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 STEVENS, dissenting.

This case raises three uniquely important questions about a fundamental component of our criminal justice system—the constitutional right of a person accused of a capital offense to have the effective assistance of counsel for his defense.[1] The first is whether a capital defendant's attorney has a duty to disclose that he was representing the defendant's alleged victim at the time of the murder. Second, is whether, assuming disclosure of the prior representation, the capital defendant has a right to refuse the appointment of the conflicted attorney. Third, is whether the trial judge, who knows or should know of such prior representation, has a duty to obtain the defendant's consent before appointing that lawyer to represent him. Ultimately, the question presented by this case is whether, if these duties exist and if all of them are vio-

[1]The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." This protection is applicable to State, as well as federal, criminal proceedings. *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). We have long recognized the paramount importance of the right to effective assistance of counsel. *United States* v. *Cronic*, 466 U. S. 648, 653–654 (1984) ("'Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have'") (citation omitted)).

lated, there exist "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *United States* v. *Cronic,* 466 U. S. 648, 658 (1984).

I

The first critical stage in the defense of a capital case is the series of pretrial meetings between the accused and his counsel when they decide how the case should be defended. A lawyer cannot possibly determine how best to represent a new client unless that client is willing to provide the lawyer with a truthful account of the relevant facts. When an indigent defendant first meets his newly appointed counsel, he will often falsely maintain his complete innocence. Truthful disclosures of embarrassing or incriminating facts are contingent on the development of the client's confidence in the undivided loyalty of the lawyer. Quite obviously, knowledge that the lawyer represented the victim would be a substantial obstacle to the development of such confidence.

It is equally true that a lawyer's decision to conceal such an important fact from his new client would have comparable ramifications. The suppression of communication and truncated investigation that would unavoidably follow from such a decision would also make it difficult, if not altogether impossible, to establish the necessary level of trust that should characterize the "delicacy of relation" between attorney and client.[2]

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[2] *Williams* v. *Reed*, 29 F. Cas. 1386, 1390 (No. 17,733) (CC Me. 1824). Discussing the necessity of full disclosure to the preservation of the lawyer-client relationship, Justice Story stated: "I agree to the doctrine urged at the bar, as to the delicacy of the relation of client and attorney, and the duty of a full, frank, and free disclosure by the latter of every circumstance, which may be presumed to be material, not merely to the interests, but to the fair exercise of the judgment, of the client."

In this very case, it is likely that Mickens misled his counsel, Bryan Saunders, given the fact that Mickens gave false testimony at his trial denying any involvement in the crime despite the overwhelming evidence that he had killed Timothy Hall after a sexual encounter. In retrospect, it seems obvious that the death penalty might have been avoided by acknowledging Mickens' involvement, but emphasizing the evidence suggesting that their sexual encounter was consensual. Mickens' habeas counsel garnered evidence suggesting that Hall was a male prostitute, App. 137, 149, 162, 169; that the area where Hall was killed was known for prostitution, *id.*, at 169–170; and that there was no evidence that Hall was forced to the secluded area where he was ultimately murdered. An unconflicted attorney could have put forward a defense tending to show that Mickens killed Hall only after the two engaged in consensual sex, but Saunders offered no such defense. This was a crucial omission—a finding of forcible sodomy was an absolute prerequisite to Mickens' eligibility for the death penalty.[3] Of course, since that strategy would have led to conviction of a noncapital offense, counsel would have been unable to persuade the defendant to divulge the information necessary to support such a defense and then ultimately to endorse the strategy unless he had earned the complete confidence of his client.

Saunders' concealment of essential information about his prior representation of the victim was a severe lapse in

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[3] At the guilt phase, the trial court judge instructed Mickens' jury as follows: "If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the killing occurred in the commission of, or subsequent to, attempted forcible sodomy . . . [but do find a malicious, willful, deliberate, premeditated killing], then you shall find the defendant guilty of first degree murder. If you find the defendant guilty of first degree murder, then you shall fix his punishment at: (1) Imprisonment for life; or (2) A specific term of imprisonment, but not less than twenty years . . . ." App. 58–59.

his professional duty. The lawyer's duty to disclose his representation of a client related to the instant charge is not only intuitively obvious, it is as old as the profession. Consider this straightforward comment made by Justice Story in 1824:

> "An attorney is bound to disclose to his client every adverse retainer, and even every prior retainer, which may affect the discretion of the latter. No man can be supposed to be indifferent to the knowledge of facts, which work directly on his interests, or bear on the freedom of his choice of counsel. When a client employs an attorney, he has a right to presume, if the latter be silent on the point, that he has no engagements, which interfere, in any degree, with his exclusive devotion to the cause confided to him; that he has no interest, which may betray his judgment, or endanger his fidelity." *Williams* v. *Reed*, 29 F. Cas. 1386, 1390 (No. 17,733) (CC Me. 1824).

