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Off the Beaten Path: An Analysis of the Supreme Court's Surprising Decision in Mickens v. Taylor

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Off the Beaten Path: An Analysis of the Supreme Court's Surprising Decision in *Mickens v. Taylor*

The Supreme Court stood poised to dispose of *Mickens v. Taylor*.[1] Through a flurry of decisions spanning a mere six-year period,[2] the Court had already established a rational framework for evaluating claims of Sixth Amendment[3] violations based on the ineffective assistance of counsel,[4] particularly those arising out of an alleged conflict of interest.[5] Surprisingly, however, the majority opinion in *Mickens v. Taylor*[6] not only departed from this framework,

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1. 240 F.3d 348 (4th Cir. 2001) (en banc) (holding that the trial court's failure to inquire into an apparent conflict of interest before trial does not relieve a defendant of the burden to show that the conflict adversely affected his attorney's performance), *aff'd*, 122 S. Ct. 1237 (2002).

2. *See* Strickland v. Washington, 466 U.S. 668 (1984); Wood v. Georgia, 450 U.S. 261 (1981); Cuyler v. Sullivan, 446 U.S. 335 (1980); Holloway v. Arkansas, 435 U.S. 475 (1978).

3. 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 defence.

U.S. CONST. amend. VI. For an overview of these procedural guarantees, as well as their historical origins, see FRANCIS H. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT 3–35 (1953). An accused's right to counsel was first recognized in the seminal case of *Powell v. Alabama*, 287 U.S. 45, 69 (1932). The *Powell* Court, moreover, interpreted the Sixth Amendment to require not only assistance, but *effective* assistance of counsel to an accused. *Id.* at 71; *see* ALFREDO GARCIA, THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE: A CRITICAL PERSPECTIVE 30 (1992). This same notion was reiterated years later in *Strickland*, where the Court commented, "[the fact that] a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the constitutional command." *Strickland*, 466 U.S. at 685.

4. *See Strickland*, 466 U.S. at 687 (requiring a defendant to demonstrate both deficient performance by the attorney and resulting prejudice to the defendant to establish a violation of the Sixth Amendment).

5. *See Wood*, 450 U.S. at 273 (ordering remand where lower court failed to inquire into a potential conflict of interest that was apparent at trial); *Sullivan*, 446 U.S. at 348, 350 (holding that a defendant who raised no objection at trial has the burden of showing an actual conflict of interest existed that adversely affected his attorney's performance); *Holloway*, 435 U.S. at 488 ("[W]henever a trial court improperly requires joint representation over timely objection reversal is automatic.").

6. 122 S. Ct. 1237 (2002) (5–4 decision) (holding that the trial court's failure to inquire into an apparent conflict of interest before trial does not relieve a defendant of the burden to show that the conflict adversely affected his attorney's performance).

but did so by positing a tenuous interpretation of a previously unambiguous case.[7] This Recent Development examines this departure, as well as the dubious interpretation of *Wood v. Georgia*,[8] and considers the ramifications for future Sixth Amendment claims.

The facts surrounding Walter Mickens's Sixth Amendment claim are disturbing indeed. In 1993, Mickens was sentenced to death for the murder of Timothy Hall, a juvenile who himself had been charged with various crimes.[9] Upon Mickens's petition for writ of habeas corpus,[10] a federal habeas attorney discovered that, almost immediately after a juvenile court judge had dismissed the charges against Hall (due to his death), she had appointed the very attorney who had previously represented Hall to represent Mickens in his trial for Hall's murder.[11] Though conceding that the trial judge had neglected a duty to inquire into this potential conflict of interest,[12] the Supreme Court nevertheless denied Mickens's petition, stating that he had failed to show any adverse effect of the conflict on his attorney's performance.[13]

To comprehend the startling nature of this decision, it is critical to understand the Court's earlier framework for Sixth Amendment claims based on ineffective assistance of counsel. The general rule, set forth in *Strickland v. Washington*,[14] enumerated two requirements

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7. *Id.* at 1243–44 (interpreting *Wood* to require a showing of an actual conflict of interest as well as the conflict's adverse effect on defense counsel's performance). In his dissent, Justice Stevens rejected the majority's interpretation, declaring it to be in direct conflict with *Wood*'s unambiguous holding. *See id.* at 1251–52 (Stevens, J., dissenting) ("As we unambiguously stated in *Wood*, *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.' " (quoting *Wood*, 450 U.S. at 272 n.18)).

8. 450 U.S. 261 (1981).

9. *See Mickens*, 122 S. Ct. at 1239–40; *see also* Mickens v. Taylor, 240 F.3d 348, 352–54 (4th Cir. 2001) (en banc) (describing the nature of Hall's death and previous criminal charges), *aff'd*, 122 S. Ct. 1237 (2002).

10. *See* 28 U.S.C. § 2254 (1994 ed. & Supp. V).

11. *See Mickens*, 122 S. Ct. at 1240; *see also Mickens*, 240 F.3d at 353–54 (relating the circumstances surrounding the judicial appointment of Bryan Saunders as defense counsel for Hall and, two weeks later, for Mickens in the murder of Hall).

12. *See Mickens*, 122 S. Ct. at 1245.

13. *See id.*; *see also* Charles Lane, *Court Clears Way for Va. Execution: Lawyer Conflict Allegation Rejected*, WASH. POST, Mar. 28, 2002, at A1 (reporting on the outcome of *Mickens* at the U.S. Supreme Court). The Court of Appeals for the Fourth Circuit had made a similar ruling. *See Mickens*, 240 F.3d at 359. Mickens was subsequently put to death by lethal injection on June 12, 2002. Maria Glod, *Execution Culminates Va. Legal Odyssey: Rights of Killer Split Supreme Court*, WASH. POST, June 13, 2002, at B1.

