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The Right to Counsel of One’s Choice: Joint Representation of Criminal Defendants

[T]here are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.¹

The right to counsel plays a fundamental role in the American constitutional scheme.² Yet, the right to counsel, like other constitutional rights, is a dynamic concept, constantly growing in diverse directions as courts explore and expand new areas of that right. Recently, courts have focused considerable attention on the question whether one has a constitutional right to be represented by counsel of his choice.³

This note examines the question whether, in a joint representation situation⁴, a non-indigent⁵ criminal defendant has the right to

² The fundamental nature of the right to counsel has long been recognized in this country. Beginning with Powell v. Alabama, 287 U.S. 45 (1932), the Supreme Court has consistently held that the necessity of counsel is so vital and imperative that a trial court’s failure to make an effective appointment of counsel for an indigent defendant who, because of ignorance, feeble-mindedness, illiteracy, or the like, is incapable of adequately making his own defense, constitutes a denial of due process. Id. at 71. While the holding in Powell was limited to capital cases arising in state courts, the Supreme Court soon expanded the right to counsel to include indigent defendants in federal court. Johnson v. Zerbst, 304 U.S. 458 (1938). The Court in Johnson also held that if the sixth amendment right to counsel is not complied with, the federal court is without jurisdiction to hear the case. Id. at 468. In commenting on the right to counsel the Court stated, “[The assistance of counsel] is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty.” Id. at 462. Later, in Gideon v. Wainwright, 372 U.S. 335, 344 (1963), the Court further extended the right to counsel to include not only indigent defendants in capital cases, but all indigents charged with a crime. Then, in Argersinger v. Hamlin, 407 U.S. 25, 37 (1972), the Court again expanded the scope of the right to counsel; it did so by broadening the definition of “crime” to include any case in which the defendant, if found guilty, could be imprisoned.

⁴ For purposes of this note, the term “joint representation” will refer both to joint repre-
be represented by counsel of his choice, regardless of any potential conflicts of interest that may arise from that joint representation.\(^6\)

Part I surveys the right to counsel; it explores the nature of the right, the effect of joint representation on the right, and the possibility of waiving the right to separate counsel. Part II discusses the Supreme Court's treatment of joint representation; it examines past Supreme Court cases\(^7\) addressing this issue, as well as the current case of *United States v. Flanagan*.\(^8\) Part III considers whether Federal Rule of Criminal Procedure 44(c) provides an answer to the questions posed in *Flanagan*.

I. The Right to Counsel

A. The Nature of the Right to Counsel

The sixth amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right... to have the assistance of counsel for his defense."\(^9\) However, the sixth amendment right to representation (a single attorney or single law firm representing two co-defendants) and to multiple representation (a single attorney or law firm representing more than two co-defendants).


6 While conflicts of interest may arise at any point in the proceeding, *see note 27 infra* and accompanying text, most conflict of interest issues in criminal cases involving joint representation have been raised at the post-conviction level. *United States v. Agosto*, 675 F.2d 965, 970 (8th Cir.), cert. denied, 103 S. Ct. 77 (1982). This note specifically addresses the question whether a defendant may challenge a court's disqualification of an attorney prior to trial. However, in order to reach this question, it is first necessary to examine in some detail the cases involving post-conviction claims that the effective assistance of counsel has been denied.


8 679 F.2d 1072 (3d Cir. 1982), cert. granted, 51 U.S.L.W. 3496 (U.S. Jan. 11, 1983) (No. 82-374). The Supreme Court granted certiorari to decide whether the Third Circuit Court of Appeals decision disqualifying defense counsel, despite the defendant's valid waiver of potential conflicts of interests, is inconsistent with past Supreme Court and Circuit Court decisions.

9 The entire text of the sixth amendment states,

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature of the cause of the accusation; to be confronted...
counsel is not a single, immutable principle. Rather, it is composed of four distinct concepts: 10 the right to have counsel, 11 the right to some minimal quality of counsel, 12 the right to a preparation period sufficient to ensure minimal quality of counsel, 13 and the right to a reasonable opportunity to select counsel and to be represented by selected counsel. 14 Thus, the right to counsel is a multifarious concept, growing and changing as each of its facets becomes more defined.

Even though they are all part of the broad sixth amendment guarantee of counsel in all criminal cases, these four facets sometimes conflict. This conflict is especially apparent when two or more criminal defendants engage a single attorney to represent them. 15 More
specifically, in joint representation situations the right to counsel of one's choice often directly conflicts with the right to the effective assistance of counsel. In attempting to resolve this conflict, courts have consistently refused to hold that the right to be represented by counsel of one's choice is absolute. While this has been particularly true with respect to indigent defendants, courts have also declined to adopt a rule giving absolute deference to the defendant's right to choose retained counsel to represent him. Instead, courts have sought to bal-

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16 Because in a joint representation situation a single attorney must "serve two masters," a conflict of interest may sometimes result. Wice, Representation of Multiple Criminal Defendants: Conflicts of Interest and the Responsibility of the Defense Lawyer, 44 Tex. B.J. 729, 734 (1981). This conflict in turn impairs the effectiveness of counsel's representation. Thus, the defendant's right to be represented by counsel of his choice may clash with his right to the effective assistance of counsel. United States v. Curcio, 694 F.2d 14, 22-23 (2d Cir. 1982).

On the other hand, the right to choose counsel and the right to effective assistance of counsel are not necessarily mutually exclusive. A strong argument can be made that requiring a defendant to accept the representation of an attorney whom he does not trust or whom he does not desire to have represent him will actually cause ineffective representation, rather than ensure effective representation. Cf. Faretta v. California, 422 U.S. 806, 834 (1975) (forcing a lawyer on a defendant only leads him to believe that the law contrives against him); Drumgo v. Superior Court, 8 Cal. 3d 930, 938, 506 P.2d 1007, 1012, 106 Cal. Rptr. 631, 636 (1973) (Mosk, J., Dissenting); Comment, An Examination of the Sixth Amendment Right to Choose Retained Counsel, 60 Iowa L. Rev. 328, 331 (1974).

17 While acknowledging that the right to be represented by counsel is absolute, no court has held that there is an absolute right to be represented by counsel of one's choice. Davis v. Stamler, 650 F.2d 477, 480 (3d Cir. 1981); United States v. Brown, 591 F.2d 307, 310 (5th Cir.), cert. denied, 442 U.S. 913 (1979) (the sixth amendment does not give a defendant an absolute, unqualified right to counsel of his choice even when counsel is retained); United States v. Burton, 584 F.2d 485, 488-89 (D.C. Cir. 1978), cert. denied, 439 U.S. 1069 (1979) (while a defendant should be afforded a fair and reasonable opportunity to secure counsel of his own choice, his right to retain counsel of his choice is not absolute); United States v. Dolan, 570 F.2d 1177 (3d Cir. 1978) (same); United States ex rel. Baskerville v. Deegan, 428 F.2d 714, 716 (2d Cir.), cert. denied, 400 U.S. 928 (1970) (same); United States ex rel. Carey v. Rundle, 409 F.2d 1210, 1215 (3d Cir. 1969), cert. denied, 397 U.S. 946 (1970) (the constitutional requirement is met as long as the accused is afforded a fair or reasonable opportunity to obtain particular counsel, and as long as there is no arbitrary action prohibiting the effective use of such counsel).

