SUPREME COURT OF THE UNITED STATES

No. 00–9285

WALTER MICKENS, JR., PETITIONER *v.* JOHN TAYLOR, WARDEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[March 27, 2002]

JUSTICE SOUTER, dissenting.

A judge who knows or should know that counsel for a criminal defendant facing, or engaged in, trial has a potential conflict of interests is obliged to enquire into the potential conflict and assess its threat to the fairness of the proceeding. See *Wheat* v. *United States,* 486 U. S. 153, 160 (1988); *Wood* v. *Georgia*, 450 U. S. 261, 272 (1981); *Cuyler* v. *Sullivan*, 446 U. S. 335, 347 (1980). Cf. *Holloway* v. *Arkansas*, 435 U. S. 475, 484 (1978). Unless the judge finds that the risk of inadequate representation is too remote for further concern, or finds that the defendant has intelligently assumed the risk and waived any potential Sixth or Fourteenth Amendment claim of inadequate counsel, the court must see that the lawyer is replaced. See *id.*, at 484; *Glasser* v. *United States,* 315 U. S. 60, 70 (1942). Cf. *Wheat*, *supra*, at 162; Advisory Committee's Notes on 1979 Amendments to Fed. Rule Crim. Proc. 44(c), 18 U. S. C. App., p. 1655.

The District Judge reviewing the federal habeas petition in this case found that the state judge who appointed Bryan Saunders to represent petitioner Mickens on a capital murder charge knew or should have known that obligations stemming from Saunders's prior representation of the victim, Timothy Hall, potentially conflicted

with duties entailed by defending Mickens.[1] *Mickens* v. *Greene*, 74 F. Supp. 2d 586, 613–615 (ED Va. 1999). The state judge was therefore obliged to look further into the extent of the risk and, if necessary, either secure Mickens's knowing and intelligent assumption of the risk or appoint a different lawyer. The state judge, however, did nothing to discharge her constitutional duty of care. *Id.*, at 614. In the one case in which we have devised a remedy for such judicial dereliction, we held that the ensuing judgment of conviction must be reversed and the defendant afforded a new trial. *Holloway*, *supra*, at 491; see also *Wood*, *supra*, at 272, n. 18. That should be the result here.

I

The Court today holds, instead, that Mickens should be denied this remedy because Saunders failed to employ a

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[1] The parties do not dispute that the appointing judge in this case knew or reasonably should have known that Saunders had represented Hall on assault and battery charges brought against him by his mother and a separate concealed-weapon charge at the time of his murder. Lodging to App. 390, 393. The name "BRYAN SAUNDERS," in large, handwritten letters, was prominently visible as the appointed lawyer on a one-page docket sheet four inches above where the judge signed her name and wrote: "Remove from docket. Def[endant] deceased." *Id.*, at 390. The same judge then called Saunders the next business day to ask if he would "do her a favor" and represent the only person charged with having killed the victim. App. 142. And, if that were not enough, Mickens's arrest warrants which were apparently before the judge when she appointed Saunders, charged Mickens with the murder, "'on or about March 30, 1992,'" of "'Timothy Jason Hall, white male, age 17.'" *Mickens* v. *Greene*, 74 F. Supp. 2d 586, 614 (ED Va. 1999). The juvenile-court judge, whom circumstances had thrust into the unusual position of having to appoint counsel in a notorious capital case, certainly knew or had reason to know of the possibility that Saunders's 14-day representation of the murder victim, up to the start of the previous business day, may have created a risk of impairing his representation of Mickens in his upcoming murder trial.

formal objection as a means of bringing home to the appointing judge the risk of conflict. *Ante*, at 11. Without an objection, the majority holds, Mickens should get no relief absent a showing that the risk turned into an actual conflict with adverse effect on the representation provided to Mickens at trial. *Ibid.* But why should an objection matter when even without an objection the state judge knew or should have known of the risk and was therefore obliged to enquire further? What would an objection have added to the obligation the state judge failed to honor? The majority says that in circumstances like those now before us, we have already held such an objection necessary for reversal, absent proof of actual conflict with adverse effect, so that this case calls simply for the application of precedent, albeit precedent not very clearly stated. *Ante*, at 8–9.

The majority's position is error, resting on a mistaken reading of our cases. Three are on point, *Holloway* v. *Arkansas*, *supra*; *Cuyler* v. *Sullivan*, *supra*; and *Wood* v. *Georgia*, *supra*.

