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# The Per Se Conflict of Interest Rule Applied to Special Assistant Attorneys General Serving as Defense Counsel - People v. Fife

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# THE PER SE CONFLICT OF INTEREST RULE APPLIED TO SPECIAL ASSISTANT ATTORNEYS GENERAL SERVING AS DEFENSE COUNSEL— *PEOPLE v. FIFE*

All criminal defendants enjoy the sixth amendment right to effective assistance of counsel,[1] which requires that services of the defense attorney be devoted entirely to the defendant unimpeded by a conflict of interest.[2] To

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1. The sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense." U.S. CONST. amend. VI. "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). *See* Reece v. Georgia, 350 U.S. 85, 90 (1955) (the effective assistance of counsel is a constitutional right that no state may disregard); Avery v. Alabama, 308 U.S. 444, 446 (1940) (denial of opportunity for appointed counsel to consult with the accused and prepare his defense could turn the requirement of counsel into a sham. The guarantee of the assistance of counsel cannot be satisfied by mere formal appointment); Powell v. Alabama, 287 U.S. 45, 58 (1932) (in the "Scottsboro boys" case the Court reversed the rape convictions of six illiterate black youths because counsel's mere "pro forma" appearance in so hostile a setting did not satisfy the requirements of the right to counsel "in any substantial sense"). *See generally*, Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077 (1973); Hails & Savage, *Effective Assistance of Counsel: A Farce and a Sham?*, 5 ORANGE COUNTY B.J. 7 (1978); Note, *Criminal Procedure—Constitutional Law—Effective Assistance of Counsel and Right to a Fair Trial*, 22 WAYNE L. REV. 913 (1976).

2. Glasser v. United States, 315 U.S. 60, 70 (1942). In *Glasser*, the trial judge ordered Glasser's attorney to simultaneously represent a co-defendant whose interests conflicted with Glasser's. The order came despite an objection by Glasser that a conflict of interest would arise in the joint representation. The Supreme Court found that Glasser's right to the effective assistance of counsel had been denied and reversed the conviction. *Id.* at 76.

*Glasser* has been the object of conflicting interpretations upon the issue of whether a finding of prejudice as well as a conflict of interest is required to sustain a violation of the right to counsel. *See generally* Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney*, 62 MINN. L. REV. 119 (1978). At one point, the Court said that "[t]o determine the precise degree of prejudice . . . is at once difficult and unnecessary." *Glasser v. United States*, 315 U.S. at 75-76. Yet, the Court presented a detailed analysis of the actual prejudice Glasser sustained, specifically the attorney's inadequate cross-examination of a key witness, and concluded that the representation was "not as effective as it might have been if the appointment had not been made." *Id.* at 76. The Supreme Court has recently interpreted *Glasser* to require reversal without a showing of prejudice when a trial judge has improperly ordered joint representation over a timely objection. *See* Holloway v. Arkansas, 435 U.S. 475, 484 (1978).

Some courts maintain that a conflict of interest in defense counsel is so conducive to divided loyalty that the mere existence of the conflict is sufficient to deny the right to the effective assistance of counsel. *See, e.g.*, Zuck v. Alabama, 588 F.2d 436 (5th Cir.), *cert. denied*, 100 S. Ct. 63 (1979) (where retained counsel represented prosecuting attorney in unrelated civil matter, trial was fundamentally unfair); United States v. Davenport, 478 F.2d 203, 210 (3rd Cir. 1973) (joint representation will be constitutionally defective upon a showing of a possible conflict of interest or prejudice however remote); Commonwealth v. Leslie, 382 N.E.2d 1072, 1075 (Mass. 1978) (prejudice will be presumed when a "genuine" conflict of interest exists); Harrison v. State, 552 S.W.2d 151, 153 (Tex. Crim. 1977) (prejudice will be presumed when a conflict of interest is found in appointed counsel); State v. Aguilar, 87 N.M. 503, 504, 536 P.2d 263, 264

safeguard this right, Illinois has employed a per se conflict of interest rule that does not require a showing of prejudice when a defense counsel's actual commitments to others might restrain the attorney's efforts.[3] Recently, in *People v. Fife*,[4] the Illinois Supreme Court applied the per se rule to special assistant attorneys general[5] who serve as criminal defense counsel.[6]

In *Fife*, the court held that a conflict of interest exists when defense counsel is a special assistant attorney general, and his or her client is not adequately informed of the relationship with the Attorney General and thus does not make a knowing and effective waiver of the right to counsel free of the conflict.[7] This conflict exists even though the attorney is limited to

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(1975) (prejudice will be presumed when victim is defense counsel's civil client). Other courts require a showing of prejudice before they will conclude that a conflict of interest has denied the defendant the effective assistance of counsel. *See, e.g.* , United States v. DeFillipio, 590 F.2d 1228, 1237 (2d Cir.), *cert. denied*, 99 S. Ct. 2844 (1979) (unless actual prejudice is shown, joint representation is permissible); Smith v. Regan, 583 F.2d 72 (2d Cir. 1978) (*Glasser* presumption applies only if timely objection was made); People v. Corona, 80 Cal. App. 3d 684, 720, 145 Cal. Rptr. 894, 915 (1978) (requirement of actual prejudice is the majority rule). The Supreme Court will have an opportunity to resolve this conflict when it reviews United States v. Cuyler, 593 F.2d 512 (3d Cir.), *cert. granted*, 100 S. Ct. 44 (1979). *Cuyler* is a multiple representation case in which the court reversed defendant's conviction because the record demonstrated the possibility of a conflict of interest. *Id.* at 521.

3. *See generally* Ehrmann, *The Per Se Conflict of Interest Rule in Illinois*, 66 ILL. B.J. 578 (1978). *See* notes 14-39 and accompanying text *infra*.

4. 76 Ill. 2d 418, 392 N.E.2d 1345 (1979).

5. The Attorney General is the legal officer of the state with his or her duties prescribed by law. ILL. CONST. art. 5, § 15. They include: the duty to appear for the state before the supreme court, defend proceedings against a state officer, give written opinions to the general assembly, prosecute corporations for failing to make reports required by law, and assist the state's attorney in the prosecution of a criminal case if, in the Attorney General's judgment, the interests of the state require it. ILL. REV. STAT. ch. 14, § 4 (1977).

To efficiently discharge this wide variety of duties the Attorney General has sought the aid of local attorneys. They are appointed special assistants with authority limited to particular types of litigation. If the attorney is limited to non-criminal matters, the special assistant owes no duty to the Attorney General in criminal cases. People v. Crawford Distrib. Co., 65 Ill. App. 3d 790, 795, 382 N.E.2d 1223, 1228 (4th Dist. 1978), *aff'd*, 78 Ill. 2d 70, 397 N.E.2d 1362 (1979). Some special assistants receive a monthly retainer fee. Others are paid by voucher for services rendered on a part time basis. Others are regularly employed by another state agency and are appointed special assistants for certain types of litigation. Appendix, Brief for Plaintiff-Appellant at 1, People v. Fife, 76 Ill. 2d 418, 392 N.E.2d 1345 (1979).

6. The Attorney General's 1969 Code of Conduct flatly prohibited staff members from engaging in criminal defense work, but this policy was relaxed as to part-time staff in the 1978 revision of the code. Reply Brief for Plaintiff-Appellant at 2. Under the current code, special assistants may represent criminal defendants with the Attorney General's permission. A prerequisite for obtaining this permission is disclosure to the client of the status as special assistant and client's written waiver of any possible conflict of interest. Attorney General's *Code of Conduct* at 5-6 (revised 1978). Criminal defense work by special assistant attorneys general is likely to be common in small downstate counties, because special assistants often form a large percentage of the local bar. *See* note 78 *infra*.

