

SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

PEOPLE OF THE VIRGIN ISLANDS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CASE NO. ST-08-CR-425
	)	CASE NO. ST-08-CR-426
PETER R. NAJAWICZ, AMOS W. CARTY, JR.,	)	CASE NO. ST-08-CR-427
and RODNEY E. MILLER, SR.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION

Pending before the Court are the Office of the Territorial Public Defender's Renewed Motion and Second Renewed Motion to be Relieved as Counsel filed by Chief Public Defender Samuel Joseph. For the following reasons, the Office of the Territorial Public Defender's Motions will be denied in part.

FACTUAL AND PROCEDURAL HISTORY

The Court appointed the Office of the Territorial Public Defender to represent Defendant Rodney Miller on October 4, 2013. Upon a motion seeking to be relieved as court-appointed counsel filed by Attorney Robert Leycock, Esq., of the Office of the Territorial Public Defender, the Court conducted a hearing on December 4, 2013, to discuss the details of any potential conflict of interest of the Office of the Territorial Public Defender incompatible with the zealous representation of Defendant Miller. The Court held that the Office of the Territorial Public Defender, and specifically Chief Public Defender Samuel Joseph, can provide conflict free representation to Defendant Miller. Further, the Court found that despite the small office size of the Office of the

Territorial Public Defender, the Office can effectively screen Attorneys VanHolten-Turnbull and Leycock, the attorneys represented to have a risk of potential conflict, from Defendant Miller's case.¹ The Office of the Territorial Public Defender, and specifically Chief Public Defender Samuel Joseph, now seek to be relieved as counsel for a second time.

STANDARD

"[T]he Sixth Amendment confers . . . [a defendant] a right to unconflicted counsel."² The Supreme Court of the Virgin Islands has adopted Model Rule of Professional Conduct 1.7, Comment 8, to define "conflict of interest:"

[A] conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests.³

Where a defendant or a defendant's counsel explicitly raises a potential conflict of interest prior to trial, the Court holds a duty to "inquire into the nature of that conflict,"⁴ absent which, a reviewing court will presume "prejudice . . . regardless of whether it was

¹ The Court's decision and findings of fact were also memorialized in a December 4, 2013, Order.

² *In Re Drue*, 57 V.I. 517, 523 (V.I. 2012) ("[U]pon notification that an actual or potential conflict of interest exists, a trial court has the obligation either to appoint separate counsel or take adequate steps to ascertain whether the risk was too remote to warrant separate counsel.") (citing *Campbell v. Rice*, 408 F.3d 1166, 1170 (9th Cir. 2005)) (citing *Holloway v. Arkansas*, 435 U.S. 475, 484 (1978)) (internal citations omitted); see US CONST. AMEND. XI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.").

³ *In Re Drue*, 57 V.I. at 523 (regarding concurrent conflicts of interest) (citing MODEL RULES OF PROFESSIONAL CONDUCT R. 1.7 cmt. 8 (1983)); See *U.S. v. Lech*, 895 F. Supp. 586, 590 (S.D.N.Y. 1995) ("Although the line between actual and potential conflicts of interest is not always clear, generally actual conflicts exist where a court finds that the conflict is so serious that it impedes the attorney's ability to present a vigorous defense.").

⁴ *Atley v. Ault*, 191 F.3d 865, 873 (1999). See also *In Re Drue*, 57 V.I. 517 (indicating an adequate inquiry includes weighing various factors such as whether the defendant is aware of the conflict and waived it, and whether the attorney can still zealously represent the defendant despite the conflict).

independently shown.”⁵ However, a court’s inquiry into a potential or actual conflict is case-specific.⁶ Thus, where “all of the relevant facts have [already] been disclosed the court,”⁷ and the Court has conducted an adequate inquiry finding that “the risk was too remote to warrant separate counsel,”⁸ absent new relevant facts, an additional inquiry may be unnecessary under the specific circumstances of the case.

ANALYSIS

In his Motion to be Relieved as Counsel, Attorney Joseph raises several issues that have previously resolved by this Court. First, Attorney Joseph argues that Assistant Territorial Public Defenders Simone VanHolten-Turnbull and Robert Leycock possess potential conflicts incompatible with the zealous representation of Defendant Miller. However, at the December hearing, the Court inquired into the details of Attorney VanHolten-Turnbull and Robert Leycock’s potential conflicts and clearly determined that “the risk of an actual conflict of interest is too remote to warrant separate counsel.”⁹ Based on the representations made by the Office of the Territorial Public Defender at the December hearing, the Court also found that no evidence suggested that any confidential communications, relevant discovery materials, or other substantive communication had been exchanged between Attorneys VanHolten-Turnbull, Leycock and the other attorneys in the Office of the Territorial Public Defender.¹⁰ However, in the abundance of caution

⁵ *Holloway*, 435 U.S. at 489; *see U.S. v. Horton*, 845 F.2d 1414 (7th Cir. 1988).

⁶ *Atley*, 191 F.3d at 872.

⁷ *Id.*

⁸ *In Re Drue*, 57 V.I. at 524.

⁹ Order, Dec. 4, 2013, at page 5. Defendant Miller also appeared via telephone at the hearing and indicated that he is willing to have the Office of the Territorial Public Defender continue to represent him so long as it can provide conflict free representation. *Id.* at 4.

¹⁰ Order, Dec. 4, 2013, at page 4; *see United States v. Judge*, 625 F. Supp. 901, 902 (D. Haw. 1986) (suggesting that where a “Chinese Wall” is promptly erected, the same concern that confidential

and to avoid any appearance of impropriety, the Court reassigned the matter to Attorney Joseph, the Chief Public Defender, and ordered him to construct an “ethical wall or cone of silence” within the Office of the Territorial Public Defender to ensure any potential conflicts within the Office of the Territorial Public Defender do not interfere with Attorney Joseph’s representation of Defendant Miller.¹¹ As such, Attorney Joseph’s arguments regarding the potential conflicts of Attorneys VanHolten-Turnbull and Leycock have already been resolved by this Court and need not be inquired into for a second time.

Second, Attorney Joseph continues to argue that Attorneys VanHolten-Turnbull and Leycock’s potential conflicts of interest have been imputed to the entire office pursuant to Model Rule of Professional Conduct 1.10. While the Court does not address whether the Office of the Territorial Public Defender falls under the purview of a “firm” under the Model Rules,¹² Model Rule 1.10 provides that:

- (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, *unless*
 - (1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; *or*
 - (2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer’s association with a prior firm, and

information will be shared amongst all attorneys in the office is severely diminished particularly in a public defenders office).

¹¹ Order, Dec. 4, 2013, at pages 4-7.

¹² See, e.g., *People v. Miller*, 404 N.E.2d 199, 202 (1980)(rejecting “the notion that a public defender’s office is to be treated as a law firm or an ‘entity’ in considering a conflict of interest claim; the disqualification of one assistant public defender due to a conflict of interest will not necessarily disqualify all members of the public defender’s office.”); See generally Catherine L. Schaefer, *Imputed Disqualification: Do Ethics Screens Adequately Shield Public Defenders from Conflicts of Interest*, 21-MAR Champion 29, 30 (1997) (discussing various jurisdictions’ approaches). Several jurisdictions have noted that a public defender’s office does not have the same financial incentives as private firms, thereby minimizing one consideration of Model Rule 1.10. *Id.*

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; . . . ¹³(emphasis added)

Once again, this argument was previously addressed in the December hearing, but the Court will briefly address it here. The Court repeats that it clearly found that the alleged potential conflicts of Attorneys VanHolten-Turnbull¹⁴ and Leycock¹⁵ are too remote to warrant separate counsel, and appropriate screening mechanisms may attenuate any imputation of the alleged potential conflicts. The Court recognizes that due to the small size of the St. Thomas community, potential conflicts often may arise when the Office of the Territorial Public Defender is assigned to a matter. While it has been the practice of this Court to often permit the entire Office of the Territorial Public Defender to be relieved as counsel as a precautionary measure in cases involving a potential conflict, this practice in no way suggests that effective screening mechanisms may not achieve the same result and preserve a Defendant's Sixth Amendment right to conflict-free representation.

Third, Attorney Joseph argues that any screening mechanisms such as an "ethical wall or cone of silence" would be inefficient due to the small size of the Office and the collaborative environment of the Office. At the December hearing, the Court inquired

¹³ MODEL RULES OF PROFESSIONAL CONDUCT R. 1.10; *see also* MODEL RULES OF PROFESSIONAL CONDUCT R. 1.11.

¹⁴ Attorney VanHolten-Turnbull's potential conflicts of interest arise from her personal relationship with some of Defendant Miller's current or previous co-defendants, as well as her previous employment as an Assistant Attorney General. While at the Attorney General's Office, Attorney VanHolten-Turnbull stated at the December hearing that she did not work directly on Defendant Miller's case and did not acquire intimate knowledge of the case, but could have overheard some information or accessed the case files. Once again, the Court found that screening Attorney VanHolten-Turnbull from the matter is sufficient under the Model Rules to protect Defendant Miller's sixth Amendment right to unconflicted counsel.

¹⁵ Attorney Leycock's potential conflict of interest was personal in nature, but the Court found it does not "present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm," particularly with the precautionary measure of placing appropriate screening mechanisms in place.

into the size, structure, and composition of the Office of the Territorial Public Defender and determined that, although the Office of the Territorial Public Defender is small,¹⁶ effective screening measures can be erected.¹⁷ Additionally, while the Court recognizes that it is the practice of the Office of the Territorial Public Defender to “collaborate” on cases, no such collaboration has occurred to date in the case of Defendant Miller, and such collaboration is not necessary to ensure the effective representation of a Defendant. The Court further noted at the December hearing that Attorney Joseph, the Chief Public Defender, has years of complex criminal defense experience and has his own physically separate office where he may isolate the materials related to Defendant Miller’s case from the rest of the Office of the Territorial Public Defender. While the Office of the Territorial Public Defender argues that it lacks the resources to create effective screening measures or an “ethical wall,” the Court does not find such a broad argument persuasive since screening is regularly practiced in other jurisdictions both within public defender’s offices and private firms.¹⁸

¹⁶ See, e.g., Diane E. Courselle, *When Clinics Are “Necessities, Not Luxuries”: Special Challenges of Running A Criminal Appeals Clinic in A Rural State*, 75 Miss. L.J. 721, 731 (2006) (recognizing the challenges that a small criminal appeals clinic may face, but recognizing that “good [screening] practices” can be developed to manage such potential conflicts and allow lawyers to zealously advocate on behalf of their clients).

¹⁷ Order, Dec. 4, 2013, at pages 5-6. Pursuant to the Model Rule of Professional Conduct 1.0(k) “‘Screened’ denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.” See also MODEL RULES OF PROFESSIONAL CONDUCT R. 1.0 cmt. 9.

¹⁸ See, e.g., *Lech*, 895 F.Supp. 586 (noting that “automatically disqualifying the Federal Defender Division from representing [a defendant may be] . . . fundamentally unfair under the particular circumstances of the case without further inquiry,” particularly where the Federal Defender is intimately familiar with the case and usually has more expertise in complex criminal defense practice than an individual in private practice); *People v. Christian*, 48 Cal.Rptr.2d 867, 877 (1996) (“Speculative contentions of conflict of interest cannot justify disqualification of counsel”); *Miller*, 404 N.E.2d at 203 (necessitating a case-by-case determination whether one public defender’s actual conflict precludes another public defender from zealously representing the defendant).

Attorney Joseph also argues that the Superior Court lacks the power to assign a specific Public Defender to a particular matter pursuant to 5 V.I.C. § 3503(a). The Court disagrees. A plain language reading of 5 V.I.C. §3503(a) simply provides that the Superior Court may refer an indigent “defendant to the Office of the Public Defender, which Public Defender shall represent him at every stage of the proceeding against him; Provided, however, the Court may, when in its judgment the circumstances warrant it, assign other counsel to represent the defendant at every stage of the proceedings . . .”¹⁹ While it is the practice of the Court to generally refer a defendant to the Office of the Territorial Public Defender and allow the Office of the Territorial Public Defender assign a specific attorney to the matter, in no way does 5 V.I.C. §3503(a) prohibit the Court from assigning a specific attorney from the Office of the Territorial Public Defender, particularly in cases that warrant such a specific assignment, as is the case here.

Insofar as Attorney Joseph has raised additional alleged potential conflicts that have not been previously brought to the attention of the Court regarding three members of the governing board of the Office of the Territorial Public Defender - Attorney Leonard Francis, Jr., Attorney Monica Howard, and Queen Terry and himself – the Court will conduct an evidentiary hearing on the matter. But, in the meantime, the Court reaffirms the December 4, 2013, Order that instructs Attorney Joseph to erect effective screening mechanisms within the Office of the Territorial Public Defender. These screening mechanisms shall be extended to the potential conflicts that Attorney Joseph has identified in his Motion and Renewed Motion to be Relieved as Counsel. A failure to

¹⁹ 5 V.I.C. §3503(a).

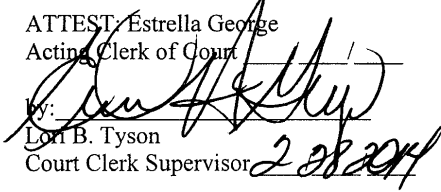
strictly abide by the Court's December 4, 2014, Order or the Order accompanying this Memorandum Opinion may be the basis for sanctions.

At the upcoming hearing on this matter, Attorney Joseph shall be prepared to testify not only to the alleged potential conflicts outlined in his Motion and Renewed Motion to be Relieved As Counsel, but shall also be prepared to testify to the specific screening mechanisms the Office of the Territorial Public Defender has erected to insulate Attorney Joseph from these potential conflicts. Attorney Joseph shall also provide a detailed written description of the screening mechanisms to the Court, opposing counsel, and Defendant Miller.²⁰

For the foregoing reasons, the Office of the Territorial Public Defender's Motions will be denied in part. The Court shall take the remainder of the Office of the Territorial Public Defender's Motions under advisement pending a hearing.

Dated: February 27, 2014

ATTEST: Estrella George
Acting Clerk of Court

By: 
Lon B. Tyson
Court Clerk Supervisor


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

²⁰ The Court need not remind the Office of the Territorial Public Defender of its mandate to zealously represent any indigent defendants referred to its Office by the Superior Court pursuant to its mandate under 5 V.I.C. § 3524. See *Fontaine v. People of the V.I.*, 2013 WL 5862599, at *3 (V.I. 2013).

SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

PEOPLE OF THE VIRGIN ISLANDS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CASE NO. ST-08-CR-425
	)	CASE NO. ST-08-CR-426
PETER R. NAJAWICZ, AMOS W. CARTY, JR.,	)	CASE NO. ST-08-CR-427
and RODNEY E. MILLER, SR.,	)	
	)	
Defendants.	)	
_____	)	

ORDER

The Court having appointed the Office of the Territorial Public Defender to represent Defendant Rodney Miller on October 4, 2013; and Chief Public Defender Samuel L. Joseph, Esq., having moved on January 27, 2014, and January 28, 2014, to be relieved as court-appointed counsel for Defendant Miller, it is

ORDERED that the Motions to be Relieved As Counsel of Samuel L. Joseph, Esq., are denied in part in accordance with the accompanying Memorandum Opinion; and it is

ORDERED this matter is scheduled for a hearing on Thursday, March 13, 2014, at 2:00 PM in Courtroom I of the Superior Court of the Virgin Islands; and it is

ORDERED that Defendant Miller may attend the hearing by telephone; and it is

ORDERED that Samuel L. Joseph, Esq., shall be prepared to discuss the details of any alleged conflict of interest of the Office of the Territorial Public Defender that is incompatible with the zealous representation of Defendant Miller; and it is

ORDERED that the Office of the Territorial Public Defender shall fully inform Defendant Miller of any alleged conflicts of interests prior to the hearing; and it is

ORDERED that the screening mechanisms, “ethical wall,” or “cone of silence” constructed as a result of the Court’s November 22, 2013, and December 4, 2013, Orders shall be immediately extended where necessary to the newly alleged potential conflicts of interest, a failure of which may be a basis for sanctions; and it is

ORDERED that the Office of the Territorial Public Defender shall be prepared to discuss the details of all screening mechanisms constructed at the Office of the Territorial Public Defender at the March 13, 2014, hearing; and it is

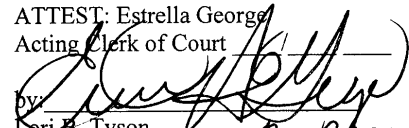
ORDERED that, prior to the March 13, 2014, hearing, the Office of the Territorial Public Defender shall provide the Court, Defendant Miller, and the Government with a detailed written description of the screening mechanisms specifically designed to preserve the ability of the Office of the Territorial Public Defender to zealously advocate on the behalf of Defendant Miller and preserve his Sixth Amendment right to unconflicted counsel; and it is

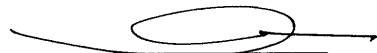
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ORDERED that copies of this Order shall be directed to Defendant Rodney Miller,
Defendant Amos Carty, Jr., the Office of the Territorial Public Defender, Assistant
Attorney General Denise George Counts, Esq., and counsel of record for Defendant Peter
Najawicz.

Dated: February 27, 2014

ATTEST: Estrella George
Acting Clerk of Court

by: 
Lori B. Tyson
Court Clerk Supervisor 2/27/2014


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS