Cir. 1986), cert. denied, 482 U.S. 918, 107 S.Ct. 3195, 96 L.Ed.2d 682 (1987)]. Second, he must demonstrate that the alternative strategy or tactic was reasonable under the facts. Because prejudice is presumed, *see Strickland*, 466 U.S. at 692, 104 S.Ct. 2052, the petitioner “need not show that the defense would necessarily have been successful if [the alternative strategy or tactic] had been used,” rather he only need prove that the alternative “possessed sufficient substance to be a viable alternative.” *Fahey*, 769 F.2d at

836. Finally, he must show some link between the actual conflict and the decision to forgo the alternative strategy of defense. In other words, “he must establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney’s other loyalties or interests.” [*Fahey*, 769 F.2d at 836].

Id. at 860. The “adverse effect” showing required under *Sullivan* is, therefore, much less stringent than the showing of prejudice required under *Strickland*,⁵ which requires a reasonable probability that the outcome of the case would have been different but for the ineffective assistance of counsel. *Id.* at 859-60.

Four years after *Sullivan*, when this Court decided its two landmark cases *Cronic* and *Strickland*, it recognized two alternative standards that are applicable in determining ineffective assistance of counsel claims: 1) the *Strickland* standard, which

⁵ *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

presumes that counsel for a defendant rendered effective assistance of counsel and, thereby, requires the defendant to prove that prejudice resulted from his counsel's errors and 2) the presumed prejudice standard, as discussed in both *Cronic* and *Strickland*, which recognizes that some ineffective assistance scenarios are so egregious that the reviewing courts must presume that the defendant suffered prejudice as a result of some action that brought on the actual or constructive absence of counsel. *Cronic*, 466 U.S. at 658; *Strickland*, 466 U.S. at 689. While, in *Strickland*, this Court held that courts addressing ineffective assistance claims should "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," it further found that in some ineffective assistance scenarios "prejudice... is so likely that case-by-case inquiry into prejudice is not worth the cost."

Strickland, 466 U.S. at 692. As a result, in such cases, courts must apply the presumption of prejudice when confronted with those factual scenarios. *Id.* at 692-93. Citing *Cronic*, the *Strickland* opinion listed examples of when presumed prejudice applies as situations in which a defendant suffers from “actual or constructive denial of the assistance of counsel altogether” or when an actual conflict of interest exists. *Id.*

The *Cronic* opinion elaborated on the presumed prejudice standard in reasoning that, despite the usual presumption of reasonableness in ineffective assistance claims, “[t]here are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.” *Cronic*, 466 U.S. at 658. One such situation, the Court noted, is when the defendant experiences the “complete denial of counsel.” *Id.* at 659. In such instances, a trial would

be presumptively unfair, the Court held, where the accused is denied the assistance of counsel at a critical stage.⁶ *Id.* at 659, 662. Likewise, a presumption of prejudice also attaches when counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing. *Id.* at 659. As an example of such a situation, the Court cited *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) in which, while the defendant was afforded assistance of counsel at trial, the trial court unconstitutionally restricted trial counsel’s ability to cross-examine and impeach an adverse witness. *Cronic*, 466 U.S. at 659. The Court, likewise, relied on *Sullivan* in the *Cronic* opinion and cited to *Sullivan* as an example of a case where it had “presumed prejudice when counsel labors

⁶ The Court, in *Hamilton v. Alabama*, 368 U.S. 52, 54, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961), and *White v. Maryland*, 373 U.S. 59, 60, 83 S.Ct. 1050, 10 L.Ed.2d 193 (1963), used the term “critical stage” to denote a step of a criminal proceeding that held significant consequences for the accused.

under an actual conflict of interest, despite the fact that the constraints on counsel in that context are entirely self-imposed.”⁷ *Cronic*, 466 U.S. at 662 n. 31 *citing Sullivan, supra*, 446 U.S. 335. The ultimate question at issue herein is whether a petitioner must prove prejudice under *Strickland* when he or she asserts that an actual conflict arose when the petitioner’s criminal defense attorney required the petitioner to enter into a non-disparagement agreement? Alternatively, when an attorney requires a non-disparagement agreement as a condition of representation, is the resulting conflict between the client and the attorney so egregious that it triggers a presumption of prejudice as contemplated in *Cronic*?

⁷ In *Cronic*, the trial court appointed a young real estate attorney to represent three defendants charged with mail fraud and afforded him only 25 days to prepare for trial. *Cronic*, 466 U.S. 648.

C. The Instant Case Presents a Prime Example of the Prejudice that Ensues Whenever a Criminal Defense Attorney Requires His or Her Client to Enter into a Non-Disparagement Agreement as a Condition of Representation

The scenario at issue in the instant case is a prime example of a case where a reviewing court must presume that the defendant suffered prejudice as a result of the actual conflict of interest that counsel created. When Petitioner Tisone expressed dissatisfaction with his counsel, trial counsel required him to enter into a non-disparagement agreement as a condition of continued representation. Such action falls far outside the norms of professional representation. In any event, as the Petitioner set out in the lower court, he was without funds to retain other counsel and felt that he had no viable option other than to enter into the non-disparagement agreement. After he then entered into that agreement, the Petitioner reasonably believed that he

could not relay to the lower court at the change of plea hearing his concerns over his attorney's lack of communication. To that point, the Petitioner's trial counsel had not reviewed discovery with him; had not made him aware of his available lack of *mens rea* defenses to the fraud, theft, and illegal monetary transactions charges; and had not discussed with him the possibility that the Government may seek a Guidelines loss amount that was based on intended losses rather than actual losses. The Petitioner was completely in the dark. However, given the terms of the non-disparagement agreement, he believed that he would be violating the agreement if he went against his counsel's advice or made any statements or representations suggesting that his counsel had failed to discuss those pertinent issues with him.

