

STATE OF LOUISIANA
COURT OF APPEAL
SECOND CIRCUIT

DOCKET NO. 52,393-CA

IN RE:	APPELLANT 2
COOPERATIVE ENDEAVOR	PUBLIC DEFENDER
AGREEMENT BETWEEN 42 ND	
DISTRICT INDIGENT DEFENDER	APPELLANT 1
OFFICE AND 42 ND DISTRICT OFFICE	DISTRICT ATTORNEY
OF DISTRICT ATTORNEY	

ORIGINAL BRIEF
ON BEHALF OF
AMICI CURIAE, SOUTHERN POVERTY LAW CENTER AND
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF LOUISIANA

ON APPEAL FROM THE 42ND JUDICIAL DISTRICT
DESOTO PARISH, LOUISIANA
SUIT NUMBER 18-CR-29385

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**STATEMENT OF INTEREST
OF AMICI CURIAE SPLC AND ACLU OF LOUISIANA**

The Southern Poverty Law Center (“SPLC”) is a non-profit organization dedicated to seeking justice on behalf of the most vulnerable members of society. SPLC advocates for reform to illegal or imprudent court practices like jailing individuals who fail to pay their fines and court costs, wealth-based pretrial detention, and the reliance on fines and court costs to generate profits for government and private actors. On June 18, 2018, SPLC filed an ethics complaint with the Louisiana Board of Ethics against De Soto Parish District Attorney Gary Evans and several other district attorneys. The complaint alleges that Evans and other district attorneys are violating La. Stat. Ann. § 42:116, among other statutory provisions, by profiting from traffic ticket diversion.

The ACLU of Louisiana, Inc. (the “ACLU-LA”) is a non-profit, nonpartisan organization dedicated to defending the principles embodied in the Constitution and our nation’s civil rights laws; it is the Louisiana affiliate of the American Civil Liberties Union. The ACLU-LA is engaged in litigation opposing prosecutorial misconduct as well as litigation challenging the state funding system for its public defenders. It has a strong interest in ensuring that the rights of Louisianans’ Constitutional freedoms are not violated, including their rights to conflict-free counsel.

This case presents an example of how relying on fines, court costs, and user fees to finance government operations may create a conflict of interest that undermines the integrity of the criminal justice system. The SPLC and ACLU-LA submit this brief to give voice to the perspective of the accused in the De Soto Parish criminal justice system, and to support the district court's decision that when public defenders are forced to rely on the largess of their adversary, it creates the appearance to the public and to indigent defendants that their own advocates are for sale. The Public Defender's Office's independence is undermined when the District Attorney replaces the Legislature as the entity responsible for funding indigent defense.

STATEMENT OF THE ISSUES

1. Did the district court judge abuse her discretion by exercising her inherent authority to find that the Cooperative Endeavor Agreement between the District Attorney and Public Defender created a conflict of interest in violation of the Sixth Amendment, Rules of Professional Conduct, and state law?

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Twenty-five years ago, the Louisiana Attorney General issued an advisory opinion about whether prosecutors may charge defendants fees to participate in a prosecutorial diversion program without creating the appearance that prosecutors are for sale. The Attorney General concluded that any diversion fees must be

limited to the cost of administering diversion, because the State’s ethics laws prohibit district attorneys from using their charging authority to profit from pretrial diversion. The Attorney General warned that “[a]ny additional fees charged” would be an abuse of authority in violation of Louisiana’s Code of Governmental Ethics, because it would amount to “payments for the dismissal of prosecutions.” La. Atty. Gen. Op. No. 93-481, 1993 WL 438522 (Aug. 31, 1993).

Notwithstanding the Attorney General’s guidance, district attorneys across the State are openly violating Louisiana’s ethics laws by abusing their charging authority to extract millions of dollars each year from residents. Sam D’Aquila, the District Attorney in West and East Feliciana Parishes, boasted that district attorneys have created a new diversion “industry” because “we just weren’t making . . . money.”¹ In Rapides Parish, diversion profits are used to pay “the general expenses” of the District Attorney’s Office.² And in Calcasieu Parish,

¹ Samantha Sunne, *Louisiana DAs offer motorists a deal: Write us a check and we’ll dismiss your speeding ticket*, The Lens (July 27, 2017), available at <https://thelensnola.org/2017/07/27/louisiana-das-offer-motorists-a-deal-write-us-a-check-and-well-dismiss-your-speeding-ticket/>.

² *Rapides Parish Police Jury v. Phillip Terrell*, Case No. 261,465 (filed May 3, 2018) at 4, available at https://www.splcenter.org/sites/default/files/rapides_parish_briefing.pdf.

