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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

* * *

UNITED STATES,

Plaintiff,

v.

KARL F. THOMPSON, JR.,

Defendant.

No. CR-09-0088-FVS

ORDER

Plaintiff United States’ Motion for Resolution of Defense Counsel’s Conflicts of Interest (Doc. # 174) has been referred to the undersigned for consideration. By this motion, the Government asks the Court to “review and address apparent, perceived, and potential conflicts of interest that defense counsel Carl Oreskovich has” as a result of his simultaneous representation of Defendant Karl Thompson in this case, and his appointment on October 20, 2008 as special counsel for the Spokane City Attorney’s Office.

Defendant Thompson, a former police officer for the City of Spokane, is charged in an Indictment returned June 19, 2009, with Deprivation of Rights Under Color of Law (Count 1) and Falsification of Records in a Federal Investigation (Count 2). The charges arise from Thompson’s alleged use of physical force on March 18, 2006, resulting in the death of Otto Zehm, and Thompson’s subsequent alleged false statements regarding the incident. Carl Oreskovich and his law partner, Steven Lamberson, have represented Defendant Thompson in these criminal proceedings since their inception. However, Oreskovich’s representation of

1 Thompson pre-dates Thompson's Indictment.

2 The record adduced by the briefing of the parties and declarations filed, as
3 well as the arguments and testimony offered at the hearings conducted May 19 and
4 24, establishes that in late October 2008, Oreskovich was contacted by the Spokane
5 City Attorney's Office to assist in the defense of possible civil claims arising from
6 the March 18, 2006 incident which resulted in the death of Otto Zehm. The record is
7 undisputed that Mr. Oreskovich also agreed in October 2008 to represent Defendant
8 Thompson with respect to the federal Grand Jury investigation convened to
9 investigate the March 18, 2006 incident. Oreskovich insists that upon agreeing to
10 represent Thompson in the criminal investigation, he recognized he would not be
11 able to represent any other defendant named in a civil lawsuit resulting from the
12 death of Otto Zehm, and that it was agreed between he and the City Attorney's
13 Office that his involvement in any civil case would be limited to the representation
14 of Thompson.

15 Although the subsequent Contract entered February 20, 2009 between the
16 City of Spokane and Mr. Oreskovich and his law firm provide that the Oreskovich
17 Firm "shall act as SPECIAL COUNSEL to assist the City Attorney's Office and
18 represent the City of Spokane in the claim filed by the Estate of Otto Zehm . . .," the
19 record before the Court establishes that there was an understanding between
20 Oreskovich and the City Attorney's Office, as well as those involved as putative
21 defendants in a potential civil action, that Oreskovich's involvement was limited to
22 the representation of Thompson. Moreover, the record demonstrates that the limited
23 nature of Oreskovich's representation was communicated contemporaneously and on
24 more than one occasion to federal prosecutors involved in the criminal investigation
25 of Defendant Thompson.

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1 On March 14, 2009, the Estate of Otto Zehm filed a civil lawsuit alleging
2 civil rights violations, wrongful death, and state tort law claims against the City of
3 Spokane, Defendant Thompson, and eight other officers of the Spokane Police
4 Department. *Estate of Zehm v. City of Spokane, et al.*, CV-09-008-LRS. The
5 Government represents that several of these officers will be called as witnesses on
6 behalf of the prosecution in the impending criminal trial of Defendant Thompson
7 scheduled to commence June 2, 2010.

8 The Government maintains that because Oreskovich represents Defendant
9 Thompson in both the criminal and the civil cases, and because under his contract
10 with the City of Spokane, Oreskovich and his law firm also represent the City of
11 Spokane and thereby arguably all employees of the City, an actual, perceived, or
12 potential conflict of interest exists. The Government further argues that by
13 presenting a common or joint defense with attorneys employed by the Office of the
14 City Attorney on behalf of all defendants in the *Zehm* civil action, Oreskovich is
15 party to a de facto joint defense agreement which has made him privy to confidential
16 communications of various defendants, if not made directly to Oreskovich, then
17 indirectly obtained through one or more attorneys in the City Attorney's Office.
18 Additionally, the Government originally contended that Mr. Oreskovich, his partner,
19 Steven Lamberson, and their law firm had a contemporaneous legal relationship with
20 the City of Spokane in connection with the defense of the recently dismissed civil
21 action of *Burton v. City of Spokane, Larry Bowman, et al.*, CV-06-322 -RHW, which
22 arguably gave rise to the potential for a conflict of interest.

