No. 12-1302

In The
Supreme Court of the United States

MICHAEL GARCIA,

Petitioner,

v.

LOUISIANA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF LOUISIANA

MOTION FOR LEAVE TO FILE BRIEF OF
AMICUS CURIAE AND BRIEF OF *AMICUS CURIAE*
THE ETHICS BUREAU AT YALE
IN SUPPORT OF PETITIONER

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Motion of the Ethics Bureau at Yale to File an Amicus Curiae Brief in Support of the Petitioner

Now comes the Ethics Bureau at Yale ("Ethics Bureau") by its supervising lawyer, Lawrence J. Fox, and moves this Court to permit the filing of the attached amicus curiae brief in support of the Petitioner, Michael Garcia. In support of this motion, the amicus asserts as follows:

1. Given the commitment by the Ethics Bureau to issues of professional responsibility, the Ethics Bureau is interested in the outcome of this case because it centers on a conflict of interest issue. The Ethics Bureau aims to ensure that the Court's consideration of this issue and interpretation of the standards of care that determine when lawyers' ethical violations render counsel ineffective take into account the professional responsibility perspective.

2. Filed herewith is a letter of consent from William Sothern, counsel for the Petitioner, granting Mr. Fox permission to file such a brief.

3. The Respondent neither consents to nor opposes the filing of this brief.

WHEREFORE, the above moves for permission to file the brief of amicus curiae.

Respectfully submitted,

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CAPITAL CASE

Questions Presented

Whether the Sixth Amendment requires automatic reversal of a conviction based upon the seriousness of the conflict of interest asserted—independent of whether counsel brings the conflict to the attention of the trial court, whether the trial court itself addresses the conflict, or whether the defendant shows adverse impact.

Whether this Court, in so approaching this issue, should recognize that three particular situations require automatic reversal: (a) when the conflict is not waivable, (b) when there are multiple conflicts, one of which precludes the raising of any others, and (c) when the trial court is on notice of the seriousness of the conflict.

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Interest of Amicus Curiae[1]

The Ethics Bureau at Yale, a clinic composed of thirteen law school students supervised by an experienced practicing lawyer and lecturer, drafts amicus briefs in cases concerning professional responsibility; assists defense counsel with ineffective assistance of counsel claims relating to professional responsibility; and offers ethics advice and counsel on a pro bono basis to not-for-profit legal service providers, courts, and law schools.

The Ethics Bureau respectfully submits this brief as amicus curiae for two reasons. First, it has an abiding interest in ensuring that the Sixth Amendment and the Model Rules of Professional Conduct preserve the right of every criminal defendant to conflict-free representation. Second, it believes that when courts ignore conflicts of interest affecting the representation of criminal defendants, they not only damage the integrity of the proceedings at issue, but also undermine public confidence in the legal system.

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[1] Pursuant to Rule 37.2 of the Rules of this Court, Petitioner has consented to the filing of this brief. The letter granting consent is filed herewith. In accordance with Rule 37.2(a), amicus has provided notice to counsel for Respondent of amicus's intent to file a brief. Respondent neither consented to nor opposed the filing of this brief. This brief was not written in whole or in part by counsel for any party, and no person or entity other than amicus and its counsel has made a monetary contribution to the preparation and submission of this brief.

I. Statement of Relevant Facts

Amicus adopts the facts as recounted in the Petitioner's brief.

II. Summary of Argument

Jerry D'Aquila, Chief Defender of the 18th Judicial District Indigent Defender Board (IDB), faced five grave conflicts of interest that made it impossible for him to represent Michael Garcia effectively. In particular, Mr. D'Aquila both represented and supervised the representation of Mr. Garcia's co-defendants, whose interests were materially adverse to Mr. Garcia's interests, demonstrating that a defense lawyer cannot always be trusted to alert the trial court to his own conflicts. Given the gravity of Mr. D'Aquila's conflicts and the trial court's failure, despite its actual knowledge, to inquire into them, only automatic reversal and a new trial will adequately protect Mr. Garcia's Sixth Amendment rights and the public's trust in the criminal justice system.

III. Argument

A. Defendants Have a Constitutional Right To Conflict-Free Counsel at Every Critical Stage of a Criminal Proceeding.

Conflicts of interest reach the heart of the duty of loyalty. "[T]he rule against representing adverse interests [of present clients] was designed to prevent a . . . practitioner from having to choose

between conflicting duties, or attempting to reconcile conflicting interests rather than enforcing a client's rights to the fullest extent." *Smiley v. Dir., Office of Workers Compensation Programs*, 984 F.2d 278, 282 (9th Cir. 1993). This rule could not be more important than when a client faces the most severe and irreversible of punishments: death.

