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DEVELOPMENTS IN NEW YORK LAW

Although failure to ensure that defendant is aware of risks inherent in joint representation is error, withdrawal of guilty plea is permitted only if defendant demonstrates significant possibility of conflict of interest

Because of the potential for conflicts of interest, a criminal defendant's sixth amendment right to effective assistance of counsel¹⁵⁴ may be violated when his attorney also represents a code-

Florida Bar v. Schreiber, 407 So.2d 595, 598-600 (Fla. 1981) and Allison v. Louisiana State Bar Ass'n, 362 So. 2d 489, 496 (La. 1978). Because of this kind of confusion, it is hoped that the Supreme Court will soon devise clear standards which will allow direct or indirect solicitation and prevent potential abuse. Note, *supra* note 119, at 774. For a discussion of various proposals which, without absolute prohibition, purport to protect the public from the potential harms of in-person solicitation, see *id.* at 775-77.

¹⁵⁴ The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. CONST. amend. VI. This provision has been held to guarantee to criminal defendants the right to effective assistance of counsel. See, e.g., Glasser v. United States, 315 U.S. 60, 76 (1942). In *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970), the Supreme Court enunciated a standard for measuring whether effective assistance of counsel has been afforded a defendant. The *McMann* Court stated that a court should not examine retrospectively the correctness of counsel's advice, but should consider "whether that advice was within the range of competence demanded of attorneys in criminal cases." *Id.* at 771. One commentator has suggested that a standard of "reasonable competence" coupled with proof of "lack of prejudice" would improve counsel's performance in criminal cases. See Note, *Criminal Law — Competence, Prejudice, and the Right to "Effective" Assistance of Counsel*, 60 N.C.L. Rev. 185, 192 (1981). See generally Alpert, *Effective Assistance of Counsel: The Exchange Theory*, 17 CRIM. L. BULL. 381, 384-88 (1981); Schwarzer, *Dealing With Incompetent Counsel—The Trial Judge's Role*, 93 HARV. L. REV. 633, 633-41 (1980).

Although the Supreme Court has held that the sixth amendment right to effective assistance of counsel applies in state proceedings by virtue of the fourteenth amendment, *Powell v. Alabama*, 287 U.S. 45, 71 (1932), New York has granted this right through its own constitutional and statutory provisions. *People v. Donovan*, 13 N.Y.2d 148, 151, 193 N.E.2d 628, 629, 243 N.Y.S.2d 841, 842-43 (1963); see *People v. Arthur*, 22 N.Y.2d 325, 328, 239 N.E.2d 537, 538-39, 292 N.Y.S.2d 663, 665 (1968); N.Y. CONST. art. I, § 6; CPL § 210.15(2) (1971); cf. *People v. Blake*, 35 N.Y.2d 331, 335-36, 320 N.E.2d 625, 629, 361 N.Y.S.2d 881, 887 (1974) (right to counsel given broader scope under New York provisions than under federal constitution). See generally Galie, *State Constitutional Guarantees and Protection of Defendant's Rights: The Case of New York, 1960-1978*, 28 BUFFALO L. REV. 157, 178-86 (1979). Nearly 40 years ago, the Court of Appeals held that denial of a defendant's fundamental right to effective assistance of counsel in the preparation of his case is cause for reversal. *People v. McLaughlin*, 291 N.Y. 480, 483, 53 N.E.2d 356, 357 (1944). In *People v. Blake*, 35 N.Y.2d 331, 320 N.E.2d 625, 361 N.Y.S.2d 881 (1974), the Court described the protections afforded to criminal defendants in the area of representation:

An accused or defendant may have the right to a lawyer generally to advise him, represent him, or act as an attorney in his behalf. An accused or defendant may have the right to have access to his lawyer or that his lawyer be allowed access to him. Lastly, an accused or defendant may be entitled specially to have a lawyer to

fendant.¹⁵⁵ Since a defendant has the right to select counsel of his choice,¹⁵⁶ however, joint representation will not pose a sixth

protect his interests before or during some particular procedure or event in the context of the criminal proceedings in which he is enmeshed.

