

TABLE OF APPENDICES

	<i>Page</i>
APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED MARCH 20, 2024	App. 1
APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED MARCH 20, 2024	App. 4
APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION, DATED SEPTEMBER 29, 2022	App. 6

App. 1

**APPENDIX A — OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT,
FILED MARCH 20, 2024**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22-51003

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JEFFREY FAY PIKE,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:21-CV-1226

Before STEWART, CLEMENT, and Ho, *Circuit Judges.*

PER CURIAM.*

Jeffrey F. Pike appeals the district court’s decision disqualifying his attorney because the attorney previously represented a government informant who was a potential witness in Pike’s case. We affirm.

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

App. 2

Appendix A

Pike was the president of the Bandidos Outlaws Motorcycle Club. He was charged with several counts of conspiracy under the Racketeer Influenced and Corrupt Organizations Act (RICO). *See United States v. Portillo*, 969 F.3d 144, 157-59 (5th Cir. 2020). He retained Kent Schaffer to represent him. But a district court disqualified Schaffer from representing Pike because the lawyer previously represented Bandidos members who were potential government witnesses.

We review the disqualification of counsel due to conflict of interest for abuse of discretion. *See United States v. Sanchez Guerrero*, 546 F.3d 328, 332-33 (5th Cir. 2008). We find no abuse of discretion here.

“The Sixth Amendment right to choose one’s own counsel is circumscribed in several important respects.” *Wheat v. United States*, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988). We “recognize a presumption in favor of [a 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.” *Id.* at 164. “[T]he 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.” *Id.* at 163; *see also United States v. Gharbi*, 510 F.3d 550, 553 (5th Cir. 2007).

There is ample record evidence of a conflict to support the district court’s decision to disqualify here.

App. 3

Appendix A

Schaffer conceded that he previously represented Bandidos members, and that he reviewed all their case files. Certified public records confirmed that Schaffer, and a member of his firm, represented the government's cooperating witnesses during the RICO conspiracy.

Nor did the district court violate Pike's due-process rights when it allowed the names of the government witnesses in question to be concealed from the defense in these proceedings.¹ We have long permitted the use of *in camera* proceedings to determine whether an informant's identity should be revealed. *See United States v. De Los Santos*, 810 F.2d 1326, 1335 (5th Cir. 1987). *See also United States v. Anderson*, 509 F.2d 724, 728-30 (9th Cir.) (finding no due process violation by an *in camera* hearing to determine whether to disclose the identity of the informant). And we see no due-process violation where, as here, certified public records confirmed the conflict, and the defendant was given a hearing and the opportunity to present argument in opposition to disqualification. *See United States v. Garcia*, 114 F. App'x 292, 294 (9th Cir. 2004).

We affirm.

1. We review Pike's due-process claim de novo. *See United States v. Burns*, 526 F.3d 852, 859 (5th Cir. 2008).

App. 4

**APPENDIX B — JUDGMENT OF THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH
CIRCUIT, FILED MARCH 20, 2024**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22-51003

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JEFFREY FAY PIKE,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:21-CV-1226.

Before STEWART, CLEMENT, and Ho, *Circuit Judges.*

JUDGMENT

This cause was considered on the record on appeal
and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment
of the District Court is AFFIRMED.

App. 5

Appendix B

The judgment or mandate of this court shall issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. *See* FED. R. APP. P. 41(b). The court may shorten or extend the time by order. *See* 5TH CIR. R. 41 I.O.P.

**APPENDIX C — ORDER OF THE UNITED
STATES DISTRICT COURT OF THE WESTERN
DISTRICT OF TEXAS, SAN ANTONIO DIVISION,
DATED SEPTEMBER 29, 2022**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SA-21-CV-1226-DAE
SA-15-CR-820-DAE-2

JEFFREY FAY PIKE
#04249-479,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

ORDER

Before the Court are Movant Jeffrey Fay Pike's Motion pursuant to 28 U.S.C. § 2255 ("Section 2255 Motion") to vacate, set aside, or correct his sentence and brief in support (ECF No. 916); the Government's sealed Response in opposition thereto (ECF No. 928); and Pike's sealed Reply (ECF No. 934). For the following reasons, the Section 2255 Motion is **DENIED**.

