Hofstra Law Review

Volume 5 | Issue 2 Article 3

1977

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Recommended Citation
Hyman, Steven J. (1977) "Joint Representation of Multiple Defendants in a Criminal Trial: The Court's Headache," *Hofstra Law Review*: Vol. 5: Iss. 2, Article 3.
Available at: https://scholarlycommons.law.hofstra.edu/hlr/vol5/iss2/3

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JOINT REPRESENTATION OF MULTIPLE DEFENDANTS IN A CRIMINAL TRIAL: THE COURT'S HEADACHE

*Steven J. Hyman**

The problem that arises when an attorney represents more than one client in the same or related matter has been a constant source of concern for both the bar and the courts, because there always exists the possibility that the interests of the clients may become "conflicting, inconsistent, diverse or otherwise discordant."[1] If a conflict of interest occurs, the attorney is placed in the untenable position of having to divide his loyalties between the competing interests of his clients. In such situations one or all of the clients may suffer because the judgment of the lawyer with regard to one client may not be in the best interests of the other. The ethical dilemma thus presented has long been recognized by the bar and is specifically referred to in the Code of Professional Responsibility.[2] The problem of an attorney's conflict of interest, however, is not merely an abstract ethical consideration, for it is the client who suffers the damage when he is represented by a lawyer who has not, "within the bounds of the law," acted "solely for the benefit of his client and free of compromising influences and loyalties."[3]

It is in the context of a criminal proceeding that the magnitude of the problem becomes apparent.[4] In a criminal case the

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1. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 5-14 (1975). This section provides:

> Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.

2. *Id. See also* ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-1, EC 9-6 (1975).

3. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 5-1 (1975). This section provides:

> The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

4. This article will discuss only the problem of an attorney's conflict of interest in criminal cases. The problems caused by conflicts of interest in civil cases involve substantially different issues since they are not premised on sixth amendment rights. That does

Published by Scholarship @ Hofstra Law, 1977

conflict of interest may arise in a variety of ways. Where an attorney represents two or more defendants in the same case there may come a time when their defenses are antagonistic or when one client desires to take a plea and the other does not.[5] A conflict may also develop when an attorney, representing one client, finds that he must cross-examine another client testifying for the prosecution.[6]

The American Bar Association, in devising appropriate standards of conduct for the defense, has recognized the problem and has stated:

> The potential for conflict of interest in representing multiple defendants is so grave that ordinarily lawyers should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation.[7]

The standards set by the bar and the caveats to a lawyer against dual representation are only part of the answer to the problems posed by conflicts of interest in criminal cases. Disciplinary proceedings for failure to adhere to this standard are, of course, of no consequence to the defendant who has been deprived of effective counsel. A better solution to the problem is necessary.

Almost thirty-five years ago the Supreme Court recognized the severity of the problem in the landmark case of *Glasser v. United States.*[8] Under *Glasser,* the constitutional right to the assistance of counsel means the effective assistance of counsel who is not inhibited by conflicting loyalties to other defendants.[9] As a result of *Glasser,* the obligations of an attorney under the Code of Professional Responsibility have become a requirement

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not mean, however, that such conflicts of interest are less troublesome. *See* Judd, *Conflicts of Interest,* 44 FORDHAM L. REV. 1097, 1107 (1976).

5. For a good discussion of the kinds of conflicts of interest that arise, see Judd, *supra* note 4, at 1099-1107. *See also* Note, *Criminal Defendants and the Sixth Amendment: The Case For Separate Counsel,* 58 GEO. L.J. 369 (1969).

6. *See, e.g.,* United States v. Jeffers, 520 F.2d 1256 (7th Cir. 1975), for the problems presented by this type of conflict, although the opinion is far from a model of how to resolve the problem.

7. ABA STANDARDS, THE DEFENSE FUNCTION § 3.5(b) (1971). Neither the ABA Standards nor the Code of Professional Responsibility prohibits multiple defendant representation. The Code sanctions joint representation where justified. Whether the lawyer can fairly and adequately protect the interests of multiple defendants is decided on a case-by-case basis. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 5-16, EC 5-17 (1975).

8. 315 U.S. 60 (1942).

9. *Id.* at 65-66.

of the sixth amendment right to counsel. Whether the *Glasser* Court intended such a broad result is of little moment today,[10] for the courts have uniformly held that "representation free from conflicting interests is an essential part of the Sixth Amendment right to the effective assistance of counsel."[11] A defendant is entitled to an attorney who is "unhampered or unfettered in his professional responsibility to the accused,"[12] "whose undivided loyalties lie with his client"[13] and who "must offer untrammeled and unimpaired assistance free of any detrimental conflict of interest."[14] In fact, it has been stated in this context that a defendant is entitled to "a vigorous advocate having the single aim of acquittal by all means fair and honorable [and who is not] hobbled or fettered or restrained by commitments to others."[15]

The expansion of the sixth amendment right to include the effective assistance of an attorney free from conflict of interest is of immense legal significance. It means that with respect to the defendant's right to a fair trial, impaired counsel is equivalent to no counsel. The impact of this conclusion is that the courts have a special obligation to protect such fundamental rights of defendants.[16] As the *Glasser* Court stated: "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused . . . . The trial court should protect the right of an accused to have the assistance of counsel."[17] Because the right to the effective assistance of counsel is part of the sixth amendment, it is the further obligation of the court to insure that a defendant does not unwittingly waive this right. Again *Glasser* notes that one must indulge "every reasonable presumption against the waiver of fundamental rights"[18] and, further, the trial judge is obliged to make sure that there is an intelligent and competent waiver by the accused of his rights.[19]

10. The *Glasser* decision involved an unusual fact situation. The attorney's conflict of interest came about as a result of the trial court's assigning Glasser's retained counsel to represent another codefendant in the joint conspiracy trial.

11. United States v. Bernstein, 533 F.2d 775, 787 (2d Cir. 1976).

12. Larry Buffalo Chief v. South Dakota, 425 F.2d 271, 279 (8th Cir. 1970).

13. United States *ex rel.* Robinson v. Housewright, 525 F.2d 988, 992 (7th Cir. 1975).

14. Alvarez v. Wainwright, 522 F.2d 100, 105 (5th Cir. 1975).

15. Porter v. United States, 298 F.2d 461, 463 (5th Cir. 1962).

16. *See, e.g.*, Faretta v. California, 422 U.S. 806 (1975); Johnson v. Zerbst, 304 U.S. 458 (1938); Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932).

17. Glasser v. United States, 315 U.S. 60, 71 (1942).

18. *Id.* at 70.

19. *Id. Glasser* specifically incorporates the knowing and intelligent standard origi-

To state the constitutional imperatives, however, does not resolve the problem. The courts must still determine when a sixth amendment violation has occurred. It is clear that joint representation is not per se violative of the constitutional right to effective counsel. *Glasser* recognized that joint representation runs afoul of the constitutional guarantee only when it results in a conflict of interest which causes the defendant some prejudice.[20] Because of the significance of the right involved, however, once a conflict of interest is demonstrated, the court is not to attempt a calculation of the "precise degree of prejudice sustained."[21] This remains the acknowledged rule.[22] As *Glasser* stated: "The 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."[23]

The courts, however, have been unable to agree on any coherent and uniform standard for determining what constitutes a conflict of interest. In the Third and Fourth Circuits the defendant need only show "a possible conflict of interest or prejudice, however remote,"[24] while in the Fifth Circuit there must be a showing of some "actual, significant conflict."[25] The Second Circuit re-

nally enunciated in Johnson v. Zerbst, 304 U.S. 458, 465 (1938), which dealt with the failure of the court to protect a defendant's right to counsel under the sixth amendment. This standard, carried into the conflict of interest area, remains the applicable one today.

20. It is interesting to note that the attorney in *Glasser* had a conflict of interest because he represented two defendants with different interests. The Supreme Court reversed only Glasser's conviction, and not that of the codefendant Kretske, because, as the Court said, "[W]e are clear from the record that no prejudice is disclosed as to him." Glasser v. United States, 315 U.S. 60, 77 (1942).

21. Glasser v. United States, 315 U.S. 60, 75 (1942).

22. While the courts have recognized the need for some conflict, they have never been clear on whether conflict of interest and prejudice are synonymous. The First Circuit has stated that "[o]rdinarily, prejudice will be assumed from the existence of a conflict, but a conflict will not be inferred from the fact of joint representation." United States v. Foster, 469 F.2d 1 (1st Cir. 1972). *See also* United States v. Lovano, 420 F.2d 769, 773 (2d Cir. 1970), where the court used the terms "conflict" and "prejudice" interchangeably, as did the Third Circuit in United States *ex rel.* Hart v. Davenport, 478 F.2d 203, 210 (3d Cir. 1973). In United States v. Gaines, 529 F.2d 1038, 1044 (7th Cir. 1976), the Seventh Circuit, even after finding conflict, examined the record to see whether the defendant was prejudiced. In United States v. Kutas, 542 F.2d 527, 529 (9th Cir. 1976), the court required proof of an "actual conflict" and "prejudice" to the defense before a defendant could prevail on appeal. The Fifth Circuit in Foxworth v. Wainwright, 516 F.2d 1072, 1077 n.7 (5th Cir. 1975), commented upon the confusion in this area but could offer little clarification of it. The court's solution seemed to be that if there was an "actual, significant conflict" then prejudice was to be presumed, but if the conflict was "irrelevant or merely hypothetical" then there was no prejudice and no constitutional right infringed.

