Spring 1985

When Constitutional Rights Clash: The Duty of the Trial Judge in Cases Involving Multiple Representation of Criminal Defendants

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Recommended Citation
Available at: http://scholar.valpo.edu/vulr/vol19/iss3/3
NOTES

WHEN CONSTITUTIONAL RIGHTS CLASH: 
THE DUTY OF THE TRIAL JUDGE IN 
CASES INVOLVING MULTIPLE REPRESENTATION 
OF CRIMINAL DEFENDANTS

The representation of more than one defendant in a criminal trial by a single attorney creates dangers that should not be ignored by the trial judge. Unfortunately, many judges either ignore or underestimate the dangers of joint representation before and during trial and do not conduct hearings or other procedures designed to determine whether a conflict of interest may exist. When this happens, a jointly represented defendant who is ultimately convicted will often bring a post-conviction writ alleging that because his attorney represented another defendant, a conflict of interest deprived him of his sixth amendment right to the effective assistance of counsel.

1. When one attorney or law firm represents two or more defendants in a single criminal trial, it is commonly referred to as either joint or multiple representation. The problems involved in multiple representation can occur in both the civil and criminal context. See, e.g., Judd, Conflicts of Interest, 44 FORDHAM L. REV. 1097, 1107 (1976) (describing types of conflicts in civil cases). This note deals exclusively with the problems of joint representation in criminal cases, which are more likely to endanger constitutional rights because only in a criminal case does a defendant have the sixth amendment right to counsel. See Powell v. Alabama, 287 U.S. 45 (1932); see infra note 93. Conflicts of interest can develop from joint representation in civil cases, and may give rise to ethical questions regarding an attorney’s duty to adequately represent the best interests of his clients. However, there is no right to counsel in civil cases, and thus the problem is not as constitutionally significant as in a criminal case. See, e.g., Watson v. Moss, 619 F.2d 775 (8th Cir. 1980) (stringent standards of effective assistance of counsel mandated by the sixth amendment do not apply to civil proceedings). Joint representation also applies to attorney’s “associated in the practice of law.” See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(D) (providing that if “a lawyer is required to decline employment or to withdraw from employment because of a potential conflict, no partner or associate of his or her firm may accept or continue such employment.”); ABA STANDARDS RELATING TO THE DEFENSE FUNCTION, § 3.5(b) (Approved Draft 1971) (applicable to “a lawyer or lawyers who are associated in practice.”) The term “joint counsel” as used in this note refers to the single attorney who is representing one of more defendants in a criminal trial.

2. See infra notes 114-16 and accompanying text.

3. A defendant cannot make a direct appeal of his conviction based solely upon alleged conflicts due to joint representation. A defendant cannot directly appeal because if he fails to object to his joint representation at trial, the court assumes he has waived his right to separate representation. Whether any conflicts actually
The dangers of joint representation are so great that some writers and a few courts advocate the disqualification of joint counsel in every criminal trial. This solution would certainly eliminate any conflicts. However, the disqualification of counsel directly implicates another constitutional right embodied in the sixth amendment: the right of a criminal defendant to retain the attorney of his choice, and even to dispense with an attorney altogether if he so chooses. In all joint representation situations, a trial judge must choose between two alternatives. He must either allow joint representation to continue or he must disqualify joint counsel. Whichever choice he makes will to some extent endanger one of these two conflicting sixth amendment rights: the right to effective assistance of counsel versus the right to counsel of choice.

The trial judge has the difficult task of delicately balancing these rights. On one side, he must weigh the potential dangers that are

arose due to this joint representation is therefore not a question that an appellate court can consider. See Cuyler v. Sullivan, 446 U.S. 335 (1980) (contemporaneous objection rule applies to joint representation cases). Therefore, to obtain post-conviction relief of this issue, a defendant must normally file a writ of habeas corpus. This writ is an extraordinary procedure, but one of its primary uses involves the allegation of ineffective counsel. Pursuant to 28 U.S.C. § 2254 “an application for writ of habeas corpus . . . shall not be granted unless it appears the applicant has exhausted remedies available in the courts of the state . . . .” Since non-objection to joint representation is considered an implied waiver of the right to separate representation, appellate remedies are exhausted and a defendant may file a federal or state habeas claim of ineffective counsel. On habeas review, a defendant must satisfy the Cuyler standard in order to obtain relief. See infra text accompanying notes 55-65.

4. See infra note 79.

5. The right to choice of counsel is derived from the 1975 Supreme Court case, Farretta v. California, 422 U.S. 806 (1975), which held that a criminal defendant has the absolute right to represent himself unassisted by counsel. Some commentators argue that it appears to follow from this right in Farretta that a criminal defendant has a correlative right to proceed with whatever assistance he chooses, including joint counsel burdened by conflicts of interest. See, e.g., Hyman, Joint Representation of Multiple Criminal Defendants in a Criminal Trial: The Court’s Headache, 5 Hofstra L. Rev. 315, 320 (1977). Hyman argues that since a defendant has the prerogative to waive his right to the assistance of counsel, he would appear to have a fortiori the power to waive his right to the effective assistance of counsel and proceed with joint counsel. Many Courts agree with this reasoning and thus allow a defendant to be jointly represented out of respect for his constitutional right to counsel of choice. See United States v. Curcio, 680 F.2d 881, 884 (2d Cir. 1982); United States v. Armedo-Sarmiento, 524 F.2d 591 (2d Cir. 1975) (per curiam); United States v. Garcia, 517 F.2d 272 (6th Cir., 1975). However, because of additional concerns that are present when counsel represents two or more defendants that do not arise when a defendant represents himself, the above a fortiori argument probably does not apply to the joint representation context. For a discussion of these additional concerns see infra text accompanying notes 88-92.

6. See infra note 108.
present in every joint representation case to adequately protect a defendant's right to conflict-free counsel. The current practice in many jurisdictions allows the judge to merely assume, absent any objection, that no conflicts exist. This view is based on the theory that any conflicts that do arise are impliedly waived. Due to the dangers of joint representation and its impact on the constitutional rights of criminal defendants, this approach cannot continue.

The purposes of this note are (1) to explain the dangers that lurk in the background of almost every multiple representation case, (2) to examine the current approaches to these problems, both as applied by the courts and as suggested by commentators, (3) to explain why most of these approaches are not working, and (4) to propose a solution that is both viable under constitutional standards and can be at the same time realistically applicable to the trial court setting. The approach suggested will ideally prevent most conflicts from arising, while leaving room for a defendant's valid exercise of his right to counsel of choice.

I. THE DANGER OF CONFLICTS OF INTEREST INHERENT IN MULTIPLE REPRESENTATION

A. Types of Conflicts

When an attorney represents multiple defendants in a single criminal case, conflicts of interest develop both in ways that are readily apparent to the attorney and in ways that are highly unforeseeable before trial. Perhaps the most foreseeable example of a conflict occurs where co-defendants offer antagonistic defenses. For instance, a con-
Conflict arises when one defendant attempts to clear himself by implicating a co-defendant. The single attorney in this situation is forced to represent two defendants whose interests are completely in opposition. He must decide whether or not to attack the credibility of the inculpating defendant in order to properly defend the defendant inculpated. But if he chooses to do so, the attorney will breach his ethical duty to defend the testifying defendant to the fullest extent possible. If he chooses not to do so, he will likewise be in breach of the same ethical duty he owes to the inculpated defendant.

Special problems confront the attorney when co-defendants testify at trial. Even when co-defendants intend to present a unified defense strategy, the pressures of trial may force a defendant to inadvertently testify to something which tends to harm his co-defendant. Likewise, testimony inculpating the petitioner. Id. at 433. See also Hawaii Supreme Court Disciplinary Board, Formal Opinions, No. 78-1-12 (1978) (existence of inconsistent defenses constitutes one reason for finding multiple representation of criminal defendants a violation of ethical standards).

11. See, e.g., Smith v. Anderson, 689 F.2d 59, 66 n.9 (6th Cir. 1982). In Smith, X and Y were jointly represented against a robbery charge. Their defenses were antagonistic because X admitted being in the store when it was robbed and was implicated by all but one res gestae witness, while Y himself claimed he was not at the scene of the robbery and was implicated by only one res gestae witness. The court held that counsel's ability to bolster Y's defense suffered due to counsel's inability to highlight the lesser number of witnesses adverse to Y and lesser incriminating acts to which those witnesses testified. Thus, Y was denied the effective assistance of counsel. Id. at 64-66.

12. The ABA Canons of Professional Ethics Nos. 4, 6, and 7 (1970) require an attorney to be loyal, competent, and zealous. A conflict may make it impossible for counsel to simultaneously adhere to these principles of conduct. If counsel tempers the aggressiveness of his representation to accommodate a conflict or to prevent its emergence, he is failing to zealously represent one of his clients. Likewise, if he decides not to adopt a certain approach or defense that would aid one of his clients to prevent harming another, his loyalty and even his competence may be called into question. See, e.g., United States v. Donahue, 560 F.2d 1039, 1045 (1st Cir. 1977) (alternative strategy available for one co-defendant but harmful to another; conflict because defendant and co-defendant represented by members of the same firm); Alvarez v. Wainwright, 522 F.2d 100, 101 (5th Cir. 1975) (attorney who advised against petitioner testifying at trial on ground that it would hurt co-defendant who was also attorney's client rendered ineffective assistance to petitioner).

13. In a unified defense strategy, each co-defendant attempts to present the same story and this eliminates many of the problems of antagonistic defenses between co-defendants. The advantages of this strategy are discussed infra notes 98-105 and accompanying text.

14. See, e.g., State v. Goode, 84 S.D. 369, 171 N.W2d 733 (1969) (A defendant testifying at trial may exculpate a co-defendant and inculpate himself in the process); People v. Perry, 242 Cal. App. 2d 724, 51 Cal. Rptr. 740 (1968) (A defendant may plead guilty, but before he is sentenced, the prosecution calls him as a witness against a co-defendant); Baker v. Wainwright, 422 F.2d 145 (5th Cir. 1980) (A defendant may be impeached in his testimony by a statement that inculpates his co-defendant); United States v. Donahue, 560 F.2d 1039, 1045 (1st Cir. 1977) (alternative strategy available for one co-defendant but harmful to another; conflict because defendant and co-defendant represented by members of the same firm); Alvarez v. Wainwright, 522 F.2d 100, 101 (5th Cir. 1975) (attorney who advised against petitioner testifying at trial on ground that it would hurt co-defendant who was also attorney's client rendered ineffective assistance to petitioner).

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a defendant on the stand may decide to entirely abandon the unified defense and suddenly switch his position, attempting to put sole blame on a co-defendant. The attorney-client privilege will be placed in danger if the attorney now attempts to use confidential information obtained from one defendant to cross-examine the other. In these situations, the attorney is placed in a dilemma which prevents him from meaningfully representing either defendant. For whatever action he chooses, or even if he chooses no action at all, he is breaching a duty which he steadfastly owes to each of his clients.

Conflicts of interest can also arise due to factual circumstances which often require counsel to offer evidence which assists one co-defendant but adversely affects others. Such factual antagonism is probable in almost every multiple representation case, because due to human nature, each defendant's version of the facts is based on his own subjective evaluation and will inevitably be somewhat different than the others. Moreover, in almost every crime that takes place, co-defendants are not identically culpable. Every conspiracy has a leader, and an attorney cannot adequately represent this leader if he also represents a follower.

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States v. DeBerry, 487 F.2d 448 (2d Cir. 1973) (one defendant testified and on cross-examination incriminated his non-testifying co-defendant, represented by the same attorney).

15. The problem is that the attorney may have gained privileged information from one co-defendant that is relevant to cross-examination, but which he refuses to use for fear of breaching his ethical obligation to maintain the confidences of his client. See, Code of Professional Responsibility Canon 4, DR 4-101(B)(2). One situation where this can occur is where defense counsel is unable to cross-examine a prosecution witness effectively because the attorney also represented the witness. See United States v. Mavrick, 601 F.2d 921, 931 (7th Cir. 1979). This problem can also occur when a defendant shifts loyalty or a part of his testimony damages a co-defendant. The attorney is unable to provide effective representation if he has gained from one of his co-defendants privileged information which could help one yet would harm the other. See United States v. Burroughs, 650 F.2d 595, 598 n.4 (5th Cir. 1981).

16. See supra note 12.

17. See, e.g., Ross v. Heyne, 638 F.2d 979, 983 (7th Cir. 1980) (conflict exists where one attorney represents co-defendants and one defendant agrees to provide evidence against the other in return for an advantageous plea bargain). United States v. Kranzthor, 614 F.2d 981, 983 (5th Cir. 1980) (conflict is present "whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a co-defendant whom counsel is also representing"). See also United States v. Huntley, 535 F.2d 1400, 1406 (5th Cir.), cert. denied, 430 U.S. 929 (1977).


Attempts by the prosecution to plea bargain with one of several co-defendants to obtain his testimony against other co-defendants will also give rise to an unresolvable conflict of interest. While it may be in a particular defendant's best interest to accept a government plea offer, his attorney is at a loss to advise him to do so because acceptance of an offer would undoubtedly have an adverse affect on the remaining defendants. But failure to advise a client to accept a plea that is in his best interest would render the attorney's representation ineffective as to this client. In our system of criminal justice, approximately 90 percent of the prosecutions filed are disposed of pursuant to a plea bargain. Attempts to plea bargain are made in vir-

in every count of the alleged conspiracy, therefore making it "immediately apparent from reading the indictment . . . that each defendant's involvement may vary significantly from that of the others." Id. at 904. The judge in Flanagan also found that a conflict was likely to develop since under the factual circumstances of the case, it appeared that defendant Flanagan was the "leader" of the alleged conspiracy. This would mean that the government would probably introduce more evidence tending to implicate defendant Flanagan and thus (a) the jury might infer that the others were also guilty because of the joint representation and (b) defense efforts might be more concentrated toward the defense of Flanagan. Id. at 903. It should be noted that the law firm representing the four co-defendants allegedly wished to present a unified defense, which normally minimizes the likelihood that an unacceptable conflict will arise. The way in which such dangers are minimized is discussed infra text accompanying notes 172-77. The plausibility of such a defense in Flanagan is discussed infra note 173.

20. The plea bargaining process itself has been subject to extensive criticism. In fact, the Supreme Court has expressly left open the question of whether such a bargain is constitutionally permissible. Bordenkircher v. Hayes, 434 U.S. 357, 364 n.8 (1976). See United States v. Laura, 667 F.2d 365, 379-80 (1981) (Stern, J., dissenting) ("where, as here, both elements are merged—where a plea agreement is entered into in order to obtain lenient treatment for a co-defendant represented by the same lawyer—the situation becomes intolerable.").

21. See, e.g., Houmis v. United States, 558 F.2d 182, 186 (3d Cir. 1977) (Gibbons, J., concurring) (guilty plea could have been disallowed for sole reason that petitioner's attorney simultaneously represented two other defendants); Alvarez, 522 F.2d at 105 (attorney who advised against petitioner's acceptance of plea bargain on ground that it would hurt co-defendant who was also attorney's client rendered ineffective assistance to petitioner by sixth amendment standards); United States v. Mari, 526 F.2d 117, 120-21 (2d Cir. 1975) (Oakes, J., concurring) (serious conflicts may arise when one or more jointly represented defendants pleads guilty).


tually every criminal case. Thus, this type of conflict is present in almost every multiple representation case and poses a serious threat to a defendant’s right to the effective assistance of counsel.

Less obvious conflicts can occur due to the necessity of making comparisons between co-defendants in order to represent each defendant’s best interests. A defense lawyer clearly has an obligation to serve the best interests of each of his clients. This obligation includes segregating particular attributes of his client at the expense of the other defendants. Segregation is often necessary during sentencing or plea bargaining, when a lawyer can base his appeal for favorable treatment on the limited involvement of his client as opposed to the others. Similarly, during closing argument at trial, it would constitute a breach of duty to fail to emphasize an individual defendant’s minimal culpability by comparing his conduct with that of a co-defendant. Yet where joint counsel does compare his multiple clients on argument to the jury, courts have held that the second defendant has been denied effective assistance of counsel.

24. See People v. Chacon, 69 Cal. 2d 765, 775, 73 Cal. Rptr. 10, 16, 447 P.2d 106, 112 (1968) (Traynor, C. J.) (Counsel "... must be free to stress particular mitigating elements in his client’s background or other individual mitigating factors that may not apply to a co-defendant. Counsel representing more than one defendant is necessarily inhibited in making such argument ... "); Developments in the Law—Conflicts of Interest in the Legal Profession, 94 HARV. L. REV. 1244, 1381 (1981) (“By making comparisons between defendants, or by failing to make such comparisons, the lawyer will sacrifice the interests of one client to those of another.”). See also supra note 11.

25. In United States v. Unger, 700 F.2d 445, 451 (8th Cir. 1983) two defendants, Crystal and Robert, were represented by a single attorney and pleaded guilty to kidnapping. They both were given a fifty-year sentence. The court found that the only aggravating factor in the kidnapping charge was an injury to the infant and that Crystal was not present when the injury occurred. Id. at 450-51. The court further reasoned that Crystal’s counsel, if he had not also represented Robert, would have argued that her lack of involvement with the injury made her less culpable than Robert; and thus, she should receive a lighter sentence. This failure by counsel to distance Crystal from the aggravating injury at the time of sentencing was held to have denied her the effective assistance of counsel. Id. at 451. Especially where there are markedly different degrees of relative culpability, a likelihood of conflict exists because of the necessity of comparison. See, e.g., Flanagan, 679 F.2d 1072 (where not all defendants are charged in every count of an alleged conspiracy, a conflict of interest is likely to arise); Camera v. Fogg, 658 F.2d 80, 88 (2d Cir. 1981) (where potential duress defense of two of three defendants was supported by some evidence, multiple representation of all three defendants charged with kidnapping violated defendants’ sixth amendment right to counsel). See also supra note 11.

26. See, e.g., Hart, 478 F.2d at 208-09 (petitioner denied effective assistance of counsel where defense attorney who represented five other defendants made no attempt in his closing argument to differentiate petitioner’s position from that of his co-defendants).

27. See, e.g., Caddie v. Warden, 3 Md. App. 192, 193, 238 A.2d 129, 129 (1968) (defendant denied effective assistance of counsel where counsel privately retained to represent defendant at trial was appointed by court to represent co-defendant, and
Conflicts of interest are invariably present in multiple representation cases because there exists the possibility that the interests of co-defendants will be divergent. If a conflict does arise, the attorney is placed in an ethical dilemma: any action on his part to accommodate one party can devastate his obligation to the other. This ethical dilemma is recognized by the drafters of the Model Code of Professional Responsibility. The Model Code states that a lawyer may represent multiple clients with conflicting interests, but only if consent is obtained after full disclosure and "if it is obvious that he can adequately represent the interests of each." This approach places on the attorney the burden of anticipating potential conflicts, fully advising a defendant about them and making a decision about whether to continue joint representation if his clients wish to do so.

While the dangers of multiple representation are grave, many courts follow the Model Code approach and do nothing before trial to insure that a defendant appreciates these dangers and intelligently chooses between his two competing constitutional rights. Most courts merely place the entire burden of locating conflicts and fairly advising their clients about such conflicts on the defense attorney. The ABA Code of Professional Responsibility likewise notes that avoiding a conflict is primarily the responsibility of the attorney. Unfortunate-

28. See supra note 12.
29. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-105(C) (1980).
30. DR 5-105 provides in part that:
(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment on behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).
(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).
(C) In the situations covered by DR-104(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.
See also ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, THE DEFENSE FUNCTION, § 3.5(b) (1974).
31. See infra notes 114-16 and accompanying text.
32. Id.
33. See ABA STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE, § 3.4(b) (1972) which explains that if a lawyer represents "multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be
ly, because of many factors including the inability to accurately predict what conflicts may occur, an attorney often cannot adequately carry out this responsibility.34 Placing the sole burden on the attorney may prevent a few conflicts, but as is evidenced by the increasing number of post-conviction petitions alleging ineffective assistance of counsel due to joint representation,35 placing responsibility on the attorney alone is clearly not an adequate solution. Under the present system, a defendant who fails to object at trial has as his sole remedy a post-conviction claim that his joint representation denied him the effective assistance of counsel as guaranteed by the sixth amendment. The problem is that placing the burden on the attorney to prevent conflicts, in conjunction with post-conviction review, is an inadequate method of protecting constitutional rights in multiple representation cases.36

B. The Ineffectiveness of Post-Conviction Review of Claims of Ineffective Assistance of Counsel

A major practical problem with post-conviction review is that many types of conflicts will not readily appear on a trial court record. Such conflicts are no less serious and damaging to a defendant's constitutional rights merely because they are less visible. Unfortunately, a reviewing court can only look at what is presented before it in the form of a printed record.37 This printed record will reveal overt conflicts such as where one of two co-defendants takes the stand and impaired or his loyalty divided if he accepts or continues the employment, and he is to resolve all doubts against the propriety of the representation.” See also ABA STANDARDS RELATING TO THE DEFENSE FUNCTION, § 3.5(b) (Approved Draft, 1971). The approved draft concluded that the “potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation.”

34. Many factors militate against the effectiveness of requiring the attorney to bear the sole burden of avoiding conflicts. See infra notes 67-73 and accompanying text.


36. See infra notes 66-78 and accompanying text.

37. An appellate court is limited to a consideration of only such questions as are properly presented by the record or the requisite part thereof. Eisenberg v. Superior Court, 142 C.A.2d 12, 297 P.2d 803 (1956); Bryant v. Kuhn, 73 So. 2d 675 (Fla. 1954); Sheridan v. State, 124 N.E.2d 701, 125 Ind. App. 271 (1955); Corey v. Carbuck, 201 Md. 389, 94 A.2d 629 (1953); Loehde v. Rudnick, 409 Ill. 73, 98 N.E.2d 719 (1951).
inculpates the other\textsuperscript{38} or destroys a silent defendant's defense.\textsuperscript{39} But as is often the case, certain types of conflicts will not appear on the record. For instance, if one defendant does not testify out of deference to another, there is an obvious conflict which is invisible to an appellate court since the decision whether to testify is made privately.\textsuperscript{40} Likewise, where a defendant is offered the chance to plead guilty and receive a reduced sentence provided that he testifies against his co-defendant, the record will reveal no conflict if the lawyer representing both defendants advises against the plea.\textsuperscript{41}

Conflicts that do not appear on a trial court record are especially dangerous not only because of what they cause a lawyer to do, but also because of what they tend to cause a lawyer to refrain from doing. For example, an attorney may recognize the existence of a potential conflict and attempt to reconcile it by failing to vigorously question a defendant who takes the stand and offers evidence unfavorable to a co-defendant. The Supreme Court in \textit{Holloway v. Arkansas},\textsuperscript{42} observed that joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. Any effort to reconcile a potential conflict prevents it from appearing in its full context on the record.\textsuperscript{43} Without a record of what counsel knew and why he acted as he did, post-conviction courts are forced to speculate as to factual issues in determining whether to grant relief.\textsuperscript{44}

\textsuperscript{38} White v. United States, 396 F.2d 822 (5th Cir. 1968); United States v. Gougis, 374 F.2d 758 (7th Cir. 1967). See also supra note 14.
\textsuperscript{39} DeBerry, 487 F.2d 448; Holland v. Henderson, 460 F.2d 978 (5th Cir. 1972).
\textsuperscript{40} See United States v. Levy, 577 F.2d 200, 210-11 (3d Cir. 1978) (defendant waived his right to present a witness in his behalf; advice given by attorney who owed an obligation to the witness who was a former client); United States v. Gaines, 529 F.2d 1038 (7th Cir. 1976); Morgan v. United States, 396 F.2d 110 (2d Cir. 1968) (question as to whether the several defendants should take the stand).
\textsuperscript{41} See, e.g., Alvarres, 522 F.2d 100; see also supra notes 20-21.
\textsuperscript{42} 435 U.S. 475, 490 (1978).
\textsuperscript{43} O'Kelly v. State, 606 F.2d 56, 58 (4th Cir. 1979) (attorney failed to introduce evidence in mitigation of one defendant's sentence for fear of harming other co-defendants with that evidence). See, e.g., Austin v. Erickson, 477 F.2d 620 (8th Cir. 1973) (one attorney represented accused and her co-defendant in trial for homicide of child; accused was denied effective assistance of counsel where defense of lack of responsibility was not developed because of counsel's divided loyalties and possible damage to co-defendant).
\textsuperscript{44} The Supreme Court in \textit{Holloway} did just this and speculated about the probability that a conflict occurred as well as the effect of the conflict. Holloway, 435 U.S. at 490. This problem of estimating the prejudice to a jointly represented defendant caused by alleged conflicts has led to the current rule presuming prejudice if
Reviewing courts are nonetheless called upon to determine whether a conflict of interest has denied a defendant his sixth amendment right to effective counsel. Adding to the problem that conflicts are often undetectable in a trial record, the standard of review that has been developed for these cases is vague and has been applied aimlessly to a variety of factual settings. The current standard of review for claims involving ineffective counsel has developed from three Supreme Court cases dealing with multiple representation.

The first Supreme Court case to deal with post-conviction claims of ineffective assistance of counsel due to joint representation was *Glasser v. United States*, decided in 1942. Glasser held that the "assistance of counsel guaranteed by the sixth amendment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests." The Court unfortunately gave no real guidance as to the degree of conflict or prejudice required for reversal when no objection to joint representation was made at trial. It merely held that when a defendant is denied separate counsel over a timely objection, a court must grant relief without indulging in "nice calculations as to the amount of prejudice arising from its denial." A defendant can show that an "actual conflict adversely affected his lawyers performance." See *Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980). Note that a defendant on a post-conviction review must still prove an "actual conflict" occurred at trial. Because of the difficulty of obtaining affirmative proof as to the existence of a conflict, many defendants cannot meet this burden even when conflicts did in fact exist. See infra notes 74-78 and accompanying text. See also *Unger*, 665 F.2d at 254 (court speculated about a negative fact that an attorney's divided loyalty made it impossible for him to use his best efforts to exonerate one defendant for fear of implicating another); *Levy*, 577 F.2d 200 (defendant waived his right to present a witness in his behalf on basis of advice from an attorney who owed an obligation to the witness who was a former client; court forced to speculate that the obligation "may well have" conflicted with the attorney's duty to the defendant).

45. 315 U.S. 60 (1942).
46. Id. at 70.
47. Id. at 76. The major reason that some of the statements in *Glasser* are not very helpful is that no court today would require joint representation over a defendant's objection as was the case in *Glasser*. The problem in modern joint representation cases is that many defendants expressly wish to proceed with joint counsel or at least make no objection to it, and later wish to attack their convictions on sixth amendment grounds. The *Glasser* decision made no statements regarding the standard for post-conviction review of such cases. This is not to say that *Glasser* is wholly without worth. The case was the first to recognize the problems of proving prejudice in this area, which led to the current rule that if an "actual" conflict can be shown, no separate showing of prejudice is required as prejudice will be assumed to have occurred due to the conflict. See supra note 44. Likewise, *Glasser* established the fundamental principle that unconstitutional multiple representation is never harmless error. *Glasser*, 315 U.S. at 76.
The extent to which a trial judge has a duty to act in joint representation cases was similarly left open except that the Court noted that "upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused." The nebulous requirements in Glasser thus provided no definitive answers for lower courts which continued to struggle with the problems of joint representation.