23 When queried by the Court as to why the Government waited until less
24 than two months before trial to file its Motion for Resolution of Defense Counsel's
25 Conflicts, Government counsel explained that he was waiting for Mr. Oreskovich to
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1 fulfill his obligation to raise the conflict issue himself.¹ Oreskovich responds that he
2 had no duty to raise the issue because he is not aware of any conflicts of interest
3 requiring him to do so, and that the Government intentionally delayed bringing the
4 matter to the Court's attention to disrupt the defense and gain tactical advantage on
5 the eve of trial.

6 The delay in raising with the Court a conflict of interest issue based upon
7 facts with which the parties had been familiar for over a year unquestionably makes
8 resolution of the matter more difficult. Regardless, the issues raised in the
9 Government's Motion are important and warrant careful examination by the Court.
10 As the United States Supreme Court observed, even where waivers of potential
11 conflicts of interest are offered, "Federal courts have an independent interest in
12 ensuring that criminal trials are conducted within the ethical standards of the
13 profession and that legal proceedings appear fair to all who observe them." *Wheat v.*
14 *United States*, 486 U.S. 153, 160 (1988). "Unfortunately for all concerned, a district
15 court must pass on the issue whether or not to allow a waiver of a conflict of interest
16 by a criminal defendant not with the wisdom of hindsight after the trial has taken
17 place, but in the murkier pre-trial context when relationships between the parties are
18 seen through a glass, darkly." *Id.* at 162.

19 There is no dispute that Defendant Thompson has a Sixth Amendment right
20 to conflict-free representation in this case by his attorneys Oreskovick and
21 Lamberson. The Sixth Amendment guarantee of effective assistance of counsel
22 includes the right to counsel's undivided loyalty. *Mannhalt v. Reed*, 847 F.2d 576,
23 579-80 (9th Cir. 1988). A conflict of interest rises to the level of a Sixth

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25 ¹ Although the Government states it was waiting for Oreskovich to bring the issue to the
26 Court's attention, Oreskovich had indicated in correspondence that he did not believe any such conflict
existed. (See Doc. #313.)

1 Amendment violation if counsel actively represents conflicting interests, and an
2 actual conflict of interest adversely affects the lawyer's performance. *Id.* Unlike the
3 right to competent counsel, prejudice is presumed if counsel actively represents
4 conflicting interests. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 692
5 (1984)). A criminal defendant would be entitled to relief if he demonstrated that "the
6 attorney's behavior seems to have been influenced by the conflict." *Lewis v. Mayle*,
7 391 F.3d 989, 997 (9th Cir. 2004) (quotation omitted). A conflict of interest
8 between a defendant and his counsel may arise from both simultaneous and
9 successive representations. *Mannhalt*, 847 F.2d at 580.

10 Where a potential conflict arises, the district court has several options to
11 resolve the situation, including obtaining a waiver from the defendant, appointing
12 separate counsel, or "taking adequate steps to ascertain whether the risk [is] too
13 remote to warrant separate counsel." *Alberni v. McDaniel*, 458 F.3d 860, 870 (9th
14 Cir. 2006) (quotation omitted). A defendant may waive his right to the assistance of
15 an attorney who is unhindered by conflicts. *Holloway v. Arkansas*, 435 U.S. 475,
16 483 n.5 (1978). To be valid, a waiver of conflict-free counsel must be "voluntary,
17 knowing, and intelligent, such that the defendant is sufficiently informed of the
18 consequences of his choice." *Lewis*, 391 F.3d at 996. Even in the face of a
19 defendant's knowing, voluntary, and intelligent waiver, the Court may disqualify
20 counsel based on "a showing of a serious potential for conflict." *Wheat*, 486 U.S. at
21 164. Whether to do so lies within the Court's discretion, based on a fact specific,
22 case-by-case inquiry. *Id.*; *United States v. Kenney*, 911 F.2d 315, 320 (9th Cir.
23 1990).

24 At the hearings conducted May 19 and 24, the Court canvassed Defendant
25 Karl Thompson extensively regarding his understanding of his right to conflict-free
26 counsel and the rights he potentially was giving up by waiving any conflict of

1 interest arising from his continued representation by Mr. Orescovich and Mr.
2 Lamberson. The Court finds Defendant Thompson's waiver to be voluntary,
3 knowing, and intelligent, and that Thompson sufficiently is informed of the
4 consequences of his waiver.

