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SIXTH AMENDMENT—JOINT REPRESENTATION AND THE RIGHT TO SEPARATE COUNSEL

Holloway v. Arkansas, 435 U.S. 484 (1978).

In *Holloway v. Arkansas*[1] the Supreme Court held that a trial court's improper denial of a co-defendant's motion for separate counsel gives rise to a presumption of prejudice, which automatically requires reversal of a conviction. However, the Court declared that joint representation is "not *per se* violative of constitutional guarantees of effective assistance of counsel."[2] The *Holloway v. Arkansas* decision thus represents a limited expansion of the right to counsel, and is in harmony with the Supreme Court's efforts of the last forty-five years[3] to effectuate the sixth amendment's[4] promise of right to counsel. Still, the limited scope of the decision leaves unresolved many of the problematical issues associated with joint representation.[5]

I

To understand fully the *Holloway* decision, a brief history of the facts and lower courts' reasoning is helpful. Holloway, and two co-defendants, Welch and Campbell, were charged with armed robbery and rape. Before the start of the trial, the court appointed one public defender to represent all three of the defendants and each moved for severance and appointment of separate counsel. As grounds for severance, each defendant maintained that by joint representation, he would be deprived of the opportunity to call witnesses to testify against the other defendants, to call co-defendants as witnesses, and to have counsel comment on the failure of any co-defendant to testify, if such occurred. The motions for separate counsel stated that the defendants had informed counsel that there was a possibility of conflicting interests in each of their cases. Still, the motions were denied.[6] Just prior to the impanelment of the jury, defendants' counsel renewed the motion for separate counsel. He stated that since each co-defendant had conveyed confidential information to him, he would be unable to cross-examine them. The attorney's motion for severance was denied,[7] and the three defendants went to trial represented by the same attorney.

In addition to the testimony of the victims, the state prosecutor at trial introduced into evidence a statement which had been made by defendant Campbell in the presence of two police officers. The officers testified that Campbell had admitted to complicity in the robbery, but had denied taking part in the rapes. According to the officers, Campbell maintained that he had merely acted as a lookout.[8] Nevertheless, since Arkansas had abolished the distinction between principals and accessories in criminal cases, the jury found all three men, including Campbell, guilty of both armed robbery and rape.[9] Since the other two defendants had been represented by the same attorneys as Campbell, these two defendants could not call their co-defendant Campbell as a witness to dispute the damaging testimony of the police officers.

On appeal to the Arkansas Supreme Court, the three defendants maintained that, among other

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

[2] *Id.* at 482.

[3] In Johnson v. Zerbst, 304 U.S. 458 (1938), the Court held that a person charged with a crime in federal court is entitled to assistance of counsel for his defense under the sixth amendment. Years later, in Gideon v. Wainwright, 372 U.S. 335 (1963), the Court noted that the right of an indigent defendant in a criminal trial to have the assistance of counsel is fundamental. Also, in Miranda v. Arizona, 384 U.S. 436 (1966), the Court recognized that an indigent defendant must be informed of his right to appointed counsel.

[4] U.S. CONST. amend. VI provides:

> 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 and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defense.

[5] The Supreme Court specifically limited its ruling to cases in which defense counsel requests separate representation for his clients and is refused. 435 U.S. at 484. The Court did not provide courts with guidelines where defense counsel does nothing to advise the court of the possibility of a conflict of interest between his clients. his clients.

[6] Holloway v. Arkansas, 260 Ark. 250, 255, 539 S.W. 2d 435, 437 (1976).

[7] *Id.* at 255, 539 S.W. 2d at 438.

[8] *Id.* at 254, 539 S.W. 2d at 437.

[9] *Id.* at 256, 539 S.W. 2d at 439.

errors, the trial court had improperly denied their motions for severance and appointment of separate counsel. Upholding the denial of the motion for separate counsel, the Arkansas Supreme Court relied on federal cases in the Seventh and Eighth Circuits.[10] Those cases, in turn, relied upon the landmark case of *Glasser v. United States.*[11] The Arkansas Supreme Court held that the "record must show some material basis for an alleged conflict of interest before reversible error occurs in joint representation of co-defendants."[12] The court recognized that a minority of jurisdictions had adopted a more liberal standard, requiring the court to determine the need for separate counsel whenever any "informed speculation" of conflict existed.[13] Nevertheless, the Arkansas Supreme Court chose to rely heavily upon the more restrictive standard enunciated in *United States v. Jeffers.*[14]

Applying the *Jeffers* standard to uphold the denial of the motion for separate counsel, the Arkansas Supreme Court in *Holloway* observed that counsel had outlined neither the nature of the confidential material nor the manner in which it created a conflict of interest.[15]

The Arkansas court maintained that no prejudice could be discerned from the trial record. All three defendants testified that they were innocent of the crimes charged and they did not attempt to incriminate one another. Campbell even retracted his confession. In addition, the court noted approvingly that the trial court had limited the use of Campbell's "confession" against the co-defendants by deleting all references by name to them.[16] These factors, according to the Arkansas Supreme Court, indicated that no conflict of interest had arisen from the joint representation.[17] Furthermore, the court refused to consider what alternative defense strategies could have been employed, had defense counsel not felt that it was impossible for him to examine one co-defendant without incriminating the others.

