IN THE SUPREME COURT OF THE UNITED STATES

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WALTER MICKENS, JR., :

Petitioner :

v. : No. 00-9285

JOHN TAYLOR, WARDEN. :

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Washington, D.C.

Monday, November 5, 2001

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

ROBERT J. WAGNER, ESQ., Office of Federal Public Defender, Richmond, Virginia; on behalf of the Petitioner.

ROBERT Q. HARRIS, ESQ., Assistant Attorney General, Richmond, Virginia; on behalf of the Respondent.

IRVING L. GORNSTEIN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting Respondent.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 00-9285, Walter Mickens, Jr. v. John Taylor, Warden.

Mr. Wagner.

ORAL ARGUMENT OF ROBERT J. WAGNER

ON BEHALF OF THE PETITIONER

MR. WAGNER: Mr. Chief Justice, and may it please the Court:

On April 3rd of 1992, Judge Foster dismissed criminal charges against Timothy Hall. She noted on the docket, case removed from docket, defendant deceased, and then signed her name. 3 inches above that reference on that docket sheet was the name, Bryan Saunders, in big letters, court appointed counsel for Timothy Hall.

On April 6th of 1992, warrants charging Walter Mickens with the capital murder of Timothy Hall came before Judge Foster. Judge Foster telephoned Bryan Saunders and asked if he would receive the appointment on that case. He accepted that appointment.

This case presents this Court with the extraordinary circumstances of a judge appointing a lawyer to a death penalty case when that judge knew or reasonably should have known that the lawyer represented the victim

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at the time of the victim's death. As a consequence, Walter Mickens has been deprived his constitutional rights under the Sixth Amendment to conflict-free representation.

QUESTION: In the U.S. -- in the Public Defender's Office, couldn't this situation arise fairly frequently? Sometimes in a small office, somebody in the office would have represented a victim many years before on a totally different matter.

MR. WAGNER: Yes, it could.

QUESTION: All right. Well, if it arises fairly often, then what kind of a rule would you suggest? I mean, does it mean that they have to -- public defenders have a hard time. I mean, they -- they can't -- you know, they -- they can't have a thousand people in their office, and sure enough, some members of the people -- sometimes this will happen. So, what kind of rule would you suggest?

MR. WAGNER: Well, the rule that's in place here, the rule from Holloway v. Arkansas, the rule from Cuyler v. Sullivan, the rule from Wood v. Georgia, is an appropriate rule, and it's appropriate because it requires that the trial judge or the -- or the judge in the case knows or reasonably should know that there is, in fact, a particular conflict. So --

QUESTION: But, Mr. Wagner, what difference

should it make from the point of view of the defendant whether the judge knew or the judge didn't know? You make a sharp distinction between this case where the judge knew. But suppose Mickens didn't know and the judge didn't know. Why should Mickens be worse off? In both cases he doesn't know.

MR. WAGNER: Well, in Holloway v. Arkansas, this Court announced a rule which if a defense attorney presents to the court an objection on the basis of a conflict of interest, and the court fails to inquire into that conflict, then prejudice is presumed. And the focus of the Holloway decision was on the court's responsibility to inquire into that conflict.

QUESTION: But I was asking you what the rule should be, not the rule -- I probably wasn't specific enough. I can't necessarily reconcile all the cases. So, if we were starting from scratch and you had a lawyer in a -- in a public defender's office who many years before had represented a victim, what should the rule be about whether he can represent this person before him?

MR. WAGNER: Well, the rule should be, first of all, if the -- if the court knows or reasonably should know --

QUESTION: Forget whether the court knows or doesn't know.

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MR. WAGNER: Then it should be if there's an actual --

QUESTION: I want to know what the rule should be.

MR. WAGNER: If there's an actual conflict, Your Honor, as opposed to a particular --

QUESTION: That doesn't help me. If the facts are that many years before the person represented the victim on a different matter. Now, what kind of a standard is the judge supposed to apply?

MR. WAGNER: If the -- the attorney is compelled to refrain from doing something because of his ethical obligations to the victim, if there's that compulsion by that defense attorney where he can't do certain things for his --

QUESTION: Fine. I got it. That's helpful.

Then why not just say, and that's what you have to do here? The judge should look into whether or not your client was significantly harmed in the way you just said because his lawyer couldn't do a proper job given the preceding representation. Why isn't that just -- that would take care of all these cases just as you say.

MR. WAGNER: Well, and if -- if the -- the judge in this case had conducted that inquiry properly and had determined whether or not Mr. Saunders had that -- that --

the compulsion to refrain from doing something on behalf of Mr. Mickens, then in fact that would have been cured right away and we wouldn't --

QUESTION: Fine. So, now he didn't do it. Why not just send it back and tell him, do it?

MR. WAGNER: Send it back and tell him to -- to do the inquiry?

QUESTION: Say where there's that prejudice, you lose; if there isn't that prejudice, you don't.

MR. WAGNER: Well, because this Court has -- has provided that there's a fundamental right to conflict-free representation.

QUESTION: Didn't -- didn't the district court find against you on the -- on the point of whether there was an adverse effect?

MR. WAGNER: They did in fact, Your Honor.

But that's not what the question before the Court is. According to Wood v. Georgia --

QUESTION: The question before the Court is whether, in addition to a Sixth Amendment violation, you have to show an adverse effect.

MR. WAGNER: That's right. That's right, Your Honor.

And we -- we would suggest to the Court that under Wood v. Georgia, we aren't compelled to show an

adverse effect. All we need to show here is an actual conflict.

QUESTION: But your answer to Justice Breyer -- correct me if I'm wrong -- was that there had to be some, at least strong possibility of adverse effect in the instance where he represented the victim years before.

MR. WAGNER: And that's exactly what distinguishes actual conflict from adverse effect. With an actual conflict, there's a compulsion to refrain from doing something. With adverse effect, there's an actual lapse in representation, and -- and that's a significant difference --

QUESTION: Well, but here it seems to me that two inquiries tend to become conflated in a case like this. If there's no adverse effect, that shows that there was no conflict.

MR. WAGNER: Well, I would suggest --

QUESTION: And -- and that's quite different from a case where there's multiple representation over the defendant's -- over the counsel's objection. I mean, we could say that in that line of cases, prejudice is apparent from the record. It -- it -- a burden on counsel inheres intrinsically in the representation to which he objects.

But that's not -- there -- there are hundreds of

different kinds of conflicts. The -- the defense attorney is a candidate for the prosecuting attorney in an upcoming election. One attorney has been interviewed -- the defense attorney has been interviewed for a position in the DA's office 4 weeks before.