14. 466 U.S. 668 (1984). Prior to *Strickland*, the Court had not addressed the standard for proving a general claim of ineffective assistance under the Sixth Amendment. *See id.* at 683 ("The petition presents a type of Sixth Amendment claim that this Court has not previously considered in any generality.").

for reversal of a defendant's criminal conviction based on a claim of ineffective assistance of counsel.[15] First, the defendant must show that counsel's assistance was objectively deficient, as measured by prevailing professional norms.[16] Second, the defendant must establish that such deficiencies resulted in prejudice.[17]

The prejudice requirement is very difficult to satisfy, as the defendant must show a reasonable probability that, but for her counsel's deficiencies, the outcome of her trial would have been different.[18] A reasonable probability, the *Strickland* Court noted, "is a probability sufficient to undermine confidence in the outcome."[19] The mere possibility, then, that the outcome would have been different, absent counsel's errors, is insufficient to meet the prejudice requirement.[20]

The Supreme Court has, however, carved out two notable instances where prejudice may be presumed without an actual showing by the defendant. First, a presumption of prejudice is appropriate where the defendant has been denied counsel outright or during a critical stage of the proceedings.[21] For instance, following a denial of counsel at trial, the Court in *Gideon v. Wainwright*[22] commented that "lawyers in criminal courts are necessities, not luxuries,"[23] and accordingly reversed Gideon's conviction without requiring him to show prejudice.[24] The Court instead simply presumed that denial of counsel resulted in prejudice.[25]

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15. *Id.* at 687. *Strickland* involved a defendant on trial for three stabbing murders, torture, kidnapping, and other similarly heinous crimes. *Id.* at 671–72. Despite acting against his counsel's advice on numerous occasions throughout discovery and trial, *id.* at 672, the defendant sought reversal of his conviction based in part on his attorney's alleged ineffective assistance. *Id.* at 675. The Supreme Court, having set forth the appropriate analysis for Sixth Amendment claims based on ineffective assistance of counsel, *infra* notes 16–17 and accompanying text, affirmed the defendant's conviction. *See Strickland*, 466 U.S. at 700–01.

16. *Strickland*, 466 U.S. at 687–88. While such norms, the Court noted, may be reflected in the American Bar Association standards, these standards are merely guidelines and do not serve as an exhaustive set of rules. *Id.* at 688. Moreover, "[a]ny such set of rules," the Court rationalized, "would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Id.* at 689.

17. *Id.* at 687.

18. *Id.* at 694.

19. *Id.*

20. *See id.* at 693–94.

21. *Id.* at 692 (citing United States v. Cronic, 466 U.S. 648, 659 (1984)).

22. 372 U.S. 335 (1963).

23. *Id.* at 344.

24. *See id.* at 344–45. Gideon had been charged with breaking and entering a pool hall with the intent to commit a misdemeanor. *Id.* at 336. After appearing in Florida state

A presumption of prejudice may also be appropriate where defense counsel has labored under a conflict of interest.[26] The extent of such a presumption, however, is dependent on whether the trial court knew or should have known of the potential conflict. If the court does not know and has no reason to know of the potential conflict, then under *Cuyler v. Sullivan*[27] the trial court does not have an affirmative duty to inquire into said conflict.[28] Under such circumstances the defendant must show, first, that an actual conflict existed, and second, that the conflict adversely affected counsel's performance.[29] Upon such a showing actual prejudice may then be presumed.[30]

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court without an attorney, Gideon requested the judge to appoint one for him. *Id.* at 337. The judge denied Gideon's request, stating that judicially appointed counsel was only guaranteed in cases involving capital offenses. *Id.* In justifying a reversal, the Supreme Court noted that "[t]he right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." *Id.* at 344.

25. *See id.* at 344–45; *see also* United States v. Cronic, 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).

26. *Strickland*, 466 U.S. at 692 (citing Cuyler v. Sullivan, 446 U.S. 335, 345–50 (1980)). Professor Brent Coverdale has aptly noted that this lesser standard entices defendants to couch ordinary ineffective assistance claims, subject to the higher standard of *Strickland*, in terms of conflict of interest claims, thereby eliminating the burden of showing actual prejudice. Brent Coverdale, Cuyler *versus* Strickland: *The Proper Standard for Self-Interested Conflicts of Interest*, 47 U. KAN. L. REV. 209, 210 (1998).

27. 446 U.S. 335 (1980).

28. *Id.* at 347. In *Sullivan*, three defendants were represented by the same pair of attorneys for the murder of two labor officials. *Id.* at 337. At no time did any of the defendants, or their counsel, object to the multiple representation. *Id.* at 337–38. Sullivan was tried first and convicted; the remaining defendants were later acquitted. *Id.* at 338. The Supreme Court remanded the case to the trial court to determine whether a possible conflict of interest actually existed and whether it adversely affected counsels' performance. *See id.* at 348, 350.

29. *Strickland*, 466 U.S. at 692; *Sullivan*, 446 U.S. at 348, 350. *Sullivan*'s two-pronged test has been implemented in a host of circuits. *See, e.g.*, Fullwood v. Lee, 290 F.3d 663, 689 (4th Cir. 2002) ("On 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.' " (quoting *Sullivan*, 446 U.S. at 348)), *cert. denied*, 123 S. Ct. 890 (2003); United States v. Novaton, 271 F.3d 968, 1011 (11th Cir. 2001) ("If a defendant carries his burden of showing an actual conflict of interest, a court must then consider whether the conflict adversely affected his representation."), *cert. denied*, 122 S. Ct. 2345 (2002); Pegg v. United States, 253 F.3d 1274, 1277 (11th Cir. 2001) ("To obtain relief on a [claim of ineffective assistance arising from a conflict of interest], a defendant must show *first*, that his attorney had an actual conflict of interest, and *second*, that the conflict adversely affected counsel's performance."), *cert. denied*, 122 S. Ct. 1435 (2002); Strouse v. Leonardo, 928 F.2d 548, 555 (2d Cir. 1991) ("If the court finds that [defendant's] representation was infected by an actual conflict of interest, it should then determine whether this conflict 'adversely affected' his performance." (quoting *Sullivan*, 446 U.S. at 350)).