Thirty-five years later, in Holloway v. Arkansas, the Supreme Court again addressed the joint representation problem. Like Glasser, the Court only made the limited holding that a state trial court must investigate timely objections to multiple representation. The Court expressly reserved opinion on the two crucial issues that have plagued appellate courts since Glasser was handed down. First, the Supreme Court in Holloway did not rule on whether the trial court has an affirmative obligation to inquire into all cases of joint representation to determine if an actual or potential conflict will deprive a defendant of his right to the effective assistance of counsel. Second, Holloway did not say what degree of conflict must be shown before a reviewing court should determine that a defendant has been denied adequate representation in violation of the sixth amendment. Thus, until the Supreme Court decided these issues two years later, appellate courts in each of the circuits applied a wide variety of standards to post-conviction claims of inadequate counsel due to joint representation. This led to a great deal of confusion over the proper standard and its application to different cases.

48. Id. at 71.
49. 435 U.S. 475 (1978). In Holloway, one attorney was appointed to represent three co-defendants at a state criminal trial. The attorney, Harold Hall, before trial objected to his continued representation of all three defendants and moved for appointment of separate counsel based on the possibility for conflict because of confidential information he received from the co-defendants. The trial judge denied the motion for separate counsel. Hall again renewed his motion prior to impanelment of the jury and it was again denied. The Supreme Court held that the trial judge committed reversible error by failing to appoint separate counsel or to take adequate steps to ascertain whether the risk of conflict was too remote to warrant separate counsel. Id. at 484.
50. Id. at 484.
51. Id. at 483-84.
52. Id. at 483.
53. Id.
54. Prior to Cuyler, courts applied varying standards of review to post-conviction claims of ineffective assistance of counsel due to joint representation. Many courts required a specific showing of prejudice, which often was an impossible burden to meet since many conflicts cause an attorney to refrain from acting in a particular manner. Any prejudice resulting from lack of action is thus incapable of concrete proof.
These two crucial issues expressly reserved by Holloway were finally decided two years later in *Cuyler v. Sullivan*. In *Cuyler*, two privately retained attorneys represented three defendants in a double-murder trial. Petitioner Sullivan had previously retained a different attorney for the preliminary hearing, but due to lack of money accepted his two co-defendants' offer to share their counsel at trial. The prosecution was then granted a motion to sever the trial. At Sullivan's trial, joint counsel decided to rest their defense at the conclusion of the state's case without allowing Sullivan to testify on his own behalf. Sullivan was convicted of both murders. His two co-defendants were subsequently acquitted.

The Supreme Court first held that in the absence of a timely objection or other special circumstances, state trial courts have no duty to initiate an inquiry into the propriety of joint representation under the sixth amendment. The *Cuyler* Court ruled that "absent special circumstances"... trial courts may assume either that multi-

See supra text accompanying notes 42-44. For cases where the defendant's claim of prejudice was rejected see Courtney v. United States, 486 F.2d 1108 (9th Cir. 1973); United States v. Irons, 475 F.2d 40 (8th Cir.), cert. denied, 412 U.S. 951 (1973); United States v. Alberti, 470 F.2d 878 (2d Cir. 1972), cert. denied, 411 U.S. 919 (1973); United States v. Horne, 423 F.2d 630 (9th Cir. 1970) (per curiam); Ford v. United States 379 F.2d 123 (D.C. Cir. 1967). See also Tague, supra note 35 at 1089-91 (describing the variety of approaches taken by the federal courts of appeal before *Cuyler*).

55. 446 U.S. 335 (1980). In *Cuyler*, the Supreme Court was finally forced to face these issues in light of the lower court's application of a standard for post-conviction review that was felt to be clearly overbroad. The Third Circuit had held that even a remote possibility that a conflict of interest occurred at trial requires reversal. United States ex rel Sullivan v. Cuyler, 593 F.2d 512, 522 (3d Cir. 1979). The Supreme Court felt that the standard was overbroad because the possibility of a conflict inheres in every multiple representation case. The Third Circuit's standard would thus require reversal of every joint representation case, amounting to a per se rule banning joint representation. While many writers have urged a per se rule, such a rule would arguably violate a defendant's constitutional right to choice of counsel under circumstances where the dangers of joint representation are outweighed by the advantages of proceeding with joint counsel. See infra text accompanying notes 79-97.

56. *Cuyler*, 446 U.S. at 337.
57. *Id.*
58. *Id.* at 338.
59. *Id.*
60. *Id.* at 346. Although the Court "approved of" Rule 44(c) procedures, it nonetheless held that nothing in the Constitution mandates it. *Id.* at 346 n.10. This holding has led to the general practice among the Circuits of failing to hold Rule 44(c) inquiries. See infra note 83. Like the Model Rules of Professional Conduct Approach, the Court noted that ordinarily the burden of revealing the existence of a conflict rests on defense counsel as an ethical matter. See supra note 33.
61. *Cuyler* held that only in "special circumstances" does a trial court have a sua sponte duty to inquire into the propriety of joint representation. But the mere fact of joint representation is not a special circumstance. A potential conflict does not
ple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist." Cuyler then established the current constitutional standard for finding a violation of the sixth amendment on review of post-conviction claims of ineffective counsel where no objection is made to joint representation at trial. The Court held that "in 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." Thus, the Supreme Court reaffirmed the validity of the traditional method of dealing with the dangers of multiple representation. Cuyler in effect holds that post-conviction review for actual conflicts combined with the ethical duty of the attorney to avoid conflicts sufficiently protects a defendant's fundamental right to effective counsel.

There are many problems with both prongs of the Cuyler decision which have a direct bearing on the constitutionally guaranteed rights of criminal defendants. The first prong decides that the attorney has the sole responsibility of recognizing and adequately advising his

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62. Id. at 346-47. The view that the trial court may presume that no conflict exists absent an objection must be overcome to argue that the duty of a trial judge to inquire comes into effect due to the fact of joint representation itself. See infra notes 118-22 and accompanying text.

63. Id. at 350. The Court went on to hold that a defendant need not demonstrate prejudice resulting from the inadequate representation. This reaffirmed the statement in Glasser that once it is shown that an actual conflict adversely affected a lawyer's performance, a court must grant relief without indulging in "nice calculations as to the amount of prejudice arising from its denial." Glasser, 315 U.S. at 76. The Cuyler court did, however, emphasize that the test for reversal on appeal contains two prongs, both of which must be satisfied to invoke the above presumption: 1) an actual conflict must be proven to have 2) adversely affected the adequacy of the attorney's representation. Cuyler, 446 U.S. at 350.

64. Id. at 346-47.

65. Id. The following statement made by the Second Circuit more than 17 years ago in United States v. Pazsierra, 367 F.2d 930, 932 (2d Cir. 1966), cert. denied, 386 U.S. 935 (1967) is still indicative of the philosophy of most courts:

No facts have thus far been presented that the Bar of this country is so unmindful of the canons of ethics and its obligation to avoid positions of conflict as to call for a pre-trial cross-examination of defendants and their counsel on the theory, or even presumptuous presumption, that counsel will not be faithful to the best interests of their clients and when aware of any conflict of interest between clients jointly represented whether before or during trial will not disclose it to the court and seek appropriate relief.

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clients about potential conflicts that may hinder his effectiveness. This approach proceeds on the assumption that an attorney will always discuss every relevant potential conflict with his clients and advise them fully and fairly. Many factors, however, militate against this assumption.

One factor is that there are instances where an attorney may misjudge the extent of the conflict, or fail to recognize its existence at all. The difficulty of predicting before trial what conflicts may arise makes it almost impossible for a defendant to be fully informed of the dangers of multiple representation. This factor alone makes it highly unlikely that a defendant will ever be able to intelligently waive his right to separate representation. Moreover, any advice given to him by his attorney about whether to proceed with joint representation is clearly not disinterested and neutral. Similarly, some

66. Cuyler, 446 U.S. at 344.
67. It is clear that to protect a defendant's sixth amendment right to separate counsel that co-defendants must be advised from some source about the dangers of multiple representation. If attorneys have a hard time recognizing the existence of conflicts, defendants themselves surely will not be in a position to note their existence and request that their lawyer object to the joint representation. See infra notes 68-72.
68. See, e.g., Gaines, 529 F.2d 1098; see also United States v. Carrigan, 543 F.2d 1053 (2d Cir. 1976) (even the most diligent attorney may be unaware of facts giving rise to a conflict of interest). Often "counsel must operate somewhat in the dark and feel their way uncertainly to an understanding of what their clients may be called upon to meet upon a trial" and consequently "are frequently unable to foresee developments which may require changes in strategy." Carrigan, 543 F.2d at 1058.
69. See United States v. Lawriw, 568 F.2d 98, 105 (8th Cir. 1977), cert. denied, 435 U.S. 969 (1978) ("Because the conflicts are often subtle it is often not enough to rely upon counsel, who may not be totally disinterested, to make sure that each of his joint clients has made an effective waiver.").
70. Especially if lawyers fail to properly appraise the dangers involved, "laymen simply are not equipped to appraise" the considerations involved. Hart, 478 F.2d at 203. This is true even of the "educated" layman. Gaines, 529 F.2d at 1044. In Carrigan, 543 F.2d at 1058 Lombard, J., concurring, stated that, "it would be a rare defendant who could intelligently decide whether his interests will be properly served by counsel who also represents another defendant ... Even defense counsel, who all too frequently are not adequately informed regarding the evidence available about their clients, may not be in a position to judge whether a conflict of interest between their clients may develop." Other less obvious factors also militate against a defendant every being in a position to voluntarily waive his right to separate representation. For example, there are social and economic pressures on co-defendants not to break ranks that can be exerted on an individual defendant by his peers. See Lowenthal, supra note 35 at n.63. Likewise, joint representation can be used coercively to insulate the leaders of a criminal enterprise more effectively against the dangers that other co-defendants will become prosecution witnesses. Id. at 969. See also infra note 101.
71. The difficulty of obtaining competent, disinterested advice on whether to waive the right to separate representation had led some courts to require the trial
writers have even suggested that fee arrangements can materially affect the judgment of both the client and the lawyer.2 Finally, the sheer number of jointly represented defendants who continue to appeal convictions due to alleged conflicts evidences the ineffectiveness of the traditional approach3 as required by the first prong of the Cuyler decision.

The second prong of the Cuyler decision held that reversal will occur only if a defendant can show an actual conflict of interest and that the conflict adversely affected his lawyer's performance.4 As previously noted, the fact that many conflicts are not apparent from a trial court record may make this burden of showing an actual conflict an impossible one for the defendant to meet.5 Because many actual conflicts are not susceptible of concrete proof, courts are forced to speculate as to the likelihood that an alleged conflict did in fact court to warn and advise co-defendants. See Carrigan, 543 F.2d 1053; Hart, 478 F.2d 203; United States v. Foster, 469 F.2d 1 (1st Cir. 1972); Campbell v. United States, 352 F.2d 369 (D.C. Cir. 1965).

72. While not suggesting that monetary concerns prompt lawyers to purposely suggest joint representation to clients, the concern for a fee may lead retained lawyers to overlook conflicts more frequently than would public defenders or appointed private counsel. See Cole, Time for a Change: Multiple Representation Should Be Stopped, 2 NAT. J. CRIM. DEF. 149 (1976) (fee considerations contribute to making multiple representation a "defense lawyers dream"). Note that a lawyer receiving a double fee for representing two defendants may lose his entire fee by suggesting the co-defendants retain separate counsel. Many courts who are given notice of a conflict will disqualify joint counsel entirely from the case because of the presumption that privileged information has been obtained which would prejudice the defendant who is no longer being represented. United States v. Provenzano, 620 F.2d 985, 1004-05 (3d Cir.), cert. denied, 449 U.S. 899 (1980); Arkansas v. Dean Foods Products Co., Inc., 605 F.2d 380 (8th Cir. 1979). See also Camera, 658 F.2d at 90 ("there is a great likelihood in any multiple representation situation that one defendant may attempt to override the will of the others. This is particularly so where one defendant assumes the burden of paying counsel fees for all"); Hart, 478 F.2d 203 (conflict found where an employee had been represented by an attorney paid for by his co-defendants who were his employers).

73. See supra note 35.

74. See supra text accompanying note 63.

75. As the Supreme Court emphasized in Holloway:

In a case of joint representation of conflicting interests, the evil—it bears repeating—is in what the advocate finds himself compelled to refrain from doing... It may be possible in some case 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 interest on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. (emphasis in original).