All of these things you say there's an absolute requirement of a new trial without any inquiry into whether there's an adverse effect? This is an astounding proposition.

MR. WAGNER: Your Honor, I would suggest, though, that the key issue here is in the trial court's duty to -- to inquire into a conflict that it knew or reasonably should have known. And that was the focus of Holloway v. Arkansas.

QUESTION: Yes, but Holloway and Cuyler were both multiple representation cases where the trial court could see the whole thing right before him at that time. This was not a multiple representation case.

MR. WAGNER: Your Honor, I agree. But I would suggest that in this type of case, it's even more dangerous for the defendant that the court doesn't initiate the inquiry. In that case, at least the court knows and the defendant knows that the co-defendant is being represented by the same attorney. In this case, Mr. Mickens never knew that his -- that his attorney had a

conflict.

QUESTION: May I ask if -- if in your view would everything have been satisfactory, as a constitutional law matter, if the judge had said, go ask your client if the client has any objection, and the client had said, no, I have no objection? Would that have taken care of it?

MR. WAGNER: Well, I believe that the court should have indulged in some inquiry of the client himself. The court should have asked the client if he understood everything that was involved in waiving that conflict. And in this situation --

QUESTION: Excuse me. You're -- you're presuming a conflict. I -- I really don't follow your argument for that -- whether the judge had an obligation to inquire into a conflict about which he knew or should have known. What he should have known was -- was not the existence of a conflict, but simply that this defendant -- that the deceased had previously been represented by counsel who's representing this defendant. That does not constitute a conflict.

The -- what follows from that -- from that relationship? Does anything follow other than the fact that the lawyer cannot, in -- in a subsequent representation, disclose any confidential information which he learned in the prior representation. Right?

Isn't that the only thing that follows?

MR. WAGNER: Well, it is that, but there's also ethical consideration 4-5 of the Virginia Code of Professional Responsibility which states that anything obtained by Mr. Saunders through his representation of Hall could not be used to Hall's disadvantage.

QUESTION: That's fine, but that doesn't show a conflict. That shows at most the potential of a conflict, and -- and you're representing it here as though there is a conflict and -- and the judge had an obligation to inquire into it. But the whole issue is -- is whether there was a conflict. That hasn't been established at all.

MR. WAGNER: Well, I believe it has, Your Honor, and it's been established because Mr. Saunders in this case obtained confidential information from Mr. Hall. That's clear from the record. The district court found that. And in preserving those confidences of Mr. Hall, he was precluded from doing certain things.

QUESTION: Would you -- would you say what they were? Because it seemed to me that some of the things you listed were just matters of record and not at all -- there was one conversation between this lawyer and the client. We know it took place for 15 to 30 minutes, and that was it. And a number of your recitations do involve matters

of public record that would not involve betraying any client confidence if Saunders brought them out. So, what was it that Saunders knew that was not available to the public?

MR. WAGNER: First of all, all of this happened in -- in juvenile domestic relations court, and under Virginia law, all of those files, all of that information from that case was confidential and couldn't be revealed to the public.

But nonetheless, even if it was public, under ethical consideration 4-4 of the Virginia Code of Professional Responsibility, which governed Mr. Saunders at that time, he was absolutely required to preserve the confidences and secrets of Mr. Hall regardless of the source or nature of those confidences --

QUESTION: So what? So what? Why does that constitute a conflict? Unless you connect up that confidential information which he knew with something that was relevant to the defense of his new client, there's no conflict.

MR. WAGNER: I want to get to that point, and the point is that in death penalty cases, it's absolutely essential that the attorney looks into the background of the client. In this case --

QUESTION: You're asking for a special rule in

death penalty cases?

MR. WAGNER: I'm not, Your Honor. I believe --

QUESTION: Well, they why do you -- why do you stress the fact this a death penalty case?

MR. WAGNER: Well, I also stress the fact that this is a sex case, Judge. This is a case of forcible sodomy, and also in that type of case, it's absolutely essential for the attorney to look into the background of the defendant --

QUESTION: Well, isn't -- wouldn't that be true in most criminal cases?

MR. WAGNER: It would be true that the -- the attorney should look into the -- the background of the victim. Absolutely, Judge. But I think it's particularly true because of the sentencing phase in a death penalty case. In the sentencing phase of the death penalty case, the attorney needs to -- or the team of attorneys need to look into the background of the victim, need to engage in a -- in brainstorming about the background and an investigation about the background. And Mr. Saunders couldn't engage in that brainstorming, couldn't engage in that investigation because he had to preserve those confidences, and he had a duty of loyalty to Mr. Hall.

QUESTION: Well, this may not get us very far so far as a general rule is concerned, but isn't your

argument, insofar as this case is concerned, pretty much undercut by the fact, number one -- let's take an example. Let's take the issue that you -- you rightly stress about the response to the victim impact evidence, the -- the mother's testimony. Isn't your case pretty much undercut here by the fact that the information, on the basis of which defense counsel could have responded to the mother's testimony, had already been published in a newspaper?

And isn't it also undercut by the fact that there was co-counsel here and there is no claim that co-counsel had any conflict, actual or potential. So, if we -- even if we accept your -- your premise that proof of conflict would be enough in this situation, don't you lose anyway?

MR. WAGNER: Well, as to the newspaper issue, Your Honor, under ethical consideration 4-4, it doesn't matter where the information is in the public. That attorney has an absolute responsibility to maintain those confidences and secrets.

QUESTION: But there's no confidence --

QUESTION: It's no longer a secret. How can you keep a secret that is no longer secret?

MR. WAGNER: Well, because the ethical considerations in the Virginia Code of Professional Responsibility required Mr. Saunders to do that.

QUESTION: Require somebody to keep a secret that is something that is no longer a secret? I don't think that's what they require.

MR. WAGNER: Well, I don't believe that -- that an attorney under those circumstances can pursue anything from the confidences and secrets that he --

QUESTION: All right. But I -- I don't --

QUESTION: He can pursue it from the newspaper. He doesn't have to pursue it from his confidential knowledge. He can pursue it from -- from the newspaper.

MR. WAGNER: I would simply suggest, Your Honor, that that's contrary to what is -- is provided in the Virginia Code of Professional Responsibility.

QUESTION: All right. I find that -- I find that hard to accept, but I'll accept it for the sake of argument.

MR. WAGNER: As far as --

QUESTION: And that gets us to co-counsel.

MR. WAGNER: Absolutely, Your Honor.

QUESTION: Co-counsel wasn't bound by that because co-counsel hadn't represented the victim.

MR. WAGNER: That's right. That's right. But the fundamental right to conflict-free representation is not that you -- you have unconflicted counsel. It's that you have conflict-free representation. The fact that he

may have had 10 unconflicted attorneys makes no difference in this case. The fact that he has one conflicted attorney is enough to poison the well.

