







B. STATEMENT OF THE CASE AND FACTUAL BACKGROUND

In May 2007, GPDSC submitted the following question to the State Bar of Georgia Formal Advisory Opinion Board (hereinafter “the Board”): *May different lawyers employed in the circuit public defender office in the same judicial circuit represent codefendants when a single lawyer would have an impermissible conflict of interest in doing so?*

The Board initially published its opinion in October 2008. That opinion, identified as FAO 07-R1, concluded that: *Different public defenders employed by the same agency are not automatically disqualified from representing co-defendants when a single public defender would have an impermissible conflict of interest merely because of such employment. Public defenders working in different offices and employing effective safeguards to protect each client’s confidential information and trial strategy may represent such co-defendants unless other circumstances create a conflict of interest for one or more of the public defenders.*

The Board reissued its opinion in April 2009. The latter opinion, which is the subject matter of the instant petition for discretionary review, completely reversed course on the question posed.

The Board’s current opinion, identified as FAO 10-1, answers the question as follows: *Lawyers employed in the circuit public defender office*

*in the same judicial circuit may not represent codefendants when a single lawyer would have an impermissible conflict of interest in doing so.*

GPDSC opposes FAO 10-1 and petitions this Honorable Court to review and disapprove said opinion. GPDSC will hereinafter demonstrate how it is aggrieved by FAO 10-1.

C. STATEMENT OF AGGRIEVEMENT

Because the mandate of GPDSC is to provide effective representation of counsel to all persons placed within its charge, it will harm GPDSC and the circuit public defender offices within its purview to impose a rule of imputed conflict of interest and/or *per se* disqualification on account thereof.<sup>1</sup>

D. ARGUMENT AND CITATION OF AUTHORITIES

1. **Imputation and *Per Se* Disqualification**

FAO 10-1 correctly states that “the general rule on imputing conflicts within a law firm reflects two concerns. One is the common economic interests among lawyers in a firm. ... Second, it is routine for lawyers in a firm to have access to confidential information of clients.” The opinion summarily, and correctly, discounts the former concern, finding the economic factor irrelevant with respect to public defender offices. Focusing

---

<sup>1</sup> There are 43 circuit public defender offices representing an estimated 90% of indigent felony defendants.

instead on the latter concern, the opinion begins with a tenuous starting point, the “*chance* that a lawyer for one defendant *might* learn the confidential information of another defendant, even *inadvertently*” (emphasis added). While this concern may be legitimate, it does not compel the Board’s conclusion.

The Board’s analysis in FAO 10-1 notes that among a dozen other states reviewed, there is no consensus on the issue of imputation of conflicts within public defender offices. In the majority of states reviewed, imputation of conflicts is not automatic. Often the courts disavow a *per se* disqualification rule because of the use of what is commonly referred to as “ethical screens,” that is, procedures established within individual public defender offices designed to diminish the potential of inadvertent sharing of confidential information.<sup>2</sup> Rather than establish a bright line rule, most states considered take a case-by-case approach. Indeed, such has been the approach of our State.

It is noteworthy that the original draft of FAO 10-1, then referred to as FAO 07-R1, expressed and evaluated the exact concerns. In FAO 07-R1, the Board concluded that establishment of ethical screens to protect the confidential information of co-defendants represented within a single public

---

<sup>2</sup> “Ethical screens” is the current and more accurate phrase for what in the past was routinely referred to as “Chinese wall.”

defender office would prevent an automatic, imputed disqualification. FAO 10-1 offers no additional analysis to undermine the Board's initial conclusion.

FAO 10-1 chiefly relies on the Eleventh Circuit opinion of Reynolds v. Chapman, 253 F.3d 1337 (11<sup>th</sup> Cir. 2001) for its proposition of imputed conflicts within public defender offices. A closer look at Reynolds raises questions concerning that reliance. First, the court in Reynolds does not *impute* a conflict. The court "tentatively accept[s]" the appellant's premise that public defender offices should be treated as law firms and conflicts attributed among its members. This "acceptance" is "tentative" because the cases the court relies upon, Lightbourne v. Dugger, 829 F.2d 1012 (11<sup>th</sup> Cir. 1987) and Mills v. Singletary, 161 F.3d 1273 (11<sup>th</sup> Cir. 1998), **both considered the possibility of a conflict but did not find one.** Thus, those cases do not appear to stand for the proposition that a *per se* rule of disqualification or imputation of conflict should be applied against a public defender office. Indeed, Reynolds itself relies on the long-recognized authority of Cuyler v. Sullivan, 446 U.S. 335 (1980), in considering an ineffective assistance of counsel claim predicated on an alleged conflict of interest. The Cuyler two-part test demands a fact-based inquiry, thus questioning the very concept of a *per se* rule of disqualification or

imputation. Reynolds is helpful in considering the issue *sub judice*, but it is not binding authority in support of the Board's position.

