Absent an Inquiry by the Trial Court and Upon a Demonstration of Possible Conflict, New Trial Required for Jointly Represented Defendants

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severely limiting the defendant's ability to waive the double jeopardy defense, it is suggested that, upon its next confrontation with the issue, the Court adopt more definite guidelines for determining the existence of a waiver.

Gene A. Capello

Absent an inquiry by the trial court and upon a demonstration of possible conflict, new trial required for jointly represented defendants

Due to the frequent inability of one attorney to protect adequately conflicting interests of criminal codefendants, joint repre-
sentation of defendants is highly suspect of giving rise to ineffective assistance of counsel.\textsuperscript{219} In order to protect a defendant from conflicts inherent in joint representation and balance them with his right to choose his own counsel,\textsuperscript{219} a trial court is required to determine on the record whether the decision to share counsel with a codefendant and decline his right to separate counsel was made with full knowledge of its potential hazards.\textsuperscript{220} Recently, in \textit{People


In Glasser v. United States, 315 U.S. 60 (1942), over the objections of the defendant Glasser, the trial court assigned his lawyer to represent a codefendant simultaneously. Id. at 69. The Court reversed Glasser's conviction, finding that the lawyer's representation of Glasser was "not as effective as it might have been" had the assignment not been made. Id. at 76. Although the Court stated that "[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial," id., it declined to reverse the convictions of Glasser's codefendant, concluding that the record clearly established that he had suffered no prejudice. Id. at 77.

The ambiguity surrounding the amount of prejudice a defendant must demonstrate in order to establish a denial of his right to the effective assistance of counsel was partially clarified in Holloway v. Arkansas, 435 U.S. 475 (1978). In Holloway, the lawyer for the three codefendants applied for a pre-trial order appointing separate attorneys for each defendant, which was refused by the trial court. Claiming that he could not effectively cross-examine each defendant as he was obliged to do as counsel for the other defendants, the lawyer reasserted his request at trial, but it was denied again by the court. Id. at 478. The Supreme Court reversed the convictions, holding that it was error for the trial court to disregard the defendants' requests for separate counsel, since the court had notice of the "possibility" of a conflict of interest. See id. at 484. The Holloway Court enunciated the rule that once a defendant objects to joint representation on the ground that a conflict of interest exists, the defendant need not show prejudice in order to obtain a reversal because prejudice will be presumed. Id. at 489.


\textsuperscript{220} Id. at 313-14, 342 N.E.2d at 554, 379 N.Y.S.2d at 775. In Gomberg, the same attorney represented three defendants charged with arson. Id. at 310-11, 342 N.E.2d at 552, 379 N.Y.S.2d at 772-73. Although all the defendants sought to discredit the testimony of the state's witnesses, one of the defendants asserted an additional defense of lack of motive. Id. at 310-11, 342 N.E.2d at 552, 379 N.Y.S.2d at 772. The latter defendant was acquitted, but the other two defendants were convicted of arson in the second degree. Id. at 311, 342 N.E.2d at 552, 379 N.Y.S.2d at 772. Appealing the convictions, one defendant claimed he had been deprived the effective assistance of counsel on the grounds that the lack of motive defense of one defendant shifted the blame to the third defendant and himself, and that the lawyer failed to call witnesses in his behalf and did not effectively cross-examine the other defendants. Id. at 311, 342 N.E.2d at 552, 379 N.Y.S.2d at 773. Gomberg's appeal was premised on the theory that should the court find that his codefendant was deprived of adequate legal representation, it should reach the same conclusion as to Gomberg and reverse
v. Macerola, the Court of Appeals held that a trial court's failure to make an inquiry mandates a new trial where the defendant can establish "at least [a] significant possibility" of a conflict of interest.