QUESTION: One apple spoils the whole barrel? I mean, is --

MR. WAGNER: I'm sorry?

QUESTION: I mean, one bad apple spoils the whole barrel?

MR. WAGNER: That's what we're suggesting. If that one bad apple was, in effect, trying to sabbotage the defense in that case --

QUESTION: Well, is there -- is there anything close to that sort of a showing here, that this -- the lawyer was trying to sabbotage the defense?

MR. WAGNER: No.

QUESTION: Then why -- why do you make that statement?

MR. WAGNER: Well, because if a rule of law is to be promulgated in this case, I think that needs to be anticipated.

QUESTION: Well, but you're saying that if -- if a person, say, has a team of six lawyers, if there's one with a conflict of interest, the whole case has to be tried over.

MR. WAGNER: If you can show, under Holloway v.

Arkansas, under Cuyler v. Sullivan, under Wood v. Georgia, that there was, in fact, either an actual conflict and adverse effect or in the event where the judge failed to inquire into a conflict that that judge --

QUESTION: But I thought you were telling us you don't inquire about an adverse effect. I thought that's your whole point. Correct me, please, if I'm wrong. I thought you were arguing --

MR. WAGNER: I may have misspoken.

QUESTION: I thought you were arguing to us the proposition that it is wrong to inquire into adverse effect. Once there has been a failure on the part of the trial court to inquire, that's the end.

MR. WAGNER: That -- that's right, but in the --

QUESTION: So then -- so then your argument whether there's an adverse effect is completely contrary to your own proposition.

MR. WAGNER: I'm sorry, Your Honor. I was speaking more generally about general conflict of interest cases where an attorney may be there to -- to sabbotage the defendant. In that situation, if there was no duty of the trial court to inquire, then you would have to go the actual conflict/adverse effect analysis, and that question will have to be addressed.

But if you're just dealing with a situation in

which the -- the judge knew or reasonably should have known of the conflict and failed to inquire, then of course, you're absolutely right. There would be no --

QUESTION: This is the -- this is the second time, Mr. Wagner, you've referred to an attorney being there to sabbotage the defendant. You feel that's something that fairly frequently happens?

MR. WAGNER: Well, I'm not saying that it fairly frequently happens.

QUESTION: I would think you would be very careful about making a statement like that.

MR. WAGNER: Absolutely, Your Honor.

QUESTION: Then why did you make it?

MR. WAGNER: I made it because I think it's a compelling point. I believe that -- that it can happen.

QUESTION: Why is it a compelling point if it hardly ever happens?

MR. WAGNER: Well, it may very well be in this case that Mr. Saunders was trying to sabbotage. We don't know all of the confidences and secrets that he obtained. We don't know everything about his reasons for accepting this case knowing that he had represented the victim in this case and performing in this case in the way he did, failing to look into a consent defense in this case, failing to investigate critical information in this case.

We --

QUESTION: All right. So, if you're right then on this point, then there was loads of prejudice.

MR. WAGNER: Well, there would be if we had --

QUESTION: All right. So, what are we supposed to do then in your view?

MR. WAGNER: What -- what --

QUESTION: I mean, use -- send it back? I thought they found no prejudice. So --

MR. WAGNER: The district court, in fact, found no prejudice, Your Honor.

And -- and what we're saying in this case is, first of all, to adopt the rule of Wood v. Georgia, the rule where if we show an actual conflict --

QUESTION: Mr. Wagner, may I stop you there? Because it seems to me, reading the Wood v. Georgia case and those facts, in those -- in that case the actual conflict and the adverse effect coincided. If the lawyer were loyal to the employer and the employer was interested in setting up a test case, then that very conflict would, at one and the same time, establish the adverse effect. Therefore, I could not take from the Wood case what you are urging this Court to take.

And if that's so, then the Wood case is in no different category. It's a case where adverse effect has

been claimed and the two are not distinguishable.

MR. WAGNER: I understand, Your Honor. And -- and if you look to the Cuyler v. Sullivan case, Cuyler v. Sullivan very specifically draws out a test in which you must show both actual conflict and adverse effect. If you then look to the dispositional paragraph of Wood v. Georgia, that speaks only of actual conflict, and it speaks of it three times. In Wood v. Georgia, the only requirement upon a showing that the defense attorney had not inquired into the conflict but that the judge knew or reasonably should have known of the conflict is that there be an actual conflict showing. And again, it's three times in the dispositional paragraph.

QUESTION: But if, on the facts of that case, those two are opposite sides of the same coin -- there's no -- if you show one, then you inevitably show the other -- then how can we extract the words of the decision from the fact background against which Justice Powell was writing?

MR. WAGNER: I don't believe that you necessarily show one by showing the other. In an actual conflict situation, it's really the potential of a lapse in representation that the Court focuses on. When you get to the actual -- the adverse effect, then it is the actual lapse of -- of -- in representation. So, it's the

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potential in the actual conflict versus the actual lapse in the -- in the adverse effect, the impeded representation in that case. So --

QUESTION: Well, you are making a nice statement in the abstract. I'm trying to bring it down to earth in the Wood case, and I said, well -- you answered both questions if the employer has a conflict -- if the lawyer has a conflict because the employer's interest diverges from the employee's.

MR. WAGNER: Yes. And in that case, the Court did actually find -- in Wood v. Georgia, did find an actual conflict, found that there were competing interests, and sent it back to the trial court to determine whether or not there was an adverse effect.

QUESTION: I thought the Court found nothing because it raised this question on its own. It was never briefed and argued.

MR. WAGNER: I'm sorry.

QUESTION: And we said you find out about this, lower court. We were supposed to hear another question entirely. We found that there is this lurking issue that should be decided first. There was no briefing. How can you use that as establishing a whole new category, a case like that where the -- the Court didn't even have the benefit of briefing on the issue?

MR. WAGNER: Well, again, I would point to the dispositional paragraph and the very language, the precise language of the case of Wood v. Georgia that said, we -- you know, if -- if the defendant fails to inquire and if the judge knew or reasonably should have known or if the defendant fails to advise the court of a conflict and if the -- the court knew or reasonably should have known of a conflict and failed to inquire, all that needs to be shown is an actual conflict, and didn't mention adverse effect. That -- that's as specific as I can get in -- in that specific case.

And you're right, Your Honor. I misspoke. They did not find an actual conflict but sent it back to the court to determine if there was an actual conflict, back to the -- to the court that -- that did the probation revocation hearing in that case to see if there was, in fact, an actual conflict. And -- and that's what the Court found, just that the court had to find an actual conflict, and if it did find an actual conflict, then that case appropriate for reversal. And that's what we're asking.