In *Holloway*, a trial judge appointed one public defender to represent three criminal defendants tried jointly. 435 U. S., at 477. Three weeks before trial, counsel moved for separate representation; the court held a hearing and denied the motion. *Ibid.* The lawyer moved again for appointment of separate counsel before the jury was empanelled, on the ground that one or two of the defendants were considering testifying at trial, in which event the one lawyer's ability to cross-examine would be inhibited. *Id.*, at 478. The court again denied his motion. *Ibid.* After the prosecution rested, counsel objected to the joint representation a third time, advising the court that all three defendants had decided to testify; again the court refused to appoint separate lawyers. *Id.*, at 478–480. The defendants gave inconsistent testimony and were convicted on all counts. *Id.*, at 481.

This Court held that the motions apprised the trial judge of a "risk" that continuing the joint representation would subject defense counsel in the pending trial to the impossible obligations of simultaneously furthering the conflicting interests of the several defendants, *id.*, at 484, and we reversed the convictions on the basis of the judge's failure to respond to the prospective conflict, without any further showing of harm, *id.*, at 491. In particular, we rejected the argument that a defendant tried subject to such a disclosed risk should have to show actual prejudice caused by subsequent conflict. *Id.*, at 488. We pointed out that conflicts created by multiple representation characteristically deterred a lawyer from taking some step that he would have taken if unconflicted, and we explained that the consequent absence of footprints would often render proof of prejudice virtually impossible. *Id.*, at 489–491.

Next came *Cuyler* v. *Sullivan*, 446 U. S. 335 (1980), involving multiple representation by two retained lawyers of three defendants jointly indicted but separately tried, *id.*, at 337. Sullivan, the defendant at the first trial, had consented to joint representation by the same lawyers retained by the two other accused, because he could not afford counsel of his own. *Ibid.* Sullivan was convicted of murder; the other two were acquitted in their subsequent trials. *Id.*, at 338. Counsel made no objection to the multiple representation before or during trial, *ibid.*; nor did the convicted defendant argue that the trial judge otherwise knew or should have known of the risk described in *Holloway*, that counsel's representation might be impaired by conflicting obligations to the defendants to be tried later, *id.*, at 343.

This Court held that multiple representation did not raise enough risk of impaired representation in a coming

trial to trigger a trial court's duty to enquire further, in the absence of "special circumstances."[2] *Id.*, at 346. The most obvious special circumstance would be an objection. See *Holloway*, *supra*, at 488. Indeed, because multiple representation was not suspect *per se,* and because counsel was in the best position to anticipate a risk of conflict, the Court spoke at one point as though nothing but an objection would place a court on notice of a prospective conflict. *Cuyler*, 446 U. S., at 348 ("[A] defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance" (footnote omitted)). But the Court also explained that courts must rely on counsel in "large measure," *id.,* at 347, that is, not exclusively, and it spoke in general terms of a duty to enquire that arises when "the trial court knows or reasonably should know that a particular conflict exists." [3]

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[2] The constitutional rule binding the state courts is thus more lenient than Rule 44(c) of the Federal Rules of Criminal Procedure, which provides:

"Whenever two or more defendants have been jointly charged 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."

See *Wheat* v. *United States,* 486 U. S. 153, 161 (1988).

[3] By "particular conflict" the Court was clearly referring to a risk of conflict detectable on the horizon rather than an "actual conflict" that had already adversely affected the defendant's representation. The Court had just cited and quoted *Holloway* v. *Arkansas,* 435 U. S. 475 (1978), which held that the judge was obligated to enquire into the risk of a prospective conflict, *id.,* at 484. This reading is confirmed by the *Cuyler* Court's subsequent terminology: Because the trial judge in *Cuyler* had had no duty to enquire into "a particular conflict" upon

Ibid. (footnote omitted). Accordingly, the Court did not rest the result simply on the failure of counsel to object, but said instead that "[n]othing in the circumstances of this case indicates that the trial court had a duty to inquire whether there was a conflict of interest," *ibid.* For that reason, it held respondent bound to show "that a conflict of interest actually affected the adequacy of his representation." *Id.*, at 349.

The different burdens on the *Holloway* and *Cuyler* defendants are consistent features of a coherent scheme for dealing with the problem of conflicted defense counsel; a prospective risk of conflict subject to judicial notice is treated differently from a retrospective claim that a completed proceeding was tainted by conflict, although the trial judge had not been derelict in any duty to guard against it. 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 to render it acceptable through a defendant's knowing and intelligent waiver. This duty is something more than the general responsibility to rule without committing legal error; it is an affirmative obligation to investigate a disclosed possibility that defense counsel will be unable to act with uncompromised loyalty to his client. It was the judge's failure to fulfill that duty of care to enquire further and do what might be necessary that the *Holloway* Court

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notice of multiple representation alone, the convicted defendant could get no relief without showing "actual conflict" with "adverse effect." 446 U. S., at 347–350.

