July 2015

Sixth Amendment; Right to Counsel; Multiple Representation; Cuyler v. Sullivan

Howard S. Essner

CONSTITUTIONAL LAW

Sixth Amendment • Right to Counsel • Multiple Representation

Cuyler v. Sullivan, 100 S. Ct. 1708 (1980).

IN *Cuyler v. Sullivan*,[1] the Supreme Court finally resolved two important issues in the areas of criminal law and the sixth amendment right to counsel. In this case, the Court is faced with a situation with which it has dealt but twice before:[2] joint representation of criminal defendants. *Cuyler* represents the culmination of the legal inquiry into the problems inherent whenever a single attorney represents more than one defendant in a criminal proceeding. In *Glasser v. United States*,[3] the Court recognized that if multiple representation results in a conflict of interests, as it often does, thereby affecting an attorney's performance at trial, the defendant has been denied his constitutional right. In *Holloway v. Arkansas*,[4] the Court ruled that the failure of a trial court to inquire into a timely objection of a defendant or his attorney that a possible conflict of interest exists mandates an automatic reversal of the conviction. In *Cuyler*, the Court finally puts to rest the two questions left unanswered in *Holloway*: 1) Whether a trial court has the affirmative duty to investigate the possibility of conflict when confronted with multiple representation, and 2) How strong a showing of a conflict of interest is necessary to overturn a conviction.[5]

John Sullivan was indicted with Gregory Carchidi and Anthony DiPasquale for the first-degree murder of a labor official and his companion. The three defendants were represented by two privately retained lawyers, G. Fred DiBona and A. Charles Peruto. At no time during the proceedings did Sullivan or his attorneys object to the multiple representation. Sullivan was tried first. The state's evidence against him was almost entirely circumstantial. The defense did not present any evidence nor did Sullivan testify. The jury found him guilty and sentenced him to life imprisonment. His conviction was upheld by an equally divided Pennsylvania Supreme Court.[6] Carchidi and DiPasquale were acquitted in separate trials.

Sullivan sought collateral relief in the Pennsylvania courts,[7] alleging, *inter alia*, that he had not received effective assistance of counsel because

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[1] 100 S.Ct. 1708 (1980).

[2] Holloway v. Arkansas, 435 U.S. 475 (1978); Glasser v. United States, 315 U.S. 60 (1942).

[3] 315 U.S. 60.

[4] 435 U.S. 475.

[5] *Id.* at 483.

[6] Commonwealth v. Sullivan, 446 Pa. 419, 286 A.2d 898 (1971).

[7] Pennsylvania Post Conviction Hearing Act, PA. STAT. ANN. tit. 19, 1180-1 to 1180-10 (repealed 1978, Purdon Supp. 1980).

his attorneys had represented conflicting interests. In the post-conviction hearing, the lower court took the testimony of Sullivan's attorneys and codefendants. The court held that Sullivan had a right to a second direct appeal to the Pennsylvania Supreme Court because his counsel had not given him effective assistance in the first appeal. It reserved judgment on the other issues, including his claim of conflict of interest, for the Pennsylvania Supreme Court.

In this second appeal,[8] the Pennsylvania Supreme Court again affirmed the conviction. The court found that there had been no multiple representation as a matter of law.[9] It based this decision primarily on the testimony in the lower court of one of Sullivan's attorneys. Peruto had testified that DiBona had been chief counsel for Sullivan and that he, Peruto, had merely assisted DiBona at trial. The two attorneys' roles were reversed in the trials of the other two defendants.[10] The court also concluded that resting the defense without testimony was a reasonable trial tactic.[11]

Sullivan then sought habeas corpus relief in federal district court. The case was assigned to a magistrate who found that Sullivan's counsel had represented conflicting interests. The court, however, adopted the opinion of the Pennsylvania Supreme Court, finding no multiple representation and no evidence of a conflict of interest.[12]

The Court of Appeals for the Third Circuit,[13] on appeal, found as a matter of law that there had been multiple representation. Although it refused to apply a per se rule that multiple representation is "tantamount to a denial of effective assistance of counsel,"[14] the court found that "some showing of possible conflict of interest or prejudice, however remote"[15] mandates a reversal of the conviction. The court found the possibility of conflict in the testimony of DiBona, who stated that the decision to rest the defense in Sullivan's trial was based in part on a desire to protect his key witnesses for the later trials.[16]

Before the Supreme Court could decide the question of multiple representation, it had to dispose of an interesting side issue: does the conduct of a

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[8] Commonwealth v. Sullivan, 472 Pa. 129, 371 A.2d 468 (1977).
[9] *Id.* at 161, 371 A.2d at 483.
[10] *Id.*
[11] *Id.* at 162, 371 A.2d at 483-84.
[12] Appendix to Petition for Certiorari at 5C-8C, Cuyler v. Sullivan, 100 S.Ct. 1708 (1980).
[13] 593 F.2d 512 (3rd Cir. 1979).
[14] *Id.* at 519, *quoting* Walker v. United States, 422 F.2d 374, 375 (3rd Cir. 1970), *cert. denied*, 399 U.S. 915 (1970).
[15] *Id.*
[16] The facts of the case are paraphrased from the Supreme Court's discussion, 100 S.Ct. at 1712-14.

private defense attorney in criminal proceedings constitute state action for purposes of a writ of habeas corpus. As the Court put it, "we must decide whether the failure of retained counsel to provide adequate representation can render a trial so fundamentally unfair as to violate the Fourteenth Amendment."[17] The Court found that a criminal trial conducted by the state is a state action within the meaning of the fourteenth amendment.[18] A defendant who is denied effective assistance of counsel is denied due process of law.[19] The right to counsel means more than the physical presence of an attorney at trial. The state cannot in any way impair or control the decisions and tactics of a defense attorney at trial.[20] Since it is the state that must ensure a defendant's right to effective counsel, a state that obtains a conviction in a proceeding in which the defense has been less than adequate has deprived the defendant of his constitutional right.

In 1942, the Supreme Court first addressed the problems of multiple representation in *Glasser v. United States*.[21] The Court was torn between the benefits of multiple representation, both in terms of judicial economy[22] and tactical advantages,[23] and the trial court's "serious and weighty"[24] duty to see that the codefendants' constitutional rights remain unimpaired. The Court held that if counsel is ineffective because of the representation of conflicting interests, the defendant has been denied his sixth amendment rights.[25] It also held that the possibility of conflict of interest warrants separate representation. "We think that such a desire [to have separate counsel] on the part of the accused should be respected. Irrespective of any conflict

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[17] *Id.* at 1715.

[18] *Id. See* Lisenba v. California, 314 U.S. 219, 236-37 (1941).

[19] Gideon v. Wainwright, 372 U.S. 335 (1963).

[20] Brooks v. Tennessee, 406 U.S. 605, 612-13 (1972).

[21] 315 U.S. 60 (1942). Five codefendants were tried jointly on charges of conspiring to defraud the government. Initially all five were represented separately. One defendant, Kretske, asked the court to dismiss his attorney. The trial judge did not wish to delay the trial, so he asked Stewart, Glasser's lawyer, to defend Kretske as well. Stewart and Glasser objected. Stewart informed the judge of a possible conflict of interest. Despite this possibility, Stewart deferred to the judge's wishes and the trial proceeded. Both defendants were convicted. Glasser appealed and the Supreme Court reversed, holding that he had been denied the right to counsel because of the conflicting interests which his attorney was forced to represent. 315 U.S. at 76. The convictions of the codefendants were upheld. 315 U.S. at 76-77.

[22] The trial judge's decision to appoint Stewart as Kretske's attorney was an attempt to avoid delay. 315 U.S. at 69.

[23] "Joint representation is a means of insuring against reciprocal recriminations. A common defense often gives strength against a common attack." 315 U.S. at 92 (Frankfurter, J., dissenting).

[24] 315 U.S. at 71 (*quoting* Johnson v. Zerbst, 304 U.S. 458, 465 (1938)).

[25] *Id.* at 76.

of interest, the additional burden of representing another party may conceivably impair counsel's effectiveness."[26]

The next logical step in the *Glasser* Court's analysis was to determine what standard of review is applicable in determining the reversal of a conviction where the defendant has objected to multiple representation. The Court was explicit:

> To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow the courts to indulge in nice calculations as to the amount of prejudice arising from its denial.[27]

The Court refused to apply the harmless error[28] rule. The Court, however, expended considerable effort detailing the actual conflict which had resulted from the joint representation of Glasser and Kretske and identified specific instances of the resulting prejudice.[29] It is this examination of the actual conflict which created the varying approaches of the courts of appeals in this area. The resulting confusion remained unresolved until the Court's decision in *Cuyler*.

In the years between *Glasser* and the Court's more recent decisions on this problem in *Holloway* and *Cuyler*, the courts of appeals have differed on how to handle the problem of multiple representation. It should be noted that from a practical point of view most instances of conflict of interest in multiple representation are handled without difficulty. Most trial courts almost automatically grant an attorney's request for appointment of separate counsel when counsel asserts that joint representation will result in conflicting interests.[30] Therefore, the problem is most critical when no objection is raised. The first question which the courts of appeals address is whether a trial court has the duty to investigate a possible conflict of interest in every case of multiple representation. *Glasser* would seem to support such a duty: "Upon the trial judge rests the duty of seeing that the

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[26] *Id.* at 75. The Court noted:

> Of equal importance with the duty of the court to see that an accused has the assistance of counsel is its duty to refrain from embarrassing counsel in the defense of an accused by insisting, or indeed, even suggesting, that counsel undertake to concurrently represent interests which might diverge from those of his first client, when the possibility of that divergence is brought home to the court. 315 U.S. at 76.

