Journal of Criminal Law and Criminology

Volume 72
Issue 4 *Winter*

Article 9

Winter 1981

Sixth and Fourteenth Amendments--Counsel Conflicts of Interest in State Court and the Supreme Court's Power to Vacate and Remand

Shell J. Bleiweiss

0091-4169/81/7204-1326
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 72, No. 4

Printed in U.S.A.

SIXTH AND FOURTEENTH AMENDMENTS—COUNSEL CONFLICTS OF INTEREST IN STATE COURT AND THE SUPREME COURT'S POWER TO VACATE AND REMAND

Wood v. Georgia, 101 S. Ct. 1097 (1981).

I. INTRODUCTION

On March 4, 1981, the United States Supreme Court in *Wood v. Georgia*,[1] vacated and remanded the decision of a lower court because of its failure to inquire about possible conflicting interests of the attorney for the defendants. *Wood* represents the Court's first application of the recently formulated rule dealing with trial courts' duty to inquire into counsel conflicts of interest.[2] The case was before the Supreme Court to resolve the question of whether it is constitutional under the equal protection clause to imprison probationers because of their inability to make installment payments on fines. In reviewing the trial records of the petitioners, the Court found numerous signs of possible counsel conflict of interest. Petitioners had not raised the question of ineffective assistance of counsel in any lower court, and indeed had not petitioned

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[1] 101 S. Ct. 1097 (1981).

[2] On May 12, 1980, in Cuyler v. Sullivan, 446 U.S. 335 (1980), the Court announced three major interpretations of the sixth amendment right to effective assistance of counsel. First, it held that the same constitutional rights accrue to defendants who hire private counsel as accrue to ones for whom the Court appoints a public defender. *Id.* at 344-45. Second, the Court held that absent objection at trial, a trial judge need only initiate an inquiry into the question of conflict of interest if he "knows or reasonably should know that a particular conflict exists." *Id.* at 347. Finally, the Court held that, in order to establish a sixth amendment violation, a defendant who raised no objection at trial must show that an actual conflict of interests adversely affected his lawyer's performance. *Id.* at 348. *See* Note, *Sixth Amendment—Conflicts of Interest in Multiple Representation of Codefendants*, 71 J. CRIM. L. & C. 529, 531-36 (1980), for a detailed analysis of *Cuyler v. Sullivan*.

The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. In McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970), the Court recognized that "the right to counsel is the right to the effective assistance of counsel." In Powell v. Alabama, 287 U.S. 45 (1932), the Court held that the fourteenth amendment makes this protection applicable to the states.

the Supreme Court for review on that ground. The Court considered, sua sponte, the effectiveness of counsel issue, vacated the lower court's probation revocation judgment, and remanded the case to the state trial court to determine if the conflict of interest tainted petitioners' counsel.[3] Although the Court treated the conflict of interest question as one raised below by the State's Solicitor,[4] it also found ample support for a remand even if the issue had not been raised below.[5]

Wood essentially presented a question of first impression concerning possible conflicts of interest which were demonstrated by trial records but were never raised by the convicted petitioners. The Court was probably correct in finding that it had the statutory authority, under section 2106,[6] to vacate the judgment and remand the case in the interests of justice, although the authorities cited by the Court are hardly "ample," extensive, or controlling. On the other hand, the Court's application of the *Cuyler* "duty of inquiry" to these facts appears to define the *Cuyler* rule in an unnecessarily broad and liberal manner. *Wood* may now increase the scope of appellate review in cases where defense counsel is provided by interested third parties. This may result in unnecessary judicial multiplicity.

II. FACTS OF WOOD V. GEORGIA

James Tante and Edna Allen were working as the projectionist and ticket taker, respectively, at the Plaza Theatre in Atlanta in early 1976 when they were arrested and charged with two counts of distributing obscene materials.[7] About four months later, Raymond Wood was similarly charged and arrested after he sold two magazines to a policeman

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[3] "[D]etermine whether the conflict of interest that this record strongly suggests actually existed at the time of the probation revocation or earlier. If [so] . . . and . . . there was no valid waiver of the right to independent counsel [the court] must hold a new revocation hearing . . . untainted by a legal representative serving conflicting interests." 101 S. Ct. at 1104.

[4] *Id.* at 1100 n.5, 1104 n.20. During the probation revocation hearing there were several discussions between the court and the parties' counsel concerning the fact that petitioners' attorney also represented and was paid by petitioners' employer. The State's Solicitor argued that this was a conflict of interests.

[5] "Even if one considers that the conflict-of-interest question was not technically raised below, there is ample support for a remand required in the interests of justice." For this proposition, the Court cited 28 U.S.C. § 2106 (1976) (authorizing the Court to "require such further proceedings to be had as may be just under the circumstances") and other authorities. 101 S. Ct. at 1100 n.5.

[6] 28 U.S.C. § 2106 (1976) reads:

> The Supreme Court . . . may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

[7] The defendants were arrested for violations of Georgia obscenity statute, GA. CODE ANN. § 26-2101 (Harrison 1977 Rev.) which reads in pertinent part: "(a) A person commits the offense of distributing obscene materials when he sells . . . publishes, exhibits or otherwise

while working at the Plaza Adult Bookstore. There was no evidence that any of the petitioners owned an interest in the business or that they had any managerial responsibilities.[8]

Tante and Allen were jointly tried before a jury and found guilty on both counts; a separate jury convicted Wood. All three were then sentenced by the same judge. Tante and Allen each received a fine of $5,000 and two concurrent twelve month jail sentences but were granted immediate probation. Wood received two $5,000 fines and two consecutive jail sentences of twelve months and also was placed on immediate probation.[9]

After these convictions were affirmed on appeal,[10] the trial court issued orders specifying the conditions of probation. The court required all three probationers to make $500 monthly installment payments on their fines. The county probation officers moved for revocation of their probations when the three probationers failed to pay the first three monthly installments. At a hearing on this motion, the probationers admitted that they had not made the installment payments, but offered convincing evidence of their inability to make these payments.[11] Their attorney did not move for a modification of the probation conditions at the revocation hearing.[12] Instead, he claimed that their employer had agreed to pay for any legal representation, fines, or bonds necessitated by their employment. This argument did not appear to be aimed at the probationers' interest in the terms of their probations.[13] Faced with probationers' complete failure to satisfy a condition of their probations, the

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disseminates to any person any obscene material . . . knowing the obscene nature thereof. . . ."