The distinction between a showing of prejudice and a showing of adverse effect is significant, as the latter is less burdensome on the defendant.[31] A showing of prejudice requires a reasonable probability that, but for counsel's deficiencies, the outcome of the trial would have been different.[32] A showing of adverse effect requires only that there existed a plausible alternative defense strategy that defense counsel might have pursued were it not for the actual conflict.[33] A showing of adverse effect, then, need not show that the outcome at trial would have been different.[34]

If the trial court knows or reasonably should know of the potential conflict of interest,[35] then the requirements for reversal become further relaxed. In such a situation, *Sullivan* held that the trial court has an affirmative duty to inquire into the potential conflict.[36] Where the trial court neglects this duty despite defense counsel's efforts to notify the court of the conflict, *Holloway v.*

An actual conflict of interest exists when defense counsel places himself in a position conducive to divided loyalties. United States v. Carpenter, 769 F.2d 258, 263 (5th Cir. 1985) (citing Mitchell v. Maggio, 679 F.2d 77, 79 (5th Cir. 1982)); *see* United States v. Christikas, 238 F.3d 1164, 1169 (9th Cir. 2001). To show that the actual conflict adversely affected defense counsel's performance, the defendant must show that there existed a plausible and reasonable alternative defense strategy that might have been pursued, but for the conflict of interest. *E.g.*, *Pegg*, 253 F.3d at 1277–79 ("To prove adverse effect . . . petitioner must show: 1) the existence of a plausible alternative defense strategy or tactic that might have been pursued; 2) that the alternative strategy or tactic was reasonable under the facts; and 3) a link between the actual conflict and the decision to forgo the alternative strategy."); Mickens v. Taylor, 240 F.3d 348, 360–61 (4th Cir. 2001) (en banc) (illustrating that defendant's claim of ineffective assistance of counsel was based on his lawyer's failure to pursue various defense strategies due to an actual conflict of interest), *aff'd*, 122 S. Ct. 1237 (2002). Failure to establish both elements of the *Sullivan* test renders a defendant's claim unsuccessful. *See Pegg*, 253 F.3d at 1275 (finding no causal link, and therefore no adverse effect, between the conflict of interest and several alternative defense strategies that were not pursued).

30. *Sullivan*, 446 U.S. at 349–50.

31. *E.g.*, Burger v. Kemp, 483 U.S. 776, 787 n.6 (1987) (noting that a showing of adverse effect is not equivalent to the more difficult showing of prejudice).

32. *See supra* notes 17–20 and accompanying text.

33. *See supra* note 29.

34. *See Kemp*, 483 U.S. at 799 n.6; *Mickens* 240 F.3d at 360.

35. In cases involving multiple representation of defendants, for instance, the trial judge should reasonably know of potential conflicts. *See* Wheat v. United States, 486 U.S. 153, 159–61 (1988) (discussing the inherent problems confronting joint representation); *see also* FED. R. CRIM. P. 44C (requiring the court to inquire into cases of joint representation to determine that no conflict of interest exists).

36. Cuyler v. Sullivan, 446 U.S. 335, 347 (1980). The basis for such a duty originates in the trial court's independent interest in ensuring that the defendant receives a fair trial. *See Wheat*, 486 U.S. at 160. Note, however, that where a trial court has no reason to know of a potential conflict, no affirmative duty to inquire exists. *Sullivan*, 446 U.S. at 347.

Arkansas[37] succinctly held that "reversal is automatic"[38] and the defendant is entitled to a new trial.[39] A showing of neither prejudice nor adverse effect is therefore required.[40]

Even absent such notification from defense counsel, a trial court's affirmative duty to inquire into an apparent conflict still remains.[41] According to *Wood v. Georgia*,[42] where the trial court fails to make an inquiry under such circumstances, the defendant need only show that an actual conflict existed in order to receive a new trial; again, neither a showing of prejudice nor adverse effect is required.[43] Because the Court in *Mickens* relied heavily on its interpretation of *Wood*,[44] it is perhaps appropriate to examine briefly *Wood*'s factual context.

Wood involved three individuals who were arrested for the sale and distribution of pornographic materials in connection with their employment.[45] The defendants' employer provided for their legal defense with his own attorney.[46] In addition, the employer had previously paid all fines levied on defendants for similar citations in the past.[47] On this particular occasion, however, the employer failed to pay the fines, and the defendants were accordingly penalized.[48]

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37. 435 U.S. 475 (1978). In *Holloway* three defendants were on trial for one count of robbery and two counts of rape. *Id.* at 477. The trial court appointed a single attorney to represent all three defendants. *Id.* Following a discussion with his clients, the attorney determined that there was a possible conflict of interest and moved the court to appoint separate counsel. *Id.* His request was denied after a hearing on the issue. *Id.* Counsel renewed his request several times during trial, but each of these requests was denied as well. *Id.* at 478–80. The jury thereafter found all three defendants guilty on all counts. *Id.* at 481. On appeal, the Supreme Court reversed the convictions and remanded the case to the trial court. *Id.* at 491.

38. *Id.* at 488. Whether or not reversal is automatic upon the *prosecution's* objection is somewhat unclear. The Court's justification for a presumption of prejudice makes sense only with respect to objections made by defense counsel; the Court noted that defense counsel is in the best position to determine whether a conflict exists, and that his declarations to the court are in essence made under oath. *Id.* at 485–86. In any event, objections made by prosecuting attorneys alleging defense counsel's conflict of interest rarely succeed. *See* Jeff Brown, *Disqualification of the Public Defender: Toward a New Protocol for Resolving Conflicts of Interest*, 31 U.S.F. L. REV. 1, 7 n.38 (1996).

39. *See Holloway*, 435 U.S. at 491.

40. *See id.* at 487–88.

41. *See* Wood v. Georgia, 450 U.S. 261, 270, 272 (1981); *Sullivan*, 446 U.S. at 347.

