No. 120997

IN THE SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. SALIMAH COLE, Defendant, (AMY P. CAMPANELLI, Contemnor-Appellant).	Illinois Appellate Court, First District, No. 1-16-1587 On appeal from the Circuit Court of Cook County, Illinois, The Honorable Michele Pitman, Judge Presiding. (arising out of case numbers 16CR0508905, related to cases 16CR0508901, 14CR1798701, 16CR0508903, 15CR2025701, 16CR0508904, 15CR2025702, 16CR0508906, 15CR2029901)

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STATEMENT OF INTEREST

Vivien Gross is a Clinical Professor of Law at Chicago Kent College of Law, where she teaches professional responsibility. Currently, Professor Gross serves as Professor-Reporter for the Illinois Supreme Court Committee on Professional Responsibility, which reviews the entire body of rules and professional responsibility issues affecting Illinois lawyers.

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As law professors and legal ethics scholars, Professors Gross, Lubet, and Burns submit this brief because they are concerned that the rule this Court will fashion to resolve the present case will have the potential to either strengthen or

undercut the confidentiality necessary to a properly functioning attorney-client relationship and can either encourage or undermine efforts by counsel to adhere to ethical obligations by assiduously avoiding conflicts of interest. These professors hope to assist this Court in formulating a rule that will best serve the interests of the legal system as a whole, including lawyers, indigent clients, and the courts.

ARGUMENT

I. The Public Defender has an ethical obligation to refuse appointment due to a conflict and delegation to assistant public defenders is incapable of curing the conflict.

Amy Campanelli is an attorney. As such, she has a "special responsibility for the quality of justice" in Illinois (Illinois Rules of Professional Conduct (2010) ("RPC"), Preamble ¶ 1. She is responsible for observance of the ethical rules set out in the RPC and should "aid in securing... observance [of the rules] by other lawyers." RPC, Preamble, Comment 12. "Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves." *Id.*

Ms. Campanelli is also the Public Defender of Cook County, In this role, she must act as the attorney, upon appointment by the court, for individuals unable to employ private counsel. 55 ILCS 5/3-4006. She has the authority to appoint assistants, who shall serve at her pleasure, to aid her in carrying out her responsibilities as appointed counsel. 55 ILCS 5/3-4008.1.

In carrying out her responsibilities as Public Defender, Ms. Campanelli was, of course, bound to adhere to the ethical obligations that apply to all attorneys in Illinois. Thus, when faced with an appointment to represent Salimah Cole, having already been appointed to represent five of Ms. Cole's co-defendants in the same criminal matter, Ms. Campanelli was ethically obligated to decline the appointment to avoid a concurrent conflict of interest under RPC 1.7.

As a matter of legal ethics, Ms. Campanelli's personal conflict could not be cured by simply assigning different assistants to represent each codefendant.

A. The Public Defender is appointed as an individual to represent defendants under the Public Defender Act.

The Public Defender and Appointed Counsel Act provides for the appointment of "a properly qualified *person*... to the position" of Public Defender. 55 ILCS 5/3-4004.1 (emphasis added). "[A]s directed by the court," this person "shall act as attorney, without fee, before any court within any county for all persons who are held in custody or who are charged with the commission of any criminal offense, and who the court finds are unable to employ counsel." 55 ILCS 5/3-4006.

The Public Defender has the authority to "appoint assistants, all duly licensed practitioners, as that Public Defender shall deem necessary for the proper discharge of the duties of the office. 55 ILCS 5/3-4008.1. These assistants "serve at the pleasure of the Public Defender." *Id.* But such assistant public defenders are not themselves appointed by the court to represent defendants. *Burnett v. Terrell*, 323 Ill. 2d 522, 538 (2009). Rather, the court appoints the Public Defender, who in turn has "the sole statutory authority to make work assignments to assistant public defenders." *Id.* at 539. Accordingly, under Illinois law, it is the Public Defender as an individual who is appointed to represent an indigent defendant, not the assistant public defenders who serve at her pleasure.

The appointment structure under the Act means that the Public Defender—in this case, Ms. Campanelli—is obligated to refuse appointment if she personally cannot ethically represent an indigent defendant due to a conflict because she alone is the attorney appointed to undertake such representation. When the court seeks to appoint the Public Defender to represent codefendants, as it did in this case, it is inconsequential that there are hundreds of assistant public defenders employed by the Law Office of the Public Defender who report to different supervisors within various divisions of the Office who could conceivably be assigned the representation of different codefendants. The fact remains that it is the Public Defender who is appointed to represent defendants under the Act and therefore it is her duty to refuse representation when her representation is ethically precluded due to a conflict.

B. The Public Defender's conflicts cannot be cured by assignment of cases to assistant public defenders.

Even if the statutory structure allowed the court to directly appoint multiple individual assistant defenders to separately represent codefendants, rather than appointing the Public Defender personally, this would not cure the conflict of interest. The conflict of interest that precludes representation of multiple codefendants by a single attorney is imputed all attorneys within the same public defendant's office just as it would be in the context of a private law firm.

The 2010 RPC defines the terms "firm" or "law firm" as "a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization." RPC 1.0(c).

Although this Court has not yet had occasion to address the application of this definition to a public defender's office, the comments to the rule indicate that a group of lawyers should be regarded as a firm "if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm." RPC 1.0, Comment 2. Here, the statutory structure makes clear that the attorneys practicing within the Office of the Public defender are not simply a collection of lawyers who happen to share the same space. Rather, they all serve at the pleasure of the Public Defender, who controls their salaries and is solely responsible for assigning cases to them. They should be treated as members of a single firm.

"While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so" based on a conflict under either RPC 1.7 (pertaining to concurrent conflicts of interest, as applicable here) or RPC 1.9 (pertaining to conflicts arising from duties owed to former clients). RPC 1.10(a) Because assistant public defenders within the same office are "associated in a firm," if representation of multiple codefendants by a single lawyer would create a

concurrent conflict of interest, then representation of such codefendants by multiple assistant public defenders within the same office is also prohibited. Thus, if a concurrent conflict under RPC 1.7 would preclude representation by the Public Defender individually, assignment to an assistant public defender would be a futile exercise that does not cure the conflict.

In addition, a concurrent conflict of interest under RPC 1.7 cannot be cured by simply adopting the sort of ethical screen contemplated by the trial judge. RPC 1.10(e) provides that where one lawyer is disqualified from a representation under RPC 1.9 based on a conflict arising from a prior representation, other lawyers within the same firm may undertake representation if "the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom." RPC 1.10(e). RPC 1.10 makes no similar provision for ethical screening where disqualification is based on a concurrent conflict under RPC 1.7.

The ethical screening procedure provided in RPC 1.10(e) provides a mechanism for protecting the confidential information of a prior client. RPC 1.10, Comment 9. Accord *SK Handtool Corp. v. Dresser Indus., Inc.*, 246 Ill. App. 3d 979, 991 (1st Dist. 1993) (recognizing ethical screening as a mechanism "to rebut the presumption of shared confidences between a newly associated attorney and his new firm"). The procedure provides an effective safeguard because the newly-associated attorney who represented—and owes a duty of

loyalty to—the prior client is screened from participating in his or her new firm's handling of the matter.

But an ethical screen cannot provide an effective safeguard in the case of *concurrent* conflicts because "a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client." RPC 1.10, Comment 2. That is, when the Public Defender is appointed to represent a defendant, the duty of loyalty is owed by every attorney within the office, not just the attorney directly assigned to handle the case. Because the duty of loyalty to a current client entitles "each client... to be informed of anything bearing on the representation that might affect that client's interests and... to expect that the lawyer will use that information to that client's benefit" (RPC 1.7, Comment 31), an ethical screen does not ameliorate the potential conflicts arising from concurrent representation of multiple codefendants. Accord *Concat LP v. Unilever, PLC*, 350 F. Supp. 2d 796, 822 (N.D. Cal. 2004)("Although an ethical wall may, in certain limited circumstances, prevent a breach of confidentiality, it cannot, in the absence of an informed waiver, cure a law firm's breach of its duty of loyalty to its client.")

In any event, even if an ethical screen could theoretically protect against conflicts arising under RPC 1.7, it cannot do so in the context of the Office of the Public Defender. As discussed above, the Public Defender alone is appointed to represent a defendant under the Act. The Public Defender alone has the authority to appoint assistant public defenders, who serve at her pleasure, and to assign cases to them. While it might be possible to screen one assistant defender

from another in a given case, the Public Defender's statutory role precludes any possibility of screening the Public Defender herself from any case to which she is appointed.

Accordingly, when a conflict of interest precludes the Public Defender as an individual from representing a defendant, the entire Law Office of the Public Defender is similarly conflicted out and separate representation is warranted.

II. Where the Public Defender advises the trial court early in a case—and especially prior to appointment—that a potential conflict precludes joint representation, public policy requires appointment of separate counsel.

In finding the Public Defender in contempt for refusing the appointment to represent Mr. Cole in the present case, the trial judge held that the Public Defender "failed to provide any substantial basis that a *per se* or a concurrent conflict of interest exist[s]." (C206.) The trial judge's oral comments reveal that, before he would recognize a disqualifying conflict, he would have required "concrete evidence of a direct conflict." (Tr. May 10, 2016 at 17:15.) To ensure the ability of appointed counsel to comply with their ethical responsibilities and to protect the rights of their indigent clients, an attorney must not be required either: (1) to provide "concrete evidence" explaining why a conflict exists and (2) to wait for an actual conflict to affirmatively materialize before acting proactively to avoid potential conflicts.

A. Counsel's representation that a disabling conflict exists must be enough.

Defense counsel has an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest

arises, regardless of the type of conflict. *Cuyler v. Sullivan*, 446 U.S. 335, 351 (1980). As the Supreme Court emphasized in *Holloway v. Arkansas*, "an 'attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial.'" 435 U.S. 475, 485 (1978), *quoting State v. Davis,* 110 Ariz. 29, 31, 514 P.2d 1025, 1027 (1973). Here, however, the trial court ignored the Public Defender's professional and ethical judgment, instead demanding "concrete evidence of a direct conflict." (Tr. May 10, 2016 at 17:15.) The intrusion of such a standard upon the attorney-client privilege and the attorney's ethical duty of confidentiality is wholly unwarranted where the Public Defender's role as an officer of the court is sufficient to insure a genuine basis for claiming a conflict.

1. Courts should defer to counsel's representation, as an officer of the court, that a conflict exists or is likely to develop.

As the United States Supreme Court recognized in *Holloway,* attorneys are officers of the court and their representations to the court are "'virtually made under oath.'" 435 U.S. at 486, *quoting State v. Brazile,* 226 La. 254, 266 (1954). Moreover, "defense attorneys have the obligation, upon discovering a conflict of interests, to advise the court at once of the problem." *Id.* at 485–86. These attorneys are in the "best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial," and they should be taken at their word. *Id.* at 485. Thus, the "*Holloway* Court

deferred to the judgment of counsel regarding the existence of a disabling conflict." *Mickens v. Taylor*, 535 U.S. 162, 167-68 (2002).

Accepting counsel's representations at face value, without requiring more detailed substantiation, presents risks that "otherwise unscrupulous defense attorneys might abuse their 'authority [to identify the existence or risk of a conflict],' presumably for purposes of delay or obstruction of the orderly conduct of the trial." *Holloway*, 435 U.S. at 486. But the "abundant power [of the courts] to deal with attorneys who misrepresent facts" is sufficient to address these risks. *Id.* at n.10. The "considered representation regarding a conflict in clients' interests [made by counsel as] an officer of the court... should be given the weight commensurate with the grave penalties risked for misrepresentation." *Id.* at n.9.

Accordingly, for reasons the *Holloway* court expressly deemed persuasive, "most courts have held that an attorney's request for the appointment of separate counsel, based on his representations as an officer of the court regarding a conflict of interests, should be granted." *Holloway*, 435 U.S. at 485-86. This Court should likewise so hold.

2. Requiring "concrete evidence" detailing the potential or actual conflict improperly intrudes upon the confidential and privileged attorney-client relationship.

Rather than give the Public Defender's representations regarding the conflict appropriate weight, the trial court here complained that the Public Defender failed to present "concrete evidence of a direct conflict." (Tr. May 10, 2016 at 17:15.) In *Holloway*, the Supreme Court acknowledged that an argument

could be made that "defense counsel might have presented the requests for appointment of separate counsel... in greater detail" (*Id.* at 485)—that is, that defense counsel might have presented more "concrete evidence" of the potential conflict. Yet the Supreme Court in *Holloway* also recognized that "defense counsel was confronted with a risk of violating, by more disclosure, his duty of confidentiality to his clients." *Id.* Thus, while not foreclosing "a trial court from exploring the adequacy of the basis of defense counsel's representations regarding a conflict of interests," the *Holloway* court made clear that such an exploration may not "improperly requir[e] disclosure of the confidential communications of the client." *Id.* at 487.

Consistent with *Holloway*, the Public Defender here declined "to go into discovery or possible conversations that have taken place between the attorneys and the clients," noting that doing so would require her to "reveal[ ] something that the Court should [not] be aware of." (Tr. May 10, 2016 at 13:16-17.) She emphasized that she could not reveal privileged information learned from her existing clients (Ms. Cole's codefendants) in order to more fully describe the specific conflicts precluding her representation of Ms. Cole. (Tr. May 19, 2016 at 7:15-18.) As a matter of legal ethics, this was precisely correct.

The trial court's insistence on concrete, substantive detail to justify the asserted conflict—and its decision to hold the Public Defender in contempt for refusing to accept an appointment based on a conflict that she could not ethically describe in greater detail—creates dangerous threats both to counsel's ability to

satisfy the ethical duty of confidentiality and to defendants' entitlement to the protection of the attorney-client privilege. Such a rule places these critical protections in direct competition with defendants' constitutionally guaranteed right to conflict-free counsel.

As this Court has recognized, the "attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *People v. Radojcic*, 2013 IL 114197, ¶39. "The purpose of the privilege... is to encourage and promote full and frank communication between the client and his or her attorney, without the fear that confidential information will be disseminated to others." *Id.* The privilege rests on both: (1) the attorney's need "to know all that relates to the client's reasons for seeking representation" if the attorney is to carry out her or his responsibilities to the client; and (2) the client's need to be "free from the consequences or the apprehension of disclosure" so that the client can confide freely and fully in his or her attorney. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). *Accord People v. Knuckles*, 165 Ill. 2d 125, 130 (1995) ("*raison d'être* of the privilege is to secure for the client the ability to confide freely and fully in his or her attorney").

The ability of attorneys and their clients to engage in full and frank communication is also promoted by the attorney's ethical duty of confidentiality. *In re Marriage of Decker*, 153 Ill. 2d 298, 314 (1992). Subject to limited exceptions, the duty of confidentiality prohibits an attorney from disclosing information related to the representation of a client absent the client's informed

consent. RPC 1.6. The duty of confidentiality applies even more broadly than the attorney-client privilege, protecting clients from disclosure "not only during judicial proceedings, but at all times," and protecting a "client's secrets, as well as confidences" (*In re Marriage of Decker*, 153 Ill. 2d at 314), including all "information relating to the representation of a client" (RPC 1.6(a)). The assurance of confidentiality "contributes to the trust that is the hallmark of the client-lawyer relationship." RPC 1.6, Comment 2.

Court-appointed counsel like the Public Defender face daunting challenges when working to build this essential trust with indigent clients. "It is no secret that indigent clients often mistrust the lawyers appointed to represent them." *Jones v. Barnes*, 463 U.S. 745, 761 (1983) (Brennan, J., dissenting). Indigent clients do not have the luxury of selecting the attorney with whom they feel most secure but, instead, must accept counsel appointed by the court with whom they may have little or no rapport. Heavy caseloads frequently constrain the amount of time even the most diligent and tireless court-appointed attorney will be able to devote to communicating–and building trust and rapport–with clients. Rodney J. Uphoff, *The Criminal Defense Lawyer As Effective Negotiator: A Systemic Approach*, 2 Clinical L. Rev. 73, 80 (1995). "Myths and preconceptions about appointed counsel may further fuel clients' anxieties." *Id.* See also Robert A. Burt, *Conflict and Trust Between Attorney and Client*, 69 Geo. L.J. 1015 (1981) (detailing numerous factors that impede the development of trust between criminal defendants and appointed counsel).

Given the indisputable importance of trust in the attorney-client relationship, and recognizing the barriers to trust that indigent clients and appointed counsel must already overcome, scrupulous protection of both confidentiality and the attorney-client privilege is indispensable if the attorney-client relationship is to function properly. A rule that requires appointed counsel to provide "concrete evidence" detailing the circumstances giving rise to a conflict of interest, as the trial court required here, would be destructive of the confidential attorney-client relationship. Having developed the trust necessary to communicate candidly with counsel, and having learned through those candid conversations that the appointed attorney faces an ethical conflict, the indigent client is thrust by this "concrete evidence" standard onto the horns of a dilemma: the client must either sacrifice confidentiality and waive the attorney-client privilege attached to her communications with counsel or, to preserve that confidentiality and privilege, she must forfeit her right to conflict-free counsel.

The dilemma would be even sharper where the client's confidential communications with counsel are potentially incriminating in some way. Requiring disclosure of such communications in order to satisfy a trial judge of the existence or risk of a conflict places the defendant's Sixth Amendment right to conflict-free counsel in tension with the defendant's Fifth Amendment protection against compelled incrimination. As the United States Supreme Court recognized, "[s]uch compelled disclosure creates significant risks of unfair prejudice, especially when the disclosure is to a judge who may be called upon

later to impose sentences on the attorney's clients." *Holloway*, 435 U.S. at 487 n.11. Such a choice is untenable.

A rule requiring counsel to disclose "concrete evidence" detailing the nature of a conflict poses still further problems in the case of joint representation because such a rule threatens a direct conflict between one client's right to confidentiality and another client's right to conflict-free counsel. For example, say counsel represents two defendants charged jointly for the same crime. Client A reveals facts to counsel that would support Client B's alibi defense but which, if revealed, would significantly strengthen the prosecution's case against Client A. The two clients' interests are indisputably in conflict under these facts and counsel's loyalty to each client is necessarily compromised.

A rule requiring counsel to provide "concrete evidence" sufficient to satisfy the trial judge of the existence of this conflict, however, places counsel in an ethically impossible position. To protect Client B's right to conflict-free counsel, the appointed attorney would be forced to breach her duty of confidentiality to Client A and forfeit Client A's attorney-client privilege. To protect Client A's confidential and privileged information, the appointed attorney would be required to forfeit Client B's right to conflict-free counsel. Neither option is consistent with counsel's ethical obligations. A rule effectively mandating a breach of counsel's ethical duties must be emphatically rejected.

Here, the Public Defender advised the trial court that, as a result of her appointment to represent Ms. Cole's codefendants, the Public Defender had

"received discovery that contains information about Miss Cole." (Tr. May 10, 2016 at 14:24–15:1.) The Public Defender further asserted that she could not provide more specific detail regarding the conflict between Ms. Cole and her codefendants without violating her duty of confidentiality to those codefendants. By insisting upon "concrete evidence" of the conflict, the trial judge asked the Public Defender to choose between her existing clients' rights to confidentiality (and the privilege protecting their confidential information) and Ms. Cole's right to conflict-free counsel.

Because the Public Defender conscientiously complied with her ethical obligations to all of the defendants, we do not know the precise nature of the conflict revealed by counsel's communications with the codefendants. But we do know that, in the Public Defender's considered judgment, joint representation of Ms. Cole and these other codefendants creates a concurrent conflict of interest for the Public Defender. Under *Holloway*, that is enough to require separate counsel. 435 U.S. 486, n.9 and n.10.