7. 76 Ill. 2d at 424, 392 N.E.2d at 1348. The court explained that the problem is "nullified or significantly lessened" by waiver. *Id.* at 425, 392 N.E.2d at 1348.

handling non-criminal matters for the state.[8] The court held that this conflict of interest denies the defendant the effective assistance of counsel absent the requisite showing that the conflict was prejudicial to the defense.[9] The holding also applies when another attorney in defense counsel's firm is a special assistant.[10]

Further, the *Fife* decision settles a dispute among appellate districts on the issue of special assistants.[11] The acute nature of the disagreement within the appellate bench is evidenced by the fact that one district decided the issue both ways on the same day.[12] Although the court in *Fife* found a sixth amendment violation when special assistants do criminal defense work, those in prior appellate cases who unsuccessfully challenged their convictions on this ground cannot claim the benefit of the *Fife* rule. The court held that its per se rule would not apply to pending cases but would operate prospectively to criminal cases occurring after the filing of the *Fife* opinion.[13]

The purpose of this Note is to analyze *Fife* in light of former Illinois Supreme Court cases employing the per se rule. The Note will demonstrate that the court's position on waiver and its decision to deny retroactive effect to its holding are inconsistent with the rationale underlying the per se rule. The likely impact of *Fife* upon the Attorney General's office in particular and defense attorneys in general also will be considered. Finally, an alternative non-constitutional approach, free of the inconsistencies in the court's reasoning, will be suggested.

## BACKGROUND: THE PER SE RULE

The per se conflict of interest rule provides that if a defense attorney's actual commitments to others might restrain the attorney in fully represent-

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8. *Id.* at 424, 392 N.E.2d at 1348.

9. *Id.*

10. *Id.* at 425, 392 N.E.2d at 1348.

11. The first appellate district held that representation of a criminal defendant by a special assistant constituted a per se conflict of interest in People v. Pendleton, 52 Ill. App. 3d 241, 367 N.E.2d 196. (1st Dist. 1977), *cert. denied*, 435 U.S. 956 (1978). The fourth appellate district was split on the issue. *See* note 12 *infra*.

12. *Compare* the appellate decision in People v. Fife, 65 Ill. App. 3d 805, 382 N.E.2d 1234 (4th Dist. 1978), *aff'd*, 76 Ill. 2d 418, 392 N.E.2d 1345 (1979) (court found a per se conflict) *with* People v. Crawford Distrib. Co., 65 Ill. App. 3d 790, 382 N.E.2d 1223 (4th Dist. 1978), *aff'd*, 78 Ill. 2d 70, 397 N.E.2d 1362 (1979) (defense counsel worked for firms with members serving as special assistant attorneys general in public aid and condemnation cases) *and* People v. Rogers, 64 Ill. App. 3d 290, 382 N.E.2d 1236 (4th Dist. 1978), *aff'd*, No. 51421 (Ill. announced June, 1979) (defense counsel was a special assistant limited to workmen's compensation cases). Both *Crawford* and *Rogers* held that there was no conflict of interest when special assistants assumed criminal defense responsibilities. *Fife*, *Crawford*, and *Rogers* were decided by different panels of fourth district justices on Sept. 29, 1978. The same court previously found a per se conflict under almost identical facts in People v. Cross, 30 Ill. App. 3d 119, 331 N.E.2d 643 (4th Dist. 1975) (defense counsel was a special assistant limited to inheritance tax work), but *Cross* was overruled in *Crawford*, 65 Ill. App. 3d at 796, 382 N.E.2d at 1228.

13. 76 Ill. 2d at 425, 392 N.E.2d at 1348-49. The opinion was filed June 8, 1979.

ing the defendant's interests, then a court will not demand a showing of prejudice to sustain a finding that the accused was denied the right to effective assistance of counsel.[14] The principle underlying the rule is that the "right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising out of its denial."[15] The rule focuses primarily on counsel's actual commitments rather than solely upon monetary interests because the commitment approach is considered both more workable and more closely related to the conflicts likely to arise in everyday practice.[16]

The Illinois Supreme Court adopted the per se rule in *People v. Stoval*,[17] in which the court reversed the defendant's conviction for burglarizing a jewelry store. At trial, Stoval's appointed counsel was a member of a law firm representing the store and its owner. Under these circumstances, the court concluded that Stoval's right to counsel had been denied because he had been deprived of his counsel's "undivided loyalty."[18] The court explained that a defense attorney who also represents the victim naturally will be reluctant to jeopardize the future business of a paying client by a vigorous defense.[19] Further, a forceful defense could require the attorney to investigate, cross-examine, and impeach his or her own client.[20] The

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14. People v. Berland, 74 Ill. 2d 286, 303-04, 385 N.E.2d 649, 657 (1978) (multiple representation case where court reviewed history of the per se rule); People v. Coslet, 67 Ill. 2d 127, 133, 364 N.E.2d 67, 70 (1977). *See* notes 17-39 and accompanying text *infra*.

15. People v. Berland, 74 Ill. 2d at 303-04, 385 N.E.2d at 657 (1978), *quoting* Glasser v. United States, 315 U.S. at 76.

16. People v. Coslet, 67 Ill. 2d at 133, 364 N.E.2d at 70. *See also* notes 17-39 and accompanying text *infra*.

17. 40 Ill. 2d 109, 239 N.E.2d 441 (1968). The per se rule is not solely an Illinois creation. It is an application of the presumption of prejudice utilized by the United States Supreme Court in its multiple representation case Glasser v. United States, 315 U.S. 60 (1942). *See* note 2 *supra*. The *Stoval* court relied upon United States v. Myers, 253 F. Supp. 55 (E.D. Pa. 1966), a case that applied the Glasser presumption to a situation in which defense counsel also represented the victim of the crime in a civil suit.

18. In *Stoval*, the court stated:

> The Constitution assures a defendant effective representation by counsel whether the attorney is one of his choosing or court-appointed. Such representation is lacking, however, if counsel, unknown to the accused and without his knowledgeable assent, is in a duplicitous position where his full talents—as a vigorous advocate having the single aim of acquittal by all means fair and honorable—are hobbled or fettered or restrained by commitments to others.

40 Ill. 2d at 111-12, 239 N.E.2d at 443, *quoting* Porter v. United States, 298 F.2d 461, 463 (5th Cir. 1962). There is also a constitutional right to counsel in Illinois. ILL. CONST. art. I, § 8.

19. 40 Ill. 2d at 113, 239 N.E.2d at 443.

