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Shell J. Bleiweiss

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SIXTH AMENDMENT—CONFLICTS OF INTEREST IN MULTIPLE REPRESENTATION OF CODEFENDENTS

Cuyler v. Sullivan, 100 S. Ct. 1708 (1980)

I. INTRODUCTION

The Supreme Court last term issued the third opinion in the Court's history on the question of multiple representation of criminal codefendants and the sixth amendment right to "assistance of counsel."[1] In *Cuyler v. Sullivan*,[2] the Court announced three major interpretations of this sixth amendment guarantee. First, it held that the same constitutional rights accrue to defendants who hire private counsel as accrue to defendants for whom the court appoints a public defender.[3] Second, the Court held that absent objection at trial, a trial judge need only initiate an inquiry into the question of conflict of interest if he "knows or reasonably should know that a particular conflict exists."[4] Finally, the Court held that, in order to establish a sixth amendment violation, a defendant who raised no objection at trial must show that an actual conflict of interests adversely affected his lawyer's performance.[5]

The Supreme Court's rulings in *Cuyler* represent a major step toward consistent judicial enforcement of the constitutional right to counsel. However, the Court's refusal to impose an affirmative duty of inquiry on trial judges in every case perpetuates the injustice that currently arises when a convicted defendant cannot prove from the face of the record that a conflict of interest hindered his lawyer's performance. An affirmative duty of inquiry would alleviate this difficult problem with little added burden on the trial courts.

II. BACKGROUND

In an important 1942 decision, *Glasser v. United States*,[6] the Supreme Court ruled that by requiring an attorney to represent two codefendants with conflicting interests, a court denied one of the defendants his sixth amendment right to the effective assistance of counsel. The Court did not again address the relationship between multiple representation and the sixth amendment until 1978 when it issued a narrow ruling in *Holloway v. Arkansas*[7] that trial judges, when faced with timely objections to multiple representation, must either appoint separate counsel or take adequate steps to ascertain whether the risk of a conflict of interests is too remote to warrant separate counsel.[8]

In ruling that a trial judge infringed upon the sixth amendment rights of a defendant by appointing joint counsel for codefendants with conflicting interests, the *Glasser* Court relied upon two important factors in the record that revealed a conflict. First, the Court found that in the interest of protecting one codefendant, the shared attorney had declined to cross-examine a government witness whose testimony linked another codefendant to the crime.[9] Second, the Court found that the lawyer had failed to object to the admission of arguably inadmissible evidence, a decision that worked to the detriment of one codefendant and to the benefit of the others.[10]

Glasser thus required reviewing courts to search trial records to decide whether one attorney representing codefendants violated their rights to effective assistance of counsel. Resulting caselaw, in both state and federal courts, was wildly discordant.[11] Reviewing courts split over the necessity of

[1] U.S. CONST. amend. VI reads in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." In McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970), the Court recognized that "the right to counsel is the right to the effective assistance of counsel." In Powell v. Alabama, 287 U.S. 45 (1932), the Court held that the fourteenth amendment makes this protection applicable to the states.

[2] Cuyler v. Sullivan, 100 S. Ct. 1708 (1980).

[3] *Id.* at 1716.

[4] *Id.* at 1717.

[5] *Id.* at 1718.

[6] Glasser v. United States, 315 U.S. 60 (1942).

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

[8] *Id.* at 484.

[9] 315 U.S. at 73.

[10] *Id.* at 73–74. The Court found evidence in the trial record "indicative of [joint counsel's] . . . struggle to serve two masters . . .." *Id.* at 75. It held that "the 'assistance of counsel' guaranteed by the sixth amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests." *Id.* at 70.

[11] Comprehensive accounts of the divergence among lower courts after *Glasser* and before *Holloway* are presented in several scholarly articles. *See, e.g.*, Note, *Criminal Codefendants and the Sixth Amendment: The Case for Separate Counsel*, 58 GEO. L.J. 369 (1969); Comment, *Conflict of Interests in Multiple Representation of Criminal Co-Defendants*, 68 J. CRIM. L. & C. 226 (1977).

finding prejudice before granting relief.[12] Most jurisdictions required only a showing that counsel furthered the cause of one codefendant at the expense of another, without inquiring into the effect of such actions on the outcome of the trial.[13] As to conflicts of interest, some courts read *Glasser* to require that a defendant claiming ineffective assistance of counsel show an actual conflict existed,[14] while other courts only required showings that a conflict was "substantially possible,"[15] "possible,"[16] "imminently possible,"[17] or "potential."[18]

The Supreme Court clarified some of the confusion when it reexamined this area of the law in *Holloway*. There, a public defender appointed to represent three codefendants at a single trial moved for severance and for appointment of separate counsel, alleging the possibility of a conflict of interests. The trial judge held a hearing, which the Supreme Court later found inadequate, and he rejected both claims of the public defender.[19]

Relying on *Glasser*, *Holloway* noted that joint representation is not a per se violation of the sixth amendment[20] and that a defendant may waive the right to effective counsel.[21] On the central issue in the case, the Court held that a trial judge has a duty, when confronted by any claim of conflict of interests, either to appoint separate counsel or to take adequate steps to ascertain whether the risk of conflict is too remote to warrant separate counsel. It also held that the failure to discharge this responsibility mandates automatic reversal on appeal.[22] Justice Powell, joined by Justices Blackmun and Rehnquist, dissented, expressing his concern

[12] Despite strong language in *Glasser* that no finding of prejudice need be made, other language in the opinion confuses the issue. The Court affirmed Kretske's conviction saying, "we are clear from the record that no prejudice is disclosed as to him." *Id.* at 77.

