

**SUMMARIES OF PUBLISHED SUCCESSFUL
CONFLICT OF INTEREST CLAIMS SINCE 1982¹**

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¹This document does not contain trial court rulings, primarily those of U.S. District Courts, and appellate court rulings disqualifying counsel, except where the trial court abused its discretion in doing so.

Table of Contents

I.	U.S. Supreme Court Cases.....	<u>1</u>
II.	Conflicted Representation Required Over Objection.	<u>5</u>
A.	Simultaneous Representation of Jointly Tried Codefendants.	<u>5</u>
1.	U.S. Supreme Court Cases.....	<u>5</u>
2.	U.S. Court of Appeals Cases.	<u>6</u>
3.	U.S. District Court Cases.....	<u>8</u>
4.	State Cases.....	<u>8</u>
B.	Simultaneous Representation of Codefendants in Plea Negotiations.	<u>11</u>
1.	U.S. Court of Appeals Cases.	<u>11</u>
2.	State Cases.....	<u>13</u>
C.	Simultaneous Representation of Codefendants in Severed Trials.....	<u>14</u>
D.	Simultaneous Representation of Government Witness on Related Charges.....	<u>14</u>
E.	Simultaneous Representation of Persons Implicated (But Not Jointly Charged) in Crimes.	<u>15</u>
F.	Simultaneous Representation of Prosecutor, Government Witness, or Confidential Informant in Unrelated Case.....	<u>16</u>
G.	Prior Representation of Victim, Government Witness, or Codefendant's Witness on Unrelated Charges.	<u>19</u>
1.	U.S. Court of Appeals Cases.	<u>19</u>
2.	State Cases.....	<u>19</u>
H.	Prior Representation of Persons Implicated (But Not Jointly Charged) in Crimes.	<u>21</u>
I.	Prior Prosecution of Defendant on Unrelated Charges.	<u>21</u>
J.	Counsel Retained by Codefendant or Third-Party With Adverse Interest.....	<u>21</u>
K.	Counsel Was Necessary or Potential Witness	<u>22</u>
L.	Defendant Had Filed Lawsuit or Ethics Complaint Against Counsel.	<u>22</u>
1.	U.S. Court of Appeals Cases.	<u>22</u>
2.	U.S. District Court Cases.....	<u>23</u>
3.	State Cases.....	<u>23</u>
M.	Defendant Alleged Ineffective Assistance.....	<u>24</u>
1.	U.S. Court of Appeals Cases.	<u>24</u>
2.	U.S. District Court Cases.....	<u>25</u>
3.	State Cases.....	<u>26</u>
N.	Connection to Prosecutor or Law Enforcement.....	<u>27</u>
1.	U.S. Court of Appeals Cases.	<u>27</u>
2.	State Cases.....	<u>27</u>
O.	Irreconcilable or Unspecified Conflict.....	<u>28</u>
1.	U.S. Court of Appeals Cases.	<u>28</u>
2.	State Cases.....	<u>28</u>
III.	Court Had Sua Sponte Duty But Failed to Adequately Inquire.....	<u>29</u>
A.	Simultaneous Representation of Jointly Tried Codefendants.	<u>29</u>

1.	U.S. Court of Appeals Cases.	<u>29</u>
2.	U.S. District Court Cases.	<u>30</u>
3.	State Cases.	<u>32</u>
B.	Simultaneous Representation of Codefendants in Plea Negotiations.	<u>34</u>
1.	U.S. Court of Appeals Cases.	<u>34</u>
2.	State Cases.	<u>35</u>
C.	Simultaneous Representation of Codefendants in Severed Trials.	<u>36</u>
1.	U.S. Court of Appeals Cases.	<u>36</u>
2.	State Cases.	<u>38</u>
D.	Simultaneous Representation of Government Witness in Unrelated Case.	<u>39</u>
E.	Simultaneous Representation of Persons Implicated (But Not Jointly Charged) in Unrelated Case.	<u>40</u>
F.	Prior Representation of Persons Implicated (But Not Jointly Charged) in Related Case.	<u>41</u>
G.	Prior Representation of Victim or Government Witness on Unrelated Charges.	<u>42</u>
1.	U.S. Supreme Court Cases.	<u>42</u>
2.	State Cases.	<u>42</u>
H.	Counsel Retained by Codefendant or Third-Party With Adverse Interest (U.S. Supreme Court Cases Only).	<u>43</u>
I.	Counsel Was Necessary or Potential Witness.	<u>44</u>
1.	U.S. Court of Appeals Cases.	<u>44</u>
2.	State Cases.	<u>45</u>
J.	Defendant Alleged Ineffective Assistance.	<u>45</u>
1.	U.S. Court of Appeals Cases.	<u>45</u>
2.	U.S. District Court Cases.	<u>46</u>
3.	State Cases.	<u>46</u>
K.	Counsel Had Conflicting Interests Due to Connection With Law Enforcement	<u>47</u>
L.	Conflicting Interests Due to Potential Ethics Violations or Criminal Conduct	<u>48</u>
1.	U.S. Court of Appeals Cases.	<u>48</u>
2.	State Cases.	<u>50</u>
IV.	Actual Conflict of Interest That Adversely Affected Representation and No Valid Waiver.	<u>50</u>
A.	Simultaneous Representation of Jointly Tried Codefendants.	<u>50</u>
1.	U.S. Court of Appeals Cases.	<u>50</u>
2.	U.S. District Court Cases.	<u>55</u>
3.	State Cases.	<u>59</u>
B.	Simultaneous Representation of Codefendants in Pleas Negotiations, Testimony for Prosecution, or Sentencing.	<u>66</u>
1.	U.S. Court of Appeals Cases.	<u>66</u>
2.	U.S. District Court Cases.	<u>70</u>

	3.	Military Cases.	<u>71</u>
	4.	State Cases.	<u>71</u>
C.		Simultaneous Representation of Codefendants in Severed Trials.	<u>78</u>
	1.	U.S. Supreme Court Cases.	<u>78</u>
	2.	U.S. Court of Appeals Cases.	<u>79</u>
	3.	Military Cases.	<u>81</u>
	4.	State Cases.	<u>82</u>
D.		Simultaneous Representation of Codefendants in Post-Trial Proceedings.	<u>82</u>
	1.	U.S. Court of Appeals Cases.	<u>83</u>
	2.	State Cases.	<u>83</u>
E.		Simultaneous Representation of Government Witness in Related Case	<u>84</u>
	1.	U.S. Court of Appeals Cases.	<u>84</u>
	2.	State Cases.	<u>85</u>
F.		Simultaneous Representation of Persons Implicated (But Not Jointly Charged).	<u>89</u>
	1.	U.S. Court of Appeals Cases.	<u>90</u>
	2.	State Cases.	<u>90</u>
G.		Simultaneous Representation of Government or Defense Witness or Confidential Informant in Unrelated Case.	<u>93</u>
H.		Simultaneous Representation of Prosecutor or Third Party With Adverse Interest.	<u>97</u>
	1.	U.S. Court of Appeals Cases.	<u>97</u>
	2.	State Cases.	<u>98</u>
I.		Retained by Codefendant or Third-Party With Adverse Interest.	<u>100</u>
	1.	U.S. District Court Cases.	<u>100</u>
	2.	State Cases.	<u>100</u>
J.		Prior Representation of Government or Defense Witness in Same Case.	<u>102</u>
K.		Prior Representation of Government Witness or Confidential Informant in Related Case.	<u>103</u>
	1.	U.S. Court of Appeals Cases.	<u>103</u>
	2.	Military Cases.	<u>103</u>
	3.	State Cases.	<u>104</u>
L.		Prior Representation of Government Witness on Unrelated Charges.	<u>105</u>
	1.	U.S. Court of Appeals Cases.	<u>105</u>
	2.	State Cases.	<u>106</u>
M.		Counsel Was Necessary or Potential Witness.	<u>108</u>
	1.	U.S. Court of Appeals Cases.	<u>108</u>
	2.	State Cases.	<u>110</u>
N.		Defendant or Counsel Had Filed Lawsuit or Ethics Complaint Against Counsel.	<u>115</u>
	1.	U.S. Court of Appeals Cases.	<u>115</u>
	2.	State Cases.	<u>115</u>
O.		Defendant Alleged Ineffective Assistance or Had Grounds For a Claim.	<u>116</u>

	1.	U.S. Court of Appeals Cases.	116
	2.	U.S. District Court Cases.	117
	3.	Military Cases.	117
	4.	State Cases.	117
P.		Conflicting Interests Due to Potential Ethics Violations, Flat or Contingent Fee Arrangement, or Criminal Conduct.	120
	1.	U.S. Court of Appeals Cases.	120
	2.	U.S. District Court Cases.	124
	3.	U.S. Military Cases.	125
	4.	State Cases.	126
Q.		Counsel Had Conflicting Interests Due to Financial Interest or Connection or Clear Sympathies with Prosecutor, Law Enforcement, or Judge.	133
	1.	U.S. Court of Appeals Cases.	133
	2.	U.S. District Court Cases.	136
	3.	Military Cases.	138
	4.	State Cases.	139
R.		Pending Criminal Investigation or Charges in Same Jurisdiction.	143
	1.	U.S. Court of Appeals Cases.	143
	2.	U.S. District Court Cases.	144
	3.	State Cases.	145
S.		Counsel Having Affair With Defendant’s Wife or Defense Investigator Having Personal Relationship With Victim’s Mother.	147
V.		Court Erred in Accepting Waiver of Unwaivable Conflict.	147
	A.	Simultaneous Representation of Jointly Tried Codefendants.	147
	B.	Simultaneous Representation of Codefendants in Pleas Negotiations.	148
	C.	Counsel Retained by Third-Party With Adverse Interest in Litigation.	149
	D.	Simultaneous Representation of the Victim.	150
VI.		Court Abused Discretion in Disqualifying Counsel Over Objection.	150
	A.	Simultaneous Representation of Jointly Tried Codefendants.	150
	B.	Simultaneous Representation of Codefendants in Severed Trials.	151
	1.	U.S. Court of Appeals Cases.	151
	2.	State Cases.	151
	C.	Simultaneous Representation of Government Witness.	151
	D.	Prior Representation of Government Witness in Same or Related Case.	152
	E.	Prior Representation of Government Witness in Unrelated Case.	152
	F.	Prior Representation of Codefendants in Same Case.	154
	G.	Prior Representation of Person Implicated (but not charged) in Same Crime	155
	H.	Counsel Was Necessary or Potential Witness.	155
	1.	Military Cases.	155
	2.	State Cases.	155
I.		Counsel Previously Worked for Prosecutor and Had Limited Involvement in Case.	157

J.	Miscellaneous.	<u>157</u>
1.	U.S. Supreme Court Cases... ..	<u>157</u>
2.	U.S. Court of Appeals Cases.	<u>157</u>
3.	State Cases.	<u>158</u>
VII.	Miscellaneous.	<u>159</u>
A.	Appearance of Impropriety.	<u>159</u>
B.	Trial Court Abused Discretion in Failing to Disqualify Codefendant's Counsel on Motion of Defendant..	<u>159</u>
C.	Trial Court Abused Discretion in Failing to Disqualify the Prosecutor Due to Prior Representation of the Defendant..	<u>160</u>
D.	Defendant Entitled to Be Present During Discussions of Potential Conflict of Interest.	<u>160</u>

***Capital Case**

I. U.S. Supreme Court Cases

- 2006:** *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006). The trial court's erroneous deprivation of a criminal defendant's counsel of choice required reversal. The defendant's family had retained counsel for him. The defendant contacted his own counsel of choice who was out of state and sought to retain him. The trial court declined to admit counsel *pro hac vice* and prohibited further contact finding that counsel violated rules against contacting someone already represented without counsel's permission. The Court held that "the Sixth Amendment guarantees the defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds." *Id.* at ____ (quoting *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624-625 (1989)). In short, "the Sixth Amendment right to counsel of choice . . . commands, not that a trial be fair, but that a particular guarantee of fairness be provided-to wit, that the accused be defended by the counsel he believes to be best." *Id.* at _____. When that right is violated, no showing of prejudice (under the *Strickland* standard or otherwise) is required for reversal to be mandated and no harmless error analysis may be applied because this is a structural error. The right to counsel of choice is limited, however, and "does not extend to defendants who require counsel to be appointed for them." *Id.* at _____. Likewise, a defendant is not entitled to representation by a person who is not an attorney or to counsel with a conflict of interests.
- 2002:** **Mickens v. Taylor*, 535 U.S. 162 (2002). Petitioner was convicted of murder and sentenced to death. His lead counsel during the trial had also represented the victim and was representing him in juvenile proceedings at the time of the murder. Counsel had only met with the victim one time for 15-30 minutes. Following the murder, he was appointed to represent petitioner by the same judge that had appointed him to represent the victim previously. Counsel did not disclose the conflict to the court, his co-counsel, or petitioner. Although the trial court knew or should have known about the potential conflict, the court conducted no inquiry. In these circumstances, the Court rejected an automatic reversal rule and held that in order to obtain relief, petitioner must establish an actual conflict and that the conflict adversely affected the representation. The Court also noted that both *Cuyler v. Sullivan* and *Holloway v. Arkansas* were cases involving simultaneous representation of codefendants and the question whether these holdings apply to successive representation and other potential conflicts remains open.
- 1988:** *Wheat v. United States*, 486 U.S. 153 (1988). There is a presumption in favor of allowing a defendant to have counsel of choice, but a trial court may disqualify counsel of choice, over objection, when there is an actual conflict or a showing of a serious potential for conflict. *Id.* at 164. Counsel in a widespread drug distribution case had previously represented one of the alleged kingpins and gotten an acquittal. Subsequently, the alleged kingpin agreed to plead guilty to tax evasion charges, but had not yet gone to trial. Counsel had also represented a smaller player in his guilty plea. Just before the defendant's trial, counsel proposed to also represent the defendant who was an intermediate player. The government objected because the minor player would be called as a witness in the defendant's trial and, if the kingpin's deal fell through, the defendant would likely

***Capital Case**

be called as a witness in his trial. All three defendants waived the potential conflict and said that it was merely speculative. The district court denied the motion to substitute counsel and allow counsel to represent the defendant. On review, the Court reasoned that it is difficult for an attorney to evaluate the risks of conflict because unforeseen testimony or evidence can 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.” *Id.* at 163. The Court also noted that “the willingness of an attorney to obtain . . . waivers [of conflicts] from his clients may bear an inverse relation to the care with which he conveys all the necessary information to them.” *Id.* Thus, the Court held that trial courts “must be allowed substantial latitude in refusing waivers of conflicts of interests not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses.” *Id.*

1987: **Burger v. Kemp*, 483 U.S. 776 (1987). Counsel in murder case did not have an actual conflict that adversely affected representation due to his partner’s representation of codefendant in severed trial. Petitioner was charged along with codefendant in murder. Both defendants confessed. They were tried separately. During defendant’s trial, his codefendant’s statement was not offered and the codefendant did not testify. Following defendant’s trial, while still representing defendant on appeal, counsel assisted his partner in representing the codefendant at his trial and on appeal. The court found no “active representation of competing interests” and that the joint efforts may have actually benefitted the defendant. *Id.* at 784. “Moreover, we generally presume that the lawyer is fully conscious of the overarching duty of complete loyalty to his or her client.” *Id.* While counsel did not assert defendant’s lesser culpability on appeal when he was also representing the codefendant, this was a proper strategic decision.

As we reaffirmed in *Smith v. Murray*, 477 U.S. 527, 536, 106 S.Ct. 2661, 2667, 91 L.Ed.2d 434 (1986), the “process of ‘winnowing out weaker claims on appeal and focusing on’ those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy. *Jones v. Barnes*, 463 U.S. 745, 751-752, 103 S.Ct. 3308, 3312-3313, 77 L.Ed.2d 987 (1983).

Id. In addition, in order to show an actual conflict, petitioner must show that counsel’s motive for not raising the issue was his partner’s representation of the codefendant or his involvement in that case. The court also found that even if counsel had an actual conflict, it did not affect counsel’s advocacy. Counsel attempted to plea bargain but was rebuffed by state. Counsel also was not prohibited from arguing petitioner’s lesser culpability because he was tried separately from the codefendant.

1984: **Strickland v. Washington*, 466 U.S. 668 (1984). In conflict of interest cases, prejudice is presumed “if the defendant demonstrates that counsel ‘actively represented conflicting interests’ and that ‘an actual conflict of interest adversely affected his lawyer’s performance.’” *Id.* at 692 (quoting *James*

***Capital Case**

v. Kentucky, 466 U.S. at 350, 348)). In cases not involving a conflict of interests, in order to establish ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that counsel's performance prejudiced the defense.

Flanagan v. United States, 465 U.S. 259 (1984). A district court's decision to disqualify counsel due to potential conflicts is not immediately appealable.

1981: *Wood v. Georgia*, 450 U.S. 261 (1981). The trial court erred in failing to inquire into the possibility of a conflict of interest created by the representation of the defendants by their employer who allegedly operated the criminal enterprise for which they were prosecuted. The defendants were charged with distributing obscene materials and convicted. They were sentenced to probation with substantial fines, but failed to pay the fines. After three months, the court held a revocation hearing in which the defendants presented evidence that they were unable to pay the fines. The trial court ordered payment of the fines within three days or confinement. The Court granted cert. to determine whether the Equal Protection Clause was violated by imprisonment of a probationer solely because of his inability to make installment payments on fines. Rather than deciding this issue, however, the Court noted that the record reflected that the three defendants had been represented throughout by one lawyer, who was paid by their employer. In addition, the employer had paid all fines and posted all bonds with the sole exception of the fines under review. The attorney never argued in the initial sentencing that the fines were excessive and the court imposed stiff fines because the court was aware that the employer had been paying all fines and expenses of the defendants. The defendants never paid even small amounts of the fine to indicate good faith because of their assumption that the employer would pay the fines. Even at the revocation hearing where the defendants presented evidence of their indigence, counsel did not argue for a reduction of the fines. Thus, the Court held that the risk of conflict was evident, because the record suggested that the employer desired to create a test case to present the current claim to the Court, which meant that the defendants had to be jailed for non-payment of the fines. The Court recognized an inherent danger in a criminal defendant being represented by a lawyer hired and paid for by a third party, particularly when the third party is the operator of the alleged criminal enterprise. One risk is that the lawyer will not seek leniency for the defendant by offering testimony against the employer who retained counsel. A second risk, present in this case, is that the employer's long-range interest in establishing legal precedent could subject the defendants to harsher treatment. *Id.* at 269. Under these facts, the Court held that "the *possibility* of a conflict of interest was sufficiently apparent at the time of the revocation hearing to impose upon the court a duty to inquire further." *Id.* at 272. Moreover, even the state raised the conflict issue and requested that the court inquire further. *Id.* at 273. The Court remanded and ordered that if the court found an actual conflict of interest and that there was no valid waiver, then a new revocation hearing should be held with counsel free of conflicts.

1980: *Cuyler v. Sullivan*, 446 U.S. 335 (1980). Court held that in multiple representation cases where there is no objection at trial, the defendant must demonstrate that an actual conflict of interest adversely affected counsel's performance in order to get relief under the Sixth Amendment. Two retained counsel represented three co-defendants in murder case. The defendants were tried

***Capital Case**

separately. Sullivan was tried first and convicted. The state's case was entirely circumstantial and the defense presented no evidence. None of the defendants objected to multiple representation. The Court held that nothing in the Sixth Amendment requires state courts to initiate inquiries into multiple representation "[a]bsent special circumstances." *Id.* at 346. "Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry." *Id.* at 347. In this case, there was no objection to the multiple representation and the risk of conflict was reduced by the provision of separate trials. Likewise, the court of appeals found that the decision to rest with no defense evidence was on its face a reasonable tactical response to the weakness of the state's circumstantial evidence. *Id.* at 347. Thus, the trial court did not have an affirmative duty to inquire into the propriety of multiple representation. *Id.* at 348. Likewise, the Court held, "In order 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." *Id.* at 348. Once the defendant shows that the conflict "actually affected the adequacy" of representation, there is no requirement that the defendant "demonstrate prejudice." *Id.* at 349. The Court remanded this case to the court of appeals to apply these standards in Sullivan's case.

1978: *Holloway v. Arkansas*, 435 U.S. 475 (1978). The trial court erred in requiring joint representation of three co-defendants by a single lawyer over their objections. The defendants were charged with armed robbery and two counts of rape. One defendant confessed to police officers and said that he was the lookout while others raped women. Weeks before trial, the public defender moved to have separate attorneys appointed because, based on his discussions with the defendants, there was a potential conflict. The court denied the motion for counsel and motions to sever the trials. Just before trial, counsel renewed the motion for separate counsel, because several of the defendants had indicated a desire to testify and he could not cross-examine them because of confidential information that he had received. Judge denied again. After the state's case, in which various eyewitnesses testified but were not consistent, counsel announced that all three defendants wanted to testify and that he could not cross-examine or even examine the defendants due to the conflicts. The court required counsel to just put them on the stand and let them tell their story. All three defendants denied involvement, but were convicted. The Court held that joint representation is not unconstitutional *per se*, *id.* at 482, but in this case the trial court "failed to either appoint separate counsel or to take adequate steps to ascertain whether the risk of conflict was too remote to warrant separate counsel," *id.* at 484. The Court recognized that most courts recognize that an attorney's request for separate counsel should be granted because attorneys are in the best position professionally and ethically to determine whether there is a conflict, have a duty to report a conflict to the court, and are officers of the court when making statements to the court. *Id.* at 485-86. In response to state arguments that such a rule would allow abuses by defense counsel, the court stated that trial courts would still have power to deal with counsel who made an untimely motion for dilatory purposes. *Id.* at 486. Likewise, the Court held that its "holding [does not] preclude a trial court from exploring the adequacy of the basis of defense counsel's representations regarding a conflict of interests without improperly requiring disclosure of the confidential communications of the client." *Id.* at 487. In addressing the standard to be applied to trial court errors in these

***Capital Case**

circumstances, the Court recognized that “[j]oint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing.” *Id.* at 489-90. Examples listed by the Court included: 1) plea bargaining for one defendant to testify against another; 2) challenging admission of evidence prejudicial to one client but favorable to another; and 3) arguing differing culpabilities of clients in sentencing in order to minimize the culpability of one by emphasizing that of another. *Id.* at 490. Given these factors, the Court recognized that “it would be difficult to judge intelligently the impact of a conflict on the attorney’s representation of a client.” *Id.* at 490-91. Thus, the Court held that “whenever a trial court improperly requires joint representation over timely objection reversal is automatic.” *Id.* at 488.

II. Conflicted Representation Required Over Objection

A. Simultaneous Representation of Jointly Tried Codefendants

1. U.S. Supreme Court Cases

1978: *Holloway v. Arkansas*, 435 U.S. 475 (1978). The trial court erred in requiring joint representation of three co-defendants by a single lawyer over their objections. The defendants were charged with armed robbery and two counts of rape. One defendant confessed to police officers and said that he was the lookout while others raped women. Weeks before trial, the public defender moved to have separate attorneys appointed because, based on his discussions with the defendants, there was a potential conflict. The court denied the motion for counsel and motions to sever the trials. Just before trial, counsel renewed the motion for separate counsel, because several of the defendants had indicated a desire to testify and he could not cross-examine them because of confidential information that he had received. Judge denied again. After the state’s case, in which various eyewitnesses testified but were not consistent, counsel announced that all three defendants wanted to testify and that he could not cross-examine or even examine the defendants due to the conflicts. The court required counsel to just put them on the stand and let them tell their story. All three defendants denied involvement, but were convicted. The Court held that joint representation is not unconstitutional *per se*, *id.* at 482, but in this case the trial court “failed to either appoint separate counsel or to take adequate steps to ascertain whether the risk of conflict was too remote to warrant separate counsel,” *id.* at 484. The Court recognized that most courts recognize that an attorney’s request for separate counsel should be granted because attorneys are in the best position professionally and ethically to determine whether there is a conflict, have a duty to report a conflict to the court, and are officers of the court when making statements to the court. *Id.* at 485-86. In response to state arguments that such a rule would allow abuses by defense counsel, the court stated that trial courts would still have power to deal with counsel who made an untimely motion for dilatory purposes. *Id.* at 486. Likewise, the Court held that its “holding [does not] preclude a trial court from exploring the adequacy of the basis of defense counsel’s representations regarding a conflict of interests without improperly requiring disclosure of the confidential communications of the client.” *Id.* at 487. In addressing the standard to be applied to trial court errors in these circumstances, the Court recognized that “[j]oint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing.” *Id.* at 489-90. Examples listed by the

***Capital Case**

Court included: 1) plea bargaining for one defendant to testify against another; 2) challenging admission of evidence prejudicial to one client but favorable to another; and 3) arguing differing culpabilities of clients in sentencing in order to minimize the culpability of one by emphasizing that of another. *Id.* at 490. Given these factors, the Court recognized that “it would be difficult to judge intelligently the impact of a conflict on the attorney’s representation of a client.” *Id.* at 490-91. Thus, the Court held that “whenever a trial court improperly requires joint representation over timely objection reversal is automatic.” *Id.* at 488.

2. U.S. Court of Appeals Cases

1996: *Selsor v. Kaiser*, 81 F.3d 1492 (10th Cir. 1996). Trial court erred in requiring joint representation in capital case where counsel represented defendant and codefendant and counsel objected to the conflicted representation. Defendants were charged with the murder and robbery of a convenience store and jointly represented by the same counsel from the public defender’s office. The single eyewitness, who had also been shot numerous times, identified the codefendant as the shooter and the sole assailant she saw at the scene. The codefendant, however, implicated the defendant. According to police, the defendant then made incriminating statements admitting his participation and that he shot the fatal shots. The codefendant’s weapon was recovered. The defendant’s alleged weapon was not. Prior to trial, counsel, on behalf of defendant, moved for a severance because the codefendant could attempt to implicate the defendant. Counsel informed the court that the codefendant was pleading not guilty by reason of insanity and that his testimony could be very damaging to the defendant. Counsel noted, however, that the motion was in the defendant’s interest but contrary to the codefendant’s interest and that counsel had a conflict. Counsel renewed the motion for severance and requested that outside counsel be appointed for one of the defendants. Counsel noted that the codefendant’s defense would admit guilt and being present at scene and defendant was simply asserting not guilty defense. Just prior to jury selection counsel renewed the motion for severance again and stated counsel could not possibly represent the interests of both defendants. Counsel noted that they only had one witness lined up and that would be in support of the codefendant’s defense. During the joint trial, counsel made no opening statement, called one witness to testify concerning the codefendant’s mental statement, and then gave only a brief closing asserting that the defendants should not get the death penalty. (This trial occurred before bifurcated sentencing proceedings and death was a mandatory punishment if convicted). Counsel renewed the motion for severance three times during the trial though. All motions were denied and the court never inquired into the conflict. The defendant was convicted and sentenced to death. (His sentence was commuted to life by the appellate court after finding the statute unconstitutional). Dodson was convicted of related charges, but acquitted of murder. The Tenth Circuit held that the trial court erred in conducting an inquiry under *Holloway*. Although this case was tried before *Holloway*, the state conceded that *Holloway* was not new law and simply applied *Glasser*. The court held that the trial court can require counsel who has raised the objection to joint representation to continue such representation only if, after a searching inquiry, it is clear that counsel’s claim of conflict of interest is ‘groundless.’” *Id.* at 1501. “[A]n adequate inquiry must be targeted at the conflict issue and that the inquiry must be searching, without improperly requiring defense counsel to disclose confidential

***Capital Case**

communications.” *Id.* Here, there was no inquiry into how defendant’s representation and defense might be adversely affected by the joint representation even though the potential conflict of interest was patent. Prejudice is presumed in this *Holloway* type situation where the issue was raised and not adequately addressed by the trial court. The defendant is not required to show an actual conflict. Even if more was required, court finds that there was an actual conflict that adversely affected representation. In attempting to defend the codefendant, counsel implicated the defendant in cross-examining the police officers about the codefendant’s statements. No unconflicted counsel would have conducted that cross-examination.

1992: *Hamilton v. Ford*, 969 F.2d 1006 (11th Cir. 1992). Trial court erred in requiring joint representation in attempted robbery and felony murder case where counsel moved for a severance or appointment of separate counsel for one of the defendants before trial due to conflict. Defendant and codefendant (his cousin) were represented by same appointed counsel in pretrial motions. Counsel moved for severance. Motion was denied. On the first day of trial, counsel renewed the motion for severance and requested appointment of separate counsel to represent one of the defendants because counsel’s investigation led him to believe that a conflict had developed. The prosecution objected that the defendants had waived any conflicts at a pretrial hearing. Counsel responded that the conflicts were not apparent three months before when the defendants waived and that there would be conflicting defenses putting the defendants in different places at the time of the crimes. The motions were denied and the trial proceeded. During the state’s evidence, an eyewitness identified both defendant and codefendant but did not testify about who the shooter was. There were also witnesses that testified that the codefendant had made statements that he and defendant committed the crimes but the defendant was the actual shooter. Following this testimony, counsel renewed the motions noting that he needed to cross-examine the codefendant concerning his alleged statements but could not do so because he represented the codefendant. The court denied the motions, but required a public defender to sit in in case independent cross-examination was necessary. Both defendants testified and asserted alibis. The codefendant denied that he had made any statements concerning the robbery. The Eleventh Circuit held that “when defendants make timely objections to joint representation, they need not show an actual conflict of interest when a trial court fails to inquire adequately into the basis of the objection. In such circumstances the trial court has failed to discharge its constitutional duty under *Holloway* to determine whether the defendants are receiving adequate assistance of counsel, a duty separate from the *Cuyler* framework. Reversal, therefore is automatic.” *Id.* at 1011. Here, although counsel did not object until the day of trial, the objection was timely because the delay was caused by the prosecution’s failure to provide the information in a more timely manner. The trial court also did not conduct an adequate inquiry. Instead, the court asked counsel a single question about trial strategies in open court to which counsel did not respond. “[B]y asking defense counsel to disclose trial strategy in open court, the trial court improperly placed counsel in a situation where in order to adequately respond he would have had to disclose client confidences, thereby breaching attorney/client confidentiality.” *Id.* at 1012-13. Court also finds that even if the *Cuyler* standard applied, counsel’s representation was adversely affected because counsel did not object to the hearsay concerning the codefendant’s statements, which were not admissible against the defendant, and did not cross-examine the codefendant concerning these statements.

***Capital Case**

The court also noted that counsel did not seriously challenge the identification testimony against the defendant although it was much weaker than the identification of the codefendant.

1984: *United States v. Caceres*, 745 F.2d 935 (5th Cir. 1984). Trial court erred in denying motion to withdraw in drug case where counsel represented defendant and codefendant in joint trial and repeatedly requested appointment of separate counsel for the codefendant due to conflicting interests and on the second day of trial brought in another attorney to represent codefendant.

1983: *United States v. Punch*, 722 F.2d 146 (5th Cir. 1983). Trial court erred in denying motion to withdraw in drug case where counsel represented defendant and codefendant in joint trial and repeatedly requested appointment of separate counsel for the defendant due to conflicting interests and on the second day of trial brought in another attorney to represent defendant.

3. U.S. District Court Cases

1995: *Harjo v. Reynolds*, 894 F. Supp. 1496 (N.D. Okla. 1995), *aff'd*, 99 F.3d 1149 (10th Cir. 1996). Trial court erred in failing to conduct adequate inquiry to determine whether potential conflict of interest existed due to counsel's representation of codefendants in conspiracy and murder trial. Two attorneys from the public defender office were appointed to represent all four codefendants. At a motions hearing, counsel moved to withdraw from representing Harjo, the petitioner here, due to potential conflicts. Counsel stated that the three codefendants implicated Harjo, while Harjo's pretrial statement implicated the three codefendants. The court stated that it had no jurisdiction until after the preliminary hearing. At the preliminary hearing, Harjo, through counsel, objected to the conflicted representation. Counsel then filed a motion for severance detailing some of the ramifications of the conflict. On the first day of trial, counsel renewed the motion for severance and pointed out the conflicts. The court denied the motions. Because petitioner made timely objections to the conflicts, *Holloway* is controlling. The inquiry at trial was inadequate because the trial judge did not inquire whether the codefendants intended to testify and portray defendant as the one in command of the situation. Likewise, the court did not address the defendants personally and inquire as to their reasons for desiring separate counsel. Moreover, defense counsel did not have burden of proving that conflict from multiple representation was more than potential conflict warranting separate counsel. The burden was on the court to conduct an adequate inquiry and to make a determination.

4. State Cases

2007: *State v. Tensley*, 955 So. 2d 227 (La. Ct. App. 2007). Both defendants (a mother and her boyfriend) in second degree murder while engaged in cruelty to a juvenile case were granted a new trial due to counsel's conflict of interest the adversely affected the representation. Counsel A & B were originally appointed to represent the mother. Later, both were also appointed to represent the boyfriend. Prior to meeting with the boyfriend, counsel A's motion to withdraw from the boyfriend's case was granted based on the likely conflict of interest. Counsel B did not similarly

***Capital Case**

move to withdraw from either case and represented both for more than a year before being relieved as the mother's counsel (without explanation) prior to trial. Immediately prior to trial, the mother moved to disqualify Counsel B from continued representation of the boyfriend due to his conflict of interest. A hearing was held in which Counsel B testified, with no objections, concerning the substance of discussions with both defendants, who both maintained innocence but also did not cast blame on the other defendant. The trial court denied the motion, but was not aware at the time that the mother would testify at trial and be cross-examined by Counsel B. The court held that under state law "a defense attorney required to cross-examine a current or former client on behalf of a current defendant suffers from an actual conflict." When the defendant asserts the issue prior to trial, no showing of prejudice is required. Instead, the court must appoint separate counsel or determine if the conflict is "too remote." Here, the conflict clearly was not too remote and "culminated in the ghastly unrestrained process" of counsel cross-examining the mother at trial. The mother's conviction was thus reversed. Although the boyfriend did not object to the conflict prior to trial, the issue was disclosed to the trial court, which then had a duty to advise him of the conflict. Because the boyfriend was never advised of his right to conflict-free counsel, his conviction was also reversed.

1996: *Eveland v. State*, 929 S.W.2d 165 (Ark. Ct. App. 1996). Trial court erred in denying counsel's motion for severance and to withdraw from representation in rape case due to conflicts. Following arrest, each of the three codefendants made statements incriminating themselves and their codefendants. All three retained the same counsel. Just prior to trial that counsel was suspended from the practice of law and new counsel was retained. Just prior to trial, the prosecutor notified counsel that the prior statements would be used for impeachment during cross-examination. Counsel moved for severance and to be allowed to withdraw from representation of the two least culpable codefendants due to the conflict. Counsel noted that there were defenses available to them that would be adverse to the more culpable defendant. The trial court denied the motion as untimely. The appellate court noted that there were conflicting interests and antagonistic defenses. Even according to the rape victim, one defendant was the actual perpetrator and one codefendant actually assisted her following the rape. Moreover, the court noted that under "*Holloway*, trial counsel was in the best position to evaluate the possible conflicts and requested to be relieved as counsel for two of the appellants." *Id.* at 169. The trial court abused its discretion in denying the motion for severance and for separate counsel for each codefendant.

1993: *Hernandez v. State*, 862 S.W.2d 193 (Tex. App. 1993). Trial court abused its discretion in refusing to appoint separate counsel for five prisoners, who were jointly tried, for assaulting a correctional officer. The trial court granted the state's motion for a joint trial. Prior to trial, counsel moved for appointment of separate counsel for each of the five defendants. The court denied the motion. Automatic reversal required due to joint representation over objection. Even if prejudice showing was necessary, "It is not speculation . . . that the separate lawyers could, and we submit would, have argued the differing degrees of assault and differing criminal backgrounds of each of the defendants; attempting to put their own client in the best possible light." *Id.* at 196.

***Capital Case**

- 1992:** *People v. DeBusk*, 595 N.E.2d 1156 (Ill. App. Ct. 1992). Trial court erred in armed robbery case in failing to either appoint separate counsel or to take adequate steps to ascertain whether risk of conflict was too remote to warrant separate counsel where counsel represented defendant and codefendant and asserted conflicts a number of times. Defendant and codefendant were charged with home invasion and armed robbery. A single public defender was appointed to represent them. Prior to trial, counsel informed the court a number of times that there was a conflict between the defenses, that the defendant was exercising undue influence over the codefendant, that the defendant had made pre-trial statements implicating the codefendant, and that there was evidence that was admissible against defendant but not against codefendant. Because both defendants stated that they wanted the same attorney and a joint trial, the trial judge refused to appoint separate counsel. Counsel then moved to withdraw, but the court did not rule on the motion. Ultimately, the defendant requested separate counsel, but the court denied the motion. The defendant then proceeded *pro se* with a different stand-by counsel. Following conviction, the defendant again requested different counsel and the court denied. The defendant again proceeded *pro se*. “The trial court’s failure to appoint separate counsel or to take adequate steps to ascertain whether the risk was too remote to warrant separate counsel was reversible error.” *Id.* at 1163.
- 1991:** *State v. Velarde*, 806 P.2d 1190 (Utah Ct. App. 1991). The court erred in failing to conduct adequate inquiry where counsel representing defendant and codefendant requested appointment of separate counsel. Defendant was charged with burglary and theft. He and his codefendant were appointed separate counsel, but both were members of the same public defenders office. Defendant’s counsel requested appointment of outside counsel because defendant and codefendant were both prepared to accuse the other of the crimes. The state objected to a possible delay and the court denied the motion. The appellate court held that when a conflict is raised, the trial court must take adequate steps to resolve the issue or prejudice is presumed. Here, the trial court did not determine whether there was a conflict, whether appointing new counsel would delay the case or the defendant’s desires. The court asked several times but the defendant only addressed other motions in response and never addressed the conflict issue.
- 1990:** *Main v. State*, 557 So.2d 946 (Fla. Dist. Ct. App. 1990). Trial court erred in requiring joint representation in drug case where counsel represented defendant and codefendant in joint trial in drug distribution case. Counsel repeatedly objected to the joint representation. During trial, on direct examination, the state’s primary witness implicated only the codefendant in one transaction. On cross, counsel elicited testimony that it was actually only the defendant, which was necessarily damaging to defendant but counsel was obliged to conduct the cross in representing the codefendant counsel has a actual conflict that adversely affected representation.
- 1988:** *State v. Knight*, 770 S.W.2d 771 (Tenn. Crim. App. 1988). Trial court erred in failing to conduct an adequate inquiry in drug case where counsel represented both defendant and codefendant and counsel informed the court that he had a conflict and should not represent defendant. The judge

***Capital Case**

failed to explore the conflict and proceeded on. Defendant then plead guilty despite having an arguable defense of entrapment, which would have highlighted the codefendant's greater culpability.

1987: *Wilson v. State*, 359 S.E.2d 661 (Ga. 1987). Trial court erred in requiring counsel in robbery case to jointly represent two defendant when counsel informed the court of a conflict of interest and requested appointment of separate counsel.

1983: *Reid v. Superior Court*, 189 Cal. Rptr. 644 (Cal. Ct. App. 1983). Trial court erred in failing to adequately inquire in forgery case where counsel represented defendant and codefendant and codefendant raised a conflict objection at the preliminary examination. Defendant's failure to object was excused because, after the magistrate brushed aside codefendant's objection, defendant had no reason to expect he would respond differently to any objection she raised. Information dismissed.

1982: *Commonwealth v. Nicolella*, 452 A.2d 1055 (Pa. Super. Ct. 1982). Trial court erred in denying continuance in drug case where counsel represented defendant and codefendant, who was the principal witness against defendant, and also represented defendant's mother, a codefendant still pending trial. It was improper for defendant's counsel to continue to represent either defendant or his co-defendant (who was the principal witness against the defendant), since counsel created at least the appearance of impropriety by his continued involvement in the case. Furthermore, the record shows that an actual conflict continued even after counsel was removed from co-defendant's case. In addition to representing defendant, counsel also represented defendant's mother. The trial record clearly shows the judge chiding counsel for acting out of concern for the mother's upcoming case, not defendant's on-going one. The trial court abused its discretion in refusing appellant's request for a continuance to obtain new counsel.

Lerma v. State, 679 S.W.2d 488 (Tex. Crim. App. 1982). Trial court erred in refusing to conduct an adequate inquiry in involuntary manslaughter case where counsel represented defendant and codefendant in joint trial and defendant objected to joint representation due to conflicts.

1982: *Shiver v. State*, 417 So.2d 1140 (Fla. Dist. Ct. App. 1982). Trial court failed to adequately inquire in drug case when counsel represented defendant and codefendant in joint trial and asserted conflict.

B. Simultaneous Representation of Codefendants in Plea Negotiations

1. U.S. Court of Appeals Cases

2000: *United States v. Henke*, 222 F.3d 633 (9th Cir. 2000). Trial court erred in failing to grant motion to withdraw due to conflict in prosecution for conspiracy to make false statements to the Securities and Exchange Commission (SEC), making false statements, securities fraud, and insider trading. Three defendants were indicted. They participated with their lawyers in joint defense meetings during which confidential information was discussed. Communications made during these pre-trial

***Capital Case**

meetings were protected by the lawyers' duty of confidentiality imposed by a joint defense privilege agreement. [Court held that such agreements are valid and implies an attorney-client relationship with the co-defendants and all counsel involved.] Before trial, one codefendant entered a plea agreement with the government in exchange for his testimony against the remaining two codefendants. Counsel for the remaining codefendants moved for a mistrial and to withdraw because the duty of confidentiality to the witness under the joint defense agreement prevented counsel from adequately cross-examining the witness. The court granted the motion for a mistrial to allow counsel to prepare, but denied the motion to withdraw. The court reasoned that any privileged impeaching information counsel learned about the witness would not be known to new counsel and the defendants were therefore no worse off for being represented by their original attorneys. During the new trial, the witness testified, in a manner allegedly contrary to statements made in the pretrial meetings, but neither counsel conducted any cross-examination for fear of violating the privilege agreement. Counsel had even been threatened with action by the witness' new counsel if the agreement was violated. Given this situation, counsel was in the best position to evaluate the conflict and the motion to withdraw should have been granted.

1995: *United States v. Cook*, 45 F.3d 388 (10th Cir. 1995). Trial court erred in drug prosecution by requiring defendant's counsel to advise his former client/codefendant to testify in accordance with plea agreement thereby creating a conflict. Three codefendants in a drug trial retained the same counsel. Before trial, the government entered into a plea agreement with codefendant to testify against defendant and remaining defendant. On motion of the government – conceded by counsel – the court then appointed new counsel for the witness because of the conflict of interest. During trial, the witness refused to testify and the court ordered the defendant's counsel to advise his former client of the consequences of failure to comply with plea agreement that required her to testify in government's case-in-chief against defendant in exchange for the government's recommendation of leniency at sentencing. Counsel noted that he had previously been disqualified due to a conflict but attended the meeting with the prosecutor and the witness' new counsel where the witness was advised. Conflicted counsel did not speak during the meeting though. The codefendant/witness then gave damaging testimony against the defendant. Appellate court finds that counsel's statement to court of conflict was an objection and that counsel's conflict was patent in being required to advise witness to give damaging testimony against defendant. Court finds that it does not matter that counsel said nothing at the meeting because, "[u]nder *Holloway*, it is the improper actions of the *trial court*, following a defendant's timely objection, that define our conflict of interest inquiry." *Id.* at 394 n.6. Habeas relief granted even though this issue was not raised on direct appeal in state court, because counsel, who also served as appellate counsel, was ineffective in failing to raise this issue. Thus, cause and prejudice for failing to raise the issue in state court was established.

1983: *United States v. Unger*, 700 F.2d 445 (8th Cir. 1983). Trial court erred in failing to adequately inquire in kidnapping case where counsel represented defendant and codefendant in sentencing. While the court found that her guilty plea was not affected by the conflict, the defendant should have been specifically warned of the dangers of joint representation. Accordingly, she did not knowingly waive her right to separate counsel, since she could not be said to have waived an unperceived

***Capital Case**

conflict that was not brought to her attention. In particular, a single-syllable answer to the clerk's question, of whether she had been satisfied with counsel's representation, was inadequate to show an informed and intelligent waiver of the right to conflict-free representation.

2. State Cases

- 2001:** *State v. Ryan*, 26 P.3d 707 (Kan. Ct. App. 2001). Counsel represented brother and sister codefendants charged with possession of cocaine. Counsel negotiated a plea for the defendant that required her to testify against her brother. Defendant claimed she did not know of the requirement to testify until just prior to the plea hearing when she admitted both her guilt and her brother's. Following the plea, counsel moved to withdraw from representing the brother and he retained separate counsel. Charges against him were dismissed. The defendant retained new counsel prior to sentencing and moved to withdraw her guilty plea due to counsel's conflict. The trial court denied without inquiry into what actions counsel may have taken if he had not been laboring under a conflict of interest. The Court held, under these circumstances, that *Holloway* required a presumption of prejudice. "[A] showing defendant's attorney had an actual conflict of interest when negotiating a plea agreement requires the district court to grant defendant leave to withdraw the guilty plea prior to sentencing." *Id.* at 710.
- 1992:** *Ross v. State*, 829 P.2d 58 (Okla. Crim. App. 1992). Trial court erred in failing to inquire or to appoint separate counsel where counsel represented three codefendants and asserted a conflict. Defendant and two others were arrested for armed robbery. Defendant initially admitted that he was the driver for a planned robbery. He later denied knowledge of any robbery but admitted that the three were planning a burglary. A single public defender was appointed to represent all three. Counsel informed the court that there was a conflict and twice requested appointment of separate counsel. The court denied the motion. The two codefendants plead guilty and the state notified counsel that they would be witnesses. Just prior to trial counsel renewed his motion for appointment of separate counsel because he could not cross-examine his own clients. The appellate court held that, "given the circumstances in this case, it was the duty of the trial judge to either appoint separate counsel or to take adequate steps to ascertain whether the risk was too remote to warrant separate counsel." *Id.* at 61. Prejudice presumed.
- 1983:** *Commonwealth v. Davis*, 455 A.2d 168 (Pa. Super. Ct. 1983). Trial court erred in denying motion to withdraw in unlawful taking, receiving stolen property, criminal conspiracy, and burglary case where the same public defender officer represented defendant and codefendant and negotiated a plea in exchange for testimony for codefendant and moved to withdraw from defendant's case.
- 1982:** *State v. Rowe*, 416 So.2d 87 (La. 1982). Trial court erred in denying motion to withdraw in robbery case where counsel represented defendant and codefendant who plead guilty and became a witness. During trial, the codefendant testified counsel had advised him to testify against defendant. Counsel

***Capital Case**

moved to withdraw as defense counsel was obviously unable to adequately cross-examine the codefendant.

Commonwealth v. Evans, 451 A.2d 1373 (Pa. Super. Ct. 1982). Trial court erred in denying motion to withdraw in theft by unlawful taking, receiving stolen property, and criminal conspiracy case where public defender office represented defendant and codefendant and codefendant plead guilty and testified for state.

C. Simultaneous Representation of Codefendants in Severed Trials

1982: **State v. Marshall*, 414 So.2d 684 (La. 1982). Trial court erred in denying motion for appointment of separate counsel in capital trial where counsel represented defendant and codefendant in severed trials. Reversal required even though severance was granted and made it highly unlikely that any prejudice would arise because of a conflict. When a defendant raises a pretrial objection because of a possible conflict, the trial court must, in accordance with *Holloway*, appoint separate counsel or take adequate steps to determine if claimed risk is too remote. If it fails to take those measures, then reversal is automatic even in absence of specific prejudice.

1982: *Commonwealth v. Nicolella*, 452 A.2d 1055 (Pa. Super. Ct. 1982). Trial court erred in denying continuance in drug case where counsel represented defendant and codefendant, who was the principal witness against defendant, and also represented defendant's mother, a codefendant still pending trial. It was improper for defendant's counsel to continue to represent either defendant or his co-defendant (who was the principal witness against the defendant), since counsel created at least the appearance of impropriety by his continued involvement in the case. Furthermore, the record shows that an actual conflict continued even after counsel was removed from co-defendant's case. In addition to representing defendant, counsel also represented defendant's mother. The trial record clearly shows the judge chiding counsel for acting out of concern for the mother's upcoming case, not defendant's on-going one. The trial court abused its discretion in refusing appellant's request for a continuance to obtain new counsel.

D. Simultaneous Representation of Government Witness on Related Charges

2008: *Scott v. State*, 991 So. 2d 971 (Fla. Dist. Ct. App. 2008). The trial court erred when it denied the public defender's motion to withdraw on the basis of a conflict of interest in prosecution for drug offense because the public defender's office also previously and simultaneously represented the confidential informant who had obtained the evidence that would be used against the defendant at trial, and the defendant's defense at trial involved implicating the informant as the source of the drugs.

By requiring the public defender to represent appellant despite simultaneously representing the client whom it had apparently advised to provide assistance to the state, assistance that consisted of procuring evidence against appellant, the trial court

***Capital Case**

impermissibly obligated the public defender to “serve a dual and adverse stewardship.” . . . A disqualifying conflict of interest plainly exists when the public defender represents a defendant against whom the state obtained inculpatory evidence, with the assistance of another of the public defender’s clients, where the public defender’s office advances the latter’s interests, based upon damage the latter did to the first defendant’s legal position. Here, if an assistant public defender advised the confidential informant to cooperate with the state, the public defender’s office would itself have helped produce most of the evidence used against appellant at trial.

In addition, “[b]ecause part of appellant’s defense was to suggest that the confidential informant framed him, appellant’s interests conflicted starkly with those of the informant.”

1983: *Leversen v. Superior Court*, 668 P.2d 755 (Cal. 1983). Trial court erred in denying motion to withdraw in robbery case where counsel simultaneously represented a government witness, who was also a suspect in the same case. Counsel informed the court that he had confidential information received in course of his representation of the witness. The state supreme court held that attorney’s good-faith representations to court, coupled with evidence in the record and posture of trial, proved that to deny his motion to be relieved would have deprived defendant of his constitutional right to assistance of counsel free from any conflict adversely affecting counsel’s performance.

E. Simultaneous Representation of Persons Implicated (But Not Jointly Charged) in Crimes

2007: *Duvall v. State*, 923 A.2d 81 (Md. 2007). The trial court erred in burglary, robbery, and assault case for failing to grant the public defender’s motion for continuance in order to cure an actual conflict of interest. The defendant was charged with breaking into a home in order to steal marijuana. The defense theory was that the defendant had an alibi from his mother and that the crime had been committed by a third party who fit the physical descriptions of the eyewitnesses, had committed a similar crime at the same home previously, and had knowledge of the location of marijuana in the home. Defense counsel filed a motion for continuance well before trial in order to reassign the case to a panel attorney because the same public defender office represented the third party on unrelated charges. The trial court erred in failing to adequately inquire into the conflict or to grant the continuance motion in order to allow counsel to cure the conflict. The trial court asked only if the defendant wanted a continuance, which he did not, and whether he wanted to proceed without counsel, to which he responded that he would if counsel could not represent him. The defendant was not, however, adequately advised about the conflict or whether he wanted to waive the conflict prior to counsel continuing to represent him. The court found that there was an actual conflict and it was irrelevant that the third party was not a co-defendant, the state’s witnesses testified that the defendant and not the third party was the perpetrator, and the defense elicited evidence and argument during

***Capital Case**

trial to try to shift the blame to the third party. The conflict existed prior to trial and what happened during trial is irrelevant to the court's error.

2000: *Lettley v. State*, 746 A.2d 392 (Md. Ct. App. 2000). Trial court erred in denying retained defense counsel's motion to withdraw (which was supported by the defendant after consultation with unconflicted counsel) from representation in attempted murder case because defense counsel faced actual conflict of interest, created by dual representation of defendant and another client, who was not charged in crime at issue but who had allegedly confessed to counsel that he had in fact committed that crime. The court denied the motion and a continuance. The court of appeals held:

the trial court's decision to require counsel's continued representation was improper. The record is clear that there was indeed an actual conflict of interest which endangered Appellant's right to undivided loyalty and assistance. In order to properly defend Appellant counsel had, by implication, to incriminate her other client.

Id. at 401-02. The fact that no other lawyer would have had access to the confidential information that someone else confessed does not change the result. "The conflict is inherent in the divided loyalties. It mattered little that new counsel would not be privy to the confidential information known to Appellant's counsel; a conflict nonetheless existed." *Id.* at 402. The court also notes that defense counsel's representations of a conflict should be given deference. "Defense counsel is in the best position to make this judgment, and will often be ethically barred from giving the court sufficient information to make it independently." *Id.* at 404.

1984: *State v. Gonsalves*, 476 A.2d 108 (R.I. 1984). Trial court erred in summarily denying counsel's motion to withdraw in fraudulent use of credit card case where counsel informed the court of a conflict of interest because he also represented the individual who actually committed the crime for which defendant was being tried.

F. Simultaneous Representation of Prosecutor, Government Witness, or Confidential Informant in Unrelated Case

2010: *Beard v. Commonwealth*, 302 S.W.3d 643 (Ky. 2010). Counsel in drug trafficking case had a conflict of interest in simultaneous representation of the defendant and a confidential informant (CI), such that the trial court's denial of the defendant's *pro se* motion to dismiss counsel was error. The CI was on probation after having been represented by counsel. He was in danger of having his probation revoked for failure to report and counsel had been appointed again. During this time, the police did not know he was on probation and accepted his offer to work as a CI, which would have been rejected if police had known of his probationary status. He made controlled buys that led to the defendant's arrest. During trial, counsel attacked the CI's credibility and the police non-compliance with their own rules regarding use of informants. "Though *Holloway*, specifically addressed joint representation in the same trial, ultimately a conflict is a conflict." Here, the

***Capital Case**

“obvious conflict” was that counsel owed a duty of zealous representation to both the defendant and the CI and was required to “help one client at the expense of the other” or “to balance the interests of his clients,” which “would require doing only half the job for both clients” and harm both of them “by denying them full representation.” In short, by representing the defendant and a witness against him, who had an interest in the defendant being convicted, counsel “had a dog in both fights.” While counsel did challenge the CI’s credibility at trial, “we cannot know what he may have refrained from doing because of his concurrent representation” of the CI. Because this was a structural error, automatic reversal was required.

- 2005:** *State v. Gregory*, 364 S.C. 150, 612 S.E.2d 449 (2005). The trial court erred in denying counsel’s motion to withdraw and to allow the defendant a continuance in a lewd acts case. After counsel began representation of the defendant, counsel began representing the prosecutor in his case in her own divorce action. After counsel began negotiating for the defendant, the defendant was indicted on an additional charge. Counsel moved to withdraw on the morning of trial because the defendant’s confidence in his abilities was diminished. The court denied the motion and ordered only that a different prosecutor would try the case. The trial court erred because there was an actual conflict of interest due to counsel’s divided loyalties. Prejudice presumed.
- 2001:** *State v. Santacruz-Hernandez*, 40 P.3d 672 (Wash. Ct. App. 2001). Court erred in failing to grant counsel’s motion to withdraw or to allow a 24-hour continuance in order for counsel to prepare and present evidence that would have established an actual conflict that would adversely affect the defendant. Defendant was charged with drug distributions, based in part on two confidential informants. The day before trial, counsel realized that she also represented one of the confidential informants on unrelated charges. Counsel moved to withdraw, but the court denied. On the morning of trial, counsel, through her own lawyer, again moved to withdraw and asked for a 24-hour continuance in order to prepare and present evidence that would establish a conflict that would adversely affect the defendant. The trial court denied the motions, based in part, on the state’s argument that the informant would not be a witness. Court held reversal was required under *Holloway*.
- 2000:** *Ramirez v. State*, 13 S.W.3d 482 (Tex. App. 2000). Defendant was denied effective assistance of counsel in prosecution for unlawful possession of a firearm by a felon because defense counsel labored under an actual conflict of interest that adversely effected her performance. During trial, the state called as a witness a client of defense counsel in another pending criminal case. Counsel moved for a mistrial because she had no notice of the witness and because she had confidential information from him and could not adequately represent the witness or the defendant in cross-examining her own client. The court denied the motion for mistrial and pressed on. The witness/client testified that the defendant made incriminating statements to him in confinement. During cross, counsel attempted to establish that she had confidential information that she could not use in cross because the witness/client was not waiving his privilege. The court would not allow this testimony. Counsel again moved for a mistrial due to the prejudice to defendant. The court of appeals held, “Great deference should be accorded the representations of an attorney who feels a

***Capital Case**

division of loyalty.” *Id.* at 486. “It is well-established that a defendant is denied the effective assistance of counsel in those instances where an attorney is unable to cross-examine, or is chilled in the cross-examination of, a government witness because of the attorney/client privilege arising from counsel’s prior representation of the witness or from his duty to advance the interests of the witness as a current client.” *Id.* at 487. Counsel in this case had an actual conflict of interest that had an adverse effect on appellant’s trial. In addition, the trial court failed to conduct an inquiry into the apparent conflict.

1997: *Maricopa County Public Defender’s Office v. Superior Court In and For County of Maricopa*, 927 P.2d 822 (Ariz. Ct. App. 1996). Trial court erred in two unrelated cases in denying public defender’s motions to withdraw where the office either currently or previously represented government witness. The trial court denied the motions absent disclosure of confidential information concerning former clients. Court held that the trial court cannot condition ruling on conflict on disclosure of confidential information and counsel’s assertion of conflict must be given great weight.

1994: **Guzman v. State*, 644 So. 2d 996 (Fla. 1994). The trial court erroneously denied motions to withdraw filed by the appointed public defender based on conflicts of interest between the defendant and two jailhouse snitches, who had been his cellmate prior to trial and were also clients of the public defender’s office. One of these witnesses testified and denied making statements to counsel that he would do anything to avoid conviction. Nonetheless, counsel chose not to testify to rebut this testimony. “We can think of few instances where a conflict is more prejudicial than when one client is being called to testify against another.” The conflict was not resolved by the witness’ waiver because this could not waive the defendant’s right to conflict-free counsel.

1991: *Mitchell v. State*, 405 S.E.2d 38 (Ga. 1991). Trial court erred in requiring counsel to proceed with representation in murder case where counsel also represented a government witness on pending unrelated charges. During the trial, the government notified counsel for the first time that witness would be called. Counsel objected and informed the court of the conflict. The court attempted to resolve the conflict by relieving counsel as the witness’ lawyer. Counsel objected and moved for a mistrial. The witness then testified that defendant had confessed to him in confinement. Counsel declined to cross-examine and moved for a mistrial or, in the alternative, for a continuance until another attorney could be appointed to represent defendant. The trial court denied the motions. The court erred in requiring the conflicted representation.

King v. State, 810 P.2d 119 (Wyo. 1991). Trial court erred in failing to adequately inquire into conflict when defendant requested different counsel because counsel had previously represented a government witness. Witness was arrested on drug charges. She agreed to participate in sting operation targeting defendant, her former boyfriend. The witness’s initial attorney, who arranged to get her out of jail and into the hospital for treatment, was appointed to represent defendant following his arrest. The witness represented by other counsel from the public defender’s office entered into a deferred plea, which would ultimately result in dismissal of charges, and testified against defendant. At trial, defendant asked for appointment of different counsel due to allegations

***Capital Case**

of ineffective assistance and due to counsel's prior representation of witness. The court denied the motion without discussion. "The trial judge should have evaluated [defendant's] claim and put into the record the reasons for rejecting [defendant's] claim for ineffectiveness of counsel based upon conflict of interest. The failure to do so constituted an abuse of discretion." *Id.* at 124 (citations omitted).

G. Prior Representation of Victim, Government Witness, or Codefendant's Witness on Unrelated Charges

1. U.S. Court of Appeals Cases

1997: *United States v. Gallegos*, 108 F.3d 1272 (10th Cir. 1997). Trial court erred in failing to conduct inquiry in drug conspiracy and money laundering case where counsel had previously represented a witness that would be called by codefendant in joint trial. Prior to trial, counsel became aware that the codefendant intended to call a witness that counsel had previously represented in a drug case. Counsel informed the court that he was concerned about his ability to cross-examine his former client because of the attorney-client privilege. The court said the matter would be addressed if the witness was called. During the trial, when the witness was called, the court instructed counsel to consult with his prior client to determine whether he would invoke his Fifth Amendment rights. After talking with the witness, counsel informed the court that the witness had information exculpatory to the defendant, but counsel advised him to invoke his Fifth Amendment rights. Counsel stated that he felt that he had a conflict in representing competing interests and moved to sever defendant's trial. The government requested appointment of independent counsel for the witness, but the witness declined. The trial proceeded and the witness did not testify. Following conviction, the defendant moved for a new trial due to the conflict. Court denied finding that the witness would have refused to testify regardless of who represented him. Appellate court held, under *Holloway*, that "where timely objection is made to joint representation of conflicting interests, and where the trial court fails to adequately address the conflicting interests, reversal is automatic." *Id.* at 1280. Here, counsel raised the conflict issue in a timely fashion and moved for severance in order to resolve the issue. Rather than inquire of defendant or the witness concerning waiver of the conflict, as was required, the trial court instructed counsel to consult with and advise the witness. As counsel explained to the court, he was in a very precarious situation. Because the witness possessed information that was exculpatory to the defendant, counsel's duty to the defendant was to encourage the witness to testify and to attempt to elicit this exculpatory information from him. On the other hand, counsel's obligation to his former client was to discourage him from testifying. If the former client had testified, he would have subjected himself to the risk of additional criminal charges. Thus, there was a real conflict of interest present, and the trial court erred in failing to either obtain a waiver from the defendant or take adequate steps to protect her right to conflict-free representation.

2. State Cases

***Capital Case**

- 2013:** *State v. Gray*, 736 S.E.2d 837 (N.C. Ct. App. 2013). Prejudice presumed due to counsel's conflict in armed robbery case. Prior to trial, the defendant objected to appointed counsel's representation on the grounds that counsel had previously represented one of the State's witnesses. The witness' waiver of the conflict did nothing to alleviate the problem.
- 2004:** *State v. Reeves*, 890 So.2d 590 (La. Ct. App. 2004). The trial court erred in simple escape case for failing to take adequate steps to assure that defendant's right to conflict-free counsel was protected after the court found that defense counsel did have an actual conflict of interest. Prior to trial, the defendant moved for the appointment of conflict -free counsel. The trial court denied the motion stating any potential conflicts with specific witnesses could be dealt with at trial. During the trial, the State indicated that it would call an inmate that had previously been represented by counsel, who was the director of the Public Defender's Office. Counsel informed the court of the conflict in having to cross-examine his former client, especially since he had confidential information gained from his representation of the inmate. The court found that an actual conflict existed, but, over objection, allowed the representation to continue based on the witness' waiver of the privilege. The court held that "[t]he conflict was not the witness' to waive. . . . [T]he only proper recourse to protect Defendant's right to effective counsel was to appoint conflict-free counsel."
- 2000:** *Valle v. State*, 763 So.2d 1175 (Fla. Dist. Ct. App. 2000). Interlocutory appeal. Trial court erred in denying public defender's motion to withdraw because of conflict of interest in manslaughter case where two state witnesses, who received injuries as passengers in defendant's vehicle, were previously represented by the public defender's office. The public defender involved in this case had not represented the witness/victims or obtained any confidential information from their files. The trial court, thus, denied the motion to withdraw. The appellate court held that the motion should have been granted because the public defender office is like a law firm and if one person is conflicted, all are conflicted.
- 1998:** *Reardon v. State*, 715 So.2d 348 (Fla. Dist. Ct. App. 1998). Court erred in aggravated battery case in denying public defender's motion to withdraw due to conflict since public defender had previously represented victim at his arraignment in DUI case. Court held that although *Holloway* did not require that counsel be relieved, Florida law does because the Florida Supreme Court interpreting a state statute requires that the public defender be relieved anytime the public defender certifies a conflict.
- 1996:** *Brooks v. State*, 686 So.2d 1285 (Ala. Crim. App. 1996). Trial court erred in denying counsel's motion to withdraw in drug case, where counsel had previously represented the confidential informant who was instrumental in defendant's arrest and even represented him in the case that led to the defendant's arrest. The appellate court held, "An actual conflict of interest existed here, and the trial court erred to reversal in denying counsel's motion to withdraw." *Id.* at 1287.

***Capital Case**

1986: *State v. Serpas*, 485 So. 2d 999 (La. Ct. App. 1986). Trial court erred in denying counsel's motion to withdraw in stolen goods case where counsel previously represented a state witness on unrelated charges and had negotiated a plea for him that required his testimony against defendant.

H. Prior Representation of Persons Implicated (But Not Jointly Charged) in Crimes

2013: *State v. Stovall*, 312 P.3d 1271 (Kan. 2013). The trial court in rape of underage daughter case abused its discretion in denying defense counsel's three motions to withdraw due to conflict of interest. The first two motions were made two weeks prior to trial and prior to the beginning of voir dire. The third motion was made prior to sentencing. In the first motion, trial counsel indicated that she had been subpoenaed to testify in another case, *Fulton*, in which her client, Hudson, was recanting his testimony incriminating *Fulton*. "The connection with this case was that Stovall was corroborating Hudson's recantation, so an impeachment of Hudson's testimony would likewise impugn Stovall's credibility." In the second motion, counsel also indicated that she had previously represented the alleged victim's uncle on child sex abuse charges within the six months prior to trial. The defendant desired to call him as a witness to establish that he had babysat the alleged victim and that he had been convicted of child sex abuse, thus, implying that he had abused the alleged victim "causing the child to act out sexually." Trial counsel stated on the record that she could not advocate solely for the defendant because of duties she owed to others. Nonetheless, the trial court denied the motions to withdraw because of prior trial date delays, even though the delays were partially caused by the state or court scheduling problems and the defendant had waived any speedy trial claims. Trial counsel's conduct was adversely affected because she was constrained from implicating the defendant's uncle as the abuser. "[T]he perils of trying to serve two masters is literally as old as the Bible."

I. Prior Prosecution of Defendant on Unrelated Charges

1990: *People v. Martin*, 168 A.D.2d 794 (N.Y. App. Div. 1990). Trial court erred in failing to appoint different counsel for defendant where defendant repeatedly requested different counsel because counsel had previously prosecuted defendant on unrelated charge and because defendant asserted that counsel was ineffective. The conflict itself was sufficient to require appointment of different counsel.

J. Counsel Retained by Codefendant or Third-Party With Adverse Interest

1986: *People v. Palmer*, 490 N.E.2d 154 (Ill. App. Ct. 1986). Trial court erred in denying counsel's motion to withdraw in arson and battery case where counsel was retained by the defendant's wife, who was the battery victim and a state's witness. She sometimes indicated that she wanted the defendant's charges dropped and at other times stated that she wanted the state to prosecute defendant. Counsel thus labored under at least a possible conflict in his representation of defendant and reversal was

***Capital Case**

required even though there was no showing that counsel did not represent defendant in competent fashion.

K. Counsel Was Necessary or Potential Witness

2004: *Flores v. State*, 155 S.W.3d 144 (Tex. Crim. App. 2004). The trial court erred in aggravated assault case in ordering defense counsel to testify over objection. Counsel elicited testimony that the victim had been unable to identify the defendant during a pretrial hearing and had to ask the court interpreter who the defendant was. The state was allowed to call counsel to testify to his recollection of the incident and testified that he did not hear the victim ask the interpreter to identify the defendant. Analyzing the issue as a right to fair trial rather than one of effective assistance of counsel, the court held that counsel may not be called as a witness unless the state establishes no feasible alternative to counsel's testimony and that the testimony is "essential, not merely relevant" to the state's case. The trial court erred under both prongs in this case and the error was harmful. "The harm flows, in part, from placing the lawyer in a dual role and the impressions created thereby. . . ." Thus, "the State may indeed call defense counsel to the stand, and the court may require the lawyer [to] testify, but the State will do so at its own peril."

1983: *Koza v. Eighth Judicial Dist. Court In and For Clark County*, 665 P.2d 244 (Nev. 1983). Trial court erred in failing to disqualify counsel on motion of defendant in murder case where the public defender counsel had represented the codefendant for six days prior to his retention of private counsel and a deputy public defender was scheduled to be called as witness at trial on whether defendant's statement to police was voluntary.

Brewer v. State, 649 S.W.2d 628 (Tex. Crim. App. 1983). Trial court erred in denying motion to withdraw in promotion of prostitution case where counsel was implicated as possible suspect in same case and was a possible witness. Counsel's conversation with defendants was recorded by informant and were so damaging to counsel's character and that of defendants as to make reasonably effective assistance impossible. Counsel made disparaging remarks against the police and the criminal justice system and also made remarks that could be construed as being involved in a coverup, which was argued by the prosecutor. In view of counsel's irreconcilable conflicts, it was abuse of discretion to deny counsel's motion to withdraw.

L. Defendant Had Filed Lawsuit or Ethics Complaint Against Counsel

1. U.S. Court of Appeals Cases

1991: *Smith v. Lockhart*, 923 F.2d 1314 (8th Cir. 1991). Trial court erred in terroristic threat and false imprisonment case for failing to appoint unconflicted counsel in pretrial stage where defendant had filed a federal lawsuit against counsel and requested substitute counsel. At arraignment, defendant objected to appointment of local public defender, in part, because he served as a municipal judge. The court informed defendant that he could proceed with counsel or proceed *pro se*. Defendant

***Capital Case**

proceeded *pro se*. Then, at a pre-trial omnibus hearing, defendant requested appointment of different counsel again because there was a complete breakdown in communications and he intended to file (and did four days later) a federal lawsuit against counsel, the judge, and others alleging a conspiracy to violate his rights. The court again refused. Defendant represented himself in hearing, which included speedy trial motion and motion to reduce bond. This hearing was also important because all motions had to be raised then or would be considered untimely. Twelve days before trial, the court did appoint separate counsel. The Eighth Circuit held that the trial court erred in failing to inquire into the potential conflicts. The federal lawsuit against the attorney suggested divided loyalties and gave the attorney a personal interest. This lawsuit and the breakdown in communications were sufficient to require substitution on counsel. Because of the trial court's failure, however, defendant was completely denied counsel at the omnibus hearing, which was a critical stage of trial.

2. U.S. District Court Cases

Hays v. Farwell, 482 F. Supp. 2d 1180 (D. Nev. 2007). Under AEDPA review, trial/appellate counsel was ineffective for numerous reasons and had a conflict of interest, due to the petitioner's pending lawsuit against him, in case where the petitioner was convicted of four counts of sexual assault on a minor and four counts of lewdness with a minor for alleging sexually abusing his oldest daughter, who was then eight years old. Counsel did move to withdraw but that motion was denied by the trial court. Due to the cumulative error, the court granted the petition unconditionally and ordered the petitioner's immediate release from custody.

3. State Cases

2014: *In re Danielle J.*, 1 N.E.3d 510 (Ill. 2013). Counsel was ineffective in juvenile delinquency proceeding for misdemeanor battery for failing to timely make a request for a continuance under supervision, the successful conclusion of which would avoid an adjudication. Under a state statute, the juvenile could obtain continuance under supervision only if, prior to adjudication *and* with consent of the state attorney, the juvenile pled guilty. Prior to trial, the state offered to recommend a nine-month continuance under supervision in exchange for a guilty plea. The offer was rejected and the defendant proceeded to trial. Only after she was found guilty did defense counsel request a continuance under supervision. Counsel's conduct was deficient in failing to be aware of the state statute. Prejudice established. Remanded for a new adjudication.

2001: *Connor v. State*, 630 N.W.2d 846 (Iowa Ct. App. 2001). Court in post-conviction case erred in failing to inquire into claimed conflict of interest on part of counsel. Defendant had been convicted of sexual abuse, kidnapping, and gang participation. He filed post-conviction application. His counsel filed motion to withdraw because the petition was frivolous. The petitioner informed the court that he had filed an ethics complaint against counsel and requested appointment of new counsel due to the conflict. The court denied both motions and ultimately denied relief. The court of appeals held that state law entitled the petitioner to appointment of counsel and that necessarily included the

***Capital Case**

right to effective counsel. Thus, the claim of a conflict of interest on part of counsel appointed for postconviction proceedings should be addressed in the same manner as if defendant were making a constitutional claim of ineffective assistance of counsel. The trial court erred under *Holloway* in failing to conduct an adequate inquiry and prejudice is presumed.

State v. McDonald, 22 P.3d 791 (Wash. 2001) (affirming 979 P.2d 857 (Wash Ct. App. 1999)). Trial court erred in failing to conduct inquiry into conflict of stand-by counsel for pro se defendant in arson case. Early in case, defendant was granted permission to proceed pro se and the public defender was appointed as standby counsel. Prior to trial, defendant informed the trial court that he had filed bar complaints and civil rights suits against the local public defenders, including standby counsel. The State filed a motion to discharge counsel because of the pending federal civil action and the potential conflict of interest. The court denied the motion based upon counsel's belief there was no conflict of interest at that time. The defendant then reasserted his motion to dismiss counsel. The prosecutor made another motion to dismiss counsel as standby counsel because the prosecutor's office had been assigned to defend him against the defendant's lawsuit in federal court, thereby creating a conflict of interest. The trial court denied the motion. Ultimately, standby counsel moved to withdraw as standby counsel because he believed a real conflict was created when the prosecutor's office was assigned to defend him against the defendant's lawsuit. The defendant also reiterated his earlier motion to remove counsel as standby counsel. The trial court denied the motions, believing the federal suit was frivolous and would proceed more slowly than the criminal case before it. The court initially determined that "[a] defendant possesses a right to have conflict-free standby counsel because standby counsel must be (1) candid and forthcoming in providing technical information/advice, (2) able to fully represent the accused on a moment's notice, in the event termination of the defendant's self-representation is necessary, and (3) able to maintain attorney-client privilege." *Id.* at 795. Court also held that when the trial court knows or should know of a conflict of interest between the defendant and standby counsel, it must conduct an inquiry into the nature and extent of the conflict. Failure to make an inquiry and take appropriate action constitutes reversible error and prejudice will be presumed. *Id.* Here, the true conflict at issue here is the one created when the prosecutor's office was assigned to represent counsel in the civil suit brought by the defendant during the same time period the prosecution was pending. While counsel only acted as standby counsel, the attorney-client privilege still attached to that relationship. The representation of counsel by the prosecutor's office undermines the duties counsel owed to the defendant, including the attorney-client privilege. The lack of an inquiry by the trial court in this situation requires reversal.

M. Defendant Alleged Ineffective Assistance

1. U.S. Court of Appeals Cases

1996: *United States v. Del Muro*, 87 F.3d 1078 (9th Cir. 1996). Trial court erred in case of falsely claiming to be a U.S. citizen in requiring counsel's continued representation following the defendant's claim of ineffective assistance of counsel in motion for new trial. Following conviction,

***Capital Case**

defendant filed a motion for new trial asserting ineffective assistance of counsel and requesting new counsel to represent him in the motion. The trial court denied the motion for new counsel and required counsel to examine the witnesses concerning the allegations of his own ineffectiveness.

There was an actual, irreconcilable conflict between [defendant] and his trial counsel at the hearing on the motion for new trial. The interests of counsel were diametrically opposed to those of [defendant]. The trial court's determination that an evidentiary hearing was warranted heightened the conflict. When [defendant]'s allegedly incompetent trial attorney was compelled to produce new evidence and examine witnesses to prove his services to the defendant were ineffective, he was burdened with a strong disincentive to engage in vigorous argument and examination, or to communicate candidly with his client. The conflict was not only actual, but likely to affect counsel's performance.

Id. at 1080. Prejudice presumed. Remanded for new hearing on motion for new trial with unconflicted counsel.

2. U.S. District Court Cases

2000: *Guzman v. Sabourin*, 124 F. Supp. 2d 828 (S.D.N.Y. 2000). Counsel in robbery case had actual conflict of interest that adversely affected the defendant in motion to withdraw guilty plea. Prior to plea, the petitioner twice requested appointment of new counsel based, in part, on counsel's admission in a motion to suppress evidence that the defendant possessed a box cutter when the evidence actually showed that the box cutter was on the ground. These motions were denied. Petitioner then accepted the government's plea offer for nine years, under the condition that he be immediately transferred to the hospital because of significant pain for which he was being medicated due to carpal tunnel syndrome. During the plea hearing, there was ambiguity and significant delays in whether petitioner was ready to plead and whether he was admitting guilt. He initially said no, then gave satisfactory answers up to what weapon he used, where he said "Whatever they have. I don't know. [Pause] A sharp object." The court went on to accept the plea without inquiring into the medications taken by petitioner. Prior to sentencing counsel notified the court of a pro se motion to withdraw the plea, due, in part, to coercion by counsel. Counsel suggested that new counsel should be appointed to represent petitioner in the motion. The court allowed petitioner to argue in his own behalf but also asked defense counsel for information. Counsel denied petitioner's allegations. "Throughout the hearing, [counsel] obviously attempted to heed the tenuous line between advocacy for his client, the professional obligations not to make false proffers to the court, and protecting his own professional reputation. However, under repeated questioning from the trial judge about [counsel's] own conduct, [counsel] crossed the line into defending himself at the expense of his client's motion." *Id.* at 835. The trial court necessarily considered counsel's statements in denying the motion to withdraw the plea. The trial court erred, however, in not appointing new counsel to argue the motion to withdraw because "[r]epresentation by conflicted

***Capital Case**

counsel is tantamount to no representation at all.” *Id.* at 836 (citing *Strickland*, 466 U.S. at 686, 692). Remanded for hearing with unconflicted counsel on motion to withdraw guilty plea.

3. State Cases

- 2014:** *In re Danielle*, 1 N.E.3d 510 (Ill. 2013). Counsel was ineffective in juvenile delinquency proceeding for misdemeanor battery for failing to timely make a request for a continuance under supervision, the successful conclusion of which would avoid an adjudication. Under a state statute, the juvenile could obtain continuance under supervision only if, prior to adjudication *and* with consent of the state attorney, the juvenile pled guilty. Prior to trial, the state offered to recommend a nine-month continuance under supervision in exchange for a guilty plea. The offer was rejected and the defendant proceeded to trial. Only after she was found guilty did defense counsel request a continuance under supervision. Counsel’s conduct was deficient in failing to be aware of the state statute. Prejudice established. Remanded for a new adjudication.
- 1999:** *State v. Taylor*, 975 P.2d 1196 (Kan. 1999). Trial court erred in failing to allow a continuance for defendant to obtain new counsel prior to sentencing due to complaints against appointed counsel in coercing plea. Defendant initially charged with felony murder. During the year leading up to trial, the possibility of a plea bargain was never discussed with the defendant by appointed counsel. The night before trial, counsel advised the defendant that she could win his case and that he should reject a deal for 10-year sentences to run concurrent. The next morning her advice changed. The defendant, with only 20-90 minutes to consider it, accepted the offer and She told Taylor a plea agreement had been offered and he should accept it. Martin did not contradict Taylor's version of these events. Taylor had somewhere between 20 minutes and 1 1/2 hours to make the decision. Taylor decided to accept the offer and entered an *Alford* plea to second degree burglary, aggravated battery, and theft. A week after the plea, the defendant expressed his dissatisfaction to counsel, but counsel waited until three weeks later on the day of sentencing to file a motion to withdraw. The defendant requested a continuance to obtain new counsel because he felt coerced into taking the plea agreement. The court denied the motions and informed the defendant he could proceed with counsel or represent himself at sentencing. Counsel did not participate in the hearing and the court rejected the plea agreement due to the defendant’s “lack of remorse” in maintaining his innocence and sentenced the defendant to life and to consecutive terms. The trial court’s actions denied the defendant an adequate hearing on his motion to withdraw his guilty plea. The court never conducted an inquiry into the defendant’s concerns about the adequacy of counsel. Remanded for a new sentencing and opportunity to raise the motion to withdraw plea with unconflicted counsel and a new judge.
- 1996:** *Kennebrew v. State*, 480 S.E.2d 1 (Ga. 1996). Trial court erred in murder case in refusing to appoint unconflicted counsel to argue claims of ineffectiveness in motion for new trial. Defendant was represented at trial by a public defender. Following trial, defendant filed a motion for new trial assisted by retained counsel, who later withdrew. The court then appointed another public defender from the same office. Defendant requested different counsel because of the ineffectiveness claims

***Capital Case**

in the motion for new trial. The court instead required the defendant to proceed *pro se* on those claims. The trial court erred in failing to appoint different counsel because a public defender cannot argue claims of ineffectiveness asserted against a member of the same office.

1995: *Carey v. State*, 902 P.2d 1116 (Okla. Crim. App. 1995). Trial court erred in denying counsel's motion to withdraw in sex abuse of minor case following defendant's motion to withdraw his guilty plea on the basis that trial counsel coerced plea. Trial counsel moved to withdraw, but the court denied the motion and assigned co-counsel to assist. Counsel did not participate in the hearing. Co-counsel's examination of defendant was geared more toward clearing counsel's name than proving the defendant's allegations. The trial court committed error in denying the motion to withdraw because counsel had an actual conflict at that point due to the allegations against him. The trial court's actions left the defendant unrepresented on his motion to withdraw his guilty plea.

N. Connection to Prosecutor or Law Enforcement

1. U.S. Court of Appeals Cases

1999: *Atley v. Ault*, 191 F.3d 865 (8th Cir. 1999) (affirming 29 F. Supp. 2d 949 (S.D. Iowa 1998)). Trial court erred in denying counsel's motion to withdraw (supported by the state and defendant) due to conflict of interest where counsel, who represented petitioner charged with numerous drug-related crimes, was pending appointment to county attorney's office where he would prosecute drug cases in cooperation with the same officers that were witnesses in petitioner's case. Court did not even conduct an inquiry into the potential conflict. The state court held that the proceedings conducted by the trial court were adequate because the "hearing" demonstrated that the trial court was "well aware of the possible conflicts of interest" and further inquiry was unlikely to uncover additional facts from which it could base its decision. *Id.* at 868. The state court's decision was an "unreasonable application of clearly established federal law" under *Holloway*, because the trial court was constitutionally obligated when counsel moved to withdraw to either substitute new counsel or take adequate steps to ascertain the seriousness of the risk presented by the conflict. The undisputed record makes clear, however, that the trial court asked no questions of counsel or of the defendant. Although the record reflects that the trial court was aware of the areas in which a conflict of interest could have arisen, such knowledge alone does not satisfy the requirement of *Holloway* that the court conduct an inquiry to "ascertain whether the risk [is] too remote to warrant [new] counsel." *Id.* at 871 (quoting *Holloway*, 435 U.S. at 484). Prejudice is presumed under *Holloway* where the trial court failed to discharge its duty to inquire into a known potential conflict.

2. State Cases

1982: *Kelly v. State*, 640 S.W.2d 605 (Tex. Crim. App. 1982). Trial court erred in denying motion to withdraw in robbery case where counsel was a prosecutor for municipal court, and his law firm partner served on city planning and zoning commission, and counsel asserted a conflict.

***Capital Case**

White v. Reiter, 640 S.W.2d 586 (Tex. Crim. App. 1982). Trial court erred in denying motion to withdraw in burglary case where counsel was staff attorney for state department of corrections and the burglaries were allegedly committed by inmate following his escape from correctional facility and there was a question of the validity of arrest by DOC employees.

O. Irreconcilable or Unspecified Conflict

1. U.S. Court of Appeals Cases

1998: *United States v. Moore*, 159 F.3d 1154 (9th Cir. 1998). Trial court erred in failing to conduct additional inquiry or to substitute counsel where there was an irreconcilable conflict of interest between defendant and counsel in drug distribution case due to defendant's threat to sue counsel and counsel's fear of defendant physically assaulting him. Defendant and counsel informed the court of the conflicts four times prior to trial and the court conducted only minimal inquiry and declined to allow substitution of counsel unless counsel could be ready by the time of the scheduled trial date. While the court did not find an actual conflict, the court held that "[a] defendant need not show prejudice when the breakdown of a relationship between attorney and client from irreconcilable differences results in the complete denial of counsel." *Id.* at 1158.

The factors we consider are the same as those we apply to determine if the district court erred in denying a motion to substitute counsel. These factors are: (1) the extent of the conflict; (2) the adequacy of the inquiry; and (3) the timeliness of the motion.

Id. at 1158-59 (footnote omitted). Here, defendant timely raised the issue of the irreconcilable conflict and the court conducted only minimal inquiry when the court had a duty to conduct additional inquiry.

2. State Cases

1996: *Aceves v. Superior Court*, 59 Cal. Rptr. 2d 280 (Cal. Ct. App. 1996). Trial court erred in denying public defender's motion to withdraw in attempted murder case based on conflict of interest. The public defender stated that due to statements by the defendant there was a complete breakdown of the relationship but counsel declined to say more for fear of violating the attorney-client privilege. Counsel did state, however, that it had nothing to do with alleged threats to witnesses as the government asserted. Counsel also stated that there was no third party involved. While counsel stated that the conflict could potentially arise with successor counsel, counsel believed there was an irreparable conflict with all members of the public defender's office. While the court accepted counsel's representations, it found that it could not grant the motion to withdraw unless counsel supplied more information. The appellate court found that the motion to withdraw should have granted where counsel's statements revealed "a classic conflict where duty of loyalty to the client is compromised by the attorney's own interests" and counsel stated, as an officer of the court, that

***Capital Case**

he could not reveal more without violating the attorney-client privilege. Citing state law and *Holloway*, the court held, “Where as here the duty not to reveal confidences prevented counsel from further disclosure and the court accepted the good faith of counsel's representations, the court should find the conflict sufficiently established and permit withdrawal.” *Id.* at 284.

1983: *Avera v. State*, 436 So.2d 1115 (Fla. Dist. Ct. App. 1983). Trial court erred in denying motion to withdraw in escape case where counsel moved to withdraw due to conflict.

Volk v. State, 436 So.2d 1064 (Fla. Dist. Ct. App. 1983). Trial court in denying motion to withdraw where the same public defender office represented codefendants and asserted a conflict of interests.

Commonwealth v. Davis, 455 A.2d 168 (Pa. Super. Ct. 1983). Trial court erred in denying motion to withdraw in theft case where public defender represented defendant and codefendant and asserted a conflict.

III. Court Had Sua Sponte Duty But Failed to Adequately Inquire

A. Simultaneous Representation of Jointly Tried Codefendants

1. U.S. Court of Appeals Cases

2012: *Salts v. Epps*, 676 F.3d 468 (5th Cir. 2012). Under AEDPA, trial counsel’s motion for a continuance to obtain separate counsel triggered the court’s duty to investigate counsel’s conflict in embezzlement case. Counsel was retained to represent husband and wife, who were proprietors of a family-run funeral-home. The embezzlement related to funeral and burial insurance. Customers sent payments to the funeral home, even after the insurance company stopped providing insurance. Initial counsel sought numerous continuances before the petitioners fired him on the eve of trial after the court refused an additional continuance. New counsel was retained and he moved for a continuance based, in part, on “an obvious conflict of interest.” The court denied the conflict claim finding that the conflict was waived. This was rejected as an unreasonable determination of the facts in light of the evidence as there was no evidence of a purported waiver. The state court also found that the petitioners had not proven an actual conflict of interest. This was contrary to clearly established law in *Holloway v. Arkansas*, 435 U.S. 475 (1978), which requires automatic reversal where counsel is forced to represent codefendants over his timely objection, unless the trial court has determined that there is no conflict. Trial counsel’s motion was sufficiently detailed to trigger the court’s duty under *Holloway* to either allow separate counsel or ensure that no conflict existed.

1982: *Smith v. Anderson*, 689 F.2d 59 (6th Cir. 1982). Counsel had conflict that adversely affected representation and trial court failed to adequately inquire in robbery case where counsel represented defendant and codefendant and informed the court of conflicts. An attorney’s timely statement that conflict adheres in joint representation is a grave representation requiring meticulous consideration. Thus, the trial judge’s terse reply that he saw no conflict of interest in joint representation of

***Capital Case**

defendants charged with armed robbery was not justified or sufficient response, even if defendant's counsel could have been more detailed in his expression of possible conflict. Here, joint representation of defendants by counsel had adverse effect on defendant's right to representation. Defendant sat, against his will, at same table with co-defendant, who admitted being in store when it was robbed and who was implicated by all but one res gestae witness. Defendant, in contrast, was implicated by only one, and defendant claimed he was not at scene of robbery. Counsel's ability to bolster defendant's defense suffered because of counsel's inability to highlight lesser number of witnesses adverse to defendant and the fewer incriminating acts to which those witnesses testified.

2. U.S. District Court Cases

2004: *Robinson v. Stegall*, 343 F. Supp. 2d 626 (E.D. Mich. 2004). Counsel had an actual conflict of interest that adversely affected counsel's representation in kidnaping case and the trial court erred in failing to inquire concerning counsel's conflict of interest. Until the final pre-trial conference, the defendant and his co-defendant were represented by the same counsel, who was retained by the co-defendant's family. During the final pre-trial conference and trial, the defendant was represented by an associate and salaried employee of co-defendant's counsel. Although the indictment revealed that the defendant and his co-defendant could have been charged with the same crimes, the defendant was indicted for kidnaping of one sister, which carried a life sentence, while the co-defendant was charged only with attempted kidnaping of a different sister, which carried only a potential five year sentence. The kidnaping and attempted kidnaping arose from the same events. Upon the advice of counsel, both defendants waived their right to a preliminary examination. No motions were filed on the defendant's behalf. On the advice of counsel, the defendant waived his right to a jury trial. Shortly before trial, the prosecution moved to amend the charges to charge the defendant and his co-defendant with kidnaping and attempted kidnaping. This motion was denied, but the prosecution issued a new warrant charging the defendant with the additional attempt charge, but did not similarly issue a new warrant against the co-defendant. At the close of the state's case during trial, the defendant informed the court that he wanted to discharge counsel because he did not believe he was being adequately represented. The court informed the defendant that he must continue with counsel or represent himself. When the trial resumed, the defendant again informed the court that he wanted to discharge counsel and that he wanted to testify but not with this counsel. The court again denied the motion and the defendant did not testify. Following a continuance of almost two weeks to locate two potential defense witnesses, the defendant again informed the court that he desired to discharge counsel and that his family was seeking new counsel for him. The court again denied the motion. The defendant was convicted of kidnaping and he and the co-defendant were both acquitted of attempted kidnaping. The defendant was sentenced to 10-20 years. The court found that an actual conflict of interest was present in this case. Because of the differing charges, the co-defendant had a "strong incentive" to proceed to trial as rapidly as possible to prevent the filing of additional charges against him. Thus, counsel advised both to waive the preliminary examination, although the preliminary examination could have benefitted the defendant by allowing the development of impeachment material regarding weaknesses and inconsistencies in the child victim's testimony. This was apparent because the defendant was acquitted of the attempted kidnaping charge based on

***Capital Case**

impeachment testimony developed during the preliminary examination on that charge. The conflict was also apparent because counsel did not file a pretrial motion to suppress identification testimony or request a hearing on the constitutionality of the pretrial identification procedures pursuant to *United States v. Wade*, 388 U.S. 218 (1967). While these motions would have been potentially harmful for the co-defendant by alerting the prosecution that he should be charged with kidnaping, they would have potentially benefitted the defendant. Although these motions were raised after the witnesses testified during trial, “a prudent attorney, unencumbered by any conflict of interest, would have preferred to know before trial whether the identification testimony was admissible” in order to prepare for trial and cross-examination of the witnesses. Moreover, an evidentiary hearing on the motions prior to trial could also have allowed development of additional impeachment material. Counsel’s explanations for waiving the preliminary examination and failing to make the pretrial motions were inadequate to provide an explanation of counsel’s conduct independent of the conflict. While counsel stated that he did not want to preserve the testimony of the complaining witnesses in a preliminary examination, the witnesses were young and not likely to be absent from trial. Moreover, their age and the stress of the events “suggest[ed] that valuable impeachment material might be developed at pretrial proceedings.” Likewise, “the importance of a preliminary examination is magnified when dealing with a child witness” because of the possibility that the testimony was enhanced during pretrial preparation due to the “suggestibility of child witnesses.” Counsel’s explanation for failing to file the pretrial motions was also inadequate because counsel stated only that he had not reviewed the photos in the photographic lineup prior to trial even though the defense was mistaken identity. The court found that the state court decision was an unreasonable application of clearly established Supreme Court law under the AEDPA in several respects. First, the state court misunderstood both the facts and the law and “inexplicably limit[ed] its examination to potential adverse effects *during* trial.” While the state court found that the defendant and co-defendant were represented by associates in the same firm, they were actually represented by the same counsel throughout all proceedings until the final pretrial conference. The state court thus ignored the “many important strategic, trial preparation decisions” made when the defendant and co-defendant were represented by the same attorney in “direct contravention” of *Holloway* and contrary to counsel’s testimony, which acknowledged a conflict prior to trial and advice to the defendant to retain different counsel. Although defendant did have different counsel for the final pretrial conference and trial, the state court’s reliance on this fact was unreasonable because the petitioner’s counsel during the final conference and trial was “not an independent attorney.” He was “an employee” of the co-defendant’s attorney. The court also held that, although the defendant did not specifically object on the basis of a conflict of interest, the defendant’s repeated requests to discharge counsel and the court’s awareness of the discrepancy in the charges between co-defendants was sufficient under *Holloway* and *Mickens* to trigger the trial court’s duty to inquire. The state court’s finding that the defendant did not object was an unreasonable determination of the facts under the AEDPA and an unreasonable application of *Holloway* and *Mickens*.

2002: *United States v. Burraston*, 178 F. Supp.2d 730 (W.D. Tex. 2002). District court suppressed the deposition testimony of a witness cross-examined by the defendant’s conflicted lawyer. Lawyer initially agreed to represent both codefendants in prosecution for smuggling people across the US-

***Capital Case**

Mexico border, but it was understood that both would pay retainer fees and if conflict developed counsel would continue to represent only the codefendant. Counsel informed the Magistrate that a conflict potential was present. Following a detention hearing, the defendant was unable to pay the retainer and announced that he would get another lawyer. Before he could, the government deposed four witnesses that were allegedly smuggled in by the defendants. Counsel conducted the depositions for both defendants. During three of them, the defendant raised no issue. During the last, he stated that the lawyer did not represent him. Court held that the magistrate judge was obligated to inquire into possible conflicts when counsel informed him initially of the potential problem. In order to resolve the problem, the District Court suppressed the one deposition the defendant had objected to at the time because defendant had not been able to cross-examine through unconflicted counsel.

3. State Cases

2014: *Alexis v. State*, 140 So. 3d 616 (Fla. Dist. Ct. App. 2014). The trial court's failure to inquire into defense counsel's potential conflict of interest in aggravated assault case required reversal. The defendant was jointly represented and jointly tried with his co-defendant and counsel raised the issue. The trial court made a limited inquiry but did not ensure that the defendant knew that the potential conflict could affect his defense or that he had a right to conflict-free counsel. Thus, the purported waiver was invalid.

2007: *State v. Tensley*, 955 So. 2d 227 (La. Ct. App. 2007). Both defendants (a mother and her boyfriend) in second degree murder while engaged in cruelty to a juvenile case were granted a new trial due to counsel's conflict of interest the adversely affected the representation. Counsel A & B were originally appointed to represent the mother. Later, both were also appointed to represent the boyfriend. Prior to meeting with the boyfriend, counsel A's motion to withdraw from the boyfriend's case was granted based on the likely conflict of interest. Counsel B did not similarly move to withdraw from either case and represented both for more than a year before being relieved as the mother's counsel (without explanation) prior to trial. Immediately prior to trial, the mother moved to disqualify Counsel B from continued representation of the boyfriend due to his conflict of interest. A hearing was held in which Counsel B testified, with no objections, concerning the substance of discussions with both defendants, who both maintained innocence but also did not cast blame on the other defendant. The trial court denied the motion, but was not aware at the time that the mother would testify at trial and be cross-examined by Counsel B. The court held that under state law "a defense attorney required to cross-examine a current or former client on behalf of a current defendant suffers from an actual conflict." When the defendant asserts the issue prior to trial, no showing of prejudice is required. Instead, the court must appoint separate counsel or determine if the conflict is "too remote." Here, the conflict clearly was not too remote and "culminated in the ghastly unrestrained process" of counsel cross-examining the mother at trial. The mother's conviction was thus reversed. Although the boyfriend did not object to the conflict prior to trial, the issue was disclosed to the trial court, which then had a duty to advise him of the conflict. Because

***Capital Case**

the boyfriend was never advised of his right to conflict-free counsel, his conviction was also reversed.

2000: *Lewis v. State*, 757 A.2d 709 (Del. Super. Ct. 2000). Trial court in burglary, unlawful imprisonment, and conspiracy case erred in failing to inquire into the propriety of joint representation prior to trial. Counsel represented both the defendant and his codefendant in the same proceedings. Both alleged mistaken identity and alibi as defense. In sentencing, the codefendant admitted his guilt and stated that the defendant was not with him. While a state rule required the judge to inquire into potential conflicts of joint representation, the trial judge simply noted that the codefendants had separate alibi defenses and were represented by the same attorney in the context of deciding how many total preemptory challenges to allow for the defense during the jury selection process. The trial court never conducted an inquiry. The Delaware Supreme Court held that automatic reversal was not required absent a showing of an actual conflict and an adverse affect on counsel's representation. In this case, the evidence against the codefendant was strong and the evidence against the defendant was weak. The conflict this worked against the defendant in possible pleas negotiations and trial itself. Any attempt to exploit the weakness of the evidence against the defendant would necessarily enhance the apparent strength of such evidence against the co-defendant. To the extent that the strength of the state's case against the codefendant undermined the credibility of his alibi defense, it had the potential for "spilling over" and undermining the jury's assessment of defendant's alibi defense. Finally, the ability to argue for a lesser sentence for defendant was compromised, where the codefendant had a gun during the crime and the second assailant was unarmed.

***State v. Bowen*, 999 P.2d 286 (Kan. Ct. App. 2000).** Trial court failed to make an adequate inquiry into a conflict of interest in counsel's dual representation of codefendants in drug manufacture case. Separate counsel were initially appointed, but then defendant retained counsel. At defendant's request, after initial resistance, counsel agreed to also represent the codefendant without an additional retainer. The state objected to the joint representation and asked for an on-the-record waiver. Counsel indicated that each defendant had signed a waiver but declined to produce it because "it was confidential." In a post-trial hearing, the document was introduced into evidence. It indicated only that the defendants "may be precluded from asserting defenses which would be detrimental to one or the other of us" and an agreement to share confidential information. It also indicated that either defendant could prevent the other from accepting a plea offer. *Id.* at 290. The trial court questioned counsel about the joint representation but never addressed either defendant. During trial, the defendant testified, contrary to counsel's expectation. He admitted attempting to manufacture methamphetamine and possessing drug paraphernalia but denied that he had ever been successful in making the drug. He also said that the codefendant was angry at him and not involved. During closing, counsel argued that the defendant was honest and admitted some guilt and that the codefendant committed no crime – she was only loyal to the man she lived with. The defendant was convicted of all charges. The court of appeals held that the trial court did not conduct an adequate inquiry because the court questioned only counsel. An in-depth hearing or inquiry should be conducted and should result in one of three outcomes: (1) a determination that the risk of conflict is too remote to warrant separate counsel; (2) the appointment of separate counsel; or (3) a

***Capital Case**

determination that defendants waive the right to conflict-free representation. Here, none of those things happened. There was also no adequate waiver of the conflict.

Mere assurances from a defense counsel, whose representation is in question, cannot provide the basis for finding a waiver of such a fundamental right. The trial court also did not examine the memorandum of understanding. The fact [counsel] was unwilling to divulge the memorandum establishing his joint representation should have heightened concern over the sufficiency of the waiver. Even if the trial court had examined the memorandum, it would not have been sufficient to establish waiver. The memorandum did not establish the extent of [counsel's] consultation with [the defendant]. The memorandum also did not spell out the possible consequences if certain defenses were precluded.

Id. at 293. The defendant's silence during the hearing did not lessen the trial court's duty to conduct an adequate inquiry. This case also reveals an actual conflict because "[t]he memorandum of understanding not only recognized the potential for conflict, it created actual conflict by purporting to give each defendant a veto over a course of action, a plea agreement, contemplated by the other." *Id.* No showing of prejudice required "because the evil here is what an advocate *refrains* from doing, 'not only at trial but also as to possible pretrial plea negotiations....'" *Id.* (quoting *Holloway*, 435 U.S. at 490). While defendant also argues that counsel's argument showed actual conflict, the argument is weakened because counsel argued based on the defendant's testimony, which was clearly designed to exonerate his codefendant. The court recognized though that "[a]n assessment of the impact of the conflict on [counsel's] tactics and decisions, however, would require unguided speculation" and the defendant only had to show actual conflict. "Where an attorney owed a duty to two defendants, yet argued one defendant's testimony incriminated him and cleared the other defendant, one may reasonably conclude the attorney labored under an actual conflict." *Id.* at 294.

1987: *Matter of Jason S.*, 126 A.D.2d 951 (N.Y. App. Div. 1987). Trial court failed to adequately inquire where counsel represented juvenile in delinquency proceedings and also represented the other youths involved.

1984: *People v. Green*, 101 A.D.2d 1009 (N.Y. App. Div. 1984). Trial court failed to adequately inquire in promoting gambling case where counsel represented both codefendants in joint trial.

B. Simultaneous Representation of Codefendants in Plea Negotiations

1. U.S. Court of Appeals Cases

1990: *Hoffman v. Leake*, 903 F.2d 280 (4th Cir. 1990). Counsel in accessory to murder case had conflict that adversely affected representation where counsel jointly represented defendant and two codefendants, who plead guilty and testified against defendant. The trial court also failed to conduct an adequate inquiry and should have rejected defendant's purported waiver even if it was valid.

***Capital Case**

Prior to trial, the court inquired of the defendants jointly and individually about the joint representation and counsel informed the court that he saw no conflict. A mistrial was granted shortly after jury selection. Prior to the new trial, a local co-counsel was retained. Each defendant again expressed a desire to continue with the joint representation. After that, both codefendants accepted plea agreements and agreed to testify against defendant. The state repeatedly brought out during the trial that counsel represented the codefendants. A codefendant was the state's primary witness. The co-counsel conducted the cross-examination. The court reached "an inescapable and unavoidable conclusion" of an actual conflict that adversely affected the representation. *Id.* at 286. The conflict was "patent" where defendant "was in the unacceptable position of having his own attorney help the state procure a witness against him." *Id.* The adverse affects were clear in that counsel negotiated a plea agreement for the codefendant that required him to implicate the defendant and did not even inform the defendant that the codefendant would testify against him. Counsel also could not cross-examine the codefendant and attack what amounted to the state's entire case against him. "To cross-examine [the witness] effectively, [counsel] would have had to question his own client's truthfulness. This he could not do." *Id.* Finally, the adverse affect was clear in the prosecutor's repeated references during trial that counsel also represented the codefendants. The adverse affect was not lessened by the fact that it was the unconflicted cocounsel that cross-examined the codefendant. Conflicted counsel was the lead counsel who prepared the case without the cocounsel's preparation. Conflicted counsel also examined 14 of the 17 witnesses during the trial. "Therefore, regardless of the effectiveness of [co-counsel's] efforts at trial, upon which we need not pass judgment, those efforts could not have overcome the presumed prejudice arising from [lead counsel's] actual conflict of interest." *Id.* at 287. In discussing whether defendant had waived the conflict, the court declared that "[n]ot even the proffer of admittedly valid waivers of conflict-free counsel can restrict a trial court's power to insist on separate representation." *Id.* at 288. Even if defendant made a valid waiver, "permitting multiple representation in a case of this type" would be improper. *Id.*

[W]e believe that a member of the public would be shocked to observe a criminal trial in which the same attorney represented both the defendant and the state's star witness, in which the attorney had cut the deal that made that witness available to the state, and in which the prosecutor pointed out the defense attorney's untenable position at every opportunity.

Id. In any event, the court found no valid waiver because "[a] defendant cannot knowingly and intelligently waive what he does not know." *Id.* at 289. Here, no one explained the meaning of a conflict of interest and defendant was not informed that his counsel had advised the codefendant to testify against him. Counsel also insisted that he saw no conflict. "If [counsel] was suffering from such myopia, we cannot insist on greater appreciation of the risk of conflict on the part of a layman whom [counsel] advised." *Id.* When it became obvious that counsel had negotiated a plea bargain for the codefendant that required him to testify, "the judge had a duty to conduct further inquiry and secure a further waiver if [defendant] wished to make one." *Id.*

2. State Cases

***Capital Case**

1986: *People v. Mattison*, 494 N.E.2d 1374 (N.Y. 1986). Trial court erred in failing to adequately inquire once it became apparent during trial that counsel had actual conflict in robbery case where a member of counsel's firm represented the codefendant and negotiated a plea for him to testify against defendant.

C. Simultaneous Representation of Codefendants in Severed Trials

1. U.S. Court of Appeals Cases

2004: *McFarland v. Yukins*, 356 F.3d 688 (6th Cir. 2004). Drug conviction reversed due to the trial court's failure to adequately inquire into counsel's conflict, counsel's actual conflict of interest that adversely effected his performance, and trial counsel's ineffectiveness in failing to present an adequate defense. The petitioner and her daughter were charged as co-defendants where drugs were found during a search of the home they shared. Both the defendant and her daughter were represented by the same retained attorney. On the day of the scheduled bench trial, counsel informed the court that the defendant and co-defendant had concerns about sharing the same attorney and that the evidence might well raise antagonistic defenses. The petitioner also informed the court that she believed she needed a separate attorney and that she had attempted to hire a different attorney but could not afford one. Rather than appoint a second attorney, the court severed the cases and ordered that they be tried in front of different judges. The trials proceeded at pretty much the same time. In the co-defendant's trial, the state presented evidence that the bedroom where most of the drugs were found belonged to the co-defendant. A caller to the crack hotline also made complaints about a woman with the co-defendant's name. A confidential informant also identified the co-defendant as the person discussing drugs. During the petitioner's trial, the state did not present any evidence that the co-defendant lived in the house or in the bedroom where most of the drugs were found and did not present any evidence that the crack hotline telephone complaints and the confidential informant had both identified the co-defendant. Defense counsel did not bring any of this information out in cross-examination or present any evidence on its own. In closing argument, the defense argued only that the drugs belonged to one of two men that were also initially suspected. One of the men was present at the time of the search, but did not have a key to the locked bedroom where most of the drugs were found. The other man was not present at the time of the search and was connected to the house only by some paperwork identifying him as the co-defendant's husband. Both the defendant and co-defendant were convicted. They were represented on appeal by a different attorney but still had the same attorney between them. Appellate counsel did not raise any issue concerning ineffective assistance of counsel or a conflict of interest. In state post-conviction, the petitioner asserted ineffectiveness of trial counsel and of appellate counsel for failing to argue that trial counsel was ineffective but the state court denied on procedural grounds that the petitioner did not show good cause for a failure to assert the issue on direct appeal as required in state court. The court first found that the petitioner was entitled to relief under *Holloway v. Arkansas* because the petitioner objected to the joint representation and the trial court was aware that there was an issue about who possessed the drugs in the house shared by the defendant and her co-defendant daughter. The trial

***Capital Case**

court was also aware that the petitioner had attempted to hire separate counsel, but was unable to afford a different lawyer. Under the circumstances, the notice to the court of a concrete conflict of interest was sufficient to bring the case within the *Holloway* rule, which required automatic reversal due to the trial court's failure to inquire and to resolve the issue. The trial court's action in severing the trials did not resolve the issue because counsel was still actively involved in the co-defendant's trial when he represented the petitioner. Although his actions in the petitioner's trial were not automatically before the trier of fact "in the co-defendant's case, still any evidence or argumentation developed against [the co-defendant] would instantly be made available to the prosecutor for use in [the co-defendant's] case." Thus, if counsel had attempted to exonerate the petitioner by showing that the co-defendant controlled the bedroom where most of the drugs were found, counsel would have compromised his duty to the co-defendant. Independent of the trial court's failure to inquire, reversal was also required because counsel had an actual conflict of interest that adversely affected representation and because counsel provided ineffective assistance of counsel. The court found that, with respect to all three of these arguments, the petitioner would have won on direct appeal had appellate counsel adequately raised the issues. Appellate counsel was ineffective in failing to assert these issues, which were clearly stronger than the arguments made by counsel on direct appeal. The conflict issue was an obvious one, and the petitioner was entitled to automatic reversal under the rule in *Holloway*. Because appellate counsel also represented the co-defendant, however, appellate counsel also had a conflict of interest. The court found that appellate counsel's ineffectiveness was the cause for petitioner's failure to assert ineffectiveness of trial counsel on appeal. Thus, the petitioner had established cause and prejudice for failing to assert these issues on appeal. Because the state court never ruled on the actual conflict of interest and the ineffective assistance claim under *Strickland*, the court reviewed these claims *de novo*. The only state court decision on the *Holloway* claim was the trial court's decision. Under the AEDPA, the court found that the trial court's actions contradicted the clearly established precedent of *Holloway v. Arkansas* because the state court confronted a set of facts that were materially indistinguishable from *Holloway* and yet arrived at a different result.

2003: *Harris v. Carter*, 337 F.3d 758 (6th Cir. 2003). The trial court failed to adequately inquire into the potential conflict after being advised by counsel that he represented the co-defendant, who was called to testify. The defendant and codefendant were charged with offenses arising from a drive-by shooting and retained the same attorney. Prior to trial, counsel did not foresee a conflict because neither client was interested in a plea bargain in exchange for testimony and they planned a common defense for a joint trial. The trial court *sua sponte* severed the trial's though. After the co-defendant was convicted, but before his sentencing, he was called as a witness in the defendant's trial. He invoked his right to remain silent but was granted immunity for any additional charges, other than perjury and falsification. Defense counsel then requested that the court appoint counsel for the co-defendant because counsel represented him and the defendant and could not adequately advise the co-defendant. The court denied the motion and proceeded. The co-defendant provided damaging testimony, but counsel did not cross-examine him at all because he feared subjecting him to further prosecution and revealing client confidences. The court held that counsel's request for separate counsel was a sufficient objection under *Holloway* to alert the trial court and trigger the court's duty

***Capital Case**

to inquire. The fact that counsel did not raise the conflict until the midst of trial was of no concern because the conflict did not arise until the co-defendant was granted immunity and compelled to testify. The court's failure to inquire once on notice required the presumption of prejudice and reversal. Applying the AEDPA standards, the court held that the state court's finding to the contrary was an unreasonable application of *Holloway*.

