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CONFLICT OF INTEREST IN CRIMINAL CASES AFTER *CUYLER v. SULLIVAN*: TIME TO RECONSIDER THE ILLINOIS APPROACH

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Like a bad penny, the issue of conflict of interest[1] in criminal cases keeps returning to the Illinois Supreme Court. In the dozen years since the court decided *People v. Stoval*,[2] the leading modern case on the subject, the court has issued thirteen significant opinions dealing with conflict of interest.[3] In spite of all this judicial attention, Illinois law in this vitally important area remains something less than a model of clarity.

Illinois purports to apply a per se rule to conflict of interest issues in criminal cases: a criminal conviction will be reversed if it is established that a conflict of interest on the part of defense counsel existed at trial. Defendant is not required to show that he was prejudiced.[4] While the rule is easily stated, its application has proven to be difficult. The defendant's burden in establishing a conflict of interest appears to depend upon how the alleged conflict arises. If the claimed conflict is between the in-

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1. The right to assistance of counsel is guaranteed by the sixth and fourteenth amendments. U.S. CONST. amends. VI, XIV. The sixth amendment provides that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to have assistance of counsel for his defense." The courts have interpreted this guarantee to be one of *effective* assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). Effective representation requires a minimum level of competence and counsel's undivided loyalty to his client. In a case involving a conflict of interest, it is this requirement of undivided loyalty which is at issue: a defendant will not be afforded full representation if counsel has irreconcilable interests. Glasser v. United States, 315 U.S. 60 (1942).

2. 40 Ill. 2d 109, 239 N.E.2d 441 (1968).

3. These cases will be discussed *infra*. In addition to the supreme court cases, the Illinois appellate courts have decided over 100 cases.

4. The Illinois Supreme Court in *Stoval* stated that the situation was too fraught with the danger of prejudice which might not be indicated by the record. Therefore, the mere existence of the conflict is sufficient to constitute a violation of the defendant's sixth amendment right to effective assistance of counsel, regardless of whether or not it influences the attorney or the outcome of the case. 40 Ill. 2d at 113, 239 N.E.2d at 443 (1968). This principle was affirmed in People v. Coslet, 67 Ill. 2d 127, 133, 364 N.E.2d 67, 70 (1977) and People v. Kester, 66 Ill. 2d 162, 166-69, 361 N.E.2d 569, 571 (1977).

terests of jointly-represented defendants, the complaining defendant must show "an actual conflict of interest manifested at trial."[5] If the conflict arises in some other manner, the defendant need only demonstrate a "possible conflict of interest."[6] Thus, it has been held that a conflict of interest does not exist where two defendants are represented by a single attorney at a joint trial and that attorney argues to the jury that if anyone is guilty, it is one defendant and not the other.[7] A conflict of interest does exist, however, where the defendant's attorney is a special assistant attorney general who handles workmen's compensation matters for the state on a part-time basis.[8]

Other aspects of the law of conflict of interest in criminal cases are also in a state of confusion. The Illinois Supreme Court has held that "it is difficult, if not impossible" to explain adequately to a defendant the "subtle effect" which a conflict of interest may have on counsel's representation.[9] Nevertheless, the Illinois Supreme Court and several appellate courts have approved waivers of conflicts of interest after the waivers were explained to defendants.[10]

In September, 1978 the Illinois Supreme Court refused to reach a claim that there was a conflict of interest on the part of the attorney for jointly-tried defendants because the issue was not raised during trial or in the post-trial motion.[11] Three

5. People v. Robinson, 79 Ill. 2d 147, 402 N.E.2d 157 (1980). *See* note 42 *infra*.

6. People v. Stoval, 40 Ill. 2d 109, 239 N.E.2d 441 (1968). *See* note 23 and accompanying text *infra*.

7. People v. Smith, 19 Ill. App. 3d 138, 310 N.E.2d 818 (1974). In this case two defendants indicted for rape were defended by a public defender. The evidence was significantly stronger against one of the defendants. In essence, the attorney argued that if anybody was guilty, it was that defendant and not the other. The court found that no conflict existed, stating that the defense of each defendant was the same—each asserted his innocence and placed guilt on a third party. *Id.* at 144. The Second District reached the same result on similar facts in People v. Lopez, 70 Ill. App. 3d 213, 388 N.E.2d 466 (1979). *See* People v. Robinson, 79 Ill. 2d 147, 402 N.E.2d 157 (1980).

8. People v. Fife, 76 Ill. 2d 418, 392 N.E.2d 1345 (1979). *See* note 21 and accompanying text *infra*.

9. People v. Meyers, 46 Ill. 2d 146, 150, 263 N.E.2d 81, 83 (1970).

10. People v. Robinson, 79 Ill. 2d 147, 402 N.E.2d 157 (1980); People v. Fife, 76 Ill. 2d 418, 392 N.E.2d 1345 (1979) (court approved the concept of waiver, although it found none in that case); People v. Mathes, 69 Ill. App. 3d 275, 387 N.E.2d 39 (1979) (knowing and intelligent waiver required); People v. McClinton, 59 Ill. App. 3d 168, 375 N.E.2d 170 (1978) (valid waiver when defendant was adequately advised of the significance of his attorney's conflict of interest and he understood how a conflict could affect the attorney's ability to represent him); People v. King, 58 Ill. App. 3d 199, 373 N.E.2d 1045 (1978) (determination of valid waiver depends upon the facts and circumstances surrounding each case, including the background, experience, and conduct of the accused).

11. People v. Precup, 73 Ill. App. 2d 7, 382 N.E.2d 227 (1978).

months later, the court reversed a conviction on the ground that there was a conflict of interest on the part of the defense attorney, who also represented a codefendant. The court said the issue, which was raised for the first time on appeal, "was not waived by appellant's silence."[12] The Illinois Supreme Court has repeatedly stated that a conflict of interest on the part of an attorney extends to any attorney associated with him in practice.[13] The court has held, however, that this rule does not apply to public defender offices, and that the facts of each case must be examined to determine whether separate members of a single public defender's office may represent conflicting interests.[14]

While the facts of some of the cases cited above justify the seemingly disparate holdings, it is nevertheless exceedingly difficult to state Illinois law in regard to conflict of interest in criminal cases with either clarity or confidence. The result is that defense attorneys, prosecutors, and trial judges are often at a loss about how to deal with a possible conflict of interest situation.

Illinois is not alone in its perplexity: the law in many other jurisdictions is in a similar state of disarray.[15] Until the past

12. People v. Echols, 74 Ill. 2d 319, 329, 385 N.E.2d 644, 648-49 (1978). There has been much confusion on the waiver issue among the appellate courts, some following *Precup* and others distinguishing the case or flatly requiring a knowing and intelligent waiver. *See* note 45 and accompanying text *infra*.

13. This principle was established in People v. Stoval, 40 Ill. 2d 109, 112, 239 N.E.2d 441, 442 (1968). In *People v. Robinson*, the court stated: "Lawyers who practice their profession side-by-side, literally and figuratively, are subject to subtle influences that may well affect their professional judgment and loyalty to their clients, even though they are not faced with the more easily recognized economic conflict of interest." 79 Ill. 2d 147, 156, 402 N.E.2d 157, 161 (quoting Borden v. Borden, 277 A.2d 89, 91 (D.C. 1971)).

14. People v. Robinson, 79 Ill. 2d 147, 402 N.E.2d 157 (1980). Although the court acknowledged that public defenders have an allegiance to their office, it stated that policy considerations required the instant decision. The size and organization of Illinois's public defender offices vary greatly. More important, to rule that the public defender offices are one entity might disqualify an experienced attorney and require the appointment of inexperienced counsel. *Id.* at 155, 402 N.E.2d at 162. *See* note 91 *infra*.

15. The New Jersey Supreme Court in People v. Bellucci, 81 N.J. 49, 404 A.2d 1149 (1980), handed down a ruling which amounts to an absolute bar against multiple representation of criminal codefendants, unless the defendants are fully advised of the potential problems both by counsel and by the trial court. The rule in non-codefendant cases is equally as strict. If the attorney is or was associated with anyone whose interests are adverse to the defendant, regardless of how tenuous the association was, that attorney is disqualified from representing the defendant. State v. Morelli, 152 N.J. Super. 67, 377 A.2d 774 (1977). Further, the New Jersey courts in non-codefendant cases appear to be unwilling to allow even a knowing, intelligent waiver by the defendant. The *Morelli* court stated: "Defendant, of course, is entitled to retain *qualified* counsel of his choice. He has no right, however, to demand to be represented by an attorney *disqualified* because of an ethical requirement." 152 N.J. Super. 67, 377 A.2d 776 (1977) (quoting

term, the United States Supreme Court had offered little guidance to the states, since it had decided only two cases dealing with conflict of interest in criminal cases.[16] The Court's recent

State v. Hucarells, 135 N.J. Super. 347, 353, 343 A.2d 465, 468 (App. Div. 1975), *aff'd*, 69 N.J. 31, 350 A.2d 226 (1975)).

Overall, the New York courts are concerned with the dual judge's role and responsibility rather than with the conflict itself. The Court of Appeals in People v. Macerola, 47 N.Y.2d 257, 391 N.E.2d 990, 417 N.Y.S.2d 908 (1979), reaffirmed its rule requiring the judge to inquire whether the defendants' decision to proceed with one attorney is informed. *Before* commencement of the trial, the judge must ascertain on the record that each defendant is aware of the potential risk involved, and has knowingly chosen it. The court stated that while the omission to inquire did not constitute reversible error in every case, if the defendant can establish at least the possibility of conflict, a new trial must be ordered. *Id.* at 264, 391 N.E.2d at 993, 417 N.Y.S.2d at 908. In People v. Davis, 72 A.D.2d 69, 423 N.Y.S.2d 98 (1979), the New York Supreme Court, Appellate Division, proposed a possible solution in the codefendant area—at least in cases where counsel is appointed. Trial judges should initially appoint separate counsel for each defendant. After such appointment, if the defendants, counsel, and the trial judge all agree that multiple representation would benefit all parties, the defenses may be consolidated. In the non-codefendant area, People v. Hall, 46 N.Y.2d 873, 387 N.E.2d 610, 414 N.Y.S.2d 678 (1979), suggests that the possibility of conflict is sufficient to disqualify counsel and therefore reverse a decision.

