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Conflicts of Interest Challenges Post Mickens v. Taylor: Redefining the Defendant's Burden in Concurrent, Successive, and Personal Interest Conflicts

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I. Introduction

A. Overview of the Issue

The United States legal system generally affords a criminal defendant the right to legal representation.[1] The complete denial of representation and certain other situations of state interference can infringe the right to counsel.[2] This type of denial is per se violative of the right to counsel, and the defendant need not show any effect on the trial to obtain a reversal of the conviction.[3] The

1. *See* U.S. CONST. amend. VI (granting a criminal defendant a right to counsel).

2. *See* Strickland v. Washington, 466 U.S. 668, 692 (1984) (describing situations in which prejudice from lack of counsel is presumed).

3. *Id.*

presence of counsel is not sufficient to satisfy the defendant's right to counsel if that attorney does not provide effective assistance.[4] Unlike the per se violations, however, the defendant who is alleging that ineffective assistance of counsel denied him his Sixth Amendment right must generally demonstrate prejudice to the result of the trial.[5] If the ineffective assistance of counsel claim stems from a conflict of interest that hampered the defendant's attorney, a defendant may face a burden somewhat less than a showing of prejudice.[6]

Conflicts of interest can take many forms.[7] Historically, the circuit courts have been divided between deciding that all types of conflicts of interest warrant the lower burden or deciding that some conflicts warrant the lower burden while other conflicts justify the prejudice standard applied to traditional ineffective assistance of counsel claims.[8] In 2002, the Supreme Court in *Mickens v. Taylor*[9] cautioned, but did not decide, that some circuits might be applying the lower burden to too many different types of conflict of interest situations.[10] In light of this cautionary advice and other relevant Supreme Court

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4. *See* McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) ("[T]he right to counsel is the right to the effective assistance of counsel.").

5. *See Strickland*, 466 U.S. at 687 (outlining the test for a general ineffectiveness of counsel claim).

6. *See id.* at 692 (noting *Cuyler v. Sullivan*'s limited presumption of prejudice provided for conflict of interest challenges).

7. *See infra* Part I.B.2 (listing the various ways in which a conflict of interest may present itself in criminal representation).

8. *See infra* Part II.C (discussing the circuit split concerning the application of the different tests to different conflicts).

9. Mickens v. Taylor, 535 U.S. 162 (2002). In *Mickens*, the Court declared that a trial court's failure to make a *Cuyler* inquiry does not reduce the defendant's burden of proof on a Sixth Amendment challenge when the defendant did not protest the conflict at the trial level. *Id.* at 173–74. Walter Mickens sought habeas relief on the grounds that his trial attorney, Bryan Saunders, labored under a conflict of interest. *Id.* at 164–65. The trial court had convicted Mickens of murdering Timothy Hall. *Id.* at 164. The defendant learned on appeal that his trial attorney represented Hall on charges of assault and carrying a concealed weapon up until his murder. *Id.* at 165. Neither Mickens, nor his trial attorney, notified the trial court of this potential conflict, unlike the defense counsel in *Holloway*. *Id.* Instead, Mickens argued that the trial court should have known of the potential conflict because the trial judge who appointed Saunders to represent Mickens was the same judge who, a few days earlier, had dismissed the charges against Hall and thereby released Saunders from his appointment to Hall. *Id.* at 164–65. Thus Mickens argued that, under *Cuyler*, the trial judge "reasonably should [have] know[n] that a conflict exist[ed]" and that the judge's failure to inquire further mandated an automatic reversal. *Id.* at 170–71. The Supreme Court declined to extend the *Holloway* automatic reversal rule to reach this case. *Id.* at 172. Rather, the Court ruled that a trial court's failure to inquire further does not reduce the defendant's burden of proof. *Id.* at 173–74. Therefore, the defendant, at a minimum, needed to meet the *Cuyler* standard to qualify for vacating his conviction. *Id.* at 174.

10. *See id.* at 174–75 (suggesting that the circuit courts overuse the lower burden test).

precedent, the question is whether different types of conflicts justify imposing different levels of burden upon the defendant, and if so, when faced with a conflict of interest challenge, how does a court determine which test to apply?

This Note addresses the question of what standard the courts should apply when a defendant challenges a conviction based on a conflict of interest that involves either successive representation or attorney personal interest conflict situations. It also addresses the effect that a trial court's knowledge of the potential conflict has on the choice of that standard. In Part II, this Note outlines the present approaches and the development of Supreme Court jurisprudence concerning these issues.[11] This Note addresses, in Part II.C, the circuit courts' of appeals interpretations of the Supreme Court case law pre-*Mickens*, with an emphasis on the Second and Fifth Circuits' frameworks.[12] In Part III, this Note examines the Supreme Court's recent decision in *Mickens v. Taylor*, especially its clarification of Supreme Court precedent and its statement that some courts may be applying the wrong standard in certain conflict situations.[13] In Part IV, this Note explores the circuit courts' responses to *Mickens*.[14] Then, in Part V, this Note discusses the policy concerns that should guide decisions on matching the appropriate test to the conflict situation.[15] Last, in Part VI, this Note recommends a framework to analyze conflict of interest cases in order to impose the appropriate burden on the defendant.[16]

This Note proposes that three steps are important in determining the proper test.[17] First, the court must determine the nature of the conflict that the defendant is asserting and what persons are involved.[18] Second, the court should determine if either the defendant or the defense counsel put the trial court on notice of a potential conflict of interest.[19] Last, the court must determine what the answers to the first two questions suggest is the appropriate test for the court to apply.

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11. *See infra* Parts II.A–B (discussing the historical development of the Supreme Court case law in the area).

12. *See infra* Parts II.C.3–4 (discussing the *Beets* and *Winkler* tests).

13. *See infra* Part III (discussing *Mickens*).

14. *See infra* Part IV (examining circuit court response to *Mickens*).

15. *See infra* Part V (looking at the policy considerations involved in the various tests and raised by the different conflicts).

16. *See infra* Part VI (suggesting a model for courts to use to address conflict of interest cases).

17. *See infra* Part VI (outlining a proposed framework for choosing the proper test to apply to a given conflict of interest situation).

18. *See infra* Part I.B.2 (discussing the types of conflicts).

19. *See infra* Part II.B.2 (discussing the duty of the trial court).

B. *Effective Assistance of Counsel and the Sixth Amendment*

The Sixth Amendment guarantees a criminal defendant the right to counsel.[20] The principal purpose of counsel is to protect the defendant's right to a fair trial.[21] Central to this purpose is the Sixth Amendment guarantee to ensure that the defendant has sufficient access to trained representation.[22] As the Supreme Court has noted, proper counsel is "critical to [the] ability" of the adversarial system to achieve a just and fair result.[23] The typical criminal defendant needs counsel because he is unfamiliar with the law, unknowledgeable about the rules of trial, and unprepared to counter skilled prosecution.[24] Without counsel, a defendant may stand trial on false charges and face a conviction on faulty evidence and witnesses.[25] Courts also deem the right to counsel necessary to ensure the "fundamental human rights of life and liberty."[26] Finally, the right to counsel is vitally important because it provides the means to ensure the protection of every other right of the criminal defendant.[27]

The Supreme Court has stated that for the right to counsel to be meaningful, it requires more than the mere presence of a licensed attorney; it also requires the right to have aid that will "produce just results."[28] In *Powell v. Alabama*,[29] the Supreme

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20. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.").

21. *See* Strickland v. Washington, 466 U.S. 668, 684–85 (1984) (discussing values served by the Sixth Amendment).

22. *Id.* at 684.

23. *See id.* at 685 (discussing values served by the Sixth Amendment).

24. *See* Johnson v. Zebrest, 304 U.S. 458, 462–63 (1938) (explaining the need for effective assistance of counsel).

25. *See id.* at 463 (discussing the dangers to a fair and just trial that competent counsel guards against).

26. *See* Glasser v. United States, 315 U.S. 60, 69–70 (1942) (discussing the importance of the Sixth Amendment).

27. *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." (quoting United States v. Chronic, 466 U.S. 648, 653–54 (1984))).

28. *See* Strickland v. Washington, 466 U.S. 668, 685 (1984) ("An accused is entitled to be assisted by an attorney . . . who plays the role necessary to ensure that the trial is fair.").

29. Powell v. Alabama, 287 U.S. 45 (1932). In *Powell*, the defendants asserted that they were denied the right to counsel. *Id.* at 57. The defendants were facing rape charges. *Id.* The Supreme Court found that the defendants were denied the aid of counsel in a substantial manner. *Id.* at 58. The defendants made an appearance for arraignment without aid of counsel, and the trial judge appointed the entire local bar counsel until a member of the bar stepped up to represent the defendants. *Id.* at 49. When the trial began six days later, the defendants still appeared to be without specific counsel. *Id.* at 53. An attorney from another bar then spoke, saying he would like to assist the defendants once the court had appointed a specific attorney.

Court first outlined this expanded protection.[30] At a pretrial appearance, the trial court appointed all of the attorneys who were present as counsel for the defendant.[31] The trial court in *Powell* did not appoint the defendant a specific counsel until moments before the trial started.[32] The late appointment made the preparation of a defense and the investigation of facts to support a defense a practical impossibility.[33] The Supreme Court held that this compelled lack of preparation equated to a denial of the right to counsel.[34] In subsequent decisions, the Supreme Court has stated that the Sixth Amendment guarantee is the right to effective counsel, not just the presence of counsel.[35] Encompassed in the right to effective assistance of counsel is the right to counsel unencumbered by a conflict of interest.[36]

1. Conflicts of Interest as a Category of Ineffective Assistance of Counsel Claims

The courts view a challenge based upon an attorney's alleged conflict of interest as a specific type of an ineffective assistance of counsel claim.[37] Thus,

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Id. at 53. The trial judge then appointed a member of the local bar. *Id.* at 56. However, that attorney did not have any time to investigate or prepare a defense as the trial began a few moments later. *Id.* at 57–58. Thus, although the trial court appointed the entire local bar counsel earlier and the specific counsel right before trial, the Supreme Court stated that this action was too indefinite or close to trial to constitute sufficient representation. *Id.* at 53. The Court stated that this mass appointment did not place any degree of responsibility on anyone for the matter. *Id.* at 58. Moreover, the Court stated that the mass appointments were "little more than an expansive gesture." *Id.* at 56. Thus, the Court held that the defendants did not receive the intended benefits of the right to counsel. *Id.* at 58.

30. *See id.* at 58 (holding that the "defendants were not accorded the right of counsel in any substantial sense").

31. *Id.* at 49.

32. *See id.* at 56 (noting that until the day of trial, the trial judge had only appointed the entire local bar counsel without imposing responsibility on any one attorney for the case).

33. *See id.* at 58–59 (stating that although expediency is a valid pursuit, a defense counsel must have an opportunity to familiarize himself with the case).

34. *See id.* at 58 ("[W]e hold that defendants were not accorded the right of counsel in any substantial sense.").

35. *See* Strickland v. Washington, 466 U.S. 668, 686 (1984) ("[T]he right to counsel is the right to the effective assistance of counsel." (quoting McMann v. Richardson, 387 U.S. 759, 771 n.14 (1970))); *see also* Avery v. Alabama, 308 U.S. 444, 446 (1940) ("The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment.").

36. *See* Glasser v. United States, 315 U.S. 60, 70 (1942) ("[T]he Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests.").

37. *See Strickland*, 466 U.S. at 692 (noting that conflicts of interest present "one type of

the focus of the courts is not upon the mere presence or lack of a conflict of interest, but rather upon ensuring a fair and reliable result.[38] Even though defendants have a limited right to waive counsel, courts take conflicts of interest challenges very seriously.[39] A conflict of interest threatens the guarantee of effective counsel not because of what it causes an attorney to do, but because of what it might keep an attorney from doing.[40] For instance, the danger exists that an attorney might not engage in plea negotiations, effectively cross examine one client while representing another, or challenge the admission of some evidence harmful to one client but beneficial to the other because of the disparate impact that these activities might have on his respective clients.[41] Not all conflicts, however, present the same concerns, and it is important to determine the type of conflict to understand the dangers involved.[42]

2. Types of Conflicts

One can group conflicts of interest for attorneys representing defendants into three main categories: concurrent representation of clients with conflicting interests, successive representation of clients with conflicting interests, and conflicts that pit the attorney's personal interests against those of the defendant. The relevant clients in both concurrent and successive representation conflicts can be two or more codefendants,[43] a defendant and a witness,[44] or a defendant

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actual ineffectiveness claim").

38. *See* Beets v. Scott, 65 F.3d 1258, 1272 (5th Cir. 1995) (en banc) ("[T]he purpose of the Sixth Amendment . . . is to assure a fair trial based on competent representation.").

39. *See* Wheat v. United States, 486 U.S. 153, 163 (1988) (stating that the trial court has discretion to refuse waivers of conflicts of interest). The exact reach of the right to waiver is not addressed in this Note as it is beyond the scope of the central question, but it remains an important issue in conflict-of-interest jurisprudence.

40. *See* Holloway v. Arkansas, 435 U.S. 475, 489–90 (1978) ("Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing.").

41. *See id.* at 490 (highlighting examples of problems a conflicted attorney might face).

