

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

UNITED STATES OF AMERICA :
 :
 v. : CRIMINAL ACTION
 : NO. 00-120-01 & 02
 :
 NICHOLAS GRASS & :
 RICHARD MARSHALL :
 :
 :
 :

M E M O R A N D U M

EDUARDO C. ROBRENO, J.

November 21, 2000

Presently before the court is the Government's motion for disqualification of defense counsel, John J. Fioravanti, Esq. and Guy R. Sciolla, Esq. (doc. no. 70) and defense counsel's response to government's motion for disqualification (doc. no. 71). The court held a hearing on the motion for disqualification on October 18, 2000. Because defense counsel for defendant Nicholas Grass have a potentially serious conflict, the court will grant the Government's motion for disqualification.

I.

The facts which follow are largely uncontested and are taken from counsel's proffers at both the detention hearing of defendant Grass on August 24, 2000 (doc. no. 54) and the hearing on the instant motion on October 18, 2000 (doc. no. 75). John J. Fioravanti, Esq. and Guy R. Sciolla, Esq. are counsel for defendant Nicholas Grass in this case. Defendant Grass was indicted on drug charges. While under indictment, Grass engaged

in conduct which allegedly constitutes obstruction of justice. The Government claims that counsel's conduct during their representation of Grass on the drug charges constitutes a link in a chain of evidence, albeit innocently on counsel's part, that makes up the obstruction of justice charges against defendant Grass. The gist of the obstruction of justice case against Grass involves an alleged plot to generate a sham suicide note from a co-conspirator in the drug case which would exculpate Grass from the underlying charges. According to the Government, Grass agreed to pay money to a co-conspirator for generating the sham suicide note and for fleeing the jurisdiction. Unbeknownst to Grass, the co-conspirator who would be responsible for writing the sham suicide note was a cooperating witness.

Attorney Fioravanti admits that he was told by a friend of Grass that he, the friend, could obtain evidence exculpatory to Grass from a co-conspirator of Grass in the underlying drug charge. Fioravanti further admits that he encouraged Grass' friend to obtain that so-called exculpatory evidence. Attorney Fioravanti denies that he knew the nature of the exculpatory evidence or that he had any knowledge that the exculpatory evidence was a sham. The Government does not contest that point. It is also admitted that sometime after Attorney Fioravanti encouraged the intermediary to obtain the exculpatory evidence, Attorney Sciolla received in the mail a sham suicide note signed by the co-conspirator (the government's cooperating witness)

which exculpated Grass from the underlying drug charges. Attorney Sciolla claims, and the Government does not dispute, that he does not know who sent him the letter or why the suicide note was sent to him.

The Government has moved for the disqualification of Fioravanti and Sciolla. The court will disqualify Fioravanti and Sciolla for three reasons: One, at trial, Fioravanti and Sciolla are expected to be called as Government witnesses. Two, Fioravanti and Sciolla will be under professional pressure to dispel any inference of wrongdoing, thus compromising the attorneys' ability to provide Grass with conflict-free advice on his ability to testify or waive his Fifth Amendment privilege. Three, at trial, Fioravanti and Sciolla could be helpful witnesses to the defense.

II.

The Sixth Amendment of the United States Constitution guarantees a criminal defendant the right to assistance of counsel. U.S. Const. amend. VI; Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029, 1037 (2000). The purpose of the right to counsel is "to protect the fundamental right to a fair trial." Lockhart v. Fretwell, 506 U.S. 364, 368 (1993) (quoting Strickland v. Washington, 466 U.S. 668, 684 (1984)). One ground for denying a defendant the counsel of his choice is when the

attorney has an actual or potentially serious conflict in representing the defendant. Wheat v. United States, 486 U.S. 153, 159 (1988). The Third Circuit has recognized that a disqualifying conflict exists when the attorney may become a witness at trial. Virgin Islands v. Zepp, 748 F.2d 125, 127 (3d Cir. 1984).

In evaluating a motion to disqualify an attorney, there is a presumption in favor of a defendant's choice of counsel. Stewart, 185 F.3d at 121 (citing Wheat, 486 U.S. at 164). When seeking disqualification, the Government bears the burden of overcoming this presumption by showing that the attorney in question has an actual or potentially serious conflict. Wheat, 486 U.S. at 164; Stewart, 185 F.3d at 121-22. When determining whether this burden has been met, the trial court must balance "a defendant's Sixth Amendment right to counsel of choice against the interests of the proper and fair administration of justice." United States v. Voight, 89 F.3d 1050, 1074 (3d Cir. 1999).

III.

