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 SCALIA delivered the opinion of the Court.

The question presented in this case is what a defendant must show in order to demonstrate a Sixth Amendment violation where the trial court fails to inquire into a potential conflict of interest about which it knew or reasonably should have known.

I

In 1993, a Virginia jury convicted petitioner Mickens of the premeditated murder of Timothy Hall during or following the commission of an attempted forcible sodomy. Finding the murder outrageously and wantonly vile, it sentenced petitioner to death. In June 1998, Mickens filed a petition for writ of habeas corpus, see 28 U. S. C. §2254 (1994 ed. and Supp. V), in the United States District Court for the Eastern District of Virginia, alleging, *inter alia*, that he was denied effective assistance of counsel because one of his court-appointed attorneys had a conflict of interest at trial. Federal habeas counsel had discovered that petitioner's lead trial attorney, Bryan Saunders, was representing Hall (the victim) on assault and concealed-weapons charges at the time of the murder. Saunders had

been appointed to represent Hall, a juvenile, on March 20, 1992, and had met with him once for 15 to 30 minutes some time the following week. Hall's body was discovered on March 30, 1992, and four days later a juvenile court judge dismissed the charges against him, noting on the docket sheet that Hall was deceased. The one-page docket sheet also listed Saunders as Hall's counsel. On April 6, 1992, the same judge appointed Saunders to represent petitioner. Saunders did not disclose to the court, his co-counsel, or petitioner that he had previously represented Hall. Under Virginia law, juvenile case files are confidential and may not generally be disclosed without a court order, see Va. Code Ann. §16.1–305 (1999), but petitioner learned about Saunders' prior representation when a clerk mistakenly produced Hall's file to federal habeas counsel.

The District Court held an evidentiary hearing and denied petitioner's habeas petition. A divided panel of the Court of Appeals for the Fourth Circuit reversed, 227 F. 3d 203 (2000), and the Court of Appeals granted rehearing en banc, 240 F. 3d 348 (2001). As an initial matter, the 7-to-3 en banc majority determined that petitioner's failure to raise his conflict-of-interest claim in state court did not preclude review, concluding that petitioner had established cause and that the "inquiry as to prejudice for purposes of excusing [petitioner's] default . . . incorporates the test for evaluating his underlying conflict of interest claim." *Id.,* at 356–357. On the merits, the Court of Appeals assumed that the juvenile court judge had neglected a duty to inquire into a potential conflict, but rejected petitioner's argument that this failure either mandated automatic reversal of his conviction or relieved him of the burden of showing that a conflict of interest adversely affected his representation. Relying on *Cuyler* v. *Sullivan,* 446 U. S. 335 (1980), the court held that a defendant must show "both an actual conflict of interest and an adverse effect even if the trial court failed to inquire into a potential

conflict about which it reasonably should have known," 240 F. 3d, at 355–356. Concluding that petitioner had not demonstrated adverse effect, *id.*, at 360, it affirmed the District Court's denial of habeas relief. We granted a stay of execution of petitioner's sentence and granted certiorari. 532 U. S. 970 (2001).

II

The Sixth Amendment provides that a criminal defendant shall have the right to "the assistance of counsel for his defence." This right has been accorded, we have said, "not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *United States* v. *Cronic,* 466 U. S. 648, 658 (1984). It follows from this that assistance which is ineffective in preserving fairness does not meet the constitutional mandate, see *Strickland* v. *Washington*, 466 U. S. 668, 685–686 (1984); and it also follows that defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation. As a general matter, a defendant alleging a Sixth Amendment violation must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694.

There is an exception to this general rule. We have spared the defendant the need of showing probable effect upon the outcome, and have simply presumed such effect, where assistance of counsel has been denied entirely or during a critical stage of the proceeding. When that has occurred, the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary. See *Cronic*, *supra,* at 658–659; see also *Geders* v. *United States,* 425 U. S. 80, 91 (1976); *Gideon* v. *Wainwright*, 372 U. S. 335, 344–345 (1963). But only in "circumstances of that magnitude" do we forgo individual inquiry into whether counsel's inadequate performance undermined the reliabil-

ity of the verdict. *Cronic, supra,* at 659, n. 26.