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

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exist at trial.\footnote{76} The vagueness of the Cuyler standard has also caused reviewing courts to employ differing tests in deciding whether an alleged conflict "adversely affected his lawyer's performance."\footnote{77}

76. The necessity of speculating about whether an actual conflict existed at trial can lead to inaccurate results. See, e.g., United States v. Bradshaw, 719 F.2d 907, 917 (7th Cir. 1983). In Bradshaw, two jointly represented defendants were convicted of conspiracy to steal goods moving in interstate commerce and the underlying offense. Defendant Bradshaw claimed that an actual conflict was created by the government's plea offer requiring that an accepting defendant cooperate with the government. Such cooperation raised the possibility that the accepting defendant might ultimately implicate the non-accepting defendant. Bradshaw argued that since his acceptance of the plea offer might have seriously damaged his co-defendant's defense, a result that joint counsel wanted to avoid, "the dual representation likely prevented defendant's counsel from advising the defendant whether he should accept the plea offer." \textit{Id.} The court replied that "this argument is completely without merit and borders on frivolous," because evidence showed that Bradshaw's counsel \textit{did} in fact advise him regarding the government's plea offer. It seems the court in this context failed to recognize the possibility that Bradshaw's attorney may have been unable to fully advise him about all the possible options, including accepting a government plea offer. It is quite probable that Bradshaw's attorney did not suggest acceptance of the plea offer as strongly as he would have had Bradshaw been his only client. It is precisely this probability that has led other courts to hold that the mere existence of a plea offer amounts to proof of an actual conflict of interest. See supra notes 20-23 and accompanying text. Some courts have articulated certain circumstances under which an "actual" conflict will be found. See, e.g., Baty v. Balkcom, 661 F.2d 391, 395 (5th Cir. 1981), \textit{cert. denied}, 456 U.S. 1011 (1982) (an actual conflict exists if "counsel's introduction of probative evidence or plausible arguments that would significantly benefit one defendant would damage the defense of another defendant whom the same counsel is representing"); United States v. Mers, 701 F.2d 1321, 1329 (11th Cir. 1983) ("where co-defendants' statements are largely corroborative, repetitive, or serve the same purpose, there is no conflict."). Even with these standards a court must still speculate as to the existence of these circumstances where a defendant alleges that his attorney failed to act in a certain way because of a conflict. See supra notes 42-44 and accompanying text. Moreover, many courts place on the defendant the burden of making a factual showing of inconsistent interests and must demonstrate that the attorney "made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other. If he did not make such a choice, the conflict remained hypothetical." \textit{Note}, \textit{Conflict of Interests in Multiple Representation of Criminal Co-defendants}, 68 J. CRIM. L. AND CRIMINOLOGY 223, 226 (1977) (parenthesis in original). See also U.S. v. Fox, 613 F.2d 99, 102 (5th Cir. 1980) ("we will not find an actual conflict unless appellants can point to specific instances in the record to suggest an actual conflict or impairment of their interests.")

77. In the past, courts generally held that an attorney's assistance was ineffective only if his ineptitude or disloyalty reduced the trial to "a farce or mockery of justice." See, e.g., Diggs v. Welch, 148 F.2d 667 (D.C. Cir.), \textit{cert. denied}, 325 U.S. 889 (1945). Then in 1970, the Supreme Court suggested that an attorney's performance must be "within the range of competence demanded of attorney's in criminal cases." McMann v. Richardson, 397 U.S. 759 (1970). Yet, courts have failed to precisely define what this "range of competence" requires. It may well be that trying to state a precise test in this area is an impossible task, and any requirement that a defendant must
Moreover, even recent tests employ a highly deferential approach, finding an adverse effect on a lawyer's performance only in extreme cases.\textsuperscript{78} The result is that courts must first speculate on the factual issue of whether an actual conflict was present at trial; then they must apply that speculation to a vague and deferential standard in an effort to determine whether reversal should occur. Clearly such an approach cannot be said to adequately protect a defendant's constitutional right to the effective assistance of counsel.

II. ALTERNATIVES TO THE TRADITIONAL CUYLER APPROACH

A. Per Se Ban of Joint Representation

One view of joint representation is that the danger to a defendant's sixth amendment right to counsel is so great as to outweigh in all instances a defendant's right to choose to be jointly represented.\textsuperscript{79} Somehow prove inadequacy of his attorney will necessarily be a vague requirement. In addition to the vagueness problem, courts generally find inadequate representation only where it is blatantly obvious that an attorney's conduct is the result of a conflict. For some recent statements of what constitutes "adequate representation" see Guzzardo v. Bengston, 643 F.2d 1300, 1305 (7th Cir.), \textit{cert. denied}, 452 U.S. 941 (1981) ("A minimum standard of professional representation does not mean representation free of questionable tactical decisions or even what hindsight might suggest were mistakes. It means representation without serious prejudicial blunders which have foreseeable adverse consequences. Implicit in the sixth amendment right to counsel in criminal cases is the notion of adequacy.") Parker v. Parratt, 622 F.2d 479 (8th Cir. 1981), \textit{cert. denied}, 103 S. Ct. 102 (1982) ("Hindsight can always be utilized by those not in the fray so as to cast doubt on trial tactics a lawyer has used. Trial counsel's strategy will vary even among the most skilled lawyers. When the judgment exercised turns out to be wrong or even poorly advised, this fact alone cannot support a belated claim of ineffective counsel . . . In order to assert a sixth amendment infirmity on this ground, the circumstances must demonstrate that which amounts to a lawyer's deliberate abdication of this ethical duty to this client. There must be such conscious conduct as to render pretextual an attorney's legal obligation to fairly represent the defendant.").\textsuperscript{78} Due to the deferential nature of the test for adequacy, many courts that have identified actual conflicts have refused to reverse when they find that the conflict did not affect the adequacy of the attorney's representation. See, e.g., \textit{Laura}, 667 F.2d at 372; \textit{Bordenkircher}, 671 F.2d 986 (even if there was an actual conflict of interest, it did not interfere with counsel's ability to represent the defendant).

78. \textit{Bordenkircher}, 671 F.2d 986.

79. See, e.g., Lowenthal, \textit{supra} note 35, at 989 (advocating a \textit{per se} rule banning joint representation); United States v. DeFillipo, 590 F.2d 1228, 1238 (2d Cir. 1979) (Oakes, J., concurring); \textit{Carrigan}, 543 F.2d 1053, 1058 (Lumbard, J., concurring) ("The right to effective representation by counsel whose loyalty is undivided is so paramount in the proper administration of criminal justice that it must in some cases take precedence over all other considerations including the expressed preference of the defendants concerned and their attorney.")
Thus, advocates of this view urge the adoption of a *per se* rule banning joint representation. A *per se* rule such as this would clearly take care of the problems involved in post-conviction review of these cases because they would no longer arise. It is also clear that one major constitutional problem would be eliminated: sixth amendment violations of the right to effective counsel caused by the conflicts of joint representation. This solution would also be the easiest to implement; far easier than holding hearings that try to predict future conflicts, and far easier than reviews of trial court records in an effort to discover alleged past conflicts.  

Given these obvious advantages of a *per se* rule, the question remains why such a rule has not taken hold and been given widespread support by the courts. While a *per se* rule has been accepted for assigned counsel in some jurisdictions, a *per se* rule with regard to retained counsel implicates another right of a criminal defendant also derived from the sixth amendment: the constitutional right of a defendant to freely choose who he wants to represent him. Many courts hold that this kind of right is one of the rights the framers of our Constitution meant to protect in passing the sixth amendment.

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80. Another possible approach that has been suggested by some courts is to hold post-trial hearings in an attempt to locate past conflicts. See, e.g., Morgan, 396 F.2d 110 (2d Cir. 1968); Alvarez, 522 F.2d 100; United States v. Lovano, 420 F.2d 769, 772-73 (2d Cir.), cert. denied, 397 U.S. 1071 (1970). While this approach is arguably a more effective way of locating past conflicts, it involves many of the same problems of traditional post-conviction review. For example:
   1) Waste of judicial machinery—a full trial must still take place. If a conflict is found, the case must be remanded for a new trial with new attorneys.
   2) Same problem of speculation as to amount of harm and as to whether an actual conflict occurred. See supra notes 74-76 and accompanying text.
   3) The judge cannot inquire too far into privileged information when trying to find a conflict. Even though a defendant waives the attorney-client privilege when attacking the effectiveness of his counsel, many attorneys are understandably hesitant to reveal such information.
   4) Finally, this method relies too heavily on the lawyer, who may have caused the conflict, to acknowledge his initial misjudgment. See Gaines, 529 F.2d at 1045 (7th Cir. 1976).

81. Mandating that indigent co-defendants accept separate counsel when they specifically request joint counsel may cause constitutional problems similar to when co-defendants who retain joint counsel are required to accept separate representation. Some circuits, however, have held that such a ban with regard to assigned counsel would pass constitutional muster. See e.g. Gaines, 529 F.2d at 1044 n.4; Morgan, 396 F.2d 110; Fryar v. United States, 404 F.2d 1071, 1073 (10th Cir. 1968), cert. denied, 395 U.S. 564 (1969); Lollar v. United States, 376 F.2d 243 (D.C. Cir. 1967).

82. *See infra* note 93.

83. As Judge Friendly recently wrote, “the defendants' choice of joint representation, like that of self-representation, may sometimes seem woefully foolish to the
is derived from basic notions of freedom and rights of individual autonomy that the founding forefathers of the United States so deeply valued and sought to protect. The arbitrary action of the government against such a choice as advocated by those urging a per se rule would be contrary to these basic notions.

It is precisely these notings of the sanctity of individual choice that led the Supreme Court in 1975 in *Farretta v. California* to hold that a criminal defendant has an absolute right to proceed pro se and represent himself if his choice is voluntarily and intelligently made. Opponents of a per se ban on joint representation argue that because of this right, a criminal defendant a fortiori has the right to waive separate representation and potential conflicts. The problem with this argument is that unlike self-representation, joint representation creates ethical problems for the attorneys involved and impedes a judge. But the choice is mainly theirs; the judge is not to assume too paternalistic an attitude in protecting the defendant from himself." *Curcio*, 614 F.2d at 25 (emphasis in original); cf. *Farretta v. California*, 422 U.S. 806, 834 (1975) (to force a lawyer on the petitioner may have convinced him that the law contrives against him). See also *Adams v. United States ex rel McCann*, 317 U.S. 269, 279-80 (1943) stating that "what were contrived as protections for the accused should not be turned into fetters. To forbid the waiver of a protected right would be to imprison a man in his privileges and call it a constitution." See also infra notes 84-86.

84. The Supreme Court in *Farretta* stated that "freedom of choice is not a stranger to the constitutional design of procedural protections for a defendant in a criminal proceeding. For example, every criminal defendant is privileged to testify in his own defense, or to refuse to do so." *Farretta*, 422 U.S. at 834 n.45. (citations omitted) Moreover, "§ 35 of the Judiciary Act of 1789, signed one day before the sixth amendment was proposed, guaranteed in the federal courts the right of all parties to 'plead and manage their own causes personally or by the assistance of... counsel.' See 1 Stat. 92 (1789), as amended, 28 U.S.C. § 1654 (1970). At the same time James Madison drafted the sixth amendment, some state constitutions guaranteed an accused the right to be heard 'by himself' and by counsel; others provided that an accused was to be 'allowed' counsel. In sum, the colonists and the framers, as well as their English ancestors, always conceived of the right to counsel, as an 'assistance' for the accused, to be used at his option, in defending himself... That conclusion is supported by centuries of consistent history." *Farretta*, 422 U.S. at 826-35. See also *Bittaker v. Enomoto*, 587 F.2d 400, 403 (9th Cir. 1978) (stating that "the purpose of the right is to protect the defendant's personal autonomy, not to promote the convenience or efficiency of the trial."); *United States v. Price*, 474 F.2d 1223 (9th Cir. 1973).

85. 422 U.S. 806 (1975).

86. A criminal defendant who chooses to represent himself unassisted by legal counsel is referred to as a pro se defendant. *Farretta* held that a defendant has the right to defend himself without an attorney being forced upon him over his objection. The Court in *Farretta* observed that although the defendant "may conduct his own defense ultimately to his detriment, his choice must be honored out of that respect for the individual which is the lifeblood of the law." *Id.* at 834.

87. See supra note 5.

88. See supra note 12.
judge's duty to supervise the ethics of those attorneys practicing before him. Additionally, unlike self-representation cases where a convicted defendant would have no claim of ineffective counsel, joint representation cases often involve post-conviction claims. The ineffectiveness of these post-conviction claims as a protection of a defendant's right to counsel combined with the ethical problems involved justifies at least some measure of interference with a defendant's choice to proceed with joint counsel. Joint representation is not the same thing as self-representation. Each has its own problems and it does not necessarily follow from the right to represent oneself in *Farretta* that there is an absolute right to counsel of choice in joint representation cases.

Just as the right to counsel of choice is not absolute, the power of the courts to override this right is likewise not absolute. Courts have clearly recognized that the right to counsel of choice is of constitutional dimension. If the mere fact of joint representation is not enough to trigger any duty on the part of the trial judge to inquire into the propriety of joint representation, courts surely are not in a position to hold that joint representation is *per se* invalid. The fact that the courts are not willing to accept a *per se* rule is not all that makes a *per se* rule objectionable. It is rather the idea that the right

89. The District Court is charged with the responsibility of supervising the members of its bar. *Cohen v. Hurley*, 366 U.S. 117, 123-24 (1961). When a district judge learns that one of the attorneys in a trial is attempting to serve conflicting interests, the judge's legal and ethical duty is triggered. These kinds of ethical obligations to a defendant and to the criminal justice system as a whole are not present in self-representation cases where no attorneys are involved.

90. A defendant who makes a knowing and intelligent election to represent himself cannot later make a claim of ineffective assistance of counsel. See *United States v. Richardson*, 588 F.2d 1235, 1241 (9th Cir. 1978); *United States v. Wilhelm*, 570 F.2d 461 (3d Cir. 1978).

91. See supra text accompanying notes 37-78.

92. Many courts have held that even assuming a knowing and intelligent waiver of the right to separate counsel, the court in some circumstances has the power to override a defendant's choice of joint counsel and disqualify such counsel. *United States v. Cox*, 580 F.2d 317, 321 (8th Cir. 1978), cert. denied, 439 U.S. 1075 (1979) (stating that "the right to retain counsel of choice is not absolute, but must be protected if possible."); *Flanagan*, 679 F.2d 1072 (disqualifying joint counsel over valid waivers even where co-defendants wished to present a unified defense).

93. *Flanagan v. U.S.*, 459 U.S. 1101 (1984) (obtaining reversal for such a right (to counsel of one's choice) does not require a showing of prejudice to the defense, since the right reflects constitutional protection of the defendant's free choice, independent of concern for the objective fairness of the proceeding; *Curcio*, 660 F.2d 881, 884; *Laura*, 607 F.2d 52, 56 (stating that the right to select a particular attorney is "the most important decision a defendant makes in shaping his defense."); *Armedosarmiento*, 524 F.2d 591; *Garcia*, 517 F.2d 272.