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[10] United States v. Gallagher, 437 F.2d 1191 (7th Cir.), *cert. denied*, 402 U.S. 1009 (1971); United States v. Williams, 429 F.2d 158 (8th Cir.), *cert. denied*, 400 U.S. 947 (1970).

[11] 315 U.S. 60 (1942). A discussion of *Glasser* appears later within the body of the text. *See* text accompanying notes 48–54, *infra.*

[12] The Arkansas Supreme Court stated that at least 32 jurisdictions adhered to the standard it had enunciated. 260 Ark. at 257, 539 S.W.2d at 439.

[13] *Id.* at 257–58, 539 S.W.2d at 439–40. This standard was first enunciated, with respect to joint representation, by the Court of Appeals for the District of Columbia in Lollar v. United States. The court held that only where there can be found no basis in the record for an informed speculation that appellant's rights were prejudicially affected, can the conviction stand. The *Lollar* court believed it had adopted the "reasonable doubt" standard which the Supreme Court had declared in Chapman v. California, 386 U.S. 18 (1964) to be applicable whenever the prosecution contended that the denial of a constitutional right was a harmless error. Lollar v. United States, 376 F.2d 243, 247 (D.C. Cir. 1967).

[14] 520 F.2d 1256 (7th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976). In *Jeffers*, the potential conflict of interest was primarily between defense counsel and a government witness whom defense counsel had previously represented. This is to be distinguished from a conflict between two co-defendants as in *Holloway.* The *Jeffers* court ruled that counsel should have outlined the nature of the confidential material and, if necessary, disclosed it to the judge *in camera.* Furthermore, the court held that the defendant had the burden of demonstrating that he had been inadequately represented.

Thus, the Arkansas Supreme Court cited the *Jeffers* decision to support its requirement that defendant produce concrete evidence of conflicting interests or inadequate representation. However, it failed to realize that the disclosure of the confidential information in *Jeffers* could not have incriminated the defendant since the privileged communications involved were between defense counsel and the government witness. In contrast, the disclosure of the information that defendants had confided to defense counsel in *Holloway* could have incriminated the defendants and prejudiced the court against them. It is interesting to note that the Court in *Holloway* ignored this aspect of *Jeffers* as well as the entire *Jeffers* decision.

[15] 260 Ark. at 259, 539 S.W.2d at 440–41. The United States Supreme Court observed that the trial court's disposition towards defense counsel's motion for separate counsel hardly encouraged him to pursue his line of argumentation in favor of appointment of separate counsel. 435 U.S. at 485.

[16] 260 Ark. at 259–60, 539 S.W.2d at 438. This fact should be of little consolation to the other two co-defendants, for it would be naive to think that the jury did not infer to whom Campbell was actually making reference. The introduction into evidence of a co-defendant's confession, from which the names of other co-defendants have been deleted, has not been declared unconstitutional. However, in Bruton v. United States, 391 U.S. 123 (1968), the Supreme Court held that the admission of a non-testifying co-defendant's confession, which referred to the defendant as an accomplice in the crime, violated the defendant's right of cross-examination secured by the confrontation clause of the sixth amendment. While the trial court in *Holloway* may have observed the letter of the law, it violated its spirit. "The government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds." 260 Ark. at 255, 539 S.W.2d at 129 (quoting Delli-Paoli v. U.S., 352 U.S. 232, 248 (Frankfurter, J., dissenting), *rev'd*, 391 U.S. 123, 126 (1968)).

[17] 260 Ark. at 259–60, 539 S.W.2d at 441.

On appeal, the United States Supreme Court hastened to reaffirm the state court's holding that joint representation "is not *per se* violative of constitutional guarantees of effective assistance of counsel."[18] But, speaking for a majority of six,[19] Chief Justice Burger declared that reversal is automatic whenever joint representation, over timely objections of defendant, is improperly required by the trial court, regardless of proof of specific prejudice suffered by the complaining defendant.[20] However, the Court narrowed dramatically the scope of this decision by declaring it applicable only in those instances where counsel acted affirmatively to inform the court of the possibility of a conflict of interest between his clients.[21]

For precedential support, the Supreme Court in *Holloway* relied chiefly on *Glasser v. United States,* which was decided over thirty-five years earlier. *Glasser* was interpreted to have "held that by requiring an attorney to represent two co-defendants whose interests were in conflict, the ... [trial] [c]ourt had denied one of the defendants his Sixth Amendment right to the effective assistance of counsel."[22] According to the Supreme Court in *Holloway,* once the *Glasser* Court had identified the conflict of interest, it "declined to inquire whether the prejudice flowing from it was harmless and instead ordered [defendant's] conviction reversed."[23] As the *Holloway* Court quoted the *Glasser* Court's reasoning:

> Of equal importance with the duty of the court to see that an accused has the assistance of counsel is its duty to refrain from embarrassing counsel in the defense of an accused by insisting, or indeed, even suggesting, that counsel undertake to concurrently represent interests which might diverge from those of his first client, when the possibility of that divergence is brought home to the court.[24]

The Court in *Holloway* determined that the *Glasser* Court's reasoning was directly applicable to the *Holloway* circumstances, since counsel in that case had formally brought to the trial court's attention the possibility of conflicting interests.[25] The Court maintained, furthermore, that most courts have adhered to the spirit of *Glasser* and have granted separate counsel where the possibility of a conflict of interest had become apparent.[26] In the opinion of the Court, the granting of counsel's motion for separate representation is logical. Counsel is in the best position professionally and ethically to ascertain the existence of a conflict of interest, has the obligation to advise the court of conflicting interests, and, finally, as an officer of the court, gives statements to the court that are made virtually under oath.[27]

The *Holloway* Court dismissed the lower court's contention that granting "separate counsel purely on the basis of a motion stating that confidential information had been received from the defendants ... could result in the mandatory appointment of additional counsel in every case where multiple defendants were involved."[28] Rather, the Court asserted that its holding in *Holloway* did not preclude a trial court from examining the basis of counsel's representations regarding a conflict of interest.[29] However, the Court did limit the powers of the trial court in one respect, stating that such examination would be improper if it required "disclosure of the confidential communications of the client."[30] In any event, these problems were not directly pertinent to *Holloway v. Arkansas.*

To determine whether the error committed at petitioner's trial automatically required reversal, the Court again turned to *Glasser* for authority. The Court interpreted *Glasser* as ruling that reversal is automatic whenever joint representation, over the timely objections of defendant, is improperly required by the trial court, regardless of proof of

[18] 435 U.S. at 482.

[19] Agreeing with Burger were Justices Brennan, Stewart, White, Marshall, and Stevens.

[20] 435 U.S. at 488.

[21] *Id.* at 484. Courts have developed widely divergent approaches to cases involving joint representation where trial counsel fails to advise the trial court of the existence of the possibility of a conflict of interest between the co-defendants whom he is representing.

[22] *Id.* at 481.

[23] *Id.* at 482.

[24] *Id.* at 484–85 (quoting 315 U.S. at 71, 76).

[25] 435 U.S. at 484–85.

[26] *Id.* In support of this statement the Court cited: Shuttle v. Smith, 296 F. Supp. 1315 (D. Vt. 1969); State v. Davis, 110 Ariz. 29, 514 P.2d 1025 (1973); State v. Brazile, 226 La. 254, 75 So. 2d 856 (1954). *But see* Commonwealth v. LaFluer, 1 Mass. App. 327, 296 N.E.2d 517 (1973).

[27] 435 U.S. at 485–86 (citing State v. Davis, 110 Ariz. at 31, 514 P.2d at 1027; The American Bar Association, Standards Relating to the Administration of Criminal Justice—The Defense Function § 3.5 (b) at 123 (1974); State v. Brazile, 226 La. at 266, 75 So. 2d at 860–61).

[28] 260 Ark. at 259, 539 S.W.2d at 441.

[29] 435 U.S. at 486–87.

[30] *Id.* The Court believed that courts possess adequate disciplinary means to prevent unscrupulous attorneys from misleading the court. *Id.* at 486 n.10. The Court passed over the possibility that a court may use its power to force an attorney to disclose confidential information damaging to his client. *Id.* at 487 n.11.

specific prejudice suffered by the complaining defendant.[31] The Court emphasized the inviolability of the right to counsel by restating its holding in *Chapman v. California*[32] that "the assistance of counsel is among those constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error."[33]

To support its argument that petitioners were deprived of their constitutional right to counsel, the Court suggested that the sixth amendment can be violated not only when counsel is absent during trial proceedings, but also when counsel is rendered ineffective due to conflict of interest.[34] "The mere physical presence of an attorney does not fulfill the Sixth Amendment's guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters."[35]

The Supreme Court emphasized that the detrimental effects of joint representation may be difficult, if not impossible, to discern. Joint representation of conflicting interests tends to reduce the defense counsel's range of initiatives. He cannot pursue strategies favoring one defendant at the expense of his other clients. As an example of this, the Court suggested that defendant Campbell could have developed several arguments to improve his defense or to reduce his sentence if he had had separate counsel.[36]

Recognizing the inherent pitfalls of such conjectures, the Court desired to prevent courts from engaging in "unguided speculation" when assessing the prejudicial impact of an error on the jury's deliberations.[37] Therefore, the Court ruled that prejudice is presumed whenever defense counsel makes timely objections to joint representation and the trial court, nevertheless, improperly refuses to provide separate counsel.[38] The exact determination of prejudice suffered would not be "susceptible to intelligent, evenhanded application."[39] As the court noted, the harmless error rule would apply to readily verifiable trial proceedings. But, in contrast, the conflicts arising from joint representation would more likely be manifested by what defense counsel feels compelled to *abstain* from initiating on behalf of his clients, particularly during plea bargaining and sentencing hearings.[40] The difficulty of reconstructing and evaluating the possible defense strategies that could have been employed by a defendant, represented by separate counsel, thus provided the rationale for the *Holloway* Court's requirement of automatic reversal.

Justice Powell, with whom Justices Blackmun and Rehnquist joined, dissented. The dissent conceded that the trial court should have held a hearing to determine whether a conflict of interest existed. However, Powell contended that the omission of such a hearing does not constitute a constitutional violation of such magnitude as to require reversal. Powell feared that the majority's opinion contained the "seeds of a *per se* rule of separate representation merely upon the demand of defense counsel."[41] According to Powell, the Court's decision did not predicate a finding of prejudice upon actual proof of conflict of interest or ineffective assistance of counsel. Rather, prejudice was equated with the failure of the court to conduct an inquiry at the behest of defense counsel to determine the appropriateness of joint representation.[42] The dissenting opinion found this to be a needless "prophylactic gloss on the requirements of the constitution in this area of criminal law."[43]

Furthermore, the majority opinion's minimal requirements[44] for appointment of separate counsel

[31] *Id.* at 488. A number of cases cited by the Court supports this interpretation. *Id.* at 487 (citing Austin v. Eriksen, 477 F.2d 620 (8th Cir. 1973); United States v. Gougis, 374 F.2d 758 (7th Cir. 1967); Commonwealth *ex. rel.* Whiting v. Russell, 400 Pa. 45, 176 A.2d 641 (1962); Hall v. State, 63 Wis. 2d 304, 217 N.W.2d 352 (1974)). However, the Court did recognize that other jurisdictions have interpreted *Glasser* to require reversal only if the defendant can demonstrate a specific instance of prejudice. United States v. Wood, 544 F.2d 242 (6th Cir. 1976), *cert. denied*, 430 U.S. 969 (1977).

[32] 386 U.S. 18 (1967).

[33] 435 U.S. at 489 (quoting Chapman v. California, 386 U.S. at 23). The *Chapman* Court held that "before a constitutional error can be held to be harmless the court must be able to declare its belief that it was harmless beyond a reasonable doubt." *Id.* at 21–24. *See* note 64 *infra*.

[34] 435 U.S. at 489–90.

[35] *Id.* at 490.

[36] *Id.* at 498. Campbell could have attempted to plea bargain, turn state's evidence, or at least minimize his sentence by having his counsel argue that the other defendants were disproportionately culpable.

[37] *Id.* at 490.

[38] *Id.* at 488.

[39] *Id.* at 490.

[40] *Id.*

[41] *Id.* at 491 (Powell, J., dissenting).

[42] *Id.* at 492.

[43] *Id.*

[44] Since separate representation should be appointed unless the risk of conflict is "too remote to warrant separate counsel," *id.* at 484, and since an "attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial," *id.* at 485 (quoting 110 Ariz. at 31, 514 P.2d at 1027), it will indeed be a rare occasion when a judge will be able to deny a motion for separate counsel on the authority of *Holloway*.

coupled with the difficulties facing a judge who seeks to ascertain the basis of a possible conflict,[45] according to Powell, will result in separate representation on demand at a substantial cost in time and money.[46] Since *Holloway* makes reversal automatic, Powell implied that few judges will risk a retrial by denying a motion for separate counsel.[47]

II

It is readily apparent that the *Holloway* case is a product of the legal trends that have emanated from *Glasser.* Both the majority and dissent claim that their positions flow logically from the principles enunciated in *Glasser.*[48] Therefore, it is necessary to analyze the *Glasser* decision to understand the significance of *Holloway.*

In *Glasser v. United States,* five defendants were tried jointly for conspiracy to defraud the government. One defendant, Kretske, dismissed his attorney, whereupon the trial court suggested that co-defendant Glasser's attorney, Stewart, represent Kretske also. Glasser and his attorney protested, claiming that the possibility of a conflict of interest existed. However, shortly thereafter, Stewart agreed to represent concurrently Glasser and Kretske. Glasser remained silent at this moment and the case went to trial. All five defendants were eventually found guilty and Glasser appealed, claiming his sixth amendment right to counsel had been violated.[49] On the appeal, the Supreme Court determined that Glasser's defense had been less effective than it might have been if his attorney had not represented another defendant.[50] No effective waiver of right to counsel was found, even though Glasser, who was an experienced attorney, did not object to the joint representation when his attorney finally consented to represent Kretske.[51] The Supreme Court reversed Glasser's conviction, but ambiguously left unresolved whether conflict of interest alone was sufficient to require reversal, or whether prejudice also had to be established as an independent fact.

It is futile to argue that a definitive interpretation of *Glasser v. United States* is possible. Before *Holloway v. Arkansas* was decided, different jurisdictions had developed widely diverging interpretations of *Glasser.* Some courts required a specific instance of prejudice to be shown,[52] others presumed prejudice from the existence of a conflict of interest,[53] while still other courts used the terms "conflict of interest" and "prejudice" interchangeably.[54] This issue has now been settled unambiguously by the Supreme Court in *Holloway v. Arkansas.*

III

In fashioning its *Holloway* opinion, the Court ostensibly relied heavily upon the authority of *Glasser.* However, *Holloway* derives its independent significance from the standard it established to determine whether a defendant suffered prejudice, a standard quite different from that announced in *Glasser.* To understand the relationship between *Holloway* and *Glasser,* it is necessary to observe carefully how the Supreme Court reformulated the *Glasser* decision, while it continued to imply that it was simply clarifying the *Glasser* Court's holding.

To support its thesis that *Glasser* presumed prejudice from the existence of a conflict of interest, the *Holloway* Court felt compelled to explain why Kretske's conviction had not been reversed. It claimed that the *Glasser* Court had refused to overturn Kretske's conviction because "he [Kretske] had not raised his own Sixth Amendment challenge to the joint representation."[55] Other interpretations are equally, if not more, plausible. In *Glasser,* the Court stated that:

> [W]here error as to one defendant in a conspiracy case requires a new trial be granted him, the rights of his co-defendants to a new trial depend upon whether that error prejudiced them. Kretske does not contend that he was prejudiced by the appointment, and we are clear from the record that no prejudice is disclosed as to him.[56]

From this statement it can be deduced that the Supreme Court in *Glasser* required specific evidence of prejudice for reversal. Therefore, the Court's

[45] The judge who wishes to ascertain the basis of the conflict of interest must respect the sanctity of the attorney-client relationship.

[46] 435 U.S. at 494 (Powell, J., dissenting).

[47] *Id.*

[48] *Id.* at 482, 492.

[49] 315 U.S. at 68–70.

[50] *Id.* at 76. Specifically, defense counsel failed to press his cross-examination of a certain witness and did not object to certain testimony in order not to prejudice Kretske. *Id.* at 73.

[51] *Id.* at 70.

[52] United States v. Woods, 544 F.2d 242, 269 (6th Cir. 1976); United States v. DeBerry, 487 F.2d 448, 452 (2d Cir. 1973); United States v. Lovano, 420 F.2d 769, 773 (2d Cir. 1970).

[53] United States v. Gougis, 374 F.2d 758, 761 (7th Cir. 1967); Hall v. State, 63 Wis. 2d 304, 217 N.W.2d 352, 355 (1974).

[54] United States v. Carrigan, 543 F.2d 1053, 1055 (2d Cir. 1976); 376 F.2d at 246 (1967).

[55] 435 U.S. at 489.

[56] 315 U.S. at 76–77.

justification in *Holloway* of the reaffirmation of Kretske's conviction is not consistent with the *Glasser* Court's reasoning. If the *Glasser* Court had presumed prejudice from the mere fact that Glasser and Kretske had been jointly represented over timely objection, then there would have been no need to investigate whether Kretske had actually been prejudiced. The fact that Kretske benefited by being jointly represented would have been immaterial. However, the *Holloway* Court interpreted *Glasser* as presupposing prejudice whenever the defendant is jointly represented over his express objections. In support of its position, the Court cited the following language in *Glasser:*

> To determine the precise degree of prejudice sustained by Glasser as a result of the [District] Court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.[57]

Additionally, the *Holloway* Court referred to a number of cases cited in *Glasser*[58] immediately following the above quotation to support its interpretation that prejudice is presumed regardless of whether it is independently shown. However, those cases in reality stand for the proposition that only certain, specific constitutional errors require automatic reversal.[59] From this, the Court argued that *Glasser* must have ruled that errors affecting right to counsel are among those automatically giving rise to a presumption of prejudice and therefore requiring reversal. Yet, in the context of *Glasser,* it appears that those cases were cited to support the Court's contention that once prejudice has been established as a fact, its precise measurement is immaterial.[60] This is a markedly different proposition from the Court's argument in *Holloway* that prejudice is presumed in *Glasser* whenever joint representation is required over timely objection.

The *Glasser* Court itself minutely examined evidence of the prejudice suffered by defendant Glasser.[61] In fact, *Glasser* may have been the genesis of the "harmless error" rule,[62] which was later developed fully in *Fahy v. Connecticut*[63] and in *Chapman v. California.*[64] If *Chapman* is to be interpreted consistently with *Glasser* regarding the importance of weighing the strength of the government's evidence against the potential harm caused by the court's error, then it becomes apparent that the *Glasser* Court required prejudice to be shown independently. Once prejudice was established as an independent fact, its degree was immaterial, since the right to effective counsel is fundamental, and reversal followed automatically.[65] As the *Glasser* Court observed:

> The case against Glasser is not a strong one .... This is significant in relation to Glasser's contention that he was deprived of the assistance of counsel contrary to the Sixth Amendment. In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true when the scales of justice may be delicately poised between guilt and innocence. Then error, *which under some circumstances would not be ground for reversal,* cannot be brushed aside as immaterial, since there is a real chance that it might have provided the slight impetus which swung the scales towards guilt.[66]

However, in *Holloway,* the Court explicitly rejected this interpretation of *Glasser.*[67] The majority

[57] *Id.* at 76.

[58] *Id.* at 75–76 (citing Snyder v. Massachusetts, 291 U.S. 97 (1934); Patton v. United States, 281 U.S. 276 (1930); Tumey v. Ohio, 273 U.S. 510 (1927)).

[59] 273 U.S. at 535.

[60] 315 U.S. at 75–76.

[61] *Id.* at 73–74.

[62] Greer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney,* 62 MINN. L. Rev. 119, 124 (1978).

[63] 375 U.S. 85 (1963).

[64] 386 U.S. 18 (1967). Chapman v. California, relying on *Fahy,* held that "before a constitutional error can be held to be harmless the court must be able to declare its belief that it was harmless beyond a reasonable doubt." *Id.* at 21–24. It is interesting to note that the *Chapman* Court specifically stated that not "all trial errors which violate the Constitution automatically call for reversal." *Id.* at 23. It appears quite clear that before Gideon v. Wainwright, 372 U.S. 335 (1963), was decided, the right of an indigent defendant in a state criminal trial to have the assistance of counsel was not recognized as a constitutionally guaranteed right. In Betts v. Brady, 316 U.S. 455 (1942), decided shortly after *Glasser,* the Court declared that upon the facts of the case, the fourteenth amendment due process clause did not obligate the State to appoint counsel to represent an indigent defendant charged with robbery. Therefore, the Court's suggestion in *Holloway* that the standards established in *Gideon* were present in *Glasser* is an anachronistic use of precedent.

[65] The *Glasser* Court's reasoning also contains inconsistencies. It would appear that the "harmless error" rule requires the court to apply a weighing test to determine whether reversal is necessary. Whereas, requiring automatic reversal because the right to counsel was infringed implies a *per se* rule. The two can be reconciled if one assumes the *Glasser* Court intended the "harmless error" rule to be applied to infractions of procedural requirements, while reserving the *per se* rule to situations where constitutional rights are violated. But this hypothesis cannot be substantiated satisfactorily.

[66] 315 U.S. at 67 (emphasis added).

[67] 435 U.S. at 488.

ruled that whenever a court requires joint representation over timely objection, prejudice is presumed and reversal is required.[68] Thus, the manner in which prejudice is determined to be present provides the key to understanding and applying the decision. Herein lies the crucial but obscured factor which distinguishes *Holloway* from *Glasser*. Despite the initial impression that both opinions ascribe the same meaning to the word prejudice, upon more detailed analysis it becomes clear that the word prejudice does not connote identical concepts in both opinions. The *Glasser* Court employed the term prejudice as a synonym for the harm suffered by the defendant in those cases where joint representation had reduced the effectiveness of his counsel.[69] In contrast, the *Holloway* Court did not predicate a finding of prejudice upon a showing that defense counsel's ability to represent defendant's interests had been compromised due to joint representation. Rather, its presence is presumed whenever a court fails to conduct a hearing at counsel's request to determine whether a conflict of interest exists. This new meaning given the word prejudice by the *Holloway* Court is pointed out in Powell's dissent.[70] One can only speculate whether the employment of the term prejudice as a synonym for the denial of a hearing to ascertain the necessity of separate counsel was an unfortunate choice of words, or a conscious effort to create the impression that the decision had firm precedential support in *Glasser*.

The *Holloway* Court's main reason for requiring reversal without proof of prejudice is the apparent difficulty of providing an appellate court with concrete and convincing evidence of the harm done defendant by joint representation where conflicting interests exist. The Court reasoned that under these circumstances joint representation invariably exerts a deleterious effect on counsel's freedom to plea bargain, plan trial strategy and influence sentencing hearings. Therefore, the particular consequences of a conflict affecting counsel's representation of his client would be difficult, if not impossible, to specify with any certainty.

But the question arises whether the Court's solution was designed to fit the problem, or whether the problem was defined in such a way as to evoke a specific solution. Over ten years earlier, the Supreme Court held in *Chapman v. California*[71] that "the assistance of counsel is among those 'constitutional rights so basic to a fair trial that their infractions can never be treated as harmless error.'"[72] In *Holloway v. Arkansas*, the Court expanded the definition of "assistance of counsel" to meet the peculiar problems presented by joint representation. In effect, the Court appears to have held that the "harmless error" rule is applicable to single representation cases where the error occurs at trial because the trial record provides an accurate representation of the proceedings. Therefore, the extent of the harm suffered by a defendant can be readily ascertained and a rule of automatic reversal is inappropriate. In contrast, the newly enunciated *Holloway v. Arkansas* rule of mandatory reversal is required to deal with the peculiarities of multiple representation, where the degree of error can rarely be satisfactorily verified. The factors motivating defense counsel in the preparation of his clients' defense strategy will seldom be discernible from the trial record.

In contrast, the *Holloway* dissent noted that requiring jointly represented co-defendants to substantiate a claim of prejudice does not impose an unreasonable burden of proof on the complainants. Thus, the dissent essentially adopted the reasoning of the Arkansas Supreme Court that the record must show some real evidence of conflicting interests before joint representation can be said to have deprived a defendant of effective assistance of counsel, requiring reversal.[73] In another respect, the dissenting opinion makes explicit what the Arkansas Supreme Court only implied. According to Powell, once defense counsel asserts that a conflict of interest exists, he should bear the burden of showing "a reasonable likelihood of conflict or prejudice."[74] If the court determines that a conflict of interest is a real possibility, then separate counsel should be appointed. If the defendant still chooses to retain joint representation after such an inquiry has been conducted, he will "bear a heavy burden

[68] *Id.*

[69] 315 U.S. at 75–76.

[70] 435 U.S. at 492.

[71] 386 U.S. 18 (1967).

[72] 435 U.S. at 489 (quoting 386 U.S. 18 (1967)).

[73] *Id.* at 492 (Powell, J., dissenting); 260 Ark. at 256, 539 S.W.2d at 439. Powell's position appears to be more consistent with the *Glasser* holding than is the majority opinion because the *Glasser* Court carefully examined the trial record and found specific evidence of conflicting interests and their detrimental effects. However, it appears that Powell would limit himself to an examination of the trial proceedings, while the *Glasser* Court was willing to speculate how the trial might have proceeded had defendant Glasser been separately represented. This aspect is developed and expanded upon by the majority in *Holloway*, but the ultimate result is far different from the *Glasser* Court's holding. Thus, neither the *Holloway* majority nor dissent remain within the parameters of *Glasser*.

[74] 435 U.S. at 495 (Powell, J., dissenting).

of proof"[75] if he later asserts that he was deprived of a fair trial due to joint representation.[76] If, however, the trial court refuses to conduct an inquiry in spite of timely objection by counsel, then the burden would shift to the government to prove that no prejudice resulted.[77] Powell conceded that the government could not satisfy its burden of proof by merely showing that petitioners' defenses were not mutually exclusive. However, his belief that the state government had satisfied its burden of proof[78] is indicative of the standards he would have courts apply to determine the existence of conflicts of interest or lack thereof.[79]

The *Holloway* opinion can thus be justifiably criticized for its inaccurate reading of precedent. But its principal deficiency stems from the Court's decision to narrow the dispositive issue to the greatest extent possible. The Court failed to establish whether the trial court or defense counsel should bear the affirmative duty to inform jointly represented co-defendants of the possible conflicts of interest that may arise from such representation. As a result, the decision will have minimal effect in practice. The Court itself observed that most lower courts since *Glasser* have granted defense counsel's request for appointment of separate counsel based on his representations that a conflict of interest existed or was likely to emerge.[80]

The problem is most acute in those situations where defense counsel does not inform individual co-defendants of the disadvantages of, and alternatives to, joint representation. The circuits have divided themselves between those that place the burden to ascertain the possibility of a conflict on the trial judge and those that leave that responsibility to defense counsel.[81] The Supreme Court acknowledged that the lower courts have developed divergent and conflicting standards to deal with these issues, which are commonly raised in challenges to joint representation.[82] Nevertheless, it declined to rule on these questions in *Holloway*. Thus, the lower courts remain without guidance and individual co-defendants have no guarantees that they will receive the representation best suited to their situation.