[13] *See* State v. Hunt, 26 Md. App. 417, 338 A.2d 95 (1975); People v. Hilton, 26 Mich. App. 274, 182 N.W.2d 29 (1970); Booth v. State, 491 S.W.2d 286 (Mo. 1973); State v. Canery, 144 N.J. Super. 527, 366 A.2d 706 (App. Div. 1976); State v. Tapia, 75 N.M. 757, 411 P.2d 234 (1966); People v. Byrne, 17 N.Y.2d 209, 217 N.E.2d 23, 270 N.Y.S.2d 193 (1966); State v. Goode, 84 S.D. 369, 171 N.W.2d 733 (1969).

A few courts have held that reversal of a conviction is automatic if a conflict existed, even when no specific harm to the defendant can be demonstrated in the record. *See* United States v. Gougis, 374 F.2d 758, 761 (7th Cir. 1967); People v. Frey, 50 Ill. App. 3d 437, 442, 365 N.E.2d 283, 287 (1977); Commonwealth *ex rel.* Whitling v. Russell, 406 Pa. 45, 48, 176 A.2d 641, 643 (1962). These courts focused on the language in *Glasser* that emphasized the fundamental nature of the right to counsel. *See* note 12 *supra*.

[14] *See, e.g.*, United States v. Mandell, 525 F.2d 671, 677 (7th Cir. 1975) (per curiam), *cert. denied*, 423 U.S. 1049 (1976) (defendant must show with a "reasonable degree of specificity" that a conflict existed); Foxworth v. Wainwright, 516 F.2d 1072, 1077 n.7 (5th Cir. 1975) (defendant must show an actual significant conflict).

[15] *See, e.g.*, United States v. Valenzuela, 521 F.2d 414, 416 (8th Cir. 1975), *cert. denied*, 424 U.S. 916 (1976).

[16] *See, e.g.*, Kaplan v. United States, 375 F.2d 895, 897 (9th Cir. 1967), *cert. denied*, 389 U.S. 839 (1967).

[17] *See* Brown v. State, 10 Md. App. 215, 221, 269 A.2d 96, 100 (1970).

[18] *See, e.g.*, People v. Gallardo, 269 Cal. App. 2d 86, 90, 74 Cal. Rptr. 572, 575 (1969).

[19] The court rejected both of the public defender's claims, that confidential information limited his ability to lead direct examination and that conflicting interests precluded him from protecting the interests of the other two defendants:

> MR. HALL: I am in a position now where I am more or less muzzled as to any cross-examination.
>
> THE COURT: You have no right to cross-examine your own witness.
>
> * * * *
>
> MR. HALL: If one [defendant] takes the stand, somebody needs to protect the other two's interest . . ., and I can't do that since I have talked to each one individually.
>
> * * * *
>
> I can't even put them on direct examination . . ., .
>
> * * * *
>
> THE COURT: You can just put them on the stand and . . . tell the man to go ahead and relate what he wants to.

Holloway v. Arkansas, 435 U.S. at 479–80.

[20] The Court cited *Glasser* for the principle that, "joint representation, is not *per se* violative of constitutional guarantees of effective assistance of counsel. . . . [I]n some cases, certain advantages might accrue from joint representation." *Id.* at 482.

[21] The Court also relied on *Glasser* for the proposition that a defendant may waive his right to the effective assistance of counsel. *Id.* at 483 n.5.

[22] The Court quoted *Glasser* and reasoned:

> In the normal case where a harmless-error rule is applied, the error occurs at trial and its scope is readily identifiable. . . . But in a case of joint representation of conflicting interests the evil . . . is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. . . . [E]ven with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. . . . [A]n inquiry into a *claim* of harmless error here would require . . . unguided speculation (emphasis in original).

Id. at 490–91.

that "the Court's opinion contains seeds of a per se rule of separate representation merely upon the demand of defense counsel. . . ."[23]

After 36 years of silence, the Supreme Court selected the very narrow facts of *Holloway* as the forum in which to reexamine the relationship between multiple representation and effective assistance of counsel. As with *Glasser*, the Court focused narrowly on the timely pretrial objections made by defense counsel. Both cases left several of the most troublesome multiple representation issues unresolved. In *Holloway*, the Court expressly reserved two such issues: the scope of the trial court's duty to assure that defendants are not deprived of their sixth amendment right to the effective assistance of counsel, and the standard on appeal for showing conflict of interest before a court will find a violation of the right.[24]

III. *Cuyler v. Sullivan*

The Supreme Court reached the multiple representation question for the third time in *Cuyler v. Sullivan*.[25] John Sullivan, the respondent, first raised the issue of ineffective assistance of counsel caused by a conflict of interest, on appeal, thereby presenting the Court with questions of first impression.[26]

