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Presumed Prejudice: When Should Reviewing State Courts Assume A Defendant's Conflicted Counsel Negatively Impacted the Outcome of Trial?

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PRESUMED PREJUDICE: WHEN SHOULD REVIEWING STATE COURTS ASSUME A DEFENDANT'S CONFLICTED COUNSEL NEGATIVELY IMPACTED THE OUTCOME OF TRIAL?

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INTRODUCTION

The Sixth Amendment mandates that a criminal defendant shall have the right to "the Assistance of Counsel for his defence."[1] A defendant who claims that ineffective assistance of counsel denied their Sixth Amendment right "must generally demonstrate prejudice to the result of the trial."[2] This prejudice requirement, set forth by the Supreme Court's ruling in *Strickland v. Washington*, requires that defendants must generally show that the ineffective assistance had a "probable effect upon the outcome of trial."[3] However, in some

1. U.S. CONST. amend. VI.

2. *See* Mark W. Shiner, Note, *Conflicts of Interest Challenges Post* Mickens v. Taylor*: Redefining the Defendant's Burden in Concurrent, Successive, and Personal Interest Conflicts*, 60 WASH. & LEE L. REV. 965, 967 (2003).

3. *See* Mickens v. Taylor, 535 U.S. 162, 174 (2002) (interpreting Strickland v. Washington, 466 U.S. 668 (1984)).

instances, "[i]f the ineffective assistance of counsel claim stems from a conflict of interest that hampered the defendant's attorney, a defendant may face a burden somewhat less than a showing of prejudice."[4] This standard, set forth by the Supreme Court in *Cuyler v. Sullivan,* requires "a showing of defective performance"[5] by counsel, but unlike the *Strickland* standard, does not require the defendant to demonstrate prejudice.[6] In *Sullivan,* the Supreme Court determined that such a presumption of prejudice applies to instances where an attorney's conflict of interest arises from representing two or more clients concurrently.[7] Should such a presumption apply to other conflicts of interest as well?

In 2002, the Supreme Court examined the issue in *dicta* in *Mickens v. Taylor* but declined to rule on the matter, instead declaring it "an open question."[8] Since *Mickens,* lower state courts have adopted diverging approaches to the issue.[9] The answer to this question can determine whether a conviction, even a capital murder conviction,[10] is overturned or upheld.[11]

Part I of this Note examines the types of conflicts of interest that arise in ineffective assistance of counsel claims. Part II examines the Supreme Court history behind conflict-of-interest law. Part III examines the way state courts have differentiated between conflict-of-interest claims that are eligible for the *Sullivan* exception or require *Strickland* since the Supreme Court declared the issue an open question in *Mickens*. Part IV provides a recommendation for how lower courts should differentiate between conflicts that require *Strickland* prejudice and conflicts that are eligible for the *Sullivan* exception.

I. TYPES OF CONFLICTS OF INTEREST

A conflict of interest (conflict) inherently divides the loyalty of counsel. A conflict exists where "there is a significant risk that a

4. Shiner, *supra* note 2, at 967.

5. *Mickens*, 535 U.S. at 174.

6. *See id.* at 171. Prejudice in this context means a "showing of probable effect upon the outcome of trial." *Id.* at 174.

7. *See* Cuyler v. Sullivan, 446 U.S. 335, 349–50 (1980).

8. *Mickens*, 535 U.S. at 176. *Mickens* was "presented and argued on the assumption that (absent some exception for failure to inquire) *Sullivan* would be applicable," but "the language of *Sullivan* itself does not clearly establish, or indeed even support, such expansive application" of *Sullivan*. *Id.* at 174–75.

9. *See* discussion *infra* Part III.

10. *See* State v. Cheatham, 292 P.3d 318 (Kan. 2013).

11. *See* discussion, *infra* Parts I–II.

lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests."[12] The impact a conflict can have on a trial is "notoriously hard to predict" for "[i]t is a rare attorney who will be fortunate enough to learn the entire truth from his own client, much less be fully apprised before the trial of what each of the Government's witnesses will say on the stand."[13] Under the Model Rules of Professional Conduct (Model Rules),[14] conflicts of interest can arise under four categories: counsel's duties to another client, to a former client, to a third person, or to counsel's own interests.[15] Courts have dealt with different conflicts in different ways.

A. Duties to Another Client

i. Multiple Representation of Codefendants

Multiple representation occurs when defense counsel simultaneously represents codefendants who have been jointly charged with the same or similar crimes.[16] Multiple representation can be highly prejudicial to a defendant because, in such scenarios, counsel's loyalty is inherently divided.[17] The Model Rules note that when an attorney represents multiple clients for a single matter, the attorneys must obtain informed consent from both clients.[18] Counsel must inform their clients of the possible risks of the multiple representation, including effects from counsel's divided loyalty, strains on confidentiality, and limitations due to attorney-client privilege.[19] In addition, the Federal Rules of Criminal Procedure require a court to inquire about a conflict of interest in a prototypical

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12. MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 8 (AM. BAR ASS'N 2020); *see also Sullivan*, 446 U.S. at 356, n.3 (Marshall, J., concurring in part) (noting that "'[c]onflict of interest' is a term that is often used and seldom defined" and looking to the ABA standards for guidance).

13. Wheat v. United States, 486 U.S. 153, 162–63 (1988).

14. Note that under *Strickland*, "prevailing norms of practice as reflected in American Bar Association Standards and the like are guides to determining what is reasonable, but they are only guides." Nix v. Whiteside, 475 U.S. 157, 165 (1986) (quoting Strickland v. Washington, 466 U.S. 668, 688 (1984)).

15. *See* MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 1 (AM. BAR ASS'N 2020).

16. *See* Bruce A. Green, *"Through A Glass, Darkly": How the Court Sees Motions to Disqualify Criminal Defense Lawyers*, 89 COLUM. L. REV. 1201, 1203 (1989).

17. *See id.* at 1204.

18. *See* MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 18 (AM. BAR ASS'N 2020).

19. *See id.* r. 1.7 cmt. 18, 30.

multiple representation scenario.[20] Nearly every instance of multiple representation is a *potential* conflict of interest.[21] Nevertheless, multiple representation is permissible under the Sixth Amendment so long as it does not lead to an *actual* conflict of interest.[22] If a defendant objects to multiple representation at trial, they shall receive the chance to demonstrate that the conflict will "impermissibly imperil his right to a fair trial."[23]

The Supreme Court in *Holloway v. Arkansas*[24] and *Sullivan* discussed the dangers of attorneys representing multiple defendants who have conflicting interests.[25] The impact of multiple representation can be difficult to detect by a reviewing court because multiple representation of codefendants can cause counsel at any point during representation to limit their advocacy for one client in deference to the interests of the other client.[26] In other words, multiple representation can cause counsel to "pull his punches."[27] For example, counsel representing two clients facing similar charges may forego plea and cooperation negotiations with the prosecution, with respect to one defendant, in hopes of getting a better sentence for the codefendant.[28] Multiple representation of codefendants can keep counsel from challenging the admission of evidence that is damaging to one client because it is beneficial to the other.[29] It can also keep counsel from arguing that one defendant is less culpable and therefore deserves a lesser sentence than the codefendant.[30] In addition, prejudice to a defendant from multiple representation can be hard to detect.[31] In *Holloway*, the Supreme Court noted that it

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20. *See* Mickens v. Taylor, 535 U.S. 162, 175 (2002) (citing FED. R. CRIM. P. 44(c)).

21. *See* Cuyler v. Sullivan, 446 U.S. 335, 348 (1980).

22. *Id.* "Absent special circumstances . . . trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist." *Id.* at 346–47.

23. *Id.* at 348.

24. 435 U.S. 475, 490–91 (1978).

25. *See* Sheri Lynn Johnson, *Racial Antagonism, Sexual Betrayal, Graft, and More: Rethinking and Remedying the Universe of Defense Counsel Failings*, 97 WASH. U. L. REV. 57, 70 (2019); *see also* Green, *supra* note 16, at 1206.

26. *See* Johnson, *supra* note 25, at 70 (quoting *Holloway*, 435 U.S. at 489–90).

27. *See* Green, *supra* note 16, at 1221.

28. *See Holloway*, 435 U.S. at 489–90.

29. *See id.* at 490.

30. *See id.*

31. *See id.*

would be "virtually impossible" to evaluate a conflict's impact on an attorney's decision-making process and tactics in plea negotiations.[32]

Because multiple concurrent representations have both a high probability of prejudice arising and a difficulty of proving said prejudice,[33] such conflicts are entitled to a presumption of prejudice on post-conviction review.[34] Multiple representation, however, does not always entail an actual conflict of interest, indeed in some cases codefendants may benefit from a common defense attorney.[35] This is why under Supreme Court law, an actual conflict of interest must also adversely affect representation.[36]

ii. Duties to Another Client Outside of Multiple Representation of Codefendants

Sometimes counsel might face divided loyalty between helping one client who is on trial or helping another client who is not on trial. In *Wood v. Georgia*, three defendants who worked at an adult entertainment store were charged with distributing obscene materials.[37] The defendants were represented by the entertainment store's lawyer.[38] The defendants were under the impression that their employer would pay both their legal and court fees — and their employer did for the most part.[39] However, the defendants were convicted and received several-thousand-dollar fines from the court, and their employer failed to pay these fines with no explanation.[40] The Supreme Court speculated that the employer might have withheld the fine payments in order to create standing for a constitutional "test case" — where the employer was seeking to avoid paying their employees' court-imposed fines but did not want its employees jailed as a result.[41] Because defense counsel represented both the employer and the employees, it was unclear whether counsel

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32. *See id.* at 491.

33. *See* Mickens v. Taylor, 535 U.S. 162, 175 (2002).

34. *See* Strickland v. Washington, 466 U.S. 668, 692 (1984) (discussing Cuyler v. Sullivan, 446 U.S. 335, 345–50 (1980)).

35. *See* Green, *supra* note 16, at 1206. Some benefits of multiple representation include a bond between codefendants, the trust of a specific lawyer, financial benefits, and distrust of the prosecution's motives for trying to disqualify defense counsel. *See id.* at 1206 n.26.