42. *See infra* Part V.A (discussing the dangers and policy issues behind the various types of conflicts).

43. *See Holloway*, 435 U.S. at 485 (1978) (finding a conflict when an attorney represented multiple defendants in one trial); *see also* Burger v. Kemp, 483 U.S. 776, 783–85 (1987) (addressing a conflict in which two partners represented codefendants in successive trials).

44. *See* Mountjoy v. Warden, 245 F.3d 31, 33–34 (1st Cir. 2001) (addressing a potential concurrent representation conflict in which defendant's attorney concurrently represented a key government witness); *see also* Enoch v. Gramley, 70 F.3d 1490, 1495 (7th Cir. 1995) (addressing a potential successive representation conflict in which defendant's attorney represented a government witness in a prior matter).

and another interested person.[45] Among the situations that can present a conflict of interest involving the attorney's personal interests are literary rights contracts for the defense attorney,[46] fear of reprimand from the judge,[47] and contingent fee arrangements.[48] The most common claims are those based on joint representation of codefendants.[49] The question centers on the burden the defendant must meet for each type of conflict of interest, especially in light of *Mickens*'s concerns over the extensive application of the test imposing the lower burden on the defendant.[50]

3. *Federal Rule of Criminal Procedure 44(c) Guidelines for Conflicts of Interest*

In addressing conflicts of interest claims, the courts have some guidance from outside sources.[51] Of particular interest, the drafters of the Federal Rules of Criminal Procedure (FRCP) have created a special rule for addressing concurrent representation but have not created any rules for addressing other types of conflicts.[52] Specifically, Rule 44(c) mandates that the trial court inquire into the nature of the potential conflict and advise each defendant of the right to effective counsel.[53] The Supreme Court has inferred that the reasoning

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45. *See* Mickens v. Taylor, 535 U.S. 162, 164–66 (2002) (addressing a potential successive representation conflict involving the defendant and the victim); *see also* Collins v. Johnson, No. 01-35585, 2002 WL 826333, at *1–2 (9th Cir. May 1, 2002) (addressing a potential concurrent representation conflict involving the defendant and an associated lawyer's representation of the victim's mother), *cert. denied*, 537 U.S. 1119 (2003).

46. *See* Beets v. Scott, 65 F.3d 1258, 1274 (5th Cir. 1995) (noting that the media rights contract presented a grave "potential conflict of interest," but finding no adverse effect).

47. *See* United States v. Sayan, 968 F.2d 55, 65 (D.C. Cir. 1992) (addressing an alleged conflict in which the defendant claimed that his attorney should have requested a continuance but failed to do so because the attorney was afraid the judge would reprimand him and his firm).

48. *See* Winkler v. Keane, 7 F.3d 304, 307 (2d Cir. 1993) (considering a conflict-of-interest claim based on a contingency fee arrangement with the defense attorney).

49. *See* Bruce A. Green, *"Through a Glass, Darkly": How the Court Sees Motions to Disqualify Criminal Defense Lawyers*, 89 COLUM. L. REV. 1201, 1203 (1989) (stating that courts and academics have focused mostly on joint representation conflicts).

50. *See infra* Part IV (examining similarities and differences in how various circuits addressed conflicts cases after *Mickens*).

51. *See* Cuyler v. Sullivan, 446 U.S. 335, 346 nn.10–11 (1980) (noting that both the Federal Rules of Criminal Procedure and the ethics rules address conflicts of interest).

52. *See* Mickens v. Taylor, 535 U.S. 162, 175–76 (2002) (discussing the FRCP's differing treatment of concurrent and prior conflicts of interest).

53. *See* FED. R. CRIM. P. 44(c) ("[T]he court must promptly inquire with respect to such joint representation and must personally advise each defendant of [his] right[s].").

for this distinction is that the drafters believed that concurrent representation presented a greater threat to a fair trial than any other conflict type.[54] Nevertheless, case law suggests that even with the heightened danger in concurrent representation, the failure to follow the mandates of Rule 44(c) does not alone justify reversal.[55]

II. Historical Evolution of the Conflict Standards

A. Strickland v. Washington: *The Basic Test for Ineffective Assistance of Counsel Claims*

The Supreme Court in *Strickland v. Washington*[56] established the standard for a general ineffective counsel claim based on the Sixth Amendment.[57] The defendant in *Strickland* alleged that his attorney, in failing to perform several tasks, denied him effective assistance of counsel.[58] In addressing the claim, the Court noted that it had never before addressed a claim of "actual ineffectiveness" in a case that proceeded through trial.[59] The Court then declared that the litmus test for an ineffectiveness claim is "whether counsel's conduct so undermined the proper functioning of the adversarial process that

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54. *See Mickens*, 535 U.S. at 175 (noting that different conflicts present different difficulties and that the FRCP account for these differences).

55. *See* United States v. Crespo De Llano, 830 F.2d 1532, 1539 (9th Cir. 1987) (stating that a failure to inquire does not mandate reversal in all situations); United States v. Carr, 740 F.2d 339, 348 (5th Cir. 1984) (same); United States v. Bradshaw, 719 F.2d 907, 915 (7th Cir. 1983) (same); United States v. Arias, 678 F.2d 1202, 1205 (4th Cir. 1982) (same).

56. Strickland v. Washington, 466 U.S. 668 (1984). In *Strickland*, the defendant claimed that his counsel's performance denied him effective assistance of counsel as guaranteed by the Sixth Amendment because of his counsel's failure to perform several tasks. *Id.* at 675. Most notably, defendant claimed that his counsel failed to investigate witnesses, seek sufficient psychiatric opinions, and prepare sound arguments for sentencing. *Id.* At the trial level, the defendant received appointed counsel and pleaded guilty against the advice of counsel. *Id.* at 672. The defense counsel felt hopeless at this point and decided that the plea gave sufficient information to help defendant receive a reduced sentence without the risk of having defendant face cross-examination. *Id.* at 673. The Supreme Court upheld the denial of a writ of habeas corpus finding that the aggravating circumstances far outweighed any possible mitigating effect the other materials might have had, and therefore stated that the defendant failed to show prejudice to his case. *Id.* at 698–701.

57. *See id.* at 687 (stating the requirements a defendant must satisfy in order for a court to find ineffective assistance of counsel).

58. *See id.* at 675–76 (stating the two prong test defendant must satisfy in order for a court to find ineffective assistance of counsel).

59. *Id.* at 683.

the trial cannot be relied on as having produced a just result."[60] Thereafter, the Court announced that a defendant must satisfy a two prong test: (1) that defense counsel's performance did not meet an objective standard of reasonableness; and (2) that the failure of counsel prejudiced the defense.[61] Applying the test to the facts of the case, the Court stated that the evidence against the defendant was so overwhelming and the mitigating effect of the alternate evidence was so minimal that the defendant failed to show prejudice.[62]

The two prongs of the *Strickland* standard impose a heavy burden on a defendant. The first prong of the test[63] is based on objective professional reasonableness.[64] This prong is premised upon the "duty of loyalty" that the defense counsel must give to the client.[65] The ultimate focus of this prong is on ensuring a reliable and fair trial process.[66] The second prong of the general ineffectiveness claim[67] focuses on outcome.[68] Because ensuring a reliable outcome is the principle underlying the Sixth Amendment right to counsel, the failure of performance must be "prejudicial to the defense."[69] This burden on the defendant is high and requires more than some possible effect on the outcome.[70] The Supreme Court stated that "prejudicial to the defense" means that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[71] Further, a "reasonable probability" is one that can destroy confidence in the result.[72]

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60. *Id.* at 686.

61. *See id.* at 687 (discussing the requirements for a defendant to achieve a reversal of his conviction based on an ineffectiveness claim).

62. *See id.* at 698–701 (applying the test to the facts of the case).

63. *See id.* at 687 ("First, the defendant must show that counsel's performance was deficient.").

64 *See id.* at 688 (noting that a more exact standard is inappropriate because the Sixth Amendment refers simply to counsel and not specific requirements and because more exact standards could hinder the individualized advocacy efforts of counsel).

65. *See id.* (discussing the performance aspect of the Sixth Amendment right to effective assistance of counsel).

66. *See id.* at 689 (reflecting on the purpose of the performance prong of the test).

67. *See id.* at 687 (stating that the second burden the defendant must show to warrant reversal of a conviction is that counsel's deficient representation "prejudiced the defense").

68. *See id.* at 691 (declaring that a deficient performance by counsel, absent an "effect on the judgment," does not justify reversal (citing United States v. Morrison, 449 U.S. 361, 364–65 (1981))).

69. *See id.* at 691–92 (explaining rationale of Sixth Amendment right to counsel).

70. *See id.* at 693 (describing the level of effect on the outcome needed to garner reversal).

71. *Id.* at 694.

72. *Id.*

Thus, the burden on the defendant lies somewhere between a showing of "some conceivable effect on the outcome" and a showing that the failures "more likely than not altered the outcome of the case."[73]

The Supreme Court did recognize several exceptions to the prejudice standard it announced for general ineffective assistance of counsel claims. For instance, the Court mentioned that two situations warrant a finding of per se prejudice: (1) when the defendant lacked representation actually or constructively; and (2) when the state interfered with the attorney's representation in a significant way.[74] The Court also reaffirmed the rule, announced four years earlier,[75] of a limited presumption of prejudice in cases involving an actual conflict of interest.[76]

B. Cuyler v. Sullivan*: Concurrent Representation and Presumed Prejudice*

1. The Standard

A conflict of interest challenge is a specific type of ineffective counsel claim.[77] As such, the Supreme Court has analyzed the multiple-representation conflict of interest claims differently from the more typical ineffective assistance of counsel claim.[78] In the mid-1900s, the Supreme Court recognized that the Sixth Amendment right to counsel included the right to counsel unimpeded by a court-mandated concurrent representation.[79] But, it was not until *Cuyler v. Sullivan*[80] in 1980 that the Supreme Court outlined the test for

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73. *See id.* at 693–94 (marking off the clear lower and upper bounds of the showing a defendant must make).

74. *See id.* at 692 (discussing situations that involve a departure from the heavier burden of prejudice).

75. *See infra* Part II.B (discussing the conflict-of-interest standard announced in *Cuyler v. Sullivan*).

76. *See* Strickland v. Washington, 466 U.S. 668, 692 (1984) (discussing *Cuyler*).

77. *See id.* at 683 (noting that the Supreme Court has addressed specific types of ineffective assistance cases, but has not addressed ineffective assistance claims generally).

78. *See id.* (discussing the different standard for multiple-representation claims).

79. *See* Glasser v. United States, 315 U.S. 60, 70 (1942) (discussing the guarantees of the Sixth Amendment).

80. Cuyler v. Sullivan, 446 U.S. 335 (1980). In *Cuyler*, the defendant Sullivan, seeking reversal of his conviction, was one of three codefendants in a murder case represented by the same counsel. *Id.* at 337. Sullivan alleged that his attorneys failed to provide effective assistance of counsel in violation of the Sixth Amendment because the attorneys also represented the other two defendants in the murder case. *Id.* at 339. Specifically, Sullivan alleged that his counsel rested the defense after the prosecution's case because they feared that any witnesses that testified might expose the other two defendants. *Id.* at 339–40. Notably,

determining when concurrent representation produces ineffective assistance of counsel.[81] In *Cuyler*, two attorneys represented three codefendants in connection with a murder charge.[82] Notably, at no time during the trial did the defendant or his attorneys object to the multiple representation.[83] The jury convicted Sullivan and acquitted his two codefendants.[84] On appeal, the Court of Appeals for the Third Circuit, in granting reversal, held that Sullivan only needed to show the possibility of prejudice to obtain reversal.[85] The Supreme Court remanded the case, stating that the Third Circuit applied the wrong standard.[86] In so doing, the Court announced a new test requiring that, absent a timely trial objection, a defendant must show that there was (1) an actual conflict of interest, and (2) that this conflict adversely affected counsel's performance.[87] An actual conflict of interest occurs if the interests of the lawyer and the client diverge during the representation in regards to "a material factual or legal issue or to a course of action."[88] The majority cited with approval prior Supreme Court precedent stating that counsel must have "actively represented" conflicting interests in order for a defendant to establish a constitutional violation.[89] The Supreme Court noted that this standard is easier to meet than a typical ineffectiveness of counsel claim.[90] Nevertheless, the Court held that a mere possibility of conflict is not enough to warrant reversal of a conviction[91] because, even though multiple representation presents

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neither Sullivan nor his attorneys objected to the multiple-representation at any time during the trial. *Id.* at 337–38. The Supreme Court stated that, absent a timely objection at trial, a court should grant a reversal based upon a multiple-representation claim only if the defendant can demonstrate both (1) an actual conflict of interest and (2) that this conflict adversely affected counsel's performance. *Id.* at 348. However, the Court of Appeals only applied a possibility of conflict test in granting Sullivan a reversal. *Id.* at 350. Thus, because the Court of Appeals applied a standard that was too low, the Supreme Court remanded the case for application of the newly announced test. *Id.*

81. *See id.* at 348 (stating the test for a conflict-of-interest claim).

82. *See id.* at 337–38 (discussing the circumstances of the multiple representation claim).