Sullivan was indicted along with two codefendants for first degree murder.[27] Two privately retained lawyers represented all three defendants in separate trials in the Pennsylvania state court.[28] The evidence against Sullivan, who was tried first, was entirely circumstantial. At the close of the Commonwealth's case, the defense rested without presenting any evidence of its own.[29] The jury returned a guilty verdict.[30] Sullivan's posttrial motions failed, and on direct appeal, the Pennsylvania Supreme Court affirmed his conviction by an equally divided vote.[31]

Sullivan then petitioned for collateral relief.[32] He claimed that his appellate counsel had not assisted him adequately before the Pennsylvania Supreme Court and that a conflict of interest had prevented his trial lawyer from representing him effectively in the lower court.[33] The Court of Common Pleas permitted Sullivan to take a second direct appeal on the basis of his first claim. Although it declined to pass directly on the conflict of interest question, the Court did find that trial counsel fully advised Sullivan about his decision not to testify.[34]

The Pennsylvania Supreme Court again affirmed Sullivan's conviction and denied collateral

[23] *Id.* at 491 (Powell, J., dissenting). The requirement of appointment of separate counsel or a hearing upon timely objection could very easily be construed as a per se rule, due to the difficulty of holding a meaningful inquiry without violating an attorney's ethical demands of confidentiality.

[24] *Id.* at 483-84. Since *Glasser*, appellate courts have differed on how strong a showing of conflict must be made, and on how certain the reviewing court must be that the alleged conflict existed, before they will find a violation of the sixth amendment right to counsel. Courts also differed with respect to the scope and nature of the affirmative duty of the trial judge to assure that defendants are not deprived of their right to effective assistance of counsel. *See* text accompanying notes 13-14 *supra*. These questions were not answered in *Holloway*.

[25] 100 S. Ct. 1708 (1980).

[26] *Id.* at 1713-14.

[27] *Id.* at 1712.

[28] Sullivan initially had different counsel at the medical examiner's inquest, but thereafter accepted multiple representation because he could not afford to pay his own lawyer. *Id.*

[29] *Id.* The prosecution's case was very weak. On appeal, the Pennsylvania Supreme Court divided evenly on whether the commonwealth's evidence was sufficient to support a conviction. *See* United States *ex rel.* Sullivan v. Cuyler, 593 F.2d 512 (3d Cir. 1979), *vacated*, 100 S. Ct. 1708 (1980).

[30] 100 S. Ct. at 1712. Sullivan's codefendants were acquitted in separate trials. *Id.* at 1713.

[31] Commonwealth v. Sullivan, 446 Pa. 419, 286 A.2d 898 (1971).

[32] 100 S. Ct. at 1713. Pennsylvania Post Conviction Hearing Act, 19 PA. STAT. ANN. §§ 1180-1 *et seq.* (Purdon 1965) (since repealed and now implemented by PA. R. CRIM. P. 1501-06).

[33] 100 S. Ct. at 1713.

[34] *Id.* at 1713.

> In five days of hearings, the Court of Common Pleas heard evidence from Sullivan, [one codefendant], . . . Sullivan's lawyers, and the judge who presided at Sullivan's trial. [The two lawyers] . . . had different recollections of their roles at the trial[s] . . . . DiBona [one lawyer] testified that he and Peruto [the other lawyer] had been "associate counsel" at each trial. Peruto recalled that he had been chief counsel for [both of Sullivan's codefendants] . . ., but that he merely had assisted DiBona in Sullivan's trial. DiBona and Peruto also gave conflicting accounts of the decision to rest Sullivan's defense. DiBona said he had encouraged Sullivan to testify . . .. Peruto remembered that he [wanted to rest the defense] . . . because "I though [sic] we would only be exposing the [defense] witnesses for the other two trials . . .." Sullivan testified that he had [accepted] . . . his lawyer's decision [to rest] . . . the defense. But other testimony suggested that Sullivan preferred not to [testify for fear of] . . . disclos[ing] an extramarital affair. Finally, one codefendant claimed he would have appeared at Sullivan's trial to rebut [the evidence presented by the prosecution]. . ..
>
> 100 S. Ct. at 1713 (citations omitted).

relief, finding no basis for Sullivan's claim of ineffective counsel at trial.[35] It found that Peruto, one of Sullivan's attorneys, merely assisted the other, DiBona, at Sullivan's trial while DiBona assisted Peruto at the trials of the other codefendants. On these facts, the court concluded that there was no dual representation.[36] The court also said that resting the defense without presenting any evidence was a reasonable tactic in light of the weakness of the case against Sullivan.[37]

Having exhausted his state remedies, Sullivan sought habeas corpus relief, but the federal district court denied his petition.[38] The Court of Appeals for the Third Circuit reversed,[39] holding that participation of co-counsel in the three trials established as a matter of law that both lawyers represented all three defendants.[40] The court ruled that any showing of a possible conflict of interest or prejudice, however remote, warranted reversal.[41] It found a sufficient showing of possible conflict in Peruto's admission that concern for the codefendants had affected his judgment concerning Sullivan's defense.[42] The United States Supreme Court granted certiorari,[43] and vacated and remanded the judgment of the Court of Appeals.[44]

On the first major sixth amendment issue in the case,[45] the Court rejected the state's argument that defendants who retain their own lawyers are entitled to less protection than defendants who receive state-appointed counsel. It held that:

> The vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant's entitlement to constitutional protection . . . [therefore] we see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers.[46]

Thus, the Court, in perhaps the clearest ruling in *Cuyler*, refused to distinguish the use of *retained* multiple counsel from the existing line of caselaw, *Glasser* and *Holloway*, which developed for *court-appointed* multiple counsel.[47] This ruling cleared the way for the Court to reach the two issues, expressly reserved in *Holloway*,[48] concerning objections to multiple representation first raised on appeal.

