The Cuyler Standard

Criminal litigation is governed by constitutional standards not applicable in civil litigation. In Cuyler, the defendant client raised the issue of conflict of interest as part of a claim of ineffective assistance of counsel under the Sixth Amendment. The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The Supreme Court has interpreted the Sixth Amendment to include a right not only to counsel for criminal defendants, but a right to effective counsel. Because ineffective assistance of counsel claims often involve claims of incompetence, we reserve a full discussion of these claims for Chapter 9, p. 878*.

How does the Court's analysis of the defendant's Sixth Amendment claim compare to a disqualification motion in a civil case based on a conflict of interest, as in Westinghouse and Fiandaca? Cuyler requires a defendant to show "that an actual conflict of interest adversely affected his lawyer's performance." What does this mean? Are "actual conflict" and "adversely affected" separate standards or does one imply the other? Do the Court's references to a conflict of interest that "actually affected" the representation, and to a lawyer who "actively represented" conflicting interests help clarify the meaning?

One way to think about the Cuyler standard is to compare it to other standards the Court has adopted in interpreted the Sixth Amendment's
right to effective assistance of counsel. On the one hand, the defendant’s burden is lower in Cuyler than in a case in which the defendant claims that his lawyer was incompetent rather than laboring under a conflict of interest. In a later ineffective assistance case based on a claim of incompetence, Strickland v. Washington (discussed at p. 874 below), the Court required a showing of prejudice, which it defined as “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cuyler, by contrast, states that if the defendant establishes an actual conflict that adversely affected his lawyer’s performance, he need not show “prejudice”; that is, prejudice is presumed. What is the difference between “adversely affected” and “prejudice”? On remand in Cuyler, the Third Circuit held that the representation was adversely affected in that the lawyer did not call the codefendant to testify because doing so would have been against that defendant’s interest.\footnote{Sullivan v. Cuyler, 723 F.2d 1077, 1084–89 (3d Cir.1983, reh. denied 1984) (divided court held that decision not to call defendant was an actual conflict of interest).}

On the other hand, the defendant’s burden is higher in Cuyler then in cases in which the defendant need not show that a conflict “actually existed” or had an “adverse effect.” For example, in Holloway, discussed by the Court in Cuyler, the Court “did not consider whether the alleged conflict actually existed.” Why not? Was it because the defendant’s counsel in Holloway sought separate counsel? Because the trial court failed to conduct an inquiry into the conflict when the court knew or should have known about it? Because the conflict issue was first raised before trial rather than after conviction? Because Holloway involved appointed counsel rather than privately retained counsel (see excerpt from Part III)? All or some of the above?

Mickens v. Taylor

Suppose that the trial court “knows or reasonably should know that a particular conflict exists,” but the trial court fails to “initiate an inquiry” into the conflict. Which of the above standards applies? The Court addressed that question in Mickens v. Taylor.\footnote{535 U.S. 162 (2002).} In that case, counsel for a defendant convicted of capital murder had represented the murder victim for ten days preceding his death in assault charges brought against the victim by his mother. Did this representation create a conflict of interest under the Model Rules or Restatement § 129? In response to an ineffective assistance of counsel claim based on the lawyer’s alleged conflict of interest, a sharply divided Court held that the fact that the state judge knew or should have known of the conflict because he appointed the defense counsel to both representations (and hence created the conflict) did not take the case out of the Cuyler standard, which the Court assumed was applicable. The Court found that a
other way renders the verdict unreliable. . . . Nor does the trial judge’s failure to make the Sullivan-mandated inquiry often make it harder for reviewing courts to determine conflict and effect, particularly since those courts may rely on evidence and testimony whose importance only becomes established at the trial.

Nor, finally, is automatic reversal simply an appropriate means of enforcing Sullivan’s mandate of inquiry . . . . We do not presume that judges are . . . careless or partial . . . . And in any event, the Sullivan standard . . . already creates an “incentive” to inquire into a potential conflict. In those cases where the potential conflict is in fact an actual one, only inquiry will enable the judge to avoid all possibility of reversal by either seeking the waiver or replacing a conflicted attorney. We doubt that the deterrence of “judicial dereliction” that would be achieved by an automatic reversal rule is significantly greater. 5

In addition, the Court distinguished Holloway and declined to apply its “automatic reversal rule” on the ground that Mickens was not a case in which “counsel protested his inability simultaneously to represent multiple defendants.” 4 Is the Court’s position that the judicial inquiry into conflicts mandated by Cuyler has no beneficial effects, or that its costs outweigh any benefits? 6 If so, why not eliminate the requirement, especially if courts already have a sufficient incentive to conduct such inquiries? On the other hand, if the basis of the judicial inquiry requirement is that judicial incentives to respond to conflicts they know or should know about are imperfect, and that such inquiries do have beneficial effects that outweigh their costs, then why isn’t automatic reversal at least a reasonable, if not the only, way to enforce the rule? For example, we punish speeding even though tort liability gives drivers incentives to drive safely. If the trial court in Mickens had been able to read the Court’s opinion before appointing defense counsel, would it still have appointed him?

