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The ''officially released'' date that appears near the beginning of each opinion is the date the opinion will be published in the Connecticut Law Journal or the date it was released as a slip opinion. The operative date for the beginning of all time periods for filing postopinion motions and petitions for certification is the ''officially released'' date appearing in the opinion. In no event will any such motions be accepted before the ''officially released'' date.

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ZARELLA, J., dissenting. The majority concludes that ''the record did not demonstrate that the state had met its burden of proving that [the testimony of one of the defendant's attorneys, Gary Mastronardi] was necessary.'' The majority therefore concludes that ''the trial court improperly disqualified Mastronardi in violation of the defendant's constitutional right to counsel of his choice.'' I disagree with the majority and, therefore, dissent.[1]

As the majority correctly notes, the trial court's determination of whether an attorney should be disqualified on the basis of an actual conflict or serious potential for a conflict is subject to the highly deferential abuse of discretion standard of review. ''The Superior Court has inherent and statutory authority to regulate the conduct of attorneys who are officers of the court. . . . In its execution of this duty, the Superior Court has broad discretionary power to determine whether an attorney should be disqualified for an alleged . . . conflict of interest. . . . In determining whether the Superior Court has abused its discretion in [ruling on] a motion to disqualify, this court must accord every reasonable presumption in favor of its decision. Reversal is required only where an abuse of discretion is manifest or where injustice appears to have been done.'' (Citations omitted.) *State* v. *Jones*, 180 Conn. 443, 448, 429 A.2d 936 (1980), overruled in part on other grounds, *State* v. *Powell*, 186 Conn. 547, 555, 442 A.2d 939, cert. denied sub nom. *Moeller* v. *Connecticut*, 459 U.S. 838, 103 S. Ct. 85, 74 L. Ed. 2d 80 (1982);[2] see also *State* v. *Webb*, 238 Conn. 389, 417, 680 A.2d 147 (1996); *Walton* v. *Commissioner of Correction*, 57 Conn. App. 511, 515, 749 A.2d 666, cert. denied, 254 Conn. 913, 759 A.2d 509 (2000); *Fiddelman* v. *Redmon*, 31 Conn. App. 201, 210, 623 A.2d 1064, cert. denied, 226 Conn. 915, 628 A.2d 986 (1993); 3 W. LaFave et al., Criminal Procedure (2d Ed. 1999) § 11.9 (c), p. 676 n.98 (listing federal cases applying same standard of review). Moreover, ''[t]he ultimate issue is whether the trial court could reasonably have reached the conclusion that it did.'' *State* v. *Jennings*, 216 Conn. 647, 655, 583 A.2d 915 (1990). The high degree of deference afforded to the trial court's ruling is an important factor in reaching a decision on the issue presented.

The majority properly stresses that a criminal defendant has a qualified[3] constitutional right to be represented by counsel of choice. See, e.g., *Wheat* v. *United States*, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988); see also 3 W. LaFave, supra, § 11.4 (c), pp. 557–58.[4] What the majority fails to emphasize, however, is that ''the purpose of providing assistance of counsel is simply to ensure that criminal defendants receive a

fair trial . . . and that in evaluating [s]ixth [a]mendment claims, the appropriate inquiry focuses on the adversarial process, *not on the accused's relationship with his lawyer as such*. . . . Thus, while the right to select and [to] be represented by one's preferred attorney is comprehended by the [s]ixth [a]mendment, the essential aim of th[at] [a]mendment 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*.'' (Citations omitted; emphasis added; internal quotation marks omitted.) *Wheat* v. *United States*, supra, 159. Because the right to counsel of choice is a *qualified* constitutional right, the trial court ''must recognize a presumption in favor of [the defendant's] counsel of choice, but that presumption may be overcome not only by a demonstration of actual conflict but [also] by a showing of a serious potential for conflict.'' Id., 164; accord *United States* v. *Register*, 182 F.3d 820, 829 (11th Cir. 1999), cert. denied, 530 U.S. 1250, 120 S. Ct. 2703, 147 L. Ed. 2d 973 (2000); *United States* v. *Voigt*, 89 F.3d 1050, 1076 (3d Cir.), cert. denied, 519 U.S. 1047, 117 S. Ct. 623, 136 L. Ed. 2d 546 (1996); *Serra* v. *Michigan Dept. of Corrections*, 4 F.3d 1348, 1351 (6th Cir. 1993), cert. denied sub nom. *Serra* v. *Toombs*, 510 U.S. 1201, 114 S. Ct. 1317, 127 L. Ed. 2d 666 (1994); *United States* v. *Vasquez*, 995 F.2d 40, 42 (5th Cir. 1993); *United States* v. *Spears*, 965 F.2d 262, 274–75 (7th Cir. 1992).[5]

The majority relies on *Ullman* v. *State*, 230 Conn. 698, 717, 647 A.2d 324 (1994), for its proposition that the state ''must demonstrate [as a precondition to calling defense counsel as a witness] that [defense counsel's] testimony is necessary and not merely relevant, and that all other available sources of comparably probative evidence have been exhausted.'' (Internal quotation marks omitted.) *Ullman*, however, did not involve a defendant's sixth amendment right to counsel of choice. Rather, the issue in *Ullman* was whether the trial court had abused its discretion in ordering a public defender to testify for the state in a criminal trial against his former client. Id., 699–700, 715. My research has not revealed a single case in which a court has held that a party moving to disqualify counsel on the basis of an actual or potential conflict of interest must establish a compelling need.[6] I believe, however, that, qualified or not, a defendant's constitutional right to counsel of his choice deserves due deference. Moreover, I believe that, in the present case, the state has demonstrated ''that all other available sources of comparably probative evidence have been exhausted.'' Id., 717. Therefore, I will not quibble with the majority's assertion that the state must establish a compelling need for defense counsel's testimony.

In the present case, there were three sets of criminal charges filed against the defendant, one for the attempted murder of Rudolph Snead, Jr., another for

the murder of Snead and a third for the murders of Leroy Brown, whom the state had planned to call as a witness in the prosecution of the defendant for attempting to murder Snead, and Brown's mother, Karen Clarke. Mastronardi, whom the defendant privately retained as counsel, appeared on behalf of the defendant in connection with the attempted murder and murder charges in the ''Snead'' cases.[7] The state moved to consolidate the murder and attempted murder charges on July 27, 1998. That motion was granted on August 12, 1998. On June 3, 1999, the state filed a motion to disqualify Mastronardi. In its motion to disqualify, the state indicated that it had filed a motion to consolidate the two previously consolidated charges with the charges filed in connection with the double murder of Brown and Clarke. The state's motion to disqualify was granted on June 30, 1999. The motion to consolidate the double murder charges filed in the ''Brown and Clarke'' case and the attempted murder and murder charges filed in ''Snead'' cases was granted on August 6, 1999.[8]

At the hearing on the motion to disqualify, the state's attorney offered two reasons why Mastronardi's testimony was ''necessary and not merely relevant''; (internal quotation marks omitted) id.; to the prosecution of the double murder charges. The first reason was that Mastronardi's testimony was necessary to demonstrate that, at some point before Brown had been murdered, the defendant discovered that Brown was going to be called as a witness in connection with the state's prosecution of the defendant for the attempted murder of Snead. The second reason was that Mastronardi's testimony was necessary to show how the defendant obtained that information. The trial court thus was confronted with the possibility that Mastronardi would be called as a witness at the defendant's trial.

The record in this case reveals that the arrest warrant affidavit in the case involving the attempted murder of Snead contained the names, but not the addresses, of two children, namely, Brown and Tyree Snead, both of whom purportedly witnessed the defendant's unsuccessful attempt to kill Snead,. The record further reveals that Mastronardi was in possession of this information prior to the filing of any discovery requests. It is unknown whether the defendant learned of the names of these child eyewitnesses from the affidavit. The affidavit did state that ''[b]oth children appeared traumatized and were *unwilling to talk about the incident*.'' (Emphasis added.) It is clear that the word ''children'' referred to Brown and Tyree Snead. Therefore, the only relevant information that the defendant could have possessed prior to the state's December 23, 1998 disclosure of a witness list, Brown's address and Brown's June 7, 1998 statement to the police, was Brown's name and the fact that he was unwilling to talk about the incident. It is also clear that, prior to December 23, 1998, the

state had provided neither the defendant nor defense counsel with any information regarding the addresses of witnesses, the actual list of state witnesses or Brown's statement.