Mickens' lawyer's violation of this fundamental obligation of disclosure is indefensible. The relevance of Saunders' prior representation of Hall to the new appointment was far too important to be concealed.

II

If the defendant is found guilty of a capital offense, the ensuing proceedings that determine whether he will be put to death are critical in every sense of the word. At those proceedings, testimony about the impact of the crime on the victim, including testimony about the character of the victim, may have a critical effect on the jury's decision. *Payne* v. *Tennessee,* 501 U. S. 808 (1991). Because a lawyer's fiduciary relationship with his deceased client survives the client's death, *Swidler & Berlin* v. *United States,* 524 U. S. 399 (1998), Saunders necessarily labored under conflicting obligations that were irreconcilable. He had a

duty to protect the reputation and confidences of his deceased client, and a duty to impeach the impact evidence presented by the prosecutor.[4]

Saunders' conflicting obligations to his deceased client, on the one hand, and to his living client, on the other, were unquestionably sufficient to give Mickens the right to insist on different representation.[5] For the "right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client," *Von Moltke* v. *Gillies,* 332 U. S. 708, 725 (1948).[6] Moreover, in my judgment, the right to conflict-free counsel is just as firmly protected by the Constitution as the defendant's right of self-representation recognized in *Faretta* v. *California,* 422 U. S. 806 (1975).[7]

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[4] For example, at the time of Hall's death, Saunders was representing Hall in juvenile court for charges arising out of an incident involving Hall's mother. She had sworn out a warrant for Hall's arrest charging him with assault and battery. Despite knowledge of this, Mickens' lawyer offered no rebuttal to the victim-impact statement submitted by Hall's mother that "'all [she] lived for was that boy.'" App. 297.

[5] A group of experts in legal ethics, acting as *Amici Curiae*, submit that the conflict in issue in this case would be nonwaivable pursuant to the standard articulated in the ABA Ann. Model Rules of Professional Conduct (4th ed. 1999). Brief for Legal Ethicists et al. as *Amici Curiae* 16 ("[T]he standard test to determine if a conflict is non-waiveable is whether a 'disinterested lawyer would conclude that the client should not agree to the representation under the circumstances.'" (quoting Model Rule 1.7, Comment 5)). Unfortunately, because Mickens was not informed of the fact that his appointed attorney was the lawyer of the alleged victim, the questions whether Mickens would have waived this conflict and consented to the appointment, or whether governing standards of professional responsibility would have precluded him from doing so, remain unanswered.

[6] Although the conflict in this case is plainly intolerable, I, of course, do not suggest that every conflict, or every violation of the code of ethics, is a violation of the Constitution.

[7] "[W]hen a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to

III

When an indigent defendant is unable to retain his own lawyer, the trial judge's appointment of counsel is itself a critical stage of a criminal trial. At that point in the proceeding, by definition, the defendant has no lawyer to protect his interests and must rely entirely on the judge. For that reason it is "the solemn duty of a . . . judge before whom a defendant appears without counsel to make a thorough inquiry and to take all steps necessary to insure the fullest protection of this constitutional right at every stage of the proceedings." *Von Moltke*, 322 U. S., at 722.

This duty with respect to indigent defendants is far more imperative than the judge's duty to investigate the possibility of a conflict that arises when retained counsel represents either multiple or successive defendants. It is true that in a situation of retained counsel, "[u]nless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry." *Cuyler* v. *Sullivan,* 446 U. S. 335, 347 (1980).[8] But

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make binding decisions of trial strategy in many areas. . . . This allocation can only be justified, however, by the defendant's consent, at the outset, to accept counsel as his representative. An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense." 422 U. S., at 820–821.

