

Appendix 7

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SUMMARIES OF ALL PUBLISHED SUCCESSFUL CONFLICT OF INTEREST CLAIMS IN THE US SINCE 1982

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

(* denotes a Capital Case)

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4. State Cases

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

A. Simultaneous Representation of Jointly Tried Codefendants

1. U.S. Court of Appeals Cases

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

1996: Griffin v. McVicar, 84 F.3d 880 (7th Cir. 1996). Trial counsel in triple murder and assault case had an actual conflict of interest that adversely affected representation where counsel represented the defendant and co-defendant during the same trial. Defendant initially retained different counsel and attempted to negotiate a plea to testify against codefendant. That counsel was unsuccessful and defendant's family then retained counsel, who was already representing the codefendant. Defendant informed counsel that he was present at the

scene of the crime but that he did not shoot anyone. Counsel moved to sever the trials on grounds that the codefendant's extensive criminal record might prejudice defendant and that either defendant might have made admissions which could prove damaging to the other. The motion was denied. Prior to trial, when questioned by the trial court, counsel asserted that there was no conflict in the joint representation. During the state's evidence, eyewitnesses identified the codefendant as the shooter of at least two of the victim's. The evidence against the defendant was conflicting on whether he may have shot anyone. Even though defendant appeared to be the least culpable, counsel failed to present a defense asserting that defendant was just an innocent bystander and co-defendant was guilty party. Instead, counsel tried to discredit the eyewitness testimony. His efforts were organized around a theory that the shootings were linked to the drug-related killing of defendant's brother, which had occurred just a few weeks earlier. He also presented a joint alibi defense, through defendant's and another witness' testimony. He did not even mention the alibi in either his opening or closing statements though, perhaps because the alibi witness could not account for the relevant time period. Defendant in post-conviction admitted that he lied in alibi testimony because counsel told him that if he admitted being present at the scene he would be convicted as accomplice. There was an actual conflict in the joint representation. Counsel clearly possess information which would have suggested to an unconflicted counsel the availability of a defense focused on discrediting the identification of defendant and shifting the blame onto the codefendant. Although defendant gave perjured testimony at trial, the court held:

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

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

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

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

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

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

1984: *United States v. Auerbach*, 745 F.2d 1157 (8th Cir. 1984). Counsel had conflict that adversely affected representation in illegal sale of firearms case where counsel represented defendant and codefendant in joint trial. Defendant and his son were represented by the same counsel. Adverse affect found because the son had a prior felony conviction and no objection was posed to the prejudicial affect of this on defendant.

1983: *United States ex rel. Gray v. Director*, 721 F.2d 586 (7th Cir. 1983). Counsel had conflict that adversely affected representation in murder and rape case where counsel represented defendant and codefendant in joint trial before separate juries. Defendant had defense of coercion by co-defendant, and an independent, conflict-free, competent attorney for defendant would have carefully considered continued cooperation with state as way of avoiding any prosecution, or immunity agreement with state, or plea bargain with state, or strong defense of coercion, or, in event of conviction, strong plea for leniency based on minimum participation. Defendant's counsel, in contrast, could not adopt any of those options because each of them would put co-defendant in jeopardy.

1982: *Smith v. Anderson*, 689 F.2d 59 (6th Cir. 1982). Counsel had conflict that adversely affected representation and trial court failed to adequately inquire in robbery case where counsel represented defendant and codefendant and informed the court of conflicts. An attorney's timely statement that conflict adheres in joint representation is a grave representation requiring meticulous consideration. Thus, the trial judge's terse reply that he saw no conflict of interest in joint representation of defendants charged with armed robbery was not justified or sufficient response, even if defendant's counsel could have been more detailed in his expression of possible conflict. Here, joint representation of defendants by counsel had adverse effect on defendant's right to representation. Defendant sat, against his will, at same table with co-defendant, who admitted being in store when it was robbed and who was implicated by all but one res gestae witness. Defendant, in contrast, was implicated by only one, and defendant claimed he was not at scene of robbery. Counsel's ability to bolster defendant's defense suffered because of counsel's inability to highlight lesser number of witnesses adverse to defendant and the fewer incriminating acts to which those witnesses testified.

United States ex rel. Williams v. Franzen, 687 F.2d 944 (7th Cir. 1982). Counsel had actual conflict that adversely affected representation in burglary case where counsel represented defendant and codefendants in joint trial. Codefendant's testimony was not only inconsistent with defendant's defense, but tended to incriminate defendant. Due to the conflict, counsel could not impeach the codefendant. Where two or more defendants have inconsistent stories about crime charged, joint representation is impermissible, particularly where one defendant cannot be effectively prevented by counsel from taking stand or where counsel is precluded from cross-examining or impeaching witness because of conflicting loyalties.

2. U.S. District Court Cases

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

3. State Cases

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

2000: *Lewis v. State*, 757 A.2d 709 (Del. 2000). Trial court in burglary, unlawful imprisonment, and conspiracy case erred in failing to inquire into the propriety of joint representation prior to trial. Counsel represented both the defendant and his codefendant in the same proceedings. Both alleged mistaken identity and alibi as defense. In sentencing, the codefendant admitted his guilt and stated that the defendant was not with him. While a state rule required the judge to inquire into potential conflicts of joint representation, the trial judge simply noted that the codefendants had separate alibi defenses and were represented by the same attorney in the context of deciding how many total preemptory challenges to allow for the defense during the jury selection process. The trial court never conducted an inquiry. The Delaware Supreme Court held that automatic reversal was not required absent a showing of

an actual conflict and an adverse affect on counsel's representation. In this case, the evidence against the codefendant was strong and the evidence against the defendant was weak. The conflict this worked against the defendant in possible pleas negotiations and trial itself. Any attempt to exploit the weakness of the evidence against the defendant would necessarily enhance the apparent strength of such evidence against the co-defendant. To the extent that the strength of the state's case against the codefendant undermined the credibility of his alibi defense, it had the potential for "spilling over" and undermining the jury's assessment of defendant's alibi defense. Finally, the ability to argue for a lesser sentence for defendant was compromised, where the codefendant had a gun during the crime and the second assailant was unarmed.

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

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

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

1993: *People v. Reyes*, 622 N.E.2d 86 (Ill. App. Ct. 1993). Counsel in unlawful use of weapon case had actual conflict that adversely affected representation where counsel represented both the defendant and codefendant. Defendant was stopped for being on school grounds, from which he was barred because he was suspended, and because it was reported that he had a gun in the car. He had just picked up some of his friends as school let out. When the car was stopped, the defendant and the four other occupants were patted down. The car was then searched and a pistol was found in a gym bag. All were arrested. Defendant admitted that the gun was solely his. Another codefendant also admitted that the gun was solely his. Both were charged. Prior to trial, the court *sua sponte* raised concerns about a

potential conflict. Counsel declared that there were none. Counsel admitted, however, that he did not argue the motion to suppress and lack of probable cause for the defendant as forcefully as he might have otherwise because of the joint representation. Counsel had an actual conflict that adversely affected representation. In order to adequately defend the defendant, counsel had to argue that the codefendant's statement was true and that the gun belonged to him. He could not do this because he represented the codefendant also.