To prevent devastating conflicts such as those Mr. D'Aquila and his colleagues labored under in this case, every state bar prohibits a lawyer from undertaking a representation that involves a conflict of interest. Louisiana is no exception. *See* La. Rules of Prof'l Conduct R. 1.7 (2011). These state rules were modeled on ABA templates, including the current Model Rules of Professional Conduct. While these provisions may vary in their particulars, they are unanimous in condemning the conduct here.

The lawyer's duty of loyalty is inextricably intertwined with the defendant's constitutional rights. The Sixth Amendment does not simply guarantee a defendant representation, but *effective* representation. Understanding the dangers posed by conflicts of interest, this Court has held that the Sixth Amendment right to counsel is the right to conflict-free counsel. *See Glasser v. United States*, 315 U.S. 60, 70 (1942). From a professional responsibility perspective, the damage to that constitutional right caused by a conflict of interest is unrelated to whether counsel brings the conflict to the attention of the court, or whether the court identifies the conflict on its own. Absent either, the damage to the client's right to effective counsel is the same.

B. Mr. D'Aquila Labored Under Multiple Actual Conflicts of Interest in His Representation of Mr. Garcia.

Mr. D'Aquila's conflicts of interest manifested themselves in five different ways. First, during crucial pre-trial proceedings, Mr. D'Aquila simultaneously acted as lawyer for all *three* co-defendants, owing each co-defendant an unfettered duty of loyalty. Second, even if one were to conclude, contrary to the applicable rules, that the co-defendants became *former* clients of Mr. D'Aquila, the conflicts continued because Mr. D'Aquila took positions directly adverse to his former clients. Third, Mr. D'Aquila's relationships with his colleagues created a non-waivable conflict of interest whose prejudicial effects were highly harmful to Mr. Garcia. Fourth, Mr. D'Aquila labored under a debilitating conflict of interest between his obligation to pursue Mr. Garcia's best interests and his duty, as Chief Defender, to conserve the resources of the IDB. Fifth, Mr. D'Aquila's conflicts must be imputed to the lawyers for Mr. Garcia's co-defendants, and the conflicts of the lawyers for Mr. Garcia's co-defendants must be imputed to Mr. D'Aquila.

1. Mr. D'Aquila Concurrently Owed Fiduciary Duties to All Three Co-Defendants, Whose Interests Were Materially Adverse.

Mr. D'Aquila violated ethical rules by representing all three co-defendants at the February 15 hearing, when the trial court appointed the IDB—specifically Mr. D'Aquila, Tom Nelson, and Tommy Thompson—to represent the three, without making individual assignments. Hr'g Tr. 6-7, Feb. 21, 2006. This representation was confirmed at the February 17 hearing when the judge again stated that he had "appointed the Indigent Defender's office to represent these three individuals." Hr'g Tr. 2, Feb. 17, 2006.

The lawyer-client relationship between Mr. D'Aquila and Mr. Garcia's co-defendants became even clearer at the February 21 hearing, when Mr. D'Aquila advocated for those co-defendants, raising the problem that the co-defendants had been arrested on capital charges but were not represented by capitally certified counsel, as required by Louisiana Supreme Court rules. *See* Hr'g Tr. 9, Feb. 21, 2006; Rules of the Supreme Court of La. R. XXXI(A)(1). In suggesting that the state could not pursue capital charges against Mr. Garcia's co-defendants, Mr. D'Aquila was advocating on the co-defendants' behalf and contrary to the interests of Mr. Garcia.

Even after that hearing, Mr. D'Aquila remained counsel to Mr. Garcia's co-defendants through his supervision of their lawyers. Among

other duties, Mr. D'Aquila had the authority and the responsibility to "[m]anage and supervise public defender services," "ensure that public defender assignments . . . compl[ied] with the standards and guidelines adopted pursuant to rule by the board and the Rules of Professional Conduct," "[s]upervise the work of the district personnel," "[i]mplement the standards and guidelines and procedures established . . . for the district," and "[e]mploy or terminate district personnel, manage and supervise all district level work, including establishment of district personnel salaries." La. Rev. Stat. Ann. § 15:161.

Mr. D'Aquila's representation of all three co-defendants violated Rule 1.7 of the Louisiana Rules of Professional Conduct. That rule bars a lawyer from undertaking a representation if "the representation of one client will be directly adverse to another client," or if "there is a significant risk that the representation . . . will be materially limited by the lawyer's responsibilities to another client . . . ." *See also* Model Rules of Prof'l Conduct R. 1.7 (1983) (using identical language).

