COMMENT

Unequal Access to Separate Counsel: An Equal Protection Problem*

Joint representation of criminal co-defendants is permitted, if not encouraged, in most jurisdictions. It is often considered necessary for judicial economy and efficiency. Numerous problems may arise from this type of representation, especially in the development of a trial strategy that is equally effective for all the co-defendants. A co-defendant being jointly represented may come to realize, that separate representation would have been more beneficial to his cause. A defendant in this predicament must make a motion that the court allow him to be separately represented. The courts, in their attempt to accommodate the defendant's wishes have created a double standard treating court-appointed joint representation differently from privately retained joint representation.4

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1. One notable exception is the District of Columbia Circuit, which requires the initial appointment of separate counsel for each codefendant, with instructions that if counsel conclude that their clients' best interests would be served by joint representation, then this conclusion be communicated to the court. See Ford v. United States, 379 F.2d 123 (D.C. Cir. 1967).

2. “The traditional rationale of joinder of offenses and defenses is that of conserving the time lost in duplicating the efforts of the prosecuting attorney, and possibly his witnesses, and of judges and court officials.” American Bar Association, Standards Relating to the Administration of Criminal Justice, Compilation 285 (1974).


4. For a comparison of the two standards, as applied by the Supreme Court, see Glasser v. United States, 315 U.S. 60 (1942), and Holloway v. Arkansas, 435 U.S. 475 (1978). The Glasser case dealt with joint representation by a retained attorney, and held that the wishes of a defendant to have “the benefit of the undivided assistance of counsel . . . should be respected. Irrespective of any conflict of interest, the additional burden of representing another party may conceivably impair counsel's effectiveness.” 315 U.S. at 75. Holloway, on the other hand, dealt with joint representation by a court-appointed attorney and held that a trial judge had no obligation to appoint separate counsel. 435 U.S. at 484.
Under the present system, an indigent asking for separate counsel is usually required to show the existence of a conflict of interests before the trial judge will grant the motion. Those courts which require the indigent defendant to show a conflict of interest, or other "good cause," before separate counsel will be appointed operate under a rebuttable presumption that joint representation is effective representative. The burden is on the indigent to prove that in his case such a conflict might impair his right to effective assistance of counsel. In these courts, the ultimate determination of the necessity of separate counsel rests with the trial judge.

5. The courts are divided as to how strong a showing of a conflict must be made before separate counsel will be appointed. Some courts hold that a showing of a possible conflict of interest, however remote, is sufficient. See Lollar v. United States, 376 F.2d 243 (D.C. Cir. 1967); United States v. Foster, 469 F.2d 1 (1st Cir. 1972); United States ex rel. Hart v. Davenport, 478 F.2d 203 (3rd Cir. 1973); Sawyer v. Brough, 358 F.2d 70 (4th Cir. 1966); People v. Cook, 13 Cal. 3d 663, 542 P.2d 148 (1975); State v. Kennedy, 8 Wash. App. 633, 508 P.2d 1386 (1973). The research of the Arkansas Supreme Court indicated that five jurisdictions have adopted this standard. Holloway v. State, 260 Ark. 250, 253, 539 S.W.2d 435, 439, 40 (1976). These jurisdictions have not changed their standards since 1976. In these jurisdictions it is easier to gain access to separate counsel since a possible conflict of interest is nearly always present in multiple representation cases. See Geer, note 3 supra. The equal protection problem is not as great in these courts.

Most jurisdictions, however, require a showing of an actual or a substantial possibility of a conflict before appointing separate counsel. See United States v. Lovano, 420 F.2d 769 (3d Cir. 1970); United States v. Beaudreau, 502 F.2d 557 (5th Cir. 1974); United States v. LaRiche, 549 F.2d 1088 (6th Cir. 1977), cert. denied 430 U.S. 987; United States v. Gallagher, 437 F.2d 1191 (7th Cir. 1971), cert. denied, 402 U.S. 1009; United States v. Williams, 429 F.2d 158 (8th Cir. 1970); United States v. Christopher, 488 F.2d 849 (9th Cir. 1973); Fryar v. United States, 404 F.2d 1071 (10th Cir. 1968); State v. Davis, 110 Ariz. 29, 514 P.2d 1025 (1973); People v. Berland, 74 Ill. 2d 286, 385 N.E.2d 649 (1978); State v. Jeffrey, 163 Mont. 92, 515 P.2d 354 (1973). The Arkansas Supreme Court indicated this is the rule in 32 jurisdictions. 439 S.W.2d at 439. These courts have not changed their standards since 1976. In these courts, the indigent's burden of proof is much greater and, consequently, his access to separate counsel is much more limited. This article will focus primarily on these jurisdictions where the equal protection problem is much more evident.

6. This is the standard set up by the Criminal Justice Act of 1962 which states that the "court shall appoint separate counsel for defendants having interests that cannot properly be represented by the same counsel, or when other good cause is shown." 18 U.S.C. § 3006A(b). A showing of an actual or substantial possibility of a conflict of interest would meet the requirement of "good cause." See cases cited in note 5 supra for jurisdictions which apply the federal standard.
Under this procedure, a denial of a timely motion for separate counsel is a very real possibility. This same procedure is not applied to non-indigent defendants. These defendants need not show a conflict of interests in order to have their motions for separate counsel granted. In fact, many jurisdictions place an affirmative duty upon the trial judge to apprise co-defendants who have retained a single attorney of the "dangers inherent in joint representation" before proceeding. Some courts have even suggested that an intelligent and competent waiver of separate representation appear on the record.