Of course, a judge who gets wind of conflict during trial may have to enquire in both directions: prospectively to assess the risk of conflict if the lawyer remains in place; if there is no such risk requiring removal and mistrial, conversely, the judge may have to enquire retrospectively to see whether a conflict has actually affected the defendant adversely, see *infra*, at 13–14.

remedied by vacating the defendant's subsequent conviction. 435 U. S., at 487, 491. The error occurred when the judge failed to act, and the remedy restored the defendant to the position he would have occupied if the judge had taken reasonable steps to fulfill his obligation. But when the problem of conflict comes to judicial attention not prospectively, but only after the fact, the defendant must show an actual conflict with adverse consequence to him in order to get relief. *Cuyler*, *supra*, at 349. Fairness requires nothing more, for no judge was at fault in allowing a trial to proceed even though fraught with hidden risk.

In light of what the majority holds today, it bears repeating that, in this coherent scheme established by *Holloway* and *Cuyler*, there is nothing legally crucial about an objection by defense counsel to tell a trial judge that conflicting interests may impair the adequacy of counsel's representation. Counsel's objection in *Holloway* was important as a fact sufficient to put the judge on notice that he should enquire. In most multiple-representation cases, it will take just such an objection to alert a trial judge to prospective conflict, and the *Cuyler* Court reaffirmed that the judge is obliged to take reasonable prospective action whenever a timely objection is made. 446 U. S., at 346. But the Court also indicated that an objection is not required as a matter of law: "Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an enquiry." *Id.*, at 347. The Court made this clear beyond cavil 10 months later when Justice Powell, the same Justice who wrote the *Cuyler* opinion, explained in *Wood* v. *Georgia* that *Cuyler* "*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.'" 450 U. S., at 272, n. 18 (emphasis in original).

Since the District Court in this case found that the state

judge was on notice of a prospective potential conflict, 74 F. Supp. 2d, at 613–615, this case calls for nothing more than the application of the prospective notice rule announced and exemplified by *Holloway* and confirmed in *Cuyler* and *Wood*. The remedy for the judge's dereliction of duty should be an order vacating the conviction and affording a new trial.

But in the majority's eyes, this conclusion takes insufficient account of *Wood*, whatever may have been the sensible scheme staked out by *Holloway* and *Cuyler*, with a defendant's burden turning on whether a court was apprised of a conflicts problem prospectively or retrospectively. The majority says that *Wood* holds that the distinction is between cases where counsel objected and all other cases, regardless of whether a trial court was put on notice prospectively in some way other than by an objection on the record. See *ante*, at 8–9. In *Wood*, according to the majority, the trial court had notice, there was no objection on the record, and the defendant was required to show actual conflict and adverse effect.

Wood is not easy to read, and I believe the majority misreads it. The first step toward seeing where the majority goes wrong is to recall that the Court in *Wood* said outright what I quoted before, that *Cuyler* "*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.'" 450 U. S., at 272, n. 18. This statement of a trial judge's obligation, like the statement in *Cuyler* that it quoted, 446 U. S., at 347, said nothing about the need for an objection on the record. True, says the majority, but the statement was dictum to be disregarded as "inconsistent" with *Wood*'s holding. *Ante*, at 6–7, n. 2. This is a polite way of saying that the *Wood* Court did not know what it was doing; that it stated the general rule of reversal for failure to enquire when on notice (as in *Holloway*), but then turned around and held that such a

failure called for reversal only when the defendant demonstrated an actual conflict (as in *Cuyler*).

This is not what happened. *Wood* did not hold that in the absence of objection, the *Cuyler* rule governs even when a judge is prospectively on notice of a risk of conflicted counsel. Careful attention to *Wood* shows that the case did not involve prospective notice of risk unrealized, and that it held nothing about the general rule to govern in such circumstances. What *Wood* did decide was how to deal with a possible conflict of interests that becomes known to the trial court only at the conclusion of the trial proceeding at which it may have occurred, and becomes known not to a later habeas court but to the judge who handed down sentences at trial, set probation 19 months later after appeals were exhausted, and held a probation revocation proceeding 4 months after that.[4]

The *Wood* defendants were convicted of distributing obscene material as employees of an adult bookstore and theater, after trials at which they were defended by privately retained counsel. 450 U. S., at 262–263. They were each ordered to pay fines and sentenced to 12-month prison terms that were suspended in favor of probation on the condition that they pay their fines in installments, which they failed to do. *Id.*, at 263–264. The *Wood* Court indicated that by the end of the proceeding to determine whether probation should be revoked because of the defendants' failure to pay, the judge was on notice that defense counsel might have been laboring under a conflict between the interests of the defendant employees and those of their employer, possibly as early as the time the sentences were originally handed down nearly two years earlier, App. 11–16 in *Wood* v. *Georgia*, O.T. 1979, No. 79–

[4] The same trial judge presided over each stage of these proceedings. See App. 11–41 in *Wood* v. *Georgia*, O.T. 1979, No. 79–6027.