Id. at 338, 320 N.E.2d at 631, 361 N.Y.S.2d at 889-90.

¹⁵⁵ See, e.g., *Glasser v. United States*, 315 U.S. 60, 76-77 (1941); *United States v. Carrigan*, 543 F.2d 1053, 1055 (2d Cir. 1976); *United States v. DeBerry*, 487 F.2d 448, 455 (2d Cir. 1973); *United States v. Alberti*, 470 F.2d 878, 881-82 (2d Cir. 1972), *cert. denied*, 411 U.S. 965 (1973); Girgenti, *Problems of Joint Representation of Defendants in a Criminal Case*, 54 ST. JOHN'S L. REV. 55, 55-57 (1979); Hyman, *Joint Representation of Multiple Defendants in a Criminal Trial: The Court's Headache*, 5 HOFSTRA L. REV. 315, 315-16 (1977). New York has recognized that the conflicts of interest involved in joint representation may deprive a defendant of effective assistance of counsel. See, e.g., *People v. Crump*, 53 N.Y.2d 824, 825, 422 N.E.2d 815, 816, 440 N.Y.S.2d 170, 171 (1981); *People v. Macerola*, 47 N.Y.2d 257, 264-65, 391 N.E.2d 990, 993-94, 417 N.Y.S.2d 908, 911-12 (1979).

Although one court has opined that it is futile to attempt to formulate a general standard to determine whether a conflict exists in joint representation, *People v. Davis*, 72 App. Div. 2d 69, 71, 423 N.Y.S.2d 98, 101-02 (4th Dep't 1979), several Court of Appeals cases provide illustrations. In *People v. Burwell*, 53 N.Y.2d 849, 422 N.E.2d 822, 440 N.Y.S.2d 177 (1981), the appellant and her husband, represented by the same attorney, were convicted of criminal possession of stolen property. *Id.* at 850, 422 N.E.2d at 823, 440 N.Y.S.2d at 178. Because there were "possible differences in the level of culpability of the two codefendants," the Court of Appeals reversed, stating that "it cannot be said that their joint representation by a single attorney did not give rise to a significant potential for conflict of interest." *Id.* at 851, 422 N.E.2d at 823-24, 440 N.Y.S.2d at 178-79. In *People v. Crump*, 53 N.Y.2d 824, 422 N.E.2d 815, 440 N.Y.S.2d 170 (1981), the Court based its reversal on the possibility that if the defendants, convicted of possession of stolen property, had had separate counsel, each might have attempted to shift the blame to the other. *Id.* at 825, 422 N.E.2d at 816, 440 N.Y.S.2d at 171. Similarly, in *People v. Macerola*, 47 N.Y.2d 257, 391 N.E.2d 990, 417 N.Y.S.2d 908 (1979), the Court reversed an assault conviction because the attorney who represented the defendants might have been able to establish the appellant's defense by placing the responsibility on his codefendant. *Id.* at 264-65, 391 N.E.2d at 994, 440 N.Y.S.2d at 912. In *People v. LaMere*, 39 App. Div. 2d 15, 331 N.Y.S.2d 178 (3d Dep't 1972), the defendant's conviction was reversed because his attorney also represented a codefendant whose testimony helped bring about the defendant's conviction. *Id.* at 16-17, 331 N.Y.S.2d at 179-80.

Attorneys are ethically bound to recognize and avoid problems arising out of joint representation of clients. See ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1979). Before an attorney may represent multiple clients, he must explain the possible risks of conflicts of interest, *id.* at EC 5-16, and must discontinue representation if one client is likely to be affected unfavorably by that representation, *id.* at DR 5-105(B). Notwithstanding these ethical duties, conflict problems continue to arise, particularly when an attorney represents two defendants during plea negotiations. See Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney*, 62 MINN. L. REV. 119, 125-27 (1978). See generally J. BOND, PLEA BARGAINING AND GUILTY PLEAS § 4.24 (1978).

