UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case Number 18-20495
Honorable David M. Lawson

IBRAHEEM IZZY MUSAIBLI,

Defendant.
_____/

ORDER ESTABLISHING PROCEDURES REGARDING POTENTIAL ATTORNEY CONFLICT OF INTEREST

Defendant Ibraheem Izzy Musaibli is charged in three counts of a superseding indictment with terrorism-related crimes involving a foreign organization. Trial in the case has been scheduled and rescheduled multiple times because of competency proceedings and recently by the impact of the global pandemic. The case currently is scheduled for trial to begin on January 11, 2022. The defendant is represented by attorneys from the Federal Community Defender Organization (FCDO) and a private attorney appointed under the Criminal Justice Act (CJA). In August of this year, the government identified to the defense a potential trial witness that previously was represented in a different case by lawyers from the FCDO, but not the FCDO lawyers who have appeared in this case. The parties brought the potential conflict of interest to the Court's attention, and after consulting with the parties and ethics counsel, the Court determines that no actual conflict of interest exists, and any potential conflict can be eliminated by directing that the government witness be cross-examined at trial by private defense counsel.

I.

On August 6, 2021, the government identified to the defense a cooperating witness that it intends to call at trial. The witness allegedly was a cellmate with Musaibli while he was in custody

at a Federal Medical Center facility for a psychological evaluation. The witness will testify about statements that Musaibli made about his case. He was interviewed twice by government agents in January and August 2020. One of the government's lawyers in this case — Mr. Hank Moon — was present and took notes during the second interview. During that interview, attorney Moon noted that the witness was "seeking compassionate release." It is customary in this district for the Court to refer such cases to the FCDO for appointment of counsel, either from that organization or by a CJA panel attorney. The defense contends, however, that the government never advised the defense team in this case about any potential conflict issue — which it should have, they say, because of the customary appointment-of-counsel practice in this district — and the witness was not identified to the defense before August 2021.

After the government identified the witness to the defense, it was discovered that in January 2021 the FCDO had been appointed to represent the witness on his motion for compassionate release. The representation ended on March 15, 2021, when the motion was granted, and the witness was ordered released from custody.

From the outset of this case in 2018, defendant Musaibli has been represented by James Gerometta and Fabián Rentería Franco, both attorneys with the FCDO. Upon request from defense counsel, the Court approved appointment of additional CJA counsel and attorney John Shea joined the defense team in June 2020. The defense team asserts that lead counsel Gerometta had no contact with the government witness or his file materials during the representation on the compassionate release motion (or otherwise). However, attorney Rentería minimally was involved in the representation: he "did not meet with [the witness] or have discussions involving privileged communications," but he "made telephone inquiries on [the witness's] behalf at the request of the assistant defenders who were [the witness's] primary counsel."

When counsel informed the Court of the potential conflict of interest, the Court convened a status conference attended by the attorneys and ethics counsel, attorney Kenneth R. Mogill, a well-known expert in the field of legal ethics. The Court also directed the parties to file briefs addressing the issue.

II.

It appears that there are at least three options available to resolve the issue: (1) require attorneys Gerometta and Rentería to withdraw from the case; (2) preclude the cooperating witness from testifying; or (3) prevent attorneys Gerometta and Rentería from having any involvement in trial preparation or cross-examination of the cooperating witness, leaving those tasks exclusively to attorney Shea. The defense team agrees that option (1) would cause an injustice to Mr. Musaibli, whose trial inevitably would be delayed further if new counsel were to be appointed in this complex case. The government urges option (3), which the defense argues would cause it some "inconvenience" in coordinating the trial preparation (Gerometta and Rentería would be precluded from discussing the witness's testimony with Shea). The defense prefers option (2).

A criminal defendant is entitled to the effective assistance of counsel free from conflict. *Holloway v. Arkansas*, 435 U.S. 475, 483-84 (1978). In *Cuyler v. Sullivan*, 446 U.S. 335, 345-50 (1980), the Supreme Court held that prejudice is presumed if counsel is burdened by an actual conflict of interest. The presumption of prejudice applies, however, only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 350.

Conflicts can arise when an attorney simultaneously represents two or more defendants in the same or related proceedings (multiple concurrent representation), and it also can occur when defense counsel previously has represented a defendant or witness whose interests are adverse to

the client (successive representation). *Jalowiec v. Bradshaw*, 657 F.3d 293, 315 (6th Cir. 2011). In either case, the evil of such conflicts is the attorney's divided loyalty: counsel must choose, possibly, to use or refrain from using privileged information from one client in the vigorous representation of the other. *Moss v. United States*, 323 F.3d 445, 460 (6th Cir. 2003). Nonetheless, the Supreme Court, to date, has applied the presumption of prejudice only "in the case of a conflict of interest arising from multiple concurrent representation of defendants." *Jalowiec*, 657 F.3d at 314-15.

When the potential for such divided loyalty arises, "the district court must consider not only any actual conflicts, but also whether there is 'a serious potential for conflict.'" *United States v. Ligon*, 861 F. App'x 612, 619 (6th Cir. 2021) (quoting *Wheat v. United States*, 486 U.S. 153, 164 (1988)). To demonstrate that he is prejudiced by an actual conflict of interest, the defendant "must show that 'a conflict of interest actually affected the adequacy of his representation,'" which means that "the alleged conflict influenced counsel's decisionmaking," and that his counsel made — or would have to make — "'a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other.'" *United States v. Berenson*, 836 F. App'x 357, 359 (6th Cir. 2020) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 349 (1980); *Mickens v. Taylor*, 535 U.S. 162, 171-72 (2002); *Thomas v. Foltz*, 818 F.2d 476, 481 (6th Cir. 1987)).

In order to establish that an actual conflict of interest impairs his defense, Musaibli would need to show that (1) his attorneys would be called upon "actively [to] represent[] conflicting interests or (2) an actual conflict adversely [would] affect[] their performance." *United States v. Kilpatrick*, 798 F.3d 365, 375 (6th Cir. 2015). He has not made the required showing here, because the defense team affirmatively represents that Mr. Gerometta had no involvement with the prior

representation and no contact with the witness, Mr. Renteria had only transient and non-substantive involvement with the compassionate release proceeding, and neither of the lawyers obtained any privileged information that they might hesitate to make use of in any potential cross-examination.

The problem of potential conflicting interests must be addressed, however, because other attorneys with the FCDO no doubt obtained privileged information from the witness during the representation on the compassionate release motion. It is impossible to say, without a probing inquiry that itself would implicate the attorney-client privilege, if that information might provide fodder for cross-examination at the witness's expense. It is beyond debate that those lawyers would be conflicted out of the case against defendant Musaibli. And in many instances, the conflict of one lawyer in a firm or organization is attributed to the other members of the firm. *See* Michigan Rules of Professional Responsibility (MRCP) 1.10(a) ("While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9(a), or 2.2."); *see also* Cmt. to Rule 1.10 ("Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units.").

Nonetheless there has been no suggestion here that successive representation would be "directly adverse" to the witness's or Musaibli's interests, *see* MRCP 1.7(a), and representation of a client that "*may* be materially limited by the lawyer's responsibilities to another client" is permissible if "the lawyer reasonably believes the representation will not be adversely affected . . . and the client consents after consultation." MRCP 1.7(b) (emphasis added). If those conditions are met, then the disqualification of other members of the FCDO also "may be waived." MRPC 1.10(d).

Based on the information presented, the Court sees no danger that the loyalty of the defense team to defendant Musaibli will be compromised. The lawyers from the FCDO have not obtained any internal information about the government witness, let alone information that would be adverse to his interest. There is no temptation or ethical demand for the FCDO lawyers to pull any punches on cross-examination at Musaibli's expense. Out of caution, however, it is prudent to restrict the FCDO's involvement with the government witness at trial, which is what the government proposes as its option (3) solution.

In similar circumstances the remedy of screening off potentially conflicted counsel and employing unconflicted counsel to handle the examination of an adverse witness has been adopted and endorsed by the court of appeals as an appropriate remedy. *Kilpatrick*, 798 F.3d at 375 ("[I]n light of (1) the 'thick ethical wall' between Kilpatrick's counsel and the firm; (2) the government's decision to drop all charges related to [the witness]; and (3) the court's decision to appoint a fourth defense attorney to cross-examine the Macomb Drain contract witnesses, the district court plausibly determined that no actual conflict existed."); *see also United States v. Kilpatrick*, No. 10-20403, 2013 WL 4029084, at *19 (E.D. Mich. Aug. 8, 2013), *aff'd*, 798 F.3d 365 (6th Cir. 2015) ("The Court also ensured that [attorneys] Thomas and Naughton did not actively represent conflicting interests by immediately appointing independent counsel, Harold Gurewitz, a well-respected and experienced criminal defense attorney to consult with Kilpatrick and to cross-examine the witnesses connected to the [prior representation].").

The defense team suggests that prohibiting the government's witness from testifying at trial would be the "most appropriate remedy," but the defendant has not cited any decision of any court endorsing that approach, and the Court has found none. The potential conflict implicates the adequacy of representation, not the admissibility of testimony. *See Bahoda v. Campbell*, No. 17-

13505, 2019 WL 952695, at *6 (E.D. Mich. Feb. 27, 2019) ("An issue of counsel's conflict of interest implicates a defendant's right to the effective assistance of counsel." (citing *Cuyler v. Sullivan*, 446 U.S. 335, 349-350 (1980)). Here the defendant has failed to show that the protective measures proposed as option (3) will impair his defense.

III.

There is no actual conflict of interest presented here that compromises the ability of the FCDO attorneys to furnish proper representation to the defendant. The minimal potential conflict of interest can be alleviated by screening those lawyers from involvement with the government witness.

Accordingly, it is **ORDERED** that the lawyers on the defense team:

A. Fully disclose to Mr. Musaibli all information related to the potential conflict of interest that results from other attorneys with the FCDO having previously represented the government witness in an unrelated matter;

B. Inform the Court whether Musaibli agrees to waive the conflict;

C. Screen the FCDO attorneys from preparing cross-examination of the government's witness; and

C. Assign all responsibility for cross-examination of the government witness to attorney Shea.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: December 7, 2021