7. This article deals only with "timely" motions; an "untimely" motion, made after initiation of the court proceedings, may warrant the interference of the court to satisfy itself that the motion was not made for the purpose of delay or obstruction of the orderly conduct of the trial. The Court in Holloway v. Arkansas, 435 U.S. at 486, noted that these dangers were not present at the outset of trial.
8. The Holloway Court authorized such a denial in its refusal to shift from the trial judge to the defending attorney the ultimate determination of the need for separate counsel. Id. at 490.
9. The Glasser Court's admonition to allow non-indigent codefendants who wish "the benefit of the undivided assistance of counsel" to have separate counsel, 315 U.S. at 75, might be understood to mean that the trial judge has no right to interfere in a non-indigent's decision as to separate counsel.
10. Virgin Islands v. Hernandez, 476 F.2d 791, 794 (3rd Cir. 1973) (case remanded with a strong recommendation that the trial judge warn defendants of the possible dangers of joint representation).
11. The following jurisdictions impose on the trial judge an affirmative duty to investigate the possibility of conflict and the non-indigent's willingness to continue with the multiple representation: Campbell v. United States, 352 F.2d 359 (D.C. Cir. 1965); United States v. Foster, 469 F.2d 1 (1st Cir. 1972); Abraham v. United States, 549 F.2d 236 (2d Cir. 1977); United States ex rel. Hart v. Davenport, 478 F.2d 203 (3rd Cir. 1973); United States v. Truglio, 493 F.2d 574 (4th Cir. 1974); United States v. Georvassilis, 498 F.2d 883 (6th Cir. 1974); United States v. Lawriw, 568 F.2d 98 (8th Cir. 1977), cert. denied, 435 U.S. 969 (1978).
"[The trial court's] protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear on the record."
See also United States ex rel. Watson v. Myers, 250 F. Supp. 292, 294 (E.D. Pa. 1966); "There is no suggestion on the state trial record of a waiver of the right to separate representation, much less a knowing and intelligent waiver."; United States v. Martorano, 510 F.2d 35, 40 (1st Cir. 1979); "The purpose of a [duty of inquiry] is to ensure that there is an on-the-record exchange between the trial
Thus, in retained multiple representation cases, the courts have applied a presumption of ineffectiveness, rather than effectiveness. In these cases, the ultimate determination as to the necessity of separate counsel rests with the defendants themselves. The trial judge's only duty is to afford these defendants an opportunity to reject multiple representation at the outset of trial and, in some jurisdictions, to obtain a waiver of separate representation on the record. Thus, provided his motion is timely, a non-indigent may retain separate counsel at will, without showing a conflict of interests, and without being at the mercy of the trial judge's discretion. Such a motion will virtually never be denied.

The existence of one presumption governing multiple representation for indigents and a different presumption governing their wealthier counterparts raises serious questions of discrimination. This dual procedure has the effect of creating for non-indigents a "right to separate counsel" which indigents do not enjoy. The courts have not addressed the issue of whether the conditional nature of an indigent's right to separate counsel is a violation of fourteenth amendment equal protection guarantees. However, judicial inquiry into the need for separate counsel, after that need has
court and defendant from which it can be readily inferred that the waiver is voluntary and knowing." The effect of requiring such a waiver is the creation for non-indigents of a "right to separate counsel" which indigents do not enjoy.

13. This presumption of ineffectiveness was extended to include court-appointed joint representation in the following proposed amendment to Fed. R. Crim. P. 44 adopted by the Advisory Committee on Criminal Rules:

Rule 44: Right to and Assignment of Counsel

(c) JOINT REPRESENTATION. Whenever two or more defendants have been joined for trial . . . and are represented by the same retained or assigned counsel . . . 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. (Emphasis added).

14. See notes 4 & 9 supra.

15. One court has, however, recognized that such a violation may exist. In Lollar v. United States, 376 F.2d 243, 246 n.6 (D.C. Cir. 1967), the court stated: Whether indigents' access to separate counsel should be conditioned — as both Lebrón v. United States, 229 F.2d 16 (1955), and 18 U.S.C. § 3006 (A)(b) contemplate — on the ability, at the outset of the trial process, to predict prejudice arising from joint representation may well raise serious questions as to discrimination between indigents and non-indigents, who may retain separate counsel at will.
already been expressed by the indigent defendant, involves the im-
position by the State of a discriminatory procedure upon a sus-
pect class. While this distinction between indigents and non-indi-
gents may, at first glance, appear reasonable in view of the State's
interest in judicial economy, a deeper analysis proves this justifi-
cation largely illusory.

**DISCRIMINATORY EFFECTS OF JUDICIAL INQUIRY**

The effects of judicial inquiry into the basis of an indigent’s
motion for separate counsel are best understood when examined in
the light of Glasser v. United States, the leading case governing
appointment of separate counsel for non-indigents. In that case,
defendant Glasser retained an attorney to represent him. Later, co-
defendant Kretske asked the court to appoint the same attorney to
represent him as well. Glasser objected to the appointment, ex-
pressing a desire to be separately represented. The court, never-
theless, appointed the attorney to represent Kretske over Glasser's
objection. On appeal, the United States Supreme Court held that
this appointment of Glasser’s attorney denied Glasser the right to
effective assistance of counsel. The Court stated:

Glasser wished the benefit of the undivided assistance of counsel

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16. The Court in Holloway v. Arkansas, 435 U.S. 475 (1978), requires a judi-
cial inquiry before denial of the motion to “ascertain whether the risk [of a con-
flict of interests] is too remote to warrant separate counsel.” Id. at 484.