¹⁵⁶ See, e.g., *Crooker v. California*, 357 U.S. 433, 439 (1958); *Chandler v. Fretag*, 348 U.S. 3, 10 (1954); *Powell v. Alabama*, 287 U.S. 45, 53 (1932); *People v. Arroyave*, 49 N.Y.2d 264, 270, 401 N.E.2d 393, 396, 425 N.Y.S.2d 282, 285 (1980); *People v. Hannigan*, 7 N.Y.2d 317, 318, 165 N.E.2d 172, 173, 197 N.Y.S.2d 152, 153 (1960). Criminal defendants must be accorded a reasonable time to obtain counsel. *United States v. Bragan*, 499 F.2d 1376, 1379

amendment problem if the accused is aware of the risk of conflicts and nevertheless permits his attorney to proceed.¹⁵⁷ Hence, New York law requires that when codefendants are jointly represented at trial, the court must conduct an inquiry to determine whether each defendant has made an informed decision to proceed with this type of representation.¹⁵⁸ Reversal of a conviction will be appropriate if the trial judge fails to follow this procedure and the defendant demonstrates that a significant possibility of conflict of interest existed.¹⁵⁹ Recently, in *People v. Monroe*,¹⁶⁰ the Court of

(4th Cir. 1974); *People v. Arroyave*, 49 N.Y.2d at 270, 401 N.E.2d at 396, 425 N.Y.S.2d at 285 (citing *Chandler v. Fretag*, 348 U.S. at 9-10); *accord*, *United States v. McMann*, 386 F.2d 611, 618 (2d Cir. 1967), *cert. denied*, 390 U.S. 958 (1968); *United States v. Bentavena*, 319 F.2d 916, 936 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963).

¹⁵⁷ *People v. Gomberg*, 38 N.Y.2d 307, 312-13, 342 N.E.2d 550, 553, 379 N.Y.S.2d 769, 773-74 (1975). It is well settled that joint representation is not a per se violation of the right to effective assistance of counsel. *See, e.g.*, *Holloway v. Arkansas*, 435 U.S. 475, 482 (1978); *People v. Macerola*, 47 N.Y.2d 257, 262, 264, 391 N.E.2d 990, 992, 993, 417 N.Y.S.2d 908, 910, 911 (1979); *People v. Gomberg*, 38 N.Y.2d at 312, 342 N.E.2d at 553, 379 N.Y.S.2d at 773. One commentator has concluded that since a defendant can waive his right to counsel completely, important constitutional questions would arise if all joint representation were barred. *See Hyman, supra* note 155, at 320. Nevertheless, although it is important for courts to avoid interfering with the attorney-client relationship, *People v. Hall*, 46 N.Y.2d 873, 875, 387 N.E.2d 610, 611, 414 N.Y.S.2d 678, 679, *cert. denied*, 444 U.S. 848 (1979), they "must remain ever vigilant in their duty to ensure that a defendant receives effective legal representation," *People v. Macerola*, 47 N.Y.2d at 262, 391 N.E.2d at 992, 417 N.Y.S.2d at 910.