In Macerola, the two defendants were charged with burglary and assault. One defendant was accused of burglary and accessory to an assault inflicted by the second defendant. In addition to the assault charge, the second defendant was charged with being an accessory to the burglary. Prior to trial, the court did not make an inquiry of the defendants, both represented by the same attorney, to determine whether each defendant understood the hazards of joint representation. Subsequently, each defendant was convicted of burglary and assault. On appeal, the Appellate Division, Third Department, reversed the burglary conviction of one defendant, but otherwise affirmed the judgment. At the Court of Appeals, the defendants claimed that the joint representation deprived them of their right to the effective assistance of counsel.

The Court of Appeals reversed the convictions and ordered a new trial. Writing for a divided Court, Judge Jasen initially observed that while joint representation does not per se violate the right to effective assistance of counsel, that right may be seriously undermined when one attorney represents multiple defend-
ants in the same action. To prevent erosion of the right, the Macerola Court reasoned that a trial court has the duty to protect the rights of defendants who are “often unschooled in the nature of criminal proceedings” by inquiring on the record whether each jointly represented defendant is aware of the possible conflicts of interest that might arise. Where there is no inquiry on the record, the Court determined that reversal is not mandated in every case, since joint representation sometimes might be justified and therefore would not interfere with the right to counsel. Only where the defendant can demonstrate an actual or possible conflict of interest, according to Judge Jasen, will the trial court’s failure to inquire necessitate a new trial.

Judge Gabrielli dissented, claiming that there was no conflict of interest between the defendants or their defenses. Observing that a defendant’s right to conflict-free assistance of counsel must be balanced against the right to be represented by an attorney of one’s choice, which is “of equal importance,” Judge Gabrielli emphasized that trial courts should not “lightly interfer[e] with” a defendant’s selection of counsel. While the dissent agreed with the majority’s assertion that a reversal is not necessary in every

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230 47 N.Y.2d at 263, 391 N.E.2d at 992-93, 417 N.Y.S.2d at 910 (citations omitted); see People v. Gomberg, 38 N.Y.2d at 313-14, 342 N.E.2d at 553-54, 379 N.Y.S.2d at 774-75; note 220 and accompanying text supra. Judge Jasen explained that the inquiry must be on the record to enable the appellate court to ascertain whether the defendant “knowingly and intelligently” elected to proceed with an attorney who also is representing a codefendant. 47 N.Y.2d at 264, 391 N.E.2d at 993, 417 N.Y.S.2d at 911.

231 Id. at 264-65, 391 N.E.2d at 994, 417 N.Y.S.2d at 912. The Court observed that by establishing a defense for either defendant on either charge, the attorney impliedly attributed the liability to the other defendant. Id. Moreover, the Court determined that the need of each defendant to have his own independent counsel was more urgent in this case because the defendants were charged with accessory liability. Id. at 265, 391 N.E.2d at 994, 417 N.Y.S.2d at 912; see N.Y. PENAL LAW § 20.00 (McKinney 1975). Judge Jasen’s assertion about accessory liability directly contrasts with the Court’s earlier statement in People v. Gonzalez, 30 N.Y.2d 28, 33, 280 N.E.2d 882, 885, 330 N.Y.S.2d 54, 58-59, cert. denied, 409 U.S. 859 (1972).

232 47 N.Y.2d at 266, 391 N.E.2d at 995, 417 N.Y.S.2d at 913 (Gabrielli, J., dissenting).

233 Id. at 267, 391 N.E.2d at 995, 417 N.Y.S.2d at 913 (Gabrielli, J., dissenting).
case where the trial court fails to make the required inquiry, it maintained that in Macerola there was no showing that the defendants were prejudiced by the joint representation. The dissent premised its conclusion on the view that the defendants had the same interest in establishing a common defense and would have gained nothing by proceeding with separate counsel. According to Judge Gabrielli, "[a]ctual, not imagined, conflict of interest must be shown before a defendant may successfully claim that he was denied the right to effective assistance of counsel."