[8] 101 S. Ct. at 1099. Although the record suggests that the Plaza Theatre and the Plaza Adult Bookstore were under common ownership, *id.* at 1100 n.3, the State had been unable to learn the owner's identity. Petitioners had refused to provide information about the identity of their employers. *Id.* at 1102 n.16 and accompanying text.

[9] *Id.* at 1099.

[10] Allen v. State, 144 Ga. App. 233, 240 S.E.2d 754 (1977), *cert. denied*, 439 U.S. 899 (1978); Wood v. State, 144 Ga. App. 236, 240 S.E.2d 743 (1977), *cert. denied*, 439 U.S. 899 (1978). Allen and Tante appealed on grounds of an illegal search and seizure, trial court abuse of discretion in denying defendants' motion for severance, insufficiency of evidence, and error in excluding an offered piece of evidence. Wood appealed on the grounds of prior restraint of freedom of expression, and that there was only one crime committed which was alleged twice.

[11] According to their testimony, all petitioners had by that time left their jobs at the "adult" establishments. Allen testified that her only income was $250 per month from unemployment insurance. Tante testified that his income as a correction officer was $540 per month. He had been unemployed for eight months before obtaining that job. Wood testified that he was trying to support a family and earning $120 per week working at a truck and trailer rental yard. 101 S. Ct. at 1099 n.2.

[12] *Id.* at 1102. A motion for modification of the probation conditions was made one day before petitioners were due to be incarcerated. This motion was denied.

[13] *Id.* at 1100-01 nn.6-10 and accompanying text.

trial court decided to revoke those probations unless the arrearages were made up within five days. When the fines remained unpaid, the court finally ordered Tante, Allen, and Wood to serve their remaining jail sentences.[14]

The revocation decision was affirmed by the Georgia Court of Appeals.[15] The United States Supreme Court granted certiorari to decide whether it is constitutional under the equal protection clause to imprison a probationer solely because of his inability to make installment payments on fines.[16]

III. THE SUPREME COURT'S DECISION

The Supreme Court, by a 5-4 majority, found *Wood* an inappropriate case in which to decide the equal protection issue.[17] The majority avoided the constitutional question by remanding the case to the trial court for a factual determination of whether the petitioners' sixth amendment right to effective assistance of counsel had been infringed when the trial judge failed to inquire concerning possible conflicts of interest of petitioners' counsel. Justice Powell wrote the majority opinion, and was joined by Chief Justice Burger and Justices Blackmun, Rehnquist, and Stevens. Justice Stevens also filed a separate concurring opinion. Justice Brennan, joined by Justice Marshall, and Justice Stewart filed separate opinions, concurring in part and dissenting in part, which would have disposed of the case by finding the Georgia obscenity statute facially unconstitutional. Justice White filed a lengthy dissent which challenged the reasoning and the result of the majority decision.

The majority found a possible due process violation in the failure of the probation revocation judge to intervene to assure either conflict-free counsel or a valid waiver of this constitutional right when the possibility of an attorney conflict of interest became obvious. *Cuyler* imposed this sixth amendment duty upon trial courts so as to guarantee a criminally accused his right to "[a]ssistance of [c]ounsel for his defense."[18] The *Wood* majority concluded:

> [T]he record does demonstrate that 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. . . . *Sullivan mandates* a reversal when the trial court has failed to make an inquiry even though it knows or

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[14] *Id.* at 1100.

[15] Wood v. State, 150 Ga. App. 582, 258 S.E.2d 171 (1979).

[16] Wood v. Georgia, 446 U.S. 951 (1980).

[17] 101 S. Ct. at 1100.

[18] Cuyler v. Sullivan, 446 U.S. 335 (1980); Holloway v. Arkansas, 435 U.S. 475 (1978). *See* notes 2 *supra*, 28 & accompanying text *infra*.

reasonably should know that a particular conflict exists.[19]

Justice Powell found facts in the record which, when considered in total, should have alerted the revocation hearing judge to the possibility of a conflict of interest. The judge should have become suspicious when he learned during the hearing about the petitioners' employer's role in the petitioners' representation.[20] The disproportionately large fines, which presumably resulted because of counsel's choice of arguments to the court should also have triggered suspicion. Finally, the court's awareness that the employer had provided petitioners' counsel and that counsel was pressing an equal protection attack (apparently in the best interest of the employer) rather than an argument for leniency to obtain substantial reductions in or deferrals of the employees' fines, likewise should have alerted the judge to a possible conflict of interests. Justice Powell declared that "[a]ny doubt as to whether the court should have been aware of the problem is dispelled by the fact that the State raised the conflict problem explicitly and requested that the court look into it."[21]

Justice Powell, speculating about the nature of the petitioners' employer's interest, initially considered the possibility that a test case was being developed. Finding it strange that the employer refused to pay the fines while continuing to post appeal bonds, Justice Powell believed that the employer might have been seeking a resolution of the equal protection claim for his own benefit.[22] Favorable resolution of this claim would mean that operators of "adult" establishments could escape the burden of paying fines imposed on indigent employees arrested for violations of the obscenity statutes. To obtain such a favorable ruling, it was first necessary for petitioners to receive fines beyond their own means and then risk imprisonment by failing to pay. Thus, in order to set up a test case, the employer would want large fines imposed and would want the attorney to place the petitioners in jeopardy of incarceration for failure to pay. Although the majority acknowledged that it

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19 101 S. Ct. at 1104 n.18 (citing Cuyler v. Sullivan, 446 U.S. at 347).

20 The facts of petitioners' employer's involvement referred to by the Court include: 1) petitioners all having been represented since the time of their arrests by a single lawyer supplied by their employer; 2) petitioners' testimony that legal representation, payment of fines, and posting of bonds had been promised by their employer; and, 3) petitioners' failure to pay even small amounts toward their fines or to show concern at the size of them. 101 S. Ct. at 1100-01.