42. 450 U.S. 261 (1981).

43. *See id.* at 273–74 (remanding to determine only whether an actual conflict of interest existed at the time of trial).

44. *See* Mickens v. Taylor, 122 S. Ct. 1237, 1242–45 (2002).

45. *Wood*, 450 U.S. at 263.

46. *Id.* at 266.

47. *Id.*

48. *Id.* at 267.

The Court surmised that the employer had intentionally failed to make the payments in order to obtain a ruling on an Equal Protection Clause issue presented by the case.[49] In light of this suspicion, the Court remanded the case to determine whether the lawyer, acting as an agent of the employer, had labored under a conflict of interest in his representation of the defendants.[50] In justifying the remand order without first requiring an affirmative showing of adverse effect, the Court emphatically declared 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.' "[51]

It is crucial to note that even in instances where the trial court should have known of the potential conflict of interest, but either rejected counsel's objections[52] or failed to independently inquire,[53] the Court does not deviate from the general requirements set forth in *Strickland*.[54] Provided that the defendant demonstrates that an actual conflict existed, the reviewing court may simply presume that the conflict resulted in prejudice.[55] Upon such a showing, therefore, both of *Strickland*'s requirements for a Sixth Amendment violation are satisfied.[56] In this sense, then, neither *Holloway* nor *Wood* provides exceptions to the general rule in *Strickland*; rather, both cases merely indicate when a defendant's burden may be lessened to satisfy the *Strickland* requirements.

Recognizing this framework, it would appear that *Mickens* falls neatly into the *Wood*-type scenario.[57] Both the Court of Appeals for the Fourth Circuit and the Supreme Court conceded that the trial judge in *Mickens* should have been aware of the potential conflict arising from appointing Hall's former trial attorney to represent

49. *Id.*

50. *Id.* at 272–74.

51. *Id.* at 272 n.18 (citing Cuyler v. Sullivan, 446 U.S. 335, 347 (1980)).

52. *See* Holloway v. Arkansas, 435 U.S. 475, 477–80 (1978).

53. *See Wood*, 450 U.S. at 266–70.

54. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984) (requiring a showing of both objective deficiencies in counsel's performance and prejudice resulting therefrom).

55. For justification of such a presumption where the trial judge has ignored defense counsel's objection, see *supra* note 38. Even where no such objection is given, however, a presumption of prejudice is still appropriate if the defendant can prove that an actual conflict existed. *Holloway*, 435 U.S. at 489 ("[I]t is clear that the prejudice is presumed regardless of whether it was independently shown.").

56. *See Strickland*, 466 U.S. at 692.

57. The scenario referred to is one where the trial court neglected to inquire into a potential conflict of interest of which it should have been aware, despite defense counsel's failure to make it known to the court. *See supra* notes 41–51 and accompanying text.

Hall's alleged murderer.[58] As such, even though Hall's counsel raised no objection, the judge had an affirmative duty to inquire into the potential conflict.[59] Having failed to make such an inquiry, *Wood* mandates reversal upon a showing only that an actual conflict existed, without an additional showing of adverse effect.[60]

The majority in *Mickens*, however, held otherwise. The Court held 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.[61] Moreover, the Court stated that such a holding was consistent with a proper reading of *Wood*, noting that *Wood* in fact required a showing of adverse effect as well.[62]

In support of this rationale, the majority reasoned that *Wood*'s requirement of "an actual conflict of interest"[63] impliedly incorporated a requirement to show an adverse effect as well, thereby requiring both elements to warrant reversal despite mentioning only one.[64] Specifically, the Court attempted to explain the absence of any "adverse effect" language in *Wood* by its desire to use "shorthand."[65]

On its face, the phrase "actual conflict of interest" could arguably convey both the notion that a conflict existed and the notion that the conflict had an adverse effect on counsel's assistance. That is, the use of "actual" coupled with the phrase "conflict of interest" could conceivably signify a conflict that adversely affected counsel's representation, as opposed to "a mere theoretical division of loyalties."[66]

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58. *See* Mickens v. Taylor, 122 S. Ct. 1237, 1245 (2002); Mickens v. Taylor, 240 F.3d 348, 357 (4th Cir. 2001) (en banc).

59. *See* Cuyler v. Sullivan, 446 U.S. 335, 347 (1980).

60. *See* Wood v. Georgia, 450 U.S. 261, 273–74 (1981). Justices Stevens and Souter endorsed such an analysis in their separately filed dissents. *See Mickens*, 122 S. Ct. at 1248 (Stevens, J., dissenting); *id.* at 1253–54 (Souter, J., dissenting). In his dissent, which was joined by Justice Ginsburg, Justice Breyer went further, arguing that "in a case such as this one, a categorical approach is warranted and automatic reversal is required." *Id.* at 1264 (Breyer, J., dissenting).

61. *Mickens*, 122 S. Ct. at 1245.

62. *Id.* at 1243–44.

63. *Wood*, 450 U.S. at 273.

64. *Mickens*, 122 S. Ct. at 1243–44.

65. *Id.* at 1243. Justice Scalia maintained that the phrase "an actual conflict of interest" in *Wood*, 450 U.S. at 273, was "shorthand for the statement 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.' " *Mickens*, 122 S. Ct. at 1243 (quoting Cuyler v. Sullivan, 446 U.S. 335, 349–50 (1980)).

66. *Mickens*, 122 S. Ct. at 1243.