94. See supra, text accompanying notes 60-62.
to counsel of choice is unimportant enough to be cast aside in every multiple representation case that is objectionable. It is a basic principle that when important constitutionally protected rights are at stake, any state action that implicates such rights must use the least restrictive means available to achieve its goal. A flat ban is not the least restrictive alternative available because in some circumstances there are valid reasons for a defendant to proceed with joint representation which outweigh the dangers involved. When such valid reasons exist, the constitution protects a defendant’s right to proceed with joint counsel.

B. Reasons to Allow Joint Representation

Despite the seemingly overwhelming dangers, many attorneys and their clients choose to proceed with joint representation in order to present a unified defense strategy. This strategy is an especially

95. In the first amendment, state regulations that implicate freedom of expression rights must use the least restrictive alternative available to achieve its legitimate goal. See, e.g., Tully v. Calif., 363 U.S. 60 (1960); Martin v. Struthers, 319 U.S. 141 (1943); Schneider v. Irvington, 308 U.S. 147 (1939); Lovell v. Griffin, 303 U.S. 44 (1938). The “less drastic means” test has also been applied to strike down legislation designed to achieve highly important governmental ends. See, e.g., Shelton v. Tucker, 364 U.S. 479 (1960) (court conceded the importance of the governmental purpose—ascertaining the fitness and competence of public school teachers; but nevertheless invalidated an Arkansas statute requiring every public school teacher to disclose annually every organization to which he has belonged or regularly contributed to within the previous five years; court held that a state’s purpose, however legitimate and substantial, “cannot be pursued by means that broadly stifle fundamental liberties.” See also United States v. Robel, 389 U.S. 258 (1967); Eefgrandt v. Russell, 384 U.S. 11 (1966). In the context of joint representation, the state has a substantial interest in disqualifying counsel in order to protect a defendant’s rights to effective counsel and in furtherance of the court’s duty to oversee the ethical practices of the members of its bar. To achieve this legitimate end, however, a state should be required to use means which least restrict a defendant’s right to choice of counsel.

96. See infra notes 98-105 and accompanying text.

97. Despite the dangers involved, the Supreme Court and many federal circuits have recognized that an accused knowingly may waive his right to separate counsel when the right to choice of counsel outweighs the dangers of doing so. See, e.g., Holloway v. Arkansas, 435 U.S. at 482-83 n.5; Glasser, 315 U.S. at 70; United States v. Reese, 699 F.2d 803, 805 (6th Cir. 1983); Curio, 694 F.2d at 26; United States v. Agosto, 675 F.2d 865, 970 (8th Cir. 1982), cert. denied, sub. nom., Gustafson v. United States, 103 S. Ct. 77 (1982); United States v. Cunningham, 672 F.2d 1064, 1073 (2d Cir. 1982); Alvarez, 580 F.2d at 1259; Cox, 580 F.2d at 321; United States v. Waldman, 579 F.2d 649, 651 (1st Cir. 1978); Armend-Sarmiento, 524 F.2d at 592; Garcia, 517 F.2d at 276-77.

98. See, e.g., Mers, 701 F.2d at 1329 (appellant’s interests “are closely aligned such that their unified front strategy might well have been the best strategy available.”); United States v. Benavidez, 684 F.2d 1255 (5th Cir. 1982), cert. denied, 457 U.S. 1121 (1982); Flanagan, 679 F.2d 1072 (four defendants retained a single law firm to conduct their unified defense strategy).
good one in conspiracy cases. It allows multiple criminal defendants to present to the jury a single story which all of the defendants support. The overall defense is often much more persuasive to a jury when alleged co-conspirators are united in their denial of guilt than when each single defendant testifies solely in his own behalf. Another distinct advantage of a unified defense is the ability to stonewall the prosecution by frustrating its attempts to single out one defendant and obtain a plea bargain in exchange for favorable treatment at the obvious expense of co-defendants.

Advantages that accrue from using multiple representation to present a unified defense are often great enough so that a joint defense

99. At the same time, however, conspiracy cases can cause extra conflict of interest problems because "the very nature of the charge suggests the desirability of disassociation." Fryar v. United States, 376 F.2d 1071, 1073 (10th Cir. 1968), cert. denied, 395 U.S. 964 (1969). For an excellent example of the potential effectiveness of the strategy of disassociation by Kenneth Parkinson during the Watergate trial, see Lowenthal, supra note 35, at 943 n.14. In the Watergate case, Parkinson attempted to avoid guilt by association (also called the spillover effect) by making sure he was not seen conferring with the other defendants and their counsel, thus accentuating his differences from the other Watergate conspirators. The strategy apparently worked as Parkinson was acquitted while his co-defendants were convicted. See R. BEN VENISTE AND G. FRAMPTON, STONEWALL 319 (1977). In Glasser, 315 U.S. 60, the Supreme Court noted the special risks of multiple representation when the charge is conspiracy: "In conspiracy cases, where the liberal rules of evidence and the wide latitude accorded to prosecution may, and sometimes do, operate unfairly against an individual defendant, it is especially important that he be given the benefit of the undivided assistance of his counsel." But it should also be noted that the desire to disassociate and be set apart from other defendants is by definition not present in a unified defense strategy. The very nature of a unified defense and the desired benefits therefrom are the result of strength by association, not disassociation. See infra notes 100-05 and accompanying text.

100. See infra note 104; see also Petitioner's Brief at 48-49, Flanagan v. United States, 459 U.S. 1101 (1984).

101. Many prosecutors seek to disqualify attorneys who represent multiple criminal defendants because of the effectiveness of this defense strategy, often called the "stonewall defense." See United States v. Hobson, 672 F.2d 825, 828 (11th Cir.), cert. denied, 459 U.S. 906 (1982). A stonewall defense strategy allows co-defendants to band together with one attorney and jointly resist individual efforts by the prosecution to offer plea bargains in exchange for favorable testimony. Some prosecutors allege that this strategy is inimical to their legitimate interest in gaining incriminating information and obtaining pleas from individual defendants, thus improperly impeding their ability to prove guilt in a particular case. Many prosecutors, therefore, propose a per se ban on joint representation. See Vaira and Huyett, Time for Rule Certain: A Proposal to End Representation of Multiple Grand Jury Witnesses, 85 DICK L. REV. 381 (1981) (Author is the U.S. Attorney for the district in which the Flanagan case was brought; he is a vigorous opponent of multiple representation). The Third Circuit in United States v. Dolan, 570 F.2d 1178, 1182 (3d Cir. 1978) seems to agree that the public interest in obtaining valid convictions can outweigh a defendant's interest in
becomes a defendant's best defense. Multiple representation allows an attorney to gain the most information possible from all the defendants charged and use it to the best advantage of all the defendants.\footnote{102}

presenting a unified defense:

... there are public interests which impel an attorney's withdrawal from representing multiple defendants absent a knowing and intelligent waiver. Joint representation creates the possibility of defendants 'stone walling'—obstructing government attempts to obtain cooperation of one of a group of defendants.

\textit{Id.}

This result, however, is based on the incorrect premise that a defendant must present his defense in a way that facilitates the ease with which the prosecution may obtain a conviction. In our adversary process, each side has the \textit{right} to present his best strategy; and that strategy will in most cases presumably be the one that is most difficult for the other side to overcome. The adversary nature of our system is bottomed on the belief that it will best serve the public interest in obtaining \textit{just} convictions. To hold that a defendant's best defense cannot be presented because it is more effective in staving off prosecution attempts to single out defendants and expose individual weakness would, if followed to its logical conclusion, destroy the adversary nature of our criminal justice system. The result in \textit{Dolan} is also contrary to the \textit{Holloway} court's recognition of the validity of using the advantages that can accrue from joint representation:

requiring or permitting a single attorney to represent co-defendants, often referred to as joint representation, is not per se violative of constitutional guarantees of effective assistance of counsel. This principle recognizes that in some cases multiple defendants can appropriately be represented by one attorney; indeed, in some cases, certain advantages might accrue from joint representation. In Mr. Justice Frankfurter's view: 'Joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack.'

\textit{Holloway}, 435 U.S. at 482-83 (quoting dissenting opinion of Frankfurter, J., in \textit{Glasser}, 315 U.S. at 92.). Further, government motions to disqualify on the ground of conflicts of interest may in fact be motivated by not totally legitimate objectives. \textit{See Margolin and Coliver, Pretrial Disqualification of Criminal Defense Counsel, 20 AM. CRIM. L. REV. 227 (1982) (Footnotes omitted):}

It is the author's opinion, based on familiarity with more than a dozen cases in which such disqualification 'inquiries' have been filed, that the government's primary motive in bringing such motions is to disqualify the most competent lawyers and firms, with little regard for their reputation for ethical practice. This view is bolstered by the government practice of making selective disqualification motions against some of the defense counsel in a given case, and not other, generally less well-known attorneys, engaged in substantially the same potential conflicts. Simply by inviting the court to consider whether any potential conflicts are likely to develop, the government can succeed in putting defense counsel "on trial," using the courts to compel counsel to disclose, explain and justify financial dealings with past clients, as well as the relation of one client to another, as a precondition for remaining counsel in a pending case.

\textit{Id.} at 229.

In most cases where defendants are separately represented, little information is shared between co-defendants. Even where separate attorneys agree to pool their information and cooperate in presenting a unified defense, the communication will almost never be as fully open. A defendant will be reluctant to reveal confidential information to other attorneys who they do not know as well and who have a primary obligation to another defendant. Moreover, there are other possible ways for the prosecution to break a unified defense when all the co-defendants are separately represented. For example, the prosecutor can more easily tempt an individual lawyer to abandon the unified defense in order to gain immunity for his client at the expense of the other defendants. In some cases, this may result in a conviction of the remaining defendants where a unified defense would have resulted in acquittal of everyone involved.

Another valid reason why some co-defendants may not wish separate representation is that they may not want to incriminate a co-defendant even if it is to their advantage to do so. For instance, many co-defendants charged in criminal conspiracies are longtime friends, business associates, or even husband and wife who would rather face joint conviction than individual exculpation at the expense of the other. Such co-defendants may likewise wish to avoid the social stigma of turning against his colleagues, co-workers, or family members. The mere fact of separate representation gives the appearance of differing defenses or levels of culpability. Joint representat-

not forced to rely upon the spotty memory of a single client, details can be cross-checked with all of them; joint representation may also facilitate interdependent action by defendants. The receipt of privileged information from co-defendants could very well cause a conflict if the interest of the two defendants are opposing and the attorney is attempting to represent both those interests simultaneously. See supra note 15 and accompanying text. On the other hand, where one attorney presents a unified defense for two or more co-defendants, he may use any confidential information he receives to facilitate the presentation of that defense. This information-sharing will not cause a conflict since it will only be used to strengthen the joint defense. Moreover, the attorney may avail himself of the "common-defense rule" which holds that waiver (of the attorney-client privilege) is not to be inferred from the disclosure in confidence to a co-party's attorney for a common purpose. See United States v. McPartlin, 595 F.2d 1321, 1336 (7th Cir.), cert. denied, 444 U.S. 833 (1979); In Re LTV Securities Litigation, 89 F.R.D. 595, 604 (N.D. Tex 1981).

103. See, e.g., United States v. Lyons, 703 F.2d 815, 820 (5th Cir. 1983) (husband and wife charged with conspiracy to transport stolen goods; retained a single attorney to present a common defense; record was "devoid of evidence that would have exculpated one of the defendants but inculpated the other."); Flanagan, 679 F.2d 1072 (four police officers in the same squad retained a single firm to present their common defense.); Curio, 680 F.2d 881 (two brothers waived their rights to be separately represented and chose a single law firm for their defense.); Laura, 667 F.2d 365 (husband and wife retained a single attorney and waived rights to separate representation.)
tation, on the other hand, gives the impression of solidarity and adds strength by association.¹⁰⁴

Finally, co-defendants may have developed trust in a single attorney or law firm with whom they have dealt before, and may wish to be jointly represented by that attorney or firm.¹⁰⁵ This is of no small importance in light of the fact that the lives and liberty of criminal defendants are usually at stake. Their desire to place this life and liberty into the hands of a trusted attorney or firm should be given great weight before such attorney or firm is disqualified.

C. The Federal Rules Approach [Fed. R. Crim. Pro. 44(c)]

The approach suggested by the drafters of Federal Rule of Criminal Procedure 44(c) is a step toward correction of the problems involved in multiple representation.¹⁰⁶ Rule 44(c) provides for an in-

¹⁰⁴ Mr. Justice Frankfurter, likewise, noted that advantages can accrue from joint representation that are not possible when every defendant is separately represented: "Joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack." Glasser, 315 U.S. 60, 92 (dissenting opinion.)

¹⁰⁵ See, e.g., Cunningham, 672 F.2d 1064 (Appellate court reversed a district court order disqualifying counsel due to a potential conflict; holding that defendant's right to choice of counsel outweighed the dangers of conflicts when defendant had relied on the attorney for more than six years in a substantial number of matters.); In Flanagan v. U.S., 459 U.S. 1101 (1984) (reversing on other grounds) four co-defendants were police officers charged with conspiracy and policy brutality. All four defendants retained the single firm of Sprague and Rubenstone and wished to present a common defense. One major reason these defendants chose to be jointly represented by this single firm was due to their belief in the skill and expertise of the law firm's members, particularly that of Mr. Sprague, Esquire. Brief for Petitioner at 4, Flanagan v. United States, 459 U.S. 1101 (1984). Mr. Sprague was an attorney with a national reputation as a prosecutor as well as a defense lawyer. He had formerly served as First Assistant District Attorney for the City of Philadelphia and had an intimate knowledge of the workings of the Philadelphia Police Department. Id. at 5. Mr. Sprague and the firm had also previously represented several Philadelphia police officers charged with criminal defenses, in which instances acquittals had been obtained. Id. at 5. The four defendants had also gained confidence and trust in the firm during the months prior to their trial, and this strengthened their desire to continue the joint representation in order to present a unified defense. Id. at 6. See also Lowenthal, supra note 35, at 952 n.12. (even with respect to indigent defendants, experienced defender representing several parties may be preferred to separate but inexperienced counsel.).

