CONFLICT OF INTERESTS IN MULTIPLE REPRESENTATION OF CRIMINAL CO-DEFENDANTS

The sixth and fourteenth amendments guarantee the right to effective assistance of counsel. Effective representation includes both the concept of a minimum level of competence, and the requirement of counsel's undivided loyalty to client. It is this obligation of loyalty which is at issue when an attorney undertakes to represent two or more criminal defendants in the same or related proceedings.

There are various reasons why co-defendants may share the services of a single attorney. A trial court may request that the retained attorney of one defendant represent a co-defendant whose own attorney has for some reason become unavailable or unacceptable, or the court may initially appoint single counsel for indigent co-defendants for the sake of economy and efficient procedure. Co-defendants may themselves retain the same attorney because they wish to collaborate in presenting a common defense, or in order to save money, or simply because it seems the easiest course. Joint representation thus serves many interests. But it also involves the risk that full and effective representation of the defendants will be jeopardized. When the interests of co-defendants diverge, the attorney faces conflicting duties which may force him to compromise the interests of at least one of his clients.

The Supreme Court held in Glasser v. United States that appointment by the trial court of one attorney to represent co-defendants when means knowledgeable counsel who is unhampered or unfettered in his professional responsibility to the accused.” Larry Buffalo Chief v. South Dakota, 425 F.2d 271, 278-79 (8th Cir. 1970).

In United States v. Bernstein, 533 F.2d 775 (2d Cir. 1976), for example, where the defendant wished to be represented by the attorney retained by her co-defendant, the reasons defendant gave for choosing to share counsel were that she could not afford to hire a separate attorney, that she was very frightened and felt she knew this lawyer, and that the lawyer was familiar with the facts of the case. Id. at 788 n.10. Bernstein is discussed in text following note 194 infra.

315 U.S. 60 (1942).
it was aware of possibly inconsistent interests was an infringement of the defendant's fundamental right to the assistance of counsel. The courts have relied on Glasser in applying the constitutional guarantee of effective representation to cases of privately retained counsel, where the trial court is not responsible for imposing the joint representation, and to situations where conflicting interests not apparent at the outset develop during the course of trial.

Since Glasser guaranteed the right of conflict-free representation, but did not prohibit all multiple representation, the courts have attempted to devise standards for reviewing cases in which the defendant later claims his defense was prejudiced by joint representation. It is generally agreed that the Glasser standard is an objective one which avoids confronting the capabilities of the individual attorney. The competence of defense counsel is not at issue. The problem on review is rather to decide in retrospect whether the attorney was in fact faced with conflicting responsibilities. Decisions vary as to the standard of proof required in order to show that a conflict of interests existed which prejudiced an accused's defense. However, be-cause the concepts of conflict of interests and prejudice are not always clearly separated, it is often difficult to determine what standards of review the courts are actually applying.

In addition to the problem of reviewing conflicts of interest on appeal, multiple representation also raises the question of what procedure the trial courts can follow at the outset to minimize the number of trials involving simultaneous representation of inconsistent interests, and to avoid where possible the necessity for a difficult retrospective determination that a conflict existed. Courts disagree about the obligation of the trial judge to determine whether potential conflicts of interest threaten to impede effective representation. Furthermore, if the judge concludes that there is a substantial risk of conflict, there may be an issue as to his power to disqualify the attorney for the defense and to require separate counsel despite defendants' insistence on presenting a joint defense.

This comment will consider the areas of uncertainty and disagreement in the review of conflict of interest claims in recent criminal cases, focusing primarily on decisions by the federal courts. It will examine in particular (1) the problem on appeal of deciding whether a prejudicial conflict of interests existed at trial; (2) the types of situations in which conflicts most readily occur; (3) the pre-trial obligations of the court in determining whether there are potential conflicts and whether the defendants.

The terms "inadequate" and "ineffective" assistance of counsel are used in cases involving conflicts of interest to mean that full representation of the defendant was impossible due to irreconcilable interests. The same terms appear in the different line of cases which focus on the level of competence of the individual attorney, or the adequacy of preparation for the defense in terms of time and attention. See note 2 supra.

An analysis of the problems of multiple representation based on cases through 1970 is presented in Note, Criminal Codefendants and the Sixth Amendment: The Case for Separate Counsel, 6 CRM. L. BULL. 432 (1970). The author, feeling that state and federal decisions have often misinterpreted Glasser, concludes that the appropriate standard of review is a finding of a genuine conflict of interests. Where there is a genuine conflict, prejudice to the defendant can always be assumed. The trial court, to protect defendants' rights, should "order separate counsel at the slightest hint of a conflict of interest." 6 CRM. L. BULL. at 453. See also Note, Conflict of Interests: Multiple Defendants Represented by a Single Court-Appointed Counsel, 74 DICK. L. REV. 241 (1970).
are sufficiently aware of the dangers of joint representation; and (4) the extent of the right of defendants to waive conflict-free representation.

GLASSER v. UNITED STATES

The single Supreme Court decision holding that joint representation may infringe upon an accused's right to counsel is Glasser v. United States.\(^{11}\) Glasser and Kretske were co-defendants in a conspiracy case. On the day set for trial Kretske's attorney requested a continuance. When the court denied the motion and appointed another attorney to represent him, Kretske objected. The court then asked Glasser's lawyer, Stewart, if he would represent Kretske as well as Glasser. When Stewart pointed out that inconsistencies in the defense would make the joint representation appear awkward and misleading to a jury, to the disadvantage of Glasser, the court ordered Kretske's appointed attorney to continue until he could be replaced. In light of the unsatisfactory alternatives—delay, severance, commencing trial with a lawyer not satisfactory to Kretske, or joint representation which would tend to associate Glasser with Kretske—Stewart then suggested that if the court would appoint him to represent Kretske, the jury might realize that the parties could not control the court order and might therefore be less apt to associate the two defendants. The court did appoint Stewart to represent Kretske. Glasser and Kretske were subsequently convicted.

The Supreme Court reversed Glasser's conviction on the ground that the appointment of his attorney to represent jointly a co-defendant with inconsistent interests denied him his constitutional right to counsel.

The "assistance of counsel" guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired.\(^{12}\)

The Court found indications of the conflicting interests of the two defendants in counsel's conduct of cross-examination and in his response to evidence introduced by the prosecution. Thorough cross-examination of a prosecution witness was awkward when his testimony was more damaging to one defendant than to the other. When counsel failed to cross-examine a prosecution witness, the Court made the reasonable inference that, since rigorous cross-examination was indicated in the circumstances, failure to cross-examine was due to conflicting obligations. In addition, evidence perhaps inadmissible as to one defendant was not objected to "lest an objection on behalf of Glasser alone leave with the jury the impression that the testimony was true as to Kretske."\(^{13}\) Again, an inference was drawn from the fact that objection might have been made and was not. The Court did not decide whether there was sufficient proof of Glasser's connection with the conspiracy such that the evidence would have been admissible over objection. "The important fact is that no objection was offered . . . on Glasser's behalf."\(^{14}\)

Having determined the existence of inconsistent interests in the defense of Glasser and Kretske, which during the course of the trial prejudiced Glasser's defense, the Court held that Glasser was "denied . . . his right to have the effective assistance of counsel, guaranteed by the Sixth Amendment."\(^{15}\) The important fact was that Glasser was prejudiced by the conflict, not how significant the prejudice was to his conviction.

To determine the precise degree of prejudice sustained by Glasser as a result of the 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.\(^{16}\)

The Court refused to set aside Kretske's conviction, even though Kretske was represented by an attorney laboring under conflicting obligations, as he had not been prejudiced by the joint appointment.

When the trial court was made aware of the possibility of inconsistent interests, it had a responsibility to safeguard Glasser's right to the undivided attention of his counsel.

\(^{11}\) 315 U.S. 60 (1942).
\(^{12}\) Id. at 70.
\(^{13}\) Id. at 74.
\(^{14}\) Id. at 75.
\(^{15}\) Id. at 76.
\(^{16}\) Id. at 75–76.
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.\textsuperscript{17}

Although Glasser did not renew an initial objection to sharing his attorney with Kretske, the Court rejected the suggestion that he tacitly acquiesced in the joint appointment, despite the fact that Glasser was an experienced attorney.\textsuperscript{18} The Court relied on the standard of waiver stated in Johnson v. Zerbst\textsuperscript{19} as to the general right to counsel.

The trial court should protect the right of an accused to have the assistance of counsel. "This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record."\textsuperscript{20}

Thus Glasser held that the sixth amendment right to counsel includes the right to assistance of counsel unimpaired (not prejudiced) by conflicting obligations to another. A waiver of this fundamental right will not be assumed from defendant's silence, but must be an intelligent and competent waiver, clearly determined by the trial court.

**Standard of Review**

Application of the standard formulated by the Supreme Court has been so varied and uncertain as to lead commentators to the conclusion that there is "virtually no discernible standard."\textsuperscript{21} The difficulty on review is to determine in retrospect whether a substantial conflict actually existed at trial. Some courts have been more willing than others to infer from indications in the record that inconsistent interests impeded the defense. The concept of prejudice has also caused a great deal of confusion. The decisions are apparently inconsistent regarding the necessity for showing prejudice, some maintaining that Glasser does not require proof of prejudice, some implying that proof of conflict necessarily indicates prejudice. Some of these variations are undoubtedly due to differing interpretations of Glasser, while others can be explained as failures clearly to articulate certain distinctions.

**Determining the Existence of Conflict**

The mere assertion on appeal that there was a conflict of interests at trial is obviously insufficient to overturn a conviction. The courts have always required that there be some factual showing of inconsistent interests.\textsuperscript{22} However, there are varying judicial expressions for describing this requirement. For example, the Fifth Circuit has said there must be an "actual, significant conflict." there is no violation where conflict is "irrelevant or merely hypothetical."\textsuperscript{23} The Eighth Circuit requires evidence of actual conflict or "a substantial possibility of a conflict."\textsuperscript{24} Other courts say that "possible conflict"\textsuperscript{25} "however remote,"\textsuperscript{26} will render joint representation constitutionally defective. These different expressions could be viewed as consistent if they refer to different times in the proceedings when conflicts are typically alleged. Thus on a motion for separate counsel at the outset or during the course of a trial, it would be appropriate to require the defendant to show a substantial possibility of inconsistent interests, whereas on appeal, only an actual, relevant conflict would support a claim of inef-

\textsuperscript{17} Id. at 76.
\textsuperscript{18} Id. at 70.
\textsuperscript{19} 304 U.S. 458 (1938).
\textsuperscript{21} 6 CRIM L. BULL., supra note 10, at 440, 443. See also 74 DICK. L. REV., supra note 10, at 256.

\textsuperscript{22} See, e.g., United States v. DeBerry, 487 F.2d 448, 452 (2d Cir. 1973) ("some real conflict of interest . . . must be shown to exist"); United States v. Bentvena, 319 F.2d 916, 937 (2d Cir.), cert. denied, 375 U.S. 940 (1963) (some conflict of interest); Boehmer v. United States, 414 F. Supp. 766, 770 (E.D. Pa. 1976) ("a claim of conflict of interest must be based on some factual support").

\textsuperscript{23} Foxworth v. Wainwright, 516 F.2d 1072, 1077 n.7 (5th Cir. 1975).

\textsuperscript{24} United States v. Valenzuela, 521 F.2d 414, 416 (8th Cir. 1975), cert. denied, 424 U.S. 916 (1976).


\textsuperscript{26} United States ex rel. Horta v. DeYoung, 523 F.2d 807, 808-09 (3rd Cir. 1975).
effective assistance of counsel. There is, however, little indication that courts draw this distinction.\textsuperscript{27} It is far more likely that the different expressions reflect uncertainty as to how much evidence of a conflictual situation ought to be

required.

Of course, some cases expressly differ from others as to the standard of proof necessary to show conflict. The Seventh Circuit has held that the defendant must establish the existence of a conflict by clear and convincing evidence,\textsuperscript{28} or "with a reasonable degree of specificity,"\textsuperscript{29} while the District of Columbia Circuit is willing to go a long way in finding conflict, relying on "indications in the record that stir doubts."

Like the famous tip of the iceberg, the record may not reveal the whole story; apparently minor instances in the record which suggest co-defendants' conflicting interests may well be the telltale signs of deeper conflict. Because of this, and because of the fundamental nature of the right involved, when there are indications in the record that stir doubts about the effectiveness of joint representation, those doubts should be resolved in favor of the defendant. . . . [O]nly where "we can find no basis in the record for an informed speculation that appellant's rights were prejudicially affected," can the conviction stand.\textsuperscript{30}

As Judge Skelly Wright indicates in the above passage, there is a pervasive difficulty in dealing with questions of conflict at the appellate level. Except in blatant situations where the interests of one defendant have been quite obviously neglected or sacrificed in favor of a co-defendant, the reviewing court is often searching the record for what is not there. When defense counsel has represented inconsistent interests as well as possible under the circumstances, a determination of whether there was a conflict may depend on focusing on omissions from the record, or alternative defense strategies not pursued. For the review-
the Court in Glasser considered instances of failure to object and to cross-examine as evidence in the record from which it could "reasonably be inferred" that defense counsel was hindered by the inherent contradiction of conflicting loyalties. The nature of the conflict is that counsel is faced with the necessity of foregoing possible means of defending one client because of his obligation to protect his other client. The question is not whether counsel actually perceived the conflict, or whether he would in fact have chosen to conduct the defense differently had there been no conflict.\(^{33}\)

In fact, an attorney's skill in dealing with inconsistent interests by evenhanded compromise may even obscure on the record the basic unfairness to a defendant of subordinating his legitimate interests to other considerations.\(^{34}\) Thus it should be clearly recognized that although defense tactics provide the evidence from which a conflict can be inferred, trial strategy is evaluated only in the sense that counsel must have been free to choose an appropriate defense.\(^{35}\)

How divergent, then, are the standards applied on review? The courts certainly agree that an allegation of conflict of interests must have some factual support. They are aware not only of the serious threat to effective representation which is posed by a situation of conflict, but also of the elusive character of the proof involved. The differences seem to lie in the varying expressions of willingness to infer conflict from indications which can be quite inconclusive in themselves. Furthermore, although some showing of conflict is expressly required, the concept of conflict is not always distinguished from the determination whether the defendant has actually been harmed.

### The Prejudice Standard

The Supreme Court in Glasser held that a conflict of interests infringes upon a defendant's constitutional rights if he is prejudiced, but that it is unnecessary to determine "the precise degree of prejudice." This holding has been understood by some courts to require that the defendant prove prejudice,\(^{36}\) while other courts, as well as several commentators, state that Glasser does not require proof of specific prejudice.\(^{37}\) The source of the confusion seems to be that the term "prejudice" is used to mean injury, as when one asks which of two defendants was adversely affected, but it also refers to substantial harm which contributes to the defendant's conviction, that is, the opposite of harmless error.\(^{38}\)

A careful reading of Glasser suggests that conflict of interest cases require analysis in

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\(^{33}\) "Beyond determining whether the foreclosed defense was plausible, we are reluctant to speculate on what defenses counsel might have chosen." Foxworth v. Wainwright, 516 F.2d 1072, 1080 (5th Cir. 1975). "The issue in this case is not why a particular defense was chosen.... This is not simply a case where appellant" now criticizes "the defense adopted from hindsight." Austin v. Erickson, 477 F.2d at 625. Except in cases where the attorney is relied on to perceive inconsistent interests and take appropriate action (see text following note 144 infra), the courts have not inquired into, or have even disregarded, counsel's own evaluation of the extent to which conflicting obligations impeded defense strategy.

\(^{34}\) It must be remembered that in cases involving conflicts of interest, the conflict does not always appear full-blown upon the record since counsel may throughout endeavor to reconcile the conflict.

\(^{35}\) See Foxworth v. Wainwright, 516 F.2d at 1079 (counsel's choice of defense was not a free choice of strategy). Foxworth is discussed in text following note 53 infra.

\(^{36}\) E.g., Baker v. Wainwright, 422 F.2d 145, 148 (5th Cir.), cert. denied, 399 U.S. 927 (1970) (some prejudice must be shown); United States v. Lovano, 420 F.2d 769, 773 (2d Cir.), cert. denied, 397 U.S. 1071 (1970). (some specific instance of prejudice, some real conflict of interest); Fryar v. United States, 404 F.2d 1071, 1073 (10th Cir. 1968), cert. denied, 395 U.S. 964 (1969) (joint representation becomes improper only in those cases where prejudice results).

\(^{37}\) E.g., Austin v. Erickson, 477 F.2d 620, 624 (8th Cir. 1973) (no prejudice need be shown). United States v. Foster, 469 F.2d 1, 4 (1st Cir. 1972) (ordinarily, prejudice assumed from the existence of conflict); United States v. Gougis, 374 F.2d 758, 761 (7th Cir. 1967) (no need to show prejudice); Sawyer v. Brough, 358 F.2d 70, 73 (4th Cir. 1966) (possibility of harm sufficient). Finer, Ineffective Assistance of Counsel, 58 CORNELL L. REV. 1077, 1108-09 (1973) found that many courts apparently ignore "the language in Glasser as to the lack of necessity of showing specific prejudice." See 6 CRIM. L. BULL., supra note 9 at 442-44, 450; Note, 22 WAYNE L. REV. 913, 922, 933 n.5 (1976); Note, 14 WASHBURN L. REV. 541, 551 (1975).

\(^{38}\) The Supreme Court formulated the federal standard for harmless error in Chapman v. Califor-
three steps. First, some divergence must be described in the positions of the defendants. In Glasser, Kretske was more directly implicated in the conspiracy than was Glasser. Stewart, the attorney, was very reluctant to associate them in the eyes of the jury. Second, it must be shown that the attorney made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other. If he did not make such a choice, the conflict remained hypothetical. If he did, the conflict materialized, and it is at least theoretically possible to determine which client was protected by the action chosen, and which was prejudiced in the sense of sacrificing his best defense. It is only the latter who is in fact denied the effective assistance of counsel.

Third, the harmless error rule is not applied, because any choice mandated by inconsistent obligations and surrendering a possible means of defense is impermissible. The error cannot be weighed to determine whether it was harmless in the circum-

stances. For example, the Court in Glasser specifically declined to inquire whether evidence to which an objection might have been offered would have been admissible over objection.

Many subsequent decisions have not clearly separated these three factors but have blurred the distinctions between conflict and prejudice and between the two implications of the term "prejudice." Semantic ambiguities make it difficult to estimate just how divergent the standards of the various jurisdictions really are. When a court says, as it did in United States v. Gougis, "there is no need on the part of a defendant to show that he has been prejudiced," it may imply that the conflict of interests need not actually have harmed the defendant, because the possibility of harm is sufficient, or it may mean that the harmless error rule should not be applied, or finally, it may indicate that prejudice can be assumed because it is so obvious or so likely to have occurred. In Gougis, the prejudice was obvious. The most damaging evidence against the defendant came from the testimony of the co-defendant with whom he shared counsel. In fact, in most cases, once a convincing conflict is defined the separate analysis of conflict and prejudice seems unnecessary, precisely because it is so apparent which defendant was affected. The court in Baker v.

41 Thus prejudice, as used in connection with the harmless error rule, need not be shown. . . . This approach is consistent with the rule that, unlike many trial errors, denial of the right to assistance of counsel calls for automatic reversal of a conviction.

Foxworth v. Wainwright, 516 F.2d at 1077 n.7.

42 An interesting example of the confusion between "conflict" and "prejudice" can be found in Austin v. Erickson, 477 F.2d 620, 625 (8th Cir. 1973), where the court quotes from the South Dakota Supreme Court ruling in the case on review: "Under these circumstances we cannot find that she has been prejudiced and as to her at least, there was no conflict of interest." The state court had previously reversed the conviction of appellant's co-defendant on the ground of conflict of interests. Austin is further discussed in text following note 48 infra.

43 The author in 6 CRIM. L. BULL., supra note 10 at 443-44 observed the semantic difficulties of the term "prejudice," which he found was variously used as synonymous with conflict, as an inherent result of conflict, or as a separate finding which must accompany conflict before a conviction will be reversed.

44 374 F.2d 758 (7th Cir. 1967).

45 Id. at 761.
Wainwright was more explicit than most when it said defendant "did not have to produce any specific proof of prejudice resulting from this conflict because prejudice is self-evident." 47 Perhaps the distinction between conflict and prejudice only becomes important when both defendants appeal but only one appears to have been harmed by the inconsistent interests, as happened in Glasser. Even in such cases, however, some courts insist that Glasser requires only a showing of conflict, with no burden of proving harm to the defendant. In Austin v. Erickson, 48 the Eighth Circuit reversed the district court's finding that a conflict which prejudiced one co-defendant had not been shown to prejudice the other. The district court had said "[S]ome prejudice must be shown even though the amount of that prejudice need not be shown." 49 The circuit court found this to be a misreading of Glasser. But it went on to say, "once the actual conflict has been established which affected her own right to counsel's effective assistance, Austin had met her burden." 50 In other words, while appearing to contradict the district court in terms of the standard to be applied, the court did speak of a conflict "which affected her own right." This suggests the court perceived actual harm to the defendant, perhaps in terms of the foreclosed defense of shifting blame to her co-defendant. 51

Austin illustrates that even when a court expressly rejects the requirement of showing prejudice, it may implicitly find that the defendant was disadvantaged by the joint representation. To the extent the courts identify a conflict and look for some evidence that the conflict adversely affected the defendant's interests, they are conforming to the standard formulated in Glasser. However, even if the court's inconsistent expressions of the standard can be reconciled, sometimes cases which seem to have similar facts are not decided consistently. This variation in outcome is arguably due to differences in the courts' perceptions of what actually constitutes a conflict. Greater consistency in appellate decisions can be expected as the courts come to recognize and define certain situations as posing inherent conflicts of interest.

Situations Conducive to Conflicts

Defendants often appear to have similar interests and a common defense, yet inconsistencies may develop during the course of the trial. A survey of the decisions which have found conflicts reveals certain situations which are particularly susceptible to divergent interests. These situations can be broadly described as those in which (1) a plausible defense is foreclosed, (2) one defendant is the "fall guy," (3) only one defendant testifies, and (4) the defense attorney also represents, or has represented, a prosecution witness. The following cases shed some light on what constitutes a conflict of interests, how conflicts are analyzed, and under what circumstances the courts assume that prejudice occurs.

Plausible Defense Foreclosed: Shifting Blame. When one defendant is more implicated than another in the common crime charged, efforts to present a common defense may result in foreclosing an alternative defense, usually the opportunity to shift blame onto a co-defendant. 52 This type of conflict is particularly difficult to review. The difficulty is inherent in the fact that the record presents the defense as it has been conducted, and while a failure to

46 422 F.2d 145 (5th Cir.), cert. denied, 399 U.S. 927 (1970). Baker is discussed in text following note 89 infra.
47 Id. at 148. See Gravitt v. United States, 523 F.2d 1211, 1219 (5th Cir. 1975) where the attorney for two brothers made disparaging remarks about one at the sentencing hearing in a successful effort to obtain favorable sentencing for the other. The court said "where the conflict is real, . . . a denial of the right to effective representation exists, without a showing of specific prejudice."
48 477 F.2d 620 (8th Cir. 1973).
49 Id. at 625.
50 Id.
51 The court quotes from the dissenting opinion in the state court decision, that it was "in appellant's interest to point the finger of guilt" at her co-defendant. Id. at 625 n.4.
52 An alleged opportunity to shift blame must be supported by specific evidence. In United States v. Huntley, 535 F.2d 1400, 1406 (5th Cir. 1976), defendants claimed that joint representation foreclosed counsel from exploiting possible differences in the degree of their criminal intent, but advanced no evidence to show lack of intent. The court in United States v. Wisniewski, 478 F.2d 274, 284 (2d Cir. 1973) found no evidence that any single defendant's position was unique. On the contrary:

[If] the position of each on the key question of guilty knowledge was substantially the same as that of the others, as apparently was the case, each might stand a better chance of acquittal by
cross-examine a witness is a more or less apparent omission, a failure to develop a completely different defense strategy will be less obvious and seem more speculative. Cases of this kind generally involve charges of constructive possession (as of drugs or stolen property), aiding and abetting, or conspiracy, of which it has been said that "the very nature of the charge suggests disassociation."\(^5\)

The alternative defense must be one which would have been adverse to the interests of a co-defendant, otherwise it is merely a question of strategy. "Of course, [defendant] might have tried a very different line of defense under the guidance of separate counsel, but this is merely to say that one lawyer may try a case quite differently from another." United States v. Foster, 469 F.2d 1, 4 (1st Cir. 1972).

\(^{53}\) Fryar v. United States, 404 F.2d 1071, 1073 (10th Cir. 1969), cert. denied, 395 U.S. 964 (1969). The Supreme Court in Glasser noted the special risks of multiple representation in cases where conspiracy is charged.

In conspiracy cases, where the liberal rules of evidence and the wide latitude accorded the prosecution may, and sometimes do, operate unfairly against an individual defendant, it is especially important that he be given the benefit of the undivided assistance of his counsel without the court's becoming a party to encumbering that assistance.

Glasser, 315 U.S. at 76. But see United States v. Gallagher, 437 F.2d 1191, 1192 (7th Cir.), cert. denied, 402 U.S. 1009 (1971) (the mere fact that evidence against one is stronger does not indicate a conflict of interest); United States v. Lovano, 420 F.2d 769 (2d Cir.), cert. denied, 397 U.S. 1071 (1970) (defendants involved in completely different aspects of the conspiracy could not have implicated each other).

\(^{54}\) 516 F.2d 1072 (5th Cir. 1975).

on the head. Under this theory, termed by the state the "united we stand, divided we fall" approach, each defendant shared the same interest in discrediting the prosecution witnesses, and the common defense did not appear to create conflicting interests. But, as the court points out, a conflict existed in the initial choice of defense strategies\(^5\) which precluded counsel from defending Foxworth by shifting the responsibility to a co-defendant. Such a strategy of shifting blame was really a plausible alternative, since one 17-year-old co-defendant was the oldest boy in the group and the evidence against him was more directly damaging. The court also makes clear that the defendant was prejudiced whether or not the alternative defense would have succeeded.

If Foxworth's attorney had not been obliged to try to save [co-defendants] and had attempted to try to clarify these details through cross-examination, it is possible that the basis for the defense we have discussed would have evaporated. Upon closer questioning the witnesses might have recalled some participation by Foxworth in the beating or motive on his part for the killing. We do not believe, however, that petitioner must show that his attorney's divided loyalties cost him a directed verdict. Rather, if the record shows that a plausible defense (one that might have influenced twelve reasonable jurors) was foreclosed because it might have prejudiced the other defendants represented by the same appointed counsel, the conviction must be overturned.\(^6\)

According to the approach in Foxworth, a defendant will be held to have been denied effective assistance of counsel if the court perceives from the record an alternative defense theory more favorable to appellant than the strategy actually pursued, but which clearly would have prejudiced at least one co-defendant by shifting to him more responsibility for the criminal act. The alternative must be shown to have been a plausible one, in light of the circumstances and the divergent evidence presented,\(^7\) but it is not necessary to inquire

\(^{55}\) Id at 1079.

\(^{56}\) Id.

\(^{57}\) The alternative defense offered in United States ex rel. Small v. Rundle, 442 F.2d 235 (3d Cir. 1971) was not plausible. In a series of group sexual acts, one defendant could hardly claim consent and shift blame to the others for rape. In Larry Buffalo Chief v. South Dakota, 425 F.2d 271 (8th Cir. 1970),
whether it would have been a successful defense as the evidence was developed, since the harmless error rule is not applicable.

Charges of constructive possession will often present the possibility of a defense strategy of shifting blame. The Third Circuit said in *United States ex rel. Horta v. DeYoung*, 58 that a possession charge where contraband is found in the zone of control of more than one person uniquely requires individual counsel. 59 Appellant, her husband, and a son-in-law had been defended by single retained counsel on charges of maintaining and working for a lottery operation. The district court had found no real possibility of prejudice, but the appellate court held that the record should have been examined to determine whether or not separate representation might have made a difference in the choice of defense strategy. Conflict in choice of strategy became apparent when the record disclosed that counsel failed in cross-examination to focus on appellant’s absence from the store during key betting hours. 60 Similarly, in *McLover v. United States*, 61 a charge of possession of drugs and paraphernalia required the Government to show constructive possession, but the record showed that defense counsel had failed to elicit testimony from one defendant that he was in the apartment only temporarily. Such testimony would have tended to shift to the co-defendant the entire responsibility for dominion and control of the apartment. 62

The charge of aiding and abetting also strongly suggests the possibility of the defense of shifting blame. In *Austin v. Erickson*, 63 the court reversed Mrs. Austin’s conviction for aiding and abetting in the killing of her infant son because her counsel relied on the defense of excusable homicide and failed to exploit the opportunity to show that she could not prevent the crime. Counsel simultaneously represented her companion, Goode, who was separately charged and tried for manslaughter. Goode testified on behalf of Mrs. Austin at her trial. In considering Mrs. Austin’s claim of ineffective representation, the Eighth Circuit found she was prejudiced by a conflict of interests despite the fact that she had the benefit of Goode’s exculpatory testimony. Separate counsel would have been in a position vigorously to exploit the occasion to cast blame on the companion alone. 64

**The Fall Guy: Deflecting Blame.** The trial of Mrs. Austin’s companion 65 illustrates another type of conflict situation. In some cases, instead of foregoing the defense of shifting blame to another, the defendant tries to exculpate co-defendants by testifying for them. But he deflects from them at the risk of prejudice to his own interests. He may unnecessarily incriminate himself by his testimony or, if he pleads guilty and then testifies, he may risk a heavier sentence. These voluntary attempts to protect a co-defendant frequently occur in family and

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58 523 F.2d 807 (3d Cir. 1975).
59 See also *State v. Green*, 129 N.J. Super. 157, 163, 322 A.2d 495, 498 (App. Div. 1974). The type of case where “[p]roof of guilt depends on establishing that the narcotics were within the control of either one or both of the defendants . . . uniquely requires undivided counsel.” The drugs in this case had been found in a car.
60 See also *United States ex rel. Hart v. Davenport*, 478 F.2d 209 (3d Cir. 1973) where an employee was tried with his employers and three patrons on charges of bookmaking and lottery offenses. The plausible defense of attributing origin and possession of certain evidence to the employers was precluded because the defendant shared counsel retained and paid by employers.
62 The court in this circumstance somehow found indications of prejudice as to both defendants.
63 477 F.2d 620 (8th Cir. 1973).
64 The court did note that separate counsel would undoubtedly have advised the companion to exercise his fifth amendment rights. But this did not change the fact that Austin’s interest was to cast all the blame on Goode. Id. at 625 n.4. See also *Craig v. United States*, 217 F.2d 355 (6th Cir. 1954). Two key witnesses were not effectively cross-examined on behalf of one defendant charged with aiding in the preparation of documents for the Internal Revenue Service, where it was in the interest of his employer co-defendant to shift responsibility for fraudulent documents to his employees. *But see People v. Gonzalez*, 30 N.Y. 2d 28, 280 N.E.2d 882, cert. denied, 409 U.S. 859 (1972), which held that assault charges of acting in concert and of aiding and abetting were defended without conflict on the theory that one acted in self-defense and the other simply went to his aid.
close friend situations. Goode, for example, was an intimate friend of Mrs. Austin, and at her trial offered testimony favorable to her defense. His testimony was then used at his own trial to convict him of first degree manslaughter of Mrs. Austin's infant child. The state supreme court reversed his conviction on grounds of ineffective assistance of counsel, saying "[h]is testimony could serve but one purpose—to deflect the glare of guilt away from [the mother]."

A defendant may also take the blame against his will or without being consulted, clearly to the prejudice of his own interests. No one should be represented by an attorney who is making him the "fall guy" by design. To hold otherwise would open the door to many abuses going to the essentials of a fair trial.

In United States v. Truglio, the defendant was induced to plead guilty in order to keep co-defendants from going to prison, pursuant to a package deal negotiated with the United States Attorney. The Fourth Circuit found that coercion resulted from the multiple representation and the nature of the proposed bargain. A similar case is Horowitz v. Henderson, where the retained counsel of co-defendant Williford was appointed to represent Horowitz, who eventually decided to plead guilty to a charge of distribution of drugs. Despite prior drug-related experiences, Horowitz testified to exculpate Williford. He was sentenced to the maximum penalty, although he had no serious record of criminal convictions. The appellate court held that joint representation restrained counsel from pursuing the single aim of incurring the least possible penalty for Horowitz.

One Defendant Testifies. When both jointly represented defendants take the stand, offering reasonably consistent testimony, the courts have usually rejected a subsequent claim of conflict of interests. When neither defendant testifies, a conflict is also difficult to prove. But if one defendant testifies and his co-defendant does not, there is the risk of an inherent conflict of interests in the appearance of unequal treatment.

The possibility of a conflict of interest is present especially where there is a question as to whether either or both of the defendants should take the stand. And if one defendant elects to take the stand and the other chooses not to, the possible prejudice in the eyes of the jury to the defendant who does not take the stand is almost insuperable.

When one defendant takes the stand, and his testimony actually incriminates his co-defendant, common representation is obviously inconsistent because the attorney is not in a position to cross-examine one client on behalf of the other. In some cases, the decision...
whether or not to testify may itself pose a conflict of interests if, for instance, a defendant is inhibited by prior criminal activity which can be used to impeach him on cross-examination.\(^7\)

If the defendant testifies on behalf of his co-defendants and by taking the stand exposes himself to impeachment, he is prejudiced by the joint representation.\(^7\) On the other hand, if the defendant does not testify because of risks to his co-defendants although taking the stand would be in his own best interests, he is also prejudiced.\(^7\)

Sometimes when a defendant refuses to take the stand, a co-defendant may attempt to claim prejudice by asserting that he would have benefited from the testimony. In such a case, the courts require some indication of what favorable testimony would have been offered absent the alleged conflict.\(^7\) For example, in *Davidson v. Cupp,*\(^7\) a claim that the attorney should have called a co-defendant to testify was rejected because the co-defendant said that she would have pleaded the fifth amendment and that in any case her testimony would not have been beneficial to the defendant. In *United States v. Lovano,*\(^8\) prejudice was claimed because counsel could not have cross-examined, had he testified, a co-defendant who pleaded guilty. But the potential problem never arose, since the co-defendant did not testify. In this case, the court rejected the claim that the multiple representation influenced the decision not to take the stand. According to the court, appellant had alleged only a theoretical conflict of interests “based on mere speculation.”\(^8\) There was no indication in the record that the co-defendant would have agreed to testify or what he would have said if he had.\(^8\)

Conflicting considerations are likely to hinder the decision whether to testify when one defendant has made a pre-trial admission implicating his co-defendants. Conflict of interest has been argued as an aspect of a claim of *Bruton* error. *Bruton v. United States,*\(^8\) concerned a post-arrest confession in a conspiracy case, admissible against one defendant as a party admission but inadmissible against his co-defendant because the conspiracy had ended. The Supreme Court held that where such a confession implicates a co-defendant who cannot cross-examine the speaker because the latter does not take the stand, there is a violation of the sixth amendment right of confrontation.\(^8\)

A *Bruton* error can be cured if the confessing defendant takes the stand and is subject to cross-examination by co-defendant’s attorney whether or not he is in fact cross-examined.

The Constitution as construed in *Bruton . . . is violated only where the out-of-court heresay statement is that of a declarant who is unavailable at the trial for “full and effective” cross-examination.”\(^8\)

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\(^7\) See *Lollar v. United States,* discussed in note 71 *supra.*

\(^7\) See *Horowitz v. Henderson,* 514 F.2d 740 (5th Cir. 1975) (exculpatory testimony exposed defendant to cross-examination about the extent of his drug-related experiences).

\(^7\) In *Alvarez v. Wainwright,* 522 F.2d 100 (5th Cir. 1975), defendant was advised to refuse an offer for a light sentence in exchange for testimony for the prosecution. He was also advised not to testify at trial because of a prior statement which was harmful to co-defendants, although exculpatory as to him.

\(^7\) United States v. Pinc, 452 F.2d 507 (5th Cir. 1971) held there was prejudice to the husband when counsel could not ethically call the wife to testify to affirm her previous confession exonerating the husband. The court noted that the confession gave some indication of what she would have testified to, and that an actual offer of proof was precluded by counsel’s ethical obligations to a former client.

\(^7\) 446 F.2d 642 (9th Cir. 1971).

\(^8\) 420 F.2d 769 (2d Cir. 1970).

\(^8\) Id. at 774.

\(^8\) Accord, *Fields v. United States,* 408 F.2d 885 (5th Cir. 1969) (value of testimony speculative); *Fryar v. United States,* 404 F.2d 1071 (10th Cir. 1968), cert. denied, 395 U.S. 964 (1969) (“subjective speculation” in no way supported by the record.)

\(^8\) 319 U.S. 123 (1968).

\(^8\) The rationale for the *Bruton* decision is that limiting instructions on the use of the evidence will not be followed by the jury. Where the statement is admissible against both defendants no *Bruton* situation arises. There is also no error where the statement refers to the co-defendant but is not inculpatory or accusatory.

If declarant and co-defendant share the same counsel, of course, full and effective cross-examination of one on behalf of the other is not possible. But since jointly represented defendants usually present a common defense, the question is more likely to be whether the declarant who testifies is truly an adverse witness, for if he denies the pre-trial statement, his testimony is in fact favorable to the co-defendant. However, while there is no Bruton error when the declarant denies his confession, the decision whether or not to testify may itself be affected by a conflict of interests. In Baker v. Wainwright, Baker and Damron, jointly represented by court-appointed counsel, were tried and convicted of robbery and kidnapping. Evidence of Damron’s pre-trial confession was admitted, with instructions to the jury that the confession could not be considered as evidence against Baker. Damron took the stand and denied that he had confessed. On these facts, Baker was not denied the right of confrontation

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86 See Courtney v. United States, 486 F.2d 1108, 1110 (9th Cir. 1973) where jointly represented co-defendants were charged with obstruction of justice. The court notes that a common attorney is of course in no position to cross-examine and impeach his own witness and client. In this case, however, the co-defendant’s testimony did not contradict defendant’s testimony in “any of its essentials.”

87 Bruton error was claimed but rejected in United States v. Valenzuela, 521 F.2d 414 (8th Cir. 1975), cert. denied, 424 U.S. 916 (1976), on the grounds that co-defendant’s prior statement did not actually implicate Valenzuela, but even if it did, any Bruton error was cured when the co-defendant took the stand to deny making the statement.

88 See Nelson v. O’Neill, 402 U.S. at 629, where the Court held that counsel’s failure to cross-examine could not be construed as a denial of the sixth amendment right to confront an adverse witness. [O]nce Runnels had testified that the statement was false, it could hardly have profited the respondent for his counsel through cross-examination to try to shake that testimony. [G]iven a joint trial and a common defense, Runnel’s testimony respecting his alleged out-of-court statement was more favorable to the respondent than any that cross-examination by counsel could possibly have produced, had Runnels “affirmed the statement as his.” It would be unrealistic in the extreme . . . to hold that the respondent was denied either the opportunity or the benefit of full and effective cross-examination. . . .

89 422 F.2d 145 (5th Cir.), cert. denied, 399 U.S. 927 (1970). which constitutes a Bruton error. The court held, however, that Baker was prejudiced by a conflict of interests. Because of the operation of the Bruton rule, counsel faced a dilemma. If Damron did not testify, a conviction of Baker could be overturned on the ground of Bruton error, but Damron would then have lost the opportunity to exculpate himself.

When a defense counsel has it within his power to void a proceeding against his client and, because of his representation of another is not completely free to exercise this power, he most assuredly has a directly conflicting interest. When he resolved this conflict in favor of putting Damron on the stand, Baker was prejudiced.

A similar conflict developed in United States v. Gaines. Gaines confessed to the robbery of an armored truck and implicated two others, one of whom he said had killed the driver. He agreed to testify for the prosecution in return for a lesser charge. Later, however, he denied his confession. It appeared that the attorney for the other two defendants was by this time also representing Gaines. At trial, Gaines took the stand to deny involvement in the crime, and in particular to repudiate his confession. The prosecution was then able to impeach Gaines’ testimony by using his confession including statements incriminating the co-defendants. When the jury could not reach a verdict, a mistrial was declared and a second trial proceeded with the same counsel and parties. Gaines this time did not testify. His confession, inadmissible against his two co-defendants, could only be introduced in evidence redacted to exclude any references to them. By not testifying, Gaines thus avoided implicating his co-defendants but, on the other hand, he did not have the opportunity to deny the evidence of his prior admissions. All three defendants were convicted of robbery and

90 Id. at 148.
91 Actually, counsel was not aware of the conflict at the time of trial, which preceded Bruton. Baker considers the impact of Bruton’s retroactive application, announced in Roberts v. Russell, 392 U.S. 293 (1968).
92 422 F.2d at 148. The court adds that if counsel had kept Damron off the stand in order to give Baker the best possible case, then Damron would have been prejudiced by the conflict. Id. at 148–49 n.12.
93 529 F.2d 1038 (7th Cir. 1976).
murder. On appeal, Gaines' conviction was reversed on the ground that the conflict between his interests and those of his co-defendants was resolved to his prejudice at the second trial.\textsuperscript{94}

\textbf{Representation of a Prosecution Witness.} When it appears that defense counsel has acted as attorney for a prosecution witness, there is a serious issue of inconsistent interests which may deprive the defendant of effective representation. The threshold question in these cases is whether the relationship between attorney and adverse witness still exists at the time of trial. In some cases the witness is actually the victim of the crime which is the subject of the trial,\textsuperscript{95} and is being represented in a civil matter by defense counsel or his firm.\textsuperscript{96} In other cases, defense counsel simultaneously represents the witness in an unrelated criminal case.\textsuperscript{97} But whatever the type of representation, "counsel is placed in the equivocal position of having to cross-examine his own client as an adverse witness."\textsuperscript{98}

The inconsistent interests involved in the simultaneous representation of defendant and witness are so self-evident, and prejudice to the defendant is so likely to occur, that courts have rarely required a specific showing of prejudice.\textsuperscript{99}

We need not inquire into those allegations [of specific instances of prejudice]. When there is a conflict of interest such as exists in this case, the prejudice may be subtle, even unconscious. It may elude detection on review. A reviewing court deals with a cold record . . . often giving no clue to the erosion of zeal which may ensue from divided loyalty. Accordingly, where the conflict is real, as it is here, a denial of the right to effective representation exists, without a showing of prejudice.\textsuperscript{100}

Defendants in such cases risk, to a greater extent than do jointly represented co-defendants, the effects of an often undetectable "erosion of zeal." The defendant also gains no advantage in this situation comparable to the possible benefits of joint representation. Therefore, rather than require the defendant to point to specific instances during the trial when the attorney did not act in his best interests, the courts have chosen to presume prejudice.

This situation is too [sic] fraught with the danger of prejudice, prejudice which the cold record might not indicate, that the mere existence of the conflict is sufficient to constitute a violation of [defendant's] rights whether or not it in fact influences the attorney or the outcome of the case.\textsuperscript{101}

Prejudice is not presumed, however, in cases in which the defense attorney has merely represented a prosecution witness on some former occasion.\textsuperscript{102} The courts have required the defendant to show "a showing of actual prejudice is not required; all that is necessary is a showing of a conflict." United States \textit{ex rel.} Miller v. Myers, 253 F. Supp. at 57. \textit{Accord}, United States \textit{ex rel.} Williamson v. LaVallee, 282 F. Supp. at 57. See also Zurita v. United States, 410 F.2d at 480. The court in Commonwealth v. Geraway, 364 Mass. 168 (1973) reversed conviction where four of the eight witnesses against the defendant were represented by defense counsel's firm, although counsel lacked knowledge of this, defended vigorously, and there was no evidence of prejudice.

\textsuperscript{94} Id. at 1044-45. The court found that despite an initial warning about potential conflicts, Gaines had not waived his rights at the second trial.