This rationale becomes less plausible, however, upon a thorough understanding of *Wood*'s phrasing.[67] In *Wood*, the Court employed the phrase "actual conflict of interest"[68] not to signify a conflict that adversely affected counsel's representation, but rather to signify a confirmation of the Court's firm suspicion that a conflict *may* have existed.[69] Examination of the phrase in its full context clarifies this usage:

> [The trial court] should hold a hearing to determine whether the conflict of interest that this record strongly suggests *actually* existed at the time of the probation revocation or earlier. If the court finds that an *actual* conflict of interest existed at that time, and that there was no valid waiver of the right to independent counsel, it must hold a new revocation hearing that is untainted by a legal representative serving conflicting interests.[70]

It is far-fetched to suppose that the *Wood* Court would first use the word "actually" in its ordinary meaning, only to use the word "actual" in the very next sentence as a term of art to signify a conflict that had an adverse affect on defense counsel's performance.[71] It is more logical to conclude that both "actually" and "actual" are used in their ordinary meanings and that a showing of adverse effect is simply not required.[72] Surely, if the *Wood* Court had intended to require such a showing, it would have explicitly said so, as it did in *Sullivan*.[73]

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67. *See Wood*, 450 U.S. at 273–74.

68. *Id.* at 273.

69. *See id.* at 272–73.

70. *Id.* at 273–74 (emphasis added).

71. Justice Stevens succinctly stated in his dissent, "*Wood* nowhere hints of this meaning of 'actual conflict of interest' . . . nor does it reference *Sullivan* in 'shorthand.' " *Mickens*, 122 S. Ct. at 1252 (Stevens, J., dissenting) (citing *Wood*, 450 U.S. at 273, and *Mickens*, 122 S. Ct. at 1243).

72. *See supra* note 71.

73. *See* Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). Interestingly, the Court in *Mickens* even attempted to dispel its earlier reading of *Sullivan* as espousing a two-prong test. *Compare* Strickland v. Washington, 466 U.S. 668, 692 (1984) (interpreting *Sullivan* as requiring a defendant to show "that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance' " (quoting *Sullivan*, 466 U.S. at 348, 350)), *with Mickens*, 122 S. Ct. at 1244 n.5 ("[T]he *Sullivan* standard is not properly read as requiring inquiry into actual conflict as something separate and apart from adverse effect."). Despite this contention, prior to *Mickens*, appellate courts employed the interpretation reflected in *Strickland*. *See, e.g.*, United States v. Novaton, 271 F.3d 968, 1011 (11th Cir. 2001) ("If a defendant carries his burden of showing an actual conflict of interest, a court must then consider whether the conflict adversely affected his representation."), *cert. denied*, 122 S. Ct. 2345 (2002); Pegg v. United States, 253 F.3d 1274, 1277 (11th Cir. 2001) ("To obtain relief on a [claim of ineffective assistance arising from a conflict of interest], a defendant must show *first*, that his attorney had an actual conflict of interest, and *second*, that the conflict adversely affected counsel's

The majority's second argument in support of its reinterpretation of *Wood* is equally unsatisfying. The Court attempted to show how *Wood*'s seemingly plain language, which mandates reversal whenever a trial court has neglected its duty to inquire,[74] was not, after all, quite so plain.[75] The majority suggested that the statement mandating reversal could not mean, in effect, what it sounds like it means, for otherwise the statement and the disposition of *Wood* would be inconsistent with each other.[76] In other words, the fact that *Wood* was remanded, instead of reversed outright, renders impossible the plain language interpretation of the statement mandating reversal.[77]

Such a suggestion, however, overlooks the true reason for *Wood*'s remand. The case was not remanded, as the *Mickens* Court stated,[78] so that the defendant might show an adverse effect of his counsel's conflict of interest. Instead, it was remanded due to the *Wood* Court's firm *suspicion* that there existed an actual conflict of interest that the trial judge should have recognized.[79] Mindful of the fact that suspicion alone is insufficient to demonstrate the existence of a conflict,[80] the *Wood* Court therefore remanded to confirm whether a conflict actually existed. *Wood*'s instruction, set forth above, clearly reflected this sentiment.[81] Moreover, such an instruction is perfectly consistent with the earlier statement mandating reversal where the trial court failed to inquire into an apparent conflict. In the case of *Wood*, if upon remand the court determined that the conflict actually

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performance."), *cert. denied*, 122 S. Ct. 1435 (2002); Strouse v. Leonardo, 928 F.2d 548, 555 (2d Cir. 1991) ("If the court finds that [defendant's] representation was infected by an actual conflict of interest, it should then determine whether this conflict 'adversely affected' his performance." (quoting *Sullivan*, 446 U.S. at 350)). After *Mickens*, at least one court has decided to continue to follow the *Strickland* interpretation. *See* Fullwood v. Lee, 290 F.3d 663, 689 (4th Cir. 2002) ("On 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.' " (quoting *Sullivan*, 446 U.S. at 348)), *cert. denied*, 123 S. Ct. 890 (2003).

74. *See Wood*, 450 U.S. at 272 n.18 ("*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.' " (quoting *Sullivan*, 446 U.S. at 347)).

75. In his dissent, Justice Souter regarded the Court's words here as "a polite way of saying that the *Wood* Court did not know what it was doing." *Mickens*, 122 S. Ct. at 1257 (Souter, J., dissenting).

76. *See id.* at 1243 n.3.

77. *See id.*

78. *See id.* at 1243–44.

79. *See Wood*, 450 U.S. at 267, 272.

80. *See* Cuyler v. Sullivan, 446 U.S. 335, 350 (1980) ("[T]he *possibility* of conflict is insufficient to impugn a criminal conviction." (emphasis added)).

81. *Supra* note 70 and accompanying text.

existed, reversal would be mandatory.[82] Otherwise, the conviction would stand.[83]

Recognizing the *Mickens* Court's curious interpretation of *Wood*, one notes that the additional justification given for the *Mickens* holding is equally puzzling. Justice Scalia's majority opinion propounded two reasons to validate *Mickens*'s requirement that adverse effect be shown even where the trial court failed to inquire into an apparent conflict. First, he wrote that to relieve Mickens of the burden of such a showing would result in poor public policy.[84] Second, Justice Scalia claimed that where a trial court fails to inquire into an apparent conflict, requiring a defendant to show both an actual conflict and adverse effect does not result in a more difficult task for the reviewing court.[85]

Regarding the public policy rationale, the Court characterized Mickens's interpretation of *Wood* as proposing a 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."[86] The Court responded that such an interpretation would result in poor public policy.[87] Although left unstated, the Court's reasoning appears to be that to allow reversal on account of a conflict that did not adversely affect defendant's representation would be to cast aside a perfectly sound verdict; that is, a verdict untainted by the conflict of interest.[88] To do so would provide the defendant with a new trial despite the legitimacy of his first trial and conviction.[89] Such an allowance therefore would oppose public policy.