Commentators[83] and courts have been regarding joint representation with increasing disfavor. The Supreme Court's decision in *Holloway v. Arkansas* reflects this trend. For although joint representation was not declared unconstitutional *per se*, the Court has facilitated the appointment of separate counsel when defense counsel so advises. It appears that joint representation will be employed less frequently in the future but will nevertheless remain available to those co-defendants who believe it would be advantageous to maintain a common defense. However, some of the progressive circuit courts have severely limited the instances in which joint representation can be employed.[84]

Conclusion

The Supreme Court held in *Holloway v. Arkansas* that prejudice is presumed and reversal is auto-

[75] *Id.*

[76] *Id.* Powell cited United States v. Foster, 469 F.2d 1, 5 (1st Cir. 1972), in support of this line of argumentation. However, he omitted a crucial part of the *Foster* decision which would seem to allow separate representation on demand, which Powell clearly opposes. "Forthwith . . . it should be the duty of the trial court . . . to comment on some of the risks confronted where defendants are jointly represented to insure that defendants are aware of such risks, and to inquire dilligently *whether they understand that they may retain separate counsel, or if qualified, may have such counsel appointed by the court and paid for by the government.*" *Id.* at 5 (emphasis added).

[77] 435 U.S. at 495 (citing 543 F.2d 1053, 1056 (2d Cir. 1976)).

[78] 435 U.S. at 496.

[79] If Powell's views had prevailed, the line of cases interpreting *Glasser* to require the defendant to demonstrate prejudice would also have prevailed. United States v. Wood, 544 F.2d 242 (6th Cir. 1976), *cert. denied*, 430 U.S. 969 (1977).

[80] 435 U.S. at 485.

[81] *See* United States v. Lawriw, 568 F.2d 98, 102-05 (8th Cir. 1977), for a detailed examination of the circuits' policies regarding this aspect of joint representation.

[82] 435 U.S. at 483.

[83] *See generally* Greer, *supra* Note 62; Hyman, *Joint Representation of Multiple Defendants in a Criminal Trial: The Court's Headache*, 5 Hofstra L. Rev. 315 (1977).

[84] The court in Ford v. United States, 379 F.2d 123 (D.C. Cir. 1967), has devised a logical solution to the problem. It requires that separate counsel initially be appointed for indigent co-defendants. If, after a thorough inquiry by counsel and the court, joint representation is determined to be in the best interests of the co-defendant, then the trial court may allow it.

In United States v. Garafola, 428 F. Supp. 620 (D.N.J. 1977), the court ruled that joint representation will be allowed only if defense counsel can impress the court that he is totally cognizant of the facts of the case, the government's case and the canons of ethics applicable to attorneys engaged in joint representation of co-defendants in criminal cases. Furthermore, he must assure the court that no conflict of interest will arise. If as a result of counsel having misstated his position, a conflict of interest does arise, then the trial judge may institute disciplinary measures against the offending attorney. Obviously, there will be very few cases of joint representation where the attorney will feel confident enough to guarantee that a conflict of interest will not arise.

matic whenever a court improperly requires joint representation over timely objection. This decision will almost invariably guarantee co-defendants separate counsel upon request, except in those cases where there is strong evidence that the motion for separate counsel is made only to delay the trial proceedings. Undoubtedly, most trial courts will require counsel to substantiate claims of conflicting interests. But, in such cases great care should be taken to preserve the confidentiality of the attorney-client relationship and to avoid prejudicially influencing the judge, who may later select the sentence. Most importantly, attorneys should bear in mind that the *Holloway v. Arkansas* holding is limited to cases where counsel requests an inquiry into the possibility of conflicting interests. The dispute between jurisdictions over who bears the affirmative duty to protect the interests of jointly represented co-defendants shows no sign of resolution.[85] Despite this lack of uniformity, counsel must remember that the ABA Code of Professional Responsibility requires attorneys to inform clients of the possibility of conflicting interests.[86]

The *Holloway v. Arkansas* decision represents the Supreme Court's continuing concern that defendants be guaranteed effective assistance of counsel. However, the scope of the decision is limited; the holding does not require the trial court to initiate an inquiry into the possibility of conflicting interests. The decision's impact is largely limited to cases where conscientious and competent counsel raises the issue in court. Thus, it is evident that *Holloway v. Arkansas* has not definitively resolved the problematical issues associated with joint representation, but has merely set the basis upon which those more difficult cases can proceed.

[85] In United States v. Steele, 576 F.2d 111 (6th Cir. 1978), the court held that in cases of joint representation by retained counsel, the sixth amendment does not require a *per se* rule that a trial court must conduct an inquiry into the possibility of conflicting interests, though it would be advisable for courts to do so. This case was decided after Holloway v. Arkansas.

[86] ABA Code of Professional Responsibility, Canon 5, EC 5-14—5-20.