The assertion of the Louisiana Supreme Court majority—that the interests of the co-defendants were not adverse in part because their defenses were not inconsistent—is absurd. *See State v. Garcia*, 108 So. 3d 1, 33 (La. 2012). While co-defendants' interests are not materially adverse in every case of joint representation, "an actual conflict of interest arises if the codefendants' interests 'diverge with respect to a material factual or legal issue or to a course of action.'" *Edens v. Hannigan*, 87 F.3d 1109,

1114 (10th Cir. 1996) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 356 n.3 (1980)).

This case presented virtually every textbook example of adverseness: resource allocation issues among the co-defendants; the offering of inconsistent statements and differing amounts of help to the authorities upon their arrest; two out of the three co-defendants pleading guilty; one co-defendant cooperating with the government and testifying as "the State's key witness" against another co-defendant. *State v. Garcia*, 108 So. 3d 1, 34 (La. 2012).

After failing to identify these clear conflicts, the Louisiana Supreme Court mistakenly dismissed Mr. D'Aquila's supervisory role as merely "administrative." *Id.* at 46. This flawed approach ignored Mr. D'Aquila's statutory obligations to Mr. Garcia's co-defendants, obligations he could only fulfill if he evaluated how the other lawyers were conducting the defenses; whether they were acting with the standard of care expected of lawyers whose clients faced such serious charges; and whether they were acting with diligence and zeal.

Moreover, because Mr. D'Aquila was charged with assuring that Mr. Garcia's co-defendants received effective assistance of counsel, *see* La. Rev. Stat. Ann. § 15:161, if he discovered any lapses in their representation, he had to intervene, make suggestions, and even wrest control of these matters from his colleagues, learning confidential information about their representation in the process.

Mr. D'Aquila's supervisory obligations were established not only by statute, but also by Rule 5.1. Under that rule, Mr. D'Aquila had an ethical obligation to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct," La. Rules of Prof'l Conduct R. 5.1 (2011), requiring Mr. D'Aquila to confirm that the lawyers in his office were "acting diligently in regard to all legal matters entrusted to them, communicating appropriately with the clients on whose cases they are working, and providing competent representation to their clients." ABA Formal Op. 06-441 (2006).

Thus the conflict of interest becomes clear. Mr. D'Aquila had an ethical obligation to defend Mr. Garcia. He simultaenously had an ethical obligation to make sure that the lawyers for the co-defendants were representing them effectively. And effective representation required these lawyers to explore opportunities to blame Mr. Garcia and to demonstrate that their clients were less blameworthy.

Finally, Mr. D'Aquila could not avoid this conflict by neglecting his ethical and statutory duties to Mr. Garcia's co-defendants and their lawyers. Such abdication did not make the conflict go away; rather, it simply added violations of other ethical rules by abandoning his other clients like "hot potato[es]" to "solve" the problem. *See*, *e.g.*, *Eastman Kodak Co. v. Sony Corp.*, No. 04-cv-6095, 2004 WL 2984297 (W.D.N.Y. Dec. 27, 2004) ("[A]n attorney cannot avoid disqualification . . . merely by 'firing'

the disfavored client, dropping the client like a hot potato, and transforming a continuing relationship to a former relationship by way of client abandonment." (internal citations omitted)). Nor could Mr. D'Aquila avoid the conflict by simply shirking his supervisory responsibilities. As Professor Dane Ciolino, an expert on legal ethics, testified, "the standard of care doesn't allow [a supervisor] to . . . run away from the obligations as a supervisor[]." S.R. 686.

2. Even If It Were Asserted that Mr. D'Aquila's Relationship with the Co-Defendants Terminated Prior to Trial, He Nevertheless Violated Rule 1.9.

Even assuming, *arguendo*, that Mr. D'Aquila's direct lawyer-client relationship with the co-defendants ceased prior to trial, Mr. D'Aquila was still barred from representing Mr. Garcia without the informed consent of all three. *See* La. Rules of Prof'l Conduct R. 1.9(a) (2011) ("A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.").

As described above, Mr. D'Aquila represented all three co-defendants through preparation for the hearing scheduled for February 17. *See supra* Subsection III.B.1. Even representations during "preliminary" criminal proceedings trigger Rule 1.9.

See, *e.g.*, *United States v. Pelle*, No. 05-CV-407-JBS, 2007 WL 674723, at *4 (D.N.J. Feb. 28, 2007); *United States v. Hreljac*, No. 6:06-CV-00096, 2007 WL 38372, at *1 (E.D. Ky. Jan. 5, 2007).

3. Mr. D'Aquila's Relationship with His Colleagues Created a Conflict.

If one were to conclude that Mr. D'Aquila did not have a full lawyer-client relationship with Mr. Garcia's co-defendants, the relationship between Mr. D'Aquila and his colleagues nonetheless made it impossible for him to represent Mr. Garcia effectively. The latter relationship created a conflict of interest that inevitably eroded his client's trust and interfered with his independent judgment.

Mr. D'Aquila's working relationship with the co-defendants' lawyers had to affect his conduct. Concluding otherwise would ignore the reality of a close-knit legal organization. As one court noted, "To hold that the right to counsel is respected when each attorney formally represents only one defendant, without regard to counsel's professional relationships, would run counter to the ethical obligations imposed on lawyers working in concert." *State v. Bellucci*, 410 A.2d 666, 672 (N.J. 1980). As another court observed, "[b]y their nature, the non-economic conflicts—friendship, loyalty, pride, fear of ostracism or retaliation—operate with equal vigor on the individual lawyer in the public firm." *State v. Veale*, 919 A.2d 794, 797 (N.H. 2007) (citation omitted), *abrogated on other grounds*, *State v. Thompson*, 20 A.3d 242 (N.H. 2011). As Chief

Defender of the IDB, Mr. D'Aquila depended on the District's lawyers whom he supervised and with whom he needed to maintain good working relationships, particularly given that the IDB consisted of only eight lawyers. As a result, how could Mr. D'Aquila attack these colleagues, their witnesses, and their clients in court?

Finally, it was inevitable that confidential information regarding Mr. Garcia's representation would be revealed to the lawyers for his co-defendants, given that they shared secretaries, resources, and files. Indeed, there cannot "be meaningful confidentiality where opposing attorneys having the same employer[] share their principal responsibilities, and use the same office, facilities, secretary and investigators." Ill. Adv. Op. 91-17 (1992). Even an ethics board that concluded (incorrectly) that co-defendants could waive the conflict created when part-time public defenders shared an office, but maintained separate individual law practices, decided that waiver would be inappropriate where a secretary was shared. Ill. Adv. Op. 85-14 (1986) ("The common secretary should not be used by either attorney in connection with the representation of the defendants who have adverse interests because of the possibility of a disclosure of confidential information and the appearance of impropriety.").

That Mr. D'Aquila worked with and supervised the co-defendants' lawyers also threatened to undermine Mr. Garcia's trust in him, trust that is central to the success of the lawyer-client relationship and to effective advocacy. As the

Restatement (Third) Governing Lawyers notes, "The prohibition against lawyer conflicts of interest . . . seeks to assure clients that their lawyers will represent them with undivided loyalty. A client is entitled to be represented by a lawyer whom the client can trust." Restatement (Third) of the Law Governing Lawyers § 121 (2000); *see also* Model Rules of Prof'l Conduct R. 1.6 cmt. [2] (1983) (noting that "trust . . . . is the hallmark of the client-laywer relationship").

Faith in one's lawyer develops even more slowly when the lawyer is court-appointed than when he is retained. Defendants often view state-paid public defenders as "part of the system" that they distrust, especially in a capital representation, where building trust is a challenge from the outset. *See* Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. Ill. L. Rev. 323, 338. How could a client in Mr. Garcia's position trust his lawyer when that lawyer supervised the lawyers of his co-defendants, including the State's key witness against him?

4. Mr. D'Aquila's Concerns for the Fiscal Health of the Agency Created a Conflict.

Mr. D'Aquila also faced conflicting interests in simultaneously representing Mr. Garcia and administering the District's finances. *See* La. Rev. Stat. Ann. § 15:161; La. Rule of Prof'l Conduct R. 1.7(b) (2011) (establishing that a conflict of interest exists where "there is a significant risk that the representation . . . will be materially limited by the

lawyer's responsibilities to . . . a third person or by a personal interest of the lawyer"). Concerned about the district's financial stability, Mr. D'Aquila refused the trial court's suggestion that he contract with outside counsel to represent Mr. Garcia's co-defendants. Mr. D'Aquila quipped in response to the $40,000 offer, "We don't have those funds in our district." Hr'g Tr. 6, Feb. 21, 2006.

Yet, in refusing to contract with outside counsel, Mr. D'Aquila betrayed Mr. Garcia. With only three capitally certified lawyers in his office, Mr. D'Aquila was forced to assign non-capitally certified counsel to represent Mr. Garcia's co-defendants, including James Nelson, the only other person who could have delivered the fatal stab wound. This precluded the prosecutor from simultaneously seeking the death penalty against both Mr. Garcia and Mr. Nelson. Given that Mr. Garcia—thanks to Mr. D'Aquila—was the only co-defendant eligible for the death penalty, the prosecutor was highly unlikely to accept a plea from him.

5. The Conflict of Mr. D'Aquila's Colleagues Was Imputed to Mr. D'Aquila.

Although the Court need not reach the issue of imputation given Mr. D'Aquila's direct conflicts, Mr. D'Aquila was barred from representing Mr. Garcia under Louisiana Rule of Professional Conduct 1.10. *See* La. Rules of Prof'l Conduct R. 1.10 (2011) ("While lawyers are associated in a firm, none of them shall knowingly represent a client when any

one of them practicing alone would be prohibited from doing so."). Because a conflict would have prevented Mr. D'Aquila from representing all three co-defendants, Rule 1.10 barred him from representing Mr. Garcia while other IDB lawyers represented Mr. Garcia's co-defendants.

The Louisiana Supreme Court, endorsing the views of numerous other courts and ethics committees, has concluded that a public defender's office constitutes a "firm" for the purposes of the professional-responsibility rules. *See State v. Garcia*, 108 So. 3d at 38 (La. 2012); *see*, *e.g.*, *Reynolds v. Chapman*, 253 F.3d 1337, 1343-44 (11th Cir. 2001) (noting that "our cases have not drawn a distinction between" public defenders' offices and law firms); *State v. Bellucci*, 410 A.2d 666, 671 n.3 (N.J. 1980) ("[T]he Sixth Amendment and a lawyer's professional responsibility are violated when two public defenders from the same office represent conflicting interests."); *Kirkland v. State*, 617 So. 2d 781, 782 (Fla. Dist. Ct. App. 1993); *Okeanai v. Superior Court*, 871 P.2d 727, 729 (Ariz. Ct. App. 1993); *In re Formal Advisory Opinion 10-1*, No. S10U167, 2013 WL 1499445, at *1 (Ga. Apr. 15, 2013); *Netters v. State*, 957 S.W.2d 844, 847 (Tenn. Crim. App. 1997); *Commonwealth v. Green*, 550 A.2d 1011, 1013 (Pa. Super. Ct. 1988).

Similarly, the ABA has concluded that a public defender's office is not exempt from Model Rule 1.10, whose language is identical to Louisiana Rule 1.10. *See* ABA Formal Op. 06-441, at 5 n.17 (2006) ("[A] public defender's office . . . is considered to be the equivalent of a law firm."). *The Restatement*

(Third) of the Law Governing Lawyers also concludes that "[t]he rules of imputed conflicts . . . apply to a public-defender organization as they do to a law firm in private practice." These statements "make[] clear that the ethical obligations of public defenders and other publically funded attorneys who represent indigent persons charged with crimes are no different from those of privately retained defense counsel." *In re Edward S.*, 92 Cal. Rptr. 3d 725, 746 (Cal. Ct. App. 2009).

More important, there is no compelling reason to distinguish law firms from public defender's offices. The purpose of Rule 1.10—to protect confidentiality, loyalty, collaboration, and client trust and to avoid the appearance of impropriety—applies with equal force whether the defendant is rich or poor. As the Supreme Court of Georgia recently explained, although "the professional responsibility of lawyers to avoid even imputed conflicts of interest . . . imposes real costs on Georgia's indigent defense system," "the problem of adequately funding indigent defense cannot be solved by compromising the promise of *Gideon*." *In re Formal Advisory Opinion 10-1*, No. S10U167, 2013 WL 1499445, at *2 (Ga. Apr. 15, 2013) (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

A public defender's office cannot avoid conflicts simply by labeling its lawyers independent contractors. In this case, a single supervisor had the right and the duty to closely monitor other lawyers in the office. *See supra* Subsection III.B.1. The lawyers substituted for one another in court if a scheduling conflict arose. S.R. 731, 786. IDB lawyers

also shared secretaries, an investigator, letterhead, and a Westlaw account. *See* S.R. 232, 236-37, 494 (secretaries), 459-60, 462 (investigator), 498 (letterhead), 780 (Westlaw). On these facts, to allow a public defender's office to circumvent the ethics rules through meaningless labels penalizes poor clients and undermines the Sixth Amendment right to unconflicted counsel.

