

ATTORNEYS-AT-LAW

STATE v. BISHOP: JOINT REPRESENTATION OF CRIMINAL CODEFENDANTS

INTRODUCTION

In *State v. Bishop*,¹ the Nebraska Supreme Court confronted the issue of conflicts of interest in joint representation of criminal codefendants. The court set guidelines to determine the existence of a conflict of interest and set the standard by which a criminal proceeding can be set aside for violation of the sixth amendment.² The court established the standard that conflicts of interest must be proven from trial evidence to have actually existed and adversely affected the results of the case.³

This article will discuss the background and nature of joint representation of criminal defendants, and the two theories concerning the standard of proof required to establish a conflict of interest. The United States Supreme Court enunciated the first theory in *Holloway v. Arkansas*.⁴ It held that "mere existence" of joint representation creates the presumption of prejudice.⁵ In *Cuyler v. Sullivan*,⁶ the Court stated the second theory; the defendant must show the existence of an "actual conflict" which adversely affected the attorney's performance and the case result.⁷

FACTS & HOLDING

Each of the three defendants in *Bishop* was charged with five counts of robbery and five counts of using a firearm in the commission of a felony. Defendant Yates was also charged with intent to kill, wound or maim. The cases were consolidated and handled by one public defender. Motions for severance and separate trials were denied. A plea bargain entered into by the public defender on behalf of all the defendants reduced the charge to two counts of robbery and one count of using a firearm to commit a felony.⁸ Yates appealed, and the lower court decision was affirmed. The

1. 207 Neb. 10, 295 N.W.2d 698 (1980).

2. U.S. CONST. amend. VI reads, in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." *Id.*

3. 207 Neb. at 19-20, 295 N.W.2d at 704.

4. 435 U.S. 475, 487-88 (1978).

5. *Id.* at 489.

6. 446 U.S. 335 (1980).

7. *Id.* at 348.

8. 207 Neb. at 11, 295 N.W.2d at 699-700.

other defendants filed for post-conviction relief.⁹ They claimed that their constitutional rights to effective counsel had been denied, arguing that their interests differed.¹⁰ Thus, joint representation created a conflict of interest resulting in inadequate counsel for each defendant. The defendants also contended that the trial court had erred in denying their motions to sever on the basis of inability to prove prejudice by consolidation of the defendants' cases.¹¹

The issue raised was whether a conflict of interest existed and by what standard the conflict would be determined. The court held that the defendants' sixth amendment rights were not denied¹² because of their failure to establish an actual conflict of interest adversely affecting their lawyer's performance.¹³

BACKGROUND

Code of Professional Responsibility

The American Bar Association's Model Code of Professional Responsibility has set guidelines to prevent conflicts of interest that may arise from the representation of multiple clients.¹⁴ The

9. 207 Neb. at 12, 295 N.W.2d at 700. NEB. REV. STAT. § 29-3001 (Reissue 1979) reads, in part:

A prisoner in custody under sentence and claiming a right to be released on the grounds that there was such a denial or infringement of the rights of the prisoner as to render the judgment void . . . under . . . the Constitution of the United States, may file a verified motion . . . asking the court to vacate or set aside the sentence.

Id.

10. 207 Neb. at 12, 295 N.W.2d at 700.

11. *See id.* at 11, 15, 295 N.W.2d at 699, 701-02.

12. *See id.* at 18, 295 N.W.2d at 703.

13. *Id.* at 19-20, 295 N.W.2d at 704.

14. ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT, EC 5-14 to -20 at 25-26 (1980). The American Bar Association, in its latest articulation of ideal standards for criminal defense, has taken the position that because of the potential for conflicts of interest in representing multiple defendants, a lawyer should decline to act for more than one of several codefendants unless "it is clear that . . . no conflict is likely to develop; . . . the several defendants give an informed consent, . . . and . . . the consent is made a matter of judicial record." 1 ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 4-3.5(b) (2d ed. 1980). This standard remains advisory unless adopted by the legislature or the courts. *Developments in the Law—Conflicts of Interests*, 94 HARV. L. REV. 1244, 1385 (1981) [hereinafter cited as *Developments*].