\textsuperscript{95} "The victim of a crime is not a detached observer of the trial of the accused, and his 'private attorney' is likely to be restrained in the handling of that client/witness." Castillo v. Estelle, 504 F.2d 1245, 1245 (5th Cir. 1974). See Zurita v. United States, 410 F.2d 477 (7th Cir. 1969) (robbed bank); United States \textit{ex rel.} Miller v. Myers, 253 F. Supp. 55 (E.D. Pa. 1966) (burglarized victim); People v. Stoval, 40 Ill. 2d 109, 299 N.E.2d 441 (1968) (robbed jewelry store).

\textsuperscript{96} Commonwealth v. Geraway, 364 Mass. 168, 301 N.E.2d 814 (1973) reversed conviction where four of the eight witnesses against the defendant were represented by defense counsel's firm, although counsel lacked knowledge of this, defended vigorously, and there was no evidence of prejudice.

\textsuperscript{97} See United States \textit{ex rel.} Williamson v. LaVallee, 282 F. Supp. 968 (E.D. N.Y. 1968). The scope of cross-examination might be restricted by counsel having received confidential information or by his reluctance to impeach the witness.

The knowledge that [the witness] has a felony charge pending against him might have reduced [attorney's] zeal in cross-examining him, one of his clients—favorable treatment [in his own case] could not be expected if he were proven to be a liar.

\textsuperscript{98} Castillo v. Estelle, 504 F.2d at 1245.

\textsuperscript{99} "A showing of actual prejudice is not required; all that is necessary is a showing of a conflict." United States \textit{ex rel.} Miller v. Myers, 253 F. Supp. at 57. \textit{Accord}, United States \textit{ex rel.} Williamson v. LaVallee, 282 F. Supp. at 57. See also Zurita v. United States, 410 F.2d at 480. The court in Commonwealth v. Geraway, 364 Mass. at 174, 301 N.E.2d at 817-18, reversed the defendant's conviction under its supervisory powers, since the court did not feel certain whether or not a sixth amendment violation required a showing of prejudice.

\textsuperscript{100} Castillo v. Estelle, 504 F.2d at 1245. The court in this case held that the defendant had been deprived of effective representation of counsel as a matter of law.

\textsuperscript{101} United States \textit{ex rel.} Miller v. Myers, 253 F. Supp. at 57. \textit{Accord}, People v. Stoval, 40 Ill. 2d at 118, 239 N.E.2d at 444: "It is unfair to the accused, for who can determine whether his representation was affected, at least, subliminally, by the conflict."

\textsuperscript{102} See, e.g., United States v. Donatelli, 484 F.2d
fendant in this situation to show that an actual conflict hindered the defense. United States v. Jeffers\(^{103}\) considers the issues raised by claims of conflict of interests arising from prior representation of a witness. The court in Jeffers looked to all the circumstances to determine whether counsel was inhibited in the conduct of cross-examination by such considerations as an interest in future business with the former client. The court noted that confidential information about the witness could also be a factor creating conflict. Counsel might possess information which could ordinarily be useful to impeach the witness, but which is privileged.\(^{104}\) Assuming that counsel will normally "treat privileged information with appropriate respect,"\(^{105}\) the court indicated that there is nevertheless some risk that "counsel may overcompensate and fail to cross-examine fully for fear of misusing his confidential information; he might thereby fail to inquire into legitimate areas of concern."\(^{106}\) However, when counsel in the Jeffers case sought to withdraw because his law partner had previously represented the Government witness, the trial court denied his request. The appellate court agreed that "a disabling conflict did not exist."\(^{107}\) There was no indication of any important pecuniary interest in future representation of the adverse witness, and there was nothing in the record, beyond the attorney's repeated bare assertions, to show that he was inhibited in his questioning of the witness by any relevant confidential information.\(^{108}\) Furthermore, the court indicated that possession of privileged information will rarely be sufficient to support a claim of conflict of interests.\(^{109}\)

If defense counsel was concerned that he might be using confidential information improperly, he could have outlined the nature of the information to the judge and, if necessary, made an in camera disclosure to him. On the basis of such a disclosure it might have become apparent that the privilege was either inapplicable or had been waived by the witness. Or, it might have been clear that the information was not usable for other evidentiary reasons.\(^{110}\)

Even if the information was privileged and could not be used for that reason, the defendant would not be prejudiced by this omission. If he had been represented by an attorney who did not have access to the confidential information, that attorney could have made no use of it either.\(^{111}\)

It is also difficult to claim a conflict of interests when the defendant is fully aware of the relationship between his retained attorney and a key prosecution witness.\(^{112}\) In United States v. James,\(^{113}\) the defendant was a pimp who sent one of his girls across state lines to engage in prostitution and beat her when she returned with insufficient proceeds. The defendant had previously engaged his attorney to defend the girl on prostitution charges. She testified against defendant at his trial, but the court rejected a subsequent claim of sixth amendment violation. Defendant "cannot now, after

505 (1st Cir. 1973) (no indication of divided loyalties at time of trial); United States v. Alberti, 470 F.2d 878 (2d Cir. 1972), cert. denied, 411 U.S. 919 (1973) (witness having already served his sentence, there was no interest of his that counsel had to protect by compromising defendant); United States ex rel. Kachinski v. Cavell, 453 F.2d 581 (3d Cir. 1971) (vigorouc cross-examination; nothing to show the relationship continued); Harrison v. United States, 387 F.2d 614 (5th Cir. 1968) (defendant made no specific showing of prejudice).

520 F.2d 1256 (7th Cir. 1975), cert. denied. 423 U.S. 1066 (1976).

Id. at 1265. The court notes, however, that it is the witness himself who must then object to the cross-examination. See United States v. Rispo, 460 F.2d 965 (3d Cir. 1972) (the witness waived the attorney-client privilege by disclosing to the prosecution his participation in the offense); Olshen v. McMann, 378 F.2d 993 (2d Cir.), cert. denied, 389 U.S. 874 (1967) (witness waived privilege by disclosure).

520 F.2d at 1265.

Id.

Id. at 1263.

See also People v. Anderson, 59 Cal. App. 3d 831, 131 Cal. Rptr. 104 (1976) (no offer of proof to show conflict).

It would seem, however, that if the confidential information relates to the case on trial, counsel could be seriously inhibited from thoroughly questioning the witness.

520 F.2d at 1265.

Id. at 1265-66.

See State v. Cox, 539 S.W.2d 684, 687 (Mo. Ct. App. 1976) (no deprivation of constitutional rights if the defendant knowingly consents to representation by an attorney who also represents a prosecution witness. There is no consent, however, if the defendant discovers the fact after trial has started.)

505 F.2d 898 (5th Cir.), cert. denied, 421 U.S. 1000 (1975).
knowingly completing trial with such counsel, urge that he was prejudiced.\textsuperscript{114}

Occasionally there is a question as to whether or not counsel's representation of the witness has terminated. Decisions which apparently depart from the practice of presuming conflict and prejudice when there is simultaneous representation of defendant and adverse witness usually indicate that there was no substantial continuation of the attorney's relationship with the witness. In \textit{United States ex rel. Kachinski v. Cavell}\textsuperscript{115} the attorney-client relationship with the witness was considered to be effectively terminated at the time of defendant's trial, although there was some overlap in representation of the witness and the defendant. The witness had been charged and sentenced the previous summer, but the attorney remained formally counsel of record until the witness was paroled. In \textit{Hayman v. United States}\textsuperscript{116} the court found no conflict where defense counsel was also the attorney for the prosecution witness who had pleaded guilty on the same charge, since there was no indication that counsel conducted a less than thorough cross-examination. But it is significant that although counsel was attorney of record for the witness, she had expressed dissatisfaction with him and given every indication that she was acting on her own when she decided to enter a plea of guilty.\textsuperscript{117}

The foregoing cases show the types of situations in which inconsistent interests have frequently developed. Any relationship between defense counsel and adverse witnesses of course raises questions of loyalty. As between co-defendants, when one defendant is less implicated in the crime charged than are the others, common representation is apt to prejudice his interest in extricating himself. Or when members of a family, or close friends, are jointly represented there is a risk that one will attempt to take most of the blame. If there are considerations indicating that only one defendant will testify, this raises questions of prejudice to his co-defendants. Since these situations pose special risks, they should indicate to the trial judge the necessity for investigating whether multiple representation is in fact appropriate in the particular case.

\begin{center}
\textbf{Duty of the Court to Inquire Into Potential Conflicts}
\end{center}

The great likelihood of inconsistent interests developing when defendants share counsel has drawn attention to the obligation of trial judges to anticipate conflicts. The Supreme Court has never specifically addressed the issue\textsuperscript{118} and there is considerable disagreement about the extent to which the judge has a duty to determine before trial whether the existence of potential conflicts requires appointment of separate counsel\textsuperscript{119} or, in the case of retained counsel, necessitates warning defendants of the hazards of joint representation. The American Bar Association has recommended that the judge make an affirmative inquiry into potential conflicts in every case of joint representation.\textsuperscript{120} Such a pre-trial determination of incon-

\textsuperscript{114} Id. at 900. There was no actual showing of prejudice to the defendant.

\textsuperscript{115} 453 F.2d 581 (3d Cir. 1971).

\textsuperscript{116} 205 F.2d 891 (9th Cir. 1953), \textit{cert. denied}, 349 U.S. 959 (1955).

\textsuperscript{117} Id. at 893.

\textsuperscript{118} In \textit{Glasser}, the judge had been warned of the possibility of inconsistent interests, and had a duty under the circumstances not to impose joint representation on the defendants. See text accompanying note 17 \textit{supra}. However, in the same way that a bare allegation of conflict is insufficient to reverse a conviction, an unsupported suggestion of potential conflict is not usually held to mandate appointment of separate counsel. In \textit{United States v. Williams}, 429 F.2d 158 (5th Cir. 1970), appointed counsel informed the court of “possible conflicts of interest” in the future, but had no present indication of any conflict either from defendants or from the evidence. The court declined to appoint another attorney on the basis of a “bald and conclusory statement.” The court held in \textit{State v. Alexander}, 334 So. 2d 588, (La. 1976) that “mere assertion that separate counsel is needed is insufficient. Specific facts must be presented to the trial judge to show that antagonism or conflict between the defenses does in fact exist.”

\textsuperscript{119} The federal courts have a statutory duty under the Criminal Justice Act of 1964 to appoint separate counsel in situations of conflict:

\texttt{[T]he court shall appoint separate counsel for defendants who have such conflicting interests that they cannot properly be represented by the same counsel, or when other good cause is shown.}


\textsuperscript{120} Whenever two or more defendants who have been jointly charged, or whose cases have been consolidated, are represented by the same attorney, the trial judge should inquire into potential conflicts which may jeopardize the right of each defendant to the fidelity of his counsel.

ABA Standards, The Function of The Trial Judge, § 8.4 (b) (Draft, 1972)
sistent interests would apparently safeguard constitutional rights and prevent wasteful retrials. Most courts have been reluctant, however, to make a pre-trial hearing mandatory. As the Seventh Circuit recently pointed out, an affirmative inquiry is not required by the sixth amendment or by Glasser. A substantial investigation by the judge into the facts might itself raise constitutional problems. For example, it might encroach on an accused's fifth amendment protections against self-incrimination. The suggestion has also been made that a substantive inquiry would actually interfere with the sixth amendment right to counsel which it seeks to protect by impairing defense strategy and compelling disclosure of confidential information.