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

When still debating within himself as to whether to make such a bargain, [defendant] was entitled to the best advice and wise experience of single-minded counsel. Notwithstanding [defendant]'s tentative decision to stand by his codefendant, a lawyer concerned only with [defendant]'s temporal welfare would have read him the riot act, expatiated at length upon the folly of misguided loyalty, and persuaded him to take the "deal" and run. [Defendant]'s lawyer, because of his mutual allegiance to [the codefendant], however, was obviously paralyzed from giving such tactically sound advice. It was in the very failure to receive such advice that [defendant] was deprived of effective assistance.

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

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

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

1988: *People v. Jones*, 520 N.E.2d 325 (Ill. 1988). Counsel had conflict in robbery and murder case that adversely affected representation where counsel represented defendant and codefendant in joint trial. Defendant and codefendant made pretrial statements admitting participation but claiming only to be the lookout. During trial, defendant testified and denied all

involvement for him and codefendant. The codefendant did not testify at trial. Counsel argued only that their confessions had been coerced. The court held that the defendant was prejudiced by the conflict because the presence in evidence of codefendant's statement implicating defendant violated defendant's right to confrontation. The joint representation of the two defendants in one trial created a clear conflict as to defendant, because when codefendant declined to testify, there was no way that defendant's attorney could effectively deal with the implicating statement.

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

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

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

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

Tate v. State, 515 N.E.2d 1145 (Ind. Ct. App. 1987). Counsel had actual conflict that adversely affected representation in theft case where counsel represented both defendants in joint trial. One defendant testified professing his own innocence, by suggesting that it was codefendant who stole groceries. Once that conflict arose, performance of joint counsel was impaired as to both codefendants by attorney's continued active representation, which precluded attorney from cross-examining witnesses on behalf of each of codefendants.

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

1986: People v. Rhinehart, 385 N.W.2d 640 (Mich. Ct. App. 1986). Counsel had actual conflict that adversely affected representation in drug case where counsel represented both defendant and codefendant in joint trial. Defendant consented to joint represent based on counsel's initial decision not to have either testify, but counsel without consulting defendant

called codefendant to testify about alibi and the testimony proved damaging to defendant. Reversal also required because the trial court failed to adequately inquire.

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

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

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

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

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

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

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

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

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

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

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

B. Simultaneous Representation of Codefendants in Pleas Negotiations or Sentencing

1. U.S. Court of Appeals Cases

1992: United States v. Swartz, 975 F.2d 1042 (4th Cir. 1992). Counsel in bank fraud conspiracy had an actual conflict that adversely affected representation in sentencing where counsel represented defendant and codefendant and counsel objected to a lower sentence for defendant because in counsel's view both were equally culpable. During the investigation, defendant retained counsel. Counsel later agreed to represent the co-defendant as well and a written waiver was signed by both. At the initial appearance and arraignment, the Magistrate Judge conducted an inquiry and determined that the waivers were valid. Defendant then negotiated a plea in which she would cooperate in the prosecution of other coconspirators and would receive a downward departure in sentencing. The codefendant also agreed to plead guilty in exchange for some charges being dropped but his plea did not include a downward departure in sentencing agreement. At the time of the pleas, the District Court was informed that the Magistrate had held a hearing and, thus, did not inquire further into the conflict. Following the pleas, defendant and codefendant testified against another coconspirator. During that trial, defendant became concerned that the codefendant was lying and increasing defendant's involvement. Defendant was concerned that counsel could not properly represent her in sentencing if counsel could not say anything derogatory about the codefendant. Defendant asked counsel to withdraw from codefendant's representation and represent only her. Counsel offered instead to withdraw from her representation and proceed only with codefendant and then counsel assured her that he could proceed with both cases. Later, defendant learned that she would be called as a witness at codefendant's sentencing. She again asked counsel to withdraw from representing the codefendant because of the conflict, but counsel assured her that he could represent both. During codefendant's sentencing, counsel argued that he and the defendant were equally culpable and should be sentenced the same, even though codefendant was higher in the guidelines than defendant even without her downward departure due to cooperation with the government and the evidence was clear that defendant was less culpable than the codefendant. Counsel's strategy, while good for the codefendant, clearly harmed the defendant. Later in the proceeding, defendant was called to testify that codefendant was not coerced, as he had previously testified. The court asked counsel why he persisted in representing both and counsel just assured the court that defendant had waived and the Magistrate Judge had inquired and resolved the issue. Later the same day, defendant was sentenced. Represented by new counsel she then filed a motion for new sentencing due to counsel's conflict. The Fourth Circuit held that counsel had an actual conflict in sentencing when counsel argued in a fashion damaging to the defendant and when the defendant testified. The conflict also adversely affected counsel's representation. Although defendant had previously signed a waiver and the Magistrate Judge inquired, the Fourth Circuit has "recognized that a single

waiver pursuant to rule 44(c) may not serve to waive all conflicts of interest that arise throughout the course of that defendant's criminal proceedings. The district court has a continuing obligation under rule 44(c) to guard against conflicts of interest that may worsen as circumstances change during the course of the representation." *Id.* at 1049. Defendant's initial waiver was insufficient to waive the conflict that ultimately developed at sentencing when counsel's argument was directly adverse to defendant.

1990: *Hoffman v. Leeke*, 903 F.2d 280 (4th Cir. 1990). Counsel in accessory to murder case had conflict that adversely affected representation where counsel jointly represented defendant and two codefendants, who plead guilty and testified against defendant. The trial court also failed to conduct an adequate inquiry and should have rejected defendant's purported waiver even if it was valid. Prior to trial, the court inquired of the defendants jointly and individually about the joint representation and counsel informed the court that he saw no conflict. A mistrial was granted shortly after jury selection. Prior to the new trial, a local co-counsel was retained. Each defendant again expressed a desire to continue with the joint representation. After that, both codefendants accepted plea agreements and agreed to testify against defendant. The state repeatedly brought out during the trial that counsel represented the codefendants. A codefendant was the state's primary witness. The co-counsel conducted the cross-examination. The court reached "an inescapable and unavoidable conclusion" of an actual conflict that adversely affected the representation. *Id.* at 286. The conflict was "patent" where defendant "was in the unacceptable position of having his own attorney help the state procure a witness against him." *Id.* The adverse affects were clear in that counsel negotiated a plea agreement for the codefendant that required him to implicate the defendant and did not even inform the defendant that the codefendant would testify against him. Counsel also could not cross-examine the codefendant and attack what amounted to the state's entire case against him. "To cross-examine [the witness] effectively, [counsel] would have had to question his own client's truthfulness. This he could not do." *Id.* Finally, the adverse affect was clear in the prosecutor's repeated references during trial that counsel also represented the codefendants. The adverse affect was not lessened by the fact that it was the unconflicted cocounsel that cross-examined the codefendant. Conflicted counsel was the lead counsel who prepared the case without the cocounsel's preparation. Conflicted counsel also examined 14 of the 17 witnesses during the trial. "Therefore, regardless of the effectiveness of [co-counsel's] efforts at trial, upon which we need not pass judgment, those efforts could not have overcome the presumed prejudice arising from [lead counsel's] actual conflict of interest." *Id.* at 287. In discussing whether defendant had waived the conflict, the court declared that "[n]ot even the proffer of admittedly valid waivers of conflict-free counsel can restrict a trial court's power to insist on separate representation." *Id.* at 288. Even if defendant made a valid waiver, "permitting multiple representation in a case of this type" would be improper. *Id.*

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

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

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

was less culpable than the others because that would have been detrimental to the interests of co-defendants who wished to plead guilty.

