CASE COMMENTS

JOINT REPRESENTATION OF DEFENDANTS VIOLATES SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

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

The United States Supreme Court in *Holloway v. Arkansas*[1] clarified the remedy for violation of the sixth amendment right to counsel arising from representation by one attorney of multiple defendants with conflicting interests.

An Arkansas state court appointed one attorney to represent three codefendants.[2] Defendants' attorney claimed that he would be unable to represent the codefendants effectively because of his receipt of confidential information. The court, however, denied three different motions for appointment of separate counsel.[3] Defendants'convictions for

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1. 435 U.S. 475 (1978).

2. *Id.* at 477.

3. *Id.* The court held a hearing three weeks before trial on a motion to appoint separate counsel and a motion for separate trials. No transcript of the proceeding exists. *Id.*

Before the jury was chosen, defense counsel reviewed the objection to joint representation, stating that "one or two of the defendants may testify and, if they do, then I will not be able to cross-examine them because I have received confidential information from them." Holloway v. State, 260 Ark. 250, 262, 539 S.W.2d 435, 442 (Byrd, J., dissenting). The judge again denied the motion, replying: "I don't know why you wouldn't." *Id.* at 263, 539 S.W.2d at 442.

Finally, after the prosecution concluded its case, defense counsel engaged in the following colloquy with the judge:

> "Now, since I have been appointed, I had previously filed a motion asking the Court to appoint a separate attorney for each defendant because of a possible conflict of interest. This conflict will probably be now coming up since each one of them wants to testify.
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> "THE COURT: That's all right; let them testify. There is no conflict of interest. Every time I try more than one person in this court each one blames it on the other one.
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> "MR. HALL: I have talked to each one of these defendants, and I have talked to them individually, not collectively.
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> "THE COURT: Now talk to them collectively." The court then indicated satisfaction that each petitioner understood the nature and consequences of his right to testify on his own behalf, whereupon Hall observed.
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> "I am in a position now where I am more or less muzzled as to any cross-examination.
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> "THE COURT: You have no right to cross-examine your own witness.
>
> "MR. HALL: Or to examine them.
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> "THE COURT: You have a right to examine them, but have no right to cross-examine them. The prosecuting attorney does that.
>
> "MR. HALL: If one [defendant] takes the stand, somebody needs to protect the other two's interest while that one is testifying, and I can't do that since I have talked to each one individually.
>
> "THE COURT: Well, you have talked to them, I assume, individually and collec-

robbery and rape were affirmed on appeal.[4] The United States Supreme Court reversed and *held:* Failure of the trial court after timely objections by the defense to appoint separate counsel, or to ascertain whether the risk of conflict of interests was too remote to warrant separate counsel, violates the sixth amendment assurance of assistance of counsel and requires automatic reversal.[5]

The sixth amendment to the United States Constitution[6] guarantees "effective assistance of counsel"[7] to defendants in every federal criminal prosecution.[8] *Gideon v. Wainwright*[9] extended this right to state court defendants under the fourteenth amendment,[10] concluding that

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tively, too. They all say they want to testify. I think it's perfectly alright for them to testify if they want to, or not. It's their business.

. . . . .

"Each defendant said he wants to testify, and there will be no cross-examination of these witnesses, just a direct examination by you.

"MR. HALL: Your Honor, I can't even put them on direct examination because if I ask them—

"THE COURT: (interposing) You can just put them on the stand and tell the Court that you have advised them of their rights and they want to testify; then you tell the man to go ahead and relate what he wants to. That's all you need to do."

435 U.S. at 478-80.

Defense counsel was concerned that the testimony of each defendant would incriminate the other two, because all three desired to testify. The conflict of interests arose because counsel could not protect the incriminated defendants with cross-examination, as would have been possible if a different attorney represented each defendant. In addition, counsel wished to avoid the presentation of testimony that contradicted information obtained from client interviews. *Id.* at 480 & n.4.

4. *Id.* at 481.

5. *Id.* at 484.

6. U.S. CONST. amend. VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

7. Powell v. Alabama, 287 U.S. 45, 71 (1932). *See* White v. Ragen, 324 U.S. 760 (1945); Avery v. Alabama, 308 U.S. 444 (1940); Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U. L. REV. 289, 293-95 (1964).

8. Johnson v. Zerbst, 304 U.S. 458, 467 (1938).

9. 372 U.S. 335 (1963). *See* Annot., 93 A.L.R.2d 747 (1964).

10. U.S. CONST. amend. XIV, § 1 provides:

All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

the right to counsel is "essential to a fair trial."[11] Ineffective assistance of counsel is possible when one attorney represents multiple defendants in the same trial;[12] defendants might be deprived of the "undivided loyalty of counsel . . . , [and] counsel . . . [may] 'slight the defense of one for that of another.' "[13]

The Supreme Court first faced the constitutional implications of joint representation in 1942 in *Glasser v. United States*,[14] a conspiracy case. The Court held that the trial judge violated defendant's right to effective counsel when he ordered defendant's attorney to represent a codefendant with conflicting interests,[15] thus compromising defendant's representation.[16] Justice Murphy wrote that when such a conflict exists, a showing of prejudice is unnecessary.[17] While the Court overturned Glasser's conviction because his counsel did not give effective

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11. 372 U.S. at 340.

12. Robinson v. Housewright, 525 F.2d 988, 992 (7th Cir. 1975). *See* Bruton v. United States, 391 U.S. 123 (1968) (intangible prejudicial factor in joint representation is possible from guilt by association through fact of common counsel); Jackson v. Denno, 378 U.S. 368 (1964) (same); Peterson v. Estelle, 446 F.2d 53 (9th Cir. 1971) (conflict exists where exculpatory statements of one defendant incriminate another); Baker v. Wainwright, 422 F.2d 145 (5th Cir. 1970) (same); Sawyer v. Brough, 358 F.2d 70 (4th Cir. 1966) (inconsistent pleas by defendants indicate per se conflict of interests); Platts v. Myers, 253 F. Supp. 23 (E.D. Pa. 1966) (same); Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077 (1973); Note, *Conflict of Interests in Criminal Proceedings*, 23 ARK. L. REV. 250, 254-55 & nn.14-20 (1969).

13. Sanchez v. Nelson, 446 F.2d 849, 850 (9th Cir. 1971) (quoting Peek v. United States, 321 F.2d 934, 944 (9th Cir. 1963), *cert. denied*, 376 U.S. 954 (1964)). *See* People v. Odom, 236 Cal. App. 2d 876, 878-79, 46 Cal. Rptr. 453, 454-55 (1965); Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney*, 62 MINN. L. REV. 119 (1978): "[I]n every case of multiple representation there exists a likelihood, if not a certainty, that the strategic maneuvers of the criminal defense attorney will adversely affect the interests of at least one defendant at some point in the trial process." *Id.* at 136.

14. 315 U.S. 60 (1942).

15. Witnesses testified that Kretske, a codefendant, took money to "fix" the impending case against the witnesses. During the testimony Glasser's name was frequently mentioned with regard to the payments. The attorney for Glasser and Kretske, in order to protect Kretske from further "lies," did not cross-examine these witnesses. Cross-examination was necessary to remove the implication that Glasser was involved. *Id.* at 72-75.

16. *Id.* at 76. In *Glasser* the Court found that the appointment of Glasser's retained attorney to represent a codefendant rendered Glasser's defense "not as effective as it might have been if the appointment had not been made. . . . [T]he court thereby denied Glasser his right to have the effective assistance of counsel." *Id.*

17. The view of the *Glasser* majority follows: "To determine the precise degree of prejudice sustained by Glasser . . . is at once difficult and unnecessary. 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.* at 75-76.

18. *Id.* at 76. *See* note 15 *supra*.

service,[18] Glasser's codefendants could not rely on the same error to obtain reversal because of the peculiar nature of a conspiracy trial, in which each codefendant must show prejudice.[19]

The resulting ambiguity led the courts to differ for thirty-six years about the standards for reversal of a conviction challenged on joint representation grounds. Because the *Glasser* majority did not define "conflicting interests"[20] in terms of degree, some appellate courts demand evidence of a definite conflict of defendants' interests;[21] others insist upon a showing of "substantial possibility"[22] of conflict; and still others require only "a possible conflict of interest."[23] Furthermore, many courts do not limit Justice Murphy's discussion of prejudice to its factual setting—a conspiracy trial.[24] Thus, "actual prejudice" must be shown in the Sixth and Ninth Circuits;[25] "conflict of interests" and "prejudice" are synonymous in the First and Second Circuits, where a

19. "[W]here error as to one defendant in a conspiracy case requires that a new trial be granted him, the rights of his co-defendants to a new trial depend upon whether that error prejudiced them." 315 U.S. at 76-77 (citing Agnello v. United States, 269 U.S. 20 (1925)). *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); Rossi v. United States, 278 F. 349 (9th Cir. 1922); Belfi v. United States, 259 F. 822 (3d Cir. 1919); Browne v. United States, 145 F. 1 (2d Cir. 1905); Dufour v. United States, 37 App. D.C. 497 (1911).

20. 315 U.S. at 76. The Court said that counsel should not "concurrently represent interests which might diverge from those of his first client." *Id.*

21. United States v. Kutas, 542 F.2d 527, 529 (9th Cir. 1976) (coconspirators convicted of harboring and concealing escaped federal prisoner; defendant has burden of proving that joint representation created conflict of interests; defendant did not object at trial), *cert. denied*, 429 U.S. 1073 (1977); United States v. Mari, 526 F.2d 117, 119 (2d Cir. 1975) (defendants convicted of extortionate extension of credit; no objection to joint representation at trial, but trial judge determined that no conflict or prejudice existed), *cert. denied*, 429 U.S. 941 (1976).