During oral argument at the Supreme Court, petitioners' lawyer conceded that he had been paid by the employer during petitioners' trials. He indicated that these payments stopped when petitioners went on probation and left their jobs with this employer, but he never dispelled the implication that he had an ongoing employment arrangement with the employer. 101 S. Ct. at 1100-01 n.8.

21 *Id.* at 1104. *See* note 32 *infra*.

22 *Id.* at 1101.

could not be sure that the employer and its attorney were attempting to bring a test case that was not in the best interest of the petitioners, it found that the circumstances were nevertheless ample to show a "clear possibility of conflict of interest. . . ."[23]

The Court found a clear possibility of conflicting interests even without the test-case motive. The employer's refusal to pay the fines for any reason put the attorney in a position of conflicting obligations. Counsel may not have made a leniency argument because it would have required him to stress that the employer had acted in bad faith toward petitioners by reneging on its promise to pay. Moreover, this argument might have forced counsel to emphasize the possibly improper relationship between himself, employer, and petitioners.[24] Finally, the majority recognized that whenever an operator of an alleged criminal enterprise provides counsel for his accused employees, the attorney may prevent the accuseds from offering testimony which would be beneficial to them but contrary to the best interests of their employer.[25] The majority speculated that this happened in *Wood*.

Thus, the majority held that the factual setting in *Wood* required it to "take note of the potential unfairness resulting from this particular third-party fee arrangement."[26] In earlier cases, the Court had held that an assurance that an unnamed employer would pay fines and other costs established indigent petitioners' right to representation by appointed counsel at any probation revocation hearing.[27] Where this con-

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[23] *Id.*

[24] *Id.* at 1102 n.14. *See also id.* at 1105 (Stevens, J., concurring).

[25] *Id.* at 1102-03 & n.15. The Court cited *In re* Investigation Before the April 1975 Grand Jury, 531 F.2d 600, 606 n.11 (D.C. Cir. 1976); *In re* Abrams, 56 N.J. 271, 276, 266 A.2d 275, 278 (1970); Pirillo v. Takiff, 462 Pa. 511, 341 A.2d 896 (1975), *appeal dismissed* and *cert. denied*, 423 U.S. 1083 (1976); ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 5-107 (A), (B), EC 5-23 (1976); 1 ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE § 4-3.5(c) (1971); Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal*, 64 VA. L. REV. 939, 960-61 (1978).

[26] 101 S. Ct. at 1103.

> Petitioners were mere employees, performing the most routine duties, yet they received heavy fines on the apparent assumption that their employer would pay them. They now face prison terms solely because of the employer's failure to pay the fines, having been represented throughout by a lawyer hired by that employer.

Id.

[27] The sixth amendment right to "assistance of counsel" reaches only "criminal prosecutions" expressly. U.S. CONST. amend. VI. *See* note 2 *supra* . In Gagnon v. Scarpelli, 411 U.S. 788 (1973) and Morrissey v. Brewer, 408 U.S. 471 (1972), the Court adopted a standard for deciding when due process requires appointment of counsel for indigent offenders during probation revocation hearings. Recognizing that the need for counsel at revocation hearings derives from the peculiarities of particular cases, it left it to the state tribunals to identify, case by case, the situations in which fundamental fairness requires appointed counsel. 411 U.S. at 790. *Scarpelli* established a presumption in favor of appointment of counsel in cases where there are substantial reasons which justify the probation (or parole) violation and make revo-

stitutional due process right to counsel exists, the Court declared that there is a correlative, sixth amendment right to representation free from conflicts of interest.[28] The Court could not be sure from the record whether an actual conflict of interest had affected the strategic decisions of petitioners' counsel, but it was sufficiently convinced that a possible conflict, apparent at the time of the revocation hearing, imposed a duty to inquire upon the trial judge.[29] Because the trial court failed to inquire, the Supreme Court vacated its probation revocation order,[30] and remanded the case.[31]

In order to exert jurisdiction over the due process issue, the majority considered the conflict of interest issue as one sufficiently raised by the State's Solicitor during the probation revocation hearing.[32] Even though the issue had not been raised on appeal below nor included as a question in the petition for certiorari, Justice Powell believed that justice demanded that the Court consider the due process issue sua sponte because the alleged attorney conflict of interests would have kept the attorney from expressly raising the issue below and preserving it on appeal.[33] The majority relied on an earlier holding in *Boynton v. Virginia*[34] to justify its deciding a case on an issue raised in the lower court but not preserved on appeal.

Even if the conflict of interest issue was not technically raised below, the majority still would have remanded the case "in the interests of

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cation inappropriate, and the reasons are complex or otherwise difficult to develop or present. *Id.*

28 101 S. Ct. at 1103 (citing Cuyler v. Sullivan, 446 U.S. 335 (1980) and Holloway v. Arkansas, 435 U.S. 475, 481 (1978)). *Holloway* held that trial judges faced with timely objection to multiple representation in criminal prosecutions must either appoint separate counsel or take adequate steps to ascertain whether the risk of a conflict of interests is too remote to warrant separate counsel. 435 U.S. at 484.

29 101 S. Ct. at 1103-04.

30 *Id.* at 1104.

31 *Id.*

32 *Id.* at 1100 n.5 and accompanying text. The State's Solicitor raised the issue at the revocation hearing and in its briefs to the trial court.

33 *Id.* The majority readily dismissed Justice White's dissenting argument, that the conflict-of-interest issue had not been properly presented, by ruling:

> To be sure, it was not raised on appeal below or included as a question in the petition for certiorari. These facts merely emphasize, however, why it *is* appropriate for us to consider the issue. The party who argued the appeal and prepared the petition for certiorari was the lawyer on whom the conflict-of-interest charge focused. It is unlikely that he would concede that he had continued improperly to act as counsel. And certainly the State's Solicitor, whose duty it was to support the judgment below, could not be expected to do more than call the problem to the attention of the courts, as he did. Petitioners were low level employees, and now appear to be indigent. . . . We cannot assume that they, on their own initiative, were capable of protecting their interests.