On December 23, 1998, the state disclosed to Mastronardi its witness list, Brown's address and Brown's statement to the police. On December 9, 1998, two weeks prior to the state's disclosure of this information, the trial court had issued a protective order prohibiting Mastronardi from disclosing the names or addresses of witnesses, including Brown. Thus, it was at this point, for the first time, that the defendant had potential access to Brown's address, the fact that Brown had given a statement to the police, and the fact that the state would be calling Brown to testify against the defendant in connection with the attempted murder charge. Whether the defendant actually had learned of these facts depended *solely* upon whether Mastronardi had adhered to the dictates of the protective order. The state argued that this was a critical fact because, on January 7, 1999, approximately two weeks after the information was disclosed to Mastronardi, Brown and Clarke were murdered.

At the hearing on the motion to disqualify, Mastronardi confirmed that neither he nor his clients knew the address of Brown. It can reasonably be assumed that, in so stating, Mastronardi meant that he did not know Brown's address until the state had disclosed that address to him on December 23, 1998, especially in view of the fact that the court's protective order clearly prohibited Mastronardi from disclosing the addresses of the state's witnesses, including Brown. Mastronardi also confirmed that he did not receive Brown's statement or the witness list until they were disclosed, under protective order, on December 23, 1998.

The majority concludes that ''the state never provided the court with specific information that *only* Mastronardi could provide.'' (Emphasis in original.) In addition, the majority declares that ''the state never argued to the trial court that Mastronardi's testimony was necessary because only he could testify that he had given the defendant any witness statements or that he had shared their contents with the defendant. Moreover, even when given the opportunity to question Mastronardi, the state never asked him about what, if anything, he did in connection with any of the statements he had been given pursuant to the court order.'' I disagree.

Regardless of whether Mastronardi disclosed Brown's address to the defendant, *the fact* that Brown had given a statement to the police and that Brown would be testifying for the state was information that *only* Mastronardi could have provided to the defendant.[9] Moreover, while the defendant knew who Brown was and knew that he was riding in Snead's car when the defendant first attempted to murder Snead, only

the state had knowledge of Brown's address and the fact that Brown had given a statement to police[10] prior to the state's disclosure of that information to Mastronardi on December 23, 1998. There was no evidence presented at the hearing on the motion to disqualify or otherwise to suggest that the source from which the defendant obtained this information was anyone other than Mastronardi or Brown himself, and the state clearly was unable to call Brown as a witness. Thus, it was necessary, if not critical, that the state inquire of Mastronardi whether he had violated the court's protective order in order to establish the source of the defendant's information.

The state's attorney brought this matter to the attention of the trial court at the hearing on the motion to disqualify. At that hearing, the state's attorney informed the court that "[t]he testimony that [the defendant] was aware of where the victims lived . . . is extremely relevant and I'd submit that, therefore, whatever . . . Mastronardi had testified to or [will] be called to testify [to] on the homicides that he had passed on the information of the Earl Avenue address or, on the other hand, that he didn't. . . . I think what's more extremely important here and what the state certainly intends to pursue at length [at] trial is did [the defendant] know that . . . Brown was, in fact, to be a witness in the cases that were pending against him up to the date of January 7th of [1999, the date on which Brown was murdered]. And, secondly, how did [the defendant] know that . . . Brown was to be a witness, not merely the fact that [the defendant] may or may not have known that . . . Brown was present in an automobile at the time of the initial case here, which is one of the cases we're dealing with, which is the drive-by shooting [of] . . . Snead that did not result in a homicide. But the fact that the state indeed contemplated, planned and listed . . . Brown as an actual witness in the Snead shooting and homicide trials, the fact is the statement of . . . Brown and his listing as a witness in those cases w[ere] never disclosed or made know[n] to anybody until December 22nd or thereabouts when [C. Robert Satti, Jr., senior assistant state's attorney] filed a response to the [defendant's] discovery demand." The foregoing statements demonstrate that the state's attorney planned to call Mastronardi as a witness in the consolidated criminal trials to determine whether he had violated the court's December 9, 1998 protective order, a fact of which only Mastronardi and the defendant had knowledge.[11]

At trial, the state's attorney questioned Mastronardi at length about the protective order issued in connection with state's disclosure of the witness list and Brown's statement. The state asked Mastronardi: "Have you ever, in your career, ever violated any court order that was placed on you?" The reference to "court order" clearly included the protective order at issue in this

case. Mastronardi replied: ''I would never violate an order of the court.'' While it may be true that the state's case would have been aided by an affirmative response to that question, the test is not whether Mastronardi's testimony ultimately bolsters the state's case, a determination that cannot be made without the benefit of hindsight, but, rather, whether there is a compelling need for that testimony. If Mastronardi had answered the question in the affirmative, that answer would have supported an inference that the defendant knew for the first time, on or after December 23, 1998, and shortly before Brown was murdered, that Brown lived on Earl Avenue and had given a statement to the police, and that the state was planning to call Brown to testify against the defendant at the defendant's trial. The fact that Mastronardi's answer ultimately was not helpful to the state is irrelevant to the issue of whether there existed a serious potential for a conflict of interest that would have warranted Mastronardi's disqualification. Indeed, whether defense counsel *ultimately* testifies at trial is irrelevant because ''we do not review the [trial court's] decision with the advantage of hindsight.'' *United States* v. *Defazio*, 899 F.2d 626, 631 (7th Cir. 1990).

Based on the foregoing, I would conclude that the state adequately had established that Mastronardi's testimony was ''necessary and not merely relevant''; (internal quotation marks omitted) *Ullman* v. *State*, supra, 230 Conn. 717; and, consequently, there was a compelling need for Mastronardi's testimony at the defendant's trial. This compelling need for Mastronardi's testimony demonstrated a ''serious potential for conflict''; *Wheat* v. *United States*, supra, 486 U.S. 164; sufficient to overcome the ''presumption in favor of [the defendant's right to] counsel of choice . . . .''. Id. Accordingly, I cannot conclude that the trial court abused its discretion in granting the state's motion to disqualify Mastronardi and, therefore, I respectfully dissent.

[1] Because I conclude that the trial court did not abuse its discretion in granting the state's motion to disqualify Mastronardi, I need not reach the issue of whether the violation of a defendant's qualified right to counsel of choice is per se prejudicial, thereby requiring automatic reversal of that defendant's conviction. I feel compelled to note, however, that, contrary to the majority's assertion, the issue of whether the violation of a defendant's qualified right to counsel of choice requires automatic reversal is not well settled. Rather, as a federal appellate court has noted in a case that the majority cites in support of its assertion that prejudice is to be presumed when a defendant is deprived of his constitutional right to retained counsel, the United States Supreme Court has yet to rule on whether the denial of this qualified constitutional right is ''structural'' and, thus, impervious to harmless error analysis. See *United States* v. *Washington*, 797 F.2d 1461, 1467 n.7 (9th Cir. 1986).

Moreover, at least one federal circuit court of appeals has rejected this rule of automatic reversal; that court has concluded that, in order to obtain a new trial, a defendant who improperly has been denied the right to counsel of choice must demonstrate prejudice. *United States* v. *Turk*, 870 F.2d 1304, 1308 (7th Cir. 1989); cf. *United States* v. *Voigt*, 89 F.3d 1050, 1074 (3d Cir.), cert. denied, 519 U.S. 1047, 117 S. Ct. 623, 136 L. Ed. 2d 546 (1996) (''nonarbitrary, but erroneous, denial'' of right to counsel of choice may be subject to harmless error analysis [internal quotation marks omitted]).

Although I need not reach this issue, I do maintain that, contrary to the

suggestion of the majority, the issue of whether the denial of a defendant's right to retained counsel is per se prejudicial or subject to harmless error analysis is far from clear and deserves a more comprehensive appraisal than that which the majority has provided. As Richard A. Posner, former chief judge of the Seventh Circuit Court of Appeals recently has noted: ''That denying the counsel of one's choice falls into either category [namely, a structural error requiring automatic reversal or a nonstructural error lending itself to harmless error analysis] is not an easy position to maintain . . . after . . . *Turk* . . . which says that proof of prejudice is required in a case in which the defendant is complaining of such a denial. . . . Most cases hold [to] the contrary, however, such as *United States* v. *Rankin*, 779 F.2d 956, 960–61 (3d Cir. 1986), which relies on *Flanagan* v. *United States*, 465 U.S. 259, 267–68, 104 S. Ct. 1051, 79 L. Ed. 2d 288 (1984)—not cited in *Turk*—[in which] the [United States] Supreme Court intimated that obtaining a reversal of a conviction because of the denial of the defendant's right to a lawyer of his choice does not require a showing of prejudice to the defense, since the right reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding. A number of cases line up with *Rankin*. . . .

''The language . . . from *Flanagan* suggests that the right to counsel of one's choice falls into the . . . subcategory of structural errors that we have identified. Subsequent cases, however, of which the most recent is *Neder* v. *United States*, [527 U.S. 1, 8–9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)], contain language that, consistent with the limited and qualified nature of the right to counsel of one's choice . . . seems to confine the rule of automatic reversal of denials of the right to assistance of counsel to cases of complete denial. . . . That a district [court] has . . . broad discretion to extinguish the right to counsel of one's choice for reasons of calendar control suggests that this right, which in any event no indigent criminal defendant has . . . is, like the right to effective assistance of counsel (a right whose vindication requires proof of prejudice . . .), not so fundamental as the rights protected by the rule of automatic reversal.

''The strongest argument for bringing the right to counsel of one's choice under that [automatic reversal] rule is practical, and also resembles a part at least of the rationale for the first class of structural errors. Prejudice will not be provable unless the replacement counsel failed to render effective assistance, an independent constitutional violation, and so the right to the lawyer of one's choice will be empty because unenforceable—had the district [court] disqualified [defense counsel] because [defense counsel] parts his hair on the right side [the defendant] would have no remedy. But this argument is overstated in at least two respects. First, it will sometimes be possible to prove prejudice even though the replacement lawyer didn't render ineffective assistance. If he is inexperienced, or lacks some specialized knowledge that the defendant's original choice of lawyer had, it may be possible to show that even though his representation of the defendant was not ineffective it was substantially less likely to achieve acquittal. Second, and more important, mandamus is an available remedy when an abuse of discretion by the trial judge cannot effectively be remedied by appealing the final decision . . . for example an abuse of discretion in disqualifying a party's lawyer.'' (Citations omitted; internal quotation marks omitted.) *United States* v. *Santos*, 201 F.3d 953, 960–61 (7th Cir. 2000). Thus, in light of the unsettled nature of this issue and the shifting perspective of United States Supreme Court precedent, I believe that this issue deserves more attention than it has been given.

[2] ''In *State* v. *Powell*, [supra, 186 Conn. 555], this court overruled the implicit conclusion of the court in *State* v. *Jones*, supra, 180 Conn. 443, that the denial of a motion to disqualify is a final judgment subject to immediate appeal. Our decision in *Powell*, however, did not prompt us to modify our substantive holding concerning the conflict of interest issue in *Jones* and, moreover, we subsequently [adhered to] that holding in *State* v. *Jones*, 193 Conn. 70, 92, 475 A.2d 1087 (1984).'' *State* v. *Webb*, 238 Conn. 389, 418–19 n.28, 680 A.2d 147 (1996).

[3] A defendant's right to be represented by counsel of choice is a ''qualified'' right in the sense that it can be ''circumscribed in several important respects. Regardless of his persuasive powers, an advocate who is not a member of the bar may not represent clients (other than himself) in court. Similarly, a defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant. Nor may a defendant insist on the counsel of an attorney who has a previous or ongoing relationship with an opposing party, even when the opposing party is the [g]overnment.'' *Wheat* v. *United States*, 486 U.S. 153, 159, 108 S. Ct. 1692,

100 L. Ed. 2d 140 (1988).

[4] The majority cites *State* v. *Crespo*, 246 Conn. 665, 696–97, 718 A.2d 925 (1998), cert. denied, 525 U.S. 1125, 119 S. Ct. 911, 142 L. Ed. 2d 909 (1999), for the proposition that ''a trial court may not reject a defendant's chosen counsel on the ground of a potential conflict of interest without a showing that both the likelihood and the dimensions of the feared conflict are substantial.'' I would conclude that the majority's reliance on *Crespo* is inapt. In that case, this court was called upon to determine whether the record presented facts sufficient to conclude that the trial court *should have known*, in the absence of an objection by either the state or the defendant, that a potential conflict existed, which would have given rise to a duty to inquire. See id., 694. In the present case, the issue is whether the trial court, *which was presented with information regarding a potential conflict*, properly concluded that such a potential conflict existed. As I indicate elsewhere in my dissenting opinion, I believe that the proper standard for determining whether the presumption favoring a defendant's right to counsel of choice is overcome is that articulated by the United States Supreme Court in *Wheat* v. *United States*, supra, 486 U.S. 164, namely, whether there is an actual conflict or ''a serious potential for conflict.''

[5] In the present case, the fact that the state's attorney intended to call Mastronardi to testify about his compliance or *noncompliance* with a court order—the latter of which possibly resulted in the murder of two witnesses—was relevant to the court's determination of a serious potential for conflict. Therefore, it is important to note that ''[t]he conflict here is not the more usual one of multiple representation. . . . Rather, counsel has been placed in the position of having to worry about allegations of his own misconduct. . . . [W]hat could be more of a conflict than a concern over getting oneself into trouble with criminal law enforcement authorities?'' (Citations omitted; internal quotation marks omitted.) *United States* v. *Arrington*, 867 F.2d 122, 129 (2d Cir.), cert. denied sub nom. *Davis* v. *United States*, 493 U.S. 817, 110 S. Ct. 70, 107 L. Ed. 2d 37 (1989).

Moreover, as the state's attorney correctly pointed out at the hearing on the state's motion to disqualify, the decision to disqualify Mastronardi was not one that could wait until trial had commenced. The state's attorney argued: ''I'd submit this is not a conflict that can be resolved later on in the middle of a trial involving a death qualifying capital case. It's really something that has to be done up front right now. I submit that the risk that . . . Mastronardi will testify is great. In fact, it's almost a definite thing. . . . I'm representing the state of Connecticut as the state's attorney here in a serious case, a capital case. As an oppos[ing] . . . party, I think it would be completely inappropriate, unfair for me to be confronting as a witness and as an attorney in both categories one individual.''

Inasmuch as the defendant was charged with multiple felony offenses, and, therefore, any disqualification of his attorney close to the commencement of or during trial would have prejudiced him in a correspondingly serious manner, it was critical that the decision to disqualify Mastronardi be made earlier rather than later. Moreover, I believe that the foregoing argument of the state's attorney indicates that there was no reason for the trial court to be concerned that the state's attorney was attempting to manufacture a conflict. See footnote 6 of this opinion.

[6] At least one federal circuit court of appeals has indicated, in the context of determining whether certain defendants were denied a fair trial when one of their defense counsel was called by the prosecutor as a witness, that the prosecutor must show that the information sought to be obtained from defense counsel's testimony ''is both necessary and unobtainable from other sources.'' *United States* v. *Crockett*, 506 F.2d 759, 760 (5th Cir.), cert. denied, 423 U.S. 824, 96 S. Ct. 37, 46 L. Ed. 2d 40 (1975). Another circuit court of appeals has noted, however, that that statement in *Crockett* is dictum. *United States* v. *Cortellesso*, 663 F.2d 361, 363 (1st Cir. 1981). I believe that the approach taken by the United States Circuit Court of Appeals for the First Circuit is the more sensible approach and properly balances the competing interests of the state, in its endeavor to put on its best case, and the defendant, who clearly has an interest in retaining counsel of his choice.

In *United States* v. *Cortellesso*, supra, 663 F.2d 361, the First Circuit was presented with a situation in which the prosecutor planned to call defense counsel as a witness to testify about a conversation in which he had engaged with government agents. Id., 362. The defendant claimed that the prosecutor should have been required to call the other participants in the conversation rather than defense counsel himself, citing *Crockett* for the proposition that if the information can be obtained from other sources, then the prosecutor

cannot call defense counsel to testify. Id., 363. The court in *Cortellesso* disagreed, stating that ''[t]he government was not required to accede to this truncation of its evidence. We do not accept the dictum in . . . *Crockett* . . . that the government must show that the evidence is unobtainable from other sources, if it means that the government must settle for less than its best evidence.'' (Internal quotation marks omitted.) Id. The court in *Cortellesso* seemed particularly concerned with the prospect of requiring the prosecutor to rely on sources other than defense counsel's testimony inasmuch as such reliance, under the circumstances, likely would have undermined the strength of the government's case. See id.

The First Circuit fleshed out this ''best evidence'' rule and its application in subsequent cases in which defense counsel had offered to stipulate to the information sought by the government. In *United States* v. *Diozzi*, 807 F.2d 10 (1st Cir. 1986), the court concluded that if defense counsel or a defendant offers to stipulate to the information sought by the government, and such information is independently verifiable and already in evidence—in that case, written statements made by the defendants through their attorneys—then such stipulation is equivalent to the government's best evidence. See id., 13. It is important to note that the court in *Diozzi* may have been troubled by the fact that the prosecutor in that case did not seek to disqualify defense counsel until six days before trial, which raises the specter of an attempt on the part of the prosecutor to manufacture a conflict. See *United States* v. *Defazio*, 899 F.2d 626, 632 (1st Cir. 1990); see also 3 W. LaFave, supra, § 11.9 (c), p. 677 n.103 (''Appellate courts have noted . . . that to ensure against what *Wheat* described as government attempts to manufacture a conflict, the trial court should seek to determine whether the testimony of counsel is truly needed (in particular, whether the prosecution could establish the same facts through other means). . . . At the same time . . . the government should not be forced to settle for less than its best evidence.'' [Citations omitted; internal quotation marks omitted.]).

In *United States* v. *Defazio*, supra, 899 F.2d 632, the First Circuit again addressed the issue of whether a stipulation would amount to less than the government's best evidence. In that case, that court concluded that when the information sought by the government is not independently verifiable and is ''only in the ken of [defense counsel] and the defendant''; id.; a stipulation amounts to less than the government's best evidence. Thus, it was proper for the district court to have disqualified defense counsel because he potentially could have been called to testify for the government. See id.

I would suggest that the foregoing cases set forth a more sensible approach than the ''compelling need'' test. In situations in which a stipulation is feasible, namely, when the information sought is independently verifiable, or when resort to other sources will not unduly undermine the strength of the government's case, the government should be required to use means other than defense counsel's testimony to bring the information it seeks before the fact finder. When the information sought, however, is within the knowledge of only defense counsel or defense counsel and the defendant, or when resort to other sources of the information will unduly undermine the strength of the government's case, the government should be allowed to call defense counsel as a witness. In any event, regardless of whether this court adopts the well reasoned ''best evidence'' approach or the more rigorous ''compelling need'' test, I believe that, in the present case, the state has sustained its burden of showing that Mastronardi was the only source available for the information that it had sought.

[7] Frank Riccio, whom the defendant also retained as counsel, initially appeared on behalf of the defendant in the case involving the attempted murder of Snead. John Walkley appeared on the defendant's behalf as a special public defender in connection with the case involving the murders of Brown and Clarke.

[8] Subsequently, on August 16, 1999, the defendant's motion to sever the charges filed in ''Snead'' cases from the charges filed in the ''Brown and Clarke'' case was granted.

[9] The majority appears to conclude that, because there were other witnesses to testify that: (1) the information was not disclosed until two weeks before the murder of Brown and Clarke; (2) prior to disclosure to Mastronardi, the state had not disclosed this information to anyone else; and (3) Mastronardi was the only recipient of this information, the jury then could infer that Mastronardi may have been the source of the defendant's knowledge. Irrespective of the fact that the presiding judge would have been unlikely to allow the state to call into question the ethics of defense counsel at the defendant's trial, a requirement that the state prove its case by inference simply is not a sufficient basis on which to conclude that there did not exist

a compelling need for Mastronardi's testimony. The state was entitled to call Mastronardi as a witness and ask him if he was, in fact, the source of the defendant's knowledge—a question that only Mastronardi and the defendant knew the answer to—and let his credibility be judged. Moreover, I would conclude that the state was entitled to put on its best evidence. See footnote 6 of this opinion.

[10] Of course, Brown, himself, and Clarke, Brown's mother, had knowledge of this information, but there is no indication that they did provide or had any incentive to provide this information to the defendant or any persons associated with the defendant.

[11] The majority makes much of the fact that the state's attorney informed the court at the hearing on the state's motion to disqualify that, ''perhaps the state can develop the information it wants to develop through some other avenue. That may well be. I don't know that it is in fact true at this time.'' What the majority fails to mention, however, is that this statement was made in direct response to Mastronardi's incorrect assertion that the information sought by the state constituted uncontested matters, namely, that Mastronardi ''never had [Brown's] address'' and that Brown's statement was not disclosed to Mastronardi until December 23, 1998. The fact remains, however, that the knowledge of what Mastronardi did with the information when it was disclosed to him is knowledge that resided exclusively with Mastronardi. Indeed, the trial court fully appreciated that Mastronardi was the only source of this information. The court stated that ''one of the core issues in the case is [what] knowledge [the defendant] had about . . . Brown's potential testimony and when and how he obtained that knowledge.''