6027 (Mar. 18, 1977, sentencing). See *Wood*, *supra*, at 272 ("at the revocation hearing, or at earlier stages of the proceedings below"). The fines were so high that the original sentencing assumption must have been that the store and theater owner would pay them; defense counsel was paid by the employer, at least during the trial; the State pointed out a possible conflict to the judge;[5] and counsel was attacking the fines with an equal protection argument, which weakened the strategy more obviously in the defendants' interest, of requesting the court to reduce the fines or defer their collection. *Id.*, at 272–273. This

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[5]The State indicated that defense counsel labored under a possible conflict of interests between the employer and the defendants, but it was not the conflict in issue here, and so, from the *Wood* Court's perspective, the State's objection, though a relevant fact in alerting the judge like the fact of multiple representation in *Cuyler*, v. *Sullivan,* 446 U. S. 335 (1980), was not sufficient to put the judge on notice of his constitutional duty to enquire into a "particular conflict," *id.,* at 347. State's counsel suggested that in arguing for forgiveness of fines owing to inability to pay, defense counsel was merely trying to protect the employer from an obligation to the defendants to pay the fines. App. A to Brief in Opposition in *Wood* v. *Georgia*, O.T. 1979, No. 79–6027, at 14–15, 27–28 (transcript of Jan. 26, 1979, probation revocation hearing). But as to forgiveness of the fines, the interests of the employer and defendants were aligned; the State's lawyer argued to the court nonetheless that counsel's allegiance to the employer prevented him from pressing the employer to honor its obligation to pay, and suggested to the judge that he should appoint separate counsel to enforce it. *Id.*, at 14. The judge did enquire into this alleged conflict and accepted defense counsel's rejoinder that such a conflict was not relevant to a hearing on whether probation should be revoked for inability to pay and that any such agreement to pay fines for violating the law would surely be unenforceable as a matter of public policy. *Id.*, at 14–17. The majority is thus mistaken in its claim that the State's objection sufficed to put the court on notice of a duty to enquire as to the particular conflict of interest to the *Wood* Court, see *ante*, at 7, n. 2, unless the majority means to say that mention of any imagined conflict is sufficient to put a judge on notice of a duty to enquire into the full universe of possible conflicts.

was enough, according to the *Wood* Court, to tell the judge that defense counsel may have been acting to further the owner's desire for a test case on equal protection, rather than the defendants' interests in avoiding ruinous fines or incarceration. *Ibid.*

What is significant is that, as this Court thus described the circumstances putting the judge on notice, they were not complete until the revocation hearing was finished (nearly two years after sentencing) and the judge knew that the lawyer was relying heavily on equal protection instead of arguments for leniency to help the defendants. The Court noted that counsel stated he had sent a letter to the trial court after sentencing, saying the fines were more than the defendants could afford, *id.*, at 268, n. 13, a move obviously in the defendants' interest. On the other hand, a reference to "equal protection," which the Court could have taken as a reflection of the employer's interest, did not occur until the very end of the revocation hearing. See App. A to Brief in Opposition in *Wood* v. *Georgia*, O.T. 1979, No. 79–6027, at 72 (transcript of Jan. 26, 1979, probation revocation hearing).[6] The *Wood* Court also

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[6] At one point, about a quarter of the way into the hearing, defense counsel said: "And I think the universal rule is in the United States, because of the Fourteenth Amendment of the United States Constitution, legal protection, you cannot, or should not, lock up an accused for failure to pay a fine; because of his inability or her inability to pay the fine, if that person, and this is a crucial point, Your Honor, if that person, like to quote from Bennett versus Harper, was incapable of paying the fine, rather than refusing and neglecting to do so." App. A to Brief in Opposition, in *Wood* v. *Georgia*, O.T. 1979, No. 79–6027, at 19. Defense counsel also cited two equal protection decisions of this Court, *Tate* v. *Short,* 401 U. S. 395 (1971), and *Williams* v. *Illinois,* 399 U. S. 235 (1970); it may very well be that he meant to say "equal protection" rather than "legal protection" or the latter was in fact a garbled transcription, but it seems unlikely that the *Wood* Court was referring to this statement when it said counsel "was pressing a constitutional attack rather than making the arguments for leniency," 450 U. S., at 272,