The non-disparagement agreement effectively silenced the Petitioner and left him in the untenable

position of feeling compelled to acquiesce in whatever action his counsel set in motion. That action included entering a guilty plea without having knowledge and understanding of the full consequences of the plea and the alternative options that were available. Under those extraordinary circumstances, counsel's representation was tantamount to no representation at all. Indeed, the proper course of action for counsel to have taken would have been to move to withdraw from the case. Instead, trial counsel took the essentially unprecedented step of requiring his client to enter into a non-disparagement agreement. In doing so, counsel created an actual conflict of interest.

The creation of the non-disparagement agreement clearly evidenced the ill feelings that existed between the Petitioner and trial counsel. The conflict, in turn, adversely affected counsel's performance because it permitted counsel to walk the

Petitioner into an unwitting change of plea hearing at which the Petitioner could not voice any displeasure over his counsel. The alternative actions that the Petitioner would have taken would have been to proceed to trial, asserting a lack of *mens rea* defense and to seek a potential plea agreement that would have limited Guidelines losses to only the actual losses that stemmed from the offenses for which the Petitioner would have been charged. Either alternative would have been viable. Those alternatives were, however, not undertaken due to the attorney's protections under the non-disparagement agreement and his corresponding desire to be finished with his representation of the Petitioner.

Even assuming for purposes of argument that the lower court properly relied on *Strickland* in addressing the actual conflict claim, the question of whether the Petitioner established prejudice was

without question. In finding that the Petitioner failed to prove prejudice, the district court overlooked the crux of the claim – that the non-disparagement agreement prevented the Petitioner from rejecting the plea agreement and alerting the court to the shortcomings of his counsel. Had the Petitioner been aware of available defenses and had he been aware that his Sentencing Guidelines range could be based on alleged intended losses stemming from purported offenses for which he was not charged, he would not have entered into the plea agreement.

The prejudice that the Petitioner suffered as a result of the ineffective assistance was multifold. For one, the Petitioner was unaware of his available lack of *mens rea* defenses to the fraud, theft, and illegal monetary transactions charges. The Petitioner believed, on the contrary, that he had no possible defense at trial. As he set forth in the lower court,

however, he clearly had an available defense of asserting that he did not knowingly and intentionally seek loans that he was not qualified to seek.

Second, the Petitioner was unaware of the fact that, under the terms of the guilty pleas, he would be subject to a Sentencing Guidelines range calculated pursuant to intended losses that would include the amounts of applied for loans that were never actually funded. To be sure, without having had discussions with counsel, the Petitioner could have had no way of knowing that he would be held accountable for intended losses because the plea agreement he entered into made no mention of the unfunded loans nor the means by which loss amount would be calculated. In the end, the failure to discuss the Guidelines and the potential for the use of intended loss had a profound impact on the outcome of the

case.⁸ The Petitioner, however, had no idea that he would be held accountable for the unfunded loan amounts when he entered the plea agreement.

Third, and most critically, despite his ignorance at the time of the change of plea, the Petitioner felt that he had no choice but to enter into a guilty plea given the non-disclosure agreement he entered into with his counsel. Under the terms of that agreement, the Petitioner believed that he would be violating the agreement if he went against his counsel's advice or even implied that his counsel failed to discuss any

⁸ The use of intended loss, rather than actual loss, increased the total offense level calculation by four levels under the Sentencing Guidelines. With a loss amount equal to the actual losses of \$2,617,447.17, Section 2B1.1 would have called for a 16-level offense level increase for a loss amount of more than \$1,500,000 but less than \$3,500,000. (Dist. Ct. Crim. Doc. 84 at 47-48.) The proposed intended loss amount on the other hand, \$10,792,154.17, triggered a 20 level increase. With the actual loss amount, the Guidelines would have proposed an imprisonment range of 70 months to 87 months. With the intended loss amount, however, the Guidelines range fell at 108 to 135 months imprisonment, a substantial difference. The court, in addition, sentenced the Petitioner within the Guidelines range.

pertinent issues with him. Virtually any client who enters into a non-disparagement agreement with his or her attorney would feel the same way at every critical stage of a criminal case.

As the instant case demonstrates, non-disparagement agreements entered into between attorneys and clients in criminal cases threaten the continued viability of the constitutional right to effective assistance of counsel. In finding that the Petitioner failed to prove *Strickland* prejudice, the lower court improperly relied on the Petitioner's responses during the change of plea hearing colloquy in which he declined to express dissatisfaction with his counsel and expressed an understanding of the consequences of his plea. In doing so, the lower courts failed to recognize that the non-disparagement agreement compelled the Petitioner to express satisfaction with his counsel and not to make any

statements critical of his counsel. Therein lies the prejudice inherent in such an agreement. Based on the effect of the non-disparagement agreement, the change of plea colloquy could not conclusively refute the Petitioner's claims of suffering ineffective assistance of counsel. For that reason, the instant case presents the critical question of whether a defendant who enters into a non-disparagement agreement must establish prejudice under *Strickland* when presenting an ineffective assistance of counsel claim that arises from the entry of the non-disparagement agreement. The question is one of great importance that has not yet been decided by this Court and one which will likely arise frequently in lower courts in the future. Sup. Ct. R. 10(c).

CONCLUSION

Based on the foregoing, the Petitioner respectfully requests that this Honorable Court grant this petition for a writ of certiorari.

Respectfully Submitted on June 29, 2026,

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