In codefendant cases, Massachusetts requires the defendant to prove both the existence and the precise character of the alleged conflict of interest to have his conviction reversed. Commonwealth v. Soffen, 386 N.E.2d 1030 (Mass. 1979). If the defendant cannot establish either element, but there is a possibility of conflict, the Supreme Judicial Court has indicated its willingness to reverse the judgment on a showing of material prejudice. *Id.* at 1033. There appears to be some inconsistency in the non-codefendant cases. *Compare* Commonwealth v. Geraway, 301 N.E.2d 814 (Mass. 1973) (although there was slight, if any, evidence of actual conflict in the conduct of the trial, the court required reversal where the firm represented the defendant, four of the six state's witnesses, and several members of their immediate families on various unrelated matters) *with* Commonwealth v. Wright, 383 N.E.2d 507 (Mass. 1978) (although citing *Geraway* with approval, the court required defendant to prove actual conflict).

The California courts in the codefendant area have created separate requirements for defendants who retain their own counsel, and for defendants whose counsel is appointed. In the latter situation the burden on the defendant is very light. It is sufficient if the record provides an adequate basis for an "informed speculation" that there was a potential conflict of interest which prejudicially affected the defendant's right to effective counsel. People v. Chacon, 69 Cal. 2d 765, 447 P.2d 106, 73 Cal. Rptr. 10 (1968). People v. Cook, 13 Cal. 3d 663, 532 P.2d 148, 119 Cal. Rptr. 500 (1975), suggests that the "informed speculation" standard is Illinois's standard of "possibility of conflict" used in non-codefendant cases. The defendant who retains an attorney, however, is held to the same standards of proof as in other instances of alleged incompetency or inadequacy of trial counsel—counsel's lack of diligence or competence reduced the trial to a farce or sham. People v. Ontiveros, 46 Cal. App. 3d 110, 120 Cal. Rptr. 28 (1975). After the United States Supreme Court opinion of Cuyler v. Sullivan, 100 S. Ct. 1708 (1980), this distinction is no longer permissible. In the non-codefendant cases, the defendant must establish not only an actual conflict of interest, but also that he was prejudiced by it. The mere possibility of prejudice is not sufficient to overturn the conviction. People v. Corona, 80 Cal. App. 3d 684, 145 Cal. Rptr. 894 (1978).

16. People v. Glasser, 315 U.S. 60 (1942); *see* note 24 and accompanying

decision in *Cuyler v. Sullivan*,[17] however, is a significant statement on the subject. The Court's enunciation of the standard for determining whether a claimed conflict of interest constitutes a denial of effective assistance of counsel is of primary importance. The Court held that "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."[18] The Court also resolved a long-standing issue by holding that the same constitutional standard that is applied when defense counsel is appointed must be applied where defense counsel is retained.[19] *Cuyler v. Sullivan* is the Court's most comprehensive statement on the subject of conflict of interest in criminal cases. It necessitates a thorough re-examination of the Illinois law, which in significant respects is inconsistent with the *Cuyler* holdings. This article will survey the Illinois law on the subject and suggest changes necessitated by *Cuyler*. It will also suggest other changes in the Illinois approach which are not required by *Cuyler*, but which would relieve some of the confusion in this vitally important area.

The law on conflict of interest in criminal cases should be consistent with both the protection of the criminal defendant's fundamental right to effective assistance of counsel,[20] and with society's interest in upholding fairly-obtained criminal convictions. Moreover, a conflict of interest policy should be clear and comprehensive, to give defense attorneys, prosecutors, and trial court judges maximum guidance about what is and what is not a disqualifying conflict of interest, and about how to deal with a possible conflict of interest.[21] In examining the Illinois law, this

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text *infra*; Holloway v. Arkansas, 435 U.S. 475 (1978), *see* note 28 and accompanying text *infra*.

17. 100 S. Ct. 1708 (1980).

18. *Id.* at 1718.

19. *Id.* at 1716. The court stated:

> A proper respect for the Sixth Amendment disarms petitioners' contention that defendants who retain their own lawyers are entitled to less protection than defendants for whom the State appoints counsel. We may assume with confidence that most counsel, whether retained or appointed, will protect the rights of an accused. But experience teaches that, in some cases, retained counsel will not provide adequate representation. The vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant's entitlement to constitutional protection. Since the State's conduct of a criminal trial itself implicates the State in the defendant's conviction, we see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers.

20. *See* note 1 *supra*.

21. The Illinois Supreme Court in People v. Coslet, 67 Ill. 2d 127, 364

article will focus on three primary issues. The first is what circumstances constitute a disqualifying conflict of interest. The second is whether a claim of conflict of interest may be waived, either implicitly, where the defendant fails to raise the issue at the appropriate time, or explicitly, where the defendant is advised of the conflict and agrees to be represented by the attorney despite the conflict. Finally, this article will consider whether a conflict of interest on the part of one attorney extends to other attorneys with whom he is associated in practice, particularly where the attorneys are all members of a public defender office.

CIRCUMSTANCES WHICH CONSTITUTE A CONFLICT OF INTEREST

Since at least 1968, Illinois has applied what has come to be termed a per se rule to conflict of interest in criminal cases. Under this rule, once it is established that a conflict of interest existed on the part of defense counsel at the time of trial, reversal is automatic and no demonstration of prejudice is required. This rule is the primary cause of the problems in Illinois's approach to the conflict of interest issue. The rule is not constitutionally required,[22] and it is mistaken as a matter of policy. Moreover, the rule is applied differently depending upon how the claim of conflict of interest arises, which leads to unfair, and even bizarre, results. Finally, the rule has apparently produced unfortunate changes in other aspects of the law of conflict of interest, primarily in the application of waiver principles.

Origins of the Per Se Rule

In *People v. Stoval*,[23] the case which is generally cited as having established the per se rule, the Illinois Supreme Court reversed the conviction of a defendant who had pleaded guilty to a burglary charge on the ground that defendant's appointed counsel was a member of a law firm which represented the jewelry store that the defendant was accused of burglarizing. Defendant's attorney himself had previously done legal work for both the store and its owner. The court found no evidence that

N.E.2d 167 (1977), recognized that with adoption of the per se rule in most instances the prosecutor would be powerless to avoid a situation where a conflict of interest arose on the part of the defendant's attorney. It further noted that the situation could be manufactured between the defendant and his lawyer in an effort to obtain a reversal if there were a conviction. Although the court said it was prepared to take this risk to assure the right of effective assistance of counsel, it seems that established guidelines would better serve both the attorneys and the defendant.

22. *See* notes 26-27 and accompanying text *infra*.

23. 40 Ill. 2d 109, 239 N.E.2d 441 (1968).

defendant's counsel failed to conduct the defense with diligence and resoluteness, but reversed nonetheless, holding that when such a conflict is present there is no need for the defendant to show actual prejudice.

To support its holding that a showing of prejudice was not necessary, the court relied upon the United States Supreme Court's decision in *Glasser v. United States*,[24] in which the Court overturned the conviction of defendant Glasser on the ground that his retained counsel was appointed to represent a codefendant having antagonistic interests. In reversing the conviction, the Court 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."[25] The Illinois Supreme Court relied upon this language in applying what amounted to a per se rule in *People v. Stoval*. *Glasser*, however, may not be the stablest foundation for the per se rule, for *Glasser* itself did not apply such a rule, at least not in the way Illinois courts have come to apply it. Aside from the one sentence quoted above, there is little in the *Glasser* opinion which suggests a per se rule.[26]

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24. 315 U.S. 60 (1941).

25. *Id.* at 76.

26. In general, *Glasser* has not been interpreted as establishing a per se rule. Indeed, the year after *Stoval*, the Illinois Supreme Court in People v. Sommerville, 42 Ill. 2d 1, 245 N.E.2d 461 (1969), distinguished *Glasser* on the ground that the defendant had established actual prejudice. The court further stated that United States Courts of Appeal, relying on *Glasser*, interpreted the decision as requiring a show of prejudice.

The next United States Supreme Court decision addressing the issue of conflict of interest was Holloway v. Arkansas, 435 U.S. 475 (1978). The Supreme Court rejected the assertion that *Glasser* created a per se rule:

> One principle applicable here emerges from *Glasser* without ambiguity. Requiring or permitting a single attorney to represent co-defendants, often referred to as joint representation, is not *per se* violative of constitutional guarantees of effective assistance of counsel. This principle recognizes that in some cases multiple defendants can appropriately be represented by one attorney; indeed, in some cases, certain advantages might accrue from joint representation.

Id. at 482.

This principle was reaffirmed in Cuyler v. Sullivan, 100 S. Ct. 1708 (1980), and a substantial majority of the courts of appeal require defendants who contend that multiple representation violated their sixth amendment rights to identify an actual conflict of interest. People v. Miller, 564 F.2d 103 (1st Cir. 1977) (relatively slight showing of *actual* prejudice required in multiple defendant cases); Smith v. Regan, 583 F.2d 72 (2d Cir. 1978) (specific instance of prejudice); O'Kelly v. North Carolina, 606 F.2d 56 (4th Cir. 1979) (significant divergence of interest between defendants which might reasonably result in prejudice); U.S. v. Medel, 592 F.2d 1305 (5th Cir. 1979) (actual conflict must be shown); Tracket v. Bordenkercher, 590 F.2d 640 (6th Cir. 1978), *cert. denied*, 442 U.S. 912 (1979) (court rejected "possible conflict of interest test"); U.S. v. Maverick, 601 F.2d 921 (7th Cir. 1979) (actual conflict); U.S. v. Cox, 580 F.2d 317 (8th Cir. 1978), *cert. denied*, 493 U.S. 1079

The defendant Glasser, who was an assistant United States attorney, was charged with several others with conspiracy to defraud the United States. He retained counsel. The attorney for one of Glasser's codefendants sought and obtained leave to withdraw shortly before trial. Over Glasser's objection his attorney was appointed to represent the codefendant. Examining the record, the Supreme Court determined that the interests of the two defendants were antagonistic, and demonstrated that counsel's representation of Glasser was actually impaired by his simultaneous representation of the codefendant. The Court also noted that the case was a close one, and that the verdict may have been affected by the conflict of interest. That determination was obviously a factor in the Court's decision:

> In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then, error, which under some circumstances would not be grounds for reversal, cannot be brushed aside as immaterial, since there is a real chance that it might have provided the slight impetus which swings the scales towards guilt.[27]

This case has been repeatedly cited as the basis for the Illinois rule which requires reversal of a criminal conviction in the event of a conflict of interest on the part of defense counsel without a showing of prejudice, or even a showing that the conflict affected the conduct of counsel at all. Yet the United States Supreme Court found in this case that the conflict had actually impaired the attorney's performance, and the existence of conflict of interest might well have determined the outcome of the trial.

