UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 23-60173-CR-WILLIAMS(s)

UNITED STATES OF AMERICA

vs.

CAROLYN DENISE WADE and
TRACY D. WADE,

Defendants.
_________________________________/

MEMORANDUM IN CONNECTION WITH RULE 44(c) *GARCIA* HEARING

Introduction

The United States of America, by and through its undersigned counsel, hereby submits this memorandum (the "Memorandum") in connection with the Rule 44(c) *Garcia* hearing held on July 15, 2024, as to Defendants Carolyn Denise Wade and Trade D. Wade (each a "Defendant," and collectively, "Defendants"). The purpose of the Memorandum is to supplement the record of the *Garcia* hearing with facts and analysis that, in the government's view, may be necessary for Defendants to consider (in addition to any facts and analysis addressed at the *Garcia* hearing) for them to be fully informed of any potential or actual conflict of interest arising from the proposed joint representation, and by extension, to make any waiver of conflict-free counsel knowingly, intelligently, and voluntarily. Relevant authority is also supplied to aid the Court in its finding as to the validity of any such waiver by Defendants. The government does not take a position on the propriety of the proposed joint representation, the ability of either Defendant to waive any potential or actual conflict of interest arising from the proposed joint representation, or whether the Court should accept such a waiver by either Defendant.

Relevant Factual and Procedural History

A. Indictment and Trial of Defendant Carolyn Wade

On September 14, 2023, a grand jury sitting in the Fort Lauderdale Division of this Court (the "Grand Jury") returned an indictment (ECF No. 3) (the "Indictment") charging Defendant Carolyn Wade with one count of wire fraud, in violation of Tile 18, United States Code, Section 1343. In sum, the Indictment alleged that, from May 2021 through August 2021, Carolyn Wade, then employed by the Broward Sheriff's Office (BSO) as a Deputy Sherriff in the Detention Department, participated in a scheme to defraud involving materially false information that she used to apply for, receive, and cause the forgiveness of, a loan through the Small Business Administration (SBA)'s Paycheck Protection Program ("PPP"). Such materially false information allegedly included, among other things, that a sole proprietorship having the business legal name "Carolyn Wade" earned "$113,560" of gross income in 2019.

Carolyn Wade pleaded not guilty and proceeded to a jury trial. The trial commenced on May 13, 2024, in the Miami Division before Senior United States District Judge Donald L. Graham (to whom Judge Williams, the assigned district judge, referred the case for trial). In its case-in-chief, the government called 10 witnesses, which included witnesses from the SBA, a PPP loan processor, a PPP lender, an identity verification service provider, two communications service providers, the Internal Revenue Service (IRS), BSO, and FBI. Through the testimony of these witnesses and stipulations between the parties, the government introduced documentary evidence marked and received as 90 separate exhibits (ECF No. 75-1). The government argued at trial that this evidence established the following facts, among others:

i. Carolyn Wade filed an individual income tax return with the IRS for the year 2019, which reported (on Form 1040, Schedule C) that a sole proprietorship business named "1 Step A-Head" had $6,800 in gross income for that taxable period. GX 201. No tax return filed by Carolyn Wade between 2018 and 2020 reported any income for a business named "Carolyn Wade," much less "$113,560" in such gross income for 2019 (or any other year). GXs 200-203.

ii. Carolyn Wade's online PPP loan application was created on May 4, 2021, at approximately 3:27 p.m. EDT, from an IP address ending in .166. The .166 IP address was then owned by AT&T and assigned to Wade Funeral Home, the business owned and operated by Carolyn Wade's husband, Tracy Wade. GXs 102.2e, 601. The .166 IP address assigned to Wade Funeral Home was used on several occasions to perform online activity related to Carolyn Wade's PPP loan application, including, among other things: (1) logging in to Carolyn Wade's PPP loan application account; (2) inputting information into Carolyn Wade's PPP loan application, including the name "Carolyn Wade" as the business legal name; (3) uploading a bank account statement and linking a bank account; and (4) submitting Carolyn Wade's PPP loan application on May 13, 2021, at approximately 9:23 a.m. EDT (GX 102.2e).