C. Although Adverse Effect Could Not Be Clearer, Proof of Adverse Effect Is Not and Should Not Be Required.

The adverse effect in this case could not be clearer. Had the conflicts of interest been cured through the appointment of outside counsel, Mr. Garcia would not have been the only defendant eligible for the death penalty; the State likely would not have put its full resources towards Mr. Garcia's prosecution; Mr. Garcia would likely have had a better chance of getting a favorable plea deal through cooperation; and Mr. Garcia would have had reason to trust and confide in his lawyers. Yet adverse effect *is not* and *should not* be required for reversal because (1) Mr. D'Aquila labored under *actual* conflicts of interest; (2) these conflicts were unwaivable; (3) one conflict prevented Mr. D'Aquila from raising another conflict; and (4) the trial court actually was aware of the conflicts, yet failed to conduct any inquiry or remedy the ethical infection. Each of these factors alone would warrant automatic reversal. *A fortiori*, the presence of all four factors requires automatic reversal.

1. Calling These Conflicts "Potential" Ignores Professional Responsibility Jurisprudence That Requires Avoidance Of All Conflicts and Rectification When Conflicts Are Ignored.

The Louisiana Rules of Professional Conduct, like the rules of every other jurisdiction in the United States, make clear that the presence of a conflict does not hinge on the lawyer's conduct during the representation. A conflict exists if "the representation of one client *will be* directly adverse to another client," or if "there is a *significant risk* that the representation . . . will be materially limited by the lawyer's responsibilities" to another client or a third party or by the lawyer's personal interests. La. Rules of Prof'l Conduct R. 1.7 (2011) (emphasis added). Therefore, "[t]o establish an ethical violation under Rule 1.7(a), one does not have to prove prejudicial impact, negative result, or an exchange of confidential information." *In re Cendant Corp. Sec. Litig.*, 124 F. Supp. 2d 235, 243 (D.N.J. 2000) (quoting Michigan Cmte. on Ethics, Opinion RI-218 (1994)). This means that "[t]he 'directly adverse' language does not imply that a bad result must occur before representation is impermissible." *Id.* (quoting Michigan Cmte. on Ethics, Opinion RI-218).

Such a prophylactic rule is logical given that, as this Court has recognized, it is difficult—if not impossible—to prove that a conflict of interest negatively affected a client. *See Holloway v. Arkansas*, 435 U.S. 475, 490-91 (1978) ("[I]t would be difficult to judge intelligently the impact of a conflict

on the attorney's representation of a client. And to assess the impact of a conflict of interests [sic] on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible."); *Glasser v. United States*, 315 U.S. 60, 75 (1942) ("To determine the precise degree of prejudice [resulting from a conflict of interest] is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.").

Conflicts of interest infect the lawyer-client relationship in subtle ways, leaving the entire representation suspect. Unlike other ethical lapses—such as a lawyer's failure to file documents in a timely manner due to client abandonment—a conflict's effects are not discrete. Rather, the conflict casts a shadow over every decision in the representation.

Not only is a conflict of interest especially pernicious in undermining the lawyer's fundamental duty of loyalty, but the conflict works its evils invisibly, blunting the lawyer's advocacy, undermining the lawyer's independent judgment, and inhibiting a lawyer's creativity and enthusiasm. Because each case is unique, the defense of a capital case is an art, not a science. There is no way to recreate, absent the conflict of interest, what might have, could have, or should have happened if the accused were represented by an unconflicted lawyer.

2. These Conflicts Were Not and Could Not Be Waived.

Louisiana's ethical rules provide for a waiver of some, but not all, conflicts of interest. *See* Louisiana Rules of Prof'l Conduct R. 1.7(b). Mr. D'Aquila does not claim that Mr. Garcia consented to the conflict. There is no evidence that Mr. D'Aquila even consulted Mr. Garcia, let alone Mr. Garcia's co-defendants, about the conflicts of interest arising from his representation of all three, his supervisory authority, and his fiscal responsibilities. But even assuming, *arguendo*, that Mr. D'Aquila had considered a waiver, he would have been compelled to conclude that these conflicts were unwaivable.

A waiver is available only if a reasonable lawyer would conclude that the lawyer seeking the waiver of the conflict could provide competent and diligent representation to each client and, only then, if all affected clients provide their informed, written consent after consultation. *See* La. Rules of Prof'l Conduct R. 1.7(b) (2011). It is unreasonable for a supervisor of a public defender's office to seek a waiver for conflicts that arise when he represents all three defendants but claims to only represent one, especially when he is obliged to supervise the lawyers representing co-defendants with conflicting defenses and to make resource decisions that determine which of the co-defendants is subject to the death penalty.