17. In criminal matters, classifications made on the basis of wealth are re-
garded as suspect, and sufficient to warrant strict scrutiny by the Court. The
Court in Griffin v. Illinois, 351 U.S. 12 (1956), stated that “[i]n criminal trials a
State can no more discriminate on account of poverty than on account of religion,
race, or color.” Id. at 17.

18. Chief Justice Warren E. Burger stated that “we must constantly keep in
mind that the duty of lawyers and the function of judges is to deliver the best
quality of justice at the least cost in the shortest time.” American Bar Ass’n An-

19. 315 U.S. 60 (1942).

20. Id. at 69. The trial record indicates that upon the appointment of Glas-
s...
of his own choice. We think that such a desire on the part of an
accused should be respected. Irrespective of any conflict of inter-
est, the additional burden of representing another party may con-
ceivably impair counsel's effectiveness.

To determine the precise degree of prejudice sustained by
Glasser as a result of the court's appointment of Stewart as coun-
sel for Kretske is at once difficult and unnecessary. 22

Thus, the Court recognized that multiple representation may im-
pair the effectiveness of counsel, regardless of the existence of a
conflict of interests. The Court also recognized that the degree of
harm caused by such representation is difficult, if not impossible,
to measure. The Court's statement that a trial court should respect
an accused's desire for separate counsel indicates that the ultimate
decision as to the need for separate counsel should remain with the
accused himself.

This same respect for an accused's desires is not present when
the accused cannot afford privately retained counsel. The leading
case governing the appointment of separate counsel for indigents is
Holloway v. Arkansas. 23 In Holloway, three indigent co-defendants
made timely motions for separate counsel based on their attorney's
representations that there was a "possibility of a conflict of inter-
est in each of their cases" which might impair his effectiveness. 24
The trial judge denied the motions, without a hearing on the con-

cflict of interest issue, and all three defendants were subsequently
convicted. The Arkansas Supreme Court affirmed, concluding that
the record showed no actual conflict of interest or prejudice to pe-
titioners. 25 The United States Supreme Court reversed, holding the
trial judge's failure either to appoint separate counsel or to "ascert-
tain whether the risk of a conflict of interest was too remote to
warrant separate counsel" denied petitioners of the guarantee of
effective assistance of counsel under the sixth amendment. 26 The
Court clarified the procedure to be applied when an indigent de-
fendant desires separate representation. The defense attorney
must first raise the issue of a conflict of interest. 27 The trial judge

22. Id. at 75.
24. Id. at 477.
after the Holloway case: "Unless the trial court knows or reasonably should know
that a particular conflict exists, the court need not initiate an inquiry."
must then either appoint separate counsel or inquire further into defense counsel's representations. The Court, therefore, clearly authorized a judicial inquiry into the "basis of defense counsel's representation." Should the trial court choose to exercise its authority, it must first determine whether a conflict of interests exists. It then must determine the impact of the conflict on the outcome of the trial.

The resolution of these questions leaves much room for human error and perhaps creates more problems than it solves. This process of proof and prediction, especially when it results in denial of the motion, has serious effects upon the fairness of the proceeding: it intrudes upon the attorney-client relationship, jeopardizes the defendant's fifth amendment privilege against self-incrimination, results in a possible violation of the defendant's sixth amendment right to the effective assistance of counsel, and creates a basis of

29. Id. at 487: "Nor does our holding preclude a trial court from exploring the adequacy of the basis of defense counsel's representations regarding a conflict of interests without improperly requiring disclosure of the confidential communications of the client."
30. See note 5 supra.
31. Several jurisdictions have adopted a per se conflict of interest rule which would presume prejudice once a conflict has been found to exist. Under this rule, reversal of the conviction is automatic. See United States v. Risi, 603 F.2d 1193 (5th Cir. 1979); People v. Vriner, 74 Ill. 2d 329, 385 N.E.2d 671 (1978).
32. In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be ground for reversal, cannot be brushed aside as immaterial, since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt.

Glasser v. United States, 315 U.S. at 67.
34. See United States v. Paz-Sierra, 367 F.2d 930 (2d Cir. 1966): "To learn all the controlling facts, the trial judge would have to require each defendant to tell him (fifth amendment rights notwithstanding) his version of the alleged crime." Id. at 932; United States v. Garafola, 428 F. Supp. 620, 626 (D.N.J. 1977) citing Fryar v. United States, 404 F.2d 1071, 1073 (10th Cir. 1968), cert. denied, 395 U.S. 964, which noted "the practical difficulty for a trial judge to determine the existence of a conflict of interest between co-defendants without encroaching upon the fifth amendment."
35. People v. Murphy, 72 Ill. 2d 421, 381 N.E.2d 677 (1978). In a special concurring opinion, Justice Clark stated that the time has come for Illinois to adopt a standard based on minimum professional responsibility. Id. at 440-44, 381 N.E.2d at 686-88. While the court has not yet adopted this standard, it seems to be an
appeal that is nearly incapable of adequate appellate review.83

Intrusion into the attorney-client relationship

The Court in Holloway allowed a trial judge to conduct an inquiry into the “basis of defense counsel’s representations.” The judicial soundness of this procedure has been questioned on the ground that it represents a threat to the attorney-client relationship.87 The Court answered this objection by saying that the inquiry must be held without “improperly requiring disclosure of the confidential communications of the client.”88 The Court recognized that the public defender in Holloway was “confronted with a risk of violating, by more disclosure, his duty of confidentiality to his client.”89 Nevertheless, the Court refused to hold that the disclosures already made to the trial judge were sufficient, in and of themselves, to warrant the appointment of separate counsel.40 Thus, while the Court indicated a desire to protect the attorney-client confidence from unjustified violation, it refused to elevate that desire into a guarantee of the integrity of the attorney-client relationship.41

emerging standard for determining the ineffectiveness of counsel. See United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973); State v. Harper, 57 Wis. 2d 543, 205 N.W.2d 1 (1973); Coles v. Peyton, 389 F.2d 224 (4th Cir. 1968), cert. denied, 393 U.S. 849. Under this standard, joint representation over defendant’s objections may be a per se violation of sixth amendment rights according to the ABA Standards for the Defense Function which is often accepted as the guideline for this standard. See note 67 infra.