In order to evaluate the impact of a potential conflict on Grass' defense, this court must engage in the difficult task of anticipating what might occur at trial. See Wheat, 486 U.S. at 162 (indicating that trial court's must rely on their judgment in projecting into the future the possible impact of a conflict). Specifically, this court should consider the effect of the

conflict on the defense's trial strategy. See Stewart, 185 F.3d at 12 (considering the negative impact of defense attorney's conflict on defendant's trial strategy). The court finds defense counsel's involvement in the events surrounding the obstruction of justice charge raise three serious potential conflicts that will interfere with their effective representation of Grass at trial.

One, at trial, the Government is expected to link Grass to the obstruction of justice actions of his co-conspirator through the testimony of Fioravanti, the person who solicited the exculpatory information from the co-conspirator, and Sciolla, the person who ultimately received the sham suicide note. When counsel for the defendant is expected to be a Government witness on a material matter, disqualification is warranted. Zepp, 748 F.2d at 138-38.

Two, a way, and perhaps the most effective way, to dispel any inference that Fioravanti and Sciolla were anything but innocent bystanders to any criminal activity would be for Grass himself to take the stand and deny, with appropriate explanations, that he ever asked either Fioravanti and/or Sciolla to obtain the sham suicide note. To do so, of course, Grass will be required to waive his Fifth Amendment privilege. The decision whether to testify at trial is an extremely important one. A criminal defendant is entitled at this sensitive stage of his prosecution to conflict-free advice from his counsel. Fioravanti

and Sciolla's advice to Grass on whether to testify could be compromised by their own interest in obtaining a public confirmation from the stand by Grass of their innocent roles in requesting exculpatory evidence and later in obtaining the sham suicide letter, respectively. This potential conflict warrants disqualification of both Fioravanti and Sciolla in this case because it interferes with Grass' right to a fair trial. See Wheat, 486 U.S. at 158 (stating that defendant's right to counsel must be balanced against the federal court's duty to ensure defendant receives a fair trial).

Third, disqualification is warranted for the additional reason that Fioravanti and Sciolla could become helpful defense witnesses. It is the Government's theory that Grass acted through Fioravanti and Sciolla to manufacture sham evidence which would exculpate him in the case. To the extent that Fioravanti and Sciolla could negate this theory by testifying as to the innocence of their roles, and by implication the innocence of Grass, their testimony will be helpful to the defense. As noted by the Third Circuit, however, "[t]he roles of an advocate and of a witness are inherently inconsistent." Zepp, 748 F.2d at 138. The inconsistency lies in the fact that the "function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively." Id. (quoting Ethical Considerations of the Model Code of Professional Responsibility). When an attorney is involved in the factual

allegations against his client, making him a potential witness for the defense, his disqualification becomes necessary "as his performance as an advocate can be impaired by his relationship to the events in question." United States v. Locascio, 6 F.3d 924, 933 (2d Cir. 1993). In explaining its conclusion, the Locascio court noted that such disqualification was necessary because otherwise a defendant's trial strategy may be improperly effected by counsel's involvement in the factual allegations of his client's case.¹ Consequently, this court finds that defense counsel's potential role as witnesses in this case requires disqualification to avoid a serious potential conflict.²

Finally, defense counsel at the hearing suggested that Grass could waive the conflict. Although a trial court may accept a waiver by a defendant regarding his attorney's conflict of interest, a court may refuse such waivers when either an actual or serious potential conflict exists. Wheat, 486 U.S. at 161. As noted by the Supreme Court in Wheat, "[f]ederal courts

¹ Specifically, the Locascio court stated that "the attorney may be constrained from making certain arguments on behalf of his client because of his own involvement, or may be tempted to minimize his own conduct at the expense of his client." Locascio, 6 F.3d at 933.

² The integrity of a plea agreement entered into by a defendant who is represented by counsel with a conflict of interest also could be challenged as a violation of a defendant's right to effective assistance of counsel. See Holloway v. Arkansas, 435 U.S. 475, 490 (1977); see also United States v. Zhadanov, 1998 WL 633698 at *1 (E.D.Pa. August 11, 1998) (noting that conflict of interest is grounds for finding a plea agreement invalid).

have 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." Id. at 1698. In this case a waiver would raise serious questions about defense counsel's ability to vigorously defend their client and, therefore, would adversely affect the public's confidence in the administration of justice.

IV.

This court finds a serious potential conflict between defense counsel and their client Grass. The conflict arises from defense counsel's involvement in the factual allegations against their client. Because defense counsel's conflict may detrimentally impact their defense of their client, this court grants the Government's motion for disqualification of counsel and denies defendant's request to allow a waiver in this case.

An appropriate order follows.