QUESTION: I take it in any case at this point you're not claiming the benefit of the Holloway rule.

MR. WAGNER: Well, we are, Your Honor. We --

QUESTION: Well, but as I -- you correct me if

I'm wrong, but I thought if -- if you had the benefit of the Holloway rule, you wouldn't have to show even an actual conflict.

MR. WAGNER: That's correct, but -- but it is the part --

QUESTION: Are you -- are you arguing that we should adopt that rule? I mean, if we did, that would -- that would answer the point that has just been raised.

MR. WAGNER: No. I -- I believe that the Holloway rule was extended in Cuyler v. Sullivan, but the Holloway rule focuses on the court's failure to inquire.

QUESTION: No. But you started -- at least, as I recall back in your brief, you started out by arguing that what puts the court on notice doesn't matter so long as the court is on notice. You said in Holloway counsel raised it before the court, and you're saying in this case, under the -- at least the rule that the court should have known of the -- of the potential conflict, that was the functional equivalent to counsel's raising it in Holloway, and therefore the result should be the same.

As I understand Holloway, if the result were to be the same, we would not even look any further into the question of actual conflict. We would say if there was enough to put the court on notice, reverse. And I take it you're not arguing for that now, or are you?

MR. WAGNER: We are not, Your Honor.

QUESTION: Okay.

MR. WAGNER: And the reason we're not is because of the component of Holloway v. Arkansas that deals with the defense attorney's advisement of the court of the conflict and -- and the importance that that --

QUESTION: So, you're -- you're -- maybe I -- I misunderstood your position when I was running through the briefs, but you're not taking the position that Holloway's counsel's advice to the court should be equated with the court's kind of obligation under the should have known standard that you argue for here. You're not equating those two.

MR. WAGNER: I'm sorry. I don't understand --

QUESTION: I thought in your original argument you were saying, look, in Holloway defense counsel said, there's a problem, judge. Here the judge knew or should have known about the problem. Those two facts are equivalent, and I take it now you're not saying those two facts are equivalent.

MR. WAGNER: They're equivalent to a certain extent, but the fact that the defense attorney raised it to the court has a certain significance. As the Solicitor General indicates in their -- in their brief, there is some significance to the defense attorney raising that

issue to the court and the court's compulsion to inquire into it at that point. It's not as significant as the trial court's role in inquiring into that conflict, but it is significant. And Wood v. Georgia takes that significance, that component into effect when it requires an actual conflict, a showing of an actual conflict --

QUESTION: But, counsel, I'm a little puzzled at this point too. It seemed to me that you would have no case if the judge were not on notice of the potential conflict.

MR. WAGNER: Well, I believe --

QUESTION: You're not -- you're not arguing that a lawyer could have this relationship and keep it secret for 5 years and then come around and say, now set aside the conviction.

MR. WAGNER: Well, Your Honor, we would say that the adverse effect prong would not be required under the circumstances where the judge knew, but we're not conceding that we can't satisfy the adverse effect prong. But you're right, Your Honor.

QUESTION: Well, but we're taking the case on the assumption there's been a hearing and there's been evidence that established an absence of adverse effect. At least I thought that's the way the case comes to.

MR. WAGNER: That-- that's what the district

court found.

QUESTION: So, I thought the key to your case was the fact that the judge had a duty, when advised or on notice of a potential conflict of interest, of making an inquiry as to find out whether in fact there was such a conflict. I thought that's your whole case.

MR. WAGNER: That -- that is the focus of our case.

QUESTION: Is that -- is that your -- see, I don't -- you -- you haven't put it that way. You -- you've put it that if the judge knew or should have known of the conflict. Now, is that it? Which is it? You've said this morning if he knew or should have known of the conflict. Is that he should have known of the conflict or should have known of the potential conflict?

MR. WAGNER: Well, in Cuyler v. Sullivan, it talks to a particular conflict.

QUESTION: No. I'm -- I'm asking you what your position is.

MR. WAGNER: My position is --

QUESTION: -- you look at the question presented --

QUESTION: No.

MR. WAGNER: Knew or should have known of a conflict.

QUESTION: That's not your question presented by your blue brief. It's potential conflict. That's what you put in your brief. Now you're changing your position?

MR. WAGNER: Well, I don't mean to change my position, Your Honor, but a potential conflict in the context of where we have it in the brief would -- would essentially equal a particular conflict. So, it is a potential conflict --

QUESTION: Well, but -- a very different question. You mean whenever there's a potential conflict, if the -- if defense counsel had -- had represented the victim 20 years ago on a totally unrelated matter, there -- there's always some confidential information he might have obtained. The judge always has to inquire into that?

MR. WAGNER: That's true, Your Honor.

No. If -- but if the judge knows --

QUESTION: Well, how potential does potential have to be then?

MR. WAGNER: Potential has to be, as Cuyler describes, a particular conflict. If -- if the judge knows that there's some information that that attorney may have obtained from a previous client, that there's some kind of conflicting interest that needs to be probed.

QUESTION: No, no. That may be conflicting.

MR. WAGNER: That may be conflicting. That's

right. There is the potential for damage to the defendant. It's that potential that the -- the judge needs to inquire. It's the peril that the defendant finds himself in by being represented by a conflicted attorney that the judge has a responsibility to --

QUESTION: 20 years ago. Is that enough of a peril?

MR. WAGNER: In that case, it's very difficult to -- to imagine how the judge would have known of that conflict. So --

QUESTION: But he knew about it.

MR. WAGNER: If he knew about it, then -- then I would suggest that that judge should at least inquire, just take the very -- the very reasonable measure, the very simple measure of inquiring into the conflict. It takes a very short amount of time, and you -- you alleviate the problem of all the litigation that we've had in this case.

If I may reserve the remainder of my time, Mr. Chief Justice.

QUESTION: Very well, Mr. Wagner.

Mr. Harris, we'll hear from you.

ORAL ARGUMENT OF ROBERT Q. HARRIS

ON BEHALF OF THE RESPONDENT

MR. HARRIS: Mr. Chief Justice, may it please

the Court:

The Fourth Circuit correctly required a showing of adverse effect for Mickens to establish a conflict of interest claim. There is a rule. The Court has established a rule and the general application for deciding conflict of interest claims, and it was decided in Sullivan. It's consistent with the repeated admonition of this Court, that in order to claim an interference with the right to counsel, you have to show that it had some effect on the representation. Sullivan states the Sixth Amendment standard. Justice Breyer, the rule that you're looking for is in Sullivan.

QUESTION: Well, Holloway doesn't stand for that proposition, does it? Holloway is consistent with what you said?