34 101 S. Ct. at 1100 n.5. In Boynton v. Virginia, 364 U.S. 454, 457 (1960), the Court avoided two constitutional issues presented to it and decided the case instead by adopting a statutory construction urged in the state appellate process but not raised in the Supreme Court.

justice," citing 28 U.S.C. § 2106.[35] Justice Powell evidently felt the lower court's failure to recognize the potential conflict of interest was an error of such magnitude that fundamental fairness required the Court to order further proceedings which would be "just under the circumstances."[36]

In two brief opinions, Justices Brennan, Marshall, and Stewart concurred in the remand, but would have reversed petitioners' convictions.[37] They would have held Georgia's obscenity statute facially unconstitutional.[38]

In a detailed and well articulated dissenting opinion, Justice White found two flaws in the Court's holding.[39] First, he denied that the Court had jurisdiction to vacate the judgment on due process grounds. Second, he did not agree with the majority's conclusion that the record demonstrated a clear possibility of conflict. He eventually considered the equal protection claim avoided by the majority and found a violation.[40]

Justice White initially maintained that an absolute jurisdictional bar prevented the Court from deciding the conflict issue. He looked to the jurisdictional statute authorizing Supreme Court review of state

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35 101 S. Ct. at 1100 n.5 and accompanying text. *See also* note 6 *supra* for complete text of 28 U.S.C. § 2106. The Court also cited STERN & GRESSMAN, SUPREME COURT PRACTICE § 6.27, at 460 (5th ed. 1978), and Vachon v. New Hampshire, 414 U.S. 478 (1974). Stern and Gressman state that in review of state cases "the Court doubtless limits its power to notice plain error to those situations where it feels the error is so serious as to constitute a fundamental unfairness in the proceedings." In *Vachon*, the Court reversed a criminal conviction on due process grounds after independent examination of the record pursuant to Supreme Court Rule 40(1)(d)(2)—the "plain error rule"—and a finding that evidence was completely lacking on a key element of the offense charged. 414 U.S. at 480.

36 *See* note 6 *supra*. 101 S. Ct. at 1100 n.5 (citing 28 U.S.C. § 2106).

37 101 S. Ct. at 1105 (Brennan, J., concurring and dissenting), (Stewart J., concurring and dissenting).

38 Justice Brennan believes that the first and fourteenth amendments prohibit states from wholly suppressing sexually oriented materials on the basis of their allegedly obscene contents, at least absent any attempted distribution to juveniles or obtrusive exposure to unconsenting adults. *See* McKinney v. Alabama, 424 U.S. 669, 678 (1976) (separate opinion of Brennan, J.); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 113 (1973) (Brennan, J., dissenting).

39 101 S. Ct. at 1105 (White, J., dissenting).

40 *Id.* After his attack on the majority's reasoning, Justice White reached the equal protection claim which had been rejected by the state appellate courts, but had not been reached by the majority. *Id.* at 1110. He acknowledged that simply calling defendants indigent does not insulate them from "any punishment whatsoever," but found that, in *Wood*, the State had only imposed probated prison terms and fines, making payment of the fines a condition of probation. Thus, he concluded that the ends of the State's criminal justice system did not call for any loss of liberty except that incident to probation, and that incarceration of an indigent for inability to pay is unconstitutional. *Id.* 1110-11 (citing Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970)).

court determinations.[41] Since the statute limits jurisdiction to claims that have been specially set up or claimed, and upon which a state court has reached a final decision, Justice White found an absolute jurisdictional bar to the Supreme Court reaching the conflict of interest/due process issue.[42] He believed that the parties had not raised the conflict of interest claim at the revocation hearing nor before the Georgia appellate courts.[43]

Responding to the majority's alternative reliance on the miscellaneous "just under the circumstances" jurisdictional provision in section 2106,[44] Justice White wrote that the "section does not purport to expand the statutory limits on the Court's jurisdiction; rather, it relates only to the disposition of the case once jurisdiction exists."[45] He relied for support on an earlier opinion by Justice Rehnquist[46] which stated that in order to preserve a constitutional claim for review in the Supreme Court, the parties must have made clear the nature of the claim in the lower courts. Justice White concluded that the petitioners did not assert a due process violation below, and the respondent did not do it for them.[47] Therefore, the issue was not properly before the Supreme Court.

Justice White also ruled out *Cuyler v. Sullivan*[48] as a source of jurisdiction over a claim otherwise beyond the Court's reach. He believed that if the trial court should have known that a conflict of interest existed, but failed to initiate an inquiry, petitioners' proper response was to seek collateral relief on sixth amendment grounds in the lower

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41 101 S. Ct. at 1106. 28 U.S.C. § 1257 (1976) reads in part:

> Final judgments or decrees *rendered by the highest court of a state* in which a decision could be had, may be reviewed by the Supreme Court. . . . [b]y writ of certiorari, where . . . any title, right, privilege or immunity is *specially set up or claimed* under the Constitution. . . .

(emphasis added).

42 101 S. Ct. at 1106 (citing Moore v. Illinois, 408 U.S. 786, 799 (1972); Hill v. California, 401 U.S. 797, 805 (1971); Cardinale v. Louisiana, 394 U.S. 437 (1969), and cases cited therein). Justice White contended that where a case comes to the Court on a writ of certiorari to state court, § 1257 limits review jurisdiction to issues properly set up and preserved.

43 101 S. Ct. at 1106-07. Justice White believed that far from suggesting that the alleged conflict was a ground of relief for petitioners, the state suggested that petitioners and their counsel had misled the court by pretending that the employer would pay the fines, and that therefore they should fail in their equal protection claim. He felt it clear that no federal constitutional claim had been made. "The sole issue in the Georgia Court of Appeals was whether petitioners had been denied equal protection of the laws. That claim was rejected, the judgment of revocation was affirmed and the Georgia Supreme Court denied further review." *Id.* at 1107.

44 *See id.* at 1100 n.5. *See also* notes 5-6 & accompanying text *supra*.

45 101 S. Ct. at 1107.

46 Vachon v. New Hampshire, 414 U.S. at 482 (Rehnquist, J., dissenting).

47 101 S. Ct. at 1107-08.