On the issue of the degree of a trial court's duty, the Court held that, absent any objection from the defense, the judge need not initiate an inquiry into conflict of interest unless he "knows or reasonably should know that a particular conflict exists."[49] The Court acknowledged *Holloway's* requirement

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[35] Commonwealth v. Sullivan, 446 Pa. 419, 286 A.2d 898 (1971), *aff'd on rehearing*, 472 Pa. 129, 371 A.2d 468 (1977), *rev'd*, 593 F.2d 512 (3d Cir. 1979), *vacated*, 100 S. Ct. 1708 (1980).

[36] 472 Pa. at 161, 371 A.2d at 483.

[37] *Id.* at 162, 371 A.2d at 483–84.

[38] *See* United States *ex rel.* Sullivan v. Cuyler, 593 F.2d 512 (3d Cir. 1979), *vacated*, 100 S. Ct. 1708, 1713 (1980). The district court accepted the Pennsylvania Supreme Court's conclusion that there had been no multiple representation. The court also found that the evidence adduced in the postconviction hearing revealed no conflict of interest.

[39] *Id.*

[40] *Id.* at 518–19.

[41] *Id.* at 522.

[42] *Id.*

[43] Sullivan v. Cuyler, 444 U.S. 823 (1979), *vacated*, 100 S. Ct. 1708 (1980).

[44] 100 S. Ct. at 1714.

[45] The Supreme Court first ruled on two preliminary issues, not directly germane to sixth amendment law. The Court found that the court of appeals had not exceeded its proper scope of review when it rejected the Pennsylvania Supreme Court's conclusion that no multiple representation had taken place. *Id.* at 1714–15. The Habeas Corpus Statute, 28 U.S.C. § 2254(d) (1966), provides that "a determination after a hearing on the merits of a factual issue . . . shall be presumed to be correct" (certain exceptions enumerated). The Court found that the state court's holding did not fall within this statute because it was a conclusion of law rather than a finding of fact. *Id.* at 1714.

The Court also rejected the state's contention that failings of privately retained counsel did not constitute the state action requisite to habeas corpus relief. *Id.* at 1715. The Court held that, "when a state obtains a criminal conviction [from a defendant who was denied effective assistance of counsel] it is the state that unconstitutionally deprives the defendant of his liberty." *Id.*

[46] 100 S. Ct. at 1716 (footnotes omitted). The Court cited with approval an earlier Third Circuit opinion which refused to distinguish the two situations. *Id.* at 1716 n.9 (quoting United States *ex rel.* Hart v. Davenport, 478 F.2d 203, 211 (3d Cir. 1973)):

> A rule which would apply one fourteenth amendment test to assigned counsel and another to retained counsel would produce the anomaly that the nonindigent, who must retain an attorney . . ., would be entitled to less protection. . .. The effect upon the defendant—confinement as a result of an unfair state trial—is the same whether the inadequate attorney was assigned or retained.

[47] *See* text accompanying notes 69–79 *infra.*

[48] Holloway v. Arkansas, 435 U.S. at 483–84.

[49] 100 S. Ct. at 1717. In choosing this rule, the Court followed the lead of the Fifth Circuit. *Compare* United States v. Medel, 592 F.2d 1305 (5th Cir. 1979) ("the mere fact that the codefendants were tried together does not trigger a duty of inquiry on the part of the trial court.") *with* Foxworth v. Wainwright, 516 F.2d 1072 (5th Cir. 1975) (The trial judge has an obligation . . . to anticipate conflicts reasonably foreseeable at the outset of the case).

that trial judges must at least investigate timely objections to multiple representation, but it noted that the Court never has held the sixth amendment to require trial courts to initiate inquiries into the propriety of every occurrence of multiple representation.[50] The Court reasoned that since defense attorneys have an ethical obligation to avoid conflicting representations and also to advise the court promptly when a conflict arises, trial courts may rely on their good faith and good judgment.[51] However, rather than giving complete control over the propriety of multiple representation to defense counsel,[52] the Court imposed the safeguard of a duty of inquiry if a trial judge knows or reasonably should know of a conflict.[53] In the *Cuyler* situation, several factors led the Court to conclude that nothing in the circumstances of the case mandated an inquiry into the possibility of conflict. These included the provision for separate trials for the three codefendants, the opening arguments outlining a defense theory that none of the codefendants was connected with the murders, the opening arguments that indicated a willingness to call witnesses whose testimony was needed, and the tactical reasonableness of resting Sullivan's defense in response to the weak case presented by the prosecution.[54]

The *Cuyler* Court also held that "[i]n order to establish a violation of the sixth amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance."[55] However, once a defendant "shows that a conflict of interest actually affected the adequacy of his representation [he] need not demonstrate prejudice in order to obtain relief."[56] The Court refused to extend the "possibility of conflict" concept of *Holloway* to objections raised for the first time on appeal.[57] It reasoned that a possibility of conflict is present in almost every instance of multiple representation, and that if on appeal a defendant need only show possibility to raise the presumption of ineffective assistance, all multiple representation would be precluded.[58] Until a defendant shows that his lawyer "actively represented conflicting interests,"[59] he has not established the constitutional predicate for his sixth amendment claim.

Because the Third Circuit had applied a liberal "any possibility of conflict, however remote" standard[60] in reversing Sullivan's conviction, the Supreme Court vacated the judgment and remanded the appeal for reconsideration consistent with its opinion.[61]

Although he concurred in the result, Justice Brennan would place an affirmative duty upon the trial judge to inquire concerning conflicts of interest.[62] Thus, in *Cuyler*, where no evidence indicated that Sullivan knew of his rights and consciously waived them, he would give Sullivan a presumption that his representation had in fact suffered,[63] and remand the case to allow the state an opportunity to rebut this presumption.[64]

Justice Marshall dissented, agreeing with Justice Brennan that trial courts have a duty to inquire whether there is multiple representation, to warn defendants of the possible dangers of such representation, and to ascertain that the multiple representation results from the defendant's informed choice.[65] He construed the Court of Appeal's decision to have been impliedly based upon a finding of actual conflict of interest,[66] and would affirm the judgment of that court.[67]

[50] 100 S. Ct. at 1717.

[51] *Id.*

[52] Much has been written on the inadequate control resulting from complete attorney discretion in this context. *See, e.g.*, Hyman, *Joint Representation of Multiple Defendants in a Criminal Trial: The Court's Headache*, 5 HOFSTRA L. REV. 315, 325-26 (1977); Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal*, 64 VA. L. REV. 939, 941 (1978).

[53] 100 S. Ct. at 1717.

[54] 100 S. Ct. at 1717-18.

[55] *Id.* at 1718.

[56] *Id.* at 1719.

[57] *Id.*

[58] *Id.* at 1718.

[59] *Id.* at 1719.

[60] Before *Cuyler*, the Third Circuit applied the most liberal test of all the circuits, requiring only a showing of the slightest possibility that a conflict of interest existed at trial before holding multiple representation constitutionally defective. *See, e.g.*, United States *ex rel.* Hart v. Davenport, 478 F.2d 203 (3d Cir. 1973); Walker v. United States, 422 F.2d 374 (3d Cir. 1970).

[61] 100 S. Ct. at 1719.

[62] Justice Brennan wrote, in part:

> Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. The trial court should protect the rights of the accused to have the assistance of counsel. . . . While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court [on the record] . . . . This principle is honored only if the accused has the active protection of the trial court in assuring that no potential for divergence in interests threatens the adequacy of counsel's representation. (citations omitted).

100 S. Ct. at 1719. (Brennan, J.)

[63] *Id.* at 1720-21.

[64] *Id.* at 1721.

[65] *Id.* (Marshall, J., dissenting).

[66] *Id.* at 1721 n.2 & accompanying text.

[67] *Id.* at 1721.

IV. Appointed Versus Retained Counsel

In *Cuyler*, the Supreme Court finally laid to rest the notion that different sixth amendment rights inure to defendants depending on whether they are represented by retained or appointed counsel.[68] After *Glasser*, many courts have applied the constitutional guarantee of conflict-free (effective) assistance of counsel to cases involving privately retained lawyers.[69] Others, however, have distinguished the two situations, withholding postconviction relief from defendants whose trial counsel had been privately retained.[70] These latter courts have reasoned that a defendant who retains private counsel is bound on an agency theory to the actions of the lawyer he selected.[71] They also have denied relief on the grounds that no state action had deprived such a defendant of his constitutionally protected rights.[72] The legal community has levelled harsh criticism against both theories.[73]

One commentator has described the agency rationale as a "concept gone astray."[74] He noted that the agency theory is essentially a creature of commercial law. The logical underpinnings of a principal's liability to an innocent third party for the acts of the principal's agent vanish when the concept is superimposed on the attorney-client relationship in criminal cases, because agency doctrine presupposes a principal in a position of knowledge to direct and supervise his agent. The same commentator has called the state action theory "myopic"[75] because it fails to focus on the defendant's perception that inept representation has caused his conviction. Whether the lawyer was appointed or retained is irrelevant to this perception.

The *Cuyler* Court readily disposed of the state action basis for distinguishing appointed from retained counsel by finding the requisite state action in a criminal conviction and sentence imposed by a state court, a part of the government.[76] Moreover, the agency and state action rationales overlook the language and policy of the sixth amendment. The Supreme Court has said that the Constitution guarantees the right to "effective assistance of counsel."[77] In *Glasser* and *Holloway*, the Court said that effective assistance requires conflict-free counsel.[78] This right is no less violated when ineffective representation comes from a privately retained lawyer than it is when counsel is appointed.

In any event, *Cuyler* has now ended the dispute. In refusing to recognize the distinction, the Court stressed that "[a] proper respect for the sixth amendment disarms petitioner's contention that defendants who retain their own lawyers are entitled to less protection than defendants for whom the State appoints counsel."[79]

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[68] *See* note 46 & accompanying text *supra*.

[69] *See, e.g.*, United States v. Gaines, 529 F.2d 1038 (7th Cir. 1976); United States v. Foster, 469 F.2d 1 (1st Cir. 1972); Larry Buffalo Chief v. South Dakota, 425 F.2d 271 (8th Cir. 1970); Craig v. United States, 217 F.2d 355 (6th Cir. 1954).