MR. HARRIS: Well, Sullivan explicitly --

QUESTION: I'm asking you about Holloway.

MR. HARRIS: Well, Sullivan explicitly carves out Holloway.

QUESTION: Do you think Holloway is good law or not?

MR. HARRIS: Holloway is -- is not been overruled. It is perfectly good law.

QUESTION: Well, that didn't require any showing of adverse effect.

MR. HARRIS: What the Court said in Holloway is that relying on the representations of counsel that there was a conflict of interest and that he would be unable to examine his multiple clients, the failure to inquire into that was itself error.

And I think if you -- you can put Holloway into the exact same terms of the Sullivan over-arching standard. The fact that counsel has taken these steps of advising the court that he sees a conflict of interest, the fact that counsel tells the court, when they get to trial, that he is not able to examine his several clients because of the confidences he knows, that is, as -- as Holloway said, relying on counsel being in the best position to know. That is persuasive evidence that, in fact, the conflict existed. And obviously, the impact on the representation in that circumstance is evident.

The -- the --

QUESTION: May I ask you this question? Do you think the lawyer in this case had a duty to tell his client that he had represented the victim? Just an ethical -- not a constitutional duty, as an ethical matter.

MR. HARRIS: The district court found that he should have -- under the rules of ethics, he should have advised his client of the fact that he had previously

represented Tim Hall.

QUESTION: And then the next question I have is do you think -- again, not necessarily a matter of constitutional law, but that it would have been good practice for the judge to inquire of the lawyer whether he thought there had been any -- any difficulty in the representation?

MR. HARRIS: I -- I certainly agree that it would have been good practice both for defense counsel and for trial -- the trial -- well, in this case it wasn't a trial court. It was a juvenile court that -- that made the appointment. Certainly it would be a good practice. I think that is part and parcel of what Sullivan was saying when it is encouraging trial courts to make those inquiries even on facts that may not be based on the objection of counsel or the defendant.

QUESTION: Would you say it was unethical for the lawyer not to have revealed to the court and his client not what is the better practice, but that it was, in fact, a violation of the ethical constraints for the lawyer, knowing that he had represented the victim, not to tell his client so his client could make the choice whether to keep the lawyer or not?

MR. HARRIS: I cannot make the final call on whether it was ethical or not. We have an independent

body in Virginia that is -- is there to do that very thing, the Virginia State Bar.

I would agree, as the district court said, that the obligations, the ethical obligations, of counsel would be to provide disclosure of such information to his -- to his client.

The -- it is the next step that you are, I guess, deliberately not taking that -- that I would have to say that that is not the type of conflicting interest that would -- that was being addressed in the Sullivan standard for finding a Sixth Amendment violation.

QUESTION: In other words --

QUESTION: And I wasn't -- I wasn't asking you any question about the Constitution. I was asking you about the ethical canons that govern lawyers.

MR. HARRIS: I --

QUESTION: Does the lawyer have a duty to advise the client of a potential conflict?

MR. HARRIS: There is a general duty of counsel to advise his client of any circumstances which the client would want to know, as far as matters that may affect the loyalty of counsel to client. That is the general and accepted ethical statement. Certainly that is an obligation that was Mr. Saunders' obligation at the time of this case.

QUESTION: May I ask -- take it one step further and turn away from the ethics to the Constitution? What -- what would you say about a case of the same facts, but the -- the client tells the -- the client finds out about it and asks the judge to relieve the lawyer because the client doesn't want a lawyer who represented the -- the victim? Would the judge have a constitutional duty to -- to discharge counsel?

MR. HARRIS: Well, the -- I think Holloway I think doesn't make a distinction between the defendant himself or his client. So, in that very circumstance, the judge would have a duty to inquire. That much I think is clear from Holloway.

QUESTION: No. I've given you the facts. The -- the client -- all the client says is, I don't trust a lawyer who's represented the man that I'm accused of killing. I would like a different lawyer. Would the -- would the judge have a duty to give him a different lawyer as a constitutional matter?

MR. HARRIS: No. I would say this, as this Court pointed out in Wheat, the judge certainly has the discretion, a very broad discretion at that point in time, to anticipate the possibility of conflicts and to substitute counsel on the risk, on the possible danger of a conflict appearing later on.

QUESTION: What -- what if the lawyer says that? What -- what if the lawyer says that? I don't feel comfortable representing this -- this defendant because -- because I represented the decedent that he's accused of murdering. The same question as -- as --

MR. HARRIS: I understand.

QUESTION: -- Justice Stevens, only it's -- it's counsel who --

MR. HARRIS: And the answer is -- is essentially the same as well. If counsel is representing to the -- if that can be interpreted as representing to the court that he is objecting to representing this man because of his prior representation, the court has to inquire.

Now, of course, the duty that Sullivan and Holloway set out, as far as the duty to inquire, is not a duty to grant relief. It's a duty to inquire to determine whether or not there is a risk that the Sixth Amendment rights will be jeopardized.

QUESTION: Well, except in Holloway exactly that happened. The -- the lawyer said, judge, I can't represent these three defendants, and the judge said, you go ahead and do it.

MR. HARRIS: Well, that's --

QUESTION: And -- and this Court reversed.

I read the opinion as saying that in this case

the conflict is apparent on the face of the record. The -- the attorney is -- is -- has such a burden that it -- the conflict inheres in the very objection the attorney makes. You don't even need to look any further. That's the way I read that opinion.

MR. HARRIS: I think that is exactly what Holloway gets to. The point is when counsel makes the effort of telling the judge that he sees a conflict of interest and that he cannot do his job effectively, that essentially makes out the Sixth Amendment violation.

QUESTION: Going back to the earlier questions about the counsel's ethical duty, as you understand it, quite apart from the Constitution, is there a duty of loyalty to the former client or just a duty of maintaining confidentiality?

MR. HARRIS: After the close of the representation of a former client, I -- I believe that the general duty of loyalty devolves down to that duty of maintaining the confidences of your former client. That is how the duty of loyalty is represented. I -- I don't think we can impose a -- even an ethical obligation on counsel to continue to have good feelings about a former client or -- or this general notion of having once represented an individual, he is forever subject to the attorney's care.

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QUESTION: The trouble I'm having with the standard is not whether the judge happens to know he should have looked in or shouldn't have looked into it, which were unusual circumstances. If a lawyer is under a real conflict -- a real one, a very serious one, a terrible one -- his client cannot get effective assistance. So, I would have thought that's the standard.

MR. HARRIS: I believe that is --

QUESTION: Did the client get effective assistance or not?

MR. HARRIS: I believe it is.

