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Cuyler v. Sullivan and Proposed Rule 44(c): Contrasting Approaches to Conflicts of Interest in Multiple Representation of Criminal Defendants

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NOTES

_CUYLER v. SULLIVAN AND PROPOSED RULE 44(c): CONTRASTING APPROACHES TO CONFLICTS OF INTEREST IN MULTIPLE REPRESENTATION OF CRIMINAL DEFENDANTS_

Multiple representation\(^1\) occurs when one attorney or law firm — either retained or court-appointed — represents two or more codefendants. Unless the interests of the codefendants are identical, this situation can produce an array of conflict-of-interest problems for the lawyer or firm.\(^2\) Clients with divergent defenses, for example, may confront counsel with the dilemma of having to refrain from advancing an argument for one

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1. Two examples of circumstances in which multiple representation may occur — and thus the potential for conflict of interest — are these:
   A doctor and his receptionist, a college student, are charged with illegally dispensing diet pills. The doctor offers to share with the receptionist the services of an attorney he has retained. The receptionist agrees because he does not have much money. An attorney representing the receptionist alone might argue that his client knew nothing of the crime and that only the doctor is culpable. This attorney might advise the receptionist to testify against the doctor in exchange for immunity or a reduced charge. An attorney representing both defendants, however, could not suggest these defenses for the receptionist because of their adverse effect upon the interests of his other client, the doctor. Consequently, the jointly represented receptionist might never learn of these alternatives.

   Similar potential for conflict exists when a corporate executive and lower echelon employees are charged with the same crime, and the corporation hires one attorney or firm to represent both the executive and the employees. The employees, fearing reprisals, might be hesitant to secure separate representation. Consequently, the employees may not be advised of their option to testify for the prosecution in return for a reduced charge or even immunity. The executive, possibly the real target of the prosecution, would have a strong interest in maintaining a solid front against the prosecution. Again the attorney confronts incompatible interests.

   The terms “multiple representation” and “joint representation” will be used interchangeably to refer to situations in which two or more defendants in a criminal case are represented by a single attorney or firm. Although multiple representation and the potential for conflict occur in civil as well as criminal contexts, this Note will deal exclusively with the criminal context.

2. The ABA Code of Professional Responsibility, addressing possible conflicts, cites the explanation given in the ABA Canons of Professional Ethics No. 6, adopted by the American Bar Association on January 7, 1938: “A lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.” ABA Code of Professional Responsibility EC 5-15 n.19 (1978).
defendant lest the other be inculpated. Moreover, even if codefendants' interests are identical at trial, those interests may diverge at a sentencing hearing. Ordinarily, counsel might attempt to mitigate the severity of one defendant's sentence by arguing that the other defendant either committed the more serious acts or incited the criminal conduct of his fundamentally law-abiding codefendant. An attorney representing both defendants, however, would be unable to present either of these arguments for one client without injuring the interest of his other client. Thus, defendants sharing counsel may receive ineffective representation at some or all stages of the proceedings.

Prior to 1980, the Supreme Court had dealt only twice with the issue of ineffective assistance of counsel arising from multiple representation. In both cases the trial court had, in effect, forced multiple representation on codefendants over the objection of counsel. Each trial resulted in a conviction that was subsequently reversed on appeal. Neither case, however, addressed the common situation in which the possibility of conflict is not raised at trial, but the defendant claims on appeal that he was denied effective assistance of counsel because of such a conflict of interest. As a result, lower courts continued to disagree over whether in all cases of joint representation a trial judge had an affirmative duty to inquire whether defendants were being denied effective assistance of counsel due to a conflict of

3. See People v. Chacon, 69 Cal. 2d 765, 775, 447 P.2d 106, 112, 73 Cal. Rptr. 10, 16 (1968), in which joint representation during death penalty sentencing proceedings was commented on by Justice Traynor:

Often the strongest argument that separate counsel can make on the issue of penalty is that his client was less culpable than the others and that he, at least, should not be executed. . . . Counsel representing more than one defendant is necessarily inhibited in making such arguments and in presenting evidence to support them. He cannot simultaneously argue with any semblance of effectiveness that each defendant is most deserving of the lesser penalty.


As this Note will explain, the Court in Cuyler v. Sullivan, 100 S. Ct. 1708 (1980), delineated the showing required of a defendant claiming ineffective assistance of counsel as a result of a conflict of interest in joint representation.

But the Court still has not determined what satisfies the sixth amendment requirement of effective assistance of counsel for a criminal defendant when no conflict of interest is alleged. See, e.g., Maryland v. Marzullo, 435 U.S. 1011, 1011 (1978) (White, J., dissenting from denial of certiorari) ("Despite the clear significance of this question, the Federal Courts of Appeal are in disarray.") Compare United States v. Madrid Ramirez, 535 F.2d 125, 129 (1st Cir. 1976) (representation deemed adequate unless it was "such as to make a mockery, a sham or farce of the trial") with Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970) (effective representation is "the exercise of the customary skill and knowledge which normally prevails at the time and place").
interest. Courts also differed on the requisite degree of conflict necessary to constitute denial of effective representation.

In *Cuyler v. Sullivan*, the Supreme Court addressed these questions and concluded that there was no constitutional basis for requiring trial judges in state courts to inquire into the propriety of every case of multiple representation. The Court endorsed such a requirement for federal courts, however, by promulgating Rule 44(c), a proposed amendment to the Federal Rules of Criminal Procedure. In addition to examining the *Sullivan* decision and its impact on multiple representation, this Note will demonstrate why an inquiry such as that mandated by Rule 44(c) is the preferable solution to the problems inherent in multiple representation in all criminal trials — state as well as federal.

I. The Right to Counsel: Historical Perspective

A. The Right to Counsel in Federal Courts

Although the sixth amendment is customarily thought to express the historical right to counsel, under English common law a defendant was not permitted representation by an attorney in felony trials until 1836. Some

5. Compare *United States v. Foster*, 469 F.2d 1 (1st Cir. 1972) (district courts must conduct inquiries into the risks of multiple representation of jointly-represented defendants) with *Mesch v. United States*, 407 F.2d 1290 (10th Cir.), *cert. denied*, 396 U.S. 826 (1969) ("procedural fact" that the trial court failed to make inquiry is not determinative without a showing of prejudice).

6. Compare *United States v. Partin*, 601 F.2d 1000, 1009 (9th Cir. 1979) (defendant must show specific prejudice caused by the alleged conflict of interest) with *Walker v. United States*, 422 F.2d 374, 375 (3d Cir.), *cert. denied*, 399 U.S. 915 (1970) (defendant must show a possible conflict of interest or prejudice, however remote).

7. 100 S. Ct. 1708 (1980).


9. *See* 100 S. Ct. at 1717 n.10. Rule 44(c), scheduled to take effect December 1, 1980, requires federal court judges to inquire into potential conflicts of interest in multiple representation cases and advise defendants of their right to separate counsel. After discussing proposed Rule 44(c) and citing circuits which require similar inquiries, the Court concluded: "As our promulgation of Rule 44(c) suggests, we view such an exercise of the supervisory power as a desirable practice." For a discussion of Rule 44(c), see notes 94-102 and accompanying text *infra*.

commentators contend that the sixth amendment was not originally intended to afford an unqualified right to counsel. Rather, they argue, the intention of the amendment was to assure a defendant the right to be represented at trial only if he were able to retain an attorney. Consequently, with the exception of capital cases where the trial judge was directed by statute to appoint counsel, there existed no right to counsel in cases involving lesser crimes.

