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Fourth Amendment Search and Seizure - Consensual Encounter or Coerced Questioning? *United States v. Drayton*, 122 S. Ct. 2105 (2002)

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CASE NOTES

FOURTH AMENDMENT SEARCH AND SEIZURE – Consensual Encounter or Coerced Questioning? *United States v. Drayton*, 122 S. Ct. 2105 (2002).

INTRODUCTION

On February 4, 1999, Christopher Drayton and Clifton Brown, Jr., were passengers on a Greyhound bus en route from Ft. Lauderdale, Florida, to Detroit, Michigan.¹ During a scheduled stop at Tallahassee, Florida, all thirty passengers aboard the bus were asked to exit the bus for cleaning and refueling procedures.² After the procedures were completed, the driver checked the passengers' tickets as they reboarded the bus.³ Once the driver had checked in all of the passengers, he went to the terminal to complete the required paperwork.⁴ As the driver was leaving, he gave three members of the Tallahassee Police Department permission to board the bus.⁵ The officers were dressed in street clothes, had concealed weapons, and displayed their badges around their necks or in their hands.⁶

Officers Lang, Hoover, and Blackburn boarded the bus to conduct routine questioning in accordance with Florida's effort to deter the transportation of drugs and illegal weapons.⁷ Once on the bus, Officers Lang and Blackburn proceeded to the back of the bus, where Officer Blackburn remained during the interdiction process.⁸ The third member of the team, Officer Hoover, remained at the front of the bus.⁹ He knelt on the driver's seat next to the exit where he could see all of the passengers and they could see him.¹⁰ Officer Lang, without giving a general announcement to the passengers identifying himself or explaining the reason for his presence, began questioning passengers.¹¹ At no time during the questioning did Officer Lang or the other officers inform the passengers they had the right to refuse to cooperate.¹²

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1. *United States v. Drayton*, 122 S. Ct. 2105, 2109 (2002).
 2. *Id.*; *United States v. Drayton*, 231 F.3d 787, 788 (11th Cir. 2000).
 3. *Drayton*, 122 S. Ct. at 2109.
 4. *Id.*
 5. *Id.*
 6. *Id.*; *Drayton*, 231 F.3d at 788-89.
 7. *United States v. Drayton*, 122 S. Ct. 2105, 2109 (2002).
 8. *Id.*
 9. *Id.*
 10. *Id.*
 11. *United States v. Drayton*, 231 F.3d 787, 789 (11th Cir. 2000).
 12. Brief for Respondent at 4, *United States v. Drayton*, 122 S. Ct. 2105 (2002) (No. 01-631).

As Officer Lang worked his way back to the front of the bus, he encountered Drayton and Brown.¹³ At this point, Officer Lang, with his face twelve to eighteen inches away from Drayton and Brown, and in a voice just loud enough for Drayton and Brown to hear, said, "I'm investigator Lang with the Tallahassee Police Department. We're conducting bus interdiction, attempting to deter drugs and illegal weapons being transported on the bus. Do you have any bags on the bus?"¹⁴ Brown and Drayton answered by pointing to a bag in the overhead luggage compartment.¹⁵ Officer Lang then asked Drayton and Brown if he could search their luggage.¹⁶ Both Drayton and Brown answered in the affirmative and the officers searched the luggage, which contained no contraband.¹⁷ However, this was not the end of the search, as Officer Lang then requested a pat down search of Brown.¹⁸ Brown subsequently gave him permission for the search.¹⁹ During the search, Officer Lang detected hard objects in both thigh areas that were similar to drug packages he had found on other occasions.²⁰ Lang arrested Brown, escorted him off the bus, and asked Drayton to consent to a similar search.²¹ Drayton gave Lang permission for a pat down search in which Lang again found hard objects in the thigh areas.²² Consequently, Drayton was also arrested.²³ Once off the bus, the officers determined the hard objects to be plastic bundles of powder cocaine.²⁴

Drayton and Brown were convicted separately in the United States District Court for the Northern District of Florida of conspiracy to distribute cocaine and possession of cocaine with intent to distribute.²⁵ Both Drayton and Brown appealed, contending that the trial court erred in denying the motion to suppress evidence of the cocaine.²⁶ Drayton and Brown argued the evidence had been obtained by an illegal search and seizure in violation of the Fourth Amendment.²⁷ In a consolidated appeal, a panel of the United States Court of Appeals for the Eleventh Circuit reversed the decision of the District Court and held that the bus search violated the Fourth Amendment's prohibition against unreasonable searches and seizures.²⁸ The panel rea-

13. *United States v. Drayton*, 122 S. Ct. 2105, 2109 (2002).

14. *Id.*; Brief for Petitioner at 4, *United States v. Drayton*, 122 S. Ct. 2105 (2002) (No. 01-631) [hereinafter *Petitioner's Brief*].

15. *Drayton*, 122 S. Ct. at 2109; *Petitioner's Brief* at 4.

16. *Drayton*, 122 S. Ct. at 2109.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 2109-10.

23. *Id.* at 2110.

24. *Id.*

25. *United States v. Drayton*, 231 F.3d 787, 788 (11th Cir. 2000).

26. *Id.*

27. *Id.*

28. *United States v. Drayton*, 122 S. Ct. 2105, 2110 (2002).

soned that a reasonable person would not have felt free to ignore the officers or exit the bus without some positive indication from the police that he could refuse to consent.²⁹

The United States Supreme Court granted certiorari to consider whether officers conducting bus interdiction by asking passengers questions “must advise bus passengers during these encounters of their right not to cooperate.”³⁰ In a six-to-three decision, the Court reversed the Eleventh Circuit’s decision and held that the totality of the circumstances did not create an illegal search and seizure.³¹ Furthermore, the Court held that during suspicionless bus searches, law enforcement officers do not have to inform passengers of their right to refuse to cooperate with the officers.³²

Initially, this case note will trace the development of Fourth Amendment search and seizure consent law prior to *United States v. Drayton*. Secondly, this case note will discuss the case history of *United States v. Drayton*. Finally, this case note will analyze the “totality of the circumstances” test as applied by the United States Supreme Court in *Drayton*. During this analysis, this case note will argue: (1) the *Drayton* decision has lessened the protection the Fourth Amendment was intended to provide; (2) the reasonable person test used to determine the consensual nature of encounters between law enforcement and citizens as applied by the United States Supreme Court is unrealistic and allows governmental interests to overrun individual constitutional rights; and (3) *Drayton* was decided under the influence of current events.

BACKGROUND

The foundation of American search and seizure law is set forth in the Fourth Amendment to the United States Constitution, which provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.³³

The authors of the Constitution added the Fourth Amendment because they:

[S]ought to protect Americans in their beliefs, their

29. *Drayton*, 231 F.3d at 790.

30. *Drayton*, 122 S. Ct. at 2108.

31. *Id.* at 2110.

32. *Id.* at 2110, 2112.

33. U.S. CONST. amend. IV.

thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.³⁴

Consensual Encounters

Prior to 1968, Fourth Amendment protection against illegal seizures and unreasonable searches was analyzed in terms of probable cause.³⁵ In *Terry v. Ohio*, however, the Supreme Court provided an exception to the general rule that seizures of persons must be based on probable cause.³⁶ In *Terry*, a police officer was patrolling a downtown area of Cleveland, Ohio, when he noticed two individuals acting suspiciously.³⁷ The police officer suspected the men were preparing to conduct a robbery.³⁸ In response to this apprehension, the officer followed the men and finally approached them to ask questions.³⁹ After the officer asked them a few questions, he grabbed one of the men, Terry, and conducted a quick frisk.⁴⁰ This frisk revealed a pistol in Terry's coat.⁴¹ Terry was subsequently convicted of carrying a concealed weapon.⁴²

Based upon these facts, the Court decided whether it is always unreasonable for a policeman to seize a person and conduct a limited search without probable cause.⁴³ After an evaluation of the competing interests, the Court concluded that in order to provide protection to the nation's law enforcement officials, police officers must have some authority to search for weapons without probable cause to make an arrest when the officer reasonably believes he is dealing with an individual that is armed and dangerous.⁴⁴ The search is reasonable, however, only if a reasonably prudent person in the same circumstance would believe that his safety or others' safety was in peril.⁴⁵

34. *California v. Hodari D.*, 499 U.S. 621, 646 (1991) (Stevens, J., dissenting) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

35. *Dunaway v. New York*, 442 U.S. 200, 208-09 (1979).

36. *Id.* (citing *Terry v. Ohio*, 392 U.S. 1 (1968)).

37. *Terry*, 392 U.S. at 5.

38. *Id.* at 6.

39. *Id.* at 6-7.

40. *Id.* at 7.

41. *Id.*

42. *Id.* at 4.

43. *Id.* at 15.

44. *Id.* at 27.

45. *Id.*

In addition to deciding the probable cause issue, the Court also addressed the matter of consensual encounters.⁴⁶ The Court noted, "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."⁴⁷ Justice White, in his concurring opinion, agreed with this contention when he wrote, "There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets."⁴⁸

The Court further clarified the bounds of a consensual encounter and further developed the definition of a seizure in *United States v. Mendenhall*.⁴⁹ In *Mendenhall*, agents of the Drug Enforcement Agency (DEA) approached Sylvia Mendenhall while she was passing through an airport and began asking her questions.⁵⁰ The agents asked to see Mendenhall's identification and flight ticket.⁵¹ The personal identification and the ticket that Mendenhall subsequently provided to the police bore different names.⁵² After returning the identification and ticket, the officers asked Mendenhall to accompany them to a DEA office in the airport.⁵³ At the office, Mendenhall was asked if she would consent to a search of her person and she answered in the affirmative.⁵⁴ During the search, heroin was discovered in Mendenhall's undergarments.⁵⁵ Mendenhall was subsequently arrested and convicted.⁵⁶ Ultimately, the Supreme Court was called upon to determine if Mendenhall's Fourth Amendment rights had been violated.⁵⁷

The *Mendenhall* Court began its analysis by noting that all seizures of a person, no matter how brief, must pass the Fourth Amendment requirement that the seizure be based upon objective justification.⁵⁸ The Court then

46. *Id.* at 19 n.16. Although the Court discussed the issue of consensual encounters, it did not make an explicit ruling indicating the consequences or limits of such a consensual encounter. *See id.* ("We thus decide nothing today concerning the constitutional propriety of investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation."). *See also id.* at 16 ("Given the narrowness of this question, we have no occasion to canvass in detail the constitutional limitations upon the scope of a policeman's power when he confronts a citizen without probable cause to arrest him.").

47. *Id.* at 19 n.16.

48. *Id.* at 34 (White, J., concurring) (noting that although officer can approach and ask questions, citizen being approached can simply walk away).

49. *United States v. Mendenhall*, 446 U.S. 544 (1980) (Stewart, J., plurality).

50. *Id.* at 547-48 (Stewart, J., plurality).

51. *Id.* at 548 (Stewart, J., plurality).

52. *Id.* (Stewart, J., plurality).

53. *Id.* (Stewart, J., plurality).

54. *Id.* at 548-49 (Stewart, J., plurality).

55. *Id.* at 549 (Stewart, J., plurality).

56. *Id.* (Stewart, J., plurality).

57. *Id.* at 547 (Stewart, J., plurality).

58. *Id.* at 551 (Stewart, J., plurality).

proceeded to determine if Mendenhall had been seized when the officers approached her and asked her questions, including the requests to see her identification and plane ticket.⁵⁹ In adhering to the *Terry* decision, the Court first explained that constitutional safeguards are only implemented when a citizen is restrained by means of physical force or show of authority.⁶⁰ Next, the Court stated that "the purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals."⁶¹ Finally, in concluding its seizure analysis, the Court clarified the *Terry* test by holding that a person is seized when circumstances surrounding the incident indicate that a reasonable person would have believed he was not free to leave.⁶² The Court then applied the facts to the new standard and found that Mendenhall was not seized when the officers approached her and asked her questions.⁶³

In 1983, the Court again addressed consensual encounters in *Florida v. Royer*, a case with facts very similar to *Mendenhall*.⁶⁴ Regardless of the similarity of the facts, *Royer* produced a different result than *Mendenhall*.⁶⁵ In *Royer*, two plain-clothes officers approached Royer in an airport, identified themselves as policemen, and asked him if he had time to answer some questions; Royer said he did.⁶⁶ The officers requested to see Royer's identification and airline tickets.⁶⁷ As in *Mendenhall*, the items carried different names.⁶⁸ The officers kept the ticket and identification and asked Royer to accompany them to a room.⁶⁹ Once in the room, the officers asked to search Royer's luggage, and he unlocked the luggage without orally consenting.⁷⁰ Consequently, drugs were found in Royer's luggage.⁷¹ Royer was arrested and later convicted.⁷²

59. *Id.* at 551-57 (Stewart, J., plurality).

60. *Id.* at 552 (Stewart, J., plurality) (citing *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968)).

61. *Id.* at 553-54 (Stewart, J., plurality) (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976)) (internal quotations omitted).

62. *Id.* at 554 (Stewart, J., plurality). The Court noted that some circumstances that amounted to a seizure might include the threatening presence of several officers, an officer displaying a weapon, physical touching of the citizen by the officer, or the use of language or tone of voice to indicate that compliance was required. *Id.*

63. *Id.* at 555 (Stewart, J., plurality).

64. *Florida v. Royer*, 460 U.S. 491 (1983) (White, J., plurality).

65. *Id.* at 506-07 (White, J., plurality).

66. *Id.* at 493-94 (White, J., plurality).

67. *Id.* at 494 (White, J., plurality).

68. *Id.* (White, J., plurality).

69. *Id.* (White, J., plurality).

70. *Id.* (White, J., plurality).

71. *Id.* (White, J., plurality).

72. *Id.* at 495 (White, J., plurality).

The *Royer* Court began its analysis with six preliminary observations.⁷³ First, the Court noted in the absence of probable cause, the validity of the luggage search depended on Royer's consent.⁷⁴ Secondly, the Court explained:

[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.⁷⁵

In a third observation, the Court noted that not all seizures of the person must be justified by probable cause because in some instances, under *Terry*, an officer may stop and frisk a citizen "if there is articulable suspicion that a person has committed or is about to commit a crime."⁷⁶ Next, in a related observation, the Court stated that *Terry* only allows for limited exceptions to the general rule requiring probable cause.⁷⁷ The Court went on to note that after *Dunaway* and *Brown*, statements given during a period of illegal detention, even if voluntarily given, are inadmissible if "they are the product of the illegal detention and not the result of an independent act of free will."⁷⁸

73. *Id.* at 497-501 (White, J., plurality).

74. *Id.* at 497 (White, J., plurality).

75. *Id.* (White, J., plurality).

76. *Id.* at 498 (White, J., plurality).

77. *Id.* at 499 (White, J., plurality).

78. *Id.* at 501 (White, J., plurality) (citing *Dunaway v. New York*, 442 U.S. 200, 218-19 (1979); *Brown v. Illinois*, 422 U.S. 590, 601-02 (1975)). In *Brown*, a man was arrested in his apartment without probable cause. *Brown*, 422 U.S. at 591-92. The police then took the man to the police station where they began questioning him. *Id.* at 592-93. Ultimately, the man made statements that he was involved in a murder. *Id.* at 594-95. The United States Supreme Court granted certiorari to decide if voluntary statements made after an illegal arrest are admissible due to the recitation of the *Miranda* warnings. *Id.* at 591-92. The Court decided that the statements were not admissible. *Id.* at 605. In reaching the holding, the Court noted:

If *Miranda* warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. Arrests made without warrant or without probable cause, for questioning or investigation, would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving *Miranda* warnings.

Id. at 602. Although the Court refused to adopt a per se rule that admitted statements made after the *Miranda* warnings, the Court also refused to rule that all statements made after an illegal arrest are inadmissible. *Id.* at 603. Instead, the Court set forth a test requiring a break in the causal chain between the illegal arrest and the incriminating statements. *Id.* at 602. In *Dunaway*, a man was apprehended by the police in connection with a recent burglary. *Dunaway*, 442 U.S. at 203. The police, however, did not have enough information to warrant an arrest. *Id.* Nevertheless, the police kept the man at the police station where he would have

In the final preliminary notation, the Court explained that if a seizure did not occur then Royer's consent to the luggage search would be valid.⁷⁹

After making the preliminary observations, the Court went on to hold that Royer was seized.⁸⁰ The Court based this holding on the fact that the narcotics agents did not return Royer's ticket and identification, asked him to accompany them to a room, and did not inform Royer that he was free to leave.⁸¹ This, as the Court noted, created an effective seizure for purposes of the Fourth Amendment because the actions by the officers amounted to a show of authority such that a reasonable person would not have believed he was free to leave.⁸²

The Court went on to note that the *Royer* decision was consistent with the *Mendenhall* holding, regardless of the differing end results.⁸³ The Court explained how the facts of the cases distinguish them and how the facts allow for different holdings.⁸⁴ For instance, in *Mendenhall*, the ticket and identification were given back, but in *Royer*, the officers retained the ticket and identification.⁸⁵ Furthermore, in *Royer* the man's luggage was detained, but in *Mendenhall* there was no luggage involved in the search.⁸⁶

In closing its analysis, the Court acknowledged that there is not a bright-line test to determine when a consensual encounter becomes a seizure.⁸⁷ In fact, according to the Court, there are so many possible circumstances that "it is unlikely that the courts can reduce to a sentence or paragraph a rule that will provide unarguable answers to the question whether there has been an unreasonable search or seizure in violation of the Fourth Amendment."⁸⁸

been restrained if he attempted to leave. *Id.* The man eventually incriminated himself in connection with the crime. *Id.* Initially, the Court held that the police had violated the Fourth and Fourteenth Amendments when they seized the petitioner without probable cause. *Id.* at 216. The Court, following *Brown*, also held that the connection between the police conduct and the incriminating evidence obtained during illegal detention was not sufficiently attenuated to permit the use of the evidence at trial. *Id.* at 219.

79. *Florida v. Royer*, 460 U.S. 491, 501 (1983) (White, J., plurality).

80. *Id.* (White, J., plurality).

81. *Id.* (White, J., plurality).

82. *Id.* at 501-02 (White, J., plurality).

83. *Id.* at 503 n.9 (White, J., plurality).

84. *Id.* (White, J., plurality).

85. *Id.* (White, J., plurality).

86. *Id.* (White, J., plurality).

87. *Id.* at 506 (White, J., plurality).

88. *Id.* at 506-07 (White, J., plurality). Although the Court declined the opportunity to create a bright line test, the Court did note that "by returning his ticket and driver's license, and informing him that he was free to go if he so desired, the officers may have obviated any claim that the encounter was anything but a consensual matter from start to finish." *Id.* at 504 (White, J., plurality) (emphasis added).

In *Immigration and Naturalization Service v. Delgado*, the Court analyzed the constitutionality of consensual searches that occur at the workplace.⁸⁹ In *Delgado*, INS agents questioned workers at a factory in an effort to determine the citizenship of the workers.⁹⁰ The agents came to the factory during working hours and conducted surveys of the workforce.⁹¹ During the surveys, some agents walked through the factory and questioned the workers while other agents were posted at the exits.⁹² Nevertheless, during the survey the workers were allowed to move around the factory and continue their work.⁹³ As a result of the questioning, several workers from the factory were detained as illegal aliens.⁹⁴ Subsequently, the detainees filed suit in the United States District Court for the Central District of California claiming that the factory searches were unconstitutional.⁹⁵ The District Court granted summary judgment to the INS.⁹⁶ The Court of Appeals for the Ninth Circuit then reversed the District Court and left the Supreme Court to decide if the surveys and the manner in which they were conducted (i.e., with officers at the exits) constituted a seizure under the Fourth Amendment.⁹⁷

The Court began its analysis by acknowledging that the Fourth Amendment does not prevent all contact between citizens and the police and that not all encounters between citizens and policemen constitute seizures.⁹⁸ The Court stated that, according to *Royer*, questioning a citizen about his identification does not create a seizure.⁹⁹ Following the *Mendenhall* test, the Court also noted that a seizure only occurs if a reasonable person would feel like he was not free to leave.¹⁰⁰ In using these notations as guidelines, the Court held that a seizure did not occur and the questioning only amounted to "classic consensual encounters."¹⁰¹ The Court rejected the claim that the officers at the exits would make a reasonable person feel like he was not free to leave.¹⁰² In fact, as the Court noted, the officers at the doors "should have given respondents no reason to believe that they would be detained if they gave truthful answers to the questions put to them or if they simply refused to answer."¹⁰³ Furthermore, as the Court explained, the real reason the em-

89. *INS v. Delgado*, 466 U.S. 210 (1984).

90. *Id.* at 212.

91. *Id.*

92. *Id.*

93. *Id.* at 213.

94. *Id.*

95. *Id.*

96. *Id.* at 214.

97. *Id.* at 214-15.

98. *Id.* at 215 (citations omitted).

99. *Id.* at 216.

100. *Id.* at 216-17 (citing *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (Stewart, J., plurality)).

101. *Id.* at 218, 221.

102. *Id.* at 218.

