¶37 REILLY, P.J. (*dissenting*). Court Commissioner Frank Parise bound Keith Henyard into the criminal justice system and then sold his legal services to Henyard as the one who could get him out. Our supreme court prohibits a court commissioner[1] from engaging in any financial or business dealings that could "[r]easonably be perceived to exploit the judge's judicial position," SCR 60.05(4)(a)1.a., and, as relevant to this case, directs that a lawyer "shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer," SCR 20:1.12(a). The comment to SCR 20:1.12(a) provides that the conflict created thereby "is not subject to waiver by consent of the parties involved." As Parise violated SCR 20:1.12(a) and Henyard cannot waive the conflict Parise created, an actual conflict of interest and prejudice exists requiring automatic reversal. Accordingly, I respectfully dissent.

¶38 A defendant has a constitutional right to the effective assistance of counsel, and "[w]here a constitutional right to counsel exists, there is a correlative right to representation that is free from conflicts of interest." ***State v. Street***, 202 Wis. 2d 533, 541, 551 N.W.2d 830 (Ct. App. 1996). "In order to establish a Sixth Amendment violation on the basis of a conflict of interest, a defendant who did not raise an objection at trial must demonstrate by clear and convincing evidence that his or her counsel had an actual conflict of interest and that the actual conflict of

[1] WISCONSIN STAT. § 19.45(11)(c) provides that our supreme court "shall" promulgate a code of judicial ethics, which all judges "shall" adhere to. WISCONSIN STAT. § 757.68(1) provides that Supreme Court Rules govern court commissioners, and SCR 60.01(8) provides that a court commissioner is a "judge" under our code of ethics.

interest adversely affected his or her lawyer's performance." ***Street***, 202 Wis. 2d at 542. The defendant, however, is not required to establish the "full showing of prejudice usually required under [***Strickland v. Washington***, 466 U.S. 668, (1984)]—that it is more likely than not that the outcome of the proceeding would have been different had the attorney acted properly." ***Street***, 202 Wis. 2d at 542.

> In [***Cuyler v. Sullivan***, 446 U.S. 335, 345-50 (1980)], the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. 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.

Strickland, 466 U.S. at 692 (citation omitted).

¶39 "Determining what constitutes an actual conflict of interest must be resolved by looking at the facts of the case." ***State v. Love***, 227 Wis. 2d 60, 71, 594 N.W.2d 806 (1999). Henyard was charged in an eight-count complaint subjecting him to 157 years of imprisonment. The probable cause portion of the complaint, which Parise reviewed to bind over Henyard, described the eight criminal acts Henyard allegedly committed and included the vehicle descriptions, the buy amounts, the location of the crimes, the people present, and details of the police stop. Henyard appeared before Parise on December 28, 2016, for his preliminary hearing.[2] Attorney Jonathan Smith appeared with and on behalf of Henyard. Parise first engaged Henyard and Smith regarding Henyard's desire to waive his right to a

[2] A preliminary hearing (examination) tests whether probable cause exists that a felony was committed by the defendant. WIS. STAT. § 970.03(1). In multiple count complaints, the court must examine each count and make a finding that probable cause exists for each count. Sec. 970.03(10).

preliminary hearing. Parise informed Henyard: "The preliminary hearing is where the State has to convince me that you may have participated in or committed a felony or felonies; do you understand that?" Parise then engaged Henyard in a full colloquy, and ultimately found that "I am satisfied that Mr. Henyard has freely, voluntarily, and intelligently waived his right to a preliminary hearing. I am satisfied further that I have reviewed the complaint and that there is probable cause to bind this matter over for trial."

¶40 Five months later, on May 22, 2017, Parise and Henyard "talked."[3] Henyard went to Parise's office three days later, on May 25, 2017, and then again on May 26, 2017, where he "physically" gave Parise money. Parise testified that he did a conflicts check, which showed the conflict, but "I didn't catch it." Parise claimed no recollection of Henyard, Smith, or the details of Henyard's eight crimes having been before him five months earlier. Parise testified that Henyard hired him "to cut a better deal."

¶41 Even if one believes Parise's memory loss, a reasonable court commissioner/judge would have known of the conflict. It strains credibility that Parise, after speaking and meeting with Henyard multiple times, reviewing the complaint and discovery, speaking with Smith, and performing a conflicts check which showed the actual conflict, claims no memory of presiding as court commissioner five months earlier in the same case. The fact that Parise "missed it" when he read his conflict checks does not cleanse the actual conflict that exists.

