

APPENDIX

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APPENDIX A

COLORADO COURT OF APPEALS

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellee,

v.

DENNIS SPENCER,
Defendant-Appellant.

Court of Appeals No. 2017CA2228

City and County of Denver District Court
Nos. 2001CR1088 and 2001CR1089
Honorable Andrew P. McCallin, Judge

ORDER AFFIRMED

Division IV
Opinion by JUDGE RICHMAN
Johnson, J., concurs
Terry, J., specially concurs

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)

Announced December 17, 2020

Philip J. Weiser, Attorney General, Erin K. Grundy,
Assistant Attorney General, Denver, Colorado, for
Plaintiff-Appellee

Megan A. Ring, Colorado State Public Defender, Sean J. Lacefield, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 Defendant, Dennis Spencer, appeals the postconviction court's order denying his Crim. P. 35(c) motion after a hearing on remand from a division of this court. We affirm.

I. Background

¶ 2 In 2002, defendant was convicted of multiple counts of sexual assault, against three child victims, in two cases that were consolidated for trial. Before the cases were consolidated, defendant was represented by private defense counsel for one case and the public defender for the other. Ultimately, defendant went to trial with private counsel.

¶ 3 On direct appeal, a division of this court considered whether the trial court had abused its discretion in denying defendant's private counsel's motion to withdraw, a motion based on (1) defendant's lack of funds for an investigator (considered a "financial conflict" in postconviction proceedings); (2) counsel's uncertainty that he could continue to be a zealous advocate on a child sexual assault cases in light of his newborn child (considered a "personal conflict" in postconviction proceedings); and (3) counsel's belief that defendant could be better represented by the public defender. *People v. Spencer*, slip op. at 2 (Colo. App. No. 02CA1992, Jan. 13, 2005) (not published pursuant to C.A.R. 35(f)) (*Spencer I*). The division concluded that the court had not abused

its discretion in denying the motion to withdraw, and it affirmed the judgment of conviction. *Id.* at 3, 7.

¶ 4 Defendant filed a pro se postconviction motion in 2006, asking for relief pursuant to Crim. P. 35(c) and alleging ineffective assistance of counsel due in part to insufficient investigation and a conflict of interest. The public defender supplemented defendant's motion in 2012. As relevant here, the public defender's motion alleged that trial counsel had articulated personal and financial conflicts of interest in his pre-trial motion to withdraw, and counsel had rendered ineffective assistance because he (1) agreed to try the two cases together; (2) did not cross-examine one of the victims on a matter that would require piercing the rape shield statute; (3) did not request a mistrial on one occasion during trial; (4) did not present a witness who was sleeping in the room during one of the assaults and was supposedly "a light sleeper"; and (5) failed to investigate a letter, written by a victim, that "alluded to the fact she had lied about the incident."

¶ 5 The postconviction court denied the motion without a hearing, in a detailed order. In doing so, the court considered the conflict of interest claim to be a general one, and it found that defendant had failed to demonstrate that a conflict had existed or that the conflict adversely affected counsel's performance, as required by *Armstrong v. People*, 701 P.2d 17, 24 (Colo. 1985). It further found that "[d]efendant's claim of conflict of interest ha[d] been logically addressed by the Court of Appeals" in the opinion issued on direct appeal. *See Spencer I*, slip op. at 2.

¶ 6 Defendant appealed the denial. A division of this court concluded that defendant had not

established ineffective assistance of counsel pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984), because the record established that he had not been prejudiced by any allegedly deficient performance of trial counsel. But the court remanded for an evidentiary hearing on whether trial counsel had labored under an actual conflict of interest as defined in *Cuyler v. Sullivan*, 446 U.S. 335 (1980) (*Sullivan*). See *People v. Spencer*, (Colo. App. No. 12CA2505, Aug. 20, 2015) (not published pursuant to C.A.R. 35(f)) (*Spencer II*).

¶ 7 The division understood that *Sullivan* operates as an exception to the normal requirements of review under *Strickland*, so that when a defendant shows an actual conflict of interest that adversely affected the adequacy of the representation, he need not demonstrate prejudice to obtain relief. The division recognized that whether the *Sullivan* exception applied to conflicts of interest other than those arising from multiple representation was an open question, as noted in *West v. People*, 2015 CO 5, ¶ 36 n.8. But as the People did not argue that point in *Spencer II*, the division remanded the case. It ordered that to show an adverse effect on remand, the defendant must (1) identify a plausible alternative strategy or tactic that counsel could have pursued; (2) show that the alternative strategy or tactic was objectively reasonable under the facts known to counsel at the time of the strategic decision; and (3) establish that counsel's failure to pursue the strategy or tactic was linked to the actual conflict, and that defendant must point to specific instances in the record to suggest actual impairment of his interest.

¶ 8 The division directed that if the postconviction court found on remand that there was an actual conflict substantially impairing trial counsel's ability to champion defendant's cause, it was to determine whether that conflict adversely affected defendant, entitling him to postconviction relief. *See id.* at ¶ 22; *see Rodriguez v. Dist. Ct.*, 719 P.2d 699, 704 (Colo. 1986). If the court found no actual conflict, the division concluded that defendant's Rule 35(c) motion should be denied. *Spencer II*, slip op. at 22.

II. Discussion

¶ 9 “The *Sullivan* exception applies ‘needed prophylaxis in situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel.’” *West*, ¶ 24 (quoting *Mickens v. Taylor*, 535 U.S. 162, 176 (2002)). The *Sullivan* adverse effect inquiry thus requires a lesser showing than does the *Strickland* prejudice analysis. *People v. Villanueva*, 2016 COA 70, ¶ 30.

¶ 10 As noted, *Spencer II* premised its conclusion upon its recognition that both the United States Supreme Court and the Colorado Supreme Court had “left open the question of whether a [*Sullivan*] conflict-of-interest analysis applies to conflicts other than those arising from multiple representation.” Slip op. at 19 (citing *West*, ¶ 36 n.8); *see Sullivan*, 446 U.S. at 348-50. In this appeal, the People now expressly argue that the *Sullivan* analysis should not apply because the asserted conflict does not arise from multiple representation. We conclude that the weight of authority now points to a preference for a *Strickland* analysis when the conflict of interest claims allege a conflict between counsel's personal

interests and the interests of his or her client, and not a conflict arising from multiple representation.

¶ 11 In *Mickens*, the Supreme Court noted that the language of *Sullivan* — “[u]ntil . . . a defendant shows that his counsel *actively represented* conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance” — did not support supplanting *Strickland* with *Sullivan*’s expansive application to conflict claims other than those related to multiple representation. *Mickens*, 535 U.S. at 175 (quoting *Sullivan*, 446 U.S. at 350). In *West*, our supreme court interpreted *Mickens* as “question[ing] the assumption that *Strickland* should not govern claims of ineffectiveness based on alleged conflicts resulting from other forms of divided loyalty (for example, counsel’s personal or financial interests, including employment concerns, romantic entanglements, and fear of antagonizing the trial judge.” *West*, ¶ 36 n.8 (citing *Mickens*, 535 U.S. at 174-75).¹

¶ 12 After *Spencer II* was decided, and after the postconviction court’s order, a division of this court similarly concluded that a *Sullivan* adverse effect inquiry does not apply to conflicts involving an attorney’s personal interests. See *People v. Huggins*, 2019 COA 116, ¶¶ 38-41 (agreeing with *Mickens* and its progeny; collecting cases) (*cert. denied* May 26, 2020). In *Huggins*, the division held that “*Sullivan*

¹ In *Ybanez v. People*, 2018 CO 16, ¶ 29, the supreme court considered, but found it “unnecessary to decide the extent to which the separate standard for actual conflicts of interest applies to conflicting loyalties or interests apart from those implicated by multiple representations.”

cannot be read so broadly as to encompass” Huggins’s claim of a conflict between his counsel’s self-interest and counsel’s duty to represent him. *Id.* at ¶ 38. The division further observed that “[a]pplying *Sullivan* in cases arising from a lawyer’s conflict of interest resulting from the lawyer’s self-interest would undermine the uniformity and simplicity of *Strickland*.” *Id.* at ¶ 41.

¶ 13 We perceive the *Huggins* division analysis to be consistent with *Mickens* and *West*, and we agree with the *Huggins* division that a *Strickland* test is sufficient to ensure defendant’s Sixth Amendment right to counsel was not compromised by a conflict involving his counsel’s personal interests. The conflicts alleged by Spencer are not conflicts arising from multiple representation, but rather personal conflicts of counsel. To the extent defendant argues that *Wood v. Georgia*, 450 U.S. 261 (1981), supports his contention that a *Sullivan* inquiry could apply here, we do not agree that *Wood* concerned a conflict involving an attorney’s personal interests. *See West*, ¶ 34 n.7 (interpreting the holding in *Wood* to be “premised on the divided loyalty resulting from multiple representation”). Thus, despite the remand order in *Spencer II*, and despite the lengthy and thorough opinion of the postconviction court, we now conclude that an analysis under the *Sullivan* prophylaxis rule was not required in this case, and only a review under *Strickland* was needed.

¶ 14 Spencer’s postconviction motion alleges the same adverse effects arising from counsel’s purported personal conflicts that he alleged amounted to defective performance under *Strickland*. *Spencer II* concluded that the postconviction court had properly

rejected defendant's *Strickland* claim without a hearing. Slip op. at 2-3; see *Ardolino v. People*, 69 P.3d 73, 77 (Colo. 2003) (Denial without a hearing is proper "where the motion, files, and record in the case clearly establish that the allegations presented in the defendant's motion are without merit and do not warrant postconviction relief."). In light of our agreement with *Huggins*, this conclusion resolves all of defendant's remaining postconviction claims. We conclude that the district court properly denied defendant's Rule 35(c) motion.

III. Conclusion

¶ 15 The order is affirmed.

JUDGE JOHNSON concurs.

JUDGE TERRY specially concurs.

JUDGE TERRY, specially concurring.

¶ 16 I concur in the outcome reached by the majority, but my reasoning differs slightly from the majority's.

¶ 17 In the hearing held after remand from this court, trial defense counsel testified as follows:

- Although he had not had funds to hire an investigator, he had conducted his own investigation, and, after his motion to withdraw was denied, personal financial concerns did not affect his representation.
- His personal feelings about handling child sexual assault cases did not affect his representation of defendant and specifically did not affect any of the trial decisions challenged in the Crim. P. 35(c) motion.
- When he moved to withdraw, he felt he had an ethical conflict, but it was different from the reasons he had shared with the trial court. His perceived conflict actually related to his perception that defendant's son, A.S., would give false testimony if called as a witness, and his expectation that the prosecution would call A.S. to testify.
- He did not remember specific conversations with defendant about the reasons he moved to withdraw.

¶ 18 Because the record supports the court's findings, I would defer to its findings that (1) trial counsel testified credibly; (2) the alleged financial conflict of interest created only a potential conflict of interest, and not an actual conflict; and (3) trial counsel's representation was not affected by any

potential conflict. *See West v. People*, 2015 CO 5, ¶¶ 11, 57; *People v. Harlan*, 54 P.3d 871, 880 (Colo. 1986).

¶ 19 Therefore, I agree with the majority that we should affirm the district court's denial of the postconviction motion.

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APPENDIX B

COLORADO SUPREME COURT
2 East 14th Avenue
Denver, CO 80203

DENNIS SPENCER,

Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

Supreme Court Case No. 2021SC72

Certiorari to the Court of Appeals, 2017CA2228
District Court, City and County of Denver,
2001CR1088 and 2001CR1089

Date Filed: September 27, 2021

ORDER OF COURT

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

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JUSTICE MARQUEZ AND JUSTICE HOOD
WOULD GRANT as to the following issue:

Whether *Cuyler v. Sullivan*, 446 U.S. 335
(1980) applies to counsel's personal conflicts
and if so whether reversal is warranted under
West v. People, 2015 CO 5.

BY THE COURT, EN BANC, SEPTEMBER 27,
2021.

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APPENDIX C

DISTRICT COURT, DENVER COUNTY,
COLORADO
520 W. Colfax, Rm. 135
Denver, CO 80204

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff,

v.

DENNIS SPENCER,
Defendant.

Case Nos. 01CR1088 & 01CR1089
Division 5C

Date Filed: October 18, 2017

**ORDER DENYING DEFENDANT'S MOTIONS
FOR POSTCONVICTION RELIEF**

This matter is before the Court on remand for a hearing on Defendant's Crim. P. 35(c) motion in which he claims that his trial counsel had a conflict of interest. On February 17, 2017 the Court held a hearing on this claim, at which Defendant's trial counsel testified. Based on the Court's consideration of his testimony, the entire file and the applicable authorities, the Court enters the following findings

and conclusions denying Defendant's motions for postconviction relief.

Procedural Background

Case no. 01CR1088 involved allegations that defendant had sexually assaulted his niece, B.B. Defendant retained private counsel for this case and, soon after the initial allegations, two more victims came forward and accused defendant of sexual assault. In case no. 01CR1089, Defendant was then charged with sexual assault and sexual assault by one in a position of trust concerning victims, K.S. and S.S. In the second case, the Court appointed counsel from the public defender's office for the second case.

By consent of the parties, both cases were tried together in June 2002. On June 6, 2002 Defendant was convicted on all counts. Between the two cases he received an indeterminate sentence of 48 years to life in the Department of Corrections.

On direct appeal, the Court of Appeals upheld these convictions and sentences. *People v. Spencer*, case no. 02CA1992 (Jan. 13, 2005) (not published pursuant to C.A.R. 35(f)) (*Spencer I*). Defendant then filed a motion under Crim. P. 35(c) alleging that his trial counsel had a conflict of interest under *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980). He also argued that counsel provided ineffective assistance under *Strickland v. Washington*, 466 U.S. 668, 687 (1984). This Court denied relief and Defendant appealed these rulings.

On appeal of the postconviction rulings, the Court of Appeals upheld the Court's ruling that Defendant's ineffective assistance of counsel claim failed. See *People v. Spencer*, case. no. 12CA2505 (Aug. 20, 2015)

(not published pursuant to C.A.R. 35(f)) (*Spencer II*). On Defendant's conflict of interest claim, the Court of Appeals remanded for a hearing to determine whether trial counsel had an actual conflict of interest. See *Spencer II*, at p. 21. If so, the Court must determine whether the conflict adversely affected Defendant. See *Spencer II*, at p. 22.

Applicable Law

A defendant has a right to conflict-free counsel. *West v. People*, 341 P.3d 520, 525 (Colo. 2015); *People v. Villanueva*, 374 P.3d 535, 542 (Colo. App. 2016). To demonstrate a violation of a defendant's Sixth Amendment rights arising from a conflict of interest, a defendant must establish that a conflict of interest adversely affected the lawyer's performance. *Villanueva*, 374 P.3d at 542. Where "a defendant . . . shows that a conflict of interest actually affected the adequacy of his representation, he need not demonstrate prejudice in order to obtain relief." *People v. Ragusa*, 220 P.3d 1002, 1006 (Colo. App. 2009) (quoting *Cuyler*, 446 U.S. at 349-50).

A potential conflict is enough to show that an attorney had a conflict of interest for purposes of this analysis. *West*, 341 P.3d at 531; *Villanueva*, 374 P.3d at 542-43.

"[T]o show an adverse effect, a defendant must (1) identify a plausible alternative defense strategy or tactic that counsel could have pursued, (2) show that the alternative strategy or tactic was objectively reasonable under the facts known to counsel at the time of the strategic decision, and (3) establish that counsel's failure to pursue the strategy or tactic was linked to the actual conflict." *West*, 341 P.3d at 533.

There must be evidentiary support for the alternative strategy. *Villanueva*, 374 P.3d at 543. The alternative strategy must be based on the facts known to counsel at the time of the decision that would have merited consideration of the alternative strategy. *Id.*

An alternative strategy is not objectively reasonable if it “would have proved unwise, illogical, or otherwise undesirable under the factual circumstances.” *Id.*, quoting *West*, 341 P.3d at 533. “In other words, proffered alternatives are not reasonable when they would have been detrimental to the defense.” *Villanueva*, 374 P.3d at 543. When determining whether an alternative strategy is objectively reasonable the Court should not defer to counsel’s subjective assessment of the representation. *Id.*

This inquiry is case specific and focuses on many factors, including: “the charge(s) against the defendant, the evidence, the information that the defendant communicated to the attorney and upon which the attorney based his [or her] decision, the attorney’s ethical obligations, the likelihood that pursuing the alternative strategy would damage the defendant’s credibility and jeopardize his chances of future Crim. P. 35(c) relief, and the alternative strategy’s viability given all of the above.” *West*, 341 P.3d at 533.

The third part of the test can be proven “either by showing that the alternative strategy or tactic was inherently in conflict with counsel’s other loyalties or interests or by showing that the alternative strategy or tactic was not undertaken due to those other loyalties or interests.” *Villanueva*, 374 P.3d at 543. “An alternative strategy is inherently in conflict with an attorney’s other duties or loyalties when the

strategy and duties are inconsistent with each other. *Id.* Under this analysis, if the attorney could not pursue the alternative strategy without compromising his or her other duties, there is an inherent conflict. *Villanueva*, 374 P.3d at 543-44 (citation omitted). Again, this is an objective inquiry. *West*, 341 P.3d at 534 (“This inquiry does not consider counsel’s subjective belief that he forewent the alternative strategy for reasons unrelated to the conflict.”).

Not all conflicts of interest involve an inherent conflict. *West*, 341 P.3d at 534. In *West* the Supreme Court explained that:

Where there is no inherent conflict, but problematic circumstances exist, a defendant must prove that the alternative strategy or tactic was not pursued *due to* the attorney’s other loyalties or interests.” While the defendant does not have to present unequivocal proof of a link, record evidence should strongly indicate that counsel’s failure to pursue the alternative strategy resulted from a “struggle to serve two masters.”

Id. (citation omitted) (emphasis in original).

The defendant “must point to specific instances in the record to suggest actual impairment of his [or her] interest.” *People v. Stroud*, 2014 COA 58, ¶ 40 (internal quotation omitted).

Potential Conflicts and Adverse Affects

On March 22, 2002 counsel sought to withdraw from his representation of Defendant. He informed the Court that Defendant lacked the funds that would have allowed counsel to hire an investigator. Counsel

testified that he thought it was important to have an investigator in this case. He also informed the Court that earlier that year he and his wife just had their first child and that he was no longer taking cases involving sexual assault on a child. Under all of these circumstances he believed that it would be better for Defendant to be represented by the public defender's office, which had investigator services available. The Court denied the motion to withdraw and the case proceeded to trial with trial counsel representing Defendant on both cases.

On April 19, 2002 the Court held a hearing on the prosecution's Rule 404(b) motion to admit evidence of the sexual assaults involving K.S. and S.S. (case no. 01CR1089) in the case involving B.B. (case no. 01CR1088). The Court granted the motion. After this ruling, trial counsel consented to joinder of the two cases for trial. At the Feb. 17, 2017 hearing, trial counsel testified that he would have consulted with Defendant about this joinder, but that he could not recall specifically the conversation he had with Defendant. The cases proceeded to trial in June 2002, and Defendant was convicted on all charges in both cases.

At the hearing held on Feb. 17, 2017, trial counsel further elaborated as to why he sought to withdraw in 2002. He testified that after his first child was born he had a philosophical problem handling sexual assault cases involving children. If the allegations were true, he was in the position of representing a defendant that committed these acts. On the other hand, if the accusations were false, he would have to attack the credibility of a child. At the hearing held Feb. 17, 2017, he stated that he could cross-examine a child

and that this concern was likely overstated when he sought to withdraw in 2002.

Trial counsel also testified about the financial constraints he faced when representing Defendant. At approximately the same time he was representing Defendant, he was handling another case that involved similar allegations. The defendant in that case was convicted. In that case there were no funds for an investigator. He saw this case going down the same path unless an investigator was hired. He felt that an investigator was important to have so that this case would not end up like the other case.

Despite his reservations about proceeding without an investigator, trial counsel testified that he was able to conduct an investigation himself. He interviewed some of the members of the congregation where Defendant gave the "ought". He also investigated Defendant's wife and his son, whose testimony is discussed later. He was also able to preserve the information he gained from these interviews for impeachment purposes by recording the conversations or having a witness present during the interviews. He testified, however, that if he had unlimited resources he could have had an investigator travel to Washington state to interview B.B. about a letter that she wrote expressing regret about bringing up these allegations. With additional resources he also could have had the investigator interview more members of the congregation that were present when the "ought" was given.

Also at the Feb. 17, 2017 hearing, trial counsel identified an ethical conflict that arose with the testimony of Defendant's son. Defendant wanted trial counsel to call his son to testify that on the night of

the sexual assault involving B.B., she was trying to “feel on him.” Trial counsel testified that he had difficulty presenting this testimony because the son had never made this statement in any previous interview. Nevertheless, the son was called as a witness by the prosecution at trial. During the son’s testimony he blurted out this statement without any questioning by counsel.

Defendant contends that counsel’s financial limitations and personal reservations presented actual conflicts. Defendant argues that these conflicts adversely affected his defense in the following specific ways:

1. Trial counsel improperly agreed to join cases 01CR1088 (sexual assault charges involving B.B.) and 01CR1089 (sexual assault charges involving S.S. and K.S.);
2. Trial counsel failed to attempt to pierce the rape shield statute after Defendant’s son testified that, on the night of the incident, B.B. was trying to “feel on him”;
3. Trial counsel failed to request a mistrial after a juror passed a note to the court reporter in an apparent attempt to explain the process for choosing godparents in Defendant’s church;
4. Trial counsel failed to investigate information that Defendant’s daughter, Al.S., was a light sleeper and was present in the room with B.B. and defendant on the night of the assault, but did not hear anything unusual; and
5. Trial counsel failed to investigate and question B.B. at trial about a letter she wrote to defendant’s wife, in which B.B. said that she

“hated” the fact that she had reported the assault.¹

Potential Conflicts

There was enough evidence presented to establish a potential conflict arising from counsel’s personal reservations. When counsel was representing Defendant he expressed his reservations about handling a sex assault case involving a child. At the hearing held on Feb. 17, 2017, some fifteen years later, he elaborated on his reservations. He felt like he was in a bind whether the allegations were true or not. While he also testified that he was overstating these concerns at the time, the Court finds that sufficient evidence has been produced to show a potential conflict of interest based on the personal reservations he expressed on March 22, 2002. This potential conflict is sufficient to establish a conflict under the *West* standards. *See West*, 341 P.3d at 531; *Villanueva*, 374 P.3d at 542-43.

The Court is not convinced, however, that the financial constraints rise to the level of even a potential conflict. These are constraints faced by most private practitioners when representing a defendant accused in a criminal action. Counsel testified to the additional investigation he would have undertaken had he had unlimited resources. It is not objectively reasonable to hold counsel to a standard that assumes

¹ The Court of Appeals found that two other actions by counsel that support his ineffective assistance claims under *Strickland* were not alleged to have been the result of any conflict. *See Spencer II*, at p. 19-20. Therefore, the Court does not analyze under *Cuyler* whether counsel had a conflict when he failed to request a hearing on the admissibility of the “ought” or seek to enforce an agreement reached at the preliminary hearing.

unlimited resources. That is a circumstance rarely enjoyed in any representation, whether it is in the public sector or private practice. The Court finds that the financial constraints did not rise to the level of a potential or actual conflict.

Even if there was a potential conflict posed by counsel's financial constraints these circumstances did not adversely affect Defendant. Counsel testified credibly to the steps he took to investigate the case without an investigator. He undertook adequate investigation and preserved any impeachment for possible use at trial. The Court also finds that the specific decisions made by counsel during trial were not influenced by any financial considerations or his personal reservations. The Court finds that counsel made these decisions with an eye on what was practical and with the best interests of the defense in mind.

In making these findings, the Court found trial counsel to be credible. However, the Court does not rely on his testimony as to any subjective assessment of the potential conflicts or the affect that they had on the representation. Under *West*, the Court is unable to credit counsel's assessments as to why he made a particular decision. *See West*, 341 P.3d at 533 (adopting an objectively reasonable standard to eliminate any reliance of defense counsel' subjective assessment of the representation). The Court relies on counsel's testimony as to the historical facts. The Court makes its findings and conclusions as the effect of an potential conflicts using an objectively reasonable standard. Based on this standard and the evidence presented the Court finds and concludes that

no potential conflict adversely affected counsel's representation of Defendant.

Adverse Affects

1. Joinder of cases for trial.

Defendant argues that having two trials would be costly to counsel. Defendant contends that financial considerations influenced counsel's decision to join the two cases.

The Court finds that counsel's agreement to join the two cases was not affected by any potential conflict. The Court granted the prosecution's Rule 404(b) motion to allow evidence of the sexual assaults on K.S. and S.S. to be admitted in the case involving B.B. It would have been futile for counsel to argue for separate trials after the Court had just admitted this evidence in the first case. A Court may join sex assault cases for trial when evidence of the sex assault in one case is admissible in the other case. *See People v. Williams*, 899 P.2d 306, 313 (Colo. App. 1995).

Given the Court's ruling on the prosecution's Rule 404(b) motion counsel had little basis to resist the joinder. Instead, by agreeing to joinder counsel was recognizing the reality of the situation. No potential conflict affected this decision. Therefore, the Court finds that Defendant was not adversely affected by any potential conflict when counsel agreed to this joinder.

2. Failure to pierce the rape shield statute based on the son's statement.

Defendant argues that counsel's personal reservations and financial constraints influenced his decision to not seek a hearing to pierce the rape shield statute. The Court finds that it would have been

unwise and detrimental to the defense for counsel to have taken this alternative course of action.

Counsel testified credibly that he had reservations about eliciting this statement from the son. Counsel testified that in all of his previous interviews the son failed to disclose this piece of information. His credibility would have been impeached with his prior failures to present this information. Even if counsel was successful in piercing the rape shield statute, impeachment of the son with his prior failure to reveal this important information would have been detrimental to the defense. It would have raised the specter that the son was protecting Defendant and that Defendant had something to do with this recent new information. The Court finds that counsel was not influenced by any potential conflict when he failed to pierce the rape shield statute. Instead he was acting in the best interest of the defense by not pursuing this aspect of the son's testimony any further.

3. Failure to ask for a mistrial based on juror note.

Defendant also argues that counsel should have sought a mistrial after a juror passed a note to the court reporter explaining how godparents are chosen in Defendant's church. Defendant argues that counsel failed to do this because he did not want to incur the cost of trying the case again.

Testimony about the church was presented because that is where Defendant gave the "ought." When the juror note came to light, the Court declined to interview the juror or dismiss the juror. The Court made that juror the alternate and, before deliberations, that juror was dismissed.

It would have been futile for counsel to ask for a mistrial based on this juror's note. The Court was not allowing even the modest step of interviewing the juror. Therefore, it would have been illogical for counsel to ask for the more drastic remedy of a mistrial. Again, his decision in this regard was recognizing the reality of the situation. It was not influenced by any potential conflict.

Moreover, counsel testified credibly that at another point in the trial he had requested a mistrial. This action effectively refutes that argument that financial considerations caused him to not ask for a mistrial when the juror note surfaced.

4. Failure to investigate Al.S.'s light sleeping allegation.

Evidence was presented at trial that Defendant's daughter, Al.S. was present in the room when the assault on B.B. occurred. Defendant claims that Al.S. is a light sleeper and would have awoken had there been any such assault. Defendant claims that counsel failed to investigate allegations that she was a light sleeper because of his potential conflicts.

The Court finds, again, that counsel acted reasonably in failing to investigate this allegation. Counsel testified credibly that evidence to the contrary came out at trial about Al.S. being a light sleeper. According to counsel, Defendant's son testified that Al.S. slept through an alarm and had to be awakened. The Court finds that it would have been unwise to present testimony about Al.S. being a light sleep when credible evidence to the contrary evidence was presented. Counsel was not influenced by financial or other considerations when he failed to

investigate this allegation. He was acting reasonable given the state of the evidence presented at trial.

5. Failure to investigate and question B.B. about the note.

Finally, Defendant argues that Defendant was adversely affected by counsel's failure to investigate the note written by B.B. in which she expresses regret about bringing up the sex assault. Counsel testified that no additional benefit would have been gained by sending an investigator to Washington state to interview B.B. about this letter. As counsel described this letter it contained a general statement of regret about reporting this assault. Counsel testified that he obtained the benefit of having this ambiguous statement presented to the jury. Counsel testified credibly to other behavior by B.B. that he was able to argue was inconsistent with her report of the assault. She continued to speak with Defendant's wife and even sent a letter about attending either homecoming or prom. When this other behavior is combined with the ambiguous statement in the letter, counsel felt he was able to obtain the maximum evidentiary value of the letter.

The Court finds that counsel was not influenced by any potential conflict in failing to investigate this letter. In the overall context of the evidence presented at trial, counsel was able to gain the benefit of the letter without any further investigation. He was not influenced by any potential conflict in failing to investigate this letter further.

The Court finds and concludes that no potential conflict influenced counsel's representation of Defendant. All of the decisions called into question were consistent with the realities of the case and

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counsel acting in the best interest of the defense. Accordingly, the Court finds and concludes that Defendant was not adversely affected by any potential conflict that his counsel may have had. Defendant's motions for reconsideration of his convictions and sentences under Crim. P. 35(c) are denied.

SO ORDERED this 18th day of October, 2017.

BY THE COURT

Andrew P. McCallin
District Judge

28a

APPENDIX D

COLORADO COURT OF APPEALS

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellee,

v.

DENNIS SPENCER,
Defendant-Appellant.

Court of Appeals No. 12CA2505

City and County of Denver District Court
Nos. 01CR1088 and 01CR1089
Honorable Brian R. Whitney, Judge

ORDER AFFIRMED IN PART AND REVERSED IN
PART, AND CASE REMANDED WITH
DIRECTIONS

Division IV
Opinion by JUDGE TERRY
Webb and Graham, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)

Announced August 20, 2015

Cynthia H. Coffman, Attorney General, Erin K. Grundy, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Douglas K. Wilson, Colorado State Public Defender, Cory D. Riddle, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

Defendant, Dennis Spencer, appeals the trial court's order denying his motion for postconviction relief. He contends that the postconviction court erred in denying his motion without holding an evidentiary hearing. We reverse and remand for a hearing on the portion of the motion that alleges an actual conflict of interest, but otherwise affirm.

I. Background

Defendant was convicted of three counts of sexual assault on a child and three counts of sexual assault – position of trust in two cases that were consolidated for trial.

The first case involved allegations that defendant had sexually assaulted his niece, B.B. Defendant retained private counsel for this case and, soon after the initial allegations, two more victims came forward and accused defendant of sexual assault. Defendant was then charged with sexual assault and sexual assault by one in a position of trust in a second case concerning these victims, K.S. and S.S. The trial court appointed counsel from the Public Defender's office for the second case.

Prior to trial, defendant's private counsel moved to withdraw. The court denied the request, and the parties subsequently agreed to try the two cases

together. The jury found defendant guilty of all charges. A division of this court affirmed his convictions on direct appeal. *People v. Spencer*, (Colo. App. No. 02CA1992, Jan. 13, 2005) (not published pursuant to C.A.R. 35(f)) (*Spencer I*).

Defendant then filed a motion alleging that his private trial counsel had labored under a conflict of interest, under *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980), and even if no such conflict existed, nevertheless had provided ineffective assistance under *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The postconviction court denied the motion in a detailed written order.

II. Analysis

Defendant contends that the postconviction court erred by failing to grant a hearing on his claims that trial counsel was ineffective under either *Strickland* or *Cuyler*. We conclude that the postconviction court properly rejected defendant's *Strickland* claim. However, we agree that a hearing was required on defendant's contentions of conflict of interest under *Cuyler*, and therefore remand for such a hearing.

We review de novo the postconviction court's summary denial of a Crim. P. 35(c) motion. *See People v. Long*, 126 P.3d 284, 286 (Colo. App. 2005). A court may deny a Crim. P. 35(c) motion without appointing counsel or conducting an evidentiary hearing "where the motion, files, and record in the case clearly establish that the allegations presented in the defendant's motion are without merit and do not warrant postconviction relief" *Ardolino v. People*, 69 P.3d 73, 77 (Colo. 2003) .

A. *Strickland* Claim

To succeed on an ineffective assistance of counsel claim, the defendant must show that (1) defense counsel's performance was deficient, and (2) this deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687.

1. Agreement to Join Cases

Defendant argues that the postconviction court erred in denying, without a hearing, his claim that his trial counsel was ineffective because he agreed to join the two sexual assault cases together for trial. We disagree.

The trial court had granted the prosecution's motion to admit other act evidence, and therefore evidence of each of defendant's cases would be admissible in the other case. Even if the cases had been tried separately, the jury in each case would have heard the same evidence and received the same legal instructions as in the other case. Thus, there was nothing to suggest that consolidation of the cases was improper.

Further, the trial court properly instructed the jury to consider the evidence separately as to each count and not to let its decision on one count influence its decision on any other. And defendant points to nothing in the record that would suggest that the jury was unable to separate the facts and legal principles applicable to each offense. *See People v. Gregg*, 298 P.3d 983, 986 (Colo. App. 2011) (upholding consolidation in similar circumstances). Thus, defendant has not alleged facts that suggest that the outcome of the trial would have been different but for counsel's agreement to try the cases together.

We do not address defendant's arguments, raised for the first time on appeal and in his reply brief, respectively, that (1) counsel was ineffective for failing to request additional limiting instructions concerning the purposes for which the jury could consider the other act evidence under CRE 404(b), and (2) the trial court committed plain error because the evidence was presented to the jury without additional limiting instructions. *See People v. Salinas*, 55 P.3d 268, 270 (Colo. App. 2002).

2. Rape Shield Statute

Defendant next argues that trial counsel was ineffective for not moving to pierce the rape shield statute after defendant's ten-year-old son testified that, on the night of the incident, B.B. was trying to "feel on him." We are not persuaded.

At trial, the prosecutor objected to the testimony, which had been elicited during defense counsel's questioning of defendant's son. Defense counsel advised the court that the child had not previously disclosed this information. The trial court ruled that it would strike the testimony as prohibited by the rape shield statute because it suggested the victim had engaged in other sexual conduct. Defense counsel then requested an opportunity to review the rape shield statute and readdress the issue outside the jury's presence. However, he did not later try to readdress the issue.

Defendant contends that counsel should have followed up in order to determine whether B.B. had lied about the assault in order to avoid attention for whatever she was doing to defendant's son that night. Specifically, he maintains that a hearing outside the jury's presence "may very well have led effective

counsel to further investigate [defendant's son's] claims regarding B.B. and [B.B.'s] motives to fabricate falsehoods about [defendant]”

However, defendant does not allege facts demonstrating that such an inquiry would have led the court to overturn its ruling that the evidence was inadmissible, or that the jury would have found the evidence significant and persuasive. Accordingly, we conclude that defendant did not allege facts that, if true, suggest defendant is entitled to postconviction relief.

3. Religious “Ought”

Defendant next maintains that the court erred in denying a hearing on his claim that counsel was ineffective for not requesting a CRE 104(c) hearing on the admissibility of defendant’s religious “ought.” We disagree.

CRE 104(c) provides, “Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury.”

Evidence may be excluded under CRE 403 when it presents the undue tendency to suggest a decision on an improper basis, such as sympathy, hatred, contempt, retribution, or horror. *People v. Dist. Court*, 785 P.2d 141, 147 (Colo. 1990). However, unfair prejudice does *not* mean the damage that results to a defendant’s case from the legitimate probative force of the evidence. *Id.*

During trial, the prosecution asked numerous witnesses about an apology, or an “ought,” that defendant made in front of his entire church congregation shortly after the sexual assault charges were filed against him. Defendant contends that the

“ought” is a specific religious practice endorsed by his congregation that is similar to an apology. He argues that counsel should have requested a hearing to determine its admissibility.

Defendant does not claim that, had counsel requested such a hearing, the ought would have been deemed inadmissible. He does not dispute the People’s argument that the ought was made in a non-coercive setting and without any expectation of privilege. Nor does he dispute that his trial counsel attempted to minimize the ought’s significance by eliciting testimony that such open apologies were required by the church “whether [the defendant had] done something or not.”

Thus, defendant has not alleged facts that, if true, indicate that he is entitled to postconviction relief for this claim.

4. Juror’s Note

Defendant next contends that trial counsel was ineffective for failing to request a mistrial after a juror passed a note to the court reporter. We disagree.

During trial, a juror attempted to pass a note to the prosecution through the court reporter. The note, which was an apparent attempt to explain the process for choosing godparents in defendant’s church, was passed after certain testimony was elicited at trial about customs in defendant’s church.

In response, the court re-admonished the jurors not to investigate the case on their own. Defense counsel asked that the court excuse the juror and question the other jurors about any discussions they might have had about the note. The court refused, concluding that there was no basis to believe the juror had spoken to

the other jurors. Nevertheless, the court agreed to make the juror an alternate, and excused the juror before jury deliberations began.

On direct appeal, a division of this court concluded that the court did not abuse its discretion in so doing. The division noted that defendant had not shown any prejudice from the juror's actions, and further concluded that his assertion that the juror tainted other jurors was conclusory. As noted by the division, (1) the note's meaning was ambiguous, (2) it did not show any predisposition of the juror, and (3) it showed the juror had taken care to place her comment in writing rather than raise the issue in front of the other jurors. *See Spencer I.*

In his postconviction motion and on appeal, defendant argues that his trial counsel was ineffective for failing to request a mistrial once the court denied his request to have each juror questioned individually. In support, defendant states that whether a taint occurred is "unknown."

In rejecting the claim, the postconviction court observed:

A mistrial is "the most drastic of remedies" that should only be granted "where the prejudice to the accused is too substantial to be remedied by other means." *People v. Santana*, 255 P.3d 1126, 1132 (Colo. 2011); citing *Bloom v. People*, 185 P.3d 797, 807 (Colo. 2008). Upon learning of the note, counsel requested to dismiss the juror. This request was denied. Instead, the court made the juror in question the alternate, and the juror was ultimately excused prior to jury deliberations. When the trial court did not find sufficient prejudice to excuse the juror, the

court would undoubtedly deny a motion for mistrial. Because the court would have denied a motion for mistrial, Defendant fails to demonstrate the results of his trial would have differed if counsel had requested a mistrial upon learning of the note.

We agree with the court's reasoning and analysis, and accordingly reject his claim.

5. Failure to Enforce Agreement

Defendant next contends that the postconviction court erred in rejecting — without a hearing — his claim that counsel was ineffective for failing to enforce an agreement he had reached with the prosecution. We disagree.

The trial court may summarily deny a Crim. P. 35(c) motion where the defendant's allegations are bare and conclusory in nature, lack supporting factual allegations, or are directly refuted by the record. *People v. Venzor*, 121 P.3d 260, 262 (Colo. App. 2005).

Here, defendant claims that he waived a preliminary hearing because the prosecution had agreed that he would be tried on only one count for which he would face a determinate sentence. He also claims that his attorney failed to enforce the agreement.

We note that defendant cites case law regarding enforcement of *plea agreements*. However, it does not appear that the agreement alleged here was a plea agreement, involving an agreement by defendant to plead guilty to a charge. Rather, it was only alleged to be an agreement to waive a preliminary hearing; according to the postconviction motion, defendant still envisioned being *tried* on “one count.”

The People responded to defendant's claims by noting that the sole *plea* disposition offered to defendant called for him to plead guilty to one count of sexual assault on a minor in exchange for the dismissal of other pending charges. They noted that defendant declined this offer and elected to proceed to trial.

The record supports the People's contention that there was no agreement as alleged by defendant. The written preliminary hearing waiver, signed by defendant and his counsel, contains no agreement to modify the charges against him. Thus, the record does not support his claim.

Further, as the postconviction court noted, defendant failed to detail any facts supporting the offer's existence, such as when the offer was made, whether it was conveyed to him directly, and whether he advised his attorney of its existence.

Under these circumstances, we conclude the court did not err in denying defendant's claim without an evidentiary hearing.

6. Failure to Investigate

Defendant next argues that the court erred in summarily rejecting his claim that his trial attorney was ineffective for failing to investigate. We address each of his contentions below, and discern no error.

a. Light Sleeper Testimony

We first reject defendant's claim that counsel was deficient in failing to investigate information that defendant's daughter, A.L.S., was a light sleeper and present in the room with B.B. and defendant on the night of the assault, but did not hear anything unusual.

During opening statements, the defense stated that Al.S. would testify that she was a light sleeper, she was in the room on the night in question, and she did not hear anything. However, defense counsel did not question Al.S. about this matter. The jury heard testimony that other children were in the room during the assault, including at least one other light-sleeping child, and that none of them woke during the assault.

The postconviction court rejected the claim that the trial's outcome would have been different if defense counsel had interviewed Al.S. or questioned her at trial. The jury heard testimony that none of the sleeping children woke during the assault, and the victim's testimony that no one woke during the assault. The jury also learned of the report of defendant's son to police that, when he entered the room, his father was on top of the victim. Under these circumstances, we agree that defendant has not alleged facts that suggest the outcome of the trial would have been different had defendant's daughter also testified that she did not wake.

b. Letter

We also reject defendant's assertion that the postconviction court erred in rejecting the claim that counsel was ineffective for failing to investigate and question B.B. at trial about a letter she wrote to defendant's wife. In the letter, B.B. said that she "hated" the fact that she had reported the assault.

In rejecting this claim, the court concluded that the failure to question B.B. about the letter at trial did not result from an insufficient investigation. The court noted that during a pre-trial motions hearing, counsel questioned defendant's wife about the letter's existence, content and tone.

Further, when the prosecution asked B.B. about the letter at trial, B.B. testified that she had never said in the letter that the allegations against defendant were untrue. She testified that she had told the truth about what happened with defendant. Further, she explained that, by the time of trial, she was glad she had disclosed the abuse because if she had not “it would have still been stuck in me and I would have been angry and mad.”

Under these circumstances, the court did not err in rejecting defendant’s claim.

B. *Cuyler* Claim

A defendant has a right to conflict-free counsel. *People v. Harlan*, 54 P.3d 871, 878 (Colo. 2002). Counsel becomes conflicted when his or her “ability to champion the cause of the client becomes substantially impaired.” *Rodriguez v. Dist. Court*, 719 P.2d 699, 704 (Colo. 1986).

An actual conflict of interest is one that is real and substantial, and is contrasted from a potential conflict; the latter is a conflict that is possible or nascent, but in all probability will arise. *Harlan*, 54 P.3d at 878. In order to demonstrate a violation of a defendant’s Sixth Amendment rights arising from a conflict of interest, a defendant must establish that an actual conflict of interest adversely affected his or her lawyer’s performance. *People v. Ragusa*, 220 P.3d 1002, 1006 (Colo. App. 2009); see *Cuyler*, 446 U.S. at 350 (1980).

“The *Cuyler* standard operates as an exception to the normal requirements of *Strickland*” *Dunlap v. People*, 173 P.3d 1054, 1073 n.24 (Colo. 2007). Where “a defendant . . . shows that a conflict of interest

actually affected the adequacy of his [or her] representation[, he or she] need not demonstrate prejudice in order to obtain relief.” *Ragusa*, 220 P.3d at 1006 (quoting *Cuyler*, 446 U.S. at 349-50). For this reason, rejection of defendant’s *Strickland* claim does not resolve his *Cuyler* claim.

“[T]o show an adverse effect, a defendant must (1) identify a plausible alternative defense strategy or tactic that counsel could have pursued, (2) show that the alternative strategy or tactic was objectively reasonable under the facts known to counsel at the time of the strategic decision, and (3) establish that counsel’s failure to pursue the strategy or tactic was linked to the actual conflict.” *West v. People*, 2015 CO 5, ¶ 57. Thus, the defendant “must point to specific instances in the record to suggest actual impairment of his [or her] interest.” *People v. Stroud*, 2014 COA 58, ¶ 40 (internal quotation omitted). The defendant must identify “something that counsel chose to do or not do, as to which he had conflicting duties, and must show that the course taken was influenced by that conflict.” *Id.* (internal quotations omitted); see *People v. Thomas*, 2015 COA 17, ¶ 19 (same).

At a pretrial hearing on March 22, 2002, trial counsel moved to withdraw from the case, citing three grounds for the proposed withdrawal. First, he said that defendant lacked sufficient funds to hire an investigator, which counsel felt was important. Second, he said that, “because of serious personal issues, I am not sure I could be effective, [or] zealous for Mr. Spencer in his cases.” When asked to explain that comment, he said:

. . . [M]y wife had our first child in February of this year . . . and I have had kind of a change of

heart on the types of cases I am going to be able to represent people on. . . It has nothing to do with how I feel about [defendant]. I have had discussions with my firm. I am not going to take these kinds of cases anymore.

And third, counsel expressed his belief that it would be in defendant's best interest to be represented by the public defender in both cases.

The trial court denied the motion to withdraw, concluding that counsel had represented defendant for a long time and had an ethical obligation to complete the representation. The court also noted that the public defender could not represent defendant unless there was a continuance of the trial. On direct appeal, a division of this court concluded that the trial court did not abuse its discretion in denying the motion to withdraw. *See Spencer I.*

In his postconviction motion, defendant alleged that his counsel's statements at the pre-trial hearing demonstrated an actual conflict of interest. The claim appears to be that counsel expressed at least personal — and perhaps financial — interests that conflicted with his duty to represent defendant zealously at trial. Further, the motion alleged that this actual conflict adversely affected the adequacy of his representation, as shown by his attorney's lack of zealousness at trial.

The indicia of purported lack of zealousness are largely the same as the examples of ineffective assistance defendant identifies for purposes of relief under *Strickland*. The motion alleged that, as a result of the conflict, his trial counsel:

- improperly agreed to joinder of the cases pending against him;
- failed to move to pierce the rape shield statute after defendant's ten-year-old son testified that, on the night of the incident, B.B. was trying to "feel on him";
- failed to request a mistrial after a juror passed a note to the court reporter, in an apparent attempt to explain the process for choosing godparents in defendant's church;
- failed to investigate information that defendant's daughter, Al.S., was a light sleeper and was present in the room with B.B. and defendant on the night of the assault, but did not hear anything unusual; and
- failed to investigate and question B.B. at trial about a letter she wrote to defendant's wife, in which B.B. said that she "hated" the fact that she had reported the assault.

The postconviction court rejected the claim.

Although defendant alleged two other deficiencies — defense counsel's failure to request a hearing on the "ought" testimony and failure to enforce an agreement with the prosecution — defendant did not allege that such deficiencies resulted from defense counsel's conflicts of interest. The trial court therefore did not err in summarily denying defendant's *Cuyler* claims as to these two alleged deficiencies.

We disagree with the postconviction court's conclusion that the division in *Spencer I* logically addressed the conflict issue. The only issue before the division in that appeal was whether it was an abuse of discretion for the trial court to deny the motion to

withdraw. The division did not purport to address whether counsel provided ineffective assistance due to a conflict of interest.

The postconviction court's order said that defendant failed to point to legal authority for applying a *Cuyler* conflict-of-interest analysis to the type of emotional or financial conflicts defendant alleges existed. We recognize that both the United States Supreme Court and the Colorado Supreme Court have left open the question of whether a *Cuyler* conflict-of-interest analysis applies to conflicts other than those arising from multiple representation. *See West*, ¶ 36 n.8 ("In dicta, the [*Mickens v. Taylor*, 535 U.S. 162 (2002)] Court questioned the assumption that *Strickland* should not govern claims of ineffectiveness based on alleged conflicts resulting from other forms of divided loyalty (for example, counsel's personal or financial interests, including employment concerns, romantic entanglements, and fear of antagonizing the trial judge). What should be made of that dicta is a matter for another day." (citations omitted)); *Duncan*, 173 P.3d at 1073 n.24 ("The Supreme Court has made clear that it is an open question whether applying the *Cuyler* exception to conflicts other than multiple concurrent representation is proper, or whether the normal *Strickland* analysis applies."). However, divisions of this court have applied the *Cuyler* conflicts analysis broadly to different types of conflicts, *see Miera*, 183 P.3d at 675-76 (collecting cases); *Ragusa*, 220 P.3d at 1006 (considering conflict based on "attorneys' personal and financial interests"), and our supreme court has given no indication that this broad application is erroneous.

We conclude that defense counsel's emotional reservations about defending child-sex-assault cases and personal financial concerns may have constituted an actual conflict of interest such that his ability to champion defendant's cause was "substantially impaired." *Rodriguez*, 719 P.2d at 704. Additionally, the existing record does not sufficiently foreclose the possibility that such a conflict adversely affected defense counsel's representation by causing one of these alleged deficiencies. Thus, as set forth in more detail below, we must remand for the court's consideration of these issues.

III. Conclusion

The portion of the order rejecting defendant's claims that defense counsel labored under a conflict of interest is reversed and remanded to the district court for a hearing on whether counsel had an actual conflict of interest that resulted in the deficiencies alleged in defendant's Crim. P. 35(c) motion. In all other respects, the order is affirmed.

Because we have rejected defendant's *Strickland* claim, the hearing on remand is limited to determining whether defendant is entitled to relief based on ineffective assistance resulting from a conflict of interest under *Cuyler*. Accordingly, on remand the postconviction court should first determine whether defense counsel had an actual conflict of interest, such that his ability to champion defendant's cause was "substantially impaired." *Rodriguez*, 719 P.2d at 704.

If the court determines that no actual conflict existed, then defendant's claims fail. If, on the other hand, the court determines that defense counsel was operating under an actual conflict, it should proceed

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to determine whether that conflict adversely affected defendant. In conducting that analysis, the court should apply the three-prong test of *West*, ¶ 57, and should consider only those alleged deficiencies which defendant argued in his 35(c) motion were caused by the conflict of interest.

JUDGE WEBB and JUDGE GRAHAM concur.

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APPENDIX E

DISTRICT COURT, CITY AND COUNTY OF
DENVER, COLORADO
520 West Colfax Ave
Denver, Colorado 80204

PEOPLE OF THE STATE OF COLORADO,
Plaintiff(s),

v.

DENNIS SPENCER,
Defendant(s).

Case Number: 01CR1088, 01CR1089

Courtroom: 5C

October 25, 2012

**ORDER RE: MOTION PURSUANT TO
CRIM.P.35(c)(2) TO SET ASIDE CONVICTIONS**

THIS MATTER comes before this Court upon consideration of Defendant Dennis Spencer's Motion Pursuant to Crim.P. 35(c)(2) to Set Aside Convictions, filed on March 9, 2012. Having reviewed the Motion, Response, court file, and applicable authority, Defendant's Motion is **DENIED**.

STATEMENT OF FACTS

Between August 30, 2000 and October 18, 2000, Defendant was charged with six offenses in two separate cases, 01CR1088 and 01CR1089. Defendant retained private attorney James Allen as defense counsel. Mr. Allen first appeared with Defendant on June 25, 2001. On February 22, 2002, the court granted a motion to admit other act evidence. Specifically, the court allowed evidence of each of Defendant's two charged cases to be introduced in the trial of the other. On March 22, 2002, Mr. Allen moved to withdraw from the case. The motion was denied. On May 31, 2002, the parties agreed to try the two cases together in 01CR1088. Defendant's jury trial began on June 2, 2002. Defendant was found guilty of all counts, three counts of sexual assault on a child and three counts of sexual assault-position of trust. Defendant filed a direct appeal in 02CA1992. Defendant's convictions were affirmed by the Court of Appeals on January 13, 2005.

Defendant now seeks postconviction relief pursuant to C.R.Crim.P. 35(c). As grounds, Defendant offers both general and specific arguments for relief. In general, Defendant asserts that trial counsel had a conflict of interest. In addition, Defendant offers the following specific allegations of ineffective assistance of counsel ("IOAC"): (a) counsel agreed to try both cases together; (b) counsel failed to explore possible motive-to-lie testimony; (c) counsel failed to object or request a mistrial due to elicited hearsay statements; (d) counsel failed to request a preliminary ruling on the admissibility of an "ought;" (e) counsel failed to request a mistrial when a juror gave the prosecution a note; (f) counsel failed to enforce a plea agreement

for which Defendant waived his preliminary hearing; and (g) counsel failed to call one witness and did not sufficiently question two others.

STANDARD OF REVIEW

When the motion, case file, and record clearly establish that a defendant is not entitled to relief, a court may deny a post-conviction motion without a hearing. *People v. Vieyra*, 169 P.3d 205, 209 (Colo. App. 2007). “A trial court may also deny a postconviction motion without a hearing if the claims are bare and conclusory and lack supporting factual allegations.” *Id.*

A court reviewing a C.R.C.P. 35(c) motion

should consider, among other things, whether the motion is timely pursuant to § 16-5-402, whether it fails to state adequate factual or legal grounds for relief, whether it states legal grounds for relief that are not meritorious, whether it states factual grounds that, even if true, do not entitle the party to relief, and whether it states factual grounds that, if true, entitle the party to relief, but the files and records of the case show to the satisfaction of the court that the factual allegations are untrue. If the motion and the files and record of the case show to the satisfaction of the court that the defendant is not entitled to relief, the court shall enter written findings of fact and conclusions of law in denying the motion.

C.R.C.P. 35(c)(3)(IV).

ANALYSIS*I. General Grounds for Relief*

Defendant generally asserts that a conflict of interest existed between trial counsel and Defendant. Defendant argues that this conflict of interest was articulated when trial counsel asked to withdraw from Defendant's case. When asking to withdraw, trial counsel offered the following arguments: (1) Defendant lacked sufficient funds to hire an investigator, which counsel felt was important; (2) counsel was uncertain that he could be a zealous advocate in a child sexual assault case after recently becoming a father; and (3) counsel believed that it would be in Defendant's best interest to be represented by the public defender's office. In denying the motion, the trial court made no findings regarding whether a conflict existed or how to proceed if a conflict existed.

This court finds that a hearing on Defendant's general allegation of conflict is unnecessary because the motion, files, and record clearly establish the defendant is not entitled to relief. *People v. Fernandez*, 53 P.3d 773, 775 (Colo. App. 2002). In order to succeed on a claim of conflict, Defendant must demonstrate that a conflict existed and that the conflict adversely affected counsel's performance. *Armstrong v. People*, 701 P.2d 17, 24 (Colo. 1985). Defendant fails to meet this burden. Defendant fails to demonstrate that a conflict of interest existed between counsel and Defendant.

As an initial matter, Defendant fails to cite any applicable statutory or legal authority reflecting that counsel's statements, made during the motion to withdraw, constituted a conflict of interest.

Defendant's only cited authority stands for the position that "representation by one attorney of two or more defendants in prosecutions arising from a single criminal episode invariably creates the possibility that a conflict of interest will arise." *Armstrong v. People*, 701 P.2d 17, 19 (Colo. 1985). This authority is factually inapplicable to the case at hand because there is no allegation of dual representation.

Additionally, Defendant's claim of conflict of interest has been logically addressed by the Court of Appeals. When a motion to withdraw is filed on an allegation of conflict of interest, the trial judge should grant the motion to withdraw if it appears that a substantial conflict of interest exists, or will in all probability arise. *Allen v. Dist. Court In & For Tenth Judicial Dist.*, 519 P.2d 351, 353 (Colo. 1974). On direct appeal, Defendant argued that the trial court abused its discretion in denying counsel's motion to withdraw. The Court of Appeals found that the trial court did not abuse its discretion despite (1) Defendant's lack of funds, (2) counsel's uncertainty that he could be a zealous advocate after becoming a father, and (3) counsel's belief that it would be in Defendant's best interest to be represented by the public defender. Given this ruling, this Court finds logical support for the position that counsel did not have a conflict of interest.

Lastly, Defendant argues that evidence of counsel's conflict of interest can be seen through counsel's failure to request a mistrial. Throughout Defendant's Motion, Defendant asserts that counsel intentionally did not request a mistrial in order to avoid trying the case again. Defendant's assertion, however, fails to recognize that counsel made an appropriate request

for a mistrial. Trial counsel requested a mistrial during the testimony of Kennishia Sneed. Although the request was denied, the request was appropriately made after Ms. Sneed referenced other alleged acts that were previously ruled to be inadmissible. The alleged evidence of counsel's conflict of interest is, therefore, contradicted by the court's file.

Given the absence of authority supporting Defendant's argument, the denial of counsel's motion to withdraw being upheld on appeal, and Defendant's assertions being refuted by the record, this Court finds that Defendant fails to demonstrate the existence of a conflict of interest. Therefore, Defendant's general claim of conflict fails.

II. Specific Grounds for Relief

In addition to Defendant's general claim of conflict, Defendant offers several specific arguments for IAOC. Specifically, Defendant argues the counsel's representation fell short of effectiveness in the following ways:

a. Agreement to Join the Cases for Trial

Defendant alleges that he received IAOC when trial counsel agreed to try Defendant's two cases together. Specifically, Defendant asserts that "the only possible reason to agree to one trial is that it served [trial counsel's] interest in ending his representation."

Defendant's argument, however, fails to demonstrate prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). As an initial matter, Defendant fails to describe how he was prejudiced by the decision to join the two trials. Defendant simply generally asserts that "there is no possible strategic value in trying both cases together." This assertion is

vague, conclusory, and insufficient to demonstrate prejudice. *See People v. Vieyra*, 169 P.3d 205, 209 (Colo. App. 2007). Additionally, prior to trial, the trial court granted the People's Motion for Other Acts Evidence. In granting the motion, the court specifically allowed evidence of each pending case to be used in the other trial. Therefore, even if the cases were tried separately, the juries would have heard the same evidence and received the same instructions of law. Because the evidence and instructions in two separated trials would be identical to the evidence and instructions actually presented in Defendant's joined trial, Defendant fails to demonstrate that but for trial counsel's decision to join Defendant's trials, the results of the proceeding would have been different. *Strickland* 466 U.S. at 694. As Defendant fails to demonstrate the prejudice element of this IAOC claim, this Court need not determine whether trial counsel's performance was constitutionally deficient. *See People v. Gresl*, 89 P.3d 499, 503 (Colo. App. 2003) ("If the defendant fails to prove either the deficient performance or the prejudice element of the claim, the trial court may reject [the motion] on that basis alone."). Accordingly, this claim fails.

b. Pursue Motive-to-lie Testimony Through [Ad.S.]

During trial, for the first time, Defendant's son [Ad.S.] denied that he saw his father "trying to goose" [B.B.]. Instead, [Ad.S.] indicated that [B.B.] was "trying to feel on [Ad.S.]" prior to the assault. The trial court ruled that this evidence was barred by the Rape Shield Statute. Trial counsel requested an opportunity to review the Rape Shield Statute and bring it up outside the presence of the jury. Trial

counsel did not to readdress the issue. Defendant argues that he received IAOC when counsel failed to readdress the issue. Defendant's assertion, however, fails to demonstrate prejudice under *Strickland* because Defendant fails to establish that the proffered testimony was admissible.

Procedurally, a defendant must file a written motion thirty days prior to trial in order to present evidence of a victim's prior sexual conduct, unless good cause is shown. C.R.S. § 18-3407(2)(a). Additionally, an *in camera* hearing "may be held during trial if evidence first becomes available at the time of trial," *Id.* at (2)(d). Firstly, Defendant does not contend that a timely motion was filed or that good cause existed to excuse the failure to file such a motion. Accordingly, the evidence was procedurally inadmissible. Secondly, Defendant fails to establish that the proffered evidence first became available at trial. Prior to trial, [Ad.S.] was interviewed twice by Defendant's attorney and once by the police. Given [Ad.S.]'s prior availability, an *in camera* hearing was not permissible. Consequently, the evidence was both procedurally inadmissible and insufficient to entitle Defendant to an *in camera* hearing. Therefore, Defendant fails to demonstrate the reasonable probability that the outcome of Defendant's trial would have differed if counsel had readdressed [Ad.S.]'s intended testimony. *Strickland* 466 U.S. at 694. Because Defendant fails to demonstrate prejudice, this Court need not address whether counsel's performance was deficient. *People v. Gresl*, 89 P.3d 499, 503 (Colo. App. 2003). Accordingly, this claim fails.

c. Failure to Object Or Request Mistrial Following Hearsay Testimony

Defendant asserts that he received IAOC when his attorney failed to request a mistrial following “numerous instances of hearsay during the testimony of [S.S.] and [L.K].” Additionally, Defendant argues that he received IAOC when counsel failed to object to these numerous instances of hearsay.

In regards to the request for a mistrial, Defendant fails to even allege that a motion for mistrial would have been granted. Absent this allegation, Defendant fails to demonstrate that the outcome of his trial would have differed if counsel had requested a mistrial. *Strickland* 466 U.S. at 694. Consequently, this claim fails.

In regards to the failure to object, Defendant fails to demonstrate that the testimony of [L.K.] included inadmissible hearsay. Defendant’s only example of alleged hearsay is the following question: “Do you remember telling Ms. Monroe that the defendant was not trying to hurt the girls, and now that people know about it, he would be less likely to mess with them again?” This Court finds that the question was admissible, not for the truth of the matter, but for impeachment purposes. During Defendant’s trial, the defense centered on delayed outcry and continued contact between the victims and Defendant’s family. The People were entitled to explore, through the use of [L.K.]’s statements, his involvement, if any, in the delayed outcry. Because Defendant fails to establish that the out of court statements were inadmissible, the failure to object to the out of court statements was not “outside the wide range of professionally competent assistance.” *Id.* at 690. Similarly, because

the evidence was admissible, Defendant fails to demonstrate that the results of Defendant's trial would have been different if counsel had objected. *Id.* at 694. Accordingly, this claim fails.

Similarly, Defendant fails to demonstrate that [S.S.]'s testimony included inadmissible hearsay. Defendant's sole example of hearsay is a question that asked [S.S.] if Detective Allen questioned her on her knowledge of sexually inappropriate conduct between Defendant and other girls. This question is admissible because it does not seek an out of court statement for the truth of the matter asserted. C.R.E. 801. Instead, the question calls for whether or not a conversation occurred. This question was relevant because the defense challenged the thoroughness of the police investigation. As the question was admissible, it was not "outside the wide range of professionally competent assistance" to fail to object to the question. *Id.* at 690. Equally, because the evidence was admissible, Defendant fails to demonstrate that the results of Defendant's trial would have differed if counsel had objected. *Id.* at 694. Therefore, this claim also fails.

Lastly, Defendant asserts that objectionable out of court statements go on for "pages and pages." Without further explanation, this court finds that this assertion is bare, conclusory and absent sufficient factual support to entitle Defendant to relief. *Vieyra*, 169 P.3d at 209. Accordingly, Defendant's claims of IAOC surrounding alleged hearsay statements fail in their entirety.

d. Failure to Request Preliminary Ruling on "Ought"

During trial, the People asked witnesses about an apology Defendant made in front of his entire church congregation. Defendant contends that his statement in front of the congregation was an “ought” or specific religious practice and not an apology in the common understanding of the term. Defendant argues that counsel was ineffective when he failed to request a preliminary ruling on the admissibility of his “ought.” Specifically, Defendant argues that the use of the “ought” was “incredibly prejudicial,” and trial counsel should have argued against its admissibility under C.R.E. 403.

Evidence should be excluded under C.R.E. 403 where it presents the “undue tendency to suggest a decision on an improper basis, commonly but not necessarily an emotional one, such as sympathy, hatred, contempt, retribution, or horror.” *People v. District Court*, 785 P.2d 141, 147 (Colo. 1990). Defendant, however, fails to describe any improper basis created through the use of Defendant’s “ought.” Without the improper basis, Defendant fails to demonstrate that the evidence would have been suppressed during a preliminary ruling. Therefore, Defendant fails to demonstrate the reasonable probability that the outcome of Defendant’s trial would have differed had counsel requested a preliminary ruling. *Strickland* 466 U.S. at 694. Accordingly, this claim fails.

e. Failure to Request Mistrial Following Juror Contact

During trial, a juror attempted to pass a note to the prosecution. The note related to the process of

choosing godparents in Defendant's church. Defendant's trial counsel asked the court to dismiss that juror and question the other jurors about any discussions they might have had about the note. Defendant asserts that he received IAOC when trial counsel did not request a mistrial upon learning of the note.

A "mistrial is 'the most drastic of remedies' that should only be granted 'where the prejudice to the accused is too substantial to be remedied by other means.'" *People v. Santana*, 255 P.3d 1126, 1132 (Colo. 2011); citing *Bloom v. People*, 185 P.3d 797, 807 (Colo. 2008). Upon learning of the note, counsel requested to dismiss the juror. This request was denied. Instead, the court made the juror in question the alternate, and the juror was ultimately excused prior to jury deliberations. When the trial court did not find sufficient prejudice to excuse the juror, the court would undoubtedly deny a motion for mistrial. Because the court would have denied a motion for mistrial, Defendant fails to demonstrate the results of his trial would have differed if counsel had requested a mistrial upon learning of the note. *Strickland* 466 U.S. at 694. Therefore, this claim fails.

f. Failing to enforce agreement

Defendant asserts that he waived the preliminary hearing under an agreement where Defendant would only be tried on one count for which he would face a determinate sentence. Defendant contends that trial counsel was ineffective by failing to enforce this agreement.

As an initial matter, Defendant provides no evidence corroborating the existence of the alleged offer. Defendant fails to identify when the offer was made,

who made the offer, and whether the offer was made to Defendant directly or through an attorney. Because Defendant fails to provide any facts supporting the existence of the offer, this Court finds that Defendant's assertion is bare, conclusory, devoid of factual support, and insufficient to sustain Defendant's claim of IAOC. *People v. Vieyra*, 169 P.3d 205, 209 (Colo. App. 2007).

Additionally, the People provide evidence refuting the existence of the alleged offer. The People provided this Court with Defendant's written waiver of preliminary hearing, filed March 20, 2001. In the written waiver, no offer is indicated on the form. The People further demonstrate that the sole plea disposition offered to Defendant was offered on May 21, 2001. The offer called for all other pending charges to be dismissed if Defendant pled guilty to one count of sexual assault on a minor. Defendant declined to accept this plea disposition and elected to go to trial. This Court further notes the absence of evidence in the court file reflecting Defendant's alleged offer. Therefore, this Court also finds that Defendant's claim states factual grounds that, if true, would entitle him to relief; however, the files and records of the case show to this Court's satisfaction that the Defendant's allegations are untrue. C.R.Crim.P. 35(c)(3)(IV). Accordingly, this claim fails.

g. Failing to Fully Investigate and Improper Questioning

Defendant asserts that counsel failed to fully investigate Defendant's case. Defendant contends that this inadequate investigation resulted in the failure to call [Al.S.] as a witness and the insufficient questioning of [B.B.] and [S.S.].

Defendant alleges that counsel failed to interview [Al.S.], Defendant's daughter. Even if this Court assumes that counsel did not interview [Al.S.], Defendant fails to demonstrate that the outcome of Defendant's trial would have differed if she had been interviewed and called to testify. If called to testify, [Al.S.] would have indicated that (1) she is a light sleeper, (2) she was in the room during the assault on [B.B.], and (3) she did not hear anything unusual that night. During the course of the trial, the jury heard uncontroverted evidence that other children, including at least one light-sleeping child, were in the room during the assault. The jury also heard that, with the exception of [Ad.S.], none of the children woke up during the assault. Even if [Al.S.] had testified, the jury was instructed that "the mere number of witnesses appearing for or against a certain proposition does not in and of itself prove or disprove that proposition." Given this instruction, that the proffered testimony would have come from Defendant's daughter, and that the content of her testimony was already presented, Defendant fails to demonstrate by preponderance of the evidence that the outcome of Defendant's trial would have differed had [Al.S.] been called to testify. *Strickland* 466 U.S. at 694. Accordingly, this claim fails.

Defendant also alleges that he received IAOC when the alleged deficient investigation caused counsel to inadequately question [B.B.] or [S.S.]. Specifically, Defendant argues that counsel insufficiently questioned the witnesses on a letter expressing the regret [B.B.] felt after she reported the assault. Firstly, this Court finds that the failure to question the witnesses on [B.B.]'s letter did not result from an

insufficient investigation. “A defendant is entitled to a pretrial investigation sufficient to reveal potential defenses and the facts relevant to guilt or penalty.” *Davis v. People*, 871 P.2d 769, 773 (Colo. 1994). During a motion hearing prior to trial, counsel questioned Ms. Spencer on the existence, content, and tone of the letter. As counsel was aware of the letter and its contents, he was sufficiently aware of the letter’s impact on the defenses and facts relevant to guilt or penalty. Accordingly, defendant’s allegation of insufficient investigation is refuted by the record.

Furthermore, Defendant fails to demonstrate that counsel’s questioning of [B.B.] and [S.S.] resulted in IAOC under *Strickland*. Because counsel was aware of the letter and its contents, the decision to not question the witnesses on the letter was clearly a strategic decision. “Mere disagreement as to trial strategy will not support a claim for ineffective assistance of counsel.” *People v. Bradley*, 25 p2d 1271, 1275 (Colo. App. 2001). Accordingly, Defendant’s claim of IAOC with regard to the questioning of [B.B.] and [S.S.] fails in its entirety.

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CONCLUSION

For the reasons discussed above, Defendants Motion is denied.

Dated this 25th day of October, 2012.

By the Court

Brian R. Whitney
District Court Judge

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APPENDIX F

DISTRICT COURT, COUNTY OF DENVER, STATE
OF COLORADO

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff,

v.

DENNIS SPENCER,
Defendant.

Case No. 01CR1088 and 01CR1089,
Courtroom 12

REPORTER'S TRANSCRIPT

The hearing in the above-captioned matter was held on March 22, 2002, before THE HONORABLE SHELLEY I. GILMAN, District Judge, presiding in Courtroom Twelve of the Denver District Court.

FOR THE PEOPLE:

CHRISTINE WASHBURN, No. 30134, Deputy
District Attorney.

FOR THE DEFENDANT:

JAMES ALLEN, No. 27197, Attorney at Law.

ALSO APPEARING:

MICHAEL VALLEJOS, No. 21028, Deputy
State Public Defender.

THE COURT: Number 16 on the docket, 01CR1088 and 1089, People v. Dennis Spencer.

MS. WASHBURN: Christine Washburn for the People.

MR. ALLEN: James Allen on behalf of Mr. Spencer who appears.

THE COURT: Is he in custody or on bond on these two cases?

MR. ALLEN: He's currently on bond, yes, Your Honor.

THE COURT: Okay. The record will reflect he's in custody on other matters.

MR. ALLEN: The matter comes on today for continued status of the case, and since our last court date on February 22nd, there have been several, I guess three updates, three things that have happened in this case that the Court needs to be aware of. The first is that Mr. Spencer has been charged with another sex assault on a child case.

THE COURT: Where that is case?

MR. ALLEN: It's set for preliminary hearing on April 2nd in 372W.

THE COURT: Are you representing him on that?

MR. ALLEN: I am not. He's represented by the public defender, Mr. Vallejos, who is present.

MR. VALLEJOS: I am on the new case for Mr. Spencer that is at preliminary hearing on April 2nd.

MR. ALLEN: And the second thing that happened as the result of that case being filed, the District Attorney has filed an additional similar transaction. I

have not received a copy of that, although I was informed yesterday via telephone that it was either on its way or here, and I haven't received a copy. I had an opportunity to review it briefly this morning, so that is an issue we need to take up as well, and the third issue, probably most pressing, I am going to ask the Court to allow me to withdraw from Mr. Spencer's cases. There is essentially three reasons for that. The first and most important, and I have discussed this with Mr. Spencer yesterday; I have advised the District Attorney that I would be moving for this and I have a written motion -- I didn't file it yet -- and I had a brief discussion with the public defender moments ago. There is three reasons for it, Your Honor. The first is when Mr. Spencer came into my office, we were clear we would need to hire an investigator on these two cases, made attempts -- he made attempts, wasn't able to come up with any funds to secure an investigator, and then he was arrested shortly after his November, or January 25th court date based upon several violations of restraining orders, harassment, trespassing, and is now being held on a total, with all of his new cases and new sexual assault case, of \$450,000 in bonds. He'll not be able to make that. He's not going to be able to come up with the funds to hire an investigator, and I don't think I can represent him without an investigator.

THE COURT: Let me tell you my concern about that. This case has been pending in the district court since April of last year. It's almost a year old. You have been on this case since July 30th of 2001, and this was never brought to my attention. I am very reluctant to continue a case of this age when we're set for trial.

MR. ALLEN: I understand.

THE COURT: Or to grant a motion to withdraw.

MR. ALLEN: So the Court is aware, Mr. Spencer -- it has not been brought to the Court's attention because Mr. Spencer and I have, over a period since July, we thought he was going to be able to have the funds. He's been working and working and working towards that, and it just hasn't happened.

The second reason is because of serious personal issues, I am not sure I could be effective, more zealous for Mr. Spencer in his cases.

THE COURT: You have to tell me more about those personal issues.

MR. ALLEN: No problem. I have talked about this with Mr. Spencer. One of the main issues is my wife had our first child in February of this year, February 1st, and I have had kind of a change of heart on the types of cases I am going to be able to represent people on. I have discussed that with him. It has nothing to do with how I feel about Mr. Spencer. I have had discussions with my firm. I am not going to take these kinds of cases anymore.

Second personal issue, I have represented I had a case in this district where I represented somebody on a very similar type of charge. Most importantly the investigator fees are the issues, were the issue at that; did my best job, was found guilty, and now there are a whole bunch of things that are happening as the result of that that have clouded my ability to represent these kinds of cases. Without an investigator, I am not sure that I can be effective.

And then the third reason for my motion to withdraw -- getting back to the original two -- is I

think it would be in Mr. Spencer's best interest to have the assistance of the public defender or the same attorney on all three of his cases, specifically as it relates to the investigator because there are so many similar witnesses that are involved in all three of these cases, from a lot of people at church, Mr. Spencer's wife, children, people that go to a school, Social Services -- they are very similar witnesses, so I think that it would be in his benefit.

I understand the Court's reluctance, but I thought the Court should know. I shared those with the District Attorney and Mr. Spencer, and it's after a lot of thought and consideration on my part.

THE COURT: Mr. Vallejos, if I was to appoint the public defender, would you be ready for trial on the first case June 3rd; the second case June 10th?

MR. VALLEJOS: I don't believe so, Judge.

THE COURT: Thank you. The People's position?

MS. WASHBURN: My main concern is -- and Mr. Allen did share it with me what his intentions were and the reasons for them. My main concern, I don't want to change the trial date.

THE COURT: I am going to deny the motion to withdraw. When counsel undertakes to represent a client and has been representing a client for about eight or nine months, it's Counsel's ethical obligation to complete the representation. The public defender cannot be ready on the date set, and I am not going to continue these trial dates. This case -- I let this case get out of control by letting it go as long as it did. This should have been tried before the end of last year. So, I am determined to get these trials heard on June 3rd and 10th.

MR. ALLEN: I guess we need to set a new motions date then because --

THE COURT: We'll set another motions date and mandatory disposition. We'll set it on a date when we think the other case will be up in district court. Is that in this division, too?

MR. VALLEJOS: I think it is, and I am assuming that would be normally two weeks after the preliminary hearing date. My next time after that would be April 15th.

THE COURT: Okay. So, how long will the motions take?

MS. WASHBURN: I just have that additional supplemental notice of intent, so I don't think it will take long.

THE COURT: Let's set it April 19th on Friday.

MS. WASHBURN: And does the Court want us to set the new case as well?

THE COURT: Yes, also on April 19th. I have talked to Judge Marcucci about using some Fridays for bindover dates, and you can tell him you have cleared that date then.

THE CLERK: 8:30 or 1:30?

THE COURT: Is 1:30 better?

THE CLERK: They are both going to be horrible.

THE COURT: April 19th, 1:30.

MS. WASHBURN: Okay.

MR. ALLEN: Thank you.

THE COURT: Thank you.

(Proceedings concluded.)