36. *See Mickens*, 535 U.S. at 164.

37. 450 U.S. 261, 263–64 (1981).

38. *See id.* at 266.

39. *See id.*

40. *See id.* at 263–64.

41. *Id.* at 267.

"single-mindedly" pursued the defendants' liberty interests.[42] If, indeed, defense counsel tried to make a test case out of the defendants' situation, it would have highly prejudiced the defendants. In addition, the conflict created by defense counsel's divided loyalty between the employer and employees was potentially diffused throughout the proceeding and was therefore hard to detect. The Court "c[ould not] be sure whether counsel was influenced in his basic strategic decisions by the interests of the employer who hired him."[43] If defense counsel was serving the interests of the employer to the disadvantage of the employee defendants during the employees' court proceedings, the employees' constitutional rights would have been violated.[44]

B. Duties to a Former Client

An attorney may have a conflict of interest between a current and former client if that former client is implicated in the current client's legal dispute — this is known as successive representation.[45] The Model Rules note that "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client" unless that former client gives written informed consent.[46] The degree of prejudice that arises from successive representation cases depends on the context of counsel's relationship with the former client.[47]

For example, in *State v. Alvarado*, a defendant was convicted of multiple violent crimes.[48] The defendant appealed his conviction claiming that his public defender had an actual conflict of interest because defense counsel had previously represented a prosecution

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42. *Id.* at 272.

43. *Id.*; *see also* Mickens v. Taylor, 535 U.S. 162, 170–71 (2002) (noting how the remand instruction in Wood "was shorthand for the statement in Sullivan").

44. *Mickens*, 535 U.S. at 171.

45. *See* MODEL RULES OF PRO. CONDUCT r. 1.9(a) (AM. BAR ASS'N 2020).

46. *Id.*

47. *See Ex parte* Kelley, No. WR-87,470-01, 2019 WL 5788034, at *33 (Tex. Crim. App. Nov. 6, 2019) (Newell, J., concurring) ("Conflicts may be based on former clients, if that client is a now a prosecution witness. But if that former client is not a witness, the potential conflict never becomes an actual conflict." In instances where a former client does not testify against the defendant, "counsel never [has] the opportunity to cross-examine him [so] [a]ny potential conflict never became an actual conflict of interest." (citing *Ex parte* McFarland, 163 S.W.3d 743, 759 (Tex. Crim. App. 2005))).

48. 481 P.3d 737, 743 (Idaho 2021).

witness.[49] The defendant argued that defense counsel's continuing ethical obligations to the witness prevented a rigorous cross examination of that witness.[50] However, because the conflict was limited to one witness, the impact of the conflict was both discrete and discernable.[51] The Supreme Court of Idaho examined the record of the cross examination to see if it adversely affected the defendant.[52] The court found that defense counsel attempted to impeach the witness' credibility by attempting to ask about the witness' own incarceration; the trial court, however, prevented defense counsel from pursuing this line of questioning.[53] The Idaho Supreme Court determined that defense counsel's attempt at impeaching the witness meant that counsel was not holding back in his advocacy of the defendant in favor of his former client. The conflict of interest, therefore, had no adverse effect on the defendant, and the defendant was not prejudiced from the potential conflict of interest due to defense counsel's successive representation.[54]

C. Duties to a Third Party

Defendants have questioned their attorney's loyalty based on many other reasons, including defense counsel's role as an administrative leader in the office,[55] counsel obtaining a new job,[56] counsel's

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49. *See id.* at 740.

50. *See id.*

51. *See id.* at 746; *cf.* Holloway v. Arkansas, 435 U.S. 475, 490–91 (1978) (discussing how joint representation is suspect because of what it prevents counsel from doing at any point throughout the legal proceedings and is therefore difficult to detect).

52. *See Alvarado*, 481 P.3d at 746.

53. *See id.*

54. *See id.* at 748–49. The court notes that that successive representation "amounts to a cosmetic crack in the exterior of the trial proceedings; the overall foundation — and our confidence in the outcome — remains firm nonetheless. For these reasons, we hold that claims of conflict of interest relating to successive representation require a showing of actual prejudice," and holding that the defendant was not denied his right to conflict-free counsel. *Id.*

55. *See* Gibson v. State, 133 N.E.3d 673, 698–700 (Ind. 2019) (declining to apply *Sullivan* to an alleged conflict of interest in which the defendant claimed that trial counsel — who was the Chief Public Defender and therefore charged with efficiently administering public funds for the office — could not provide effective representation in defendant's capital case because it would be a strain on the office's resources).

56. *See* Flaherty v. State, 221 So. 3d 633, 634–37 (Fla. Dist. Ct. App. 2017) (applying *Sullivan* and finding no actual conflict of interest in a case where an assistant state attorney criminally charged a defendant, provided discovery, offered the defendant a plea deal, and then became defendant's defense attorney at trial); *see also* Catala v. State, 897 A.2d 257, 260, 271 (Md. Ct. Spec. App. 2006) (applying *Sullivan* and finding no actual conflict of interest where during the course of

relationship to their boss,[57] and counsel's personal feelings to a third party.[58]

One example of a conflict arising out of defense counsel's loyalty to a third party was in *Acosta v. State*.[59] In *Acosta*, two Texas appellate courts considered a conflict-of-interest claim where the defendant claimed that defense counsel had a conflict of interest when counsel put forward evidence at trial that was solely beneficial to the defendant's wife's efforts to retain custody of her children.[60] Counsel admitted his actions were "solely to help" the defendant's wife and it was "no help whatsoever" to the defendant.[61] The Court of Criminal Appeals of Texas noted that "[a]n 'actual conflict of interest' exists if counsel is required to make a choice between advancing his client's interest in a fair trial or advancing other interests (perhaps counsel's own) to the detriment of his client's interest."[62] The court likened defense counsel's actions arising from the conflicted representation as "a clear example of how the danger of ineffective assistance via a conflict of interest is not strictly limited to the codefendant context."[63] Nevertheless, the impact of the conflict was limited to the evidence that was admitted to assist the wife, and the court only needed to look to that part of the trial record to discern whether the conflict adversely impacted the defendant.[64]

D. The Lawyer's Own Interests

Under the Model Rules, "[t]he lawyer's own interests should not be permitted to have an adverse effect on representation of a

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representing the defendant, defense counsel had accepted a position with the State Attorney's office and was slated to begin his new employment shortly after defendant's trial.).

57. *See* Hall v. Jackson, 854 S.E.2d 539, 544 (Ga. 2021) (applying *Sullivan* and granting habeas relief to a defendant who claimed that his public defender appellate counsel had a conflict of interest when appellate counsel did not argue on appeal that trial counsel — who was Chief Assistant Public Defender and therefore appellate counsel's boss — was ineffective as the defendant's trial counsel).

58. *See* People v. Tolbert, No. 1-18-0117, 2021 IL. App. (1st) 180117-U, ¶¶ 1,17 (Mar. 15, 2021) (applying *Sullivan* and finding no actual conflict of interest where appellate counsel did not argue that trial counsel was ineffective on appeal — trial counsel was appellate counsel's uncle, co-counsel, and former employer).

59. *See* 233 S.W.3d 349 (Tex. Crim. App. 2007).

60. *See id.*

61. *Id.* at 352 (quoting the record).

62. *Id.* at 355 (quoting Monreal v. State, 947 S.W.2d 559, 564 (Tex. Crim. App. 2007)).

63. *See id.* at 354.

64. *See id.*; *see also infra* Sections IV.A–B.

client."[65] For example, if trial counsel also argues an appeal for a defendant, counsel might be put in the awkward position of determining whether or not to argue that they provided ineffective assistance at trial.[66] In addition, media rights are an area that often implicates the lawyer's own interests.[67] Under the Model Rules, "[a]n agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer."[68]

Furthermore, a lawyer's interests can be implicated when counsel is paid by someone other than the defendant. Under the Model Rules, "[a] lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client."[69] Attorneys cannot represent a client under such circumstances unless the lawyer determines that the fee arrangement will not interfere with their professional judgment and obtains informed consent from the client.[70]

One example case alleging counsel's divided loyalties is *Sola-Morales v. State*.[71] In *Sola-Morales*, the defendant brought an ineffective assistance of counsel claim noting that counsel purportedly lied to his client about making motions to dismiss and subsequently tried to cover up the lie.[72] This purported lie and coverup allegedly gave counsel a personal conflict of interest in representing the

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65. MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 10 (AM. BAR ASS'N 2020).

66. *See* People v. Huggins, 463 P.3d 294, 302 (Colo. App. 2019) (applying *Strickland* and denying relief finding no conflict of interest between attorney and client where trial counsel failed to consider his own ineffective assistance as an argument when filing an appeal for defendant).

67. *See* MODEL RULES OF PRO. CONDUCT r. 1.8 cmt. 9 (AM. BAR ASS'N 2020).

68. *Id.*; *see also* Echols v. State, 127 S.W.3d 486, 494 (Ark. 2003) (applying *Strickland* and denying relief where trial counsel entered into a film contract with HBO because "counsel acted in [defendant's] interest, and that his defense was aided, not impeded, by the film contract").

69. MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 13 (AM. BAR ASS'N 2020); *see also* Acklin v. State, 266 So. 3d 89, 108 (Ala. Crim. App. 2017), *cert. denied*, 139 S.Ct. 1374 (2019) (mem.) (applying *Sullivan* and finding no actual conflict when defense counsel's "failure to present potential mitigating evidence regarding domestic abuse [by defendant's father who was paying the attorney bills] to the jury and trial judge was not because of a conflict of interest with [defendant's] father — it was because [defendant] made the conscious decision that he did not want this evidence presented at trial").

70. *See* MODEL RULES OF PRO. CONDUCT r. 1.8 cmt. 14 (AM. BAR ASS'N 2020).

71. 451 P.3d 887 (Kan. Ct. App. 2019) (mem.).