22. United States v. Williams, 429 F.2d 158, 161 (8th Cir.) (defendants convicted of transporting stolen vehicle in interstate commerce; where defense attorney suggested only that conflicts of interest might arise, court did not err in failing to inform defendants of their right to individual counsel or of the dangers in joint representation), *cert. denied*, 400 U.S. 947 (1970). *Accord*, United States v. LaRiche, 549 F.2d 1088, 1095 (6th Cir.) (defendants convicted of conspiracy and possession of stolen goods; hearing held on issue of joint representation, at which defendant waived right to separate counsel; court has responsibility to inform defendants of problems with multiple representation if real possibility of conflict arises), *cert. denied*, 430 U.S. 987 (1977).

23. Hart v. Davenport, 478 F.2d 203, 210 (3d Cir. 1973) (defense strategies not in best interest of defendant, and no attempt made to distinguish defendant's involvement from that of codefendants). *Accord*, United States v. DeYoung, 523 F.2d 807, 808-09 (3d Cir. 1975) (defendants convicted of wagering; no effort by counsel to show that defendant was absent from scene of betting activity).

24. *See* note 19 *supra*.

25. *See* United States v. LaRiche, 549 F.2d 1088, 1095 (6th Cir.), *cert. denied*, 430 U.S. 987 (1977); United States v. Kutas, 542 F.2d 527, 529 (9th Cir. 1976), *cert. denied*, 429 U.S. 1073 (1977).

showing of either suffices.[26] "Prejudice" and "conflict of interests" are sometimes used interchangeably,[27] but they are distinct concepts. "Conflict of interests" usually denotes significant variances in the codefendants' goals and defenses at trial, and the attorney's inability to represent fairly all those interests;[28] "prejudice" usually refers to detrimental effect on the defendant resulting from this conflict.[29] Although *Glasser* referred to a duty of the trial judge to defend the rights of the accused,[30] dispute still exists over the role of the trial judge in resolving the joint representation issue.[31] Judicial interpretations of

26. *See* United States v. Carrigan, 543 F.2d 1053, 1055-56 (2d Cir. 1976) (judge made no inquiry about potential conflict of interest; prejudice evidenced by one defendant's testimony contradicting prior statement of other defendant); United States v. Foster, 469 F.2d 1, 3-5 (1st Cir. 1972) (court suggests that in future trial courts should discuss with defendants, as early in trial as possible, the risks of joint representation, and whether defense counsel informed defendants of right to separate counsel).

27. *See* cases cited note 26 *supra*.

28. In Peterson v. Estelle, 446 F.2d 53 (9th Cir. 1971), a conflict arose when a prosecution witness attributed an exculpatory statement to codefendant that inculpated defendant. In United States v. Gougis, 374 F.2d 758 (7th Cir. 1967), a conflict appeared when defendant *A* denied presence at a narcotics sale and claimed defendant *B* was in the house where the alleged sale occurred. In Sawyer v. Brough, 358 F.2d 70 (4th Cir. 1966), a conflict arose when one defendant denied guilt while another defendant admitted guilt and accused the first defendant of participation. State v. Land, 73 N.J. 24, 372 A.2d 297 (1977), found conflicting interests "[w]here the attorney cannot or may not be able to pursue an unrestrained course of action in favor of a defendant because he represents a codefendant." *Id.* at 30-31, 372 A.2d at 301. *Cf.* Clark v. United States, 412 F.2d 491 (9th Cir.) (court found no conflict when defendants confessed guilt, neither defendant denied the other's confession, and the statement of each was admitted as evidence only against the alleged declarant), *cert. denied*, 396 U.S. 919 (1969). *See also* Note, *Criminal Codefendants and the Sixth Amendment: The Case for Separate Counsel*, 58 GEO. L.J. 369 (1969), which suggests that conflict exists whenever "codefendants find themselves in adversary and combative positions." *Id.* at 377 (citing Sawyer v. Brough, 358 F.2d 70, 73 (4th Cir. 1966)).

29. "[P]rejudice means actual prejudice to a defendant's ability to present an effective defense." United States v. Menke, 339 F. Supp. 1023, 1026 (W.D. Pa. 1972); Note, *supra* note 28: "Most often, courts seem to use the term 'prejudice' to mean . . . the inherent result of such a conflict [of interests]." *Id.* at 379-80 (citing Glavin v. United States, 396 F.2d 725, 727 (9th Cir.), *cert. denied*, 393 U.S. 926 (1968); Lebron v. United States, 229 F.2d 16, 20 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 974 (1956)).

30. "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." Glasser v. United States, 315 U.S. at 71.

