

interest. Pinsky opposes this Motion and denies he has any unwaivable real or potential conflict of interest.

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. Upon 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 Pinsky, involves his contact with Gaetano Scafidi ("Scafidi"). Since 1994, Scafidi has been imprisoned. See Government's Reply Brief at 15. 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 and Borgesi were long time associates of the organization. See *id.* at 15-16.

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 friend Borgesi. Scafidi then informed the government that he was interested in cooperating. 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. Pinsky went to the Bucks County Prison to see Scafidi. Pinsky's actions in visiting Scafidi at the Bucks County Prison were done without requesting or receiving permission from Scafidi's lawyer, Christopher G. Furlong, Esq. According to Scafidi, Pinsky visited him and assured him that Borgesi held no animosity toward him and it would be safe for him to return home. See *id.* at 18. Pinsky also gave a letter from Borgesi, allowed him to read it and then took it back. See government's Motion to Disqualify Morris W. Pinsky, Esq., exhibit F. Pinsky also offered him \$100 from

Borgesì, which he refused. This contact raises the potential conflict of interest because Pinsky's conduct suggests that Pinsky tried to influence either Scafidi's testimony before the grand jury or Scafidi's decision to cooperate with the federal authorities.

Another potential conflict arises whenever an attorney's loyalties are divided. See *Moscony*, 927 F.2d at 710. Here, Pinsky's loyalties are divided between Ralph Natale ("Natale"), an individual Pinsky represented in conjunction with a 1973 murder and his present client Borgesì. At oral argument, Pinsky asserted that he "did not represent Natale relative to the McGreal homicide" in 1973. See Record at 12. Contrary to Pinsky's assertion that he represented the union, rather than Natale, a police report of the investigation of McGreal's murder noted that the police interview of Natale took place at Pinsky's law office, in his presence and the primary focus of the interview of Natale was McGreal's murder. See Government's Motion to Disqualify Morris W. Pinsky, exhibit A. Thus, the Court concludes that Pinsky had represented Natale at that police interview as a possible criminal defendant. Pinsky's access to privileged information is conclusively presumed. See *United States v. Provenzano*, 620 F.2d 985, 1005 (3rd Cir. 1980).

In conjunction with his May 2000 guilty plea to RICO Conspiracy, Natale admitted that he committed the 1973 murder of McGreal. See Government's Reply at 6. As a cooperating government witness, if Natale is called as a witness, Pinsky would be under a

duty to cross examine Natale. Natale has indicated he has not waived his attorney-client privilege relating to past representation by Pinsky. See Government's Motion to Disqualify Morris W. Pinsky, at 15. These facts demonstrate a potential conflict between Pinsky's duty to keep his former client Natale's confidences and his duty to his current client, Borgesi, to vigorously cross examine Natale. In that event, an attorney who cross examines a former client inherently encounters divided loyalties. See Moscony, 927 F.2d at 750. Accordingly, Pinsky must be disqualified based on this conflict of interest.

In spite of any actual or potential conflict, Pinsky has asserted that his client would waive any conflict of interest. See Record at 24, 44. 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 Pinsky'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 is rejected.

III. CONCLUSION

The Court thus concludes that Morris W. Pinsky must be disqualified from representing George Borgesi or any other defendant based on an unwaivable conflict of interest.

An appropriate Order follows.

