No. 17-1225

IN THE

Supreme Court of the United States

AMY P. CAMPANELLI,
Petitioner,

v.

STATE OF ILLINOIS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois

BRIEF IN SUPPORT OF CERTIORARI OF *AMICI CURIAE* LEGAL ETHICS SCHOLARS: PROFESSOR VIVIEN GROSS, CHICAGO-KENT COLLEGE OF LAW; PROFESSOR STEVEN LUBET, NORTHWESTERN UNIVERSITY PRITZKER SCHOOL OF LAW; PROFESSOR ROBERT BURNS, NORTHWESTERN UNIVERSITY PRITZKER SCHOOL OF LAW; PROFESSOR ELLEN YAROSHEFSKY, MAURICE A. DEANE SCHOOL OF LAW AT HOFSTRA UNIVERSITY

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF THE *AMICI CURIAE*[1]

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

Steven Lubet is the Williams Memorial Professor at the Northwestern University Pritzker School of Law, where he has taught courses covering legal ethics for over forty years. He is the author of fifteen books and over 120 articles on legal ethics, professional responsibility, judicial ethics and law practice, among other subjects. He has consulted on conflicts of interest and professional responsibility with law firms, corporate law departments, governmental agencies, and legal services organizations, including the Law Office of the Cook County Public Defender.

Robert Burns is the William W. Gurley Memorial Professor of Law at Northwestern University Pritzker School of Law, where he teaches courses on evidence and professional responsibility. He has written in the field of legal ethics and has consulted on conflicts of interest and professional responsibility with law firms and the Law Office of the Cook County Public Defender.

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[1] Counsel of record for all parties received notice of the *amici curiae's* intention to file this brief at least 10 days prior to its due date. The parties have consented to the filing of this brief. *Amici curiae* certify that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici curiae* or their counsel, has made a monetary contribution to its preparation or submission.

Ellen Yaroshefsky is the Howard Lichtenstein Distinguished Professor of Legal Ethics and Executive Director of the Monroe H. Freedman Institute for the Study of Legal Ethics at Maurice A. Deane School of Law at Hofstra University. She also counsels lawyers and law firms on ethics issues and serves as an ethics expert witness. Professor Yaroshefsky serves on the New York State Committee on Standards of Attorney Conduct and co-chairs the Ethics Committee of the National Association of Criminal Defense Lawyers.

As law professors and legal ethics scholars, Professors Gross, Lubet, Burns, and Yaroshefsky (collectively, "the Legal Ethics Scholars") submit this brief to express concern that, in seeking to balance the State's interest in providing cost-effective representation to indigent criminal defendants against the right of indigent defendants to conflict-free counsel, the Illinois Supreme Court has adopted a rule that undermines the fundamental ethical obligations of attorneys.

The Legal Ethics Scholars are mindful that ethical rules defining impermissible conflicts of interest "do not, of course, define the constitutional standard" for identifying conflicts of interest in the context of a criminal defendant's Sixth Amendment right to counsel. *Cuyler v. Sullivan*, 446 U.S. 335, 356 n.3 (1980). The Legal Ethics Scholars further do not claim expertise in the finer points of criminal law and procedure or the Constitutional boundaries of the Sixth Amendment right to counsel.

But this Court has recognized that the ethical rules governing attorney conduct are instructive of "the interests of the defendants, and the corresponding duties owed by the attorney," and thus should be considered when evaluating the effect of a conflict of

interest on defendant's Sixth Amendment rights. *Ibid*. The Legal Ethics Scholars offer this brief to explain the serious ethical issues confronting an attorney or public defender's office appointed to represent multiple defendants in the same criminal matter.

The views expressed herein are the Legal Ethical Scholars' own; they are not stated on behalf of the universities or organizations with which they are affiliated.

SUMMARY OF ARGUMENT

Already appointed to represent multiple co-defendants of Salimah Cole in criminal prosecutions arising out of the same event, Petitioner concluded that a conflict of interest precluded her from accepting representation of Ms. Cole. The trial court, later affirmed by the Illinois Supreme Court, required Petitioner to either accept an appointment to represent Ms. Cole or disclose the confidential client communications that led Petitioner to conclude that a conflict of interest precluded her from doing so.