¹⁵⁸ *E.g.*, *People v. Burwell*, 53 N.Y.2d 849, 851, 422 N.E.2d 822, 823-24, 440 N.Y.S.2d 177, 178-79 (1981); *People v. Crump*, 53 N.Y.2d 824, 825, 422 N.E.2d 815, 816, 440 N.Y.S.2d 170, 171 (1981); *People v. Fioretti*, 49 N.Y.2d 976, 978, 406 N.E.2d 746, 747, 428 N.Y.S.2d 889, 889 (1980); *People v. Macerola*, 47 N.Y.2d 257, 264, 391 N.E.2d 990, 993, 417 N.Y.S.2d 908, 911 (1979). The leading New York case on a trial court's affirmative duty to determine whether a jointly represented defendant has been apprised of the risks of conflicting interests is *People v. Gomberg*, 38 N.Y.2d 307, 342 N.E.2d 550, 379 N.Y.S.2d 769 (1975). In *Gomberg*, three partners were charged with arson and were represented by a single attorney. *Id.* at 310-11, 342 N.E.2d at 552, 379 N.Y.S.2d at 772. Prior to trial, the judge asked the defendants and their attorney whether there would be any conflicts of interest, *id.* at 314, 342 N.E.2d at 555, 379 N.Y.S.2d at 776, and was informed that the defendants had been apprised of potential problems in this regard, *id.* at 315, 342 N.E.2d at 555, 379 N.Y.S.2d at 776. One of the defendants was acquitted and the others were found guilty. *Id.* at 311, 342 N.E.2d at 552, 379 N.Y.S.2d at 772. On appeal, the two convicted defendants asserted that their joint representation had denied them effective assistance of counsel. *Id.* at 311-12, 342 N.E.2d at 552-53, 379 N.Y.S.2d at 773. The Court of Appeals held that since the appellants were made aware of the possibility of conflicts before trial, *id.* at 316, 342 N.E.2d at 555, 379 N.Y.S.2d at 777, they were precluded from raising any claim of injury from joint representation, *id.*

¹⁵⁹ *E.g.*, *People v. Baffi*, 49 N.Y.2d 820, 822, 404 N.E.2d 737, 738, 427 N.Y.S.2d 615, 616 (1980); *People v. Macerola*, 47 N.Y.2d 257, 264, 391 N.E.2d 990, 993, 417 N.Y.S.2d 908, 911 (1979). In *People v. Lloyd*, 51 N.Y.2d 107, 412 N.E.2d 371, 432 N.Y.S.2d 685 (1980), the Court of Appeals defined the scope of the trial court's inquiry in joint representation cases. The *Lloyd* Court held that although the trial judge must ensure that the defendants are

Appeals held that the rules governing joint representation at trial apply with equal force when the defendant pleads guilty pursuant to a plea bargaining agreement.¹⁶¹

In *Monroe*, the defendant and his codefendant were charged with attempted murder, assault and criminal possession of a weapon, but were permitted to plead guilty to attempted assault pursuant to a plea bargaining agreement negotiated by their mutual attorney.¹⁶² Before accepting the plea, however, the trial court did not determine whether the defendant was aware of the potential risks of joint representation.¹⁶³ Prior to sentencing, the defendant secured separate counsel and moved to withdraw his plea, asserting a conflict of interest in his prior representation.¹⁶⁴ After a hearing, the court determined that the defendant had not established a deprivation of his right to effective assistance of counsel, and therefore denied the motion.¹⁶⁵ The Appellate Division, First Department, affirmed the conviction.¹⁶⁶

In a per curiam opinion, the Court of Appeals affirmed, holding that the standards applicable to joint representation at trial apply with equal force in plea bargaining situations.¹⁶⁷ Although acknowledging that a defendant's right to effective assistance of counsel is not automatically violated when his attorney also repre-

aware of the risks involved in joint representation, he is not required to explain potential conflicts with reference to the specific case. *Id.* at 111, 412 N.E.2d at 373, 432 N.Y.S.2d at 687. Rather, the Court stated that trial courts may rely upon a report by defense counsel that any conflicts have been explained fully. *Id.* at 111-12, 412 N.E.2d at 373-74, 432 N.Y.S.2d at 687. *But cf.* *People v. Baffi*, 49 N.Y.2d at 822, 404 N.E.2d at 738, 427 N.Y.S.2d at 616 (although court may look to defense counsel for assurances, there remains an independent obligation "to probe the defendants' awareness of the risks" involved in joint representation).

¹⁶⁰ 54 N.Y.2d 35, 429 N.E.2d 97, 444 N.Y.S.2d 578 (1981).

¹⁶¹ *Id.* at 37, 429 N.E.2d at 97, 444 N.Y.S.2d at 578.

¹⁶² *Id.*, 429 N.E.2d at 97-98, 444 N.Y.S.2d at 578-79.