Appendix C

BACKGROUND

This case arises from Pike's position as the National and International President of the Bandidos Outlaw Motorcycle Organization, an organized crime syndicate. On December 16, 2015, a grand jury returned a nine-count Indictment against Pike, John Xavier Portillo, and Justin Cole Forster. (ECF No. 3). Pike retained attorneys Kent Schaffer and James Kennedy to represent him. (ECF Nos. 33 & 34). On July 6, 2016, a grand jury returned an eleven-count Superseding Indictment against Pike, Portillo, Forster, and a fourth co-defendant. (ECF No. 105). The Indictment charged Pike with counts of Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy, conspiracy to commit assault with a dangerous weapon in aid of racketeering, and conspiracy to interfere with commerce by extortion. The Superseding Indictment alleged that the racketeering conspiracy began no later than the year 2000.

In October 2016, the Government filed a sealed Motion to Disqualify Schaffer and Kennedy based on a conflict of interest. (ECF No. 143). That motion was largely centered on accusations that Schaffer, acting as "house counsel" for the Bandidos, undertook actions on behalf of the Bandidos that rendered him a potential unsworn fact witness in the case. The Government supported the motion with sealed transcripts of recorded conversations between individuals associated with the Bandidos discussing actions Schaffer allegedly took on behalf of the Bandidos enterprise. (ECF No. 143-1) (Attachments A, B, & C). The Government alleged that the unwaivable conflict of interest created as

Appendix C

a result of Schaffer’s actions was imputable to Kennedy as a member of the same firm under Texas Disciplinary Rule of Professional Conduct 1.07(e). (*Id.* at 3).

The Court referred the motion to United States Magistrate Judge Henry J. Bemporad. Judge Bemporad held a hearing on the motion in November 2016, at which Eric Fuchs and Joey Contreras appeared for the Government, Cynthia Orr appeared for Schaffer and Kennedy, and Schaffer and Kennedy appeared for Pike. (ECF No. 168). Judge Bemporad denied the motion without prejudice. (ECF No. 170).

The Government then filed a Supplemental Motion to Disqualify Schaffer and Kennedy from the Representation of Pike Based Upon Unwaivable Conflict of Interest (“Supplemental Disqualification Motion”) (ECF No. 173), as well as a Sealed *Ex Parte* Addendum to Attachments (ECF No. 172) (Attachments D, E, & F). In addition to asserting the conflicts alleged in its original disqualification motion, the Government alleged that Schaffer’s prior representation of two Government witnesses slated to testify at Pike’s trial posed a separate conflict beyond the unsworn witness issue, and the conflict extended to Kennedy as a member of the same law firm. The Government then filed a Second *Ex Parte* Addendum to the Attachments. (ECF No. 181) (Attachments G & H).

The Supplemental Disqualification Motion did not reveal the identity of the witnesses, and the addendums with attachments were not served on the defense. The Government urged that its interest in protecting the

Appendix C

safety of the cooperating witnesses and preserving the protections for cooperating witnesses under Rule 16 of the Federal Rules of Criminal Procedure justified the *ex parte* nature of the submissions. (ECF No. 172 at 2; ECF No. 183 at 9).

The Government's supplemental *ex parte* evidence consisted of the following:

Attachment D: The affidavit of DEA Special Agent Chad Lloyd, who investigated the criminal activities of the Bandidos. (ECF No. 172-1 at 1-6). The affidavit set forth information provided to agents by six confidential sources/ cooperating defendants regarding the Bandidos' alleged internal procedure for determining whether members with pending criminal charges were cooperating with law enforcement. According to the affidavit, members were required to prove that they were not cooperating with law enforcement by passing their paperwork to higher-ranking Bandidos members, who then forwarded the paperwork to attorneys for professional review and opinions.

The affidavit stated that, in November 2016, "Witness 1," a former Bandidos member, provided information to agents regarding Schaffer's alleged involvement providing attorney services to the Bandidos. Witness 1 alleged that Schaffer reviewed court documents to determine whether another Bandidos member was cooperating with law enforcement and provided attorney services to several Bandidos members regarding their criminal matters. The affidavit further stated that Witness 1 also previously

Appendix C

retained Schaffer and Kennedy to represent him in a criminal matter while he was a member of the Bandidos. The affidavit further stated that Witness 1 will testify at Pike's trial and, on the advice of counsel, is not willing to waive client confidentiality. The individual identified as "Witness 1" was Gerald Ojemann.