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

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

2. U.S. District Court Cases

1999: *Trejo v. United States*, 66 F. Supp.2d 1274 (S.D. Fla. 1999). Counsel had actual conflicts that adversely affected representation. Five codefendants signed agreement with government for joint cooperation where the defendants understood that cooperation by one would inure to the benefit of all. Ultimately, one codefendant got a downward departure but the three involved here did not. The court, although finding the government's actions shaky, found that the agreement did not prohibit this and that defense counsel should have ensured that their understanding of the agreement was included in the signed document. In a 2255 proceeding, the court learned that initially all codefendants were cooperating. The three codefendants had counsel, who shared office space, and "stood in" for each other at various proceedings representing multiple defendants. One of the lawyers essentially abandoned his client without notice to him. The remaining two lawyers assured the defendants that the cooperation agreement was a "group agreement" that would benefit all, that the agreement would not be included in the plea agreement but was clear with the government, and that they would receive sentences of only 5-10 years, which did not happen. Counsel's conduct was deficient in failing to include their understanding of the plea agreement in the actual agreement and the defendants would not have plead guilty if the government refused this agreement. Counsel's failures were due to severe conflicts of interest. "The clients' concept of cooperation as 'one for all and all for one' appears to have spilled over to their attorneys' concept of representation. Examples of this haphazard 'group representation' abound in the record." *Id.* at 1286. Counsel were meeting with other codefendants. In meetings with the government, at times, some counsel and some defendants were missing. One counsel withdrew from representation without his client or the court knowing because of the "musical chairs" method of representation. *Id.* As a result, the "taint" of conflict spread to all three defendants. *Id.* at 1287. Guilty pleas set aside.

1990: *Cates v. Superintendent, Indiana Youth Center*, 752 F. Supp. 854 (S.D. Ind. 1990). Counsel had actual conflict that adversely affected representation in forgery, theft, and burglary case where counsel represented defendant and codefendant and negotiated a plea for codefendant that required testimony against defendant. Following counsel's negotiation of the plea for the codefendant, counsel moved to withdraw due to the conflict. The court allowed counsel to withdraw and defendant retained different counsel who advised the defendant to plead guilty to avoid being charged as a habitual offender. Although counsel at the time of the plea was not conflicted, the court found that the initial counsel's actual conflict and the adverse affects required reversal of the plea. The court also prohibited the state from using the codefendant's testimony in any retrial.

3. Military Cases

1987: *United States v. Newak*, 24 M.J. 238 (1987). Counsel had actual conflict that adversely affected representation in conduct unbecoming an officer case where counsel represented both the accused and the enlisted woman with whom she allegedly had

homosexual relations and counsel negotiated a plea on behalf of the enlisted woman that required her testimony against the accused.

4. State Cases

2001: *Thomas v. State*, 346 S.C. 140, 551 S.E.2d 254 (2001). Counsel in drug case had actual conflict where counsel represented husband and wife charged with drug charges. Counsel initially informed defendant about dangers of joint representation and received a waiver. Later, however, the prosecutor offered deal to allow both to plead to lesser offenses for an eight year sentence or to allow one to plead guilty to all and receive the maximum sentence while the other had charges dismissed. The defendant plead guilty and received the maximum sentence and charges against her husband were dismissed. Counsel acted on his divided loyalty by failing to advise the defendant, whom he believed to be the less culpable of the two, that she had nothing to lose by proceeding to trial since she was receiving the maximum punishment in the plea agreement. "Although petitioner initially waived a conflict of interest, once it became clear an actual conflict existed due to the plea bargain, counsel should have either withdrawn from representing one or both of them or acquired another waiver covering this specific conflict. To be valid, a waiver of a conflict of interest must not only be voluntary, it must be done knowingly and intelligently." 346 S.C. at 144, 551 S.E.2d at 256.

2000: *Ellis v. State*, 534 S.E.2d 414 (Ga. 2000). Defense counsel had actual conflict of interest that adversely affected her representation of robbery defendant. Three defendants were charged. There was a positive identification of one. The non-identified codefendant retained counsel and asked her to also represent the defendant. Both initially claimed mere presence and that they remained in the car while the identified codefendant and two other men committed the robbery. A month before trial, the defendant told counsel that he had been shown a weapon and asked to participate but he declined showing prior knowledge of the planned robbery. Following that counsel told both clients that if they went to trial they would need different lawyers and arranged two other lawyers for them. Counsel continued, however, to advise the two clients about possible pleas. On her advice, the defendant entered an *Alford* plea. He subsequently filed a motion to withdraw the plea due to the conflict of interest. The court held that counsel had an actual conflict because she continued to represent both defendants even though they had different versions of their innocence defense. The conflict had an adverse affect because counsel did not pursue a possible plea agreement for the defendant to testify against his codefendant where the state's evidence was weak.

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

were romantically involved. Counsel even admitted that he had treated the codefendant carefully during cross-examination.

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

1997: Netters v. State, 957 S.W.2d 844 (Tenn. Crim. App. 1997). Counsel had conflict of interest that adversely affected representation. Defendant and codefendant were charged with two counts of attempted murder and aggravated burglary. Both were assigned public defenders from the same office. The defendant wanted to go to trial. The codefendant wanted to plead. Several days before trial, the codefendant's attorney, without defendant's counsel being present (and possibly without his knowledge), informed the defendant that if he did not plead his codefendant would be forced to go to trial. He advised the defendant to plead guilty to lesser charges and the defendant gave in and entered a plea. His own counsel was not in the courtroom during the beginning of the plea. He entered in the middle and took issue with defendant's statements that he had not properly represented him, but the defendant continued with an *Alford* plea. The defendant got eight years and his codefendant got three. Court found that the public defender's office was viewed as a whole and the office had a conflict regardless of the appointment of two separate attorneys. The proper focus is solely upon whether counsel's conflict affected counsel's actions and the defendant's decision; therefore, it is inappropriate to consider whether another attorney, untainted by a conflict of interest, would also have recommended a guilty plea. *Id.* at 848. In this case, counsel's representation was adversely affected where he negotiated a joint plea, despite the defendant's expressed desires to go to trial. Prejudice presumed.

1995: Edgemon v. State, 318 S.C. 3, 455 S.E.2d 500 (1995). Counsel in burglary case had actual conflict that adversely affected representation where counsel represented defendant and two co-defendants. Initially, the state was negotiating with both codefendants to plead guilty and testify against the defendant. One of the codefendants entered an agreement to testify against defendant in exchange for Pretrial Intervention (ultimate dismissal of charges possible). Defendant ultimately plead guilty. Counsel testified in post-conviction that he did not negotiate the codefendants' deals but did emphasize to the prosecutor that the codefendants were less culpable than the defendant. Counsel should have withdrawn from the joint representation.

