

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL ACTION
 :
 v. :
 :
 STEVEN MAZZONE : NO. 99-0363-06

MEMORANDUM AND ORDER

HUTTON, J.

October 11, 2000

Presently before this Court are Government's Motion to Disqualify Joseph C. Santaguida, Esq. from the Representation of Joseph Merlino, Steven Mazzone or Any Other Defendant Based Upon Unwaivable Conflict of Interest (Docket No. 298), Joseph C. Santaguida's Response to Government's Motion to Disqualify Him As Counsel for Defendant Steven Mazzone (Docket No. 313), Government's Reply to Joseph C. Santaguida's Response to Government's Motion to Disqualify Him From Representation of Joseph Merlino, Steven Mazzone or Any Other Defendant Based Upon Unwaivable Conflict of Interest (Docket No. 322) and hearing held October 4, 2000.

I. INTRODUCTION

In this Motion, the United States of America seeks the disqualification of Joseph C. Santaguida, Esq. ("Santaguida") from the representation of Joseph Merlino ("Merlino"), Steven Mazzone ("Mazzone") or any other defendant in this case because of his numerous and multi-faceted conflicts of interest. Santaguida

opposes this Motion and asserts that the government fails to cite any instances of actual activity that would mandate that he be prevented from representing Mazzone in this action.

II. DISCUSSION

The Sixth Amendment to the Constitution guarantees that in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense. See *Wheat v. United States*, 486 U.S. 153, 158 (1988); *United States v. Voigt*, 89 F.3d 1050, 1074 (3rd Cir. 1999); *United States v. Dolan*, 570 F.3d 1177, 1180 (3rd Cir. 1978). The purpose of providing assistance of counsel is simply to ensure that criminal defendants receive a fair trial and that in evaluating Sixth Amendment claims, the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer. See *Wheat*, 486 U.S. at 159. Thus, while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant, rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers. See *id.* Thus, the right to counsel is not absolute. See *id.*

A court confronted with and alerted to possible conflicts of interest must take adequate steps to ascertain whether conflicts warrant separate counsel. See *Wheat*, 486 U.S. at 160. Courts have

recognized this concern as a basis to circumscribe the Sixth Amendment right to choose one's own counsel. See *id.*; *United States v. Stewart*, 185 F.3d 112, 122 (3rd Cir. 1999)(affirming disqualification of counsel based on conflict of interest); *Voigt*, 89 F.3d at 1073-80 (same). Furthermore, it is immaterial that the conflict be actual or potential. See *United States v. Voigt*, 89 F.3d 1050, 1075 (3rd Cir. 1996). Upon a showing of serious potential for conflict, a presumption in favor of a defendant's counsel of choice is overcome and the district court may disqualify counsel. See *Wheat*, 486 U.S. at 164; *United States v. Moscony*, 927 F.2d 742, 749-50 (3rd Cir. 1991). One such situation where a conflict arises is where a lawyer contacts a person implicated as a coconspirator with his own client to persuade that person not to cooperate with authorities. See *United States v. Grieg*, 967 F.2d 1018, 1020-21 (5th Cir. 1992).

Here, a potential conflict of interest, which requires the Court to disqualify Santaguida, involves his contact with Gaetano Scafidi ("Scafidi"). Since 1994, Scafidi has been imprisoned. See Government's Reply Brief at 8. He is serving a federal prison sentence for RICO and Hobbs Act extortion. Scafidi has admitted that he is a "made" member of the Philadelphia La Cosa Nostra family and that he has committed many crimes in furtherance of the conduct of the affairs of the criminal enterprise. He has also

advised that he, George Borgesi and Mazzone were long time associates of the organization.

As a mob war flared in 1993 between the Natale/Merlino faction and the faction loyal to the then boss John Stanfa, Scafidi became concerned that members of the Natale/Merlino faction, to which he belonged, did not trust him and were preparing to kill him. Accordingly, he defected to the Stanfa side. After this defection Scafidi survived several attempts to kill him before he was arrested and imprisoned.

As Scafidi was drawing near the completion of his sentence in early 2000, he concluded that he was still likely to be killed by the residue of the Merlino faction that was still on the street. This residue included his former friends Mazzone and Borgesi. Scafidi then informed the government that he was interested in cooperating. See *id.* at 9. Accordingly, he was transported via writ to testify before the federal grand jury sitting in the district. This resulted in his being moved from FCI Schuylkill to the Bucks County Prison.

Mr. Santaguida, then counsel for Merlino, traveled to the Bucks County Prison in Doylestown to visit Scafidi. Santaguida admits he knew that Scafidi had been writted to the Bucks County Prison by the government. This knowledge apparently came from mob associates at FCI Schuylkill with whom Scafidi had been incarcerated before he was moved. Santaguida also admits that he

called Assistant United States Attorney Barry Gross, stated that he was planning to visit Scafidi and asked explicitly whether Scafidi was cooperating. Gross made no such acknowledgment. Gross, however, told Santaguida that Scafidi was represented by attorney Christopher G. Furlong, Esq. Santaguida visited Scafidi without advising Furlong.

According to Scafidi, Santaguida told him that Borgesi was in Santaguida's office every day and was a nervous wreck. Santaguida assured Scafidi that Borgesi and Merlino were not planning to kill him and that he would be safe if he returned to Philadelphia once he was paroled. Santaguida told Scafidi that Borgesi would write him a letter assuring him that he would not have a problem if he returned to Philadelphia. See *id.* at 10. Santaguida also related that Borgesi "told all the guys that he (Borgesi) was 100% certain that Scafidi was not cooperating."

Scafidi's sense was that Santaguida visited him for the purpose of trying to determine whether or not he was about to cooperate. Fearing for his safety, Scafidi gave no sign that he was. Scafidi's assessment of Santaguida's purpose in visiting him is corroborated by a letter written to Scafidi by Borgesi that is dated March 5, 2000. See Government's Motion to Disqualify Joseph C. Santaguida, Esq., exhibit. L.

The Court concludes that a potential conflict exists because of Santaguida's contact with Scafidi, a person implicated as a

coconspirator with his own client. Santaguida's reassurances to Scafidi that he could come home and that Borgesi was 100% confident that Scafidi would not cooperate, can be reasonably interpreted as efforts to persuade Scafidi not to cooperate and testify. Thus, Santaguida must be disqualified.

Another potential conflict arises whenever an attorney's loyalties are divided. See *Moscony*, 927 F.2d at 710. Santaguida has at some point represented four of the nine remaining defendants in this case. See Record at 65, 90. Santaguida represented and secured the release of defendants George Borgesi and Martin Angelina ("Angelina") in connection the 1993 shooting of Michael Ciancaglini and Merlino. See Record at 91. While these defendants were not charged with any crimes in connection with the shooting, the mob war which precipitated the shooting is one of the RICO predicate acts in this case. Also, Santaguida represented and secured the release of both Borgesi and Angelina in connection with the 1998 Anthony Turra murder. See Record at 92-93. Borgesi is charged with this murder in this case. Furthermore, Santaguida represented Angelina in connection with the theft of an automobile. See Record at 93. The second superceding indictment returned March 30, 2000 included a racketeering count that charged Angelina and Merlino with receipt, possession and sale of the stolen automobile. Finally, Santaguida has represented both Merlino and Mazzone in connection with the charges in this case. See Record at 65. In

each representation, Santaguida's access to privileged information is conclusively presumed. See *United States v. Provenzano*, 620 F.2d 985, 1005 (3rd Cir. 1980).

The Court concludes that Santaguida's former representation of several other defendant's also presents a potential conflict of interest for which he should be disqualified. At oral argument, Santaguida argued that there is a united defense in this case. See Record at 85. He further asserts that a vigorous representation would not affect the other defendants he represented. See Record at 86. It is possible, however, that at some point at trial, he may be compelled to cross examine one of his former clients. One of his former clients, for example, could plea bargain and become a witness for the government. Confidences Santaguida learned through prior representations could be useful to impeach any witness who testifies against his client. In that event, an attorney who cross examines a former client inherently encounters divided loyalties. See *Moscony*, 927 F.2d at 750. Accordingly, Santaguida must be disqualified because of this potential conflict of interest.

In spite of any actual or potential conflict, Santaguida has asserted that his client would waive any conflict of interest. See Record at 86, 95. The Court notes, however, that it may decline a proffer of waiver by the defendant. See *Wheat*, 486 U.S. at 163. The United States Supreme Court has stated that the district court

must be allowed 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. See *id.* A waiver does not resolve the conflict of interest because the district court has an institutional interest in protecting the truth-seeking function of the proceedings over which it is presiding by considering whether the defendant has effective assistance of counsel, regardless of any proffered waiver. See *Moscony*, 927 F.2d at 749. This is true even if the conflict is potential. See *id.* at 750.

Thus, despite Santaguida's proffer that his client would waive any conflict of interest, the Court concludes that because the potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses, the waiver must be rejected.

III. CONCLUSION

The Court thus concludes that Joseph C. Santaguida must be disqualified from representing Mazzone and Merlino or any other defendant based on an unwaivable conflict of interest.

An appropriate Order follows.