In order to avoid the problems which a mandatory judicial inquiry might create, primary responsibility for determining potential conflicts and bringing them to the attention of the court could remain with counsel. The American Bar Association strongly advises against multiple representation, and the Code of Professional Responsibility requires an attorney to decline representation of clients with differing interests unless he makes full disclosure of the risks to his clients, obtains informed consent to such multiple representation. In some instances, as defined in the Code of Professional Responsibility, accepting or continuing employment by more than one defendant in the same criminal case will constitute unprofessional conduct.

ABA Standards, The Defense Function §3.5 (b) (1971).

The question of whether the trial judge has

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5&105 (C).

(C) [A] lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.


Glasser disapproved implicit waiver of effective representation. See text accompanying note 18 supra. Recent cases have required a very exacting standard of knowing, on-the-record waiver, even where conflicting interests were apparent at the outset. See United States v. Garcia, 517 F.2d 272 (5th Cir. 1975); United States v. Liddy, 348 F. Supp. 198 (D.D.C. 1975). But see Larry Buffalo Chief v. South Dakota, 425 F.2d 271 (8th Cir. 1970) which may suggest that retaining joint counsel when inconsistent interests are foreseeable would constitute waiver of effective representation. In a case where defendant dismissed court appointed counsel and retained the attorney who was representing his co-defendants, the Eighth Circuit said the right to adequate assistance of counsel was not necessarily waived by this choice if the conflict was not known at the outset. But the fact that the state had not imposed ineffective counsel could be considered as a factor in the issue of waiver. 425 F.2d at 279 n.5.

2 See note 152 and discussion accompanying note 164 infra.
an obligation to inquire into potential conflicts and to warn defendants of the hazards of joint representation has raised the issue of who will bear the burden of proving conflicts on appeal when the judge makes no pre-trial determination. Opposite rules have been announced by the District of Columbia Circuit and the Seventh Circuit. In 1967, the District of Columbia Circuit adopted as a rule that in the absence of a pre-trial determination of defendant's affirmative knowing choice for joint counsel, the burden shifts to the government to prove that no prejudice resulted from the multiple representation. The Seventh Circuit in 1975 explicitly rejected this approach, and, preferring to rely on counsel to detect conflicts, held that defendants must demonstrate "with a reasonable degree of specificity" that an actual conflict existed at trial whether or not the judge made an affirmative pre-trial inquiry. A middle position has recently been formulated by the Second Circuit, which requires shifting the burden of proof where the court has failed to make a pre-trial inquiry, but only when a possible conflict has been brought to the attention of the trial judge.

The District of Columbia Circuit has taken the position that whether the trial court appoints counsel or the defendants retain their own attorney, the judge has an obligation to ensure that the defendants are aware of the risks of joint representation. Campbell v. United States pointed out that when defendants have chosen a single attorney, the "trial judge has a responsibility to assure that co-defendants' decisions to proceed with one attorney is an informed decision." The judge must make a determination that defendants have been properly apprised of the risks.

Considerations of efficient judicial administration as well as important rights of defendants are served when the trial judge makes the affirmative determination that co-defendants have intelligently chosen to be represented by the same attorney and that their decision was not governed by poverty and lack of information on the availability of assigned counsel.

In Lollar v. United States Judge Skelly Wright held that the court has the same obligation to inform defendants when it appoints counsel:

"Certainly, whatever risks and disabilities inheres in joint representation inheres whether counsel is appointed or retained; and whatever steps a defendant is entitled to take to avoid such problems should be made known to him whatever his economic situation may be."

Lollar based its rule on Glasser's admonition to the trial judge to guard the essential rights of the accused and to determine whether there has been an intelligent and competent waiver of the right to counsel. Since the accused themselves are usually not in a position to appreciate and evaluate potential conflicts, the burden is on the judge to make them fully aware of the problems. Lollar did not directly discuss the question of how the judge is to determine whether there are substantial conflicts, or to what extent he may inquire into details of the proposed defense, but in Ford v. United States, a subsequent case involving Lollar's co-defendant, Judge Wright apparently felt that the burden of a pre-trial determination is such that the judge should always initially appoint separate counsel. Then, if "the interests of justice and of the clients" would be served by joint representation, counsel can suggest this for the court's consideration. In all cases which proceed with common representation, appropriate warnings by the court and a knowing, intelligent waiver by the defendants must appear on the record.

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130 United States v. DeBerry, 487 F.2d 448 (2d Cir. 1973).
131 352 F.2d 359, 361 (D.C. Cir. 1965).
132 Id. at 360.
133 376 F.2d 243 (D.C. Cir. 1967).
134 Id. at 246.
135 379 F.2d 123 (D.C. Cir. 1967).
136 Id. at 125-26. This rule requiring initial appointment of separate council seems to be based on the court's supervisory powers. There is clearly no constitutional right to separate counsel except when there are conflicts of interest. However, Judge Wright raises the possibility of a constitutional issue if the indigent's access to separate counsel is made to depend on the court's ability before trial to predict prejudice. Lollar v. United States, 376 F.2d at 246 n.6, citing Douglas v. California, 372 U.S. 353 (1963) and Griffin v. Illinois, 351 U.S. 12 (1956).
137 379 F.2d at 126.
138 The question whether a defendant can always waive his right to conflict-free representation seems to be left open. Ford suggests that it may still be for
Otherwise, the burden will be on the government to show beyond a reasonable doubt that the denial of the defendants' right is merely harmless error.\textsuperscript{139}

The First Circuit announced a similar rule in United States v. Foster.\textsuperscript{140} The trial court has a duty to comment on the risks of joint representation, to inform defendants that they may retain or be appointed separate counsel, and to "inquire diligently whether [defendants] have discussed the risks with their attorney."\textsuperscript{141} This procedure apparently does not constitute a waiver, but it increases the defendant's burden of proof on appeal.

If the court has carried out this duty of inquiry, then to the extent a defendant later attempts to attack his conviction on grounds of conflict of interest arising from joint representation he will bear a heavy burden indeed of persuading us that he was, for that reason, deprived of a fair trial.\textsuperscript{142}

Where the record does not show that a satisfactory inquiry was made, the burden of proof shifts to the government to show that prejudice was improbable.\textsuperscript{143} The First Circuit declines to follow the District of Columbia Circuit requirement of proof beyond a reasonable doubt, which it considers equivalent to a rule of automatic reversal. It also does not require appointment of separate counsel in every case, but defendants must be made aware of the risks of sharing counsel and offered the opportunity to have separate counsel appointed, apparently without any showing of probable conflict.

In United States v. Mandell,\textsuperscript{144} a case involving retained counsel, the Seventh Circuit found an adequate safeguard for defendants' sixth amendment rights in the duty of members of the bar to inform clients of potential dangers.\textsuperscript{145} Although it would not discourage the practice by district court judges of making an affirmative inquiry,\textsuperscript{146} the court declined to adopt a mandatory rule, and held that defendants had the burden of showing "with a reasonable degree of specificity, that a conflict of interests actually existed at trial."\textsuperscript{147}

In placing the "primary responsibility for the ascertainment and avoidance of conflict situations" on counsel,\textsuperscript{148} the court quoted with approval the views of the Second Circuit in United States v. Paz-Sierra.\textsuperscript{149} The Paz-Sierra court felt that the disadvantages of requiring the trial judge to make an affirmative determination included the serious fifth amendment problems raised by the necessity for hearing from each defendant before trial his version of the facts. In addition, a pre-trial finding that no prejudice was likely to occur by reason of the joint representation would on appeal work against the defendant who may in fact have been prejudiced. Relying on counsel seemed the better choice.

No facts have thus far been presented that the Bar of this country is so unmindful of the canons of ethics and its obligations to avoid positions of conflict as to call for a pre-trial cross-examination of defendants and their counsel on the theory, or even presumptuous presumption, that counsel will not be faithful to the best interests of his clients.\textsuperscript{150}

\textsuperscript{139} Lollar v. United States, 376 F.2d at 247; Ford v. United States, 379 F.2d at 125.
\textsuperscript{140} 469 F.2d 1, 5 (1st Cir. 1972).
\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{144} 525 F.2d 671 (7th Cir. 1975), cert. denied, 429 U.S. 1049 (1976).
\textsuperscript{145} 525 F.2d at 677. See note 125 supra. In United States ex rel. Robinson v. Housewright, 525 F.2d 988, 993 (7th Cir. 1975) the court relied on the fact that counsel had perceived no disabling conflict when he advised one of three clients to plead guilty. Counsel's determination that Robinson had no viable defense was accepted, and the fact that had Robinson gone to trial he would have prejudiced his co-defendants did not state a conflict since severance would have been available.
\textsuperscript{146} 525 F.2d at 677 & n.10.
\textsuperscript{147} Id. at 677. In Mandell the defendants, an attorney and two conspirators who had persuaded an associate to invest in fictitious personal injury judgments against the City of Chicago, failed to sustain their burden of proof by merely claiming from differing degrees of guilt. The court found no inconsistency in the defense and no support in the record for the suggestion that only one of the three was vigorously defended.
\textsuperscript{148} Id.
\textsuperscript{149} 367 F.2d 930 (2d Cir. 1966), cert. denied, 386 U.S. 935 (1967). In a bench trial, two brothers were convicted of selling cocaine. Since each agreed that one had not participated in the sale of drugs to a federal agent, the court found no conflict of interests.
The Seventh Circuit agreed with the practice of relying on counsel to call the court's attention to the presence of conflicts, in preference to requiring in all cases an affirmative inquiry by the trial judge. Since the court has no duty to ascertain potential conflicts, there is no question of shifting the burden of proof to the government on appeal where no inquiry was made at trial.

Mandell was a case of privately retained counsel. There are suggestions in other Seventh Circuit cases that the judge may have a greater obligation when joint counsel is appointed by the court, and when the court has notice of possible conflicts. The position of the Seventh Circuit is not yet clear as to whether in such cases the trial court's duty to inquire is mandatory and will affect the burden of proof. The court in Mandell declined to exercise its inherent supervisory authority "at this time" as a basis for announcing a mandatory rule. It purported in this respect to join the Third Circuit, which found it unnecessary to adopt the rule in a case where the conviction was reversible on grounds of actual conflict. Both the Seventh and Third Circuits have thus expressed approval for the practice of on-the-record inquiry by the court, and seem to have left room for further consideration of the question, perhaps in the context of a more suitable case.