20. *Id.* These circumstances may also pose an ethical dilemma for an attorney. A vigorous examination of the attorney's civil client might violate the ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY (1977). Canon 4 requires the attorney to preserve the confidences and secrets of a client. *See* People v. Drysdale, 51 Ill. App. 3d 667, 366 N.E.2d 394 (5th Dist. 1977) (defense counsel represented prosecution witness in involuntary commitment proceeding, a proper subject for impeachment).

court reasoned that this situation is so "fraught with the dangers of prejudice . . . which the cold record might not indicate"[21] that a showing of prejudice should not be required.[22]

In addition to protecting the accused against the harmful effects of an actual conflict of interest, the presumption of prejudice[23] was designed to protect defense attorneys. It frees defense counsel from having to defend against charges of disloyalty.[24] The court considered this policy objective important because it is virtually impossible to determine whether defense counsel is affected, at least subliminally, by a conflict.[25]

Excepting cases involving the multiple representation of defendants,[26] the Illinois Supreme Court has applied the per se rule in only three other decisions prior to *Fife*. In *People v. Meyers*,[27] the court applied the rule to a situation in which the defense attorney and his civil client had a financial interest in the length of the defendant's sentence. The defendant pleaded guilty to burglary charges. Before the plea was entered, however, his court-appointed counsel agreed to represent the defendant's wife in a possible dramshop suit against the tavern at which the defendant imbibed prior to the burglary.[28] Because the wife would be deprived of Meyer's support during his imprisonment, her damages in the suit would probably increase

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21. 40 Ill. 2d at 113, 239 N.E.2d at 443, *quoting* United States v. Myers, 253 F. Supp. at 57.

22. Since *Stoval*, other jurisdictions have held that effective assistance is denied when defense counsel also represents the victim. *See* Castillo v. Estelle, 504 F.2d 1243 (5th Cir. 1974); State v. Aguilar, 87 N.M. 503, 536 P.2d 263 (1975).

23. The court did not use the term "presumption" in *Stoval*, but has used that term on other occasions to describe the operation of the per se rule. *See* People v. Franklin, 75 Ill. 2d 173, 176, 387 N.E.2d 685, 686 (1979). It is open to question whether the prosecution can rebut the presumption by demonstrating that the error was harmless. Ehrmann, *The Per Se Conflict of Interest Rule in Illinois*, 66 ILL. B.J. 578, 581 (1978).

24. People v. Stoval, 40 Ill. 2d at 113, 239 N.E.2d at 444.

25. *Id.* *See* note 63 and accompanying text *infra*.

26. The court has been cautious in applying the per se rule in multiple representation cases. It has determined that multiple representation is not per se unconstitutional. People v. Vriner, 74 Ill. 2d 329, 340, 385 N.E.2d 671, 675 (1978). Although the court has not demanded a showing of prejudice in those cases, the court has required a showing of an actual conflict of interest that was manifested at trial. *Id.* at 341, 385 N.E.2d at 676. *See* People v. Echols, 74 Ill. 2d 319, 385 N.E.2d 644 (1978) (public defender representing appellant and co-defendant exploited fingerprinting officer's confusion of defendants, whereas independent counsel would have shown prints at burglary were not appellant's); People v. Ware, 39 Ill. 2d 66, 233 N.E.2d 421 (1968) (pre-*Stoval* case in which defendant sought acquittal while co-defendant pled guilty and testified against him).

27. 46 Ill. 2d 149, 263 N.E.2d 81 (1970).

28. *Id.* at 150-51, 263 N.E.2d at 82. The Illinois Liquor Control Act, ILL. REV. STAT. ch. 43, § 135 (1977) provides:

> Every person who is injured in person or property by an intoxicated person, has a right of action . . . against any person who by selling or giving alcoholic liquor causes the intoxication of such person. . . . An action shall lie for injuries to means of support caused by an intoxicated person or in consequence of the intoxication.

with the length of her husband's sentence.[29] The attorney shared the wife's financial interest because the suit was for a contingent fee.[30]

The court expanded its per se rule in *People v. Kester*.[31] In that case, the assistant public defender had previously appeared in the case for the prosecution as an assistant state's attorney.[32] The court found a per se violation even though the defense attorney presumably had no continuing commitments to the State's Attorney's Office similiar to the continuing commitments to clients found in *Stoval* and *Meyers*.[33] The court justified this expansion beyond cases involving a continuing commitment by reasoning that a per se conflict arose from the possible reluctance of the attorney to attack his own pleadings or question the prosecutorial decisions or actions in which he was involved.[34] The court also placed heavy emphasis upon the policy objective of avoiding situations that could give rise to unfounded accusations of disloyalty.[35]

The most recent application of the per se rule prior to *Fife* was in *People v. Coslet*.[36] In *Coslet*, counsel appointed to represent a defendant charged with murdering her husband also represented the administrator of the husband's estate.[37] In his role as attorney for the administrator, counsel had the duty to conserve and distribute estate assets. Since a murdering heir cannot inherit, a conflict arose because the estate might be enriched by a conviction.[38]

By the time *Fife* reached the supreme court, these four cases had clearly established a rule presuming prejudice from conflicts of interest in appointed counsel.[39] Conflicts occurred in two types of cases. In *Stoval*, *Meyers*, and

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29. 46 Ill. 2d at 151, 263 N.E.2d at 82. Courts have allowed recovery for support lost when the intoxicated person was imprisoned for committing a crime. Appleman, *Civil Liability Under the Illinois Dram Shop Act*, 34 ILL. L. REV. 30, 33 (1939). *See, e.g.*, Brown v. Moudy, 199 Ill. App. 85, 87 (4th Dist. 1916) (plaintiff's husband jailed after shooting and killing a man in a "fit of intoxication").

30. 46 Ill. 2d at 150, 263 N.E.2d at 82.

31. 66 Ill. 2d 162, 361 N.E.2d 569 (1977).

32. *Id.* at 164, 361 N.E.2d at 570.

33. *Id.* at 167, 361 N.E.2d at 571.

34. *Id.* at 167-68, 361 N.E.2d at 572. On the other hand, the court has found no conflict where defense counsel once prosecuted the defendant on a previous charge. *See* People v. Franklin, 75 Ill. 2d 173, 387 N.E.2d 685 (1979). The court has also found no conflict in a case in which defense counsel had served as head of the County State's Attorney's Criminal Division while the case was being prepared, but was not active in the prosecution of the defendant. *See* People v. Newberry, 55 Ill. 2d 74, 302 N.E.2d 34 (1973).

35. 66 Ill. 2d at 168, 361 N.E.2d at 572.

36. 67 Ill. 2d 127, 364 N.E.2d 67 (1977).

37. *Id.* at 131-32, 364 N.E.2d at 69.

38. *Id.* at 134, 364 N.E.2d at 70. Under Illinois law, an heir who murders an ancestor is barred from inheriting the ancestor's property. ILL. REV. STAT. ch. 110-1/2, § 2-6 (1977).

39. There is still question as to whether the per se rule applies with equal force to retained counsel. While general formulations of the rule have not drawn a distinction between appointed and retained counsel, the court has repeatedly explained that it employs greater scrutiny to conflicts of interest in appointed counsel. *See* People v. Coslet, 67 Ill. 2d at 133, 364 N.E.2d at

*Coslet* the court found various conflicts, including financial, arising out of the attorneys' commitments to clients whose interests were opposed to a vigorous defense of the accused. In *Kester*, the court found a conflict arising out of the defense attorney's prior involvement with the prosecution in a case that may have left him reluctant to defend his client forcefully.

## THE PER SE RULE IN *FIFE*: RATIONALE AND ANALYSIS

### *Facts and Rationale*

Gregory Fife was convicted of unlawful delivery of cannabis[40] by a Menard County jury.[41] His court-appointed counsel was a special assistant attorney general limited to handling workmen's compensation cases for state employees.[42] Fife did not waive any conflict of interest resulting from the attorney's position as a special assistant.[43] The supreme court reversed the conviction and held that a per se conflict of interest exists when a special

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70; People v. Stoval, 40 Ill. 2d at 113, 239 N.E.2d at 444. In a recent multiple representation case, for example, the court distinguished the set of facts before it from the per se decisions on the ground that "all [the court's per se] cases involved appointed counsel, rather than retained counsel as here, demanding even closer scrutiny for conflicting interests." People v. Berland, 74 Ill. 2d at 303, 385 N.E.2d at 656. *But see* People v. Vriner, 74 Ill. 2d 329, 339-40, 385 N.E.2d 671, 675 (1978) (the fact that counsel is retained does not end the inquiry for a conflict of interest). It is unclear whether the per se rule is solely a product of that closer scrutiny.