83. *Id.*

84. *Id.* at 338.

85. *Id.* at 340.

86. *Id.* at 350.

87. *See id.* at 348 (outlining test).

88. *See id.* at 356 n.3 (Marshall, J., concurring in part and dissenting in part) (explaining the difference between possible conflicts of interest and actual conflicts of interest).

89. *Id.* at 350 (citing Glasser v. United States, 315 U.S. 60, 72–75 (1942)).

90. *See* Strickland v. Washington, 466 U.S. 668, 692–93 (1984) (discussing the lower burden in *Cuyler* as opposed to a standard ineffectiveness of counsel claim).

91. *See* Cuyler v. Sullivan, 446 U.S. 335, 350 (1980) (remanding the case because the court of appeals applied the wrong standard).

an inherent possibility of conflict,[92] multiple representation is too valuable for the court to declare it per se unconstitutional.[93] After *Cuyler*, the question remained as to whether the standards announced in that multiple-representation case would apply to all conflicts of interest, including successive representation conflicts and personal interest conflicts of the defense counsel.[94]

In *Wood v. Georgia*,[95] a case decided one year after *Cuyler*, the Supreme Court again addressed conflicts of interest.[96] This case has created confusion in the courts because of the wording of a key sentence—"If the court finds that an actual conflict of interest existed . . . it must hold a new revocation hearing . . . "—that has been interpreted both literally and more loosely.[97] The Court used this phrase in declaring its ruling.[98] The confusion occurred because the Court in *Wood* did not reverse the lower court, but rather said that the lower court should conduct a more searching analysis to determine if there was a conflict of interest at trial.[99] The problem was that the Court in *Wood* used the phrase "actual conflict of interest" without the modifier previously

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92. *See id.* at 348 (discussing the risk of conflict in multiple representation cases).

93. *See* Holloway v. Arkansas, 435 U.S. 475, 482–83 (1978) (stating that "[a] common defense often gives strength against a common attack" (quoting Glasser v. United States, 315 U.S. 60, 92 (1942) (Frankfurter, J., dissenting))).

94. *See* Illinois v. Washington, 469 U.S. 1022, 1023–24 (1985) (White, J., dissenting from denial of cert.) (noting that most circuit courts have applied *Cuyler* unthinkingly to all conflicts-of-interest claims without questioning whether it even applied); *see also* Mickens v. Taylor, 535 U.S. 162, 174–76 (2002) (suggesting that the circuit courts may be applying the wrong standard to nonmultiple representation cases because some have relied on *Cuyler* unthinkingly).

95. Wood v. Georgia, 450 U.S. 261 (1981). In *Wood*, the defendants were charged with distribution of obscene materials. *Id.* at 262. The defendants' alleged activity occurred at their place of work. *Id.* at 263. From arrest through sentencing, the same lawyer, for whom their employer paid, represented the defendants. *Id.* at 266. In addition to paying for the defendants' attorney, the employer also stated that he would pay any fines they may incur as a result of the charges. *Id.* When fines were imposed, however, the defendants' employer, hoping to make a test case, choose not to pay their fines, causing the defendants to be placed in jail. *Id.* at 267. The defendants asserted that the third party payment and the attempt to make a test case conflicted their attorney. *Id.* at 267–68. The Court noted that on the present record it could not determine if an actual conflict existed, but merely could surmise that there was a high possibility of a conflict. *Id.* at 272–73. Therefore, the Court remanded the case for a determination whether "an actual conflict of interest existed" at the trial. *Id.* at 273.

96. *See id.* at 262–63 (1981) (noting that the defendants' counsel may have been under divided loyalties).

97. *See* Mickens v. Taylor, 535 U.S. 162, 172 (2002) (explaining the confusion over choice of wording in the *Wood* opinion).

98. *See Wood*, 450 U.S. at 273 (stating ruling of case).

99. *Id.*

found in *Cuyler*—that the conflict "adversely effect" counsel's performance.[100] Therefore, the lower courts were in confusion over whether the Court in *Wood* had declared a new standard apart from *Cuyler* or whether it was a situation-specific application of *Cuyler*.[101] The Supreme Court in *Mickens* tried to clarify this confusion,[102] but a debate still raged between the Justices in the majority and those in the dissent.[103] Ultimately, the majority's view in *Mickens*—that the wording in *Wood* is merely shorthand for the *Cuyler* standard[104]—controls and must be followed.

2. *Duty of the Trial Court*

In addition to outlining the test on appeal for conflict of interest cases, the Supreme Court in *Cuyler* also addressed the duty of the trial court to investigate potential conflicts.[105] The Court stated that the trial court has a duty to inquire into a potential conflict of interest if it knows or reasonably should know that a potential conflict exists.[106] The performance or nonperformance of this duty may affect the burden the defendant must satisfy.

The defendant's burden is lower than the *Cuyler* burden if he, or his attorney, objected at trial and notified the judge that a conflict of interest would impair the effectiveness of the representation.[107] If this occurs, the Supreme Court, in *Holloway v. Arkansas*,[108] stated that the defendant need only show

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100. *See Mickens*, 535 U.S. at 171 (discussing the misused statement).

101. *See id.* at 170 n.3 (discussing some courts' interpretation of the *Wood* case).

102. *See infra* notes 214–18 and accompanying text (discussing the Supreme Court's interpretation of *Wood* in *Mickens*).

103. *Compare* Mickens v. Taylor, 535 U.S. 162, 170–72 (2002) (stating that *Wood* merely used shorthand to refer to the *Cuyler* standard) *with Mickens*, 535 U.S. at 196–98 (Souter, J., dissenting) (arguing that the majority misreads the *Wood* case).

104. *Id.* at 171.

105. *See* Cuyler v. Sullivan, 446 U.S. 335, 345 (1980) (addressing "whether a state trial judge must inquire into the propriety of multiple representation even though no party lodges an objection").

106. *Id.*

107. *See Mickens*, 535 U.S. at 167–68 (discussing the *Holloway* automatic reversal rule).

108. Holloway v. Arkansas, 435 U.S. 475 (1978). In *Holloway*, the court appointed one lawyer to represent three separate defendants. *Id.* at 476. The lawyer objected on the grounds that he faced the risk of conflicting interests between the three clients. *Id.* at 476–77. The trial judge denied the motion and mandated the continued concurrent representation. *Id.* at 477–80. The jury convicted the defendant, and he appealed. *Id.* at 481. The Supreme Court recognized that there can be value in multiple representation and did not declare it per se invalid. *Id.* at 482–83. Nevertheless, the Court held that when the trial court did not appoint new counsel or inquire into the gravity of the risk after notification of the potential conflict through timely

that the court failed to inquire into a potential conflict in order to obtain a reversal of his conviction[109]—the so-called automatic reversal rule. In *Holloway*, the defendant objected to the appointment of an attorney who was already representing two other defendants facing the same charges.[110] During the trial, the codefendants testified.[111] The attorney objected, stating that he could not ask them questions that might incriminate any of the other defendants he represented.[112] The trial court overruled the objections and failed to appoint new counsel or offer further opportunity for clarification of the alleged conflict.[113] The jury found all the defendants guilty.[114] The defendants appealed claiming ineffective assistance of counsel.[115] The Supreme Court reversed and stated that the danger of multiple representation was what this representation caused the lawyer to refrain from doing, such as cross-examining witnesses for fear of exposing other defendants.[116]

Courts have stated that the automatic reversal rule is appropriate because ethics binds the defense counsel not to engage in conflicts, and because the counsel is in the best position to know of potential conflicts.[117] Thus, if the situation moved the attorney to object, it must be a grave conflict. Moreover, the objection puts the trial court on notice that there is a conflict that would likely prejudice the trial.[118] Therefore, any attempt to require the defendant to show prejudice from the conflict would be unfair because the defendant tried to avoid the conflict by objecting.[119] Furthermore, without the automatic reversal rule, it would be impossible for the courts to adjudicate the effects of such conflicts in a consistent manner.[120]

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objection, it denied the defendant his Sixth Amendment right to effective counsel. *Id.* at 484.

109. *See id.* at 488 (declaring that *Glasser* established a per se reversal rule when a timely objection is made and the trial court continues to require multiple representation).

110. *See id.* at 477 (discussing the circumstances leading to the appointment of one counsel for three codefendants).

111. *Id.* at 480.

112. *See id.* (discussing counsel's performance at the trial).

113. *See id.* at 477–80 (discussing the trial court's handling of the repeated objections by defendant's counsel).

114. *Id.* at 481.

115. *Id.*

116. *Id.*

117. *See* Cuyler v. Sullivan, 446 U.S. 335, 346–47 (1980) (discussing the rationale for the automatic reversal rule).

118. *See id.* (discussing the rationale for the automatic reversal rule).

119. *See* Holloway v. Arkansas, 435 U.S. 475, 490–91 (1978) (explaining rationale for the automatic reversal rule and the pitfalls of a harmless error test).

120. *See id.* (explaining the rationale for the automatic reversal rule and the pitfalls of a

C. Choosing a Test: The Circuit Courts' Interpretation of Pre-Mickens Supreme Court Precedent

The Supreme Court, although creating the standards to apply in conflict of interest challenges, did not specify when each test should apply.[121] This omission left the circuits in a state of confusion. Many circuits interpreted the Supreme Court cases broadly and applied *Cuyler* to all conflicts of interest challenges and applied *Strickland* only to general ineffectiveness claims.[122] The circuits did this even though the Supreme Court had only addressed concurrent representation conflicts.[123] Other circuits, however, developed alternate frameworks of analysis for more limited application of *Cuyler*.[124]

1. The General Trend

In the twenty-two years between *Cuyler* and *Mickens*, the circuit courts were in conflict over the appropriate application of the *Cuyler* test. It was not even unheard of for a circuit to shift positions from case to case.[125] Before *Mickens*, two circuits expressly limited *Cuyler* to multiple representation situations.[126] Multiple representation for these purposes

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harmless error test).

121. *See* United States *ex. rel.* Duncan v. O'Leary, 806 F.2d 1307, 1312 (7th Cir. 1986) (noting that the Supreme Court has not established the scope of the *Cuyler* test).

122. *See infra* Part II.C.1 (presenting an overview of the circuit courts' pre-*Mickens* jurisprudence in conflict-of-interest cases).

123. *See* Beets v. Scott, 65 F.3d 1258, 1266 (5th Cir. 1995) (en banc) (noting that the Supreme Court has not addressed a conflict situation outside of the multiple representation realm).

124. *See infra* Parts II.C.3–4 (discussing the Fifth and Second Circuits' frameworks).

125. *Compare* Atley v. Ault, 191 F.3d 865, 870 n.4 (8th Cir. 1999) (stating that *Cuyler* is not limited to situations involving joint representation, but is extended to other types of conflicts) *with* Caban v. United States, 281 F.3d 778, 783 (8th Cir. 2002) (stating that this circuit's previous pronouncements that *Cuyler* applied beyond multiple representation were dicta, and that *Cuyler* should actually be limited to multiple representation cases). Sometimes, a circuit's choice of tests can seem to be confused within a single case. *Compare* United States v. Mays, 77 F.3d 906, 909 (6th Cir. 1996) (stating at one point that it approves of the *Beets* framework, which limits *Cuyler* to multiple representation situations) *with Mays*, 77 F.3d at 909 (stating that it was applying *Cuyler* to the conflict based upon a defense attorney's past dealings with federal authorities).

126. *See* Perillo v. Johnson, 205 F.3d 775, 797 (5th Cir. 2000) (noting that recent case law applies *Cuyler* to all multiple representation situations, but uses *Strickland* in other types of conflicts); *see also* Caban v. United States, 281 F.3d 778, 782 (8th Cir. 2002) (noting the recent trend of limiting *Cuyler* to multiple representation situations and so limiting it).

included both successive and concurrent representations.[127] The Fifth Circuit is one of the leading examples of a circuit court limiting *Cuyler*.[128] This limitation, however, was the exception, as other circuits extended *Cuyler* well beyond multiple representation situations.[129] The Second, Sixth, and Ninth Circuits, in particular, extended *Cuyler* to virtually all conflicts of interest.[130] Some circuits expanded the application of *Cuyler* to situations such as personal interest conflicts stemming from book and movie rights contracts[131] and conflicts stemming from an attorney's fear of receiving a reprimand from the trial judge.[132] The circuits did this even though the Supreme Court never applied *Cuyler* beyond multiple representation.[133] Some circuits even expressed the opinion that *Cuyler* extended well beyond multiple representation cases, even though they noted that *Cuyler* itself involved only a concurrent representation challenge.[134]

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127. *See Perillo*, 205 F.3d at 798 (rejecting the idea that any real difference exists between concurrent and successive representation).

128. *See infra* Part II.C.3 (discussing the Fifth Circuit's approach).

129. *See* Mickens v. Taylor, 535 U.S. 162, 174–75 (2002) (listing cases in which circuit courts have extended *Cuyler* beyond multiple representation).