(All page number references are to the written page number on the cited document, unless the document is without page numbers, in which case the page number references the .pdf page number.)

traffic ticket diversion pays for law enforcement officers “work[ing] overtime,” “the Sulphur City Marshall’s Office,” “vehicles for law enforcement agencies, various types of equipment (such as automated speed indicating trailers, body cameras and tactical gear), significant funding for the Calcasieu Parish Public Defender’s Office, as well as the Calcasieu Parish District Attorney’s Early Intervention Program in elementary schools.”³

De Soto Parish is no different. As former Sheriff Rodney Arbuckle explained, traffic ticket diversion is “all about a money-making program. Sure it helps you with traffic safety. But in the long run, it’s all about the money.”⁴ District Attorney Evans uses the money generated from traffic ticket diversion to “fund the operation of the District Attorney’s Office,” “to acquire various types of equipment to assist law enforcement agencies (such as radar units and new state-of-the-art digital ticket machines),” and to support the “Public Defender’s Office.”⁵

³ Local Agency Compensated Enforcement (L.A.C.E.), Fourteenth Judicial District Attorney’s Office, *available at* <https://www.calcasieuda.com/programs-services/l-a-c-e/>.

⁴ Gerry May, *Top DeSoto law enforcers’ feud stifles criminal justice funds*, ktbs.com (Jan. 25, 2018), *available at* <https://goo.gl/qYRLwm>.

⁵ Local Agency Compensated Enforcement (L.A.C.E.), DeSoto Parish District Attorney, *available at* http://desotoda.org/?page_id=31.

In the future, Evans said that he plans “to pay for a drug court judge, and maybe a mental illness court” “[i]f I can make enough money” through diversion.⁶

Traffic ticket diversion produces such largess because Evans hires law enforcement officers to work outside their regularly scheduled hours to write additional traffic tickets. This arrangement is memorialized through Local Agency Compensated Enforcement (“LACE”) agreements with the State Police and Mansfield Police Department.⁷ The tickets that LACE officers issue are specially designed to steer money to the District Attorney’s Office: unlike a regular ticket, which directs motorists to the sheriff’s office for payment, LACE-funded officers direct motorists to contact the District Attorney’s Office.⁸ Evans follows up on this directive by sending a letter to 91 percent of motorists who receive one of these tickets to offer “the opportunity to enter a Traffic Diversion Program.”⁹ The letter

⁶ Jeff Beimfohr, *Diversion creates division in DeSoto Parish*, ktbs.com (July 6, 2017), available at <https://goo.gl/8M8pRr>.

⁷ See District Attorney Evans’s Response to SPLC’s Public Records Request at 24–28, available at https://www.splcenter.org/sites/default/files/evans_response_to_public_records_request_0.pdf.

⁸ See Daryl G. Purpera, et al., *District Attorney for the 42nd Judicial District Traffic Diversion Program*, at 6 (July 12, 2018), available at [http://app.lla.state.la.us/PublicReports.nsf/0/C89B936D35F5A2BE862582C8006F6A0E/\\$FILE/00019CD4.pdf](http://app.lla.state.la.us/PublicReports.nsf/0/C89B936D35F5A2BE862582C8006F6A0E/$FILE/00019CD4.pdf).

⁹ *Id.* at 4 & n.I.

states that Evans will dismiss the traffic ticket if the motorist pays the District Attorney's Office \$200 and reads a two-page driver safety information brochure (the brochure is about speeding, seatbelts, and driving while intoxicated—but traffic ticket diversion is offered to people cited for unrelated reasons such as an expired inspection sticker, excessive window tint, and no proof of insurance).¹⁰

When a motorist pleads guilty in court, state statute directs the fine and court costs to be shared among more than a dozen agencies. By contrast, Evans has complete discretion and control over the \$200 diversion enrollment fee that he collects. This amount is ten times what the District Attorney's Office would receive in court costs if the motorist pleaded guilty or was found guilty following court prosecution (i.e., \$200.00 versus \$20.00).¹¹ The cost of administering diversion is minimal. In 2017, Evans generated \$700,904.07 from diversion and spent only about \$60,032.30 on salaries, office expenses, and equipment.¹² There

¹⁰ De Soto Parish District Attorney's Payment Portal, *available at* http://desotoda.org/?page_id=25; *see also* Daryl G. Purpera, *supra* n.8 at 19.

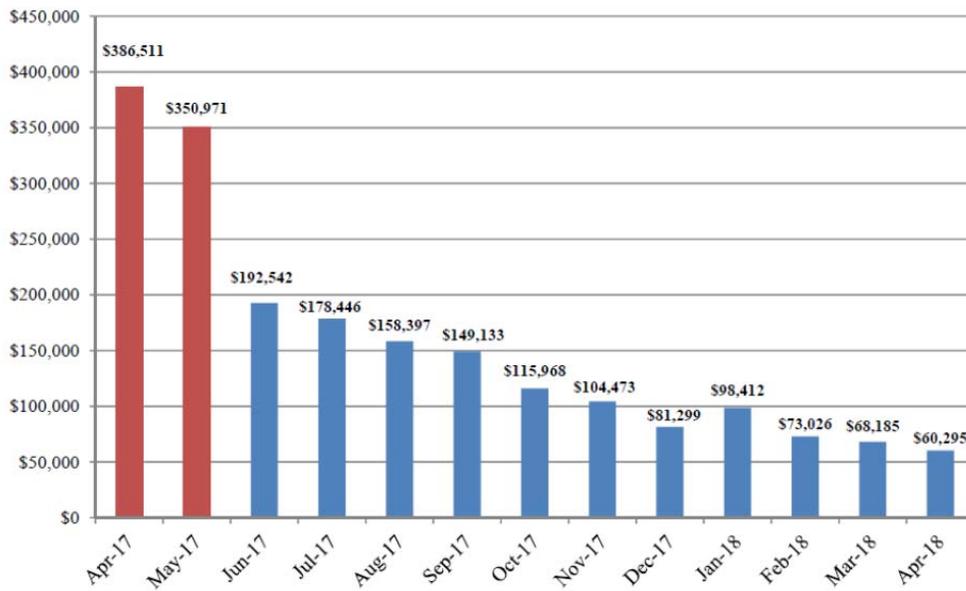
¹¹ The District Attorney's Office receives \$20.00 following a court conviction in a traffic case to reimburse the District Attorney's Office for the cost of prosecution. La. Stat. Ann. § 16:16 (imposing court costs in the amount of \$10 on each conviction); La. Stat. Ann. § 16:16.1 (imposing an additional \$10 as court costs to defray the expenses of prosecution).

¹² Evans spent an additional \$363,812.79 to reimburse law enforcement officers and \$20,875 to "assist law enforcement agencies," but this is a cost of increased law enforcement presence on local highways and roads, not a cost to administer diversion. *See* District Attorney Evans's Response to SPLC's Public Records

is good reason why the program is so profitable: traffic ticket diversion is simply a monetary transaction. Motorists are not given any services, except for the ability to avoid prosecution.

While enriching the District Attorney’s Office, traffic ticket diversion has also destabilized funding for other criminal justice agencies.¹³ According to the Legislative Auditor, traffic ticket diversion resulted in about \$1 million less in revenue to the court, public defender’s office, sheriff’s office, and other agencies between March 23, 2017 and March 31, 2018:¹⁴

Traffic Citation Revenue Flowing through DeSoto Parish's Criminal Justice System



Request, *supra* n.7 at 9. Regardless, even accounting for such payments, Evans generated \$256,183.98 in profits from traffic ticket diversion. *Id.*

¹³ See Daryl G. Purpera, *supra* n.8 at 10–13, 17.

¹⁴ See *id.* at 2, 10, 12.

The program has had a significant impact on the Public Defender’s Office, which is almost entirely funded through a \$45 court cost assessed when a person pleads guilty or is found guilty following trial.¹⁵ If “tickets are not filed”—as is the case when the District Attorney’s Office diverts a traffic ticket—“revenue is not generated” for the Public Defender’s Office. *Id.* at 3. This is particularly problematic for this Public Defender’s Office, because nearly 100 percent of its operating budget is derived from court costs.¹⁶ For that reason, in January 2018, when Forty-Second Judicial District Public Defender Steven R. Thomas said that his office may have “to start refusing appointments,” he placed the blame squarely on traffic ticket diversion.¹⁷

On March 19, 2018, Evans signed a Cooperative Endeavor Agreement

¹⁵ La. Stat. Ann. § 15:168; *see also* Louisiana Public Defender Board, *2017 Annual Board Report*, at 1 (Jan. 2018) (“Districts still rely on funds raised locally to provide for a majority of their budget. This local funding source, primarily through traffic tickets, remains unreliable, unstable and insufficient.”), *available at* <https://goo.gl/vjioYr>.

¹⁶ *Id.* at 757 (showing that 100% of revenue in the Forty-Second Judicial District came from local funding).

¹⁷ Gerry May, *Top DeSoto law enforcers’ feud stifles criminal justice funds*, KTBS.com (Jan. 25, 2018), *available at* <https://goo.gl/PRaBkx>.

(“Agreement”) with Thomas to address these concerns.¹⁸ The Agreement provides that the District Attorney’s Office will pay the Public Defender’s Office \$45 for every traffic ticket diverted in exchange for the Public Defender’s Office making “reasonable efforts to employ an African/American attorney/attorneys to assist in the defense of DeSoto Parish criminal defendants” and maintaining “an adequate level of attorney and support staff that is competent, professional, [and] diverse.”¹⁹ Either party may terminate the Agreement if it is violated or, for any reason, after one year.²⁰

After reviewing the Cooperative Endeavor Agreement, Forty-Second Judicial District Court Judge Charles Adams issued an Order to Show Cause to the District Attorney and Public Defender “[w]hy the 42nd Judicial District Public Defender’s Office should not be removed, or other appropriate relief granted . . . in which the 42nd Judicial District Public Defender’s Office has been appointed, due to a conflict of interest.” *State v. Bayles*, 17-CR-28776 (La. 42nd D. Ct., 03/29/2018). The Public Defender and District Attorney filed recusal motions, which were denied. Writs were taken to this Court. Although the District

¹⁸ See Cooperative Endeavor Agreement, *available at* https://www.splcenter.org/sites/default/files/de_soto_cooperative_endeavor_agreement.pdf.

¹⁹ *Id.* at 2.

²⁰ *Id.*

Attorney's writ was denied, this Court granted the Public Defender's writ in part, recused Judge Adams, and authorized Judge Amy McCartney to proceed. *State v. Bayles*, 52,282 (La. App. 2 Cir. 4/26/2018); *State v. Bayles*, 52,301 (La. App. 2 Cir. 5/21/2018).