18 See note 5 supra and accompanying text for a general discussion of the question whether an indigent defendant has a right to be represented by counsel of his choice.

19 Although no court has held that a criminal defendant has an absolute right to be represented by counsel of his choice, all courts have recognized that the defendant does have some right to be represented by chosen counsel. Different circuits, however, have treated this right with differing degrees of deference. The Eighth Circuit grants the defendant's right to be represented by counsel of his choice the greatest degree of deference, holding that defendants are free to employ counsel of their choice and the courts are afforded little leeway in interfering with that choice. United States v. Valenzuela, 521 F.2d 414, 416 (8th Cir. 1975), cert. denied, 424 U.S. 916 (1976). See also United States v. Agosto, 675 F.2d 965, 969 (8th Cir.),
ance the defendant's right to be represented by counsel of his choice with two other considerations: the defendant's right to the effective assistance of counsel, and judicial concern with ensuring the effective administration of justice.²⁰ Thus, the critical question is: How

²⁰ The Supreme Court recognized the need for judicial balancing of interests where the defendant exercises his right to choose counsel solely as a dilatory tactic. Holloway v. Arkansas, 435 U.S. 475 (1978). Other courts have held that, even when the defendant is in good faith (and especially when he is not in good faith) the defendant's right to be represented by chosen counsel must be balanced against the fair and effective administration of justice. Davis v. Stamler, 650 F.2d 477 (3d Cir. 1981); United States v. Burton, 584 F.2d 485 (D.C. Cir. 1978), cert. denied, 439 U.S. 1069 (1979); United States v. Liddy, 348 F. Supp. 198, 200 (D.D.C. 1972).

Another concern courts sometimes express is a judicial concern in preserving the integrity of the judicial system. See United States v. Armedio-Sarmiento, 524 F.2d 591, 593 (2d Cir. 1975). This concern is most often enunciated, however, in cases involving a conflict of interest which arises because of successive representation (where an attorney representing a defendant has previously represented co-defendants or other witnesses involved in the defendant's case) or because of joint representation of grand jury witnesses. See United States v. Agosto, 675 F.2d 965 (8th Cir. 1982) (involving both successive representation and joint representation of co-defendants); United States v. Kitchin, 592 F.2d 900 (5th Cir.), cert. denied, 444 U.S. 843 (1979) (the defendant requested to be represented by an attorney (Jones) who was a member of the same law firm as a former Assistant United States Attorney; the latter attorney had represented the state in a case closely related to the defendant's case. The defendant was actually being tried for allegedly bribing the judge in that case. The district court refused to grant defendant Kitchin's request to retain attorney Jones, stating that the defendant's interest in having Jones represent him was insufficient to outweigh the public suspicion that would likely be aroused by denial of the government's motion.); Pirillo v. Takiff, 341 A.2d 896 (Pa. 1975), aff'd, 352 A.2d 11, appeal dismissed & cert. denied, 423 U.S. 1083 (1976) (holding that the public interest in the effective investigation by a grand jury outweighed the interests of defendant-policemen in retaining their own counsel (an F.O.P. attorney)). But see Matter of Grand Jury Empaneled Jan. 21, 1975, 536 F.2d 1009 (3d Cir. 1976) (distinguishing Pirillo).
should this balance be struck?21

B. Joint Representation and Conflict of Interest

Joint representation per se does not violate the Constitution.22 A number of courts and commentators, however, disfavor joint representation.23 The primary reason for this disfavor is the potential conflict of interest arising from joint representation of criminal defendants. Such a conflict infringes upon the effective assistance of counsel,24 and may cause serious ethical problems.25

Conflicts of interest in a joint representation situation may arise in a variety of ways and at various stages in the proceedings.26 Conflicts may arise in planning and executing trial strategy,27 in plea bargaining28 or in offering defenses at trial29—particularly if one de-

21 This balance should be struck in favor of allowing the defendant the right to be represented by chosen counsel, as long as that right is exercised with full knowledge of its consequences. See generally Holloway v. Arkansas, 424 U.S. 475 (1978); Glasser v. United States, 315 U.S. 60 (1942); United States v. Waldman, 579 F.2d 649 (1st Cir. 1978); United States v. Gaines, 529 F.2d 1038 (7th Cir. 1976).


24 Holloway v. Arkansas, 435 U.S. at 482. The Supreme Court further noted in Holloway that “in a case of joint representation of conflicting interests the evil . . . is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to the possible pre-trial plea negotiations and in the sentencing process.” Id. at 490 (emphasis in original). See also United States v. Halbert, 640 F.2d 1000, 1010 (9th Cir. 1981).

25 For an excellent discussion of the defense attorney’s ethical duties in joint representation situations, see Geer, supra note 23, at 146-62.


27 United States v. Agosto, 675 F.2d 965 (8th Cir.), cert. denied, 103 S. Ct. 77 (1982) (citing Note, Developments in the Law—Conflicts of Interest in the Legal Profession, 94 HARV. L. REV. 1244, 1381-83 (1981)). The Court noted that in planning trial strategy, the attorney may make decisions favoring one defendant over another. Id. at 971 n.5. See also United States v. Medel, 592 F.2d 1305, 1311 (5th Cir. 1979).

28 United States v. Agosto, 675 F.2d at 971 n.5.

29 Id.

In offering defenses at trial, the attorney may harm one or more defendants. If he steers a neutral course, he may deny the less culpable defendants the chance to
fendant's defense is inconsistent with that of another defendant. Conflicts may also arise if the testimony of one defendant inculpates another. Moreover, the very fact that an attorney appears on behalf of a group of defendants may make some defendants appear guilty by association.

The existence of conflicts, or even the possibility that conflicts will arise, poses serious ethical considerations for the defense attorney. Rule 1.7 of the proposed final draft of the ABA Model Rules of Professional Conduct prohibits an attorney from representing a client if the lawyer's ability to represent that client "will be adversely affected by the lawyer's responsibilities to another client, or to a third person." In the comments to Rule 1.7 the drafters expounded upon the attorney's duty not to represent conflicting interests in a joint

Id. See also United States v. Medel, 592 F.2d at 1311. Robinson v. Paratt, 546 F.2d 764 (8th Cir. 1976); Tague, Multiple Representation and Conflicts of Interest in Criminal Cases, 67 GEO. L.J. 1075, 1077 (1979).

31 Tague, supra note 30, at 1077. See also United States v. Medel, 592 F.2d at 1311.

32 United States v. Agosto, 675 F.2d 965, 971 n.5 (8th Cir.), cert. denied, 103 S. Ct. 77 (1982).

33 See generally Geer, supra note 23.

34 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (Proposed Final Draft 1981).

The entire text of Rule 1.7 states,

(a) A lawyer shall not represent a client if the lawyer's ability to consider, recommend or carry out a course of action on behalf of the client will be adversely affected by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests.

(b) When a lawyer's own interests or other responsibilities might adversely affect the representation of a client, the lawyer shall not represent the client unless:

1. The lawyer reasonably believes the other responsibilities or interests involved will not adversely affect the best interests of the client; and

2. The client consents after disclosure. When representation of multiple clients in a single matter is undertaken, the disclosure shall include explanation of the implications of the common representation and the advantages and risks involved.