48 446 U.S. 335 (1980).

courts.[49]

Justice White, assuming the majority's position that the Court had jurisdiction to address the adequacy of the counsel/due process issue, then attacked the factual findings underlying this position. He found the test-case scenario suggested by the majority implausible, and pointed out that, even if true, that motive would not in itself create a conflict of interest. Rather, petitioners would have to show that it was for the sake of that test-case objective that the employer decided not to pay the fines, and that petitioners' attorney did not object to the size of the fines nor move in timely fashion for modification of the conditions of probation.[50] He found in the record suggestions of two more plausible explanations of the employer's failure to pay the fines, neither of which implied a conflict of interest.[51] Justice White did not accept the majority's assumption that because the employer continued to meet some but not all of the petitioners' expenses, it was therefore manipulating the situation to create a test case. More likely, he felt, the employer may have reneged on its promise because the expense was simply greater than the employer was willing to bear.[52] He concluded that if the employer was unwilling to pay, then the equal protection arguments advanced by counsel may well have been the best and only arguments available to petitioners.[53] He pointed to indications in the record that the trial court was fully aware of petitioners' financial situation at the time it revoked their probations, and he called the majority's conclusion that petitioners' counsel misled the court an "artificial issue."[54]

IV. ANALYSIS

Both the invocation of section 2106 and the application of *Cuyler* in the *Wood* decision represent novel applications of the law. The majority correctly invoked the Court's jurisdiction under section 2106 to vacate and remand this case to the state trial court. Although the authority for this power is not as clear and "ample" as Justice Powell would lead us to believe, the lack of precedent is due more to the unusual circumstances necessary to trigger section 2106 jurisdiction than to a lack of power to

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49 101 S. Ct. at 1108.

50 *Id.*

51 *Id.* at 1109. The employer may have reneged on its promise to pay fines because petitioners no longer worked for it, or because ownership of the establishment had changed hands. *See also id.* at 1109 n.9.

52 *Id.* at 1109.

53 *Id.* This would be most true after the motion for modification of the probation conditions was denied. *See id.* at 1109 n.11.

54 *Id.* at 1109 n.10. Petitioners contended that the trial court was fully aware of their financial situation. The State's Solicitor also brought it to the court's attention. *See id.* at 1104 n.20.

reach new remand grounds. The manner in which the Court applied section 2106 to the conflict of interest situation makes this portion of *Wood* unique. The way in which the Court applied the duty-of-inquiry rule to the *Wood* facts arguably broadens that rule beyond the original formulation of the *Cuyler* Court. This may result in a slight increase in sixth and fourteenth amendment right-to-counsel protection at the expense of much judicial inefficiency.

A. SECTION 2106 REVIEW

Generally, an appellate court decides only the issues presented to it by the parties.[55] A number of arguments and rationales have been used to support the general rule that appellate courts will not consider sua sponte a legal issue not presented and urged by the litigants. The most important rationales appear to be unfairness to the other party, the prolonging of litigation, the unconstitutionality of giving original jurisdiction to an appellate court, and depriving appellate courts of the benefit of lower court consideration of the matter.[56] However, most courts in criminal cases are willing to hazard these concerns and examine matters sua sponte to guarantee a fair trial for the accused.[57] Thus, the Supreme Court has said, "[t]his Court in a criminal case may notice material error within its power to correct, even though that error is not specifically challenged. . . ."[58] Any other policy would place the Supreme Court in the anomalous position of giving its support to constitutionally infirm lower court proceedings.[59] Whenever the record clearly indicates the infirmity of the proceeding below, and there is the possibility of negating that injustice by remanding the case sua sponte, the Court is faced with a strong case for considerating an issue not raised by the litigants even though it necessitates a remand and new proceeding.[60] Undoubtedly, the constitutional guarantee of due process outweighs the judicial con-

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[55] *See, e.g.*, Youakim v. Miller, 425 U.S. 231, 234 (1976); Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). *See also* Vestal, *Sua Sponte Consideration in Appellate Review*, 27 FORDHAM L. REV. 477, 481, 487 (1959).

[56] Note, *Raising New Issues on Appeal*, 64 HARV. L. REV. 652, 654-55 (1951). Other arguments include unfairness to the trial court, failure to punish negligence, and depriving the other party of his right to a jury trial. *Id.*

[57] Vestal, *supra* note 55, at 506.

[58] Fisher v. United States, 328 U.S. 463, 467-68 (1946). *See also* Wiborg v. United States, 163 U.S. 632, 658 (1896) ("although this question was not properly raised . . . if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it").

[59] *Cf.* Note, *supra* note 56, at 661 (dealing with attempts to recover on contracts which were void as against public policy). Appellate courts generally will hear a new defense where an attempt is made to recover on an agreement which is void as against public policy. Any other policy would place courts in the position of giving their support to illegal contracts.

[60] *Id.*

venience of not retrying cases. Furthermore, where, as in *Wood*, the case is remanded with instructions for further determinations by the lower court, all concerns about unfairness to the lower court and the other side as well as the constitutionality of original jurisdiction in appellate courts fall away.[61]

In *Wood*, eight of the nine Justices readily found sufficient discretion in the miscellaneous "just under the circumstances" jurisdictional provision, 28 U.S.C. § 2106,[62] to remand on the due process/ conflict of interest ground. Several federal courts of appeal have likewise reversed or remanded on grounds not raised on appeal.[63] This appellate discretion is exercised sparingly, but is not absent.[64]

The two cases cited by the majority in support of its jurisdictional holding provide only indirect precedent for the proposition that the

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[61] *See* Singleton v. Wulff, 428 U.S. 106, 121 (1976) where the Supreme Court stated:

> The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. . . . Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as . . . where "injustice might otherwise result." Hormel v. Helvering, 312 U.S. at 557. . . . [T]his is not such a case. The issue resolved by the Court of Appeals has never been passed upon in any decision of this Court. This being so, injustice was more likely to be caused than avoided by deciding the issue without petitioner's having had an opportunity to be heard.

As can be seen from *Singleton*, the Supreme Court has acknowledged appellate discretion to solve new issues where justice requires, but it is concerned about this approach where the law on the subject is less than clear ("never been passed on . . . [by] this Court. This being so, injustice was more likely to be caused than avoided."). In *Wood*, the law regarding a trial court's duty to inquire into possible conflicts of interest had been clearly articulated in *Cuyler v. Sullivan*. *See* note 2 *supra*.

[62] *See* note 6 *supra* for text of the provision. *See also* text accompanying notes 32-36 *supra*.

