University of Cincinnati Law Review

Volume 83 | Issue 4 Article 4

August 2015

Better Not Call Saul: The Impact of Criminal Attorneys on their Clients' Sixth Amendment Right to Effective Assistance of Counsel

Veronica J. Finkelstein
Drexel University Thomas R. Kline School of Law

Better Not Call Saul: The Impact of Criminal Attorneys on their Clients' Sixth Amendment Right to Effective Assistance of Counsel

Cover Page Footnote

Ms. Finkelstein is an Assistant United States Attorney in the Eastern District of Pennsylvania and an Adjunct Professor of Law at the Drexel University Thomas R. Kline School of Law, Emory University School of Law, and the Rutgers School of Law–Camden. This article constitutes her personal work product and any opinions expressed herein are her personal opinion and not the opinion of the United States Department of Justice.

BETTER *NOT* CALL SAUL: THE IMPACT OF CRIMINAL ATTORNEYS ON THEIR CLIENTS' SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

Veronica J. Finkelstein∗

I. INTRODUCTION

The critically-acclaimed American crime drama television series "Breaking Bad" is populated with memorable characters. Among those characters is sleazy lawyer Saul Goodman, a character introduced in the second season of the mega-hit series. Goodman is a criminal attorney under any definition of the term. He is both a lawyer who defends criminals, and a lawyer who, himself, is engaged in the criminal activity of his clients.[1] As the series unfolds, Goodman is shown assisting his clients in drug conspiracies. Specifically, Goodman launders the financial proceeds from his clients' methamphetamine distribution operation in an effort to conceal their illegal activities.

Although Breaking Bad is fiction, there are real criminal lawyers whose cases seem to have been taken from the pages of a Breaking Bad script. Although the Supreme Court of the United States (the Court or Supreme Court) has not yet granted certiorari to review a case involving the Sixth Amendment implications of a criminal lawyer, lower courts have been have convicted and sentenced lawyers for behavior not unlike that of Goodman. For example, on January 22, 2014, attorney R. Christopher Reade of Las Vegas pled guilty to laundering approximately $2.25 million that his client fraudulently obtained in an online investment scheme.[2] In his plea agreement, Reade admitted not only to laundering the money but to making misrepresentations to regulators in an effort to conceal the fraud.[3]

Reade is far from the only lawyer accused of involvement in a criminal conspiracy with a client. Prominent New Jersey criminal

∗ Ms. Finkelstein is an Assistant United States Attorney in the Eastern District of Pennsylvania and an Adjunct Professor of Law at the Drexel University Thomas R. Kline School of Law, Emory University School of Law, and the Rutgers School of Law–Camden. This article constitutes her personal work product and any opinions expressed herein are her personal opinion and not the opinion of the United States Department of Justice.

1. For the remainder of this Article, the term "criminal attorney" refers to lawyers who are involved in the criminal activities of its clients.

2. Jeff German, *Las Vegas Lawyer Pleads Guilty in Money Laundering Scheme*, LAS VEGAS REV. J., Jan. 23, 2014, at B003.

3. *Id.*

defense lawyer Aaron Denker pled guilty to laundering money from his clients' drug sales.[4] Denker was alleged to have accepted large sums of illegally obtained funds from his clients. Denker then converted those funds to money orders in smaller amounts, in an effort to evade detection. Following his conviction, Denker was disbarred from practicing in the State of New Jersey.[5]

Boston criminal defense lawyer Robert A. George was sentenced to three and a half years in prison for laundering $200,000 on behalf of a former client.[6] At the same time that he was appearing as a defendant, George was serving as defense counsel to a client accused of operating a gambling ring.[7] Following his conviction, George withdrew from representation.[8] His sentence was subsequently affirmed.[9]

Unfortunately, as these cases illustrate, the criminal attorney is no mere fictional concept limited to a television series like Breaking Bad. Although many attorneys would never dream of doing the acts Reade, Denker, and George were convicted of doing, there are true "criminal lawyers" in practice. Attorneys like Reade, Denker, and George not only served as counsel to their clients, but these attorneys either pled guilty to, or were found to have conspired in, their clients' crimes.

This criminal behavior raises serious ethical implications,[10] and may violate the applicable rules of professional conduct.[11] Importantly, the actions of a criminal attorney may violate a client's

4. Larry Lewis, *Lawyer Hit with Fine and Prison*, THE PHILA. INQUIRER, Feb. 6, 1996, at B03.

5. *In re* Denker, 147 N.J. 570, 570 (1997).

6. Brian Ballou, *Lawyer is Given 3½ Years in Jail; George Stands by Innocence Claim*, THE BOSTON GLOBE, Nov. 1, 2012, at B4, B41; Tom Egan, *Robert George's Criminal Convictions Upheld*, MASS. LAW. WEEKLY, July 30, 2014.

7. *Cape & Islands District Attorney DA O'Keefe Won't be Charged in Federal Investigation*, MASS. LAW. WEEKLY, June 28, 2012.

8. *Id*.

9. U.S. v. George, 761 F.3d 42 (1st Cir. 2014).

10. *See* Beets v. Collins, 65 F.3d 1258, 1270 (5th Cir. 1995) ("Conflicts between a lawyer's self-interest and his duty of loyalty to the client . . . fall along a wide spectrum of ethical sensitivity from merely potential danger to outright criminal misdeeds."); Cerro v. U.S., 872 F.2d 780, 788 (7th Cir. 1989) ("The purpose of the ethical duty to disclose potential conflicts is to ensure conflict-free representation."). Although the ethical issues are significant, they are not the focus of this article.

11. ABA Model Rule 1.7, the general rule regarding current conflicts of interest, states as follows:

> Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

MODEL RULES OF PROF'L CONDUCT R. 1.7 (2009).

constitutional rights. In specific, when an attorney co-conspires with his client and then defends that client at trial, the attorney's conduct raises issues that may implicate his client's Sixth Amendment rights.

The Sixth Amendment provides various safeguards to criminal defendants. Among those guarantees is that of a fair trial.[12] This guarantee has been deemed to include, with some limitations, representation by competent and conflict-free counsel.[13] Competency issues can take a variety of forms, from an attorney who fails to call a key witness to testify,[14] to an attorney accused of sleeping through a cross examination.[15]

Conflict issues, in contrast, generally arise where an attorney represents multiple clients, either concurrently or successively. The most common situation that gives rise to a conflict of interest concerns occurs when an attorney concurrently represents two defendants who are both accused of a related crime. For example, if two defendants are accused of conspiring to rob a bank, and one attorney is appointed to represent both defendants at trial, the representation would be considered concurrent joint representation. When concurrent joint representation occurs, the attorney's loyalty may be unavoidably and impermissibly divided between his two clients. For this reason, concurrent joint representation has been scrutinized because a defendant's Sixth Amendment right to counsel may be jeopardized.

The Sixth Amendment's coverage, however, is not strictly limited to circumstances of concurrent joint representation of co-defendants. The Sixth Amendment also applies to other types of conflicts, including those created when an attorney represents a client with whom the attorney formerly himself conspired. As argued herein, an attorney who is a participant in a criminal conspiracy will, by nature of his own divided loyalties and interest in self-preservation, be unable to provide effective representation to his client.

Although the Supreme Court has not yet recognized this type of

12. The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

13. Reece v. Georgia, 350 U.S. 85, 90 (1955); Glasser v. U.S., 315 U.S. 60, 69–70 (1942); Avery v. Ala., 308 U.S. 444, 446 (1940); Powell v. Ala., 287 U.S. 45, 57 (1932).

14. Branch v. Sweeney, No. 13-1657, 2014 U.S. App. LEXIS 13006, at *20–*23 (3d Cir. July 9, 2014).

15. Muniz v. Smith, 647 F.3d 619, 624–25 (6th Cir. 2011).

conflict as one requiring automatic reversal, such a rule is appropriate for a myriad of reasons. Arguably, there can be no higher loyalty than to one's self. As this article posits, an attorney's inherent desire for self-preservation creates a conflict so serious that it justifies the adoption of an automatic reversal rule. Indeed, at least one federal circuit has regularly applied an automatic reversal rule to this type of case.

The Supreme Court has not yet granted certiorari to review a case involving the Sixth Amendment implications of a criminal attorney but such a case is likely to soon present itself. When that time comes, the Supreme Court will have a unique opportunity to clarify, expand, or curtail its ineffective assistance of counsel jurisprudence. A criminal attorney cannot provide effective assistance of counsel because the attorney's loyalties are irreparably divided. For the reasons described herein, there are valid reasons for the Supreme Court to impose an automatic reversal rule in cases where an attorney represents a client co-conspirator in a trial relating to their joint crime. To reach this conclusion, this Article will first explore the scope and development of the Court's ineffective assistance of counsel jurisprudence. With that in mind, Part III of this Article will assess the true nature of various types of conflicts. Part IV of this Article explores the jurisprudence of the Second Circuit, which employs an automatic reversal rule in circumstances of a co-conspiring attorney. Finally, Part V of this Article argues that an automatic reversal rule, like the rule utilized in the Second Circuit, is justified in cases where an attorney represents a co-conspirator client.

II. THE SUPREME COURT'S INEFFECTIVE ASSISTANCE OF COUNSEL JURISPRUDENCE

The Sixth Amendment guarantees all criminal defendants a fair trial.[16] Beginning with *Powell v. Alabama*, the Supreme Court held that the due process clause of the Fourteenth Amendment included a guarantee of the right to assistance of counsel.[17] As part of this guarantee, a defendant accused of a crime is entitled to the assistance of counsel during key stages of the litigation.[18] This right attaches in

16. U.S. CONST. amend VI.

17. Maureen R. Green, Comment*: A Coherent Approach to Ineffective Assistance of Counsel Claims*, 71 CALIF. L. REV. 1516, 151 (1983).

18. Strickland v. Washington, 466 U.S. 668, 684 (1984); McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). The appropriate focus of any Sixth Amendment analysis is on the integrity of the adversarial system which includes the assistance of competent, conflict-free counsel. *See* Wheat v. U.S., 486 U.S. 153, 159 (1988).

all federal and state criminal prosecutions in which the defendant is accused of a felony or certain serious misdemeanors.[19]

Although other substantive rights are also guaranteed by the Sixth Amendment, the assistance of counsel has always been a key constitutional protection.[20] In a long line of cases culminating in *Gideon v. Wainwright*, the Court recognized that assistance of counsel is necessary to protect the fundamental right to a fair trial in criminal cases.[21] Because assistance of counsel is so fundamental to ensuring the validity of the adversarial system, "defendants cannot be left to the mercies of incompetent counsel."[22] As the Court noted, the assistance of counsel is not only a protection provided by the Sixth Amendment, but absent this safeguard, "justice will not be done."[23]

The right to counsel is fundamental for a variety of reasons. First, the typical defendant is unfamiliar with the law, has no facility with the rules of procedure, and is ill-prepared to rebut the charges leveled against him by the prosecution.[24] Without the assistance of counsel, a defendant may be wrongfully convicted based on legal error or faulty evidence.[25]

Second, the stakes are high. In a criminal case where the death penalty or a lengthy incarceration looms as potential penalties, one misstep in a defense can be the difference between life and death.[26] Given the severity of the penalties, criminal cases are ones where counsel's assistance is particularly important.

Third, assistance of counsel is one method of guaranteeing a broad spectrum of protections. A criminal defendant is entitled to various protections under the constitution including, *inter alia*, the right to confront witnesses, to trial by jury, and to be speedily tried.[27] The defendant may not be aware of these and other rights. Even if he is

19. *See* Argersinger v. Hamlin, 407 U.S. 25, 37–38 (1972) (affirming that the right applies to serious misdemeanors); Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (affirming that the right applies to felonies).

20. *See* U.S. v. Morrison, 449 U.S. 361, 364 (1981) (noting the importance of defense counsel in assuring the adversary criminal process is fair); U.S. v. Ash, 413 U.S. 300, 309 (1973) (noting that the assistance of trial counsel is a core purpose of the Sixth Amendment).

21. *See Gideon*, 372 U.S. at 339–40; *see also* Adams v. U.S. *ex rel*. McCann, 317 U.S. 269 (1942); Johnson v. Zerbst, 304 U.S. 458 (1938); *Powell*, 287 U.S. at 68.

22. *McMann*, 397 U.S. at 771.

23. *Johnson*, 304 U.S. at 462.

24. Mark W. Shiner, *Conflicts of Interest Challenges Post Mickens v. Taylor: Redefining the Defendant's Burden in Concurrent, Successive, and Personal Interest Conflicts*, 60 WASH. & LEE L. REV. 965, 969 (2003).

25. *See Johnson*, 304 U.S. at 463 (discussing the risks inherent in the deprival of assistance of counsel)

26. *Id.*

27. U.S. CONST. amend. VI.

aware, the lay defendant may not understand how to assert these rights. It is through counsel that the defendant's other substantive constitutional rights are protected.[28]

Finally, the right to counsel ensures the trial not only is fair but appears fair to the outside world. In many ways, public perception is paramount to the functioning of the justice system. Ensuring that all defendants have appropriate access to effective counsel bolsters the validity of the adversarial system itself.[29]

For these and other reasons, apart from a few narrow exceptions, the Sixth Amendment right to counsel is absolute.[30] Counsel is so fundamental, that it is guaranteed regardless of the defendant's economic status. For this reason, counsel must be appointed in criminal cases to represent defendants who would otherwise be unable to pay.[31] Where a defendant is entitled to counsel at trial, if that counsel is absent, the defendant's conviction is generally subject to automatic reversal.[32]

Simply being in the courtroom during trial, however, is insufficient. An attorney defending a client in a criminal case has a significant obligation. Counsel must be more than a potted plant; his mere presence does not constitute the constitutionally guaranteed level of assistance.[33] To meet the requirements of *Gideon*, counsel must also be effective.[34] Among other requirements, counsel must act in a manner that is objectively reasonable and that does not detrimentally prejudice the outcome of the case.[35] If present counsel does not fulfil this role properly, the defendant's conviction may subsequently be reversed.[36] As the Court has noted, however, surmounting the high bar to prove ineffective assistance is not an

28. *See* Mickens v. Taylor, 535 U.S. 162, 179 n.1 (2002) (Stevens, J., dissenting) ("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.")

