

Summer 2003

## Facilitating Fairness: The Judge's Role in the Sixth Amendment Right to Effective Counsel

John Capone

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

---

### Recommended Citation

John Capone, Facilitating Fairness: The Judge's Role in the Sixth Amendment Right to Effective Counsel, 93 J. Crim. L. & Criminology 881 (2002-2003)

This Supreme Court Review is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

## **FACILITATING FAIRNESS: THE JUDGE'S ROLE IN THE SIXTH AMENDMENT RIGHT TO EFFECTIVE COUNSEL**

Mickens v. Taylor, 535 U.S. 162 (2002)

### **I. INTRODUCTION**

Walter Mickens was convicted in a Virginia court of the premeditated murder of Timothy Hall associated with the commission of attempted forcible sodomy.<sup>1</sup> A jury sentenced him to death.<sup>2</sup> After his conviction, Mickens filed a federal habeas petition alleging that he was denied effective assistance of counsel because his defense counsel, who was court-appointed, had a conflict of interest at trial.<sup>3</sup> This defense attorney, Bryan Saunders, had recently represented Timothy Hall, the victim of the crime for which Mickens was being tried, on assault and concealed-weapons charges in juvenile court.<sup>4</sup> Furthermore, the same juvenile court judge who dismissed the charges against Hall after his death appointed Saunders to represent Mickens at his murder trial.<sup>5</sup> Saunders did not disclose his connection to the victim to the trial court, his co-counsel, or his client, Mickens.<sup>6</sup>

The Supreme Court granted a stay of execution and granted certiorari as to the question of whether the judge's failure to inquire into a potential conflict of interest mandated an automatic reversal of Mickens' conviction.<sup>7</sup> The Court, in an opinion by Justice Scalia, held that, to demonstrate a Sixth Amendment violation, a defendant must establish that a conflict of interest adversely affected his counsel's performance, even when the trial court

---

<sup>1</sup> Mickens v. Taylor, 535 U.S. 162, 164 (2000).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 164-65.

<sup>6</sup> *Id.* at 165.

<sup>7</sup> *Id.* at 165-66.

failed to inquire into a potential conflict of interest about which it knew or reasonably should have known.<sup>8</sup>

This Note will argue that *Mickens* is not consistent with the logic and principle of the precedents regarding conflicts of interest and the right to effective assistance of counsel. First, it will critique the Court's formalistic interpretation of those precedents, focusing on its emphasis on the requirement of objection.<sup>9</sup> Second, it will analyze the Court's prior Sixth Amendment jurisprudence, focusing on the holding's inconsistency with the rationale and spirit of the Sixth Amendment.<sup>10</sup> Finally, it will argue that the rule established in *Mickens* will have negative implications for the justice system and the behavior of its participants.

## II. BACKGROUND

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."<sup>11</sup> The Supreme Court has explained that this right is one of the most important prerequisites for the existence of a fair trial: "[o]f 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."<sup>12</sup> Accordingly, the Court has stated that this right exists "not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial."<sup>13</sup> This protection does not only apply to federal criminal proceedings, but also to all state criminal proceedings.<sup>14</sup> Moreover, it applies both to defendants who retain their own lawyers and defendants for whom the State appoints counsel.<sup>15</sup> It is in this context that the Court has found that assistance of counsel which is ineffective in preserving fairness does not meet the mandate of the Sixth Amendment.<sup>16</sup>

---

<sup>8</sup> *Id.* at 168.

<sup>9</sup> *Id.* at 168-70.

<sup>10</sup> See *United States v. Cronin*, 466 U.S. 648, 654 (1984).

<sup>11</sup> U.S. CONST. amend. VI.

<sup>12</sup> *Cronin*, 466 U.S. at 654 (quoting Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)).

<sup>13</sup> *Id.* at 658.

<sup>14</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>15</sup> *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980) ("The vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant's entitlement to constitutional protection.").

<sup>16</sup> *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984).

The main modern case that governs claims of ineffective assistance of counsel is *Strickland v. Washington*.<sup>17</sup> In *Strickland*, the Court held that, generally, a defendant who alleges a Sixth Amendment violation must show “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”<sup>18</sup> Respondent in *Strickland* argued ineffective assistance of counsel at his sentencing, based on his defense counsel’s failure to request psychiatric reports, to find and present character witnesses, and to seek a pre-sentence report.<sup>19</sup> The Supreme Court denied his petition, holding that “[t]he benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”<sup>20</sup> This requires that the convicted defendant demonstrate first that counsel’s performance was deficient. To demonstrate this, the defendant must show that counsel made errors so severe that he “was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.”<sup>21</sup> The standard for judging performance is an objective standard of reasonableness, but the court’s scrutiny must be deferential to the counsel’s conduct.<sup>22</sup> Second, the deficient performance must have prejudiced the defense.<sup>23</sup> “This requires showing that counsel’s errors were so serious as to deprive the defendant of . . . a trial whose result is reliable.”<sup>24</sup> There must be a reasonable probability that, aside from counsel’s errors, “the result of the proceeding would have been different.”<sup>25</sup> Under these guidelines, the Court found that respondent’s counsel’s conduct could not be found to be unreasonable, and that insufficient prejudice existed to warrant a reversal of respondent’s conviction.

The rule elucidated in *Strickland* is not without exception. In claiming a violation of the Sixth Amendment, the defendant in a criminal case does not need to demonstrate a probable effect upon the outcome of the trial where assistance of counsel has been denied in its entirety or in part during a critical stage of the proceeding.<sup>26</sup> When this occurs, the probability that

---

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 694.

<sup>19</sup> *Id.* at 675.

<sup>20</sup> *Id.* at 686.

<sup>21</sup> *Id.* at 687.

<sup>22</sup> *Id.* at 689.

<sup>23</sup> *Id.* at 687.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 694.

<sup>26</sup> See *United States v. Cronin*, 466 U.S. 648, 658-59 (1984); *Geders v. United States*, 425 U.S. 80, 91 (1976); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963).

the verdict is unreliable is so high that the effect is presumed, and a case-by-case inquiry is unnecessary.<sup>27</sup> Only in such circumstances, or in "circumstances of that magnitude," does the Court forgo inquiry concerning whether counsel's performance actually reduced the reliability of the verdict.<sup>28</sup>

Although the Court has established this exception to the usual test of *Strickland*, it has not been categorical in its evaluation of what circumstances constitute a denial of assistance of counsel in entirety or in part during significant stages of the proceeding. It has, however, examined whether a circumstance of such magnitude can occur when defense counsel actively represents conflicting interests.<sup>29</sup>

In *Holloway v. Arkansas*, the trial judge appointed one public defender to represent three criminal defendants who were being tried jointly.<sup>30</sup> Two times before trial, defense counsel moved for separate representation.<sup>31</sup> The second time, defense counsel objected on the ground that "one or two of the defendants" were considering testifying at trial, in which event the lone attorney's ability to cross-examine would be inhibited.<sup>32</sup> The court held hearings on these motions and denied them.<sup>33</sup> After the prosecution rested, defense counsel objected to the joint representation a final time, and again the court refused to appoint separate lawyers.<sup>34</sup> The defendants gave inconsistent testimony and were convicted.<sup>35</sup> The Court acknowledged that a defense counsel "is in the best position to determine when a conflict" exists and that he has an ethical obligation to alert the court to any problems.<sup>36</sup> As a result, it determined that a defense counsel must be largely relied upon to make a timely objection regarding any conflicts that could possibly affect the outcome of the trial.<sup>37</sup> Moreover, the conflict of interest, "which [the defendant] and his counsel tried to avoid by timely objections to the joint representation," undermined the adversarial process

---

<sup>27</sup> See *Cronic*, 466 U.S. at 658-59; *Geders*, 425 U.S. at 91; *Gideon*, 372 U.S. at 344-45.

<sup>28</sup> *Cronic*, 466 U.S. at 659 n.26.

<sup>29</sup> *Strickland v. Washington*, 466 U.S. 668, 692 (1984) (noting that a lawyer encumbered by a conflict "breaches the duty of loyalty, perhaps the most basic of counsel's duties"); see also *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Holloway v. Arkansas*, 435 U.S. 475 (1978).

<sup>30</sup> *Holloway*, 435 U.S. at 477.

<sup>31</sup> *Id.* at 477-78.

<sup>32</sup> *Id.* at 478.

<sup>33</sup> *Id.* at 477-78.

<sup>34</sup> *Id.* at 478-80.

<sup>35</sup> *Id.* at 481.

<sup>36</sup> *Id.* at 485-86.

<sup>37</sup> *Id.*

of the judicial system.<sup>38</sup> This rationale is supported by the fact that counsel's conflicting obligations to multiple defendants affect his selection and presentation of essential information in representing his clients, thereby making it difficult to measure the exact harm arising from his errors.<sup>39</sup> Thus, the Court's ruling in *Holloway* creates an automatic reversal rule where defense counsel is forced to represent codefendants over his timely objection, unless the trial court has determined that there is no conflict after making a sufficient inquiry.<sup>40</sup>

In *Cuyler v. Sullivan*,<sup>41</sup> the Court again faced the problem of concurrent multiple representation of codefendants. The respondent, Sullivan, was one of three defendants accused of murder.<sup>42</sup> Each defendant was tried separately, but they were all represented by the same counsel.<sup>43</sup> No one, including their counsel, objected to this multiple representation, and counsel's opening statement at Sullivan's trial suggested that the interests of all three defendants were aligned.<sup>44</sup> The Court did not extend *Holloway's* automatic reversal rule to this set of circumstances.<sup>45</sup> It held that, without a timely objection from his counsel, a defendant must demonstrate that "a conflict of interest actually affected the adequacy of his representation" in order to demonstrate a violation of the Sixth Amendment.<sup>46</sup> The Court found that, unlike the trial court in *Holloway*, the trial court in *Sullivan* was only aware of a vague, indefinite possibility of such a conflict that is inherent "in almost every instance of multiple representation."<sup>47</sup> Thus, absent an objection, the court found no "special circumstances" that triggered the trial court's duty to inquire.<sup>48</sup>

Finally, in *Wood v. Georgia*,<sup>49</sup> the Court addressed the issue of conflicts of interest through an analysis of multiple representation as a peripheral issue. The case involved three indigent defendants "who were convicted of distributing obscene materials."<sup>50</sup> They had their probation

---

<sup>38</sup> *Id.* at 490.

<sup>39</sup> *Id.* at 489-90.

<sup>40</sup> *Id.* at 488 ("[W]henver a trial court improperly requires joint representation over timely objection reversal is automatic.").

<sup>41</sup> 446 U.S. 335 (1980).

<sup>42</sup> *Id.* at 337.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 347-48.

<sup>45</sup> *Id.* at 347.

<sup>46</sup> *Id.* at 348-49.

<sup>47</sup> *Id.* at 348.

<sup>48</sup> *Id.* at 346-48.

<sup>49</sup> 450 U.S. 261 (1981).

<sup>50</sup> *Id.* at 262.

revoked because they could not make the mandatory \$500 monthly payments on their \$5000 fines.<sup>51</sup> The Court initially granted certiorari to consider whether this violated the Equal Protection Clause.<sup>52</sup> However, during its consideration, it came to the Court's attention that the defendants had been represented by their employer's lawyer, and that their employer had paid the attorney's fees.<sup>53</sup> This employer had made a general promise to his employees that he would pay their fines, but in this situation, did not do so.<sup>54</sup> The record suggested that the employer's interest in establishing a beneficial equal protection precedent (thus reducing any future fines he would have to pay for his indigent employees) diverged from the defendants' interest in receiving leniency, paying lesser fines, or avoiding imprisonment.<sup>55</sup> The possibility that defense counsel was actively representing the conflicting interests of employer and defendants "was sufficiently apparent at the time of the revocation hearing to impose upon the court a duty to inquire further."<sup>56</sup> Because, based on the record, the Court was not sure "whether counsel was influenced in his basic strategic decisions by the interests of the employer who hired him," it remanded to the trial court in order "to determine whether the conflict of interest that this record strongly suggests actually existed."<sup>57</sup>

Because of the differing treatment of the judge's duty in *Holloway* and *Sullivan*, and the ambiguous use of the phrase "actual conflict of interest" in *Wood*, these precedents have not combined to produce a clear rule for the application of the exception to conflict of interest cases. *Mickens* presented an opportunity for the Court to interpret *Holloway*, *Sullivan*, and *Wood* together and extract guiding principles from them to frame the analysis.

### III. STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

Seventeen-year-old Timothy Hall was found stabbed to death, his body bearing 143 stab wounds, twenty-five of which were fatal.<sup>58</sup> He was found "lying face down on a mattress under a sheet of plywood."<sup>59</sup> The condition of the scene and his body suggested evidence of recent sexual activity.<sup>60</sup>

---

<sup>51</sup> *Id.* at 262-63.

<sup>52</sup> *Id.* at 264.

<sup>53</sup> *Id.* at 266.

<sup>54</sup> *Id.* at 266-67.

<sup>55</sup> *Id.* at 267.

<sup>56</sup> *Id.* at 272.

<sup>57</sup> *Id.* at 272-73.

<sup>58</sup> Brief for Petitioner at 2, *Mickens v. Taylor*, 535 U.S. 162 (2002) (No. 00-9285).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

"Five days after Hall's body was found, police officers responding to the report of an assault upon a juvenile saw Mickens" fleeing the parking lot of the building where the crime took place and arrested him.<sup>61</sup> The police questioned Mickens about Hall's murder and he revealed knowledge that the murder weapon was a knife.<sup>62</sup> Eventually, Mickens admitted his guilt to an officer who served him with a warrant for the murder and forcible sodomy of Hall.<sup>63</sup>

On August 10, 1992, a Virginia grand jury indicted Mickens for the capital murder of Timothy Hall involving attempted forcible sodomy.<sup>64</sup> The allegation of attempted forcible sodomy made the crime a capital offense.<sup>65</sup>

At Mickens' trial, the prosecution presented evidence of Mickens' admissions, testimony that Mickens had "sold a pair of shoes which Hall was wearing at the time of his death," testimony that Mickens was seen near the scene of the crime, and expert testimony that hair samples and sperm found on Hall's body were consistent with samples from Mickens.<sup>66</sup> Mickens was represented by two court-appointed attorneys, Bryan Saunders, who was lead counsel, and Warren Keeling.<sup>67</sup>

At trial, Mickens took the stand and denied his guilt.<sup>68</sup> Defense counsel's only evidence to corroborate Mickens' denial of involvement was the "testimony of his mother that he was home before dark every night during the period when the killing must have occurred."<sup>69</sup> Defense counsel Saunders presented no alternative argument that, regardless of the identity of the killer, the killing could have occurred in relation to a consensual homosexual liaison, and therefore did not constitute a capital offense.<sup>70</sup>

The jury convicted Mickens of capital murder in connection with attempted forcible sodomy.<sup>71</sup> Very little mitigation evidence was presented at the jury sentencing hearing, and none of it related to the circumstances of the offense or to the character of the victim.<sup>72</sup> Mickens received a death

---

<sup>61</sup> *Id.* at 3.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 2.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 3-4.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 4-5.

<sup>70</sup> *Id.* at 5.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*



sentence.<sup>73</sup> That sentence was set aside after the Supreme Court granted certiorari and remanded to the Virginia Supreme Court to consider a claim “that the sentencing jury should have been informed about Mickens’ ineligibility for parole from a life sentence.”<sup>74</sup>

Mickens was again represented by Saunders and Keeling at the new sentencing hearing.<sup>75</sup> Again, Saunders presented little evidence in mitigation and none relating to the nature of the crime or to Hall’s character.<sup>76</sup> The jury again returned a death sentence.<sup>77</sup>

The trial judge ordered a post-sentence report for the sentence review, as prescribed by Virginia law.<sup>78</sup> After receiving the report, which included a victim impact statement that quoted Hall’s mother as saying that his death had “shattered her world,” that “all I lived for was that boy,” and that she would “never be over the way [her] son was killed,” the judge refused to set aside the jury’s sentencing verdict.<sup>79</sup> The Virginia Supreme Court affirmed the conviction and denied Mickens’ petition for post-conviction relief.<sup>80</sup>

Mickens was appointed new counsel for his federal habeas corpus proceedings.<sup>81</sup> During an investigation of Mickens’ background, the new counsel went to the Newport News Juvenile and Domestic Relations Court (“JDRC”) to examine his files.<sup>82</sup> Counsel also asked the clerk for Timothy Hall’s file.<sup>83</sup> Hall’s file revealed that before he had died Bryan Saunders had been representing him on charges of assault and possession of a concealed weapon that were going to trial the following week.<sup>84</sup> Counsel later “obtained a subpoena for the file by reporting what it illustrated about Saunders’ association with Hall.”<sup>85</sup>

Mickens’ federal habeas petition alleged that Saunders’ representation of Mickens had been subject to a conflict of interests, and thereby violated Mickens’ Sixth Amendment rights.<sup>86</sup> Information concerning Hall’s arrest for assault and battery of his mother and for possession of a concealed

---

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 6.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 7.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

weapon, and Saunders' representation of him on these two charges in front of the JDRC, was included in the petition.<sup>87</sup> This representation involved an interview conference.<sup>88</sup>

The petition stated that on "April 3, Judge Foster of the JDRC dismissed the charges against Hall" after his death, and on "April 6, Judge Foster appointed Saunders" to defend Mickens for the murder of Hall.<sup>89</sup> "Judge Foster did not inquire into" a possible conflict of interest, and Saunders did not disclose his connection to the victim.<sup>90</sup>

Counsel pointed to Saunders' consistent disregard of defensive or mitigating strategies that would have cast Saunders' former client in a bad light.<sup>91</sup> For example, Saunders did not develop any line of defense based on a consensual sexual encounter or investigate into whether Hall may have been a prostitute.<sup>92</sup> The facts that the "17-year-old Hall was not living at home, had a Department of Social Services caseworker who was his legal custodian, had been in foster care," and had criminally assaulted his mother, were not used in Mickens' defense in any way, even to impeach the testimony of Hall's mother at sentencing.<sup>93</sup>

Saunders was called as a witness at the District Court hearing and testified that "he never perceived any potential conflict of interests between his roles as counsel for Mickens and as counsel for Hall."<sup>94</sup> Though the court found his perceptions to be incorrect, it was still "persuaded that whatever confidential information Saunders may have learned from Hall" had no bearing on Mickens' case whatsoever, and it concluded that Saunders' representations of Hall and Mickens did not constitute an actual conflict of interest, and that they did not have an adverse effect on his representation of Mickens.<sup>95</sup>

A majority of a three-judge panel of the Fourth Circuit reversed this decision because it found that Mickens demonstrated "that (1) the state judge failed to inquire into an apparent conflict that she knew or reasonably should have known existed, (2) he did not waive any conflict, and (3) his

---

<sup>87</sup> *Id.* at 7-8.

<sup>88</sup> *Id.* at 8.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 8-9.

<sup>91</sup> *Id.* at 9.

<sup>92</sup> *Id.* at 10.

<sup>93</sup> *Id.* at 11, 13.

<sup>94</sup> *Id.* at 13.

<sup>95</sup> *Id.* at 15.

lawyer, Saunders, had an actual conflict of interest.”<sup>96</sup> The court found that, under *Wood*, these facts were sufficient to establish his claim.<sup>97</sup>

The dissenter argued that, while “the decision in *Wood* . . . has not turned out to be a model of clarity,” *Wood* is best read as requiring a showing of both an actual conflict of interests and a resulting adverse effect on counsel’s performance, and Mickens had not shown the adverse effect.<sup>98</sup>

The Commonwealth’s petition for rehearing en banc was granted and the Fourth Circuit adopted the position of the panel dissent in rejecting Mickens’ Sixth Amendment claim by a vote of seven to three.<sup>99</sup> Relying on *Sullivan*, the court held that a defendant must show “both an actual conflict of interest and an adverse effect even if the trial court failed to inquire into a potential conflict about which it reasonably should have known.”<sup>100</sup> Accordingly, the Fourth Circuit affirmed the district court’s denial of habeas relief.<sup>101</sup>

The Supreme Court granted a stay of execution of the petitioner’s sentence and granted certiorari.<sup>102</sup>

#### IV. SUMMARY OF OPINIONS

##### A. MAJORITY OPINION

Writing for the majority, Justice Scalia held that, in order to demonstrate a Sixth Amendment violation where the trial court failed to inquire into a potential conflict of interest about which it knew or should have reasonably known, defendant must establish that this conflict of interest adversely affected counsel’s performance.<sup>103</sup>

Petitioners relied on the language in the remand instruction of *Wood* “directing the trial court to grant a new revocation hearing if it determines that ‘an actual conflict of interest existed,’ without requiring a further determination that the conflict adversely affected counsel’s

---

<sup>96</sup> Mickens v. Taylor, 227 F.3d 203, 217 (4th Cir. 2000), *rev’d en banc*, 240 F.3d 348 (4th Cir. 2001), *rev’d* 535 U.S. 162 (2002).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 218-24.

<sup>99</sup> Mickens v. Taylor, 240 F.3d 348 (4th Cir. 2001) (en banc), *rev’d*, 535 U.S. 162 (2002).

<sup>100</sup> *Id.* at 355-56.

<sup>101</sup> *Id.* at 356.

<sup>102</sup> 532 U.S. 970 (2001).

<sup>103</sup> Mickens v. Taylor, 535 U.S. 162, 173-74 (2002). Justice Scalia’s opinion was joined by Chief Justice Rehnquist and Justices O’Connor, Kennedy, and Thomas.

performance.”<sup>104</sup> Scalia rejected this interpretation, finding that the language concerning an actual conflict of interest in *Wood* refers to a conflict that actually affected counsel’s performance, and not simply a finding that a possible conflict existed.<sup>105</sup> He interpreted the statements in *Wood* as shorthand for the standard set forth in *Sullivan*, that “a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief.”<sup>106</sup> Moreover, it is highly improbable, that *Wood*, in which the Court granted certiorari on a wholly separate issue and where neither of the parties argued the conflict of interest issue at all, would have changed the previous constitutional rule established in *Sullivan* with what Scalia called mere dictum.<sup>107</sup>

Furthermore, Scalia stated that an automatic reversal rule that is solely dependent on the awareness of the court does not make good policy sense.<sup>108</sup> The judge’s knowledge of a possible conflict does not make it more or less likely that counsel’s performance was significantly affected or that the verdict is unreliable as a result.<sup>109</sup> Thus, a “judge’s failure to make the *Sullivan*-mandated inquiry” does not make it more difficult for reviewing courts to find actual conflict or effect of that conflict.<sup>110</sup>

Also, it is not necessary to create such a severe sanction as automatic reversal to induce judges to be more careful in avoiding possible conflicts.<sup>111</sup> Judges should never be presumed to handle cases in a careless, arbitrary, or partial manner.<sup>112</sup> Even if there is a deterrent effect, it would not be significant enough to warrant such a significant rule as automatic reversal, especially when the *Sullivan* standard already created an incentive for judges to inquire into possible conflicts.<sup>113</sup>

Finally, Scalia clarified the breadth of the holding in *Mickens*.<sup>114</sup> The only question presented in this case was the “effect of a trial court’s failure to inquire into a potential conflict upon the *Sullivan* rule that deficient performance of counsel must be shown.”<sup>115</sup> The court did not grant

---

<sup>104</sup> *Id.* at 170-71 (quoting *Wood v. Georgia*, 450 U.S. 261, 273 (1981)).

<sup>105</sup> *Id.* at 171.

<sup>106</sup> *Id.* (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980)).

<sup>107</sup> *Id.* at 172.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 172-73.

<sup>110</sup> *Id.* at 173.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 174.

<sup>115</sup> *Id.*

certiorari to the question of whether or not there was actual prejudice, or whether *Sullivan* is even applicable in cases of successive representation, as it is in cases of multiple concurrent representation.<sup>116</sup> He further suggested that lower courts have wildly applied *Sullivan* to all kinds of conflict cases, and admonished against this expansive interpretation of *Sullivan*.<sup>117</sup> The Court's Sixth Amendment jurisprudence in *Holloway* and *Sullivan* does not exist to enforce the ethical canons of the legal profession, but to take care of situations where the *Strickland* requirement is inadequate in ensuring the defendant's right to effective counsel.<sup>118</sup>

#### B. KENNEDY'S CONCURRENCE

Kennedy's concurrence affirmed the analysis of the majority opinion, but went into more depth concerning why a categorical approach to the situation in *Mickens* is not warranted.<sup>119</sup> He stressed that the judge's failure to inquire cannot create an automatic presumption of prejudice as a matter of law or of policy.<sup>120</sup> He also stressed the fact that the Court only granted certiorari to the first question in the case, and not to the question of whether, in the absence of a presumption, the petitioner had actually demonstrated that a conflict of interest negatively affected his representation.<sup>121</sup> Because petitioner probably could not have demonstrated this actual effect, a finding that there should be a presumption of prejudice in cases such as this would be faulty.<sup>122</sup>

Kennedy examined the factual findings of the District Court, with regard to whether Saunders was representing conflicting interests during his representation of Mickens.<sup>123</sup> He stated that the Court must defer to the District Court's findings that the prior representation did not influence Saunders' choices made during the course of the trial, unless it can conclude that the findings are clearly erroneous.<sup>124</sup> Kennedy utilized the District Court's findings that the alternative strategies suggested by the petitioner would have been implausible and even detrimental (regardless of whether defense counsel had any relation to the victim), to illustrate that a

---

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 174-75.

<sup>118</sup> *Id.* at 176.

<sup>119</sup> 535 U.S. at 176 (Kennedy, J., concurring). Justice Kennedy was joined by Justice O'Connor.

<sup>120</sup> *Id.* (Kennedy, J., concurring).

<sup>121</sup> *Id.* (Kennedy, J., concurring).

<sup>122</sup> *Id.* (Kennedy, J., concurring).

<sup>123</sup> *Id.* at 177 (Kennedy, J., concurring).

<sup>124</sup> *Id.* (Kennedy, J., concurring).

categorical approach would presume prejudice where in fact none existed.<sup>125</sup> Kennedy stated that a strategy asserting a consensual sexual encounter would have produced a contradiction in the defense theory of the case, since Mickens alleged he did not commit the crime.<sup>126</sup> Moreover, a negative characterization of the victim and a strong impeachment of the victim's mother at sentencing would have backfired.<sup>127</sup> These strategy considerations were also rejected by Saunders' co-counsel, who had no duty to the victim, Hall.<sup>128</sup> Thus, a "theoretical conflict does not establish a constitutional violation, even when the conflict is one about which the trial judge should have known."<sup>129</sup>

Kennedy also asserted that a categorical rule would expand the duty of the judge in every instance of ineffective assistance of counsel, not just conflict of interests, since the Sixth Amendment protects the defendant from many types of attorney misconduct.<sup>130</sup> Accordingly, "it would be a major departure to say that the trial judge must step in every time defense counsel appears to be providing ineffective assistance, and indeed, there is no precedent to support this proposition."<sup>131</sup> Since the Sixth Amendment involves the assistance of counsel, a violation of it must involve a deficiency in counsel, not a deficiency in the trial court.<sup>132</sup>

### C. JUSTICE STEVENS' DISSENT

Justice Stevens' analysis broke this case into three independent questions regarding the constitutional right of a person accused of a capital offense to have the effective assistance of counsel: (1) Does a capital defendant's attorney have a duty to disclose that he was representing the defendant's alleged victim at the time of the murder? (2) Does that defendant have a right to refuse the appointment of the conflicted attorney? (3) Does the trial judge, who knows or should know of such prior representation, have a duty to obtain the defendant's consent before appointing that lawyer to represent him?<sup>133</sup> He asked: if all of these rights and duties are constitutionally mandated, and if they were all violated in

---

<sup>125</sup> *Id.* at 178 (Kennedy, J., concurring).

<sup>126</sup> *Id.* (Kennedy, J., concurring).

<sup>127</sup> *Id.* (Kennedy, J., concurring).

<sup>128</sup> *Id.* (Kennedy, J., concurring).

<sup>129</sup> *Id.* at 178-79 (Kennedy, J., concurring).

<sup>130</sup> *Id.* at 179 (Kennedy, J., concurring); *see also* Strickland v. Washington, 466 U.S. 668, 685-86 (1984).

<sup>131</sup> *Mickens*, 535 U.S. at 179. (Stevens, J., dissenting).

<sup>132</sup> *Id.* (Stevens, J., dissenting).

<sup>133</sup> *Id.* at 179-80 (Stevens, J., dissenting).

*Mickens*, do their violations constitute “circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified[?]”<sup>134</sup>

As to the first question, Stevens found the attorney’s failure to disclose his prior representation of the victim indefensible, as it violated the trust inherent in an attorney-client relationship and impaired effective communication.<sup>135</sup> He wrote, “Truthful disclosures of embarrassing or incriminating facts are contingent on the development of the client’s confidence in the undivided loyalty of the lawyer.”<sup>136</sup> Stevens continued:

An unconflicted attorney could have put forward a defense tending to show that Mickens killed Hall only after the two engaged in consensual sex, but Saunders offered no such defense. . . . This was a crucial omission—a finding of forcible sodomy was an absolute prerequisite to Mickens’ eligibility for the death penalty.<sup>137</sup>

Stevens concluded that a client has the right to presume that his attorney has no other interests that prevent him from completely and exclusively devoting himself to his client’s cause.<sup>138</sup>

As to the second question, Stevens found that the attorney’s obligation to protect the reputation and confidences of his deceased client should have given Mickens the right to insist on different representation.<sup>139</sup> Stevens stressed that Mickens should have been afforded the opportunity to give consent to or decline his appointed counsel, and that this right is as firmly protected by the Constitution as is the right of self-representation.<sup>140</sup>

As to the third question, Stevens found that, in the case of appointment of counsel to indigent defendants, the duty of the judge to make a thorough inquiry is unqualified, because it is necessary for the judge to have the protection of the defendant’s interests in mind.<sup>141</sup> At the starting point in the proceeding, “the defendant has no lawyer to protect his interests and must rely entirely on the judge.”<sup>142</sup>

After determining that these three rights were violated and that they do constitute special circumstances under *Cronic*, Stevens outlined four

---

<sup>134</sup> *Id.* at 180 (Stevens, J., dissenting) (quoting *United States v. Cronic*, 466 U.S. 648, 658 (1984)).

<sup>135</sup> *Id.* at 180 (Stevens, J., dissenting).

<sup>136</sup> *Id.* (Stevens, J., dissenting).

<sup>137</sup> *Id.* at 180-81 (Stevens, J., dissenting).

<sup>138</sup> *Id.* at 182 (Stevens, J., dissenting) (quoting *Williams v. Reed*, 29 F. Cas. 1386, 1390 (No. 17,733) (CC Me. 1824)).

<sup>139</sup> *Id.* at 183 (Stevens, J., dissenting).

<sup>140</sup> *Id.* at 183-84 (Stevens, J., dissenting) (citing *Faretta v. California*, 422 U.S. 806 (1975)).

<sup>141</sup> *Id.* at 184-85 (Stevens, J., dissenting).

<sup>142</sup> *Id.* at 184 (Stevens, J., dissenting).

reasons why setting aside the conviction is the appropriate remedy in this case.<sup>143</sup>

First, it is the remedy dictated by the applicable precedents of *Holloway*, *Sullivan*, and *Wood*.<sup>144</sup> The focus in these cases was on the trial court's duty to inquire into a potential conflict, which was triggered either by counsel's objection, or by other special circumstances placing the court on notice of the conflict.<sup>145</sup> This is an unambiguous mandate, and the Court's ruling in *Wood* did not undermine it.<sup>146</sup>

Second, setting aside the conviction is the only remedy that is fair, considering that it is possible Mickens may not have received the death penalty if he had been represented by different counsel who would have been able to pursue a strategy establishing that the murder took place during a consensual encounter.<sup>147</sup> Moreover, it should be presumed that the lawyer of the victim of a homicide cannot establish the kind of relationship with the defendant (charged with the homicide) that is necessary for effective representation.<sup>148</sup>

Third, setting aside the conviction is the only remedy that is consistent with the historic ethical rejection of the representation of conflicting interests, especially without full disclosure and consent.<sup>149</sup> Furthermore, Stevens believes that the majority's assumption that conflicted counsel is acceptable unless it can be demonstrated that such a conflict actually affected counsel's performance is contrary to the traditions and principles of the legal profession.<sup>150</sup>

Fourth, for the judicial system to be just, it must satisfy the appearance of justice.<sup>151</sup> "Setting aside Mickens' conviction is the only remedy that can maintain public confidence in the fairness of the procedures employed in capital cases."<sup>152</sup> Moreover, since a death sentence is a unique form of punishment that is both ultimately severe and ultimately irreversible, it is very important that, if it is to occur, its application appears to be based on reason and not emotion.<sup>153</sup> In essence, any rule, such as the majority's,

---

<sup>143</sup> *Id.* at 186 (Stevens, J., dissenting).

<sup>144</sup> *Id.* (Stevens, J., dissenting).

<sup>145</sup> *Id.* (Stevens, J., dissenting).

<sup>146</sup> *Id.* at 186-87 (Stevens, J., dissenting).

<sup>147</sup> *Id.* at 188 (Stevens, J., dissenting).

<sup>148</sup> *Id.* (Stevens, J., dissenting).

<sup>149</sup> *Id.* (Stevens, J., dissenting).

<sup>150</sup> *Id.* at 188-89 (Stevens, J., dissenting).

<sup>151</sup> *Id.* at 189 (Stevens, J., dissenting) (citing *Offcut v. United States*, 348 U.S. 11, 14 (1954)).

<sup>152</sup> *Id.* (Stevens, J., dissenting).

<sup>153</sup> *Id.* (Stevens, J., dissenting) (citing *Gardner v. Florida*, 430 U.S. 349, 357-358 (1977)).



which allows a defendant to be forced into being represented by the lawyer for the victim of the crime, and allows a death sentence to be imposed on the basis of this representation, is faulty.<sup>154</sup>

#### D. JUSTICE SOUTER'S DISSENT

Justice Souter asserted that a judge who knows or should know that counsel for a criminal defendant in a trial has a potential conflict of interest is obliged to inquire into the potential conflict and evaluate its significance to the fairness of the proceeding.<sup>155</sup> Unless the judge finds the risk too remote or finds that the defendant has reasonably assumed the risk and waived any potential Sixth or Fourteenth Amendment claim of inadequate counsel, the court must make sure the lawyer is replaced.<sup>156</sup>

The District Court Judge reviewing the federal habeas petition found that the state juvenile-court judge who appointed Bryan Saunders to represent Mickens in a capital murder trial knew or should have known that obligations arising from Saunders's recent representation of the victim potentially conflicted with his defense of Mickens.<sup>157</sup> The trial judge was therefore obliged to examine the significance of the risk and, if necessary, to either alert Mickens to the potential conflict and receive his consent, or appoint another lawyer.<sup>158</sup> Based on these facts, Souter explained the appropriate remedy for this judge's failure to discharge her constitutional duty of care in *Holloway*: "the ensuing judgment of conviction must be reversed and the defendant afforded a new trial."<sup>159</sup>

Souter characterized the majority opinion as holding that "Mickens should be denied this remedy because Saunders failed to employ a formal objection as a means of bringing home to the appointing judge the risk of conflict."<sup>160</sup> He questioned why an objection should matter when the judge already knew of the risk and was already obligated to inquire further.<sup>161</sup> Furthermore, he questioned the majority's interpretation of the applicable precedent, and accordingly re-examined *Holloway*, *Sullivan*, and *Wood*.<sup>162</sup>

---

<sup>154</sup> *Id.* (Stevens, J., dissenting).

<sup>155</sup> *Id.* (Souter, J., dissenting); see *Wheat v. United States*, 486 U.S. 153, 160 (1988); *Wood v. Georgia*, 450 U.S. 261, 272 (1981); *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980).

<sup>156</sup> *Mickens*, 535 U.S. at 189 (Souter, J., dissenting).

<sup>157</sup> *Id.* at 190 (Souter, J., dissenting).

<sup>158</sup> *Id.* (Souter, J., dissenting).

<sup>159</sup> *Id.* (Souter, J., dissenting) (citing *Holloway v. Arkansas*, 435 U.S. 475, 491 (1978)).

<sup>160</sup> *Id.* at 191 (Souter, J., dissenting).

<sup>161</sup> *Id.* (Souter, J., dissenting).

<sup>162</sup> *Id.* (Souter, J., dissenting).

Souter's analysis made a distinction between the holdings of *Holloway* and *Sullivan*. In *Holloway*, the Court reversed the convictions "on the basis of the judge's failure to respond to the prospective conflict, without any further showing of harm."<sup>163</sup> In *Sullivan*, counsel made no objection to the multiple representation before or during trial, and the defendant did not argue that the trial judge knew or should have known of the risk described in *Holloway*, that counsel's representation might be impaired by conflicting obligations.<sup>164</sup> The Court held "that multiple representation did not raise enough risk of impaired representation in a coming trial to trigger a trial court's duty to enquire further, in the absence of 'special circumstances,'" (the most obvious of which would be an objection).<sup>165</sup> However, the Court also stated that courts should rely on counsel in "large measure," but not exclusively.<sup>166</sup> Accordingly, the Court did not reject the respondent's claim simply because of the lack of objection by defense counsel, but instead focused generally on the circumstances of the case, which did not indicate that the trial court knew or should have known that an actual conflict of interest existed.<sup>167</sup> Thus, it required respondent to demonstrate an actual effect on the performance of his counsel.<sup>168</sup>

The different burdens in *Holloway* and *Sullivan*, although seemingly contradictory, approach the problem of conflicted defense counsel in a coherent way.<sup>169</sup> Souter wrote: "a prospective risk of conflict subject to judicial notice is treated differently from a retrospective claim that a completed proceeding was tainted by conflict, although the trial judge had not been derelict in any duty to guard against it."<sup>170</sup> When the issue comes to the court's attention before it becomes an actual conflict, the court has an affirmative obligation to evaluate the risk prospectively and eliminate it, or make it acceptable through intelligent waiver.<sup>171</sup> The error occurred in *Holloway* when the judge failed to act, and the remedy, reversing the conviction, "restored the defendant to the position he would have occupied if the judge had taken reasonable steps to fulfill his obligation."<sup>172</sup> But

---

<sup>163</sup> *Id.* at 192 (Souter, J., dissenting) (citing *Holloway*, 435 U.S. at 491).

<sup>164</sup> *Id.* at 192 (Souter, J., dissenting) (citing *Cuyler v. Sullivan*, 446 U.S. at 335, 338, 343 (1980)).

<sup>165</sup> *Id.* at 193 (Souter, J., dissenting) (citing *Sullivan*, 446 U.S. at 346; *Holloway*, 435 U.S. at 488).

<sup>166</sup> *Id.* at 193 (Souter, J., dissenting).

<sup>167</sup> *Id.* (Souter, J., dissenting).

<sup>168</sup> *Id.* at 194 (Souter, J., dissenting) (quoting *Sullivan*, 446 U.S. at 349).

<sup>169</sup> *Id.* (Souter, J., dissenting).

<sup>170</sup> *Id.* (Souter, J., dissenting).

<sup>171</sup> *Id.* (Souter, J., dissenting).

<sup>172</sup> *Id.* at 194-95 (Souter, J., dissenting).

when the potential conflict comes to judicial attention after the fact, as in *Sullivan*, the defendant must show an adverse consequence to get relief, because in such a case the conflict has occurred through no fault of the judge.<sup>173</sup>

Thus, under the scheme established in *Holloway* and *Sullivan*, “there is nothing legally crucial about an objection by defense counsel to tell a trial judge that conflicting interests may impair the adequacy of counsel’s representation.”<sup>174</sup> What was important in *Holloway* was that the judge was put on notice that he should inquire.<sup>175</sup> In a normal multiple representation case, it would take an objection to alert a trial judge to the prospective conflict, but an objection is not necessary as a matter of law.<sup>176</sup>

Souter interpreted *Wood* as a reaffirmation of this scheme, and perfectly consistent with both *Holloway* and *Sullivan*.<sup>177</sup> He stated that:

*Wood* was not like *Holloway*, in which the judge was put on notice of a risk before trial, that is, a prospective possibility of conflict. It was, rather, much closer to *Sullivan*, since any notice to a court went only to a conflict, if there was one, that had pervaded a completed trial proceeding extending over two years.<sup>178</sup>

Therefore, he continued, “since the *Wood* judge’s duty was unlike the *Holloway* judge’s obligation to take care for the future, it would have made no sense for the *Wood* Court to impose a *Holloway* remedy.”<sup>179</sup>

Since the District Court in *Mickens* found that the state judge was on notice of a prospective potential conflict, the rule established by *Holloway* and *Sullivan* applies, and the remedy for the judge’s dereliction should be a reversal and a new trial.<sup>180</sup>

Souter then proceeded to evaluate whether the new precedent produced by the majority opinion in *Mickens* has any merit whatsoever.<sup>181</sup> He asserted that the requirement of objection takes the force out of the rationale of the rules in *Holloway* and *Sullivan*, namely that an obligation is created when a judge is placed on notice of a potential conflict.<sup>182</sup> He believes that there must be a deterrent for failing to act early on.<sup>183</sup> Such failures

---

<sup>173</sup> *Id.* at 195 (Souter, J., dissenting) (citing *Sullivan*, 446 U.S. at 349).

<sup>174</sup> *Id.* (Souter, J., dissenting).

<sup>175</sup> *Id.* (Souter, J., dissenting).

<sup>176</sup> *Id.* (Souter, J., dissenting) (citing *Sullivan*, 446 U.S. at 347).

<sup>177</sup> *Id.* at 202 (Souter, J., dissenting).

<sup>178</sup> *Id.* at 201 (Souter, J., dissenting).

<sup>179</sup> *Id.* (Souter, J., dissenting).

<sup>180</sup> *Id.* at 202 (Souter, J., dissenting).

<sup>181</sup> *Id.* (Souter, J., dissenting).

<sup>182</sup> *Id.* at 202-03 (Souter, J., dissenting).

<sup>183</sup> *Id.* at 203 (Souter, J., dissenting).

increase the probability that errors that are difficult to demonstrate will pass through the system.<sup>184</sup> Thus, Souter criticized the majority opinion for having the practical consequence of eliminating the “judge’s constitutional duty entirely in no-objection cases.”<sup>185</sup>

#### E. JUSTICE BREYER’S DISSENT

Justice Breyer argued that, in a case where a defendant has had counsel appointed to him who, at the time of the crime in question, was representing the victim of that crime, a “categorical approach is warranted and automatic reversal is required.”<sup>186</sup> “By appointing this lawyer to represent Mickens, the Commonwealth created a ‘structural defect affecting the framework within which the trial [and sentencing] proceeds, rather than simply an error in the trial process itself.’”<sup>187</sup> Although the parties and other justices spend a lot of time discussing those precedents which involve the significance of a trial judge’s failure to inquire if that judge knew or should have known of a potential conflict, Breyer is “convinced that *this* case is not governed by those precedents.”<sup>188</sup>

First, without citing any precedential authority, Breyer stated that this type of “representational incompatibility . . . is egregious on its face.”<sup>189</sup> Mickens simply should not have had a lawyer whose representation of the victim continued until “one business day before the lawyer was appointed to represent” him.<sup>190</sup>

Second, the existence of a conflict “is exacerbated by the fact that it occurred in a capital murder case.”<sup>191</sup> Because evidence regarding the victim’s character may “tip the scale of the jury’s choice between life or death” in a very subtle way, “it will often prove difficult, if not impossible, to determine whether the prior representation affected defense counsel’s decisions” regarding his presentation of the victim, what kind of impeachment to use, and what strategy to use at sentencing.<sup>192</sup> Given the difficulty in demonstrating actual prejudice because of this subtlety, “the

---

<sup>184</sup> *Id.* (Souter, J., dissenting).

<sup>185</sup> *Id.* at 206 (Souter, J., dissenting).

<sup>186</sup> *Id.* at 209 (Breyer, J., dissenting). Justice Breyer was joined by Justice Ginsburg.

<sup>187</sup> *Id.* (Breyer, J., dissenting) (citing *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)).

<sup>188</sup> *Id.* (Breyer, J., dissenting).

<sup>189</sup> *Id.* at 210 (Breyer, J., dissenting).

<sup>190</sup> *Id.* (Breyer, J., dissenting).

<sup>191</sup> *Id.* (Breyer, J., dissenting).

<sup>192</sup> *Id.* (Breyer, J., dissenting).

cost of litigating the existence of actual prejudice in a particular case cannot be easily justified.”<sup>193</sup>

Third, the conflict was created by the judge in this case.<sup>194</sup> Since the judge had an active role in producing the situation of incompatible representation, no duty to inquire would have made the judge more aware of the conflict than was already obvious.<sup>195</sup>

Thus, the appearance of unfairness and unreliability produced by this breakdown in the criminal justice system, along with the high probability of actual prejudice occurring, are significant enough to warrant a categorical rule that the showing of prejudice not be required in such a case to demonstrate a Sixth Amendment violation.<sup>196</sup>

## V. ANALYSIS

*Mickens* is not consistent with the logic and principle of the precedents regarding conflicts of interest and the right to effective counsel. The Court’s interpretation of those precedents, with regard to the requirement of objection to invoke *Holloway*,<sup>197</sup> is overly formalistic. Additionally, the jurisprudence expressed in *Mickens* was not consistent with the function or spirit of the Sixth Amendment and the precedents regarding the exceptions to *Strickland*.<sup>198</sup> Finally, the rule established in *Mickens* will have negative implications for the justice system and the behavior of its participants.

The dispute concerning whether prospective notice to the judge or objection is the vital factor in *Holloway* is analyzed in Section A, *infra*. The majority focuses on the ambiguous language in *Wood* (as petitioners did),<sup>199</sup> determining that *Wood* was probably not intended to create a rule *sub silentio*. Justice Souter constructs a “coherent scheme” which incorporates the logic, if not the language, of *Holloway*, *Sullivan*, and *Wood*.<sup>200</sup> Souter’s reading of the precedent finds the overriding principle of notice behind the ambiguity of the opinions’ text, and he discovers a way to reconcile the decisions without producing a vague or arbitrary standard.<sup>201</sup> Rather than attempting to extract any general principles from the

---

<sup>193</sup> *Id.* (Breyer, J., dissenting).

<sup>194</sup> *Id.* (Breyer, J., dissenting).

<sup>195</sup> *Id.* at 210-11 (Breyer, J., dissenting).

<sup>196</sup> *Id.* at 211 (Breyer, J., dissenting); *see also* *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991).

<sup>197</sup> *Id.* at 168-69.

<sup>198</sup> *See, e.g.,* *United States v. Cronin*, 466 U.S. 648, 654 (1984).

<sup>199</sup> *Mickens*, 535 U.S. at 170-73.

<sup>200</sup> *Id.* at 194-95 (Souter, J., dissenting).

<sup>201</sup> *Id.* (Souter, J., dissenting).

application of *Sullivan* in *Wood*,<sup>202</sup> the Court establishes a formalistic and arbitrary objection requirement for invoking *Holloway*. Although the majority's emphasis on the significance of the objection in earlier precedents<sup>203</sup> is the result of an accurate reading of the language of those cases, it fails to recognize that the importance of objection lies in its function rather than its mere presence.

Section B, *infra*, examines whether the jurisprudence of the court is consistent with the rationale and spirit behind the Sixth Amendment. While *Mickens* may be consistent with the language of the precedent,<sup>204</sup> it is not in line with the purpose of the exception to *Strickland*. The exception exists to eliminate the requirement of showing prejudice in situations where prejudice is very likely to occur and where it would be difficult to detect after the fact. *Mickens* is precisely the type of case where the dangers are most likely to occur: a conflict of this nature<sup>205</sup> creates a structural predisposition towards hidden prejudice. Furthermore, the trial judge must take an active part in meeting her constitutional duty to preserve a fair trial. The criminal defendant has the right to assistance of counsel only because of the effect this right has on the ability of the accused to receive a fair trial.<sup>206</sup> Thus, as a matter of constitutional principle, the judge should have a duty to prevent conflicts of interest from occurring, if possible, regardless of the existence of objection or not.

Section C, *infra*, examines some of the implications of *Mickens* for the participants in the criminal justice system, the judicial system in general, and future defendants. *Mickens* will produce perverse incentives for lawyers and judges, high costs to the judicial system as a whole, and heavy burdens for defendants with conflicted counsel.

#### A. OBJECTION V. NOTICE

The Court's ruling in *Mickens* turned on its interpretation of the rationale and language of *Holloway*, *Wood*, and *Sullivan*. Its determination that an objection is required to invoke *Holloway*'s duty to inquire led the court to frame its analysis through *Sullivan*. This Note will argue that notice, not objection, was required to trigger the judge's duty to inquire in *Holloway*, and that the Court's interpretation of *Holloway* and *Sullivan* was

---

<sup>202</sup> *Id.* at 172-74.

<sup>203</sup> *Id.* at 168.

<sup>204</sup> *See id.* at 170-73; *see also* *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980) (which interpreted *Holloway* as requiring an inquiry when "the trial court knows or reasonably should know that a particular conflict exists").

<sup>205</sup> Where a defendant is represented by his victim's recent counsel.

<sup>206</sup> *See* *United States v. Cronin*, 466 U.S. 648, 654 (1984).

overly formalistic. While the Court's literal reading of the precedent is accurate, it fails to fairly examine the functional importance of objection and accordingly, misses an opportunity to clarify a confusing line of precedent and solidify an important constitutional principle.

The majority establishes the existence of a timely objection as the crucial fact that produces a presumption of prejudice in a conflict of interest case.<sup>207</sup> It treats the situation in *Holloway* as the model of the appropriate situation to invoke the presumption of prejudice—on the basis of an ignored objection.<sup>208</sup> *Holloway* itself focuses on objection, and declines to offer an opinion as to what the correct rule would be in cases where there is no objection.<sup>209</sup>

Non-objection cases were untouched until *Sullivan*, which made ambiguous statements about what exactly triggers the judge's duty to inquire. It begins by extracting a general rule from *Holloway*: "Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry."<sup>210</sup> It then states that "[n]othing in the circumstances of this case indicates that the trial court had a duty to inquire."<sup>211</sup> In particular, the Court noted that the separate trials reduced the potential for divergence in the defendants' interests, no participant objected, the strategy outlined in the opening argument was compatible with all of the defendants' cases, and the actions of counsel seemed to be generally reasonable.<sup>212</sup> This analysis implies that objection is just one of many circumstances that could trigger the judge's duty to inquire.

The opinion then takes a striking turn, and without explanation, states that "[i]n order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance."<sup>213</sup>

The split nature of the decision leaves it open to multiple interpretations, and *Wood* reflects its analytical confusion. *Wood* presents more questions than answers in interpreting *Holloway* and *Sullivan* because it is not clear about which standard it is following.<sup>214</sup>

---

<sup>207</sup> *Mickens*, 535 U.S. at 173.

<sup>208</sup> *Id.* at 167-168.

<sup>209</sup> *Holloway v. Arkansas*, 435 U.S. 475, 483-85 (1978).

<sup>210</sup> *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980).

<sup>211</sup> *Id.* at 347-48.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 348.

<sup>214</sup> Compare *Wood v. Georgia*, 450 U.S. 261, 272 (1981) ("The possibility of a conflict of interest was sufficiently apparent at the time of the revocation hearing to impose upon the court a duty to inquire further."), with *id.* at 273 (remanding to the trial court "to determine whether the conflict of interest that this record strongly suggests actually existed").

The one unambiguous principle that can be drawn from these precedents is that an objection always qualifies as a “special circumstance” because it definitely puts the judge on notice, and therefore, triggers his or her affirmative duty.<sup>215</sup> However, neither *Holloway* nor *Sullivan* relies on an objection exclusively.<sup>216</sup> The *Sullivan* Court simply finds that general knowledge of multiple representation is not enough for the judge to be on notice of a potential conflict, and therefore, does not trigger the special circumstances requirement.<sup>217</sup> Given that its analysis was based on “special circumstances,” but its holding establishes *objection* as the sole method of notification, it seems very likely that the Court simply did not anticipate a case like *Mickens*, where the judge was more informed about a possible conflict of interest through her own knowledge than she could have been through objection by defense counsel. If this is not the case, then the *Sullivan* Court actively contradicted its own analysis.

Thus, in the face of the ambiguity of *Sullivan* and *Wood*, *Mickens* presented the Court with an opportunity to clarify the precedent and identify the important principles therein. The majority resolved the ambiguity in favor of a creating a concrete, static rule in a case with no objection.<sup>218</sup> The Court holds that the judge only has a constitutional duty to inquire into a conflict where defense counsel makes a timely objection alerting the court to a potential conflict.<sup>219</sup> In *Holloway* there was an objection; in *Sullivan* there was not.<sup>220</sup>

The most notable distinction between the majority’s analysis, as represented by Justice Scalia’s opinion, and Justice Souter’s analysis of the precedent, is their treatment of the concept of notice.<sup>221</sup> Souter delved deep into the analysis in *Sullivan* and ignored the language of its clear holding.<sup>222</sup> He constructed a “coherent scheme” which incorporates *Holloway*, *Sullivan*, and *Wood* without discord.<sup>223</sup> Souter’s reading of the precedent finds a logic behind the ambiguity of the precedent, and he discovers a way

---

<sup>215</sup> See *Mickens*, 535 U.S. at 175, 189, 209, 279-80.

<sup>216</sup> *Id.* at 167-68.

<sup>217</sup> See *id.*

<sup>218</sup> *Id.* at 174-75.

<sup>219</sup> *Id.* at 191.

<sup>220</sup> *Id.* at 170.

<sup>221</sup> Compare *id.* at 175 (in which Scalia argues that the judge’s knowledge of a possible conflict has no bearing on whether the verdict of the trial is reliable or not), with *id.* at 191-92 (Souter, J., dissenting) (in which Souter interprets the precedent as focusing on notice to the judge).

<sup>222</sup> *Id.* at 192-93 (Souter, J., dissenting).

<sup>223</sup> *Id.* at 191 (Souter, J., dissenting).



to reconcile the decisions without producing a vague or arbitrary standard.<sup>224</sup>

Souter's analysis distinguished *Sullivan* from *Mickens* by the fact that Mickens' judge had actual knowledge.<sup>225</sup> He examined the functional meaning of the objection, by asking: What about an objection could trigger a judge's duty to inquire? Since the objection makes the judge aware of the potential for conflict, it triggers the judge's duty.<sup>226</sup> This is in keeping with *Sullivan*'s affirmation of the principle that automatic reversal should only be allowed where the judge should have known or actually did know of the potential for conflict.<sup>227</sup>

Contrary to Scalia, Souter found that the *notice*, and not the objection, is the necessary special circumstance: in *Holloway*, the notice came from constant objections; in *Sullivan*, there was no notice because there were no objections, and there were no special circumstances that brought the court's attention to any *particular* danger.<sup>228</sup> In *Mickens*, the special circumstances are threefold: the judge knew that Saunders had represented the victim, she knew that Saunders did not object to the representation, and she actively appointed him to represent his client's alleged murderer.<sup>229</sup> This was not a passive situation where the judge could not have known of a potential conflict of interest without an objection.<sup>230</sup>

Regardless of this knowledge, the majority argues that it makes little policy sense to award an automatic reversal in a case such as *Mickens* because the judge's awareness or lack of awareness of the potential conflict of interest has no bearing on the reliability of the verdict *unless* the conflict of interest actually had an effect on the performance of the counsel.<sup>231</sup> However, this is precisely the reason prejudice is presumed in some cases.<sup>232</sup> Some kinds of circumstances, including some kinds of conflicts of interest, undermine the adversarial process of the judicial system by affecting counsel's performance without leaving footprints.<sup>233</sup>

---

<sup>224</sup> *Id.* (Souter, J., dissenting).

<sup>225</sup> *See id.* at 190 (Souter, J., dissenting).

<sup>226</sup> *See id.* at 191 (Souter, J., dissenting).

<sup>227</sup> *See id.* at 192-93 (Souter, J., dissenting).

<sup>228</sup> *See id.* at 192 (Souter, J., dissenting) (noting that the only danger is that of multiple representation).

<sup>229</sup> Brief for Petitioner at 8-9, *Mickens* (No. 00-9285).

<sup>230</sup> *Id.*

<sup>231</sup> *Mickens*, 535 U.S. at 173.

<sup>232</sup> *See United States v. Cronin*, 466 U.S. 648, 658-59 (1984).

<sup>233</sup> *See id.*

Although the majority's emphasis on the significance of the objection<sup>234</sup> in *Sullivan* is the result of a fair reading of the language of those cases, its ruling perpetuated an illusory distinction between notice and objection. The Court could have bypassed *Wood*'s confusing language<sup>235</sup> altogether and re-examined the significance of notice in its prior jurisprudence.<sup>236</sup> Because it did not, objection is now the sole means for obtaining a presumption of prejudice where a judge knew or should have known of the possibility of a conflict of interest. However, from a purely functional point of view, an objection should not be, as a matter of policy and necessity, a constitutional requirement under the Sixth Amendment as long as the judge has notice through any "special circumstances."

#### B. MICKENS IS INCONSISTENT WITH THE RATIONALE OF THE SIXTH AMENDMENT

This part of the Note will analyze the Court's jurisprudence, focusing on its inconsistency with the policy rationale and general spirit of the Sixth Amendment.<sup>237</sup> While *Mickens* may be consistent with the language of the precedent, it is not in line with the purpose of the exception to *Strickland*. The presumption of prejudice only exists to eliminate the defendant's burden in situations where prejudice is extremely likely to occur and where it would be difficult to detect after the fact. The Court should have recognized that *Mickens* is precisely the type of case that should fall under the presumption of prejudice because a conflict involving a defense counsel who represented both the victim and the accused creates a structural predisposition towards hidden prejudice, especially where the accused is not apprised of the prior representation. In addition, the Court failed to recognize the importance of the trial judge in its Sixth Amendment jurisprudence. The actions of the trial judge should have been vital to the Court's decision because the trial judge in *Mickens* created the conflict by appointing conflicted counsel without disclosing it to the defendant.

The presumption of prejudice is triggered when there exist "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."<sup>238</sup> These

---

<sup>234</sup> *Id.* at 173.

<sup>235</sup> This is especially true in light of the fact that the majority suggested that the relevant material in *Wood* was not definitive because the case was granted certiorari on the Equal Protection issue only. *Mickens*, 535 U.S. at 175.

<sup>236</sup> See *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Holloway v. Arkansas*, 435 U.S. 475, 477 (1978).

<sup>237</sup> See *Cronic*, 466 U.S. at 654.

<sup>238</sup> *Id.* at 658.

circumstances exist where an adverse effect is difficult to observe, precisely because the adverse effect may not be clear when observing what is submitted, but entirely clear when observing what is omitted.<sup>239</sup> Unfortunately, the Court is not privy to what was actively omitted or what *could* have been submitted by defense counsel. As stated in *Holloway*, “the evil [of conflict-ridden counsel] is in what the advocate finds himself compelled to *refrain* from doing, . . . [making it] difficult to judge intelligently the impact of a conflict on the attorney’s representation of a client.”<sup>240</sup>

This type of omission error is likely to occur in cases of multiple or successive representation, because conflict can be expressed in a reluctance to present certain evidence or pursue a certain strategy.<sup>241</sup> As established in *Sullivan*, there is no per se rule allowing the reversal of all multiple representation cases for which a judge did not inquire into possible conflicts,<sup>242</sup> but a conflict where counsel’s loyalties are split between two or more defendants (or between a victim and accused, as in *Mickens*), may have a very significant effect on what evidence is presented or how the defendant (or the victim) is portrayed that is not detectable during or after the trial. In those cases, setting aside a conviction may be the only way to return the defendant to where he would have been without the conflict.<sup>243</sup>

Hidden prejudice becomes even more important in the context of sentencing, where the addition or omission of certain mitigating evidence can make all the difference. Observers after the fact do not and cannot know how Saunders’ prior representation affected his ability to zealously advocate for Mickens. The conflict may have contributed to his decision not to impeach the victim’s mother’s testimony<sup>244</sup> or not to argue that the sexual encounter was consensual.<sup>245</sup> Furthermore, because no one can know how Saunders’ prior representation affected him, it is extremely difficult to know whether an omission was based on strategy or loyalty to his former client.<sup>246</sup> Thus, the Court failed to analogize the dangers in

---

<sup>239</sup> See *id.* at 657-58 (explaining the need for categorical approach in the event of “actual breakdown of the adversarial process”).

<sup>240</sup> *Holloway*, 435 U.S. at 490-91.

<sup>241</sup> See *id.* at 490-91.

<sup>242</sup> *Mickens*, 535 U.S. at 168.

<sup>243</sup> See *id.* at 187-89 (Stevens, J., dissenting).

<sup>244</sup> Saunders might have countered the victim’s mother’s impact statement with information about the fact that she accused him of attacking her in the past.

<sup>245</sup> A finding of forcible sodomy was critical to the imposition of the death penalty. *Mickens*, 535 U.S. at 181 n.3 (Stevens, J., dissenting).

<sup>246</sup> See *id.* at 178 (Kennedy, J., concurring). When important functions of counsel are omitted from the defense, prejudice may be presumed. See *Davis v. Alaska*, 415 U.S. 308,

*Mickens* to the dangers elucidated in its prior jurisprudence concerning the purpose of the presumption of prejudice. The Court's inquiry should have been whether a conflict makes the result of the trial unreliable and prejudice difficult to detect, since these are the factors that drive the exception.

The Court also ignored its prior jurisprudence by minimizing the role of the judge in facilitating a fair trial. The Court's majority opinion stated that "the trial court's awareness of a potential conflict neither renders it more likely that counsel's performance was significantly affected nor in any way renders the verdict unreliable."<sup>247</sup> Kennedy's concurrence echoed the sentiment, stating that the "constitutional question must turn on whether trial counsel had a conflict of interest that hampered the representation, not on whether the trial judge should have been more assiduous in taking prophylactic measures."<sup>248</sup>

Based on the above comments, it is hard to justify the Court's willingness to uphold the objection rule of *Holloway* at all. If awareness is simply not the issue, then objection is irrelevant. Kennedy seems to suggest that the objection is important because it signals counsel's recognition of his own conflict.<sup>249</sup> If the judge's awareness does not trigger the duty to inquire, the burden of enforcing the Sixth Amendment is entirely on defense counsel. What if the defense counsel refuses to recognize his conflict, or worse, hides it purposely? This type of logic eliminates the judge as an active player in preventing violations of the Sixth Amendment.

In addition, the majority seems to be arguing against the whole concept of a presumption of prejudice. In his concurrence, Kennedy states:

It would be a major departure to say that the trial judge must step in every time defense counsel appears to be providing ineffective assistance, and indeed, there is no precedent to support this proposition. As the Sixth Amendment guarantees the defendant the assistance of counsel, the infringement of that right must depend on a deficiency of the lawyer, not of the trial judge. There is no reason to presume this guarantee unfulfilled when the purported conflict has had no effect on the representation.<sup>250</sup>

Kennedy simply ignores the possibility that the performance of the trial judge can create deficiencies in counsel.<sup>251</sup> In some cases, the actions of judges bear directly on the effectiveness of counsel.<sup>252</sup> In *Holloway*, in

---

318 (1974) (no specific showing of prejudice was required because the petitioner had been denied the right of effective cross-examination).

<sup>247</sup> *Mickens*, 535 U.S. at 173.

<sup>248</sup> *Id.* at 179 (Kennedy, J., concurring).

<sup>249</sup> *Id.* (Kennedy, J., concurring).

<sup>250</sup> *Id.*

<sup>251</sup> *United States v. Cronin*, 466 U.S. 648, 658-59 (1984).

<sup>252</sup> *Cf.* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst*

which the Court found a presumption of prejudice, the judge actively participated in the deficiency of counsel by refusing to listen to the counsel's constant objections concerning conflicts.<sup>253</sup> Prejudice was presumed because the judge's actions made it very difficult to determine whether actual prejudice occurred.<sup>254</sup> In the case of indigent defendants who receive appointed counsel, the judge can affect the quality of the defendant's representation through his or her choice of appointment.<sup>255</sup>

In *Mickens* the judge facilitated the potential for conflict—she did not simply fail to inquire. This special circumstance underscores the relevance of the judge to the issue in the case. The judge's role, and the fact that the case is one of *successive* representation, makes *Mickens* significantly distinct from *Holloway* and *Sullivan*. Indeed, Scalia questions whether the rule in *Sullivan* should have even been applied to a case of successive representation,<sup>256</sup> and Breyer questions whether the cases cited by the majority were relevant at all.<sup>257</sup> Breyer states that, "[i]n light of the judge's active role in bringing about the incompatible representation, I am not sure why the concept of a judge's duty to inquire is thought to be central to this case."<sup>258</sup> Given the possibility that the court in *Sullivan* simply could not anticipate a situation like *Mickens*,<sup>259</sup> Breyer's circumvention of *Holloway*, *Sullivan*, and *Wood* to establish a categorical rule of reversal designed *just* for cases like *Mickens* may have been a valid alternative to attempting to make sense of the quagmire created by the precedents on multiple representation.<sup>260</sup>

---

*Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1844 (1994) ("Many state court judges, instead of correcting this imbalance, foster it by intentionally appointing inexperienced and incapable lawyers to defend capital cases.").

<sup>253</sup> *Holloway v. Arkansas*, 435 U.S. 475, 488 (1978).

<sup>254</sup> *Id.* One reason for the difficulty of discovering actual prejudice is that conflicted attorneys affect the outcome of the proceeding by selecting what information to present. Since conflicted attorneys may omit information that could help their clients, a judge's knowing appointment of a conflicted attorney creates the opaqueness the exception is designed to circumvent.

<sup>255</sup> See *United States v. Cronin*, 466 U.S. 648, 658-59 (1984); Bright, *supra* note 252, at 1844.

<sup>256</sup> *Mickens*, 535 U.S. at 168.

<sup>257</sup> *Id.* at 209-11 (Breyer, J., dissenting).

<sup>258</sup> *Id.* at 210 (Breyer, J., dissenting).

<sup>259</sup> See *supra* Section VI, Part B.

