

## 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,<sup>216</sup> 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,<sup>217</sup> joint repre-

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criminal proceedings against a defendant. See *Blackledge v. Perry*, 417 U.S. 21, 30 (1974); *People v. Hobson*, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976) (right to counsel); *People v. McLucas*, 15 N.Y.2d 167, 204 N.E.2d 846, 256 N.Y.S.2d 799 (1965) (privilege against self-incrimination). Moreover, the double jeopardy claim benefits from "every reasonable presumption against . . . waiver . . ." *Glasser v. United States*, 315 U.S. 60, 70 (1942). Compare *Boyd v. Dutton*, 405 U.S. 1 (1972) with *United States v. Tateo*, 377 U.S. 463 (1964).

<sup>216</sup> Restricting the instances in which the double jeopardy claim can be waived could encourage defendants to use the defense as a "sword" rather than properly as a "shield" against harassment by the sovereign. See *People v. Key*, 87 Misc. 2d 262, 266, 391 N.Y.S.2d 781, 784 (Sup. Ct. App. T. 2d Dep't 1976). For example, in order to preclude further proceedings against him, a defendant might wait until jeopardy attached to claim error, which, if corrected earlier, would have prevented a double jeopardy violation. *Id.* In *Key*, the defendant waited until jeopardy attached before moving to dismiss the information for insufficiency. *Id.* at 263, 391 N.Y.S.2d at 783. The People's motion for reargument was granted, but the trial court denied the relief sought because of the double jeopardy implications. *Id.* The appellate term reversed, holding that since the defendant was aware of the defect and could have moved to dismiss the information prior to the attachment of jeopardy, he waived his right to claim double jeopardy. *Id.* at 266, 391 N.Y.S.2d at 784. See also *People v. Woods*, 93 Misc. 2d 426, 429, 402 N.Y.S.2d 757, 759 (Dist. Ct. Nassau County 1978).

<sup>217</sup> For a full discussion of the types of conflict involved in joint representation of multiple defendants, see Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney*, 62 MINN. L. REV. 119, 125-35 (1978); Girgenti, *Problems of Joint Representation of Defendants in a Criminal Case*, 54 ST. JOHN'S L. REV. 55, 61-67 (1979); Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal*, 64 VA. L. REV. 939, 941-50 (1978). Typically, claims of conflict allege either counsel's failure to act in favor of one defendant for fear of implicating the other, see, e.g., *People v. Coleman*, 42 N.Y.2d 500, 369 N.E.2d 742, 399 N.Y.S.2d 185 (1977); *People v. Sprinkler*, 16 App. Div. 2d 705, 227 N.Y.S.2d 818 (2d Dep't 1962), or affirmative steps taken by counsel inuring to the benefit of one client while severely damaging the case of another, see *People v. Dell*, 60 App. Div. 2d 18, 400 N.Y.S.2d 236 (4th Dep't 1977). In the latter instance, one commentator has noted, the defense attorney's role becomes prosecutorial in nature. See Geer, *supra*, at 133. In addition to the conflicting interests of multiple defendants that develop during the actual trial, are those that occur at the plea bargaining, pre-trial, or sentencing stages of the criminal prosecution. See Girgenti, *supra*, at 61-67. Moreo-

sentation of defendants is highly suspect of giving rise to ineffective assistance of counsel.<sup>218</sup> In order to protect a defendant from conflicts inherent in joint representation and balance them with his right to choose his own counsel,<sup>219</sup> 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.<sup>220</sup> Recently, in *People*

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ver, many defenses at a trial may be "lost" due to counsel's attempt to minimize the existence of conflict. See *Geer, supra*, at 125-28; *Lowenthal, supra*, at 979.

<sup>218</sup> See *Holloway v. Arkansas*, 435 U.S. 475, 489-90 (1978); *People v. Gomberg*, 38 N.Y.2d 307, 312, 342 N.E.2d 550, 553, 379 N.Y.S.2d 769, 773 (1975); *Geer, supra* note 217, at 121; *Lowenthal, supra* note 217, at 939. See generally U.S. CONST. amend. VI; N.Y. CONSR. art. 1, § 6; CPL § 210.15(2) (1971).

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.

<sup>219</sup> See *People v. Gomberg*, 38 N.Y.2d 307, 312, 342 N.E.2d 550, 553, 379 N.Y.S.2d 769, 773-74 (1975).

<sup>220</sup> *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 denied 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*,<sup>221</sup> 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.<sup>222</sup>

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.<sup>223</sup> On appeal, the Appellate Division, Third Department, reversed the burglary conviction of one defendant, but otherwise affirmed the judgment.<sup>224</sup> At the Court of Appeals, the defendants claimed that the joint representation deprived them of their right to the effective assistance of counsel.<sup>225</sup>

The Court of Appeals reversed the convictions and ordered a new trial.<sup>226</sup> Writing for a divided Court,<sup>227</sup> Judge Jasen initially observed that while joint representation does not per se violate the right to effective assistance of counsel,<sup>228</sup> that right may be seriously undermined when one attorney represents multiple defend-

both convictions. *Id.* at 312, 342 N.E.2d at 553, 379 N.Y.S.2d at 773.

The Court of Appeals affirmed. Noting that a defendant's right to effective legal assistance may conflict with his right to employ his own choice of counsel, the *Gomberg* Court held that "a Trial Judge has a duty to protect the right of an accused to effective assistance of counsel." *Id.* at 313, 342 N.E.2d at 553, 379 N.Y.S.2d at 774. The Court emphasized that where an attorney is representing more than one defendant, the trial court must satisfy itself that each defendant's selection of counsel was the product of an informed choice. *Id.* at 313, 342 N.E.2d at 554, 379 N.Y.S.2d at 774. Finding that the trial court made an adequate inquiry into the existence of a conflict of interest, that the defendants were aware of the possibility of a conflict and were advised of their ability to retain separate counsel at any time a conflict arose, but instead chose to share counsel, the Court upheld the convictions because the defendants had "waived any claim of possible prejudice resulting from the joint representation." *Id.* at 316, 342 N.E.2d at 555, 379 N.Y.S.2d at 777.

<sup>221</sup> 47 N.Y.2d 257, 391 N.E.2d 990, 417 N.Y.S.2d 908 (1979), *rev'g sub nom.* *People v. Letka*, 60 App. Div. 2d 661, 400 N.Y.S.2d 196 (3d Dep't 1977).

<sup>222</sup> 47 N.Y.2d at 264, 391 N.E.2d at 993, 417 N.Y.S.2d at 911.

<sup>223</sup> *Id.* at 261, 391 N.E.2d at 991, 417 N.Y.S.2d at 909.

<sup>224</sup> *Id.* at 261, 391 N.E.2d at 991-92, 417 N.Y.S.2d at 909.

<sup>225</sup> *Id.* at 261-62, 391 N.E.2d at 992, 417 N.Y.S.2d at 909-10.

<sup>226</sup> *Id.* at 262, 391 N.E.2d at 992, 417 N.Y.S.2d at 910.

<sup>227</sup> The majority consisted of Judges Jasen, Jones, Wachtler and Fuschberg. Judge Gabrielli wrote a dissenting opinion in which Chief Judge Cooke concurred.

<sup>228</sup> *Id.* (citing *Holloway v. Arkansas*, 435 U.S. 475, 482 (1978) and *People v. Gonzalez*, 30 N.Y.2d 28, 34, 280 N.E.2d 882, 885, 330 N.Y.S.2d 54, 59, *cert. denied*, 409 U.S. 859 (1972)).

ants in the same action.<sup>229</sup> 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.<sup>230</sup> 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.<sup>231</sup> Addressing the facts in *Macerola*, the Court found that any defense offered by counsel on behalf of one client incriminated the other defendant, which established a possible conflict of interest.<sup>232</sup>

Judge Gabrielli dissented, claiming that there was no conflict of interest between the defendants or their defenses.<sup>233</sup> 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.<sup>234</sup> While the dissent agreed with the majority's assertion that a reversal is not necessary in every

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<sup>229</sup> 47 N.Y.2d at 262, 391 N.E.2d at 992, 417 N.Y.S.2d at 910 (citing *People v. Gomberg*, 38 N.Y.2d 307, 312, 342 N.E.2d 550, 553, 379 N.Y.S.2d 769, 773 (1975) (citing *Glasser v. United States*, 315 U.S. 60, 70 (1942))).

<sup>230</sup> 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.

<sup>231</sup> 47 N.Y.2d at 264, 391 N.E.2d at 993, 417 N.Y.S.2d at 911.

<sup>232</sup> *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 accessorial 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 accessorial 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).

<sup>233</sup> 47 N.Y.2d at 266, 391 N.E.2d at 995, 417 N.Y.S.2d at 913 (Gabrielli, J., dissenting).

<sup>234</sup> *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,<sup>235</sup> it maintained that in *Macerola* there was no showing that the defendants were prejudiced by the joint representation.<sup>236</sup> 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.<sup>237</sup> 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."<sup>238</sup>

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,<sup>239</sup> the *Macerola* Court nevertheless stressed the

<sup>235</sup> *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).

<sup>236</sup> *Id.* (Gabrielli, J., dissenting).

<sup>237</sup> *Id.* (Gabrielli, J., dissenting).

<sup>238</sup> *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).

<sup>239</sup> 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."<sup>240</sup>

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.<sup>241</sup> 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.<sup>242</sup> 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.<sup>243</sup> As a result of the waiver, he also assumes the risk of conflicts native to joint representation, including actual conflicts that may develop.<sup>244</sup> It is submitted, however, that a defendant does not assume the risk of unexpected or unanticipated conflicts, for which

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joint representation and that his clients consented to joint representation after he had disclosed all the risks. 38 N.Y.2d at 314, 342 N.E.2d at 554, 379 N.Y.S.2d at 775; see ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 5-16, DR 5-101(A), DR 5-105(B), DR 5-105(C); ABA STANDARDS, THE DEFENSE FUNCTION § 3.5(B) (1974). Unfortunately, however, the attorney often is unaware of potential conflicts of interest, so that reliance on counsel will not guarantee that a conflict may not develop later. See *People v. Byrne*, 17 N.Y.2d 209, 215, 217 N.E.2d 23, 25, 270 N.Y.S.2d 193, 196 (1966); *Geer*, *supra* note 217, at 145; *Hyman*, *supra*, at 334. Furthermore, it has been observed that the economic incentives to lawyers representing multiple clients make it unrealistic to believe counsel is always competent to advise his clients on potential conflicts. See *Lowenthal*, *supra* note 217, at 961-72.

