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HEADLINE: Choice of Attorney Gives Way to Non-Waivable Conflict, Circuit Finds

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BODY:

A defendant convicted of racketeering and racketeering conspiracy in a violent effort to corner the tree service and logging market in northwest New York state was not deprived of his right to counsel of choice when a judge disqualified his attorney, a federal appeals court has ruled.

The U.S. Court of Appeals for the Second Circuit said the disqualification of attorney Angelo Musitano fell within a narrow class of so-called per se conflicts that are not waivable by defendant David Cain Jr. and therefore did not violate the Sixth Amendment.

Mr. Cain was convicted along with his brother, Chris Cain, and Jamie Soha following a six-week jury trial in 2007 before Western District Judge Richard J. Arcara. Jurors heard from 60 witnesses who helped the government build a case showing that a loosely organized gang headed by David Cain engaged in extortion, arson, robbery, insurance fraud and witness and evidence tampering.

David Cain, convicted on 16 counts, was ordered to serve 55 years in prison. Mr. Soha, convicted of racketeering conspiracy, three counts of extortion and using fire to commit a felony, was sentenced to 12 years in prison. Chris Cain was sentenced to 29 years and seven months, but the circuit reversed his convictions for racketeering and racketeering conspiracy based on an erroneous jury instruction. Mr. Cain will be resentenced because he remains convicted of mail fraud, use of a fire to commit a felony and a conspiracy to distribute marijuana.

The most significant issue to confront the Second Circuit in United States v. Cain, 09-0707-cr, was the challenge David Cain mounted to the disqualification of Mr. Musitano.

At a 2006 pretrial conference, Magistrate Judge H. Kenneth Schroeder Jr. was told by the government that it intended to call Mr. Musitano as a witness before a grand jury considering potential witness tampering by Mr. Cain.

Prosecutors claimed Mr. Cain had tried to influence Timothy Smider, a witness against him in a parallel state prosecution, to provide perjured affidavits recanting statements in which he had inculpated Mr. Cain.

Mr. Musitano was to be called as a witness because he had introduced the affidavits into court, and prosecutors wanted to establish that Mr. Cain had possessed the affidavits and intended them to be filed in an official proceeding.

The magistrate judge put off decision and appointed another attorney, Daniel Henry, to advise Mr. Cain. But when Mr. Musitano actually received the grand jury subpoena a few weeks later, Magistrate Judge Schroeder ruled that Mr. Musitano had an unwaivable conflict of interest and must be disqualified. Over Mr. Cain's objection, Mr. Henry was appointed as permanent counsel and represented him at trial.

'Broad Latitude'

The appeal to the Second Circuit was heard on Oct. 11, 2011, by Judges Jon O. Newman (See Profile) and Gerard E. Lynch (See Profile) and, sitting by designation, Judge Jane A. Restani of the U.S. Court of International Trade.

Despite the fact that there is a "very narrow" class of cases where an attorney conflict is "truly unwaivable," Judge Lynch, writing for the panel, cited United States v. Fulton, *5 F.3d 605 (2d Cir. 1993)*, for the notion that "judges are granted broad latitude in making a decision whether to disqualify a defendant's chosen counsel."

In Wheat v. United States, *486 U.S. 153 (1988)*, the U.S. Supreme Court let stand the rejection of substitute defense counsel on the ground that he had an unwaivable conflict because he represented two codefendants and potential witnesses in the case.

The Wheat court, Judge Lynch said, "observed that two important interests may impose limits on a defendant's right to waive attorney conflict; (1) 'the essential aim of the [Sixth] Amendment,' which is 'to guarantee an effective advocate for each criminal defendant,' and (2) the 'independent interest' of federal courts 'in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.'"

Judge Lynch said, "These interests, as well as the potential for gamesmanship on the part of the defendant who waives a conflict only to later claim ineffective assistance, weigh heavily in favor of affording the district court" wide latitude to refuse a defendant's request to waive the conflict.

The Supreme Court in Wheat said judges should be given "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."

Judge Lynch said that "although we have considered challenges to the disqualification of counsel on the basis of a per se conflict in at least four cases since Wheat, we have never concluded that the trial court abused its discretion in disqualifying a conflicted attorney."

Here, while Mr. Musitano was not a target of the investigation, Judge Lynch said, "we cannot say that the district court abused its discretion in concluding that the risk Musitano would become a witness against his client was sufficient to justify his qualification."

Charles F. Willson of Nevins & Nevins in East Hartford, Conn., represented David Cain on the appeal. Marc Fernich

represented Chris Cain. Jonathan Svetkey of Watters & Svetkey represented Jamie Soha.

Assistant U.S. Attorney Stephan J. Baczynski represented the government.

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