23. Glasser v. United States, 315 U.S. 60, 76 (1942).

24. United States *ex rel.* Hart v. Davenport, 478 F.2d 203 (3d Cir. 1973).

25. United States v. Huntley, 535 F.2d 1400, 1406 (5th Cir. 1976).

quires "some specific instance of prejudice, some real conflict of interest," before a conflict is established.[26] Thus, not only is there confusion,[27] but these differing views pervade each area of the law. The question of what constitutes waiver of a defendant's sixth amendment rights has engendered a variety of theories[28] as has the question whether there can be a distinction between the sixth amendment rights of a defendant where counsel is retained and where counsel is assigned.[29]

Yet for all this confusion and disagreement, the Supreme Court has refused to consider the problem in any meaningful way. Each circuit continues to struggle to formulate its own rules and approaches.[30] Each year the confusion grows greater among the circuits. The end result is that the law with regard to the sixth amendment right to the effective assistance of counsel has devel-

26. United States v. Mari, 526 F.2d 117, 119 (2d Cir. 1975).

27. The discussion in Note, *Criminal Defendants and the Sixth Amendment: The Case for Separate Counsel,* 58 GEO. L.J. 369, 375-83 (1969), sets forth the vagaries of the law in this area. Most courts acknowledge the difficulty in this area calling it "troublesome," Fryar v. United States, 404 F.2d 1071, 1073 (10th Cir. 1968), and "vexatious," Ford v. United States, 379 F.2d 123, 124 (D.C. Cir. 1967).

28. *Compare* United States v. Armone, 363 F.2d 385 (2d Cir. 1966), *with* United States v. DeBerry, 487 F.2d 448 (2d Cir. 1973).

29. Most courts have agreed that it is irrelevant whether counsel has been retained or assigned in determining if a defendant has been denied the effective assistance of counsel. *See* United States v. Alberti, 470 F.2d 881 (2d Cir. 1972); United States v. Lovano, 420 F.2d 769, 774 (2d Cir. 1970). *See also* United States v. Gaines, 529 F.2d 1038, 1043 (7th Cir.1976); United States *ex rel.* Hart v. Davenport, 478 F.2d 203, 210 (3d Cir. 1973); United States v. Foster, 469 F.2d 1, 4 (1st Cir. 1972); Larry Buffalo Chief v. South Dakota, 425 F.2d 271, 279 (8th Cir. 1970). Compare these, however, with several recent decisions in the Fifth Circuit which now intimate that the distinction between retained counsel and assigned counsel is significant. In Horowitz v. Henderson, 514 F.2d 740 (5th Cir. 1975), the court limited its holding to the facts of the case, "in particular the fact Horowitz' counsel was appointed." *Id.* at 743. In United States v. Huntley, 535 F.2d 1400 (5th Cir. 1976), the court stated: "We note that our disposition makes it unnecessary to consider what represents a waiver of the right to effective assistance of counsel in the context of joint representation by retained counsel." *Id.* at 1407 n.11. *See also id.* at 1406 n.10. The court in Foxworth v. Wainwright, 516 F.2d 1072 (5th Cir. 1975), noted that "joint representation by retained counsel is a different question absolutely." *Id.* at 1074 n.4.

30. Recently, the Court in Dukes v. Warden, 406 U.S. 250 (1972), was presented with a case which offered ample opportunity for comment on the subject. The case involved a defendant who claimed that his guilty plea was brought about by his lawyer's coercion and favoritism towards another client whose interests conflicted with his own. The majority found the plea of guilty a complete waiver and relied, without further amplification, on the state court finding that there was no conflict of interest. *Id.* at 250-56. The dissenters found that at the point the defendant sought to withdraw his plea, there was no need to decide whether there was a conflict of interest which deprived the defendant of his fourteenth amendment right to counsel and argued the issue on other grounds. *Id.* at 268 (Marshall, J., dissenting).

oped without cohesion of thought or unity of purpose.

Notwithstanding that it is almost impossible to arrive at a logical synthesis of the case law in the area, several theories do exist that could prevent the persistent reappearance of the conflict of interest problem. The first is a straightforward approach that does away with all need to define conflict of interest, prejudice or waiver: Ban all joint representation. One judge, in fact, has posited that there should be no joint representation in criminal cases except in "extraordinary circumstances."[31] While such a view has been accepted for assigned counsel,[32] it would create substantial constitutional problems with retained counsel. A defendant has the right to counsel of his choice[33] and has the right to waive counsel entirely.[34] Since he has the prerogative to waive his right to the assistance of counsel, he thus would appear to have *a fortiori* the power to waive his right to the effective assistance of counsel. The courts have, therefore, generally agreed that the total ban rule is unacceptable.[35]

A more effective and far less heavy-handed method for protecting the sixth amendment right is what may be called the "affirmative inquiry" approach. This approach places an obligation upon the trial court to advise multiple defendants represented by one attorney what conflict of interest means, what the risks are and what alternatives are available to them. It provides an efficient way for the court to achieve the essential object of the sixth amendment right to counsel — to assure understanding of

31. United States v. Mari, 526 F.2d 117, 120-21 (2d Cir. 1975) (Oakes, J., concurring). Recently, in United States v. Carrigan, 543 F.2d 1053 (2d Cir. 1976), Judge Lumbard, in a concurring opinion, advocated a ban on joint representation of multiple defendants by attorneys in criminal cases. As Judge Lumbard stated: "It has become increasingly clear that the only way to ensure adequate representation for each defendant in a multidefendant case is the initiative of the court to require separate counsel as soon as the court is aware of such a situation." *Id.* at 1058.

32. *See* United States v. Morgan, 396 F.2d 110 (2d Cir. 1968); Lollar v. United States, 376 F.2d 243 (D.C. Cir. 1967). *See also* United States v. Gaines, 529 F.2d 1038, 1044 n.4 (7th Cir. 1976); Fryar v. United States, 404 F.2d 1071, 1073 (10th Cir. 1968).

33. United States v. Armedo-Sarmiento, 524 F.2d 591 (2d Cir. 1975); United States v. Garcia, 517 F.2d 272 (5th Cir. 1975).

34. Faretta v. California, 422 U.S. 806 (1975).

35. *See* United States v. Armedo-Sarmiento, 524 F.2d 591 (2d Cir. 1975); United States v. Garcia, 517 F.2d 272 (5th Cir. 1975); United States v. Liddy, 348 F. Supp. 198 (D.D.C. 1972). *See also* United States v. Carrigan, 543 F.2d 1053 (2d Cir. 1976) (Lumbard, J., concurring); United States v. Mari, 526 F.2d 117 (2d Cir. 1975) (Oakes, J., concurring). While both Judges Lumbard and Oakes advocate banning joint representation in multidefendant criminal cases, they cite no authority for such a proposition, nor do they seek to reconcile such a view with *Armedo-Sarmiento.*

the right and a knowing and voluntary waiver of it.[36] By placing an affirmative duty on the trial court, such a rule places the responsibility for preserving the sixth amendment rights of defendants where it belongs.

While *Glasser* acknowledged that a trial court has the "duty" to insure the fundamental rights of the defendants,[37] the affirmative inquiry approach was not espoused in any significant way until 1965 in *Campbell v. United States.*[38] In this case the District of Columbia Court of Appeals stated the rule as follows:

> When two or more defendants are represented by a single counsel, the District Court has a duty to ascertain whether each defendant has an awareness of the potential risks of that course and nevertheless has knowingly chosen it.
> . . . The judge's responsibility is not necessarily discharged by simply accepting the co-defendants' designation of a single attorney to represent them both. An individual defendant is rarely sophisticated enough to evaluate the potential conflicts, and when two defendants appear with a single attorney it cannot be determined, absent inquiry by the trial judge, whether the attorney has made such an appraisal or has advised his clients of the risks. Considerations of efficient judicial administration as well as important rights of defendants are served when the trial judge makes the affirmative determination that co-defendants have intelligently chosen to be represented by the same attorney and that their decision was not governed by poverty and lack of information and the availability of assigned counsel.[39]

The *Campbell* approach has found support in some other circuits, though in somewhat different form. In *United States v. Foster,*[40] the First Circuit required affirmative inquiry under its "supervisory powers."[41] The Third Circuit, in *United States ex rel. Hart v. Davenport,*[42] expressed its approval of the affirmative inquiry approach:

> [W]e believe the dangers inherent in joint representation are serious enough . . . to make it highly desirable that [defendants] be apprised of them. If such dangers are commu-

36. *See* note 19 *supra*.
37. Glasser v. United States, 315 U.S. 60, 71 (1942).
38. 352 F.2d 359 (D.C. Cir. 1965).
39. *Id.* at 360.
40. 469 F.2d 1 (1st Cir. 1972).
41. *Id.* at 4-5.
42. 478 F.2d 203 (3d Cir. 1973).

> nicated to [defendants], difficult questions of whether a conflict of interest arose because of joint representation can be avoided. [Defendants] will intelligently be given the choice of whether to reject joint representation or to waive their right to the unfettered representation made possible by separate counsel.[43]

The Fourth Circuit follows a similar approach, holding that the fact that two or more defendants are jointly represented by one attorney should alert the court to the existence of a possible conflict of interest and cause the court to make inquiry.[44] Some state courts have also adopted an affirmative inquiry requirement under such circumstances.[45] The affirmative inquiry rule has also found support in the Second Circuit,[46] although *Campbell* is not cited as authority for it and an earlier line of cases in the circuit had rejected *Campbell.*[47]

Unfortunately, the *Campbell* rule has not gained universal acceptance. Two years after *Campbell* was enunciated the affirmative inquiry approach was considered and rejected in *United States v. Paz-Sierra.*[48] In that case the Second Circuit deemphasized the need for the trial court to inquire of defendants in potential conflict of interest situations, observing:

> No facts have thus far been presented that the Bar of this country is so unmindful of the canons of ethics and its obligation to avoid positions of conflict as to call for a pre-trial cross-examination of defendants and their counsel on the theory, or even presumptuous presumption, that counsel will not be faithful to the best interests of their clients and when aware of any conflict of interest between clients jointly represented whether

43. *Id.* at 211 (quoting Government of the Virgin Islands v. Hernandez, 476 F.2d 791 (3d Cir. 1973)). *See also* United States v. Rispo, 460 F.2d 965 (3d Cir. 1972); Government of the Virgin Islands v. John, 447 F.2d 69 (3d Cir. 1971); United States *ex rel.* Small v. Rundle, 442 F.2d 235 (3d Cir. 1971). Unlike the First and D.C. Circuits, the Third Circuit did not make affirmative inquiry mandatory. Nevertheless the inquiry is obviously favored and is generally followed. *See, e.g.,* Boehmer v. United States, 414 F. Supp. 766 (E.D. Pa. 1976).