knew that a motion stressing equal protection was not filed by defense counsel until two weeks after the revocation hearing, on the day before probation was to be revoked and the defendants locked up, App. 35–36 in *Wood* v. *Georgia*, O.T. 1979, No. 79–6027 ("Joint Motions to Modify Conditions of Probation Order—Filed Feb. 12, 1979"). 450 U. S., at 268. Since, in the Court's view, counsel's emphasis on the equal protection claim was one of the facts that together put the judge on notice of something amiss, and since the record shows that it was not clear that counsel was favoring the equal protection argument until, at the earliest, the very close of the revocation hearing, and more likely the day he filed his motion two weeks later, the Court could only have meant that the judge was put on notice of a conflict that may actually have occurred, not of a potential conflict that might occur later.[7] At that point, as the Court saw it, there were only two further facts the judge would have needed to know to determine whether there had been an actual disqualifying conflict, and those were whether a concern for the interest of the employer had weakened the lawyer's arguments for leniency, and whether the defendants had been informed of the conflict and waived their rights to unconflicted counsel.

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because it was made to supplement, not replace, appeals to leniency based on the specific financial situations of the individual defendants.

[7] The phrasing of the remand instruction confirms the conclusion that the *Wood* Court perceived the duty to enquire neglected by the judge as retrospective in nature: The "[state] court [on remand] 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." *Id.*, at 273. From the Court's vantage point, another compelling reason for suspecting a conflict of interests was the fact that the employer apparently paid for the appeal, in which counsel argued the equal protection question only, *id.,* at 267, n. 11; but, of course, this would have been unknown to the judge at the revocation hearing.

This Court, of course, was in no position to resolve these remaining issues in the first instance. Whether the lawyer's failure to press more aggressively for leniency was caused by a conflicting interest, for example, had never been explored at the trial level and there was no record to consult on the point.[8] In deciding what to do, the *Wood* Court had two established procedural models to look to: *Holloway*'s procedure of vacating judgment[9] when a judge had failed to enquire into a prospective conflict, and *Cuyler*'s procedure of determining whether the conflict that may well have occurred had actually occurred with some adverse effect.

Treating the case as more like *Cuyler* and remanding was obviously the correct choice. *Wood* was not like *Holloway*, in which the judge was put on notice of a risk before trial, that is, a prospective possibility of conflict. It was, rather, much closer to *Cuyler*, since any notice to a court went only to a conflict, if there was one, that had pervaded a completed trial proceeding extending over two years. The only difference between *Wood* and *Cuyler* was that, in *Wood*, the signs that a conflict may have occurred were clear to the judge at the close of the probation revocation proceeding, whereas the claim of conflict in *Cuyler* was not raised until after judgment in a separate habeas proceeding, see 446 U. S., at 338. The duty of the *Wood*

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[8] There was certainly cause for reasonable disagreement on the issue. As Justice White pointed out, absent relevant evidence in the record, it was reasonable that the employer might have refused to pay because the defendants were no longer employees, or because it no longer owned adult establishments. *Id.,* at 282–283, and n. 9 (dissenting opinion). Indeed, counsel said that he was no longer paid by the employer for his representation of the defendants once they were put on probation, *id.*, at 281, n. 7 (White, J., dissenting).

[9] In this case, the order would have been to vacate the commitment order based on the probation violation, and perhaps even the antecedent fine. See *id.*, at 274, n. 21 (majority opinion).

judge could only have been to enquire into the past (what had happened two years earlier at sentencing, the setting of probation 19 months later, the ensuing failures to pay, and the testimony that had already been given at the revocation hearing), just like the responsibility of the state and federal habeas courts reviewing the record in *Cuyler* in postconviction proceedings, see *id.*, at 338–339. Since the *Wood* judge's duty was unlike the *Holloway* judge's obligation to take care for the future, it would have made no sense for the *Wood* Court to impose a *Holloway* remedy.