72. *See id.*

defendant.[73] On review, the Kansas Court of Appeals determined that there was no actual conflict of interest and that it did not adversely affect counsel's representation and therefore denied relief.[74]

Another example case alleging counsel's divided loyalties, this time due to a fee arrangement, is *State v. Cheatham*.[75] *Cheatham* was a capital murder case in which the defendant was convicted and sentenced to death.[76] In a post-conviction proceeding, the defendant argued that he received ineffective assistance of counsel partially due to his attorney's flat fee arrangement at trial.[77] The trial court determined that defense counsel did have an improper fee agreement and even noted that counsel "had no business taking on a death penalty case."[78] However, the trial court applied *Strickland* to the defendant's claims, did not find that the defendant was prejudiced by his attorney's conduct and upheld the defendant's conviction.[79]

On appeal, the state supreme court determined that the district court erred when evaluating the defendant's conflict "solely under the *Strickland* standards."[80] The court instead evaluated the conflict of interest with a *Sullivan* presumption of prejudice, determined that relief was warranted, and reversed the defendant's conviction.[81] In evaluating the appeal, the state supreme court first looked at whether the flat fee arrangement was an actual conflict of interest and found that it was.[82] The court noted American Bar Association guidelines disapprove of flat fee arrangements in death-penalty cases.[83] Defense counsel did have an actual conflict of interest because he was a solo practitioner with a high caseload who had a financial incentive to devote his attention to cases for which he could bill rather than the capital case.[84] The defendant was, therefore, likely to be highly prejudiced by the conflict of interest and the impact of the conflict would be difficult to pinpoint. The court next looked at whether counsel's conflict of interest adversely affected the defendant's

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73. *See id.*
74. *See id.*
75. 292 P.3d 318 (Kan. 2013).
76. *See id.* at 321.
77. *See id.* at 337.
78. *Id.* at 322.
79. *See id.* at 322.
80. *Id.* at 338.
81. *See id.*
82. *See id.* at 340.
83. *See id.* at 341.
84. *See id.* at 341–42.

representation.[85] The court found that yes, there was an adverse effect on defendant's representation — counsel's death-penalty representation "bore a greater resemblance to a personal hobby engaged in for diversion rather than an occupation that carried with it a responsibility for zealous advocacy."[86] Furthermore, the impact of the conflict was diffused throughout the trial process. The court did not pinpoint one specific instance in which the defendant received ineffective assistance of counsel, but rather reasoned that defense counsel spent 200 hours defending his client, which was "appallingly low for a death penalty case defense and even more stunning when all but 60 of those hours, as [defense counsel] testified, were spent in trial."[87] The court also noted that defense counsel failed to investigate leads, retain an investigator and assemble a defense team.[88]

In sum, when the lower court evaluated defendant's post-conviction claim under *Strickland*, the defendant could not demonstrate that defense counsel's conflict of interest prejudiced the defendant. As a result, the defendant's murder conviction stood.[89] However, when the state supreme court evaluated the same claim under the *Sullivan* "prophylaxis,"[90] presuming prejudice, the defendant's conviction was overturned.[91]

II. SUPREME COURT HISTORY ON CONFLICT-OF-INTEREST LAW

A. The General Rule for Evaluating Ineffective Assistance of Counsel Claims

In *Strickland v. Washington*, the Supreme Court set forth the general test for interpreting claims of ineffective assistance of counsel.[92] The *Strickland* test has two parts.[93] First, a defendant must

85. *See id.* at 342.
86. *Id.*
87. *Id.*
88. *See id.*
89. *See id.* at 327.
90. *See* Mickens v. Taylor, 535 U.S. 162, 176 (2002).
91. *See Cheatham*, 292 P.3d. at 342.
92. 466 U.S. 668, 694 (1984); *see also* United States v. Gonzalez-Lopez, 548 U.S. 140, 147 (2006) ("[O]ur recognition of the right to effective counsel within the Sixth Amendment was a consequence of our perception that representation by counsel 'is critical to the ability of the adversarial system to produce just results.'" (quoting *Strickland*, 466 U.S. at 685)).
93. *See Strickland*, 466 U.S. at 687.

demonstrate deficient performance by counsel.[94] Deficient performance means that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed [to] the defendant by the Sixth Amendment."[95] Under this first prong, a defendant who wishes to argue that they received ineffective assistance of counsel has to demonstrate that counsel's representation was less than "an objective standard of reasonableness."[96] Second, the defendant has to establish that counsel's deficient performance prejudiced the defense.[97] Under this prong, the defendant must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[98] If a defendant fails to prove either prong of the *Strickland* test, then there is no "breakdown in the adversary process that render[s] the result of the proceeding unreliable, and the sentence or conviction should stand."[99]

Surmounting a *Strickland* claim is a difficult task.[100] This is largely due to the prejudice requirement.[101] The Supreme Court has a prejudice requirement for a couple of reasons.

First, a prejudice requirement helps a court determine whether counsel was — despite deficient performance in one area — overall effective in their representation of the defendant or whether counsel's ineffectiveness had a negative impact on the jury.[102] The Court considers this balance because a defendant's constitutional right to the effective assistance of counsel is based on the Sixth Amendment's purpose of ensuring a fair trial.[103] For counsel to be considered constitutionally ineffective, a court must reasonably believe that counsel's mistake actually harmed the defense — i.e., was prejudiced.[104] As the Court held in *Gonzalez*:

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94. *See id.*

95. *Id.*

96. *Id.* at 688.

97. *See Gonzalez-Lopez*, 548 U.S. at 147.

98. *See Strickland*, 466 U.S. at 694.

99. Bell v. Cone, 535 U.S. 685, 695 (2002) (quoting *Strickland*, 466 U.S. at 695) (internal citations and quotations omitted).

100. *See* Harrington v. Richter, 562 U.S. 86, 105 (2011).

101. *See* Daniel J. Capra & Joseph Tartakovsky, *Why* Strickland *Is the Wrong Test for Violations of the Right to Testify*, 70 WASH. & LEE L. REV. 95, 141–42 (2013) (citing *Strickland*, 466 U.S. at 697).

102. *See Harrington*, 562 U.S. at 105.

103. *See* United States v. Gonzalez-Lopez, 548 U.S. 140, 146–47 (2006) (citing *Strickland*, 466 U.S. at 694); *see also* United States v. Cronic, 466 U.S. 648, 658 (1984).

104. *See Gonzalez-Lopez*, 548 U.S. at 147.

> The requirement that a defendant show prejudice in effective representation cases arises from the very nature of the specific element of the right to counsel at issue there — effective (not mistake-free) representation. Counsel cannot be "ineffective" unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that they have). Thus, a violation of the Sixth Amendment right to effective representation is not "complete" until the defendant is prejudiced.[105]

Prejudice establishes that a violation of a defendant's Sixth Amendment right to effective representation actually happened.[106]

Second, a prejudice requirement promotes finality. Courts evaluating structural errors[107] generally must balance two elements: a defendant's right to a fair trial[108] and the "profound importance of finality in criminal proceedings."[109] If there is a structural error at trial, defense counsel objects, and the issue is raised on direct appeal, then a defendant can receive automatic reversal and need not demonstrate that the error prejudiced their trial — the balance of the scale is in favor of ensuring a fair trial.[110] When a court reviews a structural error as a *Strickland* claim, however, it is generally after time has elapsed and "the costs and uncertainties of a new trial are greater."[111] The Court has cautioned how a *Strickland* claim can be "a way to escape rules of waiver and forfeiture" by presenting issues for appellate review that were not presented at trial.[112] For this reason, the *Strickland* standard should be applied with "scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve,"[113] hence the prejudice requirement of *Strickland*.[114] In other words, on post-conviction review, the balance of the scale weighs in favor of finality, and *Strickland* demands that a court be very confident before overturning a conviction due to counsel's error.[115]

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105. *Id.* (citing *Strickland*, 466 U.S. at 685).

106. *Id.* at 150.

107. A structural error is an error which affects the framework of the procedure of the trial. *See* Weaver v. Massachusetts, 137 S. Ct. 1899, 1907 (2017).

108. *See id.* at 1913.

109. Strickland v. Washington, 466 U.S. 668, 693–94 (1984).

110. *See Weaver*, 137 S. Ct. at 1910.

111. *Id.* at 1912.

112. Harrington v. Richter, 562 U.S. 86, 105 (2011).

113. *Id.* (quoting *Strickland,* 466 U.S. at 689–90).

114. *See Weaver*, 137 S. Ct. at 1913.

115. *See* Capra & Tartakovsky, *supra* note 101, at 141–42 (citing *Strickland*, 466 U.S. at 697).

B. Exceptions to *Strickland*'s Prejudice Requirement

Despite the general rule that a defendant claiming relief for a Sixth Amendment violation must establish prejudice, there are some exceptions.[116] These exceptions are of a "magnitude"[117] in which the circumstances are "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."[118] These circumstances exist when the defendant is denied counsel entirely or denied counsel during a critical stage of a legal proceeding.[119] These circumstances also may arise when a defense attorney actively represents conflicting interests.[120]

In *Holloway*, defense counsel objected to his multiple representation of codefendants, seeking separate counsel.[121] The trial court denied the request for separate counsel and refused to let defense counsel cross-examine the other codefendants.[122] The Supreme Court created a rule of automatic reversal — not requiring a demonstration of prejudice — "where counsel is forced to represent codefendants over his timely objection, unless the trial court has determined that there is no conflict."[123]

In *Sullivan*, three codefendants were accused of murder and tried separately but were represented by the same defense counsel.[124] Unlike in *Holloway*, no one objected to the defense counsel's multiple representation at trial.[125] Defense counsel even noted that

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116. *See* Mickens v. Taylor, 535 U.S. 162, 166 (2002); *see also Weaver*, 137 S. Ct. at 1911 (noting that the prejudice inquiry set forth in *Strickland* "is not meant to be applied in a 'mechanical' fashion. For when a court is evaluating an ineffective-assistance claim, the ultimate inquiry must concentrate on 'the fundamental fairness of the proceeding'" (quoting *Strickland*, 466 U.S. at 696)).