The court has not explained why it more closely scrutinizes conflicts in appointed counsel, but the reason may lie in the due process clause of the fourteenth amendment. The right to counsel was applied to the states through the due process clause. *See* Gideon v. Wainwright, 372 U.S. 335 (1963). The fourteenth amendment, however, prohibits only states from denying due process. U.S. CONST. amend. XIV, § 1. The requisite state action is clearly present when the state appoints counsel with conflicting interests. When counsel is retained, on the other hand, state action is not so apparent. When conflicts of interest have appeared in retained counsel, courts have considered whether the conflicts rendered the trials fundamentally unfair. Under these circumstances, state action has been found in the court's pronouncing judgment in an unfair trial. United States v. Alvarez, 580 F.2d 1251, 1255-56 (5th Cir. 1978). This distinction has led some courts to apply a presumption of prejudice for conflicts in appointed counsel, while requiring a showing of actual prejudice when counsel is retained. *See* Harrison v. State, 552 S.W.2d 151, 153 (Tex. Crim. 1977).

Illinois appellate courts, however, have applied the per se rule to retained counsel, although they did not discuss the state action issue. *See* People v. Drysdale, 51 Ill. App. 3d 667, 366 N.E.2d 394 (5th Dist. 1977) (defense counsel represented prosecution witness in an involuntary commitment proceeding); People v. Cross, 30 Ill. App. 3d 199, 331 N.E.2d 643 (4th Dist. 1975) (first case to apply the per se rule to special assistant attorneys general).

40. ILL. REV. STAT. ch. 56-1/2, § 705 (d) (1975).

41. 76 Ill. 2d at 420, 392 N.E.2d at 1346.

42. *Id.*

43. The record did not indicate the results of a circuit court evidentiary hearing on the issue of waiver. The attorney claimed that she informed Fife of her status, but Fife testified to the contrary. On oral argument, however, the Attorney General conceded that Fife did not waive any right to counsel free of the conflict. *Id.*

assistant, or a member of a firm employing a special assistant, serves as criminal defense counsel without the defendant's knowledgeable waiver of the conflict of interest.[44]

After reviewing the history of the per se rule in Illinois, the court determined that this holding was required by its previous per se decisions and its desire to safeguard the right to effective assistance of counsel.[45] Specifically, the court indicated concern about the effect of "possible, perhaps subliminal pressure" a special assistant might receive from the Attorney General's office.[46] The court maintained that the Attorney General shared this concern because the Code of Conduct for special assistants permitted criminal defense work only after receiving the client's written waiver of the possible conflict of interest.[47] Although the court was alarmed at the possibility of pressure from the Attorney General, it noted that special assistants are engaged in non-criminal work, wholly unrelated to their private employment as practicing attorneys.[48] This offsetting factor led the court to conclude that full disclosure accompanied by knowing, effective waiver "nullified or significantly lessened" the problem.[49]

Regarding the retroactivity question, however, the court presented less rationale to support its holding to apply *Fife* only prospectively. Quoting a passage from the United States Supreme Court's opinion in *Stovall v. Denno*,[50] it indicated that public policy requires a court to give the litigants the benefit of a new rule regardless of whether the rule will operate prospectively or retroactively.[51] On this ground the court promptly reversed Fife's conviction. The court, however, declined to present the reasoning underlying its decision to deny full retroactive effect to the per se holding.[52]

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44. 76 Ill. 2d at 424, 392 N.E.2d at 1348. *Fife* employs general language, appearing to restrict both appointed and retained counsel. There is some question, however, whether the per se rule applies to retained counsel. *See* note 38 *supra*.

45. *Id.*

46. *Id.* at 424-25, 392 N.E.2d at 1348. Counsel argued that "subconscious conflicts" could arise because a vigorous defense at trial might antagonize the prosecutor and make the Attorney General's job more difficult on appeal. Brief for Defendant-Appellee at 7.

47. 76 Ill. 2d at 421, 424, 392 N.E.2d at 1346-48.

48. *Id.* at 425, 392 N.E.2d at 1348.

49. *Id.*

50. 388 U.S. 293 (1967). Note: *Stovall v. Denno* should not be confused with the Illinois per se decision of People v. Stoval, 40 Ill. 2d 109, 239 N.E.2d 441 (1968).

51. In *Stovall v. Denno*, the Court held that United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967), which found a right to counsel at lineups, had only prospective effect. Despite the prospectivity holding, the Court in *Stovall v. Denno* stated:

> Sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law, militate against denying Wade and Gilbert the benefit of today's decisions.

388 U.S. at 301, *quoted in* People v. Fife, 76 Ill. 2d at 425-36, 392 N.E.2d at 1349.

52. When originally filed, the opinion explained that the prospectivity holding was based upon counsel's good faith, acting without benefit of prior authority. People v. Fife, No. 51423,

*Critical Analysis of the Conflict of Interest Holding*

Although the court in *Fife* found a constitutional violation when special assistant attorneys general engage in criminal defense work, it appears for several reasons that the court was more concerned with remedying an apparent impropriety than avoiding a realistic threat to the right to effective counsel. First, the per se holding in *Fife* deviates from the criteria employed in the court's previous per se decisions. In cases that involved a defense attorney's relationship with a prosecutorial office, the attorney's personal involvement with the prosecution of the accused was a crucial factor.[53] In *Fife*, however, the defense attorney was not involved in criminal prosecutions. Special assistants appointed for civil matters, such as workmen's compensation, owe no duty to the state in the criminal arena and, therefore, inherent loyalty to the state is unlikely.[54] On the contrary, the attorneys' loyalty will probably lie with those whom they represent outside their official capacity, because ultimately the bulk of their clientele will be drawn from the community.

Although the attorney in *Fife* was not personally involved with the prosecution, the court maintained that a special assistant is still susceptible to "possible, perhaps subliminal" pressure from the Attorney General's office.[55] The court did not, however, offer a definition of subliminal pressure or explain how this pressure will be exerted. In light of the court's previous per se opinions providing careful analysis of how the conflict could impede the attorney's efforts,[56] this paucity of explanation was uncharacteristic.

slip op. at 5 (Ill. June 8, 1979). When officially published, this explanation was removed from the court's opinion, leaving no rationale to support the prospectivity holding. *See* 76 Ill. 2d at 425-26, 392 N.E.2d at 1348-49.

53. *Compare* People v. Kester, 66 Ill. 2d 162, 361 N.E.2d 569 (1977), *with* People v. Franklin, 75 Ill. 2d 173, 387 N.E.2d 685 (1979), *and* People v. Newberry, 55 Ill. 2d 74, 302 N.E.2d 34 (1973). *Kester* held that there was a per se conflict when defense counsel formerly represented the prosecution in the same case. In *Franklin*, however, the court found no conflict when the defense attorney had once prosecuted the defendant in a previous case but did not remember that he had done so. In *Newberry*, defense counsel served as head of the County State's Attorney's Criminal Division while the case was being prepared, but because he was not involved in the prosecution of the defendant, the court held that there was no per se conflict.

