No. 00-9285

In the Supreme Court of the United States

WALTER MICKENS, JR., PETITIONER

v.

JOHN TAYLOR, WARDEN
(CAPITAL CASE)

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

The Court granted certiorari limited to the following question:

"Did the Court of Appeals err in holding that a defendant must show an actual conflict of interest and an adverse effect in order to establish a Sixth Amendment violation where a trial court fails to inquire into a potential conflict of interest about which it reasonably should have known?".

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INTEREST OF THE UNITED STATES

The United States has a substantial interest in the resolution of the question on which the Court granted certiorari. Claims of ineffective assistance of counsel are frequently asserted under the Sixth Amendment on collateral review in federal criminal cases. Although this case involves a state prisoner seeking relief under 28 U.S.C. 2254, the Court's decision likely will affect ineffective-assistance claims brought by federal prisoners under 28 U.S.C. 2255 as well.

STATEMENT

1. In March 1992, Timothy Hall's body was discovered beneath an abandoned construction site along the James

River in Newport News, Virginia. It was covered with stab wounds and was naked from the waist down with the legs splayed. There were bloody "transfer" stains on the outside of Hall's thighs and other signs of an attempted sodomy. The medical examiner concluded that Hall had bled to death from 143 separate "sharp force injuries," and that Hall could have survived in a conscious state for as long as 30 to 45 minutes after the last wound was inflicted. Extensive evidence tied petitioner to Hall's death, including incriminating statements made by petitioner to police shortly after his arrest, petitioner's confession to a cellmate to the murder and attempted sodomy of Hall, analyses of DNA and pubic hairs found on Hall, eyewitness testimony placing petitioner at the scene of the crime, and the fact that petitioner sold a pair of athletic shoes belonging to Hall to another individual just days after Hall's death. Pet. App. 5-6.

In 1993, a Virginia jury found petitioner guilty of the capital murder of Hall under a state law making premeditated murder during or following the commission of attempted forcible sodomy a capital offense. Va. Code Ann. § 18.2-31(5) (Michie 1996). The jury further found that Hall's murder was outrageously and wantonly vile, and sentenced petitioner to death. Pet. App. 6. On direct appeal, petitioner's sentence was vacated by this Court for reconsideration in light of *Simmons* v. *South Carolina*, 512 U.S. 154 (1994), and the case was remanded for resentencing. 513 U.S. 922 (1994). Following a new sentencing hearing during which a *Simmons* instruction on parole ineligibility was made, a jury again sentenced petitioner to death. That sentence was affirmed on appeal and petitioner's application for state habeas corpus relief was denied. Pet. App. 6-7.

2. a. In June 1998, petitioner applied for a writ of federal habeas corpus under 28 U.S.C. 2254 in the United States District Court for the Eastern District of Virginia, claiming, *inter alia*, that he was denied effective assistance of counsel

in violation of the Sixth Amendment because his court-appointed counsel labored under a conflict of interest at trial. While investigating the case, petitioner's federal habeas counsel had reviewed Hall's juvenile court file and discovered that petitioner's trial counsel, Bryan Saunders, was representing Hall on assault and concealed weapon charges at the time of Hall's death. Judge Paul Criver of the local juvenile court had appointed Saunders to represent Hall on those charges on March 20, 1992. Sometime between March 20 and March 28, 1992, when Hall was last seen alive, Saunders met with Hall for 15 to 30 minutes. Pet. App. 7.

On April 3, 1992, Judge Aundria Foster of the juvenile court dismissed the charges against Hall, noting on the docket sheet that Hall was deceased. The docket sheet was one-page long and listed Saunders as Hall's counsel. Saunders learned of the dismissal that day. Pet. App. 7. The following day, petitioner was arrested for the murder and attempted forcible sodomy of Hall. On April 6, Judge Foster appointed Saunders and Warren Keeling to represent petitioner on those charges. Saunders handled the guilt phase of petitioner's trial, while Keeling handled the sentencing phase. Neither Saunders nor Keeling represented petitioner in the state habeas proceeding. Saunders did not disclose his prior representation of Hall to the court, his co-counsel, or petitioner, who did not learn about the representation until it was discovered by his federal habeas attorney upon reviewing Hall's juvenile file. *Id.* at 8.

b. In November 1999, after conducting an evidentiary hearing, the district court denied petitioner's federal habeas petition. Pet. App. 47-80. The court rejected petitioner's Sixth Amendment claim, holding that petitioner failed to establish "an actual conflict of interest [that] adversely affected his lawyer's performance." *Id.* at 65 (quoting *Cuyler*

v. *Sullivan*, 446 U.S. 335, 350 (1980)); see *id.* at 79.[1] The court found that petitioner "failed to demonstrate a correlation * * * between Saunders' representation of Hall for assault and possession of a concealed weapon and his representation of [petitioner] on attempted forcible sodomy and capital murder charges," *id.* at 68; "Saunders did not learn any confidential information from Hall that was relevant to [petitioner's] defense," *id.* at 69; and "Saunders did not believe that any 'continuing duties to a former client might interfere with his consideration of all facts and options for his current client,'" *ibid.* (internal brackets omitted). The court further found that there was no evidence that any conflict that might have existed because of Saunders' prior representation of Hall adversely affected Saunders' representation of petitioner. See *id.* at 70-76.

The district court also rejected petitioner's related argument, based on *Wood* v. *Georgia*, 450 U.S. 261 (1981), that his conviction should be reversed simply because Judge Foster declined to inquire into the potential conflict on Saunders'

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[1] Because petitioner did not present his Sixth Amendment conflict-of-interest claim to the state courts, the district court explained that petitioner could raise that claim on federal habeas only if he established both "cause and prejudice." Pet. App. 63. The court found cause for not raising the claim earlier based on the fact that neither petitioner nor his state habeas counsel had any reason "to even consider the possibility that a conflict existed." *Id.* at 64. The court next reasoned that "[w]here the defaulted claim involves an actual conflict of interest on the part of counsel, the prejudice inquiry incorporates the test for establishing the underlying [Sixth Amendment] claim." *Id.* at 65. The court of appeals followed the same approach in considering whether it was appropriate to entertain petitioner's Sixth Amendment claim. See *id.* at 9-10. Because it is not within the question framed by this Court (see 121 S. Ct. 1651 (2001)), and because the judgment may be affirmed based on the ground relied upon by the court of appeals below, we do not address whether the courts below properly collapsed the prejudice inquiry into their analysis of the merits of the underlying Sixth Amendment claim.

part. Pet. App. 77. The court agreed with petitioner that "the record before Judge Foster presented special circumstances of an apparent possible conflict which required judicial inquiry." *Ibid.* But relying on this Court's decisions in *Wood* and *Sullivan*, the district court held that a trial court's "failure to inquire into a possible conflict does not [in itself] require reversal." *Id.* at 78. Instead, the court concluded, a defendant must show both an actual conflict and an adverse effect on the representation to establish a Sixth Amendment violation. See *id.* at 65, 79.

3. a. A divided panel of the Fourth Circuit reversed. Pet. App. 25-46. Then the court of appeals granted rehearing en banc, vacated the initial panel decision, and by a 7-3 decision affirmed the denial of habeas relief. *Id.* at 1-24. The en banc court assumed for purposes of its analysis "that Judge Foster * * * reasonably should have known that Saunders labored under a potential conflict of interest arising from his previous representation of Hall." *Id.* at 10. But the court rejected petitioner's argument that that judicial lapse alone "mandates automatic reversal of his conviction." *Ibid.*

The en banc court recognized that in *Holloway* v. *Arkansas*, 435 U.S. 475 (1978), this Court held that automatic reversal of a conviction is required under the Sixth Amendment when a trial court fails to inquire into a potential conflict "in the face of repeated representations" by defense counsel that he is burdened by a conflict. Pet. App. 11. The court held, however, that *Holloway*'s automatic-reversal rule does not govern where, as here, defense counsel does not object to any conflict at trial. *Ibid.* In that context, the court reasoned, the rule of *Cuyler* v. *Sullivan* controls. "[A] defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Ibid.* (quoting 446 U.S. at 348).

The en banc court rejected petitioner's argument "that a footnote in *Wood v. Georgia* changed the rule of *Sullivan* and

extended the automatic reversal rule of *Holloway* to circumstances in which a trial court ignores a conflict about which it reasonably should have known." Pet. App. 11-12. The court further rejected petitioner's alternative argument that, "even if *Wood* does not compel automatic reversal of his conviction, it relieves him of his burden under *Sullivan* of establishing an adverse effect on his representation." *Id.* at 13. As the court explained, that argument is contradicted by the Court's decision in *Wood*, as well as subsequent Supreme Court decisions reciting the *Sullivan* rule without suggesting that it had been altered by *Wood*. *Id.* at 13-14.

Finally, the en banc court rejected petitioner's argument "that the district court erred in deciding that any actual conflict of interest did not adversely affect [the] representation." Pet. App. 14. To establish the requisite "adverse effect," the court stated, a defendant "must identify a plausible alternative defense strategy or tactic" not pursued by counsel; "show that [that] strategy or tactic was objectively reasonable"; and "establish that the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict." *Id.* at 15. The en banc court agreed with the district court's "complete, thorough, and thoughtful" consideration of that issue, *id.* at 14, and held that petitioner had failed to show that the asserted conflict on Saunders' part, even if real, had any adverse effect on the representation. *Id.* at 16. Because it found no adverse effect, the court did not decide whether an actual conflict in fact existed. *Id.* at 9.

b. Judge Michael, joined by two other judges, dissented. Pet. App. 18-24. They believed that *Holloway*, *Sullivan*, and *Wood* establish that "[w]hen a trial judge ignores an apparent conflict, a defendant need only show that his lawyer labored under an actual conflict to establish a Sixth Amendment claim"; "[t]he defendant is not required to show that the actual conflict adversely affected his lawyer's performance." *Id.* at 18. Moreover, they considered that rule neces-

sary to "encourage[] trial courts to pay strict attention to fundamental rights." *Id.* at 23. Because the dissenters believed that Saunders had an actual conflict of interest, they would have "award[ed] [petitioner] a writ of habeas corpus unless the Commonwealth of Virginia grants him a new trial," without requiring petitioner to show any adverse effect stemming from the conflict. *Id.* at 24.

SUMMARY OF ARGUMENT

A. The Sixth Amendment is not violated when a trial court fails to inquire on its own initiative into a potential conflict of interest about which it reasonably should have known, unless the defendant shows both an actual conflict and an adverse effect. The Sixth Amendment guarantee of effective assistance of counsel does not exist for its own sake, but instead to protect the integrity of the trial process. Unless a defendant shows that an alleged deficiency in counsel's performance resulted in prejudice, the Sixth Amendment guarantee generally is not implicated. The Court has held that prejudice may be presumed when defense counsel is burdened by a conflict, but "only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Strickland* v. *Washington*, 466 U.S. 668, 692 (1984). That settled rule governs the Sixth Amendment claim at issue in this case.

B. The court of appeals correctly concluded that this Court's decisions do not relieve a defendant of the burden of showing an adverse effect on the representation when a trial court fails to inquire into a possible conflict about which it should have known. When counsel objects at trial that the defense is burdened by a conflict, and the trial court fails to take appropriate corrective action, the Court has held that automatic reversal is warranted under the Sixth Amendment. *Holloway* v. *Arkansas*, 435 U.S. 475 (1978). The

Court has explained that an attorney's own objection that he is laboring under a conflict is persuasive evidence that the representation has been or will be impaired. Moreover, prejudice may inhere in forcing an attorney to continue with a representation over his *own* objection that he is conflicted.

But when no objection is raised at trial, the Court has held that a defendant must show that "an actual conflict of interest adversely affected his lawyer's performance." *Cuyler* v. *Sullivan*, 446 U.S. 335, 350 (1980). The Court has repeatedly recited *Sullivan*'s two-pronged inquiry in discussing the Sixth Amendment guarantee in the conflict-of-interest context. *Wood* v. *Georgia*, 450 U.S. 261 (1981), does not eliminate the requirement of showing an adverse effect when a trial court fails to inquire on its own initiative into an apparent conflict. The *Wood* Court never suggested that it was altering the rule of *Sullivan* and, indeed, its decision reflects that the Court looked not only to whether an "actual conflict of interest existed," but also to whether "counsel was influenced in his basic strategic decisions" by such a conflict. *Id.* at 272-273. That approach comports with the commonsense understanding that an "actual conflict," as opposed to a technical or theoretical conflict, is a conflict that *does* adversely affect the representation.

C. The *Sullivan* rule is well-founded and should be reaffirmed in this case. Requiring a defendant who does not object to any conflict at trial to show both an actual conflict and an adverse effect to prove a Sixth Amendment violation on collateral review squares with the principle that the Constitution only protects against deficiencies in counsel's performance that in fact prejudice the defense. *Holloway* is not to the contrary. Whereas an attorney's own objection that his hands are tied by a conflict is itself compelling evidence that a conflict has impeded the defense, the *absence* of such an objection suggests that there was no actual conflict, or at least that counsel did not feel constrained by

any conflict in undertaking the defense. Moreover, the risk of prejudice is much greater where, as in *Holloway*, the asserted conflict stems from the joint or simultaneous representation of conflicting interests, a concern not present here.

The principal reason that petitioner gives for dispensing with *Sullivan*'s adverse-effect requirement in this case is that the trial court should have known about the conflict and inquired into it. But that approach would give Sixth Amendment claimants a potential "windfall" based solely on whether there was a judicial lapse. The Court has declined to afford defendants such a windfall under the Sixth Amendment. *E.g.*, *Lockhart* v. *Fretwell*, 506 U.S. 364 (1993). Moreover, the state of the record that exists in a collateral proceeding to determine whether an alleged conflict adversely affected the defense is the same when a defendant does not object at trial, regardless of whether the trial court should have inquired into the conflict. Nor is there any reason to adopt petitioner's rule to encourage trial courts to protect Sixth Amendment rights. State courts already are sworn under the Constitution to protect those rights.

Petitioner's approach also would invite manipulation of conflict-of-interest claims. Whereas the dichotomy created between *Holloway*'s automatic-reversal rule for when a defendant does object at trial and *Sullivan*'s rule for when a defendant does not object establishes an incentive for defendants to bring potential conflicts to the attention of the trial court, petitioner's rule would do the opposite: a defendant who knows about a possible conflict and does not object to it could secure reversal of a conviction on collateral review merely by showing that a conflict existed, and that the trial court *should* have inquired into it. Petitioner's rule also would unduly complicate the Sixth Amendment inquiry on collateral review by adding a mixed question of law and fact concerning whether the trial court knew, or should have known, about an alleged conflict.

D. The Court should reject petitioner's contention that, even if he is required to show an adverse effect, the court of appeals erred in requiring him to show a link between the alleged deficiency in counsel's performance and the alleged conflict. The *Sullivan* inquiry focuses on whether the alleged *conflict* impaired the representation, and not simply on whether the representation was deficient. The latter consideration is the focus of the typical *Strickland* claim and may be pressed as such. To establish a Sixth Amendment violation based on an alleged conflict of interest, a defendant must show not only that a conflict actually existed, but also that counsel's failure to pursue a viable alternative defense or strategy resulted from that conflict.

ARGUMENT

THE SIXTH AMENDMENT IS NOT VIOLATED WHEN A TRIAL COURT FAILS TO INQUIRE INTO A POTENTIAL CONFLICT OF INTEREST ABOUT WHICH IT REASONABLY SHOULD HAVE KNOWN, UNLESS A DEFENDANT SHOWS AN ACTUAL CONFLICT THAT ADVERSELY AFFECTED COUNSEL'S PERFORMANCE

A. The Constitution Only Protects Against Deficiencies In Counsel's Performance That Prejudice The Defense

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." That right is "fundamental to our system of justice." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981); see *Strickland* v. *Washington*, 466 U.S. 668, 685 (1984); *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963). As this Court has explained, "[l]awyers in criminal cases 'are necessities, not luxuries.' Their presence is essential because they are the means through which the other rights of the person on trial are secured." *United*

States v. *Cronic*, 466 U.S. 648, 653 (1984) (footnote omitted). Further, "[t]he right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland*, 466 U.S. at 685.

"[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Lockhart* v. *Fretwell*, 506 U.S. 364, 369 (1993) (quoting *Cronic*, 466 U.S. at 658). As a result, the Court has repeatedly emphasized that, "[a]bsent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *Ibid.*; see *Strickland*, 466 U.S. at 686; *Kimmelman* v. *Morrison*, 477 U.S. 365, 374 (1986); *Nix* v. *Whiteside*, 475 U.S. 157, 175 (1986); *United States* v. *Morrison*, 449 U.S. at 364-365. In short, "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Strickland*, 466 U.S. at 692.

Prejudice is always required to establish a violation of the Sixth Amendment right to counsel. In three specific contexts, however, this Court has held that prejudice may be presumed. The first two contexts involve cases in which a defendant is actually or constructively denied counsel. *Smith* v. *Robbins*, 528 U.S. 259, 287 (2000); see *Cronic*, 466 U.S. at 659 n.25. The Court has explained that "[p]rejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost." *Strickland*, 466 U.S. at 692. In addition, "such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent." *Ibid.*

The other context in which the Court has held that prejudice may be presumed involves cases in which "counsel is burdened by an actual conflict of interest." *Robbins*, 528 U.S. at 287. As the Court explained in *Strickland*, however, the presumption of prejudice in that context is "more limited" than in the context of the actual or constructive denial of counsel. 466 U.S. at 692; see *ibid.* ("[T]he rule is not quite the *per se* rule of prejudice that exists for the Sixth Amendment claims mentioned above."). "Prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Ibid.* (quoting *Cuyler* v. *Sullivan*, 446 U.S. 335, 350 (1980)); see *Robbins*, 528 U.S. at 287 ("'[P]rejudice is presumed when counsel is burdened by an actual conflict of interest,' although in such a case we do require the defendant to show that the conflict adversely affected his counsel's performance") (citation omitted); cf. *Holloway* v. *Arkansas*, 435 U.S. 475 (1978).[2]

Petitioner argues that this Court's precedents establish a more accommodating rule for evaluating Sixth Amendment claims when a trial court fails to inquire into a potential conflict of interest about which it reasonably should have known. In that context, petitioner claims (at 25) that "[n]o showing of 'adverse effect' is required." As explained below, this Court's decisions do not support that contention.[3]

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[2] As discussed below (pp. 13-14), in *Holloway*, the Court found a Sixth Amendment violation based on an attorney's own objections that he was burdened by a conflict of interest in undertaking a joint representation of multiple defendants. The *Strickland* Court did not address *Holloway* in discussing the Sixth Amendment inquiry for conflict-of-interest cases.

[3] The Sixth Amendment principles discussed above apply in the same fashion in capital cases, and to capital sentencing proceedings. See *Strickland*, 466 U.S. at 686-687. Indeed, several of this Court's decisions involving claims of ineffective assistance of counsel arose from capital cases,

B. Under This Court's Precedents, A Trial Court's Failure To Inquire Into An Apparent Conflict To Which The Defendant Did Not Object Does Not Eliminate The Need To Show An Actual Conflict Adversely Affecting The Representation

Petitioner's argument that prejudice should be presumed without any inquiry into whether the alleged conflict adversely affected counsel's performance is grounded on his reading of the trio of *Holloway* v. *Arkansas*, 435 U.S. 475 (1978), *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980), and *Wood* v. *Georgia*, 450 U.S. 261 (1981). The court of appeals correctly held that those precedents, along with subsequent decisions such as *Strickland*, require petitioner to show "both an actual conflict and an adverse effect" to establish a violation of his Sixth Amendment rights. Pet. App. 11.

1. a. In *Holloway*, a public defender was appointed to represent three defendants who were tried together on the same robbery and rape charges. Before trial, the public defender moved for appointment of separate counsel, asserting that his clients had potentially conflicting interests. The trial court denied that motion. The attorney renewed his objection on the eve of trial and again during the midst of trial, explaining that the conflicting interests of his clients would prevent him from fully examining, or cross-examining the codefendants when they took the stand to testify in their own defense. See 435 U.S. at 478. The trial court declined to take corrective action. The jury convicted all three defendants. On appeal, they "claim[ed] that their representation by a single appointed attorney, over their objection, violated [the Sixth Amendment]." *Id.* at 481. This Court agreed.

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including *Strickland* itself. See also, *e.g.*, *Lockhart* v. *Fretwell*, *supra*; *Burger* v. *Kemp*, 483 U.S. 776, 783 (1987). Petitioner here does not rely upon the capital nature of this case, or the Eighth Amendment, in arguing that he is entitled to relief under the Sixth Amendment.

Holloway held that "whenever a trial court improperly requires joint representation over timely objection reversal is automatic." 435 U.S. at 488. Prejudice is presumed without requiring a showing that the conflict adversely affected the representation. In so holding, the Court observed that defense counsel's timely objection to a conflict is itself "persuasive" evidence of a Sixth Amendment violation because counsel "in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop." *Id.* at 485-486. Moreover, attorneys must act with candor as "officers of the court," lending additional weight to such an objection. *Ibid.*

The Court also stated that prejudice inheres in requiring a defense attorney to proceed with a joint representation over his own objection that he is burdened by a conflict. The Court derived that principle from *Glasser* v. *United States*, 315 U.S. 60, 75-76 (1942), which the Court read as "presuppos[ing] that * * * joint representation, over [defense counsel's] express objections, prejudiced the accused in some degree." 435 U.S. at 489. Finally, the Court observed that "a rule requiring a defendant to show that a conflict of interests—which he and his counsel tried to avoid by timely objections to the joint representation—prejudiced him in some specific fashion would not be susceptible of intelligent, evenhanded application." *Id.* at 490.[4]

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[4] In *Holloway*, the Court theorized about how a conflict of interest could impair an attorney's performance in the joint-representation context, see 435 U.S. at 490, but did not make any finding on impairment. In his dissent, Justice Powell questioned the Court's reliance on *Glasser* in that regard, pointing out that *Glasser* looked for "record support for [defendent's] claim of 'impairment' of his Sixth Amendment right to assistance of counsel." *Id.* at 492 (Powell, J., joined by Blackmun and Rehnquist, JJ.). At the same time, the record in *Holloway* established that the asserted conflict prevented counsel from fully examining or cross-examining his clients at trial. See *id.* at 478-480.

b. In *Sullivan*, the Court considered what is required to prove a Sixth Amendment violation when a defendant does *not* object to any conflict of interest at trial. Two lawyers represented three defendants who were charged with the same murders and tried separately. Sullivan was tried first and convicted. Neither Sullivan nor his lawyers objected to any conflict at trial. When his codefendants were subsequently acquitted, however, Sullivan collaterally attacked his conviction on the ground that he was "denied effective assistance of counsel because his defense lawyers represented conflicting interests." 446 U.S. at 338. The court of appeals held that just as in *Holloway*, the possibility of a conflict was "sufficient to prove a violation of Sullivan's Sixth Amendment rights." *Id.* at 340. This Court reversed.

The Court explained that in *Holloway* "[t]he trial court refused to consider the appointment of separate counsel despite the defense lawyer's timely and repeated assertions that the interests of his clients conflicted." 446 U.S. at 345. "[A] lawyer *forced* to represent codefendants whose interests conflict cannot provide the adequate legal assistance required by the Sixth Amendment." *Ibid.* (emphasis added). To help protect against such a failure, "*Holloway* requires state trial courts to investigate timely objections to multiple representations." *Id.* at 346. The *Sullivan* Court added that, "[u]nless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry," and found that the facts in *Sullivan* did not trigger any such duty to inquire. *Id.* at 347.

The *Sullivan* Court recognized that the equation changes when a defendant does not object to any conflict at trial. When a trial court does not "fail[] to afford" a defendant "the opportunity to show that potential conflicts impermissibly imperil his right to a fair trial * * *, a reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance." 446 U.S. at 348. Accordingly, the

Court held that, "[i]n order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Ibid.*

c. *Wood* also involved a situation in which there was no objection to any conflict at trial. The Court granted certiorari in *Wood* to consider whether a state court improperly revoked the probations of three codefendants who were convicted of distributing obscene materials, simply because they had failed to pay fines imposed as part of their sentences. 450 U.S. at 264. After granting certiorari, the Court discovered that a possible conflict could have infected the lower court proceedings. The defendants' lawyer had been furnished by their employer, and was an agent of that employer. At the same time, the defendants' employer, which had initially agreed to pay any fines incurred by defendants, declined to pay the fines that had resulted in revocation of defendants' probation. See *id.* at 266-267.

Rather than decide the question on which it granted certiorari, the Court considered whether due process required that the defendants be afforded another revocation hearing untainted by any conflict in representation.[5] The Court stated that "[o]n the record before us, we cannot be sure whether counsel *was influenced in his basic strategic decisions* by the interests of the employer who hired him." 450 U.S. at 272 (emphasis added). But while the Court was unable to determine "whether an actual conflict of interest was present," it found that "the *possibility* of a conflict of interest was sufficiently apparent at the time of the revo-

[5] The Court did not consider that issue under the Sixth Amendment because the case before the Court involved a challenge only to the defendants' "probation revocations," and not to their underlying convictions. See 450 U.S. at 274 n.21.

cation hearing to impose upon the court a duty to inquire further." *Ibid.*

That potential conflict, the Court concluded, required that the judgment be vacated and the case remanded to the state courts for a determination "whether the conflict of interest that this record strongly suggests actually existed at the time of the probation revocation or earlier." 450 U.S. at 273. The Court added that, if the state court finds that "an actual conflict of interest existed at that time," then due process would require that the defendants be afforded a new revocation hearing. *Id.* at 273-274.

2. Petitioner argues (at 23) that *Wood* establishes that when a trial court fails to inquire into a potential conflict about which it reasonably should have known, a defendant "is entitled to a new trial upon the showing of an actual conflict of interests without more." The court of appeals correctly rejected that argument and held that "*Wood* does not relieve [petitioner] of showing an adverse effect" under the inquiry established by *Sullivan*. Pet. App. 14.[6]

a. The *Wood* Court never stated that it was establishing a new standard for determining when a Sixth Amendment violation exists because of a potential conflict about which the defendant did not object at trial. Indeed, far from purporting to make new *Sixth Amendment* law, the *Wood* Court expressly grounded its decision on principles of "due

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[6] In the court of appeals, petitioner also advanced the more extravagant argument that "*Wood v. Georgia* changed the rule of *Sullivan* and extended the automatic reversal rule of *Holloway* to circumstances in which a trial court ignores a conflict about which it reasonably should have known." Pet. App. 11. The Fourth Circuit properly rejected that argument as well. See *id.* at 11-13. That conclusion follows *a fortiori* from the reasons that we state below for rejecting petitioner's narrower reading of *Wood*. Petitioner has not renewed his "automatic reversal" argument in this Court, and instead now acknowledges that to prevail he must at a minimum show an actual conflict.

process." 450 U.S. at 273. Moreover, although the *Wood* Court cited *Holloway* and *Sullivan*, see *id.* at 271-272 & n.18, the Court never stated that it was altering or overriding the framework established by those decisions, or that it was dispensing with the requirement of showing an adverse effect because the trial court failed to inquire into an apparent conflict. As the court of appeals observed below, "[o]verruling by implication is not favored." Pet. App. 13. This Court should be especially loathe to conclude that *Wood sub silentio* altered the rule of *Sullivan* when the Court decided the conflict-of-interest issue in *Wood* "without the benefit of briefing and argument." 450 U.S. at 272.

b. In arguing that *Wood* dispensed with *Sullivan*'s adverse-effect prong, petitioner relies (at 27-28) on the dispositional paragraph of *Wood*, emphasizing that in vacating and remanding the Court directed the state courts to consider whether "an actual conflict existed." 450 U.S. at 273. As the court of appeals explained, however, "[t]he *Wood* Court's instruction to the trial court amounts to no more than shorthand for [the] explicit two-part test [of *Sullivan*]." Pet. App. 14. Indeed, in considering "whether an actual conflict of interest was present," the *Wood* Court looked to "whether counsel *was influenced in his basic strategic decisions* by the interests of the employer who hired him." 450 U.S. at 272 (emphasis added).

In other words, as the court of appeals reasoned, the *Wood* decision indicates that the "Court used the term 'actual conflict' to refer to a conflict of interest that has adversely affected defense counsel's 'basic strategic decisions.'" Pet. App. 14 (quoting 450 U.S. at 272). That approach tracks the inquiry established by *Sullivan*. Moreover, it squares with the common-sense understanding that an "actual conflict," as opposed to a technical or hypothetical conflict, is a conflict that *does* adversely affect counsel's performance. See *Black's Law Dictionary* 33 (5th ed. 1979)

("Actual" means "[r]eal; substantial; existing presently in act; having a valid objective existence as opposed to that which is merely theoretical or * * * possible, virtual, theoretical, hypothetical, or nominal.").[7]

The First Circuit read *Wood* in the same terms in *Brien* v. *United States*, 695 F.2d 10 (1982). *Brien* involved a federal habeas claim that a defendant was denied effective assistance of counsel because his counsel was burdened by a conflict of interest into which the trial court should have inquired. In rejecting that claim, the court first stated that to satisfy the *Sullivan* standard "the conflict must be real, not some attenuated hypothesis having little consequence to the adequacy of representation." *Id.* at 15. The court then noted that *Wood* did not alter that inquiry. *Id.* at 15 n.10. The court added that "to establish an actual conflict of interest," a defendant must prove that counsel failed to pursue a "plausible alternative defense strategy" that was "inherently in conflict with the attorney's other loyalties or interests." *Id.* at 15. In other words, the defendant must show "an actual conflict of interest that adversely affected [his] representation." *Id.* at 16.[8]

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[7] That understanding is also supported by the fact that *Sullivan* did not state the pertinent inquiry in the conjunctive, but instead stated that a defendant "must establish that an actual conflict of interest adversely affected his lawyer's performance." 446 U.S. at 350. The *Sullivan* standard may be more easily applied, or readily understood, when stated in the conjunctive fashion used by the Court in framing the question presented in this case. But at the same time, the requirement of an *actual* conflict and of an *adverse effect* on the representation are complementary components of the same inquiry.

[8] Other courts have read *Wood* in a similar fashion. See, *e.g.*, *Mountjoy* v. *Warden*, 245 F.3d 31, 39-40 (1st Cir. 2001), petition for cert. pending, No. 00-10683 (filed June 18, 2001); *United States* v. *Burney*, 756 F.2d 787, 794 (10th Cir. 1985); but see *Ciak* v. *United States*, 59 F.3d 296, 302 (2d Cir. 1995) (interpreting *Wood* to "require[] reversal where a trial court neglects its duty to inquire about a particular conflict").

c. Petitioner points (at 28) to the dictum in footnote 18 of *Wood* that "*Sullivan mandates* a reversal when the trial court has failed to make an inquiry even though it 'knows or reasonably should know that a particular conflict exists.'" 450 U.S. at 272 n.18. As the court of appeals below explained, however, that dictum does not override the rule of *Sullivan* either. Pet. App. 12-13. Footnote 18 is explicitly addressed to Justice White's dissent, which argued that the Court lacked jurisdiction to decide the due process issue in *Wood*. See 450 U.S. at 281. "Reading that footnote to require reversal in each case in which the trial court has failed to make an inquiry when it might know or should know of a conflict * * * leads to an application of the footnote * * * beyond that which was intended." Pet. App. 13.

Indeed, petitioner's reading is contradicted by the result in *Wood*. Although the *Wood* Court found that the trial court "should have been aware" of the potential conflict, the Court did not simply reverse the judgment but instead vacated and remanded for further consideration of whether "an actual conflict of interest existed." 450 U.S. at 272-273; see *Brien*, 695 F.2d at 15 n.10 (rejecting the argument that under *Wood* a "trial court's failure to inquire about potential conflicts in and of itself requires a reversal"). Furthermore, construing footnote 18 as dispensing with the adverse-effect requirement would be inconsistent with the focus in the Court's decision on whether the alleged conflict "influenced [counsel] in his basic strategic decisions." 450 U.S. at 272.

d. Petitioner's argument that *Wood* created a new rule that dispenses with *Sullivan*'s adverse-effect requirement also is belied by this Court's subsequent decisions. In the wake of *Wood*, this Court has repeatedly invoked the *Sullivan* standard in considering or discussing whether a Sixth Amendment violation exists based on a possible conflict of interest. See *Strickland*, 466 U.S. at 692; *Burger* v. *Kemp*, 483 U.S. 776, 783 (1987); *Perry* v. *Leeke*, 488 U.S. 272, 280

(1989); *Burden* v. *Zant*, 510 U.S. 132, 134 (1994); *Robbins*, 528 U.S. at 287.[9] In each of those cases, the Court recognized that its precedents "*do* require the defendant to show that the conflict adversely affected his counsel's performance." 528 U.S. at 287 (emphasis added). Although the Court has not explicitly addressed the interrelationship between *Sullivan* and *Wood*, the fact that it has never pointed to *Wood* as having established a different standard for apparent conflict cases in which no objection is made (or otherwise indicated that such a standard exists) provides further reason to reject petitioner's central proposition that the Court established such an independent inquiry in *Wood*.

C. The Requirement That A Defendant Who Does Not Object At Trial Must Show Both An Actual Conflict And An Adverse Effect To Establish A Sixth Amendment Violation Is Well-Founded And Should Be Reaffirmed In This Case

The Court should reject petitioner's invitation to dispense with *Sullivan*'s adverse-effect requirement in this case.

1. Requiring a defendant who does not object to any conflict of interest at trial to show an adverse effect on the representation is consistent with the basic understanding that, "[a]bsent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *Lockhart*, 506 U.S. at 369; see p. 11, *supra*. As the court of appeals below observed, under petitioner's rule "even a defense as brilliant as that of

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[9] In *Bonin* v. *California*, 494 U.S. 1039, 1043 (1990), Justice Marshall, joined by Justice Brennan, dissented from the denial of certiorari. They objected that the Court should have granted certiorari in that case "to decide whether a criminal defendant denied the right to conflict-free counsel must show that the conflict adversely affected his attorney's performance." In addition, they argued that "*Strickland*'s reading of *Sullivan* * * * is at odds with the holding in *Wood*," and that "a showing of actual conflict alone necessitates a new trial." *Id.* at 1043, 1046.

[Lord] Erskine would be impossible to justify if a technical conflict existed which had no effect on the performance." Pet. App. 18 n.7. Focusing exclusively on whether a conflict existed, without regard to whether such a conflict had any adverse effect on the representation, would expand the Sixth Amendment guarantee beyond its constitutional mooring.

Holloway is not to the contrary. Defense counsel in that case "repeated[ly]" objected "that the interests of his clients conflicted," but the trial court nonetheless "forced" him to proceed with the representation. *Sullivan*, 446 U.S. at 345. This Court concluded in *Holloway* that several considerations support a *per se* rule of prejudice in that context, perhaps foremost among which is that a lawyer's own representation that he is burdened by a conflict is compelling evidence that a conflict is impairing or will impair the defense. See 435 U.S. at 485-486 & n.9; Pet. App. 11. That is particularly true in the joint-representation context in which *Holloway* arose. See note 10, *infra*.

Moreover, as the Court reiterated in *Sullivan*, prejudice inheres in "forc[ing]" an attorney to represent a defendant over his own objection that he is burdened by a conflict that will impair his defense. 446 U.S. at 345. That was certainly true in *Holloway*, where counsel repeatedly advised the trial court that the conflicting interests of his client-codefendants would prevent him from fully examining, or if necessary cross-examining, them when they took the stand to testify at trial. See 435 U.S. at 478-481. Indeed, in *Holloway*, defense counsel's belief that he was burdened by a conflict circumscribed his examination of the codefendants in a manner that this Court has held amounts to the constructive denial of counsel altogether. See *Cronic*, 466 U.S. at 659 (citing *Davis* v. *Alaska*, 415 U.S. 308, 318 (1974)).

By contrast, when defense counsel does not bring a potential conflict to the trial court's attention, there is no basis for presuming that a conflict existed or, even if so, that

a conflict actually impaired the defense. Just as an objection is persuasive evidence that an attorney is in fact laboring under a perceived conflict that will impede the representation, the *absence* of an objection suggests the opposite. An attorney's silence indicates that no conflict of interest existed, or at least that he believed that any technical conflict would not adversely effect his representation. Thus, in *Sullivan*, the Court explained that in the absence of a timely objection it was reasonable for a court to "assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist." 446 U.S. at 347. Moreover, it is less likely that prejudice will inhere when counsel has not been "forced" to proceed with a representation over his timely objection that he is conflicted.

This case illustrates the problem with petitioner's rule. In contrast to *Holloway*, there is no objective indication in the trial record that petitioner's counsel believed that he was laboring under a conflict of interest. Indeed, the district court found that "Saunders did not believe that any 'continuing duties to a former client might interfere with his consideration of all facts and options for his current client.'" Pet. App. 69 (internal brackets omitted). Moreover, to the extent that a technical conflict existed, it was based on a prior representation of an individual on unrelated charges that lasted for eight days, consisted of one 15-to-30 minute meeting, and did not involve the exchange of any confidential information relevant to petitioner's case. See *id.* at 68-69. Yet petitioner's rule would require a court to presume prejudice based solely on the existence of a technical conflict due to the prior representation. Nothing in this Court's precedents compels that counter-intuitive result.[10]

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[10] The argument for presuming prejudice without any showing of an adverse effect is also problematic in light of the nature of the alleged con-

2. While petitioner does not take issue with *Sullivan*, he argues (at 29) that its adverse-effect prong is inapplicable when the trial court fails to inquire into an apparent conflict. Thus, under petitioner's approach, defendants would receive a "windfall" for purposes of the Sixth Amendment when a trial court neglects to inquire into a conflict it should have discovered. The same conflict of interest could produce two different results under the Sixth Amendment, depending on whether one trial judge or another presided over the trial, since a defendant who draws a judge who does not inquire into the conflict would be entitled to reversal without having to show any adverse effect. This Court has previously declined to accord defendants such a windfall under the Sixth Amendment, see *Lockhart*, 506 U.S. at 369-370; *Nix*, 475 U.S. at 175 ("[I]n judging prejudice and the likelihood of a different outcome, '[a] defendant has no entitlement to the luck of a lawless decisionmaker.'"), and for good reason.

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flict. The possible conflict in *Holloway*, *Sullivan*, and *Wood* arose from a lawyer's *simultaneous* representation of multiple clients or interests. The risk that a possible conflict will prejudice the defense is particularly great in that context. See *United States* v. *Tatum*, 943 F.2d 370, 376 (4th Cir. 1991). Thus, the Federal Rules of Criminal Procedure impose a duty on federal courts to inquire into the existence of a conflict in the joint representation context, but in no other context. See Fed. R. Crim. P. 44(c); *Wheat* v. *United States*, 486 U.S. 153, 161 (1988). The alleged conflict in this case did not entail the joint or simultaneous representation of conflicting interests, but rather a successive representation on unrelated charges and, even then, one in which the prior client was deceased. The risk that such a conflict, even if real, would adversely affect the current representation is much less severe than in the simultaneous representation context. Indeed, in this case, Saunders could have provided petitioner with the best possible defense without compromising the defense of his deceased prior client in *any* way. Thus, application of *Sullivan*'s adverse-effect prong is particularly appropriate outside the joint or simultaneous representation context to determine whether an alleged conflict violated a defendant's Sixth Amendment rights.

From the standpoint of ensuring that a defendant receives a fair trial, there is no more reason to *presume* a Sixth Amendment violation when a defendant fails to object to a conflict about which the trial court should have known than when a defendant fails to object to a conflict about which the court could not have known. In either case, the potential conflict is what threatens the integrity of the trial process and is the predicate for the Sixth Amendment claim. Likewise, the state of the record that exists in a collateral proceeding to determine whether a conflict existed and, if so, whether it actually infected the proceedings will be the same when a defendant does not object at trial, regardless of whether the trial court had any reason to know about the conflict. In either case, a court subsequently may take and evaluate evidence on whether an alleged conflict existed and impaired the representation, as the district court thoroughly did here. See Pet. App. 67-76. Such an inquiry fully suffices to vindicate the Sixth Amendment right.

The dissent below urged that an automatic-reversal rule is necessary to "encourage[] trial courts to pay strict attention to fundamental rights." Pet. App. 23. But the Constitution already obligates state judges to abide by and protect those rights. U.S. Const. Art. VI. There is no reason for this Court to adopt petitioner's *per se* rule on the assumption that additional incentives are necessary to ensure that state courts fully honor that duty. Cf. *Brecht* v. *Abrahamson*, 507 U.S. 619, 636 (1993). Nor is there any reason to adopt petitioner's rule to ensure that federal judges abide by their sworn oath to defend the Constitution, or their obligation to inquire into the existence of a conflict in the case of a joint representation under Rule 44(c) of the Federal Rules of Criminal Procedure. At the same time, declining to adopt petitioner's approach takes nothing away from this Court's admonishment in *Holloway* and *Sullivan* that trial courts should inquire into and eliminate potential conflicts when feasible.

3. Petitioner's argument for eliminating any inquiry into adverse effect when a trial court neglects to inquire into an apparent conflict also fails to account for the countervailing interests of the State and society at large in preserving final criminal convictions. "[W]ithout detracting from the fundamental importance of the right to counsel in criminal cases," this Court's Sixth Amendment decisions "recognize[] the necessity for preserving society's interest in the administration of criminal justice." *Morrison*, 449 U.S. at 364. Indeed, the standard that this Court adopted in *Sullivan*, and that it has reaffirmed since, for determining when the Sixth Amendment is violated based on a conflict is specifically grounded on that societal interest. See 446 U.S. at 350 ("[T]he possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance.").

The potential cost to society of "impugning" convictions such as petitioner's is enormous. The evidence presented at trial overwhelmingly established that petitioner was guilty of the capital murder of Hall. See p. 2, *supra*. Granting petitioner's federal habeas petition would require the State to release petitioner or retry him. Retrying petitioner could prove difficult, not to mention costly, because nearly a decade has passed since Hall's murder. See *Brecht*, 507 U.S. at 637 ("Retrying defendants whose convictions are set aside * * * imposes significant 'social costs.'"). At a minimum, before the State and its citizens are required to incur that cost, petitioner should be required to show that the asserted conflict adversely affected his defense.

4. Petitioner's rule also could lead to the manipulation of conflict-of-interest claims by defendants. The dichotomy created by *Holloway*'s automatic-reversal rule for when a defendant does object to a conflict at trial, and *Sullivan*'s rule for when a defendant does not, creates an added

incentive for the defense to bring any potential conflict to the attention of the trial court. By contrast, petitioner's approach—which dispenses with *Sullivan*'s requirement of an adverse effect whenever a trial court fails to inquire into an apparent conflict—would provide the defense with a *dis*incentive to bring conflicts to the attention of the trial court, since remaining silent could afford a defendant with a reliable ground for reversal in the event of conviction. If the trial court did not discover the conflict, a defendant could secure reversal merely by showing that one existed.

At the same time, petitioner's approach would unnecessarily complicate the Sixth Amendment inquiry established by this Court's decisions by creating an additional mixed question of law and fact for consideration on federal habeas review concerning whether the trial court knew, or should have known, about a conflict. Particularly when the Constitution does not command that added inquiry, the Court should be reluctant to embrace it.

D. In Applying The *Sullivan* Rule, The Court Of Appeals Properly Looked For A Link Between The Alleged Conflict And The Alleged Deficiency In Representation

Petitioner argues (at 46) that, even assuming he is required to show an adverse effect as well as an actual conflict, the court of appeals misconstrued "the 'adverse effect' prong of *Sullivan*." In particular, petitioner claims (at 46-47) that the court erred in focusing on whether counsel's failure to pursue a viable alternative defense or strategy was "linked to the actual conflict." Pet. App. 15. That argument also should be rejected.

The focus of the *Sullivan* test is whether "*an actual conflict of interest* adversely affected [the] lawyer's performance," 446 U.S. at 350 (emphasis added), and not simply whether the lawyer's performance was deficient—the focus of the typical *Strickland* claim. Indeed, *Sullivan*'s use of the

verb "affect" underscores that the pertinent inquiry is keyed to the conflict. That understanding squares with this Court's focus in *Wood* on "whether counsel was influenced in his basic strategic decisions *by the [alleged conflicting] interests*," 450 U.S. at 272 (emphasis added), as well as with the Court's application of the *Sullivan* standard in *Burger* v. *Kemp*. In *Kemp*, the Court considered whether "an adverse effect *resulted from [the attorney]'s actual conflict of interest*," and rejected that contention. 483 U.S. at 787 (emphasis added). See also, *e.g.*, *Freund* v. *Butterworth*, 165 F.3d 839, 860 (11th Cir.), cert. denied, 528 U.S. 817 (1999).[11]

The *Sullivan* inquiry does not require a reviewing court to ascertain counsel's subjective motivation for pursuing, or declining to pursue, a particular defense or strategy. *Sullivan* calls for an objective inquiry that first takes account of any conflicting interests, and then considers whether an attorney's performance was actually impaired by those interests. That inquiry is more searching than the automatic presumption of prejudice that this Court has reserved for situations in which a defendant has been actually or constructively denied counsel, but it is less taxing than the standard for showing prejudice in order to establish a violation of the Sixth Amendment in the absence of any conflict. See *Strickland*, 466 U.S. at 694 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."). In that way, the *Sullivan* rule

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[11] Petitioner asserts (at 48) that "[w]hatever his subjective motivations may have been, the objective fact is that [Saunders] was ethically *forbidden* to adopt the only motivational stance that a lawyer representing [petitioner] was permitted to have—a stance of undivided loyalty to [petitioner]." That argument is simply another way of getting to petitioner's *per se* rule that prejudice should be presumed if a technical conflict exists. As explained, neither this Court's precedents nor the practical considerations underlying them commend that approach.

strikes a proper balance between the recognition that conflicts of interests pose a worrisome potential threat to the integrity of the adversarial process, and the principle that the Sixth Amendment only protects against unprofessional conduct that actually prejudices the defense.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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