QUESTION: Now, the difficulty comes up because the lawyer doesn't normally tell him, just like any other ineffective case, and now the judge has to decide what is and what is not ineffective assistance. So, to do that in the conflict category, do we just look to the ABA rules? They're often quite attenuated.

What do we use to decide whether the conflict is serious enough so the client couldn't get effective assistance? Once he didn't, I guess you do presume prejudice because you can't go back and second guess every second of what the lawyer was doing. But what's the standard?

MR. HARRIS: Well, again, Sullivan addresses the very concern. It indicates that counsel must be actively

representing conflicting interests before we have a presumed prejudice. He must have an actual conflict adversely affecting --

QUESTION: And what is that -- so, that's -- it's exactly at the time you say the words actual conflict, that I think have gotten me mixed up in these cases.

MR. HARRIS: Well, of course --

QUESTION: And sometimes they mean one thing, sometimes another.

MR. HARRIS: Well, I don't think there's any inconsistency in this Court's cases on --

QUESTION: No, maybe not. But whether there is or not, can we do better than saying actual conflict? Should we say actual conflict creating ineffective assistance? Should we say look at the ABA rules? What should we say in your opinion?

MR. HARRIS: Well, I would take us back to Sullivan because what Sullivan was doing was identifying what the lower courts had already been doing prior to the time of its decision, which was finding something called an actual conflict. And what that involved was identifying diverging interests, inconsistent interests, essentially potentially conflicting interests, and then looking to see whether or not that existence of diverging

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interests actually had any effect on the representation.

Now, the lower court decisions often spoke --

QUESTION: This is what confuses me about this discussion. I'm -- I'm not -- sometimes it seems to me that -- that we're equating the existence of an actual conflict with prejudice. Is that what you're saying, that -- that when you show an actual conflict, there is automatically prejudice? I -- I didn't understand that to be the law.

MR. HARRIS: No, and that's not what I'm arguing.

QUESTION: I understood it to be the law that no matter how actual and apparent the conflict is, if it had not effect on the trial, there's no foul.

MR. HARRIS: I would argue that it is the adverse effect that makes a potential conflict actual.

QUESTION: Then how do you explain Holloway?

MR. HARRIS: Holloway I think can easily be explained as the -- the adverse effect and actual impairment of defense counsel's ability to conduct the representation --

QUESTION: But that -- all --

MR. HARRIS: -- was provided by his own statement.

QUESTION: I think all you can say for sure in

Holloway was that there was an actual conflict. There was no showing of what effect that conflict had upon the representation.

MR. HARRIS: Again, what Sullivan said about Holloway was that Holloway did not find an actual conflict. So, I will stop short as well.

QUESTION: Well, there was no finding in the sense that the Court made a formal finding. I think what Justice Scalia was -- in any case, what I've been assuming is what Justice Kennedy said a moment ago, that when counsel in a multiple representation situation says, judge, I can't go on representing all of these people, that the conflict is so obvious that we'll take it as a given. And -- and I'm -- I'm inclined to read Holloway that way.

MR. HARRIS: Well, perhaps --

QUESTION: The conflict is so obvious or the prejudice is so obvious?

QUESTION: Well, the conflict is -- is so obvious because it seems to me -- and this was going to get to my next -- my -- my question to you.

Isn't the difference -- reading Holloway the way I am reading it, isn't the difference between Holloway and -- and Sullivan something like this? We realize that if, through no fault of anybody, through the -- the client was

not asleep, the judge was not asleep -- it nonetheless turns out later that there was a conflict, we want to make sure that that conflict actually had an effect on representation before we -- we start reversing convictions. But if there was reason to believe in advance, if somebody told the judge like the lawyer in Holloway, that there is a problem here, we want to have an inducement on the trial court to pursue that problem right then and there. And in order to get that inducement, we're going to have a rule that says, you don't have to prove effect. All you have to prove is conflict. In other words, in order to induce the trial courts to be on their toes, the defendants later on have a lesser burden.

Do you think that's the way to read Holloway and Sullivan together? And do you think that is a sensible rule?

MR. HARRIS: I substantially agree with that, with the following caveat. I don't think that Holloway necessarily is saying the actual conflict as a separate concept, actual conflict. It's so evident that we will presume prejudice. I think they are saying that in those particular circumstances where the matter is objected to and brought to the trial court's attention, both the actual conflict and the expected prejudice from the attorney telling the judge he cannot represent all of the

people are so obvious that --

QUESTION: Well, isn't that what Holloway is talking about? Expected prejudice basically. If the attorney says I can't represent these people, instead of letting it go ahead and prove that he's right, which you have every reason to think he's right, you simply say, we'll have to stop right now.

MR. HARRIS: Well, we are giving a great deal of weight to trial counsel's ability to know because he is the only person that has the access to the confidences of multiple clients who will know for certain, or at least with a high degree of certainty, that there is going to be a conflict and that it will affect the representations of the various clients.

But to -- if I could get back to your question, there is a difference, I think, in the circumstance where the attorney has made that representation to the trial court, which I think is the same as saying I see an actual conflict that will affect my representation.

QUESTION: If we want -- you know, I realize that, but if -- if we want to keep the trial judges on their toes -- and having been a trial judge, I can tell you that inducements do matter -- doesn't it make sense to treat the -- the knowledge that the appointing judge has, in a case like this, as being the equivalent of the -- of

the objection by counsel?

MR. HARRIS: No.

QUESTION: Why -- why not equate them?

MR. HARRIS: I think it is -- it is fair to say that the trial judge's notice of facts that would cause him to -- to perceive a -- the language that the Court used was a particular conflict. But the notice of that certainly imposes an obligation upon him to inquire into it. But I don't think you can then say that having knowledge of facts that would suggest an actual conflict or even suggest a particular conflict can be equated with the attorney's representation that it exists.

QUESTION: Okay. The trouble -- the trouble is if you follow -- I mean, I think I follow your -- your argument. But if I -- if I understand you correctly, then nothing is really added to the law by saying the trial judge has an obligation to inquire into it because when we -- when we come at the -- at the question after the fact, the trial judge hasn't inquired, there's been a trial, there's been a conviction, then the issue of conflict gets litigated.

MR. HARRIS: Well, that is --

QUESTION: On your -- on your rule we proceed under the same standards whether or not the trial judge should have known. Isn't that right?

MR. HARRIS: It is not so much my rule. It is this Court's rule. That's what Sullivan said.

QUESTION: No, but I mean, regardless of who it belongs to, on the -- on the argument that you are making, the -- the standards are exactly the same whether the judge should have known or should -- need not necessarily --

MR. HARRIS: As far as ultimately finding --

QUESTION: But -- but the world changes. I -- I assume that trial judges generally do what we say they're supposed to do.