117. United States v. Cronic, 466 U.S. 648, 659 (1984).

118. *Id.* at 658.

119. *See Mickens*, 535 U.S. at 166 (citing *Cronic*, 466 U.S. at 658–59); *see also Weaver*, 137 S. Ct. at 1911. In *Weaver*, the Supreme Court assumed but did not hold that a defendant could demonstrate prejudice merely by showing fundamental unfairness. *See id.* at 1911–12. In that case a defendant argued his counsel was ineffective when failing to object to the closure of the courtroom in jury selection. *See id.* at 1905.

120. *See Mickens*, 535 U.S. at 166; *see also* Glasser v. United States, 315 U.S. 60, 70 (1942) ("The 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests.").

121. *See* Holloway v. Arkansas, 435 U.S. 475, 478 (1978).

122. *See id.*

123. *See Mickens*, 535 U.S. at 168 (citing *Holloway*, 435 U.S. at 488).

124. *See* Cuyler v. Sullivan, 446 U.S. 335, 337 (1980).

125. *See id.* at 337–38.

the codefendant's interests were aligned.[126] The *Sullivan* Court noted that absent an objection to conflicted representation, if a defendant demonstrates that an actual conflict of interest "actually affected the adequacy of his representation [he] need not demonstrate prejudice in order to obtain relief."[127] In such instances, "[p]rejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'"[128] If a defendant cannot satisfy the two-prong test of *Sullivan* — by failing to demonstrate a conflict of interest or by failing to demonstrate the conflict's adverse impact on the case — a court can still consider the claim under the higher *Strickland* standard.[129]

In essence, in *Sullivan*, the Court found a middle ground — between the automatic-reversal standard of *Holloway* and the prejudice standard of *Strickland*. This middle ground was for defendants claiming ineffective assistance of counsel due to an unpreserved conflict of interest. *Sullivan* is an exception to the "general rule" outlined in *Strickland*.[130] The *Sullivan* exception negates the second prong of the *Strickland* test — requiring a demonstration of prejudice.[131]

Nonetheless, the Supreme Court has indicated that when applying the *Sullivan* test, a defendant must still meet the first prong of the *Strickland* test — demonstrating that counsel's performance was defective by falling below an objective standard of reasonableness.[132] However, if a defendant can demonstrate that counsel was burdened by an actual conflict of interest, the defendant can likely demonstrate that counsel's representation fell below an objective standard of

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126. *See id.* at 347–48.

127. *Id.* at 349–50 (citations omitted).

128. Strickland v. Washington, 466 U.S. 668, 692 (1984) (quoting *Cuyler*, 446 U.S. at 350, 348).

129. *See, e.g.*, Hinkle v. Williams, No. 19-0941, 2020 WL 6482756, at *3 (W. Va. Nov. 4, 2020) (applying *Strickland* to defendant's conflict-of-interest claim after determining that defendant failed to demonstrate that the alleged conflict of interest was not an actual conflict of interest — failing the *Sullivan* test); *see also* Gibson v. State, 133 N.E.3d 673, 699–700 (Ind. 2019) (noting that defendant's conflict-of-interest claim is claim is "essentially a repackaging" of his other ineffective assistance of counsel claims).

130. *See* Mickens v. Taylor, 535 U.S. 162, 166 (2002).

131. *See id.* at 174.

132. *See id.* (differentiating the *Sullivan* and *Strickland* tests, whereby when *Sullivan* is applicable the test "require[es] a showing of defective performance, but [does] not require[] in addition (as *Strickland* does in other ineffectiveness-of-counsel cases), a showing of probable effect upon the outcome of trial").

reasonableness — thereby satisfying the first prong of the *Strickland* test. For counsel who breaches "the most basic of counsel's duties" by operating with an actual conflict of interest is *de facto* providing representation below an objective standard of reasonableness.[133]

The purpose of the *Sullivan* exception is to give a "needed prophylaxis in situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel."[134] These are situations where the conviction will reasonably be regarded as fundamentally unfair.[135]

In *Mickens*, the Supreme Court reaffirmed that the default rule to evaluate Sixth Amendment violations is governed by *Strickland*. "As a general matter, a defendant alleging a Sixth Amendment violation must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'"[136]

III. EXAMINING HOW STATE COURTS HAVE APPLIED *SULLIVAN* POST-*MICKENS*

Some state courts never apply *Sullivan* outside of multiple representation, some courts apply *Sullivan* to certain conflicts beyond multiple representation, and some apply *Sullivan* to all conflict-of-interest claims. In addition, some states apply a higher standard of review to conflict-of-interest claims.

A. States That Never Apply *Sullivan* Beyond Instances of Multiple Representation

Some state courts, such as Colorado, Idaho, and Pennsylvania, have adopted judicial policies that effectively never apply *Sullivan* outside of conflicts of interest arising from multiple representation.

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133. *See Strickland*, 466 U.S. at 688 (discussing how "[r]epresentation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest"); *id.* at 692 (discussing when counsel is burdened by an actual conflict of interest "counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties"); *see also Mickens*, 535 U.S. at 180 n.1 (Stevens, J., dissenting) (The Supreme Court has "long recognized the paramount importance of the right to effective assistance of counsel. '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.'" (quoting United States v. Cronic, 466 U.S. 648, 653–54 (1984)).

134. *Mickens*, 535 U.S. at 176.

135. *See id.* at 167 n.1.

136. *Id.* at 166 (quoting *Strickland*, 466 U.S. at 694).

i. Colorado

In 2015, the Colorado Supreme Court assumed in *dicta* that *Sullivan* applies to all conflicts of interest. However, in 2019, a Colorado appeals court formally ruled that *Strickland* is the governing standard for conflict-of-interest claims outside of multiple representation.

In 2015, when ruling on a conflict-of-interest case in *West v. People*, the Supreme Court of Colorado assumed for the purposes of argument that *Sullivan* applies to conflict claims arising from successive representation, but declined to specifically hold that it does.[137] In making this assumption, the Supreme Court of Colorado considered the fact that the U.S. Supreme Court applied the *Sullivan* prophylaxis in *Mickens* — a case in which the conflict was not a prototypical multiple representation, rather it was a conflict of interest based on defense counsel's previous representation of the very same victim the defendant was convicted of murdering.[138] In noting the two prongs of a *Sullivan* claim — a conflict of interest that adversely affects counsel's representation — the *West* court set forth a test to determine adverse effect.[139] First, a defendant must identify a "plausible alternative defense strategy or tactic that trial counsel could have pursued."[140] Second, the defendant must also show that the defense strategy was objectively reasonable.[141] Finally, the defendant must prove causation, that counsel's failure to pursue a strategy was linked to the conflict of interest.[142] In 2018, the state supreme court again clarified that it was still an open question, as far as the Colorado supreme court was concerned, whether *Sullivan* applied beyond instances of prototypical multiple representation.[143]

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137. *See* 2015 CO 5, ¶ 38, 341 P.3d 520, 530 (Colo. 2015). The court in *West* did not need to decide whether *Sullivan* applied beyond instances of multiple representation and therefore did not. *See id.*; *see also* Ybanez v. People, 2018 CO 16, ¶ 29, 413 P.3d 700, 707 (Colo. 2018) (discussing how *West* does not stand for the proposition that *Sullivan* applies beyond instances multiple representation).

138. *See West*, ¶ 36, 341 P.3d at 530 ("Because *Mickens* involved a claim of ineffective assistance of counsel based on a conflict resulting from representation of someone other than a codefendant, we conclude that the Supreme Court remanded for evaluation of 'adverse effect' with the thought that other forms of multiple representation could constitute the 'actively conflicting interests' necessary to demonstrate a Sixth Amendment violation under *Sullivan*.").

139. *See id.* at ¶ 65, 341 P.3d at 534.

140. *Id.*

141. *See id.*

142. *See id.*

143. *See* Ybanez v. People, 2018 CO 16, ¶ 29, 413 P.3d 700, 707 (Colo. 2018).

However, in 2019 the Colorado Court of Appeals Division IV conducted an about face on the state supreme court's *dicta* in *West* and explicitly ruled that *Sullivan* does not apply to cases beyond prototypical multiple representation.[144] The appeals court noted that "[a]pplying *Sullivan* in cases arising from a lawyer's conflict of interest resulting from the lawyer's self-interest would undermine the uniformity and simplicity of *Strickland*."[145] The Colorado Supreme Court has not revisited the issue as of the publication of this Note.

ii. Idaho

In February 2021, the Supreme Court of Idaho ruled that "claims of conflict of interest relating to successive representation require a showing of actual prejudice."[146] The court reasoned that — unlike successive representation cases — multiple representation cases require a presumption of prejudice because "[a]n attorney actively representing conflicting interests in concurrent representations poses such a circumstance where ineffective assistance is so likely that prejudice may be presumed."[147] Multiple representation cases present circumstances where "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is . . . small."[148] This would lead to a high likelihood of generating an unreliable verdict.[149] However, in successive representation cases, "especially where the interests involved are unrelated to the former client's case," the threat of ineffective assistance is not as high.[150] While successive representation "may suggest an apparent conflict of interest, at most it amounts to a cosmetic crack in the exterior of the trial proceedings; the overall foundation — and our confidence in the outcome — remains firm nonetheless."[151]

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144. *See* People v. Huggins, 2019 COA 116, ¶ 40, 463 P.3d 294, 300 (Colo. App. 2019).

145. *Id.* ¶ 41, 463 P.3d at 301 (citing Beets v. Scott, 65 F.3d 1258, 1265 (5th Cir. 1995)).

146. State v. Alvarado, 481 P.3d 737, 748–49 (Idaho 2021).

147. *Id.* at 748.

148. *Id.* (quoting United States v. Cronic, 466 U.S. 648, 659–60 (1984)).