Although this rationale appears reasonable, *Wood* in no way proposed a rule mandating reversal where a trial judge failed to inquire into an apparent conflict but the conflict did not adversely affect counsel's representation.[90] Rather, *Wood* instead held that where the trial judge failed to inquire into an apparent conflict, the

82. *See Wood*, 450 U.S. at 273–74.
83. *See id.*
84. Mickens v. Taylor, 122 S. Ct. 1237, 1244 (2002).
85. *Id.*
86. *Id.*
87. *Id.*
88. *See id.*
89. *See id.*
90. *See* Wood v. Georgia, 450 U.S. 261, 272–74 (1981). Nor does it appear that Mickens himself made such a proposition. *See Mickens*, 122 S. Ct. at 1243 (construing Brief for Petitioner at 21).

defendant *need not show* that the conflict adversely affected counsel's performance.[91]

The distinction between these two formulations, although subtle, is significant and requires a review of the notions of prejudice and adverse effect.[92] Where counsel's conflict has prejudiced the defendant, there is a reasonable probability that, absent the conflict, the outcome would have been different.[93] That the outcome would have been different absent the conflict suggests that there was a plausible alternative defense strategy that counsel might have pursued, namely, a strategy that would have led to an acquittal. It is well established that where such an alternative defense strategy existed but was not pursued due to counsel's conflict, the conflict had an adverse effect on the defendant's representation.[94] The notion of prejudice therefore encompasses that of adverse effect; where prejudice has occurred due to counsel's conflict of interest, the conflict must necessarily have had an adverse effect on counsel's performance.[95]

An understanding of the relationship between prejudice and adverse effect renders the Court's public policy reasoning unpersuasive. Recall that the foundational premise for the Court's rationale is that Mickens, relying on *Wood*, proposed a rule requiring reversal where there existed an apparent conflict, neglected by the trial court, that did not affect counsel's performance.[96] Under *Wood*, however, any apparent conflict neglected by the trial court is presumed to have prejudiced the defendant. Because prejudice entails adverse effect,[97] any apparent conflict which the trial court neglected to investigate must *necessarily* have had an adverse effect on counsel's performance. The Court's fundamental premise is therefore invalid.

This invalidity undermines the remainder of the Court's reasoning as well, as it eliminates any chance that a defendant would receive a new trial despite the conflict having not adversely affected counsel's performance. Such a possibility was the policy concern expressed in *Mickens*.[98]

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91. *See Wood*, 450 U.S. at 272–74.
92. *See supra* notes 31–34 and accompanying text.
93. *See* Strickland v. Washington, 466 U.S. 668, 694 (1984).
94. *See supra* note 29 and accompanying text.
95. *See supra* notes 29, 32–33 and accompanying text.
96. *See* Mickens v. Taylor, 122 S. Ct. 1237, 1244 (2002).
97. *See supra* notes 92–95 and accompanying text.
98. *Mickens*, 122 S. Ct. at 1244.

The majority's remaining justification for its holding in *Mickens* is concerned not with defendants asserting Sixth Amendment violations based on conflicts of interest, but rather with the courts who must hear these claims. *Mickens* states that a trial court's failure to inquire into a known conflict, despite its duty to do so, does not "make it harder for reviewing courts to determine conflict and effect."[99] The unstated conclusion seems to be that because the reviewing court does not shoulder an additional burden as a result of the trial court's negligence, there is little reason to sanction the lower court by allowing reversal upon a mere showing of actual conflict.[100]

In essence, this argument asserts that *Mickens* is justified because the trial court's failure to inquire into an apparent conflict of interest does not make it harder for the reviewing court to evaluate a defendant's showing of actual conflict and adverse effect. Such reasoning conspicuously ignores the fact that, absent the *Mickens* holding, the reviewing court need not evaluate a defendant's showing of adverse effect at all; the reviewing court is relieved from such an evaluation because the defendant himself is not required to make such a showing. The reviewing court, under *Wood*, actually enjoys a *lesser* burden upon review than it would if *Mickens* were applied. Therefore, despite its reasoning to the contrary, *Mickens* actually resulted in the reviewing court shouldering a *heavier* burden than it would have under *Wood*.[101]

Perhaps the court viewed Mickens's situation as a case of harmless error and was therefore reluctant to permit reversal given his apparent guilt.[102] After all, if in fact Mickens murdered Hall, even the most perfect representation could never erase Mickens's guilt.

Yet a review of the Court's general framework for Sixth Amendment violations reveals why an appeal to harmless error to account for the Court's holding fails. While *Strickland* required that the defendant demonstrate both objective deficiencies in his representation and prejudice resulting therefrom,[103] *Wood*, *Sullivan*,

99. *Id.*

100. *See id.*

101. It could be argued that the Court's reasoning here is premised on its earlier contention that there is no distinction to be drawn between a showing of actual conflict and a showing of adverse effect. *See id.* at 1244 n.5. Accepting such a premise would in fact result in the reviewing court not enduring a greater burden upon review. However, as shown above, such a premise is itself suspect and therefore renders the Court's overall argument tenuous at best. *See supra* notes 29–30, 63–73 and accompanying text.

102. *See* Mickens v. Taylor, 240 F.3d 348, 352–53 (4th Cir. 2001) (en banc), *aff'd*, 122 S. Ct. 1237 (2002).

103. Strickland v. Washington, 466 U.S. 668, 687 (1984).

and *Holloway* all illustrate situations where prejudice need not be shown, as it is instead presumed to have occurred.[104] As discussed above,[105] both *Wood* and *Mickens* involved the failure of a trial judge to investigate a conflict of interest of which the judge had actual or constructive knowledge. This factual context justifies a presumption of prejudice upon a showing that the conflict actually existed.[106] The Court certainly suggested that Mickens made such a showing,[107] and, as such, a presumption of prejudice was appropriate under *Wood*.[108] Where prejudice has occurred on account of judicial error, such error, by definition, cannot be harmless. Therefore, a denial of Mickens's petition cannot be premised on the notion that the conflict of interest constituted harmless error, even given Mickens's apparent guilt. As noted in *Chapman v. California*,[109] where prejudicial error has occurred, "[a] conviction must be reversed . . . even if the defendant was clearly guilty."[110]

The possibility remains that the Court simply perceived *Mickens* as conceptually distinct from *Sullivan*, *Holloway*, and *Wood* and therefore exempt from the framework governing these cases. *Mickens*, of course, involved a conflict of interest arising from successive representation, while its predecessor cases concerned conflicts stemming from concurrent representation.[111] It might well be that such a conceptual distinction would render inapposite an analysis of *Mickens* under the *Sullivan-Holloway-Wood* framework.[112] If such were the case, however, one would expect the Court to recognize the distinction initially, explain the rationale for *Sullivan*'s

104. *See* Wood v. Georgia, 450 U.S. 261, 272–74 (2001); Cuyler v. Sullivan, 446 U.S. 335, 349–50 (1980); Holloway v. Arkansas, 435 U.S. 475, 488–89 (1978).

105. *See supra* notes 45–60 and accompanying text.

106. *See Wood*, 450 U.S. at 272–74.

107. *See* Mickens v. Taylor, 122 S. Ct. 1237, 1245 (2002). The Court of Appeals for the Fourth Circuit had conceded the same. *See Mickens*, 240 F.3d at 360.

108. *See Wood*, 450 U.S. at 272–74.

109. 386 U.S. 18 (1967).

110. *Id.* at 43 (Stewart, J., concurring in the result); *see also* Tumey v. Ohio, 273 U.S. 510, 535 (1927) (noting that regardless of the evidence against him, a defendant is entitled to a fair trial). It should be reiterated that reversal resulting from a successful ineffective assistance claim results in a new trial, not an outright acquittal; if a defendant is as guilty as he appears, he would presumably be convicted following the second trial as well.

111. For a general discussion of concurrent and successive conflicts of interest, see STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 231–33 (6th ed. 2002).

112. Lower courts, however, have had little difficulty in applying the traditional analysis to such cases. For an application of the *Sullivan-Holloway-Wood* framework, see *Perillo v. Johnson*, 205 F.3d 775, 797–99 (5th Cir. 2000), and *Freund v. Butterworth*, 165 F.3d 839, 858–60 (11th Cir. 1999).

inapplicability, and then set forth an analysis specific to cases of successive representation. Instead, the majority acknowledged the family of prior cases involving concurrent interests[113] and then reached its conclusion based upon an application of the *Sullivan* standard.[114] Only later, after affirming the Fourth Circuit's ruling, did the Court suggest in dicta that such a standard might be inappropriate in successive representation cases.[115] The fact remains, however, that the standard *was* used in *Mickens*, and, as such, justification for its conclusion as based on a successive representation analysis is unsubstantiated.

Despite the Court's spurious justifications for its holding, the likely effects of *Mickens* on similar Sixth Amendment claims in the future must be considered. First, it appears that in *Mickens* the Court has all but abolished a trial court's affirmative duty to inquire into an apparent conflict,[116] a duty clearly pronounced in earlier decisions.[117] The majority stated that reversal is proper only upon a showing of both an actual conflict and an adverse effect of that conflict, even where the trial court had reason to know of the potential conflict yet failed to inquire.[118] A trial court's ruling, then, is no more susceptible to reversal if the court neglects its duty to inquire. Inquiry or no inquiry, the defendant must still demonstrate both actual conflict and adverse effect. Therefore, little incentive remains for the trial court to make the inquiry, and its affirmative duty to do so becomes "just a matter of words, devoid of sanction; it ceases to be any duty at all."[119]

With the trial judge stripped of all responsibility to flush out potential conflicts of interest, such responsibility falls uneasily on counsels' shoulders. *Mickens* attaches undue significance to whether counsel makes a formal objection to a conflict of interest—only where

113. *See* Mickens v. Taylor, 122 S. Ct. 1237, 1240–41 (2002) ("The nub of the question before us is whether the principle established by these [concurrent interest] cases provides an exception to the general rule of *Strickland* under the circumstances of the present case. To answer that question, we must examine those cases in some detail.").

114. *Id.* at 1244.

115. *See id.* at 1245.

116. *See id.* at 1262–63 (Souter, J., dissenting).

117. *See, e.g.*, Wood v. Georgia, 450 U.S. 261, 272–73 (1981) (observing that the potential conflict of interest was apparent at trial and should have been investigated by the judge); Cuyler v. Sullivan, 446 U.S. 335, 346–47 (1980) (stating that where a court knows or reasonably should know of a particular conflict, the court must inquire as to the nature of the conflict); Holloway v. Arkansas, 435 U.S. 475, 489–90 (1978) (holding that a trial judge's failure to inquire into a potential conflict of interest made known to her deprived the defendant of effective assistance of counsel).

118. *See Mickens*, 122 S. Ct. at 1245.

119. *Id.* at 1263 (Souter, J., dissenting).

such an objection is made and ignored by the trial judge is reversal automatic.[120] Absent such an objection, reversal is allowed only upon the "characteristically difficult"[121] showing of both actual conflict and adverse effect.[122] A defendant is therefore at the mercy of his defense counsel to make the formal objection, and, as the facts of *Mickens* illustrate, counsel may be disinclined to make such an objection.[123] Such disinclination comes at the defendant's peril.