We have held in several cases that "circumstances of that magnitude" may also arise when the defendant's attorney actively represented conflicting interests. The nub of the question before us is whether the principle established by these 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.[1]

In *Holloway* v. *Arkansas,* 435 U. S. 475 (1978), defense counsel had objected that he could not adequately represent the divergent interests of three codefendants. *Id.,* at 478–480. Without inquiry, the trial court had denied

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[1] JUSTICE BREYER rejects *Holloway* v. *Arkansas,* 435 U. S. 475 (1978), *Cuyler* v. *Sullivan,* 446 U. S. 335 (1980), and *Wood* v. *Georgia,* 450 U. S. 261 (1981), as "a sensible [and] coherent framework for dealing with" this case, *post*, at 2 (dissenting opinion), and proposes instead the "categorical rule," *post*, at 3, that when a "breakdown in the criminal justice system creates . . . the appearance that the proceeding will not reliably serve its function as a vehicle for determination of guilt and innocence, and the resulting criminal punishment will not be regarded as fundamentally fair," *ibid.* (internal quotation marks omitted), reversal must be decreed without proof of prejudice. This seems to us less a categorical rule of decision than a restatement of the issue to be decided. *Holloway*, *Sullivan,* and *Wood* establish the framework that they do precisely because that framework is thought to identify the situations in which the conviction will reasonably not be regarded as fundamentally fair. We believe it eminently performs that function in the case at hand, and that JUSTICE BREYER is mistaken to think otherwise. But if he does think otherwise, a proper regard for the judicial function—and especially for the function of this Court, which must lay down rules that can be followed in the innumerable cases we are unable to review—would counsel that he propose some other "sensible and coherent framework," rather than merely saying that prior representation of the victim, plus the capital nature of the case, plus judicial appointment of the counsel, see *post*, at 2, strikes him as producing a result that will not be regarded as fundamentally fair. This is not a rule of law but expression of an ad hoc "fairness" judgment (with which we disagree).

counsel's motions for the appointment of separate counsel and had refused to allow counsel to cross-examine any of the defendants on behalf of the other two. The *Holloway* Court deferred to the judgment of counsel regarding the existence of a disabling conflict, recognizing that a defense attorney is in the best position to determine when a conflict exists, that he has an ethical obligation to advise the court of any problem, and that his declarations to the court are "virtually made under oath." *Id.,* at 485–486 (internal quotation marks omitted). *Holloway* presumed, moreover, that the conflict, "which [the defendant] and his counsel tried to avoid by timely objections to the joint representation," *id.,* at 490, undermined the adversarial process. The presumption was justified because joint representation of conflicting interests is inherently suspect, and because counsel's conflicting obligations to multiple defendants "effectively sea[l] his lips on crucial matters" and make it difficult to measure the precise harm arising from counsel's errors. *Id.,* at 489–490. *Holloway* thus creates an automatic reversal rule only where defense counsel is forced to represent codefendants over his timely objection, unless the trial court has determined that there is no conflict. *Id.,* at 488 ("[W]henever a trial court improperly requires joint representation over timely objection reversal is automatic").

In *Cuyler* v. *Sullivan,* 446 U. S. 335 (1980), the respondent was one of three defendants accused of murder who were tried separately, represented by the same counsel. Neither counsel nor anyone else objected to the multiple representation, and counsel's opening argument at Sullivan's trial suggested that the interests of the defendants were aligned. *Id.*, at 347–348. We declined to extend *Holloway*'s automatic reversal rule to this situation and held that, absent objection, a defendant must demonstrate that "a conflict of interest actually affected the adequacy of his representation." 446 U. S., at 348–349. In addition to

describing the defendant's burden of proof, *Sullivan* addressed separately a trial court's duty to inquire into the propriety of a multiple representation, construing *Holloway* to require inquiry only when "the trial court knows or reasonably should know that a particular conflict exists," 446 U. S., at 347[2]—which is not to be confused with when the trial court is aware of a vague, unspecified possibility of conflict, such as that which "inheres in almost every instance of multiple representation," *id.*, at 348. In *Sullivan*, no "special circumstances" triggered the trial court's duty to inquire. *Id.*, at 346.

Finally, in *Wood* v. *Georgia*, 450 U. S. 261 (1981), three indigent defendants convicted of distributing obscene materials had their probation revoked for failure to make the requisite $500 monthly payments on their $5,000 fines. We granted certiorari to consider whether this violated the Equal Protection Clause, but during the course of our consideration certain disturbing circumstances came to our attention: At the probation-revocation hearing (as at all times since their arrest) the defendants had been represented by the lawyer for their employer (the owner of the business that purveyed the obscenity), and their employer paid the attorney's fees. The employer had promised his employees he would pay their fines, and

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[2] In order to circumvent *Sullivan*'s clear language, JUSTICE STEVENS suggests that a trial court must scrutinize representation by appointed counsel more closely than representation by retained counsel. *Post*, at 6–7 (dissenting opinion). But we have already rejected the notion that the Sixth Amendment draws such a distinction. "A proper respect for the Sixth Amendment disarms [the] contention that defendants who retain their own lawyers are entitled to less protection than defendants for whom the State appoints counsel . . . . The vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant's entitlement to constitutional protection." *Cuyler* v. *Sullivan*, 446 U. S. 335, 344 (1980).

had generally kept that promise but had not done so in these defendants' case. This record suggested that the employer's interest in establishing a favorable equal-protection precedent (reducing the fines he would have to pay for his indigent employees in the future) diverged from the defendants' interest in obtaining leniency or paying lesser fines to avoid imprisonment. Moreover, the possibility that counsel was actively representing the conflicting interests of employer and defendants "was sufficiently apparent at the time of the revocation hearing to impose upon the court a duty to inquire further." *Id.,* at 272. Because "[o]n the record before us, we [could not] be sure whether counsel was influenced in his basic strategic decisions by the interests of the employer who hired him," *ibid.*, we remanded for the trial court "to determine whether the conflict of interest that this record strongly suggests actually existed," *id.*, at 273.

Petitioner argues that the remand instruction in *Wood* established an "unambiguous rule" that where the trial judge neglects a duty to inquire into a potential conflict, the defendant, to obtain reversal of the judgment, need only show that his lawyer was subject to a conflict of interest, and need not show that the conflict adversely affected counsel's performance. Brief for Petitioner 21.[3]

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[3] Petitioner no longer argues, as he did below and as JUSTICE SOUTER does now, *post*, at 14 (dissenting opinion), that the Sixth Amendment requires reversal of his conviction without further inquiry into whether the potential conflict that the judge should have investigated was real. Compare 240 F. 3d 348, 357 (CA4 2001) (en banc), with Tr. of Oral Arg. 23–25. Some Courts of Appeals have read a footnote in *Wood* v. *Georgia*, 450 U. S. 261, 272, n. 18 (1981), as establishing that outright reversal is mandated when the trial court neglects a duty to inquire into a potential conflict of interest. See, *e.g., Campbell* v. *Rice*, 265 F. 3d 878, 884–885, 888 (CA9 2001); *Ciak* v. *United States*, 59 F. 3d 296, 302 (CA2 1995). But see *Brien* v. *United States*, 695 F. 2d 10, 15, n. 10 (CA1 1982). The *Wood* footnote says that *Sullivan* does not

He relies upon the language in the remand instruction directing the trial court to grant a new revocation hearing if it determines that "an actual conflict of interest existed," *Wood*, 450 U. S., at 273, without requiring a further determination that the conflict adversely affected counsel's performance. As used in the remand instruction, however,

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preclude "raising . . . a conflict-of-interest problem that is apparent in the record" and that "*Sullivan mandates* a reversal when the trial court has failed to make [the requisite] inquiry." *Wood*, *supra,* at 272, n. 18. These statements were made in response to the dissent's contention that the majority opinion had "gone beyond" *Cuyler* v. *Sullivan*, *ibid.*, in reaching a conflict-of-interest due-process claim that had been raised neither in the petition for certiorari nor before the state courts, see 450 U. S., at 280 (White, J., dissenting). To the extent the "*mandates* a reversal" statement goes beyond the assertion of mere jurisdiction to reverse, it is dictum—and dictum inconsistent with the disposition in *Wood*, which was *not* to reverse but to vacate and remand for the trial court to conduct the inquiry it had omitted.

JUSTICE SOUTER labors to suggest that the *Wood* remand order is part of "a coherent scheme," *post*, at 6, in which automatic reversal is required when the trial judge fails to inquire into a potential conflict that was apparent before the proceeding was "held or completed," but a defendant must demonstrate adverse effect when the judge fails to inquire into a conflict that was not apparent before the end of the proceeding, *post*, at 14. The problem with this carefully concealed "coherent scheme" (no case has ever mentioned it) is that in *Wood* itself the court did not decree automatic reversal, even though it found that "the *possibility* of a conflict of interest was sufficiently apparent *at the time of* the revocation hearing to impose upon the court a duty to inquire further." 450 U. S., at 272 (second emphasis added). Indeed, the State had actually notified the judge of a potential conflict of interest "'[d]uring the probation revocation hearing.'" *Id.,* at 272, and n. 20. JUSTICE SOUTER's statement that "the signs that a conflict may have occurred were clear to the judge at the close of the probation revocation proceeding," *post*, at 13—when it became apparent that counsel had neglected the "strategy more obviously in the defendants' interest, of requesting the court to reduce the fines or defer their collection," *post*, at 10—would more accurately be phrased "the *effect of the conflict upon counsel's performance* was clear to the judge at the close of the probation revocation proceeding."

we think "an actual conflict of interest" meant precisely a conflict *that affected counsel's performance*—as opposed to a mere theoretical division of loyalties. It 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." 446 U. S., at 349–350 (emphasis added).[4] This is the only interpretation consistent with the *Wood* Court's earlier description of why it could not decide the case without a remand: "On the record before us, we cannot be sure whether counsel *was influenced in his basic strategic decisions* by the interests of the employer who hired him. *If this was the case*, the due process rights of petitioners were not respected . . . ." 450 U. S., at 272 (emphasis added). The notion that *Wood* created a new rule *sub silentio*—and in a case where certiorari had been granted on an entirely different question, and the parties had neither briefed nor argued the conflict-of-interest issue—is implausible.[5]

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[4] JUSTICE STEVENS asserts that this reading (and presumably JUSTICE SOUTER's reading as well, *post*, at 13), is wrong, *post*, at 9; that *Wood* only requires petitioner to show that a real conflict existed, not that it affected counsel's performance, *post,* at 9–10. This is so because we "unambiguously stated" that a conviction must be reversed whenever the trial court fails to investigate a potential conflict, *post,* at 9 (citing *Wood* footnote). As we have explained earlier, n. 3, *supra*, this dictum simply contradicts the remand order in *Wood*.

[5] We have used "actual conflict of interest" elsewhere to mean what was required to be shown in *Sullivan*. See *United States* v. *Cronic*, 466 U. S. 648, 662, n. 31 (1984) ("[W]e have presumed prejudice when counsel labors under an actual conflict of interest . . . . See *Cuyler* v. *Sullivan*, 446 U. S. 335 (1980)"). And we have used "conflict of interest" to mean a division of loyalties *that affected counsel's performance*. In *Holloway,* 435 U. S., at 482, we described our earlier opinion in *Glasser* v. *United States*, 315 U. S. 60 (1942), as follows:

> "The record disclosed that Stewart failed to cross-examine a Government witness whose testimony linked Glasser with the

Petitioner's proposed rule of automatic reversal when there existed a conflict that did not affect counsel's performance, but the trial judge failed to make the *Sullivan*-mandated inquiry, makes little policy sense. As discussed, the rule applied when the trial judge is not aware of the conflict (and thus not obligated to inquire) is that prejudice will be presumed only if the conflict has significantly affected counsel's performance—thereby rendering the verdict unreliable, even though *Strickland* prejudice cannot be shown. See *Sullivan, supra*, at 348–349. The trial court's awareness of a potential conflict neither renders it more likely that counsel's performance was significantly affected nor in any other way renders the verdict unreliable. Cf. *United States* v. *Cronic*, 466 U. S., at 662, n. 31. Nor does the trial judge's failure to make the *Sullivan*-mandated inquiry often make it harder for reviewing courts to determine conflict and effect, particularly since those courts may rely on evidence and testimony whose importance only becomes established at the trial.

Nor, finally, is automatic reversal simply an appropriate means of enforcing *Sullivan*'s mandate of inquiry. Despite JUSTICE SOUTER's belief that there must be a threat of sanction (to-wit, the risk of conferring a windfall upon the defendant) in order to induce "resolutely obdurate" trial

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> conspiracy and failed to object to the admission of arguably inadmissible evidence. This failure was viewed by the Court as a result of Stewart's desire to protect Kretske's interests, and was thus 'indicative of Stewart's struggle to serve two masters . . . .' [315 U. S.], at 75. After identifying *this conflict of interests*, the Court declined to inquire whether the prejudice flowing from it was harmless and instead ordered Glasser's conviction reversed." (Emphasis added.)

Thus, the *Sullivan* standard is not properly read as requiring inquiry into actual conflict as something separate and apart from adverse effect. An "actual conflict," for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance.

judges to follow the law, *post*, at 20, we do not presume that judges are as careless or as partial as those police officers who need the incentive of the exclusionary rule, see *United States* v. *Leon,* 468 U. S. 897, 916–917 (1984). And in any event, the *Sullivan* standard, which requires proof of effect upon representation but (once such effect is shown) presumes prejudice, already creates an "incentive" to inquire into a potential conflict. In those cases where the potential conflict is in fact an actual one, only inquiry will enable the judge to avoid all possibility of reversal by either seeking waiver or replacing a conflicted attorney. We doubt that the deterrence of "judicial dereliction" that would be achieved by an automatic reversal rule is significantly greater.