149. *See id.*

150. *See id.*

151. *Id.*

iii. Pennsylvania

In 2014, the Pennsylvania Supreme Court nearly shut the door on applying *Sullivan* outside of multiple representation cases.[152] The court noted that it does not "foreclose the possibility that a conflict of interest may arise apart from dual representation — such as where an attorney is somehow beholden to the interests of another, antagonistic party without actually functioning as that party's attorney."[153] And the court did not "deny that an attorney's financial interests can conflict with those of his client under some circumstances . . . or that a conflict with the attorney's private interests may adversely affect the attorney's representation of his client, such as where defense counsel is himself under criminal investigation."[154] The court noted, however, that it was "guided by the Supreme Court's own analysis of its *Holloway/Sullivan* line, in which it has criticized a tendency among the lower federal courts to apply *Sullivan* 'unblinkingly to all kinds of alleged attorney ethical conflicts.'"[155] The court has since reinforced its limited application of *Sullivan* multiple times.[156]

B. States That Sometimes Apply *Sullivan* Beyond Instances of Multiple Representation

Some state courts, such as Indiana, Kansas, and Nebraska have adopted judicial policies that, to varying degrees, sometimes apply *Sullivan* outside of conflicts of interest arising from multiple representation.

i. Indiana

In 2019, the Supreme Court of Indiana declared in *Gibson v. State* that it has "long been reluctant to depart from traditional [ineffective assistance of counsel] analysis beyond multiple-representation conflicts."[157] The court noted that such an approach "reflects the

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152. *See* Commonwealth v. King, 57 A.3d 607, 620 (Pa. 2012).

153. *Id.* (citations omitted).

154. *Id.* (internal citations omitted).

155. *Id.* (quoting Mickens v. Taylor, 535 U.S. 162, 174 (2002)).

156. *See* Commonwealth v. Cousar, 154 A.3d 287, 310 (Pa. 2017) ("Because this case involves successive and not dual representation, appellant must demonstrate he was prejudiced by any potential conflict of interest."); *see also* Commonwealth v. Tharp, 101 A.3d 736, 754 (Pa. 2014) ("[T]his case involves successive and not dual representation, and Appellant must demonstrate that he was prejudiced by any potential conflict of interest." (citation omitted)).

157. Gibson v. State, 133 N.E.3d 673, 699 (Ind. 2019).

general view taken by the U.S. Supreme Court."[158] The court, however, explicitly declined to say whether the *Sullivan* presumption of prejudice applies only to multiple-representation conflicts.[159] The court differentiated multiple representation conflicts from other conflicts noting that different conflicts of interest present different levels of concern.[160] For example, unlike in instances of multiple representation, a conflict that impacts counsel's personal interests "need not compromise the duty of loyalty — that is, counsel may still act in the client's best interest even if detrimental to counsel's best interest."[161] Therefore, the issue is if a "particular" conflict claim warrants the application of the *Sullivan* standard or the traditional *Strickland* prejudice standard.[162] Some exceptions where Indiana courts have applied a *Sullivan* analysis to instances beyond multiple representation include where counsel represented a hostile witness,[163] where counsel's personal legal problems were impacted by representation,[164] and where counsel previously served as a judge pro tempore in the same matter.[165]

ii. Kansas

The Kansas Supreme Court has "yet to resolve the *Mickens* reservation by endorsing one or the other standard."[166] That said, the state supreme court has recently erred on the side of applying the *Sullivan* standard to a broad range of conflicts of interest. In 2012, the court noted that it "need not determine whether the adverse effect exception is the appropriate exception to be applied post-*Mickens* to successive representation situations because . . . the [s]tate did not argue any other test should be applied."[167] In 2013, the state supreme court again applied the *Sullivan* standard where a defendant claimed his counsel in a death-

158. *Id.* (citing *Mickens*, 535 U.S. at 175–76).
159. *See id.*
160. *See id.*
161. *Id.*
162. *Id.*
163. *See* Cowell v. State, 416 N.E.2d 839, 841 (Ind. 1981).
164. *See* Thompkins v. State, 482 N.E.2d 710, 712 (Ind. 1985).
165. *See* Hennings v. State, 638 N.E.2d 811, 813–14 (Ind. Ct. App. 1994).
166. Sola-Morales v. State, 451 P.3d 887, 887 (Kan. Ct. App. 2019) (citation omitted).
167. State v. Galaviz, 291 P.3d 62, 77 (2012). In *Galaviz,* the conflict arose because defense counsel previously represented "as the guardian ad litem for the [minor] victim" in a case in which the defendant had pleaded guilty "to a charge of aggravated indecent liberties with a child under the age of 14." *Id.* at 64–65.

penalty case had a conflict of interest by working on a flat-fee arrangement.[168] In 2019, the state supreme court considered another conflict-of-interest case where defense counsel simultaneously represented a witness.[169] Again, the court applied the *Sullivan* standard because "the State [did] not challenge the [lower court's] application of the adverse effect standard to this conflict circumstance."[170]

In *Sola-Morales v. State*, a Kansas appeals court assumed but did not decide that *Sullivan* was the governing standard because it was "more favorable" to the defendant.[171] The alleged conflict of interest in *Sola-Morales* was due to a breakdown in communication between defense counsel and client.[172] The appeals court adopted a similar adverse-effect test to the Colorado court in *West*,[173] requiring that the conflict caused counsel to forego a plausible defense tactic or strategy.[174] The test also requires that the forgone strategy was objectively reasonable.[175]

iii. Nebraska

In 2018, the Supreme Court of Nebraska noted that most of the time the *Strickland* standard should apply to conflict-of-interest claims because "the scope of the duty of loyalty with respect to attorney self-interest is inherently vague and overlaps with professional effectiveness" — and *Strickland* sets the "constitutional norm of adequate representation."[176] However, the court declined "to adopt a bright-line rule as to whether [*Sullivan*] or *Strickland* applies to personal interest conflicts," because it could "envision a situation in which the conflict is so serious that the defendant should be relieved of the obligation to show a reasonable probability that the outcome of the trial would have been different."[177] As such the court

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168. *See* State v. Cheatham, 292 P.3d 318, 337 (Kan. 2013).
169. *See* State v. Moyer, 434 P.3d 829, 833 (Kan. 2019).
170. *Id.* at 841 (citation omitted).
171. *See Sola-Morales*, 451 P.3d at 887.
172. *See id.*
173. *See supra* discussion in Section III.A.i (discussing Colorado).
174. *See Sola-Morales*, 451 P.3d at 887.
175. *See id.* (preferring an objective component to the adverse effect test over an "after-the-fact opinion from the lawyer that the strategy would have been wholly ineffective").
176. State v. Avina-Murillo, 917 N.W.2d 865, 878 (Neb. 2018).
177. *Id.*

held that "the better approach is to determine the appropriate standard on a case-by-case basis."[178]

C. States That Always Apply *Sullivan* to Actual Conflicts of Interest

Some state courts, such as Kentucky, Maryland, and Texas, have adopted judicial policies that always apply *Sullivan* to conflicts of interest claims beyond multiple representation.

i. Kentucky

In 2020, the Kentucky Supreme Court stated that it applies the *Sullivan* standard to all conflicts of interest "where the alleged conflict is raised at some later point during post-conviction proceedings."[179]

ii. Maryland

Maryland courts have "considered ineffective assistance claims involving personal conflicts of counsel and applied the *Sullivan* analysis, where the defendant failed to object in a timely manner."[180] In a 2012 case *Taylor v. State*, the Court of Appeals of Maryland, the highest court in the state, held that the presumption of prejudice under *Sullivan* applies to any instance where a defendant claims ineffective assistance of counsel due to counsel's bringing suit against their client for unpaid legal fees before the defendant's trial.[181] This created an adversarial relationship that "infect[ed] the attorney-client relationship with an element of distrust, likely to affect the reliability of the trial and 'undermine confidence in the outcome.'"[182] The Court of Appeals of Maryland, therefore, justified its rule noting that the same concerns that the Supreme Court was addressing in

178. *Id.*

179. Zapata v. Commonwealth, No. 2018-SC-000666-MR, 2020 WL 2091861, at *8 (Ky. Apr. 30, 2020); *see also* Samuels v. Commonwealth, 512 S.W.3d 709, 716 (Ky. 2017) (ruling no conflict of interest was imputed between defendant's public defender and victim's public defender "[t]here was no evidence that [the public defenders] collaborated or were otherwise involved in each other's cases during the period of overlapping representation. Nor was there any evidence that the two accessed, or had access to, the confidential client communications and information of the other").

180. *See* Taylor v. State, 51 A.3d 655, 668 (Md. 2012) (citation omitted); *see also* Catala v. State, 897 A.2d 257 (Md. Ct Spec. App. 2006) (applying *Sullivan* to a conflict where defense counsel had accepted a job at the State Attorney's Office).

181. 51 A.3d at 668–69.

182. *Id.* (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)).

Glasser and *Sullivan* are equally applicable to conflict cases where counsel "has created an adversarial relationship with his client by initiating a civil suit against the client during the course of representation."[183] The Court of Appeals noted it would be difficult to determine the precise amount of prejudice that occurred at trial due to the attorney-created conflict and that a defendant's Sixth Amendment right to effective assistance of counsel was too important of a right to risk.[184]

After finding that an attorney who sues his client is operating under an actual conflict of interest, the Court of Appeals of Maryland in *Taylor* remanded the case to the lower court to determine whether the defendant's conflict created an adverse effect on his representation.[185] The Court of Appeals of Maryland adopted the Fourth Circuit's adverse-effect test from *Mickens* — a test which the Supreme Court reviewed and declined to comment on when *Mickens* went to the High Court.[186] Under that test, a defendant must establish three things.[187] First, there must be "a plausible alternative defense strategy or tactic that his defense counsel might have pursued."[188] Second, that alternative tactic or strategy must have been "objectively reasonable under the facts of the case known to the attorney."[189] Finally, counsel's failure to pursue that tactic or strategy must have been linked to the actual conflict.[190]

iii. Texas

In *Acosta*, a conflict of interest arose due to counsel's perceived loyalty to a third party.[191] Initially, an intermediate appellate court applied the *Strickland* standard and found that the defendant did not demonstrate that his defense counsel's actions prejudiced him.[192] In applying *Strickland*, the court noted that "Supreme Court has yet to

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183. *Id.* at 669.