[8] Part III of the Court's opinion is a foray into an issue that is not implicated by the question presented. In dicta, the Court states that *Sullivan* may not even apply in the first place to *successive* representations. *Ante*, at 10–12. Most Courts of Appeals, however, have applied *Sullivan* to claims of successive representation as well as to some insidious conflicts arising from a lawyer's self-interest. See cases cited *ante*, at 10–11. We have done the same. See *Wood* v. *Georgia*, 450 U. S. 261 (1981) (applying *Sullivan* to a conflict stemming from a third-party payment arrangement). Neither we nor the Courts of Appeals have

when, as was true in this case, the judge is not merely reviewing the permissibility of the defendants' choice of counsel, but is responsible for making the choice herself, and when she knows or should know that a conflict does exist, the duty to make a thorough inquiry is manifest and unqualified.[9] Indeed, under far less compelling circumstances, we squarely held that when a record discloses the "possibility of a conflict" between the interests of the defendants and the interests of the party paying their counsel's fees, the Constitution imposes a duty of inquiry on the state-court judge even when no objection was made. *Wood* v. *Georgia,* 450 U. S. 261, 267, 272 (1981).

IV

Mickens had a constitutional right to the services of an attorney devoted solely to his interests. That right was violated. The lawyer who did represent him had a duty to disclose his prior representation of the victim to Mickens

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applied this standard "unblinkingly," as the Court accuses, *ante*, at 10, but rather have relied upon principled reason. When a conflict of interest, whether multiple, successive, or otherwise, poses so substantial a risk that a lawyer's representation would be materially and adversely affected by diverging interests or loyalties and the trial court judge knows of this and yet fails to inquire, it is a "[c]ircumstanc[e] of [such] magnitude" that "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Cronic*, 466 U. S., at 659–660.

[9] There is no dispute before us as to the appointing judge's knowledge. The court below assumed, *arguendo*, that the judge who, upon Hall's death, dismissed Saunders from his representation of Hall and who then three days later appointed Saunders to represent Mickens in the killing of Hall "reasonably should have known that Saunders labored under a potential conflict of interest arising from his previous representation of Hall." 240 F. 3d 348, 357 (CA4 2001). This assumption has not been challenged.

and to the trial judge. That duty was violated. When Mickens had no counsel, the trial judge had a duty to "make a thorough inquiry and to take all steps necessary to insure the fullest protection of" his right to counsel. *Von Moltke*, 322 U. S., at 722. Despite knowledge of the lawyer's prior representation, she violated that duty.

We will never know whether Mickens would have received the death penalty if those violations had not occurred nor precisely what effect they had on Saunders' representation of Mickens.[10] We do know that he did not receive the kind of representation that the Constitution guarantees. If Mickens had been represented by an attorney-impostor who never passed a bar examination, we might also be unable to determine whether the impostor's educational shortcomings "'actually affected the adequacy of his representation."' *Ante*, at 8 (emphasis deleted). We would, however, surely set aside his conviction if the person who had represented him was not a real lawyer. Four compelling reasons make setting aside the conviction the proper remedy in this case.

First, it is the remedy dictated by our holdings in *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). In this line of precedent, our focus was properly upon the duty of the trial court judge to inquire into a potential conflict. This duty was triggered either via defense counsel's objection, as was the case in *Holloway*,

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[10] I disagree with the Court's assertion that the inquiry mandated by *Cuyler v. Sullivan*, 446 U. S. 335 (1980), will not aid in the determination of conflict and effect. *Ante,* at 9. As we have stated, "the evil [of conflict-ridden counsel] is in what the advocate finds himself compelled to *refrain* from doing . . . [making it] difficult to judge intelligently the impact of a conflict on the attorney's representation of a client." *Holloway* v. *Arkansas*, 435 U. S. 475, 490–491 (1978). An adequate inquiry by the appointing or trial court judge will augment the record thereby making it easier to evaluate the impact of the conflict.

or some other "special circumstances" whereby the serious potential for conflict was brought to the attention of the trial court judge. *Sullivan*, 446 U. S., at 346. 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.' " 450 U. S., at 272, n. 18. It is thus wrong for the Court to interpret Justice Powell's language as referring only to a division of loyalties "that affected counsel's performance." *Ante*, at 8, n. 3 (emphasis deleted).[11] *Wood* nowhere hints of this meaning of "actual conflict of interest" 450 U. S., at 273, nor does it reference *Sullivan* in "shorthand," a*nte*, at 8. Rather, *Wood* cites *Sullivan* explicitly in order to make a factual distinction:

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[11] The Court concedes that if Mickens' attorney had objected to the appointment based upon the conflict of interest and the trial court judge had failed to inquire, then reversal without inquiry into adverse effect would be required. *Ante*, at 10. The Court, in addition to ignoring the mandate of *Wood*, reads *Sullivan* too narrowly. In *Sullivan* we did not ask *only* whether an objection was made in order to ascertain whether the trial court had a duty to inquire. Rather, we stated 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. The provision of separate trials for Sullivan and his codefendants significantly reduced the potential for a divergence in their interests. No participant in Sullivan's trial ever objected to the multiple representation. . . . On these facts, we conclude that the Sixth Amendment imposed upon the trial court no affirmative duty to inquire into the propriety of multiple representation." 446 U. S., at 347–348.

It is also counter to our precedent to treat all Sixth Amendment challenges involving conflicts of interest categorically, without inquiry into the surrounding factual circumstances. In *Cronic*, we cited *Holloway* as an *example* of a case involving "surrounding circumstances [making] it so unlikely that any lawyer could provide effective assistance that ineffectiveness was properly presumed without inquiry into actual performance at trial." *Cronic*, 466 U. S., at 661, and n. 28. The surrounding circumstances in the present case were far more egregious than those requiring reversal in either *Holloway* or *Wood*.

In a circumstance, such as in *Wood*, in which the judge knows or should know of the conflict, no showing of adverse effect is required. But when, as in *Sullivan*, the judge lacked this knowledge, such a showing is required. *Wood,* 450 U. S., at 272–274.[12]

Second, it is the only remedy that responds to the real possibility that Mickens would not have received the death penalty if he had been represented by conflict-free counsel during the critical stage of the proceeding in which he first met with his lawyer. We should presume that the lawyer for the victim of a brutal homicide is incapable of establishing the kind of relationship with the defendant that is essential to effective representation.

Third, it is the only remedy that is consistent with the legal profession's historic and universal condemnation of the representation of conflicting interests without the full disclosure and consent of all interested parties.[13] The

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[12] Because the appointing judge knew of the conflict, there is no need in this case to decide what should be done when the judge neither knows, nor should know, about the existence of an intolerable conflict. Nevertheless the Court argues that it makes little sense to reverse automatically upon a showing of actual conflict when the trial court judge knows (or reasonably should know) of a potential conflict and yet has failed to inquire, but *not* to do so when the trial court judge does not know of the conflict. *Ante*, at 9. Although it is true that the defendant faces the same potential for harm as a result of a conflict in either instance, in the former case the court committed the error and in the latter the harm is entirely attributable to the misconduct of defense counsel. A requirement that the defendant show adverse effect when the court committed no error surely does not justify such a requirement when the court did err. It is the Court's rule that leads to an anomalous result. Under the Court's analysis, if defense counsel objects to the appointment, reversal without inquiry into adverse effect is required. *Ante*, at 10. But counsel's failure to object posed a greater—not a lesser—threat to Mickens' Sixth Amendment right. Had Saunders objected to the appointment, Mickens would at least have been apprised of the conflict.

[13] Every state bar in the country has an ethical rule prohibiting a

Court's novel and naïve assumption that a lawyer's divided loyalties are acceptable unless it can be proved that they actually affected counsel's performance is demeaning to the profession.

Finally, "justice must satisfy the appearance of justice." *Offutt* v. *United States*, 348 U. S. 11, 14 (1954). Setting aside Mickens' conviction is the only remedy that can maintain public confidence in the fairness of the procedures employed in capital cases. Death is a different kind of punishment from any other that may be imposed in this country. "From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner* v. *Florida,* 430 U. S. 349, 357–358 (1977). A rule that allows the State to foist a murder victim's lawyer onto his accused is not only capricious; it poisons the integrity of our adversary system of justice.

I respectfully dissent.

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lawyer from undertaking a representation that involves a conflict of interest unless the client has waived the conflict. University Publications of America, National Reporter on Legal Ethics and Professional Responsibility, Vols. I-IV (2001) (reprinting the professional responsibility codes for the 50 States). See also, ABA Ann. Model Rule of Professional Responsibility 1.7, pp. 91–92, Comments 3 and 4 ("As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. . . . Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests").