IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE NO. 06-51237

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

MOHAMMAD H. YYY

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

BRIEF OF DEFENDANT-APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal.

The Appellant, **Mohammad H. YYY**, was tried before and was sentenced by **Lee Yeakel**, United States District Court Judge for the Western District of Texas. The Honorable **Andrew W. Austin**, United States Magistrate Judge for the Western District of Texas, conducted preliminary proceedings in this case.

The Appellant was represented at trial by **David Reynolds**. The Appellant was represented at sentencing and is represented on appeal by **F. Clinton Broden** and **Franklyn Mickelsen**, partners in the law firm of **Broden & Mickelsen.**

The Appellee, the United States of America, was represented below by **Gerald Carruth** and **Mark Lane** and is represented on appeal by **Joseph Gay**, Assistant United States Attorneys for the Western District of Texas.

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F. Clinton Broden

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1291 as an appeal from a final judgment entered by the United States District Court for the Western District of Texas.

STATEMENT OF THE ISSUE

Whether a defendant is denied his rights under the Sixth Amendment to the United States Constitution when the District Court does not allow him to be represented by his counsel of choice.

STATEMENT OF THE CASE

A. Proceedings Below

Mohammad H. YYY was charged, with various co-defendants, in a sixteen count indictment. Mr. YYY was charged in Count 1 with conspiracy to commit mail fraud, wire fraud and bank fraud, in violation of 18 U.S.C. § 371. He was charged in Counts 2 and 4 with mail fraud, in violation of 18 U.S.C. § 1341. He was charged in Count 12 with wire fraud, in violation of 18 U.S.C. § 1343. He was charged in Count 15 with bank fraud, in violation of 18 U.S.C. § 1344. *See* Excerpts at 3.[1]

A trial was held on May 3-7, 2006 and Mr. YYY was found guilty on all five counts charged against him. *See* Excerpts at 4. Mr YYY was sentenced on August 29, 2006 to twelve months and one day imprisonment, five years supervised release, restitution in the amount of $84,914.00 and a $500 special assessment. *Id*. at 5.

On September 8, 2006, Mr. YYY filed a timely notice of appeal. *See* Excerpts at 2.

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[1]Citations to the District Court's Clerk's Record ("Rec.") are to volume number:page number. Citations to the transcripts are to the transcript and page number. Citations to the Record Excerpts ("Excerpts") are to tab number.

B. Statement of the Facts

The facts underlying the charged offenses are irrelevant to the issue raised on appeal. Therefore, Mr. YYY sets forth only those facts relevant to his appellate claim that he was denied counsel of his choice.

Mr. YYY's primary trial counsel was David Reynolds. Nevertheless, on the morning of trial, Reynolds informed the Court that he needed assistance at trial and sought to enlist Steve Brittain as co-counsel. *See* 4/3/06 (Volume 1) Tr. at 5.[2] Mr. YYY joined in Reynolds' request. *Id*. at 6-8.

The government objected to this arrangement. The government suggested that it *might* call Mr. YYY's daughter, Maryam YYY, as a witness against Mr. YYY at trial without any representation that it actually *would* call her as a witness. Likewise, the government did not make any representation as to why Maryam YYY's testimony would be damaging to Mr. YYY. *Id.* at 21-22, 27-28. Maryam YYY was represented by Bill White, Esq., for approximately eighteen months before Mr. YYY's trial. Nevertheless, Brittain was alleged to have negotiated a plea on Maryam YYY's behalf with the government as a favor to White when White was attending a criminal law conference out of town. *Id*. at 12.

The government apparently believed that Ms. YYY might testify falsely on her father's behalf at his trial, thereby jeopardizing her plea agreement. *Id*. at 22.

[2]This transcript is at Tab 6 of the Record Excerpts.

Nevertheless, Ms YYY was adamant that she was only interested in giving truthful testimony. *Id*. at 13-14, 18 ("Mr. Carruth, I can assure you I will be telling the truth whether it would be against or for my father.").

Ironically, it was revealed during the hearing held on this matter that Maryam YYY had a much closer relationship to Reynolds (with whom she spent approximately 20-40 hours without Mr. YYY present) than she had with Brittain (with whom she spent 2-3 hours). *Id*. at 12, 14.[3] In any event, Reynolds explained that he and Brittain had erected a "Chinese Wall" to the extent Brittain possessed confidential information from Maryam YYY and explained that Brittain would not cross-examine Maryam YYY in the event she appeared as a witness at trial. *Id*. at 29-30. Moreover, to the extent a conflict existed, Mr. YYY and Maryam YYY agreed to waive the conflict. *Id*. at 8, 14-15.

The Court ultimately denied Mr. YYY Brittain's assistance. In doing so, it relied upon this Court's holdings in *United States v. Milsaps*, 157 F.3d 989 (5th Cir. 1998); and *United States v. Martinez*, 630 F.2d 361 (1980), *cert. denied*, 450 U.S. 922 (1981). *See* 4/3/06 (Volume 1) Tr. at 33-35.

In the end, Mr. YYY was forced to go to trial with Reynolds alone and Maryam YYY was never called as a government witness. Moreover, the trial

[3]It was ultimately established that Reynolds met with Maryam YYY for 66.6 hours and that he actually spent more time conferring with Maryam YYY than Mohammad YYY! *See* Rec. at II:459.

transcript is replete with references by Reynolds to the fact that he was overwhelmed by having to conduct the trial alone. *See* 4/4/06 Tr. at 203; 4/5/06 at 6. Indeed, in the new trial motion he filed on Mr. YYY's behalf, Reynolds noted that "[t]he absence of co-counsel severely impaired the defense's management of over 100 exhibits, communications with the Defendant and his family members, preparation and examination of the Government's witnesses, use of technology in the courtroom, and other aspects of the trial...." *See* Rec. at II:443. Likewise, throughout trial Mr. YYY continually expressed his dissatisfaction with Reynolds' representation. In fact, on the first day of trial, Mr. YYY requested and was given an *in camera* hearing alone with the trial judge in which he vehemently expressed his dissatisfaction with Reynolds. *See* 4/3/06 (Volume 2) Tr. at 225-32. *See also*, 4/4/06 Tr. at 118-21.

SUMMARY OF THE ARGUMENT

When a district court is faced with a potential conflict, it should be resolved in a way that will alleviate the effects of the conflict while interfering the least with a defendant's Sixth Amendment right to his choice of counsel.

In this case, the only possible conflict with allowing Brittain to offer Reynolds the assistance that Reynolds claimed he needed related to the possibility that Brittain had obtained confidences from Maryam YYY. Nevertheless, as recognized by other district courts, this potential conflict was easily solvable in a way that would not interfere with a defendant being allowed his choice of counsel. It was proposed that Brittain would not have anything to do with Maryam YYY's examination in the event she testified at trial and that a "Chinese Wall" would be constructed so that, to the extent Maryam YYY had, in fact, shared confidences with Brittain, these confidences would never be known by Reynolds. Moreover, if the paternalistic concern was that Maryam YYY might testify for the defense and risk her favorable plea bargain with the government, that concern would have existed whether or not Brittain was allowed to assist Reynolds and, in any event, that was Maryam YYY's decision to make.

ARGUMENT[4]

I. INTRODUCTION

Under the Sixth Amendment to the United States Constitution, a defendant is guaranteed assistance of counsel in all criminal cases. *United States v. Morrison*, 449 U.S. 361, 364 (1981). Concomitant with that guarantee is a defendant's right to hire the attorney of his choice. *See generally Morris v. Slappy*, 461 U.S. 1, 13-15 (1983); *United States v. Gonzalez-Lopez*, 126 S.Ct. 2557 (2006). Indeed, the Supreme Court has made clear that a "District Court must recognize a presumption in favor of petitioner's counsel of choice." *Wheat v. United States*, 486 U.S. 153, 164 (1988). Nevertheless, Mr. YYY acknowledges that, in some cases, the presumption may be overcome by a conflict of interest. *See generally Id*. Still, as recognized by the United States Court of Appeals for the Eighth Circuit, "the chosen method for dealing with a potential conflict...is the one which will alleviate the effects of the conflict while interfering the least with defendant's choice of counsel." *United States v. Agosto*, 675 F.2d 965, 970 (8th Cir.), *cert. denied*, 459 U.S. 854 (1982).

[4]It appears that this Court will review the disqualification of defense counsel for a conflict of interest under an abuse of discretion standard. *See,e .g., United States v. Sotelo*, 97 F.3d 782, 791 (5th Cir. 1996). Nevertheless, Mr. YYY submits that, given the important constitutional right at stake, a *de novo* review is the proper standard of review. *See, e.g., United States v. Collins*, 920 F.2d 619, 628 (10th Cir. 1990), *cert denied*, 500 U.S. 920 (1991).

In this case, the only possible conflict with allowing Brittain to offer Reynolds the assistance that Reynolds claimed he desperately needed related to the possibility that Brittain had obtained confidences from Maryam YYY when he assisted Maryam YYY's attorney in negotiating her plea agreement and that these confidences could, in turn, be used to cross examine Maryam YYY if she was a witness at trial. Nevertheless, this conflict was easily solvable in a way that would not interfere with Mr. YYY being allowed his choice of counsel. Indeed, it was proposed that Brittain would not have anything to do with Maryam YYY's examination in the event she testified at trial and that a "Chinese Wall" would be constructed so that, to the extent Maryam YYY had, in fact, shared confidences with Brittain, these confidences would never be known by Reynolds and Reynolds would conduct any examination of Maryam YYY. Simply put, this procedure would have resolved any possible conflict.[5]

United States v. Amuso, 10 F. Supp. 2d 227, 228-29 (E.D.N.Y. 1998) is instructive. The *Amuso* Court was sensitive to the goal of balancing an alleged potential conflict of interest in a way that would least interfere with a defendant's

[5]It is unclear from the District Court's comments at the pretrial hearing whether the Court believed that Brittain and Reynolds could not maintain this "Chinese Wall," but, as Justice Stevens has pointed out, "the courts can generally rely on the sound discretion of members of the bar to treat privileged information with appropriate respect. . . . The risk that an item of confidential information might be misused does not create a conflict of interest which disqualifies an attorney. . . ." *United States v. Jeffers*, 520 F.2d 1256, 1265 (7th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976).

counsel of choice in a case very similar to the instant case. In *Amuso*, a "mafia lawyer" proposed to represent the Boss of the Luchese Organized Crime Family despite having also represented *several* members of that family who would appear at trial as government witnesses. The District Court allowed the representation because the conflicted lawyer informed the Court that he would erect a "Chinese Wall" and he would not cross examine any of the witnesses that he represented. *Id*. at 229. Any cross examination was to be handled by co-counsel with whom the conflicted lawyer agreed "not to share any information" he had learned from the potential witnesses. Notably, unlike Maryam YYY in the instant case, some of the witnesses in *Amuso* actually refused to waive any conflict. *Id*. at 229. *See also, Lemaster v. Ohio*, 119 F. Supp. 2d 754 (S.D. Oh. 2000).

An even more recent example of the balancing of an alleged potential conflict of interest in a way that would least interfere with a defendant's ability to choose his counsel can be found in *United States v. White Buck Coal Company*, 2007 U.S. Dist. LEXIS 3163 (S.D. W.Va. Jan 16, 2007) (attached hereto as Attachment A). In that case, a lawyer from the law firm representing a coal company had previously represented an employee of the coal company who had entered a guilty plea and who would be the government's chief witness against the company at trial. *Id*. at *12. As noted by the District Court, the company's goal at trial would be "the utter decimation" of the employee on cross-examination. *Id*

at 29. Still, the District Court did not disqualify the company's counsel of choice, but, instead, set restrictions in order to balance the competing interests. The Court required that the witness (*i.e.* the employee) be cross examined by a different law firm than the one that employed the lawyer that formerly represented the witness. *Id*. at *42-43. This is very similar to the type of procedure that was proposed by Reynolds and Brittain in this case.

II. *MILSAPS* AND *MARTINEZ*

In determining that the alleged conflict of Brittain in this case could not be waived by Mr. YYY and Maryam YYY, the District Court relied upon *United States v. Milsaps*, 157 F.3d 989 (5th Cir. 1998) and *United States v. Martinez*, 630 F.2d 361 (1980) *cert. denied*, 450 U.S. 922 (1981). Both cases are inapposite.

