

## Multiple Criminal Representation Examined: *Holloway v. Arkansas*

The United States Supreme Court in *Holloway v. Arkansas*<sup>1</sup> addressed sixth amendment issues arising from representation of more than one criminal defendant by the same attorney in the same judicial proceeding. The conflicts of interest possible in such a situation present the danger that one or more defendants may be deprived of their sixth amendment right to the effective assistance of counsel. The sixth amendment states in pertinent part that “[i]n all criminal prosecutions the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”<sup>2</sup> This guarantee, which has been read as a guarantee of the *effective* assistance of counsel,<sup>3</sup> had been dealt with only once before by the Supreme Court in the context of multiple representation.<sup>4</sup>

*Holloway* is an example of a case in which multiple representation resulted in the denial of the effective assistance of counsel. The Supreme Court’s decision is significant because of the frequency with which criminal defendants are jointly represented and because of the inherent dangers in such a practice.<sup>5</sup> The decision should aid lower courts. It sets some ground rules and implicitly indicates future guidelines in an area of criminal practice in which rules have traditionally been unclear.<sup>6</sup> Chief Justice Burger’s majority opinion, however, resolves only some of the problems presented by multiple representation<sup>7</sup> and thus uniformity in dealing with such representation cannot be obtained from this decision alone.

This Case Comment will discuss the issues resolved and those left unresolved by *Holloway*. It will attempt to show the broad ramifications of this case upon the sixth amendment guarantee of effective assistance of counsel as it applies to multiple representation. To this end the narrow holdings as well as the implications of the decision will be discussed. This Case Comment will focus on the crucial issues in *Holloway*, including the nature of the inquiry required when an attorney contends that a conflict

---

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

2. U.S. CONST. amend. VI.

3. “It has long been recognized that the right to counsel is the right to the effective assistance of counsel.” *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

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

5. A conflict of interest can arise at any stage of a criminal proceeding. See cases collected in J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED—TRIAL RIGHTS § 46 (1974 & Supp. 1978); Geer, *Representation of Multiple Criminal Defendants in a Criminal Trial*, 5 HOFSTRA L. REV. 315, 318 (1977); Comment, *Conflict of Interests in Multiple Representation of Criminal Co-Defendants*, 68 J. CRIM. L. & CRIMINOLOGY 226, 229 (1977).

6. Several recent law review articles have commented upon the conflicting approaches used throughout the federal courts to deal with multiple representation problems. See, e.g., Hyman, *Joint Representation of Multiple Defendants in a Criminal Trial*, 5 HOFSTRA L. REV. 315, 318 (1977); Comment, *Conflict of Interests in Multiple Representation of Criminal Co-Defendants*, 68 J. CRIM. L. & CRIMINOLOGY 226, 229 (1977).

7. Two issues were specifically reserved by the Court in *Holloway*, 435 U.S. at 483-84. See text accompanying notes 165-82 *infra*.

exists, the role of the harmless error rule in appeals of multiple representation cases, the implications of statements in *Holloway* regarding waiver, and the effect of the Court's decision upon public defender offices. Emphasis also will be placed upon the ethical considerations involved in representing more than one defendant in the same trial.

### I. THE FACTS AND HOLDINGS OF *Holloway*

In *Holloway* three defendants (Winston Holloway, Ray Lee Welch, and Gary Don Campbell) were charged with robbery of a Little Rock, Arkansas restaurant and with the rape of two female restaurant employees. They were jointly tried<sup>8</sup> and all were represented by the same public defender. The public defender, Harold L. Hall, soon after his appointment by the trial court, moved for severance and for appointment of separate counsel. These motions alleged only that the defendants had indicated the possibility of a conflict of interest.<sup>9</sup> The motions were denied by the trial judge after a hearing.

These objections were renewed before the jury was empaneled, and again at trial after the prosecution had rested its case. The objections to joint representation focused upon counsel's inability to cross-examine<sup>10</sup> and protect the other codefendants' interests in the event an individual defendant chose to testify.<sup>11</sup> These requests for appointment of separate counsel were denied by the trial judge, who strongly believed that joint representation in this case was not improper.<sup>12</sup> Against their attorney's recommendations all three defendants eventually testified, thereby creating the problem feared by defense counsel.<sup>13</sup> The alibi testimony given by each of the three defendants did not implicate the others, although there were some clear indications of conflicting interests during their testimony.<sup>14</sup> Guilty verdicts were returned by the jury on all counts.<sup>15</sup>

On appeal to the Arkansas Supreme Court,<sup>16</sup> the defendants claimed in part that the joint representation had denied them the effective

---

8. In Arkansas (as in many other jurisdictions) joinder of defendants lies within the discretion of the court, except in capital cases when the defendant can obtain severance upon demand. ARK. STAT. ANN. § 43-1802 (1964).

9. *Holloway v. Arkansas*, 435 U.S. 475, 477 (1978).

10. The trial judge at one point stated that defense counsel had no right to cross-examine his own witness. *Id.* at 480. This result was apparently caused by evidentiary rules concerning sponsorship that limit cross-examination and impeachment of one's own witness. See MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE § 38 (2d ed. 1972); 3A J. WIGMORE, EVIDENCE §§ 896-918 (Rev. ed. J. Chadbourne 1970 & Supp. 1977).

11. 435 U.S. at 479.

12. The transcript of the original trial, quoted extensively by the Supreme Court, indicates the judge's lack of receptiveness in dealing with defense counsel's claim of conflict. *Id.* at 479-80.

13. Much of the testimony given by the defendants was unguided because both Hall and the trial court were aware of defense counsel's obligation not to assist in the presentation of perjured testimony. *Id.* at 480 n.4.

14. For example, one defendant, Holloway, interrupted a codefendant's testimony to ask the trial judge if he could object. *Id.* at 480.

15. *Id.* at 481.

16. *Holloway v. State*, 260 Ark. 250, 539 S.W.2d 435 (1976).

assistance of counsel. The court upheld the convictions, finding no conflict sufficient to justify the defendants' claim of reversible error. The Arkansas court stated that "[t]he record presents no basis from which this court can find that separate counsel should have been appointed."<sup>17</sup> From this same record the United States Supreme Court reversed and remanded the cases of all three defendants.<sup>18</sup>

The Supreme Court in *Holloway* set forth two holdings without supportive discussion and, with greater explanation, established two others. It noted in passing that joint representation is not per se unconstitutional<sup>19</sup> and that a defendant may waive the right to have an attorney who is free from conflicts of interest.<sup>20</sup> The Court fully discussed two primary aspects of its decision. The Court held that a trial judge has a duty either to inquire into the existence of an alleged conflict of interest or to appoint separate counsel whenever an attorney objects in a timely fashion to continued joint representation.<sup>21</sup> The Court also held that the failure to discharge this responsibility would result in an automatic reversal on appeal, regardless of whether the defendants had shown prejudice to their defenses resulting from the judge's failure.<sup>22</sup> These two holdings could greatly alter past practices within this area, because the courts had not acted uniformly in dealing with similar circumstances prior to *Holloway*.

## II. BACKGROUND

Joinder of defendants in criminal cases has traditionally been permitted in most jurisdictions, if not universally encouraged.<sup>23</sup> The predominant view of this common practice deems it a necessity in terms of judicial economy.<sup>24</sup> The Federal Rules of Criminal Procedure,<sup>25</sup> state rules,<sup>26</sup> and the American Bar Association Standards Relating to

---

17. *Id.* at 260, 539 S.W.2d at 441.

18. 435 U.S. at 491.

19. *Id.* at 482.

20. *Id.* at 483 n.5.

21. *Id.* at 484.

22. *Id.* at 488.

23. One notable exception to this rule requiring joinder of defendants is the State of Vermont, which gives the defendant an absolute right to severance upon request. See Langrock, *Joint Trials: A Short Lesson From Little Vermont*, 9 CRIM. L. BULL. 612 (1973).

24. "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) [hereinafter cited as ABA STANDARDS].

25. FED. R. CRIM. P. 8(b) provides:

*Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

26. *E.g.*, OHIO R. CRIM. P. 8(b), which is patterned after Federal Rule 8(b) quoted at note 25 *supra*.

Criminal Justice<sup>27</sup> all permit joinder in many varied situations. The most common situation giving rise to joint trials involves two or more defendants who allegedly have participated in the same crime or conspiracy.<sup>28</sup>

When two or more indigent defendants have been charged together it is common for the trial court to appoint one attorney to represent all.<sup>29</sup> Joint representation may come about for nonindigents also, because many wish to retain joint counsel for financial or other reasons.<sup>30</sup> Sharing counsel may sometimes be advantageous,<sup>31</sup> but this convenience is often more than offset by the dangers inherent in joint representation,<sup>32</sup> which probably are not perceived by the defendants themselves.<sup>33</sup> A latent or

27. ABA STANDARDS, JOINDER AND SEVERANCE, *supra* note 24, § 1.2 (1968) provides:

*Joinder of defendants*

Two or more defendants may be joined in the same charge:

- (a) when each of the defendants is charged with accountability for each offense included;
- (b) when each of the defendants is charged with conspiracy and some of the defendants are also charged with one or more offenses alleged to be in furtherance of the conspiracy; or
- (c) when even if conspiracy is not charged and all of the defendants are not charged in each count, it is alleged that the several offenses charged:
  - (i) were part of a common scheme or plan; or
  - (ii) were so closely connected in respect to time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others.

28. See Note, *Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure*, 74 YALE L.J. 553 (1965), for a discussion of the many different instances in which prejudice can arise from the joinder of defendants.

29. Justice Powell in his dissenting opinion in *Holloway* aired some reasons why separate attorneys are not immediately appointed, when he stated:

Each addition of a lawyer in the trial of multiple defendants presents increased opportunities for delay in setting the trial date, in disposing of pretrial motions, in selecting the jury, and in the conduct of the trial itself. Additional lawyers also may tend to enhance the possibility of trial errors.

435 U.S. at 494 n.2 (Powell, J., dissenting).

30. A surprising number of cases concern joint counsel who are retained and not appointed. The courts seem more reluctant to find a conflict when counsel is retained. See, e.g., *United States v. Alvarez*, 580 F.2d 1251, 1255-56 (5th Cir. 1978); *Larry Buffalo Chief v. South Dakota*, 425 F.2d 271 (8th Cir. 1970). See also cases collected in J. COOK, *supra* note 5, § 46 n.14.

31. The Supreme Court expressly recognized this when it stated: "[I]n some cases multiple defendants can appropriately be represented by one attorney; indeed in some cases, certain advantages might accrue from joint representation. In Mr. Justice Frankfurter's view: 'Joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack.'" 435 U.S. at 482-83 (citation omitted).

32. There exists an "inherent danger" in all joint trials that the evidence will be viewed cumulatively, "rather than on the basis of the quantum of evidence relating to each defendant." *United States v. Fuel*, 583 F.2d 978, 988 (8th Cir. 1978). Added to these problems are the dangers of antagonistic defenses, a guilty plea taken by only one of the defendants and problems with cross-examination. See Hyman, *supra* note 6, at 316.

33.

It would be a rare defendant who could intelligently decide whether his interests will be properly served by counsel who also represents another defendant. However parallel his interests may seem to be with those of a codefendant, the course of events in the prosecution of the case, the taking of a guilty plea, or the conduct of the trial may radically change the situation so as to impair the ability of counsel to represent the defendant most effectively. Even defense counsel, who all too frequently are not adequately informed regarding the evidence available against their clients, may not be in a position to judge whether a conflict of interest between their clients may develop.

*United States v. Carrigan*, 543 F.2d 1043, 1058 (2d Cir. 1976) (Lumbard, J., concurring).

unrecognized conflict can arise at any stage of a criminal prosecution.<sup>34</sup> The danger of a conflict is so great that the American Bar Association recommends that joint representation not be accepted in the ordinary course of practice.<sup>35</sup> In some circumstances, continued representation of multiple defendants may constitute unprofessional conduct.<sup>36</sup> These dangers have not led to the discontinuance of multiple representation; to the contrary, it remains a common and accepted practice. Judicial convenience and demands upon the public purse have led to this policy choice.

The sixth amendment guarantee of the right to the effective assistance of counsel first began to develop into a meaningful protection within the federal courts in the 1930s.<sup>37</sup> It is now considered one of the most vital protections afforded a criminal defendant,<sup>38</sup> to be dispensed with only upon a knowing and intelligent waiver by the accused.<sup>39</sup> The multiple representation case of *Glasser v. United States*<sup>40</sup> was decided in 1942 against the backdrop of the evolving concept of effective assistance of counsel.

*Glasser* was the only Supreme Court case prior to *Holloway* to deal directly with the issues surrounding multiple representation. All of the many appellate decisions in this area have their roots in this decision. The Supreme Court, in that opinion, established that conflicting loyalties in multiple representation cases could lead to impairment of a defendant's right to effective assistance of counsel. The Court stated in *Glasser* that

---

34. See sources cited at note 5 *supra*.

35. ABA STANDARDS, THE DEFENSE FUNCTION, *supra* note 24, § 3.5(b) (1971) provides:

(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 of the defendants 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. In some instances, as defined in the Code of Professional Responsibility, accepting or continuing employment by more than one defendant in the same criminal case will constitute unprofessional conduct.

36. ABA CODE OF PROFESSIONAL RESPONSIBILITY D.R. 5-105(B) and (C) contain the primary ethical restraints on this practice.

37. Effectiveness of counsel was first examined in the due process case of *Powell v. Alabama*, 287 U.S. 45 (1932). A guarantee of effective assistance of counsel was extended to all federal felony trials under the sixth amendment in *Johnson v. Zerbst*, 304 U.S. 458 (1938), and the sixth amendment was made applicable to state proceedings in *Gideon v. Wainwright*, 372 U.S. 335 (1963). See Stephens, *The Assistance of Counsel and the Warren Court: Post-Gideon Developments in Perspective*, 74 DICK. L. REV. 193 (1970), for further background.

38. "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956). See also *Chapman v. California*, 386 U.S. 18, 23 (1966). *Holloway* discusses *Chapman* and other cases reflecting upon the importance of counsel. 435 U.S. at 489.

39. See *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Brady v. United States*, 397 U.S. 742, 748 (1970).

40. 315 U.S. 60 (1942).

"[t]he 'assistance of counsel' guaranteed by the sixth amendment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired."<sup>41</sup> The Court, in language that had been subject to much controversy<sup>42</sup> prior to *Holloway*, added that "[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."<sup>43</sup>

In the more than thirty-five years since *Glasser* many issues arose concerning its meaning. The facially simple and direct decision in *Glasser* became the subject of varying interpretations.<sup>44</sup> The decision was ambiguous in that it did not set out a definitive standard establishing to what degree a conflict of interest must be shown in order to warrant appointment of separate counsel.<sup>45</sup> Some courts have thus held that a possibility of a conflict was enough to warrant separate defense attorneys, while other courts have required a greater factual showing of conflict.<sup>46</sup> Once a conflict of constitutional dimension was found, appellate courts took differing approaches. Some required automatic reversal,<sup>47</sup> while others, seizing upon contrary language in *Glasser*,<sup>48</sup> required a showing of prejudice, insisting upon a demonstration that the conflict of interest was not harmless error.<sup>49</sup>

Differing standards also arose from language within the *Glasser* opinion concerning a trial judge's responsibilities within this area of multiple representation.<sup>50</sup> Some federal circuits used this to support imposition of an affirmative duty upon trial judges to inquire into possible

41. *Id.* at 70.

42. See Note, *Criminal Codefendants and the Sixth Amendment: The Case for Separate Counsel*, 58 GEO. L.J. 369, 379 (1969). See also text accompanying notes 95-97 *infra*.

43. 315 U.S. at 76.

44. E.g., Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U.L. REV. 289, 334 (1964); Comment, *Conflict of Interests: Multiple Defendants Represented by a Single Court-Appointed Counsel*, 74 DICK. L. REV. 241 (1969).

45. The Court's language was very imprecise. At one point it stated that "[i]rrespective of any conflict of interest, the additional burden of representing another party may conceivably impair counsel's effectiveness." 315 U.S. at 75.

46. See text accompanying notes 166-69 *infra*.

47. See note 95 *infra*.

48. While the Supreme Court stated that no "nice calculations" of prejudice were to be made, see text accompanying note 43 *supra*, it also set forth something resembling a harmless error test when it stated:

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.

315 U.S. at 67.

49. See text accompanying notes 96 & 102 *infra*.

50. In *Glasser* the trial court was extensively criticized for "embarrassing" counsel and for not fulfilling its duty to protect the defendant's rights. 315 U.S. at 71-72.

conflicts of interest at the outset of trial.<sup>51</sup> Other circuits have rejected this approach.<sup>52</sup>

All these issues were ripe for resolution due to the increasing number of appeals taken upon them and the deepening divisions throughout the lower courts. Even so, the case of *Holloway v. Arkansas* might be considered an unlikely choice for the Supreme Court finally to grant certiorari in a multiple representation case, because it did not directly raise all these issues. This may be precisely why this case was chosen as a vehicle to give guidance. The case permitted the Supreme Court to address some of the more pressing aspects of multiple representation without reexamining all the rules relating to it. Further development of the law by lower courts, even in the areas left unchanged by *Holloway*, will be affected by the decision's implications.<sup>53</sup>

### III. ANALYSIS OF THE HOLDINGS

The Supreme Court in *Holloway* clearly stated that joint representation alone does not necessarily violate the defendants' sixth amendment rights.<sup>54</sup> The Court found support for this statement in *Glasser v. United States*. The Court's holding reaffirming *Glasser* was not surprising, since, in the face of repeated argument on policy grounds, no court had ever reached the conclusion that the sixth amendment requires separate representation.<sup>55</sup>

The rejection of a per se rule could be criticized because of the problems inherent in multiple representation, but this holding can be justified in light of other strides taken in *Holloway*. The Burger Court, in its much commented upon approach,<sup>56</sup> simply chose a case by case means of dealing with these recurring problems.

#### A. *The Narrow "Holloway Inquiry"*

The Supreme Court found that the public defender's representations of a possible conflict of interest were sufficient in this case to warrant a hearing on the matter. Failure of the trial court to hold such a hearing was found to warrant reversal.<sup>57</sup> Chief Justice Burger, writing for the majority, rested this holding on the narrowest basis possible. The Court held that if defense counsel raises a timely objection concerning conflicts resulting

---

51. See note 174 *infra*.

52. See note 175 *infra*.

53. See text accompanying notes 116-90 *infra*.

54. 435 U.S. at 482.

55. The writer's research has disclosed no such case. See cases collected in J. COOK, *supra* note 5, § 46 n.94 holding that joint representation is not defective in itself.

56. Legal articles examining the Burger Court's manner of dealing with criminal justice matters have been numerous. See, e.g., George, *Doctrinal Doldrums: The Supreme Court's 1976 Criminal Law Decisions*, 68 J. CRIM. L. & CRIMINOLOGY 469 (1977); Israel, *Criminal Procedure, The Burger Court and the Legacy of the Warren Court*, 75 MICH. L. REV. 1320 (1977).

57. 435 U.S. at 488.

from joint representation of codefendants, then the trial court must either appoint separate counsel or further explore this claim of conflict. The Court stated:

The judge then failed either to appoint separate counsel or to take adequate steps to ascertain whether the risk was too remote to warrant separate counsel. We hold that the failure, in the face of representations made by counsel weeks before trial and again before the jury was empanelled, deprived petitioners of the guarantee of "assistance of counsel."<sup>58</sup>

The dissenting opinion objected to this narrow holding. That opinion, authored by Justice Powell, expressed concern that "the Court's opinion contains seeds of a per se rule of separate representation merely upon the demand of defense counsel."<sup>59</sup> This concern seems well founded, in light of the implications of the majority opinion.

The requirement of a conflict of interest hearing upon timely objection could very well collapse into a rule of separate counsel upon demand, due to the difficulty of holding a meaningful inquiry without violating the ethical demands of confidentiality imposed upon an attorney.<sup>60</sup> The majority acknowledged that any inquiry into the remoteness of the risk of conflict must be limited. A judge can require some disclosure of the facts leading to the attorney's conflict of interest objections,<sup>61</sup> but a point can be reached at which "disclosure creates significant risks of unfair prejudice."<sup>62</sup> Any "*Holloway* inquiry" is thus limited and by necessity shallow.

If attorneys in a conflict situation were forced to make known the reasons behind their disabling problem, they would be compelled in many instances to relate to the judge that one or more of the defendants had admitted guilt or other incriminating facts.<sup>63</sup> This information by its very nature may influence the trial judge and thus cannot properly be compelled.<sup>64</sup> There are dangers even when defendants are being tried before a jury, because, as in *Holloway*, the judge may be required to sentence the defendants.<sup>65</sup> The dissent correctly indicated that because

58. *Id.* at 484.

59. *Id.* at 491 (Powell, J., dissenting).

60. See ABA CODE OF PROFESSIONAL RESPONSIBILITY D.R. 4-101.

61. Under ABA CODE OF PROFESSIONAL RESPONSIBILITY D.R. 4-101(C)(2), an attorney may reveal confidences when required by court order. The majority indicated that such a court order is not proper under the circumstances presented by *Holloway*, 435 U.S. at 487 n.11.

62. *Id.*

63. *E.g.*, *People v. Singh*, 123 Cal. App. 365, 11 P.2d 73 (1932).

64. ABA STANDARDS, THE FUNCTION OF THE TRIAL JUDGE, *supra* note 24, § 5.8 (1974), provides: *Duty of judge to respect attorney-client relationship.*

The trial judge should respect the obligation of counsel to refrain from speaking on privileged matters and should avoid putting him in a position where his adherence to the obligation, such as by a refusal to answer, may tend to prejudice his client. Unless the privilege is waived, the trial judge should not request counsel to comment on evidence or other matters where his knowledge is likely to be gained from privileged communications.

65. See *Holloway v. State*, 260 Ark. 250, 269, 539 S.W.2d 435, 466 (1976) (Byrd, J., dissenting).



counsel can raise the shield of confidentiality, inquiry may often be blocked.<sup>66</sup>

Neither the dissent nor the majority can suggest an effective means for dealing with this inherent problem created by the attorney-client privilege.<sup>67</sup> Justice Powell in his dissent did suggest that disclosure under the Freedom of Information Act<sup>68</sup> may be analogous.<sup>69</sup> He was apparently suggesting that full disclosure by defense counsel of the basis of the conflict claim be made to the judge *in camera*.<sup>70</sup> This analogy does not seem appropriate. In Freedom of Information Act cases, unlike conflict of interest cases, trial judges are in no way prejudiced by making inspections of documents to determine if they should be released. The trial judge in a conflict case clearly has a duty to respect the attorney-client privilege.<sup>71</sup>

In some instances, information concerning the claimed conflict can be gained without going into confidential information,<sup>72</sup> but in others a separate attorney should be appointed based upon counsel's representations alone. The majority intended to place a heavy reliance upon defense counsel's representations at the hearing. This reliance seems well placed, in light of four considerations pointed out by the majority:

- (1) Defense attorneys have the ethical duty to immediately bring a conflict problem to the attention of the trial court;<sup>73</sup>
- (2) Attorneys are officers of the court and because of this their representations are almost the equivalent of being under oath;<sup>74</sup>
- (3) Courts will still be able to deal with attorneys who claim a conflict for dilatory or other improper purposes;<sup>75</sup>
- (4) Most courts in the past have automatically granted a separate attorney when requested to do so, because an attorney is in the best position to determine if a conflict exists.<sup>76</sup>

This last point somewhat diminishes the significance of this increased reliance upon defense attorneys, because, in effect, it means that the Court is merely standardizing the majority rule so that it is applicable in all cases. The Court stated that "[m]ost courts have held that an attorney's request for the appointment of counsel, based on his representations as an officer

66. *Holloway v. Arkansas*, 435 U.S. 475, 493 (1978) (Powell, J., dissenting).

67. The scope of the attorney-client privilege has been the subject of many cases. See generally 3 F. WHARTON, WHARTON'S CRIMINAL EVIDENCE §§ 556-561 (13th ed. C. Torcia 1973 & Supp. 1977).

68. 5 U.S.C. § 552 (1976).

69. 435 U.S. at 493 n.1 (Powell, J., dissenting).

70. See cases collected in Note, *National Security and the Public's Right to Know: A New Role for the Courts Under the Freedom of Information Act*, 123 U. PA. L. REV. 1438 (1975).

71. See note 64 *supra*.

72. *E.g.*, *Commonwealth v. Laffeur*, 1 Mass. App. Ct. 327, 296 N.E.2d 517 (1973).

73. 435 U.S. at 486 n.8.

74. *Id.* at 486. See also ABA CODE OF PROFESSIONAL RESPONSIBILITY D.R. 1-102, which provides in part: "(A) A lawyer shall not: . . . (4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation. (5) Engage in conduct that is prejudicial to the administration of justice."

75. 435 U.S. at 486-87.

76. *Id.* at 485.

of the court regarding a conflict of interests, should be granted."<sup>77</sup> The Court was unable to cite much case law to support this contention,<sup>78</sup> but there appear to be few cases to the contrary.

The one case cited by the Court as requiring continued joint representation after a motion for appointment of separate counsel was *Commonwealth v. Lafleur*.<sup>79</sup> This case, however, rather than being overturned by *Holloway*, could possibly serve as a model of how a "Holloway-type" inquiry should be conducted. In *Lafleur* an attorney was forced to continue representing joint defendants, but only after an *in camera* disclosure of the conflicting interests.<sup>80</sup> The procedure would seem to comport with *Holloway* because the trial judge made an inquiry into the nature of the conflict without requiring disclosure of confidential communications.<sup>81</sup> The trial judge stated that the situation described "does not strike me as being a conflict of sufficient dimension or weight to require the appointment of separate counsel."<sup>82</sup> There are other cases in which a court has refused to appoint separate attorneys,<sup>83</sup> but they appear to be a decided minority.<sup>84</sup>

*Lafleur* does raise the issue of what showing must be made to establish that a conflict of interest exists. While there are many appellate standards for determining if a conflict is of sufficient magnitude to warrant reversal,<sup>85</sup> there are no real guidelines for a trial judge's decision in this preliminary inquiry. The majority in *Holloway* indicated that separate counsel should not be appointed if "the risk was too remote"<sup>86</sup> or if the hearing "disclosed information demonstrating the insubstantiality"<sup>87</sup> of an attorney's representations. Aside from this slight guidance, the determination seems to lie almost completely within the trial judge's discretion.<sup>88</sup> A more definitive standard is necessary; one can hope that it will develop as more cases fill in the gaps in the *Holloway* decision.

The dissenting opinion indicated disapproval of this limited inquiry procedure.<sup>89</sup> The dissent's principal concern focused on the great reliance placed upon the defense counsel's representations that a conflict exists. The dissent predicted that leaving this determination in the hands of the

---

77. *Id.*

78. The court cited *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).

79. 1 Mass. App. Ct. 327, 296 N.E. 2d 517 (1973).

80. *Id.* at 330, 296 N.E.2d at 519.

81. *Id.*

82. *Id.*

83. *E.g.*, *People v. Buck*, 6 App. Div. 2d 528, 179 N.Y.S. 2d 1007 (1968).

84. *See Note, supra* note 42, at 385-86.

85. *See text accompanying notes 165-72 infra.*

86. 435 U.S. at 484.

87. *Id.* at 484 n.7.

88. *See cases cited at note 121 infra.*

89. 435 U.S. at 493 (Powell, J., dissenting).

defendants and their attorney will lead to disruption within trial courts.<sup>90</sup> The dissent in expressing this fear seemed to accept the argument made by the State of Arkansas that the determination whether a separate attorney should be appointed must lie solely with the trial court and should not be made by defense counsel.<sup>91</sup> The majority, for the reasons discussed earlier, did not share this view.

### B. *Harmless Error and Prejudice*

In *Holloway*, although there were some obvious inconsistencies in the testimony of the codefendants, it was not clear that any of the three were prejudiced by their joint representation. In fact, the dissent stated that “this is not a case where an inquiry into the possibility of ‘conflicting interests’ reasonably might have revealed a basis for separate representation.”<sup>92</sup> The majority never reached this issue, however, because it held that the harmless error rule does not apply in this situation.<sup>93</sup> When a conflict claim is raised, reversal is automatic on appeal if the trial judge has taken no action to appoint separate counsel or to inquire into the need for such appointment.

The Supreme Court in *Glaser v. United States* stated that “[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.”<sup>94</sup> This language was interpreted by some courts to mean that when a sixth amendment violation of effective assistance of counsel was shown, reversal automatically followed without a further showing.<sup>95</sup> Other courts required a second showing beyond conflict of interest—prejudice.<sup>96</sup> A third group of cases used the terminology “conflict of interest” and “prejudice” interchangeably so that it is difficult to ascertain exactly what analysis they had gone through.<sup>97</sup>

Prior to 1967 it had been assumed that any constitutional violation demanded automatic reversal in other areas of the law.<sup>98</sup> Prejudice was required to be shown by some courts in multiple representation cases,

---

90. *Id.* at 494 n.2 (Powell, J., dissenting).

91. See Brief for Respondent at 14-22, *Holloway v. Arkansas*, 435 U.S. 475 (1978).

92. *Id.* at 496 n.5 (Powell, J., dissenting).

93. *Id.* at 488.

94. 315 U.S. 60, 75-76 (1942).

95. On this point see the authorities cited by the Supreme Court in *Holloway*, 435 U.S. at 487. See also *Foxworth v. Wainwright*, 516 F.2d 1073, 1077 n.7 (5th Cir. 1975); *Commonwealth v. Smith*, 362 Mass. 782, 291 N.E.2d 607 (1973); *State v. Davis*, 110 Ariz. 29, 514 P.2d 1025 (1973).

96. On this point see the authorities cited by the Supreme Court in *Holloway*, 435 U.S. at 487-88. See also *United States v. Morrow*, 537 F.2d 120, 145 (5th Cir. 1976); *Lollar v. United States*, 376 F.2d 243 (D.C. Cir. 1967); *In re Watson*, 6 Cal. 3d 831, 494 P.2d 1264 (1972); *State v. Oliver*, 23 Ohio App.2d 210, 262 N.E.2d 424 (1970).

97. See, e.g., *United States v. Lovano*, 420 F.2d 769, 773 (2d Cir. 1970); *Washington v. Kennedy*, 8 Wash. App. 633, 508 P.2d 1386 (1973); *United States v. Carrigan*, 543 F.2d 1053, 1055 (2d Cir. 1976).

98. See Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale*, 125 U. PA. L. REV. 15 (1976).

however, even before the harmless error doctrine was established by the Supreme Court in *Chapman v. California*<sup>99</sup> at that time. The Supreme Court made it clear in *Chapman* that some errors in criminal proceedings are harmless and thus do not warrant reversal, but required "the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."<sup>100</sup> Other evidence within the case is viewed to see if the constitutional violation could have changed the outcome before an average jury. If it could not, the verdict is affirmed.<sup>101</sup>

Thus, using the harmless error doctrine and the concept of prejudice, a reviewing court could determine that a conflict of interest existed in a multiple representation case sufficient to violate a defendant's sixth amendment guarantee of effective assistance of counsel, yet not reverse the lower court conviction.<sup>102</sup> The Supreme Court in *Holloway*, however, held that this approach was incorrect under the circumstances, stating that "whenever a trial court improperly requires joint representation over timely objection reversal is automatic."<sup>103</sup>

The majority took precautions to limit its holding to the factual situation presented, qualifying its holding to apply only when timely objection is overruled, forcing continued conflict-plagued representation. The majority found some case support for creation of this exception,<sup>104</sup> but appears to have been motivated primarily by policy considerations. The majority's reasoning seems sound because it is very difficult for appellate courts to review conflict claims in a uniform manner.<sup>105</sup> Often an attorney's ineffectiveness in a multiple representation situation will not be displayed on the record, because the damage results from an omission provoked by the conflict.<sup>106</sup> Only with automatic reversal could the inquiry that the court required earlier in the opinion become a meaningful safeguard.

### C. Waiver

The Supreme Court in *Holloway* did not directly address the issue of waiver. The majority commented only in passing that a reading of *Glasser v. United States* leads one to the conclusion "that a defendant may waive his right to the assistance of an attorney unhindered by a conflict of interest."<sup>107</sup> This would seem to be an uncontroversial statement, because all courts had apparently permitted a "knowing and voluntary waiver."<sup>108</sup>

99. 386 U.S. 18 (1967).

100. *Id.* at 24.

101. *Harrington v. California*, 395 U.S. 250 (1969).

102. *E.g.*, *People v. Deshannon*, 11 Cal. App. 3d 982, 90 Cal. Rptr. 300 (1970), *cert. denied sub. nom.* *Suggs v. Comstock*, 404 U.S. 833 (1971).

103. 435 U.S. at 488.

104. *See* text accompanying notes 145-47 *infra*.

105. 435 U.S. at 490-91.

106. *Id.* at 490.

107. *Id.* at 483 n.5.

108. *See* Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 54 TEXAS L. REV. 193 (1977), for an overview of the entire area of waiver.

An earlier Supreme Court case<sup>109</sup> had guaranteed the defendant the right to proceed without counsel. *Holloway's* passing reference to waiver is, however, the Supreme Court's only explicit endorsement of waiver in joint representation cases.<sup>110</sup>

Recognition of this right of waiver may create a problem, in part because of the language employed by the Court in *Holloway*. The Court would have no apparent problems with a trial court permitting a clearly conflict-plagued representation to continue if there is a bona fide waiver. Some commentators had argued prior to *Holloway* that there is no absolute right to waive the sixth amendment guarantee of effective assistance of counsel when there is multiple representation.<sup>111</sup> The point has been made that defendants have no right to the "defective assistance of counsel"<sup>112</sup> and thus cannot waive their rights in the face of a clear conflict of interest.

One court has unequivocally stated that "defendants are not entitled to joint representation as a matter of right."<sup>113</sup> Some cases in this area have spoken of a need to balance the public benefits of an efficient and effective criminal justice system against a defendant's choice of a lawyer.<sup>114</sup> At least three courts have taken the initiative in the face of a conflict of interest and ordered substitution of counsel over a defendant's protests.<sup>115</sup> While the reference in *Holloway* to waiver cannot be read to overrule these prior cases, it may preclude future court action under similar circumstances. That result would be extremely unfortunate, because such actions further the ends of justice and should not be curtailed without more direct Supreme Court consideration.

#### IV. IMPLICATIONS OF *Holloway*

The Supreme Court focused narrowly upon the timely pretrial objections made by defendants' appointed counsel in resolving the *Holloway* case. This factual situation allowed the case to be decided without the necessity of examining some of the more troublesome multiple representation issues. Defendants were not contesting their representation for the first time on appeal. Moreover, the Court was not forced to scrutinize defense counsel's duties in the face of a conflict of interest, because the attorney here had entered proper timely objection.

Even though the Supreme Court limited its discussion greatly, there is

---

109. *Faretta v. California*, 422 U.S. 806 (1975).

110. *Holloway* has already been cited frequently to support waiver in multiple representation cases. See, e.g., *United States v. Cox*, 580 F.2d 317, 320 (8th Cir. 1978); *United States v. Waldman*, 579 F.2d 649 (1st Cir. 1978).

111. See Comment, *supra* note 6, at 250.

112. See generally Bazelon, *The Defective Assistance of Counsel*, U. CIN. L. REV. 1 (1973).

113. *Abraham v. United States*, 549 F.2d 236, 239 (2d Cir. 1977).

114. E.g., *United States ex rel. Cary v. Rundle*, 409 F.2d 1210, 1214 (3rd Cir. 1969); *In re Investigation Before April 1975 Grand Jury*, 403 F. Supp. 1176, 1180 (D.D.C. 1975), *vacated on other grounds*, 531 F.2d 600 (D.C. Cir. 1976).

115. *United States v. Vargas-Martinez*, 569 F.2d 1102, 1104 (9th Cir. 1978); *United States v. Dolan*, 570 F.2d 1177 (3rd Cir. 1978); *United States v. Bernstein*, 533 F.2d 775, 787-89 (2d Cir. 1976).

much outside the narrow holdings that is worthy of examination. There are implications from the opinion that could have a great effect upon the sixth amendment guarantee of effective assistance of counsel as it applies to multiple representation. It must be admitted that the scope and significance of *Holloway* are difficult to gauge because of uncertainties within the decision that can be cleared up only through subsequent Supreme Court decisions, or more likely, through lower court interpretation. Many lower courts have already addressed *Holloway*. Their diverse views of the case cast light upon its eventual effect.<sup>116</sup> To fully understand this area of the law it is necessary to go beyond the case's narrow holdings and examine the related cases that will shape the broader consequences of *Holloway*.

#### A. *The Importance of Timely Objection After Holloway*

The Supreme Court's opinion in *Holloway* specifically avoided discussion of midtrial objections. Both the majority<sup>117</sup> and the dissent<sup>118</sup> limited the requirement of a conflict of interest hearing to cases concerning timely pretrial objections to joint representation.

The dissent expressed concern over adoption of even a limited hearing requirement, fearing that this new inquiry would be abused.<sup>119</sup> One must admit the possibility that the representation hearing could be used as a tool for delay. The dissent's concern regarding disruption is particularly apt in the context of midtrial objections, because in such cases a recess must be granted during the trial to permit a new attorney to become familiar with the case. To declare a mistrial might provoke double jeopardy problems.<sup>120</sup> Continuances in similar midtrial situations have been held to be within the discretion of the trial court,<sup>121</sup> with great deference given to its determination.<sup>122</sup>

The dissent indicated that it would require a greater showing of conflict to sustain an objection that is not raised before trial. The dissent stated that "a later motion may be appropriate if the conflict is not known or does not become apparent before trial proceeds. To guard against strategic disruption of the trial, however, the court may require a substantial showing of justification for such midtrial motions."<sup>123</sup>

---

116. Most of the federal circuit courts have already cited *Holloway*; such subsequent cases are cited at notes 30, 32, 110 *supra*, and notes 150-52, 158-62, 172, 174-75 *infra*.

117. 435 U.S. at 484 n.7.

118. *Id.* at 495 n.4. (Powell, J., dissenting). See text accompanying note 123 *infra*.

119. *Id.* at 494 n.2. (Powell, J., dissenting).

120. See *Crist v. Bretz*, 437 U.S. 28 (1978); Note, *United States v. Walden: Double Jeopardy and the Mistrial*, 34 U.PITT. L. REV. 714 (1973); Annot., 49 A.L.R. 3d 1039 (1973).

121. *E.g.*, *United States v. Bunton*, 584 F.2d 485, 491-92 (D.C. Cir. 1978); *United States v. Dardi*, 330 F.2d 316 (2d Cir. 1964); *Arellanes v. United States*, 302 F.2d 603 (9th Cir. 1962).

122. *E.g.*, *Ungar v. Sanafite*, 376 U.S. 575 (1964); *United States v. Riebold*, 557 F.2d 697, 702 (10th Cir. 1977); *People v. Mason*, 91 Ill. App. 2d 118, 234 N.E.2d 351 (1968).

123. 435 U.S. at 495 n.4. (Powell, J., dissenting).

Although the dissenters gave no illustrations of what would constitute "a substantial showing of justification," it seems clear that they wish to require much more than the pretrial inquiry discussed in *Holloway*.<sup>124</sup> Once again, however, there appears to be no meaningful way to require such a showing without encountering problems of confidentiality.<sup>125</sup>

The problem of midtrial objections could be solved by forbidding them entirely. An attorney could be forced to raise all his objections concerning joint representation before trial, or forego them altogether. This is not, however, a realistic approach. One district court has acknowledged that "unfortunately, no matter how thorough an attorney's investigation, he may not be aware of those facts which suggest the possibility of a conflict."<sup>126</sup> Thus, a conflict of interest may not materialize until well into trial. Discord arising late in the trial, if not alleviated by appointment of separate counsel, may lead to an ethical dilemma:

Ironically, once divided loyalties and conflicts arise, the more joint counsel tries to remain faithful to the goal of full representation, the more he seems to reduce the probability of obtaining relief on appeal; in attempting to eliminate potentially prejudicial inconsistencies in his clients' defenses, he may produce a record barren of recognizable conflict, thereby frustrating all but the most extensive efforts of appellate speculation.<sup>127</sup>

In light of this problem and because of possibly different showings of conflict that must be met depending upon the time a claim of conflict is raised,<sup>128</sup> an attorney representing codefendants should routinely propose at the outset that separate counsel be obtained. Some courts may not grant such a motion because they consider the potential conflict too remote.<sup>129</sup> Even when the motion is denied, however, two purposes are served. First, reviewing courts are alerted that the defendants have not waived their sixth amendment guarantee of effective assistance of counsel.<sup>130</sup> Second, the defense lawyer makes it clear that he or she has met ethical responsibilities concerning conflicts of interest.<sup>131</sup>

Attorneys must be more careful representing multiple defendants after *Holloway* because the Supreme Court has to some extent shifted the burden of discovering and avoiding conflicts of interest from the trial judge to the defense practitioner.<sup>132</sup> The Court not only held that an attorney's representations alone often will be enough to cause separate ap-

---

124. See text accompanying notes 57-62 *supra*.

125. See text accompanying notes 63-71 *supra*.

126. United States v. Garafola, 428 F. Supp. 620, 625 (D. N.J. 1977).

127. Comment, *supra* note 42, at 382-83.

128. See, e.g., Austin v. Erikson, 477 F.2d 620, 623 (8th Cir. 1973).

129. E.g., United States v. Williams, 429 F.2d 158 (8th Cir. 1970).

130. The timely objection in *Holloway* precluded any appellate review of the issue of waiver. 435 U.S. at 483 n.5.

131. See notes 35-36 *supra*.

132. Several legal articles have called for such a shift in responsibility. E.g., Judd, *Conflicts of Interest—A Trial Judge's Notes*, 44 FORDHAM L. REV. 1097 (1976).

pointments, but also seemed to indicate that ethical considerations will be taken into account more frequently in the future. The majority cited American Bar Association Standards Relating to the Administration of Criminal Justice on three occasions<sup>133</sup> and both the majority<sup>134</sup> and the dissent<sup>135</sup> cited the American Bar Association Code of Professional Responsibility.

The United States District Court for the District of New Jersey had, prior to *Holloway*, relied upon such ethical rules in the case of *United States v. Garafola*.<sup>136</sup> That case put the responsibility of dealing with conflicts upon the practicing bar because "the trial judge cannot conduct a meaningful inquiry."<sup>137</sup> The court in *Garafola* established a prospective rule to govern its district. Under this rule, a defense attorney representing more than one defendant will be required to disclaim any possibility of a conflict of interest at the outset of judicial proceedings.<sup>138</sup> A proposed form for the disclaimer was included in an appendix to the decision; it clearly delineates the attorney's ethical responsibilities.<sup>139</sup> Most criminal practitioners probably would not take a chance in representing multiple defendants under this system. Should an attorney proceed with joint representation and a conflict arise, then the court in *Garafola* clearly provides that "disciplinary measures should be pursued by the offended trial judge."<sup>140</sup> Theoretically, even those conflicts not foreseeable at the outset would lead to a reprimand of the attorney. This comes very near, in practice, to a per se rule requiring separate attorneys. Although the Supreme Court did not go this far in *Holloway*, other lower courts might now follow the *Garafola* approach.

Such a rule would touch many attorneys who would otherwise remain unaffected by the Supreme Court's narrow holdings in *Holloway*. The facts of *Holloway* allowed the Justices to be more concerned with disruptive demands, and less concerned with attorneys who blindly continue representation of multiple defendants in a conflict of interest situation.<sup>141</sup> This latter problem occurs because attorneys are either unaware of the ethical danger inherent in representing more than one defendant<sup>142</sup> or disregard such ethical considerations for financial or other reasons. Alan Y. Cole, while Chairman of the American Bar Association, Section of Criminal Justice, was openly critical of the bar's behavior in this

---

133. 435 U.S. at 480 n.4; 483-84 n.6; 486 n.8.

134. *Id.* at 487 n.11.

135. *Id.* at 494 n.2. (Powell, J., dissenting).

136. 428 F. Supp. 620 (D. N.J. 1977).

137. *Id.* at 626.

138. *Id.*

139. *Id.* at 628.

140. *Id.* at 626.

141. *See generally* Geer, *supra* note 5.

142. *See* Burbank & Duboff, *Ethics and the Legal Profession: A Survey of Boston Lawyers*, 9 SUFFOLK L. REV. 66, 91-96 (1974).



area.<sup>143</sup> He indicated that the guarantee of effective assistance of counsel was being ignored by attorneys who chose to pursue their own best interests and not those of their clients.<sup>144</sup> Regrettably, *Holloway* does not address this larger problem, although it may make some attorneys more aware of their professional responsibilities in this area.

## B. *Implications of the Harmless Error Holding*

### 1. *Scope of This Holding*

In spite of the Supreme Court's efforts to limit its holding, *Holloway* has harmless error implications beyond the specific type of forced joint representation present before the Court. The Court's reasoning has application throughout the entire area of multiple representation. The Court relied heavily upon language from *Glaser v. United States* that contained no limiting provisions. *Glaser* had indicated that no "nice calculations" respecting prejudice were to be made throughout all ineffective assistance of counsel cases.<sup>145</sup> In addition, the *Holloway* Court quoted *Chapman v. California*,<sup>146</sup> stating that "this Court has concluded that the assistance of counsel is among those 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.'"<sup>147</sup> These cases would appear to be just as easily cited in other multiple representation situations as in the one presented by *Holloway*.

The majority opinion in its concluding paragraph indicated the practical reasons why a showing of harmless error should not be required. The Court stated:

In the normal case where a harmless error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can [undertake] with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury. . . . But in a case of joint representation or conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations

---

143. Cole made these points in a speech given at a commencement dinner at the National College of Criminal Defense Lawyers and Public Defenders in Houston, Texas on June 24, 1976. An article adapted from this speech appears in Cole, *Time for a Change: Multiple Representation Should Be Stopped*, 2 NAT'L J. CRIM. DEF. 149 (1976).

144. *Id.* at 149. Cole states:

The representation of several persons in a single criminal proceeding is the answer to a defense lawyer's dream. A larger fee is justified because the clients can pool their resources. Often, their bill will be paid by someone else.

Even when fee considerations are not involved, there are advantages to this practice. By representing numerous defendants, there is a better chance to learn the facts, for rather than being forced to rely upon the spotty memory of a single client, details can be cross-checked with all of them. Indeed, with a little ingenuity, an investigation can often be stopped dead in its tracks.

145. 315 U.S. 60, 76 (1943).

146. 386 U.S. 18, 23 (1967).

147. 435 U.S. at 489.

and in the sentencing process. . . . Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.<sup>148</sup>

This reasoning seems as pertinent to multiple representation that is not forced upon counsel as it does to the *Holloway* facts.

The scope of the Court's holding regarding harmless error is subject to extension into two areas. It could be extended to all conflict cases, even those in which timely objection is not made, or it could become applicable in all effective assistance of counsel cases including those not concerned with joint representation. The reasoning and the case law seem to dictate that the holding be extended to all multiple representation cases that present conflicts of interest.

The Eighth Circuit has already addressed the scope of the Court's holding in this area. *Reynolds v. Mabry*<sup>149</sup> dealt with a sixth amendment ineffective assistance of counsel claim alleging incompetency of trial counsel. The Sixth and Ninth Circuits had previously ruled that the harmless error doctrine did not apply in such cases.<sup>150</sup> The Eighth Circuit did not follow the lead of those circuits, however, retaining a harmless error analysis outside of multiple representation cases.

The Eighth Circuit found *Holloway* relevant to this matter but not dispositive. The court stated that even though "the Supreme Court's recent decision in *Holloway v. Arkansas, supra*, may be viewed as supportive of the results reached by the Sixth and Ninth Circuits, the effect of the case may be limited to conflict of interest situations."<sup>151</sup> The court went on to cite the concluding paragraph of the majority's opinion to substantiate this contention.<sup>152</sup>

The Eighth Circuit's analysis appears correct. One district court has construed the *Holloway* holding even more narrowly, but still held that no harmless error analysis need be made. That court stated:

The *Glasser* and *Holloway* decisions, narrowly construed, authorize a per se standard of review only where the trial court has played an instrumental role in a conflict of interest affecting appointed counsel's representation—either by compelling counsel to undertake the defense of codefendants whose interests are in conflict or by permitting a conflict-ridden representation to continue after being placed on notice of the problem. But the lower federal courts have not limited the application of the per se rule in the concurrent representation context.<sup>153</sup>

It appears that *Holloway* will lend support to defense arguments in all joint representation cases, so that they will automatically be reversed when

---

148. *Id.* at 490-91.

149. 574 F.2d 978 (8th Cir. 1978).

150. *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974); *Cooper v. Fitzharris*, 551 F.2d 1162 (9th Cir. 1977). *But see* *Cooper v. Fitzharris*, 586 F.2d 1325 (9th Cir. 1978).

151. *Reynolds v. Mabry*, 574 F.2d 978, 981 (8th Cir. 1978). *But see* *Commonwealth v. Badger*, 393 A.2d. 642 (1978).

152. 574 F.2d at 981 n.5.

153. *Stephans v. United States*, 453 F. Supp. 1202, 1208 (M.D. Fla. 1978).

a conflict of constitutional dimension is shown. That this change can be crucial for appellate review is demonstrated by *Holloway* itself. Defendants were unable to make a clear factual demonstration of prejudice, yet their convictions were reversed. There are no indications that one of the defendants, Welch, was in any way detrimentally affected by the joint representation. The dissent focused upon this lack of support for a finding of reversal in this case and did not directly counter the majority's position on automatic reversal.<sup>154</sup> The Court did make it clear that each defendant must raise his own sixth amendment challenge.<sup>155</sup> Codefendants cannot claim that violation of another defendant's constitutional rights requires reversal of their conviction.

## 2. Continued Use of the Term "Prejudice"

Prior to *Holloway* there was much confusion over the role prejudice plays in a conflict case.<sup>156</sup> This confusion was the result of the interchangeable use of the phrase "conflict of interest" and the word "prejudice." Prejudice, in the sense that a procedural error changes the outcome of the case, is no longer at issue in the *Holloway* factual situation. Nevertheless prejudice, in terms of detriment to a defendant's case due to multiple representation, clearly remains a relevant consideration and is not presumed.<sup>157</sup>

The Eighth Circuit correctly interpreted the concept of prejudice when it stated:

In *Holloway*, the Court held that where a trial court improperly required joint representation there can be no harmless error. In that case the court was concerned with whether a constitutional violation was subject to the harmless error rule. Here, the question is whether there was a constitutional violation. Under the rule articulated in *Holloway*, prejudice will be assumed when there is ineffective assistance of counsel, but ineffective assistance will not be inferred solely from the fact of joint representation.<sup>158</sup>

At least three courts, however, have spoken of prejudice even though they have cited *Holloway*. A Second Circuit case decided shortly after *Holloway* was remanded "for reconsideration of the issue of prejudice."<sup>159</sup> That court was certainly aware of the Supreme Court's decision in this area because it noted that both the prosecution and defense had filed "supplementary comments on its relevance."<sup>160</sup> The First<sup>161</sup> and Sixth

154. 435 U.S. at 496 n.5 (Powell, J., dissenting).

155. *Id.* at 489.

156. See generally Comment, *supra* note 44, at 248; Comment, *supra* note 6, at 231.

157. See *Perez v. Warden*, 459 F. Supp. 1141 (S.D.N.Y. 1978).

158. *United States v. Cox*, 580 F.2d 317, 321 n.5 (8th Cir. 1978); *accord*, *United States v. Alvarez*, 580 F.2d 1251, 1259 (5th Cir. 1978).

159. *Salomon v. Lavallee*, 575 F.2d 1051, 1055 (2d Cir. 1978).

160. *Id.* at 1053 n.3.

161. *United States v. Dicarlo*, 575 F.2d 952, 957 (1st Cir. 1978) ("relatively slight showing of prejudice required").

Circuits<sup>162</sup> have also spoken of a need for a showing of prejudice, although citing *Holloway* within their decisions.

These courts have not spoken of making a second determination of harmless error after a conflict has been found. They appear to be speaking of the prejudice inherent within a conflict of interest situation. They seem to make only one determination, that is, whether a conflict exists, but include prejudice as a necessary part of their conflict of interest analysis.

The concept of prejudice, if used in this sense, does not contravene the *Holloway* holding. All courts, even those that do not speak in terms of prejudice, must find certain conflicts irrelevant or insignificant and thus of not enough magnitude to create a sixth amendment problem.<sup>163</sup> When prejudice is used to mean a significant conflict, it is a problem only because of the confusion it creates. It would be preferable that all courts interpret *Holloway* to require that the defendants need not speak of prejudice. One court has already taken this approach. The Massachusetts Supreme Court has stated that "[t]he defendant suggests correctly that the violation of his sixth amendment rights is established on the showing of a conflict, with no requirement that resulting prejudice be proved."<sup>164</sup> Many courts, however, may not read *Holloway* as mandating the complete disregard of prejudice. These lower courts are content to perpetuate the confusion over the term "prejudice" which has been present since *Glaser*.

### C. Certainty of Conflict

The Supreme Court specifically reserved two issues in *Holloway*. The first was "how strong a showing of conflict must be made, or 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."<sup>165</sup> Numerous and conflicting standards exist in this area. Among them is the requirement that there must be "some factual support"<sup>166</sup> for a conflict claim. Another requirement is that "some specific instance of prejudice, some real conflict of interest resulting from a joint representation must be shown to exist."<sup>167</sup> Other less demanding standards call for only "informed speculation"<sup>168</sup> that a conflict exists, or a showing of a "possible conflict of interest or prejudice, however remote."<sup>169</sup>

There are other standards and variations in wording, but the point is

---

162. *United States v. Steele*, 576 F.2d 111, 112 (6th Cir. 1978) ("A showing of prejudice is necessary.").

163. See *Foxworth v. Wainwright*, 516 F.2d 1073, 1077 n.7 (5th Cir. 1975).

164. *Commonwealth v. Bolduc*, 378 N.E.2d 661, 667 (Mass. 1978).

165. 435 U.S. at 483.

166. *Boehmer v. United States*, 414 F. Supp. 766, 770 (E.D. Pa. 1976).

167. *United States v. Lovano*, 420 F.2d 769, 773 (2d Cir. 1970); accord, *Kaplan v. Bombard*, 573 F.2d 708, 712, (2d Cir. 1978).

168. *Lollar v. United States*, 376 F.2d 243, 247 (D.C. Cir. 1967); accord, *People v. Cook*, 13 Cal. App. 3d 663, 532 P.2d 148, 119 Cal. Rptr. 500 (1975).

169. *Walker v. United States*, 422 F.2d 374, 375 (3rd Cir. 1970); accord, *United States ex rel. Hart v. Davenport*, 478 F.2d 203, 210 (3rd Cir. 1973).

clear—a defendant's chances on appeal may hinge upon the jurisdiction in which he is tried. Because the Court in *Holloway* made the important determination that the attorney's representations alone were enough to warrant reversal, it found it unnecessary to consider these divergent standards.<sup>170</sup> Nevertheless, it would be extremely helpful to have a Supreme Court resolution of this divergence.

The Court's statements concerning forced joint representation and harmless error could be taken as a rejection of the standards that require that a factual basis be shown.<sup>171</sup> As one court reviewing *Holloway* has noted, however, each jurisdiction must look to its own precedents in this area.<sup>172</sup>

#### D. *Duty of the Trial Judge*

The second issue specifically reserved by the Supreme Court dealt with "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."<sup>173</sup> This issue has been dealt with more than any other multiple representation issue by the lower courts in the past few years. Six United States courts of appeals require the trial judges within their circuits to meet specific requirements when defendants share an attorney.<sup>174</sup> Judges may be required to hold a hearing into the possibilities of conflict or, more simply, detail the danger of such representation, making sure the defendants understand these difficulties. Four courts of appeals impose no such affirmative duty.<sup>175</sup> One circuit's highest court has apparently not dealt with this issue.<sup>176</sup> Two excellent surveys of the differing approaches used by

170. 435 U.S. at 484.

171. *But see* United States *ex rel.* Ware v. Warden, No. 78 C 1916, Slip Opinion (N.D. Ill. Oct. 12, 1978).

172. *Salamon v. Lavallee*, 575 F.2d 1051, 1054 n.3 (2d Cir. 1978).

173. 435 U.S. at 483.

174. Cases holding that a trial judge does have an affirmative duty in this area include the following within each circuit. D.C. Cir.: *Campbell v. United States*, 352 F.2d 359 (D.C. Cir. 1965). 1st Cir.: *United States v. Foster*, 469 F.2d 1, 5 (1st Cir. 1972); *accord*, *United States v. Waldman*, 579 F.2d 649, 651-52 (1st Cir. 1978); *United States v. Donahue*, 560 F.2d 1039, 1943 (1st Cir. 1977). 2d Cir.: *United States v. Carrigan*, 543 F.2d 1053, 1055 (2d Cir. 1976); *accord*, *Salomon v. Lavallee*, 575 F.2d 1051, 1055 (2d Cir. 1978); *Abraham v. United States*, 549 F.2d 236 (2d Cir. 1977). 3rd Cir.: *United States ex rel. Hart v. Davenport*, 478 F.2d 203, 211 (3rd Cir. 1973); *accord*, *United States v. Levy*, 577 F.2d 200, 211 (3rd Cir. 1978). 4th Cir.: *United States v. Truglio*, 493 F.2d 574, 579 (4th Cir. 1974); *but see* *United States v. Atkinson*, 565 F.2d 1262, 1264 (4th Cir. 1977). 8th Cir.: *United States v. Lawriw*, 568 F.2d 98, 105 (8th Cir. 1977).