36. See Holloway v. Arkansas, 435 U.S. at 490, 491 (1978). The Court stated: [I]n a case of joint representation of conflicting interests the evil— it bears repeating— is in what the advocate finds himself compelled to refrain from doing . . . [T]o assess the impact of a conflict of interests on the attorney’s options, tactics, and decisions in plea negotiations would be virtually impossible.


The attorney-client privilege, while not a right guaranteed by the Constitution, is recognized by the judiciary and the legislature as a stronghold of the American legal system. See, Hazard, An Historical Perspective on the Attorney-Client Privilege, 66 CAL. L. REV. 1061 (1978). To maintain the effectiveness of an adversary system, the client must be free to disclose any and all information pertaining to his case. It is only through such uninhibited disclosure that an attorney can properly advise his client and adequately prepare a defense.

38. 435 U.S. at 487.
39. Id. at 485.
40. Id. at 484.
41. “A system which does not guarantee the integrity of the professional rela-
The problem of intrusion into the attorney-client relationship becomes even more complicated when one considers that it is the trial judge, and not the attorney, who determines what is and is not confidential information. This is inherently illogical; once "confidential information" is revealed to the trial judge it ceases to be confidential, despite the later ruling of the judge. The public defender in Holloway pointed out that compelled disclosure would necessitate the making of a record for review purposes to determine whether the judge abused his discretion in ruling on the motion for separate counsel. Under this procedure, an attorney, in informing the court of the basis of his representations, may be forced to violate his ethical obligations to his client. If disclosure is to a judge who will select the sentencing or, in a bench trial, determine guilt or innocence, the client may be subjected to significant risks of unfair prejudice. In addition, one client's statements to an attorney cannot be assured complete confidentiality because counsel must reveal such statement to co-defendants in preparing defenses.

42. See 1970 Supplement to the Digest of Bar Association Ethics Opinions, Fla. Opns. 270 (Opinion 65-7, Feb. 18, 1965): "whether a particular matter is confidential and privileged is primarily a question of law and not ethics."

43. Appellant's Brief, p. 28.

44. The ABA Code of Professional Responsibility, Canon 4 states:
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 his 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 a full disclosure.

The Code permits the attorney to disclose confidential information when required by a court order. DR 4-101(C)(2). The situations contemplated by this section include bail jumping, the future commission of a crime, and violation of the terms of parole. Id. Canon 4 n.15. It does not appear that this section would apply to non-violative acts, such as the request for the appointment of separate counsel.

Canon 37 of the ABA Canons of Professional Ethics (which was the precursor to the ABA Code of Professional Responsibility) states that "it is the duty of a lawyer to preserve his client's confidences . . . He should not accept employment which involves or may involve the disclosure or use of those confidences."

45. See 435 U.S. at 487 n.11.

46. 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
A judicial determination of the necessity of separate counsel for indigents interferes with the attorney's development of the most effective defense strategy for his client. The attorney representing multiple defendants is likely to be inhibited in or precluded from using some common strategic devices in his development of a common defense. He is unable to plea bargain for one defendant without weighing the impact of the plea upon the other's case. 47 He is unable to minimize the culpability of one client by highlighting the relative sufficiency of evidence against the other. 48 If a defense is available to one defendant but not the other, the attorney may be forced to abandon that defense because it might weaken the defense of the other. 49 The defendants are also faced with the inevitable danger of guilt by association. 50 In the attorney's effort to develop a common defense, one defendant may be sacrificed for the other. A judicial inquiry and subsequent determination by the trial judge in effect allows the judge to make significant tactical decisions for the defense attorney.

The Court in Holloway recognized it is virtually impossible for an appellate court "to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations." 51 This assessment is no less difficult for the trial judge. Multiple representation nearly always involves tactical conflicts, whether or not it involves a conflict of interest sufficient in the eyes of the court to warrant separate counsel. 52 The attorney who has made a timely motion for separate counsel has already determined that his client would benefit from the services of an attorney with undivided loyalties. 53 Nevertheless, the Court continued to authorize the denial of such a motion, which necessarily would

connection with the case or any other matter that might be relevant to the defendant's selection of a lawyer to represent him." See generally M. Freedman, Lawyer's Ethics in an Adversary System (1975).

47. See Geer, supra note 3.
48. Id.
49. Id.
51. 435 U.S. at 491.
52. See Geer, supra note 3.
53. "[A]ttorneys are officers of the court, and when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath." Id. at 486, quoting State v. Brazile, 226 La. at 266, 75 So. 2d at 860-61. (1954). This consideration presumes that the motion is not made for dilatory purposes.
preclude the defense attorney from pursuing the strategy which he had determined was in his client’s best interests.\textsuperscript{54}

These interferences with the attorney-client relationship are not experienced by non-indigents in similar circumstances. They need not explain the reasons for desiring separate counsel if their motion is timely. They, therefore, need not fear the exposure of statements made to their attorney in confidentiality. Most significantly, they are free to develop the trial strategy which they consider most beneficial to their cause.