31. The following cases impose on the judge an affirmative duty to investigate the possibility of conflict and defendants' willingness to continue with the multiple representation: Abraham v. United States, 549 F.2d 236, 239 (2d Cir. 1977); United States v. Georvassilis, 498 F.2d 883, 886 (6th Cir. 1974); United States v. Truglio, 493 F.2d 574, 579 (4th Cir. 1974); Hart v. Davenport, 478 F.2d 203, 122 (3d Cir. 1973); United States v. Foster, 469 F.2d 1, 5 (1st Cir. 1972); Campbell v. United States, 352 F.2d 359, 360 (D.C. Cir. 1965); Skinner v. State, — Ind. App. —, —, 367 N.E.2d 19, 20 (1977); Mishler v. Commonwealth, 556 S.W.2d 676, 682 (Ky. 1977). *See generally* 6

Glasser are thus irreconcilable on the issues of the showing required on appeal to prove a conflict of interests (or prejudice to defendants) and the need for an active, investigatory bench role. The courts agree, seemingly, on one *Glasser* premise only: that representation of multiple defendants by a single attorney may violate the right to effective assistance of counsel.[32]

Joint representation is a subject of concern to the American Bar Association, whose Code of Professional Responsibility recommends great care when instituting a joint representation proceeding. The attorney is urged to disclose to clients possible conflicts of interest;[33] the

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U. TOL. L. REV. 559 (1975). The following cases hold that the trial judge has little or no duty to explore the matter: Robinson v. Housewright, 525 F.2d 988, 994 (7th Cir. 1975); United States v. Boudreaux, 502 F.2d 557, 558 (5th Cir. 1974); United States v. Christopher, 488 F.2d 849, 851 (9th Cir. 1973); Fryar v. United States, 404 F.2d 1071, 1073 (10th Cir. 1968), *cert. denied*, 395 U.S. 964 (1969).

32. "Each year the confusion grows greater among the circuits. The end result is that the law with regard to the sixth amendment right to the effective assistance of counsel has developed without cohesion of thought or unity of purpose." Hyman, *Joint Representation of Multiple Defendants in a Criminal Trial: The Court's Headache*, 5 HOFSTRA L. REV. 315, 319-20 (1977).

33. Ethical Consideration 5-14 provides:

> Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.

ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 5-14 (1975) (footnotes omitted).

Ethical Consideration 5-15 provides:

> If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially. On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client; and if the interests become differing, withdrawal is less likely to have a disruptive effect upon the causes of his clients.

Id. EC 5-15 (footnotes omitted).

Ethical Consideration 5-17 provides:

> Typically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent co-defendants in a criminal case, co-plaintiffs in a personal injury case, an insured and his insurer, and beneficiaries of the estate of a decedent. Whether a lawyer can fairly and adequately protect the interests of multiple clients in these and similar situations depends upon an analysis of each case. In certain circum-

major concern is the perversion of the attorney-client relationship. One client's statements to an attorney cannot be assured complete confidentiality because counsel must reveal such statements to codefendants in preparing defenses.[34] Purely ethical considerations should thus be a chief concern of the criminal lawyer representing multiple defendants.

The first portion of the *Holloway* opinion explained that the failure of the trial judge either to appoint separate counsel or to ascertain whether separate counsel is necessary constitutes error if the defense objects at trial. Chief Justice Burger, writing for the majority, relied extensively on *Glasser* to support his conclusion that such inaction de-

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stances, there may exist little chance of the judgment of the lawyer being adversely affected by the slight possibility that the interests will become actually differing; in other circumstances, the chance of adverse effect upon his judgment is not unlikely.

Id. EC 5-17 (footnotes omitted).

Disciplinary Rule 6-101 provides:

Failing to Act Competently

(A) A lawyer shall not:

(1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.

(2) Handle a legal matter without preparation adequate in the circumstances.

(3) Neglect a legal matter entrusted to him.

Id., DR 6-101 (footnotes omitted).

34. ABA, PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE DEFENSE FUNCTION § 3.5 (Tentative Draft 1970):

(a) At the earliest feasible opportunity defense counsel should disclose to the defendant any interest in or connection with the case or any other matter that might be relevant to the defendant's selection of a lawyer to represent him.

(b) Except for preliminary matters such as initial hearings or applications for bail, a lawyer or lawyers who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation.

(c) In accepting payment of fees by one person for the defense of another, a lawyer should be careful to determine that he will not be confronted with a conflict of loyalty since his entire loyalty is due the accused. When the fee is paid or guaranteed by a person other than the accused, there should be an explicit understanding that the lawyer's entire loyalty is to the accused who is his client and that the person who pays his fee has no control of the case.

(d) It is unprofessional conduct for a lawyer to defend a criminal case in which the lawyer's partner or other professional associate is the prosecutor or has participated in or supervised the prosecution at any stage.

See also Uhl v. Municipal Court, 37 Cal. App. 3d 526, 112 Cal. Rptr. 478 (1974), in which the court held that when defense counsel informs the court of conflicting interests, the confidential nature of such conflict need not be disclosed. *See generally* M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975).

prives defendants of the effective assistance of counsel.[35] He asserted that *Glasser* applies only when the defense counsel challenges the joint representation at trial.[36] If the request for separate counsel is based on a conflict of interests, "most courts"[37] accede to an appropriate motion[38] for the following reasons: a defense attorney is in a better position to decide that a conflict of interests may arise,[39] he is under an obligation to inform the court on recognizing a conflict,[40] and his statements about clients' interests are "virtually made under oath."[41] The Court also suggested that a judge may be unable to fully explore a conflict based on confidential information received from clients because of the attorney-client relationship.[42] The Chief Justice, however, dismissed the assertion that defense counsel thereby has authority to rule on the appointment of separate counsel.[43] A trial court can deal effectively with ill-intentioned, misleading motions;[44] ultimate discretion rests with the trial judge, who may deny the motion if it is prompted by delaying tactics.[45]