5 Defendant Thompson's waiver is not offered in the face of an actual
6 conflict that is so egregious that Thompson could not knowingly and voluntarily
7 desire continued representation by Oreskovich. *United States v. Martinez*, 143 F.3d
8 1266, 1270 (9th Cir. 1998). The Declaration and testimony of Defendant Thompson,
9 together with the Declarations of Mr. Oreskovich and Mr. Lamberson, the
10 Declaration of Spokane City Attorney Howard Delaney, and those of Defendant
11 Thompson's Co-Defendants in the *Zehm* civil case, Steven Braun, Zachary Dahle,
12 Erin Raleigh, Daniel Torok, Ronald Voeller, Jason Uberuaga, and Theresa
13 Ferguson,² and the testimony of Assistant Chief of Police James Nicks, satisfy the
14 Court that since the commencement of his involvement as counsel in matters
15 pertaining to the incident resulting in the death of Otto Zehm in March 2006,
16 Orescovich's legal representation has been limited to Defendant Karl Thompson
17 with respect to potential and actual criminal and civil charges. Oreskovich has not
18 represented other Defendants in the *Zehm* civil case and there is no evidence he has
19 received from them confidential information in the form of attorney/client
20 communications.

21 Notwithstanding the Government's insistence that a de facto joint defense
22 relationship exists which creates an attorney/client relationship between Mr.
23 Orescovich and all Defendants in the *Zehm* civil action, determining whether an
24 attorney/client relationship exists is a fact specific inquiry which may turn largely on
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26 ² See Doc. ##312-14, 326-332.

1 the reasonably formed subjective beliefs of the putative clients. *Bohn v. Cody*, 832
2 P.2d 71, 74-75 (Wash. 1992). The facts before this Court strongly weigh in favor of
3 a finding that Orescovich's relationship as Special Counsel for the Office of the City
4 Attorney in connection with the *Zehm* civil case did not in reality create an
5 attorney/client relationship between Orescovich and Thompson's co-Defendants.
6 Each declarant stated that Oreskovich was not, and never had been, his or her
7 attorney. Moreover, the potential for future conflicts is attenuated by the Spokane
8 City Attorney's Office's recent withdrawal of representation of Thompson in the
9 civil case.

10 Although the Government apparently now concedes the point, the Court
11 further finds that the Declaration and Waiver of Larry Bowman as well as those of
12 Mr. Oreskovich and Mr. Lamberson concerning the civil case of *Burton v. City of*
13 *Spokane and Larry Bowman, et al.*, demonstrates that no actual or perceived or
14 potential successive representation conflict exists. To the extent it arguably did, the
15 waivers of both Defendant Thompson and Larry Bowman remedy the conflict.


16 The choice made by the Spokane City Attorney to engage Oreskovich and
17 his law firm in the defense of the civil matter arising from the events of March 18,
18 2006, even in the limited capacity as counsel for Defendant Thompson, and the
19 decision of Oreskovich to accept representation of Defendant Thompson in the
20 instant criminal case may give rise to appearance of or potential for a conflict of
21 interest. However, an examination of the factual record shows no actual conflict of
22 interest exists.

23 Although it is not possible at this point to predict whether some actual
24 conflict of interest may emerge as this case proceeds through trial, none is apparent
25 now. Moreover, to the extent a potential conflict may be deemed to exist, Thompson
26 has knowingly, voluntarily, and intelligently waived his Sixth Amendment right to

1 conflict-free counsel. The Court, in its discretion, finds no basis to override that
2 waiver. The trial in this matter begins in one week. Thompson and Oreskovich have
3 developed an attorney/client relationship spanning nearly two years. As set forth
4 above, any potential conflict is not so serious that Thompson could not waive it.
5 Further, any potential conflict is not so serious as to undermine the Court's
6 independent interest in ensuring Thompson's criminal trial is conducted within the
7 ethical standards of the profession and that these legal proceedings appear fair to all
8 who observe them.

9 IT IS THEREFORE ORDERED that Plaintiff United States' Motion for
10 Resolution of Defense Counsel's Conflicts of Interest (Doc. # 174) is hereby deemed
11 satisfied by the Court's ruling above.

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13 DATED: May 25, 2010

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15 PHILIP M. PRO
United States District Judge³

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³ The Honorable Philip M. Pro, United States District Judge for the District of Nevada, sitting by designation.