¹⁶³ *Id.*, 429 N.E.2d at 98, 444 N.Y.S.2d at 579.

¹⁶⁴ *Id.* The defendant asserted that he was told that if he pleaded guilty, his codefendant would benefit from more lenient terms in the plea-bargain arrangement. *Id.* Moreover, the defendant claimed that he was not counselled as to the likelihood of victory at trial if he refused to plead guilty. *Id.* at 37-38, 429 N.E.2d at 98, 444 N.Y.S.2d at 579.

¹⁶⁵ *Id.* at 38, 429 N.E.2d at 98, 444 N.Y.S.2d at 579. Noting that the defendant had been "properly and fully advised" of plausible alternatives, and that he had "knowingly and voluntarily" entered his plea, the lower court concluded that there was "no adequate showing" of a deprivation of effective legal counsel. *Id.*

¹⁶⁶ *People v. Monroe*, 73 App. Div. 2d 563 (1st Dep't 1979), *aff'd*, 54 N.Y.2d 35, 429 N.E.2d 97, 444 N.Y.S.2d 578 (1981).

¹⁶⁷ 54 N.Y.2d at 38, 429 N.E.2d at 98, 444 N.Y.S.2d at 579.

sents a codefendant,¹⁶⁸ the Court observed that the problems inherent in joint representation are as severe during plea bargaining as they are at trial.¹⁶⁹ Recognizing that the trial court had failed to follow the appropriate procedure by accepting the defendant's plea without first discerning whether he was aware of the potential problems of joint representation,¹⁷⁰ the Court nevertheless determined that this omission did not constitute reversible error.¹⁷¹ Instead, the Court held that in order to obtain reversal of a conviction, the defendant must show " 'a significant possibility' that a conflict of interest existed."¹⁷² Because the defendant could not substantiate his claim regarding the existence of a conflict of interest, the Court affirmed the conviction.¹⁷³

In a vigorous dissent, Judges Jones, Fuchsberg and Meyer emphasized that every jointly represented criminal defendant must be informed of his right to separate counsel before a conflict of interest can arise.¹⁷⁴ The dissent opined that an inquiry occurring after a defendant enters his plea presents a substantial risk of unreliability because the skill of the judge who accepted the plea and the integrity of the attorney who represented the defendant are in issue.¹⁷⁵ Thus, the dissenting judges concluded that a compulsory

¹⁶⁸ *Id.* (citing *People v. Macerola*, 47 N.Y.2d 257, 264, 391 N.E.2d 990, 993, 417 N.Y.S.2d 908, 911 (1979)); see note 157 *supra*.

¹⁶⁹ 54 N.Y.2d at 38, 429 N.E.2d at 98, 444 N.Y.S.2d at 579.

¹⁷⁰ *Id.* at 39, 429 N.E.2d at 98-99, 444 N.Y.S.2d at 579-80. The *Monroe* Court observed that the lower court had held a hearing before sentencing to consider the defendant's contention that a conflict of interest existed. *Id.* The Court noted, however, that "this is not the preferred procedure," *id.*, 429 N.E.2d at 99, 444 N.Y.S.2d at 580, since the inquiry should occur before the trial judge accepts the guilty plea, *id.* at 38, 429 N.E.2d at 98, 444 N.Y.S.2d at 579.

¹⁷¹ *Id.* at 39, 429 N.E.2d at 99, 444 N.Y.S.2d at 580.

¹⁷² *Id.*, 429 N.E.2d at 98, 444 N.Y.S.2d at 579.

¹⁷³ *Id.*, 429 N.E.2d at 99, 444 N.Y.S.2d at 580.

¹⁷⁴ *Id.* at 39-40, 429 N.E.2d at 99, 444 N.Y.S.2d at 580. (Jones, Fuchsberg and Meyer, JJ., dissenting). The dissenting judges compared the requirement of an inquiry before entry of the plea with the examination of a defendant who elects to proceed *pro se*, noting that "both [procedures] are rooted in the key role the right to counsel plays under our adversary system." *Id.* at 40, 429 N.E.2d at 99, 444 N.Y.S.2d at 580. (Jones, Fuchsberg and Meyer, JJ., dissenting).