A defendant's right to conflict-free counsel cannot be contingent on counsel's willingness to violate that defendant's or his or her codefendants' right to confidentiality or their waiver of their attorney-client privilege. Accordingly, this Court should hold that when an attorney appointed to represent an indigent defendant promptly advises the trial court that confidential attorney-client communications reveal a conflict of interest under RPC 1.7, the trial court must

accept counsel's representation as an officer of the court and promptly appoint separate counsel.

B. Counsel who timely raises a potential conflict of interest prior to trial should not be compelled to jointly represent codefendants.

In the context of an ineffective assistance claim following conviction, this Court has recognized "two categories of conflicts of interest: *per se* and actual." *People v. Taylor*, 237 Ill. 2d 356, 374 (2010). This distinction is only relevant, however, "where a defendant claims ineffective assistance of counsel due to his attorney's conflict." *People v. Ortega*, 209 Ill. 2d 354, 364 (2004). Because the Public Defender timely raised the potential for a conflict of interest prior to trial—indeed, even prior to any appointment of counsel for Ms. Cole—disqualification was required.

1. A significant potential that a conflict might arise, even absent an actual or *per se* conflict, required the Public Defender to decline representation.

The trial court concluded that the appointment of counsel other than the Public Defender was unnecessary because the Public Defender failed to produce adequate evidence of a "direct conflict." But, as a matter of legal ethics, a conflict of interest need not be "direct" before counsel is obligated to decline representation. To the contrary, RPC 1.7(a) provides that a concurrent conflict of interest exists if either: (1) the interests of one client are "directly adverse" to another; or (2) "there is a *significant risk* that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client." (Emphasis added.) RPC 1.7(a).

Under RPC 1.7(a)(2), the existence of a disabling conflict of interest does not depend on whether the substantial risk of a material limitation actually materializes; rather, whether a "substantial risk" sufficient to preclude representation is present turns on the "likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client." RPC 1.7, Comment 8.

"The potential for conflict of interest in representing multiple defendants in a criminal case is so grave," in fact, that the comments to RPC 1.7 advise "that ordinarily a lawyer should decline to represent more than one codefendant." RPC 1.7, Comment 23. The United States Supreme Court noted in *Cuyler* that, in one survey, "[s]eventy percent of the public defender offices responding... reported a strong policy against undertaking multiple representation in criminal cases" and "[f]orty-nine percent... *never* undertake such representation." *Cuyler*, 446 U.S. at 347, n.11, citing Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal*, 64 Va.L.Rev. 939, 950, and n. 40 (1978).

In light of this concern, the Ohio Supreme Court's Board of Commissioners on Grievances and Discipline has advised that "ordinarily defense counsel should decline to act for more than one of several co-defendants except in unusual situations," such as where "it is clear": (1) that no conflict is likely to develop at trial, sentencing, or at any other time in the proceeding;" or

(2) "that common representation will be advantageous to each of the co-defendants." Supreme Court of Ohio, Board of Commissioners on Grievances and Discipline Op. 2008-4 ("Ohio Op. 2009-4") at 7. In either case, each codefendant's informed consent must be made a matter of record. *Id.*

When an ineffective assistance claim is raised following conviction, the trial or reviewing court has the benefit of hindsight in assessing whether the existence of an actual or *per se* conflict tainted the proceedings. See *Wheat v. U.S.*, 486 U.S. 153, 162 (1988). The trial court does not enjoy this benefit when evaluating a potential conflict prior to trial and must instead address the issue, "not with the wisdom of hindsight after the trial has taken place, but in the murkier pre-trial context when relationships between parties are seen through a glass, darkly." *Id.*

Notably, this Court has explicitly rejected the assumption "that courts can always determine in a definite, precise manner whether a conflict or potential conflict of interest exists" prior to trial. *People v. Holmes*, 141 Ill. 2d 204, 223 (1990). As the United States Supreme Court has so aptly explained:

> The likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials. It is a rare attorney who will be fortunate enough to learn the entire truth from his own client, much less be fully apprised before trial of what each of the Government's witnesses will say on the stand. A few bits of unforeseen testimony or a single previously unknown or unnoticed document may significantly shift the relationship between multiple defendants. These imponderables are difficult enough for a lawyer to assess, and even more difficult to convey by way of explanation to a criminal defendant untutored in the niceties of legal ethics.

Wheat, 486 U.S. at 162-63. Thus, disqualification is appropriate, even absent an actual or *per se* conflict, "where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses." *Id.* at 163.