The disposition in *Wood* therefore raises no doubt about the consistency of the *Wood* Court. Contrary to the majority's conclusion, see *ante*, at 6–7, n. 2, there was no tension at all between acknowledging the rule of reversal to be applied when a judge fails to enquire into a known risk of prospective conflict, *Wood*, 450 U. S., at 272, n. 18, while at the same time sending the *Wood* case itself back for a determination about actual, past conflict, *id.,* at 273–274. *Wood* simply followed and confirmed the pre-existing scheme established by *Holloway* and *Cuyler*. When a risk of conflict appears before a proceeding has been held or completed and a judge fails to make a prospective enquiry, the remedy is to vacate any subsequent judgment against the defendant. See *Holloway*, 435 U. S., at 491. When the possibility of conflict does not appear until a proceeding is over and any enquiry must be retrospective, a defendant must show actual conflict with adverse effect. See *Cuyler, supra*, at 349.

Wood, then, does not affect the conclusion that would be reached here on the basis of *Holloway* and *Cuyler*. This case comes to us with the finding that the judge who appointed Saunders knew or should have known of the risk that he would be conflicted owing to his prior appointment to represent the victim of the crime, 74 F. Supp. 2d, at 613–615; see n. 1, *supra.* We should, therefore, follow the law settled until today, in vacating the convic-

tion and affording Mickens a new trial.

II

Since the majority will not leave the law as it is, however, the question is whether there is any merit in the rule it now adopts, of treating breaches of a judge's duty to enquire into prospective conflicts differently depending on whether defense counsel explicitly objected. There is not. The distinction is irrational on its face, it creates a scheme of incentives to judicial vigilance that is weakest in those cases presenting the greatest risk of conflict and unfair trial, and it reduces the so-called judicial duty to enquire into so many empty words.

The most obvious reason to reject the majority's rule starts with the accepted view that a trial judge placed on notice of a risk of prospective conflict has an obligation then and there to do something about it, *Holloway, supra*, at 484. The majority does not expressly repudiate that duty, see *ante*, at 4–5, which is too clear for cavil. It should go without saying that the best time to deal with a known threat to the basic guarantee of fair trial is before the trial has proceeded to become unfair. See *Holloway, supra*, at 484; *Glasser*, 315 U. S., at 76. Cf. *Pate* v. *Robinson,* 383 U. S. 375, 386–387 (1966) (judge's duty to conduct hearing as to competency to stand trial). It would be absurd, after all, to suggest that a judge should sit quiescent in the face of an apparent risk that a lawyer's conflict will render representation illusory and the formal trial a waste of time, emotion, and a good deal of public money. And as if that were not bad enough, a failure to act early raises the specter, confronted by the *Holloway* Court, that failures on the part of conflicted counsel will elude demonstration after the fact, simply because they so often consist of what did not happen. 435 U. S., at 490–492. While a defendant can fairly be saddled with the characteristically difficult burden of proving adverse effects of conflicted

decisions after the fact when the judicial system was not to blame in tolerating the risk of conflict, the burden is indefensible when a judge was on notice of the risk but did nothing.

With so much at stake, why should it matter how a judge learns whatever it is that would point out the risk to anyone paying attention? Of course an objection from a conscientious lawyer suffices to put a court on notice, as it did in *Holloway*; and probably in the run of multiple-representation cases nothing short of objection will raise the specter of trouble. But sometimes a wide-awake judge will not need any formal objection to see a risk of conflict, as the federal habeas court's finding in this very case shows. 74 F. Supp. 2d, at 613–615. Why, then, pretend contrary to fact that a judge can never perceive a risk unless a lawyer points it out? Why excuse a judge's breach of judicial duty just because a lawyer has fallen down in his own ethics or is short on competence? Transforming the factually sufficient trigger of a formal objection into a legal necessity for responding to any breach of judicial duty is irrational.

Nor is that irrationality mitigated by the Government's effort to analogize the majority's objection requirement to the general rule that in the absence of plain error litigants get no relief from error without objection. The Government as *amicus* argues for making a formal objection crucial because judges are not the only ones obliged to take care for the integrity of the system; defendants and their counsel need inducements to help the courts with timely warnings. Brief for United States 9, 26–27. The fallacy of the Government's argument, however, has been on the books since *Wood* was decided. See 450 U. S., at 265, n. 5 ("It is unlikely that [the lawyer on whom the conflict of interest charge focused] would concede that he had continued improperly to act as counsel"). The objection requirement works elsewhere because the objecting

lawyer believes that he sights an error being committed by the judge or opposing counsel. See, *e.g.*, *United States* v. *Vonn*, 535 U. S. ___, ___ (2002) (slip op., at 17) (error in judge's Rule 11 plea colloquy). That is hardly the motive to depend on when the risk of error, if there is one, is being created by the lawyer himself in acting subject to a risk of conflict, 227 F. 3d 203, 213–217 (CA4 2000), vacated en banc, 240 F. 3d 348 (CA4 2001). The law on conflicted counsel has to face the fact that one of our leading cases arose after a trial in which counsel may well have kept silent about conflicts not out of obtuseness or inattention, but for the sake of deliberately favoring a third party's interest over the clients, and this very case comes to us with reason to suspect that Saunders suppressed his conflicts for the sake of a second fee in a case getting public attention. While the perceptive and conscientious lawyer (as in *Holloway*) needs nothing more than ethical duty to induce an objection, the venal lawyer is not apt to be reformed by a general rule that says his client will have an easier time reversing a conviction down the road if the lawyer calls attention to his own venality.[10]

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[10] The Government contends that not requiring a showing of adverse effect in no-objection cases would "provide the defense with a *dis*incentive to bring conflicts to the attention of the trial court, since remaining silent could afford a defendant with a reliable ground for reversal in the event of conviction." Brief for United States as *Amicus Curiae* 27. This argument, of course, has no force whatsoever in the case of the venal conflicted lawyer who remains silent out of personal self-interest or the obtuse lawyer who stays silent because he could not recognize a conflict if his own life depended on it. And these are precisely the lawyers presenting the danger in no-objection cases; the savvy and ethical lawyer would comply with his professional duty to disclose conflict concerns to the court. But even assuming the unlikely case of a savvy lawyer who recognizes a potential conflict and does not know for sure whether to object timely on that basis as a matter of professional ethics, an objection on the record is still the most reliable factually sufficient trigger of the judicial duty to enquire, dereliction of which would result

The irrationality of taxing defendants with a heavier burden for silent lawyers naturally produces an equally irrational scheme of incentives operating on the judges. The judge's duty independent of objection, as described in *Cuyler* and *Wood,* is made concrete by reversal for failure to honor it. The plain fact is that the specter of reversal for failure to enquire into risk is an incentive to trial judges to keep their eyes peeled for lawyers who wittingly or otherwise play loose with loyalty to their clients and the fundamental guarantee of a fair trial. See *Wheat*, 486 U. S., at 161. Cf. *Pate*, 383 U. S., at 386–387 (reversal as remedy for state trial judge's failure to discharge duty to ensure competency to stand trial). That incentive is needed least when defense counsel points out the risk with a formal objection, and needed most with the lawyer who keeps risk to himself, quite possibly out of self-interest. Under the majority's rule, however, it is precisely in the latter situation that the judge's incentive to take care is at its ebb. With no objection on record, a convicted defendant can get no relief without showing adverse effect, minimizing the possibility of a later reversal and the consequent inducement to judicial care.[11] This makes no sense.

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in a reversal, and it is therefore beyond the realm of reasonable conjecture to suggest that such a lawyer would forgo an objection on the chance that a court in postconviction proceedings may find an alternative factual basis giving rise to a duty to enquire.

[11] Lest anyone be wary that a rule requiring reversal for failure to enquire when on notice would be too onerous a check on trial judges, a survey of Courts of Appeals already applying the *Holloway* rule in no-objection cases shows a commendable measure of restraint and respect for the circumstances of fellow judges in state and federal trial courts, finding the duty to enquire violated only in truly outrageous cases. See, *e.g.*, *Campbell* v. *Rice*, 265 F. 3d 878, 887–888 (CA9 2001) (reversing conviction under *Holloway* when trial judge failed to enquire after the prosecutor indicated defense counsel had just been arraigned by the prosecutor's office on felony drug charges); *United States* v. *Rogers*, 209 F. 3d 139, 145–146 (CA2 2000) (reversing conviction when District

The Court's rule makes no sense unless, that is, the real point of this case is to eliminate the judge's constitutional duty entirely in no-objection cases, for that is certainly the practical consequence of today's holding. The defendant has the same burden to prove adverse effect (and the prospect of reversal is the same) whether the judge has no reason to know of any risk or every reason to know about it short of explicit objection.[12] In that latter case, the duty

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Court failed to enquire on notice that counsel for defendant alleging police misconduct was a police commissioner); *United States* v. *Allen,* 831 F. 2d 1487, 1495–1496 (CA9 1987) (finding Magistrate Judge had reasonably enquired into joint representation of 17 codefendants who entered a group guilty plea, but reversing because the District Court failed to enquire when defense counsel later gave the court a list "rank[ing] the defendants by their relative culpability"). Under the majority's rule, the defendants in each of these cases should have proved that there was an actual conflict of interests that adversely affected their representation. Particularly galling in light of the first two cases is the majority's surprising and unnecessary intimation that this Court's conflicts jurisprudence should not be available or is somehow less important to those who allege conflicts in contexts other than multiple representation. See *ante*, at 11–13.

[12] Requiring a criminal defendant to prove a conflict's adverse effect in all no-objection cases only makes sense on the Court's presumption that the Sixth Amendment right against ineffective assistance of counsel is at its core nothing more than a utilitarian right against unprofessional errors that have detectable effects on outcome. See *ante*, at 3 ("[I]t also follows that defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation"). On this view, the exception in *Holloway* for objection cases turns solely on the theory that "harm" can safely be presumed when counsel objects to no avail at the sign of danger. See *ante*, at 5. But this Court in *Strickland* v. *Washington*, 466 U. S. 668, 693–694 (1984), held that a specific "outcome-determinative standard" is "not quite appropriate" and spoke instead of the Sixth Amendment right as one against assistance of counsel that "undermines the reliability of the result of the proceeding," *id.*, at 693, or "confidence in the outcome," *id.*, at 694. And the *Holloway* Court said that once a conflict objection is made and unheeded, the conviction "must be reversed . . . even if no particular prejudice is shown and even if the defendant was clearly

explicitly described in *Cuyler* and *Wood* becomes just a matter of words, devoid of sanction; it ceases to be any duty at all.

As that duty vanishes, so does the sensible regime under which a defendant's burden on conflict claims took account of the opportunities to ensure against conflicted counsel in the first place. Convicted defendants had two alternative avenues to show entitlement to relief. A defendant might, first, point to facts indicating that a judge knew or should have known of a "'particular conflict,'" *Wood*, 450 U. S., at 272, n. 18 (quoting *Cuyler*, 446 U. S., at 347), before that risk had a chance to play itself out with an adverse result. If he could not carry the burden to show that the trial judge had fallen down in the duty to guard against conflicts prospectively, the defendant was required to show, from the perspective of an observer looking back after the allegedly conflicted representation, that there was an actual conflict of interests with an adverse effect. The first route was preventive, meant to avoid the waste of costly after-the-fact litigation where the risk was clear and easily avoidable by a reasonably vigilant trial judge; the second was retrospective, with a markedly heavier burden justified when the judiciary was not at fault, but at least alleviated by dispensing with any need to show prejudice. Today, the former system has been skewed against recognizing judicial responsibility. The judge's duty applies only when a *Holloway* objection fails to induce a resolutely obdurate judge to take action upon the explicit complaint

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guilty." 435 U. S., at 489 (internal quotation marks and citation omitted). What is clear from *Strickland* and *Holloway* is that the right against ineffective assistance of counsel has as much to do with public confidence in the professionalism of lawyers as with the results of legal proceedings. A revelation that a trusted advocate could not place his client's interest above the interests of self and others in the satisfaction of his professional responsibilities will destroy that confidence, regardless of outcome.

of a lawyer facing impossible demands. In place of the forsaken judicial obligation, we can expect more time-consuming post-trial litigation like this, and if this case is any guide, the added time and expense are unlikely to purchase much confidence in the judicial system.[13]

I respectfully dissent.

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[13] Whether adverse effect was shown was not the question accepted, and I will not address the issue beyond noting that the case for an adverse effect appears compelling in at least two respects. Before trial, Saunders admittedly failed even to discuss with Mickens a trial strategy of reasonable doubt about the forcible sex element, without which death was not a sentencing option. App. 211–213; see also *id.*, at 219. In that vein, Saunders apparently failed to follow leads by looking for evidence that the victim had engaged in prostitution, even though the victim's body was found on a mattress in an area where illicit sex was common. *Id.*, at 202–217; Lodging to App. 397–398. There may be doubt whether these failures were the result of incompetence or litigation strategy rather than a conflicting duty of loyalty to the victim or to self to avoid professional censure for failing to disclose the conflict risk to Mickens (though strategic choice seems unlikely given that Saunders did not even raise the possibility of a consent defense as an option to be considered). But there is little doubt as to the course of the second instance of alleged adverse effect: Saunders knew for a fact that the victim's mother had initiated charges of assault and battery against her son just before he died because Saunders had been appointed to defend him on those very charges, *id.*, at 390 and 393. Yet Saunders did nothing to counter the mother's assertion in the post-trial victim-impact statement given to the trial judge that "'all [she] lived for was that boy,'" *id.*, at 421; see also App. 219–222. Saunders could not have failed to see that the mother's statement should be rebutted, and there is no apparent explanation for his failure to offer the rebuttal he knew, except that he had obtained the information as the victim's counsel and subject to an obligation of confidentiality.