Rule 1.7 of the ABA Model Rules of Professional Conduct would replace EC 5-15 and DR 5-105 of the ABA Code of Professional Responsibility (1976). Rule 1.7 does not substantially alter the provisions of the present Code, but it does go farther than DR 5-105(A) by requiring that, when a lawyer's interest is involved, not only must the client consent to the representation after disclosure, but the representation must also reasonably appear to be compatible with the client's best interests. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 notes (Proposed Final Draft 1981). Moreover, Rule 1.7 does not employ the "appearance of impropriety test" which some commentators have advocated and some courts have adopted. See Kramer v. Scientific Control Corp., 534 F.2d 1085 (3d Cir.), cert. denied, 429 U.S. 830 (1976). As the drafters noted, the adoption of such a test would prohibit all dual representation, even where such representation has traditionally been considered permissible. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment (Proposed Final Draft 1981). See also Cuyler v. Sullivan, 446 U.S. 335, 347 (1980).
representation situation stating that since "the potential for conflict of interest in representing multiple defendants in a criminal case is so grave, . . . ordinarily a lawyer should decline to represent more than one defendant."³⁵

Even though they discourage joint representation, the drafters acknowledge that common representation of persons having similar interests is proper if three conditions are met: (1) the risk of adverse effects is minimal; (2) the lawyer reasonably believes the other responsibilities or interest involved will not adversely affect the best interest of the client; and (3) the client consents after disclosure.³⁶ Thus, while the proposed Model Rules of Professional Conduct strongly discourage joint representation, they do not completely condemn it; instead, they condone joint representation of clients with non-adverse interests.³⁷

Overall, the responsibility for determining whether conflicts of interest exist and, if so, whether their existence may impair the effective assistance of counsel, must rest with the attorney involved.³⁸ If an actual conflict of interest which may impair the effectiveness of the representation does indeed exist, the attorney has an ethical duty

³⁶ Rule 1.7 thus places the burden of disclosure on the attorney. Rule 1.7 also recognizes that if, after disclosure has been made, the client wishes to continue to retain the same attorney, the client may consent to the attorney's continued representation of him. Therefore, although Rule 1.7 does not state that a defendant may waive the right to separate, conflict-free counsel, it does, by implication at least, allow such a waiver. (For a more complete discussion of the question of waiver, see notes 52-56 infra and accompanying text.) However, the question whether or not the court must accept a client's consent/waiver is not addressed in the Rule.
³⁸ Cuyler v. Sullivan, 446 U.S. 335, 346 (1980); United States v. Mandell, 525 F.2d 671 (7th Cir. 1975), cert. denied, 423 U.S. 1049 (1976); Larry Buffalo Chief v. South Dakota, 425 F.2d 271, 280 (1970); Kaplan v. United States, 375 F.2d 895, 897 (9th Cir.), cert. denied, 389 U.S. 839 (1967). Moreover, if an attorney represents to the court that a conflict of interest could or does exist, the court should grant the attorney's request for withdrawal. Holloway v. Arkansas, 435 U.S. 475, 485 (1978); Glasser v. United States, 315 U.S. 60 (1932). The mere fact that the attorney has a duty to disclose possible conflicts to the client and to the court, however, does not preclude the court from making its own independent inquiry. United States v. Donahue, 560 F.2d 1039, 1044 (1st Cir. 1976) (the court held that the trial court had a duty to advise co-defendants in a multiple representation situation of the possibility of conflicts, regardless of the attorney's duty to do the same).
to withdraw from the case. Moreover, if the attorney fails to disclose the conflict and the court has reason to believe that a conflict may exist, the court has a duty to inquire into the possibility of such a conflict. If the attorney informs the court that no conflict exists, however, and if the client wishes to have that attorney continue to represent him, the court need not assume that the attorney is being untruthful, nor require that the client retain a different attorney. Contrary action would unnecessarily deprive the individual of his right to be represented by the attorney of his choice.

Despite the potential conflict of interest inherent in joint representation, two reasons warrant allowing such representation. First, the presentation of a common defense may benefit the defendant. As Mr. Justice Frankfurter noted in his dissent in Glasser v. United States, "Joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack." Second, the defendant has a right, not only to be represented by counsel, but also to be represented by counsel of his choice. These two factors should not be lightly disregarded. The defendant's exercise of his constitutional right to choose counsel is a critically important and intensely personal decision. Ultimately

39 Cuyler v. Sullivan, 446 U.S. 335, 346 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (Proposed Final Draft 1981). Counsel's duty to inform the court is a continuing duty since conflicts of interest may arise at any stage in the proceeding. See generally Girgenti, Problems of Joint Representation of Defendants in a Criminal Case, 54 ST. JOHN'S L. REV. 55, 61 (1979). However, in the interest of promoting the effective administration of justice, counsel should exercise prospective judgment and withdraw from the case as soon as it becomes apparent that a conflict could very possibly arise, rather than waiting until the trial is in progress. Geer, supra note 23, at 148-57.

40 FED. R. CRIM. P. 44(c).

41 Willis v. United States, 614 F.2d 1200, 1205 (9th Cir. 1979); United States v. Wisniewski, 478 F.2d 274, 284 (2d Cir. 1973).


43 315 U.S. 60 (1932).

44 Id. at 92.

45 See generally Note, Sixth Amendment—Conflicts of Interest in Multiple Representation of Co-Defendants, 71 J. CRIM. L. & CRIMINOLOGY 529, 536 (1980).


47 The Supreme Court remarked upon the importance of this right in Faretta v. California, 422 U.S. 806 (1975), stating that to deny a defendant his right to dispense with constitutional safeguards is "to imprison a man in his privileges and call it the Constitution." Id. at 815 (citing Adams ex rel. McCann v. United States, 317 U.S. 269, 279-80 (1942)). Accord United States v. Garcia, 517 F.2d 272 (6th Cir. 1975).
the defendant, and not the court or the attorney, will have to live with the consequences of the decision.\textsuperscript{48} Therefore, just as the defendant has the right to choose not to be represented by counsel,\textsuperscript{49} a choice which may sometimes be to his detriment, so too should the defendant have the right to choose to be represented jointly with another defendant, even though that choice may eventually prove to have been unwise.\textsuperscript{50}

C. Waiver of the Right to Separate Counsel

1. Recognizing the Waiver of Separate Counsel

The Supreme Court first recognized the defendant's right to waive separate representation in \textit{Glasser v. United States}.\textsuperscript{51} Since then most courts have recognized that defendants have the right to waive separate counsel, provided that their waiver is knowingly and intelli-

\begin{footnotesize}
\textsuperscript{48} Faretta v. California, 422 U.S. 806 (1975). \textit{Faretta} involved the question whether a criminal defendant had a constitutional right to defend himself, without the aid of counsel. In holding that the defendant did have such a right, the Court stated, 

\begin{quote}
Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the state, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law."
\end{quote}


\textsuperscript{49} 422 U.S. at 834.

\textsuperscript{50} This is the reasoning the Supreme Court adopted in \textit{Faretta}. Although the principle enunciated in \textit{Faretta} applies only to the right to self-representation, the Court's reasoning in that case is equally applicable to the joint representation situation. Forcing a defendant to accept the representation of an attorney whom he does not want is just as reprehensible in a joint representation situation as it is in a self-representation situation. In both cases, "[to] thrust counsel upon the accused, against his considered wish thus violates the logic of the [Sixth] Amendment." \textit{Id.} at 820. Therefore, a strong argument can be made that the Supreme Court should apply the reasoning adopted in \textit{Faretta} to its upcoming decision in United States v. Flanagan, 679 F.2d 1072 (3d Cir. 1982), \textit{cert. granted}, 51 U.S.L.W. 3496 (U.S. Jan. 11, 1983)(No. 82-374). See also United States v. Gaines, 529 F.2d 1038, 1043 (7th Cir. 1976), noting, but not reaching, the question whether \textit{Faretta} should be extended to joint representation situations.

\textsuperscript{51} 315 U.S. at 70. In \textit{Glasser}, five defendants were prosecuted for conspiracy to defraud the United States. On the second day of trial, defendant Kretskte dismissed his attorney and the court appointed Stewart, Glasser's attorney, to represent Kretskte too, even though Stewart informed the court that a conflict existed. Glasser remained silent, and the trial continued with Stewart representing both Glasser and Kretskte. All five defendants were convicted. The Supreme Court overturned Glasser's conviction on the grounds that he was denied the effective assistance of counsel. \textit{See also} Holloway v. Arkansas, 435 U.S. 475, 483 n.5 (1978) (stating that when the court inquired in \textit{Glasser} whether there had been a waiver, it also confirmed that a defendant may waive his right to the assistance of conflict-free counsel).
\end{footnotesize}
gently made.\textsuperscript{52} Indeed, forbidding defendants to waive the right to separate counsel while allowing them to waive the right to be represented by counsel altogether\textsuperscript{55} would be truly anomalous.\textsuperscript{54} Moreover, disallowing the waiver of the right to separate counsel while allowing the waiver of other constitutional rights would “discriminate against one right in favor of another when the Constitution does not so require.”\textsuperscript{55}

Even though courts recognize that a defendant may, in certain circumstances, waive the right to separate representation, the courts do not agree on whether the court must accept that waiver.\textsuperscript{56} Thus, the primary dispute surrounding the issue of waiver presently focuses not so much on the waiver itself but on the courts’ treatment of that waiver.\textsuperscript{57}

\textsuperscript{52} Holloway v. Arkansas, 435 U.S. at 483 n.5; Glasser v. United States 315 U.S. 60, 70 (1942); United States v. Curcio, 694 F.2d 14 (2d Cir. 1982); United States v. Cunningham, 672 F.2d 1064 (2d Cir. 1982) (the right to a conflict-free attorney may be waived); United States v. Agosto, 675 F.2d 965 (8th Cir.), cert. denied, 103 S. Ct. 77 (1982) (part of the right to counsel of choice is the defendant’s ability to waive his right to the assistance of conflict-free counsel, provided that waiver is knowing and intelligent); United States v. Laura, 667 F.2d 365, 371 (3d Cir. 1981); United States v. Cox, 580 F.2d 317, 320 (8th Cir. 1978), cert. denied, 439 U.S. 1075 (1979); Gandy v. Alabama, 569 F.2d 1318, 1327 (6th Cir. 1978); United States v. Villareal, 554 F.2d 235, 236 (8th Cir.), cert. dismissed, 434 U.S. 802 (1977); United States v. Garcia, 517 F.2d 272, 276-77 (5th Cir. 1975). See also Annot., 64 L. Ed. 2d 907, 938-41 (1981).

\textsuperscript{53} Faretta v. California, 422 U.S. 806 (1975).

\textsuperscript{54} United States v. Garcia, 517 F.2d 272 (5th Cir. 1975). See also United States v. Curcio, 680 F.2d 881 (2d Cir. 1982); Gandy v. Alabama, 569 F.2d 1318 (5th Cir. 1978).

\textsuperscript{55} The cases do not distinguish between waiver of the right to remain silent during interrogation, the right to confer with counsel, the right to representation by competent counsel at trial, the right to contest accusations of criminality through a plea of not guilty, the right to a jury trial, and the right to be present at trial. To do so would be to discriminate against one right in favor of another. While federal courts must strictly enforce the sixth amendment right to effective assistance of counsel, this constitutional guarantee is not of a “preferred” nature. United States v. Garcia, 517 F.2d at 276.

\textsuperscript{56} Courts in the following cases have held that the defendant’s right to waiver is not absolute: United States v. Flanagan, 679 F.2d 1072, 1076 (3d Cir. 1982), cert. granted, 51 U.S.L.W. 3496 (U.S. Jan. 11, 1983) (No. 82-374); United States v. Dolan, 570 F.2d 1177, 1184 (3d Cir. 1978); United States v. Bernstein, 533 F.2d 775 (2d Cir.), cert. denied, 429 U.S. 998 (1976). In contrast, other courts have accepted the defendant’s voluntary, informed waiver. United States v. Cox, 580 F.2d 317 (8th Cir. 1978), cert. denied, 439 U.S. 1075 (1979); United States v. Villareal, 554 F.2d 235 (5th Cir.), cert. denied, 434 U.S. 802 (1977); Abraham v. United States, 410 F.2d 337 (2d Cir.), cert. denied, 396 U.S. 825, 859 (1969). (Note that the Second Circuit has gone both ways on this issue.) For a further discussion of the question of waiver, see Annot., 33 A.L.R. FED. 140, 206-19 (1981).

\textsuperscript{57} The court in Kaplan v. Bombard, 573 F.2d 708 (2d Cir. 1978), took an interesting approach to the question of waiver. Instead of viewing the issue as whether the defendant \textit{waived} his constitutional right to the effective assistance of counsel, the court chose to view the issue as whether the defendant \textit{asserted} his constitutional right to be represented by counsel of his own choice. \textit{Id.} at 714. \textit{Accord} United States v. Curcio, 694 F.2d 14, 22 n.8 (2d Cir. 1982).
The waiver of separate counsel is subject to certain limitations; it must be knowingly and intelligently made with an awareness of the likely consequences of the waiver.\footnote{United States v. Dolan, 570 F.2d 1177, 1181 (3d Cir. 1978) (citing Johnson v. Zerbst, 304 U.S. 458 (1938) and Brady v. United States, 397 U.S. 742 (1970)).} For a trial judge to determine that a waiver was knowingly and intelligently made, he must be satisfied that the defendant is aware of the possible prejudices that his attorney's continued representation could cause, as well as the possible detrimental consequences of those prejudices.\footnote{United States v. Dolan, 570 F.2d at 1181. See also United States v. Garrigan, 543 F.2d 1053, 1055 (2d Cir. 1976); United States v. Bernstein, 533 F.2d 775 (2d Cir.), cert. denied, 429 U.S. 998 (1976); United States v. Gaines, 529 F.2d 1038, 1043-44 (7th Cir. 1976); United States v. Garcia, 517 F.2d 272, 277-78 (5th Cir. 1975); United States v. Foster, 469 F.2d 1, 5 (1st Cir. 1972); Campbell v. United States, 352 F.2d 359, 360-61 (D.C. Cir. 1965).} The judge may consider the background, experience, and conduct of the accused\footnote{Johnson v. Zerbst, 304 U.S. 458, 464 (1938).} in determining whether the accused has knowingly and intelligently waived his right to separate counsel. He need not, however, find that the accused has the skill or knowledge of a lawyer.\footnote{Maynard v. Meachum, 545 F.2d 273, 279 (1st Cir. 1976).} If the judge finds that no competent waiver can be made, he may refuse to accept the accused's waiver and may disqualify the attorney.\footnote{United States v. Dolan, 570 F.2d 1177, 1184 (3d Cir. 1978).} Yet, these limitations on waivers are \emph{procedural} in nature; they do not authorize courts to refuse to honor the defendant's choice of counsel based upon a judicial value judgment regarding the wisdom of the waiver.

In some joint representation cases, courts have held that a trial judge may refuse to accept the defendant's waiver of separate counsel, even if that waiver was knowingly and intelligently made, whenever an actual conflict could possibly arise.\footnote{United States v. Flanagan, 679 F.2d 1072, 1076 (3d Cir. 1982), cert. granted, 51 U.S.L.W. 3496 (U.S. Jan. 11, 1983) (No. 82-374). The reasons the Third Circuit has enunciated for its failure to limit a denial of waiver to situations where the procedural prerequisites to a waiver have not been met are twofold: the court should exercise its supervisory authority over members of the bar to ensure that attorneys do not breach the ethical code by engaging in multiple representation, United States v. Dolan, 570 F.2d 1177, 1184 (3d Cir. 1978), and the defendant's decision to proceed with joint counsel in the face of possible conflicts implicates other concerns and other people. 679 F.2d at 1076. But see United States v. Armendio-Sarmiento, 524 F.2d 591 (2d Cir. 1975); United States v. Garcia, 517 F.2d 272 (5th Cir. 1975).} If a judge refuses to accept a waiver on the basis of whether an actual conflict exists, however, he is not limiting his inquiry to whether the appropriate proce-
dural prerequisites to a waiver have been met. Rather, the judge is passing on the wisdom of the waiver and, at least impliedly, indicating that the defendant is not capable of making an intelligent waiver. Yet, if a defendant is capable of intelligently waiving the right to be represented by any counsel, he is no less capable of intelligently waiving the right to be represented by separate, conflict-free counsel. A judge’s refusal to accept a knowing and intelligent waiver unnecessarily interferes with the defendant’s right to choose counsel. Even those courts that have denied a defendant’s waiver where a strong possibility of actual conflict existed have not done so lightly.

2. A Knowing and Intelligent Waiver

The concept that a defendant may knowingly and intelligently waive the right to separate counsel presupposes that a defendant realizes the consequences of his choice and the available alternatives. Yet, defendants are rarely sophisticated enough to evaluate the potential conflicts arising from joint representation unless the court or counsel informs them about the possibility of a conflict and the effect such a conflict may have on their legal representation. Therefore,

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64 The district court in United States v. Garcia, 517 F.2d 272 (5th Cir. 1975), held that the defendants had not and could not waive the effective assistance of counsel. The court based its conclusion upon a finding that as laymen the defendants cannot foresee the professional vice and treachery pregnant in the situation. Id. at 275. The court of appeals reversed the district court’s decision.


66 Compare United States v. Curcio, 680 F.2d 881 (2d Cir. 1982) and United States v. Arnedio-Sarmiento, 524 F.2d 591 (2d Cir. 1975) (analogizing the right to self-representation with the right to be represented by conflict-free counsel) with United States v. Flanagan, 679 F.2d 1072 (3d Cir. 1982), cert. granted, 51 U.S.L.W. 3496 (U.S. Jan. 11, 1983) (No. 82-374) (expressly rejecting this analogy).


68 Flanagan, 679 F.2d at 1076.

69 The waiver of a constitutional right must constitute a voluntary, knowing, and intelligent relinquishment of a known right or privilege. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). The determination whether a waiver has met these requirements depends in each case “upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.” Id. In a joint representation situation, this entails ensuring that defendants are alert to the dangers of representation by an attorney having divided loyalties. United States v. Curcio, 680 F.2d 881 (2d Cir. 1982). See also United States v. Gaines, 529 F.2d 1038, 1044 (7th Cir. 1976).

70 Lollar v. United States, 376 F.2d 243, 245 (D.C. Cir. 1967). See also United States v. Carrigan, 543 F.2d 1053, 1058 (2d Cir. 1976); Campbell v. United States, 352 F.2d 359, 360 (D.C. Cir. 1965).
Federal Rule of Criminal Procedure 44(c) requires trial judges, in all joint representation situations, to promptly inquire into the joint representation and to personally advise each defendant that he has the right to the effective assistance of counsel, including separate representation. Once the court has done so, and the defendant has acknowledged his desire to retain joint counsel, the defendant may not claim on appeal that he was denied the effective assistance of counsel due to joint representation. Rule 44(c), in requiring trial judges to inform defendants about the possibilities of conflict and the effects that their decision to retain joint counsel may have on the adequacy of their representation, provides the defendants with the knowledge necessary to make an intelligent and effective waiver of their right to separate counsel.

At least one court has interpreted rule 44(c) as allowing a trial court to disqualify counsel in a joint representation situation, despite the defendant’s knowing and intelligent waiver of separate counsel. Because of its broad language, rule 44(c) can be interpreted as authorizing a judge to refuse to accept the defendant’s waiver in cases where actual conflict may occur. Rule 44(c) does not specify what particular measures must be taken to guard the defendant’s right to the effective assistance of counsel. It is, therefore, within the trial court’s discretion under rule 44(c) to disqualify counsel. However, such an expansive interpretation of the rule unnecessarily infringes

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71 Prior to the passage of rule 44(c), trial courts treated the judges’ duty to inquire into possible conflicts in vastly different ways. The District of Columbia Circuit required the trial judge to inquire about possible conflicts at the outset of every case involving joint representation. Lollar v. United States, 376 F.2d 243 (D.C. Cir. 1967); Campbell v. United States, 352 U.S. 359, 360 (D.C. Cir. 1963). Accord United States v. Cox, 580 F.2d 317, 320 (8th Cir. 1978), cert. denied, 439 U.S. 1075 (1979). Other circuits imposed such a duty on the trial judge only if he had some notice that a conflict might exist. Cuyler v. Sullivan, 446 U.S. 335, 346-47 (1980)(noting, however, that a trial court’s exercise of its supervisory power to conduct such an inquiry was desirable); United States v. Gaines, 529 F.2d 1038, 1043 (7th Cir. 1976); United States v. Boudreaux, 502 F.2d 557, 558 (5th Cir. 1974); United States v. Christopher, 488 F.2d 849, 851 (9th Cir. 1973); Fryar v. United States, 404 F.2d 1071, 1073 (10th Cir. 1968), cert. denied, 395 U.S. 964 (1969). Still other circuits imposed a duty of inquiry on the trial judge which, if not carried out, shifted the burden of proof to the government. United States v. Martorano, 620 F.2d 912, 915-16 (1st Cir.), cert. denied, 449 U.S. 952 (1980); Salomon v. LaVallee, 575 F.2d 1051, 1055 (2d Cir. 1978); United States v. Foster, 469 F.2d 1, 4 (1st Cir. 1972).


73 United States v. Flanagan, 679 F.2d at 1076. See note 63 supra.

74 See note 103 infra for the text of rule 44(c).

75 See note 103 infra and accompanying text.

upon the defendant's right to be represented by counsel of his choice. 77

Another reason for not giving rule 44(c) an expansive construction results from the time at which the trial court must make its determination regarding a conflict. The trial court's pre-trial judgment as to whether a conflict will arise is necessarily prospective. It can, therefore, only speculate as to whether an actual conflict will arise. 78 In this situation it makes better sense to protect the defendant's right to choose counsel, which does exist and will surely be infringed upon if the court disqualifies the attorney, rather than to protect the defendant's right to the effective assistance of counsel, which may or may not be infringed upon if a conflict does eventually arise.

II. Supreme Court Treatment of Joint Representation

A. Background Decisions

The Supreme Court first addressed the issue of joint representation in Glasser v. United States. 79 In Glasser the trial court appointed Glasser's attorney (Stewart) to also represent defendant Kretiske during their joint trial. Both defendants were convicted. On appeal, the Supreme Court found that Glasser's representation was not as effective as it might have been if Stewart had not been appointed as Kretiske's counsel. 80 Thus, the Court held that Glasser had been denied the effective assistance of counsel, stating that the sixth amendment requires that the assistance of counsel be "untrammeled and unimpaired" by a court order requiring a lawyer to represent con-

77 "The recently adopted FED. R. CRIM. P. 44(c) does . . . not eliminate the defendant's power to waive his right to be represented by a conflict-free attorney." United States v. Curcio, 694 F.2d 14, 24 n.11 (2d Cir. 1982) (citing United States v. Curcio, 680 F.2d 881 (2d Cir. 1982)(Curcio I)).

78 Even though the possibility that a conflict of interest will arise is greater in a joint representation situation than it is when co-defendants retain separate counsel, not all joint representation will result in an actual conflict of interest. See United States v. Halbert, 640 F.2d 1000 (9th Cir. 1981); United States v. Medel, 592 F.2d 1305 (5th Cir. 1979); United States v. Cox, 580 F.2d 317 (8th Cir. 1978), cert. denied, 439 U.S. 1075 (1979); United States v. Valenzuela, 521 F.2d 414 (8th Cir. 1975), cert. denied, 424 U.S. 916 (1976); United States v. Mandell, 525 F.2d 671 (7th Cir. 1975), cert. denied, 423 U.S. 1049 (1976); United States v. Boudreaux, 502 F.2d 557 (5th Cir. 1974); United States v. Foster, 469 F.2d 1 (1st Cir. 1972). (All involved joint representation of criminal co-defendants where the courts found that no actual or prejudicial conflict of interest existed.) Therefore, since not all joint representation will in fact result in a conflict of interest, a trial court's pre-trial judgment as to whether a conflict will in fact occur is necessarily speculative.

79 315 U.S. 60 (1932). For additional facts, see note 51 supra.

80 315 U.S. at 76.
flicting interests simultaneously.81

The Court's opinion in Glasser set an important precedent in holding that joint representation could not be mandated if such representation would create a conflict of interest. The decision was unclear, however, in several respects. For example, it did not specifically state whether a finding of prejudice, in addition to conflict, was necessary to establish a sixth amendment violation.82 It also did not address the question whether a defendant seeking joint representation could insist upon it.83

The Supreme Court in Holloway v. Arkansas84 answered the question whether a finding of both prejudice and conflict was necessary to establish a constitutional violation. There, the Court held that prejudice would be assumed to exist when a defendant could show that a conflict of interest actually affected the adequacy of his rep-

81 Id. at 70.

82 The Supreme Court's language in Glasser relating to the amount of prejudice that need be shown in order to find a constitutional violation caused considerable confusion among the circuits. The Court declined to determine the precise degree of prejudice sustained by Glasser as a result of the lower court's appointment of Stewart as counsel for Kretsk, stating that the right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations regarding the amount of prejudice arising from its denial. Id. at 76. However, in discussing the question whether the other defendants had their rights violated, the Court stated that to secure a new trial the other defendants must show they were prejudiced in some manner. Id.

Following Glasser, the circuit courts were unable to agree on whether both conflict and prejudice had to be shown in order to establish a constitutional deprivation of the effective assistance of counsel. The First, Seventh, and Eighth Circuits did not require a showing of prejudice. See, e.g., Austin v. Erikson, 477 F.2d 620, 624 (8th Cir. 1973); United States v. Foster, 469 F.2d 1, 4 (1st Cir. 1972); United States v. Gougis, 374 F.2d 758, 761 (7th Cir. 1967). Conversely, the Second, Fifth, Sixth, and Tenth Circuits did require a showing of prejudice. See, e.g., United States v. Johnson, 569 F.2d 269, 271 (5th Cir.), cert. denied, 437 U.S. 906 (1978); United States v. Woods, 544 F.2d 242, 269 (6th Cir. 1976), cert. denied, 430 U.S. 969 (1977); United States v. DeBerry, 487 F.2d 448, 452 (2d Cir. 1973); United States v. Lovano, 420 F.2d 769, 773 (2d Cir.), cert. denied, 397 U.S. 1071 (1970); Fryar v. United States, 404 F.2d 1071, 1073 (10th Cir. 1968), cert. denied, 395 U.S. 964 (1969). Additionally, the Third Circuit required only a showing of a possible conflict of interest or prejudice. See, e.g., United States ex rel. Hart v. Davenport, 478 F.2d 203, 210 (3d Cir. 1973). The Fourth Circuit required a conflict, but only a possibility of prejudice. Sawyer v. Brough, 358 F.2d 70 (4th Cir. 1966). For a thorough treatment of the question whether prejudice must be shown, see Geer, Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibility of the Defense Attorney, 62 MINN. L. REV. 119, 123 nn.14-16 (1979); Girgenti, Problems of Joint Representation of Defendants in a Criminal Case, 54 ST. JOHN'S L. REV. 55, 58 n.6 (1979); Annot., 53 A.L.R. FED. 140, 148-58 (1981).

83 To date, the Supreme Court has still not specifically addressed this question. Consequently, different courts have imposed different duties on the trial judge. However, Fed. R. Crim. P. 44(c) now requires a trial judge to inquire as to possible conflicts of interest in joint representation situations. For the text of Rule 44 (c) see note 103 infra.

sentation. The Supreme Court further held that the trial judge deprived the defendants of their constitutional right to the effective assistance of counsel in two ways: first, by failing to appoint separate counsel when the three co-defendants had specifically requested separate counsel because conflicts existed; and, second, by failing to take adequate steps to ascertain whether the risk of a conflict of interest was too remote to warrant separate counsel. Yet, Holloway also left several questions unanswered. The first is, how strong a showing of conflict is required for the trial court to determine that a defendant has been denied the effective assistance of counsel? The second is, what is the nature and scope of the trial judge's affirmative duty to assure that joint representation of conflicting interests does not deprive criminal defendants of their right to the effective assistance of counsel?