In 1938, however, the Supreme Court began to extend the right to appointed representation for indigent defendants. In Johnson v. Zerbst, the Court overturned a decision in which codefendants charged with uttering counterfeit currency were denied their request for appointed counsel. The Court held that the sixth amendment requires the appointment of counsel to represent indigent defendants in all federal cases where life or liberty is at stake. This requirement was later broadened in Walker v. Johnson to include the opportunity for a defendant without financial means to consult with an appointed attorney before entering a plea of guilty at trial. In Walker, the defendant pleaded guilty to armed robbery without having been apprised of his right to an attorney. The Court held that the defendant had not voluntarily waived his right to counsel and had, in fact, been deprived of his sixth amendment rights.

The principles set forth by the Court in Zerbst, Walker, and later in

11. See Allen, The Supreme Court, Federalism and State Systems of Criminal Justice, 8 DEPAUL L. REV. 213, 224 (1959) [hereinafter cited as Allen]; Holtzoff, supra note 10, at 7-8. In support of this contention, Holtzoff noted that after proposing the first 10 amendments to the Constitution in 1789, Congress passed a law in 1790, presently codified at 18 U.S.C. § 3005 (1948), requiring the appointment of counsel in capital cases. Holtzoff reasons that if the appointment of counsel was required by the sixth amendment, there would have been no reason for the law to have been proposed or passed.

12. 18 U.S.C. § 3005 (1948), provides:
Whoever is indicted for treason or other capital crime shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire, who shall have free access to him at all reasonable hours.

13. 304 U.S. 458 (1938). In a South Carolina federal district court, Johnson and a codefendant were charged with possessing and passing counterfeit money. Their request for counsel having been denied, they conducted their own defense. They were convicted and sentenced to four and one-half years in prison. On appeal the Supreme Court stated: “the Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel.” Id. at 463.

14. Id.

15. 312 U.S. 275 (1941).

16. Id. at 286.
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Glasser v. United States, were finally codified in 1946 in Rule 44 of the Federal Rules of Criminal Procedure. This rule mandates the assignment of counsel to indigents in all federal criminal prosecutions unless the defendant expressly waives his right to such assistance.

B. The Right to Counsel in State Courts

The development of the right-to-counsel doctrine in state courts resulted from the extension of sixth amendment principles to state cases. In Powell v. Alabama, seven indigent black youths from another state were tried and convicted in Alabama for the rape of two white girls, a capital offense. Six days prior to trial, the entire county bar was appointed to defend the accused. On review, the Supreme Court held that the trial court’s failure to make effective appointment of counsel in a capital case, where the defendants were young, illiterate, and besieged by hostile sentiment, constituted a denial of due process and required reversal of the conviction. Subsequently, however, in Betts v. Brady, the Court refused to extend the right to appointed counsel to defendants accused of noncapital crimes. In Betts, the Court found no reversible error where an indigent defendant charged with robbery in Maryland was denied his request for appointed counsel.

In Gideon v. Wainwright, however, the Court reconsidered this question. An indigent defendant in a Florida court was charged with breaking and entering with intent to commit a misdemeanor, a felony under Florida law. The defendant requested and was denied the appointment of an attorney. The Court overruled Betts and reversed the conviction, thus extending the rationale of Powell to noncapital cases in state courts. In so doing, the Court found that the right to counsel guaranteed by the sixth amendment was a fundamental right that applied to the states through the due process clause of the fourteenth amendment.

18. FED. R. CRIM. P. 44. Rule 44(a) provides: “Right to Assigned Counsel. Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the federal magistrate or the court through appeal, unless he waives such appointment.” The original advisory committee note adds that the rule is a restatement of the principles declared by the Supreme Court in Zerbst, Johnston, and Glasser. See notes 13-17 and accompanying text supra.
20. Id. Significantly, Powell also marked one of the first ventures by the Supreme Court into the area of state criminal procedures. See Allen, supra note 11, at 215.
23. Id. at 341-44. The Court declared:
decisions followed which created an absolute right to counsel in criminal cases where imprisonment could result. Left unaddressed was the question of how much that right might be diluted by the existence of a conflict of interest as a result of multiple representation.

C. Conflict of Interest: A Constitutional Right Imperiled

The Supreme Court first addressed the problem of conflict of interest in joint representation cases in *Glasser v. United States*, declaring that 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." At trial, the judge had required Glasser's attorney, over the objection of both counsel and client, to represent one of Glasser's codefendants who had discharged his own attorney. The Supreme Court found that the trial court thereby denied Glasser his right to effective assistance of counsel and concluded that a trial judge has "the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. . . . The trial court should protect the right of an accused to have

We accept . . . that a provision of the Bill of Rights which is "fundamental and essential to a fair trial" is made obligatory upon the States by the Fourteenth Amendment. . . . The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials.

*Id.* at 342-44.

24. The Court later limited the absolute right to counsel to felony cases. *See Mempa v. Rhay*, 389 U.S. 128, 134 (1967). But this restriction was eliminated in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), where the Court held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *Id.* at 37 (footnote omitted).

25. 315 U.S. 60 (1942). In *Glasser* the defendant, a government prosecutor, was accused of conspiracy to defraud the United States for accepting bribes in exchange for not prosecuting those charged with making illegal whiskey. *Id.* at 64.

26. *Id.* at 70.

27. *Id.* at 76. In a vigorous dissent, however, Justice Frankfurter criticized this finding: [T]he perspective of the living trial is lost in the search for error in a dead record. To set aside the conviction of Glasser (a lawyer who served as an Assistant United States Attorney for more than four years) . . . on the grounds that he was denied . . . "the assistance of counsel" . . . is to give fresh point to this regrettable familiar phenomenon. For Glasser himself made no such claim at any of the critical occasions throughout the proceedings . . . Not until . . . fifteen weeks after the trial had ended, did Glasser discover that he had been deprived of his constitutional rights. This was obviously a lawyer's afterthought. *Id.* at 88-89 (Frankfurter, J., dissenting).
the assistance of counsel."\textsuperscript{28}

The Court reaffirmed and extended *Glasser* in *Holloway v. Arkansas*.\textsuperscript{29} In that case, the trial court had appointed a single attorney to represent three codefendants charged with robbery and rape. The attorney requested appointment of separate counsel in two pretrial motions stating that conflicting interests among the codefendants prevented him from providing effective assistance to each. The trial court denied both motions without inquiry.\textsuperscript{30} The Supreme Court concluded that *Glasser* required automatic reversal "whenever the trial court improperly requires joint representation over timely objection."\textsuperscript{31}

The *Holloway* Court specifically reserved judgment, however, on two issues which arise when the possibility of conflicting interests is not raised at trial. First, the Supreme Court declined to rule on whether a trial court has an affirmative duty to inquire into all cases of joint representation to determine if an actual or possible conflict will deprive the defendant of his right to effective assistance of counsel. Second, the Court left undefined the degree of conflict that must be shown before a reviewing court should conclude that a defendant was denied his right to effective representation.\textsuperscript{32} As a result of the Court's silence, the various federal circuit courts were divided on the question of whether a district court judge must inquire into the possibility of conflict in all cases of joint representation. Five circuits required an inquiry by the trial court,\textsuperscript{33} but only the Second Circuit found the inquiry constitutionally mandated and enforceable in state

\textsuperscript{28} *Id.* at 71. See note 81 and accompanying text infra.

\textsuperscript{29} 435 U.S. 475 (1978).

\textsuperscript{30} *Id.* at 477.

\textsuperscript{31} *Id.* at 488.