184. *Id.*

185. *Id.* at 672. The defendant claimed that he was adversely affected by counsel's conflict because the two did not speak about the case for three and a half months, during which time a deadline for providing alibi witnesses came and went. *Id.* at 670.

186. *See id.* at 672.

187. *See id.*

188. *Id.* (quoting Mickens v. Taylor, 240 F.3d 348, 361 (4th Cir. 2001), *aff'd*, 535 U.S. 162 (2002)).

189. *Id.* (quoting *Mickens*, 240 F.3d at 361).

190. *See id.* (quoting *Mickens*, 240 F.3d at 361).

191. *See* discussion *supra* Section I.C on duties to a third party.

192. *See* Acosta v. State, No. 04–03–00583–CR, 2005 WL 418224, at *2 (Tex. App. Feb. 23, 2005).

decide on the issue of whether [*Sullivan*] is limited to cases of multiple representation."[193]

The Court of Criminal Appeals, the highest court in the state, then ruled that the intermediate court's decision to apply *Strickland* was an error and remanded the case to the intermediate court with instructions to apply *Sullivan*.[194] The high court noted that "the ultimate question is whether any such conflict hindered the effective assistance of counsel at trial."[195] The court declined to distinguish between types of conflicts of interest that could serve as the basis of an ineffective assistance of counsel claim.[196] The court noted that this case, where defense counsel represented the interests of a nonclient during the defendant's trial, was "a clear example of how the danger of ineffective assistance via a conflict of interest is not strictly limited to the codefendant context."[197] On remand, the intermediate appellate court overturned the defendant's conviction after finding that defendant met both elements of his *Sullivan* claim.[198]

D. States That Have Adopted More Defendant-Friendly Standards Than the *Sullivan* Standard

Some states, such as Alaska, Illinois, and Massachusetts, have incorporated higher standards for evaluating ineffective assistance of counsel claims based on attorney conflicts of interests.

i. Alaska

Alaska courts apply the *Sullivan* standard to all conflicts of interest, except in instances of an "egregious" conflict of interest[199] — in which case the courts apply an even higher standard. For example, Alaska courts have applied *Sullivan* to conflict claims, where a defendant claimed a conflict of interest because the attorney's mother knew the victim, when a public defender service represented two clients

193. Acosta v. State, 233 S.W.3d 349, 355 (Tex. Crim. App. 2007).

194. *See id.* at 356.

195. *See id.* at 355.

196. *See id.* at 354.

197. *Id.*

198. Acosta v. State, No. 04-03-00583-CR, 2008 WL 138076, at *1 (Tex. App, Jan. 16, 2008) (mem.). The court on remand noted that "the conflict colored counsel's actions during trial because he decided to introduce . . . evidence to help [the defendant's wife] even though it contained evidence damaging to [the defendant's] defense." *Id.*

199. *See* State v. Carlson, 440 P.3d 364, 384 (Alaska Ct. App. 2019).

involved with the same confidential informant,[200] and where the defendant alleged conflict due to counsel's representation of a witness as a guardian ad litem.[201] Alaska courts, however, will not apply the *Sullivan* standard to alleged conflicts that are abstract or present only the possibility of a conflict.[202]

However, in instances of "egregious" conflicts of interests — which the court defines as a joint representation of codefendants — the court applies the standard set by the state high court in *Moreau v. State.*[203] In applying the *Moreau* standard, the trial court must "affirmatively advise co-defendants who are jointly represented by the same attorney of the dangers inherent in such a joint representation."[204] If the trial court fails to do so and the defendant subsequently raises an ineffective assistance of counsel claim based on their attorney's multiple representation of codefendants, then the burden shifts to the State to prove that the joint representation caused no adverse effect to the defendant at trial.[205]

ii. Illinois

In 2008, the Illinois Supreme Court determined that the Illinois "*per se* [conflict of interest] rule does not conflict with *Mickens*."[206]

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200. *See* McDonald v. State, No. A-11031, 2015 WL 1881591, at *5 (Alaska Ct. App. Apr. 22, 2015) (mem.).

201. *See Carlson*, 440 P.3d at 384 n.52; *see also* Lane v. State, 1994 WL 16196204, at *3–5 (Alaska Ct. App. Mar. 23, 1994) (mem.).

202. *See Carlson*, 440 P.3d at 384–85 (declining to apply *Sullivan* after determining that defense counsel was not operating under a conflict of interest because he represented conflicting defenses to law enforcement — at one time arguing to that defendant accidently shot the victim but at another time arguing that a third party shot the victim); *see also* LaPierre v. State, 734 P.2d 997, 1004 (Alaska Ct. App. 1987) (declining to apply the *Sullivan* presumption of prejudice where defendant "at most, demonstrated the existence of a conflict in the abstract. He . . . neither alleged nor demonstrated that his counsel 'actively represented conflicting interests' or that the purported conflict 'adversely affected his lawyer's performance'" (quoting Strickland v. Washington, 466 U.S. 688, 692 (1984)).

203. *See Carlson*, 440 P.3d at 384–85.

204. *Id.* at 384.

205. *See id.*

206. People v. Hernandez, 896 N.E.2d 297, 304–05 (Ill. 2008). However, other states have reached the opposite conclusion regarding per se conflicts of interest under *Mickens*. *See* Flaherty v. State, 221 So. 3d 633, 636 (Fla. Dist. Ct. App. 2017) (rejecting the application of a per se conflict of interest rule in ineffective assistance of counsel conflict-of-interest cases noting that *Mickens* held that defendant must "establish that the conflict of interest adversely affected his counsel's performance" (quoting Mickens v. Taylor, 535 U.S. 162, 174 (2002)); *see also* Millette v. State, 183 A.3d 1124, 1131–32 (R.I. 2018) (declining to apply a per se conflict of interest rule

The state supreme court grounds its per se rule in the Sixth Amendment.[207] When Illinois courts evaluate conflict-of-interest claims, they "first resolve whether counsel labored under a per se conflict."[208] The state supreme court defines a per se conflict as "one in which facts about a defense attorney's status engender, by themselves, a disabling conflict. When a defendant's attorney has a tie to a person or entity that would benefit from an unfavorable verdict for the defendant, a per se conflict arises."[209] If the court determines there is a per se conflict of interest, the defendant need not demonstrate that the conflict had an adverse effect on counsel's performance.[210]

In Illinois, a per se conflict of interest exists in three situations.[211] They are:

> [W]hen defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; . . . when defense counsel contemporaneously represents a prosecution witness; and . . . when defense counsel was a former prosecutor who had been personally involved in the prosecution of the defendant.[212]

If a defendant cannot establish a per se conflict of interest, they can still show a violation of their constitutional right to effective assistance of counsel by demonstrating the *Strickland* standard — an actual conflict of interest with an adverse effect on counsel's performance.[213]

iii. Massachusetts

In Massachusetts, "art. 12 of the Massachusetts Declaration of Rights provides broader protection than the Sixth Amendment to the

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where defense counsel was not licensed to practice law in Rhode Island but was licensed to practice in Massachusetts).

207. *See* People v. Coslet, 364 N.E.2d 67, 70 (Ill. 1977) ("This court adopted a per se conflict-of-interest rule in *People v. Stoval* . . . ."); *see also* People v. Stoval, 239 N.E.2d 441, 443 (Ill. 1968) (applying a per se conflict of interest because "defendant's right to counsel under the Constitution is more than a formality, and to allow him to be represented by an attorney with such conflicting interests as existed here without his knowledgeable consent is little better than allowing him no lawyer at all" (citations and decision's edits omitted)).

208. People v. Hernandez, 896 N.E.2d 297, 303 (Ill. 2008).

209. *Id.* (internal citations and quotations omitted).

210. *Id.* at 303.

211. *See id.*

212. *Id.* at 303–04 (citations omitted).

213. *See id.* at 304.

United States Constitution."[214] Under Massachusetts law, if a defendant demonstrates an actual conflict of interest they are automatically entitled to a new trial.[215] They do not have to demonstrate that the conflict adversely affected their lawyer's representation or that actual prejudice occurred during the representation.[216] A defendant need not demonstrate more than an actual conflict of interest because "'the effect of the conflict on the attorney's representation of the defendant is likely to be pervasive and unpredictable, while the difficulty of proving it may be substantial, particularly as to things that may have been left not said or not done by counsel.'"[217] Actual conflicts of interest under Massachusetts law are generally limited to three scenarios.[218] First are instances of multiple representation.[219] Second are instances where counsel maintains a close relationship with a material prosecution witness — such as an attorney-client relationship or a personal relationship.[220] Third are instances when counsel has financial or other personal interests in a verdict unfavorable to their client.[221] The Supreme Judicial Court of Massachusetts found these scenarios to constitute actual conflicts of interest "because they epitomize the facial repugnance of an attorney's divided loyalty, which places an unmistakable stain on the attorney-client relationship."[222] The court also distinguished these situations from the multitude of other scenarios that would, by default, be only a potential conflict of interest.[223]

IV. HOW TO RECONCILE VARIOUS STATE INTERPRETATIONS OF *MICKENS*'S OPEN QUESTION

The Supreme Court has noted that lower courts "have applied *Sullivan* 'unblinkingly' to 'all kinds of alleged attorney ethical conflicts,'"[224] and that *Strickland* is the norm for evaluating such

214. Commonwealth v. Cousin, 88 N.E.3d 822, 840 n.9 (Mass. 2018).
215. *Id.* at 831.
216. *Id.*
217. *Id.* (quoting Commonwealth v. Mosher, 920 N.E.2d 285, 294 (Mass. 2012)).
218. *See id.*
219. *See id.*
220. *See id.*
221. *See id.*
222. *Id.* at 831–32 (citation omitted).
223. *Id.* at 832.
224. Mickens v. Taylor, 535 U.S. 162, 174 (2002) (quoting Beets v. Scott, 65 F.3d 1258, 1266 (5th Cir. 1995).

claims and applying *Sullivan* is the exception.[225] State courts are split on what circumstances warrant this exception. On one side of this debate are states such as Kentucky, Maryland, and Texas, which apply *Sullivan* to all types of alleged attorney conflicts of interests so long as there is an actual conflict of interest present. On the other side of this debate are states like Colorado, Idaho, and Pennsylvania, which do not apply *Sullivan* to instances beyond prototypical multiple representation. In the middle of this debate are states like Indiana, Kansas, and Nebraska, which have more of an ad-hoc approach to applying *Sullivan* beyond instances of multiple representation.