In *Milsaps*, the attorney with the potential conflict, Johnson, had represented a government witness that would testify against her client and she proposed to be the client's lone attorney. *Milsaps*, 157 F.3d at 995-96. In short, Johnson would have to have cross-examined all of the government's witnesses which would not have been required of Brittain in the instant case. Moreover, the client in *Milsaps* ultimately agreed to proceed to trial without Johnson as his attorney, something that Mr. YYY clearly did not do in the instant case. *Id*. at 996.

In *Martinez,* it was also the same attorney who had previously represented the government witness who was forced to cross-examine that government witness when he appeared unexpectedly as a witness at trial against his client. *Martinez,* 630 F.2d at 362-64. Again, that would not have been Brittain's role in the instant case as explained to the District Court at the pretrial hearing.[6]

III. DISCUSSION

This Court recently reaffirmed that even when one attorney represents multiple family members, "'[j]oint representation does not necessarily create a conflict of interest.'" *United States v. Garcia-Jasso*, 472 F.3d 239 (5th Cir. 2006), *citing*, *United Stats v. Rico*, 51 F.3d 495, 508 (5th Cir. 1995). In this case, Mr. YYY submits that no conflict existed and, even to the extent a potential conflict did exist, it was easily solvable as demonstrated by *Amuso* and *White Buck.*

Initially, given the fact that Maryam YYY agreed to Brittain assisting Reynolds in her father's defense, it is very difficult to understand the

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[6]The government may also attempt to rely upon *United States v. Izydore*, 167 F.3d 213 (5th Cir. 1999). That case is also inapposite. There, the defense intended to add an attorney, Botsford, as co-counsel to the attorney of record, Brittain (the same one as the instant case). *Izydore*, 167 F.3d at 220. Botsford represented one of the co-defendants. *Id*. at 220-21. Nevertheless, when Brittain proposed adding Botsford as co-counsel, the District Court was told that *Botsford* would undertake the cross-examination of the witnesses. *Id*. at 221. Here, again, Brittain, in this case, was not going to cross-examine witnesses so his position cannot be fairly compared to Botsford's position in *Izydore.*

government's concern in this case. If the concern was that Maryam YYY would be cross-examined using confidential information despite the "Chinese Wall" and the representations by Reynolds and Brittain, it would have been her attorney-client privilege that was at issue and she could have asserted such a privilege if and when the situation arose or she could have waived it. If the concern was that she might testify for the defense and risk her favorable plea bargain with the government, that concern would have existed whether or not Brittain was allowed to assist Reynolds and, in any event, that was Maryam YYY's decision to make-the government's paternalism aside. Indeed, the District Court in *White Buck* cogently rejected such a false argument. *White Buck*, 2007 U.S. Dist. LEXIS 3163 at *43 ("There remains the danger that [the employee] might be discredited to the point that it impacts the continued viability of his plea agreement or a possible future motion by the government for substantial assistance. Those same concerns, however, would be present regardless of who cross examined [the employee].").

In any event, like the *Amuso* and *White Buck* courts, the District Court in this case could have effectively balanced Mr. YYY's Sixth Amendment right to be represented by the attorney(s) of his choice while also addressing any potential conflict. As recognized by the courts in *Amuso* and *White Buck*, a proper balancing in this case would have allowed Brittain to give Reynolds the help he

desperately needed while ordering the "Chinese Wall" proposed by Reynolds and not allowing Brittain to cross-examine Maryam YYY.

IV. CONCLUSION

In this case, Mr. YYY was denied his counsel of choice despite the fact that no conflict existed and, to the extent it could be argued that a potential conflict existed, it was solved by the proposal made by Reynolds and Brittain. Moreover, when a defendant is denied his counsel of choice, he is not required to show prejudice from his actual representation nor that the error was not harmless. *Gonzalez-Lopez*, 126 S.Ct. 2557.

CONCLUSION

Based upon the foregoing, this case should be remanded to the District Court for retrial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that, on February 23, 2007 I caused two paper copies and one electronic copy of the foregoing Brief of Defendant-Appellant to be mailed by United States mail, postage prepaid, to: Joseph H. Gay, Jr., Assistant Untied States Attorney, 601 N.W. Loop 410, Suite 600, Austin, Texas 78216.

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F. Clinton Broden