175. Cases holding that there is no affirmative duty imposed upon the trial judge within that circuit include the following. 5th Cir.: *United States v. Smith*, 550 F.2d 277, 286 (5th Cir. 1977). 6th Cir.: *United States v. Steele*, 576 F.2d 111, 112 (6th Cir. 1978). 7th Cir.: *United States v. Mandell*, 525 F.2d 671, 677 (7th Cir. 1975), *cert denied*, 423 U.S. 1049 (7th Cir. 1975); *accord*, *United States v. Kidding*, 560 F.2d 1303, 1310 (7th Cir. 1977). 9th Cir.: *United States v. Christopher*, 488 F.2d 849, 851 (9th Cir. 1973); *but see* *United States v. Eaglin*, 571 F.2d 1069, 1086 (9th Cir. 1977).

176. The writer's search has not disclosed a Tenth Circuit case directly addressing the duty of the trial judge in a joint representation case. Dicta in *United States v. Warledo*, 557 F.2d 721, 728 (10th Cir. 1977) would suggest that such a duty might possibly be imposed.

the courts are contained in *United States v. Lawriw*<sup>177</sup> and the Advisory Committee Note to the Proposed Amendment of Rule 44(c) of the Federal Rules of Criminal Procedure,<sup>178</sup> which extensively detail the varied activity on this issue.

Proposed Rule of Federal Criminal Procedure 44(c) indicates the direction that courts have been taking. It provides:

Rule 44. Right to and Assignment of Counsel

(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.<sup>179</sup>

Adoption of the proposed rule would settle this issue within the federal courts but leave it unresolved within state courts. Several states have, however, begun to require such court inquiries.<sup>180</sup>

If, however, this proposed rule is not adopted there is sentiment expressed within *Holloway* to make an inquiry of this sort a requirement stemming from the sixth amendment. The dissent stated that it would have "followed the lead of the several Courts of Appeals that have recognized the trial court's duty of inquiry in joint representation cases . . ."<sup>181</sup> The dissent also indicated that it would shift the burden of persuasion to the Government if such an inquiry was not made.<sup>182</sup> The majority would seem receptive to this idea, refusing to decide this issue only because the facts of *Holloway* led them to their narrow holding concerning forced representation of multiple defendants. An inquiry requirement of the sort described by the dissent appears inevitable, whether through the proposed rule or a subsequent Supreme Court decision.

### E. *Effect Upon Public Defender Offices*

The dissent expressed some concern that *Holloway* will lead to disruption within public defender offices.<sup>183</sup> This concern is warranted because public defenders appear to be the group most likely to invoke the *Holloway* decision. One public defender is often appointed to represent

177. 568 F.2d 98 (8th Cir. 1977).

178. 98 S. Ct. No. 13, at 83 (1978).

179. Quoted in *Salomon v. LaVallee*, 575 F.2d 1051, 1054 (2d Cir. 1978).

180. *E.g.*, *State v. Olsen*, 258 N.W.2d 898 (Minn. 1977); *State v. Green*, 129 N.J. Super. 157, 322 A.2d 495 (1974).

181. 435 U.S. at 494 (Powell, J., dissenting).

182. *Id.* at 494-95 n.3 (Powell, J., dissenting).

183. *Id.* at 494 n.2 (Powell, J., dissenting).

more than one defendant. The difficulty caused by *Holloway* is accented because each public defender office typically serves a wide geographic area.<sup>184</sup> Problems will be created when a public defender makes a successful motion to have separate counsel appointed. The question of who can be appointed to fill this void in representation is not easy to answer.

Some prior case law has held that a public defender office should be treated as equivalent to a law office for purposes of the American Bar Association Code of Professional Responsibility.<sup>185</sup> Disciplinary Rule 5-105(D) provides that "[i]f a lawyer is required to decline or withdraw from employment . . . no partner of his or her firm may accept or continue such employment."<sup>186</sup> This provision, if found to apply to a legal aid office, would preclude anyone within that unit from representing a defendant after a successful *Holloway* claim is made by another member of that office. This result could create turmoil if one office serves a large city.

Although at least one case has held that a public defender office is not to be considered a law firm for purposes of a conflict of interest,<sup>187</sup> this does not seem a likely solution to the dilemma.<sup>188</sup> Other solutions should be sought. One possibility would be to return to the older approach of assigning counsel from throughout the legal community in such a situation.<sup>189</sup> Partitioning of public defender offices into distinct individual units would also be an option. Finally, working relationships could possibly be created with other regional and state defender systems,<sup>190</sup> so that assistance could be obtained in conflict situations.

Unfortunately, *Holloway* gives no guidance on this troublesome point. One must wonder where two or perhaps all three of the defendants in *Holloway* turned to obtain counsel on remand, because their shared attorney was affiliated with the Public Defender's Office for the Sixth Judicial District of Arkansas.

## V. CONCLUSION

Many important issues were left unresolved by *Holloway*, but the decision did address some of the varied problems created by multiple

---

184. Wice & Pilgrim, *Meeting the Gideon Mandate: A Survey of Public Defender Programs*, 58 JUD. 401 (1975); Bonsal, *The Criminal Justice Act—1964 to 1976*, 52 IND. L.J. 135 (1976).

185. E.g., *Allen v. The District Court in and for the Tenth Judicial District*, 184 Colo. 202, 519 P.2d 351 (1974); *Borden v. Borden*, 277 A.2d 89 (D.C. Ct. App. 1971). *Turner v. State*, 340 So. 2d 132 (Fla. Dist. Ct. App. 1976).

186. ABA CODE OF PROFESSIONAL RESPONSIBILITY D.R. 5-105(D). See also Webster, *The Public Defender, the Sixth Amendment, and the Code of Professional Responsibility: The Resolution of a Conflict of Interest*, 12 AM. CRIM. L. REV. 739 (1975).

187. *People v. Wilkins*, 28 N.Y.2d 53, 268 N.E.2d 756, 320 N.Y.S.2d 8 (1971).

188. See Comment, *Public Defender's Office is a "Law Firm" for Purpose of Determining Whether Conflict Exists in Representation of Codefendants*, 5 FLA. ST. U. L. REV. 492 (1977).

189. See Allison, *Relationship Between the Office of Public Defender and the Assigned Counsel System*, 10 VAL. L. REV. 399 (1976).

190. See Note, *Statewide Public Defender Organization: An Appealing Alternative*, 29 STAN L. REV. 157 (1976).

representation of criminal defendants. The case will have an effect upon four groups of people.

The first and most important group affected, future defendants, has obtained additional safeguards. No longer can defendants' claims of conflicts of interest go completely unanswered at trial. Upon objection by counsel, trial judges, a second group concerned with these matters, must appoint other attorneys, or inquire into the need for separate counsel. If they fail to do so, a third body, the appellate courts, must automatically reverse defendants' convictions.

The last of the four affected groups holds the key to the effectiveness of this process. If defense attorneys do not at the outset review the joinder of their clients to ascertain possible conflicts, problems will arise. Objections not raised until midtrial or until appeal will not be met with the same receptiveness by the courts.

A *per se* rule requiring each defendant to be represented by separate counsel, would alleviate all problems in this area of the law. Such a dramatic change, however, is not realistic at this time. The Supreme Court did permit eventual achievement of a similar result by placing more responsibility on the practicing bar.

If ethical responsibilities were strictly enforced, the number of conflicts and the number of persons being represented jointly would be greatly reduced. These practices would not be completely eliminated but would be reduced to a controllable level. Thus, the answer may lie in local trial court and appellate supervisory rules that do no more than strictly enforce ethical standards and adhere to the American Bar Association Standards for Criminal Justice. This appears to be the best way to use *Holloway* to effectuate important changes in multiple representation practice without enactment of new court or legislative rules.

Enactment of Proposed Rule of Criminal Procedure 44(c), which would require an inquiry by all federal district courts in a multiple representation situation, would also be a major step forward. It would place more responsibility upon the trial judge and can easily be coupled with increased responsibility upon attorneys. These two steps together would be more effective than placing total responsibility for conflicts upon either trial judges or attorneys alone.

There are no reasons why these changes can not come about. The existing state of the law is allowed to continue due to the demands of judicial economy and expense. Nevertheless, it would seem that the time saved at trial is later lost because of the great number of appeals taken on multiple representation issues. Judge Oakes of the Second Circuit, calling for a reexamination of the rules concerning joint representation, put it well when he stated:

Trial court insistence that, except in extraordinary circumstances, codefendants retain separate counsel will in the long run in my opinion prove salutary not only to the administration of justice and the appearance of justice but the



cost of justice; habeas corpus petitions, petitions for new trials, appeals and occasionally retrials . . . can be avoided. Issues as to whether there is an actual conflict 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 conflict 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.<sup>191</sup>

*Gary W. Spring*

---

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