¹⁷⁵ *Id.* (Jones, Fuchsberg, & Meyer, JJ., dissenting). The dissenting judges observed that:

[T]he difficulty with a retrospective hearing to determine whether there was in fact a conflict is that it requires not only the recapture of the dynamics of the plea bargaining . . . , in itself a difficult enough pursuit, but also the persuasion of the judge who failed to see the possibility of conflict in the first place and the attorney whose acumen, if not integrity, may be at stake, that they were in error and should admit it.

hearing before entry of a plea is mandatory and cannot be obviated by a postplea inquiry designed to reveal actual conflicts of interest.¹⁷⁶

It is suggested that the *Monroe* Court properly extended to plea bargaining cases the duty of trial courts to ensure that defendants are aware of the risks inherent in joint representation.¹⁷⁷ Nevertheless, it seems that the Court was unjustified in concluding that a breach of this duty mandates reversal only if a defendant can demonstrate a significant possibility that a conflict of interest occurred. Recent cases involving joint representation at trial indicate that appellate courts rely heavily upon trial records to reveal conflicts of interest.¹⁷⁸ Because there is no comprehensive trial record in the plea bargaining situation, an appellate court may be unable to state with certainty that a defendant's decision to plead guilty was not a product of invalid considerations arising out of joint representation.¹⁷⁹ Indeed, the Supreme Court has indicated

Id. (Jones, Fuchsberg and Meyer, JJ., dissenting).

¹⁷⁶ 54 N.Y.2d at 40-41, 429 N.E.2d at 99-100, 444 N.Y.S.2d at 580-81 (Jones, Fuchsberg, and Meyer, JJ., dissenting).

¹⁷⁷ See note 158 and accompanying text *supra*. In *People v. Macerola*, 47 N.Y.2d 257, 391 N.E.2d 990, 417 N.Y.S.2d 908 (1979), the Court of Appeals noted that because conflicting interests of codefendants often render the attorney's decision "all the more difficult," the reasons for imposing a duty of inquiry upon the court before trial are "obvious." *Id.* at 262, 391 N.E.2d at 992, 417 N.Y.S.2d at 910. Notably, the Court cited the plea bargaining situation as an example, stating that "an attorney may be less than willing to engage fervently in plea negotiations to obtain a lesser charge for one defendant if to do so would require that defendant to testify against the other defendants." *Id.* In light of this statement, it does not seem surprising that the Court extended the pretrial inquiry requirement to encompass plea negotiations.

¹⁷⁸ See, e.g., *People v. Burwell*, 53 N.Y.2d 849, 851, 422 N.E.2d 822, 823-24, 440 N.Y.S.2d 177, 178-79 (1981) (conviction reversed because record revealed possibility that jointly represented defendants would be held to varying levels of responsibility); *People v. Baffi*, 49 N.Y.2d 820, 822, 404 N.E.2d 737, 738, 427 N.Y.S.2d 615, 616-17 (1980) (conviction reversed because record revealed that evidence against jointly represented defendants varied in degree and kind); *People v. Dell*, 60 App. Div. 2d 18, 22-23, 400 N.Y.S.2d 236, 240 (4th Dep't 1977) (conviction reversed because record revealed that counsel could not cross-examine client whose testimony placed codefendants at scene of crime).

Significantly, the Supreme Court has indicated that even a trial record may fail to reveal the harms arising from conflicts of interest. See, e.g., *Holloway v. Arkansas*, 435 U.S. 475, 490-91 (1978). This inadequacy of the trial record is caused by the fact that the defendant often asserts that the prejudice has occurred because the attorney refrained from a certain course of action. *Id.*; accord, *Lollar v. United States*, 376 F.2d 243, 246 (D.C. Cir. 1967); see *People v. Gonzalez*, 47 N.Y.2d 606, 611, 393 N.E.2d 987, 990, 419 N.Y.S.2d 913, 916 (1979).