29. Hadassah Reimer, *Legal Ethics: Stabbed in the back, but no adverse effect*, Mickens v. Taylor, *122 S. Ct. 1237 (2002)*, 3 WYO. L. REV. 329, 332 (2003).

30. Jeffrey Scott Glassman, Note: Mickens v. Taylor: *The Court's New Don't Ask, Don't Tell Policy for Attorneys Faced with a Conflict of Interest*, 18 ST. JOHN'S J.L. COMM. 919, 923–24 (Summer, 2004); *Annual Review of Criminal Procedure*, 42 GEO. L.J. ANN. REV. CRIM. PROC. 525, 567 (2013) (noting that waiver must be knowing and intelligent); *see also* Wheat v. U.S., 486 U.S. 153, 163 (1988) (noting that even waiver by the defendant must be viewed with scrutiny due to the integral nature of assistance of counsel to the adversarial system).

31. Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963).

32. *Id. at* 339.

33. Strickland v. Washington, 466 U.S. 668, 685 (1984).

34. *Id.* at 686; Cuyler v. Sullivan, 446 U.S. 335, 344 (1980); Avery v. Ala., 308 U.S. 444, 446 (1940).

35. Roe v. Flores-Ortega, 528 U.S. 470, 476-77 (U.S. 2000) (citing *Strickland*, 466 U.S. at 688).

36. U.S. v. Cronic, 466 U.S. 648, 659 (1984).

easy task.[37] The attorney need only act "within the range of competence demanded of attorneys in criminal cases."[38]

When evaluating whether counsel was effective, and therefore ensured due process protections to the defendant, the focus is the integrity of the adversarial system.[39] Where that integrity has been detrimentally impacted, the defendant's constitutional rights may have been violated.

When a defendant was represented by an attorney who failed to provide effective assistance, the defendant may be entitled to post-conviction relief if his constitutional rights have been violated.[40] A claim for post-conviction relief is a powerful claim; if the defendant is successful he may be entitled to a new trial. For this reason, as one commentator has noted, ineffective assistance claims are some of the most frequently raised claims in both state and federal post-conviction petitions.[41]

The Court has not considered a conflict case where the conflict arose from a criminal attorney representing his co-conspirator client. The Court has addressed ineffective assistance claims in two primary contexts: conflicts of interest and attorney performance.[42] The Court first set the parameters for ineffective assistance of counsel claims in *Glasser v. United States*. The Court further honed its rules through a line of conflict of interest cases, including *Holloway v. Arkansas*, *Cuyler v. Sullivan,* and *Wood v. Georgia*. The Court articulated a different rule in its attorney performance cases, including the notable decisions in *Strickland v. Washington* and *United States v. Cronic*. In *Mickens v. Taylor* the Court's most recent decision addressing the conflict of interest inherent in successive representation, the Court attempted to reconcile its prior cases. To date, *Mickens* remains the Court's final word on ineffective assistance claims in the context of conflicts of interest.

37. Padilla v. Kentucky, 559 U.S. 356, 371 (2010).

38. McMann v. Richardson, 397 U.S. 759, 771 (1970).

39. Wheat v. U.S., 486 U.S. 153, 159 (1988).

40. Anne Bowen Poulin, *Conflicts Of Interest In Criminal Cases: Should The Prosecution Have A Duty To Disclose?*, 47 AM. CRIM. L. REV. 1135, 1137 (2010).

41. Eve Brensike Primus, *Procedural Obstacles to Reviewing Ineffective Assistance of Trial Counsel Claims in State and Federal Postconviction Proceedings*, 24 CRIM. JUST. 6, 6 (2009).

42. Other contexts include conflicts between the attorney and the judge, an employer and employee, or between multiple attorneys representing discrete interests. *See, e.g.*, Burger v. Kemp, 483 U.S. 776 (U.S. 1987) (two attorneys from the same firm representing co-defendant); Wood v. Georgia, 450 U.S. 261 (1981) (counsel was retained and paid by the employer on behalf of defendant employees); U.S. v. Sayan, 968 F.2d 55, 64 (D.C. Cir. 1992) (counsel feared reprisal from the judge due to actions taken to defend his client).

A. The Court set the parameters for ineffective assistance of counsel claims in Glasser v. United States.

The Court first addressed the parameters of a claim for ineffective assistance of counsel in the landmark case of *Glasser v. United States*.[43] In *Glasser*, the trial court appointed defendant Glasser's attorney to represent Glasser's co-conspirator, defendant Kretske, notwithstanding Glasser's objection to the joint representation.[44] At trial, the attorney zealously advocated for Kretske while foregoing trial strategies that would have been detrimental to Kretske and beneficial to Glasser.[45] In specific, the attorney failed to cross-examine a witness whose testimony was used to link Glasser to the conspiracy.[46] The attorney also failed to object to arguably inadmissible evidence.[47] Glasser, Kretske, and other co-conspirators were all convicted.[48]

On review, the Court found that the trial court's failure to provide Glasser with the assistance of an "undivided" attorney violated Glasser's Sixth Amendment right to effective assistance of counsel.[49] The *Glasser* court declined to apply the harmless error standard, adopting a standard more lenient to defendants.

Instead the *Glasser* Court merely required that the concurrent joint representation had prejudiced Glasser. Although the Court noted that "nice calculations as to the amount of prejudice" were unnecessary in light of the fundamental deprivation of constitutional rights, the Court nonetheless engaged in a factual analysis to find some evidence of actual prejudice.[50] The Court noted, *inter alia*, that the attorney's representation of Glasser "was not as effective as it might have been" but for the conflict posed by the concurrent joint representation.[51] The Court ultimately set aside the verdict below and granted Glasser a new trial.[52]

In *Glasser*, the Court had an opportunity to announce a bright-line rule and to declare unconstitutional an attorney's concurrently representation of co-defendants. The Court elected not to do so. Instead, the Court permitted concurrent joint representation.

---

43. 315 U.S. 60 (1942).
44. *Id*. at 68–69.
45. *Id*.
46. *Id*. at 72–73.
47. *Id*. at 73–74.
48. *Id*. at 63.
49. *Id*. at 75–76.
50. *Id*. at 76.
51. *Id*.
52. *Id*.

The Court not only permitted concurrent joint representation to occur, but suggested that this type of representation might be a valid strategic choice by the defendant. As noted in Justice Frankfurter's dissent in *Glasser*, "[j]oint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack."[53] The *Glasser* Court also determined that judicial economy weighed in favor of permitting, at least in some circumstances, concurrent joint representation.

Inherent in the *Glasser* decision was the Court's presumption that serving two masters does not create an automatic, unavoidable division of loyalties. By declining to prohibit all concurrent joint representation, the Court recognized that, in some cases, an attorney serving two masters may have divided loyalties but, in other cases, there may be no division of loyalties. This presumption manifests itself in the Court's future conflict jurisprudence, as is further discussed herein. Had the *Glasser* Court announced a bright-line rule, the problem posed by a criminal attorney may have never manifested. Nor would prejudice have been injected into the analysis. Instead, the *Glasser* Court held that only certain divided loyalties, those resulting in prejudice, rose to the level of ineffective assistance at trial.

In addition to declining to adopt a bright-line rule, the *Glasser* Court failed to announce a specific test to measure prejudice. The *Glasser* Court also declined to determine the specific amount of prejudice necessary for reversal. After the *Glasser* decision, it appeared that a showing of some amount of prejudice was necessary for a defendant to prevail on an ineffective assistance claim. How much prejudice or how such prejudice should be proven was unclear.

Following *Glasser*, the lower courts varied in their approaches to ineffective assistance of counsel claims. Lower courts primarily diverged as to the specific amount of prejudice a defendant had to show to prevail on an ineffective assistance claim. Some courts held that the mere potential for prejudice was sufficient to constitute ineffective assistance of counsel.[54] Other courts applied the reasonable doubt standard, evaluating the record for evidence of a conscious, knowing decision by all defendants to enter into joint representation.[55] Yet other courts required a showing of actual prejudice.[56] Still others applied different standards depending on

53. *Id*. at 92 (Frankfurter, J., dissenting).

54. *See, e.g.*, U.S. *ex rel.* Hart v. Davenport, 478 F.2d 203 (3d Cir. 1973).

55. *See, e.g.*, Lollar v. U.S., 376 F.2d 243 (D.C. Cir. 1967).

56. *See, e.g.*, U.S. v. Lovano, 420 F.2d 769 (2d Cir. 1970); Lott v. U.S., 218 F.2d 675 (5th Cir. 1955).

when the ineffective assistance claim was raised.[57] For example, in Washington state courts, if the claim was raised at the time counsel was appointed, the defendant only needed to articulate the possibility of prejudice.[58] If the claim was raised post-trial, actual prejudice needed to be shown from the trial court record.[59] In the years after *Glasser* was decided, there was little consistency among lower courts evaluating ineffective assistance claims in the context of concurrent joint representation.

B. The Court further honed its rules through a line of conflict of interest cases, including Holloway v. Arkansas, Cuyler v. Sullivan, and Wood v. Georgia.

Between 1978 and 1981, the Court considered three major conflict of interest cases, which extended the reasoning set forth in *Glasser*. First, in *Holloway v. Arkansas*, the Court adopted an automatic reversal rule for timely raised concurrent joint representation conflicts. Second, in *Cuyler v. Sullivan*, the Court articulated a different, two-part "actual conflict" test for untimely raised challenges. Third, in *Wood v. Georgia*, the Court extended the *Holloway* automatic reversal rule to cases where the trial court had a duty to inquire into a conflict even in the absence of a timely challenge. These three major cases served as the basis for years of litigation relating to concurrent joint representation conflicts.

1. In *Holloway v. Arkansas*, the Court adopted an automatic reversal rule for timely raised concurrent joint representation conflicts.

The Court further refined the parameters of a claim for ineffective assistance of counsel in a case of concurrent joint representation in *Holloway v. Arkansas*. In *Holloway*, the trial court appointed a single public defender to represent three defendants who were each charged with rape.[60] Prior to trial, the attorney moved for the appointment of separate counsel for each defendant.[61] In support of his motion, he described the potential for prejudice, noting that due to the concurrent joint representation he could learn confidential information from one defendant that would create a conflict of

57. *See, e.g.*, State v. Kennedy, 508 P.2d 1386 (Wash. Ct. App. 1973).

58. *Id*. at 1389.

59. *Id*.

60. 435 U.S. 475, 476–77 (1980).

61. *Id*. at 477.

interest in terms of his representation of another defendant.[62] The attorney argued that the defendants themselves had articulated to him the possibility of a conflict of interest.[63]

Notwithstanding this argument, the motion was denied and the trial court required the attorney to represent all three defendants.[64] Prior to jury selection and again before presenting the defense case in chief, the attorney requested a severance.[65] The trial court denied each request.[66] The defendants were convicted.[67]

On review, the *Holloway* Court held that the trial court's failure to inquire into the potential conflict and appoint separate counsel not only amounted to ineffective assistance of counsel, but that such a failure mandated automatic reversal.[68] The *Holloway* Court noted that, "the mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters."[69]

The *Holloway* Court attempted to create consistency in ineffective assistance of counsel claims going forward. Citing the *Glasser* decision, the *Holloway* opinion noted the divergent approaches among lower courts faced with ineffective assistance claims.[70] The *Holloway* Court read the *Glasser* decision "as holding that whenever a trial court improperly requires joint representation over timely objection[,] reversal is automatic."[71]

The *Holloway* Court, however, declined to rule on the standard applicable to all attorney conflict claims, deciding only the standard applicable when the challenge to concurrent joint representation was made by counsel before trial.[72] The *Holloway* Court did not decide that its automatic reversal rule would apply where the conflict was never raised before the trial court. Nor did it consider any applications arising from a criminal attorney.

Importantly, the *Holloway* Court decided that, at least for objections raised before trial, no specific amount of prejudice need be proven. In fact, the *Holloway* Court determined that, at least in some cases, no prejudice need be proven at all. Instead, the *Holloway*

62. *Id*. at 467–77.
63. *Id*. at 477.
64. *Id*. at 488.
65. *Id*. at 478.
66. *Id.*
67. *Id.* at 481.
68. *Id*. at 488.
69. *Id*. at 490.
70. *Id*. at 483–84.
71. *Id*. at 488.
72. *Id*. at 484.

Court held that reversal is automatic wherever a trial court compels concurrent joint representation over a timely, pre-trial objection by the attorney.[73] In essence, the *Holloway* Court determined that certain types of conflicts create a *per se* violation of the Sixth Amendment. One category of those types of conflicts were cases like *Holloway*, where counsel affirmatively raises the conflict and the trial court declines to inquire into the matter.

In its reasoning, the *Holloway* Court noted the difficulty encountered by a defendant who is faced with having to prove actual prejudice to be entitled to post-conviction relief.[74] As the *Holloway* Court noted, the inherent danger in a conflict of interest situation is not what the attorney does, which can be shown from the record, but rather what the attorney refrains from doing as a result of his divided loyalties.[75] On the record, there is no way to know what options, tactics, and decisions were considered and rejected due to the conflict.[76] In recognition of the impossibility of proving prejudice *post hoc*, the *Holloway* Court simply obviated any need for such a showing, at least where an objection to the concurrent joint representation was timely raised pre-trial.

Instead, the *Holloway* Court held that where the objection was timely raised, the conflict requires automatic reversal, without a showing of prejudice or an adverse effect. The mere possibility of conflict, however remote, is sufficient and no prejudice need be proven. Since the *Holloway* decision was issued, the Court has consistently held that a trial court has a duty to ascertain if there is a conflict in two situations: first, when the issue is timely raised by a litigant; or second, where the potential for conflict is readily apparently to the trial court based on the record at trial.[77] In either of these two situations, if the trial court fails to ascertain the effect of the conflict, reversal is automatic without any need for the defendant to prove prejudice from the trial court record.

In its *Holloway* decision, the Court carefully limited its holding to the facts of *Holloway*—namely a concurrent joint representation conflict raised before trial. By reserving for another day the issue of untimely objections to concurrent joint representation, the *Holloway* Court tacitly endorsed the *Glasser* reasoning that serving two masters sometimes creates an unavoidable, automatic division of loyalties but

73. *Id*. at 488–89.

74. *Id*. at 490–91.

75. *Id*. (internal citations omitted).

76. *Id*. at 496.

77. Wheat v. U.S., 486 U.S. 153, 159–60 (1988); Wood v. Georgia, 450 U.S. 261, 272–73 (1981).

that, at other times, creates an potential for conflict that never ripens into an actual conflict.

At its essence, the *Holloway* Court focused more directly on the obligations of the trial court to evaluate matters presented to it than the actual nature of a conflict of interest. By focusing on the trial court's failure, the *Holloway* Court sidestepped an opportunity to consider whether all concurrent joint representation conflicts might give rise to an automatic right to reversal. By limiting its decision to only timely, pre-trial objections, the *Holloway* Court reserved judgment as to the question of how much prejudice needed be shown to prove actual divided loyalties under other circumstances.

2. In *Cuyler v. Sullivan*, the Court articulated a different, two-part "actual conflict" test for untimely raised challenges.

In *Cuyler v. Sullivan*, the Court was presented with the issue it had declined to rule upon in *Holloway*, namely the necessary strength of any showing of an actual conflict of interest where an objection is first raised post-trial. The *Sullivan* Court drew a clear, bright line between timely and untimely challenges to concurrent joint representation. The *Sullivan* Court left intact its *Holloway* decision. As a result, where a challenge is lodged pre-trial, reversal is automatic with no showing of prejudice required. In contrast, the *Sullivan* Court held that where a challenge is lodged post-trial, the defendant must show actual prejudice.

In *Sullivan*, a pair of privately-hired attorneys represented three co-defendants who were all accused of murder.[78] Neither the co-defendants nor their attorneys objected to this representation at trial.[79]

The first defendant to be tried was Sullivan.[80] The evidence against Sullivan was largely circumstantial.[81] Sullivan himself never testified and the defense chose not to present a case.[82] Sullivan was convicted and sentenced to life in prison.[83] The other two defendants were each separately tried and acquitted.[84] Sullivan appealed his conviction, which was affirmed.[85]

Defendant Sullivan raised an objection to the concurrent joint

78. 446 U.S. 335, 337 (1980).
79. *Id*. at 337–38.
80. *Id*. at 338.
81. *Id*.
82. *Id*.
83. *Id*.
84. *Id*.
85. *Id*. at 338–40.

representation only after he was convicted and his co-defendants were acquitted.[86] During this phase of litigation the two trial attorneys gave conflicting accounts of their roles at the trial.[87] At least according to certain testimony, one attorney jointly represented multiple defendants.[88]

On appeal, the United States Court of Appeals for the Third Circuit granted Sullivan a reversal of his conviction.[89] Citing *Holloway* and other cases from within the circuit, the Third Circuit held that "actual prejudice or conflict of interest need not be shown" because even a remote possibility is sufficient.[90] Without guidance to the contrary from the Supreme Court, the Third Circuit simply applied the *Holloway* rule without considering whether this rule was applicable in light of the untimely challenge to the concurrent joint representation by Sullivan.

On review, the Supreme Court disagreed, holding that the Third Circuit applied the wrong standard. As an initial matter, the *Sullivan* Court distinguished *Holloway*, reasoning that:

> Holloway requires state trial courts to investigate timely objections to multiple representation. But nothing in our precedents suggests that the Sixth Amendment requires state courts themselves to initiate inquiries into the propriety of multiple representation in every case. Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial. Absent special circumstances, therefore, trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist.[91]

In so reasoning, the *Sullivan* Court declined to hold that the Court's *Holloway* automatic reversal rule was applicable under the facts presented in the *Sullivan* case.

The *Sullivan* Court instead articulated a new, two-part test. Under this test, the defendant had the burden to show that the conflict adversely affected one or more actions taken by the attorney at trial.[92] The *Sullivan* Court concluded that where no timely objection is

86. *Id*. at 338.
87. *Id*.
88. *Id*.
89. *Id*. at 340.
90. U.S. *ex rel.* Sullivan v. Cuyler, 593 F.2d 512, 519–20 (3d Cir. 1979).
91. *Sullivan*, 446 U.S. at 346–47.
92. *See id*. at 348–50.

raised, a defendant must show: first, that there was an actual conflict of interest; and second, that this conflict adversely affected the attorney's performance.[93]

The *Sullivan* Court provided scant explanation of this new test. In their concurring opinions, Justices Brennan and Marshall attempted to further delineate the test's parameters. Citing ethics rules, Justice Marshall defined an actual conflict as one that created a divergence between the attorney and client regarding "a material factual or legal issue or to a course of action."[94] As to the second prong of the test, less guidance was provided. Noting that something more than a mere potential for divergence between the attorney and client was necessary, the concurring Justices concluded that the defendant must prove that the attorney "actively represented" competing interests.[95]

Although the test was imprecisely defined by the majority decision, one thing was made apparent by the *Sullivan* Court—where a challenge to joint representation is untimely raised, some amount of prejudice, in the form of an "adverse effect" must be shown. Reversal is not automatic in this context. The *Sullivan* Court held that if a defendant shows that his attorney actively represented conflicting interests and that the conflict had an adverse effect on the attorney's performance, reversal is warranted. The *Sullivan* Court distinguished this standard from the one the Court articulated in *Glasser*, and failed to explain the substantive difference between the two standards.[96]

In so holding, the *Sullivan* Court, at least in part, resolved the divergence in the circuits created by its *Glasser* decision. Where prejudice need be shown, all that needed to be proven was an "adverse effect" relating to a material issue. In this way, although departing from its automatic reversal rule in *Holloway*, the *Sullivan* Court nonetheless set what appeared to be a low bar for defendants challenging concurrent joint representation. The *Sullivan* test became known as the "actual conflict" test. To meet this test, a defendant must prove some actual impact caused by the conflict, albeit perhaps less impact than a different verdict at trial.

By articulating the "actual conflict" test without overruling the *Holloway* automatic reversal rule, the *Sullivan* Court created a bright-line distinction between timely and untimely challenges to concurrent joint representation. In so holding, the Court tacitly endorsed the

93. *Id*. at 348.

94. *Id.* at 356 n.3 (Marshall, J., concurring in part and dissenting in part).

95. *Id*. at 351 (Brennan, J. and Marshall, J. concurring in part and dissenting in part) (citing Glasser v. U.S., 315 U.S. 60, 72–75 (1942)).

96. *See id*. at 348–50.

concept that some conflicts are so severe as to unavoidably taint representation, whereas other conflicts are less severe. The distinction between the *Holloway* rule and *Sullivan* test has no specific grounding in the due process clause itself, but arose instead from the Court's apparent belief that different types of conflicts and challenges to representation require different treatment. In cases of an untimely challenge, a showing of some minimal prejudice is required. The required showing is less burdensome than in other types of assistance of counsel cases, but more than in the case of a timely-raised objection under *Holloway*.[97] In cases where an objection was timely raised no prejudice need be shown. Reversal in such a case is automatic. The distinction based on the timing of the challenge was one created by the Court, not one evident in the Sixth Amendment itself.

The Court may have also had practical concerns at heart. The *Sullivan* test created a scheme in which new trials were far less likely to be granted than under *Holloway*, decreasing the chances that a trial verdict would later be disturbed by a Sixth Amendment challenge. The *Sullivan* Court made clear to trial courts that the power to prevent constitutional challenges to verdicts was, in large part, in the hands of the trial court itself. If a challenge was raised, the trial court had an obligation to act. If the challenge was untimely raised, the obligation was on the defendant to make more of a showing to justify reversal. Unfortunately for litigants, however, the *Sullivan* Court made it far more difficult for a conviction to be overturned if counsel failed to timely challenge a representational conflict.

The Court also endorsed reasoning that seemingly rendered it quite easy for a defendant to prove an entitlement to reversal. In the case of a timely challenge, the mere challenge was sufficient. In the case of an untimely challenge, reversal was not automatic but it required some showing of actual prejudice. By adopting the *Sullivan* test without overruling *Holloway*, the Court implied a continued belief that conflicts of interest pose serious threats to the right to assistance of counsel. The *Sullivan* Court established different standards for different types of conflict challenges.

97. Strickland v. Washington, 466 U.S. 668, 692–93 (1984) (comparing the higher burden for attorney performance cases to the lower burden articulated in *Sullivan*).

3. In *Wood v. Georgia*, the Court extended the *Holloway* automatic reversal rule to cases where the trial court had a duty to inquire into a conflict.

Less than a year after *Sullivan* was decided, the Court decided *Wood v. Georgia*.[98] The defendants in *Wood* were employees of an adult theater and bookstore who were changed with distributing obscene materials.[99] Due to the defendants' employment relationship with the adult bookstore, the bookstore agreed to retain an attorney for the defendants and to pay the attorney's fees and any fines.[100] There was no evidence to suggest that the defendants objected to this arrangement.[101]

As agreed, the bookstore arranged for an attorney.[102] The defendants were convicted and sentenced.[103] The attorney did not argue in favor of a reduced sentence.[104] Instead, he lodged an unsuccessful constitutional attack.[105] As part of their sentence, each defendant was issued a fine.[106] The fines were within the bookstore's ability to pay, but exceeded the defendants' ability to pay.[107]

The bookstore then reneged on the agreement to pay the fines.[108] The defendants did not themselves pay, arguing that they were unable to pay.[109] This set of circumstances created a situation wherein the institution of fines could be challenged on the basis of the equal protection clause.[110] To some observers, it appeared that the bookstore and attorney were primarily interested in creating a "test case" to litigate constitutional issues of importance to the bookstore.[111] Actual defense of the defendants seemed secondary, if a factor at all.

The *Wood* case was truly novel in several ways. Unlike *Holloway* and *Sullivan*, the conflict in *Wood* was not caused by concurrent joint representation, at least not entirely. Instead, the conflict was between the defendant and a third-party paying the defendant's legal fees.

98. 450 U.S. 261 (1981).
99. Id. at 263.
100. *Id*. at 266.
101. *Id*.
102. *Id*. at 267.
103. *Id*. at 263.
104. *Id*. at 272.
105. *Id*.
106. *Id*. at 263.
107. *Id*. at 264.
108. *Id*. at 267.
109. *Id*. at 264.
110. *Id*. at 266–67.
111. *Id*. at 267.

This conflict manifested in the attorney, who was torn between the defendants and the bookstore.

In addition, the facts of *Wood* presented a scenario somewhere on the spectrum between the facts of *Holloway* and *Sullivan* in terms of the timeliness of the disclosure of conflict. Unlike in *Holloway*, there was no timely pre-trial objection to the representation. Unlike in *Sullivan*, however, there was a sufficient record before the trial court to heavily suggest a conflict. The attorney's entire course of conduct—his very litigation strategy—suggested that he was serving a master other than the defendants.

On review, the *Wood* Court held that the trial court knew or should have known about the attorney's conflict of interest due to the attorney's disclosures and conduct during trial.[112] This holding signaled an apparent change from the reasoning in *Sullivan*. Indeed, the *Wood* Court focused on the fact that, during the trial, the prosecution noted that a conflict of interest might be created due to counsel's fee arrangement.[113] Finding the facts more akin to *Holloway* than *Sullivan*, the *Wood* Court reasoned that trial court knew or should have known about the potential conflict of interest.[114] Because the trial court failed to inquire, the *Wood* Court held that the appropriate remedy was reversal, and granted new proceedings "untainted . . . by conflicting interests."[115] The *Wood* Court extended the *Holloway* automatic reversal rule beyond the context of timely pre-trial challenges to cases where the trial court had a duty to inquire.

In many ways, the *Wood* decision reinforced the rules articulated in *Holloway* and *Sullivan*. In deciding *Wood*, the Court left the *Sullivan* test intact but created a new category of cases where the *Holloway* automatic reversal rule applied—cases where a conflict should have been apparent to the trial court. Although no timely objection to the representation was made in *Wood*, the conflict was patent to the trial court. By contrast, in *Sullivan*, no unusual circumstances would have made the trial court aware of the conflict. In its *Wood* decision, the Court expanded the application of the *Holloway* rule to cases of timely objection or where the trial court had a duty to inquire into conflict. The *Sullivan* rule, in contrast, applied to untimely objections and cases where the trial court had no reason to inquire.

The *Wood* case was the first conflict case decided by the Court

112. *Id.* at 272–73.

113. *Id.* at 273, n.20.

114. *Id*. at 273–74.

115. *Id*.

where the conflict was not one of concurrent joint representation. The conflict, instead, was one between the competing interests of an employer and employees.[116] By aligning the facts of *Wood* with those of *Holloway*, the Court seemingly acknowledged that conflicts other than those of concurrent joint representation can be serious enough to warrant automatic reversal. The *Wood* decision reinforced the extent to which the Court acknowledged that attorney conflicts can irreparably taint a defendant's case.

C. The Court articulated a different rule in its attorney performance cases, including the notable decisions in Strickland v. Washington and United States v. Cronic.

After *Glasser*, with the exception of *Holloway*, *Sullivan*, and *Wood*, the Court primarily considered ineffective assistance claims arising from circumstances other than joint representation. These cases involved ineffective assistance caused not by attorney conflicts of interests but instead by attorney performance. In *Chambers v. Maroney*, for example, the Court considered whether an attorney was ineffective due to the fact that the attorney met his client on the way to the courthouse on the eve of trial, leaving no time for advance preparation.[117] In *Estelle v. Williams*, an ineffective assistance claim was grounded in the attorney's failure to object to an order requiring the defendant to wear prison garb during trial.[118] Ineffective assistance claims were raised relating to the attorney's professional qualifications,[119] health,[120] pre-trial performance,[121] trial

116. There was also concurrent joint representation in *Wood*, although the conflict concerning the *Wood* Court was not this conflict but rather the conflict created by the employer's retention of counsel for the defendants.

117. 399 U.S. 42, 53 (1970).

118. 425 U.S. 501, 502 (1976).

119. *See, e.g.*, U.S. v. Bergman, 599 F.3d 1142, 1151, 1159–60 (10th Cir. 2010) (Holmes, J., dissenting) (remanding for an evidentiary hearing to determine the attorney's competency and for a new trial if the attorney was deemed incompetent where the attorney was unlicensed at the time of trial); U.S. v. Watson, 479 F.3d 607, 610–12 (8th Cir. 2007) (denying the defendant's motion for a new trial where his trial counsel's license was suspended during trial); Young v. Runnels, 435 F.3d 1038, 1043 (9th Cir. 2006) (affirming the trial court's denial of a new trial where trial counsel was subsequently disbarred); U.S. v. Novak, 903 F.2d 883, 886–87, 891 (2d Cir. 1990) (reversing the trial court's denial of the defendant's petition for vacation of the judgment of conviction where trial counsel had fraudulently obtained admission to the New York State Bar).

120. *See, e.g.*, Ivory v. Jackson, 509 F.3d 284, 294–95, 298 (6th Cir. 2007) (affirming the trial court's denial of a new trial where the defendant alleged that his trial counsel used drugs and alcohol during trial); U.S. v. Eyman, 313 F.3d 741, 742–44, 745 (2d Cir. 2002) (affirming the defendant's conviction and sentence where trial counsel failed to call an expert witness to testify); Frye v. Lee, 235 F.3d 897, 907–08 (4th Cir. 2000) (dismissing an appeal where the trial attorney consumed alcohol but not to the extent that it impacted his performance at trial); Johnson v. Norris, 207 F.3d 515, 518, 521 (8th Cir. 2000) (affirming a judgment where trial counsel was bipolar); Dows v. Wood, 211 F.3d 480,

performance,[122] and post-trial performance.[123]

A separate line of authority from *Glasser* developed specifically to address ineffective assistance claims relating to attorney performance. In *Strickland v. Washington*, the Court articulated a "but for" causation test that applies in the case of deficient attorney performance. In *United States v. Cronic*, the Court concluded that certain performance could be so deficient as to require automatic reversal. In important ways, these decisions reinforced many of the Court's implicit assumptions that underpin the Court's conflict of interest jurisprudence. Although reinforcing many of its prior assumptions, the Court developed an entirely different standard for attorney performance cases than it had applied to the conflict situations in *Holloway* and *Sullivan*.

1. In *Strickland v. Washington*, the Court articulated a "but for" causation test that applies in the case of deficient attorney performance.

The attorney performance standard was first articulated by the Court in *Strickland v. Washington*.[124] In *Strickland*, the Court considered whether there had been ineffective assistance based on an attorney's tactical decision not to pursue certain litigation

485–86, 488 (9th Cir. 2000) (denying *habeas corpus* relief where trial counsel was subsequently diagnosed with advanced Alzheimer's disease).

121. *See, e.g.*, Thomas v. Horn, 570 F.3d 105, 121–22, 130 (3d Cir. 2009) (affirming the trial court's guilt-phase determinations, but vacating the trial court's order for sentencing relief and remanding for an evidentiary hearing concerning the impact, if any, of the attorney's failure to investigate mitigating evidence); Virgil v. Dretke, 446 F.3d 598, 613–14 (5th Cir. 2006) (reversing judgment against the defendant and ordering that he be re-tried or released where trial counsel failed to strike jurors who admitted they could not be fair and impartial); James v. Harrison, 389 F.3d 450, 456–57 (4th Cir. 2004) (affirming the trial court's judgment denying a new trial where the defendant's attorney was absent during voir dire and jury selection because he relied on the attorneys representing co-defendants); Mello v. Dipaulo, 295 F.3d 137, 145–47, 151 (1st Cir. 2002) (denying *habeas corpus* relief where trial counsel failed to investigate the use of expert testimony); Hughes v. U.S., 258 F.3d 453, 462–64 (6th Cir. 2001) (reversing and remanding for a new trial where the defendant's attorney failed to challenge a venireperson who admitted bias).

122. *See, e.g.*, Bell v. Cone, 535 U.S. 685, 688, 701–02 (2002) (reversing and remanding where trial counsel made a strategic choice not to deliver a closing argument); Kimmelman v. Morrison, 477 U.S. 365, 385, 391 (1986) (affirming the circuit court's determination that the defendant received ineffective assistance of counsel where trial counsel failed to timely challenge key evidence against the defendant).

123. *See, e.g.*, Wiggins v. Smith, 539 U.S. 510, 534–38 (2003) (reversing and remanding for a new sentencing hearing where trial counsel failed to present mitigating evidence during the sentencing phase); Glover v. U.S., 531 U.S. 198, 203–05 (2001) (reversing and remanding for a new sentencing hearing where trial counsel failed to object to the defendant's convictions being combined, which increased the defendant's overall sentence).

124. 466 U.S. 668 (1984).

strategies.[125] In *Strickland*, against the advice of his court-appointed trial attorney, defendant Washington waived his right to a jury at sentencing and pled guilty to capital murder.[126] In an effort to prevent damaging evidence from being admitted during the sentencing phase, Washington's attorney did not prepare a presentence report and did not call Washington or any other witnesses to testify during the sentencing hearing.[127] In the absence of scant mitigating evidence, Washington was sentenced to death. [128] Washington subsequently challenged his conviction on the basis that his attorney was ineffective for failing to undertake additional investigation to determine whether a psychiatric defense might have been viable and effective.[129]

On review, the *Strickland* Court distinguished ineffectiveness claims alleging deficient attorney performance from those alleging a conflict of interest. In the case of attorney performance, the *Strickland* Court held that prejudice needed be proven to a degree more significant than it had required in *Sullivan*. The *Strickland* Court characterized the *Sullivan* test as a "not quite *per se* rule of prejudice."[130] Although the *Sullivan* test required that the defendant show only an actual conflict and adverse effect, the *Strickland* test required that the defendant show actual prejudice. In essence, under the *Strickland* test the defendant must show that "but for [his attorney's actions], the result of the proceeding would have been different."[131] This standard is considerably higher than the standard in *Sullivan*. Under the *Sullivan* test, the defendant need show only some prejudicial effect, not an entirely different outcome.

In addition, the *Strickland* Court ruled out the application of the *Holloway* automatic reversal rule to attorney performance cases. The *Strickland* Court, citing *Sullivan*, concluded that prejudice may only be presumed in conflict of interest cases.[132] In attorney performance cases, the Court could not generally begin with the presumption of ineffective assistance, as it was entitled to do in conflict cases that fit the facts of *Holloway* and *Wood*.

In its *Strickland* decision, the Court articulated a very different presumption in an attorney performance case as compared to conflict

125. *Id*. at 673.
126. *Id*. at 672.
127. *Id*. at 673.
128. *Id*. at 675.
129. *Id*. at 678–79.
130. *Id*. at 692.
131. *Id*. at 694.
132. *Id*. at 692.

cases. In so doing, the Court distinguished conflicts of interest from virtually all other issues giving rise to ineffective assistance claims.[133] In conflict cases, at least those like *Holloway* and *Wood*, the conflicted representation created a presumption of ineffective assistance as the starting point of the Court's analysis.

In cases of attorney performance, on the other hand, the Court announced a starting presumption that the attorney's performance was adequate.[134] In *Strickland*, the Court articulated this presumption as a belief that the attorney's strategy and tactics fell "within the wide range of reasonable professional assistance" unless the defendant is able to show deviation from the general standards of attorney practice.[135] Moreover, the defendant has the added burden of proving that for the attorney's deficient performance, the result of the proceeding would have been different.[136] In specific, the *Strickland* Court held that a claim for ineffective assistance due to attorney performance had two elements:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[137]

Applying this new test to the facts before it, the *Strickland* Court held that Washington had not met his burden to show causation and was not entitled to reversal under the Sixth Amendment.[138]

The *Strickland* test sets a high bar for defendants. Although ineffective claims have been sustained where an attorney's performance was so deficient that it was as though he was absent through major phases of trial,[139] defendants frequently fail to make the necessary but for showing of prejudice.[140] Under the *Strickland*

133. Heidi Reamer Anderson, *Funding Gideon's Promise by Viewing Excessive Caseloads as Unethical Conflicts of Interest*, 39 HASTINGS CONST. L.Q. 421, 438 (2012).

134. *Strickland*, 466 U.S. at 689.

135. *Id. See also* Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (per curiam).

136. *Strickland*, 466 U.S. at 698; *see also* Sanjay Chhablani, *Disentangling The Sixth Amendment*, 11 U. PA. J. CONST. L. 487, 542–43 (2009).

137. *Strickland*, 466 U.S. at 687.

138. *Id.* at 698–701.

139. *See, c.f.*, U.S. v. Cronic, 466 U.S. 648, 659 (1984).

140. *See, e.g.*, Lockhart v. Fretwell, 506 U.S. 364 (1993) (no ineffective assistance claim proven where counsel failed to object based on later overruled case law); Perry v. Leeke, 488 U.S. 272 (1989)

standard, the defendant must show more than mere prejudice. The defendant must show prejudice that has more than "some conceivable effect on the outcome"—the prejudice must have "more likely than not altered the outcome."[141]

In sum, the *Strickland* test, which is applied to most ineffective assistance claims, contains a much higher standard than the standard articulated in *Holloway* and *Sullivan*. In so holding, the Court indicated its belief that conflicts generally pose a more serious risk to a defendant than even the most bumbling attorney performance.

2. In *United States v. Cronic*, the Court concluded that some attorney performance could be so deficient as to require automatic reversal.

On the same day the Court decided *Strickland*, it also decided a second ineffective assistance case with starkly different facts and ultimate outcome. In *United States v. Cronic*, the Court delineated certain circumstances in which an automatic reversal rule would apply to attorney performance cases.[142] Defendant Cronic and two other defendants were indicted on mail fraud charges relating to a scheme involving an alleged shell corporation.[143] At trial, Cronic's inexperienced and newly-appointed attorney presented no defense.[144] Instead, the attorney cross-examined the government's witnesses in an effort to establish both that the corporation was not a shell and that defendant Cronic did not control the corporation.[145] Cronic was nonetheless convicted.[146]

The *Cronic* Court began its analysis by acknowledging that a complete denial of counsel would violate the Sixth Amendment.[147] The Cronic Court then noted that there are certain circumstances where "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

(no ineffective assistance claim proven where the defendant was preventing from talking with his attorney during parts of the trial); Burger v. Kemp, 483 U.S. 776, 795–96 (1987) (no ineffective assistance claim proven where the defendant claimed his counsel failed to investigate potentially mitigating evidence); Nix v. Whiteside, 475 U.S. 157 (1986) (no ineffective assistance claim proven where the defendant claimed his counsel refused to present certain testimony at trial).

141. *Strickland*, 466 U.S. at 693–94.

142. *Cronic*, 466 U.S. at 658–62.

143. *Id*. at 649–51.

144. *Id*. at 649, 651.

145. *Id*. at 651.

146. *Id*. at 650.

147. *Id*. at 659.

trial."[148] The *Cronic* Court further reasoned that the Sixth Amendment would also be violated "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. . . ."[149] The *Cronic* Court did not further define what would constitute a meaningful lack of adversarial testing, nor did it present a method of distinguishing such from mere litigation strategy.