130. *See* Riggs v. United States, 209 F.3d 828, 831 n.1 (6th Cir. 2000) (stating that *Cuyler* applies to all Sixth Amendment conflict-of-interest situations); Winkler v. Keane, 7 F.3d 304, 307–08 (2d Cir. 1993) (applying *Cuyler* to a contingency fee arrangement and asserting that *Cuyler* applies to all conflict-of-interest situations); Mannhalt v. Reed, 847 F.2d 576, 579–80 (9th Cir. 1988) (same). For a discussion of the Second Circuit's extension of *Cuyler*, see *infra* Part II.C.4.

131. *See* Buenoano v. Singletary, 963 F.2d 1433, 1438 (11th Cir. 1992) (applying *Cuyler*, without discussion, to a contract giving the defendant's attorney book and movie rights to the defendant's story); *see also* United States v. Hearst, 638 F.2d 1190, 1193 (9th Cir. 1980) (applying *Cuyler* when the defendant alleged that a media rights contract caused a conflict with her attorney).

132. *See* United States v. Sayan, 968 F.2d 55, 65 (D.C. Cir. 1992) (applying *Cuyler* when a defendant alleged that his attorney failed to request a continuance because of the fear that the judge would reprimand the attorney or his firm).

133. *See* Caban v. United States, 281 F.3d 778, 782 (8th Cir. 2002) ("[T]he Court has never applied Cuyler's rule of presumed prejudice outside the context of multiple representation of codefendants or serial defendants.").

134. *See* Riggs v. United States, 209 F.3d 828, 831 n.1 (6th Cir. 2000) ("[T]his circuit applies the *Cuyler* analysis to all Sixth Amendment conflict of interest claims."); *see also* Spreitzer v. Peters, 114 F.3d 1435, 1451 n.7 (7th Cir. 1997) (noting that the circuit has applied *Cuyler* outside of multiple representation before and thus applied it in the case at hand); United States v. Hearst, 638 F.2d 1190, 1193 (9th Cir. 1980) (applying *Culyer* and stating that it is immaterial that *Cuyler* was based on multiple representation and that the current defendant's challenge was based on the attorney's private financial interests).

2. *Expansion of* Cuyler *Through Modification*

Instead of a straight *Cuyler* or *Strickland* application, the Seventh, Ninth, Eleventh, and D.C. Circuits created a modified *Cuyler* standard for successive representation cases.[135] These circuits recognized that a conflict based on successive representation is not as likely to result in ineffective assistance as one based upon concurrent representation.[136] In this test, the added burden—in addition to the *Cuyler* test—that a defendant must meet for successive representation challenges is either: (1) that the defendant's attorney's prior representation of the other person is "substantially and particularly related" to the attorney's representation of the defendant; or (2) that the attorney received confidential information from the other person that is pertinent to the defendant's case.[137] Although the presence of one of these factors is necessary, it is not sufficient for a finding of actual conflict.[138] This extension of *Cuyler* was reasonable, the courts argued, because finding either alternative factor will make the dangers of successive representation more in line with those of concurrent representation.[139]

3. Beets v. Scott: *The Fifth Circuit's Framework*

In the absence of clear direction from the Supreme Court, the Fifth Circuit, in *Beets v. Scott*,[140] developed an important pre-*Mickens* framework for

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135. *See* Veney v. United States, 738 F.2d 1185, 1193 (D.C. Cir. 1999) (adopting a modified *Cuyler* test in a successive representation conflict-of-interest challenge); Enoch v. Gramley, 70 F.3d 1490, 1496–97 (7th Cir. 1995) (same); Maiden v. Bunnell, 35 F.3d 477, 480 (9th Cir. 1994) (same); Smith v. White, 815 F.2d 1401, 1405–06 (11th Cir. 1987) (same). The Eighth Circuit has also adopted a similar modified test. *See* United States v. Shepard, 675 F.2d 977, 980 (8th Cir. 1982) (applying a "confidential information" factor in determining the existence of a conflict of interest in successive representation cases).

136. *See* Enoch v. Gramley, 70 F.3d 1490, 1496 (7th Cir. 1995) ("[I]t is generally more difficult to demonstrate an actual conflict resulting from successive representation." (quoting Mannhalt v. Reed, 847 F.2d 576, 580 (9th Cir. 1988))). *But see* Perillo v. Johnson, 205 F.3d 775, 798 (5th Cir. 2000) (rejecting the idea that there is any real difference between successive and concurrent representation); Church v. Sullivan, 942 F.2d 1501, 1511 n.8 (10th Cir. 1991) (same).

137. *See* Smith v. White, 815 F.2d 1401, 1405–06 (11th Cir. 1987) (outlining the additional factor that a defendant must show in successive representation challenges).

138. *See id.* at 1406 (stating that proof of one or both factors does not necessarily equal a finding of "inconsistent interests").

139. *See* United States v. Shepard, 675 F.2d 977, 979–80 (8th Cir. 1982) (noting the dangers of successive representation, especially dangers involving the use of confidential information).

140. Beets v. Scott, 65 F.3d 1258 (5th Cir. 1995) (en banc). In *Beets*, the Fifth Circuit

determining which ineffective assistance of counsel test to apply.[141] The Fifth Circuit concluded that courts should limit *Cuyler* to situations of multiple representation[142] and that *Strickland* is the more appropriate test for conflicts in which the attorney's personal interests diverge from the interests of his client.[143] The appeal arose out of a media rights contract that the defendant signed to pay her attorney in a homicide-for-profit charge.[144] The jury convicted Beets of murder for remuneration.[145] Beets's defense at trial was that she did not know about the money she might receive as a result of her husband's death until after her husband disappeared.[146] On appeal, Beets claimed that her attorney had special knowledge of Beets's awareness of any money she might receive as a result of her husband's disappearance, and therefore she needed her attorney to testify.[147] Beets asserted that the media rights contract prevented her attorney from withdrawing and testifying on her behalf, a situation she claimed

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addressed whether *Strickland* or *Cuyler* should be the test when a defendant alleges a conflict of interest based upon a media rights contract with her attorney. *Id.* at 1260. The defendant in *Beets* faced murder charges for the death of her husband. *Id.* at 1261. In order to pay for her representation, Beets assigned all the media rights to her attorney's son. *Id.* A jury convicted Beets of murder for remuneration. *Id.* at 1264. After conviction, Beets appealed, claiming that the media rights contract created a conflict for her attorney and prevented him from withdrawing from representing her so that he could be a witness in her case. *Id.* at 1264. Beets argued that this caused her to receive ineffective assistance of counsel. *Id.* The Fifth Circuit analyzed the relevant Supreme Court cases concerning conflicts of interest and determined that *Strickland* was the correct standard for Beets's ineffectiveness claim based upon a media rights contract. *Id.* at 1265. The court chose *Strickland* over *Cuyler* because it determined that 1) the Supreme Court had only addressed multiple representation cases and that applying *Cuyler* outside of this context presented inherent difficulties, 2) that legal ethics strongly suggested against treating multiple representation and attorney self-interest cases the same, and 3) to extend *Cuyler* outside of the multiple representation context would weaken the uniformity sought by *Strickland*. *Id.* at 1265–66. Beets ultimately failed in her challenge because the Fifth Circuit determined that the media rights contract neither hindered her attorney's performance nor destroyed the reliability of the criminal trial. *Id.* at 1274. However, the court went even further and noted that Beets's case would fail under the *Cuyler* or *Winkler* tests as well. *Id.* at 1277–79.

141. *See id.* at 1268 (noting the absence of Supreme Court authority).

142. *Id.* at 1265 n.8. The Fifth Circuit defines "multiple representation" as including both successive representation and concurrent representation situations. *Id.*

143. *See id.* at 1272 (explaining when *Strickland* should apply and when *Cuyler* should apply).

144. *See id.* at 1261 (stating that Beets signed over her media rights to the attorney's son).

145. *See id.* at 1262 (stating that the jury found that Beets killed her husband for insurance and pension money).

146. *See id.* at 1263 (explaining that the attorney tried to negate intent by arguing that for at least eighteen months, Beets did not know of the potential for money from her husband's disappearance).

147. *Id.* at 1274.

prejudiced her trial.[148] Beets also asserted that her attorney labored under a separate personal interest conflict due to the media rights contract.[149] The Fifth Circuit failed to find either of these arguments persuasive.[150] The Fifth Circuit stated that the *Strickland* test was the appropriate test in situations not involving multiple representations.[151] The court stated that Beets failed to meet the *Strickland* test because her counsel's conduct did not prejudice her defense.[152]

The Fifth Circuit listed numerous reasons for applying *Strickland*, instead of *Cuyler*, to the facts of *Beets*.[153] The court began by looking at the major Supreme Court cases starting with *Cuyler*.[154] The court noted that *Cuyler* used the phrase "actively represented" conflicting interests, suggesting that the conflicts must originate from multiple attorney-client relationships and not a personal interest "conflict situation."[155] Moreover, the court determined that all of the cases the Supreme Court cited in *Cuyler* were multiple representation cases.[156] The court then noted that the only other times the Supreme Court addressed alleged conflicts of interest and applied *Cuyler* were in multiple representation cases.[157] Further, the Fifth Circuit stated that the ethical rules

148. *See id.* at 1274–75 (laying out Beets's argument that the media rights contract motivated her attorney to stay in the case, contrary to Beets's best interest).

149. *See id.* at 1273 (reporting that Beets argued that her attorney committed an ethical violation in signing the contract that created a conflict of interest).

150. *See id.* at 1274–75 (noting that Beets failed to show that the media rights contract influenced her attorney's performance or that her attorney could offer anything more than cumulative evidence and speculation as a witness).

151. *Id.* at 1271.

152. *Id.* at 1273.

153. *See id.* at 1265–73 (discussing why *Cuyler* should be limited to multi-representation cases).

154. *See id.* at 1266–68 (discussing *Cuyler*, *Wood*, *Nix*, *Strickland*, and *Burger*).

155. *Id.* at 1267.

156. *Id.*

157. *See id.* at 1267–68 (discussing *Wood*, *Nix*, *Strickland*, and *Burger*). The Fifth Circuit stated that *Nix v. Whiteside*, 475 U.S. 157 (1986), declined to extend *Cuyler* to situations where a conflict arose between the attorney's ethical obligation not to commit perjury and the defendant's desire to do so. *Id.* at 1267. The Fifth Circuit noted that *Wood* was effectively a joint representation case because the defendant's employer's lawyer represented the defendant and the defendant's and attorney's interests were not always aligned. *Id.* at 1267. The Fifth Circuit then stated that *Strickland* reinforces a limited *Cuyler* application by quoting sections of that opinion that refer to multiple representation. *Id.* Lastly, the Fifth Circuit stated that *Burger v. Kemp*, 483 U.S. 776 (1987), a case in which a defendant's attorney assisted a partner in the defense of a codefendant, showed that not even all multiple representation situations present actual conflicts of interest. *Id.*

militated against applying *Cuyler* to situations outside of the multiple representation context.[158]

The court next examined the practicalities of each type of conflict of interest.[159] The court noted that in a multiple representation situation, the attorney can be "immobilized by conflicting ethical duties among clients."[160] By contrast, a lawyer in a personal interest conflict case is bound to only one client and thus the conflict will not immobilize the attorney, although it may render him ineffective.[161] Lastly, the Fifth Circuit stated that the purpose of the Sixth Amendment is to assure a fair trial and not to create an alternate method of enforcing legal ethics.[162] Thus, the court limited *Cuyler* to situations involving multiple representation.[163]

In dicta, the majority proceeded to analyze the case under the *Cuyler* test in case its choice of the *Strickland* standard proved to be mistaken.[164] The majority stated that Beets failed to meet either prong of the *Cuyler* test.[165] Beets failed to show an actual conflict, as opposed to a hypothetical one, because she could not show that her attorney made a choice between his financial interests and her interests.[166] Beets failed the adverse effect prong because the courts below "found no conscious effect of the media contract on

158. *See id.* at 1269–71 (discounting the "duty of loyalty" rationale for extending *Cuyler* beyond multiple representations). The court noted that the ABA Model Rules distinguish between conflicts involving competing clients' interests and those involving the attorney's personal interest. *Id.* at 1270. The Fifth Circuit stated that these two conflicts are different because the multiple representation situation is straightforward, whereas an attorney's personal interests conflict could range from the benign to the severe. *Id.* Moreover, the court opined that the problem with an attorney's personal interests being in conflict with those of the client is that it ultimately reflects on the attorney's competency. *Id.* The court stated that to apply the lighter *Cuyler* standard to this broad range of potential consequences would be a "draconian remedy." *Id.*

159. *See id.* at 1271–72 (noting the effect of the conflicts on the attorney's functioning.)

160. *Id.* at 1271.

161. *Id.*

162. *See id.* at 1272 (arguing that blurring the line between *Strickland* and *Cuyler* would result in a shift in focus from "the overall fairness of the criminal proceeding—the goal of 'prejudice' analysis—to slurs on counsel's integrity—the 'conflict' analysis").

163. *See id.* at 1260 (stating that *Strickland* is the better test for situations in which the attorney's personal interests conflict with those of the client).

164. *See id.* at 1277 (discussing the alternate holding should *Cuyler* apply).

165. *See id.* at 1278 n.26 (stating that Beets did not show either an actual conflict or an adverse effect). The *Mickens* Court calls this dual prong analysis of the *Cuyler* test, stating that the *Cuyler* test "is not properly read as requiring inquiry into actual conflict as something separate and apart from adverse effect." Mickens v. Taylor, 535 U.S. 162, 172 n.5 (2002).

166. *See* Beets v. Scott, 65 F.3d 1258, 1277 (5th Cir. 1995) (en banc) (requiring defendant to show that the attorney "made a choice between possible alternative courses of action" (quoting Stevenson v. Newsome, 774 F.2d 1558, 1561–62 (11th Cir. 1985))).

Beets's attorney's decision not to testify."[167] Thus, the Fifth Circuit rejected her claims.[168]

4. Winkler v. Keane: *The Second Circuit's Framework*

The Second Circuit developed a gloss on *Cuyler* to allow courts to apply it to conflicts other than multiple representations.[169] In *Winkler v. Keane*,[170] the Second Circuit applied a modified *Cuyler* test to an alleged conflict based upon a contingency fee arrangement.[171] The defendant and his family entered into a contingency fee arrangement whereby the attorney received an extra $25,000 if the court found the defendant not guilty.[172] The jury convicted Winkler of murder and sentenced him to twenty-five years to life in prison.[173] Winkler alleged that the contingency fee arrangement created a conflict of interest, depriving him of the effective assistance of counsel.[174] The defendant argued that the agreement placed his interests adverse to those of his attorney who would earn the higher fee only if the defendant received no sentence, but suffered no penalty in compensation if the defendant received a one-day or one hundred-year sentence.[175] In analyzing the appeal, the Second Circuit parsed

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167. *Id.* at 1279.

168. *Id.* at 1278.

169. *See id.* at 1284 (King, J., dissenting) (recommending that the Fifth Circuit follow *Winkler* in cases involving conflicts outside of multiple representation situations).

170. Winkler v. Keane, 7 F.3d 304 (2d Cir. 1993). In *Winkler*, the defendant faced murder and weapons possession charges. *Id.* at 306. In order to pay for the private attorney, Winkler's family agreed to a contingency fee arrangement whereby the attorney would be paid an additional sum for an acquittal or not guilty verdict. *Id.* The jury found Winkler guilty of second degree murder. *Id.* Winkler appealed, asserting that the contingency fee arrangement created an actual conflict of interest. *Id.* at 307. The court noted that the first inquiry was whether there was an actual conflict of interest. *Id.* The Second Circuit stated that an actual conflict was present because the attorney would only get the bonus money if Winkler was acquitted or found not guilty. *Id.* at 307–08. The Second Circuit then broke down the adverse effect prong of the *Cuyler* test into two parts: 1) finding a viable alternative defense tactic that could have been pursued and 2) that this alternative strategy "was inherently in conflict with or not undertaken due to the attorney's other loyalties or interest." *Id.* at 309. Although finding some viable alternative strategies, the court stated that the reason they were not pursed was not because of the contingent fee arrangement, but rather some other reason. *Id.* 309–10. Thus, the court declared that Winkler's Sixth Amendment right to counsel was not violated. *Id.* at 310.

171. *See id.* at 308 ("Winkler must meet the *Cuyler* standard.").

172. *See id.* at 306 (reprinting a portion of the contingency fee arrangement).

173. *Id.*

174. *Id.* at 307.

175. *Id.*

the *Cuyler* "actual conflict" and "adverse effect" prongs into three parts.[176] First, the court looked for an "actual conflict" by examining whether the defendant's and attorney's interests "diverge[d] with respect to a material factual or legal issue or to a course of action."[177] In applying the second prong of the *Cuyler* test, the Second Circuit broke "adverse affect" into two segments: 1) a showing of a plausible alternative defense strategy; and 2) that the conflicting interests caused the attorney not to pursue this strategy.[178] Applying the test to the facts of the case, the court noted an actual conflict of interest, stating that the arrangement created a disincentive for the attorney to pursue a plea or argue for a lesser sentence.[179] The Second Circuit found that there were viable alternative strategies that the attorney could have pursued.[180] The court, however, stated that Winkler failed to show that the attorney did not pursue these strategies because of the contingent fee arrangement; thus, it found no adverse effect.[181] Thus, in the pre-*Mickens* context, although some circuits

176. *See id.* at 307–09 (breaking the test into a straightforward conflicting interests analysis, then looking for a potential alternative strategy, and finally examining whether the conflict resulted in not taking the alternate strategy); *see also* Beets v. Scott, 65 F.3d 1258, 1285 (5th Cir. 1995) (en banc) (King, J., dissenting) (noting that the *Winkler* court looked at three questions). The Second Circuit initially determines if the defendant and his lawyer's interest "diverge with respect to a material factual or legal issue." Winkler v. Keane, 7 F.3d 304, 307–09 (2d Cir. 1993). Second, the court looks for a viable alternative. *Id.* Lastly, the court examines proximate cause, asking whether the conflict was the reason the viable alternative was not pursued. *Id.*

177. *Id.* at 307 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 356 n.3 (Marshall, J., concurring)). Although this quote is a verbatim restatement of the difference between an actual conflict and a potential conflict, the Second Circuit seems to apply this test more loosely than intended, especially in light of *Mickens*'s statement that an "actual conflict" is "a conflict that affected counsel's performance." Mickens v. Taylor, 535 U.S. 162, 168 (2002). This statement also seems to conflict with the *Cuyler* Court's statement that a "possible conflict inheres in almost every instance of multiple representation." Cuyler v. Sullivan, 446 U.S. 335, 348 (1980).

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

179. *Id.* at 307–08. This argument lacks merit. Although the defendant's counsel would receive more money for an acquittal or a not guilty verdict than he would for a plea, this temptation is not significantly different from the fee-per-hour defense attorney faces in every case. The fee-per-hour defense attorney also would make more money the longer the case extends and thus, according to the Second Circuit's analysis, she would have an incentive to avoid a plea. Thus, the attorney's interest would diverge from the client's. The Supreme Court in *Cuyler* could not have meant an actual conflict of interest to be this simple, as one would occur in every instance of retained representation not based on a flat fee, leaving innumerable verdicts open to attack. Rather, the Supreme Court must have meant by "actual conflict" a definition closer to that proposed by the court in *Mickens*—"a conflict that affected counsel's performance." Mickens v. Taylor, 535 U.S. 162, 168 (2002).

180. *See Winkler*, 7 F.3d at 309–10 (noting that the defendant's attorney could have pursued a plea bargain or an "intoxication defense" to lower the defendant's penalty).

181. *See id.* (noting that Winkler always maintained that he was innocent and did not

limited *Cuyler* to situations involving multiple representations, other circuits had a much more expansive application, and some even modified *Cuyler* to extend to conflicts other than concurrent representation. The circuit confusion is not much better post-*Mickens*.[182]

III. Mickens v. Taylor: *The Supreme Court Offers a Cautioning on Choice of Tests*

Mickens v. Taylor[183] is important both because of its explicit holding[184] and because of dicta in the majority opinion about the appropriate application of the lower *Cuyler* standard to various types of conflicts of interest.[185] In *Mickens*, the defendant filed a habeas challenge on the grounds that his trial attorney labored under a conflict of interest due to his prior representation of the victim in an unrelated criminal charge.[186] At trial, neither Walter Mickens nor his attorney objected or otherwise notified the trial court of this potential conflict.[187] Mickens, however, argued that the trial court should have known about the potential conflict because the trial judge who appointed Bryan Saunders to represent Mickens also dropped the charges against the victim, thereby releasing Saunders from that representation.[188] Mickens claimed that the Supreme Court should reverse his conviction by applying the *Holloway* rule to his situation.[189] In addressing the specific question before it—when a trial court knows or reasonably should know of a potential conflict of interest, what effect does its failure to conduct a *Cuyler* inquiry have on a defendant's burden on appeal—the Supreme Court stated that the defendant must show at least "that the conflict of interest adversely affected his counsel's performance."[190] The majority explicitly stated that it was limiting its

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appear interested in seeking lesser charges).

182. *See infra* Part IV (discussing the circuit courts' interpretation of the *Mickens* cautioning).

183. *See supra* note 9 (introducing *Mickens v. Taylor* and providing a brief case summary).

184. *See* Mickens v. Taylor, 535 U.S. 162, 173–74 (2002) (stating that the trial court's failure to conduct an inquiry into a potential conflict of interest does not reduce a defendant's burden of proof).

185. *See id.* at 174–75 (suggesting that the circuit courts have applied *Cuyler* too broadly).

186. *Id.* at 164–65.

187. *Id.* at 165.

188. *See id.* at 170–71 (discussing the defendant's claim).

189. *See id.* (stating that Mickens argued that *Holloway* controlled both when a defendant objected at trial and when a trial court should have known of the potential conflict).

190. *Id.* at 174.

holding to this question.[191] Nevertheless, the Court, although reserving a decision for another day, discussed the propriety of extending *Cuyler* to cases of successive representation and to conflicts based upon the attorney's personal interests.[192] These two discussions have important implications in conflicts of interest jurisprudence.[193]

A. The Opinion: The Effect of a Trial Court's Failure to Inquire into a Potential Conflict of Interest

The Supreme Court in *Cuyler* stated that a trial court has a duty to inquire when it "knows or reasonably should know" about a potential conflict of interest.[194] The Supreme Court in *Holloway* made clear that when a trial court forces a defense attorney to represent conflicting interests after her objection, then the defendant is entitled to an automatic reversal.[195] However, the Supreme Court had not addressed what the consequences were when a trial court discovered on its own, and not by defendant's objection, a potential conflict of interest and failed to inquire into it.[196] The Court addressed this question in *Mickens*.[197]

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191. *See id.* ("Lest today's holding be misconstrued, we note that the only question presented was the effect of a trial court's failure to inquire into a potential conflict upon the [*Cuyler*] rule that deficient performance of counsel must be shown.").

192. *See id.* at 176 (stating that "[w]hether [*Cuyler*] should be extended to such cases remains, as far as . . . this Court is concerned, an open question").

193. *See infra* Part VI.B (proposing a framework for analyzing conflict-of-interest claims).

194. Cuyler v. Sullivan, 446 U.S. 335, 347 (1980).

195. Holloway v. Arkansas, 435 U.S. 475, 484 (1978).

196. Prior to addressing this question in *Mickens*, the circuit courts were in confusion over the appropriate standard. For instance, the Second, Seventh, and Ninth Circuits had automatic reversal rules in place if the trial court had notice of a potential conflict and failed to inquire. *See* Campbell v. Rice, 265 F.3d 878, 884 (9th Cir. 2001) (stating that reversal is automatic when a trial court fails its duty to conduct *Cuyler* inquiry when it knows of a conflict), *abrogated by* Mickens v. Taylor, 535 U.S. 162 (2002); United States v. Rogers, 209 F.3d 139, 146 (2d Cir. 2000) (same); Cambello v. United States, 188 F.3d 871, 875 (7th Cir. 1999) (same). The justification for this rule was that it was too difficult to determine the degree of harm to the defendant when the trial court had not inquired into the situation. *See* Rogers, 209 F.3d at 146 (stating rationale for rule). On the other hand, the First and Eighth Circuits applied *Cuyler* regardless of the type of conflict if the trial court failed to conduct an appropriate inquiry when it knew or should have known of the potential conflict. *See* Caban v. United States, 281 F.3d 778, 783 (8th Cir. 2002) (stating that when a court is put on notice about a potential conflict of interest, it has a duty to inquire and if it fails to do so then *Cuyler* applies, regardless of the conflict); Mountjoy v. Warden, 245 F.3d 31, 38 (1st Cir. 2001) (same). Thus, at least some of the circuits were in conflict over the effect on a defendant's burden on appeal of a trial court's failure to conduct a *Cuyler* inquiry when it had a duty to do so.

197. *See* Mickens v. Taylor, 535 U.S. 162, 164 (2002) ("The question presented in this case is what a defendant must show in order to demonstrate a Sixth Amendment violation where

In *Mickens*, the defendant filed for habeas relief on the grounds that his attorney's prior representation of the victim created a conflict of interest, thereby rendering his representation ineffective.[198] The defendant's trial counsel, Bryan Saunders, represented the victim in an unrelated matter until the victim's murder.[199] Although the defendant's attorney did not notify the court of this potential conflict,[200] the defendant argued on appeal that the trial court had a duty to inquire because it should have known about the conflict.[201] Because the trial court failed to inquire into the potential conflict, the defendant believed the appellate court should automatically vacate his conviction.[202] The Supreme Court, however, declined to extend the *Holloway* automatic reversal rule to this situation.[203] Instead, the Supreme Court declared that the defendant must show, at a minimum, "that the conflict of interest adversely affected his counsel's performance."[204] The Supreme Court was careful not to declare *Cuyler* the applicable test in this case; rather it only assumed that *Cuyler* would apply for purposes of dispensing with the question before it.[205]

In deciding the case, the Supreme Court majority laid out the relevant holdings concerning the duty of the trial court in the *Holloway*,[206] *Cuyler*,[207] and *Wood*[208] cases. The Supreme Court definitively limited the automatic reversal rule in *Holloway* to cases when the trial court requires the defense attorney to represent codefendants despite a timely objection.[209] Thus, the Court rejected the defendant's argument that the rule also applies anytime the

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the trial court fails to inquire into a potential conflict of interest about which it knew or reasonably should have known.").

198. *See id.* at 165–66 (discussing basis of defendant's challenge to conviction).

199. *Id.*

200. *Id.*

201. *See id.* at 170–71 (stating the defendant's argument for reversal).

202. *See id.* at 172 (noting the defendant's argument for a new rule of automatic reversal when the trial court fails to conduct a *Cuyler* inquiry).

203. *See id.* at 172–73 (asserting that automatic reversal is not the appropriate remedy in situations like the one at hand).

204. *See id.* at 173–74 (stating that the defendant must at least meet the *Cuyler* standard for the Court to vacate the conviction).

205. *See id.* at 174–76 (noting that the attorneys argued the case on the assumption that *Cuyler* would apply, but stating that the Court was leaving open the question of the appropriate standard for successive representation cases).

206. *See id.* at 167–68 (analyzing *Holloway* and clarifying its rule).

207. *See id.* at 168–69 (analyzing *Cuyler* and clarifying its rule).

208. *See id.* at 169–72 (analyzing *Wood* and clarifying its rule).

209. *Id.* at 167–68.

court should know of the potential conflict and fails to inquire.[210] The Supreme Court reiterated that the limitation was justified because the defense counsel is best able to know of the problems a potential conflict might cause, and the objection is an assertion that these problems are insurmountable.[211] In regards to *Cuyler*, the Supreme Court in *Mickens* stated that *Cuyler* confers a duty upon the trial court to inquire when it "knows or reasonably should know that a particular conflict exists," a situation that it distinguished from a "vague, unspecified possibility of conflict."[212] A trial court's failure to perform this duty, however, does not reduce a defendant's burden of proof because it has no impact on the probability of the potential conflict affecting counsel's performance.[213] Moreover, the Court noted that the statement in *Wood*—that the trial court should grant a new hearing if it found that "an actual conflict of interest existed"—created confusion over the reach of the *Cuyler* standard.[214] The Supreme Court stated that "actual conflict" was shorthand for the *Cuyler* test of "a conflict of interest that adversely affects counsel's performance."[215] The Supreme Court noted that this interpretation kept the *Wood* opinion internally consistent, whereas a literal reading of the *Wood* statement would clash with other proclamations in that case.[216] Lastly, the Supreme Court clarified a footnote in *Wood* that suggested that *Cuyler* mandated a reversal if the trial court failed to perform its duty of inquiry.[217] The Court declared that if this statement was meant to infer more than mere authority to reverse, it was dictum that would conflict with the actual disposition of *Wood*.[218] Thus, the Supreme Court clarified that the failure of a trial court

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210. *See id.* (discussing the opinion of *Holloway* Court).

211. *See id.* (discussing the opinion of *Holloway* Court).

212. *See id.* at 168–69 (outlining the trial court's duty (citing Cuyler *v.* Sullivan, 446 U.S. 335, 348 (1980))).

213. *See id.* at 173 (discussing how a trial court's knowledge, obtained absent an attorney's notification, of a potential conflict of interest does not make it more or less likely that the attorney's performance will be adversely affected, nor cause the verdict to be less reliable (citing United States v. Chronic, 466 U.S. 648, 650 n.3 (1984))).

214. *See id.* at 169–72 (interpreting what the *Wood* Court intended when using the phrase "an actual conflict of interest" (citing Wood v. Georgia, 450 U.S. 261, 273 (1981))).

215. *See id.* at 172 n.5 (explaining confusion over the choice of wording in the *Wood* opinion).

216. *See id.* at 169–72 (explaining that *Wood* earlier stated that the Court needed to remand in order to determine if the potential conflicting interest influenced the attorney in his trial strategy).

217. *See id.* at 172 n.3 ("[*Cuyler*] *mandates* a reversal when the trial court has failed to make [the requisite] inquiry." (citing Wood v. Georgia, 450 U.S. 261, 272 n.18 (1981))).

218. *See id.* (explaining how the *Wood* Court merely vacated and remanded the case and did not reverse as would be required if the *Wood* Court literally meant "mandates").

to conduct an inquiry into a potential conflict of interest, absent a timely objection from the defendant, does not reduce the defendant's burden.[219]

B. *The Cautioning: Expressing Skepticism About the Circuit Courts' Extension of* Cuyler *Beyond Multiple Representation Situations*

The majority devoted the last section of its opinion to a discussion of the proper application of the *Cuyler* and *Strickland* tests.[220] This portion of the opinion, however, is mostly dicta as the Supreme Court specifically reserved the question of what test to apply in a successive representation case.[221] Nevertheless, the court noted that the parties argued the case on the assumption that *Cuyler* would be the applicable standard if the Court made no exception for the trial court's failure to inquire.[222] The Court stated that this was a rational assumption based on the circuit courts' application of *Cuyler* "unblinkingly" to all alleged conflicts of interest.[223] Specifically, the majority found that some circuit courts had applied *Cuyler* to situations other than concurrent or successive representation, extending its application to conflicts involving the "counsel's personal or financial interests."[224] The majority asserted, however, that the circuit courts' extensions, and thereby the parties' assumptions, were not necessarily supported by either *Cuyler* or by other Supreme Court precedent.[225]

The majority stated that the rationale behind the lower burden in *Cuyler* was that concurrent representations entail a high probability of prejudice and that this prejudice would be difficult to prove.[226] This rationale, the majority asserted, does not necessarily hold true for other types of conflicts.[227]

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219. *Id.* at 173–74.

220. *See id.* at 174–76 (suggesting that the *Cuyler* opinion and other Supreme Court precedent may not justify the extensive application some circuits have given to the *Cuyler* test).

221. *See id.* at 176 (declining to establish Supreme Court jurisprudence on the test for successive representation).

222. *See id.* at 174 (discussing the perspective from which the parties presented the case).

223. *Id.* (citing Beets v. Scott, 65 F.3d 1258, 1266 (5th Cir. 1995) (en banc)).

224. *See id.* at 174–75 (listing cases in which the circuits applied *Cuyler* to various conflicts including, among others, book deals and romantic relationships with interested persons).

225. *See id.* at 175 ("[T]he language of [*Cuyler*] itself does not clearly establish, or indeed even support, such expansive application.").

226. *See id.* (stating the policy reasons for the lower burden in the *Cuyler* test, as opposed to the burden in the *Strickland* test, for traditional ineffective assistance of counsel cases).

227. *See id.* ("Not all attorney conflicts present comparable difficulties.").

Moreover, the majority noted that the Federal Rules of Criminal Procedure treat concurrent and successive representations differently, thereby implying that the courts should also treat them differently.[228] The majority stated that limiting *Cuyler* to successive representation conflicts would not mean that the Supreme Court believed that one particular ethical duty was more serious than another.[229] Rather, the limitation would be a recognition that *Strickland* provided sufficient protection of a defendant's rights in most situations.[230] By suggesting that *Cuyler* might be limited to concurrent representation situations in the future, the *Mickens* court placed in doubt much of the prior developed circuit court case law on conflicts of interest challenges.[231]

*IV. The Circuits Post-*Mickens

Although the Supreme Court has addressed conflict situations numerous times,[232] it has never stated the precise scope of *Cuyler* and *Strickland*.[233] In the absence of Supreme Court precedent pre-*Mickens*, the circuit courts were divided on what burden to apply in various conflict of interest situations.[234] Although *Mickens* has resolved some confusion, the circuits' responses post-*Mickens* and the Supreme Court's own wavering in *Mickens*, suggest that more clarification is needed.[235]

A. Choice of Test

The circuits that have addressed conflict of interest claims since *Mickens* have generally been cautious in their application of *Cuyler* and are still in conflict

228. *See id.* (discussing Rule 44(c)'s requirement that the trial court inquire into potential conflicts in joint representations of joined trials, but noting that there is no equivalent provision for successive representations).

229. *Id.* at 176.

230. *See id.* ("The purpose of our *Holloway* and [*Cuyler*] exceptions . . . is not to enforce the Canons of Legal Ethics, but to apply needed prophylaxis . . . where *Strickland* is . . . inadequate to assure vindication of the defendant's Sixth Amendment right to counsel.").

231. *See supra* Parts II.C.1–2 (discussing circuits that have expanded *Cuyler* beyond multiple representation).

232. *See* Beets v. Scott, 65 F.3d 1258, 1266–68 (5th Cir. 1995) (en banc) (discussing the important Supreme Court cases addressing conflicts of interest).

233. *See* Spreitzer v. Peters, 114 F.3d 1435, 1451 n.7 (7th Cir. 1997) ("The precise scope of the category of claims to which the *Cuyler* standard applies has not been definitely stated by the Supreme Court." (quoting Duncan v. O'Leary, 806 F.2d 1307, 1312 (7th Cir. 1986))).

234. *See supra* Part II.C (discussing the circuit courts' search for a framework).

235. *See infra* Part IV (discussing post-*Mickens* case law).

about the boundaries of the test. Since *Mickens*, the Fourth, Seventh, and Eleventh Circuits have noted the cautionary words in *Mickens*, but have not taken definitive stances.[236] Meanwhile, the Sixth and Tenth Circuits have used *Mickens* in support of a position that limits *Cuyler* to multiple representation.[237] This stance is a clear following of the *Mickens* cautioning as neither circuit had previously limited *Cuyler* to only successive representation.[238] Closely following the pre-*Mickens* trend in the circuits, the Eighth Circuit has stated that *Mickens* limits *Cuyler* to all types of multiple representation, both concurrent and successive.[239] On the other hand, the Seventh Circuit—contradicting its recognition of the cautioning in an earlier post-*Mickens* case[240]—and the First Circuit appear to misread *Mickens* as authority for extending *Cuyler* to other situations.[241] Therefore, although several circuits have taken notice of the cautioning in *Mickens*, confusion still exists over the appropriate test to be applied in various conflict situations.

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236. *See* Brownlee v. Haley, 306 F.3d 1043, 1064 n.17 (11th Cir. 2002) (stating that *Mickens* requires the defendant to show that the "conflict of interest adversely affected his counsel's performance," without stating whether this conflict is all the defendant has to show); Holleman v. Cotton, 301 F.3d 737, 743 (7th Cir. 2002) (stating that *Mickens* casts doubts upon the use of the *Cuyler* test in successive representation cases); Rubin v. Gee, 292 F.3d 396, 402 n.2 (4th Cir. 2002) (noting doubt expressed in *Mickens* about applying *Cuyler* outside of multiple representation situations but still finding *Cuyler* was appropriate when two attorneys advised a client on how to evade police to secure their fee).

237. *See* Smith v. Hofbauer, 312 F.3d 809, 816 (6th Cir. 2002) (referring to *Mickens* for support of the position that *Cuyler* has not been extended to situations other than joint representation in denying defendant's challenge); Montoya v. Lytle, No. 01-2318, 2002 WL 31579759, at *2 (10th Cir. Nov. 20, 2002) ("The Supreme Court . . . has never extended the *Cuyler* standard to cases involving successive . . . representation." (citing Mickens v. Taylor, 535 U.S. 162, 175 (2002))), *cert. denied*, 123 S. Ct. 2096 (2003).

238. *See* Riggs v. United States, 209 F.3d 828, 831 n.1 (6th Cir. 2000) ("[T]his circuit applies the *Cuyler* analysis to all Sixth Amendment conflict of interest claims."); United States v. Winkle, 722 F.2d 605, 610 (10th Cir. 1983) (applying *Cuyler* to situations of multiple representation in which the defense counsel also represented a government witness).

239. *See* United States v. Young, 315 F.3d 911, 915 n.5 (8th Cir. 2003) (citing *Mickens* in support of the circuit's prior position in *Caban* that *Cuyler* was limited to multiple representation claims and that *Strickland* was the appropriate standard elsewhere); *see also* Caban v. United States, 281 F.3d 778, 782 (8th Cir. 2002) (recognizing a recent trend in the circuits to limit *Cuyler* to multiple representation situations and then limiting it to those situations).

240. *See supra* note 236 and accompanying text (discussing Holleman v. Cotton, 301 F.3d 737, 743 (7th Cir. 2002)).

241. *See* United States v. Fuller, 312 F.3d 287, 291 (7th Cir. 2002) (referencing *Mickens* for authority to extend *Cuyler* to a situation where the defendant claimed that his counsel's interest in shielding himself from malpractice for former bad advice caused him to not advocate as vigorously in defendant's motion to withdraw his guilty plea); United States v. Burgos-Chaparro, 309 F.3d 50, 52 (1st Cir. 2002) (requiring a "lesser showing" when any conflict of interest is present, as opposed to a standard ineffectiveness of counsel challenge).