The Illinois per se rule is based upon a misreading of *Glasser v. United States*. In the nearly forty years since *Glasser*, the United States Supreme Court has decided only two cases dealing with conflict of interest in criminal cases, *Holloway v. Arkansas*[28] in 1978, and *Cuyler v. Sullivan*[29] in 1980. There is nothing in the *Holloway* decision which supports the Illinois per se rule. Moreover, the rule as applied in certain types of Illinois cases conflicts with *Cuyler* in that there is no violation of the sixth amendment unless the defendant can demonstrate an actual conflict of interest which adversely affected his lawyer's performance.

(1979) (showing of actual conflict of interest or evidence pointing to a substantial possibility of a conflict required); U.S. v. Kutas, 542 F.2d 527 (9th Cir. 1976), *cert. denied*, 429 U.S. 1073 (1977) (defendant has burden of establishing that the joint representation in fact created an actual conflict of interest and prejudiced the defense).

27. 315 U.S. at 67.

28. 435 U.S. 475 (1978). *See* note 42 *infra*.

29. 100 S. Ct. 1708 (1980).

Application of the Per Se Rule

In spite of the questionable ancestry of the per se rule, it remains the law in Illinois. To say that Illinois applies a per se rule in cases of conflict of interest does not, however, enable one to state with certainty what circumstances constitute a disqualifying conflict of interest. Illinois courts have been hesitant to find a conflict of interest in cases where the claim of conflict arises out of the joint representation of codefendants by a single attorney, or by attorneys associated in practice. However, they have been quick to find a conflict of interest where the claim arises in some other manner, such as where defense counsel has a present relationship with the victim of the crime, or where defense counsel was a former member of the state's attorney's office and participated in the early stages of the defendant's prosecution. For purposes of discussion these two classes of cases will be referred to as codefendant cases and non-codefendant cases.

Non-Codefendant Cases

Illinois courts have found conflicts of interest, necessitating the application of the per se rule which requires reversal even without a showing of prejudice, in a number of cases where defense counsel owed some allegiance to a person or entity, other than a codefendant, whose interests were arguably antagonistic to those of the defendant. This class of cases can be further subdivided into those cases in which the antagonistic entity is not a party to the criminal action (the victim, for example), and those cases in which the entity is a prosecution agency. For purposes of discussion, these two subcategories of cases will be referred to as nonparty cases, and prosecution-defense relationship cases.

People v. Stoval,[30] in which the Illinois Supreme Court found a conflict of interest where defense counsel was a member of the firm which represented the victim of the crime, has been discussed above. The court also found a conflict of interest where appointed counsel who represented defendant on a burglary charge was asked by defendant's wife to represent her in a dram shop action against the tavern in which defendant had

30. 40 Ill. 2d 109, 112, 239 N.E.2d 441, 442 (1968). The court reasoned that the client who had been victimized might be displeased with the firm when one of the firm's attorneys represented the defendant. The client might seek to influence the outcome or might discharge the firm. "The entire situation could be very embarrassing for the lawyer who is naturally interested in having the legal business of the [client], especially when [he is] much more able to compensate him for his services than the defendant."

been drinking prior to the burglary.[31] Counsel agreed to investigate the possibility of bringing such an action, and indicated that his fee would be one-third of the amount recovered, but ultimately informed defendant's wife that he did not believe the action would lie. The court held that the conflict required reversal, regardless of whether the defendant could demonstrate prejudice. The court also found a conflict of interest where a murder defendant was represented by appointed counsel who was also counsel for the bank which was the administrator of the victim-husband's estate.[32] Defendant and her husband held property in joint tenancy, and whether the husband's interest in that property passed to the defendant by right of survivorship or passed into his general estate depended upon whether the defendant was convicted or acquitted and, if convicted, on what charge. The court reasoned that counsel's duty as attorney for the administrator to enrich the estate for all the heirs was inconsistent with his role as counsel for the defendant in the murder prosecution. Again, reversal was required by the mere existence of the conflict. The court noted that no allegation of prejudice was made.[33]

In several cases the Illinois Supreme Court has considered claims of conflict of interest based upon some past or present relationship between defense counsel and a prosecution entity. The court has held that defense counsel's being an assistant corporation counsel did not establish a conflict of interest.[34] Because authority for the prosecution of state law is vested in the attorney general and the state's attorney, and not in the corporation counsel of the city of Chicago, there was no conflict when an

31. People v. Meyers, 46 Ill. 2d 149, 152, 263 N.E.2d 81, 83 (1970). The court stated that the conflict here was more direct than that in *Stoval.* In that case, it was at least a matter of some conjecture that the attorney would be subconsciously influenced in favor of one paying client. Here, the court found that the appointed counsel conceivably stood to gain a contingent fee which would presumably increase in proportion to the length of defendant's sentence. The appellate court applied the same rationale in People v. Richardson, 7 Ill. App. 3d 367, 287 N.E.2d 577 (1972).

32. People v. Coslet, 67 Ill. 2d 127, 364 N.E. 2d 67 (1977). The defendant was charged with murder, but ultimately convicted of voluntary manslaughter.

33. *Id.* at 135, 364 N.E.2d at 73. The court stated that no allegation was necessary. Although the court acknowledged that in most instances the prosecutor would have no knowledge of the potential conflict and would be powerless to avoid the situation, the risk was justified in order to assure every defendant the right of effective assistance of counsel at trial.

34. People v. Satterwhite, 38 Ill. 2d 138, 230 N.E.2d 206 (1967). At least two states take a different view: People v. Rhodes, 12 Cal. 3d 180, 524 P.2d 363, 115 Cal. Rptr. 235 (1974); Karlin v. State, 47 Wis. 2d 452, 177 N.W.2d 318 (1970).

assistant corporation counsel defended a client on a charge which his office was without authority to prosecute.

If defense counsel has a present relationship with the attorney general's office, however, there is a disqualifying conflict of interest. In *People v. Fife*,[35] the Illinois Supreme Court held that defense counsel who was a special assistant attorney general employed for the limited purpose of representing the state in workmen's compensation matters was disqualified, in the absence of an adequate waiver of the conflict of interest, from representing defendants in criminal cases. For reasons that are not clear from the opinion, the court reversed the conviction of defendant Fife, but held the rule announced by the case applicable prospectively to cases involving prosecution for offenses that occurred subsequent to the filing of the *Fife* opinion.[36]

A past association with a prosecution entity may also, in some circumstances, constitute a disqualifying conflict of interest. In *People v. Kester*,[37] the Illinois Supreme Court reversed a conviction on conflict of interest grounds where defendant's trial counsel had formerly been a member of the state's attorney's office and had appeared for the state on three occasions in de-

35. 76 Ill. 2d 418, 392 N.E.2d 1343 (1979).

36. This decision is somewhat surprising in light of the constitutional principles pertaining to retroactive application of rulings. The United States Supreme Court in Adams v. Illinois, 405 U.S. 278 (1972), set forth a two-tiered test for determining whether a ruling should apply retrospectively. Where a constitutional rule recognizing the right to counsel directly involves the guilt-determining process, the decision is given retroactive effect. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel at trial); Douglas v. California, 372 U.S. 353 (1963) (right to counsel on appeal). Those decisions which have a lesser effect on the process are balanced against (a) the purpose to be served by the new standards, (b) the extent of the reliance by the law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of new standards. Adams v. Illinois, 405 U.S. 278, 280 (1972). *See also* Stovall v. Denno, 388 U.S. 301 (1967); Silver Mfg. Co. v. General Box Co., 76 Ill. 2d 413, 392 N.E.2d 1333 (1979).

Although the *Fife* court gave no explicit reason for the prospective application of the holding, it probably was seeking to avoid reversal of a large number of cases. For example, in People v. Lykins, 77 Ill. 2d 30, 394 N.E.2d 1171 (1979), an assistant public defender was an associate of a firm which employed another associate who was a special assistant attorney general. The assistant public defender, therefore, clearly fell within the *Fife* holding. However, the effect of retrospective application of *Fife* would have been to reverse all his clients' convictions for the past two years.

Regardless of the court's reasoning, the prospective application is erroneous under the test established by the United States Supreme Court. Possible ineffective assistance of counsel directly involves the "guilt-determining process." Therefore the *Fife* holding should have had retroactive application regardless of the consequences.

37. 66 Ill. 2d 162, 361 N.E.2d 569 (1977). The former state's attorney had appeared twice seeking a bench warrant and bond forfeiture and once at arraignment on the charge.

fendant's case. The attorney subsequently left the state's attorney's office, joined the public defender's office, and was assigned to defendant's case. Defendant eventually entered a negotiated plea to the charge. In reversing, the court reasoned that counsel's recommendation to defendant to accept the negotiated plea might have been "affected by a subliminal reluctance to attack pleadings or other actions and decisions by the prosecution which he may have been personally involved with or responsible for."[38] In two other cases, however, the court declined to find a conflict of interest where defense counsel had been a member of the state's attorney's office when defendant's prosecution was initiated, but had not personally been involved with the case.[39]

Codefendant Cases

Although they claim to apply the per se rule in codefendant cases as well as in non-codefendant cases, Illiniois courts have been extremely hesitant to reverse criminal convictions on the basis of a claim of conflict between the interests of jointly-represented codefendants. Even before *Holloway v. Arkansas*,[40] Illinois courts recognized that joint representation of codefendants did not of itself constitute a conflict of interest. Rather, anticipating *Cuyler v. Sullivan*,[41] Illinois required defendants to demonstrate "an actual conflict of interest manifested at trial."[42]

38. *Id.* at 167, 361 N.E.2d at 572.

39. In People v. Newberry, 55 Ill. 2d 74, 302 N.E.2d 34 (1974), decided prior to *Kester*, the defendant's court-appointed counsel had served as an assistant state's attorney while the defendant's case was being prepared. It was neither alleged nor established that the defense counsel had any actual knowledge of the case. The court found no actual conflict, nor any inherent prejudice to defendant. The defense counsel in People v. Franklin, 75 Ill. 2d 173, 387 N.E.2d 685 (1979), had, as an assistant state's attorney, secured a burglary conviction against the defendant five years earlier. However, counsel did not realize that he had prosecuted the defendant until the sentencing hearing. The court distinguished *Kester*, stating that defense counsel in that case had served as an assistant state's attorney in the same criminal proceeding. Further, the fact that defense counsel in *Franklin* had no recollection of the earlier prosecution until sentencing clearly showed that he was not affected by the "subtle influences" which dictated a reversal in *Kester*.

