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 BREYER, with whom JUSTICE GINSBURG joins, dissenting.

The Commonwealth of Virginia seeks to put the petitioner, Walter Mickens, Jr., to death after having appointed to represent him as his counsel a lawyer who, at the time of the murder, was representing the very person Mickens was accused of killing. I believe that, in a case such as this one, a categorical approach is warranted and automatic reversal is required. To put the matter in language this Court has previously used: By appointing this lawyer to represent Mickens, the Commonwealth created a "structural defect affecting the framework within which the trial [and sentencing] proceeds, rather than simply an error in the trial process itself." *Arizona* v. *Fulminante,* 499 U. S. 279, 310 (1991).

The parties spend a great deal of time disputing how this Court's precedents of *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), resolve the case. Those precedents involve the significance of a trial judge's "failure to inquire" if that judge "knew or should have known" of a "potential" conflict. The majority and dissenting opinions dispute the meaning of these cases as well. Although I express no view at this time about how our precedents should treat *most* ineffective-assistance-of-

counsel claims involving an alleged conflict of interest (or, for that matter, whether *Holloway*, *Sullivan,* and *Wood* provide a sensible or coherent framework for dealing with those cases at all), I am convinced that *this* case is not governed by those precedents, for the following reasons.

First, this is the kind of representational incompatibility that is egregious on its face. Mickens was represented by the murder victim's lawyer; that lawyer had represented the victim on a criminal matter; and that lawyer's representation of the victim had continued until one business day before the lawyer was appointed to represent the defendant.

Second, the conflict is exacerbated by the fact that it occurred in a capital murder case. In a capital case, the evidence submitted by both sides regarding the victim's character may easily tip the scale of the jury's choice between life or death. Yet even with extensive investigation in post-trial proceedings, it will often prove difficult, if not impossible, to determine whether the prior representation affected defense counsel's decisions regarding, for example: which avenues to take when investigating the victim's background; which witnesses to call; what type of impeachment to undertake; which arguments to make to the jury; what language to use to characterize the victim; and, as a general matter, what basic strategy to adopt at the sentencing stage. Given the subtle forms that prejudice might take, the consequent difficulty of proving actual prejudice, and the significant likelihood that it will nonetheless occur when the same lawyer represents both accused killer and victim, the cost of litigating the existence of actual prejudice in a particular case cannot be easily justified. Cf. *United States* v. *Cronic,* 466 U. S. 648, 657–658 (1984) (explaining the need for categorical approach in the event of "actual breakdown of the adversarial process").

Third, the Commonwealth itself *created* the conflict in

the first place. Indeed, it was the *same judge* who dismissed the case against the victim who then appointed the victim's lawyer to represent Mickens one business day later. In light of the judge's active role in bringing about the incompatible representation, I am not sure why the concept of a judge's "duty to inquire" is thought to be central to this case. No "inquiry" by the trial judge could have shed more light on the conflict than was obvious on the face of the matter, namely, that the lawyer who would represent Mickens today is the same lawyer who yesterday represented Mickens' alleged victim in a criminal case.

This kind of breakdown in the criminal justice system creates, at a minimum, the appearance that the proceeding will not "'reliably serve its function as a vehicle for determination of guilt or innocence,'" and the resulting "'criminal punishment'" will not "'be regarded as fundamentally fair.'" *Fulminante*, *supra,* at 310. This appearance, together with the likelihood of prejudice in the typical case, are serious enough to warrant a categorical rule—a rule that does not require proof of prejudice in the individual case.

The Commonwealth complains that this argument "relies heavily on the immediate visceral impact of learning that a lawyer previously represented the victim of his current client." Brief for Respondent 34. And that is so. The "visceral impact," however, arises out of the obvious, unusual nature of the conflict. It arises from the fact that the Commonwealth seeks to execute a defendant, having provided that defendant with a lawyer who, only yesterday, represented the victim. In my view, to carry out a death sentence so obtained would invariably "diminis[h] faith" in the fairness and integrity of our criminal justice system. *Young* v. *United States ex rel. Vuitton et Fils S. A.,* 481 U. S. 787, 811–812 (1987) (plurality opinion). Cf. *United States* v. *Olano,* 507 U. S. 725, 736 (1993) (need

to correct errors that seriously affect the "'fairness, integrity or public reputation of judicial proceedings'"). That is to say, it would diminish that public confidence in the criminal justice system upon which the successful functioning of that system continues to depend.

I therefore dissent.