Perhaps the Macerola decision can be viewed best as a warning to the trial courts that if the duty to inquire on the record is disregarded, a new trial will be ordered on the mere showing of a "significant possibility" of a conflict of interest. Although the trial court inquiry can not always inform the defendant adequately of all the conflicting interests that might occur during the course of joint representation, the Macerola Court nevertheless stressed the

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225 Id. at 268, 391 N.E.2d at 996, 417 N.Y.S.2d at 914 (Gabrielli, J., dissenting). Judge Gabrielli observed that since the trial court must refrain from interfering with the attorney-client relationship, the inquiry "necessarily [will] be limited in scope" so that the mere failure to inquire cannot be considered absolute grounds for reversal. Id. (Gabrielli, J., dissenting).
226 Id. (Gabrielli, J., dissenting).
227 Id. (Gabrielli, J., dissenting).
228 Id. at 268-69, 391 N.E.2d at 996, 417 N.Y.S.2d at 914 (Gabrielli, J., dissenting) (citation omitted). The dissent noted that the only conflict mentioned by the majority was that the jury "might" have been persuaded that Macerola was not as culpable on the assault charge "if" the attorney had concentrated on showing that Macerola's codefendant was mainly responsible for the injuries. Id. at 269, 391 N.E.2d at 996, 417 N.Y.S.2d at 914 (Gabrielli, J., dissenting) (emphasis in original). Unlike the majority, see note 232 supra, Judge Gabrielli claimed that such a defense tactic would not have aided Macerola since the defendants had been prosecuted on a theory of accessorial liability. 47 N.Y.2d at 269, 391 N.E.2d at 996, 417 N.Y.S.2d at 914-15 (Gabrielli, J., dissenting).
229 In People v. Gomberg, 38 N.Y.2d 307, 342 N.E.2d 550, 379 N.Y.S.2d 769 (1975), the Court noted some of the difficulties the trial court is faced with in ensuring that the defendant knowingly chose joint representation. For example, since the inquiry takes place before trial, the court is not aware of the evidence that will be introduced, the strategies that will be followed, and the possible defenses that could be asserted. Id. at 314, 342 N.E.2d at 554, 379 N.Y.S.2d at 775. Some commentators have expressed doubt about whether a defendant is capable of making an informed decision despite the trial court inquiry. See Geer, supra note 217, at 141-42; Hyman, Joint Representation of Multiple Defendants in a Criminal Trial: The Court's Headache, 5 Hofstra L. Rev. 315, 334 (1977); Lowenthal, supra note 217, at 980-82. It has also been argued that many defendants, regardless of their degree of sophistication, do not understand the consequences of joint representation, and since the judge has no knowledge of the trial tactics or defenses that the lawyer has discussed with his clients, the judge is not in a position to advise the defendant adequately of the risks. See Geer, supra note 217, at 142; Lowenthal, supra note 217, at 982.

The Gomberg Court stated that in performing its duty of inquiry, the trial court "may place great weight on" counsel's assertions that no conflicts of interest are involved in the
necessity of the inquiry, since it is the only means whereby an appellate court can ascertain whether the defendant's choice of counsel was made "knowingly and intelligently."\textsuperscript{240}

The Macerola decision also serves as an example of the Court's increased sensitivity to the conflicts inherent in joint representation and the continued effort to shield defendants from unwittingly pursuing that course.\textsuperscript{241} The Court's emphasis on the inquiry, however, indicates a willingness to rely on an approach that has been conceded to be inadequate as a method for alerting defendants to the possible conflicts that may occur.\textsuperscript{242} It seems questionable, therefore, whether by a pre-trial inquiry a defendant waives all conflicts that may arise at trial. Through an inquiry and presumed waiver before trial, a defendant may be said to opt for joint representation in order to obtain the tactical advantages it provides.\textsuperscript{243}

As a result of the waiver, he also assumes the risk of conflicts native to joint representation, including actual conflicts that may develop.\textsuperscript{244} It is submitted, however, that a defendant does not assume the risk of unexpected or unanticipated conflicts, for which

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\textsuperscript{240} See note 232 supra.

\textsuperscript{241} See note 239 supra.

\textsuperscript{242} See note 237 and accompanying text supra.

\textsuperscript{243} By virtue of the defendant's decision after the inquiry to proceed with an attorney representing codefendants, both the attorney and the defendant should be aware that certain conflicts may arise and indeed may be unavoidable. \textit{But cf.} authorities cited in note 239 supra (attorney and trial judge may not advise defendant of all risks). For example, the attorney will be precluded from exonerating one defendant at the expense of another, thereby forfeiting additional defenses and adequate cross-examination of a defendant who takes the stand. Similarly, although a defendant may profit from attempting to establish a common defense, his case may suffer from guilt by association or the inability of counsel to individualize adequately the defenses of his clients. \textit{See generally} note 217 supra. In order to maintain the validity of the waiver, it is necessary to assume that the inquiry, coupled with an attorney's admonitions, is at least adequate to alert the defendant to those conflicts common to joint representation. It is submitted, therefore, that such unavoidable conflicts are waived by an adequate inquiry, since the defendant seemingly prefers to disregard the apparent drawbacks of joint representation and instead chooses to rely on the tactical advantages accruing to him by virtue of a joint defense.
the inquiry may be deemed inadequate and thus the waiver ineffec-
tive.\footnote{4} Should such a conflict occur, a defendant should be granted
a new trial, since his waiver may not be considered the product of
an "informed decision,"\footnote{5} which is "depend[ent], in each case,
upon the particular facts and circumstances surrounding that
case."\footnote{247} The waiver should retain its validity, however, for any pos-

\footnotetext{4}{When a defendant can show an actual conflict that was unanticipated at the time of
inquiry it is submitted that the defendant did not accept the risk of this type of conflict and
therefore could not knowingly and intelligently waive his right to separate counsel. Gener-
ally, a defendant can only waive his right to the assistance of counsel if the waiver was made
knowingly and intelligently. Faretta v. California, 422 U.S. 806, 820-21 (1975); Adams v.
United States \textit{ex rel.} McCann, 317 U.S. 269, 279 (1942); Johnson v. Zerbst, 304 U.S. 458, 468
(1938). Where a \textit{Gomberg} waiver is involved, in order to preclude a claim of ineffective legal
assistance on appeal, the waiver must reflect an "informed decision" on the part of the defen-
dant to proceed with joint counsel. 38 N.Y.2d at 313, 342 N.E.2d at 554, 379 N.Y.S.2d at 774
(citations omitted).}

\footnotetext{5}{People v. Gomberg, 38 N.Y.2d at 313, 342 N.E.2d at 554, 379 N.Y.S.2d at 774 (cita-
tions omitted).}

\footnotetext{247}{Johnson v. Zerbst, 304 U.S. 458, 464 (1938). It is clear that a defendant may estab-
lish an invalid waiver because there was merely a pro forma inquiry at the trial level, see
People v. Dell, 60 App. Div. 2d 18, 21, 400 N.Y.S.2d 236, 238-39 (4th Dep't 1977), or because
the attorney rather than the defendant assented to the joint representation, \textit{see id.} The va-

dility of a waiver before trial of actual conflicts, however, remains unclear. While the \textit{Gomberg}

Court seemed to indicate that a waiver would foreclose establishment of prejudice aris-
ing from a conflict, \textit{see 38 N.Y.2d at 316, 342 N.E.2d at 555, 379 N.Y.S.2d at 777, the Court
did not indicate whether this should apply to all types of conflicts.}

One commentator has noted that the dynamic nature of the criminal trial precludes
informed decision-making on the part of the defendant. \textit{See Geer, supra} note 217, at 141-45.
Situations may arise when a defendant is suddenly and suprisingly confronted by a code-
defendant's damaging testimony which the attorney is unable or unwilling to contradict. A
shift in defense strategies may cause new and inconsistent defenses to surface. The defend-
dant himself may refrain from revealing potential conflicts to his attorney in order to protect
a codefendant. Surprise witnesses presented by the prosecutor also may present unplanned
testimony and pose new conflicts. \textit{See id.} at 145. Since the inquiry was promulgated prima-
arily to protect the unwary defendant from damaging and otherwise unnecessary conflicts, it
seems a harsh measure to bind him to a waiver that did not contemplate these contingen-
cies. Indeed, the Supreme Court has noted that "[the Court] indulge[s] \[in\] every reasonable
presumption against the waiver of fundamental rights." \textit{Glasser v. United States, 315 U.S.}

60, 70 (1942).

In order that these unaudited conflicts be avoided before their damaging effects are re-
lected in a conviction, the trial judge may consider severing the joint representation in the
midst of trial, even if it is against the desires of the defendant. The Court of Appeals has
held that the right to waive counsel is not absolute but is subject to certain limitations that
are necessary "to promote the orderly administration of justice and to prevent subsequent
attack on a verdict claiming a denial of fundamental fairness." \textit{People v. McIntyre, 36
N.Y.2d 10, 17, 324 N.E.2d 322, 327, 364 N.Y.S.2d 837, 844 (1974). Indeed, it has been held
that a court may deny the defendant's request to continue with his attorney if the represen-
tation might deprive the defendant of effective assistance of counsel. \textit{People v. Hall, 46
(1979) (per curiam). In Hall, over the objections of the defendant, the trial court granted an
order disqualifying his counsel when it was discovered that the attorney formerly had repre-
sible or actual conflicts that could be reasonably expected, even though unknown, in order that the inquiry remains a viable alternative to needless reversals for properly obtained convictions.\textsuperscript{218}

\textit{Patricia A. O'Malley}

\textbf{Court of Appeals extends attenuation doctrine to include evidence disclosed by a defendant within seconds of an illegal seizure}

To effectuate the fourth amendment's\textsuperscript{219} prohibition of unreasonable searches and seizures, the exclusionary rule mandates that evidence obtained as a direct or indirect result of an illegal search or seizure may not be used as proof against the victim of the search or seizure.\textsuperscript{220} Evidence so obtained may be admitted, however, if

\textsuperscript{218} In People v. Ortiz, 49 N.Y.2d 718, 402 N.E.2d 139, 425 N.Y.S.2d 801 (1980), the Court of Appeals found that a defendant who waived his right to separate counsel at an inquiry could not later "contend that he was deprived of effective assistance of counsel because of a possible conflict of interest arising from [his] joint representation." \textit{Id.} at 719, 402 N.E.2d at 140, 425 N.Y.S.2d at 801.

\textsuperscript{219} The fourth amendment provides in part:
\begin{quote}
  The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .
\end{quote}
\textit{U.S. Const. amend. IV, see N.Y. Const. art. 1, § 12.}

\textsuperscript{220} The Supreme Court first enunciated the exclusionary rule in Weeks v. United States, 232 U.S. 383, 392, 398 (1914), where it proscribed using letters and records illegally obtained by federal officials as evidence in federal courts. The rule was extended to state courts in \textit{Mapp v. Ohio, 367 U.S. 643, 655 (1961).}


Often referred to as the "fruit of the poisonous tree" doctrine, \textit{Wong Sun v. United States, 371 U.S. 471, 488 (1963),} the exclusionary rule not only proscribes the use of unlawfully seized evidence, but also prohibits the police from using information obtained as a result of their illegal conduct. \textit{Id.} at 484-86; \textit{Silverthorne Lumber Co. v United States, 251 U.S. 385, 392 (1920); People v. Robinson, 13 N.Y.2d 296, 301, 196 N.E.2d 261, 262, 246}