On June 4, 2018, Judge Adams declared that the Agreement violated the Sixth Amendment because it undermined the Public Defender's Office's independence: "[t]he Agreement places an indigent defendant in the precarious situation where the party seeking to convict him is now paying for the attorney who is supposed to be advocating for him in his attempt to avoid a conviction, mitigate his criminal liability, and protect his constitutional and statutory rights." *In re: Cooperative Endeavor Agreement*, No. 18-CR-29385, at *8–9. The court also found that the Agreement violated the Rules of Professional Conduct and implicated La. Const. Ann. art. V, § 26(C), La. Code Crim. P. art. 65, and La. Rev. Stat. § 16:17(E).

The District Attorney and Public Defender appealed Judge McCartney's decision. Those appeals are pending before this Court.

STANDARD OF REVIEW

The trial court found that the Agreement between the Public Defender and District Attorney violated the Sixth Amendment and Louisiana Rules of Professional Conduct. The "correct standard for reviewing a district court's

disqualification of a defense attorney for conflict of interest is abuse of discretion.” *United States v. Sanchez Guerrero*, 546 F.3d 328, 332–33 (5th Cir. 2008); *State v. Abdul*, 11-863 (La. App. 5 Cir. 4/24/12), 94 So. 3d 801, 815 (“The question of withdrawal or substitution of counsel largely rests within the discretion of the trial judge, and his ruling will not be disturbed in the absence of a clear showing of an abuse of discretion.”).

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion by exercising its inherent authority to declare the Cooperative Endeavor Agreement between the District Attorney and Public Defender in violation of the Sixth Amendment, Rules of Professional Conduct, and state law.

First, the district court properly exercised its inherent authority by invalidating the Agreement. Courts have the inherent authority to regulate the practice of law—particularly in criminal proceedings, where the constitutional rights and liberty of criminal defendants are at stake—and the explicit authority to declare contracts against public policy “on its own initiative.” La. Civ. Code art. 2030.

Second, the district court correctly found that the Agreement violated Louisiana Rule of Professional Conduct 1.8(f), which prohibits a lawyer from accepting “compensation for representing a client from one other than the client” unless “there is no interference with a lawyer’s independence or professional

judgment or with the client-lawyer relationship.” The Agreement interferes with the Public Defender’s independence because funding is made contingent on the District Attorney’s subjective evaluation of the Public Defender’s Office’s performance and because the Agreement authorizes the District Attorney to determine the Public Defender’s hiring priorities.

Third, the district court did not abuse its discretion in finding that the Agreement created an unwaivable conflict of interest, because the Agreement obligates the Public Defender to a party whose interests are adverse to his clients. A district court is given substantial latitude to find a conflict unwaivable to protect the rights of indigent defendants under the Sixth Amendment and to preserve the fairness of court proceedings.

Fourth, the district court correctly found that the Agreement implicated La. Code Crim. Proc. Ann. art. 65 and La. Const. Ann. art. V, § 26. These constitutional and statutory provisions establish a bright-line rule against district attorneys assisting in criminal defense. The Agreement violates the State’s constitutional and statutory structure limiting the District Attorney to representing the State in criminal prosecutions.

Fifth, La. Stat. Ann. § 16:17(E), as the court correctly observed, prohibits the District Attorney from spending diversion funds on anything but victim assistance programs and the administrative costs of traffic ticket diversion. The

Code of Governmental Ethics also prohibits the District Attorney from charging more for diversion than the cost of processing traffic tickets; the District Attorney may not allocate funds to pay for programs and expenses unrelated to diversion.

Sixth, state and federal law prohibit the District Attorney from profiting from diversion. The Fourteenth Amendment's Due Process Clause requires the District Attorney to operate in a disinterested manner when making charging decisions and to avoid injecting financial considerations into that decision.

For these reasons, as discussed further below, Amici urge this Court to affirm the district court's decision declaring the funding Agreement unlawful.

ARGUMENT

A. The District Court Properly Exercised Its Inherent Authority in Declaring the Agreement to Violate the Sixth Amendment and Rules of Professional Conduct.

Courts have the inherent authority to regulate the practice of law, particularly in criminal proceedings, where the constitutional rights and liberty of criminal defendants are at stake. The District Attorney makes three arguments why the district court improperly invalidated the funding Agreement. All three arguments are unavailing.

First, the District Attorney argues that the district court does not have the inherent authority to review a contract between the District Attorney and Public Defender. DA Br. at 13. Not so. A court has the inherent judicial power to issue

orders in aid of a court's jurisdiction and the regulation of the practice of law. *B.A. Kelly Land Co., L.L.C. v. Questar Expl. & Prod. Co.*, 47,509 (La. App. 2d Cir. 11/14/12), 106 So. 3d 181, 187; *Konrad v. Jefferson Par. Council*, 520 So. 2d 393, 397 (La. 1988). "Under the doctrine of inherent powers, courts have the power (other than those powers expressly enumerated in the constitution and the statutes) to do all things reasonably necessary for the exercise of their functions as courts." *Safety Net for Abused Persons v. Segura*, 96-1978 (La. 4/8/97), 692 So. 2d 1038, 1041; *see also* La. Const. art. 5, § 2; La. Code Civ. Proc. art. 191. Thus, if there is any "irregularity in the proceedings," a court has the "right" and "duty" to "correct" it. *State v. Kellogg*, 104 La. 580, 583–84 (1901).