44. United States v. Truglio, 493 F.2d 574, 579 (4th Cir. 1974). *See also* Sawyer v. Brough, 358 F.2d 70 (4th Cir. 1966).

45. *See, e.g.,* People v. Gomberg, 38 N.Y.2d 307, 342 N.E.2d 550, 379 N.Y.S.2d 769 (1975); People v. Chacon, 69 Cal.2d 765, 447 P.2d 106, 13 Cal. Rptr. 10 (1968).

46. *See, e.g.,* United States v. Carrigan, 543 F.2d 1053 (2d Cir. 1976); United States v. DeBerry, 487 F.2d 448 (2d Cir. 1973).

47. *See, e.g.,* Oshen v. McMann, 378 F.2d 993 (2d Cir. 1967); United States v. Paz-Sierra, 367 F.2d 930, 932-33 (2d Cir. 1966), *cert. denied,* 386 U.S. 935 (1967); United States v. Armone, 363 F.2d 385 (2d Cir. 1966).

48. 367 F.2d 930 (2d Cir. 1966), *cert. denied,* 386 U.S. 935 (1967).

before or during trial will not disclose it to the court and seek appropriate relief.[49]

While this grand paean to the bar is not now the law in the Second Circuit,[50] it has nevertheless enjoyed continued acceptance in other circuits.

Both the Fifth and Seventh Circuits recently considered the affirmative inquiry rule and, citing *Paz-Sierra,* rejected such an approach. In *United States v. Boudreaux,*[51] the Fifth Circuit disposed of a court's obligation to inquire of all jointly represented defendants as follows: "Absent some notice that the right to effective counsel could be jeopardized by joint representation, the Court does not bear the responsibility of informing co-defendants of possible problems of joint representation."[52] The Seventh Circuit in *United States v. Mandell*[53] also refused to invoke an affirmative inquiry rule, stating:

> We think the Sixth Amendment rights of defendants are adequately safeguarded by imposing the duty of informing defendants of the potential dangers of multiple-client representation initially on the attorneys, as officers of the court, and by admonishing the trial judges to be watchful for indicia of conflict during the trial. Thus, we do not feel the D.C. Circuit's affirmative inquiry requirement is mandated by the Sixth Amendment, *Glasser,* or any other Supreme Court pronouncement.[54]

Although the *Mandell* court apparently did not want to ban such inquiry entirely,[55] later opinions by the circuit indicate that the *Campbell* rule was explicitly rejected.[56]

Other circuits are less definitive in their views on the subject, although the Ninth Circuit has expressly rejected the affirmative inquiry rule as a mandatory approach[57] and the Tenth Circuit has

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49. *Id.* at 932.

50. *See* notes 106-113 *infra* and accompanying text.

51. 502 F.2d 557 (5th Cir. 1974).

52. *Id.* at 558. *See also* United States v. Huntley, 535 F.2d 1400, 1406 (5th Cir. 1976).

53. 525 F.2d 671 (7th Cir. 1975), *cert. denied,* 96 S. Ct. 774 (1976).

54. *Id.* at 677.

55. In a footnote the court left the applicable procedure entirely up to the individual district court judges: "This is not to suggest that the adoption of such a practice by the district court judges within this circuit would not be desirable." *Id.* at 677 n.10.

56. *See* United States *ex rel.* Robinson v. Housewright, 525 F.2d 988 (7th Cir. 1975).

57. *See* United States v. Christopher, 488 F.2d 849, 851 (9th Cir. 1973), and cases cited therein. *But see* United States v. Kutas, 542 F.2d 527, 529 (9th Cir. 1976), where the district court required that each defendant sign an affidavit agreeing to the joint representation before allowing the attorney to enter his appearance. The affidavit pro-

implicitly done so.[58] The Eighth Circuit has struck a middle ground, suggesting that such a requirement might be helpful in assigned counsel cases but remaining silent on its use where retained counsel is concerned.[59]

The split among the circuits involves differing viewpoints of the role of the courts in protecting defendants from unwittingly losing these important rights. Since impaired counsel is the same as no counsel at all for purposes of a fair trial, the different approaches to the potential conflict of interest situations have great bearing on the ultimate scope and meaning of the sixth amendment right to counsel. A comparison of the disparate views with regard to (a) preserving the defendant's sixth amendment right to effective assistance of counsel, (b) fulfilling the requirement of informing defendants of their rights so that they may make knowing and intelligent waivers of them, and (c) achieving a fair and orderly administration of justice leads to the conclusion that the *Campbell* rule is superior.

Preserving Defendant's Sixth Amendment Right to Effective Assistance of Counsel

The clash between the *Campbell* approach and the *Mandell* view becomes clear upon analysis of the scope of the right each seeks to protect. Advocates of the noninquiry approach argue that the defendant's sixth amendment right to unimpaired counsel is

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vided that the defendants knew of the possible conflicts, that they had discussed the matter with the attorney and that they recognized their right to separate counsel. The court also required that the defendants and the attorney notify the court during the trial the moment any conflict arose.

58. Fryar v. United States, 404 F.2d 1071 (10th Cir. 1968). The court noted that the Second Circuit in *Paz-Sierra* and the D.C. Circuit in *Campbell* have differing rules. While it suggested appointment of separate counsel in assigned cases, where the possibiliy of conflict exists, the *Fryar* court did not discuss whether trial courts should affirmatively inquire. The court's silence has been taken to mean that it has rejected the affirmative inquiry rule. *See* United States v. Mandell, 525 F.2d 671, 677 (7th Cir. 1975), *cert. denied*, 96 S. Ct. 774 (1976); United States v. Boudreaux, 502 F.2d 557 (5th Cir. 1974).

59. In United States v. Williams, 429 F.2d 158 (8th Cir. 1970), the court stated:

> Assignment of one attorney to represent two or more co-defendants should never be made routinely or indiscriminately. To the contrary, where there are two or more defendants the trial judge should, before appointing the same attorney to represent them, conduct a careful inquiry and satisfy himself that no conflict of interest is likely to result and that the parties have no valid objection.

Id. at 161. The court recognized that the possibility always exists for a conflict of interest when two defendants are jointly represented. The court did not, however, extend such a rule to retained counsel cases even though the Eighth Circuit has indicated that there should be no distinction between assigned and retained counsel cases. Larry Buffalo Chief v. South Dakota, 425 F.2d 271, 279 (8th Cir. 1970).

best left to the attorney to uphold in the first instance and if that fails, appellate review of the trial record is available to determine if a conflict of interest existed. If the post-trial review reveals no conflict of interest, then there was no sixth amendment violation and thus no problem requiring court intervention under *Glasser*. On the other hand, proponents of affirmative inquiry argue that since all sixth amendment violations do not appear on the record the only way to truly protect a defendant's right to unimpaired counsel is for the trial court to try to assure it. Failing this, the court must at least make a defendant aware of the risks.

Reliance on the defense counsel to prevent the loss of a defendant's sixth amendment rights is no doubt sufficient in many instances, as *Paz-Sierra* states.[60] There are cases, however, in which the attorney has been wrong in his assessment of the problem, unaware of the issue entirely, or has otherwise failed to adhere to the Code of Professional Responsibility.[61] It is rare for the conflict to arise because of unknown facts or surprise witnesses[62]

60. While *Paz-Sierra* and *Mandell* both claim that the attorney can best judge the potential for conflict, when the attorney does claim to have found such conflict, his opinion is not, then, so highly regarded. In United States v. Jeffers, 520 F.2d 1256 (7th Cir. 1975), *cert. denied*, 96 S. Ct. 805 (1976), the defense counsel learned that a key prosecution witness had been a client of his office and informed the court that, because of information he had learned about the witness due to the attorney-client relationship, he could not effectively cross-examine the witness. When the attorney did not reveal this confidential information, the court held that there was no basis for the claimed conflict and instructed the attorney to continue with his cross-examination. *Id.* at 1266. Similarly, in United States v. Williams, 429 F.2d 158, 160 (8th Cir. 1970), the trial court rejected the assigned attorney's statement at arraignment that the joint representation of the codefendants might cause a conflict. On appeal, the Eighth Circuit affirmed, holding that the attorney's "bald and conclusory" statement was insufficient to establish a conflict of interest. *Id.*

61. The existence of the body of law dealing with conflict of interest is clear proof that attorneys do not always live up to the *Paz-Sierra* view. For example, in Holland v. Henderson, 460 F.2d 978, 981 (5th Cir. 1972), the failure of counsel to see that one defendant could not take the stand without inculpating the other defendant was particularly "pernicious." *Id.* In United States v. Gaines, 529 F.2d 1038 (7th Cir. 1976), the court denounced "the blindness of counsel to a potential conflict of interest." *Id.* at 1045. Obviously, in these instances, as in many others where a conviction had to be reversed as a result of a conflict of interest, the attorney failed to judge the situation as he should have. "Defense counsel should have realized that a vigorous defense of [the codefendant] would have been detrimental to appellant." United States v. Georvassilis, 498 F.2d 883, 886 (6th Cir. 1974). *See also* United States v. Marshall, 488 F.2d 1169 (9th Cir. 1973), where the court remarked that "counsel seems to have had no realization that there was a conflict of interest. . . ." *Id.* at 1191. The court also noted: "That no one seems to have been aware of the conflict or the error does not save the conviction; rather, it emphasizes the fact that [the defendant] did not get the effective assistance of counsel to which he was entitled." *Id.* at 1193.