¹⁰⁶ Rule 44(c) provides that:
Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance...
quiry by the trial judge into the propriety of joint representation; by implication this allows some room for a defendant's choice, while also taking into account the potential conflicts which may arise.\textsuperscript{107} The Rule's greatest advantage is that it attempts to do what neither traditional post-conviction review nor a \textit{per se} rule can: it attempts to accommodate both competing constitutional rights involved in joint representation cases.\textsuperscript{108}

Rule 44(c) is a sound approach, but it is an approach which has not gained widespread acceptance either in state courts or in the federal circuits.\textsuperscript{109} A Rule 44(c) inquiry is not constitutionally mandated in all joint representation cases\textsuperscript{110} and failure to hold an inquiry is not grounds for reversal unless the defendant objects to his joint representation at trial.\textsuperscript{111} Therefore, despite the mandate of Rule 44(c), which requires

\begin{quote}
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.\textsuperscript{107}

\emph{77 F.R.D.} 507, 593 (1978).

107. The Advisory Committee Notes state that the particular measures to be taken are appropriately within the court's discretion. Rule 44(c) itself does not expressly provide for a waiver of the right to separate counsel in order to protect a defendant's right to counsel of choice. The Notes then state that "one possible course of action is for the court to obtain a knowing, intelligent and voluntary waiver of the right to separate representation." \textit{77 F.R.D.} 507, 600 (citing \textit{DeBerry}, 487 F.2d 448). While not taking a position on when a waiver will be allowed, the Advisory Committee impliedly allows for waivers of the right to separate representation. Presumably the rationale is to give some weight to a defendant's right to choice of counsel, a right of constitutional significance. \textit{See supra} note 93. If a waiver is not allowed, the other alternative in joint representation cases is to disqualify counsel from representing multiple defendants. \textit{See, e.g., Flanagan}, 527 F. Supp. at 903 (disqualifying law firm from representing four defendants). \textit{See also infra} note 159. The Advisory Committee likewise allows for this course of action, but again does not specify under what circumstances counsel should be disqualified as opposed to obtaining a waiver of the right to separate representation. \textit{See infra} note 153.

108. The stated purpose of Rule 44(c) is to "establish a procedure for avoiding the occurrence of events which might otherwise give rise to a plausible post-conviction claim that because of joint representation the defendants in a criminal case were deprived of their sixth amendment right to the effective assistance of counsel." \textit{77 F.R.D.} 507, 594 (1978). \textit{See Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings on H.R. 7473 Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 96th Congress, 2nd Sess. (1980).}


110. \textit{See supra} note 60.

111. The \textit{Cuyler} court stated that the duty to inquire comes into effect only under "special circumstances." Such special circumstances occur when the trial judge knows or reasonably should know that a particular conflict exists. \textit{See supra} note 61. In practice, a trial judge's decision to not hold a Rule 44(c) hearing is given a great deal of deference. One manifestation of the deference given to trial judges who fail
that a hearing be held "whenever two or more defendants . . . are represented by the same retained or assigned counsel. . ." courts are left free to decide for themselves when to conduct such a hearing. The Cuyler decision states only that the constitution requires an inquiry by the trial judge under "special circumstances;" the mere fact of joint representation is not a special circumstance.\(^{113}\)

Although designed to protect constitutional rights, Rule 44(c) lacks a constitutional mandate and thus has led to the widespread practice among the circuits of generally not holding such hearings.\(^{114}\) Many federal circuits and most states continue to employ traditional post-conviction review as the sole safeguard of a defendant's sixth
to hold Rule 44(c) hearings is that many appellate courts strictly enforce the Cuyler requirement that a judge must have notice of a particular type of conflict being alleged as the basis for relief. \(^{112}\) See supra note 61. For example, in Wilson v. Morris, Slip Opinion No. 82-2252 (7th Cir. Jan. 5, 1984) one attorney represented two co-defendants charged with rape and armed robbery. The attorney objected to a joint preliminary hearing, stating that he believed there was a potential conflict that could arise. The court overruled the motion for separate preliminary hearings, but ordered separate trials for the two co-defendants. After being convicted, petitioner (one of the co-defendants) sought a writ of habeas corpus from the district court on the ground that the state court held the joint preliminary hearing over defendant's objection, thus requiring automatic reversal under Holloway. The Seventh Circuit held that since the defendant's attorney objected only to the joint hearing and not to the joint representation itself, the Holloway rule was inapplicable. For the same reason the court also held that no duty to inquire into the propriety of the joint representation was triggered. An objection to a joint hearing is thus not a "special circumstance" which puts a court on notice of potential conflicts due to joint representation.

112. \(^{112}\) See supra note 106.

113. \(^{113}\) See supra note 61.

114. \(^{114}\) See, e.g., Wilson v. Morris, Slip Opinion No. 81-2252 (7th Cir. Jan. 5, 1984) (holding that it is up to the defense attorney to object to joint representation; without such an objection the court does not have notice of any real conflicts and therefore no duty to inquire into possible conflicts.); Tonaldi, 716 F.2d at 439 (inquiry held, but dicta noted that such inquiry need not be held in every case.); Lyons, 703 F.2d 815 (stating that the inquiry and advice provided for by the rule are merely procedures designed to prevent conflicts of interest.); Mers, 701 F.2d at 1326 (held that where a single attorney represented four defendants in a criminal trial that the district court erred in failing to conduct an adequate hearing into the propriety of joint representation, but the error was harmless.); Alvarez, 676 F.2d at 1309-10; U.S. v. Arias, 676 F.2d 1202, 1205 (4th Cir.) cert. denied, 459 U.S. 910 (1982) ["if non-compliance (with Rule 44(c) is mentioned for the first time on appeal, we think it not plain error and decline to reverse the case or inquire further into the matter . . ."); Parker, 662 F.2d at 484 (no hearing held; court followed Cuyler noting that "nothing in our precedents suggests that the sixth amendment requires state courts to initiate inquiries into the propriety of multiple representation in every case.").] Note, however, that some trial judges do hold Rule 44(c) hearings on a regular basis, but no appellate courts hold they are duty-bound to do so. \(^{114}\) See, e.g., United States v. Gullett, 713 F.2d 1203, 1205 (6th Cir. 1983); Flanagan, 679 F.2d 1072.
amendment rights. The attitude of these courts is that the inquiries of Rule 44(c) are not ends in themselves, but merely rules of procedures designed to prevent conflicts of interest. It is certainly true that Rule 44(c) is designed to prevent conflicts, but it is also true that Rule 44(c) is necessary to protect the two fundamental constitutional rights of effective assistance of counsel and choice of counsel. The Rule protects these two rights by insuring that a defendant's choice of joint counsel is voluntary and made with full knowledge of the risks he is taking by choosing to be jointly represented.

The attitude of courts that fail to hold Rule 44(c) inquiries stems from the Cuyler holding that unless objection to joint representation is made at trial, the judge can assume that no unacceptable conflict exists. This conclusion, however, is based on the questionable assumption that an attorney can always fully and fairly advise his clients about the dangers of and alternatives to joint representation. This conclusion also directly contradicts many statements contained in the Advisory Committee Notes to Rule 44(c), which the Supreme Court itself approved. The Notes clearly state that any procedure less than that enunciated in Rule 44(c) would not adequately protect a defendant's sixth amendment rights. The Notes also urge that "when there has been 'no discussion as to possible conflicts initiated by the court,' it cannot be assumed that the choice of counsel by the defendants 'was intelligently made with knowledge of any possible conflict.'" From these statements it appears that the Advisory Committee would support a constitutional mandate of Rule 44(c) as a necessary protection of a defendant's sixth amendment right to the effective assistance of counsel. Yet, the Notes conclude by stating that

115. See supra note 114.
116. See Lyons, 703 F.2d 815, citing Benavidez, 664 F.2d at 1258-59.
117. The Advisory Committee states "that defendants should be jointly represented only if 'the court has ascertained that . . . each understands clearly the possibility of a conflict of interest and waives any rights in connection with it.'" 77 F.R.D. 507, 600, quoting DeBerry, 487 F.2d 448 (2d Cir. 1973).
118. Cuyler, 446 U.S. at 47. ("absent special circumstances, trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist.")
119. See supra text accompanying notes 67-73.
120. See supra note 60.
121. 77 F.R.D. 507, 600 (1978). The Notes go on to state that "it would not suffice, for example, to require the court to act only when a conflict of interest is then apparent, for it is not possible to 'anticipate with complete accuracy the course that a criminal trial may take.'" Id. at 600, quoting Fryar v. United States, 404 F.2d 1071, 1073 (10th Cir. 1968), cert. denied, 395 U.S. 964 (1969).
122. 77 F.R.D. at 597, quoting Carrigan, 543 F.2d at 1057.
"the failure in a particular case to conduct a Rule 44(c) inquiry would not, standing alone, necessitate the reversal of a conviction of a jointly represented defendant." Thus, the Committee retreats from its original position that an inquiry is necessary to adequately protect a defendant's sixth amendment rights. For if an inquiry of some kind is necessary to protect constitutional rights, failure to conduct that inquiry would constitutionally mandate automatic reversal.

A constitutional mandate of some form of inquiry in every joint representation case can be based on the recognition of the necessity of an inquiry to the protection of a defendant's sixth amendment rights. The current practice of inferring a waiver of the right to separate counsel from lack of objection at trial may be in violation of the due process clause of the fourteenth amendment. The due process clause guarantees that certain fundamental rights will not be taken away by the state without due process of law. Among these fundamental rights covered by due process protections is the "liberty" right of an accused to a fair opportunity to secure counsel of his own choice. The numerous cases involving the sixth amendment right to counsel have unanimously held that the right to counsel includes the right to effective counsel unburdened by conflicts of interest.

123. 77 F.R.D. at 603, citing, Carrigan, 543 F.2d at 1057; DeBerry, 487 F.2d 448.
124. See infra text accompanying notes 125-46.
125. Rule 44(c) as it stands lacks concrete guidelines regarding what specific procedures would be constitutionally required were the rule itself to be constitutionally mandated. Rule 44(c) also fails to specify when joint representation should be allowed to continue as opposed to disqualifying counsel. See infra text accompanying notes 147-56. These guidelines could be developed through case law, or as in Miranda v. Arizona, 384 U.S. 436 (1966), the court could specify what procedures are required and under what circumstances joint representation may be continued.
126. Although the contemporaneous objection rule has been held valid, see Henry v. Mississippi, 379 U.S. 443 (1965), the inference of a knowing and intelligent waiver in this context, where such an important right exists, arguably should be excepted. See generally Vandercoy, Waiver of Claims By Inadvertant Procedural Defaults: Collateral Attacks on Criminal Judgments in Indiana, 18 Val. U. L. Rev. 231 (1983).
127. The Due Process Clause of the fourteenth amendment prohibits the taking of life, liberty, or property without due process of law. U.S. CONST. amend. XIV, § 1. The first step in deciding whether a certain alleged right is protected under this clause is to determine whether the alleged right is a life, liberty, or property interest.
128. Crooker v. California, 357 U.S. 433 (1958). Crooker held that state refusal of a request to engage counsel violates due process not only if the accused is deprived of counsel at trial on the merits, but also if he is deprived of counsel for any part of the pretrial proceedings, provided that he is so prejudiced thereby as to infect his subsequent trial with an absence of "that fundamental fairness essential to the very concept of justice." Id. at 439 (citations omitted). See also Powell, 287 U.S. at 53 (due process requires a fair opportunity to secure counsel.); Chandler v. Fretag, 348 U.S. 3 (1954).
129. See supra text accompanying notes 45-65.
Therefore, due process should also guarantee a fair opportunity to secure effective counsel.

Inferring a waiver of the right to separate counsel from lack of objection at trial arguably violates this right to a fair opportunity to secure effective counsel. To have a fair opportunity to secure effective counsel, a defendant must be in a position to appreciate the consequences of a decision to proceed with joint representation. Without some procedural safeguard, most defendants will be unable to make an informed decision. As previously noted, it is almost impossible even for the attorney to predict before trial what types of conflicts may arise and how they may hinder his performance. Moreover, any advice regarding the dangers of joint representation that the attorney does give to a multiple client is by definition not disinterested. Therefore, without a pretrial inquiry of some kind, most defendants will not be in a position to object to their joint representation due to their inability to appreciate the dangers that lie ahead. In addition, post-conviction remedies are inadequate since the trial record may mask many conflicts. Thus, the risk of erroneously depriving a defendant of the right to a fair opportunity to secure effective counsel is so great that a minimal inquiry by the trial court is warranted in joint representation cases.

A procedural safeguard is necessary because in each and every multiple representation case, a defendant has the constitutional right to choose between two alternatives: (1) to proceed with joint representation in the face of potential conflicts or (2) to demand he be separately represented. The current approach, which assumes a waiver of the second choice when not expressly invoked, works a manifest injustice.

130. See supra notes 67-72 and accompanying text.
131. See supra notes 67-72 and accompanying text.
132. See supra text accompanying notes 37-44.
133. An analogy can be made to civil cases where the risk of erroneously depriving a person of an important life, liberty, or property interest is an important factor in determining whether there is due process violation. In Mathews v. Eldridge, 424 U.S. 319 (1976), the Supreme Court held that the identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Id. at 335. In joint representation cases, there is a great danger that without a mandatory procedural safeguard, criminal defendants will erroneously be deprived of their right to a fair opportunity to secure effective counsel. See supra text accompanying notes 130-32. Therefore, under an Eldridge analysis, due process requires more than mere inaction on the part of the trial judge.
It is constitutional error to assume that a defendant appreciates the dangers of joint representation and chooses the first alternative when nothing is even mentioned at trial about such dangers. Due process should demand that valid procedures be held to insure that a choice of such importance as this is knowingly made by the defendant and not imposed on him by the state.134

The language of the two recent Supreme Court decisions dealing with joint representation also suggests that the court may be willing to constitutionally require a Rule 44(c)-type procedure sometime in the future.135 For this to happen, the Court will have to realize the implications of its statements in Cuyler that a “possible conflict inheres in almost every instance of multiple representation.”136 It is probably more accurate to say that in every joint representation case some conflict of interest will probably occur sometime during the proceedings.137 In either event, the Cuyler court also held that the duty to inquire comes into effect when the trial judge “knows or reasonably should know that a particular conflict exists.”138 The court in Holloway noted that the major significance of an objection at trial is that it gives the judge the notice needed to trigger his duty to inquire.139

Given the dangers that are present in almost every joint representation case and the difficulty a judge has in gaining notice of potential conflicts, it is a small step to hold that reasonable notice of a potential conflict inheres in the very fact of joint representation itself. If the Supreme Court takes this step and constitutionally mandates some form of inquiry, a defendant will be less likely to forfeit his sixth amendment rights because either his attorney or the judge failed to spot a conflict. As Justice Brennan noted in his concurrence in Cuyler, “the court cannot delay until a defendant or an attorney raises a problem, for the Constitution also protects defendants whose attorneys fail to consider, or choose to ignore, potential conflict problems.”140 By recognizing that the mere fact of joint representation is likely to cause a conflict and that inaction by the trial judge unduly endangers a defendant’s rights to counsel, the Supreme Court can mandate Rule 44(c) and be consistent with its precedents.

134. See supra text accompanying notes 126-33.
135. See infra notes 136-40 and accompanying text.
136. Cuyler, 446 U.S. at 347.
137. See supra text accompanying notes 10-36.
138. Cuyler, 446 U.S. at 347.
139. Holloway, 435 U.S. at 484.
140. Cuyler, 446 U.S. at 351.
Finally, the Supreme Court can find precedent for a constitutionally mandated inquiry in its decision in *Miranda v. Arizona*. The *Miranda* Court held that a criminal defendant must be advised of his constitutional rights to remain silent and to have counsel present before he is questioned. The rationale behind this decision is in many respects similar to the rationale for constitutionally requiring a Rule 44(c) inquiry. The *Miranda* Court found that without these warnings, a criminal defendant would in many instances be deprived of his fifth amendment right against self-incrimination by unwittingly foregoing this right. The failure to give a *Miranda* warning is thus a *per se* violation of the privilege against self-incrimination, regardless of whether an actual violation of the privilege occurs. The Court in effect held that the prophylactic measures specified in *Miranda* are necessary to the protection of a fundamental constitutional right. The right to counsel in criminal cases is equally fundamental. By recognizing the inadequacies of the traditional approach, it becomes clear that as in *Miranda* a procedural safeguard is also necessary to the protection of a defendant's right to counsel in joint representation cases.

The sixth amendment right to effective counsel is equally fundamental, but the argument to mandate a procedural safeguard is perhaps even more compelling in joint representation cases than in *Miranda*. A jointly represented defendant is more likely to unwittingly

142. *Id.* at 444. The Supreme Court held that unless other fully effective means are devised to inform accused persons of their right to silence and to assure a continuous opportunity to exercise it, the following measures are required: "prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage in the process that he wishes to consult with attorney before speaking there can be no questioning." *Id.* at 444-45.
143. In *Miranda*, the court concluded that "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively appraised of his rights and the exercise of those rights must be fully honored." *Id.* at 467.
144. The *Miranda* court held that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards *effective* to secure the privilege against self-incrimination. *Id.* at 444 (emphasis added).
145. *Id.*
forego his right to separate counsel due to the difficulty of appreciating the dangers of potential future conflicts. An average criminal defendant is surely much more aware of the consequences of his self-incriminating testimony than a jointly represented defendant is of the possible consequences of his joint representation. If attorneys and judges have difficulty spotting and appreciating the dangers of possible future conflicts due to joint representation, surely a criminal defendant is in need of at least minimal procedural safeguards designed to protect his sixth amendment right to adequate assistance of counsel.

III. Suggested Procedures Pursuant to a Constitutionally Mandated Rule of Inquiry

A. Current Problems with Rule 44(c)

A constitutional mandate of Rule 44(c) would be a step in the right direction towards solving the problems of multiple representation. However, the Rule as it is currently stated lacks sufficient guidelines as to what procedures would be regarded by a trial judge as constitutionally necessary to protect a defendant's sixth amendment right to counsel. Courts which hold Rule 44(c) proceedings are split over four primary issues: (1) whether a defendant may waive all future "actual" conflicts or whether he can waive only certain specified "potential" conflicts, (2) under what circumstances a waiver will be deemed knowing and intelligent in joint representation cases, (3) whether the court may refuse to accept certain knowing and intelligent waivers and disqualify joint counsel over defendant's objections in certain instances, and (4) what standard of review to apply when co-defendants choose to proceed with joint counsel and are later convicted.

In its present form, Rule 44(c) does not specify whether a defendant may waive only certain potential conflicts that are discussed at the inquiry, or whether a defendant's waiver may include every actual or potential future conflict. Theoretically, a waiver of all future conflicts would totally preclude post-conviction attacks based on conflicts due to joint representation alone. Many courts that hold Rule 44(c)

146. Thus, it may be that the procedural safeguard in joint representation cases should entail more than just a warning. A mere warning by the trial judge may not be sufficient to protect a defendant's right to counsel due to the difficulty of fully appreciating the dangers involved. See infra text accompanying notes 122-26. However, a mere warning by the judge will certainly come closer to protecting this right than the current practice.

147. See infra notes 152-53.

148. See infra note 150.
inquiries allow a defendant to waive actual conflicts so long as the waiver is knowing and intelligent, thus completely insulating a conviction from later attack. Other courts, recognizing the extreme difficulty of determining before trial what conflicts might arise and what effect they might have on their attorney's effectiveness, allow only a waiver of certain potential future conflicts. Waiver would thus be limited in these courts to the types of conflicts actually discussed at the proceeding and post-conviction relief would only be allowed as to those conflicts not discussed and waived at the proceeding.

Likewise, Rule 44(c) does not specify under what circumstances a waiver will be accepted as opposed to requiring disqualification of joint counsel. Most trial courts will accept a waiver of the right to separate representation if no actual conflict currently exists. However, a few appellate courts now hold that even without an actual conflict, the trial judge may disqualify joint counsel over a defendant's otherwise valid waiver if he finds that a conflict is "likely to occur sometime in the proceedings." While it is necessary to disqualify joint counsel in many instances, a disqualification order has a dangerous impact on a defendant's sixth amendment right to counsel of choice.

149. See, e.g., Bradshaw, 719 F.2d at 913 (holding that "once the right to separate counsel is waived, even an actual conflict is waived thereby, and a defendant has totally waived his sixth amendment right to conflict-free counsel."); Curcio, 680 F.2d 881 (trial court disqualified co-defendants' joint counsel due to actual conflict; court held defendants must be given an adequate opportunity to waive their right to conflict-free counsel); Laura, 667 F.2d at 372 (district judge identified an actual conflict; court accepted this finding but held it to be irrelevant since the appellant waived the conflict.)

150. See, e.g., Bradshaw, 719 F.2d at 912 ("if a waiver is obtained, the defendant cannot at a later date attack his conviction based on an assertion of conflict."); Tonaldi, 716 F.2d 431; Flanagan, 679 F.2d at 1076 ("a truly knowing and intelligent waiver accepted by the court will insulate a conviction from later attack.")

151. See Levy, 557 F.2d at 210-11 (Stun, J., dissenting); Gaines, 529 F.2d 1038.

152. Rule 44(c) fails to provide adequate guidelines for review of a post-conviction claim of ineffective counsel due to a conflict of interest. The Advisory Committee Notes merely indicate that "although a trial court's failure to make a Rule 44(c) inquiry will not necessarily result in reversal, an appellate court is more likely to find that a conflict existed in this instance." 77 F.R.D. at 603.

153. According to the Notes to Rule 44(c), this is a matter appropriately left to the discretion of the trial judge. The Notes only state that "the court need not permit the joint representation to continue merely because the defendants express a willingness to so proceed." 77 F.R.D. at 601.

154. See, e.g., Curcio, 694 F.2d 14; Bradshaw, 719 F.2d 431; Tonaldi, 716 F.2d 431; Gullett, 713 F.2d 1203; Mers, 701 F.2d 1321; Laura, 667 F.2d 365.

155. See, e.g., Flanagan, 679 F.2d 1072.

156. See supra text accompanying notes 82-97.
The impact of a disqualification order is especially threatening to a defendant’s right to choose his own counsel in light of the Supreme Court’s recent decision in Flanagan v. United States. Flanagan held that an order disqualifying counsel does not fall within the “collateral order” exception to the final judgment rule, and is therefore not immediately appealable under 28 U.S.C. § 1291. Prior to this decision, six federal circuits in addition to the third circuit had allowed immediate appeal of pretrial disqualifications of criminal defense counsel. Immediate appeals previously offered some measure of protection for a defendant’s choice of counsel. After Flanagan, however, a defendant must wait until after a full trial to assert his constitutional claim. With such impediments to review of a disqualification order, it becomes even more important to develop a constitutional standard to guide trial judges. Whether the judge decides to disqualify counsel or accept a waiver, he is making a decision that impacts on a defendant’s two competing sixth amendment rights.

B. A Suggested Approach

From the foregoing it is clear that some form of action, either legislative or judicial, is in order. The best approach is to require

158. Id. at 1052. The Court stated that to come within the “collateral order” exception to the final judgment rule, a trial court order must “1) conclusively determine the disputed question, 2) resolve an important issue completely separate from the merits of the action, and 3) be effectively unreviewable on appeal from a final judgment.” Id. at 1055, citing, Coopers and Lybrand v. Livesay, 437 U.S. 463, 468 (1978) (emphasis added). Justice O’Connor noted that post-conviction review of disqualification orders is fully effective to the extent that the asserted right to counsel of one’s choice is like, for example, the sixth amendment right to representing oneself, since obtaining reversal for violation of such a right does not require a showing of prejudice to the defense. See McKaskle v. Wiggins, 104 S. Ct. 944, 951 n.8 (1984). Further, the policy behind the final judgment rule against piecemeal review of trial court decisions that do not terminate the litigation is especially strong in criminal cases, where a defendant has the sixth amendment guarantee to a speedy trial. While a disqualification order is not “effectively unreviewable after entry of a final judgment,” it is clearly more difficult, costly and time consuming. Since a defendant’s right to counsel of choice is a right of constitutional dimension, it is even more important that specific guidelines be set at the disqualification stage in order to protect such an important right.

159. See United States v. Phillips, 699 F.2d 798, 801 (6th Cir. 1983); Curcio, 694 F.2d 14, 19-20; Agosto, 675 F.2d 965, 968 n.1; Gustafson, 459 U.S. 834; Hobson, 672 F.2d 825, 826; Smith, 653 F.2d 126 (entertaining appeal without discussion of appealability question.); Garcia, 517 F.2d 272, 275. The ninth circuit has held that such orders are not immediately appealable. United States v. Greger, 657 F.2d 1109, 1110-13 (1981), cert. denied, 103 S. Ct. 1891 (1983).
160. See supra note 158.
161. With the exception of Miranda, supra note 141, the Supreme Court has generally been reluctant to impose constitutionally mandated procedural safeguards
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a mandatory Rule 44(c) proceeding in each and every joint representation case. If some form of Rule 44(c) inquiry is mandated, the trial judge will only be left with a choice between accepting a waiver or disqualifying joint counsel. In many cases, the mere initiation of any inquiry should cause co-defendants to consider the consequences of being jointly represented. This will insure that the choice of separate representation is one of their own volition. In other cases, co-defendants will decide it is to their advantage to proceed with joint counsel. In these cases, a trial judge must delicately weigh a defendant's constitutional right to choice of counsel against the often overriding concerns inherent in joint representation.

In order to consistently achieve the proper balance between these two competing concerns, it is necessary that a standard be articulated from which a trial judge may make a decision which least restricts the constitutional right impacted by that decision. The suggested standard is one which disallows any waiver of the right to separate representation unless the co-defendants desire to proceed with joint representation in order to present a unified defense and such a defense is plausible. This suggested per se rule with a unified defense exception is based on the premise that the only valid reason for a defendant to risk the dangers of joint representation is in order to pursue such a strategy.

In other areas of criminal procedure. See, e.g., Zurcher v. Stanford Daily, 436 U.S. 547, 567 (1978) (legislation, not the fourth amendment is the proper means to protect newspapers from illegal searches); Manson v. Brathwaite, 432 U.S. 98, 118 (1977) (Stevens, J., concurring) (procedures for identification of suspects is more effectively developed by legislative action than by judicial fiat.) A legislative rule would achieve the same result as a constitutionally mandated procedure. But where the legislature fails to act and fundamental constitutional guarantees hang in the balance, the Supreme Court must act to protect them.

