APPENDIX A

COLORADO COURT OF APPEALS

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

v.

DENNIS SPENCER,

Defendant-Appellant.

Court of Appeals No. 2017CA2228

City and County of Denver District Court Nos. 2001CR1088 and 2001CR1089

Honorable Andrew P. McCallin, Judge

ORDER AFFIRMED

Division IV
Opinion by JUDGE RICHMAN
Johnson, J., concurs
Terry, J., specially concurs

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced December 17, 2020

Philip J. Weiser, Attorney General, Erin K. Grundy, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Megan A. Ring, Colorado State Public Defender, Sean J. Lacefield, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 Defendant, Dennis Spencer, appeals the postconviction court's order denying his Crim. P. 35(c) motion after a hearing on remand from a division of this court. We affirm.

I. Background

¶ 2 In 2002, defendant was convicted of multiple counts of sexual assault, against three child victims, in two cases that were consolidated for trial. Before the cases were consolidated, defendant was represented by private defense counsel for one case and the public defender for the other. Ultimately, defendant went to trial with private counsel.

¶ 3 On direct appeal, a division of this court considered whether the trial court had abused its discretion in denying defendant's private counsel's motion to withdraw, a motion based on (1) defendant's lack of funds for an investigator (considered a "financial conflict" in postconviction proceedings); (2) counsel's uncertainty that he could continue to be a zealous advocate on a child sexual assault cases in light of his newborn child (considered a "personal conflict" in postconviction proceedings); and (3) counsel's belief that defendant could be better represented by the public defender. *People v. Spencer,* slip op. at 2 (Colo. App. No. 02CA1992, Jan. 13, 2005) (not published pursuant to C.A.R. 35(f)) *(Spencer I).* The division concluded that the court had not abused its discretion in denying the motion to withdraw, and it affirmed the judgment of conviction. *Id.* at 3, 7.

¶ 4 Defendant filed a pro se postconviction motion in 2006, asking for relief pursuant to Crim. P. 35(c) and alleging ineffective assistance of counsel due in part

to insufficient investigation and a conflict of interest. The public defender supplemented defendant's motion in 2012. As relevant here, the public defender's motion alleged that trial counsel had articulated personal and financial conflicts of interest in his pre-trial motion to withdraw, and counsel had rendered ineffective assistance because he (1) agreed to try the two cases together; (2) did not cross-examine one of the victims on a matter that would require piercing the rape shield statute; (3) did not request a mistrial on one occasion during trial; (4) did not present a witness who was sleeping in the room during one of the assaults and was supposedly "a light sleeper"; and (5) failed to investigate a letter, written by a victim, that "alluded to the fact she had lied about the incident."

¶ 5 The postconviction court denied the motion without a hearing, in a detailed order. In doing so, the court considered the conflict of interest claim to be a general one, and it found that defendant had failed to demonstrate that a conflict had existed or that the conflict adversely affected counsel's performance, as required by *Armstrong v. People,* 701 P.2d 17, 24 (Colo. 1985). It further found that "[d]efendant's claim of conflict of interest ha[d] been logically addressed by the Court of Appeals" in the opinion issued on direct appeal. *See Spencer I,* slip op. at 2.

¶ 6 Defendant appealed the denial. A division of this court concluded that defendant had not established ineffective assistance of counsel pursuant to *Strickland v. Washington,* 466 U.S. 668 (1984), because the record established that he had not been prejudiced by any allegedly deficient performance of trial counsel. But the court remanded for an evidentiary hearing on whether trial counsel had

labored under an actual conflict of interest as defined in *Cuyler v. Sullivan,* 446 U.S. 335 (1980) (*Sullivan). See People v. Spencer,* (Colo. App. No. 12CA2505, Aug. 20, 2015) (not published pursuant to C.A.R. 35(f)) *(Spencer II).*

¶ 7 The division understood that *Sullivan* operates as an exception to the normal requirements of review under *Strickland,* so that when a defendant shows an actual conflict of interest that adversely affected the adequacy of the representation, he need not demonstrate prejudice to obtain relief. The division recognized that whether the *Sullivan* exception applied to conflicts of interest other than those arising from multiple representation was an open question, as noted in *West v. People,* 2015 CO 5, ¶ 36 n.8. But as the People did not argue that point in *Spencer II,* the division remanded the case. It ordered that to show an adverse effect on remand, the defendant must (1) identify a plausible alternative strategy or tactic that counsel could have pursued; (2) show that the alternative strategy or tactic was objectively reasonable under the facts known to counsel at the time of the strategic decision; and (3) establish that counsel's failure to pursue the strategy or tactic was linked to the actual conflict, and that defendant must point to specific instances in the record to suggest actual impairment of his interest.

¶ 8 The division directed that if the postconviction court found on remand that there was an actual conflict substantially impairing trial counsel's ability to champion defendant's cause, it was to determine whether that conflict adversely affected defendant, entitling him to postconviction relief. *See id.* at ¶ 22; *see Rodriguez v. Dist. Ct.,* 719 P.2d 699, 704 (Colo. 1986). If the court found no actual conflict, the

division concluded that defendant's Rule 35(c) motion should be denied. *Spencer II,* slip op. at 22.

II. Discussion

¶ 9 "The *Sullivan* exception applies 'needed prophylaxis in situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel.'" *West,* ¶ 24 (quoting *Mickens v. Taylor,* 535 U.S. 162, 176 (2002)). The *Sullivan* adverse effect inquiry thus requires a lesser showing than does the *Strickland* prejudice analysis. *People v. Villanueva,* 2016 COA 70, ¶ 30.

¶ 10 As noted, *Spencer II* premised its conclusion upon its recognition that both the United States Supreme Court and the Colorado Supreme Court had "left open the question of whether a [*Sullivan*] conflict-of-interest analysis applies to conflicts other than those arising from multiple representation." Slip op. at 19 (citing *West,* ¶ 36 n.8); *see Sullivan,* 446 U.S. at 348-50. In this appeal, the People now expressly argue that the *Sullivan* analysis should not apply because the asserted conflict does not arise from multiple representation. We conclude that the weight of authority now points to a preference for a *Strickland* analysis when the conflict of interest claims allege a conflict between counsel's personal interests and the interests of his or her client, and not a conflict arising from multiple representation.

¶ 11 In *Mickens,* the Supreme Court noted that the language of *Sullivan* — "[u]ntil . . . a defendant shows that his counsel *actively represented* conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance" — did not support supplanting *Strickland* with *Sullivan's*

expansive application to conflict claims other than those related to multiple representation. *Mickens,* 535 U.S at 175 (quoting *Sullivan,* 446 U.S. at 350). In *West,* our supreme court interpreted *Mickens* as "question[ing] the assumption that *Strickland* should not govern claims of ineffectiveness based on alleged conflicts resulting from other forms of divided loyalty (for example, counsel's personal or financial interests, including employment concerns, romantic entanglements, and fear of antagonizing the trial judge." *West,* ¶ 36 n.8 (citing *Mickens,* 535 U.S. at 174-75).[1]

¶ 12 After *Spencer II* was decided, and after the postconviction court's order, a division of this court similarly concluded that a *Sullivan* adverse effect inquiry does not apply to conflicts involving an attorney's personal interests. *See People v. Huggins,* 2019 COA 116, ¶¶ 38-41 (agreeing with *Mickens* and its progeny; collecting cases) (*cert. denied* May 26, 2020). In *Huggins,* the division held that "*Sullivan* cannot be read so broadly as to encompass" Huggins's claim of a conflict between his counsel's self-interest and counsel's duty to represent him. *Id.* at ¶ 38. The division further observed 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.*" *Id.* at ¶ 41.

¶ 13 We perceive the *Huggins* division analysis to be consistent with *Mickens* and *West,* and we agree with the *Huggins* division that a *Strickland* test is sufficient

[1] In *Ybanez v. People,* 2018 CO 16, ¶ 29, the supreme court considered, but found it "unnecessary to decide the extent to which the separate standard for actual conflicts of interest applies to conflicting loyalties or interests apart from those implicated by multiple representations."

to ensure defendant's Sixth Amendment right to counsel was not compromised by a conflict involving his counsel's personal interests. The conflicts alleged by Spencer are not conflicts arising from multiple representation, but rather personal conflicts of counsel. To the extent defendant argues that *Wood v. Georgia,* 450 U.S. 261 (1981), supports his contention that a *Sullivan* inquiry could apply here, we do not agree that *Wood* concerned a conflict involving an attorney's personal interests. *See West,* ¶ 34 n.7 (interpreting the holding in *Wood* to be "premised on the divided loyalty resulting from multiple representation"). Thus, despite the remand order in *Spencer II,* and despite the lengthy and thorough opinion of the postconviction court, we now conclude that an analysis under the *Sullivan* prophylaxis rule was not required in this case, and only a review under *Strickland* was needed.

¶ 14 Spencer's postconviction motion alleges the same adverse effects arising from counsel's purported personal conflicts that he alleged amounted to defective performance under *Strickland. Spencer II* concluded that the postconviction court had properly rejected defendant's *Strickland* claim without a hearing. Slip op. at 2-3; *see Ardolino v. People,* 69 P.3d 73, 77 (Colo. 2003) (Denial without a hearing is proper "where the motion, files, and record in the case clearly establish that the allegations presented in the defendant's motion are without merit and do not warrant postconviction relief."). In light of our agreement with *Huggins,* this conclusion resolves all of defendant's remaining postconviction claims. We conclude that the district court properly denied defendant's Rule 35(c) motion.

III. Conclusion

¶ 15 The order is affirmed.

JUDGE JOHNSON concurs.

JUDGE TERRY specially concurs.

JUDGE TERRY, specially concurring.

¶ 16 I concur in the outcome reached by the majority, but my reasoning differs slightly from the majority's.

¶ 17 In the hearing held after remand from this court, trial defense counsel testified as follows:

- Although he had not had funds to hire an investigator, he had conducted his own investigation, and, after his motion to withdraw was denied, personal financial concerns did not affect his representation.
- His personal feelings about handling child sexual assault cases did not affect his representation of defendant and specifically did not affect any of the trial decisions challenged in the Crim. P. 35(c) motion.
- When he moved to withdraw, he felt he had an ethical conflict, but it was different from the reasons he had shared with the trial court. His perceived conflict actually related to his perception that defendant's son, A.S., would give false testimony if called as a witness, and his expectation that the prosecution would call A.S. to testify.
- He did not remember specific conversations with defendant about the reasons he moved to withdraw.

¶ 18 Because the record supports the court's findings, I would defer to its findings that (1) trial counsel testified credibly; (2) the alleged financial conflict of interest created only a potential conflict of interest, and not an actual conflict; and (3)

trial counsel's representation was not affected by any potential conflict. *See West v. People,* 2015 CO 5, ¶¶ 11, 57; *People v. Harlan,* 54 P.3d 871, 880 (Colo. 1986).

¶ 19 Therefore, I agree with the majority that we should affirm the district court's denial of the postconviction motion.