

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	CRIMINAL ACTION
Plaintiff,	:	NO. 11-464
	:	
v.	:	
	:	
MATTHEW KOLODESH,	:	
Defendant.	:	

M E M O R A N D U M

EDUARDO C. ROBRENO, J.

May 12, 2014

I. INTRODUCTION

Before the Court are the Motion for New Trial (ECF No. 130) and Supplemental Motion for New Trial (ECF No. 159) submitted by Defendant Matthew Kolodesh ("Defendant.") For the following reasons, the Court will deny Defendant's motions.

II. BACKGROUND

A) Factual History

This case concerns a complex criminal enterprise, involving many players and various manifestations of conspiracy and fraudulent behavior. For the sake of brevity, the Court includes only a brief summary of the factual context from which Defendant's criminal charges arose. The Government's case basically involves three separate schemes.

One, from in or about January 2003 to in or about October 2008, Defendant was a business partner in a for-profit hospice provider, Home Care Hospice, Inc. ("HCH"), which submitted claims to Medicare, as well as Medicaid and other insurance plans, for hospice services provided to purportedly terminally ill patients with life expectancy prognoses of six months or less. Defendant is alleged to have owned and operated this business, along with co-conspirators including HCH Director Alex Pugman and HCH Development Executive Svetlana Ganetsky (both also indicted, Case Nos. 09-651 and 09-652).

Defendant allegedly knew and approved of HCH's submission of two types of fraudulent claims to Medicare: (1) claims for services rendered to patients who were, in reality,

inappropriate for hospice care, and (2) claims for substantially more expensive "continuous care" where no such care was required or rendered. Defendant managed HCH's finances and also consulted with Pugman on major matters concerning HCH.

Two, between August 2005 and July 2009, Defendant and Pugman's company, KP Grant Enterprises LP ("KP Grant"), also allegedly implemented a scheme to obtain and prevent default on a low-interest loan in the sum of \$2.5 million from Philadelphia Industrial Development Corporation ("PIDC"). To create the false appearance of compliance with a condition in this loan agreement—that 50 full time jobs were created by the funded project—Defendant allegedly set up a sham office and directed the submission of periodic reports to PIDC that fraudulently represented that the jobs quota was met. In particular, Defendant allegedly participated in the submission, by U.S. mail, of false summery reports and employment records mailed to PIDC on or about August 20, 2008, and June 25, 2009.

Finally, between 2003 and 2008, Defendant allegedly ordered several monetary transactions in excess of \$10,000, withdrawing funds from the HCH operating account for the benefit of himself and his family, including payment for college tuition for Defendant's son, checks to Defendant's furniture business, invoices paid for IT services, bonuses paid to the Defendant's

wife as HCH's "CEO," and charitable donations with cash kicked back to the Defendant.

B) Procedural History

On August 17, 2011, Defendant was indicted on one count of conspiracy to defraud Medicare under 18 U.S.C § 1349, twenty-one counts of health care fraud under 18 U.S.C § 1347, two counts of mail fraud under 18 U.S.C § 1341, and eleven counts of money laundering under 18 U.S.C § 1957. See Indictment 1, ECF No. 1.

On October 14, 2011, attorney Mark Sheppard entered an appearance on behalf of Defendant. See Not. Att'y Appearance, ECF No. 10. Because the Indictment alleged several "complicated" fraud schemes and would involve voluminous discovery, Defendant filed on November 1, 2011, an unopposed motion to continue trial. See Mot. Extension of Time ¶¶ 2, 5-6, ECF No. 17. Because the Court believed the case to be complex, it granted this extension in its November 14, 2011 First Scheduling Order (ECF No. 23).

On February 27, 2012, the Government moved to disqualify Mr. Sheppard based on an unwaivable conflict of interest. See Mot. Disqualify Counsel, ECF No. 27. Upon

consideration of the parties' submissions on this issue, and after a hearing on March 29, 2012, the Court granted the Government's motion to disqualify Mr. Sheppard. See United States v. Kolodesh, Crim. No. 11-464, 2012 WL 1156334 (E.D. Pa., Apr. 5, 2012). On May 4, 2012, Jack McMahon, Esq., entered an appearance as Defendant's new counsel in this matter.¹

At Defendant's jury trial, which began on September 17, 2013, the Government presented evidence, in its case in chief, which included several days of testimony of cooperator co-conspirator Pugman, and transcripts of translated Russian-language conversations between Defendant and Pugman, recorded both through Title III interceptions and through the assistance of cooperators. During direct examination, Pugman provided his explanation and context for statements made by him and Defendant in these conversations.²

¹ Mr. McMahon had been involved in the case for several years as counsel to Defendant's wife in the instant criminal investigation. The wife was never charged as part of the criminal conspiracy.