[70] *See, e.g.*, Dusseldorf v. Teets, 209 F.2d 754 (9th Cir. 1954), *cert. denied*, 347 U.S. 969; United States *ex rel.* Darcy v. Handy, 203 F.2d 407 (3d Cir. 1953), *aff'd*, 351 U.S. 454 (1956). *Accord*, People v. Stevens, 5 Cal. 2d 92, 53 P.2d 133 (1935); Darby v. State, 79 Ga. 63, 3 S.E. 663 (1887).

[71] *See, e.g.*, People v. Stevens, 5 Cal. 2d at 99, 53 P.2d at 136 ("If there was any error in this regard, it was merely an error of judgment on the part of the defendant in the selection of counsel.")

[72] *See, e.g.*, United States *ex rel.* Darcy v. Handy, 203 F.2d at 426.

[73] *See* Polur, *Retained Counsel, Assigned Counsel: Why the Dichotomy?*, 55 A.B.A.J. 254, 255 (1969); Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 Nw. U.L. Rev. 289, 296-301 (1964).

An extreme but illustrative colloquy, reported in an article by Professor Lowenthal, points up typical conflict situations which are present regardless of whether counsel was appointed or retained:

> An attorney appeared in a municipal court for the purpose of requesting a reduction of bail for four defendants jointly charged with possession of a large cache of drugs seized from a communal house. Referring to the first of his clients, the lawyer stated: "This defendant should be released on his own recognizance, Your Honor, because he has no rap sheet. Obviously he is not a hardened criminal and should not be locked up with others who are." When the second defendant's case was called, counsel argued: "No drugs were found in this defendant's bedroom, Your Honor. His chance for an acquittal is great and consequently it is highly likely that he will show up for trial." On behalf of the third defendant, the lawyer began to argue that his client had lived in the area all of his life. The judge interrupted the lawyer, asking him if any drugs had been seized from the bedroom of defendant number three. The lawyer responded, "No comment, Your Honor." The judge countered with the remark: "I suppose that this client also has a prior record, making him a hardened criminal," evoking the response that although the defendant has a prior record, he certainly was not a hardened criminal. The fourth defendant then interrupted the proceedings by eagerly requesting to be represented by the public defender.

See Lowenthal, *supra* note 52 at 941.

[74] *See* Waltz, *supra* note 73, at 297.

[75] *Id.* at 299.

[76] 100 S. Ct. at 1715.

[77] *See* note 1 *supra*.

[78] *See* notes 6 & 7 *supra*.

[79] *See* text accompanying notes 45-47 *supra*.

V. The Court's Duty of Inquiry

In *Glasser*, the Court said that the trial judge has "the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused," including the right to have the effective assistance of counsel.[80] But the requirements of that duty have eluded the judiciary up to, and perhaps beyond, *Cuyler*. In *Cuyler*, the Court held that absent an objection to multiple representation at trial, a trial court need not inquire as to possible conflicts of interest unless it "knows or reasonably should know that a particular conflict exists."[81] The knowledge that multiple representation is occurring, without more, is not sufficient to raise this duty of inquiry. The Court reasoned that since defense lawyers have an ethical obligation to avoid conflicting representations and to advise the court promptly if a conflict of interests arises, trial courts may assume either that joint representation entails no conflict or that the lawyer and his clients knowingly accept the risk.[82] Thus, according to *Cuyler*, a trial judge need only concern himself with the defendant's right to conflict-free counsel if an obvious "particular conflict" exists on the face of the multiple representation before him.[83]

The Court endorsed the idea of voluntary inquiry by trial judges when a case of multiple representation occurs in criminal trials, noting with express approval that several federal circuits already were invoking their supervisory powers to require similar inquiry.[84] It also cited proposed Federal Rule of Criminal Procedure 44(c), which provides that federal district courts "shall promptly inquire with respect to . . . joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation."[85] But the Court explicitly stopped short of making the 44(c) requirement a part of the sixth amendment right to counsel. The Court may have believed that the proposed federal rule and the ABA Standards for Trial Judges,[86] which also require inquiry in every case, could combine to reach almost the same end. At the same time, the Court implicitly indicated its willingness to allow the states some flexibility in developing their own standards in this area.

In addition, the *Cuyler* majority evinced a concern that the imposition of a duty of inquiry in every case would, as a practical matter, bar joint representation for those defendants who desired it for strategic or other reasons. Justice Powell, who wrote the Court's opinion in *Cuyler*, had expressed this concern when he dissented in *Holloway*.[87] In *Cuyler* he especially noted the advantage in cases where "[a] common defense ... gives strength against a common attack."[88]

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[80] Glasser v. United States, 315 U.S. at 71. The *Glasser* Court said that the duty was "not to be discharged as a matter of rote, but with sound and advised discretion . . . and with a caution increasing in degree as the offenses dealt with increase in gravity." *Id.* (quoting Patton v. United States, 281 U.S. 276, 312-13 (1930)). The duty imposes "serious and weighty responsibility upon the trial judge . . .." *Id.* (quoting Johnson v. Zerbst, 304 U.S. 458, 465 (1938)).

[81] 100 S. Ct. at 1717.