1994: State v. Dadas, 526 N.W.2d 818 (Wis. Ct. App. 1994). Trial court erred in failing to inquire into conflict. Defendant and codefendant charged with commercial gambling. Counsel initially advised both of a potential conflict, which they purportedly waived. After consulting with the government, counsel advised both that if they cooperated with authorities, no prison time would be sought. Each gave statements incriminating themselves and the other. Counsel then entered plea negotiations that would allow jail time with more time for defendant. Defendant plead no contest pursuant to the agreement. The trial court never conducted an inquiry as required by state law into the potential conflict, although the court knew about the dual representation. The appellate court declined automatic reversal and held that when the trial court failed to inquire the appellate court would conduct *de novo* review to determine whether an actual conflict existed. Appellate court found actual conflict because counsel advised codefendant to cooperate with law enforcement and provide incriminating information against defendant. This information could serve as a basis for additional criminal charges, either federal or state, against defendant and could affect sentencing in which the information was also used. New sentencing granted.

1993: State v. Padilla, 859 P.2d 191 (Ariz. Ct. App. 1993). Counsel in drug case had actual conflict that adversely affected representation where counsel represented the defendant and his codefendant/wife. Defendant was arrested after making a sale to an informant. His family

members were separately charged in "companion cases." Counsel was retained to represent defendant, defendant's wife, his brother, and his sister-in-law at a package rate on all the drug charges stemming from the same investigation and involving the same informant. The defendant entered an *Alford* plea pursuant to a plea agreement. Although counsel did not attempt to plea bargain in exchange for the defendant's testimony against other family members, no adverse affect found because defendant testified in post-trial hearing that he would have rejected such a deal. Adverse affect was found in sentencing, however, because an unconflicted counsel would have asserted defendant's reduced culpability in the family enterprise as compared to his brother. More importantly, counsel acted adversely to defendant when he indirectly shifted the blame to defendant from his wife at her sentencing hearing immediately before defendant's sentencing. Seeking leniency for the wife, counsel implied – before the same judge that sentenced defendant – that defendant had led his wife astray. This implicit advocacy against the defendant amounted to ineffective assistance and adversely affected representation. Remanded for new sentencing.

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

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

Id. The court notes that the witness waived grand jury proceedings and was charged and plead guilty on the same day. "This would not have occurred in the absence of preceding serious, meaningful negotiation and a clear and distinct understanding between the prosecution and defense counsel." *Id.* And, the court notes that when the witness plead guilty the others had not even been indicted yet. In its analysis, the court discusses the prosecution's duty to inform the court of conflicts and not to proceed without doing so when the prosecution knows of a conflict.

***Austin v. State*, 609 A.2d 728 (Md. 1992).** Counsel had actual conflict in drug case that adversely affected representation where two partners represented defendant and codefendant that testified against him. Defendant was indicted with six codefendants. Defendant retained counsel. A codefendant retained same counsel. Initially they were represented by same counsel and then later a partner in the same firm took over representation of the codefendant. At a pretrial hearing, the court inquired about status of each of the cases without the presence of the other codefendants and counsel. The codefendant indicated she had agreed to plead guilty in exchange for her testimony against the defendant. The trial court noted a potential conflict and instructed codefendant's counsel not to inform defendant's counsel, his partner, that the codefendant had agreed to plead guilty and would be testifying against defendant. Defendant proceeded to trial. Counsel objected to the gag order against his partner and requested a transcript of the hearing held concerning the codefendant's status. The prosecutor informed the court (different judge) that the prior actions were necessary due to counsel's conflict and that the prior judge had not conducted a hearing on the conflict. The court did not inquire but sent the case back to the initial judge, who refused to lift the gag order. The case then proceeded to trial. The codefendant testified against defendant. At defendant's sentencing, counsel indicated that he had talked to the

codefendant a number of times during his representation of her prior to her plea agreement and that she had never implicated the defendant. The appellate court held that "the presence or absence of an actual conflict of interest should be resolved by the same principles, regardless of whether the codefendants are represented by the same attorney or by law partners." *Id.* at 731-32. Actual conflict clear here where counsel represented defendant and codefendant/witness in the same proceeding. Adverse affect found where counsel stated in sentencing that the codefendant/witness had made numerous statements to him that did not implicate the defendant, but counsel made no attempt at trial to cross-examine the codefendant concerning these prior statements. The court declines to determine whether this would be sufficient for reversal though because the court found that the trial court's gag order that in effect reduced defendant's defense team clearly adversely affected representation. The trial court should have instead made a determination of whether the defendant was willing to waive the conflict. The court also declined to hold that the question could only be resolved in post-conviction proceedings because it was the trial court's actions that created the adverse affect here.

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

1988: *Ingle v. State*, 742 S.W.2d 939 (Ark. 1988). Counsel in drug case had actual conflict that adversely affected representation where counsel represented both defendant and codefendant in plea negotiations. Initially, defendant and codefendant had the same charges and counsel attempted to negotiate an equal deal. After the defendant was charged with additional offenses, however, counsel argued in negotiating for the codefendant that defendant was more culpable even on the initial charges. The court observed that "[w]hen a substantial disparity of evidence or of charges exists, it is unusual if an actual conflict does not also exist." *Id.* at 941. Here, an actual conflict was apparent because counsel was "was playing one client against the other." *Id.* Counsel's representation was adversely affected because he virtually abandoned defendant in order to get a better offer for codefendant.

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

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

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

1982: *State v. Ross*, 410 So.2d 1388 (La. 1982). Counsel had a conflict that adversely affected representation where counsel represented defendant and codefendant and negotiated a plea for codefendant to testify against defendant. During trial, the codefendant testified that it was defendant who had initiated the armed robbery, struck the victim, and robbed the cash register. Defense counsel did not extensively cross-examine codefendant, who was sentenced to five years for his participation in the robbery, while defendant was

sentenced to hard labor for a period of thirty-five years without benefit of probation, parole, or suspension of sentence.

C. Simultaneous Representation of Codefendants in Severed Trials

1. U.S. Supreme Court Cases

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

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

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

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

2. U.S. Court of Appeals Cases

2004: *McFarland v. Yukins*, 356 F.3d 688 (6th Cir. 2004). Drug conviction reversed due to the trial court's failure to adequately inquire into counsel's conflict, counsel's actual conflict of interest that adversely affected his performance, and trial counsel's ineffectiveness in failing to present an adequate defense. The petitioner and her daughter were charged as co-

defendants where drugs were found during a search of the home they shared. Both the defendant and her daughter were represented by the same retained attorney. On the day of the scheduled bench trial, counsel informed the court that the defendant and co-defendant had concerns about sharing the same attorney and that the evidence might well raise antagonistic defenses. The petitioner also informed the court that she believed she needed a separate attorney and that she had attempted to hire a different attorney but could not afford one. Rather than appoint a second attorney, the court severed the cases and ordered that they be tried in front of different judges. The trials proceeded at pretty much the same time. In the co-defendant's trial, the state presented evidence that the bedroom where most of the drugs were found belonged to the co-defendant. A caller to the crack hotline also made complaints about a woman with the co-defendant's name. A confidential informant also identified the co-defendant as the person discussing drugs. During the petitioner's trial, the state did not present any evidence that the co-defendant lived in the house or in the bedroom where most of the drugs were found and did not present any evidence that the crack hotline telephone complaints and the confidential informant had both identified the co-defendant. Defense counsel did not bring any of this information out in cross-examination or present any evidence on its own. In closing argument, the defense argued only that the drugs belonged to one of two men that were also initially suspected. One of the men was present at the time of the search, but did not have a key to the locked bedroom where most of the drugs were found. The other man was not present at the time of the search and was connected to the house only by some paperwork identifying him as the co-defendant's husband. Both the defendant and co-defendant were convicted. They were represented on appeal by a different attorney but still had the same attorney between them. Appellate counsel did not raise any issue concerning ineffective assistance of counsel or a conflict of interest. In state post-conviction, the petitioner asserted ineffectiveness of trial counsel and of appellate counsel for failing to argue that trial counsel was ineffective but the state court denied on procedural grounds that the petitioner did not show good cause for a failure to assert the issue on direct appeal as required in state court. The court first found that the petitioner was entitled to relief under *Holloway v. Arkansas* because the petitioner objected to the joint representation and the trial court did not adequately resolve the issue. Independent of the trial court's failure to inquire, reversal was also required because counsel had an actual conflict of interest that adversely affected representation. The petitioner's best defense would have been to contend that the drugs belonged to the co-defendant and there was strong evidence indicating that the co-defendant and not the petitioner actually controlled the drugs. During petitioner's trial, however, counsel not only failed to argue that the co-defendant was guilty, but he affirmatively argued that she was innocent and seemed to concede that the co-defendant's room was actually the petitioner's room and that the petitioner was the person identified by the confidential informant, which was not the case. While attempting to present a common defense, counsel took on a heavier burden than would have been necessary in defending the petitioner alone because, while it was plausible that one woman in the house was innocent of involvement with the drugs, it was far less plausible that both were. Nonetheless, counsel failed to even present any evidence that the co-defendant lived in the home. Instead of this obvious defense, counsel chose to point the finger at two other men because his duty of loyalty to the co-defendant would have been breached had he actively pursued a theory that she was guilty of the charges while he was currently representing her in a trial on those same charges. Here, where counsel chose to forego an obvious and strong defense to avoid inculcating another client, the court found that counsel labored under an actual conflict of interest establishing a Sixth Amendment violation under *Cuyler v. Sullivan*. The court also found that counsel was ineffective under the standard of *Strickland v. Washington* because counsel failed to present a strong argument in petitioner's case that the co-defendant actually possessed the drugs. The court found that, with respect to all three of these arguments, the petitioner would have won on direct appeal had appellate counsel adequately raised the issues. Appellate counsel was ineffective in failing to assert these issues, which were clearly stronger than the arguments made by counsel on direct appeal. The conflict issue was an obvious one, and the petitioner was entitled to automatic reversal under the rule in *Holloway*. Because appellate counsel also represented the co-defendant, however, appellate counsel also had a conflict of interest. The court found that appellate counsel's ineffectiveness was the cause for petitioner's failure to assert ineffectiveness of trial counsel on appeal. Thus, the petitioner had established cause and prejudice for failing to assert these issues on appeal. Because the state court never ruled on the actual conflict of interest and the ineffective assistance claim under *Strickland*, the court reviewed these claims *de novo*. The only state court decision on the *Holloway* claim was the trial court's decision. Under the AEDPA, the court found that the trial court's actions contradicted the clearly established precedent of

Holloway v. Arkansas because the state court confronted a set of facts that were materially indistinguishable from *Holloway* and yet arrived at a different result.

1986: *Nealy v. Cabana*, 782 F.2d 1362 (5th Cir. 1986). Counsel had actual conflict that adversely affected representation in robbery case where counsel simultaneously represented a codefendant in severed trials. During trial, the state presented evidence that the codefendant made statements to police that incriminated defendant. The codefendant denied making these statements but was not called to testify because of counsel's concern that codefendant would be harmed in his upcoming trial. While the state argued that the codefendant's testimony would have incriminated the defendant and no counsel would have called him to testify, the court held that whether the codefendant's testimony would or would not ultimately have incriminated defendant or not was not the issue. The issue was that counsel was unable to decide whether to call the codefendant to testify unfettered by the conflict.

1983: *Sullivan v. Cuyler*, 723 F.2d 1077 (3rd Cir. 1983) (affirming 553 F. Supp. 1236 (E.D. Pa. 1982)). Counsel had conflict that adversely affected representation in murder case where counsel represented defendant and codefendant in severed trials. Defendant proved that the joint representation generated a conflict that adversely affected his representation, in that his attorneys decided not to call co-defendant to testify on a crucial matter because co-defendant was awaiting trial for the same murders.

3. Military Cases

1999: *United States v. Henry*, 50 M.J. 647 (N.M. Crim. App. 1999). Actual conflict of interest existed which adversely impacted accused as result of accused's representation on conspiracy charge by assistant defense counsel who had previously represented four other alleged co-conspirators. Some of the representations were in unrelated courts-martials. One, who testified in appellant's trial, was in an administrative discharge proceeding possibly related to this case. One was in a court-martial on these same charges. Counsel did not disclose the conflicts to the client and left discussions and advice to a junior counsel with little experience, but the junior counsel was not even aware of all of the conflicts. Although the accused decided to plead guilty, he was adversely affected by the conflict because he was not fully informed of the conflict and the potential impact of that conflict on his detailed assistant defense counsel. The accused did not make a knowing waiver. He did not even know of the conflicts until after he plead guilty and then he was not allowed the opportunity to talk to independent counsel and the judge informed him of the apparent conflict, but did not inform him of the exact nature or possible impact of the conflicts. Finally, the court held that the "burden to show the non-existence of an adverse impact lies with the Government." *Id.* at 653. Here, "[a]lthough appellant need not show any adverse impact, a review of the record shows that it existed, *id.* at 654, because conflicted counsel limited his own representation by limiting contact with the accused and leaving that to less experienced counsel. Counsel also recognized that if the case were contested, he would be limited in his participation because conflict issues would arise. Thus, "[h]e had at least an arguable interest in getting appellant to plead guilty to avoid the conflict of interest appearing on the record." *Id.* at 654.

4. State Cases

1988: *State v. Livingston*, 366 S.E.2d 654 (W. Va. 1988). Trial court erred in failing to appoint separate counsel for defendant and her husband in breaking and entering case where their interests clearly conflicted since the only evidence of husband's guilt was the defendant's statement. The same counsel was appointed to represent them and their cases were severed. Defendant was convicted and the charges were then dismissed against the husband.

1987: *Dowell v. Commonwealth*, 351 S.E.2d 915 (Va. Ct. App. 1987). Trial court failed to adequately inquire in grand larceny case where counsel represented defendant and two co-defendants called as witnesses to testify against her. Counsel objected to the state calling the two witnesses whom he also represented in connection with this same offense. Conviction vacated and proceeding remanded for the trial court to decide whether the defendant validly waived her right to independent counsel. If not, then a new trial would be required.