The extent of a district court's inherent powers includes power over officers of the court, including the Public Defender and District Attorney. Hargrave, *The Judiciary Article of the Louisiana Constitution of 1974*, 37 La. L. Rev. 765, 768 (1977). A court possesses the inherent authority to appoint counsel for an indigent defendant as well as to determine whether the State must pay for appointed counsel and from what source. *State in Interest of Johnson*, 475 So. 2d 340, 342 (La. 1985), *superseded on other grounds by statute in State in Interest of S.C. v. D.N.C.*, 639 So. 2d 426 (La. App. 2 Cir. 06/22/94) (relying on the inherent authority doctrine to "award" an "attorney a reasonable fee" for representing an indigent

parent in child abandonment proceedings “from a source which the court deems appropriate” even without express legislative or executive authorization to do so).

A court also has the inherent judicial power to invalidate contracts that violate public policy. A contract is absolutely null when it violates public policy; “absolute nullity may be . . . declared by the court on its own initiative.” La. Civ. Code art. 2030; *see also* La. Civil Code Ann. art. 7 (“Persons may not by their juridical acts derogate from laws enacted for the protection of the public interest. Any act in derogation of such laws is an absolute nullity.”). Contracts that violate state and federal law are absolutely null. *See Skannal v. Jones Odom Davis & Politz, L.L.P.*, 48,016 (La. App. 2 Cir. 9/25/13), 124 So. 3d 500, 511, 515 (attorney-client contract that violated Louisiana Rule of Professional Conduct Rule 1.5(c) absolutely null). Thus, the court had the right—and the obligation—to invalidate the Agreement, even though both parties opposed the ruling. *See Soderquist v. Kramer*, 595 So. 2d 825, 829 (La. App. 2 Cir. 1992) (“[T]his court, in order to preserve the integrity of its inherent judicial power, should prohibit the enforcement of [a] contract which directly contravenes the Code adopted by this court to regulate the practice of law.”) (citations omitted) (emphasis in original).

Second, the District Attorney argues that the court lacked jurisdiction to declare the Agreement invalid. DA Br. at 11. The Louisiana Constitution provides that district courts have “original jurisdiction of all civil and criminal matters”

unless prohibited by law. La. Const art. 5, § 16; *Williams v. Midwest Employers Cas. Co.*, 28,118 (La. App. 2 Cir. 2/28/96), 669 So. 2d 616, 618. The district court unquestionably has subject matter jurisdiction over *State v. Bayles*, the criminal case from which this matter arose, as well as any case in which the District Attorney charges someone with a violation of criminal law. Louisiana law also gives the district court subject matter jurisdiction over contract disputes, including the contract at issue here. While neither party sought a declaration about the Agreement's constitutionality, a district court has the inherent authority to assess the validity of a contract that impacts the integrity of a justiciable controversy before it. *See* La. Civ. Code art. 2030 (An "absolute nullity may be . . . declared by the court on its own initiative."); *see also Culpepper & Carroll, PLLC v. Cole*, 39,438 (La. App. 2d Cir. 3/9/05), 896 So. 2d 341, 348 ("[L]ower courts have an inherent judicial power concerning the regulation of the practice of law which entails 'the responsibility to exert control by adjudicatory means of individual cases as they arise, including those relative to discharge of counsel and regulation of fees, whether by contingency contract or otherwise.'") (citations omitted), *rev'd on other grounds*, 2005-1136 (La. 4/4/06), 929 So. 2d 1224.

Third, the District Attorney argues that the district court's decision violates the separation of powers because it encroaches on the State's fiscal affairs and the District Attorney's freedom to contract with the Public Defender. DA Br. at 13.

The court's invalidation of the Agreement does no such thing. Instead, as discussed more fully below, the Agreement *preserves* the Legislature's province over indigent defense, La. Const. Ann. art. I, § 13, and enforces state law prohibiting district attorneys from assisting in criminal defense, La. Const. Ann. art. V, § 26; La. Code Crim. Proc. Ann. art. 65.

B. The Agreement Violates the Rules of Professional Conduct Because It Undermines the Independence of the Public Defender's Office.