The proposed revision of the Code of Professional Responsibility states a more affirmative general rule of conflict of interest: "A conflict of interest exists with respect to a client when a lawyer's ability to consider, recommend, or carry out a course of action on behalf of the client may be adversely affected by the lawyer's responsibility to another client. . . ." ABA COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8 (Proposed Final Draft, May 30, 1981). The code mentions the representation of codefendants in a criminal case as a typical situation involving potentially differing interests. In

code states that a lawyer is representing conflicting interests when, "in behalf of one client, it is his duty to contend for that which duty to another client requires him to 'oppose.'"¹⁵ Therefore, he is precluded from employment which adversely affects his judgment in behalf of, or dilutes his loyalty to a client.¹⁶

The code is a non-mandatory guideline which deals with conflicting interests in criminal defense representation. But lawyers must comply with the Constitution as well as the code.¹⁷ The representation of multiple defendants which produces a conflict of interest may result in a denial of the defendant's constitutional rights to effective counsel.¹⁸

United States Supreme Court Decisions

The United States Supreme Court has addressed the issue of conflict of interest by joint representation of criminal codefendants on three separate occasions.¹⁹ These cases illustrate the Court's development of the standard of proof required to establish a conflict, and the trial court's duty to identify the existence of a conflict.²⁰ The Court's holding in *Glasser v. United States*²¹ was based on the premise that undivided loyalty is an element of effective counsel.²² The Court held that counsel is ineffective if the court appoints counsel to represent multiple defendants when the trial judge has notice that their interests may be inconsistent, and the defense is less than it might have been if there had been separate

some circumstances, a lawyer's judgment may not be adversely affected by the possibility of differing interests among multiple clients; in other circumstances, there is a chance of adverse effect. EC 5-17 at 26; although the code in section DR-105 (A) and (B) forbids employment "if the exercise of his independent professional judgment . . . will be or is likely to be adversely affected . . . or if it would be likely to involve him in representing differing interests, . . ." the code provides an exception, DR-105 (C). This section allows a lawyer to engage in multiple representation "if it is obvious that he can adequately represent the interests of each and each consents to the representation. . . ." *Id.*

15. *Id.* EC 5-15 at 29 n.19.

16. *Id.* EC 5-14 at 25.

17. *Developments, supra* note 14, at 1385.

18. *See* U.S. CONST. amend VI.

19. *Cuyler v. Sullivan*, 446 U.S. 335, 337-40 (1980); *Holloway v. Arkansas*, 435 U.S. 475, 477-81 (1978); *Glasser v. United States*, 315 U.S. 60, 64-66 (1942).

20. *See Developments, supra* note 14, at 1385-90.

21. 315 U.S. 60 (1942).

22. *See id.* at 70. In the trial of five codefendants charged with conspiracy to defraud the government, one defendant, Kretske, dismissed his attorney. To avoid delay, the trial judge asked Glasser's attorney to also represent Kretske. Despite Glasser's objection and the possible conflict of interest involved, the trial proceeded and Kretske was convicted. The U.S. Supreme Court reversed the conviction on appeal. *Id.* at 64-66.

counsel.²³ Therefore, if counsel is ineffective because joint representation creates a conflict of interest, the defendants' sixth amendment right is denied.²⁴

In determining the standard required to prove a conflict of interest, the Court held that the mere burden of representing another party may be a strong enough factor to impair counsel's effectiveness.²⁵ The Court in *Glasser* strongly asserted that "the right to have the assistance of counsel is too fundamental and absolute to allow the courts to indulge in nice calculations as to the amount of prejudice arising from its denial."²⁶ However, the Court affirmed the conviction of one defendant because it was clear from the record that no prejudice was disclosed as to him.²⁷ Therefore, while the Court did state that the possibility of conflict alone warranted separate counsel, the opinion also detailed the actual conflict and instances of prejudice which resulted from joint representation.²⁸ The Court appears to have wavered between the "mere existence" and "actual conflict" theories.

After *Glasser*, the standard by which to determine existence of conflicts of interest was uncertain. The lower courts varied in their interpretation of the *Glasser* standard.²⁹ However, in *Holloway v. Arkansas*,³⁰ decided in 1978, the Court reaffirmed and expanded the *Glasser* rule.³¹ Chief Justice Burger, writing for the majority, stated that whenever a trial court required joint representation in spite of a timely objection, reversal is automatic.³² The Court held that prejudice is presumed regardless of whether it was actually shown.³³ The standard set followed the "mere existence" theory.³⁴

23. See *id.* at 76.

24. *Id.*

25. *Id.* at 75.

26. *Id.* at 76.

27. *Id.* at 77.

28. 14 AKRON L. REV. 167, 170 (1980).