When counsel concurrently represents two codefendants but must advance the interests of one client at the expense of the other, counsel breaches the duty of loyalty.[226] The breach is so significant that "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial."[227] In *Beets v. Scott*, Judge King of the Fifth Circuit proposed that a conflict outside of multiple representation warranting *Sullivan* is "of a kind not frequently or normally encountered in the practice of law" and is an "exceptional situation, where the divergence between the lawyer's self-interest and his client's interest poses an extraordinary threat to the lawyer's duty of loyalty."[228]

According to the Supreme Court, the key trait of a *Sullivan* claim that determines if it warrants a presumption of prejudice is pervasiveness — that is, the conflict is so pervasive throughout the representation that its impact is too difficult to detect.[229] This trait should be used to determine what other conflicts of interest warrant a *Sullivan* presumption of prejudice as well.

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225. *See id.* at 175–76 (finding "the language of *Sullivan* itself does not clearly establish, or indeed even support," applying *Sullivan* unblinkingly to all conflict-of-interest claims).

226. *See* Strickland v. Washington, 466 U.S. 668, 692 (1984).

227. United States v. Cronic, 466 U.S. 648, 659–60 (1984) (citation omitted).

228. 65 F.3d 1258, 1294 (5th Cir. 1995) (King, J., dissenting).

229. *See Strickland*, 466 U.S. at 692 ("[P]rejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests."); *see also* Holloway v. Arkansas, 435 U.S. 475, 490–91 (1978) (discussing how in multiple representation scenarios "even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client").

A. Proposed Test to Determine Whether a Court Should Apply the *Sullivan* or *Strickland* Standard to a Conflict of Interest

This Note proposes a three-part test for a reviewing court to determine whether, in reviewing a conflict-of-interest claim, it should apply a *Sullivan* presumption of prejudice or require a defendant to demonstrate prejudice under *Strickland*. Steps one and two of this Note's proposed test overlap with the two-prong analysis of *Sullivan* to determine if there was an actual conflict of interest. Step three requires the reviewing court to determine if the conflict is pervasive to the point that its impact is too difficult to detect. If the impact of the conflict is too pervasive, a *Sullivan* presumption of prejudice is warranted.

For a reviewing court considering whether to presume prejudice for a conflict-of-interest claim, this Note proposes that reviewing courts start their analysis by simply applying the two-pronged *Sullivan* analysis to determine if there was an actual conflict of interest. If the claim cannot satisfy the basic elements set forth by *Sullivan*, there is no need to consider whether it should receive the *Sullivan* presumption of prejudice to bypass the more rigid requirements of *Strickland*. To determine if there was an actual conflict of interest, the court must first determine whether there was a conflict of interest and, second, whether that conflict had an adverse effect on counsel's performance.[230] A conflict exists where counsel's representing one client would be "directly adverse to another client; or there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."[231]

Once a conflict of interest is established, the second step of *Sullivan* is to see if the conflict adversely affected counsel's representation.[232] Courts have different takes on what an adverse

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230. *See Mickens*, 535 U.S. at 171 ("'[A]n actual conflict of interest' mean[s] precisely a conflict that affected counsel's performance . . . ." (emphasis removed)).

231. MODEL RULES OF PRO. CONDUCT r. 1.7(a)(1)–(2) (AM. BAR ASS'N 2020); *see also* Cuyler v. Sullivan, 446 U.S. 335, 356 n.3 (198) (Marshall, J., concurring in part) (noting that "'[c]onflict of interest' is a term that is often used and seldom defined" and looking to the ABA standards for guidance).

232. *See Mickens*, 535 U.S. at 172–73; *see also* Taylor v. State, 51 A.3d 655, 670 (Md. 2012) ("The potential violation of [the ethics rules], though, at least establishes that [counsel] operated under a potential conflict. Only if [counsel's] conflict was an 'actual conflict of interest,' due to its adverse effect on his representation of

effect on representation means. In recent years, some state courts have adopted the Fourth Circuit's test as applied in *Mickens.*[233] Under this test, a defendant must first identify a "plausible alternative defense strategy or tactic that trial counsel could have pursued."[234]

Second, the defendant must also show that the defense strategy was objectively reasonable.[235] Finally, the defendant must prove causation — counsel's failure to pursue a strategy was linked to the conflict of interest.[236]

If a court determines that an attorney-client relationship had a conflict that adversely affected the defendant, then the two *Sullivan* elements are met. The third step of this Note's proposed test is to see if it is the type of conflict that warrants a presumption of prejudice.

Prejudice is presumed in multiple representation of codefendant scenarios because the impact of the conflict is indiscernible. There is an inherent "difficulty of proving that prejudice" in such situations.[237] These are instances where "even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client."[238] Alternatively, typical *Strickland* claims have a prejudice requirement because "if and when counsel's ineffectiveness 'pervades' a trial, it does so (to the extent we can detect it) through identifiable mistakes. [Courts] can assess how those mistakes affected the outcome."[239] Prejudice helps a court determine whether counsel was, despite deficient performance in one area, overall effective in their representation of the defendant or whether counsel's ineffectiveness harmed the jury.[240] A defendant's constitutional right to the effective assistance of counsel is housed under the Sixth Amendment's purpose of ensuring a fair trial,[241] and for counsel to be considered

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Petitioner, would Petitioner then be entitled to a presumption of prejudice to the outcome of his trial.").

233. *See* West v. People, 2015 CO 5, ¶¶ 40–60, 341 P.3d 520, 531–33 (Colo. 2015) (discussing the federal circuit split in adverse effect tests and adopting the Fourth Circuit's test); *see also* Sola-Morales v. State, 451 P.3d 887, 894 (Kan. 2019) (applying an adverse effect test with an objective component like as the Fourth Circuit does); *Taylor*, 51 A.3d at 670–72 (adopting the Fourth Circuit's test as well).

234. *West*, 2015 CO 5, ¶¶ 57–64, 341 P.3d at 533–34.

235. *See id.* ¶ 59, 341 P.3d at 533.

236. *See id.* ¶ 61, 341 P.3d at 534.

237. *Mickens*, 535 U.S. at 175.

238. Holloway v. Arkansas, 435 U.S. 475, 490–91 (1978).

239. United States v. Gonzalez-Lopez, 548 U.S. 140, 150–51 (2006).

240. *See* Harrington v. Richter, 562 U.S. 86, 104 (2011).

241. *See* Strickland v. Washington, 466 U.S. 668, 685–86 (1984); *see also Gonzalez-Lopez*, 548 U.S. at 146–47; United States v. Cronic, 466 U.S. 648, 658 (1984).

constitutionally ineffective, a court must reasonably believe that counsel's mistake actually harmed the defense.[242] A court determining whether or not to apply a *Sullivan* presumption of prejudice, therefore, should look at the nature of the conflict to see if it is the type that would have detectable mistakes or not. If the conflict would permit a court to look at specific parts of the trial record for evidence of the conflict, such as specific witness testimony, then the defendant should have to demonstrate prejudice under *Strickland*. If, however, a court determines that the conflict permeates throughout the representation to the extent that prejudice would be too hard to detect,[243] then the court should apply the *Sullivan* presumption of prejudice to the claim.

B. Applying the Proposed Test to Various Types of Conflicts-of-Interest Claims

This section discusses how a reviewing court might apply this Note's proposed test to determine whether to apply the *Sullivan* or *Strickland* standard upon review of a conflict-of-interest claim. This section will apply this Note's three-part test to four previously discussed fact patterns.

In *Alvarado*, the Idaho Supreme Court considered a conflict of interest that arose out of counsel's duty to former client.[244] There, the defendant appealed his conviction claiming that his public defender had a conflict of interest because counsel had previously represented a prosecution witness.[245] The defendant argued that counsel's continuing ethical obligations to the witness prevented a rigorous cross examination of the witness.[246] The first step in applying this Note's proposed test is to apply the first prong of *Sullivan*. A court should determine whether there was indeed a conflict of interest.

Under the Model Rules, a lawyer who has formerly represented a client cannot represent another client in a related matter where that person's interests are materially adverse to those of the former client, unless the client consents in writing.[247] Furthermore, if a court reviewing the *Alvarado* claim determined that there was a significant risk that counsel's loyalty could be divided between the defendant

242. *See Gonzalez-Lopez*, 548 U.S. at 147.

243. *See* Weaver v. Massachusetts, 137 S. Ct. 1899, 1903 (2017) (noting how an error can be structural if the effects of the error are too difficult to measure).

244. *See* State v. Alvarado, 481 P.3d 737, 740 (Idaho 2021).

245. *See id.*

246. *See id.*

247. *See* MODEL RULES OF PRO. CONDUCT r. 1.9(a) (AM. BAR ASS'N 2020).

and the former prosecution witness, that would be a conflict under the Model Rules.[248] Assuming this is the case, the *Alvarado* claim satisfies step one of *Sullivan*. Step two of *Sullivan* is to determine if the conflict had an adverse effect on the defendant's representation. The Idaho Supreme Court, in actually ruling on *Alvarado*, found that counsel attempted to impeach the witness' credibility by attempting to ask about the witness' own incarceration — the lower trial court, however, prevented counsel from pursuing this line of questioning.[249] The Idaho Supreme Court determined that counsel's attempt at impeaching the witness meant that counsel did not withhold in his representation.[250] Therefore, the conflict of interest had no adverse effect on the defendant.[251] Accordingly, this claim fails the second prong a *Sullivan* analysis. There is no need to move on to the third step of this Note's proposed test to determine whether to apply prejudice.