B. Duty of the Trial Court

Despite the Supreme Court's explicit statement in *Mickens* that the failure of a trial court to conduct an inquiry into a potential conflict of interest does not reduce a defendant's burden on appeal,[242] the circuit courts that have addressed the issue since *Mickens* have not uniformly adopted one standard. The Second and Seventh Circuits have adopted a literal reading of the *Mickens* opinion and find that *Mickens* leaves it unclear what standard to apply, but determine that the standard certainly is no lower than *Cuyler*.[243] This reading appears to be appropriate given the Supreme Court's statement that the case was argued on the assumption that *Cuyler* would apply but that this assumption may not have been correct.[244] For the Second Circuit, this reading of *Mickens* reversed their pre-*Mickens* case law, which had an automatic reversal rule when the trial court failed in its duty to inquire.[245] On the other hand, the Ninth and Tenth Circuits have taken a more expansive reading of *Mickens* and state that it extends *Cuyler* to all cases in which the trial court knew or should have known of the potential conflict and failed to inquire.[246] This reading of *Mickens* appears to be too expansive given the Supreme Court's cautioning on applying *Cuyler* outside the concurrent representation situation and its statement that the parties argued the case on the assumption that *Cuyler* would apply without actually deciding that *Cuyler* did apply.[247] This reading, however, did have the effect of reversing the Ninth Circuit's prior automatic reversal rule in cases in which the trial court failed to inquire into a potential conflict.[248] Lastly, the Eight Circuit has taken a middle path and ruled that, in multiple representation situations, if the defendant did not object to the representation, then he must meet the *Cuyler*

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242. Mickens v. Taylor, 535 U.S. 162, 176 (2002).

243. *See* United States v. Blount, 291 F.3d 201, 211–12 (2d Cir. 2002) (stating that *Mickens* requires the defendant to at least meet the *Cuyler* test on appeal); *see also* Holleman v. Cotton, 301 F.3d 737, 743 (7th Cir. 2001) (noting that *Mickens* casts doubt on whether *Cuyler* should be applied to cases where trial judges have failed to inquire into conflicts of interest in successive representation situations).

244. *See Mickens*, 535 U.S. at 174–76 (questioning the application of *Cuyler*).

245. *See Blount*, 291 F.3d at 211–12 (reversing prior case history of an automatic reversal rule when a trial court fails to conduct a *Cuyler* inquiry).

246. *See* United States v. Solomon, No. 01-7045, 2002 WL 827593, at *2 (10th Cir. May 2, 2002) (applying *Cuyler* implicitly where the trial court failed to inquire into potential conflict); Collins v. Johnson, No. 01-35585, 2002 WL 826333, at *2 (9th Cir. May 1, 2002) (same), *cert. denied*, 537 U.S. 1119 (2003).

247. *See* Mickens v. Taylor, 535 U.S. 162, 176 (2002) (stating that the test for successive representation remains an open question).

248. *See Collins*, 2002 WL 827593, at *2 (overturning the automatic reversal rule from *Campbell*).

test, but if the defendant did object, then he need only show an actual conflict and not an adverse effect.[249] In all other situations, the Eighth Circuit stated it would follow its pre-*Mickens* case law and apply *Strickland*.[250] Thus, despite the Supreme Court's ruling in *Mickens*, the circuits are still in conflict over the effect of a trial court's failure to conduct a *Cuyler* inquiry. Therefore, more guidance is needed.[251]

V. Policy of Conflicts and Tests

A. Concerns Posed by Various Conflicts

Each type of conflict of interest—successive representation, concurrent representation, and personal interest—presents its own dangers. The dangers that arise when a conflict implicates the personal interests of the attorney are different from the dangers that arise when two clients' (or former clients') interests conflict.[252] A personal interest conflict tests an attorney's loyalty to one client.[253] The danger is that the attorney might be compromised in his representation of the client because of the possibility of personal enrichment or loss dependent upon the representation.[254] For example, a media rights contract may encourage the counsel to misuse the judicial process for the sake of his enrichment and publicity, effectively profiting from the misery of the victim and family.[255] Nevertheless, in these situations, the attorney is still in a position to act in a way that will further his client's interests.[256] For instance, in the media rights situation, the attorney could choose to resist temptation and represent his client as if no media rights contract was present.

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249. *See* United States v. Young, 315 F.3d 911, 915 n.5 (8th Cir. 2003) (stating the rules from *Mickens* for multiple representation cases).

250. *See id.* (stating that the Eighth Circuit would follow *Caban* and apply *Strickland* outside of the multiple representation challenges).

251. *See infra* Part VI (recommending a framework for analyzing all conflicts of interest and for choosing the appropriate test to apply).

252. *See* Beets v. Scott, 65 F.3d 1258, 1271 (5th Cir. 1995) (en banc) (stating the quandary faced by a conflicted attorney).

253. *Id.*

254. *Id.*

255. *Id.* at 1273.

256. *See* Beets v. Collins, 986 F.2d 1478, 1492 (5th Cir. 1993) (Higginbotham, J., concurring) ("Lawyers who have a choice but fail to choose correctly are of a different genre from lawyers who have no choice."), *modified by* 65 F.3d 1258 (5th Cir. 1995) (en banc).

On the other hand, a conflict that involves the interest of two or more clients is more troublesome.[257] In that situation, when the conflict becomes actual, no matter how the attorney acts, he will harm the interests of at least one of his clients.[258] Thus, the attorney may be forced into inaction. Courts have noted that the danger in dual representation conflict cases is not in what the attorney might do, but rather in what the attorney avoids doing.[259] Conversely, the danger in a personal conflicts case is in what the attorney may do; that is, further his own interest at the expense of his client's.[260] Trying to prove a negative—that the attorney did not do something he should have done—is harder than proving an affirmative—that the attorney did something he should not have done. The Supreme Court has recognized this difficulty.[261] Thus, the Court in *Cuyler* lowered the defendant's burden in multiple representation cases to account for this difficulty.[262] Although there is a danger in some personal interest conflicts that an attorney may fail to act in order to advance his own interests, the difference from multiple representation failures to act is that the attorney has a choice to act properly without harming any of his clients. The hope is that the ethical rules will keep this attorney in line.

Going one step further, the danger in concurrent representation of codefendants is worse than the dangers posed in successive representation of either witnesses and defendants or codefendants.[263] In a concurrent

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257. *See* Beets v. Scott, 65 F.3d 1258, 1271 (5th Cir. 1995) (discussing dangers of multiple representation).

258. *See id.* at 1270 ("Counsel can properly turn in no direction. He must fail one [client] or do nothing and fail both." (quoting *Beets v. Collins*, 986 F.2d 1478, 1492 (5th Cir. 1993) (Higginbotham, J., concurring))).

259. *See* Holloway v. Arkansas, 435 U.S. 475, 489–90 (1978) (explaining how an attorney involved in dual representation might be conflicted into inaction).

260. In some personal interest conflicts, there is a danger that an attorney may not act in order to advance his own interests, thereby requiring the defendant to prove a negative. For instance, in *Beets*, the defendant alleged that her attorney did not withdraw and testify due to the media rights contract. Beets v. Scott, 65 F.3d 1258, 1261 (5th Cir. 1995) (en banc). This situation, however, differs only in the degree, not the kind, of pressure an attorney normally faces when paid hourly. In that situation, the attorney will reap personal financial gain by dragging out the case, which can be done by inaction. But, the attorney still has a choice and can act in a way that furthers the interests of his client. Ethics should bind the attorney to the right course. In a conflict involving two or more clients, however, the attorney may not have a choice that would not harm either. *Id.* at 1271. In these situations, the bounds of ethics may not be sufficient. Thus, the courts allow a presumption of prejudice in these situations.

261. *See* Glasser v. United States, 315 U.S. 60, 75–76 (1942) (refusing to inquire into the degree of prejudice).

262. Cuyler v. Sullivan, 446 U.S. 335, 349–50 (1980).

263. *See* Green, *supra* note 49, at 1219 (discussing why concurrent representation raises graver concerns than simultaneous representation).

representation situation, the attorney may have to face a situation where he cannot protect both defendants' interests.[264] For instance, the attorney could not argue on behalf of one defendant that the other was the ring leader.[265] Moreover, the lawyer might be restrained from challenging evidence against one defendant because of the fear that it will make the evidence against the other defendant appear stronger.[266] General ethics principles also support the view that concurrent representation is more troublesome than successive representation.[267]

On the other hand, the danger present in successive representation is that the first client's confidences will be compromised or will prevent full representation of the current client.[268] But because the attorney's representation of one client has ceased, the potential for actual conflicts is reduced. The danger is even more limited when the former client is only a witness in the criminal trial and is in no other way implicated in the matter as a former codefendant, victim, or government agent.[269] Thus, there is not as much need for a strong prophylaxis as with concurrent representation. The danger, however, is still greater than in personal interest conflicts. This danger arises because the attorney may still have to choose between two clients, harming one to help the other, or harming both by inaction.[270] Therefore, a burden somewhere between that imposed in concurrent situations and that imposed in personal interest situations may be justified.

B. Policy Rationale Behind the Application of Each Test

When analyzing conflicts of interest cases in either a multiple representation situation or an attorney's personal interests conflict, one should start with the premise that a conflict challenge is merely a specific type of ineffective assistance of counsel challenge.[271] As such, it is ultimately a

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264. *See* Beets v. Scott, 65 F.3d 1258, 1271 (5th Cir. 1995) (en banc) (discussing dangers of multiple representation).

265. *See* Green, *supra* note 49, at 1203 (discussing the dangers, both obvious and hidden, in concurrent representation).

266. *Id.*

267. *See id.* at 1215–16 (discussing disparate ethical treatment of successive and concurrent representations).

268. *See id.* at 1216 (outlining the danger of successive representations).

269. *See id.* at 1217–18 (noting how this conflict only affects a single aspect of the trial, the cross-examination of that one witness).

270. Beets v. Scott, 65 F.3d. 1258, 1271 (5th Cir. 1995) (en banc).

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

challenge based on the Sixth Amendment right to counsel.[272] Thus, a defendant must demonstrate more than a violation of an ethical rule to warrant a reversal of his conviction.[273] Instead, the goal of the courts has been ensuring a reliable and just result, not necessarily a perfect process.[274] Therefore, the focus of the inquiry should not be on the presence or lack of a conflict, but rather it should be on whether the conflict rendered counsel's assistance ineffective, thereby compromising the reliability of the result.

Some commentators argue for extension of the automatic reversal rule whenever the trial court fails to inquire when it "knows or reasonably should know" a conflict exists.[275] They argue that if a trial court fails to inquire into an actual conflict, the defendant already has been denied his right to conflict-free counsel.[276] This reasoning is flawed because the inquiry is not meant to determine if a conflict existed, but rather to determine if a conflict deprived the defendant of effective assistance of counsel.[277] Unlike straight ineffective assistance cases, however, the Supreme Court has stated that, in conflicts of interest cases, the defendant need not show prejudice; rather, prejudice will be presumed if an adverse effect on the attorney's performance can be shown.[278]

The proponents of the automatic reversal rule argue that when the trial court fails to inquire into a conflict of which it knew or should have known, only automatic reversal will protect a defendant's interest.[279] The argument is based on the idea that the adverse effect test is too difficult to meet.[280] This argument, however, ignores the fact that the Supreme Court has already lowered the burden for defendants in conflicts cases from prejudice to

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272. *Id.*

273. *See* Mickens v. Taylor, 535 U.S. 162, 176 (2002) ("Breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel." (quoting Nix v. Whiteside, 475 U.S. 157, 165 (1986))); *see also* Beets v. Scott, 65 F.3d 1258, 1272 (5th Cir. 1995) (en banc) ("[T]he purpose of the Sixth Amendment is not . . . to create a constitutional code of professional conduct; its purpose is to assure a fair trial based on competent representation.").

274. *See* Craig M. Bradley, *The Right to Unconflicted Counsel*, TRIAL, June 2002, at 62, 63 (arguing that the Supreme Court's guiding principle in ineffective assistance challenges is that "[t]he defendant is entitled to a fair trial, not a perfect one").

275. *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, 942 (2002) [hereinafter *First Circuit*].

276. *Id.* at 943.

277. Strickland v. Washington, 466 U.S. 668, 693 (1984).

278. *Id.*

279. *First Circuit*, *supra* note 275, at 943.

280. *Id.* at 944.

presumed prejudice upon a showing of adverse effect.[281] It does not follow that a typical ineffective assistance claim requires a defendant to show prejudice, a high standard,[282] but that a lower showing of adverse effect is too difficult.[283] The gravamen of both standard ineffective assistance cases and conflict-of-interest cases is prejudice to the result.[284]

In conflicts cases, prejudice will be presumed upon a showing of adverse effect.[285] The fallacy of relying solely upon a showing of an actual conflict without actual prejudice is evident when one looks at the cases in which courts have found an actual conflict but have determined that it did not produce an adverse effect.[286] The automatic reversal rule assumes that the presence of an actual conflict makes an adverse effect and presumed prejudice very likely, thereby leading to ineffective assistance of counsel.[287] This rule makes sense when the defense counsel objects because she is in the best position to know of the potential dangers the conflict will present.[288] The rule, however, makes less sense in cases where the trial court determines the existence of the conflict on its own. In this instance, the rule requires too many leaps in logic to form a sound guideline.[289] Moreover, as the Supreme Court stated, it is illogical to assume that a potential conflict prejudiced the defendant more solely because a trial court failed to inquire.[290] The attorney, and not the court, is the one who denies the defendant effective assistance of counsel in conflicts cases.[291] The burden the defendant must meet should depend on the actions of his counsel, not the actions of the court. Therefore, the automatic reversal rule should apply only when the defendant objects and the trial court ignores the objection.