\textsuperscript{32} *Id.* at 483-84. The Court noted that the various appellate courts had arrived at conflicting answers to these questions. On the issue of a duty to inquire compare *United States v. Mandell*, 525 F.2d 671, 677 (7th Cir. 1975) (defense counsel has responsibility to apprise accused of potential dangers of multiple representation) \textit{with} *United States v. DeBerry*, 487 F.2d 448, 452-53 (2d Cir. 1973) (district courts must conduct a careful inquiry into joint representation of defendants). Regarding the requisite showing of conflict required for reversal compare *Walker v. United States*, 422 F.2d 374, 375 (3d Cir.), \textit{cert. denied}, 399 U.S. 915 (1970) (defendant must show a possible conflict of interest or prejudice, however remote, before a reviewing court may find joint representation constitutionally defective) \textit{with} *United States v. Atkinson*, 565 F.2d 1283, 1284 (4th Cir. 1977), \textit{cert. denied}, 436 U.S. 944 (1978) (defendant must show some "specific instance of prejudice, some real conflict of interest" (quoting *United States v. Lovano*, 420 F.2d 769, 772 (2d Cir. 1970)) resulting from the joint representation).

\textsuperscript{33} The First, Second, Eighth, Ninth, and District of Columbia Circuits required an inquiry by the district court in all cases of joint representation. *United States v. Eaglin*, 571 F.2d 1069, 1086 (9th Cir. 1977), \textit{cert. denied}, 435 U.S. 906 (1978); *United States v. DeBerry*, 487 F.2d 448, 452-53 (2d Cir. 1973); *United States v. Foster*, 469 F.2d 1, 5 (1st Cir. 1972); *United States v. Williams*, 429 F.2d 158, 161 (8th Cir.), \textit{cert. denied}, 400 U.S. 947 (1970);
Of the six remaining circuits, at least two found such an inquiry “suggested” or “advisable.” The District of Columbia Circuit adopted a unique rule requiring separate counsel to be appointed initially for each defendant in all cases where appointment of counsel is appropriate.

Among the states, only one required an inquiry by the trial court into all cases of joint representation; four other states strongly suggested such an inquiry.

There was substantially less disagreement among lower courts on the requisite showing of conflict necessary before relief would be granted for ineffective assistance of counsel. A majority of the circuits and states required that a defendant show some actual conflict of interest. Two circuits required a stronger showing of actual prejudice rather than the mere presence of a conflict. See Colon v. Fogg, 603 F.2d 403, 407 (2d Cir. 1979). In this case the defendants were convicted in state court of possession and sale of cocaine and sought habeas corpus relief in federal court. The Second Circuit concluded that, absent an inquiry by the trial court, the burden shifts to the state to prove that defendants were not prejudiced by the joint representation. Id. Rather than requiring an inquiry to be the mere exercise of a supervisory power, as the other circuits had, the court held that “if defendants' Sixth Amendment right is to be effective, such a course is dictated as a corollary of his constitutional right.” Id. Thus, the constitutionally required duty applied with equal force to state and federal courts.

United States ex rel. Hart v. Davenport, 478 F.2d 203, 211 (3d Cir. 1973) (inquiry is the suggested procedure in cases of multiple representation).

United States v. Atkinson, 565 F.2d 1283, 1284 (4th Cir. 1977), cert. denied, 436 U.S. 944 (1978) (inquiry, although not necessary, may be advisable, especially in cases of appointed counsel).

Ford v. United States, 379 F.2d 123, 125-26 (D.C. Cir. 1967). In this case the court adopted a rule requiring that separate counsel be appointed initially in every case (of court-appointed counsel), with the instruction that if counsel determines after investigation that the defendant will be best served by joint representation, he should relay his conclusion and reasons to the court for action.

People v. Gomberg, 38 N.Y.2d 307, 342 N.E.2d 550, 379 N.Y.S.2d 769 (1975) (court must conduct an inquiry, but must be careful not to infringe defendant's right to retain counsel of his own choice).

Moreau v. State, 588 P.2d 275 (Alaska 1978) (absent a satisfactory inquiry, burden shifts to the state to prove beyond a reasonable doubt that prejudicial conflict did not exist); Commonwealth v. Davis, 384 N.E.2d 181 (Mass. 1978) (absent a satisfactory inquiry, no automatic reversal, but state must show by a preponderance of the evidence that prejudice to the defendant was improbable); State v. Olsen, 258 N.W.2d 898 (Minn. 1977) (when no satisfactory inquiry appears on the record, burden shifts to the state to demonstrate beyond a reasonable doubt that a prejudicial conflict of interest did not exist); State v. Land, 73 N.J. 24, 372 A.2d 297 (1977) (absent an inquiry and waiver, where a potential conflict of interest exists, prejudice will be presumed).

existence of a conflict of interest. Interestingly, both circuits only required this showing if an inquiry had been made initially by the trial court into the propriety of joint representation. The Third Circuit, which had no inquiry requirement, would grant relief so long as there was "some showing of a possible conflict of interest or prejudice, however remote." Such a criterion would seem to require reversal if there was any possibility of a conflict of interest in the representation. In Cuyler v. Sullivan, the Supreme Court eliminated the divergence of views on both issues.

II. **Cuyler v. Sullivan** — Limits on the Constitutional Right to Counsel

Only two years after reserving judgment on the issues of the duty to inquire and the requisite degree of conflict, the Supreme Court confronted them in Cuyler v. Sullivan. In that case, Sullivan sought a writ of habeas corpus. The Supreme Court granted certiorari, 444 U.S. 823 (1979), and reversed the conviction of the petitioner. The Supreme Court held that the state's failure to inquire into the propriety of joint representation required reversal.


41. United States v. Partin, 601 F.2d 1000, 1009 (9th Cir. 1979) (defendant must show that some specific prejudice has resulted from the alleged conflict or interest); United States v. Lovano, 420 F.2d 769, 773 (2d Cir.), cert. denied, 397 U.S. 1071 (1970) ("some specific instance of prejudice" must be shown).

42. United States v. Eaglin, 571 F.2d 1069, 1086 (9th Cir. 1977), cert. denied, 435 U.S. 906 (1978) (the court will reject a challenge on the grounds of joint representation only if the trial court made a satisfactory inquiry); United States v. Carrigan, 543 F.2d 1053, 1056 (2d Cir. 1976) (absent an inquiry on the record the burden of proof shifts to the government to establish "lack of prejudice").

43. Walker v. United States, 422 F.2d 374, 375 (3d Cir.), cert. denied, 399 U.S. 915 (1970) (representation of codefendants by the same attorney is not tantamount to denial of effective assistance of counsel; there must be some showing of a possible conflict — affirmed because no trace of such a conflict or prejudice was apparent).

44. 100 S. Ct. 1708 (1980). The Supreme Court granted certiorari, 444 U.S. 823 (1979),
corpus, asserting as grounds for relief the ineffective assistance of counsel arising from joint representation in his state court conviction. At trial, Sullivan had not objected to sharing counsel with his codefendants.

Sullivan and two other defendants were charged in state court with first degree murder resulting from the shooting death of a union official and his companion. Sullivan's codefendants jointly retained two prominent criminal attorneys. Sullivan retained a different attorney for a preliminary hearing but, having no money, accepted his codefendants' offer to share their counsel at trial.45 A state motion for severance was granted and Sullivan was tried first. His counsel made a tactical decision to rest their defense at the conclusion of the prosecution's case without allowing Sullivan to testify or to present evidence on his own behalf.46 Sullivan was convicted of both murders by a jury. Both of Sullivan's codefendants were subsequently acquitted in separate jury trials.47

The Pennsylvania Supreme Court affirmed Sullivan's conviction after a three-three split over the sufficiency of the evidence.48 After petitioning unsuccessfully for habeas corpus relief in federal court,49 Sullivan sought collateral relief in state court alleging, among other things, ineffective assistance of counsel.50 At a hearing during these proceedings, one of Sul-

45. United States ex rel. Sullivan v. Cuyler, 593 F.2d 512, 518 n.7 (3d Cir. 1979). "Apparently, friends of the defendants raised money from contributions . . . holding a lottery. What other sources of funds there may have been remains unclear," the court said. The record showed that no payment was made by Sullivan or his family to these attorneys.