2. State Cases

1992: *Kenney v. State*, 837 P.2d 664 (Wyo. 1992). Prejudice presumed under state law where counsel represented defendant and co-defendant in drug case in separate trials. Defendant and her codefendant/boyfriend were charged. They initially retained separate counsel. Defendant was represented by retained counsel in pretrial motions. Three days prior to trial, defendant sought to retain different counsel of her choice. It was apparent, due to her limited education and other factors, that defendant had received assistance from someone with legal training in drafting her "*pro se*" documents. The court allowed her retained counsel to withdraw and granted a short continuance. The codefendant's retained counsel then begin representing the defendant. Counsel informed the court that defendant had been unable to retain other counsel because she was indigent. The defendant proceeded to trial and was convicted. She was convicted and sentenced to 18-36 months. The codefendant then entered a plea and received a suspended sentence and probation. The court held that "[w]hile the United States Supreme Court reviews claims of ineffective assistance of counsel due to conflicts of interest under the standard of review adopted in *Cuyler*, Wyoming recently adopted a more stringent approach. Absent a valid waiver, prejudice is presumed in all instances of multiple representation of criminal defendants." *Id.* at 672-73. Here, the trial court did not inquire concerning the joint representation and there was no evidence of a valid waiver of the conflict.

1997: *Rice v. State*, 487 S.E.2d 517 (Ga. Ct. App. 1997). Trial court erred in finding purported waiver of conflict in case involving theft by police officer of public funds where finding was made in a hearing held without the defendant's presence. Defendant and codefendant retained the same counsel. Codefendant proceeded to trial first. The state raised the conflict issue and defendant's absence. The court stated it would address the issue later with the defendant and proceeded with the hearing. Counsel produced a "waiver" signed by both defendants. Without even questioning the codefendant, who was present, the court found the waiver to be valid, even though it did not mention the fact that both defendants were scheduled to be witnesses against the other. The court did not inform the codefendant of the possible conflicts inherent in dual representation and did not inquire of the codefendant if he understood the agreement and voluntarily signed it. The court ruled that the agreement constituted a waiver of any conflict and satisfied the court's responsibility to determine whether the defendants agreed to the joint representation. Counsel suggested that the court bring the defendant into the courtroom and review the situation with him but the court ruled the agreement was as binding upon the defendant as it was upon the codefendant and no such action was necessary. Defendant then testified in codefendant's trial and his testimony was later used to impeach his

***Capital Case**

testimony in his own trial. Appellate court found that reversal was required because the “waiver” hearing was a critical stage conducted outside his presence. Further, because the defendant may well have chosen not to testify in the codefendant’s trial if he had been adequately advised by unconflicted counsel, the court prohibits use of his testimony in the codefendant’s trial at his own retrial.

D. Simultaneous Representation of Government Witness in Unrelated Case

- 2012:** *People v. Solomon*, 980 N.E.2d 505 (N.Y. 2012). Counsel in rape case simultaneously represented a police witness, who obtained a partial confession from the defendant. Counsel informed the court of the representation in “an unrelated civil matter” and that the defendant waived the conflict. The defendant agreed. There was no other discussion of the conflict or the nature of counsel’s representation of the witness. The trial court’s inquiry was “simply inadequate” in that the defendant was not made aware of the potential risks and could not “effectively waive any conflict of interest.”
- 2000:** *State v. Watson*, 620 N.W.2d 233 (Iowa 2000). Trial court erred in failing to sua sponte conduct inquiry into potential conflict of interest in murder case where one of two appointed counsel simultaneously represented a key prosecution witness, a jailhouse snitch who testified that the defendant admitted shooting his father. The defense was that the shooting was accidental or self-inflicted and even the expert witnesses conflicted on whether the evidence showed an intentional shooting. The witness was cross-examined and admitted that he was pending sentencing on contempt charges at the time of his initial statement. He also testified that he was represented in those contempt charges by defendant’s counsel, but not the counsel that conducted the cross-examination. The trial court failed to conduct an inquiry into the potential conflict even following this testimony. The appellate court held, based on its interpretation of *Wood v. Georgia*, that “where the trial court knew or should have known of a particular conflict, reversal is required without a showing that the conflict adversely affected counsel’s performance, even though no objection was made at trial.” *Id.* at 237. In its analysis, the court observed, “Unlike the joint representation of codefendants, where there may be a benefit to presenting a united defense, in the case of dual representation of the defendant and an adverse witness, there is no benefit to common representation. To the contrary, the potential for less zealous representation of the defendant is obvious.” *Id.* at 239. The court also rejected the state’s claims that the problem was solved because the witness’ case was resolved by the time of trial and because the conflicted counsel did not conduct the cross-examination. On the former, the court noted that counsel’s ethical obligation to his former client did not cease with the conclusion of the case. On the latter, the court noted that the counsel that conducted the cross-examination of the witness was in the same public defender office and, thus, shared the same ethical obligation to the former client. “Moreover, [counsel’s] obligation to zealously represent his client, the defendant, was not suspended simply because his co-counsel was the one who asked [the witness] questions on the witness stand. [Counsel] still had an obligation to [the defendant] to contribute what he could to the defense team’s preparation for [the witness’] cross-examination, including pre-trial investigation. We conclude, therefore, that [counsel’s] decision not

***Capital Case**

to personally examine [the witness] insufficient to remove the actual conflict of interest that burdened [the] defense team.” *Id.* at 241.

1995: *State v. Jenkins*, 898 P.2d 1121 (Kan. 1995). Trial court erred in failing to conduct inquiry when the court was informed that counsel represented a government witness/informant on charges incurred while working as a confidential informant. Defendant was charged with sale of cocaine to a police informant. At preliminary hearing, appointed counsel raised concerns about a possible conflict because she had represented the informant on unrelated burglary charges while he was working as an informant. Counsel questioned the informant and the defendant and both agreed to have her continue to represent the defendant, but the questions and answers did not amount to a waiver of the conflict. Following this hearing and prior to defendant’s trial, counsel represented the informant in a motion to modify his sentence. During defendant’s trial, he presented an alibi defense. The appellate court found an actual conflict where counsel represented the defendant and the key state’s witness at the same time. Because the trial court was informed of the actual conflict, the court had a duty to inquire, even though there was no objection to the conflict. Failure to inquire required automatic reversal under *Holloway*. Even assuming that *Cuyler* controls and adverse affect must be shown, the court finds that counsel’s representation was adversely affected because counsel did not cross-examine the witness on the affects of cocaine, even though he admitted being under the influence when he allegedly bought cocaine from the defendant. Counsel also did not question the witness regarding his admitted addiction to cocaine or to what lengths he might go to obtain drugs or the money necessary to buy drugs for himself. This was especially important in light of evidence that the witness received money from the police each time he made a sale.

1987: **State v. Carmouche*, 508 So.2d 792 (La. 1987). Trial court erred in capital murder case in failing to adequately inquire when defense counsel informed the court that he simultaneously represented a state witness on unrelated charges.

E. Simultaneous Representation of Persons Implicated (But Not Jointly Charged) in Unrelated Case

2013: *Jordan v. State*, 406 S.C. 443, 752 S.E.2d 538 (2013). Trial counsel in manufacturing methamphetamine case had an actual conflict of interest due to his concurrent representation of a potentially guilty third-party. The defendant was arrested following an investigation that started with a confidential informant notifying law enforcement that the defendant’s then-girlfriend was manufacturing drugs in a camper in Richland County. Following an investigation, the defendant was the only person arrested in the case. He retained counsel recommended by his girlfriend, who was then being represented by the same counsel in Lexington County on unrelated charges. Counsel’s representation of the girlfriend continued throughout the trial proceedings. During trial, the evidence was so strong that the girlfriend and not the defendant was the guilty party that the trial court invited the defense to present evidence of third-party guilt. Counsel did not present the available evidence, even though several witnesses were available to testify to the girlfriend’s guilt. While the trial court found that the defendant waived the conflict, there was no probative evidence in the record to

***Capital Case**

support this finding. There was no evidence that counsel or the trial court informed the defendant of the dual representation or that the defendant waived the conflict.

1986: *State v. Martin*, 513 A.2d 116 (Conn. 1986). Trial court failed to adequately inquire in robbery case where counsel informed the court that he had a conflict and moved for a mistrial following testimony implicating another client.

F. Prior Representation of Persons Implicated (But Not Jointly Charged) in Related Case

1995: *Ciak v. United States*, 59 F.3d 296 (2nd Cir. 1995). In 2255 action, the court held that the trial court erred in failing to conduct an inquiry in weapons possession case where the court was aware that counsel had previously represented an important government witness in a substantially related matter and presented in that case a theory that was possibly at odds with the position he took in defendant's trial. Defendant was arrested following a domestic disturbance while driving a car owned by his sister and her fiancé. Weapons were found in the car. Defendant retained counsel. While meeting with defendant's sister and her fiancé concerning his defense, counsel agreed to represent the sister and her fiancé in the related forfeiture action. The car was recovered, but then the sister and her fiancé broke up and the fiancé took the car. At defendant's subsequent trial, the defense was that the defendant did not own the guns or put them in the car but counsel did not call the sister to testify even though she had informed him that she put the guns in the car. The government called the ex-fiancé in rebuttal. In cross-examining him, counsel spent most of his time questioning the witness on the collateral issue of the location of the car because counsel's fee for representing petitioner had been based on funds from the anticipated sell of the car. The cross degenerated into an argument between counsel and the witness with the witness accusing counsel of misstating the facts. In the midst of this, counsel informed the court that he had represented the witness and the defendant's sister in the forfeiture action. The trial court did not inquire further. Counsel then cross-examined the witness about prior statements allegedly made to counsel in the course of his representation of the witness. Still the court did not inquire. The appellate court first noted that no procedural bar would be applied due to defendant's failure to assert the conflict issue on appeal because the conflicted counsel and his associate represented defendant at the time. Next, the appellate court found that counsel had a clear conflict in attempting to impeach his former client and making himself an unsworn witness. This was "an 'unavoidable conflict of interest,' in part because defense counsel cannot impeach the government witness in such circumstances without undermining his own credibility. Standing alone, becoming an unsworn witness is a basis for disqualification of an attorney." *Id.* at 304. Even worse, the court notes that the cross-examination of his former client raised questions about where counsel's loyalty was, i.e., himself, the defendant, or his former client. Second, counsel clearly had a conflict in presenting competing theories in the forfeiture action and in defendant's trial and counsel may have developed his own financial interest in protecting the sister from testifying due to his interest in the car. As the court noted, counsel could not call the sister to testify because it could have resulted in (1) the disclosure that counsel had presented a contrary argument in the forfeiture action, i.e., that the gun was defendant's; and (2) the possibility of state

***Capital Case**

reopening forfeiture proceedings and the loss of the car, which was the source of his retainer. Under these circumstances, the district court erred in denying an evidentiary hearing on defendant's claim of a conflict of interest that adversely affected the representation. Because the trial court erred, however, in failing to conduct an inquiry when it had a duty to do so though, the case would be remanded for new trial rather than a hearing.

G. Prior Representation of Victim or Government Witness on Unrelated Charges

1. U.S. Supreme Court Cases

2002: **Mickens v. Taylor*, 535 U.S. 162 (2002). Petitioner was convicted of murder and sentenced to death. His lead counsel during the trial had also represented the victim and was representing him in juvenile proceedings at the time of the murder. Counsel had only met with the victim one time for 15-30 minutes. Following the murder, he was appointed to represent petitioner by the same judge that had appointed him to represent the victim previously. Counsel did not disclose the conflict to the court, his co-counsel, or petitioner. Although the trial court knew or should have known about the potential conflict, the court conducted no inquiry. In these circumstances, the Court rejected an automatic reversal rule and held that in order to obtain relief, petitioner must establish an actual conflict and that the conflict adversely affected the representation. The Court also noted that both *Cuyler v. Sullivan* and *Holloway v. Arkansas* were cases involving simultaneous representation and the question whether these holdings apply to successive representation and other potential conflicts remains open.

2. State Cases

2010: *Hannah v. State*, 42 So. 3d 951 (Fla. Dist. Ct. App. 2010). The trial court erred in failing to inquire into potential conflict in burglary and theft case. The defendant was charged with breaking into a trailer and stealing equipment that belonged to a company. Several employees of the company were State witnesses. Prior to trial, counsel disclosed that he had previously represented one of these State witnesses in a probation matter. Without advising the defendant about the potential conflict or taking any other action, the court simply proceeded to trial.

2001: *Thomas v. State*, 785 So.2d 626 (Fla. Dist. Ct. App. 2001). Trial court erred in escape, battery on officer, and resisting arrest prosecution for failing to inquire into potential conflict and obtain waiver where the court was aware that counsel had previously represented a key prosecution witness. Counsel informed the court of the prior representation, but stated that he did not believe it presented a problem. He asked, however, that the witness be instructed not to mention the prior representation. The trial court found no conflict because the prior representation had nothing to do with this case. During trial, the witness testified that he was a cellmate and saw the defendant hit the officer. He admitted prior convictions and that he had a pending charge. Counsel cross-examined his former client briefly regarding how many people were in the cell and whether he expected favorable treatment for his testimony. The trial court erred because the court did not address the defendant at

***Capital Case**

all and did not inquire to determine whether the witness had given defense counsel privileged information. Prejudice presumed.

Singley v. United States, 548 A.2d 780 (D.C. 1988). The trial court erred in failing to conduct an adequate inquiry before acting to defendant's detriment when possible conflict became apparent in robbery case where counsel had previously represented the victim on unrelated charges. The court's actions in treating the conflict as an actual conflict created an adverse affect on the representation. After counsel cross-examined the victim to establish motive to testify to help himself and that he was acting on the advice of his lawyer, the government informed the court that counsel had been the victim's lawyer until he had to withdraw due to representation of the defendant. Counsel denied recollection that he had represented the victim and moved to withdraw. The court did not inquire of the witness or the defendant and denied the motion to withdraw. The court then instructed the jury that it should disregard the impeachment cross-examination of the victim. By these actions the court treated the conflict as an actual conflict and defendant's representation was adversely affected.

1983: *Matter of Richardson*, 675 P.2d 209 (Wash. 1983). Trial court erred in failing to adequately inquire in assault case where counsel either previously or simultaneously represented a defense witness. A trial court commits reversible error if it knows or reasonably should know of a particular conflict on part of counsel into which it fails to inquire. No prejudice need be shown, and rule is not limited to joint representation of co-defendants, but includes representation of both defendant and witness.

H. Counsel Retained by Codefendant or Third-Party With Adverse Interest (U.S. Supreme Court Cases Only)

1981: *Wood v. Georgia*, 450 U.S. 261 (1981). The trial court erred in failing to inquire into the possibility of a conflict of interest created by the representation of the defendants by their employer who allegedly operated the criminal enterprise for which they were prosecuted. The defendants were charged with distributing obscene materials and convicted. They were sentenced to probation with substantial fines, but failed to pay the fines. After three months, the court held a revocation hearing in which the defendants presented evidence that they were unable to pay the fines. The trial court ordered payment of the fines within three days or confinement. The Court granted certiorari to determine whether the Equal Protection Clause was violated by imprisonment of a probationer solely because of his inability to make installment payments on fines. Rather than deciding this issue, however, the Court noted that the record reflected that the three defendants had been represented throughout by one lawyer, who was paid by their employer. In addition, the employer had paid all fines and posted all bonds with the sole exception of the fines under review. The attorney never argued in the initial sentencing that the fines were excessive and the court imposed stiff fines because the court was aware that the employer had been paying all fines and expenses of the defendants. The defendants never paid even small amounts of the fine to indicate good faith because of their assumption that the employer would pay the fines. Even at the revocation hearing where the defendants presented evidence of their indigence, counsel did not argue for a reduction of the fines. Thus, the Court held that the risk of conflict was evident, because the record suggested that the

***Capital Case**

employer desired to create a test case to present the current claim to the Court, which meant that the defendants had to be jailed for non-payment of the fines. The Court recognized an inherent danger in a criminal defendant being represented by a lawyer hired and paid for by a third party, particularly when the third party is the operator of the alleged criminal enterprise. One risk is that the lawyer will not seek leniency for the defendant by offering testimony against the employer who retained counsel. A second risk, present in this case, is that the employer's long-range interest in establishing legal precedent could subject the defendants to harsher treatment. *Id.* at 269. Under these facts, the Court held that "the *possibility* of a conflict of interest was sufficiently apparent at the time of the revocation hearing to impose upon the court a duty to inquire further." *Id.* at 272. Moreover, even the state raised the conflict issue and requested that the court inquire further. *Id.* at 273. The Court remanded and ordered that if the court found an actual conflict of interest and that there was no valid waiver, then a new revocation hearing should be held with counsel free of conflicts.

I. Counsel Was Necessary or Potential Witness

1. U.S. Court of Appeals Cases

1998: *United States v. Kliti*, 156 F.3d 150 (2nd Cir. 1998). Trial court in counterfeit check case committed reversible error in failing to inquire into the potential conflict when the court learned that counsel was a witness to an exculpatory statement by co-defendant/witness. During a bond hearing, counsel also represented the co-defendant at the request of his attorney, who was absent. After the bond hearing, the co-defendant had said in front of the defendant, the counsel, and another witness that the defendant was not involved in any way and he would make sure the government knew that. Ultimately, however, he entered into a deal and testified against defendant. During trial, counsel informed the court of these events. The court held, however, that counsel could ask if the codefendant had made the statements but could not inform the jury that counsel had heard it so that counsel would not be an unsworn witness. The codefendant denied making the statement. The only other witness to the statement invoked his Fifth Amendment right leaving only counsel and the defendant to testify about the codefendant's statement. No evidence was presented about the statement. The Second Circuit held that a hearing is required whenever a defendant would forgo important testimony by his attorney because of his attorney's continued representation of him. Thus, the trial court erred in failing to conduct a hearing to ensure that the defendant was fully aware of the conflict and that he could have a different lawyer and call this lawyer as a witness. "When faced with an attorney as a sworn or unsworn witness, the proper recourse is to disqualify the attorney, not to exclude the testimony." To establish a violation of the Sixth Amendment right to effective assistance of counsel, the defendant must show that counsel had either (1) a potential conflict of interest that resulted in prejudice to the defendant, or (2) an actual conflict of interest that adversely affected the attorney's performance. Even assuming that the conflict was only a potential conflict and the defendant had to prove prejudice, the prejudice was clear. The codefendant provided the only direct evidence of the defendant's guilt and his credibility was essential. Counsel was the only person who could impeach his testimony.

***Capital Case**

2. State Cases

2003: *State v. Lopez*, 835 A.2d 126 (Conn. App. Ct. 2003), *aff'd on other grounds*, 859 A.2d 898 (Conn. 2004). A defendant's convictions for risk of injury to a child were reversed because the trial court failed to adequately inquire into the potential conflict of interest of the defense counsel, who was a potential witness. The victim alleged that the defendant had molested her numerous times after she and her mother had moved into the defendant's home. The defendant was arrested and charged with sexual assault and risk of injury to a child. Prior to trial, the victim wrote and signed a statement recanting her previous accusation against the defendant. She testified that she did so at the insistence of her mother and the defendant, and that the defendant dictated this statement and forced her to sign it. Following this signing, the victim's mother and the defendant took the victim to defense counsel's office, where she met in private with counsel, and, according to her own testimony, told him that the handwritten statement was true. Her statement was then typed and signed again. Prior to trial, outside the defendant's presence and off the record, the prosecutor informed the court that defense counsel may testify at trial. Defense counsel informed the judge that he did not intend to testify. The court conducted no further inquiry even though there was clearly a potential for conflict and the defendant was not present for this discussion. The court held that there was a potential conflict because counsel's testimony at trial concerning the victim's demeanor while in his office may have been beneficial to the defendant. The court also noted concern that testimony regarding defense counsel's role in securing and witnessing the victim's statement may have affected counsel's credibility with the jury. The court held that, under the circumstances, the defendant was not required to show an actual adverse consequence from the conflicted representation. While addressing *Mickens v. Taylor* and distinguishing it, the court held that the trial court did not fulfill its obligation of conducting a thorough and searching inquiry into the potential conflict. Prejudice was presumed.

J. Defendant Alleged Ineffective Assistance

1. U.S. Court of Appeals Cases

1995: *United States v. Shorter*, 54 F.3d 1248 (7th Cir. 1995). Trial court erred in failing to inquire into potential conflict when the defendant accused counsel of misconduct and counsel moved to withdraw. Defendant was charged with multiple counts of conspiracy and distributing cocaine. During trial, defendant plead guilty to cocaine conspiracy and perjury counts. Before sentencing, counsel moved to withdraw. At sentencing, counsel stated that the defendant had accused her of forcing him to plead guilty. The attorney also asserted that defendant was making false statements to the court. The trial court proceeded to sentencing without ruling on the motion to withdraw. "When a defendant accuses his counsel of improper behavior and the counsel disputes his client's accusations, an actual conflict of interest results because 'any contention by counsel that defendant's allegations were not true would (and did) contradict his client.'" *Id.* at 1252-53. "Because the district court failed to conduct a hearing and determine the impact of the conflict of interest, we will presume

***Capital Case**

that the conflict prejudiced [defendant] if he has shown a possibility of prejudice.” *Id.* at 1253 (citation omitted). This possibility was apparent because counsel did not argue for a downward departure from the Sentencing Guidelines.

2. U.S. District Court Cases

1984: *White v. White*, 602 F. Supp. 173 (W.D. Mo. 1984). Trial court failed to adequately inquire in drug case where defendant repeatedly expressed ineffective assistance and irreconcilable conflicts with attorney. “Prejudice should be presumed from a fractured attorney-client relationship just as it would be if the petitioner had been denied the assistance of counsel or if petitioner’s appointed counsel had a conflict of interest.” *Id.* at 178.

3. State Cases

2014: *State v. Harter*, 340 P.3d 440 (Haw. 2014). Trial court had a duty in assault and resisting arrest case to inquire into a potential conflict of interest between appointed counsel and the defendant. Shortly before trial, counsel moved to withdraw stating that the defendant no longer desired her representation. Counsel also stated that she believed that withdrawal was necessary for her professionally. Afterwards, the court did not inquire into the potential conflict, but merely informed the defendant that she would either accept counsel or represent herself. Reversal was required.

State v. Prado, 329 P.3d 473 (Kan. 2014). The trial court erred in failing to inquire into an apparent conflict of interest that arose during the defendant’s request to withdraw his guilty plea and complaints against counsel. The defendant was initially charged with one count of aggravated liberties with a child under 14 for inappropriately touching his stepdaughter, which carried a presumptive life sentence with a mandatory minimum of 25 years. Trial counsel negotiated a convoluted plea agreement in which the state would dismiss the initial charge and the defendant would enter a no contest plea to two rape cases, which carried the same “hard 25 life sentence,” but the state agreed to recommend that the court depart from the presumptive life sentence and instead impose two consecutive terms of 147 months imprisonment. Thus, the defendant would be sentenced to 24 ½ years rather than the mandatory minimum of 25 years and potential life sentence. Speaking through an interpreter, the defendant entered a no contest plea in accordance with the agreement but there was no discussion of the “convoluted nature of the plea agreement nor the ultimate benefit of the plea.” At the sentencing hearing three months later, again speaking through an interpreter, the defendant sought to withdraw his plea, complaining that trial counsel had not explained the deal to him and that he did not understand why his one charge of “touching” turned into two rape charges. Counsel essentially argued against the motion to withdraw the pleas. “When a defendant asserts alleged deficiencies in counsel’s performance during plea negotiations as the basis for a motion to withdraw plea, a district court must inquire further into the alleged conflict.” A new motion to withdraw hearing with unconflicted counsel was required here because “the record demonstrates an actual conflict.”

***Capital Case**

2006: *State v. Vann*, 127 P.3d 307 (Kan. 2006). The court had a duty to inquire into the possible conflict between the defendant and his counsel in attempted murder trial. Prior to trial the defendant moved to discharge counsel and to proceed pro se in several letters to the court because the attorney-client relationship had deteriorated such that the defendant had no confidence in counsel and that counsel would not respond to his letters and in formal motions. The court never addressed the motions because of the court's practice not to deal with the defendant who was represented by counsel and the defendant did not raise the issues in court until a motion for new trial hearing following his conviction. He stated that he had not raised the issue earlier because he had been advised that it was not in his best interest to do so. He requested new counsel for sentencing but the court still did not inquire and stated only that new counsel would be appointed after sentencing. The defendant again raised the issue in sentencing, but the court again ignored him. The trial court's failure to inquire was an abuse of discretion. While the court would normally remand for a determination of whether there was a conflict of interest that adversely affected counsel's performance, this case was remanded for new trial because of the court's failure to address the defendant's motion to proceed pro se.

1990: *Brooks v. State*, 555 So.2d 929 (Fla. Dist. Ct. App. 1990). Trial court erred in failing to conduct inquiry about defendant's request to discharge court-appointed counsel. Defendant filed several written motions alleging conflict of interest and requesting dismissal, but judge failed to inquire and summarily denied the motions. Because district court of appeal was unable to say that error of trial court in failing to conduct inquiry about defendant's request to discharge court-appointed counsel was harmless beyond a reasonable doubt, reversal and remand for new trial was required.

People v. Vaughn, 558 N.E.2d 479 (Ill. App. Ct. 1990). Trial court erred in failing to inquire into potential conflict when defendant raised the issue. Defendant plead guilty to sexual assault. He then filed a *pro se* motion to vacate the plea alleging ineffective assistance by his public defender counsel. The court offered to appoint another public defender but defendant declined because that counsel had assisted his counsel in the case. Defendant requested outside counsel, but the court informed him that it was the public defender or *pro se*. Defendant went *pro se*. The trial court erred in failing to determine whether a conflict existed.

K. Counsel Had Conflicting Interests Due to Connection With Law Enforcement

2000: *United States v. Rogers*, 209 F.3d 139 (2nd Cir. 2000). Trial court erred in failing to inquire prior to trial into counsel's conflict in drug conspiracy case. Following his conviction, the defendant learned that his appointed defense counsel was a police commissioner and requested new counsel. A police commissioner is involved, amongst other things, in making departmental policy and hiring, firing, and promotions decisions. The judge denied the motion, while acknowledging that he (the judge) had known for years that counsel was a police commissioner, and proceeded to sentencing. The Second Circuit held that the court had a duty to advise the defendant prior to trial of the potential conflict and to conduct an inquiry into the issue because the case involved the same police department for which counsel was a commissioner. Failure to do so required automatic reversal and

***Capital Case**

the court's post-trial analysis of the issue, once the defendant's motion was made, did not change the required result.

L. Conflicting Interests Due to Potential Ethics Violations or Criminal Conduct

1. U.S. Court of Appeals Cases

1995: *Ciak v. United States*, 59 F.3d 296 (2nd Cir. 1995). In 2255 action, the court held that the trial court erred in failing to conduct an inquiry in weapons possession case where the court was aware that counsel had previously represented an important government witness in a substantially related matter and presented in that case a theory that was possibly at odds with the position he took in defendant's trial. Defendant was arrested following a domestic disturbance while driving a car owned by his sister and her fiancé. Weapons were found in the car. Defendant retained counsel. While meeting with defendant's sister and her fiancé concerning his defense, counsel agreed to represent the sister and her fiancé in the related forfeiture action. The car was recovered, but then the sister and her fiancé broke up and the fiancé took the car. At defendant's subsequent trial, the defense was that the defendant did not own the guns or put them in the car but counsel did not call the sister to testify even though she had informed him that she put the guns in the car. The government called the ex-fiancé in rebuttal. In cross-examining him, counsel spent most of his time questioning the witness on the collateral issue of the location of the car because counsel's fee for representing petitioner had been based on funds from the anticipated sell of the car. The cross degenerated into an argument between counsel and the witness with the witness accusing counsel of misstating the facts. In the midst of this, counsel informed the court that he had represented the witness and the defendant's sister in the forfeiture action. The trial court did not inquire further. Counsel then cross-examined the witness about prior statements allegedly made to counsel in the course of his representation of the witness. Still the court did not inquire. The appellate court first noted that no procedural bar would be applied due to defendant's failure to assert the conflict issue on appeal because the conflicted counsel and his associate represented defendant at the time. Next, the appellate court found that counsel had a clear conflict in attempting to impeach his former client and making himself an unsworn witness. This was "an 'unavoidable conflict of interest,' in part because defense counsel cannot impeach the government witness in such circumstances without undermining his own credibility. Standing alone, becoming an unsworn witness is a basis for disqualification of an attorney." *Id.* at 304. Even worse, the court notes that the cross-examination of his former client raised questions about where counsel's loyalty was, i.e., himself, the defendant, or his former client. Second, counsel clearly had a conflict in presenting competing theories in the forfeiture action and in defendant's trial and counsel may have developed his own financial interest in protecting the sister from testifying due to his interest in the car. As the court noted, counsel could not call the sister to testify because it could have resulted in (1) the disclosure that counsel had presented a contrary argument in the forfeiture action, i.e., that the gun was defendant's; and (2) the possibility of state reopening forfeiture proceedings and the loss of the car, which was the source of his retainer. Under these circumstances, the district court erred in denying an evidentiary hearing on defendant's claim of a conflict of interest that adversely affected the representation. Because the trial court erred,

***Capital Case**

however, in failing to conduct an inquiry when it had a duty to do so though, the case would be remanded for new trial rather than a hearing.

1992: *United States v. Greig*, 967 F.2d 1018 (5th Cir. 1992). Trial court erred in drug conspiracy case for failing to inquire after the court learned that counsel had an actual conflict of interest due to counsel's unethical and criminal conduct in approaching codefendant without his counsel's permission. Defendant was along with several codefendants. Prior to trial, a codefendant's counsel informed the court that defendant and defendant's counsel had improperly approached his client several times without permission and advised that client to reject his counsel's plea negotiations, which required testimony against the defendant, and to seek different counsel. The court informed defendant's counsel that disciplinary proceedings would be held but went forward with the trial without inquiry. The court held a hearing on the issue following conviction but did not rule. At the defendant's sentencing, the court increased the guidelines level finding obstruction of justice for the defendant's part in acting with his counsel in discussions with codefendant. Following sentencing the court permanently barred counsel from appearing in the District Court again. The Fifth Circuit held that the trial court erred in not conducting a hearing to determine whether defendant was fully informed of this counsel's ethical violations and whether he desired to continue with representation. 'While we recognize that a trial court does not always have an affirmative duty to inquire into the possibility of a conflict of interest, it does have a duty to conduct a hearing once it has been alerted and certainly when it knows of the existence of an actual conflict of interest.' *Id.* at 1022. There was an actual conflict here that required inquiry because "counsel was in the position of simultaneously having to defend himself as well as his client regarding their potentially criminal activity. Like his client, counsel was open to an indictment for obstruction of justice. . . . At the very least, counsel faced severe disciplinary measures, including monetary sanctions, and indeed the very loss of the right to appear as counsel in the whole Western District of Texas. His alleged conduct was highly unethical and clearly violated the Model Code of Professional Responsibility as well as the American Bar Association's Model Rules of Professional Conduct." *Id.* at 1022-23. Because the trial court conducted no inquiry, there could be no finding of a knowing and intelligent waiver of the conflict. The court required, however, that defendant establish that counsel's representation was adversely affected by the representation. Adverse affect shown because counsel would have been preoccupied during trial with his own thoughts of the pending disciplinary proceedings and possible indictment. Likewise, during the codefendant's testimony, counsel did not object to discussions of meetings with defendant and his counsel and only cross-examined the codefendant to try to minimize his own improper acts. Further, at the hearing concerning counsel's actions, counsel questioned defendant in a fashion to shift responsibility to him. And, this hearing was prior to sentencing and adversely impacted the defendant. New trial granted.

1983: *United States v. White*, 706 F.2d 506 (5th Cir. 1983). Trial court failed to adequately inquire in escape case where counsel was under investigation for participation in escape charges. Defendant was convicted of escape from the US Marshal. Before trial, he retained counsel, who were under investigation regarding their participation in his escape. Although the defendant was fully informed

***Capital Case**

of his right to have counsel dismissed and was questioned extensively by the court about his awareness of the existence of a conflict, at no point did the record show that the court, the defense attorney, or the prosecutor informed the defendant of the precise manner in which he might be prejudiced by counsel's representation. The defendant's waiver was thus deprived of the knowing, intelligent, and voluntary nature required for the waiver of a constitutional right, and constituted an invalid waiver of the defendant's Sixth Amendment right to effective assistance of counsel.

2. State Cases

2014: *Rutledge v. State*, 150 So. 3d 830 (Fla. Dist. Ct. App. 2014). The trial court erred in failing to inquire about the potential conflict or to appoint new counsel after defense counsel in capital murder case put the court on notice that the prosecution was investigating her for witness tampering in case where the defendant was charged with capital murder for killing a witness in an unrelated burglary trial. Counsel's notice "was sufficient to trigger an immediate alarm on the part of everyone in the courtroom and the certain need for a meaningful on-the-record discussion," but the trial court "essentially disregarded the matter." The state argued on appeal that there was no "actual conflict" because the criminal investigation of counsel had been suspended.

Whether the investigation was suspended or not and whether a renewal of such an investigation was possible or not and whether an actual conflict existed or not, the proceedings below should have taken a detour. Once [counsel's] ethical responsibilities as to her representation of [the defendant] were called into question, the trial court was required to take affirmative action to ferret out the facts underlying the potential conflict. And, of course, it matters not if the state attorney or even the defense attorney herself believed no(perceived or actual) conflict of interest existed. . . . [W]hen a pretrial disclosure of a possible conflict of interest is raised, "the trial court must either conduct an inquiry to determine whether the asserted conflict of interest will impair the defendant's [Sixth Amendment right] or appoint separate counsel."

IV. Actual Conflict of Interest That Adversely Affected Representation and No Valid Waiver²

A. Simultaneous Representation of Jointly Tried Codefendants

1. U.S. Court of Appeals Cases

²This category also includes per se reversals where the court found that no showing of even adverse affect was required due to state law.

***Capital Case**

- 2010:** *McElrath v. Simpson*, 595 F.3d 624 (6th Cir. 2010). Under AEDPA, counsel had an actual conflict that adversely affected representation in complicity to murder case where counsel also represented a jointly tried co-defendant and presented a joint or mutual defense. Neither defendant testified and counsel pursued a joint defense theory that both were innocent and a state's witness was the actual shooter. This theory "was contradicted by the evidence, rather than pursuing the obviously stronger defense of pointing the finger at [the co-defendant] and arguing that there was reasonable doubt concerning [the defendant's] intent to aid the commission of the offenses." The co-defendant had a motive and was identified by a state witness as a shooter. The defendant was alleged only to have transported the shooters with intent to aid. The mutual defense also led counsel to elicit harmful testimony implying that the defendant was one of the shooters when even the state did not maintain that he was a shooter. Although the defendant had executed a waiver, the trial court did not advise the defendant as required by state rules so the waiver was invalid. Because the state court had not addressed the constitutional claim, although it was raised in state court, "AEDPA deference did not apply."
- 2008:** *Boykin v. Webb*, 541 F.3d 638 (6th Cir. 2008). Under AEDPA, trial and appellate counsel in complicity to murder and wanton endangerment case had an actual conflict of interest that adversely affected representation in simultaneously representing the defendant and his co-defendant (cousin) in a joint trial. The adverse affect was evident in counsel's failure to point to the co-defendant as the shooter and to develop an alibi for the defendant at the time of the shooting. The only adult eyewitness immediately identified the co-defendant as the shooter and only identified the defendant several days later after extensive police questioning. The murder weapon was found in their grandmother's house where they both lived but the clip was in the co-defendant's car and their grandmother provided an alibi only for the defendant. Nonetheless, counsel did not move for severance for the defendant, sought to establish the adult eyewitness as the shooter with no supporting evidence, and failed to impeach the eyewitness who changed his identification or call the child eyewitness that identified the co-defendant. "[T]he failure to call witnesses beneficial to client A but detrimental to client B, coupled with the failure to cross-examine client B, is the very definition of a conflict of interest, and a violation of the Sixth Amendment." The state court's analysis in finding no actual conflict was "flawed."

This weighing of the relative merits of the different choices available to trial counsel overlooks the fact that trial counsel decided against the best theory of defense for [the defendant], and instead pursued a common-defense theory that failed to call witnesses favorable to [the defendant] and unfavorable to [the co-defendant], and failed to cross-examine [the co-defendant]. . . . Namely, trial counsel refrained from what was objectively [the defendant's] best defense in order to pursue a doomed mutual defense to protect [the co-defendant].

The state court decision was "an unreasonable application of Federal law" established in *Holloway* and *Sullivan*.

***Capital Case**

2002: *United States v. Newell*, 315 F.3d 510 (5th Cir. 2002). The defendant's purported waiver of a conflict of interest in his money-laundering trial was not a knowing and intelligent waiver of the actual conflict that developed at trial. The defendant and his co-defendant were charged with money-laundering and fraud and were represented by the same attorney. The co-defendant was acquitted while the defendant was convicted. Prior to trial the court questioned the defendant about the potential conflict of interest and the defendant elected to proceed. During the trial, however, it became apparent and "palpable" that counsel presented a lopsided defense strategy focusing on the co-defendant's innocence, which made it appear that the defendant was the go-between the codefendant and the undisputed mastermind of the illegal operation and that the co-defendant engaged in "simple-minded trust" of the defendant. Counsel followed this theme throughout his arguments and also presented the co-defendant to testify and the testimony largely consisted of pointing the finger at the defendant. Although the trial court advised the defendant prior to trial of "the general dangers of dual representation, the scope of the waiver did not include the actual conflicts that arose during trial." "At the outset of a criminal case the district court can often offer little more than a general warning of possible harm. Such an inquiry does not end the matter of conflicted counsel, and the court remains under a continuing obligation during the course of trial to remedy an actual conflict if it emerges."

1996: *Griffin v. McVicar*, 84 F.3d 880 (7th Cir. 1996). Trial counsel in triple murder and assault case had an actual conflict of interest that adversely affected representation where counsel represented the defendant and co-defendant during the same trial. Defendant initially retained different counsel and attempted to negotiate a plea to testify against codefendant. That counsel was unsuccessful and defendant's family then retained counsel, who was already representing the codefendant. Defendant informed counsel that he was present at the scene of the crime but that he did not shoot anyone. Counsel moved to sever the trials on grounds that the codefendant's extensive criminal record might prejudice defendant and that either defendant might have made admissions which could prove damaging to the other. The motion was denied. Prior to trial, when questioned by the trial court, counsel asserted that there was no conflict in the joint representation. During the state's evidence, eyewitnesses identified the codefendant as the shooter of at least two of the victim's. The evidence against the defendant was conflicting on whether he may have shot anyone. Even though defendant appeared to be the least culpable, counsel failed to present a defense asserting that defendant was just an innocent bystander and co-defendant was guilty party. Instead, counsel tried to discredit the eyewitness testimony. His efforts were organized around a theory that the shootings were linked to the drug-related killing of defendant's brother, which had occurred just a few weeks earlier. He also presented a joint alibi defense, through defendant's and another witness' testimony. He did not even mention the alibi in either his opening or closing statements though, perhaps because the alibi witness could not account for the relevant time period. Defendant in post-conviction admitted that he lied in alibi testimony because counsel told him that if he admitted being present at the scene he would be convicted as accomplice. There was an actual conflict in the joint representation. Counsel clearly possess information which would have suggested to an unconflicted counsel the availability of a defense focused on discrediting the identification of defendant and shifting the blame onto the codefendant. Although defendant gave perjured testimony at trial, the court held:

***Capital Case**

Even if [defendant] did represent that the alibi story was true, an effective attorney would have discussed with [defendant] the disadvantages of linking his fortunes to those of [the co-defendant], given the strength of the eyewitness identifications of [the co-defendant] and [the co-defendant]'s extensive criminal history. An attorney free to consider [defendant]'s singular interests would, particularly in light of [defendant]'s waffling on his story, have pointed out the possibility of resting a defense on the weakness and contradictions in the testimony implicating him in the shootings. This approach would have compared favorably with bringing in an alibi which left [defendant] with the task of refuting the evidence against [the co-defendant] as well.

Id. at 888. Moreover, the decision to present the alibi defense was clearly favorable to the defendant, who otherwise had no defense, but detrimental to the defendant, who had a much stronger, credible defense available.

Edens v. Hannigan, 87 F.3d 1109 (10th Cir. 1996). Trial counsel had actual conflict of interest that adversely affected representation in robbery and felony murder case where counsel represented the defendant and co-defendant during the same trial. Defendant was charged with two-codefendants. The evidence showed that the three conspired to commit the robbery. The two co-defendants entered the pharmacy and codefendant one shot two people in the course of the robbery. Defendant was not present at the crime scene, but was an accomplice according to the state's evidence. During trial, both the defendant and codefendant two, who had entered the pharmacy, were represented by the same attorney, who was retained by codefendant two's family. Codefendant one testified and claimed self-defense. Codefendant two testified and claimed that he was compelled by fear of codefendant one. The defendant did not testify or present any evidence. Counsel did not even make any opening or closing argument for defendant. Because defendant did not object to the conflict at trial, he must show an actual conflict that adversely affected representation under *Cuyler*. Court held that there was an actual conflict because the only way defendant could have avoided criminal liability in this case would have been for him to have presented the defense that he had not participated in any way in the robbery. A successful effort on his behalf, however, necessarily would have damaged codefendant two, because counsel would have had to contradict and impeach his own client and allow the defendant to testify, which would have contradicted codefendant two. Adverse affect is found because the record reflects that the conflict between the defenses was consistently resolved in favor of codefendant two at defendants' expense. Counsel never articulated what defense, if any, was contemplated for defendant and he put on no evidence on defendant's behalf. Defendant was not permitted to testify and counsel never cross-examined either codefendant concerning their inculpatory testimony that defendant had provided a ride to the car used in the robbery. Counsel also failed to pursue separate plea negotiations on defendant's behalf. Counsel attempted to negotiate a joint deal for defendant and codefendant two, but never tried to negotiate solely for defendant, even though negotiations on his behalf alone might have produced a plea offer from the government since he could have provided valuable testimony undermining codefendant two's defense. He had also

***Capital Case**

witnessed the conspiratorial conversation that took place between the two codefendants and arguably could have testified that codefendant two was not forced to participate in the robbery, contrary to his claim. No effort was made to bargain solely for the defendant though because such an arrangement would have been in direct conflict with codefendant two's defense. Counsel also failed to call a witness that would have contradicted some of the incriminating information against defendant because counsel was more concerned with codefendant two's defense. The court also rejected the government's argue of waiver. "[W]e must indulge every reasonable presumption against the waiver of fundamental rights." *Id.* at 1118 (citing *Glasser v. United States*, 315 U.S. 60, 70 (1942)). The record revealed that counsel told the defendant that he could be convicted or sentenced differently the codefendant. There was no discussion during the hearing, however, of the risks associated with the dual representation and there was no inquiry by the court on this matter.

1992: *United States v. Martin*, 965 F.2d 839 (10th Cir. 1992). Counsel had actual conflict that adversely affected representation in drug conspiracy case where counsel jointly represented defendant and codefendant. Furthermore, while the District Court conducted an inquiry, the court did not adequately advise defendant and the resulting purported waiver was invalid. In an undercover drug operation, defendant was initially involved in discussions concerning the possible purchase of marijuana. Defendant did not ultimately make the purchase, but someone else did. Following the arrests of the persons involved in the purchase, defendant turned himself in after learning that he was included in the indictment. At trial, defendant and a codefendant were jointly represented by counsel. Several other codefendants had independent counsel, but defendant's counsel largely orchestrated the defense for all. The trial court conducted only a brief inquiry prior to trial. Counsel had an actual conflict because he convinced defendant not to testify due to a "united we stand, divided we fall" philosophy of defense." *Id.* at 842. Defendant, who was clearly less culpable than his codefendants, would have testified that he withdrew from the conspiracy after the initial meeting and had nothing more to do with it. An actual conflict that adversely affected representation was clear in these circumstances. The court gives deference to the District Court's finding in 2255 hearing that the same court had conducted an inadequate hearing prior to trial to ensure an adequate waiver.

1985: *United States ex. rel. Zembowski v. DeRobertis*, 771 F.2d 1057 (7th Cir. 1985) (affirming 598 F. Supp. 914 (N.D. Ill. 1984)). Counsel had actual conflict that adversely affected representation in robbery case where counsel also represented codefendant in joint trial. Prior to trial, the state moved to join the cases. Counsel opposed joinder, in part, by noting that defenses would conflict. The court held that this was sufficient objection to trigger trial court's duty to inquire and failure to do so required reversal. Even assuming trial court's duty was not triggered, reversal required because counsel had an actual conflict that adversely affected representation since counsel actually elicited testimony during trial that strengthened the identification of the defendant. Counsel also argued that defendant was more culpable than codefendant and duped her into involvement. In sentencing, counsel argued only on behalf of codefendant.

***Capital Case**

- 1984: *United States v. Auerbach***, 745 F.2d 1157 (8th Cir. 1984). Counsel had conflict that adversely affected representation in illegal sale of firearms case where counsel represented defendant and codefendant in joint trial. Defendant and his son were represented by the same counsel. Adverse affect found because the son had a prior felony conviction and no objection was posed to the prejudicial affect of this on defendant.
- 1983: *United States ex rel. Gray v. Director, Dept. of Corrections, State of Ill.***, 721 F.2d 586 (7th Cir. 1983). Counsel had conflict that adversely affected representation in murder and rape case where counsel represented defendant and codefendant in joint trial before separate juries. Defendant had defense of coercion by co-defendant, and an independent, conflict-free, competent attorney for defendant would have carefully considered continued cooperation with state as way of avoiding any prosecution, or immunity agreement with state, or plea bargain with state, or strong defense of coercion, or, in event of conviction, strong plea for leniency based on minimum participation. Defendant's counsel, in contrast, could not adopt any of those options because each of them would put co-defendant in jeopardy.
- 1982: *Smith v. Anderson***, 689 F.2d 59 (6th Cir. 1982). Counsel had conflict that adversely affected representation and trial court failed to adequately inquire in robbery case where counsel represented defendant and codefendant and informed the court of conflicts. An attorney's timely statement that conflict adheres in joint representation is a grave representation requiring meticulous consideration. Thus, the trial judge's terse reply that he saw no conflict of interest in joint representation of defendants charged with armed robbery was not justified or sufficient response, even if defendant's counsel could have been more detailed in his expression of possible conflict. Here, joint representation of defendants by counsel had adverse effect on defendant's right to representation. Defendant sat, against his will, at same table with co-defendant, who admitted being in store when it was robbed and who was implicated by all but one res gestae witness. Defendant, in contrast, was implicated by only one, and defendant claimed he was not at scene of robbery. Counsel's ability to bolster defendant's defense suffered because of counsel's inability to highlight lesser number of witnesses adverse to defendant and the fewer incriminating acts to which those witnesses testified.
- United States ex rel. Williams v. Franzen***, 687 F.2d 944 (7th Cir. 1982). Counsel had actual conflict that adversely affected representation in burglary case where counsel represented defendant and codefendants in joint trial. Codefendant's testimony was not only inconsistent with defendant's defense, but tended to incriminate defendant. Due to the conflict, counsel could not impeach the codefendant. Where two or more defendants have inconsistent stories about crime charged, joint representation is impermissible, particularly where one defendant cannot be effectively prevented by counsel from taking stand or where counsel is precluded from cross-examining or impeaching witness because of conflicting loyalties.

2. U.S. District Court Cases

***Capital Case**

2010: *Salts v. Epps*, 696 F. Supp. 2d 639 (N.D. Miss. 2010). Under AEDPA, counsel in embezzlement case, who represented both husband and wife defendants, had an actual conflict of interest that adversely affected representation. The case involved allegations of embezzlement of burial insurance payments the defendants collected in connection with their family home business. The husband handled most of the money and dealt with customers while the wife took care of the accounting and books. Initially retained counsel withdrew after consultation with the defendants on the basis of a conflict. Second counsel received a number of continuances, some due to health issues in his family and the need to prepare, and a number of which were due to several judges recusing themselves and work being done on the courthouse. Days before trial, counsel again moved for a continuance based on his father's illness and the need for additional time to prepare. This motion was never ruled on because the defendant's notified the judge they were terminating second counsel's services and retaining new counsel. The judge refused to grant a continuance and the defendants represented themselves in a motions hearing. On the day of trial, new counsel filed a motion to dismiss or, alternatively, for a continuance based on the obvious conflict of interest that one of the parties was operating the business at some points in time and the other party was operating it at other times. The motion was denied. The district court did not fault the defendants for the delay in relieving second counsel as counsel's conduct was clearly lacking, there was nothing to suggest the defendants should have realized that fact sooner, and given the many delays in the case that were not caused by the defendants, "the sudden rush to trial speaks of too much concern for speed and not enough for justice and due process." The state court's finding of a waiver of the right to the effective assistance of counsel was unsupported by the record, as well as "contrary to law and an unreasonable application of federal law to the facts." The district court held that objection had been made to the conflict both by initial counsel two years before trial and by final trial counsel and yet the trial court failed to inquire into the conflict as required by *Holloway v. Arkansas*. Automatic reversal was required due to the court's failure to inquire. The state court in applying *Cuyler v. Sullivan* "applied the wrong law and reached a conclusion contrary to federal law." Even assuming the standard of *Cuyler v. Sullivan* was the applicable law, counsel did have an actual conflict of interest that adversely impacted representation. The state court's holding to the contrary was "based upon an unreasonable finding of facts and/or unreasonable application of federal law to the facts." Counsel had not option but to attempt to present a unified front. Unconflicted counsel for the husband would have highlighted the wife's testimony that she was in charge of all bookkeeping. Likewise, unconflicted counsel for the wife would have highlighted the fact that the state's case concentrated almost entirely on the husband's role as the leader of the business and his contact with the customers, as well as evidence related to one count pointing solely to the husband cashing one of the embezzled checks at a gas station.

2005: *Williams v. Jones*, 391 F. Supp. 2d 603 (E.D. Mich. 2005). Counsel had an actual conflict of interest that adversely affected his representation in cocaine case due to his representation of the defendant and co-defendant in a joint trial and the purported waiver was not knowing, intelligent, or voluntary. The defendant and his brother/co-defendant were arrested following execution of a search warrant at their home, which was shared by their mother. The defendant was downstairs and observed by an officer throwing a brown paper bag that contained drugs. The brother, who was

***Capital Case**

upstairs, was observed by an officer outside throwing out a clear plastic bag that also contained drugs, but a lesser amount. Counsel was retained by the mother to represent both. The joint representation impacted counsel in at least six ways: (1) counsel could not argue that the brother was responsible for all the drugs even though that was the best defense in a case “involving shared possessions”; (2) counsel had to argue that both defendants were innocent, which “was far less plausible” than only one of them being innocent; (3) the joint representation “may have led the jury to believe that Petitioner and his brother were a unit and were actively employed together in the narcotics trade”; (4) due to the significant difference in the severity of the charges against each, the co-defendant had a strong incentive to proceed to trial rapidly so the complaint against him would not be amended to higher charges while the defendant “might well have benefitted from a delay in the trial and additional negotiations”; (5) counsel elicited testimony that the seller of drugs on the day before the warrant was executed matched the defendant and not the co-defendant, which further incriminated the defendant; and (6) counsel called a witness who was upstairs with the co-defendant and testified that the co-defendant was asleep at the time of the raid, which made the defendant look like the only guilty party. Under AEDPA, the state court applied the “wrong standard. Petitioner was not required to prove that the outcome of the trial would have been different if he had been represented by a separate attorney.” *Id.* at 613. The state court decision was also based on an unreasonable application of Supreme Court precedent. The purported waiver was invalid because the trial court did not apprise the defendant of the “disadvantages of dual representation, and it did not say whether it would appoint counsel if Petitioner requested a separate attorney.” In addition, because counsel was retained, the defendant may have “felt obliged for financial reasons to waive representation by a separate attorney.” The trial court also waited until after voir dire to make a record of the purported waiver and did not offer to postpone the trial if the defendant wanted separate counsel. “By waiting until after the jury was impaneled to place the defendants’ waiver on the record, the trial court exerted subtle pressure on the defendants to accept the current situation.” *Id.* at 615.

2004: *Robinson v. Stegall*, 343 F. Supp. 2d 626 (E.D. Mich. 2004). Counsel had an actual conflict of interest that adversely affected counsel’s representation and the trial court erred in kidnapping case in failing to inquire concerning counsel’s conflict of interest. Until the final pre-trial conference, the defendant and his co-defendant were represented by the same counsel, who was retained by the co-defendant’s family. During the final pre-trial conference and trial, the defendant was represented by an associate and salaried employee of co-defendant’s counsel. Although the indictment revealed that the defendant and his co-defendant could have been charged with the same crimes, the defendant was indicted for kidnapping of one sister, which carried a life sentence, while the co-defendant was charged only with attempted kidnapping of a different sister, which carried only a potential five year sentence. The kidnapping and attempted kidnapping arose from the same events. Upon the advice of counsel, both defendants waived their right to a preliminary examination. No motions were filed on the defendant’s behalf. On the advice of counsel, the defendant waived his right to a jury trial. Shortly before trial, the prosecution moved to amend the charges to charge the defendant and his co-defendant with kidnapping and attempted kidnapping. This motion was denied, but the prosecution issued a new warrant charging the defendant with the additional attempt charge, but did not similarly

***Capital Case**

issue a new warrant against the co-defendant. At the close of the state's case during trial, the defendant informed the court that he wanted to discharge counsel because he did not believe he was being adequately represented. The court informed the defendant that he must continue with counsel or represent himself. When the trial resumed, the defendant again informed the court that he wanted to discharge counsel and that he wanted to testify but not with this counsel. The court again denied the motion and the defendant did not testify. Following a continuance of almost two weeks to locate two potential defense witnesses, the defendant again informed the court that he desired to discharge counsel and that his family was seeking new counsel for him. The court again denied the motion. The defendant was convicted of kidnaping and he and the co-defendant were both acquitted of attempted kidnaping. The defendant was sentenced to 10-20 years. The court found that an actual conflict of interest was present in this case. Because of the differing charges, the co-defendant had a "strong incentive" to proceed to trial as rapidly as possible to prevent the filing of additional charges against him. Thus, counsel advised both to waive the preliminary examination, although the preliminary examination could have benefitted the defendant by allowing the development of impeachment material regarding weaknesses and inconsistencies in the child victim's testimony. This was apparent because the defendant was acquitted of the attempted kidnaping charge based on impeachment testimony developed during the preliminary examination on that charge. The conflict was also apparent because counsel did not file a pretrial motion to suppress identification testimony or request a hearing on the constitutionality of the pretrial identification procedures pursuant to *United States v. Wade*, 388 U.S. 218 (1967). While these motions would have been potentially harmful for the co-defendant by alerting the prosecution that he should be charged with kidnaping, they would have potentially benefitted the defendant. Although these motions were raised after the witnesses testified during trial, "a prudent attorney, unencumbered by any conflict of interest, would have preferred to know before trial whether the identification testimony was admissible" in order to prepare for trial and cross-examination of the witnesses. Moreover, an evidentiary hearing on the motions prior to trial could also have allowed development of additional impeachment material. Counsel's explanations for waiving the preliminary examination and failing to make the pretrial motions were inadequate to provide an explanation of counsel's conduct independent of the conflict. While counsel stated that he did not want to preserve the testimony of the complaining witnesses in a preliminary examination, the witnesses were young and not likely to be absent from trial. Moreover, their age and the stress of the events "suggest[ed] that valuable impeachment material might be developed at pretrial proceedings." Likewise, "the importance of a preliminary examination is magnified when dealing with a child witness" because of the possibility that the testimony was enhanced during pretrial preparation due to the "suggestibility of child witnesses." Counsel's explanation for failing to file the pretrial motions was also inadequate because counsel stated only that he had not reviewed the photos in the photographic lineup prior to trial even though the defense was mistaken identity. The court found that the state court decision was an unreasonable application of clearly established Supreme Court law under the AEDPA in several respects. First, the state court misunderstood both the facts and the law and "inexplicably limit[ed] its examination to potential adverse effects *during* trial." While the state court found that the defendant and co-defendant were represented by associates in the same firm, they were actually represented by the same counsel throughout all proceedings until the final pretrial conference. The

***Capital Case**

state court thus ignored the “many important strategic, trial preparation decisions” made when the defendant and co-defendant were represented by the same attorney in “direct contravention” of *Holloway* and contrary to counsel’s testimony, which acknowledged a conflict prior to trial and advice to the defendant to retain different counsel. Although defendant did have different counsel for the final pretrial conference and trial, the state court’s reliance on this fact was unreasonable because the petitioner’s counsel during the final conference and trial was “not an independent attorney.” He was “an employee” of the co-defendant’s attorney. The court also held that, although the defendant did not specifically object on the basis of a conflict of interest, the defendant’s repeated requests to discharge counsel and the court’s awareness of the discrepancy in the charges between co-defendants was sufficient under *Holloway* and *Mickens* to trigger the trial court’s duty to inquire. The state court’s finding that the defendant did not object was an unreasonable determination of the facts under the AEDPA and an unreasonable application of *Holloway* and *Mickens*.

1986: *Hudson v. Lockhart*, 679 F. Supp. 891 (E.D. Ark. 1986). Counsel had actual conflict that adversely affected representation in aggravated robbery case where counsel also represented codefendant in joint trial. During trial, the codefendant was positively identified as shotgun wielding robber and the defendant was merely placed at the scene in a passive role of customer who left premises before robbery commenced, and other evidence against defendant was sparse. Nonetheless, counsel did not attempt to shift blame to codefendant.

3. State Cases

2003: *State v. Thomas*, 840 So.2d 25 (La. Ct. App. 2003). Counsel in possession of stolen automobile case had an actual conflict that adversely affected his performance where counsel represented defendant and a testifying co-defendant with contrary interest. The defendant was arrested as a passenger in the back seat of a stolen vehicle. There were three co-defendants. One of the co-defendants testified that she had been driving the car, which had no key in the ignition and had clearly been started with a screwdriver or some other instrument. She testified that it was dark and the car was already running when she started driving though and that the defendant had been driving the vehicle before her and had picked her up. The court held that there were conflicting interests because the co-defendant could only benefit by testifying that she assumed control of the vehicle from the defendant while it was running. In presenting this testimony, however, she provided the jury with a much stronger basis to conclude that the defendant either knew or should have known that the car was stolen. Without the co-defendant’s testimony, the state’s case would have demonstrated only that the defendant was a rear passenger. The attorney’s action in eliciting the co-defendant’s testimony was clearly detrimental to the defendant.

2000: *Lewis v. State*, 757 A.2d 709 (Del. 2000). Trial court in burglary, unlawful imprisonment, and conspiracy case erred in failing to inquire into the propriety of joint representation prior to trial. Counsel represented both the defendant and his codefendant in the same proceedings. Both alleged mistaken identity and alibi as defense. In sentencing, the codefendant admitted his guilt and stated that the defendant was not with him. While a state rule required the judge to inquire into potential

***Capital Case**

conflicts of joint representation, the trial judge simply noted that the codefendants had separate alibi defenses and were represented by the same attorney in the context of deciding how many total preemptory challenges to allow for the defense during the jury selection process. The trial court never conducted an inquiry. The Delaware Supreme Court held that automatic reversal was not required absent a showing of an actual conflict and an adverse affect on counsel's representation. In this case, the evidence against the codefendant was strong and the evidence against the defendant was weak. The conflict this worked against the defendant in possible pleas negotiations and trial itself. Any attempt to exploit the weakness of the evidence against the defendant would necessarily enhance the apparent strength of such evidence against the co-defendant. To the extent that the strength of the state's case against the codefendant undermined the credibility of his alibi defense, it had the potential for "spilling over" and undermining the jury's assessment of defendant's alibi defense. Finally, the ability to argue for a lesser sentence for defendant was compromised, where the codefendant had a gun during the crime and the second assailant was unarmed.

1996: *Maya v. State*, 932 S.W.2d 633 (Tex. Crim. App. 1996). Counsel had actual conflict that adversely affected representation in attempted murder case where counsel represented two codefendants, who were husband and wife. The defendants were arrested following a "road rage" type shooting. They retained the same counsel. During trial, the husband asserted self-defense. The wife, however, had made a prior statement and testified in a manner that revealed that the shooting was not self-defense but anger that the victim had been following too closely while driving. When the wife was called to testify, counsel attempted to minimize her involvement without casting the blame on the defendant. "This is an impossible task, and the tactic compromised the defense of both clients. These dilemmas represent *actual*, not *possible*, conflicts of interest." *Id.* at 636. Prejudice presumed and reversal required under *Cuyler* because counsel failed to advise his clients of the potential conflict and to obtain a waiver.

1995: *Meyers v. State*, 454 S.E.2d 490 (Ga. 1995). Counsel in murder case had actual conflict that adversely affected joint representation of defendant and his codefendant, who was defendant's identical twin. Defendant was convicted and codefendant was acquitted. An eyewitness testified that one of the twins entered a pawnshop with another codefendant and the non-twin codefendant shot and killed one employee, shot her, and robbed the store. The witness could not identify, which twin entered the store. The twins' testimony at trial was virtually identical. Prior to trial, however, one twin (Aaron) stated that the non-twin codefendant took his mother's gun and had not returned it. The other twin (Arthur) stated that Aaron took his mother's gun on the morning of the murder and had given it to the codefendant that actually shot the victims. Aaron was convicted and Arthur was acquitted. Counsel had conflict that adversely affected representation. Counsel harmed Aaron by putting Arthur on the stand in light of his prior inconsistent statement that was damaging to Aaron and in light of his inability to attack or impeach Arthur's testimony since he represented him as well. Moreover, if counsel had not called Arthur to testify, he might well have prejudiced Arthur and caused Arthur rather than Aaron to be convicted on all charges.

***Capital Case**

People v. Lee, 649 N.E.2d 457 (Ill. App. Ct. 1995). Counsel in drug possession case had actual conflict that adversely affected representation where counsel represented three codefendants with adverse interests in joint trial. Defendant and his wife were visiting codefendant's apartment when a search warrant was served and drugs were found. According to police, defendant admitted the apartment was his. The codefendant informed counsel, however, that the apartment was hers and that the defendant and his wife rarely even visited. Counsel did not present this information at trial, however, and the court directed a verdict acquitting codefendant and wife. The court found "that defense counsel was between the proverbial rock and a hard place." *Id.* at 460. Had counsel challenged the evidence that the apartment was not the defendant's, he might have broken link between defendant and the drugs, but only at the cost of establishing for the state the fact of codefendant's control over the apartment.

1993: *People v. Reyes*, 622 N.E.2d 86 (Ill. App. Ct. 1993). Counsel in unlawful use of weapon case had actual conflict that adversely affected representation where counsel represented both the defendant and codefendant. Defendant was stopped for being on school grounds, from which he was barred because he was suspended, and because it was reported that he had a gun in the car. He had just picked up some of his friends as school let out. When the car was stopped, the defendant and the four other occupants were patted down. The car was then searched and a pistol was found in a gym bag. All were arrested. Defendant admitted that the gun was solely his. Another codefendant also admitted that the gun was solely his. Both were charged. Prior to trial, the court *sua sponte* raised concerns about a potential conflict. Counsel declared that there were none. Counsel admitted, however, that he did not argue the motion to suppress and lack of probable cause for the defendant as forcefully as he might have otherwise because of the joint representation. Counsel had an actual conflict that adversely affected representation. In order to adequately defend the defendant, counsel had to argue that the codefendant's statement was true and that the gun belonged to him. He could not do this because he represented the codefendant also.

1992: *Gee v. State*, 611 A.2d 1081 (Md. Ct. App. 1992). Counsel in drug case had actual conflict that adversely affected representation where counsel represented both buyer and seller in joint trial. Defendant and codefendant were arrested after police officers observed defendant purchasing heroin from codefendant. A public defender was appointed to represent both. At a pretrial hearing, counsel informed the court of a conflict because the government was offering a plea to defendant in exchange for cooperation against counsel's other client. The trial court found no conflict and instructed counsel to proceed with joint representation. The appellate court found that conflict adversely affected defendant prior to trial. He had no defense at trial and the conclusion was foregone. Because of the conflicted representation though, defendant was deprived of the advice of counsel in rejecting the government's plea offer, which would have resulted in only a seven-month sentence rather than the four years defendant ultimately got.

When still debating within himself as to whether to make such a bargain, [defendant] was entitled to the best advice and wise experience of single-minded counsel. Notwithstanding [defendant]'s tentative decision to stand by his codefendant, a

***Capital Case**

lawyer concerned only with [defendant]'s temporal welfare would have read him the riot act, expatiated at length upon the folly of misguided loyalty, and persuaded him to take the "deal" and run. [Defendant]'s lawyer, because of his mutual allegiance to [the codefendant], however, was obviously paralyzed from giving such tactically sound advice. It was in the very failure to receive such advice that [defendant] was deprived of effective assistance.

Id. at 1090. The codefendant, however, was prejudiced at trial. His only defense was to deny any involvement in criminal activity. An advocate for him would have argued that defendant was found with drugs on him, the codefendant had nothing on him. Unconflicted counsel would have argued that the exchange between the two had nothing to do with drugs. Because counsel was conflicted, however, codefendant was unable to place all the blame on defendant. Both defendants granted new trial.

1990: *State v. Martinez-Serna*, 803 P.2d 416 (Ariz. 1990). Counsel in drug case had actual conflict that adversely affected representation where counsel represented defendant and codefendant in joint trial. Codefendant and defendant were arrested after drugs were found in the truck driven by codefendant. Shortly after arrest, codefendant admitted that the drugs were his and that the defendant knew nothing about the drugs. Nonetheless, during trial both codefendant and defendant testified that they were coerced at gunpoint to transport the drugs. Counsel had an actual conflict that adversely affected representation because counsel's conflict dictated a united defense when codefendant had previously admitted the drugs were his.

Armstrong v. State, 573 So.2d 1329 (Miss. 1990). Counsel had actual conflict that adversely affected representation where counsel represented defendant and codefendant in joint sentencing. Trial court also erred in failing to inquire given the obvious conflict. Defendant was 14 years old. His codefendant was 17. Both plead guilty to armed robbery. The evidence was clear that the codefendant was the main culprit and the defendant's participation was minimal. Nonetheless, in sentencing, counsel presented no evidence or argument for defendant or codefendant "for fear that to do so would characterize one as being more culpable than the other." *Id.* at 1333. Counsel also refrained from arguing any other mitigation although defendant had much available mitigation but instead defendant "graduated from the seventh grade to the Mississippi State Penitentiary." *Id.*

1988: *People v. Jones*, 520 N.E.2d 325 (Ill. 1988). Counsel had conflict in robbery and murder case that adversely affected representation where counsel represented defendant and codefendant in joint trial. Defendant and codefendant made pretrial statements admitting participation but claiming only to be the lookout. During trial, defendant testified and denied all involvement for him and codefendant. The codefendant did not testify at trial. Counsel argued only that their confessions had been coerced. The court held that the defendant was prejudiced by the conflict because the presence in evidence of codefendant's statement implicating defendant violated defendant's right to confrontation. The joint representation of the two defendants in one trial created a clear conflict as to defendant, because

***Capital Case**

when co-defendant declined to testify, there was no way that defendant's attorney could effectively deal with the implicating statement.

People v. Taylor, 520 N.E.2d 907 (Ill. App. Ct. 1988). Counsel had actual conflict that adversely affected representation where counsel represented jointly tried codefendants with antagonistic defenses. Counsel represented defendant and her nephew/codefendant. Prior to trial, the court inquired into the conflict, but counsel assured the court that there was no conflict and each defendant's testimony would support the other. During trial, however, defendant testified, contrary to the state's evidence that she was the leader, that codefendant was actually the aggressor. Counsel was surprised by the testimony and opted at that point not to cross-examine her to discredit her testimony. The appellate court held that counsel had an actual conflict at that point that adversely affected his representation of codefendant because counsel did not attempt to discredit defendant's testimony. The court also reversed defendant's conviction because she also was impacted by counsel's divided loyalties. Despite the purported pretrial waiver, the court held that the waiver was inadequate because the conflict was not apparent prior to trial. The court also held that "the right to conflict-free counsel is so fundamental that a conflict of interest affecting legal representation amounts to plain error when the record plainly indicates the existence of an actual conflict of interest precluding counsel's undivided loyalty." *Id.* at 911.

Cole v. White, 376 S.E.2d 599 (W. Va. 1988). Counsel had actual conflict that adversely affected representation where counsel represented both defendant and defendant's father in joint trial for malicious assault. Evidence admitted in the trial showed that the father had a motive for the victim's beating and the father's alibi witness had been beaten by the father on several occasions. That evidence would not have been admissible against the defendant if he and his father had been represented separately or if the trials had been severed.

1987: *Fitzgerald v. United States*, 530 A.2d 1129 (D.C. 1987). Counsel had actual conflict that adversely affected representation in drug case where counsel represented defendant and codefendant in joint trial and court did not adequately inform defendants of their right to separate counsel. In addition, differing amounts of evidence against each defendant with respect to different counts of indictment foreclosed the attorney who represented both defendants from using blame-shifting defense.

People v. Pico, 514 N.E.2d 224 (Ill. App. Ct. 1987). Counsel had actual conflict that adversely affected representation in aggravated battery case where counsel represented defendant and codefendants in joint trial, where credibility of each defendant was called into question, and could not be restored without proving that at least one of the others was lying.

Tate v. State, 515 N.E.2d 1145 (Ind. Ct. App. 1987). Counsel had actual conflict that adversely affected representation in theft case where counsel represented both defendants in joint trial. One defendant testified professing his own innocence, by suggesting that it was co-defendant who stole groceries. Once that conflict arose, performance of joint counsel was impaired as to both co-

***Capital Case**

defendants by attorney's continued active representation, which precluded attorney from cross-examining witnesses on behalf of each of co-defendants.

State v. James, 739 P.2d 1161 (Wash. Ct. App. 1987). Counsel had actual conflict that adversely affected representation in robbery case where counsel represented defendant and codefendant in joint trial and female defendant chose not to testify in her own defense because it would be prejudicial to the other defendant, and where female defendant was implicated in a robbery for which the other defendant was charged and she was not.

1986: *People v. Rhinehart*, 385 N.W.2d 640 (Mich. Ct. App. 1986). Counsel had actual conflict that adversely affected representation in drug case where counsel represented both defendant and codefendant in joint trial. Defendant consented to joint represent based on counsel's initial decision not to have either testify, but counsel without consulting defendant called codefendant to testify about alibi and the testimony proved damaging to defendant. Reversal also required because the trial court failed to adequately inquire.

Matter of Delfin A., 123 A.D.2d 318 (N.Y. App. Div. 1986). Counsel had conflict that required presumption of prejudice in delinquency case involving sexual abuse where counsel had been retained by residential facility where juvenile had been voluntarily placed in foster care, and where alleged incident of sexual abuse occurred, to represent the facility in proceedings against the juvenile. At those proceedings it was expected that employees of the facility would testify. Furthermore, counsel represented two alleged accomplices whose statements about the incident of sexual abuse differed from that of the juvenile.

1985: *Armstrong v. People*, 701 P.2d 17 (Colo. 1985). Counsel who jointly represented husband and wife in aggravated robbery case had a conflict that adversely affected representation of both where husband and wife defendants were charged with differing degrees of criminal activity and the great bulk of the evidence introduced was directed toward proving the husband's culpability. The wife elected to testify in her own defense, and offered testimony in support of her husband's defense as well. The only evidence against the wife was circumstantial, but this was used to try and benefit both clients, rather than have her acquitted.

Davis v. State, 461 So.2d 291 (Fla. Dist. Ct. App. 1985). Counsel had conflict that adversely affected representation in drug case where counsel represented defendant and codefendant in drug case and elicited testimony from defendant in motion to sever cases that defendant was solely responsible and the codefendant had no knowledge of the drugs.

State v. Lem'Mons, 705 P.2d 552 (Kan. 1985). Counsel had conflict and prejudice was presumed where counsel's husband/law partner represented codefendant and defendant and codefendant each claimed innocence and implicated the other.

***Capital Case**

1984: **Barclay v. Wainwright*, 444 So.2d 956 (Fla. 1984). Counsel had conflict that adversely affected representation in direct appeal of murder case where counsel represented defendant and codefendant in joint appeal. Counsel failed to make plausible argument of lesser culpability that could have benefitted defendant immensely but would have harmed co-defendant and counsel had been retained by family of codefendant and ultimately married the codefendant's sister.

Amaya v. State, 677 S.W.2d 159 (Tex. Crim. App. 1984). Counsel had conflict that adversely affected representation in rape case where counsel represented three defendants, who were brothers, in joint trial. All three defendants were adversely affected in light of differing culpabilities, such as one of them was not present during abduction and only two of them had weapons. Witnesses repeated facts that were consistent with only one of the brothers' story. Defense counsel could not redirect witness to clarify her factual account without damaging the credibility of his other two clients.

Ex parte Acosta, 672 S.W.2d 470 (Tex. Crim. App. 1984). Counsel had conflict that adversely affected representation in probation revocation case where counsel represented defendant and codefendant with adverse interests in joint hearing.

1983: **People v. Mroczko*, 672 P.2d 835 (Cal. 1983). Counsel had a conflict of interest due to representation of a codefendant in joint trial and a witness who was an uncharged suspect in the murder committed in prison. Because of the conflict, counsel was unable to assert that the defendant, "instead of being the chief culprit, was, at worst, an accessory whose involvement was marginal and, to some extent, unwilling." Thus, "the conflicts that developed assume gigantic importance" in sentencing. While unconflicted counsel may have made similar trial decisions, "[t]he point is, of course, that if that had happened, it would have happened because each attorney decided that it should, thinking only of his own client's interests and not those of another defendant and two other clients." In addition, counsel was conflicted in plea bargaining. The state made a plea offer to the codefendant to testify and plead as an accessory after the fact, which was rejected. If the codefendant had accepted the plea and testified it may have benefitted the defendant. The state also made a second "package" offer for the defendant to plead to second degree murder and the codefendant to plead as an accessory. Counsel clearly "was in no position to lean on one client on behalf of the other. As matters turned out, each defendant would have benefited by some friendly persuasion on behalf of the other." The purported waivers were fatally flawed because the "courts' comments did not fully convey a number of actual and severe conflicts that were apparent even pretrial. Instead, each judge who addressed the defendants concerning the conflicts did so in language implying that they were merely potential conflicts. Most importantly, however, defense counsel reinforced this notion by repeatedly-and erroneously-asserting that no conflict existed." Indeed, "[i]nstead of facilitating the trial court's attempts to explore the conflicts and to obtain a valid waiver, counsel did everything in his power to prevent a penetrating inquiry. . . . Counsel not only refused to admit to the conflicts that the prosecution had unearthed, but actively prevented the court and the prosecution from discovering others."

***Capital Case**

In Interest of V.W., 445 N.E.2d 445 (Ill. App. Ct. 1983). Counsel had conflict that adversely affected representation in delinquency case for aggravated battery where counsel represented three codefendants in joint trial and the three gave inconsistent testimony. Counsel was thus presented with a situation in which it appeared that at least one of his three clients was lying, but he could not examine his own clients in detail to bring out the truth.

State v. Morrow, 440 So.2d 98 (La. 1983). Counsel had conflict that adversely affected representation in kidnapping case where counsel represented defendant and codefendant in joint trial. Counsel did not present evidence, cross-examine witnesses or make arguments to jury on state's failure to prove defendant's participation in initial abduction of victim and on his undisputed lesser culpability in entire sequence of events. That evidence and argument might have influenced jurors to return different verdict

**Ex parte McCormick*, 645 S.W.2d 801 (Tex. Crim. App. 1983). Counsel had conflict that adversely affected representation in capital case where counsel represented two codefendants in joint trial. Evidence supported findings that defendants did not waive their right to conflict-free counsel, that there was irreconcilable conflict of interest in representing both defendants, and that such conflict adversely affected counsels' performance of duties to defendants in that helping one defendant necessarily hurt the other. Defendants were denied effective assistance of counsel by such joint representation, especially in capital case where jury must consider particularized circumstances of individual offense and individual offenders.

1982: *People v. Elston*, 182 Cal. Rptr. 30 (Cal. Ct. App. 1982). Counsel had actual conflict that adversely affected representation in child abuse case where counsel represented defendant and codefendant in joint trial. Trial court erred in failing to conduct inquiry when faced at outset with possibility that conflict of interest existed precluding joint representation of defendants. Actual conflict and deprivation of effective representation arose where judge had to fix penalties for both defendants, and it appeared that defendant could have attacked probation report's allocation of responsibility and its disparate sentencing recommendations. Each defendant's statements about origin of child abuse was affront to other's credibility, defense counsel did not make arguments on defendant's behalf that could have been made, defendants had disparate criminal records, and each defense rested upon contradictory and inconsistent interpretation of facts.

B. Simultaneous Representation of Codefendants in Pleas Negotiations, Testimony for Prosecution, or Sentencing

1. U.S. Court of Appeals Cases

1994: **Burden v. Zant*, 24 F.3d 1298 (11th Cir. 1994). Counsel had an actual conflict that adversely affected his representation due to his simultaneous representation of a codefendant, who became a state witness. The defendant while pending trial on a burglary charge was charged with four murders based on the statements of the witness, who was also arrested. Counsel was then appointed to

***Capital Case**

represent both on the murder charges. At the preliminary hearing for the witness, the court held that there was insufficient evidence to charge him with murder but ordered that he be held in custody as a material witness. The witness remained in confinement until the conclusion of the defendant's trial. In exchange for his testimony at trial, the witness "received informal guarantees from the prosecution that he would not be charged in connection with the murders. . . . This informal agreement was never transformed into a formal grant of transactional immunity, which generally requires court approval under Georgia law, and which the district attorney's office apparently granted as a matter of policy only in writing." *Id.* at 1300-01 (citation omitted). Prior to trial, the public defender representing the defendant, who had the informal discussions with the prosecutor on behalf of the state witness, was replaced by another public defender in the same office as the defendant's counsel. This counsel represented the defendant during trial in which the prosecution conceded the witness had "a promise of immunity from prosecution."

In this case, an actual conflict of interest occurred when . . . pretrial counsel, while representing two persons under suspicion for a murder, reached an informal understanding with the prosecutor that one of his clients would not be prosecuted in exchange for his testimony against the other. . . . This agreement effectively placed [counsel] in the position of having to sacrifice one client, [the defendant, in order to protect another client, [the state witness]. Given that [the defendant] was indicted and tried on the strength of [the witness'] testimony, it is impossible to say that an actual conflict of interest was not created.

Adverse affect was established.

First, by negotiating an informal immunity deal for [the witness], [counsel] effectively terminated his opportunity to reach a plea agreement with the State on [the defendant's] behalf. . . . Furthermore, after reaching the understanding with the prosecutor, [counsel], to enforce the agreement, had to advise a key witness to implicate his own client. The informal nature of [the witness'] understanding with the district attorney made the corrosive effect of the conflict upon [counsel's] representation of [the defendant] all the more invidious. Because [counsel] had not obtained in writing the terms of the understanding that [the witness] would not be charged in connection with the murders if he testified . . . , [the witness] had no way to demonstrate that he was immune from subsequent prosecution because he had met his end of the bargain. Instead, [the witness] could only rely on the State's acceptance of his performance as sufficient. That ambiguity would have made [the witness], and . . . his counsel, all the more solicitous of the prosecution's needs and wishes. As a result, [counsel's] pretrial representation of [the defendant] was clearly compromised.

1992: *United States v. Swartz*, 975 F.2d 1042 (4th Cir. 1992). Counsel in bank fraud conspiracy had an actual conflict that adversely affected representation in sentencing where counsel represented defendant and codefendant and counsel objected to a lower sentence for defendant because in

***Capital Case**

counsel's view both were equally culpable. During the investigation, defendant retained counsel. Counsel later agreed to represent the co-defendant as well and a written waiver was signed by both. At the initial appearance and arraignment, the Magistrate Judge conducted an inquiry and determined that the waivers were valid. Defendant then negotiated a plea in which she would cooperate in the prosecution of other coconspirators and would receive a downward departure in sentencing. The codefendant also agreed to plead guilty in exchange for some charges being dropped but his plea did not include a downward departure in sentencing agreement. At the time of the pleas, the District Court was informed that the Magistrate had held a hearing and, thus, did not inquire further into the conflict. Following the pleas, defendant and codefendant testified against another coconspirator. During that trial, defendant became concerned that the codefendant was lying and increasing defendant's involvement. Defendant was concerned that counsel could not properly represent her in sentencing if counsel could not say anything derogatory about the codefendant. Defendant asked counsel to withdraw from codefendant's representation and represent only her. Counsel offered instead to withdraw from her representation and proceed only with codefendant and then counsel assured her that he could proceed with both cases. Later, defendant learned that she would be called as a witness at codefendant's sentencing. She again asked counsel to withdraw from representing the codefendant because of the conflict, but counsel assured her that he could represent both. During codefendant's sentencing, counsel argued that he and the defendant were equally culpable and should be sentenced the same, even though codefendant was higher in the guidelines than defendant even without her downward departure due to cooperation with the government and the evidence was clear that defendant was less culpable than the codefendant. Counsel's strategy, while good for the codefendant, clearly harmed the defendant. Later in the proceeding, defendant was called to testify that codefendant was not coerced, as he had previously testified. The court asked counsel why he persisted in representing both and counsel just assured the court that defendant had waived and the Magistrate Judge had inquired and resolved the issue. Later the same day, defendant was sentenced. Represented by new counsel she then filed a motion for new sentencing due to counsel's conflict. The Fourth Circuit held that counsel had an actual conflict in sentencing when counsel argued in a fashion damaging to the defendant and when the defendant testified. The conflict also adversely affected counsel's representation. Although defendant had previously signed a waiver and the Magistrate Judge inquired, the Fourth Circuit has "recognized that a single waiver pursuant to rule 44(c) may not serve to waive all conflicts of interest that arise throughout the course of that defendant's criminal proceedings. The district court has a continuing obligation under rule 44(c) to guard against conflicts of interest that may worsen as circumstances change during the course of the representation." *Id.* at 1049. Defendant's initial waiver was insufficient to waive the conflict that ultimately developed at sentencing when counsel's argument was directly adverse to defendant.

1990: *Hoffman v. Leeke*, 903 F.2d 280 (4th Cir. 1990). Counsel in accessory to murder case had conflict that adversely affected representation where counsel jointly represented defendant and two codefendants, who plead guilty and testified against defendant. The trial court also failed to conduct an adequate inquiry and should have rejected defendant's purported waiver even if it was valid. Prior to trial, the court inquired of the defendants jointly and individually about the joint representation and counsel informed the court that he saw no conflict. A mistrial was granted shortly

***Capital Case**

after jury selection. Prior to the new trial, a local co-counsel was retained. Each defendant again expressed a desire to continue with the joint representation. After that, both codefendants accepted plea agreements and agreed to testify against defendant. The state repeatedly brought out during the trial that counsel represented the codefendants. A codefendant was the state's primary witness. The co-counsel conducted the cross-examination. The court reached "an inescapable and unavoidable conclusion" of an actual conflict that adversely affected the representation. *Id.* at 286. The conflict was "patent" where defendant "was in the unacceptable position of having his own attorney help the state procure a witness against him." *Id.* The adverse affects were clear in that counsel negotiated a plea agreement for the codefendant that required him to implicate the defendant and did not even inform the defendant that the codefendant would testify against him. Counsel also could not cross-examine the codefendant and attack what amounted to the state's entire case against him. "To cross-examine [the witness] effectively, [counsel] would have had to question his own client's truthfulness. This he could not do." *Id.* Finally, the adverse affect was clear in the prosecutor's repeated references during trial that counsel also represented the codefendants. The adverse affect was not lessened by the fact that it was the unconflicted cocounsel that cross-examined the codefendant. Conflicted counsel was the lead counsel who prepared the case without the cocounsel's preparation. Conflicted counsel also examined 14 of the 17 witnesses during the trial. "Therefore, regardless of the effectiveness of [co-counsel's] efforts at trial, upon which we need not pass judgment, those efforts could not have overcome the presumed prejudice arising from [lead counsel's] actual conflict of interest." *Id.* at 287. In discussing whether defendant had waived the conflict, the court declared that "[n]ot even the proffer of admittedly valid waivers of conflict-free counsel can restrict a trial court's power to insist on separate representation." *Id.* at 288. Even if defendant made a valid waiver, "permitting multiple representation in a case of this type" would be improper. *Id.*

[W]e believe that a member of the public would be shocked to observe a criminal trial in which the same attorney represented both the defendant and the state's star witness, in which the attorney had cut the deal that made that witness available to the state, and in which the prosecutor pointed out the defense attorney's untenable position at every opportunity.

Id. In any event, the court found no valid waiver because "[a] defendant cannot knowingly and intelligently waive what he does not know." *Id.* at 289. Here, no one explained the meaning of a conflict of interest and defendant was not informed that his counsel had advised the codefendant to testify against him. Counsel also insisted that he saw no conflict. "If [counsel] was suffering from such myopia, we cannot insist on greater appreciation of the risk of conflict on the part of a layman whom [counsel] advised." *Id.* When it became obvious that counsel had negotiated a plea bargain for the codefendant that required him to testify, "the judge had a duty to conduct further inquiry and secure a further waiver if [defendant] wished to make one." *Id.*

1987: *Thomas v. Foltz*, 818 F.2d 476 (6th Cir. 1987). Counsel had actual conflict that adversely affected representation in murder case where counsel represented defendant and two-codefendants and negotiated a "package deal" plea for all three to plead to second-degree murder. Counsel's joint

***Capital Case**

representation of defendant and two co-defendants precluded counsel from engaging in separate plea negotiations on defendant's behalf even though he was less culpable than the others because that would have been detrimental to the interests of co-defendants who wished to plead guilty.

1985: **Ruffin v. Kemp*, 767 F.2d 748 (11th Cir. 1985). Counsel had actual conflict that adversely affected representation in murder case where counsel also represented codefendant and attempted to negotiate a plea for him in exchange for testimony against defendant. While the codefendant did not ultimately plead guilty, the court found an actual conflict that adversely affected representation because counsel did not attempt to negotiate a plea for defendant.

**Ford v. Ford*, 749 F.2d 681 (11th Cir. 1985). Counsel had conflict that adversely affected representation in murder case where counsel represented both defendant and his codefendant/brother and defendant plead guilty despite desire to go to trial because state offered only a joint agreement to avoid death penalty and defendant's brother desired to plead guilty and ask for mercy. Because counsel was in a position of divided loyalties and the defendant and codefendant had divergent interests, he could not represent both co-defendants without some conflict arising.

2. U.S. District Court Cases

2015: *United States v. Sain*, ___ F. Supp. 3d ___, 2015 WL 84785 (E.D. Mich. Jan. 7, 2015). Counsel had a conflict of interest that adversely affected his representation due to concurrent representation of the defendant's brother/codefendant. Sain was indicted in June 2007, along with his brother and other codefendants on drug charges. Attorney Short represented Sain and his brother. Subsequently, in December 2007, Sain was indicted for possession with intent to distribute marijuana and other crimes. Short also represented Sain in this case. Counsel was ineffective in failing to research Sain's sentencing exposure and failing to inform Sain of the government's plea offers, which resulted in Sain proceeding to trial and being sentenced to 168 months of imprisonment. The first plea offer would have reduced the sentencing range to 87 to 93 months. The second plea offer would have dismissed one count and reduced the sentencing range to 41 to 51 months. Counsel had a conflict of interest that adversely affected his representation because if he had encouraged Sain to accept the plea offers, Sain would have been required to disclose information that would have been detrimental to his brother, who was also represented at the same time by the same attorney. Counsel conceded that he did not convey the plea offers, in part, because he did not believe that he could encourage Sain to accept a plea offer that would have been detrimental to his other client.

1999: *Trejo v. United States*, 66 F. Supp.2d 1274 (S.D. Fla. 1999). Counsel had actual conflicts that adversely affected representation. Five codefendants signed agreement with government for joint cooperation where the defendants understood that cooperation by one would inure to the benefit of all. Ultimately, one codefendant got a downward departure but the three involved here did not. The court, although finding the government's actions shaky, found that the agreement did not prohibit this and that defense counsel should have ensured that their understanding of the agreement was included in the signed document. In a 2255 proceeding, the court learned that initially all

***Capital Case**

codefendants were cooperating. The three codefendants had counsel, who shared office space, and “stood in” for each other at various proceedings representing multiple defendants. One of the lawyers essentially abandoned his client without notice to him. The remaining two lawyers assured the defendants that the cooperation agreement was a “group agreement” that would benefit all, that the agreement would not be included in the plea agreement but was clear with the government, and that they would receive sentences of only 5-10 years, which did not happen. Counsel’s conduct was deficient in failing to include their understanding of the plea agreement in the actual agreement and the defendants would not have plead guilty if the government refused this agreement. Counsel’s failures were due to severe conflicts of interest. “The clients’ concept of cooperation as ‘one for all and all for one’ appears to have spilled over to their attorneys’ concept of representation. Examples of this haphazard ‘group representation’ abound in the record.” *Id.* at 1286. Counsel were meeting with other codefendants. In meetings with the government, at times, some counsel and some defendants were missing. One counsel withdrew from representation without his client or the court knowing because of the “musical chairs” method of representation. *Id.* As a result, the “taint” of conflict spread to all three defendants. *Id.* at 1287. Guilty pleas set aside.

3. Military Cases

1987: *United States v. Newak*, 24 M.J. 238, *amended*, 25 M.J. 164 (1987). Counsel had actual conflict that adversely affected representation in conduct unbecoming an officer case where counsel represented both the accused and the enlisted woman with whom she allegedly had homosexual relations and counsel negotiated a plea on behalf of the enlisted woman that required her testimony against the accused.

4. State Cases

2015: *Ervin v. State*, ___ So. 3d ___, 2015 WL 1122662 (Ala. Crim. App. Mar. 13, 2015). Counsel had an actual conflict of interest in negotiating a guilty plea to third-degree robbery and an unrelated drug distribution, because counsel simultaneously represented the co-defendant, who had given a statement implicating the defendant, on the robbery charge. Counsel did not inform the defendant of his simultaneous representation or the potential conflicts. While the lower court granted relief as to the robbery charge, the court denied relief on the drug charge. The appeal related only to the drug charge. Even though counsel did not have a conflict on the drug charge, the charges were resolved together in a negotiated plea. The effect of the conflict, thus, extended to the entire guilty-plea proceeding.

2010: *Mitchell v. Commonwealth*, 323 S.W.3d 755 (Ky. Ct. App. 2010). Counsel (two public defenders from the same office) had actual conflict of interest in representing father and son co-defendants where son confessed and negotiated a plea, agreeing to testify against his father, who maintained innocence. Although both defendants signed purported waivers, the waivers were invalid as the trial court had failed to advise the defendants of the dangers and consequences of dual representation as required by state rules.

***Capital Case**

- 2008:** *Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008). Counsel in drug case plea had an actual conflict of interest due to counsel's simultaneous representation and plea of the petitioner's husband on related offenses arising from the same facts. In essence, the defendant was initially arrested for distribution to an undercover officer and had three subsequent similar distributions. Her husband's charges arose from removing the drugs and money from their home after her initial arrest and prior to execution of a search warrant for their home. Nonetheless, counsel spent more time preparing the husband's case, even though the Petitioner was charged with the majority of the offenses and faced a more severe sentence. Counsel also advised the husband of the conflict, but could not recall whether she advised Petitioner. Counsel also argued for leniency, specifically arguing his limited involvement as compared to the petitioner, and then argued reconsideration of sentencing for the husband, but did not argue for leniency or reconsideration for the defendant. The husband was sentenced to three years, while the petitioner was given concurrent sentences of ranging between 5 and 25 years. Counsel's actual conflict was also clear in that the petitioner pleaded guilty to the majority of the drug charges while the husband plead guilty to a single count because counsel was able to convince the prosecutor to dismiss additional charges for him, which "essentially pitted Husband against Petitioner, which was clearly detrimental to Petitioner's interests."
- 2001:** *Thomas v. State*, 346 S.C. 140, 551 S.E.2d 254 (2001). Counsel in drug case had actual conflict where counsel represented husband and wife charged with drug charges. Counsel initially informed defendant about dangers of joint representation and received a waiver. Later, however, the prosecutor offered deal to allow both to plead to lesser offenses for an eight year sentence or to allow one to plead guilty to all and receive the maximum sentence while the other had charges dismissed. The defendant plead guilty and received the maximum sentence and charges against her husband were dismissed. Counsel acted on his divided loyalty by failing to advise the defendant, whom he believed to be the less culpable of the two, that she had nothing to lose by proceeding to trial since she was receiving the maximum punishment in the plea agreement. "Although petitioner initially waived a conflict of interest, once it became clear an actual conflict existed due to the plea bargain, counsel should have either withdrawn from representing one or both of them or acquired another waiver covering this specific conflict. To be valid, a waiver of a conflict of interest must not only be voluntary, it must be done knowingly and intelligently." 346 S.C. at 144, 551 S.E.2d at 256.
- 2000:** *Ellis v. State*, 534 S.E.2d 414 (Ga. 2000). Defense counsel had actual conflict of interest that adversely affected her representation of robbery defendant. Three defendants were charged. There was a positive identification of one. The non-identified codefendant retained counsel and asked her to also represent the defendant. Both initially claimed mere presence and that they remained in the car while the identified codefendant and two other men committed the robbery. A month before trial, the defendant told counsel that he had been shown a weapon and asked to participate but he declined showing prior knowledge of the planned robbery. Following that counsel told both clients that if they went to trial they would need different lawyers and arranged two other lawyers for them. Counsel continued, however, to advise the two clients about possible pleas. On her advice, the defendant entered an *Alford* plea. He subsequently filed a motion to withdraw the plea due to the conflict of interest. The court held that counsel had an actual conflict because she continued to

***Capital Case**

represent both defendants even though they had different versions of their innocence defense. The conflict had an adverse affect because counsel did not pursue a possible plea agreement for the defendant to testify against his codefendant where the state's evidence was weak.

1998: **Sheridan v. State*, 959 S.W.2d 29 (Ark. 1998). Counsel in capital trial had actual conflict of interest that adversely affected representation due to counsel's simultaneous representation of defendant and his codefendant/brother. Both defendants were charged with murder. Prior to trial, represented by counsel who negotiated the plea, the codefendant agreed to plead guilty to hindering apprehension and to testify against codefendant. Following the defendant's trial, the state dismissed the charges against the codefendant. The defense at trial was self-defense. Defendant alleged that he intended to scare the victim and she pulled knife out threatening him. The codefendant testified that the victim had informed the police that the defendant was dealing drugs and the defendant took her out to a cemetery presumably to scare her. The codefendant left for a few minutes and returned to find the defendant with blood on him. Counsel asserted strategy because the codefendant would testify anyway and he utilized the codefendant to corroborate defendant's account of events, but admitted that he "relaxed" his cross-examination of the codefendant for fear that it might backfire. Court found that the codefendant's testimony was not helpful. While he corroborated some of the defendant's testimony, he also described the defendant as cool and methodical following the killing, described the defendant's activities in attempting to cover for the killing, and the defendant's threats to kill another witness. Court also found that codefendant's testify was not inevitable because with different counsel he may have invoked right to remain silent, which would have resulted in a much weaker case for the state. Counsel's representation was adversely affected because counsel did not elicit the fact that the codefendant had been initially charged with capital murder and had pled guilty to a much lesser charge in exchange for his testimony. Counsel also did not point out that the codefendant had not been sentenced for the hindering-apprehension charge and had the potential to avoid serving time in prison if his testimony met with the approval of the State. He also did not explore why the codefendant was testifying against his brother and the fact that the victim's sister and the codefendant were romantically involved. Counsel even admitted that he had treated the codefendant carefully during cross-examination.

Garcia v. State, 979 S.W.2d 809 (Tex. App. 1998). Counsel in drug case had an actual conflict that adversely affected representation due to simultaneous representation of defendant and codefendant. Defendant plead nolo contendere to drug distribution and was placed on deferred adjudication. Following a subsequent arrest, defendant moved to set aside the plea due to counsel's conflict of interest in representing her and her boss. Counsel was informed by the state that if the defendant did not plead both would be tried, but if the defendant entered a plea the charges against her boss would be dismissed. Counsel informed the defendant that if she did not plead her boss would lose his liquor license, with the implication being that she would lose her job. Counsel admitted that his primary interest was in getting the charges dismissed for the boss/codefendant. Prejudice presumed.

1997: *Netters v. State*, 957 S.W.2d 844 (Tenn. Crim. App. 1997). Counsel had conflict of interest that adversely affected representation. Defendant and codefendant were charged with two counts of

***Capital Case**

attempted murder and aggravated burglary. Both were assigned public defenders from the same office. The defendant wanted to go to trial. The codefendant wanted to plead. Several days before trial, the codefendant's attorney, without defendant's counsel being present (and possibly without his knowledge), informed the defendant that if he did not plead his codefendant would be forced to go to trial. He advised the defendant to plead guilty to lesser charges and the defendant gave in and entered a plea. His own counsel was not in the courtroom during the beginning of the plea. He entered in the middle and took issue with defendant's statements that he had not properly represented him, but the defendant continued with an *Alford* plea. The defendant got eight years and his codefendant got three. Court found that the public defender's office was viewed as a whole and the office had a conflict regardless of the appointment of two separate attorneys. The proper focus is solely upon whether counsel's conflict affected counsel's actions and the defendant's decision; therefore, it is inappropriate to consider whether another attorney, untainted by a conflict of interest, would also have recommended a guilty plea. *Id.* at 848. In this case, counsel's representation was adversely affected where he negotiated a joint plea, despite the defendant's expressed desires to go to trial. Prejudice presumed.

- 1995:** *Edgemon v. State*, 318 S.C. 3, 455 S.E.2d 500 (1995). Counsel in burglary case had actual conflict that adversely affected representation where counsel represented defendant and two co-defendants. Initially, the state was negotiating with both codefendants to plead guilty and testify against the defendant. One of the codefendants entered an agreement to testify against defendant in exchange for Pretrial Intervention (ultimate dismissal of charges possible). Defendant ultimately plead guilty. Counsel testified in post-conviction that he did not negotiate the codefendants' deals but did emphasize to the prosecutor that the codefendants were less culpable than the defendant. Counsel should have withdrawn from the joint representation.
- 1994:** *State v. Dadas*, 526 N.W.2d 818 (Wis. Ct. App. 1994). Trial court erred in failing to inquire into conflict. Defendant and codefendant charged with commercial gambling. Counsel initially advised both of a potential conflict, which they purportedly waived. After consulting with the government, counsel advised both that if they cooperated with authorities, no prison time would be sought. Each gave statements incriminating themselves and the other. Counsel then entered plea negotiations that would allow jail time with more time for defendant. Defendant plead no contest pursuant to the agreement. The trial court never conducted an inquiry as required by state law into the potential conflict, although the court knew about the dual representation. The appellate court declined automatic reversal and held that when the trial court failed to inquire the appellate court would conduct *de novo* review to determine whether an actual conflict existed. Appellate court found actual conflict because counsel advised codefendant to cooperate with law enforcement and provide incriminating information against defendant. This information could serve as a basis for additional criminal charges, either federal or state, against defendant and could affect sentencing in which the information was also used. New sentencing granted.

***Capital Case**

1993: *State v. Padilla*, 859 P.2d 191 (Ariz. Ct. App. 1993). Counsel in drug case had actual conflict that adversely affected representation where counsel represented the defendant and his codefendant/wife. Defendant was arrested after making a sale to an informant. His family members were separately charged in “companion cases.” Counsel was retained to represent defendant, defendant's wife, his brother, and his sister-in-law at a package rate on all the drug charges stemming from the same investigation and involving the same informant. The defendant entered an *Alford* plea pursuant to a plea agreement. Although counsel did not attempt to plea bargain in exchange for the defendant's testimony against other family members, no adverse affect found because defendant testified in post-trial hearing that he would have rejected such a deal. Adverse affect was found in sentencing, however, because an unconflicted counsel would have asserted defendant's reduced culpability in the family enterprise as compared to his brother. More importantly, counsel acted adversely to defendant when he indirectly shifted the blame to defendant from his wife at her sentencing hearing immediately before defendant's sentencing. Seeking leniency for the wife, counsel implied – before the same judge that sentenced defendant – that defendant had led his wife astray. This implicit advocacy against the defendant amounted to ineffective assistance and adversely affected representation. Remanded for new sentencing.

1992: *Littlejohn v. State*, 593 So. 2d 20 (Miss. 1992). Counsel in drug conspiracy case had actual conflict that adversely affected representation where counsel simultaneously represented the government's primary witness for same offense. Following arrest, defendant retained counsel. The retainer agreement noted a potential conflict with witness. Counsel then represented witness in entering a plea to drug conspiracy charges in exchange for a reduced sentence and testimony “in a subsequent proceeding.” During trial, three codefendants, who had entered pleas, and witness testified against defendant. The testimony revealed that, although the witness had been separately indicted, he was part of the same conspiracy with the defendant and her codefendants. In cross-examining the codefendants, counsel established that they had plead guilty in exchange for their testimony. Counsel did not ask that question of the witness, however. And, although counsel objected, the state brought out that counsel had represented the witness in his plea. The Mississippi Supreme Court's analysis begins with the brilliant observation that “[u]nder our system of jurisprudence, if a lawyer is not one hundred percent loyal to his client, he flunks.” *Id.* at 23. When dealing with actual conflicts of interest in representation of codefendants,

Competency of defense counsel is not then the issue; loyalty of counsel is. And when the reviewing court concludes that the defense lawyer in fact had “an actual conflict of interest,” it does not “indulge in nice calculations as to the amount of prejudice attributable to the conflict. The conflict itself demonstrates a denial of the right to have the effective assistance of counsel.”

Id. The court notes that the witness waived grand jury proceedings and was charged and plead guilty on the same day. “This would not have occurred in the absence of preceding serious, meaningful negotiation and a clear and distinct understanding between the prosecution and defense counsel.” *Id.* And, the court notes that when the witness plead guilty the others had not even been indicted yet.

***Capital Case**

In its analysis, the court discusses the prosecution's duty to inform the court of conflicts and not to proceed without doing so when the prosecution knows of a conflict.

Austin v. State, 609 A.2d 728 (Md. 1992). Counsel had actual conflict in drug case that adversely affected representation where two partners represented defendant and codefendant that testified against him. Defendant was indicted with six codefendants. Defendant retained counsel. A codefendant retained same counsel. Initially they were represented by same counsel and then later a partner in the same firm took over representation of the codefendant. At a pretrial hearing, the court inquired about status of each of the cases without the presence of the other codefendants and counsel. The codefendant indicated she had agreed to plead guilty in exchange for her testimony against the defendant. The trial court noted a potential conflict and instructed codefendant's counsel not to inform defendant's counsel, his partner, that the codefendant had agreed to plead guilty and would be testifying against defendant. Defendant proceeded to trial. Counsel objected to the gag order against his partner and requested a transcript of the hearing held concerning the codefendant's status. The prosecutor informed the court (different judge) that the prior actions were necessary due to counsel's conflict and that the prior judge had not conducted a hearing on the conflict. The court did not inquire but sent the case back to the initial judge, who refused to lift the gag order. The case then proceeded to trial. The codefendant testified against defendant. At defendant's sentencing, counsel indicated that he had talked to the codefendant a number of times during his representation of her prior to her plea agreement and that she had never implicated the defendant. The appellate court held that "the presence or absence of an actual conflict of interest should be resolved by the same principles, regardless of whether the codefendants are represented by the same attorney or by law partners." *Id.* at 731-32. Actual conflict clear here where counsel represented defendant and codefendant/witness in the same proceeding. Adverse affect found where counsel stated in sentencing that the codefendant/witness had made numerous statements to him that did not implicate the defendant, but counsel made no attempt at trial to cross-examine the codefendant concerning these prior statements. The court declines to determine whether this would be sufficient for reversal though because the court found that the trial court's gag order that in effect reduced defendant's defense team clearly adversely affected representation. The trial court should have instead made a determination of whether the defendant was willing to waive the conflict. The court also declined to hold that the question could only be resolved in post-conviction proceedings because it was the trial court's actions that created the adverse affect here.

1989: *Tarwater v. State*, 383 S.E.2d 883 (Ga. 1989). Counsel in murder case had actual conflict that adversely affected representation where counsel represented all three defendants in pleas where "plea bargain required that unless all three plead guilty, none could." *Id.* at 884. Actual conflict found because counsel not bargain for defendant without jeopardizing the bargains for the codefendants. *Per se* adverse affect found "when counsel representing multiple defendants negotiates a plea bargain conditioned upon more than one pleading guilty." *Id.* at 885.

1988: *Ingle v. State*, 742 S.W.2d 939 (Ark. 1988). Counsel in drug case had actual conflict that adversely affected representation where counsel represented both defendant and codefendant in plea

***Capital Case**

negotiations. Initially, defendant and codefendant had the same charges and counsel attempted to negotiate an equal deal. After the defendant was charged with additional offenses, however, counsel argued in negotiating for the codefendant that defendant was more culpable even on the initial charges. The court observed that “[w]hen a substantial disparity of evidence or of charges exists, it is unusual if an actual conflict does not also exist.” *Id.* at 941. Here, an actual conflict was apparent because counsel was “was playing one client against the other.” *Id.* Counsel’s representation was adversely affected because he virtually abandoned defendant in order to get a better offer for codefendant.

1988: *Williams v. State*, 529 N.E.2d 1313 (Ind. Ct. App. 1988). Counsel in robbery case had actual conflict that adversely affected representation where counsel represented both defendant and codefendant. Prior to trial, counsel negotiated a plea to a lesser charge for codefendant. During the plea hearing codefendant provided factual statements implicating defendant. Defendant then proceeded to a bench trial before the same judge who took codefendant’s plea. In sentencing, counsel argued for leniency for codefendant his participation was minimal and defendant had greater culpability.

Commonwealth v. Green, 550 A.2d 1011 (Pa. Super. Ct.1988). Counsel had actual conflict that adversely affected representation in burglary case where defendant’s counsel and codefendant, who pled guilty and testified against defendant, were members of the same public defender office. Defendant denied knowledge of burglary, but codefendant testified that defendant was involved. Defendant asserted a conflict of interest and the trial court properly granted defendant a new trial.

1984: *People v. Simmons*, 352 N.W.2d 275 (Mich. Ct. App. 1984). Counsel had conflict that adversely affected representation in manslaughter case where counsel simultaneously represented defendant and codefendant in sentencing. Conflict developed when counsel in order to arguing for more lenient sentence for defendant would have had to emphasize codefendant’s greater degree of culpability. Remanded for resentencing of defendant.

1982: *State v. Ross*, 410 So.2d 1388 (La. 1982). Counsel had a conflict that adversely affected representation where counsel represented defendant and codefendant and negotiated a plea for codefendant to testify against defendant. During trial, the codefendant testified that it was defendant who had initiated the armed robbery, struck the victim, and robbed the cash register. Defense counsel did not extensively cross-examine codefendant, who was sentenced to five years for his participation in the robbery, while defendant was sentenced to hard labor for a period of thirty-five years without benefit of probation, parole, or suspension of sentence.

1980: **Foster v. State*, 387 So. 2d 344 (Fla. 1980). Counsel had a conflict of interest due to counsel’s simultaneous representation of a co-defendant who testified against the defendant during trial. Counsel elicited her testimony that she had charges pending and that he represented her and at the end of her testimony the state dismissed the charges against her.

***Capital Case**

C. Simultaneous Representation of Codefendants in Severed Trials

1. U.S. Supreme Court Cases

1980: *Cuyler v. Sullivan*, 446 U.S. 335 (1980). Court held that in multiple representation cases where there is no objection at trial, the defendant must demonstrate that an actual conflict of interest adversely affected counsel's performance in order to get relief under the Sixth Amendment. Two retained counsel represented three co-defendants in murder case. The defendants were tried separately. Sullivan was tried first and convicted. The state's case was entirely circumstantial and the defense presented no evidence. None of the defendants objected to multiple representation. The Court held that nothing in the Sixth Amendment requires state courts to initiate inquiries into multiple representation "[a]bsent special circumstances." *Id.* at 346. "Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry." *Id.* at 347. In this case, there was no objection to the multiple representation and the risk of conflict was reduced by the provision of separate trials. Likewise, the court of appeals found that the decision to rest with no defense evidence was on its face a reasonable tactical response to the weakness of the state's circumstantial evidence. *Id.* at 347. Thus, the trial court did not have an affirmative duty to inquire into the propriety of multiple representation. *Id.* at 348. Likewise, the Court held, "In order 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." *Id.* at 348. Once the defendant shows that the conflict "actually affected the adequacy" of representation, there is no requirement that the defendant "demonstrate prejudice." *Id.* at 349. The Court remanded this case to the court of appeals to apply these standards in Sullivan's case.

****Burger v. Kemp***, 483 U.S. 776 (1987). Counsel in murder case did not have an actual conflict that adversely affected representation due to his partner's representation of codefendant in severed trial. Petitioner was charged along with codefendant in murder. Both defendants confessed. They were tried separately. During defendant's trial, his codefendant's statement was not offered and the codefendant did not testify. Following defendant's trial, while still representing defendant on appeal, counsel assisted his partner in representing the codefendant at his trial and on appeal. The court found no "active representation of competing interests" and that the joint efforts may have actually benefitted the defendant. *Id.* at 784. "Moreover, we generally presume that the lawyer is fully conscious of the overarching duty of complete loyalty to his or her client." *Id.* While counsel did not assert defendant's lesser culpability on appeal when he was also representing the codefendant, this was a proper strategic decision.

As we reaffirmed in *Smith v. Murray*, 477 U.S. 527, 536, 106 S.Ct. 2661, 2667, 91 L.Ed.2d 434 (1986), the "process of 'winnowing out weaker claims on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy. *Jones v. Barnes*, 463 U.S. 745, 751-752, 103 S.Ct. 3308, 3312-3313, 77 L.Ed.2d 987 (1983).

***Capital Case**

Id. In addition, in order to show an actual conflict, petitioner must show that counsel's motive for not raising the issue was his partner's representation of the codefendant or his involvement in that case. The court also found that even if counsel had an actual conflict, it did not affect counsel's advocacy. Counsel attempted to plea bargain but was rebuffed by state. Counsel also was not prohibited from arguing petitioner's lesser culpability because he was tried separately from the codefendant.

2. U.S. Court of Appeals Cases

2004: *McFarland v. Yukins*. 356 F.3d 688 (6th Cir. 2004). Drug conviction reversed due to the trial court's failure to adequately inquire into counsel's conflict, counsel's actual conflict of interest that adversely effected his performance, and trial counsel's ineffectiveness in failing to present an adequate defense. The petitioner and her daughter were charged as co-defendants where drugs were found during a search of the home they shared. Both the defendant and her daughter were represented by the same retained attorney. On the day of the scheduled bench trial, counsel informed the court that the defendant and co-defendant had concerns about sharing the same attorney and that the evidence might well raise antagonistic defenses. The petitioner also informed the court that she believed she needed a separate attorney and that she had attempted to hire a different attorney but could not afford one. Rather than appoint a second attorney, the court severed the cases and ordered that they be tried in front of different judges. The trials proceeded at pretty much the same time. In the co-defendant's trial, the state presented evidence that the bedroom where most of the drugs were found belonged to the co-defendant. A caller to the crack hotline also made complaints about a woman with the co-defendant's name. A confidential informant also identified the co-defendant as the person discussing drugs. During the petitioner's trial, the state did not present any evidence that the co-defendant lived in the house or in the bedroom where most of the drugs were found and did not present any evidence that the crack hotline telephone complaints and the confidential informant had both identified the co-defendant. Defense counsel did not bring any of this information out in cross-examination or present any evidence on its own. In closing argument, the defense argued only that the drugs belonged to one of two men that were also initially suspected. One of the men was present at the time of the search, but did not have a key to the locked bedroom where most of the drugs were found. The other man was not present at the time of the search and was connected to the house only by some paperwork identifying him as the co-defendant's husband. Both the defendant and co-defendant were convicted. They were represented on appeal by a different attorney but still had the same attorney between them. Appellate counsel did not raise any issue concerning ineffective assistance of counsel or a conflict of interest. In state post-conviction, the petitioner asserted ineffectiveness of trial counsel and of appellate counsel for failing to argue that trial counsel was ineffective but the state court denied on procedural grounds that the petitioner did not show good cause for a failure to assert the issue on direct appeal as required in state court. The court first found that the petitioner was entitled to relief under *Holloway v. Arkansas* because the petitioner objected to the joint representation and the trial court did not adequately resolve the issue. Independent of the trial court's failure to inquire, reversal was also required because counsel had an actual conflict of interest that adversely affected representation. The petitioner's best defense would

***Capital Case**

have been to contend that the drugs belonged to the co-defendant and there was strong evidence indicating that the co-defendant and not the petitioner actually controlled the drugs. During petitioner's trial, however, counsel not only failed to argue that the co-defendant was guilty, but he affirmatively argued that she was innocent and seemed to concede that the co-defendant's room was actually the petitioner's room and that the petitioner was the person identified by the confidential informant, which was not the case. While attempting to present a common defense, counsel took on a heavier burden than would have been necessary in defending the petitioner alone because, while it was plausible that one woman in the house was innocent of involvement with the drugs, it was far less plausible that both were. Nonetheless, counsel failed to even present any evidence that the co-defendant lived in the home. Instead of this obvious defense, counsel chose to point the finger at two other men because his duty of loyalty to the co-defendant would have been breached had he actively pursued a theory that she was guilty of the charges while he was currently representing her in a trial on those same charges. Here, where counsel chose to forego an obvious and strong defense to avoid inculcating another client, the court found that counsel labored under an actual conflict of interest establishing a Sixth Amendment violation under *Cuyler v. Sullivan*. The court also found that counsel was ineffective under the standard of *Strickland v. Washington* because counsel failed to present a strong argument in petitioner's case that the co-defendant actually possessed the drugs. The court found that, with respect to all three of these arguments, the petitioner would have won on direct appeal had appellate counsel adequately raised the issues. Appellate counsel was ineffective in failing to assert these issues, which were clearly stronger than the arguments made by counsel on direct appeal. The conflict issue was an obvious one, and the petitioner was entitled to automatic reversal under the rule in *Holloway*. Because appellate counsel also represented the co-defendant, however, appellate counsel also had a conflict of interest. The court found that appellate counsel's ineffectiveness was the cause for petitioner's failure to assert ineffectiveness of trial counsel on appeal. Thus, the petitioner had established cause and prejudice for failing to assert these issues on appeal. Because the state court never ruled on the actual conflict of interest and the ineffective assistance claim under *Strickland*, the court reviewed these claims *de novo*. The only state court decision on the *Holloway* claim was the trial court's decision. Under the AEDPA, the court found that the trial court's actions contradicted the clearly established precedent of *Holloway v. Arkansas* because the state court confronted a set of facts that were materially indistinguishable from *Holloway* and yet arrived at a different result.

1994: *United States v. Levy*, 25 F.3d 146 (2nd Cir. 1994). Counsel had actual conflict of interests that adversely affected representation in drug conspiracy case. Counsel had previously represented the defendant. After arrest warrants were issued for the defendant and his nephew, counsel informed the government that he represented both defendants, although the defendant was out of the country. During plea negotiations on the nephew's behalf, counsel and the defendant made statements incriminating the defendant. After the nephew rejected plea negotiations, he was inadvertently released from custody and fled the country. The government believed counsel was involved in this flight. When the defendant was arrested and brought back to the country, counsel continued representation of both. While the government never formally moved to disqualify counsel, the prosecutors did repeatedly alert the trial court of (1) counsel's joint representation; (2) counsel's

***Capital Case**

status as a defendant awaiting his own sentencing in the same district on an unrelated criminal charge; (3) counsel's status as the object of a grand jury investigation into the nephew's flight; and (4) counsel's status as a possible witness concerning statements made by the defendant during the plea negotiations on behalf of the nephew. The District Court inquired but accepted counsel's distortions of the truth and false statements. "[T]he very nature of[counsel's] predicaments strongly indicates that he labored under actual and not merely potential, conflicts of interest." He had "continuing legal and ethical obligations to protect" the nephew, whose interests diverged from the defendant, whose most likely defense was to blame the nephew who had been directly involved in controlled buys by a confidential informant when the defendant was not even in the country. Counsel also had a personal interest to avoid being called as a witness since he would likely have to cease representing the defendant. Likewise, counsel's own charges presented a conflict because counsel may have believed he should temper his defense for the defendant here in order to curry favor with the prosecution in his own case. Finally, counsel obviously had a strong personal interest in avoiding any exploration of the nephew's flight from the country as counsel could be incriminated. Counsel's representation was adversely affected as counsel did not pursue a plausible defense strategy of trying to pin greater blame on the nephew because counsel had obligations to him and also did not want to expose counsel to prosecution for his role in the flight. Because the trial court had not obtained a knowing waiver from the defendant, reversal was required.

- 1986: *Nealy v. Cabana*, 782 F.2d 1362 (5th Cir. 1986).** Counsel had actual conflict that adversely affected representation in robbery case where counsel simultaneously represented a codefendant in severed trials. During trial, the state presented evidence that the codefendant made statements to police that incriminated defendant. The codefendant denied making these statements but was not called to testify because of counsel's concern that codefendant would be harmed in his upcoming trial. While the state argued that the codefendant's testimony would have incriminated the defendant and no counsel would have called him to testify, the court held that whether the codefendant's testimony would or would not ultimately have incriminated defendant or not was not the issue. The issue was that counsel was unable to decide whether to call the codefendant to testify unfettered by the conflict.
- 1983: *Sullivan v. Cuyler*, 723 F.2d 1077 (3d Cir. 1983) (affirming 553 F. Supp. 1236 (E.D. Pa. 1982)).** Counsel had conflict that adversely affected representation in murder case where counsel represented defendant and codefendant in severed trials. Defendant proved that the joint representation generated a conflict that adversely affected his representation, in that his attorneys decided not to call co-defendant to testify on a crucial matter because co-defendant was awaiting trial for the same murders.

3. Military Cases

- 1999: *United States v. Henry*, 50 M.J. 647 (N.M. Ct. Crim. App. 1999).** Actual conflict of interest existed which adversely impacted accused as result of accused's representation on conspiracy charge by assistant defense counsel who had previously represented four other alleged co-conspirators. Some of the representations were in unrelated courts-martials. One, who testified in appellant's trial, was

***Capital Case**

in an administrative discharge proceeding possibly related to this case. One was in a court-martial on these same charges. Counsel did not disclose the conflicts to the client and left discussions and advice to a junior counsel with little experience, but the junior counsel was not even aware of all of the conflicts. Although the accused decided to plead guilty, he was adversely affected by the conflict because he was not fully informed of the conflict and the potential impact of that conflict on his detailed assistant defense counsel. The accused did not make a knowing waiver. He did not even know of the conflicts until after he plead guilty and then he was not allowed the opportunity to talk to independent counsel and the judge informed him of the apparent conflict, but did not inform him of the exact nature or possible impact of the conflicts. Finally, the court held that the “burden to show the non-existence of an adverse impact lies with the Government.” *Id.* at 653. Here, “[a]lthough appellant need not show any adverse impact, a review of the record shows that it existed, *id.* at 654, because conflicted counsel limited his own representation by limiting contact with the accused and leaving that to less experienced counsel. Counsel also recognized that if the case was contested, he would be limited in his participation because conflict issues would arise. Thus, “[h]e had at least an arguable interest in getting appellant to plead guilty to avoid the conflict of interest appearing on the record.” *Id.* at 654.

4. State Cases

- 2007:** *Staggs v. State*, 372 S.C. 549, 643 S.E.2d 690 (2007). Counsel in murder case had an actual conflict that adversely affected his performance at trial where counsel also simultaneously represented the defendant’s father, mother, and brother who were charged as accessories after the fact. The defendant did not testify at trial based on trial counsel’s advice to him that he wanted to preserve the right to the final closing argument. Counsel had told the defendant’s father and sister-in-law, however, that he would not allow the defendant to testify and they should encourage him not to because his testimony could harm his family members’ cases.
- 1988:** *State v. Livingston*, 366 S.E.2d 654 (W. Va. 1988). Trial court erred in failing to appoint separate counsel for defendant and her husband in breaking and entering case where their interests clearly conflicted since the only evidence of husband’s guilt was the defendant’s statement. The same counsel was appointed to represent them and their cases were severed. Defendant was convicted and the charges were then dismissed against the husband.
- 1987:** *Dowell v. Commonwealth*, 351 S.E.2d 915 (Va. Ct. App. 1987). Trial court failed to adequately inquire in grand larceny case where counsel represented defendant and two co-defendants called as witnesses to testify against her. Counsel objected to the state calling the two witnesses whom he also represented in connection with this same offense. Conviction vacated and proceeding remanded for the trial court to decide whether the defendant validly waived her right to independent counsel. If not, then a new trial would be required.

D. Simultaneous Representation of Codefendants in Post-Trial Proceedings

***Capital Case**

1. U.S. Court of Appeals Cases

2001: *Reynolds v. Chapman*, 253 F.3d 1337 (11th Cir. 2001). Counsel in rape and kidnapping case had an actual conflict that adversely affected post-trial representation. Defendant and two codefendants were all represented by the same public defender's office. Another codefendant retained private counsel. The codefendants represented by the public defender office negotiated pleas, but the defendant rejected any possible plea agreement and went to trial along with the codefendant that was represented by private counsel. The codefendants that pled out did not testify. During the trial, counsel argued that the codefendant also on trial was more culpable. Both defendants were convicted. Following the trial and sentencing, private counsel for the codefendant withdrew and counsel was also appointed to represent him in his motion for new trial. Counsel ultimately filed the same motion for new trial on behalf of both the defendant and his codefendant. The defendant was not aware of any of the potential conflicts at the time. The court held that the public defender office's concurrent representation (in rape and kidnapping trial) of defendant and two codefendants was only a potential conflict that did not have adverse affect on counsel. With respect to the post-trial representation, however, the court observed that counsel "was in the untenable position of advancing arguments urging that two defendants be granted a new trial after each of those defendants had spent the entire trial attempting to foist blame on the other." *Id.* at 1345. Counsel made arguments about the lack of evidence against the defendant but did not argue the relative strength of the evidence, which pointed primarily to the codefendant. Counsel also did not argue that the defendant was unduly prejudiced by the codefendant's false testimony supported by his mother, who was held in contempt for giving false testimony. Reversal required under *Cuyler v. Sullivan* to allow new post-trial proceedings.

2. State Cases

1984: **Dougan v. Wainwright*, 448 So. 2d 1005 (Fla. 1984) (direct appeal in 1981). Appellate counsel failed to provide effective assistance due both to a conflict of interest and to the failure to raise meritorious legal claims. Trial counsel represented the defendant and two co-defendants on appeal and filed a combined appeal for the defendant and one co-defendant, whose case was previously reversed due to ineffective assistance of counsel. *Barclay v. Wainwright*, 444 So.2d 956 (Fla.1984). Counsel was ineffective and had a conflict of interest in this case for the same reasons.

**Barclay v. Wainwright*, 444 So. 2d 956 (Fla. 1984). Appellate counsel failed to provide effective assistance due both to a conflict of interest and to the failure to raise meritorious legal claims. Counsel represented the defendant (for whom the jury recommended life) and a codefendant (for whom the jury recommended death) but "made absolutely no attempt to draw our attention to this difference or to emphasize the rationality of the jury's differentiation." In addition, counsel had represented the codefendant at trial, was paid to do the appeal for both clients by the codefendant's father, and he approached the defendant about representing him rather than the other way around. In addition, during the representation, counsel divorced his wife and married the co-defendant's sister. Aside from the conflicts, counsel only argued seven of 27 issues asserted in the brief.

***Capital Case**

“[O]ther than the several points arguing the constitutionality of the death penalty, the points which contain discussion deal only with [the co-defendant]. Other than on the title page, [the defendant’s] name does not appear in this brief.” Likewise, the brief did not argue against aggravating circumstances or assert mitigating circumstances and “the most recent case cited in the original brief is *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).”

E. Simultaneous Representation of Government Witness in Related Case

1. U.S. Court of Appeals Cases

2000: **Perillo v. Johnson*, 205 F.3d 775 (5th Cir. 2000). Counsel in capital trial had actual conflict of interest that adversely affected defendant’s representation due to prior and concurrent representation of the state’s star witness. Defendant initially indicted for murder along with two codefendants. She was tried, sentenced to death, and then had the case reversed. The first codefendant ultimately had the murder charges dropped and proceeded to trial on two aggravated robbery charges represented by counsel, who argued that all of the blame should be placed on the defendant and the other codefendant. The codefendant was convicted but sentenced to only five years probation. Following the trial, counsel remained close to the codefendant and even flew from Texas to California to serve in her wedding by giving the bride away. When the second codefendant was tried, counsel was instrumental in putting the first codefendant in touch with the victim’s family and obtaining her immunized testimony against the second defendant. The immunity negotiated for the codefendant would not, however, have protected her from perjury charges if her testimony was later proven false. The testimony against the second codefendant ensured death for him but also was more damaging for the defendant than any prior statement and painted her as the most culpable. Counsel represented the first codefendant during the second codefendant’s trial and she stayed in counsel’s one-bedroom apartment for 7-10 days during that proceeding. Ultimately, the defendant’s retrial was scheduled and counsel was appointed to represent her. The defendant was not made aware of any of the above information other than the fact that counsel represented the codefendant in her trial and secured a favorable sentence for her. When the trial court issued a subpoena for the first codefendant (living in California) to testify, she indicated a desire to quash the subpoena. Counsel flew to California to represent her in that proceeding. Counsel also represented the first codefendant during the time that she was offered immunity for her testimony against the defendant. During the trial, the first codefendant/witness again stayed in counsel’s home. Counsel had his associate meet with the witness. The associate informed counsel that he had a conflict of interest due to the dual representation. Outside the associate’s presence, counsel also went over with the witness her prior testimony and what he intended to ask her in cross-examination. On the day, the witness appeared for trial, there is some question as to whether counsel stated that he had advised her to lie in the second codefendant’s trial and that she needed to continue that lie. During the witness’ testimony, the state attempted to establish that she had an on-going relationship with counsel and counsel’s associate intervened to say that he represented her and advised her to assert the attorney-client privilege. Once it became apparent that the witness would not follow his advice, the associate left. The witnesses’ testimony again revealed only the prior trial representation without more and the trial

***Capital Case**

court did not inquire further. The witness repeated her damaging testimony from the second codefendant's trial but also expanded upon it to add new details without objection from counsel. During cross, counsel actually bolstered the witness' credibility and did not impeach her credibility or expose her ulterior motives although both avenues were ripe. Counsel also brought out in cross alleged prior bad acts not developed by the state in direct examination. He even brought out false testimony, such as testimony that the witness did not receive any benefit for her testimony against the second codefendant and that counsel was not present then. During much of this cross, the defendant told counsel that the witness was lying and asked him to conduct a more vigorous cross-examination. Counsel only called one witness in defense and that was to say that the defendant had made a statement, that went unsigned, claiming sole responsibility for the murder. The state had not offered this statement in evidence. Counsel's argument during the trial was aggravating. In sentencing, counsel did present mitigation and argued for mercy, but stated that the case was never about guilt-or-innocence. The court also noted that counsel was ultimately disbarred for lying to a client. The court found an actual conflict that adversely affected representation. Counsel had a continuing duty of loyalty based upon his former and concurrent representation of the witness. If he had impeached her, she could have been prosecuted for perjury. By not impeaching her, he gave up plausible defense strategies that could have had significant impact with respect to the defendant's guilt and punishment. Moreover, counsel elicited damaging testimony from the witness/client that the state had not even elicited.

1990: *McConico v. Alabama*, 919 F.2d 1543 (11th Cir. 1990). Counsel had conflict that adversely affected representation in murder case where defendant claimed self-defense and counsel simultaneously represented a witness who was the victim's life insurance beneficiary. Defendant was tried and convicted of the shooting death of his brother-in-law. His wife was a beneficiary of victim's life insurance policy, which included a clause excluding payment if the defendant's self-defense claim were established. Defendant and wife, who was also a witness, were represented by the same counsel. Counsel had conflict because he had to cross-examine his own client and the "success of one client depend[ed] on discrediting another." *Id.* at 1547. The representation was adversely affected because counsel did not call important witnesses, did not adequately cross-examine or impeach the wife with prior inconsistent statements, and did not attempt to exclude her testimony on the basis of privileged marital communications. A petitioner need not show that the trial outcome would be different, but merely that the conflict had some adverse effect on counsel's performance.

2. State Cases

2011: *Kiker v. State*, 55 So.3d 1060 (Miss. 2011). Counsel in murder case had actual conflict of interest due to counsel's concurrent representation of a State's witness and the trial court failed to adequately advise the defendant. The only direct evidence of guilt came from a jailhouse snitch. The defendant had two lawyers. During cross by non-conflicted counsel, the snitch was asked whether he was under criminal indictment. He responded first by saying "ask my lawyer" and pointing to co-counsel as his lawyer. Counsel's representation continued through direct appeal. Two weeks after the direct appeal was concluded, the snitch still represented by the defendant's counsel entered a guilty plea.

***Capital Case**

While trial counsel had informed the prosecutor and the trial judge during trial that he represented the snitch, this was not disclosed to the defendant except through the snitch's testimony. Counsel clearly had an active conflict, which was not resolved by having his co-counsel cross-examine his snitch client. The conflict was imputed to the other counsel "by virtue of their association in the joint undertaking" of representing the defendant. The court also had an affirmative duty, upon being informed of the conflict to advise the defendant, but failed to do so. Prejudice presumed due to the absence of a knowing and intelligent waiver by the defendant.

2008: *People v. Miera*, 183 P.3d 672 (Colo. Ct. App. 2008). Counsel had actual conflict of interest that adversely affected representation in sexual assault on child case. The defendant was the legal guardian of the alleged victim. Social services suspected child abuse by the defendant and for almost 18 months periodically interviewed the alleged victim, who denied that the defendant was abusing her. Finally, after a friend and neighbor of the defendant was accused by six eyewitnesses of assaulting the alleged victim, she told investigators that he and the defendant had been sexually molesting her. The neighbor was arrested first and counsel was appointed. The neighbor entered a guilty plea and was scheduled for sentencing. The defendant was then arrested and the same counsel appointed. The neighbor soon after withdrew his guilty plea. Counsel continued to represent both for an additional five months or so and then withdrew from the neighbor's case. Several months later, the neighbor entered a deal to provide a videotaped statement against the defendant in exchange for dismissing the charges against him. Four to six months later, the state noticed the neighbor as a witness against the defendant, but then advised counsel shortly before trial that he would not be called. Counsel did not prepare to cross-examine him, but he was called after counsel elicited his name during the testimony of a social services caseworker. He testified and his testimony resulted in conviction on two of the six sexual assault convictions. These two were reversed on direct appeal. While recognizing that the presumption of prejudice of *Cuyler v. Sullivan* was not clear under U.S. Supreme Court precedent for successive representation, the court applied the presumption as a matter of state law and a finding that the representation was not just successive but was concurrent through much of the litigation, which lower federal courts had also applied the presumption to post-*Mickens*. Counsel had an actual conflict of interest in failing to cross-examine the neighbor on relevant points and in failing to seek a deal for the defendant in exchange for his testimony against the neighbor. Counsel also failed to cross-examine the alleged victim about the neighbor and the ensuing allegation against the defendant. Counsel's failures were "inextricably linked to his duty of confidentiality owed to" the neighbor. Prejudice presumed.

People v. Hernandez, 896 N.E.2d 297 (Ill. 2008). Counsel's dual representation of the defendant and the alleged victim in solicitation of murder case was a per se conflict of interest. In a prior drug conviction, drugs were seized from the defendant. Following his release confinement, he was kidnaped and beaten by the alleged victim and his family was threatened if he did not pay for the seized drugs. While the alleged victim was outside the defendant's home making these threats to the defendant's wife, police were called and the alleged victim was charged with unlawful use of a weapon. Counsel was retained and represented him for over a year, but the alleged victim fled the country while charges were still pending. Around the same time, the alleged victim fled, the

***Capital Case**

defendant was charged with solicitation of murder for soliciting undercover agents to kill the alleged victim in exchange for a reduced price on their purchase of drugs from the defendant. Two years later, defendant retained the same counsel. Although counsel had no contact with the alleged victim during those two years, he continued to be counsel of record for him even after his name appeared on the State's list as a potential witness in the defendant's case. Counsel and the prosecutor were aware of (and discussed) the dual representation but did not advise the defendant or the court. "When a defendant's attorney has a tie to a person or entity that would benefit from an unfavorable verdict for the defendant, a *per se* conflict arises" and, absent a waiver by the defendant, is grounds for automatic reversal. The court rejected the state's argument that the *per se* rule was contrary to *Mickens*. "[A] defendant's right to effective assistance of counsel is given effect, the *per se* conflict rule applies whenever an attorney represents a defendant and the alleged victim of the defendant's crime, regardless of whether the attorney's relationship with the alleged victim is active or not, and without inquiring into the specific facts concerning the nature and extent of counsel's representation of the victim."

2007: *Gibbs v. State*, 652 S.E.2d 591 (Ga. Ct. App. 2007). Counsel had an actual conflict that adversely affected representation in child sexual abuse case. The defendant was charged with molesting a neighbor child. Counsel, who was retained, had three months earlier been appointed to serve as the child's guardian ad litem in a Department of Family and Children Services action to remove the child from the home of her aunt and uncle. Counsel continued to serve as her guardian through the final hearing in that action so there was a period of eight months where counsel served as her guardian while also representing the defendant. Counsel had a conflict because "he could either zealously defend [the defendant] or protect the interests and confidential information of [the child]. He could not, however, do both." *Id.* at 700. There was an adverse affect because counsel could not and did not seek access to the sealed juvenile court records in which counsel had served as the guardian and use the information to impeach the alleged victim. Those records revealed a motive for the child to falsely accuse the defendant and that the idea that the defendant had previously been convicted of molesting children (when there were prior allegations but no charges or convictions) had been planted in her mind by her aunt and uncle.

Rael v. Blair, 153 P.3d 657 (N.M. 2007). Counsel in trafficking in controlled substance case had an actual conflict of interest that adversely affected the representation due to his contemporaneous representation of a state witness on a matter related to the defendant's trial. The defendant's charges were based on sales to an undercover agent, who had been introduced to the defendant by a confidential informant. Counsel had represented the confidential informant on previous charges, which included dismissal of drug charges in exchange for his agreement to become a confidential informant. The identity of the confidential informant and notice he would be a witness was disclosed a month prior to trial. Counsel also apparently continued representing the informant on a pending probation violation charge that was later dismissed apparently in exchange for his testimony against the defendant. Counsel's conduct was adversely affected because counsel elicited information from the informant about his prior use of drugs, but did not cross-examine him concerning his plea agreement or attack his character or credibility. The court also expressed disapproval for the state's

***Capital Case**

late disclosure of the identity of the informant and, therefore, the conflict and failure to move for disqualification because “of the prosecution’s using defense counsel’s conflict of interest as a means of affecting the evidence going before the jury instead of moving for his disqualification prior to trial.”

- 2005:** *Harmon v. State*, 122 P.3d 861 (Okla. Crim. App. 2005). Counsel had an actual conflict that adversely affected representation in burglary and weapon case due to counsel’s simultaneous representation of a state’s witness on the same charges. The defendant and his son were charged with several burglaries and some of the property went to the defendant’s daughter, who also helped plan the burglaries. The daughter, represented by counsel, pled guilty in exchange for probation and testified against the defendant, who was represented by the same counsel. The court “presume[d] prejudice from the adverse effect of inability to fully cross-examine for bias,” *id.* at 863, because while counsel thoroughly cross-examined the daughter on other matters, including prior convictions, he did not cross-examine her on any “bias matters relating to her plea or the facts in this case,” *id.*
- 2003:** **State v. Cisco*, 861 So. 2d 118 (La. 2003). Counsel in capital murder trial had an actual conflict of interest for which the defendant did not make a knowing an intelligent waiver due to counsel’s representation of the lead investigator, who was also a key witness for the state. The record reflected only that counsel represented the lead investigator and his wife in separate family law matters without any additional detail. The crime for which the defendant was arrested remained unsolved for a year before the defendant became a suspect. In initial questioning, he denied involvement, but then confessed to involvement in more than nineteen contradictory statements, with the majority being given to the lead detective. There was no physical evidence linking the defendant to the crime scene. Outside of the defendant’s confessions, the only other inculpatory evidence was the identification of the defendant in a physical lineup by an eyewitness. This witness had never been able to give a detailed description of the assailant and allegedly remembered for the first time during the physical lineup that one of the assailants had a tattoo on his hand as the defendant did. During the trial, the defense theory was that the defendant gave false confessions as a result of his turbulent upbringing and long-term substance abuse beginning when he was six years old. The defense also challenged the reliability of the identification. On the day that counsel was appointed, she requested that the physical lineup be postponed, but the detective had already obtained the defendant’s permission to proceed without her presence. It was during that lineup that the eye-witness identified the defendant. When counsel first met with the defendant, he apparently recognized the potential for conflicting interests and sent the defendant a letter in which she informed the defendant of her representation of the detective. She, nevertheless, left it up to the defendant to decide whether she had a conflict and whether he wanted to continue with her representing him. Several weeks later at the defendant’s arraignment, counsel informed the court of the dual representation and presented a written document that the defendant had signed, allegedly waiving the conflict. The trial judge made only a cursory inquiry and, like the defense counsel, effectively left it to the defendant to decide for himself whether an actual conflict of interest existed. The defendant was arraigned before a different judge, who was also aware of the potential conflict, but, nonetheless, without conducting a hearing, found that counsel could continue representation. In another court hearing held more than a year

***Capital Case**

prior to trial, counsel informed the court that the defendant had made several written allegations of collusion between counsel and the lead detective. Without inquiring into any detail, the court elicited a statement that the defendant wanted counsel to continue representing him. Ultimately, eleven months later, the case went to trial, and the defendant was convicted and sentenced to death. The court held that a defense attorney required to cross-examine a current or former client on behalf of a current defendant suffers from an actual conflict. Here, there was such an actual conflict, but neither trial judge adequately informed the defendant that counsel's representation could be negatively affected in an attempt to obtain a knowing and intelligent waiver from the defendant. Likewise, neither counsel nor the trial court, ever explained to the defendant that he had a right to obtain other counsel. Under these circumstances, the court found that the defendant had not made a knowing and intelligent waiver of his right to the assistance of conflict-free counsel.

1988: **People v. Easley*, 759 P.2d 490 (Cal. 1988). Counsel in retrial had a conflict of interest in sentencing because he simultaneously represented a state's witness, who provided damaging evidence in aggravation alleging that the defendant had committed "the violent crime of burning down the Chicken Ranch brothel" for another. Counsel was representing the witness, the owner of the Chicken Ranch, in a federal civil suit related to the arson in which it was alleged that the defendant had committed the arson. Thus, counsel "had two irreconcilable obligations: on behalf of defendant, to negate any evidence suggesting that defendant had committed the Chicken Ranch arson; and on behalf of [the] prosecution witness . . . , to prove in the civil suit that defendant had committed the Chicken Ranch arson." Indeed, counsel obtained the defendant's confession to involvement in the arson in exchange for the witness' payment for counsel's services to represent the defendant during his initial direct appeal. Counsel's conduct was adversely affected because counsel failed to expose the witness' obvious financial interest in establishing the defendant's involvement in the arson and failing to present any evidence to negate or mitigate that involvement. Although the defendant repeatedly stated his desire for counsel to represent him, there was no valid waiver because there was no indication that counsel had discussed the conflict with the defendant or that "defendant was offered the opportunity to discuss that matter with independent counsel. Although it appears the trial court informed defendant of his right to conflict-free counsel, defendant was never asked for a waiver." In addition, the defendant was never "advised of the full range of dangers and possible consequences of the conflicted representation in his case."

1987: *People v. Stewart*, 511 N.Y.S.2d 715 (N.Y. App. Div. 1987). Counsel had actual conflict that adversely affected representation in murder case where counsel simultaneously represented the defendant's father, who was the state's primary witness, and the father turned defendant in because he wanted defendant to get treatment for mental illness.

1985: *Gordon v. State*, 684 S.W.2d 888 (Mo. Ct. App. 1985). Counsel had conflict that required automatic reversal where counsel previously represented the state's primary witness on unrelated charges and simultaneously represented government witness in related parole revocation proceedings.

F. Simultaneous Representation of Persons Implicated (But Not Jointly Charged)

***Capital Case**

1. U.S. Court of Appeals Cases

2001: *Lockhart v. Terhune*, 250 F.3d 1223 (9th Cir. 2001). Counsel in murder and attempted murder trial had an actual conflict of interest that adversely affected counsel's representation where prosecutors presented evidence that petitioner had committed a second, earlier murder and his appointed counsel was also representing another man implicated (but not charged) in that earlier homicide. According to the district court, after being appointed to represent both Lockhart and Galbert, Defense counsel learned during the simultaneous representation of the conflict and had both clients to sign waivers. The waiver signed by petitioner did not, however, disclose the nature of the conflict. Counsel also informed the court his other client's alleged possession of the gun used in the prior shooting was the only basis of the conflict, when the other client had also been identified by two people as one of the shooters in the prior murder. Likewise, there was no evidence that counsel ever told petitioner that he had decided not to pursue the allegations against the other man as part of petitioner's defense. Actual conflict clear because could not fairly represent the conflicting interests where (1) allegations that the other client actually shot the prior victim suggested that he was more culpable than the petitioner, but (2) it was in the other client's interest to have petitioner convicted of the offenses with which he was charged because of the connection between those crimes and the uncharged murder. Also clear that the conflict adversely affected petitioner's defense. The state court required petitioner to show that the conflict of interest "prejudicially affected" his representation. This was contrary to clearly established federal law holding that prejudice must be presumed if adverse effect shown, whether it rises to the level of actual prejudice or not. The state court also held that petitioner could not show prejudice because proof of the other client's guilt would not exculpate petitioner. Under clearly established federal law, a conflict gives rise to an adverse effect when it "prevent[s] an attorney ... from arguing ... the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing that of another." *Wheat v. United States*, 486 U.S. 153, 160 (1988) (quoting *Holloway*, 435 U.S. at 490. Here, counsel was unable to emphasize other client's involvement in uncharged murder to minimize petitioner's involvement and a number of counsel's actions and inactions can "likely" be attributed to the conflict and counsel's desire to protect his other client. This is sufficient to satisfy the "adverse effect" prong of the conflict of interest test. The state court also denied relief based on a finding of a valid knowing and intelligent waiver. The state court's conclusion was an unreasonable application of Supreme Court precedent, however, because a valid waiver requires that the petitioner be sufficiently informed of what he is waiving and the ramifications. Here, petitioner did not know that counsel's other client had actually been accused of the prior murder by two people. He, therefore, could not have known the risk that counsel's inability to target the other man as an alternative suspect actually posed to his defense.

2. State Cases

2011: *People v. DiPippo*, 918 N.Y.S.2d 136 (N.Y. App. Div. 2011). Counsel in rape and murder case had an actual conflict of interest that adversely affected his representation. The initial police investigation identified counsel's former client, who had a lengthy arrest record and prior rape charge

***Capital Case**

that counsel had represented him on. According to witness statements, victim was last seen in a car driven by the former client. Counsel failed to pursue the plausible defense that the former client was the actual perpetrator even though counsel had been provided these statements in discovery several months prior to trial. Counsel also failed to disclose his prior representation of this initial suspect to the court or to the defendant.

- 2010:** *Shepherd v. State*, 924 N.E.2d 1274 (Ind. Ct. App. 2010). Counsel in drug case had an actual conflict of interest that adversely affected representation. Counsel simultaneously represented the defendant's girlfriend, who was a state witness and the daughter of the state's primary witness. Due to the conflict, counsel failed to cross-examine the girlfriend as to her pending charges and the amount of time she faced, even though her testimony was directly related to ownership of the cigarette package containing cocaine that was in the car that both she and the defendant had driven on the day in question. The possession conviction was vacated, but other convictions and sentences affirmed.
- 2008:** *State v. Alexander*, 958 A.2d 66 (N.J. Super. Ct. App. Div. 2008). Trial counsel had a *per se* conflict of interest in weapon and drug offense case following guilty plea because counsel simultaneously represented the defendant in sentencing and also represented another, who allegedly participated in the crimes with the defendant. Prejudice presumed and new sentencing ordered.
- 2005:** *Jones v. State*, 937 So. 2d 96 (Ala. Crim. App. 2005). Counsel in drug case had an actual conflict of interest due to simultaneous representation of a potential defense witness. The defendant's sole defense at trial was that the drugs found in her apartment belonged to her boyfriend. Counsel told the jury of this during the opening statement and intended to call the boyfriend to testify that the drugs were his. He was not called as a witness though because the State asserted that he would be charged if he gave this testimony. The defendant's counsel represented the boyfriend on federal drug charges and he had initially retained counsel for the defendant, but then counsel was paid by the defendant's parents. Although trial counsel informed the trial court of the conflict and requested to withdraw, the court denied the motion and did not squarely address the issue. Nonetheless, the record revealed that the sole reason that counsel did not call the boyfriend to testify was his fear of exposing the boyfriend to state prosecution and harsher sentencing, which was still pending, in federal court.
- 2000:** *People v. Woitke*, 729 N.E.2d 506 (Ill. App. Ct. 2000). Court found *per se* conflict of interest that required reversal of murder conviction. During his representation of defendant, counsel was also representing another client on misdemeanor charges related to impersonation of investigator into murder with which defendant was charged. Counsel was aware that his other client was a suspect in the murder and even subpoenaed him as a witness but did not call him to testify. Counsel never made defendant, his other client, or the court aware of his conflict. Reversal required even though counsel's representation of the other suspect ended seven months prior to trial. Where, as here, defense counsel has a tie to a person or entity that would benefit from an unfavorable verdict for the defendant, a *per se* conflict arises requiring reversal because the knowledge that a favorable result

***Capital Case**

for defendant would inevitably conflict with the interests of counsel's other clients or employer might subliminally affect counsel's performance in ways difficult to detect and show.

1995: *Smith v. State*, 666 So. 2d 810 (Miss. 1995). Counsel in drug distribution case had actual conflict of interest that adversely affected representation where he simultaneously represented witness (implicated but not charged in this case) in plea negotiations on other charges. Witness testified that he had distributed drugs to a confidential informant at the same time and in the same location as defendant's sale. The witness was not charged though. The witness did have prior drug charges though in which counsel had represented the witness in plea negotiations. The witness was still pending sentencing at the time of defendant's trial. Counsel attempted to cross-examine the witness. When he asked about the witness' plea, the witness pointed out that counsel represented him, and counsel asked nothing else. The court found, "The sudden curtailing of what had been up to that point a vigorous cross-examination of [the witness] by the public defender is compellingly indicative of an actual conflict of interest which adversely affected the public defender's performance as counsel for [defendant]." *Id.* at 813.

1990: *People v. Singer*, 275 Cal. Rptr. 911 (Cal. Ct. App. 1990). Counsel in murder case had a conflict that adversely affected representation where counsel was having an affair with defendant's wife and also representing her because she was potentially implicated in crimes. Defendant was arrested for the murder of his wife's ex-husband. A first trial ended in hung jury. Defendant was convicted in the second trial. During both trials counsel had a sexual relationship with defendant's wife, which was disclosed after trial to defendant by counsel's former employee. The court noted that an actual conflict must be shown under *Cuyler*, but California law requires a showing of a potential conflict if the record "supports 'an informed speculation' that appellant's right to effective representation was prejudicially affected." *Id.* at 921. Here, counsel's affair with defendant's wife "introduced deception and duplicity into the advocate-client relationship, which by definition must be grounded in trust and fidelity." *Id.* at 920. Counsel may have had an interest in defendant being convicted so the affair could continue or remain undiscovered. Counsel may also have had an interest in protecting his lover from being implicated in the crimes, especially where counsel also represented her.

State v. Santillanes, 790 P.2d 1062 (N.M. Ct. App. 1990). Counsel had actual conflict of interest that adversely affected representation in assault case where counsel simultaneously represented defendant and his brother who was implicated but not charged with crime. Defendant and his brother, who bore a strong resemblance to defendant, were arrested following a fight. Defendant was charged with one shooting and the brother was charged with two stabbings. They retained counsel. The brother entered a plea to the two stabbings and swore under oath, that he was not the shooter. Following the plea, but before defendant's trial, the brother informed counsel that he was the shooter also. During trial, one eyewitness testified that the brother was the shooter. Counsel did not call the brother to testify. Counsel had a actual conflict that adversely affected representation. Counsel told one witness before trial not to mention the brother's confession to the shootings. Counsel also did

***Capital Case**

not call the brother to testify and advised defendant not to testify in order to protect the brother from perjury charges.

1984: *Commonwealth v. Hurley*, 461 N.E.2d 754 (Mass. 1984). Counsel had conflict that required presumption of prejudice in murder case where counsel simultaneously represented a prosecution witness who was also a potential suspect as an accessory to the crime in an unrelated case. The witness was also counsel's friend.

G. Simultaneous Representation of Government or Defense Witness or Confidential Informant in Unrelated Case

2014: *Yarbrough v. State*, 139 So. 3d 143 (Miss. Ct. App. 2014). Counsel had an actual conflict of interest due to his simultaneous representation of the defendant and the alleged assault victim in aggravated assault of a law-enforcement officer. Counsel represented the officer in an August 2006 divorce proceeding, followed by a March 2007 petition for contempt against the officer's ex-wife. These charges arose in October 2006 and counsel agreed to represent the defendant on this charge, as well as some pending drug charges. This trial was held in May 2007 and the contempt action did not end until after trial. While counsel informed the defendant that he had a relationship with the officer that he believed would be beneficial to the defendant, he did not inform the defendant of his prior representation of the officer until the day of trial and even then did not inform the defendant that it was ongoing and never asked the defendant to waive any conflict. He did not inform the court at all. The overlap in representation resulted in an actual conflict of interest and prejudice was presumed. Because the defendant was not aware that the representation was ongoing or the risks of the conflict, he could not make a knowing and intelligent waiver.

2000: *Ramirez v. State*, 13 S.W.3d 482 (Tex. App. 2000). Defendant was denied effective assistance of counsel in prosecution for unlawful possession of a firearm by a felon because defense counsel labored under an actual conflict of interest that adversely effected her performance. During trial, the state called as a witness a client of defense counsel in another pending criminal case. Counsel moved for a mistrial because she had no notice of the witness and because she had confidential information from him and could not adequately represent the witness or the defendant in cross-examining her own client. The court denied the motion for mistrial and pressed on. The witness/client testified that the defendant made incriminating statements to him in confinement. During cross, counsel attempted to establish that she had confidential information that she could not use in cross because the witness/client was not waiving his privilege. The court would not allow this testimony. Counsel again moved for a mistrial due to the prejudice to defendant. The court of appeals held, "Great deference should be accorded the representations of an attorney who feels a division of loyalty." *Id.* at 486. "It is well-established that a defendant is denied the effective assistance of counsel in those instances where an attorney is unable to cross-examine, or is chilled in the cross-examination of, a government witness because of the attorney/client privilege arising from counsel's prior representation of the witness or from his duty to advance the interests of the witness as a current client." *Id.* at 487. Counsel in this case had an actual conflict of interest that

***Capital Case**

had an adverse effect on appellant's trial. In addition, the trial court failed to conduct an inquiry into the apparent conflict.

1998: *People v. Coleman*, 703 N.E.2d 137 (Ill. App. Ct. 1998). Trial court erred in denying state's motion to disqualify counsel in first-degree murder case where counsel represented three state witnesses, each of whom faced future uncertain punishment for previously adjudicated guilt on unrelated cases and hoped to gain the State's favor in return for their testimony. Counsel did not attempt to impeach one witness. For several other witnesses it appeared that counsel had actually brokered the deal to testify against the defendant. Under state law, where defense counsel has represented a State's witness, a *per se* conflict of interest exists if the professional relationship between the attorney and the witness is contemporaneous with counsel's representation of the defendant. Even though counsel withdrew right before the testimony of one of the witnesses, the representation was still contemporaneous because counsel still owed a duty to that client and had represented him in all pretrial proceedings, including the interview of him for this case. There was also no knowing waiver here. When the state raised the issue repeatedly, the defendant was merely informed that counsel represented witnesses for the prosecution and then he was asked if he had any problem with it. His response indicated that he had no problem provided the contemporaneous representation caused him no harm. This was not a valid waiver, however, because the judge did not determine whether the defendant fully understood the significance of counsel's conflicting loyalties and understood how the loyalties to the prosecution witnesses could hamper counsel's effectiveness.

1997: *Commonwealth v. Martinez*, 681 N.E.2d 818 (Mass. 1997). Trial court conducted an inadequate inquiry into conflict in murder case. Defendant was charged with drug-related murder. Only one witness (independent of codefendant) placed defendant near the scene of the crime and had first hand-knowledge of defendant's drug dealing. This witness had been interviewed several times and did not implicate the defendant. At defendant's insistence, the witness was listed as a defense witness, which prompted the state to interview the witness again. The witness implicated the defendant and testified for the state at trial. Just prior to the witness' testimony, defense counsel disclosed that he had previously represented the witness and represented him on pending charges when he first made statements in this case. He informed the defendant of this information and then interviewed the witness. He was not aware that the witness would be called as a state's witness at the time of his discussions with the witness though. Counsel stated that his representation of the witness was concluded, except for a "technical" matter to conclude a disorderly conduct case that had been part of a negotiated package deal to resolve 24 charges. The court found no simultaneous representation and no conflict. Nonetheless, the court asked the defendant if he had heard what counsel said and if he still wanted counsel to represent him. The appellate court found that the representation was simultaneous because counsel still represented the witness on one charge for which he had not be sentenced at the time of the defendant's trial. While the witness' pending charge was minor and might not rise to the level of a conflict in another case, in this case it was sufficient to raise genuine concerns about counsel's divided loyalty. Counsel was also facing pending ethics charges at the time of defendant's trial and likely felt constrained in cross-examining the witness. Counsel had also violated his confidential relationship with the defendant by informing

***Capital Case**

the witness that counsel did not believe defendant's alibi. "Taking into account [counsel's] relationship with [the witness], [counsel's] ethical problems, and the undenied allegations of broken client confidence, . . . the defendant's claim of a conflict of interest 'is supported by adequate evidence of its existence.'" *Id.* at 825-26. The trial court's inquiry was inadequate to establish defendant's intelligent waiver of conflict where judge did not inform defendant that he had constitutional right to attorney who was free of divided loyalties, did not give defendant opportunity to raise or discuss any concerns that he might have, and did not make sure that defendant understood that other counsel could be retained in his behalf. In addition, the colloquy included no discussion of counsel's alleged disclosure to his other client, no discussion of counsel's disbelief of defendant. Trial court also failed to advise defendant in such a way that he could understand or appreciate the possible implications of counsel's relationship with witness. The court was most troubled by counsel's statements of disbelief to the witness and held, "In this special context, the colloquy to procure the defendant's waiver was insufficient." *Id.* at 827.

1995: *State v. Jenkins*, 898 P.2d 1121 (Kan. 1995). Trial court erred in failing to conduct inquiry when the court was informed that counsel represented a government witness/informant on charges incurred while working as a confidential informant. Defendant was charged with sale of cocaine to a police informant. At preliminary hearing, appointed counsel raised concerns about a possible conflict because she had represented the informant on unrelated burglary charges while he was working as an informant. Counsel questioned the informant and the defendant and both agreed to have her continue to represent the defendant, but the questions and answers did not amount to a waiver of the conflict. Following this hearing and prior to defendant's trial, counsel represented the informant in a motion to modify his sentence. During defendant's trial, he presented an alibi defense. The appellate court found an actual conflict where counsel represented the defendant and the key state's witness at the same time. Because the trial court was informed of the actual conflict, the court had a duty to inquire, even though there was no objection to the conflict. Failure to inquire required automatic reversal under *Holloway*. Even assuming that *Cuyler* controls and adverse affect must be shown, the court finds that counsel's representation was adversely affected because counsel did not cross-examine the witness on the affects of cocaine, even though he admitted being under the influence when he allegedly bought cocaine from the defendant. Counsel also did not question the witness regarding his admitted addiction to cocaine or to what lengths he might go to obtain drugs or the money necessary to buy drugs for himself. This was especially important in light of evidence that the witness received money from the police each time he made a sale.

Smith v. State, 666 So. 2d 810 (Miss. 1995). Counsel in drug distribution case had actual conflict of interest that adversely affected representation where he simultaneously represented witness (implicated but not charged in this case) in plea negotiations on other charges. Witness testified that he had distributed drugs to a confidential informant at the same time and in the same location as defendant's sale. The witness was not charged though. The witness did have prior drug charges though in which counsel had represented the witness in plea negotiations. The witness was still pending sentencing at the time of defendant's trial. Counsel attempted to cross-examine the witness. When he asked about the witness' plea, the witness pointed out that counsel represented him, and

***Capital Case**

counsel asked nothing else. The court found, “The sudden curtailing of what had been up to that point a vigorous cross-examination of [the witness] by the public defender is compellingly indicative of an actual conflict of interest which adversely affected the public defender's performance as counsel for [defendant].” *Id.* at 813.

People v. Carillo, 218 A.D.2d 505 (N.Y. App. Div. 1995). Counsel had actual conflict that adversely affected representation in murder case where counsel simultaneously represented an eyewitness and had previously represented the actual shooter. Defense counsel’s prior representation of witness, whose testimony could have exculpated defendant but who did not testify in defendant’s trial – despite counsel’s indication during opening argument that witness would testify – affected his representation of defendant and conduct of defense. It was possible that witness did not testify because of a pending drug case in which he was represented by counsel and was concerned that if he was subjected to cross-examination, his testimony about his drug activities might have been used against him in the pending case. The conflict may have been created by fact that counsel had represented witness on more than one occasion, giving him pecuniary interest, in that counsel may have been motivated to guard witness’s interests to ensure that counsel would be retained in future. Otherwise, once witness “bolted” as time to testify drew near, conflict-free counsel would have hired investigator or sought witness to ensure witness’s presence at trial. Furthermore, defense counsel’s prior representation (only a short time before) of another client, the alleged triggerman in the murder with which defendant was charged, affected his representation of defendant and conduct of defense in this prosecution. Counsel had continued duty to maintain triggerman’s confidences. In addition, although every eyewitness identified triggerman as the murderer and counsel had heard on street that triggerman was real culprit, counsel did absolutely nothing to verify this information or locate triggerman.

1989: **People v. Thomas*, 545 N.E. 2d 654 (Ill. 1989). Counsel had *per se* conflict in capital murder where counsel simultaneously represented government witness on unrelated charges. Defendant was arrested based on information provided by witness, who was defendant’s cousin. Following his arrest, he retained counsel. The witness also retained the same counsel to represent her on charges of welfare fraud. Counsel moved to suppress defendant’s statement and evidence due to lack of probable cause for arrest but did not call witness to testify. During trial, witness either denied making statements or said she could not remember. On cross, counsel attempted to establish that witness had history of mental illness. On redirect, prosecutor sought to prove that counsel represented witness and the objection was sustained. Counsel intended to call another witness mental illness, but backed off when court indicated it would allow the government to rebut with evidence that counsel represented the witness. Court held that counsel had duty to withdraw from representation and that contemporaneous representation of government witness was a *per se* conflict where prejudice would be presumed. Adverse affect on representation found even if not *per se* conflict where counsel failed to call witness at suppression hearing and altered her trial strategy to avoid revelation of her representation of witness.

***Capital Case**

1986: *People v. McDonald*, 496 N.E.2d 844 (N.Y. 1986). Counsel had actual conflict that required reversal in arson case where counsel simultaneously represented the corporation, whose building was damaged in the fire, and a corporate officer gave testimony tending to prove defendant's guilt.

In Interest of Saladin, 518 A.2d 1258 (Pa. Super. Ct.1986). Counsel had actual conflict that adversely affected representation in juvenile delinquency hearing for robbery where another attorney in counsel's office simultaneously represented the victim/witness on unrelated charges. Adverse affect found because counsel did not cross-examine prosecution witness vigorously about his mental health because of the attorney-client privilege.

1984: *Commonwealth v. Hurley*, 461 N.E.2d 754 (Mass. 1984). Counsel had conflict that required presumption of prejudice in murder case where counsel simultaneously represented a prosecution witness who was also a potential suspect as an accessory to the crime in an unrelated case. The witness was also counsel's friend.

1982: *Commonwealth v. Hodge*, 434 N.E.2d 1246 (Mass. 1982). Counsel had a conflict that required presumption of prejudice in murder case where counsel's law partner simultaneously represented prosecution witness in unrelated civil matter, which created a financial interest for counsel.

H. Simultaneous Representation of Prosecutor or Third Party With Adverse Interest

1. U.S. Court of Appeals Cases

2010: *United States v. Nicholson*, 611 F.3d 191 (4th Cir. 2010). Counsel in felon in possession of weapon case had actual conflict of interest that adversely impacted counsel's performance in sentencing in that counsel failed to move for a downward departure on the basis of self-defense necessity. The defendant's brother had agreed to cooperate with law enforcement in their investigation of a major drug dealer, which resulted in threats against the whole family. The brother was shot and there was a subsequent attempt on his life while he was hospitalized. The defendant and his mother were informed by law enforcement that the drug dealer had placed a contract out for them. The defendant's stepfather was then murdered. The defendant then obtained a gun for which he was subsequently charged. He told law enforcement that he had the gun for protection. Counsel was retained by the defendant. Only weeks later, counsel also began representing the drug dealer, who was charged with murder in state court. Counsel never informed the defendant that he also represented the drug dealer. While counsel maintained that the defendant never said he was in fear and said that he had the gun because he was a drug dealer, counsel was aware from written police reports that the defendant told officers he had the gun for self-defense. The defendant pled guilty. Prior to sentencing, counsel received a presentencing report (PSR) in the dealer's case, which contained information implicating him in the shooting of the defendant's brother and murder of his stepfather. The court adopted the PSR in the dealer's sentencing. Counsel appealed on behalf of the dealer claiming error in these findings. Counsel then obtained the defendant's PSR containing the

***Capital Case**

same information and that the defendant carried the weapon for self-defense. The defendant learned from the probation officer that he might be entitled to a downward departure and asked counsel to seek one in at least two letters to counsel. The Government conceded the self-defense motive for the gun (and the other relevant facts for the departure) in the defendant's sentencing hearing. Nonetheless, counsel failed to move for a self-defense departure. The District Court found trial counsel's testimony that he did not seek a departure based on the defendant's statements to him and "ethics" to be credible. The Fourth Circuit did not disturb this finding, but noted that all the other evidence supported the defendant's claims, including the fact that, while the defendant had a lengthy history of convictions for drugs and weapons, he had never been convicted of having both at the same time. Here, irrespective of what statements the defendant may have made to counsel, "a motion for a self-defense departure was a plausible defense strategy. . . . Simply put, there is overwhelming evidence—believed and even endorsed by the Government—that [the defendant] faced not only a threat of physical injury, but also a genuine threat of death, at the time he was found with the firearm and claimed he possessed it for self-protection." Moreover, regardless of counsel's alleged subjective reasons for not seeking the departure, which the District Court relied on, "the ultimate question involves a conclusion of law reached under an objective standard: whether, considering the facts known to the lawyer, the alternative defense strategy was 'objectively reasonable.'" Here, "it is manifest that [counsel] could have requested a self-defense departure without compromising his ethical duties." Counsel could have done so without making any false statements or offering any evidence he had reason to suspect was false. The "undisputed evidence" was that the drug dealer "posed a genuine threat" to the defendant's life, the defendant told authorities he possessed the gun for protection against the dealer, and "the authorities believed him." Even in appellate argument, the government conceded these facts. Here, this "alternative defense was inherently in conflict with . . . the attorney's other loyalties or interests." *Id.* at ____ (quoting *Freund v. Butterworth*, 165 F.3d 839, 860 (11th Cir. 1999)). In other words, a self-defense departure motion was inherently in conflict with counsel's loyalties to the drug dealer.

In such a situation, it is unnecessary—and even inappropriate—to accept and consider evidence of any benign motives for the lawyer's tactics, including the lawyer's testimony about his subjective state of mind.

Thus, there was an adverse impact and prejudice was presumed. The state argued that remand for resentencing was unnecessary because of counsel's testimony that the defendant told him he had the gun due to his drug-dealing activities instead of fear. The Fourth Circuit held the defendant was "entitled to a protective order prohibiting the Government from using privileged information revealed by [counsel] in litigating [the defendant's] actual conflict of interest claim." In addition, the Fourth Circuit ordered that a different trial judge hear the resentencing in order to avoid even the appearance or "suspicion of partiality."

2. State Cases

***Capital Case**

- 2005:** *Howerton v. Danenberg*, 621 S.E.2d 738 (Ga. 2005). Counsel had an actual conflict that required presumption of prejudice in capital case that resulted in plea in exchange for a life sentence. During the defendant's representation, counsel simultaneously represented the prosecutor in a highly publicized federal challenge to the prosecutor's use of peremptory strikes to remove minorities from juries. This information was not disclosed to the defendant, even though "[g]iven the enormity of the penalty, the conflict was completely impermissible." Although there was no evidence that counsel's conduct was influenced by the conflict, "even the performance of the most honorable attorney under similar circumstances could be subtly or unknowingly affected in ways difficult to detect on review. The mere existence of such an obvious and deleterious conflict undermines the adversarial process and calls into question the reliability of the outcome of the proceedings."
- 1996:** *Derrington v. United States*, 681 A.2d 1125 (D.C. 1996). Counsel in drug distribution case had actual conflict that adversely affected representation where counsel simultaneously represented another person about whom the defendant might have had information of use to the prosecutor. Prior to trial, counsel informed the court that he believed defendant served as a confidential informant for government in the investigation of counsel's other client. While the other client had already plead guilty, he was still pending sentencing. Counsel noted that he would not be able to adequately negotiate for the defendant though on the basis of his cooperation with the government. The court continued the hearing for counsel to obtain additional information. At the later hearing, counsel informed the court that he did not believe there was an actual conflict. The defendant proceeded to trial with counsel never attempting to negotiate a plea based on his cooperation or advising the defendant about the possibility of doing so. Counsel had an actual conflict and his representation was adversely affected as evidenced by his failure to attempt to negotiate a deal for his client.
- 1986:** *Matter of Delfin A.*, 123 A.D.2d 318 (N.Y. App. Div. 1986). Counsel had conflict that required presumption of prejudice in delinquency case involving sexual abuse where counsel had been retained by residential facility where juvenile had been voluntarily placed in foster care, and where alleged incident of sexual abuse occurred, to represent the facility in proceedings against the juvenile. At those proceedings it was expected that employees of the facility would testify. Furthermore, counsel represented two alleged accomplices whose statements about the incident of sexual abuse differed from that of the juvenile.
- 1983:** *United States v. Carducci*, 557 F. Supp. 531 (W.D. Pa. 1983). Counsel had conflict that adversely affected representation in drug case where counsel simultaneously represented suspect charged with murder of codefendant. A mistrial was declared in initial trial due to codefendant's murder. During second trial, counsel did not call witnesses that corroborated entrapment defense, even though he intended to in the first trial because the witnesses would be adverse to the suspect in the murder of codefendant. While counsel stated other valid reasons for not calling these witnesses, the court found that reversal was required where counsel also considered the conflicted reasons in making decision to exclude exculpatory testimony.

***Capital Case**

1982: *Mannon v. State*, 645 P.2d 433 (Nev. 1982). Counsel had conflict that adversely affected representation in drug case where during trial counsel, who represented defendant's girlfriend on an unrelated charge, was informed by girlfriend that she was guilty of the offense with which defendant was charged, but counsel remained silent until after trial due to obligation to protect confidentiality of statement.

I. Retained by Codefendant or Third-Party With Adverse Interest

1. U.S. District Court Cases

2000: *United States v. Duran-Benitez*, 110 F. Supp.2d 133 (E.D.N.Y. 2000). Defendant convicted of various drug offenses moved for downward departure on the basis of his attorney's conflict that has adverse affect on representation. Defendant and codefendant were initially appointed separate attorneys. Defendant initially rejected plea offers. After a new attorney entered an appearance for him, his codefendant started cooperating with the government. On the basis of her information, new charges were brought against the defendant and charges were brought against a second codefendant. The first codefendant's cooperation eventually earned her her a " § 5K1.1 letter," *see* U.S. Sentencing Guidelines ("USSG") Manual § 5K1.1 (1998), from the Government and a significant downward departure at her sentencing. In contrast, the defendant, who pled guilty and was awaiting sentence, had not received a § 5K1.1 letter from the Government because the information he sought to provide was deemed stale. Defendant moved for a downward departure because his new attorney had been retained and paid for by the second codefendant without defendant even making a request that he do so. The second codefendant also retained counsel for the first codefendant and other persons implicated but they rejected the representation. In order to protect the person paying his retainer, counsel prevented the defendant from offering cooperation with the government. Ultimately, the defendant petitioned the court for new counsel and informed the court of the reason. The court appointed new counsel for the defendant. The defendant then cooperated but the government deemed the information to be stale and not warranting a § 5K1.1 letter. In order to remedy the Sixth Amendment violation, the court sentenced the defendant if he had provided earlier cooperation, provided substantial assistance to the Government, and secured a § 5K1.1 letter, which cut the sentencing range to about half of what he had faced.

2. State Cases

2011: *State v. Mamedov*, 708 S.E.2d 279 (Ga. 2011). Counsel had an actual conflict of interest that adversely affected representation in false imprisonment plea case. The defendant, a refugee from Uzbekistan with lawful permanent residence in the country, was arrested along with a codefendant. Defendant was driving the car. When his co-defendant passenger spotted a woman he had a "romantic interest" in he told the defendant to stop the car. The co-defendant forced her into the car and the defendant drove around for two to three minutes before returning her to the point where she had been forced into the car. The alleged victim informed the prosecutor that it "was customary" in her country for a man to kidnap the woman he loves in this fashion and she was not harmed, the

***Capital Case**

case was prosecuted as there were a number of witnesses, including a newspaper photographer who captured the episode. The co-defendant's family retained counsel for both men. Aside from an initial brief meeting, the defendant never met counsel without either his co-defendant or the co-defendant's family being present. Counsel never addressed the possibility of a conflict and never addressed the possibility of a separate defense. The mere fact that counsel was paid entirely by the co-defendant's family "created a strong incentive for counsel to prioritize [the co-defendant's] interests in the matter over [the defendant's]." In addition, even though the defendant was the less culpable and his participation was limited to being a passive witness in the co-defendant's unpremeditated interaction with the victim, counsel never considered anything other than a unified defense. Prejudice presumed.

1997: *State v. Norman*, 697 A.2d 511 (N.J. 1997). Counsel had actual conflict that adversely affected representation due to payment of counsel's fees by the more culpable codefendant. Codefendants were tried separately for drug-related murder. Following their arrest defendant admitted that he was an accomplice and chased the victim with a gun but stated that the victim had been shot before he arrived. The codefendant admitted that he was closest to the victim but asserted that both he and the defendant had fired their weapons. The victim was shot only once. Codefendant retained an attorney. At codefendant's request, the attorney arranged counsel for the defendant. The attorneys shared office space but were not partners. Both counsel were paid by the codefendant and the defendant was aware of that fact. The trials were severed and both were convicted. In post-conviction, counsel for defendant testified that approached the state in plea negotiations but no agreement was reached. Counsel denied that he was influenced in the negotiations by the fact that the codefendant paid his fees. No waiver found, even though the defendant was aware at the time that his counsel was paid by the codefendant. "There is a presumption against waiver, and waiver will be found only when it is on the record and when the trial court has assured itself that the defendant waiving the conflict is aware of the potential hazards of joint representation." *Id.* at 525. Court found that the state clearly would have been interested in the defendant's cooperation because he had substantial knowledge of the shooting and presumably about the codefendant's drug dealings. Court also finds that codefendant paid counsel's fees presumably because he was concerned about defendant's potential cooperation. "In such circumstances, where the defendants have starkly conflicting interests, we would be remiss if we did not recognize a significant conflict and strong likelihood of prejudice." *Id.* at 526. Defendant's conviction reversed, but not codefendant's.

1985: **State v. Chandler*, 698 S.W.2d 844 (Mo. 1985). Counsel had conflict that adversely affected representation in murder case where counsel X was implicated in the same murder and had been represented by counsel Y when counsel X was indicted but the charge was later dismissed and counsel X paid counsel Y to represent defendant. The victim was an attorney. The defendant's brother, who was represented by counsel X at the time of his initial statements, implicated defendant in murder and testified at trial that he stood watch while defendant and another brother committed murder. The other brother that had already been convicted of murder and sentenced to death had initially been represented by counsel X but discharged him and testified before a grand jury that defendant was hired by counsel X to kill the victim. He testified in a deposition that he committed

***Capital Case**

the murder alone and defendant had nothing to do with it. Adverse affect shown because counsel did not call this brother, who exculpated defendant to testify allegedly because he had no credibility. Defendant was entitled to counsel that could make decision whether to call the brother or not without a conflict.

J. Prior Representation of Government or Defense Witness in Same Case

1995: *United States v. Malpiedi*, 62 F.3d 465 (2nd Cir. 1995). Trial counsel in fraud (based on contractor kickback scheme) and obstruction of justice (based on altering checking records when they were subpoenaed by grand jury) had actual conflict of interest that adversely affected representation due to counsel's prior representation of key government witness. Witness had testified in two grand jury proceedings as custodian of defendant's records (which were altered according to government). Counsel accompanied her to first grand jury proceeding and arguably served as her counsel at the time. Just prior to her testimony, the government disclosed the potential conflict to the court. Counsel responded that he did not represent the witness previously. The government and the defense agreed that counsel would question the witness only about whether she was alone with the documents in a conference room while preparing for the first grand jury appearance and that the government would elicit from her only that counsel had accompanied her to that proceeding. She was called to testify. Counsel conducted in depth cross about the first grand jury proceeding. The court interrupted. The witness, through another attorney, then invoked her attorney-client privilege. The court prohibited counsel from any argument concerning the first grand jury testimony. Following the testimony, the court asked the defendant if he was satisfied with counsel's cross. Although he said he was, the appellate court found that this clearly was not an adequate hearing on whether he waived conflict-free representation. Following trial, the defendant, through different counsel, asserted the conflict. District court denied relief. Appellate court held that counsel had an actual conflict and his representation was adversely affected because he was unable to adequately cross-examine the witness concerning her testimony in the grand jury proceedings, in which she failed to give the damaging testimony she offered at trial and committed perjury.

1991: *United States v. Tatum*, 943 F.2d 370 (4th Cir. 1991). Counsel had actual conflict in bankruptcy case that adversely affected representation where counsel was a member of a law firm implicated in crimes and counsel had previously represented a government witness, who was also his law partner, in the same proceeding. Defendant, who was in the business of restoring expensive and collectible automobiles, filed bankruptcy petition but hid three cars from the trustee and creditors, allegedly upon advice of counsel. The cars were transferred to one of counsel's law partners. During the grand jury proceedings, defendant, his business partner, and the lawyer that obtained the cars were all represented by a different lawyer in the same firm as bankruptcy counsel and the lawyer that obtained the cars. After the government notified the firm of its concern about the conflicts (but only several months prior to trial), an outside lawyer entered an appearance and conducted the trial, but conflicted counsel was present and assisting him. The government informed the court of the conflicts but the court did nothing. The Fourth Circuit held that counsel had an actual conflict because counsel could not assert that defendant relied on the advice of counsel without inculcating

***Capital Case**

his law partners and increasing the risk of civil malpractice liability of the firm. Counsel also had a conflict because counsel could not present himself as a witness concerning a “missing file” from the law firm that defendant claimed contained exculpatory information. Counsel also had a conflict because counsel had represented the defendant’s business partner, who was the government’s primary witness, in the grand jury proceedings. Counsel also had a conflict because his law partners, the one that obtained the cars and the one that advised defendant in the bankruptcy proceedings, were witnesses during the trial. Counsel’s conduct was adversely affected because counsel could not seek a plea agreement for defendant to testify against his law partners. He also could not call himself to testify concerning the missing file or effectively cross-examine his partners or his former client at trial. The fact that outside counsel conducted the trial did not change the required result because that counsel entered the case only several months prior to trial and relied heavily on conflicted counsel’s knowledge of the facts and prior proceedings. Thus, outside counsel’s performance was infected by the conflicts.

K. Prior Representation of Government Witness or Confidential Informant in Related Case

1. U.S. Court of Appeals Cases

1986: *United States v. Iorizzo*, 786 F.2d 52 (2nd Cir. 1986). Counsel had actual conflict that adversely affected representation in mail fraud case where counsel had previously represented a government witness in related proceedings. Defendant was charged with mail fraud based on a scheme to evade state gasoline taxes by filing false information through use of the mail. The government witness worked for the defendant and had testified in a related tax commission case with counsel, paid by defendant representing him. Adverse affect found on representation because counsel did not attack witness’s credibility on the stand, even though he had made prior inconsistent statements at the time defense counsel was representing him. Counsel broached this issue but the government objected due to the conflict.

2. Military Cases

1991: *United States v. Augusztin*, 30 M.J. (N.M.C.M.R. 1990). Purported waiver of conflict was inadequate in solicitation of homosexual acts cases where counsel simultaneously represented the government’s primary witness on overlapping charges and the trial court failed to conduct an adequate inquiry. The witness made a statement against the accused and later recanted the statement. He was then tried and convicted of charges, including an overlapping solicitation to commit sexual acts with the accused. During the accused’s trial, the witness’ incriminating statement and recantation were admitted without any objection by counsel.

The *quid pro quo* arrangement to permit both [the witness]’s original statement and subsequent recantation to come into evidence without objection from either side and thus avert the need to cross-examine [the witness] was not the result of a tactical

***Capital Case**

judgment by a conflict-free lawyer that such evidence would not be helpful to appellant. Rather, the decision to forgo confrontation of the witness . . . must be viewed in some measure as being made to protect the interest of defense counsel. Defense counsel abandoned appellant's right to confront and cross-examine [the witness] in favor of a two sentence retraction that did little to deflect the straightforward impact of the initial statement. At the time, defense counsel's abandonment was viewed by all concerned as necessary to allow defense counsel to avoid ethically improper conduct. This simply reverses the priorities that the attorney owes to his client because it puts the lawyer's concerns ahead of the client's needs, and then shapes the client's needs to eliminate the attorney's problems created by a direct conflict of interest.

Id. at 709 (footnotes and citations omitted). Although the trial court inquired, the inquiry was inadequate to elicit a valid waiver because the trial court did not inform the accused of the specific nature of the conflict or explain or elicit the accused's understanding of the details and potential perils of the conflict. The court instead apparently relied on identical written "waivers" signed by the accused and the witness on the morning of trial. The "waiver," which the court noted was "apparently drafted just prior to coming into trial by the counsel whose capacity to act in appellant's interests was at issue," *id.* at 713, stated that counsel had advised the accused of the conflict but did not detail the advice.

3. State Cases

2003: *People v. Daly*, 792 N.E.2d 446 (Ill. App. Ct. 2003). Trial counsel had *per se* conflict in drug distribution case where trial counsel had represented the confidential informant, who was the primary witness for the state. The CI had been arrested on drug charges and represented by counsel had those charges dismissed in exchange for an agreement to make undercover drug buys. While doing so, the CI had other charges dropped because of his work for the state. The CI testified during trial that he made three buys from the defendant. Counsel established in cross-examination that the CI had had charges dismissed and was working as a CI, but did not elicit the fact that the dismissed charges and the work as a CI were linked. Counsel also did not establish that the CI had a financial arrangement with the state where he was paid for drug busts, but only given expense money if he failed to make a buy. Although counsel no longer represented the CI, the court held that there was a "continuing" relationship to the extent that counsel would be required to cross-examine the CI about matters occurring during the time that counsel represented him. Prejudice presumed.

2000: *Nethery v. State*, 29 S.W.3d 178 (Tex. App. 2000). Defendant's trial counsel had actual conflict of interest that prejudiced defendant in trial for organized criminal activity for theft arising out of illegal use of landfill. Counsel had also represented the defendant and codefendant in a civil suit brought against them for the same activities. Following the civil trial, the codefendant obtained different counsel. The defendant's counsel then represented one of the complaining witnesses in that suit in unrelated criminal charges for theft by a public servant. That case was pending at the same time as

***Capital Case**

the defendant's charges and counsel sought to withdraw prior to defendant's trial, but did so primarily on defendant's failure to pay his retainer with the possible conflict mentioned only as a sideline. During trial, counsel called his other client as a witness. Counsel apparently hoped to establish that defendant thought his permits were legal, but the witness/client testified, amongst numerous damaging points, that he informed defendant his dumping was illegal. Counsel's conflict and the adverse affect on his representation was clear, because counsel did nothing to minimize this damaging testimony. The court notes that there was no reason to call the witness in the first place, but after he was there counsel should have attacked his credibility with information that he had been fired from his position with the City and had no contact with the defendant at the time of the alleged offenses in this case. Prejudice presumed.

L. Prior Representation of Government Witness on Unrelated Charges

1. U.S. Court of Appeals Cases

2004: *Lewis v. Mayle*, 391 F.3d 989 (9th Cir. 2004). Defense counsel had actual conflict of interest that adversely affected the defense in second degree murder case and the defendant's waiver of his right to conflict-free counsel was invalid. Counsel had represented the defendant's nephew, who was the state's primary witness, in an unrelated felony charge of driving under the influence just prior to beginning representation of the defendant. The witness pled no contest to DUI and was placed on probation. At a post-trial hearing on a motion for new trial, counsel was asked to represent the defendant with the nephew paying a portion of the fee. The defendant and his nephew signed nearly identical waivers of any conflict of interest. The potential conflict and waiver was also discussed in a preliminary hearing. At trial, counsel raised the question of whether the nephew was the actual killer, pointed out inconsistencies in his testimony, and elicited an admission that he had been convicted of four separate burglary charges. Counsel did not, however, question the nephew about his most recent DUI charge or about his probation status. He also did not bring out the fact that he was in a substance abuse treatment program as a condition of his probation or that he had helped arrange for counsel to represent the defendant and offered to pay his fee. Under the AEDPA, the court held that the state court's finding that the conflict did not adversely affect the defense was an objectively unreasonable application of clearly established federal law because counsel refrained from eliciting evidence on at least three significant points as a result of his prior representation of the witness. First counsel failed to cross-examine the witness concerning his recent felony DUI conviction. This was significant because this conviction was in the last year while the other prior convictions were more than nine years old and the witness attempted to portray himself as a reformed man. Although the state court found that the conflict did not lead to counsel's omission, this finding was objectively unreasonable because counsel believed that at least some of the information he had about the DUI conviction was privileged and because unconflicted counsel would have raised the DUI conviction. Second, adverse affect was demonstrated by counsel's failure to present evidence of the witness' probation and participation in a court-ordered substance abuse program. The probation status was significant and the substance abuse program would have contradicted the witness' attempt to portray himself as having voluntarily undertaken a lifestyle

***Capital Case**

change. The state court's finding that counsel believed there was no connection was unreasonable because it accepted counsel's "explanations at face value" without regard to the full record. Third, the adverse affect was evidenced by counsel's failure to elicit information from the witness about his role in arranging for the defendant's counsel. The state court's analysis was unreasonable because the state court focused only on whether the witness actually influenced counsel, rather than on whether the conflict prevented counsel from making an issue of the witness' involvement.

In a case where so much turned on the credibility of one prosecution witness, a suggestion that that witness *sought* to influence the defense in any way—regardless of whether he succeeded in doing so—could have raised a reasonable doubt in the mind of jurors. . . . Had a non-conflicted lawyer represented [the defendant] and come across evidence that the only other possible suspect, and the prosecution's main witness, had offered to pay for the defense, the non-conflicted lawyer undoubtedly would have raised that evidence to impeach the prosecution witness.

Because the state court did not rule on the waiver issue, the court reviewed this issue de novo. While the defendant signed a written waiver, discussed the potential conflict with counsel, and was advised to seek outside counsel on the matter, there was no evidence that the defendant understood the specific ramifications of his waiver since he did not seek the advice of outside counsel and had only a cursory discussion with the judge. There was no evidence that the defendant knew of counsel's continuing obligations to the witness or that he foresaw potential consequences of the waive, such as the impeachment value of the DUI charges. Thus, the defendant did not validly waive his right to conflict-free counsel.

2. State Cases

1997: *Lee v. State*, 690 So. 2d 664 (Fla. Dist. Ct. App. 1997). Trial court obtained inadequate waiver in murder case where the public defender office had previously represented the state's key witness, who was a jailhouse snitch, at the time of the alleged statements. In addition, defendant's counsel had personally represented the snitch years before, although counsel had no recollection of it. The trial court conducted an inquiry and the defendant purported to waive the conflict. Later, after the defendant raised concerns about counsel's performance, the defendant sought to withdraw the waiver but the court refused to revisit the issue because the defendant had purportedly made a knowing and intelligent waiver. As additional concerns arose, the court refused to appoint different counsel and defendant went pro se. He then changed his mind and proceeded forward with the assigned public defender. The appellate court held that there clearly was an actual conflict in counsel's prior representation of the snitch and because counsel's office represented the snitch at the time of the alleged statements in this case. The court held that, "[f]or a waiver to be valid, the record must show that the defendant was aware of the conflict of interest, that the defendant realized the conflict could affect the defense, and that the defendant knew of the right to obtain other counsel." *Id.* at 667. Here, the purported waiver was not a valid waiver because the defendant was unaware at the time that he was entitled to different court-appointed counsel. Record reflected defendant's understanding

***Capital Case**

that if he did not accept conflicted counsel, then he would have to represent himself. Because the issue had been raised at trial and preserved for appeal, automatic reversal required.

- 1995:** *Livingston v. State*, 907 P.2d 1088 (Okla. Crim. App. 1995). Counsel in murder case had an actual conflict that adversely affected representation due to counsel's prior representation of the defendant's son, who was the primary state's witness. Defendant was charged with murdering his ex-wife's boyfriend. Defendant was charged six months later, primarily on the statements of his son, who said that defendant admitted murder to him. Prior to the son's allegations, represented by counsel, he was adjudicated a juvenile on charges of lewd molestation and obscene telephone calls. The defendant testified against his son in the juvenile adjudication proceedings. At a pretrial motions hearing in defendant's case, counsel indicated he wanted to cross-examine the son about these juvenile adjudication proceedings and to impeach him by showing the son's bias against his father and his motive to testify. He also initially asked to use records of the son's psychological examinations to show bias. He informed the court that he had represented the son in the juvenile proceedings. The trial court ruled that counsel could ask the son if he was biased because the defendant did not support him when he was charged with juvenile offenses, but could not cross-examine him on the substance of the offenses. The court did not conduct an inquiry into the conflict, however. Counsel's planned cross was not conducted, even though the son testified that defendant admitted killing to him. Counsel had an actual conflict due to duty of loyalty to both defendant and his son. The representation was adversely affected because counsel did not pursue cross-examination of the son to show motive and bias in testimony. Prejudice presumed.
- 1993:** *State v. James*, 433 S.E.2d 755 (N.C. Ct. App. 1993). Counsel in murder case had an actual conflict that adversely affected representation where he previously represented a key prosecution witness on an unrelated charge. Counsel was appointed to represent the defendant following his arrest for a shooting that occurred outside a nightclub. Counsel was then retained by witness to represent him on a state charge of possession of a firearm by a felon and in a federal investigation for conspiracy to possess and traffic in crack cocaine, for which he was ultimately indicted. The witness plead guilty in exchange for cooperation with the government. The witness was called to testify in the defendant's trial. Both the state and federal charges were still pending against the witness. Counsel brought out in cross that he represented the witness. The court found an actual conflict where counsel simultaneously represented the defendant a government witness. Adverse affect found because counsel did not cross examine the witness concerning his plea bargain arrangement in federal court (which involved a downward departure for cooperation). Counsel did, however, conduct this type of cross-examination with another witness. The court also observed that the trial court had an independent duty to conduct an inquiry once the conflict became apparent. Normally, the court would remand for a hearing on whether there was an actual conflict when the court failed to conduct an inquiry, but reversal was required here anyway because of the actual conflict and adverse affect on representation.
- 1989:** *Self v. State*, 564 So.2d 1023 (Ala. Crim. App. 1989). Counsel in drug trafficking case had actual conflict that adversely affected representation where both defendants were represented by counsel

***Capital Case**

who had previously represented the state's confidential informant. The informant and her husband were indicted for trafficking in cocaine. The husband, represented by defendant's counsel, was convicted. The informant, represented by codefendant's counsel, provided information supporting the search warrant that led to defendant's and codefendant's arrest as part of a plea agreement allowing probation. Some of the husband's convictions were reversed and his case was remanded for resentencing represented by defendant's counsel. Defendant and codefendant were then tried while represented by conflicted counsel. During the trial, the identity of the informant was revealed. Both counsel, based on statements previously made to them by the informant, had reason to be aware of the informant's identity prior to indictment and to believe that the information in the affidavit supporting the search warrants was untrue. Nonetheless, neither counsel called her as a witness or informed their clients because the informant was still on probation and might suffer. While the court recognized that a good argument could be made that the conflicted representation was simultaneous, the court treated it as successive representation. *Id.* at 1033. An actual conflict that adversely affected representation was found due to both counsel's failure to call the informant to testify.

1983: *In re Darr*, 191 Cal. Rptr. 882 (Cal. Ct. App. 1983). Counsel had conflict that adversely affected representation in murder case where counsel previously represented government witness on unrelated charges. The trial court erred in failing to inquire about the possible conflict or to advise the defendant of his right to conflict-free representation when it was revealed during trial that the defendant's attorney had represented the witness. Counsel did not seek timely probation revocation hearing in witness's felony case, which would have provided further grounds for impeachment of witness, and unexplained omissions existed in cross-examination of witness for bias.

M. Counsel Was Necessary or Potential Witness

1. U.S. Court of Appeals Cases

2002: *Rubin v. Gee*, 292 F.3d 396 (4th Cir. 2002) (affirming 128 F. Supp. 2d 848 (D. Md. 2001)). Counsel in murder case had an actual conflict of interest that adversely affected petitioner's representation. Following the shooting of her husband, petitioner contacted two attorneys, who both came to the crime scene. After learning that petitioner had taken a lot of medication, the attorneys instructed their assistant to take petitioner to the hospital and have her admitted under a false name. The attorneys notified the police that the victim was dead, but did not disclose any other information. The day after the shooting, one of the lawyers drove Petitioner to the bank to withdraw \$105,000 for counsel's retainer fee and expenses. The other attorney took the evidence in the case to his office. Only after the attorneys discovered that a warrant was out for petitioner's arrest did they turn the petitioner in to the police. Counsel then advised petitioner who to retain as her trial counsel. They also remained part of the defense team and continued to collect fees from the petitioner, even though they did not sit at counsel table during her trial. During trial, the state brought out (in cross-examination of petitioner) the events following the homicide, without any mention of the lawyer's activities, to refute petitioner's self-defense claim by arguing that she had fled the scene of the crime, lied about her identity, and showed consciousness of guilt. Neither attorney was called to testify.

***Capital Case**

The state court concluded that counsel's actions following the homicide did not create an actual conflict of interest. The state court also did not consider the continuing effects of counsel's conflict when evaluating the effectiveness of petitioner's trial representation. The Fourth Circuit held that this was an "objectively unreasonable" application of clearly established federal law because counsel plainly had a conflict of interest that adversely affected their own performance and the performance of petitioner's trial counsel. Counsel's personal interests fundamentally conflicted with the objectives of petitioner's representation from the moment they arrived at the scene of the crime until the completion of her trial. Counsel utterly failed to function as petitioner's advocates. Instead, they assisted her in evasive action and functioned almost as accessories after the fact in order to secure their retainer fee. Following counsel's advice created serious problems for petitioner at trial. Petitioner thus had a strong interest in having counsel testify that she acted on the advice of her own lawyers following the homicide. Counsel had no interest in testifying, however, because of potential criminal charges for obstruction of justice and hindering the apprehension of a criminal defendant. In fact, both counsel were the subject of a grand jury investigation that began prior to petitioner's trial and continued until after it was complete. One of the attorneys had even engaged his own attorney to represent him in the investigation. Furthermore, both attorneys were also the targets of an inquiry by the Maryland Attorney Grievance Commission during which they had to justify the \$150,000 fee they eventually collected for representing petitioner. Given these facts, the Fourth Circuit said, "At all times, the attorneys' fidelity to their own interests superseded any sense of obligation they may have had to their client." *Id.* at 404. Counsel's continued representation of petitioner was adversely affected by their conflict of interest. They cloaked themselves in the attorney-client privilege to assure that they would not be asked to testify at trial and never considered withdrawing so they could testify and assist petitioner as witnesses. Counsel's conflict of interest also ultimately tainted and adversely affected petitioner's representation by her three trial attorneys. Counsel "violated the most basic principles of the attorney-client compact from the beginning to the end. . . . The taint from their conflict of interest could not be cleansed simply by bringing in independent counsel to make trial decisions." *Id.* at 405. The state court decision to the contrary was an objectively unreasonable application of the *Cuyler v. Sullivan* standard. Counsel's "representation of Rubin was more than ineffective – it was a perversion of the attorney-client relationship. [Counsel's conflict of interest was so severe that it led to a corruption of the adversarial process that our system relies on to produce just results. It is hard to imagine a case that would call the fundamental fairness of a trial into more question than this one. What happened here should never happen in our system. Rubin is entitled to a new trial with conflict-free representation." *Id.* at 406.

1994: *United States v. Levy*, 25 F.3d 146 (2nd Cir. 1994). Counsel had actual conflict of interests that adversely affected representation in drug conspiracy case. Counsel had previously represented the defendant. After arrest warrants were issued for the defendant and his nephew, counsel informed the government that he represented both defendants, although the defendant was out of the country. During plea negotiations on the nephew's behalf, counsel and the defendant made statements incriminating the defendant. After the nephew rejected plea negotiations, he was inadvertently released from custody and fled the country. The government believed counsel was involved in this

***Capital Case**

flight. When the defendant was arrested and brought back to the country, counsel continued representation of both. While the government never formally moved to disqualify counsel, the prosecutors did repeatedly alert the trial court of (1) counsel's joint representation; (2) counsel's status as a defendant awaiting his own sentencing in the same district on an unrelated criminal charge; (3) counsel's status as the object of a grand jury investigation into the nephew's flight; and (4) counsel's status as a possible witness concerning statements made by the defendant during the plea negotiations on behalf of the nephew. The District Court inquired but accepted counsel's distortions of the truth and false statements. "[T]he very nature of [counsel's] predicaments strongly indicates that he labored under actual and not merely potential, conflicts of interest." He had "continuing legal and ethical obligations to protect" the nephew, whose interests diverged from the defendant, whose most likely defense was to blame the nephew who had been directly involved in controlled buys by a confidential informant when the defendant was not even in the country. Counsel also had a personal interest to avoid being called as a witness since he would likely have to cease representing the defendant. Likewise, counsel's own charges presented a conflict because counsel may have believed he should temper his defense for the defendant here in order to curry favor with the prosecution in his own case. Finally, counsel obviously had a strong personal interest in avoiding any exploration of the nephew's flight from the country as counsel could be incriminated. Counsel's representation was adversely affected as counsel did not pursue a plausible defense strategy of trying to pin greater blame on the nephew because counsel had obligations to him and also did not want to expose counsel to prosecution for his role in the flight. Because the trial court had not obtained a knowing waiver from the defendant, reversal was required.

1982: *Uptain v. United States*, 692 F.2d 8 (5th Cir. 1982). Counsel had actual conflict that adversely affected representation in bail jumping case where counsel also served as the state's primary witness. The district court's appointment of another attorney to cross-examine defense counsel did not resolve the ineffectual-assistance problem, because defense counsel resumed primary responsibility for the defense once prosecution's questioning of him ended. Nor did defendant waive his Sixth Amendment right to effective counsel. The record reflected no discussion with defendant by judge, prosecutor, or either appointed defense counsel, of problems inherent in defense counsel's serving dual role as chief prosecution witness.

2. State Cases

2013: *State v. Figueroa*, 67 A.3d 308 (Conn. Ct. App. 2013). Counsel had an actual conflict of interest that adversely affected her representation in conspiracy to commit home invasion case. The defendant was charged along with a 15-year-old co-defendant. Prior to trial, counsel met with the codefendant at the jail without the codefendant's counsel being present. The defendant, an intern, and an interpreter were present. At the conclusion of the meeting, the codefendant provided a written statement that he and the defendant were innocent. He also gave this testimony in direct during trial, but subsequently said on cross-examination that the defendant told him what to say before the meeting and "intimated" him in the meeting by observing. He also testified that counsel had promised to assist him in exchange for his help. While the trial court had a duty to inquire, there

***Capital Case**

was no need to address this threshold issue because two actual conflicts were apparent on this record. The first conflict lay in the tension between counsel's "continuing representation and the need for her to testify." Second, by facilitating the meeting itself, her participation in the meeting could have led the jury to view defense counsel as the defendant's accomplice in intimidating the witness.

***State v. Cheatham**, 292 P.3d 318 (Kan. 2013). Counsel had a conflict of interest in capital murder trial that adversely affected his representation due to a flat fee arrangement. Prior to the defendant's arrest in this case, counsel represented him on unrelated drug charges. Following his arrest in Chicago and extradition back to Kansas, the Public Defender's Office was appointed but then relieved at the defendant's request. Counsel was a sole practitioner with a "busy country law practice." He had tried only three murder cases in his career and all were more than 20 years before this case. Counsel was aware that the defendant was indigent but agreed to represent the defendant for \$50,000 because of his belief that the defendant was innocent. Counsel informed the defendant he would not be able to concentrate full-time on the case because he had "to earn a living" and because counsel was running for Governor then. While the defendant signed a document acknowledging this information, nothing in the record established that the defendant was aware of what he was giving up. Counsel was contacted by the Director of the Board of Indigents' Defense Services, which was authorized to provide resources to the indigent defendant, including co-counsel, investigators, consultants, and expert witnesses. Counsel did not accept the Director's offer of assistance and did not even ask whether he could be appointed so that funds would be available. There was nothing in the record to establish that the defendant was aware of the resources available to him, which counsel declined. The court found this to be "distressing, if not professionally irresponsible. And, it flies in the face of common sense." Counsel spent only 40-60 hours on the case prior to trial and did not hire an investigator, interview witnesses, attempt to verify the alibi defense, or file the statutorily required notice of an alibi. He testified that "he had no intention of spending his own funds to prepare the case and no intention of taking time away from his other cases or his political activities." In short, counsel's "representation bore a greater resemblance to a personal hobby engaged in for diversion rather than an occupation that carried with it a responsibility for zealous advocacy." Counsel's conduct was also adversely affected because he failed to make himself available as an alibi witness when he had advised the defendant the day before the murders to leave town because he believed the police were looking for an excuse to arrest the defendant. Counsel attempted to tell the jury this in closing argument, but the state's objection was sustained. Counsel was also found to be ineffective for introducing the defendant's prior conviction for voluntary manslaughter and repeatedly referring to the defendant as a "professional drug dealer" and "shooter of people."

2012: People v. Delgadillo, 275 P.3d 772 (Colo. Ct. App. 2012). Counsel had a conflict of interest that adversely affected his representation in sexual assault and contributing to delinquency case due to counsel's testimony in *in camera* hearing in violation of attorney-client privilege. Before the jury, counsel elicited testimony from the defendant that counsel had advised him not to request DNA testing because, if the results were bad, the defendant would be guaranteed a sentence of 25-30 years. Before the close of the defense case, the prosecutor informed the court that the defendant had

***Capital Case**

misstated his potential sentencing exposure because the sentencing range was four to sixteen years if the sentences ran concurrently. The court held an *in camera* hearing and allowed the prosecutor to question the defense counsel as a sworn witness on that issue. Defense counsel, violating the attorney-client privilege, acknowledged telling the defendant he could be sentenced to 25-30 years. No one asked whether he was referencing consecutive or concurrent sentences, even though his statement would not have been erroneous if considering consecutive sentences. The court then asked the defendant if he would have rejected the state's plea offer if he had known the range was four to sixteen years and he said he would have taken the deal. The state, however, declined to renew the plea offer. A conflict was created by calling the defense counsel to testify. No one asked the defendant whether he would waive the attorney-client privilege or explained to him the possible consequences if defense counsel contradicted his testimony. Although counsel did not contradict him, the possibility still remained that "counsel's testimony might be contrary to his client's interests" and the prosecutor could use that to impeach the defendant's testimony. Indeed, as reflected by the prosecutor's statements following counsel's testimony, that is exactly what the prosecutor expected to happen. In failing to protect the attorney-client privilege, counsel's conduct adversely affected the representation and deprived the defendant of representation during the *in camera* hearing.

2008: *State v. Regan*, 177 P.3d 783 (Wash. Ct. App. 2008). The trial court erred in compelling defense counsel to testify against the defendant, which resulted in an actual conflict of interest that adversely affected the representation. In addition to other charges, the defendant was charged with bail jumping when he showed up an hour late for his trial date. The court ordered that co-counsel, who was acting as supervising counsel for counsel due to her lack of experience, would be required to testify that he advised the defendant of the trial date and to be early. The trial was then continued at the request of the counsel so as not to interrupt with co-counsel's vacation plans even though this was to the defendant's detriment since he was placed in pretrial confinement when he showed up late. While recognizing that the presumption of prejudice of *Cuyler v. Sullivan* was not clear under U.S. Supreme Court precedent for this type of conflict, the court applied the presumption as a matter of state law. The court found an actual conflict that adversely affected the representation because counsel agreed to the continuance which was "helpful to defense counsel's own interests and harmful" to the defendant. The court also found error in the trial court's ruling because the court did not balance the competing interests of the state and the defendant, which would have revealed that defense counsel's testimony, which was used in the case in chief, was cumulative of other testimony.

2007: *Alessi v. State*, 969 So. 2d 430 (Fla. Dist. Ct. App. 2007). Counsel had a conflict of interest in murder case where he was a necessary witness and the conflict adversely affected his representation. The defendant was an experienced police officer undergoing divorce proceedings. He shot and killed his wife and shot and injured her brother. His family quickly retained counsel for him. In an early phone call, the defendant expressed a suicidal intent and counsel told him to get rid of the gun, which was disposed of in a storm drain. Counsel and the defendant subsequently agreed that the location of the gun must be disclosed to the state, but counsel did not do so for four months. During cross-examination, the state elicited testimony from the defendant that he had hid the gun and its location

***Capital Case**

was not disclosed for four months and that could have told him to get rid of the gun because he was contemplating suicide. Due to counsel's objection, however, the defendant was not allowed to explain that it was counsel rather than the defendant that delayed the disclosure. Counsel then failed to object to the state's closing argument that hiding the gun and delaying the disclosure evidenced consciousness of guilt. While recognizing that the presumption of prejudice of *Cuyler v. Sullivan* was not clear under U.S. Supreme Court precedent for this type of conflict, the court applied the presumption as a matter of state law. Prejudice presumed because counsel had an active conflict and it adversely affected his performance when he prevented the defendant from fully explaining counsel's advice and his actions "in an attempt to protect his role as counsel."

2004: *People v. Lewis*, 809 N.E.2d 1106 (N.Y. 2004). Reversal of drug convictions required where counsel testified against the defendant in a hearing on admissibility of unavailable witness' statement. The charges were based primarily on drugs found on the defendant's premises with a search warrant. Shortly after jury selection, the state notified counsel that the state would call a witness that purchased drugs from the defendant at the premises. Within an hour of the notice, the witness was threatened by an unidentified caller and intimidated into refusing to testify. At the hearing on the admissibility of the witnesses' statement, the defendant denied making the threat, but then the state called defense counsel to establish that counsel had told no one about the witness other than the defendant. Counsel did not object and provided the adverse testimony. Although counsel's testimony was "neither earth-shattering nor insignificant," reversal was required because counsel's actions were "enough to rupture the attorney-client relationship not only for the *Sirois* hearing but for the balance of the trial itself."

2000: *Commonwealth v. Patterson*, 739 N.E.2d 682 (Mass. 2000). Reversal required under state law where counsel failed to move to withdraw when it became obvious that she was a necessary witness for the defendant in murder of off-duty police officer (serving as store security guard) case. Initial investigation in search of car seen in the area of murder led to the defendant's brother to whom the car was registered. The brother informed the police that the car was actually owned and driven by the defendant. The brother then suggested that the defendant go with him to meet with counsel, who represented the brother in an unrelated civil matter. The defendant informed his brother that he had been present at the time of the murder. Counsel assumed representation of the defendant after the initial meeting. With counsel present, the defendant then made a statement to police in which he admitted being at the store on the evening of the murder with his codefendant but denied knowledge of the murder. Counsel later received a search warrant affidavit alleging that the defendant stated to police that his codefendant was the triggerman. Counsel immediately informed the state's attorney in writing and orally with a copy to codefendant's counsel that she had been present for the defendant's statement and that he was not asked and did not state that the codefendant was the triggerman. Both defendant's moved to sever the trials, in part, because of the possibility that counsel could be called to testify by the codefendant's counsel. These motions were granted. At the defendant's trial, there was testimony indicating that a man fitting the defendant's description was present in the area of the store on the night of the murder and eyewitness identification of the codefendant. There was also other evidence linking the codefendant to the murder but nothing

***Capital Case**

directly linking the defendant other than fingerprint testimony of admittedly questionable methodology. A police officer then testified that the defendant said in his statement that his codefendant was the triggerman. Counsel did not testify or call the defendant to testify so this testimony was unrebutted. The court held that counsel should have moved to withdraw based on state ethical rules that, at the time, required an attorney to withdraw as counsel if the lawyer learned or if it became “obvious” that the lawyer “ought to be called as a witness on behalf of his client.” Under state law, once the defendant has shown that his attorney should have withdrawn because of the likelihood that the attorney's testimony would be necessary, the defendant need not demonstrate any actual prejudice stemming from his attorney's failure to testify.

1989: *Nunn v. State*, 778 S.W.2d 707 (Mo. Ct. App. 1989). Counsel had an actual conflict that adversely affected representation in arson case where counsel testified and counsel was implicated in possible ethical misconduct related to the case. Prior to trial, counsel interviewed three state's witnesses by phone and tape-recorded the calls without the witness' knowledge. Counsel also subpoenaed one state witness to his office for a deposition without notifying the state and without actually setting up a deposition. At trial, this witness testified and denied talking to counsel on the phone. Counsel then called himself to testify concerning the witness' prior inconsistent statement and had his brother who was also a lawyer conduct the examination. During cross, the state brought out the tape-recording and subpoena activities. Counsel then resumed representation and called a former law clerk as a witness to testify that he and not counsel was responsible for the subpoena. During closing, the state vigorously attacked counsel's credibility. Court found an actual conflict for four reasons. First counsel had an obvious interest in the outcome of the case because he was retained, not appointed. Second, through its intimation of impropriety in counsel's tape-recording telephone conversations without the other side's knowledge and issuing a subpoena for an improper purpose, the state made defense counsel's credibility an issue for the jury. Third, defense counsel called a witness for the sole purpose of rehabilitating defense counsel's own credibility. Finally, defense counsel's appearance in the inconsistent roles of advocate and witness may have undermined the jury's ability to decide the facts and its perception of movant. The court held that counsel should have withdrawn when he decided to testify.

Counsel was caught between the obligation to do his best for movant and the need to justify his own conduct as legal and ethical. An accused is entitled to representation which is uncluttered by counsel's efforts to vindicate his own conduct. A conflict of interest resulting in ineffective assistance of counsel may arise from an interest adverse to the accused or an interest simply personal to the attorney.

The only issue which should have been before the jury was defendant's conduct, not that of his attorney.

Id. at 711 (citations omitted). Adverse affect was clear since counsel injected his credibility as an issue and the jury may have “unintentionally imputed the alleged improprieties of defense counsel to his client.” *Id.*

***Capital Case**

N. Defendant or Counsel Had Filed Lawsuit or Ethics Complaint Against Counsel

1. U.S. Court of Appeals Cases

1991: *Mathis v. Hood*, 937 F.2d 790 (2nd Cir. 1991). Appellate counsel had actual conflict that adversely affected representation in robbery appeal where defendant had filed a grievance against counsel. Following conviction, defendant filed a notice of appeal and the Legal Aid Society was appointed. Almost 18 months later, Legal Aid notified the defendant that there was a conflict because the office had represented the codefendant at trial. The court then appointed private counsel. Private counsel did nothing for a year and then was replaced with another private counsel. This counsel also did not file an appellate brief ultimately two and half years after appointment. By the time he filed his brief, defendant had filed a grievance against him. The court found an actual conflict that adversely affected representation because counsel's interest was in having the conviction affirmed, otherwise counsel faced disciplinary proceedings or could be liable for his part in the delay in setting aside an erroneous conviction. The court also noted the poor quality of counsel's briefs and that counsel waived oral argument. New appeal ordered.

2. State Cases

1992: *Clark v. State*, 831 P.2d 1374 (Nev. 1992). Counsel had actual conflict and prejudice was presumed where counsel filed civil suit against defendant to resolve retainer issues while representing him in criminal case. Defendant retained counsel to represent him in murder case. The fee was supposed to come from a personal injury settlement handled by counsel's firm on behalf of defendant. When the settlement proceeds from the personal injury case were disbursed, however, it was discovered that a medical lien had been overlooked. The clinic holding the lien filed a complaint against defendant, his wife, and counsel. Counsel filed a cross-claim against defendant and his wife, and obtained a default judgment against defendant while defendant was in jail awaiting sentencing on his first-degree murder conviction. The appellate court noted that counsel ultimately only got about \$5,000 for representing defendant in murder case. Court expressed concern that this may have caused counsel to be "conservative in his efforts to interview potential witnesses or hire necessary experts," *id.* at 1376, even though the state's case was circumstantial and involved a lot of medical evidence. Court was also concerned that counsel had less incentive in murder case because "an incarcerated client would be less apt to vigorously oppose an entry of default and subsequent enforcement of the civil judgment." *Id.*

Accordingly, we determine that there is a significant possibility that [counsel's] performance was adversely affected by this conflict, or, equally compelling, that the appearance of impropriety created by the conflict was too great to be judicially excused. Under the fact-specific circumstances of this case we conclude that [defendant] was relieved of the obligation to show prejudice.

***Capital Case**

Id. at 1376-77. Court notes though that this ruling is fact-specific and that *Cuyler* will be applied in other cases.

1991: *People v. Cano*, 581 N.E.2d 236 (Ill. App. Ct. 1991). Counsel had actual conflict that adversely affected representation in criminal sexual assault case where defendant filed a grievance against counsel and asserted ineffective assistance. Defendant's complaints were made following trial, but before sentencing. At the hearing on the motion for new trial, counsel informed the court of the grievance. The court considered appointing different counsel but counsel's supervisor informed the court that counsel was the most competent. Counsel proceeded on the motion for new trial. Defendant then requested different counsel and moved to reopen the trial. The court denied new counsel and appointed counsel's supervisor to argue the motion to reopen the trial. The supervisor informed the court of the conflict and asked not to be put in the position of arguing against his subordinate. Defendant later withdrew his pro se motion to reopen the trial and his claims of ineffectiveness and proceeded to sentencing with the original counsel representing him. Counsel had an actual conflict due to the grievance pending against him. "It was possible for [him] to render allegiance to defendant." *Id.* at 241. Counsel's supervisor also had an interest in protecting the professional reputation of his subordinate, which conflicted with defendant's interests. The representation was adversely affected because the court required conflicted counsel to proceed unless defendant withdrew his ineffectiveness claims. This prompted defendant to withdraw his claims. Prejudice presumed.

O. Defendant Alleged Ineffective Assistance or Had Grounds For a Claim

1. U.S. Court of Appeals Cases

1995: *Lopez v. Scully*, 58 F.3d 38 (2nd Cir. 1995). Counsel had actual conflict that adversely affected representation in sentencing where the defendant had asserted improper conduct by counsel. During trial, after several evidentiary rulings against the defendant, defendant plead guilty in exchange for reduced sentence of 18 years. Prior to sentencing, defendant filed pro se motion to withdraw plea, in part, because of alleged coercion and ineffective assistance by counsel. Defense counsel denied defendant's allegations and court denied motion and proceeded to sentencing. Appellate court finds that counsel had an actual conflict due to the allegations against him. Court denies new hearing on motion to withdraw plea because court finds that would have been denied regardless of whether defendant had unconflicted representation or not. Court does grant new sentencing though because counsel's conflict had adverse affect in that counsel made no argument for leniency. The fact that court had previously indicated that she would sentence the defendant to 18 years and would not consider a lower sentence did not matter. Counsel should have argued for leniency in light of a number of mitigating factors. District court found harmless error but appellate court stated, "Harmless error analysis is inappropriate in this context. Once a petitioner has shown that an actual conflict of interest adversely affected defense counsel's performance, prejudice to the petitioner is presumed and no further showing is necessary for reversal." *Id.* at 43.

***Capital Case**

1986: *United States v. Ellison*, 798 F.2d 1102 (7th Cir. 1986). Counsel had actual conflict that adversely affected representation in motion to withdraw plea to kidnapping where motion based on allegations against counsel. Counsel's representation was adversely affected because he not only failed to represent defendant but testified and denied the allegations.

2. U.S. District Court Cases

2006: *United States v. Livingston*, 425 F. Supp. 2d 554 (D. Del. 2006). Counsel had an actual conflict of interest and was ineffective in felon in possession of weapon case. Counsel had previously represented the defendant on criminal matters and had advised the Defendant that he could possess a gun after he completed his probation for that offense. After the defendant's son accidentally shot a friend with the defendant's gun, counsel advised the defendant that it was "fine" to cooperate with law enforcement. Counsel was retained in an agreement to assign to counsel any money received in connection with the settlement of a pending civil lawsuit being pursued by counsel. Counsel told the defendant that he was charged in error because he was not a felon and erroneously advised the defendant concerning the punishment range if the defendant were convicted. During trial, counsel did not present any evidence that he had advised the defendant that he could own a gun. Counsel also made no argument for leniency in sentencing "because such arguments would have necessarily implicated and exposed [counsel's] incorrect legal advice." If counsel had adequately advised the defendant, the defendant would have plead guilty in order to receive a lesser sentence. Counsel's conduct was deficient because his "legal advice was not just erroneous as a matter of law, it was manifestly unreasonable in light of the totality of the circumstances" and compounded by counsel's failure to take any steps to correct the misapprehensions created by his erroneous advice. Counsel's fee arrangement was also "questionable ethical conduct." The defendant was prejudiced because, if he had been adequately advised, the defendant likely would have plead guilty in exchange for a lesser sentence.

3. Military Cases

1992: *United States v. Jeter*, 35 M.J. 674 (A.C.M.R. 1992). Counsel in larceny and forgery case had actual conflict of interest in post-trial matters due to accusations of ineffective assistance of counsel. Following the trial, counsel submitted a request for clemency to the convening authority and attached a letter from the accused, which included allegations that she had been denied effective assistance of counsel. The Army Court held that counsel should not have continued representation in light of these allegations because counsel could not adequately represent the accused's interests in these circumstances. Remanded for new post-trial proceedings.

4. State Cases

2015: *Commonwealth v. Tigue*, 459 S.W.3d 372 (Ky. 2015). Prejudice was presumed in murder case from counsel's complete failure to advocate for the defendant in his request to withdraw his guilty plea in murder case. Just as it is the defendant's decision to enter a plea, counsel must abide by a

***Capital Case**

defendant's decision to seek to withdraw a plea. Counsel also had an actual conflict of interest because the primary argument for withdrawing the guilty plea was that the defendant was forced to enter a plea due to counsel's refusal to prepare a defense for him. And, here, counsel did not just remain silent but responded to the court's questions in a way that "weighed against and undermined" the defendant's arguments. While the remedy for this error would be simply to remand for a determination on the motion to withdraw the plea with the defendant represented by adequate counsel, the court's review did not stop there as the defendant had also asserted ineffective assistance and the court found that counsel was ineffective for failing to adequately investigate the possibility of an alternative perpetrator before advising the defendant to plead guilty in order to avoid a possible death sentence.

- 2008:** *State v. Toney*, 187 P.3d 138 (Kan. Ct. App. 2008). Counsel had actual conflict of interest that adversely affected representation in post-trial motion to withdraw plea to burglary in exchange for sentence concurrent with previously imposed federal sentence. The defendant asserted counsel was ineffective in failing to investigate. During the hearing, defense counsel suffered "divided loyalties" in that she could not advocate her own ineffectiveness while at the same time defending herself against the allegations. "[H]er conflicted representation necessarily undermined any possibility that [the defendant's] motion would be successful. Under these circumstances, . . . the divided loyalties . . . adversely affected her performance as . . . counsel and created an actual conflict of interest." Remanded for appointment of conflict-free counsel to represent the defendant on his motion to withdraw the plea.
- 2002:** *State v. Griddine*, 75 S.W.3d 741 (Mo. Ct. App. 2002). Counsel in rape case had an actual conflict that adversely affected the defendant. The defendant was convicted of forcible rape and sentenced as a prior offender. He appealed, and on appeal was represented by the same counsel. At the start of the appeal, the defendant asked counsel to file a motion challenging counsel's effectiveness at trial. State law at the time allowed only 30 days after the filing of the transcript in his direct appeal to do so. Counsel refused and told the defendant that filing such a motion would hurt the defendant's case and cause him to be incarcerated for a longer period of time. The defendant took counsel's advice and never filed the motion. The direct appeal was denied. Defendant then requested a recall of the mandate because of his counsel's conflict of interest. Actual conflict found because counsel had an interest in protecting his own representation by not filing the ineffectiveness claim. The conflict adversely affected the defendant because the defendant listened to counsel and did not file his claim. He was therefore denied review. As a result, the court recalled the mandate, vacated its previous opinion, and remanded the case to the trial court for resentencing.
- 2000:** *Zeiszler v. State*, 765 So.2d 128 (Fla. Dist. Ct. App. 2000). Trial court erred in failing to appoint conflict-free counsel to represent defendant on his motion to withdraw a guilty plea where the motion was based, in part, on allegations that counsel coerced him take the plea.
- 1999:** *Blackwood v. State*, 755 So.2d 699 (Fla. Dist. Ct. App. 1999). Trial court erred in failing to appoint conflict-free counsel in aggravated battery case. The public defender initially moved to withdraw

***Capital Case**

because the office had previously represented the alleged victim. Counsel then asked the court to hold the motion because they were attempting to resolve the case. Counsel represented the defendant in his plea and sentencing and then filed a motion to withdraw the plea based in part on counsel's conflict of interest. Trial court denied. Appellate court held that the defendant was entitled to appointment of new counsel to represent him on his motion to withdraw the guilty plea because the public defender was placed in the "impossible" position of attempting to argue motion to withdraw plea even though he certified that he had conflict of interest in representing defendant.

Padgett v. State, 743 So.2d 70 (Fla. Dist. Ct. App. 1999). Trial court erred in failing to appoint conflict-free counsel to represent defendant on his motion to withdraw a guilty plea to child sex offenses where the motion was based, in part, on allegations that counsel coerced him take the plea and counsel's and defendant's versions of events were contradictory. Under state law, indigent defendant had the right to new court-appointed counsel in this situation.

State v. Taylor, 1 S.W.3d 610 (Mo. Ct. App. 1999). Defense counsel's advice in murder case that client should not file a post-conviction motion asserting ineffectiveness of counsel was actual conflict of interest from which prejudice would be presumed for purposes of supporting recall of appellate mandate. State law at the time allowed only 30 days after the filing of the transcript in his direct appeal to do so. Counsel, who continued representation post-trial, advised the defendant not to file the post-conviction motion but instead to raise all issues as plain error in the direct appeal. None of the claims of ineffective assistance of trial counsel were presented to any court. "A trial attorney's representing a defendant on direct appeal and in a postconviction motion in which the claim is ineffective assistance of trial counsel creates an inherent conflict of interest for the attorney. . . . It puts the attorney in the untenable position of litigating his or her own incompetence." *Id.* at 612. Here, by advising the defendant not to file his motion, counsel, "in essence, was caught between his obligation to do his best for [the defendant] and a desire to protect his own reputation and financial interests." *Id.* Counsel also incorrectly advised the defendant that his claims could be asserted in the direct appeal. Counsel had an actual conflict that adversely affected his representation. Mandate recalled and remanded for resentencing after which the defendant could pursue a new direct appeal and postconviction relief.

1998: *Holifield v. State*, 717 So.2d 69 (Fla. Dist. Ct. App. 1998). Trial court erred in failing to appoint conflict-free counsel to represent defendant on his motion to withdraw a guilty plea where the motion was based, in part, on allegations that counsel coerced him take the plea

1996: *State v. Harell*, 911 P.2d 1034 (Wash. Ct. App. 1996). Trial court erred in failing to appoint unconflicted counsel to argue motion to withdraw guilty plea in rape case. Following guilty plea, defendant moved to withdraw plea due to allegations of ineffective assistance of counsel. Counsel refused to assist defendant and testified as a witness against him. Court finds that counsel had a conflict and that defendant was essentially denied any counsel on his motion to withdraw plea.

***Capital Case**

1991: *People v. Cano*, 581 N.E.2d 236 (Ill. App. Ct. 1991). Counsel had actual conflict that adversely affected representation in criminal sexual assault case where defendant filed a grievance against counsel and asserted ineffective assistance. Defendant's complaints were made following trial, but before sentencing. At the hearing on the motion for new trial, counsel informed the court of the grievance. The court considered appointing different counsel but counsel's supervisor informed the court that counsel was the most competent. Counsel proceeded on the motion for new trial. Defendant then requested different counsel and moved to reopen the trial. The court denied new counsel and appointed counsel's supervisor to argue the motion to reopen the trial. The supervisor informed the court of the conflict and asked not to be put in the position of arguing against his subordinate. Defendant later withdrew his pro se motion to reopen the trial and his claims of ineffectiveness and proceeded to sentencing with the original counsel representing him. Counsel had an actual conflict due to the grievance pending against him. "It was possible for [him] to render allegiance to defendant." *Id.* at 241. Counsel's supervisor also had an interest in protecting the professional reputation of his subordinate, which conflicted with defendant's interests. The representation was adversely affected because the court required conflicted counsel to proceed unless defendant withdrew his ineffectiveness claims. This prompted defendant to withdraw his claims. Prejudice presumed.

1985: *People v. Willis*, 479 N.E.2d 1184 (Ill. App. Ct. 1985). Counsel had conflict that required presumption of prejudice in burglary case where defendant moved to withdraw guilty plea based on part on allegations of ineffective assistance of counsel. Therefore, defendant was entitled to new hearing on his motion to withdraw his guilty plea.

People v. Thompson, 477 N.E.2d 532 (Ill. App. Ct. 1985). Counsel had conflict that required presumption of prejudice in armed robbery case where defendant moved to withdraw guilty plea based on part on allegations of ineffective assistance of counsel and was represented by a counsel in the same public defender's office on the motion to withdraw. Therefore, defendant was entitled to new hearing on his motion to withdraw his guilty plea.

P. Conflicting Interests Due to Potential Ethics Violations, Flat or Contingent Fee Arrangement, or Criminal Conduct

1. U.S. Court of Appeals Cases

2004: *United States v. Williams*, 372 F.3d 96 (2nd Cir. 2004). Counsel had actual conflict of interest during pretrial phase of criminal enterprise, money laundering, drugs, and weapons case. Counsel's conflict arose because counsel had engaged in criminal transactions relevant to the defendant's crimes and, in an effort to conceal his own misconduct, actively discouraged the defendant from engaging in plea discussions and cooperating with the government. Three months prior to trial, counsel pled guilty to facilitating the murder of his business partner, money laundering, and drug trafficking. The "requisite adversity" was apparent in counsel's failure to make any effort to negotiate a plea on behalf of the defendant, even though the defendant "may well have had

***Capital Case**

knowledge valuable to the government, especially at the early stages of the proceedings.” No waiver found because the defendant did not necessarily know the full extent of counsel’s criminal activities or know “how these facts translate into a conflict of interest.” Although counsel’s conflict did not affect the trial, it did affect the “likely result [the defendant] would have obtained had he not had conflicted counsel.” Remanded for the court to determine whether the same sentence would have resulted without conflicted counsel.

2002: *Rubin v. Gee*, 292 F.3d 396 (4th Cir. 2002) (affirming 128 F. Supp. 2d 848 (D. Md. 2001)). Counsel in murder case had an actual conflict of interest that adversely affected petitioner’s representation. Following the shooting of her husband, petitioner contacted two attorneys, who both came to the crime scene. After learning that petitioner had taken a lot of medication, the attorneys instructed their assistant to take petitioner to the hospital and have her admitted under a false name. The attorneys notified the police that the victim was dead, but did not disclose any other information. The day after the shooting, one of the lawyers drove Petitioner to the bank to withdraw \$105,000 for counsel’s retainer fee and expenses. The other attorney took the evidence in the case to his office. Only after the attorneys discovered that a warrant was out for petitioner’s arrest did they turn the petitioner in to the police. Counsel then advised petitioner who to retain as her trial counsel. They also remained part of the defense team and continued to collect fees from the petitioner, even though they did not sit at counsel table during her trial. During trial, the state brought out (in cross-examination of petitioner) the events following the homicide, without any mention of the lawyer’s activities, to refute petitioner’s self-defense claim by arguing that she had fled the scene of the crime, lied about her identity, and showed consciousness of guilt. Neither attorney was called to testify. The state court concluded that counsel’s actions following the homicide did not create an actual conflict of interest. The state court also did not consider the continuing effects of counsel’s conflict when evaluating the effectiveness of petitioner’s trial representation. The Fourth Circuit held that this was an “objectively unreasonable” application of clearly established federal law because counsel plainly had a conflict of interest that adversely affected their own performance and the performance of petitioner’s trial counsel. Counsel’s personal interests fundamentally conflicted with the objectives of petitioner’s representation from the moment they arrived at the scene of the crime until the completion of her trial. Counsel utterly failed to function as petitioner’s advocates. Instead, they assisted her in evasive action and functioned almost as accessories after the fact in order to secure their retainer fee. Following counsel’s advice created serious problems for petitioner at trial. Petitioner thus had a strong interest in having counsel testify that she acted on the advice of her own lawyers following the homicide. Counsel had no interest in testifying, however, because of potential criminal charges for obstruction of justice and hindering the apprehension of a criminal defendant. In fact, both counsel were the subject of a grand jury investigation that began prior to petitioner’s trial and continued until after it was complete. One of the attorneys had even engaged his own attorney to represent him in the investigation. Furthermore, both attorneys were also the targets of an inquiry by the Maryland Attorney Grievance Commission during which they had to justify the \$150,000 fee they eventually collected for representing petitioner. Given these facts, the Fourth Circuit said, “At all times, the attorneys’ fidelity to their own interests superseded any sense of obligation they may have had to their client.” *Id.* at 404. Counsel’s continued representation of

***Capital Case**

petitioner was adversely affected by their conflict of interest. They cloaked themselves in the attorney-client privilege to assure that they would not be asked to testify at trial and never considered withdrawing so they could testify and assist petitioner as witnesses. Counsel's conflict of interest also ultimately tainted and adversely affected petitioner's representation by her three trial attorneys. Counsel "violated the most basic principles of the attorney-client compact from the beginning to the end. . . . The taint from their conflict of interest could not be cleansed simply by bringing in independent counsel to make trial decisions." *Id.* at 405. The state court decision to the contrary was an objectively unreasonable application of the *Cuyler v. Sullivan* standard. Counsel's "representation of Rubin was more than ineffective – it was a perversion of the attorney-client relationship. [Counsel's conflict of interest was so severe that it led to a corruption of the adversarial process that our system relies on to produce just results. It is hard to imagine a case that would call the fundamental fairness of a trial into more question than this one. What happened here should never happen in our system. Rubin is entitled to a new trial with conflict-free representation." *Id.* at 406.

1993: *United States v. Fulton*, 5 F.3d 605 (2nd Cir. 1993). Counsel had an actual conflict in drug case where a government witness, who was a cooperating co-defendant, alleged, during trial, that he had once imported drugs for counsel. This created one of two actual conflicts. First, if the allegations were true, counsel would fear that a spirited defense when disclose evidence of counsel's guilt or provoke the government to pursue action against him. Second, even if the allegations were false, the defense would be impaired in cross-examination because it would put counsel in the position of being an unsworn witness. "However viewed, the allegations present an actual conflict." This conflict was "of the sort that requires application of the *per se* rule" and automatic reversal. In addition, the defendant's purported waiver was invalid. "Where a government witness implicates defense counsel in a related crime, the resultant conflict so permeates the defense that no meaningful waiver can be obtained."

1992: *United States v. Greig*, 967 F.2d 1018 (5th Cir. 1992). Trial court erred in drug conspiracy case for failing to inquire after the court learned that counsel had an actual conflict of interest due to counsel's unethical and criminal conduct in approaching codefendant without his counsel's permission. Defendant was along with several codefendants. Prior to trial, a codefendant's counsel informed the court that defendant and defendant's counsel had improperly approached his client several times without permission and advised that client to reject his counsel's plea negotiations, which required testimony against the defendant, and to seek different counsel. The court informed defendant's counsel that disciplinary proceedings would be held but went forward with the trial without inquiry. The court held a hearing on the issue following conviction but did not rule. At the defendant's sentencing, the court increased the guidelines level finding obstruction of justice for the defendant's part in acting with his counsel in discussions with codefendant. Following sentencing the court permanently barred counsel from appearing in the District Court again. The Fifth Circuit held that the trial court erred in not conducting a hearing to determine whether defendant was fully informed of this counsel's ethical violations and whether he desired to continue with representation. "While we recognize that a trial court does not always have an affirmative duty to inquire into the

***Capital Case**

possibility of a conflict of interest, it does have a duty to conduct a hearing once it has been alerted and certainly when it knows of the existence of an actual conflict of interest.” *Id.* at 1022. There was an actual conflict here that required inquiry because “counsel was in the position of simultaneously having to defend himself as well as his client regarding their potentially criminal activity. Like his client, counsel was open to an indictment for obstruction of justice. . . . At the very least, counsel faced severe disciplinary measures, including monetary sanctions, and indeed the very loss of the right to appear as counsel in the whole Western District of Texas. His alleged conduct was highly unethical and clearly violated the Model Code of Professional Responsibility as well as the American Bar Association’s Model Rules of Professional Conduct.” *Id.* at 1022-23. Because the trial court conducted no inquiry, there could be no finding of a knowing and intelligent waiver of the conflict. The court required, however, that defendant establish that counsel’s representation was adversely affected by the representation. Adverse affect shown because counsel would have been preoccupied during trial with his own thoughts of the pending disciplinary proceedings and possible indictment. Likewise, during the codefendant’s testimony, counsel did not object to discussions of meetings with defendant and his counsel and only cross-examined the codefendant to try to minimize his own improper acts. Further, at the hearing concerning counsel’s actions, counsel questioned defendant in a fashion to shift responsibility to him. And, this hearing was prior to sentencing and adversely impacted the defendant. New trial granted.

1991: *United States v. Tatum*, 943 F.2d 370 (4th Cir. 1991). Counsel had actual conflict in bankruptcy case that adversely affected representation where counsel was a member of a law firm implicated in crimes and counsel had previously represented a government witness, who was also his law partner, in the same proceeding. Defendant, who was in the business of restoring expensive and collectible automobiles, filed bankruptcy petition but hid three cars from the trustee and creditors, allegedly upon advice of counsel. The cars were transferred to one of counsel’s law partners. During the grand jury proceedings, defendant, his business partner, and the lawyer that obtained the cars were all represented by a different lawyer in the same firm as bankruptcy counsel and the lawyer that obtained the cars. After the government notified the firm of its concern about the conflicts (but only several months prior to trial), an outside lawyer entered an appearance and conducted the trial, but conflicted counsel was present and assisting him. The government informed the court of the conflicts but the court did nothing. The Fourth Circuit held that counsel had an actual conflict because counsel could not assert that defendant relied on the advice of counsel without inculcating his law partners and increasing the risk of civil malpractice liability of the firm. Counsel also had a conflict because counsel could not present himself as a witness concerning a “missing file” from the law firm that defendant claimed contained exculpatory information. Counsel also had a conflict because counsel had represented the defendant’s business partner, who was the government’s primary witness, in the grand jury proceedings. Counsel also had a conflict because his law partners, the one that obtained the cars and the one that advised defendant in the bankruptcy proceedings, were witnesses during the trial. Counsel’s conduct was adversely affected because counsel could not seek a plea agreement for defendant to testify against his law partners. He also could not call himself to testify concerning the missing file or effectively cross-examine his partners or his former client at trial. The fact that outside counsel conducted the trial did not change the required result because that

***Capital Case**

counsel entered the case only several months prior to trial and relied heavily on conflicted counsel's knowledge of the facts and prior proceedings. Thus, outside counsel's performance was infected by the conflicts.

1988: *Mannhalt v. Reed*, 847 F.2d 576 (9th Cir. 1988). Counsel had conflict in robbery and possession of stolen property case that adversely affected representation where counsel was implicated in purchasing stolen goods from a codefendant/witness. Following the witness' testimony that counsel had purchased stolen goods from him, counsel offered his own unsworn testimony that the accusation was false, but did not actually testify. Counsel also failed to question the defendant in his testimony about whether counsel had ever purchased stolen property. "Although *Cuyler* involved a conflict of interest between clients, . . . the presumption of prejudice extends to a conflict between a client and his lawyer's personal interest." *Id.* at 580.

We find that when an attorney is accused of crimes similar or related to those of his client, an actual conflict exists because the potential for diminished effectiveness in representation is so great. For example, a vigorous defense might uncover evidence of the attorney's own crimes, and the attorney could not give unbiased advice to his client about whether to testify or whether to accept a guilty plea.

Id. at 581. Counsel's representation was also adversely affected in four areas: 1) counsel's failure to testify to rebut the witness' allegations, 2) counsel's cross-examination of the witness, 3) counsel's failure to question the defendant on direct about the allegations, and 4) counsel's failure to explore possible plea bargains for defendant to testify against counsel.

1984: *United States v. Cancilla*, 725 F.2d 867 (2nd Cir. 1984). Counsel had conflict that required presumption of prejudice in mail fraud case where counsel was implicated in same crime. During appeal process, information emerged that tended to implicate counsel in criminal dealings with defendant and codefendants before their arrest. The court held that prejudice would be presumed in these circumstances.

Gov't of Virgin Islands v. Zepp, 748 F.2d 125 (3d Cir. 1984). Counsel had conflict that adversely affected representation in drug case where counsel faced potential criminal liability on the same charges and stimulated testimony that was adverse to defendant. Defendant faced charges of destruction of evidence and simple possession of a controlled substance. Even though there was no direct evidence of wrongdoing by defense counsel, on day of events giving rise to the prosecution, defense counsel had equal access and opportunity, while in house with defendant, to flush cocaine down the toilet. Bags of cocaine were later recovered from the house's septic tank.

2. U.S. District Court Cases

2004: *Rugiero v. United States*, 330 F. Supp. 2d 900 (E.D. Mich. 2004). Counsel had an actual conflict of interest that adversely affected representation in drug case because counsel was the subject of a

***Capital Case**

criminal investigation by the same prosecutor during the pretrial and trial proceedings. Counsel was being investigated for possible extortion, money laundering, and conspiracy and was aware of the investigation well prior to trial. The defendant did not learn of the investigation until the time of jury deliberations when the defendant saw TV broadcasts about the government's intent to indict counsel. Although the court acknowledged the dicta in *Mickens v. Taylor*, 535 U.S. 162 (2002), the court held that the rule in the Sixth Circuit is that the *Cuyler v. Sullivan* standard applies in all conflict cases. The court found an actual conflict because of "the attorney's obvious self-serving bias in protecting his own liberty interests and financial interests." The conflict adversely affected counsel's performance in a number of ways. First, counsel did not pursue pre-trial negotiations because he was being investigated for taking unreported large cash payments and had solicited large cash payments from the defendant. Thus, counsel's interest was to keep the defendant away from negotiations. Second, counsel delayed the defendant's trial in order to delay his own case. The delay resulted in the government strengthening its case against the defendant by gaining the cooperation of co-defendants. Third, counsel failed to protect the defendant when a key government witness violated a sequestration order. Rather than fight on this issue, counsel "curried favor" with the government. Fourth, although the court polled the jurors about the impact of TV broadcasts concerning counsel, counsel's presence at the time called into question the reliability of the juror's responses. Counsel's presence and questioning were "manipulated" by counsel contrary to the defendant's interests. Reversal was required, even though the defendant subsequently retained counsel to continue representation during the sentencing and appeal.

3. U.S. Military Cases

2004: *United States v. Cain*, 59 M.J. 285 (C.A.A.F. 2004). Counsel had an inherent conflict in indecent assault plea case because of his homosexual affair with the Appellant, which could have resulted in counsel being charged with the same offenses that the Appellant already faced. Appellant was charged with three specifications of homosexual forcible sodomy. The Senior Defense Counsel assigned himself to represent the Appellant. Due to his case load, counsel detailed an assistant defense counsel. Appellant entered a negotiated plea to two specifications of indecent assault, in exchange for dismissal of the third forcible sodomy specification and a sentence limitation of 24 months confinement. Shortly after the plea, counsel was questioned about Appellant's parents' allegations that counsel had pressured the Appellant for sexual favors. Counsel denied the allegations, but committed suicide the next morning. On appeal, the Army Court ordered an evidentiary hearing. The evidence showed that counsel had a sexual relationship with the Appellant from the outset and that the relationship was initiated by counsel. Appellant did not want to engage in a sexual relationship with counsel, who was married and had a son, but believed that he would go to prison for a long-time without counsel as his attorney. Although he was advised by several civilian attorneys to seek other counsel, he did not. While the court found that there was a relationship between counsel and the Appellant, the court found that it was not coerced and played no role in the guilty plea. The court also found that Appellant had waived any conflict of interest when he declined to follow the recommendation of the two civilian attorneys to sever his relationship with counsel. The Court of Appeals for the Armed Forces held that counsel's actions exposed him

***Capital Case**

and the Appellant to the possibility of prosecution, conviction, and substantial confinement for the military crimes of fraternization and sodomy (which Appellant was already charged with). Likewise, counsel's actions exposed him and the Appellant to administrative proceedings that could have resulted in involuntary termination for homosexuality. Counsel's actions also violated ethical rules. Under these circumstances, any testimony by the Appellant at trial would have been risky to defense counsel because the prosecution might have sought to question Appellant about similar sexual misconduct. Thus, counsel faced a conflict between his personal interests and his responsibility to Appellant. The court held that "[t]he uniquely proscribed relationship before us was inherently prejudicial and created a per se conflict of interest in counsel's representation of the Appellant." The problems from this conflict are not overcome by the actions of the assistant defense counsel, who negotiated the pretrial agreement, because conflicted counsel was the experienced, lead counsel in the case. The Court rejected a finding of waiver because, while Appellant had been advised that counsel's conduct was unethical, he was not advised that the relationship could impact the merits of his case. Thus, there was no knowing and intelligent waiver.

4. State Cases

2015: *State v. Armstrong*, 863 N.W.2d 449 (Neb. 2015). Counsel in sexual assault on children case had an actual conflict of interest and was ineffective in stipulating that defense witnesses would be excluded. The case arose from allegations that the defendant, who was retired, sexually abused two twin girls that he babysat routinely after school and before school for his neighbors. The girls had been interviewed on video by a forensic interviewer prior to trial and the videos were released to the defense for trial preparation and for use by the defense expert. Defense counsel provided the videos to the defendant without any instruction not to share the videos with anyone and the defendant's wife and son-in-law intended defense witnesses also viewed the videos. During the trial's opening, the state asserted that the alleged victims' behavior had changed over time due to the alleged abuse and that they had become reluctant to spend time with the defendant. The defense countered in the defense opening that the defendant's wife, son-in-law, and granddaughter would testify that the girls were always happy to stay with the defendant. Following the state's case, the defendant's granddaughter testified followed by the defendant's son-in-law. During cross-examination of the son-in-law, it was discovered that he had watched the videos of the alleged victims' pretrial interviews. Based on a state law making it a misdemeanor to disclose videos of interviews of child sex abuse victims without court permission, the state challenged the son-in-law's testimony. The trial court stating that defense counsel may be guilty of a crime and that he had a right to remain silent heard argument only by the co-counsel. The state focusing on impact on the trial rather than on whether counsel was guilty of a crime stated that there were only two options: (1) a mistrial; or (2) to strike the son-in-law's testimony and precluded testimony by the defendant's wife, who was similarly "tainted." Without asking for a continuance or conducting any research to determine whether the statute had been violated or whether exclusion of the evidence was appropriate, even assuming a violation, counsel agreed to exclude the defense evidence believing this was a better alternative to a mistrial because the defense evidence would still be excluded and the state would have more time to prepare for the defense evidence. Counsel had an actual conflict of interest due

***Capital Case**

to “the prospect of criminal or ethical violations [that] had a chilling effect on defense counsel’s representation.” “[C]ounsel’s interest in avoiding criminal or ethical sanctions was in conflict with Armstrong’s interest in presenting the strongest defense possible.” Counsel acquiesced to appease the state and the trial court for counsel’s benefit rather than as a matter of “trial strategy to benefit Armstrong’s defense.” Because the conflict adversely affected counsel’s performance, prejudice was presumed. Even if no presumption was applied, the court found actual prejudice under *Strickland*.

2014: *Harris v. Superior Court*, 170 Cal. Rptr. 3d 780 (Cal. Ct. App. 2014). Counsel in preliminary hearing of drug case had an actual conflict of interest because counsel himself had been arrested by the officer testifying for the state in the hearing and counsel had pending felony charges for vehicle theft with the same prosecutor’s office. While the defendant and the judge were unaware of this information, counsel, the sole state witness, and the prosecutor were all aware of this information, which was “the proverbial 800-pound gorilla in the room.” Prejudice presumed and the information was dismissed.

2013: *State v. Figueroa*, 67 A.3d 308 (Conn. Ct. App. 2013). Counsel had an actual conflict of interest that adversely affected her representation in conspiracy to commit home invasion case. The defendant was charged along with a 15-year-old co-defendant. Prior to trial, counsel met with the codefendant at the jail without the codefendant’s counsel being present. The defendant, an intern, and an interpreter were present. At the conclusion of the meeting, the codefendant provided a written statement that he and the defendant were innocent. He also gave this testimony in direct during trial, but subsequently said on cross-examination that the defendant told him what to say before the meeting and “intimated” him in the meeting by observing. He also testified that counsel had promised to assist him in exchange for his help. While the trial court had a duty to inquire, there was no need to address this threshold issue because two actual conflicts were apparent on this record. The first conflict lay in the tension between counsel’s “continuing representation and the need for her to testify.” Second, by facilitating the meeting itself, her participation in the meeting could have led the jury to view defense counsel as the defendant’s accomplice in intimidating the witness.

***State v. Cheatham**, 292 P.3d 318 (Kan. 2013). Counsel had a conflict of interest in capital murder trial that adversely affected his representation due to a flat fee arrangement. Prior to the defendant’s arrest in this case, counsel represented him on unrelated drug charges. Following his arrest in Chicago and extradition back to Kansas, the Public Defender’s Office was appointed but then relieved at the defendant’s request. Counsel was a sole practitioner with a “busy country law practice.” He had tried only three murder cases in his career and all were more than 20 years before this case. Counsel was aware that the defendant was indigent but agreed to represent the defendant for \$50,000 because of his belief that the defendant was innocent. Counsel informed the defendant he would not be able to concentrate full-time on the case because he had “to earn a living” and because counsel was running for Governor then. While the defendant signed a document acknowledging this information, nothing in the record established that the defendant was aware of what he was giving up. Counsel was contacted by the Director of the Board of Indigents’ Defense Services, which was authorized to provide resources to the indigent defendant, including co-counsel,

***Capital Case**

investigators, consultants, and expert witnesses. Counsel did not accept the Director's offer of assistance and did not even ask whether he could be appointed so that funds would be available. There was nothing in the record to establish that the defendant was aware of the resources available to him, which counsel declined. The court found this to be "distressing, if not professionally irresponsible. And, it flies in the face of common sense." Counsel spent only 40-60 hours on the case prior to trial and did not hire an investigator, interview witnesses, attempt to verify the alibi defense, or file the statutorily required notice of an alibi. He testified that "he had no intention of spending his own funds to prepare the case and no intention of taking time away from his other cases or his political activities." In short, counsel's "representation bore a greater resemblance to a personal hobby engaged in for diversion rather than an occupation that carried with it a responsibility for zealous advocacy." Counsel's conduct was also adversely affected because he failed to make himself available as an alibi witness when he had advised the defendant the day before the murders to leave town because he believed the police were looking for an excuse to arrest the defendant. Counsel attempted to tell the jury this in closing argument, but the state's objection was sustained. Counsel was also found to be ineffective for introducing the defendant's prior conviction for voluntary manslaughter and repeatedly referring to the defendant as a "professional drug dealer" and "shooter of people."

2009: *People v. Curren*, 228 P.3d 253 (Colo. Ct. App. 2009). Counsel had an actual conflict of interest in murder case because the defendant alleged to a second counsel that counsel advised him to flee to Mexico following his arrest for the murders. The defendant had retained second counsel to review original counsel's work because of concern that original counsel was not adequately preparing for trial. During this review, the second counsel disclosed to original counsel the defendant's allegations, which upset original counsel and prompted him to refuse cooperation with second counsel. Original counsel's law partner met with the defendant about the conflict and told him he would have to choose either original counsel or second counsel. He chose original counsel. No one ever informed the court of the problem, however, as was required by state law so there was no valid waiver of the conflict. During trial, counsel's motion to exclude evidence of the defendant's absconding to Mexico was granted. The defendant did not testify. Counsel had "conflicting interests [that] were not trivial." Even if the defendant's allegations were "not based in fact," counsel faced possible sanctions for unethical conduct or even criminal implications. "An actual conflict of interest arises when it places counsel in the position of having to simultaneously defend his or her client and himself or herself, particularly in those instances in which counsel faces professional and criminal sanctions." Counsel's conflict adversely affected the representation as he advised the defendant not to testify, which could open the door to testimony that the defendant had absconded to Mexico prior to trial.

2001: *State v. Martinez*, 31 P.3d 1018 (N.M. Ct. App. 2001). Counsel in murder case had conflict due to his own self-interest and possible implication in the murder that adversely affected representation. Witness testified that she saw three men beating the victim inside a home. The victim ran out and was shot. The witness left and called 911. She gave only a general description of the shooter. When the police arrived, defendant was standing over the body. The witness returned and said that he fit

***Capital Case**

the description of the shooter. At the preliminary hearing, the witness testified that she had learned that defense counsel's car was at the murder scene following the shooting and she observed that the defense counsel fit the general description of the shooter as well. Counsel did not move to preclude the information about his vehicle being at the scene or withdrew. Likewise, the trial court (not the same as preliminary hearing) was not notified of the problem. During trial, the state presented evidence that defense counsel's vehicle was at the scene following the murder. There was also evidence suggesting that a white car described by the witness as having been there after the murder (and, given tire track evidence, possibly at the time of the murder) was owned by an employee of defense counsel's law firm. After the state's evidence, the court questioned the propriety of defense counsel's representation since there was evidence that he was at the crime scene and the jury could infer from the evidence that counsel's employee removed the murder weapon, which was never found, from the scene. The court also observed that the defendant at the scene requested that his hands be tested for gunpowder residue and counsel made the same request the following morning from which the jury could infer that counsel had been there and advised the defendant to make the request. Counsel stated that he had not been at the scene, but that he and the defendant were business partners and the defendant often drove counsel's vehicle. Counsel also stated that the defendant informed him that counsel's employee had not been to the scene on the night of the murder. Counsel even denied that the employee worked for him, although the court observed that he had been in the courtroom assisting counsel during the trial. Following these discussions, which the defendant heard, the court simply asked him if wanted to continue with counsel's representation. The defendant responded that he did because he just wanted to get the trial over with. The trial continued. During the defendant's testimony, counsel asked fourteen questions on the collateral issue of why his vehicle had been at the scene. The defendant also testified that counsel's employee had been to the house earlier in the day but was not there at the time of the murder. Defendant claimed that victim was leaving his home when he heard a shot and went out to find the victim dead. The prosecution argued on the basis of tire track evidence showing the investigator's car left after the witness though that the defendant was lying. Counsel did not rebut this evidence, but instead argued only that if someone left the scene the defendant would have gone too. Counsel also did not argue the person driving the car leaving the scene was the real killer. Counsel had a conflict due to his own self-interest in not being implicated in the murder. If he was present at the crime scene, then he was not in a position to give unbiased advice to the defendant. If he was not present, then he should have considered testifying to clear up the suspicion that he was present and advising the defendant at the time. The representation was adversely affected because counsel did not call his employee to testify. Counsel also could have persuaded the defendant not to testify and argued to implicate the driver of the car leaving the scene, which he could not do, of course, because the driver worked for him. This theory though was plausible under the state's evidence and also would have explained the absence of the murder weapon. Prejudice is presumed. Court also found that defendant did not make a knowing and intelligent waiver because the trial court never asked the defendant if he understood the nature of the conflict or if he understood that he had a constitutional right to conflict-free counsel.

***Capital Case**

- 1998:** **In re Gay*, 968 P.2d 476 (Cal. 1998). Counsel had several conflicts, including pending charges against him in the same jurisdiction. The cumulative prejudice of the conflicts, in addition, to overall ineffective representation in sentencing required that death sentence be vacated. Defendant was charged with killing a police officer and numerous armed robberies. The defense counsel tricked the defendant into retaining him with the help of a psychologist/minister and then got himself appointed. Counsel then advised the defendant to confess to the numerous armed robbery charges, based on an alleged deal that the defense did not have, even though the state's evidence was based only on weak circumstantial evidence and accomplice testimony. The confession allowed the state to convict and to portray the defendant as a serial robber, which was devastating in light of the absence of substantial mitigating evidence in sentencing. Counsel then selected and used the psychologist and a psychiatrist based on a fee arrangement. The psychologist would help trick people to get the attorney retained and in turn the attorney would retain these "experts" who worked together. The psychiatrist was unwilling to take the case if extensive work was required, but counsel assured him that death was a foregone conclusion and extensive time was not required. The psychologist, who was not licensed, did only a Bender Gestalt (neuropsychological screening test) and a WISC test, which is a children's intelligence test. The psychiatrist interviewed the defendant and reviewed a single parole report. He did not request and was not provided with any additional information. He testified only that the defendant is sociopathic, but adapts well to structured environments. A few other defense witnesses that counsel spoke to briefly, if at all, prior to their testimony, testified that the defendant has good character. Counsel was ineffective for numerous reasons. In addition to all of these problems, during his representation of the defendant, counsel was being investigated by the same prosecutor for misappropriation of funds, which presented a potential conflict of interest that was undisclosed. "Whether [counsel's] failure to aggressively defend petitioner at the penalty phase of the trial is solely attributable to the conflict precipitated by the capping relationship or was influenced by the distraction of the fund misappropriation investigation cannot be determined on this record. The per se rule of prejudice arising from an actual conflict of interest does not apply therefore. Nonetheless these conflicts contribute to our lack of confidence in the verdict when considered with [counsel's] other failings." *Id.* at 510-11 (citation omitted).
- 1995:** *Burnside v. State*, 656 So.2d 241 (Fla. Dist. Ct. App. 1995). Counsel had actual conflict of interest that adversely affected representation where counsel was implicated with possible unethical behavior in offering to sell the defendant's testimony to a codefendant. Defendant was charged conspiracy and murder. He was persuaded, along with codefendant one to arrange the murder of the wife of codefendant two. He hired codefendant three to carry out the murder. Codefendant three instead murdered four men at the wife's home. Defendant then furnished money for codefendant three to flee the state. Defendant initially attempted to work out a deal with the government to testify against codefendant two, and made statements to the government. He was then listed as a witness for the government. Defendant's counsel then approached codefendant two's counsel to discuss possible favorable testimony for codefendant two. Codefendant two's counsel understood this to mean that the defendant was offering perjured testimony in exchange for financial assistance to defendant's family. The government filed a bar complaint and defendant's counsel answered that he just passed along the defendant's message in an attempt to inform codefendant two's counsel of defendant's

***Capital Case**

propensity to lie. The government then placed counsel on its witness list to rebut the defendant's testimony if he strayed from his prior statements to the government and moved to disqualify counsel. Defendant moved to strike counsel from the witness list and opposed the motion to disqualify. The court refused to strike counsel as a potential rebuttal witness, but denied the motion to disqualify counsel. Appellate court held that counsel had an actual conflict "because of the state's threat to call trial counsel as a witness if [the defendant] testified contrary to his proffer, trial counsel had a personal stake in the decision whether to put [the defendant] on the stand. That is, if [the defendant] did not testify, trial counsel would avoid again having to give sworn testimony regarding the alleged offer to sell testimony." *Id.* at 244. Adverse affect on representation found where counsel advised defendant not to testify when defendant could have testified that the murders of the four men were not part of the conspiracy to kill codefendant two's wife.

People v. Jackson, 218 A.D.2d 556 (N.Y. App. Div. 1995). Trial counsel created an actual conflict when he testified in rebuttal in robbery and endangering welfare of child case and distanced himself from his client. In response to prosecution witness's testimony that defendant offered him \$150 to provide false alibi testimony, which was allowed over defense objection (also found improper on appeal), defense counsel took stand and testified that he told defendant to tell that witness that, if he appeared, he would get witness appearance fee, if necessary. Reversal required because when defense counsel took the witness stand, he essentially distanced himself from defendant's alleged bribe offer. Since that conflict actually operated on the conduct of the defense, the judgment had to be reversed and the case remanded for a new trial.

1991: *State v. Johnson*, 823 P.2d 484 (Utah Ct. App. 1991). Counsel had an actual conflict of interest in securities law case that adversely affected representation where counsel was implicated as a conspirator. Prior to trial, the state notified the court of the potential conflict. Counsel denied involvement and asserted that he would call the defendant to rebut any such allegations. Defendant stated that he wished to proceed with counsel. During trial, a codefendant that had plead guilty testified that he, the defendant, and counsel had committed the crimes. Counsel had an actual conflict because his interest in exonerating himself was not consistent with defending his client. The adverse affect of the conflict was apparent in counsel's questioning of the codefendant only in an attempt to exonerate himself, failure to call the defendant as a witness, and his failure to object to the state's closing argument. The allegations against counsel also affected his integrity and credibility, which made him less effective as counsel. The purported waiver of the conflict was not valid because it was based on counsel's statement that he would not be implicated and if he was it would be rebutted with defendant's testimony. This did not happen. Moreover, while defendant was advised that counsel could not be a witness and counsel in the same proceeding, he was not advised of the possible effects on the jury if his defense counsel were implicated in the crimes.

1989: *Nunn v. State*, 778 S.W.2d 707 (Mo. Ct. App. 1989). Counsel had an actual conflict that adversely affected representation in arson case where counsel testified and counsel was implicated in possible ethical misconduct related to the case. Prior to trial, counsel interviewed three state's witnesses by phone and tape-recorded the calls without the witness' knowledge. Counsel also subpoenaed one

***Capital Case**

state witness to his office for a deposition without notifying the state and without actually setting up a deposition. At trial, this witness testified and denied talking to counsel on the phone. Counsel then called himself to testify concerning the witness' prior inconsistent statement and had his brother who was also a lawyer conduct the examination. During cross, the state brought out the tape-recording and subpoena activities. Counsel then resumed representation and called a former law clerk as a witness to testify that he and not counsel was responsible for the subpoena. During closing, the state vigorously attacked counsel's credibility. Court found an actual conflict for four reasons. First counsel had an obvious interest in the outcome of the case because he was retained, not appointed. Second, through its intimation of impropriety in counsel's tape-recording telephone conversations without the other side's knowledge and issuing a subpoena for an improper purpose, the state made defense counsel's credibility an issue for the jury. Third, defense counsel called a witness for the sole purpose of rehabilitating defense counsel's own credibility. Finally, defense counsel's appearance in the inconsistent roles of advocate and witness may have undermined the jury's ability to decide the facts and its perception of movant. The court held that counsel should have withdrawn when he decided to testify.

Counsel was caught between the obligation to do his best for movant and the need to justify his own conduct as legal and ethical. An accused is entitled to representation which is uncluttered by counsel's efforts to vindicate his own conduct. A conflict of interest resulting in ineffective assistance of counsel may arise from an interest adverse to the accused or an interest simply personal to the attorney.

The only issue which should have been before the jury was defendant's conduct, not that of his attorney.

Id. at 711 (citations omitted). Adverse affect was clear since counsel injected his credibility as an issue and the jury may have "unintentionally imputed the alleged improprieties of defense counsel to his client." *Id.*

1987: *Morales v. State*, 513 So.2d 695 (Fla. Dist. Ct. App. 1987). Counsel had actual conflict that adversely affected representation in robbery case where counsel had instructed defendant to unlawfully tape record conversation with codefendant who testified for state, but counsel did not use tape to impeach witness because of concerns about the propriety of his actions.

State v. Cyrs, 529 A.2d 947 (N.H. 1987). Counsel had conflict in drug case that required per se reversal where counsel was a state's witness against confidential informant and in order to avoid those charges informant agreed to be a confidential informant against defendant. Counsel also had a conflict because counsel was the subject of the same drug investigation in which the defendant was implicated. Prosecutor had inferential knowledge of those conflicts but did not notify the court. The prosecutor's silence also required reversal.

***Capital Case**

- 1986:** *Smith v. State*, 717 P.2d 402 (Alaska Ct. App. 1986). Counsel had conflict that required presumption of prejudice in rape case where counsel failed to adequately advise defendant, due in part, to concerns about ethics. Defendant had entered into agreement to be tried on one of two rape charges, and to have second charge dismissed if he were acquitted, but to plead guilty to second charge if he were convicted. He was under no legally enforceable obligation to enter a plea of guilty to the second charge after he was convicted on the first charge, but defense counsel did not inform defendant of his right to persist in a plea of not guilty to second charge. Because of the manner in which this “double or nothing” plea agreement was implemented in this case, defendant’s counsel may have considered himself foreclosed as a matter of both personal integrity and professional ethics from giving defendant any advice that would encourage him to renege on the agreement. To the extent that this precluded counsel from fully advising his client of the options legally open to him, however, the concern of counsel with his own ethical and moral dilemma was squarely at odds with his duty to protect his client’s interest conscientiously, undeflected by conflicting considerations. If counsel believed himself precluded from informing defendant of his right to persist in his plea of no contest, then, the court opined, he was under a duty to seek withdrawal from the case. Trial court’s order denying motion to withdraw plea reversed.
- 1985:** **State v. Chandler*, 698 S.W.2d 844 (Mo. 1985). Counsel had conflict that adversely affected representation in murder case where counsel X was implicated in the same murder and had been represented by counsel Y when counsel X was indicted but the charge was later dismissed and counsel X paid counsel Y to represent defendant. The victim was an attorney. The defendant’s brother, who was represented by counsel X at the time of his initial statements, implicated defendant in murder and testified at trial that he stood watch while defendant and another brother committed murder. The other brother that had already been convicted of murder and sentenced to death had initially been represented by counsel X but discharged him and testified before a grand jury that defendant was hired by counsel X to kill the victim. He testified in a deposition that he committed the murder alone and defendant had nothing to do with it. Adverse affect shown because counsel did not call this brother, who exculpated defendant to testify allegedly because he had no credibility. Defendant was entitled to counsel that could make decision whether to call the brother or not without a conflict.
- 1982:** *State v. Loya*, 289 S.E.2d 860 (N.C. Ct. App. 1982). Counsel had a conflict that required presumption of prejudice in robbery case where counsel was under investigation for his own participation in criminal conduct involving the defendant.

Q. Counsel Had Conflicting Interests Due to Financial Interest or Connection or Clear Sympathies with Prosecutor, Law Enforcement, or Judge

1. U.S. Court of Appeals Cases

- 1998:** *Blankenship v. Johnson*, 118 F.3d 312 (5th Cir. 1997). Appellate counsel had a conflict of interest that adversely affected representation in discretionary review process in Texas Court of Criminal

***Capital Case**

Appeals. Defendant was convicted of aggravated robbery. On direct appeal to the Court of Appeals, the conviction was reversed. By the time of the reversal, counsel had been elected as county attorney. Counsel did not withdraw or inform the defendant though. The state sought discretionary review in the Court of Criminal Appeals, which was granted, and the defendant's conviction reinstated without response from counsel, who was aware of the proceedings. Counsel had an actual conflict because he was serving as a prosecutor. The adverse affect was clear because counsel did nothing and did not even inform his client that he was no longer representing him until after the defendant's conviction had been reinstated. Prejudice presumed.

***Rickman v. Bell**, 131 F.3d 1150 (6th Cir. 1997) (affirming 864 F. Supp. 686 (M.D. Tenn. 1994)). Counsel had conflict due to his sympathies with the prosecution case that adversely affected his representation and resulted in constructive denial of counsel. Defendant was charged with murder, rape, and kidnapping as a contract killer hired by the victim's husband to kill his wife. During trial, counsel "combined a total failure to actively advocate his client's cause with repeated expressions of contempt for his client for his alleged actions. The effect of all this was to provide [the defendant] not with a defense counsel, but with a second prosecutor." *Id.* at 1157. Following his initial meeting with client, when client confirmed that his statement to police was true, counsel did not interview any witnesses, conduct any legal research, or obtain and review any records. Counsel spent only 16 hours preparing for trial and his preparation consisted solely of meetings with the defendant. During trial, counsel pursued "a strategy" to convince the jury that the defendant was a sick man. The appellate court observed though, "In our view, [the defendant] would have been better off to have been merely denied counsel; as it was, he had to endure attacks from his own attorney that equaled or exceeded those of the prosecution." *Id.* at 1157. What counsel actually did "was to convey to the jurors an unmistakable personal antagonism toward [the defendant], characterized both by attacks on [the defendant] and by repeatedly eliciting information detrimental to [the defendant's] interests." *Id.* at 1158. Counsel elicited testimony of careful planning when the facts suggested otherwise. He also elicited testimony of the defendant's alleged threats to commit other crimes. His attacks "took the form of portraying [the defendant] as crazed and dangerous." *Id.* During sentencing phase arguments, counsel even apologized to the prosecutors and said that he was ashamed to represent the defendant. The court views this abandonment of the duty of loyalty as a conflict of interest. "[A]n attorney who is burdened by a conflict between his client's interests and his own sympathies to the prosecution's position is considerably worse than an attorney with loyalty to other defendants, because the interests of the state and the defendant are necessarily in opposition." *Id.* at 1159 (quoting *Osborn v. Shillinger*, 861 F.2d 612, 629 (10th Cir.1988) (emphasis added)).

- 1991:** *United States v. Swanson*, 943 F.2d 1070 (9th Cir. 1991). Prejudice presumed where counsel conceded defendant's guilt in his closing argument in bank robbery case. The Ninth Circuit held that this abandonment of the duty of loyalty by assisting the prosecutor created a conflict of interest.
- 1988:** **Osborn v. Shillinger*, 861 F.2d 612 (10th Cir. 1988). Counsel had conflict that adversely affected representation in capital case due to counsel's sympathies to the prosecution. Counsel believed he

***Capital Case**

could talk the prosecutor out of seeking the death penalty. When that failed, counsel was left unprepared due to his failure to investigate. He advised defendant to plead guilty and in sentencing sought only to show that defendant's participation in the crimes was more limited than his codefendants, who were not sentenced to death. Counsel did not prepare and present mitigating evidence concerning defendant's family background and medical history. Counsel also failed to object to prejudicial *ex parte* information provided to the trial court that indicated defendant was the "ringleader," *id.* at 627, even though counsel knew or should have known that the information was provided to the court. Counsel was not prepared to present the argument chosen because counsel did not have the transcripts from codefendants' plea hearings or interview the codefendants (one of whom admitted that he was the ringleader). Counsel "so abandoned his 'overarching duty to advocate the defendant's cause,' *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2064, that the state proceedings were almost totally non-adversarial." *Id.* at 628. Following the defendant's motion to withdraw his guilty plea, counsel also made statements to the press indicating that defendant had no evidence to support the claim and was playing a game to attract attention. "Publicly chastising a client is evidence of ineffectiveness." *Id.* During sentencing, counsel also made public statements that his client was not amenable to rehabilitation. Counsel did not challenge the *ex parte* information or the state's assertion that defendant was the ringleader because counsel believed this to be correct. "[T]hat conflicting evidence existed was apparently of no moment to him. Defense counsel must present conflicting evidence to the court, not judge the issue for himself." During sentencing, counsel also violated the duty of loyalty by stressing the brutality of the crimes and compared his client to "sharks feeding in the ocean in a frenzy; something that's just animal in all aspects." *Id.* Following the trial, even though counsel still represented defendant on appeal, counsel, in an evaluation of the trial judge, informed the judge in a letter that his client deserved the death penalty.

A defense attorney who abandons his duty of loyalty to his client and effectively joins the state in an effort to attain a conviction or death sentence suffers from an obvious conflict of interest. . . . In fact, an attorney who is burdened by a conflict between his client's interests and his own sympathies to the prosecution's position is considerably worse than an attorney with loyalty to other defendants, because the interests of the state and the defendant are necessarily in opposition.

Id. at 629. Here, counsel "did not simply make poor strategic choices; he acted with reckless disregard for his client's best interests and, at times, apparently with the intention to weaken his client's case. Prejudice, whether necessary or not, is established under any applicable standard."

1986: *United States ex rel. Duncan v. O'Leary*, 806 F.2d 1307 (7th Cir. 1986). Counsel had actual conflict that adversely affected representation in murder case where counsel conspired with the prosecutor and a police officer, who was the prosecutor's girlfriend, to get defendant to retain him. Counsel was manager of the prosecuting attorney's campaign for state's attorney and they believed that it would be good for the campaign for counsel to represent defendant. Counsel entered appearance as petitioner's attorney less than ten days before trial, but did not seek continuance, failed

***Capital Case**

to interview state's witnesses, and his cross-examination of those witnesses at trial was rather limited.

1985: *Wilson v. Mintzes*, 761 F.2d 275 (6th Cir. 1985). Counsel had conflict that adversely affected representation in rape case where counsel informed the jury that he no longer represented the defendant and refused to cross-examine a witness after the trial court questioned his competence. "[C]ounsel's decision to continue his battle of wits with the trial judge rather than attend to his client's case" constituted a conflict. *Id.* at 286. "[C]ounsel's loyalty to his own interests rather than those of his client adversely affected his performance in terms of appearance before the jury as well as his tactical conduct of the case." *Id.* at 287.

Walberg v. Israel, 766 F.2d 1071 (7th Cir. 1985). Counsel had conflict and prejudice was presumed since the trial court created the conflict by his bias against counsel, which would have caused counsel concern that he would not get paid or appointed on other cases if he represented defendant vigorously. The trial judge was outwardly biased against defense counsel during pre-trial hearings, disrupted the mode of witness examination by answering for the witness, and relayed thinly veiled threats to never appoint defense counsel to another case or to pay him. The court's actions created a conflict between the defendant and counsel that opened the door to a potentially less-than-vigorous defense because "the state, here in the person of the trial judge, 'interfered in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.'" *Id.* at 1076 (quoting *Strickland*, 104 S. Ct. at 2064). "It is not right that the state should be able to say, 'sure, we impeded your defense-now prove it made a difference.'" *Id.*

2. U.S. District Court Cases

2005: **Stitt v. United States*, 369 F. Supp. 2d 679 (E.D. Va. 2005). Retained counsel in capital trial had an actual conflict of interest that adversely affected representation due to counsel's own personal, financial conflicting interests. While there was no written fee arrangement, counsel were paid a flat fee for their services (although the source of the payments was unclear), with costs and expenses to be paid by Petitioner's family as they arose. The court found counsel was "not credible in answering questions about the source of the funds, his expenditures, and his record-keeping." The court also found that counsel "sought to avoid a Court inquiry into the source of funds paid to him in order to protect his own self-interest." The conflict arose because counsel intended to hire a number of experts but knew the family could not pay for the services. Nonetheless, counsel never discussed with petitioner the possibility of having the court appoint the experts.

[Counsel] took it upon himself to determine that the inquiry which would accompany a request for appointed experts would cause too many problems, problems which [counsel] cannot-or will not-now articulate to the Court. However, [counsel] does make clear that his concern was not only for the protection of his client and his client's family. [Counsel] also sought to protect his own financial interests because

***Capital Case**

of the Government's inquiry into the source of payments made to him. . . . It is obvious that [counsel] labored under an actual conflict of interest.

The conflict adversely affected performance because, rather than request funding for the experts counsel wanted to use, including Mark Cunningham, Ph.D., he “settled on one expert he could afford” and did so “solely . . . because of the financial situation. This is not a reasonable basis for the decision” since counsel could have obtained court-appointed experts. The court found that Dr. Cunningham would have been the stronger expert and that a mitigation investigator might have discovered more thorough documentation of the Petitioner’s background. Prejudice presumed.

1994: *United States v. Harris*, 846 F. Supp. 121 (D.D.C. 1994). Counsel had actual conflict of interest that adversely affected representation in drug distribution case. Defendant was charged following execution of a search warrant. Counsel was appointed. Before meeting with defendant, counsel questioned a police officer, her lover, about his role in the arrest. He told her that he was present at the scene but had no knowledge of the arrest of defendant but had been involved in the arrest of the codefendant. During the joint trial, counsel’s lover testified. In addition to discussing the arrest of the codefendant, he stated that he was present during portions of the defendant’s arrest. During the entire period of counsel’s representation of defendant, she was involved in a longstanding, adulterous, intimate affair with her officer lover. He even had a key to her home. The court found that defense counsel’s substantial personal relationship with an adverse witness in the case established an actual conflict of interest. Adverse affect found because the officer’s testimony conflicted with other accounts of the circumstances surrounding the execution of the search warrant that led to the arrest but counsel failed to adequately exploit these differences on cross-examination. Codefendant’s counsel used this tactic on the jury hung in his case.

1991: *United States v. Marshank*, 777 F. Supp. 1507 (N.D. Cal. 1991). Government’s collaboration with defendant’s attorney during investigation and prosecution of drug case violated defendant’s Fifth and Sixth Amendment rights and required dismissal of the indictment. Counsel assisted the government by bringing in several clients, who were not charged or being investigated, to offer information in exchange for immunity. Based on information they provided, the government initially targeted an “insider” in the drug operation. Counsel contacted a former client, who was already indicted on charges, and arranged for him to surrender and cooperate. He provided information that led to indictment of another of counsel’s former clients, who on the advice of counsel also cooperated and provided information that led to defendant’s indictment. In the initial grand jury proceedings, all of the witnesses were clients of counsel. When the defendant was arrested, law enforcement, who had been working with counsel, encouraged the defendant to call an attorney. Defendant called the same counsel, who had previously represented him in divorce proceedings and with whom he had an ongoing relationship. Counsel advised him to provide some incriminating information as a showing of good faith when the government had not even been aware of the information. Ultimately, defendant retained separate counsel. The initial indictment was dismissed. In the second grand jury proceedings, counsel even testified against the defendant. [There’s more to the horror story, but you get the picture]. The court held that the government’s conduct created a conflict of interest between

***Capital Case**

defendant and counsel and the government took advantage of it without alerting the defendant, the court, or even the “oblivious” counsel to the conflicts. “While the government may have no obligation to caution defense counsel against straying from the ethical path, it is not entitled to take advantage of conflicts of interest of which the defendant and the court are unaware.” *Id.* at 1519. Moreover, the government here assisted in efforts to hide the conflicts from defendant. “In light of the astonishing facts of this case, it is beyond question that [counsel’s] representation of [defendant] was rendered completely ineffectual and that the government was a knowing participant in the circumstances that made the representation ineffectual.” *Id.* at 1520.

3. Military Cases

- 1992:** *United States v. Bryant*, 35 M.J. 739 (A.C.M.R. 1992). Military defense counsel had actual conflict that adversely affected representation where counsel considered the needs of the Army over the needs of his client. Accused was charged with disobeying orders and disrespect in Saudi Arabia during Gulf War. Despite believing that the accused should proceed to trial before a panel because of problems with the government’s proof, counsel advised the accused to waive a panel trial and proceed with a bench trial because counsel knew the ground war was about to start (and it did the next day) and he was concerned about the consequences of calling soldiers to court to serve as panel members when they were needed in combat. Although the record reflected a waiver by the accused, the court found that counsel’s own affidavit attesting to his divided loyalties could not be ignored.
- 1989:** *United States v. Whidbee*, 28 M.J. 823 (C.G.C.M.R. 1989). Reversal of two general court-martial convictions required where the prosecutor was the defense counsel’s immediate supervisor and rater in all non-military justice matters and this conflict was not explored by the court prior to trial because the court was not informed of the problem. While defense counsel had disclosed to the accuseds that trial counsel was his supervisor, defense counsel did not recognize an actual conflict and it was thus “impossible for him to provide the kind of explanation to an accused necessary for a knowing waiver.” *Id.* at 827. Absent proof of an adequate waiver when such an “inherent and irrefutable” conflict is present, *id.* at 826, prejudice is presumed.
- 1985:** *United States v. Kidwell*, 20 M.J. 1020 (A.C.M.R. 1985). Counsel had conflict that adversely affected representation in drug case where counsel negotiated a deal to dismiss charges and administratively discharge the accused in exchange for accused working as informant but counsel did not move for discharge following provision of some information because he believed it was in best interest of military to keep the accused providing information to the government. The accused then picked up additional charges and the government prosecuted and convicted him of all. The court held that counsel’s failure to move for administrative discharge was due to counsel’s desire to keep accused operating as an informant about whereabouts of blank military identification cards, which the government believed could be used by terrorists in a time when there had been widespread terrorism against the U.S. and its installations. Counsel’s interest was adverse to appellant’s interests at that point. Thus, counsel actively represented competing interests. The convictions on the initial charges were reversed. Resentencing ordered.

*Capital Case

4. State Cases

- 2014:** *In re Marriage of Wixom and Wixom*, 332 P.3d 1063 (Wash. Ct. App. 2014). Counsel had a conflict of interest in child custody suit where the trial court ordered former husband and his attorney to pay attorney fees as sanction for abuses in the custody proceeding and the attorney argued during the appeal that the former husband should be solely responsible for the sanction fees. The appellate court found a clear conflict of interest, which was not waivable, and disqualified counsel from representing the former husband. The court also prohibited counsel from representing himself, if he was going to continue arguing that sanctions should only be imposed on the former husband.
- 2009:** *People v. Ragusa*, 220 P.3d 1002 (Colo. Ct. App. 2009). Privately-retained counsel had an actual conflict of interest in theft and computer crimes case, in which the state had offered a plea agreement that counsel believed the defendant should take but she refused. Counsel breached the attorney-client privilege by revealing matters to the court and prosecutors during *in camera* hearings from which the defendant was excluded. They “‘actively represented conflicting interests’ by making a record which could be used in their favor and against defendant in some unspecified proceeding that they anticipated would later occur.” In addition, by using pretext to obtain the *in camera* hearings and concealing the substance of those proceedings from the defendant, rather than advising her about the nature of the conflict, they “‘prevented her from knowingly and intelligently exercising her right to conflict-free counsel. Counsel also had a “stated intention of not letting her fire them.” “[T]he cumulative effect . . . created an actual conflict of interest that adversely affected the attorneys’ performance.” In addition, the defendant was deprived of her right to be present at the hearings, which was not harmless. Likewise, she was effectively denied her right to counsel of choice by the trial court’s participation in keeping her “in the dark” and this was structural error that did not require a showing of prejudice.
- 2008:** *Edwards v. Lewis*, 658 S.E.2d 116 (Ga. 2008). Trial and appellate counsel, both employed by the Public Defender Office of DeKalb County labored under an actual conflict of interest that adversely affected the representation in drug case. At the time of the defendant’s indictment and trial in 2001, the county was still using 1990 Census data (54% white, 36% black) in summoning jurors though data from the 2000 Census (54% black; 36% white) was available but not used because it “‘had not yet been declared ‘official.’” Trial counsel filed a motion challenging the racial composition of the grand and traverse jury arrays, but did not pursue it with the presentation of evidence because the Public Defender Office negotiated with the county judges that the jury database would be updated quickly in exchange for agreement not to raise the issue in the defendant’s case or any older counsel. While trial and appellate counsel believed this was a strong issue for the defendant, they did not pursue it because of their boss’ directive, which was supported by the county courts. Prejudice presumed.
- 2006:** *Smith v. State*, 905 A.2d 315 (Md. 2006). Counsel had a conflict in criminal contempt case where the defendant, an inmate, was called to testify as a prosecution witness in another case. When the

***Capital Case**

witness sought to invoke his Fifth Amendment right against self-incrimination, the court appointed counsel for him. Counsel informed the court, after discussions with the witness and the prosecutor, that he had advised the witness that he could find no legitimate basis for assertion of the Fifth Amendment privileges. The witness continued refusing to answer questions, although not on the asserted basis of the Fifth Amendment. The court found him in contempt and subsequently imposed a sentence of five months. In essence, counsel had a conflict due to his attempt to advise the witness and be a friend of the court. He could not do both here and the trial court relied on counsel's statement in finding that the witness did not have a Fifth Amendment privilege.

Commonwealth v. Downey, 842 N.E.2d 955 (Mass. App. Ct. 2006). Counsel had an actual conflict of interest and was ineffective due to counsels' agreements with a television company to record with concealed microphones without the defendants' consent during the defendants' trial for second degree murder. Under state law, prejudice was presumed due to counsels' divided loyalties. Counsel was also ineffective and prejudice was found because the defendants discovered the existence of the microphones during the course of the trial. After that point, the defendants were intimidated and "were not as forthcoming with their attorneys as the otherwise might have been."

2004: ***In re S.G.***, 807 N.E.2d 1246 (Ill. App. Ct. 2004). Counsel in parental rights termination case had a per se conflict of interest due to his previous representation of the minors as a guardian ad litem. The state sought to terminate parental rights due to neglect and abuse of the children. In the initial hearing, counsel served as a guardian for the children asserting that parental rights should be terminated. Two months later, the court appointed a different guardian for the children and appointed counsel to represent the parent. A per se conflict was found because counsel represented parties with adverse objectives at different times in the same proceedings. Prejudice presumed in accord with state law per se holdings.

1998: ****Sallie v. State***, 499 S.E.2d 897 (Ga. 1998). Counsel in capital case had actual conflict because counsel simultaneously worked as a full-time judicial law clerk for the circuit judges, including the trial judge. The defendant was never informed of the conflict. "There is no need to embark on an analysis of *Cuyler, supra*, and its progeny: the conflict here is obvious and, given the enormity of the penalty in this case, completely impermissible." *Id.* at 448.

1996: ***State v. Holland***, 921 P.2d 430 (Utah 1996). Prejudice presumed where counsel did very little and was ultimately disqualified from representation on appeal due to counsel's breach of loyalty in arguing in another case that defendant is a prime candidate for the death penalty. Capital defendant initially plead guilty and was sentenced to die but initial appeal resulted in resentencing hearing. On remand, defendant moved to withdraw guilty pleas on basis that he was incompetent at the time of plea. The court denied the motion and at the resentencing counsel presented no evidence to challenge aggravation evidence and no evidence in mitigation rather counsel simply presented the transcript from the prior sentencing and did not even argue that life was an appropriate punishment. The same counsel initially represented the defendant on appeal but was disqualified due to actual conflict of interest for taking adversarial position with defendant in another capital case. New

***Capital Case**

counsel argued that judge erred in nunc pro tunc finding of competency based on evidence and ineffective assistance. Court found trial court did err in making nunc pro tunc finding of competency in combination with defense counsel's completely bad and at times adversarial representation throughout certainly draws into question whether defense counsel ever investigated or advised defendant properly and whether defendant was in fact competent.

1994: **People v. Lawson*, 644 N.E.2d 1172 (Ill. 1994). Prejudice presumed in capital murder case where court-appointed defense counsel had previously served in the same case as a prosecutor. Counsel had appeared as a prosecutor at defendant's arraignment, where he filed two discovery motions, and presented then defense counsel with copies of indictments and warrant for defendant's arrest. Counsel then became an assistant public defender and advised the court, some seven months after appearing for the state at defendant's arraignment, that he had entered his appearance as defendant's newly appointed defense counsel. Counsel represented defendant through pretrial, trial, and sentencing. Counsel then filed a motion for new trial. New counsel was appointed following defendant's *pro se* motion raising issues of ineffectiveness. The conflict was never raised until appeal. The Illinois Supreme Court found no default, however, because there was no indication in the record that defendant was aware that counsel had served as a prosecutor in his case. "[U]nder the circumstances here, where defendant's court-appointed defense counsel also previously served in the same criminal proceeding as the prosecuting assistant State's Attorney, a possible conflict of interests existed. Fairness to both the accused as well as his attorney dictates application of a *per se* rule. In such case, it is unnecessary for the defendant to show actual prejudice in order to be entitled to a reversal of his conviction." *Id.* at 1186-87.

**State v. Holland*, 876 P.2d 357 (Utah 1994). Counsel disqualified from representation on appeal due to counsel's breach of loyalty in arguing in another case that defendant is a prime candidate for the death penalty. Defendant plead guilty to capital homicide and was sentenced to death. Based on an issue not raised by counsel in trial or in first appeal, the court set aside the death sentence. In the second capital sentencing, counsel introduced only the transcript from the first penalty hearing and, otherwise, presented no evidence or argument. The death sentence was again imposed. The Utah Supreme Court held that the direct appeal would not be addressed until new counsel was appointed because counsel violated his duty of loyalty to defendant. After filing this appeal, counsel sought to call defendant to testify in an unrelated capital trial concerning his criminal acts and background so that the jury could compare defendant's background and criminal activities with those of the other capital defendant. "The purpose of the testimony was to demonstrate that, when compared to [defendant], [counsel's other client] did not deserve the death penalty." *Id.* at 358. The testimony was excluded from the other case, and counsel appealed on behalf of that client arguing that defendant, unlike counsel's other client "is a prime candidate for the death penalty." *Id.* at 359. The state moved to disqualify counsel in the other case and that motion was granted. Although the state did not move to disqualify counsel in this case, the court found the issue to be unavoidable and addressed counsel's actions *sua sponte*. The court found a violation of the duty of loyalty. "At a minimum, an attorney's duty of loyalty to his or her client requires the attorney to refrain from acting

***Capital Case**

as an advocate against the client, even in a case unrelated to the cause for which the attorney is retained.” *Id.* at 359-60.

If an attorney’s loyalty is compromised because he believes that his client should be convicted or because he is influenced by a conflict in loyalties to other defendants, third parties, or the government, the law cannot tolerate the risk that the attorney will fail to subject the prosecution's case to the kind of adversarial challenge necessary to ensure that the accused receives the effective assistance of counsel as guaranteed by the Sixth Amendment.

Id. at 360. Here, by asserting that defendant was a prime candidate for the death penalty, counsel essentially aligned himself with the state. “[A]n attorney is not justified in asserting that his client deserves the death penalty, even if his client desires to have that penalty imposed.” *Id.* at 361 n.3. “Given the direct and fundamental nature of the duty of loyalty, we will not inquire into the issue of whether the breach of that duty was prejudicial.” *Id.* at 361. New counsel appointed.

1992: *Browning v. State*, 607 So.2d 339 (Ala. Crim. App. 1992). Counsel had an actual conflict in drug case that adversely affected represent where counsel in the same case, acting as a municipal judge, had signed the search warrant for defendant’s home. The court found an actual conflict and a violation of the judicial canons prohibiting a part-time judge from appearing as counsel in a proceeding in which he has appeared as a judge. The conflict was clear. Counsel as a judge relied on information supplied him by the officers working on the case in authorizing search of defendant’s home. As defendant’s counsel, on the other hand, counsel and was obliged to question the reliability of the information from the same officers whom he had previously relied upon. Defendant did not make a valid waiver either. While counsel informed the trial court of the conflict, the court conducted an inquiry of counsel in chambers outside the defendant’s presence. The court also found that the error was not harmless, even though no evidence was obtained in the search authorized by counsel. Prejudice is presumed when an actual conflict is shown.

1987: *State v. Bolen*, 514 So.2d 691 (La. Ct. App. 1987). Counsel had actual conflict in burglary case that required reversal regardless of the absence of prejudice where counsel was the son of the sentencing judge.

1986: *Worthen v. State*, 715 P.2d 81 (Okla. Crim. App. 1986). Counsel had actual conflict that required reversal in drug case where counsel had previously prosecuted defendant for two prior crimes used to enhance his punishment.

State v. Reedy, 352 S.E.2d 158 (W. Va. 1986). Failure of defense counsel to disclose to defendant before trial the existence of a family relationship between defense counsel and burglary victim denied defendant his right to effective assistance of counsel.

***Capital Case**

- 1985: *People v. Jackson***, 213 Cal. Rptr. 521 (Cal. Ct. App. 1985). Counsel had potential conflict that required automatic reversal where counsel failed to inform defendant of counsel's ongoing "dating" relationship with prosecutor. Reversal required even though counsel and prosecutor were never married or engaged to each other and did not live together, and counsel never divulged any confidential defense information to prosecutor.
- 1984: *People v. Washington***, 461 N.E.2d 393 (Ill. 1984). Counsel had conflict that required automatic reversal in murder case where counsel was employed as the prosecutor in another city and some of the police officers from his city were called to show probable cause for defendant's arrest. Counsel's conflict centered on the simultaneous obligation to oppose and to attempt to discredit a police officer and representative of the municipality he was serving as its prosecutor. The attorney was obliged to cross-examine and attempt to discredit one of the officers whose veracity and credibility he vouched for when acting as a prosecutor for his municipality. Counsel's statement to trial judge showed that attorney was aware of the possible conflict, but there was no showing that the conflict was explained to the defendant. And there was nothing to show that defendant understood the nature of an attorney's conflict of interest. As such, defendant's waiver of the possible conflict was not knowing and understanding.
- 1983: *People v. Castro***, 657 P.2d 932 (Colo. 1983). Counsel had conflict that required presumption of prejudice in murder case where counsel simultaneously represented the district attorney in separate litigation involving recall petition and criminal charges of overspending his office's budget, even though the case was not personally tried by the district attorney. Right to effective assistance of counsel may be violated not only by representation falling below the level of competence to be expected of a reasonably competent attorney practicing criminal law, but also by representation that is intrinsically improper because of a conflict.
- State v. Franklin***, 331 N.W.2d 633 (Wis. Ct. App. 1983). Counsel had actual conflict that adversely affected representation in theft case where counsel at sentencing argued that defendant's bond money had been assigned to him for payment of legal fees, thus opposing state's plan to use bond money as restitution provided for by plea agreement. Defendant was thereby denied effective assistance of counsel, requiring vacation of sentence, regardless of whether plea agreement actually called for use of bond money as restitution.
- 1982: *Howerton v. State***, 640 P.2d 566 (Okla. Crim. App. 1982). Counsel had a conflict that required presumption of prejudice where counsel was a part-time prosecutor.

R. Pending Criminal Investigation or Charges in Same Jurisdiction

1. U.S. Court of Appeals Cases

- 1994: *United States v. Levy***, 25 F.3d 146 (2nd Cir. 1994). Counsel had actual conflict of interests that adversely affected representation in drug conspiracy case. Counsel had previously represented the

***Capital Case**

defendant. After arrest warrants were issued for the defendant and his nephew, counsel informed the government that he represented both defendants, although the defendant was out of the country. During plea negotiations on the nephew's behalf, counsel and the defendant made statements incriminating the defendant. After the nephew rejected plea negotiations, he was inadvertently released from custody and fled the country. The government believed counsel was involved in this flight. When the defendant was arrested and brought back to the country, counsel continued representation of both. While the government never formally moved to disqualify counsel, the prosecutors did repeatedly alert the trial court of (1) counsel's joint representation; (2) counsel's status as a defendant awaiting his own sentencing in the same district on an unrelated criminal charge; (3) counsel's status as the object of a grand jury investigation into the nephew's flight; and (4) counsel's status as a possible witness concerning statements made by the defendant during the plea negotiations on behalf of the nephew. The District Court inquired but accepted counsel's distortions of the truth and false statements. "[T]he very nature of [counsel's] predicaments strongly indicates that he labored under actual and not merely potential, conflicts of interest." He had "continuing legal and ethical obligations to protect" the nephew, whose interests diverged from the defendant, whose most likely defense was to blame the nephew who had been directly involved in controlled buys by a confidential informant when the defendant was not even in the country. Counsel also had a personal interest to avoid being called as a witness since he would likely have to cease representing the defendant. Likewise, counsel's own charges presented a conflict because counsel may have believed he should temper his defense for the defendant here in order to curry favor with the prosecution in his own case. Finally, counsel obviously had a strong personal interest in avoiding any exploration of the nephew's flight from the country as counsel could be incriminated. Counsel's representation was adversely affected as counsel did not pursue a plausible defense strategy of trying to pin greater blame on the nephew because counsel had obligations to him and also did not want to expose counsel to prosecution for his role in the flight. Because the trial court had not obtained a knowing waiver from the defendant, reversal was required.

1987: *United States v. McLain*, 823 F.2d 1457 (11th Cir. 1987). Counsel had an actual conflict that adversely affected representation in RICO case where counsel was being investigated for Hobbs Act violations by the same prosecutor involved in defendant's case and the prosecutor's was delaying indictment of counsel until the conclusion of the defendant's case. While counsel was aware of the investigations and had his records subpoenaed four times during defendant's case, neither counsel nor the prosecutor informed the court or the defendant. Counsel had an actual conflict manifested by counsel's interest in prolonging the defendant's trial. Adverse affect was apparent in counsel's failure to engage in plea negotiations for the defendant. The prosecutor, in RICO cases, required cooperation against co-defendants for negotiated pleas. While the defendant was reluctant to testify against one co-defendant out of fear, counsel did not press negotiations to testify against other co-defendants and did not explore the option of going over the prosecutor's head to the Justice Department as he later did in his own case.

2. U.S. District Court Cases

***Capital Case**

1985: *United States v. Marin*, 630 F. Supp 64 (N.D. Ill. 1985). Counsel had conflict and prejudice was presumed where counsel was under criminal investigation by the same prosecutor and was cooperating with the US Attorney in an attempt to avoid indictment. While there was no showing of adverse affect, the court held that, in his desire to ingratiate himself with representatives of the US Attorney's office or in his fear of offending them in the course of his negotiations seeking consideration for himself from them, counsel may have done less than he might otherwise have done for his client. The court found that prejudice should be presumed.

3. State Cases

2008: *State v. Cottle*, 946 A.2d 550 (N.J. 2008). Counsel in murder case had a *per se* conflict of interest under state law where counsel also had pending charges for criminal stalking in the same county and was involved in pretrial intervention proceedings requiring that he report to the state. Prejudice presumed.

1998: **In re Gay*, 968 P.2d 476 (Cal. 1998). Counsel had several conflicts, including pending charges against him in the same jurisdiction. The cumulative prejudice of the conflicts, in addition, to overall ineffective representation in sentencing required that death sentence be vacated. Defendant was charged with killing a police officer and numerous armed robberies. The defense counsel tricked the defendant into retaining him with the help of a psychologist/minister and then got himself appointed. Counsel then advised the defendant to confess to the numerous armed robbery charges, based on an alleged deal that the defense did not have, even though the state's evidence was based only on weak circumstantial evidence and accomplice testimony. The confession allowed the state to convict and to portray the defendant as a serial robber, which was devastating in light of the absence of substantial mitigating evidence in sentencing. Counsel then selected and used the psychologist and a psychiatrist based on a fee arrangement. The psychologist would help trick people to get the attorney retained and in turn the attorney would retain these "experts" who worked together. The psychiatrist was unwilling to take the case if extensive work was required, but counsel assured him that death was a foregone conclusion and extensive time was not required. The psychologist, who was not licensed, did only a Bender Gestalt (neuropsychological screening test) and a WISC test, which is a children's intelligence test. The psychiatrist interviewed the defendant and reviewed a single parole report. He did not request and was not provided with any additional information. He testified only that the defendant is sociopathic, but adapts well to structured environments. A few other defense witnesses that counsel spoke to briefly, if at all, prior to their testimony, testified that the defendant has good character. Counsel was ineffective for numerous reasons. In addition to all of these problems, during his representation of the defendant, counsel was being investigated by the same prosecutor for misappropriation of funds, which presented a potential conflict of interest that was undisclosed. "Whether [counsel's] failure to aggressively defend petitioner at the penalty phase of the trial is solely attributable to the conflict precipitated by the capping relationship or was influenced by the distraction of the fund misappropriation investigation cannot be determined on this record. The *per se* rule of prejudice arising from an actual conflict of

***Capital Case**

interest does not apply therefore. Nonetheless these conflicts contribute to our lack of confidence in the verdict when considered with [counsel's] other failings." *Id.* at 510-11 (citation omitted).

1996: *People v. Edebohls*, 944 P.2d 552 (Colo. Ct. App. 1996). Trial court failed to conduct adequate inquiry into counsel's conflict where counsel had pending criminal charges in the same jurisdiction. Defendant charged with numerous Organized Crime Act violations including alleged that he headed a drug distribution conspiracy. Counsel was retained. Prior to trial, counsel was charged with two counts of tampering with a witness and one count of bribery in a matter unrelated to defendant's case. Counsel informed the defendant of the charges pending against him. At the request of the defendant counsel withdrew but was then retained again two days later. On the morning of trial, the court, having read about counsel's charges in the newspapers, inquired about the pending charges against counsel. The court conducted an inquiry of the defendant without the prosecutor or counsel being present and determined that the defendant waived any potential conflict. Trial proceeded and the defendant was convicted. The appellate court held that counsel's pending charges, in the same jurisdiction, created an actual conflict of interest.

Because the same district attorney's office was responsible for the prosecutions of both defendant and defense counsel, defense counsel may well have been "subject to the encumbrance that the prosecutor might take umbrage at a vigorous defense" of defendant and become more ardent in the prosecution of defense counsel. Under these circumstances, we conclude that an actual conflict of interest existed.

Id. at 556. Although the trial court conducted an inquiry, the court did not specifically ascertain whether defense counsel and defendant had discussed the conflict of interest and did not appoint independent counsel to consult with the defendant on this matter. Moreover, at no point did the trial court explain the conflict or advise defendant of his right to conflict-free representation. Thus, defendant was never given a "clear choice" between exercising or waiving his right to conflict-free counsel. Moreover, his answers about whether he desired to continue with this counsel were equivocal. Because the inquiry was inadequate, there could be no finding of a knowing and intelligent waiver. Prejudice presumed.

1991: *Phillips v. Warden, State Prison*, 595 A.2d 1356 (Conn. 1991). Counsel in sexual assault case had actual conflict that adversely affected representation where counsel had been convicted of murder in a highly publicized case, but allowed to continue his law practice until he had completed the appeals process. Counsel had been a prominent politician in the local area before he was charged with murdering his wife. He was convicted, the trial court set aside the conviction, and then the Supreme Court reinstated the conviction and counsel was sentenced. He then appealed. During that time there were numerous headlines in the local papers. He had moved twice for a change of venue. Following defendant's arrest, his girlfriend retained counsel's former associate for the arraignment and that lawyer recommended counsel. Defendant was not from the local area and was not aware of counsel's convictions. Three days later, defendant's girlfriend told him that counsel had been

***Capital Case**

convicted but that his conviction had been overturned, which was not accurate since counsel's conviction had been reinstated by then. Defendant retained counsel anyway on the advice of his friends and relatives. Counsel did not inform defendant of his problems until close to trial, but assured him that he could continue as his attorney. Counsel did not withdraw because he needed the money. During voir dire, counsel did not question the jurors concerning their knowledge of his own murder conviction. The court found an inherent conflict because counsel's "duties of undivided loyalty and independent exercise of professional judgment demanded that he withdraw from representing the [defendant]." *Id.* at 1371. Counsel's representation was adversely affected because counsel had to choose between inquiring on voir dire about his own murder conviction or not – "either of which was fraught with peril for the [defendant's] right to a fair trial before an impartial jury." *Id.* Under these circumstances, there was a risk that the jurors "would transfer to the [defendant] the distaste or revulsion that they may have felt for his lawyer." *Id.*

S. Counsel Having Affair With Defendant's Wife or Defense Investigator Having Personal Relationship With Victim's Mother

1990: **People v. Singer*, 275 Cal. Rptr. 911 (Cal. Ct. App. 1990). Counsel in murder case had a conflict that adversely affected representation where counsel was having an affair with defendant's wife and also representing her because she was potentially implicated in crimes. Defendant was arrested for the murder of his wife's ex-husband. A first trial ended in hung jury. Defendant was convicted in the second trial. During both trials counsel had a sexual relationship with defendant's wife, which was disclosed after trial to defendant by counsel's former employee. The court noted that an actual conflict must be shown under *Cuyler*, but California law requires a showing of a potential conflict if the record "supports 'an informed speculation' that appellant's right to effective representation was prejudicially affected." *Id.* at 921. Here, counsel's affair with defendant's wife "introduced deception and duplicity into the advocate-client relationship, which by definition must be grounded in trust and fidelity." *Id.* at 920. Counsel may have had an interest in defendant being convicted so the affair could continue or remain undiscovered. Counsel may also have had an interest in protecting his lover from being implicated in the crimes, especially where counsel also represented her.

V. Court Erred in Accepting Waiver of Unwaivable Conflict

A. Simultaneous Representation of Jointly Tried Codefendants

2000: *United States v. Hall*, 200 F.3d 962 (6th Cir. 2000). Trial court erred in accepting waiver in drug conspiracy case where counsel represented both defendants, who were brothers. The court held that the "younger brother, Stanley Hall, was obviously led astray by his older brother." And, although both defendants "waived their rights to separate counsel, this is one of the unusual cases where the court should have stepped in to ensure an adequate legal defense for Stanley Hall." *Id.* at 963. Government counsel raised the issue and the conflict was discussed repeatedly. In a hearing just prior to trial, counsel stated that he had represented the older brother for years and would represent

***Capital Case**

only him if the dual representation was not allowed. The younger brother indicated he would continue with counsel, “but the record remains cloudy as to whether Stanley understood the full ramifications of what he was doing.” *Id.* at 964. During the trial, the older brother asserted that he was working undercover as an informant for the government, which he had done in the past but there was no evidence of in this case. The younger brother asserted that he had been informed by his brother that he was assisting in an undercover operation. Both were convicted. The conflict of interest was evident in Stanley Hall's case by counsel's failure to successfully negotiate a plea agreement for the younger brother. Prior to trial, both brothers entered into plea agreements which were signed but withdrawn at the last moment. Under the plea agreement, the older brother, who had two prior convictions, would have received a life sentence and the younger brother, who had no prior convictions, would have been sentenced to between three years and ten months and four years and nine months rather than receiving the mandatory minimum sentence of ten years. While the older brother's interest was to go to trial, the younger brother's interest was clearly better served by entering into the plea agreement. Likewise, during the trial, counsel focused only on the older brother's defense, even when questioning the younger brother. And, while counsel did not focus on the lack of evidence connecting the younger brother to a portion of the drugs, the jury even sent out a question noting that there was no direct evidence of the connection, only counsel's concession. This was clear evidence not only of the conflict, but that the conflict had prejudiced Stanley Hall. The trial court should have intervened and severed Stanley Hall's trial from that of his brother with unconflicted counsel.

B. Simultaneous Representation of Codefendants in Pleas Negotiations

1990: *Hoffman v. Leeke*, 903 F.2d 280 (4th Cir. 1990). Counsel in accessory to murder case had conflict that adversely affected representation where counsel jointly represented defendant and two codefendants, who plead guilty and testified against defendant. The trial court also failed to conduct an adequate inquiry and should have rejected defendant's purported waiver even if it was valid. Prior to trial, the court inquired of the defendants jointly and individually about the joint representation and counsel informed the court that he saw no conflict. A mistrial was granted shortly after jury selection. Prior to the new trial, a local co-counsel was retained. Each defendant again expressed a desire to continue with the joint representation. After that, both codefendants accepted plea agreements and agreed to testify against defendant. The state repeatedly brought out during the trial that counsel represented the codefendants. A codefendant was the state's primary witness. The co-counsel conducted the cross-examination. The court reached “an inescapable and unavoidable conclusion” of an actual conflict that adversely affected the representation. *Id.* at 286. The conflict was “patent” where defendant “was in the unacceptable position of having his own attorney help the state procure a witness against him.” *Id.* The adverse affects were clear in that counsel negotiated a plea agreement for the codefendant that required him to implicate the defendant and did not even inform the defendant that the codefendant would testify against him. Counsel also could not cross-examine the codefendant and attack what amounted to the state's entire case against him. “To cross-examine [the witness] effectively, [counsel] would have had to question his own client's truthfulness. This he could not do.” *Id.* Finally, the adverse affect was clear in the prosecutor's repeated

***Capital Case**

references during trial that counsel also represented the codefendants. The adverse affect was not lessened by the fact that it was the unconflicted cocounsel that cross-examined the codefendant. Conflicted counsel was the lead counsel who prepared the case without the cocounsel's preparation. Conflicted counsel also examined 14 of the 17 witnesses during the trial. "Therefore, regardless of the effectiveness of [co-counsel's] efforts at trial, upon which we need not pass judgment, those efforts could not have overcome the presumed prejudice arising from [lead counsel's] actual conflict of interest." *Id.* at 287. In discussing whether defendant had waived the conflict, the court declared that "[n]ot even the proffer of admittedly valid waivers of conflict-free counsel can restrict a trial court's power to insist on separate representation." *Id.* at 288. Even if defendant made a valid waiver, "permitting multiple representation in a case of this type" would be improper. *Id.*

[W]e believe that a member of the public would be shocked to observe a criminal trial in which the same attorney represented both the defendant and the state's star witness, in which the attorney had cut the deal that made that witness available to the state, and in which the prosecutor pointed out the defense attorney's untenable position at every opportunity.

Id. In any event, the court found no valid waiver because "[a] defendant cannot knowingly and intelligently waive what he does not know." *Id.* at 289. Here, no one explained the meaning of a conflict of interest and defendant was not informed that his counsel had advised the codefendant to testify against him. Counsel also insisted that he saw no conflict. "If [counsel] was suffering from such myopia, we cannot insist on greater appreciation of the risk of conflict on the part of a layman whom [counsel] advised." *Id.* When it became obvious that counsel had negotiated a plea bargain for the codefendant that required him to testify, "the judge had a duty to conduct further inquiry and secure a further waiver if [defendant] wished to make one." *Id.*

C. Counsel Retained by Third-Party With Adverse Interest in Litigation

2002: *United States v. Schwarz*, 283 F.3d 76 (2nd Cir. 2002). Counsel had unwaivable conflict in case where police officer was convicted of violating the civil rights of Abner Louima, who was sodomized with a stick in an NYPD restroom. Four officers were charged. One plead guilty and admitted committing the sexual assault. Louima testified that the other officer that drove him to the police station was also present during the attack, but could not identify him. The Policeman's Benevolent Association (PBA), the police officers' union, hired two outside attorneys to represent Schwartz and another defendant to avoid any conflicts of interest that might arise if the union's regular retained law firm were to represent multiple defendants. After Schwartz was indicted, however, the two attorneys formed a firm that soon entered into a two-year, ten million dollar retainer agreement with the PBA to represent all police officers in administrative, disciplinary, civil, and criminal matters. At the government's urging, the district court held a hearing to explore conflicts issues. The government argued that the conflicts flowing from the retainer agreement were so serious as to be unwaivable, but the district court disagreed and allowed Schwartz to waive the right to conflict-free counsel. Represented by new counsel on appeal, Schwartz argued that the

***Capital Case**

loyalties owed by his trial counsel to the PBA and trial counsel's pecuniary interest in the retainer created an actual conflict of interest that deprived him of his Sixth Amendment right to effective assistance of counsel. The appeals court agreed. Counsel's representation of Schwartz was in conflict not only with his ethical obligation to the PBA as his client, but also with his own substantial self-interest in the two-year, ten million dollar retainer agreement his newly formed firm had entered into with the PBA. Counsel's conflict so permeated the defense that no rational defendant in Schwartz's position would have knowingly and intelligently desired counsel's representation. Therefore, the conflict was unwaivable.

D. Simultaneous Representation of the Victim

State ex rel. Horn v. Ray, 325 S.W.3d 500 (Mo. Ct. App. 2010). The trial court erred in domestic assault case in finding that counsel's conflict in representing both the defendant and the victim could be waived. Prior to the preliminary hearing, defense counsel notified the State that he represented the victim and she did not wish to testify against the defendant or speak to the prosecutor. The prosecutor sought to disqualify counsel but the trial court held that any potential conflict had been waived by the defendant and the victim. The court held that the interests of the defendant and the victim "are necessarily adverse." This conflict is of a nature that cannot be waived. Aside from the inherent conflicts, the interests of the court and public weighed in favor of disqualification of counsel. "The dual representation smells of collusion between counsel, the defendant, and the victim." Even if there is no collusion, the appearance of impropriety "threatens the integrity of our judicial system and undermines public confidence in the system."

VI. Court Abused Discretion in Disqualifying Counsel Over Objection

A. Simultaneous Representation of Jointly Tried Codefendants

1999: *Hanna v. State*, 714 N.E.2d 1162 (Ind. Ct. App. 1999). Interlocutory appeal. Trial court erred in disqualifying counsel in joint representation over objection. Hanna, a police officer, was charged with criminal recklessness, pointing firearm, operating motor vehicle while intoxicated, operating motor vehicle while intoxicated causing serious bodily injury, obstruction of justice, and official misconduct. Five other police officers were indicted for obstruction of justice and/or official misconduct. All retained the same law firms to represent them. The state moved to disqualify joint counsel. All defendants, after consultation with unconflicted counsel, waived the conflict in a hearing. The trial court granted the state's motion and ordered the defendants to retain separate counsel. The appellate court held, "Where it is the government which moves to disqualify defense counsel, the burden is on the government to show that any infringement on the defendant's choice of counsel is justified." *Id.* at 1165. Here, the trial court erred because there was no showing of an actual conflict and the defendant's right to counsel of choice must be respected. "[A] defendant's right to the counsel of his choice should prevail over his or her right to conflict-free counsel" when the defendant makes a knowing and intelligent waiver of the conflict. *Id.* at 1166.

***Capital Case**

1995: *Tyson v. District Court for Fourth Judicial Dist., El Paso County, State of Colo.*, 891 P.2d 984 (Colo. 1995). Trial court erred in disqualifying counsel from joint representation when the defendants entered valid waivers. The defendants, husband and wife, were charged with a variety of offenses arising out of a drive-by-shooting on an interstate. At a preliminary hearing, the court conducted a thorough inquiry of the defendant's and also appointed independent counsel for each to advise them. The defendant's waived the potential conflicts at the hearing and subsequently in writing. Later, on motion of the government, the trial court addressed the issue again and reversed the prior ruling because of the government's assertions including: (1) the evidence is stronger against one person than it is against another person; (2) a plea agreement had been offered to one of the defendants which would include testifying against the other; and (3) both defendants statements that they would not enter plea agreements. The appellate court held that the trial court erred in disqualifying counsel since both defendants had made a knowing, intelligent, and voluntary waiver of the conflict. The court also ruled that both defendants were waiving any future allegation of ineffective assistance due to a conflict of interest.

B. Simultaneous Representation of Codefendants in Severed Trials

1. U.S. Court of Appeals Cases

United States v. Turner, 594 F.3d 946 (7th Cir. 2010). The trial court erred in disqualifying counsel of choice in drug conspiracy case. Following arrest, the defendant retained counsel, who was also represented a co-defendant, who was awaiting sentencing following a retrial at the time of the defendant's arrest. The court disqualified counsel because of the *possibility*, which was not "a serious potential" in this case, that one defendant might provide information or testimony against the other despite the fact that the prosecutors had shown no interest in securing either defendant's testimony against the other, multiple other co-defendants were cooperating with the government, and both defendants had waived any conflict.

2. State Cases

2003: *Valdez v. State*, 847 So.2d 602 (Fla. Dist. Ct. App. 2003). The trial court improperly disqualified counsel in drug case over objection. Defendant was charged, along with her boyfriend, with drug charges. They retained the same attorney. The state moved to disqualify counsel because the boyfriend would be called to testify during the defendant's trial. The trial court erred in disqualifying counsel because the defendant, after being fully informed of the potential conflict, made a knowing waiver.

C. Simultaneous Representation of Government Witness

1988: *Alcocer v. Superior Court*, 254 Cal. Rptr. 72 (Cal. Ct. App. 1988). Trial court erred in disqualifying counsel in lying to grand jury case where counsel also represented a potential state witness. Defendant was charged with lying about knowledge that a judge had been using drugs. He retained

***Capital Case**

counsel who also represented a witness the state intended to call to say the defendant was present when the witness sold drugs to the judge. The state moved to disqualify counsel. The court had independent counsel to advise defendant and defendant chose to continue with counsel. The court disqualified counsel anyway. The appellate court held that the trial court erred because “California courts have held that a defendant, upon *proper advisement*, may waive his right to retain counsel free from conflict of interest.” *Id.* at 77. The court established guidelines for the advisement and remanded due to finding that trial court had prematurely granted the motion to disqualify counsel.

D. Prior Representation of Government Witness in Same or Related Case

1989: *Commonwealth v. Cassidy*, 568 A.2d 693 (Pa. Super. Ct. 1989). Trial court erred in disqualifying counsel in racketeering case involving police narcotics unit defendants where counsel had previously represented a potential government witness (also a police officer) in a federal prosecution. Appellate court found that the government’s disqualification motion was premature and that there was no showing of an actual conflict or serious potential for conflict to overcome the presumption that defendant was entitled to counsel of choice.

E. Prior Representation of Government Witness in Unrelated Case

2015: *State v. McKinley*, 860 N.W.2d 874 (Iowa 2015). Trial court erred in disqualifying public defender’s office, over objection by the defendant, from murder trial. Two public defenders were assigned to the defendant. During trial preparation, they discovered that three other public defenders from the same office had previously represented three potential state witnesses in unrelated cases. There was no actual or potential conflict that warranted disqualification.

2011: *Lewis v. State*, 718 S.E.2d 112 (Ga. Ct. App. 2011). The trial court erred in disqualifying counsel on prosecutor’s motion due to alleged conflict of interest. The defendant was a former superintendent of schools charged with RICO violations surrounding alleged corruption in the award and management of school construction contracts. Even prior to the defendant’s indictment, the school system hired Parsons, an international engineering and construction firm, to manage the ongoing construction projects. A Parsons employee, who was assigned to work from the school system offices to manage the projects, was listed as a state witness. Defense counsel’s firm had a preexisting relationship with Parsons and previously and currently represented Parsons on a variety of matters unrelated to defendant or the school system project. Even though Parsons and the defendant consented to the simultaneous representation and counsel had never met or represented the employee, the trial court granted the state’s motion to disqualify counsel. The trial court erred in interfering with the right to counsel of choice, which is a structural error. Courts “must cast a skeptical eye toward motions to disqualify counsel of choice because parties often move for disqualification of opposing counsel for tactical reasons.” *Id.* at ____ (internal quotations omitted). Moreover, disqualification of counsel “should be seen as an extraordinary remedy and should be granted sparingly. And it is the burden of the party seeking to disqualify counsel to prove that the

***Capital Case**

extraordinary remedy of disqualification is warranted.” *Id.* Here, there was insufficient evidence to disqualify counsel. “[A] corporation and its employees are distinct persons in the contemplation of the law.” *Id.* at _____. The arguments for how counsel’s representation of the corporation in unrelated matters presented a conflict in the employee’s testimony in this case “consists of one conjecture piled upon another.” *Id.* at _____.

Bowen v. Carnes, 343 S.W.3d 805 (Tex. Crim. App. 2011). The trial court abused its discretion in capital murder trial by disqualifying retained counsel, based on his prior representation in an unrelated criminal matter of a state’s witness. The witness, a jailhouse snitch, had already entered a negotiated plea but was awaiting sentencing when the state gave notice that he would be a witness in this case. Both the defendants (husband and wife) and the snitch waived their rights, but the court disqualified counsel anyway due to concern for “the integrity of the judicial process and the public’s perception[.]” “[T]he presumption in favor of ... counsel of choice” is overcome only by “an actual conflict or a serious potential for conflict.” Concern about the public’s perception of fairness, without more, is insufficient to overcome the *Wheat* presumption.

2005: *People v. Frisco*, 119 P.3d 1093 (Colo. 2005). The trial court erred in disqualifying counsel in case involving numerous charges under the state Organized Crime Control Act because counsel had previously represented a prospective prosecution witness a year before when he had pending drug charges. Counsel’s only action on the witness’ behalf was to arrange for continued release on bond, which ended when the witness was arrested. Counsel withdrew then and had nothing to do with the plea arrangement that ultimately led the witness to agree to testify against the defendant. The court erred in disqualifying counsel because the cases did not involve the same transaction or legal dispute or even offenses allegedly involving the defendant and counsel played only a limited role in representing the witness.

2004: *State v. Carver*, 95 P.3d 104 (Kan. 2004). The trial court erred in disqualifying counsel over objection in aggravated battery case where the defendant was charged with assault and kidnaping of his former girlfriend. The defendant retained counsel, who had been his family attorney for 15 years. Counsel had also previously represented the victim’s mother five years before in an action to obtain custody of two of the victim’s children. The state moved to disqualify counsel and, without the defendant being present, the court disqualified counsel following an off-the-record discussion and appointed the public defender. The defendant objected to the disqualification and appointment of the public defender office, but the motion on the disqualification was never heard. Ultimately the court allowed a 30 day trial continuance in order to allow the defendant to retain a different lawyer. The court held that it was error to disqualify counsel because counsel had not represented the victim’s mother in a “substantially related matter” and counsel would not have been required to use information concerning his prior representation during the trial. Indeed, the state’s motion in limine preventing the defense from inquiring about the prior child custody actions ensured that the prior representation would not cause a conflict during the trial. Finally, the victim’s mother was not a key witness and would testify only to background information. The court found that the error was not harmless.

***Capital Case**

1996: *Ex Parte Tegner*, 682 So.2d 396 (Ala. 1996). Trial court erred in disqualifying counsel in murder case without sufficient inquiry. Counsel had previously represented an eyewitness. The state moved to disqualify counsel. The trial court, relying on an ethics opinion from the state bar in this specific case, disqualified counsel. Defendant sought a writ of mandamus. Appellate court held that the trial court erred in disqualifying counsel without sufficient inquiry. The trial court should have evaluated the evidence regarding the question of disqualification, weighed the constitutional rights in issue, and determined whether the first representation was substantially related to the second. It did not do so; because it had to do so before it could properly disqualify counsel, the ordering disqualifying counsel was set aside.

F. Prior Representation of Codefendants in Same Case

2014: *People v. Watson*, 998 N.Y.S.2d 27 (N.Y. App. Div. 2014). The trial court erred in disqualifying counsel in possession of weapon case. Prior representation by the same public defender office of a person arrested with the defendant in connection with the same incident did not create a potential conflict of interest. There was no indication that counsel in this case was privy to any confidential information related to the other person as he was never involved in that representation and was not even aware that his office had represented the other person until it was disclosed by the state. Moreover, the other person's case had already been adjudicated.

2012: *Samontry v. State*, 387 S.W.3d 178 (Ark. 2012). In an interlocutory appeal, the court found error in the trial court's disqualification of counsel over objection. The defendant (at issue) was arrested, along with a woman and her ex-husband, for prostitution and promoting prostitution. The ex-husband was represented during trial by one counsel and the two women were represented by a different counsel. The ex-husband was acquitted, while the women were convicted. On appeal to the primary trial court, the two women retained the ex-husband's winning counsel. Two weeks before trial, the state gave notice that the ex-husband would be called to testify and moved to disqualify counsel. The ex-husband and the women informed the court that his testimony would not be adverse to the women and, in fact, would be favorable to the defense. While his ex-wife did not properly appeal, the other woman did. In briefing, counsel also stated that he was aware of no confidential information obtained from the ex-husband that would create a conflict with either remaining defendant. The State failed to meet its burden of proof to establish that disqualification was warranted.

1995: *State v. Parrott*, 919 S.W.2d 60 (Tenn. Crim. App. 1995). Trial court erred in disqualifying counsel where defendant made a knowing and intelligent waiver of conflict. Defendant and her husband were charged with drug possession and intent to distribute. They initially were jointly represented by two attorneys. They then requested separate representation but defendant did not change counsel. The government moved to disqualify counsel. Both the defendant and her husband waived any potential conflict, but the trial court disqualified counsel anyway. The trial court erred because no

***Capital Case**

actual conflict was shown, only a potential conflict was present. The trial court also erred because the defendant made a knowing and intelligent waiver of any conflict.

1990: *People v. Burrows*, 269 Cal. Rptr. 206 (Cal. Ct. App. 1990). Trial court erred in disqualifying counsel in murder case despite waivers of conflict. Defendant and his brother were arrested. Following the preliminary hearing, their trials were severed. Defendant retained counsel, who had represented his codefendant at the preliminary hearing. Defendant and codefendant signed waivers, but the court disqualified counsel. The appellate court found error because “California makes a defendant the master of his fate and allows him to proceed uninterrupted, with the exceptions of flagrant circumstances of attorney misconduct or incompetence..., with counsel of his choice if the parties involved in the conflict properly waived any potential or actual conflicts.” *Id.* at 212.

G. Prior Representation of Person Implicated (but not charged) in Same Crime

1988: *Coffey v. Pack*, 524 So. 2d 498 (Fla. Dist. Ct. App. 1988). Trial court erred in disqualifying counsel without conducting an adequate inquiry to determine whether disqualification was necessary where it was discovered that a member of counsel’s office also represented the person the defendant claimed was the actual perpetrator on unrelated charges.

H. Counsel Was Necessary or Potential Witness

1. Military Cases

2006: *United States v. Barnes*, 63 M.J. 563 (A.F. Ct. Crim. App. 2006). The military judge erred in disqualifying the accused’s civilian defense counsel before trial in desertion and indecent assault case. Counsel was disqualified because the court was concerned that counsel would have to be a witness concerning the desertion charge, that counsel had rendered ineffective assistance in giving pretrial advice on desertion charge, and that his continued representation would give rise to a conflict of interest. The military judge erred by disqualifying counsel before the prosecution had even presented its case and the issues had ripened.

2. State Cases

2003: *State v. Peeler*, 828 A.2d 1216 (Conn. 2003). The trial court improperly disqualified defendant’s retained counsel in a murder case. Defendant was initially charged with attempting to murder his partner in a crack cocaine operation and two minor children. All three of the victims were identified by name in the police arrest warrant and information. Subsequently, while the defendant was free on bond, the defendant was charged with murdering his drug partner. The defendant retained counsel to represent him. The state subsequently filed a motion for a protective order to preclude disclosure to the defense of the identity of certain witnesses, including the two minor victims of the initial drive-by shooting. The court allowed disclosure to the defense but ordered that the names and addresses of the witnesses could not be disclosed to the defendant. Subsequently, one of the minor

***Capital Case**

children and his mother were murdered in their apartment where they had recently moved. The state charged the defendant and his brother with these murders. The state then moved to disqualify the defendant's counsel, because the state intended to call counsel as a witness in the defendant's capital trial for the murder of the young witness and his mother. Over objection, the trial court granted the state's motion to disqualify counsel. Counsel was called as a witness during the defendant's separate capital trial. The court held that the record did not demonstrate that the state had met its burden of proving that counsel's testimony was necessary or that there was a compelling need for counsel's testimony. Here the minor witness had already been mentioned by name in both the arrest warrant, affidavit, and substitute information before his death. In addition, the state's notice of service upon defense counsel of the witness' statement was a matter of public record. Therefore, the state did not need counsel's testimony in order to establish that the defense had been served with the statement. Even when given the opportunity to question counsel, the state never asked him what he did in connection with any of the statements he had been given pursuant to the court order. Prejudice was presumed. "If the decision of the trial court deprived the defendant of his constitutional right to counsel of choice," reversal was required.

1991: *State ex rel. Fleer v. Conley*, 809 S.W.2d 405 (Mo. Ct. App. 1991). Trial court erred in disqualifying counsel in light of defendant's waiver and only a remote chance that counsel would be called as a witness for the defense. On information from witness, defendant was arrested for murder. He retained counsel, who had previously represented the witness on unrelated charges. Witness refused to cooperate or to testify in defendant's case though. He claimed that he had told counsel of defendant's confession during counsel's prior representation of him and that counsel advised him not to disclose the information or to use it in plea bargaining. In an initial trial, counsel informed the jury that he might be a witness. That trial ended in a mistrial for other reasons. Prior to retrial, the court appointed independent counsel to consult with defendant concerning potential conflicts. The independent counsel reported that it would be a substantial hardship to defendant if his counsel was removed. The state moved to disqualify counsel. A hearing was held and defendant informed the court he desired to waive the conflict. The court disqualified counsel because of the likelihood that he would testify. Defendant appealed. The Court of Appeals held that the trial court erred because it was doubtful that counsel's former client would testify in light of his refusals to cooperate. The court also did not consider the substantial hardships for defendant in delaying trial and in obtaining new counsel since defendant was confined and did not have sufficient money to retain new counsel.

***State v. Shores*, 402 S.E. 2d 162 (N.C. Ct. App. 1991).** Trial court erred in disqualifying counsel in murder case where it was early in the proceeding and had not yet been determined whether counsel's testimony would be needed. Following arrest, counsel entered appearance. The state moved to disqualify counsel based on a witness' statement that the defendant talked to counsel after the victim's disappearance and counsel said there was no evidence if the authorities had no body. After that the defendant burned the body. The trial court erred in disqualifying counsel early in the proceedings because no determination had even been made that the witness' testimony was admissible or that counsel could testify despite the attorney-client privilege.

***Capital Case**

I. Counsel Previously Worked for Prosecutor and Had Limited Involvement in Case

1988: *Anaya v. People*, 764 P.2d 779 (Colo. 1988). Trial court erred in disqualifying counsel in kidnapping and assault case over objection where member of counsel's firm had previously worked in the prosecutor's office and was involved in limited discussions of this case. The court of appeals held that the error was harmless because defendant had not shown that replacement counsel was ineffective. The Colorado Supreme Court held, however, that erroneous disqualification of counsel over objection cannot be considered harmless error.

J. Miscellaneous

1. U.S. Supreme Court Cases

2006: *United States v. Gonzalez-Lopez*, 548 U.S. 149 (2006). The trial court's erroneous deprivation of a criminal defendant's counsel of choice required reversal. The defendant's family had retained counsel for him. The defendant contacted his own counsel of choice who was out of state and sought to retain him. The trial court declined to admit counsel *pro hac vice* and prohibited further contact finding that counsel violated rules against contacting someone already represented without counsel's permission. The Court held that "the Sixth Amendment guarantees the defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds." *Id.* at ____ (quoting *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624-625 (1989)). In short, "the Sixth Amendment right to counsel of choice . . . commands, not that a trial be fair, but that a particular guarantee of fairness be provided-to wit, that the accused be defended by the counsel he believes to be best." *Id.* at _____. When that right is violated, no showing of prejudice (under the *Strickland* standard or otherwise) is required for reversal to be mandated and no harmless error analysis may be applied because this is a structural error. The right to counsel of choice is limited, however, and "does not extend to defendants who require counsel to be appointed for them." *Id.* at _____. Likewise, a defendant is not entitled to representation by a person who is not an attorney or to counsel with a conflict of interests.

2. U.S. Court of Appeals Cases

1989: *Fuller v. Diesslin*, 868 F.2d 604 (3d Cir. 1989). Trial court abused discretion in arbitrarily denying motion to admit out-of-state counsel *pro hac vice* due only to concerns that admission would cause delay in the trial of drug and weapons charges. Court held that "a request for counsel *pro hac vice* should [not] be treated any differently by a trial court than any other request for counsel of choice." *Id.* at 607. The court held that *per se* reversal is required whenever, as here, there is an arbitrary denial of counsel of choice.

***Capital Case**

3. State Cases

2009: *State v. Smith*, 761 N.W.2d 63 (Iowa 2009). The trial court abused its discretion in murder case for disqualifying retained counsel despite the defendant's express waiver of the potential conflict, and notwithstanding the availability of appointed co-counsel, who was independent of retained counsel, to handle all matters related to the State's witness whose involvement in the case was the subject of the claimed conflict. The claimed conflict was that a member of counsel's firm represented a state's witness on an unrelated criminal charge. The witness was expected to testify about two tape-recorded phone conversations he had with his girlfriend and her brother while the witness was in jail. He was to identify the voices on the recordings, which included shots and the brother's statement that the defendant was shooting. Although counsel did not anticipate a need to impeach this "foundational testimony," counsel decided that co-counsel would examine this witness with no involvement from retained counsel. Counsel also took steps within his firm to avoid any information or involvement with the witness' case.

2008: *State v. Peterson*, 757 N.W.2d 834 (Wis. Ct. App. 2008). The post-conviction court abused its discretion in *sua sponte* disqualifying retained counsel due to his prior partnership and, at times, acrimonious dissolution of the partnership (including a law suit) with trial counsel.

2002: **People v. Harlan*, 54 P.3d 871 (Colo. 2002). The trial court erred in capital post conviction proceedings in disqualifying counsel of choice after counsel filed a motion for appointment of alternate defense counsel to investigate potential ineffective assistance of counsel claims.

State ex rel. Youngblood v. Sanders, 575 S.E.2d 864 (W. Va. 2002). The trial court erred in disqualifying counsel in felony murder case over the objection of the defendant. Counsel's paralegal had initially met with the co-defendant wife for the purpose of exploring the possibility of counsel representing the co-defendant. The co-defendant did not retain counsel because of financial reasons. Later the defendant retained counsel. The co-defendant plead guilty and agreed to testify against the defendant. The state move for disqualification of counsel. The court found that disqualification was not required because the information provided to counsel by the co-defendant's wife was also contained in several police reports and was therefore generally known information.

1996: *People v. Johnson*, 547 N.W.2d 65 (Mich. Ct. App. 1996). Trial court improperly disqualified counsel in armed robbery and assault case. Counsel was appointed to represent defendant. Court ordered that counsel discover defendant's prior convictions and details concerning their validity. Counsel moved to set aside the order and the court removed counsel. The court's order was found to be improper and violative of both state and federal law. Clearly, counsel was relieved because he challenged the court's order. This was improper because a court cannot relieve counsel simply because the court disagrees with counsel's actions.

***Capital Case**

- 1989:** **Stearns v. Clinton*, 780 S.W.2d 216 (Tex. Crim. App. 1989). Trial court erred in disqualifying counsel in capital trial where court was upset about counsel interviewing a witness without prosecutor's permission. The prosecutor moved for disqualification because counsel could be a witness after interviewing the witness. [Yes. That is what the opinion says.] The court erred in removing counsel because "the power of the trial court to appoint counsel to represent indigent defendants does not carry with it the concomitant power to remove counsel at his discretionary whim." *Id.* at 223. The prosecutor's rule requiring permission to interview witnesses is "in conflict with principles of fair play." *Id.* at 224.
- 1982:** **Maxwell v. Superior Court*, 639 P.2d 248 (Cal. 1982). Trial court erred in disqualifying counsel in murder case over objection where defendant validly waived any conflict due to contract with counsel giving counsel the right to exploit defendant's life story.

VII. Miscellaneous

A. Appearance of Impropriety

- 2011:** *United States v. Lee*, 70 M.J. 535 (N.M. Ct. Crim. App. 2011). Counsel's failure to fully disclose his conflict of interest due to transfer to the prosecution and supervision by the trial prosecutor by the time of trial required reversal. The accused was represented by military counsel and civilian counsel. Well before trial, the military counsel was re-assigned to prosecution duties. By the time of trial, he had "a respectable load" of prosecution duties and was directly supervised and given his military ratings by the prosecutor in the accused's case. While counsel had disclosed to civilian counsel and the accused that he was moving to the prosecution, he did not disclose that he would be working directly for the trial prosecutor. The problem was not disclosed to the trial court at all. While the court could not identify any adverse effect of the conflict, the court was troubled by the length of time that had passed, the inconsistent testimony in the hearing on the conflict, and "the reluctance of the various participants to lay bare the facts." That concern, in addition to the concern that this trial "might not appear to the general public to be 'fair,'" the court granted relief.

B. Trial Court Abused Discretion in Failing to Disqualify Codefendant's Counsel on Motion of Defendant

- 1992:** *State v. Sanders*, 616 A.2d 1345 (N.J. Super. Ct. App. Div. 1992). Trial court in drug case erred in failing to disqualify counsel, who had previously represented defendant in pretrial bail hearing from representing codefendant with adverse interests during joint trial. Defendant and codefendant were arrested following a traffic stop during which cocaine was discovered in the car. Each of the defendants claimed that the drugs belonged to the other. Prior to trial, defendant moved to disqualify his codefendant's counsel because counsel had represented defendant at a bail reduction hearing and had engaged in confidential discussions with defendant concerning the charges. The trial court denied the motion. During trial, the codefendant's counsel vigorously cross-examined defendant and asserted that the drugs belonged to the defendant. The appellate court held that the codefendant's

***Capital Case**

counsel should have been disqualified due to the prior representation of defendant in the same proceedings, which is prohibited by ethics rules. Prejudice presumed.

C. Trial Court Abused Discretion in Failing to Disqualify the Prosecutor Due to Prior Representation of the Defendant

1991: *Reaves v. State*, 574 So. 2d 105 (Fla. 1991). Reversal required due to the trial court's failure to disqualify a prosecutor given the appearance of impropriety in that the prosecutor had previously represented the defendant in a grand larceny case involving many of the mitigating factors involved in sentencing.

[A] conviction must be reversed if the trial court denies a *pretrial* defense motion to disqualify a prosecutor who previously has defended the defendant in any criminal matter that involved or likely involved confidential communications with the same client.

D. Defendant Entitled to Be Present During Discussions of Potential Conflict of Interest

2006: *State v. Sam*, 907 A.2d 99 (Conn. App. Ct. 2006). The trial court erred in robbery and other charges case for discussing counsel's potential conflicts, due to his concurrent representation of the defendant's brother, in an off-the-record and in chambers conference while the defendant was absent. As a result of the discussions, counsel severed the defendant's trial from his brother/code defendant's trial and ordered the co-defendant to get new counsel, but proceeded forward with the defendant's trial the same day with the defendant objecting that he also wanted new counsel (but for other reasons than the conflict). The discussions were "a critical stage" of the case where the defendant was entitled to hear counsel's representations and respond. The defendant's failure to object on this basis was not a waiver. While the court informed the defendant that there had been a meeting, he was not advised of the contents of the meeting in terms of representations by counsel or the prosecutor or the basis for the court's conclusions. This was a structural error mandating reversal.