Why should it matter (for purposes of deciding which standard to apply) whether defense counsel recognized the conflict and objected, as in Holloway, or ignored or missed the conflict, as in Cuyler and Mickens? The Court’s reasoning in Mickens was that deference to the defense counsel’s judgment was justified because defense counsel “is in the best position to determine when a conflict exists” and “has an ethical obligation to advise the court of any problem.” 4 Is this convincing? If defense counsel objection does matter, why should the defendant’s burden be lower when the lawyer

3. Id. at 173.
4. Id.
5. In his dissent, Justice Souter, listed some of the benefits of judicial inquiry into conflicts:
   It would be absurd . . . . to suggest that a judge should sit quiescent in the fact of an apparent risk that a lawyer’s conflict will render representation illusory and the formal trial a waste of time, emotion, and a good deal of public money. And as if that were not bad enough, a failure to act early raises the specter . . . . that failure on the part of conflicted counsel will elude demonstration after the fact, simply because they so often consist of what did not happen.
   Id. at 203 (Souter, J., dissenting).
6. Id. at 167.
behaves ethically (by recognizing the conflict and objecting) rather than unethically (by failing to recognize or acknowledge the conflict)? Is it because the defendant himself should have objected to the joint representation earlier? That might be one way to explain the defendant's higher burden in Cuyler, which does at one point refer to the defendant's failure to raise any objection at trial. \(^8\) In Mickens, however, the defense counsel did not believe he owed any continuing duties to his former client, the victim, and so did not inform the defendant of the prior representation. Two concurring justices thought that the lawyer's subjective belief, even if incorrect, precluded any adverse effect on the representation. \(^9\) Shouldn't a court be skeptical about a lawyer's possibly self-serving statement of subjective belief that there was no conflict, when a contrary statement would have made disqualification or disciplinary action more likely?

The Court in Mickens did not review the application of the Cuyler standard by the lower courts, which found no adverse effect. The Court did, however offer the following interpretation of the standard: "An 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance." \(^9\) Does this mean that the defendant bears the burden of showing specific adverse effects, i.e., that effects can never be presumed from the fact of an actual conflict, no matter what the nature of the conflict is? How can the defendant make such a showing, especially when the adverse effect is likely to consist of an omission by the lawyer—options passed by, strategies neglected, etc.? \(^11\) What if the defendant shows that effects are possible? More likely than not?

In Mickens, for example, the defendant was convicted of premeditated murder during or following the commission of an attempted forcible sodomy. Although there was evidence that the victim was a male prostitute and that the murder took place in a location known for prostitution, the defense counsel did not pursue (or apparently even raise with the defendant the possibility of pursuing) the argument that the sexual relations between the defendant and the victim were consensual, which would have taken the crime out of the capital murder category. Instead, the defense put forward was that the defendant did not know the victim and was not at the scene of the murder. Moreover, at the sentencing phase, defense counsel

7. Id. at 203–05 (Souter, J., dissenting).
8. See also Restatement § 129 cmt. c (stating that "a criminal conviction involving joint representation ordinarily is not impeachable absent a showing of timely objection and actual prejudice," because "otherwise, defendants could avoid raising a conflicts issue before trial so as to create an issue for later appeal"); Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979) (lawyer suspended for knowingly representing co-defendants with conflicting interests and telling clients that, if they were convicted, they could seek reversals based on the conflict).
10. Id. at 172 n.5 (2002).
11. See, e.g., McFarland v. Yukins, 356 F.3d 688, 707 (8th Cir. 2004) (holding that adverse effect shown "where counsel fails to pursue a strong and obvious defense, when pursuit of that defense would have incalculated counsel's other client, and where there is no countervailing benefit to the defendant from foregoing that defense or other explanation for counsel's conduct").
did not put forward any character evidence about the victim, such as evidence of prostitution or the charges brought by the victim’s mother, to rebut the mother’s favorable victim-impact statement. Although there were other possible reasons for defense counsel to pursue the strategies he did, can it confidently be said that his prior representation of the victim had no effect on these choices, and that a conflict-free lawyer would not have saved the defendant from the death penalty?