47. United States ex rel. Sullivan v. Cuyler, 593 F.2d at 515.

48. Commonwealth v. Sullivan, 446 Pa. 419, 286 A.2d 898 (1971). While conceding that a conviction may be based entirely on circumstantial evidence, Justice Roberts (dissenting) found the evidence in Sullivan's case "completely insufficient to support a conviction" and summarized it as follows:

Sullivan was one of five or six people in the building at the time of the killing, that a few minutes before the killing appellant had asked a janitor to leave a conference room until after a "meeting" and finally that appellant had misstated his identity to a telephone caller shortly before the killings.

446 Pa. at 442, 286 A.2d at 907 (Roberts, J., dissenting).


livan's two attorneys stated that he did not present a defense for Sullivan "because [he] thought [he] would be exposing the [defense] witnesses for the other two trials coming up." Sullivan recalled that he wanted to testify in his own defense but was convinced to refrain from doing so by his attorneys. The other attorney testified, however, that despite his urging Sullivan refused to take the stand.

Having exhausted his remedies in the state courts, Sullivan again sought habeas corpus relief in federal district court. On the issue of ineffective assistance of counsel, the district court accepted the state supreme court's ruling that there had been no multiple representation since Sullivan's chief counsel had only assisted at the trials of his codefendants. The Court of Appeals for the Third Circuit reversed, holding that there was multiple representation and that the defendant was entitled to reversal if he could


54. Sullivan alleged the following grounds for relief:

1. that the admission into evidence of color slides of the victims' bodies was a denial of due process; (2) that the factual basis underlying this conviction was so totally devoid of evidentiary support as to deny him due process; (3) that defense counsel had a conflict of interest because they also represented his two co-defendants; (4) that counsel was ineffective for failing to object to certain testimony; (5) that counsel was ineffective for failing to reserve objections to the offering of a secret memorandum to the trial judge; (6) that the trial judge erred in his instructions to the jury so as to deny him due process; and (7) that the failure of the prosecution to disclose to the defense certain evidence denied him due process.


The United States magistrate to whom the petition was referred for report and recommendation found that all grounds except dual representation were without merit. The magistrate recommended that the writ be issued because Sullivan's counsel also represented his co-defendants and a possibility of conflict of interest was apparent from the record. Id. at 516.

55. Id. Although both attorneys, G. Fred DiBona (now Judge DiBona, Court of Common Pleas, Philadelphia) and A. Charles Peruto, participated in all three trials, they testified that DiBona served as principal trial counsel, with Peruto assisting, for Sullivan's trial. In the subsequent trials of the co-defendants Peruto served as principal counsel, assisted by DiBona. Although the attorneys worked together on this case there is no indication in the record that they were from the same firm or otherwise associated in practice. Id. at 517-19.

make "some showing of a possible conflict of interest or prejudice, however remote." In Sullivan's case, the court found that although the decision of defense attorneys to rest at the close of the prosecution was a legitimate trial tactic, it raised the possibility of a conflict. This finding, along with co-counsel's admission that concern for Sullivan's codefendants prompted him to advise Sullivan to rest his defense, evidenced sufficient conflict to require reversal on the grounds that Sullivan's right to effective assistance of counsel had been violated.

On the threshold issue of whether multiple representation had occurred, the Supreme Court agreed with the court of appeals. Sullivan's trial was separate from those of his codefendants, and his attorneys testified in post-conviction hearings that their roles of assistant and lead counsel at Sullivan's trial were reversed at the trial of his codefendants. Nonetheless, the court of appeals found that both attorneys participated significantly at all three trials, and the Supreme Court agreed that these facts established the existence of multiple representation. Thus, regardless of the number of attorneys or the separation of proceedings, multiple representation had occurred in Sullivan's case.

The Supreme Court, however, rejected as overbroad the circuit court's standard that even a remote possibility of a conflict of interest required reversal. "A possible conflict inheres in almost every instance of multiple representation," the Court said. Thus a reviewing court should not presume that the mere possibility of conflict necessarily renders assistance of counsel ineffective. Quoting Justice Frankfurter's dissent in Glasser, the Court pointed out that such a standard "would preclude multiple representation even in cases where a 'common defense . . . gives strength against a common attack.'" Although the Court concluded on the basis of Glasser

57. Id. at 517 (quoting Walker v. United States, 422 F.2d 374, 375 (3d Cir.), cert. denied, 399 U.S. 915 (1970)). See note 40 supra.
59. The Court noted that separate trials "significantly reduce" the possibility of a conflict. Cuyler v. Sullivan, 100 S. Ct. 1708, 1717-18 (1980). For example, inconsistent defenses can be raised at separate trials and the jury may never know that an inconsistency even exists.
62. Id. at 1718.
63. Id.
64. Id. (quoting Glasser v. United States, 315 U.S. 60, 92 (1942) (Frankfurter, J., dissenting)). Justice Frankfurter was referring to the defense tactic of "stonewalling," maintaining a solid front against the prosecution. This trial strategy is particularly useful in cases involving organized crime, white collar crime, or government corruption where there may be no real witnesses except the defendants. Successful prosecution of any of the defendants
and Holloway that a defendant need not demonstrate prejudice arising from a conflict, it held that "to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." The Court remanded the case for further consideration of Sullivan's claim that even under this standard he could prevail by showing such an adverse effect.

In addition, although the question was not specifically raised in the lower court decision, the Supreme Court pointed out that absent a timely objection by the defense, state courts had no duty to initiate an inquiry into the propriety of joint representation under the sixth amendment.


65. Cuyler v. Sullivan, 100 S. Ct. at 1719. The distinction here, if one exists, is a very fine one.

66. Id. On August 19, 1980, the Court of Appeals for the Third Circuit remanded the case to the District Court for the Eastern District of Pennsylvania for rehearing consistent with the opinion of the Supreme Court.

67. Cuyler v. Sullivan, 100 S. Ct. at 1717. In Holloway, the Court had warned that should a defendant or his attorney raise a timely objection to joint representation at trial, the trial court must afford the defendant an opportunity to show that potential conflicts endanger his right to a fair trial. Failure to investigate such timely objections would require automatic reversal. Holloway v. Arkansas, 435 U.S. 475, 488 (1978). Sullivan stated the converse of this principle, holding that absent a timely objection there is no constitutional requirement of an inquiry by the trial court into all cases of joint representation. Inquiry is only necessary if the trial court "knows or reasonably should know that a particular conflict exists." 100 S. Ct. at 1717. Thus the sixth and fourteenth amendments do not normally require in state proceedings that the court initiate an inquiry.

A defendant has a sixth amendment right to effective representation in all courts, state or federal, in criminal cases after Gideon v. Wainwright. See notes 22-24 and accompanying text supra. The "adverse effect" standard announced in Sullivan determines whether a defendant has been denied that right and hence applies to state and federal courts. This is so despite the fact that a defendant in state court may not have benefited from a required inquiry.

The reason the Court refused to find an inquiry constitutionally mandated may lie in its reluctance in the area of criminal procedure, in recent years, to infer rules of law from the Constitution, preferring instead that Congress pass appropriate reforming legislation. See, e.g., Zurcher v. Stanford Daily, 436 U.S. 547, 567 (1978) (legislation, not the fourteenth amendment, is the proper means to protect newspapers, as third parties, from searches without subpoenas); Manson v. Braithwaite, 432 U.S. 98, 118 (1977) (Stevens, J., concurring) ("procedures for the identification of suspects are more effectively developed by legislation than by judicial fiat").