MR. HARRIS: That -- that is correct.

QUESTION: Now, it may mean it may well be that if they don't, nothing happens afterwards, but usually they'll do what we suggest. Won't they?

MR. HARRIS: Well, it -- it is true that the State judges and Federal judges -- lower Federal judges all are sworn to uphold the same Constitution.

QUESTION: It didn't seem to happen here, though, did it?

QUESTION: May I suggest that the -- the problem is not the bright line distinction between potential conflict and actual conflict, but rather the serious -- the potentially serious character of the conflict.

And your point is that the lawyers in Holloway

made it clear to the judge it was a serious problem. Whereas, here it's not all that apparent because it may have been just a routine appointment of the public defender's office that just happens. But if this lawyer had been the family attorney for the victim for the last 30 years and knew them intimately and so forth, I think you would agree then the judge had a greater duty of inquiry than he might have had here.

MR. HARRIS: I would say to the extent that you make the two relationships, the between representations more connected -- and you can certainly do that by virtue of a personal relationship -- you inch your way along --

QUESTION: It was more likely to be prejudicial would be the point. If it's reasonably likely to the judge to know -- I mean, if it's reasonably apparent on the face of the matter, whether said by the lawyer or just from the facts, that there's a real danger of prejudice here, you would agree the judge has a duty of inquiry, I would think.

MR. HARRIS: I -- I certainly agree that the judge's duty of inquiry is -- is presented at a much lesser level than actual prejudice to the defendant. And it's obvious these things should be taken care of --

QUESTION: Okay. But does that -- does that duty of inquiry have any consequence later in the

standards by which the case will be judged on, say, collateral attack?

MR. HARRIS: No, and for a very simple reason. You do not have the one ingredient that you have in Holloway v. Arkansas. You do not have the representation of counsel, the person in the best position to know, that in fact he sees a conflict and he sees the impairment. In fact, you have the opposite. The fact that counsel has not raised any matter to the trial court when he is in the best position to know and when he does not see that there is a conflict sufficient enough to call to the court's attention over -- for an objection to be resolved, we have a different record. In that case --

QUESTION: Why does it -- from the defendant's vantage point, why should it make a difference? He's got a counsel who has betrayed his obligation. He doesn't know anything. The client doesn't know anything. Why is Mickens, who has a lawyer who doesn't tell the court -- why is -- would he be better off if the -- the judge knew or should have known than when nobody knows and he's totally in the dark? From the defendant's point of view, the judge's knowledge isn't significant. It's that he has a lawyer who is not totally able to represent him with undivided loyalty.

MR. HARRIS: Again, that is included within the

notion that we have one Sixth Amendment standard for conflicts of interest regardless of whether or not the trial judge was on notice of some facts that could have prompted the inquiry, that we will go beyond that standard in the circumstances such as Holloway where the attorney himself has made it an essential fact of the case that he has identified a conflict and impairment in his case.

The difference is not so much that the -- I mean, I guess the -- the answer is the defendant is not entitled to a different or more lenient standard of review of his conflict claim, you know, because of the judge's failure to act on notice of additional facts. It doesn't get us any closer to determining whether or not there actually was an infringement of his Sixth Amendment rights. To assume it on the basis of a judge's failure to act on notice, it simply --

QUESTION: And what is -- what is the test for determining whether there was an impairment? You're not saying you have to be able to show that the defendant might have been acquitted --

MR. HARRIS: No.

QUESTION: -- or might not have gotten the death penalty.

MR. HARRIS: No. The --

QUESTION: So, what is -- what is the nature of

the impairment?

MR. HARRIS: Well, the Court is using the adverse effect to -- as a -- as a lesser showing of prejudice. As an example, it is not so much that a defendant would have to show Strickland prejudice, a reasonable probability of a different outcome, but he certainly has to show the likelihood that trial counsel's conduct or assessment of different defenses in the case was affected, not --

QUESTION: Thank -- thank you, Mr. Harris.

Mr. Gornstein, we'll hear from you.

ORAL ARGUMENT OF IRVING L. GORNSTEIN

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE, SUPPORTING THE RESPONDENT

MR. GORNSTEIN: Mr. Chief Justice, and may it please the Court:

When a district court has reason to know about a potential conflict and fails to initiate inquiry, the Sixth Amendment is violated only when there is a showing of an actual conflict and an adverse effect on the quality of performance. And we say that for three reasons.

First, it is a central tenet of this Court's Sixth Amendment jurisprudence that a Sixth Amendment violation does not occur unless there has been prejudice to the defense. It would be inconsistent with that basic

principle to set aside a jury verdict and order a new trial with all the societal costs that entails when --

QUESTION: I must interrupt you here, though. The prejudice standard under -- under Strickland is not the standard we're talking about here, is it?

MR. GORNSTEIN: It is not. Under Sullivan, there has to be an adverse effect on the quality of performance, but it is still -- from that, there is inferred prejudice. It would be inconsistent with the central thrust of showing some kind of prejudice to reverse a conviction, set aside it, and -- and order a new trial when there has been no showing that the quality of representation has been affected.

And in Sullivan, the Court held --

QUESTION: Well, let me just push that all the way. Supposing in -- in Holloway itself the judge said, well, I -- I really think you -- he thought it through and said, I think you could represent both. Could he have just gone ahead and insisted on the lawyer representing them?

MR. GORNSTEIN: In -- in Holloway, if there's no inquiry conducted by the judge, there's automatic reversal.

QUESTION: The question here is when does the judge have a duty of inquiry.

MR. GORNSTEIN: The judge --

QUESTION: Are you saying he never has a duty of inquiry unless there's going to be actual prejudice?

MR. GORNSTEIN: No. I -- I think that what the Court said in Wood about the duty of inquiry and -- and -- this is somewhat vague, I will agree, but it said there has to be a clear possibility of a conflict.

QUESTION: All right. Supposing there's a clear possibility of prejudice, but no actual proof of prejudice, is that enough to impose a duty of -- of inquiry on the judge?

MR. GORNSTEIN: There's a duty of inquiry, but if the duty is not fulfilled and a trial is held and a -- there's a conviction and the defendant is seeking to overturn his conviction, at that point the defendant still must show an actual conflict and an adverse effect on the quality of his representation.

QUESTION: We've been trying to find a way to distinguish Holloway from this case. One way is to say that multiple representation is so fraught with difficulties that it's simply a separate category. Another is to say that the likelihood of an adverse effect is so significant, so serious that we'll presume it. Another is to say that the conflict itself is much more serious in most cases than -- how would you --

MR. GORNSTEIN: I would say that there would --

QUESTION: How would -- how would you have us deal with Holloway?