The affidavit further stated that, in November 2016, "Witness 2," a Bandidos member, informed agents that while he was a Bandidos member, he provided court documents regarding his criminal case and another member's case directly to Pike for review, and Witness 2 believed the paperwork was eventually reviewed by Schaffer.

According to the affidavit, Witness 2 stated that the Bandidos enterprise lent members money to pay defense attorneys fees, and the members would then be responsible for paying the borrowed money directly to Schaffer and other attorneys. Witness 2 further stated that, on at least one occasion, he used Bandidos funds to directly pay Schaffer's office the legal expense fee for another Bandidos member who had a pending criminal matter. Witness 2 also stated that the Bandidos maintained a legal expense credit with Schaffer for any future legal expenses the Bandidos National Leadership might incur.

The affidavit further provided that Witness 2 was previously represented by Schaffer on a criminal matter, Witness 2 will testify at Pike's trial, and Witness 2 has told agents he is not willing to waive client confidentiality. The individual identified as "Witness 2" was Daniel Schild.

Appendix C

Attachment E: A letter from Ojemann's attorney stating that Ojemann does not consent to waiving client confidentiality. (ECF No. 172-1 at 7).

Attachment F: A print-out from the Harris County District Attorney's Office reflecting that Schaffer previously represented Schild on an aggravated assault with a deadly weapon charge. (ECF No. 172-1 at 8).

Attachment G: Certified Public Records from the Harris County District Clerk's Office showing that Kennedy previously represented Ojemann on an Engaging in Organized Criminal Activity case filed in 2010. (ECF No. 181-1 at 1-11). After pending approximately five months, the case was no-billed on January 31, 2011. The criminal complaint alleged that Ojemann, as a member of the Bandidos, conspired to commit aggravated assault with a deadly weapon.

Attachment H: Certified Public Records from the Harris County District Clerk's Office showing that Schaffer represented Schild on the aggravated assault with a deadly weapon charge referenced in Attachment F. Records show that the case was filed on June 9, 2008, and Schaffer substituted as Schild's counsel on December 2, 2008. The case was dismissed on August 20, 2009.

Although the Government did not disclose the *ex parte* exhibits or the names of Witnesses 1 & 2 to opposing counsel, the Government provided a summary of the *ex parte* submission to Schaffer, Kennedy, and On in response to an email from Schaffer requesting a copy. (ECF No.

Appendix C

183 at 2). The Government also informed opposing counsel that its second *ex parte* submission included “certified copies of public records further establishing counsel’s prior representation of two government witnesses.” (*Id.*).

On January 6, 2017, Judge Bemporad held a second hearing on the sole issue of whether a conflict of interest existed because two cooperating witnesses “were previously represented by Mr. Schaffer, Mr. Kennedy, or both, and it was during the course of the conspiracy.” (ECF No. 196 at 5). At the hearing, Eric Fuchs and Joey Contreras appeared for the Government, Cynthia On appeared for Schaffer and Kennedy, and Schaffer and Kennedy appeared for Pike.

Orr requested the names of the Government witnesses to “verify that they were actually clients of Mr. Schaffer or Mr. Kennedy or both.” (*Id.* at 7). Although Judge Bemporad acknowledged that he was “not a big fan of sealed and *ex parte* matters,” he determined that the disclosure of the cooperating witness’ identities at the time of the disqualification proceeding was “contrary to the interest of the former clients of Mr. Schaffer and Mr. Kennedy.” (*Id.* at 3; 6).

Schaffer addressed Judge Bemporad directly at the hearing and represented that he conducted a “pretty extensive search” into his prior representation of Bandidos. (*Id.* at 19). Schaffer asserted that he previously represented Bandidos in “assault-type” cases resulting from bar-fights “where one of the defendants was no-billed and one of them was dismissed prior to trial. (*Id.* at 20).

Appendix C

Schaffer then stated, “I think those are going to be your informants. Okay?” (*Id.*).