Nevertheless, in light of proposed Rule 44(c) and the Court's endorsement of it in Sullivan, an inquiry is advisable if not mandated in all cases of joint representation in federal courts. But see Tague, Multiple Representation and Conflicts of Interest in Criminal Cases, 67 GEO. L.J. 1075, 1108-22 (1979) (there may be some question as to whether all the provisions of Rule 44(c) are constitutional).
The Court noted that defense counsel had an ethical obligation to avoid conflicts of interest and to advise the trial court immediately of any such conflict. Consequently, absent objection by the defendant or his counsel, a court may assume that no conflict of interest exists or that the client and his attorney "knowingly accept such risk as may exist." 68

Despite the foregoing, the Court noted its approval of Rule 44(c), a proposed addition to the Federal Rules of Criminal Procedure. 69 Rule 44(c) would require that federal courts "shall promptly inquire with respect to . . . joint representation and shall personally advise each defendant of his right to effective assistance of counsel, including separate representation." 70 Although this rule is apparently acceptable to the Supreme Court as a federal court requirement, the Court did not find the duty to inquire constitutionally mandated. 71

The Sullivan Court also concluded that a single standard applies to conflicts involving both appointed and retained counsel, 72 dispelling any possible inference from Glasser and Holloway that a different standard might apply in cases involving retained counsel. In fact, prior to Sullivan, five circuit courts and at least six state courts employed standards that varied according to whether counsel had been assigned or retained. 73 These

68. Id. This ethical obligation arises from ABA CANONS OF PROFESSIONAL ETHICS Nos. 5 and 9 as well as from similar provisions in state bar association rules. See notes 76-79 and accompanying text infra.
70. For the text of Rule 44(c) and a discussion of its implications, see notes 91-99 and accompanying text infra.
71. The Court noted that it found such a rule to be an appropriate exercise of the federal courts' supervisory power and that only the Second Circuit, in Colon v. Fogg, 603 F.2d 403 (2d Cir. 1979), had found such an inquiry to be required by the sixth amendment and therefore required of state courts. 100 S. Ct. at 1717 n.10. The Sullivan Court also stated: "nothing in our precedents suggests that the sixth amendment requires state courts themselves to initiate inquiries into the propriety of multiple representation in every case." 100 S. Ct. at 1717.
72. See note 71 and accompanying text infra.
73. The Fourth, Fifth, Sixth, Seventh, and Tenth Circuits employed different standards of review depending on whether counsel was assigned or retained, as did Alabama, California, Montana, Oklahoma, Tennessee and Texas. See United States v. Atkinson, 565 F.2d 1283 (4th Cir. 1977) (suggests greater need to inquire if counsel is appointed); Alvarez v. Wainwright, 522 F.2d 100, 105 n.11 (5th Cir. 1975) (the court must inquire in cases of retained counsel only when the conflict is so apparent that the trial judge "should have been aware of and corrected it"); United States v. Cale, 418 F.2d 897, 898 (6th Cir. 1969) ("privately retained counsel's determination that there was no conflict of interest must weigh heavily" against the defendant); Fryar v. United States, 404 F.2d 1071, 1073 (10th Cir. 1968) (the court suggested appointment of separate counsel for indigent codefendants); United States v. Gougis, 374 F.2d 758, 761 (7th Cir. 1967) ("In the case of appointed counsel, it is especially important for the [trial] court to determine that no prejudice will result from multiple representation."); Lee v. State, 57 Ala. App. 366, 328 So. 2d 617, 622 (Crim. App.), cert.
courts reasoned that claims of ineffective representation by appointed counsel demanded close scrutiny because the courts themselves caused the joint representation; whereas, in cases of retained counsel the defendants chose multiple representation themselves and should not be heard to complain of a resulting conflict. This double standard was resolved in Sullivan: “A proper respect for the Sixth Amendment disarms petitioner’s contention that defendants who retain their own lawyers are entitled to less protection than defendants for whom the state appoints counsel.” Noting that experience indicated that “in some cases, retained counsel will not provide adequate representation,” the Court concluded that “the vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant’s entitlement to constitutional protection.” Thus, the Court found no reason to distinguish between retained and appointed counsel.

Justice Brennan concurred with the majority’s requirement of a showing of actual conflict adversely affecting counsel’s performance. He went further, however, by maintaining that the sixth amendment creates an affirmative duty on the part of the trial court to inquire into the possibility of any conflict of interest. Being of constitutional dimension, this duty would apply to state courts as well as to federal courts. He also concluded that the
Court's standard for a showing of conflict was unacceptable where, as in *Sullivan*, no evidence existed that the defendant's choice of joint representation was knowing and intelligent. Justice Marshall agreed with Justice Brennan that state courts should bear a duty of inquiry. He dissented, though, from the majority's "adversely affected" standard for the requisite showing of conflict, stating that it was unreasonably high and that the defendant should only be required to show that an actual relevant conflict existed during the representation.

III. *Cuyler v. Sullivan*: A Critical View

In discussing the constitutional dimensions of multiple representation, the *Sullivan* Court relied upon basic assumptions of questionable validity. Neither the ethical obligations imposed on attorneys nor the implied waiver derived from a defendant's silence provides adequate protection for the accused who shares counsel with codefendants. Moreover, the requisite showing of "adverse effect" may be, in a practical sense, an impossible burden for the defendant.

In concluding that the sixth amendment requires no inquiry by state courts, the Supreme Court relied in part on the ethical obligation of attorneys to "avoid conflicting representations and to advise the court promptly when a conflict of interest arises." Although the American Bar Association Code of Professional Responsibility and the proposed Model Rules of Professional Conduct urge an attorney to avoid accepting employment from clients with differing interests, he may still represent such clients if he believes he can do so adequately and if the clients consent after being fully informed. Thus, a distinction is drawn between a per-
possible degree of divergence of interests and an improper conflict of interests. An attorney must only advise the trial court if the latter arises. The problem inherent in this analysis is that the determination of whether an improper conflict exists is based on a subjective evaluation by the lawyer, and the client's consent is based upon information from the same source. By relying on the attorney's ethical obligation, the Court places inordinate weight on the attorney's judgment. The Code and the proposed Rules are meant only to guide and discipline lawyers, not to guarantee a defendant his constitutional rights. While a lawyer must be expected to avoid conflicts of interest in joint representation, this obligation does not relieve the trial court of its duty to protect the defendant's rights.

Indeed, the Court arguably had adequate precedent on which to base a constitutionally mandated duty to inquire. Glasser, for example, clearly

conduct for attorneys, the Ethical Considerations (EC), the ABA Code of Professional Responsibility adds: "Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client." ABA Code of Professional Responsibility EC 5-14 (1969). But Disciplinary Rule (DR) 5-105(c) states: "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." The ABA Code of Professional Responsibility was adopted by the American Bar Association on August 12, 1969. Section 1.8 of the Discussion Draft of the ABA Model Rules of Professional Conduct, reprinted in 48 U.S.L.W. 32 (1980) (special section), allows a lawyer to represent diverse interests which might adversely affect his representation of a client only if (1) the client consents after adequate disclosure and (2) the "representation can otherwise be performed in accordance with the Rules of Professional Conduct." See also The Roscoe Pound-American Trial Lawyer's Foundation, Commission on Professional Responsibility, American Lawyer's Code of Conduct, Public Discussion Draft Rule 2.4, 201 (June 1980) ("A lawyer may serve one or more clients, despite a divided loyalty, if each client who is or may be adversely affected by the divided loyalty is fully informed of the actual or potential adverse effects, and voluntarily consents.") But see ABA Canons of Professional Ethics No. 9 ("A lawyer should avoid even the appearance of professional impropriety.").