The district court correctly found that the Agreement violates the Louisiana Rules of Professional Conduct. “The Louisiana Rules of Professional Conduct (formerly the Code of Professional Responsibility) have the force and effect of substantive law.” *Soderquist*, 595 So. 2d at 829. Louisiana Rule of Professional Conduct 1.8(f) prohibits a lawyer from accepting “compensation for representing a client from one other than the client” unless “there is no interference with a lawyer's independence or professional judgment or with the client-lawyer relationship.” The need for independence is particularly salient in the context of indigent defense. “There can be no fair trial unless the accused receives the services of an effective and independent advocate.” *Polk Cty. v. Dodson*, 454 U.S. 312, 322 (1981). A public defender is not the District Attorney's emissary, but opponent: she must be “free of state control.” *Id.*

The Agreement violates Rule 1.8(f) because it undermines the independence of the Public Defender's Office. The District Attorney's Office is providing funding under the Agreement to enable the Public Defender's Office to maintain an "adequate level of attorney and support staff."²¹ However, this funding is made contingent on the District Attorney's subjective evaluation of the Public Defender's competence, professionalism, and diversity; and the Agreement authorizes the District Attorney's Office to terminate the Agreement immediately, upon 30 days written notice, if it determines that the Public Defender's attorneys and support staff lack these qualities. The arrangement gives the District Attorney leverage over the Public Defender's Office that undermines its professional independence: The District Attorney could threaten the financial solvency of the Public Defender's Office by construing zealous advocacy as unprofessional representation. A public defender may also hesitate to vigorously defend a client against a district attorney's allegations knowing that it could upset its adversary *and* financial patron. This tension is inherent in an agreement through which the Public Defender is beholden to its adversary for funding and especially acute when a public defender uncovers evidence that the entity paying his salary may also be violating his client's constitutional rights.

²¹ Cooperative Endeavor Agreement, *supra* n.18.

The provisions in the Agreement pertaining to employment are even more troubling. The Agreement gives the District Attorney's Office influence over the Public Defender's Office's staffing and hiring decisions: the Agreement requires the Public Defender's Office to make efforts to hire an African American attorney as one of the conditions of receiving funding. Diversity is a worthy goal, but it undermines the independence of the Public Defender's Office when the District Attorney is allowed to determine the Public Defender's hiring priorities.

Louisiana's constitutional and statutory structure is designed to avoid the conflicts inherent in the Agreement between the Public Defender and District Attorney. Although the Louisiana Constitution gives the District Attorney responsibility over every state criminal prosecution in his district, it does not give him power to subsidize indigent defense. "In Construing a Constitution, resort may be had to the well-recognized rule of construction contained in the maxim '*expressio unius est exclusio alterius*,' and the expression of one thing in a Constitution may necessarily involve the exclusion of other things not expressed." *Stokes v. Harrison*, 238 La. 343, 358, 115 So. 2d 373, 379 (1959) (citation omitted). Other constitutional provisions reinforce the applicability of this principle in this context: La. Const. Ann. art. I, § 13 gives the authority to the Legislature to determine "a uniform system for securing and compensating

qualified counsel for indigents,” La. Const. Ann. art. I, § 13, and La. Const. Ann. art. V, § 26 explicitly prohibits district attorneys from assisting in criminal defense.

C. The District Court Did Not Abuse Its Discretion in Finding that the Agreement Created an Unwaivable Conflict of Interest.

The district court did not abuse its discretion by invalidating the Agreement between the District Attorney and Public Defender because it created an actual conflict of interest.

“The Sixth Amendment right to counsel includes the ‘right to representation that is free from any conflict of interest.’” *United States v. Hernandez*, 690 F.3d 613, 618 (5th Cir. 2012) (citation omitted). “A conflict exists when defense counsel places himself in a position conducive to divided loyalties.” *United States v. Garcia-Jasso*, 472 F.3d 239, 243 (5th Cir. 2006) (citation and quotation marks omitted). “If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists.” *State v. Walker*, 51,217 (La. App. 2 Cir. 5/17/17), 221 So. 3d 951, 967.

Although a defendant can waive a conflict of interest, two important interests authorize courts to decline a waiver: (1) “the essential aim of the [Sixth] Amendment,” which is “to guarantee an effective advocate for each criminal defendant,” and (2) the “independent interest” of courts “in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal

proceedings appear fair to all who observe them.” *Wheat v. U.S.*, 486 U.S. 153, 159–60 (1988); *see also State v. Tensley*, 41,726 (La. App. 2 Cir. 4/4/07), 955 So. 2d 227, 242–43 (“The question of disqualification of counsel . . . implicates not only Sixth Amendment rights of the accused, but also the interests of the courts in preserving the integrity of the process and the government’s interests in ensuring a just verdict and fair trial.”). These interests, as well as the potential for gamesmanship on the part of the defendant who waives a conflict only to later claim ineffective assistance, weigh heavily in favor of affording the district court “substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses.” *Wheat*, 486 U.S. at 163. Given the difficulties of the decision, the uncertainties involved where the conflict has yet to fully materialize, and the need for the district court to rely on its “instinct and judgment based on experience in making the [disqualification] decision,” the Supreme Court has held that while courts “must recognize a presumption in favor of petitioner’s counsel of choice,” the evaluation of whether “the facts and circumstances” of a particular case evince a conflict so serious as to be unwaivable is a discretionary one that is best left “primarily to the informed judgment of the

trial court.” *Id.* at 162–64; *see also State v. Whitlock*, 50,757 (La. App. 2 Cir. 9/28/16), 207 So. 3d 538, 546.