62. *E.g.*, United States v. Jeffers, 520 F.2d 1256 (7th Cir. 1975), *cert. denied*, 96 S.

or by an action of the court.[63] The defendant's rights are violated by the very failure of the attorney to perceive the problem or, even worse, consciously to disregard it. In such instances the court must protect the defendant's sixth amendment rights because, obviously, the very existence of the problem indicates that counsel has not. In fact, the development of this entire body of case law stands as proof that members of the bar have not always been faithful to the best interests of their clients.[64]

If this primary[65] protection of the right to effective assistance of counsel is not totally successful, then, under the noninquiry approach, reliance on post-trial review should adequately protect a defendant's rights. The fact is, however, such review does not adequately insure a defendant's basic rights. A trial record cannot reveal the full extent to which a defendant may have suffered impaired counsel because of a conflict of interest. As the District of Columbia Circuit observed: "Like the famous tip of the iceberg, the record may not reveal the whole story; apparently minor instances in the record which suggest co-defendants' conflicting interests may well be the telltale signs of deeper conflict."[66]

Concededly, a trial transcript will in most cases reveal an overt conflict of interest. If two defendants are represented by one attorney and one of the defendants takes the stand and inculpates the other[67] or destroys the silent defendant's defense,[68] the conflict is readily apparent.[69] Similarly, if one defendant takes the stand

Ct. 805 (1976).

63. *E.g.*, Glasser v. United States, 315 U.S. 60 (1942).

64. *But see* United States v. Paz-Sierra, 367 F.2d 930, 932 (2d Cir. 1966), *cert. denied*, 386 U.S. 935 (1967).

65. United States v. Mandell, 525 F.2d 671, 677 (7th Cir. 1975), *cert. denied*, 96 S. Ct. 774 (1976).

66. Lollar v. United States, 376 F.2d 243, 246-47 (D.C. Cir. 1967). *See also* United States v. Foster, 469 F.2d 1 (1st Cir. 1972), wherein the court stated: "We are mindful of the difficulties faced by both attorneys and judges in attempting an after-the-fact reconstruction of the prejudice which may have been incurred from such sharing of counsel." *Id.* at 4.

In Fryar v. United States, 404 F.2d 1071 (10th Cir. 1968), the court stated: "Although it is clear that courts should not 'indulge in nice calculations in the amount of prejudice' . . . . still the appellate determination of the existence of prejudice, or its lack, has remained troublesome." *Id.* at 1073 (citations omitted).

67. *See, e.g.*, White v. United States, 396 F.2d 822 (5th Cir. 1968); United States v. Gougis, 374 F.2d 758 (7th Cir. 1967).

68. *See, e.g.*, United States v. DeBerry, 487 F.2d 448 (2d Cir. 1973); Holland v. Henderson, 460 F.2d 978 (5th Cir. 1972).

69. Where defendants are jointly represented and only one takes the stand, one court has commented that this alone may create serious problems for the silent defendant: "And if, where two defendants are represented by the same attorney, one defendant elects to

to help the other and in so doing incriminates himself, the conflict faced by the attorney representing both defendants will be apparent in the transcript.[70] However, what if the conflict is indetectable from a review of the record? The problems presented in such a case are far more subtle, but no less serious, and the trial transcript will be of little help in a reviewing court's consideration of them.

If one defendant does not take the stand out of deference to another, there is an obvious conflict of interest to the silent defendant.[71] Yet the record reveals nothing since the decision whether to take the stand was made in private between counsel and the clients. Where a defendant is offered the chance to plead guilty and receive a reduced sentence provided that he testify against his codefendant, the record will reveal no apparent conflict if the lawyer representing both defendants advises against the plea.[72] The same is true where the defense attorney elects to use only a joint defense and discards a possible defense that would have exonerated one of the defendants.[73]

While these conflicts might be revealed in a post-trial hearing,[74] that method relies too heavily on the lawyer, who may have

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take the stand and the other chooses not to, the possible prejudice in the eyes of the jury to the defendant who does not take the stand is almost inescapable." Morgan v. United States, 396 F.2d 110, 114 (2d Cir. 1968). *Compare Morgan with* Fryar v. United States, 404 F.2d 1071 (10th Cir. 1968), where the court found that one defendant not testifying did not require reversal and to hold otherwise was "subjective speculation." *Id.* at 1074.

70. *See, e.g.,* Austin v. Erickson, 477 F.2d 620 (8th Cir. 1973).

71. *See, e.g.,* United States v. Gaines, 529 F.2d 1038 (7th Cir. 1976).

72. *See, e.g.,* Alvarez v. Wainwright, 522 F.2d 100 (5th Cir. 1975).

73. *Compare* United States v. Luciano, 343 F.2d 172, 174 (4th Cir. 1965) ("[O]bviously, [the defendants] preferred to join forces against the indictment"), *and* United States v. Paz-Sierra, 363 F.2d 930, 933 (2d Cir. 1966), *cert. denied,* 386 U.S. 935 (1967) ("The two brothers and their counsel apparently decided they would pit their coordinated stories against that of the agent"), *with* United States v. DeYoung, 523 F.2d 807, 809 (3d Cir. 1975) ("The presentation of a consistent defense, far from precluding the possibility of prejudice, may even be evidence that the lack of independent counsel hindered development of the distinguishable positions of the separate defendants at trial." (Citations omitted)).

The Third Circuit has been particularly sensitive to the problems of a defendant who does not use a defense available to him when there is joint representation. *See* United States *ex rel.* Hart v. Davenport, 478 F.2d 203 (3d Cir. 1973); Government of the Virgin Islands v. Hernandez, 476 F.2d 791 (3d Cir. 1973); Government of the Virgin Islands v. John, 447 F.2d 69 (3d Cir. 1971). On the other hand, the problem of other available defenses was of no consequence to the court in United States v. Mandell, 525 F.2d 671 (7th Cir. 1975). "If we were to find a Sixth Amendment violation on the basis of these defendants' argument, we would, in effect, have to find such a violation in any case where two defendants of unequal culpability are represented by the same counsel." *Id.* at 678.

74. The post-trial hearing was first suggested in Morgan v. United States, 396 F.2d

caused the conflict, to acknowledge his initial misjudgment. As one court stated:

> An evidentiary hearing would force [the defendant's] attorney into a new conflict of interest in which his own personal and professional interest would be in conflict with his client's interest. While we should not presume that the attorney's testimony would be influenced by such a conflict, the appearance of justice would be ill-served by making [the defendant's] right to a new trial by reason of his attorney's conflict of interest perhaps dependent on whether that same attorney can rise above a new conflict involving his own interest.[75]

This statement places the problem in its proper perspective, and inasmuch as it was expressed by the same circuit that enunciated *Mandell,* it is further reason to believe that post-trial review is inadequate for protection of sixth amendment rights. Post-trial review will also fail to expose a conflict of interest when an attorney, recognizing that a conflict of interest may exist, attempts to overcompensate for it. Thus, as one court noted, the effort by the attorney to reconcile the conflict may prevent it from appear-

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110 (2d Cir. 1968). Its purpose was to permit the district court judge to determine whether the joint representation resulted in a conflict of interest, giving the defendant and the attorney the opportunity to be questioned by the court with regard to the issue. Such a hearing allows for direct inquiry and removes the need for speculation by the appellate court. *See* Alvarez v. Wainwright, 522 F.2d 100 (5th Cir. 1975); United States v. Lovano, 420 F.2d 769 (2d Cir. 1970). The courts have not, however, made use of the post-trial inquiry where they have decided that it would be of little value. The basis for such a determination is often quite speculative. *See also* United States v. Huntley, 535 F.2d 1400 (5th Cir. 1976); United States v. Alberti, 470 F.2d 878 (2d Cir. 1972), *cert. denied,* 411 U.S. 919 (1973); United States v. Williams, 429 F.2d 158 (8th Cir. 1970). Sometimes this approach works to the benefit of the defendant. Horowitz v. Henderson, 514 F.2d 740, 743 (5th Cir. 1975).

75. United States v. Gaines, 529 F.2d 1038, 1045 (7th Cir. 1976). There are times, however, when attorneys have admitted their errors, thus permitting the court to grant a defendant a new trial. *See* Alvarez v. Wainwright, 522 F.2d 100, 106 (5th Cir. 1975), where the court complimented the attorney, who overlooked a conflict, for being "candid."

On the other hand, how can the court know if counsel has been frank and candid? In United States *ex rel.* Robinson v. Wainwright, 525 F.2d 988 (5th Cir. 1975), the court noted:

> The record does not support the suggestion that defense counsel induced his client to plead guilty for the purpose of benefiting his other clients by effecting a severance. In light of counsel's testimony as to his belief that . . . [the defendant] had no viable defense . . . his good faith suggestion that [the defendant] plead guilty certainly met the minimum standard of professional representation . . . .

Id. at 993-94.

However, since the determination of conflict turned on counsel's testimony, under *Gaines* it can certainly be regarded as suspect.

ing "full blown" on the record.[76]

The preceding analysis should make it apparent that it is entirely unsatisfactory to rely on post-trial review to determine if a defendant suffered a loss of his right to counsel. Neither *Boudreaux* nor *Mandell* offers a method for protecting a defendant from the unseen conflict. Yet such conflicts of interest are no less damaging to a defendant's sixth amendment rights than the obvious conflict and are equally deserving of a court's attention.

The affirmative inquiry approach, at the very least, seeks to lessen the possibility of such a conflict occurring. By interjecting itself into the situation, the court may alert the parties to the potential problem, causing both the defendants and the attorney to consider the issue. Further, the court may suggest alternatives available to preserve the right to unimpaired counsel. A court using this approach demonstrates a "solicitude for the essential rights of the accused" while fulfilling its obligation to protect the defendant's right to a fair trial.[77]

Despite the theoretical differences between the noninquiry and affirmative inquiry approaches, all courts now agree that where there is notice to the court that a possible conflict exists, there is an affirmative obligation to inquire of counsel and the defendant.[78] Where the courts disagree is whether joint representation itself constitutes notice. The noninquiry approach requires more than mere joint representation to trigger inquiry. Yet the existence of joint representation is itself notice of a potential problem and should not be ignored by the trial court. To deny that there is an obligation to inquire under such circumstances is without logic.

The Fifth Circuit in *Boudreaux* made it clear that only when there is neither "objection, claim nor *notice*,"[79] is there no obligation on the court to inquire. Once there is notice, the court must act to protect a defendant's right to counsel.[80] Even the Seventh Circuit, which decided *Mandell,* has acknowledged such an obli-

76. Austin v. Erickson, 477 F.2d 620, 626 (8th Cir. 1973).

77. Glasser v. United States, 315 U.S. 60, 71 (1942).

78. *See* United States v. Georvassilis, 498 F.2d 883 (6th Cir. 1974); United States v. Alberti, 470 F.2d 878 (2d Cir. 1972), *cert. denied*, 411 U.S. 919 (1973); United States v. Williams, 429 F.2d 158 (8th Cir. 1970); United States v. Kaplan, 375 F.2d 895 (9th Cir. 1967).

79. United States v. Boudreaux, 502 F.2d 557, 558 (5th Cir. 1974).

80. *See* Holland v. Henderson, 460 F.2d 978 (5th Cir. 1972); United States v. Pinc, 452 F.2d 507 (5th Cir. 1971); Baker v. Wainwright, 422 F.2d 145 (5th Cir. 1970).

gation[81] by placing the burden on the trial judge to be "watchful for indicia of conflict."[82]

The danger of the *Boudreaux-Mandell* noninquiry approach is that it places upon the defendant the full burden of preserving his right to the effective assistance of counsel. Once there is notice, claim or objection, the court springs into action — inquiring and advising the attorney and the defendants of the problem that has already become apparent. But who has the burden of giving notice, claim or objection? According to *Boudreaux,* it is the attorney or the defendants.[83] Yet a defendant cannot be expected to give notice of or object to a situation about which he may be totally unaware. A defendant, moreover, cannot be presumed to understand the intricacies of conflicting defenses without guidance from the court, nor can it be presumed that a defendant will rise on his own to object to his lawyer's strategies except in the most blatant situations.

The courts that have opted for affirmative inquiry are in essence stating that joint representation is itself notice of a possible conflict of interest. Because the defendants' attorney may not be in a position to raise specific notice and a defendant is often unaware of the problem, the court, to preserve sixth amendment rights, must take some appropriate action to insure that a defendant's rights are not being unwittingly eroded. Thus, it is the duty of the court to inquire of the defendant in the first instance. The sixth amendment requires no less.

WAIVER OF SIXTH AMENDMENT RIGHT

The affirmative inquiry approach seeks primarily to advise both counsel and defendants of the risks inherent in joint representation and, consequently, the practice insures that the defendant's decision to proceed with one attorney is an informed one.[84] Only then can a defendant make an "intentional relinquishment or abandonment" of his rights.[85]

Where the conflict of interest is apparent on the record, the

81. In United States v. Jeffers, 520 F.2d 1256, 1262 (7th Cir. 1975), the court made clear that where the conflict of interest became known to the court, there was an obligation to inquire. *See also* United States v. Gaines, 529 F.2d 1038 (7th Cir. 1976).

82. United States v. Mandell, 525 F.2d 671, 677 (7th Cir. 1975).

83. United States v. Boudreaux, 502 F.2d 557, 558 (5th Cir. 1974).

84. United States v. DeBerry, 487 F.2d 448 (2d Cir. 1973); United States *ex rel.* Hart v. Davenport, 478 F.2d 203 (3d Cir. 1972); Campbell v. United States, 352 F.2d 359 (D.C. Cir. 1965).

85. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

courts uniformly agree that there must be a waiver on the record in sufficient detail to indicate that the defendant was fully informed of the potential problem. The Fifth Circuit, interestingly enough, has written one of the leading opinions on the subject. In *United States v. Garcia*,[86] the court, while acknowledging a defendant's right to waive unimpaired counsel, carefully set forth the obligations of a trial court when inquiring of a defendant to determine the voluntariness of the waiver. The court noted that the trial judge should "actively participate in the waiver decision,"[87] and suggested that a narrative response should be elicited from the defendant.[88] The court likened the procedure to a guilty plea interrogation under Rule 11 of the Federal Rules of Criminal Procedure[89] and specified that the waiver be in "clear, unequivocal and unambiguous language."[90] This opinion, then, is the model against which the sufficiency of a waiver must be measured.

Reading *Garcia* and *Boudreaux* together, it appears that the more obvious the conflict the greater is the obligation of the court

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86. 517 F.2d 272 (5th Cir. 1975).

87. *Id.* at 277.

88. The court set down the following form of inquiry:

> As in Rule 11 procedures, the district court should address each defendant personally and forthrightly advise him of the potential dangers of representation by counsel with a conflict of interest. The defendant must be at liberty to question the district court as to the nature and consequences of his legal representation. Most significantly, the court should seek to elicit a narrative response from each defendant that he has been advised of his right to effective representation, that he understands the details of his attorney's possible conflict of interest and the potential perils of such a conflict, that he has discussed the matter with his attorney or if he wishes with outside counsel, and that he voluntarily waives his Sixth Amendment protections. *Cf.* United States v. Foster, 469 F.2d 1 (1st Cir. 1972). If is, of course, vital that the waiver be established by "clear, unequivocal, and unambiguous language." National Equipment Rental v. Szukhert [*sic*], 375 U.S. 311, 84 S.Ct. 411, 11 L.Ed.2d 354, 367-8 (1964). Mere assent in response to a series of questions from the bench may in some circumstances constitute an adequate waiver, but the court should nonetheless endeavor to have each defendant personally articulate in detail his intent to forego this significant constitutional protection. Recordation of the waiver colloquy between defendant and judge will also serve the government's interest by assisting in shielding any potential conviction from collateral attack, either on Sixth Amendment grounds or on a Fifth or Fourteenth Amendment "fundamental fairness" basis.

Id. at 278.

89. FED. R. CRIM. P. 11(c) provides for the inquiry that a court must follow in order to "inform" the defendant and "determine that he understands" what he is doing. It also requires that the court address the defendant "personally."

90. United States v. Garcia, 517 F.2d 272, 278 (5th Cir. 1975).

to make sure that the parties see it and understand it, while the less obvious the conflict the less is the court's obligation to advise the defendants. Such a position is particularly troublesome when dealing with fundamental rights. The noninquiry courts are prepared to let the unwitting defendant proceed to trial without at least informing him of the risks in a situation where the potential for a conflict exists. Should there be a conflict of interest which is not apparent on the trial record, the defendant is deemed to have waived his right to unimpaired counsel, without any forewarning from the court on the risks of joint representation. Such waiver by the defendant is a far cry from the knowing and intelligent waiver that is required.

The problem of the noninquiry approach is best exemplified where the same counsel is assigned to, rather than retained by, joint defendants.[91] Because the risk of unknowing waiver is more substantial where counsel is appointed, the refusal to impose an obligation of affirmative inquiry is without logic. The court, by its refusal to inquire, thrusts upon a defendant an attorney who may be impaired and leaves it to the attorney or defendant to object.[92] Even some circuits which have rejected the *Campbell* affirmative inquiry approach do not think that the noninquiry approach is in the best interests of codefendants where one attorney is appointed to represent both of them.[93] Despite these reservations, neither *Boudreaux* nor *Mandell* find such problems troublesome. Instead, they rely on a post-trial determination that no conflict of interest existed.

Further problems with the noninquiry approach become apparent when a defendant is held to have waived his rights to effective assistance of counsel but, in fact, has never been advised of these rights or otherwise informed of the dangers of joint representation by the court. This situation presents itself when courts

91. It should be noted that with the exception of the Fifth Circuit, the courts consistently maintain that there is no distinction between assigned counsel and retained counsel standards. *See* Horowitz v. Henderson, 514 F.2d 740, 743 (5th Cir. 1975).

92. The unreasonableness of this approach became apparent to the Fifth Circuit in Foxworth v. Wainwright, 516 F.2d 1072, 1076 (5th Cir. 1975), and in Baker v. Wainwright, 422 F.2d 145 (5th Cir. 1970). In *Foxworth* the court rejected a Florida Supreme Court opinion that a defendant waived his right to complain by not objecting to the joint representation. The *Foxworth* court set forth a requirement that when counsel and the defendant are silent, the trial court has an obligation to anticipate conflicts "reasonably foreseeable." *Id. See also* Morgan v. United States, 396 F.2d 110 (2d Cir. 1968); Ford v. United States, 379 F.2d 123 (D.C. Cir. 1967); Lollar v. United States, 376 F.2d 243 (D.C. Cir. 1967).

93. United States v. Williams, 429 F.2d 158, 161 (8th Cir. 1970).

permit waiver of the right solely upon the representation by defendant's counsel that no conflict exists and that the defendants desire to proceed with one attorney.[94] Courts that allow this practice do so mainly on the theory that counsel's representation that no conflict exists can be relied upon by the court, at least "absent unusual circumstances."[95] This begs the question, however, since it does not indicate to the court whether the defendant is in fact aware of the risks and alternatives.