54. *See Professional Ethics Opinion No. 374*, 60 ILL. B. J. 664 (1972), which finds nothing improper about special assistant attorneys general limited to non-criminal cases taking on criminal defense responsibilities. The Ethics Committee determined that in this situation no actual conflict of interest exists and a possible conflict could not reasonably be anticipated.

Even after the decision in People v. Cross, 30 Ill. App. 3d 199, 331 N.E.2d 643 (4th Dist. 1975), which found a per se conflict, the Ethics Committee refused to alter its position. The Committee felt that the *Cross* decision was "not required by the principles of professional ethics." *Professional Ethics Opinion No. 572*, 66 ILL. B. J. 109, 110 (1977). Because special assistants represent the state in different matters than those involved in their private employment, the Committee determined that "representation of the state is not likely to adversely affect the exercise of independent professional judgment" in their clients' behalf. *Id.*

55. 76 Ill. 2d at 424-25, 392 N.E.2d at 1348.

56. *See* People v. Coslet, 67 Ill. 2d at 133-34, 364 N.E.2d at 70; People v. Kester, 66 Ill. 2d at 168, 361 N.E.2d at 572; People v. Meyers, 46 Ill. 2d at 151, 263 N.E.2d at 82; People v. Stoval, 40 Ill. 2d at 113, 239 N.E.2d at 443.

Nevertheless, the court buttressed its position by asserting that the 1978 Code of Conduct for special assistants, prohibiting criminal defense work without the defendant's waiver of the resulting conflict of interest,[57] reflects the Attorney General's own concern about possible conflicts of interest.[58] The court's contention, however, may be inaccurate. By 1978, the Attorney General was confronted with two uncontradicted appellate decisions finding a per se conflict of interest when special assistants served as criminal defense counsel.[59] The Code might reflect no more than the case law of the time.[60]

Second, the court's position on waiver indicates that it did not consider prejudice a probable consequence of representation by a special assistant. In previous per se cases, the court has recognized that the right to counsel free of the conflict could be waived but sought to discourage the practice by warning that effective waiver is virtually impossible.[61] The *Fife* opinion contains no such admonition. Rather, the court, by asserting that disclosure and waiver nullify or ameliorate the problem,[62] encouraged the Attorney Gen-

57. 76 Ill. 2d at 421, 392 N.E.2d at 1346-47.

58. *Id.* at 424, 392 N.E.2d at 1348.

59. By 1978, when the Code of Conduct was revised, both the first and fourth appellate districts had applied the per se rule to special assistants. *See* People v. Pendleton, 52 Ill. App. 3d 241, 367 N.E.2d 196 (1st Dist. 1977), *cert. denied*, 435 U.S. 956 (1978); People v. Cross, 30 Ill. App. 3d 199, 331 N.E.2d 643 (4th Dist. 1975).

60. In his brief submitted to the Court in *Fife*, the Attorney General's position was that "an attorney's part-time work for the Attorney General in areas unrelated to criminal prosecution should not prevent that attorney from representing criminal defendants. . . . Any conflicts that may arise in a stituation such as the case at bar are inevitably more speculative than real." Brief for Plaintiff-Appellant at 7, 20.

61. In the seminal per se decision, the court explained that "[t]he difficulty in appropriately advising an accused of this right [to counsel] almost directs that counsel, especially one appointed, be free from any such conflict." People v. Stoval, 40 Ill. 2d at 114, 239 N.E.2d at 444. *Coslet* illustrates the virtual impossibility of obtaining an effective waiver of the constitutional violation arising out of a per se conflict. Although the defendant knew that her attorney also represented her husband's estate, there was nothing in the record to indicate that she knew the "subtleties" of the laws of distribution and descent, and the effect her conviction would have on her right to inherit. Furthermore, there was no indication that she understood the duties of her attorney to the estate, the fiduciary relationship between the administrator and the heirs, and other legal and ethical problems involved in the lawyer-client relationship. Therefore, the court concluded that she did not waive the conflict of interest arising out of the attorney's duties to the estate of her husband. People v. Coslet, 67 Ill. 2d at 135, 364 N.E.2d at 71. Regarding waiver of constitutional rights *see generally* Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEX. L. REV. 193 (1977); Tigar, *The Supreme Court, 1969 Term-Foreward: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1 (1970).

62. The court's unusual readiness to accept waiver of the right to counsel free of the conflict set forth in *Fife* is also demonstrated in subsequent cases. In People v. Eddington, 77 Ill. 2d 41, 394 N.E.2d 1185 (1979), and People v. Lykins, 77 Ill. 2d 35, 394 N.E.2d 1182 (1979), the court held that the defendants waived their claims of ineffective assistance due to their attorneys' status as special assistants by failing to raise the issue in the trial court. This appears inconsistent with the court's position in the previous per se cases, which indicated that the mere failure of the accused to object to representation by an attorney with a conflict of interest does not constitute a waiver of the right to effective assistance, even if the defendant is fully aware of the facts surrounding the possible conflict. *See* Ehrmann, *The Per Se Conflict of Interest Rule in Illinois*, 66 ILL. B. J. 578, 581 (1978).

eral to use waiver. If the court considered subliminal pressure an actual threat to counsel's loyalty, then its position on waiver undermines its desire to safeguard effective counsel. "Subliminal" means "existing or functioning outside the area of conscious awareness."[63] If defense counsel is being unconsciously pressured, it seems improbable that waiver by the accused will have any curative effect upon the impairment of counsel. The threat to effective counsel would remain.

Ready acceptance of waiver, along with the decision to deny retroactive effect of the per se rule,[64] indicate that the court did not perceive this situation as posing a meaningful threat to the right to counsel. The court was more concerned with the appearance of impropriety. In this regard, disclosure and waiver will have a curative effect because the defendant will be apprised of the situation, and the court will be relieved of the burden of having to search the record for specific instances of prejudice.

The use of the per se rule solely to avoid an apparent impropriety is a misapplication of the rule as developed by earlier decisions. The rule was first employed to relieve the defendant of the difficult task of proving prejudice in a case fraught with the danger of prejudice.[65] In subsequent cases, the court was careful to restrict the rule to situations where it believed that prejudice was a realistic concern.[66] In *Fife*, the court exceeded this standard and applied the rule to an impropriety that it did not consider a likely source of prejudice.

### *Critical Analysis of the Prospectivity Holding*

In a decision such as *Fife*, promulgating a new constitutional rule, an important corollary issue is whether the rule should be applied retroactively.[67]

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63. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2275 (1968).

64. *See* notes 67-76 and accompanying text *infra*.

65. *See* notes 17-22 and accompanying text *supra*.

66. *See* People v. Franklin, 75 Ill. 2d 173, 387 N.E.2d 685 (1979) (no conflict of interest where defense attorney was not actually aware that he prosecuted the defendant in a previous case); People v. Newberry, 55 Ill. 2d 74, 302 N.E.2d 34 (1973) (no inherent prejudice when defense counsel merely served as head of State's Attorney's criminal division while defendant's case was being prepared and was not active in the prosecution of defendant).

67. At common law, all decisions were applied retroactively. Currier, *Time and Change in Judge Made Law: Prospective Overruling*, 51 VA. L. REV. 201, 205-06 (1965). As Justice Holmes wrote, "[j]udicial decisions have had retroactive effect for near a thousand years." Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (Holmes, J., dissenting). *See, e.g.*, Norton v. Shelby County, 118 U.S. 425, 442 (1886) (statute subsequently declared unconstitutional is as inoperative as though never enacted). The common law position rests upon the Blackstonian concept that judges do not proclaim the law but merely discover the already existing law Under this view, because the law preexists the decision, the decision should have retroactive effect. *See generally* Rossum, *New Rights and Old Wrongs: The Supreme Court and The Problem of Retroactivity*, 23 EMORY L.J. 381, 385-89 (1974); Note *Retroactivity*, 4 MEM. ST. U. L. REV. (1974).

Although the United States Supreme Court first applied non-constitutional decisions prospectively as early as the mid-nineteenth century, *see, e.g.*, Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175, 205-06 (1863); Havemeyer v. Iowa County, 70 U.S. (3 Wall.) 294, 303 (1865), pro-

The United States Supreme Court has employed specific criteria for determining this issue in criminal procedure decisions.[68] When the *Fife* prospectivity holding is compared with these criteria, it becomes apparent that the Illinois court has reached a decision inconsistent with the rationale underlying the per se rule.

Initially, the Supreme Court examines the purpose of a new constitutional rule.[69] That purpose requires a finding for retroactivity if the new rule was designed to correct a defect at trial that called past guilty verdicts into question.[70] By contrast, prospective application is required when the rule is not designed to promote reliability at trial, but to deter unlawful police conduct through an exclusionary rule.[71] In cases between these two extremes, such as where the rule affects trial accuracy but the likelihood of past unfairness is slight, the Court weighs the purpose against the degree of reliance upon past authority and the burden of retrials.[72]

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spectivity in constitutional decisions is a far more recent phenomenon. In Linkletter v. Walker, 381 U.S. 618 (1965), the Court first departed from its practice of retroactively applying constitutional decisions by prospectively applying the exclusionary rule promulgated in Mapp v. Ohio, 367 U.S. 643 (1961). The *Linkletter* Court held that the Constitution neither requires nor prohibits retroactivity, but that a court should weigh the merits of a decision, and examine its history, purpose, and effect in determining whether to apply it retroactively. 381 U.S. at 629. *See generally*, Note, *A La Recherche Du Temps Perdu: Retroactivity and the Exclusionary Rule*, 54 N.Y.U.L. REV. 84 (1979).

68. Frequently, these criteria are listed as a three-pronged test consisting of the purpose of the new rule, the degree of reliance by law enforcement on the old rule, and the burden of a retroactive application on the criminal justice system. *See generally*, Note, *Retroactivity*, 4 MEM. ST. U. L. REV. 521 (1974).

69. Desist v. United States, 394 U.S. 244, 249 (1969). Justice Marshall has stated that purpose is the only criteria the Court has employed; other factors are cited only to support the Court's decision. Michigan v. Payne, 412 U.S. 47, 61 (1973) (Marshall, J., dissenting).

70. Gosa v. Mayden, 413 U.S. 665, 679 (1973); Williams v. United States, 401 U.S. 646, 653 (1971). The proof beyond a reasonable doubt standard espoused in *In re* Winship, 397 U.S. 358 (1970), was retroactively applied in Ivan v. City of New York, 407 U.S. 203, 205 (1972). The right to counsel at arraignments required by White v. Maryland, 373 U.S. 59 (1963), was retroactively applied in Arsenault v. Massachusetts, 393 U.S. 5, 6 (1968). Also, the sixth amendment rights to counsel at trial and on appeal have been retroactively applied. McConnell v. Rhay, 393 U.S. 2, 3 (1968).

A second purpose requiring full retroactivity is found in decisions holding that the trial court lacked jurisdiction. Michigan v. Payne, 412 U.S. 47, 61 (1973) (Marshall, J., dissenting). *See* Ashe v. Swenson, 397 U.S. 436, 437 (1970), and Robinson v. Neil, 409 U.S. 505, 511 (1973), which retroactively applied double jeopardy decisions. In these cases, retroactivity was required because the purpose of the new constitutional rule was to prevent a trial from taking place at all. *Id.* at 508-10.

71. *See, e.g.*, Williams v. United States, 401 U.S. 646, 653-54 (1971) (prospectively applied Chimel v. California, 395 U.S. 752 (1969), which narrowed the scope of permissible searches incident to arrest); Desist v. United States, 394 U.S. at 254 (prospectively applied Katz v. United States, 389 U.S. 347 (1967), which prescribed an exclusionary rule for evidence obtained through unlawful eavesdropping); Linkletter v. Walker, 381 U.S. at 639-40 (prospectively applied Mapp v. Ohio, 367 U.S. 643 (1961), which imposed the exclusionary rule on the states for fourth amendment violations).

72. Desist v. United States, 394 U.S. at 251. *See, e.g.*, Stovall v. Denno, 388 U.S. 293 (1967). *Stovall v. Denno* held that United States v. Wade, 388 U.S. 218 (1967), and Gilbert v.

The rule in *Fife* is designed to remove an impediment to the fact-finding process by ensuring that defense counsel will not be restrained by a conflict of interest. Under the Supreme Court's criteria, also employed by Illinois to determine the issue in constitutional decisions,[73] this purpose favors a retroactive application. Only if the court determines that the likelihood of past unfairness is not substantial can it deny the rule retroactive effect under the Supreme Court's analysis.

This assessment of prejudice, however, would violate the rationale underlying the per se rule. The rule presumes prejudice because a reviewing court is unable to judge accurately the prejudicial impact of a conflict of interest.[74] The rule was designed to avoid "nice calculations" of prejudice.[75] Despite this principle, the court in *Fife* set forth a prospectivity holding that must have been based upon a calculation of insufficient prejudice in prior cases.

Because the per se rule rests upon suspicion of potential conflicts of interest, the court should not have refused to question past convictions. In view of the difficulty of proving actual prejudice, the court has left those already convicted without an effective remedy for the wrong the court has described.[76] This lack of concern about the accuracy of past convictions is further evidence that the court considered the impropriety arising out of representation by a special assistant more superficial than substantial.

## IMPACT OF *FIFE*

*Fife* will have a significant impact on defense attorneys and the Attorney General. The degree of that impact will depend upon how broadly the deci-

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California, 388 U.S. 263 (1967), had only prospective effect. *Wade* and *Gilbert* require the exclusion of identification evidence obtained by a post-indictment line-up at which the right to counsel was denied. Although this rule was designed to improve the reliability of identification evidence, the Court felt that the likelihood of past unfairness was too weak to require retroactive application. Stovall v. Denno, 388 U.S. at 298-99. *See generally*, Note, *Criminal Procedure—Photo Identification—Stovall Prospectivity Rule Invoked to Avoid Extension of Right to Counsel*, 43 N.Y.U.L. REV. 1019 (1968).

73. *See* People v. Ellis, 53 Ill. 2d 390, 292 N.E.2d 728 (1973) (prospectively applied an Illinois search and seizure decision using Supreme Court's criteria); People v. Williams, 44 Ill. 2d 334, 255 N.E.2d 385 (1970). *See also* People v. Hubert, 51 Ill. App. 3d 394, 366 N.E.2d 909 (1st Dist. 1977); Mertes v. Lincoln Park Fed. Sav. and Loan Assoc., 34 Ill. App. 3d 557, 340 N.E.2d 25 (1st Dist. 1975) (applied same criteria to determine retroactive effect of a civil decision).

74. *See* notes 18-22 and accompanying text *supra*.

75. *See* note 15 and accompanying text *supra*.