iii. Before Carolyn Wade's PPP loan application was submitted, a fictitious Schedule C form was uploaded to Carolyn Wade's online PPP loan application at approximately 8:59 a.m. EDT on May 13, from an IP address ending in .125. GXs 113, 102.1e. The .125 IP address was attributable to Haydee Rivero, f/k/a Haydee Granados ("Granados"). GX 002. This fictitious Schedule C purported to show that a business named "Carolyn Wade" had gross income of "$113,560" in 2019. GX 113.

iv. Throughout Carolyn Wade's PPP loan application process, additional online activity was performed by IP addresses attributable to Carolyn Wade. This included IP addresses ending in .184, .224, .127, and .200, which were owned by Verizon Wireless, then Carolyn Wade's cell phone service provider (GX 805), and IP address ending in .84, which was owned by AT&T and then assigned Carolyn and Tracy Wade's primary residence (GX 600). The online activity related to Carolyn Wade's PPP loan application that was performed using these IP addresses included, among other things: (1) logging into Carolyn Wade's online PPP loan application account on at least 9 occasions between May 13, 2021 and July 26, 2021; (2) uploading 3 bank statements and linking a bank account; (3) verifying Carolyn Wade's identity using a real-time selfie photograph of Carolyn Wade, taken with her Samsung Galaxy Note 20 cell phone, and pictures of the front and back of her Florida driver's license; (4) modifying the address of record in the PPP loan application; (5) signing two PPP loan applications via DocuSign on May 18, 2021 and May 28, 2021, respectively; and (6) signing a PPP loan forgiveness application via DocuSign on August 7, 2021.

v. On June 7, 2021, a USAA bank joint checking account ending x3926 in the name of Carolyn and Tracy Wade received the proceeds of Carolyn Wade's PPP loan in the amount of $20,833. GX 302. That same day, a Zelle payment in the amount of $1,000 was sent from the x3926 account to Granados. GX 302. On or about June 9, 2021, Carolyn Wade wrote and signed check number 1134 from the x3926 account payable to "Jersey City Group," a company associated with Granados' husband, in the amount of $4,000, with the memo "Equipment Restoration."

vi. Between approximately June 8, 2021 and July 15, 2021, Carolyn Wade wrote and signed 6 checks payable to her herself (which she endorsed) and 4 checks payable to Tracy Wade (which he endorsed), in amounts varying between $500 and $2,400, totaling $13,900. For all 10 checks, Carolyn Wade wrote the word "salary" in the memo. Bank records from the x3926 account and other accounts owned by Carolyn and/or Tracy Wade showed that no such similar "salary" checks had been written before receipt of the PPP loan proceeds, and no such similar checks were written after July 15, 2021.

After the government rested, the Court heard and denied the defense's motion for a judgment of acquittal pursuant to Rule 29. The defense then elected to present a case in which one witness testified: Tracy Wade. Mr. Wade did not dispute the false statements in Carolyn Wade's PPP application concerning the purported 2019 gross income of "$113,560" for a business purportedly named "Carolyn Wade." Indeed, Mr. Wade conceded during cross examination that there was no business having the legal name "Carolyn Wade" and that Carolyn Wade did not have any business that earned gross income of $113,560 in 2019. Tr. at 88.[1] The defense instead asserted that Carolyn Wade lacked the requisite knowledge and intent to defraud. To support this theory, Mr. Wade testified that he was more involved than Carolyn Wade regarding her PPP loan application. For example, in pertinent part, Mr. Wade's testified:

- He (Mr. Wade) presented the idea of a PPP loan to Carolyn Wade (Tr. at 17-18);
- He (Mr. Wade), not Carolyn Wade, was in touch with Granados and her husband about Carolyn Wade's PPP application process (Tr. at 20);

[1] Excerpts of the transcript of Tracy Wade's trial testimony on May 17, 2024 cited herein are filed herewith as an attachment to the Memorandum.

- As compared with Carolyn Wade, Tracy Wade was "most active" with regard to Carolyn Wade's PPP loan application (Tr. at 32);
- He (Mr. Wade), not Carolyn Wade, sent information and documents to Granados for Carolyn Wade's PPP loan application (Tr. at 111-112); and
- He (Mr. Wade) accessed Carolyn Wade's PPP loan application from Wade Funeral Home using a computer and the IP address ending in .166 (Tr. at 77-78).