40. 435 U.S. 475 (1978). *See* note 15 *supra*.

41. 100 S. Ct. 1708 (1980).

42. People v. Robinson, 79 Ill. 2d 147, 402 N.E.2d 157 (1980); People v. Berland, 74 Ill. 2d 286, 385 N.E.2d 649 (1978); People v. Echols, 74 Ill. 2d 319, 385 N.E.2d 644 (1978); People v. Vriner, 74 Ill. 2d 319, 385 N.E.2d 671 (1978). Although the Illinois Supreme Court has consistently applied this standard, until 1979 in People v. Good, 68 Ill. App. 3d 333, 385 N.E.2d 911 (1979), the Fifth District ruled that the showing of a potential conflict of interest was sufficient to justify reversal. People v. Simmons, 67 Ill. App. 3d 1045, 385 N.E.2d 758 (1978) (codefendant must demonstrate facts which could support the inference that his attorney's commitment to a codefendant potentially conflicts with his own interests); People v. Ishman, 61 Ill. App. 3d 517,

Once such a conflict is established the per se rule applies, and reversal is required without a showing of prejudice. An examination of the Illinois cases, however, suggests that it is quite difficult to establish an actual conflict of interest manifested at trial, and the required showing may be, in practical effect, the same as a showing of actual prejudice.

A clear example of conflict of interest is the situation in which one attorney represents codefendants, one of whom pleads guilty or is granted immunity and testifies against the other.[43] Equally clear is the situation presented by *Holloway*: the potential conflict of interest is brought to the court's attention either before or during trial, and the court fails to appoint separate counsel or to take adequate steps to ascertain whether the alleged conflict of interest necessitates separate counsel.[44] In that situation, reversal is also automatic.

Far more difficult, and far more common, is the situation not addressed in *Holloway* where the issue of conflict of interest between jointly-represented defendants is not raised until after trial. The United States Supreme Court spoke to that issue in

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378 N.E.2d 179 (1978), *rev. sub nom.* People v. Robinson, 79 Ill. 2d 147, 402 N.E.2d 157 (1980) (possibility of conflict); People v. Meng, 54 Ill. App. 3d 357, 369 N.E.2d 549 (1977) (potential conflict sufficient).

The Fifth District adopted the reasoning of the nonparty and prosecutor-defense relationship cases. *See* notes 17 and 20 and accompanying text *supra*. After the reversal of a large number of these cases by the Illinois Supreme Court, the Fifth District has apparently conformed to the "actual conflict" requirement.

43. People v. Johnson, 46 Ill. 2d 261, 265 N.E.2d 866 (1970). A public defender was appointed to represent two defendants indicted for robbery, one of whom obtained complete immunity and dismissal of the charges against him. The court rejected the state's argument that dismissal of the indictment against the codefendant terminated the attorney-client relationship, and therefore no conflict existed. Although the relationship was technically severed, the court found that the defendant did not receive undivided attention of counsel when one of the attorney's clients went free and testified against the defendant. In People v. Ware, 39 Ill. 2d 66, 233 N.E.2d 421 (1968), one of the codefendants pleaded guilty and testified against the defendant. The court found a clear conflict: the attorney had a duty to attack the credibility of the codefendant who testified against the defendant; yet he also had a continuing responsibility to obtain the lightest possible sentence for the testifying codefendant, which necessitated convincing the court of the truth of the testimony.

44. Holloway v. Arkansas, 434 U.S. 475, 477 (1978). Three defendants indicted in state court were represented by a public defender. The public defender repeatedly moved for appointment of separate counsel because he had received confidential information from each codefendant and was confronted with the risk of representing conflicting interests. The court denied the motions and the defendants were convicted. The United States Supreme Court reversed, holding that whenever the trial court improperly requires joint representation over timely objection, reversal is automatic. The Court, however, did not decide how strong a showing of conflict must be made, nor did it decide whether the trial court had an affirmative duty to assure that no conflict exists.

Cuyler v. Sullivan,[45] which held that to establish a sixth amendment violation, a defendant who did not object at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's peformance. A defendant who makes this showing "need not demonstrate prejudice in order to obtain relief."[46] By "prejudice" the Court apparently meant a change in the outcome of the trial.

In *Cuyler* the defendant and two others were charged with two murders and were represented by two privately-retained attorneys. These lawyers were first retained by the two codefendants, and defendant accepted representation by them because he could not afford to pay for his own lawyer. Defendant was tried first and convicted; his codefendants were acquitted at separate trials. The evidence against defendant was entirely circumstantial, and the defense rested at the close of the prosecution's case. One of the attorneys testified at the post-conviction hearing that he had not wanted to present the defense because that would expose the defense witnesses for the other two trials. The other attorney, however, testified that he had encouraged the defendant to testify, but that defendant did not wish to. Other evidence indicated that one of the codefendants was willing to testify in defendant's behalf.

The federal district court denied habeas corpus relief, accepting the conclusion of the state courts that there was not, in fact, joint representation.[47] The Third Circuit Court of Appeals reversed, holding that there was joint representation, and that the evidence demonstrated a possible conflict of interest.[48] The Supreme Court remanded the case to the court of appeals for application of the proper legal standard: whether there was an actual conflict of interest which adversely affected his lawyer's performance.[49]

As noted above, Illinois cases require the defendant to show "an actual conflict of interest manifested at trial."[50] The phrase "manifested at trial" is not defined, but the application of the standard in several cases indicates that it is the functional equivalent of the requirement announced in *Cuyler* that the

45. 100 S. Ct. 1708 (1980).

46. *Id.* at 1718.

47. United States *ex rel.* Sullivan v. Cuyler, 593 F.2d 512, 515-16 (3d Cir. 1979). The district court accepted the conclusion of the Pennsylvania Supreme Court that there had been no dual representation. *See* Commonwealth v. Sullivan, 446 Pa. 419, 286 A.2d 898 (1971), *aff'd on rehearing*, 472 Pa. 129, 371 A.2d 468 (1977).

48. United States *ex rel.* Sullivan v. Cuyler, 593 F.2d 512 (3d Cir. 1979).

49. Cuyler v. Sullivan, 100 S. Ct. 1708, 1719 (1980).

50. *See* note 28 and accompanying text *supra*.

conflict adversely affect the lawyer's performance. The Illinois cases appear to require the defendant to demonstrate that his attorney either acted or failed to act because of the conflict of interest, and that the action or inaction was harmful to him.[51] The defendant does not have to demonstrate that the action or inaction determined the outcome of the trial.

The Illinois Supreme Court has found "an actual conflict of interest manifested at trial" in only one recent case.[52] In that case defendant and two others were jointly tried for the burglary of a tavern. All three were represented by a single attorney. The testimony at trial indicated that the defendant was not one of those seen inside the tavern. A police officer testified that a fingerprint taken from a broken window matched one he had taken from one of the codefendants, but when asked to identify that person he pointed to defendant. The prosecutor sought to clarify the ambiguity by taking fingerprint samples from both, but defense counsel's objection was sustained. In argument, counsel asserted that the ambiguity regarding the fingerprint evidence limited its probative value in regard to all defendants. The fingerprint found on the window was not the defendant's, but, due to counsel's efforts, that fact was never made clear to the jury. The trial court found no conflict of interest.

The Illinois Supreme Court reversed, reasoning that independent counsel would not have resisted the state's attempt to clear up the ambiguity concerning the fingerprint, since the evidence implicated the codefendant and exculpated the defendant. Counsel should have argued that on balance the evidence indicated that defendant had not entered the tavern. The court noted that because the state's accountability instruction was refused, the jury was required to find that the defendant actually entered the tavern in order to convict him. Thus, the court could point to specific action and nonaction by defense counsel which was probably harmful to defendant and which was a result of counsel's loyalty to the codefendant.[53] In con-

51. People v. Robinson, 79 Ill. 2d 147, 402 N.E.2d 157 (1980). The defendant failed to prove his contention that due to a conflict of interest his trial attorney failed to elicit testimony favorable to his defense. In People v. Walton, 78 Ill. 2d 197, 399 N.E.2d 588 (1979), the defendant alleged that the public defender representing him in his post-conviction proceeding was laboring under a conflict of interest because his trial counsel, also a public defender, was incompetent. The court found no conflict since there was no evidence that the successor public defender either totally respected all policies and actions of his predecessor or, due to loyalty to the office, was ready to defend to the death each and every one of them. The court stated in People v. Berland, 74 Ill. 2d 286, 301, 385 N.E.2d 649, 651 (1978), "This court will not disturb a judgment on the basis of hypothetical conflicts."

52. People v. Echols, 74 Ill. 2d 319, 385 N.E.2d 644 (1978).

53. *Id.* at 328-29, 385 N.E.2d at 48-49.

trast, in several cases the court has declined to reverse on the ground of a conflict of interest between jointly-represented co-defendants where the record did not suggest that defense counsel's actions would have been different had he represented only the individual defendant.[54]

Analysis of the Illinois Approach and Suggestions for Change

Illinois law evaluates a claim of conflict of interest in a criminal case quite differently depending upon whether the claim is based on an alleged conflict between the interests of jointly-represented codefendants, or whether the alleged conflict arises in some other way, such as defense counsel's relationship with the victim of a crime, or former association with the prosecutor's office. Where the alleged conflict arises from joint representation, the law appears hesitant to find an actual conflict of interest. The requirement that the conflict be "manifested at trial" appears to require some indication in the record that counsel's conduct was affected in some way. The court seems to demand a concrete demonstration of the conflict of interest. For example, in considering one of the cases consolidated for opinion in

54. People v. Robinson, 79 Ill. 2d 147, 402 N.E.2d 157 (1980). The defendants, charged with robbery and murder, were represented by separate public defenders who developed inconsistent defenses. One codefendant admitted he was present with the defendants at the scene, but claimed he fled before the robbery occurred. The defendants denied any knowledge of the murder. The trials were severed. Although the defendant claimed his attorney failed to present favorable evidence due to a conflict of interest, the court stated that the purportedly favorable evidence was irrelevant to the defendant's defense, and might well have been harmful. The court also failed to find evidence of a conflict in People v. Berland, 74 Ill. 2d 286, 385 N.E.2d 649 (1978) and People v. Vriner, 74 Ill. 2d 319, 385 N.E.2d 671 (1978). In *Berland*, the two codefendants, Wolf and Berland, were convicted of arson with intent to defraud an insurer. Count I charged Wolf alone with damaging Berland's property without his consent. Count II charged Wolf and Berland together with knowingly damaging a building by means of fire with intent to defraud the insurer. The appellate court held that since Wolf was charged in Count I with burning one building without Berland's consent, it was impossible for a single attorney to represent both defendants. The supreme court reversed, holding that the defenses of both defendants were the same, and that since Count I was *noli-prossed* before the defense presented its evidence, any abstract possibility of conflict was removed.

In *Vriner*, two brothers and a third defendant were separately indicted for armed violence and the unlawful use of weapons, but upon motions by the state the court consolidated the cases for trial. The brothers, William and Peter Vriner, retained one attorney to represent them. At the close of the state's case, the court granted a motion for a directed verdict in favor of William. Peter was convicted. On appeal, Peter contended that because of conflicting evidence the attorney was faced with a conflict of interest in his representation of the two brothers. The court found no conflict evident in the record. Both brothers were identified by key witnesses, and the attorney rigorously cross-examined the witnesses. There is no indication that the attorney was in a position that would cause him to slight the interests of one client in favor of the other.

People v. Robinson,[55] the court reiterated that the defendant needed to show "an actual conflict of interest manifested at trial," and that "mere hypothetical or speculative conflicts will not suffice."[56] After considering the facts of the case, the court concluded: "The records show that each defendant received vigorous representation from his separate counsel [both members of a public defender office], and we are unable to discern any indication that the defense of either of them was inhibited to any degree because of the alleged joint representation."[57]

Apparently the inquiry is quite different if the alleged conflict arises in some way other than joint representation of codefendants. In such a situation, Illinois courts will reverse a conviction if there is merely a possibility that the alleged conflict might have affected counsel's performance. For example, the Illinois Supreme Court has reversed where it concluded that defendant's attorney "*might* be restrained in fully representing the defendant's interest due to his or her commitments to others."[58] Similarly, the court reversed a conviction where it concluded that there was "the *possibility* that the attorney *might* be subject to subtle influences which could be viewed as adversely affecting his ability to defend his client in an independent and vigorous manner."[59] There is no need for the defendant to demonstrate from the record that the conflict had any effect upon counsel's conduct: "There is no showing that the attorney did not conduct the defense of the accused with diligence and resoluteness, but we believe that sound policy disfavors the representation of an accused, especially when counsel is appointed, by an attorney with possible conflict of interests."[60]

Clearly, Illinois makes a critical distinction regarding how a claim of interest is evaluated depending upon how that claim arises. It is debatable whether the per se rule truly applies in codefendant cases. Certainly it does not apply in the same way as in non-codefendant cases. Under Illinois law a defendant is denied effective assistance of counsel if he and a codefendant are represented by the same attorney or by attorneys associated in practice, and the defendant can demonstrate "an actual con-

55. 79 Ill. 2d 147, 402 N.E.2d 157 (1980). The two other cases consolidated with *Robinson* are People v. Ishman, 61 Ill. App. 3d 517, 378 N.E.2d 179 (1978) (codefendant case) and People v. Freeman, 60 Ill. App. 3d 794, 377 N.E.2d 279 (1978) (codefendant case).

56. 79 Ill. 2d at 169, 402 N.E.2d at 168.

57. *Id.* at 170-71, 402 N.E.2d at 168.

58. People v. Coslet, 67 Ill. 2d 127, 133, 364 N.E.2d 167, 170 (1977) (emphasis added).

59. People v. Kester, 66 Ill. 2d 162, 167, 361 N.E.2d 569, 571 (1977) (emphasis added).

60. People v. Stoval, 40 Ill. 2d 109, 116, 239 N.E.2d 441, 444 (1968).

flict of interest manifested at trial" by some action or nonaction of the attorney. If the claim of conflict of interest arises in some other way, the defendant need only demonstrate a "possible conflict of interest." The defendant need not show any effect upon counsel's conduct.

No justification for the double standard is offered in any of the cases, and none comes readily to mind. A possible explanation is that the two kinds of authority developed separately, and there was never any attempt to rationalize them.[61] Indeed, the Illinois Supreme Court only recently began to analyze codefendant cases in terms of the per se rule. In any case, there is no reason to continue the distinction.

The per se rule as applied in non-codefendant cases is clearly not constitutionally mandated. *People v. Stoval*,[62] the case which established the rule, was based upon a misreading of the United States Supreme Court's opinion in *Glasser v. United States*. Nothing the Court has said on the subject since supports the Illinois approach. The holding of *Cuyler v. Sullivan* appears to be a direct renunciation of the Illinois approach: "[T]he possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance."[63] While it is true that in *Cuyler* the claimed conflict of interest was among codefendants, there is nothing in the opinion to suggest that the holding would not apply if the alleged conflict arose in some other manner. Under *Cuyler*, a deprivation of the right to counsel is not established unless two distinct elements are demonstrated: (1) the presence of an actual as op-

61. *Compare* People v. McCastle, 35 Ill. 2d 552, 221 N.E.2d 227 (1966) *and* People v. Somerville, 42 Ill. 2d 1, 245 N.E.2d 461 (1969) *with* People v. Stoval, 40 Ill. 2d 109, 239 N.E.2d 441 (1968) *and* People v. Meyers, 46 Ill. 2d 149, 263 N.E.2d 81 (1970). The court in *McCastle*, in requiring a showing of actual prejudice for reversal in codefendant cases, relied on *Glasser*. In *People v. Sommerville*, the court relied on *McCastle* and indicated again that under *Glasser* a showing of prejudice was necessary. *Sommerville*, however, did not cite People v. Stoval, 40 Ill. 2d 109, 239 N.E.2d 441 (1968), decided a year earlier, which used *Glasser* as the basis for the per se rule. The appellate courts, notably the Fourth District, recognized a clear distinction between the lines of authority. *See* People v. Gorecki, 54 Ill. App. 3d 267, 369 N.E.2d 380, *cert. denied*, 439 U.S. 1005 (1977). The lines of authority became mixed in the Illinois Supreme Court case People v. Precup, 73 Ill. 2d 7, 382 N.E.2d 227 (1978). Although *Precup* actually involved an assertion of conflict of interest on the part of counsel who represented two codefendants, the supreme court ignored its own language in prior cases and spoke in terms of a "potential or possible" conflict. It found none, but had already declared that the defendants had waived the issue.

62. 40 Ill. 2d 109, 239 N.E.2d 441 (1968). *See* note 21 and accompanying text *supra*.

63. 100 S. Ct. 1708, 1719 (1980).

posed to a possible conflict of interest, and (2) adverse impact on counsel's performance. Heretofore, Illinois has apparently required both elements in codefendant cases, but has not required the second, and perhaps not even the first, in non-codefendant cases.

If the application of the per se rule in non-codefendant cases is not constitutionally required, it certainly cannot be supported on any alternative policy ground. Under the rule, a defendant's conviction will be reversed if circumstances exist which arguably constitute a conflict of interest which might have affected counsel's representation of defendant. It makes no difference whether the representation was actually affected or not. Yet the reason to reverse a criminal conviction on the ground of conflict of interest is to protect the defendant's right to effective assistance of counsel. If the alleged conflict of interest did not affect counsel's performance, it could not have compromised his right to effective assistance of counsel. It is noteworthy that under Illinois law, to establish a general claim of ineffective assistance of counsel defendant must demonstrate that his trial was no more than a farce or mockery, and that his representation was so poor as to amount to no representation at all.[64] Yet where the claim of ineffective assistance of counsel is based upon a claim of conflict of interest, defendant need not demonstrate any adverse impact on counsel's performance. The result is simply gratuitous reversal in certain cases. The rule protects no interest of the defendant, and certainly does not further the societal interest of crime prevention.

Moreover, the rule seems to have had an unfortunate impact upon related questions of law concerning conflict of interest in criminal cases. The expansive definition of conflict of interest has resulted in increasingly frequent claims of conflict of interest. Illinois courts have compensated for the harsh effect of the per se rule by relaxing considerably the rules relating to waiver of claims of conflict of interest. The result is that Illinois is too quick to find a conflict of interest, but also too quick to find a waiver of the conflict of interest.

64. Defendants are entitled to assistance of counsel under the United States Constitution (Gideon v. Wainwright, 372 U.S. 335 (1963)), the sixth and fourteenth amendments, and the Illinois Constitution of 1970. ILL. CONST. 1970, art. I, § 8. *See* note 1 *supra*. The Illinois courts apply a strict test where counsel is retained. A mere error in judgment or trial strategy will not establish incompetence. The court will reverse a conviction because of incompetency of counsel only when the "representation is of such a low caliber as to amount to no representation at all or reduces the proceedings to a farce or sham." People v. Murphy, 72 Ill. 2d 421, 433, 381 N.E.2d 677, 685 (1978). There is some confusion about whether the same test applies to appointed counsel.

WAIVER OF CONFLICT OF INTEREST

The concept of waiver applies to conflict of interest cases in two ways. First, a defendant can arguably waive a conflict of interest claim implicitly by failing to raise it at the proper time. Second, a defendant may arguably waive the claim explicitly after the conflict situation is explained to him and he indicates that in spite of it he wishes to continue to be represented by his attorney.

Implicit Waiver of the Conflict

Illinois Supreme Court opinions are inconsistent about whether the failure of a defendant to raise the issue of conflict of interest in the trial court waives the issue on appeal. In *People v. Precup*,[65] the court refused to reach the merits of a conflict of interest claim on the ground that the issue had not been raised by the defendants during trial, and was not called to the court's attention in the motion for a new trial. The court noted that before the waiver rule can be circumvented on the ground that defendant's claim constitutes plain error, it must be plainly apparent from the record that an error affecting the defendant's substantial rights was committed. The court refused to find that the trial court should have raised the issue *sua sponte*.[66]

65. 73 Ill. 2d 7, 382 N.E.2d 227 (1978). The court based its decision of the waiver issue on the Code of Criminal Procedure of 1963, ILL. REV. STAT. ch. 38, § 116-1 (1979). The statute provides that a motion for a new trial shall be in writing and shall specify the grounds. The court followed the rule that failure by the defendant to raise an issue (even a constitutional issue) in the written motion constitutes a waiver, and the issue cannot be urged as a ground for reversal on review.

66. This ruling is consistent with the prevailing view of the Illinois courts that the court has no affirmative duty to ascertain whether a conflict of interest existed. People v. Sommerville, 42 Ill. 2d 1, 245 N.E.2d 461 (1969). The supreme court in People v. Berland, 74 Ill. 2d 286, 385 N.E.2d 649 (1978) held that neither *Holloway* nor *Glasser* indicated that a pretrial inquiry and waiver of separate counsel was mandated. The primary duty for the ascertainment and avoidance of a conflict situation lies with counsel and it is not necessary, until some evidence of conflict appears, for the court to inquire into such representation. People v. Doyle, 61 Ill. App. 3d 571, 377 N.E.2d 1093 (1978). The United States Supreme Court left open this question in Holloway v. Arkansas, 435 U.S. 475 (1978), but subsequently proposed amendment 44(c) to the Federal Rules of Criminal Procedure. The rule requires federal district courts to inquire into the likelihood of a conflict when two or more defendants in a trial are represented by one attorney. (Congress has postponed the effectiveness of Rule 44(c) until December 1, 1980 or until it is approved by an act of Congress. Pub. L. No. 96-42, 96th Cong., 1st Sess. (1979)). However, in Cuyler v. Sullivan, 100 S. Ct. 1708 (1980), the Court stated that nothing in its precedents suggests that the sixth amendment requires *state* courts to initiate inquiries into the propriety of multiple representation in every case. "Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of a trial." *Id.* at 1717. With re-

Three months later, however, in *People v. Echols*,[67] the court reversed a defendant's conviction on the basis of a finding of conflict of interest among jointly-represented codefendants. The issue had apparently not been raised at trial or in a post-trial motion. Making no mention of *Precup*, the court stated that the issue "was not waived by appellant's silence."[68] One year after *Echols*, the court held that a claim of conflict of interest based on defendant's attorney's association in practice with a special assistant attorney general was waived because it was raised for the first time in a petition for rehearing in the appellate court.[69]

This series of decisions leaves in question whether failure to raise a claim of conflict in interest at trial, in a post-trial motion, or in the original brief on direct appeal waives the issue. One appellate court attempted to rationalize *Precup* and *Echols* on the ground that in *Echols* an actual conflict of interest was apparent from the record, while in *Precup* it was not.[70] This attempt, although valiant, is of little help since in essence it means that a valid claim of conflict of interest is not waived by failure to raise it in the trial court, but an invalid claim is waived. If the claim is valid, then the joint representation constituted plain error not subject to the waiver rule. If the claim is invalid, then there was no denial of effective assistance of counsel and, therefore, no plain error.

One fact that may justify the distinction between *Precup* and *Echols* is that in *Precup* a new attorney entered the case to assist trial counsel in preparation of the post-trial motion. Since this attorney was not involved in the trial, the court felt he should have raised the issue, even if trial counsel overlooked it. The reasonableness of that view is open to question.

In the absence of entry of independent counsel, the principle of implicit waiver simply has no place in a conflict of interest case. If an attorney represents conflicting interests he is clearly

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spect to Rule 44(c), the Court stated that the exercise of the court's supervisory power is a desirable practice, but for state courts is not mandatory.

67. 74 Ill. 2d 319, 385 N.E.2d 664 (1978).

68. *Id.* at 329, 385 N.E.2d at 648-49.

69. People v. Lykins, 77 Ill. 2d 35, 394 N.E.2d 1182 (1979). The defendant alleged that a per se conflict of interest existed because partners of the attorney appointed by the court to represent him were special assistants to the Illinois Attorney General. This situation was expressly prohibited in People v. Fife, 76 Ill. 2d 418, 392 N.E.2d 1345 (1978). Although the court acknowledged that *Fife* permitted waiver only if it was "knowing and intelligent," this requirement did not apply since *Fife* had prospective application. *See* note 22 *supra*.

70. People v. Mathes, 69 Ill. App. 3d 275, 387 N.E.2d 39 (1979).

acting improperly.[71] If he fails to call the conflict of interest to the attention of the court in the post-trial motion, he is compounding the impropriety. Indeed, if counsel is retained instead of appointed, he may well have a financial interest in not calling a possible conflict of interest to the attention of the trial court. The attorney who represents a defendant in spite of a conflict of interest is either wilfully or negligently compromising the interest of the defendant. It is irrational to say that this attorney can waive the issue of his own misconduct on behalf of his client.

It is more reasonable to apply waiver principles to conflict of interest issues where independent counsel has entered the case, where, for example, defendant is represented by a new attorney on appeal. If the conflict issue is presented by the record and counsel does not urge it on appeal, it is arguably proper to deem the issue waived. Waiver should not apply, however, unless the attorney is truly independent. In *Precup* the new attorney was apparently associated with defendant's trial counsel for the purpose of preparing post-trial motions. It is hardly reasonable to expect an attorney to convince another attorney with whom he has associated on a case that they ought to raise in post-trial motion the issue of the original attorney's misconduct.

Because of the ethical implications of conflict of interest issues, traditional waiver principles are inappropriate. They should not apply unless truly independent counsel, unencumbered by any responsibilities to the attorney who was arguably in the conflict of interest situation, has assumed responsibility for the case and is free to raise any issues which he feels are meritorious.

Explicit Waiver of Conflict of Interest

There has been a shift in Illinois law about whether a defendant can waive a claim of conflict of interest if the alleged conflict is explained to him and he indicates that he wishes to continue to be represented by his attorney in spite of the conflict. Early cases indicated that for practical purposes a conflict could not be waived. More recently, however, Illinois courts have been willing to find waivers valid.

In *People v. Stoval*[72] the defendant was asked on the record if he knew that his defense counsel also represented the jewelry store he was accused of burglarizing. The court explained that the jewelry store was not a party to the criminal proceeding. The defendant stated on the record that he was aware of the rep-

71. ABA CODE OF PROFESSIONAL RESPONSIBILITY No. 5 (1978). *See also* ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY No. 5 (1980).

72. 40 Ill. 2d 109, 239 N.E.2d 441 (1968).

resentation and that it made no difference to him. Nevertheless, the Illinois Supreme Court refused to find a waiver, stating that courts indulge every reasonable presumption against the waiver of constitutional rights, and that the record did not establish that the defendant was adequately informed of the significance of the conflict.[73] Similarly, in *People v. Meyers*,[74] where defendant's attorney had also agreed with defendant's wife to investigate a possible dram shop action against the tavern in which the defendant had been drinking prior to the burglary, the supreme court found no waiver of the conflict of interest, even though defense counsel had explained the conflict to the defendant. Counsel had even explained that the amount of the recovery in the dram shop action might well depend upon the length of the sentence served by the defendant. He offered to withdraw from either case, but the defendant asked him to continue in both. Nevertheless, the court refused to find a valid waiver. Citing *Stoval*, the court stated:

> [I]t is difficult, if not impossible, to satisfactorily advise a defendant of the subtle effect which a conflict of interests may have upon an appointed counsel's representation. In this case, there is no indication that the appointed counsel ever undertook to explain to defendant that subconsciously compromising effect which the contingent fee prospects could conceivably have upon his counsel's effort.[75]

While several cases indicated that a waiver was theoretically possible,[76] Illinois courts were extremely hesitant to find a valid waiver, although an occasional appellate court did so.[77]

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73. *Id.* at 114, 239 N.E.2d at 442. The court's decision on the waiver issue was consistent with the theory behind the per se rule first announced in this case. The per se rule was mandated because of the dangers of prejudice which might not be indicated by one record. The court was reluctant to allow waiver, stating that it would be difficult for the client to understand how a conflict could affect, sometimes subtly, a client's representation.

74. 46 Ill. 2d 149, 263 N.E.2d 81 (1970).

75. *Id.* at 152, 263 N.E.2d at 82-83.

76. People v. Coslet, 67 Ill. 2d 127, 364 N.E.2d 167 (1977) (counsel appointed to represent defendant charged with the murder of her husband subsequently became the administrator of his estate); People v. Kester, 66 Ill. 2d 162, 361 N.E.2d 569 (1977) (court-appointed assistant public defender who represented defendant at the time the defendant pleaded guilty had appeared earlier in the same criminal proceedings on behalf of the state as an assistant state's attorney).

77. *E.g.*, People v. King, 58 Ill. App. 3d 199, 373 N.E.2d 1092 (1978). Before the defendant's trial it was discovered that defendant's appointed counsel worked for an attorney who was an assistant attorney general. In the presence of both counsel and defendant the trial court informed the defendant of his counsel's relationship to his employer, and of the employer's status. The court decided to appoint new counsel, but later the defendant insisted upon his current attorney. The court permitted the defendant to file a written waiver of conflict of interest and keep the attorney. Although the reviewing court noted that the effect of a possible conflict was not clearly

The position of the Illinois Supreme Court changed, however, with *People v. Robinson*.[78] In that case the defendant was originally represented by a part-time public defender, who withdrew after it was discovered that his law firm had previously represented the owner of the tavern the defendant was accused of burglarizing. Thereafter, the defendant's case was assigned to another public defender who had no association with the victim. Without deciding whether the conflict of interest which disqualified the original public defender also disqualified the second one, the court held that the defendant had made a knowing and intelligent waiver of the conflict of interest, if one in fact existed.[79]

The trial court had attempted to explain to Robinson the nature of the conflict, but Robinson did not wish to be represented by another attorney for the public defender's office. However, following the court's explanation that a new attorney might have to ask for a continuance, which would result in a waiver of defendant's rights under the Illinois Speedy Trial Statute, the defendant agreed to be represented by an assistant public defender. Subsequently, that assistant withdrew and still another public defender was appointed to represent Robinson. When it came to light that two other assistant public defenders had done legal work for the victim, Robinson was again brought before the court and admonished about the possible conflict and the effect that a change of attorneys might have on his speedy trial rights. Again, defendant agreed to be represented by someone from the public defender's office.

The Illinois Supreme Court, after carefully considering the portions of the transcript dealing with the purported waiver, found it had been knowingly and intelligently given. Those exchanges are susceptible to different interpretations,[80] however.

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explained, the defendant was sufficiently informed to realize that in some indirect way his counsel's employment might affect his case. The court found a valid waiver.

78. 79 Ill. 2d 147, 402 N.E.2d 157 (1980).

79. *Id.* at 166, 402 N.E.2d at 166.

