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Jeffrey Scott Glassman

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# MICKENS V. TAYLOR: THE COURT'S NEW DON'T ASK, DON'T TELL POLICY FOR ATTORNEYS FACED WITH A CONFLICT OF INTEREST

JEFFREY SCOTT GLASSMAN\*

Charged, tried, and convicted of capital murder, the condemned man waits for death.<sup>1</sup> Having exhausted his direct trial appeals,<sup>2</sup> he sought relief on collateral grounds.<sup>3</sup> Federal habeas corpus counsel was appointed for him.<sup>4</sup> During

\* J.D. St. John's University School of Law, June 2004; B.S. The University of Arizona 1995. The author wishes to thank his parents for their steadfast support.

<sup>1</sup> See *Mickens v. Greene*, 74 F. Supp. 2d 586, 590 (E.D.Va. 1999) (indicating that a jury convicted Walter Mickens of capital murder during the commission of attempted forcible sodomy on June 3, 1993 and sentenced him to death on June 7, 1993); *Across the U.S.A.: News From Every State*, U.S.A. TODAY, June 9, 1993, at 10A (reporting that a Newport News jury recommended death for Walter Mickens for stabbing Timothy Hall). See generally Letter from Diann Rust-Tierney, ACLU Capital Punishment Project & Kent Willis, ACLU of Va., to Mark R. Warner, Governor of Va. available at [http://archive.aclu.org/death-penalty/Mickens\\_letter.html](http://archive.aclu.org/death-penalty/Mickens_letter.html) (May 24, 2002) (requesting clemency for Walter Mickens, who was convicted of capital murder and sentenced to death in the Commonwealth of Virginia).

<sup>2</sup> See *Mickens v. Greene*, 74 F. Supp. 2d at 592 (explaining that after unsuccessful appeal to the Supreme Court of Virginia, the Supreme Court of the United States remanded Mickens' case for further consideration in light of *Simmons v. South Carolina*, 512 U.S. 154 (1994), and that the Supreme Court of Virginia thereafter remanded the matter to the trial court for resentencing); *Mickens v. Commonwealth*, 478 S.E.2d 302, 303 (Va. 1996) (concluding upon reconsideration that the holding in *Simmons* required a remand of the case to the trial court for a new sentencing hearing); *Mickens v. Commonwealth*, 457 S.E.2d 9, 10 (Va. 1995) (stating that the holding in *Simmons* required a remand of Mickens' case for resentencing).

<sup>3</sup> See *Mickens v. Taylor*, 535 U.S. 162, 164 (2002) (explaining that Mickens filed a petition for writ of habeas corpus in June 1998 alleging that he was denied effective assistance of counsel because one of his court-appointed attorneys had a conflict of interest at trial); *Mickens v. Greene*, 74 F. Supp. 2d at 592-93 (showing that after denial of his appeal by the Supreme Court of Virginia, Mickens filed a petition for a writ of habeas corpus with the same court). See generally *United States Supreme Court: Selected Cases*, 3 W. VA. CRIM. L. NEWSL. (Aug. 2002) (summarizing case facts and holding), available at <http://www.wvpds.org/Newsletter/Aug2002.html>.

<sup>4</sup> See *Mickens v. Greene*, 74 F. Supp. 2d at 592 (showing that counsel were appointed to represent Mickens in filing a federal habeas corpus petition). See generally *Mickens v. Taylor*, 535 U.S. at 164 (explaining that federal habeas counsel uncovered a conflict of interest involving Mickens' lead trial attorney); *United States Supreme Court: Selected Cases*, *supra* note 3 (describing the denial of Mickens' appeal for a petition for a writ of habeas corpus).

preparation of his habeas petition, new and startling information came to light about his trial lawyer: the very same court-appointed trial attorney who represented the defendant had also been representing the murder victim in a separate matter.<sup>5</sup> This information was only revealed upon the inadvertent disclosure of defendant's file to his habeas counsel. The attorney's representation of the victim included a personal meeting where the two discussed the victim's own case.<sup>6</sup> The file also revealed that the judge who had dismissed the criminal charges against the victim, upon proof of his death, was the same judge who soon thereafter assigned that victim's lawyer to the condemned man and presided at his trial.<sup>7</sup> None of this information, which raised serious questions of conflict of interest, was ever disclosed by trial counsel to the condemned man.<sup>8</sup> Nor did trial counsel ever object to his appointment to represent the man alleged to have murdered the former client.<sup>9</sup> Moreover, the trial judge, though

<sup>5</sup> See *Mickens v. Taylor*, 535 U.S. at 164 (explaining that federal habeas counsel discovered that Mickens' lead trial attorney was representing Mickens' victim on assault and concealed-weapons charges at the time of the murder); *Mickens v. Greene*, 74 F. Supp. 2d at 599 (describing Mickens' contention that he was denied effective assistance of counsel because his lead trial counsel represented Mickens' victim, Timothy Hall, at the time of Hall's murder); Patrice McGuire Sabach, Note, *Rethinking Unwailable Conflicts of Interest After U.S. v. Schwarz and Mickens v. Taylor*, 59 N.Y.U. ANN. SURV. AM. L. 89, 114 (2003) (showing that Saunders had represented Hall in a criminal matter up until the day of Hall's death).

<sup>6</sup> See *Mickens v. Taylor*, 535 U.S. at 164 (stating that Saunders had been appointed to represent Hall on Mar. 20, 1992, and had met with him once for fifteen to thirty minutes some time the following week); *Mickens v. Greene*, 74 F. Supp. 2d at 599 (describing the situation that brought about Hall's need for representation and noting professional contact between Hall and Saunders); Kristen F. Grunewald, Note, *United States Supreme Court: Mickens v. Taylor*, 15 CAP. DEF. J. 137, 137 (showing that after appointment to represent Hall on assault and concealed-weapons charges, Saunders and Hall met once for approximately fifteen to thirty minutes to discuss the case).

<sup>7</sup> See *Mickens v. Taylor*, 535 U.S. at 164 (describing Saunders' appointment to represent Hall); *Mickens v. Greene*, 74 F. Supp. 2d at 599-600 (highlighting sequence of events involving counsel being relieved from his representation of Hall and subsequent appointment to represent Mickens); Grunewald, *supra* note 6, at 137 (explaining that the same juvenile court judge that appointed Saunders to represent Hall also appointed Saunders to represent Mickens).

<sup>8</sup> See *Mickens v. Taylor*, 535 U.S. at 165 (noting that at the time of his appointment Saunders did not disclose to the court, his co-counsel, or Mickens that he had previously represented Hall); *Mickens v. Greene*, 74 F. Supp. 2d at 600 (noting as an undisputed issue the fact that Mickens was unaware of Saunders' representation of Hall until the initiation of federal habeas corpus proceedings); Sabach, *supra* note 5, at 114 (showing that Saunders never disclosed his representation of Hall to Mickens, his co-counsel, or the court).

<sup>9</sup> See Grunewald, *supra* note 6, at 137-38 (noting that Saunders accepted Mickens' case without objection and did not inform Mickens or the court of his prior representation of Hall); Sabach, *supra* note 5, at 114 (showing that Saunders never disclosed his representation of Hall to Mickens, his co-counsel, or the court). See generally *Mickens v.*

presumably aware the conflict existed through her prior involvement in the victim's unrelated matter, never conducted any inquiry into it.<sup>10</sup>

The man whose murder trial ultimately concluded with his sentence to death was thus represented at that trial by a lawyer who had previously represented his alleged victim—a lawyer who had been assigned, no less, to this case by the same judge set to hear the victim's own case. This all occurred in a matter in which a life was at stake. Certainly, a breakdown in the justice system of this magnitude should afford the condemned man some measure of relief. These circumstances raise serious questions about the fundamental fairness of his trial and sentencing. The United States Supreme Court, however, characterized these defects as harmless error. In *Mickens v. Taylor*,<sup>11</sup> a sharply divided Court held by a five-to-four majority that a trial judge's failure to inquire into an unchallenged conflict of interest arising from consecutive representation, although known or reasonably foreseeable to the trial judge, is not grounds for overturning a conviction unless the defendant demonstrates that the conflict adversely affected the representation.<sup>12</sup>

This paper argues that the Court's decision in *Mickens* represents a misapplication of prior Sixth Amendment jurisprudence and a missed opportunity to carve out a new and

Greene, 74 F. Supp. 2d at 600 (describing the circumstances surrounding the dismissal of charges against Hall as a result of his death and Saunders' subsequent appointment to represent Mickens).

<sup>10</sup> See *Mickens v. Greene*, 74 F. Supp. 2d at 593 (asserting that Mickens "was denied his . . . right to the effective assistance of counsel when the trial judge of the Newport News Juvenile and Domestic Relations Court failed to inform Petitioner of the conflict of interest and inquire of the Petitioner whether he was aware of the conflict"); Grunewald, *supra* note 6, at 138 (stating that the same court that appointed Saunders as counsel to both Hall and Mickens did not independently inquire into the potential conflict); Sabach, *supra* note 5, at 114 (showing that the trial court failed to inquire into the potential conflict despite the fact that the same judge had dismissed the unrelated charges against Hall three days before appointing Saunders to represent Mickens).

<sup>11</sup> 535 U.S. 162 (2002).

<sup>12</sup> See *id.* at 173 (holding that the scenario presented in *Mickens* does not fit within the contemplated exceptions to the general rule governing automatic reversal and conflicted representation); Grunewald, *supra* note 6, at 139 (showing that the U.S. Supreme Court affirmed the Fourth Circuit's denial of habeas relief, holding that even if a trial court fails to inquire into a possible conflict of interest about which it knew or reasonably should have known, a defendant still must show that the conflict adversely affected his representation); Sabach, *supra* note 5, at 114 (stating that the *Mickens* majority held that a theoretical conflict, one that was not shown to have adversely affected defendant, was not sufficient to establish that defendant had been deprived of his constitutional right to effective assistance of counsel).

necessary exception to the general rule governing ineffective assistance of counsel claims. Part I provides a history of the Sixth Amendment right to effective assistance of counsel. Part II describes the Court's relevant Sixth Amendment jurisprudence over the three decades prior to *Mickens*. From these cases emerges the modern doctrine governing ineffective assistance of counsel claims. In Part III, the *Mickens* decision will be presented. Part IV will scrutinize and analyze *Mickens* within the framework established by the Court's precedents. It will demonstrate that *Mickens* is distinguishable in several critical aspects from the earlier cases. Part IV will also present an alternate approach to the *Mickens*' ineffective assistance of counsel scenario that addresses the concerns expressed by both the majority and dissenting Justices in *Mickens*. Finally, Part V of this paper will turn to the future implications and impact of this decision on criminal defendants and the court system.

## I. THE ORIGINS OF THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment to the United States Constitution established a framework for proceedings in a criminal trial.<sup>13</sup> It affords several substantive rights to those accused of a crime.<sup>14</sup> Among these is a "right . . . to have the Assistance of Counsel for his defence."<sup>15</sup> From the time of ratification, it was recognized that those accused of a crime had a right to retain private

<sup>13</sup> The Sixth Amendment provides:

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

U.S. CONST. amend. VI.

<sup>14</sup> *United States v. Morrison*, 449 U.S. 361, 364 (1981) (stating that the Sixth Amendment right of the accused to the assistance of counsel for his defense is meant to assure fairness in the adversary criminal process); *United States v. Ash*, 413 U.S. 300, 309 (1973) (explaining that the core purpose of the counsel guarantee of the Sixth Amendment was to assure "assistance" at trial when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor); *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938) (stating that the Sixth Amendment "stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done'").

<sup>15</sup> U.S. CONST. amend. VI.

counsel in federal court.<sup>16</sup> Gradually, the Supreme Court's Sixth Amendment decisions,<sup>17</sup> together with its Fourteenth Amendment jurisprudence,<sup>18</sup> applied the Sixth Amendment right to counsel to state criminal cases,<sup>19</sup> including petty offenses.<sup>20</sup> This right, however, is not absolute. An accused has the right to knowingly and voluntarily waive the assistance of counsel.<sup>21</sup> Furthermore, assistance of counsel is only constitutionally required at the "critical stages" of criminal proceedings, and not at every level of the process.<sup>22</sup> Apart from these limited

<sup>16</sup> See *Patton v. United States*, 281 U.S. 276, 308 (1930) (explaining that the modern criminal defendant is provided with "the most complete opportunity for making his defense," including the furnishing of counsel by the state); see also *Johnson*, 304 U.S. at 463 (discussing the history and purpose of the Sixth Amendment right to the assistance of counsel); WAYNE R. LAFAYE ET AL., CRIM. PROC. § 11.1(a) (3d ed. 2000) (indicating that the Sixth Amendment always guaranteed a right to retain private counsel in defense).

<sup>17</sup> See *Powell v. Alabama*, 287 U.S. 45, 68 (1932) (calling the right to aid of counsel "of . . . fundamental character"); see also *Johnson*, 304 U.S. at 467-68 (finding that criminal defendants have a right to counsel and a right to waive such counsel in federal court, but that such a waiver must be knowingly and intelligently made). See generally LAFAYE, *supra* note 16, § 11.1(a) (offering a general overview of Sixth Amendment jurisprudence as it relates to the right to counsel).

<sup>18</sup> U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

<sup>19</sup> Compare *Betts v. Brady*, 316 U.S. 455, 461-62 (1942) (finding that while the due process clause of the Fourteenth Amendment does not incorporate the specific guarantees found in the Sixth Amendment, a denial by a State of rights or privileges specifically embodied in the Sixth Amendment may, "in certain circumstances, or in connection with other elements, operate, in a given case, to deprive a litigant of due process of law in violation of the Fourteenth"), with *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963) (overruling *Betts* and recognizing that the right to counsel in all felony proceedings is guaranteed at the state level). See generally JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 4.02(b) (3d ed. 2001) (offering an overview of Fourteenth Amendment limits on state governments).

<sup>20</sup> See *Argersinger v. Hamlin*, 407 U.S. 25, 30 (1972) (holding that there is nothing in the language of the Sixth Amendment, its history, or in the decisions of the Court indicating that it was intended to embody a retraction of the right to counsel in petty offenses); *Baldasar v. Illinois*, 446 U.S. 222, 225 (1980) (reiterating Court's previous rejection of the suggestion that the right to counsel applies only to non-petty offenses where the accused had a right to a jury trial). See generally *James v. Headley*, 410 F.2d 325, 331 n.9 (5th Cir. 1969) (explaining that there is nothing in the history of the Sixth Amendment to suggest that the Framers of the Constitution intended to withdraw the right to representation in cases involving lesser offenses in which it had existed at common law).

<sup>21</sup> See *Johnson*, 304 U.S. at 467-68 (asserting a right of accused to waive counsel if done so knowingly and intelligently). See generally *Mickens v. Taylor*, 535 U.S. 162, 172 (2002) (noting that in the instance of actual conflict the judge can avoid all possibility of reversal by suggesting that defendant waive counsel or by replacing the conflicted attorney); *Sabach*, *supra* note 5, at 94 (noting that defendants are generally able to waive the right to conflict-free counsel just as they are able to waive other constitutional rights, so long as the waiver is knowing and voluntary).

<sup>22</sup> See *Mickens v. Taylor*, 535 U.S. at 172 (explaining that where assistance of counsel has been denied during a critical stage of the proceeding the representation is assumed to have failed to have met the constitutional mandate); *United States v. Cronin*, 466 U.S.

exceptions, the Sixth Amendment right to counsel is absolute. Any conviction obtained in violation of the Sixth Amendment, therefore, must be reversed—not subject to harmless error review.<sup>23</sup>

The Constitution also guarantees the Sixth Amendment right to counsel to those unable to afford counsel.<sup>24</sup> These indigent individuals are appointed counsel consistent with the requirements of the Sixth Amendment.<sup>25</sup> However, the assignment of counsel is not irrevocable. Upon a showing of good cause, assigned counsel may be replaced by the court.<sup>26</sup> Good cause includes instances where the defendant can show the existence of a conflict of interest.<sup>27</sup> Such conflicts arise in several circumstances: between attorney and judge, between attorney

648, 659 (1984) (stating that the presumption that counsel's assistance is essential requires conclusion that a trial is unfair if the accused is denied counsel at a critical stage thereof); LAFAVE, *supra* note 16, § 11.2(b) (noting counsel is only constitutionally required at the "critical stages" of a criminal proceeding, defined as those stages in which the "substantial rights of the defendant may be affected").

<sup>23</sup> *Mickens v. Taylor*, 535 U.S. at 172 (explaining that where assistance of counsel has been denied entirely the representation is assumed to have failed to have met the constitutional mandate); *Cronic*, 466 U.S. at 659 (indicating that a denial of counsel is tantamount to a presumed unfair trial); *Johnson*, 304 U.S. at 467–68 (calling compliance with the Sixth Amendment's right to counsel mandate "an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty").

<sup>24</sup> See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (holding that the right of an indigent defendant in a criminal trial to assistance of counsel is a fundamental one essential to a fair trial); LAFAVE, *supra* note 16, § 11.2(g) (discussing indigence standards and appointment of counsel); *Sabach*, *supra* note 5, at 92 (noting that all defendants faced with the prospect of criminal prosecution by the state are entitled to the effective assistance of counsel regardless of ability to pay).

<sup>25</sup> See generally *Mickens v. Taylor*, 535 U.S. at 184 (explaining that when indigent defendants are unable to retain lawyers, the trial judge's appointment of counsel becomes a critical stage of a criminal trial); LAFAVE, *supra* note 16, § 11.2(b) (discussing the stages in a criminal prosecution at which the Constitution guarantees the right to counsel); *Sabach*, *supra* note 5, at 92 (outlining the constitutional guarantees implicit in the Sixth Amendment right to counsel).

<sup>26</sup> See LAFAVE, *supra* note 16, § 11.4(b) (discussing circumstances evidencing good cause for replacement of counsel). *People v. Russell*, 656 N.W.2d 817, 819 (Mich. Ct. App. 2002) (noting that the trial court is the best judge of whether good cause exists to replace appointed counsel); *People v. Traylor*, 628 N.W.2d 120, 122 (Mich. Ct. App. 2001) (stating that a disagreement on how to handle fundamental trial tactics is sufficient cause to replace counsel).

<sup>27</sup> See LAFAVE, *supra* note 16, § 11.4(b) (recognizing that good cause arises in circumstances "such as a conflict of interest, a complete breakdown of communications, or an irreconcilable conflict which could lead to an apparently unjust verdict"). See generally *United States v. Swanson*, 943 F.2d 1070, 1075–76 (9th Cir. 1991) (finding good cause for dismissal on conflict of interest grounds where court appointed defense counsel conceded the defendant's guilt during closing argument); *United States v. Ziegenhagen*, 890 F.2d 937, 940–41 (7th Cir. 1989) (holding that because defendant's appointed counsel had prosecuted him in an earlier conviction that led to the case at bar, good cause for dismissal and replacement was evident).

and client, or between multiple attorneys representing discrete interests.<sup>28</sup> In an attorney–client conflict, a showing of good cause will likely result in the granting of a motion for replacement of counsel.<sup>29</sup> The replacement of counsel is generally based upon a motion made before or during trial,<sup>30</sup> where a court is able to address and resolve conflict of interest issues on a prospective basis.

The effect for the defendant, however, is greatly altered when a conflict is raised either post-trial, or has not been adequately resolved upon a timely objection at trial.<sup>31</sup> The Supreme Court's recent jurisprudence has focused specifically on instances of retrospective claims that counsel was ineffective based upon a conflict of interest. The situation confronted by the *Mickens* Court involved such a retrospective claim.<sup>32</sup> However, a clear understanding of the Court's approach to these types of claims is a necessary predicate to exploring the 2002 decision.

<sup>28</sup> See LAFAVE, *supra* note 16, § 11.9(a) (noting that a showing of good cause bolsters a request for replacement counsel). See generally *United States v. Vaquero*, 997 F.2d 78, 89 (5th Cir. 1993) (stating that a conflict of interest existed where counsel's defense of co-conspirators may have been tainted by his own personal involvement in the conspiracy); *United States v. Swartz*, 975 F.2d 1042, 1045–48 (4th Cir. 1992) (indicating a conflict of interest where appointed counsel represented co-defendants and exploited less culpable defendant to help more culpable defendant).

<sup>29</sup> See LAFAVE, *supra* note 16, § 11.4(b) (indicating that there must be some "well founded reason" for requesting replacement of counsel). See generally *United States v. Iles*, 906 F.2d 1122, 1130 n.8 (6th Cir. 1990) (articulating that in addition to a well founded reason, the appellate courts also consider "the timeliness of the motion; the adequacy of the court's inquiry into the defendant's complaint; and whether the conflict between the attorney and client was so great that it resulted in a total lack of communication preventing an adequate defense"); *Ziegenhagen*, 890 F.2d at 940 (suggesting that an evident conflict of interest is good cause to request replacement counsel).

<sup>30</sup> See LAFAVE, *supra* note 16, § 11.4(b) (discussing replacement of counsel for good cause). See generally *United States v. Richardson*, 894 F.2d 492, 496 (1st Cir. 1991) (denying motion for substitute counsel made on morning of trial); *Ziegenhagen*, 890 F.2d at 939 (moving for replacement of counsel before sentencing hearing).

<sup>31</sup> Compare *United States v. Hallock*, 941 F.2d 36, 43–44 (1st Cir. 1991) (explaining that a defendant's failure to raise ineffective assistance of counsel claim during trial is problematic because the issue is not preserved in the record for review), with *United States v. Matos*, 905 F.2d 30, 33 (2d Cir. 1990) (stating that an appellate court may review a fresh ineffective assistance of counsel claim if it is "in the interests of justice" to do so). See generally Joe Margulies, *Criminal Law: Resource Deprivation and the Right to Counsel*, 80 J. CRIM. L. & CRIMINOLOGY 673, 715 (1989) (noting that ineffective assistance of counsel claims are generally raised after trial).

<sup>32</sup> See *Mickens v. Taylor*, 535 U.S. 162 (2002) (confronting a retrospective claim for relief based on compromised counsel due to conflict of interest); see also *Mickens v. Taylor*, 240 F.3d 348, 363 (4th Cir. 2001) (holding that the plaintiff must prove a causal link between adverse affect and attorney conflict of interest).