In *United States v. DeBerry*,[96] the Second Circuit recognized just such a problem and refused to hold that the defendant had waived his rights when counsel said that she had explained the matter in detail and had gone over it very carefully.[97] The court noted that counsel's statement was not sufficient to waive the defendant's rights: "This is quite another thing, however, from the court's interrogating the individual defendants, themselves."[98] As *DeBerry* recognized, discussions with counsel about the attorney's conflict of interest are entirely different from a court's personal interrogation of a defendant to determine his understanding of the possible risks.[99]

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94. *See* People v. Gomberg, 38 N.Y.2d 307, 342 N.E.2d 550, 379 N.Y.S.2d 769 (1975). Note, however, that in United States v. Gaines, 529 F.2d 1038 (7th Cir. 1976), the court refused to hold a hearing on just such an issue. *Id.* at 1045. *See also* Alvarez v. Wainwright, 522 F.2d 100 (5th Cir. 1975), where the court found that no such discussion had taken place.

95. United States v. Armone, 363 F.2d 385, 406 (2d Cir. 1966). The court offers no definition, however, for this term. *See also* Kaplan v. United States, 375 F.2d 895, 897 (9th Cir. 1967).

96. 487 F.2d 448 (2d Cir. 1973).

97. *Id.* at 453.

98. *Id.* Compare this holding with the recent decision in Kaplan v. Bombard, 76 Civ. 2435 (S.D.N.Y. Jan. 3, 1977). In *Kaplan* Judge Goettel held that a defendant who had not been personally interrogated had waived his right to the effective assistance of counsel even where his lawyer had not demonstrated a high degree of concern for the ethics of the profession.

99. The rule in the Second Circuit is that there must be a personal inquiry of the defendants. United States v. Carrigan, 543 F.2d 1053 (2d Cir. 1976). In United States v. Bernstein, 533 F.2d 775, 778 (2d Cir. 1976), the court refused to accept counsel's representation. *See also* United States v. Vowteras, 500 F.2d 1210 (2d Cir. 1974). However, United States v. Armone, 363 F.2d 385, 406 (2d Cir. 1966), decided just before *Paz-Sierra*, has never been explicitly overruled and was alluded to in United States v. Wisniewski, 478 F.2d 274 (2d Cir. 1973), and United States v. Sheiner, 410 F.2d 337 (2d Cir. 1969). In each of these cases, however, the court inquired of the defendant personally as well as of the attorney, thus meeting the *Carrigan* requirement. Most recently, the *Armone* approach has been followed in People v. Gomberg, 38 N.Y.2d 307, 342 N.E.2d 550, 379 N.Y.S.2d 769 (1975), although the court in *Gomberg* neglected to discuss or acknowledge *DeBerry*. The issue was further discussed in Kaplan v. Bombard, 76 Civ. 2435 (S.D.N.Y. Jan. 3, 1977) where the habeas corpus petition of Gomberg's codefendant was denied.

While attorneys are often in a position to waive many important rights of their clients, they do so presumably based upon a judgment made solely in the best interests of that client. When a conflict of interest is involved, however, that judgment is impaired because of conflicting loyalties and commitments. An attorney who is burdened with a conflict of interest cannot, by the very nature of the problem, be giving the client "[t]he professional judgment of a lawyer . . . solely for the benefit of his client and free of compromising influences and loyalties."[100] As one court put it, an attorney in a conflict situation cannot be deemed competent to advise a defendant of his rights since that "unfairly stack[s] the deck against full advice."[101]

The problems presented by not requiring the defendant to personally waive his sixth amendment rights are most clearly illustrated in *People v. Gomberg.*[102] There, one of the defendants was held to have waived his right to contest the ineffectiveness of counsel, by reason of conflict of interest, because his apparently "ineffective" counsel had waived the defendant's right when he said there was no conflict. Since the defendant was never questioned directly and the lawyer's conclusion may have been in error, the contention that there was an effective waiver distorts the doctrine that waiver of fundamental rights must be knowingly and intentionally made. Had the affirmative inquiry set forth in *Campbell* been conducted, there would be no such problem.

The affirmative inquiry requirement insures that the parties are made aware of the risks and that there will be no post-trial challenge to a conviction if the inquiry was made on the record. It is critical, of course, as recognized by *Campbell* and now *DeBerry,* that the inquiry be of the defendants and not just of counsel.[103] The court must be sure that the defendant perceives the risks inherent in joint representation, even if the court is not yet aware of any precise conflict. Only in this way can the court secure a waiver of a defendant's sixth amendment rights that passes constitutional muster.

100. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 5-1 (1975). *See* note 3 *supra.*

101. Horowitz v. Henderson, 514 F.2d 740, 743 (5th Cir. 1975).

102. 38 N.Y.2d 307, 342 N.E.2d 550, 379 N.Y.S.2d 769 (1975).

103. United States v. Kutas, 542 F.2d 527 (9th Cir. 1976) (required defendants to sign an affidavit); United States *ex rel.* Hart v. Davenport, 478 F.2d 203 (3d Cir. 1973); United States v. Foster, 469 F.2d 1 (1st Cir. 1972) (required personal interrogations of the defendants).

JUDICIAL ADMINISTRATION

Part of the rationale for the affirmative inquiry rule set forth in *Campbell* was a concern for "considerations of efficient judicial administration."[104] Looking at the matter more than ten years later, it appears fair to say that the *Campbell* court knew from whence it spoke. The approach seems to work and, if the lack of District of Columbia Circuit case law finding it necessary to reinterpret the rule is any indication of its stability, then the affirmative inquiry method can be said to have succeeded.[105]

The same cannot be said for the noninquiry approach. The Second Circuit's *Paz-Sierra* opinion, which so quickly challenged the *Campbell* view, is alive only by virtue of cases such as *Boudreaux* and *Mandell.* Otherwise the case has no vitality and is not followed in its own circuit. The Second Circuit has now adopted a rule that is so close to *Campbell* that it is virtually indistinguishable from it.[106] Gradually the circuit found it necessary to back off from the *Paz-Sierra* rigidity. It first required "careful inquiry" on the record in assigned cases,[107] which it then extended as a desirable feature in retained counsel cases as well.[108] The court then went further, holding that joint representation itself "should alert a trial judge and cause him to inquire . . . ."[109] The rule has become more clearly defined,[110] and today the circuit characterizes its approach as one which requires

> the trial judge . . . to conduct a hearing to determine whether a conflict exists to the degree that a defendant may be prevented

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104. 352 F.2d 359, 360 (D.C. Cir. 1965).

105. The rule even withstood the pressure of the Watergate trials where one of the issues was whether the defendants' counsel suffered from a conflict of interest because of joint representation and because of where the fees were coming from. *See generally* United States v. McCord, 509 F.2d 334 (D.C. Cir. 1974), *cert. denied,* 421 U.S. 930 (1975); United States v. Liddy, 348 F. Supp. 198 (D.D.C. 1972).

106. As the Second Circuit has evolved towards an affirmative inquiry approach, it has done so without reference to Campbell v. United States, 352 F.2d 359 (D.C. Cir. 1965). The end result, however, is the same. In both the D.C. Circuit and the Second Circuit joint representation requires personal inquiry of the defendants by the court in order to protect the defendants' sixth amendment rights. *See* United States v. Carrigan, 543 F.2d 1053 (2d Cir. 1976); United States v. DeBerry, 487 F.2d 448 (2d Cir. 1973).

107. Morgan v. United States, 396 F.2d 110, 114 (2d Cir. 1968).

108. *See* United States v. Alberti, 470 F.2d 878 (2d Cir. 1972), *cert. denied,* 411 U.S. 919 (1973); United States v. Sheiner, 410 F.2d 337 (2d Cir.), *cert. denied,* 396 U.S. 825 (1969).

109. United States v. Lovano, 420 F.2d 769, 772 (2d Cir.), *cert. denied,* 397 U.S. 1071 (1970).

110. *See* United States v. Vowteras, 500 F.2d 1210 (2d Cir.), *cert. denied,* 419 U.S. 1069 (1974); United States v. DeBerry, 487 F.2d 448 (2d Cir. 1973).

> from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the Sixth Amendment. The defendant should be fully advised by the trial court of the facts underlying the potential conflict and be given the opportunity to express his views.[111]

Recently, in *United States v. Bernstein*,[112] the circuit court applauded vigorous inquiry of the defendant by the trial judge. That case ultimately resulted in the withdrawal of the defendant's lawyer. A respected trial judge in the circuit acknowledged that the "duty of the court [is] to correct or prevent violations of the Code" when one attorney undertakes to represent two defendants simultaneously.[113]

Rejection of *Paz-Sierra* in its own circuit does not bode well for the *Mandell* and *Boudreaux* views which relied so heavily on it. While *Mandell* was decided in July 1975 and was strongly reaffirmed in November 1975 in *United States ex rel. Robinson v. Housewright*,[114] its death knell had already sounded in the Seventh Circuit by February 1976. In *United States v. Gaines*,[115] the circuit court acknowledged that *Mandell* had rejected *Campbell* and had placed the obligation for conducting an inquiry with the attorney as an officer of the court. The *Gaines* court added that "[w]hile the court's failure to initially warn the defendants is not itself error, it is apparent that the administration of criminal justice will be better served if possible conflicts can be discovered and dealt with before trial to avoid the risk of a mis-trial."[116] The *Gaines* court then reversed the conviction, holding that the lower court's inquiry was not sufficient to find that the defendant had waived his sixth amendment rights in the "absence of a specific warning of the serious danger to his defense posed by his attorney's conflict of interest."[117]

The confusion in the Fifth Circuit is even greater than in the Seventh.[118] The *Boudreaux* view has been adhered to without

111. United States v. Carrigan, 543 F.2d 1053 (2d Cir. 1976).
112. 533 F.2d 775, 778 (2d Cir. 1976).
113. Judd, *supra* note 4, at 1101.
114. 525 F.2d 988, 994 (7th Cir. 1975).
115. 529 F.2d 1038 (7th Cir. 1976).
116. *Id.* at 1044.
117. *Id.* at 1045.
118. It would be unfair, though, to lay all the blame for the confusion in the Fifth Circuit on the failure to adopt an affirmative inquiry rule. Somehow the circuit got sidetracked from the impaired counsel problem which it had initially so eloquently identified. Porter v. United States, 298 F.2d 461, 464 (5th Cir. 1961). The court erroneously merged

apparent exception.[119] In one case, however, where the conflict did not appear directly on the record, the court nonetheless held that "[t]he trial judge has an obligation . . . to anticipate conflicts reasonably foreseeable at the outset when counsel is appointed."[120] Even so, in a footnote the court reaffirmed its position that the trial court is not required to "warn co-defendants" of the disadvantages likely to arise from joint representation due to possible conflicts of interest.[121] It then drew a distinction between conflicts which are "reasonably apparent" and those which are not, claiming that only the former obligate a court to intercede and inquire.[122] It is not surprising that the court failed to offer any guidance in defining these terms.