In fact, in all but the rarest cases, it is unreasonable for a lawyer to believe that he simultaneously could maintain relationships with

criminal co-defendants who have obviously adverse interests. *See*, *e.g.*, *United States v. Rivera*, No. 08 CR.1327 (HB), 2009 WL 1059641, at *2 (S.D.N.Y. Apr. 13, 2009) (finding that waiver was not available in a criminal case, where a lawyer had previously represented two co-defendants and also shared an office with the lawyer for a third co-defendant); *United States v. Cooper*, 672 F. Supp. 155, 158 (D. Del. 1987) (finding that waiver in cases of joint representation of co-defendants is appropriate only in "extraordinary circumstances"). As the comments to the Model Rules warn, "The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant." Model Rules of Prof'l Conduct R. 1.7 cmt. [23] (1983).

That this was a capital case makes the suggestion of waiver even more inappropriate. In *Fleming v. State*, the Supreme Court of Georgia adopted a *per se* rule that the same lawyer may not represent co-defendants in a death penalty case. 270 S.E.2d 185, 186 (1980), noting that a "mandatory rule" was necessary in death penalty cases because "even a slight conflict, irrelevant to guilt or innocence, may be important in the sentencing phase." *Id.* at 188. In concurrence, Justice Bowels added, "No two defendants share equal responsibility for a crime. . . . [and c]ommon counsel eliminates any practical possibility of plea bargaining." *Id.* at 189 (Bowels, J., concurring).

3. Mr. D'Aquila Labored Under a "Double Conflict," as One Conflict Prevented Him From Bringing the Other to the Trial Court's Attention.

Whether a lawyer brings a conflict to the attention of the court has no bearing on the seriousness of the conflict at issue. And a more conflicted lawyer is *less* likely to bring those conflicts to the court's attention. Mr. Garcia's case demonstrates the inadequacy of relying on a conflicted lawyer to raise his own conflict.

Mr. D'Aquila had an unqualified ethical obligation to inform the trial court of the conflicts he faced. *See*, *e.g.*, *Mickens v. Taylor*, 535 U.S. 162, 167 (2002) (noting that defense counsel has an "ethical obligation to advise the court of any problem"). That Mr. D'Aquila attempted to minimize the import of these conflicts even in the face of the court's clear knowledge is unsurprising given that he was laboring under what was effectively a "double conflict:" Mr. D'Aquila's financial conflict—his obligation to conserve the district's finances, at the expense of his client's interests—sealed his lips with respect to the conflict arising from the IDB's representation of three co-defendants. Solving the second conflict would have required Mr. D'Aquila to spend money, which his position as steward of the district's finances prevented him from doing.

Similarly, a conflict prevented the lawyers for Mr. Garcia's co-defendants from raising ethical concerns about the IDB's representation of all three

men and from pressing for independent representation for their clients. These lawyers, who depended on Mr. D'Aquila for their continued employment, could not have been expected to raise the conflict arising out of the IDB's multiple representation when Mr. D'Aquila had already expressed his unwillingness to take the steps necessary to cure that conflict.

Indeed, at the February 21 hearing, the lawyers for Mr. Garcia's co-defendants said nothing about the fact that they were unqualified to represent their clients, who had been arrested on capital charges; only the State, Mr. D'Aquila, and the trial court discussed these defendants' interests. Of course, given their interest in pleasing Mr. D'Aquila, it is unsurprising that none of these lawyers objected to the IDB's joint representation of all three co-defendants or challenged Mr. D'Aquila's refusal to hire outside counsel.

4. The Trial Court Was Aware of the Conflicts yet Failed To Satisfy Its Constitutional and Ethical Obligations.

Even if Mr. D'Aquila failed to raise his own conflicts, the trial court had its own ethical and constitutional duty to address these conflicts, a duty that arose from the court's interests in doing justice and in ensuring adherence to the ethical rules. Given that state courts promulgate the ethical rules, it is they who must take primary responsibility for enforcing them through supervision. *See*, *e.g.*, *Dunton v. County of Suffolk*, 729 F.2d 903, 909 (2d

Cir. 1984), *amended*, 748 F.2d 69 (2d Cir. 1984) (where a serious conflict might warrant disqualification, the court must ensure that the client is informed about the conflict because the court has a duty to supervise members of its bar and assure litigants a fair trial); *Gas–A–Tron of Ariz. v. Union Oil Co. of Cal.*, 534 F.2d 1322, 1324 (9th Cir. 1976) (emphasizing the duty of the district court to supervise bar members and assure public confidence in the judicial system).