[82] *Id.*

[83] *Id.*

[84] *Id.* at n.10 (citing United States v. Waldman, 579 F.2d 649, 651-52 (1st Cir. 1978)); United States v. DeBerry, 487 F.2d 448, 452-54 (2d Cir. 1973); United States v. Cox, 580 F.2d 317, 321 (8th Cir. 1978), *cert. denied*, 439 U.S. 1075 (1979); United States v. Lawriw, 568 F.2d 98 (8th Cir. 1977), *cert. denied*, 435 U.S. 969 (1978), and Ford v. United States, 379 F.2d 123, 125-26 (D.C. Cir. 1967).

In *Ford*, Judge Skelly Wright held that the trial judge should always initially appoint separate counsel under its supervisory powers. Then, if the interests of justice and of the clients would be served by joint representation, counsel can suggest this for the court's consideration. 379 F.2d at 125-26. If the Supreme Court approves of this exercise of supervisory powers, perhaps it should require it. With such a requirement, appellate review of sixth amendment conflict of interest challenges would be greatly simplified and justice would be better served. *See* text accompanying notes 94-95, *infra*.

[85] 100 S. Ct. at 1717 n.10.

Proposed Federal Rule of Criminal Procedure 44 (c) —provides:

> Whenever two or more defendants have been jointly charged . . . or have been joined for trial . . ., 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.

Pub. L. No. 96-42, 96th Cong., 1st Sess. (1979) (Effective December 1, 1980 or by Act of Congress, whichever is sooner).

[86] *The Function of the Trial Judge*, ABA Project on Standards for Criminal Justice § 3.4(b) (Draft, 1972): "Whenever two or more defendants who have been jointly charged, or whose cases have been consolidated, are represented by the same attorney, the trial judge should inquire into potential conflicts which may jeopardize the right of each defendant to the fidelity of his counsel."

[87] *See* note 23 *supra*.

[88] "[A] reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance of

Courts and commentators have offered two other arguments in favor of allowing defendants to have joint representation if they so desire. First, as Justice Frankfurter noted in his *Glasser* dissent, joint representation can provide a "means of insurance against reciprocal recrimination."[89] Second, some courts have construed the sixth amendment to confer on defendants the right, unfettered by the courts, to choose their own counsel.[90]

The *Cuyler* duty is not the least intrusive way to safeguard a defendant's access to multiple representation. It inadequately protects the sixth amendment right to counsel for defendants who choose joint representation unaware of the inherent risks involved. In these cases the court might not even question multiple representation. Furthermore, the *Cuyler* duty fails to assure access to separate counsel for defendants who would be harmed by joint representation, but who cannot disclose the facts underlying the conflict without incriminating themselves, prejudicing their defense, or biasing the trial judge.

Proponents of a prophylactic per se rule barring multiple representation argue that serious limitations on the scope of conflict of interest hearings negate any chance for a meaningful determination at a pretrial hearing.[91] The information required at a conflict hearing might encroach upon an accused's fifth amendment protections against self-incrimination.[92] Ironically, substantive inquiry also can interfere with the sixth amendment right to counsel it seeks to protect by impairing defense strategy or compelling disclosure of confidential information.[93]

Undoubtedly, pretrial conflicts of interest hearings can uncover some percentage of conflicts without infringing on defendants' constitutional rights. Such hearings may also result in findings that the chance of conflict is too remote to warrant separate counsel. In a substantial number of cases, however, it may not be possible to determine adequately whether significant possibility of conflict exists. In these cases, under the *Cuyler* duty, courts would be free to refuse to appoint or order separate counsel.

Perhaps a better approach would be to impose a duty of inquiry in every case, along with a presumption against multiple representation when a pretrial conflict hearing cannot conclusively determine the likelihood of conflict. This approach would not necessarily preclude defendants who want joint representation from proposing it to the court.[94] It would, however, insure that every joint representation of codefendants results from their conscious choices, under the scrutinizing eye of the trial judge. This approach arguably is more compatible with the *Glasser* rationale concerning the trial judge's responsibility for the essential rights of the accused.[95]

Although pretrial conflict hearings and separate attorneys will result in increased costs and delays, the judicial economy from avoiding frequent and complex appeals on conflict grounds, as in *Cuyler*, may offset these costs entirely. But even if the added costs at the pretrial stages exceed the savings on the appellate level, judicial efficiency should never justify infringements on a constitutional guarantee so basic as the sixth amendment right to counsel.

VI. Standard on Appeal

Holloway required trial courts to appoint separate counsel any time an accused or his attorney claimed that a possible conflict of interest existed, unless the court ascertained that the risk of conflict is "too remote to warrant separate counsel."[96] Yet, two years later, the Court in *Cuyler* held that on appeal, a defendant who had raised no objection to multiple representation at trial, "must establish that an actual conflict of interest adversely affected his lawyer's performance," for "the possibility of conflict is insufficient to impugn a criminal conviction."[97] The *Cuyler* Court distinguished between a pretrial opportunity to show that potential conflicts impermissibly imperil an accused's right to a fair trial and a posttrial showing of actual conflict requisite to reversal of a criminal conviction.[98]

counsel. Such a presumption would preclude multiple representation even in cases where '[a] common defense . . . gives strength against a common attack.'" 100 S. Ct. at 1718 (quoting Glasser v. United States, 315 U.S. at 92 (Frankfurter, J., dissenting)).

[89] Glasser v. United States, 315 U.S. at 92.