\textit{Threat to defendant’s fifth amendment rights}

The corollary to the threat to the attorney-client privilege is the threat to the indigent’s fifth amendment privilege against self-incrimination.\textsuperscript{66} The Court, in holding that a court cannot deny a motion for separate counsel without a “proper” inquiry,\textsuperscript{66} in effect promotes stricter inquiry in those jurisdictions which already require it.\textsuperscript{67} In order to learn the facts upon which an intelligent determination can be made, the court may compel the defendant to disclose certain facts which may be incriminating to him.\textsuperscript{66} In such compelled disclosure, the indigent may be forced to choose between a waiver of his fifth amendment rights and a denial of his motion for separate counsel. Although the Court has held that a trial judge cannot “improperly require disclosure”,\textsuperscript{56} it has not set any standards as to what might constitute an “improperly” compelled disclosure.

\textsuperscript{54} “When counsel has to weigh his preferred strategy or tactics . . . the defendant does not receive the competent and complete representation which an attorney is under a duty to render and which the defendant is entitled to receive.” State v. Davis, 110 Ariz. 29, 514 P.2d 1025, 1027 (1973), citing State v. Cox, 109 Ariz. 144, 506 P.2d 1038 (1973).

\textsuperscript{55} See note 34 \textit{supra}.

\textsuperscript{56} 435 U.S. at 487.

\textsuperscript{57} See note 5 \textit{supra} for cases decided in those jurisdictions which require a showing of an actual conflict of interest.

The comments of Mr. Justice Powell, dissenting in \textit{Holloway}, are representative of the prevailing view in these jurisdictions. He stated that in the inquiry “the burden is on defense counsel, because his clients are in possession of the relevant facts, to make a showing of a reasonable likelihood of conflict or prejudice. Upon such a showing, separate counsel should be appointed.” 435 U.S. at 495.

\textsuperscript{58} See note 34 \textit{supra}.

\textsuperscript{59} 435 U.S. at 487.
Violation of sixth amendment right to effective assistance of counsel

Judicial inquiry resulting in a denial of the motion for separate counsel may result in a violation of sixth amendment guarantees of effective assistance of counsel. The Supreme Court has never defined what constitutes “effective” assistance, but the lower courts have fashioned several different standards for determining whether the assistance rendered was ineffective and, therefore, constitutionally deficient. These are the “mockery” standard, the “substantial defense” standard, the “reasonably effective assistance” standard, and the “reasonably competent assistance” standard. The courts have consistently held that forced multiple representation is not a per se violation of the sixth amendment under the first three standards. Nevertheless, forced multiple representation may be a per se violation under the reasonably competent assistance test, since under this standard the court would probably consider the tactical foreclosures resulting from such representation.

The reasonably competent assistance standard delineates specific duties which the defense counsel must perform and specific guidelines which he must follow. Several courts have adopted the ABA Standards for the Defense Function as a guideline in deter-

60. See note 35, supra.
62. This test was, essentially, whether the trial had become a “sham, farce, or mockery” due to the ineffectiveness of defense counsel. This is the standard most frequently applied by the federal and state courts. Id. at 137. See also McMillan v. New Jersey, 408 F.2d 1375 (3d Cir. 1965); United States v. Dilella, 354 F.2d 584 (7th Cir. 1965); People v. Robinson, 73 Ill. 2d 192, 383 N.E.2d 164 (1978).
63. Under this standard, the defendant must show that there was a substantial defense at the time of his trial which his defense counsel failed to consider. Only a very few courts still use this standard. See Comment, Defects in Ineffective Assistance Standards Used by State Courts, 50 U. Colo. L. Rev. 389, 401 (1979).
64. Under this standard, the defendant has an absolute right to the defense counsel’s giving reasonable assistance. Reasonableness is defined by the circumstances of the case. Id. at 402.
65. Under this standard, defense counsel must follow specific guidelines set by the court, thereby avoiding a determination as to whether counsel was reasonable in each case. Id. at 404.
66. See Holloway v. Arkansas, 435 U.S. at 482. See also those cases in note 5 supra which require a showing of an actual or substantial conflict before holding joint representation to be constitutionally deficient.
mining minimum professional competence. The District of Columbia Circuit, in *United States v. DeCoster*, adopted the ABA standards and, more specifically, required that counsel should: (1) confer with his client without delay and as often as necessary to plan his defense; (2) advise his client of his rights and take all actions necessary to preserve them, and; (3) conduct appropriate investigations both legal and factual. Furthermore, the court stated that if defendant could show a substantial violation of any of these specific requirements, then it was presumed he had been denied effective representation unless the prosecution could prove the defendant had not been prejudiced. Forced multiple representation forecloses an attorney from utilizing some basic strategic devices and, thus, prevents him from “taking all actions necessary” to preserve his client’s rights. Therefore, under this standard, which seems to be an emerging one, forced multiple representation may be presumed a denial of the sixth amendment right to the effective assistance of counsel.

**Inadequate appellate review**

It has been recognized that effective representation includes the right to counsel whose loyalty is undivided. It is difficult to understand how “undivided loyalty” can exist in multiple representation when the attorney must map out a trial strategy which is necessarily in the best interest of more than one client. In considering a strategy for one defendant the attorney must weigh the impact of that strategy upon the other defendant’s case. The result,


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 codefendants.

Should this particular standard be adopted, forced multiple representation might be a *per se* violation of the sixth amendment right. Most of the courts using a reasonably competent assistance standard have accepted these standards as only persuasive guidelines, and not as law.

68. 487 F.2d 1197 (D.C. Cir. 1973).

69. Id. at 1204.

70. See notes 47-50, 52 and accompanying text *supra*.

71. See notes 35 and 67 and accompanying text *supra*.

72. See Glasser v. United States, 315 U.S. 60, 70 (1942); United States v. Mahar, 550 F.2d 1005, 1007-08 (5th Cir. 1977).

73. See notes 47-50, 52 and accompanying text *supra* for a discussion of the
in most instances, is a collective defense which compromises inter-
ests and which may make one defendant the sacrificial lamb for
the other. The courts have reasoned that because a remedy for in-
effective assistance of counsel exists at the appellate level, the need
for an initial appointment of separate counsel, absent a showing of
a conflict of interest, is alleviated. The Supreme Court has wisely
pointed out that "the evil [in multiple representation] is in what
the advocate finds himself compelled to refrain from doing." The
Court recognized that while in some cases it may be possible to
identify from the record the prejudice resulting from the lack of
separate counsel, more often it is exceedingly difficult to judge the
impairment of trial strategy that occurred because of such repre-
sentation. These are defects which do not appear in the cold
print of the record and which may, therefore, escape adequate ap-
pellate review.

THE STRICT SCRUTINY TEST

In criminal matters, classifications made on the basis of wealth
(or rather the lack of it) are regarded as suspect, and sufficient to
warrant strict scrutiny by the Court. Under this method of analy-
sis, the state must show that the distinction between rich and poor
is necessary to achieve a compelling state interest. The Court

various ways in which joint representation can result in impaired representation
of at least one of the defendants.

1950), cert. denied 341 U.S. 928 (1951). In a habeas corpus proceeding, Judge
Woodbury, concurring, stated "... the courts of the Commonwealth have af-
forded the petitioner a full and fair opportunity to establish the factual basis
upon which his assertions of deprivation of federal constitutional rights rest . . ."
(Id. at 234).

75. 435 U.S. at 490.

76. Id. at 491: "[T]o assess the impact of a conflict of interests on the attor-
ney's options, tactics, and decisions in plea negotiations would be virually
impossible."

77. See Lollar v. United States, 376 F.2d 243 (D.C. Cir. 1967); Buffalo Chief
v. South Dakota, 425 F.2d 271 (8th Cir. 1970); Glasser v. United States, 315 U.S.
60 (1942). These courts all recognized the principle that every multiple represen-
tation case contained some degree of a conflict of interest, albeit one which may
not appear in the cold print of the record. See also Griffin v. Illinois, 351 U.S. 12
(1956): "Destitute defendants must be afforded as adequate appellate review as
defendants who have money . . ." Id. at 20.


79. See Note, Equal Protection and the Indigent Defendant: Griffin and its
must then determine whether the benefit to society from state action outweighs the detriment to the indigent defendant. 80

There are several legitimate state interests in giving the trial judge, rather than the attorney, the authority to decide whether separate counsel is needed. These include the state's concern for the fair, efficient and economical administration of justice. However, as important as these state interests are, it is doubtful that such broad discretionary power in the trial judge promotes these interests.

Fairness of the criminal proceeding

The fair operation of criminal proceedings is a central concern in the criminal justice system. The idea of fundamental fairness is reflected throughout the Constitution and numerous Supreme Court decisions. 81 But the goal of fundamental fairness is not advanced by the court's resolution of the tactical and ethical problems of the attorney.

For those co-defendants who can afford to retain an attorney there is in effect an unconditional right to separate counsel. 82 These wealthier defendants are able to structure their own defenses without obtaining the approval of the trial judge. The fact that indigents are not afforded the same opportunity as their wealthier counterparts to decide for themselves whether a common defense would be advantageous is evidence of the "fundamental unfairness" implicit in this procedure. A system which presumes the validity of joint representation in once instance and its invalidity in another is inherently deficient.

80. Id. at 406.

81. U.S. CONST. amend. V (No person "shall . . . be deprived of life, liberty, or property, without due process of law . . ."); U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury"); U.S. Const. amend. XIV ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."); see Griffin v. Illinois, 351 U.S. 12 (1956) (holding that an indigent is entitled to as adequate appellate review as non-indigents); Boddie v. Connecticut, 401 U.S. 371 (1971) (holding that Connecticut could not deny access to its courts in divorce proceedings simply because of a party's inability to pay requisite filing fees); Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that an indigent defendant charged with a crime has the same fundamental right to assistance of counsel at trial as his non-indigent counterpart).

82. See note 4 and accompanying text supra.
Efficient and economical administration of justice

Another legitimate state interest is the efficient and economical administration of justice.83 While the state is concerned with minimizing the costs of extensive litigation, it is again doubtful that involuntary multiple representation advances this goal. It is true that trying several defendants together is a more efficient method of litigation in the sense that the same set of facts need be proven only once.84 The duration of the trial is also shortened because of a decrease in the number of objections when an attorney is representing more than one defendant.85 But the likelihood that complications will develop at some stage in the trial86 illustrates the tremendous potential for delays with their subsequent increase in the cost of litigation. If a conflict of interests actually develops, the attorney is obligated to withdraw from the case.87 This greatly increases inefficiency of the trial as the new attorneys familiarize themselves with the case.

Multiple representation also tends to frustrate the prosecutorial function since any cooperation of a defendant with the government will depend upon the impact of that cooperation upon a co-defendant's case.88 This is especially evident during the plea bargaining stage, where even if an offer from the prosecution is accepted, the attorney may later confront that defendant as prosecution witness at trial.89 It is firmly established that a conflict of interest exists where one defendant becomes a prosecution witness against the other defendant.90 The result is the withdrawal of the defense attorney from the case,91 with subsequent increase in

83. See note 18 supra.
86. Id.
87. ABA Code of Professional Responsibility, DR 5-105(a) states that an attorney must avoid accepting or continuing multiple employment "if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected" by the employment.
88. See Geer, note 85 supra.
89. Id.
90. See United States v. Mahar, 550 F.2d 1005, 1008 (5th Cir. 1977).
91. See Schloetter v. Railoc of Ind., Inc., 546 F.2d 562 (2d Cir. 1973); Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973); Cord v. Smith, 338 F.2d 516 (9th Cir. 1964); ABA Comm. on Professional Ethics, Informal Opinions, No. 885 (1965).
Further obstructions to the economical administration of
criminal justice are apparent at the appellate level. It is estimated
that 45% of those convicted of crimes will appeal on the basis of
ineffective assistance of counsel.92 This figure is probably substan-
tially higher for those defendants who have been jointly repre-
sented. Many of these appeals, with their incumbent costs, could
be eliminated by the initial appointment of separate counsel.93
Judge Oakes of the Second Circuit, calling for a reexamination of
the rules concerning joint representation, eloquently stated:

Trial court insistence that, except in extraordinary circumstances,
codefendants retain separate counsel will in the long run . . .
prove salutory not only to the administration of justice and the
appearance of justice but the cost of justice; habeas corpus peti-
tions, petitions for new trials, appeals and occasionally retrials
. . . can be avoided. Issues as to whether there is an actual con-
flict of interest, whether the conflict has resulted in prejudice,
whether there has been a waiver, whether the waiver is intelligent
and knowledgeable, for example, can all be avoided. Where a con-
flict that first did not appear subsequently arises in or before trial
. . . continuances or mistrials can be saved. Essentially by the
time a case such as the present one gets to the appellate level the
harm to the appearance of justice has already been done, whether
or not reversal occurs; at the trial level it is a matter which is so
easy to avoid.94

Thus, while at first glance it may seem that a tremendous amount
of tax dollars can be saved by multiple representation, the costs of
delays and appeals that are likely to result illustrate that this is
not necessarily true. The fact that almost all multiple representa-
tion cases contain some conflict of interests, even if only with re-
spect to trial strategy, demonstrates the potential for delay and ex-
tended litigation with their resulting increase in inefficiency and

Rev. 73, 78 n.34 (1974).

93. The costs of multiple representation can be substantial, even where
the sixth amendment challenge is unsuccessful. First, even a futile appeal
imposes substantial burdens on both the defendant and the efficient ad-
ministration of justice. Second, and perhaps more significant, the fact
that an appeal is unsuccessful is in no way a guarantee that actual
prejudice did not, in fact, exist.

Geer, supra note 85, at 156 n.145.

94. United States v. Mari, 526 F.2d 117, 121 (2d Cir. 1975)(Oakes, J.,
concurring).
costs.

THE BALANCE OF INTERESTS

Under the strict scrutiny test, if the state action is to prevail, the benefits to society from that action must outweigh the detriment to the individual. The Supreme Court in Coppedge v. United States88 stressed the seriousness of the individual's interests which are at stake in criminal proceedings:

When society acts to deprive one of its members of his life, liberty, or property, it takes its most awesome steps. No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal law procedures.98

While multiple representation may result in prompt criminal proceedings, it certainly does not result in "eminently fair" criminal proceedings.

The trial judge's right to determine whether separate counsel is warranted has adverse effects on the fairness of the proceeding, whether or not the motion for separate counsel is granted. Should the trial judge grant the motion, he has intruded upon the attorney-client relation to the degree which, in his opinion, is required to make an intelligent determination. Thus, even a favorable determination poses a threat to the attorney-client privilege and the defendant's fifth amendment rights, as well as jeopardizes the impartiality of the trial judge should he receive too much information. On the other hand, an unfavorable decision adds the significant detriment of restricting the structure and development of an effective defense. These very serious detriments to the defendant would seem to outweigh the interests of the state in the efficient and economical administration of the criminal law system,99 especially since it is doubtful that these interests are advanced by the vesting of such broad authority in the trial judge.

SOME SOLUTIONS

In order to alleviate the discrimination inherent in the appointment proceedings, the distinctions between rich and poor

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95. 369 U.S. 438 (1962).
96. Id. at 449.
must be eliminated, and equal access to separate counsel provided. One means of achieving equal access is to provide that the final determination of whether separate counsel is warranted be made by the attorney and his client, and not the trial judge. This would require a reversal of the presumption that for indigents joint representation is effective representation. This presumption is part of the federal statute governing the appointment of separate counsel for indigents. In addition to this amendment in the federal statute, there are several ways that the state and federal courts could alleviate the discrimination problem. One alternative is the initial appointment of a single attorney with a mandatory appointment of separate counsel upon demand. Another alternative is the initial appointment of separate counsel with instructions that if counsel conclude that the interests of the clients would be better served by joint representation, then the court will allow it upon request.

The initial appointment of a single attorney may be advantageous from the standpoint of judicial economy. Joint representation may, in some instances, be desirable and in these instances codefendants are more likely to proceed with joint representation if they have been initially appointed a single attorney. This procedure would relieve the attorney of his ethical dilemma since ultimately he would decide whether separate counsel is warranted. He would, therefore, not be forced to reveal confidential information to the trial judge.

Despite these good points, this system of appointment of counsel has some rather serious disadvantages. First, the attorney might not be aware of potential conflicts since he is a single human being whose judgment is not infallible. As a result, the defen-

98. This view is adopted by the Advisory Committee on Criminal Rules in their proposal to amend FED. R. CRIM. P. 44. See note 13 supra.
99. See note 6 supra.
101. This is the procedure followed in Ford v. United States, 379 F.2d 123 (D.C. Cir. 1967).
102. See Kosakoff, Holloway v. Arkansas: A Partial Solution to the Problems Inherent in the Multiple Representation of Criminal Defendants, 45 BROOKLYN L. REV. 191, 211 (1978): "[T]he attorney does not have occasion to reveal confidential communications of his clients if he is not required to establish proof that the claimed conflict exists."
103. "Often conflicts do not arise until the advanced stages of trial, and perhaps an attorney's judgment as to whether he can adequately represent multiple defendants is clouded by a sense of pride or the prospect of receiving an increased
dant's sixth amendment right to effective representation might still be impaired because of his reliance upon the sole judgment of his attorney. In these instances, conflicts may not be discovered until some later stage in the trial, and at that point the confidential information received from the defendants would disqualify that attorney from representing either client. The result is an increase in delay and costs in finding substitutes.

A better solution to the problem, at least on a theoretical level, is the initial appointment of separate counsel. If counsel conclude, after fully investigating the case and consulting with their clients, that the interests of the clients will be best served by joint representation, then the court will allow it upon demand. This method safeguards the attorney-client privilege and the defendant's privilege against self-incrimination, and prevents the subject of the defendant's case to the judgment of a single individual. This alternative could create conflicts of interest within public defender offices since one "firm" cannot represent adverse parties in a case. However, the drawing of attorneys from the private sector could eliminate this problem. The initial appointment of separate counsel can be criticized from the standpoint of judicial economy. Nevertheless, its elimination of so many of the problems inherent in multiple representation, as well as its elimination of a basis of appeal, may actually make the "benefit of the bargain of multiple representation illusory." 

fee." Id.

104. See cases cited in note 91 supra for examples of the disqualification of an attorney because of a conflict of interest which developed during trial.


106. See Laskey Bros. v. Warner Bros. Pictures, 224 F.2d 824 (2d Cir. 1955); Commonwealth v. Geraway, 364 Mass. 168, 301 N.E.2d 814 (1973); Kurbitz v. Kurbitz, 77 Wash. 2d 943, 468 P.2d 673 (1970). While these cases refer to private firms, they do stand for the proposition that in no case will a conflict of interest for one lawyer be removed when the case is transferred to another lawyer in his firm. The ethical obligations of the lawyer preclude substituting any member of his firm as counsel. This argument could conceivably be extended to include public defender offices as well. Cf., People v. Miller, 79 Ill. 2d 454, 404 N.E.2d 199 (1980), holding that public defender firms are not subject to this general rule. 79 Ill. 2d at 154.

107. An interesting development in the appointment of a private attorney to represent an indigent defendant is the claim that it is a violation of the attorney's thirteenth amendment right against involuntary servitude. See In the Matter of Nine Applications for Appointment of Counsel in Title VII Proceedings, No. GO 8643 (N.D. Ala., filed Aug. 10, 1979).

108. Geer, supra note 85, at 160.
CONCLUSION

The Court in Holloway v. Arkansas has authorized the denial of an indigent’s timely motion for separate counsel,\(^{109}\) despite the desire of the accused to have “the benefit of the undivided assistance of counsel.”\(^{110}\) This same authorization does not exist for motions made by non-indigents.\(^{111}\)

The benefits to the indigent of having an unconditional right to separate counsel are clear: protection of the attorney-client relationship from the threat of intrusion by the court, elimination of the court’s interference with the structuring of a defense, and elimination of a basis of appeal which is often incapable of adequate appellate review. Despite the fundamental nature of these interests, only one circuit has held that an indigent defendant has an unconditional right to separate counsel.\(^{112}\) The Supreme Court, while recognizing that the attorney is in the best position to make the determination that separate counsel is warranted, has nevertheless continued to vest authority for that decision in the trial judge.

The interest of the state in the fairness of the criminal justice system is in no way advanced by judicial inquiry into a conflict of interest. At first glance, it seems that the state’s interest in the efficient and economical administration of criminal justice is promoted by such a procedure since it provides the court with a means of reducing unnecessary spending of public monies. However, upon deeper analysis, this justification proves largely illusory. The likelihood that conflicts of interest will develop and the creation of a basis of appeal which is nearly incapable of adequate appellate review make the benefits of a negative judicial determination insignificant.

The concerns of both the indigent criminal defendant and the government can be better protected by the less intrusive measures of initial appointment of separate counsel or appointment of separate counsel upon demand. These would alleviate the indigent’s burden of rebutting the presumption of effectiveness by having to prove a conflict of interest — a burden that is not placed upon the non-indigent who may retain separate counsel at will.

When the success or failure of an indigent’s case may hinge

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111. Id.
upon the outcome of a particular procedure and that procedure is not applied to his non-indigent counterpart, a serious discrimination problem exists. For this reason, the authority for deciding whether separate counsel is needed should be vested in the attorney and his indigent client rather than the trial judge. An unfavorable judicial inquiry shapes the kind of trial an indigent will have and it has long been recognized that "there can be no justice where the kind of trial a man gets depends upon the amount of money he has." \[113\]

N. S. Hudell

\[113\] Griffin v. Illinois, 351 U.S. at 19.