LANDAU, J., concurring. I fully agree with the majority's conclusion that the trial court properly investigated and determined that no conflict of interest existed, and that it was, therefore, unnecessary for the trial court to inquire further or to obtain a waiver from the defendant. The cases in our jurisdiction have, to date, required a specific showing of prejudice or a real conflict of interest resulting from joint representation of codefendants by one attorney before sixth amendment rights may be said to have been assailed. See *State* v. *Crespo*, 246 Conn. 665, 689, 718 A.2d 925 (1998), cert. denied, 525 U.S. 1125, 119 S. Ct. 911, 142 L. Ed. 2d 909 (1999); *State* v. *Webb*, 238 Conn. 389, 421, 680 A.2d 147 (1996); *Phillips* v. *Warden*, 220 Conn. 112, 133, 595 A.2d 1356 (1991). Under that test, which is the law of the jurisdiction each judge is bound to follow, I am required to concur here, for the reasons well stated in the majority opinion.

I believe, however, that the time has come for us to reexamine our rule. Our growing criminal calendars and the need to try a larger percentage of criminal cases under the provisions of state statutes and rules of court that require the prompt disposition of criminal cases[1] have made it all the more necessary for our trial courts

to take all measures to avoid the necessity of retrying multidefendant cases. Although I am reluctant to say so, this court has a substantial backlog of appeals.[2] As long ago as 1975, the American Bar Association stated: ''Except for preliminary matters such as initial hearings or applications for bail, a lawyer or lawyers who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation. ABA Standards Relating to the Prosecution Function and the Defense Function § 3.5 (Approved Draft 1971) at 211, 213.'' *United States* v. *Mari*, 526 F.2d 117, 120 (2d Cir. 1975) (Oakes, J., concurring), cert. denied, 429 U.S. 941, 97 S. Ct. 359, 50 L. Ed. 2d 311 (1976).

In *Mari*, Judge Oakes of the United States Court of Appeals for the Second Circuit appropriately pointed out: ''The problem is that even [absent a trial when] both codefendants pleaded guilty there are frequently potential conflicts of interest. As the ABA Standards, supra, at 213, point out, the prosecutor may be inclined to accept a guilty plea from one codefendant which may harm the interests of the other. The contrast in the dispositions of the cases may have a harmful impact on the codefendant who does not initially plead guilty; he may be pressured into pleading guilty himself rather than face his codefendant's bargained-for testimony at a trial. And it will be his own counsel's recommendation to the initially pleading co-defendant which will have contributed to this harmful impact upon him. . . . As the ABA Standards . . . also point out, the very fact of multiple representation makes it impossible to assure an accused that his statements to the lawyer are given in full confidence. . . .

''I should make it clear that in my view it is immaterial whether we are talking about trying a case or handling a plea of guilty . . . . It also makes no difference whether counsel is appointed by the court or selected by the defendants; even where selected by the defendants the same dangers of potential conflict exist, and it also possible that the rights of the public to the proper administration of justice may be affected adversely.'' Id., 120–21.

To those thoughts of Judge Oakes, I would add those of Judge Lumbard of the Second Circuit, which are found in a concurring opinion in *United States* v. *Carrigan*, 543 F.2d 1053 (2d Cir. 1976): ''It would be a rare defendant who could intelligently decide whether his

interests will be properly served by counsel who also represents another defendant. However parallel his interests may seem to be with those of a co-defendant the course of events in the prosecution of the case, the taking of a guilty plea, or the conduct of the trial may radically change the situation so as to impair the ability of counsel to represent the defendant most effectively. Even defense counsel, who all too frequently are not adequately informed regarding the evidence available against their clients, may not be in a position to judge whether a conflict of interest between their clients may develop.

"It is a rare defendant in a criminal case who fully advises his own counsel of all he knows about the charges against him. Accordingly, most counsel must operate somewhat in the dark and feel their way uncertainly to an understanding of what their clients may be called upon to meet upon a trial. Consequently, counsel are frequently unable to foresee developments which may require changes in strategy." Id., 1058 (Lumbard, J., concurring).

I would be foolish to ignore the assertion, sure in coming, of the right of defendants to retain counsel of their choice. There will, however, be cases in which the trial court should require separate counsel to represent certain defendants despite the expressed preferences of such defendants. The right to effective representation by counsel whose loyalty is undivided is so paramount in the proper administration of criminal justice that it must, in some cases, take precedence over all other considerations, including the expressed preference of the defendants concerned and their attorney.

I do not propose any rule that would per se prohibit dual representation. I also do not intend to speak for a majority of the members of this court or to imply that the High Court on Capitol Avenue, "[That Which] Must Be Obeyed,"[3] would agree to such a rule. I would propose, however, that given the availability of funds for counsel for the indigent and the probability of conflicts of interest inherent in dual representation, it should be only after the most searching inquiry on the part of the court and in those exceptional circumstances in which a conflict is not within the realm of reasonable foreseeability that dual representation by defense counsel should be permitted. Such a rule would prevent both the occasional injustice and, equally important, the appearance of injustice. Essentially, by the time a case gets to the appellate level, the harm to the appearance of justice has already been done whether or not the reversal occurs. At the trial level, such injustice is a matter that is so easy to avoid.

Trial courts should insist that, except in extraordinary circumstances, codefendants retain separate counsel. In the long run, in my opinion, this practice will prove beneficial not only to the administration of justice

and the appearance of justice, but to the cost of justice. Habeas corpus petitions, petitions for new trials, appeals and retrials can be avoided. Issues on appeal as to whether there is an actual conflict of interest, whether the conflict has resulted in prejudice, whether there has been a waiver, and whether the waiver was intelligent and knowledgeable, for example, can be avoided. Continuances or mistrials can also be avoided in those instances in which a conflict that was not apparent initially subsequently arises.

The right to counsel is a fundamental one. *Gideon* v. *Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). Only after the greatest scrutiny and in exceptional circumstances should dual representation, which may so frequently impair this right, be sanctioned by a trial court.

[1] See General Statutes § 54-82c (Prisoner's right to speedy trial on pending charges); Practice Book § 43-39 (Speedy Trial; Time Limitations).

[2] In the month that this case was argued, there were more than 300 cases ready for argument and almost 800 other appeals filed, but not yet ready for oral argument.

[3] With apologies to Rumpole. See J. Mortimer, Rumpole of the Bailey (England: Chivers 1992) p. 1. Rumpole covertly refers to his wife, Hilda, as "She Who Must Be Obeyed." The phrase is from H. Rider Haggard's adventure novel, She, A History of Adventure (McKinlay, Stone & MacKenzie 1886). In She, A History of Adventure, the title character, Ayesha, Queen of Kor, is known to her subjects as SWMBO (She Who Must be Obeyed).