Our State's appellate courts, including this Honorable Court, have more directly considered the issue than the federal court. Contrary to the Board's position, it is respectfully submitted that this Court's opinion in Burns v. State, 281 Ga. 338 (2006), is every bit as, if not more, informative on the issue.

Considering the question in Burns, this Court quoted Cuyler, in which the United States Supreme Court stated:

Given that multiple representation alone does not amount to a conflict of interest when one attorney is involved, it follows that counsel from the same PDO (public defender office) are not automatically disqualified from representing multiple defendants charged with offenses arising from the same conduct. We therefore decline to adopt any presumed or per se rule of conflict of interest involving attorneys in the same PDO.

Burns, 381 Ga. at 340.

Rather, as a substantial majority of the opinions considered find, the issue of whether or not a conflict exists necessarily requires a fact-specific inquiry into the circumstances of the case. This Court plainly noted this position in Frazier v. State, 257 Ga. 690, 694 (1987), wherein the Court held that in cases involving government lawyers, the conflict analysis looks to the individual lawyer and considers whether there has been any direct or indirect

participation in the case, or any discussion among associates concerning matters relevant to the case. Although this Court did state in Burns that it did “not reach the issue of whether public defenders should be automatically disqualified or treated differently from private law firm attorneys when actual or potential conflicts arise in multiple defendant representation cases,” Burns, 381 Ga. at 341, it is difficult to imagine that a *per se* rule of disqualification could be effectively imposed where a fact-specific inquiry is mandated.<sup>3</sup> Footnote 8 to the opinion is further evidence of this, wherein this Court stated that “we reject appellant’s argument that [counsel’s] (mistaken) belief that a conflict of interest existed was sufficient, in and of itself, to create a conflict.” If the involved lawyer’s evaluation of the existence of a conflict does not alone resolve the issue in every circumstance, how then could a cold rule applied prior to the necessary fact-specific inquiry (indeed, prior to even the investigation of a case to reveal a potential or actual conflict) be an effective means of ensuring not only conflict-free, but also effective assistance of counsel? As the Court of Appeals observed in its Burns opinion, the attorney representing the defendant “is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a

---

<sup>3</sup> In addition, if this Court deems that this is an appropriate occasion to resolve that issue, it is of course critical that GPDSC, as an affected party and as representative of other affected parties, be afforded an opportunity to fully address and brief it.

trial.” Burns v. State, 274 Ga. App. 687, 688 (citing Wilson v. State, 257 Ga. 352 (1987)).

Why is a distinction between a private and a public lawyer appropriate, aside from the universally agreed lack of financial interest? The reasons are myriad. First, unlike a private lawyer, a public lawyer is not at liberty to “select” his or her client. The Indigent Defense Act of 2003, O.C.G.A. § 17-12-1, *et seq.*, places the responsibility of representing indigent persons on the public defender. A simple, bright line rule that no office shall engage in representing multiple defendants in a single case places the public defender office at odds with its legislative mandate. Second, potential or actual conflicts are not readily apparent and under current Georgia criminal procedure, the state is not required to reveal its investigation, via production of discovery, until 10 days prior to trial. O.C.G.A. § 17-16-2, *et seq.* A public defender may establish an attorney-client relationship with a defendant, fostering that relationship for months or even years before the state places defense counsel on notice of a potential or actual conflict. At that stage, if disqualification is *per se*, the defendant faces the much greater harm of having his or her attorney-client relationship not merely undermined but destroyed. Third, the culture of the public defender office is wholly different from that found within the private sector.

Lawyers in public defender offices do not work for financial gain nor the “good of the order”; there is no loyalty to the reputation of other public defenders within the office. Lawyers are not called upon to protect the interests of their colleagues and indeed, competition among public defenders, even within the same office, is a point of institutional and personal pride. As the Court of Appeals observed in its Burns opinion, “where two attorneys work in the same office, the duty of loyalty runs only to each attorney’s client; the attorney is in no way being asked to serve two masters.” Burns, 274 Ga. App. at 690. Public defenders have a distinguishing characteristic – a zealous dedication to their clients – that alleviates the concern that conflicting collegial or institutional loyalties might inhibit their advocacy. There is no basis to suppose, nor any evidence cited by the Board, that lawyers within the same public defender office share confidential information or slight any one defendant to favor the other. Indeed, the Board’s initial proposed FAO specifically stated that “there is no reason to presume that every assistant public defender, even within the same judicial circuit, has access to the confidential information of the clients of every other assistant public defender in the circuit.”

In the numerous cases reviewed and cited, the appellate courts have almost uniformly found that the public defenders have aggressively and

zealously represented their individual client free from any influence from the existence of a co-defendant being represented by another public defender in the same office, hence the almost equally uniform rejection of the defendants' claims. It is the rare exception, not the rule, that a defendant is adversely affected by multiple representation within the same public defender office.

There is a particular note that must be made at this point. Conflict-free representation does not necessarily equal effective representation. A defendant may have a lawyer outside of a public defender office, utterly free of any potential or actual conflict, but that provides no guarantee that the defendant will receive effective representation. The conflict-free counsel may not have the level of specialization a public defender has, may not have received the intense training a public defender has, may not have access to the services of an investigator the public defender has, may not have the ongoing relationship with the prosecuting body the public defender has, may not have adequate and appropriate supervision the public defender has. To the extent conflict-free counsel is at any or all of these disadvantages, so too is the defendant. To paint with a broad brush to cover a speculative and potential harm of conflict at the sake of destroying a canvas of effective and zealous representation is a policy decision, not a fact-driven one. As already

shown, conflict determinations demand a fact-specific inquiry. A blanket policy decision may be easily implemented, but it does not compel a benefit to the defendant and carries a high likelihood of working to the defendant's detriment.

Moreover, considering the Board's initial opinion in which it had concluded that appropriate ethical screens militated against the concern of multiple representation, many public defender offices utilize ethical screens by design. Some have multiple physical offices within their judicial circuit.<sup>4</sup> Others have segregated teams dedicated to specific courtrooms or assigned to specific divisions and staffed at various levels by individual administrative personnel.<sup>5</sup> In at least one instance, the State Bar has approved the ethical screen procedure used in a circuit public defender office.

In short, for the reasons outlined above and others, a rule of imputed conflicts and *per se* disqualification is not appropriate in public defender offices and is not merely unwarranted to protect the interests of defendants and ensure effective assistance of counsel, it is unwise. The costs to the affected defendants outweigh any benefit from a simple, bright line rule.

---

<sup>4</sup> Alcovy, Atlantic, Cherokee, Conasauga, Cordele, Coweta, Eastern, Enotah, Griffin, Lookout Mountain, Macon, Ocmulgee, Piedmont, Southern, Tallapoosa are all examples of circuits with multiple physical offices.

<sup>5</sup> Augusta, Eastern, Ogeechee and Southwestern are all examples of circuits using variations of these procedures.

Therefore, GPDSC urges this Court to accept this petition and further review the Board's FAO 10-1.

## **2. The Final Sentence**

After the first publication of FAO 07-R1 and the acceptance of comments thereto, the Board issued FAO 10-1, the opinion at issue herein. Although it had not appeared in any prior version of the opinion, the final draft, which is now before this Honorable Court, contained a new final sentence: *Conversely, lawyers employed in circuit public defender offices in different judicial circuits are not considered members of the same "unit" or "firm" within the meaning of Rule 1.10.*

This conclusion exceeds the scope of the question posed by GPDSC, which was limited to circumstances arising within the same judicial circuit public defender office. At no time has the issue addressed in this sentence been commented upon by potentially affected parties or evaluated and considered for its propriety or lack thereof. Whether or not the Board's conclusion on this issue is accurate necessarily depends upon consideration of a host of issues as to which there is no evidence to suggest or reason to believe were considered. To be sure, there was no comment period in relation to this particular matter. The sentence arguably reflects a substantive change from the opinion even as already opposed by GPDSC,

and at a minimum, there should be review and evaluation of it. As the State Bar of Georgia Formal Advisory Opinion Board did not afford an opportunity for comment, should the Court not revise the Opinion as discussed in section 1, above, this Court should further accept this petition and afford the parties an opportunity to address this issue.

WHEREFORE THE GEORGIA PUBLIC DEFENDER STANDARDS COUNCIL, the aggrieved petitioner herein, petitions this Honorable Court to review and disapprove State Bar of Georgia Formal Advisory Opinion 10-1.

Respectfully submitted, this 5<sup>th</sup> day of July, 2010.

THURBERT E. BAKER      033887  
Attorney General

DENNIS DUNN      234098  
Deputy Attorney General

  
\_\_\_\_\_  
STEFAN RITTER      606950  
Senior Assistant Attorney General

40 Capitol Square, SW  
Atlanta, Georgia 30334-1300  
(404) 656-7298 (telephone)  
(404) 657-9932 (facsimile)

[Signatures continued]

Approved on behalf of Georgia Public  
Defender Standards Council

*Michael Edwards by Robert P. Pitt*

---

Michael L. Edwards  
State Bar No. 240112  
GPDSC Councilmember and Chair of  
Circuit Public Defender Committee

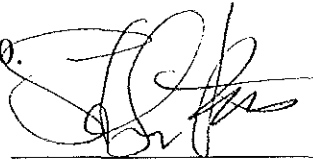
540 E. Oglethorpe Ave.  
Savannah, GA 31401  
912.447.4901

**CERTIFICATE OF SERVICE**

This is to certify that I have this day served the State Bar of Georgia Formal Advisory Opinion Board with an accurate and correct copy of the foregoing by regular U.S. mail or hand delivery to:

Paula Frederick, General Counsel  
Office of the General Counsel  
State Bar of Georgia  
104 Marietta St., Ste. 100  
Atlanta, GA 30303

This 1st day of July, 2010.



---

Stefan Ritter  
Senior Assistant Attorney General