

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-427**
)
)
) **RODNEY E. MILLER, SR.,**)
)
) Defendant.)
)
)
)

MEMORANDUM OPINION

Pending before the Court is the Office of the Territorial Public Defender’s January 28, 2014, Second Renewed Motion to be Relieved as Counsel for Defendant Rodney E. Miller, Sr., filed by Chief Public Defender Samuel Joseph. For the following reasons, the Office of the Territorial Public Defender’s Motion will be denied.

FACTUAL AND PROCEDURAL HISTORY

Due to the unique circumstances of this case, the Court is compelled to provide a brief summary of Defendant Miller’s history with counsel in this case. Beginning in October 2008, Defendant Miller was initially represented by two firms, Dudley Clark & Chan, LLP, and Grant & Lebowitz, LLC. Defendant Miller did not pay either retained law firm, and both law firms submitted requests to withdraw, which were denied on November 12, 2010.¹ Attorney Gary Alan Teague from Dudley Clark & Chan, LLP, represented Defendant throughout the first trial that began on May 13, 2011, and, once a mistrial was declared on June 24, 2011, because the jury was

¹ On March 4, 2011, a Petition for Writ of Mandamus to permit withdrawal as counsel was submitted by both law firms to the Supreme Court. The Petition was denied on April 11, 2011.

unable to reach a verdict after five days of deliberations,² the firm was permitted to withdraw. Although his Motion for Leave to Withdraw was never granted, Attorney Grant did not appear at trial and has not appeared since.³

On October 9, 2012, the Court verbally denied Miller's September 9, 2012, Renewed Motion for Appointment of Counsel.⁴ The next day Miller submitted an emergency appeal to the Supreme Court, which was denied on jurisdictional grounds. Despite repeated entreaties from the Court, Defendant chose not to retain alternative local counsel.

Initially, the Court found Miller financially able to obtain adequate representation and found nothing in Defendant's financial history that prevented Defendant from at least attempting to pay his counsel during and after the original trial.⁵ Approximately a year later, on October 4, 2013, the Court reexamined Miller's application for appointed counsel in light of his representation in the District Court of the Virgin Islands by the Federal Public Defender and the length of time this matter had been pending. The Court recognized that Miller remained unrepresented by counsel despite several attempts by the Court to have him retain representation and determined that Miller and the other Defendants could be severely prejudiced in the presentation of their defenses should Miller be required to try this case *pro se*. In order to avoid that prejudice, the Court appointed the

² The mistrial was upheld by the Virgin Islands Supreme Court on March 15, 2013, in *Najawicz v. People of the V.I.*, 58 V.I. 315, 340 (V.I. 2013).

³ Attorney Grant did not appear at trial because he was diagnosed with cancer, left private practice, and obtained employment that provided him with health insurance.

⁴ The decision was memorialized in an October 12, 2012, Memorandum Opinion in which the Court determined, "[d]efendant should not be allowed to avail himself of the valuable resources of the Superior Court under the guise of the protections afforded criminal defendants by the Sixth Amendment when he has simply made the choice to prioritize other financial expenditures over his defense. It is this Court's view that Defendant's claimed financial quandary is entirely a result of his own actions." *Id.* at 6-7. "Thus, Defendant's conduct before the Court indicates that he has knowingly and intelligently waived his right to counsel, and the Court has been forced to enter Defendant's *pro se* appearance on his behalf." *Id.* at 8.

⁵*Id.*

Office of the Territorial Public Defender to represent Miller on October 4, 2013.⁶ A significant factor in the Court's decision was that Miller's assets, remaining after the imposition of a CICO lien at the inception of this case had been exhausted in the five years the matter had been pending. In fact, Miller's primary residence had been sold at auction for his failure to make timely mortgage payments.⁷

Upon the motion of Territorial Public Defender Robert Leycock, Esq., seeking to be relieved as court-appointed counsel,⁸ the Court conducted a hearing on December 3, 2013, to receive evidence regarding any potential conflict of interest. At this hearing Miller indicated he was willing to have the Public Defender continue to represent him as long as he could be afforded conflict-free representation.⁹ The Court found that the Office of the Territorial Public Defender, and specifically Chief Public Defender Samuel Joseph, could provide conflict-free representation.¹⁰ Further, the Court concluded that, despite the small office size of the Office of the Territorial Public Defender, the Office could effectively screen Attorneys VanHoltten-Turnbull and Leycock, the attorneys purported to have a risk of potential conflict, from Miller's case.^{11,12}

⁶ The decision was memorialized by Order dated October 4, 2013. "[T]he Superior Court is... required to appoint the Territorial Public Defender unless the circumstances warrant a different appointment". *Fontaine v. People*, 59 V.I. 1004, n. 1 (V.I. 2013) (citing 5 V.I.C. § 3503(a)).

⁷ Attorney Joseph also claims in his January 28, 2014, Second Renewed Motion to be Relieved as Counsel, that a conflict exists from the mother of his two children being employed at BoltNagi PC, which handled documentation regarding Community Bank of Broward's foreclosure proceedings as the first priority mortgage holder of real property owned by Miller in Florida. However, since this potential conflict was discussed at the March 13, 2014, hearing with Miller in attendance, and since the record lacks evidence of any confidential communication between Attorney Joseph and the mother of his children regarding his representation of Miller, the Court finds any potential conflict too remote to create a significant risk that Attorney Joseph would materially limit his zealous representation of Miller. Further, the mother of Attorney Joseph's children is no longer employed at BoltNagi PC.

⁸ On October 23, 2013, Territorial Public Defender Robert A. Leycock, Esq., filed a motion to be relieved as counsel.

⁹ See Order dated December 4, 2013.

¹⁰ *Id.*

¹¹ The Court's decision and findings of fact were memorialized in the December 4, 2013, Order.

¹² Attorney Leycock is no longer employed by the Office of the Territorial Public Defender.

On January 27, 2014, and January 28, 2014, Chief Public Defender Samuel L. Joseph, Esq., moved to be relieved as court-appointed counsel for Defendant Miller. The Court denied the motions in part in a Memorandum Opinion and Order on February 27, 2014, and scheduled a hearing for March 13, 2014, instructing Attorney Joseph to be prepared to discuss the details of any alleged conflict of interest of the Office of the Territorial Public Defender incompatible with the zealous representation of Miller. Further, the Court ordered that the screening mechanisms constructed as a result of the Court's November 22, 2013, and December 4, 2013, Orders be immediately extended where necessary and that the Office of the Territorial Public Defender provide the Court, Miller, and the Government with a detailed written description of the screening mechanisms.¹³ The Court conducted an evidentiary hearing on March 13, 2014, and Attorney Joseph addressed the remaining portion of his motion. At the hearing the Court questioned Miller of his understandings of Attorney Joseph's representations, and Miller indicated he was not "comfortable" with representation by the Public Defender, but stopped short of explicitly withdrawing his consent. The People indicated they would not take a position on the motion.

At a brief hearing on December 1, 2014, the Court advised the parties that it had not yet ruled on the Motion and indicated that its findings would be issued in an Order to follow.¹⁴ After numerous continuances, a pretrial conference occurred on September 8, 2015.¹⁵ At the conference the Court orally denied Defendant's Second Renewed Motion to be Relieved as Appointed Counsel and indicated that a Memorandum Opinion would be issued. On December 2, 2015,

¹³ Chief Territorial Public Defender filed an Informational Motion with the Court on March 10, 2014, indicating the steps taken to comply with the Court's December 4, 2013, Order, and instructing the Office to erect an ethical wall.

¹⁴ See Order dated December 23, 2014.

¹⁵ See Order dated May 26, 2015.

Defendant filed a Motion for a Written Opinion/Order memorializing the Court's oral ruling at the September 8, 2015, pretrial conference.

STANDARD

"[T]he Sixth Amendment confers . . . [upon a criminal defendant] a right to unconflicted counsel."¹⁶ 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.¹⁷

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,"¹⁸ absent which, a reviewing court will presume "prejudice . . . regardless of whether it was independently shown."¹⁹ However, a court's inquiry into a potential or actual conflict is case-specific.²⁰ Thus, where "all of the relevant facts have [already] been disclosed,"²¹ and the Court has conducted an adequate inquiry

¹⁶ *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 defense.").

¹⁷ *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.").

¹⁸ *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).

¹⁹ *Holloway*, 435 U.S. at 489; see *U.S. v. Horton*, 845 F.2d 1414 (7th Cir. 1988).

²⁰ *Atley*, 191 F.3d at 872.

²¹ *Id.*

finding that “the risk was too remote to warrant separate counsel,”²² absent new relevant facts, an additional inquiry may be unnecessary under the specific circumstances of the case.

ANALYSIS

The Court addressed a majority of the issues raised by Attorney Joseph in his January 28, 2014, Renewed Motion to Withdraw in the February 27, 2014, Memorandum Opinion, with several of those issues having been previously resolved by the Court.²³ The Renewed Motion argued that the Office of the Territorial Public Defender is governed by an Administration Board that directs the Chief Public Defender’s supervision of the Office. Outstanding is the claim that an unwaivable conflict of interest exists involving three members of the Administrative Board, Attorney Leonard Francis, Jr., Attorney Monica Howard, and Attorney Queen Terry.²⁴

The “Public Defender Administration Board” is responsible for hiring and terminating all personnel and staff upon the recommendation of the Chief Public Defender. The Board is required to hear and decide all complaints and grievances of employees, promulgate rules and regulations governing employees rights and relations, and approve the annual budget for the office.²⁵ Most significantly, while the Board promulgates the rules and regulations governing employees, nothing in 5 V.I.C. § 3520 explicitly gives the Board authority to be directly involved in discussions or communications of any kind regarding the facts, investigation, defense strategy, or any other aspects of the defense of a case.

²² *In Re Druie*, 57 V.I. at 524.

²³ See Order dated December 23, 2014.

²⁴ Attorney Joseph also includes former Board member Elmo Adams Jr., whose mother is June Adams, former codefendant to Miller. However, since the record lacks evidence of Attorney Adams serving as a board member during the appointment of the Office of the Territorial Public Defender to represent Miller, or any kind of communication between Attorney Adams, the Office of the Public Defender, or the current Administration Board, the Court finds given the definition of conflict of interest, any potential for conflict is too remote to create a significant risk that Attorney Joseph would be materially limited in his zealous representation of Miller.

²⁵ 5 V.I.C. § 3520 (b).

Attorney Joseph alleges that three members of the Administrative Board had conflicts as of January 2014. First, Attorney Francis, had represented a former co-defendant, and his then legal assistant has since been employed by the Office of the Territorial Public Defender as the legal assistant to Attorney Joseph. Second, while employed with Smock and Moorehead, Attorney Howard had alleged discussions with Attorney Susan B. Moorehead regarding the preparation of Mrs. Beverly Chongasing, a witness for the People in the previous trial, for an interview with the Attorney General in relation to this matter. Third, Attorney Terry was employed with the Office of the Governor from July 1999 until February 2007 as Assistant and then Chief Legal Counsel to then Governor, Honorable Charles W. Turnbull. As Chief Counsel Attorney Terry wrote a legal opinion addressing the issue of fiscal management by Miller as Chief Executive Officer of Roy Lester Schneider Hospital and his refusal to turn over certain documents, which led to the eventual disclosure of documents that Attorney Terry believed became part of the case against Miller.

A court's inquiry into a potential or actual conflict is case-specific. Attorney Joseph raised the potential for a conflict of interest with members of the board at the end of January 2014. This was after the Court's December 4, 2013, Order, instructed Attorney Joseph to immediately create an ethical wall and screen all employees of the office from coming into contact with any matter from the case. On March 10, 2014, Attorney Joseph filed an informational motion indicating the steps taken to create an ethical wall within the office and stating that the "receptionist was notified that all documents, information or communication regarding Defendant Miller received by the office shall be delivered directly to Attorney Joseph and not shared or discussed with other employees."²⁶ As a result, it appears Attorney Joseph's legal assistant, the former assistant to

²⁶ Defendant's March 10, 2014, Informational Motion.

Attorney Francis, has had no access to any documents relating to the case nor any communications with Attorney Joseph regarding the case. Additionally, Attorney Joseph indicated that “all documents, communication or information received by the undersigned regarding Defendant Miller has been secured by placing the same in [Attorney Joseph’s private office] in a locked file draw that is not accessible to any person but [Attorney Joseph].”²⁷ Attorney Joseph further confirmed that “all staff has been notified verbally and in writing that all information, documents and communication received by the office regarding Rodney Miller shall be kept away from Public Administration Board member’s [sic] Attorney Leonard Francis, Attorney Queen Terry and Attorney Monica Howard.”²⁸ At the hearing on March 13, 2014, nothing was presented to the Court to indicate that substantive communications of any kind regarding Miller’s case were exchanged between any staff members of the Public Defender’s Office and members of the Administration Board.

Under 5 V.I.C. § 3520, the Public Defender Administration Board consists of five members, two appointed by the Presiding Judge of the Superior Court, one appointed by the Governor, one appointed by the President of the Legislature, and one appointed by the President of the Virgin Islands Bar Association. The terms of the members appointed by the Governor and President of the Legislature are coterminous with those of the persons by whom they are appointed.²⁹ Thus, the Court may take judicial notice that the terms of the Board members serving in January 2014 who had been appointed by Governor John P. deJongh, Jr., and Thirtieth

²⁷ *Id.*

²⁸ *Id.*

²⁹ 5 V.I.C. § 3520.

Legislature President Shawn Michael Malone have expired, since Governor deJongh and President Malone are no longer in office.

Additionally, the Court may also take judicial notice that the current Presiding Judge has appointed two new members to the Board since his term began in 2013, one of whom replaced Attorney Francis.³⁰ And, the Court may also take judicial notice that the presidency of the Virgin Islands Bar has changed twice since January 2014. Thus, based on the requirements of 5 V.I.C. § 3520, the terms of at least four, if not all, of the members serving on the Administrative Board in January 2014 have expired, and those persons are no longer members of the Board.

Even assuming *arguendo* that Attorney Francis, Attorney Howard, and Attorney Terry remain as members of the Administration Board (which is clearly not the case), no evidence has been presented to establish, and no precedent exists in this jurisdiction to require the conclusion that, the potential or actual conflicts of current or prior Board members are imputed to Attorney Joseph as Chief Public Defender, or to any other Attorney in that office. In regard to Attorney Francis' representation of a former co-defendant June Adams, the Court finds that this potential conflict is not an actual conflict, as all charges against Ms. Adams were dismissed with prejudice following the first week of trial in 2011, and the co-defendant is not listed as a witness for the People or otherwise involved in the case. The Court finds that, while it is remotely possible that Attorney Howard may have gained confidential information concerning this case while discussing preparations of Mrs. Chongasing's interview with the Attorney General, Attorney Howard is no longer involved with the case. If anything, the information she might have obtained would aid

³⁰ "Of the two members appointed by the Chief Judge of the Superior Court, one shall serve for three years and one shall serve for two years. Vacancies on the Board shall be filled for the unexpired term of the vacant member." 5 V.I.C. § 3520 (a).

Miller, rather than harm his defense, since disclosure of the information may reveal strategy by the People. Nevertheless, nothing indicates that Attorney Howard discussed Miller's case with Attorney Joseph or conveyed any information that would create an actual conflict. Although Attorney Terry was initially involved in the investigation against Defendant Miller, Attorney Terry is no longer Chief Counsel for the Governor or in any way involved in this case, aside from her position on the Board, if indeed she still remains in that position. While the Court previously declined to address whether the Office of the Territorial Public Defender falls under the purview of a "firm" under the Virgin Islands Rules of Professional Conduct,³¹ given the Court's conclusion that the potential conflict does not require or justify disqualification under the circumstances presented here, the Court will also decline to address whether the Board falls under the purview of a "firm" as it relates to the Office of the Territorial Public Defender.³²

Even still, the Court will review the most relevant Virgin Islands Rules of Professional Conduct involving imputed conflicts of interest, since Attorney Joseph claims that "to go forward

³¹ Jurisdictions utilize various approaches, for example "Colorado public defenders are deemed government lawyers under the Colorado Rules of Professional Conduct. Accordingly, conflicts of interest are not imputed throughout an entire office in that jurisdiction. *See People v. Shari*, 204 P.3d 453, 459 (Colo. 2009). Similarly, in Connecticut, public defenders are not considered 'members of the same firm.' *See Anderson v. Comm'r of Corr.*, 15 A.3d 658, 665 (Conn. App. Ct. 2011). Additionally, some states eschew a per se rule in favor of a flexible case-by-case approach, evaluating the facts of each case individually when determining whether the public defenders involved in the case work in a firm or as government lawyers. *See, e.g., State v. Severson*, 147 Idaho 694, 215 P.3d 414, 421, 426—27 (Idaho 2009); *Bolin v. State*, 2006 WY 77, 137 P.3d 136, 145 (Wyo. 2006)." *See State v. McKinley*, 860 N.W.2d 874, 884 n.6 (Iowa 2015)(discussing various approaches of other jurisdictions); *see also 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."); *People v. Christian*, 48 Cal.Rptr.2d 867, 877 (1996)("Speculative contentions of conflict of interest cannot justify disqualification of counsel.").

³² Several jurisdictions have noted "the unique nature of public defender offices as opposed to private law firms. Unlike private law firms, the [Office of the Public Defender] is a not-for-profit public entity with a single source of clients engaged in a single type of legal proceeding. The [Office of the Public Defender] does not solicit clients or accept referrals from the public. Moreover, the attorneys are salaried employees rather than participants in the profits and revenue generated by a law firm. As such, their compensation is not driven by their success or failure." *State v. St. Dennis*, 2010 MT 229, ¶ 30, 358 Mont. 88, 96, 244 P.3d 292, 297-98 (citing *People v. Christian*, 41 Cal. App. 4th 986, 995, 48 Cal. Rptr. 2d 867 (1996)).

with representation in such circumstances would be tantamount to asking for a complaint for malpractice or an ethics grievance against the individual attorney and the entire Office of the Territorial Public Defender.”³³ The Court disagrees. Rule 211.1.10 of the Virgin Islands Rules of Professional Conduct 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 211.1.7 or 211.1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers of the firm.
- (b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:
 - (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
 - (2) any lawyer remaining in the firm has information protected by Rules 211.1.6 and 211.1.9(c) that is material to the matter.
- (c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 211.1.7.
- (d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 211.1.11.³⁴

The Court recognizes that Rule 211.1.10 of the Virgin Islands Rules of Professional Conduct defines conflicts in terms of clients. Significantly, Attorney Joseph does not argue any conflict affecting another client. Under Virgin Islands Rules of Professional Conduct 211.1.11, Specific Conflicts of Interest for Former and Current Government Officers and Employees:

- (d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:
 - (1) is subject to Rules 211.1.7 and 211.1.9; and
 - (2) shall not:
 - (i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing...³⁵

³³ Defendant’s January 28, 2014, Second Renewed Motion to be Relieved as Counsel, at 7.

³⁴ V.I. RULE PROF’L CONDUCT R. 211.1.10. Supreme Court Rule 211 established the Virgin Islands Rules of Professional Conduct by order dated December 23, 2013, and effective on February 1, 2014. “[T]o the extent applicable, the accompanying or related ABA Interpretive Guidelines, Comments and Committee Comments... govern the conduct of members of the Bar of this Territory.” V.I.S.C.T.R. 203.

³⁵ V.I. RULE PROF’L CONDUCT R. 211.1.11(d).

Therefore, a plain reading of 211.1.10 in conjunction with Rule 211.1.11, implies that 211.1.10 does not apply to current government employees.³⁶

This Court previously found that the alleged potential conflicts of Attorneys VanHolten-Turnbull³⁷ and Leycock³⁸ were clearly too remote to warrant the appointment of separate counsel.³⁹ As a result, the Court concluded that their conflicts did not impute to the other Public Defenders. Here, in regard to Attorney Francis, Attorney Howard, and Attorney Terry, the Court finds that the alleged conflicts are also too remote to warrant separate counsel, considering not only the fact that the board members are not public defenders and are not involved in the investigation or defense of Defendant Miller's case, but also that any imputation of the alleged potential conflicts was greatly diminished, if not extinguished, since appropriate screening mechanisms were put in place as early as December 2013.⁴⁰

The Court reiterates 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.⁴¹ While it has often 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

³⁶ Rule 211.1.7 of the Virgin Islands Rules of Professional Conduct addresses conflicts of interest for current clients and Rule 211.1.9, addresses duties to former clients.

³⁷ 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.

³⁸ 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 [Public Defender's Office]," particularly with the precautionary measure of placing appropriate screening mechanisms in place.

³⁹ February 27, 2014, Memorandum Opinion, at 5; December 4, 2013, Order, at 4-5.

⁴⁰ The Court addressed the effectiveness of proper screening mechanisms in its February 27, 2014, Memorandum Opinion.

⁴¹ *Id.* at 5.

a potential conflict between defendants and past or current clients, 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.⁴²

Based upon the facts specific to this case, the Court finds that there is not a significant risk that Attorney Joseph's ability to provide conflict-free representation to Miller will be materially limited in any way as a result of Attorney Joseph's responsibilities or relationship to the Board. After weighing several factors, including but not limited to the remoteness of the potential for a conflict of interest; the limited nature of the information to which the board members were exposed in relation to Miller's case; the absence of any evidence that confidential communications or substantive communications of any kind have been exchanged between any members of the Public Defender's Office and members of the Board, and the acknowledgment by Miller of the potential conflict, the Court concludes that the risk of an actual conflict of interest is too remote to warrant separate counsel and that the Office of the Territorial Public Defender, specifically Chief Public Defender Samuel Joseph, can provide conflict-free representation to Miller.

Attorney Joseph also argues that the Superior Court lacks the power to assign a specific Public Defender to a particular matter under 5 V.I.C. § 3503(a). The Court disagrees. As previously recognized by the Court, 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 . . ."⁴³ While the Court does not

⁴² See *supra* note 31; February 27, 2014, Memorandum Opinion, at 5.

⁴³ 5 V.I.C. §3503(a); Memorandum Opinion, February 27, 2014.

usually assign a specific Public Defender to the matter, 5 V.I.C. § 3503(a) does not 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 the Court has explained in its previous opinions. The Court derives its authority to do so from 4 V.I.C. § 513(d).

Given the extensive history of counsel involved in the representation of Miller, Attorney Joseph is the appropriate individual to represent Miller. Further, in this instance, justice requires his appointment as counsel.⁴⁴ “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.”⁴⁵ The Court finds unpersuasive Attorney Joseph’s claim that the Court failed to consider the “administrative duties that a Chief Public Defender is required to handle and the time it would take to prepare and go through this trial [for Miller].”⁴⁶ In *Fontaine v. People of the V.I.*,⁴⁷ the Supreme Court of the Virgin Islands observed that the Court is not the proper body for establishing rules and procedures governing the caseload of public defenders, “[r]ather, the Legislature vested such oversight with the Public Defender Administration Board, which possesses

⁴⁴ Incidental powers of courts, which include the power “[t]o preserve and enforce order in its immediate presence,” the power “[t]o enforce order in the proceedings before it,” and the power “[t]o provide for the orderly conduct of proceedings before it”. See 4 V.I.C. § 243; see also *Pub. Def.’s Office v. Venango Cty. Court of Common Pleas*, 586 Pa. 317, 328, 893 A.2d 1275, 1281 (2006).

⁴⁵ Memorandum Opinion, February 27, 2014, at 6. 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); see also *State v. St. Dennis*, 2010 MT 229, ¶¶ 31-32, 358 Mont. 88, 96-97, 244 P.3d 292, 29 (citing *Asch v. State of Wyoming*, 2003 WY 18, 62 P.3d 945, 953 (2003)) (“[I]t goes without saying that an experienced public defender who specializes in criminal defense is a valuable asset within the criminal justice system, especially to the indigent defendant. . .”).

⁴⁶ Defendant’s January 28, 2014, Second Renewed Motion to be Relieved as Counsel, at 10.

⁴⁷ 59 V.I. 1004 (V.I. 2013).

the authority...to hear employee grievances...⁴⁸ regarding workload limits. Additionally, the Court finds Attorney Joseph's arguments that "Courts have interpreted the Sixth Amendment to provide a presumptive right of counsel of Defendant's choice" and that "[i]n order to zealously represent our clients, it is incumbent the Office build a rapport with the client" unconvincing.⁴⁹

Even assuming *arguendo* that the Superior Court does not have the authority to appoint Chief Public Defender Joseph, which the Court does not concede, the Office of the Territorial Public Defender is still the appropriate appointment for Miller.⁵⁰ The Office of the Public Defender was established for the purpose of representing indigent criminal defendants appearing before the Superior Court.⁵¹ The Superior Court is required to appoint the Territorial Public Defender unless the circumstances warrant a different appointment.⁵² Even still, under 5 V.I.C. § 3503, judges of the Superior Court may appoint private counsel for indigent persons, "but in no more than 15 percent in cases of defendants who by reason of indigence, are unable to obtain counsel."⁵³ The

⁴⁸ *Id.* at 1011-12; see 5 V.I.C. § 3520(b).

⁴⁹ Defendant's January 28, 2014, Second Motion to be Relieved as Counsel, at 5; The Sixth Amendment does not guarantee a "meaningful attorney-client relationship" between an accused and his counsel. See *Morris v. Slappy*, 461 U.S. 1, 1314, 103 S.Ct. 1610, 1617, 75 L.Ed.2d 610 (1983)("The Court of Appeals' conclusion that the Sixth Amendment right to counsel would be without substance if it did not include the right to a meaningful attorney-client relationship, [citation omitted] (emphasis added), is without basis in the law. No authority was cited for this novel ingredient of the Sixth Amendment guarantee of counsel, and of course none could be."); "The right to counsel of choice extends to a criminal defendant who has hired his own counsel." *State v. Reeves*, 2006-2419 (La. 05/05/09), 11 So. 3d 1031, 1057.

⁵⁰ "[Another] reason to avoid an automatic disqualification rule for imputed conflicts of interest among assistant public defenders is fiscal. Paying outside counsel every time there are multiple defendants in a case would, no doubt, be quite an expense for the taxpayers of the state. Where there has been no showing of an actual conflict of interest, and thus no showing of prejudice to the defendants, the minimal benefit of a per se rule would not justify the additional expense. While we cannot and should not 'put a price on' the legal representation we provide to indigent defendants, the judicial branch of government still has an obligation to be fiscally responsible." See *State v. St. Dennis*, 2010 MT 229, ¶¶ 31-32, 358 Mont. 88, 96-97, 244 P.3d 292, 29 (citing *Asch v. State of Wyoming*, 2003 WY 18, 62 P.3d 945, 953 (2003)).

⁵¹ 5 V.I.C. § 3521.

⁵² *Fontaine*, 59 V.I. at 1007, n.1; see 5 V.I.C. § 3503(a).

⁵³ 5 V.I.C. § 3503 (a); "Although not determinative to our analysis, we also recognize that a system in which attorneys are appointed to involuntarily represent indigent defendants at a significantly reduced hourly rate may implicate the Takings Clause of the Fifth Amendment to the United States Constitution." *In re Halcombe*, S. Ct. Civ. Nos. 2015-0007, 2015-0066, __ V.I.__, 2015 V.I. Supreme LEXIS 39, at *60 n.23 (V.I. 2015)(citing *see, e.g., Joseph*, 2013 V.I. Supreme LEXIS 14, at *13; *In re Morton*, 56 V.I. 313, 320-21 (V.I. 2012); *DeLisio v. Alaska Superior Ct.*, 740 P.2d 437, 442-43 (Alaska 1987); *Arnold v. Kemp*, 306 Ark. 294, 813 S.W.2d 770, 774-75 (Ark.

Supreme Court of the Virgin Islands has found unpersuasive the Public Defender's arguments that "every single attorney employed by his office is overworked or why additional attorneys cannot be hired."⁵⁴ Further, the Supreme Court's recent holding in the case *In re Holcombe*, causes the Court to question the extent of its authority to appoint private counsel for Miller.⁵⁵ Given the history between Miller and private counsel, including Miller's failure to pay counsel who represented him in the first trial and his inability or unwillingness to obtain counsel in the approximately two-year period after his private counsel withdrew, and given that the first trial took six weeks, ultimately resulting in the dissolution of the firm that represented Miller, the Court fears that it would be hard pressed to find an attorney in the Virgin Islands community willing to volunteer to take on this case.⁵⁶

While the Court's original Order appointed the Office of the Territorial Public Defender to represent Miller, the only attorneys that have appeared from that office on behalf of Miller in this case are Attorney Leycock and Attorney Joseph. In the Court's findings of fact in the December 4, 2013, Order, the Court found that, up to that point, "no... attorney other than Attorney Leycock had appeared on behalf of Defendant Miller... worked on the case...had substantive discussions with Attorney Leycock regarding strategy, preparation of a defense, or any matter of significance regarding this case, or has had access to the Public Defender's case file regarding this matter."⁵⁷ It

1991); *State ex rel. Stephan v. Smith*, 242 Kan. 336, 747 P.2d 816, 842 (Kan. 1987); *State v. Lynch*, 1990 OK 82, 796 P.2d 1150, 1158 (Okla. 1990)); "While the Superior Court may enter into voluntary contracts with attorneys to provide representation to indigent defendants, cf. *Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235, 1252 (9th Cir. 2013) (holding Takings Clause not implicated when individual voluntarily contracts with the government to provide a service), it may not involuntarily conscript attorneys to provide any services...." *In re Holcombe*, 2015 V.I. Supreme LEXIS 39, at *73-*75.

⁵⁴ *Fontaine*, 59 V.I. at 1013.

⁵⁵ See *In re Holcombe*, S. Ct. Civ. Nos. 2015-0007, 2015-0066, __ V.I. __, 2015 V.I. Supreme LEXIS 39 (V.I. 2015).

⁵⁶ *Id.* at *67 n.29 (V.I. 2015)("Even the Bar Association concedes that there may be certain situations where it may be impossible to appoint counsel for a particular defendant from a panel, thus necessitating an involuntary appointment.").

⁵⁷ December 4, 2013, Order, at 2.

was only after that Order that Chief Public Defender Joseph was appointed to the case and was immediately ordered to create an “ethical wall or cone of silence to be constructed within the Office of the Territorial Public Defender’s Office.” As a result, the Court is confident that the Chief Public Defender Joseph and his office are fully equipped to offer Miller conflict-free and zealous representation to protect Miller’s Sixth Amendment right to counsel.

CONCLUSION

Judges of the Superior Court have “inherent authority to achieve justice by appointing a particular lawyer to represent a Defendant or litigant in a particular case....”⁵⁸ For the foregoing reasons, and those discussed in the February 27, 2014, Memorandum Opinion, the Office of the Territorial Public Defender’s January 28, 2014, Second Renewed Motion to be Relieved as Counsel will be denied.

Dated: January 29, 2016

ATTEST: Estrella George
Acting Clerk of Court

by: 
Lori Boynes-Tyson
Court Clerk Supervisor 1/29/16


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

⁵⁸ *In re Holcombe*, 2015 V.I. Supreme LEXIS 39, at *64-65 (quoting *Zarabis v. Bradshaw*, 185 Ariz. 1, 912 P.2d 5, 8 (1996)).