D. Simultaneous Representation of Codefendants in Post-Trial Proceedings (U.S. Court of Appeals Cases only)

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

E. Simultaneous Representation of Government Witness in Related Case

1. U.S. Court of Appeals Cases

2000: **Perillo v. Johnson*, 205 F.3d 775 (5th Cir. 2000). Counsel in capital trial had actual conflict of interest that adversely affected defendant's representation due to prior and concurrent representation of the state's star witness. Defendant initially indicted for murder along with two codefendants. She was tried, sentenced to death, and then had the case reversed. The first codefendant ultimately had the murder charges dropped and proceeded to trial on two aggravated robbery charges represented by counsel, who argued that all of the blame should be placed on the defendant and the other codefendant. The codefendant was convicted but sentenced to only five years probation. Following the trial, counsel remained close to the codefendant and even flew from Texas to California to serve in her wedding by giving the bride away. When the second codefendant was tried, counsel was instrumental in putting the first codefendant in touch with the victim's family and obtaining her immunized testimony against the second defendant. The immunity negotiated for the codefendant would not, however, have protected her from perjury charges if her testimony was later proven false. The testimony against the second codefendant ensured death for him but also was more damaging for the defendant than any prior statement and painted her as the most culpable. Counsel represented the first codefendant during the second codefendant's trial and she stayed in counsel's one-bedroom apartment for 7-10 days during that proceeding. Ultimately, the defendant's retrial was scheduled and counsel was appointed to represent her. The defendant was not made aware of any of the above information other than the fact that counsel represented the codefendant in her trial and secured a favorable sentence for her. When the trial court issued a subpoena for the first codefendant (living in California) to testify, she indicated a desire to quash the subpoena. Counsel flew to California to represent her in that proceeding. Counsel also represented the first codefendant during the time that she was offered immunity for her testimony against the defendant. During the trial, the first codefendant/witness again stayed in counsel's home. Counsel had his associate meet with the witness. The associate informed counsel that he had a conflict of interest due to the dual representation. Outside the associate's presence, counsel also went over with the witness her prior testimony and what he intended to ask her in cross-examination. On the day, the witness appeared for trial, there is some question as to whether counsel stated that he had advised

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

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

2. State Cases

2003: **State v. Cisco*, 861 So. 2d 118 (La. 2003). Counsel in capital murder trial had an actual conflict of interest for which the defendant did not make a knowing an intelligent waiver due to counsel's representation of the lead investigator, who was also a key witness for the state. The record reflected only that counsel represented the lead investigator and his wife in separate family law matters without any additional detail. The crime for which the defendant was arrested remained unsolved for a year before the defendant became a suspect. In initial questioning, he denied involvement, but then confessed to involvement in more than nineteen contradictory statements, with the majority being given to the lead detective. There was no physical evidence linking the defendant to the crime scene. Outside of the defendant's confessions, the only other inculpatory evidence was the identification of the defendant in a physical lineup by an eyewitness. This witness had never been able to give a detailed description of the assailant and allegedly remembered for the first time during the physical lineup that one of the assailants had a tattoo on his hand as the defendant did. During the trial, the defense theory was that the defendant gave false confessions as a result of his turbulent upbringing and long-term substance abuse beginning when he was six years old. The defense also challenged the reliability of the identification. On the day that counsel was appointed, she requested that the physical lineup be postponed, but the detective had already obtained the defendant's permission to proceed without her presence. It was during that lineup that the eye-witness identified the defendant. When counsel first met with the

defendant, he apparently recognized the potential for conflicting interests and sent the defendant a letter in which she informed the defendant of her representation of the detective. She, nevertheless, left it up to the defendant to decide whether she had a conflict and whether he wanted to continue with her representing him. Several weeks later at the defendant's arraignment, counsel informed the court of the dual representation and presented a written document that the defendant had signed, allegedly waiving the conflict. The trial judge made only a cursory inquiry and, like the defense counsel, effectively left it to the defendant to decide for himself whether an actual conflict of interest existed. The defendant was arraigned before a different judge, who was also aware of the potential conflict, but, nonetheless, without conducting a hearing, found that counsel could continue representation. In another court hearing held more than a year prior to trial, counsel informed the court that the defendant had made several written allegations of collusion between counsel and the lead detective. Without inquiring into any detail, the court elicited a statement that the defendant wanted counsel to continue representing him. Ultimately, eleven months later, the case went to trial, and the defendant was convicted and sentenced to death. The court held that a defense attorney required to cross-examine a current or former client on behalf of a current defendant suffers from an actual conflict. Here, there was such an actual conflict, but neither trial judge adequately informed the defendant that counsel's representation could be negatively affected in an attempt to obtain a knowing and intelligent waiver from the defendant. Likewise, neither counsel nor the trial court, ever explained to the defendant that he had a right to obtain other counsel. Under these circumstances, the court found that the defendant had not made a knowing and intelligent waiver of his right to the assistance of conflict-free counsel.

1988: *People v. Easley, 759 P.2d 490 (Cal. 1988). Counsel in capital sentencing had an actual conflict that adversely affected representation due to counsel's simultaneous representation of a government witness in related proceedings. During initial trial, defendant was represented by a public defender. During the sentencing, the state presented evidence of defendant's prior involvement in the arson for hire of the Chicken Ranch brothel in Nevada, including testimony from the owner of the brothel who provided the only direct evidence that defendant was connected to the owner of a business competitor that allegedly planned the arson. Following trial, the owner of the Chicken Ranch, who was suing his competitor for the arson, agreed to retain counsel to represent defendant on appeal in exchange for defendant's immunized testimony in a pending federal criminal trial admitting that he committed the arson. Represented by counsel, who also represented the Chicken Ranch owner, on direct appeal, the death sentence was reversed. Prior to resentencing, defendant's initial public defender was allowed to withdraw because he had a conflict. At defendant's request, counsel was appointed to represent defendant. The government informed the court that counsel also represented a witness – the Chicken Ranch owner – and that counsel could be a witness if the defendant testified and denied the arson because counsel had elicited the defendant's confession to the arson. The trial court advised defendant that he had a right to unconflicted counsel but did not conduct an indepth inquiry. The California Supreme Court held that counsel had an actual conflict because it was in defendant's interest to prove that he did not commit the prior arson while it was in the witness' interest in the civil suit to prove that defendant did commit the arson. Counsel's representation was adversely affected because counsel did not attempt to impeach the witness with his obvious financial interest in establishing defendant's guilt of the arson. Counsel also failed to present any evidence to negate or mitigate defendant's involvement in the arson. The court also held that the defendant did not make a valid waiver of the conflict. Although the court informed defendant of his right to conflict-free counsel, the court never advised defendant of the full range of dangers and possible consequences of the conflicted representation and never asked the defendant for a waiver. Furthermore, the trial court was too willing to accept counsel's representations of no conflict when counsel's judgment in representing such clearly conflicted interests was questionable. Finally, the court held that it was irrelevant that defendant requested counsel and that this was not a case involving the right to retained counsel of choice because counsel was appointed by the court not retained.