² The nature of the questions asked to Pugman about these statements ranged from identification of the speakers in a conversation, see, e.g., Trial Tr. Sept. 23, 2013, at 42:22-23, ECF No. 110 ("[C]an you identify [the speakers] in this conversation?"), and clarification of why a particular conversation occurred, see, e.g., id. at 41:19 ("Why were you discussing this with [Defendant]?"), to what Pugman's understanding was of certain statements made by Defendant, see, e.g., id. at 47:18-23 (" . . . I draw your attention, Mr. Pugman, to . . . the reference where [Defendant] said "Didn't I say send the check in any event," . . . What was your understanding of that . . . ?").

Prior to trial, Defense counsel disclosed his intention to introduce, during Defendant's cross-examination of Pugman, the transcripts of segments of recorded conversations between Defendant and Pugman not presented by the Government during Pugman's direct examination. In a sealed motion in limine, the Government sought to exclude these transcripts. The Government argued that the statements which Defendant sought to introduce were hearsay not subject to any exception. Oral argument on this issue was held on September 23 and 26, 2013. Prior to trial, the Court ruled that Defendant's statements were hearsay not admissible under any recognized exception to the rule, see Trial Tr. Sept. 26, 2013 at 7, ECF No. 114, but that Defense counsel would be permitted to confront Pugman during cross-examination with some of the statements made by Pugman, but not by Defendant, within these conversations, see Trial Tr. Sept. 25, 2014, at 186-93, 219-22, ECF No. 112.

On October 17, 2013, following a five-week trial, the jury convicted Defendant of all 35 counts charged in the Indictment.

Defendant moved for new trial on November 21, 2013. The Government filed a response in opposition to the motion for new trial on January 3, 2013 (ECF No. 148). Four months later, on March 20, 2014, Defendant filed a thirty-nine page

"supplemental" motion (ECF No. 158), raising seven distinct new grounds for new trial. The Government filed a response in opposition to the supplemental motion on April 10, 2014 (ECF No. 164). A hearing on Defendant's motions was held before the Court on April 16, 2014, and the issues raised are now ripe for disposition.

III. MOTION FOR NEW TRIAL

A. Legal Standard Of Review

Pursuant to Federal Rule of Criminal Procedure 33, a court may grant a new trial "if the interest of justice so requires." Fed. R. Crim. P. 33(a). A district court may, in its discretion, "grant a defendant a new trial only if it finds that 'there is a serious danger that a miscarriage of justice has occurred—that is, that an innocent person has been convicted.'" United States v. Rich, 326 F. Supp. 2d 670, 673 (E.D. Pa. 2004) (quoting United States v. Johnson, 302 F.3d 139, 150 (3d Cir. 2002)). Where multiple errors are alleged, a new trial may be granted only where the errors, "when combined, so infected the jury's deliberations that they had a substantial influence on the outcome of the trial.'" United States v. Copple, 24 F.3d 535, 547 n.17 (3d Cir. 1994) (quoting United States v. Thornton,

1 F.3d 149, 156 (3d Cir. 1993)). Consequently, harmless errors that do not deprive the defendant of a fair trial are not a basis for granting a defendant's Rule 33 motion. See id. Although this standard is broader than the standard for acquittal under Rule 29, motions for a new trial are disfavored and "only granted with great caution and at the discretion of the trial court." United States v. Martinez, 69 F. App'x 513, 516 (3d Cir. 2003).

B. Motion for New Trial Under Rule 33

Defendant contends in his original motion that a new trial should be ordered based on: (1) the erroneous disqualification of Defendant's counsel of choice, Mr. Sheppard; (2) the erroneous exclusion at trial of transcripts of translated Russian-language consensually-recorded conversations between Defendant and Pugman; (3) the erroneous exclusion at trial of testimony "of the proper and legal operation though the years of [C]ommunity [H]ome [H]ealth," ("CHH"), Defendant's other business; and (4) the erroneous exclusion of testimony by Defendant's wife about Defendant's medical condition in 2003-2004.