[63] *See* K-2 Ski Co. v. Head Ski Co., 506 F.2d 471, 475 (9th Cir. 1974) ("no rigid and undeviating practice under which courts . . . decline to consider all questions . . . not previously . . . urged. Indeed there could not be without doing violence" to § 2106); Becton v. United States, 412 F.2d 1005 (8th Cir. 1969); O'Neill v. United States, 411 F.2d 139 (3rd Cir. 1969); Nuelsen v. Sorensen, 293 F.2d 454 (9th Cir. 1961); *accord*, Hormel v. Helvering, 312 U.S. 552 (1941) (decided under 26 U.S.C. § 1141(c)(1) (Supp. 1939), providing that Circuit Courts of Appeals shall have power to affirm, modify, or reverse decisions of the Board of Tax Appeals, "as justice may require"). *Cf.* E. I. DuPont De Nemours v. Cudd, 176 F.2d 855 (10th Cir. 1949) (concluding inherent power to reverse and remand on ground not raised on appeal). *See also* STERN & GRESSMAN, *supra* note 35, § 6.27 at 460:

> This power to notice plain error, at least in the review of federal court proceedings, has been held limited to exceptional circumstances where the errors "seriously affect the fairness, integrity or public reputation of public proceedings." While that standard has not been so clearly articulated in the review of state court proceedings, the Court doubtless limits its power to notice plain error to those situations where it feels the error is so serious as to constitute a fundamental unfairness in the proceedings.

(citations omitted).

[64] However, the Supreme Court and several courts of appeals have also dismissed questions not decided below or properly set up for review. *See, e.g.*, Hill v. California, 401 U.S. 797, 805 (1971); Miller v. Avirom, 384 F.2d 319, 321 (D.C. Cir. 1967); Rambo v. Peyton, 380 F.2d 363, 364 (4th Cir. 1967); Marshall v. United States, 321 F.2d 897, 898 (10th Cir. 1963). These cases and others like them demonstrate the wide discretion over sua sponte review exercised by federal courts.

Court can remand under section 2106 on an issue *not decided below* or properly set up on appeal. In *Boynton v. Virginia*,[65] the Court decided a case on a statutory issue raised below but not presented on appeal to the Supreme Court, thereby avoiding broad constitutional issues tendered by the petitioner. *Boynton* thus can be readily distinguished from *Wood* in two ways. The *Boynton* Court avoided consideration of any constitutional issue by selecting the statutory ground. Furthermore, this ground had been raised below. In *Vachon v. New Hampshire*,[66] where the only question presented to the Court related to the constitutionality of a state statute, the Court made its own review of the trial record and discovered what it considered to be a total failure of the evidence on a key element of the charged offense.[67] But, at the close of its case, the prosecution had claimed this lack of evidence and again had so claimed in the New Hampshire Supreme Court. Thus, the majority opinion cited no case precedent directly in accord with the *Wood* result.

The *Wood* majority may not have needed case precedent since it was merely pointing out a federal constitutional infirmity in the state court's proceeding and remanding the case to the state court for that court to deal with the problem. The Court did not reverse the substance of a state court decision which it viewed as inconsistent with the federal constitution; rather, it vacated a state court decision without expressing a view as to its merits. The *Wood* Court based its decision on an incidental but not de minimus procedural shortcoming which violated the federal constitution.

There is a key difference between sua sponte *disposition* of a case and simple *remand* for a determination in the state courts. Some have theorized that the Court's power to consider sua sponte issues undecided by

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[65] 364 U.S. 454 (1960); *accord* Fry v. United States, 421 U.S. 542, 545 n.5 (1975); Huntress v. Huntress' Estate, 235 F.2d 205, 209 (7th Cir. 1956); Federal Deposit Ins. Corp. v. Vest, 122 F.2d 765, 768-69 (6th Cir. 1941), *cert. denied*, 314 U.S. 696 (1941). In *Boynton*, a black petitioner who had been denied integrated food service in an interstate bus terminal and subsequently convicted in state court of a misdemeanor and fined $10, appealed his conviction on equal protection grounds. The court decided the case by finding an Interstate Commerce Act violation.

[66] 414 U.S. 478 (1974). In *Vachon*, appellant operator of a head shop was convicted of "wilfully" contributing to the delinquency of a minor after a 14-year-old girl purchased a button at his shop inscribed "Copulation Not Masturbation." The New Hampshire Supreme Court affirmed, ruling that the "wilfully" component was satisfied by the state proving that the accused acted voluntarily and intentionally and not because of mistake. The United States Supreme Court reversed for a complete lack of evidence in the record that appellant personally sold the button. *Id.* at 481.

[67] SUP. CT. R. 40(1)(d)(2) reads in pertinent part:

> Briefs of . . . petitioner . . . shall contain . . . [t]he questions presented for review. . . . The . . . brief may not raise additional questions or change the substance of the questions already presented. . . . Questions not presented according to this paragraph will be disregarded, *save as the court, at its option, may notice a plain error not presented.*

(emphasis added).

lower *federal* courts does not extend to cases such as *Wood* which are under review via a writ of certiorari to *state* court. Justice Rehnquist, dissenting in *Vachon*,[68] noted that the Court had never before considered new issues in cases from state courts:

> Whatever the import of [the plain error rule] in cases arising in the federal courts, it surely does not give this Court the power to simply ignore the limitations placed by 28 U.S.C. § 1257 on our jurisdiction to review final judgments of the highest court of a State. . . . Our prior cases establish that we will not decide . . . issues raised here for the first time on review of state decisions.[69]

Justice Rehnquist joined the majority in *Wood*, finding that section 2106 supplied the Court with sufficient discretion to raise the due process issue sua sponte even though the Georgia courts never decided it. For him, *Vachon's* sua sponte *disposition* of cases on grounds not properly set up and raised on appeal may be significantly distinct from *Wood's* vacated judgments plus remand to state court for determination of a new legal question. Only the former situation, although arguably within the authority granted by a literal reading of section 2106, is fraught with the many jurisdictional questions limiting federal court review of state court actions.[70] Ultimate disposition of cases on issues not decided by the state courts presents a fundamentally different situation than does *Wood*.