[27] *Id.* at 75-76.

[28] Harmless error means "error or defects which do not affect the substantial rights of the parties." Chapman v. California, 386 U.S. 18, 22 (1967) (*quoting* 18 U.S.C. § 2111 (1976)).

[29] 315 U.S. 76.

[30] Holloway, 435 U.S. at 485. The Court notes this practice with whole-hearted approval.

trial is conducted with solicitude for the essential rights of the accused."[31] This language has led some courts of appeals to invoke their supervisory power to require trial courts to make such an inquiry.[32] Some require no inquiry.[33] One recent decision[34] has gone so far as to hold that the sixth amendment requires such an investigation.

The more troublesome issue dividing the courts of appeals is the question of what degree of conflict of interest must be shown in order to obtain a reversal of a conviction where no objection is raised at trial. The different approaches are largely the result of the confusing language of *Glasser*. Some courts adopt a very liberal approach, requiring reversal on a showing of a possible conflict, no matter how remote.[35] Most courts, following the *Glasser* Court's specific identification of the conflict of interest, require that the appellant, with varying degrees of specificity, identify in the record an actual conflict of interest.[36] Some of those jurisdictions that require the trial court to inquire into the possibility of conflict apply a shifting standard: if an inquiry is made, the appellant must identify with specificity the actual conflict of interest. If no inquiry is made, the government must show that a conflict is improbable.[37]

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[31] 315 U.S. at 71.

[32] *Cuyler*, 100 S.Ct. at 1717 n.10. *See* United States v. Cox, 580 F.2d 317, 321 (8th Cir. 1978), *cert. denied*, 439 U.S. 1075 (1979); United States v. Walker, 579 F.2d 649, 651-52 (1st Cir. 1978); United States v. Lawriw, 568 F.2d 98 (8th Cir. 1977), *cert. denied*, 435 U.S. 969 (1978); United States v. De Berry, 487 F.2d 448, 452-54 (2nd Cir. 1973).

[33] *Id. See* United States v. Maverick, 601 F.2d 921, 929 (7th Cir. 1979); United States v. Steele, 576 F.2d 111 (6th Cir. 1978) (per curiam), *cert. denied*, 439 U.S. 928 (1978); Foxworth v. Wainwright, 516 F.2d 1072 (5th Cir. 1972).

[34] Colon v. Fogg, 603 F.2d 403, 407 (2nd Cir. 1979).

[35] Sullivan v. Cuyler, 593 F.2d 512, 520 (3rd Cir. 1979); Hart v. Davenport, 478 F.2d 203, 210 (3rd Cir. 1973); Walker v. United States, 422 F.2d 374, 375 (3rd Cir. 1970), *cert. denied*, 399 U.S. 915 (1970). *See also* Lollar v. United States, 376 F.2d 243, 247 (D.C. Cir. 1967) (Conviction must be overturned unless there is no basis in the record for an informed speculation that appellant's rights were prejudicially affected).

[36] Thacker v. Bordenkircher, 590 F.2d 640, 642 (6th Cir. 1979), *cert. denied*, 442 U.S. 912 (1979) (actual conflict); United States v. Cox, 580 F.2d 317, 321-23 (8th Cir. 1978), *cert. denied*, 439 U.S. 1075 (1979) (actual or substantial possibility of conflict); United States v. Atkinson, 565 F.2d 1283, 1284-85 (4th Cir. 1977), *cert. denied*, 436 U.S. 944 (1978) (actual conflict) United States v. Kutas, 542 F.2d 527, 529 (9th Cir. 1976), *cert. denied*, 429 U.S. 1079 (1977) (actual conflict); United States v. Mandell, 525 F.2d 671, 677-78 (7th Cir. 1975), *cert. denied* 423 U.S. 1049 (1976) (reasonable degree of specificity of actual conflict); Foxworth v. Wainwright, 516 F.2d 1072, 1077 (5th Cir. 1975) (actual significant conflict); Austin v. Erikson, 477 F.2d 620, 623 (8th Cir. 1973) (actual or substantial possibility of conflict); United States v. Williams, 429 F.2d 158, 161 (8th Cir. 1970), *cert. denied*, 400 U.S. 947 (1970) (actual or substantial possibility of conflict); United States v. Lovano, 420 F.2d 769, 773 (2nd Cir. 1970), *cert. denied*, 397 U.S. 1071 (1970) (real conflict of interest).

[37] United States v. Carrigan, 543 F.2d 1053, 1056 (2nd Cir. 1976); United States v. Foster, 469 F.2d 1, 4 (1st Cir. 1972).

The Court's decision in *Holloway*[38] did little to alleviate this confusion. In fact, although it recognized that the courts of appeals were divided on these issues, it refused to rule on them. The Court did affirm its holding in *Glasser*. "[W]henever a trial court improperly requires joint representation over timely objection reversal is automatic."[39] The Court also refused to apply the harmless error rule in such cases, pointing to the difficulty of identifying in the record the actual prejudice which resulted from the joint representation:

> But in cases of joint representation of conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial negotiations and in the sentencing process. It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics and decisions in plea negotiations would be virtually impossible. Thus an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.[40]

In *Cuyler,* the Court finally resolved the two issues which had divided the courts of appeals since the Court's decision in *Glasser* in 1942. The Court ruled that the sixth amendment does not require a trial court to investigate possible conflicts of interest in every instance of multiple representation.[41] The Court did note with approval that some jurisdictions have invoked their supervisory power to require such an inquiry.[42] In this respect the burden is on the defense attorney to object to multiple representation when it becomes clear that the interests of his clients conflict.

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[38] 435 U.S. 475 (1978). A public defender was appointed to defend three defendants charged with robbery and rape. The attorney objected to the multiple representation, repeatedly stating that the interests of his three clients conflicted. He asked that separate counsel be appointed. The trial judge ignored his objections and ordered him to proceed. The Supreme Court reversed.

[39] *Id.* at 488.

[40] *Id.* at 490-91.

[41] 100 S.Ct. at 1717.

[42] *Id.*, n.10. The Court has also promulgated proposed Fed. R. Crim. P. 44(c), effective December 1, 1980, which reads:

> Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, 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 that no conflict of interest is likely to arise, the court shall take such measure as may be appropriate to protect each defendant's right to counsel.

It is the resolution of the second issue that represents the most troublesome aspect of this decision; that being to what extent does an actual conflict of interest have to be shown in order to warrant reversal. The Court began its analysis by reaffirming the holding of *Glasser* and *Holloway*: the failure of a trial court to respond to a defendant's timely objection to joint representation mandates automatic reversal.[43] But joint representation is not a per se denial of the right to counsel, so if there is no objection, a reviewing court cannot presume that a conflict existed. If the Court had allowed such a presumption, the Court would in effect be adopting a per se rule, prohibiting multiple representation in all cases. Therefore, a defendant must show more that a mere possibility of a conflict of interest in order to have his conviction overturned.[44] It thus would seem logical for the Court to have adopted the position taken by the majority of the courts of appeals:[45] a showing of an actual conflict of interest in the record is necessary to warrant reversal. But the Court went one step further than that:

> In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest *adversely affected his lawyer's performance at trial.*[46] (emphasis added)

This passage indicates that not only must a defendant show that his lawyer represented conflicting interests, but he must indicate how the lawyer's performance at trial would have differed had there been no conflict. Such a standard is unprecedented.[47] It goes far beyond the requirements of the most strict of the courts of appeals. It is possible, as Justice Marshall pointed out in his dissent,[48] that the Court did not intend to go as far as this passage indicates. The Court stated later in the opinion:

> But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.[49]

Thus it is possible that Court intended to require no more than a showing of the actual conflict of interest. Yet, in the very next paragraph, the

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[43] *Id.* at 1718.
[44] *Id.*
[45] *See supra* note 36 and accompanying text.
[46] 100 S.Ct. at 1718. For a critical view of this requirement, *see* Justice Marshall's concurring and dissenting opinion at 1721.
[47] *Id.* at 1723.
[48] *Id.* at 1721.
[49] *Id.* at 1719.

stricter standard is repeated.[50] A defendant who does not object to joint representation at trial must show that his lawyer represented conflicting interests and that the conflict prejudiced his lawyer's performance. The harmless error rule, so long avoided by the Court under these circumstances, seems now to be in force.

It may be true that the Court's decision in *Cuyler* may not be as far reaching as it may seem. Most instances of conflict of interest resulting from joint representation are and will be handled at the trial court. Most attorneys are competent enough to recognize a conflict of interest and to request appointment of separate counsel. In those cases where there is no objection, most trial courts will inquire into the possibility of a conflict. Because of the vigilance of the trial courts and the attorneys, most defendants will know of their right to have separate counsel. But there may be one defendant who is not informed, whose lawyer does not object and whose trial judge does not inquire. If, on appeal, he attempts to raise the issue of a conflict of interest, he must show that his lawyer's performance was prejudiced at trial. In other words, he will be faced with a task, mandated by the Court's decision in *Cuyler,* that the very same Court some two years earlier characterized as being "virtually impossible."[51]

HOWARD S. ESSNER

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[50] *Id.*

[51] *Holloway*, 435 U.S. at 491.