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

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

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

1. U.S. Court of Appeals Cases

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

2. State Cases

2000: *People v. Woidtke*, 729 N.E.2d 506 (Ill. App. Ct. 2000). Court found per se conflict of interest that required reversal of murder conviction. During his representation of defendant, counsel was also representing another client on misdemeanor charges related to impersonation of investigator into murder with which defendant was charged. Counsel was aware that his other client was a suspect in the murder and even subpoenaed him as a witness but did not call him to testify. Counsel never made defendant, his other client, or the court aware of his conflict. Reversal required even though counsel's representation of the other suspect ended seven months prior to trial. Where, as here, defense counsel has a tie to a person or entity that would benefit from an unfavorable verdict for the defendant, a per se conflict arises requiring reversal because the knowledge that a favorable result for defendant would inevitably conflict with the interests of counsel's other clients or employer might subliminally affect counsel's performance in ways difficult to detect and show.

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

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

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

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

G. Simultaneous Representation of Government or Defense Witness or Confidential Informant in Unrelated Case (State Cases only)

2000: *Ramirez v. State*, 13 S.W.3d 482 (Tex. Ct. App. 2000). Defendant was denied effective assistance of counsel in prosecution for unlawful possession of a firearm by a felon because defense counsel labored under an actual conflict of interest that adversely effected her performance. During trial, the state called as a witness a client of defense counsel in another pending criminal case. Counsel moved for a mistrial because she had no notice of the witness and because she had confidential information from him and could not adequately represent the witness or the defendant in cross-examining her own client. The court denied the motion for mistrial and pressed on. The witness/client testified that the defendant made incriminating statements to him in confinement. During cross, counsel attempted to establish that she had confidential information that she could not use in cross because the witness/client was not waiving his privilege. The court would not allow this testimony. Counsel again moved for a

mistrial due to the prejudice to defendant. The court of appeals held, "Great deference should be accorded the representations of an attorney who feels a division of loyalty." *Id.* at 486. "It is well-established that a defendant is denied the effective assistance of counsel in those instances where an attorney is unable to cross-examine, or is chilled in the cross-examination of, a government witness because of the attorney/client privilege arising from counsel's prior representation of the witness or from his duty to advance the interests of the witness as a current client." *Id.* at 487. Counsel in this case had an actual conflict of interest that had an adverse effect on appellant's trial. In addition, the trial court failed to conduct an inquiry into the apparent conflict.

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

1997: *Commonwealth v. Martinez*, 681 N.E.2d 818 (Mass. 1997). Trial court conducted an inadequate inquiry into conflict in murder case. Defendant was charged with drug-related murder. Only one witness (independent of codefendant) placed defendant near the scene of the crime and had first hand-knowledge of defendant's drug dealing. This witness had been interviewed several times and did not implicate the defendant. At defendant's insistence, the witness was listed as a defense witness, which prompted the state to interview the witness again. The witness implicated the defendant and testified for the state at trial. Just prior to the witness' testimony, defense counsel disclosed that he had previously represented the witness and represented him on pending charges when he first made statements in this case. He informed the defendant of this information and then interviewed the witness. He was not aware that the witness would be called as a state's witness at the time of his discussions with the witness though. Counsel stated that his representation of the witness was concluded, except for a "technical" matter to conclude a disorderly conduct case that had been part of a negotiated package deal to resolve 24 charges. The court found no simultaneous representation and no conflict. Nonetheless, the court asked the defendant if he had heard what counsel said and if he still wanted counsel to represent him. The appellate court found that the representation was simultaneous because counsel still represented the witness on one charge for which he had not be sentenced at the time of the defendant's trial. While the witness' pending charge was minor and might not rise to the level of a conflict in another case, in this case it was sufficient to raise genuine concerns about counsel's divided loyalty. Counsel was also facing pending ethics charges at the time of defendant's trial and likely felt constrained in cross-examining the witness. Counsel had also violated his confidential relationship with the defendant by informing the witness that counsel did not believe defendant's alibi. "Taking into account [counsel's] relationship with [the witness], [counsel's] ethical problems, and the undenied allegations of broken client confidence, . . . the defendant's claim of a conflict of interest 'is supported by adequate evidence of its existence.'" *Id.* at 825-26. The trial court's inquiry was inadequate to establish defendant's intelligent waiver of conflict where judge did not inform defendant that he had constitutional right to attorney who was free of divided loyalties, did not give defendant opportunity to raise or discuss any concerns that he might have, and did not make sure that defendant understood that other counsel could be retained in his behalf. In addition, the colloquy included no discussion of counsel's alleged disclosure to his other client, no discussion of counsel's

disbelief of defendant. Trial court also failed to advise defendant in such a way that he could understand or appreciate the possible implications of counsel's relationship with witness. The court was most troubled by counsel's statements of disbelief to the witness and held, "In this special context, the colloquy to procure the defendant's waiver was insufficient." *Id.* at 827.

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

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

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

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

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

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

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

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

H. Simultaneous Representation of Third Party With Adverse Interest (State Cases only)

1996: Derrington v. United States, 681 A.2d 1125 (D.C. 1996). Counsel in drug distribution case had actual conflict that adversely affected representation where counsel simultaneously represented another person about whom the defendant might have had information of use to the prosecutor. Prior to trial, counsel informed the court that he believed defendant served as a confidential informant for government in the investigation of counsel's other client. While the other client had already plead guilty, he was still pending sentencing. Counsel noted that he would not be able to adequately negotiate for the defendant though on the basis of his cooperation with the government. The court continued the hearing for counsel to obtain additional information. At the later hearing, counsel informed the court that he did not believe there was an actual conflict. The defendant proceeded to trial with counsel never attempting to negotiate a plea based on his cooperation or advising the defendant about the possibility of doing so. Counsel had an actual conflict and his representation was adversely affected as evidenced by his failure to attempt to negotiate a deal for his client.

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

facility would testify. Furthermore, counsel represented two alleged accomplices whose statements about the incident of sexual abuse differed from that of the juvenile.

1983: *United States v. Carducci*, 557 F. Supp. 531 (W.D. Pa. 1983). Counsel had conflict that adversely affected representation in drug case where counsel simultaneously represented suspect charged with murder of codefendant. A mistrial was declared in initial trial due to codefendant's murder. During second trial, counsel did not call witnesses that corroborated entrapment defense, even though he intended to in the first trial because the witnesses would be adverse to the suspect in the murder of codefendant. While counsel stated other valid reasons for not calling these witnesses, the court found that reversal was required where counsel also considered the conflicted reasons in making decision to exclude exculpatory testimony.