80. From the following portions of the transcript, it is questionable whether the defendant's waiver was intelligently given:

> THE COURT: Well, the reason I brought this all to your attention is I want you to understand what is going on and if you have any objection then what I'm going to do then, I'm going to relieve Mr. Andreano, the Public Defender's office. Now, that's going to put me in a position of giving you a new lawyer and in your trial, it's your trial date now and you'll get a new lawyer in. Now, he may need time to prepare it. He may not be ready to go to trial promptly. Do you understand that?
>
> DEFENDANT ROBINSON: Yah.
>
> THE COURT: Under no circumstances, you may be faced with the choice of whether to ask for a continuance, do you understand?

It is not clear, for example, that defendant understood the provisions of the speedy trial statute and the effect of a continuance. Moreover, the trial court's remarks can be interpreted as an attempt to persuade the defendant to waive the conflict.

The court in *Robinson* attempted to distinguish *Stoval* on its facts. In reality, however, the opinion represents a shift in the court's attitude toward waiver of conflict of interest. It is inconceivable that the *Stoval* or *Meyers* courts would have found a valid waiver on the *Robinson* facts. At least one appellate court judge has interpreted *Robinson* as making it easier to obtain a valid waiver of a conflict of interest.[81]

DEFENDANT ROBINSON: Yep.
THE COURT: And if you ask for a continuance you will be giving up and waiving your right to a speedy trial, do you understand that?
DEFENDANT ROBINSON: Yep.
THE COURT: Your trial has to commence within 120 days of your arrest which is tomorrow. Do you understand that?
DEFENDANT ROBINSON: Yep.
THE COURT: And you still feel that you would rather have somebody outside that office and there is no possibility of any influence—
DEFENDANT ROBINSON: Repeat that question again.
THE COURT: Pardon?
DEFENDANT ROBINSON: Repeat the question.
THE COURT: Well, the question is Mr. Andreano offered to get Mr. Phelan [a full-time assistant public defender] in to replace Mr. Bonds. Do you understand that?
DEFENDANT ROBINSON: Yep.
THE COURT: And you said there is always a possibility of some kind of influence—
DEFENDANT ROBINSON: Yep.
THE COURT: And if you feel that way, then we are going to get you somebody completely un-associated with the Public Defender's office. If that's the way you feel. Because you are the one that has to make the choice. I am only advising you that your 120 days will be up, you[r] trial has to start tomorrow and this new lawyer that I bring in, he may need more than one day to familiarize himself with the case. He may say, I need more time and you are going to be faced with—You have a right to demand that your trial start and if your trial starts you may be faced with a lawyer that's not in a position to properly defend your case for lack of time. Do you understand that?
DEFENDANT ROBINSON: Yep.
THE COURT: So, knowing that, Mr. Robinson, do you want to get a new and different lawyer not connected with the Public Defender's office or do you want to get another lawyer from the Public Defender's office?
DEFENDANT ROBINSON: I'll keep the one I got.
THE COURT: You want to keep the one you got now?
DEFENDANT ROBINSON: Yah.

People v. Robinson, 79 Ill. 2d 147, 162-63, 402 N.E.2d 157, 164-65 (1980).

81. *See* the concurring opinion of Justice Green in People v. Nelson, 77 Ill. App. 3d 85, 90, 395 N.E.2d 1238, 1242 (1979) ("*Robinson* indicates that a waiver of conflict may properly be obtained from a defendant more easily than dicta in *People v. Stoval*, 40 Ill. 2d 109, 239 N.E.2d 441 (1968), might have indicated.").

If, as it appears, *Robinson* does represent a shift in the court's attitude toward waiver of conflict of interest, no explanation is offered for that shift. It is possible that the increasing frequency of conflict of interest claims had an effect. At the time *Stoval* and *Meyers* were decided, such cases were rare.[82] Today they represent a staple in the diet of Illinois reviewing courts.[83] Perhaps the relaxation of the waiver requirement is a means of dealing with the growing number of conflict of interest problems. If so, it is ill-advised.

A claim of conflict of interest goes to whether a defendant has been afforded his constitutional right to effective assistance of counsel. It is well established that courts indulge "every reasonable presumption" against the waiver of that right.[84] The hesitancy of the *Stoval* and *Meyers* courts to find a valid waiver is in keeping with that principle. The relaxation of the prejudice against the waiver, if it is a response to the increased frequency of claims of conflict of interest, treats a symptom and not the illness itself. It was suggested above that in non-codefendant cases Illinois courts are too quick to find a conflict of interest. The result is that a significant number of convictions are reversed on conflict of interest grounds where the alleged conflict has had no discernible effect upon the performance of counsel. Indeed, it appears that under current Illinois law, a conviction may be reversed merely because of the presence of a "possible conflict of interest."[85] Such a rule serves neither the interests of justice nor the legitimate interest of criminal defendants. It is,

82. *People v. Meyers* was decided in 1970 (*see* note 72 and accompanying text *supra*), and *People v. Stoval* in 1968. Between 1960 and 1970, only six other conflict of interest cases were decided by the Illinois Supreme Court: People v. Johnson, 46 Ill. 2d 266, 265 N.E.2d 869 (1970) (defendant's conviction reversed after codefendant represented by same attorney testified against defendant in return for dismissal of charges against him); People v. Sommerville, 42 Ill. 2d 1, 245 N.E.2d 461 (1969) (no conflict where there were no inconsistencies in defendants' defense and no prejudice to defendants); People v. Ware, 39 Ill. 2d 66, 233 N.E.2d 421 (1968) (conflict of interest where codefendant represented by same attorney as defendant pleaded guilty and testified against defendant); People v. Satterwhite, 38 Ill. 2d 138, 230 N.E.2d 206 (1967) (defendant's being an assistant corporation counsel for city of Chicago did not establish conflict of interest invalidating defendant's conviction); People v. McCastle, 35 Ill. 2d 552, 221 N.E.2d 227 (1966) (no conflict where defendants' defenses not inconsistent: both defendants denied knowing each other and gave separate alibis); People v. Friedrich, 20 Ill. 2d 240, 169 N.E.2d 752 (1960) (court found no conflict of interest that would require separate representation).

83. Since 1970, the Illinois Supreme and Appellate Courts have decided over 120 conflict of interest cases.

84. Johnson v. Zerbst, 304 U.S. 458, 465 (1938) (the Court stated that it "do[es] not presume acquiescence in the loss of fundamental rights").

85. People v. Coslet, 67 Ill. 2d 127, 364 N.E.2d 167 (1977); *see* note 30 and accompanying text *supra*. People v. Kester, 66 Ill. 2d 162, 361 N.E.2d 569 (1977); *see* note 35 and accompanying test *supra*.

however, no answer to this problem to relax the standards for waiver of conflict of interest. To do so allows for too easy a waiver of the legitimate, as well as of the speculative, conflict of interest.

The number of cases in which it is necessary to consider the question of waiver would be small if the constitutional standard enunciated in *Cuyler v. Sullivan*[86] were applied to determine whether the defendant's right to effective assistance of counsel has been compromised by a conflict of interest. The court could focus on the essential question: whether the defendant was deprived of his right to effective assistance of counsel. If such a deprivation were found, the court should deny relief with great hesitation on the ground that the defendant had invited the deprivation. At present, at least in non-codefendant cases, Illinois courts are forced to focus on the secondary issue of waiver.

People v. Fife[87] illustrates the misplaced emphasis of current Illinois law. In *Fife*, a defendant was represented by an attorney who was also a special assistant attorney general handling unemployment compensation cases for the state on a part-time basis. There was nothing in the record to suggest that counsel's representation of the defendant was in any way deficient. Nevertheless, the conviction was reversed because the court was "concerned about the possible, perhaps subliminal, pressure a defense counsel who is also a special assistant for workmen's compensation cases might receive from the Attorney General's office. . . ."[88] Yet the court immediately went on to observe that the danger could be "significantly lessened" (but not, apparently, eliminated) by disclosure of the conflict and waiver.[89] Indeed, the opinion essentially invites waiver as a means of dealing with the problem of special assistant attorneys general representing criminal defendants. Thus, the important issue is not whether the defendant was denied effective assistance of counsel, but whether he agreed to it in advance.

There should be a strong policy disfavoring waivers in view of these considerations: consequences of a defendant's being represented by an attorney laboring under an actual conflict of interest; the difficulty of properly advising the defendant prior to trial of the nature of a conflict of interest and its possible effects; and the danger to the legal profession in allowing an attorney to proceed in the face of a conflict of interest. A waiver should be approved only where there is no question that the defendant is

86. *See* note 16 and accompanying text *supra*.
87. 76 Ill. 2d 418, 392 N.E.2d 1345 (1979).
88. *Id.* at 424-25, 392 N.E.2d at 1348.
89. *Id.* at 425, 392 N.E.2d at 1348.

acting knowingly, intelligently, and voluntarily. The approach taken by the Illinois Supreme Court in *Stoval* and *Meyers* is consistent with this principle. The approach taken in *Robinson* and *Fife* is not.

EXTENSION OF CONFLICT OF INTEREST TO ATTORNEYS ASSOCIATED IN PRACTICE

Illinois cases have long recognized the principle that if an attorney is disqualified from representing a criminal defendant because of a conflict of interest, the conflict also disqualifies the partners and associates of that attorney.[90] However, in *People v. Robinson* the Illinois Supreme Court declined to apply that principle to public defender offices.[91] The court concluded that such offices were not entities sufficiently similar to private law firms to require application of the rule that one attorney's conflict of interest disqualified all attorneys with whom he was associated in practice. In *Robinson* the court considered several cases consolidated on appeal, all of which involved representation by multiple attorneys from the public defender's office. Since the court determined that none of the cases presented actual conflicts of interest, it did not have to pass directly on the question of when a conflict on the part of one member of the public defender's office extends to others.[92] Subsequently, the court held that a case-by-case inquiry is necessary to determine

90. People v. Fife, 76 Ill. 2d 418, 392 N.E.2d 1345 (1979) (knowledge of one firm member imputed to member who is also a special assistant attorney general); People v. Stoval, 40 Ill. 2d 109, 239 N.E.2d 441 (1968) (firm of defendant's attorney represented victim); People v. Karas, 81 Ill. App. 3d 990, 401 N.E.2d 1026 (1980) (knowledge of one member of law firm imputed to all its members).