Following Mr. Wade's testimony, the defense rested and renewed its motion under Rule 29, which the Court denied. On May 20, 2024, the parties presented closing arguments, the Court instructed the jury, and the jury began to deliberate. After deliberating on May 20 and May 21, the jury advised the Court that it was unable to reach a unanimous decision. Judge Graham declared a mistrial on May 21, 2024.

B. Superseding Indictment of Defendants Carolyn Wade and Tracy Wade

On June 27, 2024, the Grand Jury returned a superseding indictment (ECF No. 88) (the "SS Indictment"). The SS Indictment added Tracy Wade as a new defendant and the following new charges: conspiracy to commit wire fraud, in violation of Tile 18, United States Code, Section 1349 (as to both Defendants); wire fraud, in violation of Tile 18, United States Code, Section 1343 (a new count as to Tracy Wade); conspiracy to make false statements to the SBA, in violation of Tile 18, United States Code, Section 371 (as to both Defendants); and false statements to the SBA, in violation of Title 15, Untied States Code, Section 645(a) (as to both Defendants).

With respect to the conspiracy to commit wire fraud (Count 1), the SS Indictment alleged that Carolyn Wade and Tracy Wade agreed with each other, with Granados, and with others, to obtain PPP loans based on materially false and fraudulent information, including false and fictitious tax documents. The substantive wire fraud counts charged Tracy Wade with causing his own fraudulent PPP loan (Count 2) and charged Tracy Wade and Carolyn Wade with causing

Carolyn Wade's fraudulent PPP loan (Count 3). The conspiracy to make false statements to the SBA (Count 4) alleged that Carolyn Wade and Tracy Wade agreed with each other, with Granados, and with others, to make false statements to the SBA in PPP loan applications (SBA Form 2483-C) and SBA PPP loan forgiveness applications (SBA Form 3508S). Carolyn Wade and Tracy Wade were each charged individually with three counts of making false statements to the SBA in their respective PPP loan applications and forgiveness applications (Counts 5, 8, and 9 as to Carolyn Wade and Counts 6, 7, and 10 as to Tracy Wade).

C. Proposed Joint Representation and *Garcia* Hearing

On July 1, 2024, Defendant Tracy Wade made an initial appearance in the Fort Lauderdale Division as to the SS Indictment. Attorneys Johnny McCray and Daryl Wilcox, who are permanent counsel of record for Carolyn Wade in this matter and represented her at trial, each entered a temporary notice of appearance for Tracy Wade (ECF Nos. 95 and 96). After setting bond, the Court set a *Garcia* hearing pursuant to Rule 44(c) for July 15, 2024.

On July 15, United States Magistrate Judge Jared M. Strauss conducted a *Garcia* hearing outside the presence of the government. At the conclusion of the hearing, Judge Strauss reserved final ruling on acceptance of Defendants' waiver of conflict-free counsel to permit the government to submit a memorandum and/or proffer to supplement the record concerning any potential or actual conflict arising from the proposed joint representation of Defendants in this matter by Mr. McCray and Mr. Wilcox. On July 16, 2024, the Court granted the government's unopposed motion for an extension until July 24, 2024, to file its memorandum so that the government could obtain the transcript of Mr. Wade's trial testimony, review it, and incorporate any pertinent facts therein (ECF Nos. 104, 105).

Applicable Law

The Sixth Amendment to the United States Constitution guarantees each criminal defendant the right to assistance of counsel in all criminal prosecutions. This right includes the accused's ability to select the counsel of his or her choice. *United States v. Ross*, 33 F.3d 1507, 1522 (11th Cir. 1994) (citing *Powell v. Alabama*, 287 U.S. 45, 53 (1932)). However, "[w]hen an actual conflict of interest exists, the client is denied effective assistance of counsel, and the attorney may be disqualified." *Ross*, 33 F.3d at 1523 (internal citations omitted). Indeed, even a potential conflict can suffice for disqualification. *Id.* (citing cases). !

A criminal defendant may waive this protection and elect to proceed with conflicted counsel so long as his waiver is "knowing, intelligent, and voluntary." *Id.* at 1524. To ascertain whether a defendant has elected to waive a conflict and is fully informed of his rights and the nature of any conflicts beforehand, a district court must hold a hearing as follows:

> [T]he district court should address each defendant personally and forthrightly advise him of the potential dangers of representation by counsel with a conflict of interest. The defendant must be at liberty to question the district court as to the nature and consequences of his legal representation. Most significantly, the court should seek to elicit a narrative response from each defendant that he has been advised of his right to effective representation, that he understands the details of his attorney's possible conflict of interest and the potential perils of such a conflict, that he has discussed the matter with his attorney or if he wishes with outside counsel, and that he voluntarily waives his Sixth Amendment protections. *Cf. United States v. Foster*, 469 F.2d 1 (1st Cir. 1972). It is, of course, vital that the waiver be established by "clear, unequivocal, and unambiguous language.

United States v. Garcia, 517 F.2d 272, 278 (5th Cir. 1975), abrogated by Flanagan v. United States, 465 U.S. 259, 104 S. Ct. 1051, 79 L. Ed. 2d 288 (1984).

The Eleventh Circuit has further explained that, "[i]n order for a waiver of the right to conflict-free counsel to be knowing and intelligent, the State must show that the defendant (1) was aware that a conflict of interest existed; (2) realized the consequences to his defense that continuing with counsel under the onus of a conflict could have; and (3) was aware of his right to obtain other counsel." *United States v. Garcia*, 447 F.3d 1327, 1337 (11th Cir. 2006) (quoting *Zuck v. Alabama*, 588 F.2d 436, 440 (5th Cir.1979).

Although a criminal defendant "has a presumptive right to counsel of choice and courts should hesitate to disqualify defense counsel," *Ross*, 33 F.3d at 1522-23 (citing *Wheat v. United States*, 486 U.S. 153, 163 (1988)), a court need not accept a waiver of the right. *See Wheat*, 486 U.S. at 162 (holding that trial courts may refuse waivers of conflicts of interest to ensure adequacy of representation, to protect integrity of court, and to preserve trial judge's interest to be free from future attacks over adequacy of waiver and fairness of trial). In addition:

> Federal courts 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.... Not only the interest of a criminal defendant but the institutional interest in the rendition of just verdicts in criminal cases may be jeopardized by unregulated multiple representation.

Ross, 33 F.3d at 1524 (quoting Wheat, 486 U.S. at 160).

Analysis of Potential and/or Actual Conflicts

As explained below, the proposed joint representation of Defendants Carolyn Wade and Tracy Wade at trial on the SS Indictment, by the same attorneys who represented Carolyn Wade individually at trial on the Indictment, presents potential and/or actual conflicts of interest.[2] To the extent that Defendants have not already considered or otherwise been advised of the conflicts addressed herein, the government provides the following analysis to brief the Court and Defendants on such potential or actual conflicts prior to the Court making a finding as to whether

[2] Mr. McCray and Mr. Wilcox have each filed a permanent notice of appearance as counsel of record for Defendants Carolyn Wade and Tracy Wade for trial on the SS Indictment (ECF Nos. 102 and 107).

each Defendant's waiver of conflict-free counsel is knowing, intelligent, and voluntary under Eleventh Circuit case law.

As to Tracy Wade's interest, the duty of loyalty that the attorneys have to Carolyn Wade is potentially (if not actually) adverse to his interest as an indicted Defendant and alleged co-conspirator and co-schemer with Carolyn Wade, Granados, and others. For example, in the first trial, it can be gleaned from the record that counsel determined it was in Carolyn Wade's interest to have Tracy Wade testify on her behalf. As outlined above, Tracy Wade's testimony sought to distance Carolyn Wade from the PPP loan application process by establishing that Tracy Wade was more involved in the PPP loan application process than she was. This included testimony by Tracy Wade that he presented the idea of a PPP loan to Carolyn Wade (Tr. at 17-18), communicated with Granados and her husband about Carolyn Wade's PPP loan application process (Tr. at 20), sent information to Granados for Carolyn Wade (Tr. at 111-112), and accessed Carolyn Wade's PPP loan application from Wade Funeral Home (Tr. at 77-78), among other things. Indeed, as the government argued at trial, Tracy Wade's involvement in Carolyn Wade's PPP loan application was corroborated by electronic records admitted into evidence that showed, through IP address and other attributions, that Tracy Wade completed parts of Carolyn Wade's PPP loan application from Wade Funeral Home, and that Tracy Wade submitted Carolyn Wade's PPP loan application minutes after Granados uploaded the fictitious Schedule C tax document (GXs 102.1e, 102.2e).