[3] The parties at the postconviction hearing did not explore the details of how, why, and where Parise and Henyard "talked" on May 22. Neither Smith nor Henyard were called to explain the reasons for Henyard's switch to Parise.

¶42 The circumstances in this case are very different than those in ***Street*** or ***Love***. ***Love*** involved serial representation, which "occurs when an attorney represents one party in a case, then switches sides to represent the other party in the same proceeding or in an unrelated case." ***Love***, 227 Wis. 2d at 73. Similarly, ***Street*** involved simultaneous representation of individuals with divergent interests. ***Street***, 202 Wis. 2d at 543. Neither of these cases address the issue before this court—a conflict of interest involving a judge.

¶43 Unlike ***Love***, where defense counsel appeared as the prosecutor and then advocated for the defendant twenty months later, ***Love***, 227 Wis. 2d at 78, Parise had a much different and significant role—the role of judge—a role that cannot change during the game. Under no circumstances should we allow an individual to serve as both judge and attorney in the same case. A judge's role must be protected from any suggestion of impropriety to protect the integrity of the judicial process.[4] Parise bound Henyard into the criminal justice system and then sold his legal services to Henyard as the defense lawyer who could get him out. *See* ***id.*** at 75-76 ("Determining whether an attorney has an actual conflict involves a

[4] In ***State v. Miller***, 160 Wis. 2d 646, 653, 467 N.W.2d 118 (1991), our supreme court recognized that "[a]n actual conflict or serious potential for conflict of interest imperils the accused's right to adequate representation and jeopardizes the integrity of the adversarial trial process and the prospect of a fair trial with a just, reliable result." The court explained,

> The United States Supreme Court enumerated three institutional interests that are jeopardized by a criminal defense attorney who has an actual or serious potential conflict of interest: First, a court's institutional interest in ensuring that "criminal trials are conducted within the ethical standards of the profession." Second, a court's institutional interest in ensuring that "legal proceedings appear fair to all who observe them." Third, a court's institutional interest that the court's "judgments remain intact on appeal" and be free from future attacks over the adequacy of the waiver or fairness of the proceedings.

Id. at 653 n.2 (citations omitted).

closer examination of the facts of each particular case, with a particular eye to whether the attorney will, in the present case, be required to undermine, criticize, or attack his or her own work product from the previous case." (citation omitted)). Parise's violation of a Supreme Court Rule created an actual conflict of interest that adversely affected his performance, and prejudice is presumed.

¶44 The Majority errs in concluding that an actual conflict of interest did not exist. Majority, ¶19. My discussion above cannot be clearer: a judge who makes a substantive ruling and then sells his services as a defense lawyer to the defendant he just presided over has created an actual conflict. Our supreme court says so via its rules of ethics. The Majority asserts that I offer no facts to show that Henyard's representation was adversely affected. Majority, ¶25 n.9. Again, the Majority is mistaken as I choose to focus on the key fact that Parise sold himself to Henyard as the one who could "cut a better deal." Parise had no control over what the sentencing judge was going to do, but he implied that he did. Parise's violation of SCR 20:1.12(a) cannot be waived, which means that it adversely affected Henyard; the judiciary; and the independence, impartiality, and integrity of our judicial system. Parise's violation of the integrity of our judicial system is an act that "adversely affected" Henyard's representation.

¶45 My concern lies with a judiciary that obscures errors and ignores violations meant to protect defendants and the integrity of the judicial system by creating ever-expanding rules of harmless error, lack of prejudice, lack of adversely affected representation, waiver, and forfeiture that we apply on a daily basis to avoid answering for our wrongs or the wrongs of the government. We shade our mistakes by imposing the burden of proof upon the one whose only wrong was being the recipient of our bad acts. We must have the fortitude to admit that we are the wrong-

doers in this case, and we must have the integrity to accept the blame rather than force the one who did not err to prove that our mistake did not hurt him.

¶46 Where an actual conflict of interest that cannot be waived exists, we must presume not only that the lawyer's performance was prejudicial but also that it adversely affected the defendant's representation. An actual conflict of interest always adversely affects the lawyer's performance. I do not accept that ***Cook v. Cook***, 208 Wis. 2d 166, 560 N.W.2d 246 (1997), controls this answer, but if the Majority is correct that ***Cook*** does control, then the system is broken and we broke it. Honesty and integrity should prevail over avoidance.

¶47 The State has shown no prejudice to beginning this case anew. Henyard could not consent to Parise's wrongdoing, and neither should we. Public confidence in the integrity, independence, and impartiality of the judiciary has been challenged enough. We can fix our wrongs in this case, and we should do so. I respectfully dissent.