<sup>240</sup> 47 N.Y.2d at 264, 391 N.E.2d at 993, 417 N.Y.S.2d at 911; note 230 *supra*.

<sup>241</sup> See note 232 *supra*.

<sup>242</sup> See note 239 *supra*.

<sup>243</sup> See note 237 and accompanying text *supra*.

<sup>244</sup> 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. *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. 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 ineffective.<sup>245</sup> 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,"<sup>246</sup> which is "depend[ent], in each case, upon the particular facts and circumstances surrounding that case."<sup>247</sup> The waiver should retain its validity, however, for any pos-

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<sup>245</sup> 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. Generally, 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 ex rel. McCann*, 317 U.S. 269, 279 (1942); *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938). Where a *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 defendant 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).

<sup>246</sup> *People v. Gomberg*, 38 N.Y.2d at 313, 342 N.E.2d at 554, 379 N.Y.S.2d at 774 (citations omitted).

<sup>247</sup> *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). It is clear that a defendant may establish 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, *see id.* The validity of a waiver before trial of actual conflicts, however, remains unclear. While the *Gomberg* Court seemed to indicate that a waiver would foreclose establishment of prejudice arising from a conflict, *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. *See Geer, supra* note 217, at 141-45. Situations may arise when a defendant is suddenly and suprisingly confronted by a codefendant'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 defendant 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. *See id.* at 145. Since the inquiry was promulgated primarily 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 contingencies. Indeed, the Supreme Court has noted that "[the Court] indulge[s] [in] every reasonable presumption against the waiver of fundamental rights." *Glasser v. United States*, 315 U.S. 60, 70 (1942).

In order that these unwaived conflicts be avoided before their damaging effects are reflected 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." *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 representation might deprive the defendant of effective assistance of counsel. *People v. Hall*, 46 N.Y.2d 873, 875, 387 N.E.2d 610, 611, 414 N.Y.S.2d 678, 679, *cert. denied*, 100 S. Ct. 97 (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.<sup>248</sup>

Patricia A. O'Malley

*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<sup>249</sup> 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.<sup>250</sup> Evidence so obtained may be admitted, however, if

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sented an identification witness for the prosecution. *Id.* at 874, 387 N.E.2d at 610, 414 N.Y.S.2d at 678-79. The Court of Appeals upheld the order since "it appeared very likely that [the attorney's] continuance in the case would work unfair prejudice either to the prosecution or to the defendant." *Id.* at 875, 387 N.E.2d at 611, 414 N.Y.S.2d at 679; see *People v. Huggard*, N.Y.L.J., June 21, 1979, at 7, col. 3 (Sup. Ct. N.Y. County).

<sup>248</sup> 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." *Id.* at 719, 402 N.E.2d at 140, 425 N.Y.S.2d at 801.

<sup>249</sup> The fourth amendment provides in part:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .

U.S. CONST. amend. IV, see N.Y. CONST. art. 1, § 12.

<sup>250</sup> 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 *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

The primary goal of the exclusionary rule is to deter unlawful police conduct rather than to protect the constitutional rights of the victim of the illegal search or seizure. *Elkins v. United States*, 364 U.S. 206, 217 (1960); see *Brown v. Illinois*, 422 U.S. 590, 599-600 (1975); *United States v. Calandra*, 414 U.S. 388, 347-48 (1974); *People v. McGrath*, 46 N.Y.2d 12, 31, 385 N.E.2d 541, 550, 412 N.Y.S.2d 801, 810-11 (1978), cert. denied, 440 U.S. 972 (1979). The mandate of *Mapp* was first complied with by the New York Court of Appeals in *People v. Loria*, 10 N.Y.2d 368, 371, 374, 179 N.E.2d 478, 481, 482, 223 N.Y.S.2d 462, 465, 467 (1961), overruled in part, *People v. McQueen*, 18 N.Y.2d 237, 221 N.E.2d 550, 274 N.Y.S.2d 886 (1966), and has been consistently followed in subsequent cases. See, e.g., *People v. Gonzalez*, 39 N.Y.2d 122, 130-32, 347 N.E.2d 575, 582, 383 N.Y.S.2d 215, 221-220 (1976); *People v. Williams*, 37 N.Y.2d 206, 208, 333 N.E.2d 160, 160, 371 N.Y.S.2d 880, 881 (1975).

Often referred to as the "fruit of the poisonous tree" doctrine, *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. *Id.* at 484-86; *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