On the evidence before the Court, the *Cronic* Court could not determine if the tactics utilized at trial had rendered counsel ineffective. Although skeptical that Cronic would prevail, the Court nonetheless remanded the case for further evaluation by the circuit court.[150] The Court left open the possibility that a combination of factors, including the limited trial preparation time, relative inexperience of the attorney, and complexity of the case made it possible that Cronic could successfully prove that he was deprived effective assistance of counsel.[151]

As part of its instructions on remand, the *Cronic* Court noted that a reversal was not warranted simply because an attorney is inexperienced.[152] The *Cronic* Court instead concluded that only in extreme circumstances—where there has been a complete miscarriage of justice—could prejudice be presumed.[153]

Although perhaps not present under the facts of *Cronic*, the Court's reasoning in *Cronic* left open the possibility that an attorney might perform in a way that is so below-standard that it is akin to no representation at all. If the attorney's performance was that deficient, automatic reversal would be required. Although the *Cronic* facts did not rise to that level, the *Cronic* Court did not foreclose the possibility of such a case arising under different facts. Accordingly, no evaluation of prejudice is necessary in an attorney performance case where the performance is so deficient that it is equivalent to no representation at all.[154]

Although not applied with total uniformity, the reasoning of *Cronic* has been applied to a variety of circumstances where

148. *Id*. at 659–60.

149. *Id*.

150. *Id*. at 666–67.

151. *Id*. at 666.

152. *Id*. at 665.

153. *Id*. at 658 fn 24; *see e.g.*, Geders v. U.S., 425 U.S. 80 (1976); Herring v. New York, 422 U.S. 853 (1975); Brooks v. Tenn. 406 U.S. 605, 612-613 (1972); Hamilton v. Ala., 368 U.S. 52, 55 (1961); White v. Maryland, 373 U.S. 59, 60 (1963) (per curiam); Ferguson v. Georgia, 365 U.S. 570 (1961); Williams v. Kaiser, 323 U.S. 471, 475–76 (1945).

154. John Capone, *Facilitating Fairness: The Judge's Role in the Sixth Amendment Right to Effective Counsel:* Mickens v. Taylor, 535 U.S. 162 (2002), 93 J. CRIM. L. & CRIMINOLOGY 881, 883–84 (2003); Wm. C. Turner Herbert, *Off the Beaten Path: An Analysis of the Supreme Court's Surprising Decision in Mickens v. Taylor*, 81 N.C.L. REV. 1268, 1270 (2003).

prejudice "is so likely that case-by-case inquiry into prejudice is not worth the cost."[155] The *Cronic* automatic reversal rule has been applied where, due to a fee dispute with his client, an attorney failed to attend a sentencing hearing.[156] It has also been applied where the attorney slept through, or was absent from, critical portions of his client's trial.[157] At least according to the circuit courts, these attorney performances were so below-standard as to require automatic reversal.

Taken in tandem, *Strickland* and *Cronic* illustrated divergent ends of a spectrum of attorney performance. The deficient performance contemplated in *Cronic* was of an extremely rare type—so ineffective that the attorney was all but absent. In such a case, prejudice may be presumed, just as it may be presumed under the *Holloway* rule. *Strickland*, however, was a more typical example of an attorney performance that was adequate if not ideal. In such a case, prejudice need be proven to a high standard in order for the defendant to be granted a reversal of his conviction.

In its *Strickland* and *Cronic* decisions, the Court did not disturb its conflict of interest jurisprudence. Instead, the Court articulated a new, more stringent standard for reversal in attorney performance cases. The stark difference between the Court's conflict cases and attorney performance cases illustrates that conflicts are very different than other challenges facing attorneys. There is a spectrum of deficient performances. A deficient performance must amount to a near total denial of assistance for reversal to be warranted. Some level of deficient performance, therefore, is permissible and does not rise to the level of a constitutional violation. Put more simply, some degree of deficient performance is a problem that may be overcome. In contrast, there does not appear to be a spectrum of conflicts. If a conflict is present, it may present a constitutional violation. the *Holloway* and *Sullivan* decisions implied that in many circumstances a conflict of interest is a threat that, by its very nature, is unlikely to be overcome.

After *Strickland* and *Cronic* were decided, the lower courts were left with multiple tests and little guidance from the Court as to when each test applied.[158] Some circuits applied the *Sullivan* test only to

155. *See* Strickland v. Washington, 466 U.S. 668, 692 (1984).

156. Abbamonte v. U.S., 7 Fed. Appx. 58, 57–59 (2d Cir. 2001).

157. Burdine v. Johnson, 262 F.3d 336, 338, 344–45 (5th Cir. 2001) (en banc); Olden v. U.S., 224 F.3d 561, 568 (6th Cir. 2000); Tippins v. Walker, 77 F.3d 682 (2d Cir. 1996).

158. Scott W. Street, Comment, Schwab v. Crosby*: Interpreting the Scope of the Supreme Court's Tests for Ineffective Assistance of Counsel and Conflicts of Interest*, 31 AM. J. TRIAL ADVOC. 651, 651–52 (2008)

concurrent joint representation cases.[159] Some circuits applied the *Sullivan* test to all ineffective assistance cases of any type.[160] Most circuits applied the *Sullivan* test to all conflict of interest challenges and the *Strickland* test only to attorney performance challenges.[161] This final group of circuits endorsed a view that conflicts of interest pose more serious threats to the defendant than poor attorney performance.

D. More Recently, in Mickens v. Taylor, the Court attempted to reconcile its prior cases.

In 2002, twenty-two years after the *Sullivan* decision, the Court considered the first non-attorney performance ineffective assistance case since *Sullivan*. In *Mickens v. Taylor*, a sharply divided Court held by a five-to-four majority that a trial court's failure to inquire into an unchallenged conflict of interest did not require automatic reversal of the defendant's conviction. Instead, the defendant had the burden to prove that the conflict of interest adversely affected his attorney's performance.[162]

In the majority opinion, Justice Scalia examined and attempted to reconcile the holdings of *Holloway*, *Sullivan*, and *Wood* while reining in the lower courts' application of the *Sullivan* rule. [163] The *Mickens* Court held that in order to demonstrate a Sixth Amendment violation in the context of successive representation, the defendant must demonstrate prejudice.[164]

In *Mickens*, defendant Mickens was accused of sodomizing and stabbing seventeen-year-old Hall to death.[165] Counsel was appointed for Mickens by the trial court.[166] Up until the day of his appointment

159. *See, e.g.*, Perillo v. Johnson, 205 F.3d 775, 797 (5th Cir. 2000); Caban v. U.S., 281 F.3d 778, 782 (8th Cir. 2002).

160. *See, e.g.*, Spreitzer v. Peters, 114 F.3d 1435, 1451 n.7 (7th Cir. 1997).

161. *See, e.g.*, Riggs v. U.S., 209 F.3d 828, 831 n.1 (6th Cir. 2000); Atley v. Ault, 191 F.3d 865, 870 n.4 (8th Cir. 1999); Winkler v. Keane, 7 F.3d 304, 307–08 (2d Cir. 1993); Mannhalt v. Reed, 847 F.2d 576, 579–80 (9th Cir. 1988).

162. 535 U.S. 162, 173–74 (2002).

163. *Id*. at 165–76.

164. *Id.* at 166. Successive representation occurs when an attorney serially represents the interests multiple two clients who are or may be adverse. The attorney does not simultaneously represent these multiple clients. A common example of successive representation is when an attorney represents a wife in a divorce proceeding and then represents her former husband in a custody case. By representing the husband in the custody battle, the attorney represents a client whose interest may be opposed to his former client, the wife. In contrast, if the attorney represented both the husband and wife, at the same time, during the custody case the representation would be joint rather than successive.

165. *Id*. at 164.

166. *Id*.

to represent Mickens, the court-appointed counsel had acted as defense counsel for Hall in an unrelated criminal case.[167] The same trial court judge presided over the two cases and ordered the appointment of counsel.[168] Neither the trial court judge nor the attorney ever disclosed to Mickens the prior representation of Hall or the potential for a conflict of interest.[169] Mickens first learned of his attorney's prior representation of Hall as a result of an inadvertent post-trial court disclosure of docketing information.[170] In this way, the *Mickens* facts highlighted a key problem with the *Sullivan* decision—often a defendant does not become aware of a conflict before trial commences.

After exhausting his direct appeal, Mickens petitioned for a federal writ of *habeas corpus* arguing, *inter alia*, that he was denied effective assistance of counsel due to his attorney's conflict of interest.[171] The United States District Court for the Eastern District of Virginia applied the *Sullivan* test, requiring that Mickens show an actual conflict of interest and an adverse effect.[172] Although the district court found that the judge was on notice and should have inquired into the conflict, the district court nonetheless found that Mickens failed to meet the *Sullivan* test.[173]

The United States Court of Appeals for the Fourth Circuit reversed the district court's decision.[174] On rehearing *en banc*, the Fourth Circuit changed course and affirmed the conviction, following the reasoning of the district court below.[175] The Fourth Circuit held that Mickens's failure to meet the *Sullivan* test meant he was not entitled to have his conviction overturned.[176]

The case was then appealed to the Supreme Court. In an opinion authored by Justice Scalia, the *Mickens* majority suggested that a conflict created by successive representation is a conflict that may be overcome. The majority began by citing *Strickland* for the general rule that a defendant claiming ineffective assistance of counsel had an obligation to show prejudice.[177]

---

167. *Id*. at 164–65.

168. *Id*. at 165.

169. *Id*.

170. *Id*.

171. Mickens v. Greene, 74 F. Supp. 2d 586, 593 (E.D. Va. 1999).

172. *Id.* at 602–04.

173. *Id.* at 614–15.

174. Mickens v. Taylor, 227 F.3d 203, 206 (4th Cir. 2000), *rev'd* 240 F. 3d 348 (4th Cir. 2001) (en banc).

175. *Taylor*, 240 F.3d at 361–64.

176. *Id.* at 357-59.

177. *Mickens*, 535 U.S. at 166.

The majority then noted an exception for cases "when the defendant's attorney actively represented conflicting interests."[178] Citing *Holloway*, the majority concluded that there was only a requirement of automatic reversal where an attorney timely raises an objection to a conflict of interest arising from joint concurrent representation and is denied relief.[179] In so holding, the *Mickens* court limited *Holloway* and *Sullivan* even more strictly than they had been interpreted. The Court also set a very high bar for a defendant to establish that a conflict adversely affected the representation guaranteed by the Sixth Amendment.

The majority utilized *Mickens* to clarify the application of the *Sullivan* test, noting that it has been wrongly applied by courts below.[180] The majority noted that the basis for application of the *Sullivan* test was the Court's belief that concurrent joint representation creates a high probability of prejudice, a presumption that the majority opined was not present in other types of conflicts.[181] By suggesting that the *Sullivan* test be limited only to concurrent joint representation cases, the *Mickens* Court called into question the prior developed circuit court case law.[182]

Two justices concurred with the majority opinion. Justice Kennedy, joined by Justice O'Connor, filed a concurring opinion.[183] In his concurring opinion, Justice Kennedy addressed more directly the specifics facts of the case as well as the trial court's duty to inquire into a potential conflict of interest.[184]

Four justices dissented from the majority opinion, filing three separate opinions. Justice Stevens filed a dissenting opinion. In his opinion, Justice Stevens considered various factors including whether Mickens's attorney had a duty to disclose his conflict, whether Mickens had a right to refuse to be represented by conflicted counsel, and whether the trial judge had a duty to obtain Mickens's consent to the representation.[185] In light of the seriousness of the charges, Justice Stevens opined that the trial court had an obligation to make all inquiries into the attorney's effectiveness.[186] According to Justice Stevens, where duties recognized by the criminal justice system have

178. *Id*. at 166.
179. *Id*. at 168.
180. *See id.* at 174–75.
181. *See id.*
182. *See id.* at 174–75.
183. *Id*. 176–79.
184. *Id*. at 178–79. (Kennedy, J., concurring).
185. *Id*. at 179–180 (Stevens, J., dissenting).
186. *Id*. at 185–86.

been violated, reversal should be mandatory.

Justice Souter filed a dissenting opinion. In his opinion, Justice Souter focused on the trial judge's obligation to inquire into the conflict of interest.[187] He divided the Court's prior cases into two categories, those where there was a duty to inquire and those where there was no duty.[188] Given the trial court's knowledge of the attorney's representation of both Mickens and Hall, Justice Souter concluded that there had been a duty to inquire.[189]

Justice Breyer, joined by Justice Ginsburg, filed a dissenting opinion. In that dissenting opinion, Justice Breyer argued in favor of automatic reversal rule.[190] Justice Breyer distinguished the facts of Mickens from those of *Holloway*, *Sullivan*, and *Wood*.[191] According to Justice Breyer, because the conflict was egregious, occurred in a capital murder case, and was created by the judge—the trial was inherently tainted.[192] According to Justice Breyer, a "categorical rule that does not require proof of prejudice in the individual case" was warranted.[193]

The wisdom of the *Mickens* decision has been questioned.[194] Indeed, the sharp division of the court and multiple opinions suggest varying methods of analyzing the facts of the case. A difference in swing votes may have resulted in the Court announcing a different rule. The *Mickens* rule that was announced, however, provided additional context to the *Glasser* line of authority. Unlike *Holloway* and *Sullivan*, *Mickens* did not involve concurrent joint representation of multiple defendants. Rather, *Mickens* arose from a conflict of interest created by successive representation.

Although there are differences between *Mickens* and its predecessors, there are similarities as well. *Mickens* and *Holloway* both involved attorney conflicts of interests. In *Mickens*, the conflict was not one that created a *per se* conflict. In *Holloway*, the conflict was one that created a *per se* conflict requiring no showing of prejudice as grounds for reversal. Through its *Mickens* decision, the Court seemingly endorsed the implicit reasoning underpinning its prior decisions; namely, that some conflicts of interest are unavoidable and more serious than other types of conflicts. Even

187. *Id*. at 189 (Souter, J., dissenting).

188. *Id*. at 194–95.