81. Of course, unless the attorney explains to each defendant individually his alternative courses of action, the defendant's acquiescence should hardly be interpreted as an intelligent and knowing waiver. This is particularly true since an attorney may honestly feel he can represent all the defendants adequately and allow that feeling subconsciously to influence the thoroughness of his disclosure to his clients. An inquiry by the trial court would assure that the attorney fully performs his ethical duty.

82. As the Court declared in Glasser, "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. . . . The trial court should protect the right of an accused to have the assistance of counsel." 315 U.S. at 71.

83. The Court in Sullivan dismissed the possibility of a constitutionally required inquiry by saying that none of its previous cases suggested that an inquiry into every case of multiple representation was required by the sixth amendment. Cuyler v. Sullivan, 100 S. Ct. at 1717. However, the Court has, in the past, conceded that constitutional protections are
endorsed the duty of the trial court to make an inquiry:

Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. . . . 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."84

As Justice Brennan wrote in his concurrence in Sullivan, "the principle is honored only if the accused has the active protection of the trial court."85 Thus, a constitutionally mandated duty of inquiry had been suggested in prior case law but was surprisingly rejected by the Sullivan Court, despite the majority's concession that a possible conflict exists in almost every case of joint representation.

Despite this questionable reliance on the attorney's ethical obligations, the Court concluded that absent objection by the defendant or his attorney, the trial judge may assume either that there is no conflict in the multiple representation or that the defendants and their counsel accept the risk of whatever conflict may exist.86 This language implies that the trial court may assume a waiver of conflict-free representation from the defendant's silence. Such an assumption had apparently been rejected by the Court in previous decisions.87 For example, in Glasser, where the defendant was an

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86. 100 S. Ct. at 1717.
87. The Court in Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938), noted that courts "indulge every presumption against the waiver of fundamental constitutional rights" and concluded that "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 appropri-
attorney, the Court rejected the argument that he had tacitly acquiesced to joint representation by his silence.\footnote{88} Finally, in announcing the standard for reversal when a defendant raises a conflict issue on appeal, the Court rejected a \textit{per se} rule requiring reversal if a conflict is shown. Although the Court's standard does not require the defendant to demonstrate prejudice to his case, he must show that “an actual conflict of interest adversely affected his lawyer's performance.”\footnote{89} The defendant must first show an actual conflict between his interests and those of a codefendant; he must then show, by some tangible evidence, that his attorney's performance suffered as a direct result. Since a conflict of interest often produces prejudicial restraint on the part of the attorney rather than an easily identifiable affirmative act working to the detriment of his client,\footnote{90} evidence proving this negative may be impossible to produce. In the usual case one might not expect an attorney to make the type of damaging admissions made by Sul-

\footnote{88} Glasser v. United States, 315 U.S. at 70. The Court in \textit{Glasser} declared, “we indulge every reasonable presumption against the waiver of fundamental rights. . . . The fact that Glasser is an attorney is, of course, immaterial to a consideration of his right to the protection of the Sixth Amendment.” \textit{Id.} Such an assumption is also expressly rejected in the Advisory Committee Note to Rule 44(c). “When there has been ‘no discussion as to possible conflict initiated by the court,’ it cannot be assumed that the choice of counsel by the defendants ‘was intelligently made with knowledge of any possible conflict.’” \textit{Id.} at 475 (quoting Johnson v. Zerbst, 304 U.S. 458 (1938)).

\footnote{89} Cuyler v. Sullivan, 100 S. Ct. at 1719.

\footnote{90} The following are some examples of prejudicial restraint or omissions on the part of an attorney. An attorney representing both minor and adult defendants might fail to advise the minor of her option of testifying against the adult in exchange for a reduced charge or immunity. Or the attorney might fail to argue at a sentencing hearing that the minor was led astray by the other older defendant, who had a long police record.

A lawyer also might fail to present a witness who would exculpate one defendant but incriminate another because the lawyer represents both defendants. The Court in Holloway v. Arkansas, 435 U.S. 475, 490 (1978), emphasized, “in a case of joint representation of conflicting interests the evil — it bears repeating — is in what the advocate finds himself compelled to \textit{refrain} from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process” (emphasis in original). The difficulty of finding conflict in the trial record was recognized by the District of Columbia Circuit: “Like the famous tip of the iceberg, the record may not reveal the whole story; apparently minor instances in the record which suggest codefendants’ conflicting interests may well be the telltale signs of deeper conflict.” Lollar v. United States, 376 F.2d 243, 246-47 (D.C. Cir. 1967). See Hyman, \textit{Joint Representation of Multiple Defendants in a Criminal Trial: The Court's Headache}, 5 Hofstra L. Rev. 315, 324-29 (1977); Comment, \textit{Conflict of Interests in Multiple Representation of Criminal Co-Defendants}, 68 J. Crim. L. & Criminology 226, 230 (1977).
The Supreme Court recognized the need to establish a standard for reversal high enough to defeat frivolous claims of a prejudicial conflict yet low enough to permit injured defendants to obtain relief. In so doing, the Court sought to strike a balance between a *per se* rule and a showing of actual prejudice. Although the "adverse effect" standard puts a heavy burden of proof on the defendant, it seems a reasonable requirement where the trial court has both advised the defendant of his right to separate counsel and has made an inquiry into potential conflict. The defendant in this case would have knowingly accepted the possibility of conflict. Where the accused has not been so advised by the trial court, however, this standard would impose an unreasonable burden upon a typically unknowing defendant who has secured multiple representation without understanding or appreciating his rights or the dangers involved.

In view of the difficulty of proving on appeal that an attorney's performance had been adversely affected by a conflict of interest, it would seem that the choice of joint representation is tantamount to a waiver of conflict-free representation. Such a choice should therefore be knowing and intelligent, require an inquiry by the trial judge, and appear on the record, as required in *Zerbst*.

If the defendant's right to effective representation is to be protected, the time for the court to concern itself with conflicts is during a pretrial hearing rather than during a postconviction appeal.

IV. Rule 44(C): The Better Solution

Proposed Rule 44(c) would amend the Federal Rules of Criminal Procedure to require federal trial courts to explore the propriety of joint representation in all cases and to advise defendants individually of their right to

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92. As the Court noted in *Sullivan*, there is a possibility for conflict in almost every case of multiple representation. If the standard for reversal was not high, all convicted defendants jointly represented at trial would be able to appeal successfully. 100 S. Ct. at 1718. *But see* Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal*, 64 Va. L. Rev. 939 (1978). Lowenthal argues for creating a prophylactic rule prohibiting joint representation as violative of the sixth amendment as well as for revising the ABA Code of Professional Responsibility to ban joint representation in criminal cases. *Id.* at 983-89. *See also* Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney*, 62 Minn. L. Rev. 119 (1978). Geer also argues for a *per se* rule against joint representation but finds that "the answer to conflicts of interest in multiple representation lies not in constitutional principle or judicial rule making, but in a practicing bar more concerned with an effective, fair, and efficient judicial system than with the narrow self-interest of themselves and their clients." *Id.* at 121-22.

effective representation, including separate counsel.\textsuperscript{94} Although it endorsed this rule, the \textit{Sullivan} Court found no constitutional requirement under the sixth amendment that state courts inquire into the possibility of conflict in all cases of joint representation,\textsuperscript{95} despite having admitted that a possible conflict exists in nearly every case of multiple representation.\textsuperscript{96} Apparently the Court recognized the need for protection from potential conflict, but relegated enforcement of this protection to legislative rule.