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35. 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 embarrassing counsel in the defense of an accused *by insisting, or indeed, even suggesting, that counsel undertake to concurrently represent interests which might diverge from those of his first client, when the possiblity of that divergence is brought home to the court.*

435 U.S. at 484-85 (quoting Glasser v. United States, 315 U.S. 60, 76 (1942)) (emphasis added in *Holloway*).

36. "We read the Court's opinion in *Glasser*, however, as holding that whenever a trial court improperly requires joint representation over timely objection reversal is automatic." *Id.* at 488 (citing Glasser v. United States, 315 U.S. 60, 75-76 (1942)). *See* notes 50 & 67 *infra* and accompanying text.

37. 435 U.S. at 485.

38. *Id.* (citing Shuttle v. Smith, 296 F. Supp. 1315 (D. Vt. 1969); State v. Davis, 110 Ariz. 29, 514 P.2d 1025 (1973); State v. Brazile, 226 La. 254, 75 So. 2d 856 (1954)). *Accord*, Commonwealth v. Russell, 406 Pa. 45, 176 A.2d 641 (1962).

39. 435 U.S. at 485 (citing State v. Davis, 110 Ariz. 29, 31, 514 P.2d 1025, 1027 (1973)).

40. *Id.* at 485-86.

41. *Id.* at 486 (citing State v. Brazile, 226 La. 254, 266, 75 So. 2d 856, 860-61 (1954)).

42. *Id.* at 487 n.11. *See also* ABA, CODE OF PROFESSIONAL RESPONSIBILITY, DR 4-101(B) (1974):

> Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
> (1) Reveal a confidence or secret of his client.
> (2) Use a confidence or secret of his client to the disadvantage of the client.
> (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

Id. (footnotes omitted).

43. 435 U.S. at 486-87. *See* text accompanying note 56 *infra*.

44. 435 U.S. at 486 & n.10.

45. *Id.* at 486-87.

The second portion of the opinion relied on *Glasser* to support the Court's conclusion that the error requires automatic reversal of the convictions.[46] Petitioners need not show evidence of prejudice on appeal if the trial court improperly imposed joint representation over timely objection.[47] The majority suggested that cases requiring proof of prejudice in similar situations[48] have misconstrued *Glasser*.[49] The refusal in *Glasser* to overturn the conviction of the codefendant supports the *Holloway* Court's interpretation of the case. The codefendant in *Glasser* did not challenge the joint representation at trial and therefore could not receive the benefit of automatic reversal.[50]

The majority refused to find harmless error in a violation of so fundamental a constitutional right as the effective assistance of counsel.[51] The danger in joint representation is that the attorney may necessarily refrain from acting in a defendant's behalf because of obligations to the other defendant. Inquiry into a claim of harmless error would involve "unguided speculation."[52] Prejudice—the effect of what counsel has not done in such a case—is too difficult to prove.[53]

In dissent, Justice Powell, joined by Justices Blackmun and Rehnquist, found fault with the inaction of the trial judge, but deemed it insufficient in itself to warrant automatic reversal.[54] Rather, they argued for the line of cases rejected by the majority, concluding that a

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46. *Id.* at 488.

47. *Id.*

48. *Id* at 487-88 (citing United States v. Woods, 544 F.2d 242 (6th Cir. 1976), *cert. denied*, 430 U.S. 969 (1977)). *Accord*, DeConink v. State, 557 S.W.2d 698 (Mo. App. 1977).

49. 435 U.S. at 488. The Court in *Glasser* partially justified reversal of the conviction by underscoring the insufficient evidence against Glasser. Further, the Court did not reverse the conviction of codefendant Kretske because there was no evidence that violation of Glasser's constitutional rights prejudiced Kretske. 315 U.S. at 67, 75-77. Various courts have interpreted this language to indicate that prejudice must be shown for reversal of the conviction. *See* notes 15-26 *supra*.

50. *See* notes 15 & 36 *supra*; note 67 *infra* and accompanying text.

51. 435 U.S. at 489 (citing Chapman v. California, 386 U.S. 18, 23 (1967)). The Court has delineated other vital rights whose denial is never harmless error. *See* Gideon v. Wainwright, 372 U.S. 335 (1963) (counsel); Payne v. Arkansas, 356 U.S. 560 (1958) (excluded evidence of coerced confession), Tumey v. Ohio, 273 U.S. 510 (1927) (impartial judge). *But see* Fahy v. Connecticut, 375 U.S. 85 (1963) (not all trial errors violating Constitution require automatic reversal).

52. 435 U.S. at 491.

53. The Court identified two specific problem areas: the defense challenge to admission of evidence prejudicial to one client, but favorable to another; and the minimization at sentencing of the relative culpability of one defendant to demonstrate that of another. *Id.* at 490.