Schaffer further argued that “what they were charged with and then later absolved of has nothing to do with the indictment in this case, which as to do with the Bandidos Motorcycle Club ostensibly declaring war on the Cossack Motorcycle Club, totally different issues, totally unrelated facts.” (*Id.*). Schaffer maintained that he did not “have any bad information about the two former clients other than they were charged and either no-billed or dismissed. There’s nothing to impeach as far as my knowledge.” (*Id.* at 21). Schaffer proposed a solution to cure the conflict. He suggested that Judge Bemporad conduct an *in camera* review of the prior witnesses regarding potential conflicts. (*Id.* at 20). He also suggested that Judge Bemporad appoint a third lawyer to Pike’s defense team who would be “walled off” from information regarding the two Government witnesses but would cross-examine the witnesses at trial. (*Id.* at 21).

Orr argued that it would not comport with due process of law to disqualify counsel without disclosing the names of the witnesses, the evidence establishing the alleged conflict, and an opportunity to confront the evidence that the Government presented *ex parte*. (*Id.* at 31). Judge Bemporad recessed the hearing to ascertain whether any of the *ex parte* materials provided by the Government could be disclosed to Schaffer and Kennedy. (*Id.* at 32-33).

After conferring with the Government, Judge Bemporad provided a redacted version of Agent Lloyd’s

Appendix C

affidavit to the defense. (*Id.* at 32-33). Judge Bemporad further announced at the hearing that certified public records not subject to dispute—specifically, court documents—confirmed the prior representation of the Government witnesses and the nature of the criminal charges. (*Id.* at 5; 34) (“[R]ecord evidence that I’ve reviewed that’s *ex parte* confirms that we do have two witnesses who will be cooperating, who were represented by Mr. Schaffer, Mr. Kennedy, or both, and it was during the course of the conspiracy.”).

At the conclusion of the hearing, Judge Bemporad held the Supplemental Motion in abeyance pending additional briefing to the Court regarding the prior representation of the Government witnesses and whether any potential conflict could be remedied by another lawyer being hired for the defense to cross-examination those witnesses. (*Id.* at 34-35); (ECF No. 187). Orr filed a supplemental brief. (ECF No. 198).

On January 26, 2017, Judge Bemporad issued an order disqualifying Schaffer and Kennedy from representing Pike. (ECF No. 199). First, Judge Bemporad found that Schaffer and Kennedy previously represented two people scheduled to testify as Government witnesses in the criminal case proceeding before Pike. (*Id.* at 2). Second, Judge Bemporad found that the matters on which Schaffer and Kennedy previously represented the two Government witnesses meet the “substantial relationship” test to the present case, set forth by the Fifth Circuit in *In re American Airlines, Inc.*, 972 F.2d 605, 614 (5th Cir. 1992).

Appendix C

Third, Judge Bemporad found that, given these previous client representations, the continued representation by Schaffer and Kennedy of Pike presents either an actual conflict of interest, or a serious potential conflict of interest, both of which are described and disallowed by Texas Disciplinary Rules of Professional Conduct 1.09(a)(2) and 1.09(a)(3).

Fourth, Judge Bemporad found that, although Pike indicated a willingness to waive the actual or potential conflicts of interest presented by his continued representation by Shaffer and Kennedy, the Government has shown that its two witnesses—counsel's previous clients—will not waive any such conflict.

Judge Bemporad also found unavailing Pike's two main arguments in favor of allowing Schaffer and Kennedy to continue representing Pike. Judge Bemporad determined that the witnesses did not waive their right to preserve the confidentiality of all information obtained by defense counsel in the former representations by agreeing to testify. Judge Bemporad further determined that Pike's proposed solution—to add a lawyer to the defense team to cross-examine the conflicted Government witnesses formerly represented by Schaffer and Kennedy, but to wall the attorney off from any client information previously obtained by Schaffer and Kennedy—would be inadequate to protect against potential conflicts of interest.

Pike filed a motion to reconsider Judge Bemporad's ruling. (ECF No. 200). He argued that the "substantial relationship" test has not been met, and no conflict of

Appendix C

interest has been shown to exist as set forth in the Texas Disciplinary Rules of Professional Conduct. He further argued that Pike's counsel of choice has been disqualified "in complete violation of Pike's constitutional right to due process of law." (*Id.* at 8).

Pike further argued that any attorney-client privilege between the Government witnesses and Schaffer and Kennedy was waived by the witness' actions. Finally, Pike asserted that the order disqualifying counsel deprived him from exercising his Sixth Amendment right to counsel of choice. Pike also persisted in his argument that the use of a third, independent attorney could remedy any potential conflict. The Government filed a Response. (ECF No. 201).

This Court denied the reconsideration motion and affirmed the disqualification order. (ECF No. 202). This Court found that Judge Bemporad did not clearly err when disqualifying Schaffer and Kennedy based on the serious potential for conflict of interest resulting from "Schaffer and Kennedy [having] previously represented the two Government witnesses in substantially similar underlying criminal matters as the ones for which Pike is being prosecuted by the Government." (*Id.* at 9). Additionally, the Court determined that it was not clearly erroneous nor contrary to law for Judge Bemporad to find that the attorney-client privilege from the former representations by Schaffer and Kennedy has not been waived by virtue of the two witnesses agreeing to testify on behalf of the Government.

Pike retained new counsel and proceeded to trial on the Government's Fourth Superseding Indictment. (ECF No.

Appendix C

387). Ojemann testified at Pike's trial, but the Government did not call Schild as a witness. A jury convicted Pike on all counts. Pike appealed through appellate counsel, Philip Lynch. Lynch raised eight claims on appeal, however he did not raise a Sixth Amendment choice-of-counsel claim. (ECF No. 928-1). The Fifth Circuit affirmed Pike's convictions, and the Supreme Court denied Pike's petition for a writ of certiorari. (ECF Nos. 899 & 903). Pike timely filed the pending § 2255 Motion.

SECTION 2255 MOTION

Pike's Section 2255 Motion asserts two grounds for relief. In Ground One, Pike alleges that the disqualification of trial counsel denied him his Sixth Amendment right to counsel of choice and his right to due process of law. In Ground Two, Pike alleges that he was denied his Sixth Amendment right to the effective assistance of counsel on direct appeal because appellate counsel did not raise the disqualification issue. In response, the Government argues that Pike's choice-of-counsel claim is procedurally barred and meritless, and that Pike was afforded due process. The Government further argues that Pike has not demonstrated that he was denied effective assistance of counsel on direct appeal. Pike filed a timely Reply.

APPLICABLE LAW

1. § 2255 Legal Standard

A federal defendant may move to vacate, set aside, or correct his sentence if: (1) the imposition of the sentence

Appendix C

was in violation of the Constitution or the laws of the United States; (2) the District Court that imposed the sentence lacked jurisdiction; (3) the sentence imposed was in excess of the maximum authorized by law; or (4) the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255; *United States v. Placente*, 81 F.3d 555, 558 (5th Cir. 1996). Thus, § 2255 post-conviction relief is reserved for errors of constitutional dimension and other injuries that could not have been raised on direct appeal and, if left unaddressed, would result in a complete miscarriage of justice. *See, e.g., United States v. Cervantes*, 132 F.3d 1106, 1109 (5th Cir. 1998); *United States v. Payne*, 99 F.3d 1273, 1281 (5th Cir. 1996).

2. Sixth Amendment Counsel of Choice

The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the [a]ssistance of [c]ounsel for his defense.” U.S. Const. amend VI. Part of this guarantee is a criminal defendant’s right to retain the attorney of his choice. *United States v. Gharbi*, 510 F.3d 550, 553 (5th Cir. 2007). “[W]hile the right to . . . 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.” *Wheat v. United States*, 486 U.S. 153, 159 (1988). Therefore, the “right to choose one’s own counsel is circumscribed in several important respects.” *Id.* For example, “the right to counsel of choice is limited if that counsel has an actual conflict of interest

Appendix C

or a serious potential conflict of interest that may arise during trial.” *United States v. Jackson*, 805 F.3d 200, 202 (5th Cir. 2015). “[W]hile we recognize a presumption that a defendant is entitled to counsel of choice, that presumption may be rebutted by a showing of actual or potential conflicts of interest.” *Id.* Whether a party has met its burden to demonstrate these conflicts of interest “must be left primarily to the informed judgment of the trial court.” *Wheat*, 486 U.S. at 164.

Defendants may waive conflicts of interest in some situations. *See id.* at 162. Nevertheless, the district court must be ever wary of “the subtle problems implicating the defendant’s comprehension of the waiver” to protect “the integrity of the court” and defend against “future attacks over the adequacy of the waiver or the fairness of the proceedings.” *Id.* (citation omitted). Even “[a] valid waiver does not end the inquiry because the district court has an independent interest 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.” *Gharbi*, 510 F.3d at 553 (internal quotation marks and citation omitted). Consequently, given the delicate balancing of a defendant’s Sixth Amendment rights with “nascent conflicts of interest [that] are notoriously hard to predict,” “the district court must be allowed substantial latitude in refusing waivers of conflicts of interest . . . where an actual conflict may be demonstrated before trial [and] where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses.” *Wheat*, 486 U.S. at 162-63.

Appendix C

DISCUSSION

GROUND ONE

In Ground One, Pike alleges that disqualifying Schaffer¹ based on evidence of a conflict of interest presented *ex parte* by the Government denied him due process of law and his Sixth Amendment right to counsel of choice. (ECF No. 916-1 at 23).

Pike asserts that Judge Bemporad had no valid reason to withhold the names of the witnesses that counsel previously represented once the Government represented that the witnesses would testify at trial. (*Id.* at 25). Pike argues that, had Judge Bemporad disclosed the names of the witnesses, Schaffer “would have explained to the magistrate judge and offered evidence, if necessary, that he never represented Ojemann; and, that he represented Schild for a few months on a charge unrelated to Pike’s indictment, the charge was dismissed, and he did not receive any confidential information adverse to Schild.” (*Id.* at 17). Pike further argues that because the witnesses’ names were withheld, Schaffer was denied the opportunity to show that he did not have an actual or serious potential conflict of interest as to Schild or Ojemann and that any potential conflict could have been remedied by having independent counsel cross-examine the witnesses.

1. Although the Court’s order disqualified Schaffer and Kennedy, the Section 2255 Motion focuses on Schaffer’s disqualification.

Appendix C

Pike fails to demonstrate that Judge Bemporad's procedure did not comport with due process. Judge Bemporad held two adversarial hearings on the disqualification issue, at which counsel for the Government, counsel for Pike, and counsel for Schaffer and Kennedy were present. Following the hearing, Judge Bemporad ordered additional briefing on the disqualification issue before ruling on the Supplemental Disqualification Motion. Pike filed objections to Judge Bemporad's order disqualifying counsel. This Court independently reviewed the order disqualifying counsel and Pike's objections thereto and found no error. The law in this circuit does not require that a court hold a hearing before disqualifying counsel. *See United States v. De Nieto*, 922 F.3d 669, 680 (5th Cir. 2019) ("[T]he procedural fact that the district court did not hold a hearing before disqualifying [counsel] is not fatal."). Pike was afforded more process than the law in this circuit requires.

Pike does not offer any controlling precedent holding that due process requires the disclosure of the identity of witnesses under the specific circumstances presented in this case. Judge Bemporad concluded that disclosing the witnesses' names was contrary to their interests. Nevertheless, although the witnesses' names were withheld, the Government provided a summary of the *ex parte* submission to opposing counsel. Judge Bemporad provided a redacted copy of the Government's affidavit to opposing counsel. Court records not subject to dispute confirmed the prior representations and the nature of the criminal charges.

Appendix C

Moreover, Schaffer was provided the opportunity to show that he did not have an actual or serious potential conflict of interest with the Government witnesses and that any potential conflict could have been remedied by having independent counsel cross-examine the witnesses. Schaffer addressed Judge Bemporad directly at the second disqualification hearing regarding his prior representation of Bandidos members. He argued that his prior representation of Bandidos members involved “totally different issues” and “totally unrelated facts” and that he had no information with which to impeach them. Judge Bemporad invited further briefing following the second hearing, and Orr filed a supplemental brief arguing that any potential conflict could be remedied by hiring independent counsel to cross-examine the former client witnesses. Schaffer therefore had a sufficient opportunity to rebut the prosecution’s argument regarding the conflict.

Judge Bemporad delicately balanced the need to protect the identity of the Government witnesses against Pike’s right to a full and fair hearing on disqualification. Judge Bemporad held two extensive hearings on the matter, and this Court affirmed his disqualification order after careful review. Two separate judges fully considered the conflict issue and arrived at the conclusion that disqualification was required. The Court finds that Pike was afforded due process under the unique circumstances of this case.

The Court further finds that Schaffer’s disqualification did not deprive Pike of his Sixth Amendment right to counsel of choice. Pike argues that disqualifying

Appendix C

Schaffer based on his prior representation of Schild was unwarranted because Schaffer had a brief attorney-client relationship with Schild that terminated more than six-years before Pike was indicted, and Schild’s 2008 charge was not “substantially related” to Pike’s indictment. (ECF No. 916-1 at 27). Pike further argues that the Government acknowledged that “the two unnamed Bandidos” would not testify at trial about “facts that [Schaffer] represented them on,” and that Schaffer could not impeach Schild on a dismissed charge. (*Id.*). Pike further argues that Schaffer did not have any confidential information adverse to Schild that he would have been obligated to use to represent Pike effectively because Schaffer and Schild “discussed only the facts of his case—that he defended himself when the complainant attacked him.” (*Id.* at 28). Pike maintains that having independent counsel cross-examine any witnesses Schaffer previously represented would have remedied any serious potential conflict of interest, and it was unreasonable for Judge Bemporad to refuse that option. (*Id.* at 28-29).

Judge Bemporad rejected this precise argument, and this Court determined there was no error. A serious potential for conflict was clear from the record, which reflected that Schaffer represented Schild, a Bandidos member, on an assault charge that occurred during the timeframe of the charged RICO conspiracy. The indictment alleged that Pike was the President of the Bandidos and that Bandidos members committed racketeering acts—such as aggravated assaults—to establish the consistent patterns of the criminal enterprise. Schaffer’s representation of Pike was clearly adverse to Schild’s

Appendix C

interests in a substantially related matter, and Schild was unwilling to waive the conflict.

Judge Bemporad explained that the suggested procedure of having independent counsel cross-examine any witnesses would “not fully resolve the conflict inherent in an attorney representing clients with clearly adverse interests” even if it could in theory protect against the disclosure or use of confidential information. (ECF No. 199 at 5). Pike’s constitutionally founded presumption in favor of his choice of counsel was overcome by a serious potential for conflict. The Court did not exceed the bounds of its wide discretion to grant the Government’s motion to disqualify Schaffer.

Pike further argues, pursuant to the Seventh Circuit’s nonbinding decision in *Rodriguez v. Chandler*, 382 F.3d 670 (7th Cir. 2004), that the disqualification of Schaffer based on his prior representation of Schild cannot be upheld because the Government did not call Schild to testify at trial. In *Rodriguez v. Chandler*, the Seventh Circuit granted habeas relief to a state habeas petitioner when the trial court disqualified the defendant’s attorney because the attorney was also representing one of the state’s potential trial witnesses in an unrelated real estate matter, and the prosecutor did not call the witness to testify at the petitioner’s trial.

But later, in *Weaver v. Nicholson*, 892 F.3d 878 (7th Cir. 2018), the Seventh Circuit rejected the argument that a potential witness’ failure to testify mandates relief on a choice of counsel claim based on the Supreme Court’s

Appendix C

reasoning in *Wheat v. United States*, 486 U.S. 153 (1988). The Seventh Circuit held:

We likewise reject Weaver's suggestion that Traywick's failure to testify mandates relief. *Wheat* expressly noted that disqualification decisions are made "not with the wisdom of hindsight after the trial has taken place, but in the murkier pre-trial context when relationships between parties are seen through a glass, darkly." *Weaver*, 892 F.3d at 884 (quoting *Wheat*, 486 U.S. at 162). *Wheat* thus permitted pre-trial disqualification even when potential conflict does not "burgeon into an actual conflict as the trial progresses." *Id.*, quoting *Wheat*, 486 U.S. at 16.