In *Acosta*, the Texas Court of Criminal Appeals considered a conflict of interest that arose out of counsel's duty to a third party.[252] In this case, the defendant claimed that defense counsel had a conflict of interest when counsel put forward evidence at trial that was solely beneficial to the defendant's wife's efforts to retain custody of her children.[253] Counsel admitted that he introduced the evidence at trial "solely to help" the defendant's wife and it was "no help whatsoever" to the defendant.[254] Applying this Note's proposed test, the first step is to determine if there is a conflict of interest. The wife was not a client,[255] so counsel had no conflicting duties to another client. A reviewing court could potentially find that this claim fails the first prong of *Sullivan*. Or perhaps a court would determine that counsel's loyalty to the wife conflicted with counsel's loyalty to his client and created a conflict. Nevertheless, assuming that the defendant satisfies the first prong of *Sullivan,* the second element of the test is to determine if the conflict adversely affected representation.[256] In this instance, counsel admitted his actions adversely affected the

248. *ID.* r. 1.7(a)(1)–(2).
249. *See Alvarado*, 481 P.3d at 740.
250. *See id.*
251. *See id.*
252. *See* Acosta v. State, 233 S.W.3d 349 (Tex. Crim. App. 2007).
253. *See id.* at 349, 352.
254. *Id.*
255. *See id.* at 351.
256. *See* Mickens v. Taylor, 535 U.S. 162, 171 (2002).

representation of his client.[257] An alternative and reasonable defense strategy could have been simply not introducing the evidence that was solely beneficial to the wife. A court reviewing this claim likely could find that it passes the second prong of *Sullivan*. The third step of this Note's proposed test is to determine if a court can isolate the impact of the conflict or not. A reviewing court could isolate its analysis specifically to the evidence that was admitted for the benefit of the wife to see if it changed the outcome of the trial or not. A presumption of prejudice, therefore, would not be warranted and *Strickland* would be the reviewing standard under this Note's proposed test.

In *Sola-Morales*, the Court of Appeals of Kansas considered a conflict of interest that arose out of counsel's own interests — whether counsel's "lie" and purported coverup created an actual conflict of interest that adversely affected counsel's representation.[258] The defendant claimed that counsel: "misrepresented the grounds for the trial continuances, attributing them to the State's request rather than his own. And [counsel] ostensibly enhanced that conflict by falsely telling [defendant] that the district court denied his pro se motion to dismiss, when [counsel] actually withdrew it."[259] The defendant claimed he was adversely affected from the conflict when counsel "torpedo[ed] [a] hearing on [a] motion to dismiss to avoid those lies coming to light."[260] Step one of this Note's proposed test is to apply the first prong of a *Sullivan* analysis and question whether this claim contained a conflict of interest. In this instance, the district court made a factual finding that counsel did not lie and that counsel had no reason to lie.[261] Because counsel did not lie or cover anything up, there were no conflicting duties between counsel and defendant, and therefore there was no conflict. Accordingly, this claim fails the first prong of a *Sullivan* analysis. There would be no reason for a court applying this Note's proposed test to further consider whether this claim warrants a *Sullivan* presumption of prejudice. In reality, the Kansas Court of Appeals nonetheless did analyze this claim under the second prong of a *Sullivan* claim to determine whether the conflict in this case adversely affected the defendant.[262] The court found that there was no adverse effect on the defendant's

257. *See Acosta*, 233 S.W.3d at 352.
258. *See* Sola-Morales v. State, 451 P.3d 887 (Kan. Ct. App. 2019).
259. *Id.*
260. *Id.*
261. *See id.*
262. *See id.*

representation because the motion that counsel allegedly torpedoed was, in fact, meritless.[263] This case also fails the second prong of a *Sullivan* claim.[264] As such, there would be no need for a reviewing court applying this Note's proposed test to determine whether there should be a *Sullivan* presumption of prejudice.

In *Wood v. Georgia*, the Supreme Court considered a conflict of interest that arose out of counsel's duty to another client.[265] There, three defendants who worked at an adult entertainment store were charged with distributing obscene materials.[266] The defendants were represented by their employer's lawyer.[267] The Supreme Court speculated that the employer withheld the fine payments to create standing for a constitutional "test case."[268] Because defense counsel represented both the employer and the employee defendants, it was unclear whether counsel "single-mindedly" pursued the defendants' interests (seeking leniency for default on the payments) — or whether counsel was operating with a conflict of interest arising from duties to his other client, the employer.[269] For a reviewing court to determine if the *Sullivan* or *Strickland* standard applies to a fact pattern such as this one, the reviewing court should start by applying the first prong of a *Sullivan* analysis to determine if there was a conflict of interest. Under the Model Rules, a conflict exists when "the representation of one client will be directly adverse to another client."[270] Here, the employer's desire to keep the defendant's fines in place was likely directly adverse to the defendants' liberty interests.[271] Therefore, there is a conflict and step one of this Note's test is met. Next, a reviewing court should determine if the conflict had an adverse effect on the defendants' representation. Here, a reviewing court could likely find that defense counsel's representation was adversely affected at the defendants' probation revocation hearing.[272] A reviewing court could find that counsel limited his advocacy for his clients' liberty interests in order to advance the interests of the employer, which desired to make a test case.[273] Therefore, the second

263. *See id.*
264. *Id.*
265. 450 U.S. 261, 263–64 (1981).
266. *See id.* at 263.
267. *See id.* at 266.
268. *Id.* at 281.
269. *Id.* at 271–72.
270. MODEL RULES OF PRO. CONDUCT r. 1.7(a)(1) (AM. BAR ASS'N 2020).
271. *See Wood*, 450 U.S. at 272.
272. *See id.* at 266–68.
273. *See id.*

prong of *Sullivan* review and step two of this Note's proposed test are met — the conflict had an adverse effect on the defendants. Step three of this Note's proposed test is to determine if the effects of the conflict are difficult to detect. A reviewing court might find that the conflict was too intertwined with every aspect of the defendant's representation. There was no clear aspect of counsel's representation that one could examine more thoroughly to see if it prejudiced the defendants because counsel may have been serving the employer's interests at any given moment. If this were the case, having satisfied all three elements of this Note's test, the court could rule that defendants would not have to demonstrate *Strickland* prejudice. On the other hand, consider that the employer paid the defendant's legal fees and fines at the start of the case.[274] But "[f]or some reason, however, the employer declined to provide money to pay the fines" as the case progressed.[275] A reviewing court, therefore, might determine that there was an exact moment during counsel's representation where the interests of the employer and the interests of the defendants diverged and a conflict of interest arose. If this were the case, the reviewing court could point to a specific moment in the representation to determine if it negatively impacted the defendants and the *Strickland* prejudice standard would, therefore, be appropriate.

CONCLUSION

This Note's proposed test determines whether a criminal defendant should get a "do-over" because of a Sixth Amendment violation. This Note argues for evaluating conflicts of interest to see if they are so pervasive to the point that their impact is too difficult to detect. If a conflict satisfies both elements of *Sullivan*, an actual conflict that adversely affects representation, and if the conflict is pervasive, then *Sullivan* prejudice should apply. If a conflict fails any of these factors, then *Strickland* should apply. Such an approach aligns with the Supreme Court's jurisprudence evaluating ineffective assistance of counsel claims under the Sixth Amendment.

The test is likely to err on the side of applying *Strickland* prejudice to most conflict-of-interest claims of ineffective assistance of counsel. Some scholars may question whether the *Strickland* standard is the proper standard to evaluate ineffective assistance of counsel claims at

274. *See id.* at 267.
275. *Id.*

all.[276] Nevertheless, such an outcome is in line with the Supreme Court's concerns of easily upsetting the finality of convictions.[277] State courts, moreover, may impose additional protections to defendants based on state laws and state constitutions.[278]

The goal of the *Sullivan* exception to the *Strickland* prejudice requirement is to keep a trial fundamentally fair. Given the Supreme Court's signaling that lower courts have, perhaps incorrectly, applied *Sullivan* unblinkingly and continued reminders that the default rule is the *Strickland* standard,[279] this Note argues that it is inappropriate to apply the *Sullivan* standard to all alleged conflicts of interest on review.[280] However, given the Supreme Court's application of the *Sullivan* standard in *Wood* and *Mickens*, cases beyond prototypical multiple representation, this Note argues that a rule mandating the blind application of the *Strickland* standard to all conflict claims that are not multiple representation is not the right solution either. The right solution is somewhere in the middle — not applying *Sullivan* unblinkingly but allowing for the application of *Sullivan* in cases where the impact of the actual conflict of interest is so pervasive that it would be too difficult to demonstrate prejudice otherwise.[281]

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276. *See* Nancy J. King & Joseph L. Hoffmann, *Envisioning Post-conviction Review for the Twenty-First Century*, 78 MISS. L.J. 433, 438 (2008) ("[R]elief under *Strickland* remains essentially hypothetical in non-capital cases."). *See generally* William S. Geimer, *A Decade of* Strickland*'s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91 (1995).

277. *See* Harrington v. Richter, 562 U.S. 86, 105 (2011) ("Surmounting *Strickland*'s high bar is never an easy task. An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest intrusive post-trial inquiry threaten the integrity of the very adversary process the right to counsel is meant to serve." (citations and quotations omitted)).

278. *See* discussion *supra* Section III.D (discussing states that imposed protections for defendants claiming conflicts of interest based on state constitutions).

279. *See* Mickens v. Taylor, 535 U.S. 162, 174 (2002) (noting lower courts "have applied *Sullivan* unblinkingly to all kinds of alleged attorney ethical conflicts" (quoting Beets v. Scott, 65 F.3d 1258, 1266 (5th Cir. 1995)).

280. *See* Beets v. Scott, 65 F.3d 1258, 1294 (5th Cir. 1995) (King, J., dissenting) (noting a desire to "avoid having the [*Sullivan*] exception swallow the *Strickland* rule").

281. *See* Gibson v. State, 133 N.E.3d 673, 700 (Ind. 2019) (citing Beets v. Scott, 65 F.3d 1258 (5th Cir. 1995)) (coming to the same conclusion as *Beets*).