Thus, the *Wood* Court ruled, under *Cuyler v. Sullivan*, that the revocation hearing judge should have suspected and inquired about a possible attorney conflict of interest. Because the State did not inquire, it must now reconsider the petitioners' probation status after assuring either no conflict of interest or a valid waiver of petitioners' constitutional right to conflict-free representation. The Supreme Court's decision in

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[68] 414 U.S. at 483 (Rehnquist, J., dissenting).

[69] *Id.* at 483 (citation omitted). *See also* Vestal, *supra* note 55, at 492 n.67:

> [T]he Court is properly cognizant that the question must be timely and properly raised in accordance with state practice, where that practice is reasonably calculated to permit it, unless, of course, the highest court actually entertains the question and decides it. If the question is not so raised and the highest court of the state accordingly declines to consider it, the Supreme Court is without jurisdiction to review. Moore's Judicial Code 571 (1949). See also Wines, Establishing The Basis for Appellate Review, Ill. L. Forum 135, 146 (1952), wherein the author concludes that "The federal requirement that a federal question must be 'set up and specially claimed' and preserved for review in the state court is more than a principle of federal appellate procedure. It marks the limits of the United States Supreme Court's appellate jurisidiction. The United States Supreme Court has most times held that it is without jurisdiction to review a question that was not 'set up and specially claimed' and preserved for review in the state court."

[70] For elaboration of the theorized jurisdictional questions *see* note 59 & accompanying text *supra*. *See also* Vestal, *supra* note 55, at 492:

> There is a matter of fundamental importance in the federal-state relationship which bars the consideration of matters sua sponte by the . . . Court in a case coming from the highest court of the state. . . . [The] power of review is limited not only to the question whether a right guaranteed by the Federal Constitution was denied . . . but to particular claims duly made below, and denied. . . .

Wood will not prevent the state court from reinstating its order revoking the petitioners' probation once the state court is satisfied that the petitioners were provided effective assistance of counsel guaranteed by the sixth amendment.[71] This freedom is vital in supporting the jurisdictional authority exerted by the majority in *Wood*.

Justice White's contention in his dissent that the general review-of-state-court jurisdictional provision, 28 U.S.C. § 1257(3),[72] is an absolute jurisdictional bar to the Supreme Court reaching the due process issue, ignores the presence of section 2106 and the need to construe these two provisions together. Justice White did address section 2106, but only to say that it "[d]oes not purport to expand the statutory limits. . . [but rather] relates only to the disposition of the case once jurisdiction exists."[73] Justice White's view merely begs the question of how each of these provisions should be interpreted in light of the other. Jurisdiction did exist, via section 1257(3), for the petitioners' equal protection claim. Once the Court obtained jurisdiction over the case, section 2106 authorized the result reached by the majority as long as it was "just under the circumstances." Justice White provided no support for his narrow construction of section 2106. If the majority actually interpreted the provision as Justice White suggested, section 2106 would be rendered meaningless; the statutory authority to modify, reverse, or remand decisions "as may be just under the circumstances" would add nothing to existing federal jurisdiction.[74]

Just as the majority was not able to cite persuasive precedent in support of its application of section 2106, the three cases cited by Justice White[75] in support of his complete-jurisdictional-bar theory are also readily distinguishable from *Wood*. In *Cardinale v. Louisiana*,[76] the Court referred to section 1257 (but not to section 2106) in rejecting the petitioner's sole claim on the ground that it had not been decided in the

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71 At that point, of course, petitioners would be free once again to petition for certiorari on the equal protection claim originally granted a writ of certiorari by the Court.

72 *See* note 41 *supra*.

73 101 S. Ct. at 1107 (White, J., dissenting).

74 *Cf.* Nuelson v. Sorenson, 293 F.2d 454 (9th Cir. 1961) (reasoning applied to similar argument aimed at sua sponte review of lower federal court decisions).

75 101 S. Ct. at 1106 (citing Moore v. Illinois, 408 U.S. 786 (1972); Hill v. California, 401 U.S. 797 (1971); and Cardinale v. Louisiana, 394 U.S. 437 (1969)). *See* note 42 *supra* and accompanying text.

76 In *Cardinale*, the Court refused to review the constitutionality of a Louisiana statute because the state court had not had the opportunity to interpret it. The earlier cases out of which the *Cardinale* line arose merely demonstrate that the § 2106 discretion of the Supreme Court is exercised sparingly and only in exceptional circumstances such as *Wood*, not that it is absent. Moreover, none of the older cases cited in *Cardinale* addresses the discretionary power granted by § 2106. *Hill* merely cited *Cardinale* and called it controlling in a similar circumstance. 401 U.S. at 805.

state court. The *Cardinale* Court did not consider this new claim because the state courts may have construed the statute in question so as to save its constitutionality. Moreover, the state courts did not receive first opportunity to decide the question.[77] The situation in *Wood* is different because no state statute which a state court could save by a particular construction is involved in the result reached by the majority. Furthermore, the *Wood* Court did not decide a question which the Georgia courts had been deprived of an opportunity to consider. *Cuyler* already defined a trial court's duty of inquiry in the relevant situation.[78] Therefore, *Wood* decided no legal question but merely enforced a federal constitutional standard. The *Cardinale* Court probably did not refer to section 2106 because it saw no injustice. In *Moore*, the Court was presented with a due process claim, concerning the admission of evidence, which was first raised on appeal. Although the Court stated in dictum that "[w]e *could* conclude . . . that the issue is not one properly presented for review,"[79] it then went on to consider and reject the due process claim.[80] If anything, *Moore* supports the majority's view since the Court did consider and decide the improperly presented due process question. Moreover, the Court's statement in *Moore* suggests only a discretionary limit on its review power, hardly a complete jurisdictional bar.

B. TRIAL COURT'S DUTY OF INQUIRY UNDER *CUYLER V. SULLIVAN*

Justice White also claimed that the majority in *Wood* had exceeded *Cuyler v. Sullivan* when it ordered a remand. He argued that no conflict of interest of constitutional dimension appeared sufficiently possible from the face of the record to have imposed the *Cuyler* duty of inquiry on the trial court. Basically, Justice White contended that the *Wood* majority went beyond the *Cuyler v. Sullivan* holding in reaching its remand result.[81] The strength of his argument varies between the two alternate majority theories.[82]

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77 394 U.S. at 439:

> Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. . . [I]t is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground.

78 Cuyler v. Sullivan, 446 U.S. 335. *See* note 2 *supra*.

79 408 U.S. at 799 (emphasis added).

80 *Id.* at 799-800.

81 101 S. Ct. at 1104 n.18.

82 The majority held that the conflict of interest issue could be considered raised (by the State's Solicitor) at the probation revocation hearing, and that even if it were not, the Court could still consider this issue. *See* text accompanying notes 32-36 *supra*.

If the petitioners had raised the due process issue below, *Cuyler* would appear to mandate the vacated judgment which resulted in *Wood*.[83] A timely objection to counsel with an alleged conflict of interest (the *Holloway* situation) may be distinct from a conflict argument made by the opposing party (the *Wood* situation). Moreover, the probation revocation court in *Wood* was at least presented with allegations which should have made it aware that an arguable conflict of interest existed. *Cuyler* requires a trial judge to investigate counsel's interests when he knows or should know of a conflict. Since the revocation judge did nothing to ascertain whether an actual conflict existed, or whether petitioners had waived their constitutional right to conflict-free counsel, Justice Powell was correct in vacating the judgment of that court and remanding. Under this scenario, the majority applied the rule exactly as the letter and the spirit of *Cuyler* dictates.

On the other hand, if the Court based its holding on the alternative theory that, although the conflict of interest question had not been properly raised below, section 2106 still authorized the Court to find a due process violation sua sponte, then Justice White may be correct in questioning the basis for this holding. Under *Cuyler*, the probation revocation judge was only required to inquire concerning possible conflict of interest if he had reason to know that a particular conflict did exist. It is at least arguable that an argument about a conflict from an adversarial party (the State's Solicitor), without any agreement from the petitioners, should not cause the judge to know that a particular conflict existed. An adversarial party might have hidden strategy goals in raising such a contention. For example, the jury's perception of the credibility of the defense might be affected; the court or the defense might be distracted from some point which was about to be made which would hurt the prosecution; or, as in *Wood*, the prosecution might be using the argument to defeat some defense claim unrelated to the effective assistance of counsel.[84] Furthermore, the petitioners' attorney expressly denied any conflict of interest.[85] One of the petitioners also testified that he selected the attorney and trusted him.[86] And finally, the litigation strategy employed by petitioners' attorney was not so obviously unreasonable that it should have triggered the suspicion of the judge. Under this scenario,

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[83] In *Cuyler*, 446 U.S. at 346, the Court declared that Holloway v. Arkansas, 435 U.S. 475 (1978), requires state trial courts to investigate timely objections to multiple representation in order to assure effective assistance of counsel. *Cuyler* extended the *Holloway* rule to situations where the trial judge was not presented with timely objection but still knew or reasonably should have known that a particular conflict existed. 446 U.S. at 347.

[84] In *Wood* the state was attempting to counter the equal protection claim urged by petitioners' counsel.

[85] 101 S. Ct. at 1109 n.8.

[86] *Id.*

Wood broadened the duty-of-inquiry rule to reach possible conflict situations that are much less obvious than those present in *Holloway* and *Cuyler*.

C. FUTURE IMPLICATIONS

The future implications of *Wood* may be far-reaching. From the perspective of applying the *Cuyler* rules, appellate courts may more readily find that trial judges should have perceived particular conflicts. To the degree that this results in more active trial court scrutiny of possible conflict situations, this result should provide greater protection from ineffective counsel and should be welcomed.[87] It may, however, lead to judicial inefficiency associated with more frequent reversals in cases where the judge did not inquire when faced with borderline indications of possible conflict.

Wood may encourage greater utilization of section 2106 by federal appellate courts that want to address issues sua sponte. On the other hand, because *Wood* does not define when sua sponte consideration of new issues is to be deemed "just under the circumstances," it may also contribute to a further split among the circuits in the manner in which they use this provision.[88]

V. CONCLUSION

Wood is noteworthy in two ways. First, greater discretion now exists in the federal appellate courts to address issues not decided by state courts below. After *Wood*, federal courts only need to find that their inquiry is deemed "just under the circumstances." *Wood*, however, does not adequately define what will constitute abuse of this judicial discretion. Second, *Wood* also may have broadened the *Cuyler* rule as to when

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[87] *See* Note, *supra* note 2, at 537. "Presumably [*Cuyler*] will promote the existing trend among trial judges to make an affirmative inquiry [concerning possible attorney conflicts of interest]. To the extent *Cuyler* advances this trend, only increased sixth amendment protection can result."

[88] *But see* Webb v. Webb, 101 S.Ct. 1889 (1981), which indicates that invocation of § 2106 review power may be limited to counsel conflicts-of-interest situations. In *Webb*, the court (8-1) dismissed certiorari as improvidently granted, failing to invoke § 2106 power. Arguably, the unsuccessful petitioner in that case was denied the guarantees of the United States Constitution, Article IV, § 1 Full Faith and Credit Clause, when the Georgia Supreme Court refused to follow a Florida court's child custody judgment. The United States Supreme Court could have invoked § 2106 just as it did in *Wood* to remand to the Georgia courts for consideration of the federal constitutional question. But in *Webb* there was no attorney with conflicting interests who could have caused the federal issue not to be properly set up and preserved below. Petitioner and her counsel were responsible for the context of their litigation and, absent inadequate assistance of counsel, the Supreme Court refused to intervene. Justice Powell concurred, following *Wood* and distinguishing *Webb* not fundamentally unfair. *Id.* at 1894.

trial judges must inquire concerning possible attorney conflicts of interest. *Wood* may be interpreted as holding that, absent timely objection from the accused, trial judges must affirmatively ascertain whether a conflict of interest exists, and whether or not the right of conflict-free counsel has been validly waived, whenever they are presented with even a slight indication of a possible conflict. To the degree that this results in more alert and conscientious trial judges, increased sixth amendment protection should result. But if, on the other hand, this results in more reversals for failure to perceive the possible conflict, judicial inefficiency will result. A better definition of the kind of conflict evidence which triggers this duty of inquiry would be useful.

SHELL J. BLEIWEISS