Although rules of professional conduct do not control the Constitutional questions presented by this case, the interests served by these rules are instructive in evaluating the Constitutional issues. The Illinois courts' judgments unnecessarily placed the quintessential duties of confidentiality and undivided loyalty in opposition to one another—and placed Petitioner in an untenable position.

The duty of undivided loyalty is perhaps the most significant ethical obligation owed by an attorney. The duty of confidentiality is an indispensable corollary to the duty of loyalty. Without the assurance of confidentiality, a client cannot freely communicate to

counsel the full factual background necessary to effective representation.

By requiring Petitioner to disclose confidential communications with Ms. Cole's co-defendants in order to demonstrate the existence of a disabling conflict, the Illinois courts put Petitioner to an untenable choice: either violate the promise of confidentiality to existing clients or forgo the promise of undivided loyalty to all clients. Such a choice is directly contrary to the ethical rules governing this situation.

The Illinois Rules of Professional Conduct ("Illinois Rules"), consistent with the Model Rules of Professional Conduct promulgated by the American Bar Association ("Model Rules") and adopted in similar form by disciplinary authorities across the nation, provide clear guidance for counsel where a proposed joint representation presents a risk of conflicting interests. These rules require counsel contemplating concurrent representation of multiple clients to first ask whether a concurrent conflict exists. If the answer to this question is "yes," the attorney must decline representation unless, among other things: (1) the attorney reasonably believes she can nevertheless provide competent and diligent representation to all clients; and (2) each affected client provides informed, written consent.

Crucially, the ethical rules recognize that informed consent cannot be obtained where an attorney's duty of confidentiality prohibits the attorney from fully informing all clients regarding the nature of the potential conflict. By ordering Petitioner to provide a detailed description of the basis for her determination that a concurrent conflict exists, the Illinois courts demanded that Petitioner violate her duty of confidentiality in order to assert that joint representation

would violate her obligation of undivided loyalty. Compliance with the Illinois courts' holdings would, in the end, force Petitioner to violate both duties.

By statute, courts in Cook County, Illinois are authorized to appoint the Public Defender—an individual person, not an office, under the language of the statute—to represent indigent criminal defendants. Thus, the Legal Ethics Scholars begin from the premise that Petitioner's refusal to accept the trial court's appointment to represent Ms. Cole was based on a personal, not institutional, ethical conflict. But even if the conflict were institutional, Petitioner's supervisory responsibility over all attorneys in the Office of the Cook County Public Defender prohibited representation by any attorney within that office under principles of legal ethics.

In *Holloway v. Arkansas*, 435 U.S. 475 (1978), the Court foreshadowed but did not decide an additional issue raised by the petition for *certiorari*. First, the Court acknowledged the obligation of defense counsel to determine whether a conflict exists or is likely to develop. Second, the Court affirmed the responsibility of defense counsel to advise the court once a conflict has been discovered. Though holding that defense counsel's representations should generally be accepted, the Court did not foreclose the possibility that trial courts might explore the basis for an attorney's representations regarding the existence of a conflict. Importantly, the *Holloway* Court did not address whether or to what extent a trial court conducting that exploration could compel counsel to disclose confidential communications. The present case provides an ideal vehicle for addressing that question.

The Constitutional question posed by Petitioner can be resolved in a manner consistent with principles of legal ethics. The *Holloway* Court observed that attorneys are officers of the court with a duty of candor towards the tribunal and also recognized that the attorney is in the best position to determine when a conflict exists. Where an attorney represents to a court that describing the precise nature of an actual or potential conflict would require disclosure of confidential communications, the attorney's representation should be credited. To hold otherwise would have a chilling effect on the open communication between attorneys and their clients that is necessary to effective representation.

ARGUMENT

I. THE ETHICAL DUTY OF UNDIVIDED LOYALTY IS THE CORNERSTONE OF AN EFFECTIVE ATTORNEY-CLIENT RELATIONSHIP.

"Loyalty remains the cornerstone of a lawyer's core professional obligations and is found in every modern ethical codification." Debra Lyn Bassett, *Three's A Crowd: A Proposal To Abolish Joint Representation*, 32 Rutgers L. J. 387, 447 (2001). The "position that loyalty to one's client is the polestar value for lawyers" has also enjoyed considerable support from the judiciary. W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 Notre Dame L. Rev. 1, 47 (1999); see, e.g., *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 586 (1990) ("the lawyer's duty of loyalty long has precluded the representation of conflicting interests").