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281. *See* Cuyler v. Sullivan, 446 U.S. 335, 348 (1980) (stating the test a defendant must meet).

282. *See Strickland*, 466 U.S. at 693 (outlining the burden).

283. *See* Cuyler, 446 U.S. at 347 (stating the burden a defendant must meet).

284. Strickland v. Washington, 466 U.S. 668, 693 (1984).

285. *See id.* (stating a limited presumption of prejudice).

286. *See* Justin A. Fitzgerald & Ashley Whitesides, *Right to Counsel*, 85 GEO. L.J. 1215, 1235 n.1651 (1997) (listing sample cases in which an actual conflict was found but no adverse effect was shown).

287. *See First Circuit*, *supra* note 275, at 942–43 (arguing for an automatic reversal rule).

288. *See* Holloway v. Arkansas, 435 U.S. 475, 485 (1978) (explaining why a defense attorney's request for separate counsel should be granted).

289. *See* Bradley, *supra* note 274, at 62 n.11 (arguing that the defendant in *Mickens* sought an "exception to an exception" in that *Cuyler* already provides an exception to the *Strickland* test and the automatic reversal rule would be an exception to that).

290. *See* Mickens v. Taylor, 535 U.S. 162, 173 (2002) (stating that the trial court's awareness has no impact on the likelihood that the counsel's performance will be ineffective).

291. *See id.* at 177–78 (Kennedy, J., concurring) (noting the question should turn on the acts of the attorney and not the court).

Each of the alternative tests that courts and commentators have proposed are lacking in one respect or another. The *Beets* framework, which applies *Cuyler* in multiple representation cases and *Strickland* in all other types of conflicts of interest, is the current circuit approach that most closely balances the competing interests.[292] This test, however, is not complete because it fails to draw any distinction between successive and concurrent multiple representation situations[293] and does not account for the impact of the trial court's duty to inquire.[294] Another proposed framework is the *Winkler* test.[295] This test is over-inclusive, as too many conflicts fall under the modified *Cuyler* test—which applies *Cuyler* to non-multiple representation challenges—to be a satisfactory solution.[296] One alternative to the *Cuyler*, *Strickland*, and *Mickens* scheme is to have an automatic reversal rule every time the trial court knew or should have known of a potential conflict. The majority in *Mickens* rejected this alternative.[297]

Another commentator proposed that the *Cuyler* test include a burden shift.[298] Under this approach, once the defendant shows an actual conflict, the government has the burden of showing that this conflict did not adversely affect counsel's performance.[299] The problem with this approach is that it will be almost impossible to prove the negative that the conflict, which the defense counsel hid, did not affect his performance.[300] This burden upon the government is a much more difficult one than the defendant presently has in showing a single instance of how the conflict affected a choice his attorney made.[301] Thus, although each proposal has some merit, none fully address all concerns.

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292. *See supra* Part II.C.3 (discussing the *Beets* test).

293. *See supra* Part V.A (discussing difference in risks between successive and concurrent representation).

294. *See supra* Parts II.B.2 and IV.B (discussing the circuit's view on trial court duty analysis before and after *Mickens*).

295. *See supra* Part II.C.4 (discussing the *Winkler* test).

296. *See* Beets v. Scott, 65 F.3d 1258, 1284 (5th Cir. 1995) (en banc) (King, J., dissenting) (stating that *Winkler* is a good test for applying *Cuyler* to nonmultiple representation situations).

297. *See* Mickens v. Taylor, 535 U.S. 162, 173–74 (2002) (stating that a defendant's burden is not lowered by the trial court's failure to conduct an inquiry absent a defense objection notifying the court).

298. *See* Bradley, *supra* note 274, at 63–64 (arguing that a burden shift would place the *Cuyler* test more in line with the harmless error test).

299. *Id.* at 63–64.

300. *See* Glasser v. United States, 315 U.S. 60, 75–76 (1942) (recognizing the difficulty of proving a negative).

301. *See* Winkler v. Keane, 7 F.3d 304, 307 (2d Cir. 1993) (stating that under *Cuyler*, a defendant must show an alternative strategy that counsel did not choose because of the conflict

VI. Proposal and Conclusion

A. What Does Mickens *Foretell About a Potential Supreme Court Framework?*

How is the Supreme Court likely to rule on the scope of *Cuyler* in the near future? The majority's dicta cautioning against expanding *Cuyler* beyond successive representation cases should restrict the lower courts' application of the lower test.[302] Given the split among the Justices in *Mickens*, however, it is unclear how narrowly the Supreme Court would limit *Cuyler* should they decide another conflicts case.[303]

Nevertheless, reading the majority's opinion closely provides some hints that at least five justices have serious reservations about expanding *Cuyler* to successive representation cases, much less to personal conflict cases. The majority stated broadly that *Cuyler* does not clearly support the broad application the circuit courts have given it.[304] Several times the majority hinted that if it supported an extension, it would be no further than to successive representation cases. First, the majority stated that the circuit courts have expanded *Cuyler* "not only" to successive representation cases, "but even" to conflicts concerning the attorney's personal interests.[305] The majority then quoted *Cuyler* as stating that it applies when a defendant demonstrates that his counsel "*actively represented* conflicting interests."[306] Lastly, the majority

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in order to prove adverse effect).

302. *See supra* Part III.B (noting that the majority in *Mickens* questioned the validity of expanding *Cuyler* beyond multiple representation cases).

303. The majority only called into question the propriety of expanding *Cuyler* but did not expressly state that they were going to limit *Cuyler* to concurrent representation challenges. *See* Mickens v. Taylor, 535 U.S. 162, 176 (2002) (stating that it is an unsettled question whether *Cuyler* should be used in cases beyond concurrent representation). The Breyer dissent, however, recommends a categorical rule that, when there is the appearance of faulty proceedings, the conviction must be reversed, irrespective of actual harm. *Id.* at 211 (Breyer, J., dissenting). This statement, together with the fact that *Mickens* was a 5-4 decision, suggests that it would be a close decision if the Supreme Court addresses the scope of the *Cuyler* rule in the near future.

304. *Mickens*, 535 U.S. at 175.

305. *Id.* One possible reading of the quoted words suggests doubt as to the expanded application of *Cuyler*.

306. *Id.* (quoting Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)). The italics suggests the majority agrees with the Fifth Circuit that this phrase means "represent" in the traditional lawyer sense. *See* Beets v. Scott, 65 F.3d 1258, 1267–68 (5th Cir. 1995) (en banc) (stating that this phrase means to speak on behalf of and represent as a lawyer, and that one only represents clients, not conflicts). The majority had previously citied *Beets v. Scott* with approval, so it was familiar with the case. *Mickens*, 535 U.S. at 174.

noted the special difficulties that concurrent representation presents that other types of conflicts do not necessarily bring.[307] Taken together, these statements suggest that the expansive application of *Cuyler* disturbed the majority and that, at most, it will allow *Cuyler*'s expanded use in successive representation cases. Thus, it is possible that the Supreme Court would limit *Cuyler* only to concurrent representation situations. But is this analysis the best, and even if it is, should it be an "either/or" application of *Cuyler* and *Sullivan*? Is there an alternative framework that considers the trial court's duty to inquire under *Cuyler* that would adequately address all concerns?[308]

B. Proposal of Framework for Analysis

The deciding issue in applying a test should be: does the attorney have a course of action that would protect the interests of all clients involved? The lower *Cuyler* burden should be limited to situations in which the attorney has no course of action that would protect all clients. These situations occur when the likelihood of prejudice is so high that the courts can presume prejudice.[309] In concurrent representation conflicts, when an actual conflict surfaces, the attorney will not be able to act in a way that protects all clients.[310] Thus, the *Cuyler* test is always appropriate here. When a conflict implicates the attorney's personal interests, however, the attorney still has the choice of acting in a way that protects the client, even if it harms the lawyer.[311] Thus, the *Cuyler* test is never appropriate in these situations. But in successive representation conflicts, it is not clear that the attorney would face a situation that would leave him without a viable course of action. Once representation of one client has ceased, the potential for truly conflicting interests is lower. The modified *Cuyler* test is designed to ferret out situations that leave the attorney without a safe course of action by testing when two clients' interests are both sufficiently implicated.[312] With this in mind, this Note proposes the following framework:

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307. *Mickens*, 535 U.S. at 175.

308. *See infra* Part VI.B (offering a modified analysis for determining what the defendant's burden shall be on appeal).

309. *See* Mickens v. Taylor, 535 U.S. 162, 175 (2002) (explaining rationale behind the *Cuyler* test).

310. *See* Beets v. Scott, 65 F.3d 1258, 1271 (5th Cir. 1995) (en banc) (explaining the danger of concurrent representation).

311. *Id.*

312. *See supra* Part II.C.2 (discussing the modified *Cuyler* test).

(1) First, the court should ask, "What is the nature of the conflict?" If it decides that it is one of representation between two or more persons, then it needs to ask, "What represented persons have potential conflicting interests?" If the dual representation involves a potential witness and the defendant, then the court should apply the modified *Cuyler* test the Eleventh Circuit previously outlined for successive representations, regardless of whether the representation is concurrent or successive.[313] The Eleventh Circuit's modified test properly focuses the analysis on the dangers that these situations would present.

If the dual representation involves two or more defendants, then the court should apply *Cuyler* when the representation is concurrent and apply the modified *Cuyler* test when the representation is successive.[314] The modified *Cuyler* test is appropriate because it places a slightly higher burden on the defendant, recognizing that successive representation poses different dangers from concurrent representation.[315] Moreover, the modified test searches for the specific dangers that are present in successive representation situations, such as a threat to client confidences and materially related cases that impede the attorney.[316] The concerns are still greater than personal interest dangers because the attorney could still face the choice of having to sacrifice one client or the other no matter what option he chooses.[317] Therefore, it is not necessary, nor appropriate, to take the *Mickens* cautioning to its furthest extreme and decide all successive representation cases under *Strickland*.[318] The only exception to this framework is if the defendant or his counsel object to the multiple representation at trial and the trial judge erroneously requires the continued joint representation. In that situation, *Holloway*'s automatic reversal rule applies.[319] On the other hand, if the nature of the conflict involves the attorney's personal interests, then the court should proceed to the analysis in paragraph (2).

(2) In personal interest conflict situations the default test should be *Strickland*.[320] The burden can be lessened, however, if the trial court forced

313. *See* Smith v. White, 815 F.2d 1401, 1405–06 (11th Cir. 1987) (outlining the modified *Cuyler* test); *see also supra* Part II.C.2 (describing the test).

314. *See supra* Part II.C.2 (describing the modified *Cuyler* test).

315. *See* Green, *supra* note 49, at 1219 (discussing why concurrent representation raises graver concerns than simultaneous representation).

316. *See supra* Part II.C.2 (discussing the modified test).

317. *See* Beets v. Scott, 65 F.3d 1258, 1271 (5th Cir. 1995) (en banc) (outlining the dangers of multiple representation).

318. *See* Mickens v. Taylor, 535 U.S. 162, 175 (2002) (suggesting that the majority would consider limiting *Cuyler* to joint representations of codefendants).

319. *See id.* at 167–69 (stating the scope of the *Holloway* rule).

320. *See id.* at 176 (noting that *Cuyler* should only be applied when *Strickland* is

continued representation despite the defense counsel's protests about the conflict of interest.[321] Extension of the *Holloway* rule is appropriate in this situation because, as the Supreme Court noted, the defense counsel is in the best position to understand the danger of the conflict of interest situation.[322] If the defense counsel feels she cannot properly conduct herself due to the possible conflict, the trial court should work to resolve the conflict or allow the attorney to withdraw. If, on the other hand, the trial court learned of the possible conflict on its own, conducted a proper *Cuyler* inquiry, and found no actual conflict or resolved the conflict—or if the trial court never knew nor should not reasonably have known of the potential conflict—then *Strickland* should apply.

Extension of the *Cuyler* standard to these personal interest conflicts is never appropriate. The Supreme Court has never extended *Cuyler* this far, and although the parties argued *Mickens* on the assumption that *Cuyler* applied, the Supreme Court questioned this assumption.[323] Moreover, the Supreme Court expressly stated in *Mickens* that the failure of the trial court to conduct an inquiry, absent an objection by the defendant or his counsel, does not lower the burden the defendant faces on appeal.[324] Thus, the nature of the conflict and the duty of the trial court interplay to determine the proper test to apply in a conflict of interest challenge. In conclusion, this Note recommends that the Supreme Court address the precise scope of the *Cuyler* test and adopt the suggested framework to determine which test to apply for a particular conflict of interest.

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insufficient to protect the interests of the defendant); *Beets*, 65 F.3d at 1265 (noting that *Strickland* better addresses the problems inherent in personal conflict situations); *see also* Part V.A (discussing reasons why personal interest conflicts do not pose the heightened dangers that multiple representation conflicts due).

321. *See* Holloway v. Arkansas, 435 U.S. 475, 488 (1978) (stating the automatic reversal rule).

322. *Id.* at 485.

323. *See Mickens*, 535 U.S. at 174 (noting the assumption that parties argued case upon and questioning its viability).

324. *Id.* at 173–74.