The trial court had actual notice of Mr. D'Aquila's conflicts. At the February 15 hearing, the State suggested to the trial court that a conflict would arise if lawyers from the same public defender's office were appointed to represent all three co-defendants. *See* Hr'g Tr. 5, Feb. 15, 2006 ("[I]f there is a conflict—we do plan to seek the death penalty on this case on both of these guys, so if there's any other Public Defender's Office that can represent the other one, we plan to have a full blown hearing Friday."). At the February 17 hearing, "the District Court [itself] observed a problem with the same office representing three capital defendants." *State v. Garcia*, 108 So. 3d 1, 12 (La. 2012). At the February 21 hearing, the trial judge evidently remained concerned about the conflict, stating that he received a phone call from a capitally certified defense team prepared to take the case. *See* Hr'g Tr. 5, Feb. 21, 2006. At this point, Mr. D'Aquila put the court on notice of his financial conflict, protesting that the IDB could not afford an outside lawyer. *See id*. at 6.

Despite notice of Mr. D'Aquila's multiple conflicts, the trial court abdicated its responsibility to inquire into them. At the February 15 hearing, the trial court, ignoring the State's warning of conflict, appointed the IDB to represent all three co-defendants. When Mr. D'Aquila revealed his financial conflict, the court chastised him that "money cannot be the overriding factor in determining what to do." Hr'g Tr. 6, Feb. 21, 2006. But the court never again raised the issue, letting Mr. D'Aquila's financially motivated decision—one that helped the district, but hurt his client—stand.

Here, the Louisiana Supreme Court recognized that "the District Court knew of the potential conflict arising from the representation of all three capital defendants by the same Indigent Defender Board." *State v. Garcia*, 108 So. 3d 1, 45 (La. 2012). The Court nonetheless concluded that the trial court must be excused if the conflicted lawyer does not "protest[]" his ability to represent the multiple co-defendants. *Id.* But as discussed above, conflicts of interest are so pernicious precisely because they "may betray [a lawyer's] judgment, or endanger his fidelity." *Williams v. Reed*, 29 F. Cas. 1386, 1390 (C.C.D. Me. 1824). This Court has noted that while defense counsel "is in the best position to determine when a conflict exists," *Mickens*, 535 U.S. at 167, a lawyer cannot be trusted to raise his or her own conflict. In *Wood v. Georgia*, 450 U.S. 261 (1980), this Court acknowledged that "the lawyer on whom the conflict-of-interest charge focused" was "unlikely [to] . . . concede that he had continued improperly to act as counsel." *Id.* at 265 n.5; *see also Wheat v. United States*, 813 F.2d 1399, 1403 (9th Cir.

1987) ("'Because the conflicts are often subtle it is not enough to rely upon counsel, who may not be totally disinterested, to make sure that each of his joint clients has made an effective waiver.'" (quoting *United States v. Lawriw*, 568 F.2d 98, 104 (8th Cir. 1977))), *aff'd*, 486 U.S. 153 (1988).

While the prospect of financial gain may inhibit almost any lawyer from raising a conflict, it is not often the case that the trial court has actual notice of a lawyer's multiple conflicts. Mr. D'Aquila made clear, through his statements to the court, that his role as supervisor precluded him from serving his client's best interests. Clearly alerted to this "double conflict," the trial court had a duty to inquire into and rectify it—and to ensure that the Mr. Garcia's Sixth Amendment right to unconflicted counsel was protected.

IV. Conclusion

This case reflects the ease with which conflicts of interest can infect a criminal case. Unfortunately, it also reflects the ease with which those conflicts can be ignored by the same people who are tasked with protecting defendants' rights.

Here, Mr. D'Aquila faced not one, but *five* grave conflicts that made it impossible for him to provide Mr. Garcia with effective assistance of counsel. Although both Mr. D'Aquila and the trial court were aware that Mr. Garcia's Sixth Amendment rights were in jeopardy, neither took the action necessary to address the problem: Mr. D'Aquila did not alert the trial court about his

conflicts, and the trial court, once aware of these conflicts, did not inquire into them. Any attempt to measure just how much Mr. Garcia suffered from this inaction would be misguided, given the difficulty of showing the effect of a conflict on a representation.

The problem that this case highlights is not fully contemplated by the Court's precedents; they assume that the defense lawyer and the trial court will abide by their ethical and constitutional obligations to shield defendants from conflicts of interest. This assumption is demonstrably unwarranted in Mr. Garcia's case. This Court should take this case to ensure that defendants like Mr. Garcia—betrayed both by his lawyer and by the court—do not go unprotected.

Respectfully Submitted,

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