The ethical obligation of undivided loyalty has doctrinal roots in the laws of agency and fiduciary

duty. Austin T. Fragomen, Jr. and Nadia H. Yakoob, *No Easy Way Out: The Ethical Dilemmas Of Dual Representation*, 21 Geo. Immigr. L.J. 621, 626 (2007); Wendel, 75 Notre Dame L. Rev. at 59. In fact, "[l]awyers have been called the quintessential fiduciary." Charity Scott, *Doctors As Advocates, Lawyers As Healers*, 29 Hamline J. Pub. L. & Pol'y 331, 343 (2008).

"[T]he traditional designation of lawyers as fiduciaries rests on a belief that clients of all stripes are unusually dependent on lawyers, in part because they reveal confidences to the lawyers." Fred C. Zacharias, *The Preemployment Ethical Role Of Lawyers: Are Lawyers Really Fiduciaries?*, 49 Wm. & Mary L. Rev. 569, 590 (2007). Indeed, the "unique fiduciary reliance" clients must place in their attorneys, "stemming from people hiring attorneys to exercise professional judgment on a client's behalf—'giving counsel'—is imbued with ultimate trust and confidence." Scott, 29 Hamline J. Pub. L. & Pol'y at 343 (quoting *In re Cooperman*, 83 N.Y.2d 465, 472 (1994)).

At its core, the duty of loyalty is driven by a simple recognition that a "client is entitled to be represented by a lawyer whom the client can trust." Restatement (Third) of the Law Governing Lawyers ("Restatement"), § 121, cmt. b (Am. Law. Inst. 2000). "Instilling such confidence is an objective important in itself." *Ibid*. Indeed, "[o]ur adversary system functions best when a lawyer enjoys the wholehearted confidence of his client." *Polk County v. Dodson*, 454 U.S. 312, 324 n.17 (1981). The primary responsibility of a public defender is to represent the client's undivided interests. *Id.* at 318–19 (citing *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979)).

A. The ethical duty of loyalty requires an attorney to exercise professional independence.

In our legal system, "the obligations owed by the attorney to the client are defined by professional codes." *Polk County*, 454 U.S. at 327 (Burger, C.J., concurring). Thus, an attorney should never "permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." *Ibid.* (quoting ABA Code of Prof'l Responsibility r. 5-107(B)). Doing so would in no uncertain terms "dilute his loyalty to his client." *Id.* at n.* (quoting ABA Code of Prof'l Responsibility Canon 5 (1976)).

The requirement of independence applies to privately retained lawyers and public defenders equally, for the Court has made clear that "a public defender works under [the same] canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client." *Id.* at 321 (internal citation omitted). To the extent that a conflict of interest prevents a public defender from "working with appropriate vigor in the client's behalf, the client's expectation of effective representation. . . could be compromised." Restatement, § 121, cmt. b.

B. An attorney must maintain inviolate a client's confidences.

The closely intertwined ethical duties of confidentiality and undivided loyalty "serve to fortify the client's trust placed with the attorney and to ensure the public's confidence in the legal system as a reliable

and trustworthy means of adjudicating controversies." Debra Lyn Bassett, *Three's A Crowd: A Proposal To Abolish Joint Representation*, 32 Rutgers L. J. 387, 448 (2001). Thus, "[t]he requirement that a lawyer refrain from disclosing the confidences of her client is a cornerstone of the attorney-client relationship." Lee A. Pizzimenti, *The Lawyer's Duty To Warn Clients About Limits On Confidentiality*, 39 Cath. U.L. Rev. 441, 443 (1990).

The rationale underlying the attorney's duty of confidentiality has been explored both by commentators and the courts. The need to assure confidentiality rests, in no small part, "upon the premise that . . . attorneys are integral to clients' ability both to exercise their right to autonomy and to avoid encroachment on that autonomy by the state or third parties." Pizzimenti, 39 Cath. U.L. Rev. at 445–46. "Moreover, clients cannot fully exercise that autonomy unless they provide their lawyers with all relevant information, which clients will not do absent the comfort of knowing that the attorneys will hold their secrets inviolate." *Id.* at 446.

"A lawyer cannot possibly determine how best to represent a new client unless that client is willing to provide the lawyer with a truthful account of the relevant facts." *Mickens v. Taylor*, 535 U.S. 162, 180 (2002). In the context of defense of an indigent defendant by appointed counsel, the *Mickens* Court recognized that "[t]ruthful disclosures of embarrassing or incriminating facts are contingent on the development of the client's confidence in the undivided loyalty of the lawyer." *Ibid.*

The truthful and complete disclosures necessary to competent representation will be jeopardized if clients know that their "lawyer might turn them in, or reveal

damaging facts to adversaries." Stephen L. Pepper, *Why Confidentiality?*, 23 Law & Soc. Inquiry 331, 335 (1998). Clients, unschooled in the legal significance of the facts, necessarily depend on counsel's analysis. "The lawyer, however, cannot accomplish that legal analysis without the facts." Pepper, 23 Law & Soc. Inquiry at 335. Yet, "before revealing the facts a reasonable client would want to know what she risked by doing so." *Ibid.* In short, without the aid of counsel, clients do not know what facts might be damaging; but without the assurance of confidentiality, clients will be inhibited from revealing the facts necessary to counsel's analysis.

Because counsel also has an ethical obligation to communicate all material facts to a client, multiple representation introduces additional complications. Under the Illinois Rules, like the Model Rules upon which they are based, "each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit." Illinois Rule 1.7, cmt. 31. See also Illinois Rule 1.4

II. THE ILLINOIS COURTS' RULINGS ARE CONTRARY TO ETHICAL STANDARDS GOVERNING MULTIPLE REPRESENTATION.

A. Widely accepted ethical standards prohibit multiple representation in criminal cases.

Multiple representation implicates "key ethical obligations," including the ethical duties of "loyalty, confidentiality, and competent representation." Fragomen, 21 Geo. Immigr. L.J. at 625. Thus, the

Model Rules, which have been widely adopted with varying degrees of modification, address the threat to undivided loyalty posed by multiple representation. *See State Rules Comparison Charts*, ABA (March 3, 2018, 5:01 PM), https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts.html (illustrating how jurisdictions have modified the Model Rules).

Model Rule 1.7 addresses the threat posed to attorney loyalty when an attorney represents clients with "directly adverse" interests, or when the interests of a current or former client, a third person, or the attorney herself create a "significant risk" that representation of a client will be "materially limited." Model Rules 1.7(a)(1) and (2). This Model Rule has been adopted with minimal modification in Illinois. See Illinois Rule 1.7.

Consequently, where the interests of two clients are directly adverse, an attorney must decline or withdraw from representation. Model Rule 1.7(a), (b)(3). Also, where competing interests present a significant risk that an attorney's loyalty will be materially limited, an attorney may undertake representation only with the "informed consent" of all affected parties and only if the attorney reasonably believes she "will be able to provide competent and diligent representation to each." Model Rule 1.7(b)(1), (3). The Illinois Rules omit the requirement that informed consent be in writing, but otherwise conform to the Model Rule. See Illinois Rule 1.7.

The comments to both the Model Rule and the Illinois Rule explain how multiple representation threatens attorney loyalty. See Model Rule 1.7, cmt. 23; Illinois Rule 1.7, cmt. 23. "A conflict may exist by reason of substantial discrepancy in the parties' testi-

mony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question." Model Rule 1.7, cmt. 23; Illinois Rule 1.7, cmt. 23.

Thus an "attorney shall decline employment or withdraw from employment if [a] multiple representation will, or is likely to, adversely affect the exercise of the attorney's independent judgment on behalf of a client." Tex. Comm. on Prof'l Ethics, Op. 408 (1984), https://www.legalethicstexas.com/Ethics-Resources/Opinions/Opinion-408; accord Va. Legal Ethics Comm., Op. 1454 (1992), http://www.vsb.org/docs/LEO/1454.pdf; Me. Prof'l Ethics Comm'n., Op. 110, (1990) http://www.mebaroverseers.org/attorney_services/opinion.html?id=89885 ("If the multiple representation is likely to result in representation of differing interests or to have an adverse effect upon the exercise of the lawyer's independent professional judgment, the attorney should not accept employment.")

Crucially, the comments to the ethical rules recognize that "[t]he potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant." Model Rule 1.7, cmt. 23; Illinois Rule 1.7, cmt. 23.

The comments further recognize that the threat to attorney loyalty and independence is closely tied to the attorney's duty of confidentiality. For example, where an attorney's duty of confidentiality prevents the attorney from making disclosures necessary to informed consent, informed consent cannot be obtained. Model Rule 1.7, cmt. 19; Illinois Rule 1.7, cmt. 19. Likewise, "continued common representation will almost certainly be inadequate if one client asks the

lawyer not to disclose to the other client information relevant to the common representation." Model Rule 1.7, cmt. 31; Illinois Rule 1.7, cmt. 31. This is so because ethical obligations prohibit the attorney from withholding information from one client to the benefit of the other.

Virginia's Standing Committee on Legal Ethics emphasized that these challenges to the duty of confidentiality can arise as early as the attorney's initial consultation with a potential client. Va. Legal Ethics Comm., Op. 1363 (1990), https://www.vsb.org/docs/LEO/1363.pdf. The Committee was asked whether it is "ethically permissible for an attorney to conduct the initial interview with two/multiple codefendants who have sought that attorney's advice, or whether that attorney must interview one defendant first and then the other in order to avoid having to decline representation of both clients." *Ibid*. The Committee opined:

> where multiple representation of codefendants is contemplated, the problem of confidentiality is not necessarily avoided by separate interviews of each defendant, since it is possible for the attorney to gain information during the separate interviews which could be construed to be a confidence or secret from an individual defendant which may preclude the multiple representation. *Ibid.*

The committee concluded, "where there is any doubt as to whether a conflict may exist, an attorney should represent only one of the similarly charged codefendants in a criminal matter." *Ibid.*

Similarly, the Ohio Supreme Court's Board of Commissioners on Grievances and Discipline issued

an ethics opinion advising that it would be improper for a single public defender to simultaneously represent codefendants in a felony case. Ohio Bd. of Comm'rs on Grievances & Discipline, Op. 2008–4 (2008), https://www.ohioadvop.org/wp-content/uploads/2017/04/Op_08-004.pdf. Acknowledging that multiple representation conflicts may sometimes be ameliorated by the consent provisions of Rule 1.7(b), the Board nevertheless opined that "[i]n a criminal proceeding, a conflict of interest in representation of co-defendants would be extremely difficult for a lawyer to ameliorate . . . *particularly in light of the important constitutional rights of a criminal defendant.*" *Ibid* (emphasis added).

To be sure, the ethical obligation to avoid conflicts of interest does not depend on whether the conflicted representation constitutes reversible error under the Sixth Amendment. See e.g., *Florida Bar v. Brown*, 978 So. 2d 107, 111, 114 (Fla. 2008) (imposing disciplinary sanctions on attorney who simultaneously represented codefendants in a criminal prosecution and noting that on appeal, a defendant "would bear the burden of proving thaton actual conflict of interest adversely affected his lawyer's performance.").

B. The determination that the Office of the Cook County Public Defender is not "a firm" under the Illinois Rules did not eliminate the ethical problem.

Notably, the Illinois Supreme Court did not disagree that Illinois Rule 1.7 forbade the simultaneous representation of Ms. Cole and her codefendants by a single attorney. (Pet. App. 19a.) Instead, the Illinois Supreme Court concluded that the Office of the Cook County Public Defender, not Petitioner personally, was

appointed to represent Ms. Cole and her codefendants. (Pet. App. 21a.)

1. *Certiorari* should be granted to address whether the conflict raised by Petitioner is a personal or institutional conflict.

The Illinois Supreme Court's framing of the issue as one of imputed rather than personal conflict is contradicted by the fact that the trial court imposed a sanction against Petitioner *individually* for refusing to personally accept an appointment to represent Ms. Cole. (Pet. App. 9a) ("we must examine the propriety of the trial court's order directing Campanelli to accept appointment as counsel for Cole"). Further the order adjudicating Petitioner in civil contempt specifically noted that the "Contemnor," (*i.e.,* Petitioner) "was directed to ACCEPT APPOINTMENT AS COUNSEL FOR SALIMAH COLE." (Pet. App. 33a) (capitalization in original). The Illinois Supreme Court's framing is also inconsistent with § 3–4006 of the Counties Code, which specifies that "[*t*]*he Public Defender* . . . shall act as attorney" upon appointment by the court, not the *office* of the public defender. 55 Ill. Comp. Stat. 5/3–4006 (2000) (emphasis added).

Certiorari should be granted in this case to address whether, under the Sixth Amendment, the appointment of the office of the public defender to represent multiple codefendants presents a conflict of interest personal to the individual public defender responsible for operation of that office or a potential conflict between attorneys within that office subject to the rules governing imputed conflicts.

2. *Certiorari* should be granted to address whether the nature of the Office of Public Defender and creation of a "Multiple Defendant Division" resolved the question of imputed conflicts.

Even accepting the premise that the trial court appointed the Office of the Cook County Public Defender, and not a specific individual, to represent Ms. Cole and her codefendants, appointing an office rather than an individual does not, from a legal ethics perspective, resolve the issues presented by this case.

Under Illinois Rule 1.10 (and its Model Rules counterpart), "[n]o lawyer associated with a firm shall represent a client when the lawyer knows or reasonably should know that another lawyer associated with that firm would be prohibited from doing so." Illinois Rule 1.10(a). "The treatment of attorneys in a firm as one attorney for purposes of loyalty and confidentiality is based on the presumption that those attorneys have access to confidential information about each other's clients." *People ex rel. Peters v. Dist. Court*, 951 P.2d 926, 930 (Colo. 1998). This logical premise stems from the realities of the close relationships that exist between attorneys in a law firm.

The ABA recognizes the applicability of the aforementioned premise to public defenders' offices. As early as 1978 the ABA issued an informal opinion stating that a public defender's office constitutes a law firm under Model Rule 1.10 thereby extending the rule of imputed disqualification. See ABA Comm. on Prof'l Ethics, Informal Op. 1418 (1978). Other authorities have followed suit. See Catherine L. Schaefer, Indigent Defense, 21 Champion 29, 31 (March 1997)

(listing authorities which have declared that a public defender's office constitutes a law firm: S.C. Ethics Advisory Comm. Op. 92-21 (1992); *Commonwealth v. Green*, 530 A.2d 1011 (Pa. 1988); *McCall v. District Court*, 783 P.2d 1223 (Colo. 1989); *Kirkland v. State*, 617 So. 2d 781 (Fla. Dist. Ct. 1993); *State v. Stenger*, 754 P.2d 136 (Wash. Ct. App. 1988); *Okeanai v. Superior Court*, 871 P.2d 727 (Ariz. Ct. App. 1993); *State v. Dillman*, 591 N.E.2d 849 (Ohio Ct. App. 1990); *Townsend v. State*, 533 N.E.2d 1215, 1231 (Ind. 1989); see also N.Y. Comm. on Prof'l Ethics, Op. 862 (2011)), http://www.nysba.org/CustomTemplates/Content.aspx?id=4858.

Some jurisdictions have rejected the rule of imputed disqualification for public defenders' offices, which "has generated considerable controversy around the country." See John M. Burman, *Conflicts of Interest in Wyoming*, 35 Land & Water L. Rev. 79, 123 (2000); accord *Austin v. State*, 609 A.2d 728, 732 n.3 (Md. 1992) ("there appears to be some disagreement among the cases as to whether . . . a public defender's office is to be viewed like a single private law firm for purposes of applying conflict of interest principles"). Illinois is one such jurisdiction.

The "[i]mputation of conflicts of interest to affiliated lawyers reflects three concerns" bearing on the duties of loyalty, independence, and confidentiality: "(1) the common (usually financial) interests of the lawyers, (2) the lawyers' common access to confidential information, and (3) the likelihood that breaches of the lawyers' duties could be detected by the affected client or clients." Thomas D. Morgan, *Conflicts of Interest and the New Forms of Professional Associations*, 39 S. Tex. L. Rev. 215, 222–23 (1998).

When attorneys associated in a firm or other organization share common interests there is a risk that those shared interests may (consciously or unconsciously) override attorneys' senses of loyalty to their clients. Courts declining to impose a *per se* rule of imputed conflicts for public defenders have noted that this risk is mitigated by the lack of incentives for such attorneys to favor one client over another. See, e.g., *Asch v. State*, 62 P.3d 945, 953 (Wyo. 2003) (citing David H. Taylor, *Conflicts of Interest and the Indigent Client: Barring the Door to the Last Lawyer in Town*, 37 Ariz. L. Rev. 577, 606 (1995) and *People v. Christian*, 48 Cal. Rptr. 2d 867, 874 (Cal. Ct. App. 1996)). But unlike attorneys in a private firm, the "public defender does not receive more money if one client prevails and another does not." *Asch*, 62 P.2d at 953.

The Illinois Supreme Court employed similar reasoning in rejecting the imputed conflict claim here. "[A]n assistant public defender's loyalty towards his office," the court reasoned, "is not great enough to impute to him the conflicts of other assistants." (Pet. App. 17a) (quoting *People v. Banks*, 121 Ill. 2d 36, 42 (1987)). But see Model Rule 1.10, cmt. 2 (explaining that imputation of conflicts derives, in part, from "from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated").

The Illinois Supreme Court's decision did not, however, address the concerns related to each client's expectations of confidentiality and the likelihood that a breach would go undetected. Imputation of conflicts based on these two concerns arises because affiliated attorneys might have "access to files and other confidential information about each other's clients" and "clients might assume that their confidential

information will be shared among affiliated lawyers." Restatement, § 123, cmt. b. Whether this assumption is ultimately borne out, the trust and open communication underlying any effective attorney-client relationship will be impaired if clients understandably assume their confidential information will be shared.

This risk underlies a series of advisory opinions issued by the State Bar of Arizona's Committee on Rules of Professional Conduct, which address the imputation of conflicts within a Public Defender's Office. In Formal Opinion 89–08, the Committee concluded that a public defender's office must be considered a "firm." Ariz. Comm. on Rules of Prof'l Conduct, Formal Op. 89–08 (1989), http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=593. To hold otherwise "might improperly suggest that lawyers who represent indigent defendants are somehow subject to different conflict of interest rules than those lawyers who represent defendants who can afford to retain private defense counsel." *Ibid.*

The Committee then applied this principle when the head of the "Legal Defender's Office" (an independent, "alternative public defender's office" created to handle cases when the Public Defender's Office had conflicts) moved to the Public Defender's Office. *Ibid.* Treating the Public Defender's Office as a firm, the attorney's conflicts were imputed to the entire office. *Ibid.* Noting the likelihood that the lawyer's position as head of the Legal Defender's Office gave him access to "confidential information about all, or nearly all, of the cases handled by the office during his or her tenure," the Committee opined that the scope of the imputed disqualification would likely be substantial. *Ibid.*

Later, in Formal Opinion 93–06, the Committee addressed a proposal to split the Public Defender's Office into two divisions to avoid imputed disqualification problems. Ariz. Comm. on Rules of Prof'l Conduct, Formal Op. 93–06 (1993), http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=656. Under the proposal, a new division would be created with an office separate from the main division and with "case files, investigative reports and other confidential information separately maintained and not accessible to attorneys in the main office." *Ibid.*

In rejecting the proposal, the Committee acknowledged the efforts by the Public Defender to avoid dissemination of confidential information between divisions, but noted that "when both divisions are subject to the same management structure, it is clearly possible that confidential information from each division will be communicated to those in supervisory positions." *Ibid.* Because clients of the Public Defender could not be expected to know about the extensive screening measures between divisions, the proposed arrangement would still "undermine the client's and others' faith and trust in the Public Defender which is so necessary to proper administration of criminal justice." *Ibid.*

The Committee reaffirmed this conclusion in Formal Opinion 04–04, when Maricopa County proposed that one or more of three public defender offices create a separate "Conflicts Unit." Ariz. Comm. on Rules of Prof'l Conduct, Formal Op. 04-04 (2004), http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=513. As in Opinion 93–06, the Committee observed that "it would be difficult to imagine how the Public Defender could effectively oversee the Conflicts Unit without acquiring some information about individual

case files." The Committee further reiterated the importance of "a client's trust and faith in their attorney . . . to the proper administration of criminal justice." *Ibid.*

Though not directly addressing the threats to confidentiality posed by multiple representation, the Illinois Supreme Court suggested that the creation of a "Multiple Defendant Division" within the Office of the Cook County Public Defender obviated the need to impute conflicts to all attorneys within the Public Defender's Office. (Pet. App. 26a). The court also noted that the attorneys assigned to represent each of Ms. Cole's codefendants were from different divisions of the Public Defender's office, and that each had a different supervisor. *Ibid*. In doing so, the court overlooked Petitioner's statutory responsibility for the appointment and supervision of all attorneys. See 55 Ill. Comp. Stat. 5/3–4008.1 (2005) ("The Public Defedender shall . . . appoint clerks and other employees necessary for the transaction of the business in the office.")

Certiorari should be granted here to determine, first, whether a public defender's office should be treated like a law firm for purposes of the rules governing conflicts. If a *per se* rule for imputed conflicts is not adopted, *certiorari* should be granted to address when the structure and management of a public defender's office sufficiently protect against the dissemination of confidential information and erosion of undivided loyalty so that a conflict need not be imputed to all attorneys within that office.

3. *Certiorari* should be granted to address the extent to which a trial court can intrude on an attorney's duty of confidentiality in order to explore the basis for an asserted conflict of interest.

Finally, the Illinois Supreme Court's conclusion that the trial court never ordered Petitioner to divulge confidential client communications, when the trial court ordered Petitioner to describe the perceived conflict in greater detail after she had already represented to the court that she could not describe the conflict in greater detail without divulging client confidences, is a legal quandary. The Court anticipated this precise problem in *Holloway*, when it determined that when a court is alerted to a potential conflict it must either "appoint separate counsel or . . . take adequate steps to ascertain whether the risk [of conflict is] too remote to warrant separate counsel." 435 U.S. at 484. The Court noted that its decision did "not preclude a trial court from exploring the adequacy of the basis of defense counsel's representations regarding a conflict of interest," *id.* at 487, while declining to address "the extent of a court's power to compel an attorney to disclose confidential communications that he concludes would be damaging to his client" *id.* at 487, n.11.

In other words, the Court recognized in *Holloway* that occasions might arise when the facts underlying counsel's determination regarding a conflict of interest will be facts that counsel cannot disclose without revealing confidential communications damaging to her client. *Certiorari* should be granted here to address the questions left unanswered: can a trial court refuse a motion to withdraw on the basis of a conflict of

interest where counsel represents that she cannot describe the basis for the conflict without divulging client confidences?

CONCLUSION

The Legal Ethics Scholars are concerned with ensuring that public defenders are able to adhere to the highest ethical standards when representing indigent clients. The Court will necessarily be principally concerned with the Constitutional requirements under the Sixth Amendment. While the principles governing legal ethics do not dictate the rules that apply under the Sixth Amendment, the Legal Ethics Scholars believe that this case is the Court's opportunity to reconcile attorney ethics with the Constitutional right to conflict-free counsel, thereby providing guidance to both attorneys and the courts.

Although widespread disagreement remains among courts, disciplinary bodies, and legal scholars regarding the applicability of imputed disqualification to public defenders' offices, all are in agreement that the Sixth Amendment right to effective assistance of counsel requires protection. Effective representation includes "a correlative right to representation that is free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271 (1981). It is under the shadow cast by *Wood*, its predecessors, and successors that courts have crafted rules to evaluate conflicts of interests between public defenders in the same office, reaching inconsistent conclusions. This case presents an excellent vehicle for resolving this conflict.

The petition should be granted.

Respectfully submitted,

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