As discussed already, the Agreement conditions the Public Defender’s funding on the District Attorney’s subjective determination that the Public Defender is professional and competent and requires the Public Defender to pursue particular hiring priorities. The Agreement can be terminated at any time if the District Attorney believes that the Public Defender is insufficiently professional and nothing prohibits the District Attorney’s Office from suing the Public Defender for breach of contract for any perceived violation. Because the Public Defender “owes duties to a party whose interests are adverse to those of the defendant,” *Walker*, 221 So. 3d at 967, the district court did not abuse its discretion in concluding that the Agreement created an unwaivable conflict of interest.

D. The Louisiana Constitution and Code of Criminal Procedure Prohibit the District Attorney’s Office from Funding the Public Defender’s Office.

The Agreement also violates constitutional and statutory provisions that prohibit district attorneys from assisting in criminal defense. Article 65 of the Louisiana Code of Criminal Procedure states a bright-line rule: it is unlawful for district attorneys to “defend or assist in the defense of any person charged with an offense in any parish of the state.” Equally unambiguous is La. Const. Ann. art. V, § 26: “[n]o district attorney or assistant district attorney shall appear, plead, or in

any way defend or assist in defending any criminal prosecution or charge.” These provisions are even more protective than the Sixth Amendment and are intended “to avoid even the suggestion of impropriety” that could arise if a district attorney assisted with criminal defense. *See* Commentary, La. Code Crim. Proc. Ann. art. 65.

The Attorney General has advised that this prohibition must be “strictly construe[d]” in order to safeguard the adversarial system. La. Att’y Gen. Op. No. 83-895 (Nov. 7, 1983). “The reason why it is gross misconduct and a cause for removal from office for a district attorney or his assistant to defend or assist in defending a person who has committed a crime is because it is their duty to represent the State in prosecuting him.” *Kemp v. Stanley*, 204 La. 110, 137, 15 So. 2d 1, 10 (La. 1943). “The situation where a prosecutor acts as defense counsel while employed in a public capacity inevitably raises questions concerning his loyalties.” La. Att’y Gen. Op. No. 83-895, 1983 WL 177275 (Nov. 7, 1983). Thus, a law partner of a district attorney may not practice criminal law, La. Att’y Gen. Op. No. 84-881, 1985 WL 203413 (Feb. 25, 1985), and a district attorney “may not offer any assistance in any criminal defense, state or federal,” La. Att’y Gen. Op. No. 83-895 (Nov. 7, 1983), even if the prosecution is outside the district attorney’s jurisdiction.

The Agreement violates these provisions because it calls into question the District Attorney's undivided fealty to the State. The District Attorney's obligation under the Louisiana Constitution is "to represent the State" in prosecuting crime. *Kemp*, 204 La. at 137; *see also* La. Const. Ann. art. V § 26; *State v. Nunez*, 147 La. 394, 85 So. 52, 56 (1920). His ability to faithfully execute this responsibility is undermined when he voluntarily funds the criminal defense of the very people the law requires him to prosecute. Indeed, the constitutional and statutory provisions prohibiting district attorneys from assisting in criminal defense are designed to protect the adversarial system and to ensure the District Attorney's loyalty to the State. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring v. New York*, 422 U.S. 853, 862 (1975). Just as the District Attorney's obligation is "to represent the State" in prosecuting crime, *Kemp*, 204 La. at 137, a public defender's "professional and ethical obligations require him to act in a role independent of and in opposition to the State," *West v. Atkins*, 487 U.S. 42, 50 (1988).

The Louisiana Constitution guarantees this adversarial system by making the Legislature—not the District Attorney—responsible for funding the Public Defender's Office. La. Const. Ann. art. I, § 13 ("The legislature shall provide for a

uniform system for securing and compensating qualified counsel for indigents.”). The adversarial system is undermined when the District Attorney’s Office departs from its role under the Louisiana Constitution, supplants the Legislature as the entity funding the Public Defender’s Office, and conditions its financial support on the Public Defender agreeing to specific hiring goals and operating in a manner that the District Attorney determines is “competent,” “professional,” and “diverse.”²²

The District Attorney attempts to downplay these concerns by arguing that the Louisiana Constitution authorizes his office to use public funds “for programs of social welfare for the aid and support of the needy,” La. Const. Art. VII, § 14(B), and to enter into cooperative endeavor agreements that serve a “public purpose,” La. Const. Art. VII, § 14(C). DA Br. at 6–11. “When one constitutional provision addresses a subject in general terms and another addresses the same subject with more detail, the two provisions should be harmonized if possible, but if there is any conflict, the latter will prevail.” *Jackson v. City of New Orleans*, 2012-2742 (La. 1/28/14), 144 So. 3d 876, 893 (finding that constitutional provisions permitting political subdivisions to engage in a cooperative endeavor agreement did not permit city to contract for services specifically barred by the Louisiana Constitution). Louisiana Code of Criminal Procedure Article 65 and

²² *Id.*

Louisiana Constitution Article V, Section 26 both explicitly prohibit district attorneys from assisting in criminal defense. The Agreement is unlawful because these specific constitutional and statutory provisions cannot be harmonized with the District Attorney's general authority to enter into a cooperative endeavor agreement or to appropriate funds to help the needy.

E. State Law and the Code of Governmental Ethics Prohibit the District Attorney's Office from Spending Diversion Funds on Anything But Administrative Costs and Victim Assistance Programs.