MR. GORNSTEIN: I would say that Holloway is a special case where prejudice was presumed conclusively based on two factors. The first is that deference to the contemporaneous judgment of counsel that he was operating under a disabling conflict, and when he's representing that he's operating under a disabling conflict, it's not just a representation that he has a conflict, but that this is going to affect his performance. He's not going to be able to represent the defendant adequately.

And the second is that prejudice inheres in the situation in which a judge orders a defense counsel, over his objection, to continue representation even though the attorney believes he is not going to be able to perform adequately.

And those two circumstances together create a per se rule of prejudice, and it's a carve-out from the Sullivan rule.

QUESTION: Does Wood stand for a similar proposition, or is Wood different?

MR. GORNSTEIN: Now, Wood is a situation where the Sullivan rule was applied in a case in which there was reason to know a clear possibility of an actual conflict.

And what the Court said in that circumstance is that the Constitution would be violated if it was found that the lawyer had a -- a conflict that influenced his basic strategic decisions. And that is the same exact test as the Sullivan test. There not only has to be a showing of an actual conflict but an effect on performance for there to be a Sixth Amendment violation.

QUESTION: Are you saying Wood is an effect case.

MR. GORNSTEIN: It is both an actual conflict and effect. That's what it directs when it says the words actual conflict --

QUESTION: So, you're saying in this case if the lawyer had said to the judge, my client doesn't trust me because I -- I represented the decedent and he won't be candid with me, then the judge would have had a duty to discharge counsel.

MR. GORNSTEIN: I'm not saying that they -- he would have had a duty to discharge counsel. He can inquire --

QUESTION: Why would that case have been different from Holloway?

MR. GORNSTEIN: He can -- first of all, Holloway is a situation where the lawyer himself is representing that he cannot adequately represent --

QUESTION: Correct. It's because my client doesn't trust me.

MR. GORNSTEIN: Well, if he represents that he cannot adequately represent the -- the defendant, and then the district court has to conduct an inquiry. And if the inquiry reveals that in fact representation can be adequately given, then the judge need not dismiss. But if the judge concludes that adequate representation cannot be given, then the judge should dismiss.

QUESTION: No matter how severe the conflict. I mean, no matter how -- in your view, no matter how severe the conflict, still unless you can show that it actually affected the lawyer's representation, it is not a constitutional error.

MR. GORNSTEIN: After a trial has been held and the defendant is seeking to overturn his conviction, that's correct.

QUESTION: Well, Strickland doesn't say that. Strickland says that it's important to maintain a fairly rigid rule of presumed prejudice for conflicts of interest.

MR. GORNSTEIN: Yes, but Strickland goes on --

QUESTION: Should we change Strickland?

MR. GORNSTEIN: No. No, because Strickland goes on to say that in that situation, prejudice is presumed

only where there's been an actual effect on -- on performance, both an actual conflict and an adverse effect on performance. What Strickland says is the defendant doesn't have to show the additional burden that is -- that is present in most Strickland cases of showing there's a reasonable probability that the outcome of the trial would change. But what -- Strickland reaffirms Cuyler v. Sullivan, which requires both an actual conflict and an effect -- an adverse effect on performance.

QUESTION: Suppose the victim were the fiance of the lawyer's niece and the lawyer was very close to the niece, and he says, I can't do this, judge. I -- I can't represent this murderer.

MR. GORNSTEIN: Well, then you have a Holloway situation if the -- if the defendant -- defense counsel is representing that he's operating under a disabling conflict and the judge doesn't conduct an inquiry, then there's automatic reversal at that point. That's the Holloway carve-out.

QUESTION: In the worst case, when the lawyer says nothing, you end up not getting rid of him -- I mean, or not -- assuming prejudice --

MR. GORNSTEIN: Well, there's a -- there's a --

QUESTION: But in the case where he's more honest about it and comes straightforward, then you're

going to presume the prejudice.

MR. GORNSTEIN: But that's because of the reasons for Holloway have to do with the deferring to the contemporaneous representation of a counsel that he is operating under a disabling conflict and that is given deference, together with the fact that when somebody is ordered to -- to provide representation over his objection, that a certain amount of prejudice inheres in that. And that's why the Holloway rule is as it is.

And in this situation where that's not there and the defendant is seeking to obtain a new trial with all the societal costs that that entails, it is not too much of a burden for him to be able to identify a particular way in which --

QUESTION: Of course, the irony of the rule is that it gives greater protection when the lawyer is -- conceals -- unethically conceals a known conflict than when he's candid with the court.

MR. GORNSTEIN: There's a certain amount --

QUESTION: And the argument -- that's the argument here, that in order to get the higher rate of -- of fees for representing a defendant in a capital case, he didn't want it to be known that -- that he represented -- you know, had this prior --

MR. GORNSTEIN: That -- that was the argument,

but the district court found against the --

QUESTION: I understand that.

MR. GORNSTEIN: -- against the defendant on both of those points. The district court carefully examined the questions of whether there was a conflict and whether there was an adverse effect. Those were the correct inquiries.

And the argument that's being made here is that you can skip the second step, and it's our submission that under Cuyler against Sullivan and under Wood and under this Court's general Sixth Amendment jurisprudence, there has to be a showing of an adverse effect on the quality of representation.

If the Court has nothing further.

QUESTION: Thank you, Mr. Gornstein.

Mr. Wagner, you have 3 minutes left.

REBUTTAL ARGUMENT OF ROBERT J. WAGNER

ON BEHALF OF THE PETITIONER

MR. WAGNER: Thank you, Your Honor.

The thrust of the respondent's argument here is that Holloway stands for the proposition that if a defense attorney raises an objection to the court and the court compels that representation over that objection, then that is where the prejudice is presumed.

If you take this argument to its logical

conclusion, then anytime a defense attorney raises an objection on the basis of a conflict to a court and the court compels that representation over that objection, then prejudice should be presumed. In other words, when you have a situation where a defense attorney raises an objection to the court, the court properly inquires of that defense attorney about that conflict and properly finds that there is no debilitating conflict here and then requires that -- that defense attorney to proceed with the representation, then under what the respondents say here, prejudice should be presumed.

That's not what Holloway stands for. Holloway stands for the proposition that the trial court has the duty of protecting the essential rights of the defendant. The trial court has the duty of seeing that the Sixth Amendment rights of a defendant are protected. And in this case, the trial court failed in that responsibility. It knew or should have known of that conflict, failed to inquire into that conflict and that's where the prejudice lies here.

I thank the Court.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Wagner.

The case is submitted.

(Whereupon, at 11:00 a.m., the case in the above-entitled matter was submitted.)

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