162. See supra note 108.
163. See supra text accompanying notes 82-97.
164. See supra text accompanying notes 10-78.
165. Following the rationale of the Farretta decision, it might appear to be unconstitutional to condition allowing joint representation on a showing of the plausibility of a certain defense strategy. Farretta, which held that a criminal defendant has the right to represent himself unassisted by counsel, was based on the fundamental right of a defendant to choose how to conduct his case even if he chooses to conduct it eventually to his detriment. See supra note 86. Farretta stated that the defendants' choice is to be honored out of respect for them as free and rational beings, responsible for their own fates. It is the defendants, not the judge or prosecutor, who will bear the personal consequences of a conviction. Farretta, 422 U.S. at 834. Joint representation, on the other hand, does have personal consequences for the lawyers and judges involved. Defendants choice of joint representation creates dangers not involved in self-representation cases, primarily because of the problems of conflicting ethical duties that can effect a lawyer's advocacy in joint representation cases. See
The *per se* aspect of the suggested standard is warranted for the same reasons which suggest that a Rule 44(c) procedure should be constitutionally required.¹⁶⁶ Joint representation involve dangers which will in most cases outweigh a defendant’s right to choice of counsel. These dangers involve the defendant’s competing constitutional right to effective assistance of counsel,¹⁶⁷ the improbability of obtaining a fully knowing waiver of this right due to the impossibility of predicting conflicts before trial,¹⁶⁸ the difficulty of post-conviction review,¹⁶⁹ and the court’s duties to supervise the ethics of the attorney’s practicing before it.¹⁷⁰ These concerns are especially dangerous in joint representation cases because the trial record may mask so much, and because a conflict of interest puts restraints on a defense attorney in a manner distinct from other forms of ineffectiveness. They can only be outweighed by a defendant’s right to choice of counsel when co-defendants choose to present a unified defense, and such a defense is plausible.¹⁷¹ Only in this situation are these overwhelming concerns sufficiently minimized to be outweighed by a defendant’s right to choice of counsel.

A joint defense strategy sufficiently minimizes these concerns for a number of reasons. First, the danger of violating a defendant’s competing sixth amendment right to *effective* assistance of counsel is minimized because the reason that a joint defense strategy is pursued is to present a more *effective* defense.¹⁷² Second, most actual con-

¹⁶⁶. *See supra* text accompanying notes 10-36. Only when a unified defense strategy is presented can a single attorney adequately represent the interests of more than one defendant at the same time. Thus, this exception is warranted to protect the defendants’ rights to counsel of choice. Only in this situation is this choice not outweighed by the dangers involved in choosing joint representation. *See infra* text accompanying notes 172-77.

¹⁶⁷. *See supra* notes 10-30 and accompanying text.

¹⁶⁸. *See supra* notes 68-71 and accompanying text.

¹⁶⁹. *See supra* text accompanying notes 37-78.

¹⁷⁰. *See supra* note 89.

¹⁷¹. As stated by the Second Circuit in *Carigan*, 543 F.2d 1053: “the right to effective representation by counsel whose loyalty is undivided is so paramount in the proper administration of criminal justice that it must in some cases take precedence over all other considerations, including the expressed preference of the defendants concerned and their attorney.” *See also* ABA STANDARDS RELATING TO THE DEFENSE FUNCTION at 213, concluding that in some circumstances “even full disclosure and consent of the client may not be adequate protection.”

¹⁷². *See supra* text accompanying notes 98-105.
conflicts that would harm co-defendants pursuing differing defense strategies are by definition not present when co-defendants pursue a unified defense strategy. In this strategy, each co-defendant will not testify to any evidence which tends to harm any of his co-defendants. If the strategy is carried through, no single defendant will want, for example, to negotiate a plea or have his degree of culpability compared with that of his co-defendants throughout the trial. Most of the potential conflicts of joint representation are therefore resolved by the co-defendants' faith in the inevitable results of the joint strategy. Third, the ethical rules expressly allow an at-

173. See supra text accompanying notes 98-105.
174. See infra note 175.
175. See, e.g., Flanagan, 679 F.2d 1072, where four co-defendants chose to retain a single law firm to conduct their joint defense. The district court judge, pursuant to a Rule 44(c) proceeding, discussed with each defendant eight areas of possible conflict that tend to arise in joint representation cases:
1) Opening and Closing Statements—Unlike separate counsel, joint counsel would not be able to set one defendant apart from another.
2) Sentencing—In the event that more than one defendant were convicted, joint counsel could not argue that one defendant was more or less culpable than another.
3) Spillovers—Possibility that jury might infer from joint representation that if one defendant is found guilty, the others must be also.
4) Possible Grants of Immunity—Each defendant was told that the government could offer one of the defendants immunity on the condition that he testify against the others, thus interfering with a joint trial strategy.
5) Nature of Evidence—It was explained to each defendant that the government might introduce more evidence tending to implicate defendant Flanagan (the alleged "leader" of the conspiracy), and that as a result:
   a) the jury might infer that the others were guilty because of joint representation; and,
   b) defense efforts might be more concentrated toward the defense of Flanagan.
6) Right to Testify—If one defendant exercised his right to testify on his own behalf and one or more of the others did not, the jury, from the fact of joint representation alone, might infer guilt on the part of those not testifying. Also, on cross-examination, the defendant who exercised his right to testify could be questioned as to his knowledge of activities involving the other defendants.
7) Character and Reputation Testimony—Each was informed that if the defense offered character or reputation testimony on behalf of some but not all defendants, the jury might infer from the fact of joint representation that the character or reputation of the other defendants is undesirable.
8) Right to Separate Counsel—Each was apprised of his right to separate counsel, and that, if he could not afford counsel, the court would appoint counsel for him. Flanagan, 527 F. Supp. at 903.

The above possibilities for conflict are likely to be present in every joint representation case where a common defense will not be presented. Where no common defense is presented, defendants will want, for example, to be set apart for the purpose of showing different levels of culpability at opening and closing statements or sentencing, for favorable treatment pursuant to a plea bargain, or for showing differences in character or reputation. On the other hand, where a common defense will be presented, it would not be to their advantage to be so compared. Any danger that
torney to jointly represent co-defendants if he believes he can ade-
quately represent their best interests.\textsuperscript{176} Moreover, since most of the potential conflicts normally associated with joint representation are resolved by a joint strategy, a single attorney will not be in breach of his duty to represent the best interests of his clients. Indeed, if a common defense is the best defense under the circumstances, an attorney arguably has a duty to present that defense.\textsuperscript{177}

Pursuant to these principles, the trial judge should have the duty to hold an inquiry proceeding similar to Rule 44(c) whenever an attorney attempts to represent multiple clients in a criminal trial. This duty should be constitutionally mandated and made applicable to the states through the fourteenth amendment to the U.S. Constitution. At the Rule 44(c) inquiry, the judge will be required to disqualify counsel from further representing more than one defendant unless counsel alleges that he wishes to proceed with joint representation in order to present a unified defense strategy.\textsuperscript{178} If after consultation, the jury may infer guilt of all defendants from the fact of joint representation are tactical risks taken in the belief that the jury may well infer innocence of all the defendants. Thus, any spillover effect is used in a joint defense strategy for its advantages, and any risks that the jury may infer certain facts to a certain defendant’s disadvantage is the result of the trial strategy. Brief for Petitioner at 47-79, Flanagan v. Untied States, 459 U.S. 1101 (1984). The District Court nonetheless disqualified the single firm from further representing any of the defendants, apparently because of the belief that the joint strategy would not be plausible under the factual circumstances of the case. Flanagan, 527 F. Supp. at 903. A joint defense may not have been plausi-
ble in this case due to the varying degrees of culpability between the four co-defendants. Many circuits have found actual conflicts where co-defendants are forced to take a unified defense despite the fact of varying degrees of culpability. See, e.g., Austin v. Erickson, 477 F.2d 620 (8th Cir. 1973) (actual conflict found where a woman accused with her husband of killing her child was represented by the same attorney as her husband, and evidence revealed that the husband alone had perpetrated the acts resulting in the child’s death); Foxworth v. Wainwright, 516 F.2d 1072 (5th Cir. 1975) (multiple representation found constitutionally infirm where unified defenses were taken, yet the evidence suggested the crime was committed by only one person.)

\textsuperscript{176} See, e.g., ABA STANDARDS RELATING TO THE PROSECUTION AND THE DEFENSE FUNCTION, § 3.5 commentary at 214 (1971); H. DRINKER, LEGAL ETHICS 103-31; Developments in the Law: Conflicts of Interest in the Legal Profession, 94 HARV. L. REV. 1244, 1380-81 (1981).

\textsuperscript{177} Many commentators and perhaps more significantly, the National Association of Criminal Defense Lawyers and the national Legal Aid and Defense Association find joint representation ethical and even necessary, in some cases. See Margolin and Colliver, \textit{Pretrial Disqualification of Criminal Defense Counsel}, 20 AM. CRIM. L. REV. 227, 253 (1982); \textit{See also} Brief for the NACDL and the NLADA as Amici Curiae in support of Petitioners at 16-17, Flanagan v. United States, 459 U.S. 1101 (1984).

\textsuperscript{178} As is currently the approach in some courts, separate counsel would be appointed for every indigent defendant. See, e.g., Ford, 379 F.2d 123 (requiring initial appointment of separate counsel for each indigent defendant pursuant to the court’s supervisory powers.); Gaines, 529 F.2d at 1044 n.4; Fryar, 404 F.2d 1071; Morgan, 396

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counsel decides that the defendants would benefit from joint representation, he would be required to notify the court within the deadline for filing motions at which time a Rule 44(c) inquiry would be instigated to determine if a joint strategy is plausible. At the Rule 44(c) inquiry, it must be determined that a unified defense is plausible. Since the attorney is in the best position to determine which is the best defense under the circumstances, the judge or a magistrate should in most cases defer to the attorney's judgment unless it is clear that a joint defense is not plausible. A deferential approach will also have the benefit of adequately protecting privileged information that has been acquired by the attorney. A magistrate can inquire only so far into confidential areas and the defense strategy without committing error. While it may be necessary to require that the attorney-client privilege be waived to the extent necessary to persuade the magistrate that a unified defense is plausible, by deferring to an attorney's judgment, a waiver of this important privilege can be kept to a minimum.

If co-defendants wish to proceed with joint representation, the magistrate must obtain a knowing and intelligent waiver of the right to separate counsel. This will insure that each defendant's choice is voluntarily made and will also prevent many post-conviction claims of ineffective assistance of counsel. It must be emphasized that a

F.2d 110. See also McFarland v. Indiana, 359 N.E.2d 267, 268-69 (Ind. App. 1977) where the Indiana State Court urged public defender offices to adopt the Ford rule; however, Indiana still requires proof of a conflict for reversal. 179. Once the court has been notified, a Rule 44(c) proceeding should be scheduled at a reasonable time period before trial to determine the propriety of the joint representation. The purpose of this time period is to allow sufficient time for the prosecution to engage in plea bargaining with individual defendants should the court order separate representation. This will also allow time for new attorneys to become familiar with the case and to formulate an individualized defense strategy. 180. This decision should ultimately be made by a federal magistrate or an impartial judge at this special proceeding. The proceeding should also be held ex parte as a prophylactic device to ensure that the defendant's fifth amendment self-incrimination rights are protected. 181. See supra note 175 for an example of a case where the judge found that a unified defense strategy was clearly not plausible. 182. See, e.g., Tonaldi, 716 F.2d at 438 (courts are not free to inquire deeply into the attorney-client relation, nor are they free to elicit in advance the substance of a defendant's testimony.) 183. Johnson v. Zerbst, 304 U.S. 458 (1937). 184. The standard for finding a valid waiver of constitutional rights was first established by the Court in Johnson v. Zerbst and was later refined in Brady v. U.S., 397 U.S. 742 (1970). Johnson, 304 U.S. at 464. Brady held that "waivers of constitutional rights not only must be voluntary, but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Brady, 397 U.S. at 748.
pre-trial waiver of separate representation is only being accepted by the court in order to protect a defendant's right to choose joint representation where the dangers of joint representation are being held to a minimum.\textsuperscript{185} Were the unified defense to break down, the waiver of the right to separate representation would immediately become inoperative. If a defendant decides to switch his position, counsel must be disqualified from representing the adverse defendant due to an actual conflict caused by divergent defense postures and counsel's resultant inability to effectively represent all the defendants.

The procedures suggested in this note will undoubtedly place added burdens on the trial judge. Yet other burdens will at the same time be lessened. A mandated \textit{per se} rule with the limited unified defense exception will preclude habeas review of claims of ineffective counsel due to joint representation that now clog reviewing courts. The suggested rule is formulated to protect the individual choice of an accused to the extent possible given the dangers of multiple representation to a defendant's right to secure effective counsel. When constitutional rights clash, a balance must be struck between them. Sometimes the striking of that balance requires a court to affirmatively act to prevent one side of the balance from unjustly canceling out the other. In joint representation cases, both sides of the balance are of constitutional dimension. A constitutionally required procedure similar to the one suggested will insure that the balance between the two competing rights involved weighs evenly at all times.

\textit{Conclusion}

In view of the dangerous legal and ethical problems associated with joint representation of criminal defendants, the trial judge should be required to do more than merely assume counsel has adequately dealt with these problems by discussing the dangers with his clients.

\textsuperscript{185} For the purposes of deciding whether a defendant may attack his conviction on habeas review, a waiver of the right to retain separate counsel in this context is not a waiver of the right to effective counsel. It is rather a \textit{choice} to proceed with joint representation; a choice which will only be allowed when the dangers of joint representation have been minimized by the unified defense. The suggested prophylactic rules will place added burdens on the trial court at the pretrial stage. However, the rule will have the advantage of precluding later habeas review of allegations of ineffective counsel due to joint representation. Habeas review will be precluded since an express waiver is required to proceed with joint representation, thus constituting a "deliberate bypass" of the right to retain separate counsel. \textit{See Henry}, 379 U.S. at 443 (rights deliberately bypassed are unreviewable on direct or habeas review.) A convicted defendant will still be able to pursue a habeas corpus attack on the basis of ineffective or incompetent counsel that allegedly arose due to something other than the mere fact of joint representation.
The sixth amendment guarantees the right to effective counsel and the right to choice of counsel; however, these rights clash in the joint representation context. Therefore, the sixth amendment itself mandates a procedure whereby both rights are protected to the greatest extent possible. The suggested procedure, which requires the court to inquire into the reasons for co-defendants choosing to be jointly represented, and allows such representation only where a common defense appears plausible, will ideally strike a fair balance between these two competing constitutional rights.

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