The district court correctly noted that the Agreement between the Public Defender and District Attorney's Office may violate La. Stat. Ann. § 16:17(E). *See In re: Cooperative Endeavor Agreement*, at *11. State statute provides that “[t]he district attorney may assess and collect a reasonable fee from participants in pretrial diversion or pretrial intervention programs to support and maintain victims assistance and/or diversionary programs.” La. Stat. Ann. § 16:17(E). The statute does not authorize the District Attorney to transfer diversion funds to the Public Defender to pay for the salaries of its attorneys and support staff.

Moreover, the Attorney General has advised that it would violate the Louisiana Code of Governmental Ethics to use or transfer diversion funds to pay for programs or expenditures unrelated to diversion. La. Atty. Gen. Op. No. 93-481, 1993 WL 438522 (Aug. 31, 1993). The Public Defender's Office's attorneys and support staff do not administer the District Attorney's traffic ticket diversion

program. Thus, the Agreement violates not only La. Stat. Ann. § 16:17(E), but the State's ethics laws, too.

F. State and Federal Law Prohibit Evans from Profiting from Diversion.

Evans's traffic ticket diversion program raises ethical and constitutional concerns that are broader than his funding arrangement with the Public Defender.

First, to the extent that Evans is profiting from diversion, he is in violation of the State's ethics laws. The Code of Governmental Ethics provides that “[n]o public servant shall use the authority of his office or position, directly or indirectly, in a manner intended to compel or coerce any person or other public servant to provide himself, any other public servant, or other person with any thing of economic value.” La. Stat. Ann. § 42:1116. The Attorney General explicitly warned that it violates state law to charge more for diversion than the cost of administering the program because any additional fees would amount to “payments for the dismissal of prosecutions.” La. Atty. Gen. Op. No. 93-481, 1993 WL 438522 (Aug. 31, 1993).

Second, the Fourteenth Amendment's Due Process Clause prohibits Evans from using his charging authority to generate operating revenue. As the United States Supreme Court held, “[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious

constitutional questions.” *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-50 (1980); *see also Dick v. Scroggy*, 882 F.2d 192, 199 (6th Cir. 1989) (Celebrezze, J., concurring) (“That a prosecutor’s financial interest in a case can raise serious constitutional questions . . . is beyond question.”); *United States v. Farrell*, 115 F. Supp. 3d 746, 754 (S.D.W.Va. 2015) (“The potential for prosecutor partiality created by a pecuniary stake in the outcome of a criminal decision may also implicate due process.”). A prosecutor “is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all. . . .” *Berger v. United States*, 295 U.S. 78, 88 (1935). As a result, a prosecutor must “wield” his or her “criminal enforcement powers in a rigorously disinterested fashion.” *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810 (1987). This is especially important in the charging context when “the discretionary power exercised by the prosecuting attorney in initiation, accusation, and discontinuance of prosecution gives him more control over an individual’s liberty and reputation than any other public official.” *Ganger v. Peyton*, 379 F.2d 709, 712 (4th Cir. 1967) (citation omitted).

Public statements from the District Attorney and former sheriff raise serious concerns about whether Evans is abusing his charging discretion to raise revenue. As former Sheriff Rodney Arbuckle explained, traffic ticket diversion is “all about a money-making program. Sure it helps you with traffic safety. But in the long

run, it's all about the money.”²³ The District Attorney's financial records show that traffic ticket diversion generated \$700,904.07 in 2017, but cost only about \$60,032.30 to administer.²⁴ The Legislature Auditor recently concluded that the amount of money that the District Attorney charged for diversion “may be excessive and unreasonable” considering that the District Attorney's diversion account contained \$340,817.00 in unspent funds after accounting for all expenses last year.²⁵ Evans also appears to be using these profits to pay for things unrelated to diversion. According to the District Attorney's own website, Evans uses the money generated from traffic ticket diversion to “fund the operation of the District Attorney's Office,” “to acquire various types of equipment to assist law enforcement agencies (such as radar units and new state-of-the-art digital ticket machines),” and to support the “Public Defender's Office.”²⁶

CONCLUSION

Courts “have always been sensitive to the possibility that important actors in the criminal justice system may be influenced by factors that threaten to compromise the performance of their duty.” *Young*, 481 U.S. at 810. The district

²³ Gerry May, *supra* n.4.

²⁴ *See* Response to Public Records Request, *supra* n.7 at 9.

²⁵ Daryl G. Purpera, *supra* n.8 at 17.

²⁶ Local Agency Compensated Enforcement (L.A.C.E.), DeSoto Parish District Attorney, *available at* http://desotoda.org/?page_id=31.

court properly responded to this concern by finding that the Agreement between the District Attorney and Public Defender violated state and federal law. This Court should affirm her decision that it violates state and federal law when the Public Defender's Office is beholden to its adversary for funding.

Dated this August 1, 2018.

Respectfully Submitted,

A handwritten signature in cursive script that reads "Danielle Davis". The signature is written in black ink and is positioned above a horizontal line.

Danielle E. Davis, La Bar No. 37995

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief have been forwarded to all counsel of record on this date by placing the same in the United States mail with postage prepaid and addressed as follows:

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