1. Disqualification of Defendant's Counsel

Defendant contends that the Court's pre-trial disqualification of Mr. Sheppard was in error and was a violation of Defendant's Sixth Amendment right to counsel of choice, noting that "disqualification of defense counsel should be a measure of last resort," and that "[i]f there is no actual conflict or serious potential for conflict, the presumption in favor of a defendant's choice of counsel must stand." See Mot. New Trial 2 (internal citations omitted). Defendant asserts that the Government failed to establish that Mr. Sheppard was "likely to be a necessary witness," as required for disqualification under Pennsylvania Rule of Professional Conduct 3.7, and, accordingly, that disqualification was improper. Defendant goes on to argue that Defendant was convicted in this case even though Mr. Sheppard was never called as a fact witness, and thus "the benefit of hindsight" demonstrates that Mr. Sheppard was not a "necessary witness." Id. at 3.

This argument misses the mark for two reasons. First, the decision to disqualify Mr. Sheppard rested not merely on the Government's contention that he might be a "necessary witness" as defined under Rule 3.7. Mr. Sheppard was also disqualified based on (1) an actual conflict of interest arising from the potential inference to be drawn that Mr. Sheppard engaged in

professional improprieties and therefore would have to protect his professional reputation at the expense of Defendant's interests, and (2) a separate potential conflict of interest arising from Mr. Sheppard's potential as an unsworn witness at trial (because he had apparent knowledge of the facts but had not been called as a trial witness and/or because he would have commented on the facts as to which he had personal knowledge, during opening and closing arguments).³ Second, even if the

³ Defendant's Motion for New Trial presents only the allegation that Mr. Sheppard was not a "necessary witness" for purposes of Rule 3.7, and that he was therefore improperly disqualified at trial, not addressing why disqualification may have been improper based on the actual conflict of interest (based on inference of professional propriety) or potential conflict of interest (based on unsworn witness status) also identified in the Court's April 5, 2012 opinion.

At the April 16, 2014 hearing to consider Defendant's motions for new trial, Defendant revived the argument that disqualification was improper on these additional grounds, as precautionary measures including waiver of Defendant's right to cross-examine or call Mr. Sheppard, and the use of separate counsel to examine Ms. Roitshtein, could have resolved these other identified conflicts of interest. However, Defendant fails to point to any new reasoning to undermine the Court's original finding that these measures would have been inadequate to protect against "the prejudice to the Government or the potential distortion of the fact-finding process that Mr. Sheppard's appearance at Defendant's counsel table might engender." Kolodesh, 2012 WL 1156334, at *8.

Defendant further argued at the April 16, 2014 hearing that disqualification of Mr. Sheppard was improper because the Court could have instead addressed all conflicts of interest arising from his role in Count 24 of the Indictment by severing Counts 23 and 24 (the mail fraud counts) from the pending trial. The Court rejects this argument, which Defendant raised for the first time at the post-trial hearing. While Defendant did file a motion to sever the mail fraud counts (ECF No. 29), which was pending at the time that the motion to disqualify Mr. Sheppard was decided, Defendant failed to raise this basis for denying disqualification in either his response in opposition (ECF No.

benefit of hindsight were to demonstrate that Mr. Sheppard was not a "necessary witness," the Supreme Court has explicitly cautioned against judging the potential for, and severity of, conflicts of interest based on "the wisdom of hindsight," rather than in the "murkier pre-trial context" though which a trial court must make the decision whether or not to disqualify counsel. Wheat v. United States, 486 U.S. 153, 162 (1988).

Because the Court finds, contrary to Defendant's assertion, that the disqualification of Mr. Sheppard was properly justified by an unwaiveable conflict of interest, Defendant's first ground for new trial will be denied.

2. Exclusion of Out-of-Court Statements

Defendant's second basis for seeking a new trial is the assertion that the Court erroneously granted the Government's pre-trial motion-in-limine to prevent Defendant from introducing statements made by Defendant during various conversations recorded by the Government during the time that Pugman was already cooperating with the Government.

33) or at the March 28, 2012 hearing on the motion to disqualify Mr. Sheppard. See Tr. March 28 2012 Hearing, ECF No. 40. Moreover, a review of Defendant's motion to sever the mail fraud counts, later voluntarily withdrawn by Defense counsel (ECF No. 49), demonstrates that Defendant's reasoning for seeking to sever these counts was wholly unrelated the issue of disqualification of counsel.

Upon a review of the parties' written submissions and oral arguments⁴ made on this issue, it appears that the Government sought to prevent Defendant from introducing four excerpts of conversations between Defendant and Pugman.⁵ These conversations included: (1) an exchange recorded on May 8, 2009, discussing whether or not CHH had been a tenant at the 2801 Grant Avenue Building where HCH was located, see Gov't Mot. Limine, Attach. F, CT-106-24; (2) an exchange, also recorded on

⁴ Oral argument on the Government's motion in limine was held before the Court on September 23 and 26, 2013. See Trial Tr. Sept 23, 2013, ECF No. 153; Trial Tr. Sept 26, 2013, ECF No. 114.

⁵ The parties both engage in a measure of revisionist history in their representations of how this issue was presented to the Court at trial.

Defendant's motion for new trial appears to suggest that the Court erred in prohibiting the admission of thirteen separate consensual recordings collected by the Government, with the help of Pugman, in late 2008 and early 2009. The record illustrates, however, that the admissibility of all thirteen recordings was never an issue raised before the Court. Rather, the issue at the time of the Court's September 26, 2013 ruling was the admissibility of four select segments of conversations, which occurred on December 4 and 11, 2008, and on May 8 and 9, 2009. See generally Gov't Mot. Limine Attachs. B, C, F (including as attachments the specific excerpted transcripts of conversations in late 2008 and early 2009 which the Government sought to exclude).

Likewise, the Government's characterization of this issue as involving only one out-of-court statement by Defendant, "to do everything legally," coming from a "single consensual recording made on December 4, 2008," is also inaccurate. See Gov't Resp. Opp'n Mot. New Trial 8. The Government's motion-in-limine actually sought to exclude several additional exchanges between Defendant and Pugman, which occurred in May of 2009. See Gov't Mot. Limine, Attachs. B-F (including excerpted transcripts of conversations between Pugman and Defendant occurring on December 4, 2008, as well as on December 11, 2008, May 8, 2009, and July 20, 2009).

May 8, 2009, discussing whether or not Pugman should send fraudulent documentation required to fulfill the obligations of the PIDC loan, see Gov't Mot. Limine, Attach. C, CT-96-104; (3) a statement, recorded on December 4, 2008, by Defendant to Pugman, that "everything is according to the law," see Gov't Mot. Limine, Attach. B, CT-20-22; and (4) a statement recorded on May 9, 2009, where Defendant expressed confusion as to the basis for the Government's investigation into HCH's operations,⁶ see Trial Tr. Sept 26, 2013, 4:13-24.

Although the rationale offered by Defendant for admitting these statements varied throughout the pre-trial and trial proceedings, Defendant essentially argued at one time or

⁶ Defense counsel raised the admissibility of this last statement for the first time during the September 26, 2013 oral argument, immediately prior to Pugman's cross examination. Defense counsel at that time read the following statement made by Defendant to Pugman during a conversation recorded on May 9, 2008, appearing at page 29 (CT-58) of the transcripts of the Government's consensual recordings:

You and I can only blame ourselves, okay? Nobody else is to blame. It's our fault that the FBI came to Hospice and f'd everyone. We should have watched and cared for Hospice more, like, what's going on and, I don't know - I don't know what happened there. Why did they come - came? And why are they harassing us? Why do they think that we're on - on inappropriate [sic] patients? I am not an expert on that, so I cannot comment on that, you know. Everything was going great until they came. Everything was wonderful. They came and destroyed everything. They destroyed my business.

Trial Tr. Sept. 26, 2013, at 4:13-24.

another that these statements were admissible: (a) as exculpatory evidence, reflecting the state of mind of Defendant, (b) as impeachment against Pugman, (c) as admissible statements made between co-conspirators in furtherance of a conspiracy, or (d) as exculpatory evidence that the conversations—and especially Defendant's statements—did not reflect the kind of conversations in which criminal confederates would have engaged in over the course of the conspiracy.

The Court, in response to the motion-in-limine and on several occasions at trial, barred these out-of-court statements, finding that the statements made by Defendant were hearsay,⁷ and, further that:

[t]hey [a]re not admissible under any of the exceptions to the hearsay rule, [] they [a]re not statements in furtherance of the conspiracy, [t]hey are not impeachable material, and they do not reflect the state of mind [of Defendant at the time] of a prior [criminal] act.

Trial Tr. Sept 26, 2013, at 7:1-7.⁸

⁷ Federal Rule of Evidence 802 prohibits the admission of hearsay, defined as an out-of-court statement introduced "to prove the truth of the matter asserted," see Fed. R. Evid. 801(c), unless it qualifies under one of the exceptions provided under the Federal Rules of Evidence. None of these exceptions are applicable in this case.

⁸ Defendant was allowed to impeach Pugman with Pugman's own statements, see, e.g., Trial Tr., Sept. 25, 2013, at 222, but not with those of Defendant.

The Court will stand on these rulings, and Defendant's motion for new trial on this basis will therefore be denied.⁹

3. Exclusion of Evidence about "Lawful" Operations at Community Home Health

Defendant's third basis for new trial is that the Court erroneously excluded evidence at trial which illustrated CHH's lawful practices. Defendant asserts that this evidence was intended to refute the testimony of Pugman and Ganetsky that HCH's fraudulent practices were modeled on those learned at CHH. See Mot. New Trial 5-6. Notably, the Court did allow Defendant to present the testimony of CHH employees to rebut Pugman and Ganetsky's testimony about learning the fraudulent practices utilized at HCH while working previously at CHH, though the Defense's CHH witnesses were limited to only describing CHH operations during the years in which Pugman and Ganetsky were employed there. See Trial Tr., Oct. 10, 2003, at 15-16 (Irina Chudnovsky), ECF No. 142; Id. at 204-206 (Angelika Sterin); Id. at 209-210 (Mark Kofman); Id. at 213-14 (Tatyana Pocoksik).

As to the admissibility of evidence of CHH's lawful operations outside the period of Pugman and Ganetsky's

⁹ Defendant also argues in his Motion for New Trial that the statements should have been admitted under Federal Rule of Evidence 807's "residual exception." This theory was not offered at trial and is therefore waived.

employment there, the Court will rest on its prior determination that such evidence is irrelevant¹⁰ and thus inadmissible.

Consequently, Defendant's motion for new trial on this basis will be denied.

4. Exclusion of Evidence about Defendant's 2003-2004 Medical Condition

Defendant's fourth ground for new trial is the assertion that limitations imposed by the Court on defense counsel's ability to explore evidence of Defendant's 2003-2004 medical condition denied his right to a fair trial.

At trial, certain government witnesses testified that HCH did not engage in unlawful activity until late 2003 or early 2004. Defendant indicated at trial that he intended to put on testimony of Defendant's wife, Malvina Yakobashvili, that Defendant suffered from declining health in 2003 and 2004 and therefore was not involved in HCH's operations during this period. Mot. New Trial 6.

Contrary to Defendant's assertion in his motion for new trial, the Court notes that Defendant was permitted to put on this testimony of Ms. Yakobashvili, within the confines of

¹⁰ The fact that the Defendant may have acted lawfully at some other time and place has no probative value in determining whether he acted unlawfully under the circumstances alleged in the Indictment. See Fed. R. Evid. 401.

what was permissible under the rules governing the testimony of expert and non-expert witnesses. At trial, Defense counsel was permitted to question Ms. Yakobashvili concerning her day-to-day observations of Defendant's physical condition in 2003 and 2004, such as "whether he got up in the morning and went or left the house." See Trial Tr. Oct. 11, 2013, at 58. Because she lacked medical expertise and therefore did not qualify as an expert, Ms. Yakobashvili could not offer an opinion on the nature and extent of Defendant's medical condition. After the Court's ruling on this matter, Defense counsel apparently made a tactical decision to not pursue this line of questioning further. See id. at 59-60. Because Defendant points to no error or constitutional defect related to this claim, the Court will rest on its prior disposition, and therefore Defendant's motion for new trial on this ground will be denied.

C. Supplemental Motion for New Trial

Defendant filed a "Supplemental" Motion for New Trial on March 20, 2014 (ECF No. 158). This Motion raises seven additional grounds for why Defendant is entitled to a new trial, and additionally restates a number of the arguments provided in Defendant's original motion for new trial. The Government filed

a response in opposition to these "supplemental" grounds for new trial on April 10, 2014 (ECF No. 164).

The Court finds that that this supplemental submission, filed four months after the final deadline for post-trial submissions, is untimely, and, further, that the various matters raised in this submission were not raised at the time of trial and therefore were waived. In any event, the Court has reviewed the "supplemental" claims and concludes that the seven grounds for new trial contained in this motion have no merit.

IV. CONCLUSION

For the reasons stated above, Defendant's Motion for New Trial and "Supplemental" Motion for New Trial are **DENIED**.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	CRIMINAL ACTION
	:	
Plaintiff,	:	NO. 11-464
	:	
v.	:	
	:	
MATTHEW KOLODESH,	:	
	:	
Defendant.	:	

ORDER

AND NOW, this **12th** day of **May, 2014**, it is hereby **ORDERED** that Defendant's Motion for New Trial (ECF No. 130) and "Supplemental" Motion for New Trial (ECF No. 159) are **DENIED**.

AND IT IS SO ORDERED.

/s/ Eduardo C. Robreno
EDUARDO C. ROBRENO, J.