¹⁷⁹ Cf. *People v. Grant*, 45 N.Y.2d 366, 379, 380 N.E.2d 257, 264-65, 408 N.Y.S.2d 429, 436-37 (1978) (court "is rarely equipped" to determine what factors motivate a defendant's decision to plead guilty). Client interests, economic concerns, caseload pressures and the

that once a plea is entered, it may be "virtually impossible" for a defendant who has pleaded guilty to demonstrate the requisite possibility of conflict to merit reversal.¹⁸⁰ Moreover, although the *Monroe* majority appears to have endorsed a harmless error analysis,¹⁸¹ the Court of Appeals previously has noted that attempts to gauge the effects of errors are inappropriate in plea bargain cases because of the difficulty in finding prejudice upon a review of plea records.¹⁸² It is submitted, therefore, that a judge's failure to ensure that a defendant makes an informed decision to proceed with joint representation before entering his guilty plea should lead to automatic reversal.

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strength of the particular case are included among the considerations examined by both defense counsel and the prosecutor in deciding whether to plea bargain. G. ROBIN, INTRODUCTION TO THE CRIMINAL JUSTICE SYSTEM 242, 244 (1980). Commentators have observed that when joint representation is involved, an additional factor emerges which is detrimental to our criminal process. These authors assert that in some cases, defense attorneys may be inclined to bargain the rights of one client in return for benefits to another. See Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1218-19 (1975); Geer, *supra* note 155, at 125-27.

¹⁸⁰ *Holloway v. Arkansas*, 435 U.S. 475, 490-91 (1978); see Girgenti, *supra* note 155, at 65-67; Hyman, *supra* note 155, at 327.

¹⁸¹ See *People v. Monroe*, 54 N.Y.2d at 40, 429 N.E.2d at 99, 444 N.Y.S.2d at 580 (Jones, Meyer, and Fuchsberg, JJ., dissenting); cf. *People v. Hodge*, 53 N.Y.2d 313, 320-21, 423 N.E.2d 1060, 1064, 441 N.Y.S.2d 231, 235 (1981) (denial of effective assistance of counsel before trial sometimes may be analyzed under a harmless error standard).

¹⁸² *People v. Grant*, 45 N.Y.2d 366, 379-80, 380 N.E.2d 257, 264-65, 408 N.Y.S.2d 429, 436-37 (1978); see, e.g., *People v. Rolston*, 50 N.Y.2d 1048, 1049-50, 409 N.E.2d 1375, 1376, 431 N.Y.S.2d 701, 702 (1980); *People v. Harris*, 48 N.Y.2d 208, 215, 397 N.E.2d 733, 736, 422 N.Y.S.2d 43, 46 (1979). In *Grant*, the defendant pleaded guilty to a charge of murder after his motion to suppress a confession had been denied. 45 N.Y.2d at 371, 380 N.E.2d at 259, 408 N.Y.S.2d at 431. The appellate division held that the confession should have been suppressed, but affirmed the conviction, reasoning that denial of the motion was harmless error in view of the "overwhelming proof of the guilt of the defendant." 59 App. Div. 2d 661, 662, 398 N.Y.S.2d 279, 280 (1st Dep't 1977), *rev'd*, 45 N.Y.2d 366, 380 N.E.2d 257, 408 N.Y.S.2d 429 (1978). In reaching this conclusion, the court observed that even if the confession had been suppressed and the case went to trial, the defendant would have been convicted. *Id.*

The Court of Appeals reversed, stating that a court cannot properly weigh the factors usually considered in finding harmless error when a guilty plea is involved. 45 N.Y.2d at 378, 380 N.E.2d at 264, 408 N.Y.S.2d at 436. Indeed, the Court noted that absent a trial and verdict, a court would have to rely upon mere speculation to conclude that an error was harmless. *Id.* at 379, 380 N.E.2d at 436-37, 408 N.Y.S.2d at 264-65.