[90] *See* United States v. Liddy, 348 F. Supp. 198 (D.D.C. 1972). *See also* United States *ex rel.* Baskerville v. Deegan, 428 F.2d 714, 716 (2d Cir.), *cert. denied*, 400 U.S. 928 (1970) (right to choose counsel not absolute, nor on a par with the right to assistance of counsel).

[91] *See* Lowenthal, *supra* note 43, at 986–88.

[92] United States v. Paz-Sierra, 367 F.2d 930 (2d Cir. 1966), *cert. denied*, 386 U.S. 935 (1967).

[93] *See* Comment, *supra* note 10, at 242.

[94] *See, e.g.*, note 84 *supra* for the D.C. Circuit rule.

[95] Justice Murphy, writing for the majority in *Glasser*, suggested that the added responsibility entailed in the defense of a second accused might sufficiently diminish counsel's effectiveness to support reversal of a conviction: "Irrespective of any conflict of interest, the added burden of representing another party may conceivably impair counsel's effectiveness." Glasser v. United States, 315 U.S. at 75.

[96] Holloway v. Arkansas, 435 U.S. at 484.

[97] 100 S. Ct. at 1719.

[98] *Id.* at 1718–19.

Significant public policy needs support this distinction. Before or during trial, the alternative to a multiple representation infected with possible conflicts of interest is the appointment (or retention) of individual counsel. After conviction, a finding of ineffective assistance because of a conflict results in reversal. The first scenario involves possible delays in the proceedings and more public defenders. The second potentially may set free persons who otherwise would be found guilty. This distinction surely justifies the different tests laid down in *Holloway* and *Cuyler*.

Permitting defendants to upset convictions on appeal merely by demonstrating, after the fact, that a possibility of conflict existed at trial would be nothing less than a per se rule against multiple representation. The Supreme Court has acknowledged that "a possible conflict inheres in almost every instance of multiple representation."[99] A system by which "almost every" conviction obtained against defendants with multiple representation could be reversed on appeal is untenable.

Unfortunately, the *Cuyler* standard also has major problems. As *Holloway* indicated, a rule requiring a defendant to show prejudice would not be susceptible of intelligent, even-handed application. The Court noted that the evil in joint representation of clients with conflicting interests lies in what the advocate refrains from doing at possible pretrial plea negotiations, at trial, and in the sentencing process. These factors do not show up in the record, and hence are not reviewable by appellate courts.[100] When it made these comments in *Holloway*, the Court was not addressing the standard for review on appeal of a *Cuyler* situation because it found that the judge had violated the defendant's sixth amendment rights at trial. Nevertheless, these ubiquitous problems also plague the efforts of a reviewing court attempting to determine the existence of actual conflicts of interest on the basis of the trial record.[101]

Trial records do not reflect lost plea bargaining opportunities that result from joint counsel's desire to protect codefendants; nor do they reveal the defense strategies counsel has rejected because of conflicts. Similarly, when a lawyer elects not to cross-examine a witness, his reason does not appear in the record. The lawyer may even cross-examine with apparent zeal, yet completely omit another line of questioning disadvantageous to a conflicting interest. Any attempted appellate review must be based on sheer speculation as to the thoughts of the advocate.[102]

Given the choice between a standard on review under which subtle infractions are left standing and a standard by which a substantial number of guilty persons go free, the former, that chosen in *Cuyler*, is best. But the dilemma merely points up the need to circumvent this kind of appellate review of alleged multiple representation infringements on sixth amendment rights. A pretrial inquiry into possible conflicts of interest would avoid both standards of review. In every case, the judge will have considered and approved or rejected the multiple representation before the trial begins.[103] This requirement would standardize a procedure which a substantial number of federal circuits voluntarily follow,[104] the ABA recommends,[105] and the Supreme Court approves.[106]

VII. Conclusion

Cuyler answered many questions about the multiple representation area upon which state courts and federal circuits previously had split. After *Cuyler*, courts cannot consider whether counsel was appointed or privately retained in determining how much protection a defendant's sixth amendment right to counsel merits. *Cuyler* also establishes that trial judges are not required to ascertain whether multiple representation presents a conflict of interests sufficient to warrant appointment of separate counsel, unless the court knows or reasonably should know that a particular conflict exists. At the same time, the *Cuyler* Court endorsed voluntary inquiry by trial courts. Presumably this express endorsement will promote the existing trend among trial judges to make an affirmative inquiry whenever faced with a multiple representation situation. To the extent *Cuyler* advances this trend, only increased sixth amendment protection can result. However, in refusing to rule that trial judges have a constitutional duty to inquire about multiple representation and possible conflicts of interest, the Court left the door open for continued appeals on conflict of interest grounds, which often are difficult or impossible for a reviewing court to determine from the record.

Shell J. Bleiweiss

[99] *Id.* at 1718.

[100] Holloway v. Arkansas, 435 U.S. at 490–91.

[101] *See* Lowenthal, *supra* note 52, at 978. "[T]rial-court records normally will mask not only the prejudicial effects of a conflict but also the very existence of the conflict itself."

[102] *See generally* Holloway v. Arkansas, 435 U.S. at 489–90.

[103] *See* note 94 and accompanying text *supra*.

[104] 100 S. Ct. at 1717 n.10.

[105] *Id.*

[106] *Id.*