103. *Id.*

ployees could not leave the building is because their employer required them to stay at the factory and continue working.¹⁰⁴

In 1988, the United States Supreme Court again addressed the issue of personal seizures in *Michigan v. Chesternut*.¹⁰⁵ In *Chesternut*, the Supreme Court was called upon to decide whether an officer's pursuit of a citizen who ran upon sight of the police constituted a seizure.¹⁰⁶ The facts of the case indicated that Chesternut was talking to another man on a street corner when a patrol car containing four police officers pulled up.¹⁰⁷ Chesternut then ran around the corner and up the adjoining street.¹⁰⁸ The patrol car followed Chesternut around the corner, drove beside him for a while, and then the officers ultimately apprehended him.¹⁰⁹ Chesternut was charged with possessing illegal substances; however, the district court dismissed the charges.¹¹⁰

In its analysis, the Court began by criticizing both parties for trying to suggest a bright-line rule for seizures.¹¹¹ Instead, as the Court noted, seizure is determined by all of the circumstances surrounding the incident using the "free to leave" test from *Mendenhall*.¹¹² The Court further noted that it has purposefully avoided a bright-line rule because bright-line rules are too precise.¹¹³ The totality of the circumstances test focuses on the entire incident, rather than particular details, because what constitutes a restraint of

104. *Id.*

105. *Michigan v. Chesternut*, 486 U.S. 567 (1988). In 1984, the Supreme Court addressed a case involving consensual encounters in airports. *Florida v. Rodriguez*, 469 U.S. 1 (1984). The facts were very similar to the circumstances in *Royer* and *Mendenhall*. *Id.* at 2-4. Therefore, using the test set forth in *Royer* and *Mendenhall*, the Court found that no seizure occurred. *Id.* at 5-7. Although the case dealt with consensual encounters, the Court did not provide any new guidelines or rules when it made its ruling. *Id.*

106. *Chesternut*, 486 U.S. at 569.

107. *Id.*

108. *Id.*

109. *Id.* During the chase, Chesternut pulled packages of codeine pills from his pockets and discarded them on the ground. *Id.* The police did not apprehend and arrest Chesternut until after he had discarded the pills and the police had determined that the pills were illegal drugs. *Id.*

110. *Id.* at 569-70.

111. *Id.* at 572.

112. *Id.* (citing *INS v. Delgado*, 466 U.S. 210, 215 (1984); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (Stewart, J., plurality)). Although the Court noted the *Mendenhall* test in the analysis, the Court may have made an amendment to the *Mendenhall* "free to leave" test when it stated that the police action "was not so intimidating that respondent could reasonably have believed that he was not free to disregard the police presence and go about his business." *Michigan v. Chesternut*, 486 U.S. 567, 576 (1988) (citing *Delgado*, 466 U.S. at 216). Although the Court cites *Delgado* as the source of this new test, the *Delgado* holding does not explicitly set out the new test. *Delgado*, 466 U.S. at 216. Instead, *Delgado* appears to rely on the previous "free to leave" test as promulgated in *Mendenhall*. *Id.* at 216-17 (citing *Mendenhall*, 446 U.S. at 554 (Stewart, J., plurality)).

113. *Chesternut*, 486 U.S. at 573.

liberty will change in each varying situation.¹¹⁴ The Court explained that the totality of the circumstances test allows the attending officers to decide what will amount to a seizure in any given situation.¹¹⁵

In applying the totality of the circumstances test, the *Chesternut* Court found that a seizure had not occurred because a reasonable person would not have felt like the police were trying to capture him or restrain his movement.¹¹⁶ The Court then listed several factors that, although they did not occur, could have indicated a seizure had they occurred.¹¹⁷ Initially, the Court mentioned that the police did not activate the sirens or flashers nor did the police direct Chesternut to stop.¹¹⁸ The Court also noted that the police did not display their weapons and did not drive the car in a manner that would have halted Chesternut's progress.¹¹⁹

Prior to the Supreme Court's decision in *Chesternut*, it appeared that the *Mendenhall* "free to leave" test was the settled standard to determine consensual searches. Nevertheless, in *Chesternut*, the Court appeared to consider a variation of the *Mendenhall* test.¹²⁰ In *California v. Hodari D.*, the United States Supreme Court discussed the *Chesternut* variation.¹²¹ In *Hodari D.*, a case with issues very similar to *Chesternut*, a juvenile was arrested for possession of cocaine.¹²² On a routine patrol, police officers noticed several people gathered in a group.¹²³ As the officers approached the group in the patrol car, Hodari D. ran from the scene.¹²⁴ The officers became suspicious and chased Hodari D.¹²⁵ During the chase, Hodari D. dropped drugs from his pockets.¹²⁶ The police eventually apprehended and arrested Hodari D.¹²⁷

The United States Supreme Court granted certiorari to determine if Hodari D. was seized at the time he dropped the drugs.¹²⁸ The Court also

114. *Id.*

115. *Id.* at 574.

116. *Id.* at 574-75. The Court acknowledged that there may be some instances where a police pursuit may amount to a seizure if the police command the person to halt. *Id.* at 576 n.9. Nevertheless, they noted that such circumstances were not before them in *Chesternut*. *Id.* They therefore decided to "leave to another day the determination of the circumstances in which police pursuit could amount to a seizure under the Fourth Amendment." *Id.*

117. *Id.* at 575.

118. *Id.*

119. *Id.*

120. For a discussion of the *Chesternut* variation of the *Mendenhall* "free to leave" test, see *supra* note 112.

121. *California v. Hodari D.*, 499 U.S. 621, 628 (1991).

122. *Id.* at 623.

123. *Id.* at 622.

124. *Id.* at 622-23.

125. *Id.* at 623.

126. *Id.*

127. *Id.*

128. *Id.*

phrased the question presented as “whether, with respect to a show of authority as with respect to application of physical force, a seizure occurs even though the subject does not yield.”¹²⁹ The Court began its analysis by noting the common meaning of seizure.¹³⁰ However, as the Court acknowledged, seizure does not apply to a policeman who yells at a fleeing suspect to “stop, in the name of the law.”¹³¹ The Court also noted that the officer’s uncomplained-with show of authority did not constitute a common-law arrest, which is considered a seizure.¹³² Next, the Court analyzed the seizure issue in light of *Mendenhall* and *Chesternut*.¹³³ The Court decided that a seizure had not occurred under the *Mendenhall* test.¹³⁴ The Court then discussed the *Chesternut* totality of the circumstances variation.¹³⁵ The Court did not determine, however, whether a seizure had occurred under this test.¹³⁶ In conclusion, the Court held that Hodari D. had not been seized because he did not comply with any show of authority that may have been present.¹³⁷

In *Florida v. Bostick*, the United States Supreme Court analyzed consensual searches on buses in light of the *Delgado*, *Hodari D.* and *Chesternut* decisions.¹³⁸ The *Bostick* Court considered whether police officers can board buses and ask questions of the passengers without violating the Fourth Amendment.¹³⁹ In *Bostick*, two officers boarded a bus during a layover in Ft. Lauderdale, Florida.¹⁴⁰ The officers displayed their badges and one of them had a visible weapon.¹⁴¹ Once on board, the officers asked to see Bostick’s identification and boarding pass, which were unremarkable.¹⁴² The officers then asked to see Bostick’s luggage and Bostick allowed them

129. *Id.* at 626.

130. *Id.* According to the Court, the common meaning of seizure is “a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful.” *Id.*

131. *Id.* The Court further noted:

Mere words will not constitute an arrest, while, on the other hand, no actual, physical touching is essential. The apparent inconsistency in the two parts of this statement is explained by the fact that an assertion of authority and purpose to arrest followed by submission of the arrestee constitutes an arrest. There can be no arrest without either touching or submission.

Id. at 626-27 n.2 (quoting Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 206 (1940)).

132. *Id.* at 626.

133. *Id.* at 627-28.

134. *Id.* at 628.

135. *Id.*

136. *Id.*

137. *Id.* at 629.

138. *Florida v. Bostick*, 501 U.S. 429 (1991).

139. *Id.* at 431.

140. *Id.*

141. *Id.*

142. *Id.*

to search the luggage.¹⁴³ The officers subsequently found contraband in the luggage.¹⁴⁴

At the conclusion of the fact summary, the Court noted that two facts were particularly important.¹⁴⁵ First, the police advised Bostick that he could refuse to cooperate and, secondly, the officers did not threaten Bostick with a gun.¹⁴⁶ The Court then commenced its analysis by noting that a seizure does not occur when an officer simply approaches a citizen and asks him questions.¹⁴⁷ The Court also explained that police may, without violating the Fourth Amendment, approach a citizen and ask to see personal identification or ask for permission to search luggage so long as the question would not make a reasonable person think that the requests are mandatory.¹⁴⁸

Next, the Court dismissed Bostick's claim that the cramped confines of a bus would make a reasonable person feel like he was not free to leave.¹⁴⁹ The Court explained that the "free to leave" test was not appropriate for this case because the fact that a person would not want to exit the bus and risk being left behind should not factor into the determination of the coerciveness of the encounter.¹⁵⁰ The *Bostick* Court then compared the facts of *Bostick* to the facts in *Delgado*.¹⁵¹ The Court explained that the fact that Bostick did not feel free to leave, like the respondents in *Delgado*, was dependent upon a factor irrespective of the police presence.¹⁵² Bostick did not want to leave because he would miss the bus; Delgado and the other respondents did not want to leave because they might have been fired.¹⁵³ Therefore, according to the Court, the correct test was not whether Bostick felt free to leave, but whether a reasonable person would have felt "free to decline the officers' requests or otherwise terminate the encounter."¹⁵⁴

143. *Id.* at 432. There was some dispute as to whether Bostick consented to search and whether he was informed of his right to refuse to consent. *Id.* The evidence, however, was viewed in favor of the prosecution because "any conflict must be resolved in favor of the state, it being a question of fact decided by the trial judge." *Id.*

144. *Id.* The state conceded that the officers lacked reasonable suspicion to justify a seizure and that, if a seizure took place, the drugs found in Bostick's suitcase must be suppressed as tainted fruit. *Id.* at 433-34.

145. *Id.* at 432.

146. *Id.*

147. *Id.* at 434.

148. *Id.* at 434-35.

149. *Id.* at 435. At this point in the discussion, the Supreme Court also noted that the Florida Supreme Court had agreed with Bostick's argument strongly enough to create a per se rule invalidating all searches on buses. *Id.* The Court also noted that the Florida court was wrong in adopting this principle. *Id.*

150. *Id.* at 435-36.

151. *Id.* at 436.

152. *Id.*

153. *Id.*; *INS v. Delgado*, 466 U.S. 210, 218 (1984).

154. *Id.* In announcing the appropriate test, the *Bostick* Court seemed to be relying on the *Chesternut* variation of the *Mendenhall* test. *Id.* at 436-37. The Court noted:

Consensual Searches

The issue of consent not only applies to encounters with police, but it also applies to searches that occur subsequent to the encounters.¹⁵⁵ Consent becomes important in searches because searches conducted without a warrant issued upon probable cause are per se invalid unless they are conducted under an established exception.¹⁵⁶ Consent is one such exception that allows law enforcement officials to conduct valid searches without a warrant.¹⁵⁷ One of the first cases to address the issue of consensual searches was *Schneckloth v. Bustamonte*.¹⁵⁸

In *Schneckloth*, the Supreme Court was called upon to decide the definition of consent as it applies to Fourth Amendment searches.¹⁵⁹ In other words, the Court had to decide what the prosecutor must prove in order to show that consent was voluntary.¹⁶⁰ In *Schneckloth*, a police officer pulled over a car containing a driver and five passengers.¹⁶¹ After determining that the driver did not have a license, the officer had the men step out of the car.¹⁶² The officer then asked if he could search the car and the men gave him permission to do so.¹⁶³ During the search, the officer found stolen checks in the trunk.¹⁶⁴

During a lengthy discussion, the Court recognized that in determining the test for consent two concerns must be balanced.¹⁶⁵ The first concern is the need for consensual searches.¹⁶⁶ The second is the requirement of assuring the absence of coercion in acquiring consent to search.¹⁶⁷ The Court also noted that it would be impractical, prior to requesting consent to complete a search, for policemen to inform citizens that they have the right to

This formulation follows logically from prior cases and breaks no new ground. We have said before that the crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.

Id. (citing *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988); *California v. Hodari D.*, 499 U.S. 621, 628 (1991)) (internal quotations omitted).

155. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (citations omitted).

156. *Id.*

157. *Id.*

158. *See Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

159. *Id.* at 219, 223.

160. *Id.* at 223.

161. *Id.* at 220.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 227.

166. *Id.*

167. *Id.*

refuse to consent to the search.¹⁶⁸ In conclusion, the Court determined that a prosecutor must prove that consent was voluntary and not given under duress or coercion.¹⁶⁹ However, as the Court explained, voluntariness is a question of fact, and the prosecution need not show that the defendant had knowledge that he could refuse to consent.¹⁷⁰ Nevertheless, the defendant's knowledge regarding his ability to refuse to consent is a factor to be taken into consideration.¹⁷¹ Thus, in accordance with the standards it proffered, the Court found that the consent given by the men in the car was voluntary.¹⁷²

More recently, the Supreme Court addressed consensual searches in *Ohio v. Robinette*.¹⁷³ In *Robinette*, the Court considered whether, under the Fourth Amendment, a lawfully seized defendant must be advised he can leave before his subsequent consent to a search will be considered voluntary.¹⁷⁴ The facts of the case indicated that Robinette was pulled over for speeding.¹⁷⁵ After the officer gave Robinette a verbal warning, the officer asked Robinette if he could search his car for guns or drugs.¹⁷⁶ Robinette consented to the search.¹⁷⁷

The Court began its analysis by noting that "the touchstone of the Fourth Amendment is reasonableness," and reasonableness is measured by the totality of the circumstances.¹⁷⁸ The Court further explained that it routinely rejects per se, or bright-line, rules.¹⁷⁹ Finally, the Court stated that a per se rule like the one proposed before the Court was explicitly rejected in *Schneckloth*.¹⁸⁰ Therefore, the search of the car was consensual and the driver did not need to be informed that he could withhold consent.¹⁸¹

168. *Id.* at 231.

169. *Id.* at 248.

170. *Id.* at 248-49.

171. *Id.* at 249.

172. *Id.*

173. *Ohio v. Robinette*, 519 U.S. 33 (1996).

174. *Id.* at 35.

175. *Id.*

176. *Id.* at 35-36.

177. *Id.* at 36.

178. *Id.* at 39 (citing *Florida v. Jimeno*, 500 U.S. 248, 250 (1991)).

179. *Id.* See also *Florida v. Bostick*, 501 U.S. 429, 439 (1991) (holding that the per se rule adopted by the Florida Supreme Court was incongruent with the totality of the circumstances test); *Michigan v. Chesternut*, 486 U.S. 567, 572 (1988) (noting that the bright-line test proposed by both parties "failed to heed [the] Court's clear direction that any assessment as to whether police conduct amounts to a seizure . . . must take into account all of the circumstances surrounding the incident"); *Florida v. Royer*, 460 U.S. 491, 506-07 (1983) (White, J., plurality) (expressly rejecting any litmus-paper test or single sentence rule that would provide the answers to any search and seizure consent issue).

180. *Ohio v. Robinette*, 519 U.S. 33, 39 (1996).

181. *Id.* at 39-40.

PRINCIPAL CASE

Christopher Drayton and Clifton Brown, Jr., were convicted in the United States District Court for the Northern District of Florida of possessing cocaine with intent to distribute.¹⁸² On appeal to the United States Court of Appeals for the Eleventh Circuit, the convictions of Drayton and Brown were reversed.¹⁸³ Ultimately, the United States Supreme Court granted certiorari and determined that the District Court was correct in convicting Drayton and Brown, thereby overruling the Court of Appeals.¹⁸⁴

The Eleventh Circuit Panel Decision

As noted above, Drayton and Brown were convicted separately in the United States District Court for the Northern District of Florida of conspiracy to distribute cocaine and possession of cocaine with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and 846.¹⁸⁵ In a consolidated appeal, a three-member Eleventh Circuit panel, in a unanimous decision, reversed the convictions of Drayton and Brown and ordered the District Court to grant the defendants' motion to suppress the cocaine found on their persons.¹⁸⁶

The Eleventh Circuit panel began its discussion by noting that the court was there to decide "whether the consent given by each defendant for the search was uncoerced and legally voluntary under the Fourth Amendment."¹⁸⁷ The court then stated that the case was controlled by its decision in *United States v. Washington*, which extended *United States v. Guapi*, because the facts of the two cases were not distinguishable in any relevant manner.¹⁸⁸ The *Drayton* panel adopted the reasoning from *Washington* and subsequently reversed the convictions of Drayton and Brown.¹⁸⁹ However,

182. *United States v. Drayton*, 231 F.3d 787, 788 (11th Cir. 2000).

183. *United States v. Drayton*, 122 S. Ct. 2105, 2110 (2002).

184. *Id.*

185. *Id.*; *Drayton*, 231 F.3d at 788.

186. *Drayton*, 231 F.3d at 791.

187. *Id.* at 788.

188. *Id.* at 790 (citing *United States v. Washington*, 151 F.3d 1354 (11th Cir. 1998); *United States v. Guapi*, 144 F.3d 1393 (11th Cir. 1998)). The facts of *Washington* are very similar to the facts in *Drayton*. *Washington*, 151 F.3d at 1355-56. In *Washington*, law enforcement officials discovered drugs on the person of the defendant during a bus sweep in Florida. *Id.* at 1356. Like in *Drayton*, the agents in *Washington* did not inform passengers of their right to refuse to cooperate. *Id.* at 1355. Unlike in *Drayton*, however, they did make a general announcement as to the purpose of their presence before they started questioning the passengers. *Id.* *Guapi* also involved a bus search where the police made a general announcement before the police commenced the individual questioning of passengers. *Guapi*, 144 F.3d at 1396. However, as in *Washington* and *Drayton*, the police did not inform the passengers of their right to refuse to consent. *Id.*

189. *Drayton*, 231 F.3d at 788. In *Washington*, the Eleventh Circuit panel concluded that the facts and circumstances surrounding the search indicated that a reasonable person "would not have felt free to disregard [the agents'] requests without some positive indication that

in reaching the holding, the *Drayton* panel did make note of the insignificant factual differences between *Drayton* and *Washington*.¹⁹⁰ The panel discussed the distinctions in response to the government's argument that the variations precluded a holding similar to *Washington*.¹⁹¹

The first factual difference was that in *Washington* the officers made a general announcement regarding the purpose of their visit while in *Drayton* the officers addressed each passenger individually.¹⁹² The court noted that an individual show of authority is no less coercive than a general statement to all of the passengers.¹⁹³ A second factual difference in the case revealed that in *Washington* the officers asked to see the passengers' tickets and personal identification while in *Drayton* they did not ask to see the tickets or personal identification.¹⁹⁴ Nevertheless, the court also ruled this difference to be insignificant.¹⁹⁵ A third distinguishing fact indicated that in *Drayton* an officer remained at the front of the bus during the questioning process.¹⁹⁶ In *Washington*, however, only two officers were aboard the bus,

consent could have been refused." *Washington*, 151 F.3d at 1357. Therefore, the court reversed the conviction of the defendant. *Id.* In providing the holding, the *Washington* court stated:

Although we reject the notion of a *per se* rule requiring bus passengers to be informed of their constitutional rights, the facts and circumstances of this search required some indication to passengers that their cooperation was voluntary rather than mandatory. Because no such indication was provided, and because a reasonable person traveling on this bus would not have felt free to ignore the search request, we hold that this search was unconstitutional.

Id. at 1355. The *Washington* court began its analysis by noting that the *Bostick* Court found "it particularly worth noting" that the police advised Bostick he could refuse to cooperate. *Id.* at 1356 (citing *Florida v. Bostick*, 501 U.S. 429, 432 (1991)). The *Washington* panel went on to mention that *per se* rules are routinely rejected by the Supreme Court in the area of warrantless searches. *Washington*, 151 F.3d at 1357 (citing *Ohio v. Robinette*, 519 U.S. 33 (1996); *Bostick*, 501 U.S. at 435-37). Similarly, the court noted that the Supreme Court has "rejected the notion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search." *Washington*, 151 F.3d at 1357 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973)). On a final preliminary notation, the *Washington* panel explained that "if, by physical force or show of authority, a reasonable citizen would not believe that he is free to ignore police questioning and go about his business, he has been unconstitutionally seized." *Washington*, 151 F.3d at 1357 (citing *Bostick*, 501 U.S. at 439; *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968)). The *Washington* panel then reasoned that the officer's general announcement and his showing of his badge at the beginning of the sweep constituted a show of authority. *Washington*, 151 F.3d at 1357. This show of authority, without a notice to the passengers that they could refuse to cooperate, constituted a seizure. *Id.*

190. *United States v. Drayton*, 231 F.3d 787, 790-91 (11th Cir. 2000).

191. *Id.*

192. *Id.* at 790.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 791.

and both of whom moved to the back of the bus; no officers were standing at the exit.¹⁹⁷ The panel noted that an officer standing at the front of the bus would make a reasonable person feel less free to exit the bus and, therefore, cut in favor of Drayton and Brown.¹⁹⁸

The United States Supreme Court Decision

After the decision of the District Court was reversed and rehearing *en banc* was denied, the government filed a petition for writ of certiorari to the United States Supreme Court.¹⁹⁹ The Supreme Court granted certiorari to determine whether officers must advise bus passengers during these encounters of their right not to cooperate.²⁰⁰ Justice Kennedy, who delivered the majority opinion, began his analysis of the case with a discussion of some foundation principles regarding Fourth Amendment consensual search and seizure.²⁰¹ The initial discussion noted that law enforcement officials may approach individuals on the street or in public places and ask them questions without violating the Fourth Amendment.²⁰² The Court also mentioned that law enforcement officers may ask questions, ask for identification, and request consent to search luggage without any probable cause as long as they do not coerce the individual to cooperate.²⁰³ Following this reasoning, the Court stated that a person is seized only when a reasonable person would not feel free to terminate the encounter.²⁰⁴

The Court next analyzed the case in light of its decision in *Bostick*, a previous Supreme Court case involving drug interdiction efforts on buses.²⁰⁵ The Court began this discussion by noting that the *Bostick* decision made it quite clear that per se rules regarding the Fourth Amendment are inappropriate.²⁰⁶ Instead, as the Court noted, the “proper inquiry necessitates a consideration of all the circumstances surrounding the encounter.”²⁰⁷ The Court also mentioned that the *Bostick* decision modified the rule set forth in *California v. Hodari D.*, and the proper inquiry after *Bostick* “is whether a reasonable person would feel free to decline the officers’ requests or otherwise

197. *Id.*; *United States v. Washington*, 151 F.3d 1354, 1355 (11th Cir. 1998).

198. *United States v. Drayton*, 231 F.3d 787, 791 (11th Cir. 2000).

199. *United States v. Drayton*, 254 F.3d 1086 (11th Cir. 2001); *United States v. Drayton*, 122 S. Ct. 2105, 2110 (2002).

200. *United States v. Drayton*, 122 S. Ct. 2105, 2108 (2002).

201. *Id.* at 2110.

202. *Id.* (citing *Florida v. Royer*, 460 U.S. 491, 497 (1983) (White, J., plurality)).

203. *Id.* (citing *Florida v. Bostick*, 501 U.S. 429, 434-35 (1991)).

204. *Id.*

205. *Id.* at 2110-11. *See generally* *Florida v. Bostick*, 501 U.S. 429 (1991) (holding that a consensual search is not invalid simply because it occurs on a bus). For a discussion of *Florida v. Bostick*, *see supra* notes 138-54 and accompanying text.

206. *United States v. Drayton*, 122 S. Ct. 2105, 2111 (2002).

207. *Id.* at 2111 (quoting *Bostick*, 501 U.S. at 439).

terminate the encounter."²⁰⁸ Finally, the Court noted that although the *Bostick* Court did not indicate whether a seizure occurred, the *Bostick* Court did identify two factors that were important.²⁰⁹ The first factor was that the officer did not remove his gun from his holster and the second factor was that the officer notified the passenger of his right to refuse to cooperate.²¹⁰

After acknowledging the two factors discussed in *Bostick*, the Court then admonished the Eleventh Circuit for depending upon the second *Bostick* factor to develop what was "in effect a per se rule that evidence obtained during suspicionless drug interdiction efforts aboard buses must be suppressed unless the officers have advised passengers of their right not to cooperate and to refuse consent to a search."²¹¹ The Court then addressed the cases that set up this standard: *United States v. Guapi* and *United States v. Washington*.²¹² The Court concluded that the only common factor in each case, including *Drayton*, was the fact that the police officers did not inform the passengers that they had the right to refuse to cooperate.²¹³ Therefore, the Court held that this had in effect created a per se rule.²¹⁴

After reaching the conclusion that the Eleventh Circuit had created a per se rule, the Court applied the *Bostick* framework to the *Drayton* facts to decide if Brown and Drayton had been seized by the police officers.²¹⁵ The Court determined that they had not been seized.²¹⁶ The Court noted several facts that would indicate that a seizure had not occurred: (1) the officers gave the passengers no reason to believe that they were required to answer any questions; (2) Officer Lang did not brandish a weapon; (3) Officer Lang did not make any intimidating movements; (4) the aisle was left open so passengers could exit the bus; (5) Officer Lang spoke to the passengers one by one in a polite, quiet voice; (6) there were no threats or commands; and (7) Officer Lang did not say anything that would indicate to a reasonable person that he was not free to leave the bus or terminate the encounter.²¹⁷ The Court went on to state that there is no doubt "that had this encounter occurred on a street, it would have been constitutional," and just because the

208. *Id.* (citing *California v. Hodari D.*, 499 U.S. 621, 628 (1991)). The rule cited by the *Drayton* Court, as set forth in *Hodari D.*, stated that a seizure does not occur so long as a reasonable person would feel free to disregard the police and go about his business. *Hodari D.*, 499 U.S. at 628. The *Hodari D.* rule was seemingly adopted from *Chesternut*. *Id.* at 628 (citing *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988)).

209. *Drayton*, 122 S. Ct. at 2111.

210. *Id.*

211. *Id.*

212. *Id.* at 2111 (citing *United States v. Guapi*, 144 F.3d 1393 (11th Cir. 1998); *United States v. Washington*, 151 F.3d 1354 (11th Cir. 1998)).

213. *Id.* at 2112.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

encounter takes place on a bus does not automatically transform the standard police questioning into an illegal seizure.²¹⁸

The Court next addressed Brown's and Drayton's claims regarding the seizure.²¹⁹ The first claim made by the respondents asserted that Officer Lang displaying his badge served as a show of authority that would preclude the passengers from feeling free to leave or disregard the officers.²²⁰ The Court dismissed this claim by pointing to previous decisions in *Florida v. Rodriguez* and *INS v. Delgado*, cases where the Court found no seizures had occurred even though the officers had displayed badges when questioning the defendants.²²¹ The Court went on to mention that uniforms and sidearms, like badges, are not enough to create a seizure.²²² In fact, the Court stated that uniforms are reassuring and not disconcerting.²²³ The Court also explained that sidearms only become coercive if the gun is unholstered and the officer is brandishing the weapon.²²⁴

Next, the Court analyzed whether the presence of Officer Hoover at the front of the bus created a coercive environment that would yield a seizure.²²⁵ The Court did not feel that this fact would make a reasonable person feel like he could not leave the bus or terminate the encounter.²²⁶ The Court compared the facts of *Drayton* to the facts in *Delgado*, a case where no seizure occurred even though officers were positioned at the exits of a factory while other officers questioned workers.²²⁷ The Court also noted that the small number of passengers who refuse to cooperate during the bus searches does not create a presumption that a reasonable person does not feel free to leave or ignore the officers during a bus sweep.²²⁸ In fact, the Court stated that people cooperate because they know that cooperation with the police will enhance their own safety and the safety of others.²²⁹ The Court also

218. *Id.*

219. *Id.* at 2112-13.

220. *Id.* at 2112.

221. *Id.* (citing *Florida v. Rodriguez*, 469 U.S. 1, 5-6 (1984); *INS v. Delgado*, 466 U.S. 210, 212-13 (1984)).

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at 2112-13.

226. *Id.*

227. *Id.* (citing *INS v. Delgado*, 466 U.S. 210, 219 (1984)). The *Delgado* Court noted:

The presence of agents by the exits posed no reasonable threat of detention to these workers while they walked throughout the factories on job assignments. Likewise, the mere possibility that they would be questioned if they sought to leave the buildings should not have resulted in any reasonable apprehension by any of them that they would be seized or detained in any meaningful way.

Delgado, 466 U.S. at 219.

228. *United States v. Drayton*, 122 S. Ct. 2105, 2113 (2002).

229. *Id.*

stated that Drayton's consent was not involuntary just because the officers previously arrested Brown.²³⁰ The Court noted that the "arrest of one person does not mean that everyone around him has been seized by the police."²³¹ The Court pointed out that the arrest should have put Drayton on notice that consent would lead to adverse consequences.²³²

After deciding that an illegal seizure had not occurred, the Court analyzed the issue of an unreasonable search.²³³ Initially, the Court acknowledged that this analysis would deal with the same facts as the seizure issue.²³⁴ Not surprisingly, the Court discussed the fact that the respondents answered in the affirmative when Officer Lang asked if he could search their bag.²³⁵ The Court also noted that when Officer Lang asked to search the respondents' persons, they allowed him to complete the pat down search.²³⁶ The Court continued the unreasonable search analysis by noting that it "has rejected in specific terms the suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search."²³⁷ Instead, as the Court explained, it is the totality of the circumstances that determines if a seizure has occurred, and a presumption of invalidity does not arise because a citizen consents to a search without the police giving the citizen a warning that he may refuse to cooperate.²³⁸

The Court concluded the unreasonable search analysis by explaining that since Officer Lang asked for permission to search the defendants' bag and persons, and the totality of the circumstances revealed that consent was voluntary, then the searches were reasonable.²³⁹ With this conclusion and the conclusion reached in the seizure analysis, the Court established that there will be no instance where a warning will be automatically required for a consensual encounter to pass Fourth Amendment scrutiny.²⁴⁰

The Dissent

Justice Souter, writing for the dissent, began the opinion by stating that there are no justifications for subjecting passengers of bus or train travel

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* (citing *Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996); *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973)).

238. *Id.*

239. *Id.* at 2114.

240. *Id.* at 2112-14.

to the same safety precautions as passengers of air travel.²⁴¹ Thus, as the dissent explained, the majority's opinion has an "air of unreality" because bus passengers most likely do not consent to searches to enhance safety.²⁴² The dissent then began its analysis by noting that the issue on appeal is "whether the police's examination of the bus passengers, including respondents, amounted to a suspicionless seizure under the Fourth Amendment."²⁴³ If the examination was a seizure, as the dissent noted, then any consent was invalid as a product of an illegal seizure.²⁴⁴ The dissent then explained that *Florida v. Bostick* established the framework for deciding if a bus passenger had been seized during a bus sweep.²⁴⁵ The determining test posed by *Bostick*, according to the dissent, is whether a reasonable person being questioned would have felt free to decline the officers' requests or otherwise terminate the encounter.²⁴⁶

Before continuing the analysis, the dissent set forth some hypotheticals to provide perspective into the analysis.

A perfect example of police conduct that supports no colorable claim of seizure is the act of an officer who simply goes up to a pedestrian on the street and asks him a question. A pair of officers questioning a pedestrian, without more, would presumably support the same conclusion. Now consider three officers, one of whom stands behind the pedestrian, another at his side toward the open sidewalk, with the third addressing questions to the pedestrian a foot or two from his face. Finally, consider the same scene in a narrow alley.²⁴⁷

As the dissent noted, one may not be able to say that a seizure occurred in the hypotheticals, but one may be able to say that the encounters were significantly different.²⁴⁸ Therefore, as the dissent explained, by the final hypothetical a person may feel the "threatening presence of several officers."²⁴⁹ The dissent noted further that police have legitimate authority and can exercise their power without an immediate check, which leads to an imbalance of power when several officers are questioning one civilian.²⁵⁰ Before return-

241. *Id.* at 2114 (Souter, J., dissenting).

242. *Id.* (Souter, J., dissenting).

243. *Id.* (Souter, J., dissenting).

244. *Id.* at 2114-15. (Souter, J., dissenting).

245. *Id.* at 2115 (Souter, J., dissenting).

246. *Id.* (Souter, J., dissenting).

247. *Id.* (Souter, J., dissenting).

248. *Id.* (Souter, J., dissenting).

249. *Id.* (Souter, J., dissenting) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (Stewart, J., plurality)).

250. *Id.* (Souter, J., dissenting).

ing to the analysis, the dissent made one final notation.²⁵¹ The dissent stated that the majority failed to display any understanding of the fact that the display of police power can rise to a level that will override a person's ability to act freely.²⁵²

The dissent returned to the analysis with a summary of the facts.²⁵³ The dissent concluded from the facts that the bus sweep was not consensual and would continue with or without the passengers' cooperation.²⁵⁴ In fact, the dissent explained, no reasonable passenger would have believed that he had a free choice to ignore the police.²⁵⁵ The dissent then compared the *Drayton* facts to the hypothetical where three officers were questioning a citizen in a narrow alley and telling him that his cooperation was expected.²⁵⁶ The dissent followed this comparison by stating that although there may be some bus questioning that will pass the *Bostick* test without providing passengers with a warning, the facts in *Drayton* require more than what was provided.²⁵⁷

Finally, the dissent contested the majority's reliance on *INS v. Delgado*.²⁵⁸ First, the dissent distinguished *Delgado* by noting that in *Delgado*, the Court considered an order granting summary judgment and, therefore, the facts had to be read in favor of the Immigration and Naturalization Service.²⁵⁹ Next, the dissent noted that in *Delgado* the workers continued about their business during the questioning, while *Drayton* and *Brown* were stuck in their seats.²⁶⁰ Furthermore, as the dissent stated, the bus was going nowhere and no passenger would tend to his usual business until the officers allowed him to do so.²⁶¹

ANALYSIS

In *United States v. Drayton*, the United States Supreme Court attempted to create an appropriate balance between protecting individual rights and freedoms and protecting public interests by shielding law enforcement powers and abilities. By reducing individual rights and freedoms in favor of enlarging law enforcement powers, the holding reached by the

251. *Id.* (Souter, J., dissenting).

252. *Id.* (Souter, J., dissenting).

253. *Id.* at 2115-16 (Souter, J., dissenting).

254. *Id.* at 2116 (Souter, J., dissenting).

255. *Id.* (Souter, J., dissenting).

256. *Id.* (Souter, J., dissenting).

257. *Id.* (Souter, J., dissenting).

258. *Id.* at 2117 (Souter, J., dissenting) (citing *INS v. Delgado*, 466 U.S. 210 (1984)).

259. *Id.* (Souter, J., dissenting) (citing *Delgado*, 466 U.S. at 214; *Delgado*, 466 U.S. at 221 (Stevens, J., concurring)).

260. *Id.* (Souter, J., dissenting) (citing *Delgado*, 466 U.S. at 218).

261. *Id.* (Souter, J., dissenting).

Court in *Drayton* presents several issues for review.²⁶² The first issue is whether *Drayton* has lessened the protection that the Fourth Amendment was intended to provide. The second issue is whether the totality of the circumstances test as applied in *Drayton* set forth an unrealistic result. The final issue relates to the effect of the events of September 11, 2001, on the Court's decision.

Intended Fourth Amendment Protection

Although there is a need for a balance between government and individual interests, the interdiction efforts taking place on interstate buses seem to have gone too far.²⁶³ Bus searches, like the one in *Drayton*, are "inconvenient, intrusive, and intimidating" to the common passenger of an interstate bus.²⁶⁴ By allowing such searches, the decision in *United States v. Drayton* has lessened the protection of privacy the Framers intended the Fourth Amendment to provide.²⁶⁵ Furthermore, by allowing law enforcement to use illegal seizures to gather evidence, the *Drayton* decision fails to

262. See James Spallino, Jr., *The Search for the Fourth Amendment Seizure: It Won't Be Found On a Bus - Florida v. Bostick*, 25 AKRON L. REV. 457, 477 (1991) (noting that *Bostick* expanded the police conduct that does not amount to a seizure).

263. See *Florida v. Bostick*, 501 U.S. 429, 443-44 (1991) (Marshall, J., dissenting) (quoting *United States v. Lewis*, 728 F. Supp. 784, 788-89 (D.D.C. 1990), *rev'd*, 921 F.2d 1294 (D.C. Cir. 1990)) (noting that "the random indiscriminate stopping and questioning of individuals on interstate buses seems to have gone too far"); *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) (noting the need to balance the necessity for consensual searches and the requirement of assuring the absence of coercion in acquiring such results). In *Bostick*, Justice Marshall also commented that the balancing interests did not justify the bus interdiction practices when he stated:

In my view, the Fourth Amendment clearly condemns the suspicionless, dragnet-style sweep of intrastate or interstate buses. Withdrawing this particular weapon from the government's drug-war arsenal would hardly leave the police without any means of combating the use of buses as instrumentalities of the drug trade. The police would remain free, for example, to approach passengers whom they have a reasonable, articulable basis to suspect of criminal wrongdoing. Alternatively, they could continue to confront passengers without suspicion so long as they took simple steps, like advising the passengers confronted to their right to decline to be questioned, to dispel the aura of coercion and intimidation that pervades such encounters. There is no reason to expect that such requirements would render the Nation's buses law-enforcement-free zones.

Bostick, 501 U.S. at 450 (Marshall, J., dissenting).

264. *Bostick*, 501 U.S. at 442 (Marshall, J., dissenting) (quoting *United States v. Chandler*, 744 F. Supp. 333, 335 (D.D.C. 1990)).

265. See *id.* at 443-44 (Marshall, J., dissenting). Justice Marshall stated that "if the Court approves such [drug interdiction] bus stops and allows prosecutions to be based on evidence seized as a result of such stops, then we will have stripped our citizens of basic Constitutional protections." *Id.* (Marshall, J., dissenting) (quoting *Lewis*, 728 F. Supp. at 788-89). Justice Marshall also noted that the majority's reasoning in *Bostick* "borders on sophism and trivializes the values that underlie the Fourth Amendment." *Bostick*, 501 U.S. at 450 (Marshall, J., dissenting).

protect individuals of this country from unjustifiable intrusions by the government into individual privacies.²⁶⁶

When analyzing constitutional issues, the legal profession must recall the origin of constitutional liberties.²⁶⁷ As noted above, the authors of the Constitution added the Fourth Amendment to the United States Constitution because they:

[S]ought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.²⁶⁸

More specifically, the Fourth Amendment was added to protect the people of this country from governmental intrusions similar to the British general warrant.²⁶⁹ As one commentator noted:

The British general warrant was a search tool employed without limitation on location, and without any necessity to precisely describe the object or person sought. British authorities were simply given license to break into any shop or place suspected wherever they chose. With that kind of unfettered discretion, the general warrant could be, and often was, used to intimidate. . . . In the colonies, complaints that royal officers were violating the privacy of colonists through the use of writs of assistance, equivalent to general warrants, grew. Because English law did not, as yet, recognize a right of personal privacy, the crown's abuses in the colonies were

266. *Bostick*, 501 U.S. at 444 (Marshall, J., dissenting). Justice Marshall further stated:

If passengers on a bus passing through the Capital of this great nation cannot be free from police interference where there is absolutely no basis for the police officers to stop and question them, then the police will be free to accost people on our streets without any reason or cause.

Id. (Marshall, J., dissenting) (quoting *Lewis*, 728 F. Supp. at 788-89).

267. *United States v. Cothran*, 729 F. Supp. 153, 157-58 (D.D.C. 1990), *rev'd* *United States v. Lewis*, 921 F.2d 1294 (D.C. Cir. 1990). In *Cothran*, a case with facts nearly identical to *Drayton*, the United States Federal District Court for the District of Columbia ruled that the passenger did not consent to the encounter or the search; therefore, the passenger had been seized. *Cothran*, 729 F. Supp. at 154-58.

268. *California v. Hodari D.*, 499 U.S. 621, 646 (1991) (Stevens, J., dissenting) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

269. William C. Banks and M.E. Bowman, *Executive Authority For National Security Surveillance*, 50 AM. U. L. REV. 1, 2 (2000).

not remediable at law. It was thus no surprise that the new American Constitution and the government it created would respect a series of individual freedoms. . . . For the new nation, warrants would require specificity to physically invade the privacy of its citizenry.²⁷⁰

In scrutinizing the *Drayton* facts in a historical light, the police practice of drug and weapon interdiction upon buses is strikingly similar to the British general warrant practices that occurred in the days prior to American independence.²⁷¹ Those are the same general warrants that prompted the inclusion of the Fourth Amendment in the Bill of Rights.²⁷² As Justice Marshall noted in *Bostick*, bus searches, like the one in *Drayton*, “evoke[] images of other days, under other flags, when no man traveled his nation’s roads or railways without fear of unwarranted interruption, by individuals who held temporary power in the Government.”²⁷³ Consequently, by allowing such bus interdiction practices to continue, *Drayton* fails to provide the protection the Framers intended.²⁷⁴

The Reasonable Person Under the Circumstances Test

The result in *United States v. Drayton* is congruent with the Fourth Amendment consensual encounter and consensual seizure precedent. *Drayton* followed the precedent of *Terry*, *Mendenhall*, and *Bostick* in its application of the “reasonable person under the circumstances test.”²⁷⁵ Though the decision in *Drayton* is not surprising, it is disappointing. *Drayton* provided the Court with an opportunity to depart from the continual misapplication of the reasonable person consensual encounter test. However, the *Drayton* Court declined the opportunity to correct the misconceptions of previous decisions and promulgated another unrealistic result.²⁷⁶

Terry set forth the original consensual encounter test. Under the test, a citizen was seized by a police officer when the officer, by means of

270. *Id.* at 2-3 (internal quotations and citations omitted).

271. *Cothran*, 729 F. Supp. at 157.

272. *Id.*

273. *Florida v. Bostick*, 501 U.S. 429, 443 (1991) (Marshall, J., dissenting) (quoting *Bostick v. State*, 554 So. 2d 1153, 1158 (Fla. 1989)).

274. *See United States v. Felder*, 732 F. Supp. 204, 209 (D.D.C. 1990) (noting that bus interdiction practices do not meet the requirements of the Constitution). In *Felder*, a man was arrested for possession of cocaine. *Id.* at 206. The man was arrested after police searched his bag during a bus interdiction stop. *Id.* Ultimately, the court found the evidence the product of an illegal seizure and inadmissible. *Id.* at 209.

275. *United States v. Drayton*, 122 S. Ct. 2105, 2110-14 (2002).

276. *Id.* at 2114 (Souter, J., dissenting) (noting that there is an air of unreality about the Court’s explanation of consensual searches on busses). *See also* Michael J. Reed, Jr., *Florida v. Bostick: The Fourth Amendment Takes a Back Seat to the Drug War*, 27 NEW ENG. L. REV. 825, 846 (1993) (“The majority opinion in *Bostick* makes a strained and unrealistic interpretation of the circumstances surrounding *Bostick*’s consensual search.”).

physical force or show of authority, in some way restrained the liberty of the citizen.²⁷⁷ *Mendenhall* further defined a consensual encounter.²⁷⁸ Under *Mendenhall*, a citizen was not seized if all of the circumstances surrounding the incident indicated that a reasonable person would have believed he was free to leave.²⁷⁹ Finally, *Bostick* altered the test in the case of bus searches by using a standard promulgated in *Delgado*, *Chesternut*, and *Hodari D.*²⁸⁰ *Bostick* held that, in analyzing consensual encounters in circumstances similar to bus searches, the test is whether a reasonable person would have felt free to decline the officers' requests or otherwise terminate the encounter.²⁸¹ The majority in *Drayton* took the analysis one step further. The majority held that police do not have to notify citizens of their right to refuse to cooperate because nothing about drug interdiction efforts on buses would "suggest to a reasonable person that he or she was barred from leaving the bus or otherwise terminating the encounter."²⁸²

Although the Court bases its tests on the reasonable person, the person the Court uses as the standard is anything but reasonable. As one commentator noted, "The Supreme Court's doctrine is flawed in conception by its use of the reasonable person standard, and its picture of a reasonable person is simply out of touch with societal reality. Briefly put, most people have neither the knowledge nor the fortitude to terminate unwanted interactions with the police."²⁸³ The United States Supreme Court fails to realize that most citizens are not conscious of the fact that they can refuse to consent. "[A] passenger unadvised of his rights and otherwise unversed in constitutional law has no reason to know that police cannot hold his refusal to cooperate against him."²⁸⁴ In holding that law enforcement officers do not

277. *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968).

278. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (Stewart, J., plurality).

279. *Id.* (Stewart, J., plurality).

280. *Florida v. Bostick*, 501 U.S. 429, 434-40 (1991).

281. *Id.* at 436.

282. *United States v. Drayton*, 122 S. Ct. 2105, 2112 (2002).

283. Daniel J. Steinbock, *The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity, and Incivility of the Fourth Amendment Consensual Encounter Doctrine*, 38 SAN DIEGO L. REV. 507, 521-22 (2001). The author also noted:

[T]he consensual encounter doctrine paints a false picture of reality as applied to encounters involving investigation of the individual being questioned. In so doing, it mislocates the dividing line between freedom and restraint, including on the freedom side of this line many people who are effectively restrained or – to put it another way – are restrained in all but the eyes of the law. This price alone should be enough to compel reform.

Id. at 561-62.

284. *Florida v. Bostick*, 501 U.S. 429, 447 (1991) (Marshall, J., dissenting).

have to notify bus passengers of their right to refuse to consent, the majority ignores this fact.²⁸⁵

The Court also failed to comprehend that, even if they are armed with knowledge, most citizens lack the resiliency to tell the police “no.”²⁸⁶ When outnumbered by the police, a citizen can be made to feel powerless.²⁸⁷ The pressure that police exert on a civilian can rise to a “threatening” level.²⁸⁸ The pressure can be so great that it “may overbear a normal person’s ability to act freely, even in the absence of explicit commands or the formalities of detention.”²⁸⁹ The dissenters in *Drayton* also made note of the inherent power of police officers when they stated:

The police not only carry legitimate authority but also exercise power free from immediate check, and when the attention of several officers is brought to bear on one civilian the imbalance of immediate power is unmistakable. . . . As common as this understanding is, however, there is little sign of it in the Court’s opinion.²⁹⁰

The *Drayton* majority also fails to recognize that a citizen who exercises his constitutional rights and refuses to cooperate may actually make the

285. *Drayton*, 122 S. Ct. at 2112. Although *Drayton* disavowed the requirement that bus passengers be advised of their right to refuse to cooperate prior to questioning, the United States Supreme Court has previously suggested such procedures for officers engaged in consensual encounters. See *Florida v. Royer*, 460 U.S. 491, 504 (1983) (White, J., plurality). In *Royer*, the Court noted that “by returning his ticket and driver’s license, and informing him that he was free to go if he so desired, the officers may have obviated any claim that the encounter was anything but a consensual matter from start to finish.” *Id.* (White, J., plurality).

286. See Craig M. Bradley, *The Court’s Curious Consent Search Doctrine*, TRIAL, Oct. 2002, at 72. The author noted:

This argument ignores the coerciveness of such a police request – regardless of innocence or guilt – and argues for the advisory requirement. One cannot assume that innocent people welcome such intrusions. If they are truly glad to cooperate in such police endeavors, they will do so when informed that they don’t have to. This would ensure that they are cooperating freely rather than acceding to police pressure. . . . If someone has been illegally stopped or arrested, the situation is not any more coercive than if she had been legally detained.

Id. at 73-74.

287. *United States v. Drayton*, 122 S. Ct. 2105, 2115 (2002) (Souter, J., dissenting).

288. *Id.* (Souter, J., dissenting) (citing *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (Stewart, J., plurality)).

289. *Id.* (Souter, J., dissenting).

290. *Id.* (Souter, J., dissenting). See also *Mendenhall*, 446 U.S. at 554 (Stewart, J., plurality) (noting that the threatening presence of several officers was an example of a circumstance that might constitute a seizure even if the citizen did not attempt to leave the presence of the officers).

police suspicious and prolong the investigation.²⁹¹ In *United States v. Felder*, an officer conducting bus interdiction testified that “a passenger who refused to consent to an interview might be considered suspicious simply for refusing to consent and, therefore, some members of the Narcotic Interdiction Unit might notify authorities at the next stop and provide a description of the uncooperative passenger.”²⁹² If this police practice were known to the general public, it alone would make a citizen feel like he had no choice but to cooperate.²⁹³

The majority in *Drayton* was also mistaken when it compared bus interdiction to a consensual encounter on the street. The majority noted that “[i]t is beyond question that had this encounter occurred on the street, it would be constitutional. The fact that the encounter takes place on a bus does not on its own transform standard police questioning of citizens into an illegal seizure.”²⁹⁴ Although this comparison is stated in light of the reasonable person standard, it actually gives no consideration to the view of the reasonable person.²⁹⁵ A reasonable person would recognize the differences

291. See *Florida v. Bostick*, 501 U.S. 429, 447 (1991) (Marshall, J., dissenting) (noting that “in light of intimidating show of authority that the officers made upon boarding the bus” a reasonable person could believe that a refusal to cooperate would “only arouse the officers’ suspicions and intensify their interrogation”); *United States v. Cothran*, 729 F. Supp. 153, 156 (D.D.C. 1990), *rev’d* *United States v. Lewis*, 921 F.2d 1294 (D.C. Cir. 1990) (noting that refusal to cooperate is sometimes treated as an admission of guilt); *United States v. Felder*, 732 F. Supp. 204, 208 (D.D.C. 1990) (noting that refusal to cooperate may lead to further scrutiny and questioning at every bus stop).

292. *Felder*, 732 F. Supp. at 208. See also *Cothran*, 729 F. Supp. at 156. In *Cothran*, the police officer conducting bus searches testified “that if a passenger refuses to permit a search of his or her bags or claims not to have identification, he might be suspicious and, depending on the conversation with the passenger, would notify authorities at the next stop that he suspected the passenger of carrying drugs.” *Id.*

293. *Felder*, 732 F. Supp. at 208 (“Any reasonable person would feel less than free to refuse a police search if aware that refusal to cooperate would lead to repeated harassment.”). See also Andrea K. Mitchell, *United States v. Drayton: Supreme Court Upholds Standards For Police Conduct During Bus Searches*, 51 AM. U. L. REV. 1065, 1073 (2002) (“The practical effect of *Drayton* . . . could be a future alteration in police tactics in light of the Court’s decision to afford officers broad latitude in conducting consensual searches.”). Mitchell also noted that “some members of the criminal defense community contend that [*Drayton*] invites law enforcement agents to engage in more aggressive search tactics in arenas beyond public transportation.” *Id.* at 1078.

294. *United States v. Drayton*, 122 S. Ct. 2105, 2112 (2002).

295. See *Bostick v. State*, 510 So. 2d 321 (Fla. Dist. Ct. App. 1987) (Letts, J., dissenting). In his dissent, Judge Letts noted:

[M]y version of common sense tells me that a paid and ticketed passenger will not voluntarily forfeit his destination and get up and exit a bus in the middle of his journey, during a temporary stopover, while two policemen, one with a pouched gun in his hand, are standing over him in a narrow aisle asking him questions and requesting permission to search his luggage. It is not a question of whether he actually was free to leave, as all of us trained lawyers know he was. The test is whether a layman would

between an encounter on the street and an encounter on a bus. As Justice Marshall noted:

Unlike a person approached by the police on the street, or at a bus or airport terminal after reaching his destination, a passenger approached by the police at an intermediate point in a long bus journey cannot simply leave the scene and repair to a safe haven to avoid unwanted probing by law enforcement officials. The vulnerability that an intrastate or interstate traveler experiences when confronted by the police outside of his own familiar territory surely aggravates the coercive quality of such an encounter.²⁹⁶

The first difference between an encounter on a bus and an encounter on the street involves a monetary relinquishment. A passenger on a bus may have to make financial sacrifices to exert his constitutional right to refuse. By leaving the bus, the passenger may forfeit his ticket and be forced to purchase another pass. Most passengers would see this as an inhibition to refusing to cooperate.²⁹⁷ The second difference between street encounters and bus encounters is that a passenger on a bus is more likely to feel as though the bus is not going anywhere unless he cooperates with the police.²⁹⁸ A third difference reveals that a passenger may feel that he is unable to leave the bus until he cooperates with the authorities.²⁹⁹ As the *Washington* court noted, "Absent some positive indication that they were free not to cooperate, it is doubtful a passenger would think he or she had the choice to ignore the police presence. Most citizens, we hope, believe that it is their duty to cooper-

reasonably be expected to believe he was free to leave under these circumstances. I conclude he would not.

Id. at 323 (Letts, J., dissenting).

296. *Florida v. Bostick*, 501 U.S. 429, 448-49 (1991) (Marshall, J., dissenting) (internal quotation and citations omitted).

297. *See id.* at 448 (Marshall, J., dissenting) (noting that a passenger would not leave the bus to evade questioning because "the bus's departure from the terminal was imminent").

298. *See Drayton*, 122 S. Ct. at 2117 (Souter, J., dissenting) ("The bus was going nowhere, and with one officer in the driver's seat, it was reasonable to suppose no passenger would tend to his own business until the officers were ready to let him."); *Bostick*, 501 U.S. at 442 (Marshall, J., dissenting) (noting that bus sweeps hold up the progress of the bus).

299. *See Bostick*, 501 U.S. at 448 (Marshall, J., dissenting) (noting that leaving the bus would not appear to be an available option when the passenger would have to "squeeze past the gun-wielding inquisitor who was blocking the aisle of the bus"); *United States v. Cothran*, 729 F. Supp. 153, 156 (D.D.C. 1990), *rev'd* *United States v. Lewis*, 921 F.2d 1294 (D.C. Cir. 1990) ("[A]n innocent passenger would not genuinely have felt free to leave."); *United States v. Felder*, 732 F. Supp. 204, 208 (D.D.C. 1990) ("The passengers . . . clearly had to believe they could not leave the bus until they had acceded to the officers' requests and cooperated with the interdiction program."); *Bostick v. Florida*, 554 So. 2d 1153, 1157 (Fla. 1989) ("Under such circumstances a reasonable traveler would not have felt that he was free to leave or that he was free to disregard the questions and walk away.").

ate with the police.”³⁰⁰ Nevertheless, a person on the street may feel more inclined to leave the scene without cooperating with the officers. A person on the street has more than one direction in which he may leave the scene. A person on a bus has only one way to leave the questioning – straight down the aisle and out the exit. Similarly, a person on the street does not have to push his way past several officers, one of whom may be “guarding” the door, to leave the scene. Although these differences seem small, they add up to a large divergence in the coercive nature of an encounter on a bus and an encounter on the street.³⁰¹

The United States Supreme Court has even recognized differences between street encounters and bus encounters.³⁰² In *Mendenhall*, the Court held that a person was seized if a reasonable person in the same circumstance would not feel “free to leave.”³⁰³ The *Bostick* Court, however, realized that there were some differences between street encounters and bus encounters – i.e., a bus passenger may not want to leave because he would miss his bus.³⁰⁴ Therefore, *Bostick* changed the analysis from “free to leave” to “free to decline the officers’ requests or otherwise terminate the encounter.”³⁰⁵ The *Drayton* Court subsequently followed the *Bostick* application of the consensual encounter test with blind adherence. Nevertheless, the unreasonable application of the test for encounters on buses continually fails to adequately protect the rights of a bus passenger.³⁰⁶ In effect, the *Drayton* decision better protects the constitutional rights of a person on the street than of a person on a bus.

The Effect of Current Events on the Decision in United States v. Drayton

The events of September 11, 2001, changed the United States of America. The nation is now aware that there is not a barrier around the border of the country that protects us from the evils of terrorism. The Justices, along with the rest of the country, realize that we will need protection from terrorism for a long time to come. In light of this realization, the Court may have let apprehensions of future events affect the reasoning of the *Drayton* decision.³⁰⁷ In fact, the dissent seems to allude to the presence of such

300. *United States v. Washington*, 151 F.3d 1354, 1357 (11th Cir. 1998). For a discussion of *United States v. Washington*, see *supra* notes 188-89.

301. See *United States v. Guapi*, 144 F.3d 1393, 1395 (11th Cir. 1998) (noting that “the cramped confines of a bus create an environment uniquely susceptible to coercive police tactics”).

302. *Florida v. Bostick*, 501 U.S. 429, 436 (1991) (analyzing the differences between encounters that occur on a street and encounters that occur on a bus).

303. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (Stewart, J., plurality).

304. *Bostick*, 501 U.S. at 436.

305. *Id.* at 438.

306. For a discussion of the misapplication of the consensual encounter test, see *supra* notes 275-305 and accompanying text.

307. See Mitchell, *supra* note 293, at 1076-77 (“[M]uch of the media attention given to *Drayton* focused on how the Court would, in the wake of the terrorist attacks, balance the

thoughts in the majority's reasoning when it noted that "[a]nyone who travels by air today submits to searches of the person and luggage as a condition of boarding the aircraft. It is universally accepted that such intrusions are necessary to hedge against risks that, nowadays, even small children understand."³⁰⁸

Therefore, it is possible that the Court, in an effort to prevent terrorism, did not want to lessen the ability of law enforcement officials to search for contraband, especially weapons of mass destruction.³⁰⁹ A ruling that required informed consent on buses would have lessened the ability of law enforcement to protect the general public.³¹⁰ A ruling requiring informed consent on buses could also be read to require informed consent on airplanes.³¹¹ Because it would lessen the ability of law enforcement, this is definitely a rule the Court would like to avoid if it is apprehensive about the threat of terrorism.

Nevertheless, public interests should not override individual interests simply because the country is recovering from the tragic events of September 11, 2001. As one commentator noted:

Most critically, we must oppose the fatalism that has captured the minds and hearts of too many Americans. We should reject the premise that after September 11 we can no longer afford the privacy or freedom that we previously enjoyed. The United States has survived world war, presidential assassination, domestic riots, and economic depression. We have had nuclear weapons targeted on the nation's capital by foreign adversaries for much of the twentieth century. But none of these developments has required a permanent

freedom from unreasonable searches and seizures with the need for public safety on interstate transportation.").

308. *United States v. Drayton*, 122 S. Ct. 2105, 2114 (2002) (Souter, J., dissenting).

309. See Carrie L. Groskopf, *If It Ain't Broke, Don't Fix It: The Supreme Court's Unnecessary Departure From Precedent in *Kyllo v. United States**, 52 DEPAUL L. REV. 201, 204 (2002) (noting that the United States Supreme Court will be very deferential to police measures that are needed to the prevent terrorism). See also Marc Rotenberg, *Privacy and Secrecy After September 11*, 86 MINN. L. REV. 1115, 1116 (2002) (noting that September 11 will have a profound impact on the decisions of the courts and that the courts have already shown new deference to issues of national security).

310. See Bradley, *supra* note 286, at 73. Bradley notes that if notice of the right to refuse to consent is given, suspects would heed the advisory and refuse to cooperate. *Id.* Consequently, any possible evidence would be lost. *Id.*

311. *But see Drayton*, 122 S. Ct. at 2114 (Souter, J., dissenting). The *Drayton* dissent noted, "The commonplace precautions of air travel have not, thus far, been justified for ground transportation, however, and no such conditions have been placed on passengers getting on trains or buses." *Id.* See also Mitchell, *supra* note 293, at 1077 ("[T]his distinction by the dissent between air travel and ground travel may have signaled an emerging trend in search and seizure law, where the legal analysis employed could depend on the mode of public transportation at issue.").

sacrifice in the structure of liberty established by the Constitution or by law, or, specifically, a sacrifice of the individual's freedom to limit the oversight of the government. . . . We have a duty to safeguard privacy, to oppose secrecy, and to ensure the protection of constitutional freedom.³¹²

Although the Court may have been concerned about the possibility of terrorism, it cannot fail to protect our constitutional freedoms. It is "in times of crisis that hard-won liberties require the most careful protection."³¹³

CONCLUSION

Although the Court in *United States v. Drayton* tried to find an appropriate balance between the ever-competing public and private interests, the majority should not be excused for lessening the protection the Fourth Amendment was intended to provide. Furthermore, the majority's decision should not be taken as well-reasoned. The Court, despite previously acknowledging that the touchstone of the Fourth Amendment is reasonableness, failed to accurately assess what constitutes a reasonable person in the circumstances set forth in routine drug and weapon interdiction efforts on buses.³¹⁴ The Court's application of the reasonable person standard creates a person that is anything but reasonable. This reasonable person knows more about his rights than most lawyers and is not afraid to assert his rights in the face of intimidating law enforcement. Due to this unrealistic reasonable person, the Court allows individual rights to be overrun by governmental interests. Additionally, the events of September 11, 2001, and the possibility of future catastrophes should not provide justification for the *Drayton* decision. "[T]he strictures of the Fourth Amendment are not mere technicalities, but important constitutional safeguards that protect all citizens. Police practices must be designed to conform to the Fourth Amendment; a citizen's constitutional rights cannot be twisted to conform to current police practices."³¹⁵

BARRY CRAGO

312. Rotenberg, *supra* note 309, at 1135.

313. *United States v. Cothran*, 729 F. Supp. 153, 157-58 (D.D.C. 1990), *rev'd* *United States v. Lewis*, 921 F.2d 1294 (D.C. Cir. 1990).

314. *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (citing *Florida v. Jimeno*, 500 U.S. 248, 250 (1991)).

315. *United States v. Felder*, 732 F. Supp. 204, 209 (1990).

LEGAL ETHICS – Stabbed in the Back, But No Adverse Effect, *Mickens v. Taylor*, 122 S. Ct. 1237 (2002).

INTRODUCTION

On March 30, 1992, the body of 17-year-old Timothy Jason Hall was found under a piece of plywood on a mattress in an abandoned building along the James River in the City of Newport News, Virginia.¹ The autopsy revealed that Hall, nude from the waist down, had been stabbed 143 times and possibly sodomized.² His 14-year-old roommate, whom Hall had dropped off at a party near the area where his body was later discovered, was the last to see Hall alive on the night of March 28, 1992.³ Youths outside the building where the party took place saw a man, whom they later identified as Walter Mickens, hiding in the bushes across the street.⁴ On April 4, 1992, Mickens was arrested on unrelated charges in the area where Hall's body was discovered.⁵ Overwhelming evidence against Mickens began to surface.⁶ Mickens made self-incriminating statements when the police questioned him about the murder of Timothy Hall.⁷ While incarcerated, Mickens also made confessions to his cellmate about the sodomy and murder of Timothy Hall.⁸ Analyses of the specimen taken from the scene were consistent with samples taken from Mickens.⁹ Police also uncovered evidence that Mickens had sold the shoes Hall was wearing the night of the murder to another man for \$5.00.¹⁰ With all the evidence against him, Mickens went on trial.¹¹

1. *Mickens v. Greene*, 74 F. Supp. 2d 586, 590-92 (E.D. Va. 1999) (citing *Mickens v. Commonwealth*, 442 S.E.2d 678, 681-83 (Va. 1994)).

2. *Id.* at 590-91. Investigators discovered a white liquid next to Hall's anus, a pubic hair on his buttock, and semen on the mattress. *Id.*

3. *Id.* at 590. At the time of his death, Hall was living with 14-year-old Raheem Gordon and Gordon's father. *Id.*

4. *Id.*

5. *Id.* at 591.

6. *Id.* at 591-92.

7. *Id.* at 591. When asked about the murder, Mickens denied involvement, stating, "You didn't find any knife on me; did you?" *Id.* The fact that Hall had been stabbed had not been revealed to Mickens. *Id.* When the warrant for his arrest on the charge of the murder of Hall was given to Mickens, he stated that he accepted the charges. *Id.* When asked what he meant, he stated, "[I]f I told you I accept the warrants that means I'm guilty, don't it?" *Id.*

8. *Id.* at 592. When asked by his cellmate why he was arrested, Mickens answered, "They said I stabbed somebody 140 something times in the head . . . which I did." *Id.* Mickens also stated that "they" said he also sodomized the victim, "which I did." *Id.*

9. *Id.* at 591-92. The pubic hairs taken from Hall's body were "alike in all identifiable microscopic characteristics to the pubic hair sample taken from Mickens." *Id.* at 591 (quotation and citation omitted). Mickens' DNA also matched the semen found on the mattress. *Id.* at 591-92.

10. *Id.* at 591.

11. *Id.* at 590-92.

At the time of Timothy Hall's murder, assault and concealed weapons charges were pending against him in juvenile court.¹² Bryan Saunders was appointed on March 20, 1992, to represent Hall in the matter.¹³ A hearing was scheduled for April 3, 1992, in the Newport News Juvenile and Domestic Relations Court.¹⁴ Sometime between March 20 and Hall's disappearance on March 28, Saunders met with Hall for 15 to 30 minutes to discuss Hall's case.¹⁵ When Saunders arrived in court on Friday, April 3, to defend Hall against the assault and concealed weapons charges, Saunders was informed that Hall was dead and the charges had been dismissed.¹⁶ Judge Aundria Foster of the Juvenile and Domestic Relations Court issued a handwritten order on a single sheet of paper dismissing the charges against Hall.¹⁷ The name of Bryan Saunders as counsel for Hall appeared on the dismissal form.¹⁸ Mickens was arrested for Hall's murder the day after the dismissal.¹⁹ Two days later, Judge Foster appointed counsel for Mickens.²⁰ She chose Bryan Saunders, the lawyer who three days earlier had been representing the murder victim.²¹

Bryan Saunders did not inform the court, his co-counsel, or Mickens that he had represented Hall at the time of his murder and had met with him in person during the previous two weeks.²² Judge Foster did not ask Saunders if he would have a conflict of interest in representing Mickens.²³ Rather, without a word Saunders went on to represent Mickens through the guilt and penalty phases of his trial.²⁴ With the overwhelming evidence against him, the jury convicted Walter Mickens of the capital murder of Timothy Hall in the commission of attempted forcible sodomy and sentenced him to death.²⁵

After exhausting all state appeals, Mickens petitioned for a federal writ of habeas corpus in accordance with 28 U.S.C. § 2254 on several grounds, one of which was that he was denied effective assistance of counsel

12. *Id.* at 599. Hall's mother, Janet Heywood, swore out a warrant for assault and battery against Hall. *Id.* Hall allegedly grabbed his mother by the arms and "shoved her to the ground." *Id.* Hall was later charged with carrying a concealed weapon when he was found carrying a serrated bread knife in wrapped paper. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 600.

17. *Mickens v. Taylor*, 240 F.3d 348, 354 (4th Cir. 2001) (en banc).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *See Mickens*, 74 F. Supp. 2d at 599-600; *Mickens v. Taylor* 122 S. Ct. 1237, 1240 (2002).

23. *Mickens*, 240 F.3d at 354.

24. *Id.*

25. *Mickens*, 74 F. Supp. 2d at 590.

due to Saunders' conflict of interest at trial.²⁶ The United States District Court for the Eastern District of Virginia held that in order to establish a violation of the Sixth Amendment right to conflict-free counsel, Mickens must show an actual conflict of interest and an adverse affect on Saunders' performance, neither of which were sufficiently demonstrated.²⁷ The court concluded that Judge Foster knew or should have known of the potential conflict of interest when she appointed Saunders to defend Mickens.²⁸ Her failure to inquire however, did not merit a reversal of Mickens' conviction without an independent showing of adverse effect.²⁹ Accordingly, Mickens' conviction was affirmed.³⁰

The United States Court of Appeals for the Fourth Circuit reversed the decision of the trial court.³¹ On rehearing en banc, the Court of Appeals affirmed Mickens' conviction.³² The Court of Appeals in large part followed the reasoning laid out by the District Court in holding that Judge Foster's failure to inquire into a potential conflict of interest about which she knew or should have known was error, but did not warrant a reversal.³³ Instead, Mickens had the burden of showing that Saunders was acting under an actual conflict of interest that adversely affected his performance.³⁴ Like the Dis-

26. *Id.* at 590, 593. The federal habeas corpus provision states in significant part:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a) (2000). The discovery that Saunders represented Hall at the time he was murdered was quite accidental. *Mickens*, 74 F. Supp. 2d at 600. Mickens' counsel for federal habeas corpus proceedings went to the Juvenile and Domestic Relations Court to review Mickens' juvenile records. *Id.* Counsel asked for any files involving Timothy Hall. *Id.* The clerk mistakenly produced Hall's confidential juvenile file. *Id.* Counsel recognized Saunders' name as defense counsel for Hall in the file. *Id.*

27. *Mickens*, 74 F. Supp. 2d at 614-15.

28. *Id.* at 614.

29. *Id.* 610-15. The court heard evidence on adverse effect and found there was none in this case. *Id.*

30. *Id.* at 615-16.

31. *Mickens v. Taylor*, 227 F.3d 203, 206 (4th Cir. 2000), *rev'd* 240 F. 3d 348 (4th Cir. 2001) (en banc). The court reasoned that according to *Wood v. Georgia*, it was unnecessary to show an adverse effect when an actual conflict of interest existed and the trial court knew or should have known of the conflict and failed to make an inquiry. *Id.* at 210-11. For a discussion of *Wood v. Georgia*, see *infra* notes 121-41 and accompanying text. The court found that the judge knew of the conflict of interest and that an actual conflict existed according to the *Freund* test. *Id.* at 212-17. For a discussion of the *Freund* test, see *infra* note 232. Mickens was granted a new trial. *Id.* at 217.

32. *Mickens v. Taylor*, 240 F.3d 348 (4th Cir. 2001) (en banc).

33. See *id.* at 357-60.

34. *Id.* at 355-56.

trict Court, the Court of Appeals held that Mickens had not sustained his burden.³⁵

The Supreme Court of the United States granted certiorari on the following issue: “[W]hat a defendant must show in order to demonstrate a Sixth Amendment violation where the trial court fails to inquire into a potential conflict of interest about which it knew or reasonably should have known.”³⁶ The Court held that the trial court’s failure to inquire into a potential conflict of interest about which it knew or should have known did not merit reversal unless the defendant could independently demonstrate that an actual conflict adversely affected counsel’s performance.³⁷

This case note will discuss how the decision in *Mickens v. Taylor* misinterprets the previous case law regarding conflicts of interest and effective assistance of counsel and creates a new burden on defendants to demonstrate a Sixth Amendment violation. This note will also address the policy implications of *Mickens v. Taylor* and the significant impact the decision may have on future defendants who endeavor to reverse a conviction based on an attorney’s conflict of interest. In addition, the effect of the decision on conflict of interest law in Wyoming will be assessed. Finally, this note will discuss the last section of the *Mickens* opinion, which foreshadows even greater restrictions on the right to effective assistance of counsel by limiting the applicability of the widely used *Sullivan* test.³⁸

BACKGROUND

The Sixth Amendment to the United States Constitution guarantees every person accused of a crime the right to have the counsel of an attorney.³⁹ The Sixth Amendment states in relevant part that “[i]n all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defence.”⁴⁰ Assistance of counsel is a fundamental right that preserves the integrity of the justice system by assuring that verdicts are reliable.⁴¹ The Supreme Court, throughout the twentieth century, endeavored to define the scope of the Sixth Amendment right to assistance of counsel.⁴² Having as-

35. *Id.* at 360.

36. *Mickens v. Taylor*, 122 S. Ct. 1237, 1239 (2002).

37. *Id.* at 1245.

38. The *Sullivan* test states that prejudice to the defendant will be presumed if defense counsel was operating under an actual conflict of interest and the conflict adversely affected counsel’s performance. *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980); *see infra* notes 99-120 and accompanying text.

39. U.S. CONST. amend. VI.

40. *Id.*

41. *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

42. In 1932, the United States Supreme Court held, in *Powell v. Alabama*, that the right “to be heard would be . . . of little avail if it did not comprehend the right to be heard by counsel.” 287 U.S. 45, 68-69 (1932). The Court went on to say:

sistance of counsel does not mean that the mere presence of an attorney will suffice.⁴³ Rather, “the right to counsel is the right to the effective assistance of counsel.”⁴⁴ In essence, to protect the constitutional rights afforded by the

Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or [sic] criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

Id. at 69. In 1938, the Court examined a case in which the defendants, accused of murder, were never appointed counsel. *Johnson v. Zerbst*, 304 U.S. 458, 460 (1938). The Court held that the Sixth Amendment right to counsel is protected “by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake.” *Id.* at 468. The Court emphasized the importance of counsel:

The Sixth Amendment . . . embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious.

Id. at 462-63.

In *Gideon v. Wainwright*, the Court established that the right to counsel extends to defendants accused of felonies who cannot afford an attorney to represent them. 372 U.S. 335, 343-44 (1963). The Court observed, “That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.” *Id.* at 344. In *McMann v. Richardson*, the Court stated that the right to counsel is the right to “effective assistance of competent counsel.” 397 U.S. 759, 771 (1970). More specific to this case note, the Court in *Glasser v. United States* found the right to assistance of counsel can be violated if counsel is operating under a conflict of interest. 315 U.S. 60, 76 (1942). The Court stated, “The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.” *Id.* In *United States v. Cronin*, the Court held that the right to effective assistance of counsel is “the right of the accused to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” 466 U.S. 648, 656 (1984). All the surrounding circumstances must be examined to “justify a presumption of ineffectiveness.” *Id.* at 662.

43. See *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

44. *Id.*

Sixth Amendment, counsel must play "the role necessary to ensure that the trial is fair."⁴⁵

The Strickland Test for Ineffective Assistance of Counsel

The United States Supreme Court in *Strickland v. Washington* outlined the general test for effective assistance of counsel.⁴⁶ In *Strickland*, the defendant was accused of three brutal stabbing murders, kidnapping, torture, assault, attempted murder, attempted extortion, and theft.⁴⁷ Against the advice of counsel, the defendant confessed to the murders, waived his right to a jury trial, and pleaded guilty to all three murder charges.⁴⁸ At sentencing, counsel advised the defendant to waive his right to a jury recommendation on sentencing and presented no testimony to the judge, relying in part on the trial judge's earlier statement that he respected those who "are willing to step forward and admit their responsibility."⁴⁹ The judge sentenced the defendant to death.⁵⁰ The defendant appealed the convictions alleging that defense counsel was ineffective.⁵¹

The *Strickland* Court held that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."⁵² The defendant must show two elements before counsel's performance is deemed ineffective: (1) that counsel's performance was "deficient," and (2) that "the deficient performance prejudiced the defense."⁵³

The first element in *Strickland* necessary to prove a Sixth Amendment violation for ineffective assistance of counsel is to show that defense counsel's performance was "deficient."⁵⁴ The *Strickland* Court held that in order for counsel's performance to avoid deficiency, counsel must provide "reasonably effective assistance."⁵⁵ That is, counsel must act as a reasonable attorney under the circumstances.⁵⁶ The Court was quick to add that no more specific standard was necessary, as the lower court had held, because the rule could easily become too cumbersome.⁵⁷ In addition, the *Strickland*

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

46. *Strickland v. Washington*, 466 U.S. 668 (1984).

47. *Id.* at 671-72.

48. *Id.* at 672.

49. *Id.*

50. *Id.* at 675.

51. *Id.*

52. *Id.* at 686.

53. *Id.* at 687.

54. *Id.*

55. *Id.*

56. *Id.* at 688.

57. *Id.* at 688-89; see *Washington v. Strickland*, 693 F.2d 1243 (5th Cir. 1982).

Court held that a reviewing court should be highly deferential to the attorney's performance.⁵⁸ Deficient performance of counsel alone, however, is not enough to reverse a conviction.

In addition to a deficient performance, the defendant must show that the defense was prejudiced by counsel's performance or that some harm was done by counsel's performance.⁵⁹ 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."⁶⁰ If the defendant can show both deficient counsel and prejudice, then there is sufficient evidence to "undermine confidence in the outcome" and a reversal is warranted.⁶¹

There are some circumstances, however, that merit exceptions to the *Strickland* prejudice test.⁶² In these situations the Sixth Amendment violation is so flagrant that prejudice is presumed.⁶³ The most obvious is when the defendant is denied any counsel at all.⁶⁴ The second is when "although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate . . ."⁶⁵ In the third circumstance, counsel "actively represented conflicting interests."⁶⁶ Although prejudice is not automatically presumed in this case, the defendant has a lesser burden than proving prejudice.⁶⁷ Instead of establishing prejudice through the court record, prejudice is presumed if counsel is burdened by an actual conflict of interest that adversely affects counsel's performance.⁶⁸ The Court in *Strickland* wrote that such an exception is made when "counsel

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

59. *Id.* at 687.

60. *Id.* at 694.

61. *Id.*

62. *United States v. Cronic*, 466 U.S. 648, 658 (1984); *Strickland*, 466 U.S. at 692.

63. *Cronic*, 466 U.S. at 658.

64. *Id.* at 659. In *Gideon v. Wainwright*, the Court held that Gideon's right to effective counsel was violated when he was denied counsel to defend against felony charges. 372 U.S. 335, 344 (1963).

65. *Cronic*, 466 U.S. at 659-60. The *Cronic* Court cites *Powell v. Alabama* as an example of this situation. *Cronic*, 466 U.S. at 659-60 (citing *Powell v. Alabama*, 287 U.S. 45 (1932)). In *Powell*, the judge appointed a lawyer to the defendants on the day of trial. 287 U.S. at 53-54. The Court held that "such designation of counsel as was attempted was . . . so close upon the trial as to amount to a denial of effective and substantial aid in that regard." *Id.* at 53. In *Cronic*, new defense counsel was only allowed 25 days to prepare for trial, while the government had four and one half years to prepare. *Cronic*, 466 U.S. at 649. The Court held that the circumstances in *Cronic* were not sufficient to presume prejudice. *Id.* at 666.

66. *Cronic*, 466 U.S. at 661 n.28 (citing *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980)); see also *Strickland*, 466 U.S. at 692.

67. *Strickland*, 466 U.S. at 692.

68. *Id.* (citing *Cuyler v. Sullivan*, 446 U.S. 335, 345-50 (1980)). To show prejudice the defendant must prove that absent the errors of counsel, the outcome would have been different. *Strickland*, 466 U.S. at 694.

breaches the duty of loyalty, perhaps the most basic of counsel's duties."⁶⁹
The Court went on to state:

Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts . . . it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest.⁷⁰

Conflict of Interest Cases

The first case to tackle the effect of a conflict of interest on the right to effective assistance of counsel was *Glasser v. United States* in 1942.⁷¹ In *Glasser*, several government officials were convicted of conspiracy to defraud the United States government after they accepted money from individuals indicted for violating federal liquor laws in exchange for making the charges "disappear."⁷² At the time, Glasser was Assistant United States Attorney in charge of liquor cases in the Northern District of Illinois.⁷³ As the case proceeded to trial, Kretske, one of Glasser's co-defendants, found himself without counsel.⁷⁴ The court suggested that Glasser's counsel step in to defend Kretske.⁷⁵ Glasser objected, but after a long discussion the court appointed Glasser's attorney to represent the interests of both defendants.⁷⁶

69. *Strickland*, 466 U.S. at 692.

70. *Id.*

71. *Glasser v. United States*, 315 U.S. 60 (1942).

72. *Id.* at 63-64.

73. *Id.* at 63.

74. *Id.* at 68.

75. *Id.*

76. *Id.* at 68-69. The trial court, Glasser, and Glasser's counsel, Mr. Stewart, had the following discussion about Mr. Stewart representing Kretske:

Mr. Stewart: May I make this statement about that, judge? We were talking about it – we were all trying to get along together. . . . There will be conversations here where Mr. Glasser wasn't present, where people have seen Mr. Kretske and they have talked about, that they gave money to take care of Glasser, that is not binding on Mr. Glasser, and there is a divergency there, and Mr. Glasser feels that if I would represent Mr. Kretske the jury would get an idea that they are together

The Court: How would it be if I appointed you as attorney for Kretske?

Mr. Stewart: That would be for your Honor to decide.

The Court: I know you are looking out for every possible legitimate defense there is. Now, if the jury understood that while you were retained by Mr. Glasser the Court appointed you at this late hour to represent Kretske, what would be the effect of the jury on that?

Mr. Stewart: Your Honor could judge that as well as I could.

The Court: I think it would be favorable to the defendant Kretske.

On appeal, Glasser claimed that the conflicting interests his attorney was forced to represent by order of the court denied him his Sixth Amendment right to the assistance of counsel.⁷⁷ In reviewing the lower court's decision, the United States Supreme Court focused on the responsibility of the trial court to safeguard the defendant's rights.⁷⁸ "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. . . . The trial court should protect the right of an accused to have the assistance of counsel."⁷⁹ In this case, "The possibility of the inconsistent interests of Glasser and Kretske was brought home to the court, but instead of jealously guarding Glasser's rights, the court may fairly be said to be responsible for creating a situation which resulted in the impairment of those rights."⁸⁰ The Court found that Glasser's attorney failed to cross-examine a vital witness and failed to object to inadmissible testimony in his "struggle to serve two masters."⁸¹

Having discovered a conflict of interest, the Court declined to speculate on the degree of prejudice caused by the conflict of interest, reasoning that "[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."⁸² The Court was especially concerned with the role the trial court played in creating the conflict of interest:

Of equal importance with the duty of the court to see that an accused has the assistance of counsel is its duty to refrain from . . . even suggesting that counsel undertake to concurrently represent interests which might diverge from those of his first client, when the possibility of that divergence is brought home to the court.⁸³

The Court held that "the [trial] court thereby denied Glasser his right to have the effective assistance of counsel, guaranteed by the Sixth Amendment," and ordered a new trial.⁸⁴

Mr. Glasser: I think it would be too, if he had Mr. Stewart. That's the reason I got Mr. Stewart, but if a defendant who has a lawyer representing him is allowed to enter an objection, I would like to enter my objection. I would like to have my own lawyer representing me.

Id.

77. *Id.* at 67.

78. *Id.* at 71.

79. *Id.*

80. *Id.*

81. *Id.* at 72-75.

82. *Id.* at 75-76.

83. *Id.* at 76

84. *Id.* No further decision was reported on remand.

The next conflict of interest case to reach the Court was *Holloway v. Arkansas* in 1978.⁸⁵ In *Holloway*, defense counsel was appointed to defend three men accused of robbing a Little Rock, Arkansas, restaurant and raping two of the female employees.⁸⁶ Before trial, defense counsel moved that separate counsel be appointed each defendant due to possible conflicts of interest that could arise in defending all three defendants together.⁸⁷ After a hearing, the court refused to appoint separate counsel.⁸⁸ Before the jury was empaneled, defense counsel again moved for appointment of separate counsel, arguing that in the event one of the defendants testified, counsel would be unable to properly protect the rights of the others by cross-examining the defendant.⁸⁹ The court again denied the motion.⁹⁰ After the prosecution rested its case, it became clear that against counsel's advice all three defendants planned to testify.⁹¹ Counsel again explained to the court that he could not effectively represent the interests of all three defendants if they took the stand.⁹² For a third time, the trial judge refused to appoint separate counsel.⁹³

The *Holloway* Court held that "the failure, in the face of the representations made by counsel weeks before trial and again before the jury was empaneled, deprived petitioners of the guarantee of assistance of counsel."⁹⁴ The Court cited *Glasser* and reasoned that the conflict of interest was "brought home" to the court in this case by the formal motions and objections of defense counsel.⁹⁵ The Court stated that to determine whether the conflict of interest was "harmless error" would be difficult and speculative, and that "assistance of counsel is among those constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error."⁹⁶ Thus, when "a trial court improperly requires joint representation over timely objection reversal is automatic."⁹⁷ *Holloway* established the clear rule that if defense counsel objects to multiple representation and the trial court fails to inquire, the error warrants reversal.⁹⁸

Two years later, in *Cuyler v. Sullivan*, the Court addressed the issue of an appropriate standard when the trial court did not know or had no rea-

85. 435 U.S. 475 (1978).

86. *Id.* at 477.

87. *Id.*

88. *Id.*

89. *Id.* at 478.

90. *Id.*

91. *Id.*

92. *Id.* at 478-79.

93. *Id.* at 480.

94. *Id.* at 484 (quotation omitted).

95. *Id.* at 484-85.

96. *Id.* at 489, 491 (quotations and citations omitted).

97. *Id.* at 488.

98. *Id.*

son to know of a possible conflict of interest even though a conflict of interest probably existed.⁹⁹ Sullivan had been indicted along with two other men for the murders of a teamster and his companion in Philadelphia, Pennsylvania.¹⁰⁰ At the start of the litigation, separate counsel represented Sullivan.¹⁰¹ After Sullivan could no longer afford his attorney, he accepted representation by the two attorneys retained by the other defendants.¹⁰² Sullivan went to trial first.¹⁰³ The defense did not present a case on Sullivan's behalf and rested at the close of the prosecution's case.¹⁰⁴ Sullivan was convicted of murder and sentenced to life in prison.¹⁰⁵ The other two defendants were acquitted in subsequent trials.¹⁰⁶

Sullivan argued on appeal that he had been denied the effective assistance of counsel due to his lawyer's conflicting interests.¹⁰⁷ This case was different from *Holloway* because no formal objection was taken against representation by counsel, nor did any other circumstance exist that would have "brought home" to the court that there was a potential conflict of interest.¹⁰⁸ The Court of Appeals for the Third Circuit agreed with Sullivan and held that a reversal is merited if the defendant can make some showing "of prejudice or conflict of interest, however remote . . ."¹⁰⁹ Accordingly, the Third Circuit court overturned Sullivan's conviction.¹¹⁰

The Supreme Court held that the fact that the judge did not inquire into a possible conflict of interest was not reversible error.¹¹¹ Justice Powell, writing for the majority, first held that a trial judge has no affirmative duty to inquire into whether there is a conflict of interest in a case of multiple representation unless "special circumstances" indicate it is necessary.¹¹² The mere possibility of a conflict of interest, however, without any other revealing circumstances is not enough to necessitate an inquiry by the trial court.¹¹³ In *Sullivan*, the Court reasoned that because there were no special circumstances indicating the existence of a conflict of interest, the trial court had no obligation to inquire.¹¹⁴ In such case, to obtain a reversal the defendant must show that an actual conflict of interest adversely affected defense counsel's

99. 446 U.S. 335 (1980).

100. *Id.* at 337.

101. *Id.*

102. *Id.*

103. *Id.* at 338.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 347.

109. *United States ex rel. Sullivan v. Cuyler*, 593 F.2d 512, 524 (3rd Cir. 1979).

110. *Id.* at 523-24.

111. *Sullivan*, 446 U.S. at 348.

112. *Id.* at 346-47.

113. *Id.* at 348, 350.

114. *Id.* at 347.

performance.¹¹⁵ The Court did not in this case clearly define actual conflict or adverse effect.¹¹⁶

Justice Marshall's dissent criticized the majority's assessment of the inherent danger of conflicts of interest in cases of multiple representations.¹¹⁷ Justice Marshall reasoned that the potential for a conflict of interest in cases of multiple representation was so "grave" that the trial court should have a duty to inquire in every case.¹¹⁸ Justice Marshall felt the better test should be that, absent an objection at trial, the defendant should have to show only that an actual conflict of interest existed, and not that it adversely affected defense counsel.¹¹⁹ Justice Marshall opined that the burden of proving that an actual conflict of interest adversely affected defense counsel's performance is "not only unduly harsh, but incurably speculative as well."¹²⁰

Less than a year after *Sullivan* was decided, the Court decided *Wood v. Georgia*, in which the trial court knew or should have known of a conflict of interest, but failed to inquire.¹²¹ Justice Powell again wrote the majority opinion.¹²² The defendants in *Wood* were employees of the Plaza Theatre and Bookstore, an adult establishment in Atlanta, Georgia.¹²³ Each defendant was charged with and convicted of two counts of distributing obscene materials in violation of title 26, section 2101, of the Georgia Code.¹²⁴ The defendants each received fines of \$5,000 and 12-month jail sentences, suspended on the condition that the defendants paid the fines at \$500 a month.¹²⁵ The defendants believed their employer would pay the fines; however, the employer failed to do so.¹²⁶ After three months, the court held a hearing in which it denied the defendants' motion to reduce the fines due to their inability to pay and ordered the defendants to serve the remaining jail sentences.¹²⁷

115. *Id.* at 348.

116. For a discussion of the definitions of "conflict of interest" and "adverse effect," see *infra* note 232.

117. *Sullivan*, 446 U.S. at 354 (Marshall, J., dissenting).

118. *Id.* (Marshall, J., dissenting).

119. *Id.* at 355-56 (Marshall, J., dissenting).

120. *Id.* at 355 (Marshall, J., dissenting).

121. *Wood v. Georgia*, 450 U.S. 261, 272 (1981). The proceeding in which the trial court should have known of the conflict of interest was not the defendants' trial itself, but the probation revocation hearing. *Id.* The Court does indicate, however, that the conflict of interest could have been recognized as early as the trial. *Id.* at 268, 272.

122. *Id.* at 262.

123. *Id.* at 263.

124. GA. CODE ANN. § 26-2101 (1978). The Georgia obscenity statute read in part, "A person commits the offense of distributing obscene materials when he . . . exhibits or otherwise disseminates to any person any obscene material." *Dyke v. State*, 209 S.E.2d 166, 173 (Ga. 1974) (quoting GA. CODE ANN. § 26-2101 (1974)).

125. *Wood*, 450 U.S. at 263.

126. *Id.* at 266-67.

127. *Id.* at 264.

The Supreme Court granted certiorari on the issue of “whether it is constitutional under the Equal Protection Clause to imprison a probationer solely because of his inability to make installment payments on fines.”¹²⁸ The Court, however, decided that the case could not be heard on that issue because defense counsel possibly represented conflicting interests at trial and at the probation revocation hearing.¹²⁹ The defendants understood their employer would pay their legal fees and pay any fines they incurred as a result of their employment with the Plaza Theatre and Bookstore.¹³⁰ The defendants’ employer hired defense counsel as agreed, but failed to pay their fines.¹³¹ From the record, it appeared possible that counsel was attempting to create a test case on the Equal Protection Issue for the benefit of the employer, disregarding the best interests of the defendants in having their sentences reduced.¹³² The possible conflict of interest was apparent enough in the record to impose a duty to inquire upon the trial court.¹³³ Because the Court was not briefed on the issue, there was insufficient evidence to demonstrate that the possible conflict of interest actually existed and the Court remanded the case for a “hearing to determine whether the conflict of interest that this record strongly suggests actually existed”¹³⁴

Wood addressed a slightly different situation than that in *Sullivan*. No formal objection to the representation was made at trial in either case.¹³⁵

128. *Id.*

129. *Id.* at 262-63.

130. *Id.* at 266.

131. *Id.* at 266-67.

132. *Id.* at 266-68. Defense counsel did not protest the amount of the fines even though there was evidence that the defendants could not afford to pay such large fines from their salaries. *Id.* at 267-68. Counsel did not move to have the fines reduced until the last day before the defendants’ probations were to be revoked. *Id.* at 268. In addition, the employer was willing to post bond for all three defendants as well as pay for their attorney, but failed to pay their fines as promised, indicating possible ulterior motives. *Id.* at 266-67.

133. *Id.* at 272. The Court never specifically states what a trial court would have to do to fulfill the duty to inquire. *See id.* However, the Court in *Sullivan* found that multiple representation alone is not enough to trigger a duty to inquire. *Cuyler v. Sullivan*, 446 U.S. 335, 346 (1980). The concurring Justices disagreed, stating that in every situation of joint representation the trial court should have a duty to inquire. *See id.* at 352 (Brennan, J., concurring), 354 (Marshall, J., concurring). Justice Brennan, in his concurrence, referred to the duty to inquire as “the duty of the trial court . . . to ensure that the defendants have not unwittingly given up their constitutional right to effective counsel.” *Id.* at 352 (Brennan, J., concurring). Justice Marshall described the inquiry this way: “[W]henver two or more defendants are represented by the same attorney the trial judge must make a preliminary determination that the joint representation is the product of the defendants’ informed choice.” *Id.* at 354 (Marshall, J., concurring). Thus, it appears that the duty to inquire involves informing the defendant of the possible conflict of interest and obtaining consent before allowing the representation. *See id.* (Marshall, J., concurring).

134. *Wood*, 450 U.S. at 262-63, 272-73. Following the *Wood* decision, the Georgia Court of Appeals vacated its previous judgment and remanded the case to the trial court “for further proceedings consistent with [the United States Supreme Court] opinion.” *Wood v. Georgia*, 280 S.E.2d 439 (Ga. Ct. App. 1981). No further decision was reported on remand.

135. *Sullivan*, 446 U.S. at 347; *see also* *Wood v. Georgia*, 450 U.S. 261 (1980).

However, in *Sullivan*, no other "special circumstances" would have brought a potential conflict of interest home to the trial judge; therefore, there was no duty to inquire.¹³⁶ In *Wood*, on the other hand, Justice Powell wrote that the possible conflict of interest was apparent enough that the trial court had a duty to inquire.¹³⁷ Justice Powell commented, "Moreover, *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.'" ¹³⁸

The Court remanded the case "to determine whether the conflict of interest that this record strongly suggests actually existed . . . ," and if an actual conflict of interest was found, a new revocation hearing was to be held "untainted by a legal representative serving conflicting interests."¹³⁹ The Court chose not to grant an outright reversal because the issues had not been briefed.¹⁴⁰ Thus, in a case in which the trial court knew or should have known of a potential conflict of interest and failed to inquire, the appropriate remedy is reversal and a grant of new proceedings "untainted by . . . conflicting interests" if the Court can find from the record and the briefs that the actual conflict of interest existed at the time of trial.¹⁴¹

Wyoming Law

In 1992, the Supreme Court of Wyoming chose to provide greater protection than that afforded by the federal system in conflict of interest cases involving multiple representation.¹⁴² In *Shongutsie v. State*, the issue was whether a husband and wife represented by the same attorney had been deprived of their constitutional right to effective assistance of counsel.¹⁴³ The husband and wife in this case had both participated in a street brawl in Riverton, Wyoming, which left one man dead and several others injured.¹⁴⁴ Mr. Shongutsie was accused of first-degree murder and Mrs. Shongutsie was accused of aggravated assault.¹⁴⁵ The Constitution of the State of Wyoming states, "In all criminal prosecutions the accused shall have the right to de-

136. *Sullivan*, 446 U.S. at 347-48.

137. *Wood*, 450 U.S. at 272.

138. *Id.* at 273 n.18 (citing *Sullivan*, 446 U.S. at 347).

139. *Id.* at 273-74.

140. *Id.* Justice Powell comments that if the appropriate motion is made on remand, the trial court has the discretion to reverse the convictions. *Id.* at 274 n.21. "There also is the possibility that this relief may be available in habeas corpus proceedings, if petitioners can show an actual conflict of interest during the trials or at the time of sentencing." *Id.*

141. *See id.* at 273-74.

142. *Shongutsie v. State*, 827 P.2d 361 (Wyo. 1992).

143. *Id.* at 362.

144. *Id.* at 363.

145. *Id.*

fend in person and by counsel . . . ”¹⁴⁶ The court examined the federal cases defining the right to counsel guaranteed by the Sixth Amendment and rejected the holding in *Sullivan* requiring a defendant to show both an actual conflict of interest and an adverse effect when the trial court had no reason to know of the conflict of interest.¹⁴⁷ Instead, the court chose to “more firmly protect the defendant’s right to representation by an attorney who is free from any conflict of interest.”¹⁴⁸ The Wyoming rule on conflict of interest in cases of multiple representation became: “[P]rejudice will be presumed in all instances of multiple representation of criminal defendants and, in the absence of an appropriate waiver, multiple representation will constitute reversible error.”¹⁴⁹

The Supreme Court of Wyoming reaffirmed its position in *Shongutsie* later that year in *Kenney v. State*.¹⁵⁰ The situation in *Kenney* was different from *Shongutsie* in that the same counsel represented Kenney and her boyfriend, but they had separate trials.¹⁵¹ “In either case, the trial judge has a duty to apprise the defendant of conflict problems that may develop during any dual representation of interested parties.”¹⁵² The court found that this interpretation was consistent with Wyoming Rule of Criminal Procedure 44(c), which states: “Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall order separate representation.”¹⁵³ The court noted that the comparable Federal Rule of Criminal Pro-

146. WYO. CONST. art. I, § 10. Compare with the Sixth Amendment right to assistance of counsel which reads, “In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defence.” U.S. CONST. amend. VI.

147. *Shongutsie*, 827 P.2d at 366-67. The court observed that “protection of constitutional rights of an accused is not the peculiar province of the federal courts.” *Id.* at 367 (quoting *Dryden v. State*, 535 P.2d 483, 491 (Wyo. 1975)).

148. *Id.*

149. *Id.* at 367. The court reasoned that the possibility of a conflict of interest is so great in cases of multiple representation that “any case-by-case inquiry is ill-advised and unwise.” *Id.* The court also proclaimed that it was “disinterested in establishing a rule . . . which would not emphasize the importance of different counsel where any conflict in representation could be envisioned.” *Id.* (quoting *Reynoldson v. State*, 737 P.2d 1331, 1336 (Wyo. 1987)). The court also found that the automatic reversal rule would further three policy goals. *Id.* at 367-68. First, the rule would “discourage attorneys from accepting the role of a dual advocate in criminal cases and thereby potentially compromising their most fundamental duty – loyalty to the individual client.” *Id.* at 367 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). Second, the rule “promotes the effective administration of justice” by defining the trial court’s role when a case involves multiple representation. *Id.* at 368. Finally, “and perhaps most important, the rule better ensures that all defendants will be fully apprised of their constitutional right to be represented by an attorney free of any conflict of interest.” *Id.* The court observed that other jurisdictions have also adopted a similar rule despite contrary federal case law. *Id.* at 367 (citing *Harvey v. State*, 619 P.2d 1214 (Nev. 1980); *Moreau v. State*, 588 P.2d 275 (Alaska 1978); *Commonwealth v. Davis*, 384 N.E.2d 181 (Mass. 1978); *State v. Olsen*, 258 N.W.2d 898 (Minn. 1977)).

150. 837 P.2d 664 (Wyo. 1992).

151. *Id.* at 673.

152. *Id.*

153. *Id.* (citing WYO.R.CRIM.P. 44(c)).

cedure is not as strict because it does not order separate representation, but only requires the court to take "appropriate measures."¹⁵⁴ The purpose of Wyoming's stricter rule, the court added, is "[i]n part, . . . to protect the defendant; [and] in reality, it protects the prosecutor from a subsequent claim of an invalid guilty verdict."¹⁵⁵

The next year the Supreme Court of Wyoming decided *Saldana v. State*.¹⁵⁶ The court in *Saldana* was faced with an analysis of the reasonableness of a search and seizure under the Wyoming Constitution.¹⁵⁷ The majority, using federal law almost exclusively, found that the Wyoming Constitution did not provide more protection against search and seizure than the Fourth Amendment to the United States Constitution.¹⁵⁸ In his concurrence, Justice Golden laid out six criteria to be considered when deciding if the state constitution should be interpreted differently than the federal Constitution.¹⁵⁹ The criteria are: (1) the textual language; (2) the differences in the texts; (3) constitutional history; (4) pre-existing state law; (5) structural differences; and (6) matters of particular state or local concern.¹⁶⁰ These criteria are now collectively referred to as the *Saldana* test.¹⁶¹

PRINCIPAL CASE

In *Mickens v. Taylor*, decided on March 27, 2002, the United States Supreme Court had the opportunity to decide a case similar to *Wood v. Georgia*, in that the trial court knew of the potential conflict of interest but failed to inquire.¹⁶² In *Mickens*, the Court assumed in its statement of the issue that Judge Foster knew or should have known of a potential conflict of interest and failed to inquire.¹⁶³ The only question for the Court was what the defendant had to prove to show a violation of the Sixth Amendment right to the assistance of counsel in that situation.¹⁶⁴ Justice Scalia, writing for the

154. *Kenney*, 837 P.2d at 673. Federal Rule of Criminal Procedure 44(c) states: "Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel." FED.R.CRIM.P. 44(c).

155. *Kenney*, 837 P.2d at 673.

156. 846 P.2d 604 (Wyo. 1993).

157. *Id.* at 606.

158. *Id.* at 610-12.

159. *Id.* at 622 (Golden, J., concurring). This approach was later adopted by the majority in *Vasquez v. State*, 990 P.2d 476 (Wyo. 1999).

160. *Saldana*, 846 P.2d at 622 (Golden, J., concurring).

161. *Mogard v. City of Laramie*, 32 P.3d 313, 315 (Wyo. 2001). The *Saldana* test was recently employed by the court in *Mogard v. City of Laramie* where the court found that a separate analysis under the Wyoming Constitution was warranted after examining the six criteria. *Id.* at 315-23. However, the court ultimately concluded that the Wyoming Constitution should be interpreted in the same manner as the Constitution of the United States. *Id.* at 321.

162. *Mickens v. Taylor*, 122 S. Ct. 1237 (2002).

163. *Id.* at 1239.

164. *Id.*

majority, closely examined the holdings of *Holloway*, *Sullivan*, and *Wood*.¹⁶⁵ In *Holloway*, the Court established that reversal would be automatic if counsel objected to the representation, but was nevertheless forced to represent the defendants without a determination of whether a conflict of interest existed.¹⁶⁶ In *Sullivan*, the Court held that absent special circumstances, such as an objection, that would impose a duty on the trial court to inquire, the defendant must show that an actual conflict adversely affected defense counsel's performance.¹⁶⁷ Justice Scalia went on to interpret what, if any, effect the *Wood* opinion had on the precedent set forth in *Holloway* and *Sullivan*.¹⁶⁸

The Court first examined the meaning of the language of Justice Powell's remand instruction in *Wood*, directing the lower court to determine whether an "actual conflict" existed.¹⁶⁹ Counsel for Mickens argued that the remand instruction established an "unambiguous rule" that a conviction must be reversed where the trial court failed to inquire into a conflict of interest of which it knew or should have known and the actual conflict of interest can be shown.¹⁷⁰ Counsel for Mickens also argued that the *Wood* Court's silence as to whether an adverse effect was also required to be shown on remand proved that the defendant must only show an actual conflict of interest and not an adverse effect.¹⁷¹ The majority disagreed.¹⁷² "As used in the remand instruction, . . . we think 'an actual conflict of interest' meant precisely a conflict that affected counsel's performance – as opposed to a mere theoretical division of loyalties."¹⁷³ The Court decided that Justice Powell's use of the words "actual conflict of interest" in *Wood* was shorthand for an actual conflict of interest adversely affecting counsel's performance.¹⁷⁴ Thus, even in a situation where the trial court knew of a potential conflict of interest and failed to inquire, the defendant must prove both that an actual conflict existed and that it adversely affected counsel's performance.¹⁷⁵ Accordingly,

165. *Id.* at 1241-45.

166. *Id.* at 1241-42 (citing *Holloway v. Arkansas*, 435 U.S. 475, 498 (1978)).

167. *Id.* at 1242 (citing *Cuyler v. Sullivan*, 446 U.S. 335, 348-49 (1980)).

168. *Id.* at 1242-45.

169. *Id.* at 1243-44.

170. *Id.* at 1243.

171. *Id.*

172. *Id.* at 1243-44.

173. *Id.* at 1243.

174. *Id.* The Court reasoned that this interpretation was the only one consistent with Justice Powell's statement regarding why the *Wood* Court had to remand the case: "On the record before us, we cannot be sure whether counsel was influenced in his basic strategic decisions by the interest of the employer who hired him." *Id.* at 1243-44 (quoting *Wood v. Georgia*, 450 U.S. 261, 272 (1981)). In addition, "The notion that *Wood* created a new rule *sub silentio* – and in a case where certiorari had been granted on an entirely different question, and the parties had neither briefed nor argued the conflict-of-interest issue – is implausible." *Id.* at 1244.

175. *Id.* at 1245. The Court dismissed the language from footnote 18 in *Wood* that said "*Sullivan* mandates" a reversal when the trial court fails to inquire into a potential conflict of interest of which it knew or should have known, saying that it was inconsistent with the holding in *Wood*, which remanded the case instead of reversing it. *Id.* at 1243 n.3. The Court

because no such effect was found by the Court of Appeals, Mickens' conviction and death sentence were affirmed.¹⁷⁶

As a policy matter, the *Mickens* Court reasoned that its decision would not decrease the incentive for trial judges to be attentive and inquire into potential conflicts of interest.¹⁷⁷ Even though the danger of automatic reversal is removed as a disincentive, a conflict of interest still decreases the burden on the defendant in obtaining a new trial.¹⁷⁸ When the defendant can demonstrate a conflict of interest, the defendant does not have to show that the defense was prejudiced, only that counsel's performance was adversely affected.¹⁷⁹ According to the majority, this is ample incentive for the trial court to promptly address conflicts of interest.¹⁸⁰ In addition, the Court reasoned that it "makes little policy sense" to distinguish between cases in which the trial court knew of the conflict of interest and those in which it did not because the "trial court's awareness of a potential conflict neither renders it more likely that counsel's performance was significantly affected nor in any other way renders the verdict unreliable."¹⁸¹

Finally, the Court limited the scope of its decision in *Mickens*.¹⁸² The Court was explicit that its decision did not endorse the use of the *Sullivan* test in all cases of successive representation.¹⁸³ The Court indicated that the *Sullivan* test has been employed too widely in conflict of interest cases.¹⁸⁴ The more appropriate test in cases involving conflicts of interest, but not in the context of multiple representation, may be *Strickland*.¹⁸⁵

Concurring Opinion

In his concurring opinion, joined by Justice O'Connor, Justice Kennedy wrote that although Saunders acted unethically when he did not inform Mickens or the trial court of the potential conflict of interest, his representation was not necessarily affected.¹⁸⁶ In fact, Saunders' "mistaken belief" that he "had no continuing duty at all to his deceased client," proved that he was not influenced in his representation of Mickens by any interest

found that "[t]o the extent the "mandates a reversal" statement goes beyond the assertion of mere jurisdiction to reverse, it is dictum – and dictum inconsistent with the disposition in *Wood*, which was *not* to reverse but to vacate and remand for the trial court to conduct the inquiry it had omitted." *Id.*

176. *Id.* at 1245.

177. *Id.* at 1244-45.

178. *Id.*

179. *Id.* at 1244.

180. *Id.* at 1244-45.

181. *Id.* at 1244.

182. *Id.* at 1245-46.

183. *Id.*

184. *Id.* at 1245.

185. *Id.* at 1246.

186. *Id.* at 1247 (Kennedy, J., concurring).

he had for Hall.¹⁸⁷ Justice Kennedy advocated a case-by-case analysis to determine if trial counsel's performance was adversely affected rather than outright reversal of the conviction due to a conflict of interest.¹⁸⁸ Justice Kennedy also pointed out that "the infringement of that right [to assistance of counsel] must depend on a deficiency of the lawyer, not of the trial judge."¹⁸⁹

Dissenting Opinions

Justice Stevens' dissent focused on the relationship between lawyer and client in a capital murder case.¹⁹⁰ Trust, he argued, is absolutely essential to elicit the kind of cooperation necessary to develop the best defense strategy possible.¹⁹¹ In this case, Saunders' deception was detrimental to developing that trust and choosing a strategy by which Mickens could have avoided the death penalty.¹⁹² Justice Stevens also discussed the heightened responsibility of the trial judge to protect the constitutional rights of an indigent defendant.¹⁹³ He argued that when a defendant cannot afford an attorney to represent him in his defense, and the court must appoint one for that purpose, the court must be even more diligent in protecting the right of the defendant to assistance of counsel than when the defendant retains his own attorney.¹⁹⁴

Justice Stevens also explained why the precedent established in *Holloway, Sullivan, and Wood* supported reversal of Mickens' conviction.¹⁹⁵ If Saunders had objected at trial, he reasoned, there would be no question that the conviction would be reversed.¹⁹⁶ In this case, the defendant who

187. *Id.* (Kennedy, J., concurring). At a district court evidentiary hearing to determine whether Saunders was operating under a conflict of interest, it was shown that "as far as Saunders was concerned, his allegiance to Hall, [e]nded when I walked into the courtroom and they told me he was dead and the case was gone." *Id.* (quoting Hearing Tr. 156-57, 218 (Jan. 13, 1999)).

188. *Id.* (Kennedy, J., concurring). According to Justice Kennedy, the fact that in *Mickens* the conflict of interest had no effect on Saunders' performance demonstrated the necessity of a case-by-case approach. *Id.* (Kennedy, J., concurring). An undesirable automatic reversal rule would overturn convictions like Mickens' even when the conflict of interest did not affect counsel's performance. *Id.* (Kennedy, J., concurring).

189. *Id.* (Kennedy, J., concurring).

190. *Id.* at 1248-49 (Stevens, J., dissenting).

191. *Id.* at 1248 (Stevens, J., dissenting).

192. *Id.* (Stevens, J., dissenting). Mickens maintained he was innocent throughout the trial and sentencing. *Id.* (Stevens, J., dissenting). If Saunders could have persuaded Mickens to admit that he stabbed Hall, but testify that the sodomy was consensual and not forcible, the death penalty would have been removed from the table. *Id.* at 1248-49 (Stevens, J., dissenting). The fact that the sodomy was forced was the only fact that put Mickens at risk of the death penalty. *Id.* at 1249 (Stevens, J., dissenting).

193. *Id.* at 1250-51 (Stevens, J., dissenting).

194. *Id.* (Stevens, J., dissenting).

195. *Id.* at 1251-52 (Stevens, J., dissenting).

196. *Id.* at 1252 n.11 (Stevens, J., dissenting).

needed the most protection, the one whose counsel did not have the ethical awareness to object to the defense of his own client's murderer, was afforded the least protection.¹⁹⁷

Justice Souter's dissent primarily disputed the Court's interpretation of the decision in *Wood*.¹⁹⁸ Justice Souter saw no conflict between the opinions in *Holloway*, *Sullivan*, and *Wood*; rather, he saw a coherent scheme formed by the three opinions.¹⁹⁹ Justice Souter saw *Holloway* and *Sullivan* as establishing two separate and distinct rules.²⁰⁰ First, if a potential conflict of interest is recognized *before* trial and the judge fails to inquire, reversal is appropriate, as in *Holloway*.²⁰¹ Second, if the potential conflict comes to the attention of the trial court *after* the trial, as in *Sullivan*, the defendant must show that an actual conflict adversely affected counsel.²⁰² *Wood*, he argued, followed this scheme because the trial court was not on notice of a potential conflict until the end of the revocation hearing, and thus the defendant was required to show an actual conflict.²⁰³ Applying the so called "prospective notice rule" to *Mickens*, Souter found that because the trial court knew or should have known of the conflict of interest before the trial, reversal was appropriate.²⁰⁴

The final holding in *Mickens v. Taylor* was that to demonstrate a violation of the Sixth Amendment guarantee of assistance of counsel, the defendant must show that an actual conflict of interest adversely affected counsel's performance, even when the trial court knew of the potential con-

197. *Id.* at 1252 n.12 (Stevens, J., dissenting).

198. *Id.* at 1253-63 (Souter, J., dissenting).

199. *Id.* at 1256 (Souter, J., dissenting).

200. *Id.* (Souter, J., dissenting).

201. *Id.* (Souter, J., dissenting).

202. *Id.* (Souter, J., dissenting).

203. *Id.* at 1257-60 (Souter, J., dissenting).

204. *See id.* (Souter, J., dissenting). The final dissent, written by Justice Breyer and joined by Justice Ginsburg, took a categorical approach. *Id.* at 1264 (Breyer, J., dissenting). Justice Breyer argued that Saunders' representation of Mickens "created a 'structural defect affecting the framework within which the trial [and sentencing] proceeds, rather than simply an error in the trial process itself.'" *Id.* (Breyer, J., dissenting) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)). Justice Breyer chose this approach for three reasons. *Id.* at 1264-65 (Breyer, J., dissenting). First, he found that the representation was "egregious on its face." *Id.* at 1264 (Breyer, J., dissenting). Second, he reasoned that in a capital murder case, the balance between life and death is slight. *Id.* (Breyer, J., dissenting). The conflict of interest could easily have tipped that balance. *Id.* (Breyer, J., dissenting). Finally, the state "itself created the conflict in the first place." *Id.* (Breyer, J., dissenting). Justice Breyer found that this situation "at a minimum, [creates] the appearance that the proceeding will not reliably serve its function as a vehicle for determination of guilt or innocence" *Id.* at 1265 (Breyer, J., dissenting) (citations and quotations omitted). "This appearance, together with the likelihood of prejudice in the typical case, are [sic] serious enough to warrant a categorical rule – a rule that does not require proof of prejudice in the individual case." *Id.* at 1265 (Breyer, J., dissenting).

flict of interest and failed to inquire.²⁰⁵ According to the Supreme Court, the fact that the trial judge knew of the potential conflict of interest and failed to take any affirmative action did not change the analysis.²⁰⁶ The defendant had to make a showing of both an actual conflict and an adverse effect.²⁰⁷

ANALYSIS

The decision of the United States Supreme Court in *Mickens v. Taylor* misinterpreted the previous case law regarding conflicts of interest and effective assistance of counsel. It effectively established two separate rules. First, a trial court has a duty to inquire into a conflict of interest when it knows or should know of the conflict. Second, a defendant must show both an actual conflict and an adverse effect on counsel's performance to prove a violation of the Sixth Amendment right to counsel, regardless of whether the trial court knew or should have known of the conflict of interest. Additionally, the Court did not address the policy and ethical implications involved as a result of the decision. Finally, *Mickens* affects not only the conflict of interest law in Wyoming, but in the United States as well.

The New Rule Created by Mickens

1. The Sixth Amendment Right to Assistance of Counsel

The defendant, when claiming a violation of the Sixth Amendment right to assistance of counsel, has the burden of showing the violation.²⁰⁸ Depending on the situation, three different burdens of proof are applied when a defendant claims ineffective assistance.²⁰⁹ Each burden becomes easier to meet as the circumstances surrounding the ineffective assistance become more egregious.²¹⁰ First, if the defendant is attempting to prove ineffective assistance without any special circumstances, the defendant must meet the highest burden of showing a prejudicial effect, or that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."²¹¹ In cases in which a conflict of interest existed and the trial court had no reason to know of the conflict, the defendant has an intermediate burden.²¹² The defendant does not have to show prejudice or an effect on the outcome of the case, but must show that the actual conflict of interest existed and that it adversely affected counsel's

205. *Id.* at 1245.

206. *Id.*

207. *Id.*

208. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

209. *See id.* at 691-92.

210. *See id.*

211. *Id.* at 694.

212. *Id.* at 692.

performance.²¹³ Finally, in cases in which prejudice will be presumed, the burden on the defendant is least and automatic reversal is appropriate.²¹⁴ Situations in which prejudice will be presumed are cases in which assistance of counsel was denied altogether or when the state interfered with assistance of counsel.²¹⁵ In addition, a presumption of prejudice attaches in a conflict of interest case when counsel actively represented conflicting interests, and the conflict of interest was "brought home" to the trial court through an objection or otherwise.²¹⁶

None of the conflict of interest cases prior to *Mickens* required the *Strickland* showing of prejudice – a reasonable probability that but for counsel's mistakes, the outcome of the proceeding would have been different.²¹⁷ In *Holloway*, prejudice was presumed because the defense counsel recognized an actual conflict of interest and brought it to the trial court's attention with several objections, none of which was seriously considered.²¹⁸ In *Sullivan*, the defendant had the intermediate burden of showing an actual conflict of interest and an adverse effect on counsel's performance because the trial court had no reason to know of the conflict of interest before trial.²¹⁹ Finally, the Court in *Wood* remanded the case for a determination of whether there was an actual conflict, but not an adverse effect.²²⁰ This indicates that

213. *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). The difficulty of proving that a conflict of interest adversely affected counsel's performance was recognized by Justice Marshall in *Sullivan*. *Id.* at 355 (Marshall, J., concurring). Justice Marshall found, "Such a test is not only unduly harsh, but incurable speculative as well." *Id.* (Marshall, J., concurring). "Moreover, a showing that an actual conflict adversely affected counsel's performance is not only unnecessary, it is often an impossible task." *Id.* at 356-57 (Marshall, J., concurring). The *Holloway* Court commented:

It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests [sic] on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible.

Holloway v. Arkansas, 435 U.S. 475, 490-91 (1978).

214. *See Strickland*, 466 U.S. at 692.

215. *Id.*

216. *See Glasser v. United States*, 315 U.S. 60, 71, 75-76 (1942); *see also Holloway*, 435 U.S. at 488 (applying the *Glasser* Court's reasoning in finding that when an objection is the means by which the conflict is "brought home" to the trial court, reversal is warranted); *Sullivan*, 446 U.S. at 346-47 (holding that the trial court has no duty to inquire absent "special circumstances" indicating a conflict of interest).

217. *See Glasser v. State*, 315 U.S. 60 (1942); *Holloway v. Arkansas*, 435 U.S. 475 (1978); *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Wood v. Georgia*, 450 U.S. 261 (1971).

218. *Holloway*, 435 U.S. at 477-80, 491.

219. *Sullivan*, 446 U.S. at 348.

220. *Wood*, 450 U.S. at 273-74. The *Wood* Court found that the conflict of interest was apparent enough at the probation revocation hearing that the trial court should have known of the possible conflict and should have inquired. *Id.* at 272. It is important to note that the

when the trial court at the probation revocation hearing knew or reasonably should have known of the conflict, but failed to inquire, the defendant had the lowest burden (as in *Holloway*), and prejudice would be presumed without a finding of adverse effect.²²¹

From the holdings in *Holloway*, *Sullivan*, and *Wood*, it appeared that in conflict of interest cases, the defendant would have to meet one of two burdens: Either prove that an actual conflict adversely affected counsel's performance or that the actual conflict existed and the trial court failed to inquire so that prejudice should be presumed. The burden the defendant had to meet was determined by whether the trial court knew or should have known of the conflict of interest and failed to inquire. If the trial court did not know of the conflict of interest, the defendant had to prove that the conflict existed and that it adversely affected counsel's performance.²²² If the court knew of the conflict of interest and failed to inquire, prejudice would be presumed and reversal would be appropriate when the conflict of interest actually existed.²²³ Although this is a logical conclusion, it is not how the Court decided *Mickens v. Taylor*.²²⁴

2. *The Sixth Amendment Right to Assistance of Counsel After Mickens*

The United States Supreme Court in *Mickens* held that even in a situation where the trial court knew or should have known of a potential conflict of interest and failed to inquire, the defendant must meet the *Sullivan* test by showing both that an actual conflict existed and that such conflict

holding in *Wood* does not explicitly state that a finding of an adverse effect on counsel's performance is unnecessary to obtain a reversal. *See id.* at 273-74. The Court is silent on whether an adverse effect is required. *Id.* That silence can be interpreted in one of two ways. First, it could be said that the *Wood* Court meant to imply that an adverse effect is also necessary and neglected to say so, as the *Mickens* Court concluded. *See Mickens v. Taylor*, 122 S. Ct. 1237, 1243 (2002). The second interpretation is that the *Wood* Court's remand requires a showing of exactly what it says it requires – an actual conflict and nothing more. This interpretation is more plausible. It is consistent with other statements in *Wood*, such as “*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.” *Wood*, 450 U.S. at 272 n.18 (quotations and citations omitted) (second emphasis added). The *Wood* Court also stated, “There also is the possibility that [vacating petitioners' sentences or reversing their convictions] may be available in habeas corpus proceedings, if petitioners can show an actual conflict of interest during the trials or at the time of sentencing.” *Id.* at 274 n.21 (emphasis added). Note that neither of these comments made by the *Wood* Court includes any language about an adverse effect.

221. *Wood*, 450 U.S. at 273-74.

222. *Sullivan*, 446 U.S. at 348.

223. *Wood*, 450 U.S. at 473-74. For a discussion of the ambiguity of the holding in *Wood v. Georgia*, see *supra* note 220.

224. *Mickens*, 122 S. Ct. at 1245 (holding that even in a situation where the trial court knew of a potential conflict of interest and failed to inquire, the defendant must prove both that an actual conflict existed and that it adversely affected counsel's performance).

had an adverse effect on counsel's performance.²²⁵ The Court misinterpreted *Wood*, finding that the *Wood* Court required a showing of actual conflict and an adverse effect even when the trial court knew of the conflict of interest.²²⁶ Thus, with *Wood* controlling, Mickens was also required to show both an actual conflict and an adverse effect.

Putting aside the Court's interpretation of *Wood*, the result in *Mickens* is inconsistent with the holdings in *Holloway* and *Sullivan* that clearly demonstrate that different standards should be applied depending on whether the trial court knew or should have known of the conflict of interest.²²⁷ The most meaningful distinction between *Holloway* and *Sullivan* is that in *Holloway* the conflict of interest was "brought home" to the trial court, whereas in *Sullivan* it was not.²²⁸ According to this logic, *Mickens* is more analogous to *Holloway* than *Sullivan* because in both *Mickens* and *Holloway* the trial court knew or should have known of the conflict of interest. If *Mickens* had been evaluated under the *Holloway* standard, automatic reversal would have been appropriate if the conflict of interest actually existed.²²⁹ However, the *Mickens* Court found that even when the trial court knew or should have known of the conflict of interest (as in *Holloway*), the applicable test was *Sullivan*.²³⁰ The question then becomes: How did the Court distinguish *Holloway* and *Mickens* to find that the situation in *Mickens* was more similar to *Sullivan* than *Holloway*?

The most reasonable distinction that can be made between *Mickens* and *Holloway*, if not *whether* the conflict of interest was "brought home" to the trial court, is *how* the conflict of interest was "brought home" to the trial court. In *Holloway*, the trial judge learned of the conflict of interest from counsel's objections.²³¹ In *Mickens*, the trial judge knew or should have known of the conflict of interest because she appointed Saunders to defend Mickens knowing that Saunders had three days before represented the victim.²³² Thus, according to the *Mickens* Court, a presumption of prejudice no

225. *Id.* at 1245. The Court assumed in its statement of the issue that the trial judge knew or should have known of the conflict of interest but failed to inquire. *Id.* at 1239. The United State Court of Appeals for the Fourth Circuit stated, "We accept for purposes of discussion, without deciding the issue, that Judge Foster, who appointed Saunders to represent Mickens, reasonably should have known that Saunders labored under a potential conflict of interest arising from his previous representation of Hall." *Mickens v. Taylor*, 240 F.3d 348, 357 (4th Cir. 2001) (en banc). The District Court concluded in its opinion that Judge Foster knew or should have known of the potential conflict of interest when she appointed Saunders to defend Mickens. *Mickens v. Greene*, 74 F. Supp. 2d 586, 614 (E.D. Va. 1999).

226. *Mickens*, 122 S. Ct. at 1243-45. For a discussion of the holding in *Wood*, see *supra* notes 220-21 and accompanying text.

227. See *supra* notes 217-23 and accompanying text.

228. See *supra* notes 217-23 and accompanying text.

229. *Holloway v. Arkansas*, 435 U.S. 475, 488 (1978).

230. *Mickens*, 122 S. Ct. at 1243-45.

231. *Holloway*, 435 U.S. at 477-80.

232. *Mickens v. Taylor*, 240 F.3d 348, 354 (4th Cir. 2001) (en banc).

longer turns on whether the conflict was “brought home” to the trial court, but rather on whether the conflict was “brought home” to the trial court through counsel’s objection to the representation.

The new rule promulgated by *Mickens* is that absent an *objection* by defense counsel, the trial court’s failure to inquire into a potential conflict of interest about which it knew or should have known does not merit reversal unless the defendant can independently demonstrate that an actual conflict adversely affected counsel’s performance.²³³ Nothing in *Holloway*,

233. *Mickens*, 122 S. Ct. at 1243-45. The Court did not take the opportunity to clarify the definition of either “actual conflict of interest” or “adverse effect on counsel’s performance” in its decision. Authorities differ as to the definitions of both terms. “Conflict of interest” is defined in a variety of ways. Black’s Law Dictionary defines conflict of interest as, “A real or seemingly incompatibility between the interests of two of a lawyer’s clients, such that the lawyer is disqualified from representing both clients if the dual representation adversely affects either client or if the clients do not consent.” BLACK’S LAW DICTIONARY 295 (7th ed. 1999). The *Glasser* Court referred to a conflict of interest as a “struggle to serve two masters.” *Glasser v. United States*, 315 U.S. 60, 75 (1942). The Court in *Sullivan* distinguished between an “actual conflict,” which would give rise to the duty to inquire, and a “possible conflict,” which does not merit an inquiry by the trial court. *Cuyler v. Sullivan*, 446 U.S. 335, 348-50 (1980). Neither term was sufficiently defined. Justice Marshall’s dissent in *Sullivan*, however, adopted the definition set out by the American Bar Association that “a lawyer should not undertake multiple representation ‘if the duty to one of the defendants may conflict with the duty to another.’” *Id.* at 356 n.3 (Marshall, J., concurring) (quoting ABA Project on Standards for Criminal Justice, Defense Function, Standard 4-3.5(b) (App. Draft, 2d ed. 1979)). Justice Marshall went on to quote the Canons of Professional Ethics, which state that “a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.” *Id.* (Marshall, J., concurring) (quoting CANONS OF PROFESSIONAL ETHICS Canon 6 (1937)). Justice Marshall finally concluded:

There is a possibility of conflict, then, if the interests of the defendants may diverge at some point so as to place the attorney under inconsistent duties. There is an actual, relevant conflict of interest if, during the course of the representation, the defendants’ interests do diverge with respect to a material factual or legal issue or to a course of action.

Id. Today the ABA states that “a lawyer shall not represent a client if the representation involves a concurrent conflict of interest.” MODEL RULES OF PROF’L CONDUCT R. 1.7 (2002). The *Mickens* Court gave cryptic guidance as to the meaning of conflict of interest. *Mickens*, 122 S. Ct. at 1243. While interpreting the meaning of the remand instruction in *Wood* that required a determination of whether an actual conflict existed, the Court stated, “As used in the remand instruction . . . we think ‘an actual conflict of interest’ meant precisely a conflict that affected counsel’s performance – as opposed to a mere theoretical division of loyalties.” *Id.* Thus, after *Mickens*, the definition of “actual conflict of interest” includes an adverse effect. This is a new definition of conflict of interest, as none of the definitions discussed above indicates adverse effect is necessarily part of a conflict of interest.

The Court was no more clear on the definition or test for adverse effect. It was clear, however, that the facts presented in *Mickens* do not constitute an adverse effect or the conviction would have been overturned. The District Court in *Mickens* used a three-part test for adverse effect drawn from *Freund v. Butterworth*. *Mickens v. Greene*, 74 F. Supp. 2d 586, 602-04 (E.D. Va. 1999) (citing *Freund v. Butterworth*, 165 F.3d 839, 860 (11th Cir. 1999)). The first element is that the defendant, “must point to some plausible alternative defense

however, indicates that the *only* way in which the trial court can learn of a conflict of interest is through an objection.²³⁴ In fact, the *Holloway* Court adopted the language of *Glasser* that reversal is required when the “possibility of . . . inconsistent interests” is “brought home” to the trial court.²³⁵ In *Sullivan*, the Court made reference to “special circumstances,” finding that if “special circumstances” indicate a conflict of interest in cases of multiple representation, the trial court will be required to inquire into the conflict of interest.²³⁶ Thus, neither *Holloway* nor *Sullivan* envisioned an objection as the *only* circumstance that could trigger the duty to inquire, and an automatic reversal for failure to inquire. The *Mickens* Court, however, disregarded the general language of “brought home” and “special circumstances” in *Holloway* and *Sullivan* respectively in favor of the more narrow term “objection.”²³⁷

strategy or tactic [that] might have been pursued.” *Id.* Second, the defendant “must demonstrate that the alternative strategy or tactic was reasonable under the facts.” *Id.* Finally, the defendant “must show some link between the actual conflict and the decision to forgo the alternative strategy of defense.” *Id.* Although adverse effect does not require the defendant to show prejudice, “he must show that the conflict was deleterious or harm[ful] to counsel’s advocacy.” *Id.* (internal quotations and citations omitted). The court then held that “even if it is assumed that there was a plausible, viable alternate strategy that Saunders failed to pursue, the record shows no link between the failure to pursue it and the asserted conflict.” *Id.* at 610. The Fourth Circuit Court of Appeals in *Mickens* stated, “A defendant has established an adverse effect if he proves that his attorney took action on behalf of one client that was necessarily adverse to the defense of another” *Mickens v. Taylor*, 240 F.3d 348, 360 (4th Cir. 2001) (en banc). The court went on to endorse the same three-part test adopted by the lower court and deferred to the lower court’s determination that an adverse effect was not shown in this case. *Id.* at 362. The *Mickens* Court never explicitly adopted the *Freund* three-part test, but did so by implication when it deferred to the lower court’s finding of no adverse effect. See *Mickens*, 122 S. Ct. at 1245.

234. See *Holloway v. Arkansas*, 435 U.S. 475 (1978).

235. *Holloway*, 435 U.S. at 485.

236. *Sullivan*, 446 U.S. at 346-47. The Court stated that “[a]bsent special circumstances . . . trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist.” *Id.* *Sullivan* refers to cases of multiple representation, holding that a conflict of interest leading to ineffective assistance of counsel will not be presumed in all such cases. *Id.* at 348-49. Thus, unless special circumstances indicate the contrary, the trial court can assume that a situation in which multiple defendants are represented by the same counsel does not present a conflict of interest or that the defendants have consented to the representation knowing the inherent risk of a conflict of interest. *Id.* at 346-47. *Mickens* is distinguished from this scenario in two ways. First, *Mickens* is a case of successive representation as opposed to multiple representation. *Mickens*, 122 S. Ct. at 1245-46. Second, whereas in *Sullivan* no “special circumstances” were present to trigger the trial court’s duty to inquire, in *Mickens* “special circumstances” should have given rise to an inquiry by the trial court. *Sullivan*, 446 U.S. at 347; see *supra* note 225.

237. See *Mickens*, 122 S. Ct. at 1244-45. The “special circumstance” that should have “brought home” the potential conflict of interest to the trial court in *Mickens* was the fact that the judge who appointed Saunders to be *Mickens*’ defense counsel had three days previously dismissed the charges against the victim using a form on a single sheet of paper that clearly named Saunders as defense counsel for the victim. *Mickens v. Taylor*, 240 F.3d 348, 354 (4th Cir. 2001) (en banc). The Court held that these circumstances were enough to mandate a *Sullivan* inquiry, but were insufficient to require a reversal, as in *Holloway* where the poten-

In effect, the Court held that the trial court has no obligation to inquire unless prompted to do so by defense counsel's objection. The responsibility of ensuring conflict-free counsel is then left in the hands of the very counsel who has the conflict. *Holloway* opined that an "attorney . . . is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial."²³⁸ The Court then stated that "defense attorneys have the obligation, upon discovering a conflict of interest, to advise the court at once of the problem."²³⁹ The obligation imposed by *Holloway*, however, is of small comfort to Mickens, whose own counsel saw no conflict of interest where Justices of the Supreme Court of the United States recognized one.²⁴⁰ Thus, those defendants who need the protection the most are denied it.²⁴¹

Policy Considerations

1. Decreased Incentives for Trial Judges to Protect the Right to Conflict-Free Counsel

One unsavory effect of *Mickens* is that the incentive for trial judges to be vigilant about potential conflicts of interest is decreased. The *Mickens* decision has left us with two rules. The first is the *Sullivan*-mandated inquiry rule.²⁴² The second is that when the trial court fails to inquire about a conflict of interest about which it should have known, the defendant must show both an actual conflict and an adverse effect on counsel's performance to prove a violation of the Sixth Amendment right to assistance of counsel.²⁴³ This is the same burden required when the trial court has no reason to know of the conflict of interest.²⁴⁴ Thus, although the trial court has a duty to inquire, the burden of proof for the defendant remains constant whether the trial court inquires or not.²⁴⁵

tial conflict of interest was "brought home" to the trial court through an objection by defense counsel. See *Mickens*, 122 S. Ct. at 1244-45. Thus, the Court held that the only real "special circumstance" that will mandate reversal is an objection by defense counsel. See *supra* notes 225-33 and accompanying text.

238. *Holloway*, 435 U.S. at 485 (quotations and citations omitted).

239. *Holloway*, 435 U.S. at 485-86 (citation omitted).

240. Justice Stevens found that "Saunders necessarily labored under conflicting obligations that were irreconcilable." *Mickens*, 122 S. Ct. at 1249 (Stevens, J., dissenting). Justice Kennedy, concurring with the Mickens majority, commented that Saunder's belief that "his allegiance to Hall, '[e]nded when I walked into the courtroom and they told me he was dead and the case was gone'" may have been mistaken. *Id.* at 1247 (Kennedy, J., concurring) (quoting Hearing Tr. 156-57, 218 (Jan. 13, 1999)).

241. *Mickens*, 122 S. Ct. at 1262 (Souter, J., dissenting).

242. *Mickens*, 122 S. Ct. at 1244 (citing *Cuyler v. Sullivan*, 446 U.S. 335, 348-49 (1980)).

243. *Id.* at 1245.

244. *Sullivan*, 446 U.S. at 348.

245. *Mickens*, 122 S. Ct. at 1244-45. Justice Souter makes this exact argument in his dissent. *Id.* at 1260-61 (Souter, J., dissenting).

The Court in *Glasser* emphasized the important role of the trial judge in protecting the constitutional rights of the accused.²⁴⁶ "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused."²⁴⁷ The Court, quoting *Patton v. United States*, stated that such a duty

is not to be discharged as a matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity.²⁴⁸

The Court found that "instead of jealously guarding *Glasser's* rights, the court may fairly be said to be responsible for creating a situation which resulted in the impairment of those rights."²⁴⁹ To hold that *Glasser* implicitly agreed to the appointment of counsel would be to "condone a dangerous laxity on the part of the trial court in the discharge of its duty to preserve the fundamental rights of an accused."²⁵⁰

The majority argues that the *Sullivan* standard, "which requires proof of effect upon representation but . . . presumes prejudice," provides enough incentive for trial judges to jealously guard the right of the accused to unconflicted counsel.²⁵¹ This argument fails, however, because the defendant enjoys this decreased burden whether or not the trial judge inquires. Thus, there is no real effect on the burden a defendant must show in demonstrating a violation of the right to counsel when the judge fails to inquire.²⁵² The only real difference occurs when the trial court is made aware of the potential conflict of interest through an objection. If the trial court then fails to inquire, the penalty is an automatic reversal of the conviction.²⁵³

2. Ethical Implications for Defense Counsel

Beyond the trial court, the *Mickens* decision has great implications for practicing defense attorneys. The Court's opinion holds that *Mickens'*

246. *Glasser v. United States*, 315 U.S. 60, 71 (1942).

247. *Id.*

248. *Id.* (quoting *Patton v. United States*, 281 U.S. 276, 312-13 (1930)).

249. *Id.* The trial court in *Mickens* may be said to have created the conflict of interest by appointing defense counsel when she knew or should have known of the potential conflict of interest. See *supra* note 225. *Mickens* and *Glasser* are similar because in both cases the trial court created the conflict of interest.

250. *Glasser*, 315 U.S. at 72.

251. *Mickens*, 122 S. Ct. at 1244.

252. See *supra* notes 242-45 and accompanying text.

253. *Holloway v. Arkansas*, 435 U.S. 475, 488 (1978); see also *supra* notes 225-41 and accompanying text.

defense did not violate the Constitution.²⁵⁴ However, Saunders' representation of Mickens was clearly in violation of the ethical standards recognized by the American Bar Association and codified by every state bar in the nation that prohibits representation involving conflicts of interest.²⁵⁵ One of the purposes behind these ethical rules is to recognize the importance of a lawyer's loyalty to a client.²⁵⁶ The ABA Model Rules acknowledge that "[l]oyalty and independent judgment are essential elements in the lawyer's

254. *Mickens*, 122 S. Ct. at 1245. The Court held there was no Sixth Amendment violation because the conflict of interest had no adverse effect on Saunder's performance. *Id.*

255. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2002); Brief of Amici Curiae Legal Ethicists at 4, *Mickens v. Taylor*, 122 S. Ct. 1237 (2002) (No. 00-9285). Rule 1.7 of the ABA Model Rules of Professional Conduct states:

Rule 1.7 Conflict of Interest: General Rule

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

MODEL RULES OF PROF'L CONDUCT R. 1.7 (2002). Rule 1.9 of the ABA Model Rules of Professional Conduct deals directly with conflicts between present and former clients.

Rule 1.9 Conflict of Interest: Former Client

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

MODEL RULES OF PROF'L CONDUCT R. 1.9(a) (2002). Interestingly, both Rules 1.7 and 1.9 assume that the client whose interest is adverse to the present client's is alive to consent to the present representation.

256. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt.1 (2002).

relationship to a client.”²⁵⁷ “A breach of the duty of loyalty is worse than other ethical breaches because it is a breach of the most fundamental duty owed to a client.”²⁵⁸ Even Justice Kennedy concurring in the *Mickens* decision recognized that Saunders’ representation of Mickens was probably not ethical.²⁵⁹ This leads to the ironic conclusion that what is constitutional may not always be ethical, and the ethical standard may be higher than the constitutional one.²⁶⁰

For a defense attorney the double standard means that although an attorney may provide constitutionally sufficient assistance of counsel, rules of ethics may be violated. Attorneys have good incentive to follow the rules of ethics in their jurisdictions, whether or not the United States Constitution requires a lower standard of conduct. Violation of an ethical rule is professional misconduct and can lead to a formal grievance filed against the attorney and disciplinary action taken by the court.²⁶¹ Depending on the seriousness of the violation, the attorney may be disbarred, suspended, reprimanded, admonished, put on probation, or required to pay restitution.²⁶² In Brian Saunders’ case, his representation of Mickens violated the ethical rules

257. *Id.*

258. Brief of Amici Curiae Legal Ethicists at 5, *Mickens v. Taylor*, 122 S. Ct. 1237 (2002) (No. 00-9285).

259. *Mickens*, 122 S. Ct. at 1247 (Kennedy, J., concurring). “As far as Saunders was concerned, his allegiance to Hall [e]nded when I walked into the courtroom and they told me he was dead and the case was gone.” *Id.* (citation omitted).

260. The Court has acknowledged that a violation of an ethical standard may not be a violation of the constitutional right to effective assistance of counsel. *Nix v. Whiteside*, 475 U.S. 157, 165 (1986). The Court found that “[u]nder the *Strickland* standard, breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel.” *Id.*

261. Rule 8.4 of the ABA Model Rules of Professional Conduct states:

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer’s honesty . . . ;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice . . .

MODEL RULES OF PROF’L CONDUCT R. 8.4 (2002). The ABA Standards for Imposing Lawyer Sanctions provide guidelines as to what sanctions should be imposed for attorney misconduct. Rule 4.3 discusses appropriate sanction for attorneys who fail to avoid conflicts of interest. ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS R. 4.3 (2001). Sanctions available for representing conflicting interests range from disbarment to admonition. *Id.*

262. ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS R. 2.2-2.8 (2001).

of Virginia.²⁶³ Thus, Saunders may have been sanctioned for his representation of Mickens regardless of whether the representation fulfilled Mickens' constitutional right to effective assistance of counsel.²⁶⁴ The lower constitutional standards imposed by the Court for the effective assistance of counsel are not in step with the ethical guidelines promulgated by the states and the American Bar Association. If attorneys must choose one guide or the other to follow, the higher ethical standards most likely will be adhered to in an effort to avoid sanctions.

The Effect of Mickens on Conflict of Interest Law

1. Wyoming

Since *Shongutsie v. State*, the Supreme Court of Wyoming has refused to extend the right to counsel beyond the scope defined by the United States Supreme Court. The Supreme Court of Wyoming recently declined to extend the right to counsel to arrestees when deciding whether to take the chemical test administered for driving under the influence.²⁶⁵ The court discussed several cases in which it declined to extend the constitutional rights as interpreted by the federal courts.²⁶⁶ The court applied the *Saldana* test and found that right to counsel under the Wyoming Constitution should be interpreted in the same way as the right to counsel under the Sixth Amendment of the Constitution.²⁶⁷ In discussing *Shongutsie*, the *Mogard* court observed

263. Brief of Amici Curiae Legal Ethicists at 11, *Mickens v. Taylor*, 122 S. Ct. 1237 (2002) (No. 00-9285). Saunders' representation of Mickens violated three separate provisions of the Virginia Code of Professional Responsibility. *Id.* Saunders neglected to inform the trial court of the previous representation, failed to disclose the representation of Hall to his new client, and he represented conflicting interests without proper disclosure. *Id.* (citing VIRGINIA CODE OF PROF'L RESPONSIBILITY DR 7-102(A), DR 5-105(C), EC 7-8, EC 5-19 (Michie 1992)).

264. Saunders' violation best fits under Rule 4.32 of the ABA Standards for Imposing Lawyer Sanctions. Rule 4.32 reads: "Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client." ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS R. 4.32 (2001). Suspension is the "removal of a lawyer from the practice of law for a specified minimum period of time." ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS R. 2.3 (2001). The minimum suspension is generally no less than six months. *Id.*

265. *Mogard v. City of Laramie*, 32 P.3d 313, 325 (Wyo. 2001).

266. *Id.* at 319-22 (citing *Almada v. State*, 994 P.2d 299 (Wyo. 1999) (stating that Wyoming lacks the constitutional history and "long tradition of state constitutional analysis" to depart from the federal procedure); *State v. Keffer*, 860 P.2d 1118 (Wyo. 1993) (adopting the federal statutory elements test for lesser included offenses); *Jandro v. State*, 781 P.2d 512, 523 (Wyo. 1989) (adopting the federal rule on the right to confront witnesses); *Best v. State*, 736 P.2d 739 (Wyo. 1987) (declining to extend the right to counsel before the start of adversarial proceedings); *Charpentier v. State*, 736 P.2d 724, 724 (Wyo. 1987) (declining to extend the right to counsel to the preindictment lineup stage of criminal proceedings); *State v. Heiner*, 683 P.2d 629, 637 (Wyo. 1984) (following the federal rule that evidence obtained prior to filing a criminal complaint is not obtained in violation of the Sixth Amendment right to counsel)).

267. *Mogard*, 32 P.3d at 321.

that the unusual result “was based not so much on any discernment that the right to counsel is different in Wyoming as on the perception that the federal rule was difficult to implement. We preferred the ease of application of a presumptive rule, and the public policies it promoted.”²⁶⁸

The Supreme Court of Wyoming may eventually be faced with a case similar to *Mickens* in which a conflict of interest is present due to successive representation, rather than multiple representation as in *Shongutsie*. Undoubtedly the *Saldana* test, which was proposed after the *Shongutsie* decision, will be used. Based on the *Saldana* test, it may be found (as it was in *Mogard*) that the right to counsel should be interpreted the same way in Wyoming as it is in the federal courts. However, the court in *Mogard* recognized that the *Shongutsie* situation was different due to the difficulty in implementing the federal rule set forth in *Sullivan*, and due to public policy consideration specific to conflict of interest cases.²⁶⁹ The court will be faced with whether to extend the automatic reversal rule adopted in *Shongutsie*, or whether to defer to the federal interpretation in *Mickens*, which requires a *Sullivan* showing of adverse effect before reversal. The same policy goals expressed in *Shongutsie* will be implicated in a case similar to *Mickens*.²⁷⁰ In addition, the *Sullivan* test, rejected in *Shongutsie* as “difficult to implement,” is the same test applied by the Court in *Mickens*. It is difficult to say whether the Supreme Court of Wyoming will come down with *Shongutsie*, or whether it will find that it is wiser to follow the federal standards as it found in *Mogard*. The ten-year trend of following federal precedent, however, indicates the likelihood that the court will adopt the *Mickens/Sullivan* test in cases of successive representation.

2. *Foreshadowing the End of the Sullivan Test in Cases Other than Multiple Representation*

It is clear that the *Sullivan* test is the correct standard to be applied in all conflict of interest cases involving multiple representations. The final section of the *Mickens* majority opinion foreshadows a tightening of the right to unconflicted counsel in future cases involving successive representation.²⁷¹ The majority was concerned that the *Sullivan* test has been applied “unblinkingly” to all types of conflicts cases.²⁷² “It must be said . . . that the language of *Sullivan* itself does not clearly establish, or indeed even support,

268. *Id.* at 323.

269. *Id.*

270. The policy goals of the court in *Shongutsie* were to discourage attorneys from accepting the role of a dual advocate in criminal cases, “promot[ing] the effective administration of justice,” and ensuring “that all defendants will be fully apprised of their constitutional right to be represented by an attorney free of any conflict of interest.” *Shongutsie v. State*, 827 P.2d 361, 367-68 (Wyo. 1992). *See supra* note 149.

271. *Mickens v. Taylor*, 122 S. Ct. 1237, 1245-46 (2002).

272. *Id.* at 1245.

such expansive application.²⁷³ Instead, the *Strickland* test, which requires a showing of prejudice, may be better applied.²⁷⁴ The Court found that when deciding *Mickens*, it was unnecessary to address whether the *Sullivan* test applies to all cases of successive representation.²⁷⁵ Thus, "Whether *Sullivan* should be extended to such cases remains, as far as the jurisprudence of this Court is concerned, an open question."²⁷⁶ *Mickens* implied that in future conflict of interest cases not involving multiple representation, the widely used *Sullivan* test may be forsaken in favor of the less defendant-friendly *Strickland* test.²⁷⁷

CONCLUSION

Mickens v. Taylor clearly resolves any ambiguity in the *Wood* holding, disfavoring the Sixth Amendment right to conflict-free counsel. *Mickens* has made it more difficult for a defendant whose counsel was actually burdened by a conflict of interest to obtain a remedy. Even when the trial court knows or should know of the conflict of interest, the defendant must prove that the conflict of interest adversely affected counsel's performance. Not only is this burden difficult to meet, but also flies in the face of the holdings in *Holloway* and *Sullivan* and of common ethical standards of representation. It also destroys any incentive for the trial court to inquire into a conflict of interest because the burden on the defendant remains constant whether an inquiry is made or not. The bottom line is that Bryan Saunders should not have been representing Walter Mickens without Mickens' informed consent. Yet, the Supreme Court of the United States did not find that this ethical violation warranted a reversal of Mickens' conviction.²⁷⁸ Walter Mickens paid a great price for Saunders' conflict even though he neither created nor knowingly accepted Saunders' conflict. Rather than living out the rest of his life in prison, Walter Mickens will be put to death.

HADASSAH REIMER

273. *Id.*

274. *Id.* at 1246.

275. *Id.*

276. *Id.*

277. *See id.* at 1246.

278. Although the United States Supreme Court recognized Bryan Saunders had a conflict of interest and violated the canons of professional ethics, it appears that Saunders has not been sanctioned for his actions. *See* <http://www.vsb.org/attorney/attSearch.asp> (last visited December 27, 2002) (listing all disciplinary actions of Virginia attorneys since January of 1991).

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