29. *United States v. Mandell*, 525 F.2d 671, 677 (7th Cir. 1975) (per curiam), cert. denied, 423 U.S. 1049 (1976) (other courts have applied the holding in *Glasser v. United States* to require a defendant to show "with a reasonable degree of specificity" that a conflict existed); *United States v. Valenzuela*, 521 F.2d 414, 416 (8th Cir. 1975), cert. denied, 424 U.S. 916 (1976) (other courts required a lesser degree of proof, holding that conflict of interest had to be "substantially possible"). See also *Hart v. Davenport*, 478 F.2d 203, 209-10 (3rd Cir. 1973) (conflict of interest existed if it were possible, no matter how remote); *Kaplan v. United States*, 375 F.2d 895, 898 (9th Cir.) cert. denied, 389 U.S. 839 (1967) (conflict of interest had to be "possible").

30. 435 U.S. 475 (1978).

31. See *id.* at 488. Three defendants charged with robbery, using firearms, and rape were convicted after an objection to joint representation was overruled. On appeal, the Arkansas Supreme Court affirmed. Using the actual conflict of interest standard, that court found no evidence of prejudice from the record. *Id.* at 477-81.

32. 435 U.S. at 489.

33. *Id.*

The Court refused to comment on whether a defendant must prove prejudice in the absence of an objection. However, the opinion did imply that a non-objecting defendant must show prejudice.³⁵ This suggests that the court applied the "actual conflict" theory, but the opinion may be interpreted otherwise.³⁶ Apparently, the standard of proof required to show a conflict of interest remained undetermined.³⁷

The *Glasser* Court assigned the trial judge the initial duty to protect an accused's right to effective assistance of counsel.³⁸ The Court in *Holloway* clarified that duty. Trial court judges are required to appoint separate counsel any time an accused or his attorney claim a possible conflict of interest.³⁹ A judge may not demand or suggest that counsel represent multiple defendants if the possibility of differing interests is made known to the court by formal objection or motion.⁴⁰ This language implies that the court has no affirmative duty to investigate.⁴¹

The Supreme Court's most recent case, decided in 1980, on this issue is distinguishable from the earlier cases. In *Cuyler v. Sullivan*,⁴² the possibility of conflict was raised on appeal, not at the trial. The defense attorney was privately retained, not court appointed.⁴³ The Court in *Cuyler* extended the *Glasser-Holloway*

34. See *id.* at 484.

35. See *id.* at 489. Commenting on the *Glasser* decision, the Court mentioned that the defendant who did not object had failed to prove prejudice. Thus, his conviction was not reversed. *Id.*

36. The lower courts' interpretation of the *Holloway* test was varied. Compare *English v. United States*, 620 F.2d 150, 152 n.4 (7th Cir. 1980) (*Holloway* establishes the presumption of prejudice when timely objection to joint representation is made, but does not raise the presumption without objection) with *United States v. Decoster*, 624 F.2d 196, 202 (D.C. Cir. 1976), *cert. denied*, 444 U.S. 944 (1979) (if a claim of ineffective counsel is based on conflict of interest proof of prejudice is not required).

37. See note 36 *supra*.

38. 315 U.S. at 71.

39. 435 U.S. at 482; see 71 J. CRIM. L. & C. 529 (1980).

40. 435 U.S. at 485.

41. See *id.*

42. 446 U.S. 335 (1980).

43. *Id.* at 342-43. The defendants were indicted for first degree murder. Two privately retained lawyers represented all defendants. Sullivan, who was tried first, was convicted and the conviction was affirmed on appeal. Sullivan petitioned for relief, arguing that his appellate counsel was ineffective in part because of his counsel's conflict of interest. The Pennsylvania Supreme Court found no conflict of interest, and Sullivan's petition was denied. Sullivan then sought habeas corpus relief in the federal district court, but that court denied relief, accepting the Pennsylvania Supreme Court's conclusion that there was no conflict of interest.

However, the Third Circuit Court of Appeals reversed. It held that any showing of possible prejudice or conflict of interest was sufficient to warrant reversal. The Supreme Court granted certiorari. *Id.* at 337-41.

rule. It held that defendants who retain their own counsel are equally entitled to protection against conflicts of interest as are defendants with a court appointed attorney.⁴⁴ In addition, the Court addressed two critical questions which had been left unanswered by earlier decisions:⁴⁵ (1) whether trial judges had an affirmative duty to inquire if defendants were being denied effective counsel because of conflicts of interest,⁴⁶ and (2) what degree of prejudice must a defendant show to establish a denial of effective assistance of counsel.⁴⁷

On the issue of duty, the *Cuyler* Court held that the trial judge owed only a limited duty to ascertain whether a defendant is being denied effective assistance of counsel.⁴⁸ The sixth amendment requires a trial court to investigate timely objections to multiple representation, but unless the trial judge "knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry."⁴⁹

The Court did support voluntary investigation by lower state courts and a mandatory inquiry for federal courts.⁵⁰ By not specifically attaching the duty of inquiry to the sixth amendment right, the Court implicitly permitted state courts to retain flexibility in developing their own standards.⁵¹

On the issue of the appropriate standard of proof, the Court held that if a defendant failed to raise an objection at trial, he must demonstrate that an actual conflict of interest affected his lawyer's performance.⁵² A defendant must show that his lawyer's representation clearly presented a conflict of interest to establish a viola-

44. *Id.* at 344.

45. 30 CATH. UNIV. L. REV. 103, 104-05 (1980).

46. 446 U.S. at 345.

47. *Id.*

48. *See id.* at 347-48.

49. *Id.* at 346-47.

50. *Id.* Rule 44(c) of the Federal Rules of Criminal Procedure is mandatory. *Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure*, 71 F.R.D. 507, 593 (1980). COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE Rule 44C at 82 (February 1978) provides, in part:

Whenever two or more defendants have been jointly charged . . . and are represented by the same retained or assigned counsel . . . the court shall promptly inquire with respect to . . . joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take measures . . . to protect each defendant's right to counsel.

Id.

51. 71 J. CRIM. L & C. 529, 535 (1980).

52. 446 U.S. at 350.

tion of the sixth amendment.⁵³ The *Cuyler* opinion was ambiguous as to the standard of proof the defendant must meet in order to have his objection sustained at the trial court level.⁵⁴ The Court stated expressly that a defendant who raised no objection at trial must demonstrate an actual conflict of interest which adversely affected performance.⁵⁵ However, dictum supports the premise that a defendant need not show actual conflict of interest when making an objection.⁵⁶

Since the Court did reaffirm *Holloway*,⁵⁷ it would seem to be inconsistent to require the defendant to show actual prejudice on objection. The holding in *Cuyler*, although comprehensive, does not clearly establish the standard of proof the defendant must meet to prove ineffective counsel. As a result of this uncertainty, lower court decisions remain inconsistent.⁵⁸

ANALYSIS

The underlying issue in *Bishop* was whether the codefendants plea bargained because their attorney's conflict of interest blocked their chance for acquittal.⁵⁹ To resolve that issue the Nebraska Supreme Court had to identify the standard of proof it would require to establish a conflict of interest. The court had the option to choose between the "mere existence" theory⁶⁰ or the "actual conflict" theory.⁶¹ The court in *Bishop* adopted the latter test. In *Bishop*, Chief Justice Krivosha dissented⁶² from the majority and supported the "mere existence" theory.⁶³ The Chief Justice believed that the request for separate counsel coupled with evidence that there was some pressure on the defendant to plead guilty is sufficient evidence of a conflict of interest.⁶⁴

In *Bishop*, the Nebraska Supreme Court adopted the "actual conflict" of interest theory.⁶⁵ In denying relief, the court found that

53. *Id.*

54. 14 AKRON L. REV. 167, 173 (1980).

55. *Developments, supra* note 14 at 1390; *see Cuyler v. Sullivan*, 446 U.S. at 350.

56. *Developments, supra* note 14, at 1390.

57. *See* note 52 and accompanying text *supra*.

58. *Developments, supra* note 14, at 1390.

59. 207 Neb. at 12, 18, 295 N.W.2d at 700, 703.

60. *See* notes 4 and 32 and accompanying text *supra*.

61. *See* notes 7 and 52 and accompanying text *supra*.

62. 207 Neb. at 20, 295 N.W.2d at 704.

63. *See id.*

64. *Id.*

65. 207 Neb. at 18, 295 N.W.2d at 704. The Nebraska Supreme Court required a showing of actual conflict and prejudice in *State v. Williams*, 191 Neb. 57, 213 N.W.2d 727 (1974). Although differences existed in statements given by codefendants, a defendant who pleaded guilty was not automatically prejudiced by joint representa-

the defendants failed to carry their burden of establishing that an actual conflict of interest adversely affected their lawyer's performance.⁶⁶ The court recognized three situations in which a conflict of interest would be found to exist: (1) counsel fails to cross-examine a witness because it would link the codefendant to the crime;⁶⁷ (2) counsel does not introduce or oppose admission of evidence;⁶⁸ and (3) counsel is reluctant to impeach certain testimony that is detrimental to one defendant and beneficial to another.⁶⁹ In such cases, a conflict of interest exists denying the defendant effective counsel and reversal is warranted. The facts in *Bishop* do not place the case into any of those three categories which would have permitted a finding of a conflict of interest.⁷⁰

The court distinguished its reversal in *State v. Stevenson*⁷¹ on the basis of these categories.⁷² In that case, the confession of each defendant was introduced into evidence.⁷³ Each confession implicated a codefendant.⁷⁴ According to the *Bishop* rationale, the *Stevenson* court was justified in reversing.⁷⁵

According to the Nebraska Supreme Court, the *Stevenson* situation constituted a conflict of interest. But the facts of *Bishop* show no similar instances.⁷⁶ The court found that the plea bargain was struck not because of any conflict of interest, but rather because of the weight of the state's evidence.⁷⁷ When questioned by the court, the defense attorney gave no testimony to support the contention of a conflict of interest.⁷⁸ He stated that he knew of no conflict since his "clients throughout had all jointly taken the same

tion. Under the actual conflicts approach, multiple representation by itself does not imply conflict of interest and denial of sixth amendment right. No error is committed by a trial assigning joint representation absent evidence of an actual conflict of interest. *Id.* at 58, 213 N.W.2d at 728.

66. 207 Neb. at 19-20, 295 N.W.2d at 704.

67. *Id.* at 16, 295 N.W.2d at 702.

68. *See id.*

69. *Id.* Aronson, *Conflict of Interest*, 52 WASH. L. REV. 807, 830 (1977), lists situations in which a conflict of interest exists, including when counsel's duty to cross-examine and impeach a codefendant interfered with his duty to secure the most lenient sentence for that codefendant.

70. 207 Neb. at 16, 295 N.W.2d at 702.

71. 200 Neb. at 624, 264 N.W.2d 848 (1978).

72. 207 Neb. at 16, 295 N.W.2d at 702.

73. 200 Neb. at 630, 264 N.W.2d at 851.

74. *Id.* at 631, 264 N.W.2d at 832.

75. 207 Neb. at 16, 295 N.W.2d at 702. The *Stevenson* Court did not adopt the "mere existence" theory, but found that the facts met the criteria of the categories (later adopted in *Bishop*) which permit a finding of conflict of interest. 200 Neb. at 630-31, 264 N.W.2d at 851-52.

76. 207 Neb. at 16, 295 N.W.2d at 702.

77. *Id.* at 18, 295 N.W.2d at 703.

78. Brief for Appellee at 5, *State v. Bishop*, 207 Neb. 10, 295 N.W.2d 698 (1980).

position of not guilty as to all counts. . . ."⁷⁹ Additionally, he had no intention to have one defendant testify in a manner damaging to another.⁸⁰ The attorney further testified that he was unaware of any defense for one defendant that might have been available or utilized if he had not had to defend the other two.⁸¹

On the basis of this testimony and the case record, the court determined the defendants' single counsel was not hampered in presenting the defendants in the most favorable light. The trial judge questioned the defendants before accepting the guilty plea. The defendants assured the judge that they understood the consequences of a guilty plea, had been given effective counsel, and that they had been subjected to no force to make them plead guilty.⁸² The court concluded the case did not fit any category which would entitle the defendant to reversal and that the defendant had not met the standard of proof essential to establish a conflict of interest.⁸³

CONCLUSION

The Nebraska Supreme Court in *Bishop* enunciated the current status of Nebraska law on the issue of conflict of interest in representation of multiple criminal defendants. If there is no clear evidence of conflict of interest on the trial record, a defendant who claims denial of effective counsel must establish actual conflict which adversely affected his lawyer's performance.⁸⁴ The "mere existence" of joint representation is insufficient.

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79. *Id.*

80. *Id.*

81. *Id.* at 6.

82. 207 Neb. at 18, 295 N.W.2d at 703.

83. See note 70 and accompanying text *supra*.

84. *Id.* at 18, 295 N.W.2d at 704.