From a public policy perspective, which the majority claims to consider,[124] *Mickens* again misses the mark. Conflicts of interest that should have been identified and eliminated by a trial judge at or before trial will instead linger, likely contaminating the remainder of the trial, all the while costing the court system a great deal of time, the parties a great deal of emotional stress, and the public a great deal of money.[125] The losing defendant will likely appeal, inciting yet another round of time-consuming, stressful, and expensive litigation, made even more so by the harsh requirements of the *Mickens* holding.[126]

The most unfortunate effect, however, concerns neither the courts nor the public, but rather the defendants themselves. While both fairness and reason compel courts to require a defendant to

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120. *See id.* at 1241–42 (citing *Holloway*, 435 U.S. at 488).

121. *Id.* at 1260 (Souter, J., dissenting).

122. *Id.* at 1240–41.

123. *See id.* at 1239–40. Counsel's failure to object is not always the result of honest oversight. For instance, in *Wood v. Georgia*, 450 U.S. 261 (1981), defense counsel was employed by the defendants' boss, whose interests were served throughout trial. Counsel, in an effort to further his employer's interests, failed to notify the trial court of the conflict of interest. *See id.* at 266–67, 273 n.20.

124. *See Mickens*, 122 S. Ct. at 1244; *see also supra* notes 86–89 and accompanying text.

125. *See Mickens*, 122 S. Ct. at 1263 (Souter, J., dissenting).

126. One could argue, of course, that the demanding standards of *Mickens* (i.e., requiring a showing of both actual conflict and adverse effect where a trial judge has failed to inquire into an apparent conflict) will result in fewer remands and consequently fewer retrials. Fewer retrials will, in turn, conserve judicial resources and minimize inefficiency. In this sense, then, *Mickens* might actually promote judicial efficiency.

Yet while *Mickens* may result in fewer retrials for defendants whose appeals are based on a trial judge's failure to inquire into an apparent conflict, the proposed disposition of *Mickens*, *see supra* notes 57–60 and accompanying text, would result in fewer appeals initially filed on these grounds. Under this proposed disposition, trial judges would have an increased incentive to inquire into an apparent conflict. *See supra* notes 116–19 and accompanying text. Assuming that such an incentive was effective, there would be fewer overall instances of a trial judge's failure to inquire into an apparent conflict. Accordingly, there would be fewer appeals founded on such a failure, thereby minimizing the number of potential retrials resulting therefrom. Moreover, even if it were the case that the same number of retrials would be granted under *Mickens*, as decided, as under the proposed disposition of *Mickens*, the judicial inefficiency of the former would be evidenced by its surplus of appeals initially filed.

show both actual conflict and adverse effect when the trial court had no reason to know of the alleged conflict, Justice Souter rightly asserted that such a "burden is indefensible when a judge was on notice of the risk [of conflict] but did nothing."[127] Time and time again the Supreme Court has reaffirmed the importance of a defendant's right to a fair trial.[128] Not only does *Mickens* erode this fundamental principle at the trial level by permitting a judge to sit idle while an obvious conflict of interest goes unchecked, but it does so at the appellate level as well, requiring a defendant to bear the cost of a trial judge's prior negligence.[129] The result is an uncharacteristically unfair proposition that does little to strengthen our confidence in the judicial system.

The *Mickens* decision is thus perplexing. The reasons for the Court's rejection of *Wood*'s traditional interpretation as adopted by numerous lower courts[130] remains unsettled, as its only justifications for doing so rely on dubious renderings of otherwise plain language.[131] Equally unclear is the Court's departure from its pre-*Mickens* framework, itself a logical means of balancing judicial diligence against defendant accountability. The Court's justifications here, too, are unsatisfying, as they are grounded in an unsubstantiated fear of a defendant's windfall and result in imposing a greater burden upon the reviewing court.[132]

Nonetheless, we are left to face the troubling ramifications of *Mickens*. Trial judges will likely become less vigilant, assured that their failure to inquire into potential conflicts of interest will bring them no impunity. Judicial resources will in turn be squandered by

127. *Mickens*, 122 S. Ct. at 1261 (Souter, J., dissenting).

128. *See, e.g.*, Wheat v. United States, 486 U.S. 153, 158 (1988) (noting that the Sixth Amendment "was designed to assure fairness in the adversary criminal process"); Strickland v. Washington, 466 U.S. 668, 689 (1984) ("The purpose [of the effective assistance guarantee of the Sixth Amendment] is simply to ensure that criminal defendants receive a fair trial."); United States v. Cronic, 466 U.S. 648, 658 (1984) (noting that the Sixth Amendment exists for the sake of preserving an accused's right to a fair trial).

129. *See* Mickens v. Taylor, 240 F.3d 348, 369 (4th Cir. 2001) (en banc) (Michael, J., dissenting), *aff'd*, 122 S. Ct. 1237 (2002).

130. *See, e.g.*, United States v. Rodriguez, 278 F.3d 486, 492 (5th Cir. 2002) (finding that when the trial judge should have known of the conflict absent defense counsel's objection, defendant need only show actual conflict, but when no conflict was apparent to the judge, defendant must demonstrate conflict and adverse affect (citing Wood v. Georgia, 450 U.S. 261, 272–74 (1981))), *cert. denied*, 122 S. Ct. 2376 (2002); United States v. Levy, 25 F.3d 146, 153 (2d Cir. 1994) ("When a possible conflict has been entirely ignored, reversal is automatic."); Strouse v. Leonardo, 928 F.2d 548, 555 (2d Cir. 1991) (construing *Wood* to mandate reversal upon trial court's failure to inquire into a known conflict).

131. *See supra* notes 63–83 and accompanying text.

132. *See supra* notes 84–101 and accompanying text.

appellate review that might easily have been avoided. Most tragically, however, defendants themselves will bear the burden of the judiciary's negligence, further subordinating their constitutional right to a fair trial.

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