<sup>260</sup> Given the fact that all the "tests" concerning the Sixth Amendment right to effective assistance of counsel are judge-made, it would not have been out of the question for the Court to employ creative measures in deciding a case that is sufficiently distinct from the closest applicable precedent.

The criminal defendant has the right to effective assistance of counsel because of the effect this right has on the ability of the accused to receive a fair trial.<sup>261</sup> Thus, as a matter of constitutional principle, the judge who is aware of conflict should have a duty to prevent the unfairness created by conflicted counsel if possible, regardless of the existence of objection or not. A judge's participation in the trial process should be evaluated as a part of effectiveness of representation, especially if the judge actively participates in the structuring of the attorney-client relationship.<sup>262</sup>

In addition, the Court has suggested that the Sixth Amendment right is one protecting against assistance of counsel that "undermines the reliability of the result of the proceeding" as well as "confidence in the outcome."<sup>263</sup> Thus, the right to effective assistance of counsel has as much to do with public confidence in the professionalism and integrity of lawyers as with the results of legal proceedings.<sup>264</sup> Certainly, this rationale would apply to judges as well, if not more so than to lawyers.<sup>265</sup> Because the judge has a role in maintaining the appearance and actuality of justice, she should be constitutionally required to prevent the possibility of hidden prejudice.<sup>266</sup> This duty should be accentuated in cases where the judge is the creator of the conflict, as in *Mickens*.

### C. THE IMPLICATIONS OF *MICKENS* FOR THE JUDICIAL SYSTEM

This Note argues that *Mickens* will have negative implications for the criminal justice system and the behavior of its participants. First, it creates perverse incentives for both judges and attorneys, contrary to the spirit of professional responsibility. Second, it creates many more costs than benefits for both the judicial system and the defendant on trial. Third, it produces a heavy burden on the defendant that is both ironic and unfair.

#### *1. Perverse Incentives*

*Mickens* produces a scheme by which judges are not deterred from ignoring potential conflicts. Whether the judge has knowledge or not is now an irrelevant factor in the assessment of an ineffective assistance of

---

<sup>261</sup> See *United States v. Cronin*, 466 U.S. 648, 654 (1984).

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Cf. id.*

<sup>265</sup> Judges are public officials who operate as unbiased, independent interpreters of the law. Their rulings on procedural and evidentiary matters can be determinative factors in the outcomes of trials. Thus, the behavior of judges can influence the public's perception of the whether the judicial system is operating in a fair and efficient manner.

<sup>266</sup> *Cf. Bright*, *supra* note 252, at 1844.

counsel claim. The key component is now either the objection of defense counsel or the showing of an actual adverse effect from a conflict, neither of which relies on the judge's duty at all. After *Mickens*, the only time a judge has a duty to inquire is when defense counsel objects. Notice, as a guiding principle of the analysis, has been discarded, even though the Court still pays lip service to the "special circumstances" language from *Sullivan*. Judges, if they do not want to be overruled, have an incentive to be *less* vigilant to "special circumstances" that may come to their attention without an objection from defense counsel.

The Court's scheme effectively places all of the burden on the attorney to trigger the duty of the judge.<sup>267</sup> There is no reason for a judge who is aware of a potential conflict not to (at least) make an inquiry into the circumstances of that potential conflict.<sup>268</sup> In the case of *Mickens*, the judge had no reason not to inform Mickens of this potential conflict.<sup>269</sup> An objection would have been superfluous, since it would only have brought her own knowledge to her attention.<sup>270</sup>

Although the government's amicus brief in *Mickens* claims that a rule of automatic reversal would create a strange incentive for counsel not to object,<sup>271</sup> the majority's own rule creates a much stranger incentive for judges to ignore the obvious.<sup>272</sup> Since a rule of automatic reversal would never affect a judge who had no knowledge of a potential conflict, who is the majority trying to protect? Judges who know about conflicts and lawyers who hide conflicts from their clients? These are the very judges that should be scrutinized the most.

---

<sup>267</sup> Cf. Recent Cases: *First Circuit Rules That a Defendant Whose Lawyer Had a Conflict That the Judge Should Have Known About Must Show Adverse Effect to Receive a New Trial*, 115 HARV. L. REV. 938 (2002).

<sup>268</sup> From a policy standpoint, it would never be beneficial to the judicial system for a judge to ignore a potential conflict when he is on notice, because it makes it more likely the quality of representation will be compromised and it exacerbates the potential costs associated with claims of wrongful convictions. Something as simple as alerting the recipient of appointed counsel of the potential conflict is of negligible cost and of invaluable benefit.

<sup>269</sup> See Brief for Petitioner at 9, *Mickens* (No. 00-9285) (arguing that there were no barriers preventing the judge from informing Mickens of his counsel's prior client).

<sup>270</sup> No party in the case has ever argued that Judge Foster was not aware of the fact that Saunders had recently represented Hall. *Mickens*, 535 U.S. at 185 n.9 (Stevens, J., dissenting) ("There is no dispute before us as to the appointing judge's knowledge.").

<sup>271</sup> The government argued that defense counsel might remain silent to afford his client with a reliable ground for reversal. Brief for United States as Amicus Curie Supporting Respondent at 27, *Mickens v. Taylor*, 535 U.S. 162 (2002) (No. 00-9285).

<sup>272</sup> Cf. *Campbell v. Rice*, 265 F.3d 878, 887-88 (9th Cir. 2001); *United States v. Rogers*, 209 F.3d 139, 145-46 (2d Cir. 2000); *United States v. Allen*, 831 F.2d 1487, 1495-96 (9th Cir. 1987).

## 2. Costs and Benefits

The costs of this reduction in the judge's duty are very high, while the benefits are very low. For the judge, the cost of extending a rule of automatic reversal to conflicts of interest similar to that of *Mickens* would be small. All it would require is a simple inquiry into the conflict, including an opportunity for the defendant to either waive the conflict or to ask for new counsel. This inquiry would be minimally disturbing to the judge and would not significantly delay proceedings.<sup>273</sup> For the defense counsel, the costs would be low as well. The only cost to the attorney would be the effort required to fulfill responsibilities to his client and his profession generally.

In contrast, the benefits of this rule would be significant. For the judicial system, the costs would be equal to the effects of the delay in the proceedings. But the system would more than make up for this cost in gains in public confidence, less post-trial litigation, and actual justice for the accused. The appearance of justice would be upheld, presenting an image of fair proceedings that are transparent for the defendant.<sup>274</sup> Moreover, the judge's early inquiry would prevent the administrative and economic costs of appeals.<sup>275</sup> Finally, the system would benefit from the defendant's having more knowledge about his counsel's loyalties because it will increase his ability to help in his defense and achieve a reliable and fair outcome at trial.

## 3. Defendant's Burden

Finally, *Mickens* creates the sad irony that a defendant who has *less effective* assistance of counsel will have a heavier burden in proving ineffective assistance of counsel than a defendant who has *more effective* assistance of counsel.<sup>276</sup> A defense counsel that objects to the conflicted representation will be exercising better professional judgment than a counsel that ignores the possibility of the conflict and refuses to tell his client about it. Given a judge that has notice of the conflict and does not inquire, the defendant with the more effective conflicted counsel will be

---

<sup>273</sup> See *Glasser v. United States*, 315 U.S. 60, 70 (1942).

<sup>274</sup> Cf. *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977) ("It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."); *Offut v. United States*, 348 U.S. 11, 14 (1954) ("Justice must satisfy the appearance of justice.").

<sup>275</sup> *Mickens*, 535 U.S. at 203 (Souter, J., dissenting) ("It should go without saying that the best time to deal with a known threat to the basic guarantee of fair trial is before the trial has proceeded to become unfair.").

<sup>276</sup> *Id.* (Souter, J., dissenting).



more likely to succeed on an ineffective assistance of counsel claim, because he will only have to show that the conflict existed, while the defendant with the less effective conflicted counsel will have to show that the conflict adversely effected his representation.

This counter-intuitive result is exactly the reason why the judge's duty should not have been narrowed by the Court. The justice system is most certainly better off with both defense counsel and judge having an affirmative duty to inquire about conflict than it would be with only one of the two. Given the very low costs of the inquiry, *Mickens* appears to have created a formula that can only produce a net loss to our system of justice.

## VI. CONCLUSION

*Mickens* held that, in order to demonstrate a Sixth Amendment violation where the trial court failed to inquire into a potential conflict about which it knew, or reasonably should have known, defendant must still establish that the conflict of interest adversely affected counsel's performance.<sup>277</sup> *Mickens* is not consistent with the rationale surrounding other major precedents involving conflicts of interest and the Sixth Amendment right to effective counsel because its requirement of objection is inconsistent with the policy rationale of the presumption of prejudice.<sup>278</sup> The Court's reliance on objection creates an arbitrary distinction whereby judges with equal notice of conflicts will have varying duties depending on the action of counsel. Also, since the right to effective assistance of counsel is closely connected to the general right of the accused to receive a fair trial, the Sixth Amendment imposes a duty on a judge, insofar as she has the power to *make* counsel less effective through her own actions or omissions.<sup>279</sup> This role is essential for a fair trial. Finally, the *Mickens* holding provides no disincentive for judges to ignore conflicts that could substantially damage the rights of defendants.<sup>280</sup> This disincentive is among many costs created by *Mickens*, including an increased burden on defendants and the public's lost confidence in the judicial system.

John Capone

---

<sup>277</sup> *Mickens*, 535 U.S. at 174.

<sup>278</sup> See *supra* Section VI, Part A.

<sup>279</sup> See *supra* Section VI, Part B.

<sup>280</sup> See *supra* Section VI, Part C.