76. Writing for a majority of the United States Supreme Court in a recent multiple representation decision, Chief Justice Burger stated:

> It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even 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 in plea negotiations would be virtually impossible.

Holloway v. Arkansas, 435 U.S. at 490-91.

sion is interpreted. Unless waiver becomes a common phenomenon, even a narrow interpretation will require several attorneys to choose between serving as appointed defense counsel and accepting part time employment as special assistant attorneys general. In 1978, nearly two percent of the registered attorneys in Illinois were special assistant attorneys general.[77] In nine counties, one third or more of the registered attorneys were special assistants.[78] Although significant, these figures do not reflect the true impact of *Fife* because they do not include law firm affiliations.[79] For example, in Menard County, where Fife was tried, only three of eleven registered attorneys were special assistants in 1978. If law firm affiliations are considered, however, all eleven would have been excluded from appointed defense work under the per se rule set forth in *Fife*.[80]

These statistics indicate the likely difficulty of obtaining court-appointed counsel in small downstate counties should local attorneys choose to retain their status as special assistants.[81] On the other hand, if attorneys sever their relationships with the Attorney General, the office stands to lose the pool of local talent on which it has come to depend.

A broader interpretation of *Fife* would include privately retained counsel in its per se ban. Although the attorney in *Fife* was appointed, the general language of the court's holding could easily support the broader interpretation.[82] If so interpreted, it seems likely that defense attorneys and their associates will decline to accept part-time employment by the Attorney General at the risk of injuring their private practice.

Further, the court's rationale may be stretched to include private counsel retained by state agencies, because they serve only at the pleasure of the Attorney General and, at least in theory, are subject to the officer's con-

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77. *Annual Report of the Attorney Registration and Disciplinary Committee of the Supreme Court of Illinois* (1978) shows 29,972 registered attorneys either employed, practicing, or residing in Illinois. Statistics prepared by the administration division of the Attorney General's Office show that in 1978, 459 attorneys served as special assistants in some capacity. Appendix, Brief for Plaintiff-Appellant at 19.

78. For example, in Pulaski County, 66.7% of the registered attorneys were special assistants. Other examples are Cumberland: 42.9%, Brown: 43%, Hamilton: 37.5%. Appendix, Brief for Plaintiff-Appellant at 1-5.

79. The per se rule is also applicable when another attorney in defense counsel's firm is a special assistant. 76 Ill. 2d at 425, 392 N.E.2d at 1348.

80. Brief for Plaintiff-Appellant at 4, 6 n.4.

81. The impediment to obtaining appointed counsel was one factor leading a panel of fourth appellate district justices to reject the per se rule for special assistants in People v. Crawford Distrib. Co., 65 Ill. App. 3d at 795, 382 N.E.2d at 1227, *aff'd*, 78 Ill. 2d 70, 397 N.E.2d 1362 (1979).

82. The court said, "[W]e hold that a conflict of interest exists where *defense counsel* is a Special Assistant Attorney General. . . " (emphasis added). 76 Ill. 2d at 424, 392 N.E.2d at 1348. The court did not expressly state whether it intended to restrict the rule to appointed counsel; however, it can be argued that the per se rationale applies only to appointed counsel. *See* note 39 *supra*.

trol.[83] Until the scope of *Fife* is more clearly delineated in subsequent decisions, defense attorneys should be wary of any relationship with the state. They should also disclose any work that they, or their associates, do for state officers or agencies.

In addition to the direct impact upon attorneys working for the state, *Fife* will have important effect as precedent. In *Fife*, the court applied the per se rule to a conflict of interest far more remote than in previous cases.[84] Because of the broad application of the per se rule, the case could be used to support any conceivable argument of possible subliminal pressure on defense counsel in a given situation. Rather than minimize unfounded charges of disloyalty, *Fife* may increase their frequency.[85]

## AN ALTERNATIVE APPROACH: A PROCEDURAL RULE RATHER THAN A CONSTITUTIONAL HOLDING

In *Fife*, the court could have avoided the inconsistency between its per se holding and its position on waiver and retroactivity. Analysis of the court's rationale indicates that the court was more concerned with avoiding an apparent impropriety than with eliminating a realistic threat to effective counsel.[86] Under these circumstances, the court should have avoided its con-

83. By the end of the seventeenth century, the common law attorney general was not only the king's chief litigator but was advisor to the government by sitting in the House of Commons. *See* 7 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 463-65 (1924). The Illinois Attorney General inherited all the powers and duties of that common law officer through the Illinois Constitution. Under these circumstances, the Attorney General is the sole counsel and advisor to all Illinois executive officers, boards, commissions, and departments. Fergus v. Russel, 270 Ill. 304, 341, 110 N.E. 130, 145 (1915); F.E.P.C. v. Rush Presbyterian-St. Luke's Medical Center, 41 Ill. App. 3d 712, 715, 354 N.E.2d 596, 599 (1st Dist. 1976).

This duty does not require, however, that the Attorney General's staff appear in every suit. Rather, it is within the common law powers of the office to permit state agencies to retain private counsel who serve at the pleasure of the Attorney General and subject to his or her control. People v. Illinois State Toll Highway Comm'n, 3 Ill. 2d 218, 238, 120 N.E.2d 35, 45 (1954). Mere acquiescence to an agency's retention of private counsel is sufficient consent by the Attorney General. F.E.P.C. v. Rush Presbyterian-St. Luke's Medical Center, 41 Ill. App. 3d at 715, 354 N.E.2d at 599. Because those attorneys serve at the pleasure of the Attorney General, it can be argued that they too may be restrained by an unwillingness to antagonize the officer, should they choose to serve as criminal defense counsel.

84. *See* notes 17-45 *supra* and accompanying text *supra*.

85. The court has already begun to restrict the operation of the per se rule. In People v. Robinson, 79 Ill. 2d 147, __ N.E.2d __ (1979), (modified on denial of rehearing, Feb. 1, 1980), the court held that a public defender's office should not be treated as a private law firm in a conflict of interest analysis. A conflict of interest that disqualifies one member of a public defender's office will not similarly disqualify all members. *Id.* at 158-59. The court reasoned that it is better to have a skilled public defender represent the accused than appoint outside counsel who are often unskilled in the practice of criminal law. *Id.* at 159. This retreat from the broad application of the per se rule in *Fife* has met with criticism from public defenders. *See* THE NATIONAL LAW JOURNAL, Nov. 12, 1979, at 7, col. 1. The court also has refused to apply the per se rule to a public defender who, while representing a defendant in a post-conviction hearing, alleged that his predecessor in office rendered ineffective assistance to the defendant. *See* People v. Walton, 78 Ill. 2d 197, 399 N.E.2d 588 (1979).

86. *See* notes 53-76 and accompanying text *supra*.

stitutional holding and promulgated a non-constitutional procedural rule based solely on policy grounds.[87]

The Supreme Court of California in *People v. Rhodes*[88] considered an impropriety analogous to the problem of defense work by special assistants. In *Rhodes*, a city attorney with prosecutorial responsibilities was appointed to represent a criminal defendant. The court found this appointment improper and reversed the conviction, holding that a city attorney could not represent a criminal defendant.[89] Although Rhodes argued that he was denied the effective assistance of counsel, the court avoided the constitutional issue.[90] Instead, the court promulgated its holding as a judicially-declared rule of criminal procedure.[91]

A similar approach would have been appropriate in *Fife*. The court could have set forth a procedural rule prohibiting judges from appointing special assistant attorneys general as defense counsel without the defendant's informed consent to the appointment. The rule would be grounded solely in the policy objective of removing an apparent impropriety. It would both remove a cause of anxiety for the accused and minimize unfounded charges of disloyalty.[92]

The rule should be restricted to appointed counsel because the apparent impropriety is more visible when the court appoints a special assistant to represent the accused. This restriction is also in keeping with the greater

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87. Each state is free to promulgate its own rules of criminal procedure. Spencer v. Texas, 385 U.S. 554, 569 (1967); United States v. Pate, 406 F.2d (7th Cir. 1969), *cert. denied*, 397 U.S. 938 (1970). The Illinois Supreme Court has the inherent power to make rules governing the practices in inferior courts, including regulation of jury trials. People v. Lobb, 17 Ill. 2d 287, 161 N.E.2d 325 (1959). These procedural rules cannot alter substantive rights. *In re* Oliver, 452 F.2d 111 (7th Cir. 1971). However, they carry the effect of law when promulgated by the supreme court. Jones v. Reuss, 70 Ill. App. 2d 418, 219 N.E.2d 754 (1966).

88. 12 Cal. 3d 180, 524 P.2d 363, 115 Cal. Rptr. 235 (1974).

89. *Id.* at 187, 524 P.2d at 368, 115 Cal. Rptr. at 240.

90. *Id.* at 187, n.13, 524 P.2d at 368, 115 Cal. Rptr. at 240.

91. *Id.* at 185, 524 P.2d at 366, 115 Cal. Rptr. at 238. The *Rhodes* court reasoned that even if counsel's loyalty is unaffected by his or her prosecutorial responsibilities, public confidence in the criminal justice system is shaken by the apparent impropriety of the situation. *Id.* at 186, 524 P.2d at 367, 115 Cal. Rptr. at 239.

92. These policy factors have also influenced the court in its per se decisions. *See, e.g.*, People v. Stoval, 40 Ill. 2d 109, 113, 239 N.E.2d 441, 444 (1968). These same considerations led the appellate court in *People v. Fife* to conclude that the per se rule exists to protect the accused from actual conflicts of interest as well as the anxiety caused by the mere appearance of dual allegiance. 65 Ill. App. 3d 805, 807, 382 N.E.2d 1234, 1236 (4th Dist. 1975), *aff'd* 76 Ill. 2d 418, 392 N.E.2d 1345 (1979).

Other state courts have recognized the importance of avoiding apparent impropriety. For example, the South Dakota Supreme Court has noted:

> There is a very real need to assure defendants in particular and the public in general that justice is in fact being administered fairly and impartially in all criminal cases. The courts can take one small step toward this goal by foreclosing in as many cases as possible those situations which might result in conflicts of interest, either apparent or real, and resultant claims of ineffective assistance of counsel.

State v. Erickson, 85 S.D. 489, 499, 186 N.E.2d 502, 507, *cert. denied*, 404 U.S. 845 (1971).

scrutiny that the court applies to appointed counsel.[93] Apart from the proposed rule, retained counsel remain ethically required to disclose any contrary personal interests to a client[94] and to avoid the appearance of impropriety.[95]

Further, the procedural rule provides the same curative elements of disclosure and consent that the court emphasized in the constitutional holding. In this context, however, they do not assume the appearance of encouraging the waiver of the right to counsel.[96] Also, the rule's purpose will favor prospective application because the procedural rule rests upon a policy decision to avoid the appearance of impropriety, rather than on a constitutional violation. The procedural decision would be similar to the United States Supreme Court's exclusionary rule decisions that are uniformly applied prospectively:[97] the accuracy of the trial is not questioned, but the rule is designed to deter future improper governmental conduct. Despite a prospective application, the court could still reverse Fife's conviction for the same reasons as in the constitutional decision.[98]

Finally, the procedural rule avoids the harsh impact of the per se ban. Because the rule would be restricted to appointed counsel, attorneys are less likely to sever their relationships with the Attorney General and other state officers and agencies. By avoiding the constitutional holding, the court would have refrained from applying the per se rule to a case where the conflict is far more remote than in other per se cases. That limitation would reduce the untoward legal impact of *Fife* as precedent for any conceivable argument involving subliminal pressure in a given instance. Additionally, the procedural approach provides the court with the flexibility to deal with apparent improprieties solely at the public policy level. The court would remain free to employ the per se rule to the type of situation that fostered the rule: a case "fraught with the dangers of prejudice which the cold record might not indicate."[99]

## CONCLUSION

*People v. Fife* forces Illinois attorneys doing part-time work for the Attorney General's office to make a choice. These attorneys must sever their relationships with the Attorney General or limit their criminal defense work to

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93. *See* note 38 *supra*.

94. ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY, D.R. 5-101 (A).

95. *Id.* Canon 9. *Ethics Opinion No.* 572, stating that the per se rule for special assistants was not required by the principles of professional ethics, still encouraged disclosure in this situation to avoid the appearance of impropriety. 66 ILL. B.J. 109, 110 (1977).

96. The *Fife* court's emphasis on the curative aspect of waiver appears to encourage its use. *See* notes 62-63 and accompanying text *supra*.

97. *See* note 71 *supra*.

98. *See* note 51 *supra*.

99. People v. Stoval, 40 Ill. 2d at 112-13, 239 N.E.2d at 443, *quoting* United States v. Myers, 253 F. Supp. at 57. *See* notes 17-22 and accompanying text *supra*.

cases in which they can obtain knowing and effective waiver of the resulting conflict of interest. If interpreted very broadly, *Fife* also will affect attorneys doing work for state administrative agencies and other state officers. If special assistants choose to continue their part time government employment, the decision could have a detrimental impact on the availability of appointed defense counsel in small downstate counties.

Although the per se holding in *Fife* probably will go unchallenged,[100] the decision is still likely to stimulate litigation. Because the court applied the per se rule to a potential conflict of interest far more remote than in previous cases, it will be required to consider the extent of the per se rule in subsequent cases. To avoid overextension of the rule, the court should present more detailed analysis in future per se cases, and should employ the non-constitutional procedural rule approach whenever possible.

*Stanley C. Nardoni*

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100. The Attorney General has not petitioned the United States Supreme Court for certiorari. His decision may have been influenced by the Court's recent denial of certiorari to People v. Pendleton, 52 Ill. App. 3d 241, 367 N.E.2d 196 (1st Dist. 1977), *cert. denied*, 435 U.S. 956 (1978), which had found a per se conflict when special assistants engage in criminal defense work.

Even though *Fife* is not likely to be reviewed by the United States Supreme Court, the conflict of interest question may reach the lower federal courts. Those prosecuted for offenses occurring before the *Fife* opinion was filed were not given the benefit of the court's holding. They remain free to seek habeas corpus relief on the conflict of interest ground. Their success would be doubtful in the seventh circuit, since the court of appeals requires a showing of prejudice unless counsel's conflict of interests relates to the result of the case or permeates it entirely. United States v. Gaines, 529 F.2d 1038, 1044 (7th Cir. 1976). *See* United States v. Kidding, 560 F.2d 1303, 1311 (7th Cir. 1976), *cert. denied*, 434 U.S. 872 (1977) (because no prejudice resulted, joint representation of clients with conflicting defenses did not violate right to counsel); United States v. Jeffers, 520 F.2d 1256 (7th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976) (prosecution witness was defense counsel's former client, but no constitutional violation occurred because record did not evidence divided loyalty).