The Supreme Court addressed the first of these unanswered questions in Cuyler v. Sullivan. In that case, Cuyler and two others faced murder charges. The two other defendants retained two attor-

85 Id. at 487-91. Thus, after Holloway, any defendant who could show that a conflict of interest actually affected the adequacy of his representation did not need to demonstrate prejudice in order to obtain relief. Id. See also Cuyler v. Sullivan, 446 U.S. 335, 349 (1980). However, Holloway did not state how strong the actual conflict had to be in order to find that the defendant was denied the effective assistance of counsel. Id. at 483. Therefore, the circuit courts formulated different rules regarding the amount of conflict that the defendant had to establish. The Third and Eighth Circuits required a showing of an actual conflict or of evidence pointing to a substantial possibility of conflict. See, e.g., United States ex rel. Sullivan v. Cuyler, 593 F.2d 512, 522 (3d Cir. 1979), rev'd, 446 U.S. 335 (1980); United States v. Cox, 580 F.2d 317, 321 (8th Cir. 1978), cert. denied, 439 U.S. 1075 (1979); United States v. Lawriw, 568 F.2d 98, 101 (8th Cir. 1977), cert. denied, 435 U.S. 969 (1978); United States ex rel. Hart v. Davenport, 478 F.2d 203, 210 (3d Cir. 1979). However, the Second, Fifth, and Ninth Circuits required the defendant to show some real conflict of interest before the court would find that the defendant in a joint representation situation had been denied the effective assistance of counsel. See, e.g., Willis v. United States, 614 F.2d 1200, 1204 (9th Cir. 1979); United States v. Medel, 592 F.2d 1305, 1310 (5th Cir. 1979); Salomon v. LaVallee, 575 F.2d 1051, 1054 (2d Cir. 1978); United States v. Eaglin, 571 F.2d 1069, 1086 (7th Cir. 1977), cert. denied, 435 U.S. 906 (1978); United States v. Mari, 526 F.2d 111, 119 (2d Cir. 1975), cert. denied, 429 U.S. 941 (1976). See also In re Special February, 1975 Grand Jury, 406 F. Supp. 194 (N.D. Ill. 1975).

86 435 U.S. at 475.
87 Id. at 483-84.
88 Id.
89 Id. The Court has never specifically answered this question. However, the recent passage of Federal Rule of Criminal Procedure 44(c) requiring the trial judge to inquire as to the possibility of conflict when two or more defendants are jointly represented has restructured the issue. The basic question now is whether rule 44(c) permits the trial court to undercut a defendant's constitutionally protected right to be represented by chosen counsel even after the court has made sufficient inquiry into the possibility of conflict and the defendant's desire to retain chosen counsel.

90 446 U.S. 335 (1980).
neys to jointly represent them. Cuyler, who did not have enough money to retain separate counsel, was also represented by these attorneys.\(^9\) Cuyler was convicted; his co-defendants were acquitted at later trials. Cuyler then challenged his conviction, claiming that his attorneys had not presented any evidence in his defense because they feared exposing the defense witnesses for the later trials.\(^9\)

The Supreme Court in *Cuyler* held that the mere possibility of conflict is insufficient to impugn a criminal conviction.\(^9\) Thus, in order to demonstrate a violation of his sixth amendment rights, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer’s performance.\(^9\) The Court further held that this standard applies regardless of whether defense counsel is retained or appointed.\(^9\) The Court also noted, however, that if the defendant does object to joint representation, the trial court must afford him the opportunity to demonstrate that potential conflicts inherent in the joint representation impermissibly imperil his right to a fair trial.\(^9\) Moreover, the Court stated that unless the trial court does not afford this opportunity, a reviewing court must not presume that the mere possibility of conflict resulted in the ineffective assistance of counsel.\(^9\)

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91 Cuyler, however, did not pay for this representation. Cuyler was tried first and did not object before or during trial to the multiple representation. The evidence against Cuyler was largely circumstantial and at the end of the prosecution’s case the defense rested without presenting any evidence of its own.

92 *Id.*

93 *Id.* at 348-50.

94 *Id.* See also *United States v. Hearst*, 638 F.2d 1190, 1194 (9th Cir. 1980), cert. denied, 451 U.S. 938 (1981). The Ninth Circuit Court in *Hearst* followed *Cuyler*. The court also noted that an actual conflict adversely affecting the lawyer’s performance is not the same as an actual conflict which adversely affects the outcome of the case. The defendant in a joint representation case need only show that an actual conflict existed which adversely affected his lawyer’s performance and need not also show that counsel’s incompetent assistance resulted in actual prejudice.

95 Cuyler v. Sullivan, 446 U.S. at 344 (defendants who retain their own lawyers are not entitled to less protection than those for whom counsel is appointed). See also *United States ex. rel. Hart v. Davenport*, 478 F.2d 203, 211 (3d Cir. 1973).

In establishing the same standard for retained and appointed counsel, the Court did not change the precedent that an indigent defendant has no right to choose appointed counsel to jointly represent him. See generally note 5 supra. The question of the right to choose counsel was not before the Court. Rather, the Court in *Cuyler* merely held that if a defendant who raised no objection to joint representation during trial later objects on appeal as to the effectiveness of the representation, the court of appeals must apply the actual conflict standard regardless of whether the attorney in the case was appointed or retained.

96 446 U.S. at 348.

97 *Id.* An interesting question is whether the converse of this statement would also be true; if the trial court fails to afford the defendant an opportunity to demonstrate that an actual conflict exists, may a reviewing court presume that the possibility for conflict has re-
While these three Supreme Court cases have cleared up many questions regarding joint representation, one question they have not specifically addressed is whether a criminal defendant has a constitutionally protected right to choose retained counsel. Or, stated another way, does a criminal defendant have the right to waive separate counsel? Recently, the Court granted certiorari in United States v. Flanagan to address this question.

B. United States v. Flanagan

The defendants in Flanagan were charged with conspiracy to violate the civil rights of citizens and with the substantive violation of those rights. The four defendants chose to present a common defense and retained a single law firm to represent them. The district court held a hearing pursuant to rule 44(c) to determine whether the defendants' joint representation resulted in ineffective assistance of counsel? Most probably, the reviewing court would simply remand the case to the trial court for a determination of the conflict issue. This happened in Cuyler. (The Supreme Court remanded the case to the court of appeals for application of the actual conflict test.) Another interesting question arising after Cuyler is whether the principle enunciated therein—that the trial court must afford the defendant an opportunity to demonstrate conflict—may be extrapolated one step further, thereby also requiring a trial court to inquire whether the defendant is aware of any conflicts that may exist and of the dangers inherent in such a conflict.

Although both Holloway and Glasser have been cited as supporting the proposition that a defendant can make an informed waiver of the right to separate counsel, see Annot., 64 L. Ed. 2d 907, 937 (1981), the Supreme Court never specifically addressed that question in those cases. It is important to note that the defendant is waiving the right to separate counsel and not necessarily the right to the effective assistance of counsel. Characterizing the defendant's waiver as a waiver of the effective assistance of counsel is tantamount to stating that joint representation per se constitutes ineffective assistance of counsel, a proposition which courts have consistently rejected. See note 20 supra and accompanying text. It is altogether possible that a defendant will be more effectively represented if he is allowed to retain an attorney whom he trusts and respects, even though that attorney also represents another defendant. See generally note 16 supra and accompanying text.

103 FED. R. CRIM. P. 44(c) became effective on December 1, 1980. It states:

Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.
the defendants were aware of the risks of joint representation and of their rights to separate counsel. The court found that each defendant was fully aware of the potential conflicts of joint representation and had voluntarily and intelligently waived any claim of conflict of interest in choosing to be represented by the same counsel.\footnote{104} Nevertheless, the court refused to accept the waivers and disqualified the defendants' law firm because it found that a conflict of interest was very likely to arise in the course of the proceedings. On appeal, the United States Court of Appeals for the Third Circuit affirmed the district court's holding, finding that the district court did not abuse its discretion in disqualifying defendants' counsel.\footnote{105}

The Third Circuit court in \textit{Flanagan} predicated its decision on the new rule 44(c) which the court interpreted as authorizing the trial court to disqualify counsel in joint representation cases.\footnote{106} The rule's statement that "[u]nless 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" grants the trial court a great deal of discretion in handling joint representation cases.\footnote{107} Accordingly, the trial court can disqualify counsel if it appears that an actual conflict of interest is likely to arise. However, the critical question which \textit{Flanagan} poses for the Supreme Court is whether such broad discretion is warranted,\footnote{108} particularly when the defendant's right to be represented by counsel of his choice hangs in the balance.

III. Rule 44(c): The Problem and the Solution in \textit{Flanagan}

In \textit{Flanagan} the Supreme Court will have to balance the defendant's right to counsel of his choice with his right to the effective assistance of counsel\footnote{109} and with the judicial interest in promoting the

\footnotesize
\begin{enumerate}
\item \footnote{104} 679 F.2d at 1073.
\item \footnote{105} \textit{Id.} at 1076.
\item \footnote{106} \textit{Id.}
\item \footnote{107} \textit{Id.}
\item \footnote{108} \textit{Flanagan} presents five questions to the Supreme Court: (1) Is the court of appeals decision denying defendants the counsel of their choice, despite their valid waiver of potential conflicts of interest, inconsistent with other Supreme Court and circuit court decisions? (2) Does Federal Rule of Criminal Procedure 44(c) permit a trial court to undercut a defendant's constitutionally protected choice of retained counsel? (3) Does the lower court's opinion preclude presentation of a common defense, regardless of the number or affiliation of counsel? (4) Does the lower court's opinion undermine a client's ability to consult with and retain counsel of his choice? (5) Will the resolution of these issues substantially diminish the workload of the federal courts? 51 U.S.L.W. 3496 (U.S. Jan. 11, 1983) (No. 82-374).
\item \footnote{109} See note 16 \textit{supra} and accompanying text for a discussion of the problems involved in striking this balance.
\end{enumerate}
effective administration of justice. By complying with the requirements of rule 44(c), without interpreting the rule too broadly, the Court will establish an acceptable balance while still preserving the defendant's right to be represented by counsel of his choice.

Once a trial judge has fulfilled his duty under rule 44(c) of informing the defendant in a joint representation situation about possible conflicts and of his right to separate counsel, it becomes the defendant's choice as to which course to take. If the defendant wishes to assert his right to retain separate counsel, he may do so. If the defendant wishes to assert the right to retain the attorney he originally chose, he may also do so. But the crucial point is that it must be the defendant's choice, not the court's choice. Unless the defendant is intentionally using his choice to impede the orderly functioning of the court, or unless the defendant is incompetent and therefore incapable of making an informed decision to retain separate or joint counsel, his wishes should be granted the utmost deference. Later, if his choice proves to have been unwise, just as a decision to proceed pro se may also eventually prove to have been unwise, he cannot complain.

Not only will such a result be consistent with past Supreme Court decisions, but it will also aid in promoting the effective administration of justice. Appellate courts will no longer have to decide on a case by case basis whether or not an actual conflict existed at the defendant's trial or whether the defendant was prejudiced by any conflict. Rather, after the court has conducted an inquiry pursuant to rule 44(c) and elicited the defendant's voluntary and intelligent waiver, it will have fulfilled its duty to safeguard the defend-

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110 See note 20 supra and accompanying text for a discussion of the problems involved in striking this balance.
111 See notes 77-78 supra and accompanying text for a discussion of the reasons for not interpreting Rule 44(c) too broadly.
112 See United States v. Curcio, 680 F.2d 881 (2d Cir. 1982).
115 Glasser, Holloway, and Cuyler all recognize that a defendant may waive the right to be represented by separate counsel. See notes 51-52 supra and accompanying text.
116 This is particularly interesting since the right to be represented by counsel of one's choice is ordinarily viewed as being in tension with the effective administration of justice. See note 20 supra and accompanying text.
117 See note 85 supra and accompanying text.
118 See note 82 supra and accompanying text.
ant's sixth amendment rights. If the defendant refuses to waive the right to separate counsel, only then may the court use the authority granted under rule 44(c) to disqualify the attorney. However, in exercising its authority under rule 44(c), the trial court should also exercise restraint so as to avoid unnecessarily infringing upon the defendant's right to be represented by chosen counsel. The court will then be able to effectuate the optimum balance between the defendant's right to be represented by counsel of his choice, the defendant's right to the effective assistance of counsel, and the judicial considerations concerning the effective administration of justice.

VI. Conclusion

The right to counsel contains four distinct concepts: the right to have counsel, the right to the effective assistance of counsel, the right to a preparation period sufficient to ensure minimal quality of counsel, and the right to choose counsel. The judiciary must balance these concepts to ensure that one area of the right to counsel does not overshadow another. In striking this balance, however, the courts should not take a narrow approach. Rather, they should give a defendant much leeway in deciding which aspect of the right to counsel he wishes to stress. The courts need only establish a framework within which each defendant will be informed of any conflict. Then, he may balance these rights in the manner in which he desires. Rule 44(c) provides a vehicle through which courts may establish this framework.

By affording the defendant the freedom to choose whether to

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119 See Salomon v. LaVallee, 575 F.2d 1051, 1055 (2d Cir. 1978); United States v. Swanson, 509 F.2d 1205, 1210 n.7 (8th Cir. 1975); Larry Buffalo Chief v. South Dakota, 425 F.2d 271, 280 (8th Cir. 1970); United States v. Horak, 465 F. Supp. 725 (D. Neb. 1979). All state that after the court has inquired into possible conflicts and the defendant has voluntarily and intelligently waived his right to separate counsel, the defendant's conviction will not be overturned on the basis that joint representation denied him the effective assistance of counsel. As the Third Circuit Court of Appeals pointed out in United States v. Flanagan, 679 F.2d 1072 (3d Cir. 1982), cert. granted, 51 U.S.L.W. 3496 (U.S. Jan. 11, 1983) (No. 82-374), however, the trial judge's perspective should not be limited to a concern with not having a conviction overturned. Yet, insulating a conviction from later attack is a valid judicial concern; in avoiding subsequent reversals the trial court is promoting the effective administration of justice.

120 The defendant will, therefore, be prohibited from using his waiver right to impair the orderly functioning of the judicial process. The defendant will be given the choice of retaining separate or joint counsel. If the defendant insists on retaining joint counsel, but will not waive the right to conflict-free counsel, the court may then, under rule 44(c), force the defendant to choose between waiving the right to conflict-free representation and retaining joint counsel. United States v. Vargas-Martinez, 569 F.2d 1102 (9th Cir. 1978).
retain separate counsel or be jointly represented, and ensuring that this choice is an informed one, courts will be using the Constitution to protect the defendant, rather than to enslave him.

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