Some state courts do not require a showing of adverse effect for certain conflicts. The Massachusetts Supreme Court, interpreting the state constitution’s guarantee of effective assistance of counsel, held that adverse effect will be presumed even if the defendant knew of the potential conflict before the trial began. The defendant’s lawyer also represented one of the prosecution’s witnesses in an unrelated civil case. The court held that the possibility that the lawyer might go easy when cross-examining this witness warranted reversal without a showing of actual adverse effect.

Disfavoring Multiple Representation in Criminal Cases

Representation of multiple defendants in a criminal case is strongly discouraged by ethics rules and case law. Conflicts that arise in this context may be nonconsentable. A number of commentators urge a complete ban on dual representation in criminal cases.

Why is the predisposition against dual representation so strong? Co-defendants in the real world are never in equal positions; the degree of their culpability and the penalties each faces are different. The Restatement describes several problems that can arise as a result:

For example, if one defendant is offered favorable treatment in return for testimony against a co-defendant, a single lawyer could not give advice favorable to one defendant’s interests while adhering to the duty of loyalty to the other. Similarly, individual defendants might have had different motives for and understandings of events, so that establishing a common position among them is difficult. Witnesses who


13. In a later case, however, in which the defense counsel represented a prosecution witness, the Massachusetts Supreme Court distinguished Hodge because in that case, the witness was a “key witness” testifying against the defendant on a “critical issue.” Commonwealth v. Boasteng, 781 N.E.2d 1207 (Mass. 2003).


15. See M.R. 1.7(b)(3); Restatement § 122(2)(b) & cmt. g(iii).

would be favorable to one defendant might be subject to cross-examination that would be unfavorable to another defendant. In closing argument, counsel must choose which facts to stress. For example, stressing the minor role of one defendant might imply the major role of another.\textsuperscript{17}

Another potential source of conflict in multiple representations is that a co-defendant with more money (e.g., a higher-up in a criminal ring) may pay the lawyer's fee and call the shots. Whenever a third person pays the lawyer's fee there is a potential conflict between that person's interests and the client's.\textsuperscript{18}

In the face of all these potential problems, why might defendants want joint representation? Cost savings is of course one possibility. Often as important, however, is the desire to present a united front and to discourage "ratting out" one's confederates. Prosecutors often use divide-and-conquer tactics in plea-bargaining. A common defense strategy by a single defense lawyer can counter this tactic. The classic example is the famous "Prisoner's Dilemma."\textsuperscript{19} Assume two prisoners are co-defendants. Each can either inform on the other to the prosecutor or keep quiet. The prosecutor does not have enough evidence to convict either one of a major crime without the testimony of the other. The prosecutor promises each that if both inform, both will be sentenced to 3 years, if both stay silent, both will get 1 year, but if one informs and the other remains silent, the one who keeps quiet will receive 5 years and the informer will get off completely. The best choice for each individual, acting alone, is to inform on the other regardless of what the other does. The co-defendants may prefer, however, to "cooperate" and not inform. Will having joint counsel achieve that result? Note also that the Prisoner's Dilemma scenario assumes that the defendants are equally situated, whereas in reality, as discussed above, the co-defendants are often in unequal positions. This inequality may make cooperation more difficult than defendants realize. Even if such cooperation is possible, should it be allowed? Should joint representations be prohibited precisely to discourage such cooperation? Are there "good" reasons for cooperation among co-defendants? Constitutional concerns?

**Waiver and Denial of Defense Counsel of Choice**

Criminal defendants are often, though not always, allowed to waive conflicts of interest under the ethics rules. Should the defendant be allowed to waive any conflict, no matter how serious? What role does waiver play in the defendant's Sixth Amendment rights?

\textsuperscript{17} Restatement § 129 cmt. c.

\textsuperscript{18} For rules on third parties paying for a lawyer's representation of a client, see Model Rules 1.7(a)(2), 1.8(f) and 5.4(c). For discussion of these rules, see the section on representing an insured at the request of an insurer, p. 395.

\textsuperscript{19} For a good introduction, see Robert D. Luce & Howard Raiffa, Games and Decisions 94–102 (1957), and Robert M. Axelrod, The Evolution of Cooperation (1983).
When a criminal defendant is denied counsel of her choice, the defendant’s Sixth Amendment right to counsel may be violated. In a federal criminal trial, however, the defendant must generally await appeal upon final judgment to pursue the claim that she was denied counsel of her choice in violation of the Sixth Amendment. Must prejudice be shown when a defendant is wrongly denied counsel of her choice, i.e., when the trial judge’s order of disqualification was erroneous? Although the Supreme Court has not ruled on this question a majority of circuits that have considered the issue have ruled that a defendant need not show prejudice when a court arbitrarily or unreasonably deprived the defendant of his right to choose his own counsel. That of course raises the question of when disqualifications are arbitrary or unreasonable.

