

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

UNITED STATES OF AMERICA

v.

CRIMINAL CASE NO. 3:07CR192

RICHARD “DICKIE” SCRUGGS,
DAVID ZACHARY SCRUGGS,
SIDNEY A. BACKSTROM,
TIMOTHY R. BALDUCCI,
STEVEN A. PATTERSON

BENCH MEMORANDUM

Background

Rule 44(c) of the Federal Rules of Criminal Procedure make it incumbent upon the court to inquire with respect to conflicts of interest concerning potential conflicts of interest with respect to successive or joint representation and personally advise each defendant of their rights under the Sixth Amendment. Moreover, the Fifth Circuit Court of Appeals has indicated that “. . . careful government counsel should ordinarily wish to draw a court’s attention to Rule 44(c).” United States v. Holley, 826 F.2d 331, 333 (5th Cir. 1987). In the instant case, the court, *sua sponte*, noted in its order of January 9, 2008, that the Honorable Ken Coghlan originally entered an appearance representing co-defendant Patterson, withdrew as counsel for Patterson after a period of time, and now seeks to enter an appearance on behalf of Richard F. “Dickie” Scruggs, a co-defendant of Patterson. In view of the fact that the issue of successive representation, and conflicts of interest that may arise therefrom, is already before the court, no motion by the government under Rule 44(c) is necessary. At the present, both Patterson and Scruggs are named as defendants in a six-count indictment charging one count of conspiracy and five substantive counts.

Successive Representation and Conflicts of Interest

In deciding whether to disqualify trial counsel, a court has to balance two Sixth Amendment rights (1) the qualified right to be represented by counsel of one's choice, and (2) the right to a defense conducted by an attorney who is free of conflicts of interest. Wheat v. United States, 486 U.S. 153, 108 S. Ct. 1692, 1969, 100 L. Ed. 2d 140 (1988). These issues also implicate various canons of ethics:

Canon 4 (a lawyer should preserve the confidences and secrets of a client)

Canon 5 (a lawyer should exercise independent professional judgment on behalf of the client)

Canon 9 (a lawyer should avoid even the appearance of professional impropriety)

With respect to successive representation, which is the issue before the court, an attorney's access to privileged information from a prior client is presumed. United States v. Kitchens, 592 F.2d 900, 904 (5th Cir.), cert. denied, 444 U.S. 843 (1979); United States v. Provenzano, 620 F.2d 985, 1005 (3d Cir. 1980). Assuming the former client would become a current witness, the prior attorney-client relationship with the potential witness and the attorney may cause disqualification. United States v. Soudan, 812 F.2d 920, 927 (5th Cir. 1986); United States v. Davis, 61 F.3d 291, 305 (5th Cir. 1995); United States v. Williams, 81 F.3d 1321 (4th Cir. 1996); United States v. Mays, 69 F.3d 116 (6th Cir. 1996); Serra v. Michigan, 4 F.3d 1348 (6th Cir. 1993); United States v. Esposito, 816 F.2d 674 (4th Cir. 1987); United States v. Ross, 33 F.3d 1507 (11th Cir. 1994). Counsel's offer to limit cross examination in such a way to preserve any privilege need not be accepted. United States v. James, 708 F.2d 40, 45 (2d Cir. 1993). A

defendant's agreement to waive any future claim of conflict of interest has been held insufficient to allow attorney to remain in the case. Wheat v. United States, 108 S. Ct. at 1698; United States v. Ross, 33 F.3d 1507 (11th Cir. 1994). In a successive representation case, the Fifth Circuit has held that a district court did not abuse its discretion in disqualifying defense counsel based on a potential conflict of interest from defense counsel's prior representation of a potential government witness. United States v. Vasquez, 995 F.2d 40 (1993). The district court must ascertain whether potential conflicts of interest by defense counsel warrants separate counsel and may refuse to accept defendant's waiver of conflict issue, in light of the district court's independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and legal proceedings appear fair to all who observe them. United States v. Vasquez, supra at p. 42, citing Wheat v. United States, supra. See also United States v. Sotelo, 97 F.3d 782, 791-92 (5th Cir. 1996).

Since privileged communications between lawyer and client are presumed, there are several potential conflicts that exist. With respect to defendant Scruggs, he could later claim in a § 2255 petition challenging his conviction based on ineffective assistance of counsel, that counsel who represented Patterson "pulled punches" with respect to cross examination of Patterson should he be a government witness at the trial of Scruggs' case. Moreover, he could also claim that counsel did not make full use of whatever privileged information he received as a result of his temporary representation of Patterson to help exonerate Scruggs. With respect to Patterson, he could later claim that his impeachment with the use of privileged information adversely affected his ability to obtain a 5K1.1 motion for reduction of sentence. Likewise, the duty to provide privileged information to current client Scruggs could adversely affect Patterson

whether or not Patterson enters a plea of guilty and testifies on behalf of the government.

Added to this concern is the public perception of the complexities of successive representation in a multi-defendant case. A strong argument can be made that any attorney that has represented one defendant and then seeks to represent another co-defendant in the same criminal matter has an actual conflict of interest. United States v. Benavides, 604 F.2d 1255, 1259 n. 6 (5th Cir. 1982).

As a starting point, if the court would consider allowing the successive representation by Mr. Coghlan, detailed waivers under oath with questions by the court should be administered to defendant Scruggs and co-defendant Patterson.

As was recognized by the Supreme Court in the watershed case of Wheat v. United States, supra, waivers by defendants do not necessarily solve the problem. “. . . We think the district court must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as a trial progresses.” Wheat v. United States, 486 U.S. 153, 162 (1988).

Federal courts have an independent interest in ensuring that criminal trials are conducted with the ethical standards of the profession and that legal proceedings appear to be 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 the unregulated multiple representation.

Wheat v. United States, supra at p. 160.

Conclusion

The balancing of the competing interests in a successive or multiple representation of defendants in the same case present various permutations which implicate potential conflicts of interest. The Supreme Court and Fifth Circuit authority vests wide latitude and discretion in the district courts with respect to disqualification matters. These decisions require a court to balance the Sixth Amendment rights of the qualified right to be represented by counsel of one's choice and the right to a defense conducted by an attorney who is free from a conflict of interest. Absent very unusual circumstances, the trial court's examination, hearing and findings will not be disturbed on appeal.

Respectfully submitted,

JIM M. GREENLEE
United States Attorney

/s/ Thomas W. Dawson

By:
THOMAS W. DAWSON
First Assistant United States Attorney
Mississippi Bar No. 6002

CERTIFICATE OF SERVICE

I, THOMAS W. DAWSON, Assistant United States Attorney, hereby certify that I electronically filed the foregoing **BENCH MEMORANDUM** with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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and a copy was hand-delivered to:

Honorable John W. Kecker

This the 15th day of January, 2008.

/s/ Thomas W. Dawson
THOMAS W. DAWSON
First Assistant United States Attorney