Even when a defendant wishes to waive a potential conflict of interest, both *Wheat* and *Holmes* afford a trial court "substantial latitude" to disqualify counsel if the court finds that the potential for conflict is sufficient to override the defendant's constitutional right to counsel of his or her own choosing. *Wheat*, 486 U.S. at 163; *Holmes*, 141 Ill. 2d at 223. That is, disqualification may be required under *Wheat* and *Holmes* based on the potential for a conflict of interest even if the informed defendant wishes to knowingly waive that conflict and the disqualification deprives the defendant of his choice of counsel. If disqualification may be required even in the face of a knowing waiver, then disqualification must be required here where Ms. Cole never expressed any willingness to waive the potential conflict and nothing in the record remotely suggests that the Public Defender was Ms. Cole's counsel of choice. Under these circumstances, *Holloway* controls and required the appointment of separate counsel.

2. Joint representation over a defendant's timely objection is effectively treated as a *per se* conflict of interest.

Even if this Court were to find the actual or *per se* conflict distinction relevant here, this Court should hold, consistent with its precedents, that a *per se* conflict of interest exists where: (1) a single attorney represents (or is asked to

represent) multiple defendants; and (2) that attorney timely advises the trial court that a conflict of interest exists which prevents the attorney from ethically proceeding with such joint representation.

To be sure, the concurrent representation of multiple codefendants by a single attorney is not, on its own, a *per se* violation of the constitutional guarantee of effective, conflict-free counsel—both the United States Supreme Court and this Court have so held. *Holloway*, 435 U.S. at 482; *People v. Taylor*, 237 Ill. 2d 356 (2010); *People v. Orange*, 168 Ill. 2d 138, 156 (1995); *People v. Vriner*, 74 Ill. 2d 329, 373 (1978). But this does not mean that joint representation by a single attorney can never give rise to a *per se* conflict.

In *Taylor*, *Orange*, and *Vriner*, this Court addressed the standards that apply when a potential conflict of interest is *not* brought to the attention of the trial court prior to trial but instead is raised in the context of an ineffectiveness claim. Once trial has already occurred, the conflict of interest analysis logically is no longer concerned with whether there is a "substantial risk" that a conflict will materialize at trial but whether any such risk actually materialized. Thus, to prevail on an ineffectiveness claim under such circumstances, a defendant must demonstrate that "an actual conflict of interest manifested at trial" that adversely affected counsel's performance. *Taylor*, 237 Ill. 2d at 376; *Orange*, 168 Ill. 2d at 156; *Vriner*, 74 Ill. 2d at 341.

But that standard does not apply where the defendant advises the trial court of the possibility of a conflict prior to trial. A trial court has a "duty to

refrain from embarrassing counsel in the defense of an accused by insisting, or indeed, even suggesting" the concurrent representation of codefendants where the possibility that the defendants' interests "*might diverge*" is brought to the court's attention. *Holloway*, 435 U.S. at 485, *quoting Glasser v. United States*, 315 U.S. 60, 71(1942) (emphasis in *Holloway*). "If counsel brings the potential conflict to the attention of the trial court at an early stage, a duty devolves upon the trial court to either appoint separate counsel or to take adequate steps to ascertain whether the risk of conflict was too remote to warrant separate counsel." *People v. Spreitzer*, 123 Ill. 2d 1, 18 (1988).

In *Spreitzer*, this Court reiterated that multiple representation in and of itself is not a "*per se*" conflict; rather, "it is the attorney's contemporaneous allegations of a conflict and not the mere presence of multiple representation which gives rise to the trial court's duty" to take remedial action. *Id.* This framing of the issue strongly implies that this Court considers multiple representation *when coupled with a contemporaneous, timely allegation of conflict* to be a *per se* conflict of interest. Indeed, in evaluating an ineffective assistance claim, this Court applies the same standard where a pre-trial objection to multiple representation was raised as it applies to any other *per se* conflict: reversal of a conviction "does not require a showing that the attorney's actual performance was in any way affected by the purported conflict." *Id.*

3. Recognizing a *per se* conflict when counsel timely objects to joint representation is consistent with the ethical rules.

Whether this Court looks to the distinction between actual and *per se* conflicts or holds (as *Holmes* dictates) that only a potential conflict need be shown, a rule requiring separate counsel in the face of a timely objection to joint representation will align the trial court's duty to appoint separate counsel with counsel's ethical duty to decline representation in the face of a significant risk that the "lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of" (RPC 1.7, Comment 8) duties owed to a codefendant.

"[A] possible conflict inheres in almost every instance of multiple representation." *Cuyler*, 446 U.S. at 348. As an ethical matter, again, "[t]he potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant." RPC 1.7, Comment 23.

The RPC recognizes that the "mere possibility of subsequent harm" does not create a disabling conflict. RPC 1.7, Comment 8. Rather, for ethical purposes, the lawyer must weigh the "the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client." *Id.* Although the Supreme Court has indicated that, for Sixth Amendment

purposes, the trial court may decline to appoint separate counsel if the risk of a conflict is "too remote" (*Holloway*, 435 U.S. at 484), such a situation will be exceedingly rare. "[M]aterial limitation conflicts of interest will frequently occur" when a single attorney jointly represents multiple codefendants, and the conflicts that arise "would be extremely difficult for a lawyer to ameliorate under the requirements of [RPC] 1.7(b)." Ohio Op. 2008-4 at 5.

Once an attorney concludes that it is sufficiently likely that his or her representation will be materially limited by the lawyer's responsibilities to another client, however, the attorney may only continue to represent the client if, *inter alia*: (1) the client provides informed consent; and (2) "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client." RPC 1.7(b)(1), (b)(4). If counsel alleges that a conflict prevents the attorney from representing both clients, then it is clear that the client has not provided informed consent, the attorney has concluded that she or he cannot provide competent and diligent representation, or both.

A rule finding that separate counsel is required when counsel objects to multiple representation based on a potential conflict gives proper deference—as *Holloway* requires—to the attorney's professional judgment in determining whether competing interests are likely to materially limit his or her representation under the RPC. Not only is the attorney "in the best position professionally and ethically to determine when a conflict of interest exists" (*Holloway*, 435 U.S. at 485, *quoting Davis*, 514 P.2d at 1027), but, in fact, the attorney is the only person

at all able to determine whether or how competing interests are likely to affect her or his own judgment. A trial judge's conclusion that counsel's judgment will not be compromised is likely to be little comfort to an indigent defendant where counsel has already indicated his or her own belief to the contrary.

By explicitly recognizing the necessity of separate counsel—and permitting the Public Defender to decline representation—where joint representation is coupled with an attorney's timely objection, this Court would align the obligations of counsel and the trial court: in those circumstances where the attorney has an ethical obligation to decline representation, the trial court would have an obligation to appoint separate counsel. Such a rule would avoid the dilemma faced by the Public Defender in this case, who was forced to choose between violating a direct court order and violating her ethical obligations.

4. Waiting for an actual conflict to materialize at trial before appointing separate counsel would be contrary to sound public policy.

Not only would requiring separate counsel in these circumstances harmonize the trial court's duties with counsel's ethical obligations, such a requirement is also supported by public policy. As this Court's jurisprudence makes clear, if joint representation of multiple defendants over an objection does not automatically require separate counsel and is not a *per se* conflict of interest, then a defendant will be entitled to relief from a later conviction only if the defendant can show that an actual conflict of interest manifested at trial. *Orange*, 168 Ill. 2d at 156. But waiting for an actual conflict of interest to manifest itself at

trial is not only inconsistent with RPC 1.7(a)(2), it also results in unnecessary harm to both the defendant and the judicial process.

Promptly providing separate counsel when counsel raises the issue early in the proceedings will "prove salutary not only to the administration of justice and the appearance of justice but the cost of justice." Fed. R. Crim. P. 44, Notes of Advisory Committee on Rules—1979 Amendment, quoting *United States v. Mari*, 526 F.2d 117, 120 (2d Cir. 1975) (Oakes, J., concurring). If the actual conflict materializes during trial or prior to trial, at the very least the trial itself will need to be continued so that newly appointed counsel will have an opportunity to get up to speed before taking over the representation. Alternatively, a mistrial may be necessary, not only delaying that ultimate outcome of the prosecution, but also rendering any trial proceedings up to that point a waste of judicial resources that will need to be repeated with new, conflict-free counsel. That delay and waste of resources are further multiplied if the conflict is remedied only upon appeal from a conviction. And "by the time a case such as the present one gets to the appellate level the harm to the appearance of justice has already been done, whether or not reversal occurs." *Id.*

The delay occasioned by waiting for an actual conflict to materialize is not only harmful to the administration, appearance and cost of justice, but is directly harmful to the defendant. The right to a speedy trial, guaranteed both by the Constitution and by statute, is diminished when defendants are forced to endure

continuances, mistrials, and even appeals before finally receiving a proper trial with the assistance of conflict-free counsel.

Of graver concern, however, is the fact that "actual conflicts" do not always materialize in ways that are easy to discern. As discussed above, where codefendants are represented by the same attorney, each defendant's ability to fully and frankly communicate with counsel is necessarily challenged. Client A may possess information about Client B that may be beneficial (or detrimental) to Client A's own defense. An actual conflict might materialize at trial—through failure to call or cross-examine a particular witness, for example—but, if counsel scrupulously honors her duty of confidentiality to Client A, neither Client B nor the court may ever have sufficient facts to recognize the conflict.

Indeed, even counsel may never fully learn the facts giving rise to a conflict if counsel's divided loyalty inhibits a client from fully sharing the relevant information. The Supreme Court has recognized that criminal defendants often "fail to provide complete and accurate versions of events to attorneys, especially at the early stages of representation when the attorney-client relationship has just been formed." Tigran W. Eldred, *The Psychology of Conflicts of Interest in Criminal Cases*, 58 U. Kan L. Rev. 43, 52 (Oct. 2009), *citing Wheat*, 486 U.S. at 162.

The barriers to trust that inhibit communication between appointed counsel and even a single client can only be exacerbated by counsel's separate loyalty to a codefendant. Once one client shares such information with counsel,

counsel's duty of confidentiality to that client "will directly collide with [counsel's] duty to keep the other client informed about material aspects of the matter." Lawrence J. Fox and Susan R. Martyn, *Red Flags: A Lawyer's Handbook on Legal Ethics* (*Excerpts*), SL096 ALI-ABA 37, 39. A client can hardly be faulted for being reticent to share information bearing on a codefendant knowing her counsel has a duty to keep that codefendant fully informed. Alternatively, if counsel preserves each codefendant's confidences from the other, neither codefendant will be fully informed. And if, as here, counsel has already advised both her client and the court of her belief that she is laboring under a conflict of interest, it is all but unfathomable to imagine that any client would feel free to communicate openly with counsel going forward, however unconvinced of the conflict the trial judge may have been.

As the United States Supreme Court observed in *Holloway*, "in a case of joint representation of conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process." 435 U.S. at 490. "[A]ssess[ing] the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations," the Supreme Court warned, "would be virtually impossible." *Id.* at 491. Where counsel indicates, as here, that a conflict exists or is likely to arise, the most expedient course for all involved is for the court to accept counsel's representation as an officer of the court and appoint separate counsel.

Accordingly, this Court should explicitly hold that a *per se* conflict exists where counsel is compelled to jointly represent multiple codefendants despite a timely objection that a conflict of interest exists or will likely develop in the course of a trial.

III. The Public Defender's refusal to accept appointment was not contemptuous but, rather, the only appropriate means to fulfill her ethical obligations.

Finally, the trial court's belief that the Public Defender should have accepted the appointment and waited to appeal the trial judge's finding until "after a judgment on a finding of guilt" is incompatible with the Public Defender's ethical obligations. (Tr. June 15, 2016 at 14:8-10.) An appeal following a finding of guilt—assuming such a finding were ever reached—would address only the question of whether the multiple representation deprived Ms. Cole of her Sixth Amendment right to the effective assistance of counsel. Such an appeal would do nothing to ensure the Public Defender's ability to comply with her ethical obligations.

The "breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel." *Nix v. Whiteside,* 475 U.S. 157, 165 (1986). *Accord People v. Brigham*, 151 Ill. 2d 58, 71 (1992)(defendant not deprived of the effective assistance of counsel despite his attorney's suspension for failure to pay bar dues). Cases like *Holloway* or *Spreitzer*; *Mickens* or *Taylor*; establish standards necessary "to assure vindication

of the defendant's Sixth Amendment right to counsel," not "to enforce the Canons of Legal Ethics." *Mickens*, 535 U.S. at 176.

If counsel believes that a concurrent conflict of interests exists or is likely to arise, then simply accepting the appointment and waiting until trial has concluded to appeal does nothing to shield the client from counsel's conflict. Even if the appellate court agrees that separate counsel should have been appointed and awards the defendant a new trial, the defendant will already have gone through an entire trial, conviction, sentencing, appeal, and perhaps lengthy incarceration before finally securing a trial with conflict-free counsel. By that stage, information may already have been revealed to the court (through trial evidence, a presentence investigation report, or perhaps a statement in allocution) or to a codefendant (in the process of developing a joint defense strategy) that conflict-free counsel might have advised against disclosing. A defendant cannot take that information back through an appeal following a conviction. Nor can an appellate reversal undo the time lost to the initial trial and appeal. Undoing the final judgment will not undo all of the harms of proceeding to trial despite a disabling conflict.

While a lawyer has an ethical "duty to uphold legal process," a lawyer also has a "duty, when necessary, to challenge the rectitude of official action." RPC Preamble, Comment 5. "[D]ifficult ethical problems" can arise—as they did here—where the attorney must struggle to harmonize her "responsibilities to clients, to the legal system and to [her] own interest in remaining an ethical

person." *Id.*, Comment 9. "Avoiding a conflict-of-interest situation is in the first instance a responsibility of the attorney." Fed. R. Crim. P. 44, Notes of Advisory Committee on Rules—1979 Amendment.

This Court should hold that, where counsel is aware of a disabling conflict of interest, counsel properly complies with her ethical obligations by refusing an appointment and immediately appealing the resulting order holding her in contempt.

CONCLUSION

For the foregoing reasons, the amici curiae respectfully suggest that this Court should adopt a rule requiring the appointment of separate counsel and permitting the Public Defender to refuse or withdraw from an appointment to represent multiple defendants where the Public Defender advises the court that joint representation presents a non-trivial potential that a conflict of interest might arise.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of the brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 32 pages.

Kimberly A. Jansen

CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to § 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109), I, Kimberly A. Jansen, one of the attorneys for the proposed amici curiae Professor Vivien Gross, Professor Steven Lubet, and Professor Robert Burns, certify that I: (1) electronically filed the foregoing "Brief in Support of Appellant of Amici Curiae Legal Ethics Scholars" with the Clerk of the Illinois Supreme Court on February 1, 2017, by using the Illinois Supreme Court electronic filing service; and (2) have served counsel of record by depositing three copies thereof in the U.S. Mail at 222 N. LaSalle Street, Chicago, Illinois, before 5:00 p.m. on February 1, 2017, enclosed in a sealed envelope with first class postage fully prepaid, and directed to:

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