\textsuperscript{94} Proposed Rule 44(c) provides:

\texttt{Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) [defendants alleged to have participated in the same act or transaction may be charged in the same indictment or information] or have been joined for trial pursuant to Rule 13 [indictments may be joined for trial if the offenses and defendants could have been joined in a single indictment or information], and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.}


Pursuant to 28 U.S.C. § 331 (1976), the Chief Justice of the Supreme Court calls the chief judges of each judicial circuit, the Court Claims, and the Court of Customs and Patent Appeals, and a district judge from each circuit to the Judicial Conference of the United States. The Judicial Conference studies the condition of the courts, and the rules of practice and procedure, and suggests changes and additions for consideration by the Supreme Court. Rule 44(c) was proposed and approved by the Judicial Conference on September 22, 1978, and submitted to the Supreme Court on November 1, 1978. On April 30, 1979, the Supreme Court promulgated Rule 44(c) as an amendment to the Federal Rules of Criminal Procedure. Congress has postponed the enactment of Rule 44(c) until December 1, 1980, or until, and to the extent approved by, an act of Congress, whichever is earlier. Act of July 31, 1979, Pub. L. 96-42, 93 Stat. 326 (1979). Pursuant to 18 U.S.C. § 3771 (1976), the Supreme Court has the power to prescribe rules of pleading, practice, and procedure for use in the United States District Courts in criminal proceedings. Congress, however, may delay the effective date, reject, or amend the proposed rules. The proposed rules are suggested by the Advisory Committee on Criminal Rules of the Judicial Conference of the United States. The proposals are first considered by the Committee on Rules of Practice and Procedure and then, if approved, submitted to the full Judicial Conference. When approved by the Judicial Conference the proposed rules are then submitted to the Supreme Court. If the Court also approves them the Chief Justice sends them to Congress. \textit{But see} 34 L. Ed. 2d lxvi (1972), in which Justice Douglas dissented from the Supreme Court's approval of the Federal Rules of Evidence. "[T]his Court doesn't write the Rules, nor supervise their writing, nor appraise them on their merits, . . . our approval being merely perfunctory. . . . [W]e are merely the conduit to Congress."

\textsuperscript{95} \textit{Cuyler v. Sullivan}, 100 S. Ct. at 1717.

\textsuperscript{96} \textit{Id.} at 1718.
rather than to constitutional mandate. Absent such a rule at the state level, however, the necessary protection may be nonexistent after *Sullivan*. This arises in large part from the *Sullivan* Court's conclusion that unless objection is made, the trial court can assume no unacceptable conflict exists.

This assumption by the Supreme Court directly contradicts the Advisory Committee Note to proposed Rule 44(c). As to whether the trial court may assume that a defendant knowingly accepts the risk of conflict, the Advisory Committee Note states that "when there has been 'no discussion as to possible conflict initiated by the court,' it cannot be assumed that the choice of counsel by the defendants 'was intelligently made with knowledge of any possible conflict.'" 97 Similarly, the Court has declared in other contexts that while an accused may waive the right to counsel, whether the waiver is knowing and intelligent should be resolved by the trial court, and the discussion should appear on the record. 98 The Advisory Committee Note further adds that "recordation of the waiver colloque [sic] between defendant and judge will also serve the government's interest by assisting in shielding any potential conviction from collateral attack, either on Sixth Amendment grounds or on a Fifth or Fourteenth Amendment 'fundamental fairness' basis." 99

In response to such concerns, Rule 44(c) requires the trial court to take appropriate measures to protect the defendant's right to counsel unless there is "good cause to believe no conflict of interest is likely to arise." 100

The Advisory Committee explains this requirement:

> A less demanding standard would not adequately protect the Sixth Amendment right to effective assistance of counsel or the effective administration of criminal justice. It would not suffice,

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98. *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938) (reversing a federal court conviction for passing and possession of counterfeit money because defendants were not provided counsel and no waiver of the right to counsel was on the record). *See ABA STANDARDS, THE FUNCTION OF THE TRIAL JUDGE § 3.4 (1972)* (a trial judge should inquire in case of joint representation into "potential conflicts which may jeopardize the right of each defendant to the fidelity of his counsel").

99. 77 F.R.D. at 593 (quoting United States v. Garcia, 517 F.2d 272, 278 (5th Cir. 1975) (reversing an order disqualifying three attorneys, the court held even if conflicts existed, defendants had right to waive their right to conflict-free counsel; but to be effective the waiver must be intelligent and knowing)).

100. 77 F.R.D. at 593.
for example, to require the court to act only when a conflict of interest is then apparent, for it is not possible to "anticipate with complete accuracy the course that a criminal trial may take."\textsuperscript{101}

The Advisory Committee, therefore, views an inquiry as necessary to protect the defendant's sixth amendment right to effective assistance of counsel.\textsuperscript{102}

An inquiry and warning such as that required by Rule 44(c) is not unprecedented.\textsuperscript{103} For example, the \textit{Miranda}\textsuperscript{104} warnings required by the fifth amendment are analogous in many respects to the rule 44(c) warnings. \textit{Miranda} required that a suspect be advised of his right to remain

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\item \textsuperscript{101} \textit{Id.} at 599-600.
\item \textsuperscript{102} \textit{Id.} The solutions advocated by the Advisory Committee require either an intelligent and knowing waiver or appointment of separate counsel. The Note suggests that in some cases the trial court may require separate counsel in spite of an effective waiver. Although all of the witnesses before the House Criminal Justice Subcommittee endorsed the duty of inquiry imposed by Rule 44(c), all but the Chairman of the Advisory Committee voiced disapproval of a section of the Rule allowing the judge to disqualify defense attorneys in his discretion if the defendant's right to effective representation is endangered. \textit{See Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings on H.R. 7473 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 96th Cong., 2d Sess.} (1980) [hereinafter cited as \textit{Hearings}]. Generally witnesses found the suggestion that disqualification be available to be inconsistent with the recognition in \textit{Sullivan} and prior cases of the right of multiple representation. Specifically, some witnesses pointed to the Court's apparent endorsement of multiple representation in repeating in both \textit{Holloway} and \textit{Sullivan} Justice Frankfurter's dissent in \textit{Glasser} v. United States that "[a] common defense . . . gives strength against a common attack." 315 U.S. 60, 92 (1942) (Frankfurter, J., dissenting in part and concurring in part). The statement submitted by Robert L. Weinberg, a partner in the law firm of Williams and Connolly, also quoted from \textit{United States v. Garcia}: "if defendants may dispense with the right to be represented by counsel altogether, \textit{Faretta v. California}, . . . it would seem that they may waive the right to have their retained counsel free from conflicts of interest." \textit{Hearings} at 23 (statement of Robert L. Weinberg, Esq.) (quoting United States v. Garcia, 517 F.2d 272, 277 (5th Cir. 1975)). \textit{See also Faretta v. California}, 422 U.S. 806 (1975). In addition Mr. Weinberg noted that the waivability of the right to conflict-free counsel has been recognized directly or by implication by courts in 10 of the 11 circuits. \textit{Hearings} at 21-22 n.3 (statement of Robert L. Weinberg, Esq.). The Federal, Public and Community Defenders Association worried that disqualification motions would be used by the Department of Justice to break down stonewall defenses and to exclude particular attorneys. \textit{See note 61 supra}. Their position on an inquiry was more positive: "Although the Supreme Court has decided the Sixth Amendment does not require a warning or inquiry as a matter of course, we feel such a provision would enhance both the appearance and fact of fairness." Federal, Public and Community Defenders, Position Paper and Testimony on the Proposed Federal Rules of Criminal Procedure (May 30, 1980).

The House Subcommittee on Criminal Justice amended Rule 44(c) by deleting the second sentence. Approved on August 27, 1980, by the House Judiciary Committee, the Rule is now before the House of Representatives as H.R. 7817.