54. *Id.* at 492 (Powell, J., dissenting).

showing of conflict of interests or prejudice is necessary for reversal.[55] The dissent contended that under the Court's opinion, the trial judge may inquire only superficially into the nature of the conflict because of the danger in disclosing confidential information;[56] consequently this limitation will result in automatically granting motions for separate counsel.

The *Holloway* holding is narrowly limited to cases in which the defense attorney makes a timely motion for separate counsel based on a possible conflict of interests among the defendants he represents, and the trial judge fails to explore the matter or to appoint other counsel. Chief Justice Burger emphasized that the Court's holding speaks only to cases in which defense counsel objects to the joint representation.[57] The Court "need not resolve"[58] the issues inherent in a showing of conflict of interest—prejudice and the affirmative duty of the trial judge—because they are "commonly raised in challenges to joint representation where—unlike this case—trial counsel does nothing to advise the trial court of the actuality of possibility of a conflict."[59] The majority pointedly restricted its holding to a distinct minority of joint representation cases.[60]

The narrow holding unfortunately sidestepped several major difficul-

55. *Id.* at 495-96 (Powell, J., dissenting).

56. *Id.* at 493 (Powell, J., dissenting). *See* text at notes 42-45 *supra* for the majority's response.

57. 433 U.S. at 483-84.

58. *Id.* at 484.

59. *Id.* at 483.

60. Of the approximately sixty cases gleaned for this Comment, seven reflect objection at trial by defense counsel or defendant: United States v. DeYoung, 523 F.2d 807 (3d Cir. 1975) (no effort by counsel to differentiate among defendants' degrees of culpability); United States v. Georvassilis, 498 F.2d 883 (6th Cir. 1974) (no basis for new trial although codefendant had strong defense inconsistent with that of defendant); United States v. Williams, 429 F.2d 158 (8th Cir.) (attorney suggested possibility of conflict in pre-trial hearing), *cert. denied*, 400 U.S. 947 (1970); United States v. Burkeen, 355 F.2d 241 (6th Cir.) (no conflict of interest where defendant seeking separate counsel insisted on right to conduct own defense with aid of court-appointed counsel when necessary), *cert. denied*, 384 U.S. 957 (1966); United States v. Dardi, 330 F.2d 316 (2d Cir.) (defendant not prejudiced by court's failure to adjourn trial because of counsel's illness and by subsequent assignment of codefendant's counsel to defendant, when replacement counsel selected by defendant demanded two-month continuance), *cert. denied*, 379 U.S. 845 (1964); United States v. Bentvena, 319 F.2d 916 (2d Cir. 1963) (retained counsel absent due to illness; appointed interim counsel sufficed, although two defendants expressed intermittent desires for separate counsel); Noble v. Eicher, 143 F.2d 1001 (D.C. Cir. 1944) (denial by court of right to counsel defeats jurisdiction of court to render judgment of conviction). Each of the cases cited above required a showing of prejudice on appeal; none suggested the *Holloway* allowance of automatic reversal.

ties debated in the courts. First, the Court failed to explain the meaning of "timely objection,"[61] and the specific procedures the trial judge should employ in probing the attorney.[62] Second, the majority deliberately neglected to address the difficulties in waiver of the right to effective counsel, an issue at the heart of joint representation.[63] Third, the significance, if any, of retained as opposed to appointed counsel went unexamined.[64] Lastly, the Court failed to address the questions presented by a valid midtrial motion for separate counsel—should the trial be delayed, or a mistrial be declared and a new attorney given time to prepare the case?[65] Although resolution of these issues was not necessary to the decision, discussion in dicta would have helped guide courts in the critical and disputed areas of the proof of conflict of interests, the duty of the trial judge, and the assertion of a constitutional right in opposition to the lawyer-client privilege.

Holloway will directly affect only those cases in which the defense attorney challenges the joint representation. If, however, the trial judge has an obligation to "protect the right of an accused to have the assist-

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61. 435 U.S. at 488.

62. *Id.* at 487. *See also* United States v. Garcia, 517 F.2d 272 (5th Cir. 1975), which suggests a meticulous dialogue akin to that pursued in relation to a guilty plea under FED. R. CRIM. P. 11. The court indicates that federal trial judges should

> seek to elicit a narrative response from each defendant that he has been advised of his right to effective representation, that he understands the details of his attorney's possible conflict of interest . . . , that he has discussed the matter with his attorney . . . , and that he voluntarily waives his Sixth Amendment protections.

517 F.2d at 278. *But see* notes 34 & 44 *supra* and accompanying text.

63. *See* 435 U.S. at 483. The Chief Justice indicated that because the prosecution did not raise the issue of waiver, the Court would not address it. *Id.* at 483 n.5. *See generally* United States v. Warledo, 557 F.2d 721 (10th Cir. 1977); United States v. Carrigan, 543 F.2d 1053 (2d Cir. 1976); Hart v. Davenport, 478 F.2d 203 (3d Cir. 1973); Hyman, *supra* note 32, at 330-34.

64. *See generally* United States v. Lawriw, 568 F.2d 98, 104 (8th Cir. 1977) (no difference between retained and appointed counsel), *cert. denied*, 435 U.S. 969 (1978); United States v. Foster, 469 F.2d 1, 5 (1st Cir. 1972) (retained and appointed counsel of equal standing for joint representation purposes); Larry Buffalo Chief v. South Dakota, 425 F.2d 271, 279 (8th Cir. 1970) (immaterial whether counsel was appointed by court or selected by accused, in absence of facts showing a waiver of the right); Lollar v. United States, 376 F.2d 243, 245-46 (D.C. Cir. 1967) (indigents may be prejudiced in absence of affordable retained counsel, and thus there is no lesser right to separate counsel when defendants are indigent); Craig v. United States, 217 F.2d 355, 359 (6th Cir. 1954) (immaterial whether counsel appointed or retained); Holland v. Boles, 225 F. Supp. 863, 865-66 (N.D. W. Va. 1963) (irrelevant whether counsel retained or court-appointed).

65. 435 U.S. at 495 n.4 (Powell, J., dissenting). *See generally* Maynard v. Meachum, 545 F.2d 273, 275-76 (1st Cir. 1976) (undue trial delay proper justification for court to deny appointment of a particular attorney desired by defendant); United States v. Dardi, 330 F.2d 316, 335 (2d Cir.) (same), *cert. denied*, 379 U.S. 845 (1964).

ance of counsel,"[66] a defense objection should be unnecessary to trigger a trial level investigation. The *Holloway* Court makes timely objection the crucial element, relying on an unusual interpretation of *Glasser*.[67] Since the "decision goes well beyond the limits of *Glasser*,"[68] the majority could have rejected that technical distinction and shaped the decision to aid defendants whose counsel did not object at trial by placing a nondelegable, absolute duty on the judge to solve the quandary of multiple representation at the trial level.[69] In this way the substantive constitutional question would not arise on appeal, and only the discretion of the trial judge would be in question.[70] In placing the onus on

66. 435 U.S. at 484 (quoting Glasser v. United States, 315 U.S. at 71).

67. The Court uses *Glasser* to support its position that reversal due to joint representation is unavailable unless counsel objects at trial. "The Court's refusal to reverse Kretske's conviction is not contrary to this interpretation of *Glasser*. Kretske did *not* raise his own Sixth Amendment challenge to the joint representation." *Id.* at 489. *See* notes 15 & 36 *supra* and accompanying text; text accompanying note 50 *supra*. The at-trial objection was not crucial to *Glasser*, in which the Court focused on the injury to the defendant.

It is questionable whether Glasser's objection to the appointment of his counsel, Stewart, to represent his codefendant would be sufficient to withstand the tests posed in *Holloway*. The trial judge suggested that Stewart represent Kretske when Kretske expressed dissatisfaction with his own attorney. Both Stewart and Glasser originally objected. Stewart suggested the danger of guilt by association. Glasser stated, "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." 315 U.S. at 69. The court then refused to appoint Stewart to represent Kretske. After a short consultation the parties apparently changed their minds. Kretske and Stewart announced their agreement to the court appointment, and Glasser remained silent. *Id.* at 69-70. As Mr. Justice Frankfurter noted in dissent, Glasser, a former Assistant United States Attorney, made no claim at trial that his counsel was ineffective. *Id.* at 88-91. In his opinion Glasser failed to make a timely objection to the appointment. The *Holloway* Court's unusual reading of the facts in *Glasser*, stressing the *timeliness* of motions, thus became precedent for a rule mandating at-trial objections. *Holloway* is the first case to read *Glasser* in such a strict manner. *See* note 60 *supra*.

68. 435 U.S. at 492.

69. As noted in United States v. Williams, 429 F.2d 158 (8th Cir.), *cert. denied*, 400 U.S. 947 (1970):

> Assignment of one attorney to represent two or more codefendants should never be made routinely or indiscriminately. To the contrary, where there are two or more defendants the trial judge should, before appointing the same attorney to represent them, conduct a careful inquiry and satisfy himself that no conflict of interest is likely to result and that the parties have no valid objection. This course is dictated because the possibility of a conflict of interest between two defendants always exists to some extent, even if it be only in regard to the manner in which their defense is presented.

Id. at 161.

70. *See generally* United States v. Lawriw, 568 F.2d 98, 103, 105 (8th Cir. 1977) (responsibility for avoiding risks of conflict from joint representation lies heavily with both trial court and counsel), *cert. denied*, 435 U.S. 969 (1978); Morgan v. United States, 396 F.2d 110, 114 (2d Cir. 1968) (judge should exercise extreme care before allowing joint representation, and should conduct inquiry to determine whether conflict exists); Ford v. United States, 379 F.2d 123, 125-26

the judge instead of on the attorney, the Court still could have decided *Holloway* on its facts[71] and obviated the continual jockeying in other courts on the issue of proof on appeal of prejudice and conflict of interests. Because the sixth amendment right to effective counsel is "basic to a fair trial,"[72] and the dangers of joint representation are so awesome,[73] the Supreme Court should have molded more comprehensive protection for the defendant.