Adopting this defense strategy at trial on the SS Indictment may still be in Carolyn Wade's interest, and if counsel makes that determination, the duty of loyalty owed to Carolyn Wade may compel counsel to advise Tracy Wade that he should testify again. However, such advice rendered for the benefit of Carolyn Wade is potentially (if not actually) adverse to Tracy Wade's interest and right to remain silent now that he is charged with conspiring to fraudulently obtain PPP loans (including loans for himself and Carolyn Wade), obtaining and intending to obtain fraudulent PPP loans (including loans for himself and Carolyn Wade), and conspiring to make and making false statements to the SBA as it relates to such PPP loans. On the other hand, if counsel determines that it is in Tracy Wade's best interest to abandon the defense strategy from the first trial and not testify again, providing such legal advice to Tracy Wade is potentially (if not actually) adverse to Carolyn Wade's interest in pursuing the defense strategy that she followed in the first trial. Indeed, because Tracy Wade is now alleged to be her co-conspirator, Carolyn Wade's interest in pursuing a "shifting of blame" defense may be even greater in the second trial. This conflict could be exacerbated by the fact that the government intends to introduce evidence that, in furtherance of the conspiracies to commit wire fraud and make false statements to the SBA, Tracy Wade conspired to obtain another PPP loan in the amount of approximately $701,873 for Wade Funeral Home. Any interest by Carolyn Wade in separating herself from Tracy Wade's involvement in this aspect of the conspiracy could be hindered, if not precluded, by a joint representation.

As to Carolyn Wade, the duty of loyalty that her attorneys would owe Tracy Wade if jointly represented may be potentially (if not actually) adverse to Carolyn Wade's interest in other respects. For example, Carolyn Wade exercised her right to remain silent at the first trial and not testify. In evaluating Tracy Wade's defense strategy, counsel may determine that it is in Tracy Wade's interest for Carolyn Wade to testify on his behalf at trial. However, advising Carolyn

Wade to testify for the benefit of her husband's defense may be adverse to her interest in remaining silent.

Finally, on July 1, 2024, Granados was charged by way of Information with conspiracy to commit wire fraud and make false statements to the SBA, in violation of Title 18, United States Code, Section 371 (Case No. 24-CR-60124-Smith). The Information alleges that Granados conspired with Carolyn Wade and Tracy Wade to commit these offenses, and the government anticipates Haydee Granados will plead guilty to the Information and cooperate with the government. As part of her cooperation, the government anticipates that Granados will testify as a witness for the government at the trial of Carolyn Wade and Tracy Wade. If she does, her testimony has the potential for the joint representation of Carolyn Wade and Tracy Wade to create another conflict. For example, out of the duty of loyalty to Carolyn Wade, the defense may focus its cross examination of Granados on the fact that Granados had little contact with Carolyn Wade and extensive contact with Tracy Wade throughout the PPP loan application process. While taking this approach may align with Carolyn Wade's interest, highlighting the contact between Granados and Tracy Wade for Carolyn Wade's benefit could be adverse to Tracy Wade's interest. Conversely, if the defense chose not to focus its cross examination on the extensive contact between Tracy Wade and Granados to serve Tracy Wade's interest, that decision may not align with the best strategic choice for Carolyn Wade.

Conclusion

The United States does not take a position on the propriety of the proposed joint representation, the ability of either Defendant to waive any potential or actual conflict of interest arising from the proposed joint representation, or whether the Court should accept such a waiver by either Defendant. Rather, the government submits this Memorandum only to supplement the record of the July 15, 2024 *Garcia* hearing with facts and analysis that may be necessary for Defendants to consider (in addition to any facts and analysis addressed at the *Garcia* hearing) to be fully informed of any potential or actual conflict of interest arising from the proposed joint representation, and by extension, to make any waiver of conflict-free counsel knowingly, intelligently, and voluntarily consistent with Eleventh Circuit caselaw.

Respectfully submitted,

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