189. *Id*. at 207–08.

190. *Id*. at 209, 211.

191. *Id*. at 209–11.

192. *Id.* at 210–11.

193. *Id.* at 211.

194. Glassman, *supra* note 30, at 965–66.

after *Mickens*, however, there remained no clear categorization of conflicts into those which are and are not avoidable.

Although decided in 2002, the *Mickens* decision was the Court's most recent case addressing the Court's conflict of interest jurisprudence. Since *Mickens* was decided, the Court has considered only attorney performance cases under the *Strickland* standard,[195] procedural issues,[196] and the right to counsel more generally.[197] The Court has not revisited its jurisprudence on conflict of interests. For more than a decade, the *Mickens* decision has been the Court's final word on ineffective assistance claims raised due to a conflict of interest. It is ripe for the Court to revisit issues of attorney conflict of interest, especially in light of the apparent proliferation of criminal attorneys.

III. THE TRUE NATURE OF VARIOUS TYPES OF CONFLICTS OF INTEREST

As these cases illustrate, potential conflicts may take a variety of forms, each with different associated risks to the defendant. Not every form of conflict presents a direct conflict between the attorney and his client.[198] Although conflicts take a variety of forms, many are positional in nature.[199]

A positional conflict occurs when an attorney advocates a position that is directly contrary to the position taken on behalf of his client.[200] Positional conflicts may arise when the attorney appears to represent interests misaligned from the interests of his client. For example, an attorney may teach classes to an agency and later defend individuals accused of wrongdoing by that agency.[201] It may appear from this

195. Hinton v. Ala., 134 S. Ct. 1081, 1089–90 (2014); Burt v. Titlow, 134 S. Ct. 10, 13 (2013); Chaidez v. U.S., 133 S. Ct. 1103, 1107–08 (2013); Missouri v. Frye, 132 S. Ct. 1399, 1405–07 (2012); Lafler v. Cooper, 132 S. Ct. 1376, 1384 (2012); Martinez v. Ryan, 132 S. Ct. 1309, 1315–16 (U.S. 2012); Cullen v. Pinholster, 131 S. Ct. 1388, 1403 (2011); Harrington v. Richter, 562 U.S. 86, 104–05 (2011); Premo v. Moore, 562 U.S. 115, 121–23 (2011); Berghuis v. Thompkins, 560 U.S. 370, 389 (2010); Smith v. Spisak, 558 U.S. 139, 149 (2010); Porter v. McCollum, 558 U.S. 30, 38–40 (2009); Wong v. Belmontes, 558 U.S. 15, 16–19 (2009); Knowles v. Mirzayance, 556 U.S. 111, 123–28 (2009); Wright v. Van Patten, 552 U.S. 120, 124–26 (2008); Rompilla v. Beard, 545 U.S. 374, 380–81 (2005); Florida v. Nixon, 543 U.S. 175, 178–79 (2004); Yarborough v. Gentry, 540 U.S. 1, 5–6 (2003); Wiggins v. Smith, 539 U.S. 510, 521–22 (2003); Woodford v. Visciotti, 537 U.S. 19, 22–23 (2002); Bell v. Cone, 535 U.S. 685, 697–99 (2002).

196. Trevino v. Thaler, 133 S. Ct. 1911, 1917–18 (2013); Halbert v. Michigan, 545 U.S. 605, 621–22 (2005); Massaro v. U.S., 538 U.S. 500, 504–06 (2003).

197. U.S. v. Gonzalez-Lopez, 548 U.S. 140, 144–49 (2006).

198. Bellamy v. Cogdell, 974 F.2d 302, 308 (2d Cir. 1992).

199. R. David Donoghue, *Conflict Of Interest: Conflicts of Interest: Concurrent Representation* 11 GEO. J. LEGAL ETHICS 319, 320 (1998).

200. Jon S. Dzienkowski, *Positional Conflicts of Interest*, 71 TEX. L. REV. 457, 460 (1993).

201. U.S. v. Michaud, 925 F.2d 37, 40–42 (1st Cir. 1991).

representation that the attorney does not fully endorse the positions of his client because the attorney aligns himself with the agency. An attorney may be running for office and then feel some pressure to appear to be "tough on crime."[202] The attorney may feel constrained from adopting certain trial tactics which might later be scrutinized during the attorney's campaign.

Other conflicts are economic. Where an attorney is paid on a contingency fee basis or is to receive a bonus contingent on acquittal, there may be an incentive for the attorney to pressure his client to reject a plea bargain.[203] Similarly, where an attorney is paid not by his client but rather by a third-party, there may be a conflict between the best interests of the client and the third-party. For example, an attorney paid to represent a client drug dealer by the drug supplier may pressure the client to reject a plea bargain that would require cooperation in the prosecution of the drug supplier.[204]

Not every conflict, however, is positional or economic. A conflict can arise where outside forces distract the attorney from focusing on his client. An attorney may be under investigation in an unrelated matter and may feel an obligation to generally cooperate with the government.[205] The attorney may focus his time and energy on his own defense, to the detriment of the client. An attorney who is having an affair with his client's spouse may develop a personal conflict between fighting for his client's acquittal and permitting the client to be incarcerated.[206] By doing so, the client would become less of a competitor for the spouse's affection.

Types of potential conflicts are too numerous to list. Each type of conflict poses a different challenge to the attorney's ability to zealously advocate for his client. Given the variety of different conflicts, it is important to develop reliable criteria for distinguishing between different types of conflicts.

One method of evaluating conflicts in a particular situation is to determine whether that conflict calls upon the attorney to temper his defense of a client. In other words, analyzing whether the attorney may be tempted to "pull his punches" because of other obligations to clients, or due to the attorney's personal interest.[207]

---

202. U.S. v. Horton, 845 F.2d 1414, 1418–21 (7th Cir. 1988).

203. Winkler v. Keane, 7 F.3d 304, 309 (2d Cir. 1993).

204. Quintero v. U.S., 33 F.3d 1133, 1136–37 (9th Cir. 1994).

205. U.S. v. Salerno, 868 F.2d 524, 540–41 (2d Cir. 1989); Roach v. Martin, 757 F.2d 1463, 1479–80 (4th Cir. 1985).

206. U.S. v. Hanoum, 33 F.3d 1128, 113032 (9th Cir. 1994).

207. Many of these situations are specifically addressed in ABA Model Rules. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.6 (2013) (confidentiality of information; MODEL RULES OF PROF'L CONDUCT R. 1.9 (duties to former clients); MODEL RULES OF PROF'L CONDUCT R. 1.10 (imputation of

Regardless of the type of conflict, in the case of concurrent joint representation or successive representation there is a genuine risk that the attorney will temper his defense of a client due to the conflict.[208] The attorney may be caught between two diametrically opposed clients. The facts of *Glasser* illustrate the attorney's connondrum; the same evidence was both detrimental to defendant Glasser and inculpatory to defendant Kretske. The attorney could not help both of his clients equally. He had to preference either defendant Glasser or defendant Kretske. Faced with clients who have divergent interests, there is a genuine risk that the attorney will preference one client over another. As the Court concluded in *Holloway* and *Sullivan*, for this reason, concurrent joint representation can be detrimental to a defendant's Sixth Amendment right to unconflicted counsel.

In important ways, successive representation of multiple defendants differs from concurrent representation of multiple defendants. Perhaps this distinction explains why the *Mickens* decision was different than the *Holloway* and *Sullivan* decisions. Successive representation arises due to prior relationships. In successive representation, conflicts may arise if an two related cases are litigated by the same attorney or if the attorney, in defense of one client, discloses privileged communications from a different client.[209] In cases of successive representation, the attorney's representation of one defendant will have terminated prior to representation of another defendant. The attorney no longer serves two masters simultaneously; he serves two masters, one after another.

As a result, the likelihood of a conflict is decreased, although still present. The facts of *Mickens* illustrate the potential for conflict. In *Mickens*, the attorney may have gained information from his representation of defendant Hall that suggested the sex was consensual, rather than rape. That evidence would have been exculpatory to defendant Mickens—but the evidence was learned through the attorney's representation of Hall. By disclosing that information during Mickens's trial, to benefit Mickens, the attorney might have violated his duty of confidentiality to Hall. At the time the disclosure would have occurred, the attorney's representation of

conflicts of interest); MODEL RULES OF PROF'L CONDUCT R. 1.11 (special conflicts for government officers and employees).

208. Wheat v. U.S., 486 U.S. 153, 160 (1988) (citing *Sullivan* and noting that a conflict may restrain an attorney from challenging the admission of evidence prejudicial to one client but favorable to another).

209. Mannhalt v. Reed, 847 F.2d 576, 580 (9th Cir. 1988).

Hall would have been terminated.[210] Hall would no longer have been facing criminal charges and any disclosure could not have impacted Hall's own liberty interests. At least as to Hall, the attorney-client relationship had terminated and the damage of disclosure was tempered.

In contrast, in circumstances of concurrent representation, there are simultaneous attorney-client relationships and representations. If an attorney represents two co-conspirators, one guilty and one innocent, the concurrent representation constrains the attorney from exonerating the innocent client by placing all the blame on the guilty client.[211] The facts of *Holloway* and *Sullivan* illustrate well the damage that may be caused by concurrent joint representation. Two liberty interests may hang in the balance.

The potential conflict caused by simultaneously serving multiple masters seems inherently riskier, and in many cases is ill-advised or even prohibited.[212] Successive representation is frequently permitted. An attorney may be screened from a case so that others in his firm can undertake successive representation.[213] Screening, however, is not generally permitted in the case of concurrent representation.[214] Concurrent representation cases are most closely scrutinized than successive representation cases.[215] The temptation to divide loyalties is simply ever-present.

An attorney with divided loyalties cannot be a fully effective advocate.[216] Indeed, reflecting this reality, the Federal Rules of Criminal Procedure treat concurrent and prior representations differently, requiring more involvement by the trial court where there is concurrent joint representation.[217] Although successive

210. In addition, Hall was deceased. That may not be what occurs in other cases of successive representation. A client who engages in consensual sex and discloses that fact to an attorney may later object to this sex being disclosed publicly in unrelated litigation. This is especially true where, as in *Mickens*, that sexual activity is stigmatized. Mickens v. Taylor, 535 U.S. 162, 163 (2002).

211. Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670, 690 (1992).

212. David M. Siegel, *The Role of Trial Counsel In Ineffective Assistance of Counsel Claims: Three Questions to Keep in Mind*, 33 CHAMPION 14, 16 (2009).

213. *See* Donoghue, *supra* note 199, at 322–23.

214. *Id.*

215. Michael Edelman, *Ethic: Flatt v. Superior Court of Sonoma County: Attorney Withdrawal from Concurrent Representations*, 35 SANTA CLARA L. REV. 1379, 1382 (1995); Burkhart R. Lindahl, Note, *Ohio's New Ethical Screening Procedure*, 31 U. TOL. L. REV. 145, 148–49 (1999).

216. Patrice McGuire Sabach, Note, *Rethinking Unwaivable Conflicts of Interest After United States v. Schwarz and Mickens v. Taylor*, 59 N.Y.U. ANN. SURV. AM. L. 89, 92 (2003).

217. *See* FED. R. CRIM. P. 44(C). In fact although the Federal Rules of Criminal Procedure have a specific rule for addressing concurrent representation, there are no other rules addressing other types of conflicts. *See Mickens*, 535 U.S. at 175–76 (discussing the treatment of different conflicts by the Federal Rules of Criminal Procedure).

representation may have risks, the risks are treated as though they are less serious than those that may arise with concurrent representation.

Setting aside the timing of the representation, the specific nature of the conflict is also relevant. Attorneys face a variety of conflict scenarios where it is not unduly difficult to successfully balance competing loyalties. Of the types of conflicts previously noted, the following are not typically viewed as inherently threatening: the attorney is paid on a contingent fee basis; the attorney may be called to testify at trial; or the attorney represents both an employer and an employee with diverging points of view.

The very cost of trial itself may create financial conflict.[218] For example, in *Williams v. Calderon*, a potential conflict was created where a *pro bono* attorney had to pay for investigative and psychiatric services with the attorney's own funds.[219] His client argued that, as a result, the attorney might be tempted to skimp on these services even though they might be beneficial to his client's defense.

Media attention may also cause a conflict between the attorney and client.[220] For example, in *Ray v. Rose* a conflict was created between the attorney's defense of his client and the fact that the attorney was granted the right to sell his client's life story.[221] By discouraging a plea and instead going to trial, the attorney might further sensationalize the case such that the story would later become a more valuable asset.[222] Notwithstanding this potential for conflict, the United States Court of Appeals for the Sixth Circuit deemed that the attorney was able to balance his client's interests fairly.[223]

A direct conflict between the interests of the client and the attorney is more serious than those identified in *Williams* and *Ray*. Above all else, attorneys must avoid conflicts of interest between themselves and their clients. To avoid such a conflict, ethical rules prohibit forms of attorney self-dealing, including:

> (1) negotiating adverse business transactions; (2) self-dealing as to gifts or testamentary bequests; (3) obtaining property interests

218. Lisa R. Pruitt & Beth A. Colgan, *Themed Issue: Funding Justice: Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 ARIZ. L. REV. 219, 294-296 (2010); *See*, *e.g.*, Buenoano v. Singletary, 963 F.2d 1433, 1438 (11th Cir. 1992); Winkler v. Keane, 7 F.3d 304, 307–10 (2d Cir. 1993); U.S. v. Hearst, 638 F.2d 1190, 1193 (9th Cir. 1980).

219. 52 F.3d 1465, 1473 (9th Cir. 1995).

220. Tigran W. Eldred, *The Psychology of Conflicts of Interest in Criminal Cases*, 58 KAN. L. REV. 43, 52 (Oct., 2009).

221. 535 F.2d 966, 968 (6th Cir. 1976).

222. *Id*. at 973.

223. *Id*. at 973–75.

> in client's literary or media rights; (4) subsidizing or obtaining a proprietary interest in litigation; (5) receiving of unlawful referral fees; and (6) negotiating prospective limitations on malpractice claims.[224]

Even more dangerous than these forms of self-dealing are those situations where the attorney covertly pursues personal goals to the client's detriment.

A distracted attorney, more concerned with his own wrongdoing than defending his client, might pursue personal goals to his client's detriment. Where the attorney is at risk of being indicted in an unrelated matter than one involving his client, there is a risk that the defense of the client may suffer as a result.[225] The attorney may simply lose focus on his client's case.

Even worse, the attorney may seek to curry favor with prosecutors by sacrificing his client or may prolong his client's case. For example, in *United States v. McClain*, an attorney learned during trial that he was under investigation by the same prosecutors against whom he was defending his client.[226] The prosecutor and attorney discussed delaying the indictment of the attorney until after the conclusion of the client's trial.[227] After the client was convicted, the attorney was indicted for unrelated charges.[228] The attorney had a clear incentive to delay his client's trial so the attorney had additional time to prepare his own defense against the pending charges. In evaluating these circumstances, the United States Court of Appeals for the Eleventh Circuit found a conflict sufficient to meet the *Sullivan* standard for reversal.[229]

As these cases and hypotheticals illustrate, if an attorney simultaneously serves two masters, he may be forced to choose between competing interests to the detriment of the client. The conflict may, in many cases, be difficult or impossible to avoid. The competent lawyer is one who zealously advocates for the client, and prioritizes the client's interest above all others. As the Supreme Court has noted "[u]ndivided allegiance and faithful, devoted service

224. Brook K. Baker, *Traditional Issues of Professional Responsibility and a Transformative Ethic of Client Empowerment for Legal Discourse*, 34 NEW ENG. L. REV. 809, 828–29 (2000).

225. *See, c.f.*, Thompkins v. Cohen, 965 F.2d 330, 332 (7th Cir. 1992) (finding no conflict where the attorney was indicted and pled guilty to charges unrelated to his representation of his client); Commonwealth v. McCloy, 574 A.2d 86, 91 (Pa. Super. Ct. 1990) (finding no conflict where the attorney was the target of a bribery investigation while defending his client on unrelated drug charges).

226. 823 F.2d 1457, 1463 (11th Cir. 1987).

227. *Id*.

228. *Id*.

229. *Id*. at 1463–64.

to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision."[230] The attorney's duty of loyalty to his client is, therefore, fundamental. If the attorney does not observe his client's best interests, no one else will. The client's other substantive rights may be deprived with no one to defend him.

As the Supreme Court has noted, it is precisely this type of conflict, between an attorney and his client, where the adversarial process may be jeapardized.[231] It also reflects poorly on the judicial system and creates the appearance of unfairness to the public. It does not cause an untoward degree of improperity for the public to learn that some attorneys are more competent than others. There is significant impropriety in the public learning that an attorney breached his duty of loyalty to a client. In the area of ineffective assistance, public perception is paramount.[232]

For this reason, in *United States v. Ellison*, the United States Court of Appeals for the Seventh Circuit held that a conflict required reversal where an attorney, defending himself against malpractice, testified against his client.[233] Noting that the attorney was "not able to pursue his client's best interests free from the influence of his concern about possible self-incrimination," the court held that the attorney had breached the most basic of his duties: the duty of loyalty to his client.[234]

For the same reason, the conflict caused by an attorney who conspired with his client is equally unavoidable. The conflict caused by dual competing interests is even more serious where the attorney and client are co-conspirators. In such a case, the attorney may find his interests pitted directly against his client's interests. He still serves two masters, himself and his client.

An attorney whose own self-interests are interjected into his client's case is different than a merely incompetent attorney. In situations where the attorney has himself been indicted or is under investigation, the attorney has a self-serving bias in favor of protecting his own liberty interests.[235] Even litigation decisions that

230. Von Moltke v. Gillies, 332 U.S. 708, 725–26 (1948).

231. Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 586–87 (1990) (Kennedy, J., dissenting).

232. Galia Benson-Amram, *Protecting the Integrity of the Court: Trial Court Responsibility for Preventing Ineffective Assistance of Counsel in Criminal Cases*, 29 N.Y.U. REV. L. & SOC. CHANGE 425, 442–43 (2004); David Rossman, *Conditional Rules in Criminal Procedure: Alice in Wonderland Meets the Constitution*, 26 GA. ST. U.L. REV. 417, 457 (2010).

233. 798 F.2d 1102, 1106–09 (7th Cir. 1986).

234. *Id.* at 1107.

235. U.S. v. Levy, 25 F.3d 146, 157 (2d Cir. 1994).

appear to be legitimate may seemingly be motivated by conflict.[236]

Even worse, the attorney's decisions may actually be motivated by the conflict. The self-interested attorney may make conscious decisions to preference his own cause above his client's, and may do so in a savvy manner which covers any evidence of the decisions.

The consequences to the attorney are also more significant than mere financial considerations; his very life and liberty may be at stake.[237] As one court noted, prejudice is highly probable:

> First, when an attorney is the subject of a criminal investigation by the same prosecutor who is prosecuting the attorney's client, there is a high probability of prejudice to the client as the result of the attorney's obvious self-serving bias in protecting his own liberty interests and financial interests. The liberty concern at issue is avoiding or minimizing imprisonment. The financial interests include avoiding disbarment and avoiding termination of the attorney's current representation of the client in question. The high probability of prejudice in this situation distinguishes this personal interest conflict from the weaker personal interest conflicts listed in the dicta in Mickens, e.g., book deals. Second, such prejudice is difficult to prove because the client could be harmed by the attorney's actions or inactions that are known only to the attorney. In short, the personal interest conflict at issue presents comparable difficulties to situations involving concurrent representation conflicts.[238]

The risks posed by a criminal attorney, therefore, are unique and far more concerning than the risks associated with more mundane conflicts.

In the case of the criminal attorney, the attorney "cannot be wholly free from fear of what might happen if a vigorous defense should lead the prosecutor or the trial judge to inquire into his background and discover his [own criminal conduct]."[239] At every step in the litigation, the attorney puts himself in a position where his own interests are adverse to the vigorous defense his client. As the Second Circuit has suggested, nothing could be more of a conflict than "a concern over getting oneself into trouble with criminal law enforcement authorities."[240]

The attorney faces a temptation to make litigation choices that will

236. U.S. v. DeFalco, 644 F.2d 132,135 (3d Cir. 1979).

237. Poulin, *supra* note 40, at 1162–63.

238. Rugiero v. U.S., 330 F. Supp. 2d 900, 906 (E.D. Mich. 2004) (citations omitted).

239. U.S. v. Cancilla, 725 F.2d 867, 869 (2nd Cir. 1984).

240. *Id*. at 870.

increase the chances that the attorney's own wrongdoing will remain undiscovered. If calling his client to testify might exonerate the client but implicate the attorney, the attorney may find it impossible to preference the client's interest over his own. The attorney maybe constrained in a way that jeapardizes the entire justice sustem. As one court noted:

> If there is any constraint on counsel's complete and exuberant presentation, our system will fail because the basic ingredient of the adversary system will be missing. The essence of the system is that there be professional antagonists in the legal forum, dynamic disputants prepared to do combat for the purpose of aiding the court in its quest to do justice.[241]

If a truly unavaoidable conflict exists under any facts, it is where an attorney co-conspirator represents his client. If an automatic reversal rule is appopriate in any case, it should be applied to an attorney co-conspirator's defense of his client.

In its decisions, the Supreme Court has justified its lower threshold to show prejudice for conflict of interest cases by observing that it is "difficult to measure the precise effect on the defense of representation corrupted by conflicting interests."[242] Notwithstanding this fact, the Court rejected a strict rule of disqualification primarily because the Court assumed that an attorney is "fully conscious of the overarching duty of complete loyalty to his or her client."[243] An attorney who participates in a criminal scheme with his client, in contrast, may not be so focused on the overarching duties of the profession.

Moreover, cases involving conflicts of interest present a unique challenge to a defendant arguing ineffective assistance of counsel. The client must both identify a deficiency in his counsel's performance and link that deficiency to a specific action in the case.[244] As the *Holloway* Court noted, the harm stemming from a conflict of interest is often that the conflict causes a lawyer to refrain from taking action, rather than that the conflict causes the attorney to make an obvious error. The trial court record does not necessarily patently reveal decisions that were not made. An attorney laboring under a conflict may, due to that conflict, fail to aggressively puruse

241. U.S. v. DeFalco, 644 F.2d 132, 136 (3d Cir. 1979).

242. Strickland v. Washington, 466 U.S. 668, 692 (1984).

243. Burger v. Kemp, 483 U.S. 776, 784 (1987).

244. *Recent Cases: Criminal Law. Conflicts of Interest-First Circuit Rules that a Defendant Whose Lawyer had a Conflict that the Judge Should Have Known About Must Show Adverse Effect to Receive a New Trial*, 115 HARV. L. REV. 938, 944 (2002).

possible plea negotiations for his client. Such a failure would not be evident from the trial court record.

Requiring a criminal defendant to demonstrate prejudice in the case of a criminal attorney would be unnecessary.[245] As discussed herein, the very nature of the conflict makes effective representation impossible. Such a requirement would also unfairly shift the burden to the defendant to prove what may be true but unproveable—that his trial attorney made self-interested decisions and did not have his client's sole interest in mind. The defendant would be forced to prove, *post hoc*, his attorney's state of mind and thought process. Such a showing may, in many cases, be impossible for the defendant to make.[246] Unlike the defendant whose attorney's incompetence can be derived from the record, the defendant represented by a criminal attorney may be wholly unable to make a case for reversal from the record.

In at least some cases, the only person with a full understanding about the very decisions at issue would be the attorney himself. The client may be unaware that the attorney's conduct may cause the attorney to become an informant and sacrifice the client in an effort to procure a more lenient sentence for himself. The client, uneducated in the law and perhaps unaware of the full scope of his attorney's conduct, may simply fail to appreciate the risks posed by the representation.

The client also cannot prove what his attorney contemplated but failed to do. The client may not be able to prove that a choice at trial was strategic, self interested, or merely an oversight. The ability of a defendant to prove ineffective assistance would often depend exclusively on the attorney's testimony. Yet it seems unlikely that an attorney accused of ineffective assistance of counsel can be relied upon to testify truthfully in post-conviction proceedings. Empirical evidence suggests that trial counsel are reluctant to assist in subsequent ineffective assistance claims.[247] As one commentator has

245. It may also be unrealistic, given that the client may initially be tacit in accepting the conflict posed by the representation. The client may not initially recognize the risks inherent in such representation, and may only later discover or realize that his interests were subjugated to the attorney's own self-interest. In addition, unless the client is himself a lawyer the client may be unaware of the ethical obligations arising from the representation. The attorney, who is a voluntary member of the profession and subject to rules of professional conduct is aware.

246. This highlights the inherent challenge facing a defendant who must meet the *Strickland* or *Sullivan* test.

247. *See* Massaro v. U.S., 538 U.S. 500, 506 (2003) (noting that "[a]ppellate counsel often need trial counsel's assistance in becoming familiar with a lengthy record on a short deadline, but trial counsel will be unwilling to help appellate counsel familiarize himself with a record for the purpose of understanding how it reflects trial counsel's own incompetence.").

noted, "there is a direct clash between duty and self-interest."[248] Self-interest is likely to prevail.[249]

This problem is heightened in the case of a criminal attorney. Not only will the attorney's testimony be vital to the defendant's ability to prove ineffective assistance, but the attorney will have an added incentive not to testify truthfully. Not only could such testimony impugne the attorney's legal skills in defending the client, the testimony could further reveal the attorney's wrongdoing. In cases of a criminal attorney, the attorney is a person whose conduct is alleged to have been ineffective. Testifying to assist the client may focus the prosecution instead upon the attorney.

Additionally, the criminal attorney is not your garden variety individual who can be trusted to exercise good judgment. The criminal attorney is an individual who has violated ethics rules, broken the law, and exercised poor judgment by engaging in criminal activity. He is also an individual who stands much to gain from preventing the disclosure of that criminal activity. In contrast, there is little to gain from truthful testimony. The attorney whose conduct was criminal and who now faces exposure can be expected to resist any effort to allow the conflict to be fully revealed.

The potential harm to the client is readily apparent. It is possible that getting his client to accept a plea deal to lesser charges may result in the criminal attorney evading conviction or receiving a lesser sentence. This is especially true where the criminal attorney is accused of a conspiracy charge. In such a case, if the client pleas to a misdemeanor rather than a felony, the criminal attorney may now be less likely to face conspiracy charges with the underlying crime being labeled a felony.

Alternatively, the criminal attorney may curry favor with prosecutors by allowing his client to be tried and convicted. The criminal attorney may also have an incentive to lie or to withhold evidence that is exculpatory to the defendant but inculpatory to the criminal attorney. Anything that reveals the criminal attorney had an involvement in the crime may be inculpatory to him.

As this discussion highlights, different conflicts effect the Sixth Amendment right to counsel in different ways. The Supreme Court has decided, through its jurispridence, that most Sixth Amendment ineffectiveness cases require that the defendant show that his

248. Eldred, *supra* note 220, at 75.

249. *See* Lawrence Kornreich & Alexander I. Platt, *In this Issue: The Temptation of* Martinez v. Ryan*: Legal Ethics for the Habeas Bar*, 8 CRIM. L. BRIEF 1, 2 (2012); Ellen Henak, *When the Interests of Self Clients, and Colleagues Collide: The Ethics of Ineffective Assistance of Counsel Claims*, 33 AM. J. TRIAL ADVOC. 347, 369–70 (2009).

attorney's errors fell below an objective standard of reasonableness and prejudiced the case.[250] Where certain types conflicts are present, however, prejudice may be presumed because the conflict so dangerously pits the defendant's interest against other competing interests.[251] The Supreme Court has, through its *Holloway* and *Sullivan* decisions, determined that concurrent joint representation can be one such circumstance.

The criminal attorney, torn between protecting himself and his client, presents another. When a criminal attorney acts as defense counsel, a rule requiring reversal with no need to show prejudice, is equally appropriate. As noted herein, the concept of an automatic reversal rule is not absent from the Court's jurisprudence. The Court has suggested that an automatic reversal rule applies to claims with "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."[252] The criminal attorney should be numbered among these circumstances.

IV. THE SECOND CIRCUIT REQUIRES AUTOMATIC REVERSAL IN CRIMINAL ATTORNEY CASES

The Supreme Court has not yet decided a case where an ineffective assistance claim was predicated upon the conflict caused by an attorney co-conspirator or criminal attorney. The Court, therefore, has never endorsed the application of an automatic reversal rule to this type of conflict. Indeed, the Court has never applied an automatic reversal rule in a conflict case outside the context of concurrent joint representation of co-defendants.[253]

A majority of lower courts have similarly declined to extend the *Holloway* automatic reversal rule. Courts have generally limited the rule to conflicts raised by the concurrent joint representation of co-defendants in all but one circuit where the issue has been decided.[254] In most circuits, even in the context of an attorney who represents a

250. Strickland v. Washington, 466 U.S. 668, 686–88, 694 (1984).

251. Cuyler v. Sullivan, 446 U.S. 335, 348 (1980).

252. U.S. v. Cronic, 466 U.S. 648, 658 (1984).

253. *See, e.g.*, Mickens v. Taylor, 535 U.S. 162, 168 (2002); Burger v. Kemp, 483 U.S. 776, 783 (1987); Nix v. Whiteside, 475 U.S. 157, 176 (1986).

254. *See, e.g.*, Moore v. Mitchell, 708 F.3d 760, 777 (6th Cir. 2013); McCorkle v. U.S., 325 F. App'x. 804, 808 (11th Cir. 2009); U.S. v. Watson, 479 F.3d 607, 611 (8th Cir. 2007); U.S. v. Mota-Santana, 391 F.3d 42, 45–46 (1st Cir. 2004); U.S. v. Wallace, 276 F.3d 360, 368–69 (7th Cir. 2002); Williams v. Calderon, 52 F.3d 1465, 1472–73 (9th Cir. 1995); Beets v. Collins, 65 F.3d 1258, 1268–69 (5th Cir. 1995).

co-conspirator client, the *Sullivan* test applies.[255] Only the Second Circuit has uniformly extended the automatic reversal rule in conflict cases other than those involving concurrent joint representation.[256]

The Second Circuit acknowledges that certain conflicts of interest have the potential to be "so severe that [it is] deemed *per se* [violative] of the Sixth Amendment."[257] Where such conflict is present, reversal is automatic with no requirement that prejudice be shown.[258] Courts in the Second Circuit apply an automatic reversal rule in two types of cases: first, in cases where an attorney was unlicensed in any jurisdiction at the time of representation;[259] and second, in cases where the attorney is implicated in the defendant's crimes.[260] That latter circumstance is deemed a conflict of interest too significant for a defendant to waive.[261]

As discussed herein, there are valid reasons for the Second Circuit to single out the latter circumstance as one subject to an automatic reversal rule. The Second Circuit has concluded that an attorney who has himself conspired in the crimes of his client simply cannot provide effective assistance of counsel. As the Second Circuit has noted, an attorney who has engaged in a crime "cannot be wholly free from fear of what might happen if a vigorous defense should lead the prosecutor or the trial judge to inquire into his background . . . Yet a criminal defendant is entitled to be represented by someone free from such constraints."[262] As such, in the Second Circuit, there is no need to show prejudice where an attorney labored under a conflict of interest due to the attorney's own criminal activity with or on behalf of his client.

---

255. *See, e.g.*, U.S. v. Mikell, 344 Fed. Appx. 218, 227–29 (6th Cir. 2009) (applying the *Sullivan* test where the prosecutor alleged that defense counsel con-conspired with his client); Mannhalt v. Reed 847 F.2d 576, 576 (9th Cir. 1988) (granting *habeas corpus* relief where a client's attorney inserted himself into the trial as a witness); *see also* U.S. v. Snyder, 707 F.2d 139, 143 (5th Cir. 1983) (disqualifying an attorney who was an indicted co-conspirator with his client).

256. Although other circuits have declined to adopt additional extensions of the *per se* rule, courts routinely hold that an attorney co-conspirator meets the *Sullivan* test and has an actual conflict of interest. *See, e.g.*, Perillo v. Johnson, 79 F.3d 441, 447 (5th Cir. 1996); *Mannhalt*, 847 F.2d at 581–84; Government of Virgin Islands v. Zepp, 748 F.2d 125, 136 (3d Cir. 1984).

257. U.S. v. Williams, 372 F.3d 96, 102 (2d Cir. 2004); U.S. v. Cancilla, 725 F.2d 867, 870 (2d Cir. 1983).

258. U.S. v. John Doe No. 1, 272 F.3d 116, 125 (2d Cir. 2001).

259. *See, e.g.*, U.S. v. Novak, 903 F.2d 883, 890 (2d Cir. 1990); Solina v. U.S., 709 F.2d 160, 167 (2d Cir. 1983).

260. *See, e.g.*, *Cancilla*, 725 F.2d at 870. Where the attorney is implicated in unrelated criminal conduct, the Second Circuit does not apply the per se rule. *See* U.S. v. Levy, 25 F.3d 146, 157 n.8 (2d Cir. 1994); U.S. v. Aiello, 900 F.2d 528, 531 (2d Cir. 1990); Waterhouse v. Rodriguez, 848 F.2d 375, 383 (2d Cir. 1988).

261. *Williams*, 372 F.3d at 102–03; *see* U.S. v. Kliti, 156 F.3d 150, 153 (2d Cir. 1998).

262. *Solina*, 709 F.2d at 164.

The Second Circuit has applied this rule in several cases where an attorney was implicated in his client's crimes.[263] For example, in *United States v. Fulton*, the court held that there was a *per se* conflict where the attorney and client together conspired to import and distribute heroin.[264]

During the trial in *Fulton*, a witness for the prosecution implicated defendant Fulton's lead attorney in the same crime.[265] Defendant Fulton was informed of the potential conflict but nonetheless elected to proceed with his lead attorney.[266] Fulton was convicted.[267] He then appealed. [268]

On review, the United States Court of Appeals for the Second Circuit reversed the conviction holding that the conflict was a non-waiveable, *per se* violation of the Sixth Amendment. The court reasoned that the attorney's "fear of, and desire to avoid, criminal charges . . . will affect virtually every aspect of his or her representation of the defendant" such that no waiver could be permissible.[269] As the Second Circuit explained, any circumstance wherein "the attorney's own interests diverge from those of the client presents the same core problem presented in the multiple representation cases: the attorney's fealty to the client is compromised."[270]

The Second Circuit has held that the conflict may be present even when the attorney has not yet been accused or indicted.[271] In *United States v. Cancilla*, the attorney and his client were both involved in an insurance fraud scheme.[272] Defendant Cancilla and his wife would insure automobiles that had already been damaged and then submit claims for accidents that never occurred.[273] Although it was not fully revealed until after Cancilla was convicted, his attorney had a prior relationship with the automobile repair shop involved in the scheme.[274] In fact, the attorney submitted false insurance claims for

263. *See* U.S. v. Fulton, 5 F.3d 605, 611 (2d Cir. 1993) ; Triana v. U.S., 205 F.3d 36, 42 (2d Cir. 2000).

264. *Fulton*, 5 F.3d at 611–12.

265. *Id*. at 607.

266. *Id*. at 608.

267. *Id*. at 606.

268. *Id*. at 607.

269. Id. at 613.

270. *Id*. at 609.

271. Under Second Circuit law the issue of how much involvement the attorney must have in his client's crime or how likely it is that the attorney will be indicted, tried, or convicted remains unsettled.

272. 725 F.2d 867, 868 (2d Cir. 1984).

273. *Id*.

274. *Id*.

his own vehicles.[275]

On appeal, the United States Court of Appeals for the Second Circuit held that defendant Cancilla did not need to prove prejudice under the *Sullivan* test.[276] Instead, reversal of Cancilla's conviction was automatic. In so holding, the court noted the severity of the conflict—any "wrong step" by the attorney could have drawn unwarranted attention to the attorney.[277] The court reasoned that this fear of attention and detection may have caused the attorney to keep a low profile, even if that resulted in a subpar defense of his client. In the Second Circuit, an attorney who represents his co-conspirator client is grounds for the *Holloway* automatic reversal rule, not the *Sullivan* actual prejudice test.

Most circuits do not so hold.[278] Although the Second Circuit's extension of the *Holloway* automatic reversal rule is a minority view, there is wisdom to this approach. When an attorney is, or is likely to be, the subject of a criminal investigation, there is a significant temptation by the attorney to preference his own self-interest. The attorney's fear that evidence of his involvement will be disclosed could permeate every aspect of his client's defense. From discovery to plea deals, at every stage of litigation the attorney is likely to be overwhelmed by protecting himself even if it means sacrificing his client. The seriousness of this type of conflict is difficult to ignore. When an attorney has conspired with his client, the resulting conflict creates precisely the type of unavoidable, un-waivable conflict that justifies automatic reversal.

V. THE SECOND CIRCUIT'S *PER SE* REVERSAL RULE IS JUSTIFIED IN THE CASE OF ATTORNEYS WHO REPRESENT THEIR CO-CONSPIRATOR CLIENTS

Perhaps as a nod to the Second Circuit, the *Mickens* Court cautioned in *dicta* that some circuits might be applying too lenient a standard in different types of conflict of interest situations. At least in the area of attorney co-conspirators, there are valid reasons for a lenient standard to apply. The *Mickens* decision can be read to suggest that only conflicts arising from concurrent joint representation of co-defendants should be subject to a lenient standard. Under such a reading, other conflicts, including those

275. *Id*.

276. *Id*. at 870–71.

277. *Id*. at 871.

278. *See, e.g.*, U.S. v. Mikell, 344 Fed. Appx. 218, 229 (6th Cir. 2009); Mannhalt v. Reed, 847 F.2d 576, 579–80 (9th Cir. 1988).

arising from attorney co-conspirators should be subject to the rules of *Strickland* or *Sullivan*. By applying this standard, reversal would be granted only where there is a showing of "but for" causation or actual prejudice. The most detrimental of all possible conflicts would be subject to one of the two the most rigorous standards. Accordingly, many defendants would fail to meet this burden.

As posited herein, there can be no greater interest than self-presentation. In the case of the criminal attorney, this interest is pitted squarely against the interest of the client. Due to the unusual severity of this conflict, cases of this type should not be subject to the ineffective assistance of counsel tests in *Stickland* or *Sullivan*. These cases should be subject to automatic reversal, as occurs in the Second Circuit. When an attorney is implicated in the same criminal enterprise as the client he defendants, there should be no possibility of waiver by the client. Nor should it matter whether the trial court had reason to inquire into the conflict. When it is subsequently discovered that the client was represented by an attorney involved in his or her criminal conduct, the client should be granted reversal and a new trial without any need to show an adverse effect on representation.

At least in the realm of fiction, the criminal attorney endures. In 2013, the AMC series Breaking Bad ended.[279] It was almost immediately announced that a spin-off series would air in February, 2015.[280] This new series, entitlted "Better Call Saul" will focus on criminal attorney Saul Goodman.[281]

As the popularity of Breaking Bad reveals, the concept of the criminal attorney captivates and entertains. As argued herein, however, although the concept of the criminal attorney may seem like the exclusive province of screenwriters, there are real attorneys conspiring with their clients. When a client is indicted and tried, and his attorney co-conspirator acts as defense counsel, there are significant constutional law implications that should not be ignored.

Although no case involving a criminal attorney has yet reached the Court, there may come a time when a *writ of ceriorari* is granted in such a case. When such a case presents itself, the Court will have an opportunity to clarify the appropriate standard for this unique type of conflict. The Court may elect, as many lower courts have elected, to apply either the *Sullivan* "actual conflict" test or the *Strickland* "but for" causation test. For the reasons discussed herein, such

279. *See* J. Hoberman, *On the Road, and on the Run*, N.Y. TIMES, June 8, 2014, at 16.

280. Hank Stuever, *'Peter Pan' storms NBC with Christopher Walken as Hook; 'Comeback' is coming . . . back*, WASH. POST, July 15, 2014, at C02.

281. *Id*.

application would apply too lenient a standard to a very serious conflict of interest. Cases of a criminal attorney are more akin to the conflicts requiring automatic reversal in *Holloway* and *Wood*. An automatic reversal rule for attorney co-conspirators, like the one utilized in the Second Circuit, is more apt.