While the affirmative inquiry rule may not be a panacea for all the problems in this area, it is clear that such an approach certainly does not add to the confusion that exists. It is a device calculated to short circuit some of the problems before they arise. The end result is that courts need not struggle with whether the record shows a "possible conflict"[123] or an actual "significant conflict"[124] or "some specific instance of prejudice."[125] This approach allows for intelligent and informed decisions in that a defendant can decide whether to waive his rights to unimpaired counsel or to make other arrangements consistent with his sixth amendment rights.[126] It is the most effective means of preserving and protecting a defendant's constitutional right to a fair trial.

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that issue with the competency of counsel question. *See* Fitzgerald v. Estelle, 505 F.2d 1334, 1336 n.2 (5th Cir.), *cert. denied*, 422 U.S. 1011 (1975). As a result, the court's later opinions began to indicate that different standards might apply for retained counsel cases as compared with assigned counsel cases since it was necessary to find state action before there could be reversal due to conflict of interest. *See also* Horowitz v. Henderson, 514 F.2d 740 (5th Cir. 1975). This has led to a lack of standards that is so confusing that the circuit is no longer sure that even the same definition of conflict of interest will be applied to retained and assigned counsel. The fact that no other circuit has recognized such a distinction and that in many instances courts have expressly rejected it, has not, unfortunately, caused the Fifth Circuit to reconsider its position. United States v. Alberti, 470 F.2d 878, 881 (2d Cir. 1970), *cert. denied*, 411 U.S. 919 (1973).

119. United States v. Huntley, 535 F.2d 1400, 1406 (5th Cir. 1976).

120. Foxworth v. Wainwright, 516 F.2d 1072, 1076 (5th Cir. 1975).

121. "The trial court is not required, however, to warn co-defendants of the disadvantages including possible conflicts of interest of joint representation." *Id.* at 1076 n.5.

122. *Id.*

123. United States *ex rel.* Hart v. Davenport, 478 F.2d 203, 210 (3d Cir. 1973).

124. Foxworth v. Wainwright, 516 F.2d 1072, 1077 n.7 (5th Cir. 1975).

125. United States v. Mari, 526 F.2d 117, 119 (2d Cir. 1975) (quoting United States v. Lovano, 420 F.2d 769, 773 (2d Cir. 1970)).

126. The court in United States v. Foster, 469 F.2d 1, 5 (1st Cir. 1973), pointed out that once the defendant proceeds to trial after a proper inquiry, he bears a heavy burden

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INTERFERENCE WITH RIGHT TO COUNSEL

In *Paz-Sierra* the court opined that invoking the *Campbell* rule would mean that a court would have to require a defendant to give up his fifth amendment rights in order to determine whether he intelligently chose his attorney.[127] Recently, the New York Court of Appeals, while establishing an affirmative inquiry rule, noted that "a court must be careful not to pursue its inquiry too far as it may infringe upon the defendant's right to retain and confer with counsel."[128] Other courts have expressed similar concern, relying on the sixth amendment right to counsel of one's choice.[129]

The right to "retain and confer" with counsel of one's choice need not clash with the right to effective, conflict-free assistance of counsel. Both may coexist harmoniously even when the courts use the inquiry approach in joint representation situations. A court's affirmative questioning of defendants as, for example, in *Campbell*, is intended to alert and advise, not to require defendants to reveal their private conversations with counsel. In this regard *United States v. Liddy*[130] is illustrative. In *Liddy* the court initiated a *Campbell*-type inquiry, received assurances from counsel and defendants that the decision of each defendant to have the same attorney was intentionally and intelligently made, and rejected a government request that counsel be ordered off the case. Judge Sirica, after inquiring of the defendants, commented:

> [W]here the court's inquiry reveals no conflicts of interest, and where it is able to make an affirmative determination that defendants have intelligently chosen to be represented by the same attorney, the defendant's right to representation by counsel of his own choosing should be given full effect.[131]

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to thereafter complain about the denial of effective counsel. Some courts seem to attack the affirmative inquiry rule for permitting second-guessing of trial strategy on appeal. *See* United States v. Paz-Sierra, 367 F.2d 930 (2d Cir. 1966). *See also* United States v. De-Berry, 487 F.2d 488 (2d Cir. 1973) (Moore, J., dissenting). A proper inquiry can achieve a knowing and intelligent waiver that will obviate such a problem entirely. *See* United States v. Kutas, 542 F.2d 527, 530 (9th Cir. 1976).

127. 367 F.2d 930, 932 (2d Cir. 1966).

128. People v. Gomberg, 38 N.Y.2d 307, 342 N.E.2d 550, 379 N.Y.S.2d 769 (1975).

129. *See* United States v. Wisniewski, 478 F.2d 274, 285 (2d Cir. 1973). In United States v. Sheiner, 410 F.2d 337, 343 (2d Cir. 1969), the court stated: "[D]efendants who retain counsel also have a right of constitutional dimension to counsel of their own choice." *See also* United States v. Gaines, 529 F.2d 1038, 1043 (7th Cir. 1976); United States v. Liddy, 348 F. Supp. 198, 200 (D.D.C. 1972).

130. 348 F. Supp. 198, 200 (D.D.C. 1972).

131. *Id.*

The trial judge was able to balance the competing rights and to insure that the defendants understood the possible risks of joint representation without violating other constitutional privileges. Other judges have likewise been able to achieve this balance.[132]

Since affirmative inquiry is primarily intended to be informative, no court has intimated that it is proper for trial judges to conduct cross-examinations of defendants or counsel. In *United States v. Garcia*,[133] the court set down areas of inquiry, none of which required an in-depth examination of the particular defenses to be used. The court was more concerned with whether the defendant understood the potential problems caused by joint representation than with ferreting out every possible conflict of interest.

In *United States v. Foster*,[134] the court of appeals outlined the trial court's obligation as follows:

> [T]o comment on some of the risks confronted where defendants are jointly represented, to insure that defendants are aware of such risks, and to inquire diligently whether they have discussed the risks with their attorney, and whether they understand that they may retain separate counsel or if qualified, may have such counsel appointed by the court and paid for by the government.[135]

The emphasis then is not to challenge defendants and their counsel, but to make sure that they are informed about the potential risks and that defendants are nevertheless willing to waive their rights.[136]

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132. *See, e.g.*, United States v. Armedo-Sarmiento, 524 F.2d 591 (2d Cir. 1975); United States v. Garcia, 517 F.2d 272 (5th Cir. 1975); United States v. Vowteras, 500 F.2d 1210 (2d Cir.), *cert. denied*, 419 U.S. 1069 (1974); United States v. Sheiner, 410 F.2d 337 (2d Cir. 1969). *But see* United States v. DeBerry, 487 F.2d 448, 455-56 (2d Cir. 1973) (Moore, J., dissenting). Interestingly enough, Judge Moore wrote the opinion in *Paz-Sierra* and thus persists in seeking to prevent preliminary examination of counsel and defendants in joint representation situations.

133. 517 F.2d 272 (5th Cir. 1975).

134. 469 F.2d 1 (1st Cir. 1972).

135. *Id.* at 5.

136. In United States v. Gaines, 529 F.2d 1038 (7th Cir. 1976), the court articulated a rule as to what the court must do when a conflict appears. The court stated:

> When an actual conflict appears, the court must bring the fact of its existence and the resulting dangers which are reasonably foreseeable to the attention of each affected defendant so he can make an informed judgment at that time as to whether he wishes new counsel or wishes to continue with present counsel. Having done that, the court has fulfilled its duty and, if, despite the conflict and the attendant dangers, the defendant elects to continue with the same counsel, he thereby waives his sixth amendment right.

The constitutional problem presented by the inquiry rule is magnified upon consideration of the remedies available when a conflict of interest arises. While it is clear from the above discussion that the object of the inquiry rule is to obtain a knowing and intelligent waiver by the defendant, some courts have used this as a pretext for going beyond the question of waiver. The Pennsylvania Supreme Court recently ordered an attorney off a case because his representation of multiple defendants would have interfered with a criminal investigation being conducted by a grand jury.[137] It did so at the request of the state and notwithstanding that all the defendants were willing to waive their right to unimpaired counsel. Recently, this same issue was resolved in the opposite way by the Court of Appeals for the District of Columbia.[138]

Removal of an attorney who suffers from a conflict of interest has also been considered as a remedy to be invoked for the benefit of the defendant. Court intervention in the choice of counsel is necessary, it is argued, in order to protect the defendant's sixth amendment rights.[139] One judge recently stated the rationale for such action:

> Indeed failure of a trial court to require separate representation may in cases such as this require a new trial, even though the defendants have expressed a desire to continue with the same counsel. The right to effective representation by counsel whose loyalty is undivided is so paramount in the proper administra-

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Id. at 1044 (footnote omitted).

The same rationale is equally applicable to joint representation cases where the potential for conflict of interest exists but has not as yet surfaced. The object of the inquiry is not to ferret out all possible conflicts, but rather to explain the possible risks as they are then apparent to the court. If a defendant understands the risks and is still willing to continue, there is no need to further challenge the correctness of the defendant's position.

137. Pirillo v. Takiff; 462 Pa. 511, 341 A.2d 896 (1975), *cert. denied*, 96 S. Ct. 873 (1976).

138. *In re* Investigation Before April 1975 Grand Jury, 531 F.2d 600 (D.C. Cir. 1976). *See* United States v. Liddy, 348 F. Supp. 198 (D.D.C. 1972), where the court rejected the efforts by the government to oust counsel because of the difficulty the prosecutor had in getting any of the defendants to cooperate. The idea that a lawyer can be removed in order to further the "public interest" is indeed a frightening one, since it permits the prosecutor to determine what type of attorney a defendant should have. *But see* United States v. Mari, 526 F.2d 117, 121 (2d Cir. 1976) (Oakes, J., concurring). *See also* United States v. Armedo-Sarmiento, 524 F.2d 591 (2d Cir. 1975); United States v. Garcia, 517 F.2d 272 (5th Cir. 1975) (limitations on the interference by prosecutors).

139. *See* United States v. Mari, 526 F.2d 117, 120-21 (2d Cir. 1976) (Oakes, J., concurring); United States v. Carrigan, 543 F.2d 1053 (2d Cir. 1976) (Lumbard, J., concurring).

tion of criminal justice that it must in some cases take precedence over all considerations including the expressed preference of the defendants concerned and their attorney.[140]

Such a view amounts to a total ban on joint representation since it does not allow for waiver of the right to unimpaired counsel under any circumstances.[141]

The courts of appeals in both *United States v. Garcia*[142] and in *United States v. Armedo-Sarmiento*[143] reversed lower court rulings in which attorneys were removed from cases in order to protect a defendant's sixth amendment rights because of apparent conflict of interest. In both instances, the courts agreed that a defendant can waive his right to have counsel free from conflicts of interest. The opinions in both circuits emphasized that since a defendant may waive the right to counsel entirely under *Faretta v. California*,[144] the defendant also had the right to waive the effective assistance of counsel.[145] Of course, such a waiver is conditioned upon the court's determination that the waiver was a knowing and intelligent one, clearly expressed on the record.[146] Where the waiver has not been unequivocal, it has been held that counsel can be relieved since the necessary prerequisites have not been met.[147]

It would appear that the affirmative inquiry rule does not interfere with a defendant's constitutional rights but, rather, preserves them. It allows for defendants to understand the options available and to intelligently choose between them. It is neither coercive nor aloof. It recognizes the existence of the problem and it is a means of effectively preventing defendants from unwit-

140. United States v. Carrigan, 543 F.2d 1053 (2d Cir. 1976).

141. *See* notes 31-35 *supra* and accompanying text.

142. 517 F.2d 272 (5th Cir. 1975).

143. 524 F.2d 591 (2d Cir. 1975).

144. 422 U.S. 806 (1975).

145. United States v. Armedo-Sarmiento, 524 F.2d 591, 592 (2d Cir. 1975); United States v. Garcia, 517 F.2d 272, 277 (5th Cir. 1975). *But see* United States v. Gaines, 529 F.2d 1039, 1043-44 (7th Cir. 1976) (leaving open the application of *Faretta* to this issue).

146. United States v. Garcia, 517 F.2d 272, 278 (5th Cir. 1975). *See also* United States v. Kutas, 542 F.2d 527 (9th Cir. 1976).

147. In United States v. Bernstein, 533 F.2d 775 (2d Cir. 1976), the trial court conducted a vigorous inquiry as to whether the defendant understood the risks that could arise from the potential conflict of interest. When the defendant indicated that "she was not prepared to have the court stand by and do nothing in the event an actual prejudicial action on the part of her lawyer arose," the lawyer withdrew and new counsel was assigned. *Id.* at 788. At no time did the court ever suggest that it would be appropriate for the court to order counsel off the case had the waiver been unequivocal.

tingly losing their sixth amendment rights. At the same time, the affirmative inquiry approach also furthers judicial efficiency. By insuring an intelligent waiver before trial, it may prevent second-guessing by defendants of their choice of trial counsel. It will also remove the need for courts to painstakingly review trial transcripts to determine if a conflict of interest existed. A defendant who knowingly and intelligently continues to retain an attorney who may suffer from a potential conflict of interest can be deemed to have waived his right to complain after conviction except where unforeseeable circumstances arise subsequent to the waiver.

INQUIRY AND THE BURDEN OF PROOF

One significant problem of the affirmative inquiry approach is determining what its effect will be on the quantum of proof necessary to establish that a conflict of interest has so impaired the defense that a new trial must be ordered. Some courts have apparently rejected the affirmative inquiry requirement of *Campbell* because they do not want to permit reversal of a conviction merely because the trial court failed to make the necessary inquiry.[148] Yet *Campbell* itself amply demonstrates that mere joint representation is not grounds for reversal of a defendant's conviction even where no inquiry is made. Although there were two defendants in *Campbell,* the conviction of only one was reversed.[149] The conviction of the second defendant was left undisturbed inasmuch as the court saw no indication that his defense suffered from the joint representation.

Some courts which have adopted the affirmative inquiry rule, however, have also adopted a rule which shifts the burden of proof from the defendant to the government when there has been no satisfactory inquiry. In the District of Columbia Circuit the *Campbell* approach was strengthened by the court of appeals' decision to resolve any doubts in favor of the defendant where the

148. *See, e.g.*, United States v. Kutas, 542 F.2d 527, 529 (9th Cir. 1976); United States v. Christopher, 488 F.2d 849, 851 (9th Cir. 1973). Some courts have rejected *Campbell* on the ground that it establishes a per se reversal rule. *E.g.* United States *ex rel.* Hart v. Davenport, 478 F.2d 203, 211 (3d Cir. 1973); United States v. Foster, 469 F.2d 1, 5 (1st Cir. 1973). *But see* United States v. Mandell, 525 F.2d 671, 675 n.6 (7th Cir. 1975), *cert. denied*, 423 U.S. 1049 (1976) (explaining that the *Campbell* court did not enunciate such a rule).

149. 352 F.2d 359, 361 (D.C. Cir. 1965). This particular result in *Campbell* is the same as that reached in Glasser v. United States, 315 U.S. 60 (1942). *See* text accompanying note 20 *supra*.

trial court has failed to inquire. The court now places upon the government the burden of proving that "the failure to inquire was harmless beyond a reasonable doubt."[150] Similarly, in *United States v. Foster*,[151] the First Circuit set forth a rule which shifts the burden to the government to show that "prejudice to the defendant would be improbable"[152] where there was no affirmative inquiry.

Even the Second Circuit has adopted the shifting burden approach as enunciated in *Foster.*[153] Thus, the very circuit which had rejected *Campbell* in *Paz-Sierra* has come full circle and now not only favors affirmative inquiry, but shifts the burden of proof when this approach has not been implemented.

The shifting burden theory does not mandate reversal of convictions merely because of joint representation at trial. Even where there is no inquiry some showing of a conflict of interest is required. Once shown, however, it is the government which must prove that the conflict did not prejudice the defense of one or all of the defendants. In this way it is less likely that an uninformed defendant will be held to have unwittingly waived his right to effective counsel, even where the full extent of the conflict may not be apparent on the record. The impact of this rule is significant, and it is a logical counterpart to the affirmative inquiry approach. Of course, where satisfactory inquiry has been made there is no problem.[154]

CONCLUSION

The affirmative inquiry rule as originally put forward by the Court of Appeals for the District of Columbia in *Campbell* has withstood the test of time. Where it has been implemented it has proven effective both as a means of preserving constitutional rights as well as furthering the fair and orderly administration of justice. While, as with any rule it may be subject to abuse where improperly applied, it cannot be said to be a detriment to the rights of defendants.[155]

150. Lollar v. United States, 376 F.2d 243, 247 (D.C. Cir. 1967). *See also* Ford v. United States, 379 F.2d 123, 125 (D.C. Cir. 1967).

151. 469 F.2d 1, 5 (1st Cir. 1973).

152. *Id.*

153. United States v. Carrigan, 543 F.2d 1053 (2d Cir. 1976); United States v. De-Berry, 487 F.2d 448, 453 n.6 (2d Cir. 1973).

154. The First Circuit has noted that if satisfactory inquiry were made, then the defendant would "bear a heavy burden indeed" to establish that he was denied a fair trial. *See* United States v. Foster, 469 F.2d 1, 5 (1st Cir. 1973).

155. ABA STANDARDS, THE FUNCTION OF THE TRIAL JUDGE § 3.4(b) (Approved Draft

With *Paz-Sierra* mortally wounded in its own circuit and with *Mandell* now facing serious attack as a result of *Gaines,* it would appear that in the last analysis *Campbell* will prevail. It should survive because it is, in fact, the better, if not the most protective, rule. The courts have an obligation to inform defendants of their fundamental rights whether or not counsel has also done so. The criminal justice system loses little by insuring that the persons who are subject to it are better informed, and thus better equipped, to make decisions relative to their right to a fair trial.

1972). The Standards suggest the affirmative inquiry rule as the best approach. "Whenever two or more defendants who have been jointly charged, or whose cases have been consolidated, are represented by the same attorney, the trial judge should inquire into potential conflicts which may jeopardize the right of each defendant to the fidelity of his counsel." *Id.*