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

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

1. U.S. District Court Cases

2003: *Eisemann v. Herbert*, 274 F. Supp. 2d 283 (E.D.N.Y. 2003). Counsel in a sodomy case had a conflict of interest due to his simultaneous representation of both the defendant and his father and counsel's self-interest in concealing his misconduct. Defendant was charged with molesting his girlfriend's daughter. His father was charged with numerous charges out of sexually molesting the same girl. The father retained counsel to represent him. In the course of this representation, counsel "bilked" the family of relatively exorbitant sums of money and used fabricated affidavits to cover up his conduct. Counsel was later disbarred. Analyzing the case under the AEDPA, the court found a conflict of interest because the defendant and his father were essentially co-defendants accused of committing the same crimes. While the court recognized that there is disagreement among the federal courts as to whether a defendant claiming a conflict must show that counsel's abandoned defense strategy was prudent or reasonable or whether the defendant need only show that the alternative strategy was reasonable, the court found a conflict in this case because "the alternative strategies as abandoned by petitioner's counsel were plausible, reasonable, and sensible." The court found that the state court had applied a test of "significant possibility of conflict" and found that this formulation was both an unreasonable application and contrary to the test established by *Strickland* and *Cuyler*. The court found that while the defendant and his father were not literally co-defendants, they were "effectively so," because the defendant and his father were arrested on the same day for molesting the same victim during the same period of time. The court also found that the fact that counsel's associate actually conducted the trial was not relevant to the conflict of interest claim. The alternative strategies that counsel could have pursued was to call the father as a witness because he had already been convicted and sentenced at the time of defendant's trial. The counsel did not do so however because he would run the risk of revealing client confidence. He would also have run the risk that the father would have testified that the counsel had "bilked the family of tens of thousands of dollars." Counsel could also have pursued the strategy of arguing that the father was coerced into signing his confession, which also would have been a theory that alleged that the victim had fabricated all allegations of abuse at the insistence of her mother during a custody battle. This defense was not viable unless counsel would also have admitted that he coerced his former client into pleading guilty. The third defense avenue that could have been pursued was to encourage the defendant to accept a plea in exchange for testifying against his father. This was not done, however, and the court noted that it is "reasonable to suspect" that counsel "sacrificed one client, the son, because most or all of his ill-gotten fee was obtained from his paying client, the father. He who pays the piper calls the tune." The court also found that counsel's actions in stealing money from the family, forging false affidavits to excuse his conduct, and threatening petitioner with jail time if he did not vouch for the false affidavits also created a second conflict of interest because counsel had an interest in hiding his own misconduct.

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

2. State Cases

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

1985: **State v. Chandler*, 698 S.W.2d 844 (Mo. 1985). Counsel had conflict that adversely affected representation in murder case where counsel X was implicated in the same murder and had been represented by counsel Y when counsel X was indicted but the charge was later dismissed and counsel X paid counsel Y to represent defendant. The victim was an attorney. The defendant's brother, who was represented by counsel X at the time of his initial statements, implicated defendant in murder and testified at trial that he stood watch while defendant and another brother committed murder. The other brother that had already been convicted of murder and sentenced to death had initially been represented by counsel X but discharged him and testified before a grand jury that defendant was hired by counsel X to kill the victim. He testified in a deposition that he committed the murder alone and defendant had nothing to do with it. Adverse affect shown because counsel did not call this brother, who exculpated defendant to testify allegedly because he had no credibility. Defendant was

entitled to counsel that could make decision whether to call the brother or not without a conflict.

J. Prior Representation of Government or Defense Witness in Same Case (U.S. Court of Appeals Cases only)

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

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

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

1. U.S. Court of Appeals Cases

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

2. Military Cases

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

The *quid pro quo* arrangement to permit both [the witness]'s original statement and subsequent recantation to come into evidence without objection from either side and thus avert the need to cross-examine [the witness] was not the result of a tactical judgment by a conflict-free lawyer that such evidence would not be helpful to appellant. Rather, the decision to forgo confrontation of the witness . . . must be viewed in some measure as being made to protect the interest of defense counsel. Defense counsel abandoned appellant's right to confront and cross-examine [the witness] in favor of a two sentence retraction that did little to deflect the straightforward impact of the initial statement. At the time, defense counsel's abandonment was viewed by all concerned as necessary to allow defense counsel to avoid ethically improper conduct. This simply reverses the priorities that the attorney owes to his client because it puts the lawyer's concerns ahead of the client's needs, and then shapes the client's needs to eliminate the attorney's problems created by a direct conflict of interest.

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

3. State Cases

2003: *People v. Daly*, 792 N.E.2d 446 (Ill. App. Ct. 2003). Trial counsel had *per se* conflict in drug distribution case where trial counsel had represented the confidential informant, who was the primary witness for the state. The CI had been arrested on drug charges and represented by counsel had those charges dismissed in exchange for an agreement to make undercover drug buys. While doing so, the CI had other charges dropped because of his work for the state. The CI testified during trial that he made three buys from the defendant. Counsel established in cross-examination that the CI had had charges dismissed and was working as a CI, but did not elicit the fact that the dismissed charges and the work as a CI were linked.

Counsel also did not establish that the CI had a financial arrangement with the state where he was paid for drug busts, but only given expense money if he failed to make a buy. Although counsel no longer represented the CI, the court held that there was a "continuing" relationship to the extent that counsel would be required to cross-examine the CI about matters occurring during the time that counsel represented him. Prejudice presumed.

2000: *Nethery v. State*, 29 S.W.3d 178 (Tex. Ct. App. 2000). Defendant's trial counsel had actual conflict of interest that prejudiced defendant in trial for organized criminal activity for theft arising out of illegal use of landfill. Counsel had also represented the defendant and codefendant in a civil suit brought against them for the same activities. Following the civil trial, the codefendant obtained different counsel. The defendant's counsel then represented one of the complaining witnesses in that suit in unrelated criminal charges for theft by a public servant. That case was pending at the same time as the defendant's charges and counsel sought to withdraw prior to defendant's trial, but did so primarily on defendant's failure to pay his retainer with the possible conflict mentioned only as a sideline. During trial, counsel called his other client as a witness. Counsel apparently hoped to establish that defendant thought his permits were legal, but the witness/client testified, amongst numerous damaging points, that he informed defendant his dumping was illegal. Counsel's conflict and the adverse affect on his representation was clear, because counsel did nothing to minimize this damaging testimony. The court notes that there was no reason to call the witness in the first place, but after he was there counsel should have attacked his credibility with information that he had been fired from his position with the City and had no contact with the defendant at the time of the alleged offenses in this case. Prejudice presumed.

L. Prior Representation of Government Witness on Unrelated Charges (State Cases only)

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

1995: *Livingston v. State*, 907 P.2d 1088 (Okla. Crim. App. 1995). Counsel in murder case had an actual conflict that adversely affected representation due to counsel's prior representation of the defendant's son, who was the primary state's witness. Defendant was charged with murdering his ex-wife's boyfriend. Defendant was charged six months later, primarily on the statements of his son, who said that defendant admitted murder to him. Prior to the son's allegations, represented by counsel, he was adjudicated a juvenile on charges of lewd molestation and obscene telephone calls. The defendant testified against his son in the juvenile adjudication proceedings. At a pretrial motions hearing in defendant's case, counsel indicated he wanted to cross-examine the son about these juvenile adjudication proceedings and to impeach him by showing the son's bias against his father and his motive to testify. He also initially asked to use records of the son's psychological examinations to show bias. He informed the court that he had represented the son in the juvenile proceedings. The trial court ruled that counsel could ask the son if he was biased because the defendant did not support him when he was charged with juvenile offenses, but could not cross-examine him on the