91. 79 Ill. 2d 147, 158-59, 402 N.E.2d 157, 163 (1980). In the companion case to *Robinson*, People v. Spicer, 79 Ill. 2d 173, 402 N.E.2d 169 (1980), the court also addressed the issue of whether a public defender's office constituted a law firm for the determination of conflicts of interest. Although this case immediately followed *Robinson*, the court surprisingly based its decision on the premise that the two public defenders representing codefendants constituted joint representation, an assertion *Robinson* explicitly rejected. The court noted, however, that the defendants' trial had been severed and the defendants' counsel conducted a rigorous defense, and concluded that no conflict existed. Justice Clark, in his concurring opinion, stated that while he agreed with the result, the decision could be viewed as inconsistent with *Robinson* and lead to confusion. He felt (correctly) that the proper approach would have been to base the decision on *Robinson* that no joint representation existed. *Id.* at 187, 402 N.E.2d at 176 (Clark, J., concurring). *But see* People v. Miller, 79 Ill. 2d 454, 404 N.E.2d 199 (1980).

92. People v. Robinson, 79 Ill. 2d 147, 158-59, 402 N.E.2d 157, 163 (1980). The Illinois court stated that the prior decisions of the United States and Illinois Supreme Courts would furnish adequate guidelines to avoid conflicts of interest.

whether any facts peculiar to a case preclude representation of competing interests by members of a public defender's office.[93]

The Illinois Supreme Court was too quick to dismiss as "quite remote" the possibility of public defenders' performances being affected by their representation of potentially conflicting interests.[94] For example, assume two codefendants are both represented by the public defender's office, and the head of the office devises a unified strategy of defense which he feels might well result in the acquittal of both defendants. A junior member of the office, however, feels that his client's interest might best be served by an independent defense. The possibility that the junior member might yield to the suggestion of his superior can hardly be termed "remote."[95] Indeed, the court in *Robinson* acknowledged that the prevailing view in most jurisdictions is that public defender offices should be treated like law firms insofar as conflicts of interest are concerned.[96]

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93. People v. Miller, 79 Ill. 2d 454, 404 N.E.2d 199 (1980). The court reasoned that a case-by-case inquiry was preferable to applying a per se rule which would disqualify an entire public defender's office whenever one of its members was confronted with a conflict. *Id.* at 462, 404 N.E.2d at 203.

94. People v. Robinson, 79 Ill. 2d 147, 402 N.E.2d 157 (1980). The court cited no authority for this proposition, stating that the risk was remote when compared to the alternative—the application of a per se rule disqualifying the entire public defender's office.

95. *See* People v. Baxtrom, 61 Ill. App. 3d 546, 378 N.E.2d 182 (1978), where three attorneys from the public defender's office were assigned to defend three codefendants charged with attempted murder and armed robbery. The third defendant's trial was severed from the other two because of statements he made implicating the defendants. His attorney moved for a severance since there was a conflict of interest because the attorneys were all public defenders. The attorney stated:

> [T]he reason I feel so constrained in this area and the problem I see throughout the entire trial is that Mr. Sturgeon and I work in the same office. I am, in fact, for all practical purposes his boss. I'm the Public Defender, he's an Assistant Public Defender. . . . And we get into a situation where the natural defense is to accuse each other, and then you're concerned with all types of questions as to what information I have that I would not normally have, had I not been in the same office as Mr. Sturgeon.

Id. at 550, 378 N.E.2d at 186. Although the court found no conflict because the defendants did not implicate each other, this case illustrates some of the problems which may arise where public defenders represent codefendants in the same trial.

96. People v. Robinson, 79 Ill. 2d at 155-56, 402 N.E.2d at 161. The Illinois Supreme Court cited Turner v. State, 340 So. 2d 132 (Fla. App. 1976) and Commonwealth v. Via, 455 Pa. 373, 316 A.2d 895 (1974) in which courts of both states ruled that public defenders' offices are firms. The court also noted that legal aid societies and similar public service offices have been treated like private law firms for purposes of determining whether there was a conflict of interest. Estep v. Johnson, 383 F. Supp. 1323 (D. Conn. 1974); Commonwealth v. Westbrook, 484 Pa. 534, 400 A.2d 160 (1979). Furthermore, the court noted that the American Bar Association Standards Relating to the Administration of Criminal Justice draw no distinction between attorneys in private practice and those employed by the state: "[O]nce a lawyer has undertaken the representation of an accused his du-

Moreover, the court's case-by-case approach provides no guidance to public defenders and trial courts as to when conflicts extend to other members of public defender offices. Perhaps more than any other facet of the conflict of interest problem, this area needs clarification. The courts and the public defender offices need to proceed with confidence. At present this is not possible. It is well established that a single attorney representing two codefendants may not negotiate a plea of guilty for one with the understanding that he will testify against the other.[97] Clearly, two members of the same law firm could not represent these two codefendants.[98] It is not at all clear whether two members of the same public defender office could represent them. It does very little good to suggest, as does the Illinois Supreme Court in *Robinson*, that the litigants seek guidance from the appropriate provisions of the American Bar Association Standards Relating to the Defense Functions, and from decisions of the United States and the Illinois Supreme Courts.[99] These sources do not address the issue. If the court is not going to treat public defender offices as law firms, it is essential that some guidelines be established to determine in advance of trial whether representation by the public defender is proper. Litigants should not be required to proceed in ignorance and await the application of the court's case-by-case analyses to find out whether they acted properly.

The problem of the status of public defender offices is a difficult one. To dismiss as "quite remote" the chance that a public defender would be affected by a conflict of interest is to gamble with the constitutional rights of defendants. On the other hand, to unduly restrict the number of cases the public defender may enter would deprive many defendants of quality representation, for the public defender's office often provides representation superior to that available from the private bar.[100]

If the per se rule as applied in non-codefendant cases[101] were abolished, the problem would be lessened somewhat. The

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ties and obligations are the same whether he is privately retained, appointed by the court or serving in a legal aid or defender system." ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, THE DEFENSE FUNCTION § 3.9 (1971).

97. People v. Johnson, 46 Ill. 2d 266, 265 N.E.2d 869 (1970) (counsel of necessity had to assume position of ambivalence toward the defendant, and there was complete antagonism between the positions of the defendant and codefendant); People v. Ware, 39 Ill. 2d 66, 233 N.E.2d 421 (1968) (obligation to codefendant not terminated by guilty plea—attorney had continuing responsibility to convince court codefendant's testimony was truthful while simultaneously representing defendant with antagonistic defense).

98. *See* note 88 *supra*.

99. 79 Ill. 2d 147, 159-60, 402 N.E.2d 157, 163.

100. People v. Robinson, 79 Ill. 2d 147, 150, 402 N.E.2d 159, 162 (1980).

101. *See* note 28 and accompanying text *supra*.

courts would not be forced to deal with the question of whether a "possible conflict of interest" on the part of one member of the office disqualified all members. Rather, the issue would only be raised where the circumstances indicated a reasonable potential that the performance of counsel might be affected. Nevertheless, the issue would remain, particularly where several codefendants with arguably antagonistic interests all seek representation by the public defender.

A possible alternative to exempting public defender offices from the rule that a conflict on the part of one attorney extends to all attorneys with whom he is associated would be to alter the structure of those offices to accommodate conflicting interests. In at least one county the public defender function is decentralized. Several attorneys are employed by the county to defend indigents. Each functions independently, integrating his public defender clients with his private clients. This system was approved by one appellate court as a means of dealing with the conflict of interest problem.[102] Unfortuately, a decentralized public defender office seems inconsistent with the statute authorizing public defender offices.[103] In any case, some mechanism should be devised to provide independent publicly-paid counsel in appropriate cases. Larger counties could maintain multiple independent offices of several attorneys each. Rural counties where there is only one public defender could cooperate, and one county could use the public defender in the next county if independent representation were required. Alternatively, a county public defender office could be supplemented by a panel of independent private attorneys, as the office of the state appellate defender is authorized to do.[104] With a certain degree of imagination and some appropriate statutory amendments, a structure could be established which could provide able, publicly-paid, independent counsel to indigent defendants at reasonable expense. This approach to the problem of conflicts of interest within public defender offices would be superior to the case-by-case inquiry contemplated by the Illinois Supreme Court.

102. The Fourth District in People v. Puckett, 70 Ill. App. 3d 743, 388 N.E.2d 1293 (1979) and People v. South, 70 Ill. App. 3d 245, 387 N.E.2d 1294 (1979) found no conflict of interest in cases where codefendants had been represented by public defenders from the same office which was decentralized in structure.

103. ILL. REV. STAT. ch. 34, §§ 5601-5609 (1979). The statute makes no mention of the structure approved by *South* (note 102 *supra*). The tone of the various sections implies a centralized public defender's office.

104. ILL. REV. STAT. ch. 38, § 288-10(c)(1) (1979).

CONCLUSION

In light of the United States Supreme Court's decision in *Cuyler v. Sullivan*, Illinois must re-examine its approach to conflict of interest in criminal cases. *Cuyler* makes clear that the so-called per se rule as applied in non-codefendant cases has no constitutional foundation. The experience of the dozen years since *People v. Stoval* has demonstrated that the rule is unrealistic and unworkable. No distinction should be made between cases in which a conflict exists between the interests of jointly-represented codefendants, and cases in which the conflict of interest arises in some other way. Regardless of how the conflict arises, a defendant is not denied effective assistance of counsel unless he can demonstrate that an actual conflict of interest affected his counsel's performance.

Application of the proper constitutional standard would allow the courts to focus on the essential question in conflict of interest cases: whether the defendant's right to effective assistance of counsel has been compromised. Recent cases which make unfortunate application of waiver principles should be reconsidered to the extent that they are a response to the harsh results of the per se rule. A claim of conflict of interest should not be deemed waived by failure of counsel to raise the issue, unless truly independent counsel has entered the case. Because of the general prejudice against waiver of constitutional rights, and the difficulty of adequately advising a defendant of the nature of a conflict of interest, courts should be extremely hesitant to allow a defendant to waive a conflict of interest.

The case-by-case approach for determining whether a conflict of interest on the part of one member of a public defender's office extends to other members should be abandoned. Public defender offices should be considered the functional equivalent of law firms. Structural changes should be made in the public defender offices to insure that all indigent defendants receive independent and competent counsel at public expense.

The conflict of interest problem is so complex that no approach can eliminate the confusion. The changes suggested in this article could, however, do much to lessen the confusion. The suggested approach would provide criminal litigants with considerably more guidance than they presently receive about how to proceed in the face of a possible conflict of interest. Finally, and most important, the suggested approach is consistent with both the societal interest in upholding legitimately-obtained criminal convictions, and the protection of the criminal defendant's right to effective assistance of counsel.