

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
COUNTY OF WINNEBAGO

FILED

Date:

12/4/19

William A. Klein
Clerk of the Circuit Court

By

[Signature]
Deputy
Winnebago County, IL

THE PEOPLE OF THE STATE OF ILLINOIS

Plaintiff,

No. 2019CF002828

vs.

DANIEL DUALLO BASILE III,
6/6/1968

Defendant(s).

**STATE'S MOTION FOR THE COURT TO DETERMINE ACTUAL CONFLICT
OR A SERIOUS POTENTIAL CONFLICT**

NOW COME the People of the State of Illinois, Marilyn Hite Ross, Winnebago County State's Attorney, by Jessica S. Maveus, Deputy State's Attorney, and request this court determine whether an actual conflict of interest exist regarding defense counsel Aaron Buscemi or whether there is a serious potential conflict of interest that may arise during trial and interfere with the defendant's rights to conflict free counsel of his choosing and in support of said motion, the People state as follows:

STATEMENT OF FACTS

1. The defendant is charged in Indictment 2019CF002828 with the offenses of Criminal Sexual Assault a class 1 felony which occurred on or about October 10, 2019. Aaron Buscemi entered his appearance to represent the defendant on October 23, 2019.
2. Eric Thurmond was present at two separate bars with Jane Doe and Daniel Basile on or about October 10, 2019 prior to the offenses alleged. Witnesses describe the intoxicated state of Jane Doe and that she was falling down prior to being assisted out of the bar and to Basile's car by Daniel Basile and a friend of Eric Thurmond's.

3. On October 24, 2019, Eric Thurmond was charged with the offense of Criminal Sexual Assault a class 1 felony arising from a separate incident on or about May 23, 2019. Aaron Buscemi entered his appearance for Eric Thurmond on October 31, 2019.

LEGAL OVERVIEW

Under the Sixth Amendment to the United States Constitution, a criminal defendant is entitled to the undivided loyalty of counsel who is free from conflicting interests or inconsistent obligations.

“A trial court must recognize a presumption in favor of defendant’s counsel of choice, but that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict. The evaluation of the facts and circumstances of each case under this standard must be left primarily to the informed judgment of the trial court.” *Wheat v. United States* 108 S.Ct. 1692, 100 L.Ed. 2d 140, 488 U.S. 153 (1988) *Wheat*, 486 U.S. at 164, 108 S.Ct. 1692. (*People v. Jackson* 2013 ILApp 3d 110685, 989 N.E. 2d 309, 370 Ill. Dec. 921.

A trial court’s decision to disqualify counsel based on a potential conflict of interest involves a two-step process. *People v. Ortega*, 209 Ill.2d 354, 283 Ill.Dec. 530, 808 N.E.2d 496. The court should first determine whether there is an actual conflict or a serious potential conflict. The proper criteria to determine whether the conflict can overcome the presumption in favor of counsel of choice and factors to consider in reaching that determination are: (1) the defendant’s interest in having undivided loyalty of counsel; (2) the State’s right to a fair trial in which defense counsel acts ethically and does not use confidential information to attack a State witness; (3) the appearance of impropriety should the jury learn of the conflict; and (4) the probability that continued representation by counsel of choice will provide grounds for overturning a

conviction. *Id.* The second and third factors cannot be waived by a defendant. *Id.* These factors are not exhaustive in the court's determination of an actual conflict or a serious potential conflict.

Under the Rules of Professional Conduct "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent." The duty of confidentiality continues after the client-lawyer relationship has terminated. (Rule 1.9 (a), Rule 1.9 (c)(1). (Exhibit 8)

ARGUMENT

The trial court "must recognize a presumption in favor of [defendant's] counsel of choice.' " *People v. Holmes*, 141 Ill.2d at 223, 152 Ill.Dec. 268, 565 N.E.2d 950, quoting *Wheat*, 486 U.S. at 164, 108 S.Ct. at 1700, 100 L.Ed.2d at 152. The defendant's choice of counsel should receive significant deference and the prosecution does not seek the replacement of Mr. Basile's selection of counsel. The question is whether the interests threatened by the conflict or potential conflict are weighty enough to overcome the presumption. *Holmes*, 141 Ill.2d at 228, 152 Ill.Dec. 268, 565 N.E.2d 950. *Holmes* identified four interests or factors that the court correctly considered in determining that the presumption was overcome in that case: (1) the defendant's interest in having the undivided loyalty of counsel; (2) the State's right to a fair trial in which defense counsel acts ethically and does not use confidential information to attack a State's witness; (3) the appearance of impropriety should the jury learn of the conflict; (4) the probability that continued representation by counsel of choice will provide grounds for overturning a conviction. *Holmes*, 141 Ill.2d at 226-27, 152 Ill.Dec. 268, 565 N.E.2d 950. A trial court may weigh any of these factors, as the case requires.

The *Holmes* court held that these four factors were not exhaustive. A court should seek to fairly consider all the interests that are affected by a conflict in a given case. As the Seventh Circuit noted, “The decision to disqualify an attorney in a criminal case requires an evaluation of the interests of the defendant, the government, the witness and the public in view of the circumstances of each particular case.” *United States v. O’Malley*, 786 F.2d 786, 790 (7th Cir.1986).

The prosecution’s need to call a witness who creates a conflict is often an important consideration. E.g., *United States v. Messino*, 852 F.Supp. 652, 656 (N.D.Ill.1994); *State v. Miller*, 160 Wis.2d 646, 659, 467 N.W.2d 118, 122 (1991). In *Messino*, defense counsel had represented two witnesses when they testified before a grand jury regarding the drug distribution conspiracy of which the defendant was allegedly a member. The two were also expected to testify for the government at trial. The court held that disqualification was merited, even though neither witness would testify directly about the defendant’s conduct, because the government had a legitimate need to call the witnesses to establish various facets of the conspiracy. It is even clearer that the witness in this case is important to the prosecution’s case because Montez was a witness to the conduct for which the defendants are charged. Montez, the defendants, and Agent Endre were the four persons present at the drug sale. We conclude that in this case the clearly legitimate need to call Montez gave the trial court little or no reason to expressly explore the possibility that the prosecution was overreaching when it moved to disqualify Robert Novelle.

Similarly, in the case at bar, Eric Thurmond may be called as a witness by either the prosecution or the defense. If called to testify his bias may be elicited in the fact that he has pending charges

being prosecuted by the same office. In addition, the fact that he has the same legal counsel may be used to show bias. This situation is similar to the factual scenario in *Messino, Id.* The factors that the court considers in determining whether counsel of choice is overcome by an actual or serious potential conflict are apparent in the case at bar. Specifically, the defendant has an interest in having the undivided loyalty of Mr. Buscemi. A potential serious conflict arises given defense counsel representation of this potential witness. This representation raises legitimate questions about Mr. Buscemi's ability to cross examine a witness he represents. Also, it may give the appearance of impropriety if the jury learns that Mr. Buscemi represents the witness in connection with the similar charges pending against him. This potential conflict between Mr. Buscemi's obligation to protect confidential information given to him and the interest of the defendant in a thorough cross-examination of the witnesses against him (*People v Jackson* 2013 Il. App. (3d) 110685, 989 N.E. 2d 309, 370 Ill. Dec. 921) should be determined prior to trial.

The court should also consider whether the interests threatened by the potential conflict outweigh the defendant's right to counsel of choice. Moreover, a reasonable person could fear that if the jury or other members of the public learned that the same attorney was permitted to represent both a witness and the defendant, the public may conclude that the trial is not fair or that the defense bar is being allowed to behave unethically.

For example, a reasonable person could fear that the public may assume that Mr. Buscemi may be less than fully loyal to either the defendant or to the witness. Reasonable people may disagree about whether counsel's representation of Eric Thurmond would appear improper to the public. However, the interest of the State in a fair trial and the judicial interest in proceedings that not only are fair but also appear fair are both substantial, and a reasonable person could assign them

substantial weight in this case. (*People v. Ortega* 808 N.E. 2d 496, 282 Ill. Dec. 530, 209 Ill. 2d 354 (2004).

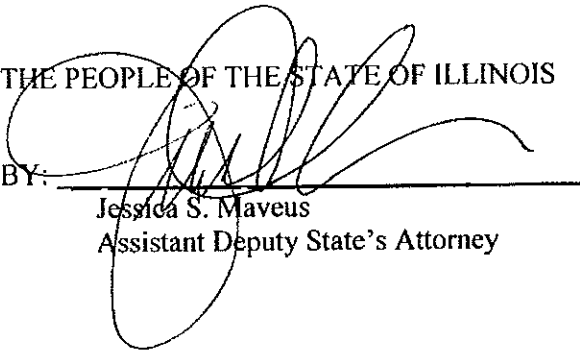
As in *Holmes*, a serious potential for conflict exists in the present case because Mr. Buscemi's client, Thurmond may testify during the State's case-in-chief and would be subject to cross-examination by counsel for Defendant when this case proceeds to trial. This would put Mr. Buscemi in the precarious position of cross-examining his client(s). That situation implicates the second and third *Ortega* factors. See *Holmes*, 141 Ill.2d at 226, 152 Ill.Dec. 268, 565 N.E.2d 950 (finding that counsel's prior representation of a potential State witness could result in counsel's cross-examination being "improperly restricted, and the adversarial process frustrated"). Mr. Buscemi's cross-examination may be hindered—or, conversely, unfairly enhanced—by any confidential information acquired through his representation of client Thurmond. The appearance of impropriety to the jury could occur if the State were to impeach Thurmond by questioning him about Mr. Buscemi's representation. Therefore, Mr. Buscemi's representation creates the potential for future conflict. Furthermore, Mr. Buscemi may be forced into the precarious position of using information shared with him in confidence to the disadvantage of his former clients. (*Jackson id.*) Thurmond may want to provide evidence or negotiate a favorable outcome in his case by providing evidence in the defendant's case. This puts Mr. Buscemi in a direct potential serious conflict.

CONCLUSION

The decision to disqualify an attorney in a criminal case requires an evaluation of the interests of the defendant, the government, the witness and the public in view of the circumstances of each particular case." *United States v. O'Malley*, 786 F.2d 786, 790 (7th Cir. 1986). The four nonexhaustive factors for reaching that determination are: (1) the defendant's interest in having undivided loyalty of counsel; (2) the State's right to a fair trial in which defense counsel acts

ethically and does not use confidential information to attack a State witness; (3) the appearance of impropriety should the jury learn of the conflict; and (4) the probability that continued representation by counsel of choice will provide grounds for overturning a conviction. *Id.* The second and third factors cannot be waived by a defendant. *Id.* There may be a serious potential conflict between Mr. Buscemi's professional obligation to protect confidential information given to him and the interest of the defendant in a thorough cross-examination of the witness against him.

Wherefore the People request this honorable court determine whether an actual or serious potential conflict exist.

THE PEOPLE OF THE STATE OF ILLINOIS
BY: 
Jessica S. Maveus
Assistant Deputy State's Attorney