Since this was not a case in which (as in *Holloway*) counsel protested his inability simultaneously to represent multiple defendants; and since the trial court's failure to make the *Sullivan*-mandated inquiry does not reduce the petitioner's burden of proof; it was at least necessary, to void the conviction, for petitioner to establish that the conflict of interest adversely affected his counsel's performance. The Court of Appeals having found no such effect, see 240 F. 3d, at 360, the denial of habeas relief must be affirmed.

III

Lest today's holding be misconstrued, we note that the only question presented was the effect of a trial court's failure to inquire into a potential conflict upon the *Sullivan* rule that deficient performance of counsel must be shown. The case was presented and argued on the assumption that (absent some exception for failure to inquire) *Sullivan* would be applicable—requiring a showing of defective performance, but *not* requiring in addition (as *Strickland* does in other ineffectiveness-of-counsel cases), a showing of probable effect upon the outcome of trial.

That assumption was not unreasonable in light of the holdings of Courts of Appeals, which have applied *Sullivan* "unblinkingly" to "all kinds of alleged attorney ethical conflicts," *Beets* v. *Scott*, 65 F. 3d 1258, 1266 (CA5 1995) (en banc). They have invoked the *Sullivan* standard not only when (as here) there is a conflict rooted in counsel's obligations to *former* clients, see, *e.g., Perillo* v. *Johnson*, 205 F. 3d 775, 797–799 (CA5 2001); *Freund* v. *Butterworth*, 165 F. 3d 839, 858–860 (CA11 1999); *Mannhalt* v. *Reed*, 847 F. 2d 576, 580 (CA9 1988); *United States* v. *Young*, 644 F. 2d 1008, 1013 (CA4 1981), but even when representation of the defendant somehow implicates counsel's personal or financial interests, including a book deal, *United* States v. *Hearst*, 638 F. 2d 1190, 1193 (CA9 1980), a job with the prosecutor's office, *Garcia* v. *Bunnell*, 33 F. 3d 1193, 1194–1195, 1198, n. 4 (CA9 1994), the teaching of classes to Internal Revenue Service agents, *United States* v. *Michaud*, 925 F. 2d 37, 40–42 (CA1 1991), a romantic "entanglement" with the prosecutor, *Summerlin* v. *Stewart*, 267 F. 3d 926, 935–941 (CA9 2001), or fear of antagonizing the trial judge, *United States* v. *Sayan*, 968 F. 2d 55, 64–65 (CADC 1992).

It must be said, however, that the language of *Sullivan* itself does not clearly establish, or indeed even support, such expansive application. "[U]ntil," it said, "a defendant shows that his counsel *actively represented* conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." 446 U. S., at 350 (emphasis added). Both *Sullivan* itself, see *id.*, at 348–349, and *Holloway*, see 435 U. S., at 490–491, stressed the high probability of prejudice arising from multiple concurrent representation, and the difficulty of proving that prejudice. See also Geer, Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney, 62 Minn. L. Rev. 119, 125–140 (1978); Lowenthal, Joint Representa-

tion in Criminal Cases: A Critical Appraisal, 64 Va. L. Rev. 939, 941–950 (1978). Not all attorney conflicts present comparable difficulties. Thus, the Federal Rules of Criminal Procedure treat concurrent representation and prior representation differently, requiring a trial court to inquire into the likelihood of conflict whenever jointly charged defendants are represented by a single attorney (Rule 44(c)), but not when counsel previously represented another defendant in a substantially related matter, even where the trial court is aware of the prior representation.[6] See *Sullivan*, *supra,* at 346, n. 10 (citing the Rule).

This is not to suggest that one ethical duty is more or less important than another. The purpose of our *Holloway* and *Sullivan* exceptions from the ordinary requirements of *Strickland*, however, is not to enforce the Canons of Legal Ethics, but to apply needed prophylaxis in situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel. See *Nix* v. *Whiteside,* 475 U. S. 157, 165 (1986) ("[B]reach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel"). In resolving this case on the grounds on which it was presented to us, we do not rule

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[6] Federal Rule of Criminal Procedure 44(c) 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."

upon the need for the *Sullivan* prophylaxis in cases of successive representation. Whether *Sullivan* should be extended to such cases remains, as far as the jurisprudence of this Court is concerned, an open question.

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For the reasons stated, the judgment of the Court of Appeals is

Affirmed.