## II. THE BURDEN OF RAISING A POST-CONVICTION INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

Generally, a convicted defendant bears the burden of raising and proving that a conflict of interest adversely affected his trial attorney's performance,<sup>33</sup> and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."<sup>34</sup> There are, however, a few key exceptions to the general rule. Where a defendant is denied the assistance of counsel at one of the "critical stages"<sup>35</sup> of a criminal proceeding, reversal is automatic.<sup>36</sup> Likewise, in instances where representation is forced upon the defendant over the timely objection of an attorney, prejudice will be presumed and reversal of conviction is mandatory.<sup>37</sup> Where a conflict of interest is known or reasonably foreseeable to a trial court, prejudice is not presumed absent the defendant's timely objection. Raising such a conflict post-trial,

<sup>33</sup> See *Strickland v. Washington*, 466 U.S. 668, 693 (1984) (requiring that plaintiff raising claim of deficient performance of counsel show that the conflict had an adverse effect on the representation); *Mickens v. Taylor*, 240 F.3d at 363 (demanding a similar standard); see also *Cuyler v. Sullivan*, 446 U.S. 335, 348-49 (1980) (holding that a defendant must demonstrate that conflict of interest materially affected the adequacy of his counsel).

<sup>34</sup> See *Strickland*, 466 U.S. at 694 (holding petitioner must show reasonable probability that outcome would have differed absent conflict). See generally *Jones v. State*, 8 S.W.3d 482, 489 (Ark. 2000) (denying rehearing based on *Strickland* standard); *Strickler v. Murray*, 452 S.E.2d 648, 651-52 (Va. 1995) (explaining the *Strickland* burden).

<sup>35</sup> See LAFAVE, *supra* note 16, § 11.2(b) (indicating that the "critical stages" of a criminal proceeding are defined as those stages in which the "substantial rights of the defendant may be affected at the particular proceeding"). See generally *Hamilton v. Alabama*, 368 U.S. 52, 53 (1961) (deeming arraignment a critical stage of a criminal proceeding); *Sigler v. Bird*, 354 F.2d 694, 698 (8th. Cir. 1966) (holding that a preliminary hearing may be a critical stage in a criminal proceeding).

<sup>36</sup> See *United States v. Cronin*, 466 U.S. 648, 659 n.25 (1984) (stating that "the Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding"). See generally *Hamilton*, 368 U.S. at 53 (reversing based on deprivation of adequate assistance of counsel at a critical stage of the proceeding); *Sigler*, 354 F.2d at 698 (reversing on grounds similar to those outlined in *Cronin*).

<sup>37</sup> See *Holloway v. Arkansas*, 435 U.S. 475, 488 (1978) (analyzing the proper standard for reversal based on forced joint representation). *But see State v. Bible*, 459 P.2d 646, 648 (Wash. 1969) (denying reversal on potential prejudice grounds where defendant never requested separate counsel). See generally *State v. Kennedy*, 508 P.2d 1386, 1389-90 (Wash. Ct. App. 1977) (noting that any evidence on the record that indicates a prejudicial ineffective assistance of counsel is grounds for reversal).

however, requires a reviewing court to conduct an inquiry which might, in turn, mandate reversal.<sup>38</sup>

This analysis will begin with a detailed examination of *Strickland v. Washington*,<sup>39</sup> the case that announced the general rule, followed by the categorical exceptions to the *Strickland* rule recognized prior to the 2002 holding in *Mickens*.

### A. *The Strickland Standard*

*Strickland v. Washington*<sup>40</sup> involved a claim of ineffective assistance of counsel during the sentencing phase of a trial.<sup>41</sup> The State of Florida brought charges against defendant David Washington for several offenses following a ten day crime spree in 1976.<sup>42</sup> Against the advice of his court-appointed counsel, Washington pled guilty to a charge for capital murder.<sup>43</sup> Also against the advice of counsel, Washington waived the right to a jury during the sentencing phase of his trial.<sup>44</sup> Although the trial judge expressed respect for Washington's acceptance of responsibility, he made no representations as to the sentence he would impose.<sup>45</sup> In his plea colloquy at the guilt phase, Washington asserted that he did not have an extensive criminal background,<sup>46</sup> a statement marred by inaccuracy.<sup>47</sup> Counsel,

<sup>38</sup> See *Wood v. Georgia*, 450 U.S. 261, 272 (1981) (requiring lower courts to inquire into possible conflicts on interest). See generally *United States v. Akinseye*, 802 F.2d 740, 744 (4th. Cir. 1986) (stating that a trial court may properly assume the absence of a conflict caused by joint representation if a defendant makes no objection); *United States v. Ramsey*, 661 F.2d 1013, 1018 (4th. Cir. 1981) (opining that only the "possibility of a particular conflict" engages the court's duty to inquire into a potential conflict of interest).

<sup>39</sup> *Strickland v. Washington*, 466 U.S. 668 (1984) (inquiring into the appropriate standard for effective assistance of counsel).

<sup>40</sup> *Id.*

<sup>41</sup> See *id.* at 675 (revealing that among the claims for relief brought by Washington was one of ineffective assistance of counsel during the sentencing phase of his trial).

<sup>42</sup> See *id.* at 671-72 (the charges against Washington included "three counts of first-degree murder and multiple counts of robbery, kidnapping for ransom, breaking and entering and assault, attempted murder, and conspiracy to commit robbery").

<sup>43</sup> See *id.* at 672 (outlining counsel's plea strategy).

<sup>44</sup> See *id.* (noting that respondent waived his right to a jury).

<sup>45</sup> See *id.* (memorializing trial judge's statement that "he had 'a great deal of respect for people who are willing to step forward and admit their responsibility' but that he was making no statement at all about his likely sentencing decision.")

<sup>46</sup> See *id.* Washington represented that "although he had committed a string of burglaries, he had no significant prior criminal record and that at the time of his criminal spree he was under extreme stress caused by his inability to support his family. He also stated . . . that he accepted responsibility for the crimes." *Id.*

<sup>47</sup> See *id.* at 673 (revealing that trial counsel successfully moved to suppress the introduction of Washington's "rap sheet").

intent on keeping any damaging evidence from surfacing, either in the form of character evidence or by the production of Washington's "rap sheet," chose not to have a presentence report prepared, did not present any witnesses on Washington's behalf, and did not call Washington to the stand at the sentencing hearing.<sup>48</sup> At that hearing, "the trial judge found that all three murders were especially heinous, atrocious, and cruel, all involving repeated stabbings."<sup>49</sup> Further, he noted that "[a]ll three murders were committed in the course of at least one other dangerous and violent felony, and since all involved robbery, the murders were for pecuniary gain."<sup>50</sup> The trial judge, having concluded that the aggravating circumstances greatly outweighed the lone mitigating factor of Washington's acceptance of responsibility, sentenced Washington to death.<sup>51</sup>

Washington then challenged the sentence collaterally in state court, alleging ineffective assistance of counsel as a ground for relief.<sup>52</sup> The trial court, however, found the claim lacked merit, and without holding a hearing, denied relief.<sup>53</sup> The Florida

<sup>48</sup> See *id.* at 672–73 (detailing counsel's trial strategy).

<sup>49</sup> *Id.* at 674.

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

<sup>51</sup> See *Strickland v. Washington*, 466 U.S. 668, 675 (1984) (reporting imposition of death sentence); see also Alexandra N. DeNeve, *Beets v. Scott: The Fifth Circuit Adopts the Strickland Test to Deal with Ineffective Assistance Claims That Arise from Conflicts of Interest That Do Not Involve Multiple- or Serial-Client Representation*, 70 TUL. L. REV. 1689, 1695 (1996) (noting trial judge's sentence of death for defendant); Richard P. Rhodes, Jr., Note, *Strickland v. Washington: Safeguard of the Capital Defendant's Right to Assistance of Counsel?*, 12 B.C. THIRD WORLD L.J. 121, 136 (1992) (reviewing Washington's death penalty sentence).

<sup>52</sup> See *Strickland*, 466 U.S. at 675 (examining ineffective assistance challenge by defendant); see also DeNeve, *supra* note 51, at 1695 (noting challenge to sentence based on ineffective counsel claim); Rhodes, *supra* note 51, at 136 (stating defendant's ineffective counsel challenge). Specifically, Washington claimed:

that counsel had rendered ineffective assistance at the sentencing proceeding. Respondent challenged counsel's assistance in six respects. He asserted that counsel was ineffective because he failed to move for a continuance to prepare for sentencing, to request a psychiatric report, to investigate and present character witnesses, to seek a presentence investigation report, to present meaningful arguments to the sentencing judge, and to investigate the medical examiner's reports or cross-examine the medical experts. In support of the claim, respondent submitted 14 affidavits from friends, neighbors, and relatives stating that they would have testified if asked to do so. He also submitted one psychiatric report and one psychological report stating that respondent, though not under the influence of extreme mental or emotional disturbance, was "chronically frustrated and depressed because of his economic dilemma" at the time of his crimes.

*Strickland*, 466 U.S. at 675–76.

<sup>53</sup> See *Strickland*, 466 U.S. at 676 (reciting collateral relief attempt by convicted defendant); *Washington v. State*, 397 So. 2d 285, 286 (Fla. 1981) (noting that defendant filed motion in trial court for post-conviction relief); see also Meredith J. Duncan, *The (So-*

Supreme Court affirmed.<sup>54</sup> Washington then sought federal habeas corpus relief on the same grounds rejected by the state courts.<sup>55</sup> However, the District Court, agreeing with the findings and rationale of the state courts, denied relief.<sup>56</sup>

The United States Court of Appeals for the Eleventh Circuit reversed,<sup>57</sup> and in doing so, articulated specific standards and created a framework for resolving ineffective assistance of counsel claims in that circuit.<sup>58</sup> As an initial threshold to relief, the court found that “the [habeas] petitioner has the burden of persuasion to demonstrate that the ineffective assistance created not only ‘a possibility of prejudice, but that it worked to his actual and substantial disadvantage.’”<sup>59</sup> Upon satisfaction of that burden, “the habeas corpus writ must be granted unless the state proves that counsel’s ineffectiveness was harmless beyond a

*Called*) *Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 B.Y.U. L. REV. 1, 14 (2002) (reviewing collateral appeal by Washington in state court).

<sup>54</sup> See *Strickland*, 466 U.S. at 678 (noting that “the State Supreme Court concluded that respondent had failed to make out a prima facie case of either ‘substantial deficiency or possible prejudice’”); *Washington*, 397 So. 2d at 287 (affirming trial court on appeal); see also *Duncan*, *supra* note 53, at 14 (describing state court’s denial of relief).

<sup>55</sup> See *Strickland*, 466 U.S. at 678 (noting Washington filed writ of habeas corpus relief in the United States District Court for the Southern District of Florida); see also *Washington v. Strickland*, 693 F.2d 1243, 1248 (11th Cir. 1982), *rev’d* by *Strickland v. Washington*, 466 U.S. 668 (1984) (denoting Washington’s habeas corpus relief attempt in federal court); *Duncan*, *supra* note 53, at 14 (reviewing Washington’s habeas relief filing in federal court).

<sup>56</sup> See *Strickland*, 466 U.S. at 678. Referring to the district court’s denial of relief, the Court, in summarizing the District Court findings, noted the following:

On the legal issue of ineffectiveness, the District Court concluded that, although trial counsel made errors in judgment in failing to investigate nonstatutory mitigating evidence further than he did, no prejudice to respondent’s sentence resulted from any such error in judgment. Relying in part on the trial judge’s testimony but also on the same factors that led the state courts to find no prejudice, the District Court concluded that “there does not appear to be a likelihood, or even a significant possibility,” that any errors of trial counsel had affected the outcome of the sentencing proceeding.

*Strickland*, 466 U.S. at 678–79.

<sup>57</sup> See *Strickland*, 466 U.S. at 679. The route to reversal, however, was unique:

On appeal, a panel of the United States Court of Appeals for the Fifth Circuit affirmed in part, vacated in part, and remanded with instructions to apply to the particular facts the framework for analyzing ineffectiveness claims that it developed in its opinion. The panel decision was itself vacated when Unit B of the former Fifth Circuit, now the Eleventh Circuit, decided to rehear the case en banc. The full Court of Appeals . . . reversed the judgment of the District Court and remanded the case for new fact-finding under the newly announced standards.

*Strickland*, 466 U.S. at 679.

<sup>58</sup> See *Strickland*, 466 U.S. at 679 (noting Eleventh Circuit’s imposition of new standard); *Washington*, 693 F.2d at 1252 (proposing guidelines for district courts dealing with ineffective assistance cases); see also *Duncan*, *supra* note 53, at 16 n.82 (explaining “Eleventh Circuit’s newly announced standard of evaluation for ineffectiveness claims”).

<sup>59</sup> *Washington*, 693 F.2d at 1258.

reasonable doubt.”<sup>60</sup> The Eleventh Circuit rejected a test that was being applied by other Circuits at that time which called for a showing by the defendant that the outcome would have been different had counsel provided more adequate assistance.<sup>61</sup> Having announced its own test, the Eleventh Circuit remanded the case for further proceedings and factual determinations by the District Court.<sup>62</sup>

The United States Supreme Court granted Florida's petition for certiorari to consider the test established by the Eleventh Circuit.<sup>63</sup> In reversing, the Court articulated a two-part test for claims of ineffective assistance of counsel, predicated upon proof that the performance of counsel was substandard and that the substandard performance prejudiced the defense.<sup>64</sup> Specifically, the Court stated:

A convicted defendant's claim that counsel's assistance was so defective as to require reversal . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.<sup>65</sup>

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

<sup>61</sup> See *Washington*, 693 F.2d at 1262 (rejecting outcome-determinative approach); *cf.* *United States v. Decoster*, 624 F.2d 196, 208 (D.C. Cir. 1976) (outlining outcome-determinative test for inadequate counsel cases). See generally *Boykins v. Wainwright*, 737 F.2d 1539, 1543 (11th Cir. 1984) (questioning validity of *Decoster* outcome determinative test after Supreme Court decision in *Strickland v. Washington*).

<sup>62</sup> See *Strickland*, 466 U.S. at 679 (noting Eleventh Circuit's remand of case); *Washington*, 693 F.2d at 1263 (remanding case to trial court for new factual determinations); see also *Duncan*, *supra* note 53, at 15 (reporting remand of case by Eleventh Circuit).

<sup>63</sup> *Strickland*, 466 U.S. at 671 (indicating issue on appeal was the proper method for determining when a sentence may be set aside under a contention of ineffective assistance of counsel); see *Duncan*, *supra* note 53, at 15 (observing Supreme Court granted certiorari); Richard L. Gabriel, Comment, *The Strickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. PA. L. REV. 1259, 1264-65 (1986) (noting certiorari was granted to consider legal standard in ineffective assistance cases).

<sup>64</sup> See *Strickland*, 466 U.S. at 687 (articulating basis for decision within new standard); see also Ivan K. Fong, Note, *Ineffective Assistance of Counsel at Capital Sentencing*, 39 STAN. L. REV. 461, 468 (1987) (articulating the Court's new standard for dealing with these cases); Gabriel, *supra* note 63, at 1265 (enunciating the Court's two-part test).

<sup>65</sup> *Strickland*, 466 U.S. at 687.

As to the first prong of the test, the Court recognized that “[t]he purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding.”<sup>66</sup> As to its second prong, the Court reasoned that “[e]ven if a defendant shows that particular errors of counsel were unreasonable, . . . the defendant must show that they actually had an adverse effect on the defense.”<sup>67</sup> This requires that “[t]he defendant . . . show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”<sup>68</sup> Ultimately, “[u]nless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.”<sup>69</sup>

The Court then proceeded to apply its newly announced test.<sup>70</sup> First, the Court found that Washington’s counsel had not performed ineffectively.<sup>71</sup> The Court concluded that the decisions made at the sentencing phase of the trial were not unreasonable under the circumstances<sup>72</sup> and found that “nothing in the record indicates . . . that counsel’s sense of hopelessness distorted his professional judgment.”<sup>73</sup> Also, the Court reasoned that “[c]ounsel’s strategy choice was well within the range of professionally reasonable judgments, and the decision not to seek more character or psychological evidence than was already in

<sup>66</sup> *Id.* at 691–92.

<sup>67</sup> *Id.* at 693.

<sup>68</sup> *Id.* at 694.

<sup>69</sup> *Id.* at 687.

<sup>70</sup> See *id.* at 698 (applying new standard); see also Fong, *supra* note 64, at 470 (explaining application of standard set forth in *Strickland*); see generally Gabriel, *supra* note 63, at 1266 (describing the Court’s application of its new rule to the case at hand).

<sup>71</sup> See *Strickland*, 466 U.S. at 698 (finding conduct of counsel reasonable); see also David J. Gross, *Supreme Court Review: Sixth Amendment – Defendant’s Dual Burden in Claims of Ineffective Assistance of Counsel: Strickland v. Washington*, 75 J. CRIM. L. & CRIMINOLOGY 755, 765 (1984) (describing Court’s holding that “counsel’s conduct was reasonable”). See generally James W. Hitzeman, Note, *Effective Assistance of Counsel: Strickland and the Illinois Death Penalty Statute*, 1987 U. ILL. L. REV. 131, 140 (1987) (describing the first prong of the test announced in *Strickland*).

<sup>72</sup> See *Strickland*, 466 U.S. at 672–73 and 698–99 (examining attorney’s conduct, including the choice not to request a pre-sentence report, the choice not to present witnesses on Washington’s behalf, and the choice not to call Washington himself to the stand); see also Gross, *supra* note 71, at 765 (describing conduct of attorney in case to show that it was not unreasonable). See generally Hitzeman, *supra* note 71, at 140 (noting that defendant must show errors “so serious that counsel did not perform as the ‘counsel’ which the Sixth amendment guarantees”).

<sup>73</sup> *Strickland*, 466 U.S. at 699.

hand was likewise reasonable.”<sup>74</sup> The Court further reasoned that on the facts presented, even had ineffectiveness been shown, there was no basis to conclude that counsel’s assistance had resulted in prejudice.<sup>75</sup> Specifically, the Court stated:

With respect to the prejudice component, the lack of merit of respondent’s claim is even more stark. The evidence that respondent says his trial counsel should have offered at the sentencing hearing would barely have altered the sentencing profile presented to the sentencing judge. . . . Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed. Indeed, admission of the evidence respondent now offers might even have been harmful to his case: his “rap sheet” would probably have been admitted into evidence, and the psychological reports would have directly contradicted respondent’s claim that the mitigating circumstance of extreme emotional disturbance applied to his case.<sup>76</sup>

For those reasons, the Court reversed and denied Washington’s claim for a writ of habeas corpus relief.<sup>77</sup> *Strickland* thus established a uniform framework for addressing post-conviction ineffective assistance of counsel claims for relief.

<sup>74</sup> *Id.* Specifically, the Court noted:

The trial judge’s views on the importance of owning up to one’s crimes were well known to counsel. The aggravating circumstances were utterly overwhelming. Trial counsel could reasonably surmise from his conversations with respondent that character and psychological evidence would be of little help. . . . Restricting testimony on respondent’s character to what had come in at the plea colloquy ensured that contrary character and psychological evidence and respondent’s criminal history, which counsel had successfully moved to exclude, would not come in. On these facts, there can be little question, even without application of the presumption of adequate performance, that trial counsel’s defense, though unsuccessful, was the result of reasonable professional judgment.

*Id.*

<sup>75</sup> See *Strickland*, 466 U.S. at 698–99 (stating lack of basis for finding of prejudice); see also Gross, *supra* note 71, at 765 (considering standard for sufficient prejudice). See generally Hitzeman, *supra* note 71, at 140 (explaining that in order to establish necessary level of prejudice, the defendant must show that he or she was deprived of a fair trial as result of counsel’s conduct).

<sup>76</sup> *Strickland*, 466 U.S. at 699–700.

<sup>77</sup> See *Strickland*, 466 U.S. at 701 (holding that the District Court properly declined to issue the writ of habeas corpus); see also *Wiggins v. Smith*, 539 U.S. 510, 519 (2003) (detailing the proper standard for issuance of a writ of habeas corpus). See generally *Woodford v. Visciotti*, 537 U.S. 19, 21 (2002) (indicating the proper standard of review for habeas corpus relief).

## B. *The Exceptions to the Strickland Rule*

The Court has since recognized a limited number of exceptions to the rule announced in *Strickland*. *Holloway v. Arkansas*,<sup>78</sup> *Cuyler v. Sullivan*,<sup>79</sup> and *Wood v. Georgia*<sup>80</sup> are the principle decisions establishing these exceptions.

### 1. *Holloway v. Arkansas*

In *Holloway v. Arkansas*,<sup>81</sup> three men were arrested and charged with one count of robbery and two counts of rape, stemming from occurrences at a Little Rock restaurant.<sup>82</sup> In June 1975, the three men entered the restaurant in the early morning hours, robbed it at gunpoint and raped two of the female employees—one of them multiple times.<sup>83</sup> After their arrest, a single public defender was assigned by the court to represent all three defendants.<sup>84</sup> Following not guilty pleas at the arraignment, a consolidated trial was set for all three defendants.<sup>85</sup> The public defender, in order to avoid a potential conflict of interest, moved for appointment of separate counsel “because ‘the defendants [had] stated to him that there is a

<sup>78</sup> 435 U.S. 475, 490-91 (1978) (establishing that requests for appointment of separate counsel based on representations regarding conflicts of interests should be granted).

<sup>79</sup> 446 U.S. 335, 353 (1980) (holding that lawyers forced to represent codefendants whose interests conflict cannot provide adequate legal assistance).

<sup>80</sup> 450 U.S. 261, 273-74 (1981) (indicating that it is inherently wrong for an attorney who represents an employee to accept a promise to pay from one whose criminal liability may turn on the employee's testimony).

<sup>81</sup> 435 U.S. at 490-91 (asserting that assistance of counsel as guaranteed by the Sixth Amendment should not be impaired by court orders requiring one lawyer to simultaneously represent conflicting interests).

<sup>82</sup> See *Holloway v. Arkansas*, 435 U.S. at 477 (detailing the outcome of the criminal trial); see also *Holloway v. State*, 539 S.W.2d 435, 436 (Ark. 1976) (indicating the facts leading to conviction). See generally *Holloway v. Lockhart*, 754 F.2d 252, 253 (8th Cir. 1985) (noting the facts of the underlying action).

<sup>83</sup> See *Holloway v. Arkansas*, 435 U.S. at 477 (indicating the details of the criminal act); see also *Holloway v. State*, 539 S.W.2d at 436 (noting the details of the offense). See generally *Lockhart*, 754 F.2d at 253 (detailing the facts leading to conviction).

<sup>84</sup> See *Holloway v. Arkansas*, 435 U.S. at 477 (noting the assignment of counsel); see also *Holloway v. State*, 539 S.W.2d at 436 (indicating the assignment of counsel). See generally *Lockhart*, 754 F.2d at 253 (detailing the assignment of counsel).