\item \textsuperscript{103} When a Rule 44(c) inquiry and advisement is mentioned subsequently it will refer only to the inquiry and advisement contemplated by Rule 44(c) and not the power of disqualification suggested by Rule 44(c) and discussed above at note 99 \textit{supra}.
\item \textsuperscript{104} \textit{Miranda v. Arizona}, 384 U.S. 436 (1966).
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silent and to have appointed or retained counsel present prior to any custodial interrogation. The Court found these warnings necessary to protect a defendant's fifth amendment right against self-incrimination. Similarly, as the Advisory Committee Note indicates, the Rule 44(c) inquiry has been added to assure a defendant the effective representation guaranteed him by the sixth amendment. Thus, in both instances the inquiry or warning is thought to be necessary to protect a constitutional right.

Several of the reasons supporting the requirement of Miranda warnings are equally applicable to the Rule 44(c) inquiry. Regarding the simplicity of a warning, Chief Justice Warren wrote:

The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his right without a warning being given. Assessments of the knowledge the defendant possesses ... can never be more than speculation; a warning is a clearcut fact.

Similarly, deciding on appeal whether a defendant knowingly waived his right to the effective assistance of counsel is mere speculation, while a pretrial warning and judicial inquiry establishes an indisputable fact. Since the sixth amendment right to assistance of counsel has been declared fundamental by the Supreme Court, the simple expedient of an inquiry by the

105. Miranda demanded that an explanation of an accused's rights be given prior to any custodial interrogation (any setting where the accused is significantly deprived of his freedom of action) to ensure that his fifth amendment privilege against self-incrimination is protected. The case was combined with three other cases: all were appeals of convictions based on confessions obtained during interrogation of the accused while they were held incommunicado and without attorneys or an explanation of their rights. The Court emphasized the importance of the fifth amendment privilege against self-incrimination and its requirement that the state prove its case and not rely on confessions. The Court also stressed the psychologically coercive interrogation techniques often employed by modern police forces and the effect of isolation and unfamiliar surroundings on an accused in custody. A statement obtained by such techniques was determined by the Court not to be a product of the defendant's free choice and hence was a violation of the privilege against self-incrimination. Thus, to safeguard the fifth amendment privilege the accused must be:

- clearly informed that he has the right to remain silent, and that anything he says will be used against him in court; he must be clearly informed that he has the right to consult with a lawyer and to have a lawyer with him during interrogation, and
- that if he is indigent, a lawyer will be appointed to represent him.

384 U.S. at 437 (syllabus).

106. The Advisory Committee explains, "A less demanding standard would not adequately protect the sixth amendment right." 77 F.R.D. at 599-600. See Miranda v. Arizona, 384 U.S. at 468 ("The Fifth Amendment privilege is so fundamental ... and the expedient of giving an adequate warning ... so simple.").

trial court would seem a small price to pay for the assurance that the defendant is aware of his rights. As Chief Justice Warren wrote in *Miranda*, "only through such a warning is there ascertainable assurance that the accused was aware of this right."¹⁰⁸

Further, just as the *Miranda* court was concerned with the intimidating surroundings of custodial interrogation, so too are the circumstances of multiple representation often intimidating to the defendant. For example, codefendants who are anxious to retain the loyalty of confederates may exert various forms of threat and coercion to prevent the accused from giving damaging testimony against them. Justice White recognized such a possibility in his dissent to *Miranda* when he wrote, "the lawyer who arrives [to represent the defendant] may also be the lawyer for the defendant's colleagues and can be relied upon to insure that no breach of the organization's security takes place even though the accused may feel that the best thing he can do is to cooperate [with the authorities]."¹⁰⁹ The intimidated defendant finds little solace in the judicial system with which he is unfamiliar and which he regards as an even greater danger than his codefendants. In such a situation, an explanation to the defendant of the possibility of a conflict of interest, of its possible effects on his representation, and of his right to effective counsel might demonstrate to the accused that the judicial system presents a lesser danger, removing at least some of the intimidation. Moreover, a proper warning might create incentives for defendants to request separate counsel, perhaps diminishing their loyalty to confederates and producing testimony useful to the prosecution and helpful to themselves.¹¹⁰

Finally, a Rule 44(c) inquiry requirement, like *Miranda* warnings, provides assurance that a defendant will not unwittingly forego his constitutional rights. The fundamental guarantees of the Constitution, such as the fifth and sixth amendments, are of such importance that a trial court should not assume from a defendant's silence that he is aware of his rights and knowingly waives them. A defendant who does not exercise his rights

¹⁰⁸. *Id* at 472.

¹⁰⁹. *Id* at 544. Justice White was referring to cases involving "organized crime."

¹¹⁰. An often repeated objection to *Miranda* is that in protecting the fifth amendment right of the suspect the Court ignored the rights and interest of society in punishing criminals and preventing crime. Assuming this criticism is valid, Rule 44 arguably helps to correct the problem: a Rule 44(c) inquiry may help seal convictions against collateral attack and help keep justly convicted criminals in jail. Additionally, rather than discourage confessions, a Rule 44(c) inquiry would encourage defendants to retain separate counsel, who may be more likely to inquire into grants of immunity in exchange for a confession and guilty plea. Thus a Rule 44(c) inquiry may advance justice by removing impediments to the defendant's testimony against co-conspirators.
because he is unaware of them may need conflict-free counsel the most.111 Although in cases of multiple representation, the defendant’s attorney is charged with care of his client’s rights, it is not sufficient to rely upon counsel alone to ensure that each defendant has made an effective waiver. The conflicts are often difficult to discern, and the attorney may not be wholly disinterested.112 Only through an inquiry such as that mandated by Rule 44(c) can the court be assured that the defendant is aware of his right to conflict-free representation. As Justice Brennan noted in his concurrence in Sullivan, “[t]he court cannot delay until a defendant or an attorney raises a problem, for the Constitution also protects defendants whose attorneys fail to consider, or choose to ignore potential conflict problems.”113 As the Supreme Court implies by its endorsement of Rule 44(c), its rationale and its basis in precedent are very persuasive. The rule provides an acceptable solution to the problems inherent in multiple representation and is certainly preferable to most state court procedures where, after Sullivan, the trial judge may simply assume, absent objection, that no conflict exists in cases of joint representation. Also, Rule 44(c) is not novel or unworkable, but is, like Miranda warnings, a simple procedural device for protecting fundamental constitutional rights.

V. CONCLUSION

In Cuyler v. Sullivan, the Court rejected strong arguments favoring a constitutionally mandated duty to inquire into possible conflicts of interest in all cases of multiple representation. In so doing, the Court declined an opportunity to extend sixth amendment protection to individuals potentially prejudiced by ineffective assistance of counsel arising from the conflicting interests of codefendants. Although the Court did implicitly endorse the duty to inquire by commending the effect of proposed Rule 44(c) for federal courts, it failed to give this endorsement constitutional underpinnings. The Court, therefore, left defendants in state court without similar protection and, thus, at the mercy either of their own legal naivete

112. United States v. Lawriw, 568 F.2d 98, 104 (8th Cir. 1977). The Court in Lawriw affirmed the conviction of a jointly represented defendant who claimed ineffective assistance of counsel as a result of a conflict of interest. Though it did not require an inquiry, the Court found that before waiver of conflict-free representation could be found to be knowing and intelligent, an inquiry must be made by the trial court. Such an inquiry was made in Lawriw and the Court found the defendant had made a voluntary and intelligent waiver and could not later complain of a conflict of interest in her representation. See also United States v. Martorano, 610 F.2d 36, 40 (1st Cir. 1979); United States v. Garcia, 517 F.2d 272, 278 (5th Cir. 1975). But see United States v. Steele, 576 F.2d 111, 112 (6th Cir. 1978).
or of the ethical judgments of their defense attorneys. Since the Court has shown that constitutional claims will be unavailing, relief can and should come through adoption of rules similar to 44(c) by state courts or similar enactments by state legislatures.

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