For example, does a court impinge a defendant’s Sixth Amendment rights when it disqualifies counsel for a conflict of interest despite defendant’s willingness to waive the conflict? In Wheat v. United States, the district court denied Wheat’s request to be represented by the same lawyer who was representing two other people charged with involvement in the drug distribution conspiracy that formed the basis for the charges against Wheat. Wheat, who was to be tried separately from the other parties, expressed his willingness to waive the conflict, as the other defendants had done, and asserted that the Sixth Amendment gave him the right to counsel of his choice. Nevertheless, the district court, citing the likelihood that the co-defendants would be witnesses at one another’s trials, held that counsel would be operating with an irreconcilable conflict and thus refused to allow counsel to represent Wheat. Wheat appealed from a subsequent conviction, claiming that the court’s rejection of his counsel of choice violated his Sixth Amendment rights. The Court (5–4) upheld the conviction:

Unfortunately for all concerned, a district court must pass on the issue of whether or not to allow a waiver of a conflict of interest by a criminal defendant not with the wisdom of hindsight after the trial has taken place, but in the murkier pre-trial context when relationships between parties are seen through a glass, darkly. The likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials. It is a rare attorney who will be fortunate enough to learn the entire truth from his own client, much less be fully apprised before trial of what each of the Government’s witnesses will say on the stand. A few bits of unforeseen testimony or a single previously unknown or unnoticed

20. United States v. Curcio, 680 F.2d 881 (2d Cir. 1982) (government’s interest in disqualifying defendant’s counsel does not override defendant’s choice of counsel where defendant’s waiver of the right to separate representation was knowing and voluntary).
document may significantly shift the relationship between multiple defendants. These imponderables are difficult enough for a lawyer to assess, and even more difficult to convey by way of explanation to a criminal defendant untutored in the niceties of legal ethics. Nor is it amiss to observe that the willingness of an attorney to obtain such waivers from his clients may bear an inverse relation to the care with which he conveys all the necessary information to them.

For these reasons we think the District Court must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses. 24

Compare the concern in Wheat for potential conflicts of interest and its skepticism about waivers with the showing the defendant has to make under Cuyler (waiver possible but not discussed) and Mickens (defendant not aware of conflict). Justice Marshall, dissenting in Wheat, criticized the majority for its unwarranted deference to the district court’s decision, given the importance of the Sixth Amendment right involved. Justice Stevens’ dissent emphasized the voluntary nature of defendant’s waiver of the conflict.

What if the district court in Wheat had accepted defendant’s waiver as informed and voluntary, and defendant was convicted despite being represented by his lawyer of choice? Would defendant be able to argue that his Sixth Amendment rights were violated because the district court mistakenly believed that the conflict was consentable, or that he had given effective consent? The Court in Wheat stated: “Nor does a waiver by the defendant necessarily solve the problem, for we note, without passing judgment on, the apparent willingness of Courts of Appeals to entertain ineffective assistance claims from defendants who have specifically waived the right to conflict-free counsel.” 25 This statement does not sound particularly approving of the practice described, does it? Is the Court suggesting that waiver should cure all conflicts for post-conviction purposes? How should courts determine whether a waiver is voluntary or informed?

Judicial Inquiry to Determine Whether a Conflict Exists

In federal cases when one lawyer proposes to represent co-defendants concurrently, the judge must hold a hearing to advise each defendant of her right to separate counsel. Fed. R. Crim. P. 44(c). Rule 44(c) further states that “[u]nless 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.” The presumption is clearly against joint representation. Note that Cuyler and Mickens were state prosecutions, so Rule 44(c) did not apply (Mickens in addition did not involve a concurrent representation of co-defendants).

When one counsel represents multiple defendants, should a failure to conduct a Rule 44(c) inquiry constitute per se reversible error? Does Mickens resolve that question?

Other Conflicts of Interest in Criminal Cases

Is the Cuyler standard (as opposed to the Strickland standard requiring a showing of prejudice) applicable to conflicts of interest other than concurrent representations of multiple defendants? The Court in Mickens declared this to be an "open question," refusing even to endorse the application of the Cuyler standard to the Mickens case itself. Although the Court recognized that many courts of appeals have applied Cuyler to other types of conflicts, such as successive representation conflicts and conflicts arising out of defense counsel’s personal interests, the Court noted that Cuyler "does not clearly establish, or indeed even support, such expansive application." Another common form of conflict not mentioned by Mickens is concurrent representation of the defendant and a prosecution witness. Should the Cuyler standard be applied to these types of conflicts or are there good reasons to distinguish them for Sixth Amendment purposes?