

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 23-cr-60173-CR-WILLIAMS

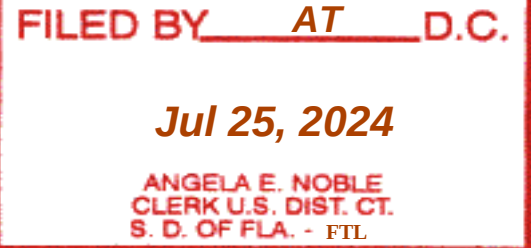
UNITED STATES OF AMERICA,

Plaintiff,

v.

CAROLYN DENISE WADE, and
TRACY D. WADE,

Defendants.



ORDER

THIS CAUSE is before the Court on the Government's *ore tenus* Motion for *Garcia* Hearing [DE 113]. At issue is whether attorneys Daryl Elliott Wilcox and Johnny Leonard McCray, Jr. will be permitted to represent Defendant Tracy D. Wade ("Tracy" or "Mr. Wade")¹ while also representing Defendant Carolyn Denise Wade ("Carolyn" or "Ms. Wade") in the same case. The undersigned conducted a *Garcia* hearing on July 15, 2024 when Mr. Wilcox sought to enter a permanent appearance (for himself and Mr. McCray) on behalf of Mr. Wade. As discussed below, the Government's Motion for a *Garcia* hearing is **GRANTED**. However, based on the representations and responses from Defendants and their counsel at the *Garcia* hearing (as discussed more fully below), I find that both Defendants have knowingly, intelligently, and voluntarily waived their rights to conflict-free counsel and that Mr. Wilcox and Mr. McCray may continue to represent both Defendants.

This case is a prosecution for conspiracy, wire fraud, and false statements to the Small Business Administration based on the Defendants' alleged misrepresentations in obtaining loans

¹ Because the Defendants have the same last name, in this Order I refer to them by their first names for clarity's sake. During the *Garcia* hearing, I addressed Tracy Wade as "Mr. Wade" and Carolyn Wade as "Ms. Wade."

under the Paycheck Protection Program. [DE 88]. Tracy and Carolyn are husband and wife. The Government initially obtained an Indictment, in September 2023, charging only Carolyn with one count of wire fraud. [DE 3]. Although Carolyn had initially retained a different attorney [DE 10], on February 21, 2024, the Court granted her Unopposed Motion for Substitution of Counsel, substituting Mr. McCray for Carolyn's original counsel. [DE 24]. Mr. Wilcox then joined Mr. McCray, entering an appearance for Carolyn on May 7, 2024. [DE 56]. Carolyn proceeded to a trial before Judge Graham, which ended in a mistrial after the jury failed to reach a unanimous verdict. [DE 72]. During the trial, Carolyn called Tracy as a witness in her defense. [DE 67, 106].

The Sixth Amendment's guarantee of a criminal defendant's right to counsel balances two competing interests: "(1) the right to be represented by counsel of choice and (2) the right to a defense conducted by an attorney who is free of conflicts of interest." *United States v. Ross*, 33 F. 3d 1507, 1523 (11th Cir. 1994). There is a presumption in favor of a defendant's counsel of choice, and a court should only override that presumption and exercise its right to disqualify counsel when there is either an actual or a "serious potential conflict of interest." *Wheat v. United States*, 486 U.S. 153, 164 (1988). However, potential conflicts may be waived, and the Court has "substantial latitude" in its decision to accept such a waiver. *Wheat*, 486 U.S. at 163. A "waiver is effective if the defendant 'understands the details of his attorney's *possible* conflict and the *potential* perils of such conflict.'" *In re Paradyne Corp.*, 803 F. 2d 604, 611 (11th Cir. 1986) (quoting *Garcia*, 517 F.2d at 278). Moreover, the waiver is effective if the defendant understands "both that [his] representation might be adversely affected in certain ways and that [he has] the right to counsel unimpaired by any conflict." *Id.*

Pursuant to the Government's motion, I conducted a hearing to determine whether the proposed joint representation is permissible under Federal Rule of Criminal Procedure 44(c) and the principles set forth in *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975). At the outset of the hearing, I excused the Government from the courtroom. I then determined that both Tracy and Carolyn were competent to participate in the *Garcia* hearing. In determining that they were both competent, I considered the content of their answers to my questions, my observations of them while answering those questions, and the fact that Mr. Wilcox stated he had no reason to believe either Defendant was incompetent to proceed.

I advised both Tracy and Carolyn about the potential conflicts created by having Mr. McCray and Mr. Wilcox represent both Defendants. This colloquy included specific examples of actual and potential conflict-related problems that could arise during trial and sentencing. Specifically, I discussed with Defendants issues related to privileged communications, cooperation, blame-shifting, limitations on cross-examination, plea negotiations, and sentencing arguments. In light of the fact that Tracy had testified in support of Carolyn's defense at her May 2024 trial, and my understanding of the nature of that testimony based on questions asked during the July 15 hearing, I also specifically addressed potential conflicts that could arise from defense counsel advising each Defendant about testifying (or not testifying) at a trial where they were both charged. I also specifically addressed how joint representation could potentially impact their attorneys' ability to pursue the same strategy for Carolyn at a second trial compared to her first trial or could potentially impact their attorneys' ability to make strategic choices (about, for example, what evidence to emphasize in a joint trial or what jurors to select in jury

selection) that would maximize both of their individual interests. Both Defendants acknowledged that they understood these potential conflicts.²

I advised both Defendants of their right to a conflict-free attorney. I advised both Defendants that, if they could not afford a separate attorney, one could be appointed for them free of charge. I also advised both Defendants that they could have the opportunity to consult with an independent attorney (appointed free of charge) before making their decision to waive any conflicts (and, indeed, an Assistant Federal Public Defender was present to provide the Defendants an opportunity for independent counsel on their decision). I offered each Defendant an opportunity to ask any questions they wished the Court to answer (they had none). I further advised each Defendant that any conflict waiver entered into at the hearing would be binding on them at later stages of the case, including sentencing and appeal. *See United States v. Rodriguez*, 982 F.2d 474 (11th Cir. 1993).

Both Tracy and Carolyn stated that they understood their rights and that they nonetheless wished to continue with Mr. McCray and Mr. Wilcox as their lawyers. They also each read and executed an affidavit [DE 114, 115] indicating the same. I find that these waivers of potential conflicts arising out of joint representation were knowing, intelligent and voluntary.

² At the start of the July 15 hearing, the Government requested the opportunity to file a memorandum explaining the potential conflicts of interest that could arise from joint representation in this case. After obtaining a brief extension of time in order to obtain a full transcript of Tracy Wade's testimony from the May 2024 trial, the Government filed that memorandum on July 24, 2024. [DE 108]. That memorandum summarizes the Government's evidence from the May 2024 trial, describes Tracy Wade's testimony (including citations to specific salient answers), and identifies potential conflicts of interest. Specifically, the Government describes potential conflicts in the duty of loyalty that could arise in counsel advising Tracy Wade whether he should testify again (which could benefit Carolyn but could be adverse to Tracy's interests) or not testify (which could impede Carolyn's ability to pursue the same defense strategy she pursued in the first trial). Similarly, the Government asserts that advising Carolyn to testify (or not testify) at a joint trial could benefit one of the Defendants to the detriment of the other. The Government further describes how strategic choices about what facts to emphasize, including in the cross examination of expected cooperating witness Haydee Granados, could benefit one of the Defendants while harming the other. Although the Court conducted the July 15 hearing without the benefit of the transcript of Tracy's testimony and the Government's memorandum, I find that the colloquy sufficiently addressed the potential conflicts described by the Government such that the Defendants' waivers of those potential conflicts were knowing, intelligent, and voluntary.

This Court finds that Mr. McCray and Mr. Wilcox may continue to represent Tracy D. Wade and Carolyn Denise Wade at this time. There is a presumption in favor of allowing a defendant to retain counsel of choice. The Court has advised both Mr. and Ms. Wade of their right to conflict-free counsel, and they both knowingly and intelligently waived their right to a conflict-free attorney. They have filed a written waivers to that effect. [DE 114, 115]. Accordingly, it is hereby:

ORDERED AND ADJUDGED that Attorneys Daryl Elliott Wilcox and Johnny Leonard McCray, Jr. will be permitted to represent Defendant Tracy D. Wade and Defendant Carolyn Denise Wade (“Carolyn” or “Ms. Wade”) in this matter.

DONE and ORDERED in Chambers at Fort Lauderdale, Florida, this 25th day of July, 2024.



JARED M. STRAUSS
UNITED STATES MAGISTRATE JUDGE