The Second Circuit, which in Paz-Sierra defended the court's reliance on the attorney's judgment, distinguishes situations where the court has notice of inconsistent interests. United States v. DeBerry held that when the trial court becomes aware of potential conflict it should conduct a careful inquiry, failing which the burden of proof on the question of prejudice shifts to the government. Unlike the more definite rule of the District of Columbia Circuit, which assumes the possibility of conflict in all cases, the obligation to conduct a hearing attaches only when the court is made aware of potential conflicts. In DeBerry, the trial judge had notice of possible conflict when the Government informed the court it had reason to believe one of two co-defendants would testify on behalf of the other. Edwards and DeBerry were convicted of possession of drugs. Edwards had shipped a suitcase containing bricks of marijuana from California to New York, where DeBerry had picked it up. At a suppression hearing, DeBerry said a man had given him $50 to collect the suitcase, but he did not know the man's name. The Government thought that Edwards would attempt to exonerate DeBerry. Defense counsel assured the court that Edwards would not testify, that only DeBerry would take the stand, and that his testimony would not incriminate Edwards. "Of course, DeBerry did . . . incriminate Edwards, which may have been fine for DeBerry, but we fail to see how Edwards could properly have been advised to permit this to occur or to agree to it as a matter of 'defense strategy.'" In these circumstances, statements by defense counsel to the trial court that the problem of possible conflicts of interest had been carefully discussed with defendants was not equivalent to direct interrogation by the judge. The convictions of both defendants were reversed and

150 Id. at 932-33.
151 Accord, Kaplan v. United States, 375 F.2d 893, 897 (9th Cir.), cert. denied, 389 U.S. 839, 897 (1967) (conflict said to be contingent on possibility of a jury trial): [T]he trial court must be able, and be freely permitted, to rely upon counsel's representations that the possibility of such a conflict does or does not exist. . . . The court may go further into the factual situation if he desires, but is under no original or continuing obligation to do so.
152 United States v. Gougis, 374 F.2d 758 (7th Cir. 1967), not mentioned by Mandell, said that in the case of appointed counsel it is especially important for the court to determine that no prejudice will result from multiple representation. 374 F.2d at 761.
153 United States v. Jeffers, 520 F.2d 1256, 1263 n.11 (7th Cir. 1975), cert. denied, 425 U.S. 1066 (1976) (prior representation of prosecution witness) said that on notification "it became the duty of the district judge to seek out the facts surrounding the alleged conflict."
154 525 F.2d at 677.
remanded for a new trial either with separate
counsel or following a determination by the
judge that the defendants knowingly waived
their right to conflict-free representation.159

The various approaches to the issue of pre-
trial inquiry into potential conflicts reflect the
tension between a court's duty to protect the
defendant's constitutional right to effective as-
sistance of counsel and the utility of joint rep-
resentation as a means of reducing the delays,
the cost, and the duplication of effort often
involved in separate representation of co-de-
defendants presenting the same defense to a
common charge. Investigation into the possibil-
ity of inconsistent interests raises problems of
interfering with the attorney-client relation and
delving into the details of defense strategy.
There are undoubtedly difficulties in ascertaining
how much investigation is sufficient. Fur-
thermore, a general pre-trial inquiry does not
solve the problem of unforeseeable conflicts
which arise during the course of the trial.

A possible solution when defendants retain
their own counsel is for the court to make a
preliminary determination, such as described in
Campbell v. United States,160 that the decision
to share counsel was not dictated by lack of
funds and ignorance of available alternatives.
This procedure, perhaps accompanied by a
warning of the risks of multiple representation,
would not interfere with the right to counsel of
one's choice, but would rather provide inform-
ation relevant to making the choice. The brief
inquiry and warning should not be for
the purpose of eliciting a waiver of the right to
conflict-free representation, however, because
it seems questionable that in the absence of
specific indications of inconsistent interests,
such a waiver could be the knowing, intelligent
waiver required when the right to counsel is at
stake.161

Rather than require further inquiry by the
judge into potential conflicts, the better ap-
proach is generally to rely on counsel to bring
conflicts to the attention of the court, and to
impose obligations on the trial judge only when
he has some notice of possible inconsistencies
in the defense. The difficulty with inquiring
into potential conflicts when there is nothing

159 Id. at 454.
160 352 F.2d 359 (D.C. Cir. 1965). See text accom-
panying notes 131–32 supra.
161 See discussion following note 193 infra.

specific to indicate in what form the conflict
might arise is that any investigation of the
defense is necessarily general and may be quite
far-reaching. However, if the judge is notified
of potential conflicts because defense counsel
moves to withdraw or because the prosecution
moves to disqualify common counsel and re-
quire separate representation, the judge's in-
quiry into defense strategy can focus on the
specific problems alleged, thus avoiding the
general questioning which, it has been sug-
gested,162 threatens to intrude on the attorney-
client relationship or to infringe the accused's
fifth amendment protections. In the same way,
the general posture of the case or situations
especially conducive to creating conflicts,163
should alert the judge to the necessity for
investigating possibly inconsistent interests, and
again, his inquiry can focus on specific areas of
concern.

Some courts suggest that the duty of the trial
judge to inquire into potential conflicts varies
depending on whether counsel is retained or
appointed.164 The distinction cannot reasonably
be supported in terms of reliance on counsel to
recognize and give notice to the court of the
inconsistent interests of his clients. The distinc-
tion seems rather to rest upon the notion that
when the court appoints counsel it assumes an
obligation to anticipate conflicts because it
makes an implicit determination that the ap-
pointment is appropriate and will be effective.
Consistent with this obligation, the judge has a
duty to make some inquiry into the feasibility
of joint representation. But absent a particular
reason to believe that a common defense may
prejudice one of the accused, the inquiry

162 See note 123 and text following note 149 supra.
163 See text between notes 51 and 119 supra.
164 See note 152 supra. The court in Foxworth v.
Wainwright, 516 F.2d at 1076 stated that the "trial
judge has an obligation . . . to anticipate conflicts
reasonably foreseeable at the outset of the case, when
counsel is appointed." The court further notes, citing
Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir.), cert.
denied, 422 U.S. 1011 (1975), "[I]n this case we address
solely the question whether it was error to appoint
one attorney for three defendants. . . . Joint represen-
tation by retained counsel is a different question
entirely." Id. at 1076 n.4. Fitzgerald (issue of incompe-
tent representation) distinguishes retained from ap-
pointed counsel on the basis of state action. See Note,
89 HARV. L. REV., supra note 6, for a critical review
of the Fitzgerald decision, and Waltz, supra note 1 at
296–301 for a general discussion of state action theo-
ries relating to sixth amendment claims.
should be a summary one, limited by the same fifth and sixth amendment considerations which are considered relevant in cases of retained counsel. Only specific indications of potential conflict would entail a more detailed scrutiny.

Even if the trial court has a clear obligation to warn defendants of the risks of sharing counsel or to inquire into conflicts when it has notice that defendants' rights may be jeopardized, it is not clear what is accomplished by shifting the burden of proof to the government on appeal when no inquiry has been made. This issue is sometimes discussed in terms of proof of conflict,\(^\text{165}\) and sometimes in terms of proof of prejudice.\(^\text{166}\) Surely the defendants must still show that some conflict of interests existed at trial, since there is no constitutional right to separate counsel absent such a conflict. Perhaps shifting the burden of proof would, as in Lollar, amount to a greater willingness by the court to infer conflict from slight indications in the record. Or perhaps, if it is proof of prejudice which is at issue, shifting the burden to the government may indicate that some harm to defendants will be presumed.\(^\text{167}\)

On the other hand, if the trial court has warned defendants of the risks of joint representation and has made a preliminary inquiry into the possibility of inconsistent interests, there may be a question, as suggested by the First Circuit in United States v. Foster,\(^\text{168}\) of increasing the defendants' burden on appeal to prove that he actually was harmed by a conflict. If the standard of review is ordinarily to define a relevant conflict of interests which disadvantaged the defense, it is difficult to see what a heavier burden of proof would amount to except requiring the defendant to show that the conflict substantially contributed to his conviction. This is precisely what Glasser said should not be required. Rather than a scale of burdens of proof depending on the degree to which either the court or the defendant should have foreseen a conflict, the standard on appeal should be based on whether or not the defendant clearly waived his right to conflict-free representation. A warning of a general risk cannot provide the same basis for a knowing, intelligent waiver as can specific indications of inconsistent interests. Just as the judge's duty to foresee conflicts can reasonably be made to depend on notice of inconsistencies, so should the defendant's waiver be predicated on the foreseeable risks.

**Disqualification of Counsel**

A few recent cases raise the question whether a judge can disqualify an attorney from representing several clients in a situation where the clients themselves either have not objected to being jointly represented, or have actually insisted on retaining their chosen counsel in the face of the prosecution's objection that serious potential conflicts of interest render the multiple representation constitutionally defective. The issue turns on the right to waive the sixth amendment guarantee of conflict-free representation. Most personal constitutional guarantees can be waived, subject to the standard of a knowing and intelligent waiver.\(^\text{169}\) But it is not entirely clear whether this right of waiver is absolute, or whether it can be limited by other important interests. If the right is not absolute, the judge may have not only a duty to determine the existence of potential conflicts, but also the power to require separate counsel regardless of the desires of counsel and clients.

The issue of waiver has been raised in two different contexts: by witnesses in a grand jury proceeding and by defendants in a criminal

\(^{165}\) See text accompanying note 147 supra.

\(^{166}\) See text accompanying note 143 supra.

\(^{167}\) This seems to have been the result in DeBerry, where the court reversed the convictions of both defendants.

\(^{168}\) 352 F.2d 359 (D.C. Cir. 1965).

\(^{169}\) See Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (a waiver is an "intentional relinquishment or abandonment of a known right or privilege"); Brady v. United States, 397 U.S. 742, 748 (1970) (valid waivers should be "knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.") A waiver of the right to effective assistance of counsel is not generally implied from the attendant circumstances, but must be expressly and intelligently stated. Glasser refused to imply a waiver from the defendant's failure to renew his objection to sharing counsel. See text accompanying note 18 supra. See also Virgin Islands v. Hernandez, 476 F.2d 791, 799–94 (3d Cir. 1973) (no waiver implied from a silent record). Therefore, the distinction between retained and appointed counsel should be irrelevant to the issue of waiver. See Craig v. United States, 217 F.2d 355 (6th Cir. 1954) (immaterial whether counsel was appointed or retained). But see Larry Buffalo Chief v. South Dakota, 425 F.2d 271 (8th Cir. 1970), discussed supra note 126.
prosecution. In Pirillo v. Takiff, the Pennsylvania Supreme Court held that the supervising judge of a grand jury proceeding may in certain circumstances disapprove the multiple representation of subpoenaed witnesses. During a grand jury investigation of corruption in the Philadelphia Police Department, the Special Prosecutor had brought to the attention of supervising Judge Takiff the possibility of a conflict of interests in the joint representation of twelve police officers, since each would be questioned about each other's conduct in connection with the taking of bribes from bar owners. There was also a problem of inconsistent interests in that the fees of attorney Pirillo were being paid by the Fraternal Order of Police (F.O.P.), an organization which strenuously opposed any cooperation with investigations into police corruption. The Pennsylvania Supreme Court upheld Judge Takiff's order to remove Pirillo as counsel primarily on the basis of the impropriety of this fee arrangement, but it also sustained the order that the witnesses engage (or be appointed) separate counsel. Reasoning from the requirement of grand jury secrecy, the court felt that where each witness was a potential defendant, and where there was a possibility that each might incriminate another, it was “inappropriate for the supervising judge to permit multiple representation,” since secrecy prevented the witnesses from knowing the full extent of conflicting interests. Petitioners first argued that a prohibition of multiple representation impaired their right to counsel of their own choosing and denied the attorney's right to practice his profession. The court felt that neither of these rights is absolute, but may be balanced with important state interests or with other individual constitutional guarantees. Petitioners then claimed to have waived their constitutional right to effective counsel, but the court suggested that the waiver might be defective in a situation in which full disclosure was restricted. However, the decision did not specifically rely on this ground, but primarily considered the important state interest in effective grand jury investigations. The Government made this same argument of public interest in support of a motion to require separate counsel for witnesses in a federal grand jury investigation of the National Maritime Union. The Third Circuit, without deciding whether or not it accepted the Pirillo theory of balancing interests, held there was not sufficient evidence to support the district court's order for separate counsel for the nine

171 341 A.2d at 899.
172 Pirillo's conflicting obligations to F.O.P. and to his clients harmed both the state interest in effective grand jury investigation and the interests of any client who might stand to gain from cooperation with the Special Prosecutor.

[P]etitioner Pirillo testified that whenever a police officer indicated that he might cooperate, he would immediately remove himself as counsel and advise the witness to hire another attorney. This fee arrangement clearly has a chilling effect upon a police witness who is considering cooperation, since his access to F.O.P. paid counsel depends directly on his agreement not to cooperate. . . . [A]lso, Pirillo] would discuss the possibility of a witness cooperating only when the witness had come to him and raised the possibility. The failure of petitioner Pirillo to raise the subject of cooperation, apparently as a result of his fee arrangement with the F.O.P., deprives the witnesses of their right to the full and complete loyalty of their attorney.

Id. at 904. The court specifically stated that the order prohibiting an F.O.P.-related attorney applied only to the grand jury proceeding, and did not restrict recourse to F.O.P. lawyers for other legal problems.

173 341 A.2d at 906.
174 Id. The court also mentioned that the concept of grand jury secrecy is itself jeopardized by multiple representation because the attorney may feel obliged to reveal to one client the testimony of another, 341 A.2d at 903, n.5. The District of Columbia Circuit found the Pirillo reasoning with regard to grand jury secrecy requirements to be inapplicable to federal courts. There is “no general obligation on the part of a grand jury witness to refrain from disclosing the contents of his testimony before the grand jury.” In re Investigation Before April 1975 Grand Jury, 531 F.2d 600, 606-07 n.11 (D.C. Cir. 1976) (multiple representation of twenty-one union pressman, witnesses in a grand jury investigation into damages to newspaper machinery during a strike).

176 Pirillo was distinguished by the fee arrangement, but the court assumed that:

[T]he government may obtain, in appropriate circumstances, judicial interference with private arrangements for multiple legal representation of witnesses called to testify before a grand jury, on the theory that the multiple representation impedes the effectiveness of the grand jury investigation.
The Government also challenged the multiple representation by alleging potential conflicts of interests if it should seek to offer immunity to one of the witnesses. The court rejected this argument, pointing out that no offer had in fact been made, and that counsel had in any case indicated he would withdraw if a conflict arose.

In United States v. Garcia, the Fifth Circuit considered the issue of waiver by defendants in the context of a criminal trial. The district court, on a pre-trial motion by the Government, had disqualified three attorneys from representing nine members of the narcotics division of the Houston Police Department charged with conspiracy and various federal tax and drug violations. The Government alleged conflicts of interest among the defendants and between defendants and potential prosecution witnesses (unindicted policemen simultaneously represented by the same counsel). The defendants claimed they were not subject to any conflicts of interest, but that even if there were conflicts, they had a right to waive their sixth amendment protections. Without determining that the multiple representation would result in ineffective assistance of counsel, the court held that defendants could waive the constitutional guarantee of conflict-free representation.

Relying on the Supreme Court cases which set forth the standard for an effective waiver of a constitutional right, and cases upholding the validity of waiver of specific rights, the court concluded that there is no basis for distinguishing one constitutional right from another. The Government contention that it is impossible to waive the right to effective assistance of counsel where there are serious conflicts of interest "is novel and unfounded." The cases draw no distinction 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.

Garcia and other cases involving a defendant's right to waive effective assistance of counsel cite Faretta v. California as indirectly supporting a defendant's right to counsel of his own choosing. Faretta upheld the right of a defendant to conduct his own defense and found that the Constitution forbids a state from...
forcing a lawyer on an unwilling defendant.\footnote{422 U.S. at 815, 836.}

The Supreme Court considered the waiver issue in \textit{Faretta} to be the defendant's competence to make a choice, not his legal knowledge and skills.

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 life-blood of the law."\footnote{Id. at 834, (quoting Illinois v. Allen, 397 U.S. 337, 350–51 (1970) (Brennan, J., concurring)).}

\textit{Faretta} seems to lend support to an absolute right to waive effective assistance of counsel. Yet it does not necessarily follow that since a court may not force a lawyer on a defendant it may not disqualify the particular lawyer whom the defendant has chosen, leaving him free to choose another. There are two considerations which may serve to limit a defendant's ability to waive effective assistance of counsel.

For a waiver to be valid, the court must make a determination that the defendant's choice is in fact knowing and intelligent.\footnote{Cf. United States v. Bernstein, 529 F.2d at 1043 ("the waiver must be deliberate and made with an understanding of the conflicting interests and the dangers resulting from them.").} In \textit{United States v. Bernstein},\footnote{533 F.2d 775 (2d Cir. 1976). The defendants in Bernstein were convicted of conspiracy, bribery and false statement offenses in connection with applications for FHA mortgage insurance.} the trial court refused to accept a waiver of conflict-free representation. The defendant appealed her conviction on the ground that she had been denied representation by counsel of her choice when the judge ordered her attorney, who was jointly representing co-defendants,\footnote{Id. at 787. The co-defendants were paying the attorney's fee.} to terminate his representation of her. The judge had determined that inconsistent defenses were probable in a situation where employers and employee had an interest in shifting blame onto each other.\footnote{The defenses actually offered at trial were that the defendant employee claimed she had simply followed standard office procedures and obeyed orders, while her employers, the co-defendants, claimed she had acted on her own. Id. at 788.}

On appeal, the Second Circuit approved the trial court's action, saying that while a defendant's choice of counsel should not be unnecessarily obstructed by the court, "where there is a serious possibility that a definite conflict of interest will arise, the necessities of sound judicial administration require the court to take command of the situation."\footnote{Id.} The court upheld the trial judge's determination that the defendant's attempted waiver was not knowing and intelligent.

The court's interrogation of [defendant] established that she was not prepared to have the court stand by and do nothing in the event an actual prejudicial action on the part of her lawyer arose. In other words, her waiver was not without strings.\footnote{See ABA Code of Professional Responsibility, DR5–105 (c), supra note 125. The Seventh Circuit in \textit{United States v. Garcia} clearly stated the issue when it said: Whether the holding in \textit{Faretta} should be extended to require that the court accede to a defendant's choice of counsel in the face of a conflict of interest, thus tolerating not only a breach of professional ethics by counsel but representation which the court finds inadequate is a question we need not decide today.}

Thus in the event of a serious foreseeable conflict, a defendant may be reluctant to make a full and explicit waiver of his constitutional protections. But even if the advantages of presenting a common defense seem to outweigh the risks of prejudice, so that a defendant is willing to waive his rights, there may nonetheless be justification for the court to disqualify an attorney representing defendants who have reasonably foreseeable conflicts of interest. In this situation, not only the defendants' rights are involved, but also the ethical obligations of the attorney. The court, in exercising supervisory authority over members of the bar, has the power to enforce the ethical standard which requires an attorney to decline multiple representation unless "it is obvious he can adequately represent the interest of each [client]."\footnote{Id.} Significantly, even cases which have explicitly approved waiver have not done so in the face of
a clear conflict of interests. The *Garcia* court expressly declined to determine whether the “multiple representation . . . in this case will result in ineffective assistance of counsel.”\(^{200}\)

The court had no notice of any actual, present conflict. Similarly, the Third Circuit, considering the Government's allegations of potential conflicts in multiple representation of grand jury witnesses, found no evidence of actual conflict where no offer of immunity had been made to a particular defendant.\(^{201}\) In *United States v. Liddy*,\(^{202}\) the court considered not only the validity of defendants' waivers but also evidence that might show actual, present conflicts, indicating that a waiver might not be accepted in all circumstances.

Implicit in these decisions is the tension between the personal rights of an accused and the integrity of the judicial system. The right to counsel of one's choice must undoubtedly be respected by the courts,\(^{203}\) even when the prosecution attacks the choice as being improperly motivated.\(^{204}\) There are, however, frequent expressions to the effect that this right is not absolute, nor on a par with the right to have the assistance of counsel.

While it cannot be disputed that the Sixth Amendment to the Constitution grants an accused in a criminal prosecution an absolute unqualified right to have the assistance of counsel for his defense, it does not necessarily follow that his right to a *particular* counsel is absolute and unqualified. [Defendant's] freedom of choice of counsel may not be manipulated to subvert the orderly procedure of the courts or to interfere with the fair administration of justice.\(^{205}\)

Since the right to be represented by a particular attorney cannot be insisted upon when it would unduly delay the proceedings,\(^{206}\) it should not be permitted to override the obligations of the court to maintain the ethical standards basic to fair representation. When the court has notice of an actual conflict of interests\(^{207}\) which exists before trial,\(^{208}\) it surely has the power as supervising authority over the conduct of counsel to require separate representation despite a knowing and intelligent waiver by the defendants. In *Faretta*, the Court emphasized the defendant's right to choose between asserting his constitutional guarantees or dispensing with them, even if his choice works "ultimately to his own detriment." But this is not to say that an accused may also waive the obligations of his attorney, or force the court to permit representation which it knows to be defective. The pursuit of justice requires not only consideration for the rights of defendants, it also requires respect for the integrity of the courts.

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\(^{200}\) 517 F.2d at 275 (emphasis added).

\(^{201}\) See text accompanying note 180 *supra*.


\(^{203}\) See, e.g., *United States v. Sheiner*, 410 F.2d 337, 342 (2d Cir.), *cert. denied*, 396 U.S. 825 (1969) where the court said:

[T]he potential hazards of joint representation are as likely to be present when counsel is retained as when assigned. However, defendants who retain counsel also have a right of constitutional dimensions to representation by counsel of their own choice.

"Defendants are free to employ counsel of their choice, and courts have 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).

\(^{204}\) "Individuals are free to waive the constitutional protections otherwise afforded them, regardless of their motivation." *United States v. Garcia*, 517 F.2d at 276-77.


\(^{206}\) See, e.g., *United States v. Dardi*, 330 F.2d 316 (3d Cir. 1964), *cert. denied*, 379 U.S. 845 (1964) (court refused to adjourn when defendant's counsel became ill, but made a temporary assignment of a co-defendant's counsel when the replacement chosen by defendant requested a two month continuance); *United States v. Bentvena*, 319 F.2d 916 (2d Cir.), *cert. denied*, 375 U.S. 940 (1965) (co-defendants' counsel was assigned to represent defendant).

\(^{207}\) Some line must be drawn between an actual present conflict and the probable development of conflicts. To be knowing and intelligent, a waiver should ordinarily be made only in the context of reasonably foreseeable risks. On the other hand, to justify disqualifying a defendant's chosen counsel the court must be aware of an existing conflict which vitiates the attorney's ability to represent all his clients fairly.

\(^{208}\) Conflicts which develop during the course of trial after a valid waiver would be similar to detrimental developments after the waiver of any other constitutional right, and not justify disrupting the proceedings with a claim for new counsel. A possible exception could be made for conflicts created by government action and not comprehended in the original waiver, such as an offer of immunity to one defendant.