Holloway's value lies in its clarification of *Glasser*[74] and its anticipated effect of fueling the growing judicial awareness of the pitfalls in multiple representation.[75] Unfortunately, *Holloway* lacks the vitality of a bolder decision,[76] and thus likely will not enjoy wide application.[77]

(D.C. Cir. 1967) (burden on judge to decide before trial whether separate counsel for codefendants is required). *See also* United States v. Warledo, 557 F.2d 721, 728 (10th Cir. 1977); United States v. Alberti, 470 F.2d 878, 881-82 (2d Cir. 1972), *cert. denied*, 411 U.S. 919 (1973); United States v. Liddy, 348 F. Supp. 198, 200 (D.D.C. 1972); State v. Olsen, — Minn. — 258 N.W.2d 898 (1977). An automatic hearing may "serve as a means of promoting effective judicial administration by providing a meaningful and independent basis upon which the trial or appellate court may make an independent assessment of the voluntariness of the waiver of such a right." *Id.* at 907. *But see* United States v. Mandell, 525 F.2d 671 (7th Cir. 1975) (affirmative judicial inquiry not required by the sixth amendment or *Glasser*). *See generally* Cole, *Time for a Change: Multiple Representation Should be Stopped*, 2 NAT'L J. CRIM. DEF. 149 (1976).

71. "In this case the trial court simply failed to take adequate steps in response to the repeated motions, objections, and representations made to it . . . ." 435 U.S. at 487.

72. *Id.* at 489 (quoting Chapman v. California, 386 U.S. 18, 23 (1967)).

73. 435 U.S. at 489-90.

74. *Id.* at 488-89.

75. *See* note 57 *supra* and accompanying text. *See also* Campbell v. United States, 352 F.2d 359 (D.C. Cir. 1965); 18 U.S.C. § 3006(A)(b) (1976). A noteworthy amendment to rule 44 of the FED. R. CRIM. P., proposed by the Advisory Committee on Criminal Rules, states:

> (c) Joint Representation. Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. 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.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE 82 (1978), *reprinted in* advance sheet to 98 S. Ct. 1123-1290 (May 1, 1978).

76. Perhaps any decision in the joint representation area is an encouraging stride. The Supreme Court has in the past sidestepped confrontation of the *Holloway-Glasser* issues. *See* Dukes v. Warden, 406 U.S. 250 (1972), in which the Court decided that withdrawal of a guilty plea obviated any discussion of the state court's finding that no conflict of interest existed between the defendants. *Id.* at 256-57.

77. *Holloway*'s narrow scope is reflected in the treatment it has received in subsequent cases. Courts have cited it to support ancillary points, noting that *Holloway* is controlling only when the

The Supreme Court faced an important constitutional problem, but disappointed courts still awaiting a conclusive path through the maze of joint representation.

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defense objects at trial. *See* United States v. Steele, 576 F.2d 111, 112 (6th Cir.) (Sixth Circuit read *Holloway* to not hold that the sixth amendment is violated per se when trial judge fails to inquire into the conflict of interest), *cert. denied*, 99 S. Ct. 313 (1978); Salomon v. LaVallee, 575 F.2d 1051, 1053-55 & n.3 (2d Cir. 1978) (if trial judge conducts no inquiry into conflict of interest, burden of proof to show no prejudice is on prosecution).

> [T]he [*Holloway*] Court pointedly refrained from commenting on the issues central to this appeal: "how certain the reviewing court must be that the asserted conflict existed, before it will conclude that the defendants were deprived of their right to the effective assistance of counsel" and "the scope and nature of the affirmative duty of the trial judge to assure that criminal defendants are not deprived of their right to the effective assistance of counsel by joint representation of conflicting interests."

Id. at 1053 n.3 (quoting 435 U.S. at 483). *See also* United States v. Levy, 577 F.2d 200 (3d Cir. 1978), in which the court noted:

> At the very least, before the district court permitted Siegal to choose between Visceglia and Verna and to represent the latter . . . , the court should have made an on-the-record disclosure of the potential conflicts to Verna. Nothing short of this will satisfy a reviewing court that there has been a knowing and intelligent waiver of the right to the effective assistance of an attorney . . . .

Id. at 211. (defense counsel had entered appearance on behalf of both defendant and informant codefendant, and was permitted to choose codefendant for trial representation without disclosing to defendant the potential conflicts of interest); State v. Stevenson, 200 Neb. 624, 632-33, 264 N.W.2d 848, 852-53 (1978) (representation of two codefendants, when the confession of each was used at trial to implicate the other defendant, suggests a conflict of interest, and trial court erred in appointing one attorney to represent the codefendants).

The Eighth Circuit has cited *Holloway* for the premise that the judge should respect codefendant's wishes to *retain* joint counsel in the absence of actual or potential conflicts. United States v. Cox, 580 F.2d 317, 321-22 (8th Cir. 1978).