In light of *Wheat*, the Court rejects Pike's argument that the disqualification of Schaffer based on a conflict of interest arising from his representation of Schild cannot be upheld because the Government did not call Schild to testify at trial.

Pike further argues that the Court violated Pike's Sixth Amendment right to counsel of choice in disqualifying Schaffer based on his prior representation of Ojemann because Schaffer and Ojemann never had an attorney-client relationship, and Ojemann's 2010 charge of engaging in organized criminal activity was not substantially related to the charges in Pike's indictment. Pike maintains that it was Kennedy who represented Ojemann on the 2010 engaging in organized criminal activity charge,

Appendix C

and Schaffer represented Ojemann's co-defendant, Scott Musslewhite. Pike asserts that Kennedy was not Schaffer's employee or partner, nor were they members of, or associated with, the same law firm, and therefore Kennedy's conflict with Ojemann was not imputable to Schaffer.

Even assuming purely for the sake of this motion that Kennedy's conflict with Ojemann was not imputable to Schaffer, Schaffer's disqualification is nevertheless valid based on his prior representation of Schild. In disqualifying Schaffer, Judge Bemporad relied on court records establishing that Schaffer previously represented Schild, and Kennedy represented Ojemann. Judge Bemporad clearly found that "Kent Schaffer and James Kennedy[] previously represented two persons who [were] scheduled to testify as Government witnesses." (ECF No. 199 at 2). This Court further recognized that the conflict arose from Schaffer and Kennedy's prior representation of the *two* Government witnesses. (ECF No. 202 at 3, 5, 9, 12) (emphasis supplied). The record does not reflect that Schaffer and Kennedy were disqualified exclusively based on Kennedy's prior representation of Ojemann.

The Court was well within its authority to disqualify Schaffer given its wide discretion, the relevant case law, and the record evidence establishing that an untenable conflict existed. Pike fails to demonstrate he was denied his Sixth Amendment right to choice of counsel.

GROUND TWO

In his second ground for relief, Pike alleges that he was denied his Sixth Amendment right to the effective assistance of counsel on appeal because appellate counsel did not raise the disqualification issue. Pike raises this issue “conditionally” as an “alternative basis for relief only if the Court declines to consider the merits of the disqualification issue based on a procedural bar. (ECF No. 916-1 at 34). Because the Court denied the disqualification issue on the merits, it is not necessary to address Ground Two.

EVIDENTIARY HEARING

An evidentiary hearing on a § 2255 motion is required “[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.” 28 U.S.C. § 2255(b). A district court’s decision not to hold an evidentiary hearing is reviewed for abuse of discretion. *United States v. Edwards*, 442 F.3d 258, 264 (5th Cir. 2006) (quoting *Cervantes*, 132 F.3d at 1110). Because the issues presented in this case can be resolved on the basis of the record, the Court finds an evidentiary hearing is not required.

CONCLUSION

Pike fails to establish that he was deprived of his Sixth Amendment right to counsel of choice and due process of law. Accordingly, Pike’s Section 2255 Motion is denied.

Appendix C

CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the court of appeals from a final order in a proceeding under § 2255 “unless a circuit justice or judge issues a certificate of appealability.” 28 U.S.C. § 2253(c)(1)(A). Pursuant to Rule 11 of the Federal Rules Governing Section 2255 Proceedings, the District Court must issue or deny a certificate of appealability when it enters a final order adverse to the movant.

A certificate of appealability may issue only if a movant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a “substantial showing of the denial of a constitutional right” in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In cases where the Court rejects a movant’s constitutional claims on the merits, “the [movant] must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Id.*

In this case, reasonable jurists could not debate the denial of Pike’s § 2255 motion on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack*, 529 U.S. at 484). Thus, a certificate of appealability shall not be issued.

Appendix C

Accordingly,

IT IS ORDERED that Movant Jeffrey Fay Pike's Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 (ECF No. 916) is **DENIED**.

IT IS FURTHER ORDERED that all pending motions, if any, are **DISMISSED AS MOOT**, and this case is now **CLOSED**.

FINALLY, IT IS ORDERED that a certificate of appealability is **DENIED**.

SIGNED on this 29 day of September, 2022.

/s/ David A. Ezra
David A. Ezra
Senior U.S. District Judge