<sup>85</sup> See *Holloway v. Arkansas*, 435 U.S. at 477 (detailing the procedural posture of the matter); see also *Holloway v. State*, 539 S.W.2d at 436 (noting the use of a consolidated trial). See generally *Lockhart*, 754 F.2d at 253 (indicating the facts leading to conviction).



possibility of a conflict of interest in each of their cases.”<sup>86</sup> This motion to appoint separate counsel was denied.<sup>87</sup>

Following this denial, and prior to trial, one of the defendants successfully moved to allow the introduction of a statement he made to officers at the time of his arrest in which he denied participation in the rapes.<sup>88</sup> On the day set for trial, before a jury had been selected and empanelled, defense counsel again requested a severance. This time, counsel moved “on the grounds that one or two of the defendants may testify and . . . I will not be able to cross-examine them because I have received confidential information from them.”<sup>89</sup> Again, the motion was denied.<sup>90</sup>

After the prosecution presented its direct case, the court was notified that the three defendants would each take the stand against the advice of defense counsel.<sup>91</sup> For a third time, counsel raised an objection to his continued concurrent representation of all three defendants.<sup>92</sup> The trial judge stated: “That’s all right; let them testify. There is no conflict of interest,” and denied the objection.<sup>93</sup> All three defendants were subsequently convicted by the jury on all counts.<sup>94</sup>

<sup>86</sup> *Holloway v. Arkansas*, 435 U.S. at 477.

<sup>87</sup> See *Holloway v. Arkansas*, 435 U.S. at 477 (reviewing denial of motions to appoint separate counsel); see also *Holloway v. State*, 539 S.W.2d at 437 (indicating the denial of request to appoint separate counsel). See generally *Lockhart*, 754 F.2d at 253 (noting the denial of appointment of separate counsel).

<sup>88</sup> See *Holloway v. Arkansas*, 435 U.S. at 477–78 (determining admissibility of redacted version of confession after conducting evidentiary hearing pursuant to *Jackson v. Denno*, 378 U.S. 368 (1964)); see also *Holloway v. State*, 539 S.W.2d at 437 (noting the admission of the statement). See generally *Lockhart*, 754 F.2d at 253 (detailing the admission of the statement).

<sup>89</sup> *Holloway v. Arkansas*, 435 U.S. at 478.

<sup>90</sup> See *Holloway v. Arkansas*, 435 U.S. at 478 (noting the denial of the motion); see also *Holloway v. State*, 539 S.W.2d at 436 (indicating the denial of the motion). See generally *Lockhart*, 754 F.2d at 253 (detailing the denial of the motion).

<sup>91</sup> See *Holloway v. Arkansas*, 435 U.S. at 478 (detailing the defendants’ testimony against advice of counsel); see also *Holloway v. State*, 539 S.W.2d at 436 (noting the defendants’ testimony). See generally *Lockhart*, 754 F.2d at 253 (indicating the defendants’ testimony).

<sup>92</sup> Counsel objected by stating: “Now, since I have been appointed, I had previously filed a motion asking the Court to appoint a separate attorney for each defendant because of a possible conflict of interest. This conflict will probably be now coming up since each one of them wants to testify.” *Holloway v. Arkansas*, 435 U.S. at 478.

<sup>93</sup> The following exchange then took place:

[MR. HALL]: I am in a position now where I am more or less muzzled as to any cross-examination.

THE COURT: You have no right to cross-examine your own witness.

MR. HALL: Or to examine them.

THE COURT: You have a right to examine them, but have no right to cross-examine them. The prosecuting attorney does that.

On appeal to the Arkansas Supreme Court, the defendants alleged that the trial court's denial of counsel's motions to appoint separate counsel violated the defendants' Sixth Amendment rights to effective assistance of counsel.<sup>95</sup> However, upon examining the record, the State Supreme Court affirmed all three convictions finding that no actual conflict had occurred since the testimony given by the codefendants had not incriminated any of the others.<sup>96</sup>

The United States Supreme Court granted defendants' petition for certiorari to consider whether requiring a single attorney to represent all three men, notwithstanding a timely objection by defense counsel, violated their right to effective assistance of counsel. The Court found that "trial counsel, by the pretrial motions . . . and by his accompanying representations . . . focused explicitly on the probable risk of a conflict of interests."<sup>97</sup> Despite this, "[t]he judge . . . failed either to appoint separate counsel or to take adequate steps to ascertain whether the risk

MR. HALL: If one [defendant] takes the stand, somebody needs to protect the other two's interest while that one is testifying, and I can't do that since I have talked to each one individually.

THE COURT: Well, you have talked to them, I assume, individually and collectively, too. They all say they want to testify. I think it's perfectly alright [*sic*] for them to testify if they want to, or not. It's their business.

...

[THE COURT]: Each defendant said he wants to testify, and there will be no cross-examination of these witnesses, just a direct examination by you.

MR. HALL: Your Honor, I can't even put them on direct examination because if I ask them—

THE COURT: (Interposing) You can just put them on the stand and tell the Court that you have advised them of their rights and they want to testify; then you tell the man to go ahead and relate what he wants to. That's all you need to do.

[DEFENDANT HOLLOWAY]: Your Honor, are we allowed to make an objection?

THE COURT: No, sir. Your counsel will take care of any objections.

MR. HALL: Your Honor, that is what I am trying to say. I can't cross-examine them.

THE COURT: You proceed like I tell you to, Mr. Hall. You have no right to cross-examine your own witnesses anyhow.

*Holloway v. Arkansas*, 435 U.S. at 479–80.

<sup>94</sup> See *Holloway v. Arkansas*, 435 U.S. at 481 (noting jury's return of guilty verdicts on all counts); see also *Holloway v. State*, 539 S.W.2d at 436 (noting the convictions). See generally *Lockhart*, 754 F.2d at 253 (detailing the convictions).

<sup>95</sup> See *Holloway v. Arkansas*, 435 U.S. at 481 (indicating the basis for appeal); see also *Wiggins v. Smith*, 539 U.S. 510, 519 (2003) (detailing this potential basis for appeal). See generally *Woodford v. Visciotti*, 537 U.S. 19 (2002) (noting this avenue for appeal).

<sup>96</sup> See *Holloway v. Arkansas*, 435 U.S. at 481 (indicating the lower court's position); see also *Holloway v. State*, 539 S.W.2d at 436 (affirming the convictions because no actual conflict occurred). See generally *Lockhart*, 754 F.2d at 253 (detailing the prior position of the lower court).

<sup>97</sup> *Holloway v. Arkansas*, 435 U.S. at 484.

was too remote to warrant separate counsel.”<sup>98</sup> In reversing, the Court held “that the failure, in the face of the representations made by counsel weeks before trial and again before the jury was empanelled, deprived petitioners of the guarantee of ‘assistance of counsel.’”<sup>99</sup> Further, the Court noted that, “[t]he mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate’s conflicting obligations have effectively sealed his lips on crucial matters.”<sup>100</sup>

The *Holloway* rationale was grounded in the Court’s 1942 holding in *Glasser v. United States*.<sup>101</sup> There, two of five co-defendants who were initially represented by separate counsel became represented by the same attorney.<sup>102</sup> In *Glasser*, the conflicted attorney was appointed by the District Court judge to jointly represent the two co-defendants following the dismissal of one party’s counsel despite his timely objection.<sup>103</sup> As a result, counsel’s ability to cross examine witnesses and make objections was restricted.<sup>104</sup> Although the *Glasser* Court found that joint representation of co-defendants was not a *per se* Sixth Amendment violation,<sup>105</sup> it noted that “[o]f equal importance

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 490.

<sup>101</sup> 315 U.S. 60 (1942) (reversing conviction of one petitioner because appointment of his attorney to represent second petitioner, co-defendant, lead to ineffective assistance of counsel); see *Holloway v. Arkansas*, 435 U.S. at 481 (noting *Glasser*’s holding that requiring an attorney to represent two co-defendants with conflicting interests violated one defendant’s Sixth Amendment right to effective assistance of counsel). See generally Norman K. Thompson & Joshua E. Kastenber, *The Attorney-Client Privilege: Practical Military Applications of a Professional Core Value*, 49 A.F. L. REV. 1, 36 (2000) (noting the Supreme Court’s holding that assistance of counsel guaranteed by the Sixth Amendment “contemplates that such assistance be untrammelled and unimpaired”).

<sup>102</sup> See *Holloway v. Arkansas*, 435 U.S. at 481–82 (discussing facts of *Glasser*); see also *Glasser*, 315 U.S. at 67 (reviewing discussion at trial which lead to defendants being represented by same attorney). See generally Michael E. Lubowitz, Note, *The Right to Counsel of Choice After Wheat v. United States: Whose Choice is it?*, 39 AM. U. L. REV. 437, 450 (1990) (noting defendant’s right to conflict-free representation).

<sup>103</sup> See *Holloway v. Arkansas*, 435 U.S. at 482 (stating attorney was dismissed because of client dissatisfaction); see also *Glasser*, 315 U.S. at 68 (noting attorney told court client no longer wanted to be represented by him). See generally Lubowitz, *supra* note 102, at 450 (discussing history of right to counsel).

<sup>104</sup> See *Holloway v. Arkansas*, 435 U.S. at 482 (stating attorney failed to cross examine government witness who linked *Glasser* with conspiracy); see also *Glasser*, 315 U.S. at 73 (stating a thorough cross examination would have been advantageous). See generally Lubowitz, *supra* note 102, at 550 (discussing factors considered in determining conflict).

<sup>105</sup> See *Holloway v. Arkansas*, 435 U.S. at 482 (noting court declined to inquire into whether prejudice was harmless); see also *Glasser*, 315 U.S. at 76 (stating calculating precise degree of prejudice is unnecessary). See generally, Lubowitz, *supra* note 102, at

with the duty of the court to see that an accused has the assistance of counsel is its duty to refrain from . . . *insisting . . . that counsel undertake to concurrently represent interests which might diverge . . . when the possibility of that divergence is brought home to the court.*"<sup>106</sup> In concluding its analysis, the *Holloway* Court stated that *Glasser* is to be read "as holding that whenever a trial court improperly requires joint representation over timely objection reversal is automatic."<sup>107</sup> Thus, *Holloway*, through *Glasser*, carves out an exception to *Strickland* where a court requires multiple concurrent representation over an attorney's timely and proper objection by making the reversal of the resulting conviction mandatory.<sup>108</sup>

## 2. Cuyler v. Sullivan

In *Cuyler v. Sullivan*,<sup>109</sup> John Sullivan and two others were charged with the first degree murders of a local labor official and his companion.<sup>110</sup> In the proceedings that followed, all three defendants were represented by two privately retained attorneys.<sup>111</sup> No objection was raised to the multiple representation at any time by any of the defendants or their

550 (noting trial judge does not have right to force an attorney to represent divergent interests).

<sup>106</sup> *Holloway v. Arkansas*, 435 U.S. at 485 (quoting *Glasser*, 315 U.S. at 76).

<sup>107</sup> *Id.* at 488 (interpreting holding of *Glasser*).

<sup>108</sup> *See id.* at 488 (holding that whenever a trial court improperly requires joint representation over timely objection, reversal is automatic); *see also Glasser*, 315 U.S. at 70 (declaring trial court's refusal to assign counsel constitutes a violation of due process under Fourteenth Amendment); *cf. Mickens v. Taylor*, 535 U.S. 162, 166 (2002) (discussing facts of *Holloway*).

<sup>109</sup> 446 U.S. 335 (1980) (finding trial court was not required to inquire into sufficiency of multiple representation where no parties objected); *see also Commonwealth v. Sullivan*, "Sullivan" 286 A.2d 898, 899 (Pa. 1971) (stating officer of Local Union was charged with murder of two Union members). *See generally* Thompson & Kastenberg *supra*, note 101, at 36 (stating Cuyler stands for proposition that potential for conflicted counsel gives rise to a Sixth Amendment violation).

<sup>110</sup> *See Cuyler*, 446 U.S. at 337 (reviewing facts of case); *see also United States ex. rel Sullivan v. Cuyler*, "ex. rel Sullivan v. Cuyler" 593 F.2d 512, 515 (3d. Cir. 1979) (noting conviction of two counts of first degree murder); *Sullivan*, 286 A.2d at 899 (noting charges were based solely on circumstantial evidence).

<sup>111</sup> *See Cuyler*, 446 U.S. at 338 (stating although Sullivan had different representation for medical examiner's inquest, same two private attorneys represented him throughout other state court proceedings); *see also ex rel Sullivan*, 593 F.2d at 515 (noting two attorney's entered appearances on behalf of each of three defendants); *Commonwealth v. Sullivan*, "Commonwealth" 371 A.2d. 468, 483 (Pa. 1977) (stating though tried separately, same attorneys were used by all three defendants).

attorneys.<sup>112</sup> Sullivan, the first to be tried, was convicted as charged and sentenced to life in prison.<sup>113</sup> In his trial, the evidence presented by the state was largely circumstantial, adduced chiefly from the testimony of a janitor employed at the premises where the homicides took place.<sup>114</sup> Sullivan never took the stand, as the defense chose not to present a case.<sup>115</sup> At the subsequent separate trials of Sullivan's co-defendants, each was acquitted.<sup>116</sup> On direct appeal, the Pennsylvania Supreme Court affirmed Sullivan's conviction.<sup>117</sup>

Sullivan then sought collateral relief pursuant to Pennsylvania's Post Conviction Hearing Act,<sup>118</sup> claiming, *inter alia*, ineffective assistance of counsel.<sup>119</sup> In the hearings that

<sup>112</sup> See *Cuyler*, 446 U.S. at 337–38 (noting Sullivan could not afford his own attorney); *ex rel Sullivan*, 593 F.2d at 515 (noting the Supreme Court of Pennsylvania consolidated three different appeals and ruled against ineffective assistance claim); see also *Commonwealth*, 371 A.2d at 483 (finding no ineffective assistance).

<sup>113</sup> See *Cuyler*, 446 U.S. at 338 (recognizing evidence was completely circumstantial, existing mainly of one witness's testimony); *ex rel Sullivan*, 593 F.2d at 515 (stating trial lasted two weeks ending in jury conviction for life imprisonment); see also *Commonwealth*, 371 A.2d at 479 (stating jury found him guilty of two counts of first degree murder).

<sup>114</sup> See *Cuyler*, 446 U.S. at 338 (restating facts of case); *ex rel Sullivan*, 593 F.2d at 516 (reviewing janitor's testimony that he heard "sounds like firecrackers"); *Commonwealth*, 286 A.2d at 899–900 (summarizing testimony of janitor).

<sup>115</sup> See *Cuyler*, 446 U.S. at 338 (stating one attorney later claimed he encouraged Sullivan to take stand); *ex rel Sullivan*, 593 F.2d at 517 (stating Sullivan did not take stand and no evidence was presented); *Sullivan*, 286 A.2d at 899–900 (stating Sullivan did not take stand). See generally *Commonwealth*, 371 A.2d at 483 (discussing reasons for claiming ineffective assistance).

<sup>116</sup> See *Cuyler*, 446 U.S. at 338 (stating co-defendants were acquitted); *Sullivan*, 286 A.2d at 900 n.2 (stating that DiPasquale was acquitted when Commonwealth could not produce its main witness and that Carchidi was also acquitted). See generally *Commonwealth*, 371 A.2d at 483 (explaining reasons why no ineffective assistance was proven).

<sup>117</sup> See *Cuyler*, 446 U.S. at 338 (noting conviction was affirmed by an equally divided vote); *Sullivan*, 286 A.2d at 899 (stating court was equally divided); see also *Commonwealth*, 371 A.2d at 483 (finding in this second appeal defendant did not prove dual representation in true sense of word).

<sup>118</sup> See PA. STAT. ANN., tit. 19, § 1180-1 *et seq.* (Purdon Supp. 1979–1980); see also *Cuyler*, 446 U.S. at 338 (stating collateral relief was subsequently sought); *Commonwealth*, 371 A.2d at 483 (noting appellant's first claim for collateral relief was "that he was denied effective assistance of trial counsel because his attorneys also represented two co-defendants who were tried separately for the crime").

<sup>119</sup> See *Cuyler*, 446 U.S. at 338. Post conviction relief was sought on five grounds, including one for ineffective assistance of counsel. *Id.* at 339. The court reviewing the claim for collateral relief pursuant to the Pennsylvania Post Conviction Hearing Act stated that to determine ineffective assistance based on dual representation, it needed to establish: 1) there was dual representation, and 2) as a result, a conflict of interest resulted. *Commonwealth*, 371 A.2d at 483. Also related to the ineffective assistance claim is the attorney-client privilege, and the fifth amendment right against self incrimination—applicable here because Sullivan was being charged for the same crime as other two defendants. See Thompson & Kastenberg, *supra* note 101, at 36.

followed, testimony was given by several individuals including Sullivan and the two trial attorneys.<sup>120</sup> In substance, the trial attorneys testified to differing accounts of their roles at the trial.<sup>121</sup> One of the attorneys maintained that the two acted as co-counsel for each co-defendant, while the other claimed that one acted as lead counsel for Sullivan and the other acted in that capacity for each of the other co-defendants.<sup>122</sup> Sullivan testified that he relied on the advice given by both the attorneys not to testify.<sup>123</sup> Relief was ultimately denied.<sup>124</sup> In that denial, the court found no conflict of interest, holding that each attorney maintained separate roles for Sullivan and his codefendants. Furthermore, the court found that counsel had fully informed Sullivan about the consequences of the decision not to take the stand.<sup>125</sup> Subsequently, the Pennsylvania Supreme Court affirmed the denial of all direct and collateral relief.<sup>126</sup>

<sup>120</sup> See *Cuyler*, 446 U.S. at 338 (stating differing opinions of two attorneys); *Commonwealth*, 371 A.2d at 475 (stating that to determine validity of ineffective assistance claim, it "often will be necessary to call counsel whose assistance is challenged as ineffective so he may explain the decisions he made in the course of the appeal"). See generally Jeffrey Levinson, Note, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel* 38 AM. CRIM. L. REV. 147, 147 (2001) (discussing United States renewed concern with rights of individuals convicted of crimes).

<sup>121</sup> See *Cuyler*, 446 U.S. at 338–39 (stating two attorneys gave conflicting accounts); *Commonwealth*, 371 A.2d at 475 (noting the PCHA court found "considerable confusion between counsel concerning the appeal due to Judge DiBona's appointment to the bench and Mr. Peruto's heavy trial schedule"). See generally Levinson, *supra* note 120, at 147–48 (discussing specific case of death row inmate who received inadequate assistance of counsel).

<sup>122</sup> See *Cuyler*, 446 U.S. at 338–39 (stating Peruto recalled he had been chief counsel for Carchidi and DePasquale, but only assisted DiBona in Sullivan's trial); *Commonwealth*, 371 A.2d at 483 (stating DiBona was primarily devoted to Sullivan, and played very minor role in other defendants' trials). See generally Levinson, *supra* note 120, at 151 (recognizing Sixth Amendment and Due Process Clause as Constitutional sources for right to effective assistance).

<sup>123</sup> See *Cuyler*, 446 U.S. at 339 (noting other evidence suggests Sullivan's decision not to take stand was for fear of cross-examination revealing an extramarital affair); *Commonwealth*, 371 A.2d at 483 (reviewing PCHA record and ultimately holding defendant's claims insufficient). See generally Levinson, *supra* note 120, at 149 (stating ineffective assistance is primarily a poverty problem).

<sup>124</sup> See *Cuyler*, 446 U.S. at 339 (noting that after court allowed a second direct appeal because counsel had acted ineffectively in Sullivan's first direct appeal, relief sought was denied); *Commonwealth*, 371 A.2d at 483 (finding course of conduct by prior attorney could not be deemed unreasonable). See generally Levinson, *supra* note 120, at 169 (reiterating idea that failure to provide effective assistance could "constitute an independent due process violation, with or without prejudice to the defendant")

<sup>125</sup> See *Cuyler*, 446 U.S. at 339 (stating there was no dual representation in true sense of term); *Commonwealth*, 371 A.2d at 483 (stating Sullivan was informed). See generally Levinson, *supra* note 120, at 169 (discussing analysis used in determining ineffective assistance).

<sup>126</sup> See *Cuyler*, 446 U.S. at 339 (finding no basis for Sullivan's claim that he had been denied effective counsel at trial); see also *United States ex. rel. Sullivan v. Cuyler*, 593

After these unsuccessful claims for post-conviction relief in the Pennsylvania State Courts,<sup>127</sup> Sullivan filed for federal habeas corpus relief in the Eastern District of Pennsylvania.<sup>128</sup> That petition was rejected for the same reason given in state court, on a finding that Sullivan was not subjected to multiple representation.<sup>129</sup> Additionally, the District Court held that even if multiple representation was assumed to have occurred, based upon the findings of fact at the state post-conviction hearings, it did not constitute a conflict of interest.<sup>130</sup>

The United States Court of Appeals for the Third Circuit reversed.<sup>131</sup> Initially, the court noted that the representation Sullivan and his co-defendants received was, as a matter of law, multiple and concurrent.<sup>132</sup> But, the court continued,

F.2d 512, 521 (3d. Cir. 1979) (explaining view that reversal was warranted in that there was possibility of prejudice or conflict of interest); *Commonwealth*, 371 A.2d at 483 (claiming there was no dual representation).

<sup>127</sup> See *Cuyler*, 446 U.S. at 338–39 (stating that collateral relief was denied); see also *Commonwealth*, 371 A.2d at 483 (denying post conviction relief after finding evidence presented at trial sufficient to sustain conviction of murder in first degree); see generally Maureen R. Green, Comment, *A Coherent Approach to Ineffective Assistance of Counsel Claims*, 71 CALIF. L. REV. 1516, 1530 (1983) (discussing why the Court denied post-conviction relief on conflict of interest claim).

<sup>128</sup> See *Cuyler*, 446 U.S. at 339 (stating Sullivan sought habeas corpus after having exhausted his state court remedies); see generally 42 PA. CODE § 741 (2003) (explaining when Pennsylvania courts have power to issue writs of habeas corpus).

<sup>129</sup> See *Cuyler*, 446 U.S. at 339 (finding no multiple representation); see also Nathan M. Crystal, *Ethics 2000 and Beyond: Reform or Professional Responsibility as Usual?: False Testimony by Criminal Defendants: Still Unanswered Ethical and Constitutional Questions*, 2003 U. ILL. L. REV. 1529, 1563–64 (2003) (stating that *Cuyler v. Sullivan* does not suggest that all multiple representations result in conflict rendering the representation unconstitutional); Helane L. Morrison, Note, *Maxwell v. Superior Court: Buying Counsel by Choice or Ineffective Assistance?*, 71 CALIF. L. REV. 1348, 1366–67 (1983) (stating that *Sullivan v. Cuyler* offers definition for “actual and potential conflicts” that shows how terms are often used in multiple representation cases).

<sup>130</sup> See *Cuyler*, 446 U.S. at 340 (claiming “evidence adduced in the state postconviction proceeding revealed no conflict of interest”); see also Robert Burrell, USALSA Report, *The Advocates for Military Defense Counsel: Effective Assistance of Counsel: Conflicts of Interests and Pretrial Duty to Investigate*, 1986 ARMY LAW. 39, 39 (1986) (showing that multiple representation is not “per se violative” of sixth amendment and that there must be some evidence of active representation of conflicting interests); John Capone, *Supreme Court Review: Facilitating Fairness: The Judge's Role in the Sixth Amendment Right to Effective Counsel*, 93 J. CRIM. L. & CRIMINOLOGY 881, 885 (2003) (discussing *Cuyler v. Sullivan* and what is necessary to demonstrate violation of Sixth Amendment).

<sup>131</sup> See *Cuyler*, 446 U.S. at 340 (reversing Court of Appeals); see also Edward L. Wilkinson, *Conflicts of Interest in Texas Criminal Cases*, 54 BAYLOR L. REV. 171, 206–07 (2002) (explaining how Court ruled); Lubowitz, *supra* note 102, at 451–52 (discussing rationale behind Supreme Court holding).

<sup>132</sup> See *Cuyler*, 446 U.S. at 340 (establishing that same two lawyers represented all three defendants); see also G. Paul McCormick, Feature, *Supreme Court Review*, 26 CHAMPION 26, 28–29 (2002) (discussing how three defendants in *Cuyler v. Sullivan* were represented by same counsel, yet tried separately). See generally Joel Skinner, Note and

[a] finding of dual representation does not, without more, require reversal. . . . [Representation] of codefendants by the same attorney is not tantamount to the denial of effective assistance of counsel guaranteed by the sixth amendment. There must be some showing of a possible conflict of interest or prejudice, *however remote*, before a reviewing court will find the dual representation constitutionally defective.<sup>133</sup>

The court was also concerned that “it is often difficult or impossible to determine [after the fact] whether a defendant has been prejudiced by dual representation.”<sup>134</sup> Thus, “a state conviction cannot stand when an examination of the record reveals that representation by independent counsel ‘might have made a difference in defense strategy.’”<sup>135</sup> Having concluded from an examination of the record that it was possible that representation by independent counsel would have produced a different strategy,<sup>136</sup> the Third Circuit held that reversal of conviction is mandatory when the criminal defendant makes “some showing of a possible conflict of interest or prejudice, however remote.”<sup>137</sup>

The Supreme Court reversed. The Court distinguished the circumstances in *Sullivan* from those in *Holloway* and created another hurdle to sustaining a claim of ineffective assistance of counsel. The Court noted that:

*Holloway* requires state trial courts to investigate timely objections to multiple representation. But nothing in our precedents suggests that

Comment, *Effective Assistance of Counsel in Illinois: “The Guiding Hand of Counsel”?*, 59 CHL.-KENT L. REV. 901, 922 (1983) (noting that Court has held that no distinction should be drawn between retained and appointed counsel in determining ineffectiveness).

<sup>133</sup> United States ex rel. Sullivan v. Cuyler, 593 F.2d 512, 519 (3d Cir. 1979) (quotations omitted).

<sup>134</sup> *Id.* at 520.

<sup>135</sup> *Id.* at 520–21 (quoting United States ex rel. Horta v. DeYoung, 523 F.2d 807, 809 (3d Cir. 1975) (per curium)).

<sup>136</sup> See *id.* at 520 (indicating that dual-representation curtails ability for attorney to fully represent his client in such areas as entering into plea bargain agreement where testimony would be offered in exchange for reduced penalty, offering evidence harmful to another party, or fighting introduction of evidence only harmful to one party); see also *Holloway v. Arkansas*, 435 U.S. 475, 490–91 (1978) (recognizing that “to assess the impact of a conflicts of interests on the attorney’s options, tactics and decisions in plea negotiations would be virtually impossible”). See generally *Glasser v. United States*, 315 U.S. 60, 75–76 (1942) (acknowledging the difficulty in determining precise degree of prejudice sustained by defendant as result of joint representation).

<sup>137</sup> *United States ex rel. Sullivan v. Cuyler*, 593 F.2d at 519 (quoting *Walker v. United States*, 422 F.2d 374, 375 (3d Cir. 1970) (per curium) (finding the possibility of prejudice enough to meet the threshold requirement of reversal in the Third Circuit)).



the Sixth Amendment requires state courts themselves to initiate inquiries into the propriety of multiple representation in every case. Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial. Absent special circumstances, therefore, trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist. . . . Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry.<sup>138</sup>

The Court concluded by stating, “[w]e hold that the possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer’s performance.”<sup>139</sup> Lower courts have come to understand *Sullivan* as standing for the principle that a trial court has no duty to conduct an inquiry into a lawyer’s conflict of interest unless it knows, or reasonably should know, that one exists. Thus an unchallenged, unknown conflict of interest will not require reversal of a conviction unless the defendant can show that an actual conflict of interest adversely affected his lawyer’s performance.<sup>140</sup>

### 3. Wood v. Georgia

*Wood v. Georgia*<sup>141</sup> arose out of the probation revocation hearing of two men and one woman convicted of distributing obscene materials.<sup>142</sup> Two of the individuals were placed on

<sup>138</sup> Cuyler v. Sullivan, 446 U.S. 335, 346 (1980).

<sup>139</sup> *Id.* at 350.

<sup>140</sup> See generally Bruce A. Green, “Through a Glass Darkly”: How the Court Sees Motions to Disqualify Criminal Defense Lawyers, 89 COLUM. L. REV. 1201, 1231 n.129 (1989) (suggesting that hearings dealing with potential conflicts of interest be conducted unobtrusively); Darrin Hurwitz & Sarah K. Eddy, *Thirty-First Annual Review of Criminal Procedure: III. Trial: Right to Counsel*, 90 GEO. L.J. 1579, 1609 (2002) (discussing trial court’s limited duty in conducting inquiry into whether conflict of interest exists); Brent Coverdale, Comment, Cuyler v. Strickland: *The Proper Standard for Self-Interested Conflicts of Interest*, 47 KAN. L. REV. 209, 223 (1998) (discussing limited time within which trial court must initiate an inquiry concerning conflict of interest).

<sup>141</sup> 450 U.S. 261 (1981).

<sup>142</sup> See *Wood v. Georgia*, 450 U.S. at 264 (indicating that probation violation hearing occurred Jan. 26, 1979); see also *Wood v. State*, 258 S.E.2d 171, 171 (1979), *vacated* by 450 U.S. 261 (1981) (discussing probation orders); Project, *Fifteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1984-1985: III. Trial*, 74 GEO. L.J. 751, 753 (1986) (explaining right to counsel at final probation revocation hearings).

probation following convictions for working at a local Atlanta adult theatre. The third was placed on probation pursuant to a conviction for selling pornographic magazines to an undercover police officer.<sup>143</sup> All three were employed by the same individual.<sup>144</sup> The employer retained counsel on their behalf and paid all their legal expenses.<sup>145</sup>

As a condition of probation, separate fines of \$5000 were imposed upon each of the defendants to be paid in monthly installments of \$500.<sup>146</sup> The fines, however, went unpaid,<sup>147</sup> and, as a result, probation violations were filed.<sup>148</sup> At the hearing, evidence was offered to establish that the defendants were incapable of paying the fines levied,<sup>149</sup> and that their employer had also reneged on a promise to pay.<sup>150</sup> The court ordered the

<sup>143</sup> See *Wood v. Georgia*, 450 U.S. at 263 (alleging each had violated Ga. Code § 26-2101); see also *Wood v. State*, 258 S.E.2d at 171 (stating facts leading up to alleged violation); Green, *supra* note 140, at 1225 n.109 (explaining facts of case).

<sup>144</sup> See *Wood v. Georgia*, 450 U.S. at 264 n.3 (stating record suggests common ownership of Plaza Theatre, where first two were arrested, and Plaza Adult Bookstore, where Wood was employed); see also John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 582 n. 316 (1994) (referring to common employer of arrested men); Green, *supra* note 140, at 1225 n.109 (claiming defendants were employees of same employer).

<sup>145</sup> See *Wood v. Georgia*, 450 U.S. at 266 n.8 (describing that lawyer conceded during oral argument that he had been paid by employer); see also Capone, *supra* note 130, at 886 (explaining it came to Court's attention that employer had paid attorney's fees); 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: Mountjoy v. Warden, New Hampshire State Prison*, 115 HARV. L. REV. 938, 942 n.40 (2002) (claiming defendants' employer paid lawyer's fees).

<sup>146</sup> See *Wood v. Georgia*, 450 U.S. at 263 (stating that trial court specified such terms of probation); see also *Wood v. State*, 258 S.E.2d at 171 (requiring appellants to pay \$500 per month each towards payment of their fines as condition of probation); Green, *supra* note 140, at 1225 n.109 (discussing fines which defendants were ordered to pay).

<sup>147</sup> See *Wood v. Georgia*, 450 U.S. 261, 263 (1981) (describing how none of petitioners had made requisite payments after three months); see also *Wood v. State*, 258 S.E.2d at 171 (noting defendants failure to make \$500 payment as directed); Green, *supra* note 140, at 1225 n.109 (stating defendants failed to make required payments).

<sup>148</sup> See *Wood v. Georgia*, 450 U.S. at 263-64 (explaining how county probation officers moved for revocation of their probations); see also *Wood v. State*, 258 S.E.2d at 171 (describing that each appellants' probation was revoked for failing to make payment); Capone, *supra* note 130, at 885-86 (discussing revocation of probation for failing to make mandatory monthly payments).

<sup>149</sup> See *Wood v. Georgia*, 450 U.S. at 264 (stating petitioners offered convincing evidence of inability to make payments from their earnings); see also *Wood v. State*, 258 S.E.2d at 171 (establishing that none of appellants had financial resources to make payments); Capone, *supra* note 130, at 885 (classifying defendants as "indigent").

<sup>150</sup> See *Wood v. Georgia*, 450 U.S. at 266-67 (discussing fees and fines employer had paid, and fact that he "chose to refuse payment of these fines"); see also Capone, *supra* note 130, at 886 (stating that "employer made a general promise to his employees that he would pay their fines, but in this situation, did not do so"); Nancy J. Moore, *Ethical Issues in Third-Party Payment: Beyond the Insurance Defense Paradigm*, 16 REV. LITIG. 586, 602

defendants to either pay the arrearages or serve their respective deferred sentences.<sup>151</sup> Thereafter, the defendants moved for an alteration of their probation conditions with respect to the repayment of their fines.<sup>152</sup> The court denied the motion and ordered them to jail.<sup>153</sup> This decision was affirmed by the Georgia Court of Appeals.<sup>154</sup>

The United States Supreme Court granted certiorari to consider whether the defendants' Fourteenth Amendment equal protection rights had been violated.<sup>155</sup> However, that issue was ultimately not addressed. The Court determined instead that a due process violation may have occurred, a condition which trumped the necessity to resolve the equal protection violation claim.<sup>156</sup> The Court was concerned that counsel for the three defendants may have been laboring under a conflict of interest by representing the interests of both the defendants and their employer.<sup>157</sup> Scrutinizing the trial record, the Court identified the following critical facts:

n.75 (1997) (explaining that defendants assumed their employer would pay their criminal fines).

<sup>151</sup> See *Wood v. Georgia*, 450 U.S. at 264 (noting that "the court decided to revoke these probations unless petitioners made up their arrearages within five days").

<sup>152</sup> See *id.* (stating that the defendants were unable to make up their arrears).

<sup>153</sup> See *id.* (denying the defendants' motion and ordering them to serve remaining jail sentences).

<sup>154</sup> See *id.* (stating that the Supreme Court granted certiorari only after the revocation decision was affirmed by the Georgia Court of Appeals).

<sup>155</sup> See *id.* (indicating that the Court took case to consider "whether it is constitutional under the Equal Protection Clause to imprison a probationer solely because of his inability to make installment payments on fines").

<sup>156</sup> See *id.* at 264–65 (stating that "[o]n closer inspection, however, the record reveals other facts that make this an inappropriate case in which to decide the constitutional question. Where, as here, a possible due process violation is apparent on the particular facts of a case, we are empowered to consider the due process issue."); see also *Mickens v. Taylor*, 535 U.S. 162, 172 (2002) (citing the *Wood* Court's explanation that it could not examine the Equal Protection claim because "on the record before us, we [could not] be sure whether counsel was influenced in his basic strategic decisions by the interests of the employer who hired him"). See generally Hadassah Reimer, *Legal Ethics: Stabbed in the Back, But no Adverse Effect*, *Mickens v. Taylor*, 3 WYO. L. REV. 329, 341 (2003) (noting that the Court could not analyze the Equal Protection claim because of the possible conflict of interest).

<sup>157</sup> See Wm. C. Turner Herbert, *Recent Development: Off the Beaten Path: An Analysis of the Supreme Court's Surprising Decision in Mickens v. Taylor*, 81 N.C. L. REV. 1268, 1274 (2003) (discussing how the case was remanded to determine whether the lawyer, acting as an agent of the employer, had created a conflict of interest by his representation of the defendants); see also Matthew S. Nichols, Case Note, *United States Court of Appeals for the Fourth Circuit: Mickens v. Taylor*, 13 WASH. & LEE CAP. DEF. J. 393, 399 (2001) (noting that the Supreme Court remanded the trial because "the possibility of a conflict of interest was 'sufficiently apparent' so as to require the trial court to determine whether a conflict of interest actually existed"). See generally, Green, *supra* note 140, at 1256 (noting that "[i]n cases in which the defendant's interests are

Petitioners have been represented since the time of their arrests by a single lawyer. The testimony of each petitioner at the probation revocation hearing makes it clear that none of them ever paid - or was expected to pay - the lawyer for his services. They understood that this legal assistance was provided to them by their employer. In fact, the transcript of this hearing reveals that legal representation was only one aspect of the assistance that was promised to petitioners if they should face legal trouble as a result of their employment. They were told that their employer also would pay any fines and post any necessary bonds, and these promises were kept for the most part. In this case itself, as petitioners' lawyer stated at oral argument, bonds were posted with funds he provided. In addition, when each of the petitioners was arrested a second time, he paid the resulting fines. All aspects of this arrangement were revealed to the court at the revocation hearing.<sup>158</sup>

The Court went on to note that the employer continued to pay the legal fees following the convictions but declined to pay the fines.<sup>159</sup> This led the Court to suspect that the employer may have been using the defendants to serve his own interest in order to create the equal protection claim as a test case.<sup>160</sup> The possibility of such a scenario called for an investigation into the potential conflict of interest.<sup>161</sup> The Court recognized that,

particularly weighty, it is less appropriate to require the defendant to bear the risk that the trial judge is incorrect in predicting that an actual conflict will emerge at trial").

<sup>158</sup> Wood v. Georgia, 450 U.S. at 266.

<sup>159</sup> See *id.* at 267 (noting that although the "employer chose to refuse payment of these fines . . . it paid other fines and paid the sums necessary to keep petitioners free on bond").

<sup>160</sup> See Wood v. Georgia, 450 U.S. at 267 (noting that the employer's refusal to pay these fines suggested the possibility that the employer was seeking its own interest, which was a resolution of the equal protection claim raised here); see also Reimer, *supra* note 156, at 341 (noting that the employer was essentially attempting to create a test case and was disregarding the best interests of the defendants). See generally Herbert, *supra* note 157, at 1274 (discussing how the court justified its remand order without first requiring an affirmative showing of adverse effect due to the precedent set forth in *Sullivan*).

<sup>161</sup> See Wood v. Georgia, 450 U.S. at 267-68. The Court stated:

Although we cannot be sure that the employer and petitioners' attorney were seeking to create a test case, there is a clear possibility of conflict of interest on these facts. Indications of this apparent conflict of interest may be found at various stages of the proceedings below. It was conceded at oral argument here that petitioners raised no protest about the size of the fines imposed at the time of sentencing. During the three months leading up to the probation revocation hearing they failed to pay even small amounts toward their fines to indicate their good faith. In fact, throughout this period, petitioners apparently remained under the impression that—as promised—the fines would be paid by the employer. Even at the revocation hearing itself, petitioners attempted to prove their inability to make the required payments but failed to make a motion for a modification of those requirements. That motion was not made until one day before petitioners were due to be incarcerated. A review of

“[s]ince a lawyer must always be free to exercise his professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of his professional freedom.”<sup>162</sup>

Having found a potential of conflict, the Court vacated the revocation judgment and remanded the case for a resolution of the conflict of interest claim.<sup>163</sup> The Court further ordered that should a conflict of interest be found on remand, the revocation hearing would have to be retried with new counsel.<sup>164</sup> In language that later became the subject of dispute, the Court concluded by stating:

Because we are presented here only with the question of petitioners’ probation revocations, we do not order more sweeping relief, such as vacating petitioners’ sentences or reversing their convictions. *Such actions do, however, remain within the discretion of the trial court upon appropriate motion. There also is the possibility that this relief may be available in habeas corpus proceedings, if petitioners can show an actual conflict of interest during the trials or at the time of sentencing.*<sup>165</sup>

This remand instruction seemingly opened the door for a mandatory reversal rule in cases where a conflict of interest existed at the time of trial was not addressed, although known or reasonably foreseeable to the trial court.<sup>166</sup>

these facts demonstrates that, if petitioners’ counsel was serving the employer’s interest in setting a precedent, this conflict in goals may well have influenced the decision of the trial court to impose such large fines, as well as the decision to revoke petitioners’ probations rather than to modify the conditions.

*Id.* See also Reimer, *supra* note 156, at 341 (noting that the court reasoned that “[t]he possible conflict of interest was apparent enough in the record to impose a duty to inquire upon the trial court”). See generally Mark W. Shiner, *Conflicts of Interest Challenges Post Mickens v. Taylor: Redefining the Defendant’s Burden in Concurrent, Successive, and Personal Interest Conflicts*, 60 WASH. & LEE L. REV. 965, 977–78 (2003) (noting that “[t]he problem was that the Court in *Wood* used the phrase “actual conflict of interest” without the modifier previously found in *Cuyler*—that the conflict ‘adversely effect’ counsel’s performance”).

<sup>162</sup> *Wood v. Georgia*, 450 U.S. at 271.

<sup>163</sup> See *id.* at 273 (noting that “[th[e] record strongly suggests [a conflict of interest] actually existed at the time of the probation revocation or earlier.”).

<sup>164</sup> See *id.* at 273–74 (explaining instruction given on remand).

<sup>165</sup> See *id.* at 274.

<sup>166</sup> See Reimer, *supra* note 156, at 342 (analyzing the courts holding that “if an actual conflict of interest was found, a new revocation hearing was to be held ‘untainted by a legal representative serving conflicting interests’”); see also *Wood v. Georgia*, 450 U.S. at 273 (citing *Cuyler v. Sullivan*, 446 U.S. 335, 337 (1980)) (noting that “*Sullivan* mandates a reversal when the trial court has failed to make an inquiry even though it ‘knows or

## III. MICKENS V. TAYLOR

A. *The Facts of Mickens*

Walter Mickens was accused of murdering seventeen-year-old Timothy Hall.<sup>167</sup> Hall was killed sometime during the evening hours of March 28, 1992, in Newport News, Virginia.<sup>168</sup> His body was discovered by a pedestrian two days later “lying face down on a mattress under a sheet of plywood.”<sup>169</sup> Death was the result of multiple stab wounds to several parts of the body.<sup>170</sup>

reasonably should know that a particular conflict exists.”). *But see* Herbert, *supra* note 157, at 1275 (noting that “Wood mandates reversal upon a showing only that an actual conflict existed, without an additional showing of adverse effect”).

<sup>167</sup> See *Mickens v. Taylor*, 535 U.S. 162, 164 (2002) (stating that “[i]n 1993, a Virginia jury convicted petitioner Mickens of the premeditated murder of Timothy Hall during or following the commission of an attempted forcible sodomy”); *see also* *Mickens v. Taylor*, 240 F.3d 348, 351–53 (2001) (4th Cir. 2001) (describing a detailed listing of the facts leading up to the accusation). *See generally* Capone, *supra* note 130, at 881 (noting that after the jury trial, Mickens was sentenced to death).

<sup>168</sup> See *Mickens v. Commonwealth*, 442 S.E.2d 678, 682 (Va. 1994) (stating that the “medical examiner . . . estimated that the victim could have lived as long as 30 to 40 minutes after infliction of the last wound and that, during this time, the victim may have been conscious”); *see also* Reimer, *supra* note 156, at 329 (noting that “[Hall’s] 14 year-old roommate, whom Hall had dropped off at a party near the area where his body was later discovered, was the last to see Hall alive on the night of March 28, 1992”). *See generally* Grunewald, *supra* note 6, at 137 (noting that scientific evidence placed Mickens at the scene of the murder).

<sup>169</sup> *Mickens v. Commonwealth*, 442 S.E.2d at 682. The Supreme Court of Virginia described the crime scene this way:

The [victim’s] body was nude from the waist down . . . and its legs were spread apart approximately 12 inches . . . Pubic hairs were recovered from the victim’s buttocks. Bloody “transfer” stains were evident on the outsides of the victim’s thighs, and a white liquid substance was observed close to the victim’s anus. Cigarette butts lying near the mattress also were recovered, and the mattress cover was seized for scientific examination. Nearby, the police found a pair of men’s blue jeans and white underwear shorts that had washed up in the surf of the river . . . identified . . . as those worn by Hall on the evening of March 28, 1992.

*Id.* at 682.

<sup>170</sup> *See id.* The autopsy of Hall’s corpse:

revealed 143 separate “sharp force injuries” to the victim’s body. Of the injuries, 62 were paired stab injuries that could have been caused by a multiple-blade knife, 13 were single stab wounds, and three were paired incised wounds. The medical examiner who performed the autopsy concluded that the victim had bled to death and that 25 of the 143 wounds were fatal. The fatal wounds included four pairs of stab wounds that punctured the right lung, three single stab wounds that punctured the left lung, seven stab wounds to the skull that penetrated the brain, a stab wound to the forehead that also penetrated the brain, one pair of stab wounds that perforated the liver, and a pair of stab wounds to the right neck that severed the carotid artery and the jugular vein.

*Id.* *See also* Reimer, *supra* note 156, at 329. The author noted that the body was found along the James River in Newport News, Virginia. *See generally* Capone, *supra* note 130, at 886. When Hall’s body was discovered, there was also evidence of recent sexual activity indicating possible sexual assault.

On April 4, 1992, the Newport News police arrested Walter Mickens for an alleged assault on a minor.<sup>171</sup> After *Miranda* warnings, Mickens agreed to speak with the arresting officer.<sup>172</sup> During this questioning, and without discussing the specific facts surrounding Hall's murder, the officer "told Mickens that he knew Mickens had killed Hall."<sup>173</sup> Mickens responding by stating, "[y]ou didn't find any knife on me, did you?"<sup>174</sup> The following day, when Mickens was arrested pursuant to an arrest warrant for the Hall murder, he told police officers, "I accept the warrants; I accept the charges . . . if I told you I accept the warrants that means I'm guilty, don't it?"<sup>175</sup>

On April 6, 1992, Bryan Saunders was appointed by the court to represent Walter Mickens on the charge of murder.<sup>176</sup> Mickens was not aware that, until the business day prior to his assignment to Mickens' case, Mr. Saunders represented Timothy Hall, the man Mickens was now accused of murdering, in a

<sup>171</sup> See *Mickens v. Taylor*, 240 F.3d at 352 (stating that "Officer D.A. Seals and Detective Dallas Mitchell of the Newport News police responded to a complaint that a black male traveling on a bicycle had assaulted a juvenile"); see also Capone, *supra* note 130, at 887 (stating that "[f]ive 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"). See generally Reimer, *supra* note 156, at 329 (noting that he was arrested on charges unrelated to the murder).

<sup>172</sup> See *Mickens v. Taylor*, 240 F.3d at 352 (describing the procedure after Mickens' arrest); see also Reimer, *supra* note 156, at 329 (noting that overwhelming evidence against Mickens began to surface after he was arrested). See generally Capone, *supra* note 130, at 887 (stating that Mickens revealed the means of Hall's murder).

<sup>173</sup> *Mickens v. Taylor*, 240 F.3d at 352 (stating that this questioning was initiated without disclosure of the way Hall had been murdered).

<sup>174</sup> See *Mickens v. Taylor*, 240 F.3d at 352 (replying in a way that denied his involvement in the murder); see also Capone, *supra* note 167, at 887 (noting that by stating he possessed no knife, he demonstrated he correctly knew of the murder weapon). See generally Reimer, *supra* note 156, at 329 (noting that "[w]hile incarcerated, Mickens also made confessions to his cellmate about the sodomy and murder of Timothy Hall").

<sup>175</sup> *Mickens v. Taylor*, 240 F.3d at 352 (confirming Mickens' answer, Officer Seals asked him again if he understood correctly what Mickens was saying); see also Capone, *supra* note 130, at 887 (discussing how Mickens eventually admitted guilt to both the murder and forcible sodomy charges). See generally Reimer, *supra* note 156, at 329 (depicting the general atmosphere that led to his admission).

<sup>176</sup> See *Mickens v. Taylor*, 240 F.3d at 354 (summarizing the events surrounding the appointment of Saunders as Mickens' counsel); Frank Green, *Conflict Case to be Heard; Lawyer Represented Victim and Slayer*, RICHMOND TIMES DISPATCH, Nov. 4, 2001, at B8 (noting that a judge appointed Saunders to represent Mickens); Brooke A. Masters, *Attorney's Ties To Inmate, Victim Spur Effort to Halt Va. Execution*, WASH. POST, Apr. 6, 2001, at B5 (commenting that Saunders was a local lawyer with a heavy load of court-appointed cases).

separate criminal matter where Hall himself was the defendant.<sup>177</sup>

In February 1992, Hall's mother filed charges against her son for assault and battery. Hall was arrested and charged in March 1992 with possessing a concealed weapon.<sup>178</sup> Saunders met with Hall in late March 1992, no more than eight days before Hall's death, to discuss the charges against the 17 year old.<sup>179</sup> Because of Hall's death, Saunders was relieved in that matter on April 3, 1992 by Judge Foster. Three days later the same judge assigned Saunders to represent Mickens.<sup>180</sup> Thereafter, Judge Foster presided over Mickens' murder trial. Neither Saunders nor Judge Foster ever disclosed to Mickens anything about Saunders' prior representation of Timothy Hall, the man he was accused of murdering.<sup>181</sup>

Although there was strong evidence that Walter Mickens had committed both the sodomy and the murder of Hall,<sup>182</sup> the

<sup>177</sup> See *Mickens v. Taylor*, 240 F.3d at 354 (stating that Mickens never learned of the prior representation until federal habeas corpus counsel discovered it in the victim's file); Green, *supra* note 176, at B8 (noting that Saunders did not disclose to Mickens that he had previously represented Hall); Masters, *supra* note 176, at B5 (articulating that Mickens did not find out about the prior representation for five years).

<sup>178</sup> See *Mickens v. Taylor*, 240 F.3d at 354 (outlining details of Hall's previous arrests); Joan Biskupic, *High Court Halts Virginia.. Execution the Day Before*, USA TODAY, Apr. 17, 2001, at 4A (noting that Saunders previously represented Hall in earlier juvenile court matters); Frank Green, *Appeals Hold Mickens' Fate*, RICHMOND TIMES DISPATCH, Apr. 16, 2001, at B2 (observing that Saunders represented Hall on charges of carrying a concealed weapon and assaulting his mother).

<sup>179</sup> See *Mickens v. Taylor*, 240 F.3d at 354 (observing that Hall and Saunders met somewhere between March 20 and March 28, 1992); Associated Press, *Court Delays Execution*, DESERET NEWS (Salt Lake City), Apr. 16, 2001, at A6 (remarking that Saunders represented Hall days before Saunders was assigned to Mickens); *Virginia Governor is Asked to Stop Execution Tonight*, N.Y. TIMES, June 12, 2002, at A18 (noting that Saunders and Hall only met briefly to discuss the charges filed against Hall).

<sup>180</sup> See *Mickens v. Taylor*, 240 F.3d at 354 (noting that Judge Foster entered a handwritten order on Hall's docket sheet dismissing the charges due to his death); Tom Campbell, *New Trial or Release Ordered; Lawyer's Conflict Cited in Capital Case*, RICHMOND TIMES DISPATCH, Sept. 15, 2000, at A1 (stating that the same judge who dismissed charges against Hall also appointed Saunders to defend Mickens); Tony Mauro, *High Court Airs Capital Conflict From Virginia; Defense Counsel at Trial Worked for Victim Before Being Appointed to Represent Accused Killer Walter Mickens*, LEGAL TIMES, Nov. 12, 2001, at 8 (observing that charges were dismissed against Hall due to his death).

<sup>181</sup> See *Mickens v. Taylor*, 240 F.3d at 354 (observing that Saunders never told Mickens of his prior representation); Campbell, *supra* note 180, at A1 (claiming that Foster made no inquiry of Saunders regarding conflicts); Green, *supra* note 176, at B8 (stating that Saunders did not disclose his prior representation to either the lawyer assisting him or Mickens).

<sup>182</sup> See *Mickens v. Commonwealth*, 442 S.E.2d 678, 682-83 (Va. 1994), *vacated* 513 U.S. 922 (1994), *rev'd*, 227 F.3d 203 (4th Cir. 2000), *aff'd* 535 U.S. 162 (2002) (summarizing Mickens' confession at the time of his arrest, physical evidence linking Mickens to the crime scene, and Mickens' confession to a cell mate); Green, *supra* note



defense strategy at trial was that Walter Mickens was not the assailant.<sup>183</sup> The defense maintained this position despite other evidence suggesting that Hall was a male prostitute, that the murder occurred in an area known for male prostitution, and that the sodomy was consensual—a fact which, if raised, could have prevented the death sentence despite a conviction.<sup>184</sup> Mickens was convicted of murder<sup>185</sup> and sentenced to death based upon the jury's finding of the necessary aggravating circumstances.<sup>186</sup>

Walter Mickens first learned of his attorney's conflict when the lawyer appointed to represent him in federal habeas corpus proceedings reviewed files provided by the county clerk.<sup>187</sup> Due to an inadvertent disclosure of Hall's juvenile file, the prior charges, representation, and contact between Hall and Saunders were revealed.<sup>188</sup> Thereafter, Mickens filed a *writ of habeas corpus* in the Eastern District of Virginia alleging that he was denied the

176, at B8 (stating that Mickens allegedly confessed killing to a fellow inmate in jail); Masters, *supra* note 176, at B5 (noting that DNA stains on mattress underneath the victim matched Mickens' DNA).

<sup>183</sup> See *Mickens v. Taylor*, 535 U.S. 162, 181–82 (2002) (Stevens, J., dissenting) (discussing possible defense strategies); Charles Lane, *Court Clears Way for Virginia Execution; Lawyer Conflict Allegation Rejected*, WASH. POST, Mar. 28, 2002, at A1 (stating that Mickens denied ever meeting Hall); Andrea D. Lyon, *State Strict on Lawyer Conflicts in Capital Cases*, CHI. DAILY LAW BULLETIN, Apr. 27, 2002, at 9 (noting that Mickens' testimony denied any involvement with Hall, despite the evidence).

<sup>184</sup> See *Mickens v. Taylor*, 535 U.S. at 181–82 (arguing that forcible sodomy was a prerequisite for the death penalty); Green, *supra* note 178, at B2 (explaining that if sodomy was consensual and not forced, then there could be no capital murder and thus no death sentence); Mauro, *supra* note 180, at 8 (stating that newspaper accounts suggesting Hall was a prostitute could have affected Mickens' case if the sexual relations were found to be consensual).

<sup>185</sup> See *Mickens v. Taylor*, 535 U.S. at 164 (stating that a jury convicted Mickens of premeditated murder); Biskupic, *supra* note 178, at 4A (noting that Mickens' conviction occurred in 1993); Campbell, *supra* note 180, at A1 (reporting that Mickens was convicted for murdering Hall).

<sup>186</sup> See *Mickens v. Taylor*, 535 U.S. at 164 (finding the murder "outrageously and wantonly vile"); Green, *supra* note 176, at B8 (remarking that Mickens was sentenced to death for the 1992 slaying of Hall); Masters, *supra* note 176, at B5 (stating that Mickens was convicted and sentenced to death in 1993).

<sup>187</sup> See *Mickens v. Taylor*, 535 U.S. at 164–65 (recounting how federal habeas corpus counsel discovered the conflict of interest); Biskupic, *supra* note 178, at 4A (stating that the prior representation was discovered during an appeal to federal court); Mauro, *supra* note 180, at 8 (explaining that Saunders' dual representation was not discovered until new lawyers reviewed Mickens case).

<sup>188</sup> See *Mickens v. Taylor*, 535 U.S. at 165 (noting that the clerk mistakenly gave federal habeas corpus counsel Hall's file); Campbell, *supra* note 180, at A1 (reporting that "the clerk slipped up and produced Hall's file"); Masters, *supra* note 176, at B5 (summarizing circumstances surrounding disclosure of prior representation).

effective assistance of counsel during his trial.<sup>189</sup> Following an evidentiary hearing, the petition for relief was denied by the district court. A divided panel for the Fourth Circuit reversed and granted a rehearing *en banc*.<sup>190</sup>

At that rehearing, the Virginia District Court initially found that despite Virginia's claims that any relief based on ineffective assistance of counsel was barred under state law,<sup>191</sup> Mickens' claim was not barred since he had no prior notice of Saunders' conflict.<sup>192</sup> The District Court then applied the framework articulated in *Sullivan* to analyze Mickens' claim.<sup>193</sup> Addressing the first prong of the *Sullivan* test, the existence of an actual conflict, the District Court concluded that Saunders' representation of Mickens did not rise to the level of conflict.<sup>194</sup> In reaching this conclusion, the District Court relied heavily on

<sup>189</sup> See *Mickens v. Taylor*, 535 U.S. at 164 (stating that he was denied effective counsel due to the alleged conflict of interest); Biskupic, *supra* note 178, at 4A (summarizing Mickens' arguments); Green, *supra* note 176, at B8 (contending that Mickens may have been denied his Sixth Amendment right to counsel).

<sup>190</sup> See *Mickens v. Taylor*, 535 U.S. at 165 (noting that a divided panel reversed and the Court of Appeals granted a rehearing *en banc*); Campbell, *supra* note 180, at A1 (noting that a three judge panel ruled in favor of release or a new trial); Barbara Grzincic, *THE DAILY RECORD* (Baltimore), Oct. 31, 2000, at 1C (commenting that appellate court vacated its opinion and will rehear the matter *en banc*).

<sup>191</sup> See *Hoke v. Netherland*, 92 F.3d 1350, 1354 n.1 (4th Cir. 1996) (finding that under Virginia state law, "a petitioner is barred from raising any claim in a successive petition if the facts as to that claim were either known 'or available' to the petitioner at the time of his original petition"); *Mickens v. Greene*, 74 F. Supp. 2d 586, 600 n.9 (E.D. Va. 1999), *rev'd*, 227 F.3d 203 (4th Cir. 2000), *aff'd* 535 U.S. 162 (2002) (stating that state claims are barred if facts of that claim were either known or should have been known to petitioner at the time of his original claim); Masters, *supra* note 176, at B5 (noting that Mickens attorneys learned of the conflict too late to file in state court).

<sup>192</sup> See *Mickens v. Greene*, 74 F. Supp. 2d at 600–02 (summarizing reasons for rejection of claim); Brooke A. Masters & Charles Lane, *High Court Halts Execution in Virginia; Defense Lawyer's Role at Issue*, *WASH. POST*, Apr. 17, 2001, at A1 (commenting because state court appeals had run out, Mickens only remedy was to try to argue in federal court that Sixth Amendment right to counsel was violated). See generally Jennifer Bier, *Virginia Appellate Report*, *LEGAL TIMES*, Sept. 25, 2000, at 25 (discussing Mickens' case).

<sup>193</sup> See *Mickens v. Greene*, 74 F. Supp. 2d at 602 (stating that there are two theories a defendant may proceed under to prove a deprivation of Sixth Amendment right to conflict-free counsel); see also *Cuyler v. Sullivan*, 446 U.S. 335, 348–49 (1980) (asserting that defendant must show that "an actual interest adversely affected his lawyer's performance"); *Enoch v. Gramely*, 70 F.3d 1490, 1496 (7th Cir. 1995) (noting that defendant can either proceed on theory that the attorney had a potential conflict of interest that prejudiced his defense or that an actual conflict adversely affected his defense).

<sup>194</sup> See *Mickens v. Greene*, 74 F. Supp. 2d at 604–06 (rejecting Mickens' arguments pertaining to proof of actual conflict); Grzincic, *supra* note 190, at 1C (distinguishing conflict in *Sullivan* from conflict in Mickens' case); see also Campbell, *supra* note 180, at A1 (noting that Court of Appeals reversed District Court decision and instead found an actual conflict).

Saunders' perception of the prior representation of Hall.<sup>195</sup> Saunders stated that any "allegiance to Hall, 'ended when I walked in the courtroom and they told me he was dead and the case was gone.'"<sup>196</sup> The District Court held that "[w]ithout condoning the inexcusable failure to disclose the previous representation of Hall . . . as a factual matter, Saunders did not believe that any 'continuing duties to [a] former client [might] interfere with his consideration of all facts and options for his current client.'"<sup>197</sup>

Under the second part of the Sullivan inquiry, the District Court employed a three-step test to determine if the conflict adversely affected the representation.

First, he must point to some plausible alternative defense strategy or tactic [that] might have been pursued. Second, he must demonstrate that the alternative strategy or tactic was reasonable under the facts. Because prejudice is presumed, the petitioner need not show that the defense would necessarily have been successful if the alternative strategy or tactic had been used, rather he only need prove that the alternative possessed sufficient substance to be a viable alternative. Finally, he must show some link between the actual conflict and the decision to forgo the alternative strategy of defense.<sup>198</sup>

Mickens contended that there were other reasonable defense strategies not adopted or investigated because of Saunders' conflict.<sup>199</sup> Specifically, Mickens argued that a consensual sodomy defense could have been used to avoid the death penalty.<sup>200</sup> However, the District Court found that "the record

<sup>195</sup> See *Mickens v. Greene*, 74 F. Supp. 2d at 606 (highlighting that Saunders did not perceive his dual representation as a conflict); see also *United States v. Young*, 644 F.2d 1008, 1014 (4th Cir. 1981) (finding that "great weight" should be placed on lawyer's perception); Tom Campbell, *Murder Trial Scrutinized; Did Lawyer Have Interest Conflict*, RICHMOND TIMES DISPATCH, Dec. 7, 2000, at B7 (announcing that judge found that Saunders did not perceive any conflicts).

<sup>196</sup> *Mickens v. Greene*, 74 F. Supp. 2d at 605.

<sup>197</sup> *Id.* at 606 (quoting *United States v. Tatum*, 943 F.2d 370, 376 (4th Cir. 1991)).

<sup>198</sup> *Id.* at 603-04 (quoting *Freund v. Butterworth*, 165 F.3d 839 (11th Cir. 1999)).

<sup>199</sup> *Id.* at 606 (asserting that conflict foreclosed presentation of consent defense); Campbell, *supra* note 180, at A1 (questioning if some of what Saunders knew may have supported other defenses); Green, *supra* note 176, at B8 (noting that Saunders ignored information that cast Hall in a bad light which may have affected Mickens' defense).

<sup>200</sup> See *Mickens v. Greene*, 74 F. Supp. 2d at 606-07 (listing facts relevant to a consent defense); Green, *supra* note 178, at B2 (noting that Saunders could not have been sentenced to death had the sodomy been consensual); Mauro, *supra* note 180, at 8 (stating that raising issue of consensual sex would have affected Mickens' case).

shows that other facts foreclosed presentation of consent as a plausible alternative defense strategy.”<sup>201</sup>

In rejecting the possible consent defense, the court pointed specifically to several findings. The court indicated that Hall had a tendency to be in the area where his body was discovered for purposes inconsistent with male prostitution.<sup>202</sup> Also, evidence of a choke hold used on Hall in conjunction with the murder and the presence of transferred blood stains on Hall’s body were not suggestive of consensual sodomy.<sup>203</sup> Finally, Mickens’ failure to assert a defense predicated on consent prior to the current proceedings also favored rejecting Mickens’ ineffective assistance of counsel claim.<sup>204</sup>

While the Fourth Circuit initially reversed that decision in 2000,<sup>205</sup> a rehearing *en banc* affirmed the District Court’s decision.<sup>206</sup> Much of the Court of Appeal’s decision focused on *Wood v. Georgia* and its requirements.<sup>207</sup> Mickens asserted that a footnote in *Wood* suggested that reversal was mandatory where a trial court fails to inquire into a conflict of interest that it has

<sup>201</sup> See *Mickens v. Geene*, 74 F. Supp. 2d at 607.

<sup>202</sup> See *id.* (indicating that Hall would sometimes be in area to “watch the water”); see also *Mickens v. Taylor*, 535 U.S. 162, 178–79 (2002) (agreeing with district court that raising issue of negative facts about victim would not have risen conflict of interest to level of constitutional violation); *Mickens v. Taylor*, 240 F.3d 348, 361 (4th Cir. 2001) (stating district court conclusion that Saunders did not have enough evidence to prove negative rumors about victim and would have been inconsistent with current defense theory).

<sup>203</sup> See *Mickens v. Greene*, 74 F. Supp. 2d at 607 (explaining Hall had blue marks on his neck which is indicative of choke hold and therefore lack of consent); see also *Mickens v. Taylor*, 535 U.S. at 178 (relying on district court finding that, given victim’s condition when body found, there could be no defense of consent to sexual intercourse). See generally *Mickens v. Commonwealth*, 442 S.E.2d 678, 682 n.1 (Va. 1994) (defining bloody “transfer” stain as stain which results from object that first comes into contact with blood and then touches another surface, leaving blood stain on second surface).

<sup>204</sup> See *Mickens v. Taylor*, 74 F. Supp. 2d at 607 (concluding Saunders did not utilize consent defense because facts of case and Mickens’ testimony would not support assertion); see also *Mickens v. Taylor*, 535 U.S. at 173–74 (confirming necessity of finding conflict of interest caused adverse affect on representation and relied on Court of Appeals in finding adverse affect); *Mickens v. Taylor*, 240 F.3d at 362 (affirming district court’s factual findings and rejecting sixth amendment challenge based on adverse effect of conflict).

<sup>205</sup> *Mickens v. Taylor*, 227 F.3d 203 (4th Cir. 2000) (reversing denial of habeas corpus relief); see also *Mickens v. Taylor*, 535 U.S. at 165 (reviewing procedural history).

<sup>206</sup> *Mickens v. Taylor*, 240 F.3d 348, 362 (2001) (granting rehearing and denying relief); see also *Mickens v. Taylor*, 535 U.S. at 165 (reviewing procedural history).

<sup>207</sup> *Mickens v. Taylor*, 240 F.3d at 358–60 (discussing whether *Wood* extended automatic reversal rule); see also *Wood v. Georgia*, 450 U.S. 261, 273 n.18 (1981) (stating reversal is required when the trial court failed to make inquiry into presence of conflict of interest in certain circumstances); *Ciak v. United States*, 59 F.3d 296, 302 (2d Cir. 1995) (applying *Wood* to create rule of automatic reversal).

reason to know exists.<sup>208</sup> That footnote stated that “*Sullivan* mandates a reversal when the trial court has failed to make an inquiry even though it ‘knows or reasonably should know that a particular conflict exists.’”<sup>209</sup> This contention was rejected because the footnote cited by Mickens was in response to Justice White’s dissent, which suggested that the *Wood* holding could be used to justify mandatory reversal regarding potential Sixth Amendment claims found by appellate courts. The Fourth Circuit opined that a broad reading of that footnote, one requiring mandatory reversal, would be well beyond its intended scope, and limited it merely to a duty of further inquiry by a trial court where the possibility of conflict existed and was not remedied at that level.<sup>210</sup>

Alternatively, Mickens argued that *Wood* altered the second prong of the *Sullivan* inquiry.<sup>211</sup> He contended that where a trial court has neglected its duty to inquire into a known conflict, or one the court should have been aware existed, the claimant need not show an adverse effect on counsel’s performance.<sup>212</sup> Instead, Mickens argued that the remand instruction in *Wood* suggested that a new trial had to be granted in such cases.<sup>213</sup> The Court of Appeals rejected this assertion because it interpreted the Supreme Court’s remand instruction in *Wood* as merely a way to initiate the lower court into beginning the *Sullivan* two-part

<sup>208</sup> See *Mickens v. Taylor*, 240 F.3d at 358 (discussing validity of Mickens’ argument); see also *Wood v. Georgia*, 450 U.S. at 273 n.18 (stating reversal is required when trial court failed to make inquiry into presence of conflict of interest in certain circumstances); *Ciak*, 59 F.3d at 302 (2d Cir. 1995) (applying *Wood* to create rule of automatic reversal).

<sup>209</sup> *Mickens v. Taylor*, 240 F.3d at 358 n.5 (quoting *Wood v. Georgia*, 450 U.S. at 273 n.18 (1981)).

<sup>210</sup> See *Mickens v. Taylor*, 240 F.3d at 359 (discussing reason for footnote was in response to dissenting opinion); see also *Brien v. United States*, 695 F.2d 10, 15 n.10 (1st Cir. 1982) (refusing to adopt automatic reversal rule). See generally *United States v. Tatum*, 943 F.2d 370, 379 (4th Cir. 1991) (citing automatic reversal rule but refusing to apply to reverse conviction).

<sup>211</sup> See *Mickens v. Taylor*, 240 F.3d at 359 (discussing details of alternate argument); see also *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980) (requiring proof of actual conflict and adverse effect). See generally *Ciak*, 59 F.3d at 301 (2d Cir. 1995) (explaining two-step process for prisoners seeking habeas corpus relief).

<sup>212</sup> See *Mickens v. Taylor*, 240 F.3d at 359 (stating reasoning for expanding interpretation due to remand instruction); see also *Cuyler*, 446 U.S. at 348 (requiring proof of adverse effect on representation as second prong of inquiry). See generally *Holloway v. Arkansas*, 435 U.S. 475, 485–86 (1977) (requiring trial courts to initiate investigation of conflict of interest upon timely objection).

<sup>213</sup> See *Mickens v. Taylor*, 240 F.3d at 359 (describing remand instruction of *Wood*); see also *Wood v. Georgia*, 450 U.S. at 274 (providing remand instruction for trial court). See generally *Ciak*, 59 F.3d at 302 (applying *Wood* to reverse conviction).

inquiry.<sup>214</sup> The United States Supreme Court granted Walter Mickens a stay of execution and granted his petition for certiorari.<sup>215</sup>

### B. *The Mickens Court's Opinion*

The Court affirmed the Fourth Circuit. In an opinion authored by Justice Scalia, the Court concluded that *Wood* simply reaffirmed the Court's holding 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," and that Mickens did not meet that burden on these facts.<sup>216</sup> Although Mickens argued that *Wood* created, through its remand instruction, a rule requiring the automatic reversal of unresolved conflicts of interest that were known, or should have been known, to the trial court, Justice Scalia noted that the key language Mickens' relied upon pertained only to *Wood*, where the Court "remanded . . . 'to determine whether the conflict of interest that this record strongly suggests actually existed.'"<sup>217</sup> Thus, the *Wood* remand instruction was held not to apply on the facts in *Mickens*.<sup>218</sup>

Justice Scalia began by noting the general rule recognized by *Strickland*, requiring that counsel be effective to meet the constitutional mandate.<sup>219</sup> He also noted that a defendant claiming ineffective assistance of counsel must show that counsel's unprofessional errors had a prejudicial effect on the

<sup>214</sup> See *Mickens v. Taylor*, 240 F.3d at 359–60 (explaining that to rely on remand instruction would be to overrule by implication which is not common practice); see also *Cuylar*, 446 U.S. at 348 (requiring proof of adverse effect on representation to satisfy second prong of inquiry). See generally *Catawba Indian Tribe of S.C. v. South Carolina*, 978 F.2d 1334, 1347 (4th Cir. 1992) (refusing to overrule by implication).

<sup>215</sup> *Mickens v. Taylor*, 532 U.S. 970 (2001) (granting writ of certiorari); see also *Mickens v. Taylor*, 535 U.S. 162, 165–66 (2002) (reviewing procedural history).

<sup>216</sup> *Mickens v. Taylor*, 535 U.S. at 171.

<sup>217</sup> *Id.* at 170.

<sup>218</sup> *Id.* at 166 (indicating the Court felt this particular conflict did not rise to the level of a constitutional violation and thus did not require that relief be afforded).

<sup>219</sup> See *Mickens v. Taylor*, 535 U.S. at 166 (noting that Sixth Amendment right to counsel is for purpose of criminal defendant receiving fair trial); see also *Wiggins v. Smith*, 539 U.S. 510, 537–38 (2003) (affirming general rule that ineffective assistance claim requires proving deficient performance); *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (stating first component of successful sixth amendment claim is proving counsel's representation was deficient).

trial outcome to overcome a claim of harmless error.<sup>220</sup> Beyond this general rule, Justice Scalia indicated that the Court has recognized exceptions. One such situation, where the Court has “spared the defendant the need of showing probable effect upon the outcome, and [has] simply presumed such effect, [is] where assistance of counsel has been denied entirely or during a critical stage of the proceeding.”<sup>221</sup> In such circumstances, Justice Scalia noted the Court has recognized that any outcome is likely to be so unreliable that a case-by-case review is unnecessary.<sup>222</sup> In addition, Justice Scalia indicated that other situations, those “when the defendant’s attorney actively represented conflicting interests,” can also lead to equally unreliable results and called for a similar remedy.<sup>223</sup> With those exceptions in mind, Justice Scalia noted that decision of the case at hand required the detailed examination of prior case law.<sup>224</sup>

In examining *Holloway*, Justice Scalia noted that the case involved a situation where counsel was forced to represent multiple clients despite timely objections. He indicated that this circumstance “undermined the adversarial process . . . because joint representation of conflicting interests is inherently suspect, and because counsel’s conflicting obligations to multiple defendants ‘effectively seal his lips on crucial matters.’”<sup>225</sup> Based on these facts, Justice Scalia concluded that *Holloway*’s automatic reversal rule operates only where an attorney raises an objection to a conflict of interest arising from joint concurrent representation and is denied relief.<sup>226</sup>

<sup>220</sup> See *Mickens v. Taylor*, 535 U.S. at 166; see also *Woodford v. Visciotti*, 537 U.S. 19, 22 (2002) (noting proper standard to prove prejudice is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different”); *Strickland*, 466 U.S. at 687 (finding deficient representation must also have prejudicial effect on defense).

<sup>221</sup> *Mickens v. Taylor* 535 U.S. at 166.

<sup>222</sup> See *Mickens v. Taylor*, 535 U.S. at 166 (indicating that circumstances that rise to an outright denial of counsel where constitutionally required create situations where judicial review is unnecessary).

<sup>223</sup> See *id.* at 166.

<sup>224</sup> See *id.* at 167 (noting that the Court will analyze its prior jurisprudence in “some detail”); see also *United States v. Cronin*, 466 U.S. 648, 658–59 (1984) (holding that representation that is at level of denial of Sixth Amendment rights is presumptively defective).

<sup>225</sup> *Mickens v. Taylor*, 535 U.S. at 168.

<sup>226</sup> *Id.* at 168 (stating “*Holloway* thus creates an automatic reversal rule only where defense counsel is forced to represent codefendants over his timely objection, unless the trial court has determined that there is no conflict”); see also *Holloway v. Arkansas*, 435 U.S. 475, 487 (1977) (explaining that holding does not prevent trial court from

Justice Scalia then turned to *Sullivan*. He indicated that *Sullivan* was a case where no objection to multiple representation was made where three co-defendants, each tried individually, were represented by the same attorney. Since no objection was made to the multiple representation, Justice Scalia observed that the *Sullivan* Court refused to apply and extend the *Holloway* reversal rule on those facts.<sup>227</sup> Instead, the Court in *Sullivan* held that “absent objection, a defendant must demonstrate that ‘a conflict of interest actually affected the adequacy of his representation.’”<sup>228</sup>

Separately, Justice Scalia noted that the *Sullivan* Court addressed the issue of whether a trial court has a duty to inquire into potential conflicts arising from multiple representation. Justice Scalia indicated that the *Holloway* inquiry is only required when “‘the trial court knows or reasonably should know that a particular conflict exists,’ which is not to be confused with when the trial court is aware of a vague unspecified possibility of conflict.”<sup>229</sup> Justice Scalia noted that although *Mickens* read *Sullivan* as extending *Holloway*’s automatic reversal rule to any unobjected to conflict, the *Holloway* inquiry and automatic reversal rule will only apply in the aforementioned situation, where the conflict of interest is, or should be, apparent to the trial court on its face and not an ambiguous potential for the conflict.<sup>230</sup>

Finally, Justice Scalia examined *Wood*. He indicated that in *Wood*, certiorari was granted in order to address an Equal Protection Claim, but was ultimately remanded for a determination as to whether a conflict of interest existed.<sup>231</sup> In that case, Justice Scalia noted that the Court identified

investigating basis of conflict of interest). *But see* *Garcia v. Bunnell*, 33 F.3d 1193, 1198 (9th Cir. 1994) (distinguishing facts of *Holloway* and interpolating between holdings of *Cuyler* and *Holloway*).

<sup>227</sup> See *Mickens v. Taylor*, 535 U.S. at 168 (discussing the Court’s refusal to apply the *Holloway* inquiry to the facts presented in *Sullivan*).

<sup>228</sup> *Id.* (citations omitted).

<sup>229</sup> *Id.* at 169 (citations omitted).

<sup>230</sup> *Id.* (stating that the *Holloway* inquiry and automatic reversal rule is only triggered where “‘the trial court knows or reasonably should know that a particular conflict exists,’ which is not to be confused with when the trial court is aware of a vague, unspecified possibility of conflict.” (citations omitted)).

<sup>231</sup> See *id.* at 169-70 (noting that the Court remanded *Wood* for a determination of a potential conflict of interest).



“disturbing circumstances” that required resolution.<sup>232</sup> Specifically, Justice Scalia indicated that *Wood* was a situation where multiple defendants were represented by the same attorney who was being paid by the third-party employer of each of the defendants.<sup>233</sup> This, Justice Scalia stated, led to uncertainty for the Court regarding “whether counsel was influenced in his basic strategic decisions by the interests of the employer who hired him” and the Court remanded for a determination of whether that conflict prejudiced the defendants.<sup>234</sup>

Justice Scalia then focused on the thrust of Mickens argument for reversal. He indicated that Mickens sought reversal on the ground that “the remand instruction in *Wood* established an ‘unambiguous rule’ that where the trial judge neglects a duty to inquire into a potential conflict, the defendant, to obtain reversal of the judgment, need only show that his lawyer was subject to a conflict of interest, and need not show that the conflict adversely affected counsel’s performance”<sup>235</sup> However, Justice Scalia again noted that *Wood* itself was not heard by the Court to address a conflict of interest, rather the Court raised the issue *sua sponte* based upon a suspect record indicating influence by a third party to the litigation.<sup>236</sup> Although the Court remanded *Wood* for a determination of that potential conflict, and gave instructions to reverse if it actually existed, Justice Scalia concluded that since *Wood* involved an issue raised only by the Court itself, it created no new exception beyond those previously recognized.<sup>237</sup> Further, Justice Scalia concluded that the language used by the Court in *Wood* “was shorthand for the statement in *Sullivan* that ‘a defendant who shows that a conflict of interest *actually*

<sup>232</sup> *Id.* (indicating that the record reflected potential undue influence by third-party employer of defendants); see also *Wood v. Georgia*, 450 U.S. 261, 272 (1981) (explaining attorney was representing defendants and interests of employer simultaneously). See generally *Brien v. United States*, 695 F.2d 10, 15 n.10 (1st 1982) (interpreting *Wood* as not requiring automatic reversal when judge should reasonably know conflict exists).

<sup>233</sup> See *supra* note 232 and the accompanying text.

<sup>234</sup> See *Mickens v. Taylor*, 535 U.S. at 170.

<sup>235</sup> *Id.*

<sup>236</sup> See *id.* at 171-72 (indicating that the record reflected potential undue influence by the third-party employer of the defendants in the case).

<sup>237</sup> See *id.* The Court concluded that “[t]he notion that *Wood* created a new rule *sub silentio* - and in a case where certiorari had been granted on an entirely different question, and the parties had neither briefed nor argued the conflict-of-interest issue - is implausible.” *Id.* at 172.

*affected the adequacy of his representation* need not demonstrate prejudice in order to obtain relief.”<sup>238</sup>

Given the majority’s reading of these cases, Scalia concluded that:

Since [Mickens] was not a case in which (as in *Holloway*) counsel protested his inability simultaneously to represent multiple defendants; and since the trial court’s failure to make the *Sullivan*-mandated inquiry does not reduce the petitioner’s burden of proof; it was at least necessary, to void the conviction, for petitioner to establish that the conflict of interest adversely affected his counsel’s performance. The Court of Appeals having found no such effect, the denial of habeas relief must be affirmed.<sup>239</sup>

Justice Scalia further opined that Mickens’ “proposed rule of automatic reversal when there existed a conflict that did not affect counsel’s performance, but the trial judge failed to make the *Sullivan*-mandated inquiry, [made] little policy sense.”<sup>240</sup> Scalia felt that neither the presence or absence of a trial court’s knowledge of the potential conflict of interest nor any affirmative obligation by that court to conduct a “*Sullivan*-mandated inquiry” will make it more difficult for a reviewing court to determine the effect of such conflict since “those courts may rely on evidence and testimony whose importance only becomes established at the trial.”<sup>241</sup> In addition, Justice Scalia found that the threat of sanctions which could lead to “the risk of conferring a windfall upon the defendant” was unnecessary particularly because the Court does not “presume that judges are as careless or as partial as those police officers who need the incentive of the exclusionary rule.”<sup>242</sup> Beyond this, Justice Scalia indicated that the “incentive” to conduct the *Sullivan* inquiry already exists with respect to those cases in which the conflict is an actual one,

<sup>238</sup> *Id.* at 171 (citations omitted).

<sup>239</sup> *Id.* at 173-74.

<sup>240</sup> *Id.* at 172 (noting that decisions should not be automatically reversed if no inquiry into existence of concrete misrepresentation took place); see *Koste v. Dormire*, 345 F.3d 974, 981 (8th Cir. 2003) (specifying defendant must prove actual conflict existed for automatic reversal (quoting *Sullivan*, 446 U.S. at 348-49)); cf. *McFarland v. Yukins*, 356 F.3d 688, 700 (6th Cir. 2004) (stating proper time for automatic reversal and rationale behind it).

<sup>241</sup> *Mickens v. Taylor*, 535 U.S. at 173.

<sup>242</sup> *Id.*

and that any extension of this rule would bear little effect on the “deterrence of ‘judicial dereliction’.”<sup>243</sup>

Justice Scalia then discussed the scope of the issue raised by *Mickens*.<sup>244</sup> He stated that “the only question presented 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>245</sup> In resolving this issue, Justice Scalia stated that “the rule applied when the trial judge is not aware of the conflict (and thus not obligated to inquire) is that prejudice will be presumed only if the conflict has significantly affected counsel’s performance— thereby rendering the verdict unreliable, even though *Strickland* prejudice cannot be shown.”<sup>246</sup> Even if *Mickens* could make the showing of prejudice required by *Sullivan*, he failed to show any adverse effect on the trial’s outcome resulting from that prejudice. This rule was contrary to holdings in the various Courts of Appeal “which have applied *Sullivan* ‘unblinkingly’ to ‘all kinds of alleged attorney ethical conflicts.’”<sup>247</sup> Although Justice Scalia questioned such a broad reading of *Sullivan*, citing both Rule 44(c) of the Federal Rules of Criminal Procedure<sup>248</sup> and *Strickland*, he noted that the question

<sup>243</sup> *Id.*

<sup>244</sup> See *Mickens v. Taylor*, 535 U.S. at 174 (noting that only one question was presented for discussion); see also *Tueros v. Greiner*, 343 F.3d 587, 593 (2d Cir. 2003) (specifying limited scope of the issue in *Mickens*); *Smith v. Hofbauer*, 312 F.3d 809, 815-16 (6th Cir. 2002) (cautioning that the holding of *Mickens* is limited to specific issue presented by Scalia).

<sup>245</sup> *Mickens v. Taylor*, 535 U.S. at 174 (stating sole issue for Court to resolve at that time).

<sup>246</sup> *Id.* at 172-73 (discussing applicable law regarding when prejudice might arise); see *Burger v. Kemp*, 483 U.S. 776, 783 (1987) (emphasizing that prejudice cannot be presumed unless actual conflict of interest adversely affected attorney’s representation); *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980) (specifying that party must object and make trial court aware of possible conflict that may have impaired fairness for reviewing court to determine if real conflict existed).

<sup>247</sup> *Mickens v. Taylor*, 535 U.S. at 174 (quoting *Beets v. Collins*, 65 F.3d 1258, 1266 (5th Cir. 1995)) (observing how circuit courts have applied standard adopted in *Sullivan* to variety of conflicts). See generally *United States v. Hanoum*, 33 F.3d 1128, 1130 (9th Cir. 1994) (applying standard to conflict where attorney engaged in sexual relations with client’s wife); *United States v. Michaud*, 925 F.2d 37, 40 (1st Cir. 1991) (considering whether conflict existed when attorney contesting tax fraud had previously educated IRS agents).

<sup>248</sup> FED. R. CRIM. PROC. 44(c). Rule 44(c) states, in relevant part:

(c) Joint representation. Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of

of *Sullivan's* breadth was not presented in this matter, and therefore the Court would not reach an interpretation of *Sullivan*.<sup>249</sup> Justice Scalia concluded by stating that the question of whether "the need for the *Sullivan* prophylaxis in cases of successive representation . . . should be extended . . . as far as the jurisprudence of this Court is concerned, [is] an open question."<sup>250</sup>

### C. *The Dissenting Opinions*

Four Justices dissented, filing three separate opinions. Justice Stevens, writing for himself, noted that three issues were presented in relation to the criminal adversary system.<sup>251</sup> Articulating those issues, he stated:

The first is whether a capital defendant's attorney has a duty to disclose that he was representing the defendant's alleged victim at the time of the murder. Second, is whether, assuming disclosure of the prior representation, the capital defendant has a right to refuse the appointment of the conflicted attorney. Third, is whether the trial judge, who knows or should know of such prior representation, has a duty to obtain the defendant's consent before appointing that lawyer to represent him.<sup>252</sup>

For Justice Stevens, the ultimate question presented in this case was whether, assuming the criminal justice system

counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

FED R. CRIM. PROC. 44(c). The Court found it necessary to examine this rule to negate the broad application of *Sullivan* to joint representation. See *Mickens v. Taylor*, 535 U.S. at 175; *Cuyler*, 446 U.S. at 347 n.10.

<sup>249</sup> *Mickens v. Taylor*, 535 U.S. at 176 (holding Court did not need to conclude whether *Sullivan* benchmark extends beyond successive representation cases); see *United States v. Esparza-Serrano*, No. 01-50436, 2003 U.S. App. LEXIS 23153, at \*13 (9th Cir. Nov. 10, 2003) (noting that although *Mickens* did not consider whether conflict exists other than joint representation, courts have applied *Sullivan* in other areas of possible conflict); *Allison v. Ficco*, 284 F. Supp. 2d 182, 189 (D. Mass. 2003) (reaffirming that question of *Sullivan's* application is left open for variety of possible conflicts).

<sup>250</sup> *Mickens v. Taylor*, 535 U.S. at 176.

<sup>251</sup> See *Mickens v. Taylor*, 535 U.S. at 179 (Stevens, J., dissenting) (noting that case addressed matters essential to criminal justice system and "the constitutional right of a person accused of a capital offense to have the effective assistance of counsel for his defense"). See generally *United States v. Cronin*, 466 U.S. 648, 653-54 (1984) (acknowledging that constitutional right to counsel requires effective assistance of counsel); Capone, *supra* note 130, at 893 (announcing three questions presented by Justice Stevens with regard to criminal system and Court's holding in *Mickens*).

<sup>252</sup> *Mickens v. Taylor*, 535 U.S. at 179-80.

recognizes the aforementioned duties and that each was violated, reversal is mandatory.<sup>253</sup>

Having concluded that the aforementioned duties did exist and that each was violated with respect to Walter Mickens,<sup>254</sup> Justice Stevens asserted four reasons why the Court should set aside the verdict.<sup>255</sup> First, he noted that prior case law required an inquiry into the conflict of interest because *Wood* indicated that the Court understood that “*Sullivan mandates* a reversal when the trial court has failed to make an inquiry even though it ‘knows or reasonably should know that a particular conflict exists.’”<sup>256</sup> Second, he argued that reversal is the only method available to address the real possibility that the death penalty would not have been imposed had the conflicted representation been addressed.<sup>257</sup> Third, Stevens noted that the tradition of the legal

<sup>253</sup> See *id.* at 180 (commenting on previously listed circumstances which may, in effect, damage defendant’s case to point where immediate reversal is essential); cf. *Estelle v. Williams*, 425 U.S. 501, 504 (1976) (highlighting example where circumstances surrounding trial so prejudiced defendant that reversal was mandated to ensure fairness of criminal justice system). See generally *Cronic*, 466 U.S. at 658 (recognizing certain situations exist which may so heavily prejudice capital defendants that continuing litigation is futile).

<sup>254</sup> Justice Stevens stated:

Mickens had a constitutional right to the services of an attorney devoted solely to his interests. That right was violated. The lawyer who did represent him had a duty to disclose his prior representation of the victim to Mickens and to the trial judge. That duty was violated. . . [T]he trial judge had a duty to “make a thorough inquiry and to take all steps necessary to insure the fullest protection of” his right to counsel. (citations omitted) Despite knowledge of the lawyer’s prior representation, she violated that duty.

*Mickens v. Taylor*, 535 U.S. at 185–86. See generally *Von Moltke v. Gillies*, 332 U.S. 708, 722 (1948) (emphasizing trial judge’s duty to inquire whether defendant is given fullest protection of rights, particularly when no counsel was present); *United States v. Taylor*, 933 F.2d 307, 314 (5th Cir. 1991) (noting that trial judge must ensure defendant representing himself had opportunity for counsel and fullest protection of rights).

<sup>255</sup> See *Mickens v. Taylor*, 535 U.S. at 186–89 (presenting rationale behind Justice Stevens’ dissent); see also Capone, *supra* note 130, at 894–95 (outlining four reasons presented by Stevens in favor of reversing conviction); *Leading Cases: I. Constitutional Law: 3. Sixth Amendment — Trial Counsel and Conflict of Interest*, 116 HARV. L. REV. 242, 245 (2002) [hereinafter *Leading Cases*] (noting that Justice Stevens presents four reasons supporting his argument in *Mickens*).

<sup>256</sup> *Mickens v. Taylor*, 535 U.S. at 186–87 (quoting *Wood v. Georgia*, 450 U.S. 261, 273 (1981)) (presenting first argument that prior case law mandates reversal in this circumstance).

<sup>257</sup> See *id.* at 188 (referring to presumption that counsel “for the victim of a brutal homicide is incapable of establishing the kind of relationship with the defendant that is essential to effective representation”); see also Capone, *supra* note 130, at 895 (reiterating Justice Stevens’ position of impossibility for an attorney of homicide victim to proficiently provide criminal defendant with adequate counsel); William Hellerstein, *The Line Holds, but Death May Matter: The Supreme Court’s Criminal Procedure Decisions of the 2001 Term*, 19 TOURO L. REV. 1, 17 (2002) (recognizing Justice Stevens’ claim that jury was unaware of conflict when imposing death penalty).

profession to fully disclose any conflicts of interest weighed heavily in favor of reversal.<sup>258</sup> Finally, he noted that reversal is the only remedy that can “maintain public confidence in the fairness of the procedures employed in capital cases.”<sup>259</sup>

Justice Souter’s separate dissent focused on the duty of the trial judge to inquire into the potential conflict of interest.<sup>260</sup> He argued that the prior jurisprudence created two distinct lines of inquiry: prospective, as in *Holloway*,<sup>261</sup> and retrospective, as in *Sullivan*.<sup>262</sup> The key difference between the lines of cases is when the duty to inquire is realized.<sup>263</sup> In the case of the prospective conflict of interest, there “is an affirmative obligation to

<sup>258</sup> See *Mickens v. Taylor*, 535 U.S. at 188–89 (stating that “it is the only remedy that is consistent with the legal profession’s historic and universal condemnation of the representation of conflicting interests without the full disclosure and consent of all interested parties”); see also *Bell v. Cone*, 535 U.S. 685, 718 (2002) (commenting on significance of diligent and efficient performance as essential to integrity of legal profession); *Leading Cases*, *supra* note 255, at 246 (reiterating Justice Stevens’ dissent that reversal is preferential based on inherent nature of legal profession in disclosing conflicts).

<sup>259</sup> *Mickens v. Taylor*, 535 U.S. at 189. Quoting prior Court death penalty jurisprudence, Justice Stevens asserted:

Death is a different kind of punishment from any other that may be imposed in this country. “From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. 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.” (*Gardner v. Florida*, 430 U.S. 349, 357–58 (1977)). A rule that allows the State to foist a murder victim’s lawyer onto his accused is not only capricious; it poisons the integrity of our adversary system of justice.

*Mickens v. Taylor*, 535 U.S. at 189.

<sup>260</sup> See *id.* (Souter, J., dissenting) (clarifying intent of his dissent as opposed to Justice Stevens’ dissent); see also Capone, *supra* note 236, at 896 (discussing Justice Souter’s approach to trial judge’s inquiry into potential conflicts of interest); *Leading Cases*, *supra* note 255, at 246 (commenting on Justice Souter’s discrete approach that trial judge is responsible for ensuring no conflict exists).

<sup>261</sup> *Holloway v. Arkansas*, 435 U.S. 475, 490–91 (1978) (rejecting steadfast rule that proof of prejudice had to be shown since this would be virtually impossible to uncover); see *Mickens v. Taylor*, 535 U.S. at 192–93 (stating that reversal in *Holloway* stemmed from “the judge’s failure to respond to the prospective conflict”); see also Capone, *supra* note 130, at 897 (discussing how Court in *Holloway* used prospective conflict standard to reach decision).

<sup>262</sup> *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980) (holding that trial court need not inquire into conflict unless it knows one previously existed); see *Mickens v. Taylor*, 535 U.S. at 193 (indicating that difference between *Holloway* and *Sullivan* was that *Sullivan* dealt with retrospective claim for relief); see also Brownlee v. Haley, 306 F.3d 1043, 1063 (11th Cir. 2002) (explaining how court must inquire into defendant’s preferences and experiences once a conflict has arisen).

<sup>263</sup> See *Mickens v. Taylor*, 535 U.S. at 194–95 (highlighting that prospective claims for relief and retrospective claims for relief should be treated differently); see also *Wheat v. United States*, 486 U.S. 153, 159–60 (1988) (distinguishing trial court’s proper inquiry based on time conflict arises); Capone, *supra* note 130, at 897 (distinguishing prospective conflict approach in *Holloway* from retrospective approach of *Sullivan*).

investigate a disclosed possibility that defense counsel will be unable to act with uncompromised loyalty to his client.”<sup>264</sup> Further, “[i]t was the judge’s failure to fulfill that duty of care to enquire further and do what might be necessary that the *Holloway* Court remedied by vacating the defendant’s subsequent conviction.”<sup>265</sup> Because the trial judge “was on notice” of Saunders’ prospective potential conflict of interest arising from his prior representation of Mickens’ alleged victim, Justice Souter concluded that *Holloway* governed and required a new trial for Mickens.<sup>266</sup>

Justice Souter then addressed the Court’s apparent withdrawal of court required standards where conflicts are known or should be known to the trial court. He argued that the Court was creating “a scheme of incentives to judicial vigilance that is weakest in those cases presenting the greatest risk of conflict and unfair trial, and [reducing] the so-called judicial duty to enquire into so many empty words.”<sup>267</sup> Essentially, Justice Souter claimed that the Court’s holding lifted a constitutional duty which extended to trial judges to enquire into conflicts of interest where no objection was raised and that conflict is known, or should be known, to that judge.<sup>268</sup>

Justice Breyer, joined by Justice Ginsburg, argued that the error here fell outside the scope of the Court’s prior jurisprudence.<sup>269</sup> Instead, he argued that the error was

<sup>264</sup> *Mickens v. Taylor*, 535 U.S. at 194 (stating how trial court should examine potential conflicts to guarantee client can maintain proper faith in representing attorney, which is essential to success of justice system).

<sup>265</sup> *Id.* (proposing proper remedy majority should have implemented here).

<sup>266</sup> *See id.* at 208 (discussing what Justice Souter feels should have been proper majority decision and order); *see also* Capone, *supra* note 130, at 896 (maintaining that Justice Souter argued for reversal in this situation due to lower court’s failure to inquire into potential conflict); *Leading Cases*, *supra* note 255, at 246 (noting that Justice Souter’s proposed mandatory reversal in *Mickens* followed precedent established in *Holloway*).

<sup>267</sup> *Mickens v. Taylor*, 535 U.S. at 192.

<sup>268</sup> *See id.* at 206 (arguing that majority’s decision improperly eliminates constitutional duty of court to inquire into defendant’s potential conflict); *see also* Capone, *supra* note 130, at 896 (finding that Justice Souter’s dissenting opinion deemed that a court’s failure to inquire about potential conflicts would be violative of Sixth and Fourteenth Amendments). *See generally* Glasser v. United States, 315 U.S. 60, 69–70 (1942) (commenting that trial court’s failure to ensure fair trial impedes on that person’s constitutional rights).

<sup>269</sup> *See Mickens v. Taylor*, 535 U.S. at 209 (Breyer, J., dissenting) (opining that *Holloway*, *Sullivan*, and *Wood* do not create the proper framework for deciding this case).

structural in nature,<sup>270</sup> that it therefore was not subject to harmless error analysis, and that it required a categorical approach and automatic reversal.<sup>271</sup> In support, Justice Breyer noted that the representation afforded at the trial level was the type that was “egregious on its face,”<sup>272</sup> that the conflict itself was “exacerbated by the fact that it occurred in a capital murder case,”<sup>273</sup> and that the state itself had created the conflict.<sup>274</sup> Thus, he concluded that the trial was inherently flawed and reversal should be mandated on those grounds.<sup>275</sup>

#### IV. THE DISTINGUISHING CIRCUMSTANCES OF MICKENS V. TAYLOR AND THE RECOMMENDED ALTERNATE APPROACH

As a threshold matter, it is important to make clear what this paper does not assert. It does not assert that the Court reached an incorrect conclusion. Rather, it argues that the legal framework applied by the *Mickens* Court was inappropriate to address this particular type of ineffective assistance of counsel claim. The *Mickens* factual context, one where there is a conflict arising from prior representation and not one arising from concurrent representation, substantially differs from the earlier cases. Further, such conflicts are inherently more prejudicial to the defendant because the potential exists for the conflict to go unrevealed throughout the representation.<sup>276</sup> In order to rectify

<sup>270</sup> *Id.* (arguing that that “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”) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)).

<sup>271</sup> *Mickens v. Taylor*, 535 U.S. at 209 (arguing that an error so egregious as to assign the defendant an attorney who represented the very man he was accused of killing warrants categorical reversal of the conviction).

<sup>272</sup> *Id.* (noting that proximity in time between counsel’s representation of victim and accused magnified appearance of conflict).

<sup>273</sup> *Id.* (indicating that the decisions made in a capital case are of the nature that any type of conflict may greatly affect the manner in which strategy is created and executed).

<sup>274</sup> *See id.* at 209–11 (asserting that the trial judge’s own actions created the conflict and that, in its own right, undermines the appearance of fairness in the proceeding that followed).

<sup>275</sup> *See id.* at 210 (concluding that the imposition of this death sentence “would invariably ‘diminish faith’ in the fairness and integrity of our criminal justice system”) (quoting *Young v. United States ex rel. Vuitton et Fils S. A.*, 481 U.S. 787, 811–12 (1987)).

<sup>276</sup> *See Lubowitz, supra* note 102, at 455 (discussing these concerns as partial basis for the enactment of Rule 44 of the Federal Rules of Criminal Procedure); *see also* Steven H. Goldberg, *The Former Client’s Disqualification Gambit: A Bad Move in Pursuit of an Ethical Anomaly*, 72 MINN. L. REV. 227, 231 (1987) (noting that concurrent conflicts of interest have always been recognized by courts as presenting very real danger to



these specific concerns, this paper argues for an alternate approach that would better ensure that when such situations arise, the balance between the constitutional guarantee of effective assistance of counsel and the fairness of the criminal justice system are more equitably preserved.

A. *The distinguishing circumstances of Mickens v. Taylor*

Before discussing the proposed alternate approach to a *Mickens* type ineffective assistance of counsel claim, several points of distinction between the *Mickens* case and the Court's precedents should be noted. Initially, *Mickens* does not involve concurrent representation, as did *Holloway*, *Sullivan*, and *Wood*, discussed in Part II of this paper. Rather, *Mickens* relates to a conflict of interest created by successive representation.<sup>277</sup> Successive representation is inherently different from concurrent representation. Successive representation will arise only in situations where the defendant is represented by an attorney who has a prior attorney-client relationship with the crime victim, or another person whose interests are adverse to the defendant, such as a material witness or friend or relative of the crime victim.<sup>278</sup> The matter involving this other individual will have already been resolved. Conversely, concurrent representation arises where the representation of multiple defendants is simultaneous and stems from the same occurrence.<sup>279</sup>

attorney-client loyalty). See generally *Gray v. Rhode Island Dep't of Children, Youth & Families*, 937 F. Supp. 153, 160 (D. R.I. 1996) ("Loyalty to a client is . . . impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interest").

<sup>277</sup> *Mickens v. Taylor*, 535 U.S. at 164 (reciting facts of the case, specifically that one of the defendant's court-appointed attorneys had previously represented the victim in the present case).

<sup>278</sup> See *Martinez v. Zavaras*, 330 F.3d 1259 (10th Cir. 2003) (analyzing conflicts resulting from defense counsel's former representation of a witness and a previous suspect); *Glover v. State*, 307 S.W.2d 409 (Ark. 1991) (discussing attorney withdrawal where the attorney's secretary was related to the defendant's victim); see also *T. C. Theatre Corp. v. Warner Bros. Pictures, Inc.*, 113 F. Supp. 265 (S.D.N.Y. 1953) (analyzing successive representation problems in a civil context).

<sup>279</sup> See *Cuylar v. Sullivan*, 446 U.S. 335, 357 (1980) (noting that conflict in joint representation cases is often more difficult to prove, since "[in cases of] joint representation of conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to refrain from doing" [emphasis in original]); *United States v. Bradshaw*, 719 F.2d 907, 915 (7th Cir. 1983) (analyzing conflict alleged by defendant in a joint-representation situation); *Green*, *supra* note 140, at 1216 (1989)

Had *Mickens* been a concurrent representation case, federal law would speak conclusively on this matter. Justice Scalia, in his opinion for the Court, clearly pointed out that Rule 44(c) of the Federal Rules of Criminal Procedure was constructed specifically to address the issue of concurrent representation.<sup>280</sup> The rule itself states, in relevant part:

(c) Joint representation. Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.<sup>281</sup>

But while Justice Scalia relied on Rule 44(c) and the advisory notes accompanying it as evidence that Congress specifically intended not to apply such requirements to situations of successive representation, he failed to note that the rule itself was a codification of the Court's decision in *Holloway*.<sup>282</sup> Thus, reliance on its direction in instances of successive representation<sup>283</sup> seems misplaced since *Holloway* did not raise that issue. Further, the Congressional notes accompanying Rule 44(c) suggest that Congress sought only to address the dangers

(arguing that under the relevant ethical standards, a successive conflict of interest is viewed as less serious than a concurrent conflict).

<sup>280</sup> See *Mickens v. Taylor*, 535 U.S. at 173 (indicating that Rule 44(c) of the Federal Rules of Criminal Procedure was designed only to address concurrent representation and not successive representation).

<sup>281</sup> FED. R. CRIM. PROC. 44 (as quoted in *Mickens v. Taylor*, 535 U.S. at 307, n. 6).

<sup>282</sup> See FED. R. CRIM. PROC. 44 advisory committee's note on 1979 amendments (citing *Holloway* as guidance behind proposed change to rule); see also *Holloway v. Arkansas*, 435 U.S. 475, 489-90 (1977) (discussing these issues and noting that "a rule requiring a defendant to show that a conflict of interests [had] prejudiced him in some specific fashion would not be susceptible of intelligent, even-handed application"); *United States v. Lawriw*, 568 F.2d 98, 105 (8th Cir. 1977) (placing responsibility on the trial judge to inquire about joint representation by appointed or retained counsel, and noting that "without such an inquiry a finding of knowing and intelligent waiver will seldom, if ever, be sustained by this Court").

<sup>283</sup> See *Mickens v. Taylor*, 535 U.S. at 175 (noting that required inquiry into successive representation was not addressed by rule); see also *Beets v. Collins*, 65 F.3d 1258, 1266 (5th Cir. 1995) (noting that Rule 44 standards had not been extended to successive representation situations). See generally *Spreitzer v. Peters*, 114 F.3d 1435, 1451 n.7 (7th Cir. 1997) (reviewing state and federal case law).

arising from concurrent representation, and did not, at that time, consider those that arise in successive representation.<sup>284</sup> The implications of this reliance on Rule 44(c), however, will be revisited in Part V of this comment.

Second, *Mickens* is clearly different from the type of conflict (known or should be known) addressed in *Sullivan*. The *Sullivan* case involved the representation of the first of three co-defendants who were each tried separately. Although a good case can be made as to the existence of a conflict that was foreseeable to the court, an equally strong case may be asserted that the conflict had not ripened until after *Sullivan*'s conviction.<sup>285</sup> It was only at that time that it became apparent that alternate strategies were adopted in his co-defendants' cases. In *Mickens*, the conflict existed from the moment Saunders was assigned to represent Mickens at trial. The sole reason that Walter Mickens was not aware of the conflict was because that information was withheld from him.<sup>286</sup>

Third, even though all the relevant inquiries were conducted post-trial, *Mickens* is not a case about addressing a retrospective

<sup>284</sup> See generally *United States v. Carrigan*, 543 F.2d 1053, 1055 (2d Cir. 1976) (expressing concerns forming the basis for the role of the trial judge in preventing joint-representation conflicts as addressed by Rule 44(c)); see also *Lawriw*, 568 F.2d at 104 (expressing the need for enlarged role of trial judge: "because the conflicts are often subtle it is not enough to rely upon counsel, who may not be totally disinterested, to make sure that each of his joint clients has made an effective waiver."); *United States v. Johnson*, 131 F. Supp. 2d 1088, 1096 (N.D. Iowa 2001) (declining to apply Rule 44(c) to a successive representation conflict where it was not likely that prejudice would result or confidence would be breached by allowing counsel to cross-examine former client).

<sup>285</sup> See *United States ex rel. Sullivan v. Cuyler*, 593 F.2d 512, 521 (3rd Cir. 1979) (noting that the mere existence of dual representation—which was obvious to the court from the start of the case—is insufficient to establish prejudice to the client, but finding sufficient evidence after reviewing a *post-trial* hearing record where counsel admitted to differing strategies which had prejudiced the defendant for the purpose of protecting codefendants); see also Fred C. Zacharias, *Waiving Conflicts of Interest*, 108 YALE L.J. 407, 416 (1998) (discussing reasons for client waiver of obvious conflicts of interests, including the inability of co-defendants to afford individual attorneys as in *Sullivan*). See generally *Glasser v. United States*, 315 U.S. 60, 76 (1942) (holding that the duty of the court to guarantee constitutionally effective assistance of counsel is "of equal importance" with the duty to see that the defendant is not prejudiced by an improper joint representation).

<sup>286</sup> *Mickens v. Taylor*, 535 U.S. at 165 ("[petitioner's court-appointed attorney] did not disclose to the court, his co-counsel, or petitioner that he had previously represented [the victim]"); cf. *Sullivan*, 593 F.2d at 518 (noting that the petitioner, when appointed counsel by the court, was aware of the joint representation and, when told by counsel "not to worry" and that "they would represent all three defendants," petitioner agreed to the representation). See generally Luther H. Soules III, *Proposed Conflict Of Interest And Confidentiality Rules*, 33 ST. MARY'S L.J. 753, 809 (2002) (proposing an amendment to the Texas Code of Ethics requiring attorneys to affirmatively disclose all potential conflicts in successive representation situations).

conflict of interest. Although it is unclear whether Mickens would have requested different counsel had the prior representation been revealed, Mickens, unlike the parties in *Holloway*, *Sullivan*, and *Wood*, could only have been in a position to address his conflict through disclosure. It is abundantly clear that two individuals, Bryan Saunders and the trial judge, knew about the conflict of interest prior to the commencement of any formal proceedings.<sup>287</sup> Mickens was never afforded the opportunity to raise the objection to his representation. In this way, the situation in *Mickens* is clearly different from the multiple-concurrent-representation cases. When there is multiple-concurrent-representation, any of the co-defendants presumably can look to his side and recognize the physical presence of his co-defendant.<sup>288</sup> The trial court and trial attorney are also presumably aware that such a conflict exists. Thus, it is much easier to address such circumstances retrospectively, even if no objection is raised. Again, this is the exact situation the Federal Rules address.<sup>289</sup>

A key question that the Court failed to address in *Mickens* was what would have happened had Mickens raised an objection to being represented by Saunders. Upon a showing of good cause, counsel may be replaced or reassigned by the court.<sup>290</sup> Given the interpretation of *Strickland*, *Holloway*, *Sullivan*, and *Wood* in

<sup>287</sup> See *Mickens v. Greene*, 74 F. Supp. 2d 586, 600–01 (E.D.Va. 1999) (outlining the circumstances of the representation).

<sup>288</sup> See *Sullivan*, 593 F.2d at 518 (noting that the decision to enter into joint representation was the choice of the codefendants together). See generally *Holloway v. Arkansas*, 435 U.S. 475, 484 (1978) (discussing pretrial hearings where the court failed to properly inquire when joint representation was made clear); *Gist v. State*, 737 P.2d 336, 344 (Wyo. 1987) (noting that at irrespective of whether a conflict actually existed in a joint representation situation, at least the *potential* for such a conflict should have been clear before trial).

<sup>289</sup> FED. R. CRIM. PROC. 44(c) (placing a burden on the trial court in joint representation situations); *Lawriw*, 568 F.2d at 105 (emphasizing affirmative role of trial court inquiry in joint representation cases); see also *Hamilton v. Ford*, 969 F.2d 1006, 1011 (11th Cir. 1992) (overturning a conviction where court failed to make proper inquiry into joint representation on *first day of trial*).

<sup>290</sup> See *LAFAYE*, *supra* note 16, § 11.4(b) (indicating that a showing of good cause may be the sole avenue to replacement of appointed defense counsel); cf. *United States v. Conti*, 1992 U.S. App. LEXIS 18398 at \*12 (6th Cir. July 24, 1992) (upholding trial court's decision not to replace counsel where petitioner failed to show good cause); *People v. Miranda*, 665 N.Y.S.2d 507, 508 (N.Y. App Div. 1997) (upholding denial of petitioner's request for new counsel because petitioner "failed to demonstrate good cause for the substitution").

other courts, new counsel would have presumably been assigned to resolve this conflict of interest.<sup>291</sup>

It should follow that, absent the requisite knowledge necessary to raise such an objection, the post-trial analysis should focus on the point at which the objection would have been raised had Walter Mickens been informed of the facts. Justice Souter, in his dissenting opinion, clearly supported this contention.<sup>292</sup> He stated, in comparing the facts of *Holloway* and *Sullivan*, that “a *prospective* risk of conflict subject to judicial notice is treated differently from a *retrospective* claim that a completed proceeding was tainted by conflict.”<sup>293</sup>

Two facts in *Mickens* seem most significant to trigger a prospective *Holloway* type scrutiny. First, Walter Mickens was unaware that his attorney had represented the victim until that fact was uncovered by his federal habeas counsel.<sup>294</sup> Second, the trial judge herself created that conflict.<sup>295</sup> “When the problem comes to the trial court’s attention before any potential conflict has become actual, the court has a duty to act *prospectively* to assess the risk and, if the risk is not too remote, to eliminate it or

<sup>291</sup> See *Sutton v. Strack*, 2001 U.S. Dist. LEXIS 1132 at \*4 (S.D.N.Y. Feb. 8, 2001) (raising the issue of successive representation where the link is between the defendant and a state’s witness, and subsequently finding a conflict of interest that adversely affected the representation); see also *Ciak v. United States*, 59 F.3d 296, 303 (2d Cir. 1995) (holding the trial court to its Rule 44(c) duty and reversing the petitioner’s conviction for lack of inquiry); *United States v. Levy*, 25 F.3d 146, 153–54 (2d Cir. 1994) (citing *Holloway*, holding that reversal of conviction is automatic when a possible conflict has been entirely ignored by the trial court).

<sup>292</sup> *Mickens v. Taylor*, 535 U.S. 162, 203 (2002) (Souter, J., dissenting) (arguing that even in the absence of proper objection by the petitioner, the trial judge should be more alert to potential conflicts – especially where the petitioner could not have known the relevant facts).

<sup>293</sup> *Id.* at 193 (emphasis added) (arguing for differing treatment of joint and successive representation conflict claims).

<sup>294</sup> See *Mickens v. Taylor*, 240 F. 3d 348, 354 (4th Cir. 2001) (asserting that Saunders never disclosed to either Mickens or co-counsel his prior representation of the victim); see also Brief for Petitioner at 2, *Mickens v. Taylor*, 535 U.S. 162 (2002) (No. 00-9285) (noting that Judge Foster did not inquire into “a possible conflict of interest, and Saunders did not disclose his connection to the victim”). See generally Capone, *supra* note 130, at 881 (discussing the repercussions of Saunders’ failure to disclose his prior representation to the presiding judge).

<sup>295</sup> See *Mickens v. Taylor*, 240 F.3d. at 354 (revealing that trial judge who dismissed Saunders from representing Hall subsequently assigned him to represent Mickens); *Mickens v. Greene*, 74 F. Supp. 2d 586, 600 (E.D.Va. 1999) (noting that Judge Foster of the JDR Court appointed Saunders to represent Mickens for the murder of Hall); see also Grunewald, *supra* note 6, at 138 (acknowledging that prior to Hall’s death, a juvenile court judge had appointed Saunders to represent Hall on assault and concealed weapons charges, and that the same judge appointed Saunders to represent Mickens for the murder of Hall).

to render it acceptable through a defendant's knowing and intelligent waiver."<sup>296</sup> In essence, time should have stopped for Walter Mickens, and the analysis should have been conducted with an eye towards the future and not the past.

### B. *An Alternate Approach*

Having exposed the factors that distinguish *Mickens* from the Court's prior jurisprudence in this area, it is possible to present an alternate approach. *Mickens* presented an issue of first impression. *Mickens* involved an unobjected to conflict of interest because the conflict itself went undisclosed to the party affected by it.<sup>297</sup> *Holloway*, *Sullivan*, and *Wood* each dealt with concurrent representation.<sup>298</sup> This factual distinction, in its own right, seems to justify a different solution. It is asserted that, in this setting, proof of an undisclosed conflict of interest by clear and convincing evidence should create a rebuttable presumption of prejudice that the state must likewise overcome by clear and convincing evidence. This approach would not only create a workable standard that could be universally applied, it would also address the arguments raised by both the majority and dissenting opinions in *Mickens*.

The successful raising of this claim is predicated upon several factors. First, in order to be successful, the claimant must be able to prove that the conflict of interest was both undisclosed and unknown to the defendant prior to, and throughout, the trial.

<sup>296</sup> *Mickens v. Taylor*, 535 U.S. at 193 (emphasis added).

<sup>297</sup> *Mickens v. Taylor*, 535 U.S. at 165 (pointing out that under Virginia law, juvenile case files are confidential and may not generally be disclosed without a court order, but petitioner learned about Saunders' prior representation when a clerk mistakenly produced Hall's file to federal habeas counsel); see also Capone, *supra* note 130, at 888-89 (pointing out that Mickens did not learn of this conflict until the new counsel appointed for his federal habeas corpus proceedings discovered it upon examination of Timothy Hall's file in the Newport News Juvenile and Domestic Relations Court). See generally Anne M. Voigts, Note, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 COLUM. L. REV. 1103, 1130-36 (1999) (citing undisclosed conflicts of interest as an issue that may require some development of the record in order to evaluate either the competence of the attorney or the alleged prejudice).

<sup>298</sup> See *Wood v. Georgia*, 450 U.S. 261 (1981) (deciding that the appearance of a violation of petitioners' due process rights was so great as to require remand to determine of whether a conflict of interest existed); cf. *Cuyler v. Sullivan*, 446 U.S. 335 (1980) (declaring that a possible conflict of interest was not enough to establish ineffective assistance of counsel); *Holloway v. Arkansas*, 435 U.S. 475 (1978) (holding that three defendants' representation by a single attorney, over their objection, had not violated their right to effective assistance of counsel).

Second, the successful claimant must be able to prove that both the court and trial counsel were aware of, or should have been aware of, the alleged conflict. Upon proof by clear and convincing evidence of both these threshold matters, the State should be afforded the opportunity to rebut the presumption of prejudice by presenting clear and convincing evidence that the conflict did not adversely affect the representation.

Under this approach, as applied to the facts of *Mickens*, one seemingly reaches the same result as the Court. As to the threshold questions of client ignorance and court notice, the findings made at each level of the habeas proceedings support Mickens' contention of a conflict of interest. Those having the knowledge of Saunders' prior representation simply did not disclose that information to Mickens. In fact, with respect to Bryan Saunders, a duty of disclosure exists pursuant to Rule 1.7 of the Model Rules of Professional Conduct.<sup>299</sup> The rule states that a "conflict of interest exists if: there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."<sup>300</sup> Among the four requirements to resolve such conflicts, Rule 1.7 states that "a lawyer may represent a client if: each affected client gives informed consent, confirmed in writing."<sup>301</sup> Clearly,

<sup>299</sup> See William J. Wernz, *The Ethics of Large Law Firms—Responses and Reflections*, 16 GEO. J. LEGAL ETHICS 175, 187 (2002) (stating in the last decade the law of conflicts of interest for lawyers has become increasingly complicated and pointing out *The Restatement (Third) of the Law Governing Lawyers* devotes 181 pages to conflicts); see also MODEL RULES OF PROF'L CONDUCT, preamble, at xviii (2003) (defining "consultation" as a "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question."). See generally Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT'L L. REV. 1241 (2001) (comparing and contrasting British and American disclosure rules and the review of resulting wrongful convictions).

<sup>300</sup> MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2003) (emphasis added).

<sup>301</sup> MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(4) (2003) (emphasis added). Rule 1.7(b), in its entirety states:

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

MODEL RULES OF PROF'L CONDUCT R. 1.7 (b) (2003).

there was no disclosure and no written waiver in this case, and thus an outright violation of the Model Rules of Professional Conduct occurred.

This should raise a rebuttable presumption of prejudice against the state which can be overcome only by a showing of clear and convincing evidence that Saunders' representation of Mickens was not adversely affected. The state did in fact create this problem, and neither the trial judge nor the attorney assigned to the case did anything to alleviate it. However, the state's culpability is overcome by other factors. Walter Mickens maintained his innocence throughout his relationship with Bryan Saunders.<sup>302</sup> He did this despite the overwhelming evidence against him,<sup>303</sup> including testimony regarding his own confessions of the crime.<sup>304</sup> Given this, the state should not have to shoulder the burdens of retrying an individual who likely did not suffer as a result of the conflict it created. In this circumstance, it is clear that the verdict reached was reasonable based upon the facts presented at trial.

However, the situation could easily be different. Had Walter Mickens attempted to assert the alternate defense of consensual sodomy, it might have ruled out the possibility of the death sentence.<sup>305</sup> In this scenario, the claim of prejudice, when considered with the knowledge of Saunders' prior representation, would likely provide a sound basis for a reviewing court to rule differently. Here, the question of Saunders' state of mind in

<sup>302</sup> See *Mickens v. Greene*, 74 F. Supp. 2d 586, 607 (E.D. Va. 1999); see also Capone, *supra* note 130, at 889 (stating that Saunders did not develop any line of defense based on a consensual sexual encounter or investigate into whether Hall may have been a prostitute). See generally Cheryl Hanna, *Sex is Not a Sport: Consent and Violence in Criminal Law*, 42 B.C. L. REV. 239 (2001) (discussing the defense of consent and innocence of violent crime).

<sup>303</sup> The evidence adduced against Walter Mickens at trial included: Mickens knowledge of the manner in which Hall was murdered at the time of his April 4, 1992 arrest, Mickens' confession at the time of his April 5, 1992 arrest, DNA evidence that linked Walter Mickens to the crime scene, and Walter Mickens confession to a cell mate on March 26, 1993. See *Mickens v. Commonwealth*, 442 S.E.2d 678, 682-84 (Va. 1994).

<sup>304</sup> See *Mickens v. Taylor*, 240 F.3d 348, 353 (4th Cir. 2001); Matthew S. Nichols, Case Note: *United States Court of Appeals for the Fourth Circuit: Mickens v. Taylor*, 13 CAP. DEF. J. 393, 393 (2001) (citing Tyrone Brister's testimony that he and Mickens shared a courthouse holding cell on March 26, 1993. Brister testified that when he asked Mickens why he was there, Mickens answered, "They said I stabbed somebody 140 something times in the head." According to Brister, Mickens then lowered his voice and added "which I did"). See generally Edward L. Wilkinson, *Conflicts of Interest in Texas Criminal Cases*, 54 BAYLOR L. REV. 171 (2002) (discussing other cases where confessions existed in conflict cases).

<sup>305</sup> See *supra* note 179 and accompanying text.



convincing Mickens to forego the claim of consensual sodomy would weigh very heavily. A reviewing court could very likely conclude that by convincing Mickens to forego a strategy that could have spared his life even if found guilty, Saunders' prior representation and relationship with the victim affected his ability to fairly represent Mickens. However, Walter Mickens did not assert any defense based upon consent until the federal habeas proceedings.<sup>306</sup> While it is certainly arguable that Mickens' trial attorney could have, and likely should have, considered this defense in light of the weighty sentence a guilty verdict carried, Saunders did not err in carrying out his client's wishes.

This proposed alternate approach alleviates several concerns raised by both the majority and dissenting Justices in *Mickens*. Justice Scalia, in the majority opinion, expressed a concern about the "risk of conferring a windfall upon a defendant" if circumstances such as those in *Mickens* would require mandatory reversal.<sup>307</sup> Conversely, Justice Souter expressed his own concern about the absence of any incentive for a trial judge to ensure a fair trial by inquiring where there is the potential for a conflict of interest. Absent such a duty, he felt that the system itself would suffer by not rectifying these types of conflicts before they had truly ripened and that a judge would not be held accountable for such misdeeds.<sup>308</sup> Also, along a separate line, Justices Breyer and Ginsburg found that no manageable standard at all existed in this atypical scenario and felt that a

<sup>306</sup> See Nichols, *supra* note 304, at 400 (pointing out that the court agreed that trial counsel failed to raise the defense of consent to the sodomy charge because the strategy was not viable based on the wounds inflicted on Hall and Mickens' denial of ever meeting Hall); see also Reimer, *supra* note 156, at 361 (discussing the defense strategy and its failure to assert a defense of consent), Grunewald, *supra* note 6, at 137 (noting Saunders' failure to raise the defense of victim consent, failure to investigate into negative information about Hall, and failure to inform the sentencing court that Hall's mother had filed the assault charge that was pending at the time of Hall's death).

<sup>307</sup> *Mickens v. Taylor*, 535 U.S. 162, 172 (2002).

<sup>308</sup> See *id.* at 201 (Souter, J., dissenting) (posing the question, "[w]hy excuse a judge's breach of judicial duty just because a lawyer has fallen down in his own ethics or is short on competence?"); cf. *Pate v. Robinson*, 383 U.S. 375, 386-87 (1966) (noting judge's duty to conduct hearing regarding competency to stand trial). See generally *Glasser v. United States*, 315 U.S. 60, 76 (1942) (stating "of equal importance with the duty of the court to see that an accused has the assistance of counsel is its duty to refrain from embarrassing counsel in the defense of an accused by insisting, or indeed, even suggesting, that counsel undertake to concurrently represent interests which might diverge from those of his first client, when the possibility of that divergence is brought home to the court.").

categorical approach requiring reversal would prove more workable for redressing such claims.<sup>309</sup>

The proposed alternative approach would address all three of these concerns. First, as to the “windfall” concern raised by Justice Scalia, although a defendant’s successful showing of the first two criteria would create a rebuttable presumption of prejudice, defeated only by clear and convincing evidence, this standard is not overly burdensome. It seems reasonable to conclude that a District Court will make the necessary findings to show that the conflict did not adversely affect the representation if the alternative may result in a reversed conviction. Arguably, that was the case at the District Court level in *Mickens*. Reversal, then, would be reserved for scenarios where the defendant himself did not advocate the position that led to his conviction; rather it would be reserved for cases where counsel specifically influenced the case.

Second, in reference to the concern raised by Justice Souter, a rebuttable presumption of prejudice would create a sufficient incentive for trial judges to explore potential conflicts of interest. It seems likely that a judge, on notice of a potential conflict, would take the few moments necessary to conduct a brief inquiry into the conflict if that judge knew that any ensuing trial or conviction would be subject to such a review.

Third, as to the need for the categorical approach advocated by Justices Breyer and Ginsburg, the alternate approach accomplishes two things. First, although it is not the categorical approach suggested, it does effectively remove this type of conflict from the strict confines of *Holloway*, *Sullivan*, and *Wood*. By creating a rebuttable presumption of prejudice in *Mickens* type cases, the alternative approach shifts the burden to the state allowing for greater protection to those charged with crimes. Second, the more definite, rebuttable presumption approach provides a more workable standard than a categorical

<sup>309</sup> See *Mickens v. Taylor*, 535 U.S. at 209 (Breyer, J., dissenting) (arguing that *Holloway*, *Sullivan*, and *Wood* do not provide a sensible or coherent framework for dealing with those cases at all). See generally note 298, *supra* and accompanying text (discussing these precedents); Gregory G. Sarno, *Circumstances Giving Rise to Prejudicial Conflict of Interests Between Criminal Defendant and Defense Counsel – Federal Cases*, 53 A.L.R. FED. 140 (2003) (collecting and analyzing the modern federal decisions determining what circumstances give rise to a conflict of interests between a criminal defendant and defense counsel).

reversal. The categorical reversal would likely open a door for abuse that would ultimately lead to unjustifiable reversals if a defendant or an attorney intentionally avoided any questions about such conflicts or purposely remained silent. Ultimately, under a categorical approach, cases factually similar to *Mickens* would be reversed although a rebuttable presumption could likely be overcome, as would likely be the case where an intentional lack of disclosure occurred solely in order to leave the door open for reversal. The only way for a reviewing court to discover such a scenario would be for the attorney to disclose those intentions, which would be unlikely given the implications for that attorney.

#### V. WHAT DOES *MICKENS V. TAYLOR* IMPLY FOR THE FUTURE?

With the decision in *Mickens*, The United States Supreme Court has set a very high bar for defendants in criminal proceedings to establish that a conflict of interest has adversely affected the representation guaranteed by the Sixth Amendment.<sup>310</sup> Today, a defendant who was himself a victim of a trial court's neglect of its duty to inquire into a conflict of interest that is known or should have been known, must not only show that the conflict existed, but that it adversely affected the representation.<sup>311</sup> Not only does this contradict the *Holloway* and *Sullivan* Courts' directives for addressing such scenarios, it seems likely that its application to future cases will only exacerbate the problem.

<sup>310</sup> See, e.g., *Pegg v. United States*, 253 F.3d 1274, 1275 (2001) (finding no causal link, and therefore no adverse effect, between the conflict of interest and several alternative defense strategies that were not pursued); cf. *United States v. Cronin*, 466 U.S. 648, 658–59 (1984) (holding that the denial of counsel is so likely to prejudice the accused that the cost of litigating the denial's actual prejudice is unnecessary). See generally Herbert, *supra* note 157, at 1275 (pointing out the Court's holding that the trial court's failure to inquire into the potential conflict, despite its duty to do so, did not relieve *Mickens* of his burden to show that the conflict adversely affected his counsel's performance).

<sup>311</sup> See Herbert, *supra* note 157, at 1271 (stating under such circumstances the defendant must show, first, that an actual conflict existed, and second, that the conflict adversely affected counsel's performance); see, e.g., *Fullwood v. Lee*, 290 F.3d 663, 689 (4th Cir. 2002) (citing the prevailing *Sullivan* rule that “[o]n a conflict of interest claim, petitioner must show (1) that his attorney had an actual conflict of interest and (2) that the conflict of interest ‘adversely affected his lawyer’s performance’”); *United States v. Novaton*, 271 F.3d 968, 1011 (11th Cir. 2001) (holding that “[i]f a defendant carries his burden of showing an actual conflict of interest, a court must then consider whether the conflict adversely affected his representation”).

In the late 1970's and early 1980's, the concern for conflicts of interest in this area was perhaps limited mostly to the problem of concurrent representation. However, in today's criminal justice system, this seems impractical. The pool of defendants, and those previously represented by counsel, is not shrinking.<sup>312</sup> In fact, it only seems more likely that the successive representation scenario will arise with greater frequency. Perhaps the facts of subsequent cases will not be quite as egregious as those presented here, but the principle is still the same. The defendant suffers from a lack of what is constitutionally guaranteed. In *Mickens*, as in any similar successive representation case, a defendant's Sixth Amendment rights have taken, and will take, a back seat to substantive determinations of guilt or innocence. This is not acceptable. Those charged with crimes are guaranteed a fair trial, and the effective assistance of council is a cornerstone of this fairness.<sup>313</sup>

Justice Scalia attempts to read into the Advisory Committee notes accompanying Federal Rule 44(c) Congress' intent to extend the rule to successive representation cases.<sup>314</sup> Nevertheless, such a proposal has never existed. Rule 44(c) was enacted following the Court's decision in *Holloway*.<sup>315</sup> In fact, a careful analysis of the history of Rule 44 notes that subsection (c)

<sup>312</sup> See Bureau of Justice, Crime and Arrest Data, available at <http://www.ojp.usdoj.gov/bjs/dtddata.htm#crime> (last visited April 17, 2003) (providing estimated United States crime statistics from 1960 to 1998, and showing that, although there has been a slight decrease in crime since 1994, United States crime has increased substantially since the 1978 decision in *Holloway*).

<sup>313</sup> See, e.g., *Reece v. Georgia*, 350 U.S. 85, 90 (1955) ("The effective assistance of counsel . . . is a constitutional requirement of due process"); see also *Glasser v. United States*, 315 U.S. 60, 69-70 (1942) (stating that the sixth amendment guarantee of assistance of counsel must be untrammelled and unimpaired by a court's ineffective appointment of counsel). See generally Gabriel, *supra* note 63, at 1261 (framing the effective assistance of counsel as a procedural right and establishing the necessary relationship between this right and the workings of the adversary system).

<sup>314</sup> See *Mickens v. Taylor*, 535 U.S. at 175 (stating the Federal Rules of Criminal Procedure treat concurrent representation and prior representation differently, requiring a trial court to inquire into the likelihood of conflict whenever jointly charged defendants are represented by a single attorney (Rule 44(c)), but not when counsel previously represented another defendant in a substantially related matter, even where the trial court is aware of the prior representation); see also FED. R. CRIM. PROC. 44(c) (promulgating the procedure for the appointment of counsel and discussing the right to counsel); Advisory Committee's Notes on 1979 Amendments to FED. R. CRIM. PROC. 44(c).

<sup>315</sup> See *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978) (theorizing that in a case of joint representation of conflicting interests the evil . . . is in what the advocate finds himself compelled to refrain from doing . . . and this "makes it virtually impossible to assess the impact of the conflict"); cf. FED. R. CRIM. PROC. 44(c). See generally Green, *supra* note 140, at 1201 (discussing the *Holloway* and Rule 44).

was likely a response to *Holloway*, as evidenced by a specific citation to that decision in amending the rule.<sup>316</sup> At that time, no proposal for applying it in successive representation cases was made, nor has one been advanced more recently. However, the fact that Congress has been silent on an issue should not be dispositive. It signals, instead, an absence of consideration where a successive representation conflict is the issue and not a disapproval of recognizing the need for relief. Nonetheless, criminal defendants must now live with a more stringent view of what is a harmless error resulting from a conflict of interest.

Another result of the Court's holding is acknowledged in the dissenting opinion by Justice Souter. Before *Mickens*, a trial court had a duty to inquire into potential conflicts of interest if the court knew or should have known of the risk of conflict.<sup>317</sup> A trial judge, however, has now effectively been absolved of the duty to keep an eye on the integrity of counsel's ethical obligation to disclose conflicts.<sup>318</sup> This is the case because after *Mickens*, the standard of review in successive representation conflict of interest cases is harmless error. Without the threat of a more stringent post-trial evaluation, it is likely that judges will not explore unobjected to potential conflicts to the extent that they would with the proposed alternative approach.

Apart from the rhetoric, it seems that a mere question or two from the trial judge would be sufficient to explore and resolve potential conflicts arising from successive representation.

<sup>316</sup> See *supra* note 314 and accompanying text.

<sup>317</sup> See *Mickens v. Taylor*, 535 U.S. at 201 (Souter, J., dissenting) (reading *Holloway* to impose a duty to act on a judge who is on notice of a risk of prospective conflict of interest); see also *Sixth Amendment – Trial Counsel and Conflict of Interest*, 116 HARV. L. REV. 242, 249 (2002) (pointing out that a trial court's duty to inquire into potential conflicts of interest, which originated in *Holloway*, is an important component of the same constitutional principles underlying the harmless error exception); see also 5 WAYNE R. LAFAVE, CRIMINAL PROCEDURE § 27.6(d) (2d ed. Supp. 2002) (stating “[t]he very premise of the constitutionally mandated inquiry was that postconviction review was not adequate protection where such special circumstances existed”).

<sup>318</sup> See *Mickens v. Taylor*, 535 U.S. at 187 (Souter, J., dissenting) (arguing that *Wood* cites *Sullivan* explicitly in order to make a factual distinction: “In a circumstance, such as in *Wood*, in which the judge knows or should know of the conflict, no showing of adverse effect is required. But when, as in *Sullivan*, the judge lacked this knowledge, such a showing is required.”); see also *Von Moltke v. Gillies*, 332 U.S. 708, 722 (1948) (holding that it is “the solemn duty of a . . . judge before whom a defendant appears without counsel to make a thorough inquiry and to take all steps necessary to insure the fullest protection of this constitutional right at every stage of the proceedings.”). But see *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980) (stating that it is true that in a situation of retained counsel, “unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry”).

Simply placing the onus on trial judges at a meeting in the pre-trial stages of a proceeding to ask defense counsel about any known conflicts that might adversely affect the representation would be sufficient to establish a record of inquiry. As previously noted, the Model Rules of Professional Ethics already extend this duty to trial attorneys. However, *Mickens* shows that the system could certainly benefit from a check designed to more completely protect an individual's Sixth Amendment rights.

Does such a standard create an undue burden on our court system? Clearly not. People are not charged, tried, and convicted on the same day. Countless hours are spent in preparation. In the normal criminal proceeding several pre-trial conferences are often held. The judge is likely to be present at most, if not all, of these hearings. An inquiry into any potential conflicts of interest, even if not known to the court, would not take any appreciable amount of time. It would, however, help assure that a situation akin to *Mickens* does not arise again. This simple solution would safeguard the effective representation of counsel that the Sixth Amendment demands.

## VI. CONCLUSION

The Court's decision in *Mickens v. Taylor* had a profound effect on trial procedure. It gave attorneys a little more leeway to consider the ethical boundaries of their profession, and a little more leeway in identifying what is considered a conflict of interest. The Court also lessened the day-to-day workload of a trial judge by removing any duty to inquire into counsel's conflicts of interest that may potentially adversely affect a criminal defendant, even if the trial court should be aware that a conflict